15 Aug

THE

LAW of NATURE AND NATIONS:

OR,

A GENERAL SYSTEM

Of the moſt IMPORTANT PRINCIPLES

OF

MORALITY, JURISPRUDENCE, and POLITICS.

In EIGHT BOOKS.

Written in *Latin* by the Baron PUFENDORF, Counſellor of State to his late *Swediſh* Majeſty, and the late King of *Pruſſia*.

Done into *Engliſh* by *BASIL KENNET*, D. D. ſometime Preſident of *Corpus Chriſti* College in *Oxford*.

To which is prefix'd,

M. *BARBEYRAC*'s PREFATORY DISCOURSE,

CONTAINING

An Hiſtorical and Critical Account of the SCIENCE of MORALITY, and the Progreſs it has made in the World, from the earlieſt Times down to the Publication of this WORK.

Done into *Engliſh* by Mr. *CAREW*, of *Lincoln's-Inn*.

To which are now added,

All the large Notes of M. *Barbeyrac*, tranſlated from his fourth and laſt Edition:

Together with large TABLES to the Whole.

The FIFTH EDITION, carefully Corrected.

LONDON:

Printed for J. and J. BONWICKE, R. WARE, J. and P. KNAPTON, S. BIRT, T. LONGMAN, R. HETT, C. HITCH, T. OSBORNE, J. HODGES, S. AUSTEN, E. WICKSTEED, E. COMYNS, T. WALLER, J. and J. RIVINGTON, J. WARD, and M. COOPER.

M.DCC.XLIX.

TO THE

RIGHT HONOURABLE

Sir *WILLIAM LEE*, Knt.

Lord Chief Juſtice of his Majeſty's Court of *King's Bench*,

AND

One of his Majeſty's moſt Honourable Privy Council.

MY LORD,

THO' this celebrated Author, enrich'd with the ample Notes of the famous M. *Barbeyrac*, can add nothing to your extenſive Knowledge, yet is your LORDSHIP a proper Patron for *the Law of Nature and Nations*, as your Conduct in the high Station you ſo worthily fill is a ſhining Illuſtration of its Poſitions; an Illuſtration, which reflects Honour on the Prince

you repreſent, and Happineſs on the People, to whom you diſpenſe Juſtice.

OF this the univerſal Applauſe of your Country is the moſt undoubted, and, at the ſame Time, the moſt valuable Teſtimony.

PERMIT me then, my LORD, to add my Suffrage to the general Voice, in wiſhing your LORDSHIP may long continue the Ornament of your Profeſſion, and the faithful Guardian of the Property of your Fellow Subjects.

I AM, with the utmoſt Duty and Reſpect,

MY LORD,

Your LORDSHIP's

moſt obedient, and

moſt humble Servant,

J. BARROW.

THE

PREFACE.

IT is a Dilemma frequently urged againſt Verſions of this Kind, that when a Subject lies remote from vulgar Conſideration, Perſons of Learning will purſue the Knowledge of it in the learned Languages, whilſt others muſt remain equally Strangers to it in all, which yet abates proportionably of its Force, according as either the original Performance has been leſs fortunate in Stile; or as the Improvements of a modern Tongue have been able to extend themſelves to the abſtruſeſt Reaſonings, and to ſpeak even of Philoſophy with the Advantages of Eloquence. As there is a Concurrence of theſe two Conditions, to juſtify the preſent Attempt; ſo the ſecond of them, which, through perſonal Inability, may have been impaired, ſeems yet to be recompenſed, by a peculiar Weight and Prevalency in the firſt. For the Commendation of our Author's Judgment hath ſcarce been more univerſal, than the Cenſure of his Compoſition; which though, by all, acknowledged to be expreſſive, yet to moſt appears ſo difficult and diſcouraging, that they ſometimes fancy the Senſe to have broken its Way through the Phraſe, and to have left theſe Irregularities, as the Tokens of its Violence. It is true, he has not failed in the very Entrance of his Work, to apologize for this Defect of Ornament; but the Plea he offers is, what may better excuſe the neceſſary Roughneſs of a Subject, than the particular Unhappineſs of a Writer. Another viſible Diſadvantage there was, which called for Relief. Our Author having publiſhed the firſt Draught of this great Undertaking in the Year MDCLX, *with the Title of* Elementa Juriſprudentiæ, *having, alſo, employed the Labour and Collections of twelve Years, in bringing it to its preſent Method and Name, was not content to have drawn together all Aſſiſtances, which were of direct and immediate Uſe, from the Stores of Morality, Politics, and Law; but engaged himſelf in a longer and wider Search, running through the whole Circle of philological Authors, ancient and modern, and diſpoſing, under the Heads of his Work, the moſt remote Examples, and Illuſtrations. Hence every Page came to be loaded, not only with numerous Citations at large, but with diſorderly Marks of* Addition, Reference, Compariſon, *and the like: As if the Confuſion of a ſwelling Margin had run over, and diſcharged itſelf upon the Text. Thus the Periods were frequently diſjointed, the Argument interrupted, or obſcured, and the greateſt Part of the main Body thrown into the diſagreeable Figure of a Common-Place.*

Some Endeavours have been here applied towards the leſſening of both theſe Imperfections. In Reſpect of Stile, it is hoped, that the Metal, how rude ſoever and incapable of being poliſhed to exact Beauty, yet after a ſecond melting, may

appear

appear leſs deformed, and may paſs into more general Uſe: But it is beyond Doubt, that the other Inequality has been farther rectified, by our caſting under the Page the needleſs and miſhapen Maſs of foreign Supplies; which it might have been no unpardonable Boldneſs utterly to have pared away; but that we ought to be cautious of practiſing upon an Author, and to take Care, leſt by cutting off an Excreſcency, we ſhould endanger the Life of a Deſign.

Cuſtom has not ſo far prevailed over Decency, as to engage the Tranſlators in proclaiming the Juſtice of their Choice, and Merit of their Author. Much leſs would they ground his Character on the invidious Argument of Compariſon. To contend with the admired Names of Grotius, Selden, *and the Right Reverend the preſent Lord Biſhop of* Peterborough, *is what he ought to decline in Point of Modeſty, if not of Safety. Yet this ſeems to have fallen out to his Advantage, that no one of thoſe great Men attempted a compleat Body of moral, or political Doctrine. The firſt choſe rather to inſiſt on Authorities taken from the Hiſtorians, Civilians, and Canoniſts, than on philoſophical Deductions, from the Nature of Men, and the Reaſons of Things. The ſecond entred no farther into this Subject, than as the* Jewiſh *Inſtitutions directed his View. My Lord of* Peterborough, *having overthrown the deceitful Fabric of a late treacherous Builder, and ſettled the Science of Morality on its trueſt and deepeſt Foundations, left the Superſtructure to be raiſed by inferior Hands. Thus, while each had a particular Boundary to his own Enquiries, all contributed to the Perfection of our Author's Syſtem: In which, as he abſtains not from grateful Remembrances of theſe, and other learned Benefactors, ſo he now teaches the Publiſher of this Tranſlation, moſt gladly to acknowledge the Favour and Aſſiſtance of his Friends; of whom two eſpecially, the Reverend Mr.* Percivale, *and the Reverend Mr.* Itchiner, *by entirely rendering the fifth and eighth Books, have, with the ſame Kindneſs, accepted a Part in his Burthen, and allowed him a Share in their Reputation and Succeſs.*

Thus far the Tranſlator of the Text.

TO which I ſhall only add, that in order to render this Edition as complete and uſeful as poſſible, I have not only enriched it with a Tranſlation of the large Notes of M. *Barbeyrac*, inſerted in his fourth and laſt Edition of this Author, but have, alſo, carefully corrected the whole Work.

J. BARROW.

THE

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THE

An Hiſtorical and Critical

ACCOUNT

OF THE

Science of Morality, &c.

SECT. I.

SEEING [1] *the ſpeculative Sciences, if conſider'd in, and for themſelves only, are all of them uſeleſs*; and ſeeing the Purſuit of ſuch Objects could never be the End, for which Man was created; it ought not to ſeem ſtrange to any, if the Generality of Mankind ſhou'd be found incapable of applying themſelves to this ſort of Science with any tolerable Succeſs; and a very great Part not able even to comprehend its firſt Rudiments: But it wou'd be juſt Cauſe of Wonder, ſhou'd the Science of [2] Morality not be attainable, to a competent Degree at leaſt, by all who will make uſe of their Reaſon, in whatſoever Condition they are found to be.

And really, none can reaſonably doubt, but that [3] every Man, who will be happy, muſt needs, in order to make himſelf ſo, regulate his Conduct after ſome certain Manner; and that GOD, as Author and Parent of all human Race, does preſcribe to all Men, without Exception, the Duties, which tend to procure them that Happineſs, which they ſo paſſionately ſeek after. Now from hence it neceſſarily follows, that the natural Principles of this Science, are ſuch as may be eaſily diſcovered; and ſuch too, as are proportionate to the Capacities of all ſort of Perſons: So that to be inſtructed in this Science, there will be no occaſion to mount up to Heaven; or to have from thence any extraordinary Revelation for that purpoſe. An ancient Doctor of the Church has made uſe [4] of this Reaſon, to ſhew the fooliſh Vanity of the greateſt Part of the Heathen Philoſophers; who aſſerted that Philoſophy, without excepting the nobleſt Part of it, even that which concerns Morality; was only calculated for the ſmall Number of thoſe, who were initiated, and profeſs'd Diſciples thereof: And it muſt be own'd, to the Eternal Glory of the Supreme Legiſlator of Mankind; as well as to the utter Confuſion of themſelves; that none can complain, without Injuſtice, that GOD has given him Laws, either impracticable; or ſurrounded with ſuch Obſcurity, as cannot be diſpell'd by one who really has his Duty at Heart, notwithſtanding all his Pains and Application. This the wiſeſt Heathens have acknowledg'd; nor will it be improper here to produce their Teſtimonies; to confound thoſe, who, under Chriſtianity itſelf, ſeem to call in queſtion ſo inconteſtable a Truth. The *Stoicks*, who made Morality their principal Study, maintain'd, that their Philoſophy was not above the Reach of [5] Women and Slaves; and that, as the Way to Virtue lies open to all Men without Diſtinction; [6] ſo there is no

[1] See *The Art of Thinking*, Diſcourſe i. *p.* 2. Edit. *Amſterd.* 1685, and 1697.

[2] I mean by this, and the Term *Morality*, not only what is commonly ſo call'd, but, alſo, *The Law of Nature, and Policy.* In a Word, all that is neceſſary for the Conduct of a Man's Self, according to his Eſtate and Condition.

[3] *Hoc opus, hoc ſtudium parvi properemus & ampli,*
Si patriæ volumus, ſi nobis vivere cari. Hor. Lib. i. Epiſt. 3, 28, 29.
——Id, quod æquè pauperibus prodeſt, locupletibus æquè;
Æquè neglectum pueris ſenibuſque nocebit. Idem ibid. Epiſt. 1, 24, *& ſeq.*

[4] *Non eſt ergo ſapientia, ſi ab hominum cœtu abhorret; quoniam, ſi ſapientia homini data eſt, ſine ullo diſcrimine omnibus data eſt; ut nemo ſit prorſus, qui eam capere non poſſit. At illi [Philoſophi] virtutem humano generi datam ſic amplexantur, ut ſoli omnium publico bono frui velle videantur; tam invidi, quam ſi velint deligare oculos, aut effodere cæteris, ne ſolem videant—Quod ſi natura hominis ſapientiæ capax eſt; oportuit opifices, & ruſticos, & mulieres, & omnes denique qui humanam formam gerunt, doceri, ut ſapiant; populumque ex omni lingua, & conditione, & ſexu, & ætate conflari. Maximum itaque argumentum eſt, Philoſophiam neque ad ſapientiam tendere, neque ipſam eſſe ſapientiam; quod myſterium ejus barba tantum celebratur & pallio.* Lactant. Inſtit. Divin. Lib. iii. Cap. xxv. Num. 2—6. Edit. Cellar. "It is no Wiſdom for Man to be averſe to Society, for "if this divine Gift was given to Mankind, it was given to all Men, and ſuited to every Capacity. But they *(the Philoſophers)* "are ſo fond of this Bleſſing, that they ſeem deſirous to engroſs it to themſelves, juſt as if they intended to blindfold the "reſt of the World, in Order to conceal from them the Light of the Sun. But if the Nature of Man is capable of Wiſdom, "it ſhould be taught to Tradeſmen, Peaſants, and Women, in ſhort, to all who bear the human Form, becauſe it is equally ne"ceſſary to all. No Nation, Condition, Sex, or Age, is exempt from its Influence. This, therefore, is an unanſwerable "Argument, that Philoſophy neither tends to Wiſdom, nor is it Wiſdom itſelf, but only aſſumes its Form, by wearing its "Cloak and Beard."

[5] *Senſerunt hoc adeo* Stoici, *qui & ſervis, & mulieribus philoſophandum eſſe dixerunt.* Idem ibid. Num. 7.

[6] *Non omnes curia admittit: caſtra quoque, quos ad laborem & periculum recipiunt, faſtidioſe legunt: Bona mens omnibus patet; omnes ad hoc ſumus nobiles. Nec rejicit quemquam Philoſophia, nec eligit: omnibus lucet.* Senec. Epiſt. xliv. *Nulli præcluſa virtus eſt; omnibus patet, omnes admittit, omnes invitat, ingenuos, libertinos, ſervos, reges, & exſules. Non eligit domum, nec cenſum; nudo homine contenta eſt.* Idem, de Benefic. Lib. iii. Cap. xviii. "Every Body is not admitted to the Bar: Poſts in "the Army are given only to the experienc'd and brave. The Acquiſition of an honeſt Man is in every one's Power: All "are equally capable of arriving at this Happineſs. Philoſophy neither rejects, or chuſes any, but ſhines equally upon all." EPIST. xliv. "Virtue denies herſelf to no Body, but is open to all. She admits, and invites every one. Kings, Nobles, the "Freeman, and the Slave, are alike welcome to her. She neither judges of a Man by his Family or Eſtate, but is content "with his Mind." *Cicero*, alſo, ſays, that there is not any Perſon, of what Nation ſoever he be, but may arrive at Virtue, provided he will take Nature for his Guide. *Nec eſt quiſquam gentis ullius, qui, ducem naturam nactus, ad virtutem pervenire non poſſit.* De Leg Lib. i. Cap. x.

Eſtate, or Condition, peculiarly privileg'd with regard to the Faculty of knowing the Principles and Rules, as well of thoſe Duties which are common to all; as of thoſe which belong to each Particular. "Is [1] it not poſſible for you to recommend yourſelf, (ſays an Emperor and Philoſopher of the ſame Sect) "and to gain Eſteem by your Genius? Very well. "But there are many other Things, as to any of "which you cannot ſay, I am not fit for it. Shew "then what does entirely depend on yourſelf; "Sincerity, Sobriety, Humanity, Induſtry, and "Contempt of Pleaſures. Be ſatisfied with thy "Condition; ſtand in need but of a little; avoid "Luxury, trifling Amuſements, and vain Diſ-"courſes. Let your Soul be judicious, free, and "great. Don't you ſee, that, being able to raiſe "yourſelf by ſo many Virtues, without having any "Pretence on the Account of natural Incapacity; "you ſtill continue mean, only becauſe you will? "Ever bear in Mind, that all the Happineſs of this "Life depends on a very little. Becauſe you de-"ſpair of being eminent in Logic, or Natural Phi-"loſophy; will you give over all Thoughts of be-"ing free, ſociable, and ſubmiſſive to the Divine "Will?" Another *Roman* Philoſopher, moſt illuſtriouſly eminent on Account of his Eloquence and Employments in the Government, had ſaid long before, to confirm this Propoſition; That a good Man will never think any Thing uſeful, but what is honeſt; and that he will never do, or even think any Thing, that he dares not boldly diſcover to all the World: [2] *Is it not a Shame for Philoſophers to queſtion a Truth, of which even Peaſants make no doubt? Witneſs that Saying, which is commonly made uſe of, when we deſcribe a Man of Integrity*; That he is a Man, to be truſted with Gold untold: *(To uſe a common Expreſſion* [3] *of our own Countrymen:) For 'twas the Peaſants who invented that old Proverb.*

But tho' none had ever yet diſcover'd in the Principles and Rules of Morality, ſo high a Degree of Evidence, and that they are ſo duly adjuſted to all Capacities; one might ſtill appeal, in this Matter, to the very Nature of the Thing itſelf; and, in ſome Meaſure, to Experience. We have here no Buſineſs to inquire into the impenetrable Secrets of Nature, to diſcover thoſe imperceptible Springs, that produce in the World ſo many Phænomena, and ſuch Variety of wonderful Events; to meaſure the Magnitude and Diſtance of the Stars, and obſerve their Motions; to ſearch into the Bowels of the Earth, and even pierce to the Centre; [4] no more have we here any occaſion to bury ourſelves in metaphyſical Speculations; to turn over a vaſt Number of Volumes; to learn ſeveral Languages; to penetrate thro' the Darkneſs of remote Antiquity; in a word, to be *very learned*: We ſhall ſcarce have occaſion to carry our Thoughts beyond ourſelves [5], or conſult any other Maſter beſides our own Heart. The moſt common [6] Experience of Life; and a little Reflection on ourſelves, and the Objects that ſurround us on every Side; are ſufficient to furniſh, even the moſt ordinary Capacities, with general Ideas of the Law of Nature; and the true Foundations of all our moral Duties. Whoever, in the leaſt, examines his own Nature; and contemplates that wonderful Order of the Univerſe, which on all Sides preſents itſelf to the View of every one capable of any Degree of Reflection; will immediately be rais'd to the Knowledge of that Almighty, All-wiſe, and All-good Creator, *in whom we* [7] *live, and move, and have our Being*; to whom he owes Homage equally with the reſt of the Univerſe. Whence it is eaſy to conclude, that we ought to have the higheſt Idea of this Supreme Being, that our Minds are capable of receiving; and to obey his Laws, as far as we can attain to the Knowledge of them. After this, there will be no great Need of much Penetration, to perceive how God has, by a natural Conſequence from the Conſtitution of human Affairs, laid us under a Neceſſity of practiſing, mutually towards each other, certain Duties, without which Society cou'd never ſubſiſt; and how he has thereby laid upon us an indiſpenſable Obligation to obſerve thoſe Duties; every one according to his State and Vocation. This is certain, at leaſt, that no ſooner are thoſe Principles propos'd, but that every one becomes ſenſible of their Goodneſs, and finds himſelf clearly convinc'd of their Truth; provided he be free from Prejudices, and that his Judgment be not clouded by the immediate Influence of ſome violent Paſſion, that darkens, and clouds his Judgment; or that there be not ſome other Obſtacle to hinder and divert his Attention. Let us here add the Teſtimony of a Heathen Philoſopher; 'tis the celebrated *Confucius* of *China* [8]. "The Rule of "Reaſon (ſays he) which comprehends the reci-"procal Duties of a King, and his Subjects; of "Parents, and their Children; of a Huſband and "his Wife; of the young Folks, and the Aged; "of Friends, and all who have any Correſpondence "or Intercourſe with one another, is not above the "Reach of every Individual. Whereas the Max-"ims, which certain People have themſelves in-"vented, or which they wou'd have paſs for ſub-"lime, and above our Comprehenſion; ſuch as "are certain ſtrange, and abſtruſe Principles, and "which have no Relation to thoſe five Conditions of "Life before-mention'd; cannot be at all reckon'd "among the Rules of Reaſon." Thus this wiſe *Chineſe* expreſſes himſelf, in explaining a Maxim, the Evidence of which he ſhews, in order to prove, that 'tis eaſy for all the World to be vir-

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[1] Δειμύτηλά σε ὐκ ἔχυσι θαυμάσαι; ἔτω· ἀλλὰ ἕτερα πολλὰ, ἐφ' ὧν ὐκ ἔχεις εἰπεῖν, ἃ γὰρ πέφυκα. Ἐκεῖνα ἓν παρέχει, ἅπερ ὅλα ἐστὶ ἐν σοι, τὸ ἀκίβδηλον, τὸ σεμνὸν, τὸ φερέπονον, τὸ ἀφιλήδονον, τὸ ἀμεμψίμοιρον, τὸ ὀλισοδεὲς, τὸ εὐμενὲς, τὸ ἐλεύθερον, τὸ ἀπέρισσον, τὸ ἀφλύαρον, τὸ μεγαλεῖον. Οὐκ αἰσθάνει, πόσα ἤδη παρέχεσθαι δυνάμενον, ἐφ' ὧν ἡδεμία ἀφυΐας καὶ ἀνεπιδεξιότητος πρόφασις, ὅμως ἔτι κάτω μένεις ἑκών, Marc. Antonin. Lib. v. Cap. v. Καὶ ἔτι ἐκεῖνο (μέμνησο ἀεὶ), ὅτι ἐν ὀλιγίστοις κεῖται τὸ εὐδαιμόνως βιῶσαι· καὶ μὲ ὅτι ἀπήλπισας Διαλεκτικὸς καὶ Φυσικὸς ἔσισθαι, διὰ τοῦτο ἀποσυῶς καὶ ἐλεύθερος, καὶ αἰδήμων, καὶ κοινωνικὸς, καὶ εὐπειθὴς Θεῷ. Idem, Lib. vii. §. 67. Edit. *Gataker.*

[2] *Hæc nonne eſt turpe dubitare Philoſophos, quæ ne ruſtici quidem dubitent? A quibus natum eſt id, quod jam tritum eſt vetuſtate proverbium: cum enim fidem alicujus bonitatemque laudant; dignum eſſe dicunt, quicum in tenebris mices. Hoc quam habet vim, niſi illam, nihil expedire, quod non deceat; etiam ſi id poſſis, nullo refellente, obtinere?* Cicer. de Offic. Lib. iii. Cap. xix. See, alſo, *Grotius, De J. B. ac Pacis, Prolegom.* §. 39.

[3] The Expreſſion in the Original is to play at *Mora*, or, as the *Latins* call it, *Digitis micare*; this is a Game manag'd on the Fingers, and now in uſe in *Italy*. But as it ſeem'd unintelligible to an *Engliſh* Reader, we have ſubſtituted in its Place a proverbial Sentence of our own, which has the ſame Meaning.

[4] See *Lactant. Inſt.* Lib. iii. Cap. xxv. Num. 9, & *ſeq.*

[5] *Eſt profecto animi medicina, Philoſophia; cujus auxilium non, ut in corporis morbis, petendum eſt foris.* Cicer. Tuſcul. Quæſt. Lib. iii. Cap. iii.

[6] *In illa priori parte* [*Philoſophia naturali*] *ut periculi minus,* [*ſi quid fuerit erratum*] *ita plus difficultatis eſt; quod obſcura rerum ratio cogit diverſa, & varia ſentire; hic* [*in Philoſophia morali*] *ut periculi plus, ita minus difficultatis; quod ipſe uſus rerum, & quotidiana experimenta poſſunt docere, quid ſit verius, & melius.* Lactant. Inſtit. Divin. Lib. iii. Cap. vii. Num. 4. Edit. *Cellar.*

[7] *Acts* xvii. 28.

[8] *Biblioth. Univerſ.* Tom. vii. *p.* 426, 427. In the Extract of Father *Couplet*'s *Confucius.*

tuous;

tuous; 'tis the ſame Maxim, which the Goſpel ſo ſtrongly inculcates: *Do not that to others, which you wou'd not have done to yourſelf.* In Effect, there needs no more, to be convinc'd, that the moſt Ignorant are, by Reaſon, perſuaded of the Neceſſity of the general Duties of the *Law of Nature*; than [1] either to aſk them, if they would be willing any one ſhou'd do themſelves the Hurt which they do to others; or to do it actually to themſelves: For they will then immediately make it appear, either by their Anſwer, or by their Complaints and Actions, that they look on ſuch Things to be wrong [2]; and are very ſenſible, that they are forbid them, not purely thro' Caprice, or a miſtaken Notion of Juſtice, and publick Good; but for moſt ſtrong and equitable Reaſons. Every one will complain, if he is ſlander'd, or robb'd, or ill treated, either himſelf, or in the Perſon of thoſe who are dear to him; or in any other Manner whatſoever: The moſt ſtupid have then Underſtanding enough to repreſent warmly, in their Way, the Greatneſs of the Injuſtice; and the Puniſhment due to the Offender. Therefore, when they themſelves commit any Thing of the like Nature againſt others, it is doing them no Wrong, to condemn them by their own Judgment; and to treat their pretended Ignorance on that Head, as altogether inexcuſable. But what is much more conſiderable, they can, not only comprehend, and diſcover, with little Trouble, the fundamental Principles of Morality; but, beſides, would they but uſe their utmoſt Endeavours to augment their ſmall Stock of Knowledge, they might, without much Difficulty, draw from thence certain Conſequences, not far remote, and extend their Knowledge to a Degree conſiderable enough; at leaſt ſufficient for their Condition. Inſtances too of this Kind we often meet with, in ſome of this Sort of People; who plainly ſhew, both by their Diſcourſe, and by their Conduct, that they have extenſive, and juſt enough Notions, concerning Morality; altho' they may not be always able to explain fully, or to expreſs clearly, the Whole of what they think. *The Manners and Diſcourſes of Peaſants*, ſays [3] *Montagne, I have generally obſerv'd to be more agreeable to the Rules of true Philoſophy, than thoſe of our Philoſophers themſelves.* Vulgus interdum [4] plus ſapit; quia tantum, quantum opus eſt, ſapit. *The Vulgar* (ſays an ancient Father) *are wiſer than us, becauſe they juſt know as far as is neceſſary.* This was plainly the Sentiment of an ancient Philoſopher [5], when he ſaid, That many People, without having their Reaſon improv'd by Study, live, nevertheleſs, in a Manner conformable to the Dictates of right Reaſon.

SECT. II.

IF Perſons, of the loweſt Rank, can arrive at ſuch a Pitch of Knowledge in Morality; it is much more to be expected, that thoſe, who have greater Talents, and more Penetration, with greater external Helps, and more eſpecially Men of Learning, ſhould be able to acquire, in this Science, and that in a much more diſtinct Manner, all the Light and Knowledge, any Way requiſite for the Conduct of Life: Nay I dare even venture to affirm, were the natural Principles of Morality, with due Application, cloſely and attentively purſu'd, to their full Extent, that all the moral Duties of Man, in every Station of Life, might from thence be eaſily deduc'd, by a Train of Conſequences, connected one with the other, in a demonſtrative Manner: It appears to me very improbable, [6] that our Creator, having given us Faculties ſufficient to diſcover, and demonſtrate with entire Certainty, abundance of ſpeculative Things, of which we may, without a Fault, be ignorant; principally, that vaſt Number of mathematical Truths, which have been acknowledg'd to be inconteſtable, by all who have been able to comprehend their Proofs and Principles: It is, I ſay, incongruous to ſuppoſe, that the ſame Creator has not, alſo, made us capable of knowing, and eſtabliſhing, with the ſame Evidence, the Maxims of Morality; in which are contain'd thoſe Duties he indiſpenſibly requires of us; and on the Practice whereof all our Happineſs depends. But, beſides this Reaſon, which the Goodneſs of GOD will not permit us to doubt, there is ſtill another drawn from the Nature of the Thing itſelf; and which alone wou'd be of Force enough to convince any reaſonable Perſon, of the Poſſibility of reducing the Science of Morality to a Syſtem, as well connected, as thoſe of *Geometry*, for Example, or *Mechanicks*; and founded on as certain Principles. It is no Part of the Buſineſs, in Morality, to know the *real Eſſence of Subſtances*; which is what has been hitherto attempted without Succeſs, and, in all Probability, will never be diſcover'd; as a great [7] Philoſopher of this Age has made appear: All that is requir'd here, is only to examine, and compare careſully, certain *Relations*, which we conceive between *human Actions* and a certain *Rule*. Let us hear what Mr. *Locke* himſelf ſays on this Occaſion [8]. "I doubt not, ſays he, but from ſelf-evi- "dent Propoſitions, by neceſſary Conſequences, "as inconteſtable as thoſe in Mathematicks, the "Meaſures of Right and Wrong might be made "out, to any one, who will apply himſelf with the "ſame Indifferency and Attention to the one, as "he does to the other, of theſe Sciences. The "*Relation* of other *Modes* may certainly be per- "ceived, as well as thoſe of Number and Exten- "ſion: And I cannot ſee, why they ſhould not, "alſo, be capable of Demonſtration, if due Me- "thods were thought on to examine, or purſue "their Agreement or Diſagreement. *Where there* "*is no* [9] *Property, there is no Injuſtice*, is a Propoſi- "tion as certain, as any Demonſtration in *Euclid*: "For the *Idea* of *Property* being a Right to any "Thing;

[1] See the *Parrhaſiana*, Tom. ii. *p.* 89, *& ſeq.*

[2] In the *Euthyphro* of *Plato*, *Socrates* ſays, That no one ſo much as queſtions whether he, who has kill'd another wrongfully, or committed any other Injuſtice, deſerves to be puniſh'd for it; but what they diſpute upon, is the particular Circumſtances; when the Queſtion is, for Example, to know who it is that has committed the Injuſtice, and what he has done, and when he became guilty of it. Ἀνθρώπων—ἥδη τινὸς ἤκουσας ἀμφισβητοῦντος ὡς τὸν ἀδίκως ἀποκτείναντα, ἢ ἄλλο ἀδίκως ποιοῦντα ὁτιοῦν, οὐ δεῖ δικάζεσθαι δίκην——ἀλλ' ἐκεῖνο ἴσως ἀμφισβητοῦσι, τὸ τίς ἐστιν ὁ ἀδικῶν, καὶ τί δρῶν, καὶ ποτέ, *p.* 8. B, C, D. Tom. i. Edit. *Serran.* And *p.* 50. F, G. Edit. *Læmar.*

[3] *Eſſays*, Lib. ii. Cap. xvii. towards the End, *p.* 115. Ed. 1727.

[4] *Lactant. Inſt. Divin.* Lib. iii. Cap. v. Num. 4. Edit. *Cellar.*

[5] Πολλοὶ λόγου μὴ μαθόντες, ζῶσι καλὰ λόγου, Democrates, in Opuſc. Mytholog. *&c* Amſt. 1688. *p.* 627.

[6] See the *Elements of Juriſprud. Univerſ.* of Mr. *Pufendorf*, p. 354. and the *Preface* of the ſame Book, *p.* 2. Edit. *Franc.* 1680.

[7] Mr. *Locke.*

[8] *Eſſay on Human Underſtanding*, by Mr. *Locke*, Book iv. Chap. iii. §. 18. *p.* 477, 478. Edit. *London.* 1706.

[9] Mr. *Locke* means, by the Word *Property*, not only the Right which one has to his Goods and Poſſeſſions, but even with reſpect to his Actions, his Liberty, his Life, his Body; and, in a Word, all Sorts of Right. See his *Latin* Letter on Toleration, *p.* 11. In *Engliſh*, *p.* 6. *4to. Lond.* 1689. and *p.* 8. *12ves. Lond.* 1690.

" Thing; and the *Idea*, to which the Name *In-*
" *juſtice* is given, being the Invaſion, or Violation
" of that Right; it is evident, that theſe *Ideas*
" being thus eſtabliſh'd, and theſe Names annex'd
" to them, I can as certainly know this Propoſiti-
" on to be true, as that a Triangle has three Angles
" equal to two right ones. Again, *No Government*
" *allows abſolute Liberty*: The *Idea* of Government
" being the Eſtabliſhment of Society, upon cer-
" tain Rules, or Laws, which require Conformity
" to them; and the *Idea* of abſolute Liberty being
" for any one to do whatever he pleaſes: I am as
" capable of being certain of the Truth of this
" Propoſition, as of any in Mathematicks—The
" preciſe real Eſſence of the Things, moral Words
" ſtand for, may (ſays the ſame Author [1] elſewhere)
" be perfectly known; and ſo the Congruity, or
" Incongruity of the Things themſelves, be cer-
" tainly diſcover'd, in which conſiſts perfect Know-
" ledge. Nor let any one object, that the Names
" of Subſtances are often to be made uſe of in
" Morality, as well as thoſe of Modes, from which
" will ariſe Obſcurity. For as to Subſtances, when
" concern'd in moral Diſcourſes, their divers Na-
" tures are not ſo much enquired into, as ſuppoſed;
" *v. g.* When we ſay, *That Man is ſubject to Law*;
" we mean nothing by *Man*, but a corporeal ratio-
" nal Creature: What the real Eſſence, or other
" Qualities of that Creature are, in this Caſe, is no
" Way conſider'd. And therefore, whether a Child,
" or a Changeling, be a *Man*, in a phyſical Senſe,
" may, amongſt the Naturaliſts, be as diſputable
" as it will, it concerns not at all the *moral* Man, as
" I may call him, which is this immoveable un-
" changeable *Idea*, of a corporeal rational Being:
" For were there a Monkey, or any other Crea-
" ture to be found, that had the Uſe of Reaſon,
" to ſuch a Degree, as to be able to underſtand ge-
" neral Signs, and to deduce Conſequences about
" general *Ideas*, he would, no Doubt, be ſubject to
" Law, and, in that Senſe, be a *Man*, how much
" ſoever he differ'd in Shape from others of that
" Name. The Names of Subſtances, if they be
" uſed in them, as they ſhould, can no more diſ-
" turb moral, than they do mathematical Diſ-
" courſes: Where, if the Mathematician ſpeaks of
" a *Cube*, or *Globe* of *Gold*, or any other Body, he
" has his clear ſettled *Idea*, which varies not, altho'
" it may, by Miſtake, be apply'd to a particular
" Body, to which it belongs not. [2] The Negligence,
" or Perverſeneſs of Mankind, cannot be excuſed,
" if their Diſcourſes in Morality be not much more
" clear, than thoſe in natural Philoſophy; ſince
" they are about *Ideas* in the Mind, which are none
" of them falſe, or diſproportionate; they having
" no external *Beings* for *Archetypes*, which they are
" referr'd to, and muſt correſpond with. It is far
" eaſier for Men to frame in their Minds an *Idea*,
" which ſhall be the Standard, to which they will
" give the Name *Juſtice*, with which Pattern, ſo
" made, all Actions, that agree, ſhall paſs under
" that Denomination, than, having ſeen *Ariſtides*,
" to frame an *Idea*, that ſhall, in all Things, be
" exactly like him, who is as he is, let Men make
" what *Idea* they pleaſe of him. For the one,
" they need but know the Combination of *Ideas*,
" that are put together within their own Minds;
" for the other, they muſt enquire into the whole
" Nature, and abſtruſe hidden Conſtitution, and
" various Qualities of a Thing exiſting without
" them.—[3] The Truth and Certainty of *moral* Diſ-
" courſes abſtracts from the Lives of Men, and
" the Exiſtence of thoſe Virtues in the World,
" whereof they treat: Nor are *Tully*'s *Offices* leſs
" true, becauſe there is no Body in the World that
" exactly practiſes his Rules, and lives up to that
" Pattern of a virtuous Man, which he has given
" us, and which exiſted no where, when he writ,
" but in *Idea*. If it be true in Speculation, *i. e.*
" in *Idea*, That *Murder deſerves Death*, it will, alſo,
" be true, in reality, of any Action that exiſts con-
" formable to that Idea of Murder. As for other
" Actions, the Truth of that Propoſition concerns
" them not.—[4] But it will be here ſaid, that if *mo-*
" *ral Knowledge* be placed in the Contemplation of
" our own *moral Ideas*, and thoſe, as other *Modes*,
" be of our own making, what ſtrange Notions
" will there be of *Juſtice* and *Temperance*? What
" Confuſion of Virtues and Vices, if every one
" may make what *Ideas* of them he pleaſes? (To
this Mr. *Locke* anſwers,) "There will be no Confuſi-
" on, nor Diſorder, in the Things themſelves, nor
" the Reaſonings about them; no more than (in
" Mathematicks) there would be a Diſturbance in
" the Demonſtration, or a Change in the Proper-
" ties of Figures, and their Relations one to an-
" other, if a Man ſhould make a Triangle with
" four Corners, or a *Trapezium* [5] with four Right
" Angles: That is, in plain *Engliſh*, change the
" Names of the Figures, and call that by one Name,
" which Mathematicians call ordinarily by another.
" —I confeſs, the Change of the Name, by the
" Impropriety of Speech, will at firſt diſturb him,
" who knows not what Idea it ſtands for: But as
" ſoon as the Figure is drawn, the Conſequences,
" and Demonſtrations, are plain and clear. Juſt the
" ſame it is in *moral* Knowledge, let a Man have
" the *Idea* of taking from others, without their
" Conſent, what their honeſt Induſtry has poſſeſs'd
" them of, and call this *Juſtice*, if he pleaſe.—He
" that takes the Name here, without the *Idea* put
" to it, will be miſtaken, by joining another *Idea*
" of his own to that Name: But ſtrip the *Idea* of
" that Name, or take it, ſuch as it is, in the Speak-
" er's Mind, and the ſame Things will agree to it,
" as if you call'd it *Injuſtice*.—[6] Where God, or
" any other Law-maker, hath defined any moral
" Names, there they have made the Eſſence of that
" Species, to which that Name belongs; and there
" it is not ſafe to apply, or uſe them otherwiſe:
" But, in other Caſes, 'tis bare Impropriety of
" Speech, to apply them contrary to the common
" Uſage of the Country. But yet, even this too
" diſturbs not the Certainty of that Knowledge,
" which is ſtill to be had by a due Contemplation,
" and comparing of thoſe even nick-nam'd *Ideas*."
Such is the Manner in which this great Philoſopher reaſons. Let us add here, that the Demonſtrations of ſpeculative Truths are much more compounded, and depend on a much greater Number of Princi-ples, than the Demonſtrations of the Rules of Morality. To be convinc'd of this, we need only compare the *Elements of Geometry*, with a [7] little methodical Syſtem of the Duties, which the Law of Na-

[1] Book iii. Cap. xi. §. 16, 17. *p.* 434, 435. Edit. 1706.
[2] Pag. 435.
[3] Lib. iv. Cap. iv. §. 8, 9, 10. *p.* 490, 491.
[4] Sect. ix.
[5] *Trapezium*, or *Trapezoides* rather, is a Quadrilateral Figure, whoſe Sides and Angles both are unequal. See *Euclid. Element. Græc. & Lat.* Edit. *Paris* 1573. *Definit.* 34. *l.* 1. *p.* 43. *& Diction. Acad. Franc.*
[6] Sect. x.
[7] Such as is (for Example) the little Treatiſe of *Pufendorf*, entitled, *The Duty of a Man, and of a Subject*; which is an Abridgment of the Work here tranſlated.

ture preſcribes to Men; and, at the ſame Time, that we ſhall find what I have juſt now ſaid to be true, we ſhall, alſo, in my Opinion, be forc'd to acknowledge, that it is incomparably more eaſy to comprehend the Principles and Reaſonings of the laſt mention'd Book, than the Theorems, Problems, and Demonſtrations of the former. In fact, as an ancient Philoſopher very juſtly remarks; [1] *It is falſe to ſay, that the Precepts of Morality are of ſo vaſt an Extent, as to make us deſpair of ever ſeeing the End of them; thoſe which concern the moſt neceſſary and conſiderable Things, may be reduc'd to a certain Number: It is true, that the Circumſtances of Time, Place, and Perſons, create therein ſome Diverſity; but that ſignifies but little, for we have, even in thoſe Caſes, general Maxims, which are ſufficient to direct our Judgments.*

SECT. III.

NOtwithſtanding all theſe Reflections, which were very obvious in themſelves, ſome have, [2] for a long Time, believ'd, and, even at this Day, many do maintain, that Morality is a Science very uncertain, and wherein ſcarce any Thing, beyond Probabilities, is to be found: But it is ſolely for want of due Examination into the Nature of Things, that this falſe Notion has prevail'd. There has ever been an uninterrupted Succeſſion of Men, who, ſeduc'd by a ſecret Deſire to ſhake off the troubleſome Yoke of Duty, and to indulge themſelves ſecurely in the Gratification, if not of their ſenſual and groſs Deſires, yet, at leaſt, of their more delicate and refin'd Inclinations, have employ'd all the Faculties of their Souls, to deſtroy the Evidence of the cleareſt and moſt acknowledg'd Truths, in order to involve in their Ruin all Certainty of the Rules of Virtue. My Deſign is not to diſpute with theſe Men in Form; and to refute minutely all their vain Sophiſtry. I ſhall content myſelf with ſaying here, in a few Words, ſomething to two Objections; on which they chiefly rely, and which ſeem moſt proper to dazzle the Underſtanding.

The firſt Objection is drawn from the Difficulty there is to decide ſome certain Queſtions in Morality; and even to reconcile ſome of its Principles. *Since the Laws of Morality* (ſays [3] a celebrated Author) *which concern the particular Duties of each Perſon ſingly, are ſo difficult to be fix'd, as we ſee they are; 'tis no wonder, if thoſe, which relate to Sovereigns, are much more ſo. If we conſider the Form of that Juſtice, which governs us, we ſhall find a true Teſtimony of human Weakneſs; ſo full is it of Error and Contradiction.*

But 1*ſt*. Whoſoever will beſtow the leaſt Attention, will, I am confident, readily agree, that the frequent Cauſes of this Perplexity, is Intereſt; which, join'd with the Prejudices of Education, or Cuſtom, obſcure the cleareſt Dictates of right Reaſon: Of this we every Day ſee numberleſs Inſtances. The greateſt Part of Mankind are ſo much blinded with an exceſſive, and miſtaken Self-love, that all their Penetration, and Integrity of Mind, entirely forſake them, as ſoon as ever any one Matter comes in Debate, the Deciſion whereof is attended with Loſs or Gain. And yet they ſhall eaſily determine, and that without any Heſitation, many other Things, a thouſand Times more difficult, when they examine them cooly, and with a Mind wholly diſintereſted. This is very well expreſs'd by the Philoſopher *Hierocles*. "One ſure Mark [4], "ſays he, that right Reaſon is natural to Men, is, "that the unjuſt Man, when concern'd in any Affair, that does no way touch his own Intereſt, "judges exactly according to the Rules of Juſtice; "and the Intemperate, according to thoſe of Moderation and Temperance. In a Word, all vicious Men have juſt Ideas in Things, where they "don't ſuffer themſelves to be prepoſſeſs'd by Paſſion. And here we have the true Reaſon, why "it is in the Power of a wicked Man to reform, "and become virtuous; for he has no more to do, "but to open his Eyes, and to condemn the Irregularity of his paſt Conduct; which he can't but "be ſenſible of, if he thinks with any Degree of "Attention." Thus this *Greek* Commentator, on the *Golden Verſes* of *Pythagoras*, judiciouſly obſerves the Caſe to be. But yet it but too often happens, that, when there is even no violent Paſſion, or perſonal Intereſt, able to miſguide the Judgment, Precipitation, and Prepoſſeſſion, often produce the very ſame Effects. Men, without Examination, or even Reflection, grow fond of falſe, or doubtful Principles; and then 'tis no wonder, if they find themſelves unable to reconcile theſe with the true; or to draw from them juſt and rational Conſequences. How few do we find, who have ſo much Courage as to call in queſtion certain Principles, which they have early imbib'd; eſpecially if they ſee them authoriz'd by the common Opinion, or eſtabliſh'd by the Cuſtom of their Country? You will meet with ſeveral Authors, who influenc'd, either openly, or ſecretly, by Party-Principles, have made it their ſole Aim, while they were compoſing Treatiſes on certain Queſtions in [5] Morality or Politicks, to endeavour to find out, not what was moſt conformable to the invariable Rules of good Senſe and Equity, but whatever ſeem'd moſt proper to juſtify their favourite Opinion; or the Pretenſions and Maxims of the Sovereign, under whoſe Dominion they liv'd.

2*dly*, Thoſe who make ſuch Objections as theſe, I am now examining; are generally ſuch Perſons, as, whatever Abilities and Penetration they may otherwiſe have, ſeem not to have ſtudy'd theſe Matters with ſufficient Care, or with a ſincere Affection for Truth; or elſe ſuch, as maliciouſly take Advantage of even the ſmalleſt Miſtakes, which they can find out in the Diſcourſes, or Works, of ſuch Authors, as have not, with juſt Attention, followed the natural Principles of this Science of Morality. And, in Truth, 'tis but too often ſeen, that Authors build on weak Foundations; or produce very inſufficient Arguments, to eſtabliſh the moſt clear and inconteſtable Truths. Whoever will be at the Pains to examine the vain Sophiſtry,

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[1] *Infinita, inquit, præcepta ſunt. Falſum eſt. Nam de maximis ac neceſſariis rebus non ſunt infinita: tenues autem differentias habent, quas exigunt tempora, loca, perſonæ. Sed his quoque dantur præcepta generalia.* Seneca, Epiſt. xciv. *p.* 335. Edit. *Amſt.* 1658.

[2] See Mr. *Pufendorf*, Lib. i. Cap. ii. §. 1.

[3] *Montagne*'s *Eſſays*, Book iii. *p.* 398. in *Engliſh*. And *p.* 797. in the *Paris* Edit. in Fol. And Edit. 1727. Lib. iii. Cap. xiii. *p.* 478, 479. Tom. iv.

[4] Τεκμήριον δὲ τῦ ἐνιεῖναι τὸν ὀρθὸν λόγον τοῖς ἀνθρώποις, τὸ, μὴ τὸν ἄδικον, ἐν οἷς μηδὲν αὐτῷ διαφέρει, κρίνειν δικαίως· μὴ τὸν ἀκόλαστον, σωφρονικῶς· μὴ ὅλως, τὸν κακὸν ὀρθαῖς ἐπιβυλαῖς χρῆσθαι, ἐν οἷς ἀπροσπαθής ἐστι. Διὸ μὴ μεθίστασθαι δύναται ὁ φαῦλος εἰς ἀρετὴν, καταγνώσει τῆς περιλέρας κακίας. *Hierocl. in Pythag.* p. 82. Edit. *Needh.* 1709. and *p.* 106. Edit. *Lond.* 1673.

[5] See Mr. *Buddeus*, in his *Hiſt. of Natural Right*, which is the firſt Diſſertation among the *Selecta, J. N. & Gent.* §. 50, *& ſeq.*

impertinent

impertinent Queſtions, ridiculous Deciſions, and deteſtable Maxims, with which the Books of moſt of the Caſuiſts are fill'd; will find an ample Field for expoſing a vaſt Number of Contradictions and Abſurdities; this Reflection, however, no way tends to prejudice the Certainty of the Principles and Rules of true Morality; but rather turns ſolely to the Confuſion of thoſe blind, or diſhoneſt Reaſoners; whoſe malicious Subtlety only hurts themſelves, and whoſe Art is employ'd to change the pureſt Gold into Droſs. Before theſe Gentlemen, therefore, triumph too far on Account of the ſeeming Oppoſition they think they have diſcover'd between certain Duties, or the weak Proofs uſed by ſome Writers, for their Support; they would do beſt, firſt to examine, if they were not in the wrong themſelves, and whether by retracing Things to their true Source, they would not meet with Aſſiſtance ſufficient to diſſipate their own Doubts. *Charron*, for Example, maintains, that [1] "Very often the "Precepts of a ſingle Virtue cannot be put in Prac"tice, without Prejudice either to that ſame Virtue, "or to ſome other; by reaſon of their claſhing "with each other: So that you cannot anſwer the "Demands of the one, but at the Expence of the "other. This is, at leaſt, adds he, uncovering one "Altar to cover another; ſo defective and abridg'd "is all human Sufficiency, that it is neither able to "give or receive one certain, univerſal, and con"ſiſtent Plan of Duty, ſufficient for the forming a "good Man; nor can it ſo well adviſe and pro"vide, but that the Means of doing Good ſhall "ſometimes interfere; Charity, and Juſtice, for In"ſtance, are often found contradictory: If in War, "I light on my Relation, or Friend, engag'd on "the Enemy's Side, Juſtice requires me to kill "him; but Charity to ſave and ſpare him: If a "Man be mortally wounded, ſo that, it being im"poſſible for him to recover, he can only linger on "in the Extremity of Pain; 'tis then a Work of "[2] Charity to diſpatch him: But yet 'tis what "[3] Juſtice will puniſh. Nay, to be found near "ſuch an one in a By-place, where it is doubtful "who is the Murtherer; altho' it was with Deſign "to do him Offices of Humanity, is extremely "dangerous; and muſt ſubject the Perſon, ſo found, "to a criminal Proſecution, however innocent he "be" But theſe Words, if well conſider'd, prove only this; that there are ſome Caſes, where ſeveral Virtues cannot be put in practice at one and the ſame Time, with Regard to the ſame Object; not that there is any Inconſiſtency between the Virtues themſelves, their Functions, or Effects. It is no more than a ſeeming Conflict between certain Duties, of which ſome, for the Time being, ſhould take place of others; ſo that what, in other Circumſtances, wou'd have been an indiſpenſible Act of Virtue, does here become unlawful, or, at leaſt, indifferent. Thus the Virtue, which at that Juncture is, if I may ſo ſay, oblig'd to give place; receives no Prejudices, nor loſe any of its Rights. *Quintilian* has a Paſſage relating to human Laws, which may, with more Juſtice, be applied to divine Laws, ſuch as the Law of Nature and Morality. "[4] A "Law, ſays he, is never contrary to another Law "in Point of Right itſelf, for by an Oppoſition of "this Kind, the one Law would abrogate the other: "But the Truth is, that theſe Laws contradict each "other by mere Accident, or Chance." *Charron* ſeems to ſoften this Notion in the ſecond Edition of his Book; where he adds the following Words: *Nor ought we to blame Virtue for this, or imagine that the Virtues contradict each other; for they perfectly agree: But the Defect lies in the Weakneſs of human Nature, which, with all its Sufficiency and Induſtry, is ſo limited and imperfect, that it can never fix on any ſettled Plan*, &c. That is to ſay, (if I miſtake not; and to give theſe Words the moſt reaſonable Conſtruction they are capable of:) That the ſeveral Virtues conſider'd as they are in themſelves, and in the *Idea* of the Divine Underſtanding, or of ſome celeſtial Intelligent Being, agree perfectly well one with the other; but that we want ſufficient Light to reconcile them in ſuch a Manner, as to ſatisfy our Minds, and to determine our Judgments with Certainty in thoſe Caſes where they ſeem to interfere; which, in effect, is the ſame Thing to us, as to ſuppoſe a real and abſolute Inconſiſtency in the Virtues themſelves. This calls to my Mind another Author, whom *Charron* very often copies, and who ſays on the Subject of natural Laws; [5] *That it is credible, that there are natural Laws, as is ſeen in other Animals: But they are loſt in us; this ſame fine human Reaſon of ours every where taking upon itſelf to domineer; diſturbing and confounding the Face of Things, according to its own Vanity and Inconſtancy.* But what we have ſaid before, does not allow us to admit of a Suppoſition ſo injurious to the Divine Goodneſs; nor are the Examples, produc'd by *Charron*, ſufficient to make it out. It is very rare, that a Soldier is oblig'd to kill, with his own Hands, knowing and ſeeing him, his Relation, or Friend, who may happen to be in the oppoſite Party. There are few Princes, or Generals of an Army, who wou'd require this of a Soldier, or ſubaltern Officer; or who would not, out of [6] regard to the Ties of Conſanguinity, or Friendſhip, eaſily forgive his having ſpar'd the Life of a Perſon ſo dear to him. But if it ſhould happen, that in a juſt War, (for that muſt be ſuppos'd in the preſent Caſe) I ſhou'd, by the preciſe Order of my General, or of my Sovereign himſelf, having ſufficient Reaſons for giving me ſuch Orders; be reduc'd to the fatal Neceſſity of killing, with my own Hands, my Relation, or Friend; I don't ſee, in this Caſe, how Charity can any ways interpoſe in Favour of that Relation, or Friend, who is ſuppos'd to bear Arms in a bad Cauſe; eſpecially, if my refuſal to obey endangers my own Life. I muſt own, this wou'd be a very ſad and moſt ungrateful Office; but after all, 'tis in me no other than the Performance of what I am indiſpenſibly oblig'd to do: And my Relation, or

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[1] *Of Wiſdom*, Book i, Chap. iv. Num. 5. of the firſt Edition. And Chap. xxxvii. Num. 5. *p.* 187. of the Editions form'd upon that which he revis'd. As the Diſpoſition of theſe two Editions is different, eſpecially in the firſt Book, I have always mark'd the Difference of the Chapters in citing this Book, whether it be my own, or my Author's Citation.

[2] As he who diſpatch'd *Saul* at his earneſt Requeſt: This *Charron* adds in his new Edition of his Book, where he endeavours to ſoften ſome Things, to appeaſe thoſe, who had been ſcandaliz'd at his free Manner of writing on ſome very nice Subjects.

[3] As he who kill'd *Saul*, was by *David*, and juſtly too; *David* being the Miniſter of publick Juſtice, and not of private Charity. Another Addition of the ſecond Edition of *Charron*.

[4] *Montagne's Eſſays*, Book ii. Chap. xii. *p.* 381. And *p.* 427. in the *Paris* Edition. And Ed. 1727. Tom. ii. *p.* 544, 545.

[5] *Omnibus autem manifeſtum eſt, nunquam eſſe Legem Legi contrariam jure ipſo; quia, ſi diverſum jus eſſet, alterum altero abrogaretur, ſe eas caſu colliſi, & eventu.* Inſtit. Orat. Lib. vii. Cap. vii. *init.*

[6] See the Reflection *Tacitus* makes, in regard to a Soldier, who demanded a Reward from his Generals, for having kill'd his own Brother in a Battle. "He was told, that the Law of Nature neither allow'd them to honour ſuch an Action, nor the "Law of Arms to condemn it." *Nec illis aut honorare eam cædem, Jus hominum; aut ulciſci ratio belli permittebat.* Hiſt. Lib. iii. Cap li. Num. 2.

Friend, ought to look on me as acting no otherwise than as the simple Instrument, and that too with great Regret, of those just Acts of Hostility, to which he has voluntarily expos'd himself. The other Case that *Charron* mentions, is as easy to decide; nor is there in it any Opposition betwixt *publick Justice* and *private Charity*, as this Author himself has made appear in the second Edition of his Work [1]. Suppose I think a Man mortally wounded, beyond all Hope, or Possibility of a Cure, (in which I, who am neither Physician, or Surgeon, may very easily be mistaken; since we very often see People recover after they have been given over, even by Men of those Professions;) altho' Compassion may seem to sollicit all who pass by, to put an End to the Sufferings of one, whom we look on as desperate; yet Charity no way requires me to deprive him of his Life; unless his Circumstances be such, as make it lawful for him to dispatch himself: In which Case [2] there are Principles sufficient to determine us. But shou'd it prove to be so in this Case, that the Man had, according to the Principles of the Law of Nature, full Liberty to dispose of his own Life; and shou'd intreat me to hasten the inevitable Moment of a Term, which wou'd otherwise soon expire, and the Prolongation whereof cou'd serve to no other Purpose, but to continue him in needless Misery; yet, if the Laws of my Country absolutely forbid me to contribute, in any Manner, towards hastening the Death of another, under any Pretence whatsoever; as is the Case almost every where, and that upon very good Grounds; the Laws of Charity in such Case cou'd in no wise oblige, or authorize me, to render to this unfortunate Man the Service he demands; and it is no more lawful for me to grant him this Request, than to force a Criminal out of the Hands of Justice, with an Intent to save his Life. As for the Danger to which I am expos'd, of being taken for the Murderer, or put to the Rack, if I stay by the wounded Person, in order to succour and relieve him; there is not always Reason to fear such fatal Consequences from a good Office on this pressing Occasion: But suppose I had all the Reason in the World to apprehend them; the Care of my own Preservation, so strongly [3] recommended to every Man, by the same Law of Nature, would, no Doubt, in this Case, be found to outweigh the Laws of Humanity; which are then only obligatory, when we can put them in Practice, without bringing on ourselves any considerable Damage, or great Inconvenience; to which we are not otherwise oblig'd to expose ourselves in favour of him, who has need of our Assistance. The Inference, therefore, which *Charron* draws from these Examples, that *Justice not only shocks Charity, but contradicts herself*, is altogether wrong and unjust. And would we examine, as we ought, the other Reasons produc'd by this Author; or those who, before and after him, have signaliz'd themselves, in establishing a Scepticism, which spares not the most necessary Truths; we should find, I believe, that none of these Reasons are sufficiently conclusive, to prove the pretended Contradictions they imagine to themselves, between the Maxims of Morality. On the contrary, the Weakness of all the Objections, hitherto started, would only serve to prepossess the Mind in favour of that entire Certainty, and perfect Consistency, to be found in all Decisions and Determinations, grounded on the true Principles of our moral Duties.

3dly, The Difficulties, that sometimes cause Perplexity in Matters of Morality, or natural Right, do not proceed so much from the Obscurity we find in the Rule itself; as from certain particular Circumstances, which render the Application thereof difficult, tho' not impossible; and [4], consequently, are no more Proofs of the Uncertainty of the Rule, than the trouble we are at, to apply a Demonstration in Mathematicks, diminishes its Evidence, or Infallibility. Besides, these Difficulties do not concern the general Principles, nor the Maxims which mediately, or immediately flow from them, even to a long Train of Deductions; but only affect certain remote Consequences, [5] which are of small Importance, in comparison with the others. If we will but make the slightest Use of our own natural good Sense, we cannot, in the least, doubt of the Truth of these following Rules: "That we ought "to render to the Deity a Worship worthy of him; "and to obey his Laws, as far as they are known "to us: That every one is oblig'd to avoid the "Excesses of Intemperance; which, by ruining his "Health, renders him incapable of attending those "Things, to which he is call'd by his Condition; "and of making himself useful to human Society: "That he is not permitted to injure his Neighbour; "and that, if he has done him any Damage, he "ought to repair it as soon as may be: That he "ought not to deny any one all friendly Services, "not hurtful to himself, that he can do him: "That he ought inviolably to keep his Word: "That all Fraud and Tricking is criminal: That "Children are under an indispensible Obligation "to honour their Parents: That it is just to obey "the Orders and Laws of a lawful Sovereign, as "long as he prescribes nothing contrary to the in-"variable Principles of the Law of Nature; or to "any Divine Law clearly reveal'd, *&c.*" All these fundamental Truths, and many more of the like Nature, are so evident, that it is impossible to bring any Objection against them so plausible, but its Weakness must appear at first View. But it may be disputed, with some Shew of Reason, "Whether a Man, for Example, who has commit-"ted Adultery with a marry'd Woman, is oblig'd "to make Satisfaction to the legitimate Children; "for the Loss they sustain by the Concurrence of "an illegitimate Sharer in the Succession? Whether "that Promise be binding, which I authorize an-"other to make in my Name, where the Person, "to whom it was to be made, dies before Notice "or Acceptance? Whether when a Thing sold, and "not deliver'd, happens to perish by some Acci-"dent, without any Fault of the Seller; he, or "the Buyer, ought to stand to the Loss of it? "Whether a Prescription shall preclude Persons yet "unborn? Whether a Possessor, *bona fide*, ought "to make good the Value of what he has con-"sum'd, or restore the Estate to the true Proprie-

[1] See the foregoing Page, Note 3.
[2] See *Pufendorf*, Book ii. Chap. iv. §. 19.
[3] See what is said on Book ii. of *Pufendorf*, Chap. iii. §. 15. Note 5.
[4] See *Pufendorf*, Lib. i. Cap. ii. §. 5. Note 2.
[5] 'Tis with respect to these only that we can admit what *Marriotte* says, (*Essay upon Logic*, p. 154. whose Words are cited and adopted by the late Mr. *Bayle*, *Answ. to the Quest. of a Provinc.* Tom. i. *p.* 352.) *That it is often necessary to consider a great Number of Things, to judge well what we ought to follow or avoid.* But they are much in the wrong, both the one and the other, to infer from thence the Uncertainty of all Morality in general; and to maintain, that *the Conclusions thereof are more uncertain than those of natural Philosophy.* An anonymous Author, who publish'd, in 1719, a Book, entitled, *Doubts with respect to the Law of Nature*, (said to be printed at *Hall*, tho' the Title bears the Name of *Juliers*) gives into the same Excesses, but it is easy to see his Design is only to confound every Thing, in order to establish Scepticism.

" tor, without being indemnified for his Expence? " Whether Poligamy or Divorce are abſolutely con- " trary to the Law of Nature? Whether ſuch, " or ſuch Degrees of Conſanguinity, or Affinity, " are forbid by the ſame Law? Whether Chil- " dren may marry without their Parents Conſent?" Altho' even theſe, and other the like Queſtions, may not, perhaps, be very difficult to decide, if examin'd attentively, and without Prepoſſeſſion; yet there is beſides, almoſt always, as to the practical Part, another infallible Way to determine ourſelves thereupon; and that by clear and ſelf-evident Principles; without at all entring into the Merit of the Queſtion. You doubt, for Example, whether Poligamy or Divorce are, in their Natures, abſolutely unlawful; but you find theſe Things forbidden by the Civil Laws of your Country; and you cannot reaſonably doubt, but that it is a Crime to diſobey the Laws of the Sovereign Power; even tho' they ſhould abridge you of the Liberty of doing that, which otherwiſe would be lawful, or indifferent. Should the Queſtion be about Things not ſettled by the Civil Laws; you have then theſe two inconteſtable Principles to regulate your Conduct by: *Firſt*, [1] *that, in difficult Caſes, you ought always to take the ſureſt Side of the Queſtion. Secondly, that the ſureſt Side, is always the oppoſite to that your Paſſions incline to.* And this Rule may ſerve in the Inſtances of *Polygamy* and *Divorce*, juſt mention'd; for, at the ſame Time, we ſuppoſe theſe Things, not abſolutely bad in themſelves, it is nevertheleſs true, they may be reckon'd ſuch as are eaſily abus'd, and which, [2] conſequently, Prudence commands us to abſtain from, not only by the Rules of the *Law of Nature*, but, alſo, by the Precepts of the *Goſpel*. And from hence I draw a Conſequence, that ſerves equally to confound, as well thoſe who ſeek Excuſe for their Faults, from a pretended invincible Ignorance, or from the Difficulties of their particular Caſes; as thoſe, who alledge theſe Difficulties, in order to deſtroy the Certainty of all the Principles of Morality: The Conſequence, I would infer, is this; That a Man, before he can arrive at this State of Doubt and Perplexity, ſo as to be at a Loſs which Side of the Queſtion to take, in Points relating to his own Conduct; muſt firſt have negligently over-look'd Maxims, ſo clear, as to be ſelf-evident; and ſo eaſy, as to be obvious in every Caſe of Practical Duty. Thus, it is plain, that the Fault lies at our own Door, and not at our Creator's; who, in giving us Laws, has, alſo, given us ſufficient Light, to prevent our falling into an endleſs Abyſs of Doubt and Uncertainty. The Caſe is much the ſame here, with that of the Maſter of a Family; who, upon taking a long Journey, had left, with his Domeſticks, Orders ſufficiently clear, and eaſy to be executed: For, in this Caſe, ſhould the Domeſticks, thro' a Neglect of following their Maſter's Orders, find themſelves reduc'd to ſuch a Nonplus, as not to be able, with their utmoſt Application, and moſt hearty Endeavours, to determine what to do, with reſpect to certain Affairs, that ſhould happen in the Interval; they could have no Grounds to complain of their Maſter's Severity, when, at his Return, he puniſh'd them for having taken wrong Meaſures, and ill manag'd his Concerns.

4*thly*, Unleſs we will doubt meerly for the ſake of doubting, or have the Aſſurance to deny that 'tis Light at Mid-Day; we cannot refuſe to acknowledge, that there are a great Number of Principles and Maxims of Morality, which are attended with the higheſt Degree of Evidence; and which are entirely conſiſtent one with another. There are ſome of theſe Truths, the Belief whereof, we are oblig'd to acknowledge to be as ancient as the World; and ſo extenſive, as to be diffus'd, in a Manner, quite throughout it; as ſhall be hereafter ſhewn. Now if there be any certain Proof, any ſure Mark of the Clearneſs of our Ideas and Opinions, independently even of the Nature of Things; ſuch an univerſal Conſent muſt undeniably be this Mark. As for thoſe Maxims, whoſe Evidence does not appear till after ſome Degree of Reflection; and about which there is, likewiſe, great Diverſity of Opinions; if we take an Account of all ſuch as really have ſome Difficulties at firſt, even to thoſe who examine them with ſome Degree of Attention; it will be found that their Number is but ſmall; that for the moſt part they relate to extraordinary Caſes; and we diſcover ſometimes, by the Force of due Attention, a clear and ſatisfactory Solution of what we regarded as very dubious, or even inexplicable. But however, ſuppoſing there were Caſes, and thoſe too not uncommon; where it was abſolutely impoſſible to come to any fix'd Reſolution, upon Principles clear and ſelf-evident; God doubtleſs would not, in ſuch Caſes, make Men [3] reſponſible for thoſe Errors, which, after their beſt Endeavours, us'd to find out the Truth, and to avoid being deceiv'd, they ſhou'd unhappily fall into. So that this would not at all make either againſt the Goodneſs, or Juſtice, of the Creator and ſovereign Lord of Men; or againſt the Certainty and Evidence of thoſe Principles, which we have always ready at hand, as ſure Guides to conduct us ſafely in an infinite Number of Caſes: But we ought rather, in ſuch Caſe, to ſay, that even this Degree of Light, ſeeing God has not thought fit to give us a greater, is ſufficiently adapted to the State and Intereſts of Mankind: Tho' 'tis my fix'd Opinion, that it cannot, without Raſhneſs, be poſitively affirm'd; that thoſe inconteſtable Principles of Morality we have, are not, if duly purſu'd thro' all their Conſequences, fully ſufficient to furniſh us with infallible Maxims in all imaginable Caſes, that can be ſuppos'd to occur in human Life. And my Reaſon is this; That theſe Principles have prov'd ſo fruitful, that even to this Day, they have not been explain'd entirely; or drawn out into all their Conſequences: But, on the contrary, during the Space of near ſix thouſand Years, that is, of the whole Duration of Mankind; there has hardly been any one Science ſo much neglected, or ſo ſuperficially cultivated, as this Science of Morality; as will appear by the Sequel of this Diſcourſe.

5*thly*, After all, ſuppoſing now that Means cannot be found out, entirely to reſolve ſome Difficulties objected to certain remote Conſequences, that follow from ſome of the evident Principles of Morality; will this be ſufficient, in the Judgment of any reaſonable Man, to ſhake the Certainty of thoſe Principles; and of that vaſt Number of Conſequences, which may be moſt manifeſtly deduc'd from them? Permit me, on this Occaſion, to make a general and very important Remark; which, tho' made uſe of by ſeveral Authors, it is yet worth while here to repeat, and place in all its ſeveral Lights; to prevent the Effects of thoſe dangerous Impreſſions, which they who endeavour directly, or indirectly, to introduce into the World an extra-

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[1] See *Pufendorf*, Book i. Chap. iii. §. 7. And Mr. *Bernard*, in his *Nouvelles de la Repub. des Lettres*, *March* 1705, *p.* 294.

[2] See my Commentary on *Grotius*, *De Jure Belli et Pacis*, Lib ii. Cap. v. § 9. Not. 10.

[3] Ὁρᾷς πῶς ὀλίγα ἐστὶν, ὧν κατλήσας τις, δυναται εὔροον καὶ θεοειδῆ βιῶσαι βίον; καὶ γὰρ οἱ θεοὶ πλέον οὐδὲν ἀπαιτήσουσι παρὰ τὸν ταῦτα φυλάσσοντος. That is to ſay, You ſee how few Things we have to practiſe, in order to lead a happy and divine Life; for the Gods will require nothing more of him, who ſhall follow theſe Rules. *Marcus Antonin.* Lib. ii. Sect. v.

vagant, and, as I may venture to ſay, moſt ridiculous Scepticiſm, might otherwiſe make. You ſhall ſee theſe Men, with great Earneſtneſs and Application, collecting from all Parts, and ſetting in the ſtrongeſt Light, the minuteſt Difficulties, which they think can be urg'd againſt the moſt certain and generally receiv'd Truths; and then concluding, with an Air of Triumph; *That Reaſon is entirely blind and at a loſs* [1]: *That it is an uncertain, inconſtant, and pliant Fool, and variable as a Weather-Cock: That its only preſervative againſt Error is, not to think, for where-ever two Opinions preſent themſelves, it is incapable of proceeding:* With much more to the like Effect. Now all ſuch Reaſonings are grounded upon this ſingle Principle; that, whatever is a certain Truth, muſt be adequately known by us; and remov'd from all Manner of Difficulty. But this is a Propoſition too conſiderable to be taken for granted; and ought to have been firſt fully prov'd, as the Ground on which all their Reaſoning ſtands; unleſs they mean to beg the Queſtion, by aſſuming for an unqueſtionable Truth, what is really falſe; which does but ill become Men, who wou'd ſeem reſolv'd to admit of nothing for Truth, but what they comprehend as fully and clearly, as they do; that *two and two make four*. May it not very well be ſo, that our Faculties are preciſely adapted to our preſent State and Occaſions here; and, conſequently, circumſcrib'd within their proper Bounds? (For bounded they muſt then be; ſince it can never be prov'd, that to this End they ought to be commenſurate with the Nature and Properties of all thoſe Things whereof we have Ideas.) This then being ſuppos'd, which no way implies any Thing contrary to the Goodneſs, or Wiſdom of the Creator; is not the having clear and direct Proofs of any Principle, enough to warrant the admitting it as certain; notwithſtanding there ſtill remain ſome Difficulties, the Solution whereof we do not well ſee? To go about to make ſuch Difficulties ſerve for Proofs of the Negative of that very Principle, would be vain and frivolous; 'twould be no more than an idle Evaſion, founded always upon the gratuitous Suppoſition I juſt now mention'd; and one ſingle Inſtance will be ſufficient to make it appear. Let the Queſtion be, ſay they, whether *Matter is divisible ad infinitum* [2]? and bring all your Proofs; they will ſtrike you ſo at firſt, that you will encline to favour the Objections brought by the *Atomiſts* againſt the infinite Diviſibility of Matter: But take the oppoſite Side of the Queſtion, and expoſe your Objections by way of Argument, you will find them make an equal Impreſſion, and you may oppoſe the Reaſons on one Side, as a Counterpoiſe to thoſe on the other. For my part, I think the Difference, according to the Rules of right Reaſoning, to be very conſiderable; for the Arguments for the infinite Diviſibility of Matter, flow directly from the Idea of the very Nature of Matter, as an extended ſolid Subſtance; whoſe Parts, tho' never ſo ſmall, cannot be otherwiſe conceiv'd than as endu'd with Figure, and as having Sides, by which they are contiguous; not to ſay any Thing of the Demonſtrations Geometry affords us in this Caſe: Whereas the Objections of the Atomiſts, which contain their ſtrongeſt Proofs for the Negative; being entirely grounded on the Difficulty of conceiving a Number of Parts really infinite, wherein the Imagination is at a loſs; are altogether inconcluſive: unleſs upon Suppoſition that nothing ought to be admitted as certain, but what we have an Idea of, exempt from all Difficulty; tho' a Thing otherwiſe attended with never ſo much Credibility, grounded on Reaſons moſt evident; and ſuch as are drawn directly from the Nature of the Thing itſelf. Now 'till ſuch Suppoſition ſhall be demonſtrated, (and how can that be ever done, eſpecially by one under the Character of a *Sceptick*?) there will not be ſo much as a Poſſibility of overthrowing the Certainty of many Truths, as well ſpeculative as practical; which Reaſon teaches to all, who conſult her with Diſpoſitions proper for that Purpoſe. The ſincere Lovers of Truth will ever find a juſt *Medium*, between the fooliſh Preſumption of the poſitive *Dogmatiſt*; who holds for Demonſtrations, all his ill-grounded Fancies, concerning even the moſt doubtful Matters: And the falſe Modeſty of the rigid *Sceptic*; who, ſinking under the Weight of the ſmalleſt Difficulties, boldly rejects all Certainty; on Pretence, that he cannot attain to a Knowledge entirely perfect, and exempt from all Mixture of Obſcurity. In vain do they heap Difficulty upon Difficulty concerning the Nature and Attributes of *God*; this will never, in the Judgment of any reaſonable Man, either overthrow the Exiſtence of that Infinite Being; or the certain, tho' imperfect Knowledge we have of ſome of his Perfections; particularly thoſe, which have relation to our Intereſts and our Wants. In vain do they exaggerate, with all the Art of ſubtle Philoſophers, thoſe ill-grounded Doubts; which, on the Subject of moral Obligations, the Mind, either not attentive enough in diſcerning Truth; or elſe ingeniouſly induſtrious in inventing Fallacy; can form to itſelf. The Idea of a Creator, boundleſs in Power, Wiſdom, and Goodneſs; and the Idea of ourſelves, as intelligent, reaſonable, and ſociable Creatures: Theſe two Ideas, I ſay, if well attended to, and compar'd together in their whole Extent, will always furniſh us with ſteady Grounds of Duty, and ſure Rules of Conduct; notwithſtanding it may ſometimes happen, that, for want of Care, or Attention, we may, in uncommon Caſes, not know how to apply them; or cannot methodically demonſtrate the neceſſary Connexion of ſome remote Conſequences, with the firſt Principles of Morality.

SECT. IV.

THE other Objection, which I purpoſe to anſwer in a few Words, is taken from the great Diverſity of Opinions there is in the World concerning *Virtue* and *Vice*; inſomuch that not only ſome particular Men, but even whole Nations, have openly derided all Morality; or at leaſt ſome of its Principles. With this View the *Sceptics* formerly [3] gave a long Detail of the Contradictions they remark'd on this Subject; as well thoſe found between the Cuſtoms of particular Nations; as between the Notions even of Philoſophers themſelves. But what will all this ſerve to prove? That Men do not always make a right Uſe of their Reaſon [4]? I readily grant it; and ſeeing there are, even amongſt the Men of Underſtanding, ſome who ſo badly employ their Leiſure and Parts, as to uſe their utmoſt Efforts to undermine, or to render, at leaſt, very dubious, the moſt manifeſt Truths; on Pretence that there are Difficulties, beyond the

[1] See *Bayle*'s Dictionary, *p.* 1565. *Col.* 1.
[2] See Mr. *Bayle*'s Continuation des Penſeés diverſes à l'occaſion de la Comete, *&c. p.* 367.
[3] See *Sextus Empiric.* Pyrrhon. Hypoth. Lib. iii. Cap. xxiv. p. 151. D. & Edit. *Fabric.* p. 176. Numb. 198, *&c.*
[4] See the Paſſage in *Diog. Laert.* cited hereafter, *Sect.* 27.

Reach of our finite Underſtanding; I am not at all ſurpriz'd, to find ſome rude and unpoliſh'd Nations, who, being either extremely corrupted; or enſlav'd to Opinions, conſecrated by long Uſage and Cuſtom; have continu'd, either wholly, or in part, immers'd in the groſſeſt Ignorance of thoſe moral Truths, which are indeed in themſelves evident enough; but not to thoſe, who either ſhut their Eyes againſt the Light of Nature; or who will not give themſelves the trouble of conſidering, and purſuing thoſe Ideas, which preſent themſelves to the Mind every Moment, and from every Quarter. Or ſhall we hence infer, that thoſe ſure and inconteſtable Principles of Conduct, if any ſuch there are, ought to have been actually impreſs'd, even from the Cradle, on the Minds of all Men; ſo that none could be either ignorant of, or under any miſtaken or different Notions about them. *Montagne* indeed reaſons after this Manner; An Author, who, amongſt a vaſt Number of fine judicious Thoughts, has but too viſibly diſcover'd a Spirit of *Scepticiſm*, carried beyond its due Bounds [1]. "It is very merry in ſome People (ſays he) who, to "give Certainty to Laws, affirm, that there are ſome "of them firm, perpetual, and immutable, which "they call natural; which are imprinted on the "human Mind: And of theſe ſome make the "Number to be Three, ſome Four, ſome more, "ſome leſs; which ſhows, that even this Impreſ-"ſion is a Thing as doubtful as any of the reſt. "Now they are ſo unfortunate (for what can I call "it elſe, but Misfortune, that of ſo infinite a Num-"ber of Laws, there ſhould not be found one, at "leaſt, that Fortune, or Chance, has ſuffer'd to be "univerſally receiv'd by the Conſent of all Na-"tions?) They are, I ſay, ſo wretched, that of "thoſe three or four ſelect Laws, there is not ſo "much as one, but is contradicted and diſown'd, "not by one Nation only, but by many. And yet "this ſame univerſal Approbation is the only pro-"bable Mark, from which they can argue, or in-"fer, any Laws at all to be natural; for we ſhou'd, "without all doubt, unanimouſly follow, whatſo-"ever Nature had really enjoin'd us; and not only "every Nation, but every particular Man would "be extremely ſenſible of the Violence offer'd him, "ſhould any attempt to force him to a Tranſgreſ-"ſion of theſe Laws." But this is a Suppoſition not to be admitted without Proof; it being contrary to Experience: And long ſince own'd to be falſe in Fact, by the moſt able Philoſophers. "[2] Nature "alone, (ſays one of them,) cannot furniſh us with "the Knowledge of moral Good and Evil; ſhe has "indeed implanted in us the Seeds of the Science "of Morality, but not the Science itſelf. This is "the Reſult of thoſe Reflections and Compariſons "which the Mind, by Parity of Reaſon, makes "between the Things it has often ſeen and con-"ſider'd." A celebrated [3] Philoſopher of the laſt Age, one to whom the World will be eternally oblig'd, for having introduc'd the right Manner of philoſophiſing; not that he was either infallible, or always followed his own Rules; *Des Cartes*, I ſay, had propagated the Opinion of *innate Ideas* among his Followers. But there aroſe another Philoſopher, [4] not long ſince deceas'd, who has re-eſtabliſh'd, and put in a new Light the ancient Opinion. The Reaſons which he alledges, ſeem ſo very ſtrong, that whoever examines them with a little Attention, and without Prejudice, cannot refuſe to ſubmit to them. Dr. *Sherlock*, who has taken upon him lately to refute them, has, in my Opinion, with all his Penetration and all his Efforts, only given thoſe who deny *innate Ideas*, all the reaſon in the World to confirm themſelves in an Opinion, which they ſee attack'd with ſo little Succeſs [5]. All the Doctor ſays, is either grounded on abſtracted, and ſcarce intelligible Principles; or on ſuch, as are advanc'd without Proof; or whoſe juſt Conſequences tends to prove [6] the very Opinion he oppoſes. But what is moſt of all ſurpriſing, he very poſitively affirms, "That [7] the Doctrine of Mr. *Locke*, about "the Origin of *innate Ideas*, may very much "ſerve the Cauſe of Atheiſm; for, ſays he, if "none of our Ideas are *innate*, neither thoſe we "have of the Deity, nor thoſe we have of Virtue "and Vice; what ſhall hinder the Atheiſt from "ſaying, that all thoſe Ideas are the Effects of a "wrong Education; and that they were firſt im-"printed on the Minds of Children, for the good "of Society; and to reſtrain and keep them in "awe?" For my part, I think on the contrary, (nor am I ſingle in my Opinion,) that the Clergy themſelves give great Advantage to the Atheiſt; when, not ſatisfied with thoſe inconteſtable Proofs we have of the great Truths of Religion and Morality; they fondly maintain, thro' an imprudent Zeal, Arguments in themſelves at beſt doubtful; and then cry out, that all's loſt, if theſe are not allow'd of as well as the former. For after all, I would fain know how Dr. *Sherlock*, without entering into metaphyſical Reaſonings, which are generally very uncertain, and do not properly belong to a Diſpute about Matter of Fact; will be ever able to prove to an Atheiſt, that notwithſtanding the manifeſt Ignorance in which whole Nations have been, and ſtill are, of ſome fundamental Duties of the Law of Nature; and the Caprice and prodigious Diverſity of Opinions, which have prevailed in all Ages on the Subject of Morality and Religion; that, notwithſtanding all this, I ſay, every particular Perſon has *innate Ideas* of the Deity, and of Virtue? Nor

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[1] *Montagne's Eſſays*, Book ii. Chap. xii. *p.* 380. *Engliſh*; *French*, 426. And Edit. 1727, *p.* 542, 543. Tom. ii.

[2] *Deſideras dici: Quomodo ad nos prima Boni Honeſtique notitia pervenerit. Hoc nos docere Natura non potuit: ſemina nobis ſcientiæ dedit, ſcientiam non dibit.—Nobis videtur obſervatio collegiſſe, & rerum ſæpe factarum inter ſe collatio, per analogiam noſtro intellectu & Honeſtum & Bonum judicante.* Senec. Epiſt. cxx. *p.* 457. Edit. *Gronov.* See *Lipſius, Manud. ad Philoſ. Stoic.* Lib. ii. Cap. xi. *per totum.*

[3] See the *Metaphyſical Meditations* of *Des Cartes*, with the *Objections* and *Anſwers* which are joined thereunto; particularly *p.* 17, 24, 102. and *Append.* p. 16, *&c.*

[4] Mr *Locke*, in his *Eſſay on Human Underſtanding*, Book i.

[5] This was my Judgment ſix Years ago, form'd on the Extract in *Bernard's Nouv. de la Repub. des Lett. May* 1705. I had Reaſon to believe, that that ingenious Journaliſt had neither weaken'd, nor miſrepreſented, in the main, the Reaſons of this *Engliſh* Doctor. I have ſince found it to be Fact, having read the Book itſelf, well tranſlated into *French* in 1708. But as to my Judgment of the Doctor's Reaſonings, I am ſo far from altering it, that I find myſelf more and more confirm'd in it, by reading that long Digreſſion, where he pretends to eſtabliſh *innate Ideas*; and to confute thoſe who deny them. The judicious and diſintereſted will diſcern, who are moſt likely to clear the Matter; whether thoſe, who go upon Experience, the only Way we have to know the Truth; and upon the proper and certain Character of Ideas; which is to make themſelves be perceiv'd, where ever they happen to be, or whatever, at Bottom, their Nature may be: Or thoſe, who, being oblig'd to acknowledge Experience to be againſt them, do yet advance nothing, but Reaſons of Congruity; and yet charge others with want of Penetration to ſee the Difficulties.

[6] M *Buddeus*, who has ſince undertaken to refute Mr. *Locke* (in his *Moral Theology*, p 399, *ſeq.*) confines himſelf to maintain, that Children, and ignorant Perſons, are ſenſible of practical Truths, and agree to them, when propos'd, and when they make uſe of their Reaſon Which is plainly giving up the Queſtion.

[7] *Ibid.* p. 545. and in the Book itſelf of Dr. *Sherlock*. p. 146, 147. in the *French* Verſion.

do I ſee how this Difficulty can be anſwer'd otherwiſe, than by affirming; that as Men are naturally provided with [1] Faculties ſufficient to know the Author of their Exiſtence, and of the Duties he expects from them; and to form to themſelves thereupon right Ideas: So they may remain in Ignorance, or even run into Miſtakes about theſe Points, if they will not make good uſe of their Underſtanding: And this Anſwer hath nothing in it, but what is ſolid. *GOD* [2] *having endued Man with the Faculty of knowing what he poſſeſſes, was no more oblig'd, by his Goodneſs, to engrave on his Mind innate Ideas of Religion and Morality, than he was, after giving him Reaſon, Hands, and Materials, he ſhould build him Bridges, or Houſes.* To alledge, therefore, the Abuſe, which Men make of the Light of Nature, in Matters of Morality, as a Proof, that there is no Certainty in it; is as poor Reaſoning as that of the *Epicureans*; who think to ſubvert true Religion, by ſetting forth all the Evils, Crimes, and Extravagancies, that falſe Zeal, Bigotry, and Hypocriſy, under the ſpecious Pretence of Piety, have occaſion'd in the World. [3] *Tantum Relligio potuit ſuadere Malorum!* But let us only conſider this Matter in a different Light, and we ſhall find this Objection itſelf furniſh us with a conſiderable Proof, or at leaſt a Prepoſſeſſion, in favour of the natural Evidence of the Principles of Morality; and of that Impreſſion, which, there is Reaſon to believe, theſe Truths would make on the Minds of all Men, did they but hearken to Reaſon. In Effect, it appears by Hiſtory, that there are few Nations to be found, in whom all Senſe of Virtue is entirely loſt. By the Confeſſion of Mr. *Bayle*,[4] "The moſt ge-"neral Rules of Morality have been preſerv'd al-"moſt every where, and have, at leaſt, obtain'd "in all Communities, where Reaſon and Know-"ledge have been at all cultivated." "Is there any "Nation,[5] (ſays a very great Orator, and heathen Philoſopher) "where Humanity, Goodneſs, and "Gratitude, are not thought amiable, and had in "eſteem? And where the proud, the miſchievous, "the cruel, and ungrateful, are not had in Con-"tempt and Abhorrence?" It has too been very judiciouſly obſerved, that [6] "No Legiſlator could "ever yet procure Laws, that were entirely bad, "to paſs: The Managers, concern'd in paſſing "ſuch Laws, have either dexterouſly tack'd them "to others, that were good, or elſe have had re-"courſe to violent Meaſures, either to eſtabliſh, "or to maintain them; ſo that the very Submiſ-"ſion to unjuſt Conſtitutions, is even a Proof of "the Neceſſity of equitable and good ones." It will perhaps be reply'd, that it is the Advantage, ariſing from Morality, that cauſes it to be generally approv'd, and receiv'd in the World. But, tho' this Reaſon contributes much towards it; yet is it not the only, nor the principal one. For 'tis very hard to conceive, that, in ſo many different Places, and in all Ages, ſuch Multitudes, of every Rank, Condition, and Character, ſhould have given their Conſent to theſe Sort of Maxims, merely for the Advantage each Individual found therein; ſo as, at the ſame Time, to think themſelves exempt from all Obligation to obſerve them, whenever they could diſpenſe from obſerving them. Indeed there have been, and ſtill are, too many, who regard them only in this Light; either, becauſe they have accuſtom'd themſelves to do ſo, in order quietly to indulge their Paſſions; or, becauſe they have ſuffer'd themſelves to be impos'd upon by ſome ill-grounded Subtilties: But then we ſee, that the wiſeſt and moſt ſenſible Part of the World have, at all Times, judg'd of Things quite otherwiſe. Nay all, whether learned or unlearned, have found in them a certain Agreement with, and Conformity to right Reaſon; and that too, more or leſs, according to their Share of good Senſe: And this Agreement becomes more or leſs evident, in Proportion to the Uſe each Man has made of his Reaſon, and the Knowledge he has acquir'd. Men have always diſtinguiſh'd the Idea of what is *juſt*, or *honeſt*, from the Idea of what is *uſeful*; even in thoſe Maxims, where theſe two Ideas have been moſt manifeſtly combin'd: The firſt of theſe, even when they ſcarcely, or not at all, perceiv'd its true Foundations, has always ſtruck them ſo, as to oblige them to own its Power, independently of the other: Men have never fail'd, ſecretly, to reproach themſelves, whenever they have ſacrificed, to their Intereſt, the Practice of any known Duty. And it has even been obſerv'd, that [7] wicked Men would chooſe (were it poſſible) to enjoy the Fruits of a criminal Action, without committing the Crime itſelf. If we reflect rightly upon the Matter, it muſt be own'd, that the Majority of Mankind are not ſo much as capable of diſcovering, or conceiving all thoſe wiſe and uſeful Ends, which a ſkilful Law-giver, or profound Philoſopher, might have had in View: So that it often happens here, that the Notion of Duty, alone, makes the Impreſſion; and it is, likewiſe, the Intention of the Law-giver, that it ſhould do ſo; for they well know the great Power that this Idea has over the Minds of Men, and that it, in certain Caſes, is level to the Capacity of many, whom Intereſt could never touch, as being a Conſideration beyond their Capacity. Hence it has ſometimes happen'd, that Religion has been call'd in as an Auxiliary; and the Law-givers have boaſted, that their Laws were of divine Original. After all, this Reply furniſhes a good Argument, towards the eſtabliſhing the Solidity of the Maxims of Morality; and which will, at the ſame Time, ſhew, the Proportion they bear to all Capacities. For ſince the Creator, who, no Doubt, deſigns that all Men ſhould be happy, has ſo manifeſtly, and inſeperably, connected human Virtue, and human Felicity; it is clear, that he indiſpenſibly requires of every one an exact Obſervation of the Law of Nature; and, conſequently, that the Principles and Rules thereof ought to be ſuch, as may be eaſily known and demonſtrated.

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[1] See *Silvæ Philologicæ* of Mr. *Le Clerc*, publiſh'd in 1711, at the End of his *Eſchines*, Cap. ii. towards the End.
[2] *Locke*'s *Eſſay*, Lib. i. Cap. iv. §. 12. *p.* 75. *French*; and *p.* 42. Edit. *Lond.* 1706.
[3] *Lucret.* Lib. i. ℣. 102.
[4] *Continuation of divers Thoughts*, &c. *p.* 762.
[5] *Quæ autem Natio non Comitatem, non Benignitatem, non gratum animum & Beneficii memorem diligit? Quæ ſuperbos, quæ maleficos, quæ crudeles, quæ ingratos non aſpernatur, non odit?* Cicero de Legib. Lib. i. Cap. xi.
[6] *Biblioth. Univerſ.* Tom. viii. *p.* 527.
[7] See the Paſſages cited in *Puffend.* Lib. i. Cap. i. §. 1. Not. 2. and add there the following Words, which come after that of *Seneca*: *Maximum hoc habemus Naturæ meritum, quod Virtus in omnium animos lumen ſuum permittit: etiam qui non ſequuntur illam, vident.* De Benefic. iv. 17. "We have this great Obligation to Nature, that Virtue diffuſes its Light to all Minds, and "that thoſe ſee her, who do not follow her."

SECT. V.

I Conclude then, with the Saying of *Strato*, in the *New Dialogues of the Dead* [1], whatever the other Party may ſay of it; *that Reaſon, in all Caſes where humen Conduct is concern'd, affords ſure Deciſions. But the Misfortune is, that we don't conſult her.* And it muſt be own'd, to the Shame of Mankind, that this very Science, which ought to have been the great Buſineſs of Men, and the chief Object of all their Enquiry; has, in all Times, been extremely neglected. [2] *Socrates* was aſtoniſhed to ſee, That "when there was Occaſion to have any one taught "the Trade of a Shoemaker, a Carpenter, a Smith, "or the Art of Riding, proper Places were never "wanting, where he might be educated in theſe "Profeſſions: And, that there was every where "abundance of People, who taught how to ma-"nage Horſes and Oxen; whereas, if any one had "a Mind to be inſtructed himſelf in the Rules of "Juſtice, or have them taught to his Children or "Slaves, there was no Academy for that Pur-"poſe." A conſiderable Time after this Philoſopher's Days [3], we find *Cicero* making the ſame Complaint: "What can be the Reaſon (ſays he) "that, ſince we conſiſt of a Soul, as well as a Bo-"dy, the Art of curing, and preſerving the Body "in Health, has been ſo early ſought out; and "found ſo uſeful, as to have its Invention aſcrib'd to "the Gods themſelves: Whereas the Art of curing "the Diſeaſes of the Mind, has neither been near ſo "much ſought after, before its Invention, nor ſo "carefully cultivated ſince; nor has it been had in "Eſteem and Admiration, but by few; whereas, "on the contrary, it has been even hated and ſuſ-"pected by many?" It is, however, no very difficult Matter to diſcover the Reaſons hereof; and it is withal highly uſeful, to give them their due Conſideration. It is but too certain, that the ſeveral Neceſſities of Life, real or imaginary; the falſe and miſtaken Intereſts; the [4] Impreſſions of Example, and receiv'd Cuſtoms; the Prevalency of Faſhions, and the Torrent of Opinions in Vogue, with the early Prejudices of Education; but, above all, the predominant Paſſions and Vices, do generally draw off the Minds of Men from a ſerious Study of Morality; and prevent their applying their Faculties to thoſe Things, which belong to them; and on which depends their true Felicity. "[5] Philoſophy (ſays the Author of the *Dialogues*, a little before cited, very agreeably) "only concerns "Mankind, and has nothing to do with the reſt "of the Univerſe. The Aſtronomer fixes his "Thoughts upon the Stars; the Naturaliſt on Na-"ture; and the Philoſopher on himſelf.——But "becauſe ſhe would be troubleſome, if ſhe inter-"meddled in their Affairs, or perpetually warn'd "them to regulate their Paſſions; they very wiſely "ſend her to Heaven, to arrange the Motions of "the Planets, and meaſure their Diſtances; or they "detach her round the Globe, to ſatisfy their Cu-"rioſity." The few, who have apply'd themſelves to the Study of Morality, have done it, for the moſt Part, in a Manner confus'd, and ſuperficial enough; and often ſo, as even to build upon Principles either entirely falſe, or obſcure and uncertain; either foreign to its proper Buſineſs, or mixt with groſs Errors and Abſurdities. From whence it comes to paſs, that, in all Languages, the Terms of Morality, both in common Diſcourſe, and in the Writings of the Learned, are ſuch, as have the moſt obſcure, confus'd, and indetermin'd Ideas, of any other Science whatever. And this would give Room to ſuſpect, that the Principles of Morality are, likewiſe, very abſtruſe; were it not known, by the Experience of all Ages, that Men generally deſpiſe the Things which are ſimple, to ſeek ſuch as are myſterious; and that they miſtake, or reject the Truth, when it comes not attended with ſome Charm, to excite their Curioſity, and pleaſe their Inclination for *the marvelous*. This is what has been judiciouſly obſerv'd, and upon the ſame Subject too, by the famous [6] *Confucius*, the *Chineſe* Philoſopher: "I know very well (ſays he) "why the greateſt Part of Mankind do not follow "the great Road of Mediocrity, altho' ſo eaſy to "find; it is becauſe the Learned deſpiſe it; and "becauſe, imagining their Penetration to reach far "beyond that Medium, they neglect it as below "them; love to advance ſtrange Doctrines; and "engage in difficult Ways." But it muſt be acknowledg'd, that it is not ſo much the Prejudices

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[1] *Dialogues of the dead Ancients with the dead Moderns*, by Mr. *Fontenelle*, Dialog. v. p. m. 208. *Oeuvr. de Font.* Tom. i. *p.* 102. Ed. *Lond.*

[2] Παρεγένετο [ὁ Ἱππίας] τῷ Σωκράτει λέγοντι πρός τινας, ὡς θαυμαστὸν εἴη τὸ, εἰ μέν τις βέλτιστα σκυτέα διδάξασθαί τινα, ἢ τέκτονα, ἢ χαλκέα, ἢ ἱππέα, μὴ ἀπορεῖν ὅποι ἂν πέμψας τοῦτο τύχοι· (φασὶ δέ τινες καὶ ἵππον καὶ βοῦν τῷ βουλομένῳ δικαίως, ποιήσασθαι, πάντα μᾶλλον εἶναι τῶν διδακτῶν) ἐὰν δέ τις βούληται ἢ αὐτὸς μαθεῖν τὸ δίκαιον, ἢ υἱὸν ἢ οἰκέτην διδάξασθαι, μὴ εἶναι, ὅποι ἂν ἐλθὼν τύχοι τοῦτο. *Xenoph. Memorab.* Lib. iv. Cap. iv. §. 5. Ed. *Oxon.* and Ed. *Paris*, p. 804. B.

[3] *Quidnam eſſe, Brute, cauſæ putem, cur quum conſtemus ex Animo & Corpore, Corporis curandi tuendique cauſſâ quæſita ſit Ars ejus, atque utilitas Deorum immortalium inventioni conſecrata; Animi autem medicina, nec tam deſiderata ſit, antequam inventa; nec tam culta, poſtea quam cognita eſt; nec tam multis grata & probata; pluribus etiam ſuſpecta & inviſa?* Tuſc. Quæſt. Lib. iii. Cap. i. Mr. *Davies*, in the ſecond Edition of his Notes on this Work of *Cicero*, rejects theſe Words, *atque ejus utilitas*, as an Interpolation, which being plac'd by ſomebody, as a marginal Note, has crept into the Text. He thinks there is no Senſe in the common Reading. But it appears to me, that the Explanation I have given, in my Tranſlation, is juſt enough, and renders unneceſſary, a Correction made againſt the Authority of all the Manuſcripts, and Editions. I have ſince taken Notice, that this judicious Critic has, in his *Addenda*, p. 394. propos'd another Reading, *ejus ex utilitate*, which makes the Senſe agreeable to mine: But as it is the ſame in the common Reading, I ſee no Neceſſity of any Alteration, tho' M. *Wopkens*, in his *Lectio Julian.* Lib. i. Cap. xii. reads it, *ejuſque utilitate*. But the firſt Reading has a peculiar Emphaſis, which makes it preferable to any Variation.

[4] *Parvulos nobis dedit* [Natura] *igniculos, quos celeriter malis moribus, opinionibuſque depravati, ſic reſtinguimus; ut nuſquam Naturæ lumen appareat: Simul atque editi in lucem, & ſuſcepti ſumus, in omni continuò pravitate, & in ſumma opinionum perverſitate verſamur.——Accedunt etiam Poetæ: qui, cum magnam ſpeciem doctrinæ, ſapientiæque præ ſe tulerunt; audiuntur, leguntur, diſcuntur, & inhæreſcunt penitus in mentibus. Cum vero eodem quaſi maximus quidam Magiſter Populus acceſſit, atque omnis undique ad vitia conſentiens Multitudo; tunc plane inficimur opinionum pravitate, à Naturâque deſciſcimus.——Quid, qui pecuniæ cupiditate, qui voluptatum libidine feruntur?* &c. Idem ibid. Cap. i. and ii. "Nature has given us faint Rays, which "by deprav'd Manners, or falſe Opinions, are ſo ſoon darken'd, as almoſt wholly to extinguiſh her Light.——As ſoon as "we are brought into the World, and have receiv'd the firſt Rudiments of Education, we become either perverted by Er-"ror, or corrupted by Vice.——To this the Poets not a little contribute: Who, carrying a great Shew of Wiſdom and Learn-"ing, are read, taught, and admired, and leave great Impreſſions on young Minds. The People, who in all Countries have "a great Influence, increaſe this Evil by bad Cuſtoms, and vulgar Opinions, which draw ſtill farther off from Nature. And "Avarice, and the Love of Pleaſure, join to compleat the Miſchief."

[5] *Dial. des Morts Anciens*, in the firſt Part, Dialog. iv. *p.* 30. *Oeuvr. de Font. Lond.* 1707. Tom. i. *p.* 18, 19.

[6] In the Extract from the Book of *P. Couplet, Bibl. Univ.* Tom. vii. *p.* 422.

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of the Understanding, as the Illusions of the Heart, and the Tyranny established in the World, with relation to Opinions; which form the grand Obstacles to the serious Study of Morality, and the exact Knowledge of our Duty. Mr. *Locke* [1] has very well express'd it: "It is not to be expected, "(*viz.* that any will very much apply themselves "to make Discoveries in Matters of Morality) "whilst the Desire of Esteem, Riches, or Power, "makes Men espouse the well endowed Opinions "in Fashion, and then seek Arguments, either to "make good their Beauty, or varnish over, and "cover their Deformity.—Whilst the Parties of "Men cram their Tenets down all Mens Throats, "whom they can get into their Power, without "permitting them to examine their Truth or Falsehood; and will not let Truth have fair Play in "the World, nor Men the Liberty to search after "it; what Improvements can be expected of this "kind? What greater Light can be hoped for in "the moral Sciences? The subject Part of Mankind, in most Places, might, instead thereof, "with *Egyptian* Bondage, expect *Egyptian* Darkness, were not the Candle of the LORD set up by "himself in Mens Minds, which it is impossible "for the Breath, or Power of Man, wholly to ex"tinguish." After all this, it is no Way surprizing, that those, whom either the Employments, and Avocations of Life, or want of Genius, and proper Assistance, prevent from engaging in long and deep Researches; that is to say, if the greatest Part of Mankind usually seem to have such limited Views, and false Ideas, in Matters of Morality. Altho', as we have already said, every one be by Nature capable to instruct himself therein, as far as his particular Station requires; it has, no Doubt, been always GOD's Will, that they, who had the greatest Light, and whom his Providence had furnish'd with the greatest Helps, should communicate their Knowledge to such, as were not able, of themselves, to acquire it so easily, or in so great a Degree; and, by this Means, should be under a double Obligation not to bury their own Talents. But in order to set, in its full Light, this inexcusable Negligence of Mankind, in a Thing of such vast Importance, I shall here present the Reader with a short History of the Progress of Morality, and of the Manner in which this Science has been cultivated in all former Ages.

SECT. VI.

THERE [2] are two Sorts of Men, who ought to apply themselves, in a more particular Manner, to Morality; (*viz.*) *The publick Ministers of Religion*; and the *Men of Learning*; or those *who make it their Profession, to cultivate their Understandings by the Study of the Sciences*. Both the one and the other are equally oblig'd, as much as in them lies; as well to be instructed therein themselves, as to teach the ignorant: But the Obligation of the former is more strict, and indispensible, than that of the latter.

It is certain, *that* [3] *Morality is the Daughter of Religion, that they go Hand in Hand together; and that the Perfection of the latter, is the Standard of Perfection in the former.* This has been acknowledg'd by a great Emperor, and heathen Philosopher. *Thou wilt never*, said [4] he, *do any Thing, tho' purely human, well, if thou art ignorant of the Relation it bears to Things divine; nor any Thing divine, if thou knowest not what Connection it has with Things human.* In Fact, the fundamental Principles of Natural Religion, which ought to be the Basis of all other Religion; are, also, the most firm, or rather only, Foundation of this Science of Morality. Without a Deity, we can see nothing which lays us under any indispensible Necessity of acting, or not acting, in such a Manner. [*Duty, Obligation, Right, are no more,* [5] *to say the Truth, than fine Ideas; which may please the Mind, but can scarce touch the Heart.*] The Ideas of Order, Decency, and Conformity with Reason, have in them, without Doubt, something real; they are founded on the Nature of Things; on certain Relations most true: And even those who cannot explain them distinctly, and fully, have still a confus'd Sense of them: Our Minds are so fram'd, that they cannot but acquiesce in them, when propos'd; and thus it is, that moral *Honesty*, or *Virtue*, has, thro' all Ages, influenc'd Mankind, even among Nations in the least civiliz'd. All this I agree to. But to give these Ideas their full Force, and due Measure of Efficacy; to make them strong enough to maintain their Ground against Passion and Self-interest, to establish that *Duty*, properly so call'd, which bridles our Inclinations in such a Manner, as that it is not in our Power to disengage them at Pleasure; all this requires a Being superior to us in Power; who has a manifest Right to our Obedience and who actually commands us to regulate our Conduct by the Light of our own Reason. This Consideration of a Deity, whom we, consequently, regard, as punishing Vice, and rewarding Virtue, has so great an Efficacy; that, altho' the fundamental Principles of Religion may be much darken'd, by the Intermixture of Error and Superstition; yet, if they are not entirely corrupted, it will never fail to have a certain Degree of Influence. The purer these Principles are, and the better they are supported, the more they contribute to the strengthning the Foundations of Morality; and to the extending its Rules in all their Consequences. But form the finest System in the World, and leave Religion out, you will have only (if I may use the Expression) *a speculative Morality*, and you build upon the Sand. This being so, it was natural to expect, that the publick Ministers of Religion should have made Morality their principal Study; in order to conform their own Lives to it, and to give the People such just Ideas thereof, as might be capable of producing solid Virtue. But they have, in this Point, fallen very short of their Duty and Abilities. Under Paganism, the *Diviners*, the *Augures*, and *Priests*, who gave out the celestial Oracles, and call'd themselves the Interpreters of the Will of the Gods, took little or no Care to teach Men the Rules of Virtue. And I must needs confess, that Lectures

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[1] *Essay of Human Understanding*, Book iv. Chap. iii. §. 20. *p.* 479, *&c.* See the *Parrhasiana*, Tom. ii. *p.* 66, *& seq.*

[2] This Paragraph, with the 7th, 8th, 9th, 10th, and 11th of my Preface, have been translated into *English*, and published in the Year 1722, with a Preface by Mr. *Gordon*, Author of the *Independent Whig*, but since, I find this whole Preface appears in the fourth *English* Edition of *Pufendorf*, in the Year 1729. The Translator is Mr. *Carew* of *Lincoln's Inn*. But it does not appear, that he had any Hand in the former Translation.

[3] Preface of Mr. and Madam *Dacier* to the *Moral Reflections* of *Marcus Antoninus*, p. 2. or *A 2. p. 2.

[4] Οὔτε γὰρ ἀνθρώπινόν τι ἄνευ τῆς ἐπὶ τὰ θεῖα συναναφορᾶς εὖ πράξεις, ὅτε ἔμπαλιν. *Marcus Antonin.* Lib. iii. §. 13. Edit. *Gataker*; and §. 12. in the Translation of Mr. and Madam *Dacier*.

[5] See what is said, *Pufend.* Lib. iii. Cap. iii. §. 19. Not. 3. and Cap. iv. §. 3. Not. 6.

of good Morality, in their Mouths, would have but ill ſuited the monſtrous Ideas they gave of the Deity; or thoſe Failings, Imperfections, and even Vices, which they, by an unaccountable Perverſion of all natural Knowledge, aſcrib'd to the Deity itſelf. We ſee, therefore, the ancient Doctors of Chriſtianity, vigorouſly reproaching the *Pagans* with this unwarrantable Separation between Religion and Morality. "They who teach and in-"ſtruct others in the Worſhip of the Gods, (ſays "[1] *Lactantius*) ſpeak not a Word of any Thing "that tends to the Regulation of Manners, and "Conduct of Life: They make no Enquiry at all "after Truth; but confine themſelves wholly to "the Knowledge of the Ceremonies of Divine Ser-"vice; which require only the Miniſtry of the "Body, and in which the Sentiments of the Mind "have really no Part.—[2] The Philoſophy, and Re-"ligion of the Heathens, are entirely diſtinct. "Wiſdom, or Philoſophy, has its peculiar Pro-"feſſors, who teach not the Way of approaching "the Gods: And Religion, alſo, has its Miniſters, "who teach not the Rules of Wiſdom. Whence "this is apparent, that theirs is neither true Wiſ-"dom, nor true Religion." And indeed, as Mr. *Bayle* has obſerv'd, "It would be very difficult to "[3] prove, that the Prieſts of *Paganiſm* requir'd "any Thing, beſides the outward Shew of Piety; "or that they preſs'd Amendment of Life; or de-"nounc'd, that, without a ſincere, and perſeve-"ring Repentance, and Reformation of all cor-"rupt Inclinations, Vows, Offerings, Proceſſions, "Sacrifices, Ceremonies, ordinary or extraordi-"nary, could not appeaſe the Anger of the Gods. "It is much eaſier to prove, that they ſuffer'd the "World to reſt under this profitable Deluſion; "*That it was ſufficient to be liberal towards the* "*Gods*; *and to follow the common Forms of Reli-*"*gion.* The Satyr of *Perſius* will ſerve to convince "us of this; where, having firſt abus'd thoſe who "turn Religion into a Trade, he immediately calls "upon, and challenges the Prieſts, to ſhew what "Gold has to do with holy Things: [4] *Tell me, O* "*you Pontiffs, of what Uſe is Gold in our holy Places?* "*Even juſt as much, as the little Puppets, which* "*the young Virgins conſecrate to* Venus. *Why do* "*we not offer to the Gods ſomething, which neither* "*the* Cotta's, *nor the* Meſſala's *can preſent to them,* "*with all their magnificent Chargers pil'd up with* "*the Fleſh of the moſt exquiſite Victims? Why do we* "*not offer to them an upright, ſincere, and generous* "*Heart, deeply imbu'd with the moſt lively Senti-*"*ments of Juſtice and Honour? Let me but have* "*this Preſent to make them, and I am ſure of ob-*"*taining whatever I aſk, tho' I ſhould offer them no-*"*thing but a Mixture of Salt and Meal.* Does not "this inſinuate, that it was the Prieſts who che-"riſh'd that mercenary Spirit, that Traffick of De-"votion, that reigning Abuſe; which made Men "ſo laviſh towards the Gods, as to ſpare nothing "in Victims and Offerings; imagining that the "Gods, being pleas'd as much as Men, with "Preſents of Gold and Silver, could not then but "grant them whatſoever they aſk'd?——We can-"not tell whether theſe Prieſts were learned or "not; and whether they had philoſophiz'd on the "Nature of the Gods: But this we have Reaſon to "believe; that they had neither Virtue, nor Pro-"bity enough, to perſuade Men to place a much "greater Confidence, in the Purity of the Heart, "than in the exterior Practices of divine Worſhip, "and religious Expences. The Profit of the "Prieſts would have been too much diminiſh'd, "if Men had follow'd the Maxims of the Philo-"ſophers." I ſhall add to this, a ſarcaſtic Saying of *Socrates*, in that Dialogue of *Plato*, which bears the Name of *Euthyphro*; that is, of him with whom *Socrates* has introduc'd as a Speaker; (whoſe *Greek* Name anſwers exactly to another *Greek* Name, more in uſe with us, called *Orthodox*; *i. e.* one that is in the right). He was a Soothſayer, and *Socrates* ſeems to reproach, in his Perſon, the Prieſts in general, as well as others of that Stamp, [5] with *being too reſerv'd in communicating themſelves*; *and that they did not willingly impart to others their* Wiſdom; that is to ſay, their Knowledge, or Diſcoveries. By which he plainly means, what relates to Morality; as is inſinuated by the Oppoſition he places between their Conduct, and the Tenor of his own Converſation; which ran generally upon that Science; and which tended ſolely to correct Mankind, and inſpire them with the Love of Virtue. Beſides, the very Subject of the Dialogue gives us clearly to underſtand the falſe Ideas the Prieſts had, upon the Subject of Morality; for we there ſee *Euthyphro*, who thinks he is doing the worthieſt Action in the World, offering himſelf as a voluntary Accuſer againſt his own Father; in a Matter too, where he pretends to convict him of no leſs than Murder. It may poſſibly be, that *Euripides* deſign'd indirectly to inſinuate, and laſh the Ignorance of the *Pagan* Prieſts, with regard to Morality, when he makes his *Helena* ſpeak thus to an *Egyptian* Prieſteſs, call'd [6] *Théoné*: *It is certainly a Shame for you, who pretend to know all divine Things, both that which is, and that which is not, to be, at the ſame Time, ignorant of what is juſt and right.* Some, perhaps, will object to me here, what I have elſewhere ſhewn in [7] one of my Notes; that, amongſt the Heathens, even the common People were not ignorant, that as Virtue was well pleaſing, ſo Vice was odious to the Deity: From whence it ſeems to follow, that the People were beholden to the publick Miniſters of Religion, for this Knowledge at leaſt. But it is more likely, that Principles of this Sort were preſerv'd among the People, either by ancient Tradition; or by ſome Remains of the Light of natural Religion; or by both theſe together: And that, if the Prieſts did not directly teach the contrary, but did ſometimes even recommend Virtue; it was only in general looſe Terms, without ever entring into the Particulars requiſite for Inſtruction; which, without Doubt, they were not very capable of doing. But this is ſufficient for my Deſign; which is to ſhew, that, in the Time of *Paganiſm*, the publick Miniſters of Religion, who ought to have made it their principal Study, ſtudied nothing leſs, than this Science of Morality.

[1] *Nihil ibi* [*in Deorum cultu*] *differitur quod proficiat ad mores excolendos, vitamque formandam; nec habet inquiſitionem aliquam veritatis, ſed tantummodo ritum colendi; quod non officio mentis, ſed miniſterio corporis conſtat.* Inſtit. Divin. Lib iv. Cap. iii. Num. 1. Edit. *Cellar.*

[2] *Quoniam igitur, ut dixi, Philoſophia & religio deorum disjuncta ſunt, longeque diſcreta; ſiquidem alii ſunt profeſſores ſapientiæ, per quos utique ad deos non aditur; alii religionis antiſtites, per quos ſapere non diſcitur: apparet, nec illam eſſe veram ſapientiam, nec hanc religionem.* Idem. ibid. Num. 4. See *St. Auſtin de Civit. Dei.* Lib. ii. Cap. iv. and vi.

[3] *Continuation des Penſées diverſes,* Artic. xlix. *p.* 223. See Mr. *Locke*'s *Reaſonableneſs of Chriſtianity,* &c. *p.* 267. Edit. *Lond.* 1696.

[4] *Dicite, Pontifices, in ſancto quid facit aurum? Nempe hoc, quod Veneri donatæ a virgine puppæ. Quin damus id ſuperis, de magna quod dare lance. Non poſſit magni Meſſalæ lippa propago; compoſitum jus, faſque animo, ſanctoſque receſſus mentis, & incoctum generoſo pectus honeſto? Hæc cedo, ut admoveam templis, & farre litabo.* Sat. ii. ℣. 69, & *ſeq.*

[5] Ἴσως γὰρ σὺ μὲν δοκεῖς σπάνιον σεαυτὸν παρέχειν, καὶ διδάσκειν οὐκ ἐθέλειν τὴν σεαυτοῦ σοφίαν. Tom. i. p. 3. D. Ed. *Steph.* Ed. *Læmar.* p. 48. E.

[6] Αἰσχρὸν, τὰ μέν σε θεῖα πάντ' ἐξειδέναι, τὰ τ' ὄντα, καὶ μή, τὰ δὲ δίκαια μὴ εἰδέναι. *Helen.* ℣. 928, 929.

[7] *Pufend.* Lib. ii. Cap. iv. § 3. Not. 6.

SECT. VII.

AMongſt the *Jews*, it does not appear that the Prieſts apply'd themſelves to this Science: And from the Time that Prophecy ceas'd among that choſen People of *God*; that is to ſay, a little after their Return from the *Babyloniſh* Captivity; the Doctors and publick Interpreters of the Law began inſenſibly to corrupt Morality; ſo far were they from explaining the true Principles thereof, and deducing from them their natural Conſequences; as they might eaſily have done, with the Help and Aſſiſtance of that Revelation, of which they were the Depoſitaries. But being entirely taken up with the *Civil* and *Ceremonial* Law; and beſides fill'd with carnal Prejudices, and ſcrupulouſly attach'd to the Letter of the Law; they either did not at all penetrate into, or elſe did entirely deſtroy the Senſe of the Legiſlator. They, under Pretence that *God*, to ſuit himſelf to the Weakneſs of the *Jewiſh* Nation, had preſcrib'd to them a great Number of Rites and Ceremonies; inſiſted much more upon the Performance of the exterior Worſhip, and the practical Punctilio's of Devotion; than the Purity of the Heart, with an exact Conformity to the Rules of Virtue; and, what was ſtill worſe, by their falſe Gloſſes, and by their human [1] Traditions, they came at laſt to deſtroy entirely ſeveral of the moſt inconteſtable Principles of the Law of Nature. They invented, for Example, a thouſand ridiculous Subtilties, to furniſh Men with Expedients for eluding the Obligation of the moſt ſolemn Oaths, and Promiſes. *Whoſoever*, (ſay the *Scribes* and *Phariſees*, whom *Jeſus* for that Reaſon treats as *Hypocrites and blind Guides*) *Whoſoever* [2] *ſhall ſwear by the Temple, it is nothing; but whoſoever ſhall ſwear by the Gold of the Temple, he is a Debtor: or, oblig'd to keep his Oath. Whoſoever ſhall ſwear by the* [3] *Altar, it is nothing; but whoſoever ſweareth by the Gift* (or Offering) *that is upon it, he is guilty: or, oblig'd to keep his Oath.——Whilſt they paid* [4] *Tithe of Mint, Aniſe, and Cummin, they omitted the weightier Matters of the Law,* [5] *Juſtice, Mercy, and Faith.* 'Tis one of the cleareſt Maxims of right Reaſon, that every Vow,[6] contrary to any divine Law, is, in itſelf, entirely void. Yet the Prieſts, and the Doctors, who were their Dependants, finding their Account in Vows, which Men made for the Benefit of the *Temple*; had the Face to maintain, that if any one had made a Vow to *God* of all that he ſhould be able to give to his Father, or Mother; ſuch a Vow was good in Law, and irrevocable; ſo that after ſuch Vow made, this unnatural, or rather impious Child was, according to them, not only diſcharg'd from giving any Succour, or Relief, to his Parents in their Neceſſities; but even bound, in Point of Conſcience, not to do it; on Account of the Obligation of this ſame Vow: Their Deciſion runs thus: [7] *Whoſoever ſhall ſay to his Father, or his Mother, what I ſhould have ſuccour'd you with, is conſecrated to GOD; he is not bound then to honour his Father, or his Mother, according to the Commandment.* And whereas *God*, for Reaſons founded on the Conſtitution of the *Hebrew* Republic, had forbidden the *Jews* to have much Commerce with other Nations; and had even expreſly commanded them to exterminate ſome of them. They hereupon entertain'd Sentiments of implacable Hatred and Animoſity againſt all the reſt of Mankind: So that a *Jew* believ'd himſelf wholly diſcharg'd from all the common Offices of Humanity [8], or Civility [9], with reſpect to all Foreigners, unleſs they embrac'd the *Jewiſh* Religion; he even pretended, that he was warranted by Law to treat them in a hoſtile Manner; and that he was not only permitted, but poſitively commanded, to take Vengeance on them, whenever it could be ſafely put in practice; and ſo far was he from any Poſſibility of being undeceiv'd with regard to theſe wild and barbarous Opinions of his, by any Inſtruction he might receive from his Teachers; that all their Diſcourſes tended to nothing ſo much as to confirm him in them. The *Phariſees*, infatuated with the Notions of *Judas* the *Gaulanite*, vainly imagin'd, that there could be no Magiſtrate, unleſs of their own Nation, and eſtabliſh'd by the immediate Appointment of *God*, to whom Obedience was due for Conſcience ſake; and upon this they founded their particular Doctrine, [10] that it was unlawful to pay Tribute to the *Roman* Emperor; tho' in peaceable Poſſeſſion of their Country. [11] *And many ſuch-like Things did they*, as our Lord *Jeſus Chriſt* lays to their Charge, in many Places of the Goſpel. As for thoſe Doctors, the *Jews* have had, during all the following Ages, down to the preſent Time; theſe ſeem to have made it their ſole Aim to ſurpaſs their Predeceſſors in this Particular; witneſs the Extravagancies, deteſtable Maxims, and impious Notions, with which their *Talmud* and Rabbinical Books are repleniſh'd. You may find there, for Inſtance, [12] that there is no harm in curſing the *Chriſtians*: That it is not lawful to ſuccour [13] an Idolater, tho' on the Point of drowning, or in danger of periſhing by any other Accident: or to do the Office of a Phyſician to him, tho' he's ſure to be well paid for it; unleſs he have juſt Cauſe to fear ſome hurt to himſelf, from the Reſentment of the Patient, on Account of his refuſal: In this particular Caſe, ſay they, he may preſcribe, but conditionally that he be very well paid; for he muſt by no Means give his Advice *gratis*. *Thus, you* [14] *ſee, how theſe falſe Teachers have corrupted the pure Morality of their Legiſlator* Moſes.

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[1] See *Matth.* xv. 3, *&c.* [2] *Matth.* xxiii. 16, 18, 23. [3] Verſ. 18.
[4] Verſ. 23. [5] See *Grotius* on the Place.
[6] See *Pufend de Jur. Nat. & Gent.* Lib. iii. Cap. vi. §. 15. and Lib. iv. Cap. ii. §. 8.
[7] *Matt.* xv. 5. See *Grotius* i, l.
[8] See *Juvenal*, Sat. xiv, ciii, civ. *Tacit. Hiſt.* Lib. v. Cap. v. And the Parable of the *Samaritan*, *Luke* x. 30, *&c.*
[9] *Matt.* v. 47.
[10] See *Matt.* xxii. 17. and *Joſeph. Antiq. Jud.* Lib. xviii. Cap. i. and *De Bell. Jud.* Lib. ii. Cap. xii. Ed. *Genev.* and Ed. *Havercam.* Cap. viii.
[11] *Mark* vii. 13. [12] See *Grotius*'s *Letters*, Part i. Epiſt. cxxii.
[13] *Maimonides*, of *Idolatry*, tranſlated by, and with the Notes of, *Dion. Voſſ.* at the End of Tom. v. Oper. *Gerh. Jo. Voſſ. Amſterd.* 1700. *Note*, This Rabbin is one of the moſt eſteem'd, and judicious. One may find ſeveral other Inſtances of his deteſtable, or ridiculous Maxims of Morality, in the Extract of his Treatiſe upon Oaths. See *Nouv. de la Rep. des Let. Jan.* 1707. Art. 4. and *Baſnage*, *Hiſt. of the Jews*, Lib. iv. Cap. xv. where theſe Authors relate ſeveral Maxims of the corrupt Morality of the *Jewiſh* Doctors.
[14] Mr. *Bernard*, in his *News* of *Oct.* 1702. p. 46. where he reports theſe looſe Deciſions of the *Jewiſh* Caſuiſt.

SECT. VIII.

JESUS CHRIST, during the Courſe of his Miniſtry, never ceas'd to oppoſe, and overthrow the erroneous Maxims, and pernicious Gloſſes of the *Jewiſh* Doctors. He re-eſtabliſh'd Morality in its utmoſt Purity; he fully laid open the true Sources thereof; and he gave Rules (touching the whole Duty both of Mankind in general, and of each Perſon in particular) that were general indeed, but perfect; entirely conformable to right Reaſon, and the true Intereſts of Mankind. His Diſciples every where preach'd up this moſt holy Doctrine; by the Light of which, if duly explain'd and underſtood, a Man may ſecurely direct his Judgment in the Deciſion of all imaginable Caſes. Nevertheleſs, even in the Time of the Apoſtles themſelves, certain falſe Doctors had crept into the Church; who began to corrupt the Chriſtian Morality, by pretending [1] it was neceſſary to add thereunto, the Obſervation of the *Moſaic* Ceremonies; altho' the Son of GOD had manifeſtly diſcharg'd Men from the Obligation of ſubmitting themſelves to that Yoke; a Thing, in its own Nature, much more proper to draw Men off from the Practice of true Virtue, than either to preſerve, or promote it. There were, likewiſe, ſome [2], *who teaching another Doctrine than that of* Jeſus Chriſt, *and that of his Apoſtles, gave heed to Fables, and endleſs Genealogies, which caus'd Queſtions and Diſputes, rather than godly edifying in that Faith, which* GOD *demands; and in that Charity, which is the End of the Commandments*, both of the Law, and of the Goſpel; knaviſh and ignorant Doctors, *who underſtood neither what they ſaid, nor whereof they affirm'd, and who turn'd aſide unto vain jangling*. Others there were, who [3] *deſpis'd Government; who being audacious and inſolent, were not afraid to ſpeak evil of Dignities; who ſpeaking big Words full of Vanity and Folly, allur'd thro' the Luſts of the Fleſh, and thro' much Wantonneſs, thoſe who had truly eſcap'd from them who liv'd in Error*; who [4] *turn'd the Grace of our GOD into Laſciviouſneſs*; And laſt of all, ſuch, [5] as *held the Doctrine of* Balaam, who [6] taught *Balac* to caſt a Stumbling-Block before the Children of *Iſrael*, ſo that they eat Things offer'd to Idols, and committed Fornication.

SECT. IX.

NO wonder then, if after the Death of the Apoſtles, and their firſt Diſciples, the Evil grew every Day worſe and worſe. The extreme Fondneſs of the following Ages for Fables [7], and Allegories; their Taſte for [8] falſe Eloquence, and the Dreams of the Heathen [9] Philoſophers; their profound Ignorance, of the Art of Reaſoning juſtly [10], and of the right Method of expounding the Holy Scripture; the Impetuoſity with which they abandon'd themſelves to the irregular Motions of an heated Imagination; the Ambition [11] and bad [12] Morals of the greateſt Part of the Clergy; more jealous of their own Rights, and more intent upon diſcuſſing Points of Diſcipline, or abſtracted Notions of Metaphyſics, than diligent in ſtudying themſelves, or teaching the People, the Rules of Morality; the dreadful Diſorders, and ſcandalous Diviſions, which ſo often rent the Church; the groſs Abuſes, which, from Time to Time, ſtole into Practice; and which at laſt produc'd a publick Reformation; a Point always difficult to undertake, and much more to execute; add to theſe the little Solidity, which we find in the greateſt Part of thoſe Works, which are the Remains of Eccleſiaſtical Antiquity: All this, I ſay, gives us reaſon to believe, that the Study of Morality, during all this Interval, notwithſtanding the Light of the Goſpel, made but little Progreſs in the World. But, to put this Matter clearly beyond all doubt, we ſhall now deſcend to Particulars.

Who knows not, (ſays a Miniſter [13] of the Reform'd Religion) *that moſt of the Fathers have not wrote at all upon Matters of Conſcience; and that thoſe who have touch'd them, have been ſilent as to the principal Queſtions, the Determination whereof was of the greateſt Importance?* In fact, it appears, both by thoſe Books we have tranſmitted down to us, and by the Catalogue of ſuch as are loſt; that the greateſt Part of thoſe, we call *Fathers of the Church*, ſcarce ever took Pen in Hand to write on any other Subject, beſides Matters purely ſpeculative; or relating to eccleſiaſtical Diſcipline. It was but very rarely, if at all, that they handled Points of Morality; and that too only occaſionally; and always in a very inaccurate and careleſs Manner. The Sermons, which they ſometimes made on this Subject, were ſo ſtuff'd with the vain Ornaments of falſe Rhetoric; that the Truth, as it were, lay ſmother'd under a Heap of Metaphors, and pompous Declamations. And the greateſt Part of thoſe moral Reflections, which they ſcatter'd here and there in their Works, were extracted, by force and farfetch'd Allegories, from a thouſand different Places of Scripture, where the true literal Senſe itſelf made nothing to their Purpoſe. To be convinc'd of this, we need only read thoſe Collections, which ſome of the moſt extravagant [14] Admirers of Eccleſiaſtical Antiquity, have given us of the moſt ſhining Paſſages which they found in the Works of the Fathers. Beſides, theſe ancient Doctors, even in their very beſt Treatiſes of Morality, perpetually [15] confound the Duties of Mankind in general, with the particular

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[1] See the Epiſtles of St. *Paul* to the *Romans*, and *Galatians*; and *Coloſſ.* ii. 20, *&c. ſeq.*
[2] *Timothy* i. 3, 4, 5, 6, 7. [3] 2 *Peter* ii. 10, 18. [4] *Jude*, *v.* 4.
[5] *Revelations*, Chap. ii. *v.* 14. [6] See *Numbers* xxii, *&c. ſeq.*
[7] See *Bibl. Univerſ.* Tom. x. *p.* 233, *&c. ſeq.* and *Du Pin, Bibl. des Auth. Eccleſ.* Tom. i. *p.* 7. Col. 1. Edit. *Hol.* and *Baſn. Hiſt. of the Jews*, Lib. iii. Cap. xxii. throughout.
[8] See the *Ars Critica* of *Le Clerc*, Tom. i. Part ii. §. 1. Cap. xvi. Num. 13, *&c. ſeq.* p. 347, *&c. ſeq.* 4th Edit. and *p.* 386. 2d Edit. and *Bibl. Univerſ.* Tom. xii. *p.* 144, *&c. ſeq.* and 263, *&c. ſeq.*
[9] See *Bibl. Univerſ.* Tom. x. *p.* 181.
[10] See *La Defenſe des Sentimens de quelques Theol.* &c. Let. xiv. *p.* 360, *&c.* and *Wotton on the Ancients and Moderns*, Chap. xxviii. and the *Epiſtolæ Crit. et Eccleſ.* of *Le Clerc*, Ep. iv.
[11] *Bibl. Univerſ.* Tom. xviii. *p.* 57, 92, 110, 119. taken from ſeveral Places of *Gregory Nazianzen*, where he ſets forth the Corruption of the Clergy.
[12] See, particularly, what *Gregory Nazianzen* has ſaid in ſeveral Places, from whom I have quoted ſome Things, in my Treatiſe of *The Morality of the Fathers*, Chap. xii. §. 4.
[13] *La Placette*, Treatiſe of *Conſcience*, Lib. ii. Cap. xvi. *p.* 190. of the firſt Edition.
[14] See the Notes of Mr. *De Sacy* on the Scripture, which are full of them; and the *Penſees Ingenieuſes des Peres d'Egliſe, by P. Bouhours.* See Mr. *Bernard*, in his *News* of *September* 1704. p. 282, 283, 284, 285.
[15] See Mr. *Buddeus*, in his *Hiſt. du Droit Natural*, §. 10. at the Beginning of the *Selecta J. N. & Gentium.*

cular Duties of a Chriſtian, preciſely conſider'd as ſuch; as well as the Principles of Morality purely natural, with thoſe of Chriſtian Morality: On the other hand, you ſhall often find them putting too great a Difference between the Man and the Chriſtian; and by puſhing this Diſtinction too far, run themſelves into the Abſurdity, of laying down Rules that are impracticable. To conclude then with what is a moſt apparent Proof, of the little Care they had to improve Morality; there is ſcarce one of them, who has not been guilty of very groſs Errors on this Subject. Let us but run over the moſt celebrated of them, and they will furniſh us with manifeſt Examples of what I am ſaying [1].

Athenagoras [2] *ſeems to eſtabliſh the* [3] *Worſhip of Angels; and ſays, they were created Superintendants over the Things here below. He extols Celibacy, and condemns ſecond Marriages, which he terms* [4] *a ſpecious ſort of Adultery.* He has in general very extravagant Notions with regard to Celibacy and Marriage.

The Work of *Clement* of *Alexandria*, entitled, *The Pedagogue*, is a Book wherein [5] *he undertakes to form the Manners of Youth; and gives them Rules of Chriſtian Conduct; but ſuch as abound with Maxims exceſſively rigid, and far remote from any Thing now in practice.* It is in Truth a confus'd Heap of Precepts without Order, without Connexion, full of Declamation, and dark myſtical Alluſion; in a word, ſuch as one would expect from an Author, who [6] *writes almoſt always without either Method, or Coherence*; and who himſelf, in another Work, [7] *profeſſes to have wrote with deſign to hide and to confound, as I may ſay, Things; to the Intent, that none but thoſe, who were Men of Ability and Underſtanding, and willing to undergo the Fatigue of a laborious Application, might be able to comprehend them.* There are ſome Paſſages in this *Pedagogue*, which, in the Opinion of Mr. [8] *Du Pin, ought not to be read by every Body.* And as *Clement* of *Alexandria* did in the main give Preference to the *Philoſophy* of the *Stoicks*; ſo we find, in this Work of his, ſeveral of their Paradoxes: For Example [9], he maintains, [10] *That the Chriſtian, and he alone, is a rich Man*; a Paradox very like that of the *Stoicks*, who ſaid the ſame Thing of their Sage. Thoſe Philoſophers expreſs'd themſelves thus [11]: *That the wiſe Man, and he alone, is rich*; ſo that *Clement* has only chang'd the Word *Sage*, for that of *Chriſtian*. The Reaſons, likewiſe, which he makes uſe of to prove his *Theſis*, are much the ſame with thoſe of the *Stoicks*; as any one may ſee, by comparing what he ſays, with the Explication, which *Cicero* gives of that *Stoick* Maxim, in his Paradoxes [12]. When he explains that [13] Precept in the Goſpel, [14] *When they perſecute you in this City, flee ye into another*; he ſtill reaſons upon the Principles of the *Stoicks*, who deny'd that *Pain* was an Evil; *The LORD*, ſays he, *does not enjoin us to fly, as if 'twas an Evil to be perſecuted; nor does he command us to avoid Death by flight, as a Thing to be fear'd.* And then our Doctor, proceeding to ſhew the Reaſon, on which this Permiſſion, or Commandment, of flying from Perſecution, is grounded, ſuggeſts this; that, otherwiſe, we ſhould give occaſion to Perſecutors to commit Murder: *For*, ſays he, *the Will of CHRIST here is, that we ſhould not be any ways aiding, or aſſiſting, to others, in the doing what is evil*, &c. It was the chimerical Idea of a wiſe Man, according to the *Stoicks*, to be entirely without Paſſions: And thus *Clement*, in another Place, makes his true [15] Chriſtian exempt from all Paſſions, or Affections, even the moſt innocent; [16] *Excepting thoſe only, which regard the Preſervation of the Body; ſuch as Hunger, and Thirſt, with others of the like Nature.* Upon this Principle, he maintains, That *Jeſus Chriſt*, and his Apoſtles [17], had not any Paſſions at all; and that *Jeſus Chriſt* himſelf had never any, even the leaſt Senſation of either Pleaſure, or Pain; That he never had any occaſion to eat; and that, if he did eat, 'twas for fear of paſſing for a Ghoſt. He as ridiculouſly juſtifies the Idolatry of the *Pagans*, by ſaying, [18] *That GOD had given them the Sun, the Moon, and the Stars, to the intent, that they ſhould adore them; and by that Worſhip lift up their Minds to GOD himſelf.* A Profeſſor of Divinity, [19] of the *Lutheran* Communion, has endeavour'd to vindicate *Clement* with regard to ſome of the before-mention'd Errors. But, whoever examines what he has ſaid, will find, that he ſucceeds no better here, than when he maintains, that the *Pedagogue*, and *Stromata*, are excellent Works, both for their Morality, as well as for their Stile and Method. The very Analyſis, he himſelf gives of them, furniſhes ſufficient Proof of the contrary; and ſhews the little Foundation there is, for thoſe magnificent Encomiums, he is pleas'd to beſtow on the Prelate of *Alexandria*.

Tertullian, to ſay nothing here of the chimerical Opinions, and rigid Auſterities of the *Montaniſts*, whoſe Sect he embrac'd; [20] "Seems, on ſome Occaſions, to have ſtretch'd a little too far, this true Principle, *(viz.)* That all, who countenance, or aſſiſt wicked Men in their vicious Practices, or contribute in any Manner to what is ſinful, become thereby guilty; and to have put too rigorous an Interpretation on Things, that were, in themſelves, excuſable; ſuch as, for inſtance, [21] the bearing Arms in Defence of the Government; the illuminating one's Houſe, and adorning it with Laurels in honour of one's Prince; the

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[1] What I ſay here, I have had Occaſion to demonſtrate more at large, as well as to defend it againſt the Objections of *P. Ceillier*'s Book, in my Treatiſe of *The Morality of the Fathers*, publiſh'd in 1728.

[2] In his *Apology for the Chriſtians*, p. 11. *A.* and p. 27. *A, B, C.* Ed. *Colon.* See *Barbeyrac*'s *Morale des Peres*, Pref. *p.* 15. and Lib. i. *p.* 6. and *p.* 25, *&c.*

[3] *Du Pin, Bibl. Des Aut. Eccleſ.* Tom. i. *p.* 65. Edit. *Holland.*

[4] Δεύτερος [γάμος] εὐπρεπής ἐστι μοιχεία, *p.* 298. And *p.* 37, *B.* Edit. *Colon.* 1683.

[5] *Bibl. Univerſ.* Tom. x. *p.* 218.

[6] *Du Pin, ubi ſupra*, p. 86. Col. 2. Edit. *Hol.*

[7] *Stromata*, or *Tapeſtry.* See Lib. i. p. 278. *B.* Lib. iv. p. 475. *D.* Lib. vii. p. 767. at the End of the Book. See too *Du Pin, ubi ſupra*, p. 81. Col. 2.——whoſe Words theſe are.

[8] *Ubi ſupra*, p. 81. Col. 2.

[9] Life of *Clement* of *Alexandria*, by Mr. *Le Clerc*, *Bibl. Univerſ.* Tom. x. p. 194.

[10] Lib. iii. Cap. vi. *Pædag.* p. 233, *& ſeq.* [11] Ὅτι μόνος ὁ σοφὸς πλούσιος. Cic. Paradox. 6.

[12] Paradox 6. [13] *Stromata*, Lib. iv. p. 504. *B.* [14] *Matth.* x. 23.

[15] Which he calls *Gnoſtick* (Γνωστικὸς) *i. e.* one who knows, and carefully practiſes Chriſtianity.

[16] Τοιοῦτος γὰρ ὁ Γνωστικὸς, ὡς μόνοις τοῖς διὰ τὴν μονὴν τοῦ σώματος γινομένοις πάθεσι περιπίπτειν, ὅιον πείνῃ, δίψει, καὶ τοῖς ὁμοίοις. *Stromat.* Lib. vi. p. 649. *D.*

[17] *Ibid.* p. 649, 650. See Mr. *Le Clerc*'s *Lett. Critic.* and *Eccleſ.* Epiſt. i. p. 18, 19. 4th Edit. And 2d Edit. p. 21, 22.

[18] Ἔδωκεν δὲ [ὁ Θεὸς] τὸν Ἥλιον, καὶ τὴν Σελήνην, καὶ τὰ Ἄστρα εἰς θρησκείαν----ὁδὸς γὰρ ἦν αὕτη δοθεῖσα τοῖς ἔθνεσιν, ἀνακύψαι πρὸς Θεὸν διὰ τῆς τῶν ἄστρων θρησκείας. *Stromat.* Lib. vi. p. 669. *B. C.*

[19] *Mich. Fortſchius, Comm. in Offic. Ambroſ.* Diſſ. ii. §. 6, *& ſeq.*

[20] *Du Pin, Bibl. des Aut. Eccleſ.* Tom. i. p. 102. Col. 1, 2.

[21] *De Idololatria.*

" making uſe of common Expreſſions, altho' they " may have ſome reference to Idolatry. And this " ſeems to have been the Caſe, when defending, " in his Book of the Garland, the Action of a " certain Soldier, who had refus'd to put a Gar- " land on his Head, he maintains, ' that Chriſtians " are abſolutely forbid to wear Garlands, as, alſo, to " bear Arms." He goes ſo far as to call theſe Chaplets, or Coronets, which Soldiers us'd to put on their Heads, *the Pomps of the Devil*; and *a Sin againſt Nature*. When he is declaiming againſt Plays, he ſuffers himſelf to be tranſported beyond all Bounds, and blindly gives into falſe Notions; as when he ſays, That [2] *'tis the Devil that mounts the Actors on their Buſkins, in order to make* Jeſus Chriſt *a Liar*; *who has ſaid, that no one can add one Cubit to his Stature*. He will have it, That a Chriſtian cannot, in Conſcience, [3] exerciſe the Office of a Judge, nor any other kind of Magiſtracy. He ſeems to maintain, that [4] Chriſtianity, and the imperial Power, are inconſiſtent. *In his Books of Monogamy,* [5] *and Exhortation to Chaſtity*, he abſolutely condemns ſecond Marriages, as Adultery. He maintains, [6] in a Treatiſe wrote expreſly on that Subject, *that we are abſolutely forbidden to fly in Times of Perſecution*; *or to give Money, to avoid being tortur'd*. After this, it is not to be wonder'd at, that he condemns Self-Defence againſt any unjuſt Aggreſſor, as a Thing contrary to Chriſtian Patience. His Reaſons for the Purpoſe are as remarkably weak, as his Maxim is rigorous, and overſtrain'd. He ſays, [7] that the Goſpel, without reſerve, forbids us, *to render Evil for Evil*: That it is incroaching on the Prerogative of GOD, and the Homage due to him, to arrogate to ourſelves the Power of Self-Defence, whenever we judge it neceſſary: That when *Jeſus Chriſt* ſays, *Judge not, that ye be not judged*; he demands and expects a Patience carry'd even to this Point; *for who elſe can be ſaid not to judge another, but he who is ſo patient, as not to defend himſelf?* Behold, in what a Manner *Tertullian* explains the Scripture; and on what Principles he founds thoſe Maxims of Morality, he is pleas'd to advance.

ORIGEN, in his Homilies, is full of moral Inſtructions: But they are ſcarce any Thing more than moral Reflections, drawn from Scripture by the mere Force of Allegory; and propos'd in a Manner, not very proper to move the Affections; or produce in the Mind any rational Conviction. 'Tis known, that this famous Doctor, by a Miſtake groſs enough, haſtily giving into the literal Senſe of theſe Words of our Saviour [8]; *There be Eunuchs, which have made themſelves Eunuchs for the Kingdom of Heaven's ſake*; executed on himſelf this miſtaken Precept, or Advice: And *Demetrius*, Biſhop of *Alexandria*, before he became his [9] Capital Enemy, admired this Action of his, as an Act of heroick Virtue.

St. *Cyprian* " Was married when he was con- " verted; [10] but from that Time, even before he " was baptiz'd, he *confin'd himſelf to the ſtrict Rule* " *of Continence*, as his Deacon *Pontius* informs us: " Which ſhews, that it was look'd upon to be a " kind of Holineſs to live a ſingle Life. A No- " tion agreeable enough to the Ideas of Virtue " Men had at that Time; which, in many Caſes, " were as remote from the common Uſage of Life, " as was the Rhetorick of the ſame Age; which " was then the more eſteem'd, as it was unnatural: " The one being as little fitted to procure the Good " of our Neighbour, and of Society, as the other " was to promote clear Reaſoning, and furniſh the " Mind with juſt Ideas. *Cyprian*, not content with " this conjugal Separation, gave all his Eſtate to " the Poor.——The great Uneaſineſs he ſuſtain'd " in the want of his Wife, was no ſmall Mortifi- " cation to him. That the Chriſtian Religion does " not enjoin needleſs, or uſeleſs Mortifications, is " pretty certain: So that the only Thing that re- " mains to be known is, whether we are in any bet- " ter Condition to ſerve *God*, by altogether ab- " ſtaining from a Thing, the Uſe of which has in " itſelf nothing criminal, and which we cannot but " be ſtill deſirous of, than when we continue to en- " joy the moderate Uſe of it. But be that as it " will; from the Time of St. *Cyprian*, this new " ſort of Continency began to be look'd upon as a " great Virtue, tho' a Thing altogether unknown " to former Ages.——[11] There is ſcarce any Thing " that St. *Cyprian* treats of, but in the declamatory " Stile; and he often expreſſes the moſt common " Things in ſuch a figurative and affected Manner, " that if the Reader be not very much upon his " guard, he will be eaſily led to imagine, that " every Thing he ſays is of the utmoſt Importance. " And had not this been the true Turn of his Ge- " nius, he could never have taken ſo much Pleaſure " in the reading of *Tertullian*, who every where " makes this his conſtant Practice.——[12] Amongſt " the Arguments he makes uſe of, to perſuade " young Women to renounce the Vanities of " [13] Dreſs; he ſays, 'tis running counter to the " Will of GOD, to make uſe of Paint, as, alſo, to " black one's Hair; becauſe our LORD has ſaid: " [14] *Thou canſt not make one Hair white, or black*; " and yet, adds St. *Cyprian*, ye attempt to ſurmount " a Difficulty, which GOD has judg'd inſurmount- " able."——An Argument that either proves nothing, or elſe proves, that 'tis not lawful for us to trim our Hair, or Beards: For the whole Reaſoning of St. *Cyprian* turns on this Maxim: [15] " *That* " *every Thing that grows naturally, is the Work of* " *GOD*; *but whatever receives change, is the Work* " *of the Devil.*" In his Notions too, with reſpect to Martyrdom, he ſeems to come very little, if at all, ſhort of the falſe Ideas Men had in thoſe Days

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1 *De Corona Milit.* Cap. v, xi.

2 *De Spectaculis*, Cap xxiii. p. 155. *H. Sic & Tragœdos* [*Diabolus*] *cothurnis extulit, quia nemo poteſt adjicere cubitum unum ad ſtaturam ſuam. Mendacem facere vult Chriſtum.*

3 *De Idololatria*, Cap. xvii—xix. *& ſeq. & De Corona Militis*, Cap. xi. See *Dallæus de uſu Patrum*, Lib. ii. Cap. iv. p. 262.

4 *Sed & Cæſares credidiſſent ſuper Chriſto, ſi aut Cæſares non eſſent ſeculo neceſſarii, aut ſi & Chriſtiani potuiſſent eſſe Cæſares.* Apologet. Cap. xxi. " They believ'd the *Cæſars* ſuperior to CHRIST, as if the *Cæſars* were not neceſſary to the " Age, or as if the *Cæſars* ſhould be Chriſtians." See *Rigaltius* thereupon.

5 *Du Pin, ubi ſupra*, p. 103. Col. 2.

6 *Idem, ibid.* p. 102. Col. 2.

7 *Abſolute præcipitur*, Malum malo non rependendum. *Par factum, par habet meritum. Quomodo id obſervabimus, ſi faſtiditi ante in faſtidio ultionis non erimus? quem autem honorem litabimus Domino Deo, ſi nobis arbitrium defenſionis arrogaverimus?*——Nolite judicare, *quum dicit*, ne judicemini, *nonne patientiam flagitat? Quis enim non judicabit alium, niſi qui patiens erit non defenſionis?* De Patientia, p. 165. Edit. *Rigalt.* and p. 144. *A, B.* Edit. *Pamel.* Cap. x.

8 *Matt.* xix. 12.

9 See *Euſebius Hiſt. Eccleſ.* Lib. vi. Cap. viii.

10 Life of St. *Cyprian*, by Mr. *Le Clerc*, *Bibl. Univerſ.* Tom. xii. p. 215, 216, 217.

11 *Ibid.* p. 212, 213.

12 *Ibid.* p. 232.

13 *De habitu virginum*, p. 99, and 100. Edit. *Oxon.*

14 *Matt.* v. 36.

15 *Opus Dei eſt, omne quod naſcitur; & Diaboli, quodcunque mutatur.* Ibid. p. 99.

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form'd to themſelves about that Matter. For he is careful to "Comfort [1] before-hand ſuch, as having "confeſs'd *Jeſus Chriſt*, might perhaps come ſhort "of the Honour of being Martyrs; becauſe it "might poſſibly happen, that before their Turns "came to ſuffer, the Perſecution might ceaſe.—— "Which ſhews a Diſpoſition very different from "the Sentiments of him, who, when juſt upon the "Point of ſuffering the Pain of the Croſs, [2] ſaid: "*O my Father, if it be poſſible, let this Cup paſs from "me.*" St. *Cyprian*, in his Tract *of the Uſefulneſs of Patience* [3], commends *Abel* very much, for ſuffering himſelf to be murther'd by his Brother, without making any Reſiſtance, as it were on purpoſe to be the firſt Example of Conſtancy to the Martyrs: Whereby, as, on the one hand, he gueſſes at a Circumſtance, of which there is not the leaſt Footſtep in the Hiſtory of *Geneſis*; ſo, on the other hand, he utterly deſtroys both here, as well as in other Places, the natural Right that all Men have to a juſt Self-Defence. When [4] he deſigns to rebuke thoſe who rebel againſt Biſhops, he makes uſe of an Argument, "Which either proves nothing at all, or elſe "that we ought to pay a blind Obedience to all "Biſhops, who are but duly elected according to "the common Form." In his Anſwer [5] to a Letter of *Florence Pupian*, an *African* Biſhop, [6] "*He "equals Biſhops to the Apoſtles; and maintains,* [7] *that "'tis an inſupportable Piece of Pride, to pretend to "judge of them*; *That* Pupian *in particular was an "inſolent Fellow, to refuſe to acknowledge* Cyprian "*for a lawful Biſhop, until he ſhou'd be convinc'd "thereof in his own Mind*; *becauſe then it wou'd "follow, that for the ſix Years that he had been a "Biſhop, he had been uncapable of adminiſtring the "Sacraments, or of giving Abſolution to thoſe he had "confeſs'd.* Thus the Salvation of the People de- "pended on the Validity of a Biſhop's Election; "and the Validity of that Election depended on "his Integrity.——A ſtrange Principle, that ren- "der'd the Salvation of Chriſtians ſo precarious; "and which annihilated the Effects of all the Vir- "tue and Piety of the People; notwithſtanding "which they were to be damn'd, if the Biſhop "prov'd not to be a good Man, or to have been "unduly elected."

LACTANTIUS maintains, that [8] a truly good Man can neither bear Arms, nor have any Dealings, or Traffick, in Foreign Countries. He, alſo, abſolutely [9] condemns the putting out Money to Intereſt; "And looks on it as a kind of Robbery [10]." He carries beyond all Bounds the Duty of Chriſtian Patience. He maintains, that we ought never to accuſe any [11] Body where the Crime is capital; and he treats all, who do this, as guilty of Homicide, without excepting any one ſingle Caſe.

"THERE are but few Principles [12] of Morality "in the Works of St. *Athanaſius*; and thoſe you "there meet with, (excepting what relates to the "flying Perſecution, and the Epiſcopal Dignity, "and to the Defence of Orthodoxy) are never "handled in their full Extent." This is the Opinion of a Catholick Writer, who, alſo, owns, that *the Catechiſtical Diſcourſes* [13] *of St* Cyril *ſeem to be a Work compos'd in haſte, and without much Preparation.*

St. BASIL, *ſurnam'd the* Great, *will have it,* [14] *That whoever gives another a mortal Wound, whether he did it as Aggreſſor, or in his own Defence, is guilty of Murder.* He declares, [15] *that it is better to ſeparate the Parties, who have committed Fornication, than to join them together in Matrimony; but however, if they will wed, he is not for hindring them, leſt a greater Evil happen.* "In that famous Letter to St. *Gre-* "*gory*, where he eſtabliſhes the Rules of a Mo- "naſtick Life, there is [16] one for regulating the "Dreſs of the Monks, which ſeems directly con- "trary to that of *Jeſus Chriſt* in the Goſpel, *Matt.* "vi. 16, 17. For this Father ordains, [17] that *the "Humility of the Anchoret be viſible in every Part of "his external Appearance; That he have a ſad and "down-caſt Look, his Head uncomb'd, and his Cloaths "naſty and ſlovenly.*"——In his little Tract, entitled, *How to read with Edification the* Greek *Authors*, I find two or three extravagant Maxims. He affirms, [18] that Chriſtians are forbidden ever to have any Law-Suits. He ſeems [19] to take ſtrictly, in the literal Senſe, thoſe proverbial Words of *Jeſus Chriſt*; [20] *Whoſoever ſhall ſmite thee on thy right Cheek, turn to him the other alſo:* And it appears to him, that *Socrates* did ſomething very like what is there preſcrib'd to us, when he quietly ſuffer'd himſelf to be ſoundly bang'd by an inſolent Fellow, who quarrell'd with him. He believes [21] it in no Caſe lawful to ſwear; and gives us thereupon the Example of a certain *Pythagorean*; who choſe rather to pay three Talents, that is, about four hundred and fifty Pounds, than to take an Oath, altho' he cou'd have done it with a ſafe Conſcience.

Gregory Nazianzene [22] *is no very methodical Writer.—His Stile is exceſſively figurative, not very correct, and even ſometimes obſcure.*——"He very much "[23] exaggerates the Boldneſs of the *Arians* and "*Macedonians*, who were then as numerous, at leaſt, "as the Orthodox, and who preſum'd to aſſemble "themſelves together, and form Churches; out- "ragious Attempt! and that too, after the Deter-

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[1] *Bibl. Univerſ. ubi ſupra*, p. 248, 249. *ex Epiſt.* 10. p. 22. Edit. *Oxon.* See the reſt of Mr. *Le Clerc*'s Reflection upon this Matter, on to the End of Pag. 250. [2] *Matt.* xxvi. 39.

[3] *Abel, originem martyrii & paſſionem juſti hominis initians primus & dedicans, adverſus fratrem parricidam non reſiſtit, nec reluctatur; ſed humilis & mitis patienter occiditur.*——De bono Patientiæ, *p.* 214. Edit. *Brem. & Oxon.*

[4] *Bibl. Univerſ.* Tom. xii. p. 309. *ex Epiſt.* 59. p 129 Edit. *Oxon.* [5] Epiſt. lxvi. p. 166, 167.

[6] *Bibl. Univerſ. ubi ſupra*, p. 332, 333. See, alſo, what is ſaid Pag. 334.

[7] Pag. 166, 167. Edit. *Fell. Brem.* Epiſt. lxix. Edit. *Beluz.* p. 122.

[8] *Nego ullo modo fieri poſſe, ut homini, qui quidem vere juſtus ſit, ejuſmodi caſus eveniat.—Cur enim naviget, aut quid petat ex aliena terra, cui ſufficit ſua? cur autem belligeret, ac ſe alienis furoribus miſceat, in cujus animo pax cum hominibus perpetua verſetur?* Inſt. Divin. Lib. v. Cap. xvii. Num. 11, 12. Edit. *Cellar.* *Ita neque militare juſto licebit, &c.* Lib. vi. Cap. xx. Num. 16, 17.

[9] *Non accipiat uſuram, ut—abſtineat ſe prorſus alieno.* Ibid. Lib. vi. Cap. xviii. Num. 7.

[10] See what my Author ſays, Lib. ii. Cap. v. §. 14.

[11] *Neque vero accuſare quemquam [juſto licebit] crimine capitali, &c.* Lib. vi. Cap. xx. Num. 16.

[12] *Du Pin*'s *Library of Eccleſiaſtical Authors*, Tom. ii. p. 54. Col. 2. [13] *Ibid.* 143. Col. i.

[14] *Idem, ibid.* p. 179. Col. 1. *ex Epiſt.* 2. *ad Amphiloch.* Canon xliii. Tom. ii. p. 772. *B. Oper. Baſil. Paris.* 1618.

[15] *Du Pin*, Canon xxvi. *ibid.* p. 178. Col 1. *Baſil. Op.* Tom. ii. p. 769. *D.* Edit. *Paris.* 1618.

[16] *Bibl. Univerſ.* Tom. xxv. p. 412, 413. in the Extract of the third Tome of the *Eccleſiaſtical Hiſtory* of Mr. *Fleury.*

[17] *Oper. Baſil.* Tom. ii. p. 786. *A.* Edit. *Paris.* 1618.

[18] Οἷς τὸ μὴ δικάζεσθαι, νόμῳ προσπεφαλμένοι ἐστὶ. *Homil. de Legend. Græc.* §. 7. Edit. *Oxon.* 1694. *Oper. Baſil.* Tom. i. p. 573. *C. Paris.* 1618.

[19] *Ibid.* §. 13. *Oper.* Tom. i. p. 577. *B.* [20] *Matt.* v. 39.

[21] Ἀκούσας ἐμοὶ δοκεῖν, τῷ προσάλμικῷ, τὸν ὄρκον ἡμῖν ἀπαλορεύονῖῳ. *Ibid. & Op.* Tom. i. p. 578.

[22] See the Life of *Gregory Nazianzene*, by Mr. *Le Clerc*, *Bibl. Univerſ.* Tom. xviii. p. 23.

[23] *Ibid.* p. 114, 115, *ex Orat.* 46. Tom. I. p. 721. *A, &c. Oper. Gregor.*

" mination of ſo well regulated a Council, [1] as " had been held but juſt before!" *Gregory* too did not comprehend, how his *Holineſs* and his *Gravity*, (for this was the Stile in which they accoſted their Biſhops, and he was then addreſſing himſelf to *Nectarius*) cou'd tolerate the [2] *Apollinarian* Meetings.——" He conceiv'd, for what reaſon I know " not, that to ſuffer thoſe People to have their Aſ- " ſemblies, was to agree with them, that theirs " was the true Doctrine, even truer than that of " the Council, ſince there could not be two con- " trary Truths; as if granting a Toleration to any " one, was a Mark that we believe his Opinion to " be true! In ſhort, he exhorts *Nectarius* to re- " monſtrate to the Emperor, that all he had done, " in favour of the Church, would ſignify juſt no- " thing, if the Hereticks were ſtill allow'd the " Liberty of aſſembling. Thus the good St. *Gre-* " *gory*, who was not willing, while the *Arians* were " the ſtrongeſt, having the reigning Emperor on " their Side, that the Orthodox ſhou'd attempt to " do, what they then cenſur'd in the *Arians*: was " for exhorting his Succeſſor to forget that good " Leſſon.——And whereas [3] the Emperor *Julian*, " adding Inſult to Perſecution, was us'd, when he " ſtripp'd the Chriſtians of their Goods, by way " of Raillery, to ſay, that he only help'd them to " obſerve the Goſpel, which commanded them to " depiſe all thoſe Things; ſo *Gregory*, being to " anſwer this, amongſt other Things ſays, that *Ju-* " *lian*, acting in this Manner, muſt needs have " imagin'd, that the *Pagan* Gods were well pleas'd " to ſee innocent Men deſpoil'd of their Goods; " and, conſequently, that they approv'd of Injuſtice. " This Anſwer might have ſuffic'd: But he adds [4], " that as there are ſome Things which *Jeſus Chriſt* " has ſtrictly enjoin'd, ſo there were others, which " he barely propoſes to ſuch as ſhall be inclin'd to " do them, without obliging any Perſon whatever " to an indiſpenſible Performance. Such, accord- " ing to *Gregory*, is the Commandment to abandon " the Goods of this Life:" Whereby 'tis plain, he ſuppoſes here a pretended Advice, to renounce our Goods wantonly and needleſsly: whereas it is a real obligatory Command; but ſuch as only takes place, when the retaining our Goods is prejudicial to our Duty, or becomes impracticable, without the Violation of ſome Precept of the Goſpel.

St. AMBROSE [5] is ſo violent in his Eſteem of Virginity and Celibacy, that he ſeems to make it his Buſineſs to cry down Marriage: and repreſent it as a Thing ſcarce reputable. He ſays plainly enough, [6] *That before the Laws of* Moſes, *and that of the Goſpel, Adultery was not forbidden.* And looſe as he is upon this Article, he appears rigid enough on another; I mean, that of putting out Money to Intereſt: which he abſolutely condemns, in all Caſes whatever, [7] without Diſtinction. His Treatiſe of *Offices*, is a Book which he compos'd to teach Eccleſiaſticks their reſpective Duties. [8] *And tho' the Name of* Miniſters *be omitted in the* Roman, *and following Editions, yet it is to be found in all the Manuſcripts: and 'tis plain, by the Work itſelf, that St.* Ambroſe *compos'd it for the Uſe of his Clergy. But tho' he addreſſes himſelf particularly to them, yet he treats of the Duties of Chriſtians in general; which he applies in a more particular Manner to the Clergy.* It appears, both by the Title, and by the Manner in which he treats his Subject, that his Deſign was to imitate the *Offices* of *Cicero*. But, after all that a certain [9] Lutheran Divine (who publiſh'd this Work at *Wirtemburgh* in 1698, with ſome Diſſertations in his own way) has ſaid; yet if the particular Principles of the Goſpel be but excepted, which St. *Ambroſe* has inſerted in this Work of his, with the Examples and Paſſages of Holy Scripture, which he perpetually quotes, tho' for the moſt part ill enough apply'd; I ſhall not ſtick to affirm, that the Copy comes infinitely ſhort of the Original, both for Purity and Eaſineſs of Stile, the Oeconomy of the Whole, and the Diſpoſition of Particulars; as well as for Solidity of Senſe, and Juſtneſs of Reaſoning. For Inſtance, let us take the Contents of his firſt Book. After ſome Prefatory Diſcourſe upon the Queſtion, when, and in what Manner, it is proper either to ſpeak, or be ſilent; he, at *Chap.* viii. enters upon his Subject with ſome grammatical Remarks, which are not very [10] well grounded. In the *tenth Chapter* he treats of *Decency*; the chief Duty whereof he makes to conſiſt in *The Art of governing the Tongue*. In the *eleventh Chapter* he divides all *Duties* in general into two Sorts: the *Mean*, and the *Perfect*. Amongſt the latter, he ranks the Love of our Enemies; Prayers for thoſe who calumniate, or in any other Manner injure us; Works of Mercy and Compaſſion. The xii*th*, and following *Chapters*, as far as the xvii*th*, run wholly upon the Subject of Providence; which he endeavours to eſtabliſh and defend in the beſt Manner he can, both againſt the Murmurs of thoſe who are, in this Life, expos'd to great Afflictions, and againſt the Objections of Libertines and Atheiſts. In the xvii*th*, and following *Chapters*, he treats of the Duties of Youth. Having at the End of the xxiv*th Chapter*, ſpoken occaſionally of the four Cardinal Virtues, *viz. Prudence*, *Juſtice*, *Fortitude*, and *Temperance*; he in the xxv*th* begins to treat of them; but in a Manner ſuperficial enough; where he himſelf taking Notice of the want of Order in his Diſcourſe, endeavours to excuſe, or rather juſtify it in theſe Words: [11] " Some will perhaps ſay, that, becauſe " from theſe four Virtues ſpring all the ſeveral ſorts " of *Duties*; we ought therefore to have begun " with theſe. But this would have been confirming " myſelf to the Rules of Art; according to which " Duty ought to have been firſt defin'd; and after- " wards divided into its ſeveral Kinds: Now we " purpoſely avoid ſubjecting ourſelves to theſe

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[1] That of *Conſtantinople*, held in 381.

[2] Ancient Hereticks, whoſe Head was *Apollinaris* of *Laodicea*. They pretended, that *Jeſus Chriſt* had not an human Soul, but that the Word of GOD, or *Logos*, animated his Body. That the Fleſh of *Jeſus Chriſt* was not form'd out of the Holy Virgin, but that it came down from Heaven. They, alſo, reviv'd the Error of the *Millennarians*, to which the Simplicity of *Papias*, a Diſciple of St. *John* the Evangeliſt, gave Birth. They were in the fourth Century.

[3] *Bibl. Univerſ. ubi ſupra*, p. 45, 46.

[4] *Orat.* iii. pag. 94. Tom. i.

[5] *De Inſtitutione virginum, & paſſim alibi.* See *Dall. de uſu patrum*, p. 272.

[6] *Conſideremus primum, quia Abraham ante legem Moyſi, & ante Evangelium fuit, cum nondum interdictum adulterium videretur. Pœna criminis ex tempore legis eſt, &c.* Lib. i. De Patriarch. Abrah. Cap. iv. See *Dall. de uſu Patr. ubi ſupra*, p. 271, 272. and Mr. *Bayle*'s *Dict.* Tom. iii. p. 2670. in the Notes, Col. 1.

[7] *De Tobia*, Cap. iii. & xv. See the Tract of Mr. *Noodt*, *De Uſuris & Fœnore*, Lib. i. Cap. iv. & Cap. x. p. 64, *& ſeq.* As, alſo, Mr. *Du Pin*, Tom. ii. p. 256. Col. 1.

[8] *Du Pin*, Tom. ii. p. 257, 258.

[9] *Mich. Fortſchius*, Profeſſor at *Tubingen*.

[10] Mr. *Du Pin* owns it, *ubi ſupra*, p. 258. Col. 2.

[11] *Hæc forſitan aliquis dicat primo loco poni oportuiſſe, quoniam ab his quatuor virtutibus naſcuntur officiorum genera. Sed hoc artis eſt, ut primo officium definiatur, poſtea certa in genera dividatur. Nos autem artem fugimus, exempla majorum proponimus: quæ neque obſcuritatem adferunt ad intelligendum; neque ad tractandum verſutias.* Lib. i. Cap. xxv. *init.*

" Rules: It is enough for us to propoſe Examples " drawn from the Conduct of our Anceſtors, which " are neither obſcure or difficult to comprehend; " and require not the Accuracy of a methodical " Writer." In the xxviii*th Chapter*, he improperly attempts to ſhew the Falſity of two of the Functions, which *Cicero* aſcribes to Juſtice; nor is this the only Place, where he unjuſtly cenſures the Heathen Philoſophers; by either miſtaking their Meaning, or undertaking to confute Things moſt apparently true. About the End of the firſt Book, he returns to the Clergy, whoſe principal Virtues he there deſcribes: and then concludes with a Diſcourſe, of the inviolable Fidelity requir'd, in the caſe of Things depoſited in truſt. Nor does he come to treat of Happineſs, till the beginning of the ſecond Book. The ſame want of Order and Accuracy reigns throughout the whole Work. He there maintains, *That* [1] *a Chriſtian ought not to engage or fight the Robber who attacks him; and lays it down for a general Rule:* That it can never be lawful to preſerve one's own Life at the Expence of another's. He lays down this general Maxim alſo; *That we cannot lawfully do* [2] *a Thing, which we do not find in expreſs Terms permitted and authoriz'd by Scripture:* And upon this Principle he abſolutely forbids the Clergy all ſort of Raillery. It ought not to be wonder'd at, that he condemns (*Book* I. *Chap.* L.) ſecond Marriages: 'tis but what had been done by many before him, as we have already ſeen.

St. *Chryſoſtome*, with the reſt of the Fathers, runs into Notions exceſſively rigid on the Subject of Uſury. This ſame Doctor, ſpeaking of the Expedient, that *Abraham* made uſe of, the [3] firſt [4] Time, for fear of being put to Death, in caſe he had been known to be *Sarah*'s Huſband; makes no Scruple thus to addreſs his Audience: *You* [5] *know, you well* " *know, that nothing is more inſupportable to a Huſ-* " *band, than to ſee his Wife ſuſpected of having been* " *in the Power of another Man; and* [6] *yet this juſt* " *and good Man, employs his utmoſt Efforts, that the* " *very Act of Adultery may be accompliſh'd.*——There- " upon, he beſtows very great Encomiums on his " Courage and Prudence.——Next he excuſes him " for having conſented to the Adultery of his Wife, " upon this Conſideration; that Death, not being " as yet diveſted of his Tyranny, could not but " be very formidable.——After this Encomium on " the Huſband, he proceeds to the Commendation " of the Wife; and ſays, that ſhe very couragi- " ouſly accepted the Propoſal; and that ſhe did all " that was in her Power, to make the [7] Comedy " ſucceed. Whereupon, he exhorts all Wives to " follow her Example; and then emphatically cries " out: [8] " *Who can forbear admiring this wonderful* " *Readineſs to obey? Who can ever ſufficiently cele-* " *brate the Praiſes of* Sarah, *who after ſuch Conti-* " *nency, and at her Years, was willing to expoſe her-* " *ſelf to* [9] *Adultery; and yield her Body to a* Bar- " barian *King, that ſhe might ſave the Life of her* " *Huſband?*——Nor is the Elogy, St. *Ambroſe* be- " ſtows on the [10] Charity of *Sarah*, on this Occa- " ſion, leſs remarkable. St. *Auſtin* too, reaſoning " upon another Inſtance of the ſame Nature, " [11] ſeems to have been under the like Illuſion. Is " it not a very ſtrange Thing, that ſuch bright " Ornaments of the Church as theſe, with all their " Virtue and Zeal, ſhould be ignorant; That it is " not lawful either to ſave one's own, or another's " Life, by any Action that is criminal?

" St. *Jerome* [12] *every where inveighs* againſt Ma- " trimony in general, and more eſpecially againſt " ſecond Marriages; and his Invectives are ſo bit- " ter, that notwithſtanding all the Mitigations, " quite thro' his Epiſtle to *Pammachius*, wrote on " this Subject, [13] it ſeems impoſſible not to take " them in the Senſe of *Tertullian:* which has been " condemn'd by the Church, as contrary to the Ho- " nour of Marriage, and the Authority of Scrip- " ture. [14] He condemns all Oaths [15] without Di- " ſtinction. He expreſſes himſelf in ſuch a Man- " ner, as gives room to believe, [16] that he thought " Chriſtians, as ſuch, were diſpens'd from paying " Tribute to the ſupreme Power. He adviſes " [17] and approves of the Action of thoſe, who " murder themſelves, for fear of having their " Chaſtity violated. He often talks of Virginity, " and the monaſtick State, in ſuch a Manner, as " to make one almoſt believe it abſolutely neceſſary " to Salvation. Labours, Faſtings, Auſterities, " and other Mortifications, with Solitude, and Pil- " grimages, are the Subject of almoſt all his Coun- " ſels, and Exhortations." He [18] plainly enough gives us to underſtand, that [19] *Jeſus Chriſt* has aboliſh'd the Permiſſion of eating the Fleſh of Animals, in the ſame Manner as he aboliſh'd Divorce and Circumciſion. Every Body knows, with how much Violence, and Injuſtice, he inveigh'd againſt *Vigilantius*, who had cenſur'd the Worſhip, which at that Time began to be paid to the Reliques of Saints and Martyrs; as, alſo, againſt divers other Practices, the dangerous Conſequences whereof, proceſs of Time has ſince too plainly diſcover'd. The little Tract of St. *Jerome*'s againſt this Prelate, is full of groſs Invectives, and falſe Arguments, [20] tending to throw a popular Odium upon an Adverſary, whom he could not ſilence by Reaſon.

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[1] *Du Pin*, p. 262. Col. 1. See the Place: *Tamen non videtur, quod vir Chriſtianus, & juſtus, & ſapiens, quærere ſibi vitam aliena morte debeat: utpote qui, etiam ſi in latronem armatum incidat, ſerientem referire non poſſit; ne, dum ſalutem defendit, pietatem contaminet.* Lib. iii. Cap. iv.

[2] Lib. i. Cap. xxiii. See what I have ſaid thereupon in my Tract of *Play*, Lib. i. Cap. iii. §. iii.

[3] See Mr. *Noodt*, *De Uſuris & Fœnore*, Lib. i. Cap. iv, & vi.

[4] *Gen.* xii. 11, 12. N. B. *Barbeyrac* ſays the ſecond, by miſtake.

[5] I make uſe here of the Words of Mr. *Bayle*, in his Dictionary, Article *Abimelech*, Not. (*A*).

[6] Ὁ μέν τοι δίκαιος, καὶ σπουδάζει καὶ πάντα ποιεῖ, ὥστε εἰς ἔργον τὴν μοιχείαν ἐκβῆναι. *Hom.* 33. *in Geneſin. Oper.* Tom. i. p. 258. Edit. *Eton.*

[7] Πάντα ποιεῖ, ὥστε τὸ δρᾶμα λαθεῖν, *ibid. Chryſoſt.* Tom. i. p. 260. lin 5. Edit. *Eton. Vid.* p. 258. lin. 35. and p. 259. lin. 12.

[8] *Ibid.* p. 260. lin. 28.

[9] Καὶ εἰς μοιχείαν ἑαυτὴν ἐξέδωκε, καὶ συνουσίας ἠνέσχετο βαρβαρικῆς. *Ibid.* p. 260. lin. 30.

[10] *De Abraham*, Lib. i. Cap. ii.

[11] See the Article of *Acindynus Septimius*, in *Bayle*'s *Dictionary*, and Notes (*A*), (*B*), (*C*).

[12] Theſe are the Terms of *Daillé*, *De Uſu Patrum*, p. 276.

[13] *Epiſt. ad Pammach. Hier. Op.* Tom. ii. p. 101. *A*, & *d.* Edit. *Baſil. & alibi paſſim.*

[14] *Du Pin*, Tom. iii. p. 136. Col. 1, 2.

[15] *Comm. on Matth.* Chap. v. 34. *and Zachar.* Chap. viii. *Oper.* Tom. vi. p. 313. *B.*

[16] *On Matth.* Chap. xvii. ver. 25.

[17] *Comm. on Jonah*, Chap. i. ver. 12. Tom. vi. p. 150. *D. Oper. Hieron.*

[18] *Dall. de uſu patrum*, p. 277.

[19] Lib. i. *adv. Jovin.* Tom. ii. p. 30. This Paſſage is cited in the *Canon Law*, Diſt. 35. Canon 2.

[20] See the *Diſſert.* of Mr. *Le Clerc*, entitled, *De Argumento Theolog. ab invidua ducto*, which is juſt after his *Latin Logick*, Tom. i. *Op. Philoſoph.* p. 250, &c.

St.

St. *Auſtin*, endeavouring to make an [1] Apology for the Complaiſance, which *Abraham* ſhew'd his Wife, on Account of *Hagar*; pretends, that the Wife can convey to another Woman, the Property which ſhe has in the Body of her Huſband; and that the Huſband, alſo, can transfer to another Man, the Power which he has over the Body of his Wife: and, what is ſtill more ſurpriſing, he founds this Paradox on a Paſſage of St. *Paul*, [2] very ill underſtood. This Father is ſo bold as to maintain, that every Thing, by Divine Right, belongs to the Juſt, or Faithful [3]; and that Unbelievers have no Right to poſſeſs any Thing: an abominable Principle, which directly ſtrikes at the Foundation of human Society! but behold another of them, every whit as deteſtable; and which alone [4] is enough to caſt an *eternal Blemiſh on the Memory* of the Biſhop of *Hippo*: 'tis this, *that, after having declar'd it as his Opinion, that Lenity and Charity ought to be the Meaſure of our Conduct towards Hereticks; he became ſo heated with the Conteſts he had with the* Donatiſts, *as to change entirely; and openly maintain, that Hereticks ought to be perſecuted, and by Force compell'd to embrace the Orthodox Faith; or elſe to be utterly extirpated: which certainly is,* (as a famous Miniſter amongſt the Reform'd obſerves,) *a moſt terrible and inhumane Opinion.* There are two of this [5] Father's Epiſtles, that any one may read in *French*; which were made uſe of to juſtify the laſt Perſecution in *France*: So that St. *Auſtin* may juſtly be ſtil'd the Grand Patriarch of Chriſtian Perſecutors. This Inſtance of Perſecution ought to be well taken Notice of; for it will be found not to confine itſelf to the Biſhop of *Hippo*: and it does alone afford us a moſt manifeſt Proof of the groſs Manner, in which the Chriſtian Doctors have neglected, or rather diſfigur'd and corrupted Morality. If ever there was a Poſition contrary to all the Dictates of good Senſe, and natural Equity; to Charity, true Policy, and the Spirit of the Goſpel; 'tis, without doubt, this deteſtable Doctrine of Compulſion, and Perſecution for the ſake of Religion. And yet, ever ſince the Church began to enjoy any Repoſe, this has been the common Opinion; which, in the End, has been always actually reduc'd to Practice, [6] by the ſtronger Party againſt the weaker. The *Codes* are full of Penal Laws againſt all Sects, different from the eſtabliſh'd Opinion; [7] *and it is the Councils, Biſhops, and moſt eminent Doctors, who have ever ſollicited theſe Laws; and have honour'd with Encomiums, Acclamations, Benedictions, and with the moſt humble Thanks and Acknowledgments, thoſe Sovereigns, who have either made ſuch Laws, or moſt rigorouſly enforc'd their Execution.* But the Honour was reſerv'd for St. *Auſtin*, if I may ſo ſpeak, of reducing the wretched Arguments of blind Bigotry, and Zeal, into a *Syſtem*; and of diſcovering at once, by the Strength of his *African* Imagination, the ſophiſtical Reaſons capable of diſguiſing, or palliating the Honours of Perſecution; ſo that he has left the Zealots of all future Ages only the Glory of copying him.

St. *Leo*, in the Opinion of Mr. *Du Pin*, [8] *is not very fertile in Points of Morality: Handles them but drily; and in a Manner which diverts, rather than affects his Readers.*

In the Time of *Theodoſius the Younger*, the Biſhop of *Suſa*, the Royal City of *Perſia*, whoſe Name was *Abdas* (or rather *Abdaa*); [9] took the Liberty to burn one of the Temples where they worſhipp'd the holy Fire [10]. The King (it was *Iſdegerdes*) inform'd thereof by the *Magi*, ſent for *Abdaa*; and, after a very gentle Reprimand, order'd him to rebuild the Temple he had deſtroy'd. But the meek Biſhop could not be brought to do any Thing in the Matter; tho' the King threaten'd, by way of Repriſals, to uſe the Churches of the Chriſtians in the ſame Manner; which he accordingly executed afterwards, on the obſtinate Refuſal of *Abdaa*; who choſe rather to loſe his Life, and expoſe the Chriſtians to a furious Perſecution, than to obey an Order ſo juſt and reaſonable. *Theodoret*, who reports this Story, does [11] not deny, but that the Zeal, which tranſported *Abdaa* to burn the Temple of the *Perſians*, was unſeaſonable; but he maintains, that his Refuſal to rebuild ſuch another Temple, ſhew'd a Conſtancy worthy of all Admiration, and a Crown: For, adds he, it is as great an Impiety to build a Temple to *Fire*, as to adore it. But [12] "There is no one Perſon whatever, whether Metropolitan, or Patriarch, who can diſpenſe with this Law of natural Religion; *That every one is bound to make amends by Reſtitution, or otherways, for the Damage he has done to his Neighbour.* Now *Abdas* here, a private Man, and Subject of the King of *Perſia*, had deſtroy'd what was the Property of another; and in a Caſe, where the Thing deſtroy'd had the extraordinary Privilege of belonging to the Eſtabliſh'd Religion.——And to ſay, that the Temple, which he ſhould have rebuilt, would have been apply'd to the Service of Idolatry, was but a lame Excuſe; for he himſelf would not have employ'd it to that Purpoſe: Neither was he to have been anſwerable for the ill Uſe, which they, to whom it belong'd, ſhould have made of it. Would it be a valid Reaſon, for the not returning a Purſe one has ſtolen, to ſay, that the Perſon, from whom he took it, is a Man who miſſpends his Money? But beſides all this, what Proportion was there betwixt the rebuilding one Temple, without which the *Perſians* would have remain'd as great Idolaters as before, and the Deſtruction of a great many Chriſtian Churches? ——In ſhort, was there any Thing more capable of rendring the Chriſtian Religion odious to all the World; than to ſee its Profeſſors, after having inſinuated themſelves into a Country, on the Foot of People who deſir'd only a Toleration; have the Confidence to demoliſh the Temples of the National Religion: And then refuſe to rebuild them, tho' enjoin'd by their lawful Sovereign?" But theſe Biſhops acted on Principles equally contrary, both to the Goſpel, and to the Law of Nature. In which, however, they did but imitate the [13] Maxims and Conduct of St. *Ambroſe*, on a like Occaſion.

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[1] *De Civit. Dei*, Lib. xvi. Cap. xxv. [2] 1 *Cor.* vii. 4.
[3] Epiſt. cliii. Tom. ii. Edit. *Benedict.* & *Col.* 250. *D.* Epiſt. liv. Edit. *Baſil.* See *Le Comm. Philoſoph. ſur, Contrain-les d'entrer*, Par. iii. p. 130, & *ſuiv.*
[4] *John Claud. Epiſt.* how to read the Fathers, &c. at the End of the firſt Edition of his *Ouverture de l'Ep. aux Rom.* p. 129.
[5] See Part. iii. of the *Philoſoph. Comment.* and Vol. iii. of *Ars Critica* of Mr. *Le Clerc*, p. 353. Edit. 2.
[6] See *Biblioth. Univerſ.* Tom. xxiii. p. 366, & *ſeq.* and Mr. *Bernard*, in his News of *May* 1699. p. 574, 575. and *April* 1702. p. 409. and the *Comm. Philoſoph.* in the *Supplement*, Cap. xxix, xxx, xxxi.
[7] *Comm. Philoſoph. ubi ſupra*, p. 355, 356. See the Book of *P. Thomaſſin, De l'unitè de l'Egliſe.*
[8] Tom. iv. p. 164. Col. 1. [9] See *Bibl. Choiſie de Mr. Le Clerc*, Tom. viii. p. 321, & *ſeq.*
[10] *Theodoret. Hiſt. Eccleſ.* Lib. v. Cap. xxxix. [11] *Ibid.* p. 245. *B. C.*
[12] Mr. *Bayle*, in the Article of *Abdas*, *Rem.* (*C*) p. 8. in the ſecond Edition of his Dictionary.
[13] See the Fact, related with its Circumſtances, and neceſſary Reflections, in the *Critical Diſſertation on the Hiſtory of* Calvin,

Gregory the Great, according to Mr. *Du Pin* [1], *is prolix, and ſometimes too confus'd, in his Explications of Morality; and too ſubtile in his Allegories.* ——His *Morals*, or Commentaries on *Job*, *are* (in the Opinion of the ſame Author) *one of the greateſt Collections* [2] *of Morality extant. But he ſeldom or never* [3] *keeps to the literal Senſe: His Work conſiſts only of Allegories, and moral Reflections, which he accommodates to the Text of* Job; *the greateſt Part whereof are full as applicable to any other Part of Scripture.*

SECT. X.

WHAT has been ſaid, is, I think, more than enough to demonſtrate clearly, that the moſt celebrated Doctors of the Church, for the ſix firſt Centuries, were but wretched Maſters, and poor Guides in Matters of Morality. As I ſaw Reaſon for this Aſſertion [4] ſix Years ago, when this Prefatory Diſcourſe came firſt abroad; ſo now, in this new [5] Edition, after a ſecond Review, I *find* no Cauſe to alter my Opinion. A Regard for Truth; which muſt needs over-rule every other Conſideration, but that of raiſing Obſtacles to its Eſtabliſhment; the Readineſs that moſt People ſhew to be miſled by great Names, and Prejudice in favour of Antiquity, more eſpecially Eccleſiaſtical Antiquity; the inexpreſſible Injury, that ſuch a blind Reſpect does to the Knowledge of true Religion, and ſound Morality; the Honour, due to the Age we live in, which has, above all others, ſhaken off the Yoke of ill grounded Authority; the Candor and Sincerity we profeſs; do all oblige us frankly to ſpeak of Things, as they really are, and to judge of theſe Doctors, who have been dead ſo many Ages, with the ſame Diſintereſtedneſs and Freedom, as we would of a deceas'd Author of the laſt Age; whoſe Reputation we are under no Concern about. As good Proteſtants, we may, and ought, boldly thus to act; without diſquieting ourſelves with what thoſe Men may ſay or think, who ſhall eſteem it their Concern, to declare themſelves jealous of the Honour of the Fathers; and ſuch profound Admirers of all their Productions, as to ſacrifice to them even the moſt common Rules of Reaſon and good Senſe; which they themſelves would be very loth to have diſpens'd with on other Occaſions. So unhappy are they, as to be reduc'd to this wretched Neceſſity, of judging differently of the ſame Things, according as they happen to proceed either from the Pen of a Profane, or an Eccleſiaſtical; of an Ancient, or a Modern Author. Nay, we doubt not, but there are many among them, who act a forc'd Part on this Occaſion; and who, tho' they talk like others, have not ſecretly ſo favourable an Opinion, as People imagine, of the Perſonal Qualities and Writings, of the moſt renown'd of the ancient Doctors of the Church. As it would be inhuman to inſult Men, who live thus under perpetual Conſtraint; ſo we pity them with all our Heart, provided they do not ſeek after, and embrace all Opportunities, of thus betraying their own Conſciences. But it is very hard to keep one's Temper, when one ſees Men, who have here full Liberty to think and ſpeak as they pleaſe; and whoſe grand Principle is, or ought to be, that the Holy Scripture is the only Rule of our Faith and Manners: When one ſees ſuch Men, I ſay, zealouſly eſpouſing the Cauſe of the Fathers; and, not content with being themſelves furiouſly engag'd in Maintenance of this viſible Relique of Popery; endeavouring, alſo, at any Rate, to impoſe the ſame Servitude on others; not being able to bear, that any one ſhould declare his Opinion of the Fathers, to be inferior to theirs; and bitterly inveighing againſt the Living, in order to vindicate the Dead; to whoſe Memory no other Injury is offer'd, but the not paying a blind Veneration to their miſtaken Notions, and wrong Conduct.

Certainly Proteſtants, whether ſuch by Education, or Converſion, who venture to declare themſelves ſuch mighty Zealots, and Idolizers of Eccleſiaſtical Antiquity, were far from conſidering well of the Matter, when they engag'd in the Maintenance of ſo bad a Cauſe: Would they but reflect a little, they muſt ſoon ſee, that it is what they can never ſupport with Honour. This is evident enough, by the Streights which they chuſe to be reduced to, rather than quit their Hold; being forc'd perpetually to change the State of the Queſtion, and contradict themſelves every Moment. They dare not in ſo many Words ſay, that the Fathers were infallible, or that they have not ſometimes fallen into great Errors; but yet ſtill arguing, as if they both believ'd it themſelves, and expected that others ſhould do ſo too, they almoſt perpetually build upon that tacit Suppoſition; ſo, what they deny in one Place, they grant in another; and even, ſometimes, more than is requir'd. In a Word, they act ſo, as to make one believe, that they had, by continually reading, and admiring the Fathers, contracted the ſame Turn of Thought with them, and entirely form'd themſelves upon their Model. By which they themſelves furniſh us with a new Argument, a living Evidence, for the Judgment I have given of theſe ancient Authors; whoſe Writings produce ſuch bad Effects; ſo that by endeavouring to re-eſtabliſh them in that exceſſive Eſteem, in which Ignorance and Superſtition had plac'd them; they, in the main, depreciate them more, than thoſe, who think they may be juſtly cenſur'd on many Accounts, could, or would do.

But this is not all; they imitate thoſe Paſſions, alſo; which are but too plainly viſible, both in the Writings and Lives of the Fathers. To come ſhort of their Maſters in nothing, they join to Declamation, falſe Reaſoning, apparent Ignorance in Criticiſm and Morality, and Contempt of Order and Method, Paſſion, and Invective. They copy after their Originals ſo well, that they are themſelves become great Models: Ill Language is ſo fluent and natural, that we muſt do them the Juſtice to own, that, in this Particular, they perform like Men of great Genius. Mortify'd to ſee, that ſeveral Authors, with little Trouble and Pains, have brought a great Number of Proofs, to ſhew the falſe Reaſonings, and groſs Errors, diſcoverable in the Writings of the Fathers; inſtead of calmly proving the contrary, or defending the Paſſages attach'd (which would be the beſt, and moſt honourable Way of defending theſe ancient Doctors, they have taken under their Protection): Inſtead of this, I ſay, they content themſelves in crying

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by *Maimbourg*, Tom. ii. Lett. xxx. p. 275, *&c.* Or what I have extracted from it, in my Notes on *Grotius, De Jure Belli & Pacis*. Lib. i. Cap. iv. §. 5. Not. 10.

[1] Tom. v. of his *Biblioth.* p. 144. Col. 2. [2] *Ibid.* p. 134. Col. 1. [3] *Ibid.* p. 133. Col. 2.

[4] In the Year 1706. [5] In the Year 1712, which is equally applicable to this new Edition.

out; *That it is now-a-days the Faſhion to attack the Fathers; that Ignorance thinks to make itſelf conſiderable this Way; That thoſe mighty Antagoniſts of the Fathers, by their Performances, ſhew themſelves to be Men of but little Judgment and Knowledge.* By which they ſhew their own want of Judgment; becauſe, in this Caſe, there is no Manner of Occaſion for that vaſt Erudition, which they ſo much pretend to. There is no Neceſſity of knowing all the Languages, both ancient and modern; or of having read all the Fathers quite through: There is ſcarce any Thing more requir'd, to judge of their Merit, than to conſult a Page of any of the Fathers; either in the Original, or any of the vaſt Number of Tranſlations, which have been publiſh'd. There are even entire Works, which are nothing but a perpetual Contexture of Impertinencies heap'd upon one another; ſuch, for Inſtance, is the Commentary of St. *Auſtin* [1] on the *Pſalms*. Beſides, there is, in Collections of Sermons, in Books of Devotion, in Commentaries on the Scripture publiſh'd in the vulgar Tongues; an infinite Number of large Fragments, and Paſſages, out of the Fathers; which their moſt zealous Admirers diſplay, and ſet forth, as the very Flower and Choice of thoſe fine and judicious Thoughts, they have remark'd in the reading of their Works. So that any one now may be ſufficiently qualify'd to judge, whether the Fathers do juſtly merit all that Encomium, and Zeal, with which they have been extoll'd, and defended: A reaſonable Share of common Reaſon, and good Senſe, is here ſufficient; and, perhaps, the Charge of Ignorance was never more unſeaſonable, or unjuſtly apply'd, than in the preſent Caſe: To be ſure, Men, who bring ſo indeterminate, and indecent an Accuſation as this, muſt needs think they have monopoliz'd all the good Senſe, as well as Learning in the World: It ſhould ſeem, they are not willing to allow the leaſt Degree of either to any, who do not embrace all their Notions, or rather Prejudices, and do not enter into all their Paſſions, and Factions. And what may lead one to imagine ſo, is, to ſee ſome of them ſo extremely civil, and modeſt, as to publickly brand, with the Name of downright *Impudence*, the Liberty we take of thinking, and ſpeaking otherwiſe, than they and the Fathers do; on Matters too, where we do no more than follow the common Opinions of Proteſtants; as with regard to the Lawfulneſs of putting out Money to Intereſt: To ſee them, I ſay, look down from the Heights of their Self-ſufficiency, with an Air of Pity, on all ſuch, as ſhall preſume to declare, tho' in never ſo modeſt Terms; that they have not ſo high an Opinion of St. *Auſtin*, and St. *Jerome*, as themſelves have; as People, who, without the leaſt Tincture of Learning, ſet up for a Character, by running down almoſt all the celebrated Authors of Antiquity: And then to ſee them, at the ſame Time, tacitly, and ſuddenly, aſſume the Character of great Authors; which the confus'd haſty reading of a great Number of Books, good or bad, muſt needs have entitled them to, and which we ſhall never be inclin'd to envy them.

But what is the very Height of Blindneſs, and Paſſion, our zealous Defenders of the Fathers, not content with the Charge of Ignorance, proceed to call in queſtion, either directly or indirectly, the Probity, and Religion of thoſe, who freely ſet forth both the Good and the Bad, in the Lives and Writting of the Eccleſiaſticks and Divines, of the firſt Ages: And who believe, that they were no more infallible, either in their Morals, or their Doctrines, than the Eccleſiaſticks and Divines of the preſent Age. One of them ſcruples not roundly to affirm; *That a Man could not fail of having a Veneration for the Fathers, if he had any true Zeal for Chriſtianity:* Another of them, the very Eccho of the former, ſays; *That Contempt of the Fathers, if carry'd to Exceſs*, (thus they term the Liberty of ſpeaking one's Sentiments of the Fathers, without Concern for their Reputation, other than what Truth and Equity permit) *that this Contempt, I ſay, reflects upon the Chriſtian Religion. If the Chriſtian Religion*, adds he, *has not had, for its Propagators, Men of true Piety and Knowledge, what Opinion muſt Mankind have of it?* I confeſs, were Reaſons, which have no other Tendency, but to render the Opinion and Perſon of an Adverſary odious, to paſs for good Arguments; that this would be one of the beſt that ever was invented. All the Defect it has, is, that it might eaſily be retorted: The Fathers, ſay you, whom you regard as Propagators of the Chriſtian Religion, muſt neceſſarily have been Men of true Piety and Knowledge. But it has been maintain'd, and prov'd to you, by a great Number of Inſtances, that the Fathers have not only fallen into very groſs Errors, and been moſt profoundly ignorant of many Things; but further, that moſt of them have, more or leſs, ſuffer'd themſelves to be miſled by Paſſion; ſo that their Conduct has been found frequently to be ſuch, as is neither regular, or juſtifiable. You make no Anſwer to all this; you do not attempt to refute the Examples and Facts, which are produc'd to you, you fairly own the Charge: You do, therefore, tacitly confeſs, that the Chriſtian Religion is of no Value: You are at Bottom ſome diſguis'd Atheiſt, or Deiſt, who, under the falſe Appearance of maintaining the Intereſt of Chriſtianity, by vindicating the Honour of thoſe, whom you regard as the *Propagators* thereof, are endeavouring ſecretly to undermine Religion itſelf. In vain do you play the Zealot for Orthodoxy, or the Opinions in faſhion; which you defend by nothing, but odious Parallels, and malicious Reflections. In vain do you ſearch into the hidden Secrets of Providence, employ all your Subtilties in their Explanation, and flatter yourſelf to have found out new Solutions, which clear thoſe great Difficulties, which have, at all Times, been rais'd, with regard to the Origin of Evil: All this will never hinder one, if he be allow'd to reaſon, in the Manner you do, againſt thoſe, whoſe Eſteem of the Fathers comes not up to your Liking; from inferring, by a Parity of Reaſoning, ſome ill Deſign, on your Part, againſt that very Religion, you pretend to engage in this Diſpute. *Heic aliquis latet Error: Equo ne Credite Teucri.* I leave it to the Judicious and Diſintereſted to judge, whether the Conſequence is not, at leaſt, as well drawn, on the one Side, as on the other.

Tho', at the ſame Time, we are far from intending to make uſe of any ſuch Weapons: We freely leave them to thoſe, as have no better; having Charity enough to believe, that they are only guilty of Imprudence. Blinded with Prejudice and Paſſion, they perceive not the Advantage they give both againſt themſelves, and againſt the Chriſtian Religion, by what appear'd to them a thundering deciſive Argument; proper both to ſave themſelves the Trouble of examining Things thoroughly; and to throw Duſt in the Eyes of the People. But to undeceive them, if poſſible, at leaſt to prevent the Honeſt and Well-meaning, or ſuch as will not take the Pains to inform themſelves, how to diſtinguiſh between good and bad Reaſonings, from being impos'd upon by this; let us ſtop a few Moments, to make its Weakneſs more fully appear.

[1] See the Opinion of Mr. *Du Pin*, in his *Biblioth.* of *Eccleſiaſtical Authors*, &c. Tom. iii. p. 218. Col. 2.

First then I obſerve, that the Apoſtles alone can properly be call'd *The Propagators of the Chriſtian Religion*, whom the Holy Spirit endued with the Gift of working Miracles, [1] and *guided into all Truth*, concerning *Jeſus Chriſt* and his Doctrine. Thoſe holy Men [2] *made Diſciples among all Nations*, according to the Order they had receiv'd from their Maſter. St. *Paul*, who *ſtrove* [3] *not to preach the Goſpel but in thoſe Places, where* Jeſus Chriſt *had never been nam'd, leſt he ſhould build on another Man's Foundation*, declares expreſly, *That* [4] *he had fully preach'd the Goſpel of* Chriſt, *from* Jeruſalem, *and round about unto* Illyricum; [5] that is to ſay, throughout a great Part of the *Roman* Empire. Tradition has preſerv'd [6] in *India*, and among other barbarous Nations, the Remembrance of the Travels and Miracles of St. *Thomas*, St. *Andrew*, and other Apoſtles. Thus the immediate Diſciples of our Saviour, fill'd with his Spirit, and arm'd with his Power, planted, almoſt thro' the whole World, the Chriſtian Faith; it was they who laid the ſolid Foundations of this great Work, either themſelves in Perſon, or thro' the Means of ſuch apoſtolical Men, to whom they had communicated the Gift of working Miracles: And the ordinary Miniſters of the Goſpel, who ſucceeded them, but without any extraordinary Power, and with Authority infinitely leſs than theirs, have had nothing elſe to do, but to cultivate thoſe deep-rooted Seeds, which the Apoſtles had ſpread abroad in all Parts, for the Propagation of Chriſtianity; and which, by their own proper Virtue, aſſiſted with the Care of Providence, will always bring forth Fruit even to the End of the World, notwithſtanding the Negligence and Malice of Men.

From hence it already appears, that the Argument we are now handling, even ſuppoſing it had any Force in it, will prove nothing in Favour of the Fathers: For it is plain, that they were not, properly ſpeaking, the *Propagators* of the Chriſtian Religion. But let us grant the Fathers, ſeeing ſome will have it ſo, this glorious Title, as what might poſſibly, in ſome Senſe, and in ſome Meaſure, belong to them: It will yet be eaſy, to ruin, at once, the Conſequence they wou'd draw from thence, in order to ſhew what they ought to have been, without ever examining what they really were. We need only conſider this one inconteſtable Fact; that even the Apoſtles themſelves were, for a conſiderable Time, full of carnal Prejudices, and had their Failings too: nor did *they* at all conceal them; the ingenuous Acknowledgment whereof ſerves very much to confirm the Truth of their Teſtimony, and the Sincerity of their Intentions. Shall we then be ſurpriz'd, that the ordinary Miniſters who ſucceeded them, and who were not favour'd with any ſupernatural Aſſiſtance, had not all that Exactneſs of Judgment, Knowledge, Uprightneſs, and Purity of Heart, which we could wiſh to have found in them?

Theſe Propagators of the Chriſtian Religion muſt needs, ſay they, *have been Men of true Piety and Knowledge*. But muſt all, who have, after the Apoſtles, contributed any Thing to the Propagation of Chriſtianity, have been ſuch, or only ſome of them? The firſt is what they will not venture to ſay: and if they betake themſelves to the latter, I aſk, by what ſhall we be able to know, that this Privilege was reſerv'd to ſuch or ſuch, for Inſtance, rather than to others? Shall we judge by the Age in which they liv'd? But why muſt the Fathers of the three or ſix firſt Centuries have been *Men of true Piety and Knowledge*, rather than thoſe of the tenth or eleventh? On the contrary, to argue on the Principle here laid down, it ſhou'd ſeem, that, in Proportion, as we become more remote from the firſt Eſtabliſhment of Chriſtianity, ſo its Propagators ought to be Men of greater Eminence for Piety and Knowledge, in order to augment, more and more, the Progreſs of this Holy Religion; and ſupply, what the Proofs of Matter of Fact, which are the very Baſis of its Truth, loſe of their Force, thro' Diſtance of Time, in the Judgment of a vaſt Number of Perſons, who are not capable of examining them, as they ought. Will they ſay, that theſe Propagators of the Chriſtian Religion, who muſt have been *Men of true Piety and Knowledge*, are thoſe Doctors, whoſe Writings have been tranſmitted to us? But why theſe, rather than an infinite Number of others, who have either wrote nothing, or whoſe Writings have not come to our Hands? Beſides, what do they mean here by *Men of true Piety and Knowledge?* Will they ſay, that all the Propagators of the Chriſtian Religion, ſince the Apoſtles, muſt neceſſarily have had the moſt exemplary Piety, and the moſt perfect Knowledge of Religion and Morality? What? muſt the Fathers have been liable to no Failings, no Paſſions, no Errors, no Ignorance at all? Was it neceſſary that GOD ſhould miraculouſly interpoſe, to hinder them from being Men as well as others, and ſubject to the Imperfections of the Age, as well as to the Temptations incident to the Circumſtances they were plac'd in? If we have not ſo exalted an Opinion of them, as their extravagant Admirers have, do we pretend to ſay, that they were all a Pack of profligate Wretches; or that there were not ſome among them, who were, in ſome Meaſure, Men of Piety and Knowledge? If we maintain, that they were not Men of the moſt accurate Judgments; that they often made uſe of bad Arguments; that they were but little vers'd in the true Method of expounding the Holy Scriptures, and explaining the Principles of Morality, which they contain: Do we therefore deny, that they retain'd the Fundamentals of Religion, and Morality? If we ſay, that, thro' an Effect of human Frailty, they have given way, more or leſs, to Paſſions, and committed Actions, contrary to the Rules of the Goſpel: Do we, therefore, take upon us to penetrate either into their Hearts, or into the Counſels of GOD? Do we deny, that many of them might, notwithſtanding all this, have been *truly pious and good Men*; that the Divine Mercy might have regarded their good Intentions, and the Sincerity of a general Repentance? Certainly, we leave it to *God* to judge of that, which we neither can, or ought, to decide: We reſerve to ourſelves only the Right of charitable Judgment, to which we ſhall always rather incline, than to raſh Condemnation. But we are not, for all that, oblig'd to call evil, good: and ſhall always take the Liberty of blaming what is blame-worthy, without paying reſpect to the Fault, out of favour to the Perſon: and as we praiſe and heartily recommend to the Imitation of every Body, the good Actions, and Virtues which appear in the Lives of the Fathers of the Church; ſo we ſhall never go about to diſſemble their ill Actions and Vices, which we cannot but ſee, when we examine them without Prejudice, or Prepoſſeſſion.

But to examine the full Force of this Argument,

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[1] *Joh.* xvi. 13. [2] *Matth.* xxviii. 19. [3] *Rom.* xv. 20. [4] *Ibid.* ver. 19.
[5] See a Diſſertation of the late Mr. *Cellarius*, entitled, *Itinerarium Apoſtolicum, &c.* printed a third Time at *Hall* in *Saxony*, 1700.
[6] See *Grotius*, *De Ver. Rel. Chriſt.* Lib. ii. §. 18. Not. 33, 34.

beſides what I have already intimated, and ſhall preſently prove, that the Fathers were neither the only, nor the principal Propagators of the Chriſtian Religion, after the Apoſtles; this Argument contains at moſt but a Reaſon of Congruity. Now Reaſons of Congruity, which are generally very inconſiderable, and never amount to more than a ſlight Probability, are altogether ridiculous in a Matter of the Nature with this we are now upon. Have the Fathers argu'd well, or ill? Have they fall'n into groſs Errors? Have they given way to vicious Actions, and Paſſions? Have they treated of Morality with Accuracy, and in its juſt Extent? Theſe are Matters of Fact, and there is nothing more to be done, but to ſee whether they are true, or not. We have at hand the Tracts and Writings of the Fathers, and the Hiſtory of their Lives: Let us read, examine, and then judge. The Queſtion to be diſcuſs'd, is not, in what Manner we conceive the Thing ſhou'd have been, but in what Manner it actually has been. For, if the Facts be true, inſtead of concluding, as they would have us, that the Fathers muſt, for the Good of the Chriſtian Religion, have been ſuch, as they have repreſented; I ſhall from thence infer, on the contrary, that there was no Neceſſity at all for it. To argue otherwiſe, is to imitate thoſe of the *Romiſh* Communion; who, to prove that *Tranſubſtantiation* is not a new Tenet, unknown to the firſt Ages, tell us gravely, that this Doctrine could not poſſibly have been ever introduc'd into the Church at all, had it not been receiv'd from the Beginning. If, with a profound Study of all the Subtilties of the Mathematicks, and the Affectation of being able to talk on all ſorts of Subjects, they form no better Judgment of Things, I fear they will give us but a very mean Opinion of *Algebra*, and that vaſt [1] *Encyclopedia*, which they pretend to value themſelves ſo much upon. Is it not true, for Example, that, as early as the ſecond Century, *Victor*, [2] Biſhop of *Rome*, excited great Troubles, to ſupport his Opinion on this important Queſtion, *On what Day Eaſter ought to be celebrated?* And that he excommunicated all the Churches of *Aſia*, becauſe they celebrated that Feſtival on the fourteenth Day of the new Moon of *March*, and not on the *Sunday* following, as he would have had it? The unſhaken Fidelity, with which he adher'd to the Chriſtian Religion, for which he ſuffer'd even Martyrdom, had not prevented him from being tranſported with Paſſion about meer Trifles, and from offending againſt that Spirit of Peace and Charity, which the Goſpel ſo earneſtly recommends. So that St *Irenæus* writ to him, [3] and warmly cenſured his Conduct. To give another Inſtance of a Father of the Church, who was, alſo, a Martyr; we need only examine the ſcandalous Conteſt, which happen'd in the third Century, between St. *Cyprian*, Biſhop of *Carthage*, and *Stephen*, Biſhop of *Rome*. The firſt had got it determin'd in a Council, that all who had been baptiz'd by Hereticks, ought to be re-baptiz'd. [4] "*Stephen*, on the contrary, perhaps "incens'd that they had come to a Deciſion, with- "out firſt conſulting him, was of a quite different "Opinion. He wrote a Letter to St. *Cyprian*, "which is loſt; wherein he rejected and con- "demn'd the Deciſions of the Council of *Carthage*; "excommunicated thoſe who had aſſiſted at it; "and declar'd, that Sectaries of all Kinds ought "to be receiv'd by the Church, without being re- "baptiz'd: This gave Birth to a troubleſome "Schiſm between the Churches of *Africa*, and that "of *Rome*. At that Time *Pompey*, Biſhop of *Sa- "brata*, a City of *Africa*, deſir'd the Biſhop of "*Carthage* to let him know, what was the Opinion "of *Stephen*; whereupon St. *Cyprian* ſent him *Ste- "phen*'s Letter, together with his own Refutation; "wherein he no more obſerves the Rules of Pati- "ence, (which he had laid down in a Book, "wherein he treats of that Virtue,) than *Stephen*, "who, for his Part, had violated them in a moſt "unworthy Manner. By which one may ſee, that "the Praiſes, which our Martyr gives to Chriſtians "on that Account, in the [5] beginning of the ſame "Book; where he ſays, that they never at all "extol their own Virtues, at the ſame Time that "he is extolling them to the Skies; were Praiſes, "which rather inform us what thoſe Men, to whom "they are given, ought to have been, than what "they really were. He accuſes *Stephen* of having "wrote in a haughty diſdainful Manner, and of "many other Things, which were nothing to the "Purpoſe; that he had contradicted himſelf, and "talk'd like an ignorant and weak Man.——That "he took the Part of Hereticks againſt the *Church*, "and betray'd it. All this Charge he advances "with more than ordinary Heat and Paſſion. And "thus, in Truth, does he demean himſelf in all "his Controverſies, where he talks of nothing but "Diſcipline and Epiſcopal Authority, without diſ- "covering much Meekneſs and Moderation; "nor was it indeed the Cuſtom in thoſe Days, to "manage their Diſputes with Temper and Calm- "neſs, any more than it is now."

In the beginning of the *fourth Century*, [6] "Ele- "ven or twelve Biſhops aſſembled together at "[7] *Cirta*, in 305, where they reproach'd each "other with enormous Crimes. The greateſt Part "of them had deliver'd up the Scriptures to the "*Pagans*, to avoid Perſecution, which a great "Number of the honeſt Lay-Chriſtians had born "with Conſtancy. Others of them had, with their "own Hands, thrown them into the Fire. One "*Purpurius* of *Limate*, [8] was accus'd, for having "murder'd the two Children of his Siſter; who, "inſtead of clearing himſelf of the Charge, boldly "anſwer'd: *For my part, I have kill'd, and I do "kill thoſe who are againſt me. Trouble me no more "about the Matter: You know that I value no Man.* "[9] As ſoon as ever there were Chriſtian Emperors, "Pleaſures began to introduce themſelves apace "into the Church; and there was, in a little Time, "nothing to be ſeen, amongſt the Clergy, but En- "mity and Diviſions. And becauſe the Biſhops "were rich, and in great Eſteem, they [10] ſtuck at "nothing to arrive at this Dignity; which, when "obtain'd, they exercis'd with a tyrannical Autho- "rity. Theſe Diſorders daily increas'd, till they "came to that Height, they have been ſince ſeen "to riſe to, as the learned *Iriſh* Archbiſhop

[1] The whole Circle of Arts and Sciences, or univerſal Knowledge.
[2] See *Euſeb. Hiſt. Eccleſ.* Lib. v. Cap. xxiv. Edit. *Vales.*
[3] There are ſeveral Fragments of his Letter in *Euſebius, ubi ſupra*, Cap. xxiv, and xxxix.
[4] See the Life of St. *Cyprian*, by Mr. *Le Clerc*, *Bibl. Univerſ.* Tom. xii. p. 351, *&c.*
[5] *Op. Cypr. Tract.* p. 211.
[6] Extract from the *Hiſt. Eccl.ſ.* of Mr. *Fleury*, Tom. ii. p. 580, *& ſuiv.* in the *Bibl. Univerſ.* Tom. xxiv. p. 341.
[7] A Town in *Africa*.
[8] See *Optat. de Meleve*, Lib. x. and the *Excerpta ad Donatiſtarum hiſtoriam, &c.* found among the Works aſcrib'd to St. *Auguſtine*, Tom. ix. Edit. *Benedictin. Antwerp.* p. 9.
[9] *Uſſerius, De Eccleſiarum Chriſtianarum, in occidente præſertim, continua ſucceſſ. &c.* In the Extract of the *Bibl. Univerſ.* Tom. ix. p. 5, *& ſeq.* See, alſo, Tom. xxiii. p. 366, *& ſeq.*
[10] See what is related of *Damaſus*, in *Amm. Marcel.* Lib. xxvii. Cap. vi. *per tot.*

"*Uſher*,

" *Uſher*, ſhews in the Book, I have quoted in the " Margin, by a great Number of Paſſages out of " Authors of Note, who have left us moſt lively " Deſcriptions of the horrible Corruption of the " reſpective Ages they liv'd in. I have already " [1] quoted *Gregory Nazianzene* on this Head. Let " us join to him *Sulpicius Severus*, who liv'd in the " ſame Century. He, in the firſt Book of his Hi- " ſtory, [2] ſpeaking of the Morals of the Clergy of " his Time; and having firſt [3] obſerv'd, that the " Tribe of *Levi* had no Share in the Diviſion of the " Land of *Canaan*, as the other Tribes had; [that " they might be more at Liberty to devote them- " ſelves to the Service of GOD] ſays, *That he was* " *not willing ſilently to paſs by that Example; but* " *choſe purpoſely to mention it, as a fit Leſſon for the* " *Clergy*: *For it ſeems to me*, adds he, *that they* " *have not only quite forgot that* [4] *Precept, but that they* " *never knew it; ſo great is now-a-days their Thirſt* " *after Riches; a Diſeaſe which has infected their* " *Minds like a common Peſtilence! They paſſionately* " *ſeek after Eſtates; they beautify their Country-Seats,* " [*improve their Lands,*] *and* [5] *lie on Gold: They* " *buy, they ſell, and in all Things diſcover an inſa-* " *tiable Thirſt for Gain. If there are any among them,* " *who ſeem to have better Principles, who are not poſ-* " *ſeſs'd of Eſtates, or engag'd in Traffick, yet they do* " *that, which is much more ſcandalous: They expect* " *Preſents without doing any Thing for them; and* " *diſhonour themſelves by taking Recompences; their* " *Holineſs being, as it were, expos'd to ſale.* To- " wards the [6] End of the ſecond Book of his *Sacred* " *Hiſtory*, you may, alſo, ſee the impartial Manner, " in which *Sulpicius Severus* relates the Perſecution, " [7] which was carry'd on againſt the *Priſcillianiſts*, " where he ſharply reprimands the Pride and Cru- " elty of ſome of the [8] *Spaniſh* Biſhops, who then " began to employ the Secular Arm againſt thoſe " People: and at length caus'd many of them to " be put to Death. In his firſt Dialogue, [9] he " gives a clear Account of the violent Methods, " which *Theophilus*, Biſhop of *Alexandria*, employ'd " againſt Hereticks; and, alſo, of the Pride of the " Clergy of *Gaul*." One of the moſt famous Doctors of that Century, is St. *Jerom*, a teſty Man, if ever there was one in the World. He had al- ways prais'd *Origen*, [10], without ever mentioning his Errors; whether it was that he thought them inconſiderable, or that he judg'd them pardonable, on Account of the many good and uſeful Things he had written. But when once the *Arians* began to take Advantage of *Origen*'s Authority, more eſpecially when *John*, Biſhop of *Jeruſalem*, who favour'd the Opinions of the Catechiſt of *Alexandria*, had drawn upon himſelf the Indignation of St. *Je- rom*; he then fell a railing moſt unmercifully againſt *Origen*, whom he had formerly cry'd up to the very Skies, and ſet himſelf [11] violently to perſecute the *Origeniſts*. *Ruffinus*, who had been St. *Jerom*'s great Friend, having declar'd himſelf for *Origen*; and having alledg'd in his own Defence, the Praiſes which St. *Jerom* had given him; what does our humble and pacifick Prieſt do, but immediately write a Book, full of the bittereſt Gall and Paſ- ſion againſt *Ruffinus*. The ſame Spirit reigns in his other Works, where he had to do with People he did not love. St. *Cyril*, Patriarch of *Alexandria*, was, in the [12] Opinion of Mr. *the Abbot Du Pin*, " A Man ambitious and violent; who, ſeeking nothing " but to augment his own Authority, no ſooner ſaw " himſelf rais'd to the Epiſcopal Chair, but he uſed " his Power to expel the *Novatians*, and ſtript their " Biſhop of all his Effects. He attack'd the *Jews* " in their Synagogues, at the Head of his People, " took from them thoſe Places of Worſhip, drove " them out of *Alexandria*, and ſuffered the *Chriſtians* " to plunder their Houſes; grounding himſelf, no " doubt, upon that pious and holy Maxim of the " Biſhop of *Hippo*, that every Thing belongs to the " Faithful, and that the Wicked can have no juſt " Title to poſſeſs any Thing. Another Time St. " *Cyril* fell out with *Oreſtes*, Governor of *Alexandria*, " on whoſe Authority he was perpetually encroach- " ing: Five [13] hundred Monks, in ſupport of their " Biſhop, one Day ſurrounded the Governor, " wounded him by a Blow with a Stone, and had " kill'd him, if the Guards, and People, had not " put a Stop to their Fury. This coſt one of the " Monks, who was taken, and put to the Rack, " his Life; but St. *Cyril* ſtrait canoniz'd him. And " his Partizans ſoon after ſacrificed *Hypatia*, a Hea- " then Lady, famous for her Learning, as a Victim " to the Biſhop's Reſentment. She was cruelly " tore to pieces, becauſe ſhe was ſaid to have irri- " tated the Governor againſt the Prelate." Would you know what were the Clergy of the *fifth*, and following *Centuries?* An Author, who cannot be ſuſpected of deſigning any Ill to the Fathers, [14] will inform us. " The Sect, ſays he, (meaning thoſe " of the *Neſtorians* and *Eutychians*) which ſprung " up, partly thro' the Indolence and Superſtition, " and partly thro' the particular Quarrels, Envy, " and Malice of the Clergy, gave the finiſhing " Stroke to the Spirit of Perſecution on Account " of Religion. 'Tis [15] true, this ſame Spirit of " Perſecution had already appear'd in the World; " but had not, as yet, exercis'd its Tyranny, with " all thoſe Circumſtances of Cruelty, with which " it has been attended ſince that unhappy Century, " *when* Diviſions aroſe about Opinions, in which

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[1] In Sect ix. Note (22) p. 19.

[2] The Article added to the Months of *March* and *April* 1701. in the *Journal* of *Trevoux*, Edit. *Amſterd.* That Article is Mr. *Le Clerc*'s.

[3] Cap. xxiii. Edit. *Lipſ.* 1709. And p. 30. Edit. *Elzev.* See, alſo, *Repub. des Lettres*, of Mr. *Bayle*, *May* 1684, p. 244, *&c.*

[4] *Levitis enim in ſacerdotium aſſumptis, nulla portio data, quo liberius ſervirent Deo.* Ibid. p. 30. Edit. *Elzevirianæ.*

[5] *Auro incubant.* Perhaps this means, that they love Gold very much, that they ſeek after it, and guard it with great Care; brooding, if I may ſay ſo, with their Eyes, over their Treaſures. See *Virg. Georg.* ii 507. *Æneid.* vi. 610.

[6] Pag. 114, *& d.* Edit. *Elzevir.*

[7] See *Pacatus*, in his *Panegyrick* on *Theodoſius*, Cap. xxix. Num. 3. p. 404. Edit. *Cellar.*

[8] See *Sulpic.* p. 118, *&c.* Edit. *Elzev.* [9] Cap. xxi. and Edit. *Elzev.* Cap. iii.

[10] See the *Quæſt. Hieron.* of Mr. *Le Clerc*, Quæſt. viii. §. 12.

[11] He himſelf brags of it in his Apology againſt *Ruffin*: *Imperatorum quoque ſcripta*, ſays he, *quæ de* Alexandria *&* Ægypto *origeniſtas pelli jubent, me ſuggerente, dictata ſunt: ut Romanæ urbis Pontifex miro eos odio deteſtetur, meum conſilium fuit: ut totus orbis, poſt tranſlationem tuam, in Origenis odia exarſerit, quem antea ſimpliciter lectitabat; meus operatus eſt ſtylus.* Hieron. Oper. Tom. ii. p. 201. Lib. i. *adv. Ruffin.* Edit. *Baſil.* " The Imperial Edicts, by which the Followers of *Origen* were " exil'd from *Egypt* and *Alexandria*, were dictated at my Requeſt. It was I who counſell'd the *Roman* Pontiff to perſue " them with the moſt violent Hatred. It was my Pen that render'd *Origen* odious to all the World, whoſe Writings before " were read with Eſteem."

[12] The Report here given of it, is in the Terms of the Extract thereof, by M. *Bernard*, *Bibl. Univerſ.* Tom. xxi. Part ii. p. 19.

[13] *Socrat. Hiſt.* Lib. vii. Cap. xiv, xv.

[14] *Diſſert. Hiſtoric. &c.* printed at *Rotterdam* in 1707. p. 8, 9. See, for the fifth Century, the Paſſages of *Iſidorus* of *Da- mietta*, quoted in the *Epiſt. Eccleſ.* and *Crit.* of Mr. *Le Clerc*, p. 167, *& ſeq.* and p. 203, *& ſeq. Edit. ſecunda.*

[15] See *Amm. Marcel.* Lib. xxii. Cap. v. p. 233. And p. 559. Edit. *Gruteri.*

" there may have been ſomething of Reality; but " *what however might have eaſily been agreed and* " *ſettl'd, had but the Spirit of Chriſtianity preſided in* " *Eccleſiaſtical Aſſemblies.* After that Time nothing " was to be ſeen in the *Eaſt*, but Proſcriptions, " Maſſacres, and Horrors. See what a Biſhop " of the fifth Century, who was perſecuted for " *Neſtorianiſm*, ſays thereupon: *I paſs by* [1] *in Si-* " *lence*, ſays he, *the Chains, the Dungeons, the Con-* " *fiſcations, the Marks of Infamy, thoſe lamentable* " *Maſſacres, the Heinouſneſs of which is ſuch, that* " *even they, who have had the Misfortune to be Eye-* " *Witneſſes thereof, can ſcarce believe them to be true:* " *All theſe Tragedies too are acted by Biſhops.*—— " *Amongſt whom down-right Impudence paſſes for Cou-* " *rage; they call their Cruelty, Zeal, and their Vil-* " *lainy is honour'd with the Name of Wiſdom.* But " this Evil ſtill went on increaſing. The Emperor " *Juſtinian* wou'd not be thought to have leſs Zeal, " than the Prelates of the fifth and ſixth Centuries: " *He thought it no Murther*, ſays *Procopius*, [2] *to con-* " *demn to Death, ſuch as made Profeſſion of a Reli-* " *gion different from his own.* All the World ſaw " the dreadful Cruelties that were committed in " theſe unhappy Ages. They ſuſtain'd Sieges in " their Monaſteries; they came to Blows in their " Councils; they enter'd the Churches Sword in " hand; [3] they treated with the utmoſt Cruelty, " all whom they ſuſpected to favour *Opinions, which* " *too often prov'd to be ſuch as no Body underſtood, not* " *even thoſe who defended them with the greateſt Zeal* " *and Obſtinacy.*" Such were the great Lights of the Church; ſuch were the Holy Fathers, which we muſt take for *Men of true Piety, and Knowledge.*

But however, what we are principally concern'd about, is the Soundneſs [4] of their Judgments, the Solidity of their Thoughts, and the Extenſiveneſs of their Knowledge: Give me Leave then to make a Parody; and apply to the Fathers ſome Verſes of a Modern [5] Satyriſt, whom *France* has not long ſince loſt.

Qu'on vante en eux l'honneur, la foi, la probité,
Qu'on priſe leur Candeur & leur ſincérité;
Qu'ils aient eu quelque fois une humeur débonnaire,
On le veut, j'y ſouſcris, & ſuis prêt de me taire:
Mais que comme un modéle on vante leurs Ecrits,
Qu'on les faſſe paſſer pour de fort bons Eſprits,
Comme aux Rois des Auteurs, qu'on leur donne l'Empire,
Ma bile alors s'échauffe, & je brûle d'écrire, &c.

Which may be *Engliſh'd* thus:

Extol them, if you pleaſe, for Probity,
For Honour, Candour, Faith, Sincerity;
Let 'em good-natur'd too ſometimes appear,
'Tis granted all, and I am ſilent here:
But that their Works, and they ſhou'd make pretence
To be the very Models of good Senſe,
That they of Writers ſhou'd as Sovereigns reign,
My Choler riſes, and I can't contain,
But muſt let looſe my Rage in the Satyrick Strain.

The Examples, which I have already produc'd, of the groſs Errors, and wrong Notions of the Fathers; what I have ſaid of Writings, where may be found an infinite Number of mean trifling Thoughts, quoted, with great Applauſe, by the paſſionate Admirers of thoſe ancient Doctors of the Church; the great Number of parallel Paſſages, which [6] divers Authors have occaſionally remark'd and criticis'd: All this might very well ſerve to excuſe me the Trouble of producing any more at preſent. I ſhall, nevertheleſs, here give the Reader a ſmall Sample, by which he may be able readily to judge of the Way of Thinking, which prevail'd in thoſe Times.

Juſtin Martyr, in the fifth [7] Chapter of his firſt *Apology*, ſays, [8] *That the evil Demons did formerly appear, that they committed Adultery with Women, and corrupted Boys*, &c. And all this he founded ſolely upon the ſixth Chapter of *Geneſis*, ℣. 4. miſunderſtood. The moſt ancient Fathers have, alſo, one after another, given out this Opinion, for certain Truth; as a learned Editor [9] of this Father has obſerv'd. *Juſtin* [10] finds the Sign of the *Croſs* in Sail-Yards, Maſts of Ships, Ploughs, Mattocks, *&c.*

St. *Irenæus*, in the Judgment of *Photius*, *has* [11] *corrupted, by foreign and weak Arguments, the Simplicity, and Truth of the Doctrines of the Church.* " Can any Thing, [12] for Example, be more inſipid, " than the Reaſons, he makes uſe of, to prove, " that there are four Goſpels, *viz.* becauſe there " are four principal Regions of the World, Eaſt, " Weſt, North, and South; or becauſe the Edi- " fice of the Church is founded on the Goſpel, " there muſt be four Columns to ſupport an Edi- " fice? *Theophylact* does not ſucceed much better, " when he ſays, that it muſt be ſo, becauſe the " Goſpel teaches us the four Cardinal Virtues; or " becauſe theſe Goſpels contain Doctrines, Pre- " cepts, Promiſes, and Threats. And don't the " five Books of *Moſes* contain the ſame Things? " St. *Maximus* and *Theophanes* ſeem to have ſuc- " ceeded ſtill worſe, when they aſſerted, that there " are but four Goſpels, becauſe there are but four " Elements. It was juſtly obſerv'd, by M. *Fa-* " *bricius*, [13] that had there been five, three, or an " hundred Goſpels, they could not have wanted " as good Reaſons to prove, why they were nei- " ther more or leſs. Such wretched Impertinences " as theſe are a Diſgrace to human Reaſon; they " might perhaps paſs in Converſation, where one " does not always maturely reflect upon what we " ſay; but when we find them ſeriouſly inſerted in " Works compos'd for the public View, and the " Inſtruction of Poſterity, the leaſt, in my Opini- " on, we can do, to be reveng'd on Authors who

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[1] *Eusebius, Tyanorum Epiſcopus, inter opera Theodoriti*, Tom. v. p. 688, and 689. *Et inter Opera Athanaſii.* Tom. ii. p. 292. *A, C.* Edit. *Colon.* 1686, *Et apud* Du Pin, *Bibl. des Aut. Eccleſ.* Tom. iv. p. 67. Col. 2. Edit. *Holland.*

[2] *Anecdot.* p. 60. Edit. *Alemanni.* [3] See *Eutychii Annales*, p. 155.

[4] See what M. *Fabricius* has ſaid on the Subject of the Credulity of the Fathers, with regard to the pretended *Sybylline* Oracles. *Biblioth. Græc.* Lib. i. Cap. xxxviii. §. 15.

[5] *Boileau*, Sat. ix. ℣. 213.

[6] See eſpecially the Remarks which *Phéreponus*, or Mr. *Le Clerc*, has made, *ex profeſſo*, on St. *Auſtin*, in the *Appendix Auguſtin.*

[7] Pag. 55. *D. Edit. Colon.*

[8] See the *Bibl. Choiſie* of Mr. *Le Clerc*, Tom. ii. p. 335, 336.

[9] *Erneſt. Grab. in ſpicilegio patrum, &c.* Tom. i. p. 347, and 359, 360. *Petavii Dogm. Theol.* Tom. iii. in Tract. *De Angelis*, Lib. iii. Cap. ii. §. 1, *&c.*

[10] See his firſt *Apology*, Cap. lxxii. p 90. *C.* Edit. *Colon.* See *Bibl. Choiſie*, Tom. iii. Article 8. p. 390. where one finds many other Examples. As, alſo, *Bibl. Univerſ.* Tom. vi. p. 22, *& ſeq.*

[11] *Cod.* 120. [12] *Repub. des Lett.* of Mr. *Bernard, Decemb.* 1703. p. 635.

[13] *In Codic Apocryph. nov. Teſtament.*

" have oblig'd us to read ſuch Stuff, is to give " ourſelves the full Liberty to diſapprove them. " St. *Cyprian* [1] quotes, at every Turn, when he " is upon the Subject of Eccleſiaſtical Diſcipline, " the Paſſages out of the Old, as well as New " Teſtament, where-ever there is the *Latin* Word " *Diſciplina*, without having any Regard to Cir- " cumſtances. We ſhall inſtance the Reaſoning he " makes uſe of againſt *Lucian* (a *Carthaginian* Prieſt " and Martyr, who was willing that thoſe ſhould " be received into the Peace of the Church, who " had ſunk under Perſecution, without obliging " them to paſs thro' all the Degrees of Penance :) " *The* [2] *Lord having commanded, that they ſhould* " *baptize all Nations in the Name of the Father, Son,* " *and Holy Ghoſt, and declar'd, that their paſt Sins* " *are forgiven them in Baptiſm*; *he* (meaning *Lucian*) " *not knowing either the Commandments, or the Laws,* " *ordains Peace, and Pardon of Sins, to be given in* " *the Name of* Paul. But how eaſy is it to ſee the " infinite Difference, between the Pardon which " GOD grants to Sins committed before Baptiſm " receiv'd in his Name, and the Remiſſion of ſome " Eccleſiaſtical Puniſhments, by the Authority of " a Martyr, who gives Order for ſo doing ?—— " In his Treatiſe of the *Unity of the Church* [3], he " maintains, that the Indiviſibility of the Church " was typify'd by our Saviour's Garment without " Seam.———He ſays, [4] that we ought to be li- " beral to the Poor, becauſe, as by Baptiſm we " obtain Pardon for all the Sins, that were com- " mitted before Baptiſm, in Virtue of the Blood " of *Jeſus Chriſt*; ſo, by giving Alms, we expiate " thoſe that are committed after.——Endeavour- " ing to refute the frivolous Excuſes, brought by " ſome, to exempt themſelves from giving Alms; " he mentions the Plea of thoſe, who alledg'd, " that the Multitude of their Children would not " ſuffer them to be ſo liberal, as they could wiſh: " To which he replies thus; that the more Chil- " dren we have, the more we ought to [5] give; " becauſe we have the more Sins to expiate, more " Conſciences to purify, and are to deliver the " Souls of a greater Number of Perſons."

St. *Jerom*, [6] " Who recommends Celibacy, as " much as he poſſibly can; and who, according " to the Cuſtom of Orators, would make any " Thing paſs for a Reaſon; makes uſe of this fine " Argument againſt *Jovinian* : [7] *Cælibes*, ſays he, " *quod cælo digni ſunt, inditum nomen*; *They have* " *given them that Name, becauſe they are worthy of* " *Heaven.*" If you would ſee an Heap of So- phiſms, and poor wretched Reaſonings, which prove nothing, or elſe prove, that Marriage is in itſelf criminal; you need only read the Remainder of that Book againſt *Jovinian*, and that which he wrote againſt *Helvidius*; [8] where he ſtrenuouſly oppoſes ſecond Marriages : In this laſt Book, he prides himſelf, in having play'd the Rhetorician and Declaimer : [9] *Rhetoricati ſumus, & in morem Declamatorum paululum luſimus.*

In another Place, [10] he makes it his Boaſt, that he wrote with great Precipitation, and without giving himſelf the Trouble to beſtow much Thought upon his Commentaries : And is accordingly found frequently contradicting himſelf. He has the Aſ- ſurance to own, in plain Terms, [11] that, in his Pole- mick Works, he had no other Aim, but to get the better of his Adverſaries; without the leaſt Con- cern, whether what he advanced were true or falſe. He ſupports himſelf by the Examples of *Origen*, *Methodius*, *Euſebius*, *Apollinaris*, and other Apo- logiſts for the Chriſtian Religion; who, as he ſays, us'd the ſame Method againſt the Heathens; mak- ing uſe of very doubtful and precarious Reaſons; and maintaining, not what they thought, but what the Intereſt of their Cauſe requir'd. Nay, further, he pretends, that, in ſo doing, he did but imitate *Jeſus Chriſt*, and [12] St. *Paul*, who maintain'd (as he would have us believe) either Side of the Argument, juſt as it ſuited their Purpoſe.

The great St. *Auſtin* alone might afford us Mat- ter enough, to furniſh out a large Volume of Im- pertinencies : I ſhall content myſelf with producing only two Inſtances. In explaining that Paſſage of *Geneſis*, Chap. iii. ℣. 14. where the *Latin* Verſion, which he us'd, reads with the *Septuagint*, *Upon thy Breaſt, and upon thy Belly ſhalt thou go, and Duſt ſhalt thou eat, all the Days of thy Life* : By [13] the *Breaſt*, ſays he, is meant *Pride*; by the *Belly*, the *Luſts of the Fleſh*; and by that which follows, *Duſt ſhalt thou eat*, *Curioſity*, which extends only to Things temporal and terreſtrial. By *Curioſity*, he means *Avarice* : And thus it is he draws his moral Reflec- tions from Scripture. His Remark on the Title of the *Pſalms* is very pleaſant. " The [14] Tranſcribers, " it ſeems, did not uſe to put before the firſt " *Pſalm*, *Pſalmus primus*, as they do now-a-days, " becauſe they did not, probably, think it at all " neceſſary; ſince there could be no Miſtake, it " being at the Head of the Book, and follow'd " by the ſecond *Pſalm*. But this would not ſerve " St. *Auſtin*'s Turn, he was for a Reaſon much more " myſterious: [15] *As this Pſalm*, ſays he, *introduces* " *GOD himſelf ſpeaking, ſo, for this Reaſon, it has* " *no Title, for fear, leſt otherwiſe ſomething elſe* " *ſhould be preferr'd before the Word of GOD*; *or leſt* " *he ſhould be call'd the firſt, which is not call'd the* " *firſt, but one* : *And, therefore, it neither could, nor* " *ought to have a Title*; *for fear, leſt if it had had the* " *Title of the firſt, it might have been believ'd to have* " *been the beſt, by its numerical Order only, and not* " *by its Authority. Or elſe*, adds he, *as has been al-* " *ready ſaid, for fear, that it might have been believ'd,* " *that the Pſalmiſt had preferr'd ſomething elſe before* " *the Word of GOD, had he put a Title before this* " *Pſalm*; *for if it had been call'd the firſt, that might* " *have been underſtood to mean, preferable to the reſt.*

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[1] Epiſt. 27. *Bibl. Univerſ.* Tom. xii. p. 264, *& ſeq.*
[2] *Epiſt.* 27. p. 53. Edit. *Oxon.*
[3] *Bibl. Univerſ.* Tom. xii. p. 283. *ex libro de Unitat. Eccleſ.* p. 109.
[4] *Bibl. Univerſ.* Tom. xii. p. 338, 339. *ex libro De Opere & Eleemoſynis*, p. 197, 205.
[5] *De Oper. & Eleemoſ.* p. 205. Edit. *Fell.* (243 *Baluz.*) [6] *Repub. des Lett. May* 1702. p. 502.
[7] *Adv. Jovinium*, Lib. ii. at the End. See, alſo, my Treatiſe of *the Morality of the Fathers.*
[8] See the Eighth *Hieronym. Quæſt.* of Mr. *Le Clerc.*
[9] *Adverſ. Helvid. in fin.* See *Eraſmus*'s Note on the Place.
[10] *Comment. in Abdiam, ſub fin. & præfat.* Lib. ii. *in Epiſt. ad Epheſ.*
[11] The Reader may ſee this Paſſage quoted at length, and the Senſe of it defended, againſt the Cavils of *P. Ceillier*, in my Treatiſe of *the Morality of the Fathers*, Cap. xv. §. 35, and following.
[12] *Nonne nobis loquitur cum ſervatore, aliter foris, aliter domi loquimur ?* Ibid. p. 106. " Does not he ſpeak to us like " our Saviour ? We ſay one Thing at home, and another abroad."
[13] Lib. ii. *De Geneſi contra Manich*, Cap. xvii, xviii. See *Les Obſervat. Hall.* Tom. iv. Obſervat. 5.
[14] *Sentimens de quelques Theol. de Holl.* p. 362. See my Treatiſe of *the Morality of the Fathers*, Cap. xvi. §. 46, and following.
[15] *Auguſtin. Oper.* Tom. viii. Col. 10. *C.* Edit. *Baſ.*

" *And*

" *And therefore*, concludes he, *to the End that we* " *may manifeſtly ſee, how much this* Pſalm *is diſtin-* " *guiſh'd above the reſt, it is the only one that has no* " *Title.*" " Reconcile, if you pleaſe, the Concluſion " with the Premiſes."

As I am quite tired with copying ſo many injudicious, and inſipid Things; ſo there is more than enough of it, to ſet, in their true Light, the Characters of the Authors in queſtion, and to let the Reader ſee *ex ungue Leonem*. I have deſignedly pitch'd upon Examples, which had been already remark'd, and produc'd by others; and are extant in Books well known, and eaſy to be had. By this we may ſee, that it ill becomes our zealous Defenders of the *Fathers*, to require us to believe, upon their Word, that they were *Men of true Piety, and Knowledge*; againſt ſo many notorious Proofs, which demonſtrate, even at firſt Sight, that their Virtues were, in general, far from being extraordinary; and were mixt with great Defects: Some of them were even ſuſpected of Hypocriſy: As for the Turn of their Mind, it was often falſe and irregular: They had a much greater Share of Imagination, than good Senſe; that they were deſtitute of many Helps, neceſſary to the augmenting and perfecting that Knowledge, they were Maſters of; and that they even neglected [1] thoſe Helps, which they actually had, or might have procur'd: Conſequently, their [2] Knowledge muſt needs have been very limited: In a Word, that the moſt able amongſt them, are, in nothing, comparable to the good Authors of ours, or the laſt Age; for either Solidity of Thought, Stile, Order, or Method. And now is it poſſible to regard the Fathers, as Men of Learning and Judgment, after all the Citations we have given from their Writings? A Man of the greateſt Knowledge and Penetration in the World, I muſt own, may be miſtaken, and may give into ſome falſe Notion; but then it muſt be a Notion, that has, at leaſt, ſome Plauſibility, and this too is what will not often happen: But I affirm, that a Man of tolerable good Senſe will never be guilty of thoſe Extravagancies, which we ſee the Fathers, almoſt all of them, have run into. None but thoſe, who are capable of ſaying as ſilly Things themſelves, or who are ſtrangely blinded by a Spirit of Party, could ſo much preach up the Authors of ſuch arrant Trifles. But, to their great Mortification, we do not now live in an Age, that will paſſively ſubmit to ſuch Treatment: The Publick is no longer to be impos'd upon by ſuch Sort of grave Affirmations, void of all Proof; and contradicted by an infinite Number of deciſive Reaſons, fairly expos'd to the publick View. 'Tis a moſt ridiculous fond Conceit, to imagine (that, without having ſo much as attempted to diſprove Facts, ſo clear as thoſe which have been alledg'd) they may get off, by producing ſuch a pitiful Reaſon of Congruity as this; (*viz.*) *If the Chriſtian Religion had not for its Propagators Men of true Piety and Learning, what Opinion muſt we have of it?* As we are under no Obligation to account for the Conduct of God, either for what he does, or what he does not; for what he permits, or directs, according to the ſecret Methods of his Providence: So, inſtead of ſaying, *ſuch or ſuch a Thing is contrary to the Deſigns of GOD, or to his Attributes; therefore GOD could not have done, or permitted it*; I think (and I have all the Reaſon in the World to think ſo) that we ſhould rather argue thus: *GOD has done, or permitted ſuch or ſuch a Thing; therefore, there is nothing in it contrary to his Deſigns, or to his Attributes:* Altho' it may not always, in our weak, and narrow Underſtandings, be clearly reconcilable with the Views, and infinite Perfections of that Sovereign Being. But however, as he has not forbidden us to enquire after, and, with due Reverence, to examine the Reaſons he might have had, not to interpoſe, in an extraordinary Manner, to prevent certain Things; ſo, if we would a little exert the Faculties of our Souls upon the Subject of the Fact in queſtion, we might eaſily diſcover enough, both to ſatisfy ourſelves, and to ſtop the Mouths of thoſe, who would have God always to act according to their Caprice. " If after the Times of the Apoſtles, we " find nothing, but what is very mean and con- " fus'd in that firſt Riſe of Chriſtianity; it was " probably (as Mr. [3] *Le Clerc* has very well remark'd) " ſo order'd, to the End, that it might " not be ſaid, in future Ages, that there were, in " thoſe Days, Men able enough to form ſuch a " Religion as Chriſtianity, and aſcribe ſuppoſititious " Books to its firſt Authors; ſince there is no- " thing to be ſeen after them, that comes up to " their genuine Writings: Not only none of the " Heads of the ſeveral Sects, which ſprung up at " that Time, but none, even of thoſe who pro- " feſs'd to follow the Apoſtles, as their ſole Guides, " have produc'd any Thing, that comes near the " Stile of thoſe holy Men. There is, in their Man- " ner of Writing, ſo much unaffected Plainneſs, " and native Sincerity, if I may ſo ſay, that we " may, from thence, moſt clearly diſcern, that " what they tell us, is not of their own Invention; " but the real Dictates of *Jeſus Chriſt*, and of that " Spirit, which he had conferr'd upon them." Certain it is, that, conſidering the Books of the New Teſtament with reſpect to the reaſoning Part, not one of the Fathers, take them as they really were, would ever have been able to compoſe Works, full of that good Senſe, which ſo viſibly reigns throughout the Goſpels and Epiſtles of the Apoſtles. It may, alſo, be ſaid, that God, in permitting the Fathers of the Church to be ſo inaccurate in their Writings, and oftentimes ſo irregular in their Conduct; was willing to ſhew, that the Chriſtian Religion, which was to continue to the End of the World, both can, and will maintain itſelf, by its own Efficacy; notwithſtanding all the Ignorance and Wickedneſs of thoſe, who ought to have been its chief Supporters. And ſhould this be deem'd to imply any Thing, that is contrary to the Wiſdom of God, or injurious to the Chriſtian Religion; it may be prov'd, by the ſame Rule, that there ought not to have been, under Chriſtianity, Ages of univerſal Ignorance and Corruption, eſpecially amongſt the Clergy; like thoſe which preceded the Reformation: And thus our zealous Defenders of the Fathers will have juſt as good a Foundation to maintain, contrary to the Truth of all Hiſtory, that thoſe Ages were not ſuch, as they are generally believ'd to have been. But entirely to ſilence ſuch, as are not aſham'd to urge this wretched Argument; which, whatever Light it is view'd in, affords not the leaſt Colour of Reaſon; I ſhall take occaſion to add, in a few Words, three or four Reflections. The firſt is; that neither *Jeſus Chriſt*, nor his Apoſtles, have any where ſaid, or in any wiſe given us to underſtand, that thoſe, who, after them, might be regarded as the *Propagators of*

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[1] See Mr. *Le Clerc*'s *Crit.* and *Eccleſ. Lett.* Epiſt. iv. p. 107, & *ſeq.* and Edit. 2. p. 128, & *ſeq.* And the *Bibl. Choiſie*, Tom. xi. p. 102, & *ſeq.*

[2] The Erudition of even thoſe, who paſs'd for the moſt learned, was very common, and coſt them little or no Pains; as Mr. *Bernard* has very well obſerv'd, in his *Repub. des Lett. March* 1699. p. 259.

[3] *Bibl. Choiſie*, Tom. iv. p. 356, 357.

the Christian Religion, ſhould be Men of true Piety and Knowledge. So very far from it, that they gave us Room to expect quite another Thing. The Parable of the Tares ſow'd by the [1] Enemy; and that of the [2] Net that gather'd of every Kind; ſhew us plainly enough, that, in the Chriſtian Church, the Wicked were to be very much intermix'd with the Good; inſomuch, that theſe latter were not to have the Aſcendant, or make a better Figure in it than the others. Our Lord hath foretold the Diviſions, which the Ignorance, the vain Subtilties, the Temerity, the Preſumption, and Paſſions of theſe *Propagators* of his Religion would produce in the Church. And St. *Paul* aſſures us, [3] *That there muſt be Sects* (or Schiſms, and Diviſions) *to the End, that thoſe who ſhould be worthy of Approbation, might be made manifeſt*; (that is to ſay) that a Mind, free from Prejudice, and which judges not of Things by Appearances, might be able to diſtinguiſh thoſe, who were really attach'd to Truth and Virtue. When the Apoſtles are telling us what was to happen in the Church, they [4] expreſs themſelves in ſuch a Manner, as gives us all the Reaſon in the World to believe, that the Clergy were not, for the generality, to be Men of the greateſt Piety, and Underſtanding: In the very Days of the Apoſtles, there were Men of turbulent Spirits, and falſe Teachers; againſt whoſe Temerity and Seduction thoſe holy Men were oblig'd to oppoſe themſelves. There was, even at that Time, to be ſeen, *Diotrephes*, [5] a Man who rail'd againſt St. *John*; who treated as Hereticks, and excommunicated, thoſe whom the Apoſtle held for Brethren.

The ſecond Obſervation I have to make, is; that, in the firſt Ages of Chriſtianity, as well as in the following, the Men, moſt applauded, and who bore the greateſt Character in the Church, were not always thoſe, who had the greateſt Share of good Senſe, or were the moſt eminent for Learning and Virtue. It was not, for the moſt Part, [6] then, any more than it is now, Merit, which ſerv'd to raiſe Men to the higheſt Eccleſiaſtical Dignities. Thus, notwithſtanding that Corruption, both of Taſte and Manners, which reign'd, more or leſs, thro' every Age; it is not to be doubted, but that there were, both amongſt the People and Clergy, Men of more Senſe, Knowledge, Moderation, Juſtice, and Piety, than theſe, whoſe Names and Writings have been tranſmitted down to us with ſo much Pomp and Oſtentation. Let the Reader judge, to which of the two, the Name and Title of *Propagators of the Chriſtian Religion*, does moſt properly belong; whether to thoſe we do, or to thoſe which we do not know; becauſe the former made it their Buſineſs, both to prevent the latter making any Figure while they liv'd, and to hinder their Memory from being handed down, with Advantage, to Poſterity. Amongſt theſe latter, ſome out of Fearfulneſs; others thro' Prudence, or the Impoſſibility which they ſaw there was of ſucceeding; declin'd the entering into Conteſts, with Men more powerful than themſelves: And if any one prov'd ſo hardy, as to oppoſe thoſe Doctors, who had gain'd the Admiration of the Populace, he ſoon found, there was no Good to be got by it: Witneſs the Affair of *Vigilantius* with St. *Jerom*.

I obſerve, in the third Place, that we have no other Occaſion, with reſpect to the Intereſts of the Chriſtian Religion, for the Writings of Eccleſiaſtical Antiquity; than as they furniſh us with hiſtorical Evidence, of what has paſs'd, and been believ'd in the Time of each Writer. This is, in expreſs Terms, acknowledg'd by an Author, whom I have already quoted: *When* [7] *the Proteſtants*, ſays he, *conſult the Fathers and the Councils, they make no other Uſe of that Study, but to learn the Hiſtory of their Doctrines, and to diſcover the Beginnings of Error; ſo far are they from looking there for the Foundations of their Faith.* Now, after this, to come and cry out, that all is loſt, if we have not a profound Veneration for the Fathers; and but venture freely, and impartially, to ſpeak our Minds of them; is plainly ridiculous. The very Diviſions, which their Ignorance, Paſſions, and vain Subtilties, have produc'd in the Church, contribute not a little to aſſure us, that no conſiderable Corruption has crept into the Text of the Holy Scriptures; ſince it is plain, had it been ſo, that the oppoſite Party would not have fail'd to have openly reproach'd the other with ſuch a wicked Attempt.

My fourth, and laſt Obſervation, is, that, notwithſtanding the great Inaccuracy of the Fathers, which has often caus'd them to commit conſiderable Errors; notwithſtanding that ſtrange Fancy they had for Sophiſtry, which made them neglect Things of much greater Importance; notwithſtanding all this, I ſay, the fundamental Doctrines of Religion and Morality have ſtill been preſerv'd amongſt Chriſtans; even in [8] the moſt dark and corrupt Ages. If ſeveral Falſities have been added and intermix'd with theſe Doctrines, or if they have not been explain'd, and carried to their full Extent; this is no Way the Fault of the Goſpel. But Providence has, at length, highly juſtify'd itſelf, if I may ſo ſay, in the Eyes of all thoſe, who would, otherwiſe, have prepoſterouſly laid to its Charge, the Neglects and erroneous Judgments of Men. *God* has rais'd up a Set of Men, who have introduc'd a better Manner of ſtudying and reaſoning. We improve daily in rightly expounding the Holy Scriptures, and in treating Morality as it deſerves. A good Taſte begins to prevail, and there is reaſon to hope, that it will, in due Time, make a conſiderable Progreſs, notwithſtanding the Efforts of thoſe, who are labouring to bring us back to the Uſe of Huſks and Acorns. In one Century more, perhaps, the Fathers of the Church, and their paſſionate Admirers, will be generally regarded no more than they deſerve.

But it is Time to cloſe this long Digreſſion. I thought it neceſſary, once for all, utterly to deſtroy the only Subterfuge which theſe boaſted Defenders of the Fathers had left. We ſhall now reſume the Thread of our Hiſtory of Morality. After what has been ſaid of the little Care taken by the Doctors of the Church of the ſix firſt Centuries, to cultivate it, it would be ſuperfluous to run over the following Ages, wherein Ignorance and Corruption, augmenting ſtill more and more, aroſe at length to ſuch a Pitch, as that there was hardly to be ſeen, eſpecially among the Clergy, the leaſt Spark of good Senſe, or Virtue, left. Not to mention that

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[1] *Matth.* xiii. 24, *& ſeq.* See the *Epiſt. Crit. & Eccl.* of Mr. *Le Clerc*, p. 121, 122. And p. 146, *& ſeq.* Edit. 2. And his Treatiſe of *Incredulity*, p. 189, *& ſeq.* And p. 199. Edit. 2.

[2] See *Matth.* xiii. 47.

[3] 1 *Cor.* xi. 19.

[4] See 2 *Theſſ.* ii. 3, *& ſeq.* 1 *Tim.* iv. 1, *& ſeq.* 2 *Pet.* iii. 3, *& ſeq.* *Jude* 18, *& ſeq.*

[5] 3 *Joh.* 9, 10.

[6] See what *Gregory Nazianzene* ſays of the Times he liv'd in, in his Life, publiſh'd by Mr. *Le Clerc*, *Bibl. Univ.* Tom. xiii. p. 56, 89, 92, 119.

[7] *Diſſ. Hiſtoriques, &c.* p. 217.

[8] See Mr. *Le Clerc*'s Treatiſe, *De eligenda inter Chriſtianos diſſentientes ſententia*, (which is at the End of the laſt Edition of *Grotius, De Ver. Rel. Chriſ.*) §. 7.

vaſt Number of ridiculous Superſtitions, that different kinds of Idolatry, which had entirely defac'd Chriſtianity; there were beſides a thouſand deteſtable Maxims eſtabliſh'd, worthy only of the groſs Darkneſs of thoſe unhappy Centuries. The Biſhop [1] of *Rome* pretended to be inveſted with a Power of depoſing ſuch Kings, as he ſhould judge to be Hereticks; and to abſolve their Subjects from their Oaths of Allegiance. A Principle which the Popes have always reduced to practice, every Time they thought they could do it without Inconveniency. Every one knows to what Exceſs the Traffick of *Indulgencies* [2] were carry'd. An *Italian*, call'd [3] *John Giglis*, or *Des Lis*, (*De Liliis*), who was made Biſhop of *Worceſter* by the Authority of the Pope, receiv'd from him, at the ſame Time, the Power to pardon all ſorts of Crimes; and to permit any one to retain the Goods of another, howſoever acquir'd, provided part thereof was given to the Commiſſaries of the Pope, or to his Subſtitutes. 'Tis well known, that ſeveral of the Popiſh Writers have maintain'd, without diſguiſe, *That no Faith is to be kept with Hereticks.* Thoſe who endeavour to excuſe themſelves from the Belief of ſo wicked an Opinion, make uſe of frivolous Subterfuges, which tend only to deſtroy all mutual Truſt, or Obligation, between Men. Indeed it is only by ſuch Sophiſtry they can ſave the Credit of the Council of *Conſtance*, in regard to the Deciſion [4] given by it, with reſpect to the ſafe Conduct of *John Hus*.

SECT. XI.

THE Light of the *Reformation* did, in a great Meaſure, reſtore, amongſt *Proteſtants*, Purity both of Doctrine and Practice. But yet it cannot be truly ſaid, that even the Reformers themſelves, and their Succeſſors, have always exactly purſu'd the true Spirit of Chriſtianity, and of the Reformation. Was not that horrible Maxim of Intoleration, or Perſecution, on Account of Religion, maintain'd by two Treatiſes, written for that very Purpoſe; the one by *Calvin* [5], and the other by [6] *Beza?* And did not *Calvin* actually put theſe his Principles in practice, [7] in the Caſe of *Servetus?* Are there not, at this Day, Numbers who, after having for many Years, and in divers Manners, themſelves felt the dire Effects of Intoleration, cannot yet be brought formally to own, that all Perſecution, or Vexation whatever, whether great or ſmall, direct or indirect, on Account of Religion, is downright Tyranny? Have we not ſeen ſome of them, bold enough to aſcribe the Progreſs Chriſtianity has made in the World, to this Way of making Converts, by expreſly maintaining, *That* [8] Paganiſm *wou'd have ſubſiſted to this Day; and that three Fourths of* Europe *wou'd have been ſtill* Heathens, *had not* Conſtantine *and his Succeſſors employ'd their Authority to aboliſh it.* Are not [9] others for reviving that pernicious Maxim of St. *Auſtin*, that ſuch as believe not in *Jeſus Chriſt*, cannot be look'd upon as lawful Poſſeſſors of the Goods of this World? If we conſider how few good Books of Morality we have, eſpecially in our Language, in Compariſon of the infinite Number of controverſial Writings, which crowd our Libraries and Bookſellers-Shops; we may from thence readily conclude, that Morality is a Study greatly neglected. Neither do the publick [10] Sermons ſeem to be very inſtructive on this Head: And that no one may doubt of it, we ſhall produce authentick Teſtimonies, fully ſufficient to convince us thereof. Mr. *La Placette*, Paſtor of the *French* Church at *Copenhagen*, in [11] his *Treatiſe of Reſtitution*, introduces ſome of thoſe, who had miſcarry'd for having neglected this important Duty, complaining of their Teachers at the Day of Judgment, in the Terms following: "We "could have very well diſpens'd with ſo many "vain Speculations; ſo many frivolous Diſquiſi-"tions; ſo many metaphyſical Enquiries; ſo many "uſeleſs Controverſies about Things, in which we "had no real Concern: and which have been the "principal Matter of your Sermons. We ſee no "Body damn'd for their Ignorance of a hundred "Things which you have taught, with an Exactneſs, "and Earneſtneſs, which you might have very well "ſpar'd. But here we are in this diſmal Place for "Breach of that Duty, of which you never told us one "ſingle Word. You have ſuffer'd us to approach the "Holy Table, without forewarning us, that we "came thither unworthily, and there receiv'd our "own Damnation, if we did not firſt entirely "empty both our Hands and Coffers of all our "unjuſt Gains. You have indeed preach'd up to "us the Mercy of God: You have, alſo, preſs'd us "to implore it with the moſt affectionate Devotion, "and the moſt lively Hope; but without ſaying "one Word of the Impoſſibility of obtaining the "Effects thereof, if we obſtinately continu'd in our "Injuſtice, and, conſequently, in Impenitency; "which all moſt certainly do, who reſtore not that "which they have unjuſtly acquir'd. In a word, "'tis you who have let us remain ignorant of theſe "capital Truths, whilſt we might have profited by "them; 'tis you who are the Cauſe, that we "learn'd them not till now, when they will only "ſerve to render us inexcuſable, and convince us "that we periſh juſtly." Mr. *Oſtervald*, Miniſter of *Neufchatel* in *Swiſſerland*, makes a parallel Con-

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[1] See the 4th *Lateran* Council held at *Rome* in 1215, Canon the third. You may find the Canon tranſlated, Tom. ix. of the *Bibl. Univerſ.* p. 39. See, alſo, Tom. xi. p. 387. And the Treatiſe, by Mr. *Du Pin, De la Puiſſance Eccleſ. & Temporelle* printed in 1707. As likewiſe *Caranza*'s *ſumma Concil.* p. 603 printed 1659.

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[5] *Fidelis expoſitio errorum* Mich. Serveti, *& brevis eorumdem refutatio:* ubi docetur, jure gladii coercendos eſſe Hæreticos.

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[7] See *Bibliotheq. Angloiſe* of M. *de la Roche*, Tom. ii. Artic. 7.

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[9] See *P. Molin. Anatom. Arminianiſmi*, Cap. xxxii. Diſt. 18. *Macov. Diſtinct.* Cap. iii. §. 18. *Theol. Quæſt.* Loc. 25. Quæſt. 19. *Voetius, &c.*

[10] As this Tranſlation is principally deſign'd for thoſe who underſtand the *French* better than any other Language; the Reader will take Notice, that I here except the *Engliſh* and *Dutch* Writers, having no Acquaintance with thoſe Tongues.

[11] Pag. 51, 52. See, alſo, p. 147.

feſſion : take it as reported, by a third [1] Miniſter, which is Mr. *Bernard*, the learned and judicious Continuator of the *Nouvelles de* [2] *la Republique des Lettres.* "The Ignorance, ſays he, "of the Duties of Chriſtianity, is both very general, and very great. There are ſome of them "which vaſt Numbers have never thought on. "The Author here inſtances in the Duty of *Reſtitution*, and tells us, that Mr. *La Placette* having "ſome Time ago publiſh'd a Treatiſe on that Subject, the Book was look'd upon as very ſingular, "and for its Subject new and curious; and that "ſome there were, who treated this Doctrine of "*Reſtitution*, as a Doctrine entirely new, and withal "too rigid.——There are even ſome who aſſert, "that Points of Morality ought not to be urg'd "too far; that ſome Indulgencies ought to be "ſhewn to human Nature; and, at the ſame Time, "rigidly inſiſt upon Points of ſpeculative Doctrine; "*and on ſuch too oftentimes, as are of very little* "Importance. Some, alſo, have proceeded ſo far, "as to ſay, that it is even dangerous to inſiſt ſo "much upon Morality; and that it is a Mark of "Hereſy. Some Divines have, likewiſe, had the "Aſſurance to publiſh Books, wherein they have "openly attempted to decry good Works. Is it "to be wonder'd at then, if the People, who are "committed to the Care of ſuch Guides, do not "give themſelves much Trouble about the Practice "of them?——The Doctors appointed to inſtruct "the People in Religion, fall out with one another "about unprofitable Queſtions; ſo that while the "Paſtor is taken up in his Cloſet, or in the Pulpit, "in confuting an Adverſary, that perhaps he has "never ſeen; or in combating an Error utterly "unknown to his Flock, his Sheep go aſtray, his "Auditors become confirm'd, as to their Morals, "in the moſt capital Errors, and deeply engag'd "in vicious Habits, and evil Courſes." Here you have the Depoſitions of unexceptionable Witneſſes. And I wiſh it could be ſaid, to the Honour of thoſe, againſt whom theſe Imputations have been but too juſtly brought, that they begin now to open their Eyes, and change their Proceedings. But, I very much fear, that the greateſt part of them will for ſome Time continue ſtill prepoſſeſs'd with this Notion, ſo contrary to the Engagements of their Miniſterial Function, that a flaming Zeal for ſpeculative Doctrines, which coſt them not much Pains to acquire, and in maintaining of which they find their Account, will excuſe them the Labour of entring deep into the ſerious Study of Morality: which requires much profound [3] Meditation, and Knowledge, beyond the rate of Common-Place Learning. It would be very well, if they would leave thoſe to interpoſe, who exert their utmoſt to do that Duty, which they neglect. But their Predeceſſors have ſet them an Example, and they will by no Means degenerate. Who was it, I pray, that introduc'd, in the laſt Age, the methodical Study of the Law of Nature; that firſt attempted to give the World a Syſtem of ſo extenſive, and neceſſary a Science? Was it any of the Eccleſiaſticks, or Profeſſors of Divinity? No: 'twas the illuſtrious *Grotius*, whoſe Memory wou'd, on this very Account, be for ever bleſs'd amongſt all ſincere Lovers of Truth, and Virtue; tho' he had not otherwiſe gain'd an immortal Reputation, by the many Pieces he has wrote of another Nature, all excellent in their Kind.——Yet no ſooner did that admirable Treatiſe, of the *Right of War and Peace*, appear in the World; but the Eccleſiaſticks, inſtead of returning Thanks to the Author for it, every where declar'd againſt him: And his Book was not only put into *the Expurgatory Index* of the [4] *Roman Catholick* Inquiſitors, (which is not ſo much to be wonder'd at;) but many, even Proteſtant Divines, labour'd to cry it down. And thus it far'd too with Mr. *Pufendorf*'s Book of, *The Law of Nature and Nations.* The *Jeſuits* of *Vienna* caus'd it to be prohibited [5]; and many Proteſtant Divines, both of *Sweden* and *Germany*, did their beſt, to make this excellent Work ſhare every where elſe the ſame Fate.

SECT. XII.

MORALITY, thus ſlighted, and almoſt baniſh'd out of the World by the publick Miniſters of Religion, took Sanctuary amongſt the Laity, or plain Men of Letters, who gave her a much kinder Reception. Let us now ſee in what Manner theſe latter have treated her, and what Progreſs ſhe hath made in their Hands. It may very probably be ſuppos'd, that, notwithſtanding the Simplicity and Ignorance of the firſt Ages of the World, as to what concern'd Arts and Sciences, purely ſpeculative; thoſe Fathers of Families, who were Men of good Senſe and Probity, did not fail to [6] teach their Children betimes, together with the Principles of Religion, the moſt important Maxims of Morality, as far as they knew them, either by their own Reflection, or by [7] Tradition, handed down to them by the firſt Parents of Mankind. Theſe Inſtructions, however ſuperficial, and immethodical they may poſſibly have been, might well enough ſuffice for thoſe Times, eſpecially before Corruption had come to that Height, at which it afterwards arriv'd. But when Depravity of Manners had defac'd the true Ideas of Religion and Morality, and the Fathers were become as negligent in inſtructing their Families, as their Children prov'd ſtubborn and unteachable; then had the cleareſt and moſt common Principles of Virtue been in a Manner entirely extinguiſh'd in the World, had there not been a Set of Men, who apply'd themſelves, in a very particular Manner, to the Improvement of their natural Reaſon, by the Study of the Sciences. It is from their Schools that [8] the moſt celebrated Legiſlators have proceeded, to whom Communities have been beholden for all the Order

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[1] Mr. *Bernard*, Paſtor of the *Walloon* Church at *Leyden*, and Profeſſor of Philoſophy and Mathematicks in the Univerſity of that Town, deceaſed, *April* 27, 1718.

[2] *November* 1699, in the Extract of the Treatiſe *Des ſources de la Corruption, &c.* p. 582, 583, 585.

[3] See the Reflections Mr. *Bernard* makes, in his *Repub. des Lettres, April* 1706, Art. i. And which drew upon him an inſipid Libel, by a petty *French* Miniſter.

[4] *Ann* 1627. See *Boecler*'s *Preface* to *Grotius*.

[5] See an Account of all theſe Diſturbances in the *Eris Scandica*, printed at *Francfort* on the *Main* 1686.

[6] See the *Hiſt. du Droit Naturel*, by Mr. *Buddeus*, §. 2.

[7] See *Bibl. Univerſ.* Tom. iii. p. 322.

[8] *Hi* [*Zaleucus, Charondas*] *non in foro, nec in conſultorum atrio, ſed in Pythagoræ tacito illo ſanctoque ſeceſſu didicerunt jura, quæ florenti tunc Siciliæ; & per Italiam Græciæ ponerent.* Senec. Epiſt. xc. p. 301. Edit. *Gronov.* "Theſe (*Zaleucus, Charondas*) did not ſtudy Laws in the *Forum*, nor in the Senate Houſe, but in the ſilent and ſacred Receſs of *Pythagoras*, whence they deriv'd thoſe Maxims of State, which adorn'd the moſt flouriſhing Republics of *Greece* and *Sicily*."

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[11] Pag. 51, 52. See, alſo, p. 147.

feſſion:

feſſion: take it as reported, by a third [1] Miniſter, which is Mr. *Bernard*, the learned and judicious Continuator of the *Nouvelles de* [2] *la Republique des Lettres*. "The Ignorance, ſays he, "of the Duties of Chriſtianity, is both very gene-"ral, and very great. There are ſome of them "which vaſt Numbers have never thought on. "The Author here inſtances in the Duty of *Reſti-"tution*, and tells us, that Mr. *La Placette* having "ſome Time ago publiſh'd a Treatiſe on that Sub-"ject, the Book was look'd upon as very ſingular, "and for its Subject new and curious; and that "ſome there were, who treated this Doctrine of "*Reſtitution*, as a Doctrine entirely new, and withal "too rigid.——There are even ſome who aſſert, "that Points of Morality ought not to be urg'd "too far; that ſome Indulgencies ought to be "ſhewn to human Nature; and, at the ſame Time, "rigidly inſiſt upon Points of ſpeculative Doctrine; "and on ſuch too oftentimes, as are of very little "Importance. Some, alſo, have proceeded ſo far, "as to ſay, that it is even dangerous to inſiſt ſo "much upon Morality; and that it is a Mark of "Hereſy. Some Divines have, likewiſe, had the "Aſſurance to publiſh Books, wherein they have "openly attempted to decry good Works. Is it "to be wonder'd at then, if the People, who are "committed to the Care of ſuch Guides, do not "give themſelves much Trouble about the Practice "of them?——The Doctors appointed to inſtruct "the People in Religion, fall out with one another "about unprofitable Queſtions; ſo that while the "Paſtor is taken up in his Cloſet, or in the Pulpit, "in confuting an Adverſary, that perhaps he has "never ſeen; or in combating an Error utterly "unknown to his Flock, his Sheep go aſtray, his "Auditors become confirm'd, as to their Morals, "in the moſt capital Errors, and deeply engag'd "in vicious Habits, and evil Courſes." Here you have the Depoſitions of unexceptionable Witneſſes. And I wiſh it could be ſaid, to the Honour of thoſe, againſt whom theſe Imputations have been but too juſtly brought, that they begin now to open their Eyes, and change their Proceedings. But, I very much fear, that the greateſt part of them will for ſome Time continue ſtill prepoſſeſs'd with this Notion, ſo contrary to the Engagements of their Miniſterial Function, that a flaming Zeal for ſpeculative Doctrines, which coſt them not much Pains to acquire, and in maintaining of which they find their Account, will excuſe them the Labour of entring deep into the ſerious Study of Morality: which requires much profound [3] Meditation, and Knowledge, beyond the rate of Common-Place Learning. It would be very well, if they would leave thoſe to interpoſe, who exert their utmoſt to do that Duty, which they neglect. But their Predeceſſors have ſet them an Example, and they will by no Means degenerate. Who was it, I pray, that introduc'd, in the laſt Age, the methodical Study of the Law of Nature; that firſt attempted to give the World a Syſtem of ſo extenſive, and neceſſary a Science? Was it any of the Eccleſiaſticks, or Profeſſors of Divinity? No: 'twas the illuſtrious *Grotius*, whoſe Memory wou'd, on this very Account, be for ever bleſs'd amongſt all ſincere Lovers of Truth, and Virtue; tho' he had not otherwiſe gain'd an immortal Reputation, by the many Pieces he has wrote of another Nature, all excellent in their Kind.——Yet no ſooner did that admirable Treatiſe, of the *Right of War and Peace*, appear in the World; but the Eccleſiaſticks, inſtead of returning Thanks to the Author for it, every where declar'd againſt him: And his Book was not only put into *the Expurgatory Index* of the [4] *Roman Catholick* Inquiſitors, (which is not ſo much to be wonder'd at;) but many, even Proteſtant Divines, labour'd to cry it down. And thus it far'd too with Mr. *Pufendorf*'s Book of, *The Law of Nature and Nations*. The *Jeſuits* of *Vienna* caus'd it to be prohibited [5]; and many Proteſtant Divines, both of *Sweden* and *Germany*, did their beſt, to make this excellent Work ſhare every where elſe the ſame Fate.

SECT. XII.

MORALITY, thus ſlighted, and almoſt baniſh'd out of the World by the publick Miniſters of Religion, took Sanctuary amongſt the Laity, or plain Men of Letters, who gave her a much kinder Reception. Let us now ſee in what Manner theſe latter have treated her, and what Progreſs ſhe hath made in their Hands. It may very probably be ſuppos'd, that, notwithſtanding the Simplicity and Ignorance of the firſt Ages of the World, as to what concern'd Arts and Sciences, purely ſpeculative; thoſe Fathers of Families, who were Men of good Senſe and Probity, did not fail to [6] teach their Children betimes, together with the Principles of Religion, the moſt important Maxims of Morality, as far as they knew them, either by their own Reflection, or by [7] Tradition, handed down to them by the firſt Parents of Mankind. Theſe Inſtructions, however ſuperficial, and immethodical they may poſſibly have been, might well enough ſuffice for thoſe Times, eſpecially before Corruption had come to that Height, at which it afterwards arriv'd. But when Depravity of Manners had defac'd the true Ideas of Religion and Morality, and the Fathers were become as negligent in inſtructing their Families, as their Children prov'd ſtubborn and unteachable; then had the cleareſt and moſt common Principles of Virtue been in a Manner entirely extinguiſh'd in the World, had there not been a Set of Men, who apply'd themſelves, in a very particular Manner, to the Improvement of their natural Reaſon, by the Study of the Sciences. It is from their Schools that [8] the moſt celebrated Legiſlators have proceeded, to whom Communities have been beholden for all the Order

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[1] Mr. *Bernard*, Paſtor of the *Walloon* Church at *Leyden*, and Profeſſor of Philoſophy and Mathematicks in the Univerſity of that Town, deceaſed, *April* 27, 1718.

[2] *November* 1699, in the Extract of the Treatiſe *Des ſources de la Corruption*, &c. p. 582, 583, 585.

[3] See the Reflections Mr. *Bernard* makes, in his *Repub. des Lettres*, *April* 1706, Art. i. And which drew upon him an inſipid Libel, by a petty *French* Miniſter.

[4] *Ann* 1627. See *Boecler*'s *Preface* to *Grotius*.

[5] See an Account of all theſe Diſturbances in the *Eris Scandica*, printed at *Francfort* on the *Main* 1686.

[6] See the *Hiſt. du Droit Naturel*, by Mr. *Buddeus*, §. 2.

[7] See *Bibl. Univerſ.* Tom. iii. p. 322.

[8] *Hi* [*Zaleucus, Charondas*] *non in foro, nec in conſultorum atrio, ſed in Pythagoræ tacito illo ſanctoque ſeceſſu didicerunt jura, quæ florenti tunc Siciliæ; & per Italiam Græciæ ponerent.* Senec. Epiſt. xc. p. 301. Edit. *Gronov.* "Theſe (*Zaleucus, Charondas*) did not ſtudy Laws in the *Forum*, nor in the Senate Houſe, but in the ſilent and ſacred Receſs of *Pythagoras*, whence they deriv'd thoſe Maxims of State, which adorn'd the moſt flouriſhing Republics of *Greece* and *Sicily*."

and Decency they have ever had amongſt them, and for all the Tranquillity they ever enjoy'd: [1] *Men more worthy of Admiration, and immortal Praiſe, than the greateſt Conquerors.*

As the *Eaſtern* Countries were the firſt peopled, ſo 'tis from thence that the moſt general Notions of Morality, and the other Sciences, ſpread themſelves thro' the World. The *Greeks*, with all their Vanity, were forc'd to own themſelves [2] indebted for their Knowledge to thoſe they call'd *Barbarians*, chiefly to the *Chaldeans*, *Egyptians*, and *Perſians*. But all that we know of the Sentiments of theſe ancient *Eaſtern* Nations, we have from the *Greeks* themſelves, who have ſometimes mixed their own Opinions with thoſe they reported, and give us at beſt but a ſlender Account, of what the Sages of the *Eaſt* taught, on the Subject of Morality. This more particularly appears by the Works of two learned [3] *Engliſhmen*, who have collected, with great Care, all that is to be found thereupon, in the Writings of the Ancients.——The Syſtem, we have given us of the Doctrine of the *Chaldeans*, is nothing but a Heap of Notions in Phyſicks, or Aſtrology, Metaphyſicks and Pneumatology, mix'd with abundance of ſuperſtitious, myſtical Alluſions, and ridiculous Fancies. I have here ſet down all I have been able to remark, which can any way be referr'd to the Science of Morality, which is as follows: *You* [4] *ought to make haſte*, (theſe Maxims are taken from a Collection, entitled, *The Oracles of the* Chaldeans; and that they were actually couch'd in the Stile of Oracles, will inſtantly appear, by the Sample I am about to give,) "You ought to [5] haſten to "the Light and Rays [6] of the Father, from whence "your Soul was ſent you.——Lift up entirely all "your Eyes on high, and do not abaſe yourſelf "towards this gloomy World, under which there "lies an Abyſs, never to be truſted, and an [7] Hell, "ſurrounded on all Sides with Miſts and Clouds, "&c.——Seek [8] Paradiſe.——Seek the Channel "[9] of your Soul, and from whence, and from what "[10] Rank, you are become a Slave to the Body, "that you may be able to return to that Rank, "from whence you are fallen, by joining Practice "to Holy Diſcourſe.——Do not aggravate your "Deſtiny.——Preſerve your frail Body for the "Practice of Piety.——Nouriſh yourſelf with the "Hope of that Fire, [11] which is in the Country "of Angels.——Do not defile your Soul, do not "debaſe it, do not yourſelf make it depart from "you, leſt in departing from you, it find nothing: "The Souls of thoſe who are ſeparated from the "Body [12] by Force, are the moſt pure.——O Man, "who art a Creature of a moſt daring Nature, "take not into thy Mind the vaſt Dimenſions of the "Earth, for the Plant of Truth is not upon the "Earth. Do not meaſure the Sun by the Help of "collected Rules: He moves by Virtue of an eternal Decree, and not for thy ſake. Trouble not "thyſelf about the Courſe of the Moon, and the "Motions of the Stars, nor about the Noiſe "of the Moon: She holds her Courſe by an "Effect of Neceſſity.——The expanded Wing "of Birds that fly in the Air, never tells Truth. "I do not trouble myſelf at all about Sacrifices, "or Entrails; they are all a Jeſt, and the vain Supports of Fraud. Fly theſe Things, you who are "to open the ſacred Paradiſe of Piety, where Virtue, Wiſdom, and Equity, dwell in Conjunction." The two laſt Sentences plainly enough condemn judicial Aſtrology, and [13] Sacrifices too, if not abſolutely, at leaſt the Preſages, which were drawn from the Entrails of the Victim, as well as thoſe from the Flight of Birds: And yet theſe Things were highly in vogue amongſt the *Eaſtern* Nations, and chiefly amongſt the *Babylonians* and *Aſſyrians*. In the other Oracles, which would have been unintelligible to any common Reader, without the ſhort marginal Notes, which I have been oblig'd to add as a Key to ſome Places; they condemn Self-Murder abſolutely in itſelf; and recommend continual Meditation on the Rewards and Puniſhments of another Life. It remains to be conſider'd, wherein they made thoſe Duties to conſiſt, which were to be practis'd, in order to propitiate the ſovereign Deity, and to aſſure to themſelves a State of Bliſs after Death. In what has been hitherto collected of the Doctrine of the *Chaldeans*, there is no mention of any Thing beſides an exact Obſervation of certain Ceremonies, whereof Sacrifice is the moſt conſiderable; by Means whereof they fancied themſelves capable of maintaining Correſpondence with

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[1] Mr. *Bayle's Dict.* Tom. iii. p. 2442. Rem. (*G*).

[2] Τὸ τῆς φιλοσοφίας ἔργον ἐνιοί φάσιν ἀπὸ Βαρβάρων ἄρξαι. *Diog. Laert.* Lib. i. §. 1. See thereupon the Commentators, Edit. *Amſtelæd.* 1692.

[3] *John Marſham*, in his *Canon Chronicus, Ægyptiacus, &c.* printed at *London* 1672, and at *Leipſick* 1676. And *Thomas Stanly*, in his *Engliſh Hiſt. of Philoſophy*, (which, as I am inform'd, has been lately tranſlated and publiſhed at *Leipſic*, by M. *Olearius*, in 1711.) Parts 14, 15, 16, 17, 18, 19. Theſe ſix laſt Parts have, long ſince, been tranſlated by Mr. *Le Clerc*; which Tranſlation was a fourth Time reprinted, in the ſecond Tome of his Philoſophy, in 1710.

[4] See *Le Clerc*'s Philoſophy, Tom. ii. p. 338, &c. Ver. 215, 216, 238, & *ſeq.* Ver. 247, & *ſeq.* Ver. 254, 259, 268, 274, & *ſeq.* Ver. 280, & *ſeq.* Χρή σε σπεύδειν πρὸς τὸ φάος ἠδὲ πάλιος αὐγάς, Ἔνθεν ἐπέμφθη σοι ψυχή. Ver. 215, 216. Edit. *Cleric.* Ὅμμαλα δ' ἄξδην πάντα ἐκπέτασον ἄνω. Μήτε κάτω νέυσεις εἰς τὸν μιλαναυγέα κόσμον Ὃν βυθὸς ἀιὲν ἄπιστος ὑπόστρωταὶ τε καὶ Ἅδης Ἀμφικνεφὴς, Ver. 238, & *ſeq.* Ζήτησον παραίδεισον. Δίζεο σὺ ψυχῆς ὀχέων, ὅθεν, ἤ τινι τάξει σώματι τηθεύσας, ἐπὶ τάξιν ἀφ' ἧς ἐρρύης Αὖθις ἀναστήσεις, ἱερῷ λόγῳ ἔργον ἑνώσας, Ver. 247, & *ſeq.* Μὴ σὺ αὔξανε τὴν εἱμαρμένην, Ver. 254. Ἔργον ἐπ' εὐσεβίης ἑυρὸν καὶ σῶμα σαώσεις, Ver. 259. Ἐλπὶς τρεφέτω σε πυρίκχος ἀγγελικῷ ἐνὶ χόρῳ, Ver. 268. Μὴ πνεῦμα πολύνης μήτε βαθύνης τὸ ἐπίπεδον, Μὴ ἐξάξης, ἵνα μὴ ἐξιῦσα ἔχῃ τί. Βίη ὅτι σῶμα λιπόντων ψυχαὶ καθαρώταται, Ver. 274, & *ſeq.* Ὦ τολμηρολάτης φύσεως ἄνθρωπε τέχνασμα! Μὴ τὰ πελώρια μέτρα γαίης ὑπὸ σὴν φρένα βάλλε, Οὐ γὰρ ἀληθείης φυτὸν ἐνὶ χθονί. Μηδὲ μέτρει μέτρα ἠελίου, κανόνας συναθρόισας, Ἀϊδίῳ βουλῇ φέρεται, οὐχ εἵνεκα σεῖο. Μηναῖον μὲν δεύτερμα, καὶ ἀστήριον προπόρευμα, Μήνης ἐῶιζον ἔασον, ἀεὶ τρέχει ἔργῳ ἀνάγκης. Αἰθερίῳ ὀργίθων ταρσοὺς πάλιν ἔπου ἀληθές. Οὐ σεσιῶι, σπλάγχνων τ' ὄθομαι· τὰ δ' ἀθύρματα πάντα, Ἐμποσίης ἀπάτης σημήϊα. Φεῦγε σὺ ταῦτα, Μέλλων εὐσεβίης ἱερὸν παραδύσιον αἰσίζειν, Ἐνθ' ἀρετὴ, σοφίαι τε καὶ εὐνομία συνάγονται, Ver. 280, & *ſeq.*

[5] That is to ſay, to do all you can, to return to the Place from whence your Soul is deſcended down here below; for they believ'd the Pre-exiſtence of Souls.

[6] They meant, by that, the Spaces that are above the Moon, which they conceiv'd to be all ſhining with bright Light. This Light was, in their Opinion, an Emanation from the Father, or Sovereign Divinity. See hereupon *Stanly*, and the Notes of Mr. *Le Clerc*, on the *Chaldean* Oracles.

[7] Ἅδης. They, as well as the *Greeks*, believ'd, that the Place, to which the Souls of the Wicked went, was underneath the Earth.

[8] That is to ſay, the Place of Bliſs, or of that Light above the World, (Φῶς ὑπερκόσμιον) which was the Abode, and Reſidence of pure Spirits. See Mr. *Le Clerc*'s Note on that Verſe.

[9] Thro' which it paſs'd, to come down here below.

[10] They conceiv'd, that there were ſeveral Ranks or Orders of Beings, and ſeveral Claſſes of pure Spirits.

[11] That is to ſay, of returning into the luminous Space, already mention'd.

[12] That is to ſay, by the Effect of an exterior Force. They thought, as did the Diſciples of *Plato*, that they ought not to depart out of this Life without the Permiſſion of God. See Mr. *Le Clerc*, on this Verſe.

[13] Mr. *Le Clerc* believes, we ought to read with *Pſellus*, σπλάγχνων τίλομαι: So that theſe Words ſhould not condemn Sacrifices, but only Divinations by the Entrails of Victims.

the Celeſtial Beings; of raiſing the Soul above the Power of the Paſſions; and even healing the Diſeaſes of the Body, as well as thoſe of the Mind. Theſe Ceremonies they call'd the [1] *Works of Piety*. "They, who perform theſe as they ought, ſay "they, [2] ceaſe to be troubled with any Evil what-"ever; they acquire thereby all ſorts of Virtues; "they become good and virtuous Men; they are "ſet free from their Paſſions, and unruly Inclina-"tions; they are purify'd from all Impiety and "Prophaneneſs. On the contrary, thoſe who neg-"lect, or do not rightly perform them, are deli-"ver'd up as a Prey to their Paſſions, depriv'd of "all Commerce with the pure ſpiritual Beings, and "become like to thoſe evil Genii, with whom they "converſe, and who puſh them on to the Practice "of all Manner of Vice."

SECT. XIII.

NOR are we much better inform'd as to the Morality of the *Egyptians*; not though we ſhould even admit for genuine, thoſe viſibly ſpurious Writings, which paſs under the Name of their [3] *Hermes*, or *Mercurius Triſmegiſtus*. 'Tis well known, that the Learned of that Country [4] made great Uſe of Enigma's, Symbols, and Hieroglyphicks, which render'd their Doctrine obſcure and impenetrable to all, who wanted the Key. So that it was almoſt impoſſible for it ever to be tranſmitted to us; eſpecially if we conſider, with what care they conceal'd their Myſteries from all, who had not been initiated therein. However there is a Fragment ſtill remaining, by which we may judge of the principal Heads of the Morality of the *Egyptians*; 'tis the Form of a kind of Funeral Oration, pronounc'd by an Officer appointed for that Purpoſe; wherein he thus delivers himſelf in the Name of the Deceas'd [5]: *I have religiouſly ſerv'd, during my Abode in this World, the Gods which my Forefathers had made known unto me. I have ever honour'd thoſe who procreated my Body. I have never committed Murther. I have never been guilty of Breach of Truſt. Nor have I ever committed any other Crime that is inexpiable.* The Remains we have preſerv'd to us by ancient Writers, of the [6] Laws of the *Egyptians* (the Eſtabliſhment whereof is aſcrib'd to their famous *Hermes*, or *Mercurius Triſmegiſtus*, Counſellor to *Oſiris*, one of their firſt Kings) give us reaſon to conclude, that the Sages of *Egypt* apply'd themſelves as well to Morality and Politicks, as to the Study of the ſpeculative Sciences. There are, notwithſtanding, ſome of thoſe Laws, which are not exactly conformable to the moſt evident Maxims of the Law of Nature. The Daughters alone, for Example, were oblig'd to maintain their Parents, whilſt the [7] Sons were entirely excus'd. They, alſo, thought that a greater Reſpect was due from the Children to the Father, than the Mother; which they founded on this falſe Notion in [8] natural Philoſophy: that the Mother contributes no more to the Production of the Child, beſides the furniſhing it with a Lodging, as I may ſay, and Nouriſhment during the Time of her Pregnancy. For which Reaſon a very ingenious Commentator [9] has judiciouſly remark'd, that in that Law of the Decalogue, *Honour thy Father and thy Mother*; there is, as in many other Places of the Pentateuch, a tacit Oppoſition to the wrong Notions and Cuſtoms of the *Egyptians*.

SECT. XIV.

THE Doctrine of the *Perſians* was, in many Points, agreeable to that of the *Chaldeans*, who, as ſome ſay, had formerly been their Maſters. The Manner, in which they educated in *Perſia*, the Children [10] of their Kings, and their young Noblemen, gives us all the reaſon in the World to believe, that they diligently cultivated Morality and Politicks. At [11] the Age of fourteen, the young Prince was put into the Hands of thoſe, who were call'd the Royal Preceptors. "Who were four of "the moſt eminent for Birth, and Character, that "cou'd be found in all *Perſia*; they were choſen "in the Flower of their Age; the firſt being the "moſt Eminent for his Learning, the ſecond for "his Juſtice, the third for his Wiſdom, and the "fourth for his Valour. The firſt taught him the "Magick of *Zoroaſter*, Son of *Oromazus*; which "comprehended all the Worſhip of the Gods: "He, alſo, taught him the Laws of the Realm, and "all the particular Duties of a good King. The "ſecond learn'd him to ſpeak the Truth always, "even tho' it ſhould prejudice himſelf: The third "inſtructed him never to ſuffer himſelf to be over-"come by his Paſſions, to the End that he might "continue always free, and always a King, by ever "maintaining as abſolute a Sway over himſelf, as

[1] Ἔργα εὐσεβείας. See *Stanley, Hiſt. Phil. Oriental.* tranſlated by Mr. *Le Clerc*, Lib. i. §. 2. Cap. xxviii.

[2] *Jamblich. de Myſter*, §. 3. Cap. xxxi. p. 102. Lin. 25, & *d.* Edit. *Oxon.*

[3] See the *Bibliotheca Græca* of Mr. *Fabricius*, Lib. i. Cap. vii, & *ſeq.* *Hecateus* of *Abdera* had wrote the Hiſtory of their Philoſophy; *Diog. Laert.* Lib. i. §. 10, 11. But this Book is loſt. See *Menag.* i. l.

[4] See *Marſham*, p. 38. Edit. *Lipſ.*

[5] Ἐγὼ γὰρ τὺς Θεὺς, ὓς ὁι γονεῖς μοὶ παρέδειξαν, εὐσεβῶν διῆλθον, ὅσον χρόιον ἐν τῷ ἐκείνῳ αἰῶνι τὸν βίον εἶχον· τύς τε τὸ σῶμά μὲ γεννήσαντας ἐτίμων ἀεί· τῶν τε ἄλλων ἀνθρώπων ὅτε [τινὰ] ἀπέκλεινα· ὅτε παρακαλαθήκην ἀπεστέρησα· ὅτε ἄλλο ὐδὲν ἀνήκεστον διεπραξάμην. *Porphyr. de Abſtinentia*, Lib. iv. §. 10. *juxta verſionem Euphanti ex lingua Egyptiaca.* See *Marſham*, p. 156.

[6] See *Marſham*, who has collected them with Care; and Mr. *De Meaux*, who has copy'd him in his *Diſcourſe ſur l'Hiſt. Univ.* p. 361, & *ſeq.* Edit. *Holl.*

[7] Τρέφειν τὲς τοκέας τοῖσι μὲν παισὶ ὐδεμίη ἀνάγκη, μὴ βελομένοισι. Τῆσι δὲ θυγατράσι πᾶσα ἀνάγκη, κὴ μὴ βελομένῃσι. *Herodot.* Lib. ii. Cap. xxxv. p. 64, 65. Edit. *Steph.* and p. 102. Edit. *Gronov.*

[8] Ὑπειλήφασι τὸν πατέρα μόνον ἄξιον εἶναι τῆς γενέσεως, τὴν δὲ μητέρα τροφὸν κὴ χώραν παρέχεσθαι τῷ βρέφει. *Diodor. Sic.* Lib. i. p. 51. A.

[9] *Cleric.* in *Exod.* xx. 12.

[10] Πάντες γὰρ ὁι τῶν ἀρίστων Περσῶν παῖδες ἐν ταῖς βασιλέως θύραις παιδεύονται. *Xenoph. de Cyri Min. expedit.* p. 158. Edit. *H. Steph.* Lib. i. Cap. ix. f. 2. Edit. *Oxon.* And p. 266. D. Edit. *Paris.*

[11] Διὶς ἐπτὰ δὲ γενομένων ἐτῶν, τὸν παῖδα παραλαμβάνουσιν ὃς ἐκεῖνοι βασιλείους παιδαγωγὲς ὀνομάζουσιν· εἰσὶ δὲ ἐξειλεγμένοι πέρσῶν ὁι ἄριστοι δόξαντες ἐν ἡλικίᾳ τέτταρες· ὅ, τε σοφώτατος, κὴ ὁ δικαιότατος, κὴ ὁ σωφρονέστατος, κὴ ὁ ἀνδρειότατος. Ὧν ὁ μὲν μαθεῖαν τε διδάσκει τὴν Ζωροάστρου τῦ Ὡρομάζυ (ἔστι δὲ τῦτο Θεῶν θεραπεία) διδάσκει δὲ κὴ τὰ βασιλικά· ὁ δὲ δικαιότατος, ἀληθεύειν διὰ παντὸς τῦ βίυ· ὁ δὲ σωφρονέστατος, μήθ' ὑπὸ μιᾶς ἄρχεσθαι τῶν ἡδονῶν (ἵνα ἐλευθερος εἶναι ἐθίζηται κὴ ὄντως Βασιλεὺς, ἄρχων πρῶτα τῶν ἐν αὐτῷ, ἀλλὰ μὴ δελεύων) ὁ δὲ ἀνδρειότατος, ἄφοβον κὴ ἀδεᾶ παρασκευάζων, ὅταν δέιση ὀῦλον ὄντα. *Plat. in Alcib.* 1. p. 121, 122. Tom. ii. Edit. *Serran.* And p. 32. F. Edit. *Læmar.* *N. B.* As the Author follows the Tranſlation of Mr. *Dacier*, ſo does his Tranſlator him, unleſs where he ſees juſt Cauſe to do otherwiſe: And this he obſerves too in all Tranſlations from Originals, quite through this Prefatory Diſcourſe.

" over his Subjects. The fourth form'd his Mind " to fear neither Dangers, nor Death; for, by ſub- " jecting himſelf to Fear, from a King he became " a Slave." A learned *Engliſh* Author [1], who was Maſter of almoſt all the Oriental Languages, and even of the Dead Language of the *Zend*; (for ſo it was the *Perſians* call'd the Books of their famous *Zoroaſter*, or *Zerduſht*:) publiſh'd ſome Years ſince, a *Latin* Tranſlation of a Piece in Verſe, which is itſelf but a Verſion, into the modern *Perſian*, of part of the Books of that ancient Legiſlator. They who have read that Abridgment, call'd *Sad-der*, will, I'm perſuaded, readily approve the Judgment of a learned Journaliſt [2], who ſays, that there are, *amongſt ſeveral good Precepts of Morality, many ſuperſtitious, and trifling Things*; I have in my [3] *Notes* on Mr. *Pufendorf*, given part of theſe Maxims; which are indeed highly conformable to Reaſon. And here the Reader has the moſt conſiderable part of the reſt, (*viz.*) " If you [4] will be holy, and ſave " yourſelf, you have two Rules to practiſe: The " one is, that if, in this World, you love Paradiſe " better than any other Thing, do not invade the " Property of another; for Paradiſe is worth more " than all the Things of this World; becauſe this " World is only, as it were, a Space of five Days; " whereas Paradiſe is like an infinite Duration. And " if the Poſſeſſion of Paradiſe be moſt agreeable to " you, ſet not your Heart on theſe poor Things: " Remember to do good to every one, for Acts of " Goodneſs are excellent Works in this Life. Do " then unto Men the ſame Things, that you wou'd " they ſhou'd do to you. The other Rule is, to " offend no Body with your Tongue; but to pro- " mote, by your Humanity and good Nature, So- " ciety amongſt Men.——Do [5] your Endeavour to " follow Truth, without any Adulteration; ſeek " her with care, for ſhe will make your Soul per- " fect: Of all the Things which God hath created, " nothing is ſo excellent as Truth.—— Have [6] no " Commerce with a Proſtitute: Do not ſeduce the " Wife of another, tho' ſhe charm your Heart, and " tho' ſhe lay Snares for you.——Do not offend " your Father, [7] who hath brought you up; nor " your Mother, who hath carry'd you nine Months " in her Womb; nor the Prieſt, who hath taught " you the Maxims of Goodneſs and Virtue.—— " When your Parents command you to do any " Thing, riſe up chearfully to obey them. [8] In- " ſtruct your Children; and then be it known unto " you, that all the good Actions, which they ſhall " do, it ſhall be as if their Parents had done them " themſelves.—He that lives in Ignorance, know- " eth neither God, nor Religion." The Reaſons, with which theſe excellent Maxims are accompany'd, are not always very ſolid; and there are ſome of them even ridiculous. They ſay, for Example, that a Man ought not to debauch his Neighbour's Wife, becauſe, [9] *If after it the Huſband approaches her, he committeth a Sin, as much as if he had to do with an Harlot.* They ſay farther, that [10] *whoſoever hath had to do with a Whore, ſhall loſe for forty Days his Underſtanding, Knowledge, and Diſcernment; nor ſhall he be able to do any Thing*, &c. In another Place [11], they adviſe to *marry betimes*; becauſe, ſay they, *Children are as a Bridge at the laſt Judgment; ſo that they who have no Children at that Day, cannot paſs over into the Manſion of Immortality; but muſt remain on this Side the Abyſs, which ſeparates it from this World.* It muſt, nevertheleſs, be acknowledg'd, that they do not fail frequently to alledge the general Motive of the Rewards and Puniſhments of another Life, which *Zoroaſter* taught with a kind of Reſurrection; tho' he has, upon that Subject, utter'd a thouſand groſs and ridiculous Things, as will appear by reading Mr. *Hyde*'s Book.

SECT. XV.

AFTER having ſpoke of the *Chaldeans*, the *Egyptians*, and the *Perſians*, I muſt, before I paſs on to the *Weſtern* Nations, ſay ſomething of the *Indians*, and *Chineſe*. What ſome Authors have related concerning the Manner of living of the *Indian Philoſophers*, whether they are call'd *Brachmans*, or *Germanes*, or *Gymnoſophiſts*; (for there were ſeveral Sects of them, who are not ſufficiently diſtinguiſh'd by the ancient Authors:) What, I ſay, is related concerning their [12] wild and ſolitary Way of living, and of their ſuperſtitious Auſterities (in which the modern *Bramines* [13] have endeavour'd to exceed them) plainly ſhew, that there was a great deal of Caprice and Folly in their Principles and Maxims. However, as *Strabo* reports, they believ'd the Immortality of the Soul, and a future Judgment; [14] *as far*, ſays he, *as it has any relation to Piety and Holineſs.* And it appears, by a Converſation, related [15] by *Philoſtratus*, which *Apollonius* had with one of the *Gymnoſophiſts* of *Ethiopia*; that their Notions of Juſtice were right enough. As for the *Chineſe*, whoſe Opinions and Cuſtoms were unknown to us till theſe latter Ages, the celebrated Mr. *Leibnitz* aſſures us, [16] that, in Matters of Morality and Politicks, the Learned of that Country far exceed ours here in *Europe*. Perhaps this Encomium may be ſomewhat over-ſtrain'd; but however, this, at leaſt, is certain, whatever [17] Mr. *De St. Evremond* may ſay to the contrary; that there are a great many excellent Things to be met

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[1] The late Mr. *Hide*, in his *Hiſtory of the Religion of the ancient* Perſians, printed at *Oxford*, in 1700.

[2] Mr. *Bernard*, in his *News*, of *March* 1701. p. 250.

[3] On Lib. i. Cap. iii. §. 8. Not. 2. p. 28. Cap. vii §. 4. Not. 4. and Lib. ii. Cap. iii. §. 13. Not. 1. p. 132. and Lib. iii. Cap. iii. §. 16. Not. 1. Cap. iv. §. 2. Not. 3.

[4] *Sad-der*, *Port.* 71. [5] *Port.* 68. [6] *Port.* 69. [7] *Port.* 64. [8] *Port.* 55. [9] *Port.* 69. [10] *Ibid.* [11] *Ibid.*

[12] See chiefly *Strabo*, *Geogr.* Lib. xv. p. 712. *A*, &c. and *Philoſtratus*, *De Vitâ Apoll. Tyan. paſſim.* and particularly p. 719, &c. Edit. *Paris*, 1608.

[13] See the Letter of Mr. *Bernier*, entitled, *Qu'il n' y a opinions ſi ridicules, ni ſi extravagantes, dont l'Eſprit humain ne ſoit capable*, &c. inſerted in his Voyages.

[14] Παραπλήσιοι δὲ καὶ μύθους ὥσπερ καὶ Πλάτων, περί τε ἀφθαρσίας ψυχῆς, καὶ τῶν καθ' ᾅδου κρίσεων, καὶ ἄλλα τοιαῦτα—ὅσα δοκεῖ πρὸς εὐσέβειαν καὶ ὁσιότητα. *Strabo*, Lib. xv. p. 1040. *A*, *C*. Edit. *Almelov.* And p. 713. *C*. & p. 714. *A*. Edit. *Paris. Anno* 1620.

[15] *De Vitâ Apoll. Tyan.* Lib. vi. Cap. xxi. Edit. *Olear.* And Cap. xi. Edit. *Morell.* *Pufendorf* has cited a Paſſage out of it, Lib. i. Cap. ix. §. 5. Num. 4.

[16] *Præfat. ad Noviſſima Sinica.*

[17] He calls him (Tom. v. p. 69.) *the moſt tedious Moraliſt he ever read. His Sentences*, adds he, *where he is intelligible, are below the Stanza's of Pibrac; where he is obſcure, he is above the Apocalypſe.* But a Man, of the Character of St. *Evremond*, might be tired with the reading a Book of Morality; and yet that be no Prejudice to the Merit of the Book. Not that there are not as well bad, as good Things, in what has been publiſh'd of *Confucius*'s Works; and we may very well ſubſcribe, or come pretty near the Judgment of Mr. *Gundling*, Profeſſor at *Hall* in *Saxony*, in his Book call'd *Hiſtor. Phil. Moral.* Part i. Cap. v. §. 5. of which the firſt Part only has been yet publiſh'd, as I think, which treats of the Oriental Philoſophy; printed in 1706.

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with in the Books of [1] *Confucius*, (or *Cum Fu Cu*:) who, not to mention the Divine Honours which have been long ſince paid him in that Country, is ſo much eſteem'd for his Philoſophy, that there are, in all the Cities, publick Schools, where his Works are read, and where one muſt ſtudy ſome Time, before he can be admitted into any Poſt in the Government. I will now give my Reader a Taſte of his Principles. [2] "All that, which is the Celeſtial "Part of Man, we call the Rational Nature; what "does conform to Nature and Reaſon, we call the "Rule: as we do Morality, or the Inſtitution of "Virtue, the Re-eſtabliſhment of this Rule, by "the Application thereof to ourſelves, in the Go"vernment of our Paſſions. Now this Rule, be"ing eſſential to the Rational Nature, neither can, "nor ought to be ſeparated one ſingle Moment "from Man; for if it could be ſeparated from "him at any Time, it wou'd not then be the Rule, "nor the Reaſon, which Heaven has given us." (*Confucius*, or *Cu Su*, his Grandſon, no doubt meant by this, that to ceaſe to be rational, is to ceaſe to be a Man; ſince they add:) "This is "the Reaſon why the perfect Man keeps ſo di"ligent a Guard upon himſelf; and is ſo watchful "even in Things, which do not appear to the "Eye; ſuch as are the firſt and moſt minute Mo"tions of the Heart: and that he governs himſelf "with ſo much Precaution, alſo, in Things, which "are not to be diſtinguiſh'd by the Ear; to the "End, that whatever he does, he may never ſwerve "from the Rule of right Reaſon, which he always "carries imprinted on his Soul. The Paſſions be"ing eſſential to Nature, or rather being Nature "itſelf, the perfect Man applies himſelf to govern, "and moderate them by the Reins of right Rea"ſon; (but not to extinguiſh them:) For the Joy "we feel at any good Succeſs, and the Uneaſineſs "we ſuffer at bad; the Grief with which any Loſs "affects us, and the Satisfaction we have in the "Poſſeſſion of any Advantage; all theſe Senſa"tions, before they are reduc'd into Act, are "term'd *Medium*, or reputed to be in a State of "Mediocrity; being as yet indifferent with reſpect "to either Exceſs, or Defect. But when they have "produc'd their Effect, and this Effect agrees with "the Light of right Reaſon; 'tis then call'd Union, "or Agreement, between Reaſon and the Paſſions. "When the Paſſions ſtill keep the Medium, they "are look'd upon as the main Spring of the Uni"verſe, and the Foundation of all good Actions; "and, when they are conformable to Reaſon, they "are call'd the Rule of the Univerſe, and the Royal "Way of Mankind.——[3] There are four Rules, "which the perfect Man endeavours to obſerve: "But of which I have ſcarce follow'd one: *1ſt*, "To pay the ſame Obedience to my Father, which "I require from my own Children. *2dly*, To have "the ſame Fidelity to my Prince, that I expect "from my own Servants. *3dly*, To have the ſame "reſpect for thoſe who are older than me, that I "look for from thoſe, who are younger. *4thly*, "To have the ſame Zeal for the Intereſt of my "Friends, as I myſelf expect at their Hands; and "to endeavour as much to be beforehand with "them in all Manner of good Offices, as I wou'd "deſire they ſhou'd do on my Account. The per"fect Man puts theſe Virtues in practice every Day, "and every Hour, without Diſguiſe. He is pru"dent and circumſpect in all his Diſcourſe; and "if he has in any Thing come ſhort of his Duty, "he never reſts till he has ſupply'd what was want"ing. If he finds a Torrent of Words come upon "him, he is very careful how he gives them Utte"rance; becauſe he will be always ſeen to ſuit his "Actions exactly to his Words, and his Words to "his Actions. The perfect Man is always content "with his Lot, he always lives in a Manner ſuitable "to his preſent Condition; and never wiſhes for "any Thing that is not proper for him. As he "ſeeks only to make himſelf perfect, and demands "nothing of other Men, he is never diſpleas'd or "angry with them; and never murmurs either "againſt Heaven, or Earth. When he is unfor"tunate, he complains not of the Injuſtice of Pro"vidence; he imputes not to other Men his own "Faults; nor does he accuſe them of being the "Authors of his Miſery. He is like an Archer, "who lays all the Fault upon his own Hand, when "he has miſs'd his aim.——[4] I do not ſee of what "Uſe a Man can be in the World, who is without "Faith, inſincere in his Words, and unſteady in "his Promiſes. Of what Uſe is a Chariot without "a Pole, or a Wheel without an Axel-Tree?" One may judge by this Sample, of the Learning and Genius of this *Chineſe* Sage. The Inſtructions which he gave to *Ngaïcum*, King of *Lu*, concerning the Art of Government, [5] *contain admirable moral Reflections; which do not meerly conſiſt of indetermin'd general Notions, but of particular Inſtructions, adapted to all the ſeveral Exigencies, and Circumſtances, in which a Prince may be ſuppos'd to be: ſo that it may very well be ſaid, without Exaggeration, that there is more to eb learn'd from this ſmall Book of* Confucius, *than from the vaſt and numerous Volumes of ſome of the Fathers of the Church.* But there aroſe ſince his Time another [6] Philoſopher, whoſe impious Notions at length prevail'd, and are now the moſt commonly receiv'd. His [7] Diſciples have an *exterior Doctrine*, which they preach to the People, to keep them, ſay they, in their Duty; and which conſiſts in teaching, that there is a real Difference between *Good*, and *Evil*, *Juſt*, and *Unjuſt*: And that there is another Life, where every one ſhall be puniſh'd, or rewarded, according to that which he hath done in this. But their [8] *interior Doctrine*, which is only for the *Initiated*, may be reduc'd to a kind of *Spinoſiſm*; which deſtroys both Religion, and Morality.

SECT. XVI.

WE come now to the *Grecians*, whoſe Opinions we are much better acquainted with, than thoſe of the *Eaſtern Nations*, whoſe Diſciples they had firſt been; though they afterwards became Maſters to all the other Nations of *Europe*. They extended, and conſiderably perfected, [9] in Time, the Knowledge they had acquir'd from abroad: And hence it is, that the farther we look back into Antiquity, the more we trace, amongſt the *Greeks*, the Notions, and Manner of Teaching, of the *Eaſtern Nations*. This is the Reaſon, that the Morality of the moſt ancient

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[1] 'Tis pretended, that he lived 551 Years before *Chriſt*.
[2] *Biblioth. Univerſ.* Tom. vii. p. 420, *&c.* in the Extract out of *Confucius*, by *P. Couplet*, printed at *Paris* in 1687, in Folio.
[3] *Ibid.* p. 427, *& ſeq.* [4] *Ibid.* p. 443. [5] *Bibl. Univerſ. ubi ſupra*, p. 436.
[6] *Foe*, or *Xe Kia*, or *Xaca*. See *Bibl. Univerſ. ubi ſupra*, p. 402, *& ſeq.*
[7] *Ibid.* p. 404, 405. [8] *Ibid.* p. 406.
[9] See *Plato, Epinomid.* p. 987. *E.* Tom. ii. Edit. *H. Steph.* And p. 703. *D.* Edit. *Læmar.*

Grecians conſiſted in *Enigma's*, *Apologues*, and *Sentences*, not much unlike the *Proverbs* of *Solomon*. There had been, before *Æſop*, whoſe Fables are ſo much celebrated, many other [1] Authors, in that Sort of ingenious, and inſtructive Fictions. *Plutarch*, ſpeaking of [2] *Pittheus*, Grandfather, on the Mother's Side, to *Theſeus*, who liv'd about the Time of the firſt *Judges of Iſrael*, ſays, That *the Science, then in Uſe, conſiſted chiefly of Sentences, and moral Sayings; ſuch as thoſe which gain'd* Heſiod *ſo much Eſteem, in his Work, entitled*, Works and Days. *Amongſt the Sentences of that Poet*, adds he, *this is one; which is aſcrib'd to* Pittheus [3]: *Let the Reward, thou promiſeſt to thy Friend, be a competent Reward.* Theſe Sentences were generally put into Verſe, after the *Eaſtern* Manner; which ſerv'd to help the Memory, and give the Precepts a more lively Turn. There is now extant, an Elegiack Poem of *Theognis* [4] of *Megara*, under the Title of *Sentences*; where you have abundance of good moral Reflections. We find *Homer*, with the other leſs ancient Poets, but more eſpecially the Tragedians, full of Precepts, either direct, or indirect; and that in Works, which ſeem, otherwiſe, rather [5] calculated for Amuſement, than Inſtruction. But they muſt be read with great Judgment; for the good and the bad lie greatly intermixt: For which Reaſon *Plato* baniſh'd them his Republick; and *Plutarch* wrote a Treatiſe, purpoſely to inform Youth with what Precautions they ought to read their Poets. But to ſay nothing of the abſurd Ideas they give of the Deity, we find there, amongſt ſome few Inſtances of Virtue, many Characters extremely vicious; which they are ſo far from expoſing as they ought, to the Horror and Deteſtation of their Readers, that, on the contrary, they are frequently ſet forth as the very Patterns of Virtue. "[6] As there are ſome moral Sentences, which are "true, and ſome noble Sentiments; ſo, likewiſe, "there are ſome Thoughts mean enough, and "moral Reflections, which are falſe. Let any [7] "one read what *Theognis* ſays concerning Poverty, "and the great Care we ought to take to avoid it; "and he will be forc'd to own, that no Miſer could "have ſaid more. [8] *Heſiod* ſays: *For my Part, I "would neither myſelf be juſt amongſt Men, nor "would I have my Son ſo, if we were to be Sufferers "by it; or if Wrong-doers were to prevail over the "Juſt. But this is what I do not believe* Jupiter "*will ever permit.* He muſt have liv'd but a very "little while, or taken but very little Notice of "what paſſes amongſt Men; who imagines, that "the moſt virtuous are generally the moſt eſteem-"ed: And the Man, who expects to ſee any ſuch "Thing happen, will find himſelf wretchedly "miſtaken. Let him but conſult *Seneca*'s *Book of "Providence*; the excellent Preface to it by *Mark "Anthony Muret*; and the Notes of ſeveral learned "Commentators on that Book; and he will plain-"ly ſee, that the Miſery which attends Virtue, "and the Proſperity of Vice, if we conſider this "Life only, have always been the conſtant Sub-"ject of Lamentation and Complaint. Yet *Heſiod*, "more than once, makes the Adherence, we owe "to Virtue, depend on the [9] Riches and Proſperi-"ty which accompany it. Such Diſcourſes were "very proper to perſuade Men, that Virtue is "but a mere Piece of Cunning, to be made uſe of "whilſt ſucceſsful; but to be thrown aſide, when-"ever it was hurtful; that is to ſay, for the moſt "Part.—Can any Thing be more flat and low, "than to ſay, as [10] *Heſiod* does; that *if we make a "Feaſt, we ſhould invite none but our Friends*, and "not our Enemies; and that *we ought to love them "only, that love us*; and not to viſit any, but "thoſe from whom we receive Viſits?" Much of this Kind is to be found in all the Poets; with whom *it is* [11] *very common, to maintain either Side of*

[1] See *J. Alb. Fabricii, Bibliothec. Græc.* Lib. ii. Cap. ix. §. 5. Tom. i. p. 394.

[2] Ἦν τῆς σοφίας ἐκείνης τοιαύτη τις ἰδέα καὶ δύναμις, οἷα χρησάμενον Ἡσίοδον εὐδοκίμει μάλιστα περὶ τὰς ἐν τοῖς ἔπεσι γνωμολογίας· καὶ μίαν γε τούτων ἐκείνην λέγουσι Πίτθεως εἶναι, Μισθὸς δ' ἀνδρὶ φίλῳ εἰρήμενον ἄριστον ἔπω. *In vita Theſ. init.* p. 4. Tom. i. *H. Steph.* Edit. And p. 2. A. Tom. i. Edit. *Francofurti*, 1620. In my firſt Edition I remark'd, that I had followed the Tranſlation of M. *Dacier*, except in the Verſes of *Heſiod*. That Gentleman (in his Notes of the *Lives of Plutarch*, Tom. i. p. 7. Edit. *Amſt.*) is very angry with me on this Occaſion, tho' he has vindicated me himſelf, by publiſhing, at the ſame Time, a Note of *Meziriac*, who was a much greater Critic than himſelf, and who explains this Verſe exactly as I do, and as M. *Le Clerc* had done before him. The paſſionate Tranſlator produces but a weak Reaſon for his Opinion, and makes no Reply to the Argument drawn from the Manner in which *Ariſtotle* underſtood the Verſe in Queſtion: An Authority much ſuperior to that of all the *Daciers*.

[3] *Oper. & Dier.* Lib. i. ℣. 370. Edit. *Cleric. cujus vide Not.*

[4] He liv'd about the fifty eighth Olympiad, about five hundred and fifty Years before *Jeſus Chriſt*. See the *Bibl. Græc.* of Mr. *Fabricius*, Lib. ii. Cap. xi. §. 1.

[5] See the *Parrhaſiana*, Tom. i. Article 1. p. 1. 2. and the fine *Diſcourſe* of *Houdart de la Motte* upon Poetry, &c. p. 21, & *ſeq.* Edit. *Holl.* An ancient Philoſopher, nam'd *Eratoſthenes*, long ago advanced this Propoſition, which does at preſent ſo much ſcandalize the Grammarians, and extravagant Admirers of Antiquity: Ποιητὴν γὰρ ἔφη πάντα στοχάσεσθαι ψυχαγωγίας, ἀ διδασκαλίας, which are the very Words of *Strabo*, who vainly endeavours to refute them, p. 28, & *ſeq.* Edit. *Amſt.* 1707. and p. 15. D. Edit. *Caſaub.* Nor is it likely, that what Madam *Dacier* ſays thereupon, in her Preface upon *Homer*'s *Iliad*, p. 67, & *ſeq.* Edit. *Paris*, will make Men quit this Opinion of theirs, who have not devoted themſelves to the idolizing of Antiquity. Perhaps too this new Verſion, done by ſo able a Hand, will not a little prejudice the Original, in the Judgment of thoſe who have not toil'd much in ſtudying it, notwithſtanding the Care Madam *Dacier* takes, at every Remark, to cry out, *This is admirable! this is divine!* as if ſhe had ſome Diſtruſt, that, without ſome ſuch Advertiſement, the great Beauties of *Homer* would not be perceiv'd. Perhaps too it were to be wiſh'd, for the better underſtanding this Poet, that his learned Interpreter had made uſe of the Remarks of other learned Moderns; and that ſhe had not ſometimes ſo faithfully adher'd to the ancient, and common *Latin* Verſion. For Inſtance, (Book i. ℣ 76.) ſhe tranſlates σὺ δέθεο, *aſſure me*, inſtead of, *take care*, or, conſider what you engage me in; as the ingenious Mr. *Bos* has explain'd it, in his *Obſ. Crit.* Cap. xxix. Verſe 132. ἐπεὶ ἢ παρελεύσεαι, ſhe has put, *you cannot ſurprize me*, for, *you ſhall not eſcape me*; or, you ſhall not prevent what I am reſolv'd to do. It is thus M. *Grævius* has corrected the common Reading, in his Notes on the Theogony of *Heſiod*, ℣. 613. A Correction, which has been copied in the ſmall Edition publiſh'd by *Wetſtean*, 1707, and which might have been of great Service to M. *Dacier*. Again, Verſe 410. Ἵνα πάντες ἐπαυξῶνται βασιλῆϊ, the *Latin* Tranſlator has ridiculouſly put, *that all might enjoy their King*. M. *Dacier* has it, *that all might enjoy the Wiſdom of their King*; upon which ſhe makes a very curious Remark, which ſhe might have ſpar'd herſelf, if ſhe had followed the juſt Explication of *Grævius* upon *Heſiod*, who has render'd it, *that all might be puniſh'd for the King*. See *Grævius's Heſiod*, ℣ 240. who has been copied by the laſt *Latin* Tranſlator of *Wetſtean*'s Edition. I ſhall take Notice of but one Place more, ℣. 178. where *Agamemnon* tells *Achilles*, Εἰ μάλα καρτερός ἐσσι θέος πὲ σοὶ τογ' ἐδωκεν, *if you be brave, who has made you ſo? Is not your Valour the Gift of GOD?* This ſhould have been render'd, *the Gift of a Deity*; or, of *Thetis* your Mother, as appears plainly from ℣. 280. But our exceſſive Admirers of *Homer*, and other Heathen Poets, endeavour, at any Rate, to find in them the Beauties of the Sacred Writings.

[6] I apply to the Poets in general, what Mr. *Le Clerc* ſays of *Heſiod*, in the Extract inſerted amongſt the Additions of the *Journal de Trevoux*, Edit. *Holl.* Tom. i. p 262.

[7] *Parrhaſ.* Tom. i. p. 45.

[8] *Oper & Dier.* Lib. i. ℣. 270, *al.* 268, & *ſeq.* I uſe the Words of the Journal above cited. See here the *Greek* Verſes of the Poet: Νῦν δὲ ἐγὼ μήθ' αὐτὸς ἐν ἀνθρώποισι δίκαιος Εἶην, μήθ' ἱμὸς υἱός· ἐπεὶ κακὸν ἄνδρα δίκαιον Ἔμμεναι, εἰ μείζω γὲ δίκην ἀδικώτερος ἕξει. Ἀλλὰ τάγ' ὔπω ἔολπα τελεῖν Δία τερπικέραυνον.

[9] See Verſe 281, *al.* 278, 279, & 284, *al.* 283.

[10] Τὸν φιλέειν ἐπὶ δαῖτα καλεῖν, τὸν δ' ἐχθρὸν ἐᾶσαι. Verſ. 342, *al.* 340. Τὸν φιλέοντα φιλεῖν, καὶ τῷ προσιόντι προσειπεῖν, Verſ. 353, *al.* 351.

[11] *Parrhaſ.* Tom. i. p. 46.

the Argument, without affording the Means of diſtinguiſhing between the good and the bad. This may be ſeen in the Collection of Stobæus; *where you may find abundance of Paſſages out of the Poets, that will ſerve to maintain both Sides of the Queſtion, upon ſeveral moral Subjects.* But our proper Buſineſs here is with thoſe, who make it their Profeſſion to inſtruct, and not to entertain. Let us run over the moſt celebrated of theſe, as they lie in order of Time.

SECT. XVII.

THE firſt that occur, are thoſe ſeven famous Cotemporaries, call'd the *Wiſe Men of Greece*; viz, [1] *Thales* of [2] *Miletus*, *Pittacus* of *Mytilene*, *Byas* of *Priene*, *Solon* the *Athenian*, *Cleobulus* of *Lindus*, *Myſo* of *Chen*, a Town of *Laconia*, and *Chilo* of *Lacedæmon*. All theſe, except *Thales*, [3] *govern'd the States where they liv'd*; and every one knows, that *Solon* was one of the greateſt Legiſlators of Antiquity. *Their Knowledge* [4] *conſiſted in certain ſingular Sayings, or Sentences, expreſs'd in a lively and conciſe Manner. Being one Day all together, they conſecrated to* Apollo, *as the firſt Fruits of their Wiſdom theſe two Sentences, which are now become common Proverbs; and caus'd them to be written in Letters of Gold over the Door of the Temple of* Apollo *at* Delphos: KNOW THYSELF: And, TOO MUCH OF NOTHING. The Ancients have tranſmitted down to us ſeveral Apophthegms of theſe ſeven wiſe Men [5]. I ſhall content myſelf with reciting here the principal ones of [6] *Thales*, the Founder of the *Ionick* Sect. "God, "(ſaid he,) is the moſt [7] ancient of all Things, "for he is uncreate. The World is the moſt beau-"tiful of all Things, for it is the Work of GOD.—"GOD [8] is what hath neither Beginning, nor End. "They who commit any wicked Action, are ſo far "from being able to hide it from his Eyes, that "they cannot even conceal their Thoughts from his "Knowledge.——Perjury is worſe than Adultery. "——The moſt difficult Thing in the World is, "to know one's ſelf: The moſt eaſy to preach it "to others. He is the happy Man, who enjoys "good Health, finds Fortune favourable, and has "cultivated his Mind with uſeful Knowledge:—— "Which we ought to value ourſelves more upon, "than the adorning and ſetting off our Perſons. "—The beſt Way, to live up to the Rules of "Juſtice, is, to avoid doing that, we blame in "others.—We ought to be mindful of our abſent "Friends, as much as if they were really preſent. "—Do not enrich thyſelf by unjuſt Methods.— "Expect the ſame Treatment from your Chil-"dren, which your Parents have receiv'd from you. "—[9] Nothing is more uſeful than Virtue: For it "makes all other Things uſeful, by applying them "to good Purpoſes.—Nothing is more pernicious "than Vice: For it makes a bad Uſe of moſt "Things.—[10] Love Learning, Temperance, Pru-"dence, Truth, and Fidelity. Endeavour to ac-"quire that Skill, which ariſeth from Experience; "be induſtrious, ſociable, friendly, diligent, fru-"gal; love Arts and Piety." I know not whether a favourable Conſtruction can be put upon the following Sentence of *Thales*, [11] *The beſt Conſolation under Misfortunes, is to ſee one's Enemy more unfortunate than one's ſelf.*

SECT. XVIII.

PYTHAGORAS, [12] the Diſciple of *Thales*, and of *Pherecydes* of *Scyros* [13], and Founder of the *Italick Sect*, *conſiderably* [14] *enrich'd the Science of Morality; yet it ſtill continu'd to be but a Collection of obſcure, and indetermin'd Precepts; unattended with either Reaſoning, or Proof. Ariſtotle* ſpeaks of him

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[1] Thus they are named, and placed by *Plato*, in *Protagor.* Tom. i. p. 343. A. Edit. *Serr.* And p. 20[illegible]. G. Edit. *Lamar.* Others, inſtead of *Myſo*, put *Periander* of *Corinth*. Some make the Number greater. See *Diog. Laert.* Lib. i. §. 13. *ibique Interpr.* & p. 9. Edit. *Colon.*

[2] But a Native of *Phœnicia*. See *Menage* on *Diog. Laert.* Lib. i. §. 22. But Edit. *Colon*, p. 13.

[3] *Septem fuiſſe dicuntur uno tempore, qui ſapientes & haberentur, & vocarentur. Hi omnes, præter Mileſium Thalen, civitatibus ſuis præfuerunt.* Cicer. de Orat. Lib. iii. Cap. xxxiv. "'Tis ſaid, there was ſeven at one Time, who were reputed, and "call'd *Wiſemen*, by way of Excellency. All theſe, except *Thales* of *Miletus*, govern'd their reſpective Cities."

[4] Καὶ καλαμάθοι ἄν τις αὐτῶν τὴν σοφίαν τοιάυλην ἔσαν, ἑήμαλα βραχέα ἀξιομνημόνευλα ἑκάτῳ εἰρημένα. Οὗτοι κ᾽ κοινῇ ξυνελθόλες ἀπαρχὴν τῆς σοφίας ἀνέθισαι τῷ Ἀπόλλωνι εἰς τὸν νεὼν τὸν ἐν Δελφοῖς, γεάψαλες, ταῦλα ἃ δὴ πάνλες ὑμνοῦσι, ΓΝΩΘΙ ΣΑΥΤΟΝ, κ᾽, ΜΗΔΕΝ ΆΓΑΝ. *Plat. ubi ſupra*, Tom. i. p. 343. A. Edit. *Serr.*

[5] See a Treatiſe of Mr. *Buddeus*, entitled, *Sapientia veterum; hoc eſt, dicta illuſtriora ſeptem Græciæ ſapientum, diſſertationibus aliquot Academicis explicata, &c.* at *Hall* in *Saxony*, 1699.

[6] He was born in the firſt Year of the thirty fifth Olympiad, 640 Years before *Jeſus Chriſt*, and died aged ninety two Years. See *Petav. D. Temp.* Tom. ii. p. 303.

[7] Πρεσβύταλον τῶν ὄνλων, Θεός· ἀγέννηλον γάρ. Κάλλιςον, κόσμος· ποίημα γὰρ Θεύ. *Diog. Laert.* Lib. i. §. 35. & p. 23. Edit. *Colon.* With regard to the Ideas of *Thales*, about the Deity, ſee the Remarks of M. *l'Abbe d'Olivet*, upon the Theology of the Philoſophers, contain'd in the third Tom. of his Tranſlation of *Cicero*'s Dialogues *de naturâ Deorum*, p. 238.

[8] Τί τὸ θεῖον; τὸ μήτε ἀρχὴν ἔχον, μήτε τελευλήν. ibid. p. 24. Edit. *Colon.* & §. 36.——Ἠρώτησέ τις αὐλὸν, εἰ λήθοι Θεὸς ἀνθρωπος ἀδικῶν· Ἀλλ᾽ οὐδὲ διανούμενος, ἔφη.——Χεῖρον μοιχείας ἐπιορκία.——Τί δύσκολον;——τὸ ἑαυλὸν γνῶναι. Τί δὲ εὔκολον; τὸ ἄλλῳ ὑπολίθεσθαι. ibid. Τίς εὐδαίμον; ὁ τὸ μὲν σῶμα ὑγιὴς· τὴν τύχην εὔπορος, τὴν ψυχὴν εὐπαίδευλος——μὴ τὴν ὄψιν καλλωπίζεσθαι, ἀλλὰ τοῖς ἐπιληδεύμασιν εἶναι καλόν, ibid. §. 36, 37. & p. 24.——Πῶς ἂν ἄρισα κ᾽ δικαιόταλα βιώσαιμεν; ἐὰν ἃ τοῖς ἄλλοις ἐπιλιμῶμεν, αὐλοὶ μὴ δρῶμεν, ibid. §. 36. & p. 24.——Φίλων παρόνλων κ᾽ ἀπόνλων μεμνῆσθαι φησί·——Μὴ πλέτει κακῶς.——Οὓς ἂν ἐράνους εἰσενέγκῃς τοῖς γονεῦσι, τὰς αὐλὰς προσδέχου κ᾽ παρὰ τῶν τέκνων, ibid. §. 37. & p. 25. Edit. *Colon. Allobr.* See the *Bibl. Choiſie* of Mr. *Le Clerc*, Tom. ii. p. 49, *& ſeq.* where *Thales* is clear'd from Atheiſm.

[9] Τί ἀφελιμώταλον; ἀρελή· κ᾽ γὰρ τ᾽ ἄλλα τῷ χρῆσθαι καλῶς, ὠφέλιμα ποιεῖ. Τί βλαβερώταλον; κακία· κ᾽ γὰρ τὰ πλεῖςα βλάπλει παραλενομένη. *Plutarch. in conviv. ſap.* p. 266. *Opuſc.* Tom. i. Edit. *H. Steph.* And Tom. ii. p. 153. D. Edit. *Francfort.*

[10] Φίλει τὴν παιδείαν, σωφροσύνην, φρόνησιν, ἀλήθειαν, πίςιν, ἐμπειρίαν, ἐπιδεξιόληλα, ἑλαιρείαι, οἰκονομίαν, τέχνην, εὐσέβειαν. *Stob.* Serm. iii. p. 46. lin. 25. Edit. *Genev.* 1609.

[11] Πῶς ἂν λις ἀλυχίαν ἐᾶσα φέροι; εἰ λὰς ἐχθρὰς χεῖρον πρᾶσσονλας βλέποι. *Diog. Laert.* Lib. i. §. 36. & p. 24. Edit. *Colon. Allobr.*

[12] He flouriſh'd about the ſixtieth Olympiad, five hundred and forty Years before *Jeſus Chriſt*. Authors are not agreed as to he Time of his Birth and Death. See *J. Alb. Fabricii Bibl. Græc.* Lib. ii. Cap. xii. §. 1. and *Bayle*'s *Dict.* Not. (B).

[13] Our Author ſhould have ſaid *Syros*. See *Menag. Obſervat. on Diog. Laert.* p. 69. Col. 1. and *Cellar. Geogr.* Tom. i. [illegible]. 834. & *Suidam* in Φερεκύδης. & *Strab. Geogr.* p. 487. B.

[14] *Dacier*'s *Life of Plato*, p. 68. Edit. *Paris.* You may, alſo, conſult the *Life of Pythagoras*, by this learned Perſon, publiſh'd [illegible] 1706, before his Tranſlation of *Hierocles*'s Comment on the Golden Verſes; and of thoſe Golden Verſes, as well as of the *Symbols*, attributed to *Pythagoras*.

as [1] *the firſt who attempted to treat of Virtue*; and *Horace* ſays, [2] *That he was no bad Maſter on the Subjects of natural Philoſophy, and Morality.*

Before his Time, thoſe who excell'd in the ſpeculative and practical Sciences, and were diſtinguiſh'd by an exemplary Life, were call'd *Sages*, or wiſe Men; which, according to the Stile of the *Grecks*, [3] meant the ſame with what we now-a-days term *learned*, or *Men of Letters*. *Pythagoras*, however, finding ſomething too aſſuming [4] in this Title, took another inſtead of it; by which he ſignified, that he did not think fit to arrogate to himſelf the actual Poſſeſſion of Wiſdom, being only an humble Enquirer after it; and therefore he gave himſelf the Appellation of *Philoſopher*, or *Lover of Wiſdom*: A Name, which has been ever ſince given to thoſe, who make it their Buſineſs to ſtudy Natural Scence and Morality. "*Pythagoras* [5] la- "bour'd uſefully to reform, and inſtruct the "World. His Eloquence muſt have been very "powerful, ſince his Exhortations influenc'd the "Inhabitants of a large City [6] (famous for its Cor- "ruption of Manners) to baniſh Luxury, and live "according to the Rules of Virtue. He prevail'd "even with the Ladies to part with all their fine "Cloaths, and Ornaments; and to preſent them "as an Offering to the principal Deity of the Place. "—It was his principal Care to correct the Abuſes "committed in the [7] Marriage State; without "which he thought neither publick Peace, Liber- "ty, a good Form of Government, or any the "like Things, for which he labour'd with very "great Zeal, could make the People happy.— "[8] His Affection for the publick Good, determin'd "him to offer his Inſtructions to the Great at their "own Palaces.—He had the good Fortune and "Glory of having form'd Diſciples, who prov'd "excellent Legiſlators; ſuch as *Zaleucus*, [9] *Cha-* "*rondas*, and others." He had travel'd [10] very much in the *Eaſt*; more eſpecially among the *Egyptians*, the *Perſians*, and the *Chaldeans*; from whence he brought many of his Notions, with his Method of Teaching; for he deliver'd his moſt excellent Precepts under the Vail of Symbols and Enigma's; and there is but too much of the Myſtical, for the moſt Part, in the cleareſt of his Principles of Morality. He had two Ways of teaching; the one for Strangers, which was obſcure, and enigmatical [11]; the other for his own Diſciples, which was plain, and inſtructive. It is not certainly known, whether he left [12] any Thing in Writing; but certain it is, that we have now nothing of his extant. The little Poem, call'd, *The Golden Verſes of* Pythagoras, was compos'd by one of his Diſciples; which ſome affirm to be *Lyſis*, others [13] *Empedocles*. I ſhall here give the Reader a general Account of his Notions, as far as they relate to Morality. He believ'd the Unity of a ſupreme God, or *a firſt Being*; whom he conceiv'd to be of a [14] *Nature impaſſible*; *and which falls not under the Cognizance of the Senſes, but is Inviſible, Incorruptible, and ſolely Intelligible.* As he made great Uſe of Arithmetick, or the Science of Numbers, to expreſs his Thoughts by, he ſaid, that *Virtue*, [15] *Health, Friendſhip, every Thing that is good, and even GOD himſelf, were nothing but* Harmony. 'Tis well known, [16] that he had his Opinion, concerning the *Tranſmigration of Souls*, from the *Egyptians*. Notwithſtanding which, he ſpeaks of *Hell*, and the Pains of another Life; in which [17] he is not very conſiſtent with himſelf. "Nothing in the World "can be more admirable, and Chriſtian-like, than "what he ſays of the main Deſign, and Aim of "our Actions and Studies: For he held, that the "Study of Philoſophy [18] tends to bring Men to "a Reſemblance of God.——His Doctrines con- "tain'd [19] two Parts; which may very well be "compar'd to the *Purgative*, and *Unitive Ways*; "about which our *Quieteſts* [20] have ſaid ſo many "fine Things.—The Acquiſition of Truth was, in "his Opinion [21], the only Way to become like "God: But the Way to diſcover Truth, is to "ſearch after it with a Soul that is purify'd, and "has ſubdu'd the Paſſions of the Body. The Fol- "lowers of [22] this Philoſopher taught, that a Man "perfects himſelf three Ways: Firſt, by conver- "ſing with the Gods; becauſe, during ſuch Com- "merce, he abſtains from every evil Action; and "thereby makes himſelf like the Gods, as far as "ſuch a Thing is poſſible. Secondly, by doing [23] "good to others,; for this being the peculiar At- "tribute of God, is, in us, an Imitation of him. "Thirdly, by departing out of this Life. The "moſt excellent Endowments of Heaven ever con-

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[1] Πρῶτος μὲν ὢν ἐπεχείρησε Πυθαγόρας περὶ ἀρετῆς εἰπεῖν, *Magn. Moral.* Lib. i. Cap. i. p. 145. c. Edit. *Paris*, 1629. & p. 192. A. An. 1654.

[2] ——*Non ſordidus auctor Naturæ verique.* Horat. Lib. i. Ode 28, 14, 15. See thereupon Meſſrs. *Le Fevre*, and *Dacier.*

[3] See *Scheffer. de Nat. & Conſtit. Phil. Italicæ*, Cap. vi. So that the critical Cenſure of *Lactantius, Inſt. divin.* Lib. iv. Cap. i. Num. 10 is not over-well grounded.

[4] *Cicer. Tuſc. Quæſt.* Lib. v. Cap. iii. *Diog. Laert.* Lib. i. Num. 12. & p. 8. Edit. *Colon. Allob.*

[5] Mr. *Bayle*'s *Dictionary*, p. 2441. ſecond Edition.

[6] *Crotona*, in *Italy*. See *Juſtin.* Lib. xx. Cap. iv, *per totum.*

[7] See Rem. (F) in *Bayle*'s *Dictionary*, p. 2442. Col. 1.

[8] *Ibid.* Rem. (G).

[9] See *Jamblich. in vita Pythag.* Lib. i. Cap. xxx. §. 172. and *Diog. Laert.* Lib. viii. §. 16. & p. 577.

[10] See *Diog. Laert. ubi ſupra*, §. 2, 3. *ibique Interpr.* And p. 568. Edit. *Col. Allob.*

[11] See *Scheffer. de Nat. & Conſt. Philoſ. Ital.* Cap. xiii.

[12] See *Diog. Laert. ubi ſupra*, §. 7. *ibique Interpr.* and the *Bibl. Græc.* of Mr. *Fabricius*, Lib. ii. Cap. xii. §. 4.

[13] See Mr. *Fabricius, ubi ſupra*, §. 6. p. 469.

[14] Οὔτε γὰρ ἐκεῖνος αἰσθητὸν ἢ παθητὸν, ἀόρατον δὲ καὶ ἀκήρατον καὶ νόητον ὑπελάμβανεν εἶναι τὸ πρῶτον. *Plutarch. in Numa*, p. 65. B. Edit. *Francof.* and p. 118. Edit. *H. Steph.* See *Bayle*'s *Dict.* Not. (N) p. 2446. Col. 1.

[15] Τήν τε ἀρετὴν ἁρμονίαν εἶναι, καὶ τὴν ὑγίειαν, καὶ τὸ ἀγαθὸν ἅπαν, καὶ τὸν Θεὸν——φιλίαν τε εἶναι, εὐαρμόνιον ἰσότητα. *Diog. Laert.* Lib. viii. §. 33. and Edit. *Col.* p. 587. See *Ariſtot. Mag. Moral.* Lib. i. Cap. i. p. 192. A.

[16] See *Diog. Laert. ubi ſupra*, §. 14. *ibique Interpr.* and p. 569. Edit. *Colon. Heredot.* Lib. ii. Cap. cxxiii. *Diod. Sic.* Lib. i. p. 88. B. towards the End. Mr. *Dacier* pretends to explain, in a figurative Senſe, this Opinion of the Tranſmigration of Souls, but ſee what Mr. *Le Clerc* ſays to it, *Bibl. Choiſ.* Tom. x. p. 185, *& ſeq.* Compare here, alſo, the Remarks of M. *l'Abbé d'Olivet*, on *Cicero*'s *de naturâ Deorum*, Tom. iii. p. 264, and following.

[17] See Mr. *Bayle*'s *Dict.* Rem. (F) towards the End, p. 2445. Col. 2. and Rem. (M) p. 2445. Col. 2.

[18] Πρὸς τὴν θείαν ὁμοίωσιν ἀνάγει, καὶ τῆς Πυθαγορικῆς φιλοσοφίας τὸν τελειότατον σκοπὸν ἐκκαλύπτει, *Hierocles in Pref. ad Carm. Aurea, circa finem*, p. 13. Edit. *Needh.* and p. 9. Edit. *Lond.* Σωκράτης, Πλάτων ταυτὰ τῷ Πυθαγόρᾳ, τέλος ὁμοίωσιν Θεῷ. *Stob. Eclog.* Lib. ii. Cap. iii. p. 163. lin. 44. I have here all along taken the Words of *Bayle*, Rem. (N) Artic. *Pythagoras.* p. 2446. Col. 2.

[19] See *Scheffer. de Nat. & Conſt. Phil. Ital.* Cap. x. p. 78.

[20] See the Words (*Myſtique* and *Quiétiſme*) in *Dictionnaire Univerſel, à Trevoux*, 1721.

[21] *Scheffer.* ibid. Cap. vii.

[22] *Apud Phot.* Cod. ccxlix. p. 1313. lin. 55. Edit. *Roth.*

[23] Διύτερον, ἐν τῷ εὖ ποιεῖν· Θεῷ γὰρ τοῦτο καὶ θείας μιμήσεως. Ibid. lin. 58.

" ferr'd on Men, are, according to *Pythagoras* [1], " thoſe of ſpeaking Truth, and doing good Of- " fices: Theſe two Things, ſay the *Pythagoreans*, " reſemble the Works of *God*." This [2] Philoſopher very earneſtly recommended Sobriety, and Moderation in all Sorts of Pleaſures. *He forbids* [3] *the leaving this World without expreſs Order from our General, that is, GOD, who has given each Man his Poſt here.* But, when we are call'd upon to quit this Life, he would have us do it with a good Grace, and without any Concern for the Loſs of the Pleaſures of this World; all which he ſignifies to us by this ſymbolical Sentence: [4] *Not to return back again, when we are once enter'd upon our Journey.* [5] Another of his Symbols ordains, *not to paſs the Equilibrium of the Balance*; intimating, that the Rules of Equity, and Juſtice, ought exactly to be followed.

SECT. XIX.

ANAXAGORAS, [6] *the firſt of the* [7] Ionick *Sect, (if we except* Thales) *who acknowledg'd for the original Cauſe* [8] *of the Univerſe, an infinite Spirit; was, nevertheleſs, generally look'd upon as an Atheiſt: becauſe he ſaid, that* [9] *the Sun was nothing elſe but a Globe of Fire, and the Moon but an Earth; that is to ſay, becauſe he denied, that there were ſpiritual Subſtances join'd to theſe Planets; and, conſequently, that they were Deities.* " Before ever the " Goſpel had taught Men, to renounce the World " and its Riches. in order to proceed more ſpee- " dily in the Way of Perfection; there were Phi- " loſophers who comprehended this Truth ſo far, " as to ſell their Eſtates, in order to apply them- " ſelves more freely to the Study of Wiſdom, and " the Search of Truth." Thus far Mr. *Bayle* [10]: But as he ſeems here to attribute to the Goſpel, according to his wonted Cuſtom, overſtrain'd Notions of Morality; ſo he extols a little too much the Conduct of theſe ancient Philoſophers; in which there was more of Oſtentation, and a miſtaken Notion of Diſintereſtedneſs, than of true Wiſdom: for we may make a good Uſe of our Riches; nor is the entire relinquiſhing of them neceſſary, to a more cloſe Application to the Study of Truth, and Virtue. " But, be that as it will, *Anaxagoras* [11], after hav- " ing convey'd [12] all his Patrimony to his Relations, " applied himſelf wholly to the Study of Nature, " without, in the leaſt, intermeddling with public Af- " fairs; which occaſion'd his being aſk'd, whether " he had no Concern for his Country? His Anſwer " was admirable; no Chriſtian Philoſopher could " have made a better: *Yes*, ſaid he, pointing to " the Heavens, *I have an extraordinary Care for my* " *Country*. Another Time [14] one aſk'd him, To " what End he was born? *To contemplate*, replies " he, *the Sun, the Moon, and the Heavens*. Ac- " cordingly he plac'd the [15] Sovereign Good, or " the chief End of human Life, in Contemplation, " and in that free State of Mind, which Contem- " plation produces.——[16] He thought the Condi- " tions [17] of Life, which appear'd leaſt happy, to " be the moſt ſo; and that thoſe, who taſted true " Happineſs, were not to be found among the " Rich and Honourable; but among thoſe, who " improv'd a ſmall Spot of Ground; or who, " void of all ambitious Cares, apply'd themſelves to " the Study of the Sciences.——He [18] was the " firſt, who ſuppos'd the Poems of *Homer* to be " Books of Morality, where Virtue and Juſtice are " explain'd by allegorical Narrations.

" *Archelaus*, [19] the Scholar of [20] *Anaxagoras*, ap- " ply'd himſelf chiefly to Natural Philoſophy, as " his Predeceſſors had done; but [21] he carried Mo- " rality to a greater Height. He was not over-or- " thodox, for he maintain'd [22], that human Laws " were the Origin of all moral Good; that is to " ſay, that he did not admit the Law of Nature, " but admitted of poſitive Laws only; and, con- " ſequently, believ'd, that all Sorts of Actions are, in " their own Nature, indifferent; and that they be- " come good, or bad, according as it ſhall pleaſe " Men to eſtabliſh ſuch or ſuch Laws." I cannot ſay, whether what has been alledg'd be exactly conformable to the Sentiments of *Archelaus*: But certain it is, that *Socrates*, his Scholar and Succeſſor, had quite different Ideas of the Nature and Foundation of the moral Part of human Actions. Perhaps it may be in this Caſe, as it is with reſpect to another Opinion of this ſame Philoſopher, which, in the Judgment of a very learned Man, [23] appears not to be well grounded: But be this as it will; let us now paſs on to his Scholar, who, in every Reſpect, much excell'd his Maſter; and under whom Philoſophy took a quite different Turn.

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[1] Πυθαγόρας ἔλεξε, δύο ταῦτα ἐκ τῶν Θεῶν τοῖς ἀνθρώποις διδόσθαι κάλλιστα, τό, τε ἀληθεύειν, καὶ τὸ εὐεργετεῖν· καὶ προσεῖναι, ὅτι καὶ ἔοικε τοῖς Θεῶν ἔργοις ἑκάτερον. *Ælian. Var. Hiſt.* Lib. xii. Cap. lix. Ed. *Perizon.* & *Tornæs.*

[2] See *Diog. Laert.* ubi ſupra, Sect. 9. and Ed. *Col.* p. 573. and *Jamblich.* Sect. 41, 42. Ed. *Kuſter.*

[3] *Vetatque* Pythagoras *injuſſu imperatoris, id eſt, Dei, de præſidio & ſtatione vitæ decedere. Cicer. de Senectute.* Cap. xx. *Plato,* (in his *Phædo*, p. 61. And p. 377. B, C, D. Ed. *Læmar.*) aſcribes this Precept to *Philolaüs*, a *Pythagorean*, who doubtleſs had it from the Doctrine of *Pythagoras.*

[4] Διὰ δὲ τὸ, εἰς ἀποδημίαν βαδίζοντα μὴ ἐπιστρέφεσθαι, παραίνει τοῖς ἀπαλλαττομένοις τοῦ βίου, μὴ ἐπιθυμητικῶς ἔχειν τοῦ ζῆν, μήδε ὑπὸ τῶν ἐνταῦθα ἡδονῶν ἑπάγεσθαι. *Diog. Laert.* ubi ſupra, Sect. 18. And p. 579. Ed. *Colon. Allob.*

[5] Τὸ δὲ, Ζυγὸν μὴ ὑπερβαίνειν, τουτέστι τὸ ἴσον καὶ δίκαιον μὴ ὑπερβαίνειν. Ibid. Sect. 18. And Edit. *Colon.* p. 578.

[6] He was born at *Clazomene* in *Ionia*, about the ſeventieth Olympiad, five hundred Years before *Jeſus Chriſt.* He died aged about ſeventy two Years.

[7] *Ralph Cudworth*, in the *Extract of the Bibl. Choiſ.* by Mr. *Le Clerc*, Tom. ii. p. 56. See alſo Tom. i. p. 83.

[8] See *Diog. Laert.* Lib. ii. Sect. 6. and Ed. *Colon.* p. 91. [9] Ibid. Sect. 8. and p. 93. Edit. *Colon. Allobr.*

[10] Mr. *Bayle*'s Dict. Art. *Anaxagoras*, Rem. (A).

[11] Ibid. in the Text, p. 214. [12] *Diog. Laert.* ubi ſupra, Sect. 7. and p. 92. Edit. *Colon. Allobr.*

[13] Ὄλε· καὶ πρὸς τὸν εἰπόντα, οὐδέν σοι μέλει τῆς πατρίδος; εὐφήμει, ἔφη, ἐμοὶ γὰρ καὶ σφόδρα μέλει πατρίδος, δείξας τὸν οὐρανόν. Ibid. p. 92. Edit. *Colon. Allob.* And Edit. *Amſtel.* Sect. 7.

[14] Ἐρωτηθείς ποτε, εἰς τί γεγένηται; Εἰς θεωρίαν, ἔφη, ἡλίου καὶ σελήνης καὶ οὐρανοῦ. Ibid. p. 95. Ed. *Allob. Amſtel.* Sect. 10.

[15] *Clem. Alex. Strom.* Lib. ii. p. 416. This Thought is criticis'd very impertinently by *Lactantius*, (Lib. iii. Cap. ix. Num. 5. & ſeq. Edit. *Cellar.*) who groſly makes *Anaxagoras* mean it of the Eyes of the Body. See the *Obſerv. Selectæ*, &c. printed at *Hall* in *Saxony*, Tom. ii. Obſerv. 14. [16] *Bayle*'s Dict. ubi ſupra, Rem. (N.) p. 226. Col. 1.

[17] *Nec parum prudenter Anaxagoras interroganti cuidam, quiſnam eſſet beatus: Nemo, inquit, ex iis, quos tu felices exiſtimas: ſed eum in eo numero reperies, qui a te ex miſeriis (vel miſeris) conſtare creditur. Non erit ille divitiis, aut honoribus abundans: ſed aut exigui ruris, aut non ambitioſæ doctrinæ fidelis, ac pertinax cultor; in ſeceſſu, quam in fronte beatior. Val. Max* Lib vii Cap. ii. in extern. Sect. 9. And p. 362. Ed. *S. Gryph.* [18] *Diog. Laert.* ubi ſupra, Sect. 11. Lib. ii. and p. 95. Edit. *Colon. Allob.*

[19] Some ſay he was born at *Athens*, others at *Miletus*: His Age is not certainly known. See *Bayle*'s Dict. Rem. (A) Tom. i. p. 309. Col. a. [20] The Words of Mr. *Bayle*, ibid. in the Text, p. 310.

[21] Ἔοικε δὲ καὶ οὗτος ἅψασθαι τῆς Ἠθικῆς. *Diog. Laert.* Lib. ii. Sect. 16. And p. 99. Ed. *Col.*

[22] Καὶ τὸ δίκαιον εἶναι καὶ τὸ αἰσχρὸν οὐ φύσει, ἀλλὰ νόμῳ. Ibid. Sect. 16.

[23] See Mr. *Le Clerc*, in his *Bibl. Choiſie*, Tom. i. p. 86.

SECT. XX.

SOCRATES [1], the worthieſt Man, and wiſeſt Philoſopher of all Heathen Antiquity, *was* [2] *the firſt who, knowing that what paſſes without us concerns us not, and affords Matter rather curious, than uſeful, applied himſelf more particularly to the Study of Morality; and treated it in his Diſcourſes more methodically, than any who had gone before him:* And for this Reaſon it is, that he has been look'd upon as the Father of [3] moral Philoſophy; not that he was the very firſt Philoſopher, who laid [4] down Rules for the Conduct of Life: We have the expreſs Teſtimony of *Ariſtotle* thereupon. *Pythagoras*, ſays he, *was the firſt who attempted to treat of Virtue.*—— [4] *And after him* Socrates *did it more accurately, and in a more extenſive Manner. Socrates* [5] wrote nothing: His Inſtructions were only, the familiar Diſcourſes he had with all Sorts of People; for he ſet up no School, nor did he communicate his Thoughts only to a certain Number of Scholars. He had an admirable Way of diſconcerting, and turning into Ridicule, the *Sophiſts* of his Time, who being Maſters of no other Learning, but a falſe Rhetorick, and the Art of maintaining, by vain Subtilties, either Side of the Queſtion, on all Sorts of Subjects, entirely corrupted the Principles of their Youth, and thereby acquir'd, with immenſe Riches, a great Reputation among the Unlearned, and the Populace. Whenever he had to do with any of theſe Pretenders to Learning, who made it not their Buſineſs honeſtly to ſearch after Truth; or with thoſe, who were prejudic'd in Favour of them; he contented himſelf with only confuting them, and involving them in Contradictions, without ever deciding himſelf the Queſtion in Debate. "He "proteſted openly [6], that he knew nothing, and "had always theſe Words in his Mouth [7]; *That* "*there was but one Thing that he certainly knew, which was, that he knew nothing.*——He talk'd "thus, to confound the Pride of all thoſe, who "boaſted of Sciences, which they had not, and "which it was even impoſſible for Man to acquire. "He did not eſteem that to be Knowledge, which "proceeded no farther than Doubts and Conjec-"tures; nor call'd him a clear-ſighted Man, who "ſaw no better, nor farther than his ſhort-ſighted "Neighbours.——But to infer from hence, that "he had a Mind to introduce Uncertainty in all "Sorts of Knowledge; and to pretend, that his "ſaying he knew nothing, was in effect to ſay, "that he knew not that Virtue was good, that a "Man ought to love his Country, or, that he "ought to have an Averſion to Vice: This, I "ſay, would be to miſtake his Meaning, and to "put a very harſh Interpretation upon his known "Humility. He could not but be well aſſur'd, that "true Happineſs conſiſted in Virtue, ſince Virtue "was his only Aim in all his Actions. He muſt have "been ſenſible of the Obedience due to the Laws, "ſince he himſelf obſerv'd them: that Arrogance, "Hatred, and Ingratitude, ought to be had in "Deteſtation, ſince he did his utmoſt Endeavour "to make them odious. And finally, he could "not but have ſtedfaſtly believ'd there was a *God*, "and that he ought to be ador'd; for he never "ceas'd talking of his Benefits towards us; and "of the Duty and Reverence we owe him. There-"fore we find [8] *Cicero* deſirous, that we ſhould ex-"clude *Socrates* from the Number of thoſe who "deny, that there is any Certainty in human Know-"ledge; it being very unreaſonable to make that "great Man, who had ſo clearly taught the Rules "of Juſtice and Piety, to be the Author of this "*dubious Doctrine*, which deſtroys all Religion and "Virtue whatever." Thus does the *French* Author, who has given us his Life, juſtify him. "[9] *So-"crates* acknowledg'd one only ſupreme *God*, as "manifeſtly appears by thoſe Diſcourſes of his, "which *Xenophon* has preſerv'd to us. But it is "not true, that he rejected the inferior Deities; and "that he was for this Reaſon put to Death. 'Tis a "vulgar Error, which Mr. *Cudworth* has very well "refuted, tho' maintain'd by ſeveral of the Fathers. "It appears by the *Euthyphro* of *Plato* [10], that all "the Impiety laid to his Charge was, that he had "openly condemn'd all the Fables concerning their "Gods, in which wicked and impious Actions "were attributed to them, altho' he had, at the "ſame Time, own'd inferior [11] Deities, as may be "ſeen by ſeveral of his Diſcourſes.——The People "imagin'd, that thoſe Fables could not be rejected, "without denying, at the ſame Time, the Deity "of thoſe, of whom they were related; in which "they reaſon'd better than *Socrates:* For, in fine, "the only Knowledge they had of *Jupiter*, and the "reſt of their Gods, was no other than what they "had receiv'd by Fiction, or oral Tradition; and "if that Tradition was to be look'd upon as im-"pious, or falſe, then it muſt neceſſarily follow, "that the whole of what was ſaid, concerning the "Gods of *Athens*, ought to have been rejected.

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[1] He was born the fourth Year of the ſeventy ſeventh Olympiad, four hundred and ſixty nine Years before *Jeſus Chriſt*, and died aged ſeventy Years. See his Life, by Mr. *Charpentier*; and the *Silvæ Philologicæ* of Mr. *Le Clerc*, publiſh'd in 1711. Cap. iii.

[2] *Dacier*'s Preface to *M. Antonin.* A 3 a. and in the *Life of Plato*, p. 68.

[3] *Socrates mihi videtur, id quod conſtat inter omnes, primus à rebus occultis, & ab ipſa natura involutis, in quibus omnes ante eum Philoſophi occupati fuerunt; avocaviſſe Philoſophiam, & ad vitam communem adduxiſſe; ut de virtutibus & vitiis, omninoque de bonis rebus & malis, quæreret; cæleſtia autem vel procul eſſe a noſtra cognitione cenſeret; vel ſi maximè cognita eſſent, nihil tamen ad bene vivendum. Cicer. Academ.* Quæſt. 1, 4. "It is agreed by all, and indeed appears to me, that *Socrates* was the firſt who reſtor'd "Philoſophy to its true Uſe, by recalling it from the Inveſtigation of occult Cauſes, and uſeleſs Speculations, which employ'd all "the Philoſophers before his Time. He applied it to Practice, by diſtinguiſhing the Nature of Virtue and Vice, and aſcertaining "the Difference between moral Good and Evil. The Diſquiſitions of natural Philoſophy, he regarded either as beyond our "Reach, or ever ſo well known, of very little Importance towards the Regulation of our Conduct." See, alſo, *Tuſc.* Quæſt. 5. Cap. iv. and *Diog. Laert.* Lib. ii. Sect. 21. and 45. ibique Interpr. And p. 101, 102. and p. 120. Ed. *Colon.*

[4] Μεῖὰ τοῦτον Σωκράτης ἐπιξενόμενος, βέλτιον, καὶ ἐπὶ πλεῖον εἶπεν ὑπὲρ τούτων. *Ariſtot. Mag. Moral.* Lib. i. Cap. i. p. 192. B. See the reſt of the Paſſage above cited, Sect. 18. Not. 1. p. 40.

[5] See the *Bibl. Græc.* of M. *Fabricius*, Lib. ii. Cap. xxiii. Sect. 30. Tom. i. p. 825. Obſerve, that when *Horace* ſays, *Rem tibi Socraticæ poterunt oſtendere chartæ, Artis Poetic.* Verſ. 310. he means only the Writings of his Diſciples.

[6] *Charpentier*'s *Life of Socrates*, p. 83. & ſeq. Edit. *Amſterd.*

[7] Καὶ εἰδέναι μὲν μηδὲν, πλὴν αὐτὸ τοῦτο εἰδέναι. *Diog. Laert.* Lib. ii. Sect. 32 and Ed. *Col.* p. 109. See thereupon *Caſaul.* & *Menag.* & *Cic. Acad.* Quæſt. 1, 4. and *Davis*, i. l. As, alſo, *Plato*, Apolog. p. 360. E. Edit. *Lænar.* and p. 21. D. *Serran.*

[8] *Quorum e numero* [qui negaſſent quidquam ſciri, aut percipi poſſe:] *tollendus eſt & Plato, & Socrates——de ſe ipſe detrahens in diſputatione, plus tribuebat iis, quos volebat refellere. Ita cum aliud diceret atque ſentiret, libenter uti ſolitus eſt ea diſſimulatione, quam Græci εἰρωνίαν vocant, Acad.* Quæſt. Lib. iv. Cap. v.

[9] *Bibl. Choiſie* of Mr. *Le Clerc*, Tom. iii. p. 70, 71, 72.

[10] P. 6. A, B. Tom. i. Ed. *Serrani.* And p. 49. E, F. d. and Edit. *Læmar.*

[11] See what *Xenophon* ſays in the Beginning of the firſt Book of *Memorable Things*, p. 708, 709. & ſeq. Ed. *Paris*, 1625.

" That there is a *God*, might then as well as now " be believed, without admitting thoſe Fables: " But how could it have been ever imagined with- " out them, that there was a *Jupiter*, a *Saturn*, " &c?" The natural Idea of a Deity, which is abſolutely incompatible with Vice, prevented *Socrates* from ſeeing this Incoherence in his Principles. Nothing can be finer than what he ſays of [1] divine Providence; and his Maxim upon Prayer, is worthy the Light of the Goſpel. "[2] When he " pray'd to the Gods, he ſimply aſk'd them to " grant him what was good; becauſe they knew " better than we do, what Things are truly ſo; " and he ſaid, that they who aſk'd either Gold, " Silver, or ſovereign Power, made as abſurd Re- " queſts, as if they had aſk'd to game, or to fight, " or deſir'd any Thing elſe, that might eaſily turn " to their Prejudice." Let us now ſee what his Sentiments were concerning the Law of Nature. " There are [3] (ſaid he) certain Laws which are " not written; by which he means thoſe which are " univerſally receiv'd throughout the World:" But nevertheleſs Men did not make them; " For all " Men could not aſſemble themſelves together in " any one Place; neither could they all ſpeak the " ſame Language. They [4] were therefore made by " the Gods: for in the firſt Place, it is a Point " univerſally acknowledg'd by all Mankind, that " the Gods ought to be ador'd. It is a Maxim " equally acknowledg'd, that every one ought to " honour his Father and Mother: and that Fathers " and Mothers ſhould not marry with their Chil- " dren. No one ever violates with Impunity, (adds " he) any one Law eſtabliſh'd by the Gods. There " are Puniſhments attach'd to the Crimes com- " mitted againſt theſe Laws, which Puniſhments " it is impoſſible to eſcape; whereas a Man may " eaſily guard againſt the Severity of human Laws, " after he has tranſgreſs'd them; either by taking " his Meaſures ſo well that he cannot be convicted, " or becauſe he has Power enough to violate them " without Fear of Puniſhment.——To do good to " them, who have done good to us, is, alſo, an uni- " verſal Law. Whoever breaks this Law, is ſuffi- " ciently puniſh'd, becauſe, being deſtitute of " Friends, he is forc'd to betake himſelf to thoſe " who have him in Averſion. For are not thoſe " the beſt Friends, who do us good Offices, when " we are in need of them? But if he, who has re- " ceiv'd Favours from them, proves unthankful, " does he not draw upon himſelf their Hatred by " ſuch Ingratitude? And yet, as he finds it a great " Advantage in preferring their good Will, is it " not to thoſe he ſtill applies with the greateſt " Aſſiduity?——When I conſider, that each Law " carries with it the Puniſhment of him, who " tranſgreſſes it, I eaſily perceive it to be the Work " of a Legiſlator more excellent than Man. The " Gods never make any unjuſt Laws: on the con- " trary, Men can ſcarce ever make any that are " juſt." It may eaſily from hence be judg'd, what were the Principles of *Socrates*. Many of the particular Conſequences he drew from them, may be ſeen in the *Memoirs* of *Xenophon*, who ſeems to have mix'd nothing of his own, with the Diſcourſes of his Maſter, which he gives us at full length. This great Philoſopher makes uſe of a very poor Argument, to ſhew that Inceſt with a Father, or Mother, is contrary to the natural, or divine Law: [5] *For they*, ſays he, *who give themſelves up to theſe unlawful Embraces, muſt needs have but very diminutive Children.*

Beſides the Works of *Xenophon*, we have ſtill extant ſome [6] Dialogues by *Eſchines* the *Philoſopher*; and a little Piece of another of *Socrates*'s Scholars, call'd [7] *Cebes*. This laſt is a moſt ingenious Picture of human Life, wherein the Method and Genius of the Maſter may be ſeen, as well as in the Dialogues I juſt now mention'd. All the ſeveral Sects of Philoſophers, who have appear'd in the World ſince *Socrates* [8], have been deſirous to have him for their Chief; and have endeavour'd to bring their Sentiments and Notions to thoſe of this great Man. We ſhall now ſay ſomething of the moſt celebrated Founders of Sects, who came out of his School; and we ſhall begin with him, who was the moſt celebrated, and the only one, except *Eſchines*, whoſe Writings we have now left.

SECT. XXI.

PLATO [9], as well as *Eſchines*, " The better to " keep up the Appearance of their Maſter [10], " that grand Reſtorer of Morality, preferr'd that " of teaching by Dialogue, to any other Method. " For as it is the moſt entertaining, as it is like a " Scene where we ſee all the Actors; ſo it, alſo, " comes nearer its End, which is to perſuade and " inſtruct; becauſe it is more animated, and has

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[1] *Xenoph. Apomnem.* Lib. i. p. 422. & ſeq. Ed. *H. Steph.* And Cap. iv. Ed. *Oxon.* And p. 47. & ſeq. in *Charpentier*'s Verſion. And p. 726. E. & ſeq. Ed. *Paris.*

[2] Καὶ εὐχέσθαι δὲ πρὸς τοὺς Θεοὺς ἁπλῶς τ' ἀγαθὰ διδόναι, ὡς τοὺς Θεοὺς κάλλιστα εἰδότας ὁποῖα ἀγαθά ἐστι· τοὺς δὲ εὐχομένους χρύσιον, ἢ ἀργύριον, ἢ τυραννίδα, ἢ ἄλλο τι τῶν τοιούτων, οὐδὲν διάφορον ἐνόμιζεν εὔχεσθαι, ἢ εἰ κυβείαν, ἢ μάχην, ἢ ἄλλο τι εὔχοιντο τῶν φανερῶς ἀδήλων, ὅπως ἀποβήσοιτο. Ibid. p. 420. in fine. Ed. *Steph.* Cap. iii. Sect 2. Ed. *Oxon.* Et. p. 722. C *Paris.*

[3] Ἀγράφους δέ τινας οἶσθα νόμους; τοὺς γ' ἐν πάσῃ——χώρᾳ καλὰ τυγχάνοντας νομιζομένους.——οἱ γὲ [ἄνθρωποι] ἔτε συνελθεῖν ἅπαντες ἂν δυνηθεῖεν, ἔτε ὁμόφωνοί εἰσι. Ibid. p. 807. B. Ed. *Paris.* And p. 470. Ed. *Steph.* And Cap. iv. Sect. 19. Ed. *Oxon.*

[4] Θεοὺς ὁμαι τοὺς νόμους τούτους τοῖς ἀνθρώποις θεῖναι· καὶ γὰρ παρὰ πᾶσιν ἀνθρώποις πρῶτον νομίζεται τοὺς Θεοὺς σέβειν——καὶ γονέας τιμᾶν πανταχῇ νομίζεται——καὶ μήτε γονέας παισὶ μίγνυσθαι, μήτε παῖδας γονεῦσιν.——Δίκην γέ τοί διδύασιν οἱ παραβαίνοντες τοὺς ὑπὸ τῶν Θεῶν κειμένους νόμους, ἢν ἐδενὶ τρόπῳ δυνατὸν ἀνθρώπῳ διαφεύγειν, ὥσπερ τοὺς ὑπ' ἀνθρώπων κειμένους νόμους, ἔνιοι παραβαίνοντες διαφεύγουσι τὸ δίκην διδόναι, οἱ μὲν, λανθάνοντες, οἱ δὲ, βιαζόμενοι,——Τοὺς εὖ ποιοῦντας ἀντευεργετεῖν, πανταχῇ νόμιμόν ἐστι——οἱ τοῦτο παραβαίνοντες δίκην διδόασι, φίλων μὲν ἀγαθῶν ἔρημοι γιγνόμενοι, τοὺς δὲ μισοῦντας ἑαυτοὺς ἀναγκαζόμενοι διώκειν· ἢ οὐχ οἱ μὲν εὖ ποιοῦντες τοὺς χρωμένους ἑαυτοῖς, ἀγαθοὶ φίλοι εἰσὶν, οἱ δὲ μὴ ἀντευεργετοῦντες τοὺς τοιούτους, διὰ μὲν τὴν ἀχαριστίαν μισοῦνται ὑπ' αὐτῶν, διὰ τὸ μάλιστα λυσιτελεῖν τοῖς τοιούτοις χρῆσθαι, τούτους μάλιστα διώκουσι:——Τὸ γὰρ τοὺς νόμους αὐτοὺς τοῖς παραβαίνουσι τὰς τιμωρίας ἔχειν, βιαιότατον ἢ καὶ ἄνθρωπον νομοθέτην δοκεῖ μοι εἶναι.——Οὐκ ἄλλα [τῶν δικαίων νομοθετοῦσιν οἱ Θεοὶ] σχολῇ γὰρ ἂν ἄλλο γέ τις τὰ δίκαια νομοθετήσειεν, εἰ μὴ Θεός. Ibid. p. 807, 808, A. Ed. *Paris.* [5] Τί γὰρ ἂν μεῖζον πάθοιεν ἄνθρωποι τεκνοποιούμενοι, τοῦ κακῶς τεκνοποιεῖσθαι. Ibid. p. 807, D. Ed. *Paris.*

[6] Mr. *Le Clerc* has lately publiſhed them with his Notes, in 1711. And there is ſince another Edition of M. *Peter Horreus* printed at *Leewarden* in 1711.

[7] It was publiſh'd entire, and of a very fine Edition, at *Amſterdam* 1689. See the *Bibl. Græc.* of M. *Fabricius*, Lib. ii. Cap. xxiii. Sect. 34. Some however pretend, that *Cebes* is not the Author of this Piece, and M. *L'Abbé Sevin* has tried to defend this Opinion. His Arguments for it may be ſeen in the Hiſtory of the *Academy of Inſcriptions* and *Belles Lettres*, Tom. ii. Vol. V. Edit. *Holl.* p. 229. and following.

[8] *Cum tamen omnes ſe Philoſophi Socraticos, & dici vellent, & eſſe arbitrarentur.* Cicer. de Oratore, *Lib.* iii. *Cap.* xvi.

[9] He was born the firſt Year of the eighty eighth Olympiad, four hundred and twenty eight Years before *Chriſt*. He died aged eighty one Years. See *Dacier*'s *Life of Plato*, who would have done well in this, as well as the other Works he has publiſh'd, to have cited the Paſſages of thoſe Authors, from whence he takes his Facts; or, at leaſt, have referr'd to them exactly. One is not oblig'd in ſuch Caſes to take a Man's bare Word. [10] *Dacier*, ibid. p. 68, 69.

" all the Appearance of an impartial Trial, where " each Party are allow'd to defend their own Cauſe, " and, conſequently, the Victory gain'd by either " is inconteſtable, at leaſt when the Dialogue is " compos'd by an able Hand, and one who is " ſincerely engaged in the Search after Truth." This is the Sentiment of Mr. *Dacier*, who has undertaken to tranſlate our Philoſopher into the *French* Tongue. But ſince all Capacities have not either the Attention, or Penetration requiſite to diſcern, in this Conteſt of Arguments on either Side, what is the real Opinion of the Author; *Plato*, in my Judgment, would have done well to have modeſtly declar'd himſelf at laſt, and have let the Reader ſeen the Deciſion which appear'd to him the moſt probable.——Thus the ingenious Writer of our Days, who has given us *The new Dialogues of the Dead*, never fails to put into the Mouth of the laſt Speaker, ſuch Sentiments as contain the Deſign and Reſult of the whole Dialogue; the Want of which Precaution has drawn this Reflection upon *Plato* [1]; That *in his Books the Reader, who finds nothing there laid down as certain, is always left in Suſpence.* But *Cicero*, whoſe Reflection this is, does him Juſtice in another place [2]; where he exempts him from the Number of thoſe, who maintain'd, that nothing could be certainly known. And it appears, by a beautiful Paſſage in his *Phædo*, that this Philoſopher was, as well as his Maſter, in many Things well determin'd in his Opinions; and that, " If he " ſeems not poſitively to affirm any Thing in his " Writings, 'tis becauſe he [3] entirely follows *So-* " *crates*'s Manner of diſputing; and is in every " Thing careful to avoid the magiſterial Air of " the Sophiſts, and Dogmatiſts, who aſſerted every " Thing in a peremptory Manner, taking almoſt " always ſimple and bare Appearances, for indiſ- " putable Truths." He accordingly there introduces *Socrates* ſpeaking in this Manner: " [4] Is it " not a moſt deplorable Misfortune, that though " there are Reaſons true, certain, and moſt obvi- " ous to the Apprehenſion, there ſhould nevertheleſs be found a Set of Men, who, after having " refus'd to lay hold of them, and having been " preſent at ſome of thoſe frivolous Diſputes, " where every Thing appears, ſometimes true, " ſometimes falſe, come at length to doubt wholly: " And inſtead of laying the Blame of thoſe Doubts " on themſelves, or their own Want of Skill and " Application, they at laſt throw it on the Reaſons " themſelves; and then, becauſe their Temper is " grown peeviſh, they paſs their Lives in hating " and calumniating all Reaſon; and thereby ut- " terly deprive themſelves of all Truth, and Know- " ledge?" It has been obſerv'd, that there are four [5] particular Perſons, in whoſe Mouths *Plato* generally puts his real Sentiments, *viz. Socrates*, *Timæus*, the *Athenian Hoſt*, and the *Stranger of Elea*.

And tho' there are ſome particular Dialogues [6], which treat more expreſly and particularly of Morality, than the reſt, yet that Science *is diffus'd* [7] *thro' all his Works; and whatſoever Subject he is upon, he ſeems to have always an Eye to that.* His Principles, as far as I have been able to collect them from his Writings, may be reduc'd to theſe following Heads.

The End and Aim of all human [8] *Actions is ſome Good; and there is* [9] *a ſovereign Good, a Good by Way of Excellence, which every Soul pants after. This ſovereign Good muſt needs be* [10] *perfect, ſole ſufficient by itſelf; and ſuch, as whoever knows it, ardently ſeek the Poſſeſſion of that alone, without the leaſt Concern for any other Things, but ſuch as are made perfect by thoſe Goods, which have ſome Relation thereto.* But this can only be found in [11] *that infinite Being*, who is *the Father and* [12] *original Cauſe of all other Beings*; who *not only gives to* [13] *Things known, whatever they contain of Truth; and to intelligent Beings, the Faculty of knowing them: but is, alſo, the Author of their Exiſtence and Eſſence, being himſelf above all Eſſence, both in reſpect of Time, and Power.* Without the Knowledge [14], and Poſſeſſion of this Good, all other Things are uſeleſs. And tho' all Men deſire it [15], and have ſome Idea of it, yet do not they well know what it is: nor can they thoroughly comprehend it, either by their own Meditation, or by any certain and invariable Information from others. For which Reaſon there are but very few Men [16], who arrive at Happineſs in this World;

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[1] *Cujus* [Platonis] *in libris nihil adfirmatur, & in utramque partem multa diſſerantur, de omnibus quæritur, nihil certi dicitur.* Academ. *Quæſt. Lib.* i. *Cap.* xii.

[2] *Quorum è numero tollendus eſt* Plato:——*quia reliquit perfectiſſimam diſciplinam, Peripateticos, & Academicos*, &c. *Ibid. Lib.* iv. *Cap.* v.

[3] *Dacier*, ubi ſupra, p. 74, 75.

[4] Οὐκοῦν, ὦ Φαίδων, (ἔφη) εἰκὸς ἂν εἴη τὸ πάθος, εἰ ὄντος δή τινος ἀληθοῦς καὶ βεβαίου λόγου, καὶ δυνάτου καταμαθεῖν, ἔπειτα τούτου ἐκπεσὼν ἀποχῇ, διὰ τὸ παραγίγνεσθαι τοιούτοισι λόγοις, τοῖς αὐτοῖς τοῦτ' μὲν δοκοῦσιν ἀληθέσιν εἶναι, τοῦτ' δὲ μή, μὴ ἑαυτόν τις αἰτιῶτο, μηδὲ τὴν ἑαυτοῦ ἀτεχνίαν, ἀλλὰ τελευτῶν, διὰ τὸ ἀληθεῖν, ἄσμενος ἐπὶ τοὺς λόγους ἀφ' ἑαυτοῦ τὴν αἰτίαν ἀπώσαιτο· καὶ ἤδη τὸν λοιπὸν βίον μισῶν τε καὶ λοιδορῶν τοὺς λόγους διαγοιτ· τῶν δὲ (thus I read, inſtead of τε, with *H. Steph.*) ὄντων τῆς ἀληθείας τε καὶ ἐπιστήμης στερηθείη, p. 390. C, D. Ed. *Læmar.* And Tom. i. p. 90. C, D. Ed. *Serrani. Sextus Empiricus (Pyrr. Hypot.* Lib. i. Cap. xxxiii. p. 45. B.) acknowledges *Plato* to have had fix'd Opinions about certain Things. (Edit. *Fabricii*, p. 57. Num. 221. and d.)

[5] Καὶ περὶ μὲν τῶν αὐτῷ δοκούντων ἀποφαίνεται διὰ τετάρων προσώπων, Σωκράτους, Τιμαίου, τοῦ Ἀθηναίου Ξένου, τοῦ Ἐλεάτου Ξένου. *Diog. Laert.* Lib. iii. Sect. 52. and p. 217. Ed. *Col.*

[6] As, for Inſtance, his two *Alcibiades*, *Socrates*'s *Apology*, *Crito*, *Phædo*, *Gorgias*, *Philebus*, the ten Books *de Repub.* and the twelve *de Legibus*, &c.

[7] *Fleury*'s *Diſcourſe on Plato*, p. 252. the *Bruſſels* Edition.

[8] Τέλος εἶναι ἁπασῶν τῶν πράξεων τὸ ἀγαθόν; καὶ ἐκεῖνο ἕνεκα δεῖν πάντα τἄλλα πράττεσθαι; ἀλλ' οὐκ ἐκεῖνο, τῶν ἄλλων, p. 302, H. Ed. *Læmar.* and Ed. *Serrani*, Tom. i. p. 499, 500. *Gorg.*

[9] Ὁ δὲ διώκει μὲν ἁπάσα ψυχὴ, καὶ τούτου ἕνεκα πάντα πράττει, *De Repub.* Lib. vi. Tom. ii. p. 505, E. and p. 477, G. Edit. *Lugdun. Læmar.*

[10] Πάντων δὴ πού τελεώταλον [ἀνάγκη εἶναι]——ἱκανὸν τ' Ἀγαθὸν——τὸ δέ γε μὴν, ὡς οἶμαι, περὶ αὐτοῦ ἀναγκαιόταλον εἶναι λέγειν, ὡς πᾶν τὸ γιγνῶσκον αὐτὸ, θηρεύει καὶ ἐφίεται βελόμενον ἐλεῖν, καὶ περὶ αὐτὸ κήσασθαι, καὶ τῶν ἄλλων οὐδὲν φροντίζει, πλὴν τῶν ἀπολελυμένων ἅμα ἀγαθοῖς. In *Phileb.* Tom. ii. p. 20, D. and p. 76, C. Ed. *Ludg.*

[11] Πρῶτον μὲν τοίνυν ἄπειρον λέγω, *Phileb.* p. 78. Ed. *Ludg.* and Tom. ii. p. 27, B. For *Plato* acknowledg'd, beſides the ſupreme Being, inferior Deities. See *Bibl. Univ.* Tom. x. p. 387, *& ſeq.* and the *Bibl. Choiſ.* of Mr. *Le Clerc*, Tom. iii. p. 72, 73. The Reader may compare with theſe the Remarks of M. *l'Abbe d'Olivet* on *Cicero's de naturâ Deorum*, Tom. iii. p. 290. and following.

[12] Τοῦ πάντων Αἰτίου. *Phileb.* p. 30, E. and p. 80, D. Edit. *Lugdun.*

[13] Τοῦτο τοίνυν τὸ τὴν ἀληθειαν παρέχον τοῖς γιγνωσκομένοις, καὶ τῷ γιγνώσκοντι τὴν δύναμιν ἀποδιδὸν. τὴν τοῦ ἀγαθοῦ ἰδέαν φᾶθι εἶναι, αἰτίαν δ' ἐπιστήμης οὖσαν καὶ ἀληθείας——ἀλλὰ καὶ τὸ εἶναι τε καὶ τὴν οὐσίαν ὑπ' ἐκείνου αὐτοῖς προσεῖναι· οὐκ οὐσίας ὄντος τοῦ ἀγαθοῦ, ἀλλ' ἔτι ἐπέκεινα τῆς οὐσίας πρεσβείᾳ καὶ δυνάμει ὑπερέχοντος, *De Repub.* Lib. vi. Tom. ii. p. 508, E. and p. 479, A. Ed. *Lugdun.*

[14] Εἰ δὲ μὴ ἴσμεν [τὴν τοῦ Ἀγαθοῦ ἰδέαν,] ἄνευ δὲ ταύτης εἰ ὅτι μάλιστα τἄλλα ἐπιστάμεθα, οἶσθ' ὅτι οὐδὲν ἡμῖν ὄφελος· ὥσπερ οὐδ' εἰ κεκτήμεθά τι, ἄνευ τοῦ ἀγαθοῦ. *De Rep.* 6. p. 505, A. Tom. ii. and p. 477, E. Ed. *Lugdun.*

[15] Ἀπομαθευομένη τὸ εἶναι [πᾶσα ψυχὴ.] ἀποροῦσα δὲ καὶ οὐκ ἔχουσα λαβεῖν ἱκάνως τί ποτ' ἐστὶν, οὐδὲ πίστει χρήσασθαι μονίμῳ, οἷα καὶ περὶ τἄλλα. *De Rep.* p. 505, E. Tom. ii. and p. 477, G. Ed. *Lugdun.*

[16] Οὐ φημι εἶναι δυαλὸν ἀνθρώποις μακαρίοις τε καὶ εὐδαίμοσι γενέσθαι, πλὴν ὀλίγων· μέχρι περ ἂν ζῶμεν, τοῦτο διορίζομαι. *Epinomid.* init. p. 973. C. Tom. ii. and p. 697, F. Ed *Lugd.* Ὅτι αὐτὴν [τοῦ Ἀγαθοῦ ἰδέαν,] οὐκ ἱκανῶς ἴσμεν. *De Repub.* Lib. vi. p. 505, A. and p. 477, E.

and

and none who can obtain it in Perfection. All the Happineſs we can poſſibly arrive at here below, amounts to no more than the Enjoyment of a Good, which is only [1] *the Production and Emanation of that ſovereign Good, or ſomething that nearly reſembles it.* This Good, which may be compar'd *to the Light and* [2] *Eyeſight, is like an Image of the Sun, but not the Sun itſelf*; this Good, I ſay, *is Knowledge and Truth*; which [3] produce *Sanctity and Juſtice*, by which *we are, as far as 'tis poſſible, united* [4], *and made like, to* [5] God: and, alſo, *the Love* [6] of that ſuperlatively excellent Being, from whence reſults *a Pleaſure that is pure* [7], *virtuous, and without Remorſe. If the Soul retires pure, unſully'd by any Contagion of the Body, as not having willingly had any Commerce with it, but, on the contrary, having, as it were, always ſhunn'd it, and been always recollected within itſelf by continual Meditation; that is to ſay, by truly philoſophizing, and effectually learning how to die; (for Philoſophy is a Preparation for Death:) if the Soul, I ſay, retires in this Diſpoſition, it goes to a Being like itſelf; to a Being divine, immortal, and replete with Wiſdom, where it lives in the Enjoyment of wonderful Felicity, deliver'd from all its Errors, Ignorance, and Fears; from all thoſe Paſſions, and Affections, which once tyranniz'd over it; and from all the other Evils attending human Nature: and leads a truly celeſtial Life with the Gods* [8] *to all Eternity* [9]. So that, beſides *the moſt glorious and moſt certain Rewards, that good Men receive in this World* [10], *both from* God, *and Man; and the good Things which Probity naturally procures for thoſe, who, with Conſtancy adhere thereto: they receive after their Deaths, Rewards both immenſe, and innumerable* Whereas the Wicked are puniſh'd in another Life, proportionably to the Crimes they have committed in this. *Plato* ſets forth theſe Principles with all the Ornaments of a majeſtick Eloquence, but intermix'd with abundance of abſtruſe, and myſterious Notions; to ſay nothing of the *Metempſychoſis* of the Souls of wicked Men, with his many other Imaginations and Conceits about the State of another Life: See, for Inſtance, what he ſays of Love, in the Abridgment, which one of his extravagant Admirers [11] has given us of his Thoughts on that Subject: "There is nothing "more natural to Men than Love; they naturally "love every Thing that is beautiful: becauſe their "Souls are deſcended from the very Source of "Beauty. But every Thing that has any Reſemblance of that primitive Beauty, affects them more "or leſs, according as the Soul is more or leſs attach'd to the Body. They, whoſe Souls are "more free and diſengag'd, adore in each beautiful "Object that ſovereign Beauty, with which their "Imagination is prepoſſeſs'd, and for which they "were born; and this Adoration produces in them "Temperance, Fortitude, and Wiſdom, with "every other Virtue. But they, who are buried "and immers'd in Matter, no longer retaining any "Idea of the ſovereign Beauty, madly purſue "thoſe Beauties which are imperfect and tranſitory, "and plunge themſelves, without any Conſidera"tion, into all Sorts of Pollution, and Impurity." But what is ſtill more to be regretted, *Plato* [12], even when he is treating of the great Truths of Religion and Morality, interſperſes ſometimes very looſe Diſcourſes, upon the moſt ſcandalous Exceſſes of Impurity, or, at leaſt, very wanton Ideas, fit only to turn Morality into Ridicule. In what a pompous Manner, for Example, does he deſcribe [13] "Thoſe "Voyages, which the winged Souls make in Cha"riots, on the higheſt Arch of the Heavens, "where they contemplate Beauty in its Eſſence: "the unhappy Falls they have from ſo lofty a Place "down to the Earth, thro' the Fault of ſome one "of their Steeds, that happens to prove ungo"vernable: the breaking of their Wings; their "Reſidence in the Body; how ſtrangely they are "affected with the ſudden View of ſome beautiful "Face, which they diſcover to be a Copy of that "Beauty, which they have ſeen in Heaven: their "Wings which revive again, which begin to fledge, "and which they endeavour to make uſe of, to "fly with, towards the Object of their Love: To "conclude, the Awe, the Dread, the Terror, with "which they are ſtruck at the Sight of a Beauty, "which they know to be Divine; the ſacred En"thuſiaſm, which tranſports them; the longing "Deſire which they feel, to offer Sacrifices to the "Object of their Love, as Men do to the Gods."

It muſt however be allowed, that *Plato* draws from his Principles a conſiderable Number of excellent Precepts of Morality, and Politicks; which are ſometimes ſufficiently clear'd and diſcuſs'd: ſo

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[1] Ὃς δ' ἔκγονός τε τοῦ Ἀγαθοῦ φάνειλαι καὶ ὁμοιόταλος ἐκείνῳ. Ibid. p. 506, E. and p. 478, C. Ed. *Lugd.* Ὃν Ἀγαθὸν ἐγέννησεν ἀνάλογον ἑαυτῷ. Ibid. p. 508, B. and p. 478. G. Ed. *Lugd.*

[2] Ἐπιστήμην δὲ καὶ ἀλήθειαν, ὥσπερ ἐκεῖ φῶς τε καὶ ὄψιν, ἡλιοειδῆ μὲν νομίζειν ὀρθὸν, ἥλιον δὲ ἡγεῖσθαι οὐκ ὀρθῶς ἔχει, p. 509. Et p. 479, A.

[3] Ἐξεμήνης δὲ ἀληθείας, ἐκ ἂν πύθοι, οἶμαι, φαῖμεν αὐτὴ χορὸν κακῶν ἀκολυθῆσαι. *De Rep.* Lib. vi. p. 490, C. and p. 471, F. Ed. *Lugd.*

[4] See *Phædo*, Tom. i. p. 79, D. and p. 385, C. Ed. *Lugdun.*

[5] Διὸ καὶ πειρᾶσθαι χρὴ ἐνθένδε ἐκεῖσε φύγειν ὅτι τάχιστα, φυγὴ δὲ, ὁμοίωσις Θεῷ κατὰ τὸ δυνατόν· ὁμοίωσις δὲ, δίκαιον καὶ ὅσιον μετὰ φρονήσεως γενέσθαι. Theætet. Tom. i. p. 176, A, B. and p. 128, F. See alſo *de Legibus*, Lib. iv. p. 716, C. Tom. ii. and p. 601, A. Ed. *Lugdun.*

[6] Ὀρθῶς ἂν ὀρᾶτον τὸ καλὸν, [γενήσεται] τίκτειν——ἀληθῆ [ἀρετὴν] ἅτε τοῦ ἀληθοῦς ἐφαπτομένῳ; τεκόντι δὲ ἀρετὴν ἀληθῆ, καὶ θρεψαμένῳ, ὑπάρχει θεοφιλεῖ γενέσθαι, καὶ, εἴπερ τῳ ἄλλῳ ἀνθρώπῳ ἀθανάτῳ καὶ ἐκείνῳ——τούτῳ τῇ κλήσει τῇ ἀνθρωπείᾳ φύσει συνεργὸν ἀμείνων Ἐρως· οὐκ ἂν τις ῥᾳδίως λάθοι. In *Conviv.* Tom. iii. p. 212, A, B. and p. 331, E. Ed. *Lugd.*

[7] Ἃς ἡδονὰς ἴθεμεν, ἀλύπους ὁρισάμενοι, καθαρὰς ἐπονομάσαντες τῆς ψύχης αὐτῆς ἐπιστήμας, τὰις δὲ αἰσθήσεσιν ἑπομένας *Phileb.* Tom. ii. p. 65, C. and p. 94, G Ed. *Lugdun.*

[8] *Plato* believ'd, as the *Chaldeans* did, that Souls return'd to the Places which are above the Moon, from whence they had been ſent into the Body, as a Puniſhment, for the Crimes they had committed. See *Timæus.*

[9] Ἐὰν μὲν καθαρὰ ἀπαλλαττήται [ἡ ψύχη] μηδὲν τῷ σώματι συνεφέλκυσα, ἅτε οὐδὲν κοινωνοῦσα αὐτῷ ἐν τῷ βίῳ ἐκοῦσα εἶναι, ἀλλὰ φεύγουσα αὐτὸ, καὶ συνηθροισμένη αὐτὴ εἰς αὐτὴν, ἅτε μελέτην τοῦτο, τοῦτο δὲ οὐδὲν ἄλλο ἐστὶν ἢ ὀρθῶς φιλοσοφοῦσα, καὶ τῷ ὄντι τεθνάναι μελέτην ῥᾳδίως——τοῦτ' ἂν εἴη μελέτη θανάτου—— ὕτω μὲν ἔχουσα, εἰς τὸ ὅμοιον αὐτῇ τὸ θεῖον ἀπέρχεται, τὸ θεῖόν τε καὶ ἀθάνατον καὶ φρόνιμον· Οἷ ἀφικομένη ὑπάρχει αὐτῇ εὐδαίμονι εἶναι, πολάνης καὶ ἀνοίας καὶ φόβων καὶ ἀγρίων ἐρώτων καὶ τῶν ἄλλων κακῶν τῶν ἀνθρωπείων ἀπηλλαγμένη——ὡς ἀληθῶς τὸν λοιπὸν χρόνον μετὰ Θεῶν διάγουσα. *Phædo.* p. 80, E, 81. Tom. i. and p. 385, 386. Ed. *Lugd.*

[10] Ἃ μὲν τοίνυν——ζῶντι τῷ δικαίῳ, παρὰ Θεῶν τε καὶ ἀνθρώπων, ἆθλά τε καὶ μισθοὶ καὶ δῶρα γίγνεσθαι, πρὸς ἐκείνοις τοῖς ἀγαθοῖς ἃς αὐτὴ παρείχετο ἡ δικαιοσύνη, τοιαῦτ' ἂν εἴη. Καὶ μάλ', ἔφη, καλά τε καὶ βέβαια. Ταῦτα τοίνυν——οὐδέν ἐστι πλήθει οὐδὲ μεγέθει πρὸς ἐκεῖνα ἃ τελευτήσαντα ἑκάτερον περιμένει. *De Rep.* Lib. x. p. 613, 614. Tom. ii. and p. 318, F. Ed. *Lugdun.* See the Deſcription that follows on quite to the End of the Book, of the Rewards and Puniſhments of another Life; as, alſo, in *Phædo*, and *Gorgias*, Tom. i. p. 523, *&c.*

[11] *Dacier*'s *Life of Plato*, p. 107, 108. See *Phædrus*, Tom. iii. p. 250, *&c. Serran.* and p. 346, B. *&c.* Ed *Lamar.*

[12] In his *Banquet*, for Inſtance, and in his *Phædrus*. It is remarkable, that *Philo* the *Jew*, otherwiſe a great Admirer of *Plato*, durſt not undertake to excuſe him as to this Particular: If this Philoſopher, ſays he, ſpeaks ſometimes of *Celeſtial Love*, 'tis but for Decency ſake. *De Vit. Contemplat.* p. 898, B. Ed. *Paris.* and p. 694, F. Edit. *Colon. Allob.* See, alſo, *Le Clerc*'s *Bibl. Choiſie*, Tom. ii. p. 317, *&c.*

[13] I make uſe of the Words of Mr. *Fontenelle, Nouv. Dial. des morts 2. Part. Diag. des morts Anc. avec les Modernes*, Dial. 4. p. 198. and p. 97. Edit. *Lond.* 1707.

that a Reader of Senſe may very much improve himſelf by the reading of his Works. There he may find that famous Argument, which Mr. *Paſchal* has, in the laſt Age, urg'd with ſo much Strength, in Favour of the Immortality of the Soul: For *Socrates*, after having produc'd the Reaſons he had for his Belief of this Truth, addreſſes himſelf to his Friends in the following Manner: "[1] If what "I ſay be found true, 'tis highly reaſonable and "expedient firmly to believe it; and even ſhould "it after my Death prove otherwiſe, I ſhall have "ſtill reap'd this Advantage from it; that in this "Life, I have been leſs ſenſible of thoſe Evils, "that generally accompany it.——Unleſs a Man "has loſt his Senſes, he cannot but be afraid of "Death, till he knows aſſuredly, and is able to "demonſtrate, that the Soul is immortal.——To "tell you now, that all theſe Things are in fact "preciſely ſuch, as they have been repreſented to "be; 'tis what a *Man of ſound Senſe will never* "take upon himſelf to aver. But that, what I "have told you concerning the State and Manſion "of departed Souls, is, in all Probability, either "abſolutely true, as I have related it, or very near "the Matter, ſeeing the Soul is, as appears, im-"mortal; that is what no Man of ſound Senſe "needs ſcruple the venturing to affirm; and he "will moſt certainly find his Account in it, whoe'er "ſhall run the Riſk: And a nobler Venture he "cannot make; for 'tis ſuch a bliſsful Hope, that "every Soul ought to be charm'd and tranſported "with it."

Plato teaches [2], that we ought never to undertake any Thing, without Prayer to God: But declares, at the ſame Time, that God [3] rejects the Prayers and Sacrifices of thoſe, whoſe Souls are impure; and that he ſuffers not himſelf to be brib'd with Gifts. This Philoſopher [4] look'd upon a blind and immoderate Self-Love to be the Source of all the Evils of Life; and eſteem'd the Conqueſt a Man gains [5] over himſelf, to be the greateſt and moſt glorious of all Victories. He ſays, that we ſhould be always learning [6] to die; and yet [7] ſhould bear with Life, in Obedience to *God*; whoſe Will it is, that we ſhould not quit it, till we have obtained his expreſs Diſcharge. He ſhews us, [8] *That we were not born for ourſelves only, but, alſo, for our Country, for our Relations, and for the reſt of our Friends:* [9] That we ought not to injure any Man: That *we ought not to return Evil* [10] *for Evil; and that* [11] *'tis much better to receive, than to do an Injury.* He refutes in his *Republick*, in his *Laws*, in his *Gorgias*, and in many other Places, thoſe falſe Notions of Morality and Politicks, which tend to the utter Subverſion of the Law of Nature. He acknowledges [12], that there is no Law in common to Men and Beaſts; and that Man of all Animals is the only one, who has any Idea of Right; and of the Deity, from whence it proceeds. He forbids [13] all Copulation contrary to Nature. He gives Rules of Conduct for the different States of Life. The Deſcription he gives of a conſummate Virtue, is ſo beautiful, and ſo well reſembles the Character of our Saviour, the only Pattern here below of perfect Holineſs; that many have regarded it as a kind of Prophecy in the Mouth of an Heathen. This Philoſopher does, in fact, give us the Repreſentation of a Man truly virtuous; who, nevertheleſs, was to be generally reputed a bad Man, altho' in all Things he inflexibly adher'd to Juſtice; and was, without being diſcourag'd at this unjuſt Cenſure, which all the World paſs'd upon him, ſteadily perſevering to Death, in the Way of Virtue [14]; *Tho' publickly ſcourg'd, put to various Kinds of Torture, kept in Irons, his Eyes burnt out, forc'd to endure all Sorts of Miſery, and in the End crucify'd.* But *Plato* has, notwithſtanding, here and there ſeveral Notions, which are really extravagant. In his *Crito*, for Example, *Socrates* maintains, that it is unlawful for a Man condemn'd to die, to make his Eſcape, if he can, tho' his Sentence be never ſo unjuſt [15]. Nay, he goes ſo far as to ſay, [16] that if a Criminal is not diſcover'd, he ought, of his own Accord, to go and offer up himſelf to Puniſhment. What he ſays upon [17] *Treaſure-Trove*, ſhews, that he did not very well underſtand that Topick. He, likewiſe, gives into the vicious Extreme of thoſe, who abſolutely [18] condemn all lending of Money at Intereſt.

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[1] Εἰ μὲν τυγχάνει ἀληθῆ ὄντα ἃ ἐγὼ λέγω, καλῶς δὴ ἔχει τὸ πειστέον εἶναι· εἰ μηδὲν ἔστι τελευτήσαντι, ἀλλ' ἓν τοῦτόν γε τὸν χρόνον αὐτὸν τὸν πρὸ τοῦ θανάτου ἧττον τοῖς παροῦσιν ἀηδὴς ἔσομαι ὀδυρόμενος. *Phædon*, Tom. i. p. 91, B. and p. 390, E. Ed. *Lugdun.* Προσήκει γὰρ φοβεῖσθαι εἰ μὴ ἀνόητος εἴη, τῷ μὴ εἰδότι, μηδ' ἔχοντι λόγον διδόναι ὡς ἀθάνατόν ἐστι. Ibid. p. 95, D. and 392, E. Τὸ μὲν ἓν ταῦτα δηλοῦν ἱκανῶς ἔστω ἔχειν ὡς ἐγὼ διελήλυθα, ὃ πρέπει νῦν ἔχοντι ἀνδρί· ὅτι μέν τοι ἡ ταὐτὸ ἐστιν, ἢ ταὐτόν ἄττα, περὶ τὰς ψυχὰς ἡμῶν, καὶ τὰς οἰκήσεις, ἐπείπερ ἀθάνατόν γε ἡ ψυχὴ φαίνεται οὖσα, τοῦτο καὶ πρέπειν ἐμοὶ δοκεῖ, καὶ ἄξιον κινδυνεῦσαι, οἰομένῳ οὕτως ἔχειν· καλὸς γὰρ ὁ κίνδυνος, καὶ χρὴ τὰ τοιαῦτα ὥσπερ ἐπᾴδειν ἑαυτῷ. Ibid. p. 114, D. *Serr. Læmar.* 401, A. See the Paſſages cited, *Pufend. De Jur. Nat. & Gent.* Lib. i. Cap. iii. Sect. 7. Not. 3. p. 27.

[2] Τοῦτο γε δὴ πάντες ὅσοι καὶ κατὰ βραχὺ σωφροσύνης μετέχουσιν, ἐπὶ πάσῃ ὁρμῇ καὶ σμικρῷ καὶ μεγάλῳ πράγματι Θεὸν ἀεί του καλοῦσιν. In *Timæo*, Tom. iii. p. 27, C. *Serr.* and p. 526, C. Ed. *Lugd.*

[3] Παρὰ δὲ μιαρῷ δῶρα ἔτ' ἄνδρ' ἀγαθὸν, ὅτε Θεοῦ ἐστὶ πολὺ τόσε ὀρθὸν δέχεσθαι. *De Legib.* Lib. iv. Tom. ii. p. 716, 717. *Serr.* and p. 601, B. Ed. *Lugd.* Οὐ γὰρ (οἶμαι) τοιοῦτόν ἐστι τὸ τῶν Θεῶν, ὥστε ὑπὸ δώρων παράγεσθαι, οἷον κακὸν τοκιστήν. *Alcib.* 2. Tom. ii. p. 149, E. *Serr.* and p. 43, C. Ed. *Lugd.*

[4] Τὸ δὲ ἀληθείᾳ γε πάντων ἁμαρτημάτων, διὰ τὴν σφόδρα ἑαυτῷ φιλίαν, αἴτιον ἑκάστῳ γίγνεσθαι ἑκάστοτε. *De Legib.* Lib. v. p. 731, E. *Serr.* and p. 606, D. Ed. *Lugd.*

[5] Τὸ νικᾶν αὐτὸν αὑτὸν, πασῶν νικῶν πρώτη τε καὶ ἀρίστη. *De Legib.* Lib. i. p. 626, E. *Serran.* and p. 565, G. Ed. *Lugd.*

[6] See the Paſſage out of *Phædo*, cited p. 45. Note (9.)

[7] See *Phædo*, p. 62, B. Tom. i. *Serran.* and p. 377, B, C, D. Ed. *Lugd.*

[8] Ἕκαστος ἡμῶν οὐχ αὑτῷ μόνον γέγονεν, ἀλλὰ τῆς γενέσεως ἡμῶν τὸ μέν τι ἡ πατρὶς μερίζεται, τὸ δέ τι οἱ γεννήσαντες· τὸ δὲ, οἱ λοιποὶ φίλοι. Epiſt. 9.

[9] Οὐδαμῶς τό γε ἀδικεῖν ἄτε ἄγαθον, ἄτε καλόν. In *Critone*, Tom. i. p. 49, A. *Serran.* and p. 372, D. Ed. *Lugd.*

[10] Οὔτε ἄρα ἀνταδικεῖν δεῖ, οὔτε κακῶς ποιεῖν ἀνθρώπων, ὁτιοῦν παθόντα ὑπ' αὐτῶν. Ibid. C. *Serr.* and E. *Lugd.*

[11] Μεῖζον μὲν κακὸν φαμὲν τὸ ἀδικεῖν, ἔλαττον δὲ, τὸ ἀδικεῖσθαι. In *Gorgia*, Tom. i. p. 509, C. See alſo p. 527, B. *Serran.* and p. 306, H. Ed. *Lugd.* See alſo p. 314, C.

[12] Ὁ [ἄνθρωπος] συνέσει τε ὑπερέχει τῶν ἄλλων [ζώων] καὶ δίκην καὶ θεὸς μόνον νομίζει. *Menexen.* p. 237, D. Tom. ii. *Serran.* and p. 404, C. Ed. *Lugd.*

[13] *De Legibus*, Lib. viii. Tom. ii. p. 836, A. *& ſeq. Serran.* and p. 645, F. *& ſeq.* Ed. *Lugd.*

[14] Μηδὲν γὰρ ἀδικῶν, δόξαν ἐχέτω τὴν μεγίστην ἀδικίας· ἵν' ᾖ βεβασανισμένος εἰς δικαιοσύνην, τὸ μὴ τέγγεσθαι ὑπὸ κακοδοξίας, καὶ τῶν ὑπ' αὐτῆς γιγνομένων· ἀλλ' ἦτω ἀμελάστατος μέχρι θανάτου——εἰς τὸ ἔσχατον (ἐλεγχθεὶς) δικαιοσύνης——ὅτι ἔστω διακείμενος ὁ δίκαιος, μαστιγώσεται, στρεβλώσεται, δεδήσεται, ἐκκαυθήσεται τῷ ὄφθαλμῷ. τελευτῶν, πάντα κακὰ παθὼν, ἀνασχινδυλευθήσεται. *De Repub.* Lib. ii. p. 361, C. p. 362. Tom. ii. *Serran.* and p. 423, B, C. Ed. *Lugd.* See a Fragment of the third Book *de Rep.* of *Cicero*, in *Lactantius, Inſt. Divin.* Lib. v. Cap. xii. Not. 5, 6.

[15] See Mr. *Pufendorf*'s *Law of Nature and Nations*, Book iv. Chap. i. Sect. 20. And Book viii. Chap. iii. Sect. 4. Num. 4.

[16] *Gorg.* p. 480, A, B. Tom. i. *Serran.* and p. 294, E, and F. Ed. *Lugdun.* See *Pufend. de Jur. Nat. & Gent.* Lib. iv. Cap. vi. Sect. 20. Not. 1. where you will find the Paſſage here referr'd to.

[17] *De Legib.* Lib. xi. p. 913, A. and d. at the Beginning. See *Pufendorf*, Lib. iv. Cap. vi. Sect. 13.

[18] Μηδὲ δανείζειν ἐπὶ τόκῳ. *De Legib.* Lib. v. p. 742, C. Tom. ii. *Serr.* and p. 610, G. Ed. *Lugd.*

Plato has, in his political Writings, laid down the true Principles of that Science; tho' the Conſequences he draws from them are not always juſt. He makes it a Fundamental, That [1] Laws are abſolutely neceſſary for the Preſervation of Society; and that without them, Men would live together no better, than the moſt ſavage Beaſts. He defines a Law to be, *a publick Ordinance* [2] *of the Body of the State, the Subſtance of which, is for the Good of the Community.* He owns the tacit Agreement there is between every particular Member, and the State; and ſays, that thoſe, who refuſe to ſubmit themſelves to the Laws, *violate that Agreement* [3]; *which was not impos'd upon them, either by Force, or Surprize, without giving them Time to conſider of the Matter; ſince they might have retir'd, had they been diſſatisfied with the Laws, or thought the Terms they propos'd unjuſt.* He ſays, that the Heads, and Governors of a State, are no more than [4] *Miniſters of the Laws; that wherever the Law bears Sway, and the Magiſtrates are its Slaves, there we ſee flouriſhing Towns, and the greateſt Plenty of all thoſe good Things, we expect from the Bounty of the Gods: But, on the other hand, where the Magiſtrate is Maſter, and the Law his Servant and Slave, there nothing can be expected, but Ruin and Deſolation.* He maintains, that thoſe Laws [5], which tend only to the particular Intereſt of the Legiſlator, and not to the publick Good, are not true Laws, but the Dictates of Faction, Tyranny, and Injuſtice. In a Word, "'Tis "his fix'd Opinion [6], that all Politicks, which tend "to make the governing Part powerful at the Ex"pence of the Subjects; and which make all the "Virtue of a Sovereign to conſiſt in ſecuring, and "increaſing his own Power, leaving Juſtice, Pati"ence, Goodneſs, Fidelity, and Humanity, as "Virtues fit only for Slaves, to be practis'd by the "Subjects, are no better than downright Tyranny: "and that the End and Deſign of true Politicks, "is to make the whole Body of the Subjects live "ſociably together, like Brethren, in the happieſt "Manner poſſible, without Poverty, without "Riches, according to the Rules of Juſtice, and "Sanctity." *Plato*, having laid down theſe general Principles, enters upon particular Expedients, of which he gives us a conſiderable Number, for the regulating of the publick religious Worſhip, the Choice of Magiſtrates, Marriages, Divorces, the Education of Children, Wills, Guardianſhips, War, and Peace, with the other principal Affairs of Civil Life. But "There is, in his Politicks, a very con"ſiderable Defect [7]; for in order to baniſh, out of "his Republick, all Manner of Property, he or"dains Community, not only of Goods, but, alſo, "of Wives and Children.——This Community is "ſo far from conducing to the End its Legiſlator "propoſes, that, on the contrary, it effectually pre"vents the Attainment of it, and entirely fruſtrates "the Deſign of his whole Eſtabliſhment. For in"ſtead of uniting the Minds of his Citizens, it ſets "them at Variance, diſſolving at once all the Re"lations, and moſt ſacred Ties of Nature; and "trampling under Foot all Law, Religion, Ho"neſty, and Decency.——*Ariſtotle* has ſtrenuouſly "oppos'd this Maxim, in his ſecond Book of *Poli*"*ticks*; and *Plato* himſelf abandons it in his ſixth "Book of *Laws*, where he reſtores to the Marriage "State, all that he had before taken from it. Be"ſides this, there is another Defect, concerning the "Education of Women, whom he deſtines to the "ſame Employments as the Men, and admits them "to the Command of Armies, and the Government "of the State." Let us add, that, by his Manner of ſpeaking of thoſe, whom the *Greeks* call'd *Barbarians* [8], he ſeems to have retain'd the falſe and preſumptuous Ideas of that Nation; who, forgetting the natural Equality of all Men, pretended to have a Right, to treat all other Nations, as their Enemies *by Nature*, againſt whom they might ſecurely exerciſe all Manner of Hoſtilities. Another very conſiderable Blemiſh, is his Pretence, that [9] *nothing ought ever to be chang'd in the Religion we find eſtabliſh'd; and that but to think of any ſuch Thing, was the higheſt Pitch of Extravagance, and Folly.* A Maxim which can have no other Effect, but to keep up Superſtition and Ignorance in the World, and for ever exclude Truth.

SECT. XXII.

ANTISTHENES [10], another Scholar of *Socrates*, founded the Sect of the *Cynicks*; and had, amongſt others, the famous *Diogenes* for his Scholar. What an ingenious [11] modern Writer has ſaid of *Diogenes*, may be generally apply'd to the Philoſophers of that Sect. "That they were of "the Number of thoſe extraordinary Perſons, who "run every Thing into Extremes, without except"ing even Reaſon itſelf; and who verify the "Maxim, [12] *That there is no great Genius without a "Mixture of Folly.*" They had learn'd from *Socrates*, that Morality was the moſt uſeful of all the Sciences, and what deſerv'd our greateſt Care and Application. From this moſt true Principle, they abſurdly concluded, that Logick, Natural Philoſophy, Geometry, Muſick, the liberal Arts and Sciences; in a word, every Thing that did not immediately relate to the Science of Morality, was to be deſpis'd [13], and entirely thrown aſide. The fundamental Maxim of their Doctrine [14] *was, to*

[1] Ὡς ἄρα νόμους ἀνθρώποις ἀναγκαῖον τίθεσθαι, καὶ ζῆν κατὰ νόμους, ἢ μηδὲν διαφέρειν τῶν πάνυ ἀγριωτάτων θηρίων *De Legib.* Lib. ix. Tom. ii. p. 874, E. *Ser.* and p. 660, G. Ed. *Lugd.*

[2] Ἐπὶ δὲ πᾶσι τούτοις, λογισμὸς ἕν, τι περὶ αὐτῶν ἄμεινον ἢ χεῖρον· ὃς γενόμενος δόγμα πόλεως κοινὸν, νόμος ἐπωνόμασται. *De Leg.* Lib. i. p. 644, D. See *Minos*, p. 317, A, C. *Serr.* and Ed. *Lugd.* p. 573, B. See alſo p. 45, F, G.

[3] Φάσκοντές σε ὁμολογηκέναι πολιτεύσεσθαι καθ' ἡμᾶς [νόμους] ἔργῳ, ἀλλ' οὐ λόγῳ ——ξυνθήκας τὰς πρὸς ἡμᾶς αὐτοῦ, καὶ ὁμολογίας παραβαίνεις· οὐχ ὑπ' ἀνάγκης ὁμολογήσας, οὐδὲ ἀπαλῃθείς, οὐδὲ ἐν ὀλίγῳ χρόνῳ ἀναγκασθεὶς βουλεύσασθαι——ἦν σοι ἀπιέναι, εἰ μὴ ἠρέσκομεν ἡμεῖς, μηδὲ δίκαιαι ἐφαίνοντό σοι αἱ ὁμολογίαι εἶναι. In *Criton*, Tom. i. p. 52, D, E. *Serran.* and p. 374, A, B. Ed. *Lugd.*

[4] Τοὺς δ' ἄρχοντας λεγομένους, νῦν ὑπηρέτας τοῖς νόμοις ἐκάλεσα, *De Leg.* Lib. iv. Tom. ii. p 715, C. *Serran.* and p. 600, E, Ed. *Lugd.* Ἐν ᾗ μὲν γὰρ ἂν (πόλει) ἀρχόμενον ὑπὸ καὶ ἄκυρον νόμου, φθορὰν ὁρῶ τῇ τοιαύτῃ ἑτοίμην οὖσαν· ἐν ᾗ δὲ ἂν δεσπότης τῶν ἀρχόντων, οἱ δὲ ἄρχοντες δοῦλοι τοῦ νόμου, σωτηρίαν, καὶ πάντ' ὅσα Θεοὶ πόλεσιν ἔδοσαν ἀγαθὰ γιγνόμενα καθορῶ. Ibid. D. *Serran.* and F. Ed. *Lugd*

[5] Τάυτας δήπου φαμὲν ἡμεῖς νῦν ἔτ' εἶναι πολιτείας, ἔτ' ὀρθὰς νόμους, ὅσοι μὴ ξυπάσης τῆς πόλεως ἕνεκα τοῦ κοινοῦ ἐτέθησαν· οἱ δ' ἕνεκα τινῶν, στασιωτείας, ἀλλ' οὐ πολιτείας τούτους φαμέν· καὶ τὰ τούτων δίκαια ἃ φασιν εἶναι, μάτην εἰρῆσθαι. Ibid. B. *Serran.* and Ed. *Lugd.*

[6] *Dacier's Life of Plato*, p. 90, 91. [7] Ibid. p. 92, *& ſeq.*

[8] See *Menexenus*, Tom. ii. p. 242, D, and the fifth of his *Repub.* p. 470, C. *Serran.* and p. 406, C. and p. 464, G. Ed. *Lugd.*

[9] Οὐδεὶς ἐπιχειρήσει κινεῖν νῦν ἔχων——τούτων νομοθέτῃ τὸ σμικρότατον ἁπάντων οὐδὲν κινητέον. *Leg.* Lib. v. p. 738, B, C. *Serran.* and p. 609, B. Ed. *Lugd.* See Mr. *De Meaux's Diſcours ſur l'Hiſt. Univ.* p. 217. Ed. *Holl.*

[10] See *Diog. Laert.* Lib. vi. Sect. 1. *& ſequen.* And p. 365, 366. Ed. *Colon. Allob.*

[11] Mr. *Bayle.* Diction. Artic. *Diogenes.* p. 1049.

[12] *Nullum magnum ingenium ſine mixturâ dementiæ fuit. Senec. de Tranq. Anim.* Cap. ult. p. 229. Tom. i. Ed. *Gronov.*

[13] Ἀρέσκει ἓν αὐτοῖς (Κυνικοῖς) τὸν Λογικὸν καὶ τὸν Φυσικὸν τόπον περιαιρεῖν——μόνῳ δὲ προσέχειν τῷ Ἠθικῷ· καὶ ὅπερ τινὲς ἐπὶ Σωκράτους, τοῦτο Διοκλῆς ἐπὶ Διογένους, ἀναιρᾶφει, τοῦτον φάσκων λέγειν, Δεῖ ζητεῖν ὅ, τι τοι ἐν μεγάροισι κακόν τ' ἀγαθόν τε τέτυκται. Παραιτεῖται δὲ καὶ τὰ ἐγκύκλια μαθήματα. Γραμματικὴν γοῦν μὴ μανθάνειν ἔφασκεν ὁ Ἀντισθένης τοὺς σώφρονας γενομένους, ἵνα μὴ διατρέφοιντο τοῖς ἀλλότριοις. Περιαιρεῖσι δὲ καὶ Γεωμετρίαν, καὶ Μουσικὴν, καὶ πάντα τὰ τοιαῦτα. *Diog. Laert.* Lib. vi. Sect. 103, 104. Et p. 431, 432. Ed. *Colon.*

[14] Ἀρέσκει δ' αὐτοῖς καὶ τέλος εἶναι τὸ καλ' ἀρετὴν ζῆν. Ibid. Sect. 104.

live

live in Conformity to the Rules of Virtue, which [1] *is ſufficient to make Men happy.* But the Conſequences, they drew from thence, were in ſome Things too rigid, and in others too remiſs. [2] *The Gods*, ſaid they, *have need of nothing ; this is their proper and natural Condition : Thoſe then who ſtand in need but of a few Things, the moſt reſemble them.* To procure to themſelves then this happy Independance, and to ſhew with what an utter Indifferency they look'd upon Riches, Pleaſures, Honours, and the Approbation of Men ; they pretended, that we ought entirely to renounce all the Conveniences of Life ; and voluntarily reduce ourſelves to the moſt extreme Poverty [3] : And they accordingly purſu'd this Maxim of theirs in their Manner of living : A long Beard, a Cloak, a Staff, and a Wallet, made up the whole of their Attire, Equipage, Goods and Chattels. *Diogenes*, for his Part, would have no other Habitation but a [4] Tub ; his Wooden Cup too [5], when he came to find he could drink out of the Hollow of his Hand, was thrown away. *Antiſthenes* ſaid [6], *he had rather loſe his Senſes, than be ſenſible of the leaſt Pleaſure.* They thought themſelves entitled freely to make uſe of any Thing that came in their Way, without troubling themſelves whether they had the Owner's Conſent, or not ; which Practice of theirs they juſtify'd in this Manner. *All Things*, ſaid they, *belong to the Gods : But the Sages are Friends to the* [7] *Gods, and all Things are common among Friends : Therefore all Things belong to the Sages.* They laugh'd at all human Eſtabliſhments [8], believing themſelves bound by no other Law, than the Law of Nature ; of which they had very falſe and imperfect Notions. Upon this Principle *Diogenes* [9] made no Scruple of coining falſe Money. He maintain'd, that [10] all Women ought to be in common ; and that the Laws of Marriage were but a vain Subjection. According to the Opinion of theſe ſame Philoſophers, there was nothing that a Man ought to be aſham'd of : They publickly, and without Reſerve, trod under Foot all the Laws of Decency, and Modeſty. A learned *German* [11] not long ſince maintain'd, That they had never advanc'd this Paradox, had it not been to remove from themſelves the Abuſe of thoſe, who, making the Whole of Virtue to conſiſt in external Decency, under this beautiful Vail, concealed the moſt enormous Practices. " If this be ſo, (ſays " an [12] ingenious Journaliſt in his Remarks there- " upon) their Deſign was good, but their Means " [12] very bad : For, as a certain [13] Lady, who did " not always follow her own Maxim, has hand- " ſomely expreſs'd it,

C'eſt un méchant moien d'enſeigner la Vertu,
Que de la faire voir par le portrait du Vice.

It is but a bad Way of teaching Virtue, to illuſtrate it by vicious Images.

But let us ſee how they argu'd the Matter : [14] *There is not*, ſay they, *any Harm in dining : Therefore there is none in dining in the Middle of the Market-Place.* It is juſt and lawful to careſs one's own Wife [15] : Therefore 'tis juſt and lawful to careſs her before all the World. But, as Mr. *Bayle* has very well obſerv'd [16], " This is but a poor Fallacy, *a* " *dicto ſimpliciter ad dictum ſecundum quid.* 'Tis as " if one ſhould ſay : *It is good to drink Wine, there-* " *fore it is good to drink it in a Fever.* Theſe Men " knew not, that many Actions are not good but in " certain Circumſtances ; ſo that the Omiſſion of " thoſe Circumſtances may make that a bad Ac- " tion, which, otherwiſe, might have been a very " good one. To lend a Friend Money to pay his " Creditors, is a very laudable Action : But to lend " it him to be drunk, or to game with, is a bad " one. Some Actions are eſſentially bad, and can " never become good, however circumſtantiated ; " but there are others, which are ſometimes good, " and ſometimes bad, according to the Time, " Place, and other Circumſtances, in which they are " perform'd.—The Difficulty then may be reduc'd " to this ſingle Queſtion : *Whether a Man ought to* " *be aſham'd, to perform conjugal Duty in publick* " *View ?*" I am ſurpris'd to find this celebrated Author, whoſe Words I have borrow'd, making the *Cynicks* to triumph, as if Reaſon alone was not ſufficient to demonſtrate, that their Impudence is vicious, and contrary to the Maxims of the Law of Nature. " It may be objected, ſays he, to *Dio-* " *genes*, that the Senſe of Shame, in Caſes of this " Nature, is a natural Sentiment ; ſo that to be " without Shame on theſe Occaſions, is to do Vio- " lence to Nature itſelf. But, to this he will an- " ſwer. that was this Senſe of Shame a real Dictate " of Nature, the other Animals too, who ſo faith- " fully follow the Impulſe of Nature, would ſeek " for dark Holes, and ſecret Receſſes, to perform " this Work of Generation in : The contrary of " which is moſt apparent. At leaſt, this would " be univerſally true as to Men, that they, in ſuch " Caſes, always ſeek out the darkeſt and moſt ob- " ſcure Retreat, which is, alſo, [17] falſe.——It will " here be reply'd to *Diogenes*, that it is ſufficient, " that all civiliz'd Nations are ſubject to this " Shame.——To which he again will make this " Return ; that the Nations we are pleaſed to call " barbarous, have much leſs deviated from the " Rules of Nature, than thoſe, who have, with " their refining, and Subtilty of Thought, ſo vaſtly " multiply'd the Modes and Forms of Decency " and Civility ; and in ſhort, ſince the Law of

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[1] Αὐταρκῆ γὰρ τὴν ἀρετὴν εἶναι πρὸς εὐδαιμονίαν Ibid. Sect. 11. and p. 371. Ed. *Colon.*

[2] Ὃς (Διογένης) ἔφασκε, Θεῶν μὲν ἴδιον εἶναι, μηδενὸς δεῖσθαι· τῶν δὲ Θεοῖς ὁμοίων, τὸ ὀλίγων χρήζειν. Ibid. Sect. 105. and Ed. *Col.* p. 433. *Socrates* had ſaid this before. See *Xenoph. Apomn.* Lib. i. circa fin. p. 731, A. Ed. *Paris.*

[3] See *Diog. Laert.* ubi ſupra, Sect 13. ibique Interp. Vid. p. 373. Ed. *Coloniæ Allobr.* and p. 378, 379.

[4] See Remark (G) of Mr. *Bayle*'s Dictionary, in the Article of *Diogenes*, p. 1051. Col. 2.

[5] See *Diog. Laert.* ubi ſupra, Sect. 37. And p. 379. Ed. *Colon.* And *Senec.* Epiſt. 90. p. 302. Ed. *Gronov.*

[6] Μανείην μᾶλλον ἢ ἡσθείην. *Diog. Laert.* ib. Sect. 3. and p. 366. Ed. *Col.*

[7] Τῶν Θεῶν ἐστὶ πάντα· φίλοι δὲ οἱ σοφοὶ τοῖς Θεοῖς· κοινὰ δὲ τὰ τῶν φίλων. πάντα ἄρα ἐστὶ τῶν σοφῶν. Ibid. Sect. 37. and Ed. *Col.* p. 388. See, alſo, Sect. 11. and Sect. 72. and p. 371. And p. 410. Edit. *Colon.* They excepted not even Things ſacred. See Sect. 73. and Ed. *Colon.* p. 411.

[8] Μηδὲν εἶτω τοῖς καλὰ νόμον, ἀς τοῖς καλὰ φύσιν διδές. Ibid. Sect. 73. and p. 410. Ed. *Col.*

[9] Τοιαῦτα διελέξετο καὶ ποιῶν ἐφάινετο, ὅλως νόμισμα παραχαράττων. Ibid. Sect. 71. and Ed. *Col.* p. 410. See Sect. 20. and Ed. *Col.* 377, 378.

[10] Ἔλεξε δὲ καὶ κοινὰς εἶναι δεῖν τὰς γυναῖκας· γάμον μηδὲν ὀνομάζων, ἀλλὰ τὸν πείσαντα τῇ πεισάσῃ συνεῖναι. Ibid. Sect. 72. and p. 411. Edit. *Colon.* [11] See *Buddæi Elem. Philoſ. Inſtrument.* Hiſt. Philoſoph. Cap. iv. Sect 35.

[12] Mr. *Bernard*'s *Nouvelles* of *July*, 1703, p. 95. [13] Madam *De Villedieu.*

[14] Εἰώθει δὲ πάντα ποιεῖν ἐν τῷ μέσῳ, καὶ τὰ Δήμητρος καὶ τὰ Ἀφροδίτης· καὶ τοιούτους τινὰς ἠρώτα λόγους, Εἰ τὸ ἀριστᾶν μηδὲν ἔιη ἄτοπον ἐν ἀγορᾷ ἐστιν ἄτοπόν· ἐκ ἔστι δὲ ἄτοπον τὸ ἀριστᾶν· ἐν ἀγορᾷ ἄρα ἐν ἀγορᾷ ἐστιν ἄτοπον. *Diog. Laert.* ubi ſupra, Sect. 69. and p. 408. Ed. *Colon.*

[15] See *Auguſt. de Civ. Dei*, Lib. xiv. Cap. xx. and L. Viv. i. l.

[16] *Dict. Hiſt. & Crit.* in the Article of *Hipparchia*, Wife of *Crates*, a *Cynick* Philoſopher, Remark (D), p. 1564. Col. 2.

[17] Several Nations in *India* do the contrary. See alſo *Sext. Empiric. Pyrrhon. hypot.* Lib. iii. Cap. xxiv. p. 152, A. Ed. *Steph.* p. 177. Ed. *Fabric.* And *la Mothe le Vayer, Dial. D'Oraſias Tubero*, p. 156.

" Nature is not ſubject to Preſcription, it is both " right and lawful, at all Times, and in all Places, " to return back to the Obſervation of it; with- " out having any Regard to the arbitrary Yoke " of Cuſtoms and Opinions, however, or where- " ſoever eſtabliſh'd." Theſe are the Reaſons which Mr. *Bayle* puts into the Mouth of *Diogenes*. I have no Deſign to engage myſelf in the Diſpute; this being no proper Place for it. I ſhall content myſelf with ſhewing, in a few words, that all theſe puzzling Subtilties of *Diogenes*, are capable of a very eaſy and obvious Anſwer. Firſt, he lays down a falſe Principle; to wit, that the Maxims of the Law of Nature are founded on an Inſtinct, common to all Animals; every Impulſe whereof is irreſiſtible: And yet Mr. *Bayle* has himſelf juſtly ridicul'd [1] thoſe moral Reflections, which are drawn from the Conduct of brute Beaſts. Secondly, Neither is it neceſſary, that all Men ſhould have innate Ideas of Virtue; and ſtill leſs, that they ſhould univerſally follow them in their Conduct. What I have already ſaid, is ſufficient, in my Opinion, to make *Diogenes* change his Battery. So that, thirdly, I ſhall now grant, as much as he pleaſes, that the Senſe of Shame, with regard to Actions, in themſelves lawful or indifferent, is not a natural Sentiment: But I ſhall maintain, that human Inſtitution may have Force enough, to make ſuch kind of Actions vicious and criminal, when attended with certain Circumſtances. My Reaſon is, becauſe Men are born to live together in Society, and, conſequently, to be benevolent towards each other; not unſeaſonably affecting Singularity, but avoiding to give Offence to any Perſon whatever; as far as it can be done without Breach of their Duty, or bringing on themſelves ſome conſiderable Detriment: In a Word, to have all the Reſpect imaginable for each other, and more eſpecially with relation to thoſe Things, that are authoriz'd by Cuſtom. Fourthly, There are three Sorts of Modes, or Cuſtoms, in the Practice of which, Civility and Decency conſiſt: Some, which are exceeding troubleſome, and without any Foundation: Others, which are but little, or not at all inconvenient; and which may be diſpens'd with, as well as the former; without giving Offence or Scandal to any one; or occaſion to fear any ill Conſequence thereupon: And, laſtly, ſuch, the Violation whereof is liable to very great Inconveniences, and, on this Account, have the Character of Impudence affix'd to the Contempt of them. I conceive, that no Man can be oblig'd to ſubject himſelf to the firſt Sort, any farther, than his own Intereſt, or Condition of Life, neceſſarily requires it. As to the ſecond Sort, I do not ſee why a wiſe Man ſhould here refuſe to conform; ſince it will coſt him ſo little Pains or Trouble to comply: Why, for Inſtance, ſhould a Man dine in the Streets, when he may as eaſily dine at home? However I ſhall grant *Diogenes*, if he pleaſe, that in violating theſe Cuſtoms, *a Man, at moſt, incurs but the Cenſure of Clowniſhneſs, and want of common Complaiſance to an eſtabliſh'd Cuſtom.* But, for the laſt Sort, there is none but a *Cynic*, that is to ſay, a Man accuſtom'd *to treat all the World with Contempt*, and to take the Liberty of doing every Thing he pleaſes, on an ill-grounded Pretence of reſtoring the Law of Nature; who can, out of mere Humour, and without any Neceſſity, trample upon, and deſpiſe them. Thus we ought, without Diſpute, to make uſe of ſome certain Terms, rather than others, though, in the main, both ſignify the ſame Thing. " The " Words [2] Adultery, Inceſt, abominable Sin, are " not infamous, altho' they repreſent very infa- " mous Actions; becauſe they repreſent them no " otherwiſe, than as cover'd with a Vail of Hor- " ror; which makes us conſider them only as " Crimes; ſo that theſe Words ſignify rather the " Crime of thoſe Actions, than the Actions them- " ſelves: Whereas there are certain Words, which, " without giving any Horror at all, expreſs them " rather as pleaſing and agreeable, than criminal; " and with the Addition too of a certain Air of " Impudence and Effrontery. Theſe are the Words, " which we call infamous and ſhameful; becauſe of " thoſe acceſſory *Ideas* which the Mind," by the Means of human Inſtitution, and common Uſage, " joins to the principal Ideas of the Things them- " ſelves. The ſame may be ſaid with reſpect to " certain Turns, which ſerve modeſtly to expreſs " ſuch Actions," as common Decency would have hid from publick View, on Account of the many Inconveniences, which would otherwiſe enſue; not " that they have in them any Tincture of the Cor- " ruption of human Nature;" as the Author, whoſe Words I have juſt before cited, pretends. " For, in Reality, theſe Expreſſions are, for this " ſingle Reaſon, counted modeſt and virtuous; be- " cauſe they do not ſimply expreſs the Things them- " ſelves, but the Diſpoſition, alſo, of him who thus " ſpeaks of them; and who, by his Modeſty and " Reſervedneſs, ſhews an Uneaſineſs at the Thought " of them, and an Endeavour to conceal them, as " much as may be, both from himſelf and others. " Whereas they, who mention them in another " Manner, plainly ſhew, that they would be pleas'd " and diverted with the View of ſuch Objects; and " ſuch Pleaſure being infamous, it is no Wonder " that the Words too, which imprint ſuch Ideas, " ſhould be thought contrary to Decency." Much more then ought this to take Place, in regard to Actions themſelves; but there is no Need at preſent to enlarge on a Thing ſo evident and clear: Nor is there, in my Opinion, the leaſt Occaſion here for Revelation; and I could wiſh, with all my Heart, that there was nothing more than theſe, and, ſuch-like, Objections of the *Cynics*, to be produc'd, in order to ſhew the Imperfection of our Knowledge. I am perſuaded, that human Reaſon would not, were that the Caſe, be much mortify'd at it. The wiſeſt of the Heathens have openly condemn'd the Principles and Maxims of the *Cynics* on this Head; [3] and expreſs'd their Diſlike of all Writings or Diſcourſes, which bore any Tincture of Obſcenity.

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[1] See the Tranſlation of *Pufend. de Jur. Gent. & Nat.* by Mr. *Barbeyrac*, Lib. ii. Cap. iii. Sect. 2. Note 5. pag. 115.

[2] *Art of Thinking*, Part. i. Cap. xiv. p. 137, 138. and p. 121, 122. Ed. *Amſterd.*

[3] *Cicero*, for Example, in his *Epiſt. ad Famil.* Lib. ix. Epiſt. xxii. & de Offic. *Lib.* i. *Cap.* xxxv. See *Ritterſhuſius* upon *Oppian*'s *Halieutic.* Lib. i. Verſ. 127. And the Hiſtory of the Pagan Philoſophy, printed at the *Hague*, 1724. Cap. xxix. Sect. 3. Tom. ii. p. 152. and following.

SECT. XXIII.

AMONG thoſe Diſciples of *Socrates*, who were the Founders of new Sects, we have, alſo, *Ariſtippus*, chief of the *Cyrenaics*. *He* [1] *had the Character of an agreeable Debauchee, a polite Libertine, and a Man of Addreſs, who knew the World.—Altho' the* Cyrenaics *were for gratifying Nature, in every Thing ſhe could deſire; they did not, however, adopt the Impudence of the* Cynics. They entirely rejected the Law of Nature [2]; and, according to them, Civil Laws, and Cuſtom, were the only Foundation of Juſtice and Honeſty. They plac'd their ſupreme Good in *Pleaſure* [3], *from what Cauſe ſoever it proceeded; not excepting even that, which was procur'd by the moſt infamous Actions.* They abſtain'd from their Pleaſures, no farther than was neceſſary, either to the avoiding Pain, or to the keeping up ſuch [4] an Independence, as ſhould ſubject them to nothing, but leave them at Liberty to enjoy all Things, without being the Slaves of any particular Pleaſure. By this we may ſee, that Virtue had no Share in their Syſtem of Morality; any farther than ſhe was thought requiſite, towards the procuring for them, that groſs and brutiſh Pleaſure, which was the only Object of their Purſuit. This Sect was divided into ſeveral ſmall Branches; one of which [5] made open Profeſſion of formal Atheiſm; and, in conſequence thereof, maintain'd, [6] *a Sage might ſteal, commit Adultery, and Sacrilege, whenever he had convenient Opportunity; thoſe Things being evil only*, ſaid they, *in the Opinion of the Vulgar; which was invented to keep Fools in Awe. Hegeſias*, chief of that Branch which bears his name [7], made ſuch eloquent, and pathetick Deſcriptions of the Miſeries of human Life, that ſeveral of his Auditors, upon hearing theſe Lectures, went home, and diſpatch'd themſelves; ſo that *Ptolomy*, King of *Egypt*, where he taught, was forc'd to prohibit him from ſpeaking any more upon that Subject.

SECT. XXIV.

ARISTOTLE [8], the moſt celebrated of all *Plato*'s Scholars, founded the Sect of the *Peripatetics*. He was the firſt, of the ancient Philoſophers, who gave us a methodical Syſtem of Morality; at leaſt of thoſe, whoſe Writings we have left. Father *Rapin* [9] grounding himſelf upon [10] a Paſſage of *Cicero*, inſiſts, that *the Morality of* Ariſtotle *has the ſame Foundations, the ſame Principles, and the ſame* OEconomy, *with that of* Plato; and that, if the latter *is leſs ſimple, and more ſtriking* [11]; the other will be found to be *more ſolid, and better connected.* But I know not how to reconcile this, with what he himſelf owns, in another Place; where he ſays [12], "That *Ariſtotle*'s Morality is too "humane, and too much confin'd within the Bounds "of this Life; that he ſcarce propoſes any other "Happineſs to Man, than that of civil Life: "*Whereas*, the Morality of *Plato* is more noble and "ſublime; is a Preparative to a Life more pure "and perfect." And indeed, Religion has no Share in the Syſtem of *Ariſtotle* [13]. Beſides, that it is not yet a ſettled Point [14], whether he believ'd the Immortality of the Soul; he makes no mention of Providence, but by the Bye; and in ſuch a Manner too, as ſhews him not to be thoroughly perſuaded of it. "If [15] the Gods, ſays he, at all concern "themſelves with human Affairs, as it is probable "they may, it is juſt and reaſonable to believe, "that they are pleas'd with that in Man, which is "the beſt, and the moſt like to themſelves; (and

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[1] Dict. of Mr. *Bayle*, Art. *Heracleotes*, Rem. (F.) p. 1558. Col. 2. See, alſo, *Diog. Laert.* Lib. ii. Sect. 65, 66. *& ſeq.* and p. 132. *& ſeq.* Ed. *Col.*

[2] Μηδέν τε εἶναι φύσει δίκαιον, ἢ καλὸν, ἢ αἰσχρὸν, ἀλλὰ νόμῳ καὶ ἔθει. ibid. Sect. 93. and p. 149. Ed. *Colon.*

[3] Ἡδονὴν μέν τοι τὴν τῦ σώματος——τέλος εἶναι φασί——εἶναι δὲ ἀγαθὸν, κἂν ἀπὸ τῶν ἀσχημοτάτων γένηται. Ibid. Sect. 87, 88. and p. 145, 146. Ed. *Colon.*

[4] *Nunc in Ariſtippi furtim præcepta relabor; et mihi res, non me rebus, ſubmittere conor. Horat.* Lib. i. Ep. 1, 18, 19. There has been ſome Diſpute about the Meaning of this laſt Verſe, occaſion'd by the new Explication of Mr. *Coſte*, in his Edition of *Tarteron*'s *Horace*. See *Nouvelles de la Repub. des Lettres*, 1710.

[5] The *Theodorians*, ſo call'd from *Theodorus* their Head, ſurnam'd the *Atheiſt*. See *Diog. Laert.* Sect 86. Lib. ii. and p. 144, 145. and p. 152. I know not how *Rapin* (in his Compariſon of *Plato* and *Ariſtotle*, Tom. i. of his *Oeuvres diverſes*, p. 367. Ed. *Amſterd.*) comes to put *Hegeſias* and *Theodorus* among the *Stoics*. This Anachroniſm is very conſiderable.

[6] Κλέπτειν τε, καὶ μοιχεύσειν, καὶ ἱεροσυλήσειν [τὸν σπουδαῖον] ἐν καιρῷ· μηδὲν γὰρ εἶναι τούτων αἰσχρὸν φύσει, τῆς ἐπ' αὐτοῖς δόξης αἰρομένης, ἢ σύγκεισθαι ἕνεκα τῆς τῶν ἀφρόνων συνοχῆς. Ibid. Sect. 99. and p. 153. Ed. *Col.*

[7] For this reaſon he was ſurnam'd ὁ Πεισιθάνατος. See *Diog. Laert.* ubi ſupra, Sect 86. and Ed. *Col.* p. 144, 145. *Cicer.* Tuſc. Quæſt. Lib. i. Cap. xxxiv. and *Val. Maxim.* Lib. viii. Cap. ix. I know not on what Grounds Mr. *Buddæus*, to juſtify the *Cyrenaics*, as to the Opinions they are charg'd with, ſays, (in his *Abridgment of his Hiſtory of Philoſophy, Inſtit. Phil. Electic.* Tom. i. Cap. iv. Sect. 13.) that *Hegeſias wrote very elegantly about the Immortality of the Soul, and its Happineſs after Death.* The Authors I cite, ſay nothing of this; *Cicero* mentions him, where he is proving Death to be no Evil, in caſe the Soul does not ſurvive; becauſe 'tis then deliver'd from the Miſeries of Life. Mr. *Dacier* is guilty of the ſame Fault, in his Argument to *Plato*'s *Phædo*, Tom. ii. p. 150. Ed. *Par.*

[8] He was born in the firſt Year of the ninety ninth Olympiad, 384 Years before *Jeſus Chriſt*; and died aged ſixty three Years.

[9] Tom. ii. *de ſes Oeuvres diverſes*, &c. And in his *Reflex. ſur la Morale*, Art. 4. p. 390. Ed. *de Holl.*

[10] *Idem fons erat utriſque*, [Peripateticis, & Veteri Academiæ,] *& eadem rerum expetendarum, fugiendarumque partitio.——Communis hæc ratio, & utriſque hic bonorum finis videbatur.——Omnis illa antiqua Philoſophia ſenſit in una virtute eſſe poſitam beatam vitam.* Acad. Quæſt. Lib. i. Cap iv. and vi. Beſides, that *Cicero* there ſpeaks rather of the Scholars of *Plato*, than of *Plato* himſelf. What he ſays may be true in ſome Senſe, and yet the Principles of *Plato* be very different from *Ariſtotle*'s; as the Caſe appears to be in my Abridgment of them. [11] Tom. i. p. 342. [12] Ibid. p. 346.

[13] Ariſtotle *was the leaſt of any made uſe of by the* Greek *Fathers. They found, that he ſpoke ſlightly of Providence, and of the Nature of the Soul; that his Logick was too intricate, and his Morality too humane: For this is the Judgment St.* Gregory *of* Nazianze *makes of him*, (Orat. 33. p. 535, D.) *Fleury, des Etudes*, &c. p. 18. Ed. *Bruſſels.* See, alſo, the *Abridgment of the Hiſtory of Philoſophy*, by Mr. *Buddæus*, Cap. iv. Sect. 33.

[14] See *Bayle*'s Dict. p. 351. Col. 1. Rem. (O.) Artic. *Ariſtot.* in Cap. xi. Lib. i. of his *Ethicks* to *Nicomachus*, towards the End, p. 17. B. Edit. *Paris. Ariſtotle* ſays, that 'tis a problematical Queſtion, *Whether the Dead can partake of any Good, or Evil?* Τὸ διαπορεῖσθαι περὶ τὰς κεκμηκότας, εἴ τινος ἀγαθῦ κοινωνῦσιν, ἢ τῶν ἀντικειμένων. *Ariſtot.* Tom. iii. p. 17. B. Ed. *Paris.*

[15] Εἰ γάρ τις ἐπιμέλεια τῶν ἀνθρωπίνων ὑπὸ Θεῶν γίνεται, ὥσπερ δοκεῖ, καὶ εἴη ἂν εὔλογον χάιρειν τε αὐτὸς τῷ ἀρίστῳ καὶ τῷ συγγενεστάτῳ· τοῦτο δ' ἂν εἴη ὁ νοῦς· καὶ τὰς ἀγαπῶντας μάλιστα τοῦτο καὶ τιμῶντας, ἀγαπᾶν ποιεῖν· ὡς τῶν φίλων αὐτοῖς ἐπιμελουμένους· καὶ ὀρθῶς τε καὶ καλῶς πράττοντας. *Ethic. Nicom.* Lib. x. Cap ix. p. 185, C. Ed. *Duval.* This Paſſage is ill tranſlated in *Le Clerc*'s *Bibl. Choiſ.* Tom. i. p. 129. but I did the Juſtice to charge the Fault on Mr. *Cudworth*, who cited not the Place where it was to be found; and beſides, has omitted a material Word of the Original. See *Bibl. Choiſ.* Tom. ix. p. 395.

" ſuch is the Underſtanding :) That they reward " thoſe, who love and cultivate this Part of them- " ſelves ; as taking care of that, which is dear to " the Gods : And moreover, as leading good and " honeſt Lives." This Philoſopher makes frequent " Mention of a [1] Plurality of Gods ; and when he " talks of *Dæmons*, which he does more ſparing- " ly, he ſpeaks of them as intelligent Beings, unit- " ed to the Stars. However, he acknowledges, " as well as *Plato*, his Maſter, but one only Prin- " ciple, which he calls [2] the *Immoveable Spirit*, " which moves all Things. In his Syſtem of Di- " vinity, there are four principal Articles : The firſt " is, that, tho' every Thing is not eternal, yet " ſomething there muſt be that is incorruptible : " Otherwiſe, all Things might return into nothing. " The ſecond is, that the Deity is an immaterial " Subſtance. The third, that his Underſtanding " comprehends in itſelf every Thing that is intel- " ligible. The fourth, that GOD being [3] immove- " able, all his Action is included within his own " Eſſence.—So the Religion of *Ariſtotle* may be " reduc'd to theſe two Heads : That there is a " Deity, who comprehends all Nature ; and that " there are, beſides, inferior Gods [4]. As for all " the reſt, he look'd upon it as fabulous, and add- " ed through political Views.——He [5] introduces " Nature, as an Inſtrument of the ſupreme Cauſe, " acting, not through a mechanical Neceſſity, but " for certain Ends [6], which, at the ſame Time, he " profeſſes not to know." In his *Ethicks*, this Philoſopher explains well enough the Principles of human Actions ; treats of the Virtues particularly, in a Manner much more diſtinct, extenſive, and methodical, than his Maſter. But we muſt not imagine, with one of his extravagant Admirers, that [7] it is *the moſt exact, regular, and compleat Syſtem of Morality in the World.* The Jeſuit, whoſe Words theſe are, does himſelf confeſs elſewhere [8], that *there is ſomething of Order wanting in* Ariſtotle's *Ethicks, as well as in his Logick.* The Reader will be able to form ſome Judgment on this Head, by the ſhort Analyſis, which I ſhall give of that Treatiſe of *Morality*, which paſſes for *Ariſtotle*'s Maſterpiece ; I mean that which he has entitled, by the Name of his Son, *Nicomachus.*

After the Introduction, where our Philopher ſays, amongſt other Things, that [9] the Sovereign Good, which is the ultimate Scope of [10] Morality, and of all human Actions, is no other than *Beatitude*, or *Felicity :* He ſhews, that this Sovereign Good does not conſiſt [11] either in *Pleaſures*, or *Honours*, or *Riches*, or even in *Virtue* ; or in [12] *that Idea of Good*, of which his Maſter *Plato* ſpeaks ; and which the Scholar ſeems not rightly to have underſtood. The *Beatitude* then in Queſtion, according to his Definition, is [13], *the Action of the rational Soul, perform'd according to the moſt excellent, and moſt accompliſh'd Virtue, in a perfect Life* ; that is to ſay, throughout the Courſe of a long Life : *For*, adds he, *as one Swallow, or one Day, makes no Summer ; ſo neither will one Day, or a ſhort Space of Time, ſuffice, to make a Man happy.* He then explains [14] this Definition in a very verboſe and confus'd Manner ; and, after ſome previous Queſtions, begins to [15] treat of *Virtue* ; which he thus defines [16] : *A laudable Habit, which perfects both the Perſon, in whom it reſides, and enables him to quit himſelf well of his Duty.* He [17] then divides Virtue into *intellectual*, and *moral.* The *intellectual*, which reſides in the *Underſtanding* ; and the *moral*, which has its Seat in the *rational Appetite*, or the *human Will.* The firſt [18] is acquir'd, and improv'd chiefly by Study ; ſo that it needs both Time and Experience : The other is produc'd by Cuſtom, or Practice ; from whence it has its Name. Here, according to Order, *Ariſtotle* ſhould have enter'd upon his particular Account of *intellectual Virtue* ; which, as he himſelf owns, is the [19] Principle of all *moral Virtue :* This Philoſopher, however, has thought fit to begin with the latter. After having prov'd, that it is [20] neither a *Paſſion*, nor a *Faculty of the Soul*, he defines it to be [21] : An *Habit of acting with Choice ; which conſiſts in a certain Mediocrity, with regard to us, determin'd by Reaſon, according to the Judgment of a prudent Man.* So that, according to him, what conſtitutes the Eſſence of *moral Virtue*, is a *Medium equally diſtant from two oppoſite Vices ; whereof the one errs through Exceſs, and the other through Deficiency. And this, as well with Regard to the Actions, as Paſſions.* Let us ſtop a little at this Principle, which is the Baſis of *Ariſtotle*'s Syſtem, in his Explication of the Virtues. " It is certain, there are ſome Virtues, which " produce this Effect of moderating the Paſſions ; " but this (as [22] *Grotius* obſerves) is not the con- " ſtant and proper Office of all Sorts of Virtues ; " but it is only, becauſe right Reaſon, whoſe Max- " ims Virtue always purſues, teaches us, that there " are ſome Things, wherein a Mediocrity ought to " be obſerv'd ; while, in others, we may indulge " ourſelves as far as poſſible. In Effect, we can- " not ſerve GOD with too much Ardour ; and it is " not, on this Account, we become ſuperſtitious, " but by not ſerving him as we ought. A Man " cannot too earneſtly deſire, and ſeek after eternal " Happineſs, nor too much dread eternal Miſery,

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[1] Extract from Mr. *Cudworth*, in *Bibl. Choiſ.* Tom. iii. p. 73, 74.

[2] Τὸν δὲ Θεὸν ἀσώματον ἀπέφαινε, καθὰ φησὶν ὁ Πλάτων——εἶναι ἀκίνητον αὐτόν. *Diog. Laert.* Lib. v. Sect. 32. and Ed. *Colon.* p. 321. Φανερὸν, ὅτι ἀδύνατον τὸ πρῶτον κινεῖν, μὴ ἀκίνητον ἔχειν τι μέρεθος——ἀδιαίρετόν ἐστι καὶ ἀμερές. *Ariſtot. Phyſ. Auſcult.* Lib. viii. in fine, Tom. i. p. 609, B.

[3] See *Cudworth* himſelf, *Intel. Syſt.* p. 417.

[4] See his *Metaphyſics*, Lib. xiv. Cap. vi, vii, viii. See particularly Tom. iv. p. 483, B.

[5] *Bibl. Choiſie*, Tom. i. p. 132.

[6] Ἄλοπον δὲ τὸ μὴ οἴεσθαι ἕνεκα τοῦ γίνεσθαι, ἐὰν μὴ εἴδωσι τὸ κινοῦν βουλευσάμενον——Οἱ μὲν οὖν αἰτία ἡ φύσις, καὶ ὅτως ὡς ἕνεκα τοῦ, φανερόν. *Phyſ. Auſcult.* Lib. ii. Cap. viii. in fine. Tom. i. p. 477, C.

[7] *Rapin*, Tom. ii. p. 390. [8] Tom. i. p. 361. [9] Lib. i. Cap. ii. Tom. iii. p. 3, E.

[10] Πολιτική. For as he always has in View Man, as a Member of Civil Society ; ſo he underſtands by *Politicks*, Morality in general ; of which *Politicks*, properly ſo call'd, is but one Part.

[11] Ibid. Cap. iii. *per totum.* [12] Cap. iv. *totum.*

[13] Τὸ ἀνθρώπινον ἀγαθὸν, ψυχῆς (λογικῆς) ἐνέργεια γίνεται, καθ' ἀρετήν· εἰ δὲ πλείους αἱ ἀρεταὶ, κατὰ τὴν ἀρίστην καὶ τελειοτάτην· ἔτι δὲ ἐν βίῳ τελείῳ. μία γὰρ χελιδὼν ἔαρ οὐ ποιεῖ, οὐδὲ μία ἡμέρα· οὕτω δὲ οὐδὲ μακάριον καὶ εὐδαίμονα μία ἡμέρα, οὐδὲ ὀλίγος χρόνος. Cap. vi. Tom. iii. p. 10, B. Ed. *Paris.* [14] Cap. vii. *& ſeq.* [15] Cap. xiii. *per tot. & ſeq.*

[16] Τῶν ἕξεων δὲ τὰς ἐπαινετὰς, ἀρετὰς λέγομεν. ibid. in fine, p. 20, D. Πᾶσα ἀρετὴ. οὗ ἂν ἡ ἀρετὴ, αὐτό τε εὖ ἔχον ἀποτελεῖ, καὶ τὸ ἔργον αὐτοῦ εὖ ἀποδίδωσιν, Lib. ii. Cap. v. init. p. 27, A.

[17] Λέγομεν γὰρ αὐτῶν, τὰς μὲν διανοητικὰς, τὰς δὲ ἠθικάς. Lib. i. Cap. xiii. in fine, p. 20, C.

[18] Ἡ μὲν διανοητικὴ, τὸ πλεῖστον ἐκ διδασκαλίας ἔχει καὶ τὴν γένεσιν καὶ τὴν αὔξησιν· διόπερ ἐμπειρίας δεῖται καὶ χρόνου· ἡ δ' ἠθικὴ, ἐξ ἔθους περιγίνεται· ὅθεν καὶ τοὔνομα ἔσχηκε, μικρὸν παρεγκλίνον ἀπὸ τοῦ ἔθους. Lib. ii. Cap. i. init. p. 20, E. 21.

[19] Προαιρέσεως δὲ (ἀρχὴ,) ὄρεξις καὶ λόγος ὁ ἕνεκά τινος διὸ——ἄνευ νοῦ καὶ διανοίας——οὐκ ἔστιν ἡ προαίρεσις, Lib. vi. Cap. ii. p. 98, A.

[20] Lib. ii. Cap. iv. *per tot.*

[21] Ἔστιν ἄρα ἡ ἀρετὴ (ἠθικὴ) ἕξις προαιρετικὴ, ἐν μεσότητι οὖσα τῇ πρὸς ἡμᾶς, ὡρισμένῃ λόγῳ, καὶ ὡς ἂν ὁ φρόνιμος ὁρίσειε. Μεσότης δὲ δύο κακιῶν· τῆς μὲν, καθ' ὑπερβολήν· τῆς δὲ, καθ' ἔλλειψιν——ἔν τε τοῖς πάθεσι, καὶ ἐν ταῖς πράξεσι. ibid. Cap. vi. p. 28, C, D.

[22] *De Jure Belli ac Pacis Prolegom.* Sect. 45.

" nor have too great an Averſion for Sin [1]. One " cannot (ſays a more modern Author [2]) love his " Country too well; tho', to ſave that, he loſeth " his Life, and a wicked Man may reſolve to ſuf- " fer Death conſtantly. So that it is not the Me- " diocrity of Reſolution, which conſtitutes Virtue; " nor the Extremity which conſtitutes Vice. But " Conſtancy, without Reaſon, is vicious. To ſuf- " fer with Reaſon is a Virtue, to ſuffer without " Reaſon, is either Obſtinacy, or Folly. 'Tis true, " that Virtue, all this while, lies between the two " Vices; but it is no more fix'd to this Poſt, than " an honeſt Man is oblig'd to ſtand between two " Thieves. Therefore the Nature of Virtue is " better expreſs'd by *Proportion*; as it, alſo, is, elſe- " where, by *Ariſtotle* himſelf. As in *Proportion* " there is an Equality, or double *Ratio*; ſo there " ſhould be the ſame between the Actions of Vir- " tue, and their Objects. We may remark this " Proportion in the Acts of *penal Juſtice*, which " muſt be proportion'd to their Crimes.—[3] We " need only (as *Grotius* again obſerves, whoſe Diſ- courſe I have a little interrupted) " conſider what " *Ariſtotle* ſays, with reſpect to *Juſtice*, to ſee the " Falſity of his Principle of *Mediocrity*, when taken " in ſo great a Latitude. For not being able to " find, in the Paſſions themſelves, and the Acti- " ons they produce, two oppoſite Vices, whereof " the one errs thro' Exceſs, and the other thro' " Defect; he is forc'd to ſeek them in the Things " themſelves, which are the immediate Objects of " Juſtice. Which is viſibly *flying from one Genius* " *to another*; a Fallacy which *Ariſtotle* juſtly cen- " ſures in others. Beſides, tho' it may accidental- " ly appear blameable in a Man, to content him- " ſelf with leſs than his due, on Account of cer- " tain Circumſtances, which ſeem to oblige him, " (either for his own Intereſt, or that of his Fa- " mily) to relax nothing of his Right: Yet there " can be nothing in it contrary to Juſtice, proper- " ly ſo call'd; for that conſiſts only in the not in- " vading the Property of another. A ſecond Miſ- " take, like this, is, that *Ariſtotle* aſſerts Adultery, " perpetrated to ſatisfy a natural Deſire, or Mur- " der, committed in Paſſion, are not, properly " ſpeaking, Acts of Injuſtice. And yet nothing " is more certain, than that the very Eſſence of " Injuſtice conſiſts in violating the Rights of an- " other. Nor is it of any Moment, upon what " Motive this is done; whether out of Avarice, " Senſuality, ſudden Paſſion, miſtaken Pity, or " Ambition; the uſual Sources of all Manner of " Injuſtice. Nay, it is, on the contrary, the very " Characteriſtic of Juſtice, to reſiſt all Tempta- " tions, from the ſole Motive of making no Breach " in the Laws of human Society.—It is [4] in con- " ſequence of this falſe Principle in Queſtion, that " *Ariſtotle* found himſelf oblig'd to make but one " ſingle Virtue of *Liberality* and *Frugality* (or a " juſt *Oeconomy*); whereas they are, in Fact, two " different Virtues. He, alſo, oppoſes to *Truth* " two Extremes, between which there is not an " equal Oppoſition, to wit, *Oſtentation*, and *falſe* " *Modeſty*: To conclude, he gives the Name of " Vices to Things, which are either imaginary, " or no way vicious in themſelves; ſuch as the " *Contempt of Pleaſures and Honours*, and that *In-* " *ſenſibility of Injuries*, which prevents our being in " a Paſſion with any one." Let us now return to the Analyſis, we have undertaken, of his Syſtem of Morality.

In explaining the diſtinguiſhing Character of the *Habit*, or Diſpoſition, belonging to moral Virtue; I mean the Property of *acting* with Choice and Deliberation; *Ariſtotle* [5] takes Occaſion to treat of *voluntary* and *involuntary*; and what he ſays, on that Head, is juſt enough. He, after that, enters upon a particular Account of the *moral Virtues*; and begins with *Fortitude*, which he defines to be. [6] *A Mediocrity between Fear and Raſhneſs*, but chiefly in regard to the firſt of theſe two Extremes: So that, according to him, *a Man of Courage*, is properly one, *who is not afraid to expoſe himſelf to an honourable Death; or to any of the Dangers which lead to it.* He had before, in the [7] general Enumeration of all theſe Virtues he ſpecifies, oppos'd to this Virtue, on the one Hand, *Stupidity, or the Security of thoſe, who are apprehenſive of nothing*; a Diſpoſition, ſays he, which has no proper Appellation; and Audacity, or Foolhardineſs: And, on the other Hand, *Timorouſneſs*, or *Cowardice*. Here he warns [8], not to confound true *Fortitude*, either with the ſenſeleſs Fury of thoſe, who kill themſelves to be deliver'd from Poverty, or ſome Miſery, which they are not able to bear; and which rather deſerves the Name of Weakneſs, and ſhameful Cowardice; or with five other Things, which ſeem to have ſome Reſemblance with this Virtue. Such is, Firſt, *Civil Valour*, or that of Subjects, who expoſe themſelves to Danger, in Hope of the Honours and Rewards promis'd by the Laws; or to avoid the Penalties they threaten. Secondly, *The forc'd Bravery of Soldiers*, and all who expoſe themſelves in Battle, at the Command of ſuperior Officers; who threaten to puniſh them, if they diſobey their Orders. Thirdly, *The Heat of Paſſion* [9]; which, by a ſudden Impulſe, common both to Man and Beaſt, incites the offended Perſon to aſſault thoſe, from whom he has receiv'd Blows, or any other Injury. Fourthly, the Preſumption of *thoſe, who confide in their own Strength*; which they have often made Proof of with Succeſs. Fifthly, The Security of thoſe, who *fear nothing, becauſe they know no Danger*.

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[1] See *Aul. Gell.* Lib. iv. Cap. ix. at the End. And *Lactant. Inſt. div.* Lib. vi. Cap. xvi. Num. 7. Ed. *Cellar.*

[2] *Grew, Coſmolog. Sacr.* Lib. ii. Cap. vii. Sect. 21, 22, 23. p. 73. See Mr. *Le Clerc*'s *Bibl. Choiſ.* Tom. iii. p. 326, 327.

[3] *Grotius ubi ſupra*, Sect. 44. *Gronovius* has, in his Notes, undertaken to refute this Criticiſm of his Author, upon the Notions of *Ariſtotle*. But if we examine well what he ſays, we ſhall only find, that he is one of thoſe, who are reſolv'd, coſt what it will, to defend every Thing the Ancients ſay; and ſuppoſing him in the right in ſome Things, yet *Ariſtotle* has, at leaſt, given juſt Cauſe for this Criticiſm, by needleſly expreſſing himſelf in a Manner ſo obſcure and confus'd.

[4] Ibid. Sect. 43. [5] Lib. iii. Cap. i. *& ſeq.*

[6] Ἡ Ἀνδρία μεσότης ἐστὶ περὶ φόβους καὶ θάῤῥη. (Cap. ix.) ἀλλὰ μᾶλλον περὶ τὰ φοβερά. ibid. Cap. xii. init. Κυρίως δὲ λέγοιτ' ἂν ἀνδρεῖος, ὁ περὶ τὸν καλὸν θάνατον ἀοχὴς, καὶ ὅσα θάνατον ἐπιφέρει ὑπόῤῥησις ὄντα. Cap. ix. p. 45, E.

[7] Τῶν δὲ ὑπερβαλλόντων, ὁ μὲν τῇ ἀφοβίᾳ, ἀνώνυμος——ὁ δ' ἐν τῷ θαῤῥεῖν ὑπερβάλλων, θρασύς· ὁ δὲ τῷ μὲν φοβεῖσθαι ὑπερβάλλων, τῷ δὲ θαῤῥεῖν ἐλλείπων, δειλός. Lib. ii. Cap. vii. p. 29, C.

[8] Lib. iii. Cap. xi. p. 47, C. and d.

[9] Καὶ τὸν θυμὸν δὲ ἐπὶ τὴν ἀνδρίαν ἐπιφέρουσιν——ὅτι καὶ οἱ ἀνδρεῖοι, θυμοειδεῖς. ibid. p. 48, E. I find by the Extract in the *Bibl. Choiſ.* Tom. iii. p. 334. that Mr. *Grew*, reading *Ariſtotle* too haſtily, charges him with a Contradiction; from which 'tis no difficult Matter to clear the Philoſopher. I doubt not but he had in View this Chapter, tho' he cites the tenth, where is nothing to his Purpoſe, either in mine, or any of the former Editions. It appears by the Extract here given, that *Ariſtotle* is far from pretending, that Courage belongs to the Faculties, deſtitute of Reaſon. Neither is the other Paſſage more exactly cited: For *Ariſtotle* does not ſpeak of Courage in particular, but of Virtue in general: Ἡ δὲ ἀρετὴ πάσης τέχνης ἀκριβεστέρα καὶ ἀμείνων ἐστί. Lib. ii. Cap. v. p. 27, E. Virtue is more exact, and more excellent than all Sorts of Arts.

Tempe-

Temperance is, according to *Ariſtotle* [1], a *Mediocrity, in reſpect of the ſenſual Pleaſures of Taſte and Feeling; and, in ſome Meaſure, in reſpect of Grief:* Inaſmuch, as the temperate Man grieves not to ſee himſelf depriv'd of Pleaſures; whereas it cauſes great Vexation to the Intemperate. He owns that *Inſenſibility, as to Pleaſure*, which he makes the oppoſite Extreme of Temperance, on the defective Side, is a [2] *Thing very rarely known; as being no way conformable to the Conſtitution of human Nature.*

There are two Virtues, which concern the Uſe of worldly Goods, or Riches; that is to ſay, [3] of Money, and whatever elſe is capable of being priz'd by Money. The firſt, which he calls *Liberality*, has for its Object moderate Wealth; and it *conſiſts in preſerving a juſt Medium* [4], *as to giving or receiving; but more eſpecially as to giving.* The Vices, oppoſite to it, are [5] *Avarice*, and *Prodigality*. The other Virtue, which he calls *Magnificence*, regulates the Uſe of great Riches; but it conſiſts only [6] in giving, or expending. Its vicious Extremes are, on the one Hand, a *ſordid Parſimony*; and, on the other, a *ridiculous and miſtaken Profuſeneſs.*

Ariſtotle next particularly diſtinguiſhes two, which concern the juſt Medium to be obſerved, with relation to Honours; the one is [7] *Magnanimity*, or *Greatneſs of Soul; which conſiſts in believing ourſelves worthy of great Honours; and in purſuing them, when we really deſerve them.* He oppoſes to this Virtue, on the one Hand, an *unbounded Ambition*, or that *Vainglory*, which makes us believe ourſelves worthy of, and aſpire to, great Honours, although we do not, in any wiſe, deſerve them: On the other Hand, a *Meanneſs of Soul*, that hinders us from knowing our own Merit; and makes us deprive ourſelves, either wholly, or in Part, of thoſe Honours, whether great or ſmall, of which we are worthy. Thus this Philoſopher makes that Diſpoſition of Mind a Vice, which is, if not the ſame with Chriſtian Humility, at leaſt, a Thing in itſelf very innocent. He goes ſtill farther; and maintains, that this [8] Indifference for Honours, which he imagines to be more common, than exceſſive Ambition, is, alſo, worſe, and more oppoſite to *Magnanimity*. The other [9] Virtue, which has for its Object ſmall Preferments, or Honours, has [10] no fix'd Appellation.

He afterwards treats of the Virtue, which preſerves a juſt Medium, with reſpect to *Anger*; *viz.* [11] *Mildneſs*; which conſiſts *in being never angry, but where there is ſufficient Cauſe; and with ſuch only as deſerve it, and in a Degree too proportionable to the Nature of the Fact; on proper Occaſions only, and no longer than is reaſonable.* The vicious Extremes are, on the one Hand, *unreaſonable Tranſport of Paſſion*; on the other, *an Indolence, that takes every Thing without the leaſt Reſentment.* So that, according to our Philoſopher [12], the Contempt of Injuries is a Vice; and Revenge a Virtue: The firſt, the Property of a ſervile Spirit; the other, that of a noble and generous Soul. There are three Virtues, which relate to Converſation, or the common Buſineſs of Life. The firſt, which may be call'd *Affability*, or a *reaſonable Complaiſance* [13]; keeps the Mean between *Flattery*, which officiouſly ſeeks to pleaſe every Body, in all Things, and without Reſerve; and the *Ruſticity*, or ill Nature of thoſe, who are always carping at, and deſpiſing others; and who care not whom they affront. The Second, is [14] *Candor*, or *Sincerity*, in Things indifferent; that is to ſay, ſuch, where an undiſguis'd Openneſs is not enjoin'd by the Laws of Fidelity or Juſtice. *Ariſtotle* oppoſes to this Virtue, on the one Hand, *ſenſeleſs, and ill-grounded Oſtentation*; and, on the other, *falſe Modeſty*; by which we pretend an Unwillingneſs to own, or endeavour to extenuate thoſe good Qualities, which we are really poſſeſs'd of. The third, and laſt of theſe Virtues, is [15] *an eaſy and agreeable Humour in Converſation, and publick Aſſemblies.* To which are oppos'd, the *Buffoonry* of falſe Wits, and the *ſower Humour* of ſuch, as are ſcandaliz'd at the moſt harmleſs Pleaſantry, and are offended at the moſt inoffenſive Raillery.

As for Juſtice, which is the Subject of one intire Book of *Ariſtotle*'s Morals; Mr. *Pufendorf* having given us [16] a Summary of our Philoſopher's Notions thereupon, I ſhall forbear ſaying any Thing here upon that Head. But I muſt not forget to obſerve, that he diſtinguiſhes Law (the exact Obſervation whereof, is what conſtitutes *Juſtice*; as the Violation of it, on the contrary, does *Injuſtice*;) into *Law, properly and ſimply ſo call'd, and Law that is only ſuch by Analogy*, becauſe of ſome Reſemblance it bears to the former [17]: The firſt, which

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[1] Μεσότης ἐστὶ περὶ ἡδονὰς ἡ Σωφροσύνη——περὶ τὰς τοιάυλας——ὧν καὶ τὰ λοιπὰ ζῶα κοινωνεῖ——αὗται δ' εἰσὶν ἀφὴ καὶ γεῦσις——ἧττον γὰρ καὶ ἧκ ὁμοίως ἐστὶ περὶ τὰς λύπας——ἀλλ' ὁ μὲν ἀκόλας@, τῷ λυπεῖσθαι, μᾶλλον ἢ δεῖ, ὅτι τῶν ἡδέων οὐ τυγχάνει——ὁ δὲ σώφρων, τῷ μὴ λυπεῖσθαι τῇ ἀπουσίᾳ, καὶ τῷ ἀπέχεσθαι τῶ ἡδέ@. Lib. iii. Cap. xiii. p. 51, B, 52, A, B, 53, A, B.

[2] Ἐλλείποιλες δὲ περὶ τὰς ἡδονὰς, καὶ ἧττον ἢ δεῖ χαίρονλις, ὐ φάνυ γίνονλαι· ὐ γὰς ἀνθρώπικὴ ἐστιν ἡ τοιαύτη ἀναισθησία. Ibid. Cap. xiv. p. 53, C.

[3] Χρήματα δὲ λέγομεν πάνλα ὅσων ἡ ἀξία νομίσματι μετρεῖται. Lib. iv. Cap. i. p. 55, C.

[4] Ελευθεριότης δοκεῖ εἶναι περὶ χρήματα μεσότης. Ἐπαινεῖται γὰρ ὁ ἐλευθέρι@——περὶ δόσιν χθημάτων καὶ λῆψιν· μᾶλλον δ' ἐν τῇ δόσει. Ibid. init. p. 55, B.

[5] Ἀνελευθερία. Ἀσωλία. Cap. iii. Ibid. p. 58, A.

[6] Ἡ Μεγαλοπρέπεια, ουχ ὥσπερ δ' ἐλευθεριότης, διαλείπει περὶ πάσας τὰς ἐν χρήμασι πράξεις, ἀλλὰ περὶ τὰς δαπανηρὰς μόνον. ἐν τούτοις δ' ὑπερέχει τῆς ἐλευθεριότητ@ μεγέθει——τῆς τοιαύτης δ' ἕξεως, ἡ μὲν ἔλλειψις, Μικροπρέπεια καλεῖται· ἡ δ' ὑπερβολὴ, Βαναυσία καὶ ἀπειροκαλία. Ibid. Cap. iv. p. 60, A, B, C.

[7] Ἡ δὲ Μεγαλοψυχία περὶ μεγάλα μὲν καὶ ἐκ τῦ ὀνόματ@ ἔοικεν εἶναι——δοκεῖ δὲ ὁ μεγαλόψυχ@ εἶναι ὁ μεγάλων αὑτὸν ἀξιῶν, ἄξι@ ὤν· ὁ γὰρ μὴ καθ' ἀξίαν αὑτὸ ποιῶν, ἠλίθι@——χαῦν@· ὁ δ' ἐλατλόνων, ἢ ἄξι@. μικρόψυχ@, ἐάν τε μεγάλων, ἐάν τε μετρίων, ἐάν τε καὶ μικρῶν ἄξι@ ὤν, ἔτι ἐλατλόνων ἑαυτὸν ἀξιοῖ, καὶ μάλιστα ἂν δόξειεν ὁ μεγάλων ἄξι@. Ibid. Cap. vii. p. 62, E, 63, A, B.

[8] Ἀντίθεται δὲ τῇ μεγαλοψυχίᾳ ἡ μικροψυχία μᾶλλον τῆς χαυνότητ@. καὶ γὰρ γίγνεται μᾶλλον, καὶ χεῖρόν ἐστι. Ibid. Cap. ix. in fine. p. 67, A.

[9] Ibid. Cap. x. *per tot.*

[10] Ibid. See the *Greek* Summary of Cap. ix. and p. 67, D, E.

[11] Πραότης δ' ἐστὶ μὲν μεσότης περὶ ὀργάς——ὁ μὲν ὢν ἐφ' οἷς δεῖ, καὶ οἷς δεῖ, ὀργιζόμεν@, ἔτι δὲ καὶ ὡς δεῖ, καὶ ὅτε, καὶ ὅσον χρόνον, ἐπαινεῖται——ἡ δ' ὑπερβολὴ, ὀργιλότης τις λέγοιτ' ἄν——ἡ δ' ἔλλειψις, εἴτ' ἀοργησία τίς ἐστιν, εἴθ' ὅ, τι δή ποτε, ψέγεται. Ibid. Cap. xi. p. 68, A, B, C.

[12] Οἱ γὰρ μὴ ὀργιζόμενοι ἐφ' οἷς δεῖ, ἠλίθιοι δοκοῦσιν εἶναι, καὶ οἱ μὴ ὡς δεῖ, μηδ' ὅτε, μηδ' οἷς δεῖ. δοκεῖ γὰρ ἐκ αἰσθάνεσθαι, οὐδὲ λυπεῖσθαι, μὴ ὀργιζόμενός τε, ἐκ εἶναι ἀμυντικός. Τὸ δὲ, προπηλακιζόμενον ἀνέχεσθαι, καὶ τὺς οἰκείους περιορᾶν, ἀνδραποδῶδες. Ibid. p. 68, C.

[13] Ἐν δὲ ταῖς ὁμιλίαις, καὶ τῷ συζῆν, καὶ λόγων καὶ πραγμάτων κοινωνεῖν, οἱ μὲν, ἄρεσκοι δοκοῦσιν εἶναι, οἱ πάνλα πρὸς ἡδονὴν ἐπαινοῦντες, καὶ ἐθὲν ἀντιλέγοντες, ἀλλὰ δὴ οἰόμενοι δεῖν ἄλυποι τοῖς ἐντυγχάνουσιν εἶναι. οἱ δὲ ἐξεναντίας τούτοις, πρὸς πάνλα ἀντιλυπῦντες καὶ τῷ λυπεῖν ὐδ' ὁτιοῦν φροντίζοντες, Δύσκολοι καὶ δυσέριδες καλοῦνται——ἡ μέση τούτων [ἕξις] ἐπαινετὴ, καθ' ἣν ἀποδέξεται ἃ δεῖ, καὶ ὡς δεῖ——ὄνομα δὲ ἐκ ἀποδέδοται αὐτῇ τι· ἔοικε δὲ μάλιστα φιλία. Ibid. Cap. xii. p. 69, E, 70, A.

[14] Δοκεῖ δὲ ὁ μὲν ἀλαζὼν, προσποιητικὸς τῶν ἐνδόξων εἶναι, καὶ μὴ ὑπαρχόντων, καὶ μειζόνων ἢ ὑπάρχει· ὁ δὲ Εἴρων ἀνάπαλιν, ἀρνεῖσθαι τὰ ὑπάρχονλα, ἢ ἐλάττω ποιεῖν· ὁ δὲ μέσ@ αὐθέκαστός τις ἂν, ἀληθευτικὸς καὶ τῷ βίῳ καὶ τῷ λόγῳ——ὡ γὰρ περὶ τὸ ἐν ταῖς ὁμολογίαις ἀληθεύοντ@ λέγομεν· ὡδ' ὅσα εἰς ἀδικίαν ἢ δικαιοσύνην συντείνει. ἄλλης γὰρ ἂν εἴη ταυτ' ἀρετῆς· ἀλλ' ὃς ἂν μηδενὸς τοιούτυ διαφέροντ@, καὶ ἐν λόγῳ καὶ ἐν βίῳ ἀληθεύη, τῷ τὴν ἕξιν τοιοῦτ@ εἶναι. Ibid. Cap. xiii. p. 71, B, D.

[15] Οἱ μὲν ὖν τῷ γελοίῳ ὑπερβάλλοντες, Βωμολόχοι δοκοῦσιν εἶναι καὶ φορτικοὶ——οἱ δὲ μήτ' αὐτοὶ ἂν εἰπόντες μηθὲν γελοῖον, τοῖς τε λέγουσι δυσχεραίνοντες, Ἄγριοι καὶ σκληροὶ δοκοῦσιν εἶναι· οἱ δὲ ἐμμελῶς παίζοντες, Εὐτράπελοι προσαγορεύονται——ὡς χαρίεντες. Ibid. Cap. xiv. p. 73, A, B.

[16] See *Pufendorf de Jure Naturæ & Gentium*, Lib. i. Cap. vii. Sect. 12.

[17] Τὸ ζητούμενόν ἐστι καὶ τὸ ἁπλῶς δίκαιον, καὶ τὸ πολιτικὸν δίκαιον. τοῦτο δέ ἐστιν ἐπὶ κοινωνῶν βίου πρὸς τὸ εἶναι αὐτάρκειαν, ἐλευθέρων καὶ ἴσων, ἢ κατ' ἀναλογίαν ἢ κατ' ἀριθμόν——τὸ Δεσποτικὸν δίκαιον καὶ τὸ πατρικὸν, ὐ ταὐτὸ τούτοις, ἀλλ' ὅμοιον. Lib. v. Cap. x. p. 87, A, D.

he calls *Civil Law*, is that which takes Place amongſt a Number of free Perſons, who are Members of the ſame Community; in which they live upon a Foot of Equality, either pure and ſimple, or proportionable. The other, which he ſtiles *Oeconomy*, or Domeſtick Law, is the Power a Maſter of a Family has over his Children, or his Slaves; and, in ſome Meaſure, over his Wife: For, ſays *Ariſtotle*, this Law is not the ſame with the *Civil Law*; becauſe the Maſter of a Family cannot [1] do any *Injuſtice*, properly ſo call'd, to thoſe who have their whole Dependance on him. Our Philoſopher ſubdivides his *Civil Law* into *Natural and Poſitive* [2]. *The Natural Law*, is that *which is every where equally in Force, and depends not on the particular Conſtitutions of any State. The Poſitive*, is that, *which regards thoſe Things, which each Perſon, at firſt, was free to regulate as he pleas'd; but which are no longer indifferent, from the Moment they are eſtabliſh'd. Ariſtotle* hereupon ſtarts the Objection, uſually made by thoſe, who inſiſt, that there is no ſuch Thing as a real Law of Nature; becauſe, ſay they, if there was, it would be immutable; as we ſee Fire has in all Countries the ſame Property of burning. To which our Philoſopher makes this Anſwer [3]; that perhaps, amongſt the *Gods*, the Law of Nature may be abſolutely invariable: But that it is otherwiſe among Men; in reference to whom, as there are ſome Things, in the Law of Nature, which do not, ſo there are others, which do admit of ſome Alteration. In order to diſtinguiſh the laſt Sort, from Laws purely poſitive, *Ariſtotle*, by way of Illuſtration, produces the following Inſtances. Naturally, ſays he, we uſe the Right Hand better than the Left. But for Laws, founded upon Compact, and the Good of particular Communities; it is with them, juſt as it is with the Meaſures for Corn and Wine; which are found to be larger or ſmaller, according to the Difference of Places, and Intereſts of thoſe, who trade in ſuch Commodities. Thus the Forms of Government, in different Countries, differ from each other; though, at the ſame Time, there is but one of them, which is conformable to Nature; and that is, the Form, which beſt ſerves to promote the Good of every Civil Community. In ſhort, this Chapter alone is ſufficient to ſhew, that *Ariſtotle*'s Morality runs wholly upon the Duties of a Subject; and that it does not take in the Duties of Man in general, conſider'd as ſuch. Nor is there one ſingle Word to be found concerning the Law of Nature, as it takes Place among the Subjects of different States; of ſuch as are not Members of any Civil Community: And, by his Silence, at leaſt, this Philoſopher ſeems to favour that inhuman Opinion of the *Greeks*, with reſpect to thoſe, they were pleas'd to call *Barbarians*. But he ſeems plainly enough to declare [4], in his *Politicks*; all thoſe Nations, that have not enter'd into Treaties of Alliance, to be in a State of War with one another. And if we may take *Plutarch*'s Word [5] for it, he adviſed *Alexander* to behave himſelf as a legal Prince towards the *Greeks*, and as a deſpotick Maſter towards the *Barbarians*; to regard the former, as his Friends and Domeſticks, but *to treat the latter as ſo many Beaſts, or Vegetables. Ariſtotle*, after this, paſſes on to *intellectual Virtue*, whoſe Function has for its Object [6] *Truth:* He divides it into five Kinds; to wit, *Science*, *Art*, *Prudence*, *Intelligence*, and *Wiſdom*. By *Science*, he underſtands [7] *a demonſtrative Knowledge*; that is to ſay, a diſtinct View of the Conſequences neceſſarily flowing from ſure Principles, or *eternal Truths*. *Art* [8], is an habitual Knowledge of the Rules, which right Reaſon preſcribes, for the performing of any Operation; or for the accompliſhing any Work, which the Agent was at Liberty to do, or leave undone. *Prudence*, is the Habit of diſcerning [9] what is, or is not conducive towards the governing ourſelves, according to right Reaſon, in all the Affairs of Life. *Intelligence* [10], is the Knowledge of thoſe firſt Principles, which need no Demonſtration, becauſe they are ſelf-evident. *Wiſdom* [11], which is compounded of *Intelligence, and Science*, conſiſts in the Knowledge of the Principles, and Demonſtrations of thoſe Things, which are moſt excellent. I might here make ſeveral Obſervations on theſe Diviſions; and the Method, in which *Ariſtotle* explains thoſe Virtues, which he treats of under diſtinct Heads. But this will require a larger Diſcourſe; they who will give themſelves the Trouble to examine into the Matter, will eaſily diſcover the Defects of this Work. The Author proceeds to treat, [12] in a more particular Manner, of the Characteriſticks, and ſeveral Functions of *Prudence*. After which he ſpeaks of thoſe moral Habits, which are imperfect; that is, of Diſpoſitions [13] towards Virtue, or Vice: And to theſe he refers, on the one Hand [14], *Continency in Pleaſures, and Patience*; on the other, *Effeminacy*, and [15] *Impatience*. On this Occaſion he enters upon the Subject of [16] *Pleaſure*, and *Pain*; which are the two grand Springs of the whole Movement of the Soul. From thence he paſſes on to *Friendſhip* [17]; which is, ſays he, *either a Virtue* [18], *or a Concomitant of Virtue*; and is, beſides, *a very*

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[1] Οὐ γάρ ἐστιν ἀδικία πρὸς τὰ αὐτῷ ἁπλῶς——διὸ μᾶλλον πρὸς γυναῖκά ἐστι δίκαιον, ἢ πρὸς τέκνα καὶ κτήματα· τοῦτο γάρ ἐστι τὸ οἰκονομικὸν Δίκαιον. Ibid. p. 87, D, E.

[2] Τῶ δὲ πολιτικῶ δικάιω, τὸ μὲν φυσικόν ἐστι· τὸ δὲ, νομικόν. φυσικὸν μὲν, τὸ πανταχῆ τὴν αὐτὴν ἔχον δύναμιν, καὶ οὐ τὸ δοκεῖν, ἢ μή· νομικὸν δὲ, ὃ ἐξ ἀρχῆς μὲν οὐθὲν διαφέρει οὕτως ἢ ἄλλως· ὅταν δὲ θῶνται, διαφέρει. Ibid. E.

[3] Τοῦτο δ' οὐκ ἔστιν ὅτως ἔχον, ἀλλ' ἔστιν ὡς. καί τοι παρά γε τοῖς Θεοῖς ἴσως οὐδαμῶς ἄλλως ἔχον. παρ' ἡμῖν δ', ἐστὶ μέν τι καὶ φύσει κινητόν. οὐ μέν τοι πᾶν—— φύσει γὰρ ἡ δεξιὰ κρείττων· καί τοι ἐνδέχεται ἀμφιδεξίους γενέσθαι. Τὰ δὲ καλὰ συνθήκην, καὶ τὸ συμφέρον, τῶν δικαίων, ὁμοιά ἐστι τοῖς μέτροις· οὐ γὰρ πανταχοῦ ἴσα τὰ οἰνερὰ καὶ σιτηρὰ μέτρα——ἐπεὶ οὐδὲ πολιτεία· ἀλλὰ μία μόνον πανταχοῦ καλὰ φύσιν, ἡ ἀρίστη .Ibid. p. 88, A, B.

[4] Διὸ καὶ ἡ Πολεμικὴ φύσει κτητική πως ἔσται· ἡ γὰρ θηρευτικὴ, μέρος αὐτῆς· ἣ δεῖ χρῆσθαι πρός τε τὰ θηρία, καὶ τῶν ἀνθρώπων ὅσοι πεφυκότες ἄρχεσθαι, μὴ θέλουσιν. ὡς φύσει δίκαιον τοῦτον ὅπλα τὸ πόλεμον. Lib. i. Cap. viii. p. 405, C. See Mr. *Noodt, de Uſuris & Foenore*. Lib. i. Cap. x. p. 66.

[5] Οὐ γὰρ (Ἀλέξανδρος,) ὡς Ἀριστοτέλης συνεβούλευεν αὐτῷ, τοῖς μὲν Ἕλλησιν ἡγεμονικῶς, τοῖς δὲ Βαρβάροις δεσποτικῶς χρώμενον (παρέσχε) καὶ τῶν μὲν, ὡς φίλων καὶ οἰκείων ἐπιμελούμενον, τοῖς δὲ, ὡς ζώοις ἢ φυτοῖς πρυσφερόμενον, &c. *De Fortun. vel virtute Alexand.* p. 586. *Opuſ.* Tom. i. Edit. *H. Steph.* & Tom. ii. p. 329, B. Ed. *Wech.* See, alſo, *Strab. Geogr.* Lib. i. in fin. p. 66, C, D. Edit. *Paris.*

[6] Ἔστω δὴ οἷς ἀληθεύει ἡ ψυχὴ τῷ καταφᾶναι ἢ ἀποφᾶναι, πλὴν τὸν ἀριθμόν· ταῦτα δ' ἐστὶ, τέχνη, ἐπιστήμη, φρόνησις, σοφία, νοῦς. Lib. vi. Cap. iii. p. 98, D.

[7] Ἕξ, ἀνάγκης ἄρα ἐστὶ τὸ ἐπιστητόν. ἀΐδιον ἄρα·——ἡ μὲν ἄρα ἐπιστήμη ἐστὶν ἕξις ἀποδεικτική. Ibid. E, 99, A.

[8] Ταὐτὸν ἂν εἴη τέχνη καὶ ἕξις μετὰ λόγου ἀληθοῦς ποιητική. ἔστι δὲ τέχνη πᾶσα περὶ γένεσιν, καὶ τὸ τεχνάζειν, καὶ θεωρεῖν ὅπως ἂν γένηταί τι τῶν ἐνδεχομένων καὶ εἶναι, καὶ μὴ εἶναι· καὶ ὧν ἡ ἀρχὴ ἐν τῷ ποιοῦντι, ἀλλὰ μὴ ἐν τῷ ποιουμένῳ. Ibid. Cap. iv. p. 99, C.

[9] See Mr. *Pufendorf*, Lib. i. Cap. ii. Sect. 4.

[10] Λείπεται, νοῦν εἶναι τῶν ἀρχῶν. Ibid. Cap. vi. p. 101, D.

[11] Ἡ σοφία ἐστὶ καὶ ἐπιστήμη, καὶ νοῦς τῶν τιμιωτάτων τῇ φύσει. Ibid. Cap. vii. p. 102, C.

[12] Ibid. Cap. viii. *& ſeq.*

[13] Lib. vii. Cap. i. p. 111, B. *& ſeq.*

[14] Ἐγκράτεια καὶ καρτερία. Ibid. Cap. i. p. 111, B. and Cap. ii. p. 111, C.

[15] Ἀκρασία, καὶ μαλακία καὶ τρυφή. Ibid. Cap. i. p. 111, B. and Cap. ii. p. 111, C.

[16] Ubi ſupra, Cap. xii. *& ſeq.*

[17] Lib. viii, and ix.

[18] Ἔστι γὰρ (ἡ φιλία) ἀρετή τις, ἢ μετ' ἀρετῆς· ἔτι δ', ἀναγκαιότατον εἰς τὸν βίον. Lib. viii. Cap. i. init. p. 131, E.

neceſſary Ingredient to the Happineſs of Life. He defines it [1], *a mutual Benevolence, whereby Perſons deſire the Proſperity and Happineſs of each other; and reciprocally teſtify it.* It is founded, continues he, either [2] upon *Profit*, *Pleaſure*, or *Virtue:* But it is the laſt only that forms ſolid and perfect Friendſhip, which is only to be met with among good Men; while Intereſt and Pleaſure can, at beſt, but produce ſome ſlight Sort of Union amongſt the Bad. *Ariſtotle* [3] divides *Friendſhip*, as to the Perſons who are capable of it, into that which is *between Equals*, and that *which ſubſiſts between thoſe, whoſe Condition is unequal*; or, where there is ſome ſort of Superiority in the one over the other; as, between a *Father*, and a *Son*; the *Aged*, and the *Young*; a *Man, and his Wife*; a *Sovereign*, and his *Subjects*, &c. He then proceeds to the Reſolution of divers Queſtions relating to *Friendſhip*; and preſcribes Rules for the better Cultivation, and Improvement of it.

In the tenth, and laſt Book, he returns [4] to his Subject of *Pleaſure* and *Pain*; which he handles a little more at large, than he had done before. He concludes with that of *Beatitude*; which he divides into *Contemplative*, [5] and *Practical.* The latter, which he makes to conſiſt in the Exerciſe of thoſe *moral Virtues*, he had been treating of, is, in his Opinion, leſs excellent than the other:- Which he grounds, amongſt other Reaſons, upon this; that [6] Contemplation, as it is accompanied with a purer and more ſolid Pleaſure; ſo it has beſides but little Need of the borrow'd Aid of external Things; which are much more requiſite for the obtaining the other ſort of Beatitude: And becauſe the Practice of *moral Virtues* [7], does not at all agree with the Condition of the Gods, who yet enjoy perfect Felicity.

This is the Summary of his ten Books of *Ethicks* to *Nicomachus*. *Ariſtotle* does little more than repeat, and explain the ſame Principles, in his two Books of *grand Morals*; and in his ſeven Books addreſs'd to *Eudemius*. His *Politicks* are founded upon very near the ſame Principles with thoſe of *Plato*; but apparently more ample, methodical, accurate, and, in general, better proportion'd and adapted to the Conſtitution of human Affairs: Not that they are compleat, or without their Defects. There are ſeveral Things treated in a very ſuperficial, and confus'd Manner. This Philoſopher, as well as his Maſter, ſeems to have had too much in View, the *Grecian* Forms of Government. Nor does he ſeem to have juſt Ideas of the natural Equality of Mankind; and, by ſome of his [8] Expreſſions, he gives Occaſion to believe, that he thought ſome Men to be, by Nature, deſign'd for Slaves. He [9] is againſt bringing up Children, that happen to be born with any bodily Infirmity; and thinks, ſhould the Laws forbid the expoſing Infants, Women ſhould be made to miſcarry, when they find themſelves with Child, after having had a certain Number of Children, anſwerable to what the Intereſt of the State requires; for, adds he, when we ſay that ſuch a Thing is lawful, or unlawful, it ought to be underſtood with reſpect to Beings, that have Life and Sentiments. Thus this vaſt Genius of Nature, this Philoſopher, for whom ſuch Numbers have ſo great a Veneration, proves to be groſly ignorant of, and, without any Scruple, treads under Foot, one of the moſt evident Principles of the Law of Nature.

SECT. XXV.

ARCESILAS [10] one of the Succeſſors of *Plato*, founded a new Sect, call'd the *Second*, or *Middle Academy*, to diſtinguiſh it from that of *Plato*. His Doctrine conſiſted [11] in making a Doubt of every Thing; in arguing both for, and againſt all Manner of Queſtions, without ever coming to any Determination; and in maintaining, that there was nothing which could be certainly known, or comprehended. It is eaſy to ſee, that ſuch a Philoſophy [12] *apparently tends to the utter Subverſion of all the Precepts of Morality:* For, *whoever affirms, that there is nothing certain, and that all Things are incomprehenſible; does, at the ſame Time, declare it to be uncertain, whether there be any ſuch Things as Virtue and Vice.* *Cicero*, who was an Academic, but a moderate one, has acknowledg'd the Juſtneſs [13] of this Conſequence, ſpeaking of *Pyrrho*, a Contemporary of *Arceſilas*; and whoſe Scepticiſm, at the Bottom, was the ſame with the [14] *Incomprehenſibility* of the new *Academics*. *Carneades* [15] founded

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[1] Δεῖ ἄρα (φίλους) εὐνοεῖν ἀλλήλοις, καὶ βούλεσθαι τἀληθὰ μὴ λανθάνοντας. Ibid. Cap. ii. in fin. p. 134, A.

[2] Τρία γάρ ἐστιν εἴδη τῆς φιλίας, ἰσάριθμα τοῖς φιλητοῖς——οἱ μὲν δὴ διὰ τὸ χρήσιμον φιλοῦντες ἀλλήλους, οὐ καθ' αὑτὸς φιλοῦσιν——οἱ δι' ἡδονήν.——τελεία δ' ἐστὶν ἡ τῶν ἀγαθῶν φιλία καὶ κατ' ἀρετὴν ὁμοίων·——διαμένει οὖν ἡ τούτων φιλία, ἕως ἂν ἀγαθοὶ ὦσιν. ἡ δ' ἀρετὴ μόνιμον. Ibid. Cap. iii, iv. p. 134, B, C. p. 135, B, C.

[3] Εἰσὶ δὲ οὖν αἱ εἰρημέναι φιλίαι ἐν ἰσότητι——Ἕτερον δέ ἐστι φιλίας εἶδος, τὸ καθ' ὑπεροχήν· οἷον πατρὶ πρὸς υἱὸν, καὶ ὅλως πρεσβυτέρῳ πρὸς νεώτερον, ἀνδρί τε πρὸς γυναῖκα, καὶ παντὶ ἄρχοντι πρὸς ἀρχόμενον. Ibid. Cap. viii. p. 139, D, E.

[4] Cap. i,—v. [5] Cap. vii, viii.

[6] Ὀιόμεθά τε δεῖν ἡδονὴν παραμεμίχθαι τῇ εὐδαιμονίᾳ· ἥδιστη δὲ τῶν κατ' ἀρετὴν ἐνεργειῶν, ἡ κατὰ τὴν σοφίαν· ὁμολογουμένως ἐστὶ, δοκεῖ γοῦν ἡ σοφία θαυμαστὰς ἡδονὰς ἔχειν καθαριότητι καὶ τῷ βεβαίῳ. Ibid. Cap. vii. p. 181, B. Δόξειε δ' ἂν καὶ τῆς ἐκὸς χορηγίας ἐπὶ μικρὸν ἡ ἐπ' ἔλατον δεῖσθαι τῆς ἠθικῆς. Cap. viii. p. 183, B.

[7] Ἡ δὲ τελεία εὐδαιμονία, ὅτι θεωρητική τίς ἐστιν ἐνέργεια, καὶ ἐνταῦθεν ἂν φανείη· τοὺς θεοὺς γὰρ μάλιστα ὑπειλήφαμεν μακαρίους, καὶ εὐδαίμονας εἶναι· πράξεις δὲ ποίας ἀπονεῖμαι χρεὼν αὐτοῖς. Pag. 183, E. [8] *Politic.* Lib. i. Cap. v.

[9] Περὶ δὲ ἀποθέσεως, καὶ τροφῆς τῶν γιγνομένων, ἔστω νόμῳ, μηδὲν πεπηρωμένον τρέφειν. διὰ δὲ πλῆθος τέκνων, ἐὰν ἡ τάξις τῶν ἐθνῶν κωλύῃ, μηδὲν ἀποτίθεσθαι τῶν γιγνομένων· ὡρίσθαι γὰρ δεῖ τῆς τεκνοποιίας τὸ πλῆθος. ἐὰν δέ τισι γίγνηται παρὰ ταῦτα συνδυασθέντων, πρὶν αἴσθησιν ἐγγενέσθαι καὶ ζωὴν, ἐμποιεῖσθαι δεῖ τὴν ἄμβλωσιν· τὸ γὰρ ὅσιον καὶ τὸ μὴ, διωρισμένου τῇ αἰσθήσει καὶ τῷ ζῆν ἔσται. *Polit.* Lib. vii. Cap. xvi. p. 597, E. The laſt Words are ſo read in the *Paris* Edition, form'd upon that of *Caſaubon*: And this reading is, in my Opinion, much better than that, which Mr. *Perizonius* follows (in his Notes on *Elian, Var. Hiſt.* 8, 1. p. 481. Col. 1.) τὸ γὰρ ὅσιον, καὶ τὸ μὴ διωρισμένον, ἐν τῇ αἰσθήσει, καὶ τῷ ζῆν, ἐστι. I could, were it now proper, eaſily prove this.

[10] He flouriſh'd about the hundred and twentieth Olympiad, three hundred Years before *Jeſus Chriſt*. See *Diog. Laert.* Lib. iv. Num. 28. *& ſeq.* particularly p. 284. Ed. *Colan. Allob.*

[11] *Arceſilas negabat eſſe quidquam, quod ſciri poſſet; ne illud quidem ipſum, quod* Socrates *ſibi reliquiſſet. Sic omnia latere cenſebat in occulto, neque eſſe quidquam, quod cerni, aut intelligi poſſit: quibus de cauſis nihil oportere neque profiteri, neque adfirmare quemquam, neque adſenſione approbare.* *Cicero Academ. Quæſt.* Lib. i. Cap. xii.

[12] Mr. *Bayle*'s Dict. in the Text, and Remark (K.) p. 307. and Col. 2.

[13] *Ariſtonis, Pyrrhonis, Herilli, jampridem exploſa ſententia eſt: qui tamen haberent jus ſuum diſputandi de officio, ſi rerum aliquem delectum reliquiſſent, ut ad officii inventionem aditus eſſet.* *De Offic.* Lib. i. Cap. ii. See, alſo, the ſame Argument made uſe of againſt the Academics, *Acad. Quæſt.* Lib. iv. Cap. viii.

[14] Ἀκαταληψία. See the Article of *Pyrrho*, Rem. (A) in Mr. *Bayle*'s Dict. p. 2429. Col. 2. and 2430. Col. 1.

[15] This Philoſopher was of *Cyrene*; he came to *Rome* in the Year 599, from the Building of that City, a hundred and fifty Years before *Jeſus Chriſt*. See *Petav. D. Temp.* Tom. ii. p. 354. See *Diog. Laert.* Lib. iv. Sect. 62. *& ſeq.* And Ed. *Colon.* p. 296. and *Cicer. Academ. Quæſt.* Lib. iv. Cap. xlv. Et *Bayle* Dict. p. 810, 811. Artic. *Carneade*, the whole Article and Notes. and p. 812, and 813. Col. 1.

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the *Third Academy*; "Which [1], in Reality, did "not at all differ from the *Second*: For, ex- "cepting a few Mitigations, which ſerv'd only to "amuſe, he was, in the main, as zealous a De- "fender of Incertitude, as *Arceſilas* himſelf: He "pretended to diſcover it, even in the moſt evi- "dent Notions; ſince [2] he diſplay'd all his Sub- "tilties againſt this Maxim: *That Things equal to, "or the ſame with any one third Thing, are equal to, "or the ſame with one another.*—He retain'd [3], in "the main, the whole Doctrine of *Arceſilas*: But "thro' Policy, and to diſarm his Adverſaries of "their moſt plauſible Topicks for Declamation, "and Raillery; he admitted ſuch a Degree of "Probability, as might ſerve to determine a pru- "dent Man, which Side of the Queſtion to take, "in the Practice of Civil Life. He plainly ſaw, "that, without this, he could never anſwer the "moſt odious Objections; nor clear his Principles "from the ſcandalous Charge, of bringing Men "to a moſt ſhameful State of Inaction, and Quie- "tiſm. All Things conſider'd, it amounts to the "ſame Thing, to ſay, *That there is not any ſuch "Thing as Truth*; or, *That there is, but that we "have no Rule to diſtinguiſh it from Falſhood.*" Thus it is that Mr. *Bayle* is pleas'd to expreſs himſelf. I ſhall not examine, whether there ever has, in Fact, been ſuch a Perſon, as one ſeriouſly perſuaded, that it is impoſſible for a Man to diſtinguiſh, for Inſtance, whether he be aſleep, or awake; or to diſcern a real Difference between Folly and good Senſe; or to be poſitively aſſur'd, that there is a Sun, Moon, Earth, Men, and Animals; that the Whole is greater than any of its Parts: And whether we may not ſay, with the Author of the *Art of Thinking* [4], *that the Sceptics are a Sect of Liars.* But one Thing to me appears *inconteſtable, viz.* that this Spirit of univerſal Scepticiſm, utterly overthrows the very Foundations of all Religion, and Morality. Nor do I know any Books more dangerous, for Men to read, who have not accuſtom'd themſelves to an accurate Way of Thinking, and diſcerning between Truth and Falſhood, than thoſe, whoſe Authors to accumulate Objections againſt the moſt evident Truths; without ever reſolving them, or preventing the fatal Impreſſions thereof, by a clear and rational Account, of what ought to be held as certain, notwithſtanding ſuch Difficulties; which, however conſiderable, yet can no way leſſen the Force of ſuch direct Proofs, as are really convincing. The ancient "Sceptics [5] did not indeed "deny, but that a Man ought to conform to the "Cuſtoms of his Country; to practiſe the Duties "of Morality; and, in all ſuch Caſes, to be deter- "min'd upon [6] probable Grounds; without in- "ſiſting upon, or expecting, abſolute Certainty." But then, as Mr. *Bayle* himſelf owns, "They [7] did, "under Pretence of only oppoſing the Reaſons, "which the Dogmatiſts urg'd for the Exiſtence of "a Deity, in Effect, undermine the Doctrine it- "ſelf. They began with declaring [8], that they pre- "tended not to be ſingular in any Thing; but "that, without being addicted to any particular "Sect, they held, that there were Gods, wor- "ſhipp'd them, and aſcrib'd to them a Provi- "dence; but for the raſh Reaſonings of the Dog- "matiſts about theſe Matters, it was what they "could not ſubmit to: Whereupon they produc'd "their Objections; which were uſually ſuch, as "did, by diſproving a divine Providence, at the "ſame Time deſtroy the Exiſtence of a Deity." As to Morality, there is no doubt to be made (ſays Mr. *Bayle* once more) but *Pyrrho* [9] taught, "That "the Honeſty and [10] Turpitude, Juſtice and Injuſ- "tice of human Actions, were intirely dependent "upon human Laws and Cuſtom." *Carneades* [11], after having, one Day, made an admirable Harangue in Praiſe of Juſtice; did, the very next, ſhew, that it was only a mere empty Name; oppoſing it, at the ſame Time, more ſtrenuouſly, than he had before defended it. Thus, however excellent thoſe [12] Maxims of Morality, which the *Academics* and *Sceptics* give out for Precepts, were in themſelves; yet, in their Mouths, they can amount to no more than empty Sounds, unprofitable Rules, Propoſitions without any Foundation, and in flat Contradiction to their own proper Principles; and this, notwithſtanding the Conduct of theſe Philoſophers, appear'd otherwiſe the moſt regular in the World. According to *Carneades*, the chief End, or ſupreme Good of Man, conſiſted in *the Enjoyment of*, what he call'd [13], the *natural Principles*; that is to ſay, in ſatisfying the Deſires of Nature; without giving one'ſelf any Trouble, or Concern, about Honeſty and Virtue. The *Sceptics* propos'd to themſelves, by Means of their [14] *Suſpenſion of Aſſent* [15], to keep the Mind in ſuch a State of Tranquility, as ſhould prevent their receiving any Uneaſineſs, on account of eſtabliſh'd Opinions; and, likewiſe, in ſuch a State of abſolute Indifference for all Things, as ſhould keep them from attaching themſelves to any one Object; or troubling themſelves about any Thing that might happen.

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[1] Mr. *Bayle*'s Dict. See the Rem. (A.) and (B.) Artic. *Carneade.*

[2] Ibid. Rem. (C.) p. 811. Col. 2. See *Galen*, in *Lib. de optimo dicendi genere*, printed at the End of the *Pyrrhon. Hypot.* of *Sext. Empiric.* Ed. *H. Steph. Ann.* 1562. p. 220, 221. Et p. 499, D. Ed. *Genev.* 1621.

[3] Ibid. p. 811. Col. 1.

[4] The firſt Diſcourſe, p. 6. See, alſo, the ſixth Chapter of Part iv. p. 419, *&c.* Ed. *Amſt.* 1685.

[5] Mr. *Bayle*'s Dict. Art. *Pyrrho*, Rem. (B.) p. 2430. Col. 1.

[6] See *Diog. Laert.* Lib. ix. Sect. 108.

[7] Mr. *Bayle*'s Dict. Artic. *Rufin*, Rem. (C.) p. 2625. Col. 2.

[8] *Sextus Empiric. Pyrrhon. Hypot.* Lib. iii. Cap. i. Init. & Ed. *Fabric.* p. 128.

[9] *Bayle*'s Dict. Art. *Pyrrho*, in the Text, p. 2433.

[10] Οὐδὲν γὰρ ἔφασκεν ἔτε καλὸν, ἔτε αἰσχρὸν, ἔτε δίκαιον, ἔτε ἄδικον. κ) ὁμοίως ἐπὶ πάντων, μηδὲν εἶναι τῇ ἀληθείᾳ, νόμῳ δὲ, κ) ἔθει πάντα τοὺς ἀνθρώπους πράττειν. *Diog. Laert.* Lib. ix. Sect. 61. Et Ed. *Col.* p. 669.

[11] *Lactant. Inſtit. Divin.* Lib. v. Cap. xiv. N. 3, 4. See the Subſtance of his Reaſons againſt Virtue, reported and confuted by Mr. *Pufend.* Lib. ii. Cap. iii. Sect. 10, 11.

[12] See *Cicer. de Finib.* Lib. ii. Cap. xviii.

[13] *Carneadi, frui principiis naturalibus, eſſet extremum.* Ibid. Cap. xi. in fine. See Mr. *Bayle*'s Dict. p. 814. Col. 2. and 815. Col. 1.

[14] Ἐποχή.

[15] See *Diog. Laert.* Lib. ix. Sect. 67, 68, 108. Et Ed. *Col.* p. 672, 674, 699. *Stob.* Serm. 118. and 120. p. 601, 609. *Sext. Empiric. Pyrrhon. Hypotheſ.* Lib. i. Cap. xii. and Edit. *Fabric.* p. 8. As to the reſt, the Reader may conſult the Extract given by Mr. *Le Clerc* of the Edition of *Sextus Empericus*, publiſh'd by M. *Fabricius, Biblioth. Anc. & Mod.* Tome xiv. Art. 1. where he ſhews at large the Sentiments and Principles of the *Sceptics*, and adds a great many Reflections of his own on this Subject.

SECT.

SECT. XXVI.

EPICURUS [1], Cotemporary of *Arceſilas*, and chief of the Sect that bears his own Name [2], admitted thoſe two Principles of the ancient Atheiſts: "*That there is no other Subſtance beſides* [3] *Body*; *and*, "*that Body had only* [4] *Extenſion*, *Solidity*, *Magnitude*, "*Figure*, *a certain Situation*, *and Motion*, *without* "*any Quality*.—However, he profeſs'd the Belief "of a vaſt Number of Gods.—He plac'd them "in certain Spaces, which he called [5] *Intermundane*; "which he believ'd to be void, and to lie between "the ſeveral Worlds, of which, according to "him, the Univerſe was compos'd. He held [6], "that the Sovereign Felicity of the Gods, conſiſt-"ed in having nothing to do; and in being free "from all Manner of Care.—And tho' they did "*not*, *in his Opinion*, *any way intermeddle in the* "Concerns of Mankind; and tho' Men had no-"thing either to hope or fear from them; yet, "ſaid he, they ought to have ſome Worſhip paid "them, on Account of the Excellency of their [7] "Nature, and Felicity. There needs not much "Penetration to diſcern, that all this Divinity of "*Epicurus* was but a mere Chimera; ſince 'twas "directly contrary to the Principles he himſelf had "laid down; by which he acknowledg'd no other "Beings, but ſuch as were made of Atoms, and, "conſequently, corruptible. But Gods he gave "out there were [8]; out of pure Policy, and to "avoid the Odium, which an avow'd Atheiſm "would otherwiſe have drawn upon him. For "which Reaſon *Poſidonius*, the *Stoic*, ſaid [9], that "*Epicurus believ'd no Gods at all*; *and that it was* "*to avoid Hatred*, *that he ſaid what he did of the* "*immortal Gods*.—*He introduces*, ſays [10] *Cicero*, *by* "*way of Ridicule*, *tranſparent Gods*; *Gods which* "*might be diſſipated with a Puff of Wind*; *dwell-*"*ing*, *as it were*, *between two Worlds*, *for Fear of* "*being*, *ſome Time or other*, *buried in their Ruins*. "But let us ſuppoſe *Epicurus* to have been never ſo "ſerious in thoſe Matters; yet, with [11] *Gaſſendus*'s "good Leave, he will ſtill, nevertheleſs, be an A-"theiſt, as long as it ſhall appear, that he held *the* "*World to be form'd without the Diſpoſition of any* "[12] *Agent*, *or the Concurrence of a bleſſed and im-*"*mortal Being*; and that the Univerſe, with all the "intelligent Natures therein, ow'd their Original "to the fortuitous Concourſe of Atoms.—[13] The "God of this Philoſopher is, in his Syſtem, like "a Piece of Building out of its Place; and which "may as well be left out, without making any "Alteration therein." Yet, with all theſe his impious Principles, *Epicurus* has nevertheleſs given us a Syſtem of Morality, in many Things juſt and beautiful enough. "His Doctrine [14] touching the "Sovereign Good, or Happineſs, was very liable "to be miſunderſtood, which prov'd of ill Conſe-"quence; and, in Effect, brought an ill Charac-"ter upon his Sect: But the Doctrine was, in the "Main, very rational; nor can it be denied, tak-"ing the Word *Happineſs* in the Senſe he us'd it, "but that the Happineſs of Man conſiſts in Plea-"ſure.—[15] Almoſt all the ancient Philoſophers, who "have treated of human Happineſs, fix'd their "Notions upon ſomething external; which has oc-"caſion'd amongſt them ſo great [16] a Variety of "Opinions: Some placing the true Happineſs of "Man in Riches, ſome in Science, ſome in Honours, "and others in Virtue, *&c.* It is plain, they fix'd "the Idea of Happineſs to—that, which they "thought capable of producing in us a State of "Felicity; without ever telling us what that State "of the Soul is, in which its Happineſs conſiſts. "*Epicurus* has not run into this Miſtake.—He ſaid, "that Man's Happineſs conſiſts in his being at "Eaſe, and under the actual Senſation of Plea-"ſure; in a Word, in Content of Mind: This no "way proves, the Placing of the Happineſs of "Man in good Cheer and Venery; for theſe can, "at moſt, be but efficient Cauſes; and theſe are "out of the Queſtion. When you enquire into "the efficient Cauſes of Content, you will be ſhewn "the beſt: On the one Hand, you will find ſuch "Objects, as are beſt fitted for the Preſervation of "bodily Health; on the other, ſuch Occupations, "as are moſt proper to prevent Uneaſineſs of "Mind: You will then find preſcrib'd to you "Sobriety, Temperance, and a reſolute Oppoſiti-"on to all thoſe tumultuous, and unruly Paſſi-"ons, which deprive the Soul of its State of Hap-"pineſs; that is to ſay, of that ſweet Compoſure

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[1] He was born in the third Year of the hundred and ninth Olympiad, three hundred and forty two Years before *Jeſus Chriſt*; and died aged ſeventy two Years. See *Du Rondel*, *de vita & moribus Epicuri*.

[2] Extract from Mr. *Cudworth*, in the *Bibl. Choiſie*, Tom. ii. p. 14. *& ſeq.* See *Cudw.* p. 59, 60, *&c.*

[3] See *Diog. Laert.* Lib. x. Sect. 39, 40. Et Ed. *Col.* p. 732. and *Lucret.* Lib. i. Verſ. 430. *& ſeq.*

[4] *Diog. Laert.* ibid. Sect. 44. Et Ed. *Col.* p. 735.

[5] *Intermundia.* See *Cicer. de Nat. Deor.* Lib. i. Cap. viii. and *Dav.* i. l. and *Lucret.* Lib. v. Verſ. 147. *& ſeq.* and Lib. iii. Verſ. 18. *& ſeq.* In the firſt Book of *Cicero*, of the Nature of the Gods, Cap. xxv. *&c.* this ridiculous Notion of *Epicurus*'s Gods is turn'd into Ridicule.

[6] *Nos autem beatam vitam in animi ſecuritate, & in omnium vacatione munerum ponimus.* Theſe are the Terms of *Velleius* the *Epicurean*, whom *Cicero* introduces, Lib. i. Cap. xx. *de Nat. Deor.* See too Cap. xxx. *Omnis enim per ſe Divum natura neceſſe eſt Immortali ævo ſumma cum pace fruatur, Semota ab noſtris rebus, ſejunctaque longe; Nam privata dolore omni, privata periclis, Ipſa ſuis pollens opibus, nihil indiga noſtri, Nec benè pro meritis capitur, nec tangitur irâ. Lucret.* Lib. i. Verſ. 57. *& ſeq.* Edit. *Creech.*

[7] *Habet enim venerationem juſtam quidquid excellit. Velleius apud Cicer. de Nat. Deor.* Lib. i. Cap. xvii.

[8] This was the Opinion of ſeveral of the Ancients. *Quamquam video nonnullis videri, Epicurum, ne in offenſionem Athenienſium caderet, verbis reliquiſſe Deos, re ſuſtuliſſe. Cicer.* ibid. Cap. xxx.

[9] *Apud Cicer. de Nat. Deor.* Lib. i. Cap. xliv. *ſive ultim.*

[10] In the Extract of the *Bibl. Choiſ.* Tom. i. p. 17. theſe Words are aſcrib'd to *Poſidonius*, but they are *Cicero*'s, Lib. ii. *de Divinat.* Cap. xvii. *Deos enim ipſos jocandi cauſâ induxit Epicurus perlucidos, & perflabiles, & habitantes, tanquam inter duos lucos, ſit inter duos mundos, propter metum ruinarum.*

[11] *De vita Epicuri*, Lib. iv. Cap. i. *& ſeq.* Mr. *St. Evremond*, who is not ſuſpected to bear any ill Will towards *Epicurus*, judges more ſincerely and juſtly of this Matter, in his Eſſay upon the Morality of *Epicurus*, (before the fifth Volume of his Miſcellanies. Ed. *Amſterd.* 1706.) where you may ſee too his Opinion about *Epicurus*'s *Pleaſures.*

[12] *Docuit enim nos idem, qui cætera, [Epicurus] naturâ effectum eſſe mundum; nihil opus fuiſſe fabrica;——quod——quemadmodum natura efficere ſine aliqua mente poſſit, non videtis.——Velleius apud Cicer. de Nat. Deor.* Lib. i. Cap. xx.——*Ex his* [corpuſculis] *effectum eſſe cælum, atque terram, nullâ cogente naturâ, ſed concurſu quodam fortuito.* Ibid. Cap. xxiv.

[13] The Words of Mr. *Le Clerc*, in his *Bibl. Univ.* Tom. x. p. 531.

[14] Mr. *Bayle*'s Dict. in the Text of Article *Epicure*, p. 1133.

[15] Ibid. Rem. (G.) p. 1133. Col. 2.

[16] See *Auguſtin. de Civ. Dei.* Lib. xix. Cap. i. Tom. v. Col. 1137, C, *&c.* Here Mr. *Bayle* cautions us not to believe what ſo many tell us, *viz.* that, according to *Varro*, there were 288 different Opinions about the Nature of the Sovereign Good. 'Tis only a Piece of Pleaſantry of that learned *Roman.*

" and Acquieſcence it has in its preſent Conditi-
" on [1]. Theſe were the Pleaſures in which *Epi-*
" *curus* made the Happineſs of Man to conſiſt.
" An Outcry however was rais'd againſt the Word
" *Pleaſure*; thoſe, who had been before corrupted,
" made an ill Uſe of it; and the Enemies of the
" Sect took Advantage of all this; thus the Name
" of an *Epicurean* became extremely odious. All
" which is, nevertheleſs, accidental; and may as
" well befall any other Doctrine." Thus it is that Mr. *Bayle* juſtifies the fundamental Principle of *Epicurus*. It muſt however be acknowledg'd, that (tho' *Epicurus*, in the Main, might reaſon well, in keeping to the general Idea of Tranquillity, or, Contentment of Mind) yet he neither taught true Happineſs, which is the End of Morality, and the Object of all human Deſire, nor ſolid Virtue: And that it was even impoſſible for him, in purſuance of his own Principles, ſo to do. It is certain, that the Soul of Man thirſts after perfect Happineſs; which, *it is evident, beyond Contradiction*, can never be attain'd to in ſuch a Life, as that which Mortals lead on Earth [2]. All the Happineſs, we can reaſonably aſpire to here below, is an agreeable Tranquillity of Mind; produc'd by the View of that perfectly happy State, which we hope to enjoy after Death. " If Men (I make uſe of Mr. [3] *Lock*'s own Words) " in this Life only have Hope;
" if in this Life they can only enjoy; it is not
" ſtrange, nor unreaſonable, that they ſhould ſeek
" their Happineſs, by avoiding all Things that
" diſeaſe them here, and by purſuing all that de-
" light them; wherein it will be no Wonder to
" find Variety and Difference. For if there be no
" Proſpect beyond the Grave, the Inference is cer-
" tainly right, *Let us eat and drink*, let us enjoy
" what we delight in, *for To-morrow we ſhall die.*"
Thus moſt of the ancient Philoſophers, not grounding their Morality upon the Suppoſition of the Immortality of the Soul, and ſeeking their ſovereign Good in this Life, did vainly enquire, " Whether
" [4] it conſiſted in Riches, or bodily Delights, or
" Virtue, or Contemplation? And they might have
" as reaſonably diſputed, whether the beſt Reliſh
" were to be found in Apples, Plumbs, or Nuts;
" and have divided themſelves into Sects upon it.
" For as pleaſant Taſtes depend not on the Things
" themſelves, but their Agreeableneſs to this, or
" that particular Palate, wherein there is great Va-
" riety; ſo the greateſt Happineſs conſiſts in the
" having thoſe Things, which produce the great-
" eſt Pleaſure; and in the Abſence of thoſe, which
" cauſe any Diſturbance, or any Pain. Now theſe,
" to different Men, are very different Things."
Since therefore *Epicurus* expreſly maintain'd, that the Soul dies with the Body; and made this his Reaſon, to [5] recover Men from the Fear of Death; he could not promiſe more than a Happineſs of ſhort Duration; and his Morality muſt, in the Nature of it, be the Concern of this Life only. In this he no way contradicts his Principles; and Mr. *Le Clerc* has very juſtly obſerv'd, that " His [6] Mo-
" rality has two enormous Defects; which make
" the laudable Precepts, it contains, of little or no
" Effect, whatever may be ſaid by thoſe, who have
" undertaken his Apology. The firſt is, that, its
" End propos'd being only the Attainment of an
" eaſy and quiet Life, it can engage us to purſue
" its Maxims upon no other View, but the preſent
" Advantage, that accrues from that Manner of
" Life it preſcribes. We ought not to be cove-
" tous, for Example, according to *Epicurus*, and
" *Horace* (a Follower of his) becauſe Covetouſneſs
" cannot render us happy in this Life; as the latter
" has, in many Places, made appear. This Prin-
" ciple being laid down, if a Man ſhould find him-
" ſelf under a Government, where Vice was re-
" warded, and Virtue puniſh'd, what muſt he do?
" Suppoſe a Man liv'd in *Japan*, and that a con-
" ſiderable Party there treated the Superſtitions of
" that Country, as ridiculous, and pernicious to
" Society; and that himſelf, alſo, was of their Opi-
" nion: If the Emperor of *Japan* ſhould raiſe a
" Perſecution againſt all of that Perſuaſion, ought
" he too, with the reſt, voluntarily to ſuffer? No,
" certainly, according to *Epicurus*; for, in his
" Opinion, Virtue is of no Eſtimation, but for the
" preſent Advantage it brings with it. As to the
" Suppoſition, that Vice may be rewarded, and
" Virtue puniſh'd, it is, by no Means, an impoſ-
" ſible Suppoſition; it is what is actually practis'd
" throughout the greateſt Part of the World.
" Thus all the Arguments, drawn from the preſent
" Advantage, which is found in the Exerciſe of
" Virtue, are very weak, eſpecially if they ſtand
" alone; and it is highly probable, that had the
" *Athenians* treated *Epicurus*, as they did *Socrates*,
" the firſt would not have thought it an Honour
" to die a Martyr for his Philoſophy, as the ſecond
" did; who, when they would have hinder'd him
" from Philoſophizing, anſwer'd, *That it was bet-*
" *ter to obey GOD than Man.*" We have, even at this Day, ſome of the Maxims of *Epicurus*; among which there is one, wherein that Philoſopher expreſly ſays, *That* [7] *Injuſtice is not evil in itſelf; and if we ought to refrain from doing wrong to another, and from violating the Laws which forbid it, it is purely through Fear of being diſcover'd, and expos'd to Puniſhment; for*, adds he, *though we may have eſcap'd a thouſand Times, we cannot always be aſſur'd, that what has been committed in the darkeſt Corners, and with the greateſt Privacy, will not, before we die, come to the Knowledge of the Miniſters of Juſtice.*
" [8] The ſecond Defect, in the Morality of *Epicurus*,
" is, that, in what Manner ſoever that Philoſopher
" liv'd, towards the latter End of his Days, he did
" not prohibit certain Pleaſures, which undoubt-
" edly diſturb human Society, and would cauſe in-
" finite Diſorders, if all Men were of his Opinion.
" *Horace* may, in Mr. *Dacier*'s Judgment, be eſ-
" teem'd a [9] *rigid Epicurean*; and yet his Writings
" are full of the Marks of a Licentiouſneſs, which
" one would not care to call by its true Name:
" And if he exclaim'd againſt Adultery, for Ex-
" ample,

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[1] See *Diog. Laert.* Lib. x. Sect. 127, 128. *& ſeq.* Et Ed. *Colon.* p. 790. *& ſeq.* Notwithſtanding this favourable Interpretation of the fundamental Principle of the Morals of *Epicurus*; this Principle is nevertheleſs dangerous to Civil Society. See what Mr. *Perizonius* ſays, concerning the Reaſons why the *Epicureans* were driven from ſeveral Places; in his Notes on *Ælian, Var. Hiſt.* Lib. ix. Cap. xii. Not. 2. See, alſo, Not. 4. of the ſame Commentator, on Lib. iv. Cap. xiii.

[2] See the *Bibl. Choiſ.* of Mr. *Le Clerc*, Tom. xi. p. 307, 308.

[3] *Eſſay on human Underſtanding*, Book ii. Chap. xxi. Sect. 55. p. 171. Ed. *Lond.* 1706.

[4] Mr. *Lock*, ubi ſupra, p. 171.

[5] *Diog. Laert.* Lib. x. Sect. 124, 125. Et Ed. *Colon. Allobr.* p. 786. and d.

[6] *Bibl. Univerſ.* Tom. x. p. 288. *& ſeq.*

[7] Ἡ ἀδικία, οὐ καθ' ἑαυτὴν κακὸν, ἀλλ' ἐν τῷ καλὰ τὴν ὑποψίαν φόβῳ, εἰ μὴ λήσει ὑπὲρ τῶν τοιούτων ἐφεστηκότας κολαστάς. ὅπου ἔστι τὸν λαθεῖν τὸ ποιοῦντα ὧν συνέθεντο πρὸς ἀλλήλους, εἰς τὸ μὴ βλάπτειν μηδὲ βλάπτεσθαι, πιστεύειν ὅτι λήσει, κἂν μυριάκις ἐπὶ τῷ παρόντι λανθάνῃ· μέχρι γὰρ καλαστροφῆς ἄδηλον εἰ λήσει. *Diog. Laert.* Lib. x. Sect. 151. Et Ed. *Colon. Allobr.* p. 802.

[8] *Bibl. Univerſ.* ubi ſupra, p. 289.

[9] *Remarks on* Horace, Tom. vii. p. 340. *& ſeq.* in the laſt Edition, printed at *Paris*. Et p. 371. Edit. *de Paris*, 1709.

" ample,

" ample, as he does in his ſecond Satyr, it was " only on account of the Danger there was [1] in " being ſurpriz'd with a married Woman. This " is, likewiſe, conformable to the Maxims of his " Maſter, who was againſt the Enjoyment of that " Pleaſure [2], which brought with it more Harm " than Good; as he, alſo, would have deſpis'd that " Virtue, which would have brought upon him " too much Vexation."

SECT. XXVII.

ZENO, of *Citium*, Cotemporary of *Epicurus*, founded the Sect of the *Stoics*; a Sect directly oppoſite to that of the Diſciples of the latter [3]. The *Stoics* imagin'd the World to be an [4] Animal; whereof the ſupreme [5] GOD, they ſaid, was the Soul, or the *active Principle*; and Matter, the *paſſive Principle*. That [6] eternal intelligent Being, which produc'd all Things, and directs them by his Providence, was, in their Opinion [7], " Nothing but a fiery Subſtance; or, as it were, [8] an " operative mechanick Fire; whereof ſome Parts " animated Plants, Beaſts, and Men; whilſt other " Parts, more ſubtil and elaſtick, made the Gods " in the Sun, and in all the Stars." They paid religious Worſhip to theſe inferior Deities; but [9] they believ'd, that the Gods themſelves, the ſupreme God only excepted, would, one Day, be deſtroy'd by Fire, with the reſt of the World; which, in their Opinion, was to undergo ſeveral Conflagrations; each whereof would happen after a certain Period, or Revolution of Years. They held, that the Souls of Men were, after Death, re-united to that [10] ſubtil *Air*, from whence they had been taken; but they believ'd them [11] corruptible, and made them to ſubſiſt no longer, at fartheſt, than the Conflagration of the World; nay, ſome of them did not allow even this Privilege, but to the Souls of their Sages. They [12] acknowledg'd an inevitable Deſtiny; to which they ſubjected the Gods themſelves, without excepting even their ſupreme Deity. " Nor has there ever been, amongſt " all the Philoſophers [13], yet extant, any who have " ſpoke in ſtronger Terms of the fatal Neceſſity " of Things; or who have more magnify'd [14] the " Liberty of Man than the *Stoics*." Theſe Principles, I muſt own, are monſtrous; and the ſeveral Philoſophers of that Sect have, each in particular, added thereto ſome new Abſurdities. However, except a few Things, nothing can be more beautiful than their Morality, conſider'd in itſelf; which, by only correcting ſome of its Maxims, with ſome ſmall Difference in their Explanation, might be eaſily reduc'd to a Syſtem of Morality, very near approaching to that of the Goſpel; which alone is entirely conformable to the Dictates of right Reaſon. I ſhall give the Reader, in a few Words, what I think beſt in the Morality of the *Stoics*.

Their great, and fundamental Principle, is, *That we ought to live* [15] *conformable to Nature*; and that the ſovereign Good of Man conſiſts in Virtue;

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[1] This, alſo, was the Reaſon why *Epicurus* ſaid, *that we ought to abſtain from our Neighbour's Wife*: At leaſt if we may give Credit to *Origen* againſt *Celſus*, Lib. vii. p. 374. cited by Mr. *Menage*, p. 469. Col. 2. on *Diog. Laert.* Lib. x. Sect. 118. Et p. 782. Edit. *Colon. Allobrogum.*

[2] Οὐδεμία ἡδονὴ καθ' ἑαυτὴν κακόν· ἀλλὰ τὰ τινῶν ἡδονῶν ποιητικά, πολλαπλασίους ἐπιφέρει τὰς ὀχλήσεις τῶν ἡδονῶν. *Diog. Laert.* Lib. x. Sect. 141. Et Ed. *Col.* p. 797.

[3] He died eight Years after *Epicurus.*

[4] Ζῶον ἄρα ὁ Κόσμος. *Diog. Laert.* Lib. vii. Sect. 143. Et p. 525. Ed. *Col.* See *Cicer. de Nat. Deor.* Lib. ii. Cap. xii. *&c. ſeq.*

[5] Δοκεῖ δ' αὐτοις, ἀρχὰς εἶναι τῶν ὅλων δύο, τὸ ποιοῦν καὶ τὸ πάσχον. τὸ μὲν οὖν πάσχον, εἶναι τὴν ἄποιον οὐσίαν τὴν ὕλην· τὸ δὲ ποιοῦν, τὸν ἐν αὐτῇ λόγον, τὸν Θεόν. *Diog. Laert.* Lib. vii. Sect. 134. Et Ed. *Col.* p. 519.

[6] Τοῦτον γὰρ ὅλα ἀΐδιον, διὰ πάσης αὐτῆς (ὕλης) δημιουργεῖν ἕκαστα. *Diog. Laert.* Sect. 134. ubi ſupra. Θεὸν δὲ, εἶναι ζῶον ἀθάνατον, λογικὸν, τέλειον, ἢ νοερὸν ἐν εὐδαιμονίᾳ, κακοῦ παντὸς ἀνεπίδεκτον, προνοητικὸν κόσμου τε καὶ τῶν ἐν κόσμῳ· μὴ εἶναι μέντοι ἀνθρωπόμορφον. Ibid. Sect. 147. Et p. 525, 526. Ed. *Col.* See *Cic. de Nat. Deor.* Lib. ii. Cap. vi. *&c.* where this whole Matter is treated of at large.

[7] The Words of Mr. *Bayle*, in his *Continuation des Penſées diverſes*, Cap. lxvii. See what he ſays there, and, alſo, p. 120. *& ſeq.* on the Abſurdity of that Hypotheſis of the Soul of the World.

[8] Δοκεῖ δὲ αὐτοῖς, τὴν μὲν φύσιν εἶναι πῦρ τεχνικὸν, ὁδῷ βαδίζον εἰς γένεσιν, ὅπερ ἐστὶ πνεῦμα πυροειδὲς καὶ τεχνοειδές. *Diog. Laert.* ubi ſupra, Sect. 156. Et Ed. *Col.* p. 534. *Zeno igitur ita naturam definit, ut eam dicat, ignem eſſe artificioſum ad gignendum progredientem via. Cic. Nat. Deor.* Lib. ii. Cap. xxii. *Atque hac mundi divinitate perfecta, tribuenda eſt ſideribus eadem divinitas: Quæ ex mobiliſſima puriſſimaque Ætheris parte gignuntur.* Ibid. Cap. xv. v. Davis. i. l.

[9] Ὁς (Θεὸς) δὴ ἄφθαρτός ἐστι καὶ ἀγένητος, δημιουργὸς ὢν τῆς διακοσμήσεως, καὶ χρόνων ποιὰς περιόδους, ἀναλίσκων εἰς ἑαυτὸν τὴν ἅπασαν οὐσίαν, καὶ πάλιν ἐξ ἑαυτοῦ γεννῶν. *Diog. Laert.* Sect. 137. Et Ed. *Col.* p. 521. See *Cic. de Nat. Deor.* Lib. ii. Cap. xlvi. *Senec. de Conſolat. ad Marc.* Cap. xxvi. in fine. And the Remark (I.) on Artic. *Chryſipp. Bayle*'s Dict. As, alſo, the Diſſertation *de Stoica mundi exuſtione*, by *J. Thomaſius*, *Lipſ.* 1676. And Diſſert. the tenth of the ſame Volume, with the ſeventh.

[10] Or Æther. See *Gataker* on *Marcus Antoninus*, Lib. iv. Sect. 21. p. 139. Col. 2. *&c.* Et Lib. vii. Sect. 50. p. 279. Col. 2. Lin. 24. In the latter of theſe Paſſages, the Emperor expreſſes his Thoughts by ſome Verſes of *Euripides*, taken out of a Tragedy now loſt, call'd *Chryſippus*; where he ſays, that *what was born of the Earth, returns to Earth; and that which had an Ætherial Origin, returns to the Celeſtial Poles.* But, as Mr. *Le Clerc* has very well obſerv'd, *Bibl. Choiſ.* Tom. vi. p. 244. *& ſeq.* that Poet had other Ideas, than thoſe of the *Stoics*; and believ'd the Immortality of the Soul. *Euripides* repeated the firſt Words of thoſe Verſes, in another Tragedy, which is now loſt; whereof *Cicero* has given us a Tranſlation; *Reddenda eſt terra terræ.*——*Tuſc. Quæſt.* Lib. iii. Cap. xxv. Edit. *Gron.* and not *Tuſc. Quæſt.* Lib. ii. as Mr. *Bayle* has cited it, in his Dict. Art. *Amphiaraus*, p. 208. Col. 2. Rem. (K.) There is another Fault too, in this Article, but chargeable upon the Printers of the Edition, he made uſe of. He criticiſes, p. 208. Col. 2. upon *Amiot*, as if, in turning the Paſſage of *Euripides*, reported by *Plutarch*, (*Conſul. ad Apoll.* p. 110, 111. Ed *Wech.* Et 192. *Steph.*) he had render'd the Words, Ὁ παρὰ τῷ ποιητῇ Ἀμφιάρεως, *Amphiaraus en un poëme*: But in the fine Edition of *Genev.* in Folio, 1604, by *J. Stoer*, I ſaw it was, as it ſhould be, *en un poëte*, p. 251, A. And 'tis likely that the other correct Editions read ſo too. 'Tis ſo Edit. ibid. An. 1726. p. 251, A.

[11] Διὸ καὶ σῶμα εἶναι (τὴν ψυχὴν,) καὶ μετὰ θάνατον ἐπιμένειν, φθαρτὴν δὲ εἶναι. τὴν δὲ τῶν ὅλων, ἄφθαρτον, ἧς μέρη εἶναι τὰς ἐν τοῖς ζώοις—Κλεάνθης μὲν οὖν πάσας ἐπιδιαμένειν μέχρι τῆς ἐκπυρώσεως· Χρύσιππος δὲ, τὰς τῶν σοφῶν μόνων. *Diog. Laert.* Lib. vii. Sect. 156, 157. Et Ed. *Colon.* p. 534.

[12] See the thirteenth of the Diſſertations I quoted laſt; and Rem. (H.) on the Artic. of *Chryſippus*, in Mr. *Bayle*'s Dict. p. 925. Col. 1. *&c.*

[13] Mr. *Bayle*, ibid. p. 925. in the Text. See the ſecond Diſſertation of Mr. *Buddæus*, *de erroribus Stoicorum*, Sect. 8, 9, 10. amongſt his *Analecta Hiſt. Philoſoph.* which were publiſhed in 1706. It will not be amiſs to join the three other Diſſertations of that ingenious Man on the ſame Subject, to what I have here ſaid, on the Principles and Errors of the *Stoics.*

[14] Thoſe Books which remain of the *Stoics*, are full of Sentences on that Subject, carried ſometimes even to a very high Degree of Preſumption.

[15] Πρῶτος ὁ Ζήνων——τέλος εἶπε, τὸ ὁμολογουμένως τῇ φύσει ζῆν. *Diog. Laert.* ubi ſupra, Sect. 87. Et p. 490. Ed. *Col. Cum ergo hoc ſit extremum, congruenter naturæ convenienterque vivere*, &c. *Cicero*, under the Name of *Cato*, the *Stoic*, *de Fin. bon. & mal.* Lib. iii. Cap. vii.

which is nothing elſe, according to them, but [1] a Life conformable to her; *for*, ſay they, *Nature leads us to Virtue*. By this *Nature* [2], ſome of them meant directly the Conſtitution of the human Nature; or that Light of Reaſon, by the Help of which we diſcern what is truly ſuitable to our State and Condition; others meant, univerſal Reaſon, or the Will of GOD; which forbids us every Thing, that is contrary to our natural Conſtitution, and preſcribes to us every Thing that is agreeable thereto; and others again, meant both theſe join'd together. They ſaid, That [3] *Juſtice, as ſuch, ariſes not from the Inſtitution of Men, but from its own Nature; as are, alſo, Law and right Reaſon; and that the Difference of Opinions, that prevail among Philoſophers, ought not to diſcourage us from the Study of Philoſophy; for, if that Reaſon was of Weight enough to divert us from any Thing, we ought to leave the World; there being nothing in it, about which Men are not divided in their Opinions.* They conſider'd the World as [4] a Kingdom, of which GOD is the King; and as a Whole, to the Service of which, every Perſon, as a Part thereof, ought to concur, and direct all his Actions; without ever preferring his own private Advantage to the common Intereſt. They believ'd, they were [5] born, not every one for himſelf alone, but for the Good of human Society: This was the diſtinguiſhing [6] Character of their Sect; this the Idea they [7] gave of the Nature of Juſtice and Honeſty. There was never any Sect of Philoſophers, who ſo well underſtood, and ſo ſtrongly preſs'd thoſe indiſpenſable Duties, which Men, preciſely conſider'd as ſuch, owe to each other. A learned *Engliſhman* [8], in the Preface to his extenſive and inſtructive Commentary on the *Reflections* of *Marcus Antoninus*, has given us a ſhort Summary of the moſt ſhining Precepts of the Morality of the *Stoicks*; taken chiefly from the Writings of that Emperor, *Epictetus*, and *Seneca*; who are the only Philoſophers of that Sect, whoſe Writings we have left. I am perſuaded, it will not be diſpleaſing to inſert it here; ſince this will ſerve to let us ſee how far the Light of Reaſon alone, tho' not exactly follow'd, and in ſome Things too a little defac'd, has carry'd thoſe among the Heathens, who have thought fit to conſult her.

The *Stoics* then ſaid, "That we ought, above "all Things, to honour [9] and ſerve GOD: To call "upon him to direct us in [10] all our Actions, to "have our [11] Thoughts always fix'd upon him, "to [12] raiſe up our Hearts to him, to ſubmit [13] to "his Will in every Thing, and to [14] praiſe, and "give Thanks to him for all Things: To obey "him abſolutely [15], and without Reſerve: To re-"ceive with a ready Submiſſion, and with Com-"placency [16], all that he is pleas'd to ſend us; to "reſt aſſur'd, that there is nothing [17] better, no-"thing [18] more fit, nothing [19] more advantageous, "nothing [20] more ſeaſonable, than that which he "ordains to come to paſs, whatever it be; to "follow him, without heſitating or murmuring [21], "wherever he is pleas'd to lead us; couragiouſly "to defend, and, with Conſtancy, to keep the Poſt "he hath aſſign'd us, whatever it be; and to [22] "ſuffer a thouſand Deaths, rather than abandon "it."

As to the Duties of Men, towards one another, theſe Philoſophers taught, "That each Man, in "particular, ought to love the reſt of Mankind "[23] with all his Heart; to take [24] care of them,

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[1] Ὅπερ ἐστὶ καὶ' ἀρετὴν ζῆν. ἄγει γὰρ πρὸς ταύτην ἡμᾶς ἡ φύσις. *Diog. Laert.* ibid. Sect. 87.

[2] Πάλιν δ' ἴσον ἐστὶ τὸ καθ' ἀρετὴν ζῆν τῷ καθ' ἐμπειρίαν τῶν φύσει συμβαινόντων ζῆν· ὡς φησι Χρύσιππος ἐν τῷ πρώτῳ περὶ τελῶν. μέρη γάρ εἰσιν αἱ ἡμέτεραι φύσεις τῆς τοῦ ὅλου. διόπερ τέλος γίνεσθαι τὸ ἀκολούθως τῇ φύσει ζῆν. ὅπερ ἐστὶ καθ' ἀρετὴν αὐτοῦ καὶ καλὰ τὴν τῶν ὅλων, οὐδὲν ἐνεργοῦντος ὧν ἀπαγορεύειν εἴωθεν νόμος ὁ κοινὸς, ὅσπερ ἐστὶν ὁ ὀρθὸς λόγος διὰ πάντων ἐρχόμενος, ὁ αὐτὸς ἐν τῷ Διΐ καθηγεμόνι τούτῳ τῆς τῶν ὅλων διοικήσεως ὕλη. εἶναι δ' αὐτὸ τοῦτο τὴν τοῦ εὐδαίμονος ἀρετὴν, καὶ εὔροιαν βίου, ὅταν πάντα πράττηται καλὰ τὴν συμφωνίαν τοῦ παρ' ἑκάστῳ δαίμονος πρὸς τὴν τοῦ ὅλου διοικητοῦ βούλησιν. ὁ μὲν οὖν Διογένης τέλος φησὶ ῥητῶς, τὸ εὐλογιστεῖν ἐν τῇ τῶν καλὰ φύσιν ἐκλογῇ. Ἀρχέδημος δὲ, τὸ πάντα τὰ καθήκοντα ἐπιτελοῦντα ζῆν. φύσιν δὲ Χρύσιππος μὲν ἐξακούει, ἢ ἀκολούθως δεῖ ζῆν, τήν τε κοινὴν, καὶ ἰδίως τὴν ἀνθρωπίνην. ὁ δὲ Κλεάνθης τὴν κοινὴν μόνην ἐκδέχεσθαι φύσιν, ἢ ἀκολουθεῖν δεῖ, οὐκέτι δὲ καὶ τὴν ἐπὶ μέρους. *Diog. Laert.* ubi ſupra, Sect. 87, 88, 89. p. 490, 491. Edit. *Col.*

[3] Φύσει τε τὸ δίκαιον εἶναι, καὶ μὴ θέσει, ὡς καὶ νόμον καὶ τὸν ὀρθὸν λόγον, καθά φησι Χρύσιππος ἐν τῷ περὶ καλοῦ. δοκεῖ δὲ αὐτοῖς μηδὲ τὴν διαφωνίαν ἀφίστασθαι φιλοσοφίας· ἐπεὶ τῷ λόγῳ τούτῳ παρολείψειν ὅλον τὸν βίον, ὡς καὶ Ποσειδώνιος φησὶν ἐν τοῖς προτρεπτικοῖς. *Diog. Laert.* ubi ſupra, Sect 128, 129. Et Ed. *Colon.* p. 515, 516.

[4] *Mundum autem* [Stoici] *cenſent regi numine Deorum, eumque eſſe quaſi communem urbem & civitatem Hominum, & Deorum; & unumquemque noſtrûm ejus mundi eſſe partem: ex quo illud naturâ conſequi, ut communem utilitatem noſtræ anteponamus.* Cato *apud Cicer. de Fin. bon. & mal.* Lib. iii. Cap. xix.

[5] Κοινωνικὸς γὰρ φύσει καὶ πρακτικός, *Diog. Laert.* ubi ſupra, Sect. 123. Et Ed. *Col.* p. 512. Ὅτι γὰρ πρὸς κοινωνίαν γεγόναμεν, πάλαι δέδεικται. *Marc. Antonin.* Lib. v. Sect. 19. There are, on this Head, many beautiful Paſſages in the Reflections of that Emperor. See *Cicer. de Fin.* Lib. iii. Cap. xx. *& ſeq.*

[6] Thus *Lucan* characterizes it, in ſpeaking of *Cato: Hi mores, hæc duri immota Catonis Secta fuit, ſervare modum, finemque tenere, Naturamque ſequi, patriæque impendere vitam; Nec ſibi, ſed toti genitum ſe credere mundo,* Lib. ii. Ver. 380. *& ſeq.*

[7] Δίκαιον δὲ, ὅτι νόμῳ ἐστὶ σύμφωνον, καὶ κοινωνίας ποιητικόν, *Diog. Laert.* ubi ſupra, Sect. 99. p. 497, 498. Ed. *Col. Quicquid equum, juſtumque eſſet, id etiam honeſtum* [*cenſent Stoici:*] *viciſſimque, quicquid eſſet honeſtum, id juſtum etiam, atque æquum fore. Cicer. de Fin. bon. & mal.* Lib. iii. Cap. xxi.

[8] *Thomas Gataker,* Prælog. * * 3. p. 4.

[9] Τί δ' ἄλλο (ἀρκεῖ) ἢ Θεοὺς μὲν σέβειν, καὶ εὐφημεῖν· ἀνθρώπους δὲ εὖ ποιεῖν. *M. Antonin.* Lib. v. Sect. 33. But I ſhall not report at their full Length the Quotations of *Gataker*, without making ſuch Corrections and Additions as I ſhall judge expedient. See, alſo, a beautiful Paſſage in *Seneca*, on the true Worſhip of GOD. Epiſt. 95. p. 354. which I have cited, *Pufend.* Lib. ii. Cap. iv. Sect. 3. Not. 1.

[10] *Marc. Antonin.* Lib. vi. Sect. 23.

[11] Idem, Lib. vi. Sect. 7.

[12] Idem, Lib. iii. Sect. 13.

[13] Τοῖς Θεοῖς σύμφωνον· τελέσιν, ἐπαινοῦντα ὅσα ἐκεῖνοι διανέμουσι καὶ διαλελάχασιν. Idem, Lib. vi. Sect. 16. Ἐγώ σοι ὑπὲρ ἀπάντων τούτων πρὸς τοὺς ἀνθρώπους ἀπολογήσομαι. *Arrian. Epict.* Lib. ii. Cap. xvi. p. 217. Ed. *Cantab.*

[14] Εἰ γὰρ νῦν εἴχομεν, ἄλλό τι ἔδει ἡμᾶς ποιεῖν καὶ κοινῇ καὶ ἰδίᾳ, ἢ ὑμνεῖν τὸ θεῖον, καὶ εὐφημεῖν, καὶ ἐπεξέρχεσθαι τοὺς χάριτας; οὐκ ἔδει καὶ σκάπτοντας, καὶ ἀρῶντας, καὶ ἐσθίοντας, ᾄδειν τὸν ὕμνον τὸν εἰς τὸν Θεόν; *Epict. Differt.* Lib. i. Cap. xvi. p. 127. See, alſo, Cap. vi. and Lib. iv. Cap. iv. p. 386.

[15] See *Epict.* Differt *Arrian.* Lib. iv. Cap. xii. p. 426. And *Marc. Anton.* Lib. iv. Sect. 33.

[16] Ἀσπαζόμενον μὲν ἐξ ὅλης τῆς ψυχῆς τὰ συμβαίνοντα καὶ ἀπονεμόμενα πάντα. *Marc. Anton.* Lib. iii. Sect. 4. See, alſo, Lib. iv. Sect. 25. and *Epict. Arran.* Lib. ii. Cap. xvii. Lib. iii. Cap. xxvi. p. 367. Lib. iv. Cap. vii. p. 401.

[17] Κρεῖττον γὰρ ἡγοῦμαι ὃ ὁ Θεὸς θέλει, ἢ ὃ ἐγώ. *Epict.* Ibid. p. 402.

[18] Καὶ τότε συμφέρει, ὅτε ἐκείνη φέρει.

[19] Τί γὰρ ἁρμοδιώτερον; *M. Anton.* Lib. vii. Sect. 57.

[20] Συμφέρει ἑκάστῳ, ᾧ φέρει ἑκάστῳ ἡ τῶν ὅλων φύσις. Idem. Lib. x. Sect. 20.

[21] *Optimum eſt——Deum, quo actore cuncta proveniunt, ſine murmuratione comitari. Malus miles eſt, qui Imperatorem gemens ſequitur. Senec.* Epiſt. 107. p. 402. Edit. *Gronov.* See the Prayer of *Cleanthus*, which *Seneca* there tranſlates into *Latin* Verſe, related by *Epictetus*, in his Manual, Chap. lxxvii. or the laſt but two. Ed. *Berkel.* and in the *Differt. Arrian.* Lib. ii. Cap. xvii. p. 221. and 23. p 251. Lib. iii. Cap. xxii. p. 321. and Lib. iv. Cap. iv. p. 386.

[22] Ἦν ἂν χώραν καὶ τάξιν ἐγχειρίσῃς——μυριάκις ἀποθανοῦμαι πρότερον, ἢ ταύτην ἐγκαταλείψω. *Epict. Differt.* Lib. iii. Cap. xxiv. p. 342. *Socrates* had ſaid the ſame Thing in the Apol. of *Plato*, p. 28, 29. Edit. *H Steph.* and p. 363, F. Ed. *Lugdun.*

[23] Οὕτω ὑπὸ καρδίας φιλεῖς τοὺς ἀνθρώπους. *(ut par eſſet) M. Anton.* Lib. vii. Sect. 13.

[24] Ἀλλὰ καὶ κήδεσθαι (αὐτῶν δεῖ.) Idem, Lib. ix. Sect. 3.

" and to intereſt himſelf in every Thing that con-
" cerns them; to [1] bear with them; to do them
" no [2] Wrong, and to believe, that all Injury and
" Injuſtice [3] is a Sort of Impiety; to [4] exerciſe
" his Bounty towards them; to live in ſuch a Man-
" ner, as will convince the World of his being
" thoroughly perſuaded, that we were not [5] born
" for ourſelves alone, but for the common Good of
" human Society; and to do good [6] to all Men,
" according to our Strength and Abilities: To be
" [7] ſatisfy'd with the having done a good Action,
" and with the favourable Teſtimony of our own
" Conſcience; and even, in ſome Meaſure, to [8]
" forget it, inſtead of ſeeking for [9] Witneſſes, or
" propoſing to himſelf any [10] Recompence, or [11]
" acting with a View to his own particular Inte-
" reſt; to [12] go on from one good Action to an-
" other, never growing weary of doing [13] Good;
" but continuing, through the whole Courſe of his
" Life, to multiply [14] good Actions, without the
" leaſt Interval, or Void; as if in that alone con-
" ſiſted all the Advantage, and Pleaſure of Life [15];
" to think the Opportunity of doing a good Office
" to another, a ſufficient Reward for the doing it;
" and to eſteem himſelf oblig'd to thoſe, who ſhall
" have put it in his Power; looking upon it, as
" a Thing [16] that redounds to his own Profit and
" Advantage; and, conſequently, not to ſeek from
" without [17], either Profit, or Praiſe. As to our-
" ſelves, we ought (ſay the *Stoics*) to make the
" [18] Soul our principal Care; to honour it, as the
" moſt excellent Part of us; to have nothing ſo
" much at Heart [19], or in ſo great Eſteem, as Vir-
" tue and Honeſty; never to ſuffer ourſelves to
" ſwerve from our Duty [20], as far as we can at-
" tain to the Knowledge of it; either through the
" Deſire of Life, much leſs of any other Thing;
" [21] or through the Fear of Torments, or Death,
" much leſs of any Damage, or Loſs, whatſoever."

This is the beautiful Side of the Morality of the Stoics; and it muſt be further acknowledg'd, to their Praiſe, that they ſtopped not at general Notions, and indeterminate Maxims: On the contrary, to judge of the Matter only by thoſe few Writings, we have left us by the three Perſons abovementioned, with the Fragments of others, and the Writings of thoſe who have reaſon'd upon their Principles; it may be affirm'd, that, of all the Philoſophers of Antiquity, they are the Men, who have gone the fartheſt into the Particulars of Morality; and have the beſt apply'd its general Precepts to the ſeveral Conditions of Life, and the different Accidents which happen. *Ariſto* of *Chios*, who thought it ſufficient to eſtabliſh [22], in general, the Nature of true Wiſdom; and to ſhew wherein the ſovereign Happineſs of Man conſiſts; without entering into any particular Explication of the relative Duties between Huſbands and Wives, Parents and Children, Maſters and Servants: This Philoſopher, I ſay, who departed a little from the Sentiments of his Maſter *Zeno*, form'd a kind of Sect, which did not laſt long: And *Seneca* has prov'd againſt him, that particular Precepts, as well as Maxims, or moral Reflections, couch'd in ſhort lively Sentences, are extremely uſeful. *Ariſto* ſaid, Theſe were only fit for Schoolmaſters, and [23] Nurſes, and therefore ought to be left wholly to them. *A fine Reaſon indeed*, anſwers [24] *Seneca: As if the Sage was not the Schoolmaſter of Mankind!* " *Chryſippus* even condeſcended to give ſhort [25] Pre-
" cepts about the Education of Children; which,
" as it is a Thing in itſelf of the utmoſt Import-
" ance to Mankind, entitles him to the higheſt
" Praiſe." After having done Juſtice to the *Stoics*, let us now ſee in what reſpect they deſerve Cenſure.

I have nothing to ſay, as to the Vanity, Hypocriſy, and bad Lives, that ſeveral particular Philoſophers of that Sect have been charg'd with; theſe are perſonal Faults, and extend not to their Doctrines: I ſhall here, as I do every where elſe, only conſider the Opinions, as they are purely and ſimply in themſelves.

The Idea, which the *Stoics* give us of Virtue, how magnificent ſoever it may at firſt appear, if conſider'd in a certain Point of Light, is neither altogether juſt, or compleat; nor intirely founded on its true Principles; nor exempt from Error. Virtue, ſay they, is the ſovereign Good; there is nothing good, but what is juſt: The Sage is ſtill [26] happy, tho' in the Midſt of the moſt cruel Torments. But, beſides that Virtue is only the [27] efficient Cauſe of Happineſs, and not Happineſs itſelf, they did not found the Advantages, and Conſolations of Virtue, on the Hope of another Life, ſince

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[1] Καὶ ἀνέχεσθαι αὐτῶν. Idem, Lib. v. Sect. 33. [2] Καὶ ἀπέχεσθαι. Ibid.
[3] Ὁ ἀδικῶν ἀσεβεῖ. Idem, Lib. ix. Cap. i. [4] See Page 60, Note 9.
[5] See Page 60, Note 5 and 6. And *Marc. Antonin.* Lib. vii. Sect. 55. and Lib. viii. Sect. 7.
[6] Καὶ ὅτι κήδεσθαι μὲν πάντων ἀνθρώπων, κατὰ τὴν τῆ ἀνθρώπῳ φύσιν ἐστίν. Idem, Lib. iii. Sect. 4. p. 17. Edit. *Gataker.*
[7] Ἑαυτῷ ἀρκεῖσθαι δικαιοπραξοῦντι. Idem, Lib. vii. Sect. 28.
[8] *Se dediſſe, dum dat, oblitus eſt. Senec. de Benef.* Lib. ii. Cap. vi. See *Marc. Antonin.* Lib. v. §. 6. We find the like Expreſſion in the Goſpel, *Matt.* vi. 3.
[9] *Ut in omnibus factis re, non teſte, movcamur. Cicero de fin.* Lib. ii. Cap. xvi. The Paſſage of *M. Ant.* which *Gataker* cites here, taken from Lib. iii. Sect. 5. has another Senſe, according to which he himſelf explains it in his Commentary, p. 101. Col. 1. Lin. 53. See rather Book ix. Sect. 29. with the Note of that Commentator, p. 340. Col. 1. Lin. 14. and d.
[10] See *Plutarch de amore prolis*, Tom. ii. p. 495, A. Ed. *Frankofurt.* [11] See *M. Antonin.* Lib. ix. in fine, p. 63.
[12] Ἐνὶ τέρπει καὶ προσαναπάυει, τῷ ἀπὸ πράξεως κοινωνικῆς μεταβάινειν ἐπὶ πρᾶξιν κοινωνικὴν, σὺν μνήμῃ Θεοῦ. Idem, Lib. vi. Sect. 7. and Lib. v. Sect. 6.
[13] Μὴ οὖν κάμνε ὠφελῶμενος, ἐν ᾧ ὠφελεῖς. Idem, Lib. vii. Sect. 74.
[14] Τί λοιπὸν, ἢ ἀπολάυειν τῆ ζῆν, συνάπτουσα ἄλλο ἐπ' ἄλλῳ ἀγαθὸν, ὥστε μηδὲ τὸ βραχύταλον διάστημα ἀπολείπειν, Idem, Lib. xii. Sect. 29. And ſee, alſo, Lib. ix. Sect. 23. [15] See above, Note [11] and [13].
[16] See *M. Antonin.* Lib. ix. in fine, p. 93. [17] Idem, Lib. vii. Sect. 73.
[18] Τῶν ἐν σοι τὸ κράτιστον τίμα. Idem. Lib. v. Sect. 21. See Lib. ii. Sect. 13.
[19] Idem, Lib. iii. Sect. 6. Lib. vi. Sect. 16. [20] Idem, Lib. vi. Sect. 22. Lib. vii. Sect. 15. Lib. viii. Sect. 5.
[21] Idem, Lib. vii. Sect. 44. *ex Platon. Apol.* See Page 60, Note [22].
[22] Ariſto Chius——*Moralem, quam ſolam reliquerat, circumcidit. Nam eum locum, qui monitiones continet, ſuſtulit; & Pædagogi eſſe dixit, non Philoſophi: tanquam quidquam aliud ſit ſapiens, quam humani generis Pædagogus!* Senec. Epiſt. 89. p. 296. Ed. *Gronov. Eam partem Philoſophiæ, quæ dat propria cuique perſonæ præcepta, nec in univerſum componit hominem, ſed marito ſuadet, quomodo ſe gerat adverſus uxorem; patri, quomodo educet liberos; domino, quomodo ſervos regat;——de iſto Stoicus,——levem exiſtimat, & quæ non deſcendat in pectus uſque: at illam, non habentem præcepta, plurimum ait proficere; ipſaque decreta Philoſophiæ, conſtitutionem eſſe ſummi boni; quam qui bene intellexit & didicit, quid in quaque re faciendum ſit, ſibi ipſe præcepit.* Idem, Epiſt. 94. at the Beginning, p. 327. Ed. *Gronov.*
[23] See *Sextus Empiricus, adv. Mathem.* Lib. vii. apud *Menag.* ad *Diog. Laert.* Sect. 160. p. 331. Col. 1.
[24] Ubi ſupra, Epiſt. 89. p. 296. Ed. *Gronov.*
[25] See Mr. *Bayle*'s Dictionary, Artic. *Chryſipp.* Rem. (R.) p. 929. Col. 2. and *Quintil. Inſt. Orat.* Lib. i. Cap. i. p. 6. Cap. iii. p. 10. Cap x. p. 61. Cap. xi. p. 66. Edit. *Oxon.*
[26] See *Cicer. Paradox* 1, 2. *Diog. Laert.* Sect. 128. and the Books of *Cicero, de Fin. bon. & mal.* or *Quæſt. Tuſcul.*
[27] See what has been ſaid before, concerning the Principles of the Morality of *Epicurus*, Sect. 26. p. 69. Col. 1.

they

they did not properly acknowledge the Immortality of the Soul; or, at leaſt [1], ſpoke of it but in a very confus'd and ambiguous Manner. Inſomuch, that *Brutus*, who was a *Stoic*, ſeems [2] not to have been ſo much in the wrong, as ſome would imagine, in thoſe dying Words of his [3]: *Wretched Virtue, how have I been deluded in thy Service! I thought thee a real Good, and as ſuch have I always devoted myſelf to thee; but thou art only an empty Name, a Phantom, the Prey and Slave of Fortune.* And in Truth, if the Idea of Rewards and Puniſhments in another Life, be not join'd to the Practice of Virtue; "Both Virtue and Innocence "may be rank'd [4] in the Number of thoſe Things, "on which *Solomon* has pronounc'd his definitive "Sentence: *Vanity of Vanities, all is Vanity!* To "rely upon Innocence, would be to lean on a bro"ken Reed; which pierces the Hand, that reſts "upon it. God, as he is the great Diſpoſer of "all Events, and the Diſtributer of Happineſs and "Miſery; has here, on Earth, made Virtue and "Innocence no leſs ſubject to his general Laws, "than Health and Riches." Beſides, to ſay that a Man, who ſuffers for a good Cauſe, is really happy, altho' he hath no Reward to expect after Death; is to advance a Propoſition equally contrary to right Reaſon, and to every Sentiment of Nature. But this is not the only Thing on which the *Stoics* form'd extravagant and chimerical Ideas. Every one knows, what [5] a Jeſt the World has made of their Sage; [6] whom, on the one Hand, they diveſted of even the moſt innocent and moderate Paſſions, nay, in a Manner, of Humanity itſelf; whilſt, on the other, they made him to vie Happineſs with the Gods themſelves. They held all Sins to be [7] equal. They ſaid, that, Virtue excepted, all other Things were indifferent [8]; that is to ſay, neither good nor bad; but of theſe *indifferent Things*, ſome were *eligible*, and others to *be rejected*. Mr. and Madam *Dacier* have undertaken the Apology of the true *Stoics*, on all theſe Heads. [9] "If "theſe Philoſophers, ſay they, have mix'd ſome"thing of Auſterity with the Sentiments of their "Maſter *Socrates*; it was not ſo much the Effect "of a ſavage, and moroſe Diſpoſition, but rather "an Expedient, which Prudence ſuggeſted to them: "For being well acquainted with the natural Weak"neſs of Mankind, they have thought fit, in pre"ſcribing Rules of Duty, to preſs them to a "greater Degree of Perfection, than they are ca"pable of; that ſo Men, by exerting their utmoſt "Endeavours to fulfil their Precepts, might, at "leaſt, fix in a State of Mediocrity; as Trees, "which ſtand bent one Way, are ſet right by a "contrary Flexure. Thus when *Zeno*, for Exam"ple, ſaid, that all Crimes were equal, his Intent "was to reclaim Men from an unhappy Opinion, "which they are but too apt to give into; that "provided they keep clear of Crimes of the firſt "Magnitude, they are not oblig'd to be ſo much "upon their Guard againſt venal Tranſgreſſions: "Now his Deſign was to perſuade them, that the "leaſt Sin, if neglected, becomes incurable; and "that in the Eye of God, who is the very Eſ"ſence of Purity, the ſlighteſt Crime in us de"ſerves Death, unleſs we diſarm his Juſtice, by a "due Atonement, and Repentance: But then "comes a *Chryſippus*, who, taking this Precept in "a literal Senſe, maintains, that there is no Diffe"rence between the ſtealing of Cabbages out of a "Garden, and the committing of Sacrilege; be"tween the cutting one's Father's Throat, and the "killing of a Capon; which two Actions he will "have to deſerve one and the ſame Puniſhment: "This indeed is ſo far from reſtraining, that it ra"ther encourages, and prompts Men to the Com"miſſion of the greateſt Enormities. When *Zeno* "ſaid, that the Sage ought to be void of Com"paſſion; his Aim was to ſhew, that the Sage "does not confine his Beneficence to thoſe Suc"cours, which Pity and Compaſſion extort from "him: But thinks himſelf oblig'd to aſſiſt his "Neighbour, though he be under no ſuch Emoti"on; though a *Chryſippus* ſhall take Occaſion, "from hence, to break all the Bands of Society, "and trample under Foot Mercy, which is one of "the moſt eſſential Attributes of the Deity. When "*Zeno* ſaid, that the Sage relies on himſelf alone "for all Things; he only meant to ſhew, that "our true and real Happineſs could not depend "on the Actions of other Men; and to encounter "the Indolence of thoſe, who, on Pretence of "committing themſelves to Providence, expect "every Thing immediately from God, without "ever ſeeking to obtain his Favour, by their own "Induſtry, and good Works. Beſides, as he "taught, that the Soul was a Part of God, nay, "God himſelf; ſo this Precept, that Men ought "to rely on themſelves for all Things, was, in Ef"fect, the ſame as to ſay, that we ought, in all "Things, to rely on the Providence of God, that "governs us. But then comes a Diſciple of his, "full of Ignorance and Pride, and intirely perverts "this Precept, by drawing from it this pernicious "Conſequence: That the Sage is above even God "himſelf, and is independently of that ſovereign

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[1] See *Gataker* on *Marc. Antonin.* Lib. iv. Sect. 21. p. 139. Col. 2. Lin. 22. *& ſeq.*

[2] Dict. of Mr. *Bayle*, Artic. *Brutus*, Rem. (B.) p. 716. Col. 1.

[3] Ibid. Rem. (B.) See *Plutarch*, in his Life of *Brutus*. And *de Superſt.tione*, init. And *Dio*. Lib. xlvii. ſub fin. *Plutarch*, Tom. i. p. 1008, B. and d. Tom. ii. p. 165, A. Edit. *Frankf. Dio. Caſ.* p 406, B. Ed *H. Steph.*

[4] Mr. *Bayle*, ubi ſupra, Rem. (C.) p. 716. Col. 2.

[5] See *Horace*, Lib. i. Sat. iii. Verſ. 115. *& ſeq. Cicer. Orat. pro Murena*, Cap xxix. *& ſeq.*

[6] *Cúmque perturbationem animi illi [ſuperiores Philoſophi] ex homine non tollerent, naturâque & condoleſcere, et concupiſcere, et extimeſcere, et efferri lætitiâ dicerent; ſed ea contraherent, in anguſtumque deducerent: hic* [Zeno] *omnibus his, quaſi morbis, voluit carere Sapientem.* Cicer. Academ. Quæſt. Lib. i. Cap. x. "When they (i. e. theſe ſuperior Philoſophers) did not pretend to era"dicate Trouble from the human Mind, for they allowed Man to be naturally ſubject to Grief, Deſire, and Fear; but they en"deavour'd to contract theſe Paſſions within a narrow Compaſs; and *Zeno* regarded them as Diſeaſes of the Soul, which a wiſe "Man ſhould avoid." See *Diog. Laert.* Lib. vii. Sect. 122, 123. Et p. 512. *& ſeq.* Ed. *Colon.*

[7] Ἀρέσκει τε αὐτοῖς, ἴσα ἡμάρτῆσθαι τὰ ἁμαρτήματα. *Diog. Laert.* Ibid. Sect. 120. Et Ed. *Colon.* p. 510. See *Cicer.* Acad. Quæſt. Lib. iv. Cap. xliii, xliv. *& de Finib.* Lib. iii. Cap. xiv.

[8] *Media illa, inquit, inter quæ nihil intereſt, tamen ejuſmodi ſunt, ut eorum alia eligenda ſint, alia rejicienda, alia omnino negligenda——Iſta——valere, locupletem eſſe, non dolere. bona non dico, ſed dicam Græce,* προηγμένα, *Latine autem* producta: *ſed* præpoſita *aut* præcipua *malo.——Illa autem, egeſtatem, morbum, dolorem, non appello mala, ſed, ſi libet, rejectanea. Itaque illa non dico me expetere, ſed legere; non optare, ſed ſumere: contraria autem non fugere, ſed quaſi ſecernere. Cicer. de Fin.* Lib. iv. Cap. xxv, xxvi. "All theſe middle Things (ſays he) between which there is no Difference, yet are of that Nature, that ſome of them are "to be choſen, others rejected, others entirely diſregarded.—For Inſtance, Health, or Riches, I do not call good, but what the "*Greeks* ſtile προηγμένα, and the *Latins producta*: I would rather chuſe to give them the Epithet of *præpoſita*, or *præcipua*, i. e. "Things eligible.—For the ſame Reaſon I do not term Diſeaſe, Want, or Grief, evil, but, if I may be allow'd the Expreſſion, "Things to be rejected. Thus I do not ſay that I wiſh for ſuch Things, but chuſe them, that I do not court them, but take "them: and with regard to the contrary, that I do not fly from them, but know how to diſcern them." See, alſo, Lib. iii. Cap. xvii. *& Diog. Laert. ubi ſupra*, Sect. 102. *& ſeq.*

[9] Preface to the Tranſlation of the Reflections of *Marc. Antonin.* * A 3. p. 2.

" Being who created him, the ſole Author of his " own Happineſs. Of almoſt the ſame Nature " are all thoſe other Paſſages, which have, at any " Time, been made uſe of, to render the Doc- " trine of the *Stoics* odious, and ſuſpected." Not to examine, whether theſe Expoſitions are as well grounded, [1] as ingenious; or whether they do not ſhew the Commentator extremely prepoſſeſſed in Favour of his Author, and, in general, of all Antiquity; and whether they are not worthy of thoſe, who, to inhance the Merit of the Ancients, and keep up their Characters, deſcribe them as enlightened as the Prophets and Apoſtles; diſcovering very great Beauties in the moſt inſipid, and ridiculous Paſſages; and wreſting the Senſe of the cleareſt Expreſſions, even to the expounding, figuratively, the *Metempſychoſis* of *Pythagoras:* I ſhall content myſelf with taking Notice of two Things, which to me ſeem inconteſtable: The one is, that rigid, and over-ſtrained Maxims, are not at all proper to inſpire Virtue; and ſo far is the demanding more of Men, than their juſt Duties, from being the proper Method to induce them to a due Performance thereof; that Experience plainly ſhews us, that by requiring too much, we obtain nothing at all. The other is, that it is the Part of a true Philoſopher to reject, eſpecially in treating of Morality, all ſuch Maxims as are ambiguous, or ſubject to Miſconſtruction. So that, even ſuppoſing that theſe Maxims, in Queſtion, are capable of the Mitigations, contended for by thoſe, who are ſo bent upon juſtifying the Ancients, whatever it coſt; yet we cannot fairly avoid cenſuring the Paradoxes of the *Stoics*; together with their vain Subtleties, [2] their conciſe and rough Stile, their Affectation of new coin'd Words, their frequent Logomachies, or frequent Wranglings about Words, the Contradictions [3] charg'd upon them, and their Opinion, as to obſcene Terms; which [4], they inſiſt, may be made uſe of, without any Manner of Scruple. Nor is this laſt Particular to be much wonder'd at, in Men who contend, as the *Stoicks* do, that all Women [5] ought to be in common among the Sages. There were, alſo, ſome among them, who maintain'd, that [6] the *Cynics* Way of living was the *ſhorteſt Road to Virtue. Chryſippus* [7] taught, that there was no Harm in committing Inceſt with one's Father, Mother, Son, Daughter, [8] Brother, or Siſter; or in eating human Fleſh. What the [9] *Stoics* ſaid about the Love of beautiful Boys, is, at leaſt, liable to very odd Conſtructions. In fine, theſe Philoſophers believ'd, that their Sage might abſolutely diſpoſe [10] of his own Life, and put an End to it, whenever he thought fit; and this Opinion, as falſe and dangerous as it is, was, as is univerſally agreed, the Senſe of the whole Sect.

SECT. XXVIII.

AFTER *Epicurus* and *Zeno*, we find not, among the ſucceeding Philoſophers, any, who form'd new Syſtems of Morality. Each Man followed that Sect, which beſt ſuited his own Taſte. The *Romans*, who had their Philoſophy, as well as the reſt of the Sciences, from the *Greeks*, took this Courſe. In the Reign of *Auguſtus*, a Philoſopher of *Alexandria*, called [11] *Potamo*, introduc'd a Manner of Philoſophizing, which they called *Eclectic*; becauſe it conſiſted in ſelecting from all the Doctrines of the preceding Philoſophers, ſuch as appear'd moſt reaſonable; and forming a Syſtem for particular Uſe. *Cicero*, who, as I ſaid before, was a moderate *Academic*, does, for the moſt Part, purſue this Method in his Book of *Offices*; [12] where he is ſometimes a *Stoic*, ſometimes a *Peripatetic*. That excellent Work, ſo well known to the World, is, without Diſpute, the beſt Treatiſe of Morality, that all Antiquity has produc'd; the moſt regular, the moſt methodical; and what comes the neareſt to a full and exact Syſtem. I ſay, *what comes the neareſt:* For he would be much out, who ſhould

[1] The Reaſons, for Example, that *Cicero* brings to eſtabliſh the Equality of criminal, as well as of good Actions, Paradox 3. leave us little Room to doubt, but that the *Stoics* underſtood this according to the Letter. See the Reaſon given by *Diog. Laert.* Lib. vii. Cap. cxx. And p. 510. Edit. *Col.* and reported by Mr. *Pufendorf*, Lib. i. Cap. viii. Sect. 1.

[2] *Stoicorum adſtrictior eſt oratio, aliquandoque contractior, quam aures populi requirunt. Cicer. in Bruto*, Cap. xxxi. *Quamquam ex omnibus Philoſophis Stoici plurima novaverunt. Zeno quoque eorum princeps, non tam rerum inventor fuit, quam novorum verborum. Idem, de Finib.* Lib. iii. Cap. ii. *Nova verba fingunt; deſeruntuſitata:——pungunt, quaſi aculeis, interrogatiunculis anguſtis: quibus etiam qui adſentiuntur, nihil commutantur animo, et iidem abeunt, qui venerant: res enim fortaſſe veræ, certè graves, non ita tractantur, ut debent, ſed aliquanto minutius.* Ibid. Lib. iv. Cap. iii. " The Stile of the *Stoics* is more *Laconic* and ſevere than " ſuits the popular Taſte.——Tho' of all the Philoſophers, the *Stoics* invented the greateſt Novelties, ye, *Zeno* their Founder, " was not ſo much the Inventor of Things themſelves, as of a new Way of expreſſing them.——The *Stoics*, ſays *Cicero*, form " new Words, quitting thoſe already in uſe.——They form their Sentences into ſhort and obſcure Periods, which thoſe who " aſſent to ſeldom underſtand, and depart as wiſe as they came. Matters, however, of Truth and Importance, they are ſo far " from treating of as they ought, that they do it in a ſlight and trifling Manner."

[3] See *Plutarch*, in his Treatiſes, *de repugnantiis Stoicorum*, and, *de communibus notitiis contra Stoicos.*

[4] Ὁ σοφὸς εὐθυρρήμων ἔσῃ. *Cicer. Ep. ad Famil.* Lib. ix. Ep. 22. See the whole Letter.

[5] Ἀρέσκει δὲ αὐτοῖς, καὶ κοινὰς εἶναι τὰς γυναῖκας δίν παρὰ τοῖς σοφοῖς. *Diog. Laert.* Sect. 131. Lib. vii. p. 517. Ed. *Colon.*

[6] Εἶναι γὰρ τὸν Κυνισμὸν σύντομον ἐπ' ἀρετὴν ὁδόν. Ibid. Sect. 121. p. 511. Ed. *Colon.*

[7] Ἐν δὲ τῷ περὶ πολιτείας, καὶ μηδέσι λίθι συνέρχεσθαι, καὶ θυγατράσι, καὶ υἱοῖς——καὶ τὰς ἀποθανόντας καταθίειν κιλέυων. *Diog. Laert.* Ibid. Sect. 188. p. 556. Ed. *Colon.*

[8] See *Sext. Empir. Pyrrh. hypoth.* Lib. iii. Cap. xxiv. p. 153, A. Et Ed. *Fabric.* p. 178.

[9] See *Diog. Laert.* Sect. 129. p. 516. Ed. *Colon. & Cic. Tuſc. Quæſt.* Lib. iv. Cap. xxxiii, xxxiv.

[10] Εὐλόγως τέ φασιν ἐξάξειν ἑαυτὸν τοῦ βίου τὸν σοφὸν, καὶ ὑπὲρ πατρίδος καὶ ὑπὲρ φίλων. κἂν ἐν σκληρολέρᾳ γένηται ἀλγηδόνι, ἢ πηρώσεσιν, ἢ νόσοις ἀνιάτοις. *Diog. Laert. ubi ſupra*, Sect. 130. Ed. *Colon.* p. 517. See *Cic. de Finib.* Lib. iii. Cap. xviii. and *M. Antonin.* Lib. iii. Sect. 1. *ibique Gataker*, p. 83. Col. 1. Lin. 53. and d.

[11] Ἔτι δὲ περὶ ὀλίγου καὶ ἐκλεκτικὴ τις αἵρεσις εἰσήχθη ὑπὸ Ποτάμωνος τοῦ Ἀλεξανδρέως, ἐκλεξαμένου τὰ ἀρέσαντα ἐξ ἑκάστης τῶν αἱρέσεων. *Diog. Laert. Prooem.* Sect. 21. p. 14. See *Menage* thereupon, p. 11. Col. 2. But above all a Diſſertation of the late *De Philoſophia Eclectica*, inſerted at the End of his *Latin* Verſion of *Stanley*'s *Philoſophical Hiſtory*, printed at *Leipſic* 1711. p. 1205. and following.

[12] *Sed tamen noſtra leges, non multum a Peripateticis diſſidentia; quoniam utrumque, et Stoici, et Peripatetici, eſſe volumus. De offic.* Lib. i. Cap. i. v. *Græv.* i. l. p. 4. Col. 1. and d. 'Tis thus we ought to read that Paſſage, partly according to the Conjecture of *Gronovius* the Father, and *Græv.*; and partly according to Mr. *Le Clerc.* See *Ars Critica*, Part. iii. Sect. 1. Cap. xvi. Num. 22. Tom ii. p. 286. Edit. 2d. Mr. *Davies* in a Note upon the Commentary of *Turnebius*, (*in Academic. Quæſt.* Sect 1. p. 231.) reads it, *quoniam* UTIQUE *& Stoici & Platonici eſſe volumus.* This Emendation he founds upon a Paſſage of *Cicero De Offic.* Lib. iii. Cap. iv. but Mr. *Le Clerc*, on the contrary, makes uſe of this Paſſage, as well as others, to ſhew, that we ought to read *Peripatetici*, and not *Platonici*, as in the common Reading. A learned *German* named *Chriſtopher Auguſtus Neumar* maintains, on the other hand, that there is no Fault in the common Reading, and that we ought to retain the Words as they lie, *quoniam utrique & Socratici & Platonici eſſe volumus.* This Remark is in his *Parerga Critica*, printed in 1712. p. 164. and following; where the Reader may examine his Reaſons, which would be of great Weight, if their Stength was equal to the Confidence with which he propoſes them.

imagine it to contain *a* [1] *Compleat Body of Morality*; ſuch as *deſcends to the utmoſt Degree of Particularity*; and where every Thing is digeſted into the beſt Order, and Method poſſible. Many Things are there wanting, which naturally come within the Plan of that Science; and, for the Generality, the Matters are but very ſuperficially treated; as might be eaſily made appear. We there, alſo, find ſome [2] Deciſions too rigid; or ſuch as plainly ſhew, that *Cicero* was not thoroughly acquainted with the true Principles, on which the Reſolution of certain Caſes depends. It is great Pity his Treatiſe *of Government* is loſt; of which the few Fragments remaining give us a very noble Idea. His Diſcourſe of *Laws*, which we yet have, though imperfect, contains many excellent Things. *Cicero* there particularly applies himſelf to prove at large, that there is a natural Law, independent of any [3] human Inſtitution; and which derives its Origin from the Will of God. This he proves [4] to be the Foundation of all juſt and reaſonable Laws. He ſhews the Uſefulneſs of Religion [5] in civil Societies. He follows the grand Principle of the *Stoics*, that Man is born for Society; and from thence deduces all the reciprocal [6] Duties of Mankind. And though he acknowledges it neceſſary to admit all this, if we would build upon well-choſen, and well-connected Principles [7]; "Yet he expects not, "that all the World will approve of them; he "promiſes himſelf only the Approbation of the "ancient *Platonics*; and that of the *Peripatetics*, "and *Stoics*. As to the *Epicureans*, he is under "no Concern about them; they profeſſedly retir'd "from all *political* Affairs; he therefore leaves them "to philoſophize, in their Retreat, as they think "fit: But for *Arceſilas*, and *Carneades*, he aſks [8] "Quarter of them; and fears, that, if they at"tack'd him, they would make too great Breaches "in the Building he had rais'd: He finds he has "not Courage enough to repulſe them, wiſhes, "therefore, not to be expos'd to their Indignation; "is deſirous to appeaſe them, and prevent all Acts "of Hoſtility." He has been, and not without Reaſon too, charg'd with not adhering ſtedfaſtly enough to his Principles, and with being too much an [9] occaſional Philoſopher. I cannot forbear adding here *Montagne*'s Opinion of this great Orator's Way of Writing. As to *Cicero*, ſays he [10], "Thoſe "of his Works, that are moſt uſeful to my Deſign, "are his philoſophical Tracts; particularly the "moral: But, to ſpeak my Mind freely—his Way "of Writing, with all others of the ſame Kind, "is to me very tedious. For his Prefaces, Defi"nitions, Diviſions, and Etymologies, take up "the greateſt Part of his Work. Whatever there "is of Life, and good Senſe, is loſt in the Tedi"ouſneſs of the Preparation. When I have ſpent "an Hour in reading him—for the moſt Part I find "nothing but Wind: For he is not yet come to "his main Arguments; or ready to produce the "Reaſons, which are to clear the Point, I want to "be reſolv'd in. To me, who only deſire to be"come more wiſe, not more learned, or eloquent, "theſe *Logical*, and *Ariſtotelian* Arrangements, are "of no Uſe at all. I would have a Man begin "with what is of the laſt Conſequence. I know "well enough what *Death* and *Pleaſure* are, there "is no Occaſion to ſtand anatomizing of them to "me. I look for good and ſolid Reaſons at once; "ſuch as will inſtruct me how to ſtand the Shock "of them. Your grammatical Niceties, fine-ſpun "Argumentation, and delicate Turns, are nothing "*to this Purpoſe*: I am for Diſcourſes, that are "able to diſpel the ſtrongeſt Doubts immediately; "his only beat about the Buſh. They are proper "enough for the Schools, the Bar, or the Pulpit; "where we have Leiſure to nod, and may awake "a Quarter of an Hour after, Time enough to "find again the Thread of the Diſcourſe. It is "very requiſite to talk after this Manner to Judges, "we would influence, right or wrong, to favour "our Cauſe; to Children, and common People, "where every Thing is to be urg'd, in Order to ſee "what will take with them. I want not any one "to ſtir up my Attention, and cry out to me fifty "Times, *O yes*, as our Cryers, and Heralds do. "The *Romans*, in their religious Exerciſes, began "with, *Hoc age*; as we, in ours, do with *Surſum "Corda*; which are ſo many Words loſt to me. "I come thither already fully prepar'd from my "Chamber;—inſtead of whetting my Appetite, "by theſe Preparatives, and Preludes, they quite "ſpoil my Stomach. Would but the Licentiouſ"neſs of the Times excuſe the ſacrilegious Bold"neſs, I ſhould even cenſure the *Dialogiſms* of "*Plato* himſelf, as too heavy, and verboſe; and "regret the great Loſs of Time, ſpent upon long, "and needleſs Preliminaries, and Interlocutions, "by one who had ſo many better Things to ſay." My Subject now naturally engages me to give the Reader here, what *Montagne* ſays [11], immediately before the laſt cited Paſſage. "*Plutarch*, ſays he, "and *Seneca*, have both this great Advantage, for "one of my Humour; that the Knowledge, I

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[1] This is what his laſt Tranſlator into *French*, in his Preface, pretends to aſſert.

[2] You may ſee Examples enough, both in the Text, and Notes of Mr. *Barbeyrac*'s Tranſlation of *Pufendorf*. See there the Index of Authors.

[3] *Nec, ſi regnante Tarquinio nulla erat Romæ ſcripta lex de ſtupris; idcirco non contra illam Legem ſempiternam* Sextus Tarquinius *vim Lucretiæ, Tricipitini filiæ adtulit. Erat enim ratio profecta à rerum naturâ, & ad rectè faciendum impellens; & a delicto avocans: quæ non tum denique incipit Lex eſſe, cum ſcripta eſt; ſed tum, cum orta eſt. Orta autem ſimul eſt cum mente divina. Quam ob rem Lex vera, atque princeps, apta ad jubendum; & ad vetandum; Ratio eſt recta ſummi Jovis*, Lib. ii. Cap. iv. "In the Reign "of *Tarquin*, tho' there had been at *Rome* no written Law againſt Adultery, yet *Sextus Tarquinius* was not the leſs guilty in vio"lating the eternal Law, in his Rape of *Lucretia*. For natural Reaſon, which teaches all Men to do well, might have with-held "him from committing the Crime: The Force of a Law of Nature is not dated from its Inſtitution, but from its Origin, which "is co-eternal with the Divinity. Therefore the true and governing Laws, which ſhould govern human Actions, is no other than "the right Reaſon of God."

[4] *Ergo eſt Lex, juſtorum injuſtorumque diſtinctio, ad illam antiquiſſimam, & rerum omnium principem expreſſa naturam; ad quam Leges Hominum diriguntur, quæ ſupplicio improbos adficiunt; defendunt ac tuentur bonos.* Ibid. Cap. v. "The Law, which diſtin"guiſhes Juſt from Unjuſt is expreſſed or deriv'd from the moſt ancient and original Cauſe of Things; according to which all thoſe "human Laws are form'd and directed, which puniſh the Wicked, and defend and protect the Good."

[5] Ibid. Cap. vii. See the Paſſage cited by Mr. *Barbeyrac*, *Pufend.* Lib. ii. Cap. iv. Sect. 3. Note 4.

[6] *Atqui, ſi natura confirmatura jus non erit, virtutes omnes tollantur. Ubi enim Liberalitas, ubi Patriæ Caritas, ubi Pietas; ubi aut benè merendi de altero, aut referendæ gratiæ voluntas poterit exiſtere? nam hæc naſcuntur ex eo, quod natura propenſi ſumus ad diligendos homines: quod fundamentum juris eſt.* Ibid. Lib. i. Cap. xv. "If the Law was not founded in Nature, there would be an "End of all Virtue, Liberality, the Love of our Country, Piety, Benevolence, and Gratitude, could never exiſt; for all theſe "ariſe from this one Principle, that Men are naturally form'd for mutual Society, which is the Foundation of all Right."

[7] Dict. of Mr. *Bayle*, Artic. *Carneades*, Rem. (H.)

[8] *Perturbatricem autem harum omnium rerum Academiam, hanc ab* Arceſila & Carneade *recentem; exoremus, ut ſileat. Nam ſi invaſerit in hæc, quæ ſatis ſcitè nobis inſtructa, & compoſita videntur; nimias edet ruinas: quam quidem ego placare cupio; ſubmovere non audeo.* Lib. i. Cap. xiii.

[9] See the *Quæſt. Hieronym.* of Mr. *Le Clerc*, p. 252. *& ſeq.*

[10] Eſſays, Lib. ii. Cap. x. p. 295, 296. And p. 164. Ed. ultim.

[11] Pag. 162, *&c.*

" ſearch for, is there deliver'd out in ſmall Parcels.
" —Such are, the *Miſcellaneous Works* of *Plutarch*,
" and the Epiſtles of *Seneca*; which are the moſt
" beautiful Part of their Writings.—Theſe Authors,
" as they do, for the moſt Part, concur, in all
" their uſeful, and true Notions; ſo they both
" happen'd to flouriſh about the ſame Age; were
" both Tutors to two [1] *Roman* Emperors; both
" Foreigners; both rich, and great Men: Their
" Doctrine is the very Cream of Philoſophy; and
" deliver'd after a plain, and pertinent Manner.
" *Plutarch* is more uniform, and conſtant; *Seneca*
" more various, and entertaining. The laſt toils,
" arms himſelf, and bends his whole Force, to for-
" tify Virtue againſt Frailty, Fear, and vicious In-
" clinations: The other ſeems more to ſlight their
" Power; diſdaining either to mend his Pace,
" or ſtand upon his Guard. *Plutarch*'s Sentiments
" [2] are *Platonic*, mild, and accommodated to civil
" Society: The other's are *Stoical*, and *Epicurean*,
" more remote from common Practice; but, in
" my Opinion, better fitted for private Uſe, and
" more determin'd. *Seneca* ſeems to favour the
" Tyranny of the Emperors of his Time.—*Plu-*
" *tarch*, every where, ſhews a Spirit of Freedom.
" *Seneca* abounds with ſurpriſing Turns, and Re-
" partees; *Plutarch* with Things. The firſt warms,
" and animates; the latter gives more Content,
" and fuller Satisfaction. The one guides us, the
" other puſhes us on.—There are (ſays the ſame
Author in another Place [3]) " in *Plutarch*, abun-
" dance of Diſcourſes, well worth our Peruſal,
" tho' prolix:—But then there are a thouſand,
" where he but glances upon Matters: Where he
" only points with his Finger, to direct us which
" Way we may go, if we will; and contents him-
" ſelf, ſometimes, with barely touching upon what
" is moſt material. Theſe then are to be remov'd
" out of their Obſcurity into a clearer Light." Mr.
and Madam *Dacier* confeſs [4], *That, in the Morals of* Plutarch, *there is ſcarce any Thing that is thoroughly diſcuſs'd, and fully made out; and that all the Matters, a few only excepted, are there but very ſlightly treated.* As for *Seneca*, his Treatiſe *de Beneficiis*, is, in my Opinion, the very beſt Piece he has; but he obſerves in it as little Order, and Method, as in the reſt of his Writings: A Defect, which is, more or leſs, to be found in almoſt all the Authors of Antiquity. "It is own'd [5], *That he has join'd to the Virtues of the firſt* Stoics, *all the Pride of their Followers:* And indeed, we may eaſily diſcover [6], *that this haughty* Stoic *never ſpeaks of Virtue, but thro' Vanity.* Notwithſtanding which, *he may be read with infinite Advantage* [7], *if we do but join to his Precepts two Things, which are wanting: The one is, that GOD has commanded us to apply ourſelves to Virtue; the other, that he will reward, with eternal Happineſs, all ſuch as ſhall have faithfully adher'd thereto.* The ſame may be ſaid of *Epictetus*, and *Marcus Antoninus*. We have of the firſt, beſides his *Manual*, ſo well known to the World, ſome Diſcourſes, that have been preſerv'd by *Arrian* [8], and are full of good Things. That Philoſopher, in the Opinion of Monſieur and Madam *Dacier* [9], " Is more unaffected, ſolid, and chaſte, than *Se-*
" *neca:* But, at the ſame Time, he has neither
" noble Views, nor Extent of Genius, nor Eleva-
" tion of Thought. *Antoninus* has all theſe Qua-
" lifications, with a Soul more vaſt, and capacious,
" than his Empire. He is not contented with the
" bare receiving, and ſolidly explaining the Pre-
" cepts of his Maſters; but frequently corrects, and
" gives them new Strength, either by the ingeni-
" ous, and natural Manner, in which he has pro-
" pos'd them, or by the new Diſcoveries, with
" which he has improv'd them." But however, it muſt be own'd, that he retains ſo much of the ill Principles, and Maxims of the *Stoics*, that he ſhould be read with a great deal of Caution and Judgment. Beſides, "*the Obſcurity, and Harſhneſs of Stile, common to all of that Sect* [10], *is ſtill greater, in the Reflections of this Emperor; who often explains himſelf but by Halves, becauſe he wrote only for himſelf.* Nor would any Thing leſs, than the Ability of his laſt Tranſlators, have ſerv'd to make that Work be read with Pleaſure in our Language.

The *Roman Lawyers*, of whom the greateſt Part were *Stoics*, contributed very much to the perfecting that Part of Morality, which may be call'd *Natural Juriſprudence* [11]. The Study of the Law having, under the Emperors, become a principal Step to Preferment; the Men of the greateſt Genius at *Rome*, continu'd to apply themſelves to this Study, for near two Centuries. It were to be wiſh'd, that we had the Writings of thoſe famous Lawyers intire; in order to judge of the Progreſs they had made, in what regards the Law of Nature. But the Emperor *Juſtinian*, having been pleas'd to abridge the *Roman* Laws; of which the Deciſions of theſe Lawyers, were the moſt conſiderable Part, their Works, hereupon, grew out of Uſe; ſo that we have now left of them, only ſome Fragments in the *Digeſt*, and ſome few others ſeparately. *Tribonian* the Lawyer, to whoſe Care the Emperor had committed this Work, has left us a true Chaos [12], full of Obſcurity, and Contradictions; which afford a vaſt Field for Chicanery; and which have, in the latter Centuries, produc'd that prodigious Number of inſipid, and confus'd Commentaries. It appears, however, by this Collection, and ſome Hiſtorical Remains, that there were, in the *Roman* Empire, Sects among the Lawyers [13]; who, upon ſeveral Points, follow'd different Opinions; in the Manner we ſee practis'd among

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[1] It is believ'd (ſay Mr. and Madam *Dacier*, in their Preface to the Tranſlation of ſome of *Plutarch*'s Lives,) that he was Tutor to *Trajan*; but this is founded only on a *Latin* Letter, which manifeſtly appears to have been forg'd: *Trajan* was as old as he. See *Vies de Plutarque Traduit par Dacier*, Tom. viii. p. 260. Edit. *Par.*

[2] He had ſtudied under the Philoſopher *Ammonius*, at *Delphos*. [3] Lib. i. Cap. xxv. p. 98. And Ed. ult. p. 267.

[4] In the Preface they jointly wrote to the firſt *Tome* of *Plutarch*'s Lives, which they publiſh'd together. Mr. *Dacier* in the compleat Tranſlation he has given himſelf of theſe Lives, confines this Reflection to ſome Treatiſes only, p. 56. Edit. *Amſter.*

[5] The ſame, in their Preface to *Marc. Antonin.* See what *Gataker* ſays in p. 2.

[6] Reflections on good and bad Fortune in Lotteries, by Mr. *Le Clerc*, p. 229. [7] Ibid.

[8] Mr. *Dacier* has abridg'd theſe, and turn'd them in a more lively and ſententious Manner in his *New Manual of Epictetus*, which he has added at the End of the Original, with the Commentary of *Simplicius*; the whole publiſh'd in two Volumes, *Anno* 1715. Many other Sentiments of *Epictetus* may be found in the ancient Writers, which are neither in his own Manual, nor in *Arrian*'s Collection. See *Fabricius Bibliothec. Græca.* Lib. iv. Cap. vii. Sect. 9. Tome iii. p. 267. And the Sentences taken from *Stobeus* in *Meibomius*'s Edition, publiſh'd by Mr. *Reland* in 1711. p. 90. and following.

[9] *Ubi ſupra*, Pref. to *Marc. Antonin.* [10] Ibid.

[11] See what *Pufendorf* ſays in his *Specimen Controverſ.* &c. Cap. i. Sect. 3.

[12] See the *Anti-Tribonian* of *Francis Hotman*; the *Latin* Verſion of which was reprinted at *Hall* in *Saxony*, and at *Leipſic* in 1704. with a Preface by Mr. *Thomaſius.*

[13] You will find the Hiſtory thereof in a few Words, in the *Principia Juris Civilis* of Mr. *Van Eck*, Profeſſor at *Utrecht*, where that Book was reprinted in 1694. See p. 55. *& ſeq.* of this ſecond Edition. See a Collection of Works, *De Sectis & Philoſophia Juris-conſultorum*, by divers Authors, publiſh'd at *Jena* in 1724. by Mr. *Slevogt*; as, alſo, a Treatiſe of Mr. *Godfrey Maſcow*, (preſent Profeſſor at *Harderwic*) *De Sectis Sabiniam & preculianorum*, printed at *Leipſic* in 1728.

Philoſophers, and Divines. And that this Diverſity of Sentiments, was not confin'd purely to Matters of the Civil Law, but extended to Points relating to the Law of Nature. We find ſeveral Reaſons to believe, that they applied themſelves but very ſuperficially to ſtudy, examine, or apply, in a proper Manner, the Rules of natural Equity [1]. Not one of them had made this his principal Study, and of ſo great a Number of Books, which they have left upon different Subjects, there remains not the Title of one, which treats of the *Law of Nature and Nations*. They contented themſelves with general Rules, known to all the World, and which they made uſe of, in ſuch a Manner, as diſcover'd them Strangers to their true Foundation, and juſt Extent. This appears from their Explanation of the Maxim, *That no Man ſhould enrich himſelf at the Coſt of another*. Their Definitions, and Diviſions, are, for the moſt Part, ſo inaccurate, and their Stile ſo obſcure, that it is impoſſible to believe they had clear and diſtinct Ideas of Things, or indeed, that they took any Pains about the Matter. What they abound in, is in Fictions, and vain Subtilties, which they had tranſplanted from the Civil Law into the Law of Nature. They have even, by ridgedly adhering to the Maxims of that philoſophical Sect, to which they were wedded, eſtabliſhed Principles, directly oppoſite to the plaineſt, and moſt undeniable Truths, of the Law of Nature. I ſhall produce but two Examples, to prove this. The *Stoics* believ'd [2], that an Infant in the Womb was not a *Man*, but only *a Part of the Mother*, or *of her Bowels*. Upon this Maxim, the *Roman* Lawyers either regarded *Abortion*, as a Matter merely indifferent, or, at leaſt, as a Crime no way comparable to *Murder*. The ſame Philoſophers (as we have obſerv'd before) thought every Man might, for a juſt Cauſe, claim a Power over his own Life. Hence it comes, that, by the *Roman* Law, [3] *Suicide* was liable to no Puniſhment, except in the Caſe where it injured another Perſon, as when a *Soldier*, or a *Slave*, deſtroy'd themſelves. In ſhort, the beſt Things the *Roman* Lawyers have left us, upon the Law of Nature, are ſo ſtrongly mixt with a Chaos of arbitrary Deciſions of the poſitive Law, that they are, in a Manner, buried, and loſt. Notwithſtanding all thoſe Diviſions, and the vain Subtilties, that were the common Source from whence they ſprung, we may find, among thoſe few Fragments, ſeveral conſiderable Principles of natural Equity, that may ſerve to decide many difficult Caſes; but they lie intermix'd with a far greater Number of Laws, purely poſitive."

Thoſe *Platonics*, who became famous in the third and fourth Centuries; ſuch as *Plotinus*, *Amelius*, *Porphyrius*, *Jamblichus*, *Proclus*, &c. apply'd themſelves, much more, to explain the Speculations, or rather chimerical Conceits, of the Founder of their Sect, than to cultivate his Morality. *Ariſtotle* had hitherto but very few Followers: He was ſcarce known in the Weſtern Parts of the World, till towards the Beginning of the ſixth Century. The celebrated *Boëtius*, by tranſlating ſome of that Philoſopher's Writings, laid the Foundations of that prodigious, and truly deſpotic Authority, which the *Peripatetic* Philoſophy became afterwards poſſeſſed of; and which, even to this Day, in many Places, it ſtill maintains. The *Arabians*, in the eleventh Century, grew fond of it, and introduc'd it into *Spain*. From thence ſprung the *Scholaſtic Philoſophy*; which ſpread itſelf all over *Europe*, and, with its barbarous Cant, became even more prejudicial to Religion, and Morality, than to the ſpeculative Sciences. The Ethics of the *Schoolmen*, is a Piece of Patchwork; a confus'd Collection, without any Order, or fix'd Principles; a Medley of divers Thoughts, and Sentences out of *Ariſtotle*, Civil and Canon Law, Scripture, and the Fathers. Both good and bad lie there intermix'd, and confus'd; but ſo, as that there is much more of the latter, than the former. The *Caſuiſts* of the ſucceeding Centuries, made it their ſole Buſineſs to excel their Predeceſſors, in vain Subtilties; nay, what is worſe, in monſtrous, and abominable Errors; as all the World knows. But let us paſs by theſe unhappy Times, that we may, at length, come to that Age, wherein the Science of Morality was, if I may ſo ſay, rais'd again from the Dead.

SECT. XXIX.

THE famous Chancellor of *England*, *Francis Bacon*, who liv'd in the End of the ſixteenth, and the Beginning of the ſeventeenth Century, was *one of thoſe*, [4] *who moſt learnedly diſcover'd the imperfect State of Philoſophy, at that Time; which he labour'd vigorouſly to redreſs; and laid down moſt excellent Plans for its Reformation.* Poſterity will be eternally oblig'd to him, for the great Lights, and noble Projects, he has furniſh'd, for the Reeſtabliſhment of the Sciences. We have Reaſon to believe, that it was the reading of the Works of this great Man, which inſpir'd *Hugo Grotius* with the Thoughts of compoſing a Syſtem of the Law of Nature; which he afterwards undertook, at the Sollicitation of the celebrated *Nicholas de Piereſc*, a Counſellor in the Parliament of *Provence*. It is pretended, that *Melancthon* had already given a Sketch of ſomething of this kind, in his *Ethics*; and they tell us too of one *Benedict Wincler*, who publiſh'd, at *Leipſic*, in 1615, a Book, intitled, *Principia Juris*; wherein he intirely departs from the Method of the Schoolmen; and maintains againſt them, among other Things [5], that the Will of God is the ſovereign Law, and firſt Foundation of all Juſtice; tho' this Will is always regulated by his infinite, and immutable Perfections. But it is acknowledg'd, that [6] the laſt mention'd Author often confounds the Law of Nature with the poſitive Law: And that neither the one, nor the other, has afforded any more than a [7] ſmall Gleam of Light; not ſufficient to diſſipate thoſe thick Clouds of Darkneſs, with which the World had been ſo long obſcur'd. Beſides, *Melancthon* [8] was too much prepoſſeſs'd in favour of the *Peripatetic* Philoſophy,

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1 See *Barbeyrac*'s *Tables of Authors*, to his Tranſlation of *Pufendorf*, where you will find many Examples of this Kind.
2 See the *Obſervat.* of *Merellus*, Lib. i. Cap. xvi. and the *Julius Paulus* of Mr. *Noodt*. Cap. x.
3 See the *Obſervat. Jur. Rom.* of M. *de Bynkerſhoek*, Lib. iv. Cap. iv.
4 See Mr. *Bayle*'s Dict. p. 447. See, alſo, the *Specimen Controverſ.* of *Pufendorf*, Cap. i. Sect. 5. 5 Lib. i. Cap. iii, iv.
6 See *Gronengii Biblioth. Jur. Gent.* Lib. iii. Cap. iv. Sect. 9. And *J. Frid. Ludovic. Delineatio Hiſt. J. Nat.* &c. Sect. 24.
7 Mr. *Buddæus*, in his *Hiſtory of the Law of Nature*, Sect. 23. Since the ſecond Edition of my Preface, this Book of *Wincler* has fallen into my Hands. It bears this Title, *Principiorum Juris Libri quinque: in quibus genuinæ Juris tam Naturalis quàm poſitivi principia, & firma, & firmiſſima Juriſprudentia fundamenta oſtenduntur, ejuſdem ſummus finis ob oculos ponitur, & Divina auctoritas probatur.* I find the Judgment given of this Piece to be juſt. The Reader may conſult the deceas'd M. *Thomaſius*'s Opinion of it in his *Paulo plenior Hiſtoria Juris Naturalis*, Cap iv. Sect. 1.
8 See his Article in Mr. *Bayle*'s Dict. Rem. (K.)

to make any great Progreſs in the Knowledge of the true fundamental Principles of the Law of Nature, and the right Method of explaining that Science. *Grotius*, therefore, ought to be regarded, as the firſt who broke the Ice; and moſt certain it is, that no Man could be better qualify'd for ſuch an Enterprize. Extraordinary Clearneſs of Underſtanding; exquiſite Judgment; profound Meditation; univerſal Knowledge; prodigious Reading; continual Application to Study, in the Midſt of a great many Misfortunes, and the neceſſary Duties of ſeveral conſiderable Employments; with a ſincere Love for Truth; are Qualifications, which no one can deny, properly to belong to that great Man, without wronging his own Judgment, and ſubjecting himſelf to the Imputation, either of baſe Envy, or groſs Ignorance. "If (as has been very rightly [1] obſerv'd) "he was not thoroughly "acquainted with the Art of thinking juſtly, the "Philoſophy of his Time being ſtill very obſcure, "he has ſupply'd, in a great Meaſure, that De"fect, by the Force of his good Senſe. If, with"out the Help of Art, he has ſhewn ſo much "Delicacy of Taſte, and true Diſcernment; what "would he not have done, had he been intire "Maſter of that Art of reaſoning juſtly, and of "rightly methodizing his Thoughts, which has "ſince prevail'd?" His Book was firſt publiſhed at *Paris* in 1625, and dedicated to *Lewis* XIII. It is ſaid, he, at firſt, deſign'd to have entitled it, *The Law of Nature and Nations*; but he choſe afterwards to give it the Title it now bears, of, *The Law of War and Peace.* What he had chiefly in View, was, to ſet forth thoſe Duties, which the ſeveral [2] Nations of the World, or their ſovereign Powers, that govern them, owe one to another; and how the Differences, ariſing between them, might be terminated. For which Purpoſe, he takes into his Work the principal Subject of natural Juriſprudence, and Politics; and lays down Principles, ſufficient to eſtabliſh the moſt conſiderable Duties of private Men. He [3] himſelf owns, that he is far from having exhauſted ſo copious a Subject, and wiſhes that others may ſupply what's wanting; to the End, that Mankind may, one Day, be furniſh'd with a compleat Syſtem of this Science. Never had Book a more univerſal Approbation. Numbers of the Learned [4] have wrote Comments upon it: It has been publicly read, and expounded in the Univerſities: And the Author, *fifty Years* [5] *after his Death, had an Honour done him, which was not paid to any of the Ancients, till after a long Succeſſion of Ages: I mean, his being publiſh'd, with various Notes, at* Francfort [6] *on the* Oder, *in* 1691.

Some Time after the Publication of this Work of *Grotius*, *John Selden*, a celebrated *Engliſh* Lawyer, enter'd the Liſt; and, whether through Jealouſy, or a commendable Emulation, form'd a Syſtem of all the *Hebrew* Laws, relating to the Law of Nature; which he ſeparated from thoſe which concern'd the particular Conſtitution of the *Jewiſh* Republick. He gave his Book the Title of, *The Law of Nature, and Nations, according to the Doctrine of the Hebrews*; wherein he is exceſſively laviſh of that vaſt Erudition, which we find in all his other Writings: But is far enough from having effac'd, or equall'd the Treatiſe of *Grotius*. For, beſides the extreme [7] Inaccuracy, and Obſcurity, remarkable in *Selden*'s Stile, that learned Author [8] derives not the Principles of the Law of Nature from the pure Dictates of Reaſon, but from the ſeven Precepts given to *Noah*; which, as to their Number, are very uncertain, and ſolely founded upon a doubtful Tradition, though perhaps ancient enough: He very often too contents himſelf, with barely reciting the Deciſions of the Rabbins, without giving himſelf the Trouble to examine, whether they are well, or ill grounded.

Not long before the Death of *Grotius*, another *Engliſh* Author appear'd, of a Character quite different from that of *Selden*, I mean [9] *Thomas Hobbes*; a great Mathematician, and one of the moſt penetrating Genius's of his Age. It is great Pity he ſuffer'd himſelf to be miſled, by the Indignation he had conceiv'd againſt thoſe, whom he look'd upon as the ſeditious Diſturbers of the Peace of his Country: Had he philoſophiz'd without Prejudice, and with a ſincere Regard to Truth only, he would doubtleſs have done her very ſignal Service. He publiſh'd at *Paris*, 1642, his [10] Treatiſe *of the Citizen*; wherein, amongſt other dangerous Errors, he endeavours to eſtabliſh, and that in the Geometrical Method, the Hypotheſis of *Epicurus*; which makes Self-Preſervation, and Self-Intereſt, to be the original Cauſes of Civil Society. He builds upon this Suppoſition; That all Men have the Will, as well as the Strength and Power, to hurt each other; and that the State of Nature, is a State of War, between each particular Perſon, and the reſt of Mankind. He gives an unlimited Authority to Kings; not only in Affairs of State, but even in Matters of Religion. Hobbes *created himſelf, by this Work, many Enemies*; *but, as Mr.* Bayle *ſays* [11], *the more diſcerning, and judicious Part of Mankind, were forc'd to acknowledge, that no one had ever yet ſo far diſcover'd the Foundations of Civil Policy. Lambert Velthuyſen*, a famous Philoſopher [12] of the United Provinces, boldly undertook the Defence of this Treatiſe *of the Citizen*, as far as related to *Hobbes*'s Manner of demonſtrating the Laws of Nature; but he did it, either by abandoning the favourite Principles of *Hobbes*, or trying to put a favourable Gloſs upon them. The ſame Year this Apology

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[1] *Parrhaſiana*, Tom. i. p. 346. [2] See his Preface, Num. 1. [3] Ibid. Num. 31. *& ſeq.*

[4] See the Names of the chief of them, and a very juſt Account of their Performance, in the *Hiſt. du Droit Nat.* by Mr. *Buddæus*. I have given my own Opinion of it in my Preface to *Grotius*, p. 12. The Reader will, alſo, find in this Preface an Hiſtorical Account of the different Editions of this Book, and the Fate it has met with.

[5] Mr. *Bayle*'s Dict. Rem. (O.) p. 1407. Col. 2. See the reſt of this Remark.

[6] By the Care of Mr. *Becman*, Profeſſor in that Univerſity. That Edition was reprinted there in 1699. It is in 4to.

[7] See the *Ars Critica* of Mr. *Le Clerc*, Tom. i. Part. i. Sect. 3. Cap. v. and Num. 5. p. 115, 116. Edit. 2d. and *Bib. Choiſ.* Tom. i. p. 355.

[8] See the *Specimen Controverſ.* of Mr. *Pufendorf*, Cap. i. Sect. 1.

[9] He was born at *Malmeſbury*, and Son of a Clergyman. See his Life printed at *Carolopoli* in 1681, in 12mo. and abridg'd by Mr. *Bayle*, in his Dictionary, p. 1571.

[10] See the Judgment *Grotius* paſſes upon it, in the Appendix to his Epiſtles, Epiſt. 648. p. 951. Col. 2.

[11] Mr. *Bayle*'s Dict. Rem. (D.) p. 1572. Col. 1. And *Pufendorf*'s Preface to his firſt Edition, of his *De Jure Naturæ & Gentium.*

[12] In an anonymous Diſſertation, entitled, *Epiſtolica Diſſertatio, de principiis juſti & decori, continens Apologiam pro tractatu clariſſimi Hobbæi, de Cive. Amſterd*, 1651. It was afterwards reprinted among his Works at *Rotterdam*, 1680. Tom. ii. A *German* Author, Profeſſor of Hiſtory and Politics, and ſince Profeſſor of Divinity at *Francfort* on the *Oder*, has very nearly defended the Principles of *Hobbes*. This Perſon is *J. Chriſtopher Becman*, in his *Meditationes Politicæ*. I know not in what Year this Book was firſt publiſh'd, but mine is the fourth Edition of 1693. But he who has moſt openly aſſerted the fundamental Principle of Mr. *Hobbes*, is Mr. *Gundling*, Profeſſor at *Hall* in *Saxony*, in an Academical Diſſertation, which appear'd in 1707, with this Title, *Status Naturalis* Hobbeſii *in Corpore Juris Civilis defenſus, & defendendus.*

Philoſophers, and Divines. And that this Diverſity of Sentiments, was not confin'd purely to Matters of the Civil Law, but extended to Points relating to the Law of Nature. We find ſeveral Reaſons to believe, that they applied themſelves but very ſuperficially to ſtudy, examine, or apply, in a proper Manner, the Rules of natural Equity [1]. Not one of them had made this his principal Study, and of ſo great a Number of Books, which they have left upon different Subjects, there remains not the Title of one, which treats of the *Law of Nature and Nations*. They contented themſelves with general Rules, known to all the World, and which they made uſe of, in ſuch a Manner, as diſcover'd them Strangers to their true Foundation, and juſt Extent. This appears from their Explanation of the Maxim, *That no Man ſhould enrich himſelf at the Coſt of another*. Their Definitions, and Diviſions, are, for the moſt Part, ſo inaccurate, and their Stile ſo obſcure, that it is impoſſible to believe they had clear and diſtinct Ideas of Things, or indeed, that they took any Pains about the Matter. What they abound in, is in Fictions, and vain Subtilties, which they had tranſplanted from the Civil Law into the Law of Nature. They have even, by ridgedly adhering to the Maxims of that philoſophical Sect, to which they were wedded, eſtabliſhed Principles, directly oppoſite to the plaineſt, and moſt undeniable Truths, of the Law of Nature. I ſhall produce but two Examples, to prove this. The *Stoics* believ'd [2], that an Infant in the Womb was not a *Man*, but only *a Part of the Mother*, or *of her Bowels*. Upon this Maxim, the *Roman* Lawyers either regarded *Abortion*, as a Matter merely indifferent, or, at leaſt, as a Crime no way comparable to *Murder*. The ſame Philoſophers (as we have obſerv'd before) thought every Man might, for a juſt Cauſe, claim a Power over his own Life. Hence it comes, that, by the *Roman* Law, [3] *Suicide* was liable to no Puniſhment, except in the Caſe where it injured another Perſon, as when a *Soldier*, or a *Slave*, deſtroy'd themſelves. In ſhort, the beſt Things the *Roman* Lawyers have left us, upon the Law of Nature, are ſo ſtrongly mixt with a Chaos of arbitrary Deciſions of the poſitive Law, that they are, in a Manner, buried, and loſt. Notwithſtanding all thoſe Diviſions, and the vain Subtilties, that were the common Source from whence they ſprung, we may find, among thoſe few Fragments, ſeveral conſiderable Principles of natural Equity, that may ſerve to decide many difficult Caſes; but they lie intermix'd with a far greater Number of Laws, purely poſitive."

Thoſe *Platonics*, who became famous in the third and fourth Centuries; ſuch as *Plotinus*, *Amelius*, *Porphyrius*, *Jamblichus*, *Proclus*, &c. apply'd themſelves much more, to explain the Speculations, or rather chimerical Conceits, of the Founder of their Sect, than to cultivate his Morality. *Ariſtotle* had hitherto but very few Followers: He was ſcarce known in the Weſtern Parts of the World, till towards the Beginning of the ſixth Century. The celebrated *Boëtius*, by tranſlating ſome of that Philoſopher's Writings, laid the Foundations of that prodigious, and truly deſpotic Authority, which the *Peripatetic* Philoſophy became afterwards poſſeſſed of; and which, even to this Day, in many Places, it ſtill maintains. The *Arabians*, in the eleventh Century, grew fond of it, and introduc'd it into *Spain*. From thence ſprung the *Scholaſtic Philoſophy*; which ſpread itſelf all over *Europe*, and, with its barbarous Cant, became even more prejudicial to Religion, and Morality, than to the ſpeculative Sciences. The Ethics of the *Schoolmen*, is a Piece of Patchwork; a confus'd Collection, without any Order, or fix'd Principles; a Medley of divers Thoughts, and Sentences out of *Ariſtotle*, Civil and Canon Law, Scripture, and the Fathers. Both good and bad lie there intermix'd, and confus'd; but ſo, as that there is much more of the latter, than the former. The *Caſuiſts* of the ſucceeding Centuries, made it their ſole Buſineſs to excel their Predeceſſors, in vain Subtilties; nay, what is worſe, in monſtrous, and abominable Errors; as all the World knows. But let us paſs by theſe unhappy Times, that we may, at length, come to that Age, wherein the Science of Morality was, if I may ſo ſay, rais'd again from the Dead.

SECT. XXIX.

THE famous Chancellor of *England*, *Francis Bacon*, who liv'd in the End of the ſixteenth, and the Beginning of the ſeventeenth Century, was *one of thoſe*, [4] *who moſt learnedly diſcover'd the imperfect State of Philoſophy, at that Time; which he labour'd vigorouſly to redreſs; and laid down moſt excellent Plans for its Reformation.* Poſterity will be eternally oblig'd to him, for the great Lights, and noble Projects, he has furniſh'd, for the Reeſtabliſhment of the Sciences. We have Reaſon to believe, that it was the reading of the Works of this great Man, which inſpir'd *Hugo Grotius* with the Thoughts of compoſing a Syſtem of the Law of Nature; which he afterwards undertook, at the Sollicitation of the celebrated *Nicholas de Piereſc*, a Counſellor in the Parliament of *Provence*. It is pretended, that *Melanchthon* had already given a Sketch of ſomething of this kind, in his *Ethics*; and they tell us too of one *Benedict Wincler*, who publiſh'd, at *Leipſic*, in 1615, a Book, intitled, *Principia Juris*; wherein he intirely departs from the Method of the Schoolmen; and maintains againſt them, among other Things [5], that the Will of God is the ſovereign Law, and firſt Foundation of all Juſtice; tho' this Will is always regulated by his infinite, and immutable Perfections. But it is acknowledg'd, that [6] the laſt mention'd Author often confounds the Law of Nature with the poſitive Law: And that neither the one, nor the other, has afforded any more than a [7] ſmall Gleam of Light; not ſufficient to diſſipate thoſe thick Clouds of Darkneſs, with which the World had been ſo long obſcur'd. Beſides, *Melanchthon* [8] was too much prepoſſeſs'd in favour of the *Peripatetic* Philoſophy,

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[1] See *Barbeyrac*'s *Tables of Authors*, to his Tranſlation of *Pufendorf*, where you will find many Examples of this Kind.
[2] See the *Obſervat.* of *Merellus*, Lib. i. Cap. xvi. and the *Julius Paulus* of Mr. *Noodt*. Cap. x.
[3] See the *Obſervat. Jur. Rom.* of M. *de Bynkerſhoek*, Lib. iv. Cap. iv.
[4] See Mr. *Bayle*'s Dict. p. 447. See, alſo, the *Specimen Controverſ.* of *Pufendorf*, Cap. i. Sect. 5. [5] Lib. i. Cap. iii, iv.
[6] See *Gronengii Biblioth. Jur. Gent.* Lib. iii. Cap. iv. Sect. 9. And *J. Frid. Ludovic. Delineatio Hiſt. J. Nat.* &c. Sect. 24.
[7] Mr. *Buddæus*, in his *Hiſtory of the Law of Nature*, Sect. 23. Since the ſecond Edition of my Preface, this Book of *Wincler* has fallen into my Hands. It bears this Title, *Principiorum Juris Libri quinque: in quibus genuinæ Juris tam Naturalis quàm poſitivi principia, & firma, & firmiſſima Juriſprudentia fundamenta oſtenduntur, ejuſdem ſummus finis ob oculos ponitur, & Divina auctoritas probatur.* I find the Judgment given of this Piece to be juſt. The Reader may conſult the deceas'd M. *Thomaſius*'s Opinion of it in his *Paulo plenior Hiſtoria Juris Naturalis*, Cap iv. Sect. 1.
[8] See his Article in Mr. *Bayle*'s Dict. Rem. (K.)

to make any great Progreſs in the Knowledge of the true fundamental Principles of the Law of Nature, and the right Method of explaining that Science. *Grotius*, therefore, ought to be regarded, as the firſt who broke the Ice; and moſt certain it is, that no Man could be better qualify'd for ſuch an Enterprize. Extraordinary Clearneſs of Underſtanding; exquiſite Judgment; profound Meditation; univerſal Knowledge; prodigious Reading; continual Application to Study, in the Midſt of a great many Misfortunes, and the neceſſary Duties of ſeveral conſiderable Employments; with a ſincere Love for Truth; are Qualifications, which no one can deny, properly to belong to that great Man, without wronging his own Judgment, and ſubjecting himſelf to the Imputation, either of baſe Envy, or groſs Ignorance. "If (as has been very rightly [1] obſerv'd) "he was not thoroughly "acquainted with the Art of thinking juſtly, the "Philoſophy of his Time being ſtill very obſcure, "he has ſupply'd, in a great Meaſure, that De"fect, by the Force of his good Senſe. If, with"out the Help of Art, he has ſhewn ſo much "Delicacy of Taſte, and true Diſcernment; what "would he not have done, had he been intire "Maſter of that Art of reaſoning juſtly, and of "rightly methodizing his Thoughts, which has "ſince prevail'd?" His Book was firſt publiſhed at *Paris* in 1625, and dedicated to *Lewis* XIII. It is ſaid, he, at firſt, deſign'd to have entitled it, *The Law of Nature and Nations*; but he choſe afterwards to give it the Title it now bears, of, *The Law of War and Peace*. What he had chiefly in View, was, to ſet forth thoſe Duties, which the ſeveral [2] Nations of the World, or their ſovereign Powers, that govern them, owe one to another; and how the Differences, ariſing between them, might be terminated. For which Purpoſe, he takes into his Work the principal Subject of natural Juriſprudence, and Politics; and lays down Principles, ſufficient to eſtabliſh the moſt conſiderable Duties of private Men. He [3] himſelf owns, that he is far from having exhauſted ſo copious a Subject, and wiſhes that others may ſupply what's wanting; to the End, that Mankind may, one Day, be furniſh'd with a compleat Syſtem of this Science. Never had Book a more univerſal Approbation. Numbers of the Learned [4] have wrote Comments upon it: It has been publicly read, and expounded in the Univerſities: And the Author, *fifty Years* [5] *after his Death, had an Honour done him, which was not paid to any of the Ancients, till after a long Succeſſion of Ages: I mean, his being publiſh'd, with various Notes, at* Francfort [6] *on the* Oder, *in* 1691.

Some Time after the Publication of this Work of *Grotius*, *John Selden*, a celebrated *Engliſh* Lawyer, enter'd the Liſt; and, whether through Jealouſy, or a commendable Emulation, form'd a Syſtem of all the *Hebrew* Laws, relating to the Law of Nature; which he ſeparated from thoſe which concern'd the particular Conſtitution of the *Jewiſh* Republick. He gave his Book the Title of, *The Law of Nature, and Nations, according to the Doctrine of the Hebrews*; wherein he is exceſſively laviſh of that vaſt Erudition, which we find in all his other Writings: But is far enough from having effac'd, or equall'd the Treatiſe of *Grotius*. For, beſides the extreme [7] Inaccuracy, and Obſcurity, remarkable in *Selden*'s Stile, that learned Author [8] derives not the Principles of the Law of Nature from the pure Dictates of Reaſon, but from the ſeven Precepts given to *Noah*; which, as to their Number, are very uncertain, and ſolely founded upon a doubtful Tradition, though perhaps ancient enough: He very often too contents himſelf, with barely reciting the Deciſions of the Rabbins, without giving himſelf the Trouble to examine, whether they are well, or ill grounded.

Not long before the Death of *Grotius*, another *Engliſh* Author appear'd, of a Character quite different from that of *Selden*, I mean [9] *Thomas Hobbes*; a great Mathematician, and one of the moſt penetrating Genius's of his Age. It is great Pity he ſuffer'd himſelf to be miſled, by the Indignation he had conceiv'd againſt thoſe, whom he look'd upon as the ſeditious Diſturbers of the Peace of his Country: Had he philoſophiz'd without Prejudice, and with a ſincere Regard to Truth only, he would doubtleſs have done her very ſignal Service. He publiſh'd at *Paris*, 1642, his [10] Treatiſe *of the Citizen*; wherein, amongſt other dangerous Errors, he endeavours to eſtabliſh, and that in the Geometrical Method, the Hypotheſis of *Epicurus*; which makes *Self-Preſervation, and Self-Intereſt, to be the original Cauſes of Civil Society. He builds upon this Suppoſition; That all Men have the Will, as well as the Strength and Power, to hurt each other; and that the State of Nature, is a State of War, between each particular Perſon, and the reſt of Mankind. He gives an unlimited Authority to Kings; not only in Affairs of State, but even in Matters of Religion. Hobbes *created himſelf, by this Work, many Enemies; but, as Mr.* Bayle *ſays* [11], *the more diſcerning, and judicious Part of Mankind, were forc'd to acknowledge, that no one had ever yet ſo far diſcover'd the Foundations of Civil Policy. Lambert Velthuyſen*, a famous Philoſopher [12] of the United Provinces, boldly undertook the Defence of this Treatiſe *of the Citizen*, as far as related to *Hobbes*'s Manner of demonſtrating the Laws of Nature; but he did it, either by abandoning the favourite Principles of *Hobbes*, or trying to put a favourable Gloſs upon them. The ſame Year this Apology

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[1] *Parrhaſiana*, Tom. i. p. 346. [2] See his Preface, Num. 1. [3] Ibid. Num. 31. *& ſeq.*

[4] See the Names of the chief of them, and a very juſt Account of their Performance, in the *Hiſt. du Droit Nat.* by Mr. *Buddæus*. I have given my own Opinion of it in my Preface to *Grotius*, p. 12. The Reader will, alſo, find in this Preface an Hiſtorical Account of the different Editions of this Book, and the Fate it has met with.

[5] Mr. *Bayle*'s Dict. Rem. (O.) p. 1407. Col. 2. See the reſt of this Remark.

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[8] See the *Specimen Controverſ.* of Mr. *Pufendorf*, Cap. i. Sect. 1.

[9] He was born at *Malmeſbury*, and Son of a Clergyman. See his Life printed at *Carolopoli* in 1681, in 12mo. and abridg'd by Mr. *Bayle*, in his Dictionary, p. 1571.

[10] See the Judgment *Grotius* paſſes upon it, in the Appendix to his Epiſtles, Epiſt. 648. p. 951. Col. 2.

[11] Mr. *Bayle*'s Dict. Rem. (D.) p. 1572. Col. 1. And *Pufendorf*'s Preface to his firſt Edition, of his *De Jure Naturæ & Gentium.*

[12] In an anonymous Diſſertation, entitled, *Epiſtolica Diſſertatio, de principiis juſti & decori, continens Apologiam pro tractatu clariſſimi Hobbæi, de Cive. Amſterd*, 1651. It was afterwards reprinted among his Works at *Rotterdam*, 1680. Tom. ii. A *German* Author, Profeſſor of Hiſtory and Politics, and ſince Profeſſor of Divinity at *Francfort* on the *Oder*, has very nearly defended the Principles of *Hobbes*. This Perſon is *J. Chriſtopher Becman*, in his *Meditationes Politicæ*. I know not in what Year this Book was firſt publiſh'd, but mine is the fourth Edition of 1693. But he who has moſt openly aſſerted the fundamental Principle of Mr. *Hobbes*, is Mr. *Gundling*, Profeſſor at *Hall* in *Saxony*, in an Academical Diſſertation, which appear'd in 1707, with this Title, *Status Naturalis* Hobbeſii *in Corpore Juris Civilis defenſus, & defendendus.*

appear'd, *Hobbes* publiſh'd his *Leviathan*; the Sum whereof is: "That, without [1] Peace, there is no "Safety in a State; and Peace cannot ſubſiſt, with-"out Authority, nor Authority without Arms; "and Arms avail not, unleſs put into the Hands "of one Perſon: And that the Fear of Arms "cannot incline thoſe to Peace, who are excited to "Hoſtilities by an Evil, more to be dreaded than "Death; that is to ſay, by Diſſentions about "Things, neceſſary to Salvation." In this Piece he lays himſelf much more open; for he here roundly maintains, That the Will of the Sovereign alone conſtitutes, not only what we call Juſt and Unjuſt, but even Religion; and that no divine Revelation can bind the Conſcience, till the Authority, or rather Caprice, of his *Leviathan*; that is, of the ſupreme arbitrary Power, to which he attributes the Government of every Civil Society, has given it the Force of a Law. If thereupon we ſometimes find, in his Works, certain ſeeming Contradictions, it is probably, becauſe he durſt not ſpeak all he thought; and was willing to provide for a Retreat, in Caſe he ſhould not be able to ſtand the Shock of his Adverſaries. He had ſeveral of them; but [2] they did not all ſucceed alike. He paſs'd for an Atheiſt; and perhaps they were not very much out in their Judgments, who thought him ſo; for he believ'd, that every Thing was corporeal: And dropp'd many Expreſſions, which gave [3] Cauſe to ſuſpect, that he acknowledg'd a God only through Policy. *Spinoza* has ſince had preciſely the ſame Notions of the State of Nature, which he founds upon the ſame Principles; [4] and, like *Hobbes*, alſo, makes Religion depend upon the ſovereign Authority.

SECT. XXX.

THE Number of Commentators upon *Grotius* daily increaſing, inſomuch, that they did nothing but diſpute about the Senſe of his Words, and brought again upon the Stage all the barbarous Terms, and ridiculous Subtleties of the Schoolmen, of which *Grotius* had purg'd his Work; a *German* had the Courage to ſhake off the tyrannical, and pernicious Yoke of Cuſtom, and bravely follow the Footſteps of that great Man; I mean the *illuſtrious Samuel Pufendorf* [5]; who has thereby acquir'd an immortal Reputation; whoſe Luſtre, not all the Efforts of thoſe, who envy his Reputation, will be ever able to efface. He purſu'd the Deſign, and Method of *Grotius:* He examin'd Things in their Originals; and, profiting by the Lights of thoſe which preceded him, added his own Diſcoveries; which gave great Hopes of ſeeing him carry, to a great Length, a Science, as yet in its Infancy. The Principles of the new Philoſophy, which he exceedingly reliſh'd, but without blindly adopting all the Opinions of the *Carteſians*; together with the Mathematics, which he ſtudied under [6] a celebrated Profeſſor in the Univerſity of *Jena*; contributed greatly to improve his natural Qualifications, and render him more capable of ſo vaſt a Work. We are beholden, for the firſt Sketch he drew of it, to the Leiſure occaſion'd by an unhappy Accident, he had the Misfortune to meet with. He had been ſent for into *Denmark*, to be Governor to the Children of a Nobleman, who was then Ambaſſador of [7] *Sweden* to the other Northern Crown. A little after his Arrival at *Copenhagen*, the War ſuddenly breaking out again with the *Swedes* (who attack'd that City, but were, after ſome Time, oblig'd to raiſe the Siege) Mr. *Pufendorf* was made Priſoner [8], with the reſt of the Retinue of the Ambaſſador; who was himſelf, but a few Days before, gone to *Sweden*. During this Confinement, which laſted eight Months, as he had no Books, neither was permitted to ſee any Body, he took a Reſolution [9] to meditate on what he had read in *Grotius* and *Hobbes*. He then compos'd a ſhort Syſtem out of what he lik'd beſt, which he turned, and explained his own Way; treating of ſuch Matters, as thoſe Authors had omitted, and adding, to the whole, ſome new Thoughts of his own, as they occurr'd. Not that he intended, at that Time, any Thing more, than to divert himſelf in his Solitude: But about two Years after his being ſet at Liberty, he went into *Holland*; where a Friend of his having read this Eſſay, advis'd him to review, and publiſh it. He did ſo; and the Work was printed at the *Hague*, in 1660. under the Title of *Elements of Univerſal Juriſprudence:* He owns, in his [10] Preface, that, beſides *Grotius* and *Hobbes*, the Profeſſor in Mathematics, mention'd before, had afforded him ſome Light. His Method is, in ſome Meaſure, that of the *Geometricians:* For he firſt lays down his Definitions, and Axioms; afterwards he explains them; and then draws out the Conſequences, deducible from them. And though he himſelf prov'd afterwards diſſatisfied with this Work, and publicly own'd its Imperfections, as the premature Eſſay of his Youth; yet, as the Public gave it a very favourable Re-

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[1] *Bayle*, Dict. Rem. (E.) p. 1573. Col. 1. *ex Auctore vitæ Hobbeſii*, p. 45.

[2] See the *Hiſt. du droit Naturel*, by Mr. *Buddæus*, Sect. 26. A Liſt of them may be ſeen at the End of his Life.

[3] Mr. *Beeman*, whom I have juſt mention'd, agrees, that *Hobbes* made himſelf, at leaſt, liable to the Suſpicion of Deiſm. See his *Parallel. Politic.* Cap. i. Sect. 5. at the End of his *Meditat. Politicæ*.

[4] *Tractat. Theologico-Politic.* Cap. xvi. xix.

[5] He was originally of the *Marquiſate* of *Miſnia*, in *Saxony*, and a Layman, tho' ſprung from the Clergy; for his Father, Grandfather, his Uncles, both on the Father's and Mother's Side, were Miniſters of the Lutheran Communion. I learn'd this from one of the Pieces, which compoſe that Collection, entitled, *Eris Scandica*, p. 149, 150. The Village whereof his Father was Miniſter, is call'd *Fleh*, near *Chemnitz*; and in all Probability he was born there. His Brother at leaſt, *Iſaiah Pufendorf*, is a Native of that Place; as Mr. *Gundling* teſtifies, in his *Hiſt. Philoſ. Moralis*, Part i. Cap. vi. Sect. 5. Note 10. See, alſo, the *Acta Eruditorum* of *Leipſic*, An. 1708. p. 185.

[6] *Erhard Weighel.* He was with that Profeſſor in 1657, during the whole Year. See *Eris Scandica*, p. 126. *Pufendorf* informs us himſelf, in his Preface *Elem. Juriſpr. Univ.* that *Weighel* firſt advis'd himſelf to this Study. This Profeſſor had undertaken to demonſtrate Morality in a mathematical Manner; but this Piece never appear'd, probably becauſe it was never finiſh'd. M. *Thomaſius* informs us he has recover'd a Fragment of it, in his *Paulo plenior Hiſt. Jur. Nat.* Cap. vi. Sect. 14.

[7] Mr. *Coyel:* 'This happen'd in 1658. *Eris Scandica*, p. 126.

[8] One of his Letters, to the *Baron de Boineburg*, is publiſh'd; wherein he ſays, that the Pretence for detaining him was, that his Brother was ſettled in *Sweden*. See *J. Groningii Bibliothec. Jur. Gent.* Lib. iii. Cap. ix. p. 281. 'Twas that Brother, to whom he dedicated, in 1675, his *Diſſertationes Academicæ Selectiores*. He calls him *Iſaiah de Pufendorf*, Knight, *(Eques Auratus,)* and Chancellor to the King of *Sweden*, in the Dutchies of *Bremen* and *Verden*. He ſays he had been ſent to the chief Courts of *Europe*, about the Affairs of that Prince. See the Place before quoted, Note 5, in Mr. *Gundling*'s Book.

[9] 'Twas what he ſays himſelf, in the Letter above cited; but which, as well as the others which follow, is full of Errata; which in many Places ſo ſpoil the Senſe, as to make them unintelligible.

[10] Pref. *. p. 3. and d.

cepti-

ception, ſo it ſerv'd to make our Author known to the World, in a very advantageous Manner. The Elector Palatine, *Charles Lewis*, to whom it was dedicated, was not ſatisfy'd with returning him his immediate Thanks, in a very obliging Letter [1], but invited him, the Year following, to his Univerſity of *Heidelberg*; where he founded, in his Favour, a *Profeſſorſhip in the Law of Nature and Nations*. Thus that great Prince, at the ſame Time that he conferr'd on Mr. *Pufendorf* ſo high a Mark of Diſtinction, and Beneficence; ſecur'd to himſelf the immortal Glory, of having firſt ſet the Example of teaching publicly a Science, ſo neceſſary for Youth, and indeed for all Mankind; but which no one had, as yet, thought of introducing into the public Univerſities. As our new Profeſſor explain'd the Treatiſe of *Grotius*, ſo he daily ſaw the Neceſſity there was of compoſing ſomething in that Kind, ſhould be more complete. The Sollicitations of the *Baron de Boinebourg*, then Chancellor to the Elector of *Mentz*, might, alſo, contribute very much to engage him therein. That Miniſter was extremely deſirous, to have ſomebody ſet about the compiling a methodical Body of natural Juriſprudence; and had, in vain, endeavoured to perſuade ſeveral learned Men to undertake it; among the reſt, *Boecler*, *Conringius*, and *Rachelius*. We may eaſily imagine, that, after having read Mr. *Pufendorf*'s *Elements of Univerſal Juriſprudence*, he could not fail to apply to him for that excellent Purpoſe, judging him more capable, than any other. He found him intirely diſpos'd to ſatisfy ſo laudable a Deſire. Mr. *Pufendorf* laid before him a Plan of the Syſtem he deſign'd: He repreſented to the *Baron*, that the due Execution thereof would require (theſe are his own Words) *great Penetration of Mind*; *an exquiſite Judgment, free from all Prejudice*; *a numerous Library*; *great Leiſure*; *a ſettled Correſpondence with ſeveral learned Men*; *who might communicate their Thoughts to him: All which Things*, adds he, *I want*. However, he promis'd to do all that lay in his Power; but without hurrying himſelf; neither would he engage to publiſh his Work, till he had brought it, in ſome Degree, to anſwer his Expectation. Theſe Particulars I have from a Letter, he wrote in Anſwer to the *Baron de Boinebourg* [2], publiſh'd the Beginning of this Century, with two Letters of *Boecler*, and one of *Herman Conringius*; to whom that Miniſter had ſent Mr. *Pufendorf*'s, to have their Opinions upon the Matter. *Conringius* and *Boecler* were too much prepoſſeſs'd in favour of Antiquity, and too unexperienc'd in the Buſineſs of clear Reaſoning [3], not to go wrong in examining the Project, and Idéas of our Author. This plainly appears by their Anſwers: *Conringius*'s is civil; whereas that of *Boecler* diſcovers an extraordinary Uneaſineſs, at the growing Fame of Mr. *Pufendorf*, and an extreme Deſire, to leſſen that Eſteem the World had conceiv'd of him. This happen'd in the Year 1663. About the Year 1667, *Charles* XI. King of *Sweden*, deſigning to eſtabliſh an Univerſity at *Lunden*, in the Province of *Schonen*, reſolv'd [4] to invite thither our *Heidelberg* Profeſſor. The Elector Palatine was very loth to part with him, but did not, however, think fit to lay his Commands upon him; and at length conſented to his accepting the more profitable, and advantageous Poſt, offer'd him in *Sweden*. But intreated him, that ſame Year, to beſtow ſome Hours extraordinary on the Electoral Prince his Son; who had his appointed Preceptors beſides. Mr. *Pufendorf* went into *Sweden*, and was, in 1670, eſtabliſh'd in the new Univerſity at *Lunden*, in Quality of firſt Profeſſor in the Faculty of [5] Law, and with a Salary more conſiderable than any of the other Profeſſors. Two Years after, he publiſh'd his *Law of Nature and Nations*: And, in 1684, he reprinted it at *Francfort* on the *Main*, augmented above a fourth Part. He had publiſh'd an Abridgment [6] of it in 1673, with this Title, *Of the Duties of a Man, and a Citizen*. And this little Book has been frequently reprinted, not only in *Germany*, but in *Holland*, and *Scotland*. It has, alſo, been tranſlated, as well as his larger Work, both into *High-Dutch*, and *Engliſh*.

SECT. XXXI.

I SHALL not here enlarge in ſetting forth, in a pompous Manner, all the particular Excellencies of this Work. Nor do I think myſelf under any Obligation to follow the Mode; which will have [7] *every Tranſlator to pay his Original the Tribute of Preference*. The Office of a Commentator no Way obliges me to this: I ſhall content myſelf with ſpeaking here hiſtorically, with the ſame Indifference and Impartiality, as will, I dare ſay, ſufficiently appear in my [8] Notes. There is no ſuch Thing as abſolute Perfection in Books, any more than in any other human Productions; and Mankind has a Right to treat as Mountebanks, all thoſe panegyrical Writers, who, to ſet off the Authors they tranſlate, or comment upon, or rather to extol themſelves and their own Performances, begin with aſſuring the Reader, that it is an entirely accompliſh'd Work in its Kind; a compleat Model, the utmoſt Effort of human Underſtanding: Always ready to ſay as much, in four Days Time, of the firſt Author, who ſhall have the good Fortune to fall into their Hands.

Firſt then, I ſhall obſerve, that this Work has had a very general Approbation. The vaſt Number of Editions it has had in *Sweden*, *Germany*, and

[1] The Dedication is dated the firſt of *September*, 1660. and the Elector's Letter the 29th of the ſame Month. The Letter is printed in the *Bibl. Jur. & Gent. of Groningius*, Lib. iii. Cap. x. Sect. 1. And in the *Delineatio Hiſt. Jur. Divini*, &c. of *J. Frid. Ludovic.* publiſhed at *Hall* in *Saxony*, 1701. Sect. 45.

[2] See *Groninguius*, ubi ſupra, Lib. iii. Cap. ix.

[3] Some learned Men, of *Boecler*'s own Country, ſay, that his Notes on *Grotius* are very perplex'd; and that he promiſes throughout more than he performs; beſides, in the greateſt Part of his Writings, he is very politic as to his Sentiments; which he always manifeſtly accommodates to the Intereſts of thoſe, he deſires to pleaſe. See Mr. *Buddæus Hiſt. Jur. Nat.* Sect. 28.

[4] *Eris Scandica*, p. 127, 128.

[5] See the Preface of the *Eris Scandica*, and p. 128, of that Collection. Some Years after his having executed that Charge, the King of *Sweden* made him his Hiſtoriographer, and one of his Privy-Council. About the Year 1686, he was ſent for by the late Elector of *Brandenburgh*, *Frederick-William*, who gave him the ſame Employs of Counſellor and Hiſtoriographer. He was created a *Baron*, (*Liber Baro*,) a little before his Death, which happen'd at *Berlin* on the ſixth of *October*, 1694.

[6] This Book I have tranſlated myſelf in 1707, with Notes, ſince which Time it has bore ſeveral Impreſſions. Mr. *Andrew Tooke*, M. A. and Profeſſor of Geometry in *Greſham* College, has tranſlated it into *Engliſh*. I have the fourth Edition of his Work printed in 1716. The Title of which imports that my Notes are added; but I find they are not all tranſlated, for the Tranſlator had only ſeen my firſt Edition, tho' at that very Time (in 1715) my third had appear'd very much corrected and augmented; and has ſince been follow'd by the fourth in 1718, more improv'd than any of the former.

[7] *Sacy*, in his Preface to the Tranſlation of the Letters of *Pliny the Younger*.

[8] Mr. *Pufendorf*, *de Jur. Nat. & Gent.*

Holland,

Holland, within the four and thirty Years ſince it was firſt publiſh'd, ſufficiently declared, in what an advantageous Manner, it has been receiv'd by the Public. At the ſame Time that I was tranſlating it into *French*, I was inform'd by Mr. *Bernard*, [1] That *Dr.* Kennet *of* Corpus Chriſti College *in* Oxford, *with ſome* [2] *others*, *had tranſlated it into* Engliſh: I ſhould have been very glad to have met with that Tranſlation, to have conſulted the Introduction, and the [3] *ample Notes*, with which it was ſaid to be accompany'd; and, at the ſame Time, to have ſeen, if thoſe different Hands had carried on this Work in Concert, ſo as to preſerve the Uniformity neceſſary in ſuch a Deſign: But as there are certain ſingle Suffrages, which are of more Value than Multitudes of the common Sort, I ſhall here produce two, which are of very great Weight, and to which all Men of Judgment will, I am perſuaded, pay a very great Regard. The firſt is that of the illuſtrious Mr. *Locke*, that great Philoſopher, whoſe Loſs the Republic of Letters ſtill laments; and whoſe exquiſite Judgment, profound Penetration, and extraordinary Abilities, eſpecially as to what concern'd Matters of Reaſoning, all the World is acquainted with. Let us ſee what he ſays, in his excellent Treatiſe of *Education*: *When* [4] [*a young Lad*] *has pretty well digeſted* Tully's Offices, *and added to it* Pufendorf de Officio hominis & civis, *it may be ſeaſonable to ſet him upon* Grotius de Jure Belli & Pacis, *or*, *which perhaps is the better of the two*, Pufendorf de Jure Naturali & Gentium; *wherein he will be inſtructed in the natural Rights of Men*, *and the Original and Foundations of Society*, *and the Duties reſulting from thence*. The other Suffrage, is that of Mr. *Le Clerc*, concerning whom I ſhall, though with Regret, forbear ſaying what I think, for fear I ſhould offend his Modeſty by Encomiums, which no reaſonable Perſon refuſes him, and which, in my Mouth, would be of no great Weight. His Approbation falls not directly on my Original, but is not therefore of leſs Force, ſeeing it regards the Abridgment of it, which the Author himſelf made a Year after he had publiſh'd his principal Work. Let us ſee then what he ſays, in the [5] *Parrhaſiana*, when he is treating of the general Knowledge, which one ought to have of the Principles of Civil Policy: *The Books of* Hugo Grotius de Jure Belli ac Pacis; *and that of* Samuel Pufendorf, *entitled*, De Officio Hominis & Civis, *are admirable for their general Principles*. *More eſpecially* the Second; *which*, *as it is more conciſe*, *eſtabliſhes with great Clearneſs and Order*, *the Fundamentals of Morality*, *Politics*, *and Juriſprudence*. *Whoever reads it carefully*, *will there find Principles ſufficient*, *to ſolve the moſt important Queſtions in thoſe Sciences*, *which admit of any Debate*. Since then the Abridgment is, in Mr. *Le Clerc*'s Opinion, ſo uſeful, what muſt he think of the Book itſelf? But that I may give a more particular Idea of this Work, and that every one may know the juſt Value thereof; I will, in a few Words, draw the Parallel of it with that of *Grotius*.

To begin then with the Stile; if the Queſtion be about Purity of Language, and Accuracy of Expreſſion, I readily give the Preference to *Grotius*, who had a much more extenſive Erudition; and who, from his Cradle, if I may ſo ſay, wrote with wonderful Facility and Elegance. But his Stile is too conciſe; he very often ſpeaks but half his Meaning; and ſuppoſes his Reader to know many Things, which require very great Study; ſo that his Work is of little Uſe but to the Learned: Whereas Mr. *Pufendorf* is much more within the Reach of common Capacities. As to what concerns Order, and the Diſpoſition of Particulars, the general OEconomy of the Work of Mr. *Pufendorf* is by far the beſt: But, in the particular Ranging of the [6] Materials, that compoſe each Chapter, he has frequently let ſlip ſome Inaccuracies, which are not to be found in *Grotius*; from which I have endeavour'd, as much as poſſible, to diſengage my Tranſlation, as I ſhall ſhew more at large in the Sequel. As to the Subject, I have already taken Notice, that *Grotius* pretended not to give a compleat Syſtem, which might be eaſily ſeen, though he himſelf had not declar'd it. 'Tis only occaſionally that he touches upon the greateſt Part of the principal Points of natural Right: So that, though his Views had been more extenſive, and leſs imperfect, than they ſeem, in many Things, to have been, his Plan did not lead him to a full Diſcuſſion of them; it was enough for him to treat of them ſo far, as might be ſufficient to decide the Queſtions, which concern'd the principal Subject of his Book. In a Syſtem of the Law of Nature, an Author ought, without Diſpute, to begin with inſtructing his Reader in the Nature of moral Entities, or Beings; in the Principles and different Qualities of human Actions; and what it is that makes them imputable either as good, or evil; in the Nature of Laws in general; and their different Kinds, *&c.* But we meet with ſcarce any Thing in *Grotius*, relating to all theſe Matters, which compoſe the firſt Book of my Original; and what he ſays ſometimes is not ſufficient, nor in its proper Place. *Grotius* ſaw the true fundamental Principle of the Law of Nature: But he does no more than juſt point it out in his [7] Preface; and that in ſuch a Manner too, as gives us Reaſon to conclude, that his Ideas on that Head were not altogether clear, nor enough diſengag'd from the Prejudices of the Schools: And when he treats of any Matter particularly, he does not always ſhew the Connection it has with its firſt Principles. On the contrary, my Author eſtabliſhes, and diſtinctly explains the fundamental Maxims of the Law of Nature; and from thence deduces, by a regular Train of Conſequences, the principal Duties of Men and Subjects, in whatſoever State and Condition they are. As *Grotius* omits ſome important Matters, ſo he touches upon others that might have been very well ſpar'd; as when he examines Queſtions relating rather to Divinity, than to the Science of natural Right; or elſe enlarges on ſome certain Subjects, more than is requiſite in a general Syſtem; as, for Inſtance, when he ſpeaks of War. On all theſe Accounts, his Work is very much inferior to that of Mr. *Pufendorf*; who beſides, ſcarce

[1] *April* 1703. p. 467.

[2] The principal Tranſlator, in his Preface, names Mr. *Percival*, and Mr. *Itchiner*, who tranſlated the fifth and eighth Books. As I have obſerv'd in looking over this Tranſlation, which fell into my Hands after the firſt Edition of my Book.

[3] Theſe Notes are only the Quotations of the Author himſelf. The *Engliſh* Tranſlation has ſince been reprinted in 1717, with a Tranſlation of my Notes, but without my Preface, which has ſince been added in a fourth Edition of 1729. I have ſeen theſe Editions, but without having Time to examine how far they have juſtly expreſs'd my Thoughts. I can ſay no more with regard to an Abridgment of M. *Pufendorf*'s Treatiſe *De Jure Nat. & Gent.* which Mr. *Spavan* publiſh'd the ſame Year at *London*, in two Volumes 8vo. in which he made uſe both of my Tranſlation and Remarks, as has been obſerv'd in *l'Hiſt. Critique de la Rep. des Lettres*, Tom. xiv. p. 308. But I have never ſeen this Piece.

[4] Sect. 136, of the fifth and ſixth Editions, in 8vo. printed in 1705, and 1709. p. 334, *&c.*

[5] Tom. ii. p. 117, 118.

[6] The learned Journaliſts of *Leipſick*, in that moſt obliging Extract they gave of the firſt Edition of this Work, *June* 1707. p. 35. make me ſay quite the contrary: *In ſpecialioribus pertractandis accuratiorem eſſe* Grotio *putat*. Perhaps this is only an Error of the Preſs, (*Grotio* for *Grotium*:) though I do not find it mark'd in the Errata of that Year.

[7] *Prolegom.* Num. 7. *& ſeq.* particularly, Num. 11, 12, 13, 14.

ever borrows any Thoughts from *Grotius* [1], but what he improves, and explains more distinctly; and draws from them a greater Number of Consequences. In fine, Mr. *Pufendorf* often justly refutes *Grotius*, as may be seen at one View by running over my *Index of Authors*: And, to be convinc'd, that *Grotius* had, as to several Matters, even false, or at least very confus'd Ideas, there needs no more, than to examine one single Notion of his, which runs through his whole System; I mean that pretended Distinction of his, between the *Law of Nature*, and a certain arbitrary *Law of Nations*, which he conceives to be founded on the tacit Consent of the People.

From all this, I think, I may boldly, and without any Fear of being suspected to have too great a Partiality for my Author, infer, that his Work, on the Whole, is far more useful than that of *Grotius*. I have no Design to derogate, in the least, from the Glory of that great Man, who is far above all my Encomiums. We should not, perhaps, even at this Day, have had any tolerable System of the Science of the Law of Nature, had it not been for the Light he has given us: And had Mr. *Pufendorf* been in the Place of *Grotius*, and *Grotius* in the Place of Mr. *Pufendorf*, the Work *de Jure Belli & Pacis* would, in my Opinion, have been much more imperfect than it is; and the other, *De Jure Gentium & Naturæ*, much more perfect. I say it once again, that I never entertain'd a Thought of diverting any one from reading the Book of *Grotius*: But very far from it, I am heartily sorry, out of the Good-will I bear to the Republic of Letters, that this excellent Work is so wretchedly translated into our Language. If the Truth may be spoken, Mr. *de Courtin*, who is the Author of this Translation, undertook more than he was able to perform; and it is surprising, that a Man, whose Employments particularly engag'd him in the Study of the Subject of this Book, should succeed no better, in a Design of this Nature. I shall say nothing of the Negligence, Harshness, and Obscurity of his Stile: These are obvious to every Reader, upon the first Opening of the Book. But there are a great Number of essential Faults, which make *Grotius* speak quite beside his Meaning; and the Translator sometimes trips, in Places so plain and easy, that he discovers a great deal of Ignorance, both in regard to the Subject, and the *Latin*. The Notes, which he has inserted in his *Index*, to explain the Terms, and Thoughts of *Grotius*, make the Thing yet more apparent. His Explanations are, for the most Part, either false, imperfect, or so confus'd, that, instead of clearing up Matters, they serve only to render them still more obscure. I have here advanc'd nothing, but what I can very easily make appear. And though I have never compar'd this Translation with the Original quite through; yet I have noted, as I have at several Times consulted it, so great a Number of such Blunders, that I may, without Rashness, pass this Judgment upon it. When the first Edition of my Preface appear'd, I immediately sent a small List of them to one, who had tâken Offence at this Judgment of mine, on the Performance of Mr. *de Courtin*; but the Party had nothing to reply to me, as to those enormous Faults, of which I had taken Instances almost at the very first Opening of the Book. But the best Way to convince all Mankind of a Thing, of which I think no judicious, and impartial Person, can have a Moment's Doubt, would be to publish a new Translation of *Grotius*'s Book; which I may [2] perhaps some Time do, should I find Leisure enough for it. I should follow the same Plan, as in my Translation of *Pufendorf*; so as to refer from one to the other, both in the Text and Notes, and to make the two Works, join'd together, serve as perpetual Supplements to each other. There would then appear so great a Difference between the two Translations, that every one, at first Sight, would conclude, that one or other of the Translators must have been strangely out of the Way. I am not ignorant, that a learned *German* [3] Professor commends this Version of Mr. *de Courtin, as an elegant, clear Version, that may serve instead of a Comment*; he adds too, that *the Translator has, in an accurate Index, given his Reader an Abridgment of the Whole*. But, in all Probability, this learned Man has rely'd upon the Judgment of some other in this Matter; or, perhaps, being better acquainted with the *Latin*, than our Language, he has concluded this Translation to be a good one, because the Author speaks *Latin* in *French*. If it has been reprinted thrice [4], this only shews what Credit the Original itself of *Grotius* has in the World, and the great want there is of Books of this Nature. So that, admitting there was, in the Main, no great Difference between my Original, and the Work of *Grotius*, this Translation, at least of the latter, could afford no just Cause, why I should have desisted from translating the former.

SECT. XXXII.

MY Design, in this Translation, has been to do Service to two Sorts of Persons. The first, are such young Men, as are destin'd for public Employments, as well Ecclesiastical, as Civil. We see them every Day aspire to, and actually obtain those Employs; without having the least Tincture of the most general Principles of a Science, so universally necessary, as that taught in this Book: Insomuch, that, even though the Passions should not otherwise interfere, we need not wonder to see Affairs succeed so ill in the Hands of Men, who sit down contented under so gross an Ignorance of their Duties. It may perhaps be said, that they can read this Book in *Latin*, and therefore have no Need of my Translation. But, not to mention, at present, the Amendments I have made in the Text of my Author, and the Notes I have added; an exact Knowledge of the most necessary Languages is, besides, a Thing generally very much neglected; and there are vast Numbers in

[1] For which Reason I have taken care to cite in the Margin that learned Man, in a great many Places, where Mr. *Pufendorf* had forgot to do it; so that by Means of my Translation, one may perpetually confront *Grotius* with my Author. This Comparison may now be made more easily, since I have translated *Grotius* in the same Manner.

[2] This Mr. *Barbeyrac* has since perform'd, his Translation with Notes appearing in 1724, to which is prefix'd a long Preface, which the Reader may compare with M. *Courtin*'s Translation.

[3] Mr. *Buddæus*, heretofore Professor of the Law of Nature and Morality at *Hall* in *Saxony*, and at present Professor in Divinity at *Jena*. See his *History du Droit Naturel*, Sect. 4. An anonymous Author has advanced the same Thing, *in Spite of my Teeth*, (as he says) in his *Bibliotheca Juris Imperantium*, published at *Nurenburg* in 1727, Cap. i. Posit. ii. But considering the Want of Taste, Judgment, and Accuracy, which that Writer discovers in his Work, he will allow me, in my Turn, to say, That I do not take him to be a competent Judge of the Subject.

[4] The last Edition I know of, is that of the *Hague*, in 1703.

Offices, who either do not underſtand *Latin* at all, or elſe ſo little, that they cannot, with Pleaſure and Improvement, read a Book, in a Stile like that of my Author. Beſides, it is my Notion (if I may be allow'd to venture a Thought, which is, perhaps, peculiar to myſelf; but I believe well enough grounded) that we ought, as much as poſſibly we can, to begin our Studies of the Sciences with Books written in that Language, which is moſt familiar. However able we may be to read, with Eaſe, Books wrote in a dead Language, yet our Mother Tongue is always beſt underſtood: Neither is it good to divide the Mind, by ſharing our Thoughts between the Attention, that we ought to have for the Things themſelves, and that, which we are oblig'd to give to the Underſtanding of the Terms, in which they are expreſs'd.

The other Sort of Men, I intended to ſerve by this Tranſlation, are the common People; among whom, it is not to be wonder'd, if we find the groſſeſt Ignorance of the Things, contain'd in this Book; ſeeing thoſe, whom I have juſt now mentioned, have but very falſe, and confus'd Ideas thereof. I know, by Experience, that even the Term, *Law of Nature*, is as much unknown to them, as is the *Terra Auſtralis incognita*; for which Reaſon, I thought myſelf oblig'd to explain it in the Title Page. The People of this Rank, when they heard talk of the Tranſlation I was then upon, imagin'd, at firſt, that it was a Book full of the Subtilties of the Bar; and therefore to be left to the Lawyers. I own, it is not within the Reach of a Peaſant, or a Day-Labourer. But how many Men are there, who, without making Learning their Profeſſion, might, with Proficiency, read ſuch a Book as this; if they would but give the ſame Attention thereto, as they do to their common Affairs, or to the reading of other Books, far leſs uſeful, nay, ſometimes pernicious? I ſhall not ſtop here, to ſhew them the Neceſſity they are under of being inſtructed, at leaſt to a certain Degree, in the Points of Morality, Juriſprudence, and Politics, treated of in this Work. If they will take the Pains to read carefully the [1] *Parrhaſiana*, they will no longer doubt thereof; and, if they have their true Intereſt at Heart, they will ſpeedily apply themſelves to the making a proper Uſe of thoſe excellent Leſſons, the Author there gives. I intended to have ſaid ſomething, in this Place, of the [2] Defects, in the Generality of Books, and Diſcourſes of Morality; of the Method to be obſerv'd in treating of, and ſtudying this important Science; of the Conformity of the Duties, right Reaſon teaches us [3], with the Maxims of the Goſpel; and of ſome other Things of the like Nature. But, beſides that this Preface is already extremely long, the Subjects having led me further than I imagin'd, the Printers allow me not Time enough, to digeſt thoroughly what I had to ſay on thoſe Heads. I ſhall therefore content myſelf with obſerving, in a few Words, one Thing, which we ſeem not enough to reflect on. And that is, that Revelation was not given to Men, to teach them abſolutely, and fully, all that they ought to know. On the contrary, it ſuppoſes in them the Knowledge of ſome certain Things; which Knowledge they either actually have, or which it is intirely in their Power to acquire: And the Faculty of drawing Conſequences from Principles known, either by the ſole Light of Reaſon, or by Holy Scripture. The Exiſtence, for Inſtance, of a Deity infinite in Power, Wiſdom, and Goodneſs, the ſovereign Legiſlator, and Author of human Society; is a Principle evident by its own Light: Therefore we find, that the Sacred Writers do not ſo earneſtly apply themſelves to eſtabliſh it; if they ſometimes ſpeak of it, it is as of a Thing manifeſt to all Mankind. They even expreſly tell us, that *that which* [4] *may be known of GOD, was manifeſt among the Heathens, GOD having ſhewn it to them* (by the Light of Reaſon); *for that the inviſible Things of him, his eternal Power and Godhead, were, from the Creation of the World, clearly ſeen, being underſtood by his Works; ſo that the Heathens were inexcuſable:* Becauſe they did not give that Attention to them, they ought to have done. Thus too it is with reſpect to the true Principles of Morality, which are founded on the general Notions of Religion. The Sacred Writers aſſure us, that, [5] *when the Nations, which have not the Law* (written, like that of *Moſes*) *do by Nature* (that is to ſay, without Revelation) *the Things contained in the Law; theſe having not the Law, are a Law unto themſelves: And ſhew, that the Commandments of the Law are written in their Hearts; their Conſciences, alſo, bearing Witneſs, and their Thoughts, the mean while, accuſing, or excuſing them, according as they have violated, or obſerv'd theſe Commands.* The Manner, in which the Sacred Writers propoſe the Maxims of Morality, does, alſo, manifeſtly ſhew, that they ſuppoſed, in the Minds of Men, certain Ideas, which, though imperfect, are nevertheleſs moſt true; and that they were ſatisfy'd with ſupplying what was defective, or with retrenching what ill Cuſtoms had unſeaſonably added thereto. They have not left us a methodical Syſtem; they do not exactly define all the Virtues; they enter not into Particulars; they only give, as Occaſion requir'd, general Precepts; from whence we muſt draw Conſequences, to apply them to the State and Circumſtances of particular Perſons; as it would be eaſy to ſhew, by many Inſtances, if the Thing was not evident to all who read, with ever ſo little Care, the Holy Scriptures. And from thence it appears, to mention it only by the Bye, how far we ought to rely upon the Expedient of thoſe, who, after having made it their Buſineſs to ruin the Certainty of the Light of Reaſon, refer us to the *Light of Faith*, for the reſolving of our Doubts: As if the Light of Faith did not neceſſarily ſuppoſe that of [6] Reaſon; and as if the Proofs, we have of the Truth of thoſe Facts, on which Revelation is founded, or of the Senſe of a great many Paſſages in Scripture, were more evident, than the Maxims of right Reaſon are, with relation to our Duties, and their true Foundations; not to mention how far theſe Gentlemen carry *Hiſtorical Pyrrhoniſm*. On the contrary, it is certain, that the Conformity of the Chriſtian Morality with the cleareſt Dictates of right Reaſon, is one of the moſt convincing Proofs of

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[1] Tom. ii. p. 54. *& ſeq.*

[2] See what I have ſaid in a few Words about one of theſe Defects, in my Preface to the *Traité du Feu*, printed in 1709. p. 17. *& ſeq.*

[3] I have ſince handled this at large in my Treatiſe *du Feu*, Lib. i. Cap. iii. I have no more Leiſure at preſent to undertake the reſt, than I had, when the firſt Edition of this preliminary Diſcourſe was printed; which is beſides now conſiderably enlarg'd, by ſeveral Additions in this new Edition.

[4] Rom. i. 19. 20. See, alſo, Acts xvii. 27, 28.

[5] Rom. ii. 14, 15.

[6] The Reader need only ſee the wretched Replies *Huet* makes on this Subject, in his poſthumous Treatiſe *De la foibleſſe de l'Eſprit Humain*. Cap. xv. A Work which agrees very well with his *Demonſtration Evangelique*; in which he gives the moſt uncertain Propoſitions in the World, for Demonſtrations as undeniable as any in the Mathematics.

the Divinity of the Chriſtian Religion: as has been acknowledg'd by all, who have wrote with any Solidity on that Subject. *We are aſſur'd*, ſays a [1] famous *Engliſh* Divine, *that GOD can never reveal any Thing contradictory to the true Dictates of our Reaſon. Nay, what ought chiefly to perſuade us, that the Holy Scriptures are the Work of GOD, or of the Author of Nature, is, that that Holy Book illuſtrates, confirms, and, every where, lets in new Light upon the Laws of Nature.* If we duly conſider it, we ſhall find, this is the Proof, which, of all others, is the moſt affecting, and the beſt proportion'd to the common Capacities of Mankind. I have no Deſign, in any Reſpect, to diminiſh the Certainty of thoſe Facts, that are the Foundation of Faith: There is no one Fact to be found, in all ancient Hiſtory, ſo well prov'd, as theſe are; and it has been very juſtly obſerv'd, that they afford, when well conſider'd, a Demonſtration as inconteſtable, as thoſe of the Mathematics; though of another Nature. But it muſt be own'd, that the Generality of Mankind are, by their Condition of Life, reduc'd to an Impoſſibility of ſufficiently inſtructing themſelves, in all that is neceſſary, for the apprehending the Force of this Demonſtration. They muſt underſtand ſeveral Languages, and read, with Application, a great many Volumes; which, we well know, they have neither Leiſure, nor Means to do. They are therefore oblig'd to truſt to the Information of thoſe, who are in a Condition to make ſuch Enquiries: And, though they may be able to draw a very ſtrong Proof, in Favour of the Goſpel, from the Unanimity which they obſerve, as to this fundamental Point, among all Chriſtians, though otherwiſe ſo very much divided about particular Opinions: Yet it muſt be own'd, that there is ſtill ſomething wanting to produce in them an intire Conviction. But when they come, at length, to conſider the Evangelical Morality, and find it intirely conformable both to their true Intereſts, and to all thoſe Principles, of which every Man has, by Nature, the Seeds in his own Heart; they cannot then help concluding, that the Author of it muſt neceſſarily be that very Being, who has given them Life, and brought *them into this* World, only to make them happy; provided they will not be wanting to themſelves, but contribute, on their Part, all that *lies* in their own Power, towards the Attainment of their own Felicity.

SECT. XXXIII*.

'TIS now Time I ſhould give an Account of my own Work, and lay before the Reader, in a few Words, the Plan I have purſued. Not to dwell here upon the Difficulties I have met with, in ſo tedious and troubleſome an Attempt, I ſhall only ſay, that whoever undertakes Tranſlation, ought to forſake every Thing, and be prepar'd for the Toil. As for my own Part, I have endeavoured to give my Author's Thoughts with all poſſible Fidelity and Clearneſs, as far as the Genius of the two Languages will admit; which is what every Tranſlator is oblig'd to, for the Support of his own Character. What I have to add, relate to the Amendments, and Alterations, I have taken the Liberty to make in the Original, to the Notes, which appear at the Foot of the Page, and to the two Indexes, which are plac'd at the End of the Work.

I have put in the Margin the ſimple Citations, that is, thoſe, in which an Author is referr'd to, without giving his own Words. There are few, who are not offended by Quotations [2], which unneceſſarily interrupt the Thread of the Diſcourſe. Our Author was ſo much accuſtom'd to this bad Method, that there is not one ſingle Citation, nor even a ſingle Letter, throughout the whole Margin of the Original. Beſides theſe ſimple Citations, as well as thoſe wherein the Words are inſerted at full Length, are often ſo falſe, or ſo uncertain, that it is neceſſary to run over a whole Volume, to find their Places. I have compar'd with the Originals all thoſe I thought of any Importance, when I could procure the Books, from whence they were extracted, or diſcover the Page where they lay. I leave the Reader to judge what Trouble this muſt have coſt me. M. *Pufendorf* ſometimes quotes one Author for another, and I have, unexpectedly, and by Chance, met with many Paſſages, which I ſought for in vain, when I had real Occaſion to find them.

M. *Pufendorf* was, without Diſpute, a Man of great Capacity, and Erudition; but being much more concern'd about the Truth of Things, than the Manner of expreſſing his Thoughts, he had not ſufficiently cultivated the Art of writing accurately, and he ſometimes read Authors (eſpecially the Ancients) too haſtily, and, what was worſe, rather in Tranſlations, than the Originals. His Stile is not only harſh, and often barbarous, but, alſo, negligent, being, in ſome Places, too conciſe, in others, too redundant. He has even ſuffer'd himſelf to fall into Inadvertencies, which make him write the quite contrary of what he thinks. He frequently miſtakes, in his Explanation of the *Greek*, and even *Latin* Paſſages, which he cites; or elſe he applies them in a falſe Manner, either for want of duly conſidering the Senſe of the Author, or becauſe he took them at ſecond Hand; of which I have found inconteſtable Proofs. He does not always exactly expreſs the Thoughts of the Authors, whoſe Opinions he gives, and, now and then, intermixes his own Reflections, without diſtinguiſhing them. He ſhews too great an Affectation of diſplaying his Reading, and, in many Places, we may apply to him, what *M. de la Bruyere* pleaſantly ſays, of thoſe who are ſubject to this Weakneſs; [3] *Herillus, whether he ſpeaks, harangues, or writes, will quote: He makes the Prince of the Philoſophers tell us, that Wine intoxicates; and brings a Proof from* Cicero, *that Water qualifies it. If he falls upon Morality, he gives us the Word of the divine* Plato, *that Virtue is amiable, and Vice odious, and that both the one and the other are confirm'd by Cuſtom: The moſt common, and trifling Things, which every Man is capable of thinking, he aſcribes to the ancient Writers,* Greek, *or* Latin. I muſt, however, to do Juſtice to my Author, ſay, that it is not through Inclination, or bad Taſte, that he has thus imitated the moſt injudicious Writers. It is long ſince, that I have ſuſpected this Defect of his, to be occaſion'd by his conforming to the Faſhion, which then prevail'd among the Scholaſtic Lawyers, as well as to avoid the Cavils of thoſe envious Critics, who re-

[1] *Richard Cumberland, de Leg. Natur. Proleg.* Sect. 27.

* *That Part of this Section, in which M.* Barbeyrac *enumerates the Alterations he has made in the Text of M.* Pufendorf, *are here omitted; becauſe the Text of this Edition is a Tranſlation of that Original.*

[2] See the *News* of M. *Bernard*, for the Year 1702. p. 161. and for the Year 1704. p. 221.

[3] *Characters of the Manners of the Age*, Tom. ii. Cap. xii. *of Judgments.* p. 122, 123. Edit. *Amſt.* 1731.

proach'd him with want of Erudition; I am extremely well pleas'd, that this Notion of mine is agreeable to the Sentiments of a very learned Lawyer of his own Nation [1], and his particular Acquaintance. What at firſt made me believe this, was, that M. *Pufendorf*, in his *Elements of Univerſal Juriſprudence*, which are, as I have obſerv'd, the firſt Sketch of this Book, as well as in moſt of his other Writings, has very few Citations. It appears, by a Letter of *Boecler* to the *Baron de Boinebourg*, before mention'd, and which was communicated to our Author; that *Boecler* [2] treated him with great Contempt, as a Man *who had no great Acquaintance with the ancient* Greek *and* Latin *Writers*; *who underſtood neither* Ariſtotle, *nor* Plato, *in the Original*; *who had never read any of their learned* Greek *Commentators*; *who was quite ignorant, as to the* Greek *Poets, and their Scholiaſts: In a Word, who was intirely a Stranger to all the* Greek *and* Latin *Authors. So that* (according to that ill-natur'd Critic) *M. Pufendorf knew no more of theſe, than he did of another World.* This Reproach ſet our Author upon reading a great Number of the Ancients, which, it muſt be freely own'd, he did a little too haſtily, and in Tranſlations, rather than in the Originals; as will appear from my Notes. He ſays himſelf, ſomewhere in his *Eriſtique* Pieces [3], that, during the Time of his Reſidence at *Heidelberg*, he read, with great Application, the beſt Books of Antiquity; and I have in my Poſſeſſion an Edition of *Euripedes* [4], which belong'd to him, wherein all the Paſſages of that Poet, which he thought for his Purpoſe, are interlin'd by his own Hand. We muſt not wonder then, if, being thus reduc'd, againſt his Will, as it were, to quote a great deal; and wanting Time to do it exactly, and judiciouſly, he has committed Miſtakes, or advanc'd Authorities, which make nothing to his Purpoſe. This is, alſo, partly the Reaſon, why he intermixes frequently great Confuſion in the Arangement of his Thoughts; and the Additions, he has inſerted in his ſecond Edition, are plac'd ſo neligently, that one would think he had thrown them, at hazard, in the firſt Place that came to his Hand, without reflecting whether they had any Connection with the Context, or Sequel.

Had I not ſought Expedients to remedy theſe Defects, I might have ſpar'd myſelf the Pains of this Tranſlation, or expected to have ſeen my Work paſs from the Bookſeller's Hands into thoſe of the Paſtry Cook. Our modern Readers do not love that Confuſion, and Heap of Remarks, and uſeleſs Citations; if I may ſpeak the Truth, they are not much in the wrong, in requiring of Authors an Accuracy, which coſts them little, if they would accuſtom themſelves to it; but the want of which, in a great Meaſure, deſtroys the Advantage, which might be reap'd from the moſt uſeful Books. Such, in general, is the Method I have taken, to ſuit my Tranſlation to the Taſte of thoſe [5], *who are not made for Fatigue, in Point of Reading, and whom this learned Confuſion only ſerves to puzzle.* I ſay *in general*; for I do not pretend to have made no Omiſſion: I have often found it neceſſary to ſuſpend my Judgment, on Account of the Difficulties which daily occurr'd to me, and oblig'd me to ſeek new Expedients to remove. The Circumſtances, and Nature of Things, will ſufficiently diſcover my Reaſons for making many Alterations, which had before eſcap'd my Memory.

I come now to the Notes, and the Additions I have made to them. The Reader will find, in the Original, the greateſt Part of thoſe Paſſages, from ancient Authors, or the *Roman* Law, which are quoted in the Text, either at length, or abridg'd. In doing this, I have made uſe of better Editions than the Author had. I ſay *the greateſt Part*, becauſe there were ſome, of which I thought it ſufficient to give the Tranſlation, and others, which I could not find, after the longeſt Search, or which were extracted from Books, which I could not procure. Notwithſtanding all this, I may affirm, that there is no Paſſage, any way conſiderable, in a Work of this Nature, which I have not compar'd with the Original, and given more exactly, than the Author, who commonly marks neither the Edition, Page, Chapter, nor even the Title of the Authors he quotes. I mean this with regard to the ancient Writers; for as to the Moderns, except the *French*, I have contented myſelf always with a bare Tranſlation. The other Sort of Notes tend to ſupply, either many Things wanting in the Original, or to confirm, defend, or criticiſe the Author's Senſe and Arguments. I have borrow'd many of theſe Notes from good Writers, to whom I have given due Honour; and I have carefully conſulted all the Books, that fell into my Hands, from whence I could draw any Light. I have chiefly read, with Attention, the other Works of my Author, which treat of parallel Subjects, and extracted from thence every Thing I thought of uſe. But I muſt give the Reader Notice, that, in quoting the Remarks of others, I have often given only their general Senſe, in my own Way; ſo that, unleſs where I cite their own Words in *Italic*, or mark'd with inverted Comma's, he muſt not impute all I ſay to the Author, from whom I borrow any Thought. I have uſed the ſame Method, with regard to the loſt Reflections of the Author, which I have remov'd to the Notes; for I have not always exactly diſtinguiſh'd the Things I have interſpers'd [6], or added. I have, alſo, given many beautiful Paſſages, from ancient and modern Writers, as they occur'd to my Memory, or preſented themſelves, in the Courſe of the Work. For the Notes where theſe Citations appear, as well as my own Reflections upon them, were not premeditated, but collected, or compos'd, in Proportion as I advanc'd in my Deſign. I own there are, in my Notes, ſome Remarks, which, ſtrictly ſpeaking, might be diſpens'd with, as not directly relating to the Subject; but as they are few, I took the Opportunity of placing them, where the Readers, who do not love theſe kind of Things, may paſs them over without Interruption. As for the reſt, as I have, without Diſſimulation, remark'd whatever I found faulty in my Author, ſo I have, where I thought neceſſary, defended ſuch of his Sentiments, as ap-

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1 M. *Thomaſius*, in his Preface to his *Fundamenta Jur. Nat. & Gent.* §. 3.

2 Apud *Groning.* in *Bibliot. Jur. Gent.* p. 294. and the *Paulo plenior Hiſt. Jur. Nat.* of Mr. *Thomaſius*, Append. II. p. 182. Obſerve that Mr. *Boecler* did not publiſh this diſadvantageous Opinion of our Author. So far from it, that he has prais'd him in his Commentary on the ſecond Book of *Grotius*, where he ſays this *Heidelberg* Profeſſor, *eſt natus ad optima quæque ſtudia ornanda; Heidelbergenſis Acad. lumen: ab eo eximia omnia & teneri & ſperari, ſibi jucundum imprimis eſſe*, &c.

3 *Epiſt. ad Amicos*, p. 106. of the Edition join'd to his grand Work in 1706. by Mr. *Hertius*.

4 Celle de *Commelin Heidelberg* 1597. in two Volumes Octavo.

5 *Fontenelle*'s Preface to his Hiſtory of Oracles.

6 I would have done this in my laſt Edition. Remark, alſo, that in the firſt I had added, in the Margin, ſeveral Citations, and that in quoting the Words of modern Authors, I have often in this Preface, and in my Notes, taken, upon mine own Authority, ſeveral Citations, either to confirm what they ſay, or to correct what they advance.

pear'd to me well grounded, againſt thoſe, who have either openly attack'd his Book, or maintain'd a contrary Opinion. Both in my Notes, and in this Preface, I have always freely diſclos'd my Thoughts, where I judg'd it proper. Not that I think my Authority of any Weight in the World; nor do I pretend to be taken upon my Word. I have brought my Reaſons, and the Republic of Letters is, or ought to be, at leaſt, *a Land of Liberty*, where every one may riſk his Fortune, and modeſtly ſpeak his Mind; leaving others at Liberty to correct him, if he miſtakes, and obliging him thankfully to profit by thoſe Criticiſms, which, upon an impartial Examination, appear to be juſt. It is in this Diſpoſition that I ſtudy to preſerve myſelf, and I ſhall always acknowledge the Kindneſs of thoſe, who point out to me in what I have err'd. Tho' I had all the Terms, Aſſiſtance, and Learning I want, it would be impoſſible for me to avoid miſtaking ſometimes, in a Work of ſuch Extent, and where it was neceſſary, at the ſame Time, to give Attention to ſo many different Things. My ſecond Edition, and, above all, this laſt, are a convincing Proof, how ſtrictly I have examin'd my Thoughts, and Stile, to correct, or rectify, what appear'd wanting, and bring this Work to as great a Degree of Perfection, as poſſible.

I have compar'd the Quotations ſo carefully, that, I preſume, they will be found to be pretty exact. As to the reſt, the Work is the moſt correct of its Kind, and the Original was never ſo well printed as in this Tranſlation. The former Index I found of no uſe to me, and it is indeed ſo defective, that I believe it uſeleſs to every Body elſe. Thoſe who make uſe of mine, will beſt judge, whether the Pains I have taken in compoſing it, have been ſucceſsfully employ'd. I have added to it another Table, containing the Authors cited, explain'd, criticis'd, or defended, either in the Text, Notes, or Preface.

I have but a Word or two to add. Thoſe, who have not read much, need not be ſurpriz'd to ſee ſo much *Greek* and *Latin* in the Notes, or in this Preface; for they may be aſſur'd, that the Senſe of thoſe Quotations is either explain'd, Word for Word, or the Subſtance of it given. As the two firſt, and the laſt Chapter, of the firſt Book, are a little abſtracted (tho' I have endeavour'd, in my Notes, to render them as clear as poſſible) the Reader may, if he pleaſes, paſs them over, without any Inconvenience; nor will his doing ſo, prevent his underſtanding the reſt. To conclude, where any Law Term appears, which is unintelligible, the Reader need only conſult the firſt Index, where he will find at once the Place wherein it is explain'd.

ADVERTISEMENT.

THE Reader is desir'd to observe, that only the Notes below the black Line at the Foot of each Page, are M. *Barbeyrac*'s, those above being Quotations of the Author.

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OF THE

LAW of NATURE AND NATIONS.

BOOK I.

Containing the preliminary Parts of that Knowledge.

CHAP. I.

Of the Origin and Variety of MORAL ENTITIES.

The CONTENTS of every Paragraph of the first Chapter.

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III. *What are moral Entities, what is their Cause and End.*
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V. *Their Division.*
VI. *Their State what.*
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XXIII. *How moral Entities perish.*

I. IT was the Business of the *first* and *highest Philosophy*[1], and that by which alone it could fully answer the Design of its Name, and Institution, to deliver the most comprehensive Definitions of Things, and to rank them agreeably under their proper Classes, subjoining the general Nature and Condition of every Sort of Beings. Now as the Series of *natural Things*[2] hath been fairly enough regulated by those, who have hitherto apply'd themselves to the adorning of that *Science*, so it is evident, that Men have not been equally solicitous about constituting the *Entia moralia*, or *moral Entities*, nor treated them with that Respect which their Dignity requir'd. Many Authors seem never so much as to have thought on them; others only touch them lightly over, as idle Fictions, of no Use or Moment in the World. When, at the same time, it was highly expedient, that they should be fully understood by Mankind, who are endu'd with the Power of producing them[3], and through whose whole Lives and Conducts their Force and Activity is diffused. This Reflection obligeth us to premise somewhat on a Part of Knowledge generally neglected; so far as shall seem requisite to illustrate our principal Undertaking: Especially lest our Definitions of moral Things should, either upon account of their Obscurity, or of their Novelty, prove a Stop to the Reader, who perhaps in common Treatises hath rarely met with the like Terms. And here, if those who have been bred up in the nicer Delicacies of Letters, shall disdain our Endeavours of this kind, and cast a censorious Frown on Words unknown to ancient Eloquence; we only petition them for this Favour, that as we often pardon the Impertinencies of their over-scrupulous

[1] *Metaphysicks* are most properly meant by our Author's *Philosophia prima*, because it comprehends (as some Philosophers hold) not only *Ontology*, or the Science of Essences in general, their chief Properties, and most eminent Species; but also Natural Theology, and *Pneumatology*, or an Account of the Nature of Spirits.

[2] Our Author reserving the Distinction of physical and moral Entities to the next Paragraph, passes it over here in the beginning of the Chapter.

[3] How this is done, see §. 3. and 4. following.

Exactneſs, ſo they would be pleas'd to grant us the Toleration not to be Polite [1], whilſt we profeſs a cloſer Regard to the ſtrict Severity of Things, than to the exterior Ornaments of Speech. For how to expreſs ourſelves with more Advantage about theſe Matters, we are yet to ſeek; unleſs by tedious Circumlocutions we would leave them more obſcure and more perplex'd than we found them. Againſt the Charge of Novelty *Tully* himſelf will be our Advocate: *New Names* (ſays [2] he) *are to be apply'd to new Things; nor is this to be wonder'd at by any Man of ordinary Knowledge, when he conſiders, that in every Art and Craft, not vulgarly underſtood, there is a Variety of Terms coin'd for that particular Subject.* And then giving Examples in the liberal and mechanic Arts, he concludes; *A Philoſopher of all Men hath an eſpecial Right to this Privilege; for Philoſophy is the Art of Life, and he that would undertake to explain its Rules, cannot, from the common Currency of Words, find Stock enough to anſwer his Occaſions* [2] [3]. But he that can upon no account digeſt ſuch Harſhneſs of Stile, is left at his Liberty to turn out of theſe rougher Tracts, and to paſs immediately to a Field of more Smoothneſs and Pleaſure.

II. All the Beings [4] which compoſe this Univerſe, as they conſiſt of ſuch Principles as were by the moſt wiſe Creator temper'd and fitted for the producing of each particular Eſſence; ſo they have every one of them their particular *Properties*, ariſing from the Diſpoſition and Aptitude of their Subſtance, and exerting themſelves in agreeable Actions, according to that Portion of Strength which their Divine Author and Founder hath imprinted on them. Theſe *Properties* we now uſually call *natural* [5], ſince the Term *Nature* hath been extended ſo far, as to denote not only the general Maſs of Things, but alſo the Modes and Acts flowing from the internal Force of their Conſtitution, by which is produc'd that infinite Variety of Motions which turns and manages all the Buſineſs of our World. Thoſe Things which exerciſe their Operations, either without any Senſe at all, or with pure down-right Senſe, or with ſuch as is aſſiſted by very imperfect Reflection, are guided by the ſole Inſtinct of Nature, and are unable to govern their Actions by any Rules or Modes of their own Invention. But Man, who beſides his excellent Form and moſt accurate Contexture of Body, fitting him for the nobleſt and the quickeſt Offices of Life and Motion, is endu'd with a ſingular Light of Underſtanding, by the Help of which he is able moſt exactly to comprehend and to compare Things, to gather the Knowledge of Obſcurities from Points already ſettled, and to judge of the Agreement which Matters bear to each other; and hath alſo the Liberty of exerting, ſuſpending, or moderating his Actions, without being confin'd to any neceſſary Courſe and Method: Man, we ſay, is farther inveſted with the Privilege of inventing and applying new Helps to each Faculty, for the more eaſy Regulation of its Proceedings. To conſider what numberleſs Modes and Notions have been introduc'd for the Aſſiſtance of the *Underſtanding*, and for preventing the Confuſion which might ariſe from the undiſtinguiſh'd Vaſtneſs of its Objects, is the Province of another Sort of Enquirers. Our Buſineſs is, to declare, how, chiefly for the Direction of the *Will*, a certain [6] Kind of Attribues have been impos'd on [7] Things, and their natural Motions; whence there ſprings up a peculiar Agreement and Conveniency in the Actions of Mankind, a grateful Order and Comelineſs for the Ornament of human Life. And theſe Attributes are called *moral Entities*,

The Author in his laſt Editions adds theſe Quotations here.

[a] We find *Manilius* uſing the like Excuſe: Lib. iii. ℣ 39. &c.

Ornari res ipſa negat, contenta doceri.
Et ſi qua externa referantur nomina lingua,
Hoc operis, non vatis erit: non omnia flecti
Poſſunt, & propria melius ſub voce notantur.

And though ſome Words of foreign Stamp appear,
Seem harſh, untun'd, uneaſy to thy Ear,
This is the *Subject*'s, not the *Writer*'s, Fault:
Some Things are ſtiff, and will not yield to Thought.
I muſt be plain: And if our Art hath found
Expreſſions *proper*, it neglects the *Sound*.

Mr. CREECH.

Nor hope ſweet Verſe and curious Turns to find:
I'll leave thy Paſſions, and inſtruct thy Mind.

To the ſame Purpoſe, V. LUCRET. Lib. i. ℣. 137. & HORAT. Art. Poet. ℣ 48. *which laſt ſpeaks thus:*

——Si forte neceſſe eſt
Indiciis monſtrare recentibus abdita rerum,
Fingere cinctutis non exaudita Cethegis
Continget: dabiturque licentia ſumpta prudenter.

Thus in Engliſh:

If to expreſs Things new found out, we uſe
New Words, unto the Ancients never known,
None may to us that Liberty refuſe,
Suppoſing that it prudently be done.

——Licuit, ſemperque licebit
Signatum præſente notâ producere nomen.

It ever was, and e'er will lawful be
To uſe the Words forg'd by Neceſſity.

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[1] *Cicero* even goes ſo far as to maintain it to be a childiſh Thing to ſpeak elegantly of Matters philoſophical: In ſuch Caſes to ſpeak plain is ſufficient, and learned Men have no other Intent, but to expreſs themſelves clearly. *Omne, quod de re bona dilucide dicitur, mihi præclare dici videtur: iſtiuſmodi autem res dicere ornate velle, puerile eſt: plane autem & perſpicue expedire poſſe, docti & intelligentis viri.* De Finib. bon. & malor. *Lib.* III. *Cap.* V.

[2] *Nobis imponenda nova vovis rebus nomina: quod quidem nemo mediocriter doctus mirabitur, cogitans, in omni Arte, cujus uſus vulgaris communiſque non ſit, multam novitatem nominum eſſe.——quo magis hoc Philoſopho faciendum eſt: Ars eſt enim Philoſophia vitæ; de quæ differens arripere verba de foro non poteſt.* De fin. l. iii. c. 1. The following Part of this Diſcourſe plainly ſhews us, that he ſpeaks expreſly of ſuch Philoſophers as treat of moral Knowledge, becauſe he diſtinguiſhes them from Logicians, Natural Philoſophers, Geometricians, &c.

[3] Our Author infers from theſe Quotations, that 'tis as lawful for him, as theſe ancient Poets, to borrow ſome Terms from other Languages, to expreſs himſelf in this Work, ſince he can find none proper in his own, and he has no other Way to render himſelf intelligible. And this might have been a good Excuſe for the ancient Schoolmen, if they had not carry'd this Liberty too far, and made uſe of Terms wholly barbarous. Mr. *Dacier* very unſeaſonably praiſes the *French* Tongue, for not admitting the coining of new Words: For beſides that this is a real Defect in any Language, more eſpecially in one ſo barren as the *French*; modern Philoſophers (not to mention many other Writers, of whom Mr. *Dacier* is one) have often taken this Liberty, without giving Offence to People of good Senſe. On the contrary, Men of Taſte are pleaſed to ſee Words new coin'd upon occaſion. I hope they will not be diſpleaſed with me, when to expreſs faithfully the Senſe of my Author, I have been oblig'd in this Tranſlation to make uſe of new Terms, or ſuch as bear a Signification ſomewhat different from their common Acceptation. I have taken this Liberty but ſeldom, and only in Caſes of Neceſſity.

[4] By *Beings* our Author means the Subſtances of Things, with all their Properties and Qualities, internal and external, as appears from what follows.

[5] It is in the Original *natural Things*, but as the Sequel of the Diſcourſe ſhews, that the Author in treating of *moral Beings*, equally oppoſes to them *phyſical Subſtances*, and their *Properties*, or *phyſical Operations*: I have choſen here, and in the preceding, to uſe the Term *natural Being*, which the Author himſelf uſed in the beginning of §. 4. and is more proper than that of *Things*, to expreſs in general all that falls under the Cognizance of our Senſes, of whatever Kind it be, whether Subſtance or Mode.

[6] See Note 2. upon §. 5. of this Chapter.

[7] Men and their Actions are here underſtood, as §. 16. ſhews.

becauſe

becauſe the *Manners* and the *Actions* of Men are judg'd and temper'd with relation to them; and do hence aſſume a Face and Habit different from the horrid Stupidity of the dumb Creation.

III. We may define our *moral Entities* to be *certain Modes ſuperadded to natural Things and Motions by underſtanding Beings, chiefly for the guiding and tempering the Freedom of voluntary Actions, and for the procuring of a decent Regularity in the Method of Life.* We call them *Modes*, becauſe we conceive *Ens*, or *Being*, in general, to be more conveniently divided at large into *Subſtance* and [1] *Mode*, than into *Subſtance* and *Accident*. And as *Mode* is contradiſtinguiſhed to *Subſtance*, ſo it is manifeſt, that *moral Entities* have no Self-ſubſiſtence, but are founded in Subſtances and in their Motions, and do only affect them after a certain Manner. Of *Modes*, [2] ſome flow, as it were, naturally from the Things themſelves; [3] others are ſuperadded by the Intervention of an intelligent Power. For whatever is endu'd with Underſtanding, can, from the reflex Knowledge of Things, and from comparing them with one another, form ſuch Notions as may prove very ſerviceable in the Direction of an agreeable and conſiſtent Faculty. *Moral Entities* are of this Kind; the Original of which is juſtly to be referr'd to Almighty GOD, who would not that Men ſhould paſs their Lives like Beaſts, without Culture and without Rule; but that they and their Actions ſhould be moderated by ſettled Maxims and Principles; which could not be effected without the Application of ſuch Terms and Notions. But the greateſt Part of them were afterwards added at the Pleaſure of Men, as they found it expedient to bring them in, for the poliſhing and the methodizing of common Life. And from hence the End of them is plainly to be diſcover'd, which is not, like that of natural Beings, the Perfection of the Univerſe, but the particular Perfection of human Conduct, as ſuperior to brutal, in being capable of regular Beauty and Grace; that thus in ſo inconſtant a Subject, as the Motions of Mens Minds, an agreeable Elegance and Harmony might be produc'd.

IV. As the original Way of producing natural Entities is [4] by *Creation*, ſo the Manner of framing moral Entities cannot be better expreſſed than by the Term of [5] *Impoſition*. For theſe do not proceed from Principles ingrafted in the Subſtance of Things, but are added, at the Pleaſure of intelligent Creatures, to [6] Beings already perfect in their Nature, and to the real Productions of thoſe Beings; and conſequently obtain their [7] whole Exiſtence from the Determination of their Authors. The ſame Power aſſigns them ſuch and ſuch Effects, which, when it ſees convenient, it can deſtroy [8], *without cauſing any natural Alteration in the Subject to which they were applied.* Hence their Force and Ability of Operation doth not conſiſt in this, that they can by their internal Efficacy produce any natural Motion or Change in Things, without the Intervention of other Cauſes; but partly in ſhewing Men how they ought to govern their Freedom of Actions, and chiefly in making them capable of receiving Benefit or Injury, and of exerciſing ſeveral Works towards other Perſons, with ſome peculiar Effect [9] And the Efficacy of moral Entities, produc'd by Almighty GOD, flows from this Principle, That he, by his Right of Creation, hath the Power of circumſcribing, within proper Limits, that Liberty of Will with which he indulg'd Mankind, and when it grows refractory, of turning it which Way ſoever he pleaſeth, by the Force of ſome threatned Evil:

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[1] Our Author, without doubt, intends by this Diſtinction to make a Difference between *Modes* properly ſo called, which are not to be ſeparated from their Subſtance, and have no Exiſtence by themſelves; and ſuch, as being real Subſtances of themſelves, can have an independent Exiſtence from the Subject to which we conceive them joined. For the Term *Mode*, preſents to the Mind, at firſt View, the Idea of a Thing directly oppoſite to *Subſtance*, and imports only the Modification, or Manner of Being. It is not the ſame with *Accident*.

[2] For Inſtance, The Figure of a Body, which is really inherent in it; and therefore called an *Internal Mode*.

[3] Theſe are called *exterior Modes*, or *external Denominations*. In effect they depend upon the Operation of the Mind, and are nothing elſe but the Relation conceived between Objects, or Ideas. See *The Art of Thinking*, I. i. c. ii. and Mr. LOCKE's *Human Underſtanding*, l. ii. c. xxviii.

[4] This Word is ſometimes uſed in Latin, to ſignify the Eſtabliſhment of a Man in an Office, as *Conſul creatus eſt*, He was made Conſul.

[5] The *French* renders it *Inſtitution*, which being uſed in *Engliſh* for every Thing that proceeds from mere human Invention and Appointment, in Oppoſition to what proceeds from Nature, may be better uſed here.

[6] We muſt not imagine, that the Exiſtence of moral Entities is always poſterior to the Exiſtence of the Things they are annexed to. This is true, in reſpect of ſuch as are of human Inſtitution only, but not of ſuch as are of divine, becauſe they are appropriated to Man from the Moment of his Creation, of which Sort are all natural Obligations, of which our Author treats, *l.* iii. *c.* iv. §. 5. and the abſolute State of Nature, of which he ſpeaks §. 7. So that there is no Moment, in which a Man may be conceived free from all moral Entities. Nevertheleſs, as moral Entities, which are born with a Man, are not leſs true *Modes* than the other, though they do not proceed from the Subſtance, and phyſical Qualities of the Man, but flow originally from the Determination and Will of the Creator, in ſuch Manner as ſhall be explained in the following Note; yet theſe may be conceived abſtractly, as Properties attached to Man phyſically perfect, by Virtue of Divine Inſtitution. This Hint is taken out of a Work of this Author's, called *A Specimen of the Controverſies with* Pufendorf *about his Right of Nature*, &c. *c.* iii. §. 10.

[7] To obviate all Objections againſt this Expreſſion of our Author, we ought to obſerve, that he makes two Sorts of *Inſtitution*: 1. Purely arbitrary. 2. Another, which has a Foundation in the Thing itſelf, and which is a neceſſary Conſequence of what is before freely reſolved, and can't be oppoſed or contradicted: As for Example, an Architect may or may not build a Palace; but when he has reſolved to do it, he muſt neceſſarily order the Materials in a different Manner than if he were to build a Cottage; and he would paſs for a Fool, if, after he had built a Cottage, he ſhould affirm it to be a Palace: Yet this hinders not, but the ordering of the Materials proceeds from the Contrivance and Will of the Architect. In like Manner it was altogether free for GOD either to create Man, or not; but after he had reſolved to ſend him into the World, it was neceſſary that he ſhould lay ſuch Obligations on him, as became a rational and ſociable Creature; ſo that if the Laws of Nature depend originally on the Divine Inſtitution, they are not a pure arbitrary Conſtitution, as the ceremonial Laws given to the *Jews* were; but an Inſtitution founded upon the very Nature of Man, and the Wiſdom of GOD, who can't will the End, but he muſt at the ſame Time will the neceſſary Means. Nevertheleſs, though the Will of GOD can't be ſeparated from his Goodneſs and Wiſdom, yet we impute the Eſtabliſhment of the Laws of Nature chiefly to the Divine Will, becauſe it is not only the Principle of all Divine Actions, but becauſe GOD's Wiſdom and Goodneſs are Attributes, the Exerciſe of which is ſovereignly free, and ſo can't be conceived without the Will. Theſe Expoſitions are taken from this Author's Works, *viz. Specim. Controverſ.* cap. v. §. 9. *Diſſert. Acad.* p. 743. *Spicil. Controv.* cap. iii. §. 9. It is proper to add, that tho' GOD cannot, without contradicting his own Perfections, and belying himſelf, preſcribe Mankind any Rules, but ſuch as are founded in their own Nature; yet the true and direct Reaſon why Men are *oblig'd* to follow theſe Rules, is the Will of GOD, who in Quality of ſovereign Maſter, has a full Right to limit their natural Liberty as he thinks proper. This I have demonſtrated more at large in the Defence of my Author againſt the deceaſed M. *Leibnitz*, added to the fourth Edition of the Abridgment of *The Duties of a Man and a Citizen*.

[8] See the laſt Paragraph of this Chapter.

[9] That is to ſay, in a Word, and to ſpeak more clearly: By Virtue of moral Entities we have a Right to do ourſelves, or require of others, certain Things; or rather we are obliged to do them, or ſuffer others to do them. See Note *z*. in the next Paragraph.

Men likewiſe were impowered to give a Force to their Inventions of the ſame Kind, by threatning ſome Inconvenience, which their Strength was able to make good againſt thoſe who ſhould not act conformably to them.

V. Since then *moral Entities* were inſtituted for the Regulation of Mens Lives; to which End it is neceſſary, that thoſe who are to obſerve this Rule ſhould bear ſome ſettled Relations to one another, ſhould govern their Actions by a fixed Method; and, laſtly, ſhould act with determinate Reſpects and Titles about ſuch Goods and Poſſeſſions as the Occaſions of Life require; we may hence conceive them to be principally inherent, *firſt*, in *Men*; *ſecondly*, in the *Actions* of Men; and, *thirdly*, after a Sort, likewiſe [1], in *Things*, which Nature, either by her own Strength, or with the Aſſiſtance of human Induſtry, may produce. [2] But though it would be no Abſurdity to ſtate their Diviſion according to theſe three Heads or Subjects, yet it ſeems a more exact Method to make the Claſſes of natural Entities our Patterns in digeſting the moral; not only becauſe the former have more engag'd the Studies of philoſophical Men, and being compar'd with the latter, caſt a conſiderable Share of their own Light and Evidence upon them; but likewiſe becauſe our Underſtandings are ſo immers'd in corporeal Images, as to be hardly capable of apprehending ſuch moral Beings any otherwiſe than by their Analogy to thoſe of Nature.

VI. Now though *moral Entities* do not ſubſiſt of themſelves, and for that Reaſon ought not, in general, to be rank'd under the Claſs of *Subſtances*, but of *Modes*; yet we find many of them to be conceiv'd in the Manner of Subſtances, becauſe other moral Things ſeem to be immediately founded in them, juſt as Quantities and Qualities inhere in the real Subſtance of Bodies. Farther, as natural Subſtances ſuppoſe ſome Kind of *Space*, in which they fix their Exiſtence, and exerciſe their Motions; ſo in Alluſion to theſe, *moral Perſons* are eſpecially ſaid to be in ſome *State*, which in like Manner contains them, and in which they perform their Operations. Hence a *State* may not improperly be defin'd *a moral Entity fram'd and taken up on Account of the Analogy it bears to Space*. And as *Space* ſeems no principal and original Being, but is devis'd, to be, as it were, *ſpread under* other Things, to hold and to ſuſtain them in ſome particular Manner; ſo the ſeveral *States* were not introduc'd for their own Sakes, but to make a Field for [3] *moral Perſons* to exiſt in. Yet there is indeed this Difference between *State* and *Space*, that the latter is a Kind of immoveable Subſtance, extended primarily, and of itſelf, and which might ſtill ſubſiſt, if all the natural Things, which now fill it, were remov'd: But *States* (and all other *moral Beings*, conſider'd *formally* as ſuch) obtain no higher Condition than that of *Modes* or Attributes; ſo that upon taking away the Perſons ſuppos'd to be in ſuch a *State*, the *State* itſelf is in manifeſt Danger of loſing its own Exiſtence.

VII. There are two Sorts of *Spaces*; one according to which Things are ſaid to be *in a Place*, which the Logicians call *Ubi*, as *here*, *there*, &c. and another according to which they are pronounc'd to be *in Time*, which they call *Quando*, as *Yeſterday*, to *Day*, to *Morrow*, &c. In the ſame Manner we may conceive a double Notion of *State*; one which denotes a *moral Ubi*, and bears an Analogy to *Place*; another which includes a Reſpect to Time, ſignifying the Application of ſome moral Effect to Perſons exiſting in ſuch a Time. The former *State*, which hath a Relation to *Place*, may be conſider'd either undeterminately, as it reſults only from [4] moral Qualities; or determinately, as it ſuppoſeth a Dependance on moral Quantities. and on Compariſon. The *State* of Man conſider'd undeterminately, is either *natural* or [5] *adventitious*. We uſe the Word *natural*, not becauſe ſuch a *State* flows from the internal Principles of human Eſſence, antecedent to the Power of Impoſition; but becauſe it was impos'd by GOD himſelf, not by Man, and affects us immediately upon our Nativity. We are wont to conſider the natural State of Man, either *abſolutely*, or *with relation* to other Men: The former Notion, till we can find a more convenient Term, we may expreſs by the Word *Humanity*, importing that Condition in which Man is plac'd by his Creator, who hath been pleas'd to endue him with Excellencies and Advantages in a high Degree above all other animate Beings [a]. Of which State this Principle is a direct Conſequence, That Man ought to be a Creature acknowledging and worſhipping the Divine Author, and admiring his Works; and that 'tis expected he ſhould maintain a Courſe of Life far different from that of Brutes. To this *State* is oppos'd the Life and the Condition of irrational Animals.

Since then the very being a Man is a *State* obliging to certain Duties, and giving a Title to certain Rights, it cannot be out of the Way to conſider the preciſe Point of Time at which particular Perſons may be ſaid to enter on ſuch a *State*: And this we conceive ought to be fix'd on the very firſt Moment when any one may be truly call'd a Man, though he as yet want thoſe Perfections which will follow his Nature in a longer Courſe: That is, whenſoever he begins to enjoy Life and Senſe, though his Mother hath not yet delivered him into the World. Now becauſe the *Obligations* cannot be fulfilled by him, without he underſtand his own Nature and the Ways of working, they for that Reaſon do not actually exert their Force, 'till he is able to ſquare

[a] CICERO Off. i. c. 28. *Nature hath given us a Perſon and Character to ſuſtain, in a Degree of Excellence far above any other Creatures.*

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[1] See what the Author ſays §. 16.

[2] All *moral Entities* may be reduced to two Heads: 1. Right. 2. Obligation. Theſe are the Foundation of all Morality, for we can conceive nothing Moral, either in Actions or Perſons, which does not ſpring from hence, either that we have *a Right* to act in a certain Manner, or obliged to do ſo. This Right and Obligation are *Relatives*, which always reciprocally ſuppoſe each other, as they refer to different Perſons. See *Lib.* iii. *cap.* v. § 1. In fine, as all Right, and every Obligation depends on the Authority of a Superior, who regulates, by Laws, the Actions of all that are ſubject to him, natural Order requires, that we treat, firſt of human Actions, their Principles, and different Kinds; and then of a Law in general; after which the Explication of *moral Entities*, which are founded on Laws, will properly follow.

[3] As for Example, When a Prince, in Favour or Reward of any of his Subjects, eſtabliſhes an Office or Dignity, which he would not elſe have done, and which was no Ways neceſſary, but purely to advance the Honour of him, for whom it was eſtabliſhed: Such are all honorary Employments.

[4] From the 17 to the 23 §. of this Chapter, the Author ſhews what he means by *moral Qualities* and *Quantities*.

[5] *Adventitious*, is a Sort of moral State, which is added by Way of Overplus to the State of Nature, in Conſequence of ſome human Action. I am not ignorant that the Lawyers uſe the Word *Adventitious*, but then it is only when they join it to the Word *Goods*, and that in a particular Senſe, which has no Agreement with the Idea our Author annexes here to the Term itſelf. After all, it is much more eaſy to make ſome ſmall Change in the Idea of a known Word, than to accuſtom ones ſelf to a Term, the Generality of Readers would look upon as barbarous.

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his Actions by ſome Rule, and to diſtinguiſh them by their proper Differences. But the *Rights*, on the contrary, date their Validity from the very Beginning of our Being, in as much as they engage other Perſons, already arrived at the full Uſe of Reaſon, to ſuch and ſuch Performances towards us, and may turn to our Benefit, even whilſt we are incapable of apprehending the Favour. Hence, it being a general Right and Privilege of all Men not to be hurt by others, if the Body of a *Fœtus* in the Womb ſhould ſuffer any unlawful Violence, the Injury is not only done to the Parents, but to the Child; who, we ſuppoſe, may in his own Name demand Juſtice on that ſcore, when he is grown up to a Knowledge of the Action [1]. But before the imperfect Materials [2] have acquired an human *Form* in the Womb, if any one ſhould diſſipate or deſtroy them, he cannot properly be termed injurious with regard to that ſenſeleſs Maſs; though he hath indeed broken the Law of Nature, by intercepting a Member of human Society, and hath done an Injury to the Commonwealth, and to the Parents, by depriving them of their promis'd Citizen and Off-ſpring.

The *Natural State* of Man, conſidered *with Relation to other Men*, is that which affects us upon the bare Account of an univerſal Kindred, reſulting from the Similitude of our Nature, antecedent to any human Act or Covenant, by which one Man is rendered peculiarly obnoxious to the Power of another. According to which Senſe, thoſe Perſons are ſaid to live in a *State of Nature*, who neither obey one common Maſter, nor are at all ſubject one to the other, nor have any Acquaintance by the Means of Benefits, or of Injuries. To which may be added a third Notion of a *natural State*, as it abſtracts from all Inventions and Inſtitutions brought in, either by human Induſtry, or by divine Revelation, for the Grace and the Conveniency of Life.

The *Adventitious State* is that which obligeth Men at, or after their Birth, by the Authority of ſome human Conſtitution; the Diviſions of which will be better ſettled hereafter [3].

But we ought to obſerve, by the Way, that there's no Reaſon why People ſhould imagine a State of Nature, in the Senſe but now delivered, to be a Thing that never was, or can be in the World; becauſe there was never any Set of Men joined together barely by that Similitude of Nature, as it abſtracts from Conſanguinity; *Eve* being knit to *Adam* in the conjugal Tie, and all their numerous Deſcendents being cloſely united and ally'd by the Communion of Blood and Affinity of Race. For we muſt know, that the Bond ariſing from Nearneſs of Birth, doth by Degrees wear out amongſt Perſons remov'd at a great Diſtance from the common Stock; nor is eſteem'd of any farther Force, when once got beyond the Reach of thoſe ſeveral Appellations and [4] Terms which Mankind have invented to expreſs it by. And therefore ſuch a *State*, though it did not appear at the Commencement of human Race, aroſe afterwards in a longer Tract of Time, when the Memory of the univerſal Root, and the Senſe of the Relation ſpringing from it, were ſunk out of the Thoughts and Minds of Men.

VIII. But although every State ſuppoſeth, in the Perſon whom it affects, a Reſpect and Diſpoſition towards others, in as much as it is attended with ſome Right, or ſome Obligation, neither of which we can conceive without an Object to employ their Force upon; yet ſome Kinds of States do more expreſly include and denote a Relation towards other Men, whilſt they ſignify the Manner and Proceſs by which the mutual Buſineſs of Mortals is on both Sides manag'd and tranſacted. Of this Sort the moſt ſignal and material are *Peace* and *War*, which two *States*, [5] *Libanius* ſays, comprehend all the Affairs,

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[1] Another Example may be; If a Thing be given to an Infant, before he comes into the World, by Will, or by any other Title, tho' in the firſt Days of his Conception, the Infant has a certain Right to it; ſo that if it be taken from him, he may legally ſue for it, when he comes to an Age of Diſcretion: For it is ſufficient, that he declares, that his Goods were taken away without his Conſent. This Compariſon will clear the Matter. When any Perſon, in our Abſence, robs us, or does us any Manner of Damage, he does us a real Injury, though we may not know it till a long Time after. We have taken this out of our Author's Work, call'd *The Elements of the Civil Law*, p. 11, 12. He might have added the Words of an ancient *Roman* Lawyer, *A Perſon may ſuffer an Injury tho' he be not ſenſible of it*; but no Body can be preſum'd to do an Injury, but he who knows he does it, even tho' he is ignorant to whom it is done. *Itaque* PATI QUIS INJURIAM, ETIAMSI NON SENTIAT, *poteſt: facere nemo niſi qui ſcit ſe injuriare facere, etiamſi neſciat cui faciat.* DIGEST. Lib. xlvii. *Tit. x. De Injuriis*, &c. *Leg.* iii. §. 2. We may add, that by the *Roman* Law, an Infant in the Mother's Womb is ſuppoſed to become into the World at all Times, when any Thing may be done for its Advantage, as the Words of the *Digeſt. Lib.* i. *Tit.* iii. *De Statu hominum*, *Leg.* vii. import. *Qui in utero eſt, perinde ac ſi in rebus humanis eſſet, cuſtoditur, quotiens de commodo ipſius partûs quæritur.* See *Leg.* xxvi. of the ſame Title. Yet the *Roman* Lawyers are not well agreed upon this Point; for ſome of them hold, that the *Fœtus* is a Part of the Mother, or of her Entrails, and that it can't be called a Man, till it is born. *Partus enim, antequàm edatur, mulieris portio eſt, vel viſcerum. Digeſt. Lib.* xxv. *Tit.* iv. *Leg.* i. §. 1. *Partus nondum editus, homo non recte fuiſſe dicitur.* Lib. xxxv. Tit. ii. Ad Legem Falcid. Leg. ix. §. 1. They borrow'd this Notion of the *Stoicks*, who in this agreed with divers others of the ancient Philoſophers. See *Julius Paulus*, written by Mr. *Noodt.* c. ii. and xi. As alſo *Merillius, Obſerv.* Lib. i. Cap. xvi. But by favour of a Fiction, a common Expedient with them, they reconcil'd this with natural Equity, from which the *Roman* Law differ'd very widely on this Head. For according to the ancient Rules, a Child yet in his Mother's Womb *(poſthumus)* could not be inſtituted Heir to any Thing, becauſe it was an uncertain Perſon. See the Interpreters on the *Inſtitutes.* Lib. ii. Tit. xx. *De Legatis*, Sect. 25. *& ſeqq.* and on the Fragments of *Ulpian*, *Tit.* xxii. §. 15. *& ſeqq.*

[2] The Explication, which *Philo* the *Jew* gives upon *Exod.* xxi. 22. is ſo very pertinent here, that 'tis a wonder our Author did not apply it. The Text is, "If Men, in ſtriving together, hurt a Woman great with Child, ſo that ſhe miſcarry, tho' no other "Miſchief follow, they ſhall pay the Huſband of that Woman ſuch a Fine, or Mulct, as he ſhall lay on them, and give it before "the Judges; but if Death follow, ye ſhall give Life for Life." Theſe Words may be underſtood of the Death of the Mother only, as *Joſephus* thinks, or of both the Mother and Child, as *Philo* ſuppoſes, according to the Opinion of this Author. Ἐὰν μὲν ἄπλασ-τον, &c. If the *Fœtus* be not formed, he that ſtrikes the Mother, ought to make Satisfaction, as well for the Harm done her, as becauſe he hath hindred Nature from perfecting her Work, and giving Life to ſo noble a Creature as Man; but if the *Fœtus* be already formed, every Member being in its natural Place, and having its proper Qualities, the Perſon ought to be put to Death. *Philo De Leg. ſpecial.* See *Selden De Jure Nat. & Gent. ſecundum Hebr.* l. iv. c. i. Further, if before the *Fœtus* be compleatly formed, a Man by hurting the Woman on Purpoſe, cauſes a bodily Deformity, or other Infirmity, in the Child; he may, when he is grown up, proſecute the Author of ſuch a Damage, and ſhall obtain Satisfaction according to his Damage, as our Author ſpeaks in a Place cited hereafter, where he treats alſo of another Queſtion, which deſerves our Notice, *lib.* iv. *c.* xii. §. 10.

[3] Yet our Author does no where do it formally, but he treats, in their proper Place, of the four principal *adventitious States*, to which all the reſt may be reduced, *viz.* Marriage, the Relation of Parents and Children, Maſter and Servant, and that of Citizen, or Member of a Society. To this we may add the Diviſions of moral Perſons, which our Author lays down in the ſame Chapter, §. 12, *&c.*

[4] *Viz.* When we have paſſed the Degrees of Father, Mother, Grandfather, Grandmother, Brother, Siſter, Uncle, Aunt, Nephew, Niece, Couſins, he and ſhe, and ſome others depending on them; for as we have no other Names proper for ſuch Deſcendents, ſo the Line of Kindred produces no ſuch ſtrong Ties between them, who are in ſuch diſtant Degrees of Relation.

[5] *Progymnaſm.* p. v. c. Edit. *Pariſ. Morel. Ariſtotle*, as Mr. *Hertius* obſerves, had before ſpoken to the ſame Effect. Διῃρῆσθαι δὲ πᾶς ὁ βίος, &c. The whole Life of Man is divided into Labour and Idleneſs, War and Peace. *Polit.* l. vii. c. xiv. Edit. *Pariſ.* 1629.

and all the Conduct of Life. *Peace is that State by which Men live quietly together, without the Disturbance of Violence or Injuries, and voluntarily discharge their mutual Duties, as Matters of necessary Obligation. War*, on the other hand, *is a State of Men mutually engag'd in offering and repelling Injuries, or endeavouring forcibly to recover their Dues. Peace* may be divided into *common* and *particular*; the former, such as is maintain'd amongst Men by Duties flowing purely from the Law of Nature; [1] the latter, such as derives its Force from express Covenants and Leagues, binding both Sides to agreeable Performances: This again is branched into *internal* and *external*, the one [2] between Members of the same Commonwealth, the other regarding Persons of different Countries and Governments, whether as common Friends, or as special Confederates and Allies. A common or universal War engaging all Mankind at the same Time, is an impossible Supposition; this being a direct Consequence of the State of Beasts. *Particular* War is either *internal* and *civil*, or *external*; *that*, between Members of the same [3]; *this*, between those of different Communities. When the *Acts* of War are suspended, though the *State* still continue, such a Cessation is call'd a *Truce* [a].

IX. *States* are said to be consider'd *determinately*, when we measure them according to the high or low Degree of Esteem which attends them; or accounting as they are reckon'd more or less honourable. [4] For since peculiar *Rights* and Obligations accompany each *State*, every one obtains a larger Share of Splendor and Credit, either as its *Rights* are more numerous and [5] more forcible; or as its *Obligations* are directed towards the Performance of such Works as require a singular Ability of Parts and Wit. On the other hand, those which demand only dull Pains and Labour of Body, are in very little Value and Repute.

X. The latter Sort of *State*, which, in our general Division, we settled with relation to Time, in conjunction with some moral Effect, may be divided, *first*, into *Seniority* and *Juniority*; both which are consider'd, either with respect to the Duration of human Existence, and are then call'd *Age*; the Degrees of which are *Infancy*, *Childhood*, *Puberty*, *Youth*, *Manhood*, *fix'd Age*, *declining*, *old*, and *decrepit Age*: or, with regard to some adventitious State, [6] according as a Man hath continued a longer or a shorter Time in it. *Secondly*, into *Plen-age* [7], when one is presum'd able by his own Strength and Discretion to manage his Affairs; and *Non-age*, when a Person hath Need of a *Tutor*, or *Guardian*, because he is suppos'd, upon the Account of Weakness of Judgment, incapable of dexterously prosecuting his own Business. The Limits of this *State* are different, according to the various Constitutions and Customs of Nations.

Different from *Non-age* is what we may call *an Age capable of* [8] *meditated Guile*; the Bounds of which it is likewise impossible to assign, *Ælian* in his *Various History* relates a very remarkable Way of discovering such an early Deceit. A Boy, having taken up a golden Plate [b] dropt out of *Diana*'s Crown, was indicted in Court: The Judges order'd a Pack of trifling Play-things to be laid upon the Board, and amongst these a Plate of Gold, and bid the Boy choose which he lik'd best; who again laying Hands on the Gold, was condemn'd as Guilty of the former Sacrilege.

XI. Before we proceed to other Matters, it seems necessary for us to observe, that through Scarcity of Words we are frequently compell'd to express by the same Term, the State itself, and the *Attribute* proper to such a *State*; though they are really distinct, and form different Conceptions in our Minds [c]. Thus, to give an Instance, *Liberty* is us'd as well for a *State* with Analogy to *Space*, as for a *Faculty of working*, with Resemblance to an *active Quality* [9]. And so *Nobility* sometimes expresseth a *State*, sometimes an Attribute, or Affection of the Person in such a *State*, in the Manner of a *passive Quality*. So likewise the Word *Truce* denotes both the *State* of Peace, and the Manner of settling it.

Nor must we forget to hint, that as one Person may be at the same Time engag'd in several *States*, provided that the Obligations of those *States* do not interfere with one another; so the Obligations adhering to one particular *State*, may, according to different Parts, be deriv'd from different Principles. And therefore he that only collects the Obligations flowing from a single Principle, and omits the rest, doth not presently form a distinct *State* incapable of other Obligations besides those which he hath taken notice of. Thus he that gathers several Parts of the Office of Priests purely from the Holy Scriptures, doth not in the least deny, but that they are likewise bound to such Performances as the Constitutions of particular Governments shall farther enjoin. So we

[a] Vide *Grot. de Jur. B. & P.* l. iii. c. xxi. [b] Lib. v. Cap. xvi.

[c] *Senec.* de Benef. l. ii. c. xxxiv. *There is a vast Multitude of Things, which have no peculiar Words fix'd upon them; and these we express not by proper, but by foreign and borrow'd Names.*

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[1] *See Book* viii. *Chap.* ix. *Sect.* 2, 3, &c.

[2] *Viz.* So far as they execute the fundamental Agreement punctually, for the sake of which the Society was established, and do not oppose, by Force, the lawful Power which is exercised over them; and so that Peace is not disturbed, by any Sort of Violence, but only that which we are engaged not to use, when we entred into a Society. As for Example, The internal Peace of a State suffers no Interruption, when the Magistrate uses the Power entrusted to him to curb and punish the Breakers of the Laws. But when the Subjects will, by Force, deliver a Criminal from Punishment, and endeavour to oppose the Magistrate in the Exercise of his legal Authority, this is called a *Civil War*. *Element. Jurisprud. Univers.* p. 17. The War also which breaks out among Confederates, united together by a perpetual Alliance, may also be looked upon as an inteſtine War, as Mr. *Hertius* here observes.

[3] When this Sort of War is extinguished at its first Rise, *viz.* without any regular Preparations on either Side, it is a *Sedition*; when Subjects take up Arms unjustly against their Sovereign, it is a *Rebellion*. In *Democracies* and *Aristocracies*, when the People and the Magistrates make two opposite Parties, and use Acts of Hostility one against the other, this is properly call'd a *Civil War*. *Element Jurisprud. Univers.* p. 18. In a monarchical State Civil War takes place, when the State is divided into two Parties nearly equal, and which cannot give each other the Appellation of Rebels. As when there are two Pretenders to the Throne, and the Succession is disputed.

[4] See Mr. Domat's *Publick Right. Lib.* i. *Tit.* ix. *Sect.* 1. and what our Author says, *l.* viii. *c.* iv.

[5] *More forcible.*] The *French* Translator renders the Words, *validiora jura*, more considerable, *i. e.* of greater Validity and Certainty; for the Honour of an Employ does not depend upon the Manner of obtaining it, but upon the Dignity and Privileges which it confers on such as are invested with it. And so this seems the better Translation.

[6] And so we say for Example, an Old General, an Old Soldier, a Young Apprentice, *&c.*

[7] See *Lib.* iii. *Ch.* vi. §. 4. and *Lib.* iv. *Ch.* iv. §. 15.

[8] The *Roman* Law declares such as are at an Age of Maturity, or not far from it, capable of Deceit. *Igitur doli non capaces, ut admodum impuberes——excusati sunt. Digest. Lib.* xlvii. *Tit.* xii. *De Sepulchro violato, Leg.* iii. §. 1. See Cujas's Observations, *Lib.* vi. *Ch.* xxii. *& Digest. Lib.* xlvii. *Tit.* viii. *De vi bonorum raptorum, Leg.* ii. §. 19. And *Jaques Godefroy* on the Law cxi. *de Titulo regulus Juris.*

[9] The Author will explain a little lower, *viz.* §. 19. what he means by Qualities *active* and *passive*.

that profeſs in this Work to treat only of thoſe Duties of Men, which [1] the Light of Reaſon ſhews to be neceſſary, do not at all pretend that there ever was, or now is, or ought to be, ſuch a *State* in which thoſe *Obligations* only ſhould prevail, excluſive of all others. Nay, it would be almoſt a needleſs Diſquiſition to ſearch, whether ſuch a State of Men was once ſo much as likely to have been in the World. For the Aſſertion, which ſome ſo confidently lay down, could never yet be clearly made out; That *if Man had continued in his primitive Holineſs, the Law of Nature alone, as it govern'd him at firſt, ſo ſhould have continu'd its Sway, except that one or two* [2] *poſitive Commands might probably have been added to it.* We may juſtly queſtion, whether Mankind, although untainted with Sin, ſhould have always paſs'd their Time in the Compaſs of a ſingle Garden, ſuſtaining themſelves with the Fruits of ſpontaneous Growth, and not have cultivated and adorn'd their Ways of living, by induſtrious Management, and by Variety of Arts and Inventions. For what Prejudice could it have been to their original Innocence and Integrity, if, upon the Multiplication of human Race, they had divided into ſeparate Societies in the Forms of Commonwealths? And what Notion can we frame of ſuch Societies, without the Addition of *poſitive* Laws and Conſtitutions?

XII. *Moral Entities*, fram'd with Analogy to Subſtances, are call'd *moral Perſons* [a]; which are either particular Men, or ſeveral join'd in one Body by ſome moral Tie, conſider'd with the State and Office which they maintain in common Life. *Moral Perſons* are either *Simple*, or *Compound*. The *Simple*, according to the Difference of their Poſts and Employments, are either *Publick*, or *Private*; as their Duty is immediately apply'd, either to the Benefit of civil Society, or to the particular Advantage of [3] every private Member. *Publick Perſons*, by the general Cuſtom of the Chriſtian World, are divided into *Civil* and *Eccleſiaſtical*. The former [4] are either *Principal*, or *Inferior*. Of *principal* Perſons, ſome adminiſter Affairs with a *ſupreme Power*; others either execute ſome Part of the Adminiſtration by Commiſſion from the ſupreme Power, who are properly call'd *Magiſtrates*, or elſe aſſiſt with their Advice and Counſel in the Management of the Commonwealth. The *Inferior* perform a leſs noble Service to the Community, and act under the *Magiſtrates*, with reſpect to their publick Capacity. In War the Officers, whether of higher or lower Commiſſions, anſwer to Magiſtrates, and are aſſiſted, in Subordination, by the common Soldiers. We reckon Men of that Profeſſion amongſt publick Perſons, in as much as they are authoriz'd by the ſupreme Power, either immediately or mediately, to bear Arms in the Service of the Commonwealth.

There is likewiſe a peculiar Species of *politick Perſons*, which we may ſtile *Repreſentatives*, becauſe they ſuſtain the Character of other Perſons: Such as, being inveſted with the Power and Authority of acting by another, do in his room tranſact Buſineſs with the ſame Force and Validity, as if he himſelf had manag'd it. Of this Kind are *Legates*, *Vicars*, *Burgeſſes*, &c.

A new Diſtinction hath been brought in of late, between Miniſters [5] of a repreſentative Character, who are *Embaſſadors* properly ſo call'd; and Miniſters of the ſecond Order, as *Envoys* or *Reſidents*, who do not, like the former, expreſs the full Power and Grandeur of their Maſters [6].

With Reſemblance to theſe publick Repreſentatives, Tutors and Guardians are concern'd for private Perſons, as they manage Affairs in behalf of Pupils or Minors given them in Charge.

On this Point Mr. *Hobbs* [b] is miſtaken, when he will have it frequently to happen in Communities, *that a Man ſhall bear the Perſon of an inanimate Thing, which therefore is itſelf not properly a Perſon; as ſuppoſe of a Church, an Hoſpital, a Bridge*, &c. For there appears no Neceſſity of introducing a *Fiction of Law*, to conſtitute Perſons by whom any of theſe ſhould be repreſented. It being more natural to ſay in plain Terms, that particular Men are impower'd by the Community, to collect the Revenue, ſettled for the preſerving of ſuch Places, or Things,

[a] *The* Roman *Lawyers ordinarily reſtrain the Word* Perſon *to thoſe that are Free: And rank their Slaves amongſt the Goods they poſſeſſed.* [b] *Leviath.* cap. 16.

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[1] In oppoſition to Revelation, and particular Rules of the Civil Laws of every Country, from whence ariſe three diſtinct Sciences, *viz.* The *Law of Nature*, which is common to all Men, without Exception; *Civil Law*, which is, or may be, different, according to the Intereſt of every State; and *Moral Theology*. See the Author's Abridgment of the Duties of a Man and Citizen. *Præf.* §. 2. of my Tranſlation printed for the fourth Time in 1718.

[2] I did not know whoſe Words theſe are, which our Author cenſures; and Mr. *Hertius*, who had greater Opportunity than I to know it, was probably as ignorant who the Author was, ſince he does not point him out. But I have ſince met with the Paſſage itſelf in *Boecler*'s Preface to *Grotius*, p. 31. As to the Queſtion, 'tis one of the moſt impertinent; for our Author elſewhere acknowledges, that it is very hard to imagine, how a Propriety of Goods and Government, on which our whole Lives now are ſpent, could have Place in our State of Integrity. See his *Spicil. Jur. Nat. c.* 2. §. 9. and his *Comment. ſuper. inven. Vener. Lipſ. pullo. p.* 386. Nevertheleſs ſome others have treated ſeriouſly upon this frivolous Queſtion; as Mr. *Thomaſius Inſt. Juriſpr. Divin. Lib.* i. *c.* 2. §. 37, 38. and Mr. *Hertius* in his *Elem. prud. Civil. l.* i. *Sect.* 3. §. 5.

[3] There is another Reaſon, why they are call'd ſo, and that is, that they are ſettled in publick Employs, by the Authority of a civil Society, or of them that govern it. Whereas private Employments depend upon the Will and Choice of every Man, unleſs the State will interpoſe and confer them.

[4] Why does he not define what is meant by Perſons *political*, or *civil?* They are ſuch, as (for ſo our Author himſelf ſpeaks, *Elem. Juriſprud. Univerſ. p.* 23.) adminiſter, by publick Authority, thoſe Affairs which have a particular regard to civil Society, conſider'd as ſuch; whereas Eccleſiaſticks are to take care of Matters of Religion only. Theſe laſt, though they ought to be ſubject to their Sovereigns in temporal and civil Matters at all Times, yet may, and ought, alſo, to be independent, as to Spirituals, provided they are reduced to their juſt Bounds, ſo as not to diſturb the eſtabliſh'd Religion: And the Reaſon of it is, that as Religion is a Thing, in its own Nature, free, ſo it has no Concern, at leaſt directly, with civil Society, wherefore every eccleſiaſtical Society may do what it judges for the Intereſt of Religion, provided it encroaches not upon any Prerogative of the Civil Power. See what ſhall be ſaid hereafter, *Lib.* vii. *ch.* 4. §. 11. *Note* 2. Nevertheleſs, I do not aſſert any Thing here, which may be a Foundation for any Principles contrary to the *Engliſh* Author, *Of the Rights of the Chriſtian Church*.

[5] The Author here quotes the Work of Mr. *Wicquefort*, entituled, *The Embaſſador, and his Office*, printed in 1677 without a Name, and under a different Title, *viz. Memoirs concerning Embaſſadors*; but lately publiſhed, with many Additions, as above.

[6] This is a viſible Miſtake in our Author, who has aſſerted the contrary of what he thought, and I am ſurpris'd that Mr. *Hertius*, who review'd, and corrected, the Text of the Original, in a great Number of Places, ſhould let ſlip ſo groſs an Overſight, in the laſt *Francfort* Edition of 1706. This Profeſſor is otherwiſe in the right to reject the Sentiments of ſuch Men (as *Charles Paſcal*, *Richard Zouchæus*, &c.) who affirm that Embaſſadors, properly ſo called, are as their Maſter himſelf, who ſends them; inſomuch, that the Prince or State, to whom they are ſent, ought to give them the ſame Honour they would to their Maſter. The Character of an Embaſſador certainly gives neither the Dignity nor Title of a Sovereign, and ſuch a Miniſter muſt not pretend, becauſe his Maſter has a Superiority above another Prince, that he muſt perſonally be preferred before him. See what our Author ſays, *Lib.* viii. *ch.* 4. §. 20.

and

and to carry on and ſuſtain any *Suits* that ſhall ariſe on thoſe Accounts.

The Variety and Diviſion of *eccleſiaſtical Perſons* is obvious to every Man, according to the particular Religion in which he hath been bred up. Nor can any Man of Letters be at a Loſs to apprehend what Kinds of *Perſons* are founded in the Management of Schools.

Private Perſons are of a vaſt Latitude and Extent; yet their principal Differences may be taken, *firſt*, from their Buſineſs, Craft, or Trade, which imploys their Pains, and exhibits their Livelihood: And theſe are, either creditable and genteel, or ſuch as ſeem to carry in them more Baſeneſs, or Drudgery. *Secondly*, from the Condition, or, as we may ſay, the *moral Situation* which any one obtains in a Community; in which reſpect one is a Citizen, with more or fewer Privileges; another a Sojourner, and a third a Stranger. *Thirdly*, from the Place in a Family, upon which Account one is ſaid to be a Houſholder, which may comprehend the Perſon of a Huſband, a Father, and a Maſter; another is call'd a Wife, another a Son, another a Servant: Theſe may paſs for the ordinary Members of a Family; the extraordinary are Gueſts and Lodgers. *Fourthly*, upon Account of Race and Birth; whence ariſe *Nobles* (divided into different Degrees in different Countries) and *Plebeians*. *Fifthly*, from Sex and Age, whence come the Differences of Man and Woman, and the Diſtinctions founded in Childhood, Youth, Manhood, and Old-Age [1]. For though the Diverſity of Sex, and Number of Years, are not of external Impoſition, yet in the Method of a ſocial Life, they involve ſome Kind of moral Notion; in as much as different Actions are becoming in different Sexes, and Perſons of various [2] Ages require a various Treatment and Application.

XIII. *A Compound moral Perſon* is then conſtituted, when ſeveral individual Men are ſo united together, that what they *will* or *act* by Virtue of that Union, is eſteem'd a ſingle Will, and a ſingle Act, and no more. And this is ſuppoſed to be done, when the particular Members ſubmit their Wills to the Will of one Man, or of one Council, in ſuch a Manner as to acknowledge, and to deſire others to acknowledge, for the common Act and Determination of them all, whatever that Man, or that Council ſhall decree or perform, in Matters which properly concern ſuch an Union, and are agreeable to the End and the Intention of it. Hence it comes to paſs, that whereas in other Caſes, when many Men *will* or *act* any Thing, we conceive ſo many diſtinct Wills and Acts as there are in Number *natural Perſons*, or *human Individuals*; yet when they cloſe, and form a *compound Perſon*, they are ſuppoſed to have but a ſingle Will, and every Action which they perform is conſtrued as one only, although a Number of natural Individuals concurs in its Production. And hence ſuch a *compound Perſon* doth and ought to obtain ſome particular Goods and Rights, which none of the Members, in their private and ſeparate Quality, can claim or arrogate to themſelves [3].

Here alſo we muſt remark, that as natural Bodies continue *the ſame*, although in length of Time, by ſlow and ſilent Degrees they receive a conſiderable Alteration from the various Acceſſions and Deſertions of their Particles; ſo by the particular Succeſſion of Individuals, the Identity of the *compound Perſon* is not injur'd; unleſs at one and the ſame Time ſuch a Change ſhould arrive, as would entirely take away the Nature and Conſtitution of that united Body. On which Point we ſhall be more large in [4] another Part of our Work.

Compound moral Perſons, or Societies, may, after the Manner of *ſingle Perſons*, be divided into *Publick* and *Private*. And the former again are ſubdivided into *Sacred* and *Civil*. Of the *Sacred*, ſome we may call *general*, as is the *Catholick* Church, and likewiſe any particular Church, whether comprehended within the Bounds of ſuch a Nation, or diſtinguiſhed from others by publick Forms of Confeſſion. Others *Peculiar*, as are Councils, Synods, Conſiſtories, Preſbyteries, *&c.* *Civil* Societies are alſo either *general*, as a *Commonwealth*, of which there are many Species, as ſimple, compound, regular, and irregular; or *particular*, as a Senate, an Order of Knights, a Tribe, a Parliament, *&c.* Armies may be called *military Societies*, and conſiſt of [5] Regiments, Troops, Cohorts, Companies, *&c.*

Amongſt *private Societies* we do not only reckon *Families*, but all the [6] Colleges, or Corporations in a Kingdom, or a City, as thoſe of the Merchants, of the Artificers, and the like. To make a minute Catalogue of every Species we think unneceſſary to our preſent Deſign.

XIV. Concerning the Nature of *ſimple moral Perſons*, we have this farther to obſerve; that as one and the ſame Man may be in ſeveral *States* together, [7] provided they do not claſh with each other, ſo he may ſuſtain ſeveral *Perſons* together, upon Suppoſition that the Duties attending thoſe *Perſons* may be perform'd together by him. For, though upon a natural Account one cannot be both a Huſband and a Wife, both a Son and a Daughter; nor in a moral Conſideration, at the ſame Time, a Maſter and a Servant, a Judge and a Priſoner, a Party and Witneſs; yet nothing hinders why the ſame Man may not be (for Example) at Home a Houſholder, a Senator in Parliament, an Advocate in the Halls of Juſtice, and a Counſellor at Court. In as much as thoſe particular Offices do not require and engage the whole Man; but may, at different Times, be all conveniently adminiſtred [a]. And upon this Principle the wiſer Heathens undertook to defend

[a] CICERO Off. *Lib.* i. *Ch.* xxx. *We muſt underſtand, that we are by Nature inveſted, as it were, with two* Perſons, *or Capacities; one common to Mankind, on Account of our being Partakers of Reaſon, and of that Excellence by which we ſurpaſs the Beaſts; the other proper to particular Men. A third is caſt upon us by Time or Chance: A fourth we undertake and accommodate to ourſelves by our own Judgment.*
Idem de Oratore, *Lib.* ii. *Ch.* xxiv. *I ſuſtain three* Perſons *at the ſame Time; mine own, the Adverſary's, and the Judge's.*

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[1] In the Civil Law ſome other Diſtinctions ariſe among Perſons from their Age and Sex. See Mr. DOMAT's *Civil Laws in their natural Order*, *Lib.* i. *Tit.* II. *Sect.* I. *of the Preliminaries; and the Interpreters upon the Digeſt. Lib.* i. *Tit.* V. *De ſtatu Hominum.*

[2] *Ages* is not in the Original, but the Manner of Reaſoning, and Beginning of the Sentence, require the Addition of it, as our Author himſelf does in his *Elements Juriſpr. Univerſ. p.* 28. from whence all this is abridg'd.

[3] As for Example, No private Perſon hath a Right to puniſh Criminals, although the Right to do it proceeds originally from private Perſons; the Sovereign only has that Power.

[4] See *Lib.* viii. *Ch.* XII.

[5] Our Author expreſſes theſe Parts of an Army according to the Manner of the *Romans*, as *Legio*, *Turma*, *Cohors*, *Manipulus*, &c. to which we have no Terms that will exactly anſwer, and therefore we are forc'd to tranſlate them thus. See the Treatiſes of *Juſtus Lipſius* upon this Matter.

[6] *Collegia* is a Name given to the Aſſemblies of ſome particular Society of Men, of one Trade, or Calling, in a City, or Corporation, and ſuch were the *Collegia*, or *Societies of Coachmen*, *Augurs*, *Æſculapius*, or *Health*, *Dendrophori*, or *Timber-Merchants*, &c. as we have at *London*, Companies, or *Collegia of Mercers*, *Drapers*, &c. Vide *Mr.* DOMAT, *Of publick Right*, *Lib.* i. *Tit.* XV.

[7] Mr. *Hertius* has treated at large of this, and illuſtrated it by a great Number of Examples, in his Diſſertation, *De uno homine plures ſuſtinente perſonas*, which makes up a Part of the third *Tome* of his *Commentaries*, and ſmall Tracts. Printed at *Frankfort* on the *Mein*, *A. D.* 1700.

Polytheiſm [a], which they knew well enough was contrary to Reaſon: For, their Excuſe was, they only conceived ſuch a Number of Perſons in the ſame ſupreme Being, as might anſwer the Variety of Operations which proceeded from his Eſſence and Nature [b] [1].

It's very plain from the Name and the Notion of *Impoſition*, that when a Man enters on the Capacity of a new *Perſon*, there is no natural Change produc'd in him, no Generation of new natural Qualities, no Augmentation of old ones; but whatever accrues to him from this Relation, is comprehended within the Sphere of *moral* Things. So when a Man is declar'd Conſul, he is made ne'er the wiſer, nor when he lays down his Office, doth he lay down any of his Parts with it. Though ſome have obſerv'd, that the Splendor of Men's Dignity hath frequently a ſtrong Influence on their Actions, and that many Men have made very differerent Figures in a publick, and in a private Station [2]. But we may reckon theſe Fancies amongſt the common Deceptions of Sight, occaſion'd by gaudy Pomp and Shew. The Caſe being much the ſame, as when Country People imagine the Name and Title of *Doctor* to have ſome Share in the Force and the Succeſs of a Preſcription [c]. Except indeed, that ſome kinds of Parts and Diſpoſitions are rouz'd and enliven'd by Buſineſs; and on the contrary, lie dormant in a State of Eaſe [d]. Yet there is no Queſtion to be made, but that when God Almighty impoſeth a peculiar Charge and *Perſon* on any Man, he can, and often doth, indue him with extraordinary Qualities, beyond the Meaſure of moral Acquirements; as is evident from the holy Scriptures [e].

From what hath been offer'd on this Subject it appears, that the *Jews* heretofore attributed too large Effects to their *Regeneration*, by which the new *Perſon* of a *Proſelyte of Juſtice* was impos'd on a Gentile; as, when they affirm'd, that there was no Force remaining in his former Kindred; that he ought not to eſteem, or uſe as Relations, his Brethren, Siſters, or Parents; nor his Children begotten in his firſt Condition [f]. The Cauſe of this Error was their abſurd Belief, that a new Soul was infus'd into the *Proſelyte*.

XV. It may not be amiſs, in the laſt Place, to obſerve, that Men ſometimes frame a kind of Shadows, or Images of *moral Perſons*, for the repreſenting of them in Sport and Jeſt. Whence it came to paſs, that the Term of *Perſon* hath been peculiarly challeng'd by the Stage. The Eſſence of a *feigned Perſon* conſiſts in this, that the Habit, Geſture, and Speech of another *real Perſon* be nauſomely expreſs'd: Thus the whole Procedure bears only a Countenance of Mirth, and whatever ſuch a fictitious Actor ſays or does, leaves no *moral Effect* behind it, and is valu'd only according to the Dexterity and Artifice of the Performance: For which Reaſon we may, by the way, juſtly wonder, why *Peter* [3], Biſhop of *Alexandria*, approv'd of the *Baptiſm* which *Athanaſius*, when a little Boy, had adminiſtred to one of his Play-fellows [g].

But the *Impoſition* which produceth true *moral Perſons*, is allow'd no ſuch Liberty; but ought always to preſuppoſe ſuch Qualities, as may contribute to the ſolid Uſe, and real Benefit of human Life: And he that in conſtituting Perſons hath not a Regard to theſe Endowments, is to be eſteem'd an extravagant Buffoon, and a vain Inſulter over Mankind [4]. Thus *Caligula* might have made a *Conſul* of the moſt wicked, or of the moſt ſenſeleſs Wretch in *Rome*, provided the Man had been a free Citizen, and could at leaſt have perform'd the common and formal Part of that Office: But to deſign his Horſe *Incitatus* the ſame Honour, was a Pitch of Madneſs, and of inſipid Raillery: nor a leſs Impudence, than when he ſet him up for a Maſter of a Family, and gave him a Houſe and Furniture; where there was good Entertainment provided for Gueſts invited in the Name of the Beaſt [h]. An equal Madneſs was it, as well as a horrid Impiety, that many of the Ancients, to flatter their Princes, their Founders of States, and other Worthies, rank'd them, after their Death, in the Number of the Gods [i]. And what to think of the Canonization amongſt the modern Papiſts, no Man of Senſe is at a Loſs.

XVI. As to *Things* conſider'd as they are the Objects of Law [k], there ſeems to be no Occaſion of ranking them under the Head of *moral Entities*. For, though *Men* are conceiv'd as different *Perſons*, upon Account of their different State or Office, yet *Things* do not raiſe ſuch diſtinct Notions in us, with reference to their Owners, whether ourſelves or others, or whether the *Propriety* be yet uncertain. When at firſt ſome Things fell under particular Right and Dominion, and others were left exempt, we muſt not fancy, that they themſelves acquir'd any new Qualities; it ſeems rather, that upon introducing this Propriety of Things, a moral Quality aroſe amongſt Men, of which the *Men* were the *Subjects*, and the *Things* only the *Terms*: For, as during the primitive Communion of Goods, any Man had a *Right* of applying to his proper Uſe,

[a] SENEC. de Benef. *Lib.* iv. *Ch.* vii. *There may be ſo many Appellations of* GOD, *as there are Employments.*

[b] MAXIM. TYRIUS. Diſſert. xxiii. *The Gods are one in Nature, though many in Name. But we, ſuch is our Ignorance, aſſign them different Titles, according to the different Helps and Favours which they afford Mankind.*

[c] ——————*Purpura vendit*
Cauſſidicum, vendunt amethyſtina; convenit illis,
Et ſtrepitu & facie majoris vivere cenſus. Juv. Sat. vii. ℣. 135, &c.

[d] *Vide Corn. Nep. Alcibiad. Ch.* 1.

[e] *Vide Exod.* iii, iv. *Deut.* xxxiv. 9. 1 *Sam.* x. 6, 9. *Matt.* x. 1, 19, 20.

[f] *Vide Selden de J. N. & G. Lib.* ii. *Ch.* iv.

[g] Sozom. *Lib.* ii. *Ch.* xvii. *Add the Argument of the Biſhop of* Minorca *in the Council of* Trent, *by Father* Paul, B. ii. *concerning the Intention of the Miniſter in the Celebration of the Sacrament.* [h] *Sueton. Calig. Ch.* lv. [i] *See* Tiberius's *Speech in* Tacitus, An. iv. *Ch.* xxxvii, xxxviii. [k] *The different Diſtinctions of Things with Reference to Law, will be explain'd in the 4th and 5th Books.*

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[1] See Mr. LE CLERC's *Bibliotheque Choiſie*; i. e. *Choice Library*, Tom. iii. Art. i.

[2] The Author might have cited here, what *Xenophon* puts in the Mouth of *Simonides*, in his Dialogue intitled *Hiero*, Ἀλλ' ἔμοιγε δοκεῖ, *&c. i. e.* I believe there is a Character of Awe, a certain Privilege which the Gods have annexed to the Perſon of a King; which not only renders a Man more beautiful, but alſo makes us regard him with more Admiration when he is inveſted with Power, than we would do were he a private Man. Certain it is, that we find ourſelves much more delighted to converſe with our Superiors than our Equals. §. xix. *Ed. Græc. Gall.* & Cap. viii. §. 5. *Ed. Oxon.*

[3] The greateſt Number of learned Men reject this Story, becauſe (as they prove) S. *Athanaſius* was eighteen Years old, when this pretended *Baptiſm* was adminiſtred. See the Life of this Father written by the *Benedictines*; but it is ſufficient for our Author's Deſign, that the Fact was poſſible.

[4] A witty Speech of *Antiſthenes* deſerves our Notice in this Place. He adviſed the *Athenians*, upon a certain Time, to decree, *That hereafter Aſſes ſhould be called Horſes.* Some preſent replied in Banter, *That can't be. But, Gentlemen,* (ſays he) *you can chooſe for your Generals Men that know nothing of warlike Affairs, and whoſe Qualifications conſiſt only in having a greater Number of Voices,* Diog. Laert. *Lib.* vi. §. 8. Edit. Amſt.

what equally belong'd to all; ſo, when once Maſters or Owners were conſtituted, there ſprung up a *Right* in each particular Maſter of diſpoſing how he pleas'd of his own, and an *Obligation* in all other Maſters to abſtain from his Poſſeſſions. But the *Things* themſelves obtain'd nothing hence, but an extrinſecal Denomination, as they make the Object of ſuch a Right, and of ſuch an Obligation. So when certain Things are ſaid to be holy, or ſacred, no moral Quality of Holineſs inheres in the Things; only, an Obligation is laid upon Men to treat them in ſuch a particular Manner: And when that Obligation ceaſeth, they are ſuppos'd to fall again into promiſcuous and ordinary Uſe. Yet if, ſtill, any Man will poſitively maintain, that there are ſome *Things*, as well as *Perſons*, which ſhould be call'd *moral*, he muſt take Care ſo to explain himſelf, that he may be underſtood to attribute this *Morality* to the Things, not *formally*, as if it were *inherent*, but only *objectively*, as it is *terminated* in them [1].

XVII. Thus much of thoſe *moral Entities* which are conceiv'd with Analogy to *Subſtance*. We are now to enquire about thoſe that are really and formally *Modes*, and paſs in our Notion as ſuch. *Modes* may be conveniently enough divided into [2] *Modes* of *Affection*, and *Modes* of *Eſtimation*: According to the former, we ſuppoſe *Perſons* to be affected in ſuch and ſuch a Manner; according to the latter, both *Things* and *Perſons* may be rated and valu'd. The former fall under the Name of *Quality*, the latter of *Quantity*; if we take both thoſe Terms in the moſt extended Senſe. *Qualities*, ſo far as concerns our Buſineſs, may be divided into *formal* and *operative*. *Formal Qualities* are ſuch as do not tend, nor are directed towards any Act or Work, but agree and are join'd with the Subject, in the Manner of pure and naked *Forms*: Whence we may likewiſe call them *ſimple Attributes*. *Operative Qualities* are either *primitive*, or *derivative*. By the *primitive*, a Thing is conceiv'd fit and able for ſuch an Act: They are divided into internal [3], and external [4], and may be term'd *moral paſſive Qualities*. The *derivative* are thoſe which proceed from the *primitive*, and are the [5] *Acts* themſelves, as the former were the *Powers*.

XVIII. Among *moral Attributes*, *Titles* have a conſiderable Place, which are apply'd for the Diſtinction of Perſons in civil Life, with Reference to their *State* and their Eſteem. They are chiefly of two Sorts: Some directly ſignify the Degree of the Rate and Value, which Perſons bear in common Account, together with the Qualities peculiar to Men of that Rank; but the State itſelf they only denote indirectly, and by the Bye, and that either more clearly, or more obſcurely, according as ſuch a Title is uſually attributed to few, or more *States*. Of this Kind are thoſe honorary Epithets, commonly prefixed to the Names of great Perſons, as Marks of general Reſpect: As, *The moſt Serene*, *The moſt Eminent*, *The moſt Illuſtrious*: The Signification of which riſes higher, or falls lower, according to the Condition of the Subſtantive to which they are join'd. Other *Titles directly* ſignify ſome particular State, or ſome peculiar Seat and Place in a *State*, but *indirectly* denote that Degree of Value and Repute, which uſually accompanies ſuch a *State*: as are the Names of *moral* Perſons, of thoſe eſpecially who fill any Poſt of Honour. Now theſe Titles are not conſider'd, as they are only Notions repreſenting to one Man's Underſtanding the State and Office of another, but as, by Virtue of human Impoſition, they declare the Power and authority of the Perſon that enjoys them. So that 'tis not a vain Contention about empty Ceremonies, when Men frequently have ſuch hot Diſputes and Quarrels about *Titles*: Becauſe, upon the Denial of a Title, we are ſuppos'd at the ſame Time to deny the *State*, the Office, the Power and the Rights, which ſuch a *Title* generally expreſſes, or includes. But here we muſt be ſure to obſerve, that the Impoſition of moſt *Titles* is not perpetual and uniform; but in different Countries, and in the ſame Country at different Times, admits of very large Alterations. Thus the *Titles* of the firſt Kind which we mention'd (or the honorary Epithets) made uſe of by our Anceſtors, how mean and little do they ſound to the Ears of our own Age: While what was heretofore thought a worthy Mark for the greateſt of mortal Men, ſhall now be deſpiſed by an inferior Scribler? For which reaſon the Increaſe of ſuch *Titles* does not always argue the increaſe of Dignity; but when the *Titles* ſwell higher, while the Thing itſelf maintains its firſt Condition, their Value and Price is ſuppoſed to be conſiderably debaſed. Sometimes, alſo, a certain *Title* is affixed by way of Elogy and Complement to ſome particular Order, becauſe the Quality or Thing meant by that *Title*, is, or ought to be conſpicuous in the Generality of the Members belonging to ſuch an Order. And hence thoſe *Members*, who are not really poſſeſs'd of the *Thing*, do however enjoy the *Title* [6]. Thus in the Order of Men of Letters, many Perſons are ſaluted with the Appellation of *moſt famous*, and *moſt learned*, who are as much any thing elſe in the World as what thoſe Terms ſignify. And ſo too, an idle unactive Nobleman muſt have *Induſtry*, and *Strength*, and *Valour* applied to him in our Addreſſes. It happens likewiſe very commonly, that private Men, or others, either advance or diminiſh the Titles of Perſons, as they judge it convenient for the preſent Condition of their Affairs to flatter and careſs, or to deſpiſe and vilify them. And even in the latter Sort of *Titles*, as we above divided them, it frequently falls out, that the *Title* may continue, tho' the Thing itſelf, or the Dignity and Right be in a high manner either better'd or impair'd. And farther, 'tis very uſual, that in different Countries the ſame Word ſhall expreſs very different Degrees of Honour. And therefore it

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1 The different Diſtinctions of Things, in relation to Right, ſhall be explain'd in *Lib.* iv. and v. See the *Inſtit. Lib.* ii. *Tit.* i. & *Digeſt. Lib.* i. *Tit.* viii. *De rerum Diviſione*, as alſo Mr. DOMAT's *Civil Laws*, in their natural Order in the *Preliminaries*, *Tit.* iii.

2 *Modi affectivi*: Words hard to be tranſlated. The *French* renders them, *ſimple Modes*; becauſe, as our Author explains them, they only modify; *i. e.* diſpoſe moral Perſons. But this comes to the ſame Thing.

3 Internal Qualities are ſuch, as are really inherent in a Perſon, as Power, Right, Obligation; as, alſo, ſuch paſſive Qualities, of which our Author treats in §. 20. following. It were to be wiſhed, that our Author had been clearer in his Diviſions, which are not very methodical.

4 External Qualities are ſuch, as are not annexed to the Perſon, but reſiding in external Objects, make an Impreſſion upon the Perſon. See §. 21. following.

5 *Viz.* Theſe derivative Qualities are nothing but the Effect and actual Uſe of the primitive Qualities. In a Word, our Author ought to have avoided all this Jargon and unprofitable Diſtinctions of the Schools.

6 Hence it is, that *Cicero* calls Titles of Honour no certain Marks of Dignity, *Lib.* x. *Epiſt. ad famil. Ep.* vi. and obſerves, a little after, that during the Troubles of the Commonwealth, ſeveral Perſons were honoured with the Title of *Conſuls*, who were altogether unfit for that Dignity. I ſhall give the Paſſage which M. *Hertius* cites, but incorrectly. *Complures in perturbatione Reipublicæ* Conſules *dicti, quorum nemo Conſularis habitus, niſi qui animo exiſtit in Rempublicam conſularis.* See *The Art of Thinking*, *Part* ii. *Ch.* vii. §. 2. and *The New Letters of Mr.* BAYLE, on the Occaſion of his general critical Remarks on MAIMBOURG's Hiſtory of *Calviniſm. Let.* iv. §. 3, 4, 8. As alſo *Grotius De jure Belli & Pac. Lib.* ii. *Cap.* 21. §. 8. *Num.* 1.

would argue a very unskilful Head, to place in the same Class all those who bear the same *Title* all over the World [1]. It must not be forgot, that sometimes a bare *Title* is attributed to a Man without the *Thing*, or without the Offices and the Profits which used to attend such a *Title*; only to this Intent, that he may hence obtain the external Ensigns and Badges of the Honour, and may acquire a more creditable Place and Seat in the Community of which he is a Member. Lastly, It is worth remarking, that chiefly in the Titles of the principal Houses of *Europe*, the same *Title* sometimes imports both the Family, and the Possession of the mention'd Territory; sometimes the Family only, without the Possession, yet with the Right of succeeding to it, according to the due Course and Order of Inheritance.

XIX. *Moral operative Qualities* [2] are either active or passive. Of the former the most noble Species are *Power*, *Right*, and *Obligation*. *Power* is *that by which a Man is enabled to do a Thing lawfully and with a moral Effect:* Which *Effect* is, That the Person exercising this Power, shall lay an Obligation on others to perform some certain Business, which he requires, or to admit some Action of his as valid, or not to stop and hinder it; or that he shall confer on others a License of doing or possessing something, which License they did not before enjoy. Whence it appears how wide this Quality runs, and how very diffusive it is of itself. *Power*, with respect to its Efficacy, is divided into *perfect* and *imperfect*. The former is that, the Exercise of which may be asserted even *by Force*, against those who endeavour unlawfully to let and oppose it. Now *Force* is chiefly applied, within the Bounds of the same Community, by an *Action at Law*, and without these Bounds by a *War*. The latter, or *imperfect Power*, is that, the Exercise of which if any Man is unlawfully prohibited, he may be said indeed to be inhumanly dealt with, yet he has no Right to defend it, either by Process of a Court, or by the Force of Arms, unless this [3] Inefficacy or Imperfection is supplied with absolute Necessity. With respect to its Subject, *Power* is further divided into *personal* and *communicable*. The former *is such as one Man cannot lawfully transfer to another*. But then this must be consider'd under several Differences. For some *Powers* are so closely united with the *Person*, that the Acts belonging to them cannot rightly be exercised by another. Such is the *Power* of the Husband over the Body of his Wife, which no Laws allow him to discharge by a Deputy. In some again, tho' we cannot transfer the Possession, yet we may by Delegacy commit the *Acts* to the Administration of others; but in such a manner, that the whole Strength of their Authority must be deriv'd from him, in whom those *Powers* are originally seated. Of this Kind is the Power of such Kings as are constituted by the Will of the People: For they cannot transfer the Right of Reigning to another, and yet they may use the Service of Ministers for the Performance of the *Acts* belonging to that Right. *Communicable Power* is such *as may be lawfully devolv'd upon others*; and that either at the Pleasure of the Person so devolving it, or by the Authority or the Consent of a Superior [4].

Lastly, In respect of the Objects, the Generality of *Powers* may be reduced to four Heads: For they regard either *Persons* or *Things*; and both these as they are either *our own*, or *other Mens*. A *Power* over *our own* Persons and Actions is called *Liberty*; [5] the different Acceptations of which Word shall be hereafter discuss'd. This must not be conceiv'd as a distinct Principle from him who enjoys it, or as an Authority [6] of obliging himself to any Thing which is oppos'd by his Inclinations [a]; but as a License to dispose of himself and of his Actions, according to his free Pleasure; which at the same Time includes a Negation of any Impediment, proceeding from a superior *Power*. A *Power* over our own Things or Goods, is called [7] *Property*. A *Power* over the Persons of other Men, is properly *Empire* or *Command* [8]. A *Power* over other Mens Things, is what the *Civilians* term *Service* [9].

XX. *Right is that moral Quality by which we justly obtain either the Government of Persons, or the Possession of Things, or by the Force of which we may claim somewhat as due to us.* The *Latin* Word *Jus* is a very wide and ambiguous Term: Besides the Signification here used, it is taken for *Law*, and for [10] a System or Body of municipal Laws or Constitutions, and likewise for a [11] Sentence pronounc'd by a Judge. There seems to be this Difference between the Terms of *Power* and *Right*, that the first does more expressly import the Presence of the said Quality, and does but obscurely denote the Manner how any one acquir'd it. Whereas the Word *Right* does properly and clearly shew, that the Quality was fairly got, and is now fairly possess'd. Yet because the several Kinds of *Power* have, for the most part, a peculiar Name, which [12] that Quality, by which we conceive

[a] Vide *Lib.* li. *D. de Recept. Lib.* xiii. *D. ad L. Aquil.*

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[1] *Vide Mr.* LE CLERC's *Ars Crit. Tom.* i. *Part* ii. *Sect.* i. *Cap.* 13.

[2] We must understand by these Qualities, such as our Author calls *Original* and *Primitive*; and, in that Number, those that he calls *internal*. See §. 17. above.

[3] As for Example, If a Man refuse to let us pass through his Ground, though we do him no Injury, and we can pass no other Way, without great and manifest Danger, he is guilty of an inhuman Action towards us; which, nevertheless, does not license us to offer him any Manner of Force; but if a Man finds himself attacked, and can't otherwise save his Life; as, when an Enemy prosecutes us furiously, then we may force a Passage. *Pufend. Elem. Jurispr. Univers. p.* 91. See also what he says, *l.* ii. *c.* 6.

[4] Such was, among the *Romans*, the paternal Power, which a Father had obtained by adopting a Son; for there must, also, be, a transferring of the paternal Authority, confirmed by the Magistrate. See *Aul. Gel. Lib.* v. *Cap.* xix. and the Titles *De Adoptionibus*, in the *Digests* and *Institutes*.

[5] See *Cap.* iv. of this Book, §. 2, 3. and *Lib.* ii. *Cap.* i.

[6] *Neque autem imperare sibi, neque se prohibere quisquam potest*; *i. e.* No Man can command or forbid himself. *Digest. Lib.* iv. *Tit.* viii. *De Receptis, qui arbitrium, &c. Leg.* li. See also *Lib.* ix. *Tit.* ii. *ad Leg. Aquil. Leg.* xiii.

[7] See *Lib.* iv. *Cap.* iv.

[8] This Authority is divided into, 1. *Absolute*, 2. *Limited*, see *Lib.* vii. *Cap.* vi. As also into, 1. *Private*, 2. *Publick*. The first is that with-which private Persons are invested for the Management of their private Concerns, consider'd as such, to which may be referred the Authority of Parents over their Children, of Masters over their Slaves, or Servants; of an Husband over his Wife; of a Schoolmaster over his Scholars; of a Tutor over his Pupils, *&c.* The other is that which publick Persons are endowed with, as such, for the Advantage of the civil Society. *Pufend. Elem. Jurispr. Univers. p.* 93, 94.

[9] See *Book* iv. *Chap.* viii.

[10] Thus the Collection made by the Command of *Justinian*, is called the *Civil*, or *Roman Law*; and in the same Sense this Book is entitled, *The Law of Nature and Nations*.

[11] This is only proper in *Latin*. *Prætor quoque* JUS *reddere dicitur, etiam quum inique decernit.* "The *Prætor* is said to pronounce Law, even when he gives an unjust Sentence." See *Digest. Lib.* i. *Tit.* i. *De Justitia & Jure, Leg.* xi.

[12] This relates to what the Interpreters of the *Roman* Law call, *Jus ad Rem*, or, *a Right to a Thing*. See what is said *Lib.* iv. *Cap.* ix. §. 8. *Note* 2. *Ulpian* the Lawyer, as Mr. *Hertius* thinks, calls it, *Jus crediti*; *i. e.* a Sort of active Debt. *Digest. Lib.* iv. *Tit.* ii. *Quod metûs causa, &c. Leg.* xii. §. 1. See *Lib.* l. *Tit.* xvi. *De verborum significat. Leg.* x. *&c.* And what is said *Lib.* v. *Cap.* xi. §. 1. *Note* 4. As also my Remark on *Grotius De Jur. Bell. & Pac. Lib.* i. *Cap.* i. §. 5. *Not.* 6.

ſomething to be due to us, wants, we have thought it convenient to give it the name of *Right* in a peculiar manner, tho' we do not in other Places abſtain from its more common Signification, as may be obſerved in the following Parts of this Diſcourſe. We place *Right* in the Claſs of *active Qualities*, as by Virtue of it any Thing may be requir'd of others. It may likewiſe be rank'd in the Number of *paſſive Qualities*, as it impowers us lawfully to receive any Thing from others. For *moral paſſive Qualities* are thoſe by which we are ſaid to do or ſuffer ſomewhat, or to admit and receive it. Of theſe there are three Kinds: One according to which we *rightly* indeed admit ſomething, but in ſuch Manner, that neither we ourſelves have any Power of exacting it, nor others any Obligation to give it: Such is the Ability of receiving a Gift purely under the Notion of a Gratuity. And that this *Quality* is not a mere Fancy and Fiction, is evident from this one Conſideration, that it may be reſtrained by a Law. A Judge, for Example, may be debarr'd the Liberty of taking a Gift from Parties engag'd in a Suit, under what Colour or Pretence ſoever. A ſecond Species is ſuch as puts us in a Capacity of receiving ſomething from another, not ſo, that we can force it from him againſt his Will, unleſs in Caſes of Neceſſity; yet ſo, that he is oblig'd, by ſome moral Virtue, to pay or perform it. This [a] *Grotius* calls [1] *Aptitude*, or *Deſert*. The third Species is that by which we are enabled to compel another to ſome Performance, even againſt his Will, to which Performance he is likewiſe fully oblig'd by the Force of ſome Law ordaining a Penalty upon his Default. Here 'tis worth our remembring, that many Things in common reckoning paſs under the Notion of *Rights*, which if we would ſpeak accurately, we ſhould rather call Compoſitions, made up of Power and Right, in the ſtrict Senſe of thoſe Words: At the ſame Time involving, or ſuppoſing, ſome Obligation, ſome Honour, or the like. Thus the *Right* or Privilege of being a Citizen, contains both the Power of exerciſing, with full Virtue, all Acts peculiar to the Members of that City, and, alſo, a Right of enjoying the Benefits proper to it, ſuppoſing in the Perſon an Obligation toward the Corporation. So, for Example, the Honours and Degrees of learned Men include both the Power of performing certain Actions proper to ſuch a Dignity, and the Right of ſharing in the Profits of their Order; to which Notion there is further added the Height of Eſteem and Reſpect, which accompanies their Place and Title.

XXI. An *Obligation* is that by which a Man is bound under a moral Neceſſity to perform, admit, or undergo any Thing. The ſeveral Kinds of Obligations [2] will be hereafter inſiſted on at large [b].

There are alſo a Sort of [3] *moral patible Qualities*, which are conceiv'd to affect the Underſtandings of Men in ſome certain Manner: As in natural Qualities, thoſe have obtain'd the Name of *patible*, which affect the Faculty of *Senſation*. Of this Order are Honour, Ignominy, Authority, Gravity, Fame, Obſcurity, and the like.

XXII. It remains that we ſubjoin ſomething about the *Modes of Eſtimation*, or the *moral Quantities*: For 'tis evident, in common Life, that Perſons and Things are rated, not only according to the Extenſion of their natural Subſtance, or according to the Intenſeneſs of their Motion, and their other natural Qualities, conſidered as they flow from the Principles of their Eſſence; but, likewiſe, according to another kind of Quantity, different both from phyſical and mathematical: And this *Quantity* ariſes from the Impoſition and Determination of a rational Power. Now *moral Quantity* is met with firſt in *Things*, where it is called *Price*; ſecondly in *Perſons*, where we term it *Eſteem*; both which were included in the Notion of *Value* [4]; and thirdly, in *Actions*, where it has not yet acquired [5] a peculiar Name. Of each Species we ſhall treat in its proper Place. What we have hitherto inſiſted on, about the Variety and Diſtinction of *moral Entities*, may ſeem ſufficient to our preſent Deſign.

XXIII. We will only add this general Remark, That as *moral Entities* owe their Original to *Impoſition*, ſo they draw their Continuance and their Changes from the ſame Cauſe; and when that once ceaſes, they immediately vaniſh, juſt as when we put out the Light, the Shadow inſtantly diſappears. Thoſe which are made by *divine Impoſition*, are not diſſolv'd but by the divine Pleaſure. Thoſe which are fram'd at the Will of Men, are deſtroy'd by the ſame Power, without the leaſt Alteration in the Perſons or Things, as to their natural Subſtance. For tho' it implies a Contradiction in the Nature of Things, that what has been done already, ſhould be made not to have been done; as that a Man, who has been Conſul, ſhould not have been Conſul; yet we find every Day how eaſy 'tis to cauſe a Man not to be for the future what he has already been: And we ſee, at the ſame Time, all the *moral Entities* that inher'd in ſuch a Man, entirely defac'd, and leaving no real Footſteps behind. For 'tis impoſſible that a *moral Entity* ſhould ever grow up to the Strength and Force of a natural Quality. Whence 'tis a very weak Thing to believe, that when a Man is conſtituted ſuch or ſuch a Perſon, an indelible Character is imprinted on him barely by Virtue of that moral Impoſition: For thus, when a Commoner is created a Nobleman, he only acquires new Right, but does not at all change his Subſtance, or the Qualities founded in it: And if a Nobleman be degraded, he only forfeits the Right of his Order; but the Benefits he holds from Nature, remain perfect and unimpair'd [6].

[a] *De Jure B. & P. Lib.* i. *Ch.* i. §. 7.

[b] Vide *Lib.* iii. *Ch.* iv.

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[1] See *Cap.* vii. §. 7. where we ſhall explain the Diſtinction of *perfect* and *imperfect Right*.

[2] See *Cap.* vi. §. 5. of this Book, and *Lib.* iii. *Cap.* iv.

[3] Our Author calls theſe *external operative Qualities*, §. 17. above; and the *French* tranſlate them, *moral ſenſible Qualities*, becauſe they thus expreſs, in *Phyſics*, the natural Qualities with which theſe are connected.

[4] The Author remarks here, that the firſt and ſecond Sort of moral Quantities are expreſs'd by the Word *Valor*, to which our *Engliſh* Word *Value* is equivalent.

[5] *Vide*, for the firſt, *Lib.* v. *Cap.* i. For the ſecond, *Lib.* viii. *Cap.* iv. For the third, *Lib.* i. *Cap.* viii.

[6] The proper and real Foundations of Honour loſe nothing of their Value, although Men are ſtript of their Titles. *Demetrius Phalereus* lively expreſſes this Matter, as he is quoted by Mr. *Hertius*; when it was told that Philoſopher, That the *Athenians* had thrown down his Statutes: *Well*, ſaid he, *but they cannot overturn that Virtue, for the Sake of which they were erected.* Diog. Laert. Lib. v. §. 82. See other Examples concerning the Manner how *moral Entities* are deſtroyed, in the laſt Chapter of this Book, §. 6.

CHAP.

CHAP. II.

Of the Certainty of MORAL SCIENCE.

The CONTENTS of every Paragraph of the ſecond Chapter.

I. *Moſt Men deny that there is a demonſtrative Certainty in moral Sciences.*
II. *What is a Demonſtration.*
III. *The Principles of a Demonſtration.*
IV. *Demonſtration agrees to that moral Science only, that treats of the Goodneſs or Evil of Man's Actions.*
V. *The Uncertainty of moral Things is objected.*
VI. *Whether any Thing be good or bad before any Inſtitution.*
VII. *Whether Shame be a Proof of it.*
VIII. *Of the Extent of moral Actions as to the Quality.*
IX. Grotius's *Opinion conſider'd.*
X. *In moral Quantities there is a Latitude.*
XI. *What is called Morally Certain.*

IT has been an eſtabliſh'd Perſuaſion among the Generality of learned Men, that *moral Knowledge* is deſtitute of that Certainty which is ſo famous in other Parts of Philoſophy, and eſpecially in the *Mathematicks* [1]. The Foundation of their Notion is this: They take Morality to be incapable of Demonſtration, from whence only true *Science, and free from the fear of Error,* can proceed; but imagine that all its Evidence riſes no higher than a probable Opinion. An Unhappineſs that has been prodigiouſly injurious to the moſt noble Diſciplines, and the moſt neceſſary to human Life. For, hence it came to paſs, that Men of Wiſdom and Parts were afraid of ſpending too much Labour in cultivating Notions which depended on ſo weak a Bottom: And the ſame Principle furniſh'd thoſe who were intirely idle and negligent about theſe Studies, with a fair Excuſe; while they might alledge, that there was no firm and demonſtrative Aſſurance to be had in ſuch Diſquiſitions, but that they could only be proſecuted in a rude and unaccurate Manner. To which *Ariſtotle* contributed not a little, who in the common Judgment of the World, has arriv'd at the higheſt Pitch of moral Attainments, and left no farther Field for the ſucceeding Induſtry and Wit of Men. *Ariſtotle* then, as to the Truth of Ethicks, in his Treatiſe on that Subject, addreſs'd to *Nicomachus* [a], delivers himſelf in the following Propoſitions: *It muſt not be expected, that all Kinds of Things ſhall be explain'd with the ſame Accuracy. Honeſty and Juſtice, which fall under the Conſideration of* [2] *civil Knowledge, have ſo many different Faces, and are liable to ſo many Miſtakes, that they ſeem to be only inſtituted by Law, and not originally decreed by Nature. We ſhall therefore think it ſufficient, when we diſcourſe on ſuch Heads, or when we argue from them, to ſhew the Truth in a ruder Manner, and under a kind of Shadow and Figure. It becomes a Man well inſtituted to require ſuch Proof and ſuch Explication of any Matter, as the Nature of the Thing will bear. For, it ſeems equally abſurd, to demand Demonſtrations from an Orator, as to let a Mathematician ſatisfy us with Probabilities* [3]. We, for our Part, as we are not at all influenced by the Name of a ſingle Philoſopher; ſo we intend to enquire what Anſwers are to be return'd to the principal Arguments urg'd by him, and others, as ſoon as we ſhall have premis'd a Word or two concerning the Nature of *Demonſtration* in general.

II. To *demonſtrate* then, as we apprehend it, is ſyllogiſtically to deduce the neceſſary Certainty of any Matter propos'd from ſuch Principles, as being its Cauſes, muſt needs make it known beyond Doubt and Diſpute. Now, tho' 'tis manifeſt that there is ſuch a Thing as we here define, and we ſee Inſtances of it every Day in mathematical Operations, to which no Man in his Wits ever denied the Art and Power of Demonſtrating; yet from the falſe Expoſition of two or three Words, it has happen'd that the greateſt Number of Philoſophers have committed a wretched Overſight in the Point, and have raſhly excluded this noble Way of Proof from many Parts of Knowledge, which had a juſt Title to its Poſſeſſion. The chief Occaſion of the Error was this: They found it laid down for a Rule, That the Subject of a Demonſtration ought to be *neceſſary*, which they interpreted, as if in a demonſtrative Syllogiſm the *Subject* of the *Concluſion*, to which the *Predicate* was applied, ought always to be a Thing *neceſſarily exiſtent*; as for Example, in that thread-bare Inſtance, *Man is rational, therefore viſible*; the *Subject* of the Demonſtration is *Man*, who muſt be own'd for a *neceſſary Being* [4]. But in Reality the *Subject* of Demonſtration is not any one ſingle Term, but ſome entire Propoſition, the neceſſary Truth of which is from ſettled Principles ſyllogiſtically inferred. Where it ſignifies little, whether or no the *Subject* of this demonſtrable Propoſition neceſſarily exiſt; but 'tis ſufficient, if granting its Exiſtence ſuch certain Affections neceſſarily agree to it, and if it can be made out, that they do thus agree to it, by undoubted Principles. Thus, a Mathematician never troubles himſelf to enquire, whether a *Triangle* be *neceſſary* or *contingent*, ſo long as he can demonſtrate all the *Angles* of it to be equal to two *Right* ones. And therefore the *Subject* of Demonſtration is only call'd

[a] *Vid. Lib.* i. *Cap.* i.

[1] If we would know the Reaſons, why it is falſly believed, that all demonſtrative Knowledge borders upon mathematical Quantity, we need read nothing but Mr. LOCKE's excellent *Eſſay on Human Underſtanding, Lib.* iv. *Cap.* ii. §. 9, 10, &c. and *Cap.* iii. §. 19, 20.

[2] *Ariſtotle* underſtands not by this, the Art of Government ſimply, but the Knowledge of Morality, and the Duties of a Citizen, of whatever Degree he is. This very Word among the *Greeks* includes, ſometimes, all practical Sciences, as, Oeconomicks, Rhetorick, &c. See Mr. *Hertius*'s *Introduct. Element. Prud. Civil.* §. 8.

[3] Theſe Words appeared ſo plain to Mr. *Buddeus*, that he was wholly of Opinion, that *Ariſtotle*'s Judgment about the Original of Juſtice and Honeſty was the ſame as *Epicurus*'s. See his Diſſertation on *moral Scepticiſm*, printed with his *Analecta of Hiſt. Philoſ.* at *Hall* in *Saxony* in 1706. §. 12. Not long ago the deceas'd Mr. *Huet* (in his Treatiſe *of the Weakneſs of the human Mind*, Liv. i Chap. xiv. §. 17.) has alſo plac'd this ancient Philoſopher among the Number of thoſe who favour *Scepticiſm*. However, Mr. *Hertius*, in his Notes upon that Place, pretends to excuſe *Ariſtotle*, by ſaying, That he wrote for ſuch of his Scholars, as, according to the Cuſtom of thoſe Times, applied themſelves cloſe to Mathematicks, and on that Account fancied that they had found geometrical Demonſtrations every where. Hereupon he quotes a Paſſage in his *Metaphyſicks*, where he ſays, That we muſt not expect a mathematical Exactneſs in all Sorts of Subjects, τὴν ἀκριβολογίαν μαθηματικὴν, *Lib.* ii. *Cap. ult.* and refers us to *Rachelius*'s Introduction to the Philoſophy of *Ariſtotle*, *Ch.* xii.

[4] He does not mean, that Man has ſuch an Exiſtence that he can't but exiſt; for that's the Property of God only. The Exiſtence of Man then is no otherwiſe neceſſary, than as God has determined to ſend him into the World, and that being ſuppoſed, he muſt exiſt till God deſtroys him.

neceſſary

neceſſary upon Account of the *neceſſary Connexion* by which the *Predicate* cleaves to it in Concluſions of that Nature [1].

III. But what kind of Propoſitions thoſe ought to be, which we are to uſe in Demonſtration, will appear from the Conſideration of its End and Effect. That then, which we require by Demonſtration, is *Science*, or *a clear and certain Knowledge, every Way, and at all Times conſtant to itſelf, and plac'd beyond the Fear of Miſtake. What we have Science of* (ſays * *Ariſtotle*) *we imagine under an Impoſſibility of being otherwiſe.*

* *Eth. Nicom. Lib.* vi. *Ch.* iii.

Therefore 'tis neceſſary the Propoſitions ſhould be *true* [2] really and abſolutely, and not upon *Conceſſion* or *Suppoſition*. For, tho' from a Suppoſition laid down, a long Chain of Concluſions may be drawn; yet 'tis impoſſible that, being deriv'd from a precarious Principle, the Streams ſhould not reliſh of the Fountain. And tho' we ſhould make the two moſt contradictory Suppoſitions in Nature, one of which muſt of Neceſſity be true; yet we can by this Means only prove for certain τὸ ὅτι, as the Logicians call it, or that the Matter is really ſo: for τὸ διότι, or the Reaſon why it is ſo, requires, as an indiſpenſable Condition, the Firmneſs of the precedent Hypotheſis. The Propoſitions of Demonſtration muſt likewiſe be the *firſt* and the higheſt that can be, ſo as to want no farther Proof, but to deſerve Credit upon their own Evidence; or, however, ſo as at laſt to be reducible to ſome *firſt* Truth. For as ſome Propoſitions are plac'd at a leſs, and ſome at a greater Diſtance from the firſt Principles; ſo we muſt not imagine that every Demonſtration can be finiſh'd in a ſingle Syllogiſm, but we muſt carry on the Argument from the Propoſition to be demonſtrated, till we arrive at the firſt Principle, on which it depends. For, *they* are not the only Maſters of Reaſoning, who are ſo very quick and expert at their *quicquid*, their *atqui*, and their *ergo*; but thoſe alſo, who beginning at evident Principles, underſtand how to frame an Argument by a juſt Train of neceſſary Conſequences. Another Requiſite in ſuch Propoſitions is, that they be *immediate* [3]; that is, that they flow immediately from one another, without any Gap or Interruption. For, a demonſtrative Argument ſhould be work'd up in the manner of a Chain, the Propoſitions being knit within each other, like ſo many Links; ſo that if any one Link breaks, or proves deficient, the whole Frame muſt diſſolve and fall in Pieces. Laſtly, 'tis neceſſary that the Propoſitions in Demonſtration be the *Cauſes of the Concluſion*, as containing the Reaſon why in ſuch a Concluſion the *Predicate* neceſſarily agrees to the *Subject* [4].

IV. This being premis'd, it is farther obſervable, that tho' 'tis a Thing common to all moral Diſcipline not to take up with a bare Theory, but to paſs into Uſe and Practice, yet there is a vaſt Difference to be diſcover'd between the two Principal of them; of which one is concern'd about the Rectitude of human Actions, in order to Laws; the other about the dextrous Government of our own, and of other Mens Actions, for the Security and the Benefit of ourſelves, and more eſpecially of the Publick. For this latter Part of *Ethicks* ought to be rank'd under the Name of *Prudence*, which *Ariſtotle* [5] defines; *A Habit, active according to Reaſon, about the Good and Evil that can happen to a Man.* Whence he thus ſettles the Duty of a prudent Perſon: *It ſeems to me to be the Property of a Man of Prudence, to take right Conſultations about thoſe Things which are good for him, and of univerſal Uſe in well living.* And theſe Opinions he builds upon Axioms drawn from the accurate Obſervation and Compariſon of human Manners and Events. But thoſe Axioms do not appear ſo very firm and evident, as to be the Ground of infallible Demonſtration, as well upon Account of the wonderful Frailneſs and Inconſtancy that occurs in the Wits and Tempers of Men, as becauſe the Events of Affairs are frequently turn'd in a little Moment, and driven to a Reſult quite contrary to our Intentions and Expectations [a 6]. Nor is human Subtilty in the Applications of theſe Rules and Maxims baffled only by ſuch unlook'd for Accidents and Occurrences; but the divine Wiſdom is pleas'd often to interpoſe, and to elude the craftieſt Stratagems, and the beſt contriv'd Plots of mortal Deſigns. And therefore the ableſt Managers of Affairs aſpire not to act always with ſtrict Demonſtration of Succeſs [7],

[a] *'Tis not barely the Event of Things* (ſays *Fabius* in *Livy*, Lib xxii. Cap. xxxix.) *which communicates this Knowledge, for that is only as the Inſtructor of Fools: But it is the ſame immutable Reaſon which was, and will be, ſo long as the World continues in its preſent Condition.*

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[1] Thus, that though the *Actions* of Men, and, in general, all *moral Entities*, do not neceſſarily exiſt, but depend upon the free Determination of ſome intelligent Faculty; yet, if we ſuppoſe certain Relations between Deeds which are actually produced, or may exiſt, and a Rule with which we may compare them, ſome Right and Obligation will as neceſſarily follow from thence, as ſuppoſing a Triangle, it follows, that its three Angles are equal to two Right ones.

[2] *Ariſtotle*, in a few Words, gives us the Nature and Properties of a good Demonſtration. I repeat his Words, both becauſe our Author reaſons here upon the Principles of that famous Philoſopher, and, alſo, to ſhew, with how little Foundation People have conceiv'd from thence a falſe Idea of the Nature of Demonſtrations. "I call (ſays he) *Demonſtration* a *ſcientific Syllogiſm*. "By *ſcientific* I underſtand, what produces Science, or ſhews us wherein it conſiſts. If it be then a Science, as we have laid "down, the Science of Demonſtration muſt flow from true, original, and immediate Principles: More acknowledged than the "Concluſions built upon them, as they are the Cauſes from whence they proceed. Thus it is that certain Principles are call'd "Demonſtratives.——If the Science of Demonſtration is founded upon neceſſary Principles, it evidently follows, that Syllogiſms, "founded on ſuch Principles, are demonſtrative Syllogiſms." *Ariſtot. Analyt. Lib.* i. *Cap.* ii. and vi.

[3] Every Step or Degree of Inference ought to be known intuitively, *i. e.* at the firſt View, and of itſelf: *Viz.* we muſt ſee the Agreement or Diſagreement of the Medium which unites the Terms together; and which intervenes to ſhew the Agreement of the two Extremes at one ſingle View. See Mr. *Lock*'s *Eſſay on human Underſtanding*, *Lib.* iv. *Cap.* ii. §. 7.

[4] Our Author might have obſerved here, that all that he was about to ſay of the Nature of a Demonſtration, is explained more at large in a *Latin* Book entitled, *Analyſis*, &c. *An Analyſis of* Ariſtotle's *Philoſophy, according to the Principles of* EUCLID, by *Erhard Weigel*, Profeſſor of Mathematicks at *Jena*. This Perſon firſt encouraged Mr. *Pufendorf* to undertake this Work, and furniſhed him with ſome Materials for it; as our Author owns in his Preface to his *Elemens de Juriſp. Univerſ.* He adds there, alſo, That no Man of his Nation has ſo well taught the Art of Demonſtration as that Profeſſor. The celebrated M. *Tomaſius* informs us, that he is poſſeſs'd of a MS. Work, which this Mathematician had begun under the Title of *Ethica Euclidea*. See the *Paulo plenior Hiſtoria Juris Naturalis*, which appear'd in 1719. *Cap.* vi. §. 14.

[5] *Ariſt. Ethic. ad Nicom. Lib.* vi. *Cap.* iii. *Cicero* alſo calls Politick, *Prudentia civilis. Partit. Orat. Cap.* xxii.

[6] See *Montagne*'s *Eſſays*, *Lib.* i. *Cap* xxiii. *P.* 76. *in fol.* And *Charron*, *Of Wiſdom*, *Lib.* iii. *Cap.* i. Here alſo we may obſerve, that ſome Events are not probable ſometimes, according to the Senſe of an ancient Poet, cited by *Ariſtotle*, *Rhetor. Lib.* ii. *Cap.* xxiv. Τάχ' ἄν τις εἰκὸς, &c. *It is probable, that many Things may happen which are not probable.* See Mr. *Bayle*'s *Hiſtor. and Critical Diction. Let.* F *Article* Agatho.

[7] In the ordinary Courſe of Life we muſt not expect a clear Evidence, but are obliged, for the moſt Part, to act by Probabilities. It is a judicious Maxim of *Deſcartes*'s, and, long before him, laid down by *Seneca*: *We muſt not expect a certain Knowledge of the Truth, which is hard to find out; but we muſt follow Probabilities. All our Actions are grounded on this. So we ſow, ſail, fight, marry, educate our Children; tho' the Event be uncertain. We go about all theſe Things, becauſe we hope the beſt. For who can promiſe Harveſt to the Sower, a ſafe Port to the Sailor, Victory to the Warrior, a chaſte Wife to the Bridegroom, or good Children to the Father? We go, where Reaſon, not Truth leads: If we tarry till we can know what will happen well, and what is certain Truth, we may ſit ſtill for ever. I will not fear to follow Probabilities.* Sen. de Benef. Lib. iv. Cap. xxxiii. While Probability calls me, I will not be aſham'd to do good to any Man, who, it is probable, will be grateful for it. *Arnobius* has a like Paſſage, in the Place where he anſwers the *Pagans* Objections againſt the Faith of *Chriſtians*, *Lib.* ii. *Pag.* 47. Even the *Sceptics*, who doubt of every Thing, own, that, in the Buſineſs of common Life, we muſt follow Probability; as the Reader may ſee in *Sextus Empericus*, and the deceaſed M. *Huet*'s *Treatiſe of the Human Mind*, Liv. ii. Cap. iv. but

but when they have apply'd the moſt ſage Circumſpection, and the moſt piercing Forecaſt, they commit the Iſſue to Providence and Fate. [a] For tho' generally we may know what can poſſibly happen, tho' we may compare theſe poſſible Events together, tho' we may determine for certain, not only which of two Poſſibilities is of greater, and which of leſſer Value, ſuppoſing them now to exiſt; but alſo what Effect can proceed from more, what from fewer Cauſes, either now in being, or hereafter to be: And tho' we may conclude *that* Effect, which can be produc'd by moſt Cauſes and Ways, to have the higheſt Degree of Probability, and therefore beſt to deſerve our Hopes and Expectations [b]; yet all Poſſibilities do not occur to the Mind at all Times and Places; or, if they do, are not always rightly weigh'd and conſider'd: And by reaſon of ſtrange and ſudden Accidents, which could ſcarcely have been foreſeen, many Things, which we at firſt thought to be moſt poſſible, or the moſt likely to fall out, when we come to the Point, appear quite otherwiſe than we before imagin'd them. Hence, in prudential Managements moſt Men think it ſufficient to follow that Rule of *Ariſtotle* [c]: *We ought no leſs to hearken to the undemonſtrated Declarations and Opinions of ſkilful, of ancient, or of wiſe Men, than to Demonſtration itſelf: for ſuch Perſons found their ſight of Things on Experience, and ſo look into the very Principles of Action.* But let others fight out this Prize [1]. As for the former and more noble Species, which we aſſign'd to moral Diſcipline, that which conſiders what is Right, and what Wrong in human Actions, the beſt Share of which [2] will be illuſtrated in our preſent Attempt; this is built altogether on ſo ſure Grounds, that we thence draw genuine Demonſtrations, able to produce true and ſolid Science [3]: Or, in other Words, its Decrees may be in ſuch a Manner deriv'd from certain Principles, as to leave no Room, no Excuſe for Doubt [4]. Whatever contributes to the improving of our Virtue, or of our Happineſs, Nature hath taken Care to lay either directly before us, or at a very eaſy Diſtance for our Search. This Aſſertion will be more clearly made out, if we, in the firſt Place, conſider and examine the Arguments uſually alledg'd to the contrary. But, by the way, we acknowledge Mr. *Hobbes* [d] to have been extreamly miſtaken, when he contends, that "*Ethicks* and *Politicks* are therefore capable of 'a Demonſtration *à priori*, *i. e.* by Reaſons drawn 'from the Nature of the Thing; becauſe we our-'ſelves are the Authors of the Principles of Juſtice 'and Injuſtice, of Right and Wrong, by making 'thoſe Laws and Compacts whence the Meaſures 'of Juſtice are to be taken: Since before any ſuch 'Laws or Compacts were inſtituted, there was no 'ſuch Thing as Juſtice or Injuſtice, *publick* Good 'or Evil, among Men, any more than among 'Beaſts [4]'. The abſolute Falſeneſs of which Poſition we ſhall hereafter [e] have Occaſion to demonſtrate; as there is alſo a Fallacy lurking under the Word *Publick*.

V. To proceed therefore to the Objections: Some affirm moral Things in general to be uncertain and unſtable; and no Science can be of a more firm and ſettled Nature than the Object about which it is employ'd. To which it may be anſwer'd, That tho' *moral Entities* owe their Original to Impoſition, and therefore cannot be call'd *Neceſſary* in an abſolute Senſe; yet they do not proceed from ſuch looſe and wandering Principles, as that, on this Account, all Knowledge about them ſhould be weak and uncertain. For, the very Nature of Man, aſſign'd him by the Wiſdom and Goodneſs of the Almighty Creator, requir'd the Inſtitution of the chief Part of them; and theſe, at leaſt, cannot be ſaid to be unſettled and uncertain. This will appear beyond Diſpute, when we come to enquire into the Origin of the *Law* of Nature. Beſides, human Actions are chiefly on this Account call'd *Moral*, becauſe they are not *neceſſary*, but *free*; yet from hence it does not follow, that upon the laying down of certain Principles, ſuch Affections may agree to theſe Actions, as may be undoubtedly *demonſtrated* concerning them. For 'tis evident, that the Acts which fall under the Conduct of the Law of Nature, do in themſelves contain an intrinſical Force and Power, directing towards a ſociable Life, tho' the actual Exerciſe of them depends on the Free-will of Man. While we deliberate, we are properly ſaid to be *free*, and the Effects which are to proceed from our Actions are, with Reſpect to the *Freedom*, rightly term'd *Contingent*: But when we have once determin'd which Way to act, the Connection between our Actions and the depending Effects is neceſſary and natural, and, conſequently, capable of Demonſtration. Neither do *they* argue any Thing to the Purpoſe, who deny the Poſſibility of paſſing a clear Judgment on human Deeds, upon Account of the great Variety of Circumſtances, any one of which ſeems to put a new Face, and a new Quality on the Action; whence it happens, that Legiſlators can ſeldom frame ſuch a Law as ſhall admit of no Exception, and where there ſhall not be frequent Occaſion to neglect the Letter of the Statute, and to have Recourſe to Equity for Relief. Becauſe indeed there are eſtabliſh'd Principles, by which it may be ſhewn how much Weight and Force any Circumſtance bears in affecting, or varying any Action. And theſe very Principles are the Occaſion, that Law-givers are frequently leſs anxious about excepting from their Decrees ſome particular Caſes involv'd in extraordinary Circumſtances [5], but proceed with more Security in the Uſe of general Words. For they take it for granted, that the Judges, whoſe Duty it is to examine particular Actions by the Rule of the Law, will be very well able to underſtand what Power any

[a] *Vide* 2 Sam. x. 12. [b] *Vide D. Cumberland De. L. Nat. Ch.* iv. §. 4. *n.* 4. [c] *Ethic. Lib.* vi. *Ch.* xii.
[d] *Senec. De Benef. Lib.* vii. *Ch.* vii. [e] *De Homine, Ch.* x. [f] *Ch.* vii. §. 13. and *Lib.* viii. *Ch.* i. §. 5.

[1] It is certain, that in many Things, *Politicks*, as well as *Phyſick*, is a conjectural Science, as Mr. *Bayle* expreſſes himſelf, in his *Reply to the Queſtion of a Province, Tom.* i. *P.* 570. But whatever that famous Philoſopher ſays, who, according to his Cuſtom, pretends to gather from thence ſome Arguments for Scepticiſm, *P.* 565. yet if he would ſeriouſly examine true Politicks, he would find, that moſt of its Principles and Maxims have a Certainty in them, which comes very near a Demonſtration; and as to thoſe Things which look like Problems, their Obſcurity proceeds rather from the Difficulty of Application, Ignorance of ſome Circumſtances, or Want of Attention, than from any abſolute Impoſſibility to eſtabliſh a Rule of Certainty concerning them. See what Mr. *Hertius* ſpeaks here, and the Diſcourſe of Mr. *Buddeus, De Scepticiſmo Morali*, §. 26. which I have before cited, and which deſerves to be read. I conjecture, that the Boaſting of the Scepticks proceeds from the Obſervation of the Behaviour of bad Politicians, and ambitious Sovereigns, and not from the Principles and Maxims which ariſe from the natural Deſign of civil Government, and the publick Good, ſeparate from the private Intereſt of ſome Perſons.

[2] Our Author, nevertheleſs, explains the fundamental and principal Queſtions of Politicks in the two laſt Books of this Work.

[3] See what I have ſaid in my Preface, §. 1, 2, 3, 4.

[4] For ſome pretend, that the Determination of what is morally good or Evil, depends upon the Will of the Sovereign.

[5] By theſe Principles (adds this Author) the following Maxims of the *Roman* Lawyers are to be explained: *Laws are to be made* (ſays *Theophraſtus*) *about ſuch Things as commonly happen, and not about ſuch Things as fall out unexpectedly: For what happens once or twice, Lawgivers paſs over.* Dig. Lib. i. Tit. iii. *De Legibus, Senatuſconſ. & longâ conſuetudine, Leg.* iii. i. e. In a Word, Laws are made about Things that commonly happen, and not for extraordinary Caſes, which may fall out once or twice by Chance. See *Ariſtot. Ethic. ad Nicom. Lib.* v. *Cap.* xiv. and what is ſaid *Lib.* v. *Cap.* xii. §. 17 and 21 following.

Circumſtance

Circumſtance has over any Fact [a]. But hence it cannot be inferr'd, that conſtant and perpetual Decrees ſometimes fail; but we ought rather to conclude, that 'tis not worth while for Legiſlators, in their written Laws, to preſcribe any Thing about Caſes that very rarely happen, ſince ſuch may be eaſily determin'd by the Judges out of the Principles of the *Law of Nature*.

VI. But to make the Knowledge of the *Law of Nature*, of which we are now treating, and which includes all moral and civil Doctrines that are genuine and ſolid, to make this Knowledge, we ſay, fully come up to the Meaſure and Perfection of *Science*, we do not think it neceſſary to aſſert, with ſome Writers [b], that there are ſeveral Things honeſt or diſhoneſt of themſelves,[2] and antecedent to all Impoſition, and ſo to make theſe Things the Object of our natural and perpetual Law, in Oppoſition to poſitive Laws, where Matters are Right or Wrong, juſt as the Law-giver was pleas'd to make them either. For, ſince Honour (or moral Neceſſity) and Turpitude are Affections of human Deeds, ariſing from their Agreeableneſs or Diſagreeableneſs to a Rule, or a Law; and ſince a Law is the Command of a Superior, it does not appear how we can conceive any Goodneſs or Turpitude before all Law, and without the Impoſition of a Superior [c]. And truly, as for thoſe who would eſtabliſh an eternal Rule for Morality of the Actions, without Reſpect to the Divine Injunction and Conſtitution, the Reſult of their Endeavours ſeems to us to be the joining with God Almighty ſome coeval extrinſecal Principle, which He was oblig'd to follow, in aſſigning the *Forms* and *Eſſences* of Things. Beſides, 'tis acknowledg'd on all Hands, that God created Man, as well as every Thing elſe, according to his own Free-will. From whence it evidently follows, that it muſt needs have been his Power and Pleaſure to endue this Creature with whatever Kind of Nature his Wiſdom thought fit. And how then ſhould it come to paſs, that the Actions of Mankind ſhould be veſted with any Affection or Quality proceeding from intrinſical and abſolute Neceſſity, without Regard to the Inſtitution, and to the good Pleaſure of the Creator [3]? So that in Reality, all the Motions and Actions of Men, upon ſetting aſide all Law, both divine and human, are perfectly *indifferent* [4]: And ſome of them are therefore only ſaid to be naturally honeſt or diſhoneſt, becauſe that Condition of Nature, which God has freely beſtow'd on Man, ſtrictly enjoins the Performance or the Omiſſion of them [5]. Not that any Morality inheres of itſelf, and without all Law, in the bare Motion, or the meer Application of natural Power [d]: And therefore we ſee Beaſts every Day doing ſuch Things without Fault or Sin, in committing which, Man would have been guilty of the higheſt Wickedneſs. Yet are not the natural Motions of Men and of Beaſts in themſelves different, but ſome Actions of Men are by the Authority of a Law inveſted with a moral

[a] *And hence chiefly we are to draw the Reaſon of it*, §. 2, 3, 4, 5, 6. de Legib. Laws are to be enacted, *as* Theophraſtus *us'd to ſay*, with Regard to Things, as they moſt commonly fall out, not as they ſometimes happen beſide Expectation. Little particular Caſes and accidental Exceptions are not worth the Notice of a Legiſlator. [b] *Add. D. Cumberland de Legg. N. Cap.* iv. §. 4. *n.* 1. [c] *Selden de J. N. & G. Lib.* i. *Cap.* iv. [d] Plato in Sympoſ. *This is the Nature of every Action, to be in itſelf neither good nor vicious; as what we are now doing, drinking, ſinging, arguing. Neither of theſe, conſider'd by itſelf, is honeſt or diſhoneſt; but the Manner of performing it gives every Action its proper Denomination. For what is done right, we call good, and what is done wrong, evil or indecent. The ſame Rule the Philoſopher afterwards applies to Love.*

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1 We muſt own, that becauſe of this infinite Variety of Circumſtances, we can hardly come to the laſt Preciſion in our Examination of all particular Caſes; "yet that does no more ſhake our moral Certainty, nor leſſen the Uſe of it, than the Impoſſibility of doing any Thing without us, either by the Uſe of our Senſes, or with the Help of Inſtruments, as to make a ſingle Line perfectly right, a ſingle Surface exactly round or plain, a ſingle Body compleatly regular, or whatever elſe may be reduced to the like Nature; ſuch an Impoſſibility (I ſay) can't deſtroy the Truth or Benefit of the Principles of Geometry, concerning the Meaſure of Lines, Superficies, and Solids. It is ſufficient that they come ſo very near Exactneſs, that nothing conſiderable can be deſired to make them uſeful to us; and ſo we may arrive at our Ends, as well by the Principles of Morality, as by thoſe of Geometry. It is true, nevertheleſs, that the *Poſtulata* of Morality, ſuch as God and Man, with their mutual Acts and Relations, can't be known ſo diſtinctly and exactly, as mathematical *Poſtulata*, and ſo moral Concluſions can't be ſo perfectly known. But as to the Method, Rules of Demonſtration, and inferring one Thing from another, they are all exactly the ſame in Geometry and Morality; and there is no more Need of an abſolute Exactneſs for the Uſe of Life, than to meaſure the Diſtance of Place, or Extent of a Field." *Cumberland. De Legib. Nat. Cap.* iv. §. 4. *n.* 1. It is thought neceſſary to give the Reader this Paſſage entire, which our Author only refers to.

2 To remove all Equivocations, and leave no Place for Cavil, we ought to obſerve, That we muſt own Things honeſt or diſhoneſt of themſelves, or in their own Nature, 1. By Way of Oppoſition to human Appointment, as the Agreements or Opinions of Men. 2. In Reſpect of the Subject, with Relation to which they are thought ſo. As for Example, There are ſome Acts which no Way agree to God, *i. e.* which he can't do without derogating from his Perfections, and ſo contradicting himſelf. There are Actions, alſo, which of themſelves agree, or diſagree with the human Nature, in our preſent State. But if we underſtand, that an Action is honeſt or diſhoneſt in its own Nature, without any Relation to the Appointment of God, or the Laws which God hath impoſed upon us by our Creation, in this Senſe, the Propoſition is falſe. This is what our Author ſays, *Specim. Controverſ. Cap.* v. §. 7. See *Lib.* ii. *Cap.* iii. §. 4, 5. following. It appears from hence, that our Author acknowledged, in honeſt and diſhoneſt Things, a Relation of Agreement or Diſagreement, independent of the Will of God. He was too knowing to believe, that, abſtractedly from all Law, it was as commendable for a Man to break his Word as to keep it; to render Good for Evil, as Evil for Good; to be grateful as ungrateful, *&c.* But he was in the right to aſſert, that theſe Relations of Agreement or Diſagreement, are not of themſelves ſufficient to impoſe an Obligation, properly ſo call'd, and that the great and ſtrong Foundation of that moral Neceſſity, which leaves us no Room for Doubt or Diſobedience, is the Will of God, who, by creating Men, and giving them Reaſon, by the Help of which they may know the Relations founded on their own Nature, and the End for which they were made, has given them the Force of an inviolable Law. This is what I have had elſewhere Occaſion to demonſtrate in Defence of my Author, againſt the deceas'd M. *Leibnitz*, at the End of the ſecond Volume of the fourth Edition of *The Duties of a Man and a Citizen.*

3 See *Note* 4. upon *Ch.* i. §. 4.

4 This will appear more plain from this Conſideration: There are ſome Actions, in which the phyſical Motion is entirely the ſame, but are very different with regard to Morality; the one being accounted good, or at leaſt allowable, the other evil and unlawful: As for Example; To kill a Man is a Crime in a Thief, but a good Action, or at leaſt an allowable one, in an Executioner, a Soldier, or a Perſon that fights in his own Defence, *&c.* ſo that in this Action, if we conſider the phyſical Movement in itſelf, and without regard to the Law, it is altogether indifferent.

5 Plato, in his Treatiſe of Banquets, ſpeaks to the ſame Effect. The Nature of all our Actions is ſuch, that they are neither honeſt nor diſhoneſt in themſelves, as to drink, ſing, diſcourſe, and ſuch like Actions; but 'tis the Manner of doing, that denominates the Action; for what we do well, and according to our Duty, is honeſt, but what we do ill is diſhoneſt. A Principle, which, as our Author remarks here, this Philoſopher applies to Love. As for the reſt, I ſhall only obſerve here, that there ſeem to be two Words wanting in the Original, to wit [ἅτε αἰσχρόν.] *Not diſhoneſt.* The Senſe ſeems to require this; and *Marſilius Ficinus* has expreſs'd it the ſame in his Tranſlation, as I have in mine. *Aulus Gellius*, however, in quoting this Paſſage, *Lib.* xvii. *Cap.* xx. has it as it is in our common Editions, which ſhews, that the Omiſſion, if there be one, muſt be very ancient. I am confirm'd in this Opinion, becauſe I have ſince ſeen the Paſſage repeated two or three Pages after, where *Plato* is ſpeaking of Love. I own this Criticiſm may appear trifling, but what makes it more ſurpriſing is, that it ſhould eſcape the Notice of *Henry Stephens*, and the rather, as, in his Notes, he has compar'd theſe two Paſſages, and corrected the one by the other.

Quality, which does not at all touch or affect the Proceedings of Brutes.

Nor will it be to the Purpoſe for any one to object, That ſince Men are endu'd with Reaſon, which is wanting in Beaſts, therefore there muſt be a natural Difference between human and brutal Actions. For, if we conſider Reaſon, as uninform'd with the Knowledge and Senſe of Law, or of ſome moral Rule, it might, perhaps, even in this Condition, furniſh Man with the Faculty of acting more expeditiouſly and more accurately than Beaſts, and might aſſiſt the natural Powers by an additional Shrewdneſs or Subtilty. But that it ſhould be able to diſcover any Morality in human Actions, without reflecting on ſome Law, is equally impoſſible, as that a Man born blind ſhould make a Judgment on the Diſtinction of Colours [1].

Another Argument in favour of our Opinion is ſuggeſted by *Oſiander*, in his Notes on *Grotius*, *de Jure Belli & Pacis*, p. 60. *If* (ſays he) *there were any ſuch Thing as moral Good or Evil before all Law, how could there be any Obligation to make ſuch a Difference in our Actions, ſince all Obligation proceeds from the Command of a Superior? For moral Good or Evil involve a Reſpect to a Perſon acting either of thoſe Ways; and if that Perſon be determin'd by no Obligation, he cannot be ſaid properly to act well or ill.*

But here we deſire it ſhould be well obſerv'd, That this Indifference of the natural Motion in human Actions is by us maintain'd and eſtabliſh'd only in reſpect to Morality: For otherwiſe Actions enjoin'd by the Law of Nature have, from the Determination of the firſt Cauſe, a native Force in themſelves of producing Effects good and uſeful to Mankind; as Actions forbidden by the ſame Law are productive of contrary Effects. But this Goodneſs and Illneſs, which an Action bears naturally, and of itſelf, can never conſtitute any new Thing in Morals, which are quite beyond its Reach and Concern. For there are many Things highly conducing to the Happineſs and Advantage of a Man [2], which are not morally good, as neither being voluntary Deeds, nor Performances of any Law [a]; and many Actions which contribute to human Welfare, do in the ſame Manner promote the Benefit of Beaſts, in whom certainly they cannot bear any moral Quality. Thus the abſtaining from mutual Hurt, the moderate Uſe of Meat and Drink, the Care of Progeny or Off-Spring, are equally ſerviceable in the Preſervation of rational and of irrational Kinds; and yet Beaſts are never ſaid to perform Actions *morally good* [b]. So tho' all human Actions falling under the Guidance of the Law of Nature, may be finally reſolv'd into that natural Strength and Force which they bear in advancing the Profit or the Harm of Men [3], conſider'd either in a ſingle or in an united State; yet it does not follow, on the other Hand, that whatever Thing is endued with a natural Power of doing good or harm to any Species of Animals, is therefore the Object of the ſame Law.

Another Objection againſt the Doctrines we are now eſtabliſhing, is taken from that Paſſage in *Ariſtotle*'s Ethicks [4]: *Every Action and every Affection does not admit a Mediocrity: For there are ſome Affections which involve a kind of Pravity in their very Name, as Malice, Impudence, and Envy, and* ἐπιχαιρεκακία, *or rejoicing at another Man's Misfortune; and likewiſe ſome Actions, as Adultery, Theft, and Murder. Now theſe, and the like, being evil directly, and in their own Natures, are not called Vices with relation to any Exceſs or Defect; for abſolutely, and without any Degrees to be guilty of them, is to commit Sin.* But 'tis by no Means a good Conſequence, that becauſe we have ſome Names of Actions or Affections, which of themſelves, and without any Exceſs or Defect, imply Vice; therefore there are ſome Actions and Affections bad in themſelves, without Reſpect to any Law: Becauſe theſe Terms or Names do not ſignify bare natural Motions and Acts, but ſuch entire moral Motions and Acts, as are repugnant to ſome Law, and ſo take in, and expreſs, the whole Compaſs of a moral Deed [5]. For why, for Example, are Envy and its vile Conſequents, which we but now mention'd under the *Greek* Name of ἐπιχαιρεκακία, reputed evil Affections, but becauſe the Law of Nature ordains, that a Man ſhould never be a Stranger to his own Kind, but ſhould bear a Part in the Pleaſures and in the Sorrows of his Neighbours; to which Rule it is an open Contradiction, to receive any Joy from the Calamity of others, and to repine at their Happineſs and Succeſs [c]? And ſo what elſe is Impudence, but a wicked Firmneſs and Hardineſs of Mind in the Commiſſion of ſuch Things as the Law bids him be aſhamed of? For not to be aſham'd, or not to bluſh, can never be a Fault, when we are not by ſome Law ſuppos'd and enjoin'd to do otherwiſe. After the ſame Manner, Adultery is the Pollution of another Man's Wife, whom the Laws appropriate to her Huſband. Theft is the taking away of another Man's Goods, againſt the Conſent of the Owner, who, by the Law, is made the ſole Diſpoſer of them. Murder is the killing of a Perſon in his Innocence, and againſt the Laws. Inceſt is a Conjunction with ſuch a Perſon as the Laws oblige us to abſtain from, upon Ac-

[a] *Such are a quick Apprehenſion, Knowledge, Memory,* &c.
[c] Add. *Stob.* Serm. cxi.
[b] *Add. D. Cumberland, De L. N. Cap.* v. §. 9.

[1] Here we muſt diſtinguiſh between ſuch Terms and Expreſſions, as denote purely and ſimply the Motion of our natural Faculties, and thoſe which ſignify to us an Action wholly moral, *i. e.* a phyſical and moral Motion. As for Example: To labour, to kill, to ſpeak, ſignify only certain natural Motions, in themſelves indifferent: But when we ſay, He laboured to deſtroy his Neighbour, He ſlew an innocent Perſon, whom he had no Right to kill, He ſpoke ill of his Neighbour, theſe are bad Actions. And theſe are good ones, or at leaſt allowable ones, To labour in our Calling, Slay an unjuſt Aggreſſor, Speak ſincerely, &c. There are alſo ſome ſimple Terms, which, in themſelves, contain both a phyſical Motion and Morality. As for Example, Adultery, Inceſt, Theft, &c. as our Author ſpeaks in his *Diſſert. Academ. p.* 733, 734.

[2] Such are (ſaith Biſhop *Cumberland, De Leg. Nat. Cap.* v. §. 9.) a Quickneſs of Wit, Knowledge of ſpeculative Sciences, and divers Arts, an happy Memory, Strength of Body, the Help of outward Things, &c.

[3] See what our Author writes, *Lib.* ii. *Cap.* iii. §. 21. Utility is a Sequel of the Obſervation of the natural Law: But it is no Way the proper and direct Foundation of the Obligation we are under to obſerve it. This Foundation, as has been before obſerv'd, is the Will of GOD, diſcoverable by the Agreement or Diſagreement of ſuch or ſuch Actions with the human Nature, of which he is the Author. See my Defence of M. *Pufendorf*, againſt the deceas'd M. *Leibnitz*.

[4] *Ethic ad Nicom. Lib.* ii. *Cap.* vi.

[5] This is ſo true, that we ſometimes confound the poſitive Idea and phyſical Action with its moral Relation, even when they are really two very diſtinct Things. As for Example, To drink Wine, or any other ſtrong Liquor, till we loſe the Uſe of our Reaſon, is that which we call Drunkenneſs; but as that Word imports, in its ordinary Uſe, a moral Turpitude in the Action contrary to a Law, Men are obliged to condemn every Thing that hath a Tendency to that, which we call Drunkenneſs, as an evil Action, and contrary to the moral Law; but if a Man happen to have his Brain diſturbed, by drinking a certain Quantity of Wine, which was preſcribed him, as a Medicine, for the Recovery of his Health, though we may call ſuch an Action Drunkenneſs, conſidering it as a Name of a mixt Nature, yet, 'tis plain, that if we compare it with the Law of GOD, our ſupream Rule, 'tis no Sin, nor a Tranſgreſſion of that divine Law, though Drunkenneſs is ordinarily taken in that Senſe. Mr. *Locke*'s *Eſſay on human Underſtanding*, *Lib.* ii. *Cap.* xxviii, §. 16. We may obſerve the great Uſe of this Remark in the Queſtion of Lying, which is treated on, *Lib.* iv. *Cap.* i.

count of the Reverence which Men are by Law, likewiſe, taught to pay to Nearneſs of Blood. And the ſame Judgment is to be made of other Vices. But now, if from all theſe you take away the Reſpect to the Law, and the Morality inherent in ſuch Actions, the bare natural Fact will involve no Abſurdity or Contradiction: For in a natural and abſolute Senſe theſe are altogether indifferent Things; to have Conjunction with your neareſt Relation, or with the ſame Woman who is enjoy'd by another, ſuppoſing he has no peculiar Right to her, as he cannot have without Law; to take away the Life of a Creature of the ſame Species with yourſelf; to take a Thing which another Man had deſign'd for his Uſe, tho' he had obtain'd no Right by Law to exclude others from their Share in its Poſſeſſion. And the Reaſon why ſo few Perſons can conceive and apprehend ſuch a natural Indifference as we are maintaining, is only this, becauſe, from our Infancy, we are taught to deteſt ſuch Practices; and this Abhorrence, being imprinted on our tender Minds, *ſeems to grow into a kind of natural Judg*ment; ſo that it ſeldom enters into Men's Heads to diſtinguiſh between the *Materiality* and the *Formality* of thoſe Actions, or between our Performance of them as natural, and our Commiſſion of them as moral Agents [1]. Hence it appears, that *Grotius* had not conſider'd this Matter thoroughly [2], when, among thoſe Things to which the Power of GOD himſelf does not extend, becauſe they involve a manifeſt Contradiction, he reckons [a] the Malignity of ſome human Actions. Indeed 'tis impoſſible that twice two ſhould not make four, becauſe twice two and four are really the ſame Thing, and only differ in Name, and in our Manner of conceiving them. But the Contradiction which appears in Actions repugnant to Nature's Law, is of a much lower Degree, and can never riſe to an *abſolute* Impoſſibility. And upon the ſame Account he derives this Malignity from ſuch Actions as are compar'd with right Reaſon: For in the very Terms of right Reaſon, when apply'd to Man, there inheres a Reſpect to the Law of Sociableneſs enjoin'd to human Race by the Creator. Thus, at the ſame Rate, he alledges [b] for a Proof of the Independency of ſome of Nature's Laws, the *neceſſary* Agreement and Diſagreement of Things to rational and ſocial Nature. But Man obtain'd a ſocial Nature from the good Pleaſure of GOD ALMIGHTY, not from any immutable Neceſſity; and conſequently the Morality of Actions, agreeable or diſagreeable to him, as a ſocial Creature, muſt be deriv'd from the ſame Original and Spring; and muſt be attributed to Man, not by an abſolute, but by an hypothetical Neceſſity; or upon Suppoſal of that Condition which GOD was pleas'd freely to beſtow on Mankind, above the Privileges of the inferior Creation. Nor can this Opinion of *Grotius* find any Shelter or Protection in thoſe Places of Scripture which he quotes to ſhew, that GOD ALMIGHTY permits himſelf to be judg'd according to the original Laws, and therefore they muſt be abſolutely immutable: For, without Doubt, GOD declar'd to Mankind, from the very Beginning of Things, that he would be a *Rewarder of the Good*, and an *Avenger on the Wicked*, Heb. xi. 6. and that he would *render unto every Man according to his Works*, Rom. ii. 6. From which Declaration his Veracity not permitting him to go back, *Abraham* had Reaſon to make that Appeal which we find *Gen.* xviii. 25. *Shall not the Judge of all the Earth do right* [c]? But how does it follow hence, that [3] human Actions have any moral Quality antecedent to the divine Impoſition? Nor does it at all appear how the ſame Concluſion can be drawn from the fifth Chapter of *Iſaiah*, where GOD is pleas'd to refer the *Cauſe between him and his Vineyard*, to the Judgment of *Iſrael* and *Judah*, and concludes, that he may lawfully neglect the farther Care and Culture of it, ſince the degenerate Fruit made ſo ill a Return for his Pains. And laſtly, from that Place in the ſixth of *Micah*, where GOD is ſaid to *have a Controverſy with his People, and to reaſon with Iſrael*, it ſeems to be hinted, that Men may, by their own Judgment, underſtand the Equity of returning Thanks for Benefits receiv'd; but we cannot thence infer, that, becauſe Men who have a Senſe of Kindneſs, are oblig'd to be grateful, therefore this Gratitude is not commanded by any Law, but is of itſelf, before all Law, a neceſſary Duty. From all that we have urg'd on this Head, it may appear, that

[a] *De J. B. & P. Lib.* i. *Cap.* i. § 10. [b] Ibid. §. 12. [c] Add. *Ezek.* xviii. 25. *Rom.* iii. 6.

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VII. It may be farther objected, and with ſome Face of Probability, among vulgar Judges, That Honeſty and Turpitude muſt needs inhere in ſome human Actions of themſelves, and by the Force of their own Nature, not by the Power of external Impoſition; for this Reaſon, becauſe our very Blood ſeems to have a natural Senſe of wicked Deeds, which it expreſſes by ſpreading a ſudden Redneſs over the Face, whenſoever we are touch'd, either with the Memory of them, or with the Reproach. Now they ſay 'tis very improper to attribute a natural Effect to a moral Quality; but, on the contrary, that ſince ſuch a certain Motion of the Blood raiſing a Redneſs in the Face, reſults in the Manner of a natural Effect from an ill Action, that Illneſs or Pravity muſt, likewiſe, be applied to the Action, as a natural and a neceſſary Affection or Quality. In return to which, in the firſt Place, we confeſs, that the moſt wiſe Creator has implanted in the Minds of Men the Paſſion of Shame, to ſerve, as it were, for a Guard and Defence to Virtue, and for a Bridle to wicked Deſigns. And it is likewiſe probable, that unleſs God had deſign'd Man for an Agent, who was to frame his Proceedings by a Law, he would never have mingled ſuch a Paſſion in human Conſtitution, ſince without that Suppoſition it does not appear to be of any Uſe at all in the World. But indeed it is no manner of Contradiction, that a moral Quality owing its Original to Inſtitution, ſhould produce in Man (tho' not directly and immediately) a natural Effect: For [2] the Soul being united by the cloſeſt Ties to the Body, while itſelf apprehends moral Concerns, and is affected with them, may, at the ſame Time, eaſily raiſe a peculiar Motion in ſome Part of the Body. Beſides, we ought to obſerve, that Shame does not only ariſe from the Pravity of Actions, but, alſo, from any Fact, tho' not morally evil, which we think will leſſen our Character and Eſteem: For, according to *Des Cartes*'s Definition, it is nothing elſe but *a Species of Sorrow, founded upon Self-love, and proceeding from a Senſe or Fear of Diſgrace* [a]: Or, as *Ariſtotle* [b] ſpeaks, *it is a certain Grief and Confuſion at Things which appear hurtful to our Reputation:* For, Man is a moſt ambitious Creature, and highly conceited of his own Excellency, whence he takes an extraordinary Pleaſure, if he can find out any Advantage or Perfection in himſelf, on the Strength of which he may brag, and ſwell, and carry himſelf above the Dimenſions of his Neighbours. And whenever he apprehends theſe Talents to be the leaſt impair'd, and to weigh lighter in common Account, he immediately conceives the deepeſt Regret in his own Mind. Now the Heart, that chief Seat of human Excellency, being affected with this Paſſion, preſently ſends up the Blood to be an outward Sign of it in the Face. But becauſe [3] Man does not only value himſelf upon Account of abſtaining from evil Deeds, but for ſeveral other Things, which are not endued with any moral Quality, if he ſuffer in any of theſe latter Points, he is equally liable to *Shame*: Thus we ſee many Perſons who cannot forbear bluſhing at their Lameneſs, or Baldneſs; at a Wen, a Crump-back, or any other Deformity of Body; at ſome particular Diſeaſes; at Poverty; bad Cloaths; at faultleſs Ignorance, or at harmleſs Miſtakes, and at [4] many other Things, which are by no Means morally Evil [c]. And among Sins, thoſe eſpecially put a Man to the Bluſh, which directly argue a Lowneſs and Dejection of Mind, and which, for that Reaſon, make us appear more contemptible [d]; nor has the Fear of this Contempt the ſame general Power, but only when we are in Danger of ſuffering it from thoſe Perſons, whoſe Eſteem and good Opinion we are particularly covetous of enjoying. And thoſe deſperate Wretches, who have once ſinned themſelves out of all Care of Credit, are not afterwards [5] touch'd with the leaſt Bluſh, upon the Commiſſion of the vileſt Wickedneſs [e]. Whatever we have urg'd againſt the natural, the abſolute, and the neceſſary Goodneſs or Pravity of human Deeds, does not at all ſeem to rob moral Knowledge of its requiſite Certainty, for this would remain fixt and unmov'd, tho' the Morality of our Actions depended entirely on Impoſition.

VIII. But if this Doctrine be true which we have aſſerted, what will become of that *moral Latitude* which is ſo much talk'd of, and ſo frequently oppos'd to *mathematical Strictneſs?* Does not that ſeem to detract ſomewhat from the Certainty which we maintain? This Doubt will be clearly ſolv'd, if it be conſider'd how far we affirm Demonſtration to prevail in theſe Notions, and in what Things this *Latitude* is to be found. Demonſtrations therefore are here chiefly employ'd about moral Qualities, ſo far as thoſe Qualities appear, for certain, to agree to ſuch Actions or Perſons: When we enquire (for Example) whether ſuch an Action be juſt or unjuſt, whether ſuch a Right, or ſuch an Obligation, accrue to ſuch a Perſon, conſider'd in general, or as that perſonal Capacity is common to others with

[a] De Paſſion. Art. ccv. [b] Rhetor. *Lib.* ii. *Cap.* vi. init. Rhet. *Lib.* ii. *Cap.* vi. [c] Add. *Cartes* de Paſſion. Art. ccvii. [c] Add. *Sirac. Cap.* xlii. 9, &c. [d] Vid. *Ariſtot.*

[1] Thoſe who have firſt ſpoken of the Eternity of the Laws of Nature, muſt mean it in Oppoſition to the Novelty and frequent Changes of the Civil Laws; for they aſſert only, that natural Law had not its Beginning in the Times of *Minos*, *Solon*, or *Lycurgus*, but exiſted before any civil Society, and is as ancient as Mankind. Further, That this Law is not ſubject to change, as Civil Laws are, which are aboliſhed according to the Neceſſities of a State, or the Humour of Sovereigns; but it remains the ſame in all Times, and Places, and ſhall end only with Mankind. In fine, 'Tis no ways neceſſary to maintain, that the Law of Nature is co-eternal with GOD; for ſince it has, properly ſpeaking, no Regard to him, and is only made for Men, on whom it is impoſed, to what Purpoſe is it to ſuppoſe, that it had a Being before Men? But if we confine ourſelves to ſay, that God had an Idea of them from all Eternity in his Preſcience, we attribute nothing thereby to the Law of Nature, but what's common to every Thing that exiſts. *Pufend. Apolog.* §. 26.

[2] See the Paſſage of PLUTARCH, §. 6. *Note* 10, and what goes before and follows it.

[3] So far from that, that we are ſometimes aſhamed that we have done Things which we believe to be good, and not done Things that are evil. See PLUTARCH's Treatiſe of *Falſe Shame*, Tom. ii. *p.* 528. *Ed. Wech.*

[4] SENECA in his *Letters*, *Numb.* 11. (of which M. *Hertius* has cited a Paſſage in this Place) proves, that Bluſhing is the Effect of Temperament, and that diverſe Cauſes produce it. As for Example, *Pompey the Great* could not help bluſhing, when he appeared in a great Aſſembly; and *Fabianus* the Philoſopher and Orator bluſhed, when he came but to give an Evidence before the Senate. SENECA ſays, it proceeds not from Weakneſs of Mind, but from Surprize; for what a Man is not accuſtomed to, diſturbs ſuch as are ſubject to Bluſhing. The learned *Gronovius* had already cited *Seneca*'s Example of *Pompey* in his Notes upon *Grotius*, *Prolegom*, §. 2.

[5] TACITUS has a like Remark, *Annal.* xi. *Cap.* 26. *Ob magnitudinem infamiæ*, &c. The Greatneſs of the Infamy gives Pleaſure to the Crime, in the Minds of ſuch as have caſt away all Senſe of their Honour. Which Mr. *Hertius* cites.

count of the Reverence which Men are by Law, likewiſe, taught to pay to Nearneſs of Blood. And the ſame Judgment is to be made of other Vices. But now, if from all theſe you take away the Reſpect to the Law, and the Morality inherent in ſuch Actions, the bare natural Fact will involve no Abſurdity or Contradiction: For in a natural and abſolute Senſe theſe are altogether indifferent Things; to have Conjunction with your neareſt Relation, or with the ſame Woman who is enjoy'd by another, ſuppoſing he has no peculiar Right to her, as he cannot have without Law; to take away the Life of a Creature of the ſame Species with yourſelf; to take a Thing which another Man had deſign'd for his Uſe, tho' he had obtain'd no Right by Law to exclude others from their Share in its Poſſeſſion. And the Reaſon why ſo few Perſons can conceive and apprehend ſuch a natural Indifference as we are maintaining, is only this, becauſe, from our Infancy, we are taught to deteſt ſuch Practices; and this Abhorrence, being imprinted on our tender Minds, *ſeems to grow into a kind of natural Judg*ment; ſo that it ſeldom enters into Men's Heads to diſtinguiſh between the *Materiality* and the *Formality* of thoſe Actions, or between our Performance of them as natural, and our Commiſſion of them as moral Agents [1]. Hence it appears, that *Grotius* had not conſider'd this Matter thoroughly [2], when, among thoſe Things to which the Power of GOD himſelf does not extend, becauſe they involve a manifeſt Contradiction, he reckons [a] the Malignity of ſome human Actions. Indeed 'tis impoſſible that twice two ſhould not make four, becauſe twice two and four are really the ſame Thing, and only differ in Name, and in our Manner of conceiving them. But the Contradiction which appears in Actions repugnant to Nature's Law, is of a much lower Degree, and can never riſe to an *abſolute* Impoſſibility. And upon the ſame Account he derives this Malignity from ſuch Actions as are compar'd with right Reaſon: For in the very Terms of right Reaſon, when apply'd to Man, there inheres a Reſpect to the Law of Sociableneſs enjoin'd to human Race by the Creator. Thus, at the ſame Rate, he alledges [b] for a Proof of the Independency of ſome of Nature's Laws, the *neceſſary* Agreement and Diſagreement of Things to rational and ſocial Nature. But Man obtain'd a ſocial Nature from the good Pleaſure of GOD ALMIGHTY, not from any immutable Neceſſity; and conſequently the Morality of Actions, agreeable or diſagreeable to him, as a ſocial Creature, muſt be deriv'd from the ſame Original and Spring; and muſt be attributed to Man, not by an abſolute, but by an hypothetical Neceſſity; or upon Suppoſal of that Condition which GOD was pleas'd freely to beſtow on Mankind, above the Privileges of the inferior Creation. Nor can this Opinion of *Grotius* find any Shelter or Protection in thoſe Places of Scripture which he quotes to ſhew, that GOD ALMIGHTY permits himſelf to be judg'd according to the original Laws, and therefore they muſt be abſolutely immutable: For, without Doubt, GOD declar'd to Mankind, from the very Beginning of Things, that he would be a *Rewarder of the Good*, and an *Avenger on the Wicked*, Heb. xi. 6. and that he would *render unto every Man according to his Works*, Rom. ii. 6. From which Declaration his Veracity not permitting him to go back, *Abraham* had Reaſon to make that Appeal which we find *Gen.* xviii. 25. *Shall not the Judge of all the Earth do right* [c]? But how does it follow hence, that [3] human Actions have any moral Quality antecedent to the divine Impoſition? Nor does it at all appear how the ſame Concluſion can be drawn from the fifth Chapter of *Iſaiah*, where GOD is pleas'd to refer the *Cauſe between him and his Vineyard*, to the Judgment of *Iſrael* and *Judah*, and concludes, that he may lawfully neglect the farther Care and Culture of it, ſince the degenerate Fruit made ſo ill a Return for his Pains. And laſtly, from that Place in the ſixth of *Micah*, where GOD is ſaid to *have a Controverſy with his People, and to reaſon with Iſrael*, it ſeems to be hinted, that Men may, by their own Judgment, underſtand the Equity of returning Thanks for Benefits receiv'd; but we cannot thence infer, that, becauſe Men who have a Senſe of Kindneſs, are oblig'd to be grateful, therefore this Gratitude is not commanded by any Law, but is of itſelf, before all Law, a neceſſary Duty. From all that we have urg'd on this Head, it may appear, that

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the Sentence which is frequently in the Mouths of moſt Men, [1] *That the Precepts of natural Law are of eternal Verity*, is ſo far to be reſtrain'd and limited, that this Eternity ought to reach no farther than the Impoſition and Inſtitution of GOD ALMIGHTY, and the Origin of human Kind. Tho', to ſay the Truth, the Eternity which we improperly attribute to the Laws of Nature, is only to be rated in Proportion to the Oppoſition they bear to *poſitive Laws*, theſe being ſubject to frequent Alterations, while thoſe remain fixt and unchangeable.

VII. It may be farther objected, and with ſome Face of Probability, among vulgar Judges, That Honeſty and Turpitude muſt needs inhere in ſome human Actions of themſelves, and by the Force of their own Nature, not by the Power of external Impoſition; for this Reaſon, becauſe our very Blood ſeems to have a natural Senſe of wicked Deeds, which it expreſſes by ſpreading a ſudden Redneſs over the Face, whenſoever we are touch'd, either with the Memory of them, or with the Reproach. Now they ſay 'tis very improper to attribute a natural Effect to a moral Quality; but, on the contrary, that ſince ſuch a certain Motion of the Blood raiſing a Redneſs in the Face, reſults in the Manner of a natural Effect from an ill Action, that Illneſs or Pravity muſt, likewiſe, be applied to the Action, as a natural and a neceſſary Affection or Quality. In return to which, in the firſt Place, we confeſs, that the moſt wiſe Creator has implanted in the Minds of Men the Paſſion of Shame, to ſerve, as it were, for a Guard and Defence to Virtue, and for a Bridle to wicked Deſigns. And it is likewiſe probable, that unleſs God had deſign'd Man for an Agent, who was to frame his Proceedings by a Law, he would never have mingled ſuch a Paſſion in human Conſtitution, ſince without that Suppoſition it does not appear to be of any Uſe at all in the World. But indeed it is no manner of Contradiction, that a moral Quality owing its Original to Inſtitution, ſhould produce in Man (tho' not directly and immediately) a natural Effect: For [2] the Soul being united by the cloſeſt Ties to the Body, while itſelf apprehends moral Concerns, and is affected with them, may, at the ſame Time, eaſily raiſe a peculiar Motion in ſome Part of the Body. Beſides, we ought to obſerve, that Shame does not only ariſe from the Pravity of Actions, but, alſo, from any Fact, tho' not morally evil, which we think will leſſen our Character and Eſteem: For, according to *Des Cartes*'s Definition, it is nothing elſe but *a Species of Sorrow, founded upon Self-love, and proceeding from a Senſe or Fear of Diſgrace* [a]: Or, as *Ariſtotle* [b] ſpeaks, *it is a certain Grief and Confuſion at Things which appear hurtful to our Reputation:* For, Man is a moſt ambitious Creature, and highly conceited of his own Excellency, whence he takes an extraordinary Pleaſure, if he can find out any Advantage or Perfection in himſelf, on the Strength of which he may brag, and ſwell, and carry himſelf above the Dimenſions of his Neighbours. And whenever he apprehends theſe Talents to be the leaſt impair'd, and to weigh lighter in common Account, he immediately conceives the deepeſt Regret in his own Mind. Now the Heart, that chief Seat of human Excellency, being affected with this Paſſion, preſently ſends up the Blood to be an outward Sign of it in the Face. But becauſe [3] Man does not only value himſelf upon Account of abſtaining from evil Deeds, but for ſeveral other Things, which are not endued with any moral Quality, if he ſuffer in any of theſe latter Points, he is equally liable to *Shame:* Thus we ſee many Perſons who cannot forbear bluſhing at their Lameneſs, or Baldneſs; at a Wen, a Crump-back, or any other Deformity of Body; at ſome particular Diſeaſes; at Poverty; bad Cloaths; at faultleſs Ignorance, or at harmleſs Miſtakes, and at [4] many other Things, which are by no Means morally Evil [c]. And among Sins, thoſe eſpecially put a Man to the Bluſh, which directly argue a Lowneſs and Dejection of Mind, and which, for that Reaſon, make us appear more contemptible [d]; nor has the Fear of this Contempt the ſame general Power, but only when we are in Danger of ſuffering it from thoſe Perſons, whoſe Eſteem and good Opinion we are particularly covetous of enjoying. And thoſe deſperate Wretches, who have once ſinned themſelves out of all Care of Credit, are not afterwards [5] touch'd with the leaſt Bluſh, upon the Commiſſion of the vileſt Wickedneſs [e]. Whatever we have urg'd againſt the natural, the abſolute, and the neceſſary Goodneſs or Pravity of human Deeds, does not at all ſeem to rob moral Knowledge of its requiſite Certainty, for this would remain fixt and unmov'd, tho' the Morality of our Actions depended entirely on Impoſition.

VIII. But if this Doctrine be true which we have aſſerted, what will become of that *moral Latitude* which is ſo much talk'd of, and ſo frequently oppos'd to *mathematical Strictneſs?* Does not that ſeem to detract ſomewhat from the Certainty which we maintain? This Doubt will be clearly ſolv'd, if it be conſider'd how far we affirm Demonſtration to prevail in theſe Notions, and in what Things this *Latitude* is to be found. Demonſtrations therefore are here chiefly employ'd about moral Qualities, ſo far as thoſe Qualities appear, for certain, to agree to ſuch Actions or Perſons: When we enquire (for Example) whether ſuch an Action be juſt or unjuſt, whether ſuch a Right, or ſuch an Obligation, accrue to ſuch a Perſon, conſider'd in general, or as that perſonal Capacity is common to others with

[a] De Paſſion. Art. ccv. [b] Rhetor. *Lib.* ii. *Cap.* vi. init. Rhet. *Lib.* ii. *Cap.* vi. [c] Add. *Cartes* de Paſſion. Art. ccvii. [c] Add. *Sirac. Cap.* xlii. 9, *&c.* [d] Vid. *Ariſtot.*

[1] Thoſe who have firſt ſpoken of the Eternity of the Laws of Nature, muſt mean it in Oppoſition to the Novelty and frequent Changes of the Civil Laws; for they aſſert only, that natural Law had not its Beginning in the Times of *Minos, Solon,* or *Lycurgus,* but exiſted before any civil Society, and is as ancient as Mankind. Further, That this Law is not ſubject to change, as Civil Laws are, which are aboliſhed according to the Neceſſities of a State, or the Humour of Sovereigns; but it remains the ſame in all Times, and Places, and ſhall end only with Mankind. In fine, 'Tis no ways neceſſary to maintain, that the Law of Nature is co-eternal with GOD; for ſince it has, properly ſpeaking, no Regard to him, and is only made for Men, on whom it is impoſed, to what Purpoſe is it to ſuppoſe, that it had a Being before Men? But if we confine ourſelves to ſay, that GOD had an Idea of them from all Eternity in his Preſcience, we attribute nothing thereby to the Law of Nature, but what's common to every Thing that exiſts. *Pufend. Apolog.* §. 26.

[2] See the Paſſage of PLUTARCH, §. 6. *Note* 10, and what goes before and follows it.

[3] So far from that, that we are ſometimes aſhamed that we have done Things which we believe to be good, and not done Things that are evil. See PLUTARCH's Treatiſe of *Falſe Shame*, Tom. ii. *p.* 528. *Ed. Wech.*

[4] SENECA in his *Letters, Numb.* 11. (of which M. *Hertius* has cited a Paſſage in this Place) proves, that Bluſhing is the Effect of Temperament, and that diverſe Cauſes produce it. As for Example, *Pompey the Great* could not help bluſhing, when he appeared in a great Aſſembly; and *Fabianus* the Philoſopher and Orator bluſhed, when he came but to give an Evidence before the Senate. SENECA ſays, it proceeds not from Weakneſs of Mind, but from Surprize; for what a Man is not accuſtomed to, diſturbs ſuch as are ſubject to Bluſhing. The learned *Gronovius* had already cited *Seneca*'s Example of *Pompey* in his Notes upon *Grotius, Prolegom.* §. 2.

[5] TACITUS has a like Remark, *Annal.* xi. *Cap.* 26. *Ob magnitudinem infamiæ, &c.* The Greatneſs of the Infamy gives Pleaſure to the Crime, in the Minds of ſuch as have caſt away all Senſe of their Honour. Which Mr. *Hertius* cites.

him. Now all theſe Kinds of Truths we maintain to be ſo clearly and certainly deducible from their genuine Principles and Cauſes, that no Man, in his right Wits, can entertain a Doubt concerning them. And tho' we ſhould diſcover ſome little *Latitude*, or ſomething analogous to *Latitude*, in the Queſtions; yet that would not be able to prejudice the Certainty of them in itſelf. As for the Goodneſs or Pravity of Actions, as they denote their Agreeableneſs or Repugnancy to the Rule of the Law, in this Reſpect they ſeem capable of no Manner of *Latitude*, but whatever declines from Good muſt immediately be pronounc'd Evil. Yet under other Conſiderations, at leaſt with reſpect to Men, they admit of ſomething like *Latitude*; *Latitude*, properly ſpeaking, being applicable only to Quantity. And firſt, Becauſe in Laws the Force and Power of obliging Men is not always of the ſame Tenour and Degree, but appears more ſtrict in commanding and forbidding ſome *Actions*, and more looſe about others. Whence it comes to paſs, that we are forc'd to diſtinguiſh between Law and Equity, or between what's rigorouſly and exactly juſt, and [1] what's equal and fair to be done. The Difference between which Things is this, We lie under a more neceſſary Duty of performing the former, but the latter engage our Obedience with a gentler Tie, and with an inferior Obligation. Yet theſe laſt have a wider Object than the firſt; the Offices of other Virtues being extended much farther than thoſe of Juſtice. It happens, likewiſe, very commonly, that among Men, and in human Courts, ſmaller Deviations from the Law ſcarce fall under Conſideration or Animadverſion. Many Things too are ordain'd and commanded in ſo weak and indifferent a Manner, that they ſeem to engage Men rather by affecting their Modeſty than their Honeſty: So that thoſe who perform them deſerve Commendation, thoſe who omit them are not obnoxious to Reprehenſion. And among theſe Matters *Grotius* [a] ſeems to reckon *Concubinage*, *Divorce*, and *Polygamy*, before they were forbidden by the Law of GOD: *Theſe* (ſaith he) *are ſuch Things as Reaſon itſelf tells us it is more honeſt to abſtain from; yet not ſo, as that (ſetting aſide the Divine Precept) they include any grievous Fault.*

But of theſe we ſhall treat in their proper [b] Place. Hither likewiſe is to be referr'd that Paſſage of *Ariſtotle* [c]; *He that declines but a little from right Dealing, whether to the Exceſs, or to the Defect, is not charg'd with Guilt; but he that tranſgreſſes in a larger Meaſure, becauſe his Faultineſs diſcovers and betrays itſelf by its Bulk.* It may happen too that a Thing in itſelf ſhall be unobliging and indifferent, and yet the Performance, or the Omiſſion of it ſhall either always, or, however, at ſome certain [2] Juncture, be more for our Advantage and Uſe. To this Caſe belong thoſe Paſſages of St. *Paul* in his firſt Epiſtle to the *Corinthians*, Chap. vi. Ver. 12. Chap. vii. Ver. 6, 7, 8, 9. Chap. x. Ver. 23. And that Obſervation of *Grotius* [d], *That ſometimes by an abuſe of Words, thoſe Things which Reaſon ſhews to be honeſt, or better than the contrary* [3], *tho' they are not enjoin'd, yet ſhall be call'd Dictates or Ordinances of the Law of Nature.* From all that has been ſaid, we may underſtand whether, and in what Manner, there may be ſaid to be Degrees of Good. If then we conſider Good in a ſtrict Senſe, for a Congruity to the Law, 'tis as impoſſible there ſhould be any Thing better than what is good, as that there ſhould be any Thing ſtraighter than what is properly ſtraight. Yet one Good may be pronounc'd better than another, according to the different Degrees of Neceſſity which are found in both, and upon Account of which, if they cannot be both perform'd, one of them, manifeſtly, gives Place to the other. To this Purpoſe, ſee *Matth.* viii. 21, 22. where it was a good Thing to bury a dead Father, but a better to follow our Saviour: *Acts* vi. 2. where it was a good Thing to miniſter to the Poor, but a better to preach the Goſpel: On which Point we ſhall be larger hereafter [e]. Laſtly, when Actions, in themſelves lawful and indifferent, are meaſur'd and rated according to their Uſefulneſs or Expedience, one of them is declar'd better than another, as it is more advantageous to the preſent Circumſtance or Occaſion [4].

IX. According to our Doctrine already deliver'd, muſt that Place of *Grotius* [f] be explain'd, about the Cauſes of Doubt in moral Actions; where he ſays, *There is not an equal Certainty to be met with in Morals and Mathematicks; which therefore happens, becauſe mathematical Sciences treat of Forms, as diſtinct and abſtracted from all Sorts of Matter, and becauſe the Forms themſelves are generally ſuch as will admit of no Medium, as we can find nothing which is not either crooked or ſtraight. But in Morals the leaſt Circumſtance alters the Matter; and the Forms, of which they treat, have commonly ſome intervenient Latitude, by Reaſon of which they ſometimes approach nearer to one Extream, and ſometimes to the other. Thus between Things abſolutely commanded, and abſolutely forbidden, there are ſome Things left indifferent; but this Medium of Indifference ſometimes inclines nearer to the Injunction, ſometimes to the Prohibition. Whence frequently ariſes an Ambiguity, ſomewhat like what we meet with in Twilight, or in Water not perfectly hot.* As to this Aſſertion, we muſt confeſs, that, as about other Actions, ſo eſpecially about making War, a Doubt may probably ariſe; either becauſe the Fact which occaſions the War is not yet fully made out, or whether it be of ſo great Conſequence as to deſerve a Proſecution by Arms, where the Caſe is ſo deſperate, and where the attending Miſeries are ſo nume-

[a] *Lib.* i. *Cap.* ii. §. 6. It is not to this Claſs that *Grotius* refers, but to a third, where our Author cites the Words of this great Man. See *Note* 1. *p.* 22. [b] *Lib.* vi. *Cap.* i. [c] *Ethic. Cap.* ult. [d] *Lib.* i. *Cap.* i. §. 10. [e] *Lib.* i. *Cap.* iii. §. 8. *&* *Lib.* v. *Cap.* xii. §. 23. [f] *Lib.* ii. *Cap.* xxiii. §. 1.

[1] So that Equity includes not only what is really and fully due to any one, although he cannot require it of us in Strictneſs by any written Law, but all that is due to another upon a Principle of Humanity, or Charity, or any other Virtue, which is ſuch, as that, if you violate the Duties belonging to it, he, to whom we ought to do it, can't complain of any proper Wrong done him; ſo that the Right from whence this Obligation ariſes, is that which is call'd by our Author, *Imperfect*. See *Chap.* i. §. 19, 20. foregoing, and *Chap.* vii. §. 7, 11, 16. *Book* iii. *Chap.* i. §. 3. and *Chap.* iii. §. 16. and *Chap.* iv. §. 6. *Book* viii. *Chap.* i. §. 1.

[2] We may add, *or with Relation to certain Perſons.* See what I have ſaid in my Treatiſe *of Games*, printed in 1709. *Lib.* iii. *Cap.* vi.

[3] Such is, for Example, the Cuſtom of covering thoſe Parts of the Body which diſtinguiſh Men from Women: To which we may refer what St. *Paul* ſays of the Cuſtoms of his Times, 1 *Cor.* xi. 14. Nature itſelf teaches us, *That if a Man have long Hair, 'tis a Shame to him; but if a Woman have long Hair, 'tis her Honour*, as *Frederick Gronovius* explains theſe Words, in his *Notes*; but our Author gives them another Turn, *Lib.* ii. *Cap.* iii. §. 22. If this Idea of Decency, independent of all Obligation, has any real Foundation, it is only on Account of the Danger, or Inconvenience there is in permitting ſuch Things, with regard to others more truly binding, rather than any Fault in abſtaining voluntarily from them; for we may either do, or not do them, if, on due Deliberation, we ſee no Hazard accrue, and that they are not, otherwiſe, either preſcribed or forbid by any poſitive Law. Thus the Matter will be reduc'd to the preceding Rule, founded on the Authority of St. *Paul*, as well as on the pureſt Lights of Reaſon. See what I have ſaid on *Grotius*, Book ii. Chap. v. §. 9. N. 10.

[4] There are other Principles by which the reſpective Quality of moral Actions may be determined. See *Chap.* viii. §. 5. with the *Note*.

rous; or whether, in the preſent Juncture and Condition of the Commonwealth, it be a moot Caſe which Courſe ought to be taken, either to return the Injury in an hoſtile Manner, or rather conceal the Affront, and defer the Satisfaction, leſt an untimely Purſuit of Revenge ſhould draw greater Misfortunes on the State. But that the Cauſes of Doubting, in ſuch Caſes, proceed from the Uncertainty of moral Matters, this we abſolutely deny. The Reaſon why the Demonſtrations in Mathematicks are ſo very accurate, is not the Abſtraction from *Matter*, but another, that we ſhall produce by and by. *That in Morals the leaſt Circumſtance alters the Matter*, is an ambiguous Expreſſion. If this be the Senſe of it, That the leaſt Circumſtance alters the Quality of an *Action*, that is, turns it from Good to Evil, this Variation does not at all injure the Certitude of moral Knowledge. For a Line that recedes never ſo little from Straightneſs, degenerates into Crookedneſs, and yet no Uncertainty ariſes hence in geometrical Operations. But if this be the Meaning of the Place, that the leaſt Circumſtance either raiſes or leſſens [1] the Quantity of an *Action*; this, at leaſt in human Regard, is not always true; for trifling Accidents and Punctilio's ſeldom weigh any Thing in the Sentence of a moral Judge. Yet, if we grant this Suppoſition, it will not in the leaſt diminiſh the Certainty of Morality; ſince even in Mathematicks the ſmalleſt Acceſſion, or the moſt inconſiderable Loſs, varies the Quantity. Lawful or indifferent Things, which compoſe the Medium between Commands and Prohibitions, we have already obſerv'd only in this Reſpect to incline ſometimes more to one Hand, ſometimes to the other, as it appears moſt expedient and uſeful ſometimes to perform them, ſometimes to omit them. Yet even hence nothing of Uncertainty can ariſe, nor is any ſuch Medium form'd, as we can clearly underſtand either to be Good or Ill. So that thoſe Examples and Inſtances of *Twilight* and *lukewarm Water*, are improperly applied to the preſent Caſe; they being of that Kind of *Media* we call *Media Participationis*, as *lukewarm Water* partakes of hot and cold together. But thoſe *Media*, which we call *Media Negationis*, as are indifferent and lawful Matters, poſſeſs not the leaſt Share of either of the Extreams, but equally deny them both. For we ſay in the ſame Manner, Good is not Indifferent, and Evil is not Indifferent; and it does not appear, how a *Medium* of this Nature can prove a Cauſe and an Occaſion of Uncertainty.

X. Yet as to the *Quantities* which are uſed in Morality, *they*, we confeſs, are capable of ſome Latitude; and it's chiefly on this Account, that mathematical Knowledge is eſteem'd to have ſo much higher Degrees of Nicety and Exactneſs than moral. The Reaſon of this depends on the different Conſtitutions of natural and of moral Quantity: For natural or phyſical Quantities may be accurately compared, and meaſured, and divided into the moſt equal Parts; becauſe they are repreſented as the Affections of material Things, which are the Objects of our Senſes. Whence we may preciſely determine, what Rule and Proportion they bear to each other, eſpecially if we employ the Aſſiſtance of Numbers, by the Application of which all Queſtions of this Kind are moſt exquiſitely ſolv'd. And beſides, thoſe Quantities are the Effect of Nature, and, conſequently, immoveable and permanent. On the other hand, moral Quantities proceed from the Impoſitions and the Eſtimation of intelligent and free Agents, whoſe Judgment and Pleaſure not falling under natural Dimenſions the Quantities which they thus conceive and determine, cannot be circumſcribed by any ſuch Meaſure, but retain, as it were, ſomewhat of the Looſeneſs and Liberty of their Original. Nor indeed did the Ends for which moral Quantities were firſt introduced, require any ſuch punctual Minuteneſs [2]; but it was ſufficient for the Uſe of human Life, that Perſons, Things, and Actions, ſhould be more groſly rated and compar'd together [3]. Thus we diſcover a Latitude in the Value or Eſteem of Perſons; by which, tho' we underſtand that one Perſon is to be preferred to another, yet we cannot exactly determine whether he exceeds him in a double, treble, or quadruple Proportion of Worth. The like Latitude occurs in the Valuation of different Things, and of Actions belonging to Commerce; on the Account of which we can ſcarcely fix any [4] ſettled Price on any other Things beſides thoſe which the Civilians call *Res fungibiles* [a], *conſumable Goods*, that is, ſuch as we borrow for our preſent Uſe, upon Condition of repaying them in the ſame Quantity and Quality: As to the reſt, we eſteem them equal and indifferent, and to be determin'd by the private Bargains and Agreements of particular Men. And ſo, likewiſe, the Proportion between many Faults and Puniſhments is adjuſted with ſome Latitude: For who, for Example, can tell preciſely how many Laſhes, and how ſmartly laid on, come juſt up to the Guilt of ſome particular Piece of Thievery? But in ſuch Caſes we aſſign what Proportion we think fit, with great Looſeneſs and Security. We find too a very remarkable Latitude in many Buſineſſes and Affairs of Life [5]. Human Lawgivers are not us'd to cut every Thing to the quick. *The Laws, and the Philoſophers* (ſays [b] *Tully*) *clear Subtilties in a different Manner*: *The Laws no otherwiſe than as Things may be felt and handled, by reaſon of their Groſſneſs; but the Philoſophers, as they may be diſcern'd by Reaſon and Underſtanding.* And in the Deciſion of Cauſes 'tis a Maxim vulgarly known, That the Judge does not concern himſelf with every petty Circumſtance. And ſo when ſuch a Number of honeſt Men are appointed [6] Arbitrators of any Controverſy, there is fair room for Latitude in their Judgment and Sentence [7]. Farther, in executing vindictive Juſtice,

[a] To underſtand what is meant by theſe Terms, ſee *Book* v. *Chap.* vii. §. 1. [b] *Off.* iii. *Cap.* xvii.

[1] As for Example, It renders a Fault more or leſs excuſable, and a Crime more or leſs enormous.

[2] See the Words of Biſhop *Cumberland*, §. 5. *Note* 2.

[3] The Author treats here of moral Qualities, which are the Matter of moral Actions. He ſpake, in §. 8. of the Quantity or Degree of Extent, which he conceived to be in the ſame Actions, in certain Reſpects.

[4] *Quæ functionem in ſuo genere recipiunt*, is an Expreſſion of the Civil Law; about which, ſee the Author, *Lib.* v. *Cap.* vii. §. 1.

[5] This is the Foundation of that excellent Expreſſion of the *Pagan* Philoſopher SENECA: *Quam anguſta Innocentia eſt, &c.* De Irâ. Lib. ii. Cap. xxvii. *How little is the Virtue of that Man, whoſe Goodneſs extends no farther than the Law demands? How much more comprehenſive are the Rules of our Duty than the Rules of the Law? How many Things do Piety, Humanity, Liberality, Juſtice, and Fidelity require of us, which the Laws give no Commands for? What the Law forbids not, Honour and Conſcience reſtrains us from: As for Example, The Law puniſhes the Injuſtice of a Seller, when he has taken more than a juſt Price; but Philoſophy and Virtue order the Reſtitution of the leaſt Thing, which he has fraudulently got, more than the Worth of his Goods.* See *Grotius*, *Lib.* iii. *Cap.* x. §. 1. Since the ſecond Edition of this Work I have had Occaſion to treat this Matter, at full Length, in two Diſſertations, the one on *the Permiſſion of the Laws*, the other on *the Advantage of the Laws*. Both theſe are annex'd to the fourth Edition of the Abridgment of *The Duties of a Man and a Citizen.*

[6] See *Lib.* v. *Cap.* xiii. §. 5. following.

[7] So when it is ordered, That one ſhall immediately pay a certain Sum, it is to be underſtood with ſome Limitations; for it can't be ſuppoſed, that he muſt go that very Moment, and deliver the Money into the Hands of him to whom 'tis to be paid. *Digeſt. Lib.* xlvi. *Tit.* iii. *De ſolutionibus & liberat. &c. Leg.* cv.

there

there is an Indulgence made of a convenient Latitude, not only on the Part of Clemency, but of Severity too. To which Purpoſe is that Saying of *Tacitus* [a]: *All great Examples have ſomewhat of Injuſtice; but the Injury they do to particular Perſons is recompens'd by the common Advantage they bring to the Publick:* And that of *Jaſon* in *Plutarch* [b], *'Tis neceſſary that thoſe ſhould act unjuſtly in ſmall Matters, who intend to maintain Juſtice in the grand and chief Concerns* [1]. Moſt Virtues, likewiſe, beſides Juſtice, admit a free Looſeneſs and Latitude in the Exerciſe of them; as, for Example, Pity, Liberality, Gratitude, Equity, and Charity. And ſo, in common Life, we apply the Names of Habits under a Latitude of Signification [2]. Thus we call him a juſt Man, who commits (tho' deliberately) but a few Pieces of Injuſtice. Laſtly, we may obſerve, that if in moral Conſideration ſome Quantities are brought to an exact Standard, and a punctual Meaſure, as the Price of ſome Commodities, the Periods of Time [3] ſettled by Law, and the like; yet this preciſe Determination does not ſo much proceed from the Things themſelves, or from the Times, as from the Inſtitution and Will of Men [c]. From all theſe Remarks we conceive the Difference between mathematical and moral Demonſtrations to appear very clear and evident; and it is no more than this, that the former are chiefly employ'd about Quantity, which is in its own Nature diſpos'd for the niceſt Diviſion and Determination; whereas the latter endeavour nothing farther than to prove for certain ſuch a *Quality* of ſuch a *Subject*, leaving the Deciſion of *moral Quantities* to the larger Scope and Range of human Will.

XI. But we muſt take heed of confounding this moral Certitude, which we have been ſo long eſtabliſhing, with that which is ſo often apply'd to Matters of Fact; as, when we declare (for Example) ſuch a Thing to be *morally certain*, becauſe it has been confirm'd by creditable Witneſſes: For, this latter Sort of moral Certitude is nothing elſe but a ſtrong Preſumption grounded on probable Reaſons, and which very ſeldom fails and deceives us. *Zeigler*, in his Notes on *Grotius* [d], has not ſufficiently diſtinguiſh'd this inferior Certainty from the former and the more noble Kind, while, tho' he grants the more general Precepts of Ethicks to bear an equal Evidence with the Propoſitions, of any Science, properly ſo call'd, yet he affirms, *That the particular Concluſions have a much ſhorter Degree of Certitude, and are often involv'd in dark Obſcurities, by reaſon that the Things themſelves, concerning which ſuch Concluſions are form'd, are many ways changeable and contingent:* And the Example he brings is this; *We have moral Certitude and Evidence, that an honeſt and ſerious Perſon, when he takes an Oath, ſwears truly. And yet this Evidence is not abſolutely ſuch, but conditionally, becauſe it is not directly impoſſible, but that a Man of theſe good Qualities may forſwear himſelf, ſince he may fall from his Virtue and Integrity.* But now that *Certitude*, by which we know Perjury to be an Evil, is very different from that by which we believe a good Man is not guilty of Perjury; nor is the latter Propoſition deduced fairly, as a Concluſion from the former. Thus, in the ſame Manner, the Faith we give to Hiſtorians is reckon'd morally certain, when they teſtify a Thing vaſtly remote from our Memory and Knowledge, and of which there is no real and demonſtrative Proof now extant; and eſpecially, if many agree in the Relation: Becauſe it is not probable that many Perſons ſhould join together by Compact, in putting a Trick on Poſterity, or ſhould entertain any Hopes, that the Lye would not in Time be diſcover'd. And yet for all this, if Occaſion were, we could produce Examples of many popular Fables that have paſs'd through ſeveral Ages, under the Colour and Character of Truth.

a *Annal.* xiv. *Chap.* xliv. b *De Sanitat. tuend. & Præcept. Reipub. gerend.* See alſo *Ariſtot. Rhet. Lib.* i. *Cap.* xii.
c Add. *D. Cumberland De L. N. Cap.* viii. §. 14. d *Lib.* ii. *Cap.* xx. §. 1.

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1 Some Reflections made by Mr. *Bayle, Dict. Hiſt. & Crit. p.* 235 and 2317, are worth our Obſervation here. He ſays, *That the publick Good requires, in ſome Caſes, that Juſtice ſhould exceed the Rigour of the Laws, becauſe an Injury done to a private Perſon is a leſs Evil, politickly ſpeaking, than the Advantage that redounds to the Publick by it, is a good*——For this Reaſon it is, that the Laws capitally condemn, ſuch Servants as lie with their Maſter's Wife or Daughter, tho' they alledge, that they were by many Promiſes and Threatnings drawn into it: Thus a Footman was hang'd at *Paris* in 1698. It is proper they ſhould have no Favour to expect, not even when they pretend an Ignorance of the Fact, in Order to keep them upon their Guard, and make them dread the pretended Advantage of being belov'd. This may ſerve to arm them againſt Flattery, Menaces, Artifice and Diſguiſe. If they could promiſe themſelves Impunity in the Caſe of a ſimple Seduction, or think to eſcape, by pleading that they were courted, they would ſoon have the Aſſurance to ſolicite for themſelves, eſpecially where there was any Hopes of Succeſs. See *Bayle*, Let. A. Article *Anchiſes*. *Bodin*, the famous Lawyer, ſpeaking of an Edict made by King *Henry* II. againſt Women who made away with their Children, ſo rigorous, that it might happen that an innocent Woman might ſuffer by it, ſays, "That the Uſe of profitable Laws ought not to be ſuſpended, upon the Account of ſome Inconveniences produced by "them." And thereupon, he quotes a Saying of *Cato*'s, *That there is no Law that is profitable for all, 'tis ſufficient that it is beneficial for the moſt Part, and generally.* Liv. Lib. xxxiv. Cap. iii: See *Montagne*'s *Eſſays*, Lib. iii. Cap. xiii. and *Charron of Wiſdom*, Lib. iii. Cap. ii. and *Bayle*'s Dictionary, Art. *Pattin*, Let. E.

2 See *Chap.* vii. §. 6. following.

3 *The Periods of Time ſettled by Law*, the *Latin* is *Tempora fatalia*, a Phraſe taken from the *Roman* Lawyers, who meant by it, ſuch a Term of Time, as after it no Appeal will lie againſt a Sentence given by Law. See *Cod. Lib.* vii. *Tit.* lxiii. *Leg.* ii. where you'll find *Tempora fatalium dierum*, and *fatales dies.*

CHAP.

CHAP. III.

Of the Understanding of Man, as it concurs to MORAL ACTIONS.

The CONTENTS of every Paragraph of the third Chapter.

I. *Two Faculties of the Understanding.*
II. *What is the Nature of the representative Faculty of the Understanding.*
III. *The natural Understanding apprehends Things moral rightly.*
IV. *Conscience, what it is, and how manifold.*
V. *A right and probable Conscience.*
VI. *Rules for a probable Conscience.*
VII. *Rules how to choose Things profitable.*
VIII. *A dubious Conscience.*
IX. *A scrupulous one.*
X. *Ignorance, what it is, and how manifold.*
XI. *Error, of how many Sorts.*
XII. *Error in lawful Actions.*
XIII. *Speculative Error about necessary Actions.*
XIV. *Or indifferent ones.*
XV. *Practical Error.*
XVI. *Error in an ill Action.*

SINCE that Part of Knowledge which we have undertaken to explain, is chiefly employ'd in demonstrating what's right and what's wrong, what's good and what's evil, what's just and what's unjust, in human Actions; in the first Place we are oblig'd to consider and examine the Principles and the Affections of these *Actions*, and to shew how, by the Help of *Imputation*, they are conceiv'd to be morally join'd and connected to the Authors of them: In this Respect then, the Excellency of Man chiefly outshines the Condition of brute Creatures, that he is endow'd with a most noble and exalted Soul, which exerts itself not only with a singular Light, as to the knowing and judging of Things, but, also, with a prodigious Quickness and Activity, as to the embracing or rejecting them. So that on this Score the Actions of Mankind ought to be rank'd in a much higher Class than the Motions of Beasts, which proceed purely from the Spurs of Senses, without the precedent Help of Reflexion [1], whatever *Charron* [a] has alledg'd to the contrary. That Power of the human Soul, which it bears as a Light for its Guidance and Direction, we commonly call the *Understanding*, and in this, as it is concern'd about voluntary *Actions*, we conceive two Faculties [2]: One is that by which, as by a kind of Mirror, the Object is shewn to the Will, with a general and confus'd Notice, whether it be agreeable or disagreeable, good or evil. The other is that by which the Reasons of Good and Evil, which in several Objects offer themselves numerously on both Sides, are weigh'd and compar'd, and Judgment is given, what, when, and in what Manner we are to act, and Consultation taken about the most proper Means for the Accomplishment of the propos'd End. And here it must be obsery'd, that the Beginning of a voluntary Act should regularly proceed from the Understanding, whence arises the vulgar Maxim,

——————*Ignoti nulla Cupido.*

Objects unknown can never move Desire:

Although this Knowledge, which precedes the Acts of Volition, is not always distinct, because a confus'd Notion is sufficient to make the Will bestir itself. And thus when we have not a tolerable Knowledge of a Thing, we cannot be said properly and fully to desire it; yet we may desire to make Trial of it.

II. As to the former Faculty of the Understanding, we must remark, that it is of the Number of those which are commonly call'd *natural Faculties* [3], contradistinct to the *free*; in as much as it is not in the

[a] *De la Sagesse. Lib.* i. *Cap.* xxxiv.

[1] Mr. *Charron*'s Words are these, *Man setting himself above, and calling himself Master of all Creatures, disdains the rest. He divides them out their Parts, and allows them what Share of Faculties and Powers he pleases. On the other Side, he degrades himself, as it were, in Spite; he groans, complains, blames Nature as a cruel Stepmother to him, and makes himself the Refuse and most miserable Creature in the World, both which are equally contrary to Reason, Truth, and Modesty. Nevertheless, Beasts can't be reasonably debased to the Condition of meer* Automata; i. e. *Clock-work: Such an Opinion must proceed from Presumption, and not a serious and impartial Consideration of their Actions.* It is sufficient to oppose, to these warm Defenders of Machinery, what Mr. *Locke* says, agreeably, in speaking of another Opinion of theirs: "Shall we believe that Dogs and Elephants do not think, "when we plainly see, that they can find out that in us, which we can't discern in ourselves? Do they not give us all the De"monstrations imaginable of their Sense, except that they can't tell us so? It is hard indeed to fix the Bounds of the Faculties "of the Souls of Beasts, tho' Mr. *Charron* asserts, that they can, from Particulars, infer Universals; but yet we have sufficient "Reason to be convinced, that Beasts act with some Knowledge and Reasoning." See Mr. LOCKE, *Lib.* ii. *Cap.* ix. §. 11, 14. & x. §. 10. & xi. §. 7, 10, 11. As also Mr. LE CLERC's Physicks, *Lib.* iv. *Cap.* xii. What Mr. *Pufendorf*'s Notion was in this Matter, is hard to know, for he allows Beasts in one Place, what he denies them in another. In short, nothing but the Exaggerations of Satyr could authorize M. *Boileau* in what he says, to shew, *that Man, in his Opinion, is the most stupid Animal in the World.* And when the Ass of this Poet concludes with a triumphant Air, *that Man was as great a Brute as he*, we see plainly it is an Ass.

[2] To speak truly, one Faculty cannot have another subordinate Faculty residing in it, as in its Subject; because every Faculty is naturally and essentially attach'd to a Subject, out of which it can have no proper Existence. *Faculties, or Powers* (says Mr. LOCKE) *belong only to Agents, and can only be attributed to Substances; and not to any other Power.* Hum. Understand. *Lib.* ii. *Cap.* xxi. §. 16. This excellent Philosopher lays it down as a Rule, *that to ask, if one Faculty comprehends another, is a Question, at first Sight, so grossly absurd, as neither admits of any Dispute, nor deserves any Answer.* Nevertheless, of late, many Writers are so fond of multiplying Entities without any Necessity, that in dogmatical Treatises (where Accuracy and Clearness are most absolutely necessary) they heap Faculty upon Faculty, and thus blindfold the Understanding of their Readers. As to our Author, he was under no Necessity to express himself impropérly, he might have distinguish'd in the Understanding two Ways of perceiving Objects, either simply in themselves, or with regard to us, and to the different Relations they bear either between themselves, or with regard to certain Circumstances. See the following Remark.

[3] By *natural Faculties* is meant *passive Faculties*, which receive simply the Impressions of Objects, and do not properly act at all; for the Understanding is like the Eye, which discerns Ideas with the different Relations, without adding or diminishing any Thing, or producing, with regard to them, any Action; whether it perceives the Objects simply in themselves, without any relation to itself (which our Author calls the *Representative Faculty*) or whether it judges what is, or is not to be done. For as to the Understanding, it has, in doing all this, only a simple Perception and Reception (if I may so speak) of Ideas with their Relations. The Determination from whence Action proceeds, is an Act of the Will only. The Distinction of the Schools; that is, Understanding is either speculative or practical, is founded upon the Nature of the Objects it contemplates; and not upon the different Actions of the Soul: For the Soul is disposed alike in the Perception of Good and Evil, Truth and Falshood. See the *Search after Truth*, Lib. i. Cap. ii. and Mr. *Clerc*'s *Discourse of Spirits*, §. 1. Chap. iii. Some *German* Writers have criticis'd

the Power of Man to apprehend Things otherwiſe than as the Images of them preſent themſelves to the Mind; nor can the Will, by any Force, hinder the Underſtanding from aſſenting to a Propoſition which appears clear and evident to it. But thus far a Man is at Liberty; he can more diligently conſider the Object in view, and more exactly weigh in his Mind the oppoſite Reaſons of Good and Evil, and ſo not ſtick at the outward Face and Semblance of Things, but pierce into the deepeſt Secrets of their Texture and Conſtitution. And after ſo ſtrict an Enquiry and Examination, he can pronounce a poſitive Judgment in the Cauſe before him. The Underſtanding being, in this Reſpect, as in many others, like the Eye, that it makes a very important Difference in beholding Things with a roving and tranſitory Caſt, and in contemplating them with a fix'd and ſteady Application [a]. And hence 'tis eaſy to conceive, how far this Power of the Soul falls under the Culture and Cognizance of Laws. For ſince 'tis beyond human Ability, that the Underſtanding ſhould apprehend Things after another Manner than they appear; and ſince Credit or Aſſent cannot but anſwer the Idea of the Underſtanding, no Perſon can judge otherwiſe of a Matter, than as he appears to have conceiv'd it; nor can he by any juſt Law be compell'd to a contrary Judgment: For ſuppoſe a Man to be in the Wrong, yet [1] a bare Injunction and Command will never make him the wiſer. Yet becauſe many Things eſcape a negligent Searcher, which offer themſelves to the Notice of more curious Enquirers; and becauſe the Will may hinder the Underſtanding from contemplating ſome Truth, by preſenting other Objects to tempt and engage its Care; therefore an earneſt and aſſiduous Application of Mind is of vaſt Uſe in confirming the Judgment; and, conſequently, thoſe who are entruſted with a Care and Authority over others, ought to make all fair Proviſion for the Aſſiſtance and Direction of a ſerious Meditation: And they may likewiſe engage Men, by the Sanction of Puniſhments, to apply, with Diligence, thoſe Means which are moſt likely to diſpel the Clouds and Perplexities of Things, and to repreſent them in their genuine Colours and Condition [2].

III. Farther, ſince the Underſtanding performs the Office of a Light in our Courſe of Action; and ſince, when it doth not guide us aright, 'tis impoſſible but we ſhould loſe our Way; we ought to eſtabliſh this as a certain Principle, That there is both in the apprehending Faculty, and in the Judgment, a natural Rectitude, which, upon due Attention given, will not ſuffer us to be deceiv'd in reference to moral Things, and that neither of thoſe Powers are ſo far corrupted and deprav'd, as to put us under a Neceſſity of being miſtaken. For at the ſame rate it would follow, that becauſe a Glaſs ill cut preſents every Image in a diſtorted Confuſion, and becauſe the Tongue, when covered with the Tincture of the Jaundice, is not able to diſcern the Difference of Taſtes; therefore the Senſes, to which thoſe Offices belong, muſt be, in general, pronounc'd fallacious and uncertain. Neither could it be charg'd on us as Guilt, that we have done a bad Action, if we were not furniſh'd with a clear Diſcernment of Good and Evil; and it would be the higheſt Injuſtice to impute that Error as ſinful, which was beyond our Power to avoid or ſhake off. Therefore, unleſs we would utterly ſubvert and deſtroy all the Morality of acting, we muſt, by all Means, maintain, that the Underſtanding of Man is naturally right and certain, and upon ſufficient Enquiry and Meditation does always apprehend Things clearly, and as they are in their own Nature and Conſtitution: And, likewiſe, that [3] the practical Judgment cannot prove ſo far debas'd and degenerate (at leaſt as to the general Precepts of Nature's Law) as to excuſe the Acts proceeding thence from being imputed as if they were Effects of invincible Ignorance [b]. And here we deſire it ſhould be conſider'd, that we are not debating what Power the Underſtanding has about Matters which depend on peculiar Revelation from God, or what it can perform in ſuch extraordinary Caſes, without the ſingular Aſſiſtance of divine Grace; becauſe this is the Subject and Buſineſs of another Profeſſion. Neither are we concern'd to examine whether, in ſpeculative Truths, requiring the moſt ſubtil Diſquiſitions of Mind, a Man may not through ill Information get ſuch firm Poſſeſſion of a falſe Tenet, as not to be able to recover himſelf out of the Miſtake: But we are diſcourſing only about the Power of the Underſtanding, as it is imploy'd in ſquaring our Actions according to the Dictates of Nature. And, as to this Point, we conceive that there's no Man of proper Years, and Maſter of his own Reaſon [4], ſo deſperately dull and ſtupid, as not to comprehend, at leaſt, the moſt general Rules of natural Law, and thoſe which are of the greateſt Uſe in common Life, and not to diſcern the Agreement they bear to the rational and ſocial Condition of Mankind. And though a Perſon, through extream Idleneſs, may poſſibly never have thought of one or two Precepts, or, through precipitate Raſhneſs, may have fram'd wrong Opinions of acting, or by bad Information, or a Mind corrupted with vicious Courſes, may have call'd their Truth and Neceſſity in queſtion, or have taken up other Rules of Action contrary to natural Suggeſtions; yet we do not, by any Means, acknowledge this Ignorance or this Error to be inſuperable, ſo as to hinder the Imputation of Deeds conſequent on ſuch a Principle. For theſe univerſal Edicts are ſo clearly publiſh'd and explain'd, and ſo cloſely interwoven with our Being, that no one can be overcome with ſo brutal a Sottiſhneſs, as not to be capable of apprehending and diſcerning them; ſince to this Buſineſs there is not requir'd any ſingular Force of Wit, any peculiar Shrewdneſs of Reaſon, but an ordinary

[a] Add. *D. Cumberland. De L. N. Cap.* ii. §. 9.

[b] Vid. *D. Cumberland. de L. N. Cap.* ii. §. 10.

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criticis'd the Opinion I have here adopted, touching the proper Act of the Judgment relating to the Will, and not to the Underſtanding. Theſe Authors only ſhew, that they do not apprehend the State of the Queſtion, as appears by the frivolous Reaſons they alledge, and which it is ſufficient to repeat, in Order to ſhew their Weakneſs. They maintain, for Example, that he who affirms or denies a Thing, doos not, by doing ſo, mean that he thinks it either true or falſe: That it would follow, the greater Share of Will we have, the more Judgment we have: That as we judge, in ſpite of ourſelves, this implies a Defect in our Will, *&c.* Mr. *Trevor*, Profeſſor at *Helmſtadt*, who makes Uſe of the like Proofs in his Notes on our Author's Treatiſe, *of the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 4. adds, that to acquieſce in a Truth, and to judge of it, are two diſtinct Acts: But either this is a Diſpute about Words, or it is ſuppoſing the Point in Queſtion. I ſhall not enlarge on this Subject, for which this is not the Place. I ſhall juſt obſerve, that the Principle in Queſtion is of more Importance than is imagin'd, with regard to the Grounds of the Imputation of human Actions; as will appear by what I have ſaid, in a few Words, on the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 9. N. 1. of the third and fourth Edition.

[1] *i. e.* Without any Reaſon or Motive.

[2] But if this fails, 'tis to no Purpoſe to have recourſe to Force, and the Authority of the Sovereign. *Elem. Juriſpr. Univerſ.* p. 375. See *Lib.* vii. *Cap.* iv. §. 8. and 11.

[3] See *Note* on §. 2.

[4] See the *Note* on *Book* i. *Chap.* i. §. 4. of the *Abridgment of the Duties of a Man and Citizen.* Printed at *Amſterdam* in 1707.

ordinary Portion of natural Light is sufficient, provided that the Mind be not vitiated and obstructed by some Distemper. To which Purpose *Tully*'s Distinction about Folly and Madness is observable: *Folly* (says [a] he) *if assisted with a due State of Health, is able to maintain a competent Set of Duties, and to keep up, in some Manner, the Culture and the Methods of common Life; but Madness is a perfect Disease, that quite extinguishes the Sight of the Mind, and involves all its Objects in a general Obscurity* [1].

IV. The Judgment pass'd on moral Actions by the Understanding, as it is suppos'd conscious of a Law, and therefore accountable to the Law-giver, is commonly call'd *Conscience*; which as it either [2] precedes, or follows the Action, we may, for Distinction sake, branch into *antecedent*, and *consequent*: This last is the reflex Judgment of the Understanding on Things done, or forborn [3], approving what's well, and condemning what's ill; the Attendants of which are either Tranquillity or Restlessness of Mind, according to the different Testimony it bears; and as it gives us Occasion to expect either the Favour, or the Displeasure of the Legislator, and either the Good-will, or the Hatred of other Men [b]. The former, coming before the Action, informs us what is good and what evil, and, consequently, what to be done, and what to be omitted. But here it is carefully to be observ'd, that the *Conscience* obtains no other Place in the Guidance of human Operations, than with respect to its being instructed in the Knowledge of some Law; since Laws only are the proper Rules of [4] acting. And therefore, if any Man will attribute to the practical Judgment, or the Conscience, any peculiar Force or Ability of directing us in our Doings, owing neither its Original to, nor its Dependance on any Law; he will invest, with a legal Power, the vain Fancy of private Men, and will bring the wildest Disorder and Confusion on the Affairs and Transactions of the World. For we must declare, that as far as our Diligence could reach, in searching the Word *Conscience*, in this strange Sense, is neither to be met with in the holy Scriptures, nor in the ancient *Latin* Authors; but it was first introduc'd by the Schoolmen, and has been maintain'd in these latter Ages by the crafty Casuists, for the better securing of Mens Minds and Fortunes to their own Authority and Advantage. But if we have regard to the true and genuine Signification of the Word, to do a Thing against Conscience, is nothing else but to commit a voluntary Evil, knowing it to be such; and is oppos'd to transgressing out of Ignorance and Mistake. And this we mean by *Conscience* in our present Enquiry, recovering it to its ancient Import, and exploding the new Abuses that have been obtruded on its Signification.

V. *Conscience* rightly inform'd is of two Sorts; for either it clearly understands that the Persuasion which it holds concerning some Performance, or Omission, is built on certain Principles, and agrees with the Laws, which are the Rule of Action and of *Conscience*; or else it esteems, indeed, its Persuasion as true and certain, and sees no Reason to doubt of it, tho' it cannot reduce it to a formal Demonstration; but, on the contrary, relies chiefly on Arguments from Probability. In the former Case it is commonly term'd a [5] *right*, and in the latter a *probable Conscience*. Concerning a *right Conscience* this general Maxim is establish'd, That every voluntary Action against its Suggestion, and the Omission of any Action which it declares to be necessary, is Sin; and so much the more heinous Sin, as the Person had a more perfect Knowledge of his Duty; because a Transgression under such Advantages argues a greater Pravity and Corruption of Mind [c].

The Difference of a *probable Conscience* from a *right*, we conceive not to be in reference to the Truth of the Persuasion, but upon Account of its Ignorance and Inability to reduce this Truth artificially into the Exactness of a Demonstration; for which Reason it has not so evident and unshaken a Knowledge of its Certainty. For (as the Logicians speak) nothing is *probable* in itself, but only with respect to our Understanding. And by this Rule of Probability the greatest Part of Mankind are steer'd and govern'd in their Proceedings. For few Persons

[a] *Tuscul. Quest. Lib.* iii. *Cap.* v. [b] Plin. Panegyr. *One Man may possibly deceive another, but there's none who can deceive himself; let him only look into his own Life and Conduct, and take his Merit and Character from his Heart.* [c] See *Luke* xii. 47, 48.

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[1] *Cicero* cites this Case out of the Laws of the twelve Tables, but to a very different Purpose from what our Author uses it, *viz.* To prove a Difference between *Insania*, Madness, and *Furor*, Fury; but our Author has no Regard to the Contexture of the Discourse, and uses the Words to this Sense only, Folly is no Impediment to the comprehending the common Duties of Life; but to be ignorant, generally, of all the Principles of Morality, is a Sort of Madness. In other Circumstances the Words might be so understood, but our Author mistakes them here.

[2] This Division is, according to the Schools, *Conscience antecedent* and *consequent*; but our Author reverses the natural Order, in defining the Conscience, which follows, before that which precedes the Action.

[3] *Alius enim fortasse alium*, &c. Plin. Panegyr. Chap. lxxiv. We may deceive others, but we can never deceive ourselves, if we examine our own Conduct truly, and seriously enquire into what we have done.

[4] This is true, but it hinders not, but that Conscience may be the immediate Rule of Action; for a Man can't conform himself to a Law, but as far as he knows it, and if he do good without knowing it, he loses his Pains, the Lawgiver regards it not. Nevertheless it follows not, but that every one may do all that he believes either permitted, or commanded, after what Manner soever it comes into his Mind. Here are two Rules, which the most simple may, and ought to follow, to satisfy themselves, upon all Occasions, that the Motions of their Conscience are according to the Law: 1. *Before we determine to follow the Dictates of our Conscience, we should carefully examine, if we have the necessary Lights and Assistance, to judge of the Point in Question.* 2. *Supposing, in general, that we have these Lights and Assistance, we should be sure, that we actually make use of them on this Occasion.* All the Inconveniences and Evils which are consequent upon a misused Conscience, come under the Breach of one or other of these Maxims, which are easy to be observ'd by such as love their Duty. This appears chiefly in Matters of Religion, as every Man's Experience will teach him. See *Biblioth. Univers. Tom.* i. *p.* 343, 344. and *Parrhasiana, Tom.* ii. *p.* 97. as also *Biblioth. Choise, Tom. x. p.* 336. with what I have said on *the Duties of a Man and a Citizen*, Book i. Chap. i. §. 6. N. 1.

[5] This Epithet is not well apply'd, for our Author owns, that a *right* and *probable Conscience* are the same: To take this Word in its natural Signification, from which there is no Necessity here to depart. Even, according to his own Definition, this Sort of Conscience should rather be call'd a *Conscience well inform'd*; but his Divisions are not exact: These are better; an antecedent Conscience is, 1. *resolved*, 2. *dubious*. The resolved Conscience declares positively, and without any Difficulty, not only about the Quality, but Execution of an Action; in which, if it mistakes, 'tis erroneous; if it judges well, 'tis right; which will be clear or probable, according as the Reasons, which Men give of their Opinions, are certain. A dubious Conscience is either simply so, when the Understanding hangs like a Balance, not knowing which Side to take, or whether the Action be good or evil, and so can't put it in Execution; or scrupulous, when we are determined about the Morality of the Action, and Execution of it, yet with some Fear of being mistaken. *Gott. Gerh. Titius*'s *Observ. on Pusend. De Officio Hom. & Civ. Obs.* xvii. But since the second Edition of my Translation, I have rectified and explain'd, in my Opinion, in a better Manner, the Divisions, and Subdivisions of Conscience. For which the Reader will see my Notes on *the Duties of a Man and a Citizen*, Book i. Chap. i. §. 5. N. 2.

are able to apprehend human Duties as they flow from their firſt Origin and Foundation. And moſt Men rely with ſo much Security on the Tenor of common Life [a], on the unqueſtionable Authority of [1] unſuſpected Teachers, and on the manifeſt Decency, or Conveniency, of ſuch and ſuch Actions; that they think it a ſuperfluous Trouble to make a more curious Enquiry into the Reaſons and Foundations of them. In the ſame Manner as the greateſt Number of Artificers are ſatisfy'd with performing their Work by Inſtruments mechanically prepar'd, and leave the Mathematicians to demonſtrate the Reaſons of their Operations. And Men are apt eſpecially to content themſelves with theſe probable Appearances, when the Propoſition in Debate is remov'd at a vaſt Diſtance from the firſt Principles; and therefore requires a tedious and troubleſome Deduction, which is commonly above the Capacity of thoſe who have not run the Courſe of the Sciences, nor cultivated their Reaſon by a learned Inſtitution. Yet hence can be drawn no Protection for that pernicious [2] *Probability* maintain'd by the later Caſuiſts, and eſpecially by thoſe of the Order of the *Jeſuits*, which reſolves itſelf into the ſole Authority of a ſingle Doctor, tho' deſtitute of Reaſons, and oppos'd by all other Judgments. For this Principle tends to the utter Subverſion of all Morality, and ſeems deſign'd only for the keeping under the Senſes and the Conſciences of Men, and making them depend entirely on the Pleaſure of the Prieſts: as has been prov'd at large by others [b]. We need only obſerve farther, that they act not at all fairly, when they confound Probability of Fact with Probability of Judgment, and of Law. For indeed, in Matters of Fact the Authority of one great and credible Perſon may raiſe a probable Preſumption, and obtain at leaſt half the Force of a full Proof. But in defining Matters of Law, 'twould be the higheſt Abſurdity and Raſhneſs to attribute ſo much to the Declarations of one Man, not grounded on good Arguments, and at the ſame Time contradicted by Perſons of equal Rank and Power, as that it ſhould be ſafely admitted for the Square and Standard of Acting.

VI. For the Information and Direction of a *probable Conſcience*, there are many Rules commonly laid down, concerning which our Opinion is this, That they take place only where there ſeems to be a Claſhing between ſtrict Law and Equity; or when both Sides of the Queſtion are alike free from the Obligation of the Laws; yet ſo as that one of them may ſeem to approach nearer to Honeſty, or may appear more likely to produce ſome Convenience or Inconvenience than the other. For in Matters abſolutely determin'd by the Command, or Prohibition, of ſome Law, there is no room left for ſuch a free Choice, as that we may reject one Side, and take the other; becauſe poſitive Laws will not be ſatisfy'd with Equivalents, but demand a punctual Obedience to their Decrees. And therefore this Freedom of Election muſt be confin'd to indifferent Things, to which the Laws do not extend their Sphere and Authority. The chief Rules are theſe:

1. In a *probable Conſcience* two Opinions being propos'd, neither of them contrary to the Laws, one of which is founded on better Reaſons, the other is more ſafe; either of the Two may be follow'd without Blame.

2. Two Opinions being propos'd, of which one is built on weaker Reaſons, the other is the more ſafe, the latter ought juſtly to have the Preference.

3. In a *probable Conſcience* a learned Man may follow that Opinion which ſeems to him to have the greateſt Degree of Probability, tho' perhaps it may appear different to others, unleſs he is under Apprehenſion of incurring ſome Inconvenience or Damage upon Account of diſſenting from the common Judgment.

4. An unlearned Man may ſafely follow the Authority of wiſer Perſons.

5. A Subject, or one plac'd under the Command of others [3], may, upon the Order of his Superiors, fairly do a Thing which he does not certainly know to be unlawful, tho' in his private Judgment he does not think it very probable that it ought to be done.

6. In Things of little Moment and Concern, [4] if there are probable Arguments alledg'd on both Hands, either Side may be taken.

7. In Things of great Moment [5] if there ariſe probable Arguments on both Sides, the ſafer Part is to be preferr'd, or that from which there cannot follow ſo great an Evil, tho' we are never ſo much miſtaken, as there might have done, had we err'd in the oppoſite Opinion.

VII. To proceed; tho' according to our preſent Deſign, we are engag'd only to treat of what's good, and what evil, what juſt, and what unjuſt; leaving the enquiring about Things profitable and [6] unprofitable to another Part of Knowledge; yet it will not be much out of the Way, if we here conſider, in ſhort, what Rules the Underſtanding ought to have regard to, in Deliberations concerning Uſefulneſs and Convenience; eſpecially becauſe the Directions already laid down depend very much on theſe; the Profit or Advantage of Things bearing a great Force in our Proceedings; according to that of the Apoſtle, 1 *Cor.* vi. 12. *All Things* (that is, all Things which he had been there ſpeaking of) *are lawful for me*; [7] *but all Things are not expedient.* And in Civil Buſineſs, Affairs are many Times committed to the ſole Wiſdom and Conduct of the Perſon employ'd; in which Caſes a Man is conceiv'd to have acted ill,

[a] *Vide Lib.* xi. *Cap.* cxi. §. 13.

[b] *Vide Lud. Montalt. in Lit. Provincial.* and upon them *Wendrochius*, and *Sam. Rachel.*

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[1] See *Lib.* ii. *Cap.* iii. §. 13.

[2] See *Buddeus*'s Diſcourſe, *De Scepticiſmo Morali*, §. 31. in his *Analect. Hiſt. Philoſ.*

[3] See *Lib.* viii. *Cap.* i. §. 6.

[4] This hath Place commonly in regard to thoſe Judgments, which we are obliged to make *ex tempore*, upon ſome urgent Occaſions, wherein the Neceſſities of Life oblige us to act. See *Biblioth. Univerſ. Tom.* v. *p.* 344.

[5] As for Example, If the Debate be about putting a Perſon to Death, it is better to run the Riſk, and let a Criminal eſcape, than puniſh an innocent Perſon. This was the Deciſion, both of ſeveral ancient Philoſophers, which are quoted by *Grotius*, *Lib.* ii. *Cap.* xxiii. §. 5. *n.* 2. and of the Emperor *Trajan*, who would have no Man condemned for Suſpicion, as he writes in his *Reſcript* to *Aſſid. Severus*. For it is better, that the Crimes of the Guilty eſcape unpuniſhed, than that an innocent Perſon ſhould be condemned. *Digeſt. Lib.* xlviii. *Tit.* 19. *De pœnis*, *Leg.* 5. For, as Mr. *Bruyere* ſpeaks, in his Chapter of *Certain Cuſtoms*, *p.* 506. If a Criminal be puniſhed, 'tis a Terror to the Gang; but if an innocent Perſon be condemned, all honeſt Men are affrighted. In fine, War brings Evils upon many innocent Perſons: If then Judgments be divided, we muſt incline to Peace.

[6] The Author does not mean by the Word *Inutili*, unprofitable, but noxious, or hurtful, as he plainly uſes it, *Lib.* ii. *Cap.* ii. §. 9. ſee the *Note*, and *Cap.* iii. §. 13. It is certain, that in Matters of Morality and Politicks, that which is oppoſed to profitable, is noxious.

[7] The Words of the Apoſtle have no Manner of Connexion with what went before; but, on the contrary, refer manifeſtly to what follows, either to the Liberty of eating certain Meats, without any Regard whether it offends others, or not; or rather, tho' St. *Paul* applies it indeed to that particular Subject, it is a general Maxim, and extends to all Things indifferent in their own Nature. See *Cap.* ii. §. 8. with the Notes above.

if, by Imprudence, or by Negligence, he has taken the leſs profitable Courſe. In Debates therefore, ariſing about ſuch Things to which we are bound by any Neceſſity, or any determinate Obligation, (for Neceſſity excludes all Deliberation and Debates, and determinate Obligations leave nothing to the Agent, but the Duty of Execution) this is laid down for a Foundation, That nothing ought to be undertaken, from which, in moral Eſteem (or as far as human Foreſight can pierce into the Obſcurity and Uncertainty of future Events) there does ſeem likely to follow as much Evil as Good [1], or more Evil than Good. The Reaſon of which Maxim is evident: For as much of Evil as any Thing has join'd with it, ſo much it loſes of its Goodneſs; and, conſequently, when the Good and Evil are in equal Degrees, the former is ſwallow'd up by the latter, and the Thing is depriv'd of the Nature and Denomination of Good. Hence that Field is reckon'd very unprofitable, which does not in the Value of its Fruits exceed the Charges of Tillage [a]. For thoſe Matters which make the Subjects of ſuch Deliberations as we are now ſpeaking of, are undertaken purely on Account of the Uſe and Advantage which may accrue to us from them [2 b]. As Corollaries from this general Truth, we may ſubjoin the three Rules eſtabliſh'd by *Grotius* [c]: 1. *If the Thing under Debate has an equal Efficacy or Ability for the Production of Good and Evil*, that is, if we may as eaſily gain as loſe by it, *we may then venture on it, when the good Conſequence is a greater Good, than the ill Conſequence is an Evil:* that is, if we are like to gain more by being ſucceſsful in the Attempt, than we can loſe if we prove [3] unſucceſsful. Thus it would be no Raſhneſs or Imprudence to hazard ten Pounds, ſuppoſe in a dangerous Adventure, when we may get an Hundred, if the Chance prove fortunate [d]. 2. *If the Good and Evil which may proceed from the Thing in Debate, appear equal, we may then choose it, with this Proviſion, that it has a greater Efficacy or Ability for producing the Good than the Evil:* that is, if 'tis more eaſy that Gain ſhould ariſe from it than Damage. In which Point we cannot omit the noble Argument of *Arnobius* [e]: "Since that "(*ſays he*) is the condition of future Things, that "they cannot be felt or held by any anticipating "Touch, is it not much the clearer Reaſon, of two "Uncertainties, the Expectation of which is equally "doubtful, rather to believe that which brings ſome "Hopes along with it, than that which brings "none? For in the former Caſe there can be no "Danger, tho' the Matter expected never come to "paſs: But in the latter we incur the higheſt Damage, if what we diſbelieved ſhould not prove "a Falſity in the final Event of Things [f]." 3. *If the Good and Evil ſeem to be unequal, and the Ability of the Thing to produce them not leſs unequal, then we muſt determine our Choice by one of the two Conditions, either that the Ability for producing Good compar'd with that for producing Evil, be greater in Proportion, than the Evil itſelf compar'd with the Good* (that is, if the Exceſs of Evil be leſs than the Ability for producing Good) *or, if the Good be greater, compar'd with the Evil, than the Ability for producing the Evil, compar'd with that for producing the Good:* that is, if the Power and Efficacy which ſeem to incline towards the Production of the Evil, be leſs conſiderable than the Degree by which the Good exceeds the evil. To which we will add this fourth Rule, That where both the Good and the Ill Effect of a Thing, and likewiſe its Ability for producing of both, remain uncertain and undertermin'd, 'tis the Part of a wiſe and cautious Man to abſtain from ſuch a Matter, unleſs he is driven on it by urgent Neceſſity.

VIII. When the Judgment of the Underſtanding is at a loſs, and cannot diſcern whether a Thing be good or Evil, and conſequently, whether it ought to be perform'd or omitted, we call this a [4] *doubtful Conſcience*. Concerning which this Rule ought to be

Xenophon's *Words at* [b] *are inſerted according to the Original.*

[a] Cato de R. R. i. 1. *A Field that is fertile, if it be, at the ſame Time, chargeable, turns to little Account.*

[b] Xenophon. Rer. Græc. Lib. vi. *They are very far from deſerving Commendation, who having carried off Glory and Victory from many Encounters, do ſtill continue to engage, till being at length ſhamefully overcome, they loſe their former Honour and their former Labour. The Caſe is the ſame with thoſe Gameſters, who once meeting with a Run of good Fortune, are entic'd to venture on, till they loſe double to their former Gains, and, in Concluſion, are commonly Beggars. Theſe Examples ought to warn us in our Martial Affairs, that we never ſuffer ourſelves to be drawn into ſuch a Combat, where we muſt, of Neceſſity, either win all, or loſe all.*

Lucan. Lib. i. *v.* 282. Par labor atque metus pretio majore petuntur.
An equal Labour for a greater Prize.

Iſocrat. Archidam. *Two Things being propos'd, the one plain and evident, the other doubtful and perplex'd; would it not be ridiculous for you to reject that which is beyond Diſpute, and to chooſe that which is controverted and uncertain?*

[c] *Lib.* ii. *Cap.* xxiv. §. 5.

[d] *Comp. Epictet. Enchirid. Cap.* xxxv, xxxvi.

[e] *Lib.* ii.

[f] *Add. Penſees de M. Paſchal. Cap.* vii.

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[1] Here is a plain Inverſion of the due Order of Things, contrary to the right Way of Reaſoning, and Sequel of the Diſcourſe. This Blemiſh is ſo notorious, that 'tis a Wonder the Author did not mend it in his laſt Editions.

[2] Theſe Words of *Xenophon* are deſigned only to ſhew, that when one has got an Advantage or Gain, he ought to take Care to preſerve it, and not run to the utmoſt Bounds of his Fortune.

[3] Our Author, in his laſt Editions, quotes an excellent Paſſage of *Arnobius* to this Purpoſe, (which has been very well applied, and urg'd with great Force by M. *Paſcal*, *Penſees*, Chap. vii) *Quam ergo hæc ſit conditio*, &c. "Since future Things are of "that Nature, that no Man can clearly diſcover them, nor foreknow their Events; no Man of Senſe, but of two Things equally uncertain, will chooſe that, from which he may hope for ſome Good, rather than that, from which he can hope for none." In ſhort, if the Evil, that threatens us, has no Effect, we run no Riſque; whereas we are expoſed to very great Danger, and hazard All, if, when the Time comes, we find, by ſad Experience, that we were not afraid without Cauſe. *Adv. Gentes, Lib.* ii. See *Lib.* ii. *Cap.* iii. §. 21. *n.* 6. As to the reſt, I know not how our Author neglected obſerving, that *Arnobius*'s Argument relates to the firſt Rule of *Grotius*, and not to the ſecond, to which it is join'd in the Original. To be convinc'd of this, 'tis ſufficient to read the following Words of M. *Paſcal*, which contain the Subſtance of his reaſoning, and to which our Author refers, immediately after the Paſſage of *Arnobius*, as belonging to the ſame Subject. "Since there is an equal Hazard of Gain "and Loſs, tho' you had but the Chance of gaining two Lives for one, we might ſafely wager. And if there were ten to "gain, you would be imprudent not to riſk one Life to gain ten, at a Game, where the Hazard of Profit and Loſs were "equal. But here there are an infinite Number of Lives infinitely happy to gain, with an equal Chance; and the Life you "ſtake is of ſo little Conſequence, and of ſo ſhort Duration, that it would be ridiculous to regard it upon this Occaſion." (*Penſees*, Pag. 43. *Edit. Amſter.*) As to the reſt, thoſe who regard this Argument, when applied to the Truths of Chriſtianity, as a weak one, unjuſtly ſuppoſe, that it is advanc'd as a direct and evident Proof. But, as I conceive, thoſe, who uſe it, deſign no more by it, than to ſhew how unreaſonable it is, not to uſe the utmoſt Attention in examining the Arguments brought in Favour of Religion; or who place it in the Rank of indifferent Problems, on Account of ſome ſeeming Difficulties not eaſily reſolv'd. Our worldly Intereſt is certainly not a Matter to oblige us to believe, without knowing why, or without good Reaſons. But a Concern ſo important, as that of Eternity, juſtly requires we ſhould neglect nothing neceſſary to know, whether there is, or is not, ſome certain Means to be convinc'd of its Reality, as ſoon as ever we believe it poſſible. Taking Things upon this Footing, nothing can be more ſolid, than M. *Paſcal*'s Way of Reaſoning. Eſpecially if we regard the great Aim of Religion, in its true Extent, which is, to render Men wiſe and virtuous in this World, in the Hope of an immortal Felicity in another Life. See Mr. *Bayle*, in the Art. *Paſcal*, whom he has defended on this Subject.

[4] Mr. *Thomaſius*, in his *Inſtit. Juriſpr. Divin. Lib.* i. *Cap.* i. §. 59. affirms, That there is no ſuch Thing as a *doubting Conſcience*, becauſe Doubting is no Determination of the Soul, but a Suſpending the Judgment only. But Mr. *Titius* will not allow this to be a ſufficient Reaſon to take away the Diſtinction; for beſides, that the Suſpenſion of Judgment is a kind of Determination, by which we conclude there is no Way to diſcuſs the Point in Queſtion, we do not here ſo much conſider the *dubious Conſcience* in itſelf, but only ſo far as it leads us to ſome Action, notwithſtanding the Doubts which ſhould hinder our Deciſion.

obſerv'd, That as long as the Judgment cannot, by the Force of any Arguments, be inclin'd to one Side more than to the other, the Action is to be ſuſpended; and that therefore, he who proceeds to do a Thing, about which his Conſcience ſtill hangs in an *Æquilibrium*, commits a [1] Sin; becauſe, as much as in him lies, he has tranſgreſs'd a Law. For he declares his Mind to this Effect: *I am not indeed certain, whether or no this Action is repugnant to the Laws; but whether it be or no, I am reſolv'd to undertake it. 'Tis good Advice* (ſays [a] *Tully*) *to forbear doing a Thing, where* [2] *we doubt whether it be fair and juſt, or foul and injurious: For when we are certain the Thing is juſt, we have a clear Light and Guide to proceed by; but to act with an unſettled Judgment, does not free us from the Thoughts and Intentions of offering an Injury.* *Grotius* [b] ſays, *That this Rule*, of abſtaining from a doubtful Action, *does not hold when we are oblig'd to do either this or that, and yet are unſatisfied in either, whether it be juſt or not; for then we are allowed to chooſe that Side which appears leſs evil or unjuſt. For whenſoever we are under the Neceſſity of making a Choice, the leſſer Evil aſſumes the Character of Good.* This Obſervation, we think, ought rather to have a Place in *Evils of Damage*, than in thoſe of *Morality*; becauſe in the former it is reckon'd a Gain and an Advantage, to avoid a greater Evil by admitting a leſs. But it cannot be applied to moral Evils, without a very dextrous Conſtruction. Properly ſpeaking, therefore, of two moral Evils, neither is to be choſen. Yet it frequently happens, that two Laws, either both Affirmative, or one Affirmative and the other Negative, ſhall ſeem to claſh with one another; ſo that we cannot ſatisfy both at the ſame Time [3]. In this Caſe ignorant Perſons are apt to fancy, that a Compariſon is made between two Evils, or Sins of Omiſſion, and that we are to do that, which it would have been the greateſt Sin to have left undone. But in Reality, we do not here of two Sins chooſe the leſſer; but that Action, which, without this claſhing and interfering, had been a Sin, now ceaſes to be ſinful, when we are oblig'd to a contrary Duty, by the Force of a ſtronger Law. Thus, for Example, when there ſeems to be a claſhing between the affirmative Command, *Give Alms*, and the Negative, *Do not ſteal*, without doubt we muſt not be guilty of Thievery to gather Matter for our Alms; according to that of the Apoſtle, we *muſt not do Evil, that Good may come of it.* Yet in this Caſe, not to give Alms, is not properly a Sin, becauſe Affirmative Precepts exert not their Force of Obligation, when there remains no Supply of Matter to furniſh out the Action. So again, when a claſhing is made between the two Affirmative Precepts, *Obey God*, and *Obey the Magiſtrate*, no Queſtion but we ought to obey GOD rather than Men [4] [c]: Not becauſe, of two Evils the leaſt is to be choſen, but becauſe it is not an Evil to deny Obedience to the Magiſtrate, when it cannot be given without violating the Duty we owe to GOD [5]. For a weaker Obligation always yields to a ſtronger, when both cannot be fulfill'd together.

IX. To a *doubtful Conſcience* a *ſcrupulous* one is very nearly related; and this is, when the Judgment of the Underſtanding is poſſeſs'd with an anxious Fear, leſt the Thing which we fancy to be Good, ſhould prove Evil, or *vice verſa*. Now when ſuch Scruples are founded on probable Arguments, the Action is to be ſuſpended, 'till they can be taken away and clear'd up, either by the Force of Arguments, or by the Authority of wiſe Men: But when they proceed only from a melancholy and a ſuperſtitious Softneſs and Indiſcretion, they are by all Means to be diſcouraged, and forcibly driven out of our Thoughts. Therefore 'tis a good Remedy which *Cartes* [d] preſcribes againſt Fluctuation of Mind, and the Bitings of Conſcience which precede an Action, *to accuſtom ourſelves to the forming of certain and determinate Judgments of all Things that offer themſelves to us.* But we muſt obſerve farther, that theſe Judgments ought to be drawn from genuine and ſolid Science, or from the Doctrine of the *Laws of Nature*, and from the Chriſtian Religion, purg'd from the vain Additions of ſuperſtitious Men. For tho', without this Security, the Mind may indeed be ſo far harden'd, as not to perceive any Fluctuation, or to feel any Remorſe of Conſcience; yet ſuch a Firmneſs and Obduracy is neither of long Continuance, nor free from the Imputation of Sin. Whence we cannot approve of the latter Part of *Des Cartes*'s Preſcription, where he tells us, *We ſhould always think our Duty is diſcharg'd, when we have done what we judg'd beſt, altho' we have made the worſt Judgment that can be.* For this is not to cure the Diſeaſe, but by an ill-temper'd Opiate, to bring a Drowſineſs and Stupidity on the Mind.

X. When the Knowledge of the Underſtanding is wanting, as to the Performance or the Omiſſion

[a] *Off. Lib.* i. *Cap.* ix. [b] *Lib.* ii. *Cap.* xxiii. §. ii. *n.* 2. [c] *This was the brave Declaration of* Socrates, I honour and eſteem you, O ye *Athenians*; but I will obey GOD rather than you. *Plato Apolog.* [d] De Paſſion. Art. 170, & 177.

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[1] Mr. *Titius* (in his *Obſervat. on Pufend. Obſerv.* 19.) affirms, That this Maxim is not abſolutely true and without Reſtriction; For (ſays he) when an Agent has no more Intention to do Evil than Good, he is not Blame-worthy, unleſs the Action be found contrary to the Law; for the Queſtion is not here about the Nature of the Action in itſelf; and therefore, whatſoever produces that Quality contrary to the Deſign of the Agent, hinders the Imputation of a Crime to him, if the Action prove evil. In fine, as we ſuppoſe the Agent to be ignorant, whether he does Good or Evil, and that the Reaſons for and againſt him are altogether equal, his Diſpoſition, nevertheleſs, is corrupt before GOD, becauſe he has reſolved to act without a certain Knowledge, that what he is about to do is good, or, at leaſt, harmleſs, and ſo he renders himſelf liable to fall into Error, and conſequently engages himſelf, as much as in him lies, in all the evil Effects. This hath Place in Matters of the greateſt Importance, as when we condemn any one, and do him any Miſchief any Ways: For the Juſtice of an Action ought to be ſo clear, that they, to whom it is done, may acknowledge it ſuch. See *Parrhaſiana. Tom.* ii. *p.* 406.

[2] 'Tis a Maxim of Holy Scripture, which teaches us, *That whatſoever we do without Faith*, i. e. without a thorough Conviction of the Goodneſs it, *is Sin.* And all the Heathen Wiſe Men, both *Greeks* and *Barbarians*, have given us the ſame Rule. *Qui in vero dubitat, male agit, cum deliberat:* He that doubts of the Truth, does Ill, while he deliberates. *Publ. Syr.* See *Grotius*, *Lib* ii. *Cap.* xxiii. §. 2. The Scholars of *Zoroaſtres* had this Rule, If it be dubious, whether an Action be good or evil, we muſt not do it, till we are informed by our *Deſtur* (ſo they call the Doctors of their Religion). *Hyde in Sadder*, *Portâ* 30. For it is certain, in the Religion, which GOD privately reveal'd to *Zoroaſter*, it is commanded, Do no Action, about which you are ignorant, whether it is good or evil; and endeavour to obtain nothing, which you do not know. Inform, Inſtruct yourſelves, and then act; but take no Step without Reflection.

[3] See *Lib.* v. *Cap.* xii. §. 23.

[4] This Saying of *Socrates* is, by many learned Men, compared with the Paſſage in the *Acts*, Chap. iv. 19. v. 29. but, as Mr. *Le Clerc* obſerves, *Ars. Crit. Tom.* i. he ſpeaks of his Dæmon or Genius, and not of the True GOD.

[5] *Hierocles* ſpeaks much to this Purpoſe, in his Diſcourſe of the Honour and Obedience due from Children to their Parents, and therefore is worthy our Notice. His Words are, *Com. in aur. Pythag. Carmina*, p. 53. *Ed. Lond. If it happens, that the Will of our Parents is contrary to the Law of GOD, what can they do, who fall under ſuch an Oppoſition of Laws, other than is uſually done, when any Duties are incompatible? For when the Choice of two Things is offered, the one Good, the other Evil, we muſt neceſſarily prefer the Good, if we can't fairly diſcharge ourſelves of both at the ſame Time*, &c.

of

of any Thing, we call this *Ignorance*. Which, as far as concerns our preſent Deſign, may be divided, either with Reſpect to its [1] *Influence on the Action*, or with Reſpect to its *Origin*. With Reference to the *former*, it is of two Sorts, one being the Cauſe of the Thing ignorantly done, and the other not. The firſt may be call'd *Efficacious*, and the other *Concomitant*. The firſt is the Negation of ſuch a Knowledge in the Underſtanding, which, had it been preſent, would have hinder'd the Action. Such was *Abimelech*'s Ignorance, *Gen.* xx. 4, 5. who, had he known *Sarah* to have been *Abraham*'s Wife, had never entertain'd any Thoughts of taking her for himſelf. The latter is a Negation of ſuch a Knowledge in the Underſtanding, as would not have hinder'd the Fact, ſo that the Man, tho' he had known what he was indeed ignorant of, yet would have done the Thing nevertheleſs. As ſuppoſe a Man ſhould kill his Enemy by a chance Blow, whom he would otherwiſe have kill'd, had he known him to be in that particular Place, where he now threw his Weapon caſually, and without any Intention of Hurt [2]. Thus the Boy who flung a Stone at a Dog, and by miſtake hit his Mother-in-Law, and kill'd her, ſaid [3], Τ' αὐτόμαλλον ἡμῶν καλλίω βαλεύεται, *Fortune had a better Aim than I.* Some diſtinguiſh theſe two Species of Ignorance in this Manner, That what is done by the former ſhall be ſaid to be done *out of Ignorance*, what by the latter, to be done by *one that is ignorant*. Yet, even in the latter Caſe, no Murder, according to the ſtrict and proper Senſe, is committed. For tho' that ill Affection of Mind was in itſelf vicious, yet it contributed nothing to the Fact. With Reference to its *Origin*, Ignorance is divided into *voluntary* and *involuntary*. The former is by ſome term'd *conſequent* and *vincible*, the latter *antecedent* and *invincible*. The former, whether it be directly *affected*, or proceeds only from Idleneſs and Unattention, is when a Man knows not that which he could, and ought to have known: The latter, when a Man knows not ſuch Things, as he had neither Ability nor Obligation to know. This *invincible Ignorance* is either ſuch *in itſelf* [4], *and not in its Cauſe*, or elſe both *in itſelf*, *and in its Cauſe too*. The former is, when in doing a Thing a Man is not able to overcome the Ignorance from which it proceeds, and yet is in Fault for falling into that Ignorance. Thus frequently when a drunken Man commits a Sin, he does not know what he is doing, yet he is culpable for not knowing it. The latter is, when a Man not only is ignorant of ſuch Things as could not be known before the Action, but is, alſo, free from any Blame upon the Account of his falling into that Ignorance, or his continuing in it. On this Point is obſervable what *Ariſtotle* has ſaid in his *Ethicks*, *Book* iii. *Chap.* i, ii. and what *Euſtathius* has commented on the Place. Where he diſtinguiſhes between what is done *by one being ignorant*, and what is done *out of Ignorance*. For Inſtances of the former, he brings the Actions of a drunken, or of an angry Perſon; for ſuch Men, tho' they often know not what they do, yet the Ignorance is not the Cauſe of their acting, but the Drunkenneſs, or the Anger, of which 'twas in their Power to decline the former, and to reſtrain the latter. He adds farther, that thoſe Perſons cannot be ſaid to do a Thing unwittingly, who ſin upon Account of not knowing what was to be done, or what to be avoided, which Ignorance he calls *Ignorance in Election* [5], or *Ignorance of Univerſals* [6]: for theſe every Man was obliged to know. But that *Ignorance of Particulars* is the Thing, which renders an Action capable of being conſtrued involuntary. Theſe Particulars are, *who*, *what*, *about what*, *and in what*, *with what Inſtrument*, *for what Cauſe*, *and by what Manner*. All theſe no Man in his Senſes can be ignorant of together, becauſe he is at leaſt apprehenſive of his own acting, and therefore can reſolve the firſt Queſtion (*Who?*) But [7] in all the other Circumſtances Ignorance may intervene. Thus

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[1] The Diviſions of our Author are neither clear nor compleat enough; and therefore *Titius*, in his 23d Obſervation, rectifies them, by conſidering *Ignorance*, 1. With Reſpect to the Influence of the Object on the Action; whence ariſes *efficacious* and *concomitant Ignorance*, of which I ſhall treat in the following Note. 2. With Reſpect to the Nature of the Object, conſidered in itſelf, which produces an *Ignorance de Jure*, and an *Ignorance de Facto*. 3. With Reſpect to the Conſent of the Agent; whence reſults *voluntary* and *involuntary Ignorance*.

[2] This Definition comes near the Opinions of the Peripateticks, who diſtinguiſh the Sorts of Ignorance and Error, by the Trouble and Penitence which the Agent ſhews, or not, after the Action, *Ethic. Nicom. Lib.* iii. *Cap.* ii. But this Circumſtance, conſider'd in itſelf, has properly no Power, either to conſtitute the Morality of an Action, or to alter the Nature of the Ignorance from whence that Action proceeds, nor to ground or exclude the Imputation of it. For (as our Author acknowledges here) the Diſpoſition of the Agent, after the Thing is done, whether good or bad, would have no Influence on the Action itſelf, becauſe it is already committed. Therefore the Diſtinction, in Queſtion, is either intirely uſeleſs, or leads us to a falſe Concluſion; ſince if we make the Efficacy of Ignorance, or Error, depend on the Senſe of the Agent after the Action, every Man, by a diſſembled Penitence, might illude the Imputation of Actions the moſt capable of ſubjecting him to Puniſhment. But this Diſtinction has another Effect, which is, that it is only applicable to Actions lawful, or indifferent. For it is with regard to theſe alone we want that Knowledge, which, by preventing our Deciſion, renders Error efficacious, and, conſequently, excludes the Imputation. See §. 12. 13. Now ſuch Ignorance is thus diſtinguiſhed; 1. It is efficacious, when it reſpects the neceſſary Knowledge of the Action we are about, either as to the Nature of the Thing, or Intention of the Agent; ſuch Ignorance hinders Conſent, and being involuntary, can't be imputed. By *neceſſary Knowledge*, I here underſtand, that which the Nature of the Thing abſolutely requires, or elſe the Intention of the Agent form'd in due Time, and notified by ſuitable Tokens. This may be eaſily applied to particular Actions, as well lawful as unlawful. On the contrary, 2. *Concomitant Ignorance* is that which reſpects that Knowledge which has no Relation to the Affair we are about, and which, not hindring Conſent, cannot preſerve us from Imputation. And here it is of no Conſequence, whether it be voluntary, or involuntary, it is ſufficient that it has no Influence upon the Buſineſs in Queſtion, can't contribute any Thing to cauſe an Alteration. *Tit. Obſ.* 25. Add this to what I have ſaid in the Abridgment *of the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 8. Not. 1.

[3] *Plutarch*, who mentions this Sentence in two Places of his Works of Morality, makes this to be the Speech of the Step-Son, Οὐδ' ἅτω κακῶς; 'twas not badly thrown. *De animi tranquil. p.* 467. *Ed. Wech.* Theſe Words are a Verſe of an ancient *Greek* Poet. See the Interpreters on the Letters of *Cicero* to *Atticus*, Lib. i. Epiſt. 12. where we find the Beginning of it.

[4] This Diviſion is not very neceſſary, for only the laſt ſort of Ignorance is involuntary or invincible; for in Matters moral, voluntary comprehends not only what is formally conſented to, but what precedes Conſent, if it be a neceſſary Conſequent of it. *Titius Obſ.* xxvii.

[5] *i. e.* When we are ignorant which of two Things propos'd to us is moſt advantageous, or with what View we muſt act; as for Example, when we prefer a profitable or agreeable Good before an honeſt one.

[6] Such is the *Ignorance* of the *Law of Nature*, at leaſt of its common Principles; and the *Ignorance* of the *Civil Laws* of the Government to which we belong: So that tho' we may kill or poiſon another without any ſuch Deſign, we can't innocently perſuade ourſelves, that Murder, or Poiſoning, are lawful. Add here what I have ſaid on the Abridgment *of the Duties of a Man and a Citizen*.

[7] There are ſome other particular Circumſtances, the Ignorance of which is as inexcuſable as that of general Principles. As for Example, If one ſhall ſhoot off a Gun in a publick Place, and kill a Man, it will be no Excuſe, that he thought no Man would paſs that Way, becauſe he muſt needs imagine, that ſuch Places are much frequented. ſo that the Conſequence was to be dreaded.

Persons offend who say [1] what they ought not, not knowing that *what* they have said ought to be kept secret. And the same is the Case of a Man who intending to shew his Friend some shooting Engine, should let it go off, and kill him. An Instance of Ignorance *about what*, and *in what* (which are the same Thing) may be, when a Man kills his own Son, mistaking him for his Enemy. *Ignorance of the Instrument* is, suppose a Man should throw a pointed Spear at another, and kill him, taking it to have had no Point. *For what Cause* comes to be consider'd in *Ignorance*, in such a Case as this: Suppose a Man should apply a Remedy to another, with Design of preserving his Health, and the Remedy should (against his Knowledge) prove mortal. The last Circumstance is, *in what Manner*; as if a Man in teaching another should intend only to give him a slight Blow, but should by Accident desperately wound him [2]. The *Roman* Lawyers have treated under a peculiar Head concerning *Ignorance of the Law*, and *Ignorance of the Fact* [3]. But they did not consider Ignorance so much for the Force and Use it had in *moral Actions*, as for the Influence it had on Matters of Right, and as it made for the keeping, [4] acquiring, or losing of any legal Possession or Qualification. But their numerous Reasonings about both Kinds may be reduc'd to this short Issue, That *Ignorance of the Law* is, for the most part, join'd with some Degree of culpable Negligence [5], but *Ignorance of the Fact* is not; and that therefore Equity directs us to interpret [6] the former to the Man's Prejudice, and the latter not.

XI. When not only a Knowledge of the Truth is wanting in the Understanding, but a false Persuasion has intruded into its room, which passes itself for Truth, then we say a Man has an *erroneous Conscience*, or that his Mind is possest by an *Error*. This Error is (like Ignorance) either *vincible* or *invincible*: The former is that which a Man could and ought to have overcome, by applying such Diligence as is [7] morally possible, or as the common Condition of Humanity admits and allows: The latter is such as a Man could not vanquish by all Diligence morally possible. Where it must be observ'd, that should we approve of that saying of the Emperor *Antoninus*, Book ix. Chap. xlii. *Whosoever sins, does in that decline from his propos'd End, and is certainly deceiv'd* [a]; yet if the Error were not insuperable, the ill Actions proceeding from it cannot be exempted from the Number of Sins properly so call'd, nor ought to be pardon'd in Gross by a promiscuous Indulgence [8].

[a] *Add* Arrian Epictet. *Lib.* i. *Cap.* xxviii. *&* *Cap.* v. §. 13.

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[1] Thus says *Aristotle*; Æschylus *the Poet, being accused for publishing the Mysteries of* Venus Elusina, *was acquitted, because he knew not, that those Things which he had spoken were to be kept secret. For Ignorance, with regard to the Quality of the Thing, consists not in our not knowing that we do it, but in being ignorant that it is of such a Nature, or our want of conceiving the Qualities of it.*

[2] Two other Circumstances may be added; as, 1. The Time; for we may be ignorant whether a Day be holy or not, a Festival, or Working-day, *&c.* 2. The Place, whether it be consecrated or common.

[3] See the *Digest. Lib.* xxii. *Tit.* vi. and *Cod. Lib.* i. *Tit.* xviii. See also Mr. *Domat*'s *Civil Laws in their natural Order, Part.* i. *Lib.* i. *Tit.* xviii. §. 1.

[4] *Ignorance of Right* (say the *Digest. Lib.* xxii. *Tit.* vi. *Leg.* vii) hinders not from preserving our just Due, but is of no Use to acquire any Thing. As to Crimes, their Judgment is, that Ignorance of what is forbidden by the *Law of Nature*, or *Nations*, or by the *Revealed Law*, is altogether inexcusable; but as to what is contrary to the *Civil Laws*, Ignorance or Error excuses sometimes, either wholly, or in part; in which Case Men are considered as having Means, or not, to know the Law.

[5] The Reason is, because the Law may, and ought to be clear and determinate, but Facts are often very intricate, so that the wisest Men can't unfold them; and thereupon, in Matters of Fact, when Ignorance is gross, it can't be alledged as a Reason available. *Ibid. Leg.* ii. *&* vi. *&* ix. §. 5. See *Cujas Observ.* *y*. 39.

[6] For 'tis a Rule of the Law, That Ignorance of the Law hurts any Man, but of the Fact not. *Digest. ibid.*

[7] See *Chap.* vii. §. 16. The Questions about *invincible Ignorance* and *Error*, have been much debated about the End of the last Century, and produc'd a great Number of *French* Books, in Order to maintain the Rights of Conscience in Matters of Religion, against the Attempts of such Teachers as are against a Toleration, and are for prosecuting all that differ from them. It has been maintain'd, with unanswerable Force of Reason, that as Men know not the Heart, and have no Power over its Motions, they have no Right to judge of the Principle of Ignorance, or Error, in another, much less to use any rigorous Methods to hinder a Man from following the Lights of his own Conscience. It belongs to God alone, to judge whether Ignorance or Error, be invincible, as it belongs only to him to punish what is vicious in either. So far from that, both natural Equity and Christian Charity equally obliges to presume that every Man, who appears otherwise honest, acts sincerely in the Sentiments he professes, however erroneous they may appear to us; and that if he appears strongly prejudic'd, it is because, by regarding his Opinions as so many evident Truths, they have obtain'd in his Mind the Force of Reason. In a Word, however blinded Men may be, or under whatever Illusions they may labour, yet while these Errors lead them to no Action contrary to the Good of Society in general, or the Safety of that Government under which they live, they ought no Way to be disturb'd on this Account. Nor is there any other lawful Way to recover them, and prevent the Effects of their Error, than that of a calm and solid Instruction; it is the highest Injustice to deprive them of their Goods and Privileges, either civil or natural; because every Man has a natural and unalienable Right to enjoy a full Liberty of acting according to his Conscience, especially in Matters that relate to his eternal Interest. See my Notes on the Abridgment *of a Man and a Citizen*, Lib. i. Cap. i. §. 7. Not. 1. The most specious Objection, in my Opinion, urg'd against this, arises from the following Principle, that those who believe they do God Service in persecuting others, may and ought to do it. *Mr. Bayle*, in his *Philosophical Commentary* (Tom. ii. Cap. ix. and Supplement, Cap. xxi.) has replied several Things to this, but, in my Opinion, has omitted the direct and only decisive Argument, which is, that it is in itself a kind of Contradiction to urge a Motive of Conscience as a Reason of Persecution. For it is to include in the Extent of a Right, what, in itself, destroys the Foundation of that Right. In short, according to this Supposition, a Man would be authorized to offer Violence to the Consciences of others, by Virtue of the Right he has to act according to his own. It signifies nothing to say, that it is not the same Person whose Conscience forces and is forc'd: For besides that every Man, in his Turn, would have equal Reason to exercise the like Authority, which would set all Mankind by the Ears; the Right of acting according to the Motions of Conscience, is founded in the Nature of Man, which being common to all, can authorize nothing, which grants to any particular Person the least Thing tending to diminish their common Rights. Indeed, the Right of following our Conscience tacitly implies this Exception, that is, *it excludes all Cases where Violence is done to the Conscience of another.*

[8] It is certain, that unless Men are arrived at the Height of Wickedness, they sin not for sinning's sake, but are ordinarily seduced by their Passions, which, on a sudden, divert the Mind from the Thoughts of their Duty; but tho' a Man considers not the Sin formally in the Instant of sinning, he is not less to be blamed, because his Ignorance respects Things which he might and ought to know; and so the Maxim of *M. Antonine*, if not understood with the Restriction beforementioned, leads us directly to the philosophical Sin of the Jesuits. About which, see *Biblioth. Univers. Tom.* xv. In fine, all that is said of *Ignorance* should be applied to *Error*, the one being often the Cause of the other; for we frequently deceive ourselves, because we are ignorant of certain Truths, the Knowledge whereof would have prevented our being misled; or, at least, because we do not perceive the Connection they have with that Truth which is directly opposite to the Prejudice we have conceiv'd. When even we do ill without being influenc'd by any Error, (as happens in Case of a simple Omission, which, in its own Nature, implies no Reflection, or when we do any Action, without considering whether it be good or bad) it is always true, that we think we have done no Harm, and that, perhaps, we should have done what we omitted, or omitted what we have done, had we attended to that Omission, or regarded the Quality of the Action. Thus *Error* and *Ignorance* are generally intermixt, tho' sometimes one appears more prevalent than the other. But whether combin'd, or not, they produce the same Effect, and are subject to the same Rules, with regard to the Imputation of the Actions or Omissions they produce.

XII. But it ought, especially, to be remark'd, that Error has different Effects in Actions, which a Man may undertake or omit as he pleases, or the Exercise of which is left to his free Will; and in such Actions as are enjoin'd or forbidden him by the Law or the Command of a Superior. In the former kind of Actions, the Error is suppos'd to intercept our Consent: And therefore those Consequences do not flow from it, which are otherwise apt to follow on such an Action as we have thus consented to; especially if the Error did not steal on us thro' supine Carelessness and Neglect. And therefore in Bargains an Error about a Thing, or about its Quality, upon Prospect of which a Man was induc'd to come to such an Agreement, renders the Bargain void. For in this Case the Man is not conceiv'd to have agreed absolutely, but upon Supposal of the Presence of such a Thing or Quality, on which, as on a necessary Condition, his Consent was founded: and therefore the Thing or Quality not appearing, the Consent is understood to be null and ineffectual. Which Point shall be discuss'd more fully in its proper Place.

XIII. But the Case seems to be very different in necessary Actions, or in such as are commanded or forbidden by a Superior. Where we must first enquire, whether the Error arises in the Theory, or in the Practice; that is, whether a Man entertains a false Opinion concerning the Necessity of some Actions, thinking those ought to be omitted which should have been perform'd, or *vice versa*; or whether some Error occurs in the very Exercise of an Action, by Means of which the Action is not applied so rightly as it ought to have been. The former Kind of Errors do not, in our Judgment, at all hinder the *Imputation* of an Action to the Agent, according as it shall appear to agree or disagree with the Rules prescrib'd him, because they must, upon all Accounts, be esteem'd superable: For he that would restrain the Actions of another by a Rule, ought at the same Time to make a sufficient Declaration of his Will, that it may be clearly known by the Person whom he is to oblige. For otherwise 'tis the most unjust Thing in the World to require Obedience to a Law, when either the Law is unknown, or the Discovery of its Sense exceeds the Capacities of those whom it affects. Therefore, if a Man *errs in Theory*, that is, if he fancy a Thing to be commanded which is really forbidden, or, *vice versa*, he is suppos'd *not to have* apply'd sufficient Diligence, and therefore he cannot refuse to bear the Imputation of Faults committed upon such an Error. This Doctrine is by some Casuists thus explain'd in other Words: If the Conscience entertain a vincible Error about an evil Thing, the Man *sins*, as well if he acts for it, as if he acts against it: That is, if he has persuaded himself that an Action was commanded, which was indeed forbidden, or that an Action was forbidden, which was indeed commanded, he sins by performing the former, and by the forbearing the latter; because such a Performance and such a Forbearance are repugnant to the Law, but the Agent might, and ought, to have known the Law, according to its true Import and Signification: And yet [1] the same Man has sinn'd no less, if he has forborn an Action which was indeed forbidden, but by him believ'd to be commanded; or if he has perform'd an Action really commanded, yet such as he imagin'd to be forbidden. For tho', in these Cases, there be no external Acts repugnant to the Law, yet because the Man thinks his false Notion and Construction of the Law to be right, therefore the contrary Intention shall be imputed to him as Sin: For the evil Intention of the Agent makes the Action appear evil, at least with Respect to the Agent himself. From all which it appears, that from an erroneous Judgment no Action can proceed which may be imputed as good and right to the Actor, and that when a Man is *falsly* persuaded that such a Thing is unjust [2], the Thing is unlawful for him to do, so long as his Persuasion shall continue uncorrected. *Add. Lib.* lxvi. § 8. *D. of Thefts.*

XIV. But if a speculative Error be entertain'd concerning a Thing indifferent; that is, if a Man should be persuaded that he ought to do, or to omit somewhat, which was indeed left free on both Sides, he will only sin, if he acts contrary to what this false Opinion suggests, upon the Account of the Pravity of his Intention, but will not sin, if he acts according to the Directions of his Error. For indifferent Things are plac'd without the Bounds of the Law; which cannot be transgress'd by their Performance or Omission: And that Error appears very harmless, which does not give Occasion to sin. Yet it is plain, the Actions undertaken upon the Motions of such an Error, cannot obtain those good Effects, which otherwise follow the like Instances of Obedience to the Laws [3]: Thus, if a Legislator had constituted such a Reward to those, who comply'd with his Injunctions, this Reward could not be challeng'd by one, who thro' Error and Mistake should have observ'd some indifferent Things, fancying them to be positively determin'd, and legally enacted.

XV. But 'tis much more usual, that an Error should intervene in the Practice and Exercise of Actions commanded by the Laws: As *suppose the true* Object of the Action should be remov'd, and another substituted in its Place; or if we *should* mistake the Time, or Place, of the Execution *enjoin'd*. Such Actions, as they are not follow'd by those Effects, which are otherwise due to Actions rightly apply'd; so neither are they attended with the Effects proper to bad Actions, because the Error was not contracted by any culpable Negligence: Which some Authors thus express in other Words, An intervening Error hinders the Action from being imputed on either Side, making it neither good nor evil. *Who ever* (says *Seneca Herc. fur. v.* 1237.) *gave Error the Name of Wickedness?* Thus, tho' otherwise you would be freed from your Obligation by paying a Man what you owe him, yet should you pay him undesignedly, and by pure Mistake, you will not indeed have committed a Sin, but you will by no

[1] Moreover, a Man likewise sins as much in doing a good Action contrary to his Conscience, as by doing a Thing evil in itself, in following the Motions of an *erroneous Conscience*. The Reason is, because, in the first Case, he directly and deliberately disobeys GOD, which is the most aggravating Circumstance of Sin; and besides, all the Good that can be in the Action, can't be imputed to the Agent, who could not but be sensible, that he had no Design to do it. Whereas, in the other Case, there is no formal Contempt of the Authority of the Lawgiver; nay, on the contrary, there is a Design to obey him; which shews, that the Action contains in it some moral Goodness, altho', in some Respects, it may be accounted evil, if the Error appears not unconquerable. See the *Philosophic Comment*, &c. *Tom.* ii. *Cap.* viii.

[2] 'Tis on this Account that the *Roman* Law has decreed, that he that takes away any Thing from another, thinking that he does it without the Consent of the Owner, commits a Robbery, tho' afterward he find, that the Proprietor was willing he *should* take it and have it for his own; but he *that has*, as much as in him lies, committed the Robbery, can't be prosecuted in Law as a Thief. The Law is this; If I, against the Will and Consent of the Owner, as I believe, do meddle with his Goods, tho' the Owner is willing I should, whether am I guilty of Theft? And *Pomponius* says, I am a Thief: Yet it is true, that if I am willing he should have the Use of them, tho' he know it not, he can't be impleaded as guilty of Theft. *Digest. Lib.* xlvii. *Tit.* ii. *Of Thefts*, *Leg.* xlvi. §. 8.

[3] This needs some Limitation. See *Sect.* xvi. *Not.* 2. of this Chapter

Means

Means have cancell'd the Obligation. Thus when a Man has, with an honest Intention, tho' with an inconsiderate Liberality, conferr'd a Kindness on a wicked Person, who will abuse it toward the maintaining of his Disorders; he cannot at all boast of having done a good Action, yet he shall be excus'd from any Share in the consequent Wickednesses, and not be reckon'd to have contributed any Thing toward their Commission. But when a Man has been particularly commanded to discover and observe precisely the Object, the Place, or Time of acting, it will be a hard Matter for him to escape the Imputation of those Effects, which shall proceed from the ill applied Action, unless he can demonstrate his Error to have been morally insuperable and unavoidable. Thus if you give your Servant a strict Charge to wake you at such a certain Hour of the Night, it will not serve him for an Excuse of his Default, to say, that he mistook in telling the Clock; yet if by any Casualty the Clock went wrong, or was out of Order, the Servant shall be free from all Offence and Blame.

XVI. It frequently happens, too, that an Error intervenes in the Exercise of a bad Action, while the Actor misses the Object at which he aim'd. In which Case, the *Malice* of the Actor shall continue the same as if he had not mistaken, but the Action itself shall be esteem'd more or less heinous, according as the Object is on which it casually lighted. Thus a Person who, intending to kill his Enemy, accidentally kills another Man, shall be nevertheless guilty of Murder [1]. *See Lib.* xviii. §. 3. D. *of Injuries, & Lib.* xiv. D. *L. Corneliam de Sicariis, & Grot. in Sparf. Florum ad h. l.* Yet the Murther shall receive more or less Aggravation, according to the Dignity or Meanness of the Man, who has been so unfortunately slain. Hitherto must be referr'd the Case of a Man's killing another outright, whom he intended only to wound, or to hurt in a less Degree; for here the Fact itself must be the Rule to go by in Judgment: But when, in the Exercise of a faulty Action, a Man by Mistake lights on a lawful Object, such an Action will be no farther evil, than as it flows from an ill Intention in the Actor; so that this Error shall hinder the Fact from coming under the Name of the Vice design'd to be committed. And therefore that Saying of *Seneca*, of the *Constancy of a wise Man*, Chap. vii. will not hold, at least [2] in human Courts and Consideration [3], *That if a Man lies with his own Wife, fancying her to be another's, the Man shall be an Adulterer, tho' the Woman be no Adultereſs.* Add. Sen. of Benefits, *Lib.* ii. *Cap.* xix. *& Lib.* v. *Cap.* xiii. in the End. And compare *Libanius Declam.* xxxv. *p.* 780. of *Morellius*'s Edition.

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[1] In one of the *Roman* Laws, to which our Author here refers, 'tis decided, that if a Man, who is a Stranger to me, or who mistakes me for another, does me an Injury, the Intention carries it, because the Action is itself injurious, and has been voluntarily committed against me; for the Law considers me as still myself, tho' the Offender took me for another. *Si injuria mihi fiat ab eo, cui ſim ignotus; aut ſi quis putet, me* Lucium Titium *eſſe, quum ſim* Cajus Sejus: *prævalet quod principale eſt, injuriam eum mihi facere velle, nam certus ego ſum, licet ille putet me alium eſſe, quàm ſum, et ideo injuriarum habeo.* Digest. Lib. xlvii. Tit. x. *De injuriis*, &c. Leg. xviii. §. 3. One may consult, upon this Law, the great Cujas, *Recit. in Paul. ad Edit.* Pag. 800. Tom. v. *Opp. Edit. Fabrott.* We shall find the natural Foundation of this Decision in the Explanation our Author has given of it. It is not lawful to injure this Man, or that Man; so that one is always criminal, let him hurt whomsoever he will, if he does it wilfully and knowingly. Thus, for Instance, were the Case to happen so, that if we had known the Person we struck, we should not have given the Blow, yet this Mistake, only relating to an accidental Circumstance, does not prevent the Action from being in itself criminal, and from being imputed to us with all its Consequences, however unforeseen. Whoever strikes a Man, unknown to him, exposes himself, by that, to injure a Person more considerable, perhaps, than he imagines: And 'tis the same Thing, if he rashly pushes forward against one, whom he has not seen near enough, to know who he was: In such a Case, if we are deceiv'd, we can only blame ourselves; for the Possibility of the Action should have put us upon our Guard against it. 'Tis no Alleviation to alledge the Mistake for the Excuse, or to pretend, upon that Account, that the Punishment should be only proportion'd to the Character of the Person such as we took him to be; for, at this Rate, it would be very easy, with little Hazard, to insult People, to whom, otherwise, we durst not do the least open Injury; as for Example, a Father or a Magistrate. To conclude, our Author here refers us to another Law, and to what Grotius says upon it in his *Florum Sparsio ad Jus Justinian*, Pag. 204, 205. *Edit. Amst.* This Law bears, that in Punishments we should have a principal Regard to the Intention, not the Effect: *Divus* Hadrinus *in hæc verba reſcripſit: In maleficiis voluntas ſpectatur, non exitus*, Digest. Lib. xlviii. Tit. viii. *Ad Leg. Corn. de Sicar.* But this has nothing to do here, where the principal Regard is had to the Effect rather than the Will. The illustrious Mr. de Bynkershoek even affirms, that this last cited law did not relate to all sort of Crimes, but only to *Enchantments*, or *Sorcery*. See his *Obſerv. Jur. Rom.* Lib. iii. Cap. x.

[2] Indeed, before God, it is real Adultery; for, as the Author has observed more than once before, and as he hereafter speaks, *Chap.* vii. §. 4. an evil Intention renders the Action evil, which otherwise is good and innocent, as to the Matter, and in itself: Tho' a good Intention is not sufficient to render an Action materially evil, or good. Whereas, on the contrary, if a Man designs to do a good Action, and happens (thro' Mistake) to do an ill one, there is no doubt but God will accept of that Intention, as if he had effected the Good that he propos'd; and although it gives Place, by Accident, to some Sin in another Person, 'tis no less commendable for the Good which he would have done, unless the Execution of a pious Design either becomes unprofitable, or be hindred by the Change of certain Circumstances. It is the same Thing with regard to the Divine Tribunal, that is, when we believe we do a Thing commanded, or abstain from a Thing forbidden by God, when, in reality, he has given us no positive Injunction upon the Subject: Our Intention of Obedience being, in this Case, agreeable to the sovereign Legislator, who knowing the Hearts of Men, judges of their Actions by their Sincerity. So that the Maxim, which our Author has laid down in the last Section, I mean, *That every Action, in doing of which we may fall into an Error, can neither be imputed to us as Good, nor Evil:* This Maxim, I say, had need be understood with some Restrictions. Nor is it generally more true, that these sort of Actions must always want, before human Judicatures, those Effects which they would have, if they were well applied. As for Instance, If a Man, not knowing it, marries a Woman who hath a Husband already, or is a Relation within the Degrees forbidden, as he is no Adulterer or incestuous Person, supposing that it be a real Error; so their Children cannot be reputed Bastards, provided that both the Father and the Mother be under an invincible Ignorance in that Respect. This is the very Example that Mr. *Hertius* alledges here, and we may also consult his Discourse of a *Supposed Marriage, Tom.* i. of his Commentaries and small Tracts. Printed in 1700.

[3] Consult also the new Letters of Mr. *Bayle*, written upon the Occasion of his general criticising upon Mr. *Maimbourg*'s *History of Calvinism*, Lett. ix. §. 12.

CHAP.

CHAP. IV.

Of the Will of Man, as it concurs in, or conſents to MORAL ACTIONS.

The CONTENTS of every Section of the fourth Chapter.

I. *Of the Acts of the Will.*
II. *Of the Liberty of the Will.*
III. *That the Will muſt of Neceſſity be indifferent,* i. e. *not forced to chooſe Good or Evil.*
IV. *How the Will is inclined to good Things, and to Goodneſs in general.*
V. *Certain Diſpoſitions of the Body ſtir up the Will.*
VI. *As alſo ſome Habits.*
VII. *And Paſſions.*
VIII. *Alſo Intemperance.*
IX. *Actions of a mixt Nature.*
X. *Involuntary, and forced Actions.*

THE moſt wiſe Creator being pleas'd to make Man an Animal governable by Laws, for this Purpoſe implanted a Will in his Soul, as an internal Directreſs of his Actions; that the Objects being propos'd and known, this Power might, by an intrinſick Principle, and without any phyſical Neceſſity, move itſelf towards them, and might chooſe that which ſeem'd moſt agreeable and convenient, and reject that which appeared unſuitable and incommodious. The Will is concern'd to govern human Actions by the Adminiſtration of two [1] Faculties, by one of which it is ſaid to act *ſpontaneouſly*, and by the other [2] *freely*. To *Spontaneity*, if we may ſo ſpeak, are attributed certain Acts and Motions, of which ſome are interior, commonly call'd [3] *Eliciti*, others exterior, generally term'd *Imperati*. The former are ſuch Acts as are immediately produc'd by the Will, and terminated in the ſame Power. Some of theſe are employ'd about the End, as Volition, Intention, Fruition; others about the Means, as Conſent, Election, and Uſe. *Volition* is that Act of the Will by which it is *ſimply* carried toward ſome End, without Regard had whether the End be preſent or abſent; or that Act by which the End is barely approv'd of. Others call this the Will of ſimple Approbation, by which a Thing is underſtood to agree with the Nature and Inclinations of ſome Perſon, though he has not yet actually and effectually mov'd himſelf towards the producing or obtaining of it. *Intention* (or *Proæreſis*) is *a Deſire efficacious toward the obtaining of an End*, or it is an Act of Will, by which it effectually tends toward an abſent End, and endeavours actually to produce or to acquire it. This Act being join'd with the Hopes and the Attempts of procuring an End, we may eaſily conceive what ſort of Things it is employ'd about: And they, certainly, muſt be Things poſſible in themſelves, and Things in our Power; as *Ariſtotle* has more largely obſerv'd, *Ethic. ad Nicom. Lib.* iii. *Cap.* iv. *Election* [4] *is concern'd only about thoſe Things which are in our Power. Every Man purpoſeth to do that alone which he imagines* [5] *himſelf able to compaſs.* Again, *Lib.* vi. *Cap.* ii. *What is already done, cannot be the Object of our Choice and Purſuit; for no Man conſults of what is paſt, but of what is to come, and is changeable and contingent. Whereas what is already done cannot be alter'd or recall'd. And therefore* Agatho *well ſays, This alone is beyond the Power of God himſelf, to make that never to have been done, which hath really been done.* For it enters into the very Definition of *Intention*, or Προαίρεσις, that it may be made with Reaſon and with Thought. Tho' there be many Degrees of *Intention*, with Reference to its different Height and Force; yet as far as concerns the Occaſions and Purpoſes of civil Life, 'tis ſufficient to divide it into plenary and ſemi-plenary. The former is that by which the Will determines on any Thing after a full Examination of the Matter, and without being driven to it by the Violence of the Paſſions. The latter, when due Deliberation has not been taken, or when the Hurry of the Affections has created a Confuſion and Diſorder in the Reaſon. *Fruition* [6] is the Reſt, or the Delight of the Will in the End now obtain'd and preſent to it. To which is oppos'd Repentance, or an Averſion (commonly join'd with Shame or Grief) to ſomewhat which we have before deſign'd or affected. *Conſent* is our ſimple Approbation of Means, as we judge them proper for our Work: And theſe Means, when they are plac'd within our Reach and Power, imply the two remaining Acts mentioned in our firſt Diviſion; for *Election* determines, and *Uſe* applies them to the compaſſing of the End propos'd.

Thoſe Acts are call'd *Imperati*, or enjoin'd, which are perform'd by other human Faculties upon the Motion and Appointment of the Will.

II. *Liberty* is a Faculty of the Will, by which, all Requiſites of acting being given, it may, out of many propos'd Objects, chooſe one or more, and reject the reſt; or if one only Object be propos'd, may admit that, or not admit it; may do, or not

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[1] See what is ſaid about this unprofitable and ill-deſigned multiplying of Faculties in the ſecond Note of the firſt Chapter foregoing.

[2] Mr. LOCKE ſeems to have Reaſon to believe, That Liberty is nothing elſe but a Power properly appertaining to Agents, and not an Attribute or Modification of the Will, which is itſelf nothing but a Power. See his *Philoſophical Eſſay on human Underſtanding, Lib.* ii. *Cap.* xxi. where this whole Matter about the Will, and Liberty in general, is treated on at large. Mr. LE CLERC, in his *Latin* Treatiſe about Spirits, *Sect.* i. *Chap.* iii. is of the ſame Opinion with Mr. LOCKE, as to the Seat of Liberty (as I may ſpeak) but he elſewhere enters upon a more particular Matter of the Hypotheſis of that great Philoſopher, and ſhews, that his Notions are neither exact nor clear. See his *Choiſie Biblioth. Tom.* xii. *Art.* iii. *p.* 83, *&c.* and *Tom.* xvii. *Art.* vi. *p.* 236, 237.

[3] The Author makes Uſe of the School Diſtinction here, of *Actus Eliciti*; i. e. Acts drawn (as we may ſay) from the very Bottom of the Will; which being Terms not uſed in the *Engliſh* Tongue, they are better expreſſed by, *The immediate Acts of the Will.*

[4] Our Author, in all this Quotation, follows, very unfitly, ſome *Latin* Tranſlation, which had rendred the *Greek*, προαίρεσις, *Election*, inſtead of *Deliberation, Conſultation*, or *Counſel.*

[5] This Writer being deceiv'd by the *Latin* Interpreter, tranſlates, ὅσα ὄιεται ἂν γενέσθαι δι' αὐτῦ, *quæ ex ſeſe fieri poſſe exiſtimaverit*; i. e. *which he thinks may be done of themſelves*; which being a Miſtake, the *Engliſh* Tranſlator has truly avoided it, as I have done, by rendring it, *which he believes himſelf able to execute.*

[6] This Term (*Fruition* or *Enjoyment*) is very improper (as any Man may obſerve) becauſe the Notion of it, which he here lays down, is the Effect of Fruition, and not Fruition itſelf. It is true, that the *Latin* Word, *Fruitio*, comes ſomething near it; but it is very hard to find a Word in *French* (or any other modern Language) fit to expreſs the Moraliſts Notion upon which theſe Diviſions are built.

do it. What we call the Requisites of acting, some express by the single Term *Occasion* [1]: Now from these the last Determination of the Agent is conceiv'd as a distinct Thing, which being added to the other Requisites, we immediately proceed to Action; and therefore those Requisites, mention'd in the Definition of *Liberty*, do not include that Share which the Man himself bears in the Action, but are contra-distinguish'd to it. But more particularly, we call [2] the Faculty of choosing one or more out of many Objects, Liberty of *Specification*, or of *Contrariety*, and the Faculty concern'd in the Admission or Rejection of one only Object, Liberty of *Contradiction*, or Liberty *of Exercise*.

Now *Liberty* is suppos'd to superadd to Spontaneousness, first an Indifference of Acts as to their Exercise; so that the Will is not oblig'd necessarily to exert one of its Acts, as to desire or refuse: For tho', in general, it is impossible but it should affect Good, and refuse Evil, *as such*, yet in Reference to any particular Object propos'd, it may determine on which Side it pleases, tho', perhaps, it may seem to have a greater Propension toward the one than toward the other. Another Thing that *Liberty* superadds to the Notion of *Spontaneousness*, is the *Freedom of Determination*; so that the Will may, upon an internal Impulse and Motion, exert either of its Acts of wishing or loathing, just in such a Place, and at such a Time. We must add farther, That tho' the Reason, which makes a Thing desired, or avoided, does not depend upon the Will, but upon the Condition of the Object, according as it bears the Face of Good or Evil; yet that Appetite, and that Aversion, which thus follow the Appearance of the Object, are not of so much Force and Sway, but that there still remains in the Will a Liberty, whether or no it shall determine itself to any external Act about such an Object; especially since such an evil Thing may bear the Countenance of Good, and consequently be desireable, as long as it shall be set in Opposition to a greater Evil. And therefore to refute that Notion of *Hobbes*, *De Homine*, *Cap.* xi. §. 2. that Appetite and Aversion necessarily follow our Pre-Conception of some Pleasure, or of some Uneasiness likely to proceed from the Object; no room being thus left for Free-Will, we must carefully distinguish the Volition of simple Approbation, from effectual Intention or Προαίρεσις [3], of which the latter does not so necessarily depend on particular Objects. In the Words following this Assertion, he applies a very idle Piece of Nicety, while he observes, That *when we say a Man has free Will of doing this or that, we ought always to understand it with this Condition, If he pleases; for 'tis absurd to say, that a Man has free Will of doing this or that, whether he will or no.* For no Body is so stupid as not to apprehend this Contradiction: And 'tis extream foolish to add the very same Thing which the Proposition asserted as a Condition to it. To say, that a Man may freely will the doing of a Thing if he will, is the same Thing as to say, *Peter* runs if he runs: And who would ever give this Clause the Name of a Condition? From what has been said it, likewise, appears, how we are to judge of those Notions laid down by Monsieur *Le Grand* in his Institutions of Philosophy, *Part* iii. *Art.* v. as if it were impossible for a Man not to desire, what he clearly and distinctly perceives to be good; and as if a Man sinn'd only upon this Account, in not having a clear and distinct Perception of Evil [4].

III. But the chief Affection of the Will, and what seems immediately to flow from its Nature, is an *intrinsical Indifference*, upon the Account of which it is not restrain'd to any certain, fix'd, and unalterable Way of acting; and which cannot be entirely extirpated by the Force of any external Means. And this Indifference we are the more firmly to assert and maintain, because, upon the Removal of it, all the Morality [5] of human Actions is inevitably overthrown. So *Arrian* on *Epictetus*, Lib. i. Cap. xvii. *What can overcome an Appetite? Another Appetite. What can conquer a Desire, or an Aversion? Another Desire, or another Aversion. You will say, He that threatens me with Death compels me. I deny it; 'tis not the terrible Proposal which lays the Force upon you, but 'tis your own Choice which inclines you rather to the Commission of such a Deed, than to the Desire of Death. In this Case therefore, as well as in all others, nothing compell'd you but your own Opinion; that is, nothing overcame your* Will *but your* Will. Idem Lib. i. Cap. xxix. *The* Will *is not conquerable by any Thing but by itself.* Add. *Simplic. ad Epictet.* Cap. i. p. 22. Of which wicked Design those Men are, in a great Measure, guilty, who fancy some strange Kind of physical Predetermination in human Deeds, by which the Motion in itself, and as it is a natural Being, is so determin'd by the first Cause, that it cannot be done in any other Manner; tho' it afterwards receive its Morality from the second Cause. Nor are they in a less Fault, who from the Divine Prescience would derive an absolute Necessity on all our Proceedings. For tho' this Attribute of God cannot be deceiv'd, yet that it does not take away the Indifference of the Will, may be easily understood, if we either clear the Word *Prescience* from the Imperfection which it seems to imply, as do all other Terms taken from human Things, and applied to the Divine Nature (since in God there can be no Succession of Time) or if we say, that the Divine Concurrence does in such a Manner accompany second Causes, as still to leave them the Power of acting in the Way originally assign'd them by their Creator, not debasing them with Reference to moral Actions from principal into meerly instrumental Causes. Add. *Lucian*, *Minoe*, *& Jupit. Confut. Anton. le Grand. Inst. Philosoph. Cart.* Part 8. Cap. xvii, xviii. How prejudicial such Notions are to a State or Kingdom, *Grotius* is well

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[1] See *Chap.* v. §. 5. following.

[2] This Distinction does not appear to be very necessary. The Liberty of Contrariety implies no more than a double Act of the Liberty of Contradiction. As for Example, If a Man is to choose, whether he shall read *Greek* or *Hebrew*, he consults with himself, 1. Whether he shall read *Greek* or no, and resolves in the Negative. Then, 2. Whether he shall read *Hebrew* or no, and chooses the first. *This Instance is taken out of Mr.* Le Clerc's *Latin Discourse of Spirits*, Sect. 1. Cap. iii. §. 12.

[3] That is to say, Altho' we can't but be sensible of such Impressions as particular Objects make upon us, yet we are not necessarily carried to search for them, or avoid them; but a Man may, by Reason, deny himself the Pleasure with which the Idea may flatter him, and, on the contrary, expose himself to that Grief and Uneasiness, from which he would be glad to be exempted, without those Considerations, which have induced him to undergo them. See *Note* 5. upon *Chap.* v. §. 13. following.

[4] See the former Chapter, *Pag.* 32. *Note* 4. *Chap.* v. §. 13. following. Let us add, that when we sin for want of knowing the Ill we do, if the Ignorance be surmountable (as must be suppos'd in Matter of moral Good or Evil) it is only so, because we abuse our Liberty, in not giving Attention to such Things as might lead us to the Knowledge of our Duty. See what I have said thereupon, in a few Words, in my Note on the Abridgment of *the Duties of a Man and a Citizen*, Book i. Chap. i. §. 9. upon which I might greatly enlarge. The Reader may consult what has been since said, by the ingenious Author of the *Journal Litterarairc*, Tom. x. Pag. 95, and following.

[5] We may add to these Quotations another Saying of the same *Epictetus*; Ληστὴς προαιρέσεως ἐ γίνεται, τύραννος ἐ γίνεται, *No man is a Thief or a Tyrant of his own Will.* See *Gataker*'s Notes upon *Marc. Antoninus*, *Lib.* xi. §. 36. where the Emperor quotes the Words of the same Philosopher.

aware,

aware, when he obſerves, *Obſerv. de Dogmat. Reip. Nox.* That *thoſe who utterly diſcard the Doctrine of Free-Will, can hardly avoid making* GOD *the Author of all Wickedneſs; an Attempt which* [1] Plato *himſelf declar'd ought not to be born with in a Commonwealth*; De Repub. Lib. ii. Τῶν κακῶν ἄλλ' ἄτλα δεῖ ζητεῖν τὰ αἴτια, ἀλλ' ἐ τὸν θεόν. *We ought to affix any other Cauſe of* Evil, *but never to refer it to* GOD. To the ſame Purpoſe *Suetonius* ſpeaks well when he makes *Tiberius* (*Lib.* lxix.) a Contemner of all Religion, ſay, *Quod omnia fato agi crederet*, for *believing the World to be guided by Fate.* For thus *Proclus* (*ad Timæum*) divides Atheiſts into three Ranks and Orders; two of which he makes *thoſe who deny* GOD *the Care of human Actions and Affairs*; and *thoſe who attribute ſuch a Care to* GOD, *as impoſeth an abſolute Neceſſity on all Events, utterly depriving Men of their Freedom and Choice.* So alſo *Saluſt* the Philoſopher ſpeaks in his Book *De Diis & Mundo: To attribute Injuſtice, or Luſt, and Wantonneſs to the over-ruling Influence of Fate, is to make ourſelves good, and the Divine Natures wicked.* Again, in *Plautus* (*Aulular.* iv. 10.) when one ſays, *I believe this was the Will of the Gods, for otherwiſe I am certain it could never have come to paſs.* Another anſwers him merrily, *And I, for my part, believe, 'tis the Will of the Gods, that I ſhould take you and hang you up for a Raſcal.*

IV. For the right Underſtanding of this Indifference of the Will, ſomewhat ought to be premis'd concerning the Nature of *Good* in general: Now tho' Good by many [2] of the Philoſophers is conſider'd abſolutely, ſo that every Being really exiſtent may be pronounc'd Good; yet we, without regarding this Signification, which we judge to be very uſeleſs, will only conſider *Good*, as it denotes Reſpect to others, and as it is ſaid to be Good *to* one, or *for* one. According to which Senſe the Nature of Good [3] ſeems to conſiſt in that Aptitude, by which one Thing is indiſpos'd to benefit, preſerve, or compleat another; becauſe this Aptitude, depends either upon the Nature of the Things themſelves, or ſuch Properties as they have naturally, or by Virtue of human Induſtry; and therefore this *Good*, to which we may give the Name of natural, is firm and uniform, and has no Dependance on the erroneous and various Opinions of Men. But becauſe *Good* does not excite the voluntary Appetite of Man, unleſs it be known, at leaſt under a confus'd Notion; and becauſe Knowledge ariſing from Senſe, gives but a groſs Repreſentation of the genuine Natures and Conſequence of Things, ſo that the Underſtanding is often clouded with Error, and diſorder'd by the violent Noiſes of Senſe and Paſſion; hence it comes to paſs, that many Men inveſt Things falſly with the Name and Notion of *Good*, and this is what we call *imaginary Good.* And farther, every particular Perſon, as he underſtands a Thing to make for his Profit, his Preſervation, or his Perfection, loves and deſires it; and, on the contrary, what he conceives to be Evil for him, he hates and avoids. But as it is not requiſite to the Nature of Good, and to its Power of moving the Appetite, that it ſhould be conſider'd preciſely as Good only for the Perſon deſiring, and abſtracting from the Advantage of others; eſpecially ſince upon Account of the Society and Conjunction of Men, the Good of others may redound to our Benefit and Uſe; ſo, amongſt Mankind, there is ſo fair an Agreement about the general Nature of Good, and its chief Parts and Species, that barely on the Score of their being divided about ſome Particulars, there's no manner of Reaſon either why we ſhould deny the univerſal, and unſhaken, and uniform Notions of Good, or why, in a State of natural Liberty, we ſhould make it depend on the bare Opinion of every private Man, in a State of Government on the ſole Judgment of the ſupreme Magiſtrate, as the only proper Meaſures and Rules for its Determination. Add. D. *Cumberland, De L. N.* iii. where he refutes *Hobbes*'s Notions of *Good, &c. Chap.* i. §. 20. As for the *moral Good* which appears in human Actions, it ſhall be diſcuſs'd by and by in its proper Place.

From the foregoing Obſervations this manifeſtly appears to be the Nature of the *Will*, that it is always deſirous [4] of Good in general, and always averſe to Evil in general: For it implies an open Contradiction, [5] not to incline towards that which ſeems agreeable, and to incline to that which ſeems diſagreeable to us. And therefore in this general Inclination of the Will there can be no Indifference admitted, as if it could (with the Appetite of ſimple Approbation) ſometimes deſire Good and ſometimes Evil. But they are the particular Goods and [6] Evils, which give room for the Indifference of the Wills

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[1] The whole Sentence of *Plato*, of which our Author cites only the laſt Part, is very emphatical; GOD, *becauſe he is good, can't be the Cauſe of all Things, as ſome aſſert, but is only the Cauſe of ſome few Things among Men; and no Cauſe of many; for good Things are much fewer than evil among us, and none can be the Cauſe of good Things but God; but we muſt ſeek out ſome other Cauſe of Evils than him.* Theſe Words are but a little before the Place where that Philoſopher delivers the Words which *Grotius* refers to, κακῶν δὲ αἴτιον &c. *We muſt, with all Zeal, oppoſe them who aſſert, That* GOD, *who is good, is the Cauſe of any Evil: Nor muſt it be endured in any well governed City, that any Man whatſoever, either young or old, no not ſo much as a Poet, by way of Fiction, ſhould but lightly, much leſs plainly, either ſpeak, or hear any ſuch Things, as are neither pious, convenient, nor conſonant in themſelves to be mention'd, when ſpoken.*

[2] All the Metaphyſicians.

[3] According to the Definition which Mr. *Locke* gives of Good (in his *Philoſophical Eſſay upon the Human Underſtanding*, Lib. ii. Cap. xx. §. 2.) every Thing is ſo called, which is proper to produce and increaſe Pleaſure in us, or to leſſen and ſhorten any Grief; or is able to procure or preſerve us in the Poſſeſſion of any other Good, or a Freedom from any Evil. And, on the contrary, every Thing is accounted Evil, which is proper to produce or increaſe Grief in us, or leſſen any Pleaſure; or is able to cauſe any Evil to us, or deprive us of any Good. This Definition, which reſpects the Effect chiefly, that Things, good or evil, work upon our Spirits, is conſequently more natural, than that of our Author, which only refers to the Diſpoſitions and Qualities of the Objects, as to the Effect which they produce, with relation to the Conſtitution of our Nature in general, not diſtinctly expreſſing the Senſe of Pleaſure or Pain, which, in all Languages, and in the Opinion of all Men, are comprehended under the Notion of Good and Evil. Theſe Diſpoſitions, and theſe Qualities, are in the Objects themſelves, whether known or unknown to us, and conſequently may be found in them, without producing any Motion in the Will towards them. For tho' we ſhould believe a Thing capable of contributing to our Preſervation, Perfection, or general Advantage; yet, till it makes certain Impreſſions, which excite in us ſome Deſire, or ſome agreeable Senſation, we do not regard it as good with reſpect to us. Beſides, we often conſider Objects as good, which are no way proper, either for our Preſervation or Perfection, nay, rather, ſuch as produce a quite contrary Effect: As, on the other Hand, the Things moſt ſuited to our real Happineſs appear evil to us, for the Reaſons our Author gives elſewhere. See *Note* 5. of the following Page.

[4] This is what is implied by that common Maxim, *That all Men naturally and unmoveably deſire their own Happineſs*; for true Happineſs conſiſts not only in the Enjoyment of all good Things, of which they are capable, but in a Freedom from all Evil; the leaſt Pain being ſufficient to mar our greateſt Pleaſure.

[5] The Quotations, which are annexed by the Author a little lower (*viz.* at the End of the Paragraph in the *Engliſh* Tranſlation, and are noted by *a, b, c*) are more properly to be put in here, and eſpecially the laſt of them. I ſhall add, upon this Occaſion, a Paſſage out of the Emperor *Marc. Antoninus*, Πῶς οὐχ ὡμόν ἐστι, &c. *Is it not a cruel Thing to hinder Men from purſuing Things, which they believe to be uſeful and agreeable to them? Lib.* vi. §. 27. See *Gataker*'s Notes upon the Place, where he has gathered ſeveral Sentences out of ancient Writers to the ſame Purpoſe.

[6] Such are all thoſe that concern this Life, and which form any particular Act of our Will. Hence it appears, that the Author was miſtaken in ſearching for the Eſſence of Good in the Nature of Things themſelves, conſidering Good as he does here,

Wills of particular Men, who at different Times, and upon different Occaſions, are very various in their Scents and Purſuits. And there is this evident Reaſon why it ſhould be ſo, becauſe there are ſcarce any Goods or Evils which appear to a Man in their native Colours, and without ſuffering any Mixtures, but commonly they are blended and ſhuffled together; Good is adulterated with Evil, and Evil is ſweetned with [1] Good; to which, if we add the ſtrange Inclination which we find to ſome good Things in particular Perſons, and how all Men have not the Ability to diſtinguiſh ſolid and durable Enjoyments, from thoſe which are [2] only painted and tranſitory; we ſhall ſee how there muſt needs ariſe hence an infinite Variety in the Wills and Inclinations of Men; and how all purſue what they think their own good, but in different Paths, and by different Means. Beſides, many Men do not know what Things are good for them, and therefore do not deſire them; many more prefer the fair Face and Semblance of Evil to real and ſubſtantial Good, and ſo reject what they ought to deſire, and deſire what they ought to reject. To which Purpoſe *Ariſtotle* well obſerves, *Ethic. ad Nicom. Lib.* iii. *Cap.* vi. That *to be deſirable by the Will, ſimply and properly ſpeaking, which is truly Good, but* that *to be deſirable by every particular Man which he imagines ſo.* What *Gunther* writes to *Ligurinus* may be here applied, *Lib.* iii. *Ver.* 289.

———Tantum falſa loquendo
Fallere nemo poteſt: veri ſub imagine falſum
Inſluit, & furtim deceptas occupat aures.

When Falſhood bare and undiſguis'd appears,
It never can deceive: but when it wears
The Garb of Truth, it cheats the heedleſs Ears.

Thus then in almoſt every Thing, and every Action, many Species of Good and Evil, both *real* and *apparent*, croud themſelves into our Thoughts, and when they have for ſome Time variouſly agitated the Mind, and driven it one while to favour one, and one while another, at laſt the Will, by an intrinſical Force, determines itſelf to the embracing of one Object, and diſcarding the reſt. And an Action perform'd in this Manner, is call'd *ſpontaneous* or voluntary, which *Ariſtotle* thus defines, *Ethic. ad Nicom. Lib.* iii. *Cap.* iii. Τὸ ἑκούσιον δόξειεν ἂν εἶναι, ὃ ἡ ἀρχὴ ἐν αὐτῷ, εἰδότι τὰ καθ' ἕκαστα ἐν οἷς ἡ πρᾶξις. *That is to be eſteemed ſpontaneous, the Principle of which is in the Perſon acting, who likewiſe underſtands the Particulars in which the Action conſiſts.* *Euſtratius* comments on this Place to this Purpoſe: *Both theſe Conditions are neceſſary to the conſtituting a ſpontaneous Action, that the Principle be in the Actor, and that the Actor know the Particulars. For he that acts out of Ignorance, has the Principle of acting in himſelf; and he that knows the Particulars, may yet act by the Compulſion of others.* And therefore neither of theſe Conditions by itſelf can make a Thing properly voluntary.

V. But it does not always fall out that the Mind ſhall maintain a kind of *Æquilibrium*, and apply itſelf to acting or not acting, without any conſiderable Advantage on one Side more than on the other. But for different Reaſons, and by different Cauſes, it frequently bends with great Violence one way; and ſometimes external Violence bears ſo hard upon it, as to take away its Strength, and to diſable its Powers. As the Mariner does not always cut the Sea with an even and proſperous Gale, but ſometimes oppos'd by furious Winds, he hardly holds the Helm, and ſometimes being violently ſhaken out of his Seat and his Command, he is oblig'd to commit his Veſſel to the Rage of the Tempeſt.

Among the Things then which are forcible in drawing the Will to one Side, are the peculiar Genius's and Diſpoſitions of Men, by which many Perſons are render'd extreamly inclinable to ſome kind of Actions. Theſe Diſpoſitions ariſe, in a great Meaſure, from the Nature of the Climate and of the Soil, as *Lucan. Lib.* iii. *Ver.* 366. ſpeaks,

———Emollit gentes clementia cœli,

———The Heavens ſweet Clemency
Softens the Tempers of the Men.

And *Herodot. Calliop. It is the ſettled Appointment of Nature, that ſoft Soils ſhould breed ſoft Men; and that the ſame Land ſhould never be famous for the Excellency of the Fruits, and for the Vigour of the Inhabitants.* To which add *Charron de la Sageſſe, (Lib.* i. *Cap.* xlii.) from the Temperature of Humours in Men's Bodies (occaſion'd by the Food, the Age, the Diet, the Health, the Studies and Purſuits of particular Perſons) from the Conformation of thoſe Organs, which the Soul employs in performing its Duties, and from the like Cauſes [a]. Concerning all which it muſt be in general aſſerted, That none of them, as they belong to the Production of a moral Action, are of ſo great Force and Vehemence, as to render it impoſſible for the Will to take [3] the contrary

[a] Add. *Hobbs de Homine, Cap.* xiii. & *Bacon De Augment. Scient. Lib.* iv. *Cap.* i.

here, as what produces in us ſome actual Deſire. For all that he ſays on this Head only proves, that the Nature of Things is in itſelf immutable, and independent either of our Judgment or Deſires; ſo that if the Motions of our Will be duly regulated, they will tend only to ſuch Things as are truly advantageous. But ſince it is confeſſed, Men commonly conceive ſuch falſe Ideas in this reſpect, it follows, that what moſt frequently ſtrikes, and moves them, is not any real Good in the Things themſelves, but the Appearance of it: Although they certainly may, by a requiſite Attention, diſtinguiſh Truth from Falſhood, and, by that Means, be in a Condition of acting agreeably to the Movements of their Will.

[1] Every Object (ſays this Author in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* i. §. 11.) makes different Impreſſions, as it works upon Man in different Places: As for Example, Some work upon him by way of Eſteem, or according to the great Value he has for himſelf. Others affect the Senſes with Pleaſure. Others move him by Self-love, which engages him upon Self-preſervation. He looks upon the firſt as honeſt and convenient; the ſecond, as agreeable; and the laſt, as profitable. Every one of theſe Goods, in particular, draws with him more or leſs Violence, according as the Impreſſions, which it makes upon the Heart, are more or leſs ſtrong. See *Note* 3. of the foregoing Page.

[2] Mr. *Locke*, in his *Phil. Eſſay of Human Underſtanding, Lib.* ii. *Cap.* xxi. §. 58. ſpeaks well to this Purpoſe: *The preſent Judgment of Good or Evil, which we make, is always right. Indeed, Things conſidered as we actually enjoy them, are what they ſeem to be, ſo that, in this Caſe, Good apparent and real are the ſame Thing; for Grief and Pleaſure being eſteemed ſo as we feel them, and no more; the Good or Evil preſent is really no greater than it appears: And, by Conſequence, if every one of our Actions be reſpected in itſelf, without any regard to its Conſequences, we can never miſtake in our Choice of Good, but muſt always infallibly adhere to the better Part.* Compare theſe Words with what goes before and follows, where that great Philoſopher clears this Matter with much Solidity and Exactneſs. Add to this what I have ſaid on the Abridgment *of the Duties of a Man and a Citizen,* Lib. i. Cap. i. §. 11. in the Notes to my laſt Edition.

[3] A little Care and Diligence (adds this Author elſewhere) ſeldom fails of taming, and conſiderably amending theſe natural Diſpoſitions. But if ſometimes it doth not perfectly ſucceed, it, at leaſt, prevents the Commiſſion of ſuch outward Acts, as are puniſhable in the civil Judicatory, and the Difficulty which we find, in conquering theſe kind of Inclinations, is abundantly recompenſed by the Honour conſequent upon ſuch a Victory. *The Duties of a Man and a Citizen, Lib.* i. *Cap.* i. §. 12. I ſhall here make ſome Reflections, to ſet this Point in a ſtronger Light. 1. That the Obſervation, made in all Ages, on the natural Diſpoſitions of particular Nations to certain Vices, is not ſo general, but it is liable to many Exceptions. 2. That the Force of theſe common Diſpoſitions depends, in reality, more upon Education and Cuſtom, than to any natural Cauſe there is in one

trary Side [1]. And tho' [1] as to ſome particular Impulſes [2] ariſing from the Difference of Conſtitutions, the Will ſometimes ſeems unable to hinder their Exiſtence, or their breaking out into Action, yet it may provide ſo far, as to ſee they ſhall not break out into Sin [3]. Thus, if a Man be ſo far vanquiſh'd by the warm Motions of Love, as to raiſe his Paſſion above Reſtraint, a Power is ſtill left him of ſatisfying his Deſires in an innocent and lawful Manner. See 1 *Cor.* vii. 2. And thus *Plato* diſputes well, *De leg. Lib.* xii. "That however the moſt "unnatural of Luſts had prevailed in the *Grecian* "State, they might yet be ſuppreſt by the Laws, if "rightly fram'd and apply'd." By the ſame Rule we muſt judge of what *Horace de Arte Poet.* and others, have deliver'd concerning the different Manners and Inclinations of the ſeveral Ages of Life: Thus, for Example, if old Men are violently inclin'd to Covetouſneſs, yet 'tis in their Power to ſeek Wealth without injuring others, and without uſurping the proper Goods and Poſſeſſions of their Neighbours. Add. *Huart. Scrutin. Ingen. Cap.* v.

VI. *Another Thing* that inclines the Will vehemently to ſome particular Actions, is the frequent Repetition and Cuſtom of thoſe Actions; whence it comes to paſs that they are undertaken very freely and with great Diſpatch, and that when the deſired Object preſents itſelf, the Mind ſeems, by a kind of Magnetiſm, to be drawn towards it [4]. And theſe Inclinations being join'd with an exceeding Deſire and Dexterity of acting, paſs commonly under the Name of *Habits*, which, as they are concern'd about *moral Actions*, either good or evil, are call'd either Virtues or Vices. There's no Reaſon why we ſhould tire ourſelves to reckon up theſe according to their full Tale and Number, ſince moſt Authors, who have hitherto profeſſedly treated of moral Philoſophy, have fancied the main Part of their Buſineſs and of their Science diſcharg'd, by explaining only the eleven Words that ſtand for ſo many Virtues. It will ſuffice to obſerve in general, that thoſe Diſpoſitions of the Mind are Virtues, by which a Man is inclin'd to Actions making for the Preſervation of himſelf, and of human Society; and that thoſe, on the contrary, are Vices, which addict us to Actions deſtructive of ourſelves, and of the Community to which we belong. And here Mr. *Hobbes* muſt fall under Cenſure for that Aſſertion in his Book *De Homine, Cap.* xiii. §. 9. where he declares, *That, except in civil Life, there can be no common Meaſure found out applicable to Virtues and Vices*, and that, conſequently, *in a State of Nature there can be no ſuch Meaſure eſtabliſh'd, by which, as by a Standard, thoſe Things, which we call Virtues and Vices, may be ſettled and determined.* For the Definition which we but now ſet down, will reach even to a natural State: And whatever Things are enjoin'd as Virtues in civil Communities, ought to agree to that Definition; and if any Things ſhould be ordain'd contrary to it, they ought to be reckon'd abſurd and unreaſonable Commands.

The Diverſity which appears in the Laws of ſeveral different Communities [5], does not hinder, but that there may be ſome univerſal and uniform Definition of the Virtues. For this Diverſity either is concern'd about ſuch Things as are plac'd without the Sphere of natural Laws, or it ariſes from hence, That what is really a Precept of the Law of Nature, is in one Place inveſted with the farther Force of a civil Law, and in other Places not; or laſtly, it is an Evidence, that ſome Legiſlators, in framing their Edicts, were not befriended by good Reaſon. Of which we ſhall have more to ſay by and by [6].

Farther, tho' Vices and ill Manners confirm'd by long Uſe and Habit, ſeem to paſs into a kind of ſecond Nature, ſo as not to be without great Difficulty reſiſted, as *Calpurnius Flaccus* ſpeaks, Declam. ii. *When Modeſty hath once loſt its Influence, no Ruin, no Horror appears deform'd to Minds bent upon Wickedneſs*; and *Lucian* againſt an unlearned Man, *A Dog that is accuſtomed to eat Tripes, can hardly be brought off from it*, (Add. *Bacon's Eſſays*, Chap. xxxvii.) yet

Horat. Lib. i. *Epiſt.* i. *Ver.* 39, 40.

Nemo adeo ferus eſt, ut non mitеſcere poſſit,
Si modo culturæ patientem commodet aurem.

The fierceſt Soul to Temper may be brought,
If calm to Rules, and patient to be taught.

It is my Opinion (ſays *Socrates* in *Xenoph.* Apomnem. i.) *that whatever is good and honeſt, Men, by Exerciſe and Application, may attain.*

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one Climate, more than another, being capable to produce, or facilitate theſe particular Inclinations. Now Cuſtom, we know, is contracted by repeated Acts, which, without Diſpute, are in our own Power. 3. The ſame may be applied to the particular Temper or Conſtitution of each Perſon, which has a much more immediate Influence than the Air, or other general Cauſes, whoſe Effects are infinitely varied and modified. 4. That both the one, and the other of theſe, may be corrected, evidently appears, on the one Hand, from the Example of thoſe, who travel early into foreign Countries, or reſide there for any Time; and, on the other, by the Experience of thoſe, who, finding themſelves naturally ſubject to any Vice, have, in good Earneſt, ſet about to correct it. I ſhall ſpeak, in its proper Place, of the Confeſſion which *Socrates* made on this Subject to a Phyſiognomiſt. What is related of another *Greek* Philoſopher, *Stilpo* of *Megara*, is well known. See *Cicero de Fato*, Cap. iv. and v. To conclude, 5. If the natural Diſpoſition, either general or particular, inclines Men to certain Vices, it, alſo, diſpoſes them to certain Virtues. And yet we ſee a great many People, who, tho' born and educated among Nations the moſt famous for good Nature, Humanity, and Politeneſs, entirely void of theſe Diſpoſitions; becauſe they have early imbib'd falſe Principles, which accuſtom them to behold inſenſibly, and without Horror, and to exerciſe, in cold Blood, the moſt notorious Cruelties.

[1] *Socrates*'s Words ſignify no more than this, as *Charpentier* has very well tranſlated them; *It is my Opinion, that all Virtue depends upon Exerciſe and Uſe; that is to ſay, to preſerve them, we muſt daily practiſe them*; and the Series of the Diſcourſe will not ſuffer us to doubt, that this is *Socrates*'s Meaning. So that theſe Words are nothing to the Purpoſe of our Author, who, being deceived by the *Latin* Tranſlation, thought they ſignified, *It is my Opinion, that all Virtues may be acquired by Exerciſe.*

[2] See *Chap.* xiii. of *Tom.* i. of Mr. *Bayle*'s Anſwer to the Queſtions of a Provincial, where you'll find ſome curious Paſſages about the Power of the Conſtitution. But, if we reflect ſeriouſly upon this Matter, we muſt acknowledge, that thoſe, over whom Nature has ſuch an abſolute Command, are commonly ſuch Men as will take little or no Pains to conquer their Inclinations, or have taken no proper Methods to do it. Theſe depraved Inclinations are a kind of natural Diſtemper, yet not altogether incurable; as *Cicero* very well obſerves, who alledges a notable Example to this Purpoſe, *viz.* that of *Socrates*, who freely confeſſed, that he was naturally inclined to thoſe Vices which a Phyſiognomiſt charged him as guilty of, but that he conquered them by the Aſſiſtance of Reaſon: *Cicero*'s Words are, *Qui autem naturâ dicuntur iracundi, &c. Such Perſons, as are ſaid to be by Nature paſſionate, revengeful, envious, or the like, are ſo made by ſome evil Diſpoſitions of the Mind, but are curable*; as Socrates *is ſaid, when* Zopyrus, *who profeſſed himſelf to know every Man's Nature by the Figure of his Face, had, in a great Aſſembly, loaded him with many Vices, for which he was laughed at by all the reſt*; *but* Socrates *cleared him of any Miſtake, by ſaying, that he had once ſuch Inclinations, but he had maſtered them perfectly by his Reaſon.* Tuſ. Quæſt. *Lib.* iv. *Cap.* xxvii. See alſo the ſame Author concerning *Fate*, Chap. v. See what the Philoſopher, *Simplicius*, ſays in his Way (in *Epictet. Enchir.* Cap. i.) to prove, that neither the Impreſſions of external Objects, nor Conſtitution, nor Cuſtom, &c. deſtroy Liberty.

[3] This does not always happen. See the Remark on this Place, in the Abridgment *of the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 12.

[4] We may add, *Or if it be abſent, it hopes for it with very great Expectation*; as our Author ſpeaks in the Abridgment *of the Duties of a Man and a Citizen*, &c. *Lib.* i. *Cap.* i. §. 5, 13.

[5] See what I have ſaid in my Preface, §. 3.

[6] See Book viii. Chap. i.

Actions

Actions proceeding from them ought nevertheleſs to be reputed *voluntary*. And altho' Actions which precede any Habit, and by which it is introduc'd, are undertaken with a fuller Intention, and with a more urgent Endeavour, than thoſe which are perform'd after the Habit has been contracted, when, as it were, without ſtaying for the Command of the Will, the other Faculties ruſh ſwiftly upon the Object: Yet neither the Goodneſs, nor Pravity of the Actions, ſeem, upon this Account, to be at all diminiſhed. For 'twould be a Thing of very ill Conſequence, if a good Action were therefore to be reckon'd leſs good, becauſe it has been often repeated, or if a Man were to be eſteem'd leſs a Sinner, becauſe he had frequently ſinn'd. Eſpecially, ſince every Man is the Cauſe of his own obtaining a Habit, or of his acting ſo ſuddenly and expeditiouſly. *Ariſtotle* has an Obſervation very cloſe to this Purpoſe in his Ethicks to *Nicom. Lib.* iii. *Cap.* viii. Οὐχ ὁμόιως δὲ αἱ πράξεις ἑκούσιοί εἰσι, καὶ αἱ ἕξεις. Τῶν μὲν γὰρ πράξεων ἀπ' ἀρχῆς μέχρι τέλους κύριοί ἐσμεν, εἰδότες τὰ καθ' ἕκασα· τῶν ἕξεων δὲ τῆς ἀρχῆς, τῶν καθ' ἕκασα δὲ ἡ πρόθεσις ἀ γιώριμος, ὥσπερ τῶν ἀῤῥωσιῶν. ἀλλ' ὅτι ἐφ' ἡμῖν ἦν, ἅτως ἢ μὴ ἅτω χρήσασθαι, διὰ τῦτο ἑκούσιοι. *Actions and Habits are not ſpontaneous in the ſame Manner; for as to our Actions, we are Maſters of them from the Beginning to the End, becauſe we underſtand all the Circumſtances that belong to them: But of Habits the Beginning only is properly in our Power, continual Additions being beyond our Knowledge, or Prevention, juſt as it happens in the Increaſe of Diſtempers. But becauſe we had originally the Power of doing ſo, or otherwiſe, therefore the Habits, likewiſe, are to be conſtrued as ſpontaneous, upon Account of the Principle whence they ſpring.* On which Place *Euſtratius* thus deſcants; *We have a Command only over the Beginnings of Habits, not over their Increaſe or their End. For the Progreſs and Improvement of them is unperceiv'd and unregarded, while they riſe and advance by ſilent Degrees; whence it happens, that ſome Men run deeper now and then into Wickedneſs and Vice than they intended* [1]. *This may be ſeen particularly in Drunkenneſs and Uncleanneſs, in which Men ſometimes going on freely and heedleſly, as if it were left to our Pleaſure whether we ſhould get a Habit, or no, by a Continuance of bad Practice, contract a Habit before they are aware. Nor is it in Vices only that the Additions and Augmentations are undiſcover'd, but in Virtues likewiſe the Advances are made by ſuch ſecret Steps, that a Man may ſooner obſerve his own Proficiency, than he can know how he came by it* [2].

VII. Thoſe Motions of the Mind, which they call Paſſions, or Affections, chiefly excited by the Appearances of Good and Evil, have likewiſe a great Force in driving the Will violently to ſome certain Actions, beſides their ill Influence on the Judgment, which they frequently cloud and obſcure [a]. How many theſe are, by what Means they are either rais'd or allay'd, and what Uſe and Service they have in Life, is moſt excellently ſhewn by *Des Cartes* [b], and his Follower *Le Grand* [c]; to whom may be added Mr. *Hobbes* [d]. It is enough for our Deſign, if we only remark, that however violent the Affections may prove, they can never quite extinguiſh the Force of our Will. But *that Men of the weakeſt Souls may obtain* [3] *an abſolute Command over their* [4] *Paſſions, if they uſe a ſufficient Diligence in managing and directing them*, as *Des Cartes* has prov'd [5]. *Ovid*'s *Medea* put a Cheat upon herſelf, when ſhe ſaid,

Sed trahit invitam [6] *nova vis.*

Eſpecially ſince ſhe acknowledged, that the Judgment of Reaſon oppos'd her Paſſion.

a *Pindar* in his Olymp. Od. vii. ℣. 55. ſays, αἱ δὲ φρενῶν, *A troubled Mind betrays into Miſtake the wiſeſt Heads.*
b *Cartes de Paſſion.* §. 50.
c *Le Grand. Inſt. Phil. Carteſ.* Part vii. Cap. ix.
d *Leviath.* Cap. vi. & *de Homine.* Cap. xii.

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1 The natural Conſequence of this is, that we muſt ever omit, and avoid, whatever has the leaſt Tendency in the World to engage us in an ill Cuſtom. See what I have ſaid in my Treatiſe of *Games, Lib.* ii. *Cap.* iii. §. 2.

2 See the Author's Abridgment *of the Duties of a Man and a Citizen, Lib.* i. *Cap.* i. §. 13. and what he ſays in the following Chapter, §. 13.

3 This wholly depends upon our Endeavours timely to conquer theſe dangerous Enemies. 'Tis a known Speech of *Ovid*'s, *Remed. Amor.* ℣. 91, 92.

Principiis obſta: Sero Medicina paratur,
Cum mala per longas invaluere moras.

Oppoſe Beginnings: Medicine comes too late,
When long Delays have haſten'd on our Fate.

Indeed, as Mr. *Montaigne* ſays (*Eſſays, Lib.* iii. *Cap.* xiii.) if a Man looks cloſely into the Motions and Circumſtances of his Paſſions, which prevail uſually upon him, he may obſerve how they come, and abate a little of their Furiouſneſs and Courſe. They don't fall upon him all of a ſudden, and, as I may ſay, take him by the Throat, but they threaten, as it were, and creep on him by Degrees. *Seneca* has ſome fine Reflections of this Nature, which I can't paſs over without Notice, (*Epiſt.* cxvi. at the End, and *De Irâ, Lib.* ii. *Cap.* xii, xiii. which deſerve alſo our Peruſal) *Scis quare non poſſumus iſta? Quia nos poſſe non credimus, &c. Do you know why we can't command our Paſſions? 'Tis becauſe we can't believe we can. There's more in't. We love our Vices heartily, and therefore we become the Defenders of them, and inſtead of baniſhing them, we do all we can to excuſe them. Nature has made us able enough to reſiſt them, and to free ourſelves from their Dominion, if we would make uſe of our Forces, if we would rally them, and employ them wholly in our own Cauſe, or, at leaſt, would not turn them againſt ourſelves. Our only Hindrance is, we will not, and the Inability that we plead is a vain Pretence. There is nothing ſo hard, but the Mind of Man may compaſs and accuſtom itſelf to it, by frequent and daily Meditations. There is no Paſſion ſo fierce and commanding, but Education and Care can tame. The Soul can govern itſelf as it pleaſes. Some have found out a Way to reſtrain Laughter altogether, others have forborn Wine, Venery, and all ſorts of Drinks; others have accuſtomed themſelves to long and almoſt perpetual Watching, unleſs with Slumbers for a ſmall Moment; others have learned to dance upon a Rope, to carry vaſt Burdens, which have ſeemed to be above all human Abilities, and to dive very deep into the Sea, and ſtay a long time without breathing.* See what ſhall be ſaid on *Chap.* v. § 13. Note 6. & Heſiod de Oper. & Dieb. Ver. 290, &c. Edit. Cleric.

4 That is to ſay (as our Author ſpeaks in his Apology, §. 22.) at leaſt, that they do not produce any Action that is puniſhable in human Judicatures. Indeed, if we examine all the Laws of all Nations, we ſhall find none that wholly excuſe Offences committed in a violent Paſſion; an Evidence, that all Legiſlators ſuppoſe, that it is in the Power of a Man to reſtrain his Paſſions. *Ariſtotle* has obſerved the ſame Thing in theſe Words, Τοιύτοις δ' ἔοικε, &c. *To theſe Things agree not only what's done privately by every one, but what's done by Law-givers themſelves, who puniſh and correct all ſorts of Offences, except ſuch as are done through Force or Ignorance, of which they are not the Cauſe.* Ethic. ad Nicom. *Lib.* iii. *Cap.* vii.

5 Dict. loc. Art. v. & *Cicero* Tuſc. Queſt. *Lib.* iv. *Cap.* xiv. ſpeaks thus, *All Diſeaſes and Diſturbances of Mind ariſe from the Scorn and the Neglect of Reaſon.*

6 There is a Place in *Xenophon*'s *Cyropædia, i. e.* the Book of *Cyrus*'s Education, which contains ſome notable Reflections to this Purpoſe: "A *Mede*, named *Araſpes*, maintains there, That Beauty has no Force naturally to incline a Man to depart from his "Duty, whether he will or no; for if it were ſo (adds he) it would have the ſame Effect upon all Men, as Fire burns every one "that comes near it. But we ſee that ſome are affected with Beauty, and ſome not; one loves one Beauty, and another, another. In a word, 'tis a voluntary Thing, and every one loves whom he pleaſes. A Father does not fall in Love with his "Daughter, nor a Brother with his Siſter: Fear and Law reſtrain us from entertaining a Deſire for ſuch Perſons, tho' others love "them. Whereas were there a Law ſtrictly forbidding Men not to be hungry, becauſe they have nothing to eat; or not to be "thirſty, becauſe they have nothing to drink; nor to feel Cold in Winter, and Heat in Summer; no Man would obey ſuch a "Law, becauſe 'tis beyond his Power to do it. But *Cyrus* objects to this Aſſertion, If it be in our Power to love or not, why

——*aliudque cupido,*
Mens aliud ſuadet, video meliora proboque ;
Deteriora ſequor.——Metam. vii. 19, &c.

The Obſervation of *Grotius* on *Matthew* v. *Ver.* 22. is very applicable to our preſent Purpoſe : He conſiders three diſtinct Things in Anger, the Πάθος, or *Affection*, the Ὁρμὴ, or *Impetus*, and the συγκατάθεσις, or *Conſent*. The Πάθος, or Faculty, enabling us to be angry, being implanted in us by Nature, cannot be extirpated ; but it ſhould be rank'd among thoſe indifferent Things, which we may make either a good, or a bad Uſe of [1]. But becauſe that Part of the Mind where the Πάθη, or Paſſions, are ſeated, is in itſelf irrational, hence it comes to paſs, that, without expecting the Judgment of Reaſon, the Ὁρμαὶ, or ſudden Sallies, exert their Force ; and unleſs theſe are diligently kept under, the συγκατάθεσις, or Conſent, certainly follows, when the Power of the Soul; which was conſtituted for the governing and reſtraining of the Affections, idly lets go the Reins, and permits itſelf to be dragg'd by thoſe it ought to guide. Thus συγκατάθεσις then, or Conſent, he declares to be voluntary, and to be perform'd at the free Pleaſure of Man : But he tells us farther, that from diligent Attention and Exerciſe, but more eſpecially from the *holy Spirit of God*, ſufficient Aſſiſtance may be obtain'd, even againſt theſe firſt Motions (which the Philoſophers compare to the twinkling of the Eyes) ſo as to hinder them from any long Continuance, or any forcible [a] Sway.

Beſides, that Man is arm'd by Nature with ſome peculiar Inſtruments for moderating the Paſſions, and that he is engag'd by a ſtricter Neceſſity to reſtrain them, in as much as he incurs a far greater harm to his Health, and Life, from their Violence and Rebellion, has been fully made out by Dr. *Cumberland* [b]. To conclude this Point, ſince ſome of the Paſſions are excited by the Appearance of Good, others by the Appearance of Evil, and accordingly ſpur us on toward the procuring the one, and avoiding the other : This Difference is obſervable between them ; that the former Kind afford little or no Excuſe, if any Thing be done otherwiſe than it ought to be, by their Inſtigation ; but the latter deſerve the greater Degree of Favour and Pardon, according as the threatning Evil which excited them was more ungrateful to human Nature. For 'tis much eaſier to want a Good, not neceſſary to the Preſervation of Nature, than to admit an Evil tending to the Deſtruction of our Nature : Whatever *Ariſtotle* [c] has affirm'd to the contrary in that Maxim of his, Χαλεπώτερον ἡδονῇ μάχεσθαι, ἢ Θυμῷ, [2] *It's harder to reſiſt Pleaſure than Anger.* When a Man has done an ill Action out of Obedience to an itching Luſt, he is ſuppos'd, for the ſake of the preſent Pleaſure, voluntarily to run the Hazard of bearing whatſoever Evil may thence enſue ; and therefore when he has already had the Enjoyment, which he thought equivalent to the Evil that might ariſe from it, he cannot, upon any Pretence, plead for the Mitigation of that Evil. But he that has done amiſs upon the Fear of an impending Evil, has all the Infirmity of human Nature apologizing and interceding in his Behalf, ſince the only Cauſe of his Miſcarriage was his being willing to admit what he imagin'd to be the leaſt of the Evils likely to befal him. But of thoſe Caſes we ſhall hereafter have a larger Field to conſider and determine, *viz.* in *Lib.* viii. *Cap.* iii. §. 19, 21.

VIII. *Laſtly*, The Vice [3] of *Drunkenneſs* is a great Inciter of the Will to ſome particular Kinds of Actions ; and this is procur'd either by Drink, or by ſome other Sorts of Fumes, or by Opium, a Thing of ſo univerſal Uſe in the Eaſtern World, the Effect of which is, that it diſturbs and drives along the Spirits of the Blood with a moſt violent Motion, and by theſe Means renders Men extreamly prone to Luſt in the firſt Place, *Propert. Lib.* iv. *El.* 9. *Ver.* 6.

——*Potæ non ſatis unus erit.*

——Her Sparks ſhe doubles in her Drink.

[a] *Senec.* de Ira. II. iv. [b] De L. N. *Cap.* ii. §. 26, 27. [c] *Ethic. Nicom. Lib.* ii. *Cap.* ii.

" can we not ceaſe to love as we pleaſe ? How comes it to paſs that Love tyrannizes over ſo many Men, who ſacrifice all to that " Paſſion, and put themſelves upon a thouſand mean Actions to pleaſe the Object loved ? What is it that makes their Chains ſo " ſtrong, and makes them avoid all Means that may free them from their Slavery ? *Araſpes* anſwers, It is becauſe they are Men of " vicious and looſe Tempers, lazy Souls, and Slaves to their Appetites, who tho' they wiſh a thouſand Times that Death might " deliver them from their Torments, yet they have not Courage to undertake it themſelves, tho' nothing were more eaſy, if they " deſired it. Men of this Sort would not ſcruple to ſteal to ſatisfy themſelves, and as they are in the Judgment of all the World " puniſhable, becauſe nothing could force them to rob another, ſo we may ſay, that the faireſt Countenance does not force a Man " to love it, or ſeek that which he ought to abſtain from. So that a Man who gives himſelf up to his Deſires, without Reſerve, " abſurdly accuſes Love of conſtraining them, whereas indeed 'tis nothing but his own Weakneſs. Such as ſtand upon their own " Honour and Integrity are ſubject to theſe Affections, as well as others, they love Money, fine Horſes, and handſome Women, " but they eaſily want them when they can't be attained without a Crime." This is the Subſtance of *Xenophon*'s Words, Καὶ ὁ νεάνισκος Ἀράσπης, &c. *Xen. de Inſtit. Cyr. Lib.* v. *Cap.* i. §. 5, 6, 7. *Edit. Oxon.* See alſo *Cap.* ii. §. vi. *Pag.* 19. *Note* 2.

[1] See *Seneca of Anger*, Lib. ii. Cap. iii, iv.

[2] Our Author might have obſerved, that *Ariſtotle* contradicts himſelf, for elſewhere he thus ſpeaks, χαλεπώτερον γὰρ &c. *It is harder to bear what cauſes Grief, than to abſtain from what produces Pleaſure*, Lib. iii. Cap. xii. See alſo the Beginning of *Cap.* xv. and *Lib.* vii. *Cap.* vii. where he maintains, that *Intemperance* is more voluntary and ſhameful than the Tranſports of *Anger*. *Muretus* endeavours to prove the Truth of the firſt of theſe contradictory Propoſitions in his poſthumous Comments, printed at *Ingolſtadt*, 1602, but his Reaſons are very weak ; and I don't obſerve that he ſpeaks any Thing about thoſe Places that I have juſt before cited, to reconcile them with that he was treating of. He had a good Opportunity, and I doubt not but he might have prevented ſo palpable a Contradiction. All that can be ſaid for *Ariſtotle* is, that after he had advanced ſuch a Paradox, he thought it neceſſary to maintain his Propoſition, and forgetting himſelf, reaſon'd at length from the Light of common Senſe and Experience ; for the Philoſophers hold this as a conſtant Maxim, *That he that yields to Pleaſure is more to blame, than he that is overcome by the fear of Grief, becauſe 'tis eaſier to conquer the firſt than the laſt.* *Ariſtotle* does but repeat what his Maſter *Plato* aſſerted before him. ΑΘ. Νῦν ἐν πότερα, &c. (*De Legib.* Lib. i. Pag. 775.) Ath. *Shall we ſay that he is worſt, who is conquered by Grief, or by Pleaſure?* Cl. *He ſeems to me worſe, who is conquered by Pleaſure, for we all agree, that he who is conquered by Pleaſure is ſhamefully baffled by himſelf, but the former is vanquiſh'd by Grief.* To this we may add the Authority of the Imperial Philoſopher *Marcus Antoninus*, *Lib.* ii. *Cap.* x. where he thus ſpeaks : Theophraſtus, *in his Compariſon of Crimes, following the common Opinion, determines like a great Philoſopher*, That thoſe which come from Luſt, are greater than thoſe that proceed from Anger ; for thoſe that are moved by Anger ſeem to act againſt Reaſon, contrary to their Purpoſe, and with a ſecret Remorſe ; but they that follow their Luſts, and are conquered by their Pleaſure, appear more intemperate, and effeminate in their Faults. So that it is with great Reaſon and Truth, which is an Honour to Philoſophy, that he adds, *The Crime that is done with Pleaſure, is greater and more puniſhable, than that which is committed with Sorrow and Grief.* Indeed he that is angry reſembles a Man, who having received an Offence, is provoked by Grief to revenge himſelf, whereas the Voluptuary is moved by his own Paſſion, to do an Injuſtice for his own Satisfaction. See further what is ſaid on *Chap* vi. §. 14. *Note* 4.

[3] This Author elſewhere (in his Abridgment *of the Duties of a Man and a Citizen*) joins thoſe ſort of Diſeaſes, which deprive us of the Uſe of our Reaſon, either for a Time, or for the reſt of our Life. But, to ſpeak truly, the Effect of thoſe Diſeaſes, as well as Drunkenneſs, is not ſo much to incline the Will to certain Things, as entirely to deſtroy the Principle of human Actions, becauſe in that Caſe a Man knows not what he does. *Titus Obſ.* xxxvii. *upon* Pufendorf *of the Duty of a Man and Citizen*, Chap. i. §. 15.

And

And not much leſs to Anger and Raſhneſs: Upon which Account *Lycurgus* us'd to call Wine an evil Potion (or a magick Draught) becauſe it chang'd and turn'd Men's Minds. *Hygin.* Fab. cxxxii. *Iſocrat.* ad *Demonic.* *The Mind, when debauch'd with Liquor, is in the ſame Condition as a Chariot that has loſt its Driver: The latter is not more fatally hurried into Danger, than the former into Sin.* And for the ſame Reaſon the *Cretians* receiv'd this, among other Laws, of their famous *Minos*, Μὴ συμπίνειν ἀλλήλοις εἰς μέθην [a], *Not to drink with one another ſo far as to cauſe Diſorder by Exceſs.* Among the *Indians* Drunkenneſs lies under the heavieſt Cenſure, being rank'd in the Number of their five moſt heinous Sins, which are ſaid to be theſe: 1. To *lie with one's Mother*, which takes in both a Mother-in-Law, and the Wife of a Maſter or Teacher. 2. *To kill a* Brachman. 3. *To ſteal Gold.* 4. *To be drunk.* 5. *To converſe and keep Company with Perſons guilty of any of theſe Crimes* [b]. *Mahomet* too, under the Notion of Religion, found Means to prohibit his People the Uſe of Wine, tho' they were naturally more addicted to it than moſt other Nations [1].

Whoſoever is voluntarily guilty of this Vice, ſince he knew, or, at leaſt, might preſume what Effects would follow it, can with no more Reaſon deſire to be freed from the Imputation of Faults committed under its Guidance, than he can with a good Grace complain of a Shower of Rain falling into his Houſe, when he himſelf, out of a petulant Humour, has been pulling off the Roof. *Plautus* [c] has a merry Jeſt to this purpoſe; *Wine* (ſays he) *would be too cheap at the Price it now bears, if a drunken Man might do whatever he pleas'd, without being call'd to an Account:*

Yet in indifferent Actions, which are left to every Man's Pleaſure to perform or omit, Drunkenneſs is allow'd this Favour, that the Effect which would have followed any ſuch Action, had it been [2] deliberately perform'd, ſhall now be utterly invalid, ſince the overtaken Perſon acted with much Diſadvantage.

And thoſe Cauſes which we have hitherto reckon'd up, are the moſt conſiderable among ſuch as impoſe a kind of phyſical Biaſs and Tendency on the Will. That which morally inclines it moſt, or at leaſt, *ought to incline it*, is *Obligation:* And yet this, how great ſoever, neither takes away the Will's intrinſick Liberty, nor renders the Action voluntary [3], tho' the Luſts and Paſſions may ſtrive vehemently to oppoſe it. Hither may be referr'd that Sentence of *Ariſtotle*, ἄτοπον τὰ ἀκούσια φάναι, ὧν δεῖ ὀρέγεσθαι, *'Tis abſurd to call thoſe Things* involuntary, *which we ought to deſire and to purſue*, Ethic. Nicom. *Lib.* iii. *Cap.* iii.

We ſay, Obligations ought *to incline the Will*; for ſuch is the perverſe Diſpoſition of human Minds, that frequently the very forbidding of a Thing, raiſes a Deſire of doing, or of enjoying it [4], as *Ovid* Amor. iii. 4. ſpeaks,

Nitimur in vetitum ſemper, cupimuſque negata.
Quicquid ſervatur, cupimus magis; ipſaque furem
Cura vocat.———
———Juvat inconceſſa voluptas.
Cui peccare licet, peccat minus: Ipſa potęſtas
Semina nequitiæ languidiora facit.

We court the more what Men the leſs will grant;
Warm when deny'd, and fiercer by Reſtraint.
What's cloſely kept, improves in our Belief;
To hoard the Gold is to invite the Thief.
Forbidden Pleaſures have a quicker Taſte.
They that have Freedom uſe it leaſt; and ſo
The *Power* of Ill doth the Deſign o'erthrow.
Sir *Charles Sidney.*

Which Unhappineſs, if we conſider its cloſer and nearer Cauſes, may be referr'd, partly to the vicious Curioſity of Mortals, who admire every Thing that they are Strangers to (which Opinion is ſtrongly confirm'd by the Harſhneſs of the Edict, and by the Care and Trouble of Obedience) and partly to the Hatred and Obſtinacy which we bear towards the Forbidder, whence we diſdain that our Liberty ſhould be abridg'd by a Perſon who looks ſo ill in our Eſteem; whereas, on the contrary, it's the Nature of Love to make us willing to comply with the Commands and Deſires of the Party we affect.

IX. It is farther obſervable, That ſometimes upon the Approach of extraordinary Dangers, and ſuch as are ſuppos'd to exceed the common Strength and Firmneſs of human Minds, the Will is ſo vehemently urg'd and preſs'd, that it gives Conſent to ſomewhat, which had it been free from that Neceſſity, it would have utterly abhorr'd. Actions of this Kind have the Name of *mixt*, being partly voluntary, and partly involuntary. Thus far they are to be eſteem'd voluntary, in as much as their Principle is in the Agent, who is acquainted with the Nature and Circumſtances of the Thing he is going about: And in as much as the Will, for the preſent Time and Neceſſity, inclines toward them as toward a leſſer Evil, or toward one Part of an Evil, when otherwiſe a greater or an entire Evil muſt be undergone: And this leſſer or partial Evil turns into a kind of Good, when both it and the Evil compar'd with it, cannot be both avoided together. *Ariſtotle Ethic. ad Nicom. Lib.* v. *Cap.* vii. ſays, *A leſſer Evil, if it be compar'd with a greater, may be eſteem'd a kind of Good.* So *Quinctil.* Inſtit. vii. Cap. iv. *In com-*

[a] *Plato, Minoc.* Add. *Plin. Lib.* xiv. *Cap.* xxii. *Ariſtoph.* Veſp. *Drunkenneſs is all Miſchief and all Terror: It tears down Gates and Doors, and defies Oppoſition. And then you pay for it doubly the next Morning, in your Pocket and in your Head.*

[b] *Manil.* Aſtron. *Lib.* v. 226. *Ardeſcit vitio vitium, vinoſque miniſtrat*
Bacchus, & in flamma ſævas exſuſcitat iras.
One Vice adds Fewel to another's Fire,
And *Bacchus* makes their Fury blaze the higher.
Mr. Creech.

[c] *Aulular.* iv. x. 20.

[1] See what is related in the *Univerſal Library*, concerning the Inhabitants of *Siam*, *Tom.* x. *p.* 529.

[2] If we will make a more curious and exact Diſtinction of the Effects of Drunkenneſs, we muſt obſerve how a Thing may be imputed to a Man which is done in his Wine, according to the two principal Degrees of Drunkenneſs, *viz.* The one moderate, which does not hinder a Man's acting freely, and with Deliberation; the other which ſtrips him entirely of the Uſe of his Reaſon. This laſt Sort, if it be otherwiſe involuntary in its Original, that is to ſay, if a Man falls not into it by his own Fault, produces Actions altogether involuntary, and conſequently furniſhes him with a ſufficient Excuſe; but if this Drunkenneſs be voluntary in its Principle, then we muſt diſtinguiſh Actions indifferent from Actions unlawful. As to the firſt, If a Man, for Example, make a Contract, that hinders the Effects of an Imputation, becauſe thoſe ſort of Actions require a particular Knowledge of what is done, and the Fault which went before them, and from which they derive their Original, is not ſufficient to make it valid. Becauſe a Man is no more oblig'd to be upon his Guard in this Caſe, than he was to contract. See *Lib.* iii. *Cap.* vi. §. 5. But it is not the ſame in unlawful Actions; for if a Man be in an Eſtate, from whence 'tis his Fault if he fall, becauſe he might and ought to hinder it, his greateſt Degree of Drunkenneſs will not excuſe him from the Crimes which he has committed thro' Exceſs of Wine. And if he puts himſelf into that Condition on purpoſe to execute ſome ill Deſign, he deſerves a double Puniſhment. *Titius Obſerv.* xxxviii.

[3] It is then, on the contrary, that they become moſt voluntary, becauſe the Will has a Power of ſubduing the oppoſite Inclination.

[4] See *Montagne's Eſſay, Lib.* ii. *Cap.* xv. *p.* 451, &c. Edit. Fol. at *Paris*, 1657.

paring Evils, that which appears lighteſt, muſt paſs for Good. Ariſtot. Ethic. iii. 1. *Simply and abſolutely ſpeaking, no Man in his Wits willingly throws away his own Goods, but for the Security or Preſervation of himſelf and others. Such Actions then are to be accounted* mixt, *tho' they approach nearer to voluntary than to involuntary.*

But the ſame Actions are, likewiſe, in ſome Degree involuntary, becauſe the Will ſeems to de driven on them contrary to its Inclinations, and would never undertake them, if the impending Evil were by any other Means poſſibly to be eſcap'd. For which Reaſon they have this Quality in common with involuntary Actions, that the moral Effects and Conſequences attending Actions meerly voluntary, do in theſe, in a great Meaſure, if not totally, fail [1]. For tho' ſometimes a Man may have ſo ſtrait an Obligation laid upon him, that even upon the Threats and Apprehenſions of Death, the moſt terrible of natural Evils, [2] he ought not to recede from it; yet where this does not expreſly appear, it is not eaſily preſum'd and ſuppos'd, as being too ſharp and rigorous for the Condition of Humanity: And where there is no ſuch ſevere Obligation impos'd, it would be downright Folly not to come off as cheaply as we can, and not to ſuffer as ſmall a Share of Evil as we may compound for. And therefore many Things, which [3] would have deſerv'd Reprehenſion, had they been undertaken without ſuch a Neceſſity, when they are done under the Urgency of ſo hard a Caſe, are commended by all fair and equitable Judges; [4] other Things deſerve Pity rather than Revenge; others again are for the ſame Reaſon, either entirely, or for the moſt part [5] excus'd, and in others, the Odium and Fault of the Action is devolv'd upon the Perſon [6], who reduced him to that unhappy Extremity [7], the Man who perform'd the Deed being declar'd innocent. *Ariſtotle* diſcourſes well on this Point [8], *Ethic. ad Nicom.* Lib. iii. Cap. i. *For theſe kind of Actions,* ſays he, *Men are ſometimes commended, when for the ſake of great and honeſt Things, they have ſuſtain'd ſome Indecency, or Hardſhip. To ſome Things, tho' we allow no Praiſe, yet we grant a Pardon, when a Man has done what he ought not, upon the fear of Evils exceeding human Nature, and not tolerable by mortal Strength. And there are ſome Things perhaps, which no Man can be forc'd or compell'd to commit, but ought rather to endure the utmoſt Extremities, and Death itſelf.* Add. *Euſtrat.* ad loc. But I queſtion, whether it were proper (eſpecially for a Chriſtian Biſhop) to give this Example of a *mixt* Action, *Familiarity with another Man's Wife, though in itſelf foul and ſinful, yet ceaſeth to be ſo, if undertaken on the Account of killing a Tyrant.*

X. Laſtly, ſince to make an Action *voluntary*, there is requir'd not only that the Principle of Motion be in the Agent, or that the Agent addreſs himſelf to work by the Impulſe of his own Will, but, likewiſe, that he knows what he is doing; upon the want of both, or of either of theſe Conditions, the Action is rendered involuntary, as *Ariſtotle* ſpeaks, *Ethic. ad Nicom.* iii. 1, 2. *Thoſe Things ſeem to be involuntary, which are done either upon Force, or upon Ignorance. An Action cannot be ſaid to have been perform'd involuntarily out of Ignorance, unleſs it be followed with Sorrow and Repentance* [9]. Now a Man is properly ſaid to *be compell'd*, when, by the Force of a ſtronger extrinſecal Power, he is brought to apply his Limbs otherwiſe than he would, ſo as to expreſs his Averſation and Diſſent by manifeſt Signs, and eſpecially by corporal Reſiſtance and Reluctancy. *As if* (to uſe *Ariſtotle*'s Examples) *the Wind, or Men ſuperior to us in Power, ſhould violently carry us any where againſt our Conſent. Tully*, in his ſecond Book of *Invention*, Lib. ii. Cap. xxxii. gives an Inſtance after this Manner: The *Rhodians* had a Law, that whatever *beak'd* Veſſel ſhould, at any Time, be found in their Harbour, it ſhould be condemn'd as Prize, and expos'd publickly to Sale. Now the Queſtion is, Whether a Veſſel of this kind, being driven into their Ports by a Tempeſt, ought nevertheleſs to ſuffer the common Penalty? 'Twas upon this Topick, that the Friends of the raviſh'd *Lucretia* [a] comforted her under her deep Affliction, by turning all the Guilt on the vile Author of the Crime, telling her, That *the Mind only properly ſinn'd, and not the Body; and that there could be no Fault where there was no Deliberation or Deſign.*

[a] *Liv. Lib.* i. *Cap.* lviii.

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[1] The Author ſpeaks nothing here of good Actions, or indifferent, but contents himſelf to ſpeak of ill ones only. Good Actions, which may paſs for *mixt*, are accounted for nothing; and every one may ſee the Reaſon. Indifferent Actions done in the ſame Manner, can no more be imputed to the Agent, for tho' there is a kind of Will, it is not ſufficient to produce an Obligation. The Injuſtice of the Author of Violence, rendering him incapable of acquiring any Right by that Action, which is not fully voluntary, and, conſequently, laying no Obligation upon him, who never conſented, but with Regret. *Titius Obſ.* xl. See *Lib.* iii. *Cap.* vi. §. 10.

[2] See *Lib.* ii. *Cap.* vi. §. 2. following.

[3] As for Example, When a Woman, or Maid, kills the Man that makes an Attempt upon her Chaſtity. See *Lib.* ii. *Cap.* v. §. 11. following.

[4] Such is the Caſe of the Mother, who, in a Famine, was forc'd to eat her own Child, as it happen'd in the Siege of *Jeruſalem*, as *Joſephus* tells, *Lib.* vii. *de Bell. Judg. Cap.* viii. we may alſo refer the Reader to the Caſe of the ſeven *Engliſhmen*, of which our Author ſpeaks, *Lib.* ii. *Cap.* vi. §. 3.

[5] As when a Woman, or Maid, ſlays herſelf to avoid the Loſs of her Chaſtity, with which ſhe is threatned by an extravagant Man, who will ſatisfy his Luſts at any Rate. See *Lib.* ii. *Cap.* iv. §. 19. following, where Mr. *Hertius* refers us to what the Author ſpeaks, *Lib.* ii. *Cap.* v. §. 15. of an Huſband who ſhould ſlay his Wife's Gallant, or his Wife, when he took them in the Fact. But this is the Effect of a furious Anger, and Deſire of Revenge, which ought to be referred to §. 7. above, and not to *mixt* Actions, ſuch as our Author calls them. I ſay the ſame of an Example, which Mr. *Hertius* gives of a Woman, that poiſoned her Huſband and Son, becauſe they had killed a Son of hers by a former Huſband. See *Valer. Max. Lib.* viii. *Cap.* i. in the End, and *Aul. Gell. Lib.* xii. *Cap.* vii.

[6] See the following *Chap.* §. 9. Mr. *Hertius* makes an Application, not very proper here, out of *Juſtin*, of the *Phoceans*, who, ſeeing themſelves deprived of their Lands, Wives, and Children, went and robbed the Temple of *Delphos*, for the Hiſtorian reflects upon it as a Thing not to be excuſed altogether; though they that committed it were leſs worthy of Blame, than thoſe who had brought them to this Pitch of Deſpair. For ſo he ſpeaks, *The Fact of the* Phoceans, *though all Men abominated it upon the Account of the Sacrilege, yet the* Thebans, *by whom they were compelled to this Neceſſity, were more deteſted than they*, Lib. viii. Cap. i.

[7] Mr. *Puſendorf* might have joined with *Euſtratius*, another Biſhop more famous, who fell upon a looſe Thought about a Subject ſomething near it, but of more Difficulty. Read Mr. *Bayle*'s Dictionary under the Head *Acyndinus*. See further concerning theſe Sort of *mixt* Actions, upon the Account of which ſome Evil in itſelf is committed, what is ſaid upon the following *Chap.* §. 9. *Note* 2.

[8] See *Chap.* iii. §. 10. aforegoing, about the beginning of *Note* 5.

[9] In fine, *Sextus* did not uſe an immediate Force upon *Lucretia*, as when a Woman defends herſelf, as much as ſhe can, with her Hands, Feet, and Teeth. She was not forced, any otherwiſe than ſuch are, who reſolve to caſt their Goods into the Sea for fear of periſhing. She reſiſted his Threatnings of Death; but when *Sextus* threatned to expoſe her Reputation to eternal Diſgrace, ſhe did what he wiſhed, and then ſlew herſelf. So that this Example does not well agree to this Place, where he is treating of *forc'd*, and not *mixt* Actions. See *Mr.* Bayle's *Dictionary*.

This Reluctancy in Civil Courts is presum'd to have been us'd in such Actions, or Passions, as are not vulgarly thought to be willingly perform'd or undergone, and where the Signs of all actual Consent are wanting; whence arose the Term of *interpretative Reluctancy*.

Thus, whereas by the *Jewish* Law a Virgin is suppos'd to have suffer'd Ravishment, if she lost her Honour in the Field, without Witnesses; yet *Philo* the *Jew* [a] denies the Favour of this Law to reach a Maid, who admitted a Debauch willingly, tho' in a Solitude: As neither can the same Law hurt a Maid in the City, who, in the like Danger, either could not cry out, or cried to no Purpose, and without Relief.

A *forc'd* Thing may be so either *in itself*, and *not in its Causes*, or else both in itself, and in its Cause. The first is, When a Person remains in such a State at present, as to be unable to repel the offer'd Violence, and yet was in a Fault for getting into such a State. Of this Kind was the Rape of *Dinah*, *Jacob*'s Daughter [b]; for the Virgin ought not to have wander'd among Strangers. The latter is, When the Person has, not by his own Fault, been brought into those Streights, which now occasion the Compulsion of him to any Fact. By the not being his own Fault, we mean, if he has done nothing but according to the Laws of Prudence, and of his Duty. For, if a Man performs the Office enjoin'd him, or uses his Right any other way, and acts not rashly or inconsiderately, whatever Violence over-powers him, he will have no Guilt imputed to him, and no Sin to answer for.

CHAP. V.

Of MORAL ACTIONS in general, and of their Application to the Agent, or their Aptness to be imputed.

The CONTENTS of every Section of the fifth Chapter.

I. *What a moral Action is.*
II. *Its Matter.*
III. *Its Form, where we treat of a moral Cause.*
IV. *A moral Action consider'd in itself is a positive Entity.*
V. *The Cause or Ground why a Thing may be imputed, or not.*
VI. *Things not to be imputed to a Man, are Things necessary.*
VII. *The Operations of our vegetable Faculties:*
VIII. *Things impossible.*
IX. *Things compell'd, where meer Execution is treated of.*
X. *Things done through Ignorance.*
XI. *Things done, or seen in a Dream.*
XII. *Evils to come.*
XIII. *But evil Actions, proceeding from an Habit, must certainly be imputed.*
XIV. *How other Men's Actions may be imputed to us.*

HAVING, in Pursuance of our Design, examined and explained the Will and the Understanding, as the Principles whence human Actions obtain the Privilege of being ranked in a different Class from the Operations of Brutes, the next Thing which we are concern'd for, is the general Disquisition of *moral Actions*, since in discovering their Rectitude, or Pravity, the Science we are now engaged in is chiefly employ'd. *Moral Actions* then, are *the voluntary Deeds of Men consider'd in common Life, as they include the Imputation of their Consequences and Effects.* We call those voluntary Deeds, which in such a Manner depend on human Will as on a free Cause, that without its Determination (proceeding from its [1] internal Acts drawn forth by the previous Knowledge of the Understanding) they would never have been perform'd; and which therefore, as to their being done, or not done, must be referr'd to the Power of Man. And these Actions are here consider'd, not as they are bare Motions produc'd by some Power according to the natural Constitution of Things, but as they proceed from the Determination of the Will; a Faculty dispos'd to embrace either Part of two contradictory Choices. For a voluntary Action contains something *material* and something *formal*; the first is nothing else but the Motion of a Power existing by Nature, or its Exercise consider'd barely by itself; the other is the Dependence of that Motion or Exercise on the Determination of the Will, as on a Cause that is truly free, and acts by its own Resolution. The Exercise consider'd separately and by itself, is, for Distinction sake, rather call'd, *an Action of the Will*, or of the *willing Power*, in a Man, than a *voluntary Action*.

We may farther consider the *Action* [2] *of the Will*, either in itself, and *absolutely*, as it is a physical Motion, undertaken upon the previous Injunction of the *Will*, or else *reflexively*, as the Effects of it may be imputed to the Actor. Now *voluntary Actions*, as they comprehend this Reflexion, are, by a special Appropriation of the Word, call'd *human Actions*. And because from these Actions, as they are perform'd *well* or *ill*, as they are agreeable or repugnant to their Rule, the Law, one is said to be a *good* or an *ill moral Man* (the Inclinations of the Mind resulting from Frequency of acting, being, likewise, term'd *Morals*) hence it comes to pass that *moral Actions* seem only another Name for *human*.

II. The Essence of *moral Actions*, [3] according to the last Way of considering them, may be divided into two Parts or Notions, a *Material* and a *Formal*. The material Part, or the Matter of a moral Action, is of a very wide Extent: Such may be first any physical Motion, whether it be of the locomotive Faculty; or of the sensitive Appetite; or of the external, or of the internal Senses; or of the Understanding, so far as concerns the Exercise of Apprehension. For the Act of Judgment depends so much on the Quality which appears in the Object, that it is not capable of the Direction of the Will,

[a] *De Legib. Special.* [b] *Genesis* xxxiv.

[1] The Original is, *Actus Elicitis*, which is better rendered, *Immediate Acts*. See §. 1. of the preceding Chapter.
[2] The Original is, *Actio Voluntatis*; which Expression, tho' 'tis used in all the Editions, and his *Elements of the Universal Civil Law*, yet 'tis a plain Mistake of the Author, contrary both to his own Distinction, and the following Part of his Discourse; for he says positively, *When moral Actions include in*, &c. The *English* Translator was not aware of this.
[3] That is to say, as far as they are voluntary Actions, whose Effects may be imputed unto Men.

tho' in forming of that Judgment, our Free-Will and our Induſtry [1] are allow'd ſome Influence and Power. The Act of the Will itſelf may, likewiſe, be the Matter of a moral Deed, if we conſider it in its natural Condition, or as it is preciſely taken, for an Effect produc'd by a *phyſical* Power, *as ſuch*. So, likewiſe, may be the Privation of any *phyſical* Motion, which a Man might have produc'd either in itſelf, or in its Cauſe: For a Man may render himſelf obnoxious to Puniſhment, as well by Omiſſions as by Commiſſions. As, alſo, the Inclinations of the natural Powers toward certain Objects (acquir'd by the voluntary Actions that have already paſs'd) at leaſt ſo far as they are Spurs and Incentives to acting. Nor are my own Motions and Habits, or the Privations of either, alone the material Parts of my *moral Actions*; but the ſame Motions, and Habits, or Privations proceeding immediately from others [2], provided they could, or ought, to have been directed by my Will. Thus the *Spartan Inamorato's* were to [3] ſuffer for the Faults committed by their Minions [a]. Nay, the Operations of Brutes, of Vegetables, and of inanimate Things, may furniſh out the *Matter* of my *moral Actions*, when my Will ſhould have guided their Proceedings. Thus even in the Law of GOD, a Miſchief done by a goring Ox, is imputed to the Owner, in caſe he knew before-hand that the Beaſt was faulty this way [b]. Thus a Vine-dreſſer is reſponſible, if, through his Negligence, the Vine has ſpent all its fruitful Strength and Vigour in ſending out numerous and unneceſſary Suckers. Thus the Damages by Fire are repairable by the Perſons who occaſion'd it; and Waſtes cauſed by the breaking in of the Sea, or of Rivers, are to be made good by him who has either broke down, or neglected to keep up the Banks. *Quinctilian* [c] has propos'd two Declamatory Lemma's much to our preſent Purpoſe. *A Piper had play'd a Phrygian Ayre to a Man who was offering Sacrifice; the Man running Mad, and throwing himſelf down a Precipice, the Piper is accus'd as the Perſon who had caus'd his Death. A Club of young Perſons, who had frequent Meetings and Entertainments, one Day made an Agreement to ſup together by the Sea-Side; one of the Society being abſent, the others wrote his Name upon the Stone Table which they had reared: The young Man's Father at his Return from a long Voyage, landing in this Place, and reading the Inſcription on the Stone, took it for his Son's Monument, and hang'd himſelf for Grief. The Company is hereupon impeached as acceſſory to his Death* [4]. Laſtly, the Admiſſions or Receptions another Man's Deeds, as far as my Default contributed to their Production, may be the *Matter* of my own *moral Actions*. Thus a Rape is partly imputed to the Woman, if it appear that ſhe raſhly ventur'd into ſuch a Place, where ſhe might have expected to meet with ſuch Violent Treatment.

III. The Formality of a *moral Action* conſiſts in the *Imputativeneſs* of it, if we may ſo ſpeak, by which the Effect of a voluntary Action may be imputed to the Agent, or eſteem'd as ſomething properly belonging to him, whether he himſelf phyſically produc'd that Effect, or whether he cauſed it to be produc'd by others. And from this Formality of the Action, the Agent, likewiſe, has a Share in the Denomination of Morality, being call'd a *moral Cauſe*. Whence we may eaſily underſtand, that the *Ratio Formalis* of a moral Cauſe, in Strictneſs and Propriety of Speech, conſiſts in Imputation, conſider'd with Reference to the Perſon in whom it terminates; and that therefore ſuch a Cauſe can be nothing elſe but a voluntary Agent, to whom the Effect is, or muſt be imputed, upon Account of his being either wholly, or partly the Author of it; and that therefore, whether it be Good or Evil, both are to be reckon'd as owing to him, and he is liable to give an Account for both. Thus one Man is the *moral Cauſe* of Hurt in another Man, whether he has made his Head ſwell by Blows of the Fiſt, or whether he has broke it with a Club, or whether he has ſet Dogs or Murderers upon him. Thus *Anah* was the *moral Cauſe* [5] of Mules, he being recorded in *Geneſis* xxxvi. *Ver.* 24. to have firſt found them out, or to have join'd the Mare and the Aſſes together for their Production. So *Jacob* was the moral Cauſe of the different Colours in *Laban*'s Sheep, *Chap.* xxx. *Ver.* 37. And thus *Lyſius* (*Orat. contra Ayorat*) pleading againſt an Informer, upon whoſe Accuſations many Perſons had been executed, calls him *the manifeſt Cauſe of their Death*. So alſo OVID. HEROID. *Epiſt.* ii. 147.

Phyllida Demophoon leto dedit, hoſpes amantem;
Ille neci cauſam præbuit, ipſa manum.

Poor *Phyllis* dy'd, by him ſhe lov'd oppreſs'd;
The trueſt Miſtreſs, by the falſeſt Gueſt:
He was the cruel Cauſe of all her Woe;
But her own Hand perform'd the fatal Blow.
Mr. POLEY.

Yet it does not always happen, that a Man who has barely given Occaſion to the Fact of another Man,

[a] *Ælian. V. H. Lib.* iii. *Cap.* x. *Wiſigoth. Lib.* viii. *Tit.* iv. *Cap.* xvi. *V. Exod.* xxi. 29.
[b] *Add. Lib.* i. §. 1, 2, 3. *D. Si Quadrup. Lib.* ix. §. 5. *D. ad L. Aquil. Lex.*
[c] *Inſt. Orat. Lib.* i. *Cap.* x. *and Lib.* iii. *Cap.* vii.

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[1] If we will find the Author's Meaning, we muſt remember what he has ſaid, *Chap.* iii. §. 2.

[2] That is, when one may, or ought to engage others to do a certain Thing, or hinder them from it, or contribute towards the begetting a certain Habit, or prevent it, he is reſponſible for that which he did not properly do, and in which he was guilty of nothing but pure Negligence, or Want of Acting, which is yet looked upon as a real Action, in reſpect to the moral Effect. This reſpects all them who are charged with the Management of others. See §. 14. following.

[3] See *Ælian*'s *Various Hiſtory*, *Lib.* iii. *Cap.* x. and Mr. *Perizonius*'s *Comment* on it. But that Example ſeems to be ill choſen, among ſo many other which are commonly to be had. It is poſſible, that this being ſo unlike our Opinions and Cuſtoms, made this Author think fit to give this Inſtance. For they pretend, that this Friendſhip, ſo dear and conſtant, had nothing but what was honeſt in it, and ſerved to inflame thoſe young Men, who were the Objects of it, with the Love of Virtue, tho', in Time, it degenerated into an infamous Converſation, chiefly among the *Greeks*. See *Potter*'s *Antiquities of* Greece. Theſe *Lacedomonian* Inamorato's being then, as *Ælian* ſpeaks, *The continual Guardians of thoſe they loved*, 'tis no wonder, that they were to anſwer for their Behaviour.

[4] With regard to theſe two Examples (of which the laſt may be conteſted) we ſhall obſerve, that, in Caſes of this Nature, the whole depends upon knowing whether or no the Party believ'd his Conduct would produce a bad Effect; for if he had no Apprehenſion of this, the Accident itſelf was only a mere Misfortune, of which he was but the innocent Occaſion, and therefore can never be conſidered as the moral Cauſe of it. See my Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 18. Note 2. of the laſt Edition.

[5] But *Moſes* does not ſay in that Place, That that *Idumean* was the firſt that cauſed Aſſes and Horſes to couple together, and ſo was, morally ſpeaking, the Original of Mules. ימים is the Name of a People, and ſo ought to be tranſlated, not, He produced Mules, but, He fought againſt the *Jemians*, as Mr. *Bochart* has fully proved in his *Hierozoicon*, *Part* i. *Lib.* ii. *Cap.* xxi. However, had the Thing in itſelf been true, this Author might better have paſſed over this Example.

ſhould be [1] reputed the moral Cauſe of that Fact: And therefore the Sentence pronounc'd by *Piſo*, which *Seneca* ſpeaks of, was extream fooliſh, as well as cruel, when ordering a Soldier to be led to Execution, upon Suſpicion of whoſe Murder another had before ſuffer'd Death, he gave his Reaſon in theſe Words [2], *I order you to be executed for being the Cauſe of the Condemnation of your Fellow Soldier.* There ſeems no great Neceſſity that we ſhould here, with the Author of the Treatiſe *De Principiis Juſti & Decori* [a], diſtinguiſh between a moral Cauſe by *itſelf*, and a moral Cauſe by *Accident*. For a Cauſe by Accident is a Term of vaſt Obſcurity, and very likely to create and encourage vain Diſputes: And beſides, if we cannot rightly impute the Effect of an Action to a Man, we cannot upon any Account, call him a moral Cauſe by Accident, tho' he contributed never ſo much to the material Part of the Action. Yet thus far we muſt plainly acknowledge, that in weighing and rating the Greatneſs of the Imputation, it is a very important Query, whether the Action proceeded from ſuch a Perſon as the Principal, or as the Acceſſary? As, likewiſe, whether the Agent directly intended ſuch an Effect, or whether it proceeded from his Inadvertency, or any other concomitant Reaſon? For if the laſt of theſe Caſes appear true, the Conſequence will be, that the Action ſhall not be imputed to the Perſon, as if committed againſt the Laws of Juſtice, but againſt thoſe of Prudence and Fore-ſight; and that therefore he ſhall not be reckon'd to have acted wickedly, but only raſhly or unadviſedly. It will not be amiſs to examine more cloſely what the above-mentioned Author lays down in the ſame Place. Firſt, therefore, he eſtabliſhes this as a Maxim, *Whatever is Evil in its own Nature, ſo that it can never be chang'd into Good, yet may by Accident follow upon the Exerciſe, or upon the Defence of my Right, without my incurring the Guilt of Sin; and therefore I am not oblig'd to decline the Uſe of my juſt Right in ſuch Caſes.* *Grotius*, likewiſe,[3] propoſes a Rule much to the ſame Purpoſe, in his Third Book [b], but judiciouſly tempers it with [4] a good Reſtriction. But our Author proceeds: *A Sin is ſaid to follow by Accident upon another free Act, when upon the Uſe of a Thing, to which I have a Right, ſome Effect follows, which I have otherwiſe no Right to produce.* For an Inſtance, in this Caſe, may be alledg'd what Divines call Scandal, or Offence *taken*; concerning which they tell us, That a Man ought not to omit an honeſt, a pious, or a due Act, though a wicked Perſon ſhould take never ſo much Offence at it; and this Rule they confirm by the Authority of our Saviour. But now this very Example might have taught our Author to lay aſide his Term of *Cauſa per Accidens*; ſince even in that reſtrain'd Senſe it would be little leſs than Impiety to call *him* the Cauſe of Evil, who is the Spring and Fountain of all Good. We ought rather to ſay, That a Man who exerts a good and neceſſary Action, is by no Means the Cauſe of Sin in another Man, who ſhall thence take Occaſion of offending. Thus we commonly ſay, He who uſes his own Right, does no Body any Wrong. But he further adds, *Since every Man has a Right of preſerving his Health, it is lawful, for the Recovery of Health, to make uſe of a medicinal Potion, tho' upon the taking of this Potion ſhould follow Diſtraction (for ſome little Time) or Drunkenneſs, or (voluntary) Pollution, or Abortion* [5] (in caſe both the Mother and the *Fœtus* muſt otherwiſe infallibly periſh) and that therefore the Perſon who takes the Medicine is only the Cauſe of ſuch Effects by *Accident*. On which Doctrine we only obſerve, that it had been much plainer to have ſaid, that thoſe Effects are not to be accounted Sins in the Caſes here mention'd. Neither do all the Examples brought by the ſame Author to illuſtrate the *moral Cauſe per ſe*, or that which is truly and properly ſuch, rightly hold. *For a Criminal*, as he ſpeaks, *who is to ſuffer, tho' he go on to the Place of Execution, and aſcend the Ladder*, cannot meerly upon this Account be call'd the *moral Cauſe* of his own Death, becauſe if he had refus'd to go willingly, he had been dragg'd along by the publick Officers. And yet there is no Reaſon why one Man who drinks immoderately, or another who waſtes his Strength in honeſt and neceſſary Labours, may not be reputed the *moral Cauſe* of their own untimely Deaths; tho' the former Perſon ſins, and the latter not; and tho' neither, properly ſpeaking, can be call'd a Murtherer. But ſuch a one we ſhould rightly call the *moral Cauſe of his own Death*, who is therefore condemn'd, becauſe he would not declare ſuch Matters as might demonſtrate his own Innocency.

IV. It muſt be farther obſerv'd, that this *Imputativeneſs*, which we have made the *Formale* of a *moral Action*, bears the Nature of *a poſitive Form*, from which, as from the Spring and Root, all the Affections, Properties, and Conſequences of ſuch an Action reſult. And therefore a *moral Action* may be call'd a *poſitive Being* (at leaſt in the Order of *Morals*,

[a] *Veltbuyſen*, *Pag.* 161. [b] *Chap.* i. §. 4. *and Chap.* xi. §. 9.

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[1] He muſt (as our Author ſpeaks in his *Elements of the Univerſal Civil Law*, p. 3, 4.) for this End, either do, or neglect to do ſomething that he was obliged to, otherwiſe another Man's Action has ſo neceſſary a Connection with what he himſelf does, or neglects, that, without this, it cannot otherwiſe happen. Further, we muſt conſider how far he, that gave the Occaſion, might know the Effect that would follow upon it, and that it is not neceſſary, that he ſhould certainly know it, 'tis ſufficient, that there was ſome Probability. I will explain this by an Example: If I leave a Piſtol charged, or ſome other dangerous Weapon, upon a Table, in a Room where every Body has Liberty to come, I am not ſure that a Child, or any other Perſon will come, who, not knowing the Danger of the Weapon, will run the Hazard of killing or hurting himſelf, by meddling with it out of Curioſity; nevertheleſs, becauſe the Thing is poſſible, and I had Reaſon to believe it ſo, I am certainly to anſwer for it. The ſame may be ſaid concerning the Good of which we have given Occaſion. As it can't be attributed to us, if we were the Cauſe of it without our Knowledge, and had no ſuch direct Deſign, ſo, on the other Side, 'tis not neceſſary, that we be ſure of the Succeſs of what we undertake for another's Advantage; 'tis ſufficient, that we had Reaſon to preſume it; for tho' the Effect was not obtain'd, the Intention is very commendable at all Times; as, on the contrary, the Neglect is not altogether excuſable, although it luckily had no ill Conſequence.

[2] *Seneca*'s Words are (*De Ira, Lib.* i. *Cap.* xvi.) *Te duci jubeo, quia cauſa damnationis commilitoni fuiſti.*

[3] This Rule (according to *Grotius*) takes Place in the juſt Defence of a Man's ſelf, which this Author explains in another Place. And ſo it does, alſo, when we labour after the Recovery of what belongs to us; for if we can recover the full Value, we have a Right to take it, nevertheleſs, upon Condition that we return the Over-plus, if any be. So, alſo, we may cannonade a Ship full of Pirates, or an Houſe full of Thieves, altho' we know there are ſome Children, Women, or other innocent Perſons in it, who are in Danger of being involved in the Ruin of thoſe that deſerve it. *Lib.* iii. *Cap.* i. §. 4. *Num.* 1.

[4] He further adds, in the ſame Place, *Num.* ii. That thoſe Things, that a Man hath an indiſputable Right to do, are not to be allowed him to do in all Reſpects. Love to our Neighbour often hinders us from uſing that Right, and obliges us, likewiſe, to avoid thoſe Things which do, or may happen, contrary to our Intention, at leaſt, if the Advantage, we aim at, be not greater than the Damage which may juſtly be feared; or if there be an equal Probability of Benefit and Damage, or the Hope of the Benefit be not better grounded, than the Fear of Damage; but this muſt be left to every Man's Judgment and Prudence. But this ought only to be obſerved, That where there is a Doubt, we ought to incline to that Side, that is more favourable to another, than to ourſelves, as the ſureſt Part. See what follows, and *Chap.* xi. §. 8. of the ſame Book. See, alſo, what has been ſaid above, *Chap.* iii. §. 7.

[5] See *Book* vi. *Chap.* ii. §. 6. following.

if not always in the Order of *Naturals*) whether the Matter of it be a phyſical Motion, or the Privation of a phyſical Motion. For to conſtitute a poſitive Being in Morality, 'tis ſufficient that we conceive ſomething in it, from which there ariſe true Affections of the ſame Kind; ſince as a *Non Ens* can have no Affections, ſo whatever has certain and poſitive Affections cannot upon any Account be ſtil'd a meer *Non Ens*.

V. Now, that a *moral Action* ſhould belong, or ſhould be *imputed* to any Man (in which we have aſſerted the *ratio formalis* of it to conſiſt) there can be no other Reaſon or Cauſe, but that the Man had Power and Ability to do it, or not to do it; to perform or omit it. And this is ſo manifeſt a Truth, that the moſt ignorant and unſkilful Mortals, when they are accus'd of any Omiſſion, or of any Fact, think they cannot bring a fairer Excuſe, than to ſay in the firſt Caſe, *That they could not do it*, and in the other, *that they could not help it*. So that it is to be eſtabliſh'd as a prime Maxim in Morals, That a Man is accountable for thoſe Actions, the Performance, or the Forbearance of which were both in his Power: Or (what comes to the ſame Thing) that every Action dirigible by a moral Rule, which a Man is able to do, or not to do, may be imputed to him: And, on the contrary, that whatever neither in itſelf, nor in its Cauſe, was in a Man's Power and Diſpoſal, cannot be rightly imputed to him [1]. Nor is it any Breach of this Rule, that ſometimes a Man is oblig'd to perform a Buſineſs depending on Chance, and conſequently not in his Power. For this Caſe can never happen, unleſs the Man voluntarily takes on himſelf ſuch an Obligation [2]. Thus much therefore is in the Man's Power, to bind himſelf to repair a Damage, proceeding from Cauſes not capable of human Direction. To conclude then, that an Action or Fact ſhould be imputed, it is ſufficient that it was not involuntary, according to our Diſcourſe in the preceding Chapter, §. 10. and that it was ſubject to the Guidance of our Will. But to make an Omiſſion truly *imputable*, 'tis requiſite that there have been both Power and Opportunity for Performance, which Conditions of Power and Opportunity ſeem to conclude theſe four Things, *Firſt*, That the Object be ready at hand. *Secondly*, That we have a commodious Place, where we may neither be hindred by others, nor ſuffer any Evil from them upon our acting. *Thirdly*, That we have a convenient Time, in which we are not call'd to the Diſcharge of more neceſſary Duties, and which is equally ſeaſonable for thoſe who are to concur with us in the Action. And, *Laſtly*, That our natural Powers adminiſter ſufficient Strength for the Buſineſs. When any one of theſe Conditions is wanting without the Fault of the Man, it would be moſt abſurd and unjuſt to lay the Omiſſion of any Thing to his Charge. *Cicero de Invent.* Lib. i. Cap. xxvii. *Occaſion or Opportunity is a Part of Time implying a Convenience of doing a Thing, or not doing it.* See *Cartes* of the Paſſions. Art. 144, 145, 146.

VI. Thus much being premis'd in general, it will be worth our while to conſider more diſtinctly and in particular, what Things may be imputed to a Man, which proceed from a phyſical Neceſſity, or from any Cauſe placed beyond the Direction of Men. And therefore 'tis a ſimple [3] Practice they tell us of the Kings of *Mexico*, that at the Commencement of their Reign they us'd to promiſe their Subjects, that they'd take Care the Sun ſhould riſe and ſet at due Times; that Rain ſhould fall as often as there was Occaſion; and that the Land ſhould bring forth Fruit. Neither can it be imputed to Man, that natural Cauſes produce this and no other Effect, or that they produce it in this and no other Way; as for Inſtance, that the Fire warms, and not cools us. Yet thus indeed the Effects of natural Cauſes furniſh large Matter for Imputation, as their active Force is drawn out, or confirm'd by Man, applying Actives to Paſſives, or exciting their internal Strength by proper Means. On which Account a Plenty of Fruit is imputed to the Huſbandman, inaſmuch as his diligent Culture obtain'd it from the Earth: Thus the Damage of Fire is imputed to him that kindled it; and thus the varied Colour of *Laban*'s Lambs may be imputed to the Subtilty of his Shepherd *Jacob* [a]. A natural Effect may be farther imputed to a Man as he has mov'd the ſupream Cauſe and Director of all Things to determine [4] ſuch an Effect. Thus the *Three Years Drought* might be imputed to *Elias* [b]. As in fabulous Story a long Drought is ſaid to have ceas'd on the Prayers of [5] *Æacus* [c]. Thus too, the Death of the Men who fell in the Peſtilence [d], might, in ſome Meaſure, be imputed to *David*, tho' not to the Degree of a Murther.

VII. Neither may we impute to a Man the Actions and the Effects of vegetative Faculties which appear in his Body, as they ariſe from his Birth, or from other Cauſes beyond his Diſpoſal. Yet thus much is in a Man's Power, to ſupply thoſe Faculties with convenient, or with unſuitable Objects, which may either maintain and cheriſh, or weaken and extinguiſh their Force; as, alſo, to diſtort and abuſe their proper Organs. Thus he to whom Nature has given a large, a ſound, and an able Body, is liable to no Imputation of Merit on that Score. But to correct a weak Conſtitution by Induſtry and Exerciſe, and to increaſe the natural Powers, gives juſt Occaſion for Commendation; and, on the contrary,

[a] Gen. xxx. 37. [b] 1 Kings xvii. 1. James v. 17. [c] *Apollodor.* Lib. iii. Cap. xi. [d] 2 Sam. xxiv. 13, 17.

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[1] *Culpam autem nullam eſſe, cum id, quod ab homine præſtari non potuerit, evenerit.* Cicer. Tuſcul. Quæſt. Lib. iii. Cap. xvi. See my Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 17. in the Notes of the laſt Edition.

[2] See what is ſaid, *Lib.* v. *Cap.* ix. following. Sometimes, alſo, we muſt anſwer for an accidental Miſchance without engaging in it, becauſe we have neglected to do a Thing which we were obliged to do, altho' the Neglect itſelf did not contribute at all to the unforeſeen Accident. See *Lib.* iii. *Cap.* i. §. 6. *Note* 3. and *Lib.* v. *Cap.* v. §. 3. following.

[3] This Author ought to have mention'd the Hiſtorian who relates this Fact. It is *Lopez de Gomara*, in his *Hiſt. des Indes.* See the *Obſervat. miſcellæ de Matthias Bernegger*, printed at *Straſburg* 1669. *Obſ.* xxxv. Mr. *Titius* (*Obſerv.* 47.) relates a favourable Explication, which a certain Perſon (*viz. Kreb*'s Treatiſe *De Lig. & Lapid. Part* I. *Claſs* II. *Sect.* ii. §. i.) gives of this Promiſe. According to him, it is the Effect of great Wiſdom, and theſe good Kings would have Men underſtand no more by it than this: *That a Prince, by his good Laws, and by the Prudence and Juſtice of his Government, can, in ſome Meaſure, ſo diſpoſe of the Stars and Elements, that they ſhall promote the Good of his Subjects.* Upon this Foot, their Aſſertion, as abſurd as it may ſeem at firſt Sight, is not altogether without Ground, and proves, that even the *American* Princes are leſs barbarous than many *European*. *Montagne* does not give it ſo favourable a Gloſs. He regards this Oath, which the *Mexicans* oblig'd their Kings to take at their Coronation, as the Effect of the falſe Notions which Mankind has of Grandeur, and which lead them to canonize and deify Monarchs of their own Creation. See his Eſſays, *Tome* iv. *Liv.* iii. *Cap.* viii.

[4] We muſt explain the Words of our Author, who ſays only, *Ad eum effectum determinandum*, i. e. to determine that Effect: for it appears by the following Examples, and by the Nature of the Thing, that the Queſtion here is not only of the Exiſtence of the Effect, but, alſo, of its Non-Exiſtence and Diſcontinuance.

[5] But to be aſſur'd that Providence has produc'd an Event, either as a Mark of Favour, or Puniſhment, requires no leſs than a Revelation from Heaven; otherwiſe this Principle, tho' true in itſelf, is liable to great abuſe. See the Abridgment *of the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 18. Note 4. And my Diſſertation upon *the Uſefulneſs of the Sciences*, Pag 31.

to

to break or deſtroy the ſame Powers by Idleneſs and Petulancy, turns to a juſt Shame and Reproach.

Hence no Man can be fairly reprehended for a weak, a tender, or a diminutive Body; for diſtorted, or for maim'd Limbs, or for want of Strength, provided that none of thoſe Infirmities were contracted by this Default. [1] *Ariſtotle* talks very pertinently to this Purpoſe, *Ethic. ad Nicom. Lib.* iii. *Cap.* vii. Οὐ μόνον δὲ αἱ τῆς ψυχῆς κακίαι, &c. "Not only Faults of the Mind (ſays he) are "Voluntary, but thoſe of the Body too in ſome "Perſons, whom we therefore diſcommend. For "we do not blame thoſe that are naturally deformed, "but thoſe who are grown ſo by neglect of Exer-"ciſe, and by a careleſs way of Life. And the Caſe "is the ſame as to any Meanneſs or Unſightlineſs "ariſing from Diſtempers, or from the maiming of "any Part of the Body. For Men will not re-"proach, but rather pity his Blindneſs, who had "it from Nature, or from a Diſtemper, or from "an honourable Wound: But he will juſtly fall "under univerſal Scorn, or Cenſure, who has loſt "his Eyes by Drunkenneſs, or by any other kind of "Intemperance." *Plutarch de Audiend. Poet.* ſpeaks to the ſame Purpoſe: Ulyſſes *doth not upbraid* [1] Therſites *with his Lameneſs, his Baldneſs, or his Crook-back, but with his Scurrility and Impudence.* Thus the wiſe Poet ſilently derides thoſe who are aſham'd of Lameneſs, Blindneſs, or the like Defects; it being his Judgment, that nothing can be Blame-worthy which is not vicious, and nothing vicious the Cauſe of which is in Fortune, not in ourſelves. *As thoſe who bruſh or ſtrike Cloaths touch not the Body, ſo thoſe who cenſure others for their Imperfections of Birth, or of Fortune, vainly and fooliſhly ſtrike the outward Parts, but never reach the Soul, nor thoſe Blemiſhes which really deſerve Reprehenſion and Correction.* Ibid. Add. *Sympoſ.* Lib. ii. Qu. i. Yet it was not without Reaſon, that among the ancient *Gauls*, as *Strabo* relates, *Lib.* iv. *The young Men were fin'd for exceeding the Meaſure of their Girdle:* Becauſe they took it for granted, that ſuch a large Paunch, at ſuch early Years, could proceed from nothing elſe but Lazineſs and Gormandizing. So ſays *Nichol. Damaſcen.* de Mor. Gent. *The* Iberians *uſe a Girdle of a certain Meaſure, and whoever ſuffers himſelf to grow beyond thoſe Bounds, is looked upon as highly infamous* [2].

The ſame may be ſaid of the other Faculties which Nature, and not our own free Pleaſure, has implanted in us; as that a Man has ſharp or heavy Parts, quick or dull Senſes, a firm or a deceitful Memory; unleſs theſe natural Abilities have been improv'd or impair'd by the Man himſelf. Hither muſt be referr'd that Obſervation of *Ariſtotle* in his Ethicks [a], *Many Things according to our Nature we do and ſuffer, which we are truly conſcious of, and yet which cannot be call'd Voluntary or Involuntary: As to grow old, and to die.* Theſe Things therefore are not proper Matter of Imputation. Neither can the getting of wicked Children be imputed to Parents, provided they have not encourag'd them in their Vices by ill Education. Whence the witty Turn of *Vindex* will not hold ſtrictly, when he ſaid, *That* Nero's *Mother was juſtly put to Death by her Son, for bringing ſuch a Monſter into the World* [b] [3].

VIII. It's evident, likewiſe, That thoſe Things cannot be imputed, which exceed our Strength, either as to the Hindrance or the Performance of them: Provided that this Inability has not been of our own ſinful [4] Procurement. On which Foundation are built thoſe common Maxims, That Impoſſibilities are incapable of Obligation [5]; That no Man can be conceiv'd to have enjoin'd impoſſible Duties in a Law; and that therefore if any ſuch [6] Thing occur in a Statute, a Covenant, or a *Will*, it is either to be eſteem'd as null, or elſe a more commodious Interpretation of it is to be found out [c]. To this Purpoſe we meet with a pleaſing Paſſage in *Herodotus* [d]; he tells us, that when *Themiſtocles* deſir'd a Supply of Money from the Inhabitants of *Andros*, ſupported by the two ſtrong Goddeſſes, *Perſuaſion* and *Neceſſity*, the *Andrians* oppos'd him with two ſtronger Goddeſſes, *Poverty* and *Impoſſibility*. But here it muſt be carefully obſerv'd, that it is one Thing to be *phyſically*, and another Thing to be *morally impoſſible*. The former Impoſſibility lays an Obſtacle, which binds up the Will in ſuch a Manner, that either it cannot break out into Action, or elſe that it ſhall loſe all its Labours and Endeavours. But a moral Impoſſibility lays no Impediment ſurpaſſing the active Power which inheres in the Will, but on the contrary ariſes wholly from the Will itſelf. And in this Manner, we ſay, 'tis impoſſible that all Men ſhould conſpire together in delivering down a Lie to Poſterity, without any Proſpect of Advantage: Or that any Man ſhould lead a Life of ſuch exact Holineſs and Circumſpection [7], as not to offend (at leaſt through the Precipitancy of his Paſſions) in

[a] Lib. v. Cap. x. [b] *Philoſt. Apollon.* Lib. v. Cap. x.
[c] *Ovid.* de Pont. Lib. i. El. 7.

——— *Nulla potentia vires*
Præſtandi, ne quid peccet amicus, habet.
So far can no Degrees of Power extend,
To purge all Frailty from a mortal Friend.

Quinctilian. Inſt. Lib. vi. *Cap.* iii. *We uſually reckon it inhuman to upbraid a Man with his ill Fortune; either becauſe it comes without his Fault, or becauſe it may be the Cenſurer's Turn to ſuffer next.* [d] *Uran.*

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[1] *Plutarch*'s *Greek* is, Ὁ Θερσίτης ἀπὸ τῦ Ὀδυσσέως, ὁ χωλὸς, ὁ φαλακρὸς, ὁ κυφὸς, ἀλλ' ἀκριβόμυθος λοιδορεῖται —— Οὕτως Ὅμηρος καλαισχρᾶ τῶν αἰσχυνομένων ἐπὶ χωλότησιν, ἢ τυφλότησιν, ὅτε ψεκτὸν ἡγούμενος τὸ μὴ αἰσχρὸν, ὅτε αἰσχρὸν τὸ μὴ δι' ἡμᾶς ἀλλ' ἀπὸ τύχης γινόμενον. Καθάπερ γὰρ οἱ τὰ ἱμάτια μαστιγοῦντες, οὐχ ἅπτονται τῦ σώματος, οὕτως οἱ δυσχερείας τινὸς, ἢ δυσγενείας ὀνειδίζοντες, εἰς τὰ ἐκτὸς ἐνίεντες κενᾶς, καὶ ἀνοήτως, τῆς ψυχῆς δ' οὐ θιγγάνουσιν, οὐδὲ τῶν ἀληθῶς ἐπανορθώσεως δεομένων, καὶ δήξεως. Plut. p. 35. Ed. Wech. Tom. ii. I have followed in the ſecond Fragment of this Quotation, a tacit Correction, which the *Latin* Tranſlator *Xylander* has made, in his Opinion juſtly; that is, τὸ μὴ, &c. for τὸν μὴ. Tho' *Grotius*, in his Verſion of this Treatiſe, prefixt to his Edition of *Stobæus*, follows the common Reading: *Neque vitupe randum*, &c. *Nor is any Thing to be blam'd but what is baſe, nor is any Thing baſe but what happens through our own Fault, and in which Fortune has no ſhare.* See *Plato*'s *Protagoras*, Lib. i. Pag. 323.

[2] This Remark ſeems rather to relate to the Women of the Country, of whom *Nicolas de Damas* ſpeaks here. I am at a loſs to know if theſe were the People of *Spain* formerly ſo call'd, or thoſe of *Aſia*, who liv'd near *Colcis*. The Reader may, on this Head, ſee what *Ælian* ſays of the *Lacedæmonians* in his *Var. Hiſt.* Lib. xiv. Cap. vii. with the deceas'd Mr. *Perizonius*'s Note upon it.

[3] The *Greek* is, Τὴν γὰρ μηλίδα ἐν δίκῃ ἀπεκτονέναι, ἐπειδὴ τοιοῦτον ἔτεκε.

[4] In this laſt Caſe we may lawfully be treated in the ſame Manner as if we were yet in a State of acting. Otherwiſe, as ſoon as any Obligation we are under becomes in the leaſt troubleſome, or incommodious, we ſhall find a Way to avoid it, by putting ourſelves on purpoſe into a Condition unable to fulfil it.

[5] *Impoſſibilium nulla obligatio eſt.* Digeſt. Lib. l. Tit. 17.

[6] See Lib. iii. Cap. vii. §. 2, &c. following.

[7] Mr. *Hertius* was in the right to think, that the Encomium which *Valerius Paterculus* gives *Scipio Æmilianus*, was extravagant, viz. That in all his Life he never acted, ſpoke, or thought any Thing, but what was commendable, *Lib.* i. *Cap.* xii. Here I ſhall remark, by the by, that the critical Conjectures of *Nich. Heinſius*, are as ſtrange as they are neceſſary.

ſome ſmaller Inſtance of Duty. Hence the Author of the Treatiſe *De Principiis Juſti & Decori* [a] infers, *That a Legiſlator cannot indeed enjoin what is phyſically impoſſible, but he may exact Obedience to Things which include a moral Impoſſibility. Becauſe in this he commands nothing contrary to the Liberty of the Will, ſince all the Difficulty of obeying ariſes from the Will itſelf. Thus 'tis not impoſſible for any Man to frame a Lie* gratis ; *and if not for any Man, then not for the whole Multitude ; and yet 'tis certain that the whole Multitude will not do ſo. In the ſame Manner every Man has the Power of ſpeaking Truth, and conſequently a whole Society or Community ; and yet 'tis moſt certain, that a Commonwealth will never be ſo happy, as to have all its Members abſtain from falſe Speeches : Yet this Impoſſibility does not take away the Liberty of particular Men, or excuſe them from ſinning. Thus too we ſay, that the fulfilling of the Law is impoſſible, and yet that that Impoſſibility does not injure the Liberty of the Will. For 'tis equally impoſſible for a particular Man to obey* GOD*'s Command in all Things, and for a Multitude to abſtain from all Manner of Lying : And he is as able to preſerve himſelf from each particular Act of Sin, as the particular Citizens are to keep themſelves pure from Lies ; and yet this is never likely to happen in the World.* Which Doctrine, as it is applied to Theological Points, we leave to be diſcuſs'd by the proper Profeſſors. But if it keep within the Bounds of human Courts, it does not appear why this ſhould not rather be admitted, than that Aſſertion of *Grotius* [b], where, ſpeaking of thoſe Sins which ſome call *Sins of daily Incurſion*, he ſays, *It may well be doubted, whether ſuch as theſe may rightly and properly be called Sins, becauſe, though we are at Liberty as to the doing each Particular, yet we ſeem to loſe that Liberty, when we conſider them in general.* For how can theſe Failures, taken collectively, eſcape the Nature of Sin, when at the ſame Time each Particular of them is acknowledged to be ſinful ? Tho' indeed ſuch ſmall Slips are in human Cognizance ſcarce look'd upon as puniſhable.

IX. Neither can thoſe Things be imputed which a Man does or ſuffers [1] upon Compulſion : For they will belong, in moral Eſtimation, to him who offers the Force, and he that receiv'd or executed them is look'd upon only as an Object or an Inſtrument. 'Tis a Rule with *Dionyſius Halicarnaſſæus*, [c] *That every Thing which is involuntary deſerves Excuſes.* And *Cicero* [d] argues with good Reaſon, when he ſays, *If we are oblig'd to pardon thoſe who hurt us out of Ignorance, we are not bound to thank thoſe who benefit us out of Neceſſity.* Now Compulſion is ſuppos'd to be apply'd, not only when the Principle of Motion is in another Man, who by Force bends the Members of a Perſon, to ſome Action or Suffering, of which the Perſon by ſtruggling and reſiſting, expreſſes his Abhorrence ; but, likewiſe, when a Man, by the Peril of Death, or of any [2] other extream Evil, is put upon the Execution of [3] ſome Enormity, to which he is otherwiſe exceedingly averſe ; yet ſo that he ſhall not be the Author of the Deed, but the other Perſon who compell'd him to it. Examples of the former Kind are, when a Man by Superiority of Strength violently thruſts another upon a third Perſon, or ſtrikes him with a forcible Bend of the other Man's Hand : Or when any one commits a violent Rape upon a Woman that did not provoke his Lewdneſs by her own Fault. Her Body indeed, in this Caſe, ſuffers Diſhonour, but the Blemiſh doth not reach her Soul. *The Body is ſtain'd, but the Mind is pure*, ſays *Lucretia* in *Livy*, *Lib.* i. *Cap.* lviii. See *Hen. Stephens*'s elegant Diſcourſe on that Story in his *Apolog.* for *Herodot. Cap.* xv. But a Nymph will not have the Benefit of this Interpretation, when, with a faint Reſiſtance, ſhe lets her Ring be ſtolen off from her [4] *digitus male pertinax*, as *Horace* calls it. An Inſtance of the latter Compulſion may be when a Sergeant, or a Guards-man, is commanded to kill a Man whom he knows innocent, under Pain of being immediately kill'd himſelf upon Refuſal : For he can by no Means lie under an *Imputation* in this Caſe, ſince nothing is enjoin'd him but the bare Execution, which in itſelf is agreeable enough to his Perſon and Character, and ought not to be refus'd upon the Hazard of loſing his Life : Eſpecially ſince tho' he threw away himſelf, he could not by that Means ſave the other innocent Party [5]. Yet it muſt be confeſs'd, that the bare

[a] *Veltbuyſen. p.* 174. [b] *Lib.* ii. *Cap.* xx. §. 19. [c] *Lib.* i. [d] *De Invent. Lib.* i. *Cap.* xxx.

[1] Our Author here ſpeaks of the Extremity that one is reduced to by the immediate Violence of a Perſon, who will force us to ſuffer, or do ſome thing. But he ought, alſo, to have ſet down what a Man is conſtrained to do by other Circumſtances, which are not leſs preſſing, and no leſs exclude all Imputation. In a word, we ought to reduce to this Head all the Effects of Neceſſity in general, of which we ſhall elſewhere ſee the Privileges, *Lib.* ii. *Cap.* vi. where the Paſſages in the Margin may refer to the Caſes of Neceſſity, which are omitted.

[2] Which he may ſuffer in that very Inſtant, as this Author adds, in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* i. §. 24.

[3] Our Author then believes, that this laſt ſort of Compulſion, as well as the firſt, excludes all Sorts of Imputation. He explains himſelf better upon this Head, in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* i. §. 24. where he maintains, That we can have no more Ground to impute the Actions committed in the like Circumſtances to the Agent, than to the Spear, or Ax, that is uſed to kill an Enemy with ; *At leaſt*, ſays he, *whoever is reduced to that Neceſſity, is not under any clear or expreſs Obligation, to ſacrifice himſelf for the Perſon to whom he ſees himſelf conſtrain'd, upon Peril of Life, to do ſome great Miſchief, which they have no Way deſerv'd.* I own that this Sort of Compulſion much leſſens a Sin, but yet it doth not ſeem to me (as Mr. *Titius* remarks, *Obſerv.* xl. and xlviii.) to free it from all Imputation at the Judgment-Seat of GOD. For indeed the Inſtance of the Spear and Ax is not well apply'd, for they are Inſtruments purely paſſive ; whereas a Perſon forced by the Threatnings of ſome great Evil, without any phyſical and irreſiſtible Violence, acts with a kind of Will, and conſents in ſome Manner to the Action, viſibly evil, which he performs. So that tho' before a civil Judicature he ought not rigorouſly to be puniſhed for the like Action, he can't attempt it without Hurt to his own Conſcience. Here, alſo, we may apply thoſe Principles which we ſhall lay down, *Lib.* ii. *Cap.* vi. §. 2, 3, following ; for in the Example which our Author there alledges, of an Officer, who was commanded, under Pain of being put to Death himſelf, to kill a Perſon when he knew him innocent, the Evil he does to ſuch an one, is as great as that he would ſave himſelf from, otherwiſe this Execution were an uncertain Means, becauſe it depends entirely on the Caprice of him who laid the Obligation on him. And who is there that can aſſure himſelf, that the Perſon, who forces a Man to do ſuch Things, ſhall have a greater Reſpect for him that executes his Orders, than for him, againſt whom he has uſed this Force ? This laſt Reaſon has yet a great Strength, as any one may ſee, when a Son is forced to lie with his Mother : An Action, which our Author ſeems to take ſome Pains to excuſe, when he is treating of the Caſe of Compulſion. See what is ſaid upon *Lib.* ii. *Cap* vi. §. 2. and upon *Lib.* viii. *Cap.* i. §. 6. *Note* 4. and Mr. *Thomaſius*'s *Divine Civil Law*, *Lib.* ii. *Cap.* ii. §. 149, and 161, &c. as alſo *Werner*'s *Elements of the Law of Nature and Nations*, *Chap.* ii. §. 9, 10. and my Note, Sect. 24. of the firſt Chap. of the *Abridgment of the Duties of a Man and a Citizen.*

[4] The Author refers to theſe Words of *Horace*, *Lib.* i. *Od.* ix. *Pignuſque direptum Lacertis, aut Digito male pertinaci.* See alſo, to the ſame Purpoſe, *Lib.* ii. *Od.* xii.

——— *Aut facili Saevitia negat,*
Quæ poſcente magis gaudeat eripi.

[5] But, in Anſwer to this, 1. The Danger is not always certain. There are many, who, in the firſt Heat of their Paſſions, utter Menaces, which they afterward are afraid to execute : The Refuſal of a Man (who, by a Principle of Integrity, ſhews he is reſolv'd to abide the laſt Extremity, rather than be the Inſtrument of a bad Action) often makes thoſe, who commands it, aſham'd

bare Execution of ſome Acts is ſo very foul and deteſtable, that it is a generous Bravery for a Man rather to die, than to apply his Body to ſuch Operations, tho' if committed, the Fault of them would not light on himſelf, but on others. To which Caſe the Paſſage of *Ariſtotle* relates, above-cited: An Inſtance of it may be, Suppoſe a Man ſhould be commanded to commit a Rape on his own Mother, which Fact, in *Oedipus*, tho' committed out of invincible Ignorance, yet tormented him ſo, as to make him tear out his own Eyes. But when *Ariſtotle*, *Ethic. Nicom. Lib.* iii. *Cap.* i. alledges for an Inſtance of a *forced* Action, the doing a *baſe Thing*, upon the Command of a [1] Tyrant, who has our Parents or Children in his Hands, and will ſave or kill them, according to our Obedience or Diſobedience; what he then calls αἰσχρὸν τὶ, or a *baſe Thing* [2], muſt be underſtood in a limited Senſe, ſo as not to reach thoſe more odious Villanies we are now ſpeaking of.

X. *Ignorance*, likewiſe, takes off all Imputation, ſo far as it renders the Action involuntary [a]. This Point may be illuſtrated from ſeveral Paſſages of *Ariſtotle*'s Morals; *Magn. Moral. Lib.* i. *Cap.* xxxiv. Ὅταν μὲν γὰρ ἡ ἄϊνοια αἰτία ᾖ τῦ πρᾶξαί τι, ἐχ ἑκὼν τῦτο πράττει, &c. "Whenſoever (ſays he) Ignorance has "been the Occaſion of doing a Thing, that Thing "is not done willingly, and conſequently cannot "be injurious. But when a Man is himſelf the "Cauſe of his own Ignorance, and out of that "Ignorance commits a Deed, he plainly offers an "Injury, and may in Juſtice be accountable for the "Crime. This is the Caſe of drunken Men, who "if they commit any Diſorder under that Condition, without Diſpute do a real Injury, ſince they "themſelves have been the Cauſes of their Ignorance. For 'twas in their Power, whether or no "they would tipple themſelves ſo far out of their "Senſes, as to make them (for Example) beat "their own Father. The ſame Rule will hold in "all other Inſtances of Ignorance, the Cauſe of "which is in the Agent; ſo that he who injures "another upon the Strength of thoſe Pleas, is nevertheleſs properly unjuſt. But thoſe Perſons "cannot by any Means be called *unjuſt*, who offend "out of Ignorance, not of their own procuring. "For ſuch Ignorance is to be eſteem'd Natural; "as when little Children ſtrike their Parents, their "natural Ignorance, which is the Cauſe of the Fact, "hinders it from being ſtil'd *Unjuſt*; the Ignorance "not at all depending on their own Power." So alſo *Seneca Phœniſ. vel Thebaid.* Ver. 249.

———Aliquis intra viſcera
Materna letum præcocis fati tulit;
Sed nunquid & peccavit?

———An Infant with untimely Fate,
Dies in the Womb before the Gift of Light;
And has it therefore ſinn'd?

But this muſt be extended no farther than *human* Conſideration.

But, in reference to Infants, it is farther obſervable, that we chide and beat them for ſome Actions, not becauſe in human Judgment they be ſtrictly Crimes, but meerly for the ſake of Amendment, that they may not prove troubleſome to others by ſuch Tricks, or may not get an ill Habit when they are little, and ſo keep it when they are grown up. And the ſame muſt be ſaid of delirious Perſons, provided their Diſeaſe was not occaſioned by their own Fault [3]. For the Blows given to one in this Condition, have no more the proper Nature of a Puniſhment anſwering to a Fault, than thoſe we give to a kicking Horſe, to break him of that Cuſtom. *Vid. Anth. Matthæ. de Crimin. Prolog. Cap.* ii. §. 5, 6, 7, 8.

But he who is the Cauſe of his own Ignorance, and who has wittingly and willingly hindred himſelf from the Knowledge of thoſe Things, which he might, and ſhould have known, is in the ſame Caſe as if he had offended upon Knowledge and Deliberation. *Ariſtot. Magn. Moral. Lib.* i. *Cap.* ix. *We then blame diſeas'd, or deform'd Perſons, when we judge them to have been the Authors of their own Diſtemper or Diſfigurement; becauſe it was in their Power to have kept ſound and perfect.*

And more fully, *Ethic. Lib.* iii. *Cap.* vii. *Legiſlators correct and puniſh thoſe who commit Evil, provided they did it neither upon Violence and Compulſion: nor out of ſuch Ignorance as they did not themſelves occaſion. For, otherwiſe, Ignorance itſelf is puniſhable, when contracted by the Perſon's own Fault. Hence there is a* [4] *double Puniſhment ordain'd againſt Drunkards, becauſe the Spring of that Vice is in a Man's ſelf, he having the Power of avoiding it; and therefore what he doth through Ignorance in that Condition, is nevertheleſs to be charged upon him. In like Manner*

[a] *Xenophon.* Cyropæd. Lib. iii. *I take all thoſe Things which Men commit thro' Miſtake, to be done againſt their Inclination and Deſign.* Euripid. Hippol. Coronat. Ver. 1334. *Your Ignorance and Error cleanſe the Deed from ſinful Stain.* ———

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aſham'd of themſelves, and retract their Orders. 2. Our Author, elſewhere, rejects (Book iii. Chap. i. §. 4.) the frivolous Excuſe, urg'd from hence, that, in Caſe of our Refuſal, other People would undertake to commit ſuch a bad Action. 3. It is not abſolutely above the Strength of the human Mind to reſolve to die, rather than counter-act our Duty. We have ſeen many Perſons brave Death upon very ſlight Occaſions: Even, among whole Nations, the Fear of Diſhonour has prevail'd upon the Women to inter themſelves alive with their Huſbands, in Obedience to the eſtabliſh'd Cuſtoms. Indeed, to conſider Mankind as they are, the Idea of Duty has not, commonly, an Impreſſion ſtrong enough to induce them to face Death, rather than obey an unjuſt Command: But this is their own Fault, for though the Thing be difficult, it is not impoſſible. 4. It is the Intereſt of human Society, that Men, in this Caſe, give Proofs of an invincible Conſtancy. The Reader may ſee, with Pleaſure and Admiration, the noble Anſwers, which *Hilvedius Priſcus*, a *Roman* Senator, made to the Emperor *Veſpaſian*, on an Order of this Nature, with the wiſe Reflections of *Arrian, Diſſert. Epictet.* Lib. i. Cap. i. To conclude, the Fear of a great Evil, eſpecially Death, may diminiſh the Crime of him, who commits, againſt his own Will, and the Light of his own Conſcience, a bad Action; but the Action will be always vicious in itſelf, and attended with Remorſe. The Philoſopher, *Hierocles*, admits of no Diſtinction. He maintains abſolutely, that a Son, threaten'd by his Father with Diſinheritance or Death, ſhould ſubmit to either, rather than execute an unjuſt Command. See the *Diſſertatio Epiſtolica de M. Wolfius*, Pag. 12. and the *Aureæ Carm.* of *Pythagorus*, Pag. 46.

[1] Mr. *Pufendorf* unwarily followeth a bad *Latin* Tranſlator, who has rendred theſe Words ill, though plain enough in themſelves. They that do it, ſhall eſcape, and they that will not do it, ſhall periſh, as if the *Greek* had been, πραξάντες, whereas it is, πράξαντος, *He that does it.* The *Engliſh* Tranſlator has amended this Fault.

[2] But why muſt this Caſe be excepted, if our Author's Principles be ſound? Or what Rule doth he give us to diſtinguiſh theſe Sorts of Things, where Force excludes not Imputation? The Truth is, we muſt either excuſe every Act of Compulſion, how infamous ſoever it be in itſelf, or account every Thing vicious, which we cannot do innocently of ourſelves, and in our own Name, let the Threatnings of him, that would conſtrain us, be never ſo terrible. See *Note* 3. of this Paragraph. The Change of our Author, and the ſmall Connexion there is between his Notions in this Matter, ſhew, that he had not conſidered it with ſufficient Attention.

[3] Suppoſing this ſhould happen. See my Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. i. §. 25. laſt Editions.

[4] The one for being drunk, and the other for having done wickedly in their Drunkenneſs, for he treats not of all Sorts of Drunkenneſs, but only of ſuch as do ſome Injury in their Wine. *Ariſtotle* alludes to a Law of *Pittacus*, of which he ſpeaks, *Polit. Lib.* ii. *Cap.* xii. Our Author quotes it. *Lib.* viii. *Cap.* iii. §. 21. where we ſhall ſee upon what it is grounded.

they punish those who plead Ignorance of the Laws, when the Points were easy, and such as ought to have been known. The Case is the same with all that are ignorant by their own Neglect, they being Masters of their own Powers, and capable of Diligence and Application. Ignorance of Universals, and that which we were obliged to know, does not take off Imputation; but only Ignorance of Particulars, and of what concerns the present Fact. *Aristot. Ethic. Lib.* iii. *Cap.* ii. *He that is ignorant of his Duty or Interest, ought not to be said to act against his Will; for Ignorance upon Choice doth not produce an involuntary, but a wicked Action. An Ignorance of Universals renders Men liable to Reprehension; but an Ignorance of Particulars, or of the Circumstances of the Action, deserves Pity and Pardon, in as much as the Person thus offending doth truly proceed involuntarily.* An Example of this Ignorance is thus given by *Tully, de Invent. Lib.* ii. *Cap.* xxxi [1] *There was a Law in some certain Place, forbidding to sacrifice a Calf to* Diana; *now a Company of Mariners being in Distress at Sea, made a Vow, that if they gain'd the Port, which was now in sight, they'd offer a Calf to the Deity who presided there. It happen'd that in that very Port there stood a Temple of* Diana, *to whom no Calf was to be offered by the Laws; but the Mariners not being acquainted with these Laws, offered the Calf which they promis'd: and upon this Fact they are accus'd* [2].

If an Action be done without any malicious Design, and not with Ignorance voluntarily contracted, but such only as crept in by Inconsideration and Inadvertency [a], the Imputation is not altogether taken away, yet it is considerably diminished [3]. And thus far only may we allow the Saying of *Quinctilian, Inst. Lib.* i. *Cap.* vi *Even an Error is commendable in those who follow great and noble Guides.* Vide *Aristot. Ethic. Lib.* v. *Cap.* x. Hither we may refer the Case propos'd by *Aristotle* [b], of a Woman that gave a Love-Potion to her Gallant, of which he died. Now the *Athenian* Judges absolved the Woman from this Indictment, because she did the Fact undesignedly, and only miss'd the Effect of her Potion, and procur'd his Death instead of his Love, which was her only Aim. But to make this Sentence equitable, it must have been suppos'd as a Principle, that the Woman never so much as thought the Potion she administred was any way hurtful. For otherwise it were more rational to proceed according to [4] the Law of the *Roman* Lawyers. Add. *Anth. Matth. de Crimin, ad l.* 48. *D. Tit.* 5. *Cap.* v. §. 6.

XI. Farther, Since the Images form'd by the Fancy, in Sleep, are not in our Power, nothing can be imputed to us which we seem to do in a Dream, only as far as by thinking on such Things [5] in the Day-time with Delight, we have fix'd the Ideas deeply in our Minds [c]. Hence the Man whom *Tacitus* [d] speaks of, and reports to have seen the Emperor *Claudius* in his Sleep, covered with a *Crown made of Ears of Corn*, was not guilty of any Crime. And the Fisherman in *Theocritus* [e] entertain'd a very vain Scruple, when he appear'd concern'd for an Oath he had made in his Sleep, never to venture out again to Sea [f]. Neither was *Julius Cæsar* guilty of Incest, upon Account of his strange Dream, recorded by *Sueton* [g]. Yet *Byblis* was not altogether innocent, when, as *Ovid* tells the Story, *Met.* ix. 469.

Sæpe videt, &c.

In Sleep she oft does the lov'd Shadow seem
To grasp, and joys, yet blushes in her Dream.
Mr. *Oldham.*

Nor is *Plutarch* [h] much out of the way, when he maintains, that a fair Argument may be drawn from a Man's Dreams, as to the Temper and Composure of his Mind: And therefore 'twas a good Saying of *Epicurus*, That *a wise Man will be like himself, even in his Sleep* [6]. *Diog. Laert. Lib.* x. Some apply to this Purpose, *Psal.* xvii. 3. *Vid. Claudian Præf. ad Lib.* iii. *de Raptu Proserp. Theocrit Idyll.* 22.

[a] *These are properly the ἁμαρτήματα of* Aristotle.
[b] *Magn. Moral. Lib.* i. *Cap.* xvii.
[c] *Nonn. Dionys. Lib.* iv. ——'Αλλότυπον γὰρ
"Εργον ὅπερ τελέει τις ἐν ἤματι νυκτὶ δοκεύει.
——Fancy's idle Play
Mimicks by Night the Labours of the Day.
[d] *Ann.* xi. *Cap.* iv. *See Ammian. Marcellin. Lib.* xv. *Cap.* ii. [e] *Idyll.* 22. [f] *See* Evagrius's *Oath made in a Dream, in* Sozomen, *Hist. Eccl. Lib.* vi. *Cap.* xxx. [g] *Cæs. Cap.* vii. Nam visus erat per quietem matri stuprum intulisse.
[h] *De Profect. Virtut. Sent.*

[1] The one for being drunk, and the other for having done wickedly in their Drunkenness, for he treats not of all Sorts of Drunkenness, but only of such as do some Injury in their Wine. *Aristotle* alludes to a Law of *Pittacus*, of which he speaks, *Polit. Lib.* ii. *Cap.* xii. Our Author quotes it, *Lib.* viii. *Cap.* iii. §. 21. where we shall see upon what it is grounded.

[2] *Apud quosdam lex erat, ne quis Dianæ vitulum immolaret. Nautæ quidam, cum adversâ tempestate in alto jactarentur, vovêrunt, si portu—potiti essent, se vitulum immolaturos. Casu erat in eo portu fanum Dianæ, &c.*

[3] This Passage of *Quintilian* relates only to Errors of Style, into which we fall, by imitating celebrated Authors. See *Quint. Edit. Burm.* Pag. 42.

[4] The *Roman* Law is this, That when one gives a Potion to cause a Miscarriage, or to cause Love, although the Party, who gives it, has no Design to do Evil, nevertheless, by reason of its Consequences, he should be condemned, besides some Part of his Goods confiscated, either to the *Mines*, if he were of a mean Condition, or to Banishment into some Isle, if he were of a good Family. But if the Man or Woman, who had taken the Potion, died of it, he was condemned to Death, without Mercy, *Digest. Lib.* xlviii. *Tit.* xix *de Pœnis, Leg.* xxxviii. §. 5. and the *Recepta Sententiæ* of *Julius Paulus, Lib.* v. *Tit.* xxiii. §. 14. with M. *Schulting*'s Notes upon it, in his *Juris Prudentia Ante-Justinian.* In fine, that we may have a just Idea of invincible Ignorance, as to Imputation, let that be remembred, which we have observed *Chap.* iii. §. 10. *Note* 2. For Ignorance purely concomitant, in the Manner we have explained it, be it vincible, or invincible, doth not hinder Imputation, and to know whether it be invincible, or no, we must judge according to common Estimation, *Titius Observ.* xlv. See *Cap.* vii. §. 16. following.

[5] See what Mr. *Bayle* says, concerning such as have dreamed, that they were present at the Meetings of Magicians and Sorcerers, in his *Answer to the Quest. of a Provinc. Tom.* i. *Pag.* 304, 305.

[6] Some of these Quotations of our Author are not much to the Purpose. He puts the Third Book of *Claudian de Raptu Proserp.* for the Second, and one Work for another; for his Quotation is taken out of his Preface to his Poem in VI. *Consul. Honori. Omnia quæ sensu volvuntur vota diurno, Pectore sopito reddit amica quies.* See *Lucretius, Lib.* iv. *Ver.* 959, *&c.* and *Cicero*'s *Somn. Scip. Cap.* i. Here he ought to have spoken of the Actions of such as walk in their Sleep, who have been beaten, wounded, and killed others, while they were in that State. The Canon Law in the *Clementines* propounds such a Supposition, and determines, that their Actions are involuntary, and, consequently, not punishable. *Si furiosus, aut infans, seu dormiens hominem mutilet, vel occidat, nullam ex hoc irregularitatem incurrit, Leg. de Homicid. vol. & cas. Lib.* v. *Tit.* 4. But Mr. *Hertius* adds, with Reason (in his Treatise *De Paræm. Jur. Germanic. Lib.* iii. *Paræm.* 1. §. 4.) That if a Person who walks in his Sleep, being advertised of what he does in that State, does not secure his Arms, and take other necessary Precautions to hinder him from doing any Mischief whatsoever, he is not excusable. See *Tiraquel. de Pœn. temper. Caus.* 5. Mr. *Thomasius* has published a Treatise of the Laws about Sleep and Dreams, which is the XI. of his Disputations held at *Leipsick*, and are collected into one Volume, Printed 1695.

————Καὶ γὰρ ἐν ὕπνοις
Πᾶσα κύων ἄρλως μαίνεύεται.——

The hungry Dog presages in his Dream
A mighty Spoil of Crusts.——

XII. Lastly, It is against Reason, that the *Imputation* of any future Crime should be, as it were, *antedated*, or that it should affect us backwards: unless, perhaps, the future Crime should depend on some [1] past or present Act of ours, as a necessary Effect does on its Cause: For it is a common Thing to impute the Effect to him to whom the Cause properly belong'd. Indeed it is not at all absurd, that by *Imputation* of *Favour* a future Deed shall procure some good Thing to the Agent, or to some Body else, long before it is perform'd. For since any Man may (if he pleases) do a Kindness *gratis*, it is certainly in the Power of a Benefactor, who knows what will afterward happen, to confer a present Favour under some Term and Condition hereupon to be fulfilled. But since ill Actions cannot be imputed, but by way of Debt or Guilt, it would be the highest Absurdity, to reckon so far backwards, as to lay Imputation on Persons who neither had any Knowledge of Futurity, nor any Obligation or Power to hinder the Thing from being done; nor, lastly, any Communication of Action with the Author of the Fact [a] [2].

XIII. Beyond these Exceptions no Human Action ought to be reckon'd involuntary or incapable of Imputation, tho' to undertake it be never so contrary to right Reason, or tho' any Disorder of Mind violently hurry us into the Commission. Indeed *Plato* [b] lays it down for a Rule, That "in those "Injuries, which 'tis impossible to repair, no Man "is voluntarily injurious, because no Man is wil-"ling to admit the greatest of Evils into any of "his Concerns, and much less into those Things "which are most dear to him, and most excellent "in themselves; such as is his Soul [c]." To the same Purpose *Aristippus* says in *Diogenes Laertius*, "That all Mistakes (by which he means all smaller Offences) "deserve Pardon, because no Person is "mistaken willingly, but as he is compell'd by "some Perturbation of Mind." And the Emperor *Antoninus* frequently advanceth the like Doctrine [d]. But *Aristotle* hath, in many Places, refuted this Opinion. As when [e] he recites the following Argument of *Socrates* [3], design'd to prove, that *it was not in our Power whether we would be good or bad*: "Be-"cause, supposing we should ask any one, whe-"ther he had rather be just or unjust, no Man "would choose Injustice; whence it should appear, "that if some Men are wicked, they are not wicked "of their own Accord, and, consequently, none are "of their own Accord good." In Confutation of which *Aristotle* hath us'd these Reasons; "That it "would be absurd for a [4] Lawgiver to enjoin good "Actions, and to forbid and to punish Evil, unless "both were ἐφ' ἡμῖν, *in our Power*: And that other-"wise there would be no manner of Cause why "Virtue should meet with Praise, or Vice with "Disgrace and Reproach." In another Work [f] he handles the Point more at large, and, with good Reason, [5] rejects that common Argument of the *Stoicks*, *All desire and follow what appears good to them*; *but now no Man is Master of his own Fancy, but the Ends he pursues appear to him just, according as he is inclin'd and dispos'd*. For in spight of this Objection, the Understanding of what is just, and what unjust, must be acknowledg'd both to be in the Power of Man, and to be attainable without much Difficulty or Labour [g]. In the same Place *Aristotle* well observes, that as Ignorance contracted by our own Fault doth not render an Action involuntary, so neither can an ill Habit, or a Mind corrupted by Frequency of sinning [6]. "If (says he) a "Man, not out of Ignorance, does Things which "may denominate him unjust, he is voluntarily "unjust; but he cannot, at his Will and Pleasure, "turn from unjust to just again (but this we are to understand [7], either in a compound Sense, *i. e.* that

a *Cicero de Invent. Lib.* i. *A* Remote *Argument is such, as depends on a Cause and Principle too far distant. For Instance, If* P. Scipio *had not married his Daughter to* Tiberius Gracchus, *by whom she brought forth the young* Gracchi, *the Seditions had been prevented, which those Brothers rais'd in the State: And therefore all these Disturbances are chargeable on* P. Scipio.
b *De Leg. Lib.* v. c *Vid. Timæum*, Pag. 1085. *& Marsil. Ficin Præfat. ad Plato, Lib.* ix. *de LL. & Apulei de Philosophia.*
d *Lib.* iv. §. 3. *Lib.* vii. §. 22, 62. *Lib.* viii. §. 14. *Lib.* xi. §. 13. e *Magn. Moral. Lib.* i. *Cap.* ix. f *Ethic. Lib.* iii. *Cap.* vii. g *Vid. Eustrat. ad loc.*

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1 'Tis in the Original, *Present or Future*, which is a plain Mistake, and ought to be corrected thus, *Present or Past*, for that a future Crime be imputed by way of Retrospection, upon the Account of some Action, which it is necessarily consequent upon, that Action must necessarily be produced. This is so true, that the Author himself, in his *Elements of Universal Civil Law*, *Pag.* 368. from whence these Words are copied, expresses himself exactly so. Neither the *English* Translator, nor Mr. *Hertius*, were aware of this Mistake, which quite spoils the Sense.

2 *Remotum est, quod ultra quàm satis est, petitur, hoc modo: Quod si non P. Scipio Corneliam filiam Tiberio Graccho collocasset, atque ex eâ duos Gracchos procreasset, tantæ seditiones natæ non essent; quare hoc incommodum Scipioni ascribendum videtur.* Cicero de Invent. Lib. i. Cap. xlix. See also the Thought of *Vindex* above, §. 7.

3 Σωκράτης ἔφη, ἆρ' ἐφ' ἡμῖν γενέσθαι τὸ σπουδαίους εἶναι ἢ φαύλους· εἰ γάρ τις, φησὶν, ἐρωτήσειεν ὕτινα ἂν, πότερον ἂν βέλτιστο δίκαιον εἶναι, ἢ ἄδικον, εἰδὼς ἂν λέγοιτο τὴν ἀδικίαν——δῆλον ὡς εἰ φαῦλοί τινές εἰσιν, ἑκὼν ἂν ἐκείνες εἶησαν φαῦλοι· ὥστε δῆλον ὅτι ἐφ' ἡμῖν ἐστὶ σπουδαίοις, *Magn. Moral. Lib.* i. *Cap.* ix. We may observe, that there is something of Truth in this Notion, *viz.* That usually Men do not sin for nothing, nor do any ill Thing, purely and simply for Evil-doing. 'Tis a common Maxim used by *Sallust*, *Men are wicked for Rewards, take away them, and scarce any Man will do Evil. Orat.* ii. *de Repub. Ordinan.* See *Lib.* iii. *Cap.* i. §. 1. *Note* 5. following, and *Lib.* viii. *Cap.* iii. § 19. *Note* 1, 2. The Use of this Principle is to make us tender to our Neighbour's Faults, a Consequence which the Emperor *Antoninus* draws from most of the foregoing Places; but when we deal with ourselves, as we never are severe to our own Faults, let us turn the Balance, and always say, as *Max. Tyrius*, though a *Platonist*, expresses himself pithily, and in a few Words. Ἐκέσιον ἡ μοχθηρία——μισεῖται τὰ ἑκούσια. *Dissert.* xli. *p.* 426. *Edit. Davis.*

4 The *Greek* of *Aristotle* runs thus: Ὁ δὴ τοιοῦτος λόγος οὐκ ἔστιν ἀληθής. διὰ τί γὰρ ὁ νομοθέτης οὐκ ἐᾷ τὰ φαῦλα πράτλειν, τὰ δὲ καλὰ καὶ σπουδαῖα κελέυει; καὶ ἐπὶ μὲν τοῖς φαύλοις ζημίαν τάτλει, ἂν πράτλῃ. ἐπὶ δὲ τοῖς καλοῖς, ἂν μὴ πράτλῃ; καί τοι ἄτοπος ἂν εἴη ταῦτα νομοθιῶτων, ἃ μὴ ἐφ' ἡμῖν ἐστὶ πράτλειν. ἀλλ' (ὡς ἔοικεν) ἐφ' ἡμῖν τὸ σπουδαίοις εἶναι, καὶ τὸ φαύλοις, ἔτι δὲ μαλλυθῆσαι τ' ἔπαινοι καὶ ψόγοι γινόμενοι· ἐπὶ μὲν γὰρ τῇ ἀρελῇ ἔπαινος, ἐπὶ δὲ τῇ κακίᾳ ψόγος· ἔπαινος δὲ καὶ ψόγος οὐκ ἐπὶ τοῖς ἀκουσίοις. *Arist. Mag. Mor. Cap.* ix.

5 The *Greek* is, Εἰ δέ τις λέγοι, ὅτι πάντες ἐφιένται, τῷ φαινομένῳ ἀγαθῷ, τῆς δὲ φανλασίας ὁ κύριοι, ἀλλ' ὁποῖός τις ἕκαστός ἐστι, τοιοῦτο καὶ τὸ τέλος φαίνεται αὐτῷ. *Ethic. ad Nicom. Lib.* iii. *Cap.* vii. He answers to this, 'That as every one is, himself, the Cause of that Disposition, which causes Things to appear to us after a certain Manner, so he is, in some Sense, the Cause of that Appearance, as these Words import, εἰ μὲν ὃν ἕκαστος ἑαυτῷ τῆς ἕξεώς ἐστι πως αἴτιος, καὶ τῆς φανλασίας ἔσται πως αὐτὸς αἴτιος. See *Eustratius*'s Comment on the Place.

6 The *Greek* is, Εἰ δὲ μὴ ἀγνοῶν τις πράτλει, ἐξ ὧν ἔσται ἄδικος, ἑκὼν ἄδικος ἂν εἴη· ὁ μὴν ἐάν γε βέλτιστα, ἄδικος ὢν παύσεται, καὶ ἔσται δίκαιος· οὐδὲ γὰρ ὁ νοσῶν, ὑγιὴς· καὶ εἰ ὅτως ἔτυχεν, ἑκὼν νοσεῖ, ἀκραλῶς βιοτεύων, καὶ ἀπειθῶν τοῖς ἰατροῖς· τότε μὲν οὖν ἐξῆν αὐτῷ μὴ νοσεῖν· προεμένῳ δὲ, οὐκ ἔτι· ὥσπερ οὐδ' ἀφεὶς λίθον, ἔτι αὐτὸν δυναῖὸν ἀναλαβεῖν· ἀλλ' ὅμως ἐπ' αὐτῷ τὸ βαλεῖν, καὶ ῥίψαι· ἡ γὰρ ἀρχὴ ἐπ' αὐτῷ· ὅτω δὲ καὶ τῷ ἀδίκω, καὶ τῷ ἀκολάστῳ, ἐξ ἀρχῆς μὲν ἐξὴν τοιούτοις μὴ γενέσθαι· διὸ ἑκούσιοι εἰσί· γενομένοις δὲ οὐκέτι ἔξεστι μὴ εἶναι. *Ethic. Nicom. Lib.* iii. *Cap.* vii.

5 That is to say, that the Wicked, as such, can't desire to be good Men. See the *Art of Thinking*, *Part* iii. *Chap.* xviii. § 6

he cannot be juſt and unjuſt at the ſame Time; or elſe in this Meaning, that the bare Will cannot preſently aboliſh a confirm'd Diſtemper of the Mind; tho' by long and earneſt Endeavour it may be overcome) " no more than a ſick Man can be " found again when he pleaſeth, tho' his Sickneſs, " perhaps, was voluntary, occaſion'd either by his " intemperate Way of Life, or by his Diſobedience " to the Orders of his Phyſician: Such a Perſon at " firſt had it indeed in his Power not to be ſick; " but when he hath once neglected his Health, it " is not in his Power to reſtore it: In the ſame " Manner, as one, who hath thrown a Stone out of " his Hand, cannot recover it again, though, at firſt, " he had the Power of throwing, or not throwing " it. Thus the unjuſt and the intemperate, at firſt, " might have been otherwiſe, and therefore were " voluntarily ſuch, but being once under thoſe " Conditions, they are not at Liberty to be without " them; that is, before they have reform'd and " corrected themſelves [1]."

It may not be amiſs to caſt an Eye upon what the Author of the Treatiſe *De Principiis Juſti & Decori*, *p.* 165, &c. hath advanced on the Subject of moral Habits. " Thoſe moral *Habits*, which we com- " monly call Evil, are not (ſays he) really [2] Sins, " nor worthy of Puniſhment, if conſider'd in them- " ſelves; becauſe they do not touch the Effect with " any moral Cauſality, ſo long as they continue " *Habits*, but only as they break out into *Acts*. " And if they prove a Hindrance to Virtue, this is " done by an *elicit Act* of Men's Will, which Will " is then the Cauſe of the moral Vice. But to " eſtabliſh a moral Cauſe ſuperior to the Will, is " to take away the Nature of that Faculty, it is to " turn one *elicit* into an *enjoin'd* Act, and to attri- " bute to Habits an actual Efficacy of operating " without any Operation. For we operate only by " the Will, and nothing truly moral can work be- " fore the *elicit* Act of that Power, from which " alone proceeds the Morality of any Performance. " For an ill *Habit* before the Act of the Will, is " only a *phyſical* Thing, or a *Mode* of the Soul; " but when the Soul works ſinfully by the Will, " then the *Habit* ceaſeth, and is ſuperſeded. The " Efficacy by which ill Habits diſpoſe the Mind to " ill Actions, is different from that (for Inſtance) " by which lewd Diſcourſe inſtils Wantonneſs into " the Minds of the Hearers: Becauſe that Diſ- " courſe may be properly ſaid to *work* antecedently " on the Will of him to whom it is applied, tho' " the Effect doth not always follow." Which abſtruſe Doctrine may fitly enough be explained by this Similitude: Splayneſs of Foot in itſelf, and as long as the Foot reſts, is not a Fault againſt the Rules of Dancing, but when the Spark makes an ill Step; the moral Cauſe of that Miſcarriage is not the *turning out of the Toes too far*, conſider'd in itſelf, but the Will of him that hath ſo aukwardly mov'd them.

The ſame Author adds, That " the Reaſon why " we hate ill Habits, is partly, becauſe the Perſons " got them by ill Actions, and partly, becauſe they " are more prone to ill Actions on the Account of " them:" And that *tho' they are Diſeaſes of the Mind, yet they do not deſerve Puniſhment in themſelves, but becauſe they were voluntarily contracted.* As if we ſhould ſay, when we beat an unlucky Boy that puts out his Ankle by a wanton and negligent Leap, the Reaſon why we beat him, is not the putting out his Ankle (*in itſelf*) but the idle Leap that caus'd it.

XIV. A Man is not only liable to have his own Actions imputed to him, but, likewiſe, the Actions of other Men. Yet this cannot rightly be, unleſs he has ſome way or other efficaciouſly concurr'd in their Production. For otherwiſe Reaſon will never ſuffer, that the Effect of a moral Action ſhould be transferr'd from one to another, unleſs this other Perſon had ſome Influence on the Action, by ſome Performance, or ſome Omiſſion of his own. *Arrian. Epict. Lib.* i. *Cap.* xxviii. [3] *No Man ſuffers for the Fact of another.* Marc. Antonin. *Lib.* viii. §. 53. *Unto my Free-Will my Neighbour's Free-Will* (*as his Life, or his Body*) *is altogether indifferent. For altho' we are all made one for another, yet have our Minds and Underſtandings each of them their own proper and limited Juriſdiction. Elſe another Man's Wickedneſs might be my Evil; which* GOD *would not have, that it might not be in another Man's Power to make me unhappy.* Thus when a Sound arrives at our Ears againſt our Conſent, the bare *Hearing* can be no Crime, if we proceed no farther; unleſs, as [4] *Lucian De Imagin.* ſpeaks, *You fancy any Crime in the bare Act of Hearing.* Though ſometimes, indeed, a quiet and ſilent Hearing is conſtrued as a Token of Conſent. And 'twas on this Account, that the brave *Germanicus*, when, on the News of *Auguſtus*'s Death, his ſeditious Soldiers offer'd him the Empire, ſtarted immediately in Confuſion from his Seat of Command, *as if he had been already tainted with*

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[1] Now that a Man may hinder himſelf from yielding to a Paſſion, and may reform an ill Habit, at length, if he pleaſes to take the Pains, appears not only from the ſecret Checks, which he finds in himſelf when he ſins, and the inward Senſe he has of the Freedom of Will, by which he acts, but, alſo, by Experience. It often happens, that, in the very Moment, when a Man is upon the Point of offending, the Preſence of ſome conſiderable Perſon, or of a Magiſtrate, who has Power to puniſh the Action, is of Force to prevent the Commiſſion; and there are ſome Men, who can curb themſelves in, when their Paſſions are ſtrongeſt: Sometimes, alſo, a ſmall Thing is able to make us reſiſt a Temptation. Suppoſe, for Example, an hard Drinker, being in perfect Health, and free from all Cares, comes thirſty into a Tavern, where he finds his Companions with Glaſs in Hand, who doubts, but that, upon a Wager, he could, and would reſiſt all Allurements of the Objects which might tempt him, and the moſt earneſt Entreaties of his Comrades? Since then the Hopes of a ſmall Gain, or a little Vain-glory, is able to induce him to abſtain from a Thing he loves ſo well, why may he not be able, by little and little, wholly to abſtain from it, being moved with better Arguments, and a Principle of Virtue? It is certain, at leaſt, that if a Prince reſolves to make ſevere Laws againſt *Drunkenneſs*, and ſees them well executed, he'll ſoon put a Stop to that Vice. 'Twas by this Means, that the Madneſs of *Duelling*, not long ſince ſo very common in *France*, *Brandenburg*, *Saxony*, &c. is almoſt quite laid aſide, becauſe of the ſevere Prohibitions of that pernicious Cuſtom; and we ſhould ſee fewer Examples of it, if the Laws againſt it were not eluded, by the Addreſs of making a Duel paſs for a ſingle Rencounter. See *Chap.* iv. §. 7. *Note* 2. foregoing, and Mr. *Clerc*'s *Ontology*, *Chap.* xiii. §. 4. In a Word, we may ſay, with an ancient *Greek* Poet, That it is, in Truth, hard to reform an ill Habit, that is become almoſt natural, but not impoſſible, ſince we have ſeen ſeveral Perſons reform their Manners by good Advice given them by others, as his Words ſhew,

Τὸ γὰρ ἀποσῆναι χαλεπὸν
Φύσεῳ ἣν ἔχει τὶς ἀεί.
Καί τοι πολλοὶ ταῦτ' ἔπαθον.
Ξυνόντες γνώμαις ἑτέρων
Μεταβάλλονθ' τῦς τρόπους.
Ariſtoph. Veſp. ℣. 1446.

[2] Very well, but they are anſwerable for their evil Diſpoſitions, becauſe they have brought them on themſelves, by their own Fault. In ſhort, all theſe Reaſonings contain nothing in them, but the idle Speculations of ſubtile Philoſophy.

[3] The *Greek* of *Arrian* runs thus: Δι' ἀλλότριον ἔργον πταίει ἀδεὶς, &c. *Antoninus*'s thus, Τῷ ἐμῷ προαιρετικῷ τὸ τῦ πλησίον προαιρετικὸν ἐπίσης ἀδιάφορόν ἐστιν, ὡς κὴ τὸ πνευμάτιον αὐτῦ, κὴ τὸ σαρκίδιον· κὴ γὰρ εἰ ὅτι μάλιστα ἀλλήλων ἕνεκεν γεγόναμεν, ἀλλ' ὅμως τὰ ἡγεμονικὰ ἡμῶν ἕκαστον τὴν ἰδίαν κυρίαν ἔχει· ἐπεί τοι ἔμελλεν ἡ τῦ πλησίον κακία ἐμῷ κακὸν εἶναι· ὅπερ οὐκ ἔδοξε τῷ Θεῷ, ἵνα μὴ ἐπ' ἄλλῳ ἦ τὸ ἐμὲ ἀτυχεῖν. *Marc. Antonin. Lib.* viii. §. 56.

[4] *Lucian*'s *Greek* is this, Ἐκλὸς εἰ μή τινα νομίζεις ἀκροάσεῳ ἐυθύνην εἶναι. *Apolog. in fine.*

Rebellion,

Rebellion, Tacit. Annal. *Lib.* i. *Cap.* xxxv. So, alſo, [1] *Themiſt. Orat.* xix. *Heretofore, in Crimes of this ſort, no Diſtinction was made between Misfortune and Guilt: It being judg'd as heinous to hear a villainous Propoſal, though againſt one's Will, as to contrive the Plot, or to attempt the Execution. But this was indeed to cenſure and reproach Nature for framing our Ears flat and open, and for not putting it in our Power to cloſe and contract them, as we do our Eyes or our Mouth: Since theſe alone, of all our Inſtruments of Senſe, are plac'd beyond our Will and Command, lying ready to receive, of Neceſſity, every Thing that flows in, like a Houſe without Gates or Doors. But* you, *at length, have reſtor'd our Faculty of Hearing to its juſt Character of Innocence.*

Sometimes, then, it happens, that an Action is not *imputed* to the immediate Performer of it, but to him who commanded it to be done. As when a Superior, under the Penalty of the ſevereſt Evils, and ſuch as he is really able to inflict, enjoins a Subject the bare Execution of ſome Deed. Thus, as [2] *Procopius Hiſt. Goth. Lib.* i. well obſerves, "An "Ambaſſador, at the Command of him whom he "repreſents, ſpeaks ſuch and ſuch Words; in which "if there appear any Fault or Offence, it ought "not to be charged on him, but on his Maſter, "whoſe Orders and Inſtructions he is under a Ne"ceſſity of obeying." When the *Roman* Senate declar'd the League with the *Samnites* to be baſe and inglorious, and voted the delivering up the General, the Author of it, to the Enemy, it was a very ſenſeleſs Propoſal, mov'd by one of the grave Fathers, that the ſame Puniſhment ſhould be inflicted on the Perſon who held the *Swine*, during the Ceremony of making the Agreement [a] [b]. When *Mithridates* put to Death *Attilius* and other Conſpirators againſt his Life, he pardon'd *Attilius*'s Freed-men, who were of the Company, ὡς δεσπότῃ διακονησαμένους [c], *as Perſons that only obey'd their lawful Maſter.*

But it's more uſual that the Action ſhall be imputed both to the Performer and to the Commander of it. And this is chiefly done in theſe three Ways: Either, that the Commander ſhall be the principal Cauſe of the Action, and the Performer, the inferior and acceſſary Cauſe, or that both ſhall be deem'd equally guilty, or that the Commander ſhall be the inferior Cauſe, and the Performer the Principal. And in all Caſes the Concurrence to another Man's Action is made either poſitively or privately, by ſome Commiſſion or Omiſſion.

Firſt then, he is eſteem'd the principal Cauſe of an Action commi·ted immediately by another Man, who commands ſomething to be done by one under his Power and Sway, or who, by his bare [3] *Authority*, not eaſily to be reſiſted, moves a Man to the Performance of ſome Deed, which he could not have enjoin'd by Command or Power, properly ſo call'd. And this laſt was the Caſe of *Piſo* in [4] *Tacitus*, whom *Tiberius* himſelf *excuſed from having any Guilt in the Civil War, ſince as he was a Son he could not decline his Father's Orders* [d]. But now his Father, by his paternal Right and Power, could not have obliged him to engage in ſuch a Crime, and therefore he was mov'd only by his *Authority*.

Secondly, He who gives a Conſent neceſſarily requiſite to the Performance, and without which the Agent had not proceeded. *Comp. Valer. Max. Lib.* ii. §. 8. §. 2. [5] *Liban. Progymn. He is to ſuffer for the Fault, without whoſe Leave it had not been committed.* Id. ib. *They are not ſo properly to be accounted the Authors of Crimes, whoſe Hands commit them, as they who gave the Power and Authority of committing them.*

Thirdly, He who ought to have forbidden an ill Action, and did not; provided he had a full Obligation thus to prohibit it, and that upon the Account of that Obligation other Men had a Right of exacting ſuch a Prohibition from him. *Vide Lib.* xlv. *D. ad L. Aquil. Lib.* ii. *De Noxal. act. Lib.* i. §. 1. *D. famil. furt. fec.* Seneca Troad. *Qui non vetat peccare cum poſſit, jubet.* Not to forbid a Sin, when in our Power, is to command it. *Sophocl. Philoctet* [6].—— *Men are influenc'd into Vice by bad Inſtructors.* On this Score *Diogenes* beat a School-maſter, whoſe Boys were too much given to their Bellies, *Not imputing*

[a] *This Cuſtom of uſing Swine, at Times of Pacification, is accounted for,* Livy, Lib. i. Cap. xxiv. *Si populus Rom. prior de fecerit publico Conſilio, dolo malo; Tu illo die, Jupiter, P. Rom. ſic ferito, ut ego hunc Porcum hodie feriam: tantoque magis ferito, quanto magis potes polleſque. Id ubi dixit, Porcum Silice percuſſit. To this Purpoſe,* Virg. En viii. 641.——*Caſa jungebant fœdera Porca. See Mr.* Kennet's Roman Antiquities, Part ii. Chap. xvii. [b] Cicero de Invent. Lib. ii. Cap. xxx. Mamertin. Paneg. i. *Whatever is tranſacted by his Commiſſion, is properly the Deed of the Emperor. Seneca Troad.* Ad authores redit ſceleris coacti culpa. *The Guilt of Miſchief, acted upon Force, turns on the Authors*—— [c] *Appian. B. Mithridat.*

[d] *Add. Lib.* xxxvii. *Princ. D. ad L. Aquil. Lib.* ix. §. 2. &c. *D. De Injuriis; Ant. Matth. de Crimin. Proleg. Cap.* i. §. 13.

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[1] *Themiſtius*'s Words *(Orat.* xix. *De humanitate Theodoſii,* Pag. 230. *Ed. Par. Hard.)* are, Καὶ πάλαι μὲν ἐ διεκέκειλο ἐν τῷ τοιῷδε ἐγκλήματι ἀδίκημα δυσυχήματος, ἀλλ' ἐν ἴσῳ καθειστήκει τὸ βουλεῦσαί τι τῶν ἀθέσμων, ἢ τὸ πυθέσθαι μὴ προελόμενον· καί τοι τῆς φύσεως ἔγκλημα ἦν τοῦτο, ἐ τοῦ ἀνθρώπου, ὅτι τὴν ἀκοὴν ἐποίησεν ἀναπεπταμένην, ἢ ἔχ ὥσπερ τὰ βλέφαρα καὶ τὸ στόμα ἐφ' ἡμῖν κλείειν καὶ ἀνοίγνύναι, ἔτω καὶ τὰ ὦτα· ἀλλ' αὕτη μόνη σχεδὸν ἡ αἴσθησις ἐκπέφυγε τὴν ἐφ' ἡμῖν ἐξουσίαν, καὶ δέχεσθαι ἀνάγκη πᾶν τὸ προσπῖπτον αὐτῇ, ὥσπερ οἴκημα ἄθυρον καὶ ἀνεῳγμένον. Σὺ δὲ τὴν μὲν ἀκοὴν ἐξεῖλες πανλάπασι τῶν ἐγκλημάτων.

[2] The *Greek* is this, Λόγῳ δὲ, ὅσους ἂν ἐκ τοῦ πέμψαντος ἀκηκοὼς εἴπῃ, ἐκ αὐτὸς τὴν ἐντεῦθεν αἰτίαν, ἢ γε ἐκ ἀγαθοὶ τύχωσιν ὄντες, εἰκότως ἂν λάβοι· ἀλλ' ὁ μὲν κελεύσας φέροιτο ἂν δικαίως τὸ ἔγκλημα τοῦτο, τῷ δὲ πραχθέντι τὸ τὴν ὑπηρεσίαν ἐκπεπρᾶχθαι μέμψει μόνον. *Procop. Hiſt. Goth. Lib.* i. Among the *Greeks*, where a Maſter had an abſolute Authority over his Slaves, theſe were looked upon only as ſimple Inſtruments of what they did by Order of their Maſter, whether good or bad. See Baron *Spanhemius* upon *Callimachus Hymn. in Cerer.* Yet we ought to obſerve, that an Action, perform'd at the Command of a Superior, is not altogether excuſable at the Judgment-Seat of GOD, eſpecially if he doth any Thing, which he knows clearly to be Evil in itſelf. See §. 9. *Note* 3. So that we muſt, by no Means, approve the ancient Saying, That it is a Sort of Virtue to commit a Fault, in Obedience to a Maſter. *Pro Dominis peccare, etiam virtutis loco eſt.* Publ. Syr. ℣. 567.

[3] Authority here, ſignifies not a Power, or Command, which one has over another, but the particular Reſpect which a Perſon bears in his Mind to another, either upon the Account of his Merit, or Superiority, or ſome other Reaſon, which engages him to pay a great Deference to his Will and Pleaſure (for which Reaſon the *French* Tranſlation renders it, *La Conſideration, Reſpect*, or *Regard)* according to *Livy*'s Diſtinction, ſpeaking of King *Evander, Authoritate magis quàm imperio regebat ea Loca,* Lib. i. Cap. vii. He ruled more by his Authority than Command. And, on the contrary, of a King of *Numidia*, named *Capuſa, Quum magis jure gentis quàm Authoritate inter ſuos, aut viribus obtineret Regnum.* Lib. xxix. Cap. xxix. He obtained the Kingdom more by Law of the Nation, than by any Authority he had with his People, or Force of Arms. *Tacitus* alſo ſpeaks of the ancient *German* Kings, *Nec Rex, vel Princeps, prout ætas cuique, prout nobilitas, prout decus bellorum, audiuntur, authoritate ſuadendi, magis quàm jubendi poteſtate,* Cap. xi. Then the King or Prince, as every one was more aged, noble, or warlike, was liſtened to, more for the Authority of his Eloquence, than Power of his Command. As to the reſt, all that our Author ſays, in this Paragraph, is very confus'd, which is not to be wonder'd at, ſince he neglects even to define the three different Manners, in which an Agent can concur to an Action, produc'd immediately by another. I have endeavour'd to ſupply this Defect, and give a clear Idea of the Subject. The Reader may farther ſee my Notes on the laſt Editions of the Abridgment of *the Duties of a Man and a Citizen,* Lib. i. Cap. i. §. *ult.*

[4] *Tacitus*'s Words are, *Poſt quæ Tiberius Adoleſcentem* [*Piſonem*] *crimine civilis Belli purgavit: Patris quippe Juſſa nec potuiſſe filium detrectare.* Tacit. Annal. Lib. iii. Cap. xvii. Num. 1.

[5] The *Greek* runs thus, Οὐ γὰρ μὴ συγχωρήσαντος ἐκ ἂν ποτε ἐπέπρακτο, τοῦτον ἡγεῖτο δίκην τῶν πραχθέντων ὀφείλειν—Δεῖ τὰ ἀδικήματα νομίζειν ἃ τῶν ταῖς χερσὶν ἐργαζομένων θᾶλλον, ἢ τῶν τὸ δυνηθῆναι δεδωκότων. *Liban. in Progymn.* Pag. 12. *D. Ed. Morel.*

[6] The *Greek* is, Οἱ δ' ἀκοσμοῦντες βροτῶν διδασκάλων λόγοισι γίγνονται κακοί. Ver. 386.

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the Fault (as [1] *Plutarch* says) *to them for not learning better Things, but to him for not teaching them. Libro, virtutem doceri posse.* Vide Ælian. Lib. iii. Cap. x. Juvenal. Sat. xiv. 233.

Nemo satis credit tantum delinquere, quantum
Permittas; adeo indulgent sibi latius ipsi.

All think too streight th' Indulgence they receive;
And to themselves a kinder Licence give.

Add. Lib. iv. §. 2. *D. De Offic. Proconf.* Thus *Messalinus* in *Tacitus An.* 4. [2] advised, that a Decree of the Senate should pass to punish the Magistrates for the Crimes committed by their Wives, in Relation to the Government of the Provinces, whether they themselves were concern'd or unconcern'd in the Fact. And thus too, by the *English* Laws, the Husband is oblig'd to answer and to make Satisfaction for the Wrong his Wife doth to another, either by Word or Deed; because he neglected to use his Power of restraining her. Nay, if the Husband and Wife commit *Felony* together, the Wife is accounted neither a Principal nor an Accessary in the Crime, because she is suppos'd to have acted upon Necessity, by Virtue of the Obedience she owed her Husband [a].

Fourthly, He who commands, or hires a Person to perform a Villany [b].

Fifthly, He who assists; as he who brings and holds the Ladder, while a Thief gets into a Window: He who strikes the Money out of a Man's Purse, that another Rogue may pick it up: He that drives away a Man's Cattle, that his Comrade may seize them, and carry them off [c].

Sixthly, He that conceals or receives stolen Goods. *Phocylid.* Ἀμφότερι κλῶπες, καὶ ὁ δεξάμενος καὶ ὁ κλέψας. *They that receive are arrant Thieves no less than they that steal.* Plato LL. Lib. xii. *He that knowingly takes into his Keeping stolen Goods, shall be esteem'd equal in Guilt to the Thief himself.* Lib. i. Princ. D. de fugitivis. Add. Cap. i. D. de receptatoribus, & Edict. Reg. Theodoric. Cap. cxvi. *Concerning the Assistants or Abettors in Adultery, see* Lib. viii. Lib. ix. D. ad L. Julian de adulter. [3] Periander, *the Tyrant of* Corinth, *threw all the Bawds into the Sea,* Heraclid de Polit. Add. Anth. Matth. de Crimin. Proleg. Cap. i. §. 11. & ad Lib. xlviii. D. Tit. 10. Cap. i. & ii.

Seventhly, He who did not assist the suffering Party, tho' he was oblig'd to do so. [4] *Cicero Off.* i. *He that doth not, when he is able, guard and protect an injur'd Person, is as much in Fault as if he should desert his Parents, his Country, or his Friends.* Add. Anth. Matth. de Crimin. Proleg. Cap. i. §. 15. Thus Soldiers, who are hired for a Guard in a Journey, if, on the Approach of a Number of Villains, whom they are able to grapple with, they refuse to fight, they are to be reckon'd themselves among the Villains. Thus a Fire shall be rightly imputed to the Watchman, who saw it kindling, yet neglected to stop it, or call for Help [d]. Thus, among the *Egyptians*, if a Man on the Road saw another kill'd, or suffering any Violence, and did not rescue him though he was able, he was obnoxious to capital Punishments. And if the Man was too weak to give Assistance and Deliverance, he was oblig'd to discover and prosecute the Actors: Upon Default thereof, he received a set Number of Blows, or was injoin'd a three Days Abstinence from Victuals [e]. And thus *Abas*, King of *Persia*, to clear his Country of Thieves, publish'd an Order, that whenever any Person was kill'd, or plunder'd, the Inhabitants of the next Town should be accountable for the Fact [f]. So with [5] the *Spartans*, he that did not reprove a Person who offended in his Presence, was punished as a Partner in the Crime. So [6] *Cato*, exhorting the Magistrates to put the Laws in Execution against Offenders, told them, "That those who were able "to restrain wicked Doers, and yet neglected this "Power, did plainly assent, and contribute to their "Enormities [g]." As for the Silence and the Dissimulation of the Magistrates, *Plato* [h] has given those Crimes their due Censure: *The second Enemy to a State* (says he) *is the Man, who, tho' he be not strictly a Partner in this Villany* (he means Treason) *yet, while he enjoys the highest Offices in the Commonwealth, does not observe the Conspiracy; and if he does observe it, out of a timorous Baseness, neglects to succour and to deliver his Country.* The Story of *Scedasius*'s Daughter in *Plutarch, Amator. Narration. Grotius ad* Prov. xxix. 24. *He that knows the Thief, and doth not, when requir'd upon Oath before a Magistrate, discover him, is in Guilt equal to him,* Vide Levit. v. 1. [7]

For the same Reason, if a Keeper, who has undertaken the Care of a Madman, prove negligent, and the Madman happen to do any Hurt, the Keeper shall be answerable for the Fact, tho' the Madman be not capable of *Imputation. Vide Lib.* xiv. *D. De Offic. Præsid.*

Those Persons are reckon'd the inferior, or less principal Causes of other Men's Actions, who have

[a] Chamberlain's *Present State of* England, *Pag.* 1. *Chap.* xvi. [b] *Vide Anth. Matth. d. Lib.* §. 12. *& ad Lib.* xlvii. *D. tit. Cap.* iii. §. 16. [c] *Add. Lib.* liv. §. 4. *Lib.* lxvi. §. 2. *D. De furtis.* [d] *Add.* Ezech. xxxiii. ℣. 6. [e] *Diodor. Sic. Lib.* i. *Cap.* lxxvii. *Add. Lib.* vii. *De Nautæ caup. Stab. Lib.* ii. *Lib.* vi. *D. ad L. Pompeiam de Paricid. Lib* vii. *d. Cap. Lib.* ix. §. 1. *D. ad D. Cornel. de falf. Lib.* vi. §. 8. *D. De re militari.* [f] *Vide Pet. de Valle Itinear. Part* ii. *Epist.* i. [g] *Vide Lib.* ii. *D. De noxal. act. Lib.* viii. *L. qui sine manumissione, t.* 1. *De Magistratibus conveniendis.* [h] *De LL. Lib.* ix.

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[1] His Words are, Παιδὸς ὀψοφαγοῦντος, ὁ Διονυσὶος τῷ παιδαγωγῷ δάκτυλον ἔδωκεν. Ὀρθῶς ἐ τοῦ μὴ μανθάνοντος, ἀλλὰ τοῦ μὴ διδάξαντος, τὸ ἁμάρτημα ποιήσας. *In Libro, Virtutem doceri posse.*

[2] *Tacitus*'s Words are, *Massalinus Cotta———censuit cavendum esse Senatûs consulto, ut quanquam Insontes Magistratus, & culpæ alienæ nescii, provincialibus Uxorum criminibus, perinde quàm suis plecterentur.* Tacit. Annal. Lib. iv. Cap. xx. Num. 5.

[3] The *Greek* is, Τὰς προαγωγὲς πᾶσας κολασάντος. As to those who are Procurers for Adulterers, see *Digest. Lib.* xlviii. *Tit.* 5. *ad Legem. Juliam de Adulteriis, Leg.* viii. & ix. In the *Latin* Version of the Fragments of this ancient Author, which is join'd to the Edition of *Daniel Heinsius*, the Translator follows the Paraphrase on the Politics of *Aristotle*, where this is explain'd, as relating to the Courtezans themselves: *ac quæ se prostituissent, &c.* But this is an Error which deserves Correction. As to those who acted as Bawds, see the *Digest.* Lib. xlviii. Tit. v. *Ad Legem Juliam de Adulter.* Leg. viii. & ix.

[4] *Cicero*'s Words are, *Qui autem non defendit, nec obsistit, si potest, injuriæ, tam est in vitio quàm si parentes, aut amicos, aut patriam deserat.* De Offic. Lib. i. Cap. vii. See *Anton. Matthæus de Crimin. Prolegom.* Cap. i. §. 15. Mr. *Hertius* cites, also, *Aristotle de Mirab. auscult.* where he speaks of a certain Road of *Italy* between *France* and *Spain*, in which the Inhabitants, nearest the Place, were obliged to indemnify Travellers, if they had any Thing taken from them, or received any Wrong or Injury. Add here the Remark of *Retierschusius* on the *Institutes Tit. de Satisdat Tutorum, &c. in fin.* See also *Rhodolph. Fournier Rerum Quotidianarum*, Lib. v. Cap. xxviii.

[5] *Plutarch*'s Words *(Instit. Lacon.)* are these, Ὁ δὲ μὴ ἐπιπλήττων παρόντος αὐτῷ ἁμαρτάνοντα, ἔνοχος ἦν τῷ ἴσῳ ἐπιλιμίῳ, ὥσπερ κὴ ὁ ἁμαρτών.

[6] *Plutarch*'s Words are, Παρορμῶν δὲ τὰς ἄρχοντας ἐπιλιμᾶν τοῖς ἁμαρτάνουσιν, ἔλεγε τὰς δυναμένας κωλύειν τὰς κακῶς ποιοῦντας, ἐὰν μὴ κωλύσωσι, κολακεύειν. *Plut. Apophthegm.*

[7] The Author adds here the Instance of those, who, by their Negligence, are the Cause, that a *Madman*, committed to their Care, does Hurt to any Body. But, as he asserts immediately after, that the Actions of a *Madman* are liable to no Imputation; it was needless to put this Example among the Number of Actions, for which one is as responsible, as he that does them immediately. He had cited the *Digest*, Lib. i. Tit. xviii. *De Officio Præsid.* Leg. xiv. which was nothing to his Purpose.

advis'd,

advis'd, commended, or cajol'd them before the Facts, in such a Manner, as that their Counsel, Praise, or Flattery, has had any Weight in promoting their Undertakings. For, otherwise, a Man who barely commends a Crime, and yet by his Commendation contributes nothing to it, ought not to be punish'd for the Crime itself, but should suffer for his ill Thoughts and Designs [a]. It will not be very unjust to reckon those in the same Class, who by their Recommendation have preferr'd a Man to the Care and Management of any Business, since 'tis decent they should blush for his Faults and Miscarriages [b].

But as to the Matter of *Counsel*, it's worth while to run over the Disputes of the [1] *Civilians*, where they are arguing whether the Words *Ope* and *Consilio*, *by Help* and *by Counsel*, are to be understood in a Conjunctive, or in a divided Sense. For if *Counsel* imports the same as Intention or Design, he only will be guilty of another Man's Theft, who assisted him in it, not out of Imprudency, but with premeditated Wickedness [c].

If Counsel has been given without Help, it will be requisite to enquire, whether it were General or Special. The former Kind is, for Example when a Man, hearing another complain of Poverty, advises him to support himself by Stealing; and such a Counsellor will not, in human Cognizance, pass himself for a Thief. But if a Man has given special Counsel to another, as, if he has shewn him what way to break into a House, told him the fittest Time, and where the Things be that may be most conveniently carried off, or how he may hide himself after the Fact, such an one will nearly equal the Thief [d]. It is farther observable, in Reference to Counsel, and other like Influences on other Men's Actions, that by them the Guilt is only communicated; but not wholly devolv'd from the Actor to the Exhorter, unless the former were under an [2] Obligation to put his Advice in Practice. Hence *Diodotus* in *Thucydides* [e] complains, with good Reason, "That the Orators in a "State should be accountable for their Advice, "and the People not at all accountable for hearken-"ing to them." He adds [3], *If he that believed, as well as he that persuaded a Business, were liable to be punish'd, you would proceed much more wisely in your Judgments. But now, when you fall into Passions on any Disappointment of your Hopes, you only punish him who gave the Advice, and not yourselves, who have always born so great a Share in the Mistake, or Miscarriage.* Hence Mr. *Hobbes* [f] thus declares in general, *This is, also, incident to the Nature of Counsel, that whatsoever it may be, he that asks it cannot in Equity accuse or punish it: For to ask Counsel of another, is to permit him to give such Counsel as he shall think best; and, consequently, he that gives Counsel to his Sovereign, (whether a Monarch, or an Assembly) when he asks it, let it please or displease, cannot be punish'd, because he gave it to such as were willing to hear it, whatsoever it should be.* But he here should have added, *If the Counsellor gives his Opinion* bona fide, *and has a perfect Knowledge of the Matter in Debate.* For it is a Piece of Wickedness to pretend to give a Judgment about a Thing which we are unacquainted with. He presently subjoins; *But if one Subject gives Counsel to another to do any Thing contrary to the Laws, whether that Counsel proceed from evil Intentions, or from Ignorance only, it is punishable by the Commonwealth, because Ignorance of the Law is no good Ex-*

[a] *Ovid. Trist. Lib.* v. *El. ult.*

Qui monet ut facias quod jam facis, ille monendo
Laudat, & hortatu comprobat acta suo.

Who prompts you to *go on*, approves the Ways
You took before; and his *Advice* is *Praise*.

So, in the Constitutions of the Lombards, Lib. i. Tit. ix. §. 25. *He that stands by, and encourageth the Commission of any Villany, is himself adjudg'd an Actor in it.* Add. Rom. Cap. i. ult. Quinctil. Declam. 255. *To commit a Villany, and to approve of it, are Actions naturally resembling each other.* Anth. Matth. De Crimin. Proleg. Cap. i. §. 9, 10, & 14.

[b] Vide *Socrat. in Xenophon. Apomn. Lib.* ii. *Pag.* 439. *Ed. Steph.* [c] *Lib.* liii. §. 13. *D. de furtis.* [d] Vide *Anth. Matth. de Crimin. Proleg. Cap.* i. §. 7. [e] *Lib.* iii. *Cap.* xliii. [f] *Leviath. Cap.* xxv

[1] The Words of the *Roman* Law are, *Interdum quoque furti tenetur, qui ipse furtum non fecit, qualis est is, cujus ope & consilio furtum factum est.* Instit. Lib. iv. Tit. i. *De obligationibus, quæ ex delicto nascuntur* (and not *De furtis*, as this Author and *Grotius* cite it, for that's no Title in the *Institutions*.) See also *Digest, Lib.* l. *Tit.* xvi. *De verborum signif. Leg.* 53. §. 2. and *Lib.* xlvii. *Tit.* ii. *de furtis Leg.* 36. §. 1. The Dispute between the ancient Lawyers was rather a *Logomachy*, than any real Controversy. The Word *Consilium* was the Occasion of this Ambiguity. This Word signifies, either that Design which we call a *deliberate Purpose*, or an Advice given. There was an ancient *Formulary* in the *Roman* Law, which is preserv'd in *Cicero*. *Ope Consilio* (for thus I believe that great Orator wrote it, and not *Consilioque*, as the common Editions have it; for *Consilio*, alone, has more the Air of Antiquity, and resembles the Style of the ancient Laws) *Tuo Furtum ajo Factum esse.* I am greatly of Opinion, that these Words, *Ope Consilio*, according to the Language and Notions of the Times, in which this *Formulary* was introduc'd, signifies, properly, the *Assistance* given to a Robber, thro' *deliberate Purpose*, in order to favour his Theft; as, for Instance, the lending him a Ladder, knowing the Use he would make of it. The Lawyers, of those Days, had not the least Notion of bringing an Action for Theft, on Account of a simple Advice, however successful it might be: It was sufficient they regarded, and treated as Thieves, all who furnish'd any real Aid to others, tho' they forbore to steal themselves; because, even this, according to the Rules of Civil Law, constitutes the Essence of Theft. But, in after Times, they began, by the Word *Consilio*, to understand a *Counsel* given; either, because these Lawyers did not rightly understand the Terms of the old *Roman* Law, as their Altercations on that Head plainly prove, or because, thro' the Ambiguity of the Word *Consilio*, they design'd to heighten the Severity of the Laws against Theft. The Question was to know, whether a simple Advice, without any real Assistance, render'd a Man an Accomplice in this Crime, as much as a real Assistance, without any preceding Advice. *Sabinus*, at the Head of one Party, maintain'd the affirmative: *Labeo*, another Leader, tho' otherwise fond enough of Innovation, kept to the ancient Letter of the Law, and asserted, that a simple Advice, while it only influenc'd the Resolution of the Thief, without contributing to the Execution of his Design, was not liable to Punishment. This gave Rise to another Dispute (the Remains of which, the Compilers of the *Roman* Law have preserv'd to us) relating to the different Actions, which the Law granted against Thieves, or such as were reputed so. If we do not attend to what I have said, which Authors have not sufficiently regarded (except some obscure Hints given us by *Jean de la Coste*, on the Passage of the Institutes just quoted, and by *Edmond Merille* Observ. Lib. ii. Cap. xxxix.) it is very difficult to explain several Laws, which the Interpreters, with all their Pains, have not been able to reconcile, in a satisfactory Manner. It is upon these Laws that my System is founded, which will excuse me from quoting them here, especially as such a Discussion cannot be made but in *Latin*. These Remarks are sufficient to shew, that the Explanation of our Author may serve to solve the Question, not, indeed, according to the Ideas of the ancient Lawyers, but according to the Rules of right Reason: And even this Explanation, in my Opinion, may be corrected by my Notes on the Passage, already cited, in the Abridgment of *the Duties of a Man and a Citizen*. I shall only add, that *Justinian* has follow'd the Opinion of those, who denied an Action of Theft against a Person guilty only of having influenc'd a Thief, by his Advice, or Solicitation. *Certe qui nullam opem ad furtum faciendum adhibuit, sed tantum Consilium dedit atque hortatus est ad furtum faciendum, non tenetur furti.* Ubi. sup. §. 11. *Certainly, he who gave no Assistance towards the Theft, but only by his Advice, or Exhortation, is not guilty.*

[2] Which does not commonly happen; but, on the contrary, he is responsible for his Fidelity only, as CICERO speaks very well, *Deinde, etiamsi te auctore, quid debet, qui consilium dat, præstare præter fidem*, i. e. If we advise others for the best, we are not answerable for the Event. *Lib.* xvi. *ad Attic. Epist.* 7. See Mr. *Hertius*'s *Notes* upon §. 12. of this *Chap.*

[3] The *Greek* is this, Εἰ γὰρ ὅ τε πείσας, καὶ ὁ ἐπισπώμενος ὁμοίως ἐξηπίστουτο, σωφρονεστέρου ἂν ἐκρίνετε, νῦν δὲ πρὸς ὀργὴν ἅμα τύχης ἐστὶν ὅτε σφαλέντες, τὴν τοῦ πείσαντος μίαν γνώμην ζημιοῦτε, καὶ οὐ τὰς ὑμετέρας αὐτῶν, εἰ πολλαὶ ὅσαι ξυνεξήμαρτον. *Thucyd. Lib.* iii. *Cap.* xliii.

cuſe, where every one is bound to take notice of the Laws to which he is ſubject.

Hence that Maxim in *England*, commended ſo highly by Dr. *Bates* [a], cannot be receiv'd without ſome Limitation, *That the King can never miſtake, nor do any Man an Injury, becauſe all the Fault and Puniſhment is deriv'd, as it ought to be* [1], *on his Miniſters and Counſellors, whoſe Duty is to admoniſh the Prince, to deny him their Aſſiſtance, when he enters on ill Deſigns, and rather to quit their Places than to obey him, when he commands the doing of any Thing contrary to the Laws.* Add. Gell. Lib. i. Cap. iii. Where he tells us of *Chilon*, that he was troubled with Remorſe of Conſcience, upon his having perſuaded the Judges to [2] abſolve a Friend of his manifeſtly guilty, and whom he himſelf had in private condemn'd. 'Tis a remarkable Story which we find in the ſame Author, *Lib.* xi. *Cap.* xviii. of a Perſon's being convicted as a *Man-ſtealer*, for hiding, with a Caſt of his Gown, a Runnagate Slave, who was paſſing within Sight of his Maſter.

It is doubtful, whether we ſhould rank under this, or under the former [3] Claſs, thoſe, who, by their Example, excite others to ſuch Sins, as they would have otherwiſe declined. *Matth.* xviii. *Ver.* 6. *Juvenal. Sat.* ii. 79.

———Grex totus in agris
Unius ſcabie cadit, & porrigine porci;
Uvaque conſpecta livorem ducit ab uva.

From one infected Beaſt the Murrain reigns
O'er all the Drove, and ſpreads them on the Plains:
And one corrupted Grape its purple Neighbour ſtains.

Add. *Grot. Lib.* ii. *Cap.* xvii. §. 6, &c. *and Cap.* xxi. §. 2, &c. *Ant. Matth. de Crimin. Proleg. Cap.* i. §. 6, &c.

From all theſe Obſervations it is eaſy to perceive the Reaſon and the Limitation of thoſe common Axioms; *What a Man does by another, of that he himſelf is reckon'd the Author: We make theſe Things our own, to which we grant our Conſent* [b]. *That which, in Matters relating to us, is done by others upon our Command, obliges us ourſelves: That is eſteem'd our Action, the Execution of which we have impos'd on another*; and the like. As for that Communication of Actions, which reſults from the Union of a moral Body, it will be hereafter explain'd in its proper Place.

When one is ſaid to partake of another's Action, upon Account of his own Permiſſion, or becauſe he did not hinder the Action, in this Caſe it is requiſite not only that he ſhould have been able, by his natural Strength, to have hindred it, but, likewiſe, that he ſhould have had an Obligation incumbent on him to hinder it. When either of theſe Two Conditions fails, nothing can be imputed to him, who gives another leave to act at Pleaſure. And therefore GOD ALMIGHTY is capable of no Imputation, upon the Account of his Permiſſion of Sins. For he is not oblig'd to reſtrain them in ſuch a Manner, as to make them impoſſible to be committed: That is, by withdrawing our natural Strength, or extinguiſhing the Liberty of our Will: Since upon the Removal of theſe, no ſort of moral Actions could be perform'd by Man [c].

That Permiſſion then of another Man's Action, is void of all moral Effect, which we give when to hinder the Action is beyond our Duty, or above our Strength; unleſs this Weakneſs and Inability is procur'd by our Fault, and unleſs the Ignorance aroſe thro' ſupine Negligence, and within that Degree of Diligence which we are oblig'd to obſerve.

Laſtly, Nothing can be *imputed* upon the Account of permitting a good Action, which we might indeed, but ought not to have hinder'd. Thus he can impute nothing to me (or I owe him nothing) who has given me Permiſſion, or has not forbidden me to uſe my Right; that is, has done me no Injury.

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[a] *Elench. Mot.* Part i. [b] Lib. ii. Tit. x. *D. Do eo per quem factum erit.* [c] *'Tis a notable Saying of* Lucian, de Merced. Conduct. GOD is not in the Fault, but the Man that makes it. *And thus we intend no more than a Jeſt, when we ſay, on ſome Occaſions,* Now I'll give it Leave to rain, *or the like.*

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[1] In *England*, it is common to lay all the Faults of the Prince upon his Miniſters, who are, indeed, very often moſt guilty of them, but the Fault of the Miniſters does not always excuſe the Fault of the Sovereign; for they have their Reaſon and Judgment, and may over-rule them; ſo that if they ſuffer themſelves to be govern'd by thoſe that are about them, 'tis their Fault. In moſt Affairs, they ought to ſee with their own Eyes, and not leave themſelves to be biaſſed by a vicious and corrupt Miniſtry. But if they are not able to ſearch into the Bottom of Things themſelves, and diſtinguiſh between Good and Evil, they ought to leave the Governing the People to ſuch as are able; for I do not ſee, but the Saying of *Charles Barromæus*, which he ſpake of bad Biſhops, who could not govern their Flocks, may be applied to Princes who manage ill. *If they are incapable of ſuch an Employ, why are they ſo ambitious as to ſeek it? If they are capable, why ſo negligent?* Mr. *Bernard*, in his *Nov. Rep. of Letters*, ſpeaks the ſame Thing in plain Terms, which, 'twere to be wiſhed, Princes would conſider on, as they are judiciouſly made.

[2] See the Reflections which Mr. *De Sacy* makes upon it, in his Treatiſe of *Friendſhip*, *Lib.* ii.

[3] Uſually bad Examples only encourage thoſe, who are either inclin'd to Wickedneſs, or ſubject to be eaſily led aſtray: And therefore thoſe, who ſet them, are only the ſubordinate Cauſes of what is done, in imitating them. But ſometimes theſe Examples are ſo powerful, on Account of the Characters of the Perſons who give, and the Diſpoſition of thoſe who follow them; that, if the *former* had abſtain'd from Evil, the *latter* had forborn to commit it: In this Caſe there is no Doubt, but the Author of the Example is the principle Cauſe of the bad Actions done, by endeavouring to reſemble them. Such, often, are the Patterns of our Superiors, or Perſons we eſteem for their Wiſdom and Underſtanding. Such, alſo, are the Examples of Crimes unknown, either thro' their great Heinouſneſs, or the ſtrict Laws made to prevent their ſpreading, or for ſome other Reaſon. In a Word, here, as in other Places, our Author refers ſolely to one of the three Claſſes in Queſtion: According to the Degree of Influence, theſe Things have on the Action of another, thoſe, who in doing them, occaſion that Action, are ſometimes *principal*, ſometimes *collateral*, and, at others, *ſubordinate Cauſes*. It would be eaſy to ſhew this, but the Enquiry would lead us too far; and every one may be convinc'd of it, by applying here the Definitions I have given, in my Notes on the Abridgment of *the Duties of a Man and a Citizen*, Cap. i. §. *ult.*

CHAP.

CHAP. VI.

Of the Rule of MORAL ACTIONS, or Law in General.

The CONTENTS of every Section of the fixth Chapter.

I. *A Law differs from Counſel.*
II. *From a Bargain, or Covenant.*
III. *And from Right.*
IV. *What a Law is.*
V. *What an Obligation.*
VI. *How it comes to paſs that a Man is obliged.*
VII. *No Man is obliged to himſelf.*
VIII. *He that is to be obliged, muſt have a Superior.*
IX. *How a Man may lay an Obligation on another.*
X. *It can't be done by meer Force.*
XI. *Nor by any Excellency of Nature alone.*
XII. *What gives greater Force to an Obligation.*
XIII. *The Law-giver and Law ought to be known.*
XIV. *What are the eſſential Parts of a Law.*
XV. *What is the Permiſſion of a Law.*
XVI. *The Matter of Laws.*
XVII. *Who is obliged by a Law.*
XVIII. *The Diviſion of a Law.*

WE come now to conſider of that moral Rule, or *Law* [a], by which moral Actions are to be ſquar'd, and according to their Agreement, or Diſagreement, with which, they acquire peculiar Qualities [1]. And here we muſt take Care, in the firſt Place, accurately to diſtinguiſh *Law* from ſome other Things, which ſeem to bear ſome Relation to it, and which, for that Reaſon, are frequently confounded with it: And theſe are *Counſel*, *Covenant*, and *Right*. Now *Law* differs from *Counſel* in this, that by the latter a Man endeavours, with Reaſons taken from the Nature of the Thing, to induce another Perſon to ſome Performance, or Omiſſion, over which Perſon, at leaſt, as to the preſent Buſineſs, he has no proper Power, ſo as that he can lay any direct Obligation on him, but muſt leave it to his Pleaſure and Choice, whether he will follow the Counſel, or not [2]. Yet *Counſel*, indeed, may adminiſter Occaſion to an Obligation, inaſmuch as it furniſhes a Man with ſome Knowledge, by which an Obligation may be produc'd and increas'd. Thus, a Phyſician cannot, by Virtue of any Power, or Command, order his Patient to take ſuch Things, and to abſtain from others; but while he ſhews one Thing to be conducive, and another pernicious to Health, the Patient is bound to embrace the former, and to avoid the latter; not upon Account of any Right which the Phyſician holds over him, but by the Law of Nature, which commands every Man to take care of his own Life and Health. But Law, though it ought not to want its Reaſons, yet theſe Reaſons are not the Cauſe why Obedience is paid to it, but the Power of the Exactor, who, when he has ſignify'd his Pleaſure, lays an Obligation on the Subject to act in Conformity to his Decree, tho', perhaps, they do not ſo well apprehend the Reaſons of the Injunction. To which Purpoſe Mr. *Hobbes* [b] thus expreſſeth himſelf; *Counſel* (ſays he) *is a Precept, in which the Reaſon why we obey, is taken from the Thing preſcribed: But Law, or proper Command, is a Precept, in which the Reaſon of our Obedience is taken from the Will of the Preſcriber.* For no Man can ſay, *Sic volo, Sic jubeo*, ſo I will, and ſo I command; unleſs

——*Stet pro ratione voluntas,*

his Will is his Reaſon.

We obey Laws therefore, not principally upon Account of the Matter of them, but upon Account of the Legiſlator's Will. And thus, *Law is the Injunction of him, who has a Power over thoſe to whom he preſcribes; but Counſel, of him who has no ſuch Power. To do the Things enjoin'd by Law, is Matter of Duty; to do thoſe appointed by Counſel, is Matter of free Pleaſure. The End of Counſel is directed toward him who receives it:* And this End he is at Liberty to weigh and to approve. But tho' *Law* too has commonly ſome End directed towards thoſe who receive it, yet it does not leave them the Right of examining and rejecting this End, but actually determines it by enjoining it. *Counſel is only given to thoſe who are willing to have it, but Law reaches the unwilling.* Laſtly, *The Right of a Counſellor ceaſes at the Pleaſure of him who receives the Counſel; but the Right of a Law-giver cannot be taken away at the Pleaſure of thoſe on whom he impoſes the Law* [c].

II. Neither were thoſe Ancients accurate enough in their Expreſſions, who frequently apply to Laws the Name of [3] *Common Agreements* [d]. For, beſides that, neither the Divine poſitive Laws, nor the Laws of Nature, had their Riſe from the *Agreement* of Men, and therefore that Title can only be attributed to *civil* Laws; even [4] theſe are not properly Covenants and Agreements, tho' there was indeed ſome Intervention of Compact at the Original of Civil Power. It is plain, that the *Grecians*, as in their other politick Speeches, ſo in this too, had an Eye to their own Democratical Governments; in

[a] See *Book* ii. *Chap.* i. [b] *De Cive, Cap.* xiv. §. 1. [c] *Add. Digg. B.* 17. *Tit.* 1. *De Mandato.* [d] Συνθήκη τῆς πόλεως. So *Ariſtotle Rhetor. ad Alex. Cap* i, ii, iii.

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[1] Our Author ought to have treated, in the Beginning of this Chapter, of the Neceſſity of a Law in general, *i. e.* have ſhewed, that it is not agreeable to the Nature of Man to live without ſome Law; which natural Order he follows himſelf, in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* ii. §. 1. See, alſo, what he ſays, *Lib.* ii. §. 1.

[2] So the Civil Law teaches, *Nemo ex conſilio obligatur; etiamſi non expediat ei, cui dabatur; quia liberum eſt cuique apud ſe explorare, an expediat ſibi conſilium.* Digeſt. Lib. xvii. Tit. i. *Mandati.*

[3] Κοιναὶς συνθήκαις, καὶ ὁμολογίαις, as the *Greeks*, almoſt every where, in their Writings, do. So *Ariſtotle* defines the Law, Λόγος ἀφωρισμένος καθ' ὁμολογίαν κοινὴν τῆς πόλεως. A Law is an Order decreed by the common Agreement of a City, *Rhet. ad Alexandr. Cap.* i. See, alſo, *Cap* ii. & iii. So *Iſocrates* calls an Act of Oblivion and Indemnity, συνθήκη πόλεως, the Covenant of a City. *Orat adv. Callim. Dionyſius Halicarn.* ſays, Συνθήκας εἶναι κοινὰς πόλεων τὰς νόμους. *i. e.* Laws are the common Agreement of the City, *Lib.* x. *Cap.* iv. See, alſo, the *Digeſt. Lib.* i. *Tit.* iii. *de Legib. Senatuſque Conſult. & Longa Conſuet. Leg.* i. & ii.

[4] Indeed, the End of Civil Laws is to engage Men to the Obſervation of certain Things, by a Motive more prevalent, than any natural Obligation, *i. e* by the Fear of Puniſhment, which the Breaker of them muſt expect from certain Perſons, inveſted with an Authority over them. But ſuppoſe a Number of Men ſhould ſeparate themſelves from any Civil Society, and agree together to obſerve certain Rules to act by, yet having no Sovereign Power, provided with ſufficient Abilities, to puniſh Tranſgreſſors, this Engagement could have no other Effect, than ſuch Agreements, as are made by natural Right, have, and, by Conſequence, could not oblige as a Law: For we might ſafely refuſe our Obedience, and it would become neceſſary to employ Force, to make us obſerve ſuch Regulations. But this would not be ſufficient to intimidate thoſe, who might be tempted to break them, and who might eaſily flatter themſelves with being able to make a good Defence, or imagine their Aggreſſors not ſtrong enough to attack them. In this Manner I have explain'd what our Author ſays. *Element. Juriſprud. Univerſ.* Pag 250

which, becauſe the Laws were made upon the Propoſal of the Magiſtrate, with the Knowledge, and by the Command of the People, and ſo, as it were, in the Way of Bargain or Stipulation, they gave them the Name of *Covenants* and *Agreements* before-mention'd. Tho' indeed, neither upon Account of the major Part of the People's conſenting, or agreeing to them, can democratical Laws be properly ſtil'd Covenants. For this Agreement is only the Manner by which the ſupream Power, lodg'd in a general Aſſembly, exerts its Force; that being taken for the Will and the Decree of all, to which the greater Number gives Conſent.

So that the Efficacy of a Vote given in Council by any Member about framing a Decree, is very different from the Conſent, which a Man declares at his Entrance on a Covenant: For in this laſt Caſe, a Perſon that diſſents is not bound, and the Party cannot proceed without him: Whereas in the former Caſe, even the diſſenting Party is tied and obliged by the Plurality of Votes.

The remaining Points of Diſtinction between a Compact or Covenant, and a Law, are obvious. For a *Compact* is a *Promiſe*, but a *Law* is a *Command*. In *Compacts* the Form of ſpeaking is, *I will* do ſo and ſo; but in Laws the Form runs, *Do thou ſo*, after an imperative Manner. In *Compacts*, ſince they depend, as to their Original, on our Will, we firſt determine what is to be done, before we are oblig'd to do it; but in *Laws*, which ſuppoſe the Power of others over us, we are, in the firſt Place, oblig'd to act, and afterwards the Manner of acting is determin'd. And therefore he is not bound by a *Compact*, who did not freely tie himſelf by giving his Conſent; but we are for this Reaſon oblig'd by a *Law*, becauſe we ow'd an antecedent Obedience to its Author [a].

III. As for the Term of *Right*, as it imports a Power of acting granted, or left free by the Laws, we muſt take care not to let it paſs for the ſame Thing as the Law itſelf: That is, When we are ſaid to have a Right by the Divine Law of doing ſuch or ſuch a Thing, we muſt not imagine that the ſame Thing is injoin'd and commanded by the Divine Law, and that therefore we may fairly do it, tho' it ſhould be forbidden by the Laws of Men. For, ſince a Man hath a Power of doing all ſuch Things as can proceed from his natural Abilities, except thoſe which are forbidden by ſome Law, hence, by common Cuſtom of Speech, thoſe Things which are not prohibited by ſuch or ſuch a Law, we are ſaid to have a *Right* of doing [1] by that Law. *Right* therefore, in this Senſe, denotes a Liberty; but *Law* includes ſome Bond and Engagement, by which our natural Liberty is reſtrain'd [2].

IV. In general, a *Law* may conveniently enough be defin'd, *A Decree by which a Sovereign obligeth a Subject to conform his Actions to what he preſcribes* [3]. We call it a *Decree*, not as it remains in the Mind and Will of the Party decreeing, but as it is communicated to the Subject in ſuch a Manner, as to let him underſtand the Neceſſity of his conforming to it: And therefore the Term *Decree* is here equivalent to *Command*. And we think it an indifferent Matter, whether one ſhould call a Law a *Decree* or a *Speech*, provided it be not eſteem'd neceſſary to it, that it be promulgated either *vivâ voce*, or in Writing; ſince it is ſufficient that the Will of the Legiſlator be any way made known to the Subject, tho' it ſhould only be by the internal Suggeſtion of Natural Light. Therefore we take it to be an uſeleſs Piece of Subtilty and Niceneſs in Mr. *Hobbes* [b], when he maintains, that the Laws of Nature have no farther the Force of Laws, than *as they are promulgated in Holy Scriptures by the Word of God; and not as they are certain Concluſions apprehended by Reaſon, concerning the doing, or the omitting of Things.* For, from the bare Dictates of Reaſon, we do not only underſtand, that the Obſervance of Nature's Laws is good and profitable to Mankind, but, likewiſe, that it is the Will and the Command of GOD, that Men ſhould govern their Actions by thoſe Rules; which is ſufficient to the Eſſence of a Law. Tho' ſtill indeed this Reply may be made, that natural Laws, even as they are the Dictates of Reaſon, cannot be conceiv'd any otherwiſe than in the Manner of Speeches, Propoſitions, or Sentences [4].

As to *Grotius*'s Definition [c]; where he ſays the Law obligeth to *that which is Right*, we muſt obſerve, that he ſuppoſeth ſomewhat to be Juſt and Right before any Rule or *Law*; whence it muſt follow, that the Law of Nature doth not make what we call *Right* [5], but only denotes and points it out as a Thing already Exiſtent. Concerning which Hypotheſis we have already declar'd our Mind, *Cap.* ii. §. 6.

To conclude this Head, It is evident, that under the Name of *Laws*, not only thoſe are comprehended which belong to *Juſtice*, ſtrictly ſo called, directing us, upon a full and perfect Obligation [6], to exhibit ſuch and ſuch Things to *others*; but thoſe too which are concern'd about the other Virtues, and which extend

[a] Vide *Hobbes loc. cit.* §. 2. *Add. Grot. Annot. in Matth. Inſcript. vocab.* καινὴ διαθήκη. [b] *De Cive, Lib.* iii. §. ult.
[c] *Book* i. *Chap.* i. §. 9.

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[1] This Uſage is not ill-grounded, for the Liberty which the Laws leave us to do, or not do, certain Things, includes ſomething more than a negative Permiſſion. *See Note* 2. *on Paragraph* 15.

[2] This fully includes the general Notion of a Law. *See the ſame Note.*

[3] This Definition agrees only to *obligatory Laws, i. e.* which oblige us poſitively to act, or not. But we ſhall ſhew, in our ſecond *Note* on §. 15. that the general Notion of a Law, taken in the full Extent of it, as 'tis my Deſign to explain it here, comprehends, beſides that, a Permiſſion to act, or not act, in certain Caſes, as we judge convenient. I have given a more compleat and exact Definition, in my Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. ii. §. 2. laſt Editions. Mr. *Trevet* has criticis'd it, in a Note upon the ſame Place, but without well underſtanding my Thoughts. I ſhall refer my Reader to §. 15. Note 2. following.

[4] To make the Arguings of the Author compleat, theſe Words ought to be added, *But this is no Foundation for Mr.* Hobbes's *Hypotheſis.* In Effect, to form to ourſelves ſome Idea of the Principles of the *Law of Nature*, or to draw Conſequences from it, there is no Occaſion to make Uſe of Words; theſe being only neceſſary, when we would communicate our Thoughts to others. Thoſe Sentiments of Conſcience, which convince us of the Obligation we are under, of acting according to that Law, are entirely independent of Language, and Revelation only confirms them to us. I ſhall add, that with regard to *human Laws*, there are Caſes in which we believe, or ought to think ourſelves oblig'd to do certain Things, without any expreſs Command; and that only, becauſe we judge in ourſelves, that ſome Superior, on whom we depend, (as, for Inſtance, a Father, a Maſter, or a Prince) will approve our Actions as agreeable to his Will. *Xenophon* informs us, that this was the Reaſon that *Cyrus* formerly gave for preferring *Chryſantes*, to another of his Courtiers: *He is not* (ſays that Monarch) *contented with doing only what I enjoin him, but he does, of himſelf, whatever he judges ſerviceable to my Intereſt.* Ἐπεὶ δὲ ὁ τὸ, &c. *Cyrop. ed.* Lib. viii. Cap. iv. §. 6.

[5] The Author, by this, underſtands a *Juſtice* and *Right*, accompanied with *Obligation*: For as to the reſt, he does not deny the Ideas of *Agreement* and *Diſagreement*, which are founded in the Nature of Things. See the preceding Part of this Work, Chap. ii. §. 6. Note 1. As for *Grotius*, I have examin'd his Notions, in my Notes on his Book *De Jure Belli et Pac.* Lib. i. Cap. i. §. 9. Not. 3. and §. 10. Not. 4.

[6] To underſtand this Diſtinction of *perfect* and *imperfect* Obligation, ſee *Chap.* vii. of this Book, §. 7. and *Book* iii. *Chap.* iv. §. 2, &c. See, alſo, what has been ſaid before, *Chap.* i. §. 19. concerning *Power.*

CHAP. VI.

Of the Rule of MORAL ACTIONS, or Law in General.

The CONTENTS of every Section of the ſixth Chapter.

I. *A Law differs from Counſel.*
II. *From a Bargain, or Covenant.*
III. *And from Right.*
IV. *What a Law is.*
V. *What an Obligation.*
VI. *How it comes to paſs that a Man is obliged.*
VII. *No Man is obliged to himſelf.*
VIII. *He that is to be obliged, muſt have a Superior.*
IX. *How a Man may lay an Obligation on another.*
X. *It can't be done by meer Force.*
XI. *Nor by any Excellency of Nature alone.*
XII. *What gives greater Force to an Obligation.*
XIII. *The Law-giver and Law ought to be known.*
XIV. *What are the eſſential Parts of a Law.*
XV. *What is the Permiſſion of a Law.*
XVI. *The Matter of Laws.*
XVII. *Who is obliged by a Law.*
XVIII. *The Diviſion of a Law.*

WE come now to conſider of that moral Rule, or *Law* [a], by which moral Actions are to be ſquar'd, and according to their Agreement, or Diſagreement, with which, they acquire peculiar Qualities [1]. And here we muſt take Care, in the firſt Place, accurately to diſtinguiſh *Law* from ſome other Things, which ſeem to bear ſome Relation to it, and which, for that Reaſon, are frequently confounded with it: And theſe are *Counſel*, *Covenant*, and *Right*. Now *Law* differs from *Counſel* in this, that by the latter a Man endeavours, with Reaſons taken from the Nature of the Thing, to induce another Perſon to ſome Performance, or Omiſſion, over which Perſon, at leaſt, as to the preſent Buſineſs, he has no proper Power, ſo as that he can lay any direct Obligation on him, but muſt leave it to his Pleaſure and Choice, whether he will follow the Counſel, or not [2]. Yet *Counſel*, indeed, may adminiſter Occaſion to an Obligation, inaſmuch as it furniſhes a Man with ſome Knowledge, by which an Obligation may be produc'd and increas'd. Thus, a Phyſician cannot, by Virtue of any Power, or Command, order his Patient to take ſuch Things, and to abſtain from others; but while he ſhews one Thing to be conducive, and another pernicious to Health, the Patient is bound to embrace the former, and to avoid the latter; not upon Account of any Right which the Phyſician holds over him, but by the Law of Nature, which commands every Man to take care of his own Life and Health. But Law, though it ought not to want its Reaſons, yet theſe Reaſons are not the Cauſe why Obedience is paid to it, but the Power of the Exactor, who, when he has ſignify'd his Pleaſure, lays an Obligation on the Subject to act in Conformity to his Decree, tho', perhaps, they do not ſo well apprehend the Reaſons of the Injunction. To which Purpoſe Mr. *Hobbes* [b] thus expreſſeth himſelf; *Counſel* (ſays he) *is a Precept, in which the Reaſon why we obey, is taken from the Thing preſcribed: But Law, or proper Command, is a Precept, in which the Reaſon of our Obedience is taken from the Will of the Preſcriber.* For no Man can ſay, *Sic volo, Sic jubeo*, ſo I will, and ſo I command; unleſs

——*Stet pro ratione voluntas,*

his Will is his Reaſon.

We obey Laws therefore, not principally upon Account of the Matter of them, but upon Account of the Legiſlator's Will. And thus, *Law is the Injunction of him, who has a Power over thoſe to whom he preſcribes; but Counſel, of him who has no ſuch Power. To do the Things enjoin'd by Law, is Matter of Duty; to do thoſe appointed by Counſel, is Matter of free Pleaſure. The End of Counſel is directed toward him who receives it:* And this End he is at Liberty to weigh and to approve. But tho' *Law* too has commonly ſome End directed towards thoſe who receive it, yet it does not leave them the Right of examining and rejecting this End, but actually determines it by enjoining it. *Counſel is only given to thoſe who are willing to have it, but Law reaches the unwilling.* Laſtly, *The Right of a Counſellor ceaſes at the Pleaſure of him who receives the Counſel; but the Right of a Law-giver cannot be taken away at the Pleaſure of thoſe on whom he impoſes the Law* [c].

II. Neither were thoſe Ancients accurate enough in their Expreſſions, who frequently apply to Laws the Name of [3] *Common Agreements* [d]. For, beſides that, neither the Divine poſitive Laws, nor the Laws of Nature, had their Riſe from the *Agreement* of Men, and therefore that Title can only be attributed to *civil* Laws; even [4] theſe are not properly Covenants and Agreements, tho' there was indeed ſome Intervention of Compact at the Original of Civil Power. It is plain, that the *Grecians*, as in their other politick Speeches, ſo in this too, had an Eye to their own Democratical Governments; in

[a] See *Book* ii. *Chap.* i. [b] *De Cive, Cap.* xiv. §. 1. [c] *Add. Digg. B.* 17. *Tit.* 1. *De Mandato.* [d] Συνθήκαι τῆς πόλεως. So *Ariſtotle Rhetor. ad Alex. Cap* i, ii, iii.

[1] Our Author ought to have treated, in the Beginning of this Chapter, of the Neceſſity of a Law in general, *i. e.* have ſhewed, that it is not agreeable to the Nature of Man to live without ſome Law; which natural Order he follows himſelf, in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* ii. §. 1. See, alſo, what he ſays, *Lib.* ii. §. 1.

[2] So the Civil Law teaches, *Nemo ex conſilio obligatur; etiamſi non expediat ei, cui dabatur; quia liberum eſt cuique apud ſe explorare, an expediat ſibi conſilium.* Digeſt. Lib. xvii. Tit. i. *Mandati.*

[3] Κοιναὶς συνθήκας, καὶ ὁμολογίας, as the *Greeks*, almoſt every where, in their Writings, do. So *Ariſtotle* defines the Law, Λόγος ἀφωρισμένος καθ' ὁμολογίαν κοινὴν τῆς πόλεως. A Law is an Order decreed by the common Agreement of a City, *Rhet. ad Alexandr. Cap.* i. See, alſo, *Cap.* ii. & iii. So *Iſocrates* calls an Act of Oblivion and Indemnity, συνθήκη πόλεως, the Covenant of a City. *Orat adv. Callim.* *Dionyſius Halicarn.* ſays, Συνθήκας εἶναι κοινὰς πόλεων τὲς νόμους. *i. e.* Laws are the common Agreement of the City, *Lib.* x. *Cap.* iv. See, alſo, the *Digeſt. Lib.* i. *Tit.* iii. *de Legib. Senatuſque Conſult. & Longa Conſuet. Leg.* i. & ii.

[4] Indeed, the End of Civil Laws is to engage Men to the Obſervation of certain Things, by a Motive more prevalent, than any natural Obligation, *i. e.* by the Fear of Puniſhment, which the Breaker of them muſt expect from certain Perſons, inveſted with an Authority over them. But ſuppoſe a Number of Men ſhould ſeparate themſelves from any Civil Society, and agree together to obſerve certain Rules to act by, yet having no Sovereign Power, provided with ſufficient Abilities, to puniſh Tranſgreſſors, this Engagement could have no other Effect, than ſuch Agreements, as are made by natural Right, have, and, by Conſequence, could not oblige as a Law: For we might ſafely refuſe our Obedience, and it would become neceſſary to employ Force, to make us obſerve ſuch Regulations. But this would not be ſufficient to intimidate thoſe, who might be tempted to break them, and who might eaſily flatter themſelves with being able to make a good Defence, or imagine their Aggreſſors not ſtrong enough to attack them. In this Manner I have explain'd what our Author ſays. *Element. Juriſprud. Univerſ.* Pag. 250

which, becauſe the Laws were made upon the Propoſal of the Magiſtrate, with the Knowledge, and by the Command of the People, and ſo, as it were, in the Way of Bargain or Stipulation, they gave them the Name of *Covenants* and *Agreements* beforemention'd. Tho' indeed, neither upon Account of the major Part of the People's conſenting, or agreeing to them, can democratical Laws be properly ſtil'd Covenants. For this Agreement is only the Manner by which the ſupream Power, lodg'd in a general Aſſembly, exerts its Force; that being taken for the Will and the Decree of all, to which the greater Number gives Conſent.

So that the Efficacy of a Vote given in Council by any Member about framing a Decree, is very different from the Conſent, which a Man declares at his Entrance on a Covenant: For in this laſt Caſe, a Perſon that diſſents is not bound, and the Party cannot proceed without him: Whereas in the former Caſe, even the diſſenting Party is tied and obliged by the Plurality of Votes.

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III. As for the Term of *Right*, as it imports a Power of acting granted, or left free by the Laws, we muſt take care not to let it paſs for the ſame Thing as the Law itſelf: That is, When we are ſaid to have a Right by the Divine Law of doing ſuch or ſuch a Thing, we muſt not imagine that the ſame Thing is injoin'd and commanded by the Divine Law, and that therefore we may fairly do it, tho' it ſhould be forbidden by the Laws of Men. For, ſince a Man hath a Power of doing all ſuch Things as can proceed from his natural Abilities, except thoſe which are forbidden by ſome Law, hence, by common Cuſtom of Speech, thoſe Things which are not prohibited by ſuch or ſuch a Law, we are ſaid to have a *Right* of doing [1] by that Law. *Right* therefore, in this Senſe, denotes a Liberty; but *Law* includes ſome Bond and Engagement, by which our natural Liberty is reſtrain'd [2].

IV. In general, a *Law* may conveniently enough be defin'd, *A Decree by which a Sovereign obligeth a Subject to conform his Actions to what he preſcribes* [3]. We call it a *Decree*, not as it remains in the Mind and Will of the Party decreeing, but as it is communicated to the Subject in ſuch a Manner, as to let him underſtand the Neceſſity of his conforming to it: And therefore the Term *Decree* is here equivalent to *Command*. And we think it an indifferent Matter, whether one ſhould call a Law a *Decree* or a *Speech*, provided it be not eſteem'd neceſſary to it, that it be promulgated either *vivâ voce*, or in Writing; ſince it is ſufficient that the Will of the Legiſlator be any way made known to the Subject, tho' it ſhould only be by the internal Suggeſtion of Natural Light. Therefore we take it to be an uſeleſs Piece of Subtilty and Niceneſs in Mr. *Hobbes* [b], when he maintains, that the Laws of Nature have no farther the Force of Laws, than *as they are promulgated in Holy Scriptures by the Word of God; and not as they are certain Concluſions apprehended by Reaſon, concerning the doing, or the omitting of Things.* For, from the bare Dictates of Reaſon, we do not only underſtand, that the Obſervance of Nature's Laws is good and profitable to Mankind, but, likewiſe, that it is the Will and the Command of GOD, that Men ſhould govern their Actions by thoſe Rules; which is ſufficient to the Eſſence of a Law. Tho' ſtill indeed this Reply may be made, that natural Laws, even as they are the Dictates of Reaſon, cannot be conceiv'd any otherwiſe than in the Manner of Speeches, Propoſitions, or Sentences [4].

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To conclude this Head, It is evident, that under the Name of *Laws*, not only thoſe are comprehended which belong to *Juſtice*, ſtrictly ſo called, directing us, upon a full and perfect Obligation [6], to exhibit ſuch and ſuch Things to *others*; but thoſe too which are concern'd about the other Virtues, and which

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[c] *Book* i. *Chap.* i. §. 9.

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[2] This fully includes the general Notion of a Law. *See the ſame Note.*

[3] This Definition agrees only to *obligatory Laws, i. e.* which oblige us poſitively to act, or not. But we ſhall ſhew, in our ſecond *Note* on §. 15. that the general Notion of a Law, taken in the full Extent of it, as 'tis my Deſign to explain it here, comprehends, beſides that, a Permiſſion to act, or not act, in certain Caſes, as we judge convenient. I have given a more compleat and exact Definition, in my Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. ii. §. 2. laſt Editions. Mr. *Trevet* has criticis'd it, in a Note upon the ſame Place, but without well underſtanding my Thoughts. I ſhall refer my Reader to §. 15. Note 2. following.

[4] To make the Arguings of the Author compleat, theſe Words ought to be added, *But this is no Foundation for Mr.* Hobbes's *Hypotheſis.* In Effect, to form to ourſelves ſome Idea of the Principles of the *Law of Nature*, or to draw Conſequences from it, there is no Occaſion to make Uſe of *Words*; theſe being only neceſſary, when we would communicate our Thoughts to others. Thoſe Sentiments of Conſcience, which convince us of the Obligation we are under, of acting according to that Law, are entirely independent of Language, and Revelation only confirms them to us. I ſhall add, that with regard to *human Laws*, there are Caſes in which we believe, or ought to think ourſelves oblig'd to do certain Things, without any expreſs Command; and that only, becauſe we judge in ourſelves, that ſome Superior, on whom we depend, (as, for Inſtance, a Father, a Maſter, or a Prince) will approve our Actions as agreeable to his Will. *Xenophon* informs us, that this was the Reaſon that *Cyrus* formerly gave for preferring *Chryſantes*, to another of his Courtiers: *He is not* (ſays that Monarch) *contented with doing only what I enjoin him, but he does, of himſelf, whatever he judges ſerviceable to my Intereſt.* Ἐπεὶ δὲ ὁ τὸ, &c. *Cyrop.* Lib. viii. Cap. iv. §. 6.

[5] The Author, by this, underſtands a *Juſtice* and *Right*, accompanied with *Obligation*: For as to the reſt, he does not deny the Ideas of *Agreement* and *Diſagreement*, which are founded in the Nature of Things. See the preceding Part of this Work, Chap. ii. §. 6. Note 1. As for *Grotius*, I have examin'd his Notions, in my Notes on his Book *De Jure Belli et Pac.* Lib. i. Cap. i. §. 9. Not. 3. and §. 10. Not. 4.

[6] To underſtand this Diſtinction of *perfect* and *imperfect* Obligation, ſee *Chap.* vii. of this Book, §. 7. and *Book* iii. *Chap.* iv. §. 2, &c. See, alſo, what has been ſaid before, *Chap.* i. §. 19. concerning *Power.*

extend no farther than the Agent's own Perſon. For which Reaſon Laws may, and frequently are, made againſt Drunkenneſs [a], and other kinds of Intemperance, which Vices are ſo very prejudicial to the Parties committing them [1]. The ſame muſt be held as to [2] *Sumptuary Laws*, which preſcribe the Meaſure of Expences in Victuals, Cloaths, Building, and other Furniture or Proviſions. In which Particulars, if any Man offends, he doth no one an Injury, provided he defray the Charges out of his own Stock: And yet there's no Queſtion to be made, but that a Subject may, by Laws, be obliged to Frugality, which conduceth ſo highly to every Man's Intereſt and Advantage.

V. But ſince in the Definition of Laws it hath been aſſerted, that they proceed from a Superior, and that they have in themſelves the Power [3] of *obliging*, it ſeems neceſſary that we here ſhew what *Obligation* is, and whence it ariſeth; as, alſo, who is capable of receiving an Obligation and how one Man can *oblige* another, or, which is the ſame thing, how it comes to paſs that one Man may, by Virtue of his Authority and Command, enjoin another ſuch and ſuch Duties.

Obligation, then, we have already defin'd, *Cap.* i. §. 21. as a moral operative Quality, by which a Man is bound to perſom ſomewhat, or to ſuffer ſomewhat. In thus defining *Obligation*, we conſider it as it inheres in the Perſon obliged. Biſhop *Cumberland*, *Chap.* v. §. 27. in his Definition proceeds another way, conſidering *Obligation* as it is an Act of the Legiſlator, by which he ſhews or declares, that Actions conformable to his Laws are neceſſary to be done by the Perſons for whom the Laws are ordain'd. The *Roman* Lawyers call it [+] *the Bond of the Law*, by which we are neceſſarily tied to this or that. For, by Means of it, a kind of *moral Bridle* is put upon our Freedom of Action, ſo that we cannot rightly take any other way than what we are thus guided to. Not that it can ſo far reſtrain Men's Wills, as to render them unable to ſteer a different Courſe, tho' at their own Peril: For in this Senſe *Arrian*'s [a] Aſſertion will ever hold true, Προαιρέσεως ἀλλοτρίας οὐδεὶς κύριος, *No Man is Maſter of another's Will.*

Now, altho' there are many other Things which have an Influence on the Will, in bending towards one Side rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only preſs the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inſpires it inwardly with ſuch a particular Senſe, as compels it to paſs Cenſure itſelf on its own Actions, and to judge itſelf worthy of ſuffering Evil, if it proceeds not according to the Rule preſcrib'd. And hence alone we may underſtand how ſufficient the Strength of the *Obligation* is to the bending and inclining the Will; ſince there's nothing but the Thoughts of that Good or Evil [5], which our Actions may bring on ourſelves or others, that can lay any Neceſſity of ſuch a Performance, or of ſuch an Omiſſion, upon the Mind of Man, whilſt in Debate about future Concerns; ſuppoſing that the Will is allow'd its proper Liberty, and that ſuch Actions are to be exerted, as may be properly imputed to the Agent. And in this Reſpect chiefly, *Obligation* differs from downright *Compulſion*, that altho' both do ultimately repreſent ſome Object of Fear, yet *Compulſion* only ſhakes the Will with an external Force, and drives it on to the Choice of an ungrateful Thing, by the bare Senſe of an approaching imminent Danger: Whereas *Obligation* doth farther engage the Perſon to acknowledge, that the Evil denounc'd againſt the Tranſgreſſion of ſuch or ſuch a Rule, doth not undeſervedly fall upon him, ſince, by obſerving the Rule, he might have declin'd and eſcap'd it.

VI. As to Man's being capable of receiving *Obligation*, one Reaſon how he comes to be ſo is, becauſe he is endu'd with Will, which can turn to either Side, and ſo guide itſelf by a moral Rule; unlike thoſe other Beings, which, by ſome intrinſical Conſtraint, are determin'd to one and the ſame Way of acting. Whence it follows, that ſo far as

a In *Epictet. Lib* iv *Cap.* xii.

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1 To this we may refer a Law of *Zaleucus*, commanding, That *whoſoever happening to be indiſpos'd, ſhould drink pure Wine, unleſs upon the Advice of a Phyſician, tho' he recover'd, ſhould ſuffer Death, for exceeding the Bounds of Temperance without expreſs Orders.* Which Penalty was, no Doubt, unreaſonably ſevere. *Ælian. in V. H. Lib.* ii. *Cap.* xxxvii. But the learned Dr. *Bentley* is of Opinion, that all the Laws, which paſs under the Name of *Zaleucus*, and of which we find divers Fragments in Authors, are all forged. See his *Engliſh Diſcourſe* on *Phalaris*, Pag. 335. and *Nouvll. de Repub. des Lett.* by Mr. *Bernard*, *June* 1699. *Art.* v.

2 The Author will treat of them *Lib.* viii. *Cap.* v. § 3. There is a curious academick Diſcourſe upon this Subject, among his more choice academick Diſſertations (which I ſhall ſometimes quote) printed at *Lunden* in *Sweden*, *Anno* 1675, and reprinted at *Amſterdam*, under the Title of *Analecta Politica*, i. e. *Politick Fragments*, ſome Years ſince, (if I miſtake not in 1698)

3 This is the Effect of all Laws *obligatory*; for as for the Laws of *ſimple Permiſſion*, of which we ſhall ſpeak *Note* 2. §. 5. their Effect is to give a moral Right, or Power, to have particular Things certainly and lawfully, or to do and require certain Actions of another, if we judge it convenient. See *Chap.* i. §. 19, 20. aforegoing.

+ This Author gives the general Definition of the *Inſtitutes*, which properly reſpects Payments, or all other Engagements, which Men enter into of their own Accord, with Relation to another; for thus it runs, *Obligatio eſt Juris vinculum, quo neceſſitate aſtringimur alicujus rei ſolvendæ, ſecundum noſtræ civitatis Jura. Inſtitut. Lib.* iii. *Tit.* 14. *princ.*

5 This is the Opinion of Biſhop *Cumberland*, whoſe Words our Author tranſcribes. Another *Engliſhman*, in a Work, which we hoped would have been tranſlated into *French*, embraces the ſame Notion. According to him, the Duty or Obligation of a Man can be nothing elſe but a Reaſon and Motive, propos'd in a proper Manner, and neceſſarily determining him to chooſe and prefer one Manner of acting before another; and this Reaſon, or Motive, can be no other, than a greater Degree of Miſery to be avoided, or Happineſs to be attained; which can't be avoided, or gained, by acting after any other Manner. He owns no other Obligation, and if there be any other, he believes, that, if it be looked into with Care, it will be found to end in that. Mr. *Bernard* expreſſes Dr. *Gaſtrel*'s Senſe after this Manner, in his *Nouv. De la Rep. des Lettres*, *April* 1700. But here the *Motive* of *Obligation*, or that which ſtrongly influences us to ſubmit to it, is confounded with the *Foundation* of *Obligation*, or the Reaſon why we hold ourſelves indiſpenſibly bound to do ſuch or ſuch a Thing. Now this Reaſon is no other, than the Will of a Superior, whoſe Power, with regard to our Happineſs or Miſery, ſerves to influence our Will, ſo as to determine it, actually, to what is our Duty. It is true, theſe two Things are commonly join'd together, and, indeed, they are inſeparable, as far as relates to the Duties of the natural Law: But we muſt not, on this Account, confound them, as many do, to follow the Notions of this *Engliſh* Writer, and others of the ſame Nation. This would be to reduce every Thing to our own *Utility*, to confound what is *juſt* with what is *profitable*, and, by that Means, give Room to dangerous Miſtakes. Beſides, the Motive of *Utility* may ceaſe, and the Duty remain; as is eaſy to prove, by a ſenſible Example drawn from human Laws (for, with regard to divine Laws, the Caſe cannot be ſuppos'd to exiſt). Let us ſuppoſe a Prince, unjuſtly depriv'd of his Authority and Power, and in no Condition to do them Good or Harm, but does this abſolve them from their *Allegiance?* As for what concerns the Obligation of natural Laws, founded only on the Will of God, tho' always attended with the moſt powerful Motive of *Utility*; I have eſtabliſh'd this Diſtinction at full Length, in my Reflections on the *Jugement d'un anonyme*, or the deceas'd Mr. *Leibnitz*. I ſee no Reaſon, ſince, to alter my Opinion, nor to defend what I have prov'd, ſufficiently to convince every attentive and unprejudic'd Reader.

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no Neceſſity is interpos'd by any external Principle, Man muſt be conceiv'd to be perfectly free, and to have a Power of doing all thoſe Things which fall within the Sphere of his natural Strength and Ability. Nay, when he hath once determin'd and reſolv'd with himſelf, or when he hath once made any Choice, yet in the Determination, Reſolution, or Choice, conſider'd purely as they proceed from the Will, there is no ſuch Force, but that he may, at his Pleaſure, rightly change or relinquiſh them: unleſs there intervene ſome outward Reſtraint, forbidding any Alteration of the Will, when once ſettl'd and declar'd; for a Man, upon once ſignifying his Will and Purpoſe, may put himſelf under ſuch a Condition as that it ſhall be unlawful for him afterwards to recede.

Now a Man is ſuppos'd to have chang'd his Will, not only when he expreſly declares his preſent Diſlike of his former Choice, but, likewiſe, when he hath done any Thing inconſiſtent with his preceding Reſolution. And from this Principle may be deduc'd the greateſt Part of what the Civilians deliver concerning *Repentance*, or the altering of a Purpoſe. For, if we enquire after the general and ultimate Cauſe, why to repent of a Deſign ſhould, in ſome Acts, be lawful, in others not, we ſhall find it to be no other but this, that ſome Acts are attended with an external Bond, which forbids any Change of Purpoſe once declar'd; whereas in the reſt, the Will is left to the Exerciſe of its intrinſick Liberty. The former Caſe uſually happens, when, upon Suppoſition of a Change in one Man's Reſolution, ſome other Man would be highly injur'd and [1] prejudic'd, and ſo Occaſion would be adminiſtred to the breaking off of all Society and Commerce amongſt Men. And therefore from a Signification of the Will, this other Man is ſaid *to obtain a Right*, by Means of which he is now impower'd to make the promiſing Party ſtand to his Word, and upon Default may proſecute him by Force, either ſuch as he himſelf can exert, or ſuch as proceeds from the ſupream Ruler, according as the Perſons live, either in a State of Nature, or of civil Society. Therefore, when upon Declaration made of my Will, another Man doth not obtain a Right over me, I am then at Liberty to repent of what I have done. And ſuch a Right over us is then not obtain'd, when the Sovereign, under whoſe Power we live, hath not given another Man Authority to require and exact that from us, which we have ſignify'd as our Intention [2]. And hence it appears, why poſitive Laws may be repeal'd by him that enacted them; becauſe they do not convey to the Subjects any ſuch Right upon the Legiſlator, by Virtue of which they may demand and require their Continuance. Tho' ſome Commonwealths have endeavour'd to preſerve the Perpetuity of their Laws [3], by obliging the Members to declare upon Oath, that they will not conſent to their Alteration. Nay, tho' at the End of the Statute or Ordinance, a Clauſe ſhould be affix'd, pronouncing all Decrees that may hereafter be made contrary to this, to be null and void, yet ſuch a Clauſe cannot hinder the altering or reverſing of a Law by which no Man has obtain'd a Right. For 'tis abſurd that a former Decree ſhould diſannul a latter; ſince abſolute Power cannot bind and reſtrain itſelf; and ſince that which is in its own Nature ſubject to change [4], cannot be made fix'd and irrevocable [a]. The *Athenians* in *Thucydides* [b], laid up a thouſand Talents in the Citadel, denouncing a capital Penalty againſt him who ſhould either decree or perſuade the employing that Money to any Uſe, except in Caſe the City were attack'd by a hoſtile Fleet: And yet, upon the Revolt of the Inhabitants of *Chios*, their Fears engag'd them to repeal that Decree [c]. When Princes [5] add expreſly in ſome of their *Conſtitutions*, that altho' they ſhould hereafter order any Thing to the contrary in a particular Edict, yet the Magiſtrates and Judges ſhall not obey or regard any ſuch Command, this Addition doth by no Means amount ſo high, as to prove they may not abrogate ſuch *Conſtitutions*, but rather ſhews, that the latter Orders are not ſerious, or that they dropt from them unawares. And ſometimes by this ſubtil Artifice they cut off and prevent the Importunities of ſaucy Petitioners, whom perhaps it would not be ſafe for them abſolutely to deny [d].

But there's need of diſtinguiſhing very nicely between the poſitive Law itſelf, and that Right which it occaſions to be obtain'd. The Law itſelf may be diſannull'd by the Author, but the Right acquir'd by Virtue of that Law, whilſt in Force, muſt ſtill remain: For, together with a Law, to take away all its precedent Effects, would be a high Piece of Injuſtice: For Example, [6] Suppoſe it were a Law in any State, that *as a* [7] *Man diſpos'd of his Poſſeſſions by Will, ſo the Right to them ſhould ſtand.* It would be very fair, in this Caſe, for the Sovereign to retrench this Liberty of Teſtaments, and to order that, for the future, all theſe Inheritances ſhall paſs to the Heirs at Law. Yet it would be unreaſonable to take away from Perſons what fell to them by Will, whilſt the former Law was in Uſe and Vigour. And by the ſame Rule we may judge of that Action of Pope *Boniface* VIII. when, out of Hatred to *Philip the Fair*, King of *France*, he recall'd all the Indulgences which his Predeceſſors had granted to the *French* Nation; which *Harry Stephens* hath ſo juſtly ridicul'd in his pleaſant Apology for *Herodotus* [e].

[a] Vide *Cicero.* ad *Attic.* Lib. iii. Ep. xxiii. [b] Lib. ii. Cap. xxiv. Ed. *Oxon.* p. 98. [c] Ibid. *Lib.* viii. *Cap.* xv. p. 476. [d] Vid. *Cod.* Lib. v. Tit. viii. *ſi ex reſcripto nuptiæ petantur.* [e] Cap. xl.

[1] It is a Rule of the *Roman* Lawyers, *Nemo poteſt mutare conſilium ſuum in alterius injuriam*, i. e. *No Man can change his Purpoſe to another's Prejudice.* Digeſt. Lib. l. Tit. xvii. De diverſis Reg. Juris. Leg. lxxv.

[2] We ſhall, hereafter, treat of ſeveral Caſes, in which 'tis lawful for a Man to change his Opinion or Intentions. See chiefly *Lib.* iii. *Cap.* vi, vii.

[3] See *Book* iv. *Chap.* ii. §. 17. *N.* 2. following.

[4] If Kings were infallible, as they would, in the Caſe before us, always take proper Meaſures, and command nothing but what is for the great Advantage of the State, we might then believe, that whatever Laws and Orders they make, would never need Alteration; but ſince the contrary is evident, by Experience, it is as abſurd, as prejudicial to a Society, to affirm, That what is once reſolved and eſtabliſhed, in what Manner ſoever it is done, ſhould always continue in Force, whatever Inconveniences may ariſe from it. The ancient Kings of *Perſia*, whoſe Laws were looked upon as unalterable, found themſelves often obliged to elude their Effect by ſome latter Edicts, (See *Eſth.* viii. 8, &c.) and the Princes, who, in all Times, have acted upon this Principle, altho' ſecretly, muſt eaſily obſerve the bad Conſequences of it, if they were careful to do their Duty, unleſs they were intoxicated with a good Opinion of themſelves, and puffed up with a falſe Notion of Grandeur.

[5] See Mr. *Hertius*'s Diſcourſe, entitled, *De Lege, Clauſulâ, ut nè abrogari unquam poſſit, munita*, i. e. *Of a Law ſtrengthened with a Clauſe, that it ſhall not be repealed*, which is the firſt of his third Tome of ſmall Tracts and Comments.

[6] So, in the *Civil Law*, new Laws and new Conſtitutions have no Force but for the future, they meddle not with what's paſt; as theſe Words import, *Leges & Conſtitutiones futuris certum eſt dare formam negotiis, non ad facta præterita revocari. Cod. Lib.* i. *Tit.* xiv. *De Legib. & Conſtitut. Principum, Leg.* vii. See Mr. DOMAT's Civil Laws, according to the Order of Nature. *Tit.* i. *ſ.* 1. §. 13, &c. of the Preliminaries.

[7] It is a Law of the twelve Tables, *Uti legaſſit ſuæ rei, ita jus eſto*, i. e. *As every Man bequeaths his Goods, let Right be.* Inſtitut. Lib. ii. Tit xxii. *De Lege Falcid.* in the Beginning. See, alſo, *Digeſt. Lib.* l. *Tit.* xvi. *De verbor. Signifcat. Leg.* cxx.

We muſt take Care, likewiſe, to diſtinguiſh the other Acts of Sovereigns from their Laws, leſt any ſhould imagine that all their juſt Donations, Alienations, or Compacts, may be retracted by themſelves, or [1], by their Succeſſors. For upon theſe Acts a Right is obtain'd by other Men, which ought not to be taken from them againſt their Conſent. Hence it appears, that when a Man renounceth his Right, it is not neceſſary to add expreſly, that neither he nor his Heirs will do hereafter any Thing contrary to that *Renunciation*; and that if they do attempt any ſuch Matter, it ſhall be eſteem'd void. For, ſince in Deeds of this Nature, a Man plainly declares his receding from his Right to any Thing, and profeſſeth to tranſlate it on another Perſon, it would be evident, without that additional Clauſe, that he cannot (with any Force or Effect) afterwards diſpoſe of that Thing, having no longer any Right or Title to it. And for the ſame Reaſon, becauſe whilſt the Teſtator lives, no Man hath obtain'd a Right by Virtue of his Teſtament, he may fairly alter it, even tho' he had ſtrengthen'd it with a Clauſe, declaring all Wills that ſhould hereafter be made to be invalid [2]. For this indeed carries Grounds enough to make us preſume the latter Will did not proceed from his ſerious Intentions; yet if that very Clauſe be revok'd in that latter Will, the former will be of no Virtue or Efficacy. And ſo in Deeds and Inſtruments of Conveyances, and other Contracts, if a Diſpute ariſe about any Point, [3] that which bears the latter Date ſhall take Place of that which was made firſt.

VII. From what has been ſaid, we may, likewiſe, gather the Reaſon why a Man cannot be *oblig'd* to himſelf, or why he cannot enter into any Agreement or Promiſe purely directed to his own Perſon, no other Party being concern'd with him. For he who obtains a Right by any Obligation, may fairly wave that Right, when, by ſo doing, he injures not a third Perſon. But now in this Caſe the obliged and the obliging Party, or he that owes the Right, and he that obtains it, are one and the ſame. Therefore ſhould a Man never ſo much reſolve to oblige himſelf, yet the Obligation would be in vain, ſince he could excuſe himſelf from Performance at his Pleaſure: And he that can diſpenſe with himſelf in this Manner, is actually free. Beſides, ſuch an Obligation could be of no manner of Uſe; becauſe when a Man gives or denies any Thing to himſelf, he neither gets by the Performance, nor loſeth by the Omiſſion [a].

But whereas it is ſometimes ſaid, that a Man is obliged to preſerve himſelf [4], the Meaning of this is no more, but that the Exerciſe of that Obligation, inherent in every Man, is terminated in a Man's own Perſon, but it hath, likewiſe, a reference to God, the Author of natural Law, as to him who hath a Right of requiring the Performance of that Obligation, and of puniſhing its Neglect: And therefore a Man is ſo far bound to conſult his own Preſervation, as he is a Servant of God, and a part of human Society, to which, by the Divine Command, he ought to ſhew himſelf a uſeful Member. In the ſame Manner as a Maſter may rightly puniſh his Servant, and a Sovereign his Subject, who hath render'd himſelf unfit to diſcharge his proper Labours and Employments. Neither is this Maxim, that *a Perſon cannot oblige himſelf*, confin'd to ſingle Men, but extends to whole Bodies and Societies [5]. As for that which ſome Authors urge about a Man's ſwearing to himſelf, That he will, for Inſtance, refrain from this or that Enormity, to which his evil Appetites incline him, this Obligation bears the Nature of a *Vow*, the exacting of which appertains to Almighty God [b].

VIII. Another Reaſon why, ſince the Will of Man is capable of conforming to a Rule, ſuch a Rule may be preſcrib'd to it, and an Obligation laid on it thus to conform, is, becauſe he is under the Command of a ſuperior Power. Theſe two Conditions put together, render Men liable to Obligations, proceeding from eternal Principles. For when the Powers of any Agent are ſo tied up by Nature to an uniform way of acting, as that it cannot, by its inward Motion, ſteer a different Courſe, the Action thus produc'd is rather *phyſical* than *moral*, and ariſeth rather from Neceſſity than from Obligation. And, on the other hand, where a Perſon acknowledgeth no Superior, there can be no eſſential Principle apt to reſtrain his inward Liberty. And, altho' ſuch an one ſhould never ſo exactly obſerve a certain Method of proceeding, and conſtantly refrain from ſome kinds of Actions, yet this would not be taken for the Effect of any Obligation, but of his own free Pleaſure. It follows then, that he alone is capable of Obligation, who [6] can have Knowledge of a Rule preſcrib'd him, and hath a Will [7] intrinſically free, able to ſteer contrary ways; which Will muſt, however, when a Rule is enjoin'd it by a Superior, be ſenſible that it ought not to recede from it. And that ſuch is the Nature of Man, every one's Obſervation may inform him.

IX. *Obligations* are laid on human Minds properly by a *Superior*, that is, by ſuch an One as not only [8] hath ſufficient Strength to denounce ſome Evil againſt us upon Non-compliance, [9] but hath, likewiſe, juſt Reaſon to require the retrenching of our Free-Wills by his own Pleaſure. For when any one is endued with theſe Qualifications, ſo ſoon as he ſhall command any Thing, and ſhall farther ſignify the good and evil Conſequence on Obedience and Diſobedience, there muſt needs ariſe, in the rational Faculty, a Fear mixed with Reverence, the former proceeding from his Power, the latter from the Conſideration of ſuch other Reaſons, as without that Motive of Fear, and barely by way of Counſel, ought to prevail on us to embrace the Command. Hence we conceive, that the Right of impoſing Obligations on another, or, which comes to the ſame Thing, the Right of commanding another,

[a] Add. *Senec. de Benef.* Lib. v. Cap. vii, &c.

[b] Com. *Felden* ad *Grot. Lib.* ii. *Cap.* xiii. §. 1.

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[1] See *Lib.* viii. *Cap.* x. following.

[2] Conſult here my Remark on *Grotius, De Jure Belli et Pac.* Lib. i. Cap. iii. §. 18. Note 4.

[3] The laſt Editions, even that of 1706, which M. *Hertius* publiſh'd, have it *poſteriori derogabit.* But in the firſt Edition, and in the *Elemen. de Univ. Juriſp. Univ.* the Paſſage is right, *Poſterius priori derogabit.* See *Lib.* v. *Cap.* xii. §. 6.

[4] That is to ſay, That Man is the Object of the Duties which reſpect himſelf, but not the Foundation of them; and if he is obliged to preſerve himſelf (for Example) or improve himſelf, he is not the Cauſe of it preciſely, as if he could lay an Obligation upon himſelf, but becauſe God will have him do ſo. See *Lib.* ii. *Cap.* iv. §. 16.

[5] This is, becauſe theſe Bodies are looked upon as a ſingle moral Perſon. See what is ſaid above, *Chap* i. §. 13.

[6] Theſe Words ought to be added, *acknowledging a Superior, can*——and the Author himſelf has not omitted them in his Abridgment of *the Duties of a Man and a Citizen, Lib.* i. *Cap.* ii. §. 4. where the reſt of this Sentence is found Word for Word.

[7] See Paragraph 4. of the Chap. of the Abridgment juſt cited, in the Note of the laſt Editions.

[8] *Force*, properly ſpeaking, has no Share in the Foundation of *Obligation*: It ſerves only to put the Superior in a Condition to make good his Right.

[9] See what I have ſaid upon this Place, to defend my Author againſt the unjuſt Criticiſm of the deceas'd M. *Leibnitz Jugement d'un anonyme.*

and

and of prescribing Laws, doth not arise barely from Strength, or from the superior Excellency of Nature [1]. Strength, indeed, may, of itself, so far bend me contrary to my Inclinations, as to make me choose rather, for a while, to obey another's Will, than to venture the Experience of his Force: But this Inducement ceaseth, when once the Fear is over, and I shall then have no Reason why I should not act rather according to my own Pleasure, than according to *his*. And where a Man can bring no other Argument for my Compliance to his Orders, but Force and Violence, nothing hinders, but that, if I judge it expedient for my Affairs, I may try all Means to repel the Violence, and to assert and vindicate my own Liberty [2].

X. It may not be improper here, to examine that Assertion of Mr. *Hobbes*, which he hath laid down in his Book, *De Cive* [a], and which runs thus, in the *English* Improvement of his *Leviathan* [b]. *The Right of Nature, whereby GOD reigneth over Men, and punisheth those who break his Laws, is to be deriv'd, not from his Creating them, as if he requir'd Obedience, as of Gratitude for his Benefits, but from his irresistible Power.* The Argument, with which he defends this Notion, is carried on to this Purpose: "All "Right over others being either by Nature, or by "Compact, that Right may be said to be granted "by Nature, which Nature doth not take away." *Now seeing all Men, by Nature, had a Right to all Things, they had a Right every one of them to reign over all the rest. But because this Right could not be obtain'd by Force, it concern'd the Safety of every one, laying aside that Right, to set up Men with sovereign Authority, by common Consent to rule and defend them: Whereas if there had been any Man of Power irresistible, there had been no Reason why he should not, by that Power, have rul'd and defended both himself and them, according to his own Discretion. To those therefore, whose Power is irresistible, the Dominion of all Men adhereth naturally by their Excellence of Power; and, consequently, it is from that Power, that the Kingdom over Men, and the Right of afflicting them at his Pleasure, belongs naturally to Almighty GOD, not as Creator and Gracious, but as Omnipotent.* Now in this Discourse there are several Things that deserve to be censur'd. For, in the first Place, it may be question'd, whether or no those two Expressions, *A Right of Sovereignty* (upon Account of Strength) *is granted by Nature*, and, *A Right of*, &c. *is not taken by Nature*, hang very well together. Because in most Cases, my not taking away a Thing is by no Means an Argument, that I therefore grant it. And since, *not to be taken away*, and *to be granted*, are different Things; such a Right may seem to be *granted* by some other Principle than Nature, tho' Nature doth not *take it away*. Besides, that Maxim, *All Men by Nature had a Right to all Things* [3], ought to be interpreted with great Caution. By *Right* [c], he means the Liberty which every Man hath of using his natural Faculties according to Reason. Therefore his Principle, in a sound Sense, will amount to no more than this; By Nature, that is, upon the Removal of all Law, every Man may fairly use his natural Strength against those whom his Reason instructs him thus to deal with, for the sake of his own Preservation. But it doth not hence follow, that barely by natural Strength an *Obligation*, properly so call'd, may be laid on another: For to *compel* and to *oblige*, are very different Matters; and tho' natural Strength be sufficient for the former, yet the latter cannot be perform'd by that Superiority alone. For, even according to Mr. *Hobbes*'s own Notion, as one Man hath a Right of *compelling others*, so those others have a Right of *resisting him*. But now Obligation cannot stand with a Right of resisting; because it presupposeth such Reasons as inwardly affecting Men's Consciences, make them conclude, by the Judgment of their own Mind, that they cannot *honestly*, and therefore *rightly* resist. And though it be irrational, to contend violently against a superior Strength, and by that Means to draw upon ourselves [4] greater Mischiefs; yet there remains in us a Right of trying all Ways, either to drive off the Force, by the dexterous Application of other Force, or to elude it by Subterfuge and Escape: But neither can this Right consist with that *Obligation* which is precisely so term'd, and which *Grotius* commonly opposeth to *Extrinsecal* [5]. So that, on the whole Matter, by bare Force, not the Right of Resistance, but only the Exercise of it, is extinguish'd. We may explain the Point by the Case of Brutes, with which we Men live in a lawless State: Now those of them which we can master by our Strength, we lay hold on, and employ in our Service; but if any of them escape our Power, we are not apt to complain of any Injury receiv'd from them. Nor can it be here replied, that Brutes are not capable of Obligation; and that therefore they cannot be tied and engag'd any other Way, than by Strength: For Mr. *Hobbes* himself acknowledgeth, [d] That a Captive in War, although capable of Obligation, yet is under none, whilst he is restrain'd only by *natural Bonds*, and before the Interposition of any Faith, or Compact; and that therefore, such an one may give his Conqueror the slip, or may assault him violently; so soon as he finds Opportunity. *Seneca de Ira. Lib.* ii. *Cap.* xi. *Nature hath so order'd Things, that he whose Greatness*

[a] *Chap.* xv. §. 5. [b] *Pag.* 187. [c] Vide *De Cive, Cap.* i. §. 7. [d] *De Cive, Cap.* viii. §. 2.

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[1] All the Power of obliging an intelligent Creature, such as Man, is founded upon the Ability and Will, rendering him more happy, or miserable, than he would be, if he disobeyed. If Man were such a Creature, that he must necessarily be unhappy, or that it were impossible, that his Misery could be increased or diminished, GOD might force him, indeed, to act after such or such a Manner, but he could not properly oblige him to it (*Gastrell* in the *Extract of the New Rep. of Letters.*) It were, also, in vain, for an intelligent Being to pretend to subject another's Actions to a certain Rule, if it be not in his Power to reward his Obedience, and punish his Disobedience, and that by some Good or Evil, which is not the natural Effect, or Produce of the Action itself, for that which is naturally profitable, or unprofitable, works of itself, without the Help of any Law. Mr. LOCKE's *Philos Essay, p.* 428. All this should be understood according to my Remark upon it, §. 5. of this Chapter, Note 4.

[2] Terent. Adelph. *Malo coactus qui suum officium facit, &c.* He that doth his Duty out of Fear of Punishment, will be sure to take care, whilst he is under Apprehension of being discover'd: But, upon the Hopes of Privacy and Security, he never fails to give a Loose to his old Inclinations.

[3] See *Book* ii. *Chap.* ii. §. 3.

[4] *Pindar. Pyth.* Od. Ποτὶ κέντρον δέ, &c. To kick against the Goad is a very dangerous Attempt.

[5] But this external Obligation imposes, also, according to *Grotius*, a Necessity of not *resisting*. All the Difference is this, That the internal Obligation has respect to Right, properly so call'd, by Virtue of which we act according to Reason, and agreeable to the Light of *Conscience*, whereas, an external Right, which produces an external Obligation, imports no more, than *Impunity* to him that uses this Right, and hinders not, but that he may do Evil in the Use of it, altho', in this last Case, he can't resist lawfully. *Grotius*, among other Instances, gives an Example of the ill Treatment which a Prisoner of War receives from a Conqueror, and a Subject from his Prince. See *De Jur. Bell. & Pacis Prolegom.* §. 41. and *Lib.* i. *Cap.* iv. §. 3. and *Lib.* iii. *Cap.* vii. §. 6, 7. But he chiefly applies this Distinction to a great Number of Questions relating to the Right of War.

depends

depends on the Fear of others, is not without Fear himself[2]. Were we diſpos'd to be tedious, we might farther ſhew, that this Maxim of Mr. *Hobbes* is meer Abſurdity and Nonſenſe, if applied to God Almighty. For how can Nature be ſaid to have *granted* any Thing to God: Since Nature is either God himſelf, or, at leaſt, the Work of God? For theſe Reaſons therefore, and becauſe it ſeems unworthy of the Divine Goodneſs, we conclude, that the Right of Commanding, or the Sovereignty of God, as it denotes the Virtue of imprinting Obligations on Men's Minds, is not to be deriv'd from the bare Conſideration of his Omnipotence.

Neither do thoſe Arguments, brought by Mr. *Hobbes* from Scripture, prove the Truth of his Poſition. When God ſeems to have Recourſe to his Abſolute Power, about the Calamities ſent on *Job*, we cannot hence infer, that he hath no Right over his Creatures, but what ariſeth from that Power only. *Job* himſelf, at the beginning of his Sufferings, made a true Declaration, by what Right God had deprived him of his Goods, and of his Children: *The Lord gave* (ſays he) *and the Lord hath taken away:* That is, *why may not he recal at his Pleaſure, thoſe Things which he gave upon the ſame free Account?* But when his Grief had ſo far prevail'd on his Reaſon, as to make him enter into Expoſtulation with Heaven, then God, to repreſs the Inſolence of the Complaint, alledg'd his Power, ſince the Sufferer had now neglected to conſider the other Reaſons of the Divine Sovereignty and Command. And thus we commonly deal with obſtinate and refractory Subjects; when they refuſe to hear our *Reaſons*, we ſhew them our *Strength*, to make them underſtand not only their Sin, but their Folly too in oppoſing our Dominion. In the ſame Manner, if a Perſon complains of the Misfortunes of good Men, and the Proſperity of the Wicked, when he perſiſts deaf to the genuine Cauſes of that Proceeding, in the laſt Place, we confound him with Divine Omnipotence: As if we ſhould ſay, *You that fancy yourſelf injur'd, go and try your Strength againſt GOD for Satisfaction.*

Nor is it a better Inference of Mr. *Hobbes*, when he ſays, that the Obligation of paying Obedience to God is incumbent on Men, upon Account of their Weakneſs. For this only could make it a Piece of Folly in us, not to redeem ourſelves by obeying, from ſome greater Evil: But it doth not at all take away our Right of deſiring, and of endeavouring, by all Means, to eſcape the ſuperior Strength which thus oppreſſeth us. But ſuch a Right is utterly excluded by every true *Obligation*. Nor is this Conſequence good, *Of two Omnipotents, neither can oblige the other, therefore Men are oblig'd to GOD, only becauſe they are not Omnipotent*; were the Antecedent never ſo unqueſtion'd. Not to ſay, that the Fancy of two Omnipotent Beings is [1] an impoſſible Suppoſition. Neither did our Saviour intend to aſſert his Right againſt *Saul* by that Argument, *It is hard for thee to kick againſt the Pricks*; but rather to reprove the Boldneſs and Vanity of *Saul*'s Deſign. Nor was that mighty Convert afterwards invited by *Ananias* into the *Chriſtian* Faith, barely by being inform'd how much above his Strength it was, to deſtroy that Profeſſion. We have applied ſo much the more Diligence to the confuting of this Opinion, the more Danger we apprehend of its being abus'd by violent and headſtrong Men. In *Thucydides*[2] the *Athenian* Ambaſſador ſpeaks to this Purpoſe, *We follow the common Nature and Genius of Mankind, which appoints thoſe to be Maſters who are ſuperior in Strength. This Law is not of our making, nor are we the firſt who have uſed it; but we receiv'd it as it came down to us, and we ſhall leave it to guide the Practice of all Poſterity.* Dionyſ. Halicarn. Lib. i. *It is a Law of Nature common to all Men, and which no Time ſhall diſannul or deſtroy, that thoſe who have more Strength and Excellence, ſhall bear Rule over thoſe who have leſs.* [3] *Brennus* (in *Plutarch*'s *Camillus*) calls it *a moſt ancient Law, that which gives to the Valiant the Poſſeſſions of Cowards; derived from GOD himſelf, and reaching even to brute Creatures; for even amongſt theſe, Nature gives larger Privileges and Portions to the Strong than to the Weak.* *Livy* hath expreſs'd the Notion more conciſely, *Omnia fortium eſſe*, that *the World was made for the Bold and the Strong.* *Callicles* (in *Plato*'s *Gorgias*) purſues the ſame Argument: In the firſt Place, he lays down this Suppoſition, That *Nature* and *Law* are many Times contrary to each other: He inſtanceth in the Caſe of *Injury*; to *receive* which is, by Nature, the moſt baſe and vile,[4] as *the Treatment of a Slave, not of a free Subject*; yet to do an Injury is much worſe in the Conſtruction of the Law. He obſerves it to have been the Policy of Law-givers to encourage this latter Notion, ſo to order the uſeful Engines of Praiſe and Diſpraiſe, as to hinder others from growing too powerful for them; well knowing, that they were otherwiſe [5] an unequal Match for the Multitude.

[1] *Now*

[2] *Add. Senec. ad Polyb. Cap.* xxix.

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[1] See how Mr. *Locke* proves this, in one of his Letters written in *French*, becauſe it was to be ſhewed to a Perſon of Quality, who did not underſtand *Latin*. Two Omnipotent Beings are altogether inconſiſtent, becauſe we muſt neceſſarily ſuppoſe, that the one muſt always will what the other wills; and, in this Caſe, he, whoſe Will is neceſſarily determined by the other, is not free, conſequently has not that Perfection; for 'tis better to be free, than to be ſubject to the Determination of another's Will. But if they are not both reduced to the Neceſſity of willing the ſame Thing always, then the one may deſire to have that done, which the other would not; in which Caſe, the Will of the one muſt prevail over the Will of the other, and ſo he, of the Two, whoſe Power can't bring about what he would, can't be Omnipotent, becauſe he can't do ſo much as the other. So that there can't be two Omnipotent Beings, and conſequently not two Gods, *p.* 413. See, alſo, Mr. *Clerc*'s *Ontology*, *Sect.* iii. *Chap.* x. §. 3. For as to what regards Mr. *Hobbes*'s Argument, independently of the falſe Suppoſition of two Omnipotent Beings, it can have no Appearance of Foundation, but by ſuppoſing that Force is the only Source of Obligation. Now this is begging the Point in Queſtion.

[2] Ἡγούμεθα γὰρ τό, τε θεῖον δόξῃ, τὸ ἀνθρώπειόν τε σαφῶς διὰ παντὸς ὑπὸ φύσεως ἀναγκαίας, ὃν ἂν κρατῇ ἄρχειν, καὶ ἡμεῖς ὅτε θέντες τὸν νόμον, ὅτε καὶ μένῳ πρῶτοι χρησάμενοι, ὄντα δὲ παραλαβόντες, καὶ ἐσόμενον ἐς ἀεὶ καταλείψοντες, χρώμεθα αὐτῷ. *Thucyd. Lib.* v. *Cap* cv. See, alſo, *Dionyſ. Halicarn. Lib.* i. *Cap.* v.

[3] *Brennus*'s Words, in *Plutarch*'s *Camillus*, are theſe, Οὐδὲν ἁδὲ ἡμεῖς γε δεινὸν ἐδὲ ἄδικον ποιοῦντες, ἀλλὰ τῷ βαρυσθενεστάτῳ τῶν ἀνθρώπων ἀκολουθοῦντες, ὃς τῷ κρείττονι τὰ τῶν ἡττόνων δίδωσιν, ἀρχόμενον ἀπὸ τῶν θεῶν, καὶ τελευτῶν εἰς τὰ θηρία, καὶ γὰρ τούτοις ἐκ φύσεως ἔστιν, τὸ ζῆλον πλέον ἔχειν τὰ κρείττονα τῶν ὑποδεεστέρων.

[4] *Plato*'s Words are, Οὐδὲ γὰρ ἀνδρὸς τοῦτό γ' ἐστὶ τὸ πάθημα, τὸ ἀδικεῖσθαι, ἀλλ' ἀνδραπόδου τινὸς, &c.

[5] It appears plainly, by this Place, as it is printed in all the Editions of the Original, that our Author did not conſult the *Greek* Originals of the Paſſages, which he quotes, nor, thro' Inadvertence, did he ſometimes thoroughly underſtand the *Latin* Tranſlation. *Callicles*, in *Plato*, ſays, οἱ τιθέμενοι τοὺς νόμους, οἱ ἀσθενεῖς ἄνθρωποι εἰσὶ καὶ οἱ πολλοί. Words both very clear and coherent with the former Diſcourſe; but *Marſilius Ficinus* having tranſlated them in an ambiguous Manner, unleſs one conſiders them throughly, thus, *Qui leges condunt, imbecilliores ſunt ac multitudo ipſa eſt*; Mr. *Purſendorf* thought that he had ſaid, *Lawgivers are weaker than the People*, as if the *Latin* had been, *Imbecilliores multitudine ipſâ*, or, in the *Greek*, ἀσθενέστεροι τῶν πολλῶν, whereas the Senſe of *Callicles* is, That the Laws were firſt eſtabliſhed by the People, who thought themſelves not ſtrong enough to defend themſelves againſt the Inſults of others, and chiefly by thoſe who fear'd the Great would oppreſs them. This is pretty exactly the Sentiment of *Horace*, which perhaps he borrow'd from *Plato*:

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[1] *Now Nature herſelf* (ſays he) *as I imagine, ſhews it to be juſt and right, that the Good and the Strong ſhould have, in every Thing, a larger Share than the Bad and the Weak.* And therefore, whereas *Xerxes* and *Darius* had both made uſe of this Pretence, the former againſt the *Grecians*, the latter againſt the *Scythians*; he ſays they did all this *according to the Law of Nature.* He complains that the rigid Doctrine of *Juſtice* damps and oppreſſeth the generous Spirits of young Men; or that, on the contrary, when any one breaks thro' thoſe formal Reſtraints, he ſeems to ſhake off his Ruſt, and to *ſhine in all the Splendor of natural Right.* On this Principle, he ſays, *Hercules* drove off *Geryon*'s Oxen, who neither ſold, nor gave them him; *the Hero having a natural Right to the Oxen, and all the other Goods and Poſſeſſions of inferior puny Mortals.* And this is indeed the Maxim, which the great Bullies of Mankind would have prevail in the World: *Hoc Ithacus velit, & magno mercentur Atridæ. Plutarch*'s Opinion is much more moderate, and might be admitted with leſs Exception, [2] *It is the firſt and principal Law of Nature* (ſays he) *that he whoſe Circumſtances require Protection and Deliverance, ſhould admit him for his Ruler, who is able to reſcue and defend him.*

XI Others there are who derive the Origin of *Sovereignty*, or of the Power of impoſing *Obligations* on another, from Eminency or ſuperior Excellency of Nature, which they pretend is of itſelf ſufficient for that great Purpoſe. They draw a main Argument from the Nature of Man, in whoſe Mind, as in the moſt excellent Part, is ſeated the τὸ ἡγεμονικὸν, the *Directive Power.* To illuſtrate which, they alledge the Authority of *Cicero* [3], when he commends the *Latin* Phraſe *exire de poteſtate*, as applied to thoſe, who are carried away from rational Acting, by the Fury of their Paſſions and Luſts; ſuch Men being truly *gone out of the Power or Command* of their Minds. [4] *Ariſtotle*, likewiſe, is brought in to ſtrengthen their Party, becauſe he hath ſomewhere declared, that if a Man can be found excelling in all Virtues, ſuch an one hath a fair Title to be King. Thus the moſt ſuperlative Pre-eminence of GOD, would, they ſay, deſerve Veneration, tho' he had never created the World. Farther, to this Pre-eminence of Nature, they add *Non-accountableneſs*; and affirm, That for this Reaſon only, if a Man uſeth brute Creatures (whom he ſo far excels) any otherwiſe than with Decency and Moderation, he may do it fairly and ſecurely, and they have no Right to complain of their hard Treatments: Becauſe, when one contends with another about Matters of Right, he doth, as it were, compare himſelf with him, and is willing that both ſhould be judg'd by the ſame Law; but this cannot be admitted in two Natures ſo vaſtly different, that one may be ſaid to have been made for the ſake of the other. And therefore they pretend, that GOD declar'd Men's Right over Brutes, purely on Account of their ſuperior Nature. Whence, they tell us, if a Man, for abuſing his Cattle, happen to be puniſh'd by the Magiſtrate, this is not done in Favour of the Beaſts, but for the ſake of the other Subjects, whoſe Intereſt it frequently is, that every one ſhould uſe well what he poſſeſſeth. On the ſame Score, they ſay, the Body ought not to complain, tho' it ſhould, by the Command of the Soul, be waſted and worn out in Labours; ſince it is in ſo high a Degree ſurpaſs'd by that nobler Part.

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[3] *Tully*'s Words are, *Itaque nihil melius, quàm quod eſt in conſuetudine ſermonis Latini, cum exiſſe ex poteſtate dicimus eos, qui effrænati feruntur, aut libidine, aut iracundia,* Tuſc. quæſt. Lib. iii. Cap. v. To which Words, it may be convenient to add another Paſſage of *Cicero*'s, which will ſhew, that the former is very well apply'd, *Qui igitur exiſſe ex poteſtate dicuntur, idcirco dicuntur, quia non ſunt in poteſtate mentis, cui regnum totius animi à naturâ tributum eſt.* They, therefore, who are ſaid to go beyond their Power, are ſo term'd, becauſe they are not under the Command of the *Underſtanding*, to which Nature has given the ſupreme Government of the Soul.

[4] See this Author's Treatiſe, *De Republica, Lib.* iii. *Cap.* xvii.

[5] The *Greek* of *Antonine* is, Εἰ δ' ἄρα περὶ μηδενὸς βουλεύονται (οἱ θεοὶ) πιστεύειν μὲν οὐχ ὅσιον, ἢ μηδὲ θύωμεν, μηδὲ εὐχώμεθα, μηδὲ ὀμνύωμεν, μηδὲ τἆλλα πράσσωμεν, ἅπερ ἴσασι ὡς πρὸς παρόντας καὶ συμβιοῦντας τοὺς θεοὺς πράσσομεν. And *Tully*'s *Latin* is, *Sin autem Dii neque poſſunt nos juvare, neque volunt, nec omnino curant, nec quid agamus animadvertunt, nec eſt quod ab his ad hominum vitam permanare poſſit, quid eſt quod ullos Diis immortalibus cultus, honores, aut preces adhibeamus?* See, alſo, *Tully de Nat. Deorum, Lib.* ii. *Cap.* xxv.

depends on the Fear of others, is not without Fear himself[a]. Were we diſpos'd to be tedious, we might farther ſhew, that this Maxim of Mr. *Hobbes* is meer Abſurdity and Nonſenſe, if applied to God Almighty. For how can Nature be ſaid to have *granted* any Thing to God: Since Nature is either God himſelf, or, at leaſt, the Work of God? For theſe Reaſons therefore, and becauſe it ſeems unworthy of the Divine Goodneſs, we conclude, that the Right of Commanding, or the Sovereignty of God, as it denotes the Virtue of imprinting Obligations on Men's Minds, is not to be deriv'd from the bare Conſideration of his Omnipotence.

Neither do thoſe Arguments, brought by Mr. *Hobbes* from Scripture, prove the Truth of his Poſition. When God ſeems to have Recourſe to his Abſolute Power, about the Calamities ſent on *Job*, we cannot hence infer, that he hath no Right over his Creatures, but what ariſeth from that Power only. *Job* himſelf, at the beginning of his Sufferings, made a true Declaration, by what Right God had deprived him of his Goods, and of his Children: *The Lord gave* (ſays he) *and the Lord hath taken away:* That is, *why may not he recal at his Pleaſure, thoſe Things which he gave upon the ſame free Account?* But when his Grief had ſo far prevail'd on his Reaſon, as to make him enter into Expoſtulation with Heaven, then God, to repreſs the Inſolence of the Complaint, alledg'd his Power, ſince the Sufferer had now neglected to conſider the other Reaſons of the Divine Sovereignty and Command. And thus we commonly deal with obſtinate and refractory Subjects; when they refuſe to hear our *Reaſons*, we ſhew them our *Strength*, to make them underſtand not only their Sin, but their Folly too in oppoſing our Dominion. In the ſame Manner, if a Perſon complains of the Misfortunes of good Men, and the Proſperity of the Wicked, when he perſiſts deaf to the genuine Cauſes of that Proceeding, in the laſt Place, we confound him with Divine Omnipotence: As if we ſhould ſay, *You that fancy yourſelf injur'd, go and try your Strength againſt GOD for Satisfaction.*

Nor is it a better Inference of Mr. *Hobbes*, when he ſays, that the Obligation of paying Obedience to God is incumbent on Men, upon Account of their Weakneſs. For this only could make it a Piece of Folly in us, not to redeem ourſelves by obeying, from ſome greater Evil: But it doth not at all take away our Right of deſiring, and of endeavouring, by all Means, to eſcape the ſuperior Strength which thus oppreſſeth us. But ſuch a Right is utterly excluded by every true *Obligation*. Nor is this Conſequence good, *Of two Omnipotents, neither can oblige the other, therefore Men are oblig'd to GOD, only becauſe they are not Omnipotent*; were the Antecedent never ſo unqueſtion'd. Not to ſay, that the Fancy of two Omnipotent Beings is [1] an impoſſible Suppoſition. Neither did our Saviour intend to aſſert his Right againſt *Saul* by that Argument, *It is hard for thee to kick againſt the Pricks*; but rather to reprove the Boldneſs and Vanity of *Saul*'s Deſign. Nor was that mighty Convert afterwards invited by *Ananias* into the *Chriſtian* Faith, barely by being inform'd how much above his Strength it was, to deſtroy that Profeſſion. We have applied ſo much the more Diligence to the confuting of this Opinion, the more Danger we apprehend of its being abus'd by violent and headſtrong Men. In *Thucydides*[2] the *Athenian* Ambaſſador ſpeaks to this Purpoſe, *We follow the common Nature and Genius of Mankind, which appoints thoſe to be Maſters who are ſuperior in Strength. This Law is not of our making, nor are we the firſt who have uſed it; but we receiv'd it as it came down to us, and we ſhall leave it to guide the Practice of all Poſterity.* Dionyſ. Halicarn. Lib. i. *It is a Law of Nature common to all Men, and which no Time ſhall diſannul or deſtroy, that thoſe who have more Strength and Excellence, ſhall bear Rule over thoſe who have leſs.* [3] *Brennus* (in *Plutarch*'s *Camillus*) calls it *a moſt ancient Law, that which gives to the Valiant the Poſſeſſions of Cowards; derived from GOD himſelf, and reaching even to brute Creatures; for even amongſt theſe, Nature gives larger Privileges and Portions to the Strong than to the Weak.* *Livy* hath expreſs'd the Notion more conciſely, *Omnia fortium eſſe*, that *the World was made for the Bold and the Strong*. *Callicles* (in *Plato*'s *Gorgias*) purſues the ſame Argument: In the firſt Place, he lays down this Suppoſition, That *Nature* and *Law* are many Times contrary to each other: He inſtanceth in the Caſe of *Injury*; to *receive* which is, by Nature, the moſt baſe and vile,[4] as *the Treatment of a Slave, not of a free Subject*; yet to do an Injury is much worſe in the Conſtruction of the Law. He obſerves it to have been the Policy of Law-givers to encourage this latter Notion, ſo to order the uſeful Engines of Praiſe and Diſpraiſe, as to hinder others from growing too powerful for them; well knowing, that they were otherwiſe [5] an unequal Match for the Multitude.

[1] *Now*

[a] *Add. Senec. ad Polyb. Cap.* xxix.

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[1] See how Mr. *Locke* proves this, in one of his Letters written in *French*, becauſe it was to be ſhewed to a Perſon of Quality, who did not underſtand *Latin*. Two Omnipotent Beings are altogether inconſiſtent, becauſe we muſt neceſſarily ſuppoſe, that the one muſt always will what the other wills; and, in this Caſe, he, whoſe Will is neceſſarily determined by the other, is not free, conſequently has not that Perfection; for 'tis better to be free, than to be ſubject to the Determination of another's Will. But if they are not both reduced to the Neceſſity of willing the ſame Thing always, then the one may deſire to have that done, which the other would not; in which Caſe, the Will of the one muſt prevail over the Will of the other, and ſo he, of the Two, whoſe Power can't bring about what he would, can't be Omnipotent, becauſe he can't do ſo much as the other. So that there can't be two Omnipotent Beings, and conſequently not two Gods, *p.* 413. See, alſo, Mr. *Clerc*'s *Ontology*, *Sect.* iii. *Chap.* x. §. 3. For as to what regards Mr. *Hobbes*'s Argument, independently of the falſe Suppoſition of two Omnipotent Beings, it can have no Appearance of Foundation, but by ſuppoſing that Force is the only Source of Obligation. Now this is begging the Point in Queſtion.

[2] Ἡγούμεθα γὰρ τό, τε θεῖον δόξῃ, τὸ ἀνθρώπειόν τε σαφῶς διαπαντὸς ὑπὸ φύσεως ἀναγκαίας, ὃν ἂν κρατῇ ἄρχειν, καὶ ἡμεῖς ὅτε θέντες τὸν νόμον, ὅτε κειμένῳ πρῶτοι χρησάμενοι, οὐκ ἀφ' ἑτέρων λαβόντες, καὶ ἐσόμενον ἐς ἀεὶ καταλείψοντες, χρώμεθα αὐτῷ. *Thucyd. Lib.* v. *Cap.* cv. See, alſo, *Dionyſ. Halicarn. Lib.* i. *Cap.* v.

[3] *Brennus*'s Words, in *Plutarch*'s *Camillus*, are theſe, Οὐδὲν ἀδὲ ἡμεῖς γε δεινὸν ἐδὲ ἄδικον ποιοῦντες, ἀλλὰ τῷ πρεσβυτάτῳ τῶν νόμων ἀκολουθοῦντες, ὃς τῷ κρείττονι τὰ τῶν ἡττόνων δίδωσιν, ἀρχόμενος ἀπὸ τῶν θεῶν, καὶ τελευτῶν εἰς τὰ θηρία, καὶ γὰρ τούτοις ἐκ φύσεως ἔστιν, τὸ ζητεῖν πλέον ἔχειν τὰ κρείττονα τῶν ὑποδεεστέρων.

[4] *Plato*'s Words are, Οὐδὲ γὰρ ἀνδρὸς τοῦτό γ' ἐστὶ τὸ πάθημα, τὸ ἀδικεῖσθαι, ἀλλ' ἀνδραπόδου τινὸς, &c.

[5] It appears plainly, by this Place, as it is printed in all the Editions of the Original, that our Author did not conſult the *Greek* Originals of the Paſſages, which he quotes, nor, thro' Inadvertence, did he ſometimes thoroughly underſtand the *Latin* Tranſlation. *Callicles*, in *Plato*, ſays, οἱ τιθέμενοι τοὺς νόμους, οἱ ἀσθενεῖς ἄνθρωποι εἰσὶ καὶ οἱ πολλοί. Words both very clear and coherent with the former Diſcourſe; but *Marſilius Ficinus* having tranſlated them in an ambiguous Manner, unleſs one conſiders them throughly, thus, *Qui leges condunt, imbecilliores ſunt ac multitudo ipſa eſt*; Mr. *Pufendorf* thought that he had ſaid, *Lawgivers are weaker than the People*, as if the *Latin* had been, *Imbecilliores multitudine ipſâ*, or, in the *Greek*, ἀσθενέστεροι τῶν πολλῶν, whereas the Senſe of *Callicles* is, That the Laws were firſt eſtabliſhed by the People, who thought themſelves not ſtrong enough to defend themſelves againſt the Inſults of others, and chiefly by thoſe who fear'd the Great would oppreſs them. This is pretty exactly the Sentiment of *Horace*, which perhaps he borrow'd from *Plato*:

Jura

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That is, *We muſt confeſs Laws were firſt invented through Dread of Injuſtice.* I have rectified the Author's Expreſſion, and have more diſtinctly explain'd, in the Sequel, *Callicles*'s Thought, agreeably to the *Greek* Text of *Plato*, though the *Engliſh* Tranſlator did not mind it.

[1] Ἡ δὲ γε (εἶμαι) φύσις αὐτὴ ἀποφαίνοι ἂν, ὅτι δίκαιόν ἐστι τὸν ἀμείνω τοῦ χείρονος πλέον ἔχειν, καὶ τὸν δυνατώτερον τοῦ ἀδυνατωτέρου. Ibid.

[2] Ὁ γὰρ πρῶτος (ὡς ἔοικεν) καὶ κυριώτατος νόμος, τῷ σώζεσθαι δεομένῳ, τὸν σώζειν δυνάμενον, ἄρχοντα καὶ δεσπότην φύσιν ἀποδίδωσι. *Plutarch in Pelop. p.* 290. This is true, ſuppoſing the Weaker willing to ſubmit to ſuch as are able to protect him. Otherwiſe, the worſe for them: But it would be unjuſt to uſe this as a Pretence for inſlaving them. M. *Dacier* (who is otherwiſe ſo fruitful of needleſs moral Reflections) is ſilent on this Paſſage, the Senſe whereof he alters a little, without any viſible Occaſion. Tom. iii. Pag. 217.

[3] *Tully*'s Words are, *Itaque nihil melius, quàm quod eſt in conſuetudine ſermonis Latini, cum exiſſe ex poteſtate dicimus eos, qui effrænati feruntur, aut libidine, aut iracundia,* Tuſc. quæſt. Lib. iii. Cap. v. To which Words, it may be convenient to add another Paſſage of *Cicero*'s, which will ſhew, that the former is very well apply'd, *Qui igitur exiſſe ex poteſtate dicuntur, idcirco dicuntur, quia non ſunt in poteſtate mentis, cui regnum totius animi à naturâ tributum eſt.* They, therefore, who are ſaid to go beyond their Power, are ſo term'd, becauſe they are not under the Command of the *Underſtanding*, to which Nature has given the ſupreme Government of the Soul.

[4] See this Author's Treatiſe, *De Republicâ, Lib.* iii. *Cap.* xvii.

[5] The *Greek* of *Antonine* is, Εἰ δ' ἄρα περὶ μηδενὸς βουλεύονται (οἱ Θεοὶ) πιστεύειν μὲν ὀχ ὅσιον, εἰ μηδὲ θύωμεν, μηδὲ εὐχώμεθα, μηδὲ ὀμνύωμεν, μηδὲ τἆλλα πράσσωμεν, ἅπερ ἕκαστα ὡς πρὸς παρόντας καὶ συμβιοῦντας τοὺς Θεοὺς πράσσομεν. And *Tully*'s *Latin* is, *Sin autem Dii neque poſſunt nos juvare, neque volunt, nec omnino curant, nec quid agamus animadvertunt, nec eſt quod ab his ad hominum vitam permanare poſſit, quid eſt quod ullos Diis immortalibus cultus, honores, aut preces adhibeamus?* See, alſo, *Tully de Nat. Deorum, Lib.* ii. *Cap.* xxv.

us ? Cicero de Natur. Deor. Lib. i. Cap. ii. *There have been Men in the World, who thought the Gods not in the leaſt concern'd about human Affairs. Were this Opinion admitted for true, there could be no ſuch Thing as Piety, Holineſs, or Religion amongſt Men: For to pay theſe Regards to the Divine Nature, is moſt agreeable to Goodneſs, and to Purity, provided they take Notice of our Actions, and are the Authors of any Benefits and Advantages in our Lives. But if the Gods are neither able nor willing to help us, nor at all beſtow their Care and Obſervation on our Proceedings, and ſo derive no Bleſſings, no Favours upon Mankind, to what End is our Worſhip, our Honours, and our Prayers, the Tribute which we now pay to the Immortal Beings ? As no Virtue can ſubſiſt in Hypocriſy and Shew, ſo eſpecially Piety would be ſoon loſt in that Diſguiſe; and then farewel to all Holineſs, and all Religion; which being once baniſh'd the World, what could follow but the Miſery and utter Diſorder, of univerſal Confuſion ?* And again, *What Piety can you owe to him from whom you have receiv'd no Benefit ? Or how can he claim any Thing as his Due, who hath no Merit to plead in his Behalf ?* Idem de Nat. Deor. Lib. ii. The common Title which our Anceſtors gave *Jupiter* was, *Optimus Maximus*, moſt *eminent in Goodneſs and in Greatneſs.* In which we find Goodneſs, or Beneficence, preferr'd to Greatneſs; it being a more noble, and more excellent, as well as the moſt acceptable Prerogative to be good, than to poſſeſs the higheſt Degrees of Majeſty and Strength. *Ovid. de Pont. Lib.* ii. *El.* ix.

Nunquid erit quare ſolito dignemur honore
Numina, ſi demas velle juvare Deos ?

What Vows would to regardleſs Powers be paid ?
They loſe their Altars, if we loſe their Aid.

The Inſtance about Brutes is nothing to the Purpoſe; for they are not held by Obligation, but only by Force, or by the Enticement of Food: Neither would they act contrary to their Natures, ſhould they endeavour to throw off the Yoke and the Authority of Men. As to the Argument about the Soul, when that is ſaid to bear a Sovereignty over the Body, the Speech is figurative: For Sovereignty, or Command, is not properly underſtood but between two *Perſons*, or two compleat Natures; and the Body is ſubject to the Soul, by Virtue of the *phyſical* Combination, not of any *moral* Tie. Laſtly, the Citation from *Ariſtotle*, if a King were to be conſtituted by free *Election*, the Crown ought to be given to the moſt deſerving Perſon [a] [1]; yet would not he bear the Sovereignty by a *Right*, deriv'd purely from his ſuperior Gifts and Excellencies, but by Virtue of the *Donation* made him by the Conſent of the Electors.

XII It muſt be acknowledg'd therefore as a certain Truth, That neither Strength, nor any other natural Pre-eminence, is alone ſufficient to derive an Obligation on me from another's Will; but that it is farther requiſite, I ſhould either have receiv'd ſome extraordinary Good from him, or ſhould voluntarily have agreed to ſubmit myſelf to his Direction. *Plin. Paneg. Chap.* xxxviii. [2] *Nature doth not ordain amongſt Men as ſhe doth amongſt Beaſts, that the Power and the Sovereignty ſhall paſs to the ſtrongeſt.* For, as we naturally yield and give up ourſelves to ſome ſingular Benefactor, [3] ſo if it appears that this Benefactor both intends my Good, and can conſult it better than I myſelf am able, and, farther, doth actually claim the Guidance of me, I have no Reaſon in the World to decline his Government and Sway. Eſpecially if it ſo happen, that I am beholden to him for my very Being, *Acts* xvii. 24, *&c.* For he who firſt conferr'd on Man the Benefit of free acting, why may not he, by his own Right, retrench that Freedom in ſome Particulars ? And then, as for the other Caſe, he that conſents to admit another for his Sovereign, declares by this his own proper Act, that he will conform to his Sovereign's Pleaſure. Though indeed to make a lawful Sovereignty ariſe from *Conſent*, it is farther neceſſary, that by this new Subjection, no Prejudice be offer'd to the *well-grounded Right* of a third Perſon, and that the one Party may juſtly have ſuch Subjects, and the other Party as juſtly ſuch a Governor. From theſe two Springs we conceive all thoſe Obligations to flow, which do, as it were, caſt an inward Tie and Reſtraint upon the Liberty of our Wills. But becauſe 'tis beyond the Power of any moral Bonds, utterly to ſuppreſs our natural Freedom of acting; and becauſe ſuch is either the Lightneſs, or the Wickedneſs of moſt Men's Minds, that they deſpiſe theſe Grounds of Dominion, as feeble Reaſons for Obedience; hence there ariſeth a Neceſſity of adding ſome further Motive, which may work on our diſorderly Luſts with a ſtronger Effect than the bare Senſe of Decency and Honour. And this Addition is the more requiſite, in as much as, generally ſpeaking, the Wickedneſs of one Man tends to the Damage of another: Whereas we ſhould be more willing to leave a Man to his own Guidance, provided his Sins would incommode no Body but himſelf. Now there is nothing which could have ſuch an Effect as this, but the Fear of ſome Evil to be inflicted upon our violating an Obligation, by ſome ſtronger Power, whoſe Intereſt it was, that we ſhould not have thus offended. So that Obligations receive their final Strength and Authority from Force, and from a Suppoſition that he, whoſe Buſineſs it is to ſee them obſerv'd, is furniſh'd with ſo much Power, either originally inherent in himſelf, or conferr'd upon him by others, as to be able to bring ſome conſiderable Evil on the Diſobedient. For amongſt wicked Subjects, *he* muſt needs be a very precarious Ruler, whom they can deſpiſe without Danger. On the contrary, *his* Dominion is ſettled on a firm Bottom, who, in the firſt Place, bears a juſt Title to it, and, beſides this, hath ſo much Force always at his Command, as is ſufficient to reduce the Seditious,

[a] *So far the Saying of* Cyrus *will be true,* That no one ought to be a Governor, who has not more Virtue than his Subjects. *Plutarch. in Apophthegm. And in the ſame Senſe we muſt take what* Socrates *urgeth in* Xenophon. De rebus memorab. Lib. iii. p. 453, 454. Ed. *H. Steph.*

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1 *Plutarch*'s Words are, Ἄρχειν δὲ μηδενὶ προσέχειν, ὃς ἀ κρείττων ἐστὶ τῶν ἀρχομένων.

2 *Pliny*'s *Latin* is, *Nec uti inter pecudes, ſic inter homines* [*Lex Naturæ*] *poteſtatem & imperium valentioribus dedit.*

3 This, and the following Reaſons, ſerve rather to make an Obligation ſtronger and more reaſonable, than to eſtabliſh it upon a ſure and proper Foundation; for, in my Judgment, there is properly but one ſole general Foundation of Obligation, to which all others may be reduced, and that is, our natural Dependance upon the ſupream Authority of God, who has given us Exiſtence, and being Almighty, may, upon that Account, require of us, that we put our Faculties to the Uſe for which he has deſign'd them. From hence ariſeth all lawful Authority, by Virtue of which one Man commands another; for that is lawful only, when it is conformable to the Will of God, known to us, either by Revelation, or the mere Light of Nature. But if, amongſt Men, the immediate Reaſon why they ought to be ſubject to the Command of another is ordinarily this, That having voluntarily conſented to it, this Conſent, and all other Engagements whatſoever, which they enter into, are only *obligatory*, through that Maxim of natural Law, which tells us, That every one ought to obſerve what he has engaged himſelf to. See *Lib.* ii. *Cap.* iii. §. 20. following, and what I have ſaid more at large in the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. ii. §. 5. Num. 3.

and to reſtrain the Tranſgreſſors. [1] *Sophocl. Ajac. Flagellif.* Ver. 1092.

Nor Laws, nor Governors, could ſtand ſecure,
Without the Guard of Fear; nor mighty Chiefs
Secure the Faith of Armies, but ſuſtain'd
By awful Dread, and Shame of doing ill.

Arrian [2] *Epict. Lib.* i. *Cap.* xxix. *p.* 164. *Ed. Cantab.* *'Tis not Man who is the Lord of another Man, but Life and Death, Pleaſure and Pain, are the proper Sovereigns whom we obey: Take away theſe, and bring me before* Cæſar, *and ſee how little Majeſty without Terror can prevail upon a Man's Reſolution.*

From our Diſquiſitions on this Head, ſome Temper may be found and applied to that Maxim, which ſome have more crudely utter'd, that *Right and Law is nothing elſe but what pleaſeth the ſtronger Party:* For indeed Laws can hardly obtain their outward End and Effect, unleſs they are ſupported and arm'd with Strength, ſo as to be able, upon Occaſion, violently to force a Compliance. *Solon*, as he us'd to ſay of himſelf, atchiev'd the greateſt Things, ὁμῦ βίην τε καὶ δίκην συναρμόσας, *by coupling together Juſtice and Strength*, Plutarch Solon. *p.* 86. *Ed. Wechel.* And there is no Argument of greater Efficacy in human Affairs, than that which *Scylla* in *Ovid.* (*Metam. Lib.* viii. *Ver.* 59.) uſeth concerning *Minos*,

In cauſaque valet, cauſamque juvantibus armis.
With a good Cauſe, he brings as good a Sword to ſecond it.——— [3]

Even all that Pleaſure, and Joy of Conſcience, upon Performance of our *Duty*, and thoſe Horrors and Tortures of Mind, which are the conſtant Attendants of *Sin*, both which we are in Piety oblig'd to admit and acknowledge, proceed from the Strength and Power of Almighty GOD, who can as eaſily make ſuch Wretches their own Puniſhers, as contemn the Authority and Reſtraints of other Men. *Juvenal. Sat.* xiii. *Ver.* 193. *& ſeqq.*

——————*Cur tamen hos tu*
Evaſiſſe putes, quos diri conſcia facti
Mens habet attonitos, & ſurdo verbere cædit,
Occultum quatiente animo tortore flagellum?
Pœna autem vehemens, ac multo ſævior illis
Quas aut Cæditius gravis invenit, aut Rhadamanthus,
Nocte dieque ſuum geſtare in pectore teſtem.

But why muſt thoſe be thought to *'ſcape*, that feel
Thoſe Rods of Scorpions, and thoſe Whips of Steel,
Which *Conſcience* ſhakes, when ſhe with Rage controuls,
And ſpreads amazing Terrors thro' their Souls?
Not ſharp Revenge, nor *Hell* itſelf can find
A fiercer Torment, than a guilty Mind;
Which Day and Night doth dreadfully accuſe,
Condemns the Wretch, and ſtill the *Charge* renews.
Mr. CREECH.

And indeed it highly concerns the common Good of Mankind, that all Men believe and confeſs the Certainty of a divine Tribunal, incapable of the leaſt Corruption, where Judgment is to be paſs'd on thoſe, who, by Means of Cunning, Colluſion, or Strength, have declin'd the juſt Performance of their Duty. Hither may be referr'd that of *Plutarch*, (*adverſ. Colot.*) *'Tis eaſier to build a City without Ground to hold and ſupport it, than to make a Commonwealth either unite or ſubſiſt, without the Acknowledgment of a* GOD *and a Providence* [4].

[1] The *Greek* of *Sophocles* is, Οὐ γάρ ποτ' ἦν ἐν πόλει νόμοι καλῶς
Φερόιντ' ἂν ἔνθα μὴ καθεστήκοι δέος,
Οὐκ ἂν τραλός γε σωφρόνως ἄρχοιτ' ἔτι
Μηδὲν φόβου προβλημα μηδ' αἰδῦς ἔχων.

[2] The *Greek* of *Arrian* is, Ἄνθρωπος ἀνθρώπου κύριος οὐκ ἔστι, ἀλλὰ θανάτου καὶ ζωὴ, καὶ ἡδονὴ, καὶ πόνος, ἐπεὶ χωρὶς τούτων ἄλαλα μοι τὸν Καίσαρα, καὶ ὄψει πῶς εὐσταθῶ.

[3] See *Grotius de Jure Bell. & Pac. prolegom.* Sect. xx. N. 3.

[4] *Plutarch*'s Words are, Ἀλλὰ πόλις ἄν μοι δοκεῖ μᾶλλον ἐδάφους χωρὶς, ἢ πολιτεία, τῆς περὶ θεῶν δόξης ἀναιρεθείσης παντάπασι, σύστασιν λαβεῖν, ἢ λαβοῦσα τηρῆσαι. But our Author treats more largely elſewhere, (in his Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. iv. §. 9.) of the Uſefulneſs of Religion in human Life, and ſhews us, how it is the principal and moſt ſtrong Bond of Society. [In the independent State of Nature, if there were no Fear of a Deity, ſo far as every one found himſelf able to oppreſs another with Impunity, they would attempt any Thing as they pleaſed: *Honeſty*, *Modeſty*, and *Fidelity*, would be eſteem'd meer Chimera's, and empty Names; no Man would think himſelf obliged to do any Good, but upon the Account of his own Impotency. Further, without *Religion*, no civil Society can be maintained; the Fears of temporal Puniſhments, the moſt ſolemn Oaths and Engagements to be faithful Subjects, the Reputation of keeping our Engagements inviolably, and the Knowledge of the Cares of our Kings and Governors, to ſecure us from the Inconveniencies of our natural State, are not, of themſelves, ſufficient to keep Subjects to their Duty; for Death being the only Thing in the World, which is moſt feared by them who believe no GOD, we can't but acknowledge the Truth of that Maxim, *He that fears not Death, cannot be forced.* He that has Reſolution enough to die bravely, is capable of attempting any Thing againſt his Sovereign, and he can't want ſome ſpecious Motives, or Pretences, to entertain ſuch a Deſign; as, for Example, The Deſire he hath to avoid the Evils which he apprehends from the preſent Government, an Endeavour to procure himſelf the Supream Power, but, above all, the Juſtice, which he may fancy himſelf to do by ſuch an Attempt, either, becauſe his King may ſeem to him not to diſcharge his Duty, or, becauſe he flatters himſelf, that if he were in his Place he could do much better. Such Pretences as theſe, readily preſent themſelves, when Men have a Mind to put ſuch Projects in Execution, and they may effect their Deſigns, if the Prince neglects, in the leaſt, to ſecure himſelf againſt the Attempts of *Aſſaſſins* (in ſuch Caſes, who can anſwer for his Guards themſelves?) or ſeveral Perſons conſpire together againſt him, or in a foreign War, his Subjects revolt to the Enemy. Beſides, Subjects themſelves would do many Injuries one to another; for as in Civil Judicatures Sentence muſt be given according to the Acts and Proofs that are evident, all the Crimes, from which ſome Profit may be acquir'd, may paſs for good Management, which every Man applauds himſelf for, as often as he is ſo lucky as to commit them without Witneſs. No Man would exerciſe any Acts of Charity, or do any friendly Offices, were it not for the certain Hope of ſome Glory or Advantage, which would redound to him by it. If the Senſe of all Chaſtiſement from Heaven were baniſhed, no Man could depend upon another's Fidelity, every one would live in perpetual Diſquiet, thro' Fear and Suſpicion of ſome Deceit, or baſe Uſage from their Equals. Nor would Sovereigns themſelves be better diſpos'd, than their Subjects, to good Actions. For having no Principle of Conſcience to keep them in, they'd ſell all Offices, yea, Juſtice itſelf; they'd aim at nothing but their own Intereſt, to which they'd ſacrifice the Happineſs of their Subjects. And if they apprehended their Subjects to revolt, they'd endeavour to weaken them as much as poſſible, as the only Way to maintain their Authority againſt Attempts of the Oppreſſors. The Subjects, on the other Side, for Fear of Oppreſſion, would ſeek all Occaſions to ſhake off the Yoke, and, in the mean Time, live in Diſtruſt of each other. The Huſband and Wife, at the Diſagreement that happens between them, would lay hold on the Sword or Poiſon to deſtroy each other, and live in Fear of their Children, Servants, and the reſt of their Family. For ſince, without Religion, there is no Conſcience, it will be hard to diſcover thoſe Sort of Crimes, which are uſually committed in ſecret, and are ſeldom diſcovered, but by ſuch Means as ariſe from a guilty Conſcience.] *N. B.* All within the Crotchets is omitted in *Barbeyrac*'s laſt Edition, Tom. i. Pag. 123. Thus our Author explains this Point, and Experience verifies his Aſſertion. We may add to this two Examples, which the excellent Author of *Parrhaſiana* makes uſe of, to prove the ſame Thing. *The Hiſtory of* China (ſays he) *tells us, that the great Men among the* Chineſe *believe neither the Being of a* GOD, *who governs all Things, nor the Immortality of the Soul, and ſo we ſay, that the Virtue of the* Chineſe *conſiſts in nothing but a profound Diſſimulation of their Vices.* Mem. de la Chine, Tom. i. Lib. v. and Tom. ii. Lib. i. Among the *Jews*, the *Sadducees*, who denied the Immortality of the Soul, tho' they believed a GOD, and tho' they rejected a Providence, made it appear, by their Converſation, that they could not be of that Opinion, but they muſt be Enemies to Society. For *Joſephus* ſays of them, They,

They, therefore, who would prescribe Laws to others with any Effect and Validity, must build their Power on the Foundations which we have here established.

XIII. But that a Law may be able to exercise its *directive* Force, there is required in the Person for whom 'tis made, a Knowledge both of the Law-giver and of the Law. For how can any Man pay Obedience, who neither apprehends to whom it should be paid, nor to what Duties his Obligation binds him? And here it will be sufficient, that a Man hath once been Master of such a Knowledge: For he that forgets what he once knew, is not at all loos'd from his Obligation, since he might well have secur'd his Remembrance, had he taken up, as he ought to have done, a real Desire and Resolution of obeying. Now to the Knowledge of the Legislator, 'tis hardly possible any Man should be a Stranger. For, as to *natural Laws*, that they have the same Author with the Universal Frame of Things, none can be ignorant, that will but make Use of their ordinary Reason. Much less can the Author of *civil Laws* be hid from the Apprehension and Notice of his Subjects: Since he is constituted, either [1] by the express and open Consent of those Subjects, or else [2] by their tacit Agreement, whilst they any way submit to his Command. How we arrive at a Sense of *natural Laws* by the Contemplation of human Condition, we shall hereafter have occasion to explain. *Civil Laws* are convey'd to the Subject's Knowledge by a Promulgation, publickly and [3] perspicuously made. In which there are two Conditions, which ought to be clear and certain; first, That the Laws proceed from him who hath the chief Command in the State; and, secondly, That the Meaning of the Law is such, and no other. The former Condition is then known, when the Sovereign promulgates a Law, either by his own Voice, or by Persons of his Deputation. That these Persons publish Laws by the Command and Authority of the Sovereign, there is no Question to be made, if it appear that they have been [4] employ'd usually by the Sovereign, in declaring his Will; if the Laws are brought into Use at judicial Proceedings, and if they contain in them nothing derogatory to the Sovereign's Power. For it is not to be suppos'd that a Minister should vent that for a durable Decree of his Prince, which is not so, or that he should impudently usurp so extravagant a Power; since, in an Enterprize of this Nature, there could be no Hopes of Concealment, or of escaping due Punishment for so insolent an Offence. As to the other necessary Point, that the Sense of a Law may be clearly apprehended, it is incumbent on the Promulgators, to use the greatest Plainness that the Thing is capable of: Contrary to that Management of *Caligula*, who wrote his Laws in small Letters, and fix'd them in a high Place, in this Manner only shewing them to the People [a].

If any Thing in the Law seems obscure, the Explication of it is to be sought, either from the Legislator, or from those Persons who are by him appointed to judge according to the Laws. For it is their Business, observing a right Interpretation, to apply the Laws to particular Cases, or upon the Proposal of such or such a Fact, to declare the Sovereign's Pleasure concerning it [b].

We cannot here but observe, that the Notion maintain'd by some Authors, *That the Consent of the People is requisite to make Laws and oblige the Subject in Conscience*, is neither true in the Laws of Nature, nor in the Civil Laws of monarchical or aristocratical Rulers; nor indeed at all, unless it be understood of implicit Consent; as a Man by agreeing to the Sovereignty of another, is, at the same Time, supposed to have agreed to all the future Acts of that Sovereignty. Though it would really be very useful, and contribute much to engaging the Subjects in a voluntary Obedience, if the Laws could be made with their Consent and Approbation; especially such as are to pass into their Lives and Manners. Agreeable to this is *Pericles*'s saying in *Xenophon. Apom. Lib.* i. *P.* 418. *Ed. Steph. Whoever, either by written or unwritten Commands, enjoins another to do a Thing, without persuading him that he ought to do it, seems to me, not to use Law, but Violence.* Comp. Sanderson de Oblig. Conscient. Prælect. 7. §. 22. [5].

XIV. As in the Sovereign, or in him who is to govern another by Laws, two Things are requisite, that he understand what is fit to be prescrib'd, and

[a] *Dio Cass. in Excerpt. Peiresc. Lib.* lix.

[b] *Comp. Hobbes de Cive, Cap.* xiv. §. 11. &c. and *Leviath. Cap.* xxvi.

De Bel. Jud. Lib. ii. *Cap.* xii. *The* Sadducees *are rude and inhuman to one another, and as cruel to their own Countrymen, the* Jews, *as to Strangers.* In fine, that Religion may produce all the good Effects to Society, which naturally result from it, it is necessary that we have right Apprehensions of the Deity; otherwise, if we form to ourselves a Deity too merciful, or such an one as favours our Sins, either by his Example, or any other Way, Religion will be so far from firmly upholding Society, that it will utterly destroy it. So that, according to the Principles of the Heathens, every one may reason as the Person the Poet introduces, *As miserable a Mortal as I am, may not I be wiser than the greatest of the Gods?* Teren. Eunuch. Act iii. Scen. v. Wherefore we must think, that the virtuous Heathens either did not believe what was commonly reported among them, about the Vices of their Gods, or were not aware of the Consequences that naturally followed, from the Principles of a Religion so monstrous. See what shall be spoken, *Chap.* iii. *Lib.* ii. §. 19. *Note* 2. and *Chap.* iv. §. 3. *Note* 4.

[1] This is done, either when a Multitude of Men unite to make up a Civil Society, or when a Society, already formed, takes an Oath of Fidelity to their Sovereign. We shall treat more at large of this Subject, *Lib.* vii.

[2] This hath Place always when we enjoy the Protection of a State, and the Benefit of the Laws established; for then we must be supposed to consent tacitly to submit ourselves to the Laws, tho' we have not formally engaged to do it, as *Plato* observes in the Case of the Citizens of *Athens*, who had not Liberty to go whither they would, unless they submitted to the Government of that famous Commonwealth, ὃς δ' ἂν ὑμῶν παραμείνῃ, ὁρῶν ὃν τρόπον ἡμεῖς [οἱ Νόμοι] τάς τε δίκας δικάζομεν, καὶ τ' ἄλλα τὴν πόλιν διοικοῦμεν, ἤδη φαμὲν τοῦτον ΩΜΟΛΟΓΗΚΕΝΑΙ ΕΡΓΩ ἡμῖν, ἃ ἂν ἡμεῖς κελεύωμεν ποιήσειν ταῦτα. In *Criton*, and in the next Page, the *Greek* is. ἔρξω, ἀλλ' ἐῶ λόξω. I see this Passage cited by Mr. *Wollaston*, but in a very loose Manner, and without the Name of the Author. See his *Religion of Nature delineated*, Pag. 259.

[3] In the ancient Times, before the Invention of Writing, Laws were composed in Verse, which were frequently sung in publick, that Men might remember them, *Aristot. Problem.* §. 19. *Problem.* xxviii. *Horat. de Arte Poet.* ℣. 399. Among the *Athenians*, the Laws were written upon Tables, which were hung up in some publick Place, or even engrav'd, in large Characters, upon the Walls. See *Pollux Onomast.* Lib. viii. §. 128. *Lucian De Gymnas.* Tome ii. Pag. 284. *Potter*'s *Greek Antiquities*, Book i. Chap. xxvi. The Laws of the *twelve Tables* were so well known, that *Cicero* tells us expressly, in his Time Children learned them by Heart. *De Legib. Lib.* ii. *Cap.* xxiii. We know, also, that the *Prætor*'s *Edicts* were expos'd in a Place where all the People might read them as they stood. See *Cujas Observat.* Lib. vii. Cap. xxix. The Laws of all the ancient Nations were written in the vulgar Tongue, and it is only in the last Ages, that a ridiculous Respect for the ancient Laws caus'd them to be receiv'd, without taking from them that Vail which hides the Knowledge of them from those they principally concern. See what *Montagne* says pleasantly on this Subject, *Essais*, Lib. i. Cap. xxii.

[4] This Author, in his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* ii. §. 6. says, *That it is the Business of their Employ*; a Circumstance worth our Observation. For we may doubt of the Validity of the Action of any Minister, or Magistrate, which belongs not to his Office, unless it plainly appears, that the supream Governor hath given him a Commission extraordinary.

[5] The *Greek* of *Xenophon* runs thus, Πάντα δοκεῖ, φάναι τὸν Περικλέα, ὅσα τις μὴ πείσας ἀναγκάζει τινὰ ποιεῖν, εἴτε γράφων, εἴτε μή, βία μᾶλλον, ἢ νόμῳ εἶναι.

that he have ſufficient Strength to denounce and to execute ſome Evil on thoſe who ſhall not conform to his Rules (for we ſuppoſe the Perſons for whom the Laws were made, to have both Power and Inclination to diſobey them). So every Law conſiſts of two Parts; in one is defin'd and declar'd what is to be perform'd, or omitted; in the other is ſignify'd, what Evil ſhall be incurr'd by thoſe who trangreſs in either reſpect; and this latter Part is uſually term'd the *Sanction* of a Law; about which Biſhop *Cumberland*[a] hath open'd a wide Field of Enquiry, whilſt, contrary to the general Opinion of the Lawyers, he maintains, "That the Sanction of Laws is "made, not only by Puniſhments, but by Rewards "too, and more principally by the latter than by "the former. That as to the Sanctions of the "Laws of Nature, it is impoſſible by any natural "Signs, more openly and more forcibly to per-"ſuade Men to do a Thing[1], or to judge with "good Authority, that ſuch a Duty is commanded "by the Governor of the World, than if ſuch Acts "are grac'd by him with natural Rewards. That, "altho' in the Sanction of Laws by Men, uſe is "made of negative Conceptions, and of Words "properly expreſſing them, yet in the Nature of "Things, that which drives us on to Action, is "ſome poſitive Good, which we hope to preſerve, "or to acquire upon keeping off thoſe Things that "would have a contrary Effect. That Privations "and Negations do not move the Will of Man, "and that the avoiding of Evil is by no Means its "Object, any farther than as it denotes the Preſer-"vation of ſome Good. That, whatever Strength "is uſually aſcribed to natural Puniſhments and "Evils, in engaging Men to ſhun and decline "them, is all to be reſolv'd into the attractive and "impulſive Force of thoſe Goods, which the Pu-"niſhments or Evils would deprive them of. That, "thus all thoſe Things, which are commonly ſaid "to be done for the ſake of eſcaping Death, or "Want, might be more properly affirm'd to pro-"ceed from the Love of Life, or of Riches. That, "unleſs Life went before it, Death would ſignify "nothing, and that the former would never be "fear'd, if the latter were not firſt deſir'd. That, "the Nature of Things moves our Affections more "ſtrongly with the Love of a preſent Good, or the "Hope of a future, than with the Hatred of a "preſent, or the Fear of a future Evil; and that "good Things are deſir'd upon Account, not of "the oppoſite Privation, but of their inward Agree-"ableneſs to our Natures. That, civil Laws re-"ceive a firmer Eſtabliſhment from their End[2], "the publick Good, a part of which is communi-"cated to every honeſt Subject, than from the Pe-"nalties they threaten, the Fear of which can pre-"vail only on a few Men, and thoſe the moſt "wicked in the Commonwealth." To this purpoſe Biſhop *Cumberland* diſcourſeth. On whoſe Opinion we may firſt obſerve, That if we would comprehend under the Term of *Sanction*, even the good Things and the Rewards following the Obſervation of Laws; it is requiſite, that thoſe good Things ſhould really proceed from our Obedience, and be, as it were, bought and purchas'd by it. But now 'tis apparent, that all the good Things we poſſeſs, we do not obtain by conforming to Laws; and therefore thoſe which we any other way acquire, do not come under the Notion of Rewards. Thus, our Selves, our Lives, and all the natural Benefits we enjoy, are not paid to us as the Rewards of fulfilling any Law, but the Divine Goodneſs freely conferr'd them on us, before we could ſo much as think of any Law to be fulfill'd. Neither is the Continuance of theſe good Things (ſince it proceeds from the inward Force of natural Subſtance) deriv'd from any Performances of ours, but is the Gift of our Great Creator, who[b] *makes his Sun to ſhine on the Evil and on the Good, and ſendeth Rain on the Juſt and on the Unjuſt.* Thus, likewiſe, what a Man gets by his proper Labour and Induſtry, he doth not directly and principally aſcribe to his own Obedience, but to his Creator, who gave him the Strength, and to himſelf, who rightly employ'd it. Yet this Effect indeed, we may obtain by Laws, both the Preſervation of thoſe good Things, which either the free Bounty of Heaven, or our own Diligence, hath procur'd us, from the Incurſions and Aſſaults of other Creatures, that might otherwiſe hurt or deſtroy them; and, likewiſe, the Increaſe of the ſame Enjoyments, by various Methods and Means: And therefore theſe Advantages only, in as much as 'tis in the Power of the Legiſlator to make them good, are properly to be eſteem'd Rewards. And that theſe may have a perfect Force, in diſpoſing Men to Obedience, the Legiſlator is to ſignify, that ſuch Effects will moſt certainly follow ſuch a Cauſe.

We may obſerve farther, That altho' the Will may be incited to an Action, by the Propoſal of ſome Good likely to proceed from that Action, yet this Conſideration doth not impoſe any Neceſſity[3] of Performance, unleſs it be ſtrengthned with the Commination of ſome Puniſhment, to be incurr'd upon Non-Compliance. And therefore, that any good Effect proceeds by natural Conſequence from any Action, is indeed a Token of the ſuperlative Bounty of our Creator, who is ſo willing to confer that Good on us, and ſo kindly invites and perſuades us to embrace it. Yet this muſt not preſently be thought a neceſſary Argument, that he at the ſame Time commands us, by performing the Action, to acquire ſuch a Good. He might, perhaps, judge it ſufficient to have offer'd us ſo fair an Occaſion of receiving his Munificence. But if ſome Evil be farther pronounc'd againſt us upon Omiſſion, then there can remain no doubt, but that the Action is really and directly enjoin'd. To which we may add, that the Minds of

[a] *De Leg. Nat. Prolegom.* §. 14. *& Cap.* v. §. 40.

[b] *Matth.* v. 45.

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[1] Theſe Words, *ut quicquam agant, i. e.* that they may do any Thing, which are omitted in all the Editions of this Work, either by the Neglect of the Author, or Careleſsneſs of the Printers, quite ſpoil the Senſe. The *Engliſh* Tranſlator has not taken the Pains to conſult the Original, where theſe Words are expreſſed diſtinctly, *Chap.* v. §. 42. He hath, alſo, carefully copied out a Fault in the Impreſſion, in theſe Words, *aut cum Authoritate judicare*, for *indicare, i. e.* to judge, *for* to ſhew his Authority, which makes the Senſe diſagreeable.

[2] Theſe Words, *Which wiſe Legiſlators and good Citizens have propounded with a Deſire of*, ought to be added, to render the Senſe of Biſhop *Cumberland* more clear, tho' they be not in the Original.

[3] Mr. *Locke* proves in a moſt ſolid Manner, "That it is not the moſt poſitive Good, but Uneaſineſs (as he calls it) that uſu-"ally determines the Will. That is to ſay, that Good, nay the greateſt Good, tho' we judge it ſuch, does not determine the "Will, at leaſt, to deſire it with an Earneſtneſs proportionable to its Excellence; yet this Deſire makes us uneaſy, becauſe we "are deprived of it. As, for Example, perſuade a Man, as long as you pleaſe, That Wealth is more advantageous than Po-"verty; make him to ſee and confeſs, that ſuitable Conveniencies of Life are to be preferred before a ſordid Indigency, if "yet he be contented with this latter Eſtate, and finds no Inconveniency in it, he'll perſiſt in it, contrary to your Advice, his "Will is not inclined to any Action, whereby he will renounce it." *Eſſay on Hum. Underſtand. Lib.* ii. *Cap.* xxi. §. 35. See the following Part of the Chapter.

Men [1] are mov'd more forcibly by the Infliction of Evil, than by the Poſſeſſion of Good. It muſt be confeſs'd, that the Acquiſition of Good hath very powerful Charms; eſpecially when it is freſh, and join'd with the Deliverance from ſome preſent Evil. But the Senſe of this Pleaſantneſs wears off in a long Courſe of Poſſeſſion; and when once that Motion of Mind ceaſeth, which either the Abſence of the Good, or the freſh Enjoyment of it rais'd, there remains ſcarce any Thing but a dull Acquieſcence and Contentment. Whence it comes to paſs that many Perſons, then only begin to value their good Things, when they either have loſt, or are in danger of loſing them. But *Grief*, into which all Evils and all Privations of Good are at laſt reſolv'd, is not itſelf a bare Privation, but a Thing of a moſt poſitive Nature, and of ſuch prodigious Strength, as to be able ſo far to extinguiſh

[1] The famous Mr. *Bayle* maintains the contrary Opinion in his Treatiſe upon a Comet, ſaying, *That a Man has more Love for Pleaſure, than Averſion for Pain*; which Paradox he pretends to prove thus; *No Man* (ſays he) *makes any Difficulty to ſuffer Chagrin or Pain, provided he paſſes to it through Joy—This appears from the Examples of ſo many Women, who being tranſported with the preſent Pleaſure, ſuffer themſelves to be led into ſuch Actions, as they are ſenſible will produce a long Train of Miſeries: As, alſo, by the Example of great Numbers of Men, who having found, a thouſand Times, that the eating of certain Meats, and their drinking too much, has cauſed terrible Pains, will not yet reſtrain their Appetites, when they have Occaſion.* But 'tis my Opinion, that theſe young Women and Drunkards do not uſually think of the bad Conſequence of their Actions, ſo far are they from determining, after they have exactly compar'd the preſent Pleaſure with the Miſery that will follow. 'Tis not then a Time for Reflection; we might do it when we are ſerious, and the Object and Occaſion being at a Diſtance, our favourite Paſſion is ſilent; but when the Heart is briſkly attacked in a ſenſible Place, all theſe good Reflections vaniſh, we dream of nothing but the greateſt Satisfaction, and never trouble ourſelves with what may happen. *The preſent Pleaſure, unleſs it be very ſmall, and next to nothing, fills the narrow Capacity of our Soul, and ſo engroſſes the whole Mind, that it troubles not itſelf to think at all of Things abſent* (as Mr. *Locke* ſpeaks, *Eſſay of Hum. Underſt.* p. 326.) The Orator *Eſchines*, ſpeaking of thoſe who engage themſelves in ſome great Wickedneſs, ſays, *That they neither conſider of the Diſgrace, or Puniſhment, which they bring on themſelves, but are wholly employed with the Thoughts of that Pleaſure they ſhall obtain, if they compaſs their Deſign*; Οὐ γὰρ τὴν αἰσχύνην, ἢ ἃ πείσονται κηφθέντες λογίζονται· ἀλλ' ἐφ' οἷς καλοεθώσαντες εὐφρωνθήσονται, τούτοις κεκήληνται. *Orat. in Timarch. p* 197. *Ed. Gen.* But if, notwithſtanding the Earneſtneſs of the Deſire which the Preſence of the Object excites, there are ſome Intervals, which permit them to conſider the Conſequence of the Action, they always have a great Inclination to flatter themſelves. *They think, that tho' the Conſequence is important, nevertheleſs 'tis not ſo certain, but that it may happen otherwiſe, or, at leaſt, that it may be avoided by ſome Means or other; as by Induſtry, Cunning, change of Behaviour*, &c. (Mr. *Locke* of *Hum. Underſt.* p. 328.) See *Simplicius* upon *Epictet.* Furthermore, the prevailing Power of preſent Pleaſure, by which they are hurried, is, properly ſpeaking, a real Pain, for, in the Heat of a violent Paſſion, the earneſt Deſire, which is inflamed by the Nearneſs and Allurements of the Object, cauſes ſuch an Uneaſineſs, as affects us in the ſame Manner, as what we ordinarily call Pain, and the preſent Uneaſineſs being greater, determines the Will, as Mr. *Locke* has very well prov'd, altho' the future Pain, to which Men are expos'd, by ſuffering themſelves to be carried away by the prevailing Power of preſent Pleaſure, may be ſeen at a Diſtance, and as a greater Evil, in its own Nature, than what they feel themſelves actually preſſed with, the Deluſion, cauſed by a ſmall Difference of Time, inclines the Mind to chooſe the worſt Part. *Moſt of our Pleaſures* (ſays *Montagne*, according to the Opinion of the Heathen Wiſemen, *viz. Seneca*, Ep. li, &c.) *ſooth and embrace us, in Order to ſtrangle us, as the Thieves, which the* Egyptians *call* Philetæ, *did; and ſhould the Head-Ache ſeize us before Drunkenneſs, we ſhould abſtain from overmuch drinking, but Pleaſure, going before, deceives us, and ſo conceals the Conſequence from us. Eſſais*, Lib. i. Cap. xxxviii. See the ſame Thought in two Comick Poets, quoted by *Athenæus* in his *Deipnoſophiſts*, Lib. xiv. Cap. i. and Lib. x. Cap. vii. whoſe Words *Gataker* recites in his Preface to *Marcus Antoninus*. *If, at the ſame Moment* (ſays Mr. *Locke*) *that a Man takes the Glaſs into his Hand, the Pleaſure, that he finds in drinking, were accompanied with that Pain in the Head, and Qualms of Stomach, which never fail to ſeize ſome Men, ſome few Hours after they have drunk to Exceſs, I do not believe that any Man would, upon theſe Conditions, put the Cup to his Lips, whatever Pleaſure he might have by drinking.* So that, in the Examples alledged by Mr. *Bayle*, and in other like Caſes, none can propound to himſelf to undergo any Uneaſineſs or Sorrow, provided it paſſes with us for Pleaſure, but he aims to free himſelf from ſome immediate Uneaſineſs, or Grief, that lies upon him, which his Paſſion, or erroneous Judgment, hinders him from comparing, fully, with the Decree, or Certainty of Sorrow, at a Diſtance. The other Reaſon of Mr. *Bayle* is, That Men ſtick not to paſs thro' Pain and Uneaſineſs, provided, at length, they can arrive at Pleaſure. *Theſe, as ſome* Corſicans, (ſays he) *having receiv'd an Affront, will hide themſelves fifteen Days together, in the Buſhes, to wait for their Enemy, being well contented to feed on the Roots of Graſs all that while, on Condition, that they may have the Satisfaction of ſeeing their Ambuſh ſucceſsful.* But we may rather ſay, that the Uneaſineſs, or Pain, which theſe Men have conceived at the Affront given them by their Enemy, and the eager Deſire of Revenge, with which they are poſſeſſed, renders them inſenſible of thoſe leſſer Diſturbances, which are cauſed by the Inclemency of the Weather, or an hungry Appetite. We can obſerve very few Men, who will willingly undergo any great Pain, or Trouble, to arrive at the Enjoyment of thoſe Pleaſures, of which they are moſt ſenſible; but when, indeed, only ſome ſmall Inconvenience, or little Uneaſineſs, which they think can be eaſily born, attends, there needs no great Reſolution to open a Way to the Poſſeſſion of that Object, which has made ſo great Impreſſions upon our Heart. But the Proſpect of ſome violent Evil abates the Eagerneſs of the ſtrongeſt Paſſions, and deters the weakeſt Minds from ſwallowing the Baits of Pleaſure: But if ſometimes, to ſatisfy theſe Deſires, Men run themſelves chearfully into great Troubles, and ſharp Pain, as ſoon as they are ſenſible of them, they'll immediately repent of their Raſhneſs, and Imprudence; the Pleaſures, whoſe ſweet Morſels have drawn us away, will then appear to have been bought too dear, and we ſhall renounce, with all our Hearts, the Hopes of all we once accounted delightful, to be delivered from the Evil we endure; a ſufficient Proof, that we have not well conſulted our own Good, or that the Violence of our Paſſions ſo blinded us, that we did not perceive all the Bitterneſs of the Pain, into which we have ſo blindly thrown ourſelves. To come then to the Subject our Author is on, Suppoſe that two Law-givers, willing to ſettle the ſame Law, ſhall propound, the one great Rewards to ſuch as obſerve it, and the other ſevere Puniſhments to ſuch as break it: Do we think, that the firſt would more effectually engage Men to Obedience, than the other? No Body, I believe, will venture upon the affirmative; for there may be many Men, who will not much regard the greateſt Rewards that can be given, and, being contented with their preſent Condition, aſpire not to any higher Degree of Happineſs: But how few are there, who will not be affrighted at the Proſpect of a great Puniſhment, tho' they do not attentively conſider it? For one Man, who will yield to a Temptation, in ſpite of ſuch Threatenings, we ſhall find a thouſand, who will not, in the leaſt, be affected with the Hopes of the greateſt Rewards; eſpecially, if, to deſerve them, they muſt offer Force to any ſtrong Inclination. *Quintilian* (an able Orator, whom Mr. *Bayle* very juſtly eſteems) in treating of the Means of Perſuaſion, lays it down, among other Things, as a Maxim, that it is neceſſary to point out to the Auditor, not only the Advantage, which will accrue to him, by following our Advice, but, alſo, to point out to him the Danger of rejecting it. For (adds he) not only Fear has a ſtrong Influence over weak Minds, but I doubt, if the generality of Mankind are not more eaſily prevail'd upon by the Apprehenſion of Evil, than the Hope of Good: Juſt as we are more ſenſible of Vice, than of Virtue. *Animus deliberantis, &c. Inſtit. Orat.* Lib. iii. Cap. viii. See, alſo, St. *Auguſtine* Lib. *de Div.* Queſt. 83. and 36. Tom. 6. I ſhall add one more Remark, which is this, If a Man were more ſenſible of Good than Evil, thoſe Sins, into which Men fall, for fear of Pain, ought to be puniſh'd with greater Severity, than thoſe, into which they fall, through the Love of Pleaſure. Now this Conſequence, which naturally flows from the Principle of Mr. *Bayle*, is contrary to the Judgment of all the wiſeſt Legiſlators, and moſt able Philoſophers, as well as the conſtant Practice of all the Judicatures of the moſt civiliz'd Nations; and I am apt to think, that Mr. *Bayle* himſelf would not approve of a more gentle Treatment towards that young Girl, who (as he inſtances) ſuffered herſelf to be carried away with the Prevalency of a preſent Pleaſure, than of her who yields to the Threatenings of a furious Spark, See *Chap.* iv. §. 7. *Notes* there, and what the Author farther ſays, *Lib.* viii. *Cap.* iii. §. 19. as, alſo, *Grotius, Lib.* ii. *Cap.* xx. §. 29. *Numb.* 2. with the Notes. I am aware, alſo, that in the ſame Book, in which this Maxim, which has occaſion'd this large Note, is contained, theſe Words, which will confirm my laſt Reflection, are found, *I much doubt* (ſays Mr. *Bayle*) *whether the Prevalency of that Pleaſure, which hurrieth us, will be able to diminiſh the Crime*, p. 341.

all [1] Senſe and Value of Happineſs, as ſometimes to make us deſire ſo ſevere a Remedy as Death, for its Cure.

Hence, we think, civil Legiſlators have ſufficient Grounds and Reaſons for choſing to make the *Sanction* of their Laws conſiſt rather in Puniſhments than in Rewards. The Obſervance of human Laws is indeed advantageous enough in general, as it ſecures the Poſſeſſion and Enjoyment of thoſe Bleſſings which attend a civil Life: But were the Exerciſe of common Virtues enforc'd by the Propoſal of particular Rewards, 'twere impoſſible to furniſh Stock enough for ſo profuſe a Bounty. On the other hand, the denouncing of Puniſhments was the ſureſt way to make Men ſhake off that heavy Drowſineſs, with which moſt of them are beſotted and benumb'd: And becauſe generally the Tranſgreſſion of the Laws is join'd with the Hurt of others, and with ſome imaginary Good of the Offender, therefore it ſeem'd moſt expedient to repreſs the enticing Allurements of Sin, by repreſenting the frightful Image of that Pain and Grief, which was unavoidably to follow it. Thus we find that civil Laws do always come enforc'd with a Penalty denounc'd againſt Tranſgreſſors, either expreſly defining the kind of Mulct, or Puniſhment; or elſe intimating, that it is left undetermin'd to be ſettled by the Diſcretion of the Judges, and of thoſe who are to take Care of putting the Laws in Execution. Indeed, the *Roman* Lawyers tell us of ſome Laws, which were *imperfect*, *viz.* ſuch as have no Puniſhment enacted for Offenders, as *Macrobius* ſpeaks [2], or which wanted this penal Sanction. Such a one they reckon the *Lex Cincia* [3], which had no other Clauſe added at the End to enforce it, [4] but this, *He that doth otherwiſe, ſhall be accounted to have done wickedly.* But I ſhould conjecture, that in that Law, either the Infamy alone was thought a ſufficient Puniſhment, or it was left to the Power of the Cenſors to fix ſome further Mark of Diſgrace on the Delinquents in this Point. That ſuch Perſons were not altogether unpuniſh'd, we may fairly conclude from *Tacitus* [5]. *Cicero de Legibus*, Lib. ii. Cap. ix. [6] *The Puniſhment of Perjury is from Men Diſgrace, and from Heaven Deſtruction. Livy*, Lib. x. Cap. ix. gives us an Inſtance of another Law ſeemingly *imperfect*. [7] *The* Valerian *Law*, ſays he, *when it had forbidden the ſcourging, or the beheading of a Man, who ſhould make an Appeal, only added, that whoever acted thus, acted wickedly. This, I ſuppoſe (ſo great was the Modeſty of Men in thoſe Days) might be thought a ſufficient Tie for a Law: But in our Times, ſuch a Simplicity of Expreſſion would be us'd in no Threats, but thoſe which are deſign'd for Jeſts.* In the ſame Rank we may place the Law of [8] *Zaleuchus* mention'd by *Diodorus Siculus*, Lib. xii. Cap. xx. *Let no Citizen proſecute his Enemy with implacable Hatred, but let him ſo maintain Enmity with him, as if he were ſhortly to return into Favour and Friendſhip. He that doth otherwiſe, let him be reputed a Man of a fierce and barbarous Diſpoſition.* Unleſs you'll ſay, that, in this Caſe, as well as the former, the Infamy may well be interpreted as a Puniſhment. And ſo, likewiſe, in thoſe other Laws recited immediately after by the ſame Author, *Lib.* xii. *Cap.* xxi. *Let not a free Woman, unleſs ſhe be drunk, go attended with above one Maid. Let her not ſtir out of the City in the Night-time, unleſs when ſhe goes to proſtitute herſelf to her Gallant. Let her not wear golden Ornaments, nor Garments interwoven with Gold, unleſs ſhe deſigns to act the Courteſan. Let not a Man wear a Ring allied to Gold, or a Garment approaching near to* Mileſian *Richneſs, unleſs he be guilty of Fornication, or of Adultery. Thus* (as the Hiſtorian proceeds to obſerve) *by ſuch ſcandalous Exceptions and Conditions, he eaſily diverted his Subjects from the Purſuit of Luxury*

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[1] One ſmall Pain is ſufficient to ſpoil all the Pleaſures we enjoy. The Reaſon of it is, becauſe, ſo long as we are troubled with any Uneaſineſs, we can't think ourſelves happy, or in the Way of Happineſs, becauſe every one looks upon Grief and Uneaſineſs, as Things inconſiſtent with Happineſs. Mr. *Locke* of *Hum. Underſt.* p. 299.

[2] *Inter Leges quoque illa imperfecta eſſe dicitur, in qua nulla deviantibus pœna ſancitur.* Macrob *in* Somn. Scip. Lib. ii. Cap. xvii.

[3] The *Cincian* Law is ſo called from *M. Cincius*, the Tribune, who propoſed it, *A. U. C.* 549. It forbad all Advocates and Pleaders to take any Money, or Preſents, from whence *Plautus* calls it *Muneralis*. See *Tacit. Lib.* xi. *Cap.* v. But it was, alſo, imperfect in another Senſe, relating to the Validity of the Action committed againſt the Prohibition of the Law. See the following Note.

[4] The *Latin* is this: *Qui ſecus fecerit, improbè feciſſe videbitur.* It is not known whence our Author took theſe Words: But theſe Sort of Laws do not make void what was done againſt their Prohibition. They are found in none of the Ancients, who has ſpoken of the *Cincian* Law. It is probable, that our Author borrowed this Formulary from the *Valerian* Law, which he mentions elſewhere. He follow'd, perhaps, the Conjecture of a learned *German*, in an excellent Treatiſe, intitled, *Friderici Brummeri Comment. ad Legem Cincian*, reprinted at *Leipſic*, with other Pieces, 1712. This learned Writer was of Opinion, that the Article of the *Cincian* Law, which related to Advocates, had no penal Sanction; for which he brings, as Proof, another Article of *Ulpian*, wherein it is forbidden to leave Legacies beyond a certain Sum, unleſs to particular Relations: Notwithſtanding which, tho' the Teſtator tranſgreſs'd the Law, the Donation was ſtill good and valid. *Imperfecta Lex eſt, veluti Cincia, quæ ſupra certum modum donari prohibet, exceptis quibuſdam cognatis, & ſi plus donatum ſit, non reſcindit*, i. e. *Cincius*'s Law is an imperfect one; becauſe, tho' it forbids all immoderate Fees and Gifts, unleſs to ſome Kindred, yet, if more be given, it makes them not void. *Ulp. Inſtit. Tit.* i. See *Lib.* iii. *Cap.* vii. §. 6. following. M. *Brummer* (Cap. iii. §. 7, 8.) aſſerts, however, that the Judges had a diſcretionary Power of puniſhing ſuch Lawyers as took Money or Preſents. M. *Schulting*, alſo, ſhews, in his admirable Notes on *Juriſp. Ante-Juſtinian.* Pag. 562. that ſeveral Expedients were afterwards contriv'd, to prevent theſe illegal Donations from having their full Force.

[5] Who ſays, *Annal.* xiii. §. 62. *Suillii opprimendi gratiâ repetitum credebatur Senatuſconſultum, Pœnaque Cinciæ Legis adverſus eos qui pretio cauſas oraſſent*, i. e. The *Cincian* Law was reviv'd to ruin *Suillius*. But *Brummer*, whom I have juſt now quoted, maintains, with a great Shew of Probability, that the *Cincian* Law was renew'd by *Auguſtus*, whom, moreover, condemn'd the Lawyers to reſtore Four-fold what they took from their Clients. See *Dion. Caſſ.* Lib. liv. and the *Comment. ad Leg. Cincian*, Cap. iii. §. 9. & *ſeq.*

[6] *Perjurii Pœna divina, exitium humana, dedecus. Cicero* de Legibus, Lib. ii. Cap. ix.

[7] The *Latin* is, *Valeria Lex, quum eum qui provocaſſet, virgis cædi, ſecurique necari vetuiſſet, ſiquis adverſus ea feciſſet, nihil ultra, quam improbè factum, adjicit. Id (qui tum pudor hominum erat) viſum, credo, vinculum ſatis validum Legis. Nunc vix ſeriò ita minetur quiſquam.* But here, by the Bye, we may obſerve, that the laſt Words of this Paſſage are much varied in the Manuſcripts, where they are greatly corrupted. *Gronovius*, the Father, faintly conjectures, that they ſhould be read thus, *Nunc vix ſi ſummas pœnas minetur quiſquam*; and he builds it upon two of the beſt Manuſcripts, which read thus, *Nunc vix ſi ſummo ſerio minetur, &c.* Others add, *Ita ad ſervata*, which being joined with the former Readings, and keeping to the Senſe, we may gather the true Reading to be, *Nunc vix ſi ſummos cruciatus minetur quiſquam*, i. e. *Men, at this Day, can hardly be kept to their Duty, by the plaineſt Denunciation of the moſt ſevere Puniſhments.*

[8] *Diodorus Siculus*'s *Greek* is, Περσάτλων μηδένα τῶν πολιτῶν ἐχθρὸν ἀκαλάλλακτον ἔχειν, ἀλλ' ἔτω τὴν ἔχθραν ἀναλαμβάνειν, ὡς ἤξοντα πάλιν εἰς σύλλυσιν καὶ φιλίαν· τὸν δὲ παρ' αὐτὰ ποιοῦντα, διαλαμβάνεσθαι παρὰ τοῖς πολίταις ἀνήμερον καὶ ἄγριον τὴν ψυχήν——— Γυναικὶ ἐλευθέρα μὴ πλείω ἀκολουθεῖν μιᾶς θεραπαίνιδος, ἐὰν μὴ μεθύῃ, μηδὲ ἐξιέναι νυκτὸς ἐκ τῆς πόλεως, εἰ μὴ μοιχευομένην· μηδὲ περιλίθεσθαι χρυσία, μηδὲ ἐσθῆτα παρυφασμένην, ἐὰν μὴ ἑταίραν· μηδὲ τὸν ἄνδρα φορεῖν δακτύλιον ὑπόχρυσον, μηδὲ ἱμάτιον ἰσομιλήσιον, ἐὰν μὴ ἑταιρεύῃται, ἢ μοιχεύῃται· διὸ καὶ ῥᾳδίως ταῖς τῶν προτίμων αἰσχραῖς ὑπεξαιρέσεσιν ἀπετρέψε τῆς βλαβερᾶς τρυφῆς καὶ ἀκολασίας τῶν ἐπιθυμάτων, ἀδεὶς γὰρ ἐβούλετο τὴν αἰσχρὰν κόλασιν ὁμολογήσας, καλαγέλαστος ἐν τοῖς πολίταις εἶναι. See *Montagne*'s *Eſſays*, *Lib.* i. *Cap.* lxiii. *Digeſt. Lib.* xl. *Tit.* vii. *De Religioſis, & Sumptib. Funer. &c. Leg.* xiv. §. 14. and *Lib.* xlvii. *Tit.* xii. *De Sepulchr. viol. Leg.* iii. §. 4.

and

and of Intemperance. For no one could bear the expoſing himſelf to his Fellows by ſo foul a Diſgrace [a].

Thus then, there are two Parts of a Law, one *Definitive*, and the other *Vindicative*, which is the penal Sanction. Theſe, we ſay, are two Parts of the ſame Law, and not two Species of Laws. For as it is loſt Labour to ſay, *Do this*, if nothing follow beſides; ſo it is abſurd to ſay, *You ſhall undergo a Penalty*, unleſs it have been before ſignified by what Means we ſhall render ourſelves obnoxious to this Suffering. We muſt therefore take Notice, that the whole Strength and Force of a Law, properly conſiſts in declaring what our Superior is pleas'd we ſhould perform or omit, and what Penalty we ſhall incur upon Default. Whence, alſo, it may be underſtood in what Senſe the Power of obliging is attributed to the Law. For, properly ſpeaking, the Power of obliging, or laying an inward Neceſſity on Perſons to act in ſuch a Manner, is in him who bears the ſovereign Command. But the Law is only the Inſtrument of Sovereignty, by which the Ruler makes his Pleaſure known to his Subject, which being once diſcover'd, an Obligation to Obedience is produc'd in them by Virtue of his ſupreme Authority. Hence too it appears, that the vulgar Diſtinction of the Power of a Law, into *directive* and *compulſive*, was ill made; unleſs by the compulſive Power we underſtand the penal Clauſe. For the proper Efficacy of a Law conſiſts in *directing*, as it declares the Will of the Sovereign, and denounceth Threats againſt the Subject, if he prove diſobedient. But the *compulſive* Power, or the Power of exacting from the Subject a Conformity to the Rule [1] preſcrib'd them, by decreeing and actually inflicting Penalties, is properly in the Perſon of him who made the Laws, or of him who hath the Care of their Execution. *Liban.* Orat. V. *Laws were of no Force without Judges to put them in Execution. Bare Statutes have neither Ears to hear our Cauſe, nor Feet, nor Hands, to haſten to us and defend us: But all the Aſſiſtance which Juſtice gives us, is convey'd by its Miniſters* [2]. Tho' 'tis a common Thing with Writers to attribute to the Laws themſelves ſuch Effects, as in a ſtrict Senſe belong to the ſupreme Power. Of which kind of Speech, that one Paſſage of *Apuleius* [b] may be a ſufficient Inſtance, *Quod eſt lex in urbe, dux in exercitu, hoc eſt in mundo Deus.* "*What the Law is in a City, what the General is in the Army*[3], *ſuch is* GOD *in the World.* When *Livy* ſays [4], *The Commands of the Laws are more powerful than thoſe of Men*; this is ſo far true in Democracies only, that the Magiſtrates cannot recede from the Laws, nor over-rule their Force.

Legiſlators, *as ſuch*, are ſaid to *compel*, only *morally*; not that by any natural Violence they ſo conſtrain a Man, as to render it impoſſible for him to act otherwiſe than as they direct; but becauſe, by declaring and exhibiting a Penalty againſt Offenders, they bring it to paſs that no Man can eaſily chooſe to tranſgreſs the Law; ſince, by reaſon of the impending Penalty, Compliance *is*, *in a high Degree*, preferable to Diſobedience.

XV. Now by attributing thus to Laws the Power of *obliging*, we immediately exclude *Permiſſions* from the Number of true and proper Laws: Tho' *Modeſtinus* [c] tells us, the [5] Virtues of Law are to *command*, to *forbid*, to *permit*, to *puniſh*. For [6] *Permiſſion* is not properly an Action of the Law, but the Negation of an Action. Whatſoever Things the Law *permits*, thoſe it neither *commands* nor *forbids*, and therefore it really doth nothing at all concerning them. Some maintain, that there is nevertheleſs a kind of Obligation in *Permiſſions*; not indeed affecting him to whom we ſay a Thing is *permitted*, but binding up a third Perſon from giving him any Hindrance, in caſe he undertake what the Law thus permits. Tho' this is by many reſtrain'd to ſuch Things as are fully and perfectly permitted, ſo as not to take in thoſe leſſer and imperfect Permiſſions, which may be more properly ſtil'd Indulgences or

[a] Add. Lib. xi. Tit. vii. D. *De Relig. Sumptibus Funeral.* & Lib. iii. §. 4. *Leg. de Sepulchro violato.*
[b] *De Mundo, p.* 749. Ed. *in uſum Delph.* [c] *Lib.* i. *D. Tit.* iii. *L.* 7.

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[1] The Original is, *ab ipſis*, for *ipſis præſcriptam.*

[2] This Author cites only the *Latin* Verſion of *Libanius*'s Oration V. He has ſome Declamations, but I have never ſeen his Orations. To ſupply this Defect, I ſhall obſerve, that this Thought was borrow'd from a much more ancient Writer, I mean, *Demoſthenes*, as the Cloſe of his Oration againſt *Medias*; his Words are, Ἡ δὲ τῶν Νομῶν, &c.

[3] The Senſe of this Paſſage is certainly taken out of *Ariſtotle*, who ſpeaks exactly the ſame Thing in his Book *De Mundo*, *Cap.* vi.

[4] *Imperiaque legum potentiora, quàm hominum.* Tit. Liv. Lib. ii. Cap. i.

[5] The Words of the *Digeſts* are, *Legis virtus* [*hæc*] *eſt, imperare, vetare, permittere, punire, Digeſt.* Lib. i. Tit. iii. Leg. vii.

[6] This is not always true, for every one knows, that Laws, ſometimes, poſitively grant particular Privileges and Rights. If we carefully reflect upon the Nature of moral Things, we ſhall find, that the general Notion of a Law, as it implies a Conſtitution, by which a Superior orders the Actions of ſuch as are ſubject to him, includes not only an Obligation to do, or not do, certain Things, but, alſo, a Liberty to do, or not do, others. So that Liberty imports always a Conceſſion, either expreſs or tacit, which is a poſitive Thing. And, indeed, on what are all the Rights we have founded, but upon the poſitive Will of our Superior, by Virtue of which we may defend ourſelves, or require the Protection of the Law againſt all thoſe who endeavour to moleſt us in the Enjoyment of ſome lawful Right? Farther, *Right* and *Obligation* are two relative Notions, which always go Hand in Hand. And why may we not allow a *Law of meer Permiſſion*, as well as a *Law obligatory*? Certainly, if this Law be neceſſary to impoſe upon us a Neceſſity of acting, or not acting, the other is no leſs neceſſary to put us in a State of acting, or not acting, with Security and Impunity, as we think fit. *Grotius*, who, like this Author, affirms, that Obligation is the Eſſence of all Law, ſeems tacitly to acknowledge, in the ſame Chapter (*Lib.* i. *Cap.* i. §. 17.) that *Permiſſion* is comprehended in the Notion of a Law. We muſt therefore allow, That the Law of meer *Permiſſion* is an Ordinance, or Conſtitution, by which a Superior gives to thoſe that are ſubject to him, a Right, or moral Power, to enjoy Things ſafely and lawfully, or to do, and require of another, certain Actions, if they judge convenient. See what Mr. *Titius* ſpeaks, much to the ſame Purpoſe, in his *Obſerv. on Pufendorf*, l. li. Mr. *Selden* has already maintained the ſame Opinion, and uſes a Compariſon, very proper to make it underſtood, *viz. All the Boundaries, which divide my Field from my Neighbour's, ſet out the Extent of his Field as well as mine; ſo the obligatory Right, which determines what Actions are commanded, and what forbidden, being once ſettled, there neceſſarily follows a Right of meer Permiſſion, which has, for its Object, all other Actions, about which the Lawgiver has determined nothing authoritatively, and, conſequently, permits every Man to do, or not to do, as he pleaſes.* De Jure Nat. & Gent. Lib. i. Cap. iv. See, alſo, what I have ſaid upon *Grotius De Jure Bell. & Pac.* Lib. i. Cap. i. Not. 3. where the Queſtion is treated at length, and more diſtinctly. Again, We muſt remember, that there is a great Difference between the Permiſſion given by human Laws and divine; for the Permiſſion of divine Laws is always abſolute, ſo that every one has a full Right to do all that they permit, provided the Things permitted are not forbidden by any human Law, to which he ought to ſubmit, in Obedience to ſome other divine Law; but as to human Laws, the Permiſſion, which they give, is, for the moſt Part, imperfect, which implies only Impunity in human Judicatures, as our Author explains himſelf a little lower. And, as I have ſhewn at length in two Diſſertations, the one on the *Permiſſion*, the other on the *Advantage* of the Laws, which, after being printed ſeparately, have been ſince annex'd, by way of Supplement, to the fourth Edition of *the Duties of a Man and a Citizen*. Nevertheleſs I am aware, that this Author, forgetting his Principles, ſeems to allow a *Law of meer Permiſſion*; for, ſpeaking of the Goodneſs or Evil of Actions in the following Chapter, §. 3. he ſays expreſly, *By a Law, I mean always here a Law, which indiſpenſably obliges to ſome Thing, and not a Law that only permits.* Legem neceſſitantem, non permittentem. *Grotius*, alſo, ſpeaking of the Right of the firſt Occupant, ſays, *It is founded upon the natural Right of bare Permiſſion.* Eſt hoc jus ex jure naturæ permittente. *Lib.* ii. *Cap.* iii. §. 5.

• Connivances.

Connivances. Thus, for Example, the Laws of ſome Countries permit the killing of a Wife taken in Adultery; yet they do not forbid others from uſing their utmoſt to hinder her Death. But if we would be accurate and exact in our Way of talking, even this Effect doth not properly reſult from the Permiſſion of the Law, but from every Man's juſt Liberty [1]. For about thoſe Things in which the Law gives me no Stop, or Hindrance, I have a perfect Freedom of acting, the chief Effect of which is, that no Man ought to diſturb me in the harmleſs Exerciſe of it. So that for a Law expreſly to permit thoſe Things to which we claim a ſufficient Licence by their not being prohibited, which cannot well fall under Doubt or Diſpute, ſeems little better than uſeleſs and ſuperfluous. As, likewiſe, it is not always neceſſary, that when any prohibiting Law is repeal'd, an Act hitherto *forbidden*, ſhould, by an expreſs Ordinance, be declar'd *permitted*: Since upon Removal of the former Impediment, our natural Liberty doth, as it were, revive and recover itſelf. There are indeed two ſpecial Caſes, in which civil Law-givers are wont to uſe expreſs *Permiſſion*: Firſt, when Licence and Impunity is indulg'd to ſuch an Act, within ſuch a Meaſure; and, ſecondly, when the Licence or Impunity is to be purchas'd by ſome Fine or Burthen. Of the former Caſe, ſome give an Inſtance in the Laws of moſt Countries permitting Uſury, within ſuch a fix'd Degree: Of the latter, in the Conſtitutions of ſome Places, where Women are allow'd to proſtitute themſelves, upon Condition of paying a certain Tax [2]: which whether it be well or ill done, we are not now to diſpute [a 3].

Legal *Permiſſion* is divided into *Plenary*, which gives a Right of acting, and makes the Deed altogether lawful; and *leſs Plenary*, which either affords Impunity, or Freedom from Impediment, or both. Now that ſeveral Things find an Impunity amongſt Men, is occaſion'd by ſome of theſe Reaſons: Either, that the Matters exceed the Reach of human Courts and Cognizance, as do the Faults of Kings; or, that human Law hath either determin'd nothing plainly about ſuch an Action, or hath declar'd it ſhall be lawful; or, laſtly, becauſe civil Ordinances frequently leave many Things to the Modeſty and common Honeſty of every particular Man [b].

Some have more accurately obſerv'd concerning theſe *Permiſſions* of Civil Laws and Civil Courts, that they are made either by the Action of the Law, or only tacitly. To the former they refer the Omiſſion, or paſſing by of a Matter, not ſimply, and, as it were, by Accident, but when the Deſign and the Form of the Law run in ſuch a Manner, that the Legiſlator ſhews his Intent of making a full Enumeration of Particulars: For, in ſuch a Caſe, he is ſuppos'd to have *permitted* whatever he hath not expreſly reckon'd up amongſt Things prohibited; provided the Matter be not repugnant to natural Honeſty. Thoſe Things are underſtood to be tacitly forbidden, which the civil Power lets paſs by conniving at, tolerating, or diſſembling; either for the preſent only, or for a longer Time, ſo as to let them obtain the Force of Cuſtoms. Yet a Permiſſion, granted by a civil Law, cannot cauſe that an Action ſhall not be contrary to the divine Law, or ſet it beyond the Fear of the divine Puniſhment.

We may farther remark, that when a Thing *is* ſaid to be *permitted*, which is not determin'd by the [4] expreſs Command or Prohibition of any Civil Law, we are not to cavil at the Words of the Law, but to conſider the Scope and Intention of it. For many Things are contain'd in the Senſe of the Laws, and are ſuppos'd to be really implied by them, either as they are neceſſary Conſequences, or upon Account of their near Affinity and Reſemblance to the determin'd Caſes. Regard is, likewiſe, always to be had to natural Law, or to common Honeſty, which is the perpetual Supplement of civil Decrees. *Laſtly*, Thoſe Things which are tolerated only for a Time, or upon the Score of Neceſſity, cannot fall under the proper Notion of *Rights*. All [5] which Obſervations are chiefly to be underſtood of the moſt perfect or *plenary Permiſſion* [c].

XVI. The *Matter* of *Laws* in general, is whatever *can be done* by thoſe Perſons for whom the *Laws* are made, at leaſt at the Time of their Promulgation. For if any Man afterwards, by his own Fault, loſeth his Ability to fulfil the *Law*, the Force of the *Law* doth not thereupon ceaſe and expire; but the Legiſlator hath Power to puniſh him, for rendering himſelf thus incapable of conforming to the Rule preſcrib'd him. But, otherwiſe, to make ſuch a *Law* as the Subject cannot fulfil, and yet hath not loſt his Power of fulfilling by his own Fault, is not only a moſt vain, but a moſt unjuſt Deſign [6]. As to the ſubject Matters which employ the particular Species of Laws, we ſhall more conveniently conſider them in their proper Place.

XVII. To

[a] Vid. *Evagr. Hiſt. Eccleſ. Lib.* iii. *Cap.* xxxix. *Of the Tribute paid by common Strumpets, which* Anaſtaſius, *the Emperor, took off.* See *Book* viii. of our **Author, *Chap.* i. §. 3.** [b] Vid. *Digeſt. Lib.* I. *Tit.* xvii. [c] Vid. *Bæcler.* in *Grot. Lib.* ii. *Cap.* i. §. 9.

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[1] But the free Uſage of this Faculty, in ſuch and ſuch Caſes, is an Effect of the Permiſſion of a Superior, who might reſtrain us, if he had pleas'd, in ſuch Caſes where he has us'd his Authority; ſo that not having exercis'd this Right, we may ſuppoſe that he has wav'd it, and thereby granted us a real, tho' a tacit Permiſſion. Hence it comes, that he may hereafter forbid, what he has now permitted; becauſe, as well in this Caſe, as in regard to all obligatory Laws, he has not tied up his own Hands. See Note 2. above.

[2] See *Evagrius*'s Eccleſ. Hiſt. *Lib.* iii. *Cap.* xxxix. about a Tribute called *Chryſargius*, which was levied upon the Curtezans, and which was aboliſhed by *Anaſtaſius*, as our Author there obſerves. This was otherwiſe called *Auraria*, or *Luſtalis Collatio*, becauſe it was levied every five Years. And all, who carried on any Trade, as well as Beggars, were ſubject to it. See *Jaques Godefroi*, upon the *Theodoſian Code*, Lib. xiii. Tit. i.

[3] See what is ſaid, *Lib.* viii. *Cap.* i. §. 3.

[4] In all the Editions of *Pufendorf* it is printed, *Volente aut Jubente* (and therefore the *Engliſh* Tranſlator renders them, *the expreſs Command*) but the Author would have ſaid, *Vetante aut Jubente*, as the Connection of the Diſcourſe requires, for *Velle & Jubere* ſignify the ſame Thing.

[5] See *Lib.* v. *Cap.* xii. §. 17. following. We muſt diſtinguiſh here between the Permiſſion of divine and human Laws, the latter, properly ſpeaking, carries along with it only Impunity, but the former, when it is poſitive, always implies Approbation. The Reader will find the Matter treated at full Length, in my Notes upon *Grotius De Jur. Bell. & Pac.* Lib. i. Cap. i §. 17. Not. 3.

[6] It is neceſſary, that what is forbidden ſhould produce ſome Advantage, either to thoſe, for whom the Law is made, or to others; for 'tis not reaſonable, that the natural Liberty of Subjects ſhould be reſtrain'd, and no Profit, thereby, redound to any Body, *De Offic. Hom. & Civ. Lib.* i. *Cap.* ii. §. 8. See what is ſaid, *Lib.* vii. *Cap.* ix. §. 5. Laws are made only about ſuch Things as commonly happen, as is obſerved above, *Cap.* xi. §. 5. To theſe two Conditions (of which our Author has juſtly inſerted the Second in his Abridgment) he ſhould have added a third; which is, that the Law ſhould not only be *poſſible* to be obſerv'd, as well as uſeful to thoſe who obſerve it, but, alſo, juſt. The Caſe is clear, with regard to human Laws, which become evil, from the Moment they contain any Thing contrary to the divine Law, either natural or reveal'd. As to divine

XVII. To know who is capable of being oblig'd by a Law, we need ſeek no further than to the Right of the Legiſlator; which certainly takes in all thoſe who are ſubject to his Command. What Perſons the Legiſlator intended to oblige, is plain enough from the Law itſelf. For in all Laws it is ſignified whom they concern; either by expreſs Determination, made ſometimes by a general Sign, ſometimes by a Reſtriction to certain Individuals; or elſe by ſome Condition or Reaſon, which a Subject finding in himſelf, at the ſame Time apprehends that he therefore ſtands *oblig'd* by ſuch a Law. Regularly then, a Law obligeth all Perſons ſubject to the Legiſlator, whom the Reaſon of the Law reacheth, and to whom [1] the Matter of it may be applied. For, otherwiſe, Tumults and Confuſions would continually ariſe amongſt Subjects, the Prevention of which Diſorders was a principal Reaſon why Laws were firſt introduc'd. And therefore no Body ſhall be eſteem'd exempted from a Law, unleſs he can ſhew his peculiar Privilege. Yet this indeed frequently happens, that a Man may be exempted from the Obligation of a Law, *after* the Time of its being enacted, and this we call being *diſpens'd with*. For if the Legiſlator may rightly abrogate or repeal a Law, he may as fairly ſuſpend the *Effect* of it in ſome certain Perſon. *Diſpenſation* differs from *Equity* [2], with which it is generally confounded, in this Reſpect, that the former cannot be granted, but by one endued with Legiſlative Power; whereas an inferior Miniſter of Juſtice, not only *may*, but *ought* to apply the latter; ſo that if he follow the ſtrict Letter of the Law, in a Caſe where there is room for an equitable Conſtruction, he ſhall be judg'd to act contrary to the Mind and Intention of the Legiſlator. *Diſpenſations* therefore depend on the free Grace of the *Law-giver*, but *Equity* on the Office and Duty of the *Judge*. In granting Diſpenſations [3], great Prudence is to be us'd, leſt, by a promiſcuous Indulgence, the Force and Authority of Law be enfeebled: Or leſt, if the ſame happen to be denied to Perſons of the like Condition, Occaſion ſhould be given to Anger and Reſentment, whilſt Men of equal Circumſtances are not admitted to equal Favours. *Plutarch* hath recorded ſeveral Inſtances of very nice and ſubtil Diſpenſations. As when *Ageſilaus* ſuſpended the Laws for one Day, with this Form, *Let the Laws ſleep to Day* [a] [4]; to hinder thoſe Perſons who had fled in an Engagement, from ſuffering the uſual Diſgrace. So when *Demetrius* deſir'd to be admitted at once into all the *Athenian Myſteries*, whereas it had ever been a Cuſtom to celebrate the greater *Myſteries* in *November*, and the leſſer in *Auguſt*, *Stratocles* publiſh'd a Decree, that the Month of *March*, in which *Demetrius* viſited *Athens*, ſhould be call'd, firſt *November*, and then *Auguſt* [b]. What the ſame Author reports of *Demoſthenes* is more plauſible: *Demoſthenes*, upon his being recall'd from Baniſhment, lay under a pecuniary Mulct, and the Law forbidding that he ſhould be entirely diſcharg'd from it without Payment, they invented this Way of eluding the Law; they had a Cuſtom of giving Money to the Man who prepar'd and adorn'd the Altar, at the Time of Sacrificing to *Jupiter* the *Deliverer*: This Office, and this Money, they decreed *Demoſthenes*; and, under that Pretence, allotted him fifty Talents, the Sum in which he had been amerc'd. The *Lacedæmonians* made uſe of much ſuch another Evaſion in Reference to *Lyſander*. It was a Law amongſt them, that no Man ſhould bear the ſame Office above once [5]; but now reſolving to let *Lyſander* have again the chief Power in a Naval Expedition, they gave [6] *Aracus* the formal Command of the Fleet, but join'd *Lyſander* with him [7] in a private Station, with expreſs Orders, *That the General ſhould never act contrary to his Advice* [c]. I know not whether the *Spaniſh* Cuſtom mention'd by *Naudeus* [d], may not be reckon'd, likewiſe, amongſt theſe nice *Permiſſions*: "In *Spain*, he ſays, when they deem a Man to be "guilty of Treaſon, they appoint Judges to ſit on "him in ſecret, who form a Proceſs, and condemn "him to ſuffer Death; after which they ſeek by "any Means to put the Sentence in Execution. And "this they practiſe as a Salvo to their Conſciences; "that they may not be accus'd of Injuſtice in puniſhing Men capitally, without a legal Knowledge "of their Crime."

XVIII. Law may be beſt divided, with reference to its Original, into *divine* and *human*; the former having *God*, and the latter *Man* for its Author. But if we conſider Law, as it bears a neceſſary Agree-

[a] *Plutarch Apophthegm. Lacon. & Ageſil. Appian. Libyc.* [b] *Idem Demetr. & in Alexandr. p.* 672, & 679. [c] *Diodor. Sic. Lib.* xiii. *Cap.* c. *Plutarch Lyſand. Add. Valer. Max Lib.* vi. *Cap.* v. § 3. [d] *Coups d'Eſtat. Chap.* iii. *p.* 198.

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divine Laws, they are always infallible, agreeable to thoſe Ideas of Juſtice which flow from the Nature of God; that is to ſay, to what his infinite Perfections demand, when conſider'd, according to the perfect Conformity there is between them. Hence it is, that whoever attempts to promulge it, as a divine Law, any repugnant to theſe immutable Ideas ought, upon that Account, to be regarded as an Impoſture.* This is ſufficient to deſtroy the Inference, which the Partizans of Perſecution draw from the Evangelical Parable, *Compel them to enter in.* The ſame Thing may be applied to the Utility of divine Laws. There is only this Difference, between purely poſitive and natural Laws, that we cannot, ſometimes, perceive ſo well the Advantage, which ariſes to Men from the Obſervation of the former; becauſe the infinite Wiſdom of God has, ſometimes, impenetrable Views, or ſuch, at leaſt, as are very difficult to be diſcover'd, by thoſe to whom he has preſcrib'd theſe Laws. In this Caſe, we muſt ſtill ſuppoſe ſome real Utility in them, tho' it is unknown to us. With reſpect to the natural Law, the Principles of which are ſuited to the Capacity of all who make uſe of their Reaſon; if, after having thoroughly examin'd any Thing (pretended either to be commanded, or forbid by the Rules of this Law, founded on the Conſtitution of our Nature) we find it not of the leaſt Uſe to Mankind, we may be certain, it is only a Chimera. There is another Point deſerves Attention, with regard to human Laws. We know very well, thoſe, who make them, are not always ſo wiſe, or penetrating, as to preſcribe nothing, but what is advantageous to their Inferiors, or Subjects. Nevertheleſs, to avoid Inconveniencies, the Good of Society directs, that, in Caſe of Doubt, the Preſumption ſhould always be in Favour of the Uſefulneſs of the Law, and that we ſhould even obey Laws, acknowledg'd as trifling, provided they do not confine us in too rigorous a Manner.

[1] See *Lib.* v. *Cap.* xii. §. 10. following.

[2] See *Lib.* v. *Cap.* xi. §. 21. following, as alſo his *Abridgment of the Duties of a Man and a Citizen*, *Lib.* i. *Cap.* ii. §. 10. Farther, to ſpeak properly, what he here calls *Equity*, ought to be called, *An Interpretation according to Equity*; as *Titius* ſpeaks, *Obſerv.* 62. See a little Treatiſe of *Grotius*'s upon this Subject, printed in the latter Editions of his Book *De Jure Bel. & Pac.* which is entitled, *De Æquitate, indulgentia, & facilitate.*

[3] See Mr. *Bayle*, in his *Divers Obſervations about a Comet*, *p.* 456. and the ſecond Volume of his *Parrhaſiana*, *p.* 178.

[4] The *Greek* of *Plutarch* is, Καὶ φήσας, ὅτι τοὺς νόμους δεῖ σημεῖον ἔχειν καθεύδειν, ἐκ δὲ τῆς σήμηρον ἡμέρας κυρίους εἶναι περὶ τὸ λοιπόν.

[5] The Word *bis*, being omitted in all the Editions of this Author, ſpoils the Senſe quite; and therefore, as the *French* Tranſlator adds, *deux fois*, ſo the *Engliſh* puts in, *above once*.

[6] Here's a great Miſtake in all the Editions of the Original, putting *Arratus*, the Name of a General of the *Achæans*, a very different Perſon from this Admiral, for *Aracus*. Our Author has follow'd *Diodorus Siculus*, who relates the ſame Fact, Lib. xiii. Cap. c. where the Text is apparently faulty.

[7] The *Latin* ſays, *Privatus*, as the *Engliſh* Tranſlator renders it, but ſurely our Author meant *Legatus*, a Deputy; but however that be, 'tis ſafeſt to follow *Plutarch*, who calls him, Ἐπιστολεὺς, i. e. *Præfectus Claſſis*, a Rear-Admiral at leaſt. See farther about theſe Sorts of intricate Diſpenſations, in *Montagne*'s *Eſſays*, *Lib.* i. *Cap.* xxii.

ableneſs to the ſubject [1] Matter, in this Reſpect we divide it into *natural* and *poſitive*. The former is that which is ſo exactly fitted to ſuit with the rational and ſocial Nature of Man, that human Kind cannot maintain an honeſt and a peaceful Fellowſhip without it: or, in other Words, that which carries in it a natural Goodneſs, or a Uſefulneſs ariſing from its internal Efficacy, towards Men in general. Tho' there be, alſo, a farther Reaſon of this Denomination; in as much as this Law may be found out and known by the ordinary Sagacity of Men, and from the Conſideration of human Nature in Common.

Poſitive Law is that which doth not by any Means flow from the general Condition of human Nature, but from the ſole Pleaſure of the Law-giver; tho' theſe Laws ought, likewiſe, to have their Reaſon and their Uſes; in reference to that particular Society for which they are enacted.

Some are us'd to call *poſitive* Law by the Name of *Voluntary*: Not as if the Law, of *Nature* [2] did not proceed from the Will of GOD, but becauſe no *poſitive* Law had ſuch an Agreeableneſs with human Nature, as to be neceſſary in general for the Preſervation of Mankind, or, as to be known and diſcover'd without the Help of expreſs and peculiar Promulgation. And therefore the Reaſons of this Law are not to be drawn from the general Condition of human Race, but from the particular, and ſometimes the [3] temporary Advantage of ſeparate Communities. So that upon the Union of Men in Societies, they are fix'd and determin'd by the Pleaſure of Superiors. We may improve our Notion of *poſitive* Law by that Paſſage of *Ariſtotle* [4], where he ſays, *That Laws proceeding from Inſtitution and Uſefulneſs, bear ſome Reſemblance to Meaſures: For the Meaſures of Wine and Corn, for inſtance, are not every where the ſame; but greater where the Merchants buy, and leſſer where they ſell.*

Divine Law is again divided into *natural* and *poſitive* [b]: But *human* Law, ſtrictly taken, is only *poſitive* [5]. Of the particular Species, we ſhall diſcourſe in their Place [6].

[a] Vide *Ethic. ad Nicom. Lib.* v. *Cap.* x. *Et Vid. Lib.* xv. *D. de condit. Inſtit.*

[b] *Divine natural Law is diſtinguiſh'd from poſitive, becauſe this is alterable by the Authority that made it; that is not, but is Eternal and Immutable. See what our Author ſays in* Book ii. Chap. iii. §. 4.

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[1] The Text in this Place is either corrupted, or not clear. It may be rectified, partly, from his *Elements of univerſal civil Law*, where our Author thus expreſſes himſelf; *Quantum autem ad materiam, quædam cum ipſa humanæ naturæ, quâ talis, conditione maniſeſtè congruunt, & ex eâ fluunt*, i. e. As to the Matter (of Laws) ſome plainly agree with the human Nature, as ſuch, and others flow from it. And, partly, from his *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* ii. §. 16. where he ſays, *Sed ſi lex conſideretur prout neceſſariam, & univerſalem Congruentiam cum hominibus, vel minus, habet, &c. i. e.* If the Law be conſidered, as it has a neceſſary and univerſal Agreement with Men, though in the loweſt Degree, *&c.* The *Engliſh* Tranſlator is ſo far from clearing this Paſſage, that he has made it more obſcure, by taking it in a wrong Senſe; for he underſtands, by the Word *Subjectis*, in the Original, the *Subject*, or *Matter* of the Law; whereas, the Author plainly treats of the *Perſons* upon whom a Law is impoſed.

[2] See what we have ſaid, *Chap.* i. §. 4. and *Chap.* ii. §. 6. with the *Notes.*

[3] The Author here cites *Vitellius*'s Reflection, *Morem accommodare, prout conducat*, i. e. *To accommodate the Cuſtom to the Intereſt of State.* Tacit. Annal. Lib. xii. Cap. vi.

[4] *Ariſtotle*'s Words are, Τὰ δὲ, καλὰ συνθήκην, καὶ τὸ συμφέρον τῶν δικαίων, ὅμοιά ἐστι τοῖς μέτροις· ἃ γὰρ πανταχοῦ ἴσα τὰ οἰνηρὰ, καὶ σιτηρὰ μέτρα, ἀλλ' ἃ μὲν ὠνοῦνται μείζω, ἃ δὲ πωλοῦσιν ἐλάττω.

[5] This is an eſſential and diſtinguiſhed Character, between Laws *natural* and *poſitive*, the firſt are immutable, ſo juſt every Way, that no Authority can change, or abrogate them lawfully; whereas poſitive Laws are ſo arbitrary, that, as a lawful Authority may eſtabliſh them, ſo he may change and aboliſh them, as he ſees Occaſion. See Book ii. Chap. iii §. 4.

[6] For tho' there be natural Laws, which conſtitute a Part of human Laws, it is not from the Legiſlator they derive their Force, becauſe they would be equally obligatory without this: All that the Legiſlator does, is to ſubject to Puniſhment, before human Judicatories, Things which would, otherwiſe, remain unpuniſh'd. But when GOD formerly gave Laws to the *Jews*, as a temporal Legiſlator, it was eaſy to diſtinguiſh thoſe, which were founded upon the natural Law, from thoſe purely political, or ceremonial, and which, as ſuch, had no other Foundation, than the particular Will of GOD, ſuited to the Condition of that People. For every poſitive Law, whether human or divine, is only made for certain particular Perſons, or Societies, whatever ſome modern Divines, and Lawyers, may imagine; as *Grotius* (*Lib.* i. *Cap.* i. §. 15.) affirms, That there is a divine voluntary Right, that obliges all Men, as ſoon as they come ſufficiently to their Knowledge; and adds, That this Right hath been publiſhed upon three Occaſions, *viz.* 1. At the Creation of our firſt Parents. 2. After the general Deluge. 3. By the Goſpel. This great Man did not proceed to Particulars; but, ſome Years ſince, Mr. *Thomaſius*, Profeſſor at *Hall* in *Saxony*, compoſed a Syſtem of the divine poſitive univerſal Laws, in his *Inſtitutions of Divine Civil Law*, printed in 1702. But this able Lawyer being none of thoſe, who count it an Honour to defend what they have once aſſerted, right or wrong, did, at length, own himſelf miſtaken, and pulled down his own Building, when he found the Foundation to be weak. See his *Select Obſervations*, made at *Hall*, *Tom.* vi. *Obſervat.* xxvii. and his *Principles of the Law of Nature and Nations, drawn from common Senſe*, printed in 1705, and again in 1708. Others, in imitation of him, have abandon'd this Syſtem. A *German* Author has lately endeavour'd to revive, and defend it, after his Way, in a Book printed at *Keil*, in 1720, with this Title, *Friderici Genizkenii Juris Divini Poſitivi Prudentia, &c.* The Difficulty of proving the moſt Part of the Articles, which relate to this pretended univerſal Law, forms a ſtrong Objection againſt its reality. There are other Articles, which are, manifeſtly, only temporary Laws, made for a ſhort Time, and for a ſmall Part of Mankind. Others belong, only, to the natural Law, and not the poſitive. I have examin'd ſeveral of theſe, in my Notes on *Grotius*, Lib. i. Cap. i. §. 15. But to conclude, it is ſufficient to make two Remarks, which will ſpare the Reader the Neceſſity of a more particular Enquiry. I affirm then, that if there is any divine Law, which we may call *poſitive*, and, at the ſame Time, univerſal, it muſt have theſe Characters. 1. It ought to be uſeful to Mankind, at all Times, and in all Places. For GOD, being infinitely wiſe and good, can preſcribe no Law, which is not advantageous to thoſe, to whom it is given. Now a Law, conformable to the Intereſts of all Men, in all Times, and Places (conſidering the infinite Difference, which the particular *Genius*, Situation, and Circumſtances of Men occaſion) ſuch a Law, I ſay, muſt be agreeable to the Conſtitution of human Nature in general, and, conſequently, a natural Law. 2. Beſides, if there was ſuch a Law, as it never could be diſcover'd by the Light of Reaſon, it is neceſſary it ſhould be clearly reveal'd to all Mankind. But this is a Point can never be prov'd. A great Number of People have, as yet, no Knowledge of Revelation, and there is no Tradition can be depended upon in this Caſe. If we ſay, that the Laws, in Queſtion, oblige only thoſe, to whom they are reveal'd, we deſtroy the Idea of their Univerſality, without being ſatisfied, why they were not publiſh'd to all People, ſince they were made for all. Add to this, that we here ſuppoſe the very Point which is diſputed, with regard to the Reality, and Number of theſe Laws.

CHAP. VII.

Of the Qualities of Moral Actions.

The Contents of every Section of the ſeventh Chapter.

I. *How many are the Qualities of moral Actions.*
II. *A neceſſary, lawful Action.*
III. *The Goodneſs or Evil of Actions, in what they conſiſt.*
IV. *A good Action muſt have all Things requiſite, an evil one is made ſuch, by wanting one Condition.*
V. *GOD can't be the Cauſe of any Evil.*
VI. *Juſtice is either in Perſons or Actions.*
VII. *What is the Juſtice of Actions.*
VIII. *Univerſal and particular Juſtice.*
IX. *Juſtice diſtributive.*
X. *Commutative.*
XI. Grotius's *Opinion about Juſtice.*
XII. Ariſtotle's *Judgment upon the ſame.*
XIII. Hobbes's *Opinion of Juſtice and Wrong.*
XIV. *What is an unjuſt Action.*
XV. *What an Injury is.*
XVI. *An Injury is done by Deſign and Choice only, whi... the Nature of a Fault is treated of.*
XVII. *No Wrong is done to any Man that wills it.*

OUR next Buſineſs is to conſider the *Qualities* of moral Actions: Now according to theſe Actions are ſaid to be *neceſſary*, or *not neceſſary*, *lawful* or *allow'd*, and *unlawful* or *diſallow'd*, *good* or *evil*, *juſt* or *unjuſt*. So that the Qualities of moral Action muſt be Neceſſity, Licence, or Allowance, and the Oppoſites of theſe, which want proper Names; together with Goodneſs and Illneſs, Juſtice and Injuſtice [1].

II. A *neceſſary* Action is that which by Virtue of the Law, or the Command of a Superior, the Perſon to whom the Law or the Command is given, is bound abſolutely to perform. For in this conſiſts the Neceſſity of moral Actions, that they ought not to be omitted, nor yet to be done in another Manner than what was enjoin'd; though by our natural Power and Strength we are able either to omit them, or to do them in another Manner. Yet it is uſual for the Lawyers to ſay abſolutely, that a Thing which wants only this moral Neceſſity, *cannot be done* [a 2]. To a *neceſſary* Action is oppos'd not only a *forbidden* Action, expreſly prohibited by the Laws, or other Orders of the Superior, but, likewiſe, a *lawful* or an *allow'd* Action, which the Laws neither command nor forbid, but leave it to every Man's Pleaſure, whether he will underſtand or decline it [3]. *Cicero pro Balb.* Cap. iii. *There are ſome Things which we ought not to do, tho' we might lawfully do them: But on the other Hand, whatever we cannot lawfully do, it's very certain we ought not to do.* Now by the common Uſage of Speech, not only thoſe Things are ſaid to be *lawful*, which neither divine nor human Law forbids, and which therefore may be undertaken without Sin or Blame, but, likewiſe, thoſe Things, which altho' prohibited by the Laws of Nature, yet the Laws of particular States ſo far permit, as not to impoſe a Penalty on them in human Cognizance; leaving them to every Man's private Conſcience and Honour [4]. *Tully*'s Obſervation is admirable to this Purpoſe, *It is not* lawful (ſays he) *for any Man to ſin; but we commit an Error in Speech, whilſt we ſay that ſuch a Thing is* lawful, *which is indeed tolerated or allow'd.* The former kind of Actions we may call *perfectly lawful*, the latter *imperfectly*. So [5] *Lampridius* reports of the Emperor *Severus*, that *he had ſome Thoughts of prohibiting the publick Profeſſors of Lewdneſs: But he feared this might rather increaſe Debauchery in private; Men naturally affecting what is unlawful, and purſuing with Eagerneſs and Fury any Practice which hath been forbidden them.*

But farther than this, we ſometimes in a very looſe Senſe, term even thoſe Things *lawful*, which all Men agree and confeſs to be the moſt baſe and vile; whenſoever the Perſon who performs them is Maſter of ſo much Strength, as to be above human Puniſhment or Reprehenſion. *Senec. de Clement. Lib.* i. *Cap.* xviii. *Tho' we commonly ſay, All Things are lawful towards a Slave, yet there are indeed ſome Things which common Nature forbids us to act towards a Man, one of our own Species and Condition* [6].

III. We call that Action *good* morally (for the other kind of Goodneſs, term'd *Natural* or *Material*, by which a Thing or an Action tends to the Benefit or Perfection of any one [7], is explain'd in another Place. Tho' we muſt obſerve, that in the Precepts of natural Law, and in moſt civil Conſtitutions, it goes along with this moral Goodneſs, and amongſt rational Creatures [8], ſeems to give the firſt

[a] *Nam quæ facta lædunt pietatem, exiſtimationem, verecundiam noſtram, & (ut generaliter dixerim) contra bonos mores fiunt: nec facere nos poſſe credendum eſt.* Dig. Lib. xxviii. Cap. vii.

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[1] All theſe Diviſions are very ſcholaſtic, as well as inaccurate, ſince they claſh with one another. Without ſo much Myſtery, it is ſufficient to divide Actions into Good, Bad, and Lawful, or Indifferent. The Good, are thoſe which the Law commands: The Bad, thoſe it forbids: And the Indifferent, thoſe which it leaves every Man at Liberty about. All the Species may be reduc'd to this, and the other Diviſions, as we ſhall ſee, are only Subdiviſions of one of theſe three Claſſes. See Sect. v. Not. 5. and Sect. vii. Not. 1. following.

[2] *Nam qua facta, &c.* For we ought to ſuppoſe thoſe Things impoſſible to be done, which prejudice natural Affection, Reputation, Honour, and, in general, good Manners.

[3] Ἃ γὰρ ἂ κεκέλευσαί τις ποιεῖν, ταῦτα δὲδὲ μὴ ποιεῖν, κεκώλυσαι, *i. e.* What a Man is not ordered to do, that he is not hindered from doing. *Liban. Declam.* xvi. The Author himſelf cites this Paſſage in his later Editions.

[4] There are ſome Things not to be done, tho' lawful; but whatever is not lawful, that ought not to be done. *Tully*'s Words are, *Etſi peccare nemini licet, ſed ſermonis errore labimur; id enim licere dicimus, quod cuique conceditur.* Tuſc. Quæſt. Lib. v. Cap. xix.

[5] This Quotation making little to our Author's Purpoſe, and containing ſomething obſcene in it, 'tis no Damage to omit it, and, inſtead of it, put ſome of the Sayings of the *Roman* Lawyers, *viz. Digeſt. Lib.* l. *Tit.* 17. *De diverſ. Reg. Juris, Leg.* cxliv. *Every Thing is not honeſt that is lawful.* And *Leg.* cxcviii. *We ought to conſider, not only what is lawful, but what is alſo honeſt.* Mr. *Stryck*, Profeſſor at *Hall* in *Saxony*, has publiſh'd a Diſcourſe on the Law of what's lawful, but not honeſt, reprinted in 1704, in *Quarto*, where we may find a particular Account of Things permitted, and authorized by Cuſtom, which, in themſelves, are contrary to natural Honeſty, and much more to Chriſtianity, altho' the Author has carried the Subject a little too far in ſome Places.

[6] The whole Chapter, treating of a Maſter's Power over his Slaves, is worth peruſing.

[7] See *Book* i. *Chap.* iv. §. 6. and *Book* ii. *Chap.* iii. §. 21.

[8] *Seneca*'s Words, *Ep.* cxx. may ſerve as an excellent Comment upon our Author's Notion, *Nobis videtur obſervatio collegiſſe, & rerum ſæpe factarum inter ſe collatio, per analogiam noſtro intellectu & honeſtum & bonum judicante—— Noveramus corporis ſanitatem, ex hâc cogitavimus eſſe aliquam & animi. Noveramus corporis vires, ex his collegimus eſſe & animi robur. Aliqua benigna*

firſt Spring or Occaſion to it) or in moral Eſtimation, which is agreeable to the Law, and that Action *evil*, which is diſagreeable. Inaſmuch as the *ratio formalis*, the proper and diſtinguiſhing Nature of the Goodneſs, or Illneſs, of Actions, conſiſts in a *Relation*, determining them towards a directive Rule; and this Rule is what we term a Law (under which Name we here mean a *neceſſitating*, and not a *permitting* Law, and if it be human, we ſuppoſe it not contrary to thoſe which are Divine) [1] for when a deſign'd Action is form'd according to the Rule preſcrib'd, and exactly agrees with it, it is ſaid to be *good*: Whereas, if it is undertaken againſt the preſcrib'd Rule, or varies from it, it is call'd *Evil*, and, in one Word, *Sin*. Now it is plain, that any directing Rule; for inſtance, the Mariner's Compaſs, is ſaid to be *the Cauſe* of his right Sailing, and of his coming to the Port, not ſo much in regard that the Ship takes a Courſe falling in with its Direction, as becauſe the Pilot guides himſelf by it in managing the Steerage: *In like* Manner, a Law is ſaid to be the Cauſe of Rectitude in an Action, not when the Action, however intended, is agreeable to it; but when the Action proceeds from the Dictate of the Law, and from ſome Dependance on it; that is, from an Intention of paying Obedience to its Injunctions. Whence, if a Man by Chance, or without thinking of any Obedience to a Law, performs a Thing preſcrib'd by that Law, he may, indeed, be ſaid to have done *rightly*, or *not ill*, in a negative, rather than in a poſitive Senſe; but he cannot be ſaid to have done morally *well*, no more than one that by diſcharging a Gun at venture and random, hath brought down a Bird, can be ſaid to have ſhot ſkilfully, and like a Markſman.

IV. Farther, ſince the Law determines either the Diſpoſition of the Agent, or elſe the Object, or the End, or the Circumſtances of the Action; an Action is morally Good, or Evil, for one of theſe Reaſons, either becauſe the Agent is ſo diſpos'd as the Law requires him to be, or otherwiſe; or, becauſe the Action is directed towards the proper Object, with that End, and thoſe Circumſtances which the Law preſcribes, or with the contrary. But here it muſt be obſerved, that to make an Action good, 'tis neceſſary, that it not only conform to the Law in all its *material* Requiſites and Conditions; but, likewiſe, that, in reſpect of its *Formality*, it be exercis'd, not out of Ignorance, or any other Cauſe, beſides the Intention of paying Obedience to the Law. And therefore an Action, tho' otherwiſe, on the Account of the Matter of it, *Good*, may, by Reaſon of the bad Intention of the Agent, be imputed to him as *Evil*. For a Man who deſigning an ill Thing, doth a good one, hath by no Means a Title to any Reward for his Service. As he in *Valerius Maximus* [2], who intending to kill *Jaſon*, luckily broke his Impoſtume. Upon the ſame Account, he who miſſpends his lawful Power in ill Service, is guilty of Sin: As a Judge, for Inſtance, who abuſeth his Authority of puniſhing Offenders, to the ſatisfying his own private Reſentments. For which Reaſon the *Carthaginians* ſentenc'd their Generals to Death, if they had undertaken an Enterprize, tho' with good Succeſs, yet with ill Counſel and Deſign [2]. *Liv.* xxxviii. *Cap.* xlviii. *Val. Max. Lib.* ii. *Cap.* vii. §. 1. *Extern.* But, on the other Side, an Action, as to the *Matter* of it Evil, cannot, [3] by Virtue of the honeſt Intention of the Agent, be turn'd into Good. Whence the Reaſon is clear, why a Man cannot uſe his own Sins as Means for the Attainment of any virtuous End, or why we muſt not *do Evil that Good may come of it*, Rom. iii. 8. For to render an Action Evil, it's ſufficient that it be incongruous to the Law, in any one Point, or Condition, whether *Material*, or *Formal*: That is, If either the Diſpoſition of the Agent, the Object, the End, or any one of the Circumſtances contradict what the Law directs. 'Tis a moſt vain Diſtinction of ſome Men, when they affirm, that an Action, as to the Subſtance of the Work, may be good, altho' the End, required by the Law, be not intended by the Agent. For the End makes a main Part of the very Eſſence of a moral Action, inaſmuch as it enters into the Intention, which is a Principle of the greateſt Force in determining the Action's Quality. Hence it is ſinful to direct an Action, not only to an ill End, but, likewiſe, to any other End, than what is preſcrib'd by the Law, *Matth.* vi. 5. *Juv. Sat.* 8. *Ver.* 215. *Cauſa facit rem diſſimilem.* Nor is an accompliſh'd Fact only, or ſuch as hath obtain'd its End, accounted Wickedneſs, but even a commenc'd Enormity: And this latter is, by Civil Laws, ſometimes puniſh'd with equal, or however with little leſs Severity than the former; according as they find it neceſſary to repreſs a Villainy in its firſt Riſe and Appearance. *Senec. de Conſtant. Sapient. Cap.* 7. *All Villainies, before the Accompliſhment of the Work, are compleat in reſpect of the Guilt* [4].

a *Lib.* i. *Cap.* viii. §. 6. *Extern.*

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benigna facta, aliqua humana, aliqua fortia, nos obſtupefeccerant, hæc cæpimus tanquam perfecta mirari, i. e. "Our Notions of "Goodneſs and Honeſty are the Reſult of the Reflections and Compariſons, which the Mind makes, by Analogy, between ſuch "Things as it often ſees and obſerves. We know, that there is ſuch a Thing as Health of the Body, and, from thence, we "conclude, that there muſt, alſo, be an Health of the Soul. We know, that the Body hath Force and Strength, and, from "thence we infer, that the Soul, alſo, hath its Force. We are ſtruck with Admiration, at the View of ſome eminent Acts of "Goodneſs, Humanity, and Courage, and we begin to look upon them as Patterns of Perfection."

[1] The two following Periods, not being well placed in the Original, muſt be a little varied, to make the Diſcourſe coherent.

[2] Theſe two Paſſages, cited by our Author, are nothing to the Purpoſe; and, tho' clear in themſelves, are miſtaken, by him, in this whole Diſcourſe. The firſt is that of *Livy*, where *Cn. Manlius*, anſwering thoſe, who refus'd him the Honour of the Triumph, under a Pretence, that he had not managed the War againſt the *Gallogræci*, or *Galatians*, with ſufficient Conduct, ſays, That he was ſure to carry his Cauſe, tho' it were not before a *Roman*, but *Carthaginian* Senate, who are ſaid to crucify their Generals, if they acted wrong, tho' they were ſucceſsful; for ſo are his Words, *In quo confiderem equidem cauſæ meæ, etiamſi non apud Romanum, ſed Carthaginienſem ſenatum agerem, ubi in crucem tolli imperatores dicuntur, ſi proſpero eventu pravo conſilio geſſerunt.* The other Paſſage is out of *Val. Maximus*, whoſe Words are much the ſame about this Cuſtom at *Carthage*. Mr. *Pufendorf* believes, that theſe Words, *pravo conſilio*, ſignify, *with a bad Intention*, whereas they plainly ſignify, *without taking good Meaſures*; as *Montagne* rightly takes them, when he ſays, *The* Carthaginians *puniſhed the ill Conduct of their Captains, although they made Amends for it by their good Succeſs.* Eſſays, Lib. iii. Cap. viii. p. 693. Fol. As to the reſt, for what regards the Thing itſelf, all that our Author ſays here, is only applicable to divine Laws, either natural or reveal'd. For the Intention, which, in the Sight of GOD, is the eſſential Circumſtance, is that, which is the leaſt regarded in human Judicatories. This is, becauſe Men, not knowing the Heart, are oblig'd to judge by equivocal Tokens. Beſides, the End of human Laws, conſider'd as ſuch, confines itſelf, only, to regulate external Conduct: This is all they can do, and is ſufficient to ſecure the public Tranquillity. Hence it is, that thoſe, who abſtain from violating them, merely through Fear of Puniſhment, enjoy their Protection, equally, with the beſt Citizens. Beſides, if any one, honeſtly, does a good Action, which the Law has not preſcrib'd, believing the Law would reward it, his good Intention would ſignify nothing to him: Whereas, in the very ſame Caſe, GOD would have approv'd of his Conduct, though the Action had been indifferent in itſelf. See *Chap.* viii. §. 2, 3. following.

[3] What is Faulty, 'tis no Matter with what Intention it is done. *Publ. Syr.* See the next *Chap.* §. 2, 3.

[4] *Seneca*'s Words, *Omnia ſcelera, etiam ante effectum operis, quantum culpæ ſatis eſt, perfecta ſunt.* The Scholars of *Zoroaſtres* ſay, *We muſt baniſh every Sin from our Hands, Tongue, and Thought.* In Sadder, Porta lxxi. They add elſewhere (*Porta* xxv.) *as alſo from our Eyes.* See what this Author ſays afterwards, *Lib.* viii. *Cap.* iii. §. 14.

V. This *Goodneſs*, and this *Evil* of Actions, as they conſiſt *formally* in ſuch an Agreeableneſs, or Diſagreeableneſs, to the Law, as we have been ſpeaking of, ſo they depend entirely on him as their efficient Cauſe, who performs an Action which the Law either commands or forbids. For his Determination ſo conſtitutes the Action in the Rank of *Moral Beings*, that it muſt be imputed to him, and to him only [1]. And therefore thoſe Men have tormented themſelves with a needleſs Fear, who, leſt they ſhould ſeem to make GOD Almighty the Author of Sin, have plac'd the *ratio formalis* of an evil Action, in the *Privation of Conformity to the Law* [2]. For tho' the Poſition of any *Form* neceſſarily infers the *Privation*, or Abſence, of the contrary Form; yet how miſtaken muſt he be in his Opinion, who would ſeek for the Eſſence of a Thing in this Privation? Nor will *he* find himſelf any great Proficient in Wiſdom, who hath arriv'd to know, that Straightneſs is the Privation of Crookedneſs, and Crookedneſs the Privation of Straightneſs. But theſe Inventions, and theſe Fears of Men, both proceeded from their Ignorance of moral Things. GOD, the Author of all natural Beings, need not, and ought not to be eſteem'd the Author and Cauſe of all moral [3], all notional, and all artificial Beings. Some looſe Thinkers muſt needs be touch'd with a ſtrange Itch of Wit, when they imagine they have given us an extraordinary Specimen of their philoſophical Subtility, in numbering GOD among the Cauſes of our ſinning. For a Man, who hath the leaſt Inſight into the Conſtitution of Morality, will judge nothing more abſurd, than to enquire, whether or no *He* be the *Cauſe* of an Action, who forbids it by a Law, and puniſheth it for being done after his Prohibition. As for GOD's concurring to the phyſical Part of an Action, he can with no more Reaſon be, on this Account, ſtil'd the Author of Sin, than one who hath furniſh'd an Artificer with Materials to work upon, can be reckon'd the Cauſe of a Deformity in his unſkilful Work. Wherefore, to uſe the Term or Name of *Cauſe* in a Signification ſo very improper, and ſo remote from common Senſe, is to join our Pride and Ambition in offering an Irreverence to the Divine Nature. *Philo Judæus de profug.* + *What greater Inſtance of Blaſphemy can there be, than to make GOD, and not ourſelves, the Author of Evil?* *Maxim. Tyr. Diſſertat.* iii [5]. *Theſe dreadful Names of Furies, Fates, and Deſtinies, what are they but the ſpecious Pleas and Excuſes of human Wickedneſs, by the Means of which we are wont to charge our own Faults upon the Providence of Heaven? When, alas! theſe, and all the other Miniſters of Terror, and over-ruling Neceſſity, which we ſo often complain of, are Monſters of our own making, and ſuch as we carry about us in our Breaſt.* Idem. Diſſert. xxv. Let the Wretch who ſins upon Choice, take all the Guilt upon himſelf, and let GOD be clearly juſtified [6].

VI. We are, in the next Place, to diſcourſe of *Juſtice*, concerning which, it ought to be our firſt Obſervation, that the Signification of this Term, as applied [7] to *Perſons*, is very different from that, by which it denotes an Attribute of *Actions*. For when we uſe [8] it with regard to *Perſons*, to be *juſt*, im-

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[1] That is, as the immediate Author of the Action; for, as our Author himſelf ſhews at large, *Chap.* v. §. 14. the Actions of another may, alſo, ſometimes be imputed to a Perſon.

[2] This Notion much reſembles *Ariſtotle*'s Opinion of the Principles of natural Bodies, among which he ranks Privation. See the *Art of Thinking*, Part iii. Chap. xviii. §. 1. where the Author ſeems to have taken the Expreſſion from *Montagne's Eſſays, Lib.* ii. *Cap.* xii. *p.* 393. Fol. *Ed. Par.* The Error of thoſe, whom our Author confutes here, conſiſted in their diſtinguiſhing, in one and the ſame Action, the Motion of the Will, by which it is produc'd, and which they regarded, as ſomething poſitive to which GOD concurs; from the Irregularity of that Motion, which, according to them, is a mere Non-Entity. For as to the reſt, it is allow'd, that the want of Conformity to the Law, conſtitutes the Eſſence of a bad Action. But this want of Conformity is ſo connected with the Action, that we cannot ſeparate the one from the other, but by an Abſtraction of Mind, which makes no Alteration in the Reality of the Action itſelf, whoſe Irregularity is a Quality as poſitive, as Regularity is in Actions morally good.

[3] The Author underſtands, by this, the Operations of our Underſtanding.

[4] *Quæ poteſt eſſe blaſphemia gravior, quàm contendere, non ex nobis mala provenire, ſed ex Deo?*

[5] The *Greek* is, Ἔοικε δὲ ταυτὶ τὰ ὀνόματα εἶναι μοχθηρίας ἀνθρωπίνης εὕφημοι ἀποσκοφαὶ, ἀναθέντων αὐτῆς τὴν αἰτίαν τῷ Δαιμονίῳ, καὶ ταῖς Μοίραις, καὶ Ἐρινύσι——Ἡ δὲ Ἐρινὺς, καὶ ἡ Αἶσα, καὶ οἱ Δαίμονες, καὶ ὅσα ἄλλα διανοίας ἠμαξιμένης (for ſo it muſt be read, with *Heinſius*, inſtead of εἱμαξμένης) ὀνόματα, ἔνδον ἐν τῇ ψυχῇ καθειργμένα.

[6] Our Author treats here, only, of Actions morally good or bad, *i. e.* fully agreeable, or plainly contrary to ſome Law in Force. But he ought, alſo, to have ſpoke ſomething of Actions morally indifferent, *i. e.* which every one may lawfully do, or not do, according as he pleaſes, by Virtue of a Law of ſimple Permiſſion. See §. 1. *Note* 1. That, then, we may have a true Notion of this laſt Sort of Actions, we muſt obſerve, that the Term, *Indifferent*, may have three Significations, which ought to be carefully diſtinguiſh'd; for, 1. If we ſay, that an Action may be, indifferently, either commanded, or forbidden, or permitted by the Law, even, in this Senſe, we muſt acknowledge all human Actions are not indifferent; as, for Example, Manſlaughter can't be commanded, nor permitted, becauſe it is ſo great a Prejudice to the human Nature. 2. But if we conſider our Actions, as Motions purely phyſical, and with a Relation to any Rule, in one Word, without a Regard to any Law, 'tis certain, that, in this Reſpect, all Actions are indifferent. See *Chap.* ii. §. 5. aforegoing. Laſtly (and 'tis in this Senſe that our Author treats of it here) if we conſider an Action as freely permitted by the Law. This is an Action morally indifferent, which we may, in a negative Senſe, call *good*, becauſe it is not evil. Now there can be no Difficulty in judging of theſe Sort of Actions; for what elſe can thoſe Things be, which are neither commanded, nor forbidden, by any Law, Divine or Human, and which we have Power to do, or not do, as we ſee fit? The Schoolmen fooliſhly affirm, That Dancing (for Example) conſider'd abſtractly in itſelf, is morally indifferent; but it ceaſes to be ſo, in the very Moment when we look upon it as a particular Action, done by ſuch, or ſuch a Perſon, at ſuch, or ſuch a Time, in ſuch, or ſuch a Place, with ſuch, or ſuch an Intention; for an Action, thus ſtripped of all its Circumſtances, is a meer Chimera, and Nothing. So that if Dancing be morally indifferent, it muſt be ſo, with relation to certain Circumſtances, of Perſons, Times, and Places. It ſignifies nothing to ſay, that every particular Action, that is done with a good, or bad Intention, ought to be good, or bad, for this Concluſion is not abſolutely true. An Action done with a good Intention, is good, only, in a negative Senſe, that is to ſay, either not evil, or indifferent, ſo far as ſome Law has formally preſcribed it, for there are a great Number of Actions done for a lawful End, which are not commanded by any Law, and, conſequently, can't paſs for ſuch as are good poſitively. This is almoſt all taken out of Mr. *Titius*'s *Obſerv.* lxv. 'Tis long ago, ſince that learned *Engliſhman, Thomas Gataker*, ſpoke ſomething like this againſt the vain Subtilties of the Schoolmen, about Actions indifferent. See his Treatiſe of *the Uſe and Nature of Lots*, printed at *London*, 1619, *Chap.* v. §. 4. where he mentions the famous Diſtinction of the *Stoicks*, and cites, among others, a Paſſage of *Aulus Gellius*, who has the ſame Notions, which I ſhall ſet down here, becauſe he expreſſes the Thing well. *Omnia, quæ in rebus humanis fiunt, ſicut docti conſuerunt, aut honeſta ſunt, aut turpia*; wherein he omits the third Member of the Diviſion, as other good Authors do, for the Reaſon which Mr. *Noodt* gives us, in his Book, intitled, *Probabilia Juris*, i. e. *The Probabilities of the Law*, *Lib.* i. *Cap.* xii. *Quæ ſuâ vi recta aut honeſta ſunt, ut fidem colere, patriam defendere, amicos diligere, ea fieri oportet, ſive imperet Pater, ſive non imperet. Sed quæ his contraria, quæque turpia & omnino iniqua ſunt, ea nè ſi imperet quidem. Quæ vero in medio ſunt, & à Græcis tum ἀδιάφορα, tum μέσα appellantur, ut in militiam ire, rus colere, honores capeſſere, cauſas defendere, uxorem ducere, uti juſſum proficiſci, accerſitum venire, quoniam & hæc & his ſimilia per ſe ipſa neque honeſta ſunt, neque turpia, ſed proinde ut à nobis aguntur, ita ipſis actionibus aut probanda ſunt, aut reprehendenda; propterea in ejuſmodi omnium rerum generibus patri parendum eſſe cenſent, &c.* Lib. ii. Cap. vii. See, alſo, *Veltkuſen of the Principles of Juſtice and Decency*, p. 19, &c.

[7] This is not only true concerning Juſtice, but, alſo, concerning all Morality in general, *i. e.* concerning all Virtue and Vice.

[8] We muſt indiſputably treat of the Juſtice of Actions themſelves, before that of Perſons, becauſe this laſt neceſſarily ſuppoſes the firſt, as appears by the Definition which our Author gives of it. How ſhall we underſtand theſe Expreſſions, *to do juſtly, to delight in Juſtice*, if we be ignorant what Juſtice is?

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ports as much as to delight in acting juſtly, to ſtudy after Juſtice, or to endeavour, in every Thing, to do what is juſt: And to be *unjuſt*, is to neglect Juſtice, or to think it ſhould be meaſur'd, not according as it is really due, but as it ſuits with preſent Advantage. So that a *juſt Man* may perform ſeveral *unjuſt Actions* [1], and an *unjuſt Man* ſeveral *juſt Actions*. For he is to be eſteem'd a juſt Perſon, who doth juſt Things in Obedience to the Law [2], and unjuſt Things only thro' Infirmity; and he an unjuſt Perſon, who doth juſt Things in Fear of the Puniſhment annex'd to the Law, and unjuſt Things either out of Perverſeneſs and Pravity of Mind, or for the procuring of Glory, or any other ſeeming Benefit. *Hobbes de Cive, Cap.* iii. §. 5. And to the ſame Purpoſe *Pliny*, in his *Panegyr. Cap.* lvi. *A wicked Man may do many Things, in themſelves commendable: But to deſerve Commendation in his own Perſon, is the Prerogative of a Man truly good and virtuous.* [3] Philemon *in* Strabo. *Scrm.* ix.

He is not Juſt who barely acts no Wrong,
But he who ſpares, when fraught with Power to harm:
Nor will the Conqueſt of a *puny* Luſt
Enſure his Triumph; but a Strength of Soul,
Fit to ſuſtain the united Force of Sin,
And foil Temptation in its laſt Attack.
Solid in Worth, and generous Honeſty.
Nor bent with crooked Guile, nor brib'd with Praiſe,
He courts the *Virtue*, and contemns the *Fear*.

Architas De viro bono & beato [4]. *As he who hath ſome Time or other been guilty of Immodeſty, Injuſtice, or Timorouſneſs, is not to be reckon'd in the Number of bad Men, ſo neither is he who hath perform'd ſome Acts of the oppoſite Virtues, immediately to be rank'd amongſt the good. But the true Judgment of Perſons is to be made, not from any ſhort Period of acting, but from the whole Courſe and Tenor of Life. Agathias, Lib.* v. hath left a very judicious Cenſure of thoſe People in *Conſtantinople*, who, upon a terrible Earthquake in the City, had contended with each other in the Performance of good and pious Works. *All this they did* (ſays he) *for a certain Time; ſo long as the Impreſſion of the Fright was freſh and ſtrong upon their Apprehenſion. But when the Calamity began to abate, moſt of them return'd to their former Looſeneſs of Practice. Now ſuch a ſudden Motion of the Mind, ſuch a Fit, as it were, of Goodneſs, cannot be call'd true Juſtice, or ſolid and fruitful Piety, ſuch as is wont to be form'd in Men by right Opinions and conſtant Application; but an unnatural Diſguiſe, an ill-contriv'd Stratagem, a mere huckſtering in Holineſs, taken up as a Preſervative againſt the common Evil. Virtue upon Neceſſity is juſt as long liv'd as the Fear that occaſions it.* Hence it appears, that the Definition of [a] Juſtice ſo much in vogue with the *Roman* Lawyers, in which they call it, *A conſtant and perpetual Inclination to give every* [5] *one their Due*, belongs to the Juſtice of *Perſons*, not to that of *Actions*. And this we take to be very inconvenient: Inaſmuch as the Science of *Law* is chiefly employ'd about the Juſtice of *Actions*, and toucheth on the Juſtice of *Perſons* only by the bye, and in ſome few Particulars.

VII. The *Juſtice of Perſons* differs from their *Goodneſs* chiefly in this, that *Goodneſs* barely denotes a Conformity to the Law, but *Juſtice* farther includes a Reſpect to thoſe Perſons towards whom the [6] Action is perform'd. So that we apprehend that Action to be *juſt*, which, with full Deſign and Intention, is applied to the Perſon to whom it was due. And therefore *Juſtice*, in this Senſe, will be nothing elſe, but the right Application of the Action to the Perſon. We ſhall chooſe to divide Juſtice chiefly with Regard to the Matter which is owing, or which bears a Relation to another by way of Debt or Due.

But we muſt obſerve beforehand, that ſome Actions may be call'd *pure*, and others *mixt*. The former are perform'd and finiſh'd by the Motion of ſome of our Powers applied in ſuch a certain Manner to the Object; of this Kind are honouring, paying Duty and Reſpect, loving, hating, comforting, praiſing, diſpraiſing, *&c.* the Product of all which is nothing elſe but the cauſing the Object to be really affected, or to be thought affected by the Action in a certain Way, either with Complacency or Diſſatisfaction. But the latter, or the *mixt Actions*, are join'd with the transferring of ſome Advantage or Diſadvantage on the Perſon towards whom they are exercis'd; and therefore their Effect conſiſts principally in ſome Operation, either profiting or hurting another Man in his Perſon or in his Goods [7]. Again, there are ſome Actions which make a great Part of Commerce amongſt Men, and are valu'd at a certain Rate; others have no Price or Rate impos'd upon them: Concerning which Difference we ſhall enquire farther hereafter [8]. Laſtly, we muſt take Notice that ſome Things are *due* to us *perfectly*, others *imperfectly*. Thoſe Things which are due to us in the former Manner, if voluntary Payment be not made, we may conſtrain the Debtor to diſcharge, if we live in a natural State, by Arms and main Strength; if we are Members of the ſame

[a] *Inſtit. Lib.* i. *Tit.* i. *Digeſt. Lib.* i. *Tit.* i. §. 10.

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[1] *Laudabilia multa etiam mali faciunt, ipſe laudari, niſi optimus, non poteſt*, Plin. Panegyr. Chap. lvi. *The Wicked, themſelves, do many Things commendable, but only the beſt Men deſerve Commendation.* The Author cites this Paſſage at the End of the Period, but he ſuppoſes here, a little too heedleſsly, that thoſe, who have not a Diſpoſition to univerſal Juſtice, never do Actions juſt in themſelves, but to avoid the Penalty of the Law. See what I have ſaid, in my Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Cap. ii. §. 12. in the Note of the fourth Edition.

[2] There is, alſo, a Caſe, when we may do juſtly in a negative Senſe. *i. e.* not unjuſtly, altho' the Thing, in itſelf, be not juſt. This happens, when a Man is really in an Error, or ignorant, as it often comes to paſs, both in reſpect to Right and Fact. On this Ground *Grotius* maintains, and that with good Reaſon, That War may ſometimes be juſt on both Sides. See his Book *De Jure Belli & Pacis, Lib.* ii. *Cap.* xxiii. §. 13. and what ſhall be ſaid, *Lib.* viii. *Cap.* vi. §. 4. *Note* 2.

[3] The *Greek* is,

Αιὴρ δίκαιός ἐϛιν, ὐχ ὁ μὴ ἀδικῶν·
Ἀλλ' ὅϛις ἀδικεῖν δυνάμενος μὴ βέλεται.
Οὐδ' ὃς τὰ μικρὰ λαμβάνειν ἀπέχεϛο·
Ἀλλ' ὃς τὰ μεγάλα καῤῥεῖ μὴ λαμβάνων.
Ἔχειν δυνάμενος καὶ χρᾶϛαι ἀζημίως·
Οὐδ' ὅς γε ταῦτα πάντα διαῤῥεῖ μόνον.
Ἀλλ' ὅϛις ἄδολον γνησίαν τ' ἔχων φύσιν
Εἶναι δίκαιος, καὶ δ' δοκεῖν εἶναι θέλει.

[4] Οὔ τοι δὲ ἀκολαϛάνοντα ἴν τισι καιροῖς, οὐδὲ τὸν ἀδικάϛαντα, οὐδὲ τὸν ἀποδειλιάϛαντα ἐς τὼς κακὼς ταχέως ἄνδρας, οὐδὲ μὴν τὰς τούτων τὶ καλοῤῥώϛαντας ἐς τὼς ἀγαθὼς——τὰν δὲ ἀληθινὰν κρίσιν ὑπόθ' ἕνα καιρὸν ἀποβλέποντας, οὐδὲ ἐπὶ χρόνῳ τὶ πλαδῶντα, ἀλλ' ἐπὶ πάντα τὸν βίον.

[5] *Juſtitia eſt conſtans & perpetua voluntas jus ſuum cuique tribuendi*, Inſtit. Lib. i. Tit. i. de Juſtitia & Jure. Digeſt. Lib. i. Tit. i. §. 10. See the Explication of this Definition, in Mr. *Noodt*'s *Probabilia Juris, Lib.* iii. *Cap.* i, ii.

[6] There is not, properly, any Difference between Goodneſs and Juſtice; for, as our Author himſelf ſhews us above, the Idea of a good Action contains in it the Notion of an Object agreeable. We may better diſtinguiſh good Actions, according to the threefold Object which they may have, *viz.* God, other Men, and ourſelves. Thoſe that have God for their Object, are comprized under the general Name of *Piety*: Thoſe that have other Men for their Object, are contained in the Term of *Juſtice*: And thoſe that directly regard ourſelves, may be reduced to *Temperance*, or *Moderation*. This Diviſion, which is the moſt common, ſeems to be the plaineſt, and moſt natural.

[7] For Example, a Gift, a Loan, a Theft, Murder, *&c.*

[8] See *Book* v. *Chap.* i. §. 5.

civil Society, by preferring an Action againſt him in Courts of Juſtice. But what is due to us in the latter Way, we ought neither to claim by Methods of Hoſtility, nor to extort by legal Proceſs. It is uſual [1] with *Latin* Authors, to expreſs *perfect Right* by the Help of the Word *Suus*, as when they ſay a Man claims ſuch a Thing, *ſuo jure*, *by his own Right*. Now that ſome Things ſhould be thus *due* to us *perfectly*, and others *imperfectly*, the Reaſon amongſt thoſe who live in a State of natural Liberty is, the great Diverſity of Precepts in Nature's Laws, of which ſome conduce to the very Being, others only to the well-being of Society: And therefore, ſince there's leſs Neceſſity of performing theſe latter than the former, Reaſon ſhews that the former may be requir'd and executed by more ſevere Courſes and Means; whereas, in regard to the latter, it is mere Folly to apply a Remedy more grievous than the Diſeaſe. Beſides, there uſually paſſeth between Men ſome Covenant about the former, but not about the latter; and, conſequently, ſince they are left to every Man's Conſcience and Modeſty, it would be very improper to extort them violently from another [2], unleſs in Caſes of extraordinary Neceſſity. In civil Communities this Difference ariſeth from the particular Laws and Conſtitutions, allowing or diſallowing an *Action* in ſuch or ſuch Caſes. Tho' moſt Commonwealths do in theſe Points follow the Track of the Law of Nature; except where they have ſome particular Reaſons adviſing the contrary.

VIII. When, then, we exhibit to another either Actions, or Things, due to him only by *imperfect* Right, or when we exerciſe towards another, Actions not coming under the Head of ſtrict Commerce, we are ſaid to have obſerv'd *general*, or *univerſal Juſtice*. As when a Man ſupplies another with his Counſel, Goods, or Help, as he hath Need; or when he performs the Offices of Piety, Reverence, Gratitude, Humanity, or Beneficence towards thoſe to whom he is in Duty bound to pay them. This Kind of Juſtice, only, enjoins that the Debt be paid, not conſidering whether the Thing given in Payment be equal to the Reaſon why it is due, or not. Thus a Man ſufficiently diſchargeth the Duty of Gratitude, if he make all the Return that his Abilities will allow; tho', perhaps, the Kindneſs he hath receiv'd were in Value much greater [3].

But when we perform towards another Actions falling under Commerce, or ſuch as transfer any Thing on another, to which he had a *perfect Right*, this is call'd *particular Juſtice*.

IX. Now this *perfect Right* accrues [4] either to ſingle Perſons by a Covenant (tacit or expreſs) made with ſome Society, in order to their being admitted Members of it; or to a Society by a Covenant made with ſingle Perſons, in order to the receiving them into the ſame Community: Or, laſtly, from [5] Pacts made between any Parties concerning Things, or Actions, falling under Commerce. When we pay thoſe Things which are due upon the Pact of a Society with a Member, or of a Member with a Society [6], upon the Accounts juſt now ſpecified, we are ſaid to exerciſe *diſtributive Juſtice*. For whenever a Man is receiv'd into a Society, a Pact is either expreſly, or, at leaſt, tacitly made between the *Society* and the *Member* now to be introduc'd, by which the *Society* engageth to give him a juſt Share and Proportion of the *Goods* which it enjoys as a common Body: And the *Member* promiſeth, that he will bear his proper and equal Part of, thoſe *Burdens* which conduce to the Preſervation of the *Society*, conſider'd *as ſuch*. The exact Determination of the proper Share of Goods to be aſſign'd to the Member, is made according to the Rule and Value of the Pains, or Charges, employ'd by him, towards preſerving the common Society, in Proportion to the Pains, or Charges, contributed by the other Members. On the other Hand, the Determination of the proper Share of Burthens to be laid on the Member, is made according to the Value of the Benefits receiv'd by him from the Society, conſider'd in Proportion to the Advantages which the reſt of the Members enjoy. Hence, ſince it generally happens, that one Member contributes more towards the Preſervation of the Society than another, and that one, likewiſe, exceeds another in deriving Advantage from it, the Reaſon is very apparent, why, upon the Suppoſal of many Perſons, and of this Inequality amongſt them, we ought, in the Exerciſe of *diſtributive Juſtice*, to obſerve a *comparative* Equality: Which conſiſts in this, that what Proportion the Merits of one Perſon bear to the Merits of another, ſuch Proportion ſhall his Reward bear to the other's Reward. [7] For, as *Philo Judæus de Monarchia. Lib.* ii. *p.* 640. *Ed. Genev.* obſerves, *'tis high Inequality to give equal Honours to thoſe who are not equal in Merit.* Arrian. Epictet. Lib. iii. Cap. xvii. *This is a ſettled Law of Nature, that he who is more ex-*

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1 As for Example, when we ſay, *Ille ſuo jure hoc poſtulat.* See *Grotius, Lib.* i. *Cap.* i. §. 5. with *Gronovius*'s firſt *Note*. And we, alſo, ſay ourſelves, We muſt render to every one their own; we wrong no Man, when we require our own.

2 We could not, otherwiſe, diſcern ſuch as are truly good, from ſuch as do juſtly againſt their Will, or for fear of ſome Inconvenience, if there were no Duty, to which we might be conſtrained. Add to this, that as the Obligation of actually exerciſing the Acts of Charity, and Beneficence, depend on the Means we have, and the Situation we are in (of which every Man muſt judge for himſelf) it is often difficult, not to ſay impoſſible, to convince any Man, how far he is bound to perform theſe Sort of Duties.

3 It is, nevertheleſs, no great Virtue to own an Obligation to ſuch as have done us Good, provided that the Acknowledgment does not much ſurpaſs, in its Effects, the Obligation we have to our Benefactors; for, according to the Maxim of Jesus Christ, *If you love thoſe only, that love you, what Thanks have you?* Matth. vi. 46.

4 This Diviſion is not compleat, becauſe it contains in it the Obligation we are in to another, by Virtue of ſome Engagement that we are entred into, either general or particular. Now there are Things, which our Neighbour may require of us, in Strictneſs, without any relation to a particular Promiſe, or Convention; as not to do them any Injury, to make good a Damage done them, and to look upon them as Beings equal with ourſelves. It would pleaſe me better, with Mr. *Buddeus (Elem. Phil. Pract. Part.* ii. *Cap.* ii. §. 46.) to divide particular Juſtice, which we may more ſtrictly call *rigorous Juſtice*, into that which Equals uſe one towards another, and that which Superiors exerciſe towards their Inferiors. The firſt may be ſubdivided into ſeveral Sorts, *viz.* The Duties which a Man may, in Strictneſs, exact of all other Men, and a Citizen of every Perſon, ſubject to the ſame Government. The other contains as many Kinds, as there are Kinds of Societies, where ſome command, and others obey, which is much the ſame as *Grotius*'s *Jus Rectorium & Æquatorium*, *Lib.* i. *Cap.* i. §. 3. The Epithet of *Univerſal*, given to the other general Sort of Juſtice, is, alſo, very improper. We had better call it *imperfect Juſtice*, ſince it gives us the Idea of a Diviſion, in which one of the Members include the other.

5 Our Author here uſes the Term *Convention*, but it muſt be underſtood in a large Senſe, which comprehends perfect Promiſes, of which he ſpake, *Lib.* iii. *Cap.* v. §. 7. which confer upon him, to whom the Promiſe is made, a perfect Right to require the Accompliſhment. For in theſe Sort of Promiſes, the Acceptation of him, to whom the Promiſe is made, is a kind of Engagement on his Part. See *Lib.* iii. *Cap.* v. §. 1.

6 We muſt remember this Reſtriction, for otherwiſe a Society may treat with any one of its Members, as it would treat with another Society, or as particular Perſons treat with one another.

7 *Philo*'s Words are, Τὸ γὰρ τοῖς τὰς ἀξίας ἀνομοίοις ὁμοίᾳ ἀπονέμειν, ἄνισον. *Arrian*'s, Νόμος ἔτος φυσικὸς, τὸν κρείττονα τῷ χείρονος πλέον ἔχειν, ἐν ᾧ κρείττων ἐστί. The true Meaning of which Words are, That 'tis a Law of Nature, that good Men, as ſuch, ſhould have the Advantage of wicked; and, if ſo, they are nothing to our Author's Purpoſe.

cellent ſhould, on that very Account, have a larger Share of good Things, than he who is leſs. Thus, for Inſtance, if ſix Things of the ſame Value are to be diſtributed amongſt *Caius*, *Seius*, and *Titius*, upon Suppoſition, that *Titius* exceeds *Caius* in a triple Proportion, and *Seius* in a double, *Titius* ſhall have three, *Seius* two, and *Caius* one. Nor is it requiſite [1] to this Equality, that the Reward fully anſwer and come up to the Merits of the Perſon; but 'tis ſufficient, that what Proportion the Service of the one bears to the Service of the other, the ſame Proportion there ſhould be between their Shares of the common Benefits. And the ſame Rule muſt be followed in diſtributing *Burthens*.

As for what Mr. *Hobbes* [a] alledgeth, to overthrow this *reſpective Equality*, that *I may of my own Goods diſtribute leaſt to him that deſerves moſt, and moſt to him that deſerves leaſt, provided I pay but for what I bargain'd for*; and uſeth the Authority of our Saviour, in the xxth of St. *Matth. Ver.* 13, *&c.* to confirm his Opinion: All this, if rightly conſider'd, makes nothing to the Purpoſe. For in the Place of Scripture above-cited, it is ſhewn, indeed, that *he* doth not offend againſt *commutative* Juſtice (which governs the Contracts about Hire, *&c.*) who out of his Liberality gives to ſome a larger Reward than their Service deſerves; or who, to the Wages due upon this *commutative* Juſtice, adds ſomething out of free Bounty, which is comprehended under *univerſal* Juſtice. But how doth this affect our *diſtributive* Juſtice, the Buſineſs of which is nothing elſe, but to aſſign to many Perſons their proper Shares of a Thing, to which all of them have a *perfect*, though (in regard to the Quantity) an *unequal* Right? And then as for the Word *Diſtributing*, which occurs in the Inſtance alledg'd from Scripture, this doth not in the leaſt make the Act fall under Juſtice, ſtrictly call'd *Diſtributive*; but only hints that the Labourers were *many*, to every one of whom their Wages were to be paid according to *commutative* Juſtice [2].

To clear the Doubts rais'd on this Head by *Grotius*, in his firſt Book and firſt Chapter, we need only obſerve, that his [3] *expletive* Juſtice doth not exactly come up to *commutative*, nor his *attributive* to *diſtributive*; and that his Diviſion is not founded on the ſame Bottom as ours. For *ours* is chiefly taken from the *Matter* which is owing, and from the *Cauſe* of owing it; but *his* from the *Manner* and the *Degree* in which a Thing is ow'd. Whence the Reaſon is evident, why the parting of Gain in Contracts of Societies, is by him referr'd to [4] *expletive*, and by us to [5] *diſtributive* Juſtice. The obſerving of [6] geometrical Proportion in theſe Caſes is, indeed, only accidental; ſince 'tis not neceſſary, that the Members ſhould have contributed unequal Shares, but that they might as well have contributed equally, and then in parting the Gains a *ſimple* or ſtrict Equality muſt have been follow'd. As for that Caſe ſtated by *Grotius*, *If* [7] *one Man only be found fit for a publick Office, his Reward ſhall be aſſign'd him according to ſimple, or* arithmetical *Proportion*; it muſt be farther enquir'd, whether the Man had a *perfect*, or [8] *imperfect* Right to this Office. If the latter, the Caſe will then belong to *univerſal* Juſtice: If the former, we agree to *Grotius*'s Remark, that the Species of Proportion call'd *Geometrical*, is, tho' generally, yet not always follow'd in *diſtributive* Juſtice. Nor have we taken the Difference of our two Kinds of Juſtice from their making uſe of a different Proportion. And ſo, for the other Inſtances of *Grotius*, *the aſſigning of Legacies* belongs not to *diſtributive Juſtice*, but to *univerſal*: And *when a City or State repays, out of the common Stock, what ſome particular Members have expended on the publick Account, commutative* Juſtice is exercis'd, and not *diſtributive*. Becauſe the Reaſon of the Debt ariſeth, not from that Pact by which the Society firſt admitted the ſaid Members, but from a particular, and a very different Nature.

X. When we exhibit to another Things or Actions due [9] upon reciprocal Pact, and coming into Commerce, this is call'd *commutative* Juſtice. And ſince Pacts of that Kind tend to this Iſſue, that for a Thing, or Action, of my own, falling under Commerce, I receive from another an equivalent Thing, or Action, at leaſt ſuch as I eſteem equivalent; the Reaſon is hence obvious, why, in this Species of Juſtice, a *ſimple* Equality is requir'd, which we commonly call [10] *arithmetical* Proportion, but that the ſtrict Mathematicians will allow it that Title, we dare not engage. The Thing, or Action, then, coming in Commerce to another, ought to be anſwer'd

[a] *De Cive*, iii. §. 6.

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[1] Why not, if that can be done? This is the Diſtinction we muſt make. Otherwiſe, tho' we do not offend againſt the Equality of Proportion, nor do any Injury to any particular Member of the Society, conſider'd with relation to each other, yet we do wrong to them, taken all together. For, according to the Notions of our Author, the Queſtion here is about Rewards, to which we have a perfect Right, which, conſequently, ſhould be as great, as the Nature of Things will allow. Whereas, in the Diſtribution of Recompences, made from a Principle of Liberality, or where the Obligation is imperfect, we are not ſtrictly bound to proportion them to Merit.

[2] *Hobbes* gives another Example, ſee the next Section.

[3] Our Author will explain, and examine more largely, this Definition of *Grotius*, in §. xi. of this Chapter. —

[4] The *expletive* Juſtice of *Grotius* includes *diſtributive* Juſtice; and the *permutative* Juſtice of our Author is plac'd in oppoſition to *attributive* Juſtice, which, according to the Notions of *Grotius*, is the ſame which our Author calls here *univerſal* Juſtice. But, in Fact, *Grotius*'s Diviſion is more ſimple than that of M. *Pufendorf*, which, beſides, is incomplete. See above, §. 9. Not. 1.

[5] But I do not ſee how our Author joins this Contract of Society with his *diſtributive* Juſtice. According to his Notions, it ſhould belong to *permutative* Juſtice; for the Queſtion, here, relates to a Convention of Society, made between particular Men, where no regard is had to the Merit of Perſons, but as far as this Merit forms, or increaſes, the Proportion furniſh'd by each towards the common Fund. It is, at leaſt, of ſuch a Contract which *Grotius* ſpeaks, and our Author himſelf, elſewhere, places it in the Number of thoſe, which belong to *permutative* Juſtice. This ſhews, it were better to lay aſide all theſe confus'd Diviſions, copied from *Ariſtotle*, whoſe Faults he has alter'd, by putting others, as great, in their Room.

[6] To underſtand what *Geometrical* Proportion is, the beſt Way is to give an Example of it: When I ſay then, Six is to Two, as Twelve is to Four, there is a *Geometrical* Proportion; becauſe Two is as often found in the Number Six, as Four is found in the Number Twelve.

[7] *This is to ſuppoſe a Thing impoſſible* (ſays *Gronovius* the Elder, in his *Notes*) viz. *That all Citizens, only one excepted, ſhould be equal, which can only happen, when they can have but one Noſe, Mouth, Eyes, and, in a Word, a Face exactly alike.* See Mr. *Vander Meulen*, in his *Comment on* Grotius, *Tom.* i. *Pag.* 31. See what I have ſaid upon *Grotius*, Lib. i. Cap. 1. §. 8. Not. 10.

[8] See *Lib.* iii. *Cap* i. §. 3. following.

[9] If theſe Engagements are always mutual, as our Author manifeſtly ſuppoſes, to what Claſs of Juſtice ſhall we refer ſimple Promiſes? According to our Author's Principles, they certainly belong neither to *diſtributive* Juſtice, nor to *univerſal* Juſtice. So far from it, that in the Manner in which our Author explains that *Proportion*, which takes Place in *permutative* Juſtice, it contains only intereſted Contracts. What ſhall we do then with free Contracts?

[10] This Author obſerves here, with Reaſon, that he uſes not the Words *Arithmetical Proportion* in the Senſe of the Mathematicians, tho' we find that *Plutarch*, *De amore fraterno*, uſes it for an exact Equality; but he ſpeaks of it a little lower, §. 12. properly, when he relates the Opinion of *Ariſtotle*.

by ſomewhat exactly of the ſame Value in moral Eſtimation. For, the Objection of Mr. *Hobbes* [a], that *if we ſell our own Goods at the higheſt Price that can be, we do no Injury to the Buyer, who inclin'd and conſented to the Bargain*, ſhall be examin'd at large hereafter [1]. As for *vindicative* Juſtice, which, according to our Notion, conſtitutes a particular Species, it will be conſider'd in a more convenient Place [2].

XI. It may be worth our while to take farther Notice of [b] *Grotius*'s Opinion concerning Juſtice, which he, neglecting the uſual Diſtinction of *general* and *particular*, divides into *expletive* and *diſtributive*. This Difference is founded on the Diverſity of that Right, which one Man hath to receive any Thing from another, which, as we have already obſerv'd, is either *perfect* or *imperfect*; the latter being, alſo, term'd *Amplitude*, in Oppoſition to *ſtrict Right*. Therefore an Act belongs to *expletive* Juſtice, when we render that to another which is due to him by a *perfect* Right; but to *attributive* Juſtice, when we render that which is due to him only by an *imperfect* Right. Now the Reaſon of theſe two Appellations of Juſtice ſeems to be this; whatſoever is due to me by *perfect* Right, is conceiv'd to be already in ſome Meaſure *my own* [3], and conſequently ſo long as it is with-held, ſomewhat of my own is ſuppos'd to be wanting. (Thus even Names and Titles are reckon'd Part of our Patrimony, and may paſs in Payment to others.) So that if a Man pays me what is my Due by a *perfect* Right, he gives me no new Thing, but only fills up the Place of a Thing which before was abſent, and which in the mean Time [4] was ſupplied by an Action. For Example, a Man who hath borrowed a Book out of my Study, when he reſtores it, doth not properly increaſe my Study, but only [5] fills up a Place made empty on his Account. But ſuch Things as I have only an *imperfect* Right to receive, I cannot reckon my own, nor put them into my Patrimony; ſince they depend entirely on the Modeſty and common Honeſty of another Man, who may not, by any violent Means, be compell'd to pay them. And therefore 'twould be ridiculous, if a Beggar, for Inſtance, ſhould make over to a Shoe-maker, for the Price of a Pair of Shoes, an Alms which he *expects* to receive from ſome rich Perſon. Thus then, he who renders to another any Thing due by *imperfect* Right, doth properly *attribute*, give or add to him ſomewhat which he could not before call *his own*. For this Reaſon *Grotius* calls *attributive* Juſtice the Companion of thoſe Virtues which tend to the Benefit and Advantage of others, as Liberality, Mercy, Humanity, and the like. For theſe Dues Men receive only by *imperfect* Right. When he adds to theſe, *Providentia rectrix*, or *State-providence*, he is, in our Judgment, chiefly to be underſtood of the Diſtribution of thoſe Rewards, to which the Subjects have only an imperfect Right; in which, tho' a greater Liberty may be taken than in giving thoſe which are due upon Contract, yet it would be, perhaps, moſt adviſeable to proportion every Man's Share to his Merits, as the ſureſt Way to prevent Strifes and Complaints [6]. Thus *Iſocrates*, (*Areopagit.* p. 247, 248. *Ed. Pariſ.*) obſerves of the old *Athenian* Miniſters: *One Thing which prov'd of great Advantage to them in the Management of the Commonwealth was this; that whereas there are two ſorts of Equality, one which gives exactly the ſame Portion to each Man, and another which proportions Men's Shares to their particular Merits, they were not ignorant which of theſe two was moſt beneficial to a State: But rejecting that as unjuſt, which dealt out the ſame Allotment to good and bad Men without Diſtinction, they choſe the other which aſſigns Honours and Puniſhments according as every Man deſerves, for the ſureſt Guide of their Proceedings.*

Why *Grotius* forbore the Uſe of the common *Ariſtotelian* Terms, he himſelf gives this Reaſon, becauſe the Word Συναλλακτικὴ doth not come up to the full Import of *Expletive*; for, that he who is poſſeſs'd of my Goods ſhould reſtore them again, doth not proceed from any συνάλλαγμα, or [7] *commutative* Contract, and yet it belongs to *expletive* Juſtice: That is, tho' I have a perfect Right of retrieving what is my own, from any Poſſeſſor, yet my Action is not founded upon any Contract made between us about the Reſtitution; but 'tis ſufficient to my Purpoſe, if I can prove myſelf to be the true Maſter and Proprietor of the Thing thus with-held. It is clear then, that there may be an Act of *expletive* Juſtice without any συνάλλαγμα, or *Contract*. Neither doth the other Term διανεμητικὴ fully anſwer that of *attributive*; becauſe it ſuppoſeth a Neceſſity of many Perſons, amongſt whom the Diſtribution is to be made. But now *attributive* Juſtice may be exercis'd towards a ſingle Perſon, when he alone is fit to receive ſuch an Honour, or ſuch a Reward.

XII. *Ariſtotle*'s Opinion concerning the Species of Juſtice, as far as we can apprehend, ſeems to be this: *General* Juſtice, which he calls *the Univerſal* [8] *Exerciſe of Virtue towards others*, is a Duty which belongs to all Men. Particular Juſtice he divides into three Kinds. Firſt, *Diſtributive*, which [9] takes in the Partition of Honours, or Money, or other Things capable of being divided amongſt the Mem-

[a] *De Cive, Cap.* iii. §. 6. [b] *Lib.* i. *Cap.* i. §. 8.

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[1] *Viz.* Lib. v. Cap. iii. §. 10.

[2] *Viz.* Lib. viii. Cap. iii. §. 5.

[3] *Id apud ſe quiſque habere videtur, de quo habet actionem; habetur enim quod peti poteſt*, i. e. Every one ſeems to be in Poſſeſſion of that, for which he may have a juſt Action; for that is poſſeſſed that may be required, *Digeſt. Lib.* l. *Tit.* 16. *De verborum ſignificatione, Leg.* cxliii.

[4] The Author underſtands by this, either the Act of Engagement into which a Man is entered, or the Right a Man hath to require his Due, which Right he expreſſes, by the Phraſe, *To have an Action againſt another.*

[5] *Gronovius* the Father, and Mr. *Vander Meulen*, in their Notes upon *Grotius*'s Treatiſe, *Of the Right of War and Peace*, affirm, That this Diſtinction bears much the ſame Senſe, as the ordinary one of Juſtice *commutative* and *diſtributive*, and that, as in *Latin* the Word *Explere* ſignifies ſometimes to ſatisfy, Juſtice *expletive* is ſo called, becauſe, by the Practice of it, we ſatisfy thoſe to whom we owe any Thing, which they have a Right to require, by way of Return of what they have received. But all this is of little Importance.

[6] Μάλιστον δ' αὐτοῖς συνεβάλετο πρὸς τὸ καλῶς οἰκεῖν τὴν πόλιν, ὅτι δυοῖν ἰσοτήτοιν νομιζομέναιν εἶναι, καὶ τῆς μὲν ταὐτὸν ἅπασιν ἀπονεμούσης, τῆι δὲ πρὸς τὸ προσῆκον ἑκάστοις, οὐκ ἤλπιον τούτων τὴν χρησιμωτέραν, ἀλλὰ τὴν μὲν τῶν αὐτῶν ἀξιοῦσαν τοὺς χρηστοὺς καὶ πονηρούς, ἀποδοκίμαζον ὡς οὐ δικαίαν οὖσαν· τὴν δὲ κατ' ἀξίαν ἕκαστον τιμῶσαν, καὶ κολάζουσαν προσῆκόντως. But here we muſt take Notice of a Miſtake in our Author, who has rendered κολάζουσαν, *præmia*, for *pœnas attribuit*, he renders *Rewards* for *Puniſhments*.

[7] We muſt not take the Term συνάλλαγμα, *Exchange*, or *Contract*, in the natural and ordinary Signification, but in the Senſe that *Ariſtotle* uſes the Word. See the next Paragraph, and *Gronovius*'s Notes upon *Grotius*.

[8] Theſe are *Ariſtotle*'s Words, Ἡ μὲν δικαιοσύνη τῆς ὅλης ἀρετῆς ἔστι χρῆσις πρὸς ἄλλον. *Ethic. Nicom.* Lib. v. Cap. v. See the Commentary of Mr. *Noodt* on the *Digeſt*. Lib. i. Tit. i. Pag. 2.

[9] *Ariſtotle* further goes on, and ſays, Τῆς δὲ καλὰ μέρος δικαιοσύνης——ἓν μὲν ἐστὶν εἶδος, τὸ ἐν ταῖς διανομαῖς ἢ τιμῆς, ἢ χρημάτων, ἢ τῶν ἄλλων, ὅσα μεριστὰ τοῖς κοινωνοῦσι τῆς πολιτείας——ἓν δὲ, τὸ ἐν τοῖς συναλλάγμασι διορθωτικὸν, τούτου δὲ μέρη δύο, τῶν γὰρ συναλλαγμάτων τὰ μὲν ἑκούσια ἐστὶν, τὰ δὲ ἀκούσια· ἑκούσια τὰ τοιάδε, οἷον πρᾶσις, ὠνὴ, δανεισμὸς, ἐγγύη, χρῆσις, παρακαταθήκη, μίσθωσις——τῶν δὲ ἀκουσίων, &c. Ibid.

bers of the ſame State. Secondly, *Corrective*, which conſiſts in rectifying [1] *Commutations*: And of theſe ſome are *Voluntary*, others *Involuntary*. The former are made without Conſtraint, as Buying and Selling, Hiring and Letting to Hire, in Loans, Uſury, and Suretiſhip. The latter conſiſts in [2] Crimes, when Men are forc'd to a *Commutation* againſt their Wills: For Inſtance, when my Goods paſs to a Thief; for then there ariſeth an Inequality, he having *more*, and I *leſs* than we ought. The Correction then of this Inequality is made by taking from him what he had above his Due, and reſtoring it to me. Thus, ſuppoſe a Man, by the Fraud of the Seller, gives nine Shillings for a Thing that is worth but ſix; three Shillings are to be taken from the Seller, and given to the Buyer, to make an Equality. Now between theſe three Numbers, 3, 6, 9, there is properly an *arithmetical* Proportion, the third Number exceeding [3] the ſecond juſt as much as the ſecond exceeds the firſt [a]. Theſe two Kinds of Juſtice belong properly and principally to thoſe who bear ſome high Command in a State. For 'tis the Duty and Office of ſuch, and not of private Perſons, to diſtribute the publick Goods amongſt the particular Members; and to correct the Inequalities which ariſe either in Contracts, or Crimes, by reducing them to a Parity. *It is the Buſineſs of the Judge to reduce thoſe Things to an Equality, which, upon Account of an Inequality, are unjuſt* [4].

The third Species of Juſtice aſſign'd by *Ariſtotle*, is *Retaliation*, which ſerves to regulate the *Commutations* made between Man and Man, by comparing Things that are different and unequal, and reducing them to a *geometrical* Proportion. To give an Inſtance, Were a Pair of Shoes to be exchang'd for a Horſe, the Queſtion would be, how many Times the Price of the Horſe contains the Price of the Shoes, which, ſuppoſing to be twelve Times, the Rule of *retaliating* or compenſating is, that twelve Pair of Shoes be given for one Horſe [b]. And this Species of Juſtice belongs as well to Men of private, as of publick Capacities. As for our former Remark, that the other Species aſſign'd by *Ariſtotle*, concern'd principally the Magiſtrates and Judges; this will be eaſily granted by any who take a cloſer View of his moral Works: For they will find, that in ranging and marſhalling the Virtues, he had always in his Head the Idea of ſome *Grecian* State; in which Time all the Subjects had not the ſame Duties to perform, 'tis no Wonder that he hath given us ſome Virtues applicable only to Men of particular Quality and Degree.

XIII. Mr. *Hobbes* [c] hath advanc'd one ſingle Notion of Juſtice to comprehend every Kind; making it nothing elſe but a keeping of Faith, and fulfilling of Covenants; which Opinion he borrow'd from *Epicurus* [d]. *Commutative Juſtice*, he ſays, *takes place in Contracts, as in Buying and Selling, Hiring and letting to Hire, Lending and Borrowing, Exchanging, Bartering, and the like.* [5] *Diſtributive* Juſtice (tho' improperly ſo call'd) is, he ſays, *the Juſtice of an Arbitrator, when being truſted by them who make him Arbitrator, if he perform his Truſt, he is ſaid to diſtribute to every Man his own.* Nor will he allow any other Equality to be obſerv'd but this, that ſince we are all equal by Nature, one Man ought not to arrogate to himſelf more Right than he allows another, unleſs he hath obtain'd a greater Right than ordinary, by the Intervention of Covenants. Farther, ſince, according to his Sentiments, an Injury, or an unjuſt Action, or Omiſſion, is nothing elſe but the Violation of a Covenant; he hence infers, that we cannot offer an Injury to a Man, unleſs we have before covenanted with him. This Aſſertion is founded on his old Maxim, of *the Right of every Man to all Things*, which he hath ſtretch'd far beyond its juſt Limits; ſo that he imagines, before any Covenant is made, by which one Man might transfer his Right to another, every Man hath a Right of doing to others what he pleaſeth; and thus, only uſing his Right, he cannot be ſaid to commit an Injury [e]. But we ſhall by and by [6] ſhew, that this *Right of every Man to all Things* can be extended to no farther Senſe than this, That Nature allows a Man to uſe all ſuch Means as Reaſon ſhall judge conducible to his firm and laſting Preſervation: As indeed Mr. *Hobbes* himſelf, in his Definition of *Right* [f], inſerts the *Uſe of Reaſon*. But now found Reaſon will never adviſe us, out of our own Pleaſure and Humour, to put ſuch Affronts on another, as cannot but provoke him to War, or to a reciprocal Deſire of hurting us. Beſides it implies a manifeſt Contradiction to ſay, that upon the Suppoſal of many Men equal in Rights, each of them hath a Right to all Things; ſince the Right of one Man to all Things, if it hath any Effect, muſt extinguiſh the Rights of the reſt; and if the Right hath no Effect upon the other, it is uſeleſs, abſurd, and ridiculous: For, in moral Account, *not to be*, and *not to be effectual*, are much the ſame. And indeed, how can we call that a Right, which another may oppoſe with an equal Right? Who would ſay, I had the Right of commanding a Man, if he, by the ſame Right, might deſpiſe my Orders? Or, that I had a Right of beating another, when he too had a Right of returning my Blows, and, if he pleas'd, with Advantage and Increaſe? 'Tis certain therefore, that he that doth theſe Things to another, hath

[a] Vide *Selden ad Grot. Lib.* i. *Cap.* i. §. 8.
[b] Vide *Ariſtot. Ethic. Lib.* v. *Cap.* viii. & *Michael Epheſ. in loc. eund.*
[c] *De Cive, Cap.* iii. §. 6. & *Leviath. Cap.* xv.
[d] *In Diog. Laert. Lib.* x. *circ. fin.*
[e] Vid. *Gaſſend. Syntagm. Phil. Epicur. Par.* iii. *Cap.* xxvi, xxvii.
[f] *De Cive, Cap.* i. §. 7.

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[1] By the Word Συνάλλαγμα, which ſignifies a *Contract*, *Exchange*, or *Commutation*, *Ariſtotle* means Affairs in which we are concern'd with another. See what I have ſaid upon *Grotius*, Lib. i. Cap. i. §. 8. Note 1. So that we muſt not take this Term in the Senſe that it is commonly uſed in, for we ſhall afterwards ſee, that it is to be taken in a more extenſive Senſe, which would extreamly perplex us, if we ſhould follow *Ariſtotle*'s Notion without Examination, or it were neceſſary to know his Idea.

[2] By Crimes, we underſtand all ſorts of Injury done to another.

[3] This Sentence, which was not in the firſt Edition, is ſo very much corrupted in all the others (the laſt of 1706 not excepted) either thro' the Fault of the Printers, or Overſight of the Author, that we can make no Senſe of it: His Words are, *Quia exceſſus, quo poſterior numerus priorem ſuperat, ſunt æquales.* Doubtleſs he intended to have ſaid, *Exceſſus, quo poſterior numerus ſecundum ſuperat, & exceſſus, quo ſecundus priorem ſuperat, ſunt æquales*, as I have expreſs'd it in my Tranſlation. In fine, an Arithmetical Proportion is found, alſo, between four Degrees of Magnitude, of which the firſt exceeds the ſecond, or is exceeded by it, in an equal Quantity, as the third exceeds the fourth, or is exceeded by it; as for Example, five is to ten, as ſeven is to two.

[4] So *Ariſtotle* ſpeaks, Ὥστε τὸ ἄδικον τοῦτο, ἄνισον ὂν ἰσάζειν πειρᾶται ὁ δικαστής. *Ariſt. Ethic. ad Nicom Lib.* v. *Cap.* viii.

[5] We ought to obſerve, That Mr. *Hobbes* owns no Equality to be obſerv'd, as to the Price of Things, which are the Matter of Contracts. See his *Leviathan, Chap.* xv.

[6] *Viz.* Lib. iii. Cap. v. §. 3.

no Right of doing them, and, consequently, is injurious. On the contrary, the other Party hath a Right that such Things should not be put upon him, and is therefore injur'd. Thus we see, that such *Right* as being violated produceth an Injury, is not only acquir'd by Covenant, but was given at first by Nature, without the Intervention of any human Act: And so the Assertion, that an Injury can be done to no Man, unless we have transferr'd [1] something on him by Covenant, or Gift, is false and unreasonable.

The other Position of Mr. *Hobbes* [a], that Justice, as well as Property, owes its Original to civil Constitutions, we shall hereafter consider and refute.

Indeed, so far is it from being rational to resolve all Justice into Performance of Covenants, that, on the contrary, before we can know whether any Covenant is to be perform'd, we ought to be certain that it was entred upon, either by the Command, or with the Permission of the Laws of Nature; that is, that it was *justly* made [b].

From what hath been here offered, it is farther evident, that altho' otherwise *Damage* and *Injury* are very different Things, and though it be possible that [2] the Injury of an Action may redound to one Man, and the Damage to another; yet the Inference which Mr. *Hobbes* draws from this Consideration will not hold, that a bare Damage, and not an Injury is done to him, who is either hurt, or hath something taken from him, by a Man with whom he had pass'd no Covenant. Nor do the Instances which he brings to countenance this Conjecture, make very much to the Purpose [c]. *When the Master*, says he, *commands his Servant to give Money, or to do a Kindness to a third Person; if it be omitted, the Injury is done to the Master, but the Damage to the third Person.* But indeed, if the Servant does not pay the Money which is due, as he is order'd, the Creditor shall suffer no [3] Damage, since his *Action* remains good against the Master. Nor, if a Servant, being commanded to do a Kindness to another Man, fails in performing it, shall the other Man incur any Damage: Tho' he is indeed guilty of Theft, or the like Crime, if he intercept and keep for his own Use, what he ought, on his Master's Account, to have deliver'd to others. For, besides that from the not receiving of a Kindness, which is not strictly due, Damage, properly so call'd, cannot arise [d], the other Person may complain to the Master, who will be sure to compel the Servant to his Duty. And tho' we suppose the Servant to have been never so far from doing an Injury to the third Person, yet, for all this, 'tis certain he did not what by *Right* he ought to have done; because he affords the other Man sufficient Grounds of a Complaint against him. His other Instance Mr. *Hobbes* thus proposeth in his *Leviathan*, Chap. xv. p. 75. *Private Men may remit to one another their Debts, but not Robberies, or other Violences whereby they are endamag'd: Because the detaining of a Debt is an Injury only to themselves, but Robbery and Violence are Injuries to the Person of the Commonwealth.* Which we are willing enough to admit, provided he will not hence infer, that in Crimes an Injury is not, likewise, done to the particular Person who is hurt. But as he proposeth the same in his Book *De Cive*, Cap. iii. §. 4. it is by no Means to be endur'd. He says, that *in a State, if any one hurts another, with whom he hath not covenanted, he damageth the Party on whom he brings the Evil, but he doth an Injury only to him who holds the sovereign Power in the State* [4]. For, if one of my Fellow-Subjects hurts me by Violence, doth he offer an Injury to the King only, and not to me? Or suppose we should grant, as Mr. *Hobbes* desires, that when Men live in a natural Liberty, each of them hath a Right to all Things, yet will this hold good amongst the Members of the same Republick, who own one common Master? As to what he subjoins, that *if the Person who receiv'd the Damage, should accuse the other of injuring him, he would be answer'd in this Manner, What are you to me? Why should I act according to your Pleasure, rather than my own, since I don't hinder you from acting by your own Will, rather than by mine?* 'Tis so far from being true, that *if no particular Covenants have interven'd, this way of speaking will not be free from Reprehension*, that we would rather imagine a Man to be out of his Senses, who should hope by such a way of arguing to satisfy the Complaints of one whom he had hurt. Yet one Thing Mr. *Hobbes* hath well remark'd, that *the Term of Injustice signifies with Reference to the Law, but the Term of Injury with Reference both to the Law, and to the particular Person.* For, when an *unjust* Thing is done, all may call that *unjust*, or it is *unjust* to all. But an *Injury* may have been done, not to me, or to him, but to a third Person, and

[a] *Lev. Chap.* xv. [b] *Dr.* Cumberland *De L. L. N. Cap.* viii. §. 6. [c] *De Cive, Cap.* iii. §. 4. [d] Vid. *Grot. Lib.* ii. *Cap.* xvii. §. 2.

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[1] This Expression of Mr. *Hobbes* is founded upon his great Principle, That every Man hath a Right to every Thing; for, according to him, in every Engagement we yield to another the Right which we had to certain Things, and to break an Agreement, is to require, in some Measure, what we had granted.

[2] This ought to be understood, either of one and the same Action, in which several have concurred, but so as that some have acted without an evil Intention, and others with a Design to injure; or of an Action done by a single Person, but in such a Manner, as that the Effect concerns several others, and, in respect to some, it is an Injury, but, in respect to others, it is a single Damage; as if a Man, designing to kill another, should slay or hurt a third Person, contrary to his Intention. See §. 15. following.

[3] He may receive some, at least, for the present, if he had a necessary Occasion for it, and because he had it not in Hand, he sustained some Loss, or miss'd an Occasion of getting some Advantage. Further, it may happen, that his Master might become altogether insolvent, or not in a Capacity of paying for a long Time; when any of these Inconveniencies happen from this, that a Master has given Money to his Servant to pay his Creditor, the Creditor has a full Right to require, that the Servant pay him that Sum, as a Thing belonging to him, tho' he knows nothing of his Commission; for the Servant, by keeping the Money, does what in him lies to cause the Creditor to lose his Debt. We may, also, add, in the other Case, the Deceit of the Servant has frustrated the Liberality of his Master; for tho' these Works of Charity are, in their own Principle, not rigorously due, yet, from the Moment that a Master determines to do some Good to the poor Man, and he is actually kept out of that Money by the Servant, who, keeping it, robs him, as much as if he had already received it; for Men have a true Right to that which is lawfully given, in respect of the Donor, insomuch, as that he can't demand it again, unless for some extraordinary Reasons. See *Book* v. *Chap.* iv. §. 1. *Note* 1. following.

[4] That is to say, for Instance, that a Man, who has been robb'd, cannot free the Robber from the Penalty he has incurr'd by the Law. Yet this does not hinder, but he may remit what concerns his own particular Interest, either by suffering the Robber to keep what he has got, or not rigourously exacting the full Demands of Justice against him. The *Roman* Law authorizes such an Agreement: *Et in ceteris igitur omnibus ad Edictum Prætoris pertinentibus, quæ non ad publicam læsionem, sed ad rem familiarem respiciunt, paciſci licet. Nam & de furto Lex permittit.* Leg. vii. §. 14. See the excellent Treatise of Mr. *Noodt*, *De Pactis & Transact.* Cap. xvi.

ſometimes to no private Subject, but to the State only; as when a Man is kill'd in a Duel, for Inſtance, upon a fair Challenge. For, in this Caſe, the Party who receiv'd the Hurt, cannot complain of having an *Injury* done him; ſince he himſelf agreed to the Chance of the unlawful Combat: But the Legiſlator may, however, proſecute the Survivor for tranſgreſſing his Prohibition.

XIV. Having arriv'd to know what Juſtice is, we may eaſily ſettle our Notions of *Injuſtice*, and of its ſeveral Species. An Action, then, is *unjuſt*, either when we apply it deſignedly, to a Perſon to whom we ow'd a different Action, or when we deny another ſomewhat which was really his due. That is, We are equally guilty of a Breach of Juſtice, by doing any Evil to another which we had no Right to do, and by taking from another, or denying him any Good which he had a fair Title to require. [1] For good Things are of that Nature, that they may be given to any Man without a Reaſon, provided a third Perſon is not defrauded thereby: And the *Evils*, likewiſe, which a Man hath merited, we may, without Injury, with-hold from him, if, at the ſame Time, we do not endamage others by our Forbearance. An unjuſt Action, therefore, either brings upon another Man what it ought not to bring upon him, or denies and with-holds what it ought to give him. For the Denial or Omiſſion of an Action, is, in moral Account, itſelf an Action.

XV. But an unjuſt Action, proceeding from Intention, and treſpaſſing on the perfect Right of another, is, in our Word, call'd *Injury*. Which if we would exactly ſtate, we muſt again obſerve, that a Man may be hurt three Ways; either, if he be denied what he ought to have [a], or if that which he now hath for his own be taken from him, or if ſome Evil be put on him by another, which had no juſt Right of doing it. As to the firſt of theſe Ways, Things may be ſaid to be due to a Man, either by the bare Law [2] of Nature, yet ſo as that he hath no perfect Right to them; of which Kind are the Offices of Humanity, Beneficence, and Gratitude: Or elſe by Covenant, and that either ſuch as is expreſs and particular, or ſuch as is contain'd under our Obligation to Civil Laws, by which we engage ourſelves to perform thoſe Things towards others, which the Laws command us to exhibit. If Things of the latter Kind are denied a Man, an *Injury* is properly done; but there is no proper Injury in the Denial of Things which belong to the former Kind; tho' there be a Sin indeed committed againſt the Law of Nature. Yet neither doth the Law of Nature itſelf allow of compelling another by Violence to pay theſe Duties (eſpecially if the compelling Party have no Power and Authority over the other) unleſs upon urgent Neceſſity: Since the Nature and Property of thoſe Offices requires that they be perform'd voluntarily, and without the Motive of Fear. Thus far therefore, and no farther, will the Maxim of Mr. *Hobbes* hold true, That *an Injury cannot be done but to a Man with whom a Covenant has been made.* But when we ſtudiouſly and induſtriouſly bring an Evil on another Man, unconſenting and unprovoking, either by taking from him any Good which he poſſeſſeth, or by poſitively inflicting on him an Evil: In theſe Caſes an Injury is always done, whether a Covenant hath interven'd, or not. For Nature hath given this Right to every Man, that no Evil be offer'd him from another Man, without his own preceding Demerit: Nor is it allowable for any Perſon, unleſs when provok'd, to hurt another, any farther than the due Exerciſe of Government ſhall require. We add, *unleſs provok'd*, becauſe to make an Action properly *Injurious*, there is requir'd the τὸ πρότερον, *that it be done firſt*: For *Ariſtotle* tells us [3], that *he who returns another what he firſt ſuffer'd from him, cannot be ſaid to do an Injury.*

XVI. In an *Injury*, properly ſo call'd, it is farther requir'd, that it proceed from Intention, and deliberate Deſign of hurting or vexing another. And therefore the Harm which is done caſually in Ignorance and unwillingly, is not us'd to come under the Name of *Injury*. As ſuppoſe a Soldier that is exerciſing himſelf, in the uſual Place, at caſting his Javelin, ſhould ſtrike it through a Man that paſs'd by accidentally: Or, if a Lopper of Trees ſhould let fall a Bough upon a Perſon who had no Right to be in that Place. So *Antiphon*, an ancient Orator, defends a young Man who had unfortunately kill'd a Child with a Caſt of his Javelin: [4] *He was engag'd*, ſays he, *in no forbidden Exerciſe, but in his proper and neceſſary Buſineſs; nor by himſelf, but with his Companions in Arms: Nor did he ſtrike the Youth by an unſkilful Throw, at a Diſtance from the Mark: But he guided the Weapon with exact Art and Care, and was ſo far from doing any Thing amiſs, that he rather ſuffer'd in having his Throw ſpoil'd, and in being hindred from hitting what he ſo well aim'd at.*

Ariſtotle [5] tells us, *That the doing of a Thing juſtly, or unjuſtly, depends on its being done voluntarily, or involuntarily.* And again, That *when we do a Hurt beſide Reaſon, it is only a Misfortune; but when we do a Hurt, which is not beſide Reaſon, and yet not out of Malice, then we commit an* Ἁμάρτημα, *or Treſpaſs.* On which Place *Michael* of *Epheſus* thus comments: *Of Hurts, ſome are done out of Ignorance, and againſt our Wills, others with our Knowledge and Conſent. Thoſe which are done out of Ignorance, are again divided into ſuch as are done without any Likelihood, and beſide all Expectation; and ſuch as are done, tho' involuntarily, yet not beſide all Expectation and Probability. Therefore after the Philoſopher hath ſaid, that all Hurts proceeding from Ignorance, fall*

[a] *Marc. Anton. Lib.* ix. §. 5. *It often happens, that there may be Injuſtice in the not doing of a Thing, as well as in the doing.*

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[1] The three following Sentences ſeem ill placed in the Original, and therefore ought to be altered; and another Period ſhortned, becauſe it contains a needleſs Repetition.

[2] *Ex mero Jure Naturæ*, by which our Author underſtands, what he elſewhere calls, *abſolute Duties*; that is to ſay, ſuch as are grounded upon the original Conſtitution of our Nature, and which every Man is obliged to perform to another Man, conſidered preciſely as ſuch, in Oppoſition to thoſe, who ſuppoſe ſome other Eſtabliſhment, or other human Act, and which they call *conditional Duties*. See *Lib.* ii. *Cap.* iii. §. the laſt, following.

[3] Ὁ γὰρ διότι ἔπαθε, καὶ τὸ αὐτὸ ἀντιποιῶν, οὐ δοκεῖ ἀδικεῖν. *Ariſt. Ethic. ad Nicom. Lib.* v. *Cap.* xv. See what is ſaid, *Lib.* ii. *Cap.* v. and *Lib.* iii. *Cap.* i. §. 7.

[4] *Antiph.* Orat. 7. p. 56. Edit. *Hanov.* 1619. Οὔτε γὰρ ἀπειρημένων, ἀλλὰ προτεταγμένων ἐξεμελέτα· οὔτε ἐν γυμναζομένοις, ἀλλ' ἐν τῇ τῶν ἀκοντιζόντων τάξει ἠκόντιζεν· οὔτε τῷ σκοπῷ ἁμαρτὼν, εἰς τὸς ἀφεστῶτας ἀκοντίσας, τὸ παιδὸς ἔτυχεν, ἀλλὰ παίσια ὀρθῶς ὡς ἐπειόει δρῶν, ἔδρασε μὲν ἐδὲν ἀκόσιον, ἔπαθε δὲ, διακωλυθεὶς τῷ σκοπῷ τυχεῖν.

[5] Ἀδίκημα δὲ καὶ δικαιοπράγημα ὥρισται τῷ ἑκουσίῳ καὶ ἀκουσίῳ———Ὅταν μὲν οὖν παραλόγως ἡ βλάβη γένηται, ἀτύχημα· ὅταν δὲ μὴ παραλόγως, ἄνευ δὲ κακίας, ἁμάρτημα. Ethic. ad Nicom. Lib. v. Cap. x.

under the general Names [1] *of Errors or Treſpaſſes, he then makes a kind of Subdiviſion, and tells us, that thoſe which are done beſide Reaſon are Misfortunes, and thoſe which are done not beſide Reaſon are properly Treſpaſſes. Now thoſe Things are beſide Reaſon, which happen very rarely and unexpectedly; as if a Man by ſuddenly thruſting open a Door ſhould ſtrike his Father, who ſtood accidentally behind it; or if, whilſt he is exerciſing himſelf at his Javelin, in a Place thro' which none are wont to paſs, he wounds ſome Body who happen'd to come by when the Weapon was flying. For theſe, and ſuch like Accidents, fall out beyond all Thought and Expectation. But Actions done indeed ignorantly, but not beſide Likelihood, or Probability, are call'd Treſpaſſes. For, a Man who exerciſing his Bow and Arrows in a Place commonly frequented, ſtrikes any Perſon, doth properly treſpaſs; as a Man is then always ſaid to do, when he himſelf was the Principle and Cauſe of the Unluckineſs of the Action: But now the Man whom we ſpeak of, was no doubt the Principle and Cauſe of what he did, ſince he* [2] *voluntarily choſe ſuch a Place to ſhoot in, where it was probable ſome Body or other would paſs by.*

An Ἁμάρτημα, or *Treſpaſs* of this Nature, is what the *Civilians* properly term *Culpa*, or a *Fault*; which they ſay is committed through *Negligence*, or *Unſkilfulneſs*, when a Man is either careleſs or ignorant of ſuch Things as he ought, and was able to have known, and to have obſerv'd. Of *Faults* they make three Degrees, anſwerable to the Degrees of Diligence, by the Omiſſion of which the Fault is contracted. Firſt then, there is a [3] general Diligence of all Men, not work'd out by Labour and Wit, but deriv'd, as it were, from common Senſe. Next to this, there is a Diligence more improv'd [4] proper to every Man in his own Affairs; and which is requir'd by Nature in the Management of human Life, according to each Perſon's Capacity and Parts. Laſtly, There is a Diligence of the greateſt Exactneſs and Accuracy, us'd only by the moſt knowing and experienc'd Men [5] in their own Buſineſs and Concerns [6]. To this laſt kind of Diligence they oppoſe their *Culpa leviſſima*; to the ſecond, their *Culpa levis*, and to the firſt, their *Culpa lata*. As to this *Culpa lata*, they obſerve, that it is equivalent to Malice and Deceit, in Contracts and other civil Buſineſs, and in Caſes of Reparation for Damages [7]. But that [8] in criminal Matters it bears not ſo hard an Interpretation; where however it doth not take away, but only extenuate the Guilt. The Effects of the *Culpa levis*, and *Culpa leviſſima*, they ſhew at large, when they treat about Performances of Contracts.

The *Treſpaſſes* we have hitherto ſpoken of, are ſuppos'd to be done without Intention. But now

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[1] A little before the Words, which he has juſt now quoted, are theſe, Τὰ μὲν μετ' ἀγνοίας, ἁμαρτήματά ἐστιν. And here, to ſpeak by the Bye, *Grotius*, *Lib.* iii. *Cap.* xi. §. 4. *Num.* 2. renders ἁμάρτημα, *Infortunium, a Misfortune thro' Miſtake*, whereas he ſays, in another Place, that it ſignifies *Culpa aliqua*; I am amazed, that neither Mr. *Courtin*, in his Tranſlation, nor *Gronovius* the Father, in his Notes, corrected this Inadvertence in their Author. I have amended it in my Tranſlation.

[2] We may call it, *An indirect Will*, becauſe he did not directly, and formally, intend to hurt any Man; but he did, or neglected to do a Thing, from whence a Damage did redound, which was occaſioned (as may eaſily be preſumed) by that Action, or Omiſſion.

[3] *Lata culpa eſt nimia negligentia*, i. e. *non intelligere, quod omnes intelligunt.* Digeſt Lib. l. Tit. xvi. *De verborum ſignif.* Leg. ccxiii. §. 2. See, alſo, *Leg.* ccxxiii. and *Lib.* xxii. *Tit.* 6. *De juris & facti ignorantia, Leg.* ix. §. 2. It would be (for Example) a great Fault, if having borrowed a Jewel, you ſhould leave it at your Door, where the firſt Comer may carry it away.

[4] *Si cum diſtrahere deberet, non fecit, lata culpa, non levi, & rebus ſuis conſueta negligentia; hujuſmodi rei rationem reddet*, Digeſt. Lib. xxxvi. Tit. i. Ad Senatuſconſultum Trebellian. Leg. xxii. §. 3. *Si venditor eam diligentiam adhibuiſſet in inſula cuſtodienda, quam debent homines frugi & diligentes præſtare, &c.* Lib. xviii. Tit. vi. *De periculo & commodo rei venditæ*, Leg. xi. *Si nihil appareat conveniſſe, talis cuſtodia deſideranda eſt a venditore, qualem bonus paterfamilias ſuis rebus adhibet*, Lib. xviii. Tit. i. *De contrab. empt.* Leg. xxxv. §. 4. *Si quis non ad eum modum, quem hominum natura deſiderat, diligens eſt, &c.* Lib. xvi. Tit. iii. *Depoſiti vel contra*, Leg. xxxii. It would (for Example) be a ſlight Fault, if, when a Man has received a Pledge, he leaves it in his Chamber, and puts it not in his Trunk, or forgets to take out the Key of the Trunk where it is. In fine, the Lawyers ordinarily call this Sort of Negligence by the Name of *Culpa* alone, *i. e.* a Fault. See, for Example, *Digeſt. Lib.* ix. *Tit.* ii. *Ad Leg. Aquiliam, Leg.* xxxi. but ſometimes we mean by it one of the other two Sorts, of which we may judge by the Sequel of the Diſcourſe. See Examples of it in the *Probabilia Juris* of Mr. *Noodt*, Lib. iv. Cap. iii. where you will find other Terms differently applied on this Subject.

[5] *In lege Aquiliâ & leviſſima culpa venit*, Digeſt. Lib. ix. Tit. ii. Leg. xliv. *In rebus commodatis talis diligentia præſtanda eſt, qualem quiſque diligentiſſimus pater-familias ſuis rebus adhibet*, Lib. xiii. Tit. vi. *Commodati vel contra*, *Leg.* xviii. A Fault of this Nature does not excuſe (for Example) him that hath borrowed any Thing from another for his Uſe, if the Thing lent be loſt. See *Lib.* v. *Cap.* iv. §. 6. following. This, alſo, would be a very ſlight Fault, if, through Heedleſneſs, a Man inſecurely ſhuts the Chamber where he has laid the Thing entruſted to him, and, going away, forgets to ſee whether he has well turned the Key of his Door.

[6] In all Things, which are not capable of an exact and mathematical Meaſure, we may always diſtinguiſh three Degrees, at leaſt, *viz.* two Extreams and a Mean, which ſometimes comes neareſt the Firſt, and ſometimes the Laſt. If we admit of a greater Number, we muſt determine juſt to a Point, where each Degree begins and ends, without which there will be no Way to diſcern them: But 'tis not neceſſary, when we confine ourſelves to theſe Three. It ſufficeth, then, to conſider here Watchfulneſs, as well as Negligence, either as being raiſed to an higher Degree, or as ſinking to the loweſt, between which is the Medium, which inclines ſometimes to one Side, and ſometimes to another. Now theſe middle Degrees (as we may ſay) muſt be meaſured according to the Nature of thoſe Things, which are the Objects of our Cares, as they are more or leſs conſiderable, and, conſequently, require more or leſs Precaution. This Comment is taken out of Mr. *Titius*'s Obſervations *Ratiocin. in Comp. Jur. Laut. Obſ.* 397. See, alſo, a curious Diſcourſe of Mr. *Thomaſius*, entitled, *De uſu Pract. Doctr. diffic. Jur. Rom. &c.* printed at *Hall* in *Saxony*, 1705. In this he examines the Deciſions of the *Roman* Lawyers, in which he ſhews there is much Obſcurity: A Point in which we muſt agree with him, though we ſhould not approve his Explanation.

[7] *Magna negligentia culpa eſt, magna culpa dolus eſt*, Digeſt. Lib. l. Tit. xvi. De verbor. ſignif. Leg ccxxvi. See, alſo, *Lib.* xvi. *Tit.* iii. *Depoſiti vel contra, Leg.* xxxii. and Mr. *Noodt*'s *Probabilia Juris, Lib.* i. *Cap.* xiii. §. 8, 9, 10, 11, 12.

[8] *In lege Corneliâ dolus pro facto accipitur, nec in hâc lege culpa lata pro dolo accipitur*, Digeſt. Lib. xlviii. Tit. viii. *Ad Leg. Corn. de Sicariis & Veneficiis Leg.* vii. There is a Caſe, or, as Mr. *Titius* ſpeaks, a groſs Fault in unlawful Actions, which renders them as culpable as Deceit, or a bad Intention; as for Example, If a Man orders another to be ſtricken with a Sword, with a Deſign only to hurt him, expreſly forbidding the Perſon, commiſſioned, to kill him, to whom he would have it done, he ſhall, nevertheleſs, be thought directly, and maliciouſly, to have murdered that Perſon, if he die of the Wound, which may, and often does happen, and deſerve to be treated as a Murderer. For he indirectly willed it; and being the Effect of a formal ill Deſign, it ought to be looked upon as a malicious Act, and not as a ſingle Fault. Another Point to know, is, whether, according to the Principles of the *Roman* Law, we render ourſelves always liable, in theſe Caſes, to the Penalty of the *Cornelian* Law. About this the Interpreters are not agreed. See the Commentary of the deceas'd Mr. *Voet* on the *Digeſt*. Tit. *de pœnis*, §. 3. But before God, and according to the Law of Nature, the Caſe is the ſame with that of Duelliſts, who have a Deſign often only to wound and hurt one another, yet this hinders not, but if one of them be killed, the other ſhall be counted a Murderer. See Mr. *Titius*'s Obſerv. in Lauterb. 1333.

if a Man through the Violence of his Paſſions, and only with an imperfect and ſemiplenary Intention is driven to hurt another, this Hurt ſhall not be exempted from the Name of *Injury*, altho' the Man be not immediately, for ſuch a Fact, branded with the Character and Stile, of *Unjuſt* [1]. *Ariſtotle*'s Diſtinction is excellent in this Caſe: *An ill Thing*, ſays he, *done with Knowledge, but without Deliberation, is unjuſtly done; ſuch are the Effects of Anger, and of other natural and neceſſary Paſſions. For Perſons who offend on ſuch Accounts, commit Injuſtice indeed; yet they are not for this Reaſon accounted unjuſt and wicked Men, becauſe the Hurt did not proceed from any meditated Malice. But when a Man hurts another out of Choice and Deſign, then only he incurs the Name of unjuſt and wicked. Hence Facts proceeding from Anger, are always interpreted as done unadviſedly; for the Principle and Cauſe of ſuch Miſchances, is not the angry Perſon, but he who provok'd him to Anger.*

XVII. *Laſtly*, It is requiſite to the making an Action properly *Injurious*, that it be done to a Perſon againſt his Will. For 'tis a Maxim in every Man's Mouth, that *volenti non fit injuria, Nothing can be an Injury when the Party is willing to receive it. Ariſtotle* ſays, [2] *A Man with his own free Conſent may be hurt, or may ſuffer Things which are in themſelves unjuſt; but he cannot properly be injur'd, except it be againſt his Will.* See *Dig. Lib.* I. Tit. xvii. *De diverſ. reg. Juris. Nemo videtur fraudare eos, qui ſciunt & conſentiunt.* The Reaſon of which is, "that both the Good which I take from a Man, and the Debt which I with-hold from him, with his Conſent, are, as it were, *Gifts* from him to me: But now, who will ſay I do an Injury, by taking what is *given* me? Nor can that be eſteem'd Evil which a Man deſires to receive; ſince all Evil neceſſarily includes an Abhorrency of the Will from embracing it. But then it muſt be ſuppos'd, that the Man enjoys the full Uſe of his Reaſon, and is not tranſported with the Violence of any extravagant Affection [3 a]. Hence *Ariſtotle*, *Ethic.* Lib. v. Cap. xv. gathers, that a Man who in a Paſſion lays violent Hands on himſelf, doth an Injury not to himſelf, but to the State, which he robs either of a General, a Soldier, an Artificer, or the like, according as his Station was. Upon which Account it hath been a Cuſtom in moſt Commonwealths, to puniſh ſuch Offenders even after their Death, by affixing ſome Mark of Diſgrace on their Bodies, and on their Memory. [4] Add. *Mich. Epheſ. ad loc. dictum.* Tho' *Ariſtotle*'s Reaſoning in that Place, (*the Law commands not a Man to kill himſelf; but what it doth not command it forbids*) is falſe and abſurd; unleſs we ſay, that by κελεύει, *commands*, he rather means *permits*.

[a] Add. *Aut. Matth.* de Crimin. Proleg. Cap. iii. §. 2, 3. Mr. *Hobbes*'s Definition, which he gives in his Book *De Cive*, Cap. iii. §. 7. is founded upon a wrong Suppoſition, that *Injury conſiſts in nothing but the Violation of a Covenant.*

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[1] The *Greek* is, Ὅταν δὲ, εἰδὼς μὲν, μὴ προβεβουλευσας δὲ [ἡ βλάβη γένηται] ἀδίκημα· ὅιον ὅσά τε διὰ θυμὸν, καὶ ἄλλα πάθη. ὅσα ἀναγκαῖα ἢ φυσικὰ, συμβαίνει τοῖς ἀνθρώποις· ταῦτα γὰρ βλάπτοντες καὶ ἁμαρτάνοντες ἀδικοῦσι μὲν, καὶ ἀδικήματά ἐστιν· ἀ μέντοι τῶν ἄδικει διὰ ταῦτα, οὐδὲ πονηροί· οὐδὲ γὰρ διὰ μοχθηρίαν ἡ βλάβη ὅταν δ' ἐκ προαιρέσεως, ἄδικοι καὶ μοχθηροί· διὸ καλῶς τὸ ἐν θυμῷ οὐκ ἐκ προνοίας κεῖνται· οὐ γὰρ ἄρχει ὁ θυμῷ ποιῶν, ἀλλ' ὁ ὀργίσας. Ethic. ad Nicom. Lib. v. Cap. x. See, alſo, *Cicero* de Offic. Lib. i. Cap. ix. with *Grævius*'s Notes.

[2] Ethic. Lib. v. Cap. xi. Βλάπτεται μὲν ἔν τις ἑκὼν, καὶ τὰ ἄδικα πάσχει· ἀδικεῖται δὲ οὐδεὶς ἑκών. This is, alſo, the Deciſion of the *Roman* Lawyers, *Nemo videtur fraudare eos, qui ſciunt & conſentiunt. No Man is preſum'd to defraud thoſe, who know and conſent to what is done.* Digeſt. Lib. I. Tit. xvii. *De diverſ. regul. Juris.* Leg. cxlv.

[3] Theſe Limitations are not ſufficient to prove the Maxim, he is ſpeaking of, true, and therefore the Philoſopher *Hermias*, with Reaſon, maintains, "That no Man muſt make uſe of the Ignorance of a Seller, to his own Advantage, unleſs he will incur the Guilt of doing a great Wrong. A good Maxim, which every one ſhould practiſe (*Phot. Biblioth p.* 1044.) as Mr. *Bayle* obſerves in his *Hiſtorical* and *Critical Dictionary*. To ſet this important Matter in a due Light, I ſhall borrow ſome judicious Reſtrictions, made by Mr. *Placette*, upon this Maxim, in his Treatiſe of *Reſtitution, p.* 74, &c. I. The Conſent of the Sufferers ought to be counted for nothing, unleſs it be abſolutely free and voluntary. Now there are three Orders of Things, which may hinder that Liberty, ſo that his Conſent is not ſo full and entire, as to authorize what he ſuffers, *viz.* In the firſt Rank is every Thing that debars us of the Uſe of Reaſon, as Infancy, Folly, and Drunkenneſs; in the ſecond, Fear and Force; and in the third, Ignorance, Heedleſneſs, and Error. As to the firſt, there is no Difficulty; as to the ſecond, we will ſuppoſe, that Fear or Force proceeds directly, or indirectly, from him who gives his Conſent; laſtly, as to the third, That Conſent is of no Uſe, unleſs he, that gives it, knows what he conſents to, and ſees the Prejudice which he does himſelf by it; for if he be ignorant in whole, or in part, his Conſent is not voluntary, and no Man can, without Injuſtice, take Advantage of his Ignorance. Indeed Ignorance renders the Actions, which it produces, more involuntary, than Fear does, for this does not render an Action involuntary, but when it is cauſed by him that is to get by it; whereas Ignorance has always that Effect, whatever be the Cauſe of it. I own, that the Injuſtice is the more notorious, when he, who gets by the Action, deſignedly leads him, that gives his Conſent, into the Error; but the Injuſtice is here the ſame, even when the Gainer is not the Cauſe of that Ignorance: But he who buys Jewels at a low Price, of an ignorant Perſon that knows not the Value of them, does him an Injury, if, knowing it himſelf, he doth not adverтiſe him of it. See *Lib.* v. *Cap.* iii. §. 8. following. II. There are two Sorts of Rights; the one, when we are ſo much Maſters of a Thing, that we can diſpoſe of it as we pleaſe, ſuch is that which every Man hath of his own Goods. The other we can't renounce, becauſe a ſuperior Law forbids it; ſuch is that, which every Man has over his own Life; for we may defend it againſt an unjuſt Aggreſſor, tho' we can't deprive ourſelves of it. The Maxim which imports, *That we can't do an Injury to ſuch as conſent*, has Place only in reſpect to the firſt Sort; for, as to the laſt, which are in their Nature unalienable, a Conſent given to the Violation of them is ever null and void. Thus when an Huſband conſents to the Proſtitution of his Wife, that does not hinder, but that Crime is really Adultery. III. Altho' the Conſent of him, that is deprived of a Thing, may be ſufficient to acquit him, that deprives him of the Injury, in reſpect of the Perſon deprived; yet we ought to take Care, that a third Perſon, who has ſome Intereſt in the Thing, be not injur'd. As for Example, a Wife, Children, Creditors, or the State. IV. Laſtly, The Conſent of him, that is deprived of any Thing belonging to him, muſt be known to him who takes it, if not by a full Aſſurance, yet by a probable Preſumption, grounded upon good Reaſon; for if it afterwards appears, that the Perſon, who was thought to conſent, did not, tho' the Action might be innocent when it was done, yet he ought to make good the Injury done thereby, tho' he did not think he did any.

[4] Οὐ κελεύει ἑαυτὸν, &c. *Ethic. Nicom.* Lib. v. Cap. iv. *init.* But theſe Terms do not admit this Interpretation. *Giphanius*, in his Commentary upon this Place, (*Pag.* 444. *Edit.* 1608.) owns, that the Propoſition appears abſurd at firſt Sight. To give it a favourable Senſe, he pretends, that the Philoſopher ſpeaks only of Things diſhoneſt in themſelves. Thus, adds he, *Solon* neither forbid, nor commanded *Parricide*, and by which he tacitly forbid it. But this Commentator acknowledges afterwards, that there are many evil Things, which the Laws tolerate, but which they are far from commanding. Beſides, if *Ariſtotle*'s Argument be good, we muſt ſuppoſe, that the Law might ordain Things, bad in themſelves, and, conſequently, *Suicide*. If, therefore, it might either forbid, or command, it may, alſo, permit. Conſequently, where it does not command, it only follows, that it neither commands, nor forbids. As to the Example of *Solon*, every Body knows, that the Reaſon why he made no Law againſt Parricide, was, becauſe he believ'd no Man capable of committing ſo black a Crime.

CHAP.

CHAP. VIII.

Of the Quantity [or Eſtimation] of MORAL ACTIONS.

The CONTENTS of every Section of the eighth Chapter.

I. *The abſolute Quantity of moral Actions.*
II. *What Intention is requir'd to make an Action good before GOD's Tribunal.*
III. *What Intention is ſufficient in human Judicatures.*
IV. *What is a perfect and compleat Action.*
V. *The relative Quantity of Actions.*

HAVING done with the *Quality*, it comes next in our way to ſay ſomething of the *Quantity* of moral Actions; or to conſider on what Account they fall under different Rates and Meaſures. Now we find the voluntary Deeds of Men to be capable of undergoing a double Meaſure, or Valuation, either abſolutely in themſelves, or relatively towards one another. As to the abſolute Eſtimate, the Caſe is very different in good and in evil Actions. For in a good Action, if we conſider it *formally* and *preciſely*, we diſcover nothing which bears an Analogy to Quantity: Since the Goodneſs of it conſiſts only in an Agreeableneſs, or Conformity, to the Law, which doth not appear capable of Meaſure. Hence good Actions, conſider'd, as we ſaid, preciſely as to their *Form*, are not better one than the other; tho' they ſurpaſs each other in Excellence as to their *Matter*, with Regard to the Condition of the Object, and to the Intenſeneſs, or Strictneſs, of the Obligation. But now, an evil Action, as declining from the legal Rule, is conceiv'd to bear a greater or a leſs Diſtance from it; and on that Account may, even conſider'd *formally* and *in itſelf*, be eſteem'd *greater* or *leſs*: In the ſame Manner as one crooked Line may recede farther from a right Line than another doth. For *Zeno*'s Argument in *Diogenes Laertius* [a] is not worth confuting: *All Sins*, ſays he, *are equal*; *for* [1] *as nothing is truer than Truth, nor falſer than Falſity, ſo neither can Deceit be greater than Deceit, nor Sin than Sin. As he that is an hundred Furlongs from* CANOPUS, *and he who is only one Furlong diſtant from the ſame City, may be ſaid both alike not to be at* CANOPUS; *ſo he that ſins leſs, and he that ſins more, are both at an equal Diſtance from doing well.* But becauſe this Diſtance between evil Actions and the Law, if any one will exactly compare them with other Kinds of Quantity, may have ſome Likeneſs to a Right-lined Angle, whoſe Greatneſs is meaſured by the Arch of a Circle, having ſtraight Lines drawn from the Circumference to the Center; therefore when I was young, and ſtudied the Rudiments of the Law, I compar'd them to a Circle [2]; but in my riper Age I have thought it better to lay aſide ſuch Niceties, and explain them more plainly.

II. Farther, ſince to the Goodneſs of an Action it is requiſite, not only that what the Law commands be fully done, but, likewiſe, that it be done with ſuch Intention as is agreeable to the ſaid Law; it appears hence, that to make an Action be eſteem'd perfectly Good, there is a Neceſſity, not only that the Preſcription of the Law be anſwer'd in all its Parts; but beſides, that the only Thing which prevail'd on the Mind of the Agent, and put him on ſuch a Proceeding, was a Deſire of paying ready Obedience to the Legiſlator. And for this Reaſon, ſince we are, in the Divine Law, commanded *to love* GOD, *with all our Hearts, and with all our Souls, and with all our Strength, and our Neighbour as ourſelves*, Mark xii. 30, 31. 'tis manifeſt, that no Action can be approv'd by GOD Almighty as entirely Good [3], but ſuch an one as was undertaken with the fulleſt Intention, and in which the Agent propos'd nothing elſe to himſelf, but a Compliance with the Pleaſure of his Creator. Eſpecially, ſince the Divine *Searcher of Hearts* cannot but diſcover the leaſt Wavering in our Reſolutions, and the ſmalleſt Obliquity in our Deſigns. Whoever conſiders this Point as he ought, will find but very little Inclination to boaſt of his Uprightneſs towards GOD.

III. But in human Account ſo exact a Diligence is not requir'd. For, ſince our earthly Law-givers propoſe, as the chief End of their Conſtitutions [4], the Benefit of their Subjects, which commonly proceed from the outward Performance and Exerciſe of the Actions, whatever the Intention of the Actor may be; hence they are uſually ſatisfied, if the exterior Action be conformable to their Injunctions. And ſo much the rather, becauſe they are unable to dive into the Receſſes of Men's Minds, nor can at all underſtand the Intention of any Agent, but by Conjectures, and by Signs obvious to their Senſes, which are by no Means infallible Guides in diſcovering our inward Sentiments and Purpoſes. Therefore they value good Actions only as they appear to Senſe, or ſo far as the Reach and Condition of human Sagacity, and the Uſe of civil Life do admit or require; and are not very ſolicitous how full or ſincere the Intention of the Agent was, provided his exterior Work deſerve their Approbation [5]. Yet in evil Actions, even amongſt human Judges, more Regard

[a] *Lib.* vii. See *Cicer. Paradox. Cap.* iii.

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[1] His *Greek* is this, Ἀρέσκει δὲ αὐτοῖς ἴσα ἡμαρτῆσθαι τὰ ἁμαρτήματα——Εἰ γὰρ ἀληθὲς μᾶλλον οὐκ ἔστιν, οὐδὲ ψεῦδος ψεῦδος, οὔτε δὴ ἀπάτης ἀπάτης, οὐδὲ ἁμάρτημα ἁμαρτήματος· ᾗ γὰρ ὁ ἑκατὸν σταδίους ἀπέχων Κανώβου, ᾗ ὁ ἕνα, ἐπίσης οὐκ εἰσὶν ἐν Κανώβῳ· οὕτω ᾗ ὁ πλείων, ᾗ ὁ ἔλαττον ἁμαρτάνων, ἐπίσης οὐκ εἰσὶν ἐν τῷ καλοῷδεν. *Diog. Laert. in Zenon.* Lib. vii. Seg. 120.

[2] Theſe are the *Elements of the Univerſal Law*, printed at the *Hague*, 1660. and reprinted at *Francfort* on the *Mein* in 1684. *p.* 311.

[3] See the precedent *Chapter*, §. 3, 4.

[4] See Mr. *Noodt*'s *Diſcourſe about Liberty of Conſcience*, tranſlated into *French*, and printed at *Amſterdam* in 1737, and what I have ſaid in my *Treatiſe of Sports, Lib.* iii. *Cap.* vi. §. 19. and in my Diſſertation on the *Permiſſion of the Laws*, (Pag. 19[illegible] join'd to the fourth Edition of the *Duties of a Man and a Citizen*.

[5] When the Intention is dubious or equivocal, we ought to incline to that Side which is moſt favourable to the Agent. There is a pretty Paſſage, to this Purpoſe, in *Plutarch*, which it may be pleaſant to read here. Ἐν μὲν γὰρ τοῖς εὐδοκιμοῦσιν ἔργοις, καὶ πράγμασιν ἐπαινουμένοις, αἰτίαν φαύλην ὑπολάβωσι, καὶ καλάζειαι ταῖς διαβολαῖς εἰς ὑποψίας ἀτόπους περὶ τῆς ἐν ἀφανεῖ πονηρίας ἕξεως, ὁ πεφυκὼς αὐτῷ [which laſt Words ſhould rather be read τῷ πεφυκότος αὐτοῦ] τὸ πεπραγμένον ἐμφανῶς ὁ δυνάμενος ἰδεῖν——εὐδηλον ὅτι φθόνῳ καὶ κακοηθείας ὑπερβολὴν ὁ λέλοιπε. *De Herodoti malignitate.* They who, like *Herodotus*, can't deny that an Action is praiſe-worthy in itſelf, and can find no plain Reaſon to blame it; will pry into the Secrets of the Heart

Regard is had to the Intention. And where this ſhall appear to have been abſolutely wanting, as happens in Things done upon invincible Ignorance, or Error, the Action ſhall be accounted involuntary: And ſuch an Action, as it is not uſually *imputed* to the Agent, ſo is it conceiv'd to be deſtitute of all *moral Quantity*. But, otherwiſe, an evil Action, undertaken upon Knowledge and Deliberation, as it proceeds from a former and fuller Deſign. And ſince an ill Intention is to mortal Judges ſcarce more evident than a good one, by reaſon of their Incapacity to ſearch into the Heart; they are us'd to ſettle this Point by the Help of various Indications and Conjectures, which we ſhall elſewhere explain at large [1].

IV. With Regard to the *Matter* of moral Actions, that good Action is eſteem'd Perfect in its Kind, which hath attain'd its utmoſt Complement, or to which no Part is wanting that it ought to have. Thoſe which decline from this Perfection, are reckon'd inferior in a greater or leſs Degree, according to their Diſtance from it; whether the Cauſe of this Defect be, that the Action was deſtitute of ſome Part which ſhould have made it compleat; or that it was [2] only attempted, and not actually perform'd. On the other Hand, of evil Actions, that is reckon'd the worſt in its Kind, which hath fully arriv'd at the End propoſed; and every one is leſs evil, acccording as it falls ſhorter of this final Completion.

And here we muſt obſerve a twofold Difference in [3] the *Objects* of Actions, as ſet down in Laws. For ſome admit of a Diviſion, others do not: or, to ſpeak more plainly, ſome are ſo conſtituted, that when we exerciſe an Action about them, we muſt either entirely perform, [4] or entirely omit them, [5] or do what's directly contrary [6] to them: But in others, it is poſſible to perform ſome one Part only, and to omit the reſt; or ſomething may be done which is oppoſite to them, not directly, but in an inferior Degree. We may, likewiſe, conſider Objects under a ſecond Diſtinction: For ſome of them contain Things into which they may be divided, as into ſo many Species. Thus the affirmative Law of the [7] ſixth Commandment, enjoining us to ſuccour our Neighbour in all Neceſſities and Diſtreſſes of his Body, contains under it, in the Manner of different Species, the Preſervation of his Life, of his Members, of his Health, the turning away of any Thing that doth, or may grieve, or moleſt him, the ſupplying him with Food in Time of Famine, *&c.* And the oppoſite or negative Law, in the ſame Commandment, forbidding us to hurt the Body of our Neighbour, comprehends, in like Manner, Murther, Maiming, Wounds, Stripes, Threats [a], *&c.*

Thus too the affirmative Law, in the ſeventh Commandment, enjoining Chaſtity, contains under it, Purity of Thoughts, Modeſty of Words and Geſtures, Abſtinence from unlawful Love, *&c.* And the oppoſite Law, forbidding Unchaſtity, comprehends Adultery, Fornication, obſcene Speeches and Geſtures, and impure Imaginations. For, to give an Inſtance in this Caſe, obſcene Words do not reſpect Adultery in the Way of a Part or Degree: But becauſe the divine Law-giver was pleas'd, for Brevity ſake, to comprehend many *ſpecial* Acts under one general Law, hence it comes to paſs, that he who commits ſimple Fornication, doth as fully and entirely ſin againſt the ſeventh Commandment, as he that is guilty of Adultery. Therefore, as to theſe Objects, when what the Law commands is not perform'd, we muſt of Neceſſity either quite omit, or do directly the contrary. But other Objects of Actions, as determin'd in Laws, are in ſuch a Manner diviſible, that they ſeem to conſiſt of [8] *integral* Parts. So that here it is not neceſſary we ſhould do all, or omit all, or perform the contrary; but 'tis poſſible to perform one Part, and to let the reſt alone. For Example, the Law commands me to pay the Labourer his full Hire; now I may perhaps pay him ſome Part of it, and keep back the reſt. But when I not only deny a Man his Due, but farther take ſomething from him, or bring any Evil upon him, this Act will be quite of another Species, and bear no Reference or Affinity to the former.

[a] *Vid. Lib.* xlvii. *Tit.* x. *D. De Injuriis.*

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and, ſuppoſing them to be evil, endeavour, by their Calumnies, to create Suſpicions in other Men's Minds are manifeſtly arriv'd at the Height of Envy and Malice. *I obſerve* (ſays Mr. *Montagne* very well) *that the greateſt Wits of our Time employ their Ingenuity to darken the Splendor of the brave and generous Actions of the Ancients, by putting a bad Interpretation upon them, and aſcribing them to vain Motives. A wretched Subtilty! give me the moſt excellent and worthy Action in the World, and I will engage to find out fifty vicious, or faulty Views in it.* Lib. i. Cap. xxxvi. The famous Mr. *Bayle*, in his *New Letters* upon Mr. *Maimbourg*'s *Critical Hiſtory of* Calviniſm, *Let.* xii. §. 12. affirms, That the Laws of Charity, which oblige us to put a favourable Conſtruction upon the Actions of our Neighbour, rather than a diſadvantageous, are altogether contrary to Reaſon, but I have endeavoured to invalidate his Proofs of that Poſition, in my *Treatiſe of Sports, Lib.* i. *Cap.* iii.

[1] See *Lib.* viii. *Cap.* iii. §. 19, 20.

[2] An Attempt is counted for an Action, when the Impediment of performing ariſes from an Impoſſibility coming on it by ſome unforeſeen Accident, or invincible Hindrance, and not from any Refuſal or Diſcouragement in the Perſon acting. *Seneca* has a fine Paſſage to this Purpoſe, of which Mr. *Hertius* cites a Part; 'tis this, *Quædam ejus conditionis ſunt, ut effectum præſtare debeant; quibuſdam pro effectu eſt, omnia tentaſſe, ut efficerent. Si omnia fecit ut ſanaret, peregit Medicus partes ſuas. Etiam damnato reo, Oratori conſtat eloquentiæ officium, ſi omni jure uſus eſt. Et Imperatori etiam victo, & duci redditur, ſi & prudentia, & induſtria, & fortitudo muneribus ſuis functa eſt. Omnia fecit, ut beneficium redderet; obſtitit illi ſalicitas tua. Nihil incidit durius, quod veram amicitiam experiretur. Locupleti donare non potuit ſano adſidere, felici ſuccurrere Gratiam retulit, etiamſi tu beneficium non recepiſti.* De Benef. Lib. vii. Cap. xiii. "Some Things are of that Nature, "that they muſt produce an Effect; in other Things, 'tis the ſame with an Effect, to have endeavoured. The Phyſician has "done his Office, if he has done all he can to cure. The Pleader, if he has urged the Law well; and a General, if he "hath managed with Courage and Conduct, tho' a ſuitable Succeſs do not follow. Thanks is ſufficient, where no Requital "can be made."

[3] The Original expreſſes it thus, *Objecta Actionum*, i. e. The *Objects of Actions*, but the Object of Action is neither the Thing commanded, nor forbid, it is only the Perſon, with regard to whom we do, or abſtain from the Action; and ſo our Author himſelf uſes it in the next Paragraph. Doubtleſs he means, the *Matter* of Actions, and the Miſtake ariſes from hence, that, in his *Elements of the Univerſal Civil Law*, he had ſaid (*p.* 317) the *Objects* of Laws; for the Word *Actions*, ſubſtituted in the Place of *Laws*, would not ſuit his Purpoſe.

[4] Suppoſing, for Inſtance, that the Law commanded to *ſwear*, or to *marry*. Theſe are indiviſible Acts.

[5] The Law forbids to *kill*, you cannot kill by halves.

[6] The Law ordains to tell the *Truth*, when a Perſon is examined as a Witneſs. The Fact is either true or falſe. If you do not tell the *Truth*, you *lye*. There is no Medium.

[7] Our Author calls this the Fifth, and the next Commandment the Sixth, according to the *Lutheran* Diviſion of the Decalogue.

[8] We muſt underſtand them of Parts really diſtinct one from the other, and which, conſequently, can exiſt ſeparately.

V. Beſides all this, ſince one may be concern'd about a more noble, another about a more ignoble Object; and ſince one may produce more Good or Evil than another; it is plain, that upon this Account, likewiſe, amongſt good Actions ſome are far better than others, and amongſt ill Actions, ſome far [1] worſe than others. *Horace*'s [2] Inſtance may ſerve to illuſtrate this Truth;

Nec vincet ratio hoc, tantundem ut peccet, idemque
Qui teneros caules alieni fregerit horti,
Et qui nocturnus divûm ſacra legerit.——

Reaſon will never call't an equal Sin,
To rob an Orchard and a ſacred Shrine.

Add. Cicero pro Muræn: Where he ſmartly refutes the *Stoicks* Notion, that *all Sins are equal.* And his *Paradoxes, Chap.* iii. as, alſo, *Montaign*'s *Eſſays, Lib.* ii. *Cap.* ii. in the Beginning, and *Gaſſendus Phil. Epic. Tome* iii. Yet in many Caſes *Horace*'s Reaſoning will hold good, *Lib.* i. *Epiſt.* xvi.

——*De mille fabæ modiis quum ſurripis unum,*
Damnum eſt, non facinus pacto mihi lenius iſto.

When from a thouſand Pecks you ſteal but one,
Leſs Loſs is felt, but no leſs Guilt is ſhown [2].

And this is the *relative* Eſtimation of Actions, which is treated of at large, *Book* viii. *Chap.* iii.

CHAP. IX.

Of the Imputation of MORAL ACTIONS.

The CONTENTS of every Section of the ninth Chapter.

I. *Of actual Imputation.*
II. *Of Imputation thro' Favour.*
III. *Of Imputation from Debt.*
IV. *What can be effectually imputed to another.*
V. *Merit, and Demerit, what.*
VI. *How the Effects of moral Actions may be aboliſhed.*

WHAT Conditions are required to make an Action capable of being *imputed*, or of being conſider'd as really belonging to a Perſon, we have formerly ſhewn at large: It remains, that we ſee how and by what Means it may be actually *imputed*, ſo as to produce ſome moral Effect, either in the Agent, or in ſome other Man. And here we muſt firſt of all diſtinguiſh between thoſe Actions which are directed by Law, and thoſe which are left to every Man's free Pleaſure. Actions of the former Kind are then ſaid to be *imputed* to the Agent, when the Legiſlator or Sovereign declares him to be the Author of them, and, at the ſame Time, decrees [3], that the ordinary Effects of ſuch Actions ſhall redound on him, or ſhall be conceiv'd as inherent in him. But the latter Kind of Actions are then ſaid to be *imputed*, when he, who, without being bound by any Neceſſity, hath exercis'd them for the Uſe and Benefit of another Man, doth ſignify, that he undertook ſuch an Action for the other Man's ſake, and out of an Intention to oblige him. The latter Senſe of the Word *Imputatio* is moſt frequent in Claſſick Authors, and the former more in Uſe with the Divines and Moraliſts. But there is between them this manifeſt Difference, the former tends from the Legiſlator, or Sovereign, toward the Agent, but the latter proceeds from the Agent, and reſts in the Perſon, for whoſe Sake or Uſe the Action was perform'd.

II. The former Kind of *Imputation* is ſubdivided into *Imputation of Favour*, and *Imputation of Right*. *Imputation of Favour* is when a Man, out of pure Benevolence, derives upon another the Effects of an Action perform'd by a third Perſon; which Effects the ſecond Party had no Right to, without the Grant of the firſt. Or, when one, out of free Kindneſs, makes a larger Effect redound to the Performer of a certain Action, than the Action would otherwiſe of itſelf have produc'd. But this laſt Inſtance will hold good in Matters of Reward only [4], not in

[a] *Book* i. *Sat.* iii, ℣. 115, 116, 117.

[4] Since this Author does not expreſs himſelf either diſtinctly, or fully, upon this important Subject, and in *Lib.* viii. to which he refers us, treats of evil Actions only; I ſhall give you an Abridgment of what he ſays in his *Elements of Univerſal Civil Law. The relative Quantity of Actions may be conſider'd,* 1. *In reſpect to the Object. For the more noble the Object is, the more is a good Action, done to that Object, better than another; and, on the contrary, an evil Action the more criminal.* See *Lib.* viii. *Cap.* iii. §. 18. 2. *In reſpect to the State and Condition of the Agent. And ſo a Benefit, conferr'd by an Enemy, is more conſiderable, than that which is received from a Friend. And, on the contrary, an Injury done by a Friend is more ſenſible and affecting, than that done by an Enemy.* See the ſame Place, §. 20. 3. *In reſpect to the Nature of the Actions themſelves, according as we take more or leſs Pains to do them. A good Action, the more difficult it is, the more excellent and more commendable, all Things equally conſider'd. On the contrary, the more eaſily an evil Action may be avoided, the more enormous it is above others of the ſame Kind.* 4. *In reſpect to the Effect and Conſequences of the Action, on which Account the Action is better or worſe, accordingly as the good or bad Conſequences are, or may be foreſeen and prevented.* 5. *In reſpect to the Circumſtances of Time and Place.* See the Place already quoted. In fine, 'Tis evident, from this Compariſon of good Actions one with another, that ſome are more excellent than others, according as the Practice of ſome ought to give Place to the Practice of others, ſince we can't diſcharge all at the ſame Time. See what is ſaid about this, *Lib.* v. *Cap.* xii. §. 23. As to bad Actions, it is no Excuſe to ſay, that we have committed one leſs heinous, to avoid committing a worſe.

[3] M. *Dacier* remarks, that the Servant took but one Peck, the better to conceal his Theft. We may ſay, more generally, that, as no Man has more Right over Part of another's Property, than over the Whole, ſo, as ſoon as he determines to take the leaſt Thing, he ſhews a Diſpoſition, or Inclination, to take more, if he ſhould find a proper Opportunity. So that his Forbearance is either thro' Prudence or Intereſt, or ſome other Motive, and not from a Principle of Virtue. For, indeed, why ſhould he reſpect the Right of the Proprietor in one Thing more than another? Thus the greater, or leſs Value of the Thing taken, no way leſſens the Intention of the Thief, which is equally criminal. It is by other Circumſtances we muſt judge of the Degree of Wickedneſs.

[4] That is to ſay, adjudging to him the Rewards, and decreeing to him the Puniſhments inflicted by the Law, with all their Conſequences.

[1] The Author will explain, *Lib.* v. *Cap.* xii. §. 12. the Diſtinctions which the Civil Lawyers make, in treating upon Bargains and Laws, of Things, 1 *Odious*; 2. *Favourable*; and 3. *Mixt.* But here he treats only of Things advantageous and diſadvantageous.

Matters of Punishment. For, as such is the Nature of good Things, that they may be given to another *gratis*, without any Colour, or Condition; so, if a Man is not willing to confer a good Thing on another, by the Name of a pure Gratuity, he may lawfully do it under the Notion of rewarding him for some *imputed* Action, which either did not otherwise belong to him, or could not have given him a Right of demanding such a Benefit. But, on the other hand, common Reason will not allow me, on the same Pretence, to derive on another the Effects of an evil Action, which he is not really guilty of, and without the *Imputation* of which, these Effects would not follow his natural State and Condition. And therefore 'tis very incongruous and absurd, that either for a Fault purely another's, I should have those Things taken from me, which Nature gives every Man, on the very Account of his being a Man; or that, under the same Colour, such Things should be impos'd on me, as Nature, by an Indulgence universal to all Mankind, hath forbidden us to suffer without Reason. A Prince, for Example, may *impute* the Father's Merits to a Son not illustrious by his own Atchievements; and may, on the Account of those Merits, load him with Honours not otherwise his Due. But to punish the Innocent for the Father's Crime, is (strictly speaking) unreasonable [1]. This indeed may happen, that the Father's Fault shall be the Occasion of not conferring on the Son, or of taking from him, those Things which he was neither to receive, nor to retain, but under certain Conditions. But a Person thus dealt with, cannot be said to suffer an Evil, which his natural State would otherwise have made him a Stranger to. For Nature, in this Case, gave no Security to the Children, that that they should certainly possess the Parent's Goods, or that they should be admitted to the like Posts of Honour: But their Right to those Goods, or those Honours, proceeded on these Conditions and Proviso's, that the Parents should deliver them down safe and untainted, and should not fall under such and such Penalties by their Crimes. Nor can he, by any Means, be said to be in a worse Condition than human Nature admits or allows, who, having no paternal Inheritance, is forced to work out his Fortunes by his own Industry.

It is just, likewise, so far to proceed against innocent Children upon Account of their Parent's Demerits, as to oblige them to quit the Kingdom, or State. For no Man hath a Right from Nature of living in this or that Territory; but [2] every one attains to such a Right by some Act of his own, or of other Men: And it may be a Condition of keeping this Right, that he shall lose it in case his Parents are found guilty of some particular and high Offences. It is not repugnant to Reason, that the Possession of a Right should depend on contingent Terms. Though, that the Laws of some Countries are too rigorous, and severe in this Point, no Man can pretend to deny.

III. *Imputation of Right* consists in this, that those Persons, whose Interest it concerns, that an Action be done, or not done, do declare, that the said Action belongs to the Agent, and that the Effect assign'd to that Action shall redound or fall upon him. Hence, if in any Law a certain Reward be decreed to such or such a good Action, so soon as the Sovereign, or the Guardian of the Laws, shall understand that particular Action to have been perform'd by any Man, 'tis manifest, that the Man hath immediately a Right of demanding the promis'd Reward. But when a Man is enjoin'd to do a Thing, solely by the Authority of the Commander, and without any such Proposal of a Reward, he ought to rest satisfied with the bare Approbation of his Superior, and to esteem it a very sufficient Recompence, that he hath avoided his Displeasure, which would *necessarily have follow'd* upon Default. On the other Side, when an ill Action hath been committed, [3] so soon as the Author of it is discover'd, he hath Reason to fear the Execution of the legal Penalty.

As to inferior Persons, to whom neither the Guardianship, nor the Execution of the Laws belong, if they either approve a good Action, or reprehend a bad one, their Judgment can affect only the Credit and Character of the Agent. According to that elegant Saying of *Diodorus Siculus*, [4] *Praise is a kind of Reward of Virtue putting us to no Charges, and Dispraise is a Punishment of Vice inflicting no real Wound.*

It is farther to be observ'd, that when the Interest of many Persons is concern'd in the doing, or the not doing of an Action, if one of those Persons should forgive, and not *impute* it to the Agent, he cannot, by this Means, abate any Thing of the Right of the others, which he hath no Power to controul. Thus, if a Man hath done me an Injury by an illegal Fact, I may forgive him for my own Part and Concern, but, at the same Time, I do not, in the least, derogate from the just Pretensions of the Publick, and of the Sovereign Authority. And thus too the Pardon which GOD Almighty is pleas'd to vouchsafe to repenting Sinners, doth not at all impair or hinder the Proceedings of human Judicature. But when all the Persons, whom the doing or the not doing of a Thing concerns, agree that they will not *impute* it, in such a Case the Deed is conceiv'd to be Null and Void as to all moral Effects. Now the Persons concern'd in a Thing's being done, or not done, are either the Objects, or the Directors of the Action; that is, those towards whom the Action is perform'd, and to whom it brings either Good or Evil, and those who have a just Power of guiding and supervising such an

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[1] See what is said, *Lib.* viii. *Cap.* iii. §. 31.

[2] See *Lib.* viii. *Cap.* xi. §. 6, 7. following.

[3] He certainly renders himself guilty, and worthy of Punishment; which, if it be inflicted upon him, he has not the least Room for Complaint. But the Legislator is not indispensably oblig'd to punish him. He may indeed always do it if he will. This is sufficient to intimidate the Wicked, and make them regard it, as a great Imprudence, to expose themselves, even to the uncertain Danger of actual Punishment. The Legislator no way, by this, ties up his own Hands. He may, for good Reasons, entirely remit, or diminish the Punishment. But if he never punished at all, his Menaces would have no Force, and the Laws, consequently, become useless. As, on the other Hand, if he constantly inflicted Punishment to the utmost Rigour of the Law, his Supreme Authority would be limited, his Clemency would have no Room to exercise itself, and this inflexible Severity would sometimes produce Effects, which every wise Legislator would avoid. In a Word, Prudence is necessary here, and when the Authority of the Laws, and the public Tranquillity, are secure, the Legislator may shew, that as he has a Power to punish, he has, also, a Power to pardon, and, by this Means, equally display his Justice, Wisdom, and Goodness.

[4] *Diodorus*'s Words are, ἔστιν ὁ μὲν ἔπαινος ἔπαθλον ἀχρείῳ ἀδάπανον, ὁ δὲ ψόγος τιμωρία φαυλότητος ἄνευ πληγῆς. *In Excerpt. Peiresc.* Praise and Censure, to judge properly of them, always follow the Quality of Actions, or Omissions, according as they are morally good or bad. This is clear, with regard to the Legislator, who would grosly bely himself, if he did not approve what was agreeable to his own Laws, and disapprove the contrary. Those who are subject to him, are, by that, oblig'd to regulate their Judgment. Others, tho' independent of his Laws, must praise or blame those subject to them, according as they observe or violate them. The particular Differences of the Rule of Actions makes no Alteration in their Nature, and, consequently, none in the Opinion conceiv'd of them.

Action. For which reason, if, in Case of an Injury, the Deed be forgiven by the Person to whom it was offer'd, by the civil Magistrate, and by God Almighty, in moral Estimation it shall be suppos'd undone, and, consequently, shall be attended with no ill Effect [1].

IV. Very different from the Imputation of which we have been speaking, is that by which the Agent is said to *impute* an Action, which he might have omitted, to the Party for whose [2] Sake and Use he perform'd it. A Man who hath exactly fulfill'd the Command of his Superior, may indeed expect the Approbation of his Performance, as from all others, so especially from him who enjoin'd it. But he cannot lay claim to any farther Reward, unless such as is expresly promis'd in the Law [a]. For the same Reason, no Man can demand that it should be *imputed* to him, in order to the giving him any *Right*, that he hath abstain'd from a bad Action, forbidden by the Laws, or by any Command of his Superior; but he must be satisfied, that his Obedience hath pleas'd him who requir'd it. For since upon acting contrary to the Law, he would have justly incurr'd a considerable Evil, to escape such a Punishment must pass with him for a Reward. Hence in *Seneca*'s *Controversies*, *Lib.* iv. *Controv.* vii. when a Man [3], who being taken in Adultery by a Tyrant, hath forc'd the Sword out of his Hand, and killed him, desir'd a Gratification from the State, he is put off with this Rebuke, *imputat nobis quod deprehensis in adulterio mori noluit. He reckons we are indebted to him, because being taken in Adultery, he had the Sense to save his own Life:* And [4] *Tully*, in his second *Philippic*, denies himself to have any Obligations to *Antony* upon Account of his not being murder'd by him: *Where lies the Kindness to me,* (says he) *in your keeping yourself from so horrid a Villainy?* Others maintain the Reasonableness of our present Assertion from this Topick, that the Omissions of ill Actions are purely *non Entia*, and, consequently, can have no positive Affections, or Properties. Tho' to such an Argument it might perhaps be answer'd, That even these Omissions may, in moral Account, pass for *Entities*, as they are the real and actual Restrictions, and Confinements of our natural Powers

But now, if, for the sake of another Man, I do what I might rightly and properly have omitted, or omit what I might fairly and conveniently have done, it is highly reasonable, that I should *impute* my Service to him; or, that I should, by Virtue of my Right, demand of him to acknowledge my Kindness, and his own Obligation, according to the Quality and Condition of it. This *Imputation* cannot rightly be laid, unless there was in the Actor a real Intention of procuring some Good to the other Man; and in the Receiver an express, or, at least, a presumptive Consent to admit it. For no Man can *impute* or *reckon* to us a Service forc'd upon us against our Will: And it would be a much higher Degree of Impudence, to charge such a Fact to us for a Kindness, as was perform'd either without any Regard to our Benefit, or, perhaps, with a Design to hurt us. Thus he must be extreamly foolish, who would desire a Reward from a Man whom he [5] had restor'd to Health by breaking an Imposthume, otherwise incurable, whilst he intended to give him a mortal Stab. Yet [6] *Marius Celsus*, in *Tacitus* [b], when he was brought before *Otho* as one of *Galba*'s Servants and Confidents, immediatcly confessing his Loyalty to his old Master, propos'd it as an Example, how faithful he would be to the new Emperor; and thus reckon'd he had already oblig'd *Otho* by sticking resolutely to *Galba*. And thus *Eudoxia*, when she was married to the Emperor *Theodosius*, sent for her Brothers, by whom she had been formerly expell'd her Father's House; and was so far from resenting their Injury, that she rather paid them Thanks, as the Authors of her Promotion: [7] Since unless she had been driven from Home, she had never seen *Constantinople* [c].

When the Parties concern'd and interested agree in defining the Rate at which a Thing shall be reckon'd or *imputed*, in this Case a Covenant intervenes, expressing how far, or to what Value, the *Imputation* shall extend, and beyond what it shall not reach in any Business, or Transaction [d]. *For Merit* (as Mr. *Hobbes* [e] observes) *presupposeth a Right, and* implies, *That the Thing deserv'd is due by Promise.*

V. Hence 'tis easy to gather what is the Force of *Merit*, or what Actions are properly meritorious, which some Men would vainly *set to the Account of* God himself. Now the main Spring of all Merit is the Performance of a Work which we did not owe: or, which the Person towards whom it is exercis'd, had no Right of requiring from us. For he that performs a Thing which he lay under a full and perfect Obligation of doing, only discharges his necessary Duty, and lays no Foundation for any consequent Merit. *M. Senec.* Cont. Lib. i. Cap. viii. [8] *Give me leave to perform some Service to my Country, which may properly be a Piece of Merit: What I have hitherto done in the common Course of Arms, is not*

[a] *See* Luke xvii. 9, 10. [b] *Hist.* Lib. iv. [c] *Zonar.* Tom. iii. *Add.* Gen. xlv. 5. Lib. xx.
[d] *Comp.* Matth. xx. 13, 14. [e] *Leviath.* Chap. x.

[1] See *Lib.* viii. *Cap.* iii. §. 16. following.

[2] All this turns upon the different *Latin* Word *Imputare.* In attempting to explain these, our Author here falls into some Confusion, as he had done in his *Elementa Jurisprud. Univers.* Pag. 359. Whereas, according to the natural Idea of the Word *Imputation*, in the Style of Law and Morality, the Action is imputed to the Agent itself, as its Author, who, consequently, is worthy of either Praise or Censure, and receives either Profit or Loss by it. Here, on the contrary, the Action is imputed to another Person than the Agent, not as the Author, but as one for whose Advantage it is done, and who, by that, is bound to make some Return. These we see are Notions, or moral Qualifications of a quite different kind. It is proper to remember these, to prevent being misled by the Confusion into which the Author has run.

[3] This Example had been better plac'd a little lower, where the Author speaks of those who do some Service without any such Design, and, by Consequence, have some other Motive for their Actions.

[4] *Tully*'s Words are, *Quale autem beneficium est, quod te abstinueris nefario scelere?* Philip. 2. Chap. iii.

[5] They say this actually happen'd to a *Thessalian.* See *Tully, De Nat. Deor. Lib.* iii. *Cap.* xxviii. and *Plutarch de Capiendâ ex Inim. Utilit.* as, also, *Seneca de Benefic.* Lib. ii. Cap. xix. with the Note of *Justin Lipsius.*

[6] *Tacitus*'s Words are, *Celsus constanter servatæ erga Galbam fidei crimen confessus, exemplum ultro imputavit. Histor. Lib.* i. *Cap.* lxxi. *Num.* ii. See the Commentators on this Passage.

[7] Generosity join'd to the Pleasure we feel on these Occasions, at the Advantage we receiv'd accidentally from the Evil which another has done, or design'd to do us; these, I say, make us forget the Injury so far, as to regard it as a Benefit. But the Crime is still the same, and we should repent of it the rather, as the offended Person seems to express no Resentment. The Patriarch *Joseph* (whose Example our Author cites) comforted his Brethren in the like Case, with the View of an over-ruling Providence. And he did not even do this, till he had put them in great Fear, to make them reflect on themselves, in order to give them a due Sense of their Crime. This Conduct was much wiser than the Thanks of *Eudoxia.*

[8] The *Latin* of *Seneca* is this, *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus est.* And *Julius Capitolinus*'s Words are, *Quod quidem non satis magnæ pietatis est argumentum, quum impius sit magis, qui ista non faciat, quam pius, qui debitum reddat,* Cap. ii.

owing to me, but to the Laws. *Julius Capitolinus*, in his Life of *Antoninus Pius*, reciting the Reason of the Emperor's obtaining that Title, from lending his Hand to support his ancient Father-in-Law, in the Presence of the Senate, adds, *This Action was really no great Argument of Piety: Since the Debt we owe our Parents is such, as rather denominates a Man impious if he neglects, than pious if he pays* [1]. Neither is it fair to *impute* a Thing, which we do not owe to a Person against his Consent; and much less, if our doing of such a Thing did not turn to his Benefit. [2] Whence it is clearly apparent, that no Man can pretend to any Merit with Reference to Almighty GOD, even tho' it were possible for him to pay a full Obedience to all the Divine Laws. And that, therefore, GOD cannot, any other way, become a Debtor to mortal Men, but upon Account of his free Promise, the Breach of which would be repugnant to his [3] Goodness; not that any *Right*, properly so call'd, is thence deriv'd to us. Indeed no Actions enjoin'd by Virtue of a supreme Authority, do produce Merit towards the Enjoiner. For tho' both the Sovereign of Heaven, and the inferior Rulers of the Earth, are wont, frequently, to confer certain good Things on those who comply with their Commands, in order to the encouraging and exciting their Obedience; yet to the Payment of these good Things they are not bound by the Merits of the Agent, or as in the Manner of Covenants; but by their own free Offer and Promise: And therefore they cannot be so properly call'd *Rewards* as *Gratuities*, in the strictest Sense of that Word [a].

But notwithstanding all this, if the Legislator do expressly declare, that upon the Performance of such or such an Action, the Agent shall have a Right of demanding such a Reward; there's no doubt to be made, but he may fairly and justly require it. But the bare Omission of forbidden Actions is utterly unable to produce any Merit, or any Matter for Boasting, or for Praise. *Philostrat. de Vit. Apollon. Tyan.* Lib. vi. Cap. i. [4] *It is not an Act of Justice to abstain from Injustice, nor an Act of Prudence to have declin'd a foolish Resolution, nor of Valour not to desert one's Colours, nor of Temperance not to fall into the base Effeminacy of the* Medes; *nor will a bare negative Goodness entitle you to any Commendation: When we escape Punishment, but yet do nothing worthy of Honour and Reward, such an Indifference cannot reasonably be call'd Virtue.* Add *Luke* xviii. 11. *Ammian. Marcell.* Lib. xxx. Cap. xi. *To forbear Plunder and Rapine, is a false Foundation for Praise.*

It remains then, that the only Actions whereby we cannot obtain Merit towards other Men, are such as we do not owe them; at least, not by a full and perfect Obligation: Whether natural Reason either commands or adviseth them in general, leaving the Application of them to particular Persons in our Power; or whether they are only not enjoin'd by the civil Laws. For whatsoever I owe another, as a full and proper Debt, to that he hath already a Right, and therefore when I pay such a Due, I do not, properly speaking, part with any Thing which I have then a Right of retaining, or of otherwise applying, because upon denying and keeping it back, I should bring a real Injury and Damage on the Person to whom I stand engag'd. And therefore since Things, which I owe in this Manner, do already belong, in some respect, to another Person, and I have no longer a Power to dispose of them as I please, they cannot be proper Matter for the founding of Merit. But when I perform any Thing towards another Man, which I was not bound to pay by any *perfect Obligation*, such a Thing really passing from me, and accruing to him, leaveth in me either a perfect or an imperfect Right of receiving an equivalent Return. And this is properly *Merit* [b]; the Retribution, or Payment of which, when it is determin'd by express Covenant, we call *Wages*: But when, as to the Manner, the Time, and the Quantity, it is left to the Equity of the other Party, it bears the Name of *Reward*. Now upon such Accounts, and Considerations, we may receive four Kinds of Things, [5] Corporeal, Incorporeal, Moral, and [6] Notional. Of the first Sort are, Money, Land, *&c.* Of the second, the Grant of Privileges and Immunities: Of the third, Honours and Dignities: Of the last, Statues, Inscriptions, Crowns, and the like Tokens and Testimonies of Worth. Add. *Montaigne's Ess. Lib.* ii. *Cap.* vii.

And thus, as hath been shewn, *Merit* ariseth from those Actions which we do not owe to others; and chiefly as they are useful and beneficial to them. On the contrary, from evil Actions, especially such as damage or injure others, ariseth *Demerit*; by Virtue of which a Man is oblig'd to make Satisfaction for the Harm he hath done: But in general, all evil Actions produce a Guilt, by which the Agent is suppos'd liable to undergo some Penalty: Which Point we shall hereafter find more Room to explain. See *Lib.* viii. *Cap.* iii.

VI. As the actual applying of *Imputation* causeth the Effects of moral Actions to exist; so the ceasing, and, as it were, the recalling of it, doth dissolve and extinguish those Effects. And as to this Matter, the Case is very near the same in good Actions and in evil. For both good and evil Actions, whilst they are *such*, or so long as they are enjoin'd or prohibited by the Laws, must necessarily be attended with *Imputation*; at least, [7] in the first and plain Import of that Term. But when a Law is repeal'd, the

[a] *Euripides Rhes.* Rewarded Virtue gives a double Joy.

[b] *Add. Senec. de Beneficiis, Lib.* iii. *Cap.* xxi, xxii.

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[1] The Author might have added here, the Words which an ancient Rhetorician makes his Son speak, when his Father would hinder him from going to War the fourth Time, to secure him from the Danger. *Sine me aliquod meritum in patriam conferre, adhuc militia mea Legis munus est*, Seneca Controv. Lib. i. Contr. 8. Suffer me to do a meritorious Service to my Country, for, as yet, I have done no more in War, than I was obliged to do by the Law.

[2] Always provided, that the Thing be of such a Nature, that no Advantage can accrue from it to those, in Favour of whom we declare to act. For the Will should be taken for the Deed, if it has fail'd against our Expectation, and after our utmost Endeavours to insure its Success.

[3] Or rather his Veracity; which this Author himself mentions in his Elements of *Univers. Jurispr.* and therefore unfitly omits it here. For it is directly, and precisely on Account of this Virtue, that GOD cannot fail of performing what he has once promised. See *Nehem.* ix. 8. 33. 1 *John* i. 9. where he is called *Just*, who departs not from the Truth, neither in his Discourse nor Deportment.

[4] The *Greek* is, Μὴ γὰρ εἶναι δικαιοσύνην, τὸ μὴ ἀδικεῖν——ἔστε γὰρ φρόνησις, τὸ μὴ ἀνοήτως τι ἐνθυμεῖσθαι· ἔστε ἀνδρεία, τὸ μὴ λείπειν τὴν τάξιν· ἔστε σωφροσύνη, τὸ μὴ εἰς τὰ τῶν μοιχῶν ἐμπίπλειν· ἔστε ἄξιον ἐπάινε, τὸ μὴ κακὸν φάινεσθαι· πᾶν γὰρ ὃ τιμῆς τε καὶ τιμωρίαν ἴσον ἀφέστηκεν, ἔπω ἀρελή.

[5] See the Explication of this Distinction of the Lawyers, *Lib.* iv. *Cap.* ix. §. 7.

[6] Our Author understands by this, what serves to raise some Ideas in our Mind, and to signify something done by human Institution.

[7] To understand this, we are to know, that this Author (in his *Elements of Univers. Jurispr. p.* 357.) divides Imputation into *Simple* and *Efficacious*: *Simple Imputation* consists in simply approving, or disapproving an Action, so far, as there redounds no

Action. For which reaſon, if, in Caſe of an Injury, the Deed be forgiven by the Perſon to whom it was offer'd, by the civil Magiſtrate, and by God Almighty, in moral Eſtimation it ſhall be ſuppos'd undone, and, conſequently, ſhall be attended with no ill Effect [1].

IV. Very different from the Imputation of which we have been ſpeaking, is that by which the Agent is ſaid to *impute* an Action, which he might have omitted, to the Party for whoſe [2] Sake and Uſe he perform'd it. A Man who hath exactly fulfill'd the Command of his Superior, may indeed expect the Approbation of his Performance, as from all others, ſo eſpecially from him who enjoin'd it. But he cannot lay claim to any farther Reward, unleſs ſuch as is expreſly promis'd in the Law [a]. For the ſame Reaſon, no Man can demand that it ſhould be *imputed* to him, in order to the giving him any *Right*, that he hath abſtain'd from a bad Action, forbidden by the Laws, or by any Command of his Superior; but he muſt be ſatisfied, that his Obedience hath pleas'd him who requir'd it. For ſince upon acting contrary to the Law, he would have juſtly incurr'd a conſiderable Evil, to eſcape ſuch a Puniſhment muſt paſs with him for a Reward. Hence in *Seneca*'s *Controverſies*, *Lib.* iv. *Controv.* vii. when a Man [3], who being taken in Adultery by a Tyrant, hath forc'd the Sword out of his Hand, and killed him, deſir'd a Gratification from the State, he is put off with this Rebuke, *imputat nobis quod deprehenſis in adulterio mori noluit. He reckons we are indebted to him, becauſe being taken in Adultery, he had the Senſe to ſave his own Life:* And [4] *Tully*, in his ſecond *Philippic*, denies himſelf to have any Obligations to *Antony* upon Account of his not being murder'd by him: *Where lies the Kindneſs to me,* (ſays he) *in your keeping yourſelf from ſo horrid a Villainy?* Others maintain the Reaſonableneſs of our preſent Aſſertion from this Topick, that the Omiſſions of ill Actions are purely *non Entia*, and, conſequently, can have no poſitive Affections, or Properties. Tho' to ſuch an Argument it might perhaps be anſwer'd, That even theſe Omiſſions may, in moral Account, paſs for *Entities*, as they are the real and actual Reſtrictions, and Confinements of our natural Powers.

But now, if, for the ſake of another Man, I do what I might rightly and properly have omitted, or omit what I might fairly and conveniently have done, it is highly reaſonable, that I ſhould *impute* my Service to him; or, that I ſhould, by Virtue of my Right, demand of him to acknowledge my Kindneſs, and his own Obligation, according to the Quality and Condition of it. This *Imputation* cannot rightly be laid, unleſs there was in the Actor a real Intention of procuring ſome Good to the other Man; and in the Receiver an expreſs, or, at leaſt, a preſumptive Conſent to admit it. For no Man can *impute* or *reckon* to us a Service forc'd upon us againſt our Will: And it would be a much higher Degree of Impudence, to charge ſuch a Fact to us for a Kindneſs, as was perform'd either without any Regard to our Benefit, or, perhaps, with a Deſign to hurt us. Thus he muſt be extreamly fooliſh, who would deſire a Reward from a Man whom he [5] had reſtor'd to Health by breaking an Impoſthume, otherwiſe incurable, whilſt he intended to give him a mortal Stab. Yet [6] *Marius Celſus*, in *Tacitus* [b], when he was brought before *Otho* as one of *Galba*'s Servants and Confidents, immediately confeſſing his Loyalty to his old Maſter, propos'd it as an Example, how faithful he would be to the new Emperor; and thus reckon'd he had already oblig'd *Otho* by ſticking reſolutely to *Galba*. And thus *Eudoxia*, when ſhe was married to the Emperor *Theodoſius*, ſent for her Brothers, by whom ſhe had been formerly expell'd her Father's Houſe; and was ſo far from reſenting their Injury, that ſhe rather paid them Thanks, as the Authors of her Promotion: [7] Since unleſs ſhe had been driven from Home, ſhe had never ſeen *Conſtantinople* [c].

When the Parties concern'd and intereſted agree in defining the Rate at which a Thing ſhall be reckon'd or *imputed*, in this Caſe a Covenant intervenes, expreſſing how far, or to what Value, the *Imputation* ſhall extend, and beyond what it ſhall not reach in any Buſineſs, or Tranſaction [d]. *For Merit* (as Mr. *Hobbes* [e] obſerves) *preſuppoſeth a Right, and* implies, *That the Thing deſerv'd is due by Promiſe.*

V. Hence 'tis eaſy to gather what is the Force of *Merit*, or what Actions are properly meritorious, which ſome Men would vainly *ſet to the Account of* God himſelf. Now the main Spring of all Merit is the Performance of a Work which we did not owe: or, which the Perſon towards whom it is exercis'd, had no Right of requiring from us. For he that performs a Thing which he lay under a full and perfect Obligation of doing, only diſchargeth his neceſſary Duty, and lays no Foundation for any conſequent Merit. *M. Senec.* Cont. Lib. i. Cap. viii. [8] *Give me leave to perform ſome Service to my Country, which may properly be a Piece of Merit: What I have hitherto done in the common Courſe of Arms, is not*

[a] *See* Luke xvii. 9, 10. [b] *Hiſt.* Lib. iv. [c] *Zonar.* Tom. iii. *Add.* Gen. xlv. 5. Lib. xx.
[d] *Comp.* Matth. xx. 13, 14. [e] *Leviath.* Chap. x.

[1] See *Lib.* viii. *Cap.* iii. §. 16. following.

[2] All this turns upon the different *Latin* Word *Imputare.* In attempting to explain theſe, our Author here falls into ſome Confuſion, as he had done in his *Elementa Juriſprud. Univerſ.* Pag. 359. Whereas, according to the natural Idea of the Word *Imputation*, in the Style of Law and Morality, the Action is imputed to the Agent itſelf, as its Author, who, conſequently, is worthy of either Praiſe or Cenſure, and receives either Profit or Loſs by it. Here, on the contrary, the Action is imputed to another Perſon than the Agent, not as the Author, but as one for whoſe Advantage it is done, and who, by that, is bound to make ſome Return. Theſe we ſee are Notions, or moral Qualifications of a quite different kind. It is proper to remember theſe, to prevent being miſled by the Confuſion into which the Author has run.

[3] This Example had been better plac'd a little lower, where the Author ſpeaks of thoſe who do ſome Service without any ſuch Deſign, and, by Conſequence, have ſome other Motive for their Actions.

[4] *Tully*'s Words are, *Quale autem beneficium eſt, quod te abſtinueris nefario ſcelere?* Philip. 2. Chap. iii.

[5] They ſay this actually happen'd to a *Theſſalian.* See *Tully, De Nat. Deor. Lib.* iii. *Cap.* xxviii. and *Plutarch de Capiendâ ex Inim. Utilit.* as, alſo, *Seneca de Benefic.* Lib. ii. Cap. xix. with the Note of *Juſtin Lipſius.*

[6] *Tacitus*'s Words are, *Celſus conſtanter ſervatæ erga Galbam fidei crimen confeſſus, exemplum ultro imputavit. Hiſtor. Lib.* i. *Cap.* lxxi. *Num.* ii. See the Commentators on this Paſſage.

[7] Generoſity join'd to the Pleaſure we feel on theſe Occaſions, at the Advantage we receiv'd accidentally from the Evil which another has done, or deſign'd to do us; theſe, I ſay, make us forget the Injury ſo far, as to regard it as a Benefit. But the Crime is ſtill the ſame, and we ſhould repent of it the rather, as the offended Perſon ſeems to expreſs no Reſentment. The Patriarch *Joſeph* (whoſe Example our Author cites) comforted his Brethren in the like Caſe, with the View of an over-ruling Providence. And he did not even do this, till he had put them in great Fear, to make them reflect on themſelves, in order to give them a due Senſe of their Crime. This Conduct was much wiſer than the Thanks of *Eudoxia.*

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the Action about which it was concern'd can no longer be *imputed*. The Imputation of an Action not properly due, he alone can remit, whoſe Intereſt it is, that the Effect or Conſequence of the Action ſhould be made good. Therefore if he who hath perform'd a Work remits the Imputation, the Wages otherwiſe due cannot, on any Account, be demanded. But to make this Releaſement, or Remiſſion, is not in the Power of the Perſon for whom the Work was done; it being the Creditor's Part to forgive, and not the Debtor's. So, likewiſe, to take off the Imputation of an ill Action, as to any Force and Efficacy, belongs to thoſe, whoſe Intereſt it is that ſuch an Action be attended with its due Effects; that is, to the Party injur'd, and to the Maker and Guardian of the Law, not to the Author of the Fact [1].

The *Civilians* reduce the chief Ways by which Crimes are cancell'd, or extinguiſh'd in human Courts [2], to theſe five. Firſt, when the Puniſhment defin'd by the Law ſhall be compleatly undergone: For no Man is puniſh'd twice, and with equal Severity for the ſame individual Fault. Tho' many Puniſhments indeed leave a kind of laſting Stain behind them [a],[3] and, frequently, after the Completion of a corporal Puniſhment, moral Puniſhment, or Infamy, with its ſcandalous Marks, [4] continues. Secondly, he whom the Judges have acquitted, paſſeth, in human Eſteem, for an innocent Perſon. The third Way is, when the Delinquent dies. Tho' ſometimes, in extraordinary Crimes, for a Terror to others, Severities are ſhewn on the Body, the Goods, and the Memory of Wretches after they are dead. Fourthly, by Length of Time Crimes are ſo far taken away, as that the Author cannot be afterwards try'd on the ſame Account. *Senec. Oedip.* [5].

Latere ſemper patere, quod latuit diu. V. 826.

What long hath lain conceal'd ſhould ever lie.

Tho' *Lyſias* (Orat. xii.) denies that a Crime can be blotted out by any Space of Years. The fifth and laſt Way is the procuring of Pardon for the Offence from the ſovereign Power [b].

As the Effects of an evil Action lie dormant, as long as the Action is either conceal'd, or thoroughly diſſembled, or pardon'd (as it were) before-hand: So when once theſe Effects have broken out in Publick, their *moral* Part may indeed be effac'd, but not their *phyſical*. For what is once done, cannot, in a phyſical, or natural Senſe, be render'd undone; but it may be ſo order'd, as that it ſhall no longer have any moral Effect in civil Life. Thus a Man who hath been whipp'd for a Miſdemeanor, muſt ſtill keep the Scars and Signs in his Back, tho' all the Diſgrace and Scandal of the Puniſhment may be remov'd by a Decree of the Government. And when the Imputation is taken off, the Action is, to all Intents and Purpoſes, no more than if it had never been done [c].

We need only add by way of Remark, that thoſe Authors are ſtrangely miſtaken, who, in order to the taking away the Guilt of an evil Action, beſides the Non-Imputation, or the Forgiveneſs of it, require the Infuſion of ſome contrary Quality, or of the Habit of Juſtice and Honeſty: In the ſame Manner, as by plaiſtering over a Wall we rid it of the Spots that were in it before; and as we drive away an ill Smell by burning Frankincenſe in a Room. Which Miſtake was occaſion'd by their Ignorance of moral Things, and becauſe they imagin'd that moral Qualities were produc'd and deſtroy'd in the ſame way as phyſical: The Abſurdity of which Notion is plain enough from what we have before deliver'd.

[a] Vid. *Sueton. Claud. Chap.* xvi. [b] *All which are treated of at large, by* Anton. Matthæus *de Crimin. ad Lib.* xlviii. *D. Tit.* xix.
[c] *And thus we are to underſtand thoſe Sentences of* Ovid de Pont. *Lib.* i. *El.* i.

Eſtque pati pœnam quam meruiſſe minus.
'Tis leſs to feel, than to deſerve our Doom,
Pœna poteſt demi, culpa perennis erit.
The Penalty may ceaſe, but ne'er the Crime.

Mors faciet certè, ne ſim cum venerit exul,
Ne non peccarim mors quoque non faciet.
Death's kind Releaſe may end my baniſh'd State.
My Sin will live, and mock the Power of Fate.

Effect from it to the Agent. And this Sort of Imputation may be made indifferently by any, whether he hath any Intereſt or no in the Action that is done, or not done. An *Efficacious Imputation* is that which produces ſome Effect, with relation to the Agent; and this belongs to thoſe, whoſe Intereſt it is, that the Action be done or not.

[1] Sometimes the Law lays a double Fine on the Criminal; to wit, one payable to the Perſon injured, and the other to the Public. It appears from a Declaration of *Quintilian*, that tho' the Party griev'd might admit his Part of the Fine, the Criminal was not freed from that Part due to the State: *Qui in Templo injuriam facerit, &c. Declam.* cclxiv.

[2] For before the divine Tribunal, nothing but a ſerious Repentance can efface our Crime, becauſe that only can obtain our Pardon, without which we are always liable to Puniſhment.

[3] Our Author's Words are *Velut lituram*. By this he underſtands Records, or other Monuments, which remain, and preſerve the Memory of the Puniſhment inflicted; ſo as to give a diſadvantageous Idea of the Criminal. Our Author here alludes to a Sentence of the Emperor *Claudian*, who, at the Intreaty of his Courtiers, having granted, that a Mark of Infamy, inflicted on a Perſon, ſhould be remov'd, ſaid, playing upon the Words, *Let it be ſo, but let ſome Scratch remain. Et quum orantibus familiaribus demſiſſet cuidem adpoſitam notam, Litura tamen, inquit, exiſtet. Sueton. Caud.* Cap. xvi. See the Interpreters thereupon.

[4] See *Book* viii. *Chap.* iv. §. 7. following.

[5] Our Author here quotes the Words of *Seneca*'s *Oedipus*, where an old Man adviſes *Oedipus* to keep that always ſecret, which had long lain hid. This can hardly be thought to our Author's Purpoſe: For it plainly appears, by what follows, and is ſpoken by the ſame old Man, that he intends nothing about the Imputation of Crimes, for (thus he ſays) *Sæpe eruentis veritas patuit malo*, ℣. 827. they who make ſuch Diſcoveries, often endanger themſelves, by laying open the Truth. See *Lib.* iv. *Cap.* xii. §. 2. at the End.

BOOK

BOOK II.

CHAP. I.

It is not agreeable to the Nature of Man to live without LAWS.

The CONTENTS.

I. *Whether a Law may be impoſed on Man, is doubtful.*
II. *What Freedom of Will is.*
III. *What ſort of Freedom of Will is in GOD.*
IV. *What is the Freedom of Beaſts.*
V. *Man too noble a Creature to be allowed ſuch a Freedom.*
VI. *The Corruption of ſuch a Freedom.*
VII. *The Variety of Men's Tempers.*
VIII. *Man's natural Weakneſs and Rudeneſs.*

I. HAVING, in the preceding Book, explain'd the Condition of moral Things in general, together with the moſt frequent Uſes of the common Terms, (which Notices, if inſerted otherwiſe, and only as Occaſion ſerv'd, would have interrupted us in our Buſineſs, and broken the Series of our Undertaking) we come now to fall more directly on our main Deſign; and the firſt Enquiry we are here to make, is, whether it would be convenient, or not, for Men to paſs their Lives without the Reſtraint of any Law. Whence it will evidently appear, why the All-wiſe Creator hath not inveſted them with ſuch a wild Liberty, as ſhould impower them to act merely as they liſt, and as their wandring Inclinations lead them; without being under the Reſtraint of any Rule, [1] Neceſſity, or Law. For ſince GOD Almighty has been pleas'd to endue Man with a Will, (that is, with a Power of working by a kind of internal Impulſe, and enabling him to incline towards ſuch Things as appear agreeable to him, and to turn from ſuch Things as ſeem inconvenient or unpleaſant) and with ſuch a Will as cannot be compell'd; a Doubt may be rais'd, whether it did not become the Divine Goodneſs to allow him the full Range of this flexible Faculty, without any Limit, or Impediment. For to what Purpoſe, ſome will ſay, did GOD firſt make us intirely free to all Things, and afterwards confine us to certain Bounds and Rules? And as the Motion of our Joints is render'd uſeleſs by the Reſtraint of Chains and Fetters; ſo may the Liberty of the Will ſeem vain, and of no Manner of Uſe, if we can incline to many Things, which muſt of Neceſſity be forborn, and if we can be averſe to many Things, which we muſt as neceſſarily purſue and undertake.

II. In tracing this Point to its proper Spring, we think it convenient firſt of all to ſhew, that an abſolute Liberty would be ſo far from being uſeful, that indeed it would be deſtructive to human Nature; and that therefore the binding and reſtraining it with Laws, is highly conducive to the Good, and to the Safety of Mankind. And this Conſideration, rightly purſued, will, at the ſame Time, diſcover what Scope may be fairly indulg'd, and how far the Reins may be given to our Freedom. Here then we muſt know, that Liberty in general implies, *an internal Faculty of doing, and of omitting Things, according to the Direction of our Judgment.* When we call it [2] a *Faculty*, or Power, we intimate, that the Perſon to whom this Liberty is applied, is Maſter of ſufficient Strength for many Performances, and has a Force and Ability, not only to move himſelf, but to imprint Motion on other Things, and to affect them in a certain Manner. We term this Faculty *internal*, to ſignify, that its Force, and its Motion, ariſe from an inward Principle, contrary to that outward and violent Impulſe, which is the Cauſe of Movement, rather in a Log, than in a Man. Laſtly, we add, *according to the Direction of our Judgment*, to hint, that the Motion is not rais'd at a Venture, or by ſome blind kind of Force; but that the Agent is ſuppos'd, in ſome Degree at leaſt, to have had a Knowledge of the Object, and to have determin'd himſelf to Action, after ſome ſort of Deliberation, ſo that the immediate Reaſon of his acting ſhall be, becauſe he was pleas'd to act. At the ſame Time it will be underſtood, that all Rubs and Hinderances, which may [3] either prevent the Motion, or turn it another Way, ought to be ſuppos'd abſent, when we ſtate the Notion of Liberty in Perfection, and without Alloy.

III. Matters being thus ſettled, if we caſt our Eyes over the univerſal Frame of Things, we ſhall find, that many have no Liberty at all, ſuch are all inanimate and vegetative Creatures. Others enjoy ſeveral Kinds of Liberty, and in ſeveral Degrees. An univerſal Liberty, void of all Hinderance, and of all Defect, is applicable only to GOD Almighty; this is conceiv'd as the moſt noble Attribute of his moſt perfect Eſſence, admitting no Bounds or Circumſcription, and intimately join'd with Omnipotence. And therefore, the Reaſon

[1] Our Author does not treat here of a *phyſical*, but *moral* Neceſſity, ſuch as is explain'd, *Lib.* i. *Cap.* vi. §. 14. *ad fin.* and *Cap.* vii. §. 2. Neceſſity is no more than Obligation.

[2] Our Author ſays only, *A Faculty*, but this Term alone does not imply the Power of acting or moving, *&c.* for there are Faculties purely Paſſive, and therefore I have added this Definition of a Faculty to do, or not, that we are to underſtand by it, a Power of Acting or Moving, not only itſelf, but communicating a Motion to other Things, and modelling them after a certain Manner.

[3] There are, in general, two Sorts of Obſtacles or Impediments, which hinder us from acting according to our own Wills, the one *phyſical*, as Chains, Fetters, Priſons, *&c.* The other *moral*, as a Bond, Law, Government, Authority, *&c.* *Elem. Jur. Univerſ. p.* 20.

why GOD doth not do [1] ſome Things, or why he doth not always do [2] all Things, is not to be fetch'd from the Deficiency of his Liberty, but from his own abſolute Pleaſure [a]. So, likewiſe, when we ſay, he cannot do all Things [3], this does not proceed from any outward Impediment, whether [4] natural, or moral; but from his own Intention and Deſign, which we Mortals endeavour to conceive, in Proportion to his Greatneſs and his Excellency. In which Senſe we are to interpret that common Saying, *That* GOD *is a Law to himſelf.* Thus too the Juſtice, which we aſcribe to GOD, is not to be ſuppos'd to bear a Regard to any Obligation, or to any Right in another Perſon, as the Nature of human Juſtice neceſſarily implies. But inaſmuch as he has ſhewn, both by his Works, and by his Revelations, that ſuch a Manner of acting is ſuitable to his moſt compleat Nature, hence we come to expreſs it by the ſame Term, which denotes our own equitable Dealings towards other Men. Thus the Reaſon why GOD's Promiſes do not fail, is not becauſe his Liberty is reſtrain'd by any Obligation ariſing from his Promiſe, but becauſe it is agreeable to the divine Excellency, to let us not expect in vain, what he commands us to expect, or becauſe, to violate a Promiſe, implies ſome kind of Imperfection, from which the ſupreme Nature is moſt immenſely remov'd. Upon which Account, we Men do not challenge the divine Promiſes, as of Right belonging to us, but receive them with Humility and Reverence, as Gratuities proceeding from GOD's free Pleaſure. For 'tis not here, as in human Promiſes, where there lies an Obligation to Payment, where the Promiſe turns into a Debt, and what was before free, is brought under a Neceſſity: But thoſe Things, which GOD performs upon Promiſe, do as fully retain the Nature of Gifts and Benefits, as thoſe Things which he diſpenſes, without any ſuch ſeeming Engagement. Thus may we, weak Mortals, faintly repreſent the divine Liberty; but that alone, which we can determine with Certainty about it, is, that it ſurpaſſes, in an infinite Manner, both our Notion, and our Condition [b].

IV. Brute Creatures, which are plac'd below our Degree of Being, do, however, enjoy a Liberty proper to their Nature and State. But this Liberty cannot be otherwiſe than very ignoble, ſince the Power of theſe Animals is confin'd to ſuch narrow Bounds, and ſince ſuch is the Dulneſs of their Senſes, and ſuch the Lowneſs of their Appetite, that they are concern'd about very few Objects, and regard even thoſe but very negligently and ſuperficially; nor are excited by any Thing, but what is extremely groſs, and perpetually obvious, and tends to the Service of their Belly. As to other Matters, they have no Cuſtom, no Law, no Right to bind them, in tranſacting either with one another [5], or with Mankind. Amongſt a few of them, there is ſome Semblance of Marriage, but ſuch as is obſerv'd in the bare Act of Conjunction, and in ſome Shew of Love or Liking, not in any Strictneſs of ſerious and conſtant Fidelity. Moſt of them, as ſoon as they have ſatisfied their luſtful Deſires, retain no farther Mark of Love, no Senſe of Shame, no Regard of Offspring. Some indeed are moſt paſſionately fond of their Young, but then their Kindneſs continues no longer, than till they are able to provide for themſelves. After this Period, all Love is loſt and forgot on both Sides; the Dams take no Care, or Notice of their Progeny, and the Progeny do not ſhew any Gratitude, any Senſe of Debt or Duty to their Dams. Thoſe Beaſts, which feed on Fleſh, tear and devour, without Diſtinction, whatever is agreeable to their Palate; and many, when they fall out, pull each other in Pieces, without Regret. Being ignorant of the Laws of Propriety, whenever a ſharper Hunger than ordinary pinches them, we may ſee them fighting furiouſly for the common Paſture or Prey; and what ſome have laid up, or ſeiz'd for their private Uſe, the others make no Scruple to invade, and to devour. Nor is there, among them, any ſuch Thing as Eſteem, as Honour, Command, or Prerogative, unleſs ſuch as is deriv'd purely from Superiority of Strength. It muſt be confeſt, that Likeneſs of Kind does produce, in ſome Creatures, a Shew of Friendſhip, and of Society. Hence many delight to live in Herds, and thoſe which are more fierce than others, have ſome Averſion to preying on their own Kind. Thus *Juvenal* obſerves, *Sat.* XV. *ver.* 159, *&c.*

——————————*Parcit*
Cognatis maculis ſimilis fera: quando leoni
Fortior eripuit vitam leo? quo nemore unquam.
Expiravit aper majoris dentibus apri?
Indica tigris agit rabidâ cum Tigride pacem
Perpetuam: ſævas inter ſe convenit urſis.

Beaſts of one Kind from other each refrain:
No weaker Lion's by the ſtronger ſlain:
Nor from his larger Tuſks the Foreſt Boar
Commiſſion takes his Brother Swine to gore.
Tyger with Tyger, Bear with Bear you'll find,
In Leagues offenſive and defenſive join'd.
Mr. TATE.

But, not to ſay that there's ſomething of a Poetical Figure in theſe Expreſſions, we may only take Notice, that this ſeeming Relation is but a very weak Bond for a laſting Friendſhip: Since 'tis immediately broken, whenever the Concerns of the Belly intervene. Thus you ſhall ſee a Litter of Puppies play very lovingly together, but throw a Piece of Meat amongſt them, and you breed a dangerous and a general Quarrel [6]. The Reaſon why ſome Creatures exerciſe a little Shadow of Duty, Love, Faith, and Gratitude towards Men, is purely to be referr'd to Cuſtom, and to their Deſire of being ſupplied with Food. If theſe Obſtacles are

[a] *See* Pſalm cxv. 3. Epheſ. i. 11.

[b] *Add Cumberland De Legg. Nat. Cap.* vii. §. 6.

1 For Example, doth not make ſeveral Moons to circulate round the Earth, as may be ſeen to go round the Planets of *Jupiter* and *Saturn*. *Apologiæ Pufend.* §. 7.

2 As to create every Day new Kinds of inanimate Bodies, or even Animals, *Ibid*

3 The Imperfection of human Language may juſtify this Way of ſpeaking againſt the Criticiſm of *Montagne*, who has carried the Matter too far: "It has always (ſays he) appear'd to me very fooliſh and irreverent, in Chriſtians to ſay, *God cannot die, God cannot contradict himſelf, God cannot do this or that.* They do not like confining the Divine Power, in this Manner, to our Forms of Speech. The Truth, which offers itſelf in their Propoſitions, ſhould be repreſented in a more modeſt and religious Manner." *Eſſais, Liv.* ii. *Chap.* xii.

4 See *Note* 2. of §. foregoing. When we ſay, that GOD can't do a Thing abſolutely, as for Example, Lye, or be worſe than his Word: For ſince there is no Being ſuperior to GOD, to lay any Obligation upon it, nor more powerful than he, to hinder him from doing as he pleaſes, or to conſtrain him to abſtain from certain Things, or do others, the Inability, which we attribute to GOD, can proceed from nothing but his own good Pleaſure, and infinite Perfections, *Ibid.* See *Chap.* iii. §. 5, 6. following.

5 See *Chap.* iii. §. 2. following.

6 This Example is alledg'd by *Arrian*: τὶ οὖν; Κυνάρια ἐδὲ ποτ' εἶδες σαίνοντα καὶ προσπαίζοντα ἀλλήλοις, ἢ εἶπης ἐδὲν φιλοκόπτει ἀλλ' ὅπως [Thus we muſt read with *Salmaſius*, for ὅταν] ἴδῃς τὶ ἐστὶ φιλία, βάλε κρέας εἰς μέσον, καὶ γνώσῃ. *Epictet Diſſert. Lib.* ii. *Cap.* xxii.

once remov'd, and if they find themſelves of ſufficient Strength, Man himſelf cannot eſcape their Violence, if he unhappily provokes them. The Liberty of Brutes then is not reſtrain'd by any intrinſical and moral Tie: Tho' their external Motions are often violently put under Confinement by Men Now if any one is ſo curious, as to enquire on what Account brute Creatures are allow'd ſo unbounded a Freedom, the plain Reaſon ſeems to be, becauſe GOD Almighty has not given them a Mind capable of the Knowledge of Right, and of Law. There was indeed no Occaſion to be ſo very careful and exact, in enſuring the Safety and Preſervation of ſuch Beings, as are not only produced by Nature, with ſuch vaſt Fertility, and with ſo little Pains, but are, likewiſe, denied the Privilege of an immortal Soul; and whoſe Life conſiſts in nothing elſe, but in the curious and accurate Diſpoſition of the little Parts of Matter, with the additional Benefit of Motion. Hence GOD is pleas'd, in producing, and in deſtroying theſe inferior Animals, to give us frequent Inſtances, and evident Tokens of his Power. Another Reaſon why Brutes had no need of the Reſtraint of Laws, is, becauſe their Appetite is rais'd by nothing elſe but by Hunger, or Thirſt, or by ſalacious Deſire, for their Satisfaction in all which Enjoyments, Nature has made ſuch large Proviſion. Neither is it likely, that their unlimited Way of Proceeding ſhould render them very hurtful, and deſtructive to Mankind, ſince we are enabled, by our ſuperior Strength and Cunning, to prevent any ſuch unhappy Effects [a].

V. Now why the great Creator ſhould not indulge us Men in ſo lawleſs a Liberty, many Reaſons may be given, ariſing both [1] from the primitive and from the acceſſory State and Condition of human Nature. The Dignity of Man, and his Excellency above all the other Parts of the animal World, made it requiſite that his Actions ſhould be ſquar'd by ſome Rule; without which no Order, no Decorum, no Beauty can be conceiv'd. Hence it is his greateſt Honour that he has obtain'd an immortal Soul, endu'd with the Light of Underſtanding, with the Faculties of judging and of chooſing Things, and with an admirable Capacity for Arts and Knowledge. On which Account he is juſtly term'd,

Sanctius——animal, mentiſque capacius altæ
——Et quod dominari in cætera poſſet.

An Animal bleſt with Loftineſs of Mind, and with Sanctity of Reaſon, and fram'd for the Dominion and Sovereignty of all the reſt [b].

Farther, That the Soul was deſign'd, by the All-wiſe Creator, for a much nobler End than to ſerve only as Salt to keep the Body freſh, [2] may be gather'd from this Conſideration, that the greateſt and moſt ſhining Part of its Faculties are ſuch, as contribute either little or nothing to the Preſervation of the Body, which [3] might be ſecur'd without any ſuch mighty Parade, without ſo great and pompous a Proviſion. It's plain, that the Power and the Activity of the rational Soul, [4] is chiefly exercis'd about ſuch Things as belong [5] to the Worſhip of GOD, and to a Life [6] of Society and of Civility. And 'tis principally for the Service and Furtherance of theſe great Ends, that it can [7] from known Things infer and explain thoſe which are leſs known, that it can diſcern and judge what is agreeable and what diſagreeable to it; that it can form univerſal Notions by Abſtraction from Singulars; that it can by proper Signs communicate its Notions to others, can form Inventions, can apprehend the Nature of Numbers, Weights, and Meaſures, and compare them with one another; that it can perceive the Beauty, and the Force of Order and Method; that it can either raiſe, or repreſs, or moderate Affections; that it can hold in Memory and *endleſs Compaſs of* Things, and call out, as it were, at its Beck, any Part of the Stock which it has Occaſion to uſe; that it can turn its Sight inward upon itſelf, recollect its own Dictates, and by them judge of its Actions, whence ariſes the Force and the Authority of Conſcience. Of all theſe Powers and Abilities there would be very little Uſe, or rather none at all, in a lawleſs, a brutal, and an unſociable Life [c]. Now the more Gifts GOD has beſtowed on Man, and the greater Inlargements he has granted to his Wit and Mind, the more baſe and unſeemly would it be that all theſe noble Endowments ſhould ruſt for want of Culture and Regulation, ſhould be vainly ſpent and ſquander'd away without Uſe, without Order, and without Grace. Nor was it altogether in vain, that GOD indued Man with a Mind apprehenſive of Accuracy and of Decency; but it was, without doubt, intended, that he ſhould ſo employ the Powers he had receiv'd, as to manifeſt the Glory of his Creator, and to promote his own true Intereſt and Happineſs. The Heathen Poet was able to make ſuch an Inference as this:

——Quis dubitet hominem conjungere cœlo?
Eximiam natura dedit linguamque capaxque
Ingenium, volucremque animum; quem denique in unum
Deſcendit Deus atque habitat, ſeque ipſe requirit.

Then who can doubt that *Man*, the glorious Pride
Of all, is nearer to the Skies ally'd?
Nature in *Men* capacious Souls has wrought,
And given them Voice expreſſive of their Thought.
In *Man* the God deſcends, and joys to find
The narrow Image of his greater Mind.

Mr. CREECH.

[a] Add *Charron of Wiſdom, Book* i. *Chap.* xxxiv.

[b] *Solinus* (Cap. iii.) calls Man a Being, *whom Nature has preferr'd to all others in Excellency of Senſe, and in Capacity of Reaſon.*

[c] Add. *Cumberland de Legg. Nat. Cap.* ii. §. 4. *who likewiſe, in the 33d Section of the ſame Chapter, has drawn moſt admirable Proofs, from the Frame and Structure of Human Bodies.*

[1] We muſt underſtand by the *Primitive State*, that, in which Man was, when he came out of the Hands of his Creator, conſidered purely and ſimply as a Man, before he had made any Uſe of his Faculties, whereas, his acceſſory State *(poſt ſuperveniens)* is that wherein he is left to himſelf, and, conſequently, ſuppoſes the Uſe of his Faculties. The firſt is treated of in this Paragraph, and the other in the three following.

[2] This is an Alluſion to what *Cicero* ſays of Swine: *Ut non inſcitè illud dictum videatur in Sue, animam illi pecudi datam pro ſale, ne putiſceret. De Finib. bon. & malor.* Lib. v. Cap. xiii. *in fin. So that it may not be improperly ſaid of the Hog, that Life was beſtow'd upon the Animal, leſt it ſhould ſtink.*

[3] This appears from the Example of ſome Beaſts, which are endued with long Life, as Stags; and of ſome Trees, as the Oak, which continue a long Time, tho' they have no Senſation. *Cumberland, Chap.* ii. §. 4.

[4] The Sagacity of our Mind conſiſts not in finding out what Sort of Meats, Exerciſe, or Medicines, are proper to lengthen out our Lives here; for the moſt able Phyſicians and Philoſophers have had but a very imperfect and uncertain Knowledge of thoſe Things. *Ibid.*

[5] See *Chap.* iii. §. 20. following, *Note* 2.

[6] *Cicero* obſerved this, when he reckoned up the Advantages of Men above Beaſts, in theſe Words, *Eademque natura, vi rationis, hominem conciliat homini ad Orationis & ad vitæ Societatem——Nec vero illa parva vis naturæ eſt, rationiſque, quod unum hoc animal ſentit, quid ſit ordo, quid ſit quod deceat, in factis, dictiſque qui modus*, i. e. "Nature, by the Force of Reaſon, "renders Men fit for Converſation——Nor is this a ſmall Force of Nature and Reaſon, that Man only is ſenſible what Order is, "and how both Words and Actions are to be moderated." *De Offic. Lib.* i. *Cap.* iv. See, alſo, *De Legibus, Lib.* i. *Cap.* vii.

[7] See *Chap.* iii. §. 10. following, *Note* 5. and *Cicero de Nat. Deor. Lib.* ii. *Cap.* lix.

VI. Another Reaſon, why it was inconvenient to allow Man the ſame extended Liberty as Brutes, 'was his prodigious Corruption and Degeneracy ſo many Degrees beyond theirs. That we charge him thus, no one will wonder, who has had the Curioſity to reflect a little on the various Purſuits and Inclinations of Mankind. Beaſts are ſolicited only by their Belly, and by their Luſt: And then their Luſt has ſome Shew of Temperance, provoking them only at certain Times and Seaſons, and being exercis'd, not for empty and ſuperfluous Pleaſure, but for Increaſe and Propagation of their Kind. *Oppian Cyneg. Lib.* iii. *ver.* 151, 152.

Οὐ γὰρ τοῖς θήρεσσι νόμῳ γαστὴρ ὅτε πλήθει
Εἰς λέχος ἐρχομένοις τελέειν φιλοπήσιον ἔρδον.

Beaſts, in their Joys, a decent Temp'rance keep;
Nor offer Love, when 'tis the Time for Sleep.

But the carnal Deſires of Men do neither obſerve any ſet Times for their Eruption [2], nor are, by any Means, ſo moderate in their Heat, as to make no farther Efforts, than are neceſſary for the Preſervation of human Species. Again, the Hunger of Beaſts is eaſily ſatisfied with ſuch Food, as Nature has ſpread, in all Places, for their Suſtenance; nor do their Meals ſtand in need of the Formality of Furniture, or of the Incentives of Sauce. And when they find this Appetite reliev'd and quieted, they put an End to their Buſineſs and their Care. (Nor are they very forwardly diſpos'd to Rage or Miſchief [3], provided they are unprovok'd, and that their two chief Deſires are at reſt.) But now the Food of Man muſt not only ſatisfy his Belly, but tickle his Palate [4]. Nature has taken Care, that Beaſts ſhould have no need of other Cloathing, beſides what ſhe has given them. But Man turns the Infirmity of his Nakedneſs into an Occaſion of Vanity and Pride. Beſides, do not Men float in a whole Tide of Affections and Deſires, utterly unknown to Beaſts? Covetouſneſs [5], Ambition, Vainglory, Envy, Emulation, Contentions of Wit, Superſtition, the Care of future Things, and the Spur of Curioſity, do all claim Entertainment in human Breaſts, and yet are Strangers to the dumb Creation. *Manilius Aſtron. Lib.* iv.

——————*Nullo votorum fine beati*
Victuros agimus ſemper, nec vivimus unquam,
Pauperiorque bonis quiſque eſt, quo plura requirit:
Nec quod habet numerat, tantum quod non habet optat.
Quumque ſui parvos uſus natura repoſcat,
Materiam ſtruimus magnæ per vota ruinæ,
Luxuriamque lucris emimus, luxuque rapinas,
Et ſummum cenſus pretium eſt effundere cenſum.

Why ſhould deluding Hopes diſturb our Eaſe,
Vain to purſue, yet eager to poſſeſs?
With no Succeſs, and no Advantage crown'd,
Why ſhould we ſtill tread on th' *unfiniſh'd* Round?
Grown grey in Cares, purſue the ſenſeleſs Strife,
And ſeeking how to live, conſume a Life?
The more we have, the meaner is our Store,
The unenjoying craving *Wretch* is poor.
But Heaven is kind, with bounteous Hand it grants
A fit Supply for Nature's ſober Wants:
She aſks not much, yet Men preſs blindly on,
And heap up more, the more to be undone:
By *Luxury* they *Rapine*'s Force maintain,
What that ſcrapes up, flows out in Luxury again;
And to be ſquander'd, or to raiſe Debate,
Is the great only Uſe of an Eſtate.

Mr. CREECH.

Liban. Declam. 9. *Is not a Man a mild and peaceable Animal, ſo far as Words go; but, in Reality, ſavage and ungovernable? For when do we hear of Lions undertaking an Expedition againſt Lions? When do wild Beaſts war againſt their own Kind? What Perjury do we find amongſt them? What Breach of Covenants? What Perfidiouſneſs and Avarice, what inſatiable Love of Riches? What Intemperance, what Adultery can we lay to their Charge?* Whoever conſiders and examines the unhappy Variety of Contentions and Quarrels, that continually ariſe amongſt Men, will find, that the greateſt Part of them proceed from ſuch Inclinations, and Propenſions, as never diſturb the Peace of Brutes [a]. Now, in ſo violent a Fierceneſs, and in ſo wide a Diverſity of Affections, and of Deſires, what a Life would Men lead, were they deſtitute of the Benefit of Law, to unite and to compoſe them? We ſhould ſee nothing but a furious Multitude of Wolves, of Lions, of Dogs tearing, and devouring each other. Every Man would indeed be a Lion, a Wolf, a Dog to his Neighbour, or rather a Monſter, more pernicious, and more ſpiteful, than the fierceſt of theſe Creatures; ſince Man, of all living Things, is the moſt able to hurt Man, and, if left to his own furious Paſſions, the moſt willing. And ſince Men are continually bringing ſo many Evils and Miſchiefs on one another, while they now live under the Force of Law, and under the Fear of Puniſhment, what would become of the World, if they were left to the wild Sway of their Corruptions, if they had no inward Bridle to curb their Inclinations, and to check their Purſuits. *Add.* Ariſtotle's *Problems, Sect.* 29. *Queſt.* 7. Plin. *Nat. Hiſt. Lib.* xviii. *Proem.* Jamblichus *Protrept. Cap.* xx. *That Men ſhould maintain a Familiarity with one another, and, at the ſame Time, live contrary to the Laws, is an impoſſible Thing: For, by this Means, they would*

a Add. *Charron of Wiſdom, Book* i. *Chap.* xxxiv. *Num.* 12. and *Chap.* xxxix. *Num.* 11.

[1] *Philemon*, an ancient Poet, quoted by *J. Lipſius* upon *Seneca, Epiſt.* ciii. ſays, That were it not for this, no Laws need be made for Man; and that Man is naturally a fierce Beaſt, who differs nothing from them we call ſo, but that he lifts up his Head towards the Heavens. His Words are theſe,

Φεῦ ὡς πόνηρον ἐστὶν ἀνθρώπων φύσις
Τὸ συνάλλον· Οὐ γὰρ ἂν ποτ' ἐδεήθη νόμων
Οἵει τι τῶν ἄλλων διαφέρει θηρίων
Ἄνθρωπον; Οὐδὲ μικρὸν, ἀλλὰ σχήματι.
Πλαγί' ἐστὶ τ' ἄλλα, τοῦτο δ' ὀρθὸν θηρίον.

Mr. *Hertius* has collected together abundance of Authorities about this Matter, which we may find in his *Elements of Civil Prudence, Part* i. *Sect.* i. §. 5, *&c.* I know they are not all to the Purpoſe, nor taken at the firſt Hand; for the firſt of them gives a juſt Suſpicion to the contrary. *Seneca* ſays indeed, *Cæterum idem ſemper de nobis pronunciare debebimus, malos eſſe nos, malos fuiſſe, invitus adjiciam, & futuros eſſe.* De Benef. Lib. i. Cap x. But there is not one Word of what Mr. *Hertius* adds, as if it were ſubjoined in the ſame Place, *Vis amplius dicam? Homo eſt omnium animalium peſſimum, ac deterrimum, qua nihil pejus, ac atrocius.* See *Lib.* vii. *Cap.* i. §. 4. *Note* 5. following.

[2] Διὸ ἀνοσιώτατον, καὶ ἀτιμοτάτον [τῶν ζώων ἄνθρωπος] ἀνευ ἀρετῆς καὶ πρὸς ἀφροδίσια καὶ ἐδωδὴν χείριστον. *Ariſtot. Pol. Lib.* i. *Cap.* ii. *in fine.* Man, without Virtue, is the moſt profane and wild Creature, as to Venery and Eating.

[3] *Nunquam enim illas* [*feras*] *ad nocendum, niſi neceſſitas miſit, aut fame, aut timore, coguntur ad pugnam. Homini placet hominem laniare.* Seneca Epiſt. ciii. "Nothing but Neceſſity drives the Beaſts to hurt one another, either Hunger or Fear "forces them to fight. Men take a Pleaſure in killing each other."

[4] To compleat the Senſe, we may add, out of this Author's *Abridgment of the Duties of a Man and a Citizen, Lib.* i. *Cap.* iii. §. 4. And he often deſires more Food than his Stomach can digeſt, as well as that which reſpects Revenge, in the Enumeration of thoſe Paſſions of Man, which are unknown to Beaſts. Of which the Author ſpeaks a little lower.

[5] *Uni (animantium) ambitio, uni avaritia, uni immenſa vivendi cupido, uni ſuperſtitio, uni ſepulturæ cura, atque etiam poſt in futuro.* Plin. Nat. Hiſtor. Lib. vii. Præm.

ſuffer more Injury and Damage, than if every Man led a ſeparate Life by himſelf. On theſe Accounts, and for theſe Neceſſities, Law and Juſtice are to be admitted as it were for Sovereigns amongſt Men, without the Government of which they could not continue or ſubſiſt.

VII. It is ſtill farther obſervable to our Purpoſe, that a much greater Variety of Diſpoſitions may be diſcover'd in Men than in Beaſts. All the ſeveral Kinds of irrational Creatures are, for the moſt part, indu'd with the ſame Inclinations, and rais'd and incited by the ſame common Appetites and Affections. We may underſtand a whole Species by the Knowledge of one ſingle Member of it. But amongſt Men there are *not more Heads than Wits*; and every one is equally zealous in giving the Preference to his own Opinion, and to his own Poſſeſſions. So *Horace*, *Sat.* i. *Lib.* ii. ſpeaks:

—Quot capitum vivunt, totidem ſtudiorum millia.

As many Men as live, of them the Brain
As many thouſand Studies entertain.

Philemon *in* Stobæus, *Speech* 2. [1] *If a Man ſhould get together thirty thouſand Foxes, he'd find that they not only have all one Nature, but all one Method and Tenor of Life. But amongſt US, as many Bodies as there are, ſo many Ways of living may we diſcover.* Plin. Pan. *There are no Things in the World more likely to diſpleaſe all, than ſuch as are done with an Aim of pleaſing all.* Nor are all mov'd with a ſimple and an uniform Deſire, but with Propenſions as vaſt in their Number, as they are various in their Mixture and Compoſitions. Nay, the ſame Man is very frequently unlike, and unequal to himſelf, and what he once moſt eagerly deſir'd, he ſhall at another time moſt ſtrongly abhor:

—— Magno curarum fluctuat æſtu,
Atq; animum nunc huc celerem, nunc dividit illuc;
In parteſq; rapit varias, perq; omnia verſat [a].

This Way and that he turns his anxious Mind,
Thinks, and rejects the Counſels he deſign'd;
Explores himſelf in vain through ev'ry Part,
And gives no Reſt to his diſtracted Heart.
Mr. DRYDEN.

Neither is there a leſs Difference in their Studies, their Inſtitutions, and their Inclinations to employ and exert their Vigor of Mind, as appears from the numberleſs Profeſſions, and the endleſs Methods of living. [2] *Quintus Calaber. Lib.* i. Now, as the more Voices there are, the more harſh and unpleaſant would be the Sound, unleſs they join'd in Conſort and Harmony; ſo would human Life be nothing elſe but Noiſe and Confuſion, were not the jarring Diſſonance compos'd and ſweeten'd by Law, and turn'd into a muſical Agreement. As things ſtand, this exceeding Variety of Parts and of Diſpoſitions, is at the ſame time an Ornament and an Advantage to Mankind; ſince, when it is thus rightly temper'd, there naturally reſults from it ſo admirable an Order and Grace, as could not have been produc'd by an univerſal Likeneſs. And beſides, there was likely to be much leſs Claſhing and Conteſt in ſo vaſt a Multitude, whilſt their various Humours and Inclinations led them to quite different Objects of Choice. The ſame wiſe Counſel Providence ſeems to have us'd in ſpreading ſo wonderful a Diſtinction of Features over the Faces of Men. For ſince different Offices are to be diſcharg'd, and *different Behaviour* to be us'd towards different Perſons; there would ariſe a moſt wild and fatal Diſorder, if all Men exactly reſembled one another, and could not be diſtinguiſh'd but by artificial Marks, which would be liable to ſo many counterfeiting Cheats. *Add.* Dr. *Cumberland, de L. N. Ch.* ii. §. 28. And there lies this farther Secret in this natural Diſtinction, that one Face pleaſes the Fancy of one Man, and one ſeems more agreeable to another; ſo that out of the univerſal Stock, every Man may chuſe what he thinks moſt beautiful, and what may engage his Affection with the ſweeteſt Comfort and Delight.

VIII. Beſides all this, it was inexpedient for Man to live without Law upon account of his exceeding Weakneſs; which is our laſt Reaſon. A few Days will ſet a brute Creature in a Condition of providing for himſelf; nor is he in any great Need of the Company of others for his Aſſiſtance and Support. But Man, from his firſt coming into the World, undergoes a long and tedious Courſe of helpleſs Infirmity. *Quinctilian Declam.* 306. *The Frailty of human Nature appears moſt in its Beginning and early Growth. The Beaſts ſee their Young, immediately after their Birth, ſtanding on their Feet, and ſeeking for the Dug; but we are forc'd to take up the helpleſs Infant, and to protect him from the Cold; and, after all this Nicety and Care, it is not unlikely, he may die beiween the Arms of the Parents and the Boſom of the Nurſe.* *Add.* Plin. N. H. Lib. vii. Præfat. What a Length of Years is requir'd, and what Diligence of Information, to enable him, by his own Strength, to accommodate himſelf with

[a] *Virg. Æn.* viii. *v.* 19. Add. *Charron de la Sageſſe*, Lib. i. Chap. xxxiv.

§. VII. [1] His Words are, Ἐὰν τεισμυρίας ἀλώπεκας τὰς συναγάγῃ, μίαν φύσιν ἁπάντων ὄψεται, τρόπον δ' ἕνα· ἤμβλυ ἢ ὅσα ἔχῃ τὰ σώματα ἢ ἄειθμον καὶ ἐν ᾧ, τοσοῦτος ὄχλος ἢ ποικίλος ἰδεῖν. And *Pliny*'s *Nulla magis omnibus diſplicent, quam quæ ſic fiunt tanquam omnibus placeant.*

[2] His Words are,

Πᾶσι δ' ἀφ' ἀνθρώποισιν ὁμὴν γένος, ἀλλ' ὅτι ἔργα
Στρωφᾶται ἄλλῳ ἐπ' ἄλλα—— —— ——

All Men indeed have th' ſame Original,
But them to divers Works their Genius's call.

§. viii. [3] *Quintilian*'s Words are, *Caducum circa initia animal; homines ſumus, nam ferarum, pecudumq; fœtibus eſt ſtatim ingreſſus, & ad ubera impetus: nobis tollendus infans, & adverſus frigora nutriendus: ſic quoque inter parentum manus, gremiumq; nutricis ſæpe labitur.* And *Theocritus*'s, theſe, Ἄλλῳ δ' ἄλλον ἔδωκε θεὸς γ' ἐπιδευέα φωτῶν, i. e. *GOD made Man to want eath others Help.* To theſe we may add the fine Deſcription of *Seneca, Quid eſt homo? imbecillum corpus, & fragile, nudum, ſuâpte naturâ inerme, alienæ opis indigens, ad omnem fortunæ contumeliam projectum, quum benè lacertos exercuit, cujuſlibet feræ pabulum, cujuſlibet victima, ex infirmis fluidiſque contextum, & lineamentis exterioribus nitidum; frigoris, æſtus, laboris impatiens: ipſo rurſus ſitu, & otio iturum in tabem, alimenta metuens ſua, quorum modo inopia, modo copia rumpitur; anxiæ, ſolicitæq; tutelæ, precarii ſpiritus, & male hærentis, quem pavor repentinus, adjectuſq; ex improviſo ſonus auribus gravis excutit: Soli ſemper ſibi nutrimentum vitioſum & inutile,* i. e. What is Man? His Body is frail and weak, naked and defenceleſs, wanting Help, and expoſed to Misfortnnes; when he is arrived at ſome Strength, a Prey to Beaſts, every body's Sacrifice; made up of Infirmities, tho' of a neat Compoſure, unable to undergo Heat, Cold, or Labour; growing diſeaſed by Idleneſs; ſuſpecting his Food, by Want and Plenty of which he is ſometimes ruin'd; anxious and ſolicitous; of a precarious and inconſtant Mind, which a ſudden Fear and Noiſe diſtracts; his Nouriſhment is vicious and unprofitable to himſelf alone. *De Conſol. ad Marciam*, Chap. xi. Our Author ſeems to have had theſe Words in his Thoughts, becauſe he expreſſes himſelf much to the ſame Effect.

Food and Cloathing? Let us ſuppoſe a Man bred up by another, juſt ſo far as to be able to walk, and without hearing a Word ſpoken, inſomuch that he ſhall be deſtitute of all Inſtruction and Diſcipline, and enjoying no Knowledge, but ſuch as ſprouts naturally from the Soil of his Mind, without the Benefit of Cultivation; let us ſuppoſe the ſame Man to be left in a Wilderneſs or Deſert, and entirely depriv'd of the Company and of the Aſſiſtance of others: What a wretched Creature ſhould we at laſt behold! A mute and an ignoble Animal, Maſter of no Powers or Capacities, any farther than to pluck up the Herbs and Roots that grow about him; to gather the Fruits which he did not plant; to quench his Thirſt at the firſt River, or Fountain, or Ditch that he finds out in his Way; to creep into a Cave for Shelter from the Injuries of the Weather, or to cover over his Body with Moſs, Graſs, and Leaves. Thus would he paſs a heavy Life in moſt tedious Idleneſs; would tremble at every Noiſe, and be ſcared at the Approach of any of his Fellow-Creatures, 'till at laſt his miſerable Days were concluded, by the Extremity of Hunger, or of Thirſt, or by the Fury of a ravenous Beaſt. That Mankind therefore do not paſs their Life in a more forlorn, and a more deplorable Condition than any other living Thing, is owing to their Union and Conjunction, to their Intercourſe with the other Partners and Companions of their Nature. The divine Saying, *'Tis not good for Man to be alone*, is not to be reſtrain'd to Matrimony, but ſeems to belong in general to any Society with other Men. But now without Law, 'tis impoſſible that any Society ſhould be either introduc'd or maintain'd in Strength and Quietneſs. And conſequently, unleſs Man had been deſign'd for the baſeſt and the moſt wretched Part of the animal Creation, it was not by any means convenient that he ſhould live looſe from all Direction and Obligation of Law. *Plutarch*'s Philoſophy could teach him, that a general and unbounded Licenſe of Acting was diſagreeable to the Condition, and to the Dignity of Man. '*Thoſe Perſons only* (ſays he, *De Audit.*) *who live in Obedience to Reaſon, are worthy to be accounted* Free. *They alone Live as they* will, *who have learnt what they ought to* will. *Thoſe who give the Reins to unworthy Practices and Purſuits, uſe an imaginary Freedom, to purchaſe a real Diſſatisfaction.*

From all theſe Remarks it is ſufficiently evident, that the natural Liberty of Man, ſuch as really and truly agrees to him, and not only in an abſtracted Senſe, muſt always be underſtood as guided and reſtrain'd by the Ties of Reaſon, and by the Laws of Nature [2].

CHAP. II.

Of the natural State of Man.

The Contents.

I. *Man's natural State diverſly conſidered.*
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XI. *Natural Peace has no need of Covenants.*
XII. *Natural Peace is not to be truſted to.*

I. BY the natural State of Man, in our preſent Enquiry, we do not mean that Condition which is [3] ultimately deſign'd him by Nature, as the moſt perfect and the moſt agreeable; but ſuch a State as we may conceive Man to be plac'd in by his bare Nativity, abſtracting from all the Rules and Inſtitutions, whether of human Invention, or of the Suggeſtion and Revelation of Heaven; for the Addition of theſe Aſſiſtances ſeems to put another Face on things, and to frame human Life anew, by an exacter Model. By this wide Exemption we do not only exclude all the various Arts and Improvements, and the univerſal Culture of Life, but eſpecially civil Conjunctions and Societies, by the introducing of which Mankind was firſt brought under the decent Management of Order and Regularity. That we may be able to form clear and diſtinct Notions of this ſuppos'd State, we will firſt conſider it *in itſelf*, and examine eſpecially what Rights and what Inconveniences attend it; that is, what would be the Condition of particular Men, if there were no Arts or Inventions ſet afoot, and no Communities form'd and eſtabliſh'd in the World. And then, ſecondly, we will conſider it *in order to other Men*, whether in this Regard it bears the Semblance of Peace, or of War; that is, whether Men who live in a natural Freedom, ſo as neither to be ſubject to one another, nor to acknowledge a common Maſter, are likely to prove Enemies or Friends. In this ſecond Conſideration the State we are ſpeaking of is capable of a Subdiviſion, being either *full* and *abſolute*, and ſo bearing an equal Regard towards all Men in general; or elſe *limited* and *reſtrain'd*, as it has Reſpect only to a certain Part of Mankind. This double Notion of a State is anſwerable to the double Manner in which we may conſider the Men who are to compoſe it, either as each particular Man lives in a natural

[1] His Words are, Τῷ λόγῳ τοὺ ἑπομϕόυς ἄξιον ἔςι μόνους ἐλευθέρους νομίζειν. Μόνοι γὰρ, ἃ δεῖ βέλεσθαι, μαθόντες, ὡς βέλονται ζῶσι, τοῖς ὑπ' αὐτῶν δόξαις καὶ ϕρονήσεσιν ἕνεκα, καὶ μικρὸν ἐν πολλῷ τῷ μετανοεῖν ἐκόσιον. *De audit. in princip.*

[2] See *Buddei Elementa Philoſophiæ practicæ*, Part II. Chap. iii. where he is both particular and large in ſhewing how People incorporated into Society, are under a Neceſſity of having Laws impoſed upon them.

[3] If Mr. *Titius* (*Obſervat.* 452.) had conſidered well theſe Words, he would not have criticiſed upon our Author, as calling that Eſtate Natural very unfitly, which is contrary to Nature, *i. e.* to the Intention of God, who appointed Man for Society. See what our Author ſays at the End of §. 4.

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tural Liberty towards all others; or as ſome Men have entred into a Society between themſelves, but are join'd to all the reſt of the World by no other Ties, beſides thoſe of common Humanity.

II. Now to form in our Minds ſome Image of this natural State, ſuch as it would be, if deſtitute of all Arts and Aſſiſtances either invented by Men, or reveal'd by GOD, we muſt fancy a Man thrown at a Venture into the World, and then left entirely to himſelf, without receiving any farther Help or Benefit from others, than his bare Nativity; we muſt likewiſe ſuppoſe him to be furniſh'd with no larger Endowments of Body or Mind, than ſuch as we can now diſcover in Men, antecedent to all Culture and Information; and laſtly, we muſt take it for granted, that he is not foſter'd under the peculiar Care and Concern of Heaven. The Condition of ſuch a Perſon could not prove otherwiſe than extremely miſerable, whether he were thus caſt upon the Earth in Infancy, or in Maturity of Stature and of Strength. If an Infant, he could not but have ſadly periſh'd, unleſs ſome brute Creature had, by a kind of Miracle, offer'd its Dugs for his Support; and then he muſt neceſſarily have imbib'd [1] a fierce and ſavage Temper, under the Nurſery and Tutelage of Beaſts. If in Perfection of Limbs and Size, we muſt, however, conceive him naked, able to utter nothing but an inarticulate Sound, a Stranger to all Inſtitution and Diſcipline, amazed and ſtartled at the things about him, and even at his own Being: The Admonition of Hunger would make him ſeize greedily on any thing that was near him, his Thirſt would direct him to the firſt Water, and Dens or Trees would afford a Refuge from the Injuries of Weather. Should we ſuppoſe a Number of ſuch helpleſs Wretches thrown together by Nature on ſome uninhabited Soil, we cannot but think that they would ſo long, however, continue in a brutal Wildneſs and Diſorder, 'till at laſt, either by their own Wit and Experience, or by ſome Hints and Inſtructions taken from the Conduct of mute Creatures, they ſhould by degrees arrive at ſome Method and Elegancy of living; and, as *Virgil* ſays,

—— *Varias uſus meditando extunderet artes,*
Studious Need might beat out uſeful Arts.

This will eaſily be acknowledg'd by any one that looks about on the numerous Improvements and Aſſiſtances which we make uſe of in our daily Actions, and at the ſame time conſiders how difficult it would be for any Man to invent all theſe of his own Head, if he were not put in the way by the previous Labour and Guidance of others; and how great a Part of theſe Ornaments and Conveniences of Life would at once enter into the Thoughts of the Generality of Mankind. Hence it is no wonder that the Heathen Writers, who underſtood not the true Origin of Men as deliver'd in holy Scriptures, ſhould make ſo foul a Repreſentation of their primitive State.

Quum prorepſiſſent primis animalia terris,
Mutum & turpe pecus, glandem atq; cubilia prenſant
Unguibus & pugnis, dein fuſtibus, atq; ita porro
Pugnabant armis, quæ poſt fabricaverat uſus.
Donec verba, quibus voces ſenſuſq; notarent
Nominaq; invenere; dehinc abſiſtere bello,
Oppida cœperunt munire, & condere leges,
Ne quis fur eſſet, neu latro, neu quis adulter.

When the firſt Fathers of our human Brood,
Dirty and dumb crawl'd from the teeming Mud;
A War began with Nails, and Fiſts, and Heads,
For Acorn Banquets, and for leafy Beds.
Cudgels came next in Play, and riper Hate
Arm'd them with ſurer Inſtruments of Fate.
At length their Voice grew Index of their Thought,
Joyful to name the Things for which they fought.
Now Rage began to cool, and Force to ceaſe,
And gen'ral Parleys work'd a gen'ral Peace.
Towns roſe, and Laws were ſettled, to remove
Invading Thefts, and check licentious Love.

This is *Horace*'s Deſcription, and we may expect a fuller from *Lucretius*.

Et genus humanum multò fuit illud in arvis
Durius, ut decuit, Tellus quod dura creâſſet.

Quod ſol atq; imbres dederant, quod terra creârat
Sponte ſuâ, ſatis id placabat pectora donum;
Glandiferas inter curabant corpora quercus;
Plerumque.

At ſedare ſitim fluvii fonteſq; vocabant.

Nec dum res igni ſcibant tractare, nec uti
Pellibus, & ſpoliis corpus veſtire ferarum:
Sed nemora atq; cavos montes ſylvaſq; colebant.
Et frutices inter condebant ſqualida membra,
Verbera ventorum vitare imbreſq; coacti.
Nec commune bonum poterant ſpectare, nec ullis
Moribus inter ſe ſcibant, nec legibus uti.
Quod cuique obtulerat prædæ fortuna, ferebat,
Sponte ſuâ ſibi quiſque valere & vivere doctus.
Et Venus in ſylvis jungebat corpora amantum,
Conciliabat enim vel mutua quamque cupido,
Vel violenta viri vis atq; impenſa libido.

—— *Illud erat curæ quod ſæcla ferarum*
Infeſtam miſeris faciebant ſæpe quietem.

Inde caſas poſtquam ab pelles ignemq; pararunt;
Et mulier conjuncta viro conceſſit in unum,
Caſtaq; privatæ Veneris connubia læta
Cognita ſunt, prolemq; ex ſe videre creatam.
Tum genus humanum primum molleſcere cœpit:
Ignis enim curavit, ut alſia corpora frigus
Non ita jam poſſent cœli ſub tegmine ferre:
Et Venus imminuit vires; puerique parentum
Blanditiis facile ingenium fregere ſuperbum.
Tunc & amicitiam cœperunt jungere habentes

§. ii. [1] This appears from an Inſtance which *Procopius* (*Lib.* ii. *Gothicorum*) relates of a Child nurſed by a Goat. Mr. *Hertius* alſo quotes *Harthknock*'s Hiſtory of *Poland*, *Lib.* i. *Chap.* ii. who relates ſomething like it of an Infant who had been ſuckled by a Bear, and being brought to *Warſaw*, was preſented to *Caſimire* King of *Poland*, in 1661. I ſhall alſo add at length a like Story which the ſame Mr. *Hertius* has ſet down in his Treatiſe of Sociality, (*primo Jur. Natur. Principio*, Sect. 1. §. 8.) yet leaving the Reader at Liberty to examine the Truth of it, tho' the Author warrants it. "In 1344 there was a Child found "in *Heſſe*, who, as we underſtand ſince, was taken away by Wolves, when it was about three Years old, and wonderfully "maintained by them. They carried it to a Tree, where they laid up the greateſt Part of their Prey, and in the Winter they "dug a Ditch, into which they caſt Leaves and Graſs, which they laid under the Child, lying themſelves round it to keep it "from the Cold. They taught it to go on the Hands and Feet, and run like themſelves; inſomuch that by Cuſtom it would "run as ſwift, and make as great Leaps. When he was firſt taken, they bound ſome Pieces of Wood to him, to reſtore him, "and accuſtom him not to go like a Beaſt with his Face downward. He was carried to the Court of *Henry* Prince of *Heſſe*, and "was often heard to ſay, That if it were in his Power, he had rather live among the Wolves again, than among Men." This Story is related by the Author of the Additions to the Hiſtory of *Lambert de Schaffnaberg*, about 1344.

Finitima inter ſe, nec lædere, nec violare:
Et pueros commendarunt muliebreq; ſæclum,
Vocibus & geſtu cum balbe ſignificarent,
Imbecillorum eſſe æquum miſererier omnium.
Non tamen omnimodis poterat concordia gigni,
Sed bona magnaq; pars ſervabant fœdera caſti;
Aut genus humanum jam tum foret omne peremptum,
Nec potuiſſet adhuc perducere ſæcla propago.
At varios linguæ ſonitus natura ſubegit
Mittere, & utilitas expreſſit nomina rerum, &c.

Then Man was *hard*, as hard as *Parent*-Stones,
And built on *bigger* and on *firmer* Bones.

Contented they with the *poor eaſy* Store
That *Sun* and *Earth* beſtow'd, they wiſh'd no more,
Soft *Acorns* were their firſt and chiefeſt Food.
When thirſty, then did purling Streams invite
To ſatisfy their eager Appetite.

They knew no Uſe of Fire to dreſs their Food,
No Cloaths, but wandred naked thro' the Wood.
They liv'd in *ſhady Groves*, and *Caves* confin'd
Were Shelter from the *Cold*, the *Heat*, and *Wind*.
No fix'd *Society*, no ſteady Laws,
No *publick* Good was ſought, no *common* Cauſe.
But all at War, each rang'd, each ſought his Food
By Nature taught to ſeek his *private* Good.
Then to renew frail Man's decaying Race,
Or *mutual Luſt* did prompt them to embrace,
Or elſe the *greater Vigor* of the Male,
Or ſome few *treacherous* Preſents did prevail;
Some *Acorns*, *Apples* ſome, ſome *Pears* beſtow,
The Thing the ſame, the Price was leſs than now.

The moſt they dreaded was the furious Beaſt,
For thoſe i'th' dead of Night did oft moleſt,
And lengthen into Death their ſlumbering Reſt.

But when they built their Huts, when Fire began,
And Skins of murther'd Beaſts gave Cloaths to Man;
When One to One confin'd in chaſte Embrace
Enjoy'd *ſweet Love*, and ſaw a *num'rous* Race;
Then Man grew ſoft, the Temper of his Mind
Was chang'd from *rough* to *mild*, from *fierce* to *kind*.
For us'd to Fire, his Limbs refus'd to bear
The piercing Sharpneſs of the open Air:
Luſt weaken'd him, and the ſweet playing Child
Tam'd his wild Sire, and into Peace beguil'd.
Then Neighbours by degrees familiar grown,
Made Leagues and Bonds, and each ſecur'd his *own*.
And then by *Signs*, and broken Words agreed,
That they would keep, preſerve, defend, and feed
Defenceleſs Infants, and the Female Train;
A Right which Pity urg'd them to maintain.
Tho' this fix'd not an univerſal Peace,
Yet many kept their Faith, and liv'd at Eaſe;
Or elſe, almoſt as ſoon as it began,
The Race had fall'n, this Age ne'er ſeen a Man.
Kind Nature Power of framing Sounds affords,
And theſe at length Convenience turn'd to Words.

Mr. Creech.

We have much the ſame Story in Proſe from *Diodor. Sic. Lib.* i. *c.* viii. *They tell us, that Men at their firſt Origin led an irregular Life, in the Manner of Beaſts; ſcattering themſelves about in Search of Food, which was preſented them by the ſavoury Herbs, and the Fruits which grew of their own Accord. But being infeſted on every Side with the wild Beaſts, they learnt, by Uſe, the Security of mutual Aſſiſtance; and being forc'd by Fear to unite in Society, they came acquainted by degrees with their Similitude of Figure and Shape. The firſt Men, before any Inventions of Conveniency and Uſe, ſupported Life with great Labour and Trouble; being, as yet, deſtitute of Cloaths and Dwellings, unaccuſtom'd to the Relief of Fire, and Strangers to all ſweet and regular Food. Being ignorant of Stores and Proviſions, they neglected to ſecure ſo much of the Fruits of the Earth as was requiſite for neceſſary Suſtenance. And thus many periſh'd in the Winter by Hunger and Cold. But being afterwards inſtructed by gradual Experience, to ſpend that ſharp Seaſon in Caves, and to lay up a Stock of Neceſſaries, and finding out the Uſe of Fire, and other Comforts and Supports, they began to introduce many Arts, and many Advantages of living.* Add, Lib. i. Chap. xliii. Cicero pro P. Sectio. *Who amongſt you does not know the Condition of Nature to have been once ſuch, that Men, in thoſe Days, before the Settlement of natural or of civil Laws, wandered ſeparately about the Fields, and poſſeſs'd no more than what they could get or keep by mutual Force, and Wounds, and Slaughters. Now between our preſent Way of Life, poliſh'd with Humanity and Civility, and that rude and barbarous Courſe, the only diſtinguiſhing Marks are* Law *and* Violence. *Vid.* de Invent. Lib. i.

Euripid. Supplic.

I praiſe the generous Pow'rs, that fenc'd our Life
With Rules and Graces from the lawleſs Herd;
By giving firſt a Soul, and next a Tongue,
The Soul's Interpreter; and Fruit for Food,
And kindly Rain to breed a future Store:
And cloſe Abodes, to ſkreen us from the Rage
Of threatning Skies; and Sails to wing our Courſe
To diſtant Shore, to join the Globe in Trade,
And mix the common Treaſures of Mankind.

It is a general Cuſtom with the Poets to attribute to the Gods the Invention of all Things uſeful in human Life. Vid. *Oppian. Halieut. Lib.* ii. *v.* 16, *&c.*

However fabulous theſe Accounts appear, yet ſo far the Authors of them were in the right, that upon Suppoſition of ſuch an Origin of Mankind[1], the Face of Nature would have born all theſe Features which we now eſteem ſo monſtrous and extravagant. In the ſame manner, being ignorant of the State of Paradiſe, they pleas'd themſelves in making Deſcriptions of a ſingular and conſtant Temperateneſs of Air, and of a ſpontaneous Fertility of the Earth, in the firſt and the golden Age of the World. Becauſe they thought it impoſſible that human Race could have been preſerv'd, as according to their Notion they were produc'd, if the Weather and the Seaſons had been then as changeable and as unſteady as now, and if the Support of Food had not been more eaſy to procure[a]. And indeed, tho' it is clear from the Authority of Scripture,

[a] Vid. *Ovid. Metamorph. Lib.* i. *v.* 107. *Virg. Georg.* xi. *v.* 336. *Lacret. Lib.* v.

At novitas mundi nec frigora dura ciebat,
Nec nimios æſtus; nec magnis viribus auras.

Nature, whilſt new, no cruel Cold brought forth,
Nor raging Heats; nor arm'd the ſtormy North.

[1] Altho' Mankind was never wholly in ſuch a State of Nature as we have deſcribed, yet it is proper to reflect what that State would have been, not only to convince us, how great an Advantage we receive one from another, and by that Means induce us to

ture, that the primitive Mortals, by the divine Direction and Assistance [1], arriv'd at a very early Knowledge of the most necessary Arts (See *Gen.* iii. 21, 23. and iv. 17, 22.) which they daily improv'd and increas'd by their own Industry and Application; yet the Condition of Men had been most deplorable and base, if no Societies had been set on foot, but every one had reign'd a separate Prince in his own Family, and suffer'd his Children, when once grown up, to seek their Fortunes in a State of natural Liberty. And then we might pronounce of all Mankind, as *Euripides* does of the *Cyclops*, they would be

[a] De *Cive*, *Ch.* x. §. 1.

Νομάδες, ἀκέλευστ' ἄδην ἄδικοι ἄδεινοί·

as wandering Swains, never hearing, and never heeding one another. *Hobbes* has [2] been lucky enough in painting the Inconveniences of such a State. *Out of Society* (says [a] he) *we are defended only by our single Strength; in Society, by the Strength of all. Out of Society no Man is* [3] *sure to keep Possession of what his Industry has gain'd; in Society every body is secure from that Danger. To conclude, out of Society we have* [4] *the Tyranny of Passions,* [5] *War,* [6] *Fear,* [7] *Poverty,* [8] *Filthiness, Barbarity, Igno-*

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to a reciprocal Sense of Love and Sociableness, but also because it may happen, that every Man may be reduced to this Extremity, either altogether or in Part. Such, for Instance, is the Case of an Infant left in a Desert, where no Man passes; and if this Infant, who is thus forsaken, lives to grow up without any human Assistance, he'll represent to us perfectly that State of Nature we are now speaking of. Nay, a Person at Man's Estate, who by a Shipwreck, or some other Accident, is cast upon an Island uninhabited, will find himself but in a certain Degree of that State of Nature, because he preserves the Remembrance of Arts, and other Conveniences of Life, by the Help of which he may more easily provide for his Necessities. I have taken this out of the Academical Discourse of our Author, *De statu hominum Naturali*, §. 5.

[1] This appears from this Expression in the first of those Texts, *And God made Coats of Skins, and cloathed them*; which, according to the *Hebrew* Style, signifies, that God taught them to make them; for otherwise how could the first Men, who were destitute of all necessary Instruments of Iron, and before there was any Custom to kill Beasts, in so little a Time find out that Invention, and bring it to any Perfection by their Industry? From hence we may infer, in my Opinion, that Divine Providence instructed them in several other Things which were as necessary for human Life, and no less difficult to find out. So God having commanded our first Parents to till the Ground, and get their Bread by the Sweat of their Brows; or to that End, he farther taught them the Nature of the Grain, the Time of Sowing, and the Manner of Plowing and making Bread; which Things they could not have discovered of themselves, but by long Experience, and much Reflection. The Histories of *Greece* tell us, that the ancient Inhabitants there, having lost the Use of Corn, I know not by what Accident, lived upon Acorns and wild Fruits, before the Use of Husbandry was restored among them; whereas the Sacred History tells us, that *Adam*'s eldest Son was an Husbandman, which shews, that the Art was well known before; and consequently, so was the Use of Iron; for 'tis not necessary for us to understand what the Scripture says of *Tubal-Cain*, *Gen.* iv. 22. that he was the Inventor of Iron; for we may suppose the more simple Use of that Metal was before discovered, and that *Tubal-Cain* first improv'd the Art of a Smith; for 'tis said only that he polished all Works of Brass and Iron. As to Fire, the Invention of it among the *Greeks* was looked upon as such a considerable Thing, that they feigned that *Prometheus* brought it down from Heaven. 'Tis related of the Inhabitants of the *Canary* and *Philippine* Islands, and of an Isle of *China*, called *Los Jordenas*, that they knew nothing of Fire 'till the *Spaniards* arrived there; and perhaps they had been in this Ignorance many Ages, neither their own Ingenuity, nor any Chance, having been able to settle among them the Use of so necessary a Thing. See *Geo. Hornius de Origin. Gent. American. Lib.* i. *Ch.* viii. *Lib.* ii. *Ch.* ix. We find also, that several Nations have been ignorant a long time of the Use of Iron, tho' they had Mines of that Metal in their Country. We must then acknowledge, that the first Men were early instructed by Divine Providence in these Sorts of Things, and many other Necessaries of Life. And if a long time after we discovered some People among whom the Use was lost, 'twas either because a barren Region fell to their Share, or because they were forc'd by the irresistible Violence of their ambitious Neighbours, precipitately to fly into a distant uninhabited Country, where they wanted all the Instruments of Tillage, used in the Places they had lost; or because some Colony going to settle itself in a foreign Country, neglected to carry those Kinds of Instruments, or accidentally lost them by the Way, after which 'twas very hard to recover them, because Traffick was not yet settled. Nevertheless, some have endeavoured to supply this Defect, by making use of other Materials for the same End. Thus several People of *America* use, instead of Iron, Oyster shells, the Bones and Teeth of some Creatures, Canes, and such like things. See *Dapper*'s Description of *America*. This is also taken out of our Author's Treatise quoted in the foregoing Note.

[2] Our Author ought not to have approved Mr. *Hobbes*'s Words so generally, as Mr. *Titius* has observed (*Obs.* 460, 461.) as I shall shew in this, and the following Notes. And first, what Mr. *Hobbes* says is not absolutely true; for what hinders but in a *State of Nature* many may join together in their own Defence? I own, that such a Protection, tho' founded upon an united Force, is not comparable to what is found in a well regulated Society; but this may in some measure be sufficient to guard us from the Insults that we are liable to in a *State of Nature*, because 'tis not likely that we shall be attacked by so great a Number of Enemies at one time; for it often happens in a *Civil Society*, that private Persons are oppressed by the Forces of the whole Body, an Inconvenience not to be feared in a *State of Nature*.

[3] This is to carry Matters too far. According to the Circumstances of Time, Place, Person, Neighbourhood, &c. this might be fear'd more or less; but Men also might be impeach'd in a *State of Nature*, as well as in *Civil Society*. And here he would be sure to enjoy the Fruits of his Industry; whereas the wretched Subjects are often fleec'd by bad Princes.

[4] This he ought also to have proved; for why should our Passions have greater Command of us then? Are Men less Men by living in a civil Society? Or have they fewer Objects or Occasions capable of exciting the Passions? Nay rather, have they not more? If the Fear of Punishment keeps the People to their Duty, it will make a like Impression upon the great ones, and Persons of Quality, but they easily find out Ways to evade the Laws; for those in whom the Passions reign with the greatest Fury, and in a manner most prejudicial to Society, are, beyond Contradiction, these Persons in Authority, of which we can't find any Examples in a *State of Nature*, nor can there be any in a Condition of doing so much Mischief.

[5] Wars are not a necessary Consequence of a *State of Nature*, and our Author proves it a little lower, §. 5. against Mr. *Hobbes*. There would be doubtless some Wars, but neither so furious, nor so cruel, nor with such great Armies, as to lay waste large Provinces and great Kingdoms.

[6] There want not Means to suppress or diminish this Fear. See what is said *Lib.* vii. *Ch.* i. §. 7. And in Civil Governments is there not often more Reason for terrible Apprehensions from Princes and their Ministers?

[7] Labour and good Husbandry would easily furnish us with all things necessary for Life. None but Sluggards and Prodigals would fall into Poverty, and this often happens in civil Societies. Riches are not always necessary to render Life happy; and supposing they were, *Abraham*, and the other Patriarchs, had Wealth enough, tho' they were not Members of any State that subsisted in their Time.

[8] This is founded upon the false Hypothesis of Mr. *Hobbes*, that *A State of Nature is a State of War*. But that civil Societies are not always free from these Inconveniences, appears from several Nations of *Asia*, *Africa*, *America*, and even *Europe*, which are neither less miserable nor barbarous for having a King.

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And theſe at length Convenience turn'd to Words.

Mr. Creech.

We have much the ſame Story in Proſe from *Diodor. Sic. Lib.* i. *c.* viii. *They tell us, that Men at their firſt Origin led an irregular Life, in the Manner of Beaſts; ſcattering themſelves about in Search of Food, which was preſented them by the ſavoury Herbs, and the Fruits which grew of their own Accord. But being infeſted on every Side with the wild Beaſts, they learnt, by Uſe, the Security of mutual Aſſiſtance; and being forc'd by Fear to unite in Society, they came acquainted by degrees with their Similitude of Figure and Shape. The firſt Men, before any Inventions of Conveniency and Uſe, ſupported Life with great Labour and Trouble; being, as yet, deſtitute of Cloaths and Dwellings, unaccuſtom'd to the Relief of Fire, and Strangers to all ſweet and regular Food. Being ignorant of Stores and Proviſions, they neglected to ſecure ſo much of the Fruits of the Earth as was requiſite for neceſſary Suſtenance. And thus many periſh'd in the Winter by Hunger and Cold. But being afterwards inſtructed by gradual Experience, to ſpend that ſharp Seaſon in Caves, and to lay up a Stock of Neceſſaries, and finding out the Uſe of Fire, and other Comforts and Supports, they began to introduce many Arts, and many Advantages of living.* Add, Lib. i. Chap. xliii. Cicero pro P. Sectio. *Who amongſt you does not know the Condition of Nature to have been once ſuch, that Men, in thoſe Days, before the Settlement of natural or of civil Laws, wandered ſeparately about the Fields, and poſſeſs'd no more than what they could get or keep by mutual Force, and Wounds, and Slaughters. Now between our preſent Way of Life, poliſh'd with Humanity and Civility, and that rude and barbarous Courſe, the only diſtinguiſhing Marks are* Law *and* Violence. *Vid.* de Invent. Lib. i.

Euripid. Supplic.

I praiſe the generous Pow'rs, that fenc'd our Life
With Rules and Graces from the lawleſs Herd;
By giving firſt a Soul, and next a Tongue,
The Soul's Interpreter; and Fruit for Food,
And kindly Rain to breed a future Store:
And cloſe Abodes, to ſkreen us from the Rage
Of threatning Skies; and Sails to wing our Courſe
To diſtant Shore, to join the Globe in Trade,
And mix the common Treaſures of Mankind.

It is a general Cuſtom with the Poets to attribute to the Gods the Invention of all Things uſeful in human Life. Vid. *Oppian. Halieut. Lib.* ii. *v.* 16, *&c.*

However fabulous theſe Accounts appear, yet ſo far the Authors of them were in the right, that upon Suppoſition of ſuch an Origin of Mankind[1], the Face of Nature would have born all theſe Features which we now eſteem ſo monſtrous and extravagant. In the ſame manner, being ignorant of the State of Paradiſe, they pleas'd themſelves in making Deſcriptions of a ſingular and conſtant Temperateneſs of Air, and of a ſpontaneous Fertility of the Earth, in the firſt and the golden Age of the World. Becauſe they thought it impoſſible that human Race could have been preſerv'd, as according to their Notion they were produc'd, if the Weather and the Seaſons had been then as changeable and as unſteady as now, and if the Support of Food had not been more eaſy to procure[a]. And indeed, tho' it is clear from the Authority of Scripture,

[a] Vid. *Ovid. Metamorph. Lib.* i. *v.* 107. *Virg. Georg.* xi. *v.* 336. *Lucret. Lib.* v.

At novitas mundi nec frigora dura ciebat,
Nec nimios æſtus; nec magnis viribus auras.

Nature, whilſt new, no cruel Cold brought forth,
Nor raging Heats; nor arm'd the ſtormy North.

[1] Altho' Mankind was never wholly in ſuch a State of Nature as we have deſcribed, yet it is proper to reflect what that State would have been, not only to convince us, how great an Advantage we receive one from another, and by that Means induce us to

ture, that the primitive Mortals, by the divine Direction and Aſſiſtance [1], arriv'd at a very early Knowledge of the moſt neceſſary Arts (See *Gen.* iii. 21, 23. and iv. 17, 22.) which they daily improv'd and increas'd by their own Induſtry and Application; yet the Condition of Men had been moſt deplorable and baſe, if no Societies had been ſet on foot, but every one had reign'd a ſeparate Prince in his own Family, and ſuffer'd his Children, when once grown up, to ſeek their Fortunes in a State of natural Liberty. And then we might pronounce of all Mankind, as *Euripides* does of the *Cyclops*, they would be

Νομάδες, ἀνὲυ δ' ὀδὲν ὀδεὶς ὀδενός·

as wandering Swains, never hearing, and never heeding one another. *Hobbes* has [2] been lucky enough in painting the Inconveniences of ſuch a State. *Out of Society* (ſays [3] he) *we are defended only by our ſingle Strength; in Society, by the Strength of all. Out of Society no Man is [3] ſure to keep Poſſeſſion of what his Induſtry has gain'd; in Society every body is ſecure from that Danger. To conclude, out of Society we have [4] the Tyranny of Paſſions, [5] War, [6] Fear, [7] Poverty, [8] Filthineſs, Barbarity, Igno-*

[1] De *Cive*, *Ch.* x. §. 1.

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to a reciprocal Senſe of Love and Sociableneſs, but alſo becauſe it may happen, that every Man may be reduced to this Extremity, either altogether or in Part. Such, for Inſtance, is the Caſe of an Infant left in a Deſert, where no Man paſſes; and if this Infant, who is thus forſaken, lives to grow up without any human Aſſiſtance, he'll repreſent to us perfectly that State of Nature we are now ſpeaking of. Nay, a Perſon at Man's Eſtate, who by a Shipwreck, or ſome other Accident, is caſt upon an Iſland uninhabited, will find himſelf but in a certain Degree of that State of Nature, becauſe he preſerves the Remembrance of Arts, and other Conveniences of Life, by the Help of which he may more eaſily provide for his Neceſſities. I have taken this out of the Academical Diſcourſe of our Author, *De ſtatu hominum Naturali*, §. 5.

[1] This appears from this Expreſſion in the firſt of thoſe Texts, *And God made Coats of Skins, and cloathed them*; which, according to the *Hebrew* Style, ſignifies, that God taught them to make them; for otherwiſe how could the firſt Men, who were deſtitute of all neceſſary Inſtruments of Iron, and before there was any Cuſtom to kill Beaſts, in ſo little a Time find out that Invention, and bring it to any Perfection by their Induſtry? From hence we may infer, in my Opinion, that Divine Providence inſtructed them in ſeveral other Things which were as neceſſary for human Life, and no leſs difficult to find out. So God having commanded our firſt Parents to till the Ground, and get their Bread by the Sweat of their Brows; or to that End, he farther taught them the Nature of the Grain, the Time of Sowing, and the Manner of Plowing and making Bread; which Things they could not have diſcovered of themſelves, but by long Experience, and much Reflection. The Hiſtories of *Greece* tell us, that the ancient Inhabitants there, having loſt the Uſe of Corn, I know not by what Accident, lived upon Acorns and wild Fruits, before the Uſe of Husbandry was reſtored among them; whereas the Sacred Hiſtory tells us, that *Adam*'s eldeſt Son was an Huſbandman, which ſhews, that the Art was well known before; and conſequently, ſo was the Uſe of Iron; for 'tis not neceſſary for us to underſtand what the Scripture ſays of *Tubal-Cain*, *Gen.* iv. 22. that he was the Inventor of Iron; for we may ſuppoſe the more ſimple Uſe of that Metal was before diſcovered, and that *Tubal-Cain* firſt improv'd the Art of a Smith; for 'tis ſaid only that he poliſhed all Works of Braſs and Iron. As to Fire, the Invention of it among the *Greeks* was looked upon as ſuch a conſiderable Thing, that they feigned that *Prometheus* brought it down from Heaven. 'Tis related of the Inhabitants of the *Canary* and *Philippine* Iſlands, and of an Iſle of *China*, called *Los Jordenas*, that they knew nothing of Fire 'till the *Spaniards* arrived there; and perhaps they had been in this Ignorance many Ages, neither their own Ingenuity, nor any Chance, having been able to ſettle among them the Uſe of ſo neceſſary a Thing. See *Geo. Hornius de Origin. Gent. American. Lib.* i. *Ch.* viii. *Lib.* ii. *Ch.* ix. We find alſo, that ſeveral Nations have been ignorant a long time of the Uſe of Iron, tho' they had Mines of that Metal in their Country. We muſt then acknowledge, that the firſt Men were early inſtructed by Divine Providence in theſe Sorts of Things, and many other Neceſſaries of Life. And if a long time after we diſcovered ſome People among whom the Uſe was loſt, 'twas either becauſe a barren Region fell to their Share, or becauſe they were forc'd by the irreſiſtible Violence of their ambitious Neighbours, precipitately to fly into a diſtant uninhabited Country, where they wanted all the Inſtruments of Tillage, uſed in the Places they had loſt; or becauſe ſome Colony going to ſettle itſelf in a foreign Country, neglected to carry thoſe Kinds of Inſtruments, or accidentally loſt them by the Way, after which 'twas very hard to recover them, becauſe Traffick was not yet ſettled. Nevertheleſs, ſome have endeavoured to ſupply this Defect, by making uſe of other Materials for the ſame End. Thus ſeveral People of *America* uſe, inſtead of Iron, Oyſter ſhells, the Bones and Teeth of ſome Creatures, Canes, and ſuch like things. See *Dapper*'s Deſcription of *America*. This is alſo taken out of our Author's Treatiſe quoted in the foregoing Note.

[2] Our Author ought not to have approved Mr. *Hobbes*'s Words ſo generally, as Mr. *Titius* has obſerved (*Obſ.* 460, 461.) as I ſhall ſhew in this, and the following Notes. And firſt, what Mr. *Hobbes* ſays is not abſolutely true; for what hinders but in a *State of Nature* many may join together in their own Defence? I own, that ſuch a Protection, tho' founded upon an united Force, is not comparable to what is found in a well regulated Society; but this may in ſome meaſure be ſufficient to guard us from the Inſults that we are liable to in a *State of Nature*, becauſe 'tis not likely that we ſhall be attacked by ſo great a Number of Enemies at one time; for it often happens in a *Civil Society*, that private Perſons are oppreſſed by the Forces of the whole Body, an Inconvenience not to be feared in a *State of Nature*.

[3] This is to carry Matters too far. According to the Circumſtances of Time, Place, Perſon, Neighbourhood, *&c.* this might be fear'd more or leſs; but Men alſo might be impeach'd in a *State of Nature*, as well as in *Civil Society*. And here he would be ſure to enjoy the Fruits of his Induſtry; whereas the wretched Subjects are often fleec'd by bad Princes.

[4] This he ought alſo to have proved; for why ſhould our Paſſions have greater Command of us then? Are Men leſs Men by living in a civil Society? Or have they fewer Objects or Occaſions capable of exciting the Paſſions? Nay rather, have they not more? If the Fear of Puniſhment keeps the People to their Duty, it will make a like Impreſſion upon the great ones, and Perſons of Quality, but they eaſily find out Ways to evade the Laws; for thoſe in whom the Paſſions reign with the greateſt Fury, and in a manner moſt prejudicial to Society, are, beyond Contradiction, theſe Perſons in Authority, of which we can't find any Examples in a *State of Nature*, nor can there be any in a Condition of doing ſo much Miſchief.

[5] Wars are not a neceſſary Conſequence of a *State of Nature*, and our Author proves it a little lower, §. 5. againſt Mr. *Hobbes*. There would be doubtleſs ſome Wars, but neither ſo furious, nor ſo cruel, nor with ſuch great Armies, as to lay waſte large Provinces and great Kingdoms.

[6] There want not Means to ſuppreſs or diminiſh this Fear. See what is ſaid *Lib.* vii. *Ch.* i. §. 7. And in Civil Governments is there not often more Reaſon for terrible Apprehenſions from Princes and their Miniſters?

[7] Labour and good Huſbandry would eaſily furniſh us with all things neceſſary for Life. None but Sluggards and Prodigals would fall into Poverty, and this often happens in civil Societies. Riches are not always neceſſary to render Life happy; and ſuppoſing they were, *Abraham*, and the other Patriarchs, had Wealth enough, tho' they were not Members of any State that ſubſiſted in their Time.

[8] This is founded upon the falſe Hypotheſis of Mr. *Hobbes*, that *A State of Nature is a State of War*. But that civil Societies are not always free from theſe Inconveniences, appears from ſeveral Nations of *Aſia*, *Africa*, *America*, and even *Europe*, which are neither leſs miſerable nor barbarous for having a King.

rance,

rance, and Wildneſs; in Society we have the Sway of [1] *Reaſon,* [2] *Peace, Security,* [3] *Riches,* [4] *Decency of Ornament, Company, Elegancy, Knowledge, and Benevolence* [a]. And I believe there cannot be a more effectual Way found out to ſilence the Complaints and Murmurs of the common People, when they pretend to find fault with the Miſcarriages and the Impoſitions of the Government, than if we would lay before them a true Proſpect of the Miſery and Confuſion which attends a natural State. Which Trouble thoſe Perſons had certainly a right Notion of, who brought into a proverbial Saying, [5] *That unleſs there were ſuch Things in the World as Courts of Juſtice, Men would infallibly devour one another.*

III. What kind of Rights attend Men in a State of Nature we may eaſily gather, as well from that Inclination common to all living Things, by which they cannot but embrace and practiſe, with the greateſt Readineſs and Vigor, all poſſible Ways of preſerving their Body and their Life, and of overcoming all ſuch things as ſeem to drive at their Deſtruction; as from this other Conſideration, that Perſons living in ſuch a State are not ſubject to any Sovereignty or Command. For from the former Reflection it follows, that Men plac'd after this manner in a natural State, may uſe and enjoy the common Goods and Bleſſing, and may act and purſue whatever makes for their own Preſervation, while they do not hence injure the Right of the reſt. From the latter Suppoſition it is clear, that they may uſe not only their own Strength, but their own Judgment and Will (provided they are form'd and guided according to the Law of Nature) for procuring their own Defence and Safety. And in this Reſpect likewiſe, the State we are treating of has obtain'd the Name of natural Liberty; inaſmuch as, antecedently to all human Pact and Deed, every Man is conceiv'd to be perfectly in his own Power and Diſpoſal, and not to be controll'd by the Pleaſure or Authority of any other. On which Account too, every Man may be thus acknowledg'd *equal* to every Man, ſince all Subjection and all Command are equally baniſh'd on both Sides. According to this Temperament, we ought to correct and explain thoſe Aſſertions laid down by Mr. *Hobbes*, in the Beginning of his Book *De Cive, That the firſt Foundation of natural Right, is the Liberty which each Man hath to preſerve, as far as he is able, his own Life and Limbs, and to apply all his Endeavours towards the guarding his Body from Death, and from Pains.* From which it follows, That *ſince 'tis in vain to have a Right to the End, if one has not likewiſe a Right to the Means; therefore every Man has a Right of uſing all Means, and of doing all Actions, without which he cannot defend and enſure himſelf.* But now ſince in a natural State no Man is ſubject to another as to a Superior, to whoſe Pleaſure his own Will and Judment ſhould be ſubmitted, hence *every Man is by natural Right a Judge, whether the Means which he uſes, and the Actions which he performs, are neceſſary to the Preſervation of his own Life and Limbs, or not:* For altho' in this Caſe one Man ſhould pretend to give Advice to another, yet the other not having ſubjected his Will and Judgment to his Controul, may ſtill judge of this Advice, whether it be proper and expedient to be follow'd, or not. And therefore he may perhaps do according as he was advis'd, but then it will not be for the ſake of the Counſellor, but becauſe he himſelf approves of the Propoſal; and conſequently he will at laſt act by the Determination of his own Judgment. From all which he concludes, *That Nature has given to every one a Right to all things; that is, in a mere natural State, or before Men had bound themſelves to one another by any Covenants, it was lawful for every one to do all things whatſoever and againſt whomſoever he pleas'd; and to poſſeſs, uſe, and enjoy all that he would or could. Whence it may be underſtood, that in a State of Nature, Profit or Utility is the Meaſure of Right.* Which Notions, however paradoxical they appear at firſt View, yet no Man can fairly draw from them a Licenſe of doing *any* Thing to *any* Perſon, who conſiders that *Hobbes*, even in this State of Nature, ſuppoſes a Man ſubject to the Laws of Nature, and to the Government of [6] ſound Reaſon. But ſince ſuch

[a] Comp. *Polyb. Lib.* iv. *Ch.* xlv. where he relates the Miſeries of the *Byzantines*, occaſion'd by their endleſs War with the *Thracians*.

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[1] Whence come thoſe Monſters of Ambition, Covetouſneſs, Pleaſure, Cruelty and Inhumanity, which ordinarily reign in the Courts of Princes, and whoſe contagious Examples ſpread almoſt always to their Inferiors?

[2] The horrible Perſecutions which the Subjects ſometimes ſuffer, and the bloody Wars which often harraſs the moſt flouriſhing States and Empires, prove, that Peace and Tranquillity do not more ordinarily reign in civil Societies, than in the *State of Nature*, where it could never be troubled in ſuch a manner, as to hurt, at the ſame time, a great Number of Perſons. We do not know, at leaſt, in a *State of Nature*, the Madneſs of Law Suits, and the Chicanery to which the Laws themſelves frequently give Occaſion.

[3] How comes it to paſs that we ſee ſo many Families reduced to Beggary, and ſo many Subjects ruin'd by Extortion?

[4] Under theſe fine Names are often hidden Vanity, Weakneſs, Folly, Pedantry, irregular Paſſions, and artful Intrigues. There is no good thing that can be ſecured to us by Society, but it may have place in a *State of Nature*. Further, this Beauty, Politeneſs, and Pleaſures of Life, of which Men boaſt ſo, are found only in great Cities; the ruſtick Behaviour is ſtill kept up every-where in the Country, in the moſt civilized Kingdoms. Let us then, by way of Concluſion, make an exact Parallel between the *State of Nature* and *civil Society*. Experience teaches us, that, contrary to the natural Appointment of the Creator, and thro' Man's Corruption, both States are often unſociable and unhappy; but Civil Government being a proper Means to reſtrain the Malice of Men, the *Civil State*, without Contradiction, may be more ſociable and happy than the *State of Nature*; but then we muſt ſuppoſe the *civil Society* to be well governed, otherwiſe, if a King abuſes his Power, or devolves the Management of civil Affairs to Miniſters both ignorant and vicious, as it often happens, a *Civil State* is then more unhappy than the *State of Nature*; which appears by the Wars, Calamities and Vices which ſpring up from ſuch Abuſes, and from which the *State of Nature* would be free. See what Mr. *Locke* ſays in his ſecond Treatiſe of Civil Government, *Chap.* i. §. 10. and *Chap.* xviii. §. 17. near the End. It ſignifies nothing to ſay, that the Evil which happens at one time is compenſated by the Good accruing at other times, from the Eſtabliſhment of Civil Society. For it is ſufficient that the Evils be ſo great and frequent, as to make us doubt, whether, if duly weigh'd, they do not over-balance the Good. Beſides, we may, with equal Reaſon, ſay the ſame thing of the Inconveniences of natural Liberty. For theſe would not ſubſiſt in all Times and Places: they would be ſometimes greater, or leſs; and leave Intervals ſufficient to let Men taſte all the Sweets of Independance, as well as prevent them from any Thoughts of chuſing themſelves a Maſter for their Protector. This, at leaſt, is more than enough to ſhew, that *Hobbes*, and our Author too, far exaggerate the Advantages of *Civil Society* over a *State of Nature*.

[5] 'Tis a Proverb of the *Jewiſh* Doctors. See *Grotius, Lib.* i. *Chap.* iv. §. 4. *num.* 2.

§. 111. [6] Mr. *Hobbes*, as he himſelf ſays in a Note upon §. 1. of the ſecond Chapter, underſtands by right Reaſon, not as moſt do, the infallible Faculty, but the Power of reaſoning, *i. e.* the proper and true Arguings which every one makes upon his own Actions, ſo far as they conduce to the Advantage or Detriment of other Men. If we aſk him what is this true Reaſoning, he will anſwer, It is founded upon the Principles laid down in the foregoing Chapter, §. 2, 3, 4, 5, 6, and 7. *i. e.* upon

ſuch an unbounded and injurious Licenſe could never, by any Man in his Wits, be thought a likely Means for the laſting Preſervation of himſelf, we muſt preſume that it was never granted or intended by Nature. And ſuppoſe ſome Man ſhould be ſo extravagant as to endeavour the putting it in Practice, it's plain his Experiment would turn, in a high Manner, to his own Prejudice and Miſchief. So that the only fair Senſe of *Hobbes*'s Principle is this; the Things which make for the Preſervation of Men, Nature has laid in common, before they have divided them amongſt themſelves by Covenant: And he that has no Superior may, by the Direction of his own beſt and ſoundeſt Reaſon, do any thing that is truly conducible to his laſting Safety. But if that Philoſopher really intended his Words with the ſame Harſhneſs, and the ſame groſs Appearance which their Countenance bears, and to reject our kind and favourable Interpretation, the Fault is his own, and let him ſhift how he can to eſcape the perpetual Cenſure and Reprehenſion of wiſe Men. This is evident, that the Author of the *Theologico-Political* Treatiſe, who goes commonly by the Name of *Spinoza*, has deſcrib'd that *Right of all Men to all Things* which attend a natural State, in moſt horrid and barbarous Terms; and therefore it may not be improper to take the Trouble of diſcuſſing his Notions on the Point. *By the Right and Inſtitution of Nature*, he underſtands nothing elſe, *but the Rules of the Nature of every individual Thing, according to which we conceive every one of them to be naturally determin'd to a certain Manner of Exiſtence and of Operation. For Example, Fiſhes are naturally determin'd to ſwim, and the bigger of them to eat the leſſer; and therefore Fiſhes, by the higheſt natural Right, poſſeſs the Water; and by the ſame Right, the larger Kinds of them prey on the ſmaller.* Here it is obſervable, that by the Term of *Right* he does not expreſs any Law directive of an Action, but only the Power of acting [1], and what may be done without Injury; and that therefore 'tis by no means a fair Concluſion, that one ought neceſſarily to do all thoſe things, which one has [2] a Right of doing. Farther, as it is an improper Acceptation of the Term of *natural Law*, to make it denote that according to which every thing acts by a certain and determinate Manner; ſo is it likewiſe improper to apply the Name of *Right* to that Power and Manner of acting which appears in irrational Beings: For he alone can be truly ſaid to have a Right of acting, who acts on previous Reaſon and Deliberation. He proceeds to tell us, *That Nature, abſolutely conſider'd, has the higheſt Right of doing whatever it can; that the Right of Nature extends itſelf as far as the Power of Nature: For the Power of Nature is the very Power of God, who hath the higheſt Right to all things.* Here, if by *Nature abſolutely conſider'd*, he [3] means GOD in Conjunction with all created Things, we grant his Aſſertion, and willingly acknowledge in GOD the higheſt Right to all Things, yet ſuch a Right as is ſuited to the Perfections of his Eſſence. But if by Nature he underſtands the Univerſity of created Beings, as contradiſtinguiſh'd to the Creator, then we may deny the Power of Nature to be the Power of GOD himſelf, or that theſe two Powers have the ſame Latitude and Extent. The Power of Nature is indeed produc'd by GOD, but not in ſuch a Manner as to exhauſt all the Power of the Divinity, but to contain itſelf within the Bounds preſcrib'd by its Author. His next Inference runs thus: *Since the univerſal Power of all Nature is nothing elſe but the Power of all the Individuals taken together, it follows, that each Individual has the higheſt Right to all things that it can compaſs, or that the Right of each Individual extends itſelf as far as the determinate Power of the ſame Individual.* But 'tis beyond me to apprehend the Concluſiveneſs of this Argument, *The Power of all Nature is the Power of all the Individuals together, therefore each Individual has the higheſt Right to all things.* For is it not rather true, that each Individual has a certain and definite Share or Portion of Right; and that therefore no particular Individual can fairly arrogate to itſelf that Right which is proper to all, as they make up one univerſal Nature? He adds, *And becauſe it is a ſupreme Law of Nature, that every thing endeavours, as far as it is able, to continue in its own State, and this not with any regard or reſpect to other things, but only to itſelf; hence it follows, that each Individual has the higheſt Right to this Advantage; that is, to exiſt and to operate as it is naturally determin'd.* Here, beſides that *Law of Nature* is us'd in an improper Senſe, it is apparently falſe, as to Men at leaſt, that their Nature is ſo determin'd, as to make them endeavour their own Preſervation and Continuance [4] with reſpect to themſelves only, without any Care or Conſideration for others. Properly ſpeaking, thoſe things are ſaid to be *naturally* determin'd, which are tied to an uniform Method of acting, and are ſo contradiſtinguiſh'd to free Agents: And therefore Men, as to thoſe Actions which are left to their own Guidance and Direction, are determin'd to certain Ways and Courſes, not by Nature, but by ſome Law; and conſequently they are not preſently inveſted with a Right of doing all things within the reach of their natural Powers and Abilities. But the Vanity of ſuch Reaſonings will more fully appear, if, diveſting them of their dark Turnings and Intricacies, we thus clearly propoſe them: GOD has the higheſt Right to all things; the Power of Nature is the Power of GOD, therefore Nature has a Right to all things: But the Power of Nature is the Power of all the Individuals together; therefore

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on the *State of War*, wherein he ſuppoſes all Men to be naturally one againſt another; a falſe Hypotheſis, which our Author will confute a little lower, §. 5, &c. So that we ſee, that according to Mr. *Hobbes*, all is reduced to every Man's Judgment, either well or ill founded. This appears clearly from what he poſitively maintains, *That in whatever Manner a Man deals with a Perſon, with whom he makes a Bargain, or Contract, he does him no Injury.* See above, *Lib.* i. *Chap.* vii. §. 13. If a Man ſins againſt GOD, or the Laws of Nature, 'tis, according to him, becauſe we pretend ſomething is neceſſary for our Preſervation, which we know in Conſcience not to be ſo. *Note on Chap.* i. §. 10. See alſo that on *Chap.* iii. §. 27.

[1] The Words of the Original, in all the Editions of *Germany* and *Holland* (for in that which the Author publiſhed at *Lunden* in *Sweden* in 1672, there is nothing of this Confutation of *Spinoza*) not excepting that which Mr. *Hertius* publiſh'd in 1706, the Words are placed as we find them in this *Engliſh* Edition, but they make a ſtrange Confuſion; for if we examine into the Sequel of the Diſcourſe, and the Deſign of the Author, we may eaſily diſcern them miſplaced; for theſe laſt Words, *And what may be done without Injury*, ought not to refer to the pure Faculty of acting, which may do a great deal of Injury, but to the Laws, which forbid doing an Injury to any Man, and therefore I have placed it in its right Order in my Tranſlation.

[2] In Reality, the meer phyſical Power of doing a Thing, does not prove that we are indiſpenſibly obliged to do it, nor that we can lawfully do it, if we will; at leaſt, unleſs we ſuppoſe, what is in Queſtion, that a phyſical and moral Power are one and the ſame Thing.

[3] We may ſee plainly enough that *Spinoſa* does not acknowledge a GOD, or ſuch an intelligent Being as is altogether perfect. What he calls God is nothing but the World, which he ſuppoſes eternal, and not created.

[4] See §. v. below, and the following Chapter, where Sociability is treated of.

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each Individual has a Right to all things. Let any Man judge whether the Connection in this Argument be juſt, or not. *Spinoſa* very falſly declares, *That in this Point no Difference ought to be made between Men and the other Individuals of Nature; or between Men who underſtand and exerciſe Reaſon, and thoſe who do not; nor between Men in their Wits, and Fools and Madmen.* For, as to the firſt Part of this Aſſertion, the Queſtion of Right ought not to proceed but about the Right of Men. And as to the latter Part, altho' ſome Men may have a quicker and ſome a ſlower Uſe of Reaſon; yet whoever has any Uſe at all of that Faculty may at leaſt underſtand thus much [1], in order to his own Preſervation he has no Need of an unlimited Right to all things, and that therefore ſuch a Right doth by no means belong to him. As for thoſe who have no Manner of Uſe of Reaſon, 'twould be frivolous to diſpute about their Right; nor from the unhappy Circumſtances of diſeas'd Perſons, can we pronounce any thing about the natural Condition of Mankind: Nor is it impoſſible for any one of theſe poor Creatures to be preſerv'd otherwiſe than by a Right to all things. The Reaſon which he ſubjoins is equally vain and fruitleſs. *For whatſoever any thing acts by the Laws of its Nature, it acts with the higheſt Right; inaſmuch as it acts as it is by Nature determin'd, and cannot do otherwiſe.* Becauſe we deny Man when he acts by the Law of Nature, to aſſert a Right to all things, or to be determin'd by Nature to the Exerciſe of any ſuch Right. *Spinoſa*'s Concluſion therefore is falſe; *Amongſt Men, as they are conſider'd to live only under the Command of Reaſon; he who is not come to a Knowledge of Reaſon, or who has not yet acquir'd a Habit of Virtue, doth as well by the higheſt Right live according to the Laws of his Appetite, as he who directs his Life by the Laws of Reaſon: That is, as a wiſe Man has the higheſt Right to all things which Reaſon ſuggeſts, or according to the rational Laws of living; ſo an ignorant and ſenſeleſs Perſon has the higheſt Right to all things which his Appetite affects, or according to the Laws of living by Appetite.* But now the natural State, or the Command and Dominion of Nature, ſuppoſes Reaſon in Men; nor are other Laws preſcrib'd to the Sagacious, and others to the Simple. Thoſe who are govern'd purely by Appetite, are Subjects incapable of Right or Law. But when the Appetite in Men proceeds contrary to their Reaſon, they are ſo far from living by any Right, or by any Laws, that they are continually guilty of tranſgreſſing the Laws. The Corollaries which he deduces are no truer than the foregoing Propoſitions. *The natural Right of each Man is not determin'd by ſound Reaſon, but by Deſire and by Power. For all Men are not naturally determin'd to operate according to the Rules and the Laws of Reaſon; but, on the contrary, all are born ignorant of all things, and before they can attain to know the true and rational Way of living, and acquire the Habit of Virtue, a great Part of their Age (altho' they have been well educated) paſſes away; and yet notwithſtanding all this, they are in the mean time bound to live, and to preſerve themſelves to the beſt of their Power; and this Obligation is fulfilled by obeying the ſole Motion of their Appetite, ſince Nature has yet given them no other Guide, denying them the actual Power of living by ſound Reaſon; and therefore they are no more oblig'd to live by the Laws of true Senſe and Judgment, than a Cat is oblig'd to live by ſuch Laws as are proper only to the Nature of a Lion.* [2] For to make a Man oblig'd to live according to Reaſon, it is not neceſſary that he ſhould be *naturally determin'd* to act according to the Laws of Reaſon, that is, that he ſhould not be able to act otherwiſe; but it is ſufficient that he has ſo much natural Power, as may enable him to abſtain from bringing Injuries and Troubles on other Men, than which nothing in the World can be more eaſy. Neither is the Manner and Method of preſerving himſelf ſo very difficult and laborious, as to make him ſtand in need of a Right to all things. And then from him who through Defect of Age is yet in abſolute Ignorance, none can require a more accurate Direction of his Proceedings, than is conſiſtent with his low Capacity, and his ſmall and feeble Efforts of Reaſon. But that what is done in

[1] This is ſo true, that Mr. *Hobbes*, whoſe Notions, at the Bottom, are not much diſtant from *Spinoſa*'s, makes a Neceſſity to come to ſome Agreements, (which, according to him, are the Foundation of Juſtice) ariſe from this Principle, that it could not be poſſible to preſerve ourſelves, by making uſe of that boundleſs Right about every thing, and againſt all Men. See his Book *de Cive*, Chap. i. §. 11, 13. and Chap. ii. §. 3. *Spinoſa* himſelf, as our Author obſerves at the End of this Paragraph, aſſerts, *That it is more advantageous to follow the Maxims of Reaſon, than the ſimple Deſires of Nature.*

[2] It is ſcandalous, that Men who pretend to be accurate Philoſophers, ſhould deceive themſelves by ſuch Sophiſtry. The Terms of *Law, Right*, and others of this Kind, according to their proper and natural Signification, mean no more than a *Rule aſcrib'd to free Agents*; that is to ſay, ſuch whom we may ſuppoſe capable of knowing that Rule, bound to conform themſelves to it, and diſpos'd in ſuch a Manner, as that they are free to follow it, or not. Indeed they always do follow it when they act according to Reaſon, and their true Intereſt. As this Rule, conſider'd as ſuch, is conſtant and invariable, it forms the *Law of Nature*, which in itſelf can never ceaſe: Hence it happens, that the Name of Laws, or Law, have been metaphorically applied, not only to the Motions of Beaſts, but to thoſe of inanimate Beings, when produc'd in Conſequence of a natural and unchangeable Order. Thus it is that *Virgil*, ſpeaking of the Difference of Climates, which produce one thing in one Country rather than another, ſays, that Nature has given to each Place its Qualities, as ſo many *eternal Laws:*

Continuo has Leges Æternaque Fœdera certis
Impoſuit natura locis ——————
Georgic, Lib. 1. *Verſ.* 60, 61.

He uſes the ſame Metaphor in ſpeaking of the Bees:

—————— *Magniſque agitant ſub Legibus ævum.*
Lib. IV. *Verſ.* 154.

In the ſame Senſe the ancient Philoſophers, eſpecially the *Stoics*, call'd by the Name of the *Law of Nature*, whatever was done in Conſequence of the Order of natural Cauſes: Juſt as our modern Philoſophers ſay, that ſuch or ſuch a thing is done according to the *Laws of Motion*, which they deſcribe. But all this phyſical Neceſſity has nothing in common with the moral Order in queſtion, to which we ſubmit only through a free Determination of the Will; inſomuch that when we are invincibly bent upon a thing, there is no Occaſion, in that reſpect, to ſeek out an *Obligation*, properly ſo call'd, which anſwers to *a Law*. No wiſe Legiſlator will preſcribe ſuch things as Men would do of themſelves, whether commanded, or not; and it would be equally contrary to his Wiſdom and Equity to forbid them, ſince his Prohibitions could produce no Effect, however willing Men may be to obſerve his Laws. But it is eaſy to ſee, that *Spinoza*, and thoſe who follow his Doctrine, entirely deſtroy the Liberty of human Actions, and by that means, at the ſame time, overthrow all kind of Right and Morality. It is therefore needleſs to diſpute with ſuch People, 'till we can agree what is the Subject in Diſpute. We muſt leave them the Pleaſure of believing, that whatever they do in indulging their Paſſions, they follow more cloſely the *natural Law*, as they willingly yield to the invincible Force of their own Inclinations.

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this State of Simplicity may not prove very hurtful or troublesome to others, Nature has carefully provided, by giving it so little Strength of its own, and by commending the Care and Guidance of it to those of maturer Years. The following Inference is as false as the former. *Whatsoever therefore any one, consider'd only under the Command and Guidance of Nature, shall judge convenient for himself, either by the Direction of Reason, or by the Impulse of his Passions, this by the highest natural Right he may desire, and may seize upon by whatever Means he can, whether by Force, or by Fraud, or by Entreaty, or the easiest Way he can think of; and, consequently, he may reckon every one his Enemy, who would hinder him from satisfying his Inclinations.* As also this, *Whence it follows, that the Right and the Institution of Nature, under which all are Born, and the most part Live, is averse to nothing, besides that which none can desire, and which none can hinder; not to Contentions, not to Hatred, not to Anger, not to Deceit, nor absolutely to any thing which it's possible for the Appetite to pursue.* This Assertion, if applied to Men, is manifestly false and absurd. But if it includes all living Creatures, and be meant in this Sense, that there is no Way or Manner of Self-preservation, which some animate Being doth not follow and make use of out of natural Instinct, then it is nothing to the Purpose; since the only Question is, whether Men have such a Right to all things, as they may use against all other Men. But that *Spinosa* intended the latter Sense, is evident from what follows: *And no wonder, for Nature is not restrain'd to the Laws of human Reason, which concern not only the true Profit and Preservation of Men; but, also, comprehends an Infinity of other things, which fall under the universal Order of all Nature, of which Man is but a little Part.* He afterwards confesses, that it is more convenient for Men to live according to the Laws and infallible Dictates of Reason, which point out their true Interest and Advantage. But then what Occasion was there for the feigning of such a Right, as Man, if he intended to be safe, must necessarily relinquish; while other Animals, which exercise a kind of Right to all things, lie under no Necessity of quitting it for their own Preservation? Neither indeed could such an absurd Abdication be necessary for Man, upon Supposal that Nature had invested him with the same Right.

IV. We are ready to acknowledge it for a most certain Truth, that all Mankind did never exist together in a mere natural State: Inasmuch as, upon the divine Authority of the Scriptures, we believe all human Race to have proceeded from one original Pair. Now it's plain that *Eve* was subject to *Adam*, *Gen.* iii. 16. and those who were born of these primitive Parents, and so on, did immediately fall under paternal Authority, and under Family Government. But such a State might have befallen Mankind, if, as some of the Heathens believ'd, they had, in the Beginning of their Being, leap'd out of the Earth like Frogs, or had come up from Seed, like *Cadmus*'s human Crop, *Ovid Metamorph. Lib.* iii. *ver.* 122, 123. Which Fable is, methinks, a very exact Representation of that State of Nature, and of that War of all Men against all, which Mr. *Hobbes* would introduce; where

——————— *furit omnis turba, suoque*
Marte cadunt subiti per mutua vulnera fratres.

Rage hurries all; and in so blind a Fray,
The sudden Brothers fall a mutual Prey.

A State of Nature then did never naturally exist, unless qualified, and, as it were, in Part; namely, while some Party of Men join'd with some more in a civil Body, or in some Confederacy like that; but still retain'd a natural Liberty against all others. (Tho' it must be own'd, that the more and the smaller those Societies were, into which Men at first divided, the nearer Approach was made to a meer natural State.) [1] Thus of Old, when Mankind were parted into distinct Families, and now since they are fallen [2] into separate Communities, those might have been then, and may now be said to live mutually in a State of Nature, neither of whom obey the others, and who do not acknowledge any common Master among Men. Thus, in the primitive Age, when Brethren left their Father's House, and set up particular Families for themselves, independent from any other, then they began to live in a natural State, or Liberty. Therefore not the first Mortals, but their Offspring, did actually exist in such a State. Now a State of Nature thus temper'd and qualified, is attended with none of those Inconveniences which follow a meer natural Liberty, especially if we apply it to publick Communities: And besides, it passes for the highest Pitch of Honour amongst Mortals, by vertue of the united Strength of the whole publick Body, to acknowledge no earthly Superior. So that Commonwealths, and the Governors of them, may fairly declare themselves to be in a State of natural Liberty, while they are furnish'd with sufficient Strength to secure the Exercise of that grand Privilege. Whereas, when Men live singly in a meer natural State, it is no manner of Pleasure or Advantage to them to own no Superior; inasmuch as upon account of their own small Force and Ability, their Safety must needs be in perpetual Doubt and Danger.

There are some indeed who maintain, with great Eagerness, that such a natural State either doth not at all exist, or is not rightly call'd natural; and they form their Argument in the following Manner: Nature inclines Men to an orderly Society or Fellowship; now there being no such thing as Order without Government, it follows that there can be no Society without Government, and that therefore Government or Command ought rather to be stil'd Nature than Liberty. To strengthen this Assertion, they alledge the Authority of *Cicero*: [3] *Nothing* (says he, *De Leg. Lib.* iii. *Chap.* i.) *is so*

§. IV. [1] The three Sentences following, in my Opinion, are unfitly placed, and may better be ranged thus: Thus in the primitive Age——Liberty, And when of Old Mankind —— among Men, Therefore not the first Mortals, *&c.* Let the Reader judge.

[2] See *Plato* concerning this whole Matter, *De Legib. Lib.* 3. not far from the Beginning. *P.* 680, 681. *Tom.* ii *Ed. Steph.* and *Aristotle*'s *Politicks, Lib.* i. *Chap.* ii. p. 297. Edit. *Paris.*

[3] He means by it the Law. These are his Words: *Nihil porrò tam aptum est ad jus, conditionemque naturæ (quod cùm dico, legem à me dici, & nihil aliud intelligi volo) quàm imperium, sine quo nec domus ulla, nec civitas, nec gens, nec hominum universum genus stare, nec rerum natura omnis, nec ipse mundus potest. Nam & hic Deo paret, & huic obediunt maria, terræque, & hominum vita jussis supremæ legis obtemperat.*

agreeable to the Right and to the Condition of Nature, as Government: Without which no Houſe, no State, no Nation, not human Race in general, not the univerſal Nature of Things, not the World itſelf could ſtand. For the World obeys God, *and the Seas and the Earth obey the ſuperior Frame of the World, and the Life of Man is led in Conformity to the High and the Sovereign Law.* Hence they bring a general Accuſation againſt Mr. *Hobbes*, for feigning ſuch a State under the Name of Natural, as is unworthy of human Nature, and more agreeable to that of Beaſts, who are ignorant of Reaſon and of Speech. For that all Men have a Liberty of doing, of deſiring, of poſſeſſing all Things, no Reaſon, no Nature, truly and rightly judging, can adviſe. Such Inclinations may indeed flow from depraved Nature, but cannot be the Dictates of right Reaſon, which, by deſiring Society, doth, at the ſame time, deſire an Order in Society, and by that means cuts off all ſuch licentious and irregular Motions. For what Order can be conceiv'd without tending to ſome firſt and principal Point? This firſt and principal Point muſt be Government, or the ſovereign Power in Society, without Regard to which, no Society can be deſir'd by thinking and ſpeaking Beings. Nature itſelf inſtructs us, that Government is eſſential to all Society; but that ſuch a Liberty as excludes all Government, tends to unnatural Confuſion. Add. *Bœcler ad Grot. Proleg.*

What may be return'd in anſwer to all this Proceſs of Argument, is clear from the preceding Doctrine. A meer natural State is a Repreſentation of Mens Condition abſtracted from all human Inſtitution, but doth not ſuppoſe that Nature intended Man for ſuch a Way of Life [1]. For by the ſame Allowance of Expreſſion, an entire Ignorance of all things may be ſaid to be natural to Man, or to be born with him; without implying any ſuch thing as that it ſhould be repugnant to Nature for Men to acquire very high Degrees of Knowledge. Beſides, we have been ſo cautious as to attribute no ſuch natural Liberty to Man, as ſhall be exempt from the Obligation of natural Law, or of divine Commands. But ſuch a Liberty as excludes all human Sovereignty and Superiority cannot be ſaid to contradict Nature, any more than it can be ſaid to reach as far as Infinite itſelf. Government indeed is Natural; that is, it was the Deſign of Nature that Men ſhould conſtitute Governments amongſt themſelves. But this doth not make it leſs Natural, that he who himſelf bears the ſupreme Government and Command amongſt Men, ſhould himſelf be exempt from all other human Command, and, in that Senſe, ſhould enjoy a natural Liberty: Unleſs in the ſame Order we can fancy ſomewhat *before* the *firſt*, ſomewhat *ſuperior* to the *Supreme*. Upon the ſame Account it is in general very agreeable to Nature, that he who hath no Lord or Maſter ſhould govern himſelf, and his Actions, by the Guidance of his private Reaſon.

V. There is a Diſpute of much greater Conſequence, whether this natural State, in regard to other Men, bears the Semblance of War or of Peace: Or, which comes to the ſame thing, whether they who live in a State of Nature, that is, who do neither obey one another, nor own a common Lord, ought to be reckon'd Enemies amongſt themſelves, or quiet and peaceful Friends? And here our firſt and chief Buſineſs muſt be to examine the Opinion of Mr. *Hobbes*, who as he calls his meer natural State not a ſingle War, but a War of all Men againſt all; ſo he maintains, that when ſome Men have agreed to enter into Society, they immediately quit their hoſtile State in regard to one another, but ſtill continue againſt all the reſt of the World. Thus in his Book *de Cive*, *Chap.* ix. §. 3. *Every Man is an Enemy to every Man whom he neither ſerves nor obeys.* (He ought to have added, *and with whom he has no common Maſter.*) And again, *Chap.* xiii. §. 7. *The State of Commonwealths, amongſt themſelves, is Natural, that is, Hoſtile. And tho' they ceaſe to fight, yet this Intermiſſion muſt not be call'd a Peace, but a Breathing-time, during which each Enemy, obſerving the Motions and the Countenance of the other, rates his Security, not by Covenants, but by the Strength and Deſigns of his Adverſary.* (He ſhould have added, *and by his own Force* [a].) He adds, in his *Leviathan*, Chap. xiii. *That War conſiſts not in Battle only, or the Act of Fighting, but in a Tract of Time wherein the Will to contend in Battle is ſufficiently known: And* that *therefore the Notion of* Time *is to be conſider'd in the Nature of War, as in the Nature of Weather: For, as the foul Weather lieth not in a Shower or two of Rain, but in an Inclination thereto for many Days together; ſo the Nature of War conſiſts not in actual Fighting, but in the known Diſpoſition thereto, during all the Time there is no Aſſurance to the contrary.* Nor indeed was Mr. *Hobbes* the firſt Inventor of theſe Notions; for we meet with ſomewhat much of the ſame Strain in *Plato*'s firſt Book of Laws; where *Clinias*, a *Cretan*, in giving the Reaſons why the Lawgiver of that Country introduc'd a great Number of Ordinances in reference to military Affairs, concludes: [2] *By which Conduct he ſeems to me to have accus'd many Men of extreme Folly and Ignorance, in their not being ſenſible, that all Cities are in a perpetual War with all. And that which we call Peace is no more than a bare Name, while, in Reality, Nature has ſet all Communities in an unproclaim'd War againſt each other.*

We may obſerve, by the way, that ſome [3] Authors have given a very unaccurate Explication of this great Queſtion; while they tell us, that by a

[a] *Juſt as* Oppian *deſcribes the State of Fiſhes,* Halieut. Lib. ii.

In mutual War they ſwim, and mutual Hate,
The Weak, the Strong, the Smaller feed the Great:
Deſtructive Rage boils in the reſtleſs Flood;
Each frights and fears, purſues and is purſu'd.
And hence the ſcaly Tribes, with wakeful Eyes,
Still watch, and live, and die upon Surprize.
Unfix'd, unwearied, all their Age they ſtray,
In Hopes, or Fears, to find, or prove a Prey.

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[1] See *Chap.* 3. §. 13, and 16, following, at the Beginning.

§ v. [2] *Plato*'s Words are, Ἄγνοια δή μοι δοκεῖ καταγνῶναι τῶν πολλῶν, ὡς ἀ μανθανόντων, ὅτι πόλεμῳ ἀεὶ πᾶσι διὰ βίου ξυνῳκὼς ὑπάρχει πρὸς ἁπάσας τὰς πόλεις ——— ἣν γὰρ καλοῦσι οἱ πλεῖστοι τῶν ἀνθρώπων εἰρήνην, τοῦτ' ἔστι μόνον ὄνομα, τῷ δ' ἔργῳ πάντῃ πρὸς πάσας τὰς πόλεις ἀεὶ πόλεμον ἀκήρυκτον κατὰ φύσιν ἔστι. *De Legibus, Lib.* i. *princ.*

[3] I have at laſt diſcover'd that our Author here means *Chriſtopher Beeman*, who has undertaken to defend and explain the Syſtem of *Hobbes*, in a Book entitled, *Meditationes Politicæ*, printed ſeveral times at *Frankfort* upon the *Oder*, where this Author was then Profeſſor of Hiſtory and Politics. I had a Suſpicion that the Quotation was taken from this Work; but to be convinc'd of it, I procur'd the Book, and have tranſlated the Words from the Original. The Reader may ſee them in M. *Backman*'s Book, *Cap.* iv. §. 4. *p.* 49. *Edit.* 1693.

natural

natural State is underſtood that Condition by which we are conceiv'd to live ſingly, or out of Society; and that this is a State of War, that is, of Inclination to poſſeſs what another hath, and to drive the Owner from it; ſo that their whole Meaning amounts to this, that if Men liv'd without all Society, they would be engag'd in a perpetual Quarrel; or, if Men did not lead a ſocial Life, they would continue in a State of endleſs Diſcord. But now here's a great Impropriety committed, the oppoſing a State of Nature to a ſocial Life; for thoſe who live in a State of Nature both may, ought, and frequently do, conſent to live ſocially.

But ſince, upon this Queſtion rightly ſtated, are founded almoſt all the Pretenſions and all the Debates which can fall out between the Governors of one Commonwealth, and their Neighbours of other Countries or Dominions; we imagine it will not be loſt Labour, if we proceed to a cloſer and a ſtricter Diſcuſſion of the *Arguments alledg'd* on either hand.

VI. That the State of Nature then is a State of War, Mr. *Hobbes* endeavours in this Manner to demonſtrate. The Reaſon why Man is continually in Fear of Man, and conſequently in a State of War with him, he draws from this Principle, that Men have both the Power and the Will of hurting one another. That they have the Power of hurting each other, he ſhews by obſerving that Men of ripe and ſettled Age are commonly equal in Strength. For though one may frequently have the Advantage of another in bodily Force, yet, 'tis poſſible, that the Weakeſt may kill the Strongeſt, either by ſecret Machination, or by Confederacy with others; inaſmuch as the ſtouteſt Mortal has his vital Parts no better enſur'd from extreme Violence, than the moſt puny and [1] impotent Wretch [a]. Neither is it probable that a larger Degree of natural Cunning (in which, of two Men, one commonly exceeds the other) ſhould be able to ſecure a Man's Safety, while he has no Guard, and no Protector but himſelf. Farther, ſince the greateſt Evil that Men can bring upon one another is Death; and ſince this may as well be brought on the Stout by the Weakly, as on the Weakly by the Stout, he ſays it follows, that thoſe who can bring on each other the greateſt Evil, muſt, in Effect, be of equal Power and Strength. As to the Will of hurting others, this, he ſays, is, in ſome Men, out of Neceſſity, and in ſome out of Luſt and Pleaſure. For while ſome are for living as they liſt, for arrogating to themſelves undue Honours, and for petulantly ſetting on their quiet Neighbours; it's impoſſible but that thoſe Neighbours, how modeſt ſoever they may be, and how willing ſoever to allow others an equal Liberty with themſelves, muſt neceſſarily defend themſelves againſt the Violence of their Aſſailants [b]: Beſides, he tells us, that the Will of hurting ariſes frequently from the Contention of Wit, while every Man thinks himſelf wiſer than his Fellows, and yet at the ſame time cannot bear the ſame Arrogance in others. Hence, he ſays, it comes to paſs, that it is not only odious to contradict, but, likewiſe, not to conſent: For not to conſent to another in a Thing, is tacitly to accuſe him of Error in that Matter; and to diſſent in very many Things, is as much as to count him a Fool, in not being able to apprehend ſuch an evident Truth, as every one takes his own Opinion to be. Hence, ſince all Pleaſure and Satisfaction of Mind conſiſts in this, that one be able to prefer one's ſelf to others, 'tis impoſſible but that now and then ſome Signs of Contempt towards others will break out; than which no Affront is more provoking to human Minds [c]. The laſt and moſt frequent Cauſe of a mutual Deſire of hurting, ariſes, according to *Hobbes*, from hence, that [d] many deſire one and the ſame Thing at once, which frequently they neither can, nor will, enjoy in common, nor yet divide: From whence it follows, that it muſt be given to the Stronger; and who is the Stronger, can only

[a] Seneca de Ira, Lib. i. Chap. iii. *There is no one ſo low or contemptible, who may not hope to ſatisfy his Revenge on the greateſt Perſon. We are all ſtrong enough to do Miſchief.*

[b] *It is very probable there may be ſome Perſon like* Achilles,

Jura negat ſibi nata, nihil non arrogat armis. — Scorning all Judges and all Law but Arms.

Or like thoſe whom Manilius *deſcribes,*

Nec pacem a bello, civem diſcernit ab hoſte,
Ipſe ſibi lex eſt, & qua fert cunque libido,
Præcipitat vires: laus eſt contendere cunctis.

Nulla quies placet, in nullo ſunt otia fructu,
Sed populum, turbamque petit, rerumque tumultus,
Seditio, clamorque juvat. ——

Who make no Difference between War and Peace,
But Friends, and Foes, with equal Fury ſeize.
They every Thing to wild Condition draw;
Their Will their Ruler, and their Sword their Law.
They ſcorn that Reſt which private Minds enjoy,
But fawn upon the Crowd, and court Employ,
Love Noiſe, and Stirs, and Tumults —— Mr. CREECH.

[c] *Cicero*, Off. i. Chap. xxvii. *Contraque falli, errare, labi, decipi tam dedecet, quàm delirare, & mente eſſe captum. To be miſtaken, deceiv'd, or put upon, is reckon'd no leſs Diſgrace, than to doat, or to be out of one's Wits.* Hor. Ep. i. Lib. ii.

Vel quia nil rectum, niſi quod placuit ſibi, ducunt;
Vel quia turpe putant, parere minoribus, & quæ
Imberbes didicere, ſenes perdenda fateri.
Juvenal. Sat. xv.

Or making their own Taſte the Rule of Wit,
Or to their Juniors ſcorning to ſubmit;
That what they *beardleſs* learnt, *All Beard* they ſhould forget.

—— *Summus utrinque*
Inde furor vulgo, quod numina vicinorum
Odit uterque locus, quia ſolos credit habendos
Eſſe Deos quos ipſe colit.

In furious Anger they each other mock;
Each calls the other's God a ſenſeleſs Stock,
His own Divine, tho' from the ſelf-ſame Block.
One Carver fram'd them —— Mr. TATE.

[d] *Cicero* Off. 1. *Nam quicquid ejuſmodi eſt, in quo non poſſint plures excellere, in eo ſit plerumque tanta contentio, ut difficillimum ſit, ſanctam ſervare ſocietatem. Whatever is of that Nature, as not to admit more than one to excel in it at the ſame time, uſually proveth the Subject of ſo much Strife and Contention, as exceedingly to endanger the ſacred Peace of Society. Sit iſta in Græcorum levitate perverſitas, qui maledictis inſectantur eos à quibus de veritate diſſentiunt.* Cicero de fin. bon. & mal. Lib. ii. Chap. xxv. *It is a Perverſeneſs* peculiar *to the* Grecian *Levity, to reproach thoſe from whom they differ in Opinion.* See alſo *Charron of Wiſdom*, Lib. i. Chap. vii. Edit. *Bourd.*

§. VI. [1] *Seneca*'s Words are, *Deinde nemo tam humilis eſt, qui pœnam vel ſummi hominis ſperare non poſſit. Ad nocendum potentes ſumus.* We may add what *Q. Curtius* delivers in a Speech to the *Scythians*, *Leo quoque aliquando minimarum avium pabulum fuit. Nihil tam firmum eſt, cui periculum non ſit etiam ab invalido.* Lib. vii. Chap. viii. Num. 15.

be known by fighting [a]. Upon all these Accounts, he declares it to be impossible but that Men should live in perpetual Fear and Suspicion of one another. And that since not only natural Passion, but Reason too, recommends to every Man his own Safety in the highest Manner, and indulges him in the Use of all Means for the attaining of that End, the Fitness of which, no Superior being yet admitted, is to be determin'd by each Man's particular Judgment; hence there must necessarily arise a Desire rather of preventing others, than of yielding to their Invasion: From whence there will, at last, result a State of infinite War, of all Men against all; the Consequence of which is, that it shall be lawful for any Man to do to any Man, either secretly or openly, whatever he shall think expedient for his own Affairs: In doing which, altho' his Reason should sometimes fail him, yet he would not offer an Injury to any body, since Justice and Injustice have nothing to do but with Societies and establish'd Corporations: Tho' a Man may indeed sin against Reason, by using unfit Means for his own Preservation.

VII. These Notions are, in some measure, tolerable, if propos'd only by way of Hypothesis. And that *Hobbes* design'd them for nothing more, we may be apt to conclude from those Words in the eighth Chapter of his Book *De Cive*; *But to return again to a natural State, and to consider Men as if they were just now risen out of the Earth like a Mushroom, and of full Stature, without any manner of Obligation to each other.* Yet in the thirteenth Chapter of the same Book, and frequently in other Places, he calls the State of publick Bodies, not by way of Supposition, but seriously and absolutely *Natural*; that is, as he explains it, *Hostile*. Which seeming Contrariety we may do him the Justice thus to reconcile; it shall be a pure Hypothesis, that all Men did at any time live together in such a State of Nature, as they would have done if they had risen suddenly in a great Multitude from the Earth: But what he seriously maintains shall be only this, that such a natural State doth really exist amongst some Men; that is, amongst such as are neither subject one to the other, nor to a common Master, as is now the Case of all establish'd Communities. And this indeed is his own Judgment, as he has moderated it in his *Leviathan*. *Though* (says he) *there never had been any Time, wherein particular Men were in a Condition of War one against another; yet in all Times, Kings and Persons of Sovereign Authority, because of their Independency, are in continual Jealousies, and in the State and Posture of Gladiators,* &c.

But the contrary Opinion seems more reasonable, as what is clearly favour'd by the Origin of Mankind, as related in the infallible Records of holy Scripture; which represent the natural State of Man, not hostile, but peaceful, and shew that Men, in their true Condition, are rather hearty Friends than spiteful Foes. From these sacred Histories we learn, that the first Man being, by divine Power, produc'd out of the Earth, a Companion was soon join'd to him, different in Sex, whose Substance was therefore taken out of him, to engage him immediately in the deepest *Love* and Affection for her, as being *Bone of his Bone, and Flesh of his Flesh.* This primitive and original Couple God Almighty was pleas'd to unite in the most solemn Manner, and with the most sacred Tie; and since from them all human Race orderly descended, we may conceive Mankind mutually engag'd, not only by such a vulgar Friendship as might result from Similitude of Nature [b], but also by such a tender Affection as endears Persons allied by a Nearness of Race, and of Blood: Although the Sense of this kind Passion may be almost worn off amongst the Descendants, by reason of their great Distance from the common Stock. Now if any Man should pretend to divest himself of this Affection, and entertain a Temper of Hostility against all others, he ought to be censur'd as a Revolter from the primitive and natural State of Mankind. Nor will it signify much here to object, that, even from this Account of Matters, it follows, that the natural State of Men is a State of War; inasmuch as if Societies were therefore instituted at the Beginning of the World to make Men live peaceably together, it must be true on the contrary Side, that without Societies Men would not have liv'd peaceably, and that hence arose the Necessity of making Societies be born with them. To which we reply, that our present Enquiries are not made after such a natural State, as may be conceiv'd by the Help of Abstraction, but after such an one as really has been, and is now, in the World. And that therefore, since the first Mortals were placed in such a State as inspir'd them with Love, and not with Enmity, and since from this State all the rest of Mankind descended, it is plain, if Men were mindful of their first Original, they might be rather accounted Friends than Foes. Nor were Societies therefore establish'd amongst Men from the Beginning, to hinder a natural State from taking place, but because human Kind could not otherwise have been propagated and preserv'd. But a State of Nature did then arise, when Men being largely multiplied could no longer be contain'd in one Society [z]. Hence it is Nonsense to say, that without the Help of a social Condition, Mankind, at the Beginning of their Being, would have liv'd like Ene-

[a] Thus *Socrates* discourseth, *Xenophon Apomnem. Lib.* i. Φύσει γὰρ ἔχουσιν οἱ ἄνθρωποι τὰ μὲν φιλικὰ (δέονται γὰρ ἀλλήλων, καὶ ἐλεοῦσι, καὶ συνεργοῦντες ὠφελοῦσι, καὶ ἄττα συνιέντες χάριν ἔχουσιν ἀλλήλοις)· τὰ δὲ πολεμικά, τὰ γὰρ αὐτὰ καλὰ καὶ ἡδέα νομίζοντες, ὥσπερ τῶν μαχόμενοι, καὶ διοργυωμοῦντες ἐναντιοῦνται, πολεμικὸν ὂν καὶ ἔρις καὶ ὀργή· καὶ δυσμένεια μὲν ὁ τὰ πλεονεκτεῖν ἔρως, μισητὸς ὂν ὁ φθόνος. *Nature has plac'd in Man the Principles of Friendship and Dissention both together. Of Friendship; because, having need of each other, they are inclin'd to compassionate the Unhappy, mutually to succour each other in their Necessities, and express their Gratitude for Services done. Of Dissension; because, the same thing appearing good and desirable to many, they contend for it, and try to hurt and traverse each other in their Designs. Now Contestations and Anger beget Enmity; Covetousness stifles good Will; and Envy produces Hatred.* See *Seneca de Ira*, Lib. iii. Cap. xxxiv. and *Charron de la Sagesse*, Lib. i. Chap. xxxix. to whom our Author refers.

[b] And such is that spoken of in *Lib.* iii. *D. De Justit. & Jure.*

[c] *This is contrary to* Aristotle's *Notion of Friendship, who makes it to consist, not only in doing no Injury to others also, but in the real and outward Performance of Kindness towards them.*

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§. VII. [1] The Original has it, *nè illi pacatè viverent, that they might not live in Peace.* A gross Contradiction, tho' it be continued in all the Editions, even that of Mr. *Hertius* in 1706; and therefore I have changed the Words, and rendred them, *That they might not live in perpetual Discord,* as the *English* has also.

[z] Tradition has preserved some plain Footsteps of it among the *Pagans.* See *Grot. de Ver. Rel. Christianæ Lib.* i. §. 16. and the Commentators upon *Acts* xvii. 26.

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mies one to another, unleſs we firſt ſuppoſe, that in the Beginning of Things a Multitude of Men ſtarted up together, without being beholden to one another for their Production. *Ariſtot. Rhetor. Lib.* i. *Chap.* xi. [1] *Becauſe whatever is according to Nature, is pleaſant and agreeable; and becauſe thoſe things which are allied in their Original have a natural Reſemblance to each other, all things that are thus related, and thus alike, are, commonly ſpeaking, as mutually delightful as Man to Man.* Cicero de Fin. Lib. iii. Chap. xix. *Nature hath given Men an univerſal Recommendation to each other; on which Account, every Man owes ſo much to his Neighbour barely for the ſake of being a Man like himſelf, as ſhould hinder him from ſhewing any Unkindneſs or Strangeneſs.* Idem De Nat. Deor. Lib. i. Chap. xxvii. *Do you not ſee how full Nature is of Charms and Engagements, as if ſhe intended to act the kind Procureſs to herſelf? Do you imagine there is any Monſter of Land or Sea, which is not delighted with the Fellow-Monſter of its own Race and Shape? And is it any Wonder then, that ſhe ſhould have inſtill'd this Principle into Man* (the moſt noble Member of her Family) *to think nothing ſo beautiful as Man?* Quinctil. Declam. v. *There is a publick*, or univerſal, *Kindred amongſt Men, derived from Nature their common Mother.* Add. M. Antonin. Lib. ix. §. 9. Where he proſecutes at large the Argument of the *Likeneſs of Nature, inclining Men to Unity and Love.* Add. & D. *Cumberland*, De L. N. Chap. ii. §. 18. We muſt interpret only of *particular* Love and Hatred that Saying of *Beliſarius* in *Procop. Hiſt. Vandal.* Lib. ii. Chap. xv. *By Nature Men have neither mutual Affection, nor mutual Averſion. But their particular Actions, either by their Agreeableneſs inviting our Company and Friendſhip, or by their contrary Diſpoſitions provoking our Hoſtility, render ſome the Objects of our Love, others of our Hate.*

VIII. As to Mr. *Hobbes*'s Reaſons, they are eaſily anſwer'd. In the firſt place, thoſe cannot immediately hurt one another, who are divided by Diſtance of Place; for he who is abſent cannot hurt me, except by ſome body elſe who is preſent, and my Poſſeſſions cannot be deſtroyed unleſs by one upon the Spot: Therefore, ſince thoſe who live ſeparately, or at a Diſtance from each other, can offer no mutual Hurt ſo long as they continue thus diſtant, it doth not appear why ſuch Men ſhould not rather be reckon'd Friends than Enemies. For if any Perſon is more inclin'd to call them *Neuters*, he ought to underſtand, that the Term of Friendſhip may be there fairly applied, where there is neither Will nor Power to injure [2]. And then, as for that Equality of Strength which *Hobbes* aſſerts, it is certainly more [3] fit to reſtrain, than to provoke a Deſire of hurting. For no Man in his Wits is very fond of coming to an Encounter with his Equal, unleſs he is either driven upon it by Neceſſity, or by the Fairneſs of the Opportunity put in Hopes of Succeſs. Otherwiſe, to engage in an unneceſſary Fight, where the Blows one gives will be return'd with no leſs Force, and where the Event is meerly dubious, is no better than Foolhardineſs. For when two equal Combatants are ſo far engag'd as to put both their Lives in Danger, neither of them can poſſibly gain ſo much by the Victory, as he muſt loſe who is kill'd in the Fight; nor is it ſo much to have taken away another's Life, as to have hazarded one's own. For the Danger to which I expoſe my Life, takes from me more Good than can poſſibly accrue to me from my Enemy's Life being in the ſame Danger; nor is his Safety increas'd upon account [4] of the Uncertainty of mine: But each Party is a Loſer, and yet the Loſs of neither turns to the Advantage of the other.

Beſides, the Cauſes alledg'd by Mr. *Hobbes*, why Men muſt have a mutual Deſire of hurting, are only particular, and therefore cannot infer a Neceſſity of an univerſal War of all Men againſt all, but only a War of ſome particular Men againſt ſome others. And then it doth not always happen, as he would ſuppoſe, that modeſt and civil Men ſhould have a more fierce and inſolent Generation living near them; or, if the Caſe be ſo, yet it is not neceſſary that the latter ſhould be in a Humour of invading the former. *Contention of Wit* prevails only amongſt Men exalted above the ordinary Level; the greater and vulgar Part of Mankind have none, or but very ſlight Touches of that Diſeaſe. Nor has the All-wiſe Creator been ſo unkind, or ſo ſparing in his Proviſions for human Race, that two Perſons muſt always lay Claim to the ſame Thing. Farther, the general Wicked-

[a] See Dr. *Cumberland de L. N. Chap.* ii. §. 29. Thus the *Scythians* argue in *Q. Curtius*, Lib. vii. Chap. viii. *The firmeſt Friendſhip is between Equals; and thoſe ſeem properly to be Equals, who have not made Experience of each other's Strength.* So *Cæſar* (*De B. C. Lib.* iii. *Chap.* x.) admoniſheth *Pompey*, that *this was the only Time to treat of Peace, whilſt both ſeem'd Equals, and each had good Confidence of his own Power.* *Florus* makes the like Remark on another Occaſion. *The* Romans *and the* Parthians, ſays he, *having try'd their Force againſt each other, and* Craſſus *on the Side of the former, and* Pacorus *of the latter, having given them Examples of their mutual Abilities, they renew'd their ancient Friendſhip with equal Deference and Reſpect.* In *Thucydides*, Lib. iii. §. 11. *Edit.* Oxf. *Mutual Fear is* aſſerted to be the ſureſt Guard of States, *becauſe, on either Side, the doubting of their Safety would keep them from any open Attempt of Violence, though it were never ſo much in their Deſires.*

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[1] The *Greek* of *Ariſtotle* is, Καὶ ἐπεὶ τὸ κατὰ φύσιν ἥδὺ, τὰ συγγενῆ ὄντα κατὰ φύσιν ἀλλήλοις ἐστὶν, ἅπαντα τὰ συγγενῆ καὶ ὅμοια, ἥδεα, ὡς ὅπου τὸ πολὺ, οἷον ἄνθρωπος ἀνθρώπῳ, καὶ ἵππος ἵππῳ, καὶ νέος νέῳ —— *Cicero*'s Words are, *Ex hoc naſcitur, ut etiam communis hominum inter homines naturalis ſit commendatio, ut oporteat hominem ab homine, ob id ipſum quod homo ſit, non alienum videri.* And again the ſame Author ſays, *Non vides quam blanda conciliatrix, & quaſi ſui ſit lena Natura? An putas ullam eſſe terra marique belluam, quæ non ſui generis belluâ maximè delectetur?* —— *Quid igitur mirum ſi hoc eodem modo homini natura præſcripſit, ut nihil pulcrius, quàm hominem putaret, eam eſſe cauſam quod Deos hominum ſimiles putaremus? Beliſarius*'s Words in *Procopius* are, Φύσει μὲν γὰρ, ὅσοι τῶν πάντων ἀνθρώπων ὀρθῶς ἂν ἢ ἐναντίως ἀλλήλοις ἔχοιεν, αἱ ὀργαὶ ἐκάστων, ἢ τῷ ὁμοτέπω ἐς ξυμμαχίαν σωάπτουσι, ἢ τῷ διαλλάσσοντι τὰ γνώμης ἐς τὸ δυσμενὲς διακείνουσι, φίλους (ἄν ὅπως τύχοι) ἢ πολεμίους ἀλλήλους ποιοῦσιν.

§. VIII. [2] The Original imports, Word for Word, the Will and Power not to hurt; but ſince our Author treats here of ſuch Men as are not in a Condition to do Injuries one to another, though they have a Deſire to do it, I believe that this Sentence may be better tranſlated, *A ſimple Want, if a Deſire to hurt, joined with an Impoſſibility to do it actually, may paſs for Friendſhip.*

[3] In the Latin of *Q. Curtius* the *Scythians* thus ſpeak to *Alexander*, *Nam & firmiſſima eſt inter Pares amicitia, & videntur pares eſſes, qui non fecerunt inter ſe periculum virium.* *Cæſar*'s Words are, *Hoc unum eſſe tempus de pace agendi, dum ſibi uterque confideret, & pares ambo viderentur.* The Words of the Ambaſſadors of *Mitylene* in *Thucydides*, are theſe: Τὸ δ' ἀνέλπιστον μέγιστον ἐς ξυμμαχίαν, ὃ δὴ παρεκελεύετο τῷ [and not τὴ, as it is commonly read] μὴ προέχων ἂν ἐπελθεῖν ὠφέλει.

[4] The Original in moſt of the Editions runs thus, *Quoniam inde certa eſt mea*, which imports a contrary Senſe than the Author ſeems to intend; but in the Edition of *Frankfort* the Reading is true, *inde incerta*, as it is in Dr. *Cumberland*, from whence this Sentence is taken; and ſo I have tranſlated it, as alſo doth the *Engliſh* Tranſlator.

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neſs of Men may have ſo much Effect, as to hinder any one from raſhly thruſting, or offering (as it were) his bare Breaſt to another, eſpecially if he has not a Knowledge of him [a] [1]. But, that this Suſpicion or Diffidence ſhould proceed ſo far, as to the ſeizing, or the oppreſſing another, unleſs he hath declar'd a particular Deſire and Deſign to hurt us, no Man of Senſe will admit [2]. *Cicero* (*Off.* i. 7.) rightly calls it, *An Injury out of Fear, when he that is contriving to do another Man Miſchief, doth it by way of Prevention, ſuſpecting he ſhould otherwiſe ſuffer Hurt from the Quarter where he now offers it.* *Hobbes* is the more inexcuſable for maintaining that his natural State cannot be remov'd and broken up, but by letting in the Sovereignty of another, and by uniting in the ſame Commonwealth: For that thoſe Commonwealths, how diſtinct ſoever, which are allied by Friendſhip and by Leagues, ſhould ſtill continue in a State of mutual War, is a Contradiction evident to the common Senſe of Mankind [3]. Nor ſhould we (as he would have us) diſcard all Peace, as not deſerving that Name, which is not ſufficiently firm and certain, any more than we ſhould forbear ſaying, that ſuch a Man is in Grace and Favour with another, becauſe the Wills of Men are ſubject to continual Alterations.

IX. We muſt likewiſe take ſpecial Care to obſerve, that we are not diſputing about the natural State of a meer Animal, govern'd by the ſole Impulſe and Inclination of the ſenſitive Soul; but of an Animal whoſe nobleſt and chiefeſt Part is Reaſon, the Sovereign and Controller of all other Faculties; and which, even in a natural State, has a common, a firm, and an uniform Meaſure to go by; namely, the *Nature of Things*; which, laſtly, is very free and ready in offering itſelf, ſo far as to inſtruct us in the general Precepts of Living, and the Dictates of natural Law. And thoſe who would rightly deſign and repreſent a State of Nature, ought by no means to exclude the juſt Uſe of this Reaſon, but ſhould join it with the Operations of the other Faculties. Foraſmuch then as Man has not only the raſh Cry of his Luſts, but alſo the ſober Voice of Reaſon (not meaſuring itſelf purely by private Intereſt) to hearken to, if his wild Affections incite him to a War, ſuch as that extravagant one of all Men againſt all, his Reaſon will be more powerful in diſſuading him from it; and that chiefly by giving him theſe two Intimations, that a War undertaken without Provocation from the other Party, is both [4] unſeemly and unprofitable. For it is eaſy for any Man to gather thus much, that he did not exiſt of himſelf, but was produc'd by ſome Superior, who conſequently retains a Power and Authority over him. And when he finds himſelf ſpurr'd on, as it were, by a double Principle, of which one is wholly fix'd on Things preſent, the other can embrace in its Thought what is abſent or future; of which one drives him furiouſly on Dangers, Doubts, and Diſorders, the other conducts him to nothing but what is comely and ſafe; he will conclude, without any Difficulty, that 'tis the Pleaſure of his Creator, he ſhould rather follow the latter Guide than the former. And when to this Conſideration is added, the exceeding great Benefit and Advantage of that quiet Condition which Reaſon adviſes, a Man cannot but naturally incline to Peace. Eſpecially, ſince, if at any time he ſhould happen to neglect his Reaſon, and follow his blind Paſſions, he would find by the ſad Event that he took the wrong Meaſures, and would be ready to wiſh thoſe things to be undone, which were done againſt the Orders and Directions of his nobleſt Faculty. From all which we conclude, that the natural State of Men, altho' they be conſider'd as not united in Commonwealths, is not War, but Peace. And this Peace chiefly depends on the following Laws and Conditions; that no Man hurt another, who doth not aſſault and provoke him; that every one allow others to enjoy their own Goods and Poſſeſſions; that he faithfully perform whatever ſhall be covenanted for, and voluntarily promote the Intereſt and Happineſs of others, in all Caſes where a ſtricter Obligation doth not interfere. For ſince the natural State of Man includes the Uſe of Reaſon, we muſt by no means ſeparate from it thoſe Obligations, which Reaſon tells us we lie under. And becauſe every Man may diſcover it to be moſt for his Intereſt and Advantage, ſo to manage his Behaviour, as to procure rather the Benevolence, than the Enmity of others; he may eaſily preſume, from the Likeneſs of Nature, that other Men have the ſame Sentiments about the Point as himſelf. Therefore it is very foul Play, in deſcribing this imaginary State, to ſuppoſe that all Men, or however the greateſt Part of them, do act with Diſregard and Defiance to Reaſon, which is by Nature conſtituted ſupreme Directreſs of human Proceedings; and ſuch a State cannot, without the higheſt Abſurdity, be called *natural*, which owes its Production to the Neglect, or to the Abuſe of the natural Principle in Man [b].

X. It will be in vain for any one here to object, the ſtrange Barbarity which reign'd among moſt of the ancient Nations and People; who ſeem to have had ſcarce any other Pleaſure, or any other Buſineſs, but the Purſuits of Plunder and [5] Prey; and amongſt whom Robbery paſs'd for one of the particular Profeſſions and Ways of living. For thus *Ariſtotle* in his Politicks, reckoning up the ſeveral Callings, or Lives, of the Herdſmen, the Huſbandmen, the Fiſhermen, and the Hunters, adds

[a] Plautus Aſinar. *A Man doth not ſhew himſelf a* Man, *but a* Wolf, *to another whoſe Temper and Deſigns he is not acquainted with.*

[b] *This is moſt largely demonſtrated by Biſhop* Cumberland, *to whom the Reader is recommended for fuller Satisfaction.*

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[1] See *Chap.* v. §. 6. and *Lib.* iii. *Chap.* vi. §. 9. and *Lib.* viii. *Chap.* v. *Note* 3. following.

[2] *Cicero*'s Words are, *Atque illæ quidem injuriæ, quæ nocendi cauſâ de induſtria inferuntur, ſæpe à metu proficiſcuntur, quum is, qui nocere alteri cogitat, timet, nè ſi id fecerit, ipſe aliquo afficiatur incommodo.*

[3] This Argument againſt *Hobbes* appears not concluſive; for, according to his Principles, by ſuch Conventions, or Agreements, we renounce the Right which every Man has againſt all in a State of Nature: So that, as long as this Agreement laſts, the Hoſtility which ſubſiſted during the State of Nature, is ſuſpended. But it muſt be own'd, that *Hobbes* allows very little Force to the Agreements enter'd into between ſuch as are not Members of the ſame civil Society.

§. IX. [4] It is in the Original, *inutile*; but the Sequel makes it evident, that it ought to be underſtood, *hurtful and prejudicial*, and not barely, *unſeemly and unprofitable*. See *Note* 1. upon §. 7. of *Chap.* iii. *Lib.* i.

§. X. [5] Here our Author uſes *Virgil*'s Words, as he makes *Numanus*, ſirnamed *Romulus*, to ſpeak,

Semperque recentes
Convectare juvat prædas, & vivere rapto. Æneid. ix. v. 612, 613.

adds to the reſt the βίᾳ ληϛεικὸς, *the Life of Thieves.* And afterwards, *War is, in ſome ſort, a natural Way of acquiring Poſſeſſion. For Hunting, or violently purſuing, is one of its chief Parts; and this may not only be uſed againſt Beaſts, but, likewiſe, againſt ſuch Men as, tho' they were born to obey, do yet refuſe Subjection.* We have numerous Teſtimonies to this Purpoſe in antient Writers. *Vid. Homer. Odyſſ.* iii. *v.* 73. and *Odyſſ.* ix. *v.* 253. on which Place *Didymus* tells us, that the *Profeſſion of Robbers amongſt the Antients was not infamous but glorious. Diodor. Sic. Lib.* iii. *Ch.* xlix. *The* Libyans *on no Account obſerve any manner of Right, or any manner of Faith towards Strangers. Cæſar* reports of the *Germans*, that *thoſe Robberies do not fall under Cenſure or Reproach, which are practis'd beyond the Bounds of each particular State:* And the Excuſe they alledge for them is, *That they ſerve for the Exerciſe of Youth, and the Diſcouragement of Idleneſs.* De B. G. Lib. vi. He tells us farther, *That every State reckon'd it the greateſt Honour and Glory to have as large Solitudes round them as poſſible, caus'd by their own Devaſtations: eſteeming it a noble Teſtimony of their Valour, that their Neighbours were forc'd to quit the Country, and that none are ſo hardy as to live near them. Mela, Lib.* iii. *Ch.* iii. gives the like Account of the *Germans* in general; but *Tacitus* ſpeaks in this manner only of the *Vendredi*, a particular People amongſt them. Of the *Spaniards*, *Plutarch* (in *Mario*) reports, that *Robberies paſs'd amongſt them, till that Time, for gallant Adventures.* And *Thucydides* ſays as much of the antient *Grecians, Lib.* i. To the ſame Purpoſe ſome produce the *Roman* Law, *(l. ult. D. de Colleg.)* where thoſe Covenants are declar'd valid which paſs between τῶν ἐπὶ λείαν ἐρχομένων, or οἰχομένων, *Perſons who unite on the account of Booty or Prey.* Tho' *Salmaſius, de Uſuris Lib.* i. *Ch.* xii. corrects the antient Reading into ἐπὶ κατάλειαν, *on the Account of a drinking Match. Polybius, Lib.* iii. mentions it as a Clauſe in a League between the *Romans* and *Carthaginians*, that the former ſhould neither *drive Booty to* Maſtia *and* Farſeium, *beyond the fair* Promontory, *nor exerciſe Merchandize:* As if both theſe Practices had been then eſteem'd equally lawful. *Juſtin, Lib.* xliii. ſays of the People of *Phocis*, that *they ſupported themſelves by Piracy, which, at that Time, was look'd upon as Glory.* Sextus Empiric. Hypot. Lib. iii. Ch. xxiv. *To rob and ſpoil is reckon'd by no Means diſgraceful amongſt many of the barbarous Nations: Nay, the* Cilicians *are ſaid to have accounted theſe Adventures moſt highly creditable and renown'd, ſo as to pay Honours to the Memory of ſuch as died in their Proſecution. And* Neſtor, *in the Poet, having kindly receiv'd* Telemachus *and his Company, aſks them,*

What, are you Rovers of the Plundering Trade—?

Now if Robbing had been then ſcandalous, it is not likely he would have entertain'd with ſo much Civility Perſons whom he ſuſpected of ſuch a Courſe. *Lib.* ii. *D. De Captio & Poſtlim. If there be a Nation, with which we have no Tye of Friendſhip, Hoſpitality, or League, we muſt not preſently eſteem them Enemies: Yet whatever of ours comes into their Poſſeſſion belongs to them; and even a free Man of our Country, if taken by them, becomes their Slave.* Comp. Lib. cxviii. de verb. ſignific. *Dio Caſſius, Lib.* liv. ſpeaking of the *Rhætians, Often plundering*, ſays he, *their Neighbours the* Gauls, *they had driven Booty from the Borders of* Italy, *and had infeſted the* Romans *and their Allies in their Paſſage through thoſe Parts: And it was then a receiv'd Cuſtom amongſt them, to deal in this Manner with all thoſe whom they were united to by ſolemn Leagues and Agreements.* Iſocrates (*Panathen.*) ſays of the *Triballians, There are no Men who obſerve a ſtricter Concord amongſt themſelves; but then they endeavour utterly to deſtroy all beſides; not only their Borderers and Neighbours, but any People to whom they can force an Acceſs. Add.* Grot. Lib. ii. Ch. xv. §. 5. This antient Hoſtility, amongſt other Reaſons that are given for it, might proceed, in a great meaſure, from the groſs Superſtition and Idolatrary of thoſe Nations, by which every People imagin'd themſelves to have peculiar Gods, and thoſe only true ones [1]. Vid. *Juvenal, Sat.* 15.

In return to this vulgar Argument, 'tis ſufficient to ſay, that, in thoſe blinder Ages of the World, the Dictates and Informations of ſound Reaſon were choak'd and ſtifled by the Prevalency of corruped Manners. Yet it doth not follow from hence, that there was no Man, even in thoſe Nations, ſenſible enough to apprehend that the Laws of Nature were violated by this Courſe of Robberies and Spoils, or to diſallow that State to be natural, into which wild and ungovernable Men had thrown themſelves, in Neglect and in Contempt of the nobleſt Part of their Being. For that a promiſcuous Liberty of Rapine doth not flow as a Conſequence from a State of Nature, is evident, becauſe the like ill Effect is not ſeen in the State which different Commonwealths now bear one to [2] another, which is really natural. Nor muſt we admit what *Hobbes* farther aſſerts, that *ſuppoſing Matters ſtood thus, Robbery or Pillaging would be contrary to the Law of Nature:* For thoſe who had plunder'd us in this Manner, without Provocation, we might have treated with the like Violence, and have made Repriſals on their Poſſeſſions for the Loſs of our own: But then we could not have ſhewn ſuch rough Uſage to a third Perſon, who had offer'd no Injury or Moleſtation to us before. The Impudence of ſome Perſons, in breaking the Law of Nature, is no juſtifying Example for us to imitate. Nor is the Remark more

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[1] But this very Example may prove to our Author, that his Conjecture is not good, ſince the Poet ſets it down as a ſingular Example, and he could not but know, that the Heathens did not hate, and perſecute each other, purely for Religion's ſake. The Truth is, it was their Ignorance of the Law of Nature, and of the true Religion, which cauſed them to approve of theſe publick Robberies. And if any Perſons looked upon them as unjuſt, yet they were forced, in a manner, to practiſe them, partly for their own Preſervation, and partly by way of Repriſal. We may find that the *Iſraelites* themſelves uſed them, as appears from the Example of *Jephtha, Judges* xi. 3. upon which Place conſult Mr. *Le Clerc*'s Comment. In fine, We may obſerve, that in the *Select Obſervations*, printed at *Hall* in *Saxony* ſome Years ago, there are two Diſcourſes upon this Subject worth our reading, *viz.* the ſixth and ſeventh in *Tome* VII. thus entituled, the one, *Hiſtoria de latrocinio Gentis in Gentem*; and the other, *Moralitas latrocin. Gent. in Gent.* The Author is *Vames Thomaſius*, the Father of Mr. *Thomaſius*, the famous Profeſſor of Law at *Hall* in *Saxony*.

[2] *And yet they might reaſonably uſe, towards each other, this pretended Right of Robbery.* This ſhould have been added to compleat our Author's Reaſoning. But it is alſo what *Hobbes* denies, according to his Principles, as appears by the Paragraph itſelf, which our Author examines here. It muſt be own'd, that if *Hobbes*'s Reaſons were concluſive, with regard to Individuals, they would equally ſerve to prove the ſame thing, as to civil Society, conſider'd with relation to each other. It is ſufficient to apply here the contrary Reaſons, which, by deſtroying the Liberty, that *Hobbes* unſeaſonably eſtabliſhes as a Right, amongſt Particulars, diſcover the Injuſtice of it between Societies.

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tolerable which *Hobbes* ſubjoins, that *this Kind of Life was not without Glory to them who exercis'd it valiantly, and yet not cruelly. As it was the Cuſtom of ſome, who laid violent Hands on every thing elſe, to ſpare the Perſons Lives, and to paſs by the ploughing Oxen, and all the Inſtruments of Huſbandry. Which they did, not as if they were oblig'd to it by the Law of Nature, but purely conſulting their own Glory, leſt their Cruelty ſhould betray their Cowardice.* A wondrous Glory indeed, to accompliſh only half a Villainy, when to have carried it through, would not have turn'd to ſo much Advantage!

XI. When we affirm that the Exerciſe of a Peace towards all Men, *as ſuch*, is the natural State of Man, we imply that it is inſtituted and eſtabliſh'd by bare Nature, without the Intervention of any human Deed; and that therefore it depends ſolely on that Obligation of natural Law by which Men are bound as they are reaſonable Creatures, and doth not owe its firſt Introduction to the Agreement and Covenant of Men. Hence, to us, it ſeems uſeleſs to frame any Pacts or Leagues, barely for the Defence and Support of this Univerſal Peace [1]. For by ſuch a League or Bond, nothing is ſuperadded to the Obligation of the Law of Nature; or, no Agreement is made for the Performance of any thing, which Men were not before by the Law of Nature bound to perform: Nor is the former Obligation rendred ſtreighter or firmer by ſuch an Addition. For we ſuppoſe both Parties to remain in a natural Equality, and conſequently not to be held to their Covenant by any other Tie, than that of Reverence towards God Almighty, and Fear of ſuch Evil as may fall on them, if they break the Agreement [2]. Though indeed there appears ſomewhat of Baſeneſs and Foulneſs in refuſing a Thing which one has expreſly engag'd to perform. As for the Power and Liberty which the injur'd Party hath, of proceeding againſt ſuch a Violator of Nature's Law, this is altogether the ſame, whether any antecedent Covenant had been made, or not. Men of any tolerable Culture and Civility muſt needs abhor the entring into any ſuch Compact, the Heads and Conditions of which imply only thus much, that the Party concern'd ſhall not offend in ſome Point, which was before an Expreſs Command of Nature. Beſides, we ſhould be guilty of great Irreverence towards God, ſhould we ſuppoſe, that his Injunctions had not already laid a ſufficient Neceſſity upon us, unleſs we ourſelves voluntarily conſented to the ſame Engagement; as if our Obligation to obey the divine Will depended on our own Pleaſure. Therefore, in every Covenant, ſome Matter is to be inſerted, the Performance of which the other Party could not have required from me, by a bare Right of Nature [3], or which, by virtue of that Right only, I did not fully and perfectly owe him; tho' it now becomes a true and abſolute Debt, upon my Declaration, and his Acceptance of my Conſent. Thus, as a Man who lets himſelf out to hire as a Servant to another, doth not ſet it down expreſly and immediately amongſt the Terms and Conditions of the Bargain, that he will not act perfidiouſly towards him, or that he will not pillage or plunder him; ſo *that* would be a ſhameful Agreement, in which a Man ſhould only bind himſelf not to break the Univerſal Peace towards another; that is, not to uſe ſuch a Right againſt him, as he obtains and exerciſes over Beaſts. Yet, ſuppoſing any ſuch Robberies and Depredations, as we have been lately ſpeaking of, to prevail amongſt ſome Barbarous Nations, then, in order to the reſtoring the *Univerſal* Peace, there would be Occaſion to enter into Covenant, by which all Parties ſhould tie themſelves to the Practice of the Law of Nature towards each other. The Caſe is much the ſame, when two Nations, hitherto engag'd in War, ſhall, by Agreement, lay down their Arms on both Sides; for ſuppoſing that they do not come to any Terms of Settlement about particular Matters and Performances; then the only Thing concluded on and eſtabliſh'd, is that general and common Peace. We find indeed in Hiſtory, many Examples of Commonwealths reduc'd to ſuch Extremities, as to purchaſe of their Spoilers this [4] univerſal Peace and Forbearance of Injuries, not only by Compact, but by Tribute. *Claudian De Laudib. Stilicon. Lib.* i. *v.* 210, 211. ſays, that the Antients were obliged to do ſo, in theſe Verſes,

Illi terribiles, quibus otia vendere ſemper
Mos erat, & fœda requiem mercede paciſci.

——————Thoſe dreaded Foes,
Traders in Peace, and Huckſters of Repoſe.

If between Nations, or People, hitherto not known to one another by Benefits or Injuries, by Peace or War, any common Leagues are made, without deſcending to particular Points or Conditions; ſuch Leagues are ſuppos'd to be entred on for the Eſtabliſhment of a Friendſhip, which is reckon'd to imply a cloſer Union, than is produc'd by that general Peace of Nature. Or elſe we may take them only for ſolemn Proteſtations made by both Parties, that they will, for the future, obſerve [5] their mutual Offices and Duties. In the ſame Manner as Perſons related, at their firſt Meeting, or their firſt Knowledge of each other, are uſed to make long Declarations and Promiſes, to expreſs their mutual Benevolence and Love.

XII. After all, it muſt be confeſs'd, that this natural Peace is but too weak and uncertain, and ſuch as, without other Aſſiſtances, would prove but a very mean Defence to the Safety of Mankind; ſo that we might well enough expreſs, and repreſent it in *Ovid*'s Verſe [a];

Pax tamen interdum eſt; pacis fiducia nunquam,
A Peace which all pretend, yet none can truſt.

[a] *Vid. de Triſt. Lib.* v. *Eleg.* 2. *v.* 71.

§. xi. [1] See *Lib.* viii. *Ch.* ix. §. 2. following.

[2] Our Author ſays this apparently in Oppoſition to the particular Engagements, which a Sovereign, for Example, requires of his Subjects. For tho' they are bound, in general, to obey his Laws and Commands; and, conſequently, a ſimple Diſobedience renders them criminal; they become more ſo, and deſerve a greater Puniſhment, when, having expreſsly and ſolemnly ſworn to perform their Duty, they fail in their Allegiance.

[3] For with regard to thoſe things which, tho' really due by the Law of Nature, are unattended with any perfect Obligation, which determines the Perſon in Queſtion to obey them; they very properly conſtitute, and frequently become the Subject of mutual Agreement. The Convention, in this Caſe, renders the Obligation perfect, and binds it with a ſtronger Tye.

§. xi. [4] Our Author refers us to *Claudian*'s *Conſulat. Mallii.* but thro' Miſtake. See *Grotius, Lib.* i. *Ch.* iii. §. 22.

[5] *i. e.* Which the one could not require of the other in Strictneſs, or by virtue of any indiſputable Right, as appears from what our Author has ſaid a little before.

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The Cauſe of which Unhappineſs is the great Wickedneſs of Men, their unbridled Luſt of Power, and their Deſire of encroaching on the Rights and Poſſeſſions of others. When *Micipſa* King of *Numidia*, in *Saluſt*[1], grew jealous of the growing Power of *Jugurtha*, we are told the chief Things that frighted him, and ſet him on his Guard, were *the Nature of Mankind, covetous of Dominion and Government, and violently bent on gratifying its Deſires; and then the Advantage of Opportunity, which, by the fair Hopes of Gain and Succeſs, is able to ſeduce Men to ambitious Practices, who were otherwiſe moderate enough in their Wiſhes, and in their Purſuits.* Indeed theſe pernicious Charms of Avarice and of Ambition have taken ſo faſt hold on human Minds, that even the moſt mild and gentle Doctrine of our Saviour CHRIST, which is perpetually inculcating the Rules of Peace, of Kindneſs, of Good-will, of Propenſion to forgive Injuries, of Humility, of Contempt of Riches and worldly Power; hath not been able to extinguiſh the moſt unjuſt Oppreſſions, Treacheries, and Wars amongſt the Profeſſors of that holy Religion. So that *Plutarch*'s[2] Deſcription will too exactly hit the Character of ſome Chriſtian Princes, *whoſe Deſires, not Seas, nor Mountains, nor Deſarts, can ſtop and conclude; not the Bounds which ſeparate* Europe *and* Aſia *can circumſcribe. When ſuch ambitious Spirits border on one another's Poſſeſſions, it is ſcarce poſſible that they ſhould live ſatisfied with their proper Shares, and abſtain from mutual Injuries and Invaſions. In effect, they are continually engag'd againſt each other, Envying and Plotting being the neceſſary Conſequences of their Temper. As for the two Names of Peace and of War, they uſe them juſt as they do Money, not as they are determin'd by Reaſon, but according to Cuſtom and Convenience.* Nor doth *Paterculus*'s Remark affect only the *Romans* and *Carthaginians*, when he ſays[3], *Amongſt thoſe People, there was perpetually either a War, a Preparation for War, or a deceitful Peace.* Therefore, as it is the Duty of an honeſt and good Man to reſt contented with his own Lot, and not diſturb the Portion of his Neighbour either by actual Invaſions, or by covetous Deſires: So it becomes a cautious and wary Man, and one who has a true Care and Concern for his own Safety, in ſuch a Manner to believe all Men his Friends, as that they may ſoon turn his Enemies; in ſuch a Manner to obſerve this Peace with all the World, as a State which may ſuddenly be converted into War[a]. And the famous Saying of *Dionyſius Halicarnaſſeus*[4], ſhould often run in our Thoughts: *So long as wicked Men have the Power of doing Miſchief, they cannot want the Will.* For which Reaſon *Euripides*[5], tells us, that *a prudent Diffidence is a moſt uſeful and advantageous Quality*: And that a wiſe Man ought[6] neither to act like a *Sheep*, nor like a *wild Beaſt*, to be neither tame in ſuffering Violence, nor furious in offering it[b].

Tacitus, in deſcribing the Manners of the *German* Nations, hath left theſe two Characters of the *Chauci* and the *Cheruſci*, very remarkable for their Oppoſition[7]. The former he calls *a moſt noble People, who chuſing to maintain their Greatneſs by their Juſtice, living in Secrecy and Quiet, without Ambition, and without Inſolence, by never inviting War, they never feel it; by never doing, they never ſuffer Violence and Spoil. And this is the principal Mark of their Virtue and of their Power, that their Superiority is not obtain'd by Injury. Yet they have always Arms ready at hand for their Defence; and upon Occaſion could bring together a mighty Army: And their Numbers of Men and Horſes make them famous and terrible, in the midſt of their peaceful Repoſe.* The latter, he tells us, *Ch.* xxxvi. *were too fond of cheriſhing a long and decaying Eaſe. This was more pleaſant to them than ſafe. For amongſt ſtout and daring People, 'tis never the true way to lie ſtill; and where Men are buſy in Action and Contention, Honeſty and Probity belongs to the Titles of Conqueror*[8]. *Thus the* Cheruſci, *who had once the Repute of Equity and Juſtice, now lie under the Imputation of Folly and Cowardice.* So true is the Obſervation of *Dio* the Orator[9], that *thoſe who are beſt prepar'd for War, may moſt ſecurely live in Peace.*

[a] *Comp. Sophocl. Ajax. Flagell. v.* 688, *&c.* [b] *Add. Hobbes de Cive, Ch.* xiii. §. 7, 8.

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§. XII. [1] *Saluſt. Bell. Jugurth. Ch.* ii. *Terrebat eum* [*viz. Micipſam*] *natura mortalium avida imperii, & præceps ad explendam animi cupidinem; præterea opportunitas, ſuæque & liberorum ætatis, quæ etiam mediocres viros ſpe prædæ tranſverſos agit.*

[2] *Plutarch* in *Pyrrho, p.* 389. Edit. *Wechel.* Οἷς γὰρ ὁ πόλεμος, οὐκ ὄρος, οὐκ ἀνοίκητον ἡγεμὼν πρὸς ἐστὶ τὴν πλεονεξίας, οὐδ' εἰ διαιρεῖντες Εὐρώπην καὶ Ασιαν τέρμονες ἐρίζουσι τὰς ἐπιθυμίας——Δυοῖν δὲ ὀνομάτων, ὥσπερ νομισμάτων, πολέμου καὶ εἰρήνης, ἕκαστος χρῶνται πρὸς τὸ συμφέρον, οὐ τρὸς τὸ δίκαιον.

[3] Vid. *Lib.* i. *Ch.* xii. *Aut bellum inter eos populos* [*viz. Romanos, & Pœnos*] *aut belli præparatio, aut infida pax fuit.*

[4] *B.* 6. Ἕως δ' ἂν παρῇ τὸ δύνασθαι πονηρὸν ὄφιν, οὐκ ἐλλείψει τοῖς Πονηροῖς τὸ βούλεσθαι.

[5] *Eurip. Helen. v.* 1633, 1634.——Σώφρονα δ' ἀπιστὰς
Οὐκ ἔστιν οὐδὲν χρησιμώτερον βροτοῖς.

[6] The *Greek* is, Μὴ ὡς πρόβατον, εἰ μὴ ἐπίκοινς, ἢ βλάπτικον, ὡς θηρίον. We know not from whence theſe Words are taken. The *Engliſh* Tranſlator attributes them to *Euripides*, but without any Certainty. Since the ſecond Edition of this Work, I have found them, by chance, in the Diſſertations of *Epictetus* by *Arrian, Lib.* iii. *Cap.* 23. at the Beginning. *Wolfius* believ'd we ſhould read ἐπικὲς, and βλαπτικῶς. As for the reſt, this Philoſopher founds, upon theſe two Heads, the manner in which Man ought to act, conſider'd as Man.

[7] *Tacit. de Morib. German. Ch.* xxxv. *n.* 4, 5, 6. *Populus inter Germanos nobiliſſimus; quique magnitudinem ſuam malit juſtitiâ tueri; ſine cupiditate, ſine impotentiâ, quieti ſecretique, nulla provocant bella, nullis raptibus, aut latrociniis populantur. Idque præcipuum virtutis ac virium argumentum eſt, quòd, ut ſuperiores agant, non per injurias adſequantur. Prompta tamen omnibus arma, ac ſi res poſcat, exercitus; plurimum virorum, equorumque, & quieſcentibus eadem fama.*

[8] The ſame Author's Words are, *Cheruſci nimiam ac marcentem diu pacem inlaceſſiti nutrierunt, idque jucundius, quàm tutius fuit; quia inter impotentes, & validos, falsò quieſcas, ubi manu agitur, modeſtia, & probitas nomina ſuperioris ſunt. Ita qui olim boni æquique Cheruſci, nunc inertes, & ſtulti vocantur.*

[9] *Orat.* i. *De Regno. p.* 6. Ed. *Par. Morell.* Ὅτι τοῖς κάλλιστα πολεμεῖν παρεσκευασμένοις, τούτοις μάλιστα ἔξεστιν εἰρήνην ἄγειν.

CHAP. III.

Of the *Law of Nature* in general.

The CONTENTS.

I. *The Connection.*
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VII, VIII, & IX. *The natural Law does not depend upon the Consent of Nations.*
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XXI. *Of the Establishment of the Law of Nature.*
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XXIV. *A Division of the Law of Nature.*

I. SINCE then it appears inconsistent with the Nature and the Condition of Man, that he should live entirely loose from all Law, and perform his Actions by a wild and wandering Impulse, without Regard to any Standard or Measure; it follows, that we make Enquiry into that most general and universal Rule of human Actions, to which every Man is obliged to conform, as he is a reasonable Creature. To this Rule Custom hath given the Name of *natural Law*, and we may call it likewise the Law *universal* and *perpetual*; the former, in regard that it binds the whole Body of human Race; the latter, because it is not subject to change, which is the Disadvantage of *positive* Laws. What this Law is, whence the Knowledge of it arises, what are the chief Marks and Tokens by which it is discover'd, what Matters are to be referr'd to that, and what to positive Constitutions, are Points which require the more careful Examination; because if this Basis and Ground-work should be ill laid, whatever we afterwards build upon it must fall of course. 'Tis [1] a good Rule of *Plato* (in *Cratyl*, p. 299. Edit. *Francof.*) *A Man ought to be very strict and accurate in examining the first Principle and Foundation of Things, and no less copious and distinct in explaining them; inasmuch as these Points being once clearly settled, the whole Scheme of Doctrine regularly follows.* And so much the more ought this Rule to be observ'd in our present Subject, the more Truth there is in that Remark of [2] *Lactantius*, Lib. iii. Chap. vii. p. 224. Ed. *Oxon. Because in framing the Manners and forming the Model of Life, it is the highest and most fatal Danger to mistake, we ought to apply the stricter Diligence to the Study of our Duty. In this great Point there is no Allowance for Error or Disagreement, all ought to be of one Opinion, and to declare, with a common Mouth, the same Doctrine: since the least Slip may overturn the Rule and Order of living.* To the same Purpose *Diogenes Apollonias* (in *Diog. Laert.* Lib. ix. Segm. 57.) *Every Discourse, in my Judgment, ought to take its Rise from some clear and manifest Principle; and the Style made use of should be plain and grave.*

II. The *Roman* Lawyers defin'd [3] the *Law of Nature*, to be *that Law which Nature teaches all living Creatures*; which therefore is not peculiar to Man, but is apprehended and observ'd by other Animals. So that, according to this Hypothesis, those things must be said to belong to the *Law of Nature*, which brute Creatures either affect and pursue, or avoid and abhor: Whence it naturally follows, that there must be a Law common to Men and Beasts. Which Opinion, it's likely, might proceed from that famous old Notion about [4] *the Soul of the World*, of which all other Souls were a kind of ἀπορρώδματα, or Particles, being in themselves all

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§. I. [1] *Plato*'s Words are, Δεῖ δὴ περὶ τῆς ἀρχῆς παντὸς πράγματος παντὶ ἀνδρὶ τὸν πολὺν λόγον ἔχειν, καὶ τὸν πολλὴν σκέψιν, εἴτε ὀρθῶς, εἴτε μὴ ἐστόκειν. Ἐκείνως δ' ἐξεπαιδεῖσθαι ἱκανῶς, τὰ λοιπὰ φαίνεται ἐκείνῃ ἑπόμενα.

[2] *Lactantius*'s Words are, *Et quoniam in disponendo vitæ statu formandisque moribus, periculo majori peccatur, majorem diligentiam necesse est adhiberi, ut sciamus, quomodo nos oporteat vivere* ——— *Hic vero nullus dissidio, nullus errori est locus, omnes unum sentire oportet, ipsamque philosophiam, uno quasi ore præcipere, quia, si quid fuerit erratatum, vita omnis evertitur.*

§. II. [3] *Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium, sed omnium animalium, quæ in terrâ, quæ in mari nascuntur, avium quoque commune est.* ——— *Videmus etenim cætera quoque animalia, feras etiam, istius juris perita censeri.* Digest. B. I. Tit. i. *Of Justice and Law.* Leg. i. §. 3. See *Instit.* B. I. Tit. ii. §. 1.

[4] 'Tis certain that this was the Opinion of the *Stoicks*, as *Justus Lipsius* in his *Physiol. Stoic. Lib.* i. *Diss.* viii. and *Lib.* iii. *Diss.* viii. makes it appear, and most of the *Roman* Lawyers were of the same Principles as that Sect of Philosophers, for which the Reader may consult *Merillius*, Observ. Lib. i. Cap. 8. & *seq.* But above all a Collection of Tracts, *De Sectis & Philosophia Jurisconsultorum*, publish'd at *Jena* by Mr. *Slevogt*, 1724. But it does not, from hence, follow, that the Definition of *natural Right* which *Ulpian* gives, is grounded on this Opinion, as after our Author, Mr. *Buddeus* in his first Discourse of the *Errors of the Stoics*, which is amongst his *Analecta Hist. Philosoph.* §. 6. and Mr. *Ludovici* in his *Delineatio Hist. Juris Divin. Nat. & Posit. &c.* §. 14. affirm, who also quotes *Ja. Thomas. Physic.* Chap. xxxviii, Quest. xxxii. and *Hornius, De Subjecto Jur. Nat. &c.* for they suppose, as they necessarily must, that the *Stoicks* attribute Reason to Beasts; but they take it for granted, by a *Petitio principii*, without Proof, since they alledge no Authority but the Definition itself, which they produce to prove, that, according to them, these ancient Philosophers must believe that Beasts have Reason. The contrary appears by divers plain Passages. *In homine optimum quid est? Ratio* (says *Seneca*) *hâc antecedit animalia, Deos sequitur — Quid in homine proprium? Ratio Epist.* lxxvi. *p.* 294, 295. See also his cxxiv. Epist. *p.* 621, 622. Ed. *Gron.* 'Tis certain that the *Stoicks* did not acknowledge a Law common to Man and Beasts. *Cicero* is plain as to this Point, *Et quo modo hominum inter homines juris esse vincula putant, sic homini nihil juris esse cum bestiis.* De finib. bon. & mal. Lib. iii. Chap. xx. and *Diog. Laertius.* Ἔτι ἀρέσκει αὐτοῖς μέδεν εἶναι ἴδιον δίκαιον πρὸς τὰ ἄλλα ζῶα, διὰ τὴν ἀνομοιότητα, &c. *In Zenone*, Lib. vii. §. 129. p. 446. Edit. *Amstel.* See what is said upon §. 3. *Note* 10. following.

of the ſame Nature, but exerting different Operations, according as they fell on different Bodies, and met with different Organs for the Conveyance of their Strength and Powers. Nearly allied to this Fancy was the Μετεμψύχωσις, or Tranſmigration of Souls; according to which, Men and Beaſts were thought to differ only in their corporeal Figure, having Souls altogether of the ſame Nature, and mutally lending to each other [a]. But the general Conſent of learned Men hath diſcarded this common Law of animate Beings: Inaſmuch as it is impoſſible to conceive how a Creature ſhould be capable of Law, and at the ſame time incapable of Reaſon [1]. *Heſiod.* Op. & Dier. Lib. i. ℣. 275.

Τὸν μὲν γὰρ ἀνθρώποις, νόμον (Δίκης) διέταξε Κρονίων,
Ἰχθύσι μέν, καὶ θηρσὶ, καὶ οἰωνοῖς πετεηνοῖς,
Ἔδμεν ἀλλήλους, ἐπεὶ οὐ δίκη ἔστ' ἐν αὐτοῖς.
Ἀνθρώποισι δ' ἔδωκε δίκην, ἣ πολλὸν ἀρίστη
Γίνεται ——————

This Law did *Jove* for *human Race* ordain:
The Beaſts, the Fiſhes, and the feather'd Train
He left to mutual Spoil and mutual Prey,
But *Juſtice* gave to *Men*.

And altho' there are ſeveral Actions of Men and Beaſts very much alike, on the Performance of which the former are ſaid to have fulfill'd the Law; yet in Strictneſs and Reality they are extremely different, ſince they are done by Brutes out of ſimple Inclination of Nature, but by Men out of Obligation, of which thoſe other Creatures have no Senſe. And therefore we muſt ſuppoſe Authors to ſpeak figuratively, when they attribute to ſuch inferior and dumb Animals, Juſtice, Fortitude, Pity, Gratitude, or Chaſtity; only becauſe they perceive in ſome of their Proceedings the Shadow and Semblance of theſe Virtues [b]. For Things which ſeem alike in their external Face and Appearance, are by no means the ſame, if they proceed from different internal Principles. As for *Grotius*'s Opinion [c], that ſome Acts of other Creatures are diſpos'd in an extraordinary manner by [2] an external *Reaſon* or Principle, as [illegible]s of Bees and of Ants, and the Frugality which ſome ſeem to uſe about what they have got, for the Benefit of their Kindred and Off-ſpring; this is allowable only if we mean by it, that the Nature of theſe Creatures is in ſuch a manner temper'd by the Divine Creator, as to be capable of producing ſuch Actions; not that any outward Principle violently guides and ſteers them [3], as a Pilot doth a Veſſel. Nor is it difficult to underſtand, why they do not diſcover the ſame Cunning in other Matters equally obvious; if we ſuppoſe, with [4] the new Philoſophers, that whatever *Form* irrational Animals enjoy, ariſes purely from the Figure and Diſpoſition of material Particles, and from the Variety of their Movements. Eſpecially ſince, even amongſt Men, we may find thoſe who are extremely quick and ready at ſome ſorts of Buſineſs, yet ſtrangely dull and heavy about others, not more difficult and abſtruſe: Which can proceed from nothing elſe, but from the particular Diſpoſition of their Parts, eſpecially of the Brain and Spirits [d]. Thoſe therefore who will have a *Law of Nature* in Brutes, becauſe they ſee them acting now and then with ſome Appearance of Regularity and of Deſign, abuſe the Term of *Law* by an undue and unneceſſary Application.

Beſides, there can be found no dumb Creature which performs all the Duties and Offices of Man; on the contrary, there is ſcarce any rational Proceeding, to which ſome Brutes do not [5] act directly oppoſite

[a] Vid. *Virgil.* Æn. vi. 724, &c. *Ovid.* Met. Lib. xv. v. 75, &c. [b] Vid. *Selden.* De L. N. & G. ſecund. *Hebr.* Lib. i. Chap. v. [c] Prolegom. De. J. B. & P. & Lib. i. *De Ver. Rel. Chriſtianæ.* [d] Vid. *Plutarch. Conviv. Sept Sapient.* p. 163. Ed. *Wech.*

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[1] As to this pretended Right common to Men and Beaſts, ſee a beautiful Paſſage of *Cicero de Offic.* Lib. I. Cap. xvi. and *Grotius*, Lib. I. Cap. I. §. xi.

[2] The Original has it, *Principio intrinſeco*, contrary to the Connection of this Diſcourſe, and the expreſs Words of *Grotius*. But Mr. *Hertius* has amended it in his Edition of 1706, and made it, *extrinſeco*, as it ought to be.

[3] See Mr. *Bayle*'s *Dictionar. Hiſtoric. & Critic.* Tom. iii. p. 2610. of the ſecond Edit.

[4] Nevertheleſs our Author does not follow that Syſtem, as we may judge from many Places in his Works, which ſuppoſe the contrary. See what I have ſaid, *Lib.* i. *Chap.* iii. §. 1. *Note* 1. *Remark* K. Art. *Rorarius.*

[5] Mr. *Bayle* has made ſome Reflections which may pleaſe the Reader, and therefore I ſhall give him them in his own Words: *It is one of the fineſt Common-places of Morality, to ſhew the Diſorder of Mankind, by comparing their irregular Actions with the regular Motions of the Beaſts.* (See *Horace Epod.* vii. *Juvenal. Satyr.* xv. and *Boileau Sat.* viii.) But how finely ſoever it may appear, and however it may affect, it is nevertheleſs but a weak Way of arguing; for, firſt, it may be eluded by way of Banter, and, ſecondly, may be more ſeriouſly anſwered by this Maxim:

Nil agit exemplum, litem quod lite reſolvit. — That Argument is of no Force, Which when retorted is the worſe.

Barbara, the Wife of *Sigiſmond* the Emperor, deſigning to marry again after the Death of her Huſband, one ſuggeſted to her the Example of the Turtle, which always remains ſingle after the Death of her Mate. To which ſhe anſwered, *If you will propoſe to me the Example of Animals, inſtance in that of Pigeons and Sparrows.* Thus the firſt ſort of Argument is eaſily ſolved without any Inconvenience. Nor is the other more difficult; for the Man whom you'll ſend to School to the Beaſts to learn his Duty, will reply, he deſires no better Maſters; for he'll tell you, *I ſhall learn of them to yield up Right to Force.* The ſtrongeſt Dog makes no Scruple to take the Morſel from his Fellow. How often do we ſee Dogs quarrelling for their Meat? Will not Chickens fight one with another in the Sight of their common Mother? Do not Cocks fight ſo furiouſly with each other, that nothing but the Death of one of them can end the Combat? Do not Pigeons, the very Emblem of Mildneſs, often come to Blows? What more furious Quarrels are there than thoſe of Bulls? Does any thing but Force decide Right among them in Matters of Love? (*Horace*, Lib. i. Sat. iii. v. 110.) Can a more unnatural Barbarity be any where learned than at this School? Do not ſome Beaſts devour their own Young? Shall I not learn Inceſt from them? (*Ovid Metamorph.* Lib. x. v. 323, &c.) Shall I not learn to take every thing within my Reach, to lay up my Proviſions as the Ant does? *Horace Satyr*, Lib. i. Sat. i. v. 32, &c.) May not I reſcue myſelf from that hard Bondage which makes all Men groan, and wrings ſuch grievous Complaints from them as theſe?

——— *How bleſt are you,* / *No Laws but thoſe of Love! whilſt human Laws*
Wild Beaſts, that are, in loving, ty'd unto / *Inhumanly condemn us for that Cauſe.* Paſtor Fido.

This does not hinder but that ſuch Morality may be proper to affect the greateſt Part of Men. *Dict. Hiſt. & Critic.* Tom. i. p. 475, 476. Article *Barbara.* Rem. C. See what our Author ſaid, *Chap.* i. §. 4. *Grotius* alſo obſerves, that there is no Action commendable in Man, but GOD has impreſſed ſome Footſteps of it in the Beaſts which are deſtitute of Reaſon. *De Jure Bel. & Pac.* Lib. ii. Chap. xix. §. 2. *Numb.* ii. in the Notes. *Laſtly*, It is always certain, that no Law, common to Man and Beaſts, can be eſtabliſhed, nor can the Inſtinct of Beaſts be taken for a Rule of *natural Law*, properly ſo called. Such

oppoſite. Yet in Harangues to the People, it is reckon'd a high Aggravation of a Crime, to ſhew, that even brute Creatures abhor the Commiſſion of ſuch Enormities. Thus *Plato* [a] ſays, that in arguing againſt the unnatural Vice of Pollution with the ſame Sex, it would be proper to appeal to the Nature of Beaſts, in whom we do not diſcover the ſame foul and monſtrous Practices [b].

III. Some Perſons indeed (rather I believe to ſhew their Wit, than out of any ſerious Deſign) have aſſerted this Community of Law between Men and Beaſts, and back'd their Aſſertion with a numerous Heap of Arguments, all which have been long ſince moſt ſolidly confuted. It ſhall be enough for us to touch lightly on the Proofs which they draw from Scripture. That Text then in *Gen.* ix. 5. *Your blood will I require at the hand of every living thing*, according to ſome Expoſitors, imports only thus much, that God would revenge the Murther of a Man committed, not only by the Hands or the Weapon of another, but by the Fury of wild Beaſts ſet on him by the other's Command. Inaſmuch as in the Antediluvian Times many violent Tyrants and Oppreſſors uſed to keep wild Beaſts, to ſerve for Executioners of thoſe who diſpleaſed or affronted them [1]. Others give this Interpretation, that God will ſometimes make even wild Beaſts [2] the Inſtruments of puniſhing Murtherers. Others again underſtood by *every living Thing* [3] only *every Man*, as if God only declar'd that no human Murtherer ſhould eſcape his Juſtice. In *Levit.* xviii. 23. and xx. 15, 16. Command is given, that if any Man or Woman are found guilty of Beſtiality, [4] the Beaſt ſhall be ſton'd, without any Difference of Age. Yet the *Jews* obſerv'd ſuch a Difference of Years in regard to the human Parties of both Sexes; ſo that if a Boy were not above nine, and a Girl above three Years old, they maintain'd that no Puniſhment ought then to be inflicted, either on the Perſon, or on the Beaſt; becauſe they would not allow that the Pollution forbidden in the Law could be actually committed at ſuch an Age. Now when they ſton'd the Beaſt, they did not do it becauſe the Beaſt had properly offended; but partly leſt the Sight of that Creature ſhould incite ſome other Perſon to the like foul Paſſion, and partly leſt the Beaſt remaining alive ſhould keep up the ſcandalous Remembrance of the human Offender, who had ſuffer'd Puniſhment, *Gratian*, Cauſ. xv. Queſt. i. Chap. iv. *The Reaſon why Beaſts were order'd to be kill'd, ſeems to have been, becauſe they would renew the unhappy Remembrance of the foul Crime. Philo Judæus* (*De ſpecial. leg.*) adds a third Reaſon, *Leſt the Beaſt ſhould bring forth any deteſtable Monſter, ſuch as uſually proceed from unnatural Impurities, and ſuch as no pious Man can bear the Sight of* [5]. Thus too, *Deut.* xiii. 15, 16. God commands the *Iſraelites*, in rooting out the idolatrous Nations, to deſtroy the very Beaſts; only to ſhew the Heinouſneſs of that Crime, not as if the Beaſts could be Partakers of it. It is obſervable, that if a *Gentile*, living amongſt the *Jews*, had been polluted with a Beaſt, the Man only ſuffer'd Death, but the Beaſt eſcap'd [c]. According to the Law in *Exodus* xxi. 28. the goring Ox was to be ſton'd; not becauſe he had properly committed a Fault, but that he might not offer the like Hurt another time; and that the Owner, who had negligently kept him, might be puniſh'd by his Loſs: And hence they were not allowed to eat the Fleſh of ſuch an Ox. This Puniſhment was thought ſufficient when the Owner was but ſlightly in Fault, or when he was ignorant of the Fierceneſs of the Beaſt: Whereas if he knew him thus furiouſly diſpos'd, and ſtill neglected to keep him up, he paid for the Miſchief with his own Life, being made a ſad Partner in the Puniſhment. And here again the *Rabbins* tell us, that the Ox was ſton'd only when he had kill'd a *Jew*, not if a *Gentile* had periſh'd by his Violence. And indeed it was a Cuſtom in ſeveral other Nations, to deſtroy ſuch things as had been the Inſtrument of any Miſchief, or of any Misfortune [6]. Thus it appears from the Orations of *Demoſthenes* againſt *Ariſtocrates*, and of *Æſchines* againſt *Cteſiphon*, that by the *Athenian* Laws, Stones, Clubs, Axes, and ſeveral other ſuch things, when they had been made uſe of in the Commiſſion of Murther, were brought formally into Court, as it were in order to undergo a Penalty. Thus the Statue of *Theagenes* in *Thaſos* having unfortunately kill'd a Man by falling on him, the People order'd it to be dragg'd into the Sea [d]. St. *Ambroſe* calls the Copulation of Aſſes and Mares, by which Mules are produc'd, *forbidden*; not becauſe the Beaſts contract any Guilt in thoſe Practices, but becauſe Men are forbidden to procure any ſuch unnatural Mixture [e].

[a] Lib. viii. De L. L. p. 913. Ed. *Francof.*

[b] *Senec. Hyppol.* v. 910, 911.

Feræ quoque ipſæ Veneris evitant nefas,
Generiſque leges inſcius ſervat pudor.

The Beaſts themſelves avoid enormous Love;
And Modeſty unconſcious and untaught,
Preſerves the decent Laws of Sex and Kind:

Add. *Oppian.* Cyneget. Lib. i. v. 239, *&c.* and *Halieut.* Lib. i. v. 702, *&c.* which laſt Place may well be urg'd againſt Parents who ſeem to have loſt their natural Affection.

[c] Add. *Selden.* De J. N. & G. Lib. i. Chap. iv. & *Mornac. ad Leg.* vii. D. *De his qui effuderint vel dejec.* Lib. ix. Tit. iii.

[d] Vide *Div. Chryſoſt.* in *Rhodiac.* p. 340. Edit. *Morell.*

[e] *Hexaemeri*, Lib. v. Chap. iii.

[f] Levit. xix. 19. Vide *Selden & Ant. Matth.* De Crimin. *Proleg.* Chap. ii. §. 1. The Account which *Thuanus* (Lib. v.) gives of the Proceſs againſt the Mice in *Burgundy* is no more than a Jeſt.

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as follow this Method run a great Riſk of throwing themſelves into *Scepticiſm*, or leading others into it, by the manifeſt Uncertainty of the Maxims built upon ſuch weak Principles. See the Diſcourſe, *De Scepticiſmo Morali*, among Mr. *Buddeus*'s *Analecta Hiſt. Philoſoph.* §. 32.

§. 111. [1] This is founded only on the Dreams of ſome *Rabbi*. See *Selden* of the *Law of Nature and Nations among the Hebrews*, B. i. Chap. v. Ed. *Argent.*

[2] Some turn it thus, *God will require your Blood at the Hand of every Beaſt*; but the Prepoſition in the Original will not bear this Interpretation.

[3] I have corrected our Author's Expreſſion, *Others underſtand by every living Creature Man only*; as if *every living Creature* were in the Text of our Copies or Verſions, whereas it is found only in the *Samaritan* Pentateuch, which is corrupted. See Mr. *Le Clerc*'s Notes upon this Paſſage.

[4] Our Author ſays, *the Beaſt ſhall be ſtoned*; but that's only a Conjecture of the Rabbins, for the Scripture determines not how the Beaſt ſhall be ſlain.

[5] Our Author hath forgot a fourth Reaſon, as conſiderable as any of them, which is this, That God, *that he might make us ſenſible how deteſtable ſuch Crimes were to him, would have every Thing deſtroyed which contributed any way to their Commiſſion.*

[6] The ſpiritual Tribunals of *Lyons*, *Maçon*, and *Autun*, in the xvth Century, gravely paſſed ſeveral Sentences upon the Beaſts that annoyed their Country. Sometimes, alſo, they cauſed the Caſe of the Inhabitants and Beaſts to be pleaded judicially by their Advocates, who produced the Reaſons for each Party, before they paſſed Sentence. See the *Critical Hiſtory of ſuperſtitious Practices*, written by F. *Le Brun*; an Extract of which is found in the *News from the Republ. of Letters*, in *July* 1702. Article iv. p. 63.

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We may excuſe thoſe learned Compilers of the *Roman* Laws, by urging in their Defence, that by the Term of *the Law of Nature* [a], they meant that [1] Order inſtituted by the great Creator, chiefly in thoſe Things which make directly for the Preſervation of Nature, or of the Species and Individuals of all animate Beings. And it is the more probable, that they took it in ſuch a Senſe, becauſe [2] they ſet down, as the chief Heads of this Law, only the Conjunction of Sexes, the Procreation and Education of Off-ſpring, and Self-defence. Many other Authors have us'd the ſame Terms in the ſame improper Manner; as particularly Mr. *Yves* of *Paris*, in his Treatiſe concerning the *natural Law ordain'd by God over all created Things*, and *Des Cartes*, in his *Principles of Philoſophy*. We may conclude this Point with the excellent Obſervation of *Plutarch* [b], *Nature*, ſays he, *as in thoſe Trees and Shrubs which we call wild, ſhe hath ſown the crude and imperfect Principles of true and pleaſant Fruits; ſo in Brutes hath implanted an imperfect Love of their Off-ſpring, not belonging to the Head of Juſtice, nor reaching beyond the Inducements of Profit and Advantage. But in Man, whom ſhe produc'd for a rational and a civil Being, for the Worſhip of God, for the Obſervation of Juſtice and of Laws, for the building of Cities, and for a ſocial and friendly Life; in Man, I ſay, ſhe has fix'd the Seeds of this Love in a fairer, and in a more plentiful Manner: And in this ſhe hath follow'd the firſt Principles of his Body, and the original Ingredients of his Conſtitution.*

IV. Others make the Object of *natural Law* to be ſuch Acts as, in themſelves, include a moral Neceſſity or Turpitude, and which are therefore, in their own Nature, either abſolutely requiſite or unlawful, and which we muſt of Conſequence ſuppoſe to be neceſſarily commanded, or neceſſarily forbidden by GOD. And this Mark, they ſay, diſtinguiſhes *natural Law*, not only from *human*, but from the *divine poſitive Law*, which doth not command or forbid Things in their own Nature neceſſary or unlawful [3], but by forbidding Things makes them unlawful, and by commanding Things makes them neceſſary: while the Things forbidden by the *natural Law* are not therefore evil, becauſe GOD hath forbidden them; but GOD therefore forbad them, becauſe they were in themſelves evil: And, on the other Hand, the Things enjoin'd by the ſame

[a] Lib. i. Tit. ii. *D. De Juſt. & Jure.*

[b] *De amore prolis*, Edit. *Wechel. p.* 495.

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[1] There is all the Evidence in the World to believe, that they underſtood by it what the *Stoics* call, τὰ πρῶτα κατὰ φύσιν, as Mr. *Hertius* briefly obſerves. See *Aul. Gellius*, *Lib.* xii. *Chap.* v. & *Cicero De fin. bon. & mal.* who tranſlates it, *Prima ſecundum naturam*, *Lib.* v. *Ch.* vii. Not that the *Stoics*, or the *Roman* Lawyers, who follow'd their Notions, believ'd there was any Law, properly ſo call'd, common to Men and Brutes. The expreſs Paſſages I have alledg'd above, *Note* 2. evidently prove the contrary, with regard to the *Stoics*. As for the *Roman* Lawyers, the Manner in which *Ulpian* expreſſes himſelf, in the very Definitions of the *natural Law* in queſtion, ſhews, that he did not regard this Law, as agreeing in the ſame manner preciſely to Brutes as to Men; for he doth not ſay, that the Beaſts are, *iſtius juris perita*, but only, *perita cenſeri*; that is, they did not properly know the Rules of *natural Right*, but are only thought to know them. The ſame *Ulpian* ſays elſewhere, *That a Beaſt in hurting a Man, or doing him ſome Damage, does him no Injury, becauſe he doth not know what an Injury is*; from whence it follows, that there is no Right common to Man and Beaſt. *Pauperies eſt damnum ſine injuriâ facientis datum. NEC ENIM poteſt animal injuriam feciſſe, quod ſenſu caret.* Digeſt. Lib. ix. Tit. i. Leg. i. §. 3. The *Roman* Lawyers may be very eaſily defended in this Point; and I do them this Juſtice, with the greater Pleaſure, as I never had for them that violent Reſpect which ſome have, who admire or excuſe every thing they ſay, at any rate. They conſider'd Man, either as an *Animal*, or as a *rational Creature*; and, from theſe two Ideas, they deduc'd the Foundation and Rules of a *Law common to all Nations*, in contradiſtinction to the *Civil Law* of each particular State. With regard to the firſt, they laid down, as a Principle, thoſe *natural Inclinations*, which Mankind enjoy in common with the Brutes. Under this Head they rank'd the Care of Self-preſervation, the Deſire of propagating our Species, that parental Affection which leads us to educate our Children; in ſhort, all that we do thro' natural Inſtinct, and which requires no Reflection. With regard to the ſecond Head, they eſtabliſh'd *Reaſon*, which is the diſtinguiſhing Characteriſtic of Man; and, by the Help of which, he not only directs that Inſtinct he has in common with the Brutes, ſo as to uſe it in a manner worthy of rational Beings; but, alſo, diſcovers, in his own Nature, Principles which lead him to Things of which the brute Creation have not the leaſt Notion. To this Point may be reduc'd the Sentiments of Religion; the reciprocal Love between Children and their Parents; Treaties, Commerce, Societies private or public; with the Laws of War and Peace, *&c.* We may ſee upon this Head, *Cujas*; *Recit. in Digeſt.* Tome VII. Opp *Edit. Fabrott.* Page 13, *& ſeq.* But above all Mr. *Noodt*, *Comm. in Digeſt.* Page 5. *& ſeq.* who has admirably clear'd up the Ambiguity of the Diſtinctions between the *Law of Nature*, and the *Law of Nations*, according to the different Language of the antient Lawyers; of which we ſhall ſpeak further, §. xxiii. of this Chapter.

[2] *Hinc deſcendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus, hinc liberorum procicaio, hinc educatio.* Digeſt. Lib. i. Tit. i. *De juſtitiâ & jure*, Leg. i. *Nam jure hoc evenit, ut quod quiſque ob tutelam corpori ſui fecerit, jure feciſſe exiſtimetur.* Ibid. Leg. iii. This laſt Law, as it is placed, has Reſpect to the *Right of Nations*, as *Vinnius* upon the *Inſtitutes* has obſerved; and this appears by the Reaſon alledged by the Lawyer of *Florence*, from whom theſe Words are taken, for he appeals to Nature, which has eſtabliſhed a kind of Relation among us, by Virtue of which one Man cannot, without a Crime, do any Evil to another. Our Author, who ought to have obſerved this, ſays, That divers learned Men, and among them *Yves* of *Paris*, in his Treatiſe *De Jure Nat. à Deo rebus creatis conſtituto*, and Mr. *Deſcartes*, in his *Principles*, have made a wrong Uſe of this Term, *natural Right*.

§. IV. [3] *Grotius* (*Lib.* i. *Ch.* i. §. 15. *Num.* i. criticiſes upon the Philoſopher *Anaxarchus*, as having aſſerted, too generally, that *what Things* GOD *wills, he wills not becauſe they are juſt, but they are juſt becauſe he wills them.* This is the Example he brings to prove it; *Alexander the Great*, deſpairing for the Death of *Clitus*, whom he had ſlain in his Paſſion, becauſe he had ſpoken too freely to him, *Anaxarchus*, to comfort him, ſaid to him, in vile Flattery, Οὐκ οἶδα ὅτι τὸν Δίκλω ἔχει παρεδρον ὁ Ζεὺς, καὶ τὴν Θέμιν, ἵνα πᾶν τὸ πραχθὲν ὑπὸ τοῦ κρατοῦντος θεμιτὸν ᾖ καὶ δίκαιον; *Plut. in Alexand. p.* 695. *Ed. Wech.* i. e. *Know'ſt thou not that the Poets ſay, that* Jupiter *is married to* Themis? i. e. Right *and* Juſtice *ſitting by him*, which ſignifies, That all that a Prince does is holy, right and juſt? By which *Anaxarchus* gives us to underſtand, That as GOD regulates Juſtice according to his Will, ſo a Prince can change, as he pleaſes, the Rules of Right and Wrong. This is juſt the Language of Flatterers, and the Principle of Mr. *Hobbes*, who deſtroys all Juſtice, and yields up plainly the Will of GOD to the Humour of Princes, ſince all that a Prince does being juſt, becauſe he does it, if he thinks good to do it, GOD muſt will it, alſo, and approve of it as juſt. *Plutarch* elſewhere relating this Story, maintains that *Anaxarchus* did very ill to ſpeak ſo to *Alexander*, becauſe inſtead of adviſing him to repent of his Fault, he had laid down a Maxim, which would encourage him to do the ſame again. *The Truth is*, (ſays he) *that* Jupiter *has not* Juſtice *ſitting on his Side, but is himſelf perfect Juſtice, and is more antient, as well as more perfect than all Laws.* This Fiction of the Antients tends to make us underſtand, that without *Juſtice*, *Jupiter* himſelf could not govern as he ought, Οὐκ ὀρθῶς ἀλλ' ὠφελίμως ἅπτεται ἐφ' οἷς ἥμαρτε μετάνοιαν ἀυτῷ τῷ θεῷ τὰ ὅμοια διδόντος. Εἰ γὰρ δεῖ ταῦτα εἰκάζειν, ὁ μὲν Ζεὺς οὐκ ἔχει τὴν Δίκλω πάρεδρον, ἀλλὰ καὶ αὐτὸς δίκη καὶ θέμις ὤν, καὶ νόμῳ ὁ πρεσβύτατος καὶ τελειότατος· οἱ παλαιοὶ δέ τινες λέγουσι, καὶ γεγράφασι, καὶ διδάσκουσιν, ὡς ἄνευ δίκης οὐκ ἔστιν οὐδὲ τὸν Διὸς καλῶς διοικεῖν. *Ad Princip. Inſtruct. Tom.* ii. *p.* 781. We may ſee, by theſe Words, that this Philoſopher, in eſtabliſhing the Will of GOD, as the Foundation of Right and Wrong, ſuppoſes, at the ſame Time, that his Will is not purely arbitrary, but that he immutably follows what the Perfection of his Nature requires. See alſo the Reflexion which *Arrian* makes upon this Matter in his *Expedit. Alexand. Lib.* iv *Ch.* ix.

ſame Law, are not made good or neceſſary by GOD's enjoining them; but were therefore enjoin'd by GOD, becauſe they were in themſelves ſimply good and neceſſary [a]. But now beſides that upon admitting this Opinion, it would remain a moſt perplexing Doubt what thoſe Acts are which we thus ſuppoſe in themſelves, unlawful, and by what diſtinguiſhing Token they may be clearly known from others: We have already ſhewn, in our former Book [b], that no Actions are in themſelves good or bad, honeſt or vile, till they are made ſo by ſome Law. Nor ought any Man to be ſhock'd with ſuch a Scruple as this; "If all the Morality of hu-"man Actions depends on ſome Law, might not "GOD therefore have ſo fram'd the *Law of Nature*, "as to enjoin Things directly contrary to the pre-"ſent Duties? For Example, if amongſt the mu-"tual Offices due from Men to one another, he "ſhould have put killing, ſtealing, fornicating, "and bearing Falſe-witneſs; and amongſt the pro-"hibited Actions, Gratitude, keeping Faith, pay-"ing Loans, and the like." For here, tho' it ſeems altogether a needleſs and an impudent Curioſity to enquire what GOD might have done, when it appears plainly what he hath done; yet if any Man ſhould perſiſt in ſuch Vanities, we may aſſure him, that ſuch a Doubt as we have been propoſing, implies a manifeſt Contradiction. For altho' GOD was not oblig'd by any Neceſſity to create Man (as I think thoſe Perſons have but a very narrow and unworthy Notion of the divine Power, who believe it would have diminiſh'd any Thing from GOD's Glory, not to have made theſe poor Inhabitants of the Earth [c]) yet when he once decreed to create him a rational and a ſocial Being, it was impoſſible but that the preſent *natural Law* ſhould agree to him; not by an *abſolute*, but [1] by an *hypothetical* Neceſſity. For ſhould Man have been engaged to the contrary Performances, not a ſocial Animal, but ſome other Species of barbarous and horrid Creatures had been produc'd. Notwithſtanding all which, it remains for a certain Truth, that antecedently to the Impoſition of any Law, all Actions are to be eſteem'd indifferent. For by decreeing to create Man, that is, to create an Animal whoſe Actions ſhould not be all indifferent, GOD immediately conſtituted a Law for his Nature. Neither from our Aſſertion, that all Actions are in themſelves indifferent, before the Application of Law, doth it follow, that GOD could have order'd our worſhipping him with Blaſphemy, or [2] with Contempt; as *Vaſquez* [d] raſhly maintains. For a rational Creature, that is, a Creature indued with the Faculty of apprehending Things as they truly are, cannot form any other Conception of GOD than to acknowledge him a Being not only vaſtly his Superior in Nature and Dignity, but, likewiſe, his proper Lord and Governor in the higheſt Degree. For otherwiſe he would conceive a meer Idol, or indeed any Thing rather than a GOD. But now it is plainly contradictory, to ſuppoſe a Being at the ſame Time the moſt eminent and the moſt deſpicable; a Governor deſign'd purely to be inſulted on by his Subjects; and to expreſs our Acknowledgment of the Excellency and the Power of the divine Nature, by ſuch Signs as denote directly the contrary. Therefore to ſay that GOD cannot eſtabliſh ſuch horrid Abſurdities by a Law, doth no more detract from his Omnipotence, than to ſay, that he cannot die, that he cannot be untrue, that he cannot make Things undone, which have been already done.

We may obſerve farther, on this Argument, that if the Definition of *natural Law* is to be founded on that neceſſary Honeſty or Turpitude of ſome Actions, it muſt be always perplext and obſcure, and run round in an unconcluding Circle; as will ap-

[a] Vide *Grot. Lib.* i. *Ch.* i. §. 15. *Num.* i.
[b] *B.* i. *Ch.* ii. §. 6.
[c] Vide *Job* xxxviii. *v.* 4.
[d] Controv. Illuſtr. *Lib.* i. *Ch.* xxvii. *Num.* ix, *&c.*

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[1] We underſtand by *hypothetical* or *conditional Neceſſity*, that which is founded upon ſome Suppoſition, without which it could not be. And ſo in the Matter in hand, we muſt ſuppoſe the Will of GOD as a Condition, without which there could be no *Law of Nature*, ſince if GOD had not freely determined to ſend into the World ſuch a Creature as Man, we could not conceive that there ſhould be any Rule of Conduct given, which ſhould neceſſarily agree to the Conſtitution of a reaſonable and ſociable Creature. See *Lib.* i. *Ch.* i. §. 4. *Note* 4. This is true: But our Author might have anſwer'd more plainly, that there is no Contradiction between our ſaying, that the *Will of God* is the Baſis of the *Force* of the *natural Law*; and that, nevertheleſs, this Will is not arbitrary. For it is no way repugnant to the Independance of a Being ſupremely perfect, to aſſert, that he *neceſſarily* wills to preſcribe or forbid Things, which have a neceſſary Agreement or Diſagreement with the Conſtitution of that Nature, which he has given us; and, conſequently, that he can change nothing in the *Laws of Nature*, or even diſpence with them. This is in him a glorious Neceſſity, and a happy Impotency, reſulting from the Perfection of his infinite Eſſence. See my Reflections on the Judgment of an *Anonymous*, or M. *Leibnitz*, §. 15, 16. For want of rightly underſtanding this clear Diſtinction, between an *arbitrary Will*, and a *Will neceſſarily determin'd by the Goodneſs of God*, M. *Bayle* (in his *Continuat. des penſées diverſ.* Artic. 153, and elſewhere) falls into metaphyſical Reaſonings, and draws endleſs Conſequences, which make nothing againſt the Opinion we defend.

[2] That is to ſay, In caſe GOD had created a Creature like us in Body only, and in outward Shape, and, by Reaſon of that Reſemblance, he had been called *MAN*, this is only a Suppoſition, and a Reduction *ad abſurdum*, to make us underſtand the Ridiculouſneſs of the Hypotheſis. See, alſo what our Author ſays in his *Diſſertationes Academ. p.* 747. where he explains his Sentiments in this manner. See, alſo, my Remark on *Grotius, Lib.* i. *Cap* i. § 10. *Note* 14.

[3] 'Tis thus our Author quotes, and criticiſes the Paſſage of *Vaſquez*. The Journaliſts *de Trevoux* (at the End of the Extract they gave of the firſt Edition of my Tranſlation, *Nov* 1708.) obſerv'd, that the *Baron de Puffendorff* miſrepreſented *Vaſquez* in this Place. But they themſelves have impoſed upon their Readers in a much groſſer manner, as will appear from the Words of *Vaſquez*, which follow: *Nec, ut nobis videtur, recipienda eſt ſententia* DOMINICI DE SOTO (Lib. ii. *De Juſt. & Jur. Art.* 8. *Queſt.* 8.) *exiſtimantis Deum non poſſe efficere, quid bonum ſit, ut homo ipſum Deum amare deſinat, vel forte odia habere incipiat: quin imo forte poterit, ſi velit, efficere, ut bonum ſit.——Si ergo Deus Opt. Max. hanc mentem à primis cunabilis nobis vellet imbuere, ut eum odio haberemus, idque riſui & ludibrio haberet: quis vetat quin id efficere poſſet, & nihilominus nos diligere, ſi ſibi libitum eſſet?* Let *Meſſieurs* the *Jeſuits*, if they can, give theſe Words a more favourable Senſe. Few People will, in my Opinion, believe them, eſpecially if they take the Pains to read what follows in the Original. But there is ſomething more curious ſtill. *This able Divine* (add theſe Journaliſts) *ſolidly refutes the Opinion which M* Puffendorff *aſcribes to him* Where does he do this? *In his Commentaries on the firſt and ſecond Diſpute*, Page 179, *and other Places, where he demonſtrates, that God cannot diſpence with any rational Creature from loving him, or practiſing any other Precept of the natural Law.* Were this ſo, all that would follow, would be that *Vaſquez* had groſsly contradicted himſelf. But how came theſe good Fathers to miſtake *Gabriel Vaſquez*, a *Spaniſh* Divine, for *Ferdinando Vaſquez*, a Lawyer of the ſame Nation, and Counſellor to *Philip* the Second; for it is this laſt who is the Author of the *Controv. Illuſtr.* Our Author obſerves here, that the Sacrifices of *Hercules* of *Lindus*, of whom, amohg others, *Lactantius* ſpeaks (*Inſtitut. Divin. Lib.* i. *Ch.* xxi. *p* 98, 99. *Edit Oxon*) are the abominable Inventions of ſenſeleſs Ideas.

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pear to any Man who examines the Definition laid down by [1] *Grotius*. And Dr. *Cumberland* excellently remarks, *Ch.* v. §. 9. that in defining the *Law of Nature*, when we uſe the Word *Good*, we muſt mean *natural*, and not *moral Good*; ſince it would be the higheſt Abſurdity to define a Thing by ſuch Terms as ſuppoſe it to be already known; thoſe very Terms being deriv'd as Conſequences from it, and depending on it as to their own Evidence and Certainty.

V. Thoſe Authors who ſearch for the firſt Pattern, or the original Draught of *natural Law* in GOD himſelf, are divided into two Parties. For ſome placing the Spring and Fountain, as it were, of it in the divine Will, thence conclude, that inaſmuch as that Will is, in the higheſt Manner, free, the *Law of Nature* may therefore be chang'd by GOD, or [2] the contrary be commanded, as is the Caſe and the Condition of *poſitive Laws*. Others affirm this *natural Law* to be founded after ſuch a Manner, in the eſſential Holineſs and Juſtice of GOD, as to repreſent and expreſs a kind of Image or Copy of thoſe Attributes. And hence likewiſe, they ſay, proceeds the Immutability of the *Law of Nature*: Inaſmuch as the divine Juſtice and Holineſs are utterly incapable of Change or Alteration. Concerning the former of theſe Opinions, we have this to remark, that it was indeed at firſt entirely free to the divine Pleaſure to produce or not to produce an Animal to whom the preſent *Law of Nature* ſhould agree. But that ſince GOD Almighty hath been pleas'd to create Man, a Being not poſſibly to be preſerv'd without the Obſervation of this Law, we have no manner of Reaſon or Colour to believe that he will either reverſe or alter the *Law of Nature*, ſo long as he brings no Change on human Nature itſelf; and ſo long as the Actions enjoin'd by this Law do, by a natural Conſequence, promote Society, in which is contain'd all the temporal Happineſs of Mankind; while the contrary Actions do, by as ſtrong a Neceſſity, deſtroy that Society: That is, ſo long as Beneficence, Kindneſs, Fidelity, Gratitude, and the like Practices, ſhall have a Power of engaging and of winning on Mens Minds; and Injuriouſneſs, Treachery, and Ingratitude, a Power of raiſing and provoking them. And therefore ſuppoſing human Nature and human Affairs to be fixt and conſtant, the *Law of Nature*, tho' it owed its original Inſtitution to the free Pleaſure of GOD, remains [3] firm and immoveable; unlike to thoſe *divine poſitive Laws* which depend in ſuch a Manner on the divine Will, as not to ſeem ſo neceſſarily requiſite to the good and ſafe Condiiton of Mankind in general. Beſides, tho' this Opinion be ſo far right, as it makes GOD the Author of *natural Law*, a Truth which no Man in his Wits can doubt of [4]; yet it ſtill remains an Uncertainty, by what Means this divine Will is to be known, and what Tokens there are to evince, that GOD intended to comprehend ſuch or ſuch a Thing under the *Law of Nature*. And the ſame Inconvenience attends, likewiſe, on the latter Opinion. For though no one can be guilty of ſuch horrid Impiety, as to aſſert that the *Law of Nature* contains any Thing in it repugnant to the divine Holineſs or Juſtice [5]; yet it would be very difficult to prove, that the ſame Law is ſo exact a Copy or Reſemblance of thoſe Attributes, that in what ſoever GOD Almighty is pleas'd to deal with his Creatures, particularly with Men, in the ſame Manner the Law of their Nature commands Men to deal with one another. Nor doth it appear how a Right which is to obtain amongſt Perſons by Nature equal, can be copied from that tranſcendent Right, which the Creator uſeth towards his own Works; that is, how a Law impoſing a mutual Obligation on Men, can repreſent

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[1] Our Author proves this in his Apology, §. 19. thus, If we demand of them who define the natural Law ſo, What Things are the Matter of this Law? They'll anſwer, Such as are honeſt or diſhoneſt in their Nature. If we again aſk them, What are thoſe? They can anſwer nothing elſe, than that they are the Matter of the *natural Law*. This makes well for the Schoolmen. But can't we ſpeak ſomething here in the Behalf of *Grotius?* I own, that the Notions of this great Man are not ſufficiently cleared and freed from vulgar Prejudices: But I am very much miſtaken, if he had not a Glimpſe of the Truth, and can't explain his Notion ſo, that when the Thing is ſearched to the Bottom, the Difference between him and our Author will prove a verbal Diſpute only. The *Law of Nature* (ſays *Grotius*, *Lib.* i. *Chap.* i. §. 10. *Num.* 1.) *conſiſts in certain Principles of right Reaſon, by which we know that an Action is honeſt or diſhoneſt morally, according to the neceſſary Agreement or Diſagreement it hath with a reaſonable or ſociable Nature.* So that it is no Circle; for if you aſk *Grotius* whence comes that neceſſary Honeſty or Baſeneſs of the Actions commanded or forbidden by the *Law of Nature*, he'll anſwer you, From the neceſſary Agreement or Diſagreement with a reaſonable and ſocial Nature. Nay much more. He ſeems to acknowledge, alſo, with our Author, that this Neceſſity is not abſolute and independent upon the Will of GOD. This appears not only by the following Words, which finiſh *Grotius*'s Definition, *And by Conſequence* GOD, *who is the Author of Nature, orders or forbids ſuch an Action*; but by what he ſays in his Preface, where he expreſſes himſelf more fully, *The Law of Nature, as well that which conſiſts in our uniting in Society, as that which is ſo called in a more extenſive Senſe.* This Law, I ſay, altho' it flows from the internal Principles of Man, (*i. e.* from the Conſtitution of the human Nature) may nevertheleſs, and that with Reaſon, be attributed to GOD, becauſe he has implanted ſuch Principles in us. I will now leave it to any Man, whether the Commentators upon *Grotius* have not miſtaken his Senſe; and if, when he ſpeaks of honeſt or diſhoneſt Actions, he does not mean them in the ſame Senſe that our Author allows them, as I have ſhewed above, *Lib.* i. *Chap.* i. §. 4. *Note* 4. and *Ch.* ii. §. 6. *Note* 1.

§. v. [2] Mr. *Buddeus* eſteems them *Sceptics* who favour this Opinion: *For*, ſays he, *they may eaſily imagine that it is uncertain, whether* GOD *has not changed this or that Law, in this or that Caſe, and whether he does not command what we ſuppoſe forbidden; and, on the contrary, forbid what we believe commanded, ſince he may do it, at all Times, without any Hindrance, according to them.* De Sceptic. Moral. §. 32. p. 257. Let us add, that if the Will of GOD, on which depend the Principles and Rules of *natural Law*, were a Will meerly arbitrary, it could have no Foundation in the Nature of Things, conſider'd according to certain invariable Relations; nor would there be any Way of knowing this Law, but by a clear and univerſal Revelation made to Mankind. Now it is agreed, that the *Law of Nature* is, and ought to be, known by the ſole Light of Reaſon. We therefore deny this, if we affirm the *Law of Nature* to be like a *poſitive Law*, and ſubject to change. See *Note* 2, of the foregoing Section.

[3] The Immutability of the *natural Law* is a Principle acknowledged by all ſuch as reaſon well. Hear what the *Roman* Lawyers ſay about this Matter. *Sed naturalia quidem jura, quæ apud omnes gentes peræquè obſervantur, divina quadam providentia conſtitutat, ſemper firma atque immutabilia permanent; ea vero, quæ ipſa ſibi quæque civitas conſtituit, ſæpe mutari ſolent, vel tacito conſenſu populi, vel alia poſtea lege lata, Inſtitut. Lib.* i. *Tit.* ii. S. 11. See alſo the *Digeſt Lib.* i. *Tit* i. *De juſtitia & jure. Leg.* xi and *Lib* iv. *Tit.* v *De capite minutis, Leg.* viii. as alſo a Paſſage in *Cicero*, which is quoted a little lower, §. 20. *Note* 4. and Mr. *Noodt*'s *Probab Juris, Lib.* ii. *Chap.* xi.

[4] Upon this it is that they ought to reflect, who lay down, for the fundamental Principle of the *Law of Nature*, the Will of GOD, affirming, that there is no great Difference between that and our Author's Hypotheſis; whereas what we ſeek chiefly to know is, what is the general Rule, by which we may diſcover what is the Will of GOD, that we may draw from that Rule, by direct Conſequences, all the Maxims of the *natural Law*

[5] It is only in this Senſe we can allow the Saying of *Euripides*, (Hecub v. 800) *We judge of the Conduct of the Gods by a certain Law*, i. e. by the Rules of Right and Wrong. See *Lib.* vii. *Chap* vi. § 3. *Note* 1.

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any Image of Omnipotency, which no Laws, no Obligations can reſtrain [1]. For that Argument, drawn from Scripture, about Man's being created in the Image of GOD, is of no Force as to the preſent Caſe. For even thoſe who confeſs that Image to be loſt, do yet acknoledge the Senſe of *natural Law*, to have ſtill remain'd in Man. Amongſt our ſelves we uſually call him a holy or righteous Perſon, who abſtains from groſſer Sins, and regularly obſerves his Duty: But now, who ever fram'd a Notion of the divine Holineſs by ſo unworthy a Model? He, amongſt Men, is accounted juſt, who makes it his conſtant Purpoſe and Reſolution to hurt no body, and to pay every one their Due: But in GOD it is Juſtice to deſtroy his Creatures, even in the moſt grievous and painful Manner. Neither can he ſo owe a Perſon any thing, as to be accus'd with doing an Injury upon with-holding it. If he hath been pleas'd to promiſe any thing to Mortals, he indeed performs it: Not becauſe by virtue of ſuch a Promiſe they obtain a Right againſt GOD; but becauſe it would be ſome kind of Derogation from his Greatneſs and Goodneſs, to command Men to expect any Favour from him, and afterwards to fruſtrate their Expectations. For he who breaks his Promiſe, either wants Power to perform it; or elſe, through Inconſtancy or Diſhoneſty, falls from the Engagement he had once well made; or elſe, at the ſame time of making his Promiſe, he was ignorant how the State and Condition of things would be, when it was afterwards to be fulfill'd: all which Caſes imply ſome kind of Failing and Imperfection. Hence GOD *cannot* but obſerve his Promiſes, and Men *ought not* but to obſerve theirs: Hence human Promiſes turn into *Debts*, but divine Promiſes are made good out of pure *Favour*. What Rules the vindicative Juſtice of GOD proceeds by, is far above our Apprehenſion to diſcover. But thus much is certain, that they are not altogether conformable to the Methods of human Judicature. *Ariſt. Ethic. Nicom. Lib.* x. *Ch.* viii. [2] *What kind of Actions ought we to attribute to the Gods? Shall we ſay they are juſt? But, alas! it would ſeem moſt ridiculous to fancy that they are concern'd in driving Bargains, in reſtoring Loans, and the like Performances, which we reckon honeſt amongſt Men. Shall we call them valiant and brave, able to endure Hardſhips, and encounter Dangers? Shall we pronounce them liberal? Who then ſhall be the Object, or what the Matter of their Bounty? Certainly we muſt not oppreſs them with the Load of Money or Treaſures. In like manner it would be an impertinent and troubleſome Commendation, to ſay they are temperate; inaſmuch as they have no inordinate Affections to govern and reſtrain. And ſo thus, if we run through the whole Train of human Actions, we ſhall find them all ſo mean and contemptible, as to be infinitely unworthy of the heavenly Natures.* Catull. *ad* Manl. 68. ℣. 141.

Atqui nec divis homines componier æquum eſt.

No juſt Compariſon 'twixt Gods and Men.

From this Conſideration, that we ought not to admit any Law common both to GOD and Man, we may draw an eaſy Anſwer to thoſe Inſtances, which ſome give of GOD's diſpenſing with the *Law of Nature*, as when he commanded *Abraham* to kill his Son, and the *Iſraelites* to rob the *Ægyptians* of their Veſſels of Silver, and Veſſels of Gold. For GOD, the ſupreme Lord and Diſpoſer of all Things, hath a much higher and fuller Right over his Creatures, than one Man can have over another, who is by Nature his Equal. Therefore we cannot properly call it a Diſpenſation of the *Law of Nature*, when a Man, by expreſs Command from Heaven, executes GOD's Right upon other Men, meely as *His* Inſtrument. *Comp. Grot. Lib.* i. *Chap.* i. §. x. *Note* 6. None, I believe, can be ſo ſimple as to imagine, that when the Object is chang'd, or the Circumſtances varied, the Law itſelf ſuffers Alteration. When *the Creditor hath forgiven a Debt*, it loſeth that Name, and therefore is no longer comprehended under the Law, which enjoins Payment. And as for the other Inſtance, when the Goods of a Perſon, who gave a Thing *in Truſt*, are adjudg'd to the publick Treaſury, neither the Law is chang'd, nor its Object. For thus runs the Law: *He who receives a Thing* in Truſt, *ought to reſtore it either to him who committed the Thing* (being his own) *to his Charge, or to him on whom the Right deſcends* [3]. Now this Law cannot affect the Thief, becauſe the Thing was not *his own*; nor the former Owner, who is ſuppos'd to be at preſent a baniſh'd Man, becauſe the Propriety of all that was his paſſeth to the Publick.

VI. But neither do the Arguments which the Author [a] of the Treatiſe *De Principiis Juſti & Decori* produces, ſeem forcible enough to eſtabliſh a twofold natural Law, *Divine and Human, which, ſuppoſing the preſent Order of the World to continue,*

[a] *Velthuyſen*, p. 253.

[1] We muſt add here two important Obſervations: I. That there are ſeveral Acts of human Juſtice which can't be attributed to GOD, becauſe of the Excellency of his Nature. Such are a great Number of the Acts of univerſal Juſtice, and thoſe of particular Juſtice, which regulate Contracts, invented to carry on the Buſineſs, and ſupply the Neceſſities of Life. See *Pſal.* l. ver. 10, 11, 12. *Rom.* xi. 35. For who, for Example, dare reaſon thus? Pay your Debts, becauſe GOD pays his. Be grateful, becauſe GOD is grateful to them that ſerve him. Obey your Governors, becauſe GOD is ſubject to his Superiors. Honour your Parents, becauſe GOD honours his. Are not theſe Arguings manifeſtly abſurd? II. Moreover, as we know GOD by his Works, and by aſcending from the Effect to the Cauſe, we can't know the Perfections of GOD, but by taking from the Perfections of the Creatures, and eſpecially from Man's, whatever is imperfect, and then attributing them to GOD, when they are ſo purified. Thus, for Example, having obſerved that theſe are the Perfections of Man, to keep one's Promiſe, ſpeak the Truth, do no Man any Injury, diſtribute Juſtice impartially, we thence conclude, that they ought to be in him, who is the firſt Cauſe, and abſolute Lord of the World, but in a moſt excellent Manner, and worthy of the ſupreme and ſovereign Being. It would be ridiculous then to eſtabliſh divine Juſtice as the Foundation of human, becauſe this laſt is better known than the firſt, as Dr. *Cumberland, De Leg. Nat. Prolegom.* §. 6. and *Chap.* v. §. 13. acknowledges. I have taken this out of the Specimen *Controverſ. Pufendorf. motarum, &c.* Chap. iv. §. 4. and out of his *Epiſt. ad amicos*, p. 262.

[2] *Ariſtotle*'s *Greek* is this: Περὶξεις ὴ ποίας ἀπονέμομαι χρεῶν αὐτοῖς; πότερα τὰς δικαίας; ἢ γελοῖοι φαινῦνται συναλλάττοντες, καὶ συνθήκας ἀποδιδόντες, καὶ ὅσα ἄλλα τοιαῦτα; ἀλλὰ τὰς ἀνδρείας; ὑπομένοντας τὰ φοβερὰ καὶ θαῤῥοῦντας, ὅτι καθίστ ἢ τὰς ἐλευθερίους; τίνι ὴ δώσουσιν; ἄτοπον δ', εἰ μὴ ἔσται αὐτοῖς νόμισμα, ἢ τοιοῦτον· εἰ ὴ σώφρονες, τί ἂν εἶεν; ἢ φορτικὸς ὁ ἐπαινῶν, ὅτι οὐκ ἔχουσι φαύλας ἐπιθυμίας; διεξιοῦσι ὴ πάντα φαίνοιτ' ἂν τὰ περὶ τὰς περξεις, μικρὰ καὶ ἀνάξια θεῶν.

[3] See *Lib.* iv. *Chap.* xiii. §. 5. following.

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do fall in with one another [1]. For, inasmuch as all Law implies Obligation, and that again presupposes some external and superior Principle, it doth not appear how we can, without Absurdity, apply any such Matter to GOD. And it is alike Impropriety to say, that [2] GOD *obliged by himself, or by his own Essence.* Nor will that Text which he alledges, of *Rom.* i. 32. ever prove [3] such a Law to be in GOD. For since the *Gentiles*, from the Dictates of their Reason, were able to gather the Knowledge of the Law of Nature, the next Thing which they must infer, was, that GOD, the Legislator, would not suffer the Law to be violated without punishing the Offender. Therefore, upon the Violation of that Law, there arises a Right to GOD (if it be decent so to speak) of exacting Punishment; or, upon Commission of the Sin, GOD most justly executes what he before threatened. But who can conclude from hence, that GOD is obnoxious to Law? What follows is an ambiguous Expression, *That the supreme Right of* GOD *over his Creatures is discover'd by natural Reason, from those Principles which make the Foundations of natural Right and Equity amongst Men.* For if this only be the Sense of it, that in many Cases GOD doth proceed in the same Manner in his Dealings with Men, as he would have them follow in their Transactions with each other; it will easily pass without Contradiction [a]. For thus GOD, by the natural Law, hath enjoin'd Men to keep their Promises, as he will firmly keep those which he makes himself [b]. So he forbids human Judges to condemn the Innocent, declaring that he himself will acquit them in his own Judgments [c 4]. But if it be meant to assert, that GOD hath no more Right over his Creatures, than Men are allow'd to obtain over each other; there will be need of more convincing Arguments to make us believe, that the supreme Lord and Master hath no fuller Right over his Servants, than the Servants have over their Fellow-Servants, with whom Nature has set them on a Level: Or, to use *Grotius*'s [d] Terms, that the *Jus Rectorium*, and the *Jus Æquatorium*, the Right of Governors, and the Right of Equals, are exactly the same Thing.

Neither must we let that Assertion pass by uncensur'd, which the Author of the same Treatise lays down, p. 52. *That* GOD *ought necessarily to esteem the Laws of Nature as just, the Order of the Universe being establish'd in the Manner we now behold; and that he cannot but own every Deviation from them to be indecent and unjust.* For without doubt those imperious Terms, GOD *ought necessarily*, are very unsuitable to the Majesty of an Omnipotent Legislator. Nor is here any Necessity to be discover'd in the Case [5], except such as owes its Original merely to the divine Pleasure. The Reason which he subjoins is not strong enough to maintain his first Position; *All Things*, says he, *which our Thoughts can imagine, have always some kind of* χέσις, *or Relation, arising from the intrinsick Nature of the Thing, and which cannot be separated from the Thing, without offering Violence to Reason.* For this Nature, and this adhering Relation, Things have not from themselves, but from the free Will of GOD; and the Decrees of *His* Will cannot properly be called his *own Law.* Thus, the Reason why amongst Men one Benefit obliges to the Return of another; why Violation of Covenants, Inhumanity, Pride, Slander, can never be allowable, is, because GOD hath given Man a sociable Nature; and as long as that Nature remains unalter'd, those things which are agreeable to it must be good and honest, and those which are repugnant to it uncomely, and unlawful. But who can hence infer, either that there is but one Law common to GOD and Men, or that things are indued with any χέσις, or Habitude, independent from the divine Disposal?

VII. Those who found the Law of Nature on the Consent of Mankind in general, or on the Agreement either of all, or however of the most, and the most polish'd Nations, seem chiefly to follow [6] *Aristotle*, as the Author and Patron of their Opinion. He, in his Ethicks to *Nicomachus*, **B. v.** Ch. x. calls that *natural Justice, which bears the same Force in all Places, and doth not depend on particular Sentiments.* And in his *Rhetorick*, **B. v.** Ch. xiii. he tells us, *there is a general Right and Wrong, or Just or Unjust, believ'd and profess'd by all Men; although no Society should be instituted amongst them, and no Covenants be transacted.*

Now besides, that this Way of proving the Law of Nature is only *à posteriori* [7], and therefore cannot

[a] *See* Luke vi. 35.
[b] Rom. iii. 4. Hebr. vi. 17, 18.
[c] 2 Chron. xix. 6, 7. Rom. ii. 2.
[d] Lib. i. Chap. i. §. 3. *n.* 2.

§. VI. [1] Our Author here breaks off his Discourse in a strange Manner, to confute a Writer which he had read over in too great haste. *Velthuysen* does no where make two distinct Kinds of natural Law, one to which GOD is subject, and the other to govern Man; but that natural Law which he calls *divine*, as well as that which he calls *human*, is a Law only for Man. He has not a Word that so much as intimates, that he would establish a Law common to GOD and Men. He only endeavours to prove, that the Law of Nature, which is taught us by Reason, is really a divine Law, and therefore GOD can't dispense with it, but he must contradict himself, so far as the Constitution of Things is such as he himself appointed at the Creation of the World. This appears both by the Coherence of his Discourse, and by what he had before said, *p.* 52, 53. I had not minded to justify this Author in this second Edition of my Work, if I had not forgot it in my first. I know not how to read what follows in the Original.

[2] I know not what our Author means here; for these Words are not the Person's whom he confutes.

[3] Nor is this Mr. *Velthuysen*'s Conclusion. His Design was only to prove, that the *Gentiles* might know very well, that by breaking the Laws of Nature they disobeyed GOD, and deserved his Corrections, so that he might justly punish with Death any that had sinned against the Law of Nature. From whence it follows, that in sinning against the Law of Nature they sinned against the Law of GOD.

[4] Mr. *Velthuysen* says not the least thing that tends that way. He only asserts, that GOD, notwithstanding his Almighty Power, does nothing but what's agreeable to his Perfections. *There is nothing*, says he, *of a worse Consequence in religious Matters, than to teach that* GOD *does many things wherein human Reason can see no Justice. For, if this be allowed, we destroy all reasonable Worship; Men will be obliged to renounce the Use of right Reason. They must do, and believe, in reference to* GOD, *things contrary to the Light of the clearest Reason, and conform to such Notions as to them are incredible*, &c.

[5] I can't see that Mr. *Velthuysen* means any other Necessity here, than what is founded upon the Perfections of the Deity, which permit not him to will the End, without willing, at the same time, the Means necessary to arrive at it; for this is the Principle he uses, as well as our Author, to discover the Original of the Laws of Nature. See §. 12. following.

§. VII. [6] The *Greek* of *Aristotle* is, Φύσικον μὲν δίκαιον τὸ παντα χοῦ τὴν αὐτὴν ἔχον δυναμιν, καὶ ὐ τῷ δοκεῖν, ἢ μή. And again, Ἐστὶ δὲ ὃ μαντάνουσί τι πάντες, φύσει κοινὸν δίκαιον, καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ μηδὲ συνθήκη. See *Cicero*'s *Tusc. Quæst. Lib.* i. *Chap.* xiii, xiv. *The Consent of all Men in any Point, is to be esteem'd a Law of Nature.* And again, *The Consent of all Men is the Voice of Nature.*

[7] That is, not from the Nature of the Thing itself, but from some external Principle, as from the Consent of People.

ſhew the Cauſe and Reaſon of the Thing; ſo it is very ſlippery and uncertain, and involv'd in an endleſs Maze of Doubts and Perplexities. To appeal to the Conſent of all Mankind, Mr. *Hobbes* [a] obſerves to be inconvenient upon this Account, becauſe, at this Rate, it would be impoſſible for a Man, actually uſing his Reaſon, to ſin againſt the Law of Nature. Inaſmuch as his Conſent being wanting, who is a Part of Mankind, the common Agreement muſt needs be maim'd and imperfect. Then again, becauſe it would not be fair to gather the Laws of Nature from the Conſent of thoſe who break them more frequently than they obſerve them [1]. For, as *Iſocrates* [b] ſpeaks, *It is a natural Misfortune which we all lie under, that we ſhould more frequently tranſgreſs than perform our Duty.*

Nor will it be a more happy Way of arguing to appeal to the Conſent of *all Nations.* For, were it poſſible for us to underſtand all the Languages of ancient and modern People, yet we ſhould be ſtill far enough to ſeek in the Knowledge of their Manners, and of their Inſtitutions. We cannot hit off this Difficulty by ſaying, that the Conſent of the moſt civiliz'd Nations is ſufficient, and that the Opinions of Barbarians are not to come into the Account. For what Nation, any ways able to manage and preſerve itſelf, will own the Title of Barbarous? Or what Nation can take ſo much on itſelf, as to deſire its own Manners and Proceedings ſhould be the Standard in trying all others, and that whatever People did not exactly conform to its Model, ſhould be immediately [2] pronounc'd barbarous and ſavage? Heretofore the Pride of the *Grecians* cenſur'd all as *Barbarians*, who liv'd without the Bounds of their Country. The *Romans* afterwards ſucceeded them, as well in their Arrogance, as in their Empire. And, at the preſent, ſome few Nations here in *Europe* have the Vanity to prefer themſelves to the reſt of the World, in the Opinion of their own Civility, and Improvements of living. But there are not wanting other People, who imagine themſelves to have the Advantage of them in all Reſpects: And 'tis an old Proverb amongſt the *Chineſe*, that themſelves only have two Eyes, only the *Europeans* one, and all the reſt of the World are ſtark blind.

Some, too, there are, who cenſure our Learning, in proſecuting which we ſpend ſo much good Time; they will have it to be no better than a Prop, or a Crutch to ſupport and aſſiſt our Dulneſs: Inaſmuch as the good Diſpoſition of many Men carry them on to a natural Innocence and Probity, without Improvement or Ornament of Letters; and becauſe it requires no great Clerkſhip to be an honeſt Man. It is likewiſe too evident, that high Attainments of Knowledge are not always bleſs'd with the Attendance of good Manners, or of good Temper [c]. Many Nations, we ſee, pride themſelves in the tedious Pageantry of vain unneceſſary things; deſpiſing thoſe who lead a Life of leſs Gallantry, and more Simplicity. Yet, were we to ſeek for Innocency and Integrity, we might, perhaps, find them much ſooner amongſt theſe plain and unartificial Mortals, than amongſt their ſtately and formal Neighbours. 'Tis a ſhrewd Remark of *Juſtin* [3], Lib. ii. Chap. ii. ſpeaking of the *Scythians: It ſeems wonderful*, ſays he, *that meer Nature ſhould give* them, *what the* Grecians, *with the long Inſtitutions of their wiſe Men, and the Precepts of their Philoſophers, could never attain; and that the politeſt Manners ſhould be diſtanc'd and outdone in the Compariſon with Barbarity. Of ſo much greater Benefit, on one ſide, was the Ignorance of Vice, than, on the other, the Knowledge of Virtue.* Vid. *Valer. Max. Lib.* i. *Chap.* i. §. 2. *Extern. & Sext. Empiric. Hypotyp. Lib.* ii. *Chap.* v. where we meet with ſeveral things to the ſame Purpoſe.

Beſides, that *ſuch* a Conſent can be of no Force, appears from this farther Reflection; that the Number of Fools far exceeds that of wiſe Men; and that few Perſons have form'd their Opinions upon a full Search into the Foundations of Things; but moſt Men follow on in the Track of others, and yield an implicit Aſſent to their Notions, without applying their own Thoughts or Judgments to the Points in Debate. Farther, altho' we have a tolerable Aſſurance of the Conſent of moſt People, at leaſt, as to the general Precepts of natural Law; and altho' we may preſume on the Conſent of the reſt, from the Principles of thoſe who are better known to us; yet it is more ſafe to conclude hence, what thoſe Nations eſteem juſt and equal amongſt themſelves, than what they think fair Ways of dealing with Strangers; all whom [4] are, by ſome People, accounted Enemies, and treated accordingly [d].

VIII. Tho' the common Uſe and Cuſtom of many Nations may ſeem to be alledg'd with more Force, for proving a Thing to be lawful or allowable, than for the proving it to be actually commanded by the Law of Nature; yet that we cannot, with any Security, make ſo much as the former of theſe Concluſions, ſeems probable from the great Variety and Contradiction diſcoverable in the Manners, and in the Inſtitutions of the moſt famous People upon Record. So that we may well apply to the preſent Caſe, that Saying of [5] *Socrates* [e], Οὐκ εἰς σοφιστὰς γε διδασκάλους καταφεύγεις, εἰς τὸν πολὺν ἀναφέρων. *You conſult no very expert Maſters, when you refer yourſelf to the Multitude for Inſtruction.* To the ſame Purpoſe *Plutarch* [f] obſerves, that *the Laws of Men are vaſtly different, ſome making one thing to be good, and ſome another:* And *Tacitus*'s Deſcription of an Army, compos'd of various Nations, may ſerve to repreſent the ſame wide Diſa-

[a] *De Cive*, Lib. ii. §. 1. [b] *Orat. ad Philipp.* [c] *Plato Epiſt.* x. *Firm Integrity, Faith, and ſincere Dealing, this I take to be the true Philoſophy.* [d] Add. *Montaigne*'s *Eſſays*, Lib. i. Chap. xxx. [e] *Plato Alcibiad.* 1.
[f] In *Themiſtocl. Pyrrhon. Hypotheſ.* Lib. ii. Chap. v. p. 125. Ed. *Wech.*

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[1] The *Greek* is, Ἀλλὰ γὰρ πάντες πλείω πρύγμαν ἐξαμαρτάνειν, ἢ κατορθοῦν.

[2] *Charran* reckons this among the fooliſh Opinions that are in the World, to condemn and reject all Things, Manners, Opinions, Laws, Cuſtoms, and Obſervances, as barbarous and evil without Knowledge of them, meerly becauſe they are not uſed by us, and are remote from our common Practice. *Of Wiſdom*, Lib. i. Chap. vi. §. 9. Numb. 2. See alſo *Lib.* ii. *Ch.* viii. and *Ch.* ii. §. 5. Let the Reader further conſult Mr. *Bruyere*'s Characters in his Chap. *of Judgments*, p. 420. where he'll find ſomething very ingenious and lively upon this Subject.

[3] *Juſtin*'s Words are, *Prorſus ut admirabile videatur, hoc illis naturam dare, quod Græci longa ſapientium doctrina præceptiſque philoſophorum conſequi nequeunt, cultoſque mores incultæ barbariæ collatione ſuperari. Tanto plus in illis proficit vitiorum ignoratio, quam in his cognitio virtutis.*

[4] This appears eſpecially by the Example of two of the moſt famous People of the World, I mean the *Greeks* and *Romans*. See *Parrhaſiana, Tom.* 1. *Page* 202, 203. and Mr. *Le Clerc*'s *Ars Critica*, Tom. i. Part 11. §. 1. Chap. vi. §. 2, *&c.*

§. VIII. [5] But here he ſpeaks of the Populace, and not of the Conſent of ſeveral Nations.

greement. *Their Languages, their Manners, their Deſires*, ſays he, *are different; and while ſome will have one thing to be lawful, and ſome the contrary, amongſt them all, nothing can eſcape as unlawful* [a]. To give ſome Account of this Variety by way of Specimen. *Ariſtotle* [b] reports of ſome ſavage Nations on the Confines of *Pontus*, that it is cuſtomary with them to borrow one another's Children, to furniſh out their Feaſts. And theſe People he preſently after calls *Irrational*, *Wild*, and living only by *Senſe*. *Euſebius*, in his Book *de Præparatione Evangelicâ* [c], reckoning up the foul Cuſtoms and Manners which had been corrected by the Doctrine of the Goſpel, amongſt others, mentions the Pollution with Mothers and Siſters in *Perſia* (which *Diogenes Laertius* [d] too takes notice of from the Authority of *Socion*) the eating of human Fleſh, and the murdering of Children, under a religious Pretence, amongſt the *Scythians*. He adds, that the *Maſſagetæ*, and the *Derbices*, us'd to kill their Relations when they grew very old, and make an Entertainment with their Bodies; that the *Tibareni* in *Cappadocia* threw their ancient Perſons down Precipices; that the *Hyrcanians* [1] caſt out their Dead to the Birds, and the *Caſpians* to the Dogs, to be devour'd. Hither, alſo, may we refer thoſe foul Watchings, and other Ceremonies, deſign'd for the Honour of their Gods, but mix'd with all the licentious Practices of Adultery and Lewdneſs; as, alſo, the human Sacrifices barbarouſly murder'd on their Altars. The ſame excellent Author [e] gives the following Relations out of *Bardeſanes* the *Syrian*. *'Tis a Law amongſt the* Getulians, *that the Women offer their Bodies to whomſoever they pleaſe, eſpecially to Strangers; and that their Huſbands ſhall not accuſe them on theſe Accounts, or pretend to cenſure them as guilty of Adultery. The ſame Liberty obtain'd amongſt the* Bactrians. *Whereas, on the contrary, amongſt the* Arabians, *all Adultereſſes were puniſh'd with Death; and if ſuſpected only, underwent ſome leſſer Penalty. In* Parthia *and* Armenia *it is provided by Law, that no Man ſhall be accus'd for killing his Wife, his Son, his Daughter, or his unmarried Brother or Siſter. Amongſt the* Atrians *petty Robberies are puniſh'd with Stoning; amongſt the* Bactrians, *only with the Ignominy of being publickly defiled with Spittle. The wiſe Men of* Greece *are not aſhamed to court the Love of little beautiful Boys. In* Britain *many Men poſſeſs one Wife. In* Parthia *many Women belong to one Huſband.* [2] *Sextus Empiricus* [f] the Sceptick, to ſhew that there is no Certainty in the Notions of Honeſty or Diſhoneſty, hath raked up a great Heap of theſe contradictory Cuſtoms and Inſtitutions. But he hath ſtumbled very fatally in the very Entrance of his Deſign, while he talks in this Manner: *Amongſt us Pollution with the male Sex is unlawful and abominable; yet amongſt the* Germans, *as is reported, it is no Diſgrace, but rather a faſhionable Practice.* For the *Grecians* were ſo ſcandalouſly addicted to this unnatural Vice, that *Plato*, in his eighth Book of Laws, thought there was need of urging ſome Reaſons to prove the Poſſibility of reſtraining it by publick Edicts. And that the *Bœotians*, *Sextus Empiricus*'s Countrymen, ought not to ſtand excepted from this Imputation, may be gather'd from a Paſſage in *Cornelius Nepos*'s Life of *Epaminondas*; tho' perhaps the vile Cuſtom had ceas'd in thoſe Parts before this ſceptical Philoſopher wrote. That it once prevail'd there, he himſelf afterwards relates. But what he reports of the *Germans* is ſo groundleſs a Falſity, that 'tis wonderful how it ſhould enter into the Head of any one, who is the leaſt acquainted with the Manners, and the Story of that Nation. He adds, that the *Cynick* Philoſophers, and *Zeno*, *Cleanthes*, and *Chryſippus*, eſteem'd the ſame foul Enormity an indifferent Thing. That ſome of the *Indians* thought it no Indecency to be familiar with their Wives in Publick. That in ſeveral Parts of *Egypt*, for Women to proſtitute themſelves was look'd on as a creditable Profeſſion; and that 'twas uſual with the younger Sort, firſt to get themſelves a Fortune by the jilting Trade, and then to marry. That the *Stoicks* held it to be no irrational Practice, either to frequent the Stews, or to maintain one's ſelf by Pimping. That the *Perſians* contracted Marriages with their Mothers, and the *Egyptians* with their Siſters: The former of which *Zeno* maintain'd to be agreeable to Reaſon [g]. That *Chryſippus* permitted a Father to have Children by his Daughter, a Mother by her Son, and a Brother by his Siſter. That *Plato* allow'd the Community of Wives. That 'twas a receiv'd Cuſtom with many of the Barbarians to feed on Man's Fleſh; which the *Stoicks* themſelves approv'd of. That, amongſt many others, Adulteries paſs'd for indifferent Matters. That the *Scythians* offer'd Strangers to *Diana*; and kill'd their own Parents, when they arriv'd beyond the Age of ſixty Years. That by a Law of *Solon*'s at *Athens*, the Parents were impower'd to put their Children to Death. That the *Roman* Gladiators, after the Performance of their Murther, receiv'd Honours and Rewards. That Thieves amongſt the *Spartans* were puniſh'd, not for ſtealing, but for letting themſelves be catch'd. That the *Amazons*, if they happen'd to bear male Children, wilfully made them Cripples, to prevent their Performance of any manly Actions or Exploits. He enlarges farther about the different Opinions in reference to the divine Nature, about the Diverſity of religious Rites and Ceremonies, about the various Manners of Burial, and the abſurd Procurements of Death [h]. *Tully* [i] reports, that the *Egyptians, having their Minds overcome by wicked Errors, will ſooner let themſelves be cut in pieces, than they will hurt a Serpent, an Aſp, a Cat, a Dog, or a Crocodile: And if they happen unawares to do any of theſe Creatures a Miſchief, they voluntarily undergo any Puniſhment.* *Buſbequius* [k] informs us, that Theft is an honourable Practice amongſt the *Colchians*: And *Fran. Alvarez*, that in *Abyſſinia* the Cuſtom is, for the Thieves to preſent a Part of their Booty to the King, keeping the reſt without

[a] *Hiſt.* 3. *Lib.* 3. *Lib.* iii. *Chap.* xxxix. *in fin.* [b] *Ethic.* Lib. vii. Chap. vi. [c] Lib i Chap. iii. [d] *See his Preface*, §. 7. *with* Menage's *Notes.* [e] Lib. vi. Chap. viii. [f] *Pyrrhon. Hypotheſ.* Lib. iii. Chap. xxiv.
[g] *Ibid.* Chap. xxiii. Zeno's *Speech, as there repreſented, reacheth the higheſt Degree of Looſeneſs and Impudence.*
[h] Add *Diog. Laert. in Pyrrho*, Lib. ix. [i] *Tuſc. Quæſt.* Lib. v. Chap. xxvii. [k] *Epiſt.* iii.

[1] Our Author does not exactly quote *Euſebius*'s Words. The Queſtion relates to Perſons ſuperannuated. The *Hyrcanians* expos'd theſe alive, to be devour'd by Dogs and Birds: The *Caſpians* contented themſelves to ſuffer theſe Animals to prey upon them after they were dead.

[2] Theſe Remarks againſt *Sextus Empiricus*, in Favour of the *Germans*, contain only an uſeleſs Digreſſion, which might well be ſpared, as I have done.

Scandal for their own Uſe. *Philo Judæus de Temulentia, p.* 208, 209. Ed. *Genev.* [1] *And theſe Things may give us Warning not eaſily to credit thoſe Uncertainties, which being diffus'd thro' almoſt the whole World, have thrown both* Greeks *and Barbarians into common Errors of Judgment. I mean thoſe early Inſtitutions, thoſe national Cuſtoms, thoſe antient Laws, through the whole Sum of which we cannot find one in which all agree; but in every Coutry, People, City, Street, and even in every Houſe, the Men, at leaſt, differ from the Women, and the Children from both. And Ideed I do not wonder, that a confus'd and miſcellaneous Rabble, meer Slaves to Laws and Cuſtoms, however introduc'd, inur'd from the Cradle to yield Obedience to them, no leſs than to Maſters or Tyrants; and, having their Mind cow'd and broken by Severity and Blows, and not able to aſpire to any great and manly Attainments, ſhould believe the Traditions they receiv'd from their Anceſtors; and, letting their Reaſon lie without Uſe or Exerciſe, affirm Things, or deny them unexamin'd and unobſerv'd. But I cannot forbear wondering at the Philoſophers; who, whilſt the greateſt Part of them pretend to hunt for the real Truth and Certainty of Things, dividing themſelves into ſo many Troops and Orders, pronounce of almoſt every Matter, great or ſmall, ever with Difference, and often with Contradiction.* Add. *Montaigne*'s *Eſſ. Lib.* i. *Chap.* xxii. and *Charron of Wiſdom, Lib.* ii. *Chap.* viii. §. 4, 7.

IX. But that Notion of extracting the Law of Nature, from the Manners and Cuſtoms of the World, is accompanied with this farther Inconvenience; that 'tis almoſt impoſſible to find any Nation, which is govern'd purely by natural Law; but every Country hath its own particular Laws ſuperadded, either in Writing or otherwiſe: to be made uſe of when the People have any Bargains or Tranſactions with their Fellow-ſubjects. And many times Affairs in Debate between whole Nations, are decided either by civil Law common to both, or by the Law of Nature, as it is not naked, but cloath'd, as it were, with many poſitive Additions. So that it is no eaſy Matter to diſtinguiſh what thoſe Nations admit for natural Law; and what for poſitive and civil. We may add to this Conſideration, that meer Uſe and Cuſtom when it hath born a long, and an unqueſtion'd Sway, frequently puts on the Face and Semblance of natural Reaſon. *'Tis manifeſt,* ſays *Agathias* [a], *that whatever Law or Inſtitution hath obtain'd thro' a long Courſe of Time amongſt many People, they certainly cry it up for moſt excellent and moſt equitable; and if any Thing be attempted contrary to it, this they reject as ridiculous, and unworthy of all Credit and Allowance.* We have a famous Example to this Purpoſe in *Herodotus* [b]. *Darius*, for Experiment's ſake, put the Queſtion to the *Greeks*, who were under his Command, what Sum of Money he ſhould give them to feed on the Bodies of their deceas'd Parents, after the Manner of the *Indians*. Upon their Refuſal to comply on any Conſiderations, he aſk'd ſome of the *Indians*, what they'd take to burn their dead Parents after the *Grecians* Faſhion, and not to eat them: But they ſetting up a general Outcry, deſired the King to have better Thoughts of them. Beſides, to have been inur'd in any Opinion from one's Infancy, is ſo forcible a Prepoſſeſſion, that altho' the Opinion be falſe, yet it ſcarce enters into any Perſon's Head to queſtion it; at leaſt it paſſes with an uncontroul'd Currency, amongſt Men of vulgar Parts and Capacities. [2] *Ariſtot. Problem.* §. 18. *Qu.* 6. *Thoſe Things which Men have at firſt made Choice of, and to which they have been accuſtom'd, in theſe they are not able to judge for the better. For their Mind is already corrupted by evill Prejudices and Prepoſſeſſion.* Cicero, Tuſc. Quæſt. Lib. iv. Ch. iii. *Some Perſons are tied and reſtrain'd in their Notions, before they are capable of judging what is beſt; and afterwards, in the weakeſt Part of their Age, either following the Opinions of ſome Friends, or taken with the Speech of the firſt Maſter they have heard, they give their Verdicts on Points which they do not in the leaſt underſtand, and being carried with the Violence, as it were, of a Tempeſt, to ſome particular Doctrine or Sect, they cleave to it as if they were hugging a Rock to ſave their Lives.* And a little after, *I know not how it comes to paſs, that moſt Men had rather continue in a Miſtake, and quarrel and fight in Defence of an Opinion, which they have once lov'd and embrac'd, than to examine without Obſtinacy or Partiality, what is deliver'd with moſt Agreement on all Sides.* Add. *Mich. Montaigne*'s *Eſſ. Lib.* i. *Ch.* xxii. *Philo Jud. de Abrahamo, p.* 294. B. Ed. *Genev. Inveterate Cuſtom uſually bears as much Force as Nature itſelf.* To the greateſt Part of Mankind we may apply *Sextus Empiricus*'s [3] Saying, *they follow the uſual Ways of Life without Thought or Reflection* [c]. And [4] *Euripides*'s Obſervation is no leſs true, that *the Traditions which we receiv'd from our Parents, and which are grown up with us, no Reaſon can confute, no*

[a] Lib. ii. Chap. xx. [b] *Thalia*, p. 112. *Gr.* Edit. *H. Steph.* [c] *Pyrrhon. Hypoth.* Lib. iii. Chap. xxiv.

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[1] *Philo*'s *Greek* is, Ἐκεῖ δ' ἡμᾶς ὁ φιλαγαθὸς μὴ λίαν τοῖς ἀφανέσι πιστεύειν, ἃ χρὴν ἀνὰ πᾶσαν τὴν οἰκουμένην ἀνακήρυξε, κοινὸν Ἕλλησιν ὁμοῦ καὶ βαρβάροις ἐπάγοντα τὸ ἐν τῷ κρίνειν ὄλισθον; τίνα δ' ἂν ταῦτ' εἴη; ἀγωγαὶ δυσπαθεῖς αἱ ἐκ παίδων, καὶ ἔθη πάτεια, καὶ παλαιοὶ νόμοι, ὧν ἐν οὐδὲν ὁμολογεῖται τῶν ὄντων ἁπάντων, ἀλλὰ κατὰ χώρας καὶ ἔθνη, καὶ πόλεις, μᾶλλον δὲ καὶ κατ' οἰκίαν ἑκάστην, ἄνδρα μὲν ἓν καὶ γυναῖκα καὶ νήπιον παῖδα, τοῖς ἄλλοις διαπέπειται· τὰ μὲν αἰσχρὰ παρ' ἡμῖν ἑτέροις καλά, καὶ τὰ πρέποντα, ἀπρεπῆ, καὶ τὰ δίκαια, ἄδικα —— Ἐγὼ δ' ὁ πεπαυμένα εἰ συμπεφορημένῳ καὶ μιγάδι ὄχλῳ ἐθῶν καὶ νόμων τὸ ὁπωσοῦν εἰσπεμπόντων ἀκλεὴς δῆλος, ἀπ' αὐτῶν ἔτι παρεγάνων μὴ φιλαυτεῖν [for ſo it ought to be read, inſtead of ἀκούειν] ὡς ἂν δεσποτῶν ἢ τυράννων, ἐκμαθὼν, καταπεκονδυλισμένος τὴν ψυχὴν· καὶ μέγα καὶ νεανικὸν φρόνημα λαβεῖν μὴ δυνάμενος, πιστεύει τοῖς ἅπαξ φιλαδόξοις, καὶ τὸ νῦν ἐάσας ἀγύμναστον, ἀδιαιρετωτάτοις καὶ ἀνεξετάστοις συναινέσεσί τε καὶ ἀρνήσεσι χρῆται; ἀλλ' εἰ καὶ τὴν λεγομένην φιλοσοφίαν ἡ πληθὺς τὸ ἐν πᾶσι σαφὲς καὶ ἀψευδὲς ὁπωμορφάζουσα θηρᾶν κατὰ σπουδὴν καὶ λόγους διατέτριπται, καὶ δόγματα ἀσύμφωνα, πολλάκις ὅ καὶ ἐναντία ἀλλήλοις ἐστὶ τίθενται τῷ τυχόντι, ἀλλὰ χρεὼν πᾶσιν ἐπὶ πάντων μικρῶν τε καὶ μεγάλων, ἐν οἷς αἱ ζητήσεις συνίστανται.

§. ix. [2] *Ariſtotle*'s Words are, Τί ὃ ἂν πίνες ἐξ ἀρχῆς ἔλωνται, καὶ οἷς ἂν συνεθῶσιν, οὐδὲ κρίνειν δύνανται τὰ βέλτιω διεφθαρμένην ἔχοντες τὴν διάνοιαν διὰ παῦλαν πρεσβύτητος· *Tully*'s Words are, *Nam cæteri primùm ante tenentur adſtricti, quàm, quid eſſet optimum, judicare potuerunt: deinde infirmiſſimo tempore ætatis aut obſecuti amico cuidam, aut una alicujus, quem primam audierunt, oratione capti, de rebus incognitis judicant, & ad quamcunq; ſunt diſciplinam quaſi tempeſtate delati, ad eam, quaſi ad ſaxum, adhæreſcunt.*

[3] *S. Empiricus* Words are, Ἕπεται ὁ ἀδιαφόρως τῇ βιωτικῇ τηρήσει· But the Queſtion here relates to the *Sceptics*, who, without following any ſettled Opinion, liv'd like other Men.

[4] *Euripides*'s Words are, Πατρὸς παραδοχὰς, ἅστε' ὁμιλίκας χρόνῳ
Κεκτήμεθ', οὐδεὶς αὐτὰ καταβαλεῖ λόγος,
Οὐδ' εἰ δ' ἄκρων τὸ σοφὸ ἐυρήσει φρενῶν·

Strength

Strength of Wiſdom can over-rule [a]. To the ſame Head we may refer that Text of the [1] Apoſtle, 1 *Cor.* xi. 14. and that Remark in *Plato*, in his ſeventh Book of Laws, that our uſing one of our Hands more readily than the other, proceeds purely from Cuſtom: Inaſmuch as Nature equally favours both. Amongſt many People Honour and Reſpect are meaſured by the Length of Beards [b]; whereas, on the contrary, the greateſt Part of the *Americans* think it a brutiſh Indecency to appear with any Beard at all [c].

But all this while, we do not aſcribe ſo much Force to Cuſtom, that it ſhould be able in ſuch a Manner to deprave and ſeduce the Judgment of Reaſon, as to render the Truths concerning natural Laws impoſſible to be apprehended [d].

X. This ſtrange Diverſity of Laws and Manners, by which moſt Nations in the World contradict each other, hath, without doubt, been the Occaſion why ſome Men have aſſerted that there's no ſuch Thing as natural Law, but that all Law firſt aroſe from the Convenience and the Profit of particular States, and is incapable of any other Meaſure. Thus *Horace, Serm. Lib.* i. *Sat.* iii. *v.* 98, 111, *&c.*

Atq; ipſa utilitas, juſti prope mater & æqui.

Jura inventa metu injuſti fateare neceſſe eſt,
Tempora ſi faſtoſq; velis evolvere mundi.
Nec natura poteſt juſto ſecernere iniquum,
Dividit ut bona diverſis, fugienda petendis.

Of Mother Profit, Juſt and Right were born.

Turn o'er the muſty Annals of Mankind,
And you'll confeſs that Laws were firſt enjoin'd
Thro' Fear of Wrong: Meer Nature never knew,
Or Good, or Bad to ſhun, or to purſue.

Ovid Ep. Heroid. iv. *v.* 131, *&c.* makes his *Phædra* declare her Mind to the ſame Purpoſe.

Iſta vetus pietas ævo moritura futuro,
Ruſtica Saturno regna tenente fuit.
Jupiter eſſe pium ſtatuit quodcunq; juvaret.

That Thread-bare Virtue only held its Sway,
Whilſt heavy *Saturn* rul'd the Sons of Clay.
Jove broke the dull Reſtraint; by *Jove*'s Decree
Profit is made the Teſt of *Piety*.

Photinus's wicked Counſel in *Lucan, B.* viii. *v.* 488. *Et ſeq.* proceeds on the ſame Principles.

——————*Sidera terrâ*
Ut diſtant, & flamma mari; ſic utile recto.
Sceptrorum vis tota perit, ſi pendere juſta
Incipit; evertitq; arces reſpectus honeſti.
Libertas ſcelerum eſt, quæ regna inviſa tuetur.

As Fire from Water, as each heavenly Light
From Earth, ſo *Profit* ſtands remov'd from *Right*.
If nice Regards to Faith and Truth are ſhown,
Your Scepter drops, and you unhinge your Throne.
The Way to fix all *hated* Reigns has been
To grant a general Liberty of Sin.

Ariſtippus too, and *Pyrrho* in *Diogenes Laertius* [e], deliver themſelves very groſsly concerning the Origin of Juſt and Unjuſt. But of all the Antients none diſputed this Point ſo largely as *Carneades* is ſaid to have done. His Arguments, as *Lactantius* [f] hath contracted them, are [2] to this Effect: That Men firſt inſtituted Laws to ſecure and to promote their own Advantage; whence they came to be ſo various according to their different Manners, and different Times; but that there was no ſuch Thing as natural Law in the World. That Mankind, and all other animate Beings, are by the Guidance of Nature, carried on to the Purſuit of their own Profit; and that, conſequently, there can be no Juſtice; or, if there be, that it muſt be the higheſt Folly, inaſmuch as it would make a Man injure himſelf in conſulting the Conveniences of others. That all Nations, famous for Empire and Command, and the *Romans* themſelves, who then reign'd Maſters of the World, if they would be juſt; that is, if they would reſtore every one his own, muſt return to their antient Cottages, and to their primitive Poverty [g]. In clearing up theſe Objections, it will not be amiſs to begin with *Tully*'s Remark, in his ſecond Book of Offices, *Ch.* iii. [3] *Profitable*, ſays he, *is a Word, which by the Corruption of Time and Cuſtom is perverted inſenſibly to the Signification of ſomewhat that may be ſeparated from Honeſty; ſo as to make ſomething honeſt which is not profitable, and ſomething profitable without being honeſt: An Error of the moſt pernicious Conſequence to the Life of Man.* On which Account, in his third Book of the ſame excellent Work, *Ch.* iii. he tells us, that *Socrates us'd to curſe the Authors who firſt divided theſe Names in Notion and Opinion, which were in Nature ſo inſeparably united.* For thoſe Maſters of falſe Politicks cheated the heedleſs Vulgar with the ambiguous Term of Profit; which is of two Kinds, as it is rated by two different Principles. One ſort of Profit is that which appears ſuch to the deprav'd Judgment of ill-compos'd Affections; theſe being mov'd chiefly by preſent and tranſitory Advantages, and

[1] In *Bacchis*, v. 201, *&c.* [b] Vide *Arrian. Epictet.* Lib. ii. Chap. xvi. [c] Vide *Rochefort. Deſcript. Antill.* p. 2. Chap. viii. §. 6. & Chap. ix. [d] Add. *Selden. de J. N. & G. ſecund. Hebræos.* Lib i. Chap. vi. [e] *See* Book ii. *and* Book ix. [f] *Divine Inſtitutions*, Lib. v. Chap. xvii. [g] Add. *Grot. Prolegom. N.* 16, &c.

[a] St. *Paul*, in that Place, ſhews us only the Power of Cuſtom, which is ſo ſtrong that Nature itſelf taught the *Corinthians*, that if any Man among them wore long Hair, it was a Shame to him, whereas if Women had long Hair, it was honourable.

§. x. *Lactantius*'s Words are, *Ejus* [i.e. *Carneadis*] *Diſputationis hæc fuit ſumma: Jura ſibi homines pro utilitate ſanxiſſe, ſcilicet varia pro moribus, & apud eoſdem pro temporibus ſæpe mutata; jus autem naturale nullum eſſe: Omnes & homines & alias animantes ad utilitates ſuas, naturâ ducente, ferri: proinde aut nullam eſſe juſtitiam; aut, ſi ſit aliqua, ſummam eſſe ſtultitiam, quoniam ſibi noceret alienis commodis conſulens.——Omnibus populis, qui florerent imperio, & Romanis quoq; ipſis, qui totius orbis potirentur, ſi juſti velint eſſe, hoc eſt, ſi aliena reſtituant, ad caſas eſſe redeundum, & in egeſtate & miſeriis jacendum.* As to the reſt, this Father took theſe Words from the third Book of *Cicero*'s Republic. We find the like Sentiments in an anonymous *Pythagorean, Opuſc. Mythol* Page 704, *& ſeq.* Edit. *Amſterd.* 1687.

[2] *Tully*'s Words are, *In quo* [*verbo*] *lapſa conſuetudo deflexit de via, ſenſimq; eo deducta eſt, ut honeſtatem ab utilitate ſecernens, & conſtituerit honeſtum eſſe aliquid, quod utile non eſſet, & utile quod non honeſtum, qua nulla pernicies major hominum vitæ potuit adferri.*

Again, *Itaq; accepimus, Socratem execrari ſolitum eos, qui primum hæc naturâ cohærentia opinione diſtraxiſſent.*

very little ſolicitous about future Concerns. [1] The other, and the true Profit, is advanc'd ſo by ſound Reaſon, which doth not only conſider Things at hand, but weighs and examines the Effects and Conſequences which they are likely to produce. Which therefore muſt pronounce that alone to be truly profitable, which is univerſally ſuch, and which gives Aſſurance of Conſtancy and Duration [a], but can never judge it a deſirable Thing to enjoy a momentary Advantage, drawing after it a Train of endleſs Miſchiefs. 'Tis a moſt unhappy and a moſt dangerous Pleaſure, in the Heat of a Fever, to relieve ourſelves with cold Water, which will be ſure afterwards to redouble our Tortures. Actions perform'd in Conformity to the Law of Nature have a double Excellency, not being only *Honeſt* [2]; that is, conducive to the Preſervation, and to the Increaſe of the Honour, and the good Credit of Men; but likewiſe *Uſeful and Profitable*, promoting their Intereſt and Advantage, and contributing largely to their Happineſs. And this latter Quality is ſo far from being an unworthy Attribute of Virtue, that even in Holy Scripture, 1 *Tim.* iv. 8. *Godlineſs* is ſaid to be *profitable to all Things, having both the Promiſes of this Life, and that which is to come.* On the other hand, thoſe Actions which contradict the Law of Nature, are always baſe and *diſhoneſt*; and, tho' they, now and then, bear ſome Appearance of Profit and of Pleaſure, yet theſe Charms are quickly over, and never fail of being attended with a more conſiderable Croud of Evils and Misfortunes [b]. [3] *Tully*, in his firſt Book of *Offices*, *Chap.* 4. talks admirably for our preſent Buſineſs. *Betwixt a Man and a Brute*, ſays he, *there is eminently this Difference; the one is carried on by Senſe; and to that only, which is preſent, with little or no Regard to what is either paſt or to come: Whereas the other, by the Benefit of Reaſon, ſees the Conſequence of Things; their Riſe and their Progreſs, and couples together Cauſes and Effects; compares Reſemblances of Actions and Events; tacks the preſent to the future; and ſo, taking in his whole Life at a View, he prepares all Things neceſſary for the Uſe and Comfort of it.* Therefore 'tis ſo far from being true, that Civil Laws were firſt inſtituted for the ſake of this momentary and baſtard Profit, that it appears to have been their chief End and Deſign, to hinder Men from ſquaring their Actions by ſo falſe a Meaſure. For, ſhould any one reſolve to direct all his Proceedings to his own private Advantage, without any regard to the reſt of Mankind; ſince all other Men might as well take the ſame Courſe, there could not but ariſe the deepeſt Confuſion, and a kind of War of all againſt all, a State [4] the moſt unprofitable, and the moſt inconvenient in the World. On the contrary, it is very manifeſt, that he who, by obſerving the Law of Nature, endeavours to win the Affections, and the good Grace of others, may conceive much ſurer Hopes of Profit attainable by their Aſſiſtance, than he, who truſting to his own ſingle Power, takes the Liberty of treating others as he pleaſes [c]. Nor is it poſſible for Men to frame a Notion of any Profit, which will be their own Peculiar, or to which all Men will not have as good a Title as themſelves; ſince Nature hath never given any Man ſo large a Privilege, as to let him exerciſe any kind of Right againſt others, the Uſe of which they are not allow'd to turn again upon him. Therefore 'tis a greater Miſtake to fancy 'twill be *profitable* to you, to take away, either by Fraud or Violence, what another Man hath acquir'd by his Labour [d]; ſince others have not only the Power of reſiſting you, but of taking the ſame Freedom with your Goods and Poſſeſſions. And you have as little Reaſon to think it will prove *advantagious* to you to break your Faith; ſince your own Example may be made

[a] *Marc. Antonin.* Lib. vii. §. 74. *Thoſe Actions are profitable or advantageous, which are agreeable to Nature.* [b] *See* Prov. xx. 17. v. 3, 4—ix. 17, 18.—xxi. 6. [c] Add. D. *Cumberland*, Chap. ii. §. 29. *n.* 2. [d] *See* Prov. i. 13, 14, *&c.*

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[1] As the Objects which are near us are commonly eſteemed greater than thoſe that are at a Diſtance; ſo, in reſpect of Good and Evil, the preſent Objects have the Advantage; and, in Compariſon of thoſe that are at a Diſtance, ſeem always the greateſt: So the moſt of Men are like prodigal Heirs, who believe a leſſer Good in preſent preferable to the Reverſion of a greater; and ſo for the preſent Poſſeſſion of a ſmall Thing, they'll part with a large Inheritance which would certainly come to them. This proceeds from a falſe Opinion. Every one ought to know, wherein conſiſts his Pleaſure; for what is abſent now, will one Day be preſent certainly; and then, having the Advantage of Nearneſs, he'll ſee Things at their juſt Proportion, and ſo prevent, in Time, the unreaſonable Eſtimate he has ſet on them, by reaſon of the unequal Meaſures. *Mr.* Locke's *Eſſay of the Underſtanding*, Lib. ii. Chap. xxi. §. 93. See alſo what goes before and follows.

[2] There are here two Extremities to be avoided. The one of thoſe, who confounding the *honeſt* with the *uſeful*, by that Means deſtroy all Ideas of Virtue and Vice, all *Natural Law*, and all Morality. The other, of thoſe who juſtly believing, that the Practice of Virtue, and of all the Rules of the natural Law, is truly and infallibly advantageous to Mankind, yet every where confound this *Utility* with the natural *Honeſty* of Actions. Whereas the firſt is only an inſeparable Conſequence of the laſt; and a Mark, by which we may diſtinguiſh what is truly honeſt, from that which is only ſo in the miſtaken Opinion of Men. When I ſay, for Example, we ſhould render *Good for Good*, and not *Evil for Good*; or, *that Men ought to obey the Will of* GOD *their Creator:* There is in theſe two Propoſitions ſo real and evident an Agreement, that any Man, who gives the leaſt Attention, will readily own the Truth of what they contain, without in the leaſt reflecting on the Advantages which ariſe from their Practice. We are convinc'd, at firſt Sight, that if once we act contrary to theſe Maxims, we offend againſt our Reaſon, and become liable to Self-Reproach. From hence alone ariſes the Idea of *Duty*, and the rational End of its Obſervation. It is true, that to give theſe, or the like Maxims, in which we diſcover a natural Beauty and Agreement, their full Force, we muſt be perſuaded of the Truth of the ſecond; to wit, *that it is our Duty to obey the Will of* GOD. But having once reduc'd every thing (as we muſt do) to this fundamental Rule, we ſhall have no occaſion to regard the infinite Utility reſulting from them, to enforce our Obligation to obey them. So far from it, that it is no way preciſely on account of this Utility, that we ſhould actually conform ourſelves to the Will of GOD: But rather, becauſe we acknowledge our Dependance, and hereby ſhew, that we think it good and honeſt to obey him; and that even tho' he ſhould require of us what is uſeleſs, which is an impoſſible Suppoſition. But if we regard the Utility alone, we muſt not conſider it ſimply in itſelf, but as it flows from the natural and wonderful Connection, which the wiſe Creator has eſtabliſh'd between the Duty and Happineſs of his Creatures. In ſhort, it is to confound Ideas, and make the Acceſſory the Principal to eſtabliſh this Utility, (however real or univerſal) as the Foundation of moral Honeſty and *Obligation*, properly ſo call'd. And indeed we ſee, that thoſe who are ignorant of, or very imperfectly acquainted with this Utility, have been notwithſtanding affected in a very ſtrong Manner, with the intrinſic Honeſty and Worth of moſt Actions agreeable to the Law of Nature. If they have not perceiv'd this in others, it has been for want of Attention, or becauſe a bad Education, and corrupt Manners, had cover'd their Minds with a thick Cloud, which render'd them inacceſſible on this Side, at leaſt, to the Light of Truth.

[3] *Sed inter hominem & belluam hoc maximè intereſt, quod hæc tantum, quantum ſenſu movetur, ad id ſolùm, quod adeſt, quodque præſens eſt ſe accommodat, paululum admodum ſentiens præteritum aut futurum. Homo autem, quod rationis eſt particeps, per quam conſequentia cernit, cauſaſque rerum videt, earumque progreſſus & quaſi anteceſſiones non ignorat, ſimilitudines comparat, & rebus præſentibus adjungit, atque adnectit futuras, facilè totius vitæ curſum videt, ad eamque degendam præparat res neceſſarias.*

[4] Of the Word *Inutilius*, ſee *Note* 1. on §. 9. of *Chap.* ii. of this *Book.*

made use of to your own Prejudice. *Isocrates* in *Areopag.* p. 252. [1] *They judge those who break Faith and Contracts, to injure the Poor more than the Rich. The latter, by losing their Dependents, could suffer only some little Damage in their Revenues. The former, if they were thrown off by their Patrons, whose Support and Assistance they continually needed, must be reduc'd to extreme Indigence and Misery.* [2] The same Orator, in *Orat. de Pace*, p. 285. Ed. *Paris.* placeth the chief Strength and Foundation of all his Advice to his Countrymen, in this Principle, that *there is more Gain and Profit in a peaceful Competency, than in a needless Pursuit of Abundance. That Justice is much more eligible than Injury, and the Care of their own Possessions, than the Desire of other Mens'.* [3] Nor should any presume so much on his own Strength and Power, as to imagine that others will not repay him with such Usage as they receive from him: For all true Power arises from a Conjunction with other Men, whom 'tis impossible to keep together by your single Force. So that if that false and spurious Profit were to be the Measure of all our Proceedings, the Life of the stoutest Mortal would be as often in Danger, as it should seem profitable to any one to rid him out of the Way: And whoever took such a Course, would only set a fatal Pattern, and chalk out the Way to his own Destruction. On the whole Matter then, not Justice, but Injustice is really the highest Folly; which, tho' it may seem to succeed for the present, yet is neither general nor lasting; and tends to the Dissolution and Destruction of human Safety; Men being chiefly guarded and secur'd from Dangers by Society and by Friendship. Nor will this hold true only of particular Men, but likewise of whole States and Communities; there having never been any Commonwealth so powerful, or so well establish'd, as not sometimes to stand in need of their Neighbours Assistance; since no single Kingdom could long bear up against the united Forces of a strong Confederacy.

Quintilian observes, [4] that an *ill Example can never be truly advantagious; for tho' it may give some Delight as the Occasion now stands, yet it afterwards draws on us a heavier Load of Mischiefs. It is impossible*, says *Demosthenes*, (*Olynthiac.* 2.) *to obtain any firm and durable Power by Injuries, by Perjury, and by Lies. Epicurus* himself, in his Notions of Justice, was very honourable and very fair, as *Gassendus*, hath given us this short Representation of them [b]. *Justice not only never hurts any one; but, on the contrary, always carries along with it something conducing to the Ease and Tranquillity of the Mind; which it likewise farther supports with the Hopes of wanting nothing that uncorrupted Nature can desire. A Soul where Injustice hath taken up its Seat, cannot but be in perpetual Disorder and Confusion, whilst when it attempts any thing with never so much Secrecy, yet it hath no Assurance that the Fact will always be undiscover'd. And since Justice is design'd for the Promotion of the common Good, it's plain that nothing can be just which doth not tend to the Advantage of whole Societies, and of each Member in particular. And because every one by the Guidance of Nature, desires and pursues what is good for him, it is necessary, that whatever is just should be according to Nature, and should therefore be call'd natural. And this Justice is nothing else but the Pledge and Assurance of general Profit; for while it takes Place by the Universal Consent of all Parties, there arises this common Advantage, that Men do not mutually give and receive Injuries, but live in Peace and Quietness together; which, as it is good and profitable, so doth Nature incite every Man to embrace and to pursue it.* Tho' it must be observ'd by the Way, That what *Gassendus* afterwards delivers about a different Profit, among different Persons, and about a variable Justice, must not be admitted, in regard to Natural Law, but only to Civil Constitutions. *Diodor. Sicul.* Lib. xxv. *Eclog.* 1. *Epicurus*, in the Book which he calls *Settled Notions*, affirms, *That a Life led according to Justice is free from all Trouble and Disquiet; but that Injustice is full of Disturbance and Disquiet.* Lucretius, *Lib.* v. 1151, *&c.*

Circumretit enim vis atque injuria quemque,
Atque unde exorta est ad eum plerumque revertit.
Nec facile est placidam ac pacatam ducere vitam,
Qui violat factis communia fœdera pacis.

Because *diffusive Wrong* can spread o'er all,
No State's secure; nay, oft' the Wrongs recoil
With double Force on the Contriver's Fall.
Nor can those Men expect to live at Ease,
Who violate the common Bonds of Peace.
Mr. CREECH.

In short, any one is able to judge what a Contradiction it is almost to common Sense, to make such a *Profit* as is opposite to *Justice*, the Standard of Acting. [5] The Sophist *Protagoras* in *Plato*, p. 225. Ed. *Fran. Ficin.* though a Trifler in other Matters, yet

[a] Which Assertion he afterwards proves at large, and which is much more to the present Purpose than that above-mention'd by our Author.

[b] *Syntagm.* Part III. Chap. xxiv. & xxv. Vide *Ciceron. de Fin. Bonorum & Malorum*, Book i. Chap. xvi.

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[1] This Passage of *Isocrates* is nothing to our Author's Purpose, as any one may discern at the first Sight.

[2] Τὴν μὲν ἡσυχίαν ὠφελιμωτέραν καὶ κερδαλεωτέραν εἶναι τῆς πολυπραγμοσύνης, τὴν δὲ δικαιοσύνην τῆς ἀδικίας, τὴν δὲ τῶν ἰδίων ἀπιμέλειαν τῆς τῶν ἀλλοτρίων ἐπιθυμίας.

[3] "There are more Men can poison, steal, and cheat us, than there are against whom we can commit those Crimes. Every "one is more liable to be offended, than offend; for among Twenty Persons that are Equals, it is manifest every one of them "has less Power against the Nineteen, than they against him." *Bayle's Dict. Hist. & Crit. Tom.* iii. p. 2745. *Col.* 2. Art. *Socinus*, Rem. I.

[4] *Nunquam prodest malum exemplum, etiamsi in præsenti occasione quadam delectat, in futurum tamen altius nocet.* Declam. 255. Οὐκ ὄφελος, ὦ Ἄνδρες Ἀθηναῖοι, ἀδικοῦντα, καὶ ἐπορκοῦντα, καὶ ψευδόμενον δυναμιν βέβαιον κτήσασθαι.

[5] Ἐγὼ δὲ ἄλλας ἀρετὰς (ὥσπερ σὺ λέγεις) ἐὰν τις φῇ ἀγαθὸς αὐλητὴς εἶναι ἢ ἄλλου ἀντινοῦν τεχνῶν, ἢ μὴ ὄφελὸς ἢ κατάγελως εἶναι, ἢ χαλεπαίνεσι, καὶ οἱ ἐπιεικεῖς ὑποσιόντες νουθετοῦσιν ὡς μαινόμενον· ἐν ᾗ δικαιοσυνῃ, καὶ ἐν τῇ ἄλλῃ πολιτικῇ ἀρετῇ, ἐάν τινα καὶ ἐπαινῶσιν, ὅτι ἄδικος ὄφελὸς ἐστὶν, ἐὰν ἔτι αὐτὸς καθ' αὑτὸν τἀληθῆ λέγῃ ἐναντίον πολλῶν, ὃ ἐκεῖ σωφροσύνην ἡγοῦντο εἶναι, τἀληθῆ λέγειν, ἐνταῦθα μανίαν, καὶ φασὶ πάντας δεῖν φάναι εἶναι δικαίους ἐάν τε ὦσιν, ἐάν τε μὴ, ἢ μαίνεσθαι τὸν μὴ ὑποκρινόμενον δικαιοσύνην, ὡς ἀνωφελῆ ὄντα, ὅτῳ μὴ ἀμοσγέπως μετέχειν αὐτῆς, ἢ μὴ ἔστιν ἐν ἀνθρώποις. But I do not see how this Passage, and the following one of *Quintilian*, make for our Author's Purpose, since they only prove the Maxim of the Duke of *Rochefoucaut*, That Hypocrisy is an Homage which Vice pays to Virtue. Moreover, there is not any thing that can prove, that Profit may be opposed to Justice, and any Man's private Interest to the Publick. I shall alledge some more pertinent Authorities to this Purpose, out of *Seneca* and *Arrian*'s *Epictetus*. *Seneca*'s Words, *Epist.* 48. are, *Nec potest quisquam beatè degere, qui se tantum intuetur, qui omnia ad utilitates*

yet had Wit enough to ſpeak ſmartly on this Point. *In other Habits*, ſays he, *if a Man pretend, for Example, to be an excellent Piper, when he doth not underſtand a Note, he either raiſes the Laughter or the Indignation of thoſe that hear him; and his Friends admoniſh him of his Madneſs and Vanity. But the Caſe is quite otherwiſe in Injuſtice. For ſuppoſe ſome Perſons know another to be really unjuſt, yet ſhould the Man himſelf confeſs that he is guilty of that Vice before Strangers, they would take it for granted, that he was out of his Wits; maintaining that ſuch a Wickedneſs is never to be diſcover'd, but the contrary Virtue always to be pretended to, whether it be really practis'd, or not. Not to counterfeit Juſtice therefore they take to be a ſenſeleſs Extravagance; ſince whoever makes a contrary Profeſſion deſerves to be driven out of human Converſe and Society* [1]. *No Man is ſo bad*, ſays *Quintilian* [a], *as that he deſires to ſeem bad.* And almoſt every Body ſpeaks more honeſtly than he either thinks or acts.

But the divine Providence hath ſufficiently confuted this pernicious Opinion, by making its boldeſt Patrons and Aſſertors feel the fatal Conſequences of it. To give an Inſtance or two. "*Lyſander*, that crafty Deſigner, who manag'd moſt "Affairs by Cheats and Shuffles, who plac'd all "Right in Profit, who affirm'd Truth and Lies "to be indifferent things, and either to be moſt "valuable, as it was moſt advantageous; who "bragg'd that Men were to be deceiv'd with Oaths, "as Children with Dice or bounding Stones," as [b] *Plutarch* or *Polyænus* [c] give his Character; did he build his Fortunes on a firmer Bottom, than if he had made Truth and Honeſty the Mark and the Standard of his Proceedings [d]? *Ageſilaus* [e], who at other Times, and in other Speeches, us'd to cry up Juſtice for the Queen of Virtues, without which Valour and Fortitude would be of no Uſe; yet when *Phœbidas* had, without Orders, poſſeſs'd himſelf of the Fort *Cadmea*, defended that Boldneſs by ſuch kind of Rhetorick as this: That *the Action of* Phœbidas *was to be rated and judg'd of, according to the Benefit and Advantage it brought to the State. Since whatever conduc'd to the publick Good of* Lacedemon, *was to be done at a Venture; whether Men were impower'd by Commiſſion for ſuch Performances, or not.* But was not this very Exploit the Occaſion of the *Spartans* miſcarrying in their Deſign of rendring themſelves Maſters of *Greece?*

XI. Theſe Foundations being ſettled, 'tis eaſy to ſolve the Objections of the oppoſite Party. 'Tis ridiculouſly weak to conclude, that ſuppoſing different States to have ſet up different Laws upon the Account of Profit, therefore there can be no perpetual or natural Law. For all civil Laws do either preſuppoſe, or include the chief Heads of the Law of Nature, thoſe by which the Safety of Mankind is ſecur'd: Neither are theſe, in the leaſt, injur'd or impair'd by the particular Ordinances, which each Commonwealth finds a Neceſſity of ſuperadding, for its ſeparate Intereſt and Benefit. *Penal Laws*, or *Sanctions*, we acknowledge to have been inſtituted *out of Fear of Juſtice*, or to reſtrain the Wickedneſs of Men, when the bare Dictates of natural Law were found inſufficient for that Purpoſe. When *Horace* denies that Nature is able to diſtinguiſh betwixt Right and Wrong; we agree with him, if he means only that Nature which Man bears in common with Brutes; whereby Brutes themſelves, through the Information of their Senſes, do perceive what is agreeable to their Body, and what not; without the leaſt Apprehenſion of Honeſty, or of Diſhoneſty. But if he means the rational Nature, we deny the Poſition as abſolutely falſe. As for *Carneades* his Argument, that *if the* Romans *would be juſt, that is, if they would reſtore every one his own, they muſt return to their primitive Cottages; and that therefore Juſtice is Folly:* In vulgar Eſteem this may bear ſome Semblance of a plauſible Truth; but to thoſe who look farther into it, it will appear exceeding empty and trifling. For, ſince whatever Right we aſſume upon others, they may, in like manner, uſe againſt us; it can by no means be profitable for us, by injuriouſly ſeizing on other Mens Goods, to invite them to make Repriſals on our own. And in ſtating the Nature and the Definition of *Profit*, we are not to conſider what ſeems advantageous to ſuch or ſuch a Man, at ſuch a particular Time, to the Prejudice of others, but what is of univerſal and perpetual Benefit and Expediency. Thus, for Inſtance, let us ſuppoſe an Officer to have rais'd a vaſt Eſtate by robbing the publick Treaſury; ſuch an one certainly imagines it would be Folly in him to make an exact Reſtitution, and ſo to return to his firſt Narrowneſs of Fortune. But when the Prince, upon convicting him of Extortion, hath adjudg'd his Goods to the Treaſury, and his Perſon to the Goal, or Gallows, do we then think he took a wiſer Courſe to raiſe himſelf in the World, than another Perſon who reſts contented with a competent Maintenance innocently acquir'd? Thus I know not whether it had not been better for the *Roman* People to have ſate down with Satisfaction in the Enjoyment of that moderate Wealth which, at firſt, they got together, without the Expence of their Virtue or Honour; than when they had rifled and plunder'd all the whole World, to turn their Weapons upon themſelves, and to expoſe the feeble Carcaſs of their Empire to be torn in pieces by the barbarous Nations. Nor do the other Arguments of *Carneades*, as ſet down by *Lactantius* [2], require any long, or any

[a] *Inſtitut.* Lib. iii. Chap. viii. Ed. *Lugd. Bat.* p. 251. [b] *Plutarch. Apophthegm. Lacon.* p, 229. Ed. *Wech.* [c] *Stratag.* Lib. i. Chap. xlv. [d] Vide *Cornel. Nep. Lyſand.* [e] See *Plutarch*, in *Ageſil.* p. 608.

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utilitates ſuas convertit: alteri vivas oportet, ſi vis tibi vivere. Hæc ſocietas diligenter & ſanctè obſervanda eſt, quæ nos omnes omnibus miſcet, & judicat aliquod eſſe commune jus generis humani: i. e. "'Tis not poſſible for any Man to live happily who regards himſelf only, who minds his own Intereſt only; we muſt live for the Good of others, if we will advance our own. "This Union in Society is carefully and ſacredly to be preſerved, which intermixes us together, and teaches us, that there is "a common Right of Mankind." *Arrian*'s Words in *Epictet.* Lib. i. Chap. xix. are, Καθόλου τε [ὁ Ζεὺς] πεποίηκε φύσει τὸ λογικὸν ζῶον κατεσκευάσθαι, ἵνα μηδενὸς τῶν ἰδίων ἀγαθῶν δύνηται τυχεῖν, εἰ μή τι εἰς τὸ κοινὸν ὠφέλιμον προσφέροιτο, ὅπως ἀνεπίκοινώνητον γίνεται τὸ πάντα ἀπὸ τοῦ ἕνεκα ποιεῖν· *i. e.* "GOD hath diſpoſed the Nature and Order of reaſonable Creatures in ſuch "a Manner, that every one of them ſhould advance each other's Intereſts, with regard to the publick Advantage; ſo that "though we refer all to our private Advantage, we ought yet to do what in us lies to promote that of others." *M. Antoninus* has many ingenious Reflections in his Works tending this way.

[1] *Nec enim eſt quiſquam tam malus, ut malus videri velit.*

§. 1. [2] *Bonus vir, inquit, ſi habeat ſervum fugitivum, aut domum inſalubrem, & peſtilentem, quæ vitia ſolus ſciat, & ideo proſcribat, ut vendat, utrumque profitebitur fugitivum ſervum, & peſtilentem domum ſe vendere, an celabit emptorem? ſi profitebitur, bonus quidem quia non fallet, ſed tamen ſtultus judicabitur, quia vel parvo vendet, vel omnino non vendet; ſi celaverit, erit quidem*

any laborious Reply. For if any think it a Piece of Wiſdom in the Seller of a Houſe, to diſſemble its being infected with the Plague; certainly it muſt be own'd for Wiſdom in the Buyer, if he either give falſe Money for his falſe Goods, or to puniſh the Author of the Cheat by the ſevereſt Methods. Laſtly, As for thoſe Caſes, whether it be fair [1] in a Shipwreck for a ſtronger Man to force a Plank from the Arms of a weaker; or, in a Flight, for a ſound Man to diſpoſſeſs a wounded Soldier of his Horſe, preferring his own Preſervation to the Safety of his Fellow, we ſhall hereafter find Occaſion to diſcuſs, and to determine them [a]. It will be ſufficient, for the preſent, to make this ſhort Remark, that Actions done upon extreme Neceſſity, and out of Conſternation of Mind ariſing from imminent Danger, and which do therefore meet rather with Excuſe, than with Approbation, ought by no means to be eſtabliſh'd for common Rules of proceeding [b].

XII. The Author of the Treatiſe *De Principiis juſti & decori*, in ſearching after the right Notion of the Law of Nature, follows this Method. In the firſt place he lays down this confeſs'd Principle, *That there is a* GOD, *and that he created the World in Wiſdom*; which no Man in his Senſes will diſpute. He adds, that GOD *hath declar'd his Reſolution of exerciſing the Virtues of Truth and Juſtice, in his Government of the World* [c]. But here, beſides that it ſcarce ſeems right to conceive the divine Juſtice, or Truth, after the Manner of *Virtues*, it is ſufficiently manifeſt, that the Diſpoſition, or the Inclination to Juſtice which we attribute to GOD [2], is very different from that which Men are to exerciſe towards one another: Inaſmuch as the former denotes that Method by which an infinitely great and good Creator is pleas'd to govern his intelligent Creatures; whereas the latter obtains only amongſt Perſons by Nature equal, and ſubject all alike to a common and a ſupreme Lord. Neither can it be at all made out, that divine and human Juſtice are capable of the ſame Meaſure, from this Argument, that in holy Scripture we are frequently referr'd to the Example of GOD [d]: For in thoſe Paſſages the Holy Spirit is pleas'd to follow the uſual Way of Reaſoning [3], *from a greater to a leſs*. But from theſe Principles the ſaid Author, *p.* 9, 10. concludes, that *in the Creation of the World* GOD *propos'd to himſelf ſome End. That he hath appointed Means ſufficient for the obtaining that End. That a Man ſhall certainly be puniſh'd, if he deviates from that Order which* GOD *would have us obſerve, in the Proſecution of the End propos'd by him to himſelf, and to Mankind. And, on the contrary, ſhall certainly be rewarded, if he direct his Life according to the Order preſcrib'd by his Creator.* In fine, that *the Juſtice of* GOD *implies nothing elſe, but his lawful Diſtribution of Rewards and Puniſhments.* In regard to this Doctrine, I queſtion whether it can be ſaid with any tolerable Senſe, that GOD *hath conſtituted an End, common to Man with himſelf*; or, that the Order preſcrib'd by him to Man, that is, the Obſervation of the Law of Nature, doth produce the End for which GOD created the World. Nor can the Crudeneſs of the following Aphoriſm paſs with ordinary Digeſtions: *That the natural Neceſſity which is in* GOD, *doth lay on Men a Neceſſity of purſuing Virtue, and of flying Vice.* Yet ſuppoſe we ſhould be brought to grant all this, and then ſhould guide our Search after the Law of Nature by ſome ſuch general Maxim and Rule, *Whatever things are by Nature ſo diſpos'd, as to hinder the End which* GOD *propos'd in the Creation of the World; all thoſe things are prohibited by the Law of Nature: But whatever things are ſo naturally order'd, that the End beforemention'd cannot be obtain'd without them, thoſe are certainly enjoin'd, or commanded by the ſame Law:* We ſhall ſtill be at a loſs to underſtand what neceſſary Relation every particular Precept of the Law of Nature bears to that End; whilſt the End itſelf is not perfectly diſcover'd by us. Thus, for Example, there would be need of a Train of Deductions, to make me apprehend, that the End for which the World was created cannot be attain'd without honouring one's Parents, or that Theft is repugnant to the ſaid End. 'Tis meer trifling therefore to ſtick upon ſuch general Terms, without calling in the Aſſiſtance of nearer and more diſtinct Principles. And the Foundation of the Law of Nature muſt be always left in the Dark by him

[a] See *Chap.* vi. *of this Book.* [b] Add. *Velthuyſen, de principiis juſti & decori*, p. 114, &c. [c] *Pſalm* xcvi. *v.* ult.
[d] *Luke* vi. 36. *Matth.* v. 44, 45.—xviii. 33.

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dem ſapiens, quia rei conſulet, ſed idem malus, quia fallet. Rurſus ſi reperiat aliquem, qui aurichalcum ſe putet vendere, cum ſit illud aurum; aut plumbum, cum ſit argentum; tacebitne, ut id parvo emat, an indicabit, ut magno? Stultum planè videtur malle magno. Divin. Inſtitut. Lib. v. Chap. xvii. n. 5, 6, 7.

[1] Again, *Lactantius* adds, *ibid.* n. 10, &c. *Nempe juſtitia eſt, hominem non occidere, alienum prorſus non attingere, quid ergo juſtus faciet, ſi forte naufragium fecerit, & aliquis imbecillior viribus tabulam ceperit? Nonne illum tabula deturbabit, ut ipſe conſcendat cãque nixus evadat, maxime cum ſit nullus medio mari teſtis? Si ſapiens eſt, facict, ipſi nimirum pereundum eſt, niſi fecerit. Si autem mori maluerit, quam manus inferre alteri, jam non juſtus ille, ſed ſtultus eſt, qui vitæ ſuæ non parcat, dum parcit alienæ.* Item: *Si acie ſuorum fuſa, hoſtes inſequi cæperint, & juſtus ille fuerit nactus aliquem ſaucium equo inſidentem, eine parcet, ut ipſe occidatur, an dejiciet ex equo, ut ipſe poſſit hoſtem effugere? Quod ſi fecerit, ſapiens, ſed idem malus; ſi non fecerit, ſtultus ſit neceſſe eſt, licet juſtus.*

§. XII. [2] I do not ſee that *Velthuyſen* ſays any thing that can intimate the contrary. His Notion is, That GOD hath diſpoſed all things in a manner ſuitable to his Perfections; and this is that natural Neceſſity of which he ſpeaks a little lower. Our Author here is a little too ſcrupulous, as to his Expreſſions. It were to be wiſh'd, indeed, that all Men would ſpeak in the ſame Manner on ſuch important Subjects; but, as things are ſituated, this is what cannot be expected. The beſt Way, therefore, is to have more Regard to the Thought, than to the Expreſſions, and to ſeek as much as poſſible Union and Harmony, as to the main Points. Whereas, on the contrary, by the Multiplicity of Words we vary the Difference of our Opinions, which is already but too great.

[3] Our Author ſays, that in thoſe Places of Scripture the Arguments are drawn *à minori ad majus*, i. e. from the Leſs to the Greater; whereas 'tis evident that they are drawn juſt the contrary Way; for thus the Argument runs, and he himſelf ſpeaks ſo in another place: "If GOD, who is the Lord of all the World, and has from all Eternity enjoyed a compleat Happineſs, "who is ſelf-ſufficient, and has no need of Pardon, is very merciful to his Creatures, who have provoked him to Anger by "their Sins, with how much greater Reaſon ought Men to have Compaſſion on their Brethren, whoſe Pardon they themſelves "often want, and whoſe Help they can't live without? If a Maſter hath Pity of his Servant, the Servant ought much more to "have Pity on his Fellows. If GOD cauſes the Sun to riſe on wicked Men, much more ought Men to do good to their Ene-"mies. Men, I ſay, who are ſo ſubject to offend each other, and who have ſo great Need of mutual Aſſiſtance." *Specimen Controverſ.* Chap. iv. §. 5. To call this way or arguing, *à minori ad majus*, is contrary to the Language of all Orators and Logicians. See *Ariſtot. Rhet.* Lib. ii. Chap. xxiii. and Top. ii. Chap. x. as alſo *Quinctil. Inſtit. Orat.* v. 10.

who can make no farther Progreſs in the Queſtion, than to tire us with ſuch Repetitions, that [1] *ſince the World was made in Wiſdom and Order; and ſince Man hath his Part aſſign'd him in the univerſal Harmony; therefore that Order ought neceſſarily to point out to every Man his Duty, in every Action of Proceeding.*

XIII. Thus far moſt are agreed, that the Law of Nature is to be drawn from Man's Reaſon; flowing from the true Current of that Faculty, when unperverted [2]. On which Account the holy Scriptures declare it to be written in the Hearts of Men, *Rom.* ii. 15. This we judge to be a moſt manifeſt Truth, that altho' the ſacred Writings do throw in a more enlarged Light to direct us in the cleareſt View of Nature's Law [3]; yet the ſame Law may, without any extraordinary Aſſiſtance, be found out and ſolidly demonſtrated by the bare Force of Reaſon, ſuch as GOD firſt implanted, and ſtill preſerves in Mankind. Yet here we by no means think it neceſſary to maintain, that the general Principles of natural Law are *innate*, or imprinted, as it were, upon Mens Minds, from their very Birth, in the Manner of diſtinct and actual Propoſitions, ſo as to be readily expreſs'd and utter'd by them, as ſoon as they arrive at the Uſe of Speech, without farther Inſtruction or Meditation. For that theſe native Ideas, or original Characters, are no better than unwarrantable Fictions [4], any one may diſcover, who will be ſo curious as to obſerve nicely the Steps by which Children make their Progreſs in Knowledge, clearing themſelves by little and little from the Ignorance of their infant State. Nor is it a Conſideration of little Weight in this Point, that the holy Scriptures frequently deſcribe Infancy and Childhood [5] by the Ignorance, and riper Age by the Knowledge of Right and Wrong [a]. Dr. *Cumberland* muſt be our Guide and Maſter in theſe Diſquiſitions, who hath moſt clearly demonſtrated, that altho' we reject the Notion of thoſe innate Propoſitions, yet the Knowledge of the Law of Nature is truly and really imprinted on human Minds by GOD, as he is the firſt Mover and Director of them: Whence, likewiſe, any one may readily diſcover, that 'tis his Will and Command we ſhould act according to that Law. That Phraſe in *Romans* ii. 15. which is urg'd ſo vehemently by ſome Authors, is certainly [6] figurative, and implies no more than a clear and certain Knowledge treaſur'd up in the Memory; of which the Perſons ſpoken of are convicted in their own Conſciences, by what Means ſoever thoſe Notions firſt enter'd into their Thoughts. Thus too thoſe Sins which, in *Jerem.* xvii. 1. are ſaid to be *engraven on the Tables of the Heart*, inaſmuch as they are actual Tranſgreſſions, could not be diſcover'd at the Nativity of the Offenders [c]. That Readineſs which we ſee in Children, and in the ignorant Multitude, to diſtinguiſh Right from Wrong, is owing, in a great meaſure, to Exerciſe and Uſe; whilſt, from their early Years, and the firſt opening of their Reaſon, they obſerve good Things to be approv'd of, and evil Things to be exploded; the former to be attended with Praiſe, the latter [7] with Puniſhment. Their Minds are ſo fix'd and diſpos'd by daily Practice, and by the whole [8] Series of common Life, that few of them ſo much as doubt whether they may not proceed by other Methods. Whoever conſiders this Matter accurately, will diſcover, that 'tis very hard to give a Reaſon for many Practices, which yet the common People undertake without Scruple or Heſitation. To borrow an Inſtance from a late Author [d]: *If a Man be found committing a Robbery, the Multitude preſently join Hands and Minds to purſue, and to ſeize the Thief: But if, upon a Quarrel, one Man hath kill'd another, every body wiſhes he may get off ſafe; at leaſt, no body willingly aſſiſts in the taking of him.* The Reaſon of ſuch a Difference the Vulgar underſtand not, which is this; *Every one is more in danger from a Thief, who deſigns to plunder where-ever he can meet with Booty; than from an Actor of Manſlaughter, who intends Miſchief to none but to the Perſon who gave him Provocation.* Therefore, when we acknowledge the Law of Nature to be the Dictate of right Reaſon, our Senſe and Meaning is this, that the Underſtanding of Man is endued with ſuch

[a] Vid. *Jonah* iv. 11. *Deut.* i. 39. *Iſaiah* vii. 14, 15, 16. [b] *Prolegom.* §. 5, 7, 8. [c] Add. *Luke* ii. 51. *Proverbs* vii. 3. [d] *De principiis juſti & decori*, p. 81.

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1 'Tis true, that this is not much to the Purpoſe; but we muſt own, that *Velthuyſen* did not much depend on it; and though he does not explain himſelf ſo diſtinctly as our Author, yet he lays down a Principle, which reaches to the very Bottom of that which eſtabliſhes Society, in another place, which is this: "That which is ſuch in general, and of that Nature that Men can't "diſpenſe with the Obſervation of it, without bringing a great Prejudice to all Mankind, or which if Mankind ſhould permit "to every body, 'twould be to their great Damage; whatever is ſuch, ſay I, is forbidden by the Law of Nature." *Page* 115.

§. XIII. 2 Νῦν ὃ ἔχων γνώσῃ ἀπὸ σαυτοῦ, ὅ, τι σοι πρακτέον ὀρθῶς, καὶ ὅπως. *Being endued with a Soul, you may know from yourſelf, what and how you ought to act.* Dio Chryſoſt. Orat. x. De Servis, p. 150. Ed. *Morell.*

3 See what I have ſaid in my Treatiſe of *Games*, Lib. i. Chap. iii. §. 2.

4 Our Author treats more at large of this in his Apology, §. 24. and in his *Specimen Controverſ.* Chap. iv. §. 23. But Mr. *Locke* has ſet it in its full Light in his *Eſſay on human Underſtanding*. See, alſo, what I have ſaid in my Preface, §. 3.

5 Our Author muſt underſtand here by Good and Evil, Honeſty and Diſhoneſty; but that is not the true Notion of this Expreſſion in the ſacred Writers, who, according to the Idiom of their Language, would have us to underſtand by that Phraſe in general, *All that can be known*; becauſe, in Reality, all things that we know are either good or evil, *i. e.* profitable or hurtful: as is judiciouſly obſerved by *Lud. Capellus* in his Notes upon *Gen.* iii. 5. which it would be well to conſult; as alſo Mr. *Le Clerc*'s Commentary on the ſame Place. Nevertheleſs, if any Conſequence ought to be drawn from the Expreſſions of ſacred Writers in Matters of Philoſophy, in reſpect to which they commonly follow the moſt popular Notions, we might infer, that theſe Paſſages very much favour the Opinion of thoſe who deny innate Ideas, ſince he that ſays *all*, excepts nothing. In fine, we find this Way of ſpeaking among the profane Authors. See Mr. *Le Clerc*'s *Ars Critica*, Part II. §. 1. Chap. ii. §. 26. p. 153. Tom. i. and *Heſiod*'s *Theogonia*, v. 900.

6 See *Grotius* in his Notes upon this Paſſage, and *Le Clerc*'s *Ars Critica*, p. 194, &c. Tom. i. 2d Edit.

7 See Mr. *Locke*'s *Philoſophical Eſſay*, Lib. ii. Chap. xxviii. §. 10, 11, 12.

8 Add to this the manifeſt Proportion that theſe Maxims have with the Light of right Reaſon; for it is perceived by the moſt ſimple the very Moment that 'tis propounded, and they underſtand it, though they would never have found it out themſelves, nor can they apprehend the Reaſons ſo well as to deliver their Thoughts diſtinctly about it. Further, it is certain that no Man, at the Age of Diſcretion, can reaſonably pretend an invincible Ignorance for his Excuſe; but yet it is no leſs true, that Education, Inſtruction, and Example, are the ordinary Means by which Knowledge is conveyed into the Mind of Man, and without it either the natural Light would be almoſt wholly extinguiſhed, or we ſhould not attend to it. This Experience ſhews us, not only among ſeveral ſavage Nations, but even among the more civilized, there being many Men that make good this ſad and mortifying Truth. Whence we may conclude, that every one ought to take ſpecial Care to contribute, as much as may be, to the Inſtruction of others in their Duty, and to eſtabliſh, confirm, and ſpread abroad ſo neceſſary a Knowledge.

a Power,

a Power, as to be able, from the Contemplation of human Condition, to discover a Necessity of living agreeably to this Law; as, likewise, to find out some Principle by which the Precepts of it may be clearly and solidly demonstrated [a]. Nor is it any Rub or Prejudice to this Doctrine, that the artificial Method of demonstrating these natural Precepts is not known or apprehended by all Men; and that most Persons both learn and observe the Law of Nature by Custom, and by the common Course and Tenor of living. For we see every Day the common Mechanicks and Artificers performing many things, either by Imitation, or by the compendious Direction of Instruments, the Proof of which they do not in the least understand: And yet this doth not hinder such Operations from being truly mathematical, or from being founded on solid Principles of Reason. Hence it, likewise, appears what Rule we are to measure our Reason by, in judging of its Fitness for the Discovery of natural Law; or whence we may be assur'd, whether such a Dictate proceeds from right, or from deprav'd Reason. The Dictates of right Reason are true Principles, which agree with the Nature of things well observ'd and examin'd; and which are deduc'd from other true and first Principles, by the Rules of good Consequence. On the contrary, those are Dictates of deprav'd Reason, in which a Man either lays down false Principles, or, by a wrong Method, deduces false Conclusions. For [1], at the same time as we affirm the Law of Nature to be imprinted on us by the Nature of Things, we imply that it is most true and infallible; since Nature presents us with nothing but what really exists, and produces no Effect that can be charg'd with Falshood: All Falsity arising from the Mistakes of Men, whilst they either divide such Notions as naturally cleave together, or join such together as Nature hath separated, and plac'd at a Distance [b]. And this Course of judging being duly follow'd, we need not fear that any one shall be able to foist upon us for natural Law, either the frantick Notions of his ill-purg'd Brain, or the irregular Desires of his misguided Mind. For 'tis in vain for that Man to make his Appeal to Reason, who cannot demonstrate his Assertions from Principles of unquestion'd Truth, and such as agree with the Nature of Things; inasmuch as all Truth, and all Rectitude, consists in the Agreement of Conceptions, and of Propositions with the Things themselves, which they are intended to express. And he who hath not Parts enough to frame and unite the Chain of a Demonstration, must supply that Defect by an exceeding Stock of Impudence, if he desires any Regard should be had to his vain Conjectures, when they run astray from the receiv'd Opinions of Mankind. Moreover, it is manifest to all those who understand the Force, and the Manner of Demonstrations, that there is not only a Necessity that the Principles made use of be true, and the first or highest that we can ascend to; but likewise that they be proper and peculiar to the Question in Debate, and so very clear, that the Mind apprehending, by their Means, the Cause of the Thing asserted, may rest satisfied, and neither desire nor want any farther Proof. Now against this Rule of finding out the Dictates of right Reason, those Authors have not only transgress'd, whose Foundations of natural Law we have already examin'd; but those too who think it sufficient to build that Law on so slender a Bottom as this, *That natural Honesty consists in the Agreement of Reason and Appetite; the Rule of which Honesty is the Excellency and the Dignity of human Nature, and that most noble End for which Providence seems to have given us the Dominion and the Possession of the World.* For tho' we could argue never so fairly, this Action is suitable to the Excellency and the Dignity of Man, and therefore honest, and to be perform'd; yet this doth not furnish us with any clear and certain Knowledge, in which our Minds may rest safely without

[a] Add. Dr. *Cumberland*, De L. N. Chap. iv. §. 3.

[b] *Idem*, Chap. x. §. 1.

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[1] This Period was not in the first Edition of this Work; and not being exactly fitted to the Coherence of the Discourse, I have changed the Reading in my Translation, but without any Prejudice to the Author's Sense. As to the Thing itself, the same Principle here laid down, has been establish'd in the celebrated Book of the deceas'd Mr. *Wollaston*, entitled, *The Religion of Nature delineated*. But after all, the immediate Foundation of moral Good and Evil, of Virtue and Vice, is not the general Idea of *Truth*; but it consists in certain *particular Truths*, which give Rise to practical Propositions. We must always suppose, however, that those with whom we dispute are neither *Sceptics*, or such who give themselves little Concern about Truth or Falsehood; otherwise it would be in vain to pretend to undeceive them. For a Man must be a Fool to pretend to advance, as the Rules of Just and Unjust, Propositions manifestly false. The true Question has always been this, Whether what is *Just* be so in its own Nature, and not through the Effect of an arbitrary Will, (φύσει ὁ θέσει) that is to say, in consequence of the essential Relation there is between our Actions and their Objects, or in the Nature of Things. The Passages which Mr. *Wollaston* produces, plainly evidence this. Nor is it sufficient barely to have shewn these Relations of Agreement or Disagreement: We may be convinc'd of them without owning the Truth of our Obligation to conform our Conduct to them, or without denying *that the Things are what they are*. See what I have said upon *Grotius*, Lib. i. Cap. i. § 10. N. 4. and my Reflection on the Judgment of *an Anonymous*, or the deceas'd M. *Leibnitz*. There are even Relations between the Nature of Things, and certain Actions; from whence, nevertheless, there arises no moral Obligation, nor any Negation of the Things themselves. Suppose, for Example, a Man (who is free to build, as he pleases, upon his own Ground) has a mind to erect a handsome, commodious, House, &c. He understands nothing of Architecture, neglects to consult proper Masters, or even despises their Advice: The Building is irregular, and does not answer the Purpose of the Proprietor. Shall we say on this Account, that he err'd morally? Or, that he denied there were any Rules of Architecture founded on the Nature of Things? By no means: He only falsly imagin'd himself to know these Rules without having learned them, or that he understood them better than those of the Trade. Now, though in this, he acted contrary to Reason, yet he committed nothing morally bad. But let us suppose the Architect, who should engage to build this Man an Edifice, according to his Mind, and who, either through Ignorance, or Impudence, should neglect the Rules of his Art, the Case would here be alter'd. The Architect becomes answerable for not having acted conformably to the Nature of Things; because his Contract laid him under a moral and indispensible Necessity of doing so. This, therefore, comes to the Point in Question; and all Obligation is founded upon this, That GOD wills *that we should treat Things as they are*. This is what Mr. *Wollaston* acknowledges throughout his whole Book: but he places it out of Order. For while he designs to prove, that there is really a *Religion of Nature*, he establishes for its Basis this Proposition, *That there is an essential Difference founded even in the Nature of Things, between Actions Good, Bad, and Indifferent*. Whereas, on the contrary, he should have shewn, *there is a* GOD, *and, consequently, a Religion of Nature*. Whence it follows, that Man being bound to conform himself to the Will of GOD, should act agreeably to the Nature of those Things of which he is the Author. But it has been justly observ'd, that Mr. *Wollaston*'s Method has thrown him into sensible Confusions. See what *M. de la Chappelle* has said upon this Subject in his *Bibl. Angl. Tom.* xii. *p.* 402. and a Note which is found in the *French* Translation of it, *p.* 21. The Style and Taste of the Author of this Note would easily distinguish him from the Translator, tho' he had not inform'd the Reader. As to the rest, I mean by saying this, in no wise to prejudice or lessen the just Esteem of the Public, for the Character and Work of the *English* Writer.

farther Enquiry: But the Queſtion ſtill remains, in what that Excellency conſiſts, and by Virtue of what Cauſe it comes to agree to Mankind. Thus, if one ſhould ſay to a Clergyman, It doth not become you to frequent Taverns and Houſes of Debauchery, becauſe ſuch Courſes are repugnant to the Dignity of the ſacerdotal Office; he ſays nothing but Truth, in all this, but he doth not alledge the laſt and the ſtrongeſt Reaſon, ſo as to ſet the Matter beyond Doubt and Diſpute [a].

Altho', as hath been already obſerv'd, it is not in the Power of every Man, to deduce the Law of Nature artificially from its Principle: yet that it may be properly ſaid to be *known* to all Men enjoying the Uſe of their Reaſon, it is ſufficient, if even Perſons of tolerable Heads are able to apprehend the Demonſtration when propos'd by others, and clearly to perceive the Truth of it, by comparing it with their own natural Condition. As for the loweſt Degree of Mortals, who are acquainted with the Law of Nature, chiefly by popular Information, and by common Uſe, they ought to require no farther Proofs of its Certainty, than that firſt the Exerciſe of it is maintain'd by their Superiors, by whoſe Authority they are to be guided; and then, ſecondly, that they themſelves cannot find any probable Reaſons by which they might either confute or weaken its Force; and laſtly, becauſe they are every Day ſenſible of its Uſefulneſs, and of the Benefits which it confers upon Mankind. And upon this account the Law of Law of Nature appears to be ſufficiently promulgated; ſo that no Perſon of competent Years, and of ſound Underſtanding, can, by any Means, plead invincible Ignorance of it.

For the eaſy Knowledge of what the *Law of Nature* dictates, *Hobbes* [b] commends the Uſe of this Rule, *When a Man doubts whether what he is going to do to another be agreeable to the* Law of Nature, *let him ſuppoſe himſelf in the other's Room.* For by this Means, when Self-love, and the other Paſſions, which weigh'd down one Scale, are taken thence, and put into the contrary Scale, 'tis eaſy to gueſs which way the Balance will turn [1]. *Moſchus* Idyll. V. *v.* ult.

Στέργετε τὸς φιλέοντας, ἵν' ἦν φιλέητε, φιλῆδς.
Love thoſe who court, that thoſe you court may love.

Add. *Selden* De J. N. & G. Lib. vii. Ch. xii. *Ariſtotle*, (in *Diogenes Laertius*, Lib. v. *Segm.* xxi,) being aſk'd how we ought to behave ourſelves towards our Friends, anſwer'd, *As we wiſh they would behave themſelves towards us.* Lib. ii. Tit. ii. *D. quod quis juris in alterum*, &c. *Senec.* De ira, Lib. iii. Ch. xii. *Let us ſuppoſe ourſelves in the ſame Circumſtances as the Perſon with whom we are angry: That which now puts us in a Paſſion, is only the wrong Opinion and Eſtimate of ourſelves: We are unwilling to SUFFER what we are willing to DO.* 'Tis a Saying of *Confucius*, (in *Martinius*'s Hiſt. *Sin. Lib.* iv. *Ch.* xxv.) *Never do to another what you are unwilling to ſuffer from him.* The ſame Precept was made uſe of by *Ynca Manco Capace*, the Founder of the *Peruvian* Empire; in order to the reducing his Subjects to a Life of Civility. *De la Vega, Lib.* i. *Ch.* xxi. And indeed this is no other than that great Rule preſcrib'd by our Saviour himſelf, of *Doing to Men as we would be done by.* Matth. vii. 12.

Dr. *Sharrock* is of Opinion, [c] that this Rule is not univerſal; becauſe, if ſo, a Judge muſt needs abſolve the Criminals left to his Sentence, in as much as he would certainly ſpare his own Life, were he in their Place: I muſt needs give a poor Petitioner what Sum ſoever he deſires, becauſe I ſhould wiſh to be thus dealt with, if I was in his Condition: Or I muſt clean my Servant's Shoes, becauſe I require him to clean mine. But the Rule will ſtill remain unſhaken, if we obſerve, that not [2] one Scale only, but both are to be conſider'd; or that I am not only to weigh and examine what is agreeable to me, but, likewiſe, what Obligation or Neceſſity lies [3] on the other Perſon, and what I can demand of him, without injuring either of our Duties. Yet we muſt confeſs, that this Precept cannot be eſteem'd a Fundamental Axiom of the *Law of Nature*; ſince it is only a Corollary of that Law which obliges us *to hold all Men equal with our ſelves*; and therefore may be demonſtrated *à priori*.

XIV. According to our Judgment, there ſeems no Way ſo directly leading to the Diſcovery of the *Law of Nature*, as is the accurate Contemplation of our [4] natural Condition and Propenſions. Altho' in this Conſideration regard muſt be had to ſome Things which are extrinſical to a Man, and chiefly to thoſe which are likely to promote his Intereſt, or to procure his Damage and Inconvenience.

a Comp. *Rachel.* Prolegom. ad Offic. *Ciceronis*, §. 38, &c.
* *De Officiis*, Chap. ii. Numb. 11.

b De *Cive*, Chap. iii. §. 26. & *Leviathan.* Chap. xv.

[1] We find the ſame Maxim in *Sadder*, or the Collection of the Precepts of *Zoroaſter*, made by the *Perſian* Magi (*Porta.* lxxi. in Mr. *Hyde*'s Book. See the Paſſage of *Hierocles* ſet down in my following Notes.

[2] *Hierocles* laying down the ſame Rule, adds this Reſtriction, *A Maſter*, ſays he, *ought to think how he would be treated if he were a Slave*; and this laſt, *if he were a Maſter, how he would be ſerved.* Κατὰ παντὸς μὲ γὰρ εἰπεῖν προσώπου ὑγιὴς ὁ λόγος, ὡς σαφής. Παντὶ ἔν χρήσῃ, ἑκ τε τῦ σαυτὸν μὲ ἐκεῖνον, ἐκεῖνον ἢ σαυτὸν νουθέτης. Καὶ γὰρ εἰκότῃ χρῶτ' ἂν τις ἡμῶν, ἐνθυμηθεὶς πῶς ἂν ἠξίωσαν ἑκεῖνον ἑαυτῷ προσφερεῖς, εἴπερ ἐκεῖνῳ μὲ ἦν διαφορὰ, αὐτὸς ἢ ἄλλῳ. Apud. Stob. Serm. 83. See Mr. *Wollaſton*'s Religion of Nature delineated.

[3] So that, altho' a Judge, if he were in the Place of a Criminal, would undoubtedly wiſh, as well as he, to eſcape the Puniſhment inflicted by the Law; nevertheleſs he ought to paſs Sentence, becauſe otherwiſe he can't diſcharge the Duty of his Office, and will bring on himſelf much Trouble by ſuch an Indulgence. We muſt relieve the Poor, but not to hurt ourſelves much by it, nor ſatisfy their inſatiable Avarice. It is juſt to uſe our Servants kindly, but we are not oblig'd to clean their Shoes; this were to become a Servant inſtead of a Maſter. In a Caſe of urgent Neceſſity, for Example, in Sickneſs, a Maſter may and ought, for want of another, to do ſuch Services for his Domeſtics, as they have a Right to require of him; but to go farther, is to reverſe the Order of Society, and accuſtom his Servants to Idleneſs, or rather make them inſolent in the higheſt Degree. See what I have ſaid upon this Maxim, *That we ſhould not do to another, what we would not they ſhould do unto us*, in my Treatiſe of *the Morality of the Fathers*, Chap. ix. §. 7. and Chap. xvi. §. 9.

§. XIV. [4] The very Name of *natural Law* ſhews us, That its Principles ought to be deduced from the Nature of Man, as many of the Antients have acknowledged. *Natura enim Juris*, ſays *Cicero*, *explicata eſt nobis, eaque ab hominibus repetenda Natura*, De Leg. Lib. i. Chap. v. Παρατήρει τί σε ἡ φύσις ἀπαιτεῖ, ὡς ὑπὸ φύσεως μόνον διοικυμένη· εἶτα πάλιν αὐτὴ, ἢ προσθεῖσα· εἰ μὴ χεῖρον μέλλῃ διατεθεῖς σὺ ἢ ὡς ζῶον φύσει· ἔξεστι δὲ καταπαυστέον, τί ἀπαιτεῖ σε ἡ ὡς ζῶον φύσις, καὶ πᾶν τοῦτο ποιητέον, εἰ μὴ χεῖρον μέλλῃ διατεθεῖς ἢ ὡς ζῶον λογικὸν φύσει· ὅθεν δὲ τὸ λογικὸν εὐθὺς καὶ πολιτικὸν, τόπῳ δὲ καιρῷ χρώμενον, μηδὲν προσταχθῇς. Marc. Antonin. Lib. x. §. 2. *i. e. Conſider well what your Nature requires, as if you were governed by Nature only; and do this, if the Nature of the Creature be not any ways diſordered. Then conſider what the Nature of the Creature requires, and do not deny*

nience. For whether this Law was impoſed on Man to advance his Happineſs, or to check his Wickedneſs, (which might otherwiſe break out to his own Deſtruction) [1] we cannot proceed more clearly in gaining a Notion of it, than by examining in what Points and Reſpects he hath need of Aſſiſtance, and in what he hath Occaſion for Reſtraint and Controul. In the firſt Place then, Man hath this in Common with all other Creatures endued with a Senſe of their own Being, that he loves himſelf as highly as is poſſible, that he endeavours, by all Ways and Means, to ſecure his own Preſervation, to obtain what appears conducible to his Good, and to repel what is in his Judgment Evil [a]. And this Self-love, regularly ſpeaking, is ſo very ſtrong, as to ſuperſede any Inclination which a Man may have for another. Sometimes indeed Men ſeem to affect others with a more tender Paſſion than themſelves, to be more delighted with their Happineſs, and more diſturb'd at their Misfortunes than at their own. Thus *Des Cartes* [b] obſerves, that the Love which a Good Parent bears towards his Children is ſo very pure, as to make him deſire neither the gaining of any thing by them, nor the poſſeſſing them in any other Manner than he doth at preſent, nor the being joined to them by any ſtricter Engagements than thoſe of the preſent Union. But conſidering them as his *other Self*, he ſeeks their Good equally with his own; or rather with greater Care, in as much as he reckons himſelf and his Children to make up but one entire Thing, of which, not thinking himſelf the better Part, he frequently prefers their Advantage to his own, and is not afraid to ſecure their Safety by his own Deſtruction [c]. But now beſides that this Love is not always conſtant, there are other Reaſons why Parents are ſometimes willing to have the Misfortunes of their Children transferr'd on themſelves, namely, becauſe they think themſelves more able to ſuſtain them: or becauſe they cannot but confeſs, that Perſons of thoſe tender Years are more worthy of Life and of Safety. And a Reaſon why, on the other hand, Parents are ſo highly ſatisfy'd and pleas'd with the Succeſs and Proſperity of their Off-ſpring, may be, becauſe they are ſenſible a great Part of the Glory will redound to themſelves, for bringing ſuch excellent and worthy Perſons into the World [d]. *Qui tanti talem genuere Parentes* [e]? It is likewiſe evident, that many Perſons have contentedly ſuffer'd Death for other Perſons, whom they either lov'd with an entire Affection, or to whom they devoted themſelves with an abſolute Service. For theſe Men fancied themſelves to be join'd to ſuch Friends or Maſters as leſſer Parts of the Whole, and therefore choſe to be themſelves deſtroy'd for the Preſervation of the greater Part [f]. *Procopius* [g] tells us, that amongſt the *Ephalite Hunns* the more wealthy Men pick out about Twenty, or perhaps more Perſons, for their ſpecial Friends; theſe are conſtant Gueſts at their Tables, and have the Uſe and Command of all their Riches and Poſſeſſions, being allow'd a kind of a Common Right over all Things: And when their Patron happens to die, Cuſtom obliges them to be put alive with him into his Grave. And that ſuch Ways of Mens devoting themſelves are ſtill practis'd in *Japan*, we are aſſur'd by the Authors who deſcribe that Country and People [h]. The Truth is, in the Opinion of ſuch Perſons, the Boaſts of Faith and of Affection, with the Glory thence ariſing, are of more Value than all the Things in the World beſides, and are not overpurchas'd at the Expence of Life itſelf. Some too being depriv'd of a near Friend, or of a ſingular Benefactor, caſt away their own Lives only out of Impatience and Deſpair, imagining it is impoſſible they ſhould be otherwiſe than very miſerable, having loſt him on whom alone all their Hopes and Fortunes depended. Certain it is, whatever a Man doth for others, he never forgets himſelf; and Satan in *Job* ii. 4. well expreſs'd the common Temper and Inclination of Mankind, when he ſaid, *Skin for Skin, and all that a Man hath, will he give for his Life.*

Beſides this Self-love, and this Deſire of preſerving himſelf by all Means and Methods, there is diſcoverable in Man a wonderful Impotency and natural Indigence; ſo that if we ſhould conceive any ſingle Perſon quite deſtitute of the Aſſiſtance of others, we ſhould conclude his Life was given him rather for a Puniſhment than for a Bleſſing. It is farther manifeſt, that, next to the Support and the Defence of Heaven, Men draw their chief Help and Comfort [z] from each other. For, as the Strength of particular Perſons is ſo unable to compaſs their Preſervation and their Maintenance, that to live happily and conveniently they have continual Occaſion for the Works, and for the Supplies of their Neighbours, in as much as their own Time, as well as Power, would fail them to procure the moſt uſeful and the moſt neceſſary Things; ſo on the other Hand, particular Men have Convenience of

[a] *Cicero* de Fin. Lib. iii. Chap. v. *So ſoon as any Animal is born, it is endear'd, and, as it were, recommended to itſelf for its own Preſervation, and for the loving of its own Condition, and of every Thing that tends to the Preſervation of it: Being at the ſame time made averſe to Deſtruction, and to all things which ſeem pernicious.* *Valer. Flacc.* Lib. v. V. 644.

Eſt amor & cunctis rerum tutela ſuarum.
By Nature all love and protect their own.

Add *Diog. Laert.* Lib. vii. In *Zen. Marcus Antoninus*, Lib. xi. §. 8. *Epictetus* Enchirid. Chap. xxxviii. Numb. 2. *Cicero de Officiis*, Lib. i. Chap. iv. [b] *De Paſſionibus*, Art. 82. [c] See 2 *Sam.* xviii. 33. *Euripid. Alceſt.* v. 653. *uſque ad* 705. [d] See *Luke* xi. 27. [e] *Æn.* i. 610. On the other Side, it was a gallant Saying of *Epaminondas*, that amongſt all the good and fortunate Accidents of his Life, none ſtruck him with ſo real a Pleaſure, as that he won the famous Victory at *Leuctra*, before he had loſt either of his Parents, *Plutarch*'s Apothegm. p. 193. Ed. *Wech.* [f] Vid. *Cartes* de *Paſſion.* Art. 83. *Cæſar* de B. G. Lib. iii. Chap. xxii. concerning the *Soldurii*. [g] De Bello *Perſ.* Lib. i. Chap. iii. [h] Vid. *Franc. Carron*, in Deſcript. *Japan.* Chap. vii. Of the *Æthiopians*, ſee *Diod. Sic.* Lib. iii. Chap. vii.

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deny it to yourſelf, if it be not contrary to the Nature of a reaſonable Creature; for he that ſpeaks of a reaſonable Creature, ſpeaks of a Political one, i. e. *one born for Society. If you obſerve theſe Rules, you need not be uneaſy for any thing.* Further, Our Author ſpeaks only of a natural *obligatory Law*; he thinks not in the leaſt of the *natural Law* by ſimple Permiſſion, which follows nevertheleſs from the ſame Principles. See above, *Lib.* i. *Chap.* 6. §. 16. *Note* 1. and what is ſaid in the laſt Note of this Chapter.

[1] The laſt of theſe Periods was added in the ſecond Edition, and is not well placed. With regard to the reſt, the laſt Words may be illuſtrated by what *Seneca* ſays, *That there are Virtues which need a Spur, and others which require a Bridle. Non eſt enim quod ullam exiſtimes eſſe ſine labore virtutem, ſed quædam virtutes ſtimulis quædam frænis egent.* De Vita Beata. Cap. xxv. which Paſſage our Author ſeems to have had in his Eye.

[z] *Cicero* proves at large, (*De Offic.* Lib. ii. Chap. iii, iv, v.) that there is nothing that a Man can receive more Good or Evil from, than from his Like. After which he thus concludes, *Cum igitur hic locus nihil habeat Dubitationis, quin homines plurimum hominibus & proſint & obſint, primum hoc ſtatuo eſſe virtutis, conciliare animos hominum, & ad uſus ſuos adjungere*, Chap. v. Juſt the ſame Conſequence as our Author draws in §. following.

furniſhing

furniſhing others with many Things, which they themſelves do not want; and which therefore would turn to no Uſe or Account, unleſs they were thus beſtow'd and diſpenſed [a]. And as Men appear thus to be ſo vaſt a Support and Help to each other, ſo may they, likewiſe, in as eminent a manner, prove a mutual Plague and Miſchief; and they do often actually prove ſo, either upon the Inſtigation of their brutiſh Paſſions, or being compell'd by the Neceſſity of defending themſelves from the Injuries and the Aſſaults of others. The Truth of all which is clear to us from daily Experience, and hath been inſiſted on more largely by us in the firſt Chapter of this Book [b]. But we deſire it ſhould be well obſerved, that in ſeeking out the true Condition of Men, we have aſſign'd the firſt Place and Influence to Self-love, not as if each particular Man ought, in every Reſpect, to prefer himſelf to all others, or to meaſure all Things by his own private Advantage, eſtabliſhing his ſeparate Intereſt for his chief End and Deſign; but becauſe a Man is by Nature ſooner ſenſible of the Love he bears towards himſelf, than of that which he bears towards others, in as much as it is natural for him ſooner to perceive his own Exiſtence, than the Exiſtence of others. And farther, becauſe the Care of me and my Affairs belongs to no body ſo properly as to myſelf: For altho' I propoſe the common Good for the Mark of Acting, yet ſince I, likewiſe, am a Part of Mankind, to the Preſervation of which ſome Care is due, this Care muſt needs lie more eſpecially, and more forcibly, on me myſelf, than on any Perſon elſe in the World.

XV. Thus much being granted, it is an eaſy Matter to diſcover the Foundation of Natural Law. Man is an Animal extremely deſirous of his own Preſervation, of himſelf expos'd to many Wants, unable to ſecure his own Safety and Maintenance, without the Aſſiſtance of his Fellows, and capable of returning the Kindneſs by the Furtherance of mutual Good: But then he is often malicious, inſolent, and eaſily provok'd, and [1] as powerful in effecting Miſchief, as he is ready in deſigning it. Now that ſuch a Creature may be preſerv'd and ſupported, and may enjoy the good Things attending his Condition of Life, it is neceſſary that he be *ſocial*; that is, that he unite himſelf to thoſe of his own Species, and in ſuch a Manner regulate his Behaviour towards them, as that they may have no fair Reaſon to do him Harm, but rather incline to promote his Intereſts, and to ſecure his Rights and Concerns [2]. This then will appear a fundamental Law of Nature, *Every Man ought, as far as in him lies, to promote and preſerve a peaceful Sociableneſs with others, agreeable to the main End and Diſpoſition of human Race in general* [3]. For by *Sociableneſs* we do not here mean a bare Readineſs or Propenſion to join in particular Societies, which may poſſibly be form'd on ill Deſigns, and in an ill Manner; as the Confederacies of Thieves and Robbers; as if it were ſufficient only to join ourſelves with others, let our Intentions be what they will. But by this Term of *Sociableneſs*, we would imply [4] ſuch a Diſpoſition of one Man towards all others, as ſhall ſuppoſe him united to them by Benevolence, by Peace, by Charity; and ſo, as it were, by a ſilent and a ſecret Obligation. It would therefore be a Charge moſt notoriouſly falſe, ſhould any inſinuate, that the Sociableneſs which we eſtabliſh is perfectly indifferent, and hath an equal Regard to good Society and to bad. We ſaid it was the Duty of every Man to promote and to practiſe Sociableneſs *as far as in him lies*; becauſe, for as much as it is not in our Power to oblige all other Men to behave themſelves towards us as they ought, we have done our Duty when we have omitted nothing which we were able to perform, in moving and engaging them to exerciſe the like Sociableneſs towards us. From all which it follows, that ſince he who obliges us to any *End*, cannot but, at the ſame Time, be ſuppos'd to oblige us to thoſe *Means*, which are neceſſary to the Attainment of that *End*, *all Actions which neceſſarily conduce to this mutual Sociableneſs, are commanded by the Law of Nature; and all thoſe, on the contrary, are forbidden, which tend to its Diſturbance, or Diſſolution.*

This

[a] *Senec.* de Irâ, *Lib.* i. *Chap.* 5. *Men are born to be Helps to each other.* *Marc. Antonin.* Lib. ii. Chap. i. *We are born for mutual Support and Aſſiſtance, and have each of us our proper Office to diſcharge for the general Benefit; as the Feet, the Hands, the Eye-lids, the Teeth,* or any Members of the Body.

[b] Add. Dr. *Cumberland,* Chap. i. §. 15, 16.

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§. xv. [1] Mr. *Titius* affirms, that the Conſequence is not good, but he is certainly miſtaken; for our Author deduces *Sociableneſs* from all theſe Characters put together, and not from any ſingle one. But in one Thing Mr. *Titius* ſeems to ſpeak without Reaſon, when he ſays, That our Author in ſettling Sociableneſs in that Manner, gives us Cauſe to believe, that every one's private Advantage is the Foundation of *Natural Law*; becauſe, according to him, if a Man becomes ſociable, 'tis becauſe he can't preſerve himſelf without it, nor enjoy ſuch Conveniences of Life as are neceſſary in this World. Our Author had obviated this Objection at the End of the preceding Paragraph. The only Defect in his Argument lies in this, that he does not give us the direct and proper Foundation of all the Duties of the *natural Law.* Our Author, on the one hand, was deceived in believing, that all the Laws of Nature might be deduc'd from one ſole Principle; whereas he himſelf had eſtabliſh'd (in his *Elem. Juriſpr. Univ.* Page 431, *& ſeq.*) two diſtinct Principles, to wit, *Self-love*, and *Sociability*. On the other hand, he errs in having here too high a Notion of Utility, and regarding it in a ſtronger Light than it deſerves: As I have remark'd, §. 10. N. 6. preceding. I ſhall preſently ſhew, how we ſhould conſider this Subject.

[2] *Nihil eſt profecto præſtabilius, quàm planè intelligi nos ad juſtitiam eſſe natos, neque opinione, ſed naturâ conſtitutum eſſe jus. Id jam patebit, ſi hominum inter ipſos ſocietatem, conjunctionemq; perſpexeris.* Cicero De Leg. Lib. i. Ch. x. "There is nothing "more uſeful than to reflect, that we are born to practiſe Juſtice; and that, conſequently, Right doth not depend on Opinion, "but on the Eſtabliſhment of Nature; if you conſider the neceſſary Union and Alliance of Mankind." Συὴν ἀλλήλοις ζῆν ἀνθρώπους, καὶ ἀνομία διαπᾶσι ἄχ εἶναι τι μείζω καὶ ἂν αὐτοῖς ζημίαν ἅπω γίνεσθαι ἐκείνης ἢ κἂν ἕνα διαιτᾶν. *Jamblich. Protrep.* Chap. xx. "That Men ſhould live together, and yet without Law, is abſurd and impoſſible; for at this rate, Society would "be more dangerous and prejudicial to them, than if they dwelt ſeparately and ſingly without any Communication."

[3] To explain this Rule more fully, I think this ought to be added: From whence it follows, that whoever is oblig'd to aim at a certain End, is oblig'd at the ſame time to make uſe of the Means, without which it can't be obtain'd. Whatever contributes neceſſarily to an univerſal Sociableneſs, ought to be looked upon as preſcrib'd by the *Law of Nature*; and, on the contrary, whatever diſturbs it, to be forbidden by the ſame Law.

[4] Whenever a Thing appears advantagious or noxious to Society in general, in what State ſoever Men are, in every Place, and at all Times, we muſt look upon it as either abſolutely commanded or forbidden by the *Law of Nature.* So altho' Theft or Adultery may in certain Circumſtances, and through the Corruption of Manners in certain Countries, have cauſed little or no Trouble in ſome particular Societies, as ſome affirm, that Experience hath proved in the Kingdoms of the *Maſſagetæ* and *Lacedæmonians*, yet theſe two Crimes are not a whit the leſs contrary to the *Law of Nature*: For if they were allowed always, and in all

States.

This [1] Method of discovering the *Law of Nature*, doth not only appear, upon Examination, to be the most plain and easy, but it is, likewise, own'd for the most proper and genuine Way, by full Consent of the greatest Part of Learned Men. There's no Need of heaping up Testimonies and Authorities, but we may let *Seneca* speak for all the rest. [2] *By what other Means*, says he, *are we preserv'd, but by the mutual Assistance of good Turns? This Commerce and Intercourse of Kindnesses adds Strength and Power to Life; and, in Case of sudden Assaults, puts it into a better Condition of Defence. Take us all asunder, and what are we, but an easy and an unequal Prey to wild Beasts? Man by Nature is weak on every Side: Society fortifies his Infirmity, and arms his Nakedness. Those two Excellencies, of Reason and of Society, render him the most potent of all Creatures, who would otherwise be obnoxious to Injuries from every Thing about him. Thus, by the Help of Union, he commands the World, who, if divided, would scarce be a Match for any living Rival. And it is Society alone which gives him his sovereign Sway over the inferior Creation. This was the Thing which first restrain'd the Violence of Diseases, which lent Crutches and Supports to Old Age, and administred Consolation to Grief. Take away this, and you cut asunder the Band of Union, the vital String of Mankind* [a].

There are other less principal Causes, or rather Arguments of a sociable Nature in Men. For Example, because nothing is more sad and disagreeable

[a] Ἀνὴρ γὰρ ἀνδρὸς, &c. *Men are the Defence of Men, Cities of Cities; as the Hand rubs the Hand, and the Fingers wash the Fingers. All Safety is Confederacy.* Plin. N. H. Lib. ix. Chap. xlvi. Add. *Marc. Antonin.* Lib. iv. §. 4. & Lib. v. §. 16, & 29. where he calls Society the *Good* or *Happiness* of a rational Creature; as it is frequent with him to term Man *a Creature sociable by Nature.* Vide & Lib. vii. §. 55. *Liban. Declam.* xix. p. 499. *Nature appointed Man to be a Companion, and an Assistant to Man.*

States, there would result from them, without doubt, terrible Disorders; and, on the contrary, every Society whatsoever, must be more quiet and happy, where the Members of it religiously abstain from Robbery, and debauching their Neighbour's Wife, than where such Attempts are frequently made. Our Author explains himself well enough upon this Subject in several Places of this Book, and in his other Works, *viz.* his *Spicilegium Controvers. circa Jus Natur.* Chap. iii. §. 13. So that I am amazed that certain Men, who labour to confute him, and pretend to take a new Method in explaining the *Law of Nature*, are continually deceiv'd in a Thing so clear.

[1] Our Author (in the Beginning of the following §. of this Chapter, and in his *Specimen Controvers.* Chap. v. §. 25. as, also, in his *Spicilegium Controvers. &c.* Chap. i. §. 14.) declares, that he designs to explain here the Duties of Men only which properly refer one to another: For, according to him, our Duties toward GOD belong to natural Theology, and Religion is no other ways concern'd in a Treatise of *natural Law*, than as it is a more strong Cement of human Society. As for the Duties of Man to himself, they are derived partly from Religion, and partly from Sociability. So that were Man independent on GOD's Authority, and no way concern'd in Society, we could not conceive how he could be subject to any Obligation which regarded himself. If some had attended to this System of our Author, (which he has since follow'd in his Abridgment of *the Duties of a Man and a Citizen*) they would not have wasted so much Paper in Objections so ill grounded. Nevertheless I own, that he would have done better to prevent these Cavils, by putting out a Treatise, containing all the Duties of Man, of which we may know the Necessity by the Strength of Reason only; and which, if we rightly understand the Thing, are contained in the Idea of the *Law of Nature*; otherwise we must agree, as I have shewn in *Note* 1. of this Paragraph, that the Principle of Sociableness is not sufficient; but that it is necessary to join some other to it, in order to deduce directly certain Duties, which, tho' they may have a great Influence of human Society, may, and ought, nevertheless, to be conceiv'd independent of this Utility, which, of Consequence, is neither their proper, or only Basis. In my Opinion, we should consider the Matter thus. We may regard *Man*, either as the *Creature* of *God*; or as endow'd by his Creator with certain *Faculties*, both of Body and Soul, whose Effects are very different, according to the Use he makes of them; or, lastly, we may look upon him as necessitated, and led by his natural Condition to enter into *Society*. The *first* Relation is the proper Foundation of all those Duties of the *Law of Nature*, which have GOD for their Object, and are comprehended under the Name of *Religion*. It is not necessary to make any other Supposition. A Man, tho' plac'd alone in the World, ought, and should, practise these Duties, or at least the principal of them, from whence the rest flow. From the *second* Relation we are supplied with all the Duties which regard *ourselves*, and which properly may be referred to *Self-love*. The infinitely wise and good Creator, by assigning us certain Faculties, both of Body and Mind, has undoubtedly propos'd to himself an End equally worthy of himself, and agreeable to our real Happiness. His Will is, that we should use these Faculties in a Manner suitable to their natural Destination. From hence then arises the Obligation of taking Care of our own Preservation, without which our Faculties would be useless; as well as the Duty of cultivating and improving them, as far as is requisite to answer the End for which they were given us. A Man who should find himself abandon'd in a desart Island, without either Hopes of Deliverance, or of having any Companion, would not from thence acquire any Right to destroy his Life, to deprive himself of the Use of his Reason, or to mutilate his Body, no more than he would be authoriz'd to cease loving, and honouring GOD. The *third*, and last, Relation is not therefore only the proper Foundation for those Duties of the *Law of Nature*, which regard *other Men*. When a Man reflects, that GOD has plac'd him in the World, with similar Beings equal to himself; that he has given all Men a strong Inclination to live in Society, and dispos'd Things in such a Manner, that a Man can neither preserve himself, nor subsist conveniently without mutual Succour: It evidently follows, that GOD, as our Creator and common Father, commands each of us to observe all that is necessary to keep up this Society, in order to render it equally beneficial to the whole Community. This Principle of Sociableness is, I own, more extensive and fruitful, than the two former; but as they flow into it, they afford it more ample Matter for Exercise. But we should not, for this Reason, confound them together, and make them depend upon Sociableness, as if they had no proper and independent Force of their own. All we can say here, as well as upon many other Occasions, is, that the Divine Wisdom has plac'd a strong Connection between those Things which serve his own Ends. Human Nature, therefore, regarded in this Light, discovers to us the Will of the Creator, which is the sole Foundation of the Obligation we are under of following the Rules contain'd in these three great Principles of our Duty. The manifest Utility, which we find in practising them, is a very powerful Motive to engage us in our Duty. Thus GOD has neglected nothing proper to convince our Understandings, or incline our Hearts. As to the rest, there being a Subordination between these three great Principles of the *Law of Nature*, I have just laid down; if it should happen, as it sometimes does, that we cannot fulfil the Duties flowing from each, in such Cases we ought to regulate ourselves by these general Maxims: 1. That our Duties towards GOD should always be preferred before all others. 2. That when there is a kind of Opposition between two Duties of Self-love, and two of Sociableness, we ought to prefer that which is attended with the greatest Advantage, *i. e.* we must consider whether the Good that shall be procured to ourselves, or to others, in performing either of these Duties, is more considerable, than the Good that shall redound to ourselves, or to others, by the Omission of that Duty, which we can't at present discharge, without neglecting some other. 3. If, all Things else being equal, there is an Opposition between a Duty of Self-love, and a Duty of Sociableness, whether it happens through the Fact of another, or not, then Self-love ought to prevail; but if there be an Inequality, then Preference ought to be given to that of the two Sorts of Duties, which is accompanied with the greatest Profit. See what is said upon *Chap.* v, and vi. of this *Book*; where we shall have Occasions to illustrate these Rules by divers Examples.

[2] *Ut scias per se expetendam esse grati animi adfectionem, per se fugienda res est ingratum esse, quoniam nihil æquè concordiam humani generis dissociat & distrahit, quàm hoc vitium. Nam quo alio tuti sumus, quam quod mutuis juvamur officiis? Hoc uno instructior vita, contraque incursiones subitas munitior est, beneficiorum commercio. Fac nos singulos, quid sumus? præda animalium & victimæ, & imbecillissimus & facillimus sanguis. Quoniam cæteris animalibus in tutelam sui satis virium est. Quæcunque vaga nascuntur, & actura vitam segregem, armata sunt: hominem imbellia cingit: non unguium vis, non dentium, terribilem cæteris*

ble than perpetual Solitude [a]: Becauſe otherwiſe we ſhould have no Uſe of our Tongue, that moſt noble Inſtrument, by the Help of which Mankind have this Advantage above all other living Things, that they are able to expreſs their inward Sentiments in articulate Sounds [b]: Becauſe every good and excellent Perſon is deſirous of ſhewing his worthy Deeds amongſt others. Amongſt theſe ſecondary Reaſons of Sociality, is that which *Tully* takes Notice of in his firſt Book of Offices, *Chap.* xliv. *There are ſome People*, ſays he [1], *that fancy all Leagues and Aſſociations amongſt Men, to ariſe from the Need that one Man hath for another, toward the ſupplying of our natural and common Neceſſities: Becauſe* (ſay they) *if Providence had delivered us from this Care of looking after Food and Cloathing, by appointing ſome extraordinary Way for the Procurement of it; no Man of either Brains, or Virtue, would ever trouble his Head about Buſineſs, but wholly deliver himſelf up to the attaining of Wiſdom. But this is a Miſtake; for even in that Condition a Man would fly Solitude, and wiſh for a Companion in his very Studies: He would be willing to teach and to learn, to hear and to ſpeak.* He talks to the ſame Purpoſe in the Third Book of that Work, *Chap.* v. [2] *It is more according to Nature, for a Man to undergo all Sorts of Labours and Troubles for the Service and Conſervation (if it were poſſible) of the whole World, after the Example of* Hercules, *whom the Gratitude of Men hath plac'd for his Virtue among the Gods; than to live in Solitude, and not only free from Cares, but even wallowing in Pleaſures and Plenty, with all the Advantages of Strength and Beauty over and above. This is what makes all great and glorious Spirits prefer the former Kind of Life to the latter.* What the ſame Author obſerves in his *Lælius*, is rather applicable to particular Friendſhip, than to common Society: *Friendſhip firſt aroſe rather from Nature than from Weakneſs; rather from the Bent and Inclination of Mens Minds, than from the Conſideration of the Profit it would produce.*

We would have it obſerv'd, that the fundamental Law of Nature, eſtabliſh'd by us, doth not diſagree [3] with that which Dr. *Cumberland* hath laid down in his Work on that Subject [c], concerning the Study and Endeavour after the common Good, and the demonſtrating all poſſible Benevolence towards all Men. For we, when we maintain that a Man ought to be ſociable, do at the ſame time intimate, that he ought not to make his own ſeparate Good the Mark of his Proceedings, but the Benefit of Mankind in common; that no Perſon ſhould purſue his private Advantage by oppreſſing, or by neglecting other Men; and that none hath Reaſon to hope for Happineſs and Succeſs, who either injures or deſpiſes his Neighbours.

From this ſocial Nature of Man, and from the Conſideration that every one is born, not for himſelf alone, but for all human Kind, the Lord *Bacon*, in his Work of the *Advancement of Learning*, Book vii. Chap. i. deduces ſeveral excellent Corollaries; as, that an active Life is preferable to a contemplative one; that the Happineſs of Man is to be ſought for in Virtue [4], not in Pleaſure; that the Fear of ſudden and unexpected Accidents ought not to deter us either from managing publick Affairs, or from maintaining Society and Commerce with other Men: Laſtly, that we ought not to withdraw ourſelves from civil Buſineſs, out of a tender and ſcrupulous kind of Humour, or out of an Averſion to the uſual Methods of Complaiſance. In which place the ſame noble Author further obſerves, that there never was any Philoſophy, Religion, Law, or Diſcipline found out in the World, which ſo far exalts the publick Good, and debaſes private Intereſt, as the Chriſtian Inſtitution appears to have done.

XVI. Let us conſider now whether or no the Doctrine aſſerted by *Hobbes*, in his Book *De Cive*, Chap. i. §. 2. claſhes with what we have been delivering on this Head. Certainly he hath been interpreted with very great Rigor, and with very little Reaſon, by ſome learned Men, when they cenſure him for teaching, *That Nature did not inſtitute Society, but Diſcord, amongſt Men*; and, as they hence infer, *That all kind of human Society is againſt the Deſign of Nature* [d]. Which is much the ſame thing as if I ſhould talk thus: *Speech is by Nature actually born with no Man; therefore all Speech, which is afterwards learnt, runs againſt Nature's Intention.* Or thus: *All Men by Nature come into the World little; therefore it is againſt Nature that they ſhould grow up to larger Dimenſions.* Or, *Men are by Nature ſubject to Diſeaſes; therefore it is againſt Nature to make uſe of Diet, or Phyſick, to prevent or to cure them.* We muſt confeſs, that this Notion of *Hobbes* looks, at firſt View, extremely para-

[a] Cicero de Fin. Lib. iii. Chap. xx. *No Man would be willing to lead a Life of Solitude, though in an Infinity of Delights and Pleaſures. Whence 'tis eaſy to apprehend, that we are born for natural Conjunction and Community.*

[b] Vid. *Quinctil. Inſtitut.* Lib. ii. Chap. xvi.

[c] Chap. i. §. 4.

[d] *Compt. Conring.* in *Jure Civili*, Chap. xiv. *in fin.*

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teris fecit; nudum, & infirmum ſocietas munit. Duas res dedit, quæ illum obnoxium, validiſſimum facerent, rationem & ſocietatem. Itaque qui par eſſe nulli poſſet, ſi ſeduceretur, rerum potitur. Societas illi dominium omnium animalium dedit; ſocietas terris genitum, in alienæ naturæ tranſmiſit imperium, & dominari etiam in mari juſſit. Hec morborum impetus arcuit, ſenectuti adminicula proſpexit, ſolatia contra dolores dedit: hæc fortes nos facit, quod licet contra fortunam advocare. Hanc tolle & unitatem generis humane, quâ vita ſuſtinetur, ſcindes. De Benef. Lib. iv. Chap. xviii.

[1] *Nec verum eſt, quod dicitur à quibuſdam, propter neceſſitatem vitæ, quòd ea quæ natura deſideraret, conſequi ſine aliis, atque efficere non poſſemus, idcirco initam eſſe cum hominibus communitatem & ſocietatem; quod ſi omnia nobis, quæ ad victum cultumque pertinent, quaſi virgula divina, ut aiunt, ſuppeditarent, tum optimo quiſque ingenio, negotiis omnibus omiſſis, totum ſe in cognitione, & ſcientia collocaret. Non eſt ita, nam & ſolitudinem fugeret, & ſocium ſtudii quæreret, tum docere, tum diſcere vellet, tum audire, tum dicere.*

[2] *Magis eſt ſecundum naturam, pro omnibus gentibus, ſi fieri poſſit, conſervandis, aut juvandis maximos labores, moleſtiaſque ſuſcipere, imitantem Herculem illum, quem hominum fama beneficiorum memor, in concilium cæleſtium collocavit, quàm vivere in ſolitudine, non modo ſine ullis moleſtiis, ſed etiam in maximis voluptatibus, abundantem omnibus copiis, ut excellas etiam pulchritudine & viribus.*

[3] There are ſeveral other Authors, whoſe Principles being well underſtood, may be reduced to this, though there appears ſome Difference in the Language and Method. See Mr. *Hertius*'s Diſcourſe *De Sociabilitate primo Jur. Nat. princip. Sect.* ii. §. 9, &c.

[4] Virtue is the Cauſe of Happineſs, but it is not Happineſs itſelf. All Happineſs conſiſts eſſentially in Pleaſure, although, there being divers Sorts of Pleaſure, every one will not make a Man happy. This might be eaſily proved, if this were a proper Place. See a fine Paſſage of *Montagne*'s upon this Subject. *Eſſays*, Lib. ii. Chap. xix. *init.*

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doxical; especially if a Man doth not consider dilligently the Ambiguity of the Word *Nature*. But for fear any one should hereafter be cheated by the same doubtful Philosophy, and led fatally into Error; let us first observe, that Self-love and Sociableness ought by no means to be made Opposites; but those different Inclinations are, in such a manner, to be temper'd, that the former do not overthrow or disturb the latter [a]. When, by the Enormity of wild Lusts, this Temperament is broken, and so all take up a Resolution of seeking each his own Advantage to the Injury of others; then arise those Heats and Contentions which divide and confound Mankind. For the avoiding which, the bare Care of our private Safety commands the Observation of social Laws, since we cannot ensure our own Persons without their Assistance and Protection. As for *Hobbes*'s Demonstration, in which he ingeniously enough deduces those Laws, which we call *natural*, from the Principle of Self-preservation, the first Remark that we shall offer concerning it is this; that such a Way of Proof doth indeed clearly enough make out, how conducive 'tis to the Safety of Men, that they act according to these Dictates of Reason: But it is not an immediate and direct Conclusion to say, a Man hath a Right of using those Means for his Preservation; therefore he is oblig'd, as it were by a Law, to observe and to pursue them: For to give those Dictates of Reason the Force and Authority of Laws, there is need of proceeding on some other Principle than what he lays down.

In the next place, great Care is to be taken lest any should conclude from such Arguments and Positions, that when he hath once ensur'd his own Safety, and set himself out of Danger, he need not trouble himself about the Security of other Men; or that he may insult, how he please, over such a Person as doth not contribute to his Quiet and Happiness, or hath not Strength enough to disturb it. For we therefore give Men the Name of social Creatures, because they, of all living things, are the fittest and the most able to promote the Advantage of each other: Neither is any inferior Creature capable of receiving so great Benefit [1] from Man, as Man himself. Again, the Excellency and Perfection of any particular Person rise the higher, the more he deserves of the Community by his publick Benefactions; and Works of this kind are reckon'd the most noble, being suppos'd to proceed from the greatest Wisdom: Whereas any worthless Wretch, or a meer Fool, may be able to trouble, or to hurt his Fellows. Besides, supposing every Man's private Advantage were establish'd for the Mark of his Actions, if many Persons should happen to fix that private Advantage on the very same thing [2], there will either be a Necessity of saying that these many Desires, including a plain Contradiction, are consistent with Reason, which is the highest Absurdity: Or, since none can pretend that his Desire should have the Preference of the rest, we shall be forc'd to admit it for a Truth, that no Man ought so to make his own Profit the Aim of his Proceedings, as not to consider and to regard the Good of others. Farther, whoever attempts to draw every thing to himself, and to his own Interest, without looking towards his Neighbour, will not only labour in vain (it being impossible that all Persons, and all Things, should be dispos'd according to the contradictory Desires and Wills of particular Men) but he will likewise invite others to plunder and to destroy him. Moreover, if that only can be said to be *good* to a particular Person, which conduces to his separate Interest, it follows, that in respect of all other Persons it must be *evil*, inasmuch as their Interest or Profit is not furthered by it: And so what one covets and pursues, all the rest will oppose and keep off; which cannot but raise perpetual clashing and contending amongst Men [b]. Lastly, although another Person hath done me neither Good nor Hurt, and though he hath nothing in him to raise either my Fear or my Love, yet Nature obliges me to esteem even such a one as my Kinsman and my Equal; which Reason alone (had we no others) were sufficient to enforce the Practice of a friendly Society and Correspondence amongst Men. And upon this Consideration, supposing there was a Nation in the World maintaining Peace and Justice amongst themselves, and of such mighty Strength as to be formidable to all others, and so not restrain'd from hurting them by the Fear of a like Return [3]; yet should this Nation or People assault, drive, kill, or drag into Slavery their weaker Neighbours, as often as they thought convenient, we should pronounce them actually guilty of a Breach of the Law of Nature. And yet (as we suppose) these People might *preserve* themselves, whether they allow'd any Rights to others, or not [4]. In the same manner, none will commend the Life and Profession of Robbers, because they exercise some little Justice towards those of their Gang, because their Captains divide the Prizes equally amongst them, and because he, who either openly or secretly robs one of the Crew, is (even by Thieves) adjudg'd unworthy of farther Partnership and Society with them [c]. This Rule of extending our Care beyond our own Persons, is so much the more diligently to be attended to, the more evident it is, that a Man of more Strength and Power than ordinary, is likely to be tempted to the Violation of natural Law, by the Thoughts of his own Self-sufficiency; that since his private Safety is abundantly provided for, he need not give himself the trouble of maintaining Peace and Friendship with his Neighbours.

[a] *Arrian. Epictet.* Lib. i. Chap. xix. *God has dispos'd the Nature and Constitution of rational Creatures after such a Manner, that they can't advance their private, without contributing something to the publick Interest. Community doth not exclude the Pursuit of private Advantage.*

[b] *Self-Interest is a poor Centre of a Man's Actions,* says my Lord *Bacon,* Essay xxiii.

[c] Vide *Cicero. Off.* ii. *Chap.* xi.

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§. XVI. [1] Our Author must mean *Harm,* for to say *Benefit* would not be agreeable to right Reasoning.

[2] Again, our Author is guilty of an Inadvertency; for instead of saying, *on the very same thing,* he doubtless meant to say, *on things very different from one another*; as appears from his Reasoning afterwards, and from Dr. *Cumberland,* Chap. v. §. 16. whose Notions our Author follows: *If right Reason,* says that *English* Writer, *dictates to* Peter, *that all his Happiness, and the End that he aims at, consists in the Enjoyment of the full Right of the Lands which* John *and* James *possess, as also of their Persons, and of the Goods of all others in general, right Reason cannot inspire* James *and* John *to place their Happiness in the Enjoyment of a full Right in the Lands and Person of* Peter, *and of all others, for that would imply a plain Contradiction,* &c.

[3] Compare this with *Grotius*'s Preface, §. xxiii. and following.

[4] *Nec magis vituperandus est proditor patriæ, quam communis utilitatis aut salutis desertor, propter suam utilitatem, aut salutem.* Cicero de Fin. *Lib.* iii. *Chap.* xix. "A Betrayer of his Country is not more fouly scandalous, than he who deserts the common "Benefit, or Safety, for the Procurement of his own."

But to conclude this Point; as the Care of our own particular Preſervation doth not exclude a Concern for Society, ſo neither doth a kind Regard for Society ſuppreſs our Affection to our Perſons; but they are both extremely agreeable and conſiſtent, as appears ſufficiently from the Rule propos'd by our Saviour, *Matth.* xxii. 39. when he commands us *to love our Neighbours as ourſelves* [1]. Indeed Reaſon plainly informs us, that whoſoever hath a hearty Deſire for his own Security, muſt not, cannot neglect the Care of his Fellows. For, ſince our Safety and Happineſs depend, for the moſt part, on the Benevolence and on the Aſſiſtance of others; and ſince the Nature of Men is ſuch, that for Benefits conferr'd they expect a Return of Kindneſs; and when no ſuch Return is made, refrain from farther Favours: No Perſon in his Wits can ſtick ſo cloſe to the Purſuit of his ſeparate Advantage, as to diveſt himſelf of all Regard to the reſt of the World; but rather the more rationally he loves *himſelf*, the more earneſt he will be in endeavouring, by good Turns, to procure the Love of other Men. For no one hath any Reaſon at all to hope, that Men will voluntarily contribute towards advancing *his* Happineſs, whom they know to be malicious, perfidious, ungrateful, and inhuman, and that theſe wicked Practices are the Requitals which he will make for their Bounty; on the contrary, it ſhould be expected that they will all join together in ridding the Earth of ſuch a Monſter, or, at leaſt, in reſtraining him from doing farther Miſchief.

XVII. Neither is the following Argument, which the *Hobbiſts* make uſe of, at all concluſive: "Particular Men, when they join Society or Com- "pany with certain others, have Regard to ſome "peculiar Good or Benefit, which is likely to re- "dound to themſelves: Therefore human Nature "in general is not determin'd to Society; or, I "am not obliged to behave myſelf in a ſocial Man- "ner towards him, from whom I do not expect "ſome particular Advantage." For thus much indeed is evident, that the Reaſon why certain Men join in any certain Species of Society, is either becauſe they have a peculiar Reſemblance and Agreement in Diſpoſition of Mind, or in other Qualities; or elſe becauſe they think they ſhall better obtain ſome End which they drive at, amongſt theſe Perſons than amongſt others. But (beſides that, regularly ſpeaking, no Man hath the Property of belonging to no particular Society) even amongſt Men, who are united only by the common Tie of Humanity, that general Sociableneſs and Peace are to be obſerv'd and cultivated; which implies little more than this, that they abſtain from hurting one another unjuſtly; and that, as far as their ſtricter and particular Obligations leave room, they mutually promote and communicate their Intereſts and their Goods.

XVIII. Hence it is clear what Anſwer ſhould be made to that Objection, *If one Man lov'd another* naturally, *that is, upon account of his being a* Man; *then there can be no Reaſon given, why every one ſhould not love every one equally, all being equally Men: Or, why a Man ſhould chuſe to frequent their Company moſt, from whom he receives either greater Honour, or greater Profit.* In this Falacy, common Society is confounded with particular and ſtricter Confederacies, common Love with ſuch as ariſes from peculiar and ſingular Cauſes. For to deſerve that common Affection, no Property is requir'd but barely the being a Man. Nature having, for the Reaſons above aſſign'd, really conſtituted a general Friendſhip amongſt Men, from which *no Perſon is excluded, unleſs he* hath render'd himſelf unworthy of it by his monſtrous Villanies. Now, although by the good Diſpoſal of the All-wiſe Creator, our natural Laws are ſo fitted to human Condition, that the Obſervation of them is join'd with the Intereſt and Advantage of the Obſervers; ſo that even this common Love is exceedingly profitable to Mankind: Yet, in aſſigning the Cauſe and Reaſon of it, we are wont to have Recourſe, not to the Benefit proceeding from it, but to the general Nature in which it is founded. For Example: If we are to give a Reaſon why one Man ought not to hurt another, we do not uſually ſay, becauſe an abſtaining from mutual Violence is profitable (altho' it is ſo indeed in the higheſt Degree) but, becauſe the Perſon being another *Man*, that is, another Animal related to us by Nature [2], it would be a Crime to offer him any Harm [a].

Yet beſides this common and univerſal Affection, ſome Circumſtances may make a Man love one Perſon in a higher Degree than another: Suppoſe, becauſe their Inclinations particularly agree, and their Heads lie the ſame way; or, becauſe this Perſon is more able, or more willing to promote his Advantage; or, becauſe their Race, or Original, makes them allied to each other. As to that Obſervation about Mens being more willing to frequent ſuch Company, where they find themſelves preferr'd to others in Honour and in Profit; the Reaſon of the thing is this, becauſe every one muſt naturally love his own Intereſt, if he have Wit enough to underſtand it. But this Love is by no means repugnant to the ſociable Nature of Mankind, if it doth not riſe to ſuch a guilty Height, as to diſturb the Harmony and Agreement which is univerſally to be maintain'd amongſt Men. For Providence did not, for this Reaſon, give us a ſo-

[a] *Lucian* in *Amoribus*, Tom. i. p. 893. Ed. *Amſt.* *We do not, like brute Creatures, affect ſolitary Meditations; but joining together in a friendly Society, we make our Joys to be the greater, and our Afflictions the leſs, by being mutually communicated: and our Pleaſures having many Sharers in them, fill us with the truer Satisfaction and Delight.* Dio Chryſoſtom, *Orat.* xii. tells us, that the Reaſon why *Jupiter* hath often the Title of φίλιος and ἑταιρεῖος, *The Kind* and *The Friendly*, is, becauſe *he gathers, as it were, all Mankind into Unity and Society, and would have them prove Friends to each other, without the leaſt Mixture of Hatred or Oppoſition. In like manner,* ſays he, *he is called* ξένιος, *or* hoſpitable, *becauſe we ought really to think no Man a Stranger to us.*

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[1] *Qui ſtadium currit, eniti & contendere debet, quàm maxime poſſit, ut vincat; ſupplantare eum, quicum certet, aut manu depellere, nullo modo debet. Sic in vita ſibi quemque petere, quod pertineat ad uſum, non iniquum eſt, alteri deripere jus non eſt.* Chryſippus apud Ciceron. De Offic. Lib. iii. Chap. x. *In running of a Courſe, a Man may be allow'd, nay, he ought to ſtretch and contend his utmoſt for the Victory: But he muſt not, on any Account, trip up his Antagoniſt's Heels, or thruſt him out of the Liſts by main Force. So, in Life, it is very fair and allowable for every Man to get, by honeſt Means, whatever makes for Uſe and Advantage; but 'tis by no means lawful that he ſhould take it away from others.*

§. XVIII. [2] This is what the *Roman* Lawyers ſay, *Cum inter nos cognationem quandam natura conſtituit, conſequens eſt hominem homini inſidiari nefas eſſe.* Digeſt. Lib. i. Tit. i. De Juſtit. & Jure, Leg. iii.

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ciable Nature, that we ſhould therefore [1] neglect ourſelves, and our own Affairs. But rather we are ſtudious of Society on this very Account, that by a mutual Communication of Aſſiſtance and of Goods, our own Concerns may be manag'd with more Conveniency, and with more Succeſs. And although, when a Man unites himſelf to any particular Society, he hath a prime Regard to his own Intereſt, and but a ſecondary one to the Intereſt of his Companions, not being able to carry on his own Matters without ſuch a Conjunction; yet this doth not hinder him from being obliged, ſo to purſue his own private Ends and Advantage, as not to injure either the Corporation in general, or any ſingle Member of it; and ſometimes to poſtpone his ſeparate Good, for the Advancement of the common Benefit.

What is urged about the Original of great and laſting Societies, or *States* (it being ſaid that they are not deriv'd from mutual Benevolence, but from mutual *Fear*; by which Word they mean any Kind of Precaution and Foreſight) is entirely beſide the Purpoſe. For as the Queſtion doth not, at preſent, proceed about the Riſe of Civil Society in general; ſo farther, it is highly agreeable to our natural Condition, that whereas ſingle Perſons, or a few join'd in Confederacy, might lie perpetually expos'd to the Inſults of ſuch Wretches as purſue their private Ends, without Regard to their Neighbours; many ſhould unite in a Body, and ſo ſtrengthen their Guard againſt farther Aſſaults and Miſchiefs. Neither is it indeed abſolutely neceſſary, to the proving any Society agreeable to Nature, to ſay that it aroſe entirely from mutual Benevolence. And yet even this Principle muſt be allowed ſome little Share, at leaſt, in the forming of States, ſince the Perſons who firſt begin them are commonly join'd on the Account of Kindneſs and Good-liking, though many others may afterwards engage in the ſame Union, by the Inducement of Fear. But as for this *Fear*, which is look'd on as the Cement of States, as, likewiſe, for that Diſpute, whether or no Man, by Nature, be ζῶον πολιτικὸν, we ſhall examine them more at large, when we come to enquire into the Riſe and the Original of Commonwealths.

XIX. This Principle which we have eſtabliſh'd for deducing the Law of Nature, as it is the moſt genuine and the moſt clear; ſo we take it to be in ſuch a high Degree [2] adequate and ſufficient, that there is no natural Obligation bearing a Regard to other Men, the Reaſon of which is not terminated here, as in the chief Head and Fountain of Duty. Yet, as we ſhall hereafter ſhew, to give theſe Dictates of Reaſon the Force and Authority of Laws, there is a Neceſſity of ſuppoſing that there is a GOD, and that his wiſe Providence overſees and governs the whole World, and, in a particular Manner, the Lives and the Affairs of Mankind. For we cannot, by any means, ſubſcribe to the Conjecture which [3] *Grotius* ſtarts in his *Prolegomena*, or

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[1] *Seneca* has very well obſerved this, and ſays, That the higheſt Point of Friendſhip is to look upon one's Friend as a Perſon who ought to be as dear to us, as we are to ourſelves; we ought to provide for the Intereſts of each other. *I will*, ſays he, *beſtow upon him that is in Want, but in ſuch a Meaſure as not to be reduced to Neceſſity myſelf. I will ſtep in to the Aſſiſtance of him who is in Danger of periſhing, but not ſo as to periſh with him.* Quum ſumma amicitiæ ſit, amicum ſibi æquare, utrique ſimul conſulendum eſt. Dabo egenti, ſed ut ipſe non egeam, ſuccurram perituro, ſed ut ipſe non peream. *De Benef.* Lib. ii. Chap. iv.

§. XIX. [2] See *Note* 5. upon the 15th Paragraph.

[3] Mr. *De Courtin*, the Tranſlator of *Grotius*, explains theſe Words, but ſomething obſcurely, and ſeems, alſo, to miſtake him; telling us that he maintains, That Man's natural Light, without any Fear of GOD, would carry a Man in a moſt efficacious Manner to ſeek Good, and avoid Evil, by all Means poſſible, in Obedience to that Law only which Reaſon preſcribes, and with the Execution of which Conſcience is charged. But, by the Manner in which *Grotius* expreſſes himſelf, he does not go ſo far: he only ſays, That the Rules of natural Law *ſhould take place in a certain Manner*. Now this Reſtriction ſufficiently ſhews, that, in the Opinion of this great Man, theſe Rules would loſe much of their Force in the Suppoſition which he rejects as abſurd. *Grotius* has, beſides, acknowledg'd the Relation between the Ideas of Agreement founded on the Nature of Man, and the Will of God. See what I have ſaid above, §. 4. of this Chapter, *Note* 5. as well as a Paſſage of the ſame Author cited in the following Chapter, §. 3. Therefore Mr. *Bayle* ſhould not have made ſo much Uſe of the Authority of *Grotius*, as he has done (in his *Continuation des penſées diverſes, &c.*) to confirm a Point he had much at heart, as appears from a great Number of Paſſages in his Works. This was, "That an Atheiſt might think himſelf oblig'd to follow the Rules of Virtue laid down in "the natural Law, not only on Account of their Utility, but alſo on Account of their natural and intrinſic Honeſty." I willingly acknowledge this Honeſty; but I have never yet ſeen it fully prov'd, that this alone was a ſolid and ſufficient Foundation for indiſpenſible Obligation, properly ſo call'd. I think I have ſhewn the contrary in my Reflections on the *Judgment of an anonymous*, or the deceas'd M. *Leibnitz*. It is in vain to ſay, *That an Atheiſt may be very much diſſatisfy'd to have fail'd in the Duties of Virtue* (even though he ſhould offend in ſecret) *juſt as a Writer is vex'd, when he has miſ-tranſlated a Paſſage, or committed a Soleciſm.* This only proves, *that an Atheiſt only looks upon himſelf as guilty of a phyſical Fault.* His Concern, therefore, is an Effect of his Vanity, and not any Senſe of an *Obligation*, properly ſo call'd; as in the other Examples alledg'd by M. *Bayle*, p. 440. If we regard *Utility*, which, as I have already obſerv'd ſeveral times, is only the *Motive* which leads us to the Obſervation of our Duty, it is evident that Atheiſm deprives it of its greateſt Force. So that whether we view the true Foundation of Obligation, or conſider its moſt powerful Motives, we may regard M. *Bayle*'s Plan of a Society of Atheiſts, to be as great a Chimera, as the Republic of *Plato*. For it is ridiculous to ſuppoſe, ſuch a Community could maintain itſelf as well, as one which acknowledg'd and ador'd a Deity, whether true or falſe. This is one of the favourite Paradoxes of that Writer, who, in the Parallel he has drawn between Superſtition and Atheiſm, urges in favour of the latter, upon very ſlight Grounds, a great Number of Authors; to whom he might have join'd the famous Chancellor *Bacon*, *Serm. Fidel.* Cap. xvii. yet, nevertheleſs, the ſame M. *Bayle*, in his *Thoughts upon a Comet*, (p. 376.) confeſſes, *That if we regard the Atheiſts from the Diſpoſition of their Hearts, we ſhall find, that neither being reſtrain'd by the Fear of any divine Puniſhment, nor having any celeſtial Bleſſings to animate their Hope, they ought freely to indulge their Paſſions.* Now if we freely examine ſuch a Society of Atheiſts, all things elſe being equal, it would be more corrupt, and ſubject to more Diſorders, than any of thoſe who retain ſome Principles of Religion, although imperfect and incoherent: I ſay, all things elſe being equal. For it would be ridiculous to compare, for Example, a polite and well-inſtructed People with a ſavage Nation, who have not Senſe enough to do any Evil. We muſt, beſides, if we will exactly diſtinguiſh the Effects proper to Atheiſm, and a good or bad Religion, ſuppoſe the Perſons, ſo compared together, to be very near furniſhed with the ſame Notions, and to be in the ſame Situation, and under the ſame Circumſtances in general, otherwiſe we ſhall be in danger of attributing to Religion, what really proceeds from Conſtitution, Education, Cuſtom, or the like; which Religion is very little or nothing conducing to; or we may accuſe Religion of Impotency, by reaſon of ſome invincible Obſtacles in them, upon whom it would not fail to produce its Effect, were it not that they are ignorant of the moſt neceſſary Point. Upon this Foot I maintain, that Religion, though corrupted, would produce better Effects than Atheiſm, that it would diſturb Society leſs, and that the Good it would do, would be much greater than the Evil it would cauſe. I will not deny, but there may be, amongſt theſe Atheiſts, Men of Senſe and Philoſophers, who, reflecting that it is better for Men to ſubject themſelves to certain Rules of Life, than for every Man to follow his Humours only, may obſerve them outwardly, ſo far as they are exempt from ſuch Circumſtances, as ſome great Intereſt preſent, or ſome violent Paſſion forces them upon, ſuch Counſels as are reaſonable, calm, and aware of the Conſequences. But the common Sort of ignorant People, and Idiots, which make up the greateſt Part of Society, are not able to make ſuch Reflections. To curb in, therefore, the Violence of their Paſſions, and to outweigh Mens private Intereſts, which often claſh with the publick Good, ſome more obvious

or Introduction, *N.* XI. *That the Laws of Nature would take place, ſhould we (as we cannot without the moſt horrid Impiety) deny either the Being of* GOD, *or his Concern in human Buſineſs.* For, ſhould any Wretch be ſo horribly ſenſeleſs, as to maintain that wicked and abſurd Hypotheſis in the rankeſt Way, and ſo hold Men to have deriv'd their Being wholly from themſelves; according to them, the Edicts of Reaſon could not riſe ſo high as to paſs into a Condition of Laws; inaſmuch as all Law ſuppoſes a ſuperior Power. [1] 'Tis a good Obſervation of *Tully*, *De Naturâ Deorum*, Lib. ii. Chap. ii. *I know not*, ſays he, *but that upon taking away Religion, and Piety towards the Gods, all Faith and Society of human kind, and even the moſt excellent Virtue of Juſtice, muſt be baniſh'd the World* [a]. Unleſs the Rules would be obſerv'd out of a bare Regard to Intereſt, as thoſe are which the Phyſicians preſcribe in the Regimen of Health. *Grotius* ſeems to have taken the Hint of that Notion from a Paſſage in *Marcus Antoninus* [b]; *If*, ſays the Emperor, *the Gods do not conſult about any of our Affairs, which the vileſt Impiety can ſcarce believe; why then 'tis fit that I ſhould conſult or deliberate about my own Concerns: And all my Deliberation muſt be concerning what is moſt profitable for me. Now that is moſt profitable to every one, which beſt agrees with his Nature and Conſtitution. And my Nature is to be rational, and to be a ſociable Member of ſome City or State. My City and Country, as I am* Antoninus, *is* Rome; *as I am a Man, is all the World: Thoſe things therefore which are profitable to theſe Communities, are the only things which are good and expedient for me.*

As to what a certain learned Man objects, That particularly the Virtue of *Fortitude* cannot be demonſtrated from our Principle, unleſs we farther ſuppoſe the Immortality of the Soul; ſince otherwiſe there would be no Reward to a Man who ſhould throw away his Life on a good Cauſe: This will require no great Pains to anſwer. For altho' really to deny, or ſo much as to call in Queſtion ſo certain a Truth be extremely impious; yet, without bringing this high Point into the Argument, it is poſſible to demonſtrate, that a Soldier may fairly be commanded to fight to Death, in the Behalf of his Country. For, beſides that there appears yet no clear Reaſon why we muſt ſacrifice, as it were, every good Action to ſome external Reward; thus much is univerſally agreed on, that 'tis in the Power of the Sovereign to arm the Subjects, and to lead them out againſt the Enemy, in Defence of the State; and farther, when they find it requiſite to forbid every one, under Pain of capital Puniſhment, to quit his Station by Flight. Now of two Evils the leſſer is moſt certainly to be choſe. But it is a leſs Evil to fight with extraordinary Danger, and even to the laſt Breath, than to ſuffer unavoidable Death for running away. And therefore that Soldier muſt be the greateſt Fool, as well as the greateſt Coward, who would not chuſe rather to fall honourably by the Enemy's Hand, having firſt anticipated his own Revenge, than to deliver up himſelf to be ignominiouſly diſpatch'd by the Executioner [2]. It ſeems ſufficient that a Man fight with all his Force and Ability, let his Inducement to this Behaviour be what it will. Nor is it requiſite to the Preſervation of States, or of Society amongſt Men in general, that every particular Perſon ſhould be endued with ſuch a Firmneſs of Mind, as the Terrors of Death cannot ſhake or overcome; all Souls not being capable of this noble Pitch of Valour. Beſides, the Uſe of Fortitude doth not only diſcover itſelf in bearing Death undauntedly upon extreme Occaſion; but is chiefly employ'd in vigorouſly withſtanding, and in driving off the Danger of Death, as it preſſes on us. Many Difficulties are not otherwiſe to be avoided, than by undergoing others of almoſt equal Hazard [3]; and Fate ſooner overtakes the Coward, than it maſters the Valiant. It is farther obſervable,

[a] *Liban. Declam.* iii. p. 250. Ed. *Pariſ.* *Where there is no Honour of the Gods, there can be no Fidelity amongſt Men.*

[b] *See his moral Reflections,* Book vi. §. 44.

Principle, which all the World may be ſenſible of, and which may make the deepeſt Impreſſions upon them, muſt be found out; and that, in a word, can be no other than the Fear of a Deity. Experience ſufficiently confirms this, that in all Times this Motive has had great Influences upon the Mind of Man; for who knows not, that in the darkeſt Times of Paganiſm, it was the Cauſe of Honeſty in a great Number of Men? Mr. *Bayle* proves at large, that Men did not always act according to their Principles; and ſo it might well happen, that many Pagans did not perceive, nor draw the Conſequences which followed from the falſe Notions which they had of the Deity. 'Tis certain, that not only the Philoſophers, but the Vulgar, looked upon the Gods as the Revengers of the Violation of the Laws of Nature. See what is ſaid in the next *Chap.* §. 3. *Note* 4. Since then there are among Atheiſts the ſame Principles of Diſorder, as among Pagans, from which no Man can be reſtrained but by Religion; it ſeems plain that Vice muſt reign with much leſs Controul in the Society of Atheiſts, than in a religious one, altho' their Worſhip be falſe and erroneous. It may be, perhaps, pretended, that the Want of this Reſtraint is made up by the Diſorders created in religious Societies by Superſtition and falſe Zeal; and Lown, that theſe Inconveniences, which ariſe from the Abuſe of Religion, are great; but the Diſbelief of a Deity would produce much greater. As much as the Notions of Religion are perverted, and though they are made uſe of as an Occaſion or Pretence of confirming, or engaging many Perſons in the Commiſſion of Crimes; yet they fail not to diſcourage and deter others, and thoſe in a much greater Number. The Notion of a GOD, and of an inviſible Judge, who will puniſh Vice and reward Virtue, are naturally ſo faſt linked together, that the moſt Simple have a Senſe of it, notwithſtanding their other falſe ſuperſtitious Ideas, as appears from the Example of the Pagans. But, refine Atheiſm as much as you pleaſe, nothing but pernicious Conſequences can be drawn from it, tending directly to the greateſt Licentiouſneſs; Conſequences which are clear to the Sight of all the World, and can't but bring Deſtruction to a Society, which is compoſed of Men tainted with irreligious Principles. If the Nations, which are ſo barbarous as to have no Religion, be objected; beſides that the Hiſtories, which give an Account of them, are contradicted by more modern and faithful Relations; theſe People are either not formed into any Society, or are ſo illiterate and ſtupid, as there is little Difference between them and the Beaſts, as the ingenious Writer of the *Rights of the Chriſtian Church* has very well obſerved in his *Preface*, §. 18. See alſo *Lib.* i. *Chap.* vi. §. 13. *Note* 7. *aforegoing*, and *Chap.* iv. §. 3. *Note* 4. of this Book following, where I ſhall have occaſion to enlarge more on this Subject.

[1] *Tully*'s Words are theſe, *Atque haud ſcio, an Pietate adverſus Deos ſublatâ, fides etiam & ſocietatis humani generis, & una excellentiſſima virtus, juſtitia tollatur.* See alſo *Libanius, Declam.* iii. *p.* 250.

[2] Φ ἐῳ μειζόνων ὑπομένουσιν αὐτῶν οἱ ἀνδρεῖοι ἢ θάνατον, ὅταν ὑπομένωσι. *Jamblich.* in *Protrept.* "When the valianteſt "Men ſuſtain Death, they do it for fear of greater Evils." The Author might here have quoted another Example equally applicable to the Subject. It is what the Orator *Lycurgus* ſaid with regard to a Law of the *Lacedæmonians*, by which all thoſe who refus'd to periſh in Defence of their Country, were made liable to capital Puniſhments. I ſhall refer the Reader to the Place where the Words are contain'd, *p.* 183, 184. Edit. *Wech.* 1619.

[3] Horat. Lib. iii. Od. ii. ver. 14, *&c.*

Mors & fugacem perſequitur virum;
Nec parcit imbellis juventæ
Poplitibus, timidove tergo.

that

that, ſetting aſide the Suppoſition of the [1] Soul's Immortality, it doth by no means appear that the chief End and Happineſs of Man [2] conſiſts in Pleaſure. For, beſides that in the Doctrine of natural Law, treated of in this Manner, the Immortality of the Soul is by no means denied, but only abſtracted from it; 'tis plain that the Pleaſure of the Body, in which *Epicurus* is vulgarly thought to have plac'd his *Summum Bonum*, is ſo far from promoting, that it rather contradicts and hinders the Preſervation, the Sociableneſs, the Peace, and the Tranquillity of Mankind. But the Genius and the Scope of Chriſtianity differs vaſtly from theſe meer natural Schemes; and the holy Apoſtle had good Reaſon to affirm [3], that *if in this life only we had hope in Chriſt, we ſhould be of all men the moſt miſerable.* 1 Cor. xv. 19.

XX. But to make theſe Dictates of Reaſon obtain the Power and the Dignity of Laws, it is neceſſary to call in a much higher Principle to our Aſſiſtance. For altho' the Uſefulneſs and Expediency of them be clearly apparent, yet this bare Conſideration could never bring ſo ſtrong a Tie on Mens Minds, but that they would recede from theſe Rules, whenever a Man was pleas'd either to neglect his own Advantage, or to purſue it by ſome different Means, which he judg'd more proper, and more likely to ſucceed. Neither can the Will of any Perſon be ſo ſtrongly bound by his own bare Reſolution, as to hinder him from acting quite contrary, whenever the Humour takes him. And altho' we ſhould ſuppoſe many Perſons ſtanding in a natural Liberty, and combining to keep theſe Precepts, yet the Force of them could then laſt no longer, than the Agreement from whence they deriv'd it. Nor would the Obligation then only ceaſe, when all the conſenting Parties ſhould pleaſe to alter their Minds, (as is now the Manner of receding from mutual Covenants by common Conſent) but even during the general Agreement, the Power of obliging would be wanting to the Compact: Inaſmuch as we ſuppoſe, *that* Dictate of Reaſon, which commands us to ſtand to our Bargains and Promiſes, not yet to have obtain'd the Authority of a Law; and therefore 'tis at every one's Pleaſure to renounce the Covenant, whether the other Perſons concern'd are willing, or not. Laſtly, the meer Force of human Command ſeems inſufficient to inveſt theſe Dictates with the Power of Obligation. For ſince no ſuch Command could take place otherwiſe than by the Intervention of Covenants, and ſince Covenants owe all their Strength to ſome Law, it doth not appear how there could ariſe any human Sovereignty capable of Obligations, unleſs the Dictates of Reaſon were before-hand receiv'd for Laws. Or ſhould we grant the Fancy of ſome, that human Government depends only on human Conſent, and then make theſe rational Duties be enjoin'd the Subjects like other Laws; yet even thus they would obtain no more Power than poſitive Conſtitutions, which depend on the Will of the Legiſlator, both as to their Original and their Duration [a]. It is therefore, on all Accounts, to be concluded, and to be maintain'd, that the Obligation of *natural Law* proceeds from GOD himſelf, the great Creator and ſupreme Governor of Mankind; who, by Virtue of his Sovereignty, hath bound Men to the Obſervation of it. And thus much may be demonſtrated by the ſole Light of natural Reaſon. Here then we lay it down as a granted Truth, that GOD Almighty is the Creator and Governor of the World, ſince it hath been ſhewn, with ſo much Evidence, by wiſe and learned Men, and ſince no Perſon of Senſe and Underſtanding ever call'd it in queſtion [4]. Now this ſupreme Being having ſo form'd and diſpos'd the Nature of Things, and of Mankind, as to make a ſociable Life neceſſary to our Subſiſtence and Preſervation; and having, on this Account, indued us with a Mind capable of entertaining ſuch Notions as conduce to this End; and having inſinuated theſe Notions into our Underſtandings, by the Movement of natural Things, deriv'd from him the firſt Mover; and, likewiſe, moſt clearly repreſented to us their neceſſary Connexion, and their Truth: Hence it follows, that it is the Will of GOD, Man ſhould frame his Life according to that Diſpoſition and Method, which he ſeems peculiarly to have aſſign'd him above the Life of Brutes. And ſince this cannot otherwiſe be atchiev'd and compaſs'd, than by the Obſervance of *natural Law*, it muſt be ſuppos'd that GOD hath laid an Obligation on Man to obey this *Law*, as a *Means* not ariſing from human Invention, or changeable at human Pleaſure, but expreſly ordain'd by GOD himſelf for the Accompliſhment of this Deſign. For when any Sovereign enjoins his Subject the Purſuit of ſuch an End, he is at the ſame Time ſuppos'd to oblige him to make uſe of thoſe Means, without which the End cannot be attain'd [b]. Nor is this the only Proof of Man's being oblig'd to a ſocial Life by the Command of GOD, that, as the Condition of Mankind ſtands at preſent, we could not ſupport and ſecure ourſelves, unleſs this Perſuaſion were firmly rooted in our Minds; and that by Order of the divine Providence it ſo falls out, that by a natural Conſequence our Happineſs flows from ſuch Actions as are agreeable to the Law of Nature, and our Miſery from ſuch as are repugnant to it: But it is farther confirm'd by this Conſideration, that in no other Animal there is diſcoverable any Senſe of Religion, or any Fear of a Deity [c 5]. To which

[a]. *Comp. Selden De J. N. & G.* Lib. i. Chap. vii.
[b] Vide *M. Antonin.* Lib. ix. §. i.
[c] Vide *Protag. De Platon. p.* 224. Ed. *Wech. Ficin.*

[1] All that the Author ſays here is true; but we muſt, alſo, declare, that the moſt effectual Motive to leſſen the Fears of Death, and make us out-face, as I may ſay, the Dangers, which the Defence of a good Cauſe engages us in, is the Hopes of another Life, and the Proſpect of the Reward which ſhall be given to good Men; the Courage produced by any other Principle is but a falſe Bravery, in Compariſon of the Undauntedneſs which naturally follows that Perſuaſion, when it is ſtrong, and the Idea of it is vigorouſly impreſſed on the Mind. See the *News of the Rep. of Letters*, July, 1707, p. 79. and *Auguſt*, p. 178.

[2] See §. xv. *Note* 10. above.

[3] See what is ſaid at the End of §. xxi, with *Note* 6.

§. XX. [4] The ſtrongeſt and moſt natural Proofs of this fundamental Truth may be found in *Locke*'s *Eſſay of human Underſtanding*, B. iv. Chap. x. §. 9, &c. See *Le Clerc*'s *Latin* Treatiſe of *Pneumatology*, Part iii. Chap. i.

[5] Πρῶτος δὲ ἄνθρωπος θείας ἐπιστήμης μόνος, πρῶτον μὲν διὰ τὴν πρὸς θεοὺς συγγένειαν, ζῶον μόνον θεοὺς ἐνόμισε, καὶ ἱδρύσατο τὰ ἀγάλματα ἔπειτα. *i. e.* "Man is the only one of all the Creatures, who by reaſon of the Relation which he has "to the divine Being, thinks that there are Gods, and erecteth Altars and Images to them. *Plato* gathered this Notion from *Socrates* his Maſter, as it appears from what *Xenophon* relates, *Memoirs of* Socrates, *Lib.* i. *Chap.* iv. *Numb* 13. See alſo *Cicero De Legib.* Lib. i. Chap. viii. and *Lactantius De Ira Dei*, Chap. xiv. n. 2.

may

may be added, that tender Senſe of Conſcience inherent in the Minds of Men that are not corrupted and debauched with Vice; by which they are convinc'd, that to ſin againſt Nature's Law, is to offend him, who hath a ſovereign Power over Mens Souls, and who is to be fear'd, even when we do not apprehend any Danger from human Puniſhment [a].

The Laws of Nature would have a full and perfect Power of binding Men, altho' GOD Almighty had never propos'd them anew in his reveal'd Word. For Man was under Obligation to obey his Creator, by what Means ſoever he was pleas'd to convey to him the Knowledge of his Will. Nor was there any abſolute Neceſſity of a particular Revelation to make a rational Creature ſenſible of his Subjection to the ſupreme Author and Governor of Things. No one will deny but that thoſe Perſons who were not acquainted with the holy Scriptures, did yet ſin againſt the Law of Nature: Which we could not affirm, did this Law derive its Force from the Promulgation made of it in the ſacred Writings. On this Account we can by no Means admit of that Notion ſtarted by *Hobbes* [b], *Since thoſe Laws*, ſays he, *which we call natural, are nothing elſe but certain Concluſions apprehended by Reaſon, concerning Things to be done, and Things to be omitted; and ſince Law, in a proper Senſe, is only the Speech of him, who, by virtue of his Right, commands Men to execute or to abſtain from ſome Performances; therefore they are not Laws as they proceed from Nature, but only as they are enacted by* GOD *in Scripture.* For we do not take it to be eſſential to a Law, that it be conveyed to the Subjects Notice in the Form and Manner of a Propoſition; but we reckon it ſufficient, that the Will of the Sovereign be gather'd and underſtood any way, whether by internal Suggeſtion of the Mind, or from the Contemplation of our State and Condition, and of the Nature of thoſe Affairs and Tranſactions, which are to engage our Life. And indeed he himſelf acknowledges as much, in another Part of the ſame Work [c], where he obſerves, that *the Laws of* GOD *are declar'd three ways; firſt by the tacit Dictates of right Reaſon*, &c. Beſides, the Laws of Nature, as they are deduc'd by Ratiocination, cannot be apprehended otherwiſe than in the Manner of Propoſitions, and therefore, in this reſpect, they may be allow'd to bear that Name. But as in Civil Laws it matters not, whether they be promulgated in Writing, or *viva voce* [1], ſo the divine Law is of equal Obligation, whether it is diſcover'd to Men either by GOD himſelf in a viſible Shape, and with the Reſemblance of a human Voice, or by holy Men, peculiarly inſpir'd from Heaven; or whether, laſtly, it be work'd out by natural Reaſon, from the Contemplation of human Condition. For Reaſon, properly ſpeaking, is not the Law of Nature itſelf, but the Means, upon a right Application of which that Law is to be diſcover'd. Nor doth the Manner and the Method of promulgating a Law belong to its inward Eſſence and Conſtitution. Farther, altho' it ſeem a more clear and a more compendious Way of revealing one's Will to another, to force it upon his Senſes by expreſs Words and Speeches; yet that is, likewiſe, reckon'd to be ſufficiently reveal'd, which we muſt unavoidably diſcover, if we make uſe of the Occaſion offer'd, and keep the Way that we are put into. And thus Man, who, by the Bounty of his Creator, enjoys the Faculty of comprehending both his own and other Mens Actions, and of judging whether or no they are agreeable to human Nature, cannot but take Occaſion (*ſuppoſing* there are more Men in the World beſides himſelf) to obſerve and conſider how ſome of thoſe Actions do really agree to the Inclination, and to the Condition of Mankind [d].

Although to render a Law obligatory there is a Neceſſity of making it known to the Subject; and altho' to deduce the Law of Nature from the Suggeſtions of Reaſon, and to apprehend its Foundation, and its neceſſary Connexion with the State of Humanity, be not the Gift of every Perſon; yet hence it can neither be pretended, that this Law doth not oblige all Men, or that it may not be ſaid to be known by the Light of Reaſon. For to give a Law a binding Force, a popular and ſimple Knowledge is ſufficient; nor is an artificial Demonſtration and Deduction abſolutely requiſite to this Purpoſe. And altho' 'tis [2] very probable that the chief Heads of natural Law were expreſsly deliver'd by GOD Almighty to the firſt Mortals, and were from them communicated to others by Cuſtom and Inſtitution; yet the Knowledge of that Law may nevertheleſs be ſtil'd *natural*, inaſmuch as the neceſſary Truth and Certainty of it may be drawn from the Uſe of natural Reaſon. At the ſame Time, becauſe thoſe Propoſitions which repreſent to us the Law of Nature, are inſinuated into Mens Minds from the Contemplation of the Nature of Things; on that Account they are juſtly attributed and referr'd to GOD, the Author of Nature [e].

The wiſeſt of the old Heathens acknowledg'd the Authority of natural Law, and deriv'd it rightly from GOD. Thus *Plutarch* [f], Ταυτόν ὅτι τὸ ἕπεσθαι θεῷ, καὶ τὸ πείθεσθαι λόγῳ· *To follow* GOD, *and to obey Reaſon, is the ſame Thing.* But *Tully* hath left the moſt noble Teſtimony for our Purpoſe, as it is cited

[a] 'Tis remarkable what *Tacitus* ſays, *An.* vi. *Chap.* vi. of *Tiberius*. *His own Crimes and Villainies were by his Conſcience turn'd into the greateſt Puniſhments to him. And it was not without Reaſon, that the greateſt Maſter of Wiſdom us'd to affirm, That could we open the Hearts of Tyrants, we ſhould diſcover the Strokes and Wounds of Guilt: The Body not being more cut and tormented with Stripes, than the Mind is with Cruelty, Luſt, and ill Deſigns.* Cicero De Finib. Lib. i. Chap. xvi. *If there be any who think themſelves ſufficiently guarded and ſecur'd againſt the Diſcovery of Men, yet they dread the Majeſty of the Gods: And judge all thoſe Cares and Diſquiets, which Night and Day prey upon their Minds, to be ſent from Heaven, as a preſent Puniſhment for their Crimes.* Seneca in Lactant. Lib. vi. Chap. xxiv. *Vain Madman! what can it profit thee to have had no Witneſs of thy Villainy, when thou always carrieſt a Conſcience about with thee?* Albricus De Deorum Imagin. Chap. xxii. *A wicked Man is never Maſter of his own Countenance. Add.* Juvenal. Sat. xiii. 139. The Advantage of a *good Conſcience Martial* hath thus happily expreſs'd, *Lib.* x. *Ep.* xxiii.

Ampliat ætatis ſpatium ſibi vir bonus: hoc eſt
Vivere bis, vita poſſe priore frui.

Good Men live twice: It doubleth every Hour,
To look with Joy on that which paſs'd before.

Add. *Philoſtrat. De Vit. Apollon.* Lib. vii. Chap. xvii.

[b] *De Cive*, Chap. iii. §. *ult.*
[c] *Ch.* iv. §. iii.
[d] Add. Dr. *Cumberland*, Chap. i. §. 11. & Chap. v. §. i.
[e] Add. Dr. *Cumberland*, Chap. i. §. 10.
[f] *De Auditione.*

[1] Theſe Words, which are found a little lower, *Nor doth the Manner*——as far as, *Conſtitution*, may be more properly added here, as any Man may eaſily diſcern.

[2] See the Extract of an *Engliſh* Sermon of Dr. *Barrow*'s in *Tom.* iii. of the *Univerſal Library*, p. 322.

cited out of his Books *De Republicâ* by *Lactantius*[a]: [1] *There is indeed*, says he, *a Law agreeable to Nature, and no other than right Reason, made known to all Men, constant and perpetual; which calls us to Duty by Commands, and deters us from Sin by Threats; and whose Commands and Threats are neither of them in vain to the Good, though they may seem of little Force to the Wicked. This Law we are neither allow'd to disannul, nor to diminish; nor is it possible it should be totally revers'd; the Senate or the People cannot free us from its Authority. Nor do we need any other Explainer or Interpreter of it besides ourselves. Nor will it be different at* Rome *and at* Athens, *now and hereafter; but will eternally and unchangeably affect all Persons in all Places:* GOD *himself appearing the universal Master, the universal King. 'Tis he who is the Inventor, the Expounder, the Enacter of this Law; which whosoever shall refuse to obey, shall fly and loath his own Person, and renounce his Title to Humanity; and shall thus undergo the severest Penalties, though he escape every thing else which falls under our common Name and Notion of Punishment.* *Sophocles* speaks very honourably on the same Subject in his first *Oedipus*, Act 3d, p. 187. Ed. *H. Steph.*

——— νόμοι ὑψίποδες, &c.

———The lofty Laws
Deriv'd from Heaven, and high *Olympian Jove*,
And not the mean Device of mortal Men.

Mr. *Selden*, in his Discussion of this Point, hath shewn[b], that although the Gentiles did acknowledge the chief Heads of natural Law to be sometimes violated through the corrupt Manners of Men, and to be (as it were) oppress'd and stifled by wicked Ordinances and Constitutions; yet they were, at the same Time, fully persuaded that their τὸ αὐτοδίκαιον, or what was really just and fit to be done, did, by Order of the Gods, perpetually remain the same, and hold the same Force of Obligation. Whence arose that common Opinion amongst them of the Punishment of wicked Men in another State, when they had been guilty of any monstrous Offences against the Law of Nature. And since they thus believ'd the Gods to be the Avengers of its Violation, we may take it for granted, that they thought them too the Authors and Founders of its Authority. On the other Hand, such of them as had any Sense of Virtue, did as fairly suppose, that good Men exercising Piety, never fail'd of the peculiar Countenance and Consideration of Heaven. [2] Thus *Jamblichus*[c], *We must take this therefore for a certain Truth, that nothing properly evil shall happen to a good Man, either in this Life, or after it. Nor are the Affairs and Concerns of such a Person neglected by the immortal Deities.* And *Euripides*[d] says, *Good Men do at last obtain what their Virtue hath deserv'd: But evil Men shall never arrive at any tolerable Degree of Happiness.* But Mr. *Selden* farther shews[e] it to have been a constant Opinion amongst the Primitive Christians, that in the Interval betwixt the Creation, and the Publication of the Decalogue, those natural and universal Laws were given to Mankind, which were afterwards inserted in the Mosaical Constitutions. Hence was drawn that most excellent Observation of St. *Chrysostom*[f], that to the Commandments about the honouring of Parents, about Murder, about Adultery, and about Theft, GOD was therefore pleas'd to add no Reason, because those Duties were already well known and understood, as being main Points of the *natural Law*; whereas to the Ordinance concerning the Sabbath-day, a Reason of the Precept was designedly affix'd, upon account of its being *positive* and arbitrary[g]. To conclude, all Legislators have believ'd that their Laws, of what kind soever, would derive the greatest Strength and Authority from the Succours of Religion: As appears from their solemn Custom of ushering in all their Constitutions with the Worship of the Gods[h].

XXI. It is well worth our while to treat more distinctly and more carefully concerning the *Sanction* of the Law of Nature. And to this Purpose, besides what we have formerly deliver'd about the Sanction of Laws in general, we will first of all observe, that the Goods and Evils which happen to Man, may be both divided into three Ranks or Classes. And as for the Goods, some of them proceed, either from the free and liberal Donation of the Creator, or from the voluntary Benevolence of other Men, or from the Industry of the Acquirers, to which Industry they determin'd themselves by their own free Choice. And it is plain, that this first Sort are not owing to the Observation of the Laws. Other Goods there are, which flow, by a natural Consequence, from some Actions which the Laws command: The Creator having been pleas'd to assign to such and such Performances of the Laws such perpetual and natural Effects, productive of the Good and Profit of Mankind. And these are those which Dr. *Cumberland* calls *natural Rewards*. A third Kind of Goods proceed from some certain Actions, either by the Pleasure of the Legislator, or by the Covenant and Agreement of Men; of which the former are call'd, κατ' ἐξοχήν, *Rewards*, or arbitrary Returns, the latter more properly *Wages*. In the same Manner may Evils be divided. Some of them follow the very Nature and Condition of Men,

[a] Lib. vi. Chap. viii. [b] *De. J. N. & G.* Lib. i. Chap. viii. [c] *Proterp.* Chap. xiii. [d] *Euripid. Ion.* v. 1620, *&c.* [e] See Book vii. Chap ix, x. [f] *Orat.* xii. *ad Pop. Antiochen.* [g] Add *Selden*, ibid. Chap. ix. and Lib. vii. Chap. ix, x. [h] *See the Form which introduceth* Zaleuchus's *Laws in* Diodor. Sic. Lib. xii. Chap. xxi.

[1] *Cicero*'s Words are, *Est quidem vera lex, recta ratio, naturæ congruens, diffusa in omnes, constans, sempiterna, quæ vocet ad officium jubendo, vetando à fraude deterreat: quæ tamen neque probos frustra jubet, aut vetat; nec improbos jubendo aut vetando movet. Huic legi nec abrogari fas est; nec derogari ex hac aliquid licet; neque tota abrogari potest. Nec vero aut per senatum, aut per populum solvi hac lege possumus: neque est quærendus explanator, aut interpres ejus alius. Nec enim alia lex Romæ, alia Athenis, alia nunc, alia posthac; sed & omnes gentes, & omni tempore, una lex, & sempiterna, & immutabilis continebit; unusque erit communis quasi magister & imperator omnium Deus, ille legis hujus inventor, disceptator, lator: cui qui non parebit, ipse se fugiet, ac naturam hominis aspernabitur; atque hoc ipso luet maximas pœnas, etiamsi cætera supplicia, quæ putantur, effugerit.*

[2] *Jamblichus*'s *Greek* is, Ἕν τι ἂν τοῦτο διαφοῖδε δεῖ ἀληθὲς, ὅτι ἀνήρ ἔσται ἀνδρὶ ἀγαθῷ κακὸν οὐδὲν ζῶντι, οὔτε τελευτήσαντι, οὐδὲ ἀμελεῖται ὑπὸ θεῶν τὰ τότε συμβαλα. These very Words *Plato*, also, makes *Socrates* to speak, at the End of his *Apology*, p. 41. and *Cicero* has translated them, *Tusc. Quæst.* Lib. i. Chap. xli. *Euripedes*'s Words also are,

———Σέβουσα δαίμονας δαρρεῖν χρεών
Εἰς τέλος γὰρ οἱ μὲν ἐσθλοὶ τυγχάνουσιν ἀξίων
Οἱ κακοὶ δ', ὥσπερ πεφύκασ', οὐποτ' εὐτυχεῖαν ἄν.

(if

(if we abſtract the firſt Cauſe and Original of that Condition) or they happen without the particular Default of him who ſuffers them. Which we may, in a juſt Senſe, call *fatal Evils*, oppoſing the Word *Fate*, not to the divine Diſpoſal, but to the peculiar Faultineſs of the Perſon on whom theſe Evils light. Others do, by natural Conſequence and Connexion, proceed from Sins; which are by ſome Authors term'd *natural Puniſhments*. Laſtly, others there are which ariſe from Sins, by the peculiar Determination and Diſpoſal of the Legiſlator beyond the Manner of natural Effects: In which the Quality, the Manner, the Place and Time of the Evil depend on the Legiſlator's free Pleaſure. And theſe are what we would *properly* call *Puniſhments*, or (in a looſer Senſe of the Word) *arbitrary Puniſhments*.

Thus much being premis'd, we proceed to remark, that altho' the omnipotent Creator might, by virtue of his Sovereign Right, have requir'd our Obedience, without making any good Fruit proceed thence to our own Advantage; yet it hath pleas'd his infinite Goodneſs, ſo to order and conſtitute the Nature of Things, and of Mankind, that by a kind of natural Connexion ſome Goods ſhould attend the Obſervance, and ſome Evils the Tranſgreſſion of Nature's Laws. Thus a conſtant Obedience is follow'd by ' Serenity and Security of Conſcience, join'd with a good and certain Aſſurance; by a good Frame and a ſettled Tranquility of Mind [a]; by the Preſervation of the Body from many Evils, not *fatal*: Beſides an infinite Number of Advantages, which may be obtain'd by the mutual Benevolence and good Offices of other Men [b]. On the other hand, from the Violation of the ſame Laws ariſe, by a natural Connexion, Diſquiet of Conſcience, Diſturbance and Degeneracy of Mind, Deſtruction of the Body, and numberleſs Evils, which may be occaſion'd by the withdrawing of other Mens Aſſiſtance, or by the Violence of their provok'd Revenge [c].

Now altho' theſe Rewards, and theſe Puniſhments, are by ſome imagin'd not to proceed with Certainty enough from good and evil Actions; becauſe many Perſons in Return for Benefits receive only Hatred, Envy, or Injury; whilſt others, on the contrary, do ſecurely enjoy the Fruits of their Wickedneſs, without Moleſtation or Puniſhment; whence we cannot be infallibly aſſur'd before-hand that our good Deeds will be equally repaid by *other Men*, (tho the Fruit which ariſes in *ourſelves* from ſuch honeſt Practices is not capable of Hindrance or of Interruption) yet thus much is beyond Diſpute, that more Advantages moſt ſurely and certainly follow from good and juſt Proceedings, than we can in Reaſon expect from the oppoſite Vices [d]. And altho' the whole Train of thoſe Goods do not attend on ſuch a conſcientious Behaviour, as in the Nature

a *See Archbiſhop* Tillotſon's *38th Sermon, Folio*, page 451, &c. *See, likewiſe*, pag. 51 *and* 74, &c. b Seneca de Irâ, Lib. ii. Chap. xiii. *calls the unmov'd Tranquility of a happy Mind*, A great Reward. Idem Ibid. *The Way to Happineſs is plain and eaſy. For what can be more comfortable to the Mind than Calmneſs? What more troubleſome than Paſſion? What more at Reſt than Clemency? What ſo full of Buſineſs as Cruelty? Modeſty and Chaſtity enjoy a perfect Leiſure, whilſt Luſt is ever tir'd with laborious Purſuits. To conclude, the Poſſeſſion of every Virtue ſtands us in little Coſt or Trouble, but Vices are all chargeable to be kept. Add.* de Irâ, Lib. ii. Chap. xxx. *& ult. and* Lib. iii. Chap. v, xxvi. *See the Story of* Hercules, *at the two Ways, in* Xenoph. Apomnem. Lib. ii. *Prov.* viii. 19. x. 9. xi. 3, 5, 10, 18, 19, 25. c Marcus Antonin. Lib. x. §. 4. *He that acts unjuſtly really injures himſelf by his Wickedneſs.* 'Tis a Saying of *Tully, ad Attic.* Lib. ix. Ep. xii. on a profligate Wretch, *Ulciſcentur illum mores ſui, His own Practices will be reveng'd upon him.* See *Prov.* v. 9, 10, 11. vi. 33, 34, 35. xii. 31. xiv. 14, 32, 34. xvii. 13. xix. 29. xx. 1. xxii. 5. xxiii. 22, *&c.* d See *Prov.* xi. 31. Vid. *Iſocrat. De Permutatione*, p. 576.

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§. xxi. 1 " It is certain, (ſays *Montaigne*) I know not how to expreſs the Satisfaction that we enjoy in ourſelves by well-
" doing, nor the generous Bravery that accompanies a good Conſcience. A Soul couragiouſly vicious may provide for its Secu-
" rity at all Adventures, but it can't have the Pleaſure and Satisfaction. 'Tis none of the leaſt Comforts, that it finds itſelf free
" from the Infection of a corrupt Age, and can ſay in itſelf, If any Man could look into my Breaſt, he ſhould not find me guilty
" of troubling or ruining any Man, neither of Revenge, nor Envy, nor Breach of the publick Laws, nor of Innovation, nor
" Diſturbance, nor ill Language; and tho' the Licentiouſneſs of the Time allows and inſtructs, yet I have not put my Hands
" to the Goods or Purſe of any Man, nor eat of any Man's Bread but my own, either in War or Peace, nor made uſe of any
" Man's Labour without Wages. Theſe Teſtimonies of Conſcience are pleaſing, and 'tis our Benefit that this Comfort is natural,
" and the only Recompence which never fails. To expect the Reward of virtuous Actions from the Commendation of Men, is
" an uncertain and troubleſome Foundation." *Eſſays*, Lib. iii. Chap. ii. p 596.

2 *Seneca*'s Words are, ——— *Quos tantum præmium expectat fælicis animi immota tranquilitas* ——— *Nec, ut quibuſdam dictum eſt, arduum in virtutes & aſperum iter eſt; plano adeuntur. Non vanæ vobis auctor rei venio. Facilis eſt ad beatam vitam via, inite modo bonis auſpiciis, ipſiſque diis benè juvantibus. Multo difficilius eſt, facere iſta quæ facitis Quid enim quiete otioſius eſt animi, quid irâ laboroſius? quid clementiâ remiſſius, quid crudelitate negotioſius? Vacat pudicitia, libido occupatiſſima eſt; omnium denique virtutum tutela facilior eſt, vitia magno coluntur.* We may add to this *Montaigne*'s Meditation, *Eſſay*, Lib. i Chap. xxv. " Virtue is not, as the Schoolmen repreſent her, placed on the Top of a ſteep Mountain, rough, and inacceſſible. They
" who have approached her, on the contrary, find her ſeated in a fine fertile and pleaſant Plain, from whence ſhe beholds all
" Things below her; and if we labour to find her, our Way lies through ſhady and green Roads, ſweet, flouriſhing, and plea-
" ſant; of an eaſy and ſmooth Aſcent, like that of the celeſtial Arch. ——— The Price and Excellency of true Virtue conſiſts in
" the Eaſe, Pleaſure, and Profit of the Practice. The Difficulty is ſo little, that an Infant may exerciſe it as well as a Man,
" and the Simple as well as the Wiſe. The Rule is its chief Inſtrument, and not Force. *Socrates*, her firſt Favourite, willingly
" left his Buſineſs to glide along in Eaſe and Innocency in her Paths. She is the nurſing Mother of all human Pleaſures, by ren-
" dering them juſt; ſhe purifies and refines them, by moderating them keeps us in Breath and Appetite. By retrenching thoſe
" ſhe refuſes, ſhe makes us more eager of what ſhe allows us, and ſhe allows us all Things that are ſuitable to our Nature plen-
" tifully, to Satiety, at leaſt, if not to Wearineſs, like an indulgent Mother, unleſs we will ſay that a Regimen of Sobriety and
" Temperance is an Enemy to Pleaſure. If a common Fortune befals it, ſhe can make her Eſcape, or paſs through it, and
" make another, not leſs fleeting and tranſitory. She knows how to be rich and powerful, and lie in Beds of Roſes. She
" loves Life, Beauty, Fame, and Health; but her peculiar Office is to teach us to uſe theſe Goods regularly, and to know how
" to loſe them freely; an Office more noble than ſevere, without which the whole Courſe of our Lives is unſocial, turbulent,
" and deformed, and may be juſtly call'd full of Rocks, Thickets, and Monſters." See alſo *Marc-Antonin.* Lib v. § 9.

" 3 That is not Vice, really Vice, which offends not, and in a true Judgment does not accuſe. For there is ſuch an apparent
" Deformity and Inconvenience in it, that they ſpeak with Reaſon who ſay, that it is principally produced by Stupidity and Ig-
" norance, ſo hard is it to know it, and not hate it. Malice ſucks up the greateſt Part of its own Venom, and is poiſon'd with
" it. Vice leaves an Ulcer in the Fleſh, and Repentance in the Soul, which always frets itſelf; for tho' Reaſon extinguiſhes al-
" moſt all other Griefs and Sorrows, yet it begets Repentance, which is ſo much the more grievous, becauſe it is bred within,
" as the Cold and Heat in Fevers is always more ſharp than that which outwardly affects " *Montaigne*, Lib iii Chap ii I could not forbear copying out theſe fine Thoughts, of which *Seneca*, alſo, hath one, *Epiſt.* lxxxi. *Quemadmodum Attalus noſter ſi-
cere ſolebat, Malitia ipſa maximam partem veneni ſui bibit.*

of

of Things they were disposed to do [1], yet we have a fair Probability that many of them will not disappoint us; at least, that we shall obtain a greater Share than we could have hop'd for from a Course of Dishonesty and Wickedness. And so, by this Means, we provide much better for our own Security, and have much fairer Grounds to hope that others will, in their Turn, be alike ready to promote our Interests and Concerns, than if, laying side all Regard to our Neighbours, we directed every Thing towards our own private Advantage; and therefore infinitely better, than if, by the Exercise of Violence or of Deceit, we endeavour'd to make our own Gains and Profits out of the Losses of other Men. By this way of reckoning therefore it appears, that the Value of that Reward which will follow, upon a good Action, doth, all Things rightly consider'd, exceed the Gain of the opposite illegal Practice.

We desire it should be well observ'd, that whilst we are here treating about the natural Effects of good and evil Actions, we do not by any Means reckon amongst these Effects those kind of Goods which we but now rank'd in the first Class, and which our own Prudence and Industry either cannot obtain, or cannot avoid. Such Things both may, and generally do happen alike to virtuous and to vicious Men. Thus a wicked Person may, by the Gift of Nature, possess a vigorous and a healthy Body, while perhaps a Man of Honesty and Piety labours under a weak and crazy Constitution. And thus Death lays hold promiscuously on the Just and on the Vile. But the only Goods we here allude to, are such as it is in the Power of human Reason to provide for us; and which do therefore, in some measure, depend upon our own Act. Now altho' some Part of those Goods which we intend by the Observance of the Law of Nature to obtain from other Men, has a Dependance on their Kindness, and on their Probity, and so is not absolutely in our own Power; yet, for as much as in all Probability, they have the same End and Design with ourselves, we have, at least, fair Reason to hope for, and to expect such good Usage and Retribution from them, tho' we cannot give ourselves an infallible Assurance of it, before it comes. Scarce any Man hath met with so many Enemies in the World, as not to own himself indebted to some Benefactors. And we see that the Evils which Men procure to one another, have never been able to prevail to the utter Ruin and Destruction of human Race: Which is a plain Evidence, that good Actions have oftner attain'd their just End and Reward, than they have fail'd, and been disappointed of it. On the other side, altho' a Person who neglects or disobeys the Law of Nature, may sometimes, by an unaccountable Concourse of external Causes, receive a whole Flood of Goods and Benefits from other Men; yet because, in this Case, those Effects are, with regard to him, meerly contingent, and do very seldom fall out in such a Manner, we may conclude, that Nature and Reason did not prescribe, much less command, the Means by which he attain'd, only casually, to such an End. Reason, on the contrary, most clearly shews us, that we take a much more probable Way to Happiness, by acting on a settled Design, and by applying the best Means we can to the gaining of our Purpose, than if we should throw aside all Counsel and Forecast, and permit ourselves to be driven at random by the blind Guidance of Chance. But this Point is indeed as clear as any Thing in Nature, and hath been made out to full Advantage by Dr. *Cumberland*.

There remains therefore only this Question farther, whether or no besides the natural Effects of evil Actions, and besides those which arise from the Sanction of Civil Laws, there are still others in reserve, appointed by GOD's free Pleasure, and to be [2] inflicted by virtue of his Sovereign Prerogative; or whether GOD hath not added to the Sanction of the Laws of Nature some arbitrary Punishment: Especially since it is apparent, that the natural Consequences and Effects of evil Actions are frequently interrupted, and that the Wickedness of many Men seems to turn to their Gain and Advantage. Now what the Scripture hath declar'd in this Matter, is plain, and beyond all Dispute. But waving that Authority, the affirmative Side of the Question may be defended from several Considerations: As from that most antient and most universal Tradition, concerning a certain revenging Divinity [3], and the Pains after Death. Of which Opinion we have

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[1] A Passage of *Isocrates* in *Orat. De Permutat.* is worth our Notice here, where he says, Θαυμάζω δ' εἴ τις οἴεται τοὺς τῇ εὐσεβείαν καὶ τῇ δικαιοσύνῃ ἀσκοῦντας, καὶ χαρτερεῖν καὶ μένειν ἐν τούτοις ἐθέλοντας, ἔλαττον ἔχειν τῶν πονηρῶν· ἀλλ' οὐχ ἡγέμαι[ον] [for so it should be read, and not ἡγεμόνας] καὶ θεοῖς καὶ ἀνθρώποις πλέον οἰσέσθαι τῶν ἄλλων. ἐγὼ μὲν γὰρ οἶμαι, τούτους μόνους, ὧν δεῖ πλεονεκτεῖν, τοὺς δ' ἄλλους οὐδὲ γινώσκειν οὐδὲν ὧν βέλτιόν ἐστιν· ὁρῶ γὰρ τοὺς μὲν τῆς ἀδικίας ἀπεπαυομένους, καὶ τὸ λαβεῖν τι τῶν ἀλλοτρείων μέγιστον ἀγαθὸν νομίζοντας, ὁμοίως παύσοντας τοῖς ἁλισκομένοις τῶν ζώων, καὶ καταρχὰς μὲν ὑπολαμβάνοντας ὧν ἂν λάβωσιν· ὀλίγῳ δ' ὕστερον ἐν τοῖς μεγίστοις κακοῖς ὄντα· τοὺς δὲ μετ' εὐσεβείας, καὶ δικαιοσύνης ζῶντας, ἔν τε τοῖς παροῦσι χρόνοις ἀσφαλῶς διάγοντας, καὶ πρὸς τὸν σύμπαντα αἰῶνα ἡδίους τὰς ἐλπίδας ἔχοντας, καὶ ταῦτ' εἰ μὴ καθ' ἅπαντων ὅπως εἰθίσαι συμβαίνειν, ἀλλὰ τό γ' ὡς ἔπὶ τὸ πολὺ τοῦτο γίγνεσθαι τῶν πραγμάτων, χρὴ δὴ τοὺς εὖ φρονοῦντας, ἐπειδὴ τὸ μέλλον ἀεὶ σωισεῖσθαι οὐ καθορῶμεν, τὸ πολλάκις ὠφελοῦν τοῦτο φαίνεσθαι προαιρεῖσθαι. Πάντων δ' ἀλογώτατον πεπόνθασιν, ὅσοι κάλλιον μὲν ὄρεξιν νομίζουσιν εἶναι, καὶ θεοφιλέστερον, τῆς δικαιοσύνης ἢ τῆς ἀδικίας; χεῖρον δ' οἴονται βιώσεσθαι τοὺς ταύτῃ χρωμένους, τῆς τῆς πονηρίας ἐφιεμένων. Which is thus Englished, "I wonder that any one can be persuaded, that they who apply themselves constantly to Piety and Justice should think themselves more unhappy than the Wicked, and don't promise themselves more Advantages both from GOD and Man. As for me, I believe, that only good Men enjoy most plentifully what is worth seeking; and Sinners, on the contrary, know not their own true Interests. For whoever prefers Injustice before Justice, and supposes his chief Happiness to consist in extorting other Mens Goods from them, is, in my Judgment, like the Beasts that bite at an Hook, who are pleas'd at first with the Sweetness of the Bait, but soon after find themselves embroiled in very great Troubles. But, on the other hand, they that apply themselves to Piety and Justice, are not only in Safety for the present, but meet with agreeable Hopes, that all their Life shall be happy. I own, this does not always happen, but Experience verifies it to be true for the most part. Now in all Things wherein we can't infallibly foresee the Success, a wise Man will chuse that Side which commonly proves most advantagious. But nothing is more unreasonable than their Opinion, who believing that Justice is something fine and more agreeable to the Nature of the Gods than Injustice; and yet imagine, that they who apply themselves to the first, shall be more unhappy than those who give themselves up to the latter." See Mr. *Wollaston*'s *Religion of Nature delineated.*

[2] Our Author expresses himself thus; *Manu velut Regiâ exercendi*; in which he alludes to an Expression of the *Roman* Lawyer *Pomponius*, speaking of the first *Roman* Kings, who dispens'd Law to every one as they thought fit, because they had no written Law; *Et quidem initio civitatis nostræ populus sine lege certâ, sine jure certo primum agere instituit, omniaque* MANU A REGIBUS GUBERNABANTUR. Digest. Lib. I. Tit. ii. *De Origine Juris, &c.* Leg. ii. §. 1. See *Tacitus*'s Annals, Lib. iii. Chap. xxvi.

[3] Which was call'd *Nemesis*, [or Δίκη] or Celestial Justice, and was thought to have the Care of punishing the Crimes which were unpunish'd upon Earth; either thro' Negligence, or thro' want of Power; there is a fine Description of her in *Ammian. Marcellin.* B. xiv. Chap. ii.

two fair Inſtances in the Caſes of *Jonas* and of St. *Paul*, (*Jonas* i. 7. *Acts* xxviii. 1. *&c.*) for there being no natural Connexion and Conſequence, either between *Jonas*'s Crime and the Tempeſt, or between the Fact of Murther and the biting of the Viper, the People who were preſent at both Accidents, immediately ſuppos'd that GOD Almighty did thus extraordinarily interpoſe his Hand to puniſh ſome heinous Wickedneſs [a]. Moreover, it being moſt certain, that it is the divine Pleaſure thoſe Laws ſhould be obey'd; and not leſs manifeſt, that the natural Effects of them may be (partly at leaſt) eluded; it is highly probable, that GOD will find ſome other Way of puniſhing ſuch Offenders; eſpecially ſince the Gnawings of Conſcience, and the Want of Quiet and Security, which conſtantly attend evil Men, do not always riſe to ſuch an afflicting Degree, as to ſeem a ſufficient Plague and Penalty for their Crimes [b]. But becauſe whatever Arguments we can alledge *à priori*, will not amount to a Demonſtration, but only to a high Probability; and becauſe this arbitrary Puniſhment preſuppoſes ſome poſitive Determination of the divine Will, which we can hardly come to the Knowledge of without a particular Revelation; and, ſince our Induction and our Experience are at preſent imperfect, we can ſcarce avoid confeſſing, that to thoſe who ſee only [1] by the Light of natural Reaſon, this Controverſy muſt ſtill appear in ſome meaſure dark and obſcure.

XXII. As to the *Matter* of the Law of Nature, *Grotius* obſerves [c], that many Things are referr'd to this Law not *properly*, but *reductively*, foraſmuch as the Law doth not oppoſe or forbid them. As thoſe Things are term'd Juſt, not only which are in ſtrict Juſtice due, but which Juſtice doth not contradict, (tho' it would be better to call ſuch Things *permitted*, than plainly *juſt*.) But perhaps this Diſtinction of *Grotius* might be more conveniently applied to thoſe Conſtitutions which, according to the particular State of Men, the Deſire of Peace and Tranquility hath, at any time, introduc'd; as, likewiſe, to the Actions undertaken in Conformity to ſuch Conſtitutions. For we ſhall often hear the Lawyers debating ſuch Caſes as theſe, whether the *Poſſeſſion of Things*, whether *Preſcription*, whether *the making of Wills*, and whether *buying or ſelling*, do belong to the Law of Nature, or not. Which Doubts cannot eaſily be reſolv'd, unleſs we diſtinguiſh between thoſe Things which the Law of Nature determines, by commanding or forbidding them; and thoſe things which Men have been induc'd to ordain for the neceſſary Promotion of Society [2], the Liberty of doing which flows, immediately, from this human Ordinance and Inſtitution: And then we ſay of theſe laſt Things, that they belong to the Law of Nature by way of *Reduction*. Thus the Dominion, or the Poſſeſſion of Things, doth not immediately ſpring from Nature, nor can we alledge any direct and expreſs Precept for its Introduction: Yet it may be ſaid, in ſome meaſure, to be enjoin'd by natural Law, in as much, as when Mankind began to multiply in the World, it was requiſite to their peaceable Condition, that the primitive Communion of Goods ſhould be laid aſide. Thus *Preſcription* is not plainly commanded by the Law of Nature; yet, upon Suppoſition of Things being divided into diſtinct Proprieties, the Peace of Mankind ſeems to favour it; leſt, otherwiſe, the Titles to Things ſhould remain always in doubt. Thus, laſtly, Nature doth not poſitively enjoin us to make Wills, or to buy and ſell; yet Proprieties being ſuppos'd, as in the former Caſe, it naturally follows, that a Perſon, at his Death, ſhall have the Power of diſpoſing of his own Goods; and that Men, by the Intervention of Bargains and Contracts, ſhall be at Liberty to alienate ſuch Things as belong to themſelves, for the Procurement of thoſe which are in the Poſſeſſion of others.

Grotius farther obſerves on this Subject [4], that ſometimes by Abuſe thoſe Things are referr'd to the Law of Nature, which Reaſon indeed ſhews us

[a] Add. *Grot. De Veritate Rel. Chr.* Lib. i. §. 19, 20, 21, 22. Lib. ii. §. 9. [b] Add. Dr. *Cumberland*, Chap. v. §. 25. [c] Lib. i. Chap. i. §. 10. *Note* 3.

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[1] This is true; but not to leſſen the Efficacy of the Laws of Nature, ſo far as they are known by the Light of Reaſon alone, let us add ſome Reflexions; and, to this End, I think I can't do better, than to make uſe of the Words of a great Philoſopher of this Age, whom I have already quoted in ſeveral Places, who thus ſpeaks; "The Rewards and Puniſhments of another "Life, which GOD has eſtabliſhed, to give greater Force to his Laws, are of Importance ſufficient to determine our Choice "concerning all the good or evil Things of this Life, when we conſider the Happineſs or Miſery to come as poſſible, of which "none can doubt. Whoever, I ſay, agrees that an excellent and infinite Felicity is a poſſible Conſequence of a good Life "which he hath lived here upon Earth, and an oppoſite State a poſſible Recompence of an irregular Life, ſuch a Man muſt ne"ceſſarily own that he judges amiſs, if he concludes from thence, that a good Life, joined with a certain Aſſurance of eternal "Felicity which he may attain, is not preferable to a wicked Life, accompanied with the Fear of ſuch horrible Miſery, into "which it is poſſible the wicked Man ſhall one Day fall, and where nothing can be his Comfort, but the terrible and uncertain "Hopes of being annihilated. All this is very evident, ſeeing good Men have nothing to receive in this World but Evil, and "Sinners are in a perpetual Felicity; which yet often happens otherwiſe, inſomuch as Sinners have no great Reaſon to boaſt "of their Eſtate, in relation to the good Things that they actually enjoy; or rather, if we conſider all Things well, they have, "I believe, the worſt Part, even in this Life; but when we put infinite Happineſs into the Balance with infinite Miſery, if "the worſt happen to a good Man, which is, that he is miſtaken, it is the greateſt Advantage that the Sinner can have; but, if "the contrary happen, what Man would run the hazard, if he be a Perſon of any Thought? Who, I ſay, will be ſo much a "Fool, as to expoſe himſelf to the danger of being poſſibly infinitely miſerable, whereas he can get nothing by it but a pure "Negative, if he eſcapes the Danger? But, on the contrary, the good Man hazards a Negative only againſt an infinite Hap"pineſs, which he ſhall attain, if his Expectations ſucceed. If his Hope be well grounded, he is eternally happy; and, if he be "miſtaken, he is not unhappy, becauſe he'll be ſenſible of nothing. But, on the other ſide, if the Sinner judges rightly, he is "not happy; but, if he be miſtaken, he is eternally miſerable. Is not this one of the moſt viſible Irregularities of Thought "that any Man can fall into, not to ſee, at the firſt Sight, which Side ought to be preferred in this Controverſy?" Mr. *Locke*'s *Philoſ. Eſſay upon Human Underſtanding*, Lib. ii. Chap. xxi. §. 70. This is the Reſult of almoſt all Mr. *Paſcal*'s Reaſonings in his *Meditations*, Chap. vii. The Reader alſo would do well to conſult Mr. *Clerc*'s *Pneumatology*, Chap. ix. §. 2, 9. to the End of the Chapter; and Mr. *Bruyere*'s Characters, or *Manners of the Age*, in his Chapter of *Wits*, Page 560, *&c.* See, alſo, a Paſſage out of *Arnobius*, quoted above, Lib. i. Chap. iii. §. 7. *Note* 5. And the deceas'd Mr. *Wollaſton*'s *Religion of Nature delineated*, two or three Pages before the End.

§. XXII. [2] There are two Sorts of Duties preſcribed by the Law of Nature, taken in its full Extent; the one flowing from the natural and primitive Conſtitution of Man immediately, and the other ſuppoſing human Eſtabliſhment. Theſe laſt are but the Conſequence of the former, or a ſuitable Application of the general Rules of the Law of Nature to the private Condition, and diverſe Circumſtances of every one. See §. 15. above, *Note* 5. and the laſt Paragraph of this Chapter. We may obſerve the ſame in all the Duties, of which this Author treats.

[3] It appears by theſe Inſtances, that the Senſe in which our Author explains the Diſtinction of *Grotius*, is confin'd to thoſe Things which belong to the natural Law; becauſe this Law, by permitting, authorizes us to do them, and that without Prejudice to what it preſcribes or forbids poſitively. See Lib. i. Chap. vi. §. 15. *Note* 2. preceding.

[4] *See above*, Lib. i. Chap. ii. §. 8. *Note* 5.

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to be honeſt, and better than their Oppoſites, tho' they are not properly matter of Debt and ſtrict Obligation. Of which kind are many high and uncommon Acts of Liberality, of Mercy and Clemency; as, likewiſe, whenever a Man recedes from any Part of his Right, not being compell'd by Neceſſity. Theſe Matters St. *Paul* illuſtrates in his firſt Epiſtle to the *Corinthians*, Chap. vi. ver. 12. Chap. vii. ver. 38. Chap. x. ver. 23.[a]

Socrates [b], when a raſcally Fellow had offer'd him an Injury, would not complain of it to the Judge, but reckon'd it (as he ſaid) no more than if an Aſs had kick'd him. And *Cato* [c], as *Seneca* tells us, when he receiv'd a Blow in the Face, was ſo far from reſenting the Affront, and from deſiring Satisfaction, that he would not venture ſo far as to *forgive* it, but denied that any ſuch thing had been done; thinking it better not to acknowledge the Fact, than to proſecute it.

XXIII. There is ſtill one Queſtion behind, which requires our Determination: Whether or no there be any ſuch thing as a particular and poſitive *Law of Nations*, contradiſtinct to the *Law of Nature?* Learned Men are not come to any good Agreement in this Point: Many aſſert the *Law of Nature and of Nations* to be the very ſame Thing, differing no otherwiſe than in external Denomination. Thus Mr. *Hobbes* [d] divides *natural Law, into the natural Law of Men, and the natural Law of States, commonly called the Law of Nations.* He obſerves, *That the Precepts of both are the ſame: But that foraſmuch as States, when they are once inſtituted, aſſume the perſonal Proprieties of Men; hence it comes to paſs, that what, ſpeaking of the Duty of particular Men, we call the Law of Nature, the ſame we term the Law of Nations, when we apply it to whole States, Nations, or People* [1]. This Opinion we, for our part, readily ſubſcribe to: Nor do we conceive, that there is any other *voluntary* or *poſitive* Law of Nations, properly inveſted with a true and legal Force, and obliging as the Ordinance [2] of a ſuperior Power [e]. And thus we do not really differ in Judgment from thoſe, who are more inclin'd to call that the Law of Nature, which conſiſts in a Conformity to rational Nature, and that the Law of Nations, which flows from the Conſideration of human Indigence, the Relief of which ſeems to be the main End and Deſign of Society. For we, as well as they, deny that there is any poſitive Law of Nations proceeding from a Superior. And, whatever is deducible from Reflections on the Indigence of human Nature, we refer immediately to *natural Law*; only we were unwilling to define and explain this natural Law by a Conformity to rational Nature; becauſe, by this Means, we ſhould eſtabliſh Reaſon for the Rule and Meaſure of itſelf; and ſo this way of demonſtrating Nature's Laws would run round in a Circle.

Moſt of thoſe Matters, which by the *Civilians* and others are referr'd to the Law of Nations, as the Ways of acquiring Things, the Buſineſs of Contracts, *&c.* do indeed belong either to the Law of Nature, or to the civil Laws of thoſe Countries where they are obſerv'd: Many People and States agreeing in ſuch Points, which otherwiſe do not depend on the univerſal Reaſon of Mankind. Now it is not proper, or fair, to conſtitute theſe as a peculiar and diſtinct Species of Law; inaſmuch as the Reaſon why ſuch Conſtitutions are common to many Nations, doth not ariſe from any mutual Co-

[a] So *Ulpian*, (Lib. iv. §. 1. D. *de alien. jud. mut. cauſ.*) *The Prætor doth not diſapprove of his Proceeding, who choſe rather to loſe his Right, than to engage in long Suits and Contentions. This Averſion to Strife doth by no means deſerve Reproof.*

[b] See *Plutarch* of the *Education of Children*, p. 10. C. Ed. *Wech.*

[c] *De Irâ*, Lib. ii. Chap. xxxii, *&c. de Conſtant. Sapientis*, Chap. xiv.

[d] *De Cive*, Chap. xiv. 4, 5.

[e] Add. *Boecler.* in *Grot.* Lib. i. Chap. i. §. 14. and in Lib. ii. Chap. iv. §. 9.

§. XXIII. [1] It is probably from this Diſtinction of the *Law of Nations* from the *natural Law*, that we are accuſtomed to judge otherwiſe of the Actions of Princes, or Commonwealths, than of private Perſons, as Mr. *Bernard* has obſerved in relating Mr. *Buddeus*'s Words, as a good and ſmart Notion, in his *Elemen. Philoſoph. Pract.* Page 236. I ſhall give you them in the Extract made of them in the *News of the Republ. of Letters, March* 1704. "If one private Perſon offends another without Cauſe, we call that Action *Injuſtice*; but if one Prince encroaches upon another without Cauſe, by invading his Dominions, by robbing his Subjects, and plundering his Towns and Provinces, it is called *War*, and 'twere too much Boldneſs to call it *unjuſt*. To break Bargains made and agreed on, is a *Crime* between one Man and another: But among Princes, to break the moſt ſolemn Alliance, is *Prudence, i. e.* the Art of Governing. 'Tis true, they always alledge ſome plauſible Pretences, but they matter not whether they are believed juſt or unjuſt. Be they called Cheats, Frauds, Lies, Double-dealings, Rapine, Theft, or the like Crimes, which are abhorred in the common Sort, all the World will commend, or at leaſt excuſe them, if a Prince or a whole Nation commits them."

[2] This Reaſon is demonſtrative to prove, that there is no *Law of Nations*, (ſuch as that in queſtion) which is diſtinct from the *natural Law*; and yet, nevertheleſs, has an obligatory Force, whether Men will or will not ſubmit to it. If it be ſaid, that all Nations, or the greateſt Part, have engag'd to obſerve the Rules of this Law, they have done it expreſsly or tacitly. Now the firſt of theſe never happen'd; and, according to all Appearances, never will: But, ſuppoſing it ſhould, it would be only an Agreement, which, by Virtue of the Law of Nature, would bind Men not as a Law, but like all other Treaties, whoſe Duration depends upon the Circumſtances of Time, Place, Perſons, *&c.* As to the tacit Conſent, it could never take place here, ſo as to produce a real Engagement. Becauſe many Nations have, for a Time, acted in Concert, with regard to ſuch and ſuch Affairs, it no way follows, that by that they laid themſelves under a Neceſſity of acting in the ſame manner for the future. The Moment they think it proper, they may all in general, or every Man in particular, alter their Behaviour in the manner as ſhall appear moſt for their Advantage. In a word, this Point depends ſolely on Cuſtom, which, we know, has nothing obligatory in itſelf. If, between Members of the ſame State, Cuſtom often acquires the Force of a Law, it is becauſe it receives that Power, from the clear, tho' tacit Will of a Superior. See what I have ſaid upon *Grotius*, Lib. ii. Cap. iv. §. 5. Note 5. But all Men being naturally equal, even tho' they ſhould all agree to eſtabliſh certain Rules, excepting one ſingle Perſon, he, tho' alone, might refuſe to ſubmit. Indeed when Cuſtom has eſtabliſh'd a Thing, for good Reaſons, between ſeveral Nations, it is imprudent not to conform to it: But even then our Oppoſition is only a Breach of Prudence, Humanity, Decency, Politeneſs, or, in a word, ſome other Virtue, whoſe Obligation is imperfect, and to the Exerciſe of which no Man has a Right to conſtrain us. It is, alſo, certain, that the Moment any Uſage is introduc'd between correſponding Nations, (let it be in what Manner, or for whatever Reaſon it will) each of them is mutually and reaſonably ſuppos'd to conſent to it, if it has not publickly declar'd to the contrary. This, tho' great, is all the Effect flowing from Affairs which relate to the Law of Nations. The Queſtion is then to bring good Proof for this Cuſtom, which is not ſo eaſy as People imagine. The Reader will find all this confirm'd in my Notes upon *Grotius*, as, alſo, in thoſe I have added to the Treatiſe of the illuſtrious *M. de Bynckerſhoek Du Juge competent des Ambaſſadeurs*, &c. To conclude; Since M. *Pufendorf* has rejected the Law of Nations in the preceding Senſe, he has been follow'd by all thoſe who have ſtudied this Subject with proper Care, and without Prejudice. See Mr. *Titius*'s Obſervations on *Pufendorf*, XCI. *Num.* 14. Mr. *Buddeus*'s Elemen. Phil. Pract. *p.* 206, 207. as, alſo, a Diſcourſe *de Lytro*, §. 1, 2, *&c.* in Tom. I. of the Comment. & Opuſc. of Mr. *Hertius*. The ſecond of theſe Authors had Occaſion to obſerve, after he had treated of the Law of Nature, the Application that People might make of it one to another, ſo far at leaſt as the thing would permit and require him. In this he has done very well.

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venant or Obligation, but is wholly to be attributed to the particular Pleasure of the several Legislators, who, by Accident, agreed in these Ordinances, without the least Regard to each other. And therefore this kind of Customs and Decrees may be, and frequently are, alter'd by one People, or Kingdom, without advising with their Neighbours.

Nor is *Feldenius*'s Distinction to be despis'd, who, in his Observations on *Grotius* [a], tells us, that the *Roman* Lawyers, by the *Law of Nations* [1], understood the Power and Liberty which Strangers and Foreigners were allow'd in transacting Matters in the *Roman* State; and by the *Civil Law*, that which was proper to the Citizens only, all Foreigners being excluded from its Benefit. That, on this Account [2], *Wills* and *Marriages* were said to be of the *Civil Law*, and *Contracts* or *Bargains*, of the *Law of Nations*; because the former were restrain'd to the Citizens, whereas Strangers were admitted to a Share and Right in the latter.

Many Authors do farther rank, under the Title of the *Law of Nations*, several Customs, mutually observ'd by tacit Consent, amongst most People pretending to Civility, especially in the Affairs and Transactions of War. For after that the most polish'd Parts of the World came to esteem martial Glory as the greatest of human Honours, and to think that a Man had no such fair Way of shewing his Excellency beyond others, as by being able, by his Boldness and his Sagacity, to destroy many of his Fellows; upon which Account there perpetually arose either unnecessary, or unjust Contentions; for fear great Captains, if they us'd the full Liberty of a just War, should bring too much Envy on their Power, and expose themselves to general Hatred: Many Nations found it convenient to temper the vigorous Fierceness of hostile Proceedings, by a Shew of Clemency and of Magnanimity. Hence arose the Customs of exempting certain Things and Persons from martial Violence; the particular Manners of hurting Enemies to such Degrees, of treating Captives, and the like. *Machiavel* in his *Prince*, Chap. xii. relates one Practice of this Nature, which I question whether it were worthy of the Name and the Profession of Soldiers; he says, it was first introduc'd by *Alberigo de Como* of *Romagna*, and kept up in the *Italian* Wars of the last Age, chiefly by the foreign and mercenary Troops: The opposite Generals endeavour'd, with all possible Industry, to rid themselves and their Soldiers of all Trouble and Fear; and their Way was, by killing no one in Fight; only taking one another Prisoners, whom they afterwards dismiss'd without Ransom. When they were in Leaguer before a Town, they shot not rudely amongst them in the Night; nor did the Besieged disturb their Camp with the like Incivilities. They made no Intrenchments for their Security whilst encamped; and when Winter came on, never lay at all in the Field. And to behave themselves in this manner was Part of their Discipline and Institution. An Agreement, something like this, *Strabo* tells us of, *Lib.* x. between the *Eretrians* and the *Chalcidians*, forbidding the Use of missive Weapons against each other. To which we may add the Custom observ'd by the ancient *Indians*, of letting the Husbandman remain safe from all Injury and Molestation, even in civil Wars [b].

But altho' these Customs seem to include some kind of Obligation arising from tacit Consent; yet if one, who is engag'd in a lawful War, shall neglect them, and profess that he will not be bound by such Restraints; provided what is contrary to them may be rightly done according to the Law of Nature; he is guilty of no other Sin, but a sort of Unskilfulness, in not adjusting his Proceedings to the nice Models of those who reckon War in the Number of the liberal Studies. As a Gladiator is accus'd of Inexpertness, when he wounds his Antagonist otherwise than by the Rules of Art. Whoever therefore wages War in a just Cause, may slight these Formalities at Pleasure, and govern

[a] Lib. ii. Chap. ii. §. 20. and Chap. viii. §. 1.

[b] *Arrian.* in *Indicis*, Chap. xi.

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[1] This is not the precise Idea, or uniform Style of the *Roman* Lawyers. Some, by the *Law of Nations*, understand the Rules of Right common to all Men, and establish'd between them agreeably to the Light of Reason, in Contradistinction to the particular Laws of each People: *Omnes populi, qui legibus & moribus reguntur, partim suo propio, partim communi omnium hominum Jure utuntur. Nam quod quisque populus ipse sibi jus constituit, id ipsius proprium civitatis est: vocaturque* JUS CIVILE, *quasi jus proprium ipsius civitatis. Quod vero naturalis ratio inter omnes homines constituit, id apud omnes peræque custoditur vocaturque* JUS GENTIUM, *quasi quo jus omnes gentes utuntur.* Digest. Lib. i. Tit. i. *De Just. & Jure*, Leg. ix. *Tribonian*, according to his Custom of confounding every thing, adopts these Words unseasonably to his Definition of the *Law of Nations*, as distinguish'd from the *Law of Nature*, (*Instit.* Lib. i. Tit. ii. §. 1.) for the Lawyer *Cajus*, who has left us Law the Ninth, just cited, comprehended both these under the Name of the *Law of Nations*. But others distinguish'd them, as *Ulpian* does plainly in the first Law of the same Title; for they call'd that *the Law of Nations*, which agrees to Man as Man, in Opposition to that which agrees to him as an Animal, as has been observ'd in §. 3. *Note* 10. Others indeed included both the one and the other under the Name of the *Law of Nature: Uno modo* [jus dicitur] *quum id quod semper æquum ac bonum est*, jus *dicitur, ut est* JUS NATURALE. *Altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est* JUS CIVILE. *Ibid. Leg.* xi. Hence it comes, that good *Latin* Authors call, without Distinction, *the Law of Nature*, or *the Law of Nations*, whatever belongs to either: As *Cicero* does, where he says, That by the *natural Law* (*i. e.* the *Law of Nations*) a Man cannot benefit himself at another's Expence: *Neque vero hoc solum natura, id est, Jure Gentium.—Constitutum est, ut non liceat sui commodi causa nocere alteri.* De Offic. Lib. iii. Cap. v. p. 296. *Edit. maj.* See *Grævius*'s Note upon this, and Mr. *Hertius*'s Dissertation *De Litio*, already quoted, *Sect.* 1. §. 5.

[2] The *Roman* Lawyers do not refer *Marriage* to the Civil Law, because, according to them, it belongs not only to the Law of Nations, but Law of Nature: *Hinc* [ex Jure Naturali] *descendit maris atque fœminæ conjunctio, quam nos matrimonium appellamus.* Digest. Lib. i. Tit. i. Leg. 1. §. 3. They only say, that to make a Marriage-contract valid, which is to have the Effect of the Civil Law, both the Persons who are to be married must be Citizens of *Rome*. See *Ulpian*, Tit. 5. §. 3, 4. *Seneca, de Beneficiis*, Lib. iv. 35. *Boeth. in Top. Cicer.* Chap. iv. and the Notes of Mr. *Schulting*, on the Instit. of *Cajus*, Lib. i. Tit. 2. *princip.* Likewise, altho' a *Will*, to make it valid, requires certain Formalities; and Strangers can neither make a valid *Will*, nor inherit by a *Will*, (See *Cod. Lib.* vi. *Tit.* 24. and *Dion. Gothofred.* upon it) nevertheless, *Wills* were reputed to be from the Law of Nations, as appears from this, That a Soldier might make a Person condemned to Banishment, or condemned for all his Life to the Mines or Quarries, his Heir, because they, though they were not *Roman* Citizens, still had a Right by the Law of Nations. *Ut sunt in opus publicum perpetuo damnati, & in insulam deportati, ut ea quidem, quæ juris civilis sunt, non habeant, quæ vero juris gentium, habeant.* Digest Lib. lxviii. Tit. 9. *De Pœnis*, Leg. 17. §. 1. See *Lib.* xxix. Tit. 1. *De Testamento Militis*, Leg. 13. §. 2. See, also, the Law of the Code quoted, *Lib.* iv. *Chap.* x. §. 4. *Note* 1. It must be own'd, however, that *Tribonian* has not left us any Fragments clear, or sufficiently express, to decide the Notions of the ancient Lawyers upon this Subject, or whether they are uniform in their Opinions. Their Interpreters have as little been able to agree. See *Theophilus*'s Paraphrase on the Institutes, *Lib.* i. Tit. ii. §. 1.

himself

himſelf purely by the Law of Nature: Unleſs he thinks it more for his Intereſt to obſerve them, as a Means to render the Enemies leſs ſevere towards himſelf and his Men. On the other hand, he who proſecutes an unjuſt Quarrel, if he punctually fulfils theſe Niceties, is ſo far in the right, as to appear wicked with ſome kind of Temper and Moderation. However, theſe Reaſons not being general, cannot conſtitute any Law of [1] an univerſal Obligation. Eſpecially ſince, as to any Reſtraints which depend on tacit Agreement, it ſeems reaſonable that either Party ſhould have the Liberty of abſolving themſelves from them, by making expreſs Declaration that they will be holden by them no longer, and that they do not expect or require the Obſervance of them from others. Hence we find many ſuch Practices to be worn out by Time, or overcome by the Prevalence of contrary Cuſtom. Neither have [2] thoſe Men any good Reaſon of Complaint, who cenſure this Doctrine as a Notion by which the Security, the Intereſt, and the Safety of Nations are robb'd of their ſureſt Guards and Defence. For the Inſurance of theſe Advantages and Bleſſings doth not conſiſt in the Practice of ſuch mutual Favours, but in the due Obſervance of the Law of Nature, a much more ſacred Support; and which, whilſt they enjoy, they have little need of inferior Methods of Protection. And ſure it ſhews much more Excellency and Worth in any Cuſtom, to derive it from the Law of Nature, than to eſtabliſh it only on the Conſent of different People.

Amongſt the chief Heads of that *voluntary Law of Nations* which *Grotius* maintains, he reckons the *Law* [3] *of Embaſſies*. Now, as to this Point, it is our Opinion, that the Perſons of Ambaſſadors are ſacred and inviolable, even amongſt Enemies, by the meer Law of Nature; provided they do not come purely as Spies, nor enter into any hoſtile Deſign againſt the Perſon to whom they are ſent; altho', in the ordinary Courſe of Buſineſs, and of Treaties, they prefer their Maſter's Intereſt to all others. For inaſmuch as ſuch Perſons are neceſſary for the procuring, the preſerving, or the ſtrengthening of Peace by Leagues and Covenants; and ſince the Law of Nature enjoins us to embrace Peace by all honeſt Ways, it muſt, at the ſame time, be ſuppos'd to have provided for the Security of thoſe Men, without whoſe Intervention this good End cannot be obtain'd [a]. To this Right of perſonal Safety is join'd another, of being exempted from the Juriſdiction of the Sovereign to whom they are ſent; at leaſt in all Matters relating to their Office. Since otherwiſe they would not have full Power and Liberty *to promote their* Maſter's Intereſt, with due Application and Vigor, were they oblig'd to give an Account of their Management to any Authority, beſides that which they repreſent. Other Privileges commonly attributed to Ambaſſadors, eſpecially to thoſe who reſide in Courts, not for the ſettling or the ſecuring of Peace, but chiefly for the diving into the Secrets and Policies of a State, theſe depend abſolutely on the Indulgence of the Prince who entertains them; and therefore, if he ſees convenient, he may deprive them of theſe Favours without the Breach of any Law, provided he will ſuffer his own Miniſters abroad to be treated in the ſame Manner.

The [4] Right of Burial, which, according to *Grotius*, ſeems, likewiſe, to make a particular Head of the *Law of Nations*, may be well referr'd to the common

[a] Add. *Marſelaer Legat.* Lib. ii. Chap. xiii.

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[1] Even in a State, where Cuſtoms, by the tacit Will of the Sovereign, have the Force of Law, we are not always indiſpenſibly oblig'd to conform ourſelves to them. This only takes place in thoſe things about which a Regulation is made either by ourſelves, or with the Conſent of others. Cuſtom then determines that to which we have agreed, even by that which is left undecided. But this might have been order'd otherways, and Cuſtom left without any Effect. Hence, for Inſtance, in Caſes of Country, the *Roman* Lawyers ſo often add to the Rules introduced by Uſage, this formal Exception, *Unleſs both Parties have otherways agreed, Niſi aliter convenerit.*

[2] *Samuel Rachelius* is plainly meant here, as appears to me by what Mr. *Hertius* ſays in the ſame Diſcourſe, §. 11. where he mentions a Diſcourſe, *De Jure Gentium*, of that Lawyer, who was Profeſſor at *Kiel* in the Province of *Holſtein*.

[3] See what is ſaid *Note* 1. §. 12. *Chap.* ix. *Lib.* viii.

[4] Though after Death, whatever Treatment the Body meets with, is all one to it; yet *the Right of Sepulture* is ſtill founded upon *the Law of Humanity*, and, in ſome meaſure, upon Juſtice itſelf. With regard to the firſt Point, it is evidently ſhocking to leave the human Body to conſume in the Sun, or to be a Prey to wild Beaſts. This muſt be a frightful Spectacle to the Living, if they are in the leaſt civiliz'd, and produces an Infection prejudicial to Health. Thus the moſt indifferent People become oblig'd (were it for this Reaſon only) to bury the Dead, though no Friend or Relation ſhould be near to pay them the laſt Duty. But if the Friends or Relations are hinder'd from performing this Office, we certainly do them an Injury, and that a very ſenſible one. We by this means augment the Grief they feel, for the Loſs of a Perſon dear to them: We deprive them of the Conſolation of paying him what they not only regarded as a Duty, but an Honour, the Privation of which redounds upon themſelves. It is upon this Footing the Matter has been regarded in all Ages, among the Nations reckon'd moſt barbarous; and upon this, partly, are founded the Laws which deprive thoſe, who have committed certain Crimes, of the Rights of Interment: For by this they purpoſe as much to make every one careful of keeping their Friends and Relations from ſuch Crimes, as to intimidate themſelves from attempting them. But is there nothing in the Caſe here, which relates to the deceas'd Perſon? May we not, in ſome reſpect, violate Juſtice and Humanity with regard to him? Mr. *Thomaſius* (*Juriſpr. div.* Lib. iii. Cap. 10.) and ſeveral others who after him deny this, maintain, that the dead Perſon cannot feel the Injury done to his Remains. But to be truly hurt, or injur'd, it is not always neceſſary to be ſenſible of the Injuſtice done us, no more than to be in a Condition to revenge it. (See what is ſaid above, *Lib.* i. *Cap.* i. §. 7. *Note* 4.) All the World is agreed, that an Injury may be done to an Infant yet unborn, and to a Lunatic; though the firſt has no Knowledge of what paſſes, and the other is inſenſible of the Prejudice done him. But (ſay they) the dead Perſon is no more: for Reaſon alone is ignorant that the Soul ſubſiſts after the Body. To this I reply, That if Reaſon, without the Aid of Revelation, has no demonſtrative Certainty on this Head, it has, at leaſt, no Proofs to the contrary. So that the Thing may be regarded, at leaſt, as poſſible; which is ſufficient in this Caſe. We are not ſure that a Child in the Womb will ever come to Life; and yet we do him a real Injury by ſtripping him before-hand, of what he may, one Day, come to enjoy. As the Injury, in this Caſe, is real, though it has no Effect with regard to the Object; ſo, in the Caſe before us, it has a kind of retroſpective Effect. It is juſt as if we had offer'd the Affront to the deceas'd before his Death, ſince, if he had foreſeen it, he muſt have been ſenſibly provok'd. Can we ſay (ſetting aſide the Immortality of the Soul) that thoſe who calumniate the Reputation of a dead Perſon, do not offend againſt Truth? And ſuppoſing (which is a thing inconſiſtent with the Idea of an omnipotent Being) ſuppoſing, I ſay, that this Perſon ſhould return into the World, has he not a Right to complain, and Demand Reparation for the Injury? Theſe, in my Opinion, are plauſible Reaſons. But thoſe taken from the Injury done to the Living are ſufficient, I think, to infer, that Burial maliciouſly denied, affords the Friends or Relations of the Deceas'd a juſt Cauſe for War; and that the Laws of War do not extend ſo far, as to refuſe Interment to the Bodies of the Enemy. For this Refuſal has no Connection with the juſt Grounds of War, and can flow from no Principle but barbarous Cruelty. *Plato* affirms, that it is vile Cowardice to treat the Body of an Enemy in an inhuman Manner; and that by doing ſo, we reſemble the Dogs who bite the Stones thrown at them, when they cannot get at the Perſon who threw them. Καὶ γυναικείας τι καὶ σμικρᾶς δειλίας, πολέμιον νομίζειν τὸ σῶμα τὸ τεθνεῶτος, ἀποπαμένους τὸ ἐχθρόν, λελοιπότος ὃ ὧ ἐπολέμει· ἢ οἱ

common Duties of Kindneſs and Humanity [a]. Nor are the other Inſtances, which he offers, of Conſequence enough to eſtabliſh a new Species of Law, ſince they may, with Convenience enough, be allow'd a Place in the Syſtem of the *Law of Nature*. As for thoſe Perſons who rank, under the *Law of Nations*, the particular Compacts of two or more States, concluded by Leagues and Treaties of Peace, to us their Notion appears very incongruous. For altho' the *Law of Nature*, in that Part of it concerning the *keeping of Faith*, doth oblige us to ſtand to ſuch Agreements; yet the Agreements themſelves cannot be called *Laws*, in any Propriety of Speech, or of Senſe. Beſides, they are almoſt infinite in Number, and commonly are ſettled only for a Time. Nor do they any more conſtitute a Part of Law in general, than the Covenants and Bargains of particular Subjects with each other, do belong to the Body of the Civil Law of the Kingdom: But they are rather to be eſteem'd the Subject and the Concern of *Hiſtory* [b].

XXIV. Of all the Diviſions of *natural Law*, that ſeems to us moſt accurate and moſt convenient, which conſiders, in the firſt place, a Man's *Behaviour towards himſelf*, and then *towards other Men*. Thoſe [2] Precepts of the *Law of Nature*, which bear a Regard to other Men, may be again divided into *abſolute* and *hypothetical*, or conditional. The former are ſuch as *oblige* all Men in all States and Conditions, independent from any human Settlement or Inſtitution. The latter preſuppoſe ſome publick Forms and civil Methods of living to have been already conſtituted and received in the World. Which Diſtinction *Grotius* hath thus expreſs'd in other Words; *The Law of Nature is concern'd, not only about ſuch Things as exiſt antecedent to human Will, but, likewiſe, about many Things which follow upon ſome Acts of that Will.* "Whence, although "the *Dominion*, or the Propriety of Things, as it "now ſtands, is eſtabliſh'd by the Pleaſure of "Men; yet ſuch a Settlement being once ſuppos'd, *natural Law* informs us, that 'tis a Sin to "take the Goods of another Man, without the "Owner's Conſent [c]." That is, there are many things which, as to the Exerciſe of the Act, are arbitrary, or where it is left to the free Pleaſure of Men, whether they will perform ſuch an Act, or no: But the Act being once perform'd, there follows upon it, by virtue of ſome Precept of the Law of Nature, a moral Neceſſity or Obligation; or elſe the Manner and Circumſtances of the Act are, by the ſame Law, adjuſted and determin'd. Thus, for Example, although the Law of Nature doth not command me to buy of another; yet ſuppoſing me to buy at my own Pleaſure, it commands me not to ſeek my own Gain to the Damage of the other Party, nor to cheat him in the Bargain. And many ſuch Precepts of the Law of Nature there are, which cannot take place, or indeed be underſtood, unleſs upon Suppoſition of diſtinct Proprieties of things, and of the Eſtabliſhment of civil Authority. Yet it cannot hence be prov'd, that even all poſitive Laws are Part of the Law of Nature; *becauſe* Nature obliges us to obey the Commands of the ſupreme Magiſtrate, though our own Conſent gave him his Sovereignty over us. Thus much indeed is certain, that the Violators of civil Laws do, by breaking their intervening Covenant, mediately ſin againſt the Law of Nature. And yet there ſtill remains a prodigious Difference between theſe natural Laws, which we call *hypothetical*, and the poſitive Laws of civil Governments; inaſmuch as the Reaſon of the former is drawn from the Condition of Mankind conſider'd in general; but the Reaſon of the latter is taken from the particular Intereſt of any Nation or State, or from the bare Pleaſure of the Legiſlator. Therefore our civil poſitive Laws are not ſo many Precepts of the natural *hypothetical* Law, but do only borrow their Force of obliging [3], in human Regard, from the Virtue of ſome ſuch hypothetical Precept of Nature. Now of thoſe human Inſtitutions, which ſerve for Foundations of theſe hypothetical Precepts, the three chief are [4] *Speech*, the *Dominion* and the *Price* of Things, and [5] *human Sovereignty*, or Command. And by this Diviſion we ſhall hereafter guide our Proceedings, when we arrive at that Part of our Deſign.

CHAP.

[a] Add. *Ant. Matth. de Crimin. Proleg.* Chap. iii. §. 5.

[b] Add. *Selden de Mari Clauſo*, Lib. i. Chap. ii. Concerning *unwritten Laws* or *Cuſtoms*, beſides others, ſee *Bæcler.* ad *Grot.* Lib. ii. Chap. iv. §. 5.

[c] Vid. *Leg.* i. §. 3. *D. De furtis, Leg.* xlii. *D. De verb. Signif.*

ἢ οἷεσθ᾽ διάφορον δεῖν τοῦ τὸ τοιοῦτον ἢ κυνῶν, αἳ τοῖς λίθοις οἷς ἂν βληθῶσι χαλεπαίνουσι, τοῦ βάλλοντος οὐχ ἅπτόμεναι. De Republ. Lib. v. Tom. ii. p. 469. D. E. *Edit. Steph.* I add this Paſſage to thoſe which *Grotius* has cited *Lib.* II. *Cap.* xix. where I have treated this Queſtion more diſtinctly, and at greater Length. See Mr. *Buddeus*'s *Elem. Philoſ. pract.* p. 324. I ſhall only obſerve, after him, that by *Sepulchure* muſt be here underſtood, the laſt Duties paid to the Dead, whether by Interment or Burning: for this depends upon Cuſtom, which determines, in every Country, the Honours paid to the Deceas'd.

[1] 'Tis the ſame Mr. *Rachelius*, before-mention'd, in his Book *De Jure Gentium*, in which he follows *Herman Conringius*'s Diſcourſe *De Jure*, as I underſtand from Mr. *Hertius*: for I have ſeen none of theſe Diſſertations.

§. XXIV. [2] We muſt add, *And towards* GOD. See what is ſaid above, §. 15. *Note* 5. and in the next Chapter, §. 3. *Note* 2. This Diviſion is very natural and ancient. We find it in *Tuſc. Quæſt.* Lib. i. Chap. xxvi. *Hæc philoſophia nos primum ad illorum [Deorum] cultum, deinde ad jus hominum, quod ſitum eſt in generis humani ſocietate, tum ad modeſtiam, magnitudinemque animi erudivit, i. e.* "Philoſophy teaches us firſt of all the Worſhip of a GOD, then the Duties of Men one to another, which are "founded upon the Society of Mankind, and then Moderation and Greatneſs of Mind." Every one knows that the Goſpel obliges us to reſpect GOD, our Neighbour, and ourſelves, as the three principal Objects, and greateſt Originals of all our Duty. This Diviſion is clearly deduced from St. *Paul*'s Words, *Tit.* ii. 12. *The grace of* GOD, *which bringeth ſalvation — teacheth us to deny ungodlineſs and worldly luſts, and to live ſoberly, righteouſly, and godly in this preſent world.* We may, alſo, here take notice of that Paſſage of the philoſophick Emperor, Τρεῖς σχέσεις, ἡ μὲν πρὸς τὸ αἴτιον περιεχόμενον, ἡ δὲ πρὸς τὰ ἐκ τῆς αἰτίας συμβαίνοντα πᾶσι πάντα, ἡ δὲ πρὸς τοὺς συμβιοῦντας· *i. e.* "We have three Obligations, the one to the Cauſe which is ſur"rounding us, *i. e.* our Body; the other ties us to the ſupreme Cauſe from whom all things come, which happen in this "World, *i. e.* GOD, who is the univerſal; the third and laſt ties us to all Men, *i. e.* as joined in Society." *M. Antonin.* Lib. viii. §. 27.

[3] The laſt Editions ſay, *in foro humano*, and the *Engliſh* Tranſlator follows them, rendring it, *in human Regard*; whereas the firſt Editions expreſſed it, *in foro divino*, as the Reaſoning of the Author plainly requires; and Mr. *Hertius*, in his Edition in 1706, hath ſuffer'd this Miſtake to paſs.

[4] See *Note* on §. 8. Lib. iii. Chap. ix.

[5] All that our Author ſays in this Chapter reſpects only the Obligations of the natural Law, which obliges us to act, or not act indiſpenſibly, and which hath for its Object ſuch Actions as contain in them an Agreeableneſs, or Diſagreeableneſs to the human Nature; but, as I have already ſaid above, *Lib.* i. *Chap.* vi. §. 16. *Note* 1. we muſt acknowledge a natural Law of ſimple

CHAP. IV.

Of the Duties and Performances of Man towards himself; as well in regard to the Improvement of his Mind, as to the Care of his Body, and of his Life.

The CONTENTS.

I. *Every Man is to take Care of himself.*
II. *In what Care consists.*
III. *The Mind is to be instructed in Religion:*
IV. *And all corrupt Opinions to be rooted out.*
V. *The Knowledge of a Man's self is necessary.*
VI. *A Man should know his Soul and its Offices:*
VII. *And how great its Abilities are.*
VIII. *Nothing above its Abilities may be attempted.*
IX. *How much we are to labour after Fame:*
X. *And how much after Riches:*
XI. *And about Pleasures.*
XII. *Our Passions are to be governed by Reason.*
XIII. *Of our Study for Learning.*
XIV. *Of the Care of the Body.*
XV. *Of the Use of Life.*
XVI. *What Obligations we are under to preserve Life.*
XVII. *How far our Life is to be employed in the Service of others.*
XVIII. *Whether it is to be endangered for them.*
XIX. *Whether Self Murder is lawful.*

ALtho' this be a Quality common to [1] Man, with other Animals, that he is concern'd for his own Preservation, and is naturally glad to be in as good a Condition as possible; yet that *his* [2] Care of himself ought to be of a much more refin'd, and of a much nobler Strain, than what we can suppose in brute Creatures, there is good Reason to conclude: Not only because he hath receiv'd more Endowments than they, and such as are more capable of fruitful Culture, and of useful Improvement; but farther, because he cannot perform the Duties to which he stands oblig'd, unless he brighten and quicken his Faculties by good Exercise, and make them more vigorous and more ready, in the Production of worthy Actions. Besides, the Labour which a Man spends on his own Improvement, is not terminated in himself; but spreads abroad its Fruit to the Benefit of all Mankind; and the better any Person approves himself in the Management of his own Gifts and Abilities, he is justly esteem'd the more excellent Citizen of the World, and the more generous Benefactor to his Fellows. Wherefore Man, in his Endeavours to fulfil the Laws of Society, to which he is by his Creator directed and designed, hath good Reason to employ his first Pains and Study on himself; since he will be able to discharge his Duty towards others with so much more Ease and Success, the more diligent he hath been in advancing his own Perfection. Whereas he who is unuseful to himself, and idle in his proper Concerns, can give other Men but little Reason to expect Advantage from his Pains.

There is scarce more Necessity for our engaging in this Care, than there is Solicitude and Difficulty in the Prosecution of it. For, in the first Place, Men are born in an entire Ignorance of Things, and their Minds, whilst yet tender, may be easily so far defiled, and tainted with vile Opinions, that it will afterwards be no easy Labour to wash off the Stains. Besides, we bring hereditary and inbred Corruptions with us into the World, which draw us all, more or less, out of the straight Path of Reason; and unless we bridle and restrain them, pour out a Flood of foul and unworthy Actions, thro' the Course of our whole Lives. And it may, perhaps, quicken our Industry, to consider that we have but one Time allow'd us to act our Part in, and cannot hope for a second Entrance on the Stage, to amend the Faults of our first Performance. For that old Complaint in *Euripides* will ever be as vain and ineffectual as when it was first made [3]:

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simple Permission, by virtue of which we may act, or not act, according as we judge fit, every Thing which has not a necessary Agreeableness or Disagreeableness with the Nature of Man, unless it be expressly ordered or forbidden by some positive Law, either divine or human. 'Tis upon this natural Law of simple Permission, that all Rights, as well natural as accessory and acquired, are founded, which are of such a Nature, that we make use of them or not, as we judge convenient, or may even renounce them, either for a Time, or for ever. After such Renunciation the Actions permitted may be either commanded or forbid, and so become obligatory; but, as soon as this Obstacle is remov'd, they return of themselves to their natural State of Indifference.

§. 1. [1] This Objection ought first to have been answered, before our Author had entred upon this Subject, *viz.* How a Man can be under any Obligation to himself? Our Author meddles not with it till he comes to §. 16. where see *Note* 2. This Neglect proceeded from hence, that the fifteen first Paragraphs were not in the first Edition, but being added in the second, the Objection became so far postponed.

[2] Our Author here puts the Care of preserving a Man's self, before that of perfecting himself, which is indeed the more natural Order; for, besides, that the Idea of Preservation is a Thing more simple than that of Perfection, our Being certainly precedes our Well-being; and in vain a Man thinks of perfecting himself, if he has not before taken all the Care he can of preserving himself. But if the Author expresses himself well in this first Period, 'tis by meer Chance, for he forgets himself the next Moment, and takes a clear contrary Method in this Chapter; for all he says in this, and the thirteen following Paragraphs, concerns only the Care of perfecting a Man's self; and he begins not, till the fifteenth, to speak of his Life, and the Preservation of it. Further, we must observe, that, according to the Principles I have above laid down, to rectify our Author's Notions, (Chap. iii. §. 15. *Note* 5.) the Duties of Man, with regard to himself, directly, and immediately, flow from Self-love, which obliges him both to preserve himself, and put himself into as good a Condition as possible to attain all the Happiness that he is capable of. *Montaigne*'s Words may be pertinent here. "'The principal Office, (says he) which we have here, is for "every one to govern himself. 'Tis the chief End of our Being. He that forgets to live well and piously, and thinks to dis-"charge his Duty, by directing and instructing others, is a Fool. He that is careless of his own Health, and chearful Con-"versation, to serve others, takes, in my Opinion, an ill and unnatural Course.". *Essays*, Lib. iii. Chap. x. p. 748. But we must always remember, that Self-love must be managed according to every one's Condition, and without any Prejudice to Religion or Society. See the general Rules, which I have laid down in the Note above quoted.

[3] *Euripid.* Supplic. 1080. *& seqq.*

Οἵ μοι. τί δὴ βροτοῖσιν οὐκ ὄζιν τόδε
Νέους δ' ἐς ἓν, κοὐ γέροντας αὖ πάλιν;
Ἀλλ' ἐν δόμοις μ' ἦν τι μὴ καλῶς ἔχειν,
Γνώμασιν ὑστέροισιν ὀρθούμεθα.
Αἰῶνα δ' οὐκ ἔξεσιν, εἰ δ' ἦμεν νέοι
Δὶς κοὐ γέροντες, εἴ τις ἐξαμάρτανεν,
Διπλᾶ βίᾳ λαχόντες, ὀρθούμεθ' ἄν.

See *Gataker* upon *Marcus Antoninus*, Lib. ii. §. 5. p. 60. Edit. *Londin.* 1652.

Me

Me miſerable! that Men ſhould be deny'd
The Gift of ſpringing to a ſecond Youth,
A double Age! The Structures which we raiſe
If found defective, later Cares reform,
New modell'd: But our unhappy Frame
Stands without Change, and falls without Repair!

O! might we turn our Steps, and tread again
The Path of Life, what Slips we once had made
We would correct, and every cheating Maze
Avoid, where Folly loſt our Way before.

Now ſince Man conſiſts of two Parts, a [1] *Soul* and a *Body*, whereof the former is the great Principle and Spring of human Actions, the latter ſupplying the Place of a ſubordinate Inſtrument, the Care and Improvement of the firſt and nobleſt Part, may juſtly challenge the Precedence in our Endeavours [2].

II. [3] The Culture of the Mind, which all Men are oblig'd to undertake, and which is abſolutely neceſſary for the Performance of human Duty, conſiſts chiefly in theſe Particulars; that we obtain true Opinions concerning all ſuch Things as our Duty bears any Reference to; that we ſet a right Judgment and Price on thoſe Objects which commonly excite our Appetites, and that we temper and regulate our Paſſions by the Direction of ſound Reaſon [4].

III. Amongſt the Opinions then which it highly concerns all Men to ſettle and to embrace, the Chief are thoſe which relate to Almighty GOD, as the great Creator and Governor of the Univerſe. That there is really exiſting a ſupreme Being, from whom all other Things derive their Original, and the Principle of their Motion; not as from a dull and ſenſeleſs Power, (as the Weight, for Example, in a Clock) but as from a Cauſe endued with Underſtanding, and with Freedom of Choice. That this eternal Being exerciſes a Sovereignty not only over the whole World, or over Mankind in general, but over every individual human Perſon: Whoſe Knowledge nothing can eſcape: Who, by virtue of his imperial Right, hath enjoin'd Men ſuch certain Duties by *natural Law*, the Obſervance of which will meet with his Approbation; the Breach, or the Neglect, with his Diſpleaſure: And that he will, for this Purpoſe, require an exact Account, from every Man, of his Proceedings, without Corruption, and without Partiality [5].

Now as the main Parts [6] of human Duty turn on this Belief, ſo is it the only Foundation of that ſweet Tranquility

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[1] So *Salluſt* ſpeaks, *Sed omnis noſtra vis in animo & corpore ſita eſt. Animi imperio, corporis ſervitio magis utimur; alterum nobis cum Diis, alterum cum belluis commune eſt.* De Bel. Catilin. Chap. i.

[2] Thus *Plato* judiciouſly reflects to the ſame Senſe, Καὶ μὴν τοῦτο ὅ [ὡμολόγηϑ] ὅτι ψυχῆς ἐπιμελητέον, καὶ εἰς τοῦτο βλεπτέον ——Σωμάτων ὴ καὶ χρημάτων τὴν ἐπιμέλειαν ἑτέροις παραδοτέον, i. e. *We muſt all confeſs, that the Soul is to be chiefly taken Care of, and above all Things to be looked after. The Care of our Bodies and Eſtates we may commit to others.* In Alcib. i. p. 448. See, alſo, his Book *De Legib.* Lib. v. in the Beginning; and *Cicero De fin.* Lib. v. Chap. xii, xiii.

§. 11. [3] This Paragraph, and the following, afford an Example of the Corrections and Additions which I have made of the Lemma's in the Margin, to fit them to the Subject treated on, and to contribute to the Clearneſs of his Ideas. The Author ſhews in what this Care conſiſts, as if he were ſpeaking in general of the Care a Man ought to take of himſelf, whereas this Paragraph treats only of the Care of the Soul, in Oppoſition to that of the Body. In the following Paragraph I have diſtinguiſh'd and explain'd more diſtinctly the different Duties, which make the Parts of the general Duty.

[4] *Seneca* hath a fine Paſſage to this Purpoſe, which begins thus, *Epiſt.* lxvi. Edit. *Gronov. Animus intuens vera, peritus fugiendorum ac petendorum, non ex opinione, ſed ex naturâ pretia rebus imponens——pulcherrimus, ordinatiſſimus, cum decore, cum viribus ſanus & ſiccus, imperturbatus, &c. i. e.* "The Mind looks into the Truth, is ſkilful in knowing what is to be avoided "and deſired; ſets a Price on Things, not according to the common Opinion, but according to its Nature——is moſt beauti- "ful, orderly, graceful, and tho' of great Force, yet is ſound, uncorrupted, and undiſturb'd, *&c.*

§. 111. [5] *Primus eſt Deorum cultus* (ſays *Seneca*) *Deos credere, deinde reddere illis majeſtatem ſuam, reddere bonitatem, ſine qua nulla majeſtas eſt. Scire illos eſſe, qui præſident mundo, qui univerſa vi ſuâ temperant, qui humani generis tutelam gerunt, interdum curioſi ſingulorum. Hi nec dant malum, nec habent; cæterum caſtigant quoſdam, & coercent, & irrogant pœnas, & aliquando ſpecie boni puniunt. Vis Deos propitiare? bonus eſto. Satis illos colluit, quiſquis imitatus eſt.* Epiſt. xcv. *i. e.* "The Worſhip of "the Gods conſiſts, firſt of all in believing their Exiſtence, and then in acknowledging their Sovereignty and Goodneſs, without "which there can be no real Greatneſs. We muſt, alſo, be throughly perſuaded, that they govern the World, and by their "Power order and diſpoſe all Things, who take Care of Mankind in general, and ſometimes concern themſelves in private "Affairs. They neither are evil, nor do any, yet they correct ſome Perſons to reſtrain their Malice; yea, and, ſometimes, "puniſh them whom they ſeem to favour. Would you have them propitious and kind to you? Be good. The greateſt Honour "can be paid them, is to imitate them." See *Cicero De Legibus*, Lib. ii. Chap. vii. and *Epictet. Enchirid.* Chap. xxxviii. And above all, with regard to the juſt Notions of GOD, and the Duties reſulting from thence, ſee Mr. *Wollaſton*'s *Religion of Nature delineated*, §. 5.

[6] Our Author, in his *Abridgment of the Duties of a Man and a Citizen*, Lib. i. Chap. iv. hath given us a Syſtem of natural Religion; *i. e.* the Duties of Man to GOD; which, becauſe I have ſaid, Chap. iii. §. 15. *Note* 5. ought not to be excluded our Knowledge of the Law of Nature, I ſhall here give an Extract of what he there ſays, which is, Theſe Duties, ſo far as they can be diſcovered by the Light of Reaſon only, may be referred in general, to ſuch as concern, 1. The Knowledge; and, 2. The Worſhip of GOD. So that the Syſtem of natural Religion comprizes Propoſitions; 1. Speculative; and, 2. Practical. The ſpeculative Propoſitions are, I. That we muſt believe, 1. That there is a GOD. See §. 20. of the foregoing Chapter. 2. That this GOD created the World. See his *Abridgment of the Duties of a Man and a Citizen*, Lib. i. Chap. iv. § 3. 3. That he governs all Things by his wiſe Providence, which takes particular Care of all Mankind. And indeed it is the ſame in reſpect to Morality, to deny the Exiſtence of GOD, as his Providence, as the Pagans themſelves acknowledged. See the Paſſages quoted Chap vi. Lib. i. § 11. *Note* 3. 4. That nothing can be attributed to GOD that implies the leaſt Imperfection. For, ſince he is the firſt Cauſe of all Things, he can't be ſuppoſed, without a manifeſt Abſurdity, to have any Imperfection, nor want any of thoſe Perfections, of which we, who are his Creatures, can form to ourſelves any Notion. See the *Abridgment* above-mentioned, §. 5. and what is ſaid in the next Paragraph of this Chapter. The practical Propoſitions of natural Religion contain all the Parts of, II. Divine Worſhip; which is either outward or inward. The inward conſiſts in the *Honour* that is given to GOD. Now Honour being nothing elſe but the Opinion which we have of the Power or Goodneſs of any Thing, we honour GOD, when, with regard to his infinite Power and Goodneſs, we conceive of him all the Sentiments of Reſpect and Reverence we are capable of. From whence it follows, that we muſt love him, as the Fountain and Author of all good Things; hope in him, as the Being upon whom all our Happineſs depends, both now and for ever; ſubmit entirely to his Will, having a Perſuaſion that he will do all Things for our Good, and that he knows better than ourſelves what is convenient for us; to fear him, as a Being of infinite Power, by which he is able to inflict the moſt terrible Evils upon thoſe that offend him; laſtly, to obey him in all Things with the moſt profound Submiſſion, as our Creator and Lord, Almighty, and of all Goodneſs. Outward Worſhip conſiſts principally in the following Duties. 1. We muſt give GOD Thanks for all the good Things we receive from him. 2. We muſt, as far as in us lies, regulate our Actions according to his Will, *i. e.* actually obey him, ſo far as Ignorance and human Frailty will permit. 3. We muſt admire and celebrate his Greatneſs. 4. We muſt addreſs ourſelves to him by Prayer, to obtain all the Bleſſings we ſtand in need of, and to deliver us from all the Evils which threaten us. Indeed, Prayer is a Sign of our Hope and Confidence; and Hope implies a ſpecial, though tacit Dependance upon the Goodneſs and Power of him in

Tranquility and Acquieſcence of Mind, which Men inwardly enjoy, and 'the very Fence and Bulwark of all that Probity, which we are to exerciſe towards our Neighbours; without which no Man can ſeriouſly and heartily do a good Action himſelf, or give ſufficient Caution and Security of his honeſt Intentions to others[a]. And although it appears from the Ordinances of the Chriſtian Religion, that GOD is not ſo far pleas'd with every Kind of Worſhip which Men pay him, as to embrace them with peculiar Favour, and to give them a Title to eternal Life, which good Effects follow only that Inſtitution, and Way of Service, which he hath reveal'd in a ſingular Manner to the World: Yet a ſerious Perſuaſion concerning the divine Exiſtence and Providence, under whatever particular Apprehenſions, or particular Worſhip, hath, however, thus much of Force and Efficacy, as to render Men more obſervant[z] of their Duty. To prove this Aſſertion we need only conſider, that there have been

[a] *Grotius in Lib. Sapientiæ*, Chap. xiii. ver. 1. *How high ſoever ſome People talk about Honeſty's being deſirable meerly on its own Account, yet ſo great is the Force of theſe outward viſible Things upon our Mind, that, without a full Perſuaſion of the divine Providence and Retribution, and without ſome Syſtem of Law to guide Men in the true Way of Acting, it is impoſſible but that they ſhould wander into moſt grievous and fatal Dangers. For, as human Reaſon is looſe and giddy, when the Paſſions have overcome the Judgment, and the Manners are ſuited to the Paſſions, it eaſily finds out a Colour and Diſguiſe for Sin, and ſo long obſtinately refuſeth to hear, till it grows quite deaf. Therefore the wiſe Man pronounceth thoſe to be miſerably vain, who are ſo far from having a carefull Regard to the Knowledge of* GOD, *and of his Providence, as to let thoſe great Points depend on every Man's Fancy and Choice: Than which nothing can be contriv'd more deſtructive, I do not ſay to good Manners, but to Government and Society.*

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in whom we truſt. 5. When we are obliged to take an Oath, we ought to ſwear by the Name of GOD, and afterwards obſerve religiouſly what we have engaged ourſelves to, by taking GOD to witneſs, as his infinite Knowledge and Power does require. 6. We ſhould never ſpeak of GOD, but with the greateſt Care and Circumſpection, for it is a Sign of Fear, and that is a tacit Regard to the Power of him whom we fear. From hence it follows, that we muſt not uſe the Name of GOD lightly, and without Neceſſity, in our common Diſcourſe, for this ſhews want of Circumſpection; that we ſhould never take an Oath, but upon Neceſſity; that we ſhould never curiouſly and nicely ſearch into the Nature of GOD, and the Acts of his Providence; for that were to confine the divine Nature within the narrow Bounds of our own feeble Reaſon. 7. Whatever we do in relation to GOD, ought to be moſt excellent in its Kind, and proper to ſhew our moſt profound Reſpect to him. 8. That we muſt honour him, and ſerve him, not only in private, but publick, and in the Sight of Men. For what a Man does only in private, looks as if he were aſhamed to do it. Whereas publick Worſhip is a Teſtimony, not only of our Zeal, but is, alſo, an Example to others, and often induces them to join in the ſame Actions. 9. And, laſtly, We muſt apply ourſelves as cloſe as poſſible to the Practice of ſuch Duties as the natural Law preſcribes, both in reſpect to ourſelves and others; which ſome call an *indirect Worſhip*. Indeed, as the Contempt of GOD's Commands is the greateſt Affront we can offer to him; ſo, on the contrary, there is no Sacrifice ſo agreeable to him as Obedience to his Laws. Now the Law of Nature is a divine Law, as we have before proved. This is what our Author has delivered in ſhort. I might alledge ſeveral Paſſages of Heathen Authors to this Purpoſe, but this Note is already too long: Nevertheleſs, we will add what Mr. *Thomaſius* (*Inſtit. Juriſp. Divin.* Lib. ii. Chap. i. §. 11, *&c.*) has ſaid, *viz.* That the Law of Nature indiſpenſibly requires a direct outward Worſhip, ſo far as is neceſſary to ſhew that we do not contemn the Deity, and not ſo far as it conſiſts in giving a poſitive Honour to the Deity, by ſome exterior Acts, the Omiſſion of which is no Sign of Contempt to him. This able Lawyer grounds this Aſſertion upon this, That GOD has no need of our Service, and that he is the Searcher of Hearts, the inward Worſhip, without which all outward Acts of Piety are of no Worth, is ſufficient to diſcharge us of the Obligation we owe to the ſupreme Being, on whom we depend. As to what concerns other Men, Mr. *Thomaſius* ſays, That the Omiſſion of the outward Worſhip does not hurt either human Society in general, nor civil Society in particular, provided there be an inward Worſhip paid. But it does not, from thence, follow, in my Opinion, that there is no Neceſſity of worſhipping GOD outwardly, and that this Neceſſity is not ſufficiently known by the Light of Reaſon. I own, that as GOD is ſelf-ſufficient to his own Happineſs, all our Homage adds nothing to his Glory; and therefore, when he requires it, it is for two Reaſons. The firſt, becauſe his Wiſdom does not allow him to diſpenſe with the neceſſary Conſequence there is in the Relation between the Creator and the Creature; between the ſovereign Legiſlator and Creator of the World, and the Men he has plac'd upon the Earth. The ſecond is, that this Worſhip ſerves to enable us the better to perform our other Duties, and ſo contribute to our own Happineſs. St. *Irenæus* has acknowledg'd and expreſs'd this in his own Way: *Sic & ſervitus erga Deum, Deo quidem nihil præſtat, nos opus eſt Deo humano obſequio.*——*Propter hoc autem exquirit Deus hominibus ſervitutem, ut, quoniam eſt bonus & miſericors, benefaciat eis qui perſeverant in ſervitute ejus*, &c. Contra Hæreſ. Lib. iv. Cap. xiv. *Edit. Maſſuet. &c.* (XIX. Vulg. Edit.) But the Reaſon drawn from the Inutility of our Homage, in reſpect to GOD, proves nothing here, both becauſe of what I have ſaid, and becauſe it proves too much: For it would follow thence, that the interior Worſhip was no more neceſſary than the exterior, ſince GOD has as little need of the one as the other. The other Reaſon alledg'd by Mr. *Thomaſius* proves only, that the external Worſhip is not always neceſſary; and that, when we have not Opportunity to perform it, or are prevented by certain Obſtacles, the internal Worſhip is ſufficient before GOD, who chiefly regards the Heart. But it cannot be reaſonably inferr'd from hence, that the Acts of external Worſhip are not neceſſary in a certain Degree. The Neceſſity here being equally founded on the Nature of Man, and the Intereſt of Society; for how can we conceive that there is a true Piety contain'd in the Heart, unleſs it ſhew itſelf by ſome outward Acts of Religion? Men are made in ſuch a Manner, that they do not think that they ſhew a ſufficient Reſpect one to another, if they do not give ſome Proofs of it by Word of Mouth, or ſome inſignicant Action, ſeeing they can no ways be aſſured of the Sincerity of each other's Intention. But, if the inward Worſhip of GOD is neceſſary for the Welfare of Society, as Mr. *Thomaſius* ſuppoſes it, I can't ſee how ſuch a purely ſpiritual Religion can be of any great Uſe; unleſs we will ſuppoſe that all Men are equally capable of knowing their Duty to GOD, and as careful to practiſe it, ſo that none need to be inſtructed or exhorted by others. Meer Talk is not ſufficient for the ignorant and common People, which are the greateſt Part of Mankind; there muſt be ſomething that will affect their Senſes, and rouze their Attention, without which they'll forget the Being of a GOD. So that though I might enlarge upon the Obligation to outward Worſhip, of which we ſhall ſpeak more afterward, Chap. vi. §. 2. we muſt grant, 'tis abſolutely neceſſary. And though Mr. *Thomaſius* declares, that he was always of that Opinion, yet I ſee him owning, in his *Fundament. Jur. Nat.* p. 150. that outward Worſhip is neceſſary for the Regulation of Honeſty and good Order, which, as he explains theſe Terms in the general Reformation of his Syſtem, lay an Obligation, if not ſo binding, yet, at leaſt, as true and indiſpenſible, in my Judgment, as that he calls *juſt*.

[1] *Boethius* de Conſulat. Philoſoph. in fin. *Magna vobis eſt, ſi diſſimulare non vultis, neceſſitas indicta probitatis, cum ante oculos agitis judicis cuncta cernentis*, *i. e.* "Your living under the Eyes of an All-ſeeing Judge, lays a kind of a Neceſſity upon you to "be good and virtuous, if you do not wilfully blind yourſelf."

[z] *Lucian de Imaginib.* Ὡς ὅσοι τὸ θεῖον μὴ ἐν παρέργῳ σέβουσιν, ἅτοι καὶ τὰ πρὸς ἀνθρώπους ἄριστοι ἂν εἶεν, *i. e.* "Thoſe who "are moſt ſtrict and conſcientious in their Duty to GOD, are the moſt honeſt and regular in their Dealings with Men." It is certain that religious Motives are of great Force to wean Men from Vice, and engage them to Virtue, however confuſed and imperfect Mens Notions of the Deity are. This may appear ſomething difficult to conceive, in reſpect of the Heathens, but we have Matters of Fact to prove it. I don't ſpeak of Philoſophers, who had more clear Notions of Religion than the Vulgar, although they dared not deliver them openly. Mr. *Selden* (in his Treatiſe *De Jure Nat. & Gent. ſecundum Hebræos*, Lib. i. Chap. viii.) has collected ſeveral Authorities to make it evident, that moſt of them looked upon the Laws of Nature as derived from the Deity, who will puniſh the Tranſgreſſion of them, and reward their Practice. And 'twould be no hard Thing to add to them many other Paſſages. Nay, the very People, notwithſtanding the prodigious Superſtition into which they were plunged, preſerved ſome Tincture of this important Principle, either by reaſon of that natural Relation there is between the Ideas of

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been of old, and ſtill are, Men profeſſing Religions, which we muſt own to be deſtructive to Salvation, as ſuppoſe *Mahometans*, or *Pagans*; who, nevertheleſs, by virtue of their Perſuaſion of GOD's Providence, have ſhewn no inconſiderable Care and Concern for Honeſty and Juſtice; ſo as not to be outdone

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the Deity, and Sanctity, which hindered ſuch Men, as had not wholly given themſelves up to Vice, from attending to the Conſequences of the received Opinions, or becauſe there remained ſome Footſteps of the antient Tradition of one only true GOD, the Creator of the World, and the Author and Protector of human Society. This ſeems plainly to ariſe from the common Opinion amongſt moſt of the Heathens, concerning the Rewards and Puniſhments of another Life. (See what our Author has ſaid, Chap. iii. §. 20.) We may, alſo, find ſome expreſs Words relating to this Matter in the Poets, who, as every one knows, accommodated themſelves to the common Opinions. *Selden* has alledged many in the Place above quoted; we ſhall produce ſome others, *viz.* in the *Oedipus* of *Sophocles*, Act iii. the Chorus ſaith,

Εἴ μοι ξυνείη εὐαγεῖν μοῖρα τὰν
Εὐσεπτον ἁγιείαν λύγαν.
Ἔργων τε παντων, ὧν νόμοι πρόκεινθ'
Ὑψίποδες, ἀερίαν δι' αἰθέρα
Τεκνωθέντες· ὧν Ὄλυμπος
Πατὴρ μόνος, οὐδέ νιν θνατὰ
Φύσις ἀνέρων ἔπλαστεν, οὐδὲ
Μάν ποτε λάθα κατακοιμάσει.
Μας ἐν τούτοις Θεὸς,
Οὐδὲ γηράσκει.

Let the Gods be ſo propitious to me,
As I preſerve myſelf in Sanctity,
In Words, and Deeds, by the Laws unto us given,
Not by poor Mortals, but the GOD of Heaven.
Which Laws no Mortal can aboliſh quite,
For GOD's in them; and, by his Power and Might,
Will triumph over all that is not right,
For he can ne'er grow old———

See, alſo, the *Antigone* of the ſame Poet, ver. 455. *Euripides* in his *Jon.* ver. 440, *&c.* and a Paſſage of *Heſiod*, which our Author hath quoted in the foregoing Chapter, §. 2. to which we may add, ver. 321, *&c.* in the Work of this laſt Poet. I will conclude with *Cicero*, who was not leſs ſuperſtitious, (*De Legib* Lib ii. Chap. vii.) *Utiles autem eſſe opiniones has, quis neget, cum intelligat, quàm multa firmentur jurejurando, quantæ ſalutis ſint fœderum religiones? quàm multos divini ſupplicii metus à ſcelere revocarit? quamque ſancta ſit ſocietas civium inter ipſos, diis immortalibus interpoſitis tum judicibus, tum teſtibus? i. e.* "Who can deny the Uſefulneſs of theſe Opinions, [*viz.* of the Gods and Providence] when he conſiders, how many "Things are confirmed by the Solemnity of an Oath? How much the Security of Leagues and Alliances depend on the In- "terpoſition of Religion? How many the Fears of divine Vengeance keep from Wickedneſs? And how careful Citizens are "to diſcharge their Duties to each other, becauſe they believe the immortal Gods are not only the Witneſſes, but will "be the Judges of their Actions?" See what I have ſaid, Lib. i. Chap. vi. §. 12. *Note* 7. and Lib. ii. Chap. iii. §. 19. *Note* 2.

I have mention'd in this laſt Note ſomething touching a Compariſon between a Society of *Atheiſts*; and another, of ſuch as have ſome Notion of a GOD, though imperfect and incoherent; but ſince that Note was compoſed and printed, there appear'd, (in 1704.) *A Continuation of the diverſe Meditations upon Comets*, of Mr. *Bayle*, where he ſpeaks ſomething that may ſerve to ſtrengthen and explain my Aſſertion; but I ſhall firſt begin with what Mr. *Le Clerc* has ſaid upon this Subject, in his *Biblioth. Choiſie*, Tom. v. p 302, 303 in Anſwer to this Queſtion, Whether Atheiſm is to be preferr'd to Pagan Idolatry? To which he ſays, "We muſt, in my Opinion, diſtinguiſh firſt of the Societies, conſider their Opinions abſtractly, and then, on the one "Side, deſcribe Atheiſm, and, on the other, Idolatry. 'Tis poſſible we may find one ſort of Idolatry preferable to Atheiſm, and "another worſe; and ſo I can give no direct Anſwer to Mr. *Bayle*'s general Queſtion. In the ſecond Place, when we come to "conſider, not only the Opinions in general, but the Societies in themſelves, which profeſs the Pagan Idolatry or Atheiſm, we "muſt make, alſo, ſome curious Diſtinctions, and divide the Queſtion into ſeveral Propoſitions, according to the different Caſes "which are put, and to which we muſt anſwer negatively or affirmatively, according to their Nature." Mr. *Le Clerc* gives us an Example, in the ſame Volume, ſpeaking of the Hiſtory of the *Yncas*, written by *Garcilaſſo de la Vega*, Page 380, 381. Theſe are his Words, "If what *Garcilaſſo de la Vega* ſays of the Opinions, Laws, and Manners of the Subjects of the "*Yncas*, be true, there is no idolatrous Nation in the World, not excepting the moſt polite and learned, where there are ſuch "good Laws, or ſo well obſerved. Their Religion, which chiefly conſiſts in worſhipping the Sun, whom they believe to be "the Father of the *Yncas*, not with human Sacrifices, as they do in the other Parts of *America*, but with Beaſts and other "Things, has been the leaſt corrupted of any among the Idolaters. Beſides the Sun, they hold there is another Deity, which "they call *Pacha-camac*, a Word that ſignifies, in their Language, *The Soul of the World*. They ſpeak of this God as a Being "inviſible, whoſe Nature is incomprehenſible, and who created the Sun and the Stars. They believe the Immortality of the "Soul, and have ſome confuſed Notion of a Reſurrection. Suppoſing that all this which *Gar. de la Vega* ſays is true, we may "ſay, that ſuch an idolatrous Society as this, is incomparably better than a Society of Atheiſts; and, in ſome Reſpects, may be "preferred to many Societies, that otherwiſe have better Principles." Tho' this Queſtion in itſelf be not very important, becauſe a Society of meer Atheiſts is a Thing which will never be found, at leaſt, not in any civiliz'd Country; yet I doubt not, but many Perſons wiſhed Mr. *Le Clerc* had deſcended to more Particulars

I ſuppoſed in my Note, to which this is only a Supplement, that I did not intend to ſpeak of the Opinions of the Atheiſts or Idolaters, conſidered in themſelves and abſtractly, but only of the Effects they are able to produce in reſpect to Societies. I ſuppoſed, alſo, that in the Parallel between a Society of Idolaters and Atheiſts, we might conceive an Idolatry which did not deſtroy the principal Fundamentals of Religion, *i. e.* the Exiſtence and Providence of ſome Deity. For it is certain, that Faith in the Exiſtence of a GOD, without Faith in his Providence, is, at the Bottom, indirect Atheiſm, as to Morality. This Mr. *Bayle* has own'd in ſeveral Places; for inſtance, in his Hiſtorical and Critical Dictionary. Art. *Lucretia*, Rem. K. Upon which foot, I think, that all Things being otherwiſe equal, a Society of Atheiſts, *i. e.* a People compoſed of Men learned and unlearned, Perſons of all Orders and Conditions, bearing that Character; ſuch a Society, I ſay, will be more corrupt than another, which preſerves the fundamental Principles of Religion, though mixt with Errors, and Things inconſiſtent with the Truth. And ſince in this Queſtion we have chiefly an Eye to the antient Heathens, let us ſuppoſe, for Example, that the Commonwealth of *Greece*, or ſome *Roman* Province, were on a ſudden turned Atheiſts, and no Man had any Senſe of Religion; I will not ſay, that, after ſuch a Change, that Commonwealth or Province could not keep up any tolerable Order in Civil Society, but there would be among them many more Diſorders than were before. And my Reaſons are theſe: Among the Heathen, the People were not ignorant of the Agreement there is between the fundamental Principles of Religion, and the Obſervation of the Laws of Nature. The Poets, who principally wrote for the People, have delivered many Things, (as Mr. *Le Clerc*, in his *Biblioth. Choiſie*, Tom. iii. ſhews) that prove the true Notion of GOD was not quite blotted out of their Minds. For Example, the moſt antient of them, *Homer* and *Heſiod*, ſpeak thus of the Gods, that they are *Almighty, Immortal, Good, Ommiſcient, Wiſe, Happy, Lovers of Virtue*, &c. (See the Index of the *Gnomologia Homerica* of *Jac. Duport*, who refers to ſeveral Paſſages of *Homer*, which he compares with the other he has taken from the moſt antient Writers.) Moreover, the Unity of the Godhead itſelf was not altogether unknown to the Poets, although Mr. *Bayle* ſeems to think that all the Heathens were ignorant of that Truth. Nothing can prove this better and more fully, than theſe Verſes of *Sophocles*, in a Tragedy now loſt, but preſerved to us in *Grotius*'s *Excerpta*, Page 149.

Εἷς, ἢ ἀληθείαισιν, εἷς ἔστιν θεὸς,
Ὃς οὐρανὸν τ' ἔτευξε, καὶ γαῖαν μακρᾶν,
Πόντου τε χαροπὸν οἶδμα, καὶ νέμων βίας
Θνητοὶ δ' ὑπὸ πολλοὶ καρδίαν πλανώμενοι
Ἱδρυσάμενοι τιμάτων ἄγαλμα ψυχὰς,
Θεῶν ἀγάλματ' ἐκ λίθου, ἢ χαλκέων,
Ἢ χρυσοδύκτων, ἢ 'λεφαντίνων τυπας
Θυσίας τε τούτοις, καὶ καλὰς πανηγύρεις
Τεύχοντες, ὅπως εὐσεβεῖν νομίζομεν.

In Truth there are no more Gods but one,
Who made the Heaven, far extended Earth,
The blue ſwelling Sea, and fierce Winds.
Yet many Men being groſly deceived,
Have erected, to comfort themſelves in Trouble,
Images of the Gods, of Gold, and Stone, and Braſs;
And offer Sacrifices to them in their Aſſemblies,
And think that they are religious.

Several

outdone by many Chriſtians, at leaſt, as to external Performances. Nay, there are not wanting Perſons, who, from the Experience of long Travels, pretend to affirm, that Chriſtianity hath not been able to alter the common Diſpoſitions of ſome Nations towards particular Vices; and that 'tis not eaſy

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Several eccleſiaſtical Writers quote theſe Verſes; among others, *Clement* of *Alexandria Protreptic.* Cap. vii. and *Strom.* Lib. v. Yet Mr. *Bentley* (in a Letter to the deceas'd Mr *Mill*, annext to the Chronicle of *Jean Malala*) maintains, that they are neither *Sophocles*'s, nor any other heathen Writers, but were forg'd by a *Jew*, call'd *Hecateus* of *Abdera* But tho' this Conjecture ſhould be allow'd, there are ſeveral other Paſſages, beſides, what are alledged above, might be produced, from heathen Authors, to prove that they thought the Practice of Virtue was well-pleaſing to the Gods; on the contrary, Vice odious, notwithſtanding the Crimes attributed to them in their Fables Mr *Bayle*, in the *Continuation of diverſe Meditations*, Page 654.) ſays, "That ſimple Theft, for Example, and Lying, were not contrary to the Ordinances which their Gods had expreſly delivered, "and ſo they believed that their Gods did not regard them," I own, that their Poets ſpake very little of Morality to the People, but this hinders not but that the principal Duties of the Law of Nature were known among the People, who looked upon them as Laws, to which the Gods required their Obſervation, although their Notions of them were very obſcure, and corrupted by ill Cuſtoms. This is what the Poets always ſuppoſed, who contributed more to their entertaining the Notions of Virtue and Vice, than the Prieſts, who, as wicked as they were, durſt not openly contradict them. We find in *Euripides* this fine Sentence, which he makes a Woman ſay, *That the Gods abhorred all Oppreſſion, Extortion, and every unjuſt Way of enriching ourſelves.* The ſame Poet, alſo, ſays, that every Crime is A GREAT IMPIETY, as well as a great Folly, in theſe Words,

Τὸ δ' ἀῶ κακουργεῖν ἀτίζεια μεγάλη,
Κακοφρόνων τ' ἀνδρῶν παρήνοια. *Oreſt.* ver. 821, 822. Ed. *Cant.*

See *Heſiod Oper. & Dier.* ver. 180, &c. 219. &c. and 238, 239 Ed. *Cler.* and Mr. Baron *Spanhemius*'s Comment on *Callimachus, Hymn. in Jovem* ver. 3 and in *Serer* ver. 19. Many more ſuch Paſſages might be collected out of the Poets; but there is a remarkable Place in *Plato*, that I cannot paſs over. That Philoſopher, treating of *Inceſt*, ſays, That it was looked upon with ſuch Horror, that Men of no Honeſty, yea, and the common People, would not entertain ſuch wicked Deſires, for a Siſter, for Example, though ſhe were never ſo fair And that which extinguiſhed thoſe impure Thoughts was this, That Inceſt PASSED FOR AN UNLAWFUL AND ABOMINABLE ACT IN THE EYES OF THE DEITY. *Nobody*, ſays he, *contradicts it, every one knows this from his Cradle, and all the World ſpeaks the ſame Language, in both jocular and ſerious Diſcourſes.* We are accuſtom'd from our Infancy to ſee repreſented on the Stage *Thyeſtes*'s, *Oedipus*'s and *Macareus*'s, who ſlew themſelves for the inceſtuous Commerce which they had with their Siſters or Mothers. His Words are, Σμικρὸν ῥῆμα καταστέγνυσι πάσας τὰς τοιαύτας ἡδονάς —— τὸ ταῦτα ΕΙΝΑΙ ΦΑΝΑΙ ΜΗ ΔΑΜΩΣ ΟΣΙΑ, ΩΕΟΜΙΣΗ ΔΕ, καὶ αἰσχρῶν αἴσχος. τὸ δ' αἴτιον ἀφ' οὗ τοῦτ' ὄζει, τὸ ΜΗ ΔΕΝΑ ΑΛΛΩΣ ΑΕΓΕΙΝ ΑΥΤΑ, ἀλλ' εὐδὺς γενομένων ἐμοὶ ἕκαστον, ἀκούειν τε λεγόντων ἀεὶ καὶ πανταχῇ ταῦτα, ἐν γελοίοις τε ἅμα, ἐν πάσῃ τε ἀσεβεῖ τραγικῇ λεγόμενα πολλάκις, ὅταν ἢ Θυέστας, ἢ τινας Οἰδιπόδας εἰσαγωσιν, ἢ Μακαρέας τινὰς ἀδελφοῖς μιχθέντα λαθραίως, ὀφθέντος ἢ, ἐλέγχου θάνατον ἑαυτοῖς ὅπασέ τις δίκαιος ἢ ἁμαρτίας. *De Legib.* Lib. viii. p. 838. Ed. *Steph.* So that it was a common Opinion, that even in this Life Crimes do not go unpuniſhed always; but whoever violates the Law of Nature, hath great Reaſon to fear the Effects of divine Vengeance. *Plautus* hath a fine Paſſage to this Purpoſe in one of his Comedies, ſufficient to ſhew how great Impreſſion ſuch a Perſuaſion makes upon the Minds of the common People. *Arcturus*, one of the Conſtellations, is introduced, ſaying, That *Jupiter*, the King of Gods and Men, had ſent her and other Conſtellations, *i. e.* inferior Deities, which preſided over the Stars; he ſent them, I ſay, into all Parts, *to be Witneſſes of the Actions, Manners, Piety and Integrity of Men*, and to ſee how every Man enriched himſelf. "We write down "diſtinctly (ſays *Arcturus*) the Names of thoſe who make uſe of falſe Witneſſes, to gain their unjuſt Cauſes, or who deny their "Debts upon Oath before a Judge, and carry theſe Names to *Jupiter*, and by this he knows every Day who they are, that by "their Crimes pull down his Judgments upon their Heads. He knows them that are ready to forſwear themſelves to get their "Cauſe, or ſuch as get it unjuſtly by the Favour of the Judges. He reviews their Cauſe, and judges it anew, condemning the "Offender to ſo great a Puniſhment, that the Gain they have made by it is inconſiderable. *He hath the Names of good Men "written in another Book.* Theſe wicked Men I ſpoke of before, flatter themſelves, that they can appeaſe *Jupiter* with Of- "ferings and Sacrifices, but they loſe both their Labour and Coſt, for he regards not any of the Prayers or Services of perjured "Perſons. A good Man will always be more eaſily heard, and rather obtain Favour from the Gods than a wicked Man. "This I advertiſe you of, O ye Virtuous, who live in Piety and Integrity: Continue in them, that ye may rejoice in your good "Conduct." The Poet thus expreſſes himſelf,

Is nos per gentes alium alia diſparat,
Hominum qui facta, mores, pietatem & fidem
Noſcamus, ut quemque adjuvet opulentia:
Qui falſas lites falſis teſtimoniis
Petunt, quique in jure abjurant pecuniam:
Eorum referimus nomina exſcripta ad Jovem.
Cotidie ille ſcit, queis heic quærat malum,
Qui heic litem apiſci poſtulant perjurio,
Mali res falſas qui impetrant apud judicem:
Iterum ille eam rem judicatam judicat,
Majore multâ multat, quam litem auferunt.
Bonos in aliis tabulis exſcriptos habet.
Atque hoc ſceleſti in animum inducunt ſuum,
Jovem ſe placare poſſe donis, hoſtiis:
Et operam & ſumptum perduunt: ideo fit, quia
Nihil ei acceptum eſt à perjuris ſupplicii.
Facilius, ſi qui pius eſt, à dis ſupplicans,
Quam qui ſceleſtus eſt, inveniet veniam ſibi.
Iccirco moneo vos ego hæc, qui eſtis boni,
Quique ætatem agitis cum pietate & cum fide,
Retinete porro, poſt factum ut lætemini.

Rudent. Proleg. ver. 10, &c.

I do not know what Mr. *Bayle* thought, when, reciting exactly what the Conſtellation aſſerted upon the *Roman* Theatre, he added thereupon, (*Reſp. ad Provincial.* Tom. iv. p. 320.) "This was only to teach Men this, that, provided they did not "offend the Deity perſonally in abuſing Oaths, which they have taken to bear Witneſs with the greateſt Formality, they need "not fear his Anger." But, on the contrary, it is very evident, that the Poet ſpeaks of Honeſty and good Manners in general, without which all outward Acts of Religion are no ways acceptable to GOD; and if he mentions other Crimes joined with Perjury, it is only to give an Example of the moſt enormous Wickedneſs, and ſuch Circumſtances as aggravate the Heinouſneſs of it. Nor is Mr. *Bayle* more happy in Criticiſm than he is in Reaſoning, "So that (adds he) common Lies, Evil Speaking, "Lewdneſs, Drunkenneſs, and an hundred other Diſorders, may promiſe themſelves Impunity in reſpect of the Gods." Be it ſo, yet it will be always true, that Religion will be of uſe to keep Heathens from Fraud, Cheating, Double-dealing, &c. in which it has much the Advantage of Atheiſm; and we know that many Heathens were faithful in their Dealings, for fear of bringing down Vengeance upon them in this World; and, on the contrary, to obtain Succeſs of the Gods in their Affairs. 'The Heathens even believ'd it neceſſary to pray to the Gods for Wiſdom and Virtue. In vain Mr. *Bayle* denies this, (*Contin. des penſées diverſ.*) pretending that all their Prayers related only to the Goods of this Life: He has been ſtrongly refuted on this Head by Mr. *Lenfant*, (*Biblioth German.* Tome I. Art. 7.) who citing, among the reſt, a beautiful Paſſage of *Juvenal*, (Satyr. x. 356) well known, and which Mr. *Bayle* has ſuppreſs'd, ſays, that he has omitted it, *not out of Malice*, but for fear of troubling the *Poet's Ghoſt*. See, alſo, the third Tom. of the ſame *Biblioth. German.* and the *Gnomologia Homerica*, of *Jacques Duport.* on the *Iliad.* Lib. xx. N. 4. As to the Rewards and Puniſhments of another Life, we know that an antient Tradition, which is much inculcated in the Writings of the Poets, made the Opinion common almoſt every where. But can we think that thoſe Puniſhments were only deſigned for thoſe who neglected the outward Worſhip of GOD, or directly offended his Majeſty? Read the Deſcription of Hell written by *Virgil*, and you'll ſee that not only the *Titans*, *Giants*, *Salmoneus*, *Tityus*, *Ixion*, and *Pirithous*, are puniſhed, but Brethren that are Enemies, and they who beat their Father; thoſe who deceive their Clients and Dependants, hoard up their Riches, and will neither impart them to their Fathers nor Friends; thoſe who have been ſlain in the Act of Adultery; who have engaged in unjuſt Wars; ſuch as make no Conſcience of breaking their Promiſes made to their Maſters. Another cries out, as loud as he can, "Learn, by my Example, to do Juſtice, and not to ſlight the Gods." Another

hath

eaſy to diſcover the Truth of that holy Religion, from the Manners and the Practices of thoſe who profeſs it. Though I ſhould imagine the Reaſon of that Unhappineſs to be chiefly this, becauſe the Chriſtian Doctrine and Worſhip, being received by moſt Men, not upon their own Choice and Judgment,

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hath ſold his Country, and betrayed it to a Tyrant. Another for Money has made Laws, and abrogated them. Another has committed Inceſt with his own Daughter. "If I had, adds *Sibyll*, an hundred Tongues, and as many Mouths, with a Voice "that would never fail, it were impoſſible for me to reckon up all the different Sorts of Crimes which are puniſhed in this "Place, or the Names of all the different Sorts of Puniſhments which the Wicked ſuffer." Theſe are his Words:

Hic, quibus inviſi fratres, dum vita manebat,
Pulſatuſve parens, & fraus innexa Clienti;
Aut qui divitiis ſoli incubuere repertis,
Nec partem poſuere ſuis, quâ maxima turba eſt;
Quique ob adulterium cæſi, quique arma ſecuti
Impia, nec veriti dominorum fallere dextras;
Incluſi pœnam exſpectant ———
——magna teſtatur voce per umbras:
Diſcite juſtitiam moniti, & non temnere divos.
Vendidit hic auro patriam, dominumque potentem
Impoſuit, fixit leges pretio atque refixit.
Hic thalamum invaſit natæ vetitoſque hymenæos.
. . . . . .
Non mihi ſi linguæ centum ſint, oraque centum,
Ferrea vox, omnes ſcelerum comprendere formas,
Omnia pœnarum percurrere nomina poſſim. Æneid. Lib. vi. v. 608.

He, on the contrary, repreſents good Men in a Place by themſelves, *viz.* in the *Elyſian Fields*, enjoying the Happineſs of another Life, and being, as it were, under the Conduct of a wiſe *Cato:*

Secretoſque pios, his dantem jura Catonem. Æneid. viii. v. 670.

There are, I own, many ridiculous Fables mixed with theſe Deſcriptions of the Gods, and another Life; and the rude Multitude did apparently depend more upon the Chimera's of the Poets, than on the Truths which they had interſperſed in their Works. But is it credible, that among the People themſelves, which comprehends the illiterate Part of Mankind in general, there ſhould be many who have acknowledged, at leaſt in part, the Abuſe, and gave great Attention to the true Principles of natural Religion, though mixed with many Falſities? Theſe Notions eaſily enter into the Mind of any Man that will make uſe of the Light of Nature; and Men without Study are ſometimes better diſpoſed to receive the Truth, and leſs prejudiced, than ſuch as profeſs themſelves learned. (See *Parrhaſiana*, Tom. ii. p. 103, &c.) The Poets might here, alſo, ſhew the People the Way, and give them Occaſion to think, that they did not themſelves believe the Abſurdities which they attributed to the Gods. Thus, for Example, tends the Expreſſion of *Euripides* cited by *Plutarch*, (*De audiendis Poetis*, §. 20.) Εἰ Θεοί τι δρῶσι φαῦλον, οὐκ εἰσὶ Θεοί. "If the Gods do any thing ill, they are no longer Gods." The Poet makes *Hercules* ſay the ſame thing:

Ἐγὼ γὰρ τοὺς Θεοὺς οὔτε λεκτρ', ἃ μὴ θέμις,
Στέργειν νομίζω, δέσμα τ' ἐξάπτειν χεροῖν·
Οὔτ' ἀξίωσα πώποτ', οὔτε πείσομαι,
Οὐδ' ἄλλον ἄλλου δεσπότην πεφυκέναι.
Δεῖται γὰρ ὁ Θεὸς, εἴπερ ἐς' ὄντως θεὸς,
Οὐδενός· ἀοιδῶν οἵδε δύσφημοι λόγοι.

I don't believe the Gods love unlawful Beds,
Or that they put one another in Fetters and Chains:
Nor can I perſuade myſelf to believe
That one of them is Maſter of the other.
God, who is really ſuch, can ſtand in need
Of nothing. Theſe are the falſe Accounts of the Poets.

See, alſo, Mr. Baron *Spanheim* upon *Callimachus*'s *Hymn. in Jovem*, v. 60. & *in Iphigenia Taurica* the Chorus thus ſpeaks, *v.* 385, &c. Ed. *Cambr.*

——— Ἐγὼ μὲν οὖν
Τὰ Ταντάλου θεοῖσιν ἐσθέματα,
Ἄπορα κρίνω, παιδὸς ἁδὼν βορᾶ.
Τοὺς δ' ἐνδαδ', αὐτοὺς ὄντας ἀνθρωποκτόνους,
Εἰς τ' ἄλλον τὸ φαῦλον ἀναφέρειν δοκῶ.
Οὐδένα γὰρ οἶμαι δαιμόνων ἔδ' κακόν.

'Tis incredible to me that *Tantalus* ſhould feaſt the Gods,
And that they ſhould eat the Fleſh of Children.
I rather think, that the Inhabitants of that Country
Were accuſtomed to Homicide, and to juſtify their Crimes
They attributed them to the Gods; for I can't perſuade myſelf
That any God can be guilty of ſuch a Wickedneſs.

Pindar had before ſaid much the ſame thing, reflecting upon the ſame Fable;

Ἐμοὶ δ' ἄπορα, γαστρίμαργον
Μακάρων τιν' εἰπεῖν,
Ἀφαμαί, Ἀκέρδεια λέλογχεν
Θαμινὰ κακαγόρος. ———

To me it is abſurd to ſay, that God's a Glutton;
I muſt with-hold Aſſent. They that thus abuſe
Thoſe happy Beings ſhall ſurely be puniſhed.
Olymp. I. 82.

The ſame Poet, as Mr. *Le Clerc* obſerves (*Biblioth. Choiſ.* Tom. vi. p. 269.) ſhews a little higher, that he was ſenſible of the Falſhood of theſe Fables, ſaying, "Romantick Stories and Fables, ſet out with divers Fictions, do more eaſily gain Entertain-"ment in Mens Minds, than true Hiſtories. A graceful Eloquence, which renders every thing agreeable to Mankind, often "embelliſhes an incredible thing, ſo as to render it credible. But Length of Time certainly diſcovers the Truth. Men ſhould "always ſpeak well of the Gods, for they run the leaſt Hazard."

Ἦ θαύματα πολλὰ,
Καί πᾳ τι κἀ βεβρότων φρένας·
Ὑπὲρ τ' ἀληθῆ λόγον
Δεδαιδαλμένοι ψεύδεσι ποικίλοις
Ἐξαπατῶντι μῦθοι,
Χάρις δ' ἅπερ ἅπαντα τεύχει τὰ μείλιχα θνατοῖς,
Ἐπφέρουσα πιθὼν,
Καὶ ἄπιστον ἐμήσατο πιστὸν
Ἔμμεν τὸ πολλάκις,
Ἀμέραι δ' ἔπειτοι,
Μάρτυρες σοφώτατοι,
Ἔστι δ' ἀνδεὶ φάμεν
Ἔοικὸς ἀμφὶ δαιμόνων
Καλά, μείων γὰρ αἰτία.

Theſe Reflections may eaſily occur to the Minds of the moſt ſimple Perſons, who will but make uſe of their natural Senſe. For 'tis probable that the Poets did not hatch them in their own Brains, but here, as in other things, followed the Dictates of Nature. We have always obſerved theſe things to happen among Chriſtians, and doubtleſs the ſame things happened among the Heathens. Among the Papiſts, in ſome Countries eſpecially, one Word from a Prieſt will raiſe the Mob againſt an Heretick, as they call them; but yet there are many honeſt Men, who abhor ſuch a diabolical Madneſs, and do not believe that any Man ſhould be perſecuted for his Religion; though the Clergy inculcate that Doctrine with all the Earneſtneſs poſſible, to ſatisfy their Ambition, Pride and Avarice, and to engage the People in their Intereſts, who ſuffer themſelves to be led blindly by their Harangues, eſpecially when they ſuggeſt things agreeable to their brutiſh and irregular Inclinations. We may alſo ſay the ſame of divers Opinions, which are received by the ſeveral Parties of Chriſtians. The Doctrines of Tranſubſtantiation, Impanation, and the Ubiquity of Chriſt's Body, are ſuch groſs Contradictions, that none can believe them; and though ſome Men make a Profeſſion of that Faith, they no more believe them than ſuch as deny them. (See what I have ſaid in my *Preface* to *Tom.* III. of Archbiſhop *Tillotſon*'s Sermons.) But there are other ſpeculative Opinions and moral Maxims, either entirely falſe, or extremely forc'd, which the Preachers, every Day, deliver from the Pulpit, without convincing many Men, who, by the Strength of their own natural good Senſe, perceive the Abſurdity of theſe Doctrines and Maxims, or explain them in a clear different Senſe from the Preachers, as appears when they are queſtion'd about them in free Converſation. The Pagan Fables were much more

ment, but from the Custom of the State in which they happen to be born, resides rather in their Mouth than in their Heart; whence it comes to pass, that so few are seriously inclin'd to reform their Mind by its Direction. For I doubt not, but that, at least, the external Acts even of national Vices

more absurd; and why may we not also believe, that many among the People looked upon them as false, and kept to the Fundamentals of natural Religion, though with some Mixtures of Error and Imperfection? Did not Men then make use of their Reason? Or were those Truths so obscure, that they could not be found out but by long and profound Meditation? We may, with much greater Reason, suppose, that they, whose Education gave the Means of studying in the Schools of the Philosophers, and carefully reading their Books, should be happily freed from the Superstitions and gross Notions of Heathenism. We know with what Liberty the Philosophers ridicul'd the Religion of the Vulgar several Ways: "We have good Reason to believe (says Mr. *Fontenelle*, in his History *of Oracles, Dissert.* i. *Chap.* viii.) "that among the Pagans Religion was only a Practice, whose "Speculation was a Thing indifferent. Do as others do, and you may believe as you please" This is a wild Notion; but the People, who saw not its Consequence, were contented with it, and the Philosophers submitted readily to it, because it laid them under no Restraint. Mr. *Bayle* also (in his *Divers Meditations*, p. 367.) owns, that there were, among the Heathen, Men of Ingenuity and good Sense, who, without Philosophy, had sometimes tolerable Notions of the Deity. It is true, that, according to him, they were not to be regarded; because when they had heard the Reasonings of the Philosophers about the Nature of the Gods, as soon as they were gone, they did as others did. But it is no ways necessary, in the Question we are debating, to find such Men among the Pagans, as had the Courage to oppose the common Errors, or Worship, establish'd by publick Authority. 'Tis sufficient that several did acknowledge the more gross Abuses of Superstition and Idolatry, and acquire such Notions in Religion, as were able to produce such a Degree of Honesty, as they could not have had, if they had been Atheists. The Descriptions of the Pagan Corruptions, made by Mr. *Bayle* (in his *Continuation of divers Meditations*, p. 702, *&c.*) do not prove the contrary. These Sort of Descriptions ought not to be taken in a metaphysical Generality; 'tis sufficient that, according to the Rules of good Criticism, they agree to the greatest Number. Farther, the Men, of whom I am now speaking, not daring, for fear of incurring a general Odium, to openly oppose those strange Abuses of the Vulgar, deserve certainly to come under that Description, as well as the Philosophers, as having *held the Truth in Unrighteousness*, according to the Reproof given them by St. *Paul*, *Rom.* i. 18. But you'll say, we must not attribute the Honesty of these Men to the religious Notions they had received: It was caused by a Principle of Honour, Fear of Laws, the crossing of Passions, and several other Interests proceeding from Self-love. That this is all the Virtue which most Men have, as we see among Christians, can't be deny'd; but doth it thence follow, that no Heathen was inclin'd to Virtue by a religious Motive, or by the View of the Punishments and Rewards which are distributed by the Deity, either in this Life, or the next? "I can't deny, saith Mr. *Bayle* (in his "*divers Meditations*, p. 439, 440.) but there have been some Heathens, who, making a good Use of their Knowledge of the "Nature of GOD, have, by that Motive, subdued the sudden Force of their Passions. But then (says he) 'tis most probable, "that when this Motive was so prevalent, their Passions were so moderate, that they might have been reduced by Reason "without that Help." So we may as well believe, that, among Christians, no Man is virtuous purely through his religious Principles, because there are Laws and Disgrace annex'd to Vice; nay, in a word, all the other Motives which had place in Heathenism. Moreover, what we may have said of the Laws may suggest a Reflection not to be slighted. These wise Lawgivers of Antiquity, so much esteemed and respected by all the World, at the same time that they appointed that the Gods should be worshipped in their several Countries, forbad, under the most rigorous Punishments, most of those Crimes which the Vulgar attributed to these Deities. And is it not natural to infer from thence, that they looked upon the Fables as absurd Relations of the Poets, which the People pleased themselves with? At least, this is the Reasoning of *Lucian* in his *Necromancy*, Tom. i. p. 327. Ed. *Amstel.* Οὔτε γὰρ τοὺς θεοὺς ἄν ποτε ἡγέμην μοιχεῦσαι, καὶ στασιάσαι πρὸς ἀλλήλους, εἰ μὴ ὡς περὶ καλῶν τούτων ἐγίνωσκον, οὔτ' ἂν τοὺς νομοθέτας τἀναντία τούτοις παραινεῖν, εἰ μὴ λυσιτελεῖν ὑπελάμβανον· *i. e.* "On the one Side, I can't "imagine that the Gods commit Adultery, or that there are among them Divisions, or, at least, that they think these things "just and honest; and, on the other Side, I see that the Lawgivers have ordained the contrary; which they would not have "done, had they thought them profitable." But you'll say again, The very Notion of Honesty, consider'd without any respect to Religion, might incline a regular Heathen, for Instance, to restore a Pledge that had been entrusted in his Hands, tho' he might have kept it without any Apprehensions of Punishment from the Law, or Infamy of any kind. But I'll leave it to any considering Man, if the Reasonings which Mr. *Bayle* attributes to an *Atheist*, can come into any Man's Mind but some subtil Philosophers, who are exercised in deep and abstruse metaphysical Meditations. I doubt if it be conceivable that any Philosophers, whether *Atheists*, or not, should be inclined to practise the Maxims of Virtue, by no other Motive, but its own proper and internal Beauty.

It is very probable, that all which is said about these Notions of Honesty is, in the Mouth of most Men, especially *Atheists* and *Epicureans*, meer empty Talk and pure Declamation, of which the Mind is not persuaded. Nor are we more sure, that those who say, *That Honesty is natural to Virtue, and Dishonesty to Vice; that Virtue is worthy to be loved for itself, and is its own Reward*, (Continuation, *&c. p.* 761.) have, by that Means, excluded all Relation between Honesty and the Will of GOD, as the Example alledged by Mr. *Bayle* out of *Cicero* gives us Reason to believe. It is true, that this great Orator maintains, That though we could escape the Eyes of the GODS, as well as Men, we should not suffer ourselves to hearken to any Motions of Avarice, Injustice, Debauchery, or Intemperance. But does not the same Author declare positively elsewhere, that GOD is the Author of the Law of Nature (*Lib.* iii. *De Repub. apud Lanctantium, Lib.* vi. *Chap.* viii.) in these Words, *Unusque erit communis quasi magister, & imperator omnium Deus; ille* LEGIS *illius* [*viz.* RECTÆ RATIONIS, NATURÆ CONGRUENTIS] INVENTOR, DISCEPTATOR, LATOR, *&c.* See the whole Passage quoted above, *Chap.* iii. §. 20. *Note* 5. What do I say? In the same Book of Offices from whence this Passage is taken, which Mr. *Bayle* quotes, do we not find that the Law of Nature is both an human and divine Law? *Atque hoc multo magis exigit ipsa naturæ ratio, quæ est lex divina & humana.* Lib. iii. Chap. v. Edit. *Græv.* And a little lower, *Chap.* vi. he explains himself better, *Qui autem civium rationem dicunt habendam, externorum negant, hi dirimunt communem humani generis societatem: quâ sublatâ, beneficientia, liberalitas, bonitas, justitia funditus tollitur: quæ qui tollunt, etiam adversus Deos immortales impii judicandi sunt,* i. e. "There are others who hold, that the "Rights established among Citizens are to be regarded, yet will not allow the Benefit of them to Strangers; and these destroy "the general Society of all Mankind, with which Bounty, Liberality, Humanity, and Justice must fall. Now to violate these "things is an Impiety against the Gods themselves, since it is the Destruction of that Society they have established among Men." The same thing appears in many other Passages of that famous *Roman*. Whoever then will consider what I have said, will perhaps agree, that, notwithstanding the Pagan Blindness, Religion hath won from Vice, and inclined to Virtue, many Men, who, without that, had never been virtuous, especially such of the People as were not able to make or understand all the Reflections, which the Prospect of Interest, or Fame, and the Notion of Honesty, might suggest to the Philosophers. As for others, they would not be less corrupted, supposing they were Atheists. Generally speaking, we may say, in my Opinion, that the false Notions of Religion determine the Evil of an Action rather than produce it; they serve for an Excuse or Pretence, but never invite into any Crimes of themselves, even those who are otherwise inclined to them. For the most part, those whom we think to be seduced by Superstition, or by false Consequences drawn from the true Principles of Religion, act altogether by another Motive, which is, if not the only, the chief Cause, at least, of their Conduct: These are ordinarily the downright Hypocrites, Men without any Religion, and false Bigots, who, (as Mr. *de la Bruyere* speaks, p. 478.) under a King that is an Atheist would be Atheists; or who, if they have not quite extinguished all Sense of a Deity, and a Providence, yet, at least, look upon these great Truths as some indifferent Problems. *Montagne*, speaking of a great Number of Christians, says, That some falsly make the World believe, that they believe what they do not; others, and those a great Number, cheat themselves with a false Notion of Faith, (*Essays*, p. 316. Edit. *Paris.*) And how much greater Reason have we to think, that Paganism affords Men of that Character? I do not deny but there are some Men who engage themselves in evil Actions out of a Principle of Religion; but if Idolatry and Superstition seduceth them in some respects, what was otherwise good and true, in the Notions of Paganism, preserv'd its Influence upon them to keep them from Vice, and incline them to certain Virtues; insomuch, that the Evil which Religion produc'd on the one Side, was compensated by the Good it did on the contrary; so that they were never guilty of the Excesses they would have committed had they been Atheists: for we must not imagine, that the greatest Bigots

ces might be repreſs'd, would Men but apply themſelves in earneſt to the leading a Life ſuitable to their Profeſſion [1].

IV. As this Perſuaſion, and whatever elſe we are able to learn concerning the Worſhip of GOD, either from Reaſon or from Revelation, is firſt of all to be implanted in a rightly cultivated Mind. So are the Opinions contrary to theſe Truths moſt carefully to be barr'd off and excluded. And here we would not only be underſtood of *Atheiſtical* and *Epicurean* Principles, but of thoſe numerous Notions which appear to be deſtructive of true Religion, of good Manners, and of human Society, which it is, in an high manner, the Intereſt of Mankind to ſee abſolutely rooted up, and baniſh'd out of the World. Such is that Fancy of the *Stoical* Fate, or the unchangeable Courſe and Wheel of Things and Actions, by which Men are made only the Tools or Engines of their own Operations, it not being in their Power to manage them with any Freedom of Choice, or with any Direction of Counſel. For, admitting this Hypotheſis, it doth not appear, why the Actions of a Man ſhould be morally *imputed* to him, rather than the Motion of a Clock to the Wheels by which it is perform'd, or what would be the Uſe of Religion, what the Equity of Laws and of Puniſhments. *Seneca Oedip.* ℣. 1028.

Fata iſta culpa eſt; nemo fit fato nocens.
The Fault is Fate's; and Fate can fix no Guilt.

Vid. ibid. ℣. 980, *&c. Homer Il.* Tom. 86.

——— Ἐγὼ δ' ἂν αἴτιός εἰμι,
Ἀλλὰ Ζεὺς, καὶ μοῖρα, καὶ ἠερόφοιτις
Ἐρινύς.

——The Fault's not mine, but *Jove*'s and Fate's,
And the Night-wandring Hag's. ——

Zeno (in *Diog. Laert.* l. vii.) retorted this Objection very pleaſantly, though he did not refute it: As he was correcting his Slave, who had been catch'd in a piece of Thievery, the Fellow, in way of Excuſe, told him, *Truly, 'twas his Fate to ſteal: Yes,* ſays *Zeno, 'twas your Fate too, to be beat for it. Marcus Antoninus* gives a more ſerious Judgment on the Point [2], *The Gods* (ſays he, *l.* ii. *c.* 11.) *have put it into every Man's Power and Choice, to avoid whatever is truly Evil.* There is an Opinion nearly allied to this, which ſuppoſes the Conſequences of Cauſes and of Effects, or the great Chain of Things eſtabliſh'd by the Creator, to ſtand by ſuch an immoveable Decree, that GOD hath left himſelf no Liberty of interpoſing in particular Caſes. Thus all Miracles, all extraordinary Aſſiſtances of Heaven, all Effects of Prayer, of Repentance, and of Amendment, ſeem to be entirely cut off at one Stroke. To this we may join that ancient and wildly receiv'd Perſuaſion, that the Poſitions of the Stars laid an indiſpenſable neceſſity on human Actions and Events; or that the Hour of Nativity determin'd the whole Proceedings of Life. Which *Manilius*, one of the Aſſertors of it, thus delivers, l. iv. c. 79, *&c.*

———— *Furit alter amore,*
Et pontum tranare poteſt, & vertere Trojam.
Alterius ſors eſt ſcribendis legibus apta:
Ecce patrem nati perimunt, natoſque parentes,
Mutuaque armati coeunt in vulnera fratres:
Non noſtrum hoc bellum eſt: coguntur tanta movere,
Inque ſuas ferri pœnas, lacerandaque membra.
Hoc quoque fatale eſt, ſic ipſum expendere fatum.

One, mad in Love, to *Troy* will carry War,
Or ſwim the Flood, and view the Torch from far;
Another is determin'd to the Bar.
A Son his Father, Father kills the Son,
On mutual Wounds two headlong Brothers run.
Theſe Combats prove the Force of ruling Powers:
For they are too unnatural to be ours.

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gots to Paganiſm did only draw, or obſerve all the Conſequences which naturally followed thoſe things, which they attributed to their Gods. What I have ſaid above proves to the contrary; and no Man but muſt as readily agree to it, as Mr. *Bayle*, who has taken great Pains to prove, That Men do not reaſon and act always according to their Principles; and perhaps has carried that Matter too far. A *Pagan* may, for Example, proſtitute his Daughter upon ſome Feſtival in Honour of the Gods, and for all that be honeſt in his Buſineſs, a religious Obſerver of his Promiſes, ſerviceable, charitable, *&c.* for fear of the Gods. It is not uſually ſome ſpecial Notions of Religion which make Impreſſions upon Men, and which determine to do Good or Evil; but the general Notion of a Deity, who puniſhes Vice and rewards Virtue, works more effectually upon them: a Notion ſo ſuited to the human Capacity, that it often hinders the Effects that bad Principles would have upon ſuch as profeſs Religion. But I ſhall ſay little more in this Matter; yet though I have enlarged myſelf beyond the Bounds of a Note, I can't but add ſomething more. Mr. *Bayle*, who has quoted that Paſſage of *Grotius* upon which our Author criticizes, explains it thus, (*Continuat. &c.* p. 768.) We ſhould be obliged to follow the Law of Nature, if we ſuppoſed that there were no GOD, nor Providence; but his Way of expreſſing himſelf, *viz. Hæc locum aliquem haberent, etiamſi daremus, &c.* ſhews, that he means no more than what's expreſſed in my Note. I know not what Mr. *Bayle* means by theſe Words, *Law* and *Obligation*; but, in the Language of the Philoſophers, a *Law* ſuppoſes a Superior, and *Jus* comes from *Jubeo*, becauſe Right and Law proceed from the Authority of a Superior. Our Author, as I think, has very well proved, in the foregoing *Chapter*, §. 20. and *Lib.* i. *Chap.* vi. §. 7, 8. That Man's Will cannot impoſe any Obligation, properly ſo called, upon itſelf, and that Maxims of Reaſon are not ſufficient of themſelves to determine the Will neceſſarily this Way, or that Way. All that Mr. *Bayle* ſays proves only, 1. That an Atheiſt knows that Thankfulneſs and Ingratitude are two different Things, as are, alſo, Faithfulneſs and Deceitfulneſs, a Circle and Triangle. 2. He can perceive that the Maxims of Virtue are not purely arbitrary, but that they have a Foundation in the Nature of Things, and imply certain Agreements. But can that alone make him certainly follow thoſe Maxims contrary to his private Intereſt, and the Bent of his Deſire? I can't think it can ever come into an Atheiſt's Mind; much leſs, that he ſhall have Courage to ſacrifice his earneſt Paſſions to thoſe fine Notions. He may think it becomes a reaſonable Creature to conform to Reaſon; but from the Moment that theſe Maxims of Reaſon are oppoſed to the Enjoyment of any Pleaſure, in which he promiſes himſelf more Satisfaction than he at preſent enjoys, he'll ſilence his Reaſon, and follow the Allurements of Senſe. Let us ſpeak the Truth: Suppoſing the Impiety of the Atheiſt, he does not act unreaſonably in following the Voice of Nature, whoſe Leſſons, according to Mr. *Bayle*, are (*Continuat. &c.* p. 31.) "We muſt eat and drink well, enjoy all the Plea-
"ſures of Senſe, prefer our own Intereſt before another's, take every thing we find for our Convenience, to do a Wrong rather
"than ſuffer any, to revenge ourſelves, *&c.*" See more againſt Mr. *Bayle* in Mr. *Bernard*'s *Extract* of his *Continuation*, *&c.* in his *News from the Republick of Letters*, *March* 1705, and in his Diſpute againſt Mr. *Bayle*, *April* 1707. *Art.* 3. *May*, *Art.* 4. *June*, *Art.* 3. *Auguſt*, *Art.* 3. and *September*, *Art.* 4.

[1] We may add to this, That tho' the Chriſtian Religion be not obſerved as it ought, inſomuch that there is not a ſufficient Difference between the Manners of *Chriſtians* and *Pagans*; yet Chriſtianity has divers great Advantages above Paganiſm, as Mr. *Le Clerc* has made it appear in his Treatiſe of *Infidelity*, Part ii. Chap. v. p. 222. To the Examples that he has produc'd, to ſhew the good Effects of the Chriſtian Religion, we may add this very remarkable one, that by it the Cuſtom of expoſing Infants is utterly aboliſhed, which was ſo much uſed by the *Greeks* and *Romans*, as Mr. *Noodt* in his *Julius Paulus* ſhews.

[2] The *Greek* is, Καὶ τοῖς μὴ καθ' ἁλίθειαν κακοῖς, ἵνα μὴ φευτίπῃ ὁ ἄνθρωπος, ἐπ' ἴσῳ τὸ πᾶν ἔθηκαν οἱ θεοί.

Nay,

Nay, this Opinion's ſettled by Debate,
'Tis *Fate*, that we ſhould thus diſpute of *Fate*.
Mr. *Creech.*

And this Superſtition ſtill bewitcheth a great Part of the Eaſtern World, where no Buſineſs of Moment is undertaken without conſulting the Aſtrologers, *that they may read*, as the Phraſe is, *what is written in Heaven.* [1] To which purpoſe Father *Bernier* tells a pleaſant Story of a Gardener of *Abas* King of *Perſia*, who rooting up ſome Trees which the King, by Direction of his Aſtrologer, had planted in a *fortunate Hour*, and being thereupon rebuked, turning to the Aſtrologer, *Sure*, ſays he, *you was out in your Calculation: for theſe Trees could never have the Benefit of lucky Stars, which were ſet at Noon, and unfortunately pull'd up at Night.* Another Relation like this, he gives us of a certain Slave, a Run-away from *Goa*, who ſet up in the City of *Debli* for an Expounder of the Stars, and foretold many ſtrange Events with good Confidence to the People: Every now and then looking upon his *Mariner's Compaſs* and his *Hour Book*, as the noble Inſtruments of his Art. When ſome, who had formerly a Knowledge of him, declar'd their Wonder at his new Profeſſion and Equipment, his Reply was, *A tal Beſtias, tal Aſtrologuo*; *For ſuch Beaſts, ſuch an Aſtrologer.* But all this kind of Aſtrology is really nothing elſe but a ſpecious Way of cheating ignorant People of their Money, undertaken by ſome confident Knaves, who, in their Talk of future Occurrences, are not ſo much ſupported by their own Arts, as by the Credulity of their Hearers: If Things fall out as they boldly gueſs'd, they preſently riſe in Honour and Credit with the Multitude; if Matters go otherwiſe, their Predictions are eaſily forgot, and ſo their Miſtakes make no noiſe. *Tacitus*, Hiſt. l. 1. c. 22. calls the Pretenders to Aſtrology, *Gentes hominum potentibus infidum, ſperantibus fallax:* "A Pack of Men "unfaithful to the great, and diſappointing to all "of eager Hopes and Deſires." Add, *Hobbes de Homine*, c. 14. §. 12. *Agathias*, l. 1. c. 1. *I cannot believe that the Cauſe of Evil is fix'd in the Courſe of the Stars, and in the fatal Appointment of unconceivable Neceſſity. For, if the Power of Fate every where prevails, all free Election of Man's Will is deſtroy'd; and with it, all Precepts, all Arts, all Diſcipline muſt come to nothing; and thoſe who have led pious and virtuous Lives, will be depriv'd of their future Expectation. Nor do I think it allowable to aſcribe mutual Wounds and Slaughter to the Deities.* Vid. *Grot.* de Veritate Rel. Chriſtianæ, *l.* iv. §. 11. Now, beſides the other numerous ill Conſequences of ſuch a Superſtition, this Miſchief follows of courſe, that whilſt Men are continually gaping at the Stars, they have neither Leiſure nor Inclination to guide their Lives by the Rules of ſound Reaſon. *Helen* ſays wiſely in *Euripides*, *Hel.* v. 763.

Γνώμη δ' ἀρίστη μάντις, ἢ τ' εὐβουλία.

Prudence and good Counſel are the beſt Prognoſticators.

Statius, Theb. iii. 562.[2]

——— *Quid craſtina volveret ætas*
Scire nefas homini. Nos pravum ac debile vulgus
Scrutamur penitus ſuperos: hinc pallor & iræ,
Hinc metus, inſidiæque, & nulla modeſtia voti.

———What future Years ſhall bring to paſs,
'Tis Sin to know. We, a weak, puny Race,
Examine Heav'n, and ranſack *Jove*'s Decrees,
Wiſely to antedate our Miſeries.
Hence all our Miſchiefs ſpring, our *Rage*, our *Fears*,
Our treach'rous Wiles, and our immodeſt Prayers.

Moſt pernicious, likewiſe, is that Conceit, which makes GOD to allow a kind of Market of Sins, ſo as to let them be bought off with Money or other Preſents, or perhaps with ſome vain Ceremonies and ſet Forms of Speech, without Amendment of Life. No leſs abſurd is it to imagine, that GOD Almighty is delighted with ſuch Inventions of Men, ſuch Inſtitutions and Ways of living, as are diſagreeable to human and civil Society, as it is temper'd by the Dictates of Reaſon, and the Laws of Nature. Such may we reckon the greateſt Part of the Monaſtical Orders, which we find in vaſt Numbers, not only in *Chriſtendom*, but amongſt the *Turks* and the Heathens. We ſhould, alſo, carefully avoid all ſuch unworthy and ſuperſtitious Notions, as debaſe and diſhonour the Divine Nature, or Worſhip. Every ſenſible Man ought to be, as [3] *Antoninus* ſays his Father was, Θεοσεβὴς χωρὶς δεισιδαιμονίας [a], *Devout without Superſtition* [b].

'Tis another wicked Opinion, that the bare Exerciſe of Piety towards GOD is ſufficient, without any Regard had to Honeſty, and to thoſe other Duties which are to be practis'd towards our Neighbours: As if the Externals of Divine Worſhip, when exactly perform'd, were able to make amends for a Courſe of Injuſtice toward other Men: Or, as if it were lawful to ſcrape up Money in our Lifetime, by all Means and Methods, good or bad, provided, at our Death, we leave ſomewhat to be ſpent in *pious Uſes* [c]. Nor leſs unreaſonable is the Fancy, that a ſingle Man ſhould be able not only to fulfil his own Duty to GOD, but to transfer ſome of his Merits on others; as if one Perſon's Negligence in his Duty was to be ſupplied by the *over* Righteouſneſs of another. Of the ſame Stamp is that vain Conjecture, that, upon Account of the Satisfaction and the Merit of CHRIST, we have a leſs Obligation lying on us to Probity and Sanctity of Manners; and that the Hope of thoſe Bleſſings

furniſhes

[a] Lib. vi. §. 30. Add. *Bacon*, Eſſay 17.

[b] See *Plutarch*'s Treatiſe of Superſtition. Item, *Charron of Wiſdom*, lib. 2. c. 5. §. 10.

[c] Add. *Charron de la ſageſſe*, l. 2. c. 5. §. 25, &c.

[1] Our Author might have ſpared himſelf the Pains of reciting theſe two Stories.

[2] *Euripides*, in another Place, gives a Deſcription of all ſuch Perſons as pretend to Divination, in theſe Words:

———Τίς δ' μάντις ἐς' ἀνὴρ;
Ὃς ὀλίγ' ἀληθῆ, πολλὰ δ' ψεύδη λέγει
Τυχών, ὅταν δὲ μὴ τύχῃ, διοίχεται.

What's an Aſtrologer? I thus reply,
A Man that ſpeaks few Truths, but many a Lye,
Which, when found out, he takes his Heels to fly.

Spoken by *Iphigen in Aulid.* v. 956. Edit. *Cant.*

[3] See what Mr. *Bayle* ſpeaks about this Matter in his Meditations upon a Comet.

furniſhes us with a Security of ſinning. He who believes that his own Offences ſhall be forgiven him for the ſake of another's Deſerts, can ſcarce be hinder'd from ſinking into the baſeſt Diſſoluteneſs, unleſs he be, at the ſame time, fully perſuaded, that there is ſtill an Obligation incumbent on him, to apply all his Endeavours to the Practice of a moſt holy Life.

Farther, It is no leſs a peſtilent than brutal Opinion, to pretend that the Wickedneſs of ſome Actions is excus'd with GOD, upon account of their Dexterity or Humour; and that ſome Sins paſs only for Jeſts in the Cognizance of Heaven. As the old Poets feign'd their Deities to take no notice of the Perjury of Lovers, and to forgive their Thefts and treacherous Intrigues [a]. Nay, their Madneſs proceeded ſo far, that they were not afraid to introduce their heavenly Powers as the Actors of deteſtable Villanies; aſſigning ſo many Tutelar Gods to have the Care, as it were, and the Guidance of ſo many particular Kinds of Wickedneſs. Now the Argument which *Fulgentius* [b] draws hence, is right and concluſive: *If there were any Deities* (ſays he, meaning *Mercury* and *Laverna*) *preſiding over Robberies, how could thoſe Actions be criminal before human Judges, which had divine Authors and Patrons to defend them* [c]? *Euripides* diſputes as well on the ſame Point; *Ione*, ℣. 449, &c.

——— Οὐκέτ' ἀνθρώπους κακῶς
Λέγειν δίκαιον, εἰ τὰ τῶν Θεῶν κακὰ
Μιμούμεθ', ἀλλὰ τοὺς διδάσκοντας τάδε.

If Human Vices are but Tranſcripts drawn
From Deeds Divine, and Copies ſet in Heaven,
Should Men be blam'd who act what they are taught,
Or thoſe immortal Guides who teach 'em wrong?

Nor was the poor *Indian* much out in his Inference, who, when a *Spaniard* boaſted to him, that he was a Chriſtian, a Son of the great Creator of Heaven and Earth, whoſe Laws he came there to publiſh and proclaim, anſwer'd him to this effect: *If 'tis by Command of your God, that you thus invade other Mens Dominions, and there ſpoil, burn, kill, and commit all other Wickedneſs at pleaſure; you may reſt aſſur'd, that we we will not, on any account, believe in ſuch a God, or receive his Ordinances amongſt us* [d].

It is wicked likewiſe to believe, that thoſe Prayers can pleaſe GOD, by which a Man deſires that others may ſuffer an undeſerv'd Evil, for the promoting, or the occaſioning of an Advantage to himſelf. As ſuppoſe, if the Inhabitants of a Sea-coaſt ſhould pray, that many Shipwrecks might happen on their Shore. Nor do I take thoſe ſolemn Supplications to contain much more Holineſs, which are perform'd, either upon the engaging in an unjuſt War, or upon any Succeſs obtain'd in it. Thoſe Perſons too muſt needs lie under a great Miſtake, who fancy the Breach of ſome Precept of natural Law to be a Part of divine Worſhip. As they who are for treating in a hoſtile Manner, all ſuch as differ from them in Perſuaſion; who aſſert that Religion is to be propagated by the Sword; that no Faith is to be kept with Men of a contrary Profeſſion, no political Friendſhip (as they call it) and no Offices of Humanity to be exercis'd towards them, but that they are to be avoided, even in common Converſation, as unholy and unclean; that Violence, Wickedneſs, Treaſon, Perfidiouſneſs, *Sedition* and Rebellion, are not only lawful; but commendable, if undertaken on a religious Account [1]. To conclude, the following Opinions are not of leſs fatal Effect, than thoſe which we have already mention'd: That it imports nothing to ſolid Felicity, whether a Man apply himſelf to a virtuous, or to a vicious Life, and that good Men are [2] entitled to no better State or Condition than the Wicked. That the higheſt Pleaſure a Man can expect or obtain, is the preſent Gratification of his Senſes; and that the Soul periſhes with the Body. Laſtly, that all Law, even that which we call *natural*, is a meer human Device, not referable to GOD as the Author of it, nor deriving from him its Force and Sanctity. Theſe, therefore, and ſuch like Notions, are entirely to be rooted up out of human Minds, inaſmuch as they deſtroy our Duty to Almighty GOD, and prevent, or intercept, all Endeavours of conforming our Life and Manners to the Guidance of good Reaſon.

V. When this principal Care is over, the main Concern behind is for a Man accurately to examine his own Nature, and to ſtudy to *know himſelf*. An Enquiry, which Antiquity ſo much valued as the Forerunner of true Wiſdom, that γνῶθι σεαυτὸν was thought an Inſcription worthy to be ſet in Letters of Gold, and conſecrated in the *Delphian* Temple. [3] On which *Tully* hath given us this Comment, *The Precept of* Apollo, ſays he, *in which he enjoins us to know ourſelves, doth not mean that we ſhould be careful in knowing our Limbs, our Stature, or our Figure; for our Bodies indeed are not ourſelves.*

[a] *Tibull.* l. 3. el. 7.
Perjuria ridet amantum
Jupiter, & ventos irrita ferre jubet.

Jove laughs to hear Love's harmleſs Perjury,
And bids the Winds go loſe it as they fly.

[b] *Mytholog.* l. 1. c. 18.

[c] *Senec. Hypolit.* ver. 195.
Deum eſſe Amorem, turpis & vitio favens
Finxit libido; quoque liberior foret
Titulum furori Numinis falſo addidit.

Love was firſt deify'd by Luſt and Vice:
When Men, to gain a Patron to their Sin,
And free Purſuit of Pleaſure, fix'd the Stamp
Of Heaven on Hell, a *Fury* made a *God*.

[d] *Benzo.* Hiſt. Nov. Orb. l. 2. c. 13.

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[1] See Mr. *Bayle*'s *Philoſophick Commentary* upon theſe Words, *Compel them to come in*, &c. Part i. Chap. iv. &c.

[2] *Cicero* de Naturâ Deorum, l. 3. c. 35. *Ut enim nec Domus, nec Reſpublica ratione quadam, & diſciplina deſignata videatur, ſi in ea nec rectè factis præmia exſtent ulla, nec ſupplicia peccatis; ſic mundi divina in homines moderatio, profectò nulla eſt, ſi in diſcrimen nullum eſt bonorum & malorum*: i. e. *Heaven is certainly not at all concern'd in the Government of Men, if it doth not make a Diſtinction between the Good and the Wicked.*

§. V. [3] *Tully*'s Words are, *Nimirum hanc habet vim præceptum Apollinis, quò monet, ut ſe quiſque noſcat; non enim, credo, id præcipit, ut membra noſtra, aut ſtaturam, figuramve noſcamus; neque nos corpora ſumus* —— *Cum igitur Noſce te, dicit, hoc dicit, noſce animum tuum. Nam corpus quidem quaſi vas eſt, aut aliquod animi receptaculum. Ab animo tuo quicquid igitur, id agitur a te.* The Reader may compare what has been ſaid in this Chapter, with the ninth Section of Mr. *Wollaſton*'s *Religion of Nature delineated*. He will find a great Conformity in the Ideas and Precepts of theſe two Authors; but with this Difference, that ſometimes the one, and ſometimes the other, urges and explains certain Things in a clearer Manner, according to the particular Plan which each had laid down.

But when the Oracle says, Know yourself, it says in Effect, Know your own Mind and Soul. For the Body is no more than the Soul's Vessel or Receptacle. And no Action is properly done by yourself, but what proceeds from your better and nobler Part [a]. Now from this *Knowledge of himself*, rightly pursu'd, a Man is brought to understand his Condition, and the Office he is to bear in the World: Whilst he apprehends, that he did not exist of himself, but ow'd his Original and Being to a much sublimer Principle; that he is endow'd with far more noble Faculties, than he sees enjoy'd by the Beasts about him; lastly, that he was not born by himself, nor purely for his own Service; but that he is a part of human Kind, and is oblig'd to behave himself sociably towards other Men. And from these Fountains may easily be drawn the compleat Knowledge of human Duty. Vid. *Marc. Antonin.* l. x. s. 6.

[1] *Pers. Sat.* iii. 71.

——————*Quem te Deus esse*
Jussit, & humana qua parte locatus es in re
Disce.

Study thyself: Learn in what Rank and State,
The wise Creator hath ordain'd thy Fate.

It belongs, likewise, to our understanding ourselves [2], to know our own Power, and how far it extends, either in exerting our Actions, or informing our Designs [b]. And farther, what is the true Effect and Consequence of every Practice; and what Respect and Use the Things without us have to ourselves, and to our Happiness.

VI. From this Knowledge it follows, that a Man must apprehend his Subjection to Almighty GOD, and the Obligation which lies upon him, according to the Measure of the Gifts he hath receiv'd, both to celebrate the Divine Majesty, and to shew himself a sociable Creature in his Transactions with his Fellows. And inasmuch as GOD hath bestow'd on him the Light of Understanding, he ought certainly to conclude, that he is not to do every thing at random, and [3] without End or Design; but that, whatever he undertakes, he should first weigh the Matter in hand, and regulate his Method of proceeding about it [c]. And, consequently, that he propose an End [4] agreeable to his Nature, and rightly moderate and direct both his own Actions, and all other due Means towards the Attainment of that End. And this in such a manner, that he neither proceed in the Application of the means, before the End is fix'd and determin'd; nor settle such an End as he must afterwards want Means to arrive at. Another Instance, closely ally'd to this, is, that since Truth and Right are always uniform, and without Alteration, so he ought always to form the same Judgments of the same Things, [5] and when he hath once judg'd truly, to be always constant in his Mind and Resolution. Farther, that his Will and his Appetite do not get the Start of [6] good Judgment, but follow and obey it; never making Resistance to its Decrees [7]. For he who observes this Course of Proceeding, will be sure to act with Prudence, with Constancy, and with Moderation. He will make it his chief Aim and Rule, as *Lucan* describes *Cato*, ii. 381.

[a] Add. *Casaubon* ad *Pers.* Sat. 3: ver. 57. and *Plato*, in his *first Alcibiades*, p. 448. Edit. *Francofurt. Ficin.*
[b] *See* Socrates's *Explication of that noble Sentence in* Zenophon Apomnem. l. 4. Add. *Bacon Ess.* 36.
[c] Τάξον πρὸ ὁδοῦ ἑαυτῷ, καὶ τύπον ὃν φυλάξῃς ὅπη τε σαυτὸν ὦν, καὶ ἀνθρώποις ἐντυγχάνων. *Epict. Ench.* Chap. xl.

[1] *Persius*'s preceding Words are elegant and pertinent:

Discite vos, miseri, & causas cognoscite rerum,
Quid sumus, & quidnam victuri gignimur, ordo
Quis datus, aut metæ, quàm mollis flexus & undæ;
Quis modus argento, quid fas optare, quid asper
Utile nummus habet, patriæ, charisque propinquis
Quantum elargiri deceat, quem, &c.

Learn, wretched Men, and know the Cause of Things,
What 'tis we are, and why we have our Beings;
What is the Order, and what Nature's Course,
What we may wish for, and what Money's Force,
What Profit it doth yield; what to bestow
Upon our Country, and our Kindred too.
Study, &c.

[2] "This great Precept is often alledg'd in *Plato*, *Mind thy own Business, and know thy Self.* Each of these Sentences contains in general our whole Duty, and seems to include the other. He that will do his own Business, must learn this Lesson first, to know himself, and he that knows himself, will not undertake any Business as his own, that he is not acquainted with; for if he loves and takes care of himself, he'll refuse needless Employments, and unprofitable Thoughts and Proposals." *Montaigne*'s *Essay*, l. 1. c. 3.

§. VI. [3] *Seneca* has a fine Passage relating to this Subject, Epist. 71. *Ideò peccamus, quia de partibus vitæ omnes deliberamus, de totâ nemo deliberat. Scire debet, quid petat, ille, qui sagittam vult mittere, & tunc dirigere, & moderari manu telum. Errant consilia nostra, quia non habent quo dirigantur. Ignoranti quem portum petat, nullus suus ventus est. Necesse est multum in vitâ nostrâ casus possit, quia vivimus casu. i. e.* "The Original of our Errors is, that no Man contrives seriously to draw up a Scheme of his whole Life, but contents himself to deliberate occasionally upon some particular Actions. The Gunner should know his Mark, before he takes his Aim to shoot. Our Projects are disappointed, because we keep not the End in our Minds. The Wind can never blow well for him, who don't know the Port he is sailing to. Fortune must do much among us, who leave so much to Chance in our Lives." See *Cicero*'s *Paradoxes*, Chap. v. with *Grævius*'s *Notes*, and *M. Antoninus* with *Gataker*'s, Lib. 2. §. 16. and l. 11. §. 21. See, also, *Plato de Repub.* l. 7. p. 695. *Ed. Wech.* and *Montaigne*'s *Essays*, Lib. 2. Chap. 1. at the End.

[4] All the World knows that famous Principle of Morality laid down by the *Stoicks*, who say, That *we should live agreeable to Nature.* See *Seneca*, *M. Antoninus*, *Epictetus*, *&c.* but chiefly *M. Antonin.* Lib. v. Chap. 16.

[5] This is to be understood of Cases where, after having reflected thoroughly of a Thing, we judge quite differently of another like it; otherwise the two Judgments would be false. The Use of this Rule chiefly regards the different Lights in which we judge of the same thing, whether it concerns ourselves or another Person. *Isocrates* warmly reproach'd the *Athenians*, that they aim'd to usurp the Empire of the Sea, while they regarded this Ambition, as equally pernicious and tyranical in all other Nations. This, he said, was shamefully to counter-act one of the clearest Maxims of good Sense, which commands us, in all Times and Places, to judge uniformly of the same Actions. Πεπόνθατε γὰρ πάν αἰσχίστον, *&c. Orat. de Pace*, Page 182. Tho' all Conditions of Men break through this Rule, the Great are more subject to violate it towards their Inferiors, by acting as if they thought themselves dispens'd in their Respect from the most common Laws of Justice and Equity.

[6] *Cicero* has very well observ'd, *Efficiendum autem est, ut Appetitus rationi obediant, eamque neque præcurrant, nec propter pigritiam, aut ignaviam deserant; sintque tranquilli, atque omni perturbatione animi careant. Ex quo elucebit omnis constantia, omnisque moderatio, i. e.* "We must bring all our Affections into Subjection to our Reason, and not suffer them either to outrun it, or thro' Sluggishness to desert it. They must, also, be calm, and not disturb our Minds. From this springs what we call Equality and Moderation." *Off.* l. 1. c. 29.

[7] *i. e.* Never to enquire into them, but after mature Deliberation, and never to act against our own Conscience. I have added this Explication in favour of those, who might else, at first sight, have misunderstood the Author's Expression.

——*Servare modum, finemq; tenere,*
Naturamq; sequi, patriæq; impendere vitam:
Nec sibi sed toti genitum se credere mundo.

To keep a *Mean*, to eye the chief Design;
To follow *Nature*, as a Guide Divine,
To pay his Country's Ransom with his Blood,
And private Pleasure quit for publick Good:
To raise his Soul to universal Cares,
And in his Pains give all the World their Shares.

He that acts otherwise, instead of keeping a decent Pace in the Journey of Life, seems to rowl and tumble through the World [1]: His Proceedings are perpetual Contradictions; and 'tis impossible for him to arrive at any comfortable Condition: Since, [2] as *Sophocles* observes, *Antig.* ver. 1348.

Πολλῷ τὸ φρονεῖν εὐδαιμονίας
Πρῶτον ὑπάρχει ——————

True Wisdom is the Spring of Happiness.

VII. If a Man thus rightly apprehend and consider his own Strength and Power, he will discover that it is of a *finite* Nature, having certain Limits, beyond which it can never extend itself; and, therefore, that there are many Things in the World which we cannot manage or compass, and many that he cannot hinder or resist. Other Matters there are which do not absolutely exceed human Power, but which may be intercepted and prevented by the Opposition of other Causes. And a third Kind of Things we cannot compass by our bare Strength, nor assisted by Dexterity and Address. Applicable to these Reflections is the famous old Distinction of the *Stoicks*, dividing Things into τὰ ἐφ' ἡμῖν, and τὰ οὐκ ἐφ' ἡμῖν, those *in our Power*, and those *without*, or *beyond it*. What seems to be most under our Command, is our own Will, and the Power of that Faculty in exerting Actions proper to our Species of Being. For although the Will hath some cross and stubborn Principles adherent to it, which bend and ply it continually from its due *Æquilibrium*, yet hath a Man nothing in his whole Nature more nearly and closely tied to him, nothing which is less capable of being hindred by external Powers, and therefore nothing, the Motions of which do more properly belong to his Person, and may accordingly be *imputed*. Hence it follows, that every Man ought to make it his main Care and Concern, rightly to employ his Force and Abilities, in conformity to the Rules of Reason: At least, to settle a constant Resolution of discharging, as far as in him lies, every thing which seems agreeable to his Duty, and to the Design of his Being. For this is the Test by which we are to rate the Worth of every Person, and to measure his intrinsical Goodness and Excellency. [3] *Arrian. Epictet.* l. i. c. 1. *What, therefore, on the whole Matter, are we to do? To improve, and to put to the best use those Things which are in our Power, and to deal with other Things as their Natures* [4] *require.*

VIII. As to the other Matters which lie without us, we are so far to employ ourselves about them, as they do not surpass our Strength, as they tend to a lawful End, and are worth the Labour which we spend in the Pursuit. For Things above us, a wise Man will not lose his Hopes and his Pains upon them; he will reckon it folly to endeavour, with vast Toil, the Attainment of such an End, which he knows his own Force, together with the Assistances he expects, unable to compass: Or unless he be, at least, certain, that the very Probability of obtaining the End is of more Consequence than any other Effect, which he could, without question, have produced at the same Time, and with the same Labour. [5] Other Things he will leave to the Direction of Providence, and will compose his Mind as well as he is able, [6] for a peaceful Acquiescence in every Event. He will not [7] vainly disquiet himself on the Account of Evils, which either have already

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[1] These Words are *Horace*'s, Epist. 1. Lib. 1. ver. 99. *Et vitæ disconvenit ordine toto.*

[2] *Lipsius*, in his *Politicks*, translates the Words thus, Lib. 1. Chap. 7. *Longe Prudentia fælicitatis primas tenet, i. e.* "That "Prudence which makes a Man happy, is certainly the chiefest by much." which agrees with these Verses of *Grotius*:

Sapiens animus prima hamanas
Sors inter opes ——————

But Wisdom is incomparably much more advantagious and valuable than Happiness or Prosperity: So that this Sentence makes nothing to our Author's Purpose, who is proving, That Wisdom is the Means to arrive at Happiness. Nevertheless I thought fit to observe, that this Passage of *Sophocles* is explained, as I have understood it, in the *Greek* Comment of *Triclinius*; for others follow an Explication, which, to me, seems not true, and which they embraced, without being aware that πρῶτον has sometimes a comparative Signification. This *Scholiast* thus explains the Sentiment of the Poet. *Wisdom is the Principle of Happiness: therefore it is more valuable; because the Cause is more noble than the Effect.*

§. VII. [3] *Arrian*'s Words are, Τί οὖν δεῖ; τὰ ἐφ' ἡμῖν, βέλτιστα κατασκευάζειν, πῖς δ' ἄλλοις χρῆται, ὡς πέφυκε.

[4] *M. Antonin.* l. 6. 32. Τῇ δ' διανοίᾳ ἀδιάφορα, ὅσα μὴ ὄζιν αὐτῆς ἐνεργήματα, ὅσα δ' γε αὐτῆς ὄζιν ἐνεργήματα, ταῦτα πάντα ἐπ' αὐτῇ ὄζιν, καὶ τούτων μέν τι, ἃ νῦν μόνον τὸ παρὸν περαιοῦται· τὰ γὰρ μέλλοντα, καὶ παρῳχημένα ἐνεργήματα αὐτῆς, καὶ τὰ ἤδη ἀδιάφορα. *i. e.* "All Things are indifferent to my Soul, except its own Operations. Now all its Operations depend "upon itself: But only those about which it is busy at present are dear to it; such as are past and to come are equally indifferent." See, also, §. 50. of the same Book.

§. VIII. [5] *Permittes ipsis expendere Numinibus, quid*
Conveniat nobis, rebusque sit utile nostris.
Nam pro jucundis aptissima quæque dabunt Dî.
Carior is illis homo, quam sibi ——————

Let's leave it to the Gods to do what they
Think agreeable and profitable for us.
We ask what pleases us, they give what's fit and best.
They love Man better than himself.
Juv. Sat. 10. v. 347, &c.

[6] 'Twas a Maxim of the *Pythagoreans*, That wise Men are prepared for all Events which may happen to Man, and whose Management depends not on himself. Καὶ ὧδ' αὐτοῖς (says *Jamblichus*) θεώρημα, ὡς ὀδὲν δεῖ, τῶν ἀνθρωπίνων συμπτωμάτων ἀπροσδόκητον εἶ) θεῷ τοῖς ὧν ἔχουσιν, ἀλλὰ πάντα προσδοκᾷν, ὧν μὴ τυγχάνουσιν αὐτὰ κωλύοντες ὄντες. *De Vitâ Pythag.* Chap. 31. n. 196. Edit. *Kuster.* See, also, numb. 224.

[7] "Represent to yourselves in your Minds all the Evils that can befal you, yea, the most intolerable, suppose yourselves certain to suffer them; and, on the contrary, is it not more easy and natural to banish such Thoughts? They'll happen ne'er the sooner, nor continue e'er the longer. We may enlarge and prolong them by our Thoughts, yea, so incorporate them beforehand in ourselves, and entertain them, as if we have not truly any Sense of them. They disturb us enough whenever they come, (says one of the Leaders, not of the tendereſt, but severeſt Sects) therefore favour thyself. Believe what thou "loveſt

ready happen'd, or may hereafter fall out without his Fault: And so he will cut off the greatest Part of human Troubles, which are wont to be produced, either by vain Hope driving us on ill Designs, or by the more violent Motions of Grief, Anger, or Fear [a].

From these Considerations this farther Consequence may be drawn; that Man, as he is guided only by the Light of Reason, ought not to frame to himself, or to aspire after any other Happiness in this World, than such as arises from the prudent Government of his Faculties, and from those Assistances and Supports, which we are sure the Divine Providence will afford us in the universal Administration of Things. From the same Principles we may infer, that as we are not to leave Things to meer Hazard and Chance, whilst there is any room for human Caution and Foresight; so, when we have done all that lies in our Power, we cannot ensure an Event which doth not depend on our Direction, and of which we have no certain Knowledge, till it actually happen. As *Iphicrates* often observ'd, 'twas unworthy of a General to say, *I did not think it*; so 'tis below a wise Man to make the like sorry Reflection. It was a good Wish of the Poet, *Ov. Ep.* ii. 85.

——————*Careat successibus opto*
Quisquis ab eventu facta notanda putat.

——————Ne'er may Successes bless
The Man who measures Actions by Success.

Yet this absurd Opinion is so strong, and so universal among the *Mahometans*, that they take good Success to be an infallible Argument of the Justice of a Cause, and an open Sign of the Approbation of Heaven. Whereas such a Notion is indeed to be rank'd amongst the ridiculous Follies of the lowest and most ignorant Vulgar. For 'tis evident to any Person of common Sense [a], that, as *Juvenal* says, Sat. xiii. 103.

——————————*Multi*
Committunt eadem diverso crimina fato;
Ille crucem pretium sceleris tulit, hic diadema.

That Sins *alike* unlike Rewards have found,
And whilst *this* Villain's hang'd, the *other's crown'd.*

Hence, likewise, we learn, that as it is the Part of a wise Man [a], not to bound his Sight at the Things before him, but to extend his Consideration and his View to Things to come, and to drive on his well-form'd Resolution with his whole Strength, without suffering either the Threats of Fear, or the Flatteries of Pleasure, to turn him aside: So is it as sure a Mark of a Fool to drive directly against the Stream, and not rather to accommodate his Inclinations to the Events, when they will not conform themselves to his Inclinations [b]. Lastly, since human Foresight is so weak in discovering future Things; and, since they are very far from being under our Guidance, though they frequently fall out well beyond our Hopes and Expectations [c]; hence it is plain, that we ought neither too securely to trust our present Condition, nor to spend too much Care and Anxiety on what is to come. And, for the same reason, Insolence in Prosperity, and Despair in Adversity, are to be both avoided, as equally dangerous and equally absurd. 'Twould be easy to illustrate this Doctrine with endless Testimonies of Authors. Take the following for a Specimen. *Arrian. Epist.* l. ii. c. 1. *In Things which do not depend upon our Election, let us be bold and venturous; but, in Things which are capable of Choice and Counsel, let us be timorous and cautious* [d]. Juvenal, Sat. x. 365.

Nullum numen abest, si sit prudentia; sed te
Nos facimus, Fortuna, Deam, cæloque locamus.

All Heav'n stands ready to assist the Wise, but we
Make Fortune a celestial Deity.

Horat. Carm. iii. 4. 65.
Vis consilii expers mole ruit sua:
Vim temperatam Dii quoque provehunt
In majus——————

Force, without Wisdom for its Guide,
Sinks with its own unwieldy Weight;
But, with delib'rate Art apply'd,
The Gods advance it to a nobler Height.

Lucret. l. iii. 1011.
——*Petere quod inane est nec datur unquam,*
Atque in eo semper durum perferre laborem;
Hoc est adverso nixantem trudere monte

[a] Arrian. Epictet. l. 2. c. 7. *What can be better for us than that which hath the Approbation and the Appointment of GOD himself?*

[b] *Cedere majori virtutis fama secunda est.* Mart.
'Tis next to conqu'ring, wisely to submit.

[c] Ὀμίχλαι ἄσκοποι ἐσομένων, *the dark Mist of Futurities.* Tryphiodor.

[d] *Plutarch* de Superstitione. Ἀρετῆς γὰρ ἐλπὶς ὁ θεός, ἐστὶν, ἃ δειλίας προφάσεις, *i. e. GOD is the Hope of Courage and Virtue, not the Plea and Excuse of Weakness and Cowardice.* Indeed Self-love is the Cause, that we are ashamed to own that the Evil which befalls us happens through our own Fault, and so we charge Fortune, as Mr. *La Fontaine* speaks suitably, Fab. 11. Lib. 5.

Nothing happens here below,
But she may us answer so,
We do make her rule our Fate,
She is the Author of our Adventures.

And are we Fools so to take our Measures?
This Excuse we meditate,
We accuse our Luck, not to be long
Fortune always has the Wrong.

"lovest best. Recollect thyself, and use all Means to prevent thy ill Fortune. Don't lose thy present Ease for fear of future "Evil, and be not now miserable, because thou shalt be so at such a time." These are the Words of Mr. *Montaigne*'s, *Essays*, Lib. 3. Chap. 12. See, also, *Seneca*, Epist. 13, 24, 74, 98, &c.

[a] *Liban. Declam.* 21. Ὁ χρηστὸς καὶ σπουδαῖος ἀνὴρ τῇ γνώμῃ, καὶ οἷς προείλητο, κεῖνος· κἂν μὴ τὸ πρᾶγμα ἀκολουθήσῃ τῷ βουλεύμασιν ἄξιον, ἀλλ' οὖν ἥττων δεῖ σπουδαῖος, *i. e.* "A good and diligent Man proceeds according to his Judgment, and to the "Notions which he hath form'd of Things: And although the Event doth not answer the Worthiness of his Design, he is no "less industrious for the future." See *Marc. Antonin.* Lib. VI. 50. VII. 38. VIII. 47.

[a] See Mr. *Montaigne*'s *Essays* upon this Subject, That 'tis not reasonable to judge of Actions by the Event, Lib. 1. Chap. 31 and Lib 3. Chap. 8.

[b] So *Terence* speaks, *Istuc est sapere, non quod ante pedes modo est*
Videre, sed etiam illa, quæ futura sunt. Adelph. Act. 3 Scen 4. Vers. 23, 24.

Saxum, quod tamen à ſummo jam vertice rurſum
Volvitur, & plani raptim petit æquora campi.

For, ſtill to ſeek, and ſtill in hopes devour,
And never to enjoy deſired Power,
What is it but to roll a weighty Stone
Againſt a Hill, which ſtrait will tumble down?
Almoſt at Top, it muſt return again,
And with ſwift Force roll thro' the humble Plain.
Mr. *Creech.*

Hor. Carm. ii. 3.
Æquam memento rebus in arduis
Servare mentem: non ſecus in bonis
Ab inſolenti temperatam
Lætitia.

Learn, Friend, to keep an even State,
Whatever Scene your Cares employs,
Amongſt the Smiles or Frowns of Fate.
Nor mean in Grief, nor inſolent in Joys.

Ibid. Od. 10. 21.
Rebus anguſtis animoſus atque
Fortis appare, ſapienter idem
Contrahes, vento nimium ſecundo,
Turgida vela.

The more you are oppreſs'd, bear up the more;
Weather the Tempeſt, till its Rage be o'er.
But if too proſp'rous, and too ſtrong a Gale,
Should rather ruffle than juſt fill your Sail,
Leſſen 't, and let it take but ſo much Wind,
As is proportion'd to the Courſe deſign'd.
Dryd. Miſcel. 2. p. 422.

Lib. iii. Od. 29.
Ille potens ſui
Lætuſque deget, cui licet in diem
Dixiſſe, Vixi; cras vel atra
Nube polum pater occupato,
Vel ſole puro.

He lives *in true Delight*,
And Maſter of himſelf appears,
Who, ſtrange alike to Hopes and Fears,
Can boldly ſay each Night,
To-morrow let my Sun his Beams diſplay,
Or in Clouds hide them, I have liv'd to-day.
Mr. *Cowley.*

Idem, l. ii, Sat. 7.
Quiſnam igitur liber? Sapiens; ſibi qui imperioſus,
Quem neque pauperies, neque mors, neque vincula terrent.
Reſponſare cupidinibus, contemnere honores
Fortis, & in ſeipſo totus teres atque rotundus,
Externi ne quid valeat per læve morari.

He's *Free*, who wiſely can himſelf controul,
And challenge Fate and Death to ſhock his Soul.
Brave to reſiſt the Tide of wild Deſire,
And Proof againſt Ambition's cheating Fire.
All round and ſmooth, that no external Load,
May fix a Rub, to check him in his Road.

Juvenal. Sat. xiii. 20.
——————*Dicimus autem,*
Hos quoque felices qui ferre incommoda vitæ,
Nec jactare jugum vita didicere magiſtra.

As *Happy* thoſe, tho' not ſo *Learn'd*, are thought,
Whom *Life* inſtructs, who by Experience taught
For *new* to come from *paſt* Misfortunes, look,
Nor ſhake the *Yoke*, which galls the more 'tis ſhook.
Mr. *Creech.*

Idem, Sat. x. 347.
Permittes ipſis expendere Numinibus, quid
Conveniat nobis, rebuſque ſit utile noſtris.
Nam pro jucundis aptiſſima quæque dabunt Dî;
Carior eſt illis homo, quam ſibi.

Intruſt thy Fortune to the Powers above,
Leave them to manage for thee, and to grant
What their unerring Wiſdom ſees thee want;
In Goodneſs as in Greatneſs they excel:
Oh, that we lov'd ourſelves but half ſo well!
Mr. *Dryden.*

IX. Another neceſſary Part of human Improvement, is to be able to ſet a juſt Price on thoſe Things, which are the chief in moving our Appetites. Becauſe from the exact Worth and Value of them we are to judge how far we may juſtly labour to be concern'd about them. Amongſt theſe, that which appears with moſt Figure and Splendor, and which is moſt capable of ſoliciting elevated and noble Souls, is the Opinion of Worth and Excellency, the Foundation of Glory and of Praiſe. Now as to this Concern, we are in ſuch a manner to form and diſpoſe our Mind, as to endeavour, as far as poſſible, the [1] procuring, and the preſerving that kind of *Eſteem* which is [2] *ſimply* ſo call'd, being the bare good Opinion of good Men: Inaſmuch as this *regularly* flows from the Obſervance of the Law of Nature, and of our Duty: And becauſe the want of it may lay open an Occaſion to a thouſand Miſchiefs and Inconveniencies [3]. And if this good Reputation be aſſaulted by the Lies and Calumnies of wicked Men, we are to ſpare no Labour in reſtoring it to its primitive Purity. But when it is not in our Power to overcome Slander, or to ſtifle the falſe Conceptions that the World may entertain about us, we are to comfort ourſelves [3] with the Teſtimony of a good Conſcience,

[a] *See* 2 Cor. viii. 21. Vide *Eſſais de Morale par Mr.* Placete, Vol. 4. Diſcourſ. 6, and 7.

§. IX. [1] *Negligere quid de ſe quiſque ſentiat, non ſolùm arrogantis eſt, ſed etiam omnino diſſoluti.* Cicero de Off. Lib. i. Chap. xxviii. *To be careleſs what others think of us, is a Sign not only of great Preſumption, but, alſo, of entire Impudence.* See *Grævius's Notes.* And mine on *The Duties of a Man and a Citizen*, Lib. i. Cap. v. §. 5.

[2] See the Explication of this Diviſion of Eſteem, into *ſimple*, and *diſtinctive*, Lib. viii. Chap. iv. §. 2. and what I have ſaid upon the laſt in my *Treatiſe of Games*, Lib. i. Chap. iii. §. 6.

[3] *Seneca* has very well obſerved, That no Diſgrace ought to diſcourage us from doing good. *Si gratum eſſe non licebit, niſi ut videar ingratus, ſi reddere beneficium non aliter quàm per ſpeciem injuriæ potero, æquiſſimo animo ad honeſtum conſilium, per mediam infamiam tendam. Nemo mihi videtur pluris æſtimare virtutem, nemo illi magis eſſe devotus, quàm qui viri boni famam perdidit, ne conſcientiam perderet*, i. e. "When I can't ſhew my Gratitude, unleſs I expoſe myſelf to the Diſgrace of being "thought ungrateful, and I can't be thought to do a Kindneſs, but it will be taken for an Injury; I will ſtill perſiſt ſincerely "in my honeſt Deſign to execute it, though I wade through Diſgrace. For no Man ſeems to have a greater Eſteem for Virtue, "or to be more devoted to it, than he, who, to ſave his Conſcience, riſks the Reputation of a good Man." Epiſt. 81. See *Marc. Antonin.* Lib. v. §. 3.

and

and with the Aſſurance that our Integrity is ſtill known to GOD [a].

As for that *Eſteem*, which we uſually term *Intenſive*, as Honour and Glory, we are ſo far to purſue it, as it redounds from worthy Actions, agreeable to Reaſon, and promoting the Good of human Society; and, as far as it opens a wider Field for ſuch generous Undertakings. But how large a Share ſoever we obtain of theſe Favours, and even by honeſt Means, good heed is to be taken that our Mind doth not ſwell with Arrogance and Vain-glory [1]. Much more fooliſh and ridiculous is it to boaſt of, and to value ourſelves upon, what is empty and vain, and gives no ſolid Proof of our Worth. Therefore *Demonactes* in *Lucian*, when he ſaw a Fellow priding himſelf in the Wideneſs of his Purple, *Hark you, Friend*, (ſays he) *a Sheep us'd to carry this fine Burthen before you, and yet was ſtill but a Sheep.* But when we want Occaſions and Opportunities of ſhewing our Worth, and are not able to procure them, we muſt bear this ill Fortune with Patience, ſince there is nothing in it that can be charg'd upon our Default [2]. On the other hand, it appears to be, at the ſame time, wicked and fooliſh, to affect and uſurp the external Enſigns of Honour, when the inward Foundations of it are wanting: As it is deteſtable Madneſs to aſpire to Fame and to Honours by evil Arts, and by Deeds repugnant to Reaſon; and to deſire the ſhining above others, only to be able to inſult over them, and to make them obnoxious to our Pleaſure. Laſtly, Since we are not always allow'd the Liberty of building our Fortune as we pleaſe, ſince it muſt ſometimes depend on external Cauſes; our Mind is to be put into ſuch a Temper, as when we have once done our beſt, to reſt ſatisfied with the Lot that falls to our Share; and to look on thoſe Things which we are not able to compaſs and to obtain, as Matters which do not concern us, and which therefore are not worthy our Grief or our Anger [3].

X. For the better maintaining and preſerving himſelf in the World, a Man hath, likewiſe, need of external Goods and Poſſeſſions; as it is frequently a Part of our Duty to provide them for others. Concerning which, it is the Command of Reaſon and Nature, that we endeavour [4] the Procurement of them, ſo far as is conſiſtent with our Strength, our Opportunities, and our Honeſty. The *Ant*, which *Virgil* [b] makes ſo *prudent a Provider for Old Age*, is, even in the Divine Writings, propos'd amongſt the Examples of harmleſs Induſtry [c 5]. But becauſe our Wants are not infinite, but lie in a very little Compaſs, therefore we muſt moderate our Deſire and our Purſuit of theſe Things, according to the juſt Occaſions of Nature, and the Meaſure of Sobriety. *Socrates*, in *Diogenes Laertius*, when he us'd to ſee the prodigious Quantity of Goods expos'd to Sale in the publick Places, would cry out, Πόσων ἐγὼ χρείαν οὐκ ἔχω; *What a number of Things are there here which I do not want!*

Juv. Sat. ver. 6.
Ventre nihil novi frugalius.——
——The Belly is a frugal Gueſt.

Idem. Sat. xiv. 316.
——*Menſura tamen quæ*
Sufficiat cenſus, ſi quis me conſulat edam:
In quantum ſitis atque fames & frigora poſcunt.

[a] Add. *Le Grand Philoſ.* Part VIII. p. 420.
[b] ——*Inopi metuens Formica ſenectæ.* Virg. Georg. l. 1. ver. 186.
[c] *Prov.* vi 6. xiii. 7.

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[1] *Plin. Panegyr.* Chap. 71. *Nam cui nihil ad augendum faſtigium ſupereſt, hic uno modo creſcere poteſt, ſi ſe ipſe ſubmittat, ſecurus magnitudinis ſuæ, i. e.* "He who hath already arriv'd at the higheſt Degree of Honour, hath this only Way left of increaſing his Reputation, by ſhewing his Humility, without fearing to endanger his Greatneſs.

[2] Hor. Carm. III. 2.
Virtus repulſæ neſcia ſordidæ
Intaminatis fulget honoribus,
Nec ſumit aut ponit ſecures,
Arbitrio popularis auræ.

On its own Worth true Majeſty is rear'd,
And Virtue only is her own Reward;
With ſolid Beams, and native Glory bright,
She neither Darkneſs dreads, nor covets Light.
True to herſelf, and fix'd to in-born Laws,
Nor ſunk by Spite, nor lifted by Applauſe.
Mr. *Prior.*

Claudian. de Conſulat. Mall.
Ipſa quidem Virtus pretium ſibi; ſolaq; latè
Fortunæ ſecura nitet, nec facibus ullis
Erigitur plauſuve petit clareſcere vulgi;
Nil opus externæ cupiens, nil indiga laudis,
Divitiis animoſa ſuis, immotaque cunctis
Caſibus, ex alta mortalia deſpicit arce.

Virtue the Tribute ſcorns of Vulgar Eyes,
And in herſelf her richeſt Portion lies.
With native Rays ſhe ſhines, nor owes a Beam
To glittering Honour, or to gloſſy Fame.
Unmov'd at earthly Storms, to Heaven ally'd,
From Heaven ſhe looks, and laughs at mortal Pride.

[3] Seneca Agamemn. *ver.* 102.
Modicis rebus longius ævium eſt.
Felix mediæ quiſquis turbæ
Sorte quietus,
Aura ſtringit littora tuta
Timiduſque mari credere cymbam,
Remo terras propiore legit.
Idem, Herc. OEtæ, *ver.* 691, *&c.*
Malè penſantur magna ruinis;
Felix alius, magnuſque volet;
Me nulla vocet turba potentem;
Stringat tenuis littora puppis.
Nec magna meos aura phaſelos
Jubeat medium & ſcindere pontum.
Tranſit tutos Fortuna ſinus,
Medioque rates quærit in alto,
Quarum feriunt ſuppara nubes.

Exceſs of Fortune kills, or cloys,
But *Temp'rance* is the *Health* of Joys.
Happy the Man, whoſe middle State,
Fearing to tempt the Tide of Fate,
Securely guides with wary Oar
His humble Bark along the Shore.

Falls are the ſad Rewards of Height:
Let others burſt in ſwelling Great.
Give me no Title from the Crowd,
But let my gentle Bark be row'd
Cloſe to the Bank, whilſt fluttering Gales
Court me in vain to hoiſt my Sails.
When angry Vengeance puts to Sea,
She leaves in Peace the ſilent Bay;
At the tall Maſts her Thunders fly,
Whoſe blazing Streamers ſtrike the Sky.

Add. *OEdip.* ver. 882, *&c.* See, alſo, *Val. Max.* Lib. vii. Chap. ii. §. 1. *exter.*

§. X. [4] See my Treatiſe of Games, Lib. i. Chap. iii. §. 7.

[5] *Eurip. Electr.* ver. 80, 81.
Ἄρρὼς γὰρ ἐλπὶς, θεὸς ἔχων ἀνὰ σῶμα,
Βίον δ' ὠίεται' ἂν ξυλέγειν ἄνδ' πόνῳ.

——The Wretch that hopes
To help his idle Hands with idle Prayers,
And will not work to live, ſhould fairly ſtarve,
By Gods and Men unpity'd.——

If any aſk me what would ſatisfy
To make Life eaſy, thus would I reply:
As much as keeps out Hunger, Thirſt, and Cold.
Mr. *Drydan*, jun.

[1] *Apuleius* Apolog. *I would chuſe my Fortune as I would my Coat, rather neat and fit, than too long or too full. Inaſmuch as in all Things which belong to the Service of Life, whatever exceeds Conveniency and Moderation, turns more to Burthen than to Uſe. Unweildy Poſſeſſions, like vaſt and monſtrous Rudders, will ſooner drown than guide us: They clog with Plenty, and ſurfeit with Exceſs.*

Lucan. iv. 377.
Diſcite quàm parvo liceat producere vitam,
Et quantum natura petat.———
———Satis eſt populo fluviuſque Cereſque.

True Bliſs is frugal, every Brook and Field
A full Supply for Life and Nature yield.

Lucret. ver. 1116.
Quod ſi quis vera vitam ratione gubernet,
Divitiæ grandes homini ſunt, vivere parcè
Æquo animo.

Would Men but once live up to Reaſon's Rules,
They would not ſcrape and cringe to wealthy Fools.
For *'tis the greateſt Wealth to live content*
With little——— Mr. *Creech.*

Claudian *in* Rufin. 1.
Vivitur exiguo melius; Natura beatis
Omnibus eſſe dedit, ſi quis cognoverit uti.

Life runs the beſt on little: Nature's Store
Can make all happy that will uſe their Power.

Horat. Carm. III. 16.
Contracta meliùs parva cupidine
Vectigalia porrigam,
Quam ſi Mygdoniis regnum Halyattici
Campis continuem: multa petentibus
Deſunt multa, benè eſt cui Deus obtulit,
Parca quod ſatis eſt manu.

Thus paraphras'd by Mr. *Cowley.*
A Field of Corn, a Fountain, and a Wood,
Is all the Wealth by Nature underſtood.
The Monarch on whom fertile *Nile* beſtows
All which that grateful Earth can bear,
Deceives himſelf if he ſuppoſe
That more than this falls to his ſhare.
Whatever an Eſtate doth beyond this afford,
Is not a Rent paid to the Lord;
But is a Tax, illegal and unjuſt,
Exacted from it by the Tyrant Luſt.
Much will always wanting be
To him who much deſires. Thrice happy he,
To whom the wiſe Indulgency of Heaven,
With ſparing Hand, but juſt enough has given.

Idem, l. 1. Epiſt. 10. ver. 32.
———Licet ſub paupere tecto
Reges, & regum vita præcurrere amicos.

A Cottager may match in true Delights
Kings, and their more luxurious Favourites.

Idem, l. 1. Ep. 12. ver. 4.
Pauper enim non eſt, cui rerum ſuppetit uſus.

He's never poor that holds enough for Uſe.

Quinctil. Declam. 13. *It is Wealth enough to deſire no more.* Turpilius *in* Priſcian. *The happieſt Livers are the contented Maſters of little Fortunes.*

We muſt not then, on any account, give too looſe Reins to our deſire of getting; much leſs muſt we invade the Wealth of others by Injuries and evil Deſigns [a]. And thoſe Things which we have fairly made ourſelves Maſters of, we are to account no otherwiſe, than as Helps to our Neceſſities, and Inſtruments to make us deſerve well of Mankind. But the Mind muſt by no means fix and enſlave itſelf, to poſſeſs and to preſerve them merely for their own Sake; or to be perpetually employ'd in the endleſs Labour of increaſing them. 'Tis downright Frenzy, as *Juvenal* ſays, *Syl.* xiv. 137.

Ut locuples moriaris, egenti vivere fato.

Living, to ſuffer a low ſtarving Fate,
In hopes of dying in a wealthy State.

On the other ſide, 'tis a very good part of the Character which *Statius* gives of a wiſe Man, *Syl.* ii. 2.

Non tibi ſepoſitas infelix ſtrangulat arca
Divitias, avidiq; animum diſpendia torquent
Fœnoris: expoſiti cenſus & docta fruendi
Temperies.

In ſtifling Chefts your Wealth is not confin'd,
Nor, lent on greedy Uſe, torments your Mind;
But nobly ſpreads, on decent Ends employ'd,
By Moderation, and with *Art enjoy'd* [b].

We

[a] Hor. Sat. 1. 1. 92.
Denique ſit finis quærendi, cumq; habeas plus,
Pauperiem metuas minus; & finire laborem
Incipias, parto quod avebas.———
Stop then your ſwelling Riches as they grow;
And let baſe Want, with its Retinue, ſhow,
At greater Diſtance, a leſs dreadful Foe.
Ceaſe your vain Care, let all your Labours ceaſe,
When your large Wiſh is crown'd with full Succeſs.

Eumen. Panegyr. *Thoſe who make not Reaſon the Bounds of their Deſires, are never ſatisfied with any Profuſeneſs of Fortune; and thus Happineſs ever ſlides by them, whilſt, being full of Hopes, and void of real Enjoyments, they loſe the preſent in gaping after the future.* Add. *Charron de la Sageſſe*, l. 1. c. 21.

[b] Hippodamus de Felicitate: *The Poſſeſſion of good Things contributes nothing to Happineſs, without the Uſe.* Add. *Theocrit. Idyll.* 16.
Horat. Epod. 1. 32.
———Haud paravero
Quod aut, avarus ut Chremes, terra premam,
Diſcinctus aut perdam ut nepos.
I would not labour to abound
In what I might with no leſs Care,
Like a baſe Miſer, or a Spendthrift Heir,
Squander *above*, or bury *under* Ground. *Idem,*

[1] *Apuleius*'s Words are, *Fortunam, velut tunicam, magis concinnam, quàm longam probare, quippe etiam ea ſi non geſtetur, & trahatur, nihilominus quàm lacinia præpendens, impedit, & præcipitat. Etenim in omnibus ad vitæ munia utendis, quidquid aptam moderationem*

We are farther to consider, that Nature is not wanting in a plentiful Provision for the Necessities of her Sons [a]. That the Riches which we hoard up for future use, are expos'd, in the mean time, to a thousand Dangers, and sometimes give us more trouble in keeping them, than they gave us Labour in getting them [b]. Lastly, that whatever we leave heap'd together, at our Death, must fall to an Heir, who may not only be unworthy of the Gift, but may despise and deride the Giver [c]. As therefore an honest Occasion of acquiring Riches is not to be neglected, so the Mind ought to be put into so even a Temper, as not to lose *itself*, if it should happen to lose *them*. *Horace* hath taught us the best way of dealing with Fortune: *Od.* iii. 29.

Laudo manentem; si celeres quatit
Pennas, resigno quæ dedit, & meâ
Virtute me involvo; probamq;
Pauperiem sine dote quæro.

Which a great and noble Wit hath thus most happily paraphras'd:

Let her love whom she please, I scorn to woo her;
Whilst she stays with me, I'll be civil to her;
But if she offers once to move her Wings,
I'll fling her back all her vain Gew-gaw Things,
And, arm'd with Virtue, will more glorious stand,
Than if the Bitch still bow'd at my Command.
I'll *marry* Honesty, though ne'er so poor,
Rather than follow such a dull blind Whore [d].

As to Expences, we are to use such a Moderation about them, as most willingly to undertake such as our Duty requires of us, and yet not squander our Fortune at a venture, without Necessity, and without Reason [e]. For 'tis equally foolish and absurd, not to apply our Riches to the Ends for which they are given us, and vainly to throw them away on inferior Uses and Designs. The former Vice including numerous Breaches of our Duty; the latter leading the direct way to Debt, Poverty, Rapine, Deceit, and a thousand other Enormities and Mischiefs [f].

XI. In reference to Pleasure and Pain, 'tis not only the Permission, but the Advice of Reason, that we avoid, as much as possible, all unnecessary Trouble and Disquiet; and not only endeavour to keep ourselves free from Grief and Disgust, but, likewise, to entertain our Senses with such Objects as are [g] agreeable and delightful to them [g]. But to a singular

Idem, Carm. IV. 9.
Non possidentem multa vocaveris
Recte beatum: rectius occupat
Non beati, qui deorum
Muneribus sapienter uti
—Callet. ——— ——

The wide Possessor vainly claims,
Amongst his Titles and his Names,
The Term of *Happy*, which should bless
The Man that wisely lives on less.

Idem, L. 1. Epist. 2.
Semper avarus eget; certum voto pete finem:
Quod satis est cui contingit nil amplius optat.

The Miser's ever poor: Thy Wish should fall
On some fix'd End: who has enough, has all.

Idem, L. 2. Epist. 2.
Utar, & ex modico, quantum res poscit, acervo
Tollam: nec metuam quid de me judicet hæres,
Quod non plura datis invenerit. ——— ———
Add. *Gell.* l. 10. c. 17.

I'll use my little Store, and freely take,
Without Concern, what fair Occasions lack.
And let my greedy, disappointed Heir,
Rail when I'm gone, and curse my want of Care.

[a] Arrian. Epictet. l. 3. c. 24. *No Man is properly an* Orphan; *we have a common Father, who is constantly busied in providing for us.*

[b] Horat. Carm. III. 16. *Crescentem sequitur cura pecuniam.* Care in proportion swells with every Bag.

[c] Bion. Idyll. 5.
Ἐς πόσσον ἄ δειλοὶ καμάτως κ' εἰς ἔργα πονεῦμες,
Ψυχὰν δ' ἄχρι τίνος ποτὶ κέρδεα καὶ ποτὶ τέχνας
Βάλλομες, ἰμειρεῦντες ἀεὶ πολλῶ πλέονος ὄλβω;
Λαθόμεθ' ἢ ἄρα πάντες, ὅτι θνατοὶ γεγόμεσθα.

How vainly wretched do we spend our Years
In useless Labour, and in idle Cares?
The Chase of Wealth unwearied we pursue,
And lose the present for a future View.
But not one thinks how soon his mortal Line
Must sadly break, and end his wild Design.

[d] Add. *Charron de la Sagesse*, l. 1. c. 39. n. 2. f. 9.

[e] *Horat.* l. 2. Epist. 2. ver. 195.
Distat enim spargas tua prodigus, an neque suptum
Invitus facias, neque plura parare labores.

You may be gen'rous, and yet not profuse;
Vain squandering differs wide from chearful Use,
Which neither fears to break the present Store,
Nor labours in the needless Search of more.

[f] Lucan. l. 1. ver. 181.
Hinc Usura vorax, avidumq; in tempore fœnus,
Et concussa fides, & multis utile bellum.

Hence greedy Usury, hence Trusts betray'd,
And War, to Wickedness a gainful Trade.

Ovid. Epist. 15. 76.
Quæsq; malle amisit, nunc male quærit opes.

What Vice has spent by Vice he would repair.

[g] Vide *Charron de la Sagesse*, l. 2. c. 6. n. 1, 2.

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moderationem supergreditur, oneri potiùs, quàm usui exuberat. Igitur & immodicæ divitiæ, velut ingentia & enormia gubernacula, facilius mergunt quàm regunt: quod habent irritam copiam, anxiam nimietatem Our Author in this Paragraph heaps together a great Number of Quotations confusedly. The Reader may consult, upon this Subject, the Notes of *John Price*, a learned *English* Author.

§. XI. [f] Mr. *Montaigne* has some curious Thoughts on this Subject, which are worthy our Observation. "Nature, says he, "like an indulgent Mother, has enjoin'd us no Actions for our Necessities, but what it is a Pleasure to perform; being invited "to them, not by our Reason only, but by our Appetite, so that it is Injustice to corrupt her Rules. When I see *Cæsar* and "*Alexander* in the midst of their great Employments, enjoying human and bodily Pleasures so fully, I believe this was not done, "to unbend their Mind, but to strengthen it, submitting, by the Force of their Courage, to the Use of common Life, their "military Occupations and Cares of State. Wise, if they had believ'd that the one was their ordinary Employment, the other "their extraordinary.——Let the Soul assist and favour the Body, and not refuse to share in its Pleasures, but to be delighted "with them, it is to preserve a Moderation, as the wiser Part, for fear, through Indiscretion, Men should turn them into "Trouble; for Intemperance is the Bane of Pleasures, and Temperance is so far from being an Abridgment of them, that 'tis "a sweetning of them. I direct my Soul to look upon both Grief and Pleasure with a View equally regular and firm, but on "the

ſingular and exquiſite Gratification of Senſe, the Mind is by no means to be accuſtomed; inaſmuch, as this kind of Epicuriſm either weakens and enervates a Man, equally oppreſſing the Vigour of Body and of Soul, and rendring them both unfit for any ſerious Buſineſs; or ſteals our Time from better and more neceſſary Employments; or waſtes and conſumes our Wealth, and our Conveniences of Life; or often, being join'd with ſome criminal Practice, draws after it no other Train, than Trouble, Danger, Damage, and Diſgrace. As therefore 'tis the next degree to Madneſs, to invite Uneaſineſs and Torment without uſe or occaſion: So it is very rational to allow ourſelves a moderate Taſte of lawful and innocent Pleaſures, without ſuffering them to overwhelm and to *drown* us. But this is to be fix'd as an inviolable Rule, That no Pleaſure muſt be purchas'd at ſo dear a rate, as the Neglect or the Tranſgreſſion of our Duty.

XII. The laſt Care which lies on us in the improving and well-ordering of our Mind, is with our utmoſt Diligence to maintain its Sovereignty over its own Motions and Affections; the greateſt part of which do not only impair the Health of the Body and the Vigor of the Soul, but caſt ſuch a Cloud on the Judgment and Underſtanding, as to wreſt them violently from the ways of Reaſon and of Duty. So that a *Coldneſs of the Paſſions* is, as it were, the natural Principle of Prudence and Probity amongſt Men [1]. It may not be amiſs to run, with ſome light Remarks, through the Particulars. *Joy* is in itſelf a Paſſion moſt agreeable to Nature. But ſtrict Care is to be taken, that it do not break out on improper Occaſions, as upon the Misfortunes of other Men: And, likewiſe, that it do not drive us on any thing that is vain and trifling, or baſe and indecent. *Sorrow* [2] is a Canker that waſtes alike the Body and the Mind. This therefore is, as much as poſſible, to be remov'd and expell'd; unleſs ſo far as the Offices of Humanity oblige us to expreſs our Concern and Pity at the Misfortunes, or at the Deaths of others; and, as it is requiſite to the great Buſineſs of Repentance. *Love* is a friendly Motion to Mankind; yet this is ſo wiſely to be manag'd and moderated by Reaſon, that it does not throw itſelf away on an ill Object; that it does not procure baſe and unworthy Fuel to its Flame; that it does not hinder the Exerciſe of other Duties, nor degenerate into Diſquiet and Diſeaſe: That if it ſettle on a Thing ſubject to Loſs, or to Corruption, it ſtick not ſo cloſely to it, as upon the Failure of it, to make the Soul unable to recollect and to recover its Force [3]. [4] *Hatred* is pernicious, as well to the Perſon who employs it, as to him againſt whom it is employ'd. This therefore is to be diligently quench'd and ſtifled, leſt it betray us to Injuries and Breach of Duty againſt our Neighbours. And if ſome Perſons do really [5] deſerve our Averſion, yet 'twould be ſtill Folly to create, on their account, Uneaſineſs and Diſquiet to ourſelves. *Envy* is a moſt deform'd Monſter, ſometimes producing ill Effects in others, but always in the en-

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" the one pleaſantly, and on the other ſowrely; and, according to its Ability, to be as careful to ſuppreſs the one, as en-
" large the other. The clear ſight of good Things is always attended with a diſtinct Knowledge of Evil, and Grief hath ſome-
" thing as unavoidable in its tender Beginning, as Pleaſure has in the Poignancy of its End. *Plato* (*De Legib.* Lib. 1. Tom. 2.)
" couples them together, and will have it the Duty of Courage to encounter Grief, and the charming Delights of Pleaſure,
" with equal Bravery. Theſe are two Fountains, at which whoever draws, where, when, and how he ought, whether
" he be Citizen, Man, or Beaſt, he is happy. The firſt he muſt take as a Medicine, merely for Neceſſity, and ſparingly; the
" other to ſatisfy his Thirſt, but not to Drunkenneſs. Grief, Pleaſure, Love, and Hatred, are the firſt Things an Infant
" feels. If Reaſon happens to guide them, they follow it, and that is Virtue." *Eſſays*, Lib. 3. Chap. *ult.* There are many other curious Thoughts both before and after. See *Porphyr. de Vit. Pythag.* §. 39. and what I have ſaid in my Treatiſe of *Games*, Lib. 1. Chap. 4. §. 8.

§. XII. [1] Quintilian Declam. 296. *Magni affectus Jura non ſpectant, i. e.* " Great Paſſions acknowledge neither Law nor
" Juſtice." See Lib. 1. Chap. 4. §. 7.

[2] " I neither love nor value this Paſſion, (ſaith *Montaigne*) although the World ſet a peculiar Eſteem upon it, and gives it a
" particular Honour. They call it Wiſdom, Virtue, and Conſcience. Fooliſh and vain Commendations! The *Italians*
" have given it a much properer Name, calling it, *Malignity*. It is a Quality always noxious, always fooliſh, and the *Stoicks*
" maintain it to be baſe and cowardly, as their wiſe Men have ever eſteemed it." *Eſſays*, Lib. 1. Chap. 2. See alſo *Charron of Wiſdom*, Lib. 1. Chap. 33. and Lib. 3. Chap. 29. and what I have remark'd on, *The Duties of a Man and a Citizen*, Lib. 1. Chap. 5. §. 8. n. 1. of the fourth Edition.

[3] Sophocles Antigone, ver. 663.

Μὴ νῦν ποτ', ὦ παῖ, τὰς φρενας ὑφ' ἡδονῆς
Γυναικὸς ἥνεκ' ἐκβάλῃς.

Never let Woman rob thee of thy Wits.

Euripid. Hippol. Coron. ver. 258.

Χρὴν γὰρ μιᾶλείας εἰς ἀλλήλους
Φιλίας θνητὸς ἀναπίνασθαι,
Καὶ μὴ σφὸς ἥκειν μυελὸν ψυχῆς
Εὔλυτα δ' εἶδ' ἔστ' ἀφρενῶν,
Ἀπό τ' ὦσασθαι, καὶ ξυνθεῖναι.

Men ſhould be mod'rate when they fix their Love,
And ne'er give up their Freedom and their Soul.
The Bands of Paſſion ſhould be looſely ty'd,
Fit for a wider or a cloſer Knot.

Plutarch criticizes this Sentence, in his Treatiſe of *the Multitude of Friends*, Page 95. Tom. 2. *Edit. Wech.*) where he pretends, that the Maxim of *Euripides* agrees exactly to a Subject contrary to what he applies it to, I mean Hatred and Enmity, and that it ought rather to be looked upon as a Precept, not to make too great a Number of Friends. Whereas the Poet only condemns ſuch an Exceſs of Familiarity as cauſes us to carry our Kindneſs beyond the Bounds of Duty, and makes the Loſs of the Perſon loved intolerable. This is evident from the Verſes following, which are an Explication of the foregoing:

Οὕτω τὸ λίαν γ' οὐκ ἐπαινῶ
Τὲ μηδὲν ἄγαν.
Καὶ ξυμφήσουσι σοφοί μοι.

[4] " Anger and Hatred, (ſays *Montaigne*) alſo, are above the Duty of Juſtice, and are Paſſions of Uſe only to them who can't
" be kept to their Duty by plain Reaſon. *Utatur Motu animi, qui uti ratione non poteſt.*" Eſſays, Lib. 3. Chap. 1.

[5] We may, and ought to hate all Vices, eſpecially thoſe that are enormous. But as to the vicious Perſon, be his Crime ever ſo great, he is rather worthy our Pity than Deteſtation. If we ought to wiſh the Converſion of Sinners, and contribute to it all in our Power, as Reaſon and the Goſpel enjoin us, a perſonal Hatred can never agree with ſuch a Diſpoſition. Thus our Author here makes a Suppoſition, which can by no means be admitted. It is even very much to be apprehended, if this were the caſe, that we ſhould confound our Averſion for a Man, conſider'd as vicious, with Sentiments of real Animoſity; and make our pretended Goodneſs miniſter to our Reſentment.

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vious Person; who, like Iron, o'er-run with Rust, not only defiles, but destroys himself continually [1]. *Hope*, altho' a Passion more easy and mild than others, yet it is to be guided with such a Temper, that it do not *make the heart sick*; nor, by aiming at Things either vain and [2] uncertain, or beyond its Strength and Reach, tire itself to no purpose, and become, as *Aristotle* terms it, ἐγρηγορὸς ἐνύπνιον, *a waking Dream*: And that we do not fall under *Lucretius*'s Censure and Character;

——*Dum abest quod avemus, id exsuperare videtur*
Cætera; post aliud, cum contigit illud, avemus;
Et sitis æqua tenet vita, semper hianteis, &c. l. iii. 1095.

——*Absent* Pleasures seem the best;
With wing'd Desire and Haste we those pursue;
But those enjoy'd, we straitway call for new.
Life, Life we wish, still eager to live on, &c.
Mr. *Creech.*

Fear, as it is a dangerous Enemy to human Minds, so is it a Motion [3] altogether useless and unserviceable. For that good Caution, which some make to be the Product of it, may arise without its Assistance from a wary Circumspection, and from a Prudence alike untouch'd with Anxiety, or with Consternation. *Anger* is a most destructive, as well as a most violent Passion; which is to be resisted with our utmost Strength and Endeavour. And whereas [4] some alledge in its Favour, that it excites our Valour, and confirms our Constancy in Dangers; its Effect is indeed directly contrary, for it binds a Man's Spirit and Courage, and drives him headlong to his Ruin [5]. [6]. *Anger* [7] *is the most improvident Thing in the World: and seldom acts but what we afterwards repent of.* Nearly related to *Anger* is the [8] *Desire of Revenge*, which, when it exceeds a moderate Defence of ourselves, and of our Dependants or Concerns, and a just Assertion of our Rights against the Invaders of them, turns, beyond dispute, into a *Vice* [a].

XIII. In such Duties then, as we have already reckon'd up, that culture of the Mind chiefly consists, which all are obliged to undertake, and in the implanting and enforcing of which those Persons ought to employ especial Care and Concern, who have the Information and Institution of others committed to their Care. For the want of this Improvement, or the Disposition directly contrary to it, are both repugnant to human Duty, and lay such a Rub in our way, as it is not easy to get over. And, therefore, whoever is found destitute of such a necessary Perfection, justly falls under common Censure and Reproach.

There is still behind [9] a more peculiar Culture of the Mind, consisting in the various Knowledge of Things, and of Arts and Disciplines. This cannot be absolutely necessary to the Discharge of our Duty in general: And, therefore, every one is to moderate his Pursuit of them, according to his own Capacities and Occasions, according to the Causes which drive him on such Searches, and the Fruits which he may fairly hope to obtain from them.

[a] Add. *Le grand. Philosoph.* p. 8. c. 12, &c.

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[1] Ovid. Metamorph. l. 2. 781.
——*Videt ingratos, intabescitque videndo*
Successus hominum, carpitque & carpiter una,
Suppliciumque suum est.
Pale Envy with pernicious Joys surveys
Others Success; and, in Reflection, preys
Upon herself; her Sin's her Punishment.
Add. *Bacon*'s *Ess.* 10.

[2] Horat. Lib. 1. Epist. 2.
Invidia Siculi non invenere Tyranni
Majus tormentum.
Envy's a Torment that no Art can reach,
Of Cruelty improv'd——

[3] See *Montaigne*, Lib. 1. Chap. 17.

[4] *Aristotle* says, that Anger serves instead of Arms and Courage to Fortitude. This is very probable, but they that oppose (*Senec. de Irâ*, Lib. 1. Chap. 16.) answer pleasantly: "'Tis a Weapon of a new Invention, for whereas we use others, this "uses us: Our Hand does not guide it, but it guides our Hand; it holds us, and we do not hold it." *Montaigne*'s *Essays*, Lib. 2. Chap. 31. in the End; read the whole Chapter, which is very fine and instructive.

[5] *Ira furor brevis est*, Anger is a short Phrenzy. *Hor.* Lib. 1. Ep. 2. Add. *Liban. Progymn. Vituper. Iræ.*

[6] Statius, Theb. 10. 697.
——*Ne fræna animo permitte calenti,*
Da spatium tenuemq; moram: male cuncta ministrat
Impetus.
Give not the Reins to Passion in its Course,
Let Silence cool, and Leisure break its Force:
Fury does all things ill——

[7] Horat. Lib. 1. Epist. 2.
——*Qui non moderabitur iræ*
Infectum volet esse, dolor quod suaserit & mens,
Dum pœnas odio per vim festinat inulto.
The Man of Rage, whose Mind is not his own,
Must often grieve, and often wish undone,
What pass'd when Rashness, deaf to wise Debate,
Prompted the speedy Vengeance of his Hate.

[8] *Marcus Antoninus* says, Ἄεις ὀρθὸν τὴν ἀμύνεσθαι, τὸ μὴ ὁμοιοῦσθαι. "The best way of revenging ourselves is, not "to resemble him that has done us an Injury." See what is said in the following Chapter. *Seneca* has a proper Passage for our Purpose, of which our Author quotes a part elsewhere: *Non enim ut in beneficiis honestum est, merita meritis repensare, ita injurias injuriis; illic vinci turpe est, hic vincere. Inhumanum verbum est, & quidem pro justo receptum, Ultio, & a contumelia non differt, nisi ordine. Qui dolorum regerit, tantum excusatius peccat——Magni animi est, injurias despicere, ultionis contumelioſissimum genus est, non esse visum dignum, ex quo peteretur ultio. Multi leves injurias altius sibi demisere, dum vindicant; ille magnus & nobilis est, qui, more magnæ feræ, latratus minutorum canum securus exaudit. Minus, inquies, contemnemur, si vindicaverimus injuriam. Si tanquam ad remedium venimus, sine ira veniamus, non quasi dulce sit vindicari, sed quasi utile. Sæpe autem satius fuit dissimulare, quam ulcisci, i. e.* "We must not behave ourselves under Injuries as under Benefits. It is good to "requite the one, but bad to resent the other; there 'tis a Shame to be overcome, here to overcome. Revenge is an inhuman "Word, though the Thing which it signifies is looked upon commonly as just and innocent. It differs nothing from an Injury, "but in point of Time. The Aggressor does the first Injury, and he that revenges himself does another in his Turn; this last "is but little more excusable than the former. A great and generous Soul contemns Injuries. The most injurious Revenge, "and most mortifying to the Aggressor, is to be judged unworthy of Revenge. Many Men, in revenging a small Injury, have "gained nothing but an Affront more smarting and hard to be forgotten. A Lion hears the Barkings of little Whelps without "Emotion. But you'll say, by revenging ourselves, we prevent others Contempt of us: Very well. But if you use Revenge "as a Remedy, do it without Passion and Anger, and behave yourselves, not as if you delighted in it, but as a thing profitable. "Nevertheless we must own, that it is more advantageous often to dissemble an Injury than to revenge it." *De Irâ*, Lib. 2. Chap. 32. See *Justus Lipsius*'s Notes on it.

§. XIII. [9] We may find several curious Remarks upon this Subject in Mr. *Buddeus*'s Discourse, entitled, *De cultura Ingenii*, which is the fifth among his *Selecta Jur. Nat. & Gent.*

ſingular and exquiſite Gratification of Senſe, the Mind is by no means to be accuſtomed; inaſmuch, as this kind of Epicuriſm either weakens and enervates a Man, equally oppreſſing the Vigour of Body and of Soul, and rendring them both unfit for any ſerious Buſineſs; or ſteals our Time from better and more neceſſary Employments; or waſtes and conſumes our Wealth, and our Conveniences of Life; or often, being join'd with ſome criminal Practice, draws after it no other Train, than Trouble, Danger, Damage, and Diſgrace. As therefore 'tis the next degree to Madneſs, to invite Uneaſineſs and Torment without uſe or occaſion: So it is very rational to allow ourſelves a moderate Taſte of lawful and innocent Pleaſures, without ſuffering them to overwhelm and to *drown* us. But this is to be fix'd as an inviolable Rule, That no Pleaſure muſt be purchas'd at ſo dear a rate, as the Neglect or the Tranſgreſſion of our Duty.

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" large the other. The clear ſight of good Things is always attended with a diſtinct Knowledge of Evil, and Grief hath ſome-
" thing as unavoidable in its tender Beginning, as Pleaſure has in the Poignancy of its End. *Plato* (*De Legib.* Lib. 1. Tom. 2.)
" couples them together, and will have it the Duty of Courage to encounter Grief, and the charming Delights of Pleaſure,
" with equal Bravery. Theſe are two Fountains, at which whoever draws, where, when, and how he ought, whether
" he be Citizen, Man, or Beaſt, he is happy. The firſt he muſt take as a Medicine, merely for Neceſſity, and ſparingly; the
" other to ſatisfy his Thirſt, but not to Drunkenneſs. Grief, Pleaſure, Love, and Hatred, are the firſt Things an Infant
" feels. If Reaſon happens to guide them, they follow it, and that is Virtue." *Eſſays*, Lib. 3. Chap. *ult.* There are many other curious Thoughts both before and after. See *Porphyr. de Vit. Pythag.* §. 39. and what I have ſaid in my Treatiſe of *Games*, Lib. 1. Chap. 4. §. 8.

§. XII. [1] Quintilian Declam. 296. *Magni affectus Jura non ſpectant, i. e.* " Great Paſſions acknowledge neither Law nor
" Juſtice." See Lib. 1. Chap. 4. §. 7.

[2] " I neither love nor value this Paſſion, (ſaith *Montaigne*) although the World ſet a peculiar Eſteem upon it, and gives it a
" particular Honour. They call it Wiſdom, Virtue, and Conſcience. Fooliſh and vain Commendations! The *Italians*
" have given it a much properer Name, calling it, *Malignity*. It is a Quality always noxious, always fooliſh, and the *Stoicks*
" maintain it to be baſe and cowardly, as their wiſe Men have ever eſteemed it." *Eſſays*, Lib. i. Chap. 2. See alſo *Charron of Wiſdom*, Lib. 1. Chap. 33. and Lib. 3. Chap. 29. and what I have remark'd on, *The Duties of a Man and a Citizen*, Lib. 1. Chap. 5. §. 8. n. 1. of the fourth Edition.

[3] Sophocles Antigone, ver. 663.

Μὴ νῦν ποτ', ὦ παῖ, τὰς φρενας ὑφ' ἡδονῆς
Γυναικὸς ἕνεκ' ἐκβάλῃς.

Never let Woman rob thee of thy Wits.

Euripid. Hippol. Coron. ver. 258.

Χρὴν γὰρ μιᾶσθαι εἰς ἀλλήλους
Φιλίας ὄνητὰς ἀναπίναδαι,
Καὶ μὴ πρὸς ἅπαν μυελὸν ψυχῆς
Εὔλυτα δ' εἶδη τέρπεσθαι φρενῶν,
Ἀπό τ' ὦσθαι, καὶ ξυνθεῖναι.

Men ſhould be mod'rate when they fix their Love,
And ne'er give up their Freedom and their Soul.
The Bands of Paſſion ſhould be looſely ty'd,
Fit for a wider or a cloſer Knot.

Plutarch criticizes this Sentence, in his Treatiſe of *the Multitude of Friends*, Page 95. Tom. 2. *Edit. Wech.*) where he pretends, that the Maxim of *Euripides* agrees exactly to a Subject contrary to what he applies it to, I mean Hatred and Enmity, and that it ought rather to be looked upon as a Precept, not to make too great a Number of Friends. Whereas the Poet only condemns ſuch an Exceſs of Familiarity as cauſes us to carry our Kindneſs beyond the Bounds of Duty, and makes the Loſs of the Perſon loved intolerable. This is evident from the Verſes following, which are an Explication of the foregoing:

Οὕτω τὸ λίαν γ' ἧσσον ἐπαινῶ
Τοῦ μηδὲν ἄγαν.
Καὶ ξυμφήσουσι σοφοί μοι.

[4] " Anger and Hatred, (ſays *Montaigne*) alſo, are above the Duty of Juſtice, and are Paſſions of Uſe only to them who can't
" be kept to their Duty by plain Reaſon. *Utatur Motu animi, qui uti ratione non poteſt.*" Eſſays, Lib. 3. Chap. 1.

[5] We may, and ought to hate all Vices, eſpecially thoſe that are enormous. But as to the vicious Perſon, be his Crime ever ſo great, he is rather worthy our Pity than Deteſtation. If we ought to wiſh the Converſion of Sinners, and contribute to it all in our Power, as Reaſon and the Goſpel enjoin us, a perſonal Hatred can never agree with ſuch a Diſpoſition. Thus our Author here makes a Suppoſition, which can by no means be admitted. It is even very much to be apprehended, if this were the caſe, that we ſhould confound our Averſion for a Man, conſider'd as vicious, with Sentiments of real Animoſity; and make our pretended Goodneſs miniſter to our Reſentment.

vious

vious Perſon; who, like Iron, o'er-run with Ruſt, not only defiles, but deſtroys himſelf continually [1]. *Hope*, altho' a Paſſion more eaſy and mild than others, yet it is to be guided with ſuch a Temper, that it do not *make the heart ſick*; nor, by aiming at Things either vain and [2] uncertain, or beyond its Strength and Reach, tire itſelf to no purpoſe, and become, as *Ariſtotle* terms it, ἐγρηγορὸς ἐνύπνιον, *a waking Dream:* And that we do not fall under *Lucretius*'s Cenſure and Character;

——*Dum abeſt quod avemus, id exſuperare videtur*
Cætera; poſt aliud, cum contigit illud, avemus;
Et ſitis æqua tenet vita, ſemper hianteis, &c. l. iii. 1095.

——*Abſent* Pleaſures ſeem the beſt;
With wing'd Deſire and Haſte we thoſe purſue;
But thoſe enjoy'd, we ſtraitway call for new.
Life, Life we wiſh, ſtill eager to live on, *&c.*
Mr. *Creech.*

Fear, as it is a dangerous Enemy to human Minds, ſo is it a Motion [3] altogether uſeleſs and unſerviceable. For that good Caution, which ſome make to be the Product of it, may ariſe without its Aſſiſtance from a wary Circumſpection, and from a Prudence alike untouch'd with Anxiety, or with Conſternation. *Anger* is a moſt deſtructive, as well as a moſt violent Paſſion; which is to be reſiſted with our utmoſt Strength and Endeavour. And whereas [4] ſome alledge in its Favour, that it excites our Valour, and confirms our Conſtancy in Dangers; its Effect is indeed directly contrary, for it binds a Man's Spirit and Courage, and drives him headlong to his Ruin [5]. [6]. *Anger* [7] *is the moſt improvident Thing in the World: and ſeldom acts but what we afterwards repent of.* Nearly related to *Anger* is the [8] *Deſire of Revenge*, which, when it exceeds a moderate Defence of ourſelves, and of our Dependants or Concerns, and a juſt Aſſertion of our Rights againſt the Invaders of them, turns, beyond diſpute, into a *Vice* [a].

XIII. In ſuch Duties then, as we have already reckon'd up, that culture of the Mind chiefly conſiſts, which all are obliged to undertake, and in the implanting and enforcing of which thoſe Perſons ought to employ eſpecial Care and Concern, who have the Information and Inſtitution of others committed to their Care. For the want of this Improvement, or the Diſpoſition directly contrary to it, are both repugnant to human Duty, and lay ſuch a Rub in our way, as it is not eaſy to get over. And, therefore, whoever is found deſtitute of ſuch a neceſſary Perfection, juſtly falls under common Cenſure and Reproach.

There is ſtill behind [9] a more peculiar Culture of the Mind, conſiſting in the various Knowledge of Things, and of Arts and Diſciplines. This cannot be abſolutely neceſſary to the Diſcharge of our Duty in general: And, therefore, every one is to moderate his Purſuit of them, according to his own Capacities and Occaſions, according to the Cauſes which drive him on ſuch Searches, and the Fruits which he may fairly hope to obtain from them.

[a] Add. *Le grand. Philoſoph.* p. 8. c. 12, *&c.*

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[1] Ovid. Metamorph. l. 2. 781.
——*Videt ingratos, intabeſcitque videndo*
Succeſſus hominum, carpitque & carpiter una,
Suppliciumque ſuum eſt.
Pale Envy with pernicious Joys ſurveys
Others Succeſs; and, in Reflection, preys
Upon herſelf; her Sin's her Puniſhment.
Add. *Bacon*'s *Eſſ.* 10.

[2] Horat. Lib. 1. Epiſt. 2.
Invidia Siculi non invenere Tyranni
Majus tormentum.
Envy's a Torment that no Art can reach,
Of Cruelty improv'd——

[3] See *Montaigne*, Lib. 1. Chap. 17.

[4] *Ariſtotle* ſays, that Anger ſerves inſtead of Arms and Courage to Fortitude. This is very probable, but they that oppoſe (*Senec. de Irâ*, Lib. 1. Chap. 16.) anſwer pleaſantly: "'Tis a Weapon of a new Invention, for whereas we uſe others, this "uſes us: Our Hand does not guide it, but it guides our Hand; it holds us, and we do not hold it." *Montaigne*'s *Eſſays*, Lib. 2. Chap. 31. in the End; read the whole Chapter, which is very fine and inſtructive.

[5] *Ira furor brevis eſt*, Anger is a ſhort Phrenzy. *Hor.* Lib. 1. Ep. 2. Add. *Liban. Progymn. Vituper. Iræ.*

[6] Statius, Theb. 10. 697.
——*Ne fræna animo permitte calenti,*
Da ſpatium tenuemq; moram: male cuncta miniſtrat
Impetus.
Give not the Reins to Paſſion in its Courſe,
Let Silence cool, and Leiſure break its Force:
Fury does all things ill——

[7] Horat. Lib. 1. Epiſt. 2.
——*Qui non moderabitur iræ*
Infectum volet eſſe, dolor quod ſuaſerit & mens,
Dum pœnas odio per vim feſtinat inulto.
The Man of Rage, whoſe Mind is not his own,
Muſt often grieve, and often wiſh undone,
What paſs'd when Raſhneſs, deaf to wiſe Debate,
Prompted the ſpeedy Vengeance of his Hate.

[8] *Marcus Antoninus* ſays, Ἄειτο πρόπο τῦ ἀμύνεσθαι, τὸ μὴ ἐξομοιῦσθαι. "The beſt way of revenging ourſelves is, not "to reſemble him that has done us an Injury." See what is ſaid in the following Chapter. *Seneca* has a proper Paſſage for our Purpoſe, of which our Author quotes a part elſewhere: *Non enim ut in beneficiis honeſtum eſt, merita meritis repenſare, ita injurias injuriis; illic vinci turpe eſt, hic vincere. Inhumanum verbum eſt, & quidem pro juſto receptum, Ultio, & à contumelia non differt, niſi ordine. Qui dolorum regerit, tantum excuſatius peccat——Magni animi eſt, injurias deſpicere, ultionis contumelioſiſſimum genus eſt, non eſſe viſum dignum, ex quo peteretur ultio. Multi leves injurias altius ſibi demiſere, dum vindicant; ille magnus & nobilis eſt, qui, more magnæ feræ, latratus minutorum canum ſecurus exaudit. Minus, inquies, contemnemur, ſi vindicaverimus injuriam. Si tanquam ad remedium venimus, ſine ira veniamus, non quaſi dulce ſit vindicari, ſed quaſi utile. Sæpe autem ſatius fuit diſſimulare, quam ulciſci, i. e.* "We muſt not behave ourſelves under Injuries as under Benefits. It is good to "requite the one, but bad to reſent the other; there 'tis a Shame to be overcome, here to overcome. Revenge is an inhuman "Word, though the Thing which it ſignifies is looked upon commonly as juſt and innocent. It differs nothing from an Injury, "but in point of Time. The Aggreſſor does the firſt Injury, and he that revenges himſelf does another in his Turn; this laſt "is but little more excuſable than the former. A great and generous Soul contemns Injuries. The moſt injurious Revenge, "and moſt mortifying to the Aggreſſor, is to be judged unworthy of Revenge. Many Men, in revenging a ſmall Injury, have "gained nothing but an Affront more ſmarting and hard to be forgotten. A Lion hears the Barkings of little Whelps without "Emotion. But you'll ſay, by revenging ourſelves, we prevent others Contempt of us: Very well. But if you uſe Revenge "as a Remedy, do it without Paſſion and Anger, and behave yourſelves, not as if you delighted in it, but as a thing profitable. "Nevertheleſs we muſt own, that it is more advantageous often to diſſemble an Injury than to revenge it." *De Irâ*, Lib. 2. Chap. 32. See *Juſtus Lipſius*'s Notes on it.

§. XIII. [9] We may find ſeveral curious Remarks upon this Subject in Mr. *Buddeus*'s Diſcourſe, entitled, *De cultura Ingenii*, which is the fifth among his *Selecta Jur. Nat. & Gent.*

Now, as for thoſe Arts which adminiſter to the Neceſſities and Conveniences of human Life, no Man can raiſe a Doubt about their Excellency and Uſe. But, concerning the Study of Letters, many have been ſo bold as to maintain, That Learning is not only uſeleſs [1], but deſtructive to Mankind; and, that, for this Reaſon, we find it to have been forbidden in ſo many Commonwealths, above the degree of reading, writing, and managing Accompts. Every one knows the common Reproaches that are caſt on Scholars: of their unfitneſs for Buſineſs, their weakneſs of Courage, and of civil Prudence, their aukwardneſs in Geſture, and in Converſation; with a thouſand more Reflections of the ſame Nature, which ſome Men have thought themſelves very eloquent in ſetting out [a 2].

Now, to come at the Truth of this Queſtion, and to know how to ſet a juſt Value on ſuch Attainments, let us firſt lay this down for an undoubted Principle, that, to the acquiring of Wiſdom and Prudence, bare Letters are by no means ſufficient, without a native Excellency of Soul. If this Happineſs be wanting, we can no more produce Wiſdom by ſcholaſtical Inſtitution, than we can procure a rich Harveſt of Corn by ploughing on the barren Sands. For 'tis one thing to be a great Reader, and another to be a prudent Man [b]. And *Quintilian*'s Judgment is right, when he obſerves [c 3], that *Prudence can do more without Learning, than Learning without Prudence.* Therefore, that Perſons, naturally fooliſh and ſtupid, are not turn'd into great Sages by the Application of liberal Studies, no more detracts from the Excellency of ſolid Learning, than it doth from the Efficacy of Medicines, that they are not able to recover dead Men. *To him that hath ſhall be given*, Matth. xxv. 29 [4]. And Learning, as *Horace* ſays, *Vim promovet inſitam* [5]; and where that *vis inſita*, that *natural Vigor* is wanting, the other Gift is vainly beſtow'd.

We may obſerve farther, that as Learning cannot alter native Folly, ſo neither can it reform a native Diſpoſition to Wickedneſs, and to Impiety; which, on the contrary, grow more incurable by its Application, drawing thence a Supply of Arms for their open Defence. 'Tis a Remark of *Hobbes* [d], that *without Learning it is impoſſible for any Man to become either excellently wiſe, or* (unleſs his Memory *be hurt by Diſeaſe, or ill Conſtitution of Organs*) *excellently fooliſh* [c].

But the whole Courſe of thoſe Purſuits, which paſs under the Name of Learning, is not all of the ſame Nature, and therefore ſhould not be all rated at the ſame Price. We may divide Learning then into three kinds, ſuch as is *Uſeful*, ſuch as is *Ele-*

[a] *Eraſmus*, (Epiſt. 12. l. 17.) giving a Character of a learned Man, adds, *He was ſkill'd in common Prudence and Knowledge of Affairs, which is generally wanting to Scholars.* Procop. Hiſt. Goth. l. 1. *Learning and Virtue are different Things; and good Diſpoſitions are moſt commonly broken, and cow'd by rigorous Inſtitution. Theodorick* us'd to ſay, *'Twas impoſſible that they who had been bred up in the fear of the Rod, ſhould ever arrive to ſuch a Degree of Courage, as to contemn Swords and Spears.* Plato de Repub. l. 7. *No free-born Subject ought to be inſtructed in a ſervile Manner.* Seneca Hippol.

Ingenia melius recta ſe in laudem ferunt;
Si nobilem animum vegeta libertas alit.

Great Souls move ſtraighteſt in the Paths of Praiſe,
When left to follow their free native Bent.

Plato Gorg. *When they* (the Philoſophers) *apply themſelves to the Management of publick or of private Buſineſs, they are moſt contemptibly ridiculous. Arrian. Epictet.* l. 1. c. 11. calls a meer Scholar, *an Animal that all the World laughs at.* Add. *Montaigne*, l. 1. c. 24. *Charron*, l. 1. c. 39. l. 3. c. 14. n. 19, *&c.*

[b] 'Tis the ſaying of an old Poet, Ὡς ὄφελεν ἡ μάθησις, ἂν μὴ νοῦς παρῇ, i. e. *Learning ſignifies nothing without* good Senſe. I find this Paſſage in *Stobeus Florileg.* Tit. III. Page 37. *Edit. Genev.* 1608. where it is placed among thoſe Sentences, whoſe Author is anonymous.

[c] *Quintilian* Inſtit. l. 6. c. 6. *Plus ſine Doctrina Prudentiam, quàm ſine Prudentia facere Doctrinam, certum eſt.*

[d] *Leviath.* c. 4. [e] Add. *Bacon*, Eſſay 48.

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[1] *Seneca*, ſpeaking upon this Head, (Epiſt. 88.) in order to heighten the Excellency of *Morality*, debaſes the other Sciences in too exceſſive a manner. It is eaſy to preſerve a juſt Medium by following the Rules I have laid down in my Diſſertation upon *the Uſefulneſs of the Sciences*, and in the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Chap. v. §. 9. N. 2. of the fourth Edition.

[2] Among the Paſſages here collected by our Author, there are two nothing to the Purpoſe; *viz.* The firſt is of *Plato*, whom our Author makes to ſay, That a young Man of a good Education ſhould not *ſervilely* ſtudy the Sciences. His Words are, *Nullam diſciplinam ingenuum ſerviliter oportet diſcere.* By which he thinks *Plato* underſtood, that Study made the Mind ſervile, and produc'd Diſpoſitions fit only for a Slave. But this is not the Senſe of *Plato* in that Place: He only ſpeaks of the manner of teaching Youth the Sciences: He will not have any Conſtraint or Force to be uſed with Children, or have them treated like Slaves, but to be inſtructed with Pleaſure; becauſe, as he ſays, what is put into them by Force can't remain long; beſides, he adds, by alluring them, their Diſpoſitions are better known. Ὅπ (λῶ δ' ἔγωὠ) ἄδὲν μάθημα μὴ δουλείας ἢ ἐλευθέρων χρὴ μανθανειν, οἱ μὲν γὰρ τῷ σώματι πόνοι, βίᾳ πονούμενοι, χεῖρον ἄδὲν τὸ σῶμα ἀπεργάζονται· ψυχὴ δὲ βίαιον ἄδὲν ἔμμενει μάθημα——— Μὴ πίνω βίᾳ———τὼ παῖδας ἐν τοῖς μαθήμασιν, ἀλλὰ παίζοντας τρέφε, ἵνα καὶ μᾶλλον οἷός τ' ἦς, κατόψει, ἐφ' ᾧ ἕκαστος πέφυκεν, *De Repub.* Lib. 7. Tom. 2. This is the very Notion which Mr. *Locke* has ſo well maintain'd in his Treatiſe, *Of Education of Children*; ſee chiefly §. 73, *&c.* and §. 131. of the laſt Edition at *Francfort* in 1708. *Plato* is ſo far from diſcouraging any from the Study of the Sciences, that he tells us particularly in that Book, what thoſe are which Children ought to learn early, and ſays, with Reaſon, that they who cry down Philoſophy, as of no Uſe to the Vulgar, never underſtood it; and that moſt of thoſe who meddle with it are not well qualified for it. We will, alſo, rehearſe ſome Words of the ſame Philoſopher, and ſo the Heedleſneſs of this Author will give an Opportunity to produce ſome Quotations, which contain ſome remarkable Thoughts, *viz.* Τὸ γὲν νῦν ἁμάρτημα (λῶ δ' ἔγω) καὶ ἡ ἀπειρία φιλοσοφίας διὰ ταῦτα θεραπεύσειν (ὃ καὶ πρόσθεν εἴπομεν) ὅτι ὅσοι καθ' ἀξίαν αὐτῆς ἅπτονται, οὐ μὰ νόσους ἔδει ἅπτεσθαι, ἀλλὰ γνησίους. The other Paſſage unfitly applied, is, *Seneca*'s *Hippol.* v. 459, 460. where we may plainly ſee, that he is ſpeaking of a clear different Thing, than the bad Effects of ſtudying the Sciences.

[3] *Montaigne*'s Words are, "The moſt learned are not the leſs fooliſh. I love and honour Knowledge as much as they that "have it; and, if it be rightly uſed, it is the moſt noble and powerful Acquirement of Men. But as to thoſe, (and there are a "vaſt Number of them) who place their chief Excellency and Worth in it, and refer their Underſtanding to their Memory, "*Sub aliena umbra Latentes*, (as *Seneca* ſpeaks, Epiſt. 33.) and can do nothing without a Book; I hate them, if I may ſo "ſpeak, almoſt as much as a Blockhead. In my Country and Time Learning has done much Service to the Purſe, but little to "the Soul. If it meets with dull Men, it loads and choaks them, becoming a crude and undigeſted Maſs; if, with airy "Minds, it purifies their Wills, and ſo ſubtilizes their Notions, as to turn them into nothing. 'Tis a Thing of almoſt an indifferent Nature; a very uſeful Addition to a generous Mind, but pernicious and hurtful to any other: Or, rather, 'tis a Thing "of a precious Uſe, which can't be attain'd at a cheap rate. In one Man's Hand 'tis a Scepter, in another's a Fool's Bauble." *Eſſays*, Lib. 3. Chap. 8.

[4] This Maxim of the Goſpel, which our Author applies in the Stile of a Preacher, is meant in another Senſe.

[5] Lib. 4. Od. 4. ver. 33, 34.

gant and *Curious*, and, laſtly, ſuch as is *Vain* and *Inſignificant* [1]. *Uſeful* Learning may be again divided into three Claſſes, *Morality*, *Phyſick*, and *Mathematicks*. For *Divinity* ſtands on its own Bottom, and maintains a ſeparate, and a ſuperior Eſteem: Tho', if it condeſcends to enter the common Diviſion of Sciences, it muſt be placed under this firſt Head [2]. *Morality* is concern'd about the Improvement of Mens Minds, and the Advancement of a ſocial Life; *Phyſick* hath the Health of the Body under its peculiar Care; and *Mathematicks* are of apparent Uſe and Benefit in the Invention of ſo many Arts for the Profit, and for the Conveniency of human Life. By that Learning which we term *Elegant* and *Curious*, we underſtand ſuch as is not indeed of ſo neceſſary Uſe, as to render the Life of Man leſs ſociable, or leſs convenient, upon the Want of it; and yet is worthy of the Enquiries of ingenious Perſons, becauſe it either leads us deeper into the Diſcovery of the ſecret Works of Nature, or ſhews the ſingular Excellency of human Wit and Cunning, or preſerves the Memory of Things and Actions, and the Records of Mankind. And ſuch may we reckon the Knowledge of various Tongues, natural Experiments and Speculations, the more fine and ſubtile Parts of Mathematicks, Hiſtory of all kinds, Criticiſm, (as it preſerves Authors correct and entire) Poeſy, [3] Oratory, and the like. Which are all in themſelves excellent, and worthy of Praiſe, and ſerve for the Gloſs and Ornament of human Improvement; according to which Meaſure both the Practice and [4] the Value of them are to be ſtated and determined.

Vain Learning we call, not only ſuch as is made up of falſe and erroneous Notions; but, likewiſe, all thoſe Inventions of [a] crafty, or of idle Men, ſet up to amuſe our Minds, and to hinder us from the Purſuits of ſolid Knowledge. Amongſt which, as we muſt needs reckon many Opinions of the old Philoſophers, ſo very diſagreeable to the apparent Nature of Things; ſo we think it will not be overſevere to join to them the greateſt Part of that barbarous Cant, which went under the Name of *School Learning*, in the Ages preceding the Reformation of Religion; and which is ſtill reſolutely maintain'd by ſome Men, either becauſe they know no better, or becauſe they are aſham'd to unlearn what they have made themſelves Maſters of with ſuch prodigious Labour, or becauſe 'tis the manifeſt Intereſt of the *Papal Monarchy* to keep Mens Wits employ'd on Trifles, for fear they ſhould make ſome very dangerous Diſcoveries [b]. Now the greater Proficiency any Perſon hath made in ſolid Knowledge, the more he deſpiſes theſe empty and unprofitable Enquiries.

Another Thing to be conſider'd by thoſe who diſpute about the Uſefulneſs of Learning is this; that the Faults of bad Inſtitution, and of hot-brain'd Pedants, are not to be charg'd on the Sciences themſelves [c]. Is it likely, that ſound Knowledge and Wiſdom ſhould be learnt in ſuch a School as *Agathias* deſcribes under the Philoſophaſter *Uranius*? *At their Meetings*, ſays he, *every one talks as he pleaſes about the ſublimeſt Matters, and Points of Divine Science; and, tho' they are perpetually canvaſſing theſe Queſtions, yet they neither perſuade others, nor will ever lay aſide the Notions they themſelves have taken up, but whatever they be, defend them Tooth and Nail againſt all Oppoſers. When the Diſputations are over, they depart mutually incens'd, and vent their Rage againſt one another, like quarrelling Gameſters, in the moſt abuſive and fouleſt Ribaldry* [5]. *Thus the*

[a] See *Seneca de Brevit.* Cap. xxiii. Epiſt. 88. where he cites ſeveral Examples, and ſays many uſeful Things upon this Subject.

[b] See *Hobbes*'s Leviath. c. 46, 47. *Plutarch* (in *Alexand.*) has left this Cenſure of *Ariſtotle*'s Metaphyſicks, that *they can afford no real Advantage to the Teacher, or the Learner.* *Martial.* II. Epig. 86.

Turpe eſt difficiles habere nugas,
Et ſtultus labor eſt ineptiarum.

'Tis ſhameful Men ſhould needleſs Knots invent
To prove laborioufly impertinent.

[c] Vid. *Charron*, l. 3. c. 24. n. 21, *&c.*

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[1] See *Seneca de Brevitate Vitæ*, Chap. 13. and his Epiſtle 88. where there are, alſo, many other fine Reflections on Study.

[2] I wonder our Author hath ſpoke nothing of Logick, which is abſolutely neceſſary, whatever Science we purſue, if we will do it with Benefit. See Mr. *Le Clerc*'s Preface to his *Latin Logick*, and *The Art of Thinking*; as, alſo, the ſecond Volume of *Parrhaſiana*, Art. 2. But, above all, the *French* and *Latin* of M. *Crouzas*, who has propos'd to give a great number *of Examples drawn from all the Sciences.*

[3] This Science, far from being of great Uſe, is often pernicious, becauſe 'tis very ſubject to be abuſed. Let us hear *Montaigne* about this Matter: "An Orator of old ſaid, That it was his Work to make ſmall Matters appear great. He is a Cobler that "makes great Shoes for a ſmall Foot. They were whipp'd in *Sparta*, who profeſſed any Art of Cheating or Deluding. We "may believe that *Archidamus*, King of *Sparta*, could not hear, without Aſtoniſhment, the Anſwer of *Thucydides*, when he was "aſked, Who was beſt at Wreſtling, *Pericles*, or He? He ſaid, *This is very hard to determine, for when I have thrown him "to the Ground, he'll perſuade them who ſaw it, that he did not fall, and ſo win the Prize.* They that maſk and paint Women "do leſs Evil, becauſe 'tis no great Matter whether we ſee them in their pure natural Shapes, or no; but theſe make it their Bu- "ſineſs to deceive, not our Eyes, but our Judgments, and to baſtardize and corrupt the very Eſſence of Things. Thoſe Re- "publicks who maintain'd a regular Order and Polity, as the *Cretans* and *Lacedemonians*, ſet no Value upon Orators. *Ariſtotle* "defined Rhetorick wiſely, calling it, *An Art to perſuade the People*, but *Socrates* and *Plato* called it, *An Art of Soothing and "Deceiving*; and thoſe that deny this in the general Deſcription, verify it every where in their Rules. It is an Inſtrument "invented to manage and ſtir up the Multitude and diſorderly Societies, which is never made uſe of, but in ſickly States, and as "a Medicine. Where the Vulgar or the Ignorant, or both, have the Power, as they had at *Athens*, *Rhodes*, and *Rome*, or "Things were in mighty Confuſion, there Orators were plentiful." *Eſſays*, Lib. 1. Chap. 51. Where we may find many other fine Things about this Matter. To theſe we may add the Judgment of a modern Author, whoſe Authority is of great Weight. "In Diſcourſes by which we ſeek rather to pleaſe and divert, than to inſtruct and compleat the Judgment, we can't blame ſuch "ſort of Ornaments as are taken from Figures. But —— —— except Order and Elegancy, the whole Art of Rhetorick, all "its neat Applications and figurative Expreſſions, according to the Rules of Eloquence, ſerve only to beget falſe Notions in the "Mind, and corrupt the Judgment; ſo that, in effect, they are nothing but perfect Cheats; and, conſequently, ought to be "avoided in all Diſcourſes, which are deſigned to inſtruct; for they muſt be eſteemed great Defects, either in the Language or "Perſon that uſes them, ſo far as Truth is concerned. Hence it may appear how little Regard and Concern Men have for the "Truth, ſince theſe fallacious Arts have ſo great Eſteem and Reward given them.——But Eloquence, like the fair Sex, hath "Charms too powerful to admit of any Contradiction, and 'tis in vain to diſcover any Faults in theſe Arts of Deceiving, ſince "Men take Pleaſure in being cheated." Mr. *Locke*'s Phil. Eſſay, *&c.* p. 642. See, alſo, what I have ſaid upon this Subject concerning the Pulpit, in my *Preface* upon *Tom.* II. of Archbiſhop *Tillotſon*'s Sermons. As to Poetry, there is an excellent Diſcourſe in *Art.* 1. of the *Parrhaſiana*, *Tom.* I. which 'twill be a Pleaſure to read.

[4] We muſt obſerve here, that ſome of theſe Sciences are neceſſary, if not in themſelves, yet in reſpect to others, in which no Progreſs can be made but by their Help; ſuch, for Example, is Hiſtory in reſpect of Politicks, and Criticiſm in reſpect of Hiſtory and Divinity. See Mr. *Clerc*'s *Ars Critica* in the *Preface.*

[5] See about the Abuſe of Diſputes, a fine Paſſage in *Montaigne*'s *Eſſays*, Lib. 3. Chap. 8. which is copied out with ſome ſmall Alteration of Words, by the Author of the *Art of Thinking*, Part 3. Chap. 19. §.

Contention

Contention ends, without the leaſt Profit given or receiv'd; and thoſe who went to the Engagement very good Friends, come away moſt violent and ſpiteful Enemies [a].

But ſuppoſing Things rightly order'd, can any one doubt whether a Perſon endow'd with good natural Abilities, and inſtituted in ſolid Learning, will not diſcharge the greateſt Affairs with more Accuracy, and with more Diſpatch, than if he depended on the bare Strength of Nature, and neglected other Aſſiſtances [b]? But then all thoſe who apply themſelves to Study, ſhould be exactly careful, firſt, that they direct their Enquiries to a good End, the Service of Life, or the Improvement and Perfection of their Minds; and not make uſe of them for idle Amuſements, or pleaſant Methods of paſſing away Time. *Ariſtippus* [z] in *Diogenes Laertius*, being aſk'd what Things ingenious Children ſhould be taught, anſwer'd, *Such as they may uſe when they come to be Men.* 'Twould not be only *ſhameful*, but *wicked*, if thoſe whoſe Heads are fill'd with brave Notions and Sentences ſhould do no more good than common Ideots [3] [c]. The *Egyptians* call'd their Libraries *Phyſick Shops for their Souls*, intimating their Uſe, as well as their Excellency [d]. And *Arrian*'s *Epictetus* [e] thought he could not give a worſe Character of Mens being falſly and inſignificantly learned, than to ſay that they were *Lions in their Schools, but meer Vermin out of them.*

They are, likewiſe, to take heed, that they do not reſolve all Science [4] into bare Authority [f], and Cuſtom of Speech, and an unintelligible Set of Terms; but that they ſearch into the ſolid Foundation of Things, and build their Schemes on evident Reaſon. As for thoſe Things which they cannot yet bring to clear Demonſtraton, there muſt be no Stubbornneſs or Obſtinacy in maintaining them; but a former Opinion muſt be willingly quitted, upon a better and a more certain Information; becauſe 'tis very likely another Man may have more quick and more piercing Parts than ourſelves; and becauſe every new Day may correct ſome Miſtake in the former. And this teachable Diſpoſition of Mind is a moſt infallible Mark [5] of a generous Mind [g]. Laſtly, Care is to be us'd, that they do not in ſuch a manner bury themſelves amongſt their Books, as to neglect other Duties, and render themſelves [6] unfit for the Genius of a civil and ſociable Life. For *Pedantry* of Mind is a [7] Vice not peculiar to Scholars, but runs, in ſome Meaſure, through the whole World, and infects Men of all Orders, Profeſſions, and Conditions.

XIV. But although the principal, and the moſt laborious Part of human Improvement is concern'd about the Mind, we muſt not, in the mean time,

[a] The Maſter is deſcrib'd very agreeable to his Scholars, *Bearing above the reſt only by Impudence, and Volubility of Tongue*, he appear'd the firſt Fool of the Herd, and *conquer'd thoſe that knew nothing, by knowing juſt as much.* The like Form of Diſputation is ridicul'd by *Lucian*, in his *Accuſato*, and in *Charron.*

[b] Plutarch de Educat. *The Life of Contemplation is of no Uſe, unleſs Action be added. And the Man of Action cannot but miſtake and miſcarry, without the Aſſiſtance of Study and Contemplation.* Saluſt. Jugurth. *The more reaſon have we to wonder at the Perverſeneſs of thoſe who ſuffer their Parts and Genius, the beſt and the nobleſt Advantage of a Mortal Nature, to ruſt in Idleneſs, and to grow dull and barren through want of Culture.* Ælian. V. H. l. 7. c. 15. *When the* Mitylenians *were Maſters of the Sea, they impos'd this Penalty on their revolted Allies, that they ſhould not teach Children Letters or Muſick: Thinking it the moſt grievous Puniſhment that could be inflicted, to live in utter Ignorance of the Liberal Arts.* Add. Cic. Off. I. where he ſpeaks of the Study and Search of Truth.

[c] *I hate Men* (ſays old *Pacuvius*, in *Gell.* l. 53. c. 8.) *that are Philoſophers in Opinion, and Drones in Buſineſs.* Iſocrates Encom. Helen. *The Sophiſts ought to have inſtructed their Scholars in Things which are of uſe in common Life, and to have exercis'd them in the ſkilful Management of civil Affairs; taking this for a certain Truth, That a competent Knowledge of profitable Points is highly preferable to the moſt exquiſite Attainments in unneceſſary Speculations; and that it is much better to excel others a little in great and important Things, than to go far beyond them in ſmall Matters, eſpecially in ſuch as contribute nothing to the aſſiſtance of Life.* Lucian. *in* Conviv. *'Tis to no Purpoſe to be* wiſer, *unleſs we are* better.

[d] *Diodor. Sic.* l. 1. c. 49. [e] L. 4. c. 5.

[f] *Horat.* l. 1. Epiſt. 1. ver. 14. *Nullius addictus jurare in verba Magiſtri.* Vide *Ciceron. de Nat. Deorum*, l. 1. c. 5. *Seneca de Vita beata*, c. 1.

[g] *Plin.* N. H. l. 3. Proem. *'Tis not to be looked upon as a Wonder, that mortal Creatures ſhould be incapable of knowing all Things. Idem*, l. 11. c. 3. *By my frequent Contemplations on Nature, I have been inſtructed never to call any Thing* incredible *that ſhe performs.* Diog. Laert. l. 10. *In natural Enquiries we are not to proceed according to ſtrict Method and Rules, but according as the various Appearances offer themſelves to our Obſervation, and incline our Judgment.* Cicero de Nat. Deor. l. 1. *The Authority of thoſe who pretend to teach, often proves a hindrance to thoſe who deſire to learn. For by this Means they neglect to apply their own Judgment, and to take every Thing for fix'd and certain, which they hear deliver'd by thoſe whom they admire.* Quintil. Inſtit. l. 3. c. 1. *They love the Path which they firſt trod in, whatever it be. And you will find it a moſt difficult Taſk to make Perſons change ſuch Opinions as they imbib'd when they were Children; becauſe every one rather wiſhes to have his Trouble over, than to continue it; to have learn'd formerly, than to be a Learner now.* Idem, l. 7. c ult. *Nobody is willing to ſee a Thing leſſen'd, in which he once appear'd great.* Yet, as *Plato* obſerves, *De Repub.* l. 5. *'Tis very unjuſt to be angry with the Truth. And all farther Study would be in vain, if it were unlawful to improve the Diſcoveries of thoſe that went before us.*

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[1] *Plutarch*'s *Greek* is, Ὁ μὲν ἀναρμοςικὸς [βίος] τῆ μελικῆ διαμαρτάνων, ἀνωφελὴς. Ὁ δὲ μελικὸς ἀμοιρήσας ἁ σιλαφίας, ἄμουσος καὶ πλημμελὴς. The Author, alſo, quotes here the Saying of an antient *Greek* Poet, Γεράμματα μαθεῖν δεῖ, καὶ μαθόντα νοῦν ἔχειν, *He that ſtudies ſhould cultivate his Underſtanding.* See *Diogenes Laertius*, Lib. ix. Cap. i. with the Note of *Menage*, who brings ſeveral Inſtances of the ſame kind. The Verſe of the *Greek* Poet is found in the *Excerpta* in *Grotius*, Page 939.

[2] The *Greek* is, Ὁ δὲν Ἀρίστιππος ἐρωτηθείς, τίνα δεῖν ἃ δεῖ μὴ καλὰς παῖδας μανθάνειν; ἔφη, Οἷς ἄνδρες γενόμενοι χρήσονται.

[3] *Iſocrates*'s Words are, Οὓς [σοφιστὰς] ἐγὼ μὲν ἀπειρήκειν ταύτης τῆς παιδείας, τῷ μὴ τοῖς λόγοις ἐξελέγχειν ἀπιστοτέρους, ἐν οἷς τοῖς ἔργοις πολὺν ἤδη χρόνον ἐξελήλεγμαι, τῷ μὴ φρονεῖν τὰς πράξεις, ἐν αἷς πολιτευόμεθα, μηδὲ σωφρονεῖν παιδεύειν, καὶ μᾶλλον τῆς ἐμπειρίας τῆς τότε γυμνάζειν, ἐνθυμουμένους ὅτι πολὺ χρεῖττον ἐστὶ τὰ χρήσιμα ἐπιεικῶς δοξάζειν, ἢ περὶ τῶν ἀχρήστων ἀκριβῶς ἐπίστασθαι, καὶ μικρὸν προέχειν ἐν τοῖς μεγάλοις, ἢ πολὺ διαφέρειν ἐν τοῖς μικροῖς, καὶ τοῖς μηδὲ πρὸς τὸ εἶναι ὠφελοῦσιν. *Lucian*'s *Greek* is, Ὡς ἀδὲν ὄφελος ἦν ἄρα ἐπίστασθαι τὰ μαθήματα, εἰ μή τις ἄρα καὶ τὸ εἶναι ῥυθμίζει πρὸς τὸ βέλτιον.

[4] *Tully*'s *Latin* is, *Obeſt plerumque iis, qui diſcere volunt, authoritas eorum, qui docere profitentur, deſinunt enim ſuum judicium adhibere: id habent ratum, quod ab eo, quem probant, judicatum vident.*

[5] *Sophocl. Antigone*, ver. 725.

Ἀλλ' ἀνδρὸς ἡ μὴ σοφὸς, τὸ μανθάνειν	True Wiſdom is not ſtiff or poſitive,
Πόλλ' ἀν χρεὼν ἔδρᾶν, καὶ τὸ μὴ τείνειν ἄγαν.	Nor thinks it a Diſgrace to be inform'd.

[6] "A Learned Inſtitution leads aſide from right and plain Reaſon, thoſe who keep their Eyes and their Thoughts continually "fix'd upon their Books." *Lucian. Conviv.*

[7] Here is a Fault in the Original that quite ſpoils the Senſe. *viz. Initium* for *Vitium*; and 'tis ſurpriſing that Mr. *Hertius* did not correct it in his Edition of 1706. Indeed all this is taken, Word for Word, out of the *Art. of Thinking*, Diſc. 1. and the Author ought to have referred us to the Original where he had it.

neglect

[1] neglect the Body; since [2] the Mind makes use of its Supports, and can never rise to any great Atchievement, if this Inferior be ill affected. We are oblig'd therefore, as much as in us lies, to [a] secure [3] a *sound Body* for our *sound Mind* to lodge in; and rather to harden our Limbs and Constitution by long Endurance of Labour, than to soften or break their Strength by Effeminacy and Idleness [b]. *Pyrrhus* is said to have made this only Request to the Gods in his daily Devotions, ὑγιαίνειν, *to be well in Health* [c], judging this Blessing to contain under it all Degrees of Happiness. Care is, likewise, to be taken that our bodily Force and Vigor be not weaken'd by Intemperance in Meat or Drink, or by unseasonable and unnecessary Labours, or any other way. Upon this Account *Gluttony*, *Drunkenness*, immoderate Use of *Women*, and the like Excesses are to be avoided. 'Tis a famous [4] Saying of *Democritus* in *Plutarch* [5], *If the Body should bring an Action of Damage against the Soul, the Soul would be sure to be cast.* Though to this it might be replied, that the Mistakes of the Mind, in reference to Food, and Pleasure, and other Things which concern the Preservation of the Body, do all proceed from its yielding to the corporeal Appetites and Affections, contrary to the Admonitions of Reason: So that the Mind is never of itself the Cause of bringing the Body into a worse Condition than ordinary. And, therefore, to *Democritus*'s Saying, on one side, we will oppose the no less renown'd Sentence of [6] *Theophrastus* on the other; *The Soul* (says he) *pays large Rent to the Body for its Dwelling.*

XV. Our Life is given us by our great Creator, as a kind of Course or Race, in which we might exercise our Strength and Abilities by the Direction of Reason: And therefore it is not to be measur'd by so many Times drawing Breath, but by a constant Succession of good Actions. Every one is therefore to take care that he be not ἐτάσιον ἄχθος ἀρούρης [d], *an useless Burden to the Earth*; unprofitable to himself, and troublesome to others, [7] born only to increase the Number of Mankind, and to devour the Provisions of Nature, and [8] that he only lives for the sake of his Palate [e 9]. Farther, since human Industry commonly exercises itself one of these two Ways, either in procuring Things necessary for the Preservation of Life, or in discharging the Offices of a social and a civil Condition; which admit of great Variety, and do not all suit alike with all Mens Capacities and Abilities [f]; it is manifest that every Man ought, with early Care, to chuse out and undertake such a Course of Life as is honest, profitable, and comporting with his Parts and Strength. In which Choice [g] Men are usually determin'd, either by Impulse and Inclination of Genius and Fancy, or by some peculiar Aptness of Body or Mind, or by Condition and Quality of Birth, or by the Goods of Fortune, or by the Au-

[a] To this End it may be useful to read that incomparable Book, *Medicina Mentis & Corporis*, by Mr. *Tschirnhausen*.
[b] Vide *Diodor. Sic.* l. 1. c. 45. [c] *De Sanitate tuenda.* Add. *Bacon, Ess.* 30. [d] *Homer. Il.* Σ. ver. 104.
[e] *Ovid. de Pont.* l. 1. El. 6. ——*Mors nobis tempus habetur iners.*
——To be Idle's to be Dead.
Sil. Ital. l. 3. ——*Quantum etenim distant à morte silentia vitæ?*
——A silent Life is an untimely Grave.
Theocrit. Idyl. 14. ——Ποιεῖν τι δεῖ οἷς γήρυς χλωρεύν.
——Business should be ply'd whilst Age is green. Add. *Gell.* l. 19. c. 10.
[f] Vide *Essais de Morale*, Vol. 3. p. 44, 202. [g] Vide *Mr.* Ostervald's *Causes of Corruption*, Engl. Ed. p. 227, &c.

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§. XIV. [1] See *Plato*, (in *Charmid.* p. 464. *Ed. Wech*) *Seneca*, Epist. 14. 14. in the beginning, and *Hierocles* upon *Pythagoras*'s Golden Verses, p. 153, 182. Edit. *Lond.*

[2] *Corpori vaco, cujus fulturis animus sustinetur. Plin.* Lib. 1. Epist. 9. The Author alludes to this and the following Passage, though he does not quote them; nor are they distinguish'd by the *Italick* Letter.

[3] *Orandum est, ut sit mens sana, in corpore sano*, i. e. *We must pray for a sound Mind in a sound Body.* Juv. Sat. 10. ver. 356. This, in general, includes a right Disposition of the Soul, in all respects; and, consequently, Wisdom and Virtue, as well as good Sense. See the Letter of M. *Lenfant*, in the *Biblioth. German.* Lib. i. Art. 7. Where, among others, he criticises *P. Tarteron*, for translating the Words *Mens sana*, by that of *l'Esprit*, (or *Genius.*) But this Translator, in his Edition of 1714, has corrected this Fault, by rendering it, *Pray the Gods to give you Reason*; which comes much nearer the Sense of the Poet.

[4] Juvenal. Sat. 11. ver. 34.

——*Buccæ*
Noscenda est mensura tuæ——

Fools only make Attempts beyond their Skill;
A wise Man's Power's the Limit of his Will.

This Verse does not reflect upon an Excess in Eating and Drinking, but upon such exorbitant Expences as Men are at; not considering whether they are rich enough to bear them. For 'tis a Proverb signifying, That Men ought in all Things to examine themselves, what they are capable of, and able to do. Our Author more fitly refers us to *Socrates*'s Words about Intemperance, in his *Memoirs* collected by *Xenophon*, Lib. 1. Chap. 3.

[5] *Plutarch*'s *Greek* is, Ὡς εἰ τὸ σῶμα δικάσαιτο τῇ ψυχῇ, κακώσεως ἂν ἂν αὐτῶν ἀπφυγεῖν. The Reflection which our Author makes upon these Words, is not altogether proper, for though Briskness of Spirits, and other Motions of the Body, have great Influence upon the Soul, there are other Passions purely spiritual, as Covetousness, &c. which are not less violent, and do much hurt to a good Constitution of Body. See my *Treatise of Games*, Lib. 3. Chap. 4. §. 6. and Chap. 5. §. 11, &c.

[6] His *Greek* is, Πολὺ πᾶ σώματι πλεῖν ἐνείκιον ἢ ψυχῇ, in *Plut.*

§. XV. [7] *Nos numerus sumus & fruges consumere nati.* Hor. Lib. 1. Ep. 2. ver. 27.

[8] *Juvenal* is referr'd to without Quotation, *Aut quibus in solo vivendi causa palato est.* Sat. 11. v. 11.

[9] *Ciceron. de Nat. Deor.* l 2. c. 16. *Mihi enim, qui nihil agit, esse omnino non videtur, i e.* "He that doth not shew himself "in Action, seems to me to have lost his very Being." But this is nothing to our Author's Purpose. For by these Words one of the Dialogists labours to prove a Providence against the *Epicureans* that denied it: for, says he before, *To maintain that there are no Gods, and to deprive them of all Care and Action, is much the same Thing; for he that doth not*, &c. So that this Passage could not be fitly applied to the Idleness of Man, but by a Preacher: He might much better have quoted *Salust*'s Words, who says, "That they only live truly, who are busied in doing good; the idle Man's Life is Death." *Sed multi mortales dediti ventri, atque somno, indocti, incultique vitam, sicuti peregrinantes, transiere, quibus profecto contra naturam corpus voluptati, anima oneri fuit. Eorum ego vitam, mortemque juxta existimo, quoniam de utraque siletur. Verum enimvero is demum mihi vivere, atque frui anima videtur, qui aliquo negotio intentus, præclari facinoris, aut artis bonæ famam quærit.* De Bell. Catilin. c. 2. *Maximus Tyrius*, also, says, That Inaction belongs to none but a dead Man, τὸ ἦ ὅλον, ἀπραξίαν τινὰ καὶ ἀνάλγητον εἶναι πλὴν νεκροῦ. Dissert. 5. Mr. *Bruyere*, also, has a fine Passage, which may perhaps agree better than all these Quotations of old Authors. "There are such Creatures made by GOD as are called Men, who have a Soul, which is a Spirit, whose Life is wholly em-"ployed, and all their Thoughts taken up in sawing Marble: This is very silly, and a Thing of little Worth; and there are "others that wonder at it, but are nevertheless useless, and spend their Days in doing nothing; this is worse than sawing Marble." *Character of the Manners of this Age*, Chap. *of Judgments*, p. 450, 451. See what I have said in my *Treatise of Games*, Lib. 1. Chap. 1. §. 1. and Lib 4. Chap. 6.

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thority of Parents, and ſometimes by the Command of the civil State; or, laſtly, by the Invitations of Opportunity, or by the Compulſion of Neceſſity. [1] *Iſocrates* in *Areopagit.* gives us this Account of the old *Athenians: Under ſo great an Inequality of Fortunes, they could not preſcribe to all the ſame common Exerciſes; and therefore they put them in different Ways, according to their Circumſtances and Condition. The meaner Sort they engag'd in Agriculture and in Trading; well knowing, both that Idleneſs was the Cauſe of Poverty, and Poverty a Temptation to Injury and Miſchief. So that by removing this Fountain of Vice, they thought they ſhould prevent the Evils which us'd to flow from it. As for the more wealthy, them they compell'd to apply their Minds to Horſemanſhip, Feats of Body, Hunting, and Philoſophy: Apprehending that ſuch Employment and Amuſements muſt needs have this good Effect, to make ſome excel in Virtue, and to keep others from being notorious in Vice.* It was an Ordinance amongſt the *Egyptians* and *Indians*, that every Man ſhould follow his Father's Trade. *Diodor. Sic.* l. i. c. 74. and l. xii. c. 41. [2] The Reaſon of which Inſtitution is given by *Iſocrates*, in *Laud. Buſir.* The like Cuſtom was receiv'd amongſt the *Peruvians*, under their ancient *Yncas*; the Nobility alone being allow'd to improve themſelves by the Study of Letters. *De la Vega*, l. iv. c. 19. 'Tis a true Obſervation of *Xenophon*, *Cyropæd.* l. ii. *Thoſe Perſons arrive at the greateſt Height and Perfection in particular Attainments, who have given themſelves wholly to ſome ſingle Purſuit, avoiding Multiplicity of Buſineſs and of Enquiry.* As he ſays well in another Place, Lib. viii. *'Tis impoſſible that a Man who profeſſeth many Arts together ſhould excel in all.* Hence it appears, that not only thoſe Perſons live in a State repugnant to ſound Reaſon, who maintain themſelves by Robbery or Villanies; but thoſe too, who withdraw themſelves unneceſſarily from the common Duties and Offices of Life; ſuch are many of the modern Hermits and Monks, as well as ſome of the antient Philoſophers. But thoſe who chiefly fall under this Cenſure, are the ſturdy and able *Vagrants*, who abuſe the Divine Name into a Trade of getting Money, and make GOD, as it were, their Tributary. The Wickedneſs of theſe Varlets is the greater, if they voluntarily maim or diſtort any of their Limbs, ſo as to render themſelves incapable of doing the World any Service, though they ſhould afterwards deſire it. 'Tis a Cuſtom very remarkable amongſt the *Chineſe*, that no Perſon of ſound Strength is permitted to beg, although he be *blind*; ſuch unfortunate Wretches being employ'd in turning Mills, from which Service they earn their Subſiſtence [a].

Again, ſince Time runs on with ſuch ſwift Steps, ſince Death ſurprizes Men ſo often, when they leaſt expect it, and is always beyond their Power to avoid; thence it follows, that 'tis our Duty to make an early [3] Uſe of Life, not to begin too long a Thread of Actions, not to lay too vaſt a Train of Deſigns [b]. We ought, likewiſe, to have the Accompts of our Life always drawn up in a Readineſs, and to harden our Minds betimes againſt the Terror of *Dying*; that, without a trembling Reluctancy, without repining at our Creator's Pleaſure, we may reſign, when he demands it, what he lent us of his free Bounty, under no Terms of keeping [c].

XVI. How paſſionately every Man loves his own Life, and how heartily he ſtudies the Security and Preſervation of it, is evident beyond Diſpute. But it will admit of a Debate whether the bare natural Inſtinct, which he enjoys in common with Beaſts, inclines him to theſe Deſires? or whether he is not engag'd in them by ſome ſuperior Command of the Law of Nature? For, inaſmuch as no one can, in a legal Senſe, ſtand *oblig'd* to himſelf,

[a] *Mart. Hiſt. Sin.* l. i. c. 34.

[b] *Martial*, l. i. Epigr.

Non eſt, crede mihi, ſapientis dicere vivam:
Sera nimis vita eſt craſtina: vive hodie.

Ars longa vita brevis. Hippocrat.

The *Future* is the Tenſe of Fools. Delay
May make To-morrow late; be wiſe To-day.

Horat. l. i. Epiſt. 4.

Inter ſpem curamque, timores inter & iras,
Omnem crede diem tibi diluxiſſe ſupremum;
Grata ſuperveniet, quæ non ſperabitur, hora.

Whilſt Hopes, Cares, Fears, and Frets to plague you join,
Think every Day your laſt that is to ſhine,
'Tis *not expecting* makes a Bleſſing dear:
An Hour's Reprieve is worth a vulgar Year.

Sil. Ital. Lib. 3. ver. 141.

——Brevitaſque vetat mutabilis horæ
Prolatare diem.——

Time, ever on the Poſt, and on the Change,
Forbids us to delay.——

Horat. Carm. i. 4.

Vitæ ſumma brevis ſpem nos vetat inchoare longam.
The ſhortneſs of our mortal Line
Forbids a longer Thread in our Deſign.

[c] *Sil. Ital.* ix. 376.

——Virtus futile nomen,
Ni decus adfuerit patiendo, ubi tempora lethi
Proxima ſint.——

——Virtue's but an idle Sound,
Unleſs undaunted Honour keeps our Ground
Againſt the laſt Attack of Fate.——

Plin. N. H. l. 7. c. 40. *One Day paſſeth Judgment on another, and the laſt on all.* *Arrian Epictet.* l. i. c. 1. Τῆς ὥρας ἐκθέσης, εἶτα τότε τεθνήξομαι· πῶς; ὡς ἀποδιδοὺς ἃ χρήσιμα τὰ ἀλλότρια ἀποδίδοται. *When my Time is come, I will be prepar'd immediately to leave the World. After what manner? Why, like a Perſon who is reſtoring what was lent him.* Add. *M. Antonin.* l. 12. ſ. 12. and *Bacon*, Eſſay 2. See, alſo, *Montaigne*'s Eſſays, Lib. i. Chap. 19.

[1] *Iſocrates*'s *Greek* is, Ἅπαντας μὲν οὖν ὅτι τὰς αὐτὰς ἄγειν διαῤῥιβὰς οὐχ οἷόντ' ἦν, ἀνομάλως τὸ θεῖον τὸν βίον ἔχοντας· ὡς δὲ τοῖς τὴν οὐσίαν ἠρμοττεν, ὅπως ἑκάστοις προσέταττον· τοὺς μὲν γὰρ ἀναγκάζειν προσέταττον, ὅτι τὰς γεωργίας καὶ τὰς ἐμπορίας ἔξεστιν εἰδότες, τοὺς μὲν ἀπορίας, διὰ τὰς ἀρχὰς γιγνομένας· τοὺς δὲ κακουργίας, διὰ τὰς ἀπορίας· ἀναιροῦντες ἐν τοῖς ἀρχοῖς τὰ κακῶν, ἀπαλλάξειν ᾤοντο, καὶ τὰ ἄλλων ἁμαρτημάτων τὰ μετ' ἐκείνων γιγνομένων. τοὺς δὲ βίον ἱκανὸν κεκτημένους, οἷόν τε ἱππικοῖ καὶ τὰ γυμνάσια, καὶ τὰ κυνηγέσια, καὶ τὰ φιλοσοφίαν, ἠναγκασαν διαῤῥιβεῖν· ὁρῶντες ἐκ τούτων, τοὺς μὲν διαφέροντας γιγνομένους, τοὺς δὲ τὰ πλεῖστα κακῶν ἀπεχομένους.

[2] *Iſocrates* only ſays, that *Buſiris* would have no Man have more than one Trade or Profeſſion, becauſe 'tis not poſſible to excel in ſeveral. Ἀεὶ τοῖς αὐτοῖς τὰς αὐτὰς προστάξεις μεταχειρίζειν προσέταξεν· εἰδὼς τοὺς μὴ μεταβαλλομένους τὰς ἐργασίας, πρὸς ἅπαν τὸ ἔργον ἀκριβῶς ἔχοντας, τοὺς δὲ ὅτι τὰ αὐταῖς προστάξεσι συνεχῶς ὀπτομένους, εἰς ὑπερβολὴν ἕκαστον ἀποτελοῦντας. So that he had better have joined this with what he quotes out of *Xenophon*'s *Cyropæd.* Lib. 2. Chap. 1. §. 8. and Lib. 8. Chap. 2. §. 4.

[3] "The moſt glorious and principal Work of Man is to live well. All other Things, as to reign, get Eſtates, build, &c. are "but Appendages and Helps for the more——They are mean Souls who are buried in Buſineſs, and do not know how "to diſentangle themſelves, nor to leave them, and reſume them." *Montaigne*'s *Eſſays*, Lib. 3. Chap. ult.

ſelf, ſuch a Law ſeems to be of no Force or Significancy, which is terminated in myſelf, which I can diſpenſe with when I pleaſe, and by the Breach of which I do no one an Injury. Beſides, it looks like a needleſs thing to eſtabliſh a Law about this Point, ſince the anxious Tenderneſs of Self-love would beforehand drive us ſo forcibly on the Care of our own Safety, as to render it almoſt impoſſible for us to act otherwiſe [1]. If then [2] a Man were born only for himſelf, we confeſs it would be convenient that he ſhould be left entirely to his own Diſpoſal, and be allow'd to do whatever he pleas'd with himſelf. But ſince, by the univerſal Conſent of all wiſe Men, it is acknowledg'd that the Almighty Creator made Man to ſerve him, and to ſet forth his Glory in a more illuſtrious manner, by improving the good Things committed to his Truſt; and ſince *Society*, for which a Man is ſent into the World, cannot be well exercis'd and maintain'd, unleſs every one, as much as in him lies, takes care of his own Preſervation, (the Safety of the whole Society of Mankind being a thing unintelligible, if the Safety of each particular Member were an indifferent Point) it manifeſtly appears that a Man, by throwing aſide all Care of his own Life, tho' he cannot properly be ſaid to *injure* himſelf, yet is highly injurious both to Almighty GOD, and to the general Body of Mankind [a].

It was not rightly inferr'd in the Argument we juſt now mention'd, that the Law of Nature did not concern itſelf with this Matter, becauſe Inſtinct did before drive us on the like good Reſolution. We ſhould rather imagine, that the Force of Inſtinct was ſuperadded (as an able Second) to the Dictate of Reaſon; as if this Help alone could ſcarce make a Tie ſtrong enough to keep Mankind together. For indeed, if we reflect on the Troubles and Miſeries that conſtantly wait on human Life, and ſo far outweigh that little and mean Portion of Pleaſure [3], which, through a perpetual Repetition, grows every Day more flat and languid, ſo that we muſt needs loath it in every Enjoyment; and if we conſider farther, how many Men have their Days prolong'd only to make them capable of more Misfortunes and Evils; who is there, almoſt, who would not rid himſelf of the Burthen of Life, as ſoon as poſſible, if Inſtinct did not render it ſo light and ſo ſweet; or unleſs ſo much Bitterneſs, or ſo much Terror were join'd to our Notion of Death? And yet who is there, almoſt, who would not break through the bare Oppoſition of Inſtinct, had not the Command of our Creator ſecur'd us with a much ſtronger Bar and Reſtraint [b]? "Nature, ſays *Quinctilian*, hath "invented this chief Device for the Preſervation of "Mankind, *to make us die unwillingly*, thus en- "abling us to bear ſo vaſt a Load of Misfortunes "as fall to our Share, with ſome Patience and "Quiet." And *Socrates* in *Xenophon* [c] declares it to be σοφῶ δημιουργῶ τέχνημα, *the Artifice of a wiſe Workman, or Builder*, "To have implanted in Men a "Deſire of producing Offspring; in Women a "Deſire of nurſing and bringing them up; and, in "all, when brought up, a vaſt Deſire of Living, "and as great a Fear of Death." And this laſt Motive is the main Security of every Man from the Violence of others. For how eaſy were it to *kill*, were it not ſo hard to *die?* Hence he preſently becomes [4] Maſter of other Mens Lives, who hath once arrived at the Contempt of his own. And the Regard that others have to their own Safety, is the beſt Defence of mine [d].

XVII. 'Tis a Queſtion of more difficulty, whether at all, or how far, a Man hath Power over his own Life, either to expoſe it to extreme Danger, or to conſume it by ſlow Means and Degrees, or, laſtly, to end it in a ſudden and violent manner [e]. Many of the Antients allow'd a Man an abſolute Right in theſe Points, and thought he might either volun-

[a] Compare *Ant. Matth.* de Crim. Prolegom. c. 3. ſ. 4.

[b] *Quint.* Declam. 4. "What Satisfaction, O wretched Mortals, can it prove, to keep the Soul for ſo many Years; or, if "Nature allow'd it, for infinite Ages, in the unpleaſant and weariſome Reſtraint of the Body? If we diligently weigh and exa- "mine all our Joys, all the Pleaſures, which in this univerſal Scene of the World, either attract our Sight, or flatter our "Senſes, we ſhall find the whole Life of a Man to be no more than a ſingle Day. They muſt be low and abject Minds, which "are not tired with this poor Circulation of Actions. So that he, who, by Application to honeſt Arts, is able to underſtand "what is the Perfection of Goodneſs and true Happineſs, will think no Death untimely: And thoſe who refer the Deſign of "our Being chiefly to the Mind and Soul, muſt every Day be ſurfeited of Life. Ye expect I ſhould now give an account how "many things there are in this ſhort Stage, which we ought to avoid and decline; that I ſhould ſet our Fears and our Calami- "ties againſt our Joys and our Succeſs. Let us then weigh thoſe dear Comforts for which we weary the Gods with vain Peti- "tions, and on the account of which we complain of the Shortneſs of Life: And what are they, but Vanity, Greedineſs, "Luxury, and Luſt? And ſhall not we be aſhamed for the ſake of ſuch ſcandalous Privileges, to bear Weakneſs, Grief, and "tedious Diſtempers; and even to court their Stay, when we have an Opportunity of throwing them off and eſcaping?"

[c] *Xenophon* Apomn. l. 1. [d] Add. *Charron*, l. 2. c. 11. n. 8. [e] See *Montaigne's* Eſſays, l. 2. c. 3.

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§. XVI. [1] Senec. de Benef. Lib. 4. Chap. 17. *Supervacuum eſt enim, in quod imus, impelli: quemadmodum nemo in amorem ſui cohortandus eſt, quem adeo dum naſcitur trahit.* 'Tis needleſs to drive us, whither we are going of our own accord. No one wants an Exhortation to be perſuaded to love himſelf, ſince he drew in that Principle with his firſt Breath. See, alſo, *Xenophon's* Memoirs of *Socrates*, Lib. 1. p. 423. Ed. *Steph.*

[2] The Obligation of preſerving and compleating a Man's ſelf, proceeds directly from Self-love properly enlighten'd, which we have proved, §. 15. *Note* 1. of the foregoing Chapter, to be one of the three principal Fundamentals of all our Duties. Indeed Inſtinct alone cannot always ſo forcibly conquer our own Idleneſs and Negligence, as to make us know ſufficiently, what is really profitable, or hurtful, to our own Self-preſervation, as Experience teaches. On the other ſide, 'tis ſometimes too fierce, and ſometimes too blind, to leave to its Direction entirely, a thing that requires ſo much Circumſpection, as the Care of ourſelves, and our true Intereſt does, which ought to be managed in ſuch a manner, as not to be prejudicial to Religion, the Rights of others, or the good of Society.

[3] Mr. *Bayle* has over and over prov'd in his *Hiſt.* and *Crit. Dictionary*, *that the Miſeries of Life are more and greater than its Comforts.* The places are marked in his Index. See, alſo, my Treatiſe of *Games*, Lib. 3. Chap. 1. §. 3. and Mr. *Wollaſton's* *Religion of Nature delineated*, §. 5.

[4] 'Tis the Expreſſion of *Seneca*, *Ita dico, quiſquis vitam ſuam contempſit, tuæ Dominus eſt.* Epiſt. 4. and Mr. *Corneille*, in his *Cinna*, makes *Æmilius* ſpeak thus of *Auguſtus*;

Whatever Care or Order thou doſt take,
He that deſpiſes his own Life, doth make
Himſelf Maſter of thine.

Act 1. *Scene* 2.

This Verſe is alſo found in *Seneca's* Tragedy, *Hercul. Oet.* ver. 443.

Contempſit omnes ille, qui mortem prius.

He contemns all Men that contemns Death,

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thority of Parents, and ſometimes by the Command of the civil State; or, laſtly, by the Invitations of Opportunity, or by the Compulſion of Neceſſity. [1] *Iſocrates* in *Areopagit.* gives us this Account of the old *Athenians: Under ſo great an Inequality of Fortunes, they could not preſcribe to all the ſame common Exerciſes; and therefore they put them in different Ways, according to their Circumſtances and Condition. The meaner Sort they engag'd in Agriculture and in Trading; well knowing, both that Idleneſs was the Cauſe of Poverty, and Poverty a Temptation to Injury and Miſchief. So that by removing this Fountain of Vice, they thought they ſhould prevent the Evils which us'd to flow from it. As for the more wealthy, them they compell'd to apply their Minds to Horſemanſhip, Feats of Body, Hunting, and Philoſophy: Apprehending that ſuch Employment and Amuſements muſt needs have this good Effect, to make ſome excel in Virtue, and to keep others from being notorious in Vice.* It was an Ordinance amongſt the *Egyptians* and *Indians*, that every Man ſhould follow his Father's Trade. *Diodor. Sic.* l. i. c. 74. and l. xii. c. 41. [2] The Reaſon of which Inſtitution is given by *Iſocrates*, in *Laud. Buſir.* The like Cuſtom was receiv'd amongſt the *Peruvians*, under their ancient *Yncas*; the Nobility alone being allow'd to improve themſelves by the Study of Letters. *De la Vega*, l. iv. c. 19. 'Tis a true Obſervation of *Xenophon*, *Cyropæd.* l. ii. *Thoſe Perſons arrive at the greateſt Height and Perfection in particular Attainments, who have given themſelves wholly to ſome ſingle Purſuit, avoiding Multiplicity of Buſineſs and of Enquiry.* As he ſays well in another Place, Lib. viii. *'Tis impoſſible that a Man who profeſſeth many Arts together ſhould excel in all.* Hence it appears, that not only thoſe Perſons live in a State repugnant to ſound Reaſon, who maintain themſelves by Robbery or Villanies; but thoſe too, who withdraw themſelves unneceſſarily from the common Duties and Offices of Life; ſuch are many of the modern Hermits and Monks, as well as ſome of the antient Philoſophers. But thoſe who chiefly fall under this Cenſure, are the ſturdy and able *Vagrants*, who abuſe the Divine Name into a Trade of getting Money, and make GOD, as it were, their Tributary. The Wickedneſs of theſe Varlets is the greater, if they voluntarily maim or diſtort any of their Limbs, ſo as to render themſelves incapable of doing the World any Service, though they ſhould afterwards deſire it. 'Tis a Cuſtom very remarkable amongſt the *Chineſe*, that no Perſon of ſound Strength is permitted to beg, although he be *blind*; ſuch unfortunate Wretches being employ'd in turning Mills, from which Service they earn their Subſiſtence [a].

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Ars longa vita brevis. Hippocrat.
The *Future* is the Tenſe of Fools. Delay
May make To-morrow late; be wiſe To-day.

Horat. l. 1. Epiſt. 4.

Inter ſpem curamque, timores inter & iras,
Omnem crede diem tibi diluxiſſe ſupremum;
Grata ſupervenict, quæ non ſperabitur, hora.

Whilſt Hopes, Cares, Fears, and Frets to plague you join,
Think every Day your laſt that is to ſhine,
'Tis *not expecting* makes a Bleſſing dear:
An Hour's Reprieve is worth a vulgar Year.

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Plin. N. H. l. 7. c. 40. *One Day paſſeth Judgment on another, and the laſt on all.* *Arrian Epictet.* l. 1. c. 1. Τῆς ὥρας ἐλθούσης, εἶπα τότε τεθνήξομαι· πῶς; ὡς ἀποσταλὲν τὰ ἀλλότρια ἀποδόντα. *When my Time is come, I will be prepar'd immediately to leave the World. After what manner? Why, like a Perſon who is reſtoring what was lent him.* Add. *M. Antonin.* l. 12. ſ. 12. and *Bacon*, Eſſay 2. See, alſo, *Montaigne*'s Eſſays, Lib. 1. Chap. 19.

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[1] *Iſocrates*'s *Greek* is, Ἅπαντας μὲν ἔγωγ' ὅτι τὰς αὐτὰς ἄγειν διαιρεθὰς οὐχ' οἷόντ' ἐῶ, ἀνομάλως τὰ πρὸς τὸν βίον ἔχοντας· ὡς δὲ πρὸς τὴν οὐσίαν ἤρμοττεν, ὅπως ἑκάστοις προσήκοντ' εἶναι· τοὺς μὲν γὰρ ὑποδεέστερον προέχοντας, ὅτι τὰς γεωργίας καὶ τὰς ἐμπορίας ἐξεπον εἰδότες, τὰς μὲν εὐπορίας, διὰ τὰς ἀργίας γιγνομένας· τὰς δὲ κακουργίας, διὰ τὰς ἀπορίας· ἀναιρεῦντες ἐν τοῖς ἀρχοῦσι τὴν κακῶν, ἀπαλλάξειν ᾤοντο, καὶ τὴν ἄλλων ἁμαρτημάτων τὴν μετ' ἐκείνων γιγνομένων. τοὺς δὲ βίον ἱκανὸν κεκτημένους, πρὸς τε ἱππικὴν καὶ τὰ γυμνάσια, καὶ τὰ κυνηγέσια, καὶ τὴν φιλοσοφίαν, ἠναγκασαν διατρίβειν· ὁρῶντες ἐκ τούτων, τοὺς μὲν διαφέροντας γιγνομένους, τοὺς δὲ τὴν πλησίον κακῶν ἀπεχομένους.

[2] *Iſocrates* only ſays, that *Buſiris* would have no Man have more than one Trade or Profeſſion, becauſe 'tis not poſſible to excel in ſeveral. Ἀεὶ τοῖς αὐτοῖς τὰς αὐτὰς πρᾶξεις μεταχειρίζειν προσέταξεν· εἰδὼς τοὺς μὴ μεταβαλλομένους τὰς ἐργασίας, πρὸς ἅπαν τὸ ἔργον ἀκριβῶς ἔχοντας, τοὺς δὲ ὅτι τὴν αὐτὴν πρᾶξιν συνεχῶς διημένοντας, εἰς εὐχερολὴν ἕκαστον ἀποτελοῦντας. So that he had better have joined this with what he quotes out of *Xenophon*'s *Cyropæd.* Lib. 2. Chap. 1. §. 8. and Lib. 8. Chap. 2. §. 4.

[3] "The moſt glorious and principal Work of Man is to live well. All other Things, as to reign, get Eſtates, build, &c. are "but Appendages and Helps for the more—— ——They are mean Souls who are buried in Buſineſs, and do not know how "to diſentangle themſelves, nor to leave them, and reſume them." *Montaigne*'s *Eſſays*, Lib. 3. Chap. ult.

ſelf,

ſelf, ſuch a Law ſeems to be of no Force or Signifi-
cancy, which is terminated in myſelf, which I can diſ-
penſe with when I pleaſe, and by the Breach of which I
do no one an Injury. Beſides, it looks like a needleſs
thing to eſtabliſh a Law about this Point, ſince the
anxious Tenderneſs of Self-love would beforehand
drive us ſo forcibly on the Care of our own Safety,
as to render it almoſt impoſſible for us to act other-
wiſe [1]. If then [2] a Man were born only for him-
ſelf, we confeſs it would be convenient that he ſhould
be left entirely to his own Diſpoſal, and be allow'd
to do whatever he pleas'd with himſelf. But ſince,
by the univerſal Conſent of all wiſe Men, it is ac-
knowledg'd that the Almighty Creator made Man
to ſerve him, and to ſet forth his Glory in a more
illuſtrious manner, by improving the good Things
committed to his Truſt; and ſince *Society*, for
which a Man is ſent into the World, cannot be well
exercis'd and maintain'd, unleſs every one, as much
as in him lies, takes care of his own Preſervation,
(the Safety of the whole Society of Mankind being a
thing unintelligible, if the Safety of each particular
Member were an indifferent Point) it manifeſtly
appears that a Man, by throwing aſide all Care of
his own Life, tho' he cannot properly be ſaid to
injure himſelf, yet is highly injurious both to Al-
mighty GOD, and to the general Body of Man-
kind [a].

It was not rightly inferr'd in the Argument we
juſt now mention'd, that the Law of Nature did
not concern itſelf with this Matter, becauſe Inſtinct
did before drive us on the like good Reſolution.
We ſhould rather imagine, that the Force of Inſtinct
was ſuperadded (as an able Second) to the Dictate of
Reaſon; as if this Help alone could ſcarce make a
Tie ſtrong enough to keep Mankind together. For
indeed, if we reflect on the Troubles and Miſeries
that conſtantly wait on human Life, and ſo far out-
weigh that little and mean Portion of Pleaſure [3],
which, through a perpetual Repetition, grows every
Day more flat and languid, ſo that we muſt needs
loath it in every Enjoyment; and if we conſider
farther, how many Men have their Days prolong'd
only to make them capable of more Misfortunes and
Evils; who is there, almoſt, who would not rid
himſelf of the Burthen of Life, as ſoon as poſſible,
if Inſtinct did not render it ſo light and ſo ſweet;
or unleſs ſo much Bitterneſs, or ſo much Terror
were join'd to our Notion of Death? And yet who
is there, almoſt, who would not break through the
bare Oppoſition of Inſtinct, had not the Command
of our Creator ſecur'd us with a much ſtronger Bar
and Reſtraint [b]? "Nature, ſays *Quinctilian*, hath
"invented this chief Device for the Preſervation of
"Mankind, *to make us die unwillingly*, thus en-
"abling us to bear ſo vaſt a Load of Misfortunes
"as fall to our Share, with ſome Patience and
"Quiet." And *Socrates* in *Xenophon* [c] declares it to
be σοφῦ δημιουργῦ τέχνημα, *the Artifice of a wiſe Work-
man, or Builder*, "To have implanted in Men a
"Deſire of producing Offſpring; in Women a
"Deſire of nurſing and bringing them up; and, in
"all, when brought up, a vaſt Deſire of Living,
"and as great a Fear of Death." And this laſt
Motive is the main Security of every Man from the
Violence of others. For how eaſy were it to *kill*,
were it not ſo hard to *die?* Hence he preſently be-
comes [4] Maſter of other Mens Lives, who hath
once arrived at the Contempt of his own. And the
Regard that others have to their own Safety, is the
beſt Defence of mine [d].

XVII. 'Tis a Queſtion of more difficulty, whe-
ther at all, or how far, a Man hath Power over his
own Life, either to expoſe it to extreme Danger, or
to conſume it by ſlow Means and Degrees, or, laſt-
ly, to end it in a ſudden and violent manner [e]. Ma-
ny of the Antients allow'd a Man an abſolute Right
in theſe Points, and thought he might either volun-

[a] Compare *Ant. Matth.* de Crim. Prolegom. c. 3. ſ. 4.

[b] *Quint.* Declam. 4. "What Satisfaction, O wretched Mortals, can it prove, to keep the Soul for ſo many Years; or, if "Nature allow'd it, for infinite Ages, in the unpleaſant and weariſome Reſtraint of the Body? If we diligently weigh and exa-"mine all our Joys, all the Pleaſures, which in this univerſal Scene of the World, either attract our Sight, or flatter our "Senſes, we ſhall find the whole Life of a Man to be no more than a ſingle Day. They muſt be low and abject Minds, which "are not tired with this poor Circulation of Actions. So that he, who, by Application to honeſt Arts, is able to underſtand "what is the Perfection of Goodneſs and true Happineſs, will think no Death untimely: And thoſe who refer the Deſign of "our Being chiefly to the Mind and Soul, muſt every Day be ſurfeited of Life. Ye expect I ſhould now give an account how "many things there are in this ſhort Stage, which we ought to avoid and decline; that I ſhould ſet our Fears and our Calami-"ties againſt our Joys and our Succeſs. Let us then weigh thoſe dear Comforts for which we weary the Gods with vain Peti-"tions, and on the account of which we complain of the Shortneſs of Life: And what are they, but Vanity, Greedineſs, "Luxury, and Luſt? And ſhall not we be aſhamed for the ſake of ſuch ſcandalous Privileges, to bear Weakneſs, Grief, and "tedious Diſtempers; and even to court their Stay, when we have an Opportunity of throwing them off and eſcaping?"

[c] *Xenophon* Apomn. l. 1. [d] Add. *Charron*, l. 2. c. 11. n. 8. [e] See *Montaigne's* Eſſays, l. 2. c. 3.

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§. XVI. [1] Senec. de Benef. Lib. 4. Chap. 17. *Supervacuum eſt enim, in quod imus, impelli: quemadmodum nemo in amorem ſui cohortandus eſt, quem adeo dum naſcitur trahit.* 'Tis needleſs to drive us, whither we are going of our own accord. No one wants an Exhortation to be perſuaded to love himſelf, ſince he drew in that Principle with his firſt Breath. See, alſo, *Xenophon's* Memoirs of *Socrates*, Lib. 1. p. 423. Ed. *Steph.*

[2] The Obligation of preſerving and compleating a Man's ſelf, proceeds directly from Self-love properly enlighten'd, which we have proved, §. 15. *Note* 1. of the foregoing Chapter, to be one of the three principal Fundamentals of all our Duties. Indeed Inſtinct alone cannot always ſo forcibly conquer our own Idleneſs and Negligence, as to make us know ſufficiently, what is really profitable, or hurtful, to our own Self-preſervation, as Experience teaches. On the other ſide, 'tis ſometimes too fierce, and ſometimes too blind, to leave to its Direction entirely, a thing that requires ſo much Circumſpection, as the Care of ourſelves, and our true Intereſt does, which ought to be managed in ſuch a manner, as not to be prejudicial to Religion, the Rights of others, or the good of Society.

[3] Mr. *Bayle* has over and over prov'd in his *Hiſt.* and *Crit. Dictionary*, *that the Miſeries of Life are more and greater than its Comforts.* The places are marked in his Index. See, alſo, my Treatiſe of *Games*, Lib. 3. Chap. 1. §. 3. and Mr. *Wollaſton's* *Religion of Nature delineated*, §. 5.

[4] 'Tis the Expreſſion of *Seneca*, *Ita dico, quiſquis vitam ſuam contempſit, tuæ Dominus eſt.* Epiſt. 4. and Mr. *Corneille*, in his *Cinna*, makes *Æmilius* ſpeak thus of *Auguſtus*;

Whatever Care or Order thou doſt take,
He that deſpiſes his own Life, doth make
Himſelf Maſter of thine.

Act 1. *Scene* 2.

This Verſe is alſo found in *Seneca's* Tragedy, *Hercul. Oet.* ver. 443.

Contempſit omnes ille, qui mortem prius. He contemns all Men that contemns Death,

tarily

tarily offer his Life as a Pledge for another's, or *devote* it freely, without any ſuch Deſign of preſerving the Life of his Friend; or whenever he grew weary of Living, might prevent the Tardineſs of Nature and Fate. *Pliny* [a] calls the Ability to kill one's ſelf, *the moſt excellent* Convenience, *in the midſt of ſo many Torments of Life.* Whom we can by no means excuſe from flat Impiety, for daring to think ſo abjectly [1] of the greateſt Gift of Heaven. It is our Buſineſs to examine what ſeems moſt agreeable, in this Caſe, to the *Law of Nature.* And here we may take it firſt of all to be true beyond Diſpute, that ſince Men both can and ought to apply their Pains to the Help and Service of another; and ſince ſome certain kinds of Labour, and an overſtraining Earneſtneſs in any, may ſo affect the Strength and Vigor of a Man, as to make old Age and Death come on much ſooner, than if he had paſs'd his Days in Softneſs, and in eaſy Purſuits; and one may, without Fault, voluntarily contract his Life in ſome degree, upon account of obliging Mankind more ſignally, by ſome extraordinary Services and Benefits [2]. For ſince we do not only live to ourſelves, but to GOD, and to human Society; if either the Glory of our Creator, or the Safety and Good of the general Community require the ſpending of our Lives, we ought, willingly, to lay them out on ſuch excellent Uſes [b]. *Pompey the Great*, in a time of Famine at *Rome*, when the Officer who had the care of tranſporting the Corn, as well as all his other Friends, intreated him not to venture to Sea in ſo ſtormy a Seaſon, nobly anſwered them, *That I ſhould go 'tis neceſſary, but not that I ſhould live.* And *Achilles* in *Homer*, when his Fate was put to his Choice, preferr'd a hafty Death in the glorious Adventures of War, to the

[a] N. H. l. 2. c. 7.
[b] *Statius*, Theb. X. 609.

Felix qui tanta lucem mercede relinquet.
Happy, who at a Price ſo noble ſells
A fleeting Life!

Horat. Carm. III. 2.

Dulce & decorum eſt pro patria mori.
Mors & fugacem perſequitur virum,
Nec parcit imbellis juventæ
Poplitibus, timidoque tergo.

How ſweet, how glorious is the parting Breath
With which our injur'd Country's Peace we buy!
In vain the Coward flies: whilſt ſwifter Death
Hangs on his Back, nor ſpares the quivering Thigh.

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§. XVII. [1] Mr. *Montaigne*'s Words are here remarkable: After he has alledged the Reaſons of ſuch as hold it lawful to kill themſelves, he goes on and ſays, "Several hold, that they may not leave this Gariſon of the World without the expreſs Com-
"mand of him that ſent them into it; and that GOD hath placed us in it, not for ourſelves only, but for his own Glory, and
"the Good of others, and he is to releaſe us when he pleaſes, and not we ourſelves; that we are not born for ourſelves, but for
"our Country; and therefore the Laws call us to an account of Ourſelves, for their Intereſt, and have an Action of Murder
"againſt us. Nay, we are in another World puniſhed as Deſerters of our Stations, as *Virgil* (in his *Æneids*, Lib. 6. ver. 434, &c.) ſpeaks:

Proxima deinde tenent mæſti loca, qui ſibi lethum
Inſontes peperêre manu, lucemque peroſi
Projecêre animas——

Thoſe doleful Souls in the next Rooms of Hell,
Who, without Guilt, did ſlay themſelves, do dwell.

"'Tis an Argument of much Bravery and Courage, rather to lug the Chain that clogs us, than break it. *Regulus*'s Conſtancy
"is more commendable than *Cato*'s Deſpair. 'Tis Indiſcretion and Impatience that haſtens our Pace; Virtue will not turn its
"back upon any Misfortunes, it rather ſeeks out Trouble and Affliction, as its Nouriſhment. The Threatnings of Tyrants,
"Fires, and Executioners, rather invigorate and enliven it." (See *Horace*, Lib. 4. Ode 4. ver. 55, &c.) And *Seneca*'s *Theb.* or *Phœniſſ.* Act. 1. ver. 190, &c.

Rebus in adverſis facile eſt contemnere vitam,
Fortiter ille facit, qui miſer eſſe poteſt, *Mart.* Lib. 11. Epigr. 57.

"It is a Sign of Cowardice, and not of Courage, to caſt a Man's ſelf into the Grave, under an heavy Tombſtone, to avoid
"the Strokes of Fortune. Courage will not be beat out of its Way, or Courſe, by any Tempeſt that attends it.

Horat. Od. iii. 3.

Si fractus illabatur orbis,
Impavidam feriunt ruinæ.

If the World falls about his Ears,
The Ruins will not raiſe his Fears.

"Moſt commonly, when we are flying from other Troubles we fall into this. By avoiding Death we ſometimes run headlong
"to it.

Hic rogo, non furor eſt, ne moriare, mori? *Mart.* Lib. 2. Epigr. 80.

"As thoſe who, for fear of a Precipice, throw themſelves headlong from it. (See *Lucan.* Lib. 7. ver. 103, &c. and *Lucretius*,
"Lib. 3. ver. 79. &c.) Contempt of Life is ridiculous, for our Being is our All. Things which have a more noble and ex-
"cellent Being, may ſlight ours; but 'tis againſt Nature for us to deſpiſe it ourſelves, and bring ourſelves to neglect it. 'Tis a
"particular Diſeaſe, which no other Creature is troubled with, to hate and deſpiſe ourſelves. 'Tis a like Vanity to deſire to
"be another Thing than we are. The Conſequence of ſuch a Wiſh does not concern us ſo much, as contradict and hinder itſelf.
"He that deſires to be made an Angel, does nothing for himſelf, he deſires nothing better; for having no Exiſtence, how can
"he be ſenſible of, or rejoice at the Amendment? The Security, Indolence, Impaſſibility, and Privation of the Evils of this
"Life, which we purchaſe by dying, bring no Profit to us. In vain he avoids War, that can't enjoy Peace; and in vain he
"flies from Pain, who has no way to get Eaſe. All Inconveniences are not ſo heavy, as to make us deſirous to die to avoid
"them; for ſince there are ſo many ſudden Changes in human Affairs, it is hard to judge when we are come to the full End of
"our Hopes. *All Things*, ſays an antient Proverb, *are full of Hope to a Man as long as he lives.* Eſſays, Lib. 2. Chap. 3.
"Madam *Deſhoulieres* has ſome fine Verſes to this purpoſe:

In greatneſs of Courage Men do not know
When they are got to the Rank of the Hero's.
Thoſe *Greeks* and *Romans* who themſelves ſlew,
That they might make themſelves famous,
What great Thing have they done? They're departed this Life?
But Diſgrace follows them hard, as they deſerve.
By one Death they have eſcaped a thouſand.
How ſweet it is to troubled Hearts to ſigh!
It is more noble, more difficult
To bear a Misfortune, than to be delivered from it.
Diverſe Reflex. Stanza x. Tom. 1.

[a] In fine, We may obſerve with Mr. *Titius*, (*Obſerv.* 115.) That the Effect of theſe great Undertakings is not always ſo certain, that we need believe, that they thereby infallibly ſhorten their Days. Moreover, the equal Poiſe between *Self-love* and *Sociableneſs*, doth not conſiſt in an indiviſible Point, but contains a conſiderable Extent. Laſtly, *Sociableneſs* ſometimes prevails more than *Self-love*. See what I have ſaid in the foregoing Chapter, §. 15. *Note* 5.

longeſt

longeſt Period of Age, to be paſs'd idly and inglorioufly at home.

XVIII. Farther, inaſmuch as it frequently happens, that the Lives of many Men cannot be preſerv'd, unleſs others expoſe themſelves, on their behalf, to a probable Danger of loſing their own; this makes it evident, that the lawful Governor may lay an Injunction on any Man in ſuch Caſes, not to decline the Danger, upon Pain of the ſevereſt Puniſhment. And on this Principle is founded the Obligation of Soldiers, which we ſhall enlarge upon in its proper place. 'Tis a noble Saying of *Socrates* in *Plato*'s Apology, '*In whatever Station a Man is fix'd, either by his own Choice, as judging it the beſt, or by the Command of his Superior; in that he ought reſolutely to continue, and to undergo any Danger that may aſſault him there; reckoning neither Death nor any other Evil ſo grievous as Cowardice and Infamy.*

Nor doth it ſeem at all repugnant either to *natural Reaſon*, or to the *Holy Scriptures*, (which command us to *lay down our Lives for our Brethren*) that, without any ſuch rigid Injunction of a Superior, a Man ſhould voluntarily expoſe himſelf to a Probability of loſing his Life for others; provided he hath good hopes of thus procuring their Safety, and that they are worthy of ſo dear a Ranſom: for it would be ſilly and ſenſeleſs, that a Man ſhould venture his own Life for another whom 'tis impoſſible to preſerve; and [z] that a Perſon of Worth and Excellence ſhould ſacrifice himſelf for the Security of an inſignificant *paultry Fellow* [a]. We conceive it then to be lawful, that a Man may either give himſelf as a Surety for another, eſpecially for an innocent and worthy Perſon, or as a Hoſtage for the Safety of many, in the Caſe of Treaties; upon pain of ſuffering Death, if either the accus'd Perſon doth not appear, or the Treaty be not obſerv'd. Tho' the other Party, to whom he ſtand bound on either of theſe accounts, cannot fairly put him to death upon ſuch Failure; as we ſhall elſewhere prove. But that thoſe vain Cuſtoms of Mens devoting themſelves out of Foolhardineſs and Oſtentation, (ſuch as we obſerv'd to be in uſe amongſt the *Japoneſe*) are contrary to the *Law of Nature*, we do not in the leaſt doubt. For there can be no Virtue in an Action where there's no *Reaſon*. Nor do we pretend to maintain, that the *Law of Nature* obliges a Man to prefer the Lives of others to his own; eſpecially ſuppoſing the Caſes and Circumſtances to be equal. For, beſides, that the common Inclination of Mankind is an Argument to the contrary, we might alledge the Teſtimony of Witneſſes beyond all Exception, allowing a Man to be always *deareſt to himſelf*, and *Charity* ſtill to *begin at home* [b].

XIX. It remains that we examine, whether or no a Man, at his own free Pleaſure, either when he grows weary of Life, or on the account of avoiding ſome terrible impending Evil, or ſome ignominious and certain Death, may haſten his own Fate, as a Remedy to his preſent, or to his future Misfortunes [c]. On this Point we have a famous Saying of [3] *Plato*, *in Phædo*, frequently mention'd with Honour and Commendation by the Chriſtian Writers: ὡς ἔν τινι φρουρᾷ ἐσμὲν οἱ ἄνθρωποι, καὶ οὐ δεῖ ἑαυτὸν ἐκ ταύτης λύειν, οὐδ' ἀποδιδράσκειν. *We are plac'd, as it were*, upon the Guard, in Life; *and a Man muſt not rid himſelf of this Charge, or baſely deſert his Poſt.* Which *Lactantius* hath expreſs'd more fully in his *Divine Inſtitutions* [d]; *As*, ſays he, *we did not come into the World upon our own Pleaſure or Choice, ſo neither muſt we quit our Station otherwiſe than by the Command of him who gave it us; who put us into this Tenement of the Body, with Orders to dwell here, till he ſhould pleaſe to remove us.* It is worth while to hear how *Plato* [4] deſcribes the *Self-murderer*, whom he hath condemn'd to a diſgraceful Burial: *He that kills himſelf, preventing by Violence the Stroke of Fate, being forced to his End neither by the Sentence of the Judges, nor by any inevitable Chance, nor on the account of defending his Modeſty in extreme Danger; but thus unjuſtly condemning and executing himſelf, out of Cowardice and Unmanlineſs of Spirit.* *Ariſtotle* hath well ſeconded his Maſter: *To die*, ſays he [e], *either to get rid of Poverty or of Love, or of any other Trouble or Hardſhip, is ſo far from being an Act of Courage, that it rather argues the meaneſt degree of Fear. For 'tis Weakneſs to*

[a] *Grotius* ad *Jonah*, C. 1. ver. 12. *If one Man does well in offering to die for the Preſervation of many*, (as Phocion *told* Demoſthenes) *how much more is he in Juſtice oblig'd to this, who apprehends himſelf to be the Cauſe of the common Danger?*

[b] See 2 *Corinth.* viii. 13, 14. l. 14. *Prin. D. præſcript. verb.* l. 6. C. *de ſervit.* l. 2. f. 9. D. *de aqua pluv. arc.* Nor can any Argument for the contrary be drawn from L. 5. f. 4. D. *Commodati*, L. 1. f. 28. D. *de Sancto Silan.* Add. *Tract. de Principiis Juſti & Decori*, p. 112, &c.

[c] Vid. *Lipſii* Epiſt. Cent. 2. Ep. 22. Dr. *Donne*'s Βιαθανάτου, Eſſ. *de Morale*, Vol. 1. p. 50.

[d] Div. Inſtit. l. 3. c. 18.

[e] Ethic. l. 3. c. 2.

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[z] The *Greek* is, Οὐ ἄν τις ἑαυτὸν τάξῃ, ἡγησάμενος βέλτιον εἶναι, ἢ ὑπὸ ἀρχοντος ταχθῇ, ἐνταῦθα δεῖ, ὡς ἐμοὶ δοκεῖ, μένειν καὶ κινδυνεύειν, μηδὲν ὑπολογιζόμενον, μήτε θάνατον, μήτε ἄλλό τι μηδὲν πρὸ τῆς αἰσχρᾶς. There would be not only Folly, but great Injuſtice in it; for the Law of Nature poſitively ordains, That, all other Things being equal, every one ſhould love himſelf better than others, and prefer his own Intereſt before theirs, in a thing of ſuch great Conſequence as Life is, which is the Foundation of all the good Things of this World. By a much ſtronger Reaſon, if he who runs the riſk of periſhing does not deſerve that a Man of any Merit or Uſefulneſs to Society ſhould ſacrifice himſelf to ſave him.

[3] *Plato* plainly treats here of the private Inſtructions which the *Pythagoreans* gave their Scholars, juſt admitted into their Schools, and in which they diſcover the Reaſons of the moſt abſtruſe and private Doctrines of their Philoſophy. Theſe ſecret Inſtructions they call'd their Ἀπόῤῥητα, about which ſee *Scheffer*, *De Not. & Conſtit. Phil. Ital.* Chap. 10. What *Plato* ſays before of *Philolaus*, a *Pythagorean* Philoſopher, will not allow us to doubt, that the Reaſon which he ſets down here, as very obſcure and hard to comprehend, is no other than what the *Pythagoreans* give, to prove that Self-murder is not allowable. And 'tis the ſame exactly which *Cicero* attributes to *Pythagoras*, *De Senec.* Chap. 20. To conclude, there is no occaſion to diſpute, as I ſee is done by the Author of a Book printed in 1720. (*Nic. Pragemanni Juriſpr. Nat. Seneſtute*, §. xxiii.) about the figurative Expreſſions of *Pythagoras*, or others of the ſame kind, ſuch as this, *That Life is a Depoſitum truſted to each Man by his Creator*, &c. All this is no more than to ſay, That God has not given us the Power of diſpoſing of our own Life at pleaſure; but, on the contrary, commands us to preſerve it carefully.

[4] De LL. l. 9. Ὃς ἂν ἑαυτὸν κλείνῃ, ἢ ὃ εἱμαρμένως ἄλλα ἀποστερῶν μοῖραν, μήτε πόλεως ταξάσης δίκην, μήτε πρεπωδοῦς τυχῃ ἀναγκαδεὶς, μηδὲ αἰσχύνης πρὸς ἀπόρου, ἢ ἀβίου μαλακὸν, ἀρετὴν ἢ ἀνανδρίαν δειλίᾳ ἑαυτῷ δίκην ἀδικος ὀφλισὼν——ταῦτα δ' εἰ τοῖς ὕπω φθάρεῖσι, πρέπον μὴ κεῖται μοῖρα, &c. See a Paſſage of Mr. *Montaigne*'s quoted §. 17. Note 1. where you'll find an Abridgment, and a lively Repreſentation of the principal Reaſons which can be alledged againſt thoſe who believe that Self-murther is allowable, and ſome other Paſſages which our Author puts in the Margin. Our Author here has unſeaſonably copied *Grotius*, in what he ſays of the *Jews*, upon the Credit of a Paſſage in *Joſephus*, which he did not rightly remember. See my Remark on the *Jur. Bel. & Pac.* Lib. II. Cap. 19. §. 5. N. 1.

fly, and to avoid those things which are hard and painful to be undergone [a]. *Grotius* [b] hath observed, that Persons guilty of Self-murther were excluded from decent Honours of Burial, both amongst the *Gentiles* and the *Jews*. But amongst the latter, one Case is commonly excepted, and allow'd as a just Reason for killing one's self; and that is [1], when a Man finds he shall otherwise be made a Reproach to GOD, and to Religion. For acknowledging the Power over our Lives not to be in our own hands, but in GOD's, they took it for granted, that nothing but the Will of GOD, either *manifest* or *presumptive*, could excuse the Design of anticipating our Fate. As Instances of this excepted Case, they alledge the Examples of *Sampson*, who chose to die by his own Strength, when he [2] found the true Religion expos'd to Scorn in his Person and Misfortunes: And of *Saul*, who [3] fell on his own Sword, lest he should have been derided and insulted over by GOD's and *his* Enemies; and lest, if he should have yielded himself Prisoner, the Slavery of his Country and Kingdom should inevitably follow. For the *Jews* are of Opinion, that *Saul* recover'd his Wisdom and Honour, as to the last Act of his Life; inasmuch as after the Ghost of *Samuel* had foretold his Death in the Battle, yet he refus'd not to engage for his Country, and for the Law of his GOD; whence he merited eternal Praise, even by the Testimony of *David*; who, likewise, commended so highly the Piety of those Men, who honour'd their Prince's Relicks with a decent Burial.

Some extend this Exception and Allowance to many other Cases which bear a Resemblance to the former. And the Foundation they build upon is this, that as no Man can be properly bound or *oblig'd* to himself, so no Man can do an Injury to himself, when he takes away his own Life. As for a Man's being engag'd by the *Law of Nature* to preserve himself, they say the Reason of this is, because he is constituted and appointed by GOD for the Maintenance of *human Society*, which he must not by any means forsake, like an idle Soldier, who runs away from the Post assign'd him in Battle: And that therefore my Obligation to save my own Life, is not a *Debt* to myself, but to GOD, and to [4] the Community of Mankind. So that if that Respect to GOD and to Mankind be taken off, and be remov'd, the Care of my Life is recommended to me only by *Sensitive Instinct*, which not rising to the Force of a Law, an Action repugnant to it cannot be accounted sinful. On these Considerations, they think the Case of those Persons deserves a favourable Judgment, and, at least, a kind Pity, rather than a rigorous Censure, who lay violent Hands upon themselves, when they see that they shall otherwise infallibly suffer a Death of Torture and Ignominy from their Enemies; since it cannot be for the Interest of the Publick, that they must needs die in so infamous a manner: Or else, when they see such an Injury likely to be offer'd to them, which if they undergo, they shall be ever after scorn'd and derided by the rest of Mankind. Of the former sort are those who seeing themselves condemn'd to Death, either by cruel Enemies abroad, or bloody Tyrants at home, have wilfully prevented the Stroke; either to avoid the Tortures and the Shame of a publick Execution, or to procure some Benefit to their Friends or Families by this Expedient. Thus *Tacitus*, *Ann.* VI. 29. giving an Account of some of the *accus'd Persons* under *Tiberius*, who destroy'd themselves, observes, that *the* [5] *Fear of the Execution render'd these Acts very frequent. And* that, *whereas such as suffer'd Death in publick were denied the Privilege of Burial, and had their Goods confiscated; those who died by their own Hands were decently interr'd, and their Last Wills stood good with full Effect; these Indulgences serving as a Reward for their Haste.* And here, by the way, we

[a] Senec. *Phœniss.* ver. 190.

——Non est Virtus
Timere vitam; sed malis ingentibus
Obstare, nec se vertere ac retro dare.

Valour is not, to be afraid of Life,
But bravely to resist impending Woes,
And never to submit or to retire.

Martial, L. 11. Epigr. 57.

Rebus in angustis facile est contemnere vitam;
Fortiter ille facit qui miser esse potest.

Cowards in Misery may court their Fate;
He's brave that dare persist Unfortunate.

Virgil assigns a Place in Hell to Self-murtherers:

—— Qui sibi letham
Insontes peperere manus, lucemque perosi
Projecere animas.

——They
Who prodigally throw their Souls away;
Fools, who repining at their wretched State,
And loathing anxious Life, suborn'd their Fate.

Mr. *Dryden.*

Procop. Hist. *Gothic.* l. 4. *To throw away our Life when there can be no Advantage, is precipitate Madness: And tho' such a blind Fierceness hath some vain Shadow of Courage, yet it will always pass for Folly, in the Judgment of wise Men.* Ammian. Marcellin. l. 25. c. 4. *If we consider right, it is just the same Fearfulness and Cowardice, to desire Death when we ought not, as to refuse it on a proper Occasion.* Add. *Roger de Bramin.* p. 2. c. 19. *Nicol. Trigan. de Regno Chinæ*, l. 1. c. 9. *Charron*, l. 2. c. 11. n. 18.

[b] L. 2. c. 19. § 5.

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[1] This Reason does not excuse Self-murder at all. Supposing that we do not any thing to dishonour GOD on our part, 'tis not our Fault, if profane Persons take an occasion unjustly to ridicule their Creator; and this does not at all authorize us to violate the express Prohibition both of the Natural Law and Revelation, in departing out of this Life without his Leave. If there be any Case affording a sufficient Presumption, that GOD himself allows us to anticipate the fatal Term, we must suppose 1. That by this we may shun a real and imminent Evil, which threatens either us or our Family, whose Advantage we are bound to consult. 2. That we have no way merited this Evil, and that it is not the Consequence of any Crime of our own. 3. That the Evil itself be morally inevitable. 4. That we may, by shortening our Lives, either save ourselves from such an Evil, or procure to our Family, or Country, some great Benefit, which is morally certain. It is not impossible, perhaps, that all these Circumstances may combine together, but the Case will happen very seldom. The surest Way, therefore, is to keep to the general Rule. Besides, it is not easy for a Man to form the Resolution of *Suicide*, unless to be under the immediate Influence of deep Melancholy, or wounded by some criminal Remorse. The last is excluded by what I have laid down; and as to Melancholy, it is out of the Question; for the Case here relates to such as can determine with Choice and Judgment.

[2] 'Twas done rather out of Revenge against the *Philistines*, and GOD punished him by hearing his Prayers. See Mr. *Le Clerc* on *Judges* xvi. 28. 30.

[3] See Mr. *Le Clerc* upon 2 *Sam.* i. 14.

[4] *Aristotle* maintains, (Ethic. l. 5. c. 15.) that those who are guilty of their own Deaths, are more properly injurious to the Commonwealth than to themselves; and that therefore they deserve the Ignominy commonly inflicted on their Relicks.

[5] *Tacitus*'s Words are: *Nam promptas ejusmodi Mortes, metus carnificis faciebat; & quia damnati, publicatis bonis, sepultura prohibebantur; eorum, qui de se statuebant, humabantur corpora, manebant testamenta, pretium festinandi.*

may

may remark, that *Martial*'s Cenſure doth not always hold good,

——*Furor eſt, ne moriare, mori* ;

——'Tis mad to die for fear of Death ;

For, as *Æſchines* [a] hath well diſtinguiſh'd, *To die is not ſo terrible, as to bear the Infamy that attends ſome kinds of Deaths.*

The other ſort of Perſons, whoſe Death we obſerv'd to be ſo favourably interpreted by ſome Caſuiſts [1], are thoſe Women and beautiful Boys, who have kill'd themſelves to avoid the Violation of their Chaſtity [b]. And in their Behalf they urge this plauſible Excuſe, That being aſſaulted with ſuch a Danger as they could not otherwiſe, unleſs by a Miracle, eſcape, they might well conclude, that their Almighty Sovereign and General now gave them a Diſmiſſion, and that they might well preſume on the Conſent and Leave of Mankind, to whom they were already loſt : It being no one's Intereſt that they ſhould not anticipate their Death for ſo little a time, to avoid the feeling of ſuch Tortures and Abuſes as might, perhaps, tempt them to yield to a more grievous Sin : And inaſmuch as it ſeem'd unreaſonable to condemn generous Souls to ſuch a Neceſſity, as that they muſt wait for the Sword of Villains, who would enhance the Bitterneſs of Death, by their foul and ignominious Uſage [c].

But, to leave this particular Point without venturing at a Determination ; thus much we take to be evident, that thoſe who voluntarily put an end to their own Lives, either as tired out with the many Troubles which commonly attend our mortal Condition ; or from an *Abhorrence* of Indignities and Evils, which yet would not render them diſgraceful Members of *human Society* ; or through Fear of ſuch Pains and Torments, as by reſolutely enduring, they might have become uſeful Examples to others, cannot be well clear'd of the Charge of *Sinning againſt the Law of Nature.* Sir *Thomas More* ſeems to be of another Opinion in his *Utopia*, but his Reaſons do not prevail with us to alter our Judgment.

But thoſe are, on all accounts, to be exempted from the Crime of Self-murder, who lay violent Hands on themſelves, under any Diſeaſe robbing them of the Uſe of Reaſon. Many Perſons, likewiſe, who have run into voluntary Deſtruction, upon an exceeding Fright and Conſternation, have, on that Account, been excus'd by moderate and candid Judges [d].

It ought to be obſerv'd farther on this Head, that it makes no Difference whether a Man kill himſelf, or force others to diſpatch him. For he who at ſuch a Time, or on ſuch Occaſion, ought not to die, is by no means excus'd, if he makes uſe of another's Hands to procure his Death ; ſince what a Man doth by another, he is ſuppos'd in Law to have done himſelf, and muſt therefore bear the Guilt or *Imputation* of the Fact. *David* was guilty of the Death of *Uriah*, tho' he got it effected by the Hands of the *Ammonites*. So were *Pilate* and the *Phariſees* guilty of that of our Saviour, tho' they did not themſelves faſten him to the Croſs, but order'd the Soldiers to do it. Altho' the Perſon who lends his Hands to ſuch a Service, may, likewiſe, bring himſelf in for a Share in the Fault. For this Reaſon we don't admire the Reflection which *Florus* [e 2] makes on the Deaths of *Brutus* and *Caſſius* ; *Who*, ſays he, *doth not wonder, that theſe wiſe and great Perſons did not employ their own Hands in their concluding Strokes ? Perhaps it was part of their Perſuaſion, that they ought not to defile themſelves by ſuch Attempts, but that in delivering their moſt holy and moſt pious Souls from the Confinement of their Bodies, they ſhould make uſe of their own Judgment, in the Intention, and of other Mens Wickedneſs in the Execution.* For if it were unlawful for them, at that time, to end their Lives, it was indifferent whether they fell by their own, or by others Violence. But if it were lawful, how can any Wickedneſs or Guilt be imputed to the Servants who aſſiſted them ? Tho' the Hiſtorian might, in ſome meaſure, be excus'd, if the ſame Cuſtom were practis'd in his Country, which *Æſchines* mentions amongſt the *Grecians*,

[a] Orat. de *falſ. Legat.*

[b] Vid. *Paul. Diac.* l. 15. & *Euſeb.* H. E. l. 8. c. 24, 27.

[c] *Cicero*, Tuſc. Qu. I. Cato *left the World rejoicing that he had met with an Opportunity of Dying. For that Divine Power which dwells in us, forbids us to depart without his Leave. But when Heaven preſents a fair Occaſion, as formerly to* Socrates, *now to* Cato, *and often to other Perſons, I dare engage, that a truly wiſe Man will quit with Joy this Vale of Darkneſs, to enter into Happineſs and Light. And yet ſuch an one will not violently break the Chains of his Priſon ; for this the Laws forbid him ; but he will go out quietly and fairly, when God is pleaſed to give him his Enlargement ; as if his Releaſe from the Reſtraint were ſign'd by the proper Magiſtrate and Power.* Compare L. 3. ſ. 6. *D. de bonis eorum qui ante ſententiam.* L. 45. ſ. *D. de jure fiſci.* Add. *Quintilian*, Declam. 4. *Ant. Matthæ :* de Crim. ad l. 48. Tit. 5. c. 1. ſ. 9. *Grot.* ad Judic. c. 16. ver. 30.

[d] *Q. Curtius*, L. 4. c. 16. *When Fear hath once got Poſſeſſion of the Mind, Men grow deſperate, and dread nothing but that firſt Object of Terror*, Lucan. L. 3. ver. 684.

Mille modos inter, lethi mors una timori eſt,
Qua cœpere mori——————

Amongſt a thouſand Ways of Death, they fear
That only which in part they feel——————

Mors timore appetita, Death deſired thro' Fear, is a Phraſe with *Sueton.* Add. L. 14. ſ. 3. *D. quod metus cauſa,* and *Montaigne*'s Eſſay, L. 1. c. 17.

[e] Lib. 4. 7.

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[1] This is not a ſufficient Reaſon *to juſtify* Self-murder, for they ought to comfort themſelves with the Teſtimony of their own Conſcience, which can't blame them in that reſpect, and bear patiently the unwarrantable Cenſures of Men, and the other Inconveniences which may redound from ſuch a Violence. True Chaſtity, as Mr. *Thomaſius* ſpeaks very well, (*Inſtitut. Juriſpr. Divin.* Lib. 2. Chap. 2. §. 76.) is a Thing which no Man can take away by force, and 'tis without Reaſon that they are leſs eſteemed ſo, who have been obliged to yield to a greater Power.

[2] Thus *Deianira* ſpeaks in *Seneca*, (*Herc. Oet.* ver. 996.)

——————*Dextera ſternar tua,*
Sed mente noſtra.

——————*Yours* ſhall be the *Hand* of Fate,
And *mine* the *Will.*

that if a Perſon murther'd himſelf, the Hand that perform'd the Deed was buried apart from the reſt of the Body [a][1].

To conclude, ſince we deny that a Man hath abſolute Power over his own Life, it is plain that we cannot approve of thoſe Laws, which, in ſome Countries, either command or permit People to deſtroy themſelves. Such a Law *Diodorus Siculus*, L. ii. c. 57. reports to have been in force amongſt the Inhabitants of the Iſland *Ceylan*, ordaining, "That the People ſhould live only to ſuch a "Number of Years, which being expir'd, they eat a "certain Herb that put them into their long Sleep, "and diſpatch'd them without the leaſt Senſe of "Pain. Add. L. iii. Chap. 33. And thus too amongſt the *Ceans*, all Perſons above ſixty Years old, were obliged by the Laws to poiſon themſelves, to *ſupply Food for the reſt* [b]. Though *Ælian* gives this better Reaſon for the Practice; "That having ar-"riv'd at ſuch an Age, they were conſcious to them-"ſelves that they were no longer able to promote their "Country's Intereſt by their Service; growing now "towards Stupidity and Dotage [c]. *Procopius*, Hiſt. *Goth.* L. 2. relates a Cuſtom of the *Heruli*, by which thoſe who were weaken'd and diſabled, either by Diſeaſe or Age, voluntarily ſent themſelves out of the World: The Wives hanging themſelves at the Tombs of their Huſbands, if they loſt them in this manner. *Ælian*, l. iv. C. 4. reports ſomewhat to the ſame purpoſe of the *Sardi*, and the *Bebryci*; and *Strabo*, Lib. ii. and *Herodotus*, *Clio* in *fin.* of the *Maſſagetæ*, who may be conſulted at Leiſure.

CHAP. V.

Of SELF-DEFENCE.

The CONTENTS.

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XIX. *Of ſuch Defence as is made by him who has offered the Injury.*

TO *Self-preſervation*, which not only the tendereſt Paſſion, but the exacteſt Reaſon recommends to Mankind, belongs *Self-defence*, or [3] the warding off ſuch Evils or Miſchiefs as tend to our Hurt, when offer'd by other Men. This Defence of ourſelves may be undertaken two Ways, either without *hurting* him who deſigns the Miſchief againſt us [4], or elſe by *hurting* or *deſtroying* him. As to the former Expedient, no ſenſible Man can queſtion, but that it is altogether lawful and blameleſs. But concerning the latter, many have entertain'd a Scruple; inaſmuch as by putting it in Practice, we hurt or deſtroy a Man like ourſelves, with whom we are oblig'd to live in a *ſocial* manner, and whoſe Death ſeems to be as great a Loſs to Mankind as our own. And beſides, becauſe a forcible Repulſe of an Aggreſſor may cauſe more diſturbances and Outrages in human Society, than if we ſhould either decline the Miſchief by flight, or patiently yield our Body to it, when an Eſcape is impoſſible. Yet, that the Defence of ourſelves may not only be undertaken the firſt of theſe Ways, but [5] when that proves ineffectual, even with the Hurt of the Aſſailant, we are inform'd, as well by the

a Orat. contra Cteſiphon.
b *Strabo*, L. 10. *Heraclia*. de Polit: Vide H. Lib. 3. Chap. 37.
c Add. *Valer. Max.* Lib. 2. Chap. 6. ſ. 7, 8.

[1] This was becauſe they regarded the Hand as guilty, tho' a ſimple Inſtrument, and ſo deſerv'd Puniſhment, in ſome meaſure, for this Separation. But this Puniſhment was not equal to that of the Body. To make our Author's Application juſt, the Hand ſhould have been thrown in the Common-ſhore, and not interr'd. I own, I don't ſee very well the Reaſon for the Cuſtom among the *Athenians*.

[2] By the *Roman* Laws (according to the Principles of the *Stoic* Philoſophy, to which the greateſt Part of the *Roman* Lawyers were devoted) every Man had a full Power over his own Life, provided his Death caus'd no Injury to another. See, upon this Head, the Obſervations of M. *de Byuckerſhoek*, Lib. iv. Cap. 4.

[3] This is well ſtated by the *Roman* Lawyers; for they lay it down as a Maxim of the Law of Nations, (which we call *The Law of Nature*) *Ut vim atque injuriam propulſemus: Nam jure hoc evenit, ut quod quiſque ob tutelam corporis ſui fecerit, Jure ſuo exiſtimetur*, Digeſt. Lib. 1. Tit. 1. De Juſtit. & Jure, Leg. 3. See, alſo, Lib. 9. Tit. 2. *Ad Leg. Aquil. Leg.* 4. *in princ.* Indeed, as Mr. *Titius* obſerves, (Obſerv. CXX.) there may be ſome Oppoſition between the Laws of Self-love, and the Duties of Sociability, either in reſpect to ſome Good, which can't be poſſeſſed by two Perſons at the ſame time; and, in this caſe, Self-Love ought often to carry it; or, in reſpect of ſome Evil, which equally threatens others and ourſelves. Our Author, in this and the next Chapter, treats of this laſt Oppoſition, which happens either by the Act of him towards whom we ought otherwiſe to obſerve the Laws of the Community, or without any Act on his part. He explains the firſt Caſe in this Chapter, and clears the other in the following; for the Act of the other, which produces this Oppoſition, is either malicious, or not. He treats of the firſt in this Paragraph, and will ſpeak of the other in §. 5.

[4] We may add this Explication here, which our Author uſes in his Abridgment of the *Duties of a Man and Citizen*, Lib. I. Chap. 5. §. 12. *i. e.* Taking good Heed that he ſhall not gain his Ends in inſulting us; or that he may have Reaſon to fear the ill Succeſs of his Attempt. See, upon this Caſe of Self-defence, Mr. *Wollaſton*'s *Religion of Nature delineated*, §. 6. Page 152.

[5] We ought to obſerve this Limitation well; how unjuſt ſoever the Attempt of the Aggreſſor may be, the Community obliges us to ſpare him, if we can do it without Prejudice to ourſelves. By this juſt Temper we may, at the ſame time, preſerve the Rights

he Judgment of Reaſon, as by the concurring Teſtimony of the learned and unlearned World. 'Tis true, Man was created for the maintaining of Peace with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, primarily tend towards the Conſtitution and the Preſervation of this univerſal Safety and Quiet. Yet Nature is not backward in giving us an Indulgence to fly even to *Force*, when we cannot by other Means ſecure ourſelves from Injuries and Aſſaults. For the Obligation to the Exerciſe of the Laws of Nature, and the Offices of Peace, is *mutual*, and binds all Men alike; neither hath Nature given any Perſon ſuch a diſtinct Privilege, as that he may break theſe Laws at his Pleaſure towards *others*, and the others be ſtill oblig'd to maintain the Peace towards *him*. But the Duty being *mutual*, the Peace ought to be *mutually* obſerv'd. And, therefore, when another, contrary to the Laws of Peace, attempts ſuch Things againſt me, as tend to my Deſtruction, it would be the higheſt Impudence in him to require me, at the ſame time, to hold his Perſon as ſacred and inviolate; that is, to forego my own Safety, for the ſake of letting him practiſe his Malice with Impunity [1]. But, ſince in his Behaviour towards me he ſhews himſelf *unſociable*, and ſo renders himſelf unfit to receive from me the Duties of Peace, all my Care and Concern ought to be how to effect my own Deliverance from his Hands; which, if I cannot accompliſh without his *Hurt*, he may impute the Miſchief to his own Wickedneſs, which put me under this Neceſſity [a]. For, otherwiſe, all the Goods which we enjoy either by the Gift of Nature, or by the Procurement of our own Induſtry, would have been granted us in vain, if it were unlawful for us to oppoſe thoſe in a *forcible* Manner, who unjuſtly invade them. And *honeſt* Men would be expos'd a ready Prey to *Villains*, if they were never allow'd to make uſe of Violence in reſiſting their Attacks. So that, upon the Whole, to baniſh *Self-defence* though purſued by *Force*, would be ſo far from promoting the Peace, that it would rather contribute to the Ruin and Deſtruction of Mankind. Nor is it to be imagin'd, that the *Law of Nature*, which was inſtituted for a Man's Security in the World, ſhould favour ſo abſurd a Peace, as muſt *neceſſarily* cauſe his preſent Deſtruction, and would, in fine, produce any Thing ſooner than a *ſociable* Life.

II. But now, whether a *violent Self-defence*, and ſuch as is join'd with the Hurt, or the Slaughter of the Aſſailant, be an obliging and a neceſſary Duty, (as we have already ſhewn it to be a lawful and an allow'd Practice) is a Queſtion not ſo eaſy to be determin'd. In ſtating which Point we do not ſpeak of Soldiers, or of the Guards hired by Travellers, who, whilſt they defend themſelves with the Slaughter of the Enemies or the Robbers, at the ſame time protect and deliver their Country, [2] or the Men who have put themſelves under their Care. But we confine ourſelves to the Caſe of thoſe who are *excited to make ſuch* Defence by their own [3] particular Danger [b]. Now there are ſome who will have this *Defence* to be ſo ſtrict a *Command*, that it cannot be taken off, even by *Civil* Conſtitutions; and, conſequently, that he who ſuffers himſelf to be kill'd, when he might have violently reſiſted, ought to be look'd upon as guilty of *Self-murder* [c]. Which is ſomething like the Cuſtom in *Sparta*, where the *Ephori* puniſh'd a Man for having ſuffer'd many Perſons to injure him [d].

The Author of the Treatiſe, *De Principiis Juſti & Decori*, declares in favour of this Opinion; and the Argument he proceeds on is to this Purpoſe, Page 33. "That ſince, amongſt other Things, "contributing to the Preſervation of Man, Nature "hath given us all a quick Senſe of Pain, a Deſire "of Revenge, together with Hands for the hurting "others, or the defending ourſelves; we may "hence infer, that theſe Gifts not being beſtow'd "on us in vain, it is the Pleaſure of GOD, that "we ſhould employ them in procuring our own "Safety. And that, therefore, not to uſe my "Hands againſt an Aſſailant, tho' to the Procure-"curement of his Death [4], would be the ſame "Thing as voluntarily to cut them off. Tho' in-"deed he afterwards confeſſes, Page 118. that this "Law of Self-preſervation is not of ſo ſtrict Ne-

[a] Hor. 2. Sat. 1. ver: 44.

Nec quiſquam noceat cupido mihi pacis: at ille
Qui me commorit (melius non tangere, clamo)
Flebit.——

Hurt not a peaceful Man; but if you try
My Patience far (*You'd beſt keep off*, I cry)
You may repent your Boldneſs.——

[b] *Plutarch* in *Phocion*: Ὁ δὲ Φωκίων, ὅτι τὸ προέσθαι τὸν [Νικάνορα] καὶ μὴ καλοῦσιν ἐγκαλέσω, φάσκων μὴ πρὸς Νικάνορα, καὶ μικρὸν ἀπ' αὐτοῦ προσδοκᾶν δεινόν. εἰ δὲ μὴ μᾶλλον ἑτέρως ἀποβήσεται, καὶ ἀνδρὸς φανερῶς χείρονος. τοῦτο μὲν οὖν ἐπὶ αὐτοῦ μόνου σκοπῶν δοκοίη καλοκαγαθικῶς λελέχθαι, καὶ γενναίως. ὁ δὲ εἰς πολέμου κίνδυνον σωτηρίαν, καὶ ταῦτα στρατηγὸς καὶ ἄρχων, ἐκ ὀίδα μὴ μείζονι τινὶ φθείρειε, καὶ πρεσβύτερον τὸ πρὸς τοὺς πολίτας δίκαιον. When he was cenſur'd by ſome for letting *Nicanor*, the Ambaſſador of *Caſſander*, enjoy his Liberty, he anſwer'd, that he did not diſtruſt the Man, nor apprehend any Danger from him: But if Things ſhould happen otherwiſe, he would be glad to let the World ſee how much more willing he was to receive an Injury than to offer one. *This, if he look'd no farther than his own Perſon, was ſpoke with Honeſty, as well as with Bravery. But if a Man, by ſuch an Act of Generoſity, endangers the Safety of the State, eſpecially being himſelf in a publick Truſt, I queſtion if he does not violate that greater and more ſacred Law, his Obligation to his Country.*

[c] Vid. *Zeigler* ad *Grot.* Lib. 1. c. 3. ſ. 3.

[d] *Plutarch Lacon.* Inſtitut.

Rights of Self-love, and the Duties of Community. The *Roman* Lawyers have admitted this Exception, in queſtion, when a Man defends himſelf againſt the Slave of another; for, if the Slave was kill'd, the Law oblig'd the Defendant to pay his Maſter the full Value, *Injuria autem* (ſay they) *occidere intelligitur, qui nullo jure occidit. Itaque qui latronem* [*Inſidiatorem*] *occiderit, non tenetur, utique* SI ALITER PERICULUM EFFUGERE NON POTEST, *Inſtitut.* Lib. 4. Tit. 3. *De Leg. Aquil.* §. 2. See Mr. *Noodt*'s excellent Treatiſe, *Ad Legem Aquiliam*, Chap. 4. p. 15, 16.

[1] *Herodian*, Lib. 4. c. 10. Ὁμοῦ καὶ ἔυλογον, καὶ ἀναγκαῖον, ἅ μέλοντα πάσχειν δεινὰ, ἀυυνατώτερα μᾶλλον, ἢ ὑπομένειν, τῇ μὲν γὰρ συμφορᾷ τὸ πρόσθεν, καὶ ἀναιδείας φόβῳ παρακολουθεῖ. In extream Danger, not only Neceſſity, but Reputation obligeth us rather to avenge an Injury than ſuſtain it. Since, ſhould we fall by ſuch a Miſchief, at the ſame time that we are pity'd as unfortunate, we ſhould be reproach'd as Cowards.

[2] Add. *Grot.* Lib. 1. c. 2. & c. 3. ſ. 3. To whom we may apply that Saying of *Seneca*, (Phœniſſ. 294.)

Vitam tibi ipſi ſi negas, multis negas.
By chuſing Death yourſelf you hazard the Lives of many.

[3] In general, no Man can releaſe his own Rights, or renounce his private Intereſts, when they are intermixed with another's, who will not allow us to do it. To this add the Example of *Phocion* alledged by our Author. See Letter b.

[4] Mr. *Veltbuyſen* does not ſay this, 'tis our Author's Comment.

"ceſſity,

that if a Perſon murther'd himſelf, the Hand that perform'd the Deed was buried apart from the reſt of the Body [a] [1].

To conclude, ſince we deny that a Man hath abſolute Power over his own Life, it is plain that we cannot approve of thoſe Laws, which, in ſome Countries, either command or permit People to deſtroy themſelves. Such a Law *Diodorus Siculus*, L. ii. c. 57. reports to have been in force amongſt the Inhabitants of the Iſland *Ceylan*, ordaining, "That the People ſhould live only to ſuch a "Number of Years, which being expir'd, they eat a "certain Herb that put them into their long Sleep, "and diſpatch'd them without the leaſt Senſe of "Pain. Add. L. iii. Chap. 33. And thus too amongſt the *Ceans*, all Perſons above ſixty Years old, were obliged by the Laws to poiſon themſelves, to *ſupply Food for the reſt* [b]. Though *Ælian* gives this better Reaſon for the Practice; "That having ar-"riv'd at ſuch an Age, they were conſcious to them-"ſelves that they were no longer able to promote their "Country's Intereſt by their Service; growing now "towards Stupidity and Dotage [c]. *Procopius*, Hiſt. *Goth.* L. 2. relates a Cuſtom of the *Heruli*, by which thoſe who were weaken'd and diſabled, either by Diſeaſe or Age, voluntarily ſent themſelves out of the World: The Wives hanging themſelves at the Tombs of their Huſbands, if they loſt them in this manner. *Ælian*, l. iv. C. 4. reports ſomewhat to the ſame purpoſe of the *Sardi*, and the *Bebryces*; and *Strabo*, Lib. ii. and *Herodotus*, *Clio* in *fin.* of the *Maſſagetæ*, who may be conſulted at Leiſure.

CHAP. V.

Of SELF-DEFENCE.

The CONTENTS.

I. *The Defence of a Man's Self is a lawful Violence:*
II. *And is ordain'd by the Law of Nature.*
III. *What ſort of Defence is allow'd in a natural State:*
IV. *And what ſort in Cities.*
V. *Whether it is lawful againſt one that miſtakes.*
VI. *The Time for ſuch Defence in a natural State.*
VII, VIII, IX. *And how to be ſettled in a Civil State.*
X. *Of maiming any Part of the Body.*
XI. *Of Chaſtity.*
XII. *Of a Box on the Ear.*
XIII. *Whether a Man is bound to fly.*
XIV. *Whether the Chriſtian Religion commands otherwiſe.*
XV. *Slaughter committed in Self-defence, is guiltleſs.*
XVI. *Of the Defence of our Goods.*
XVII, XVIII. *Of a Night-thief*
XIX. *Of ſuch Defence as is made by him who has offered the Injury.*

TO *Self-preſervation*, which not only the tendereſt Paſſion, but the exacteſt Reaſon recommends to Mankind, belongs *Self-defence*, or [3] the warding off ſuch Evils or Miſchiefs as tend to our Hurt, when offer'd by other Men. This Defence of ourſelves may be undertaken two Ways, either without *hurting* him who deſigns the Miſchief againſt us [4], or elſe by *hurting* or *deſtroying* him. As to the former Expedient, no ſenſible Man can queſtion, but that it is altogether lawful and blameleſs. But concerning the latter, many have entertain'd a Scruple; inaſmuch as by putting it in Practice, we hurt or deſtroy a Man like ourſelves, with whom we are oblig'd to live in a *ſocial* manner, and whoſe Death ſeems to be as great a Loſs to Mankind as our own. And beſides, becauſe a forcible Repulſe of an Aggreſſor may cauſe more diſturbances and Outrages in human Society, than if we ſhould either decline the Miſchief by flight, or patiently yield our Body to it, when an Eſcape is impoſſible. Yet, that the Defence of ourſelves may not only be undertaken the firſt of theſe Ways, but [5] when that proves ineffectual, even with the Hurt of the Aſſailant, we are inform'd, as well by the

a Orat. contra Cteſiphon.
b *Strabo*, L. 10. *Heraclia.* de Polit: Vide H. Lib. 3. Chap. 37.
c Add. *Valer. Max.* Lib. 2. Chap. 6. ſ. 7, 8.

1 This was becauſe they regarded the Hand as guilty, tho' a ſimple Inſtrument, and ſo deſerv'd Puniſhment, in ſome meaſure, for this Separation. But this Puniſhment was not equal to that of the Body. To make our Author's Application juſt, the Hand ſhould have been thrown in the Common-ſhore, and not interr'd. I own, I don't ſee very well the Reaſon for this Cuſtom among the *Athenians*.

2 By the *Roman* Laws (according to the Principles of the *Stoic* Philoſophy, to which the greateſt Part of the *Roman* Lawyers were devoted) every Man had a full Power over his own Life, provided his Death caus'd no Injury to another. See, upon this Head, the Obſervations of M. *de Byuckerſhoek*, Lib. iv. Cap. 4.

3 This is well ſtated by the *Roman* Lawyers; for they lay it down as a Maxim of the Law of Nations, (which we call *The Law of Nature*) *Ut vim atque injuriam propulſemus: Nam jure hoc evenit, ut quod quiſque ob tutelam corporis ſui fecerit, Jure factum exiſtimetur*, Digeſt. Lib. 1. Tit. 1. De Juſtit. & Jure, Leg. 3. See, alſo, Lib. 9. Tit. 2. *Ad Leg. Aquil. Leg.* 4. *in princ.* Indeed, as Mr. *Titius* obſerves, (Obſerv. CXX.) there may be ſome Oppoſition between the Laws of Self-love, and the Duties of Sociability, either in reſpect to ſome Good, which can't be poſſeſſed by two Perſons at the ſame time; and, in this caſe, Self-Love ought often to carry it; or, in reſpect of ſome Evil, which equally threatens others and ourſelves. Our Author, in this and the next Chapter, treats of this laſt Oppoſition, which happens either by the Act of him towards whom we ought otherwiſe to obſerve the Laws of the Community, or without any Act on his part. He explains the firſt Caſe in this Chapter, and clears the other in the following; for the Act of the other, which produces this Oppoſition, is either malicious, or not. He treats of the firſt in this Paragraph, and will ſpeak of the other in §. 5.

4 We may add this Explication here, which our Author uſes in his Abridgment of the *Duties of a Man and Citizen*, Lib. i. Chap. 5. §. 12. *i. e.* Taking good Heed that he ſhall not gain his Ends in inſulting us; or that he may have Reaſon to fear the ill Succeſs of his Attempt. See, upon this Caſe of Self-defence, Mr. *Wollaſton*'s *Religion of Nature delineated*, §. 6. Page 132.

5 We ought to obſerve this Limitation well; how unjuſt ſoever the Attempt of the Aggreſſor may be, the Community obliges us to ſpare him, if we can do it without Prejudice to ourſelves. By this juſt Temper we may, at the ſame time, preſerve the Rights

he Judgment of Reason, as by the concurring Testimony of the learned and unlearned World. 'Tis true, Man was created for the maintaining of Peace with his Fellows; and all the Laws of Nature, which bear a Regard to other Men, primarily tend towards the Constitution and the Preservation of this universal Safety and Quiet. Yet Nature is not backward in giving us an Indulgence to fly even to *Force*, when we cannot by other Means secure ourselves from Injuries and Assaults. For the Obligation to the Exercise of the Laws of Nature, and the Offices of Peace, is *mutual*, and binds all Men alike; neither hath Nature given any Person such a distinct Privilege, as that he may break these Laws at his Pleasure towards *others*, and the others be still oblig'd to maintain the Peace towards *him*. But the Duty being *mutual*, the Peace ought to be *mutually* observ'd. And, therefore, when another, contrary to the Laws of Peace, attempts such Things against me, as tend to my Destruction, it would be the highest Impudence in him to require me, at the same time, to hold his Person as sacred and inviolate; that is, to forego my own Safety, for the sake of letting him practise his Malice with Impunity [1]. But, since in his Behaviour towards me he shews himself *unsociable*, and so renders himself unfit to receive from me the Duties of Peace, all my Care and Concern ought to be how to effect my own Deliverance from his Hands; which, if I cannot accomplish without his *Hurt*, he may impute the Mischief to his own Wickedness, which put me under this Necessity [a]. For, otherwise, all the Goods which we enjoy either by the Gift of Nature, or by the Procurement of our own Industry, would have been granted us in vain, if it were unlawful for us to oppose those in a *forcible* Manner, who unjustly invade them. And *honest* Men would be expos'd a ready Prey to *Villains*, if they were never allow'd to make use of Violence in resisting their Attacks. So that, upon the Whole, to banish *Self-defence* though pursued by *Force*, would be so far from promoting the Peace, that it would rather contribute to the Ruin and Destruction of Mankind. Nor is it to be imagin'd, that the *Law of Nature*, which was instituted for a Man's Security in the World, should favour so absurd a Peace, as must necessarily cause his present Destruction, and would, in fine, produce any Thing sooner than a *sociable* Life.

II. But now, whether a *violent Self-defence*, and such as is join'd with the Hurt, or the Slaughter of the Assailant, be an obliging and a necessary Duty, (as we have already shewn it to be a lawful and an allow'd Practice) is a Question not so easy to be determin'd. In stating which Point we do not speak of Soldiers, or of the Guards hired by Travellers, who, whilst they defend themselves with the Slaughter of the Enemies or the Robbers, at the same time protect and deliver their Country, [2] or the Men who have put themselves under their Care. But we confine ourselves to the Case of those who are *excited to* make such Defence by their own [3] particular Danger [b]. Now there are some who will have this *Defence* to be so strict a *Command*, that it cannot be taken off, even by *Civil* Constitutions; and, consequently, that he who suffers himself to be kill'd, when he might have violently resisted, ought to be look'd upon as guilty of *Self-murder* [c]. Which is something like the Custom in *Sparta*, where the *Ephori* punish'd a Man for having suffer'd many Persons to injure him [d].

The Author of the Treatise, *De Principiis Justi & Decori*, declares in favour of this Opinion; and the Argument he proceeds on is to this Purpose, Page 33. "That since, amongst other Things, "contributing to the Preservation of Man, Nature "hath given us all a quick Sense of Pain, a Desire "of Revenge, together with Hands for the hurting "others, or the defending ourselves; we may "hence infer, that these Gifts not being bestow'd "on us in vain, it is the Pleasure of GOD, that "we should employ them in procuring our own "Safety. And that, therefore, not to use my "Hands against an Assailant, tho' to the Procure-"curement of his Death [4], would be the same "Thing as voluntarily to cut them off. Tho' in-"deed he afterwards confesses, Page 118. that this "Law of Self-preservation is not of so strict Ne-

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Nec quisquam noceat cupido mihi pacis: at ille
Qui me commorit (melius non tangere, clamo)
Flebit.——

Hurt not a peaceful Man; but if you try
My Patience far (*You'd best keep off*, I cry)
You may repent your Boldness.——

[b] *Plutarch* in *Phocion*: Ὁ γὰρ Φωκίων, ὅτι τὸ πεφεύσθαι τὸν ἄνδρα [Νικάνορα] καὶ μὴ καλοσχεῖν ἐγκαλέμενον, ἔφη πιστεύειν μὲν τῷ Νικάνορι, καὶ μηδὲν ἀπ' αὐτοῦ προσδοκᾶν δεινόν. εἰ δὲ μὴ μᾶλλον εὐθέλειν ἀδικεῖσθαι, ἢ ἀδικῶν φανερὸν γενέσθαι. τοῦτο μὲν οὖν πρὸς αὐτὸν ἂν τινι σκοπουμένῳ δοκοίη καλοκαγαθικῶς λελέχθαι, καὶ γενναίως. ὁ δὲ εἰς παλεμάρχου ἀποκινδυνεύων σωτηρίαν, καὶ ταῦτα στρατηγὸς καὶ ἀρχὴν, οὐκ οἶδα μὴ μείζονι τῇ φιλαλήθειᾳ, καὶ προσούσῃ τὸ πρὸς τοὺς πολίτας δίκαιον. When he was censur'd by some for letting *Nicanor*, the Ambassador of *Cassander*, enjoy his Liberty, he answer'd, that he did not distrust the Man, nor apprehend any Danger from him: But if Things should happen otherwise, he would be glad to let the World see how much more willing he was to receive an Injury than to offer one. *This, if he look'd no farther than his own Person, was spoke with Honesty, as well as with Bravery. But if a Man, by such an Act of Generosity, endangers the Safety of the State, especially being himself in a publick Trust, I question if he does not violate that greater and more sacred Law, his Obligation to his Country.*

[c] Vid. *Zeigler* ad *Grot.* Lib. 1. c. 3. s. 3.

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Rights of Self-love, and the Duties of Community. The *Roman* Lawyers have admitted this Exception, in question, when a Man defends himself against the Slave of another; for, if the Slave was kill'd, the Law oblig'd the Defendant to pay his Master the full Value, *Injuria autem* (say they) *occidere intelligitur, qui nullo jure occidit. Itaque qui latronem* [*Insidiatorem*] *occiderit, non tenetur, utique* SI ALITER PERICULUM EFFUGERE NON POTEST, *Institut.* Lib. 4. Tit. 3. *De Leg. Aquil.* §. 2. See Mr. *Noodt*'s excellent Treatise, *Ad Legem Aquiliam*, Chap. 4. p. 15, 16.

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Vitam tibi ipsi si negas, multis negas.
By chusing Death yourself you hazard the Lives of many.

[3] In general, no Man can release his own Rights, or renounce his private Interests, when they are intermixed with another's, who will not allow us to do it. To this add the Example of *Phocion* alledged by our Author. See Letter b.

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" ceſſity, but that there may ſometimes happen " ſuch Caſes, as ſhall either diſpenſe with a Man's " Obedience to it, or leave him free to do as he " pleaſes."

For our Parts, we think it ought principally to be conſider'd, whether it much concern the Intereſt of many, that the Perſon invaded ſhould ſurvive, or whether he ſeem only to live for himſelf. In the former Caſe we conceive, that there lies an *Obligation* on a Man to ſecure his own Life by any poſſible Means. But in the latter Caſe we take it to be a Thing of *Permiſſion*, or Allowance only, not of Command, to defend one's ſelf by the Death of the Aggreſſor, eſpecially if his Life would have been of great Service and Profit to many People; and if we may probably conjecture, that by dying in ſuch an Attempt, he incurs the Danger of eternal Damnation. For tho' the Greatneſs of a ſurpriſing Terror will ſcarce ſuffer one exactly to weigh the Merits of Perſons; and tho' ſuch a Danger as a Man voluntarily throws himſelf into, and may at his Pleaſure get rid of, ought to find little Regard or Conſideration from others, eſpecially from him who is the Subject of his Fury, and at whoſe Coſt he is thus extravagant [1 a]: Yet, that an Act from which ſo great Evils would be brought upon another, (as there would ſometimes from this violent Defence) ſhould be reckon'd a Matter of ſtrict Duty, and the Omiſſion of it a Sin, we ſee little Reaſon to allow. Eſpecially, ſince the old Maxim might be ſo well apply'd to this Caſe, *that any Man may renounce his own Privilege, provided he doth not thereby injure a third Perſon:* Which *Quintilian* [2] hath thus expreſs'd and illuſtrated, *This*, ſays he, *is the Nature of all Benefits, that they do not impoſe a Neceſſity, but grant a Power. Whatever Expedient you invent to procure the Honour or Safety of another, loſes the Name of a Privilege, if you compel him to make uſe of it. Run over all the Inſtitutions, and all the Rights of Mankind, and you ſhall never obſerve that the Law is ſo fondly ſolicitous for our Good, as to extort that from us, by which it intends only to do us a Favour.*

III. But, in order to a more exact Judgment of *Self-defence*, and to know by what Rule it ſhould be moderated, and how far it may rightly proceed: Firſt of all we ſhould examine, whether the Defendant live in a *State of Nature*, or of *civil Society*; ſince the Bounds of this Practice are much narrower in the latter than in the former Condition. Which Difference not being obſerv'd by many Authors, hath been the Occaſion of their delivering ſuch Things in general concerning *unblameable Self-defence*, as will hold true only under one particular State. But now, if we firſt diſtinctly explain what Right we have to ſuch a Practice in a *State of Nature*, it will appear with great Eaſe and Evidence, how far, and on what Grounds this Liberty is limited, in Perſons living together under a civil Government.

It is then a good Rule of Prudence, that a wiſe Man ought to try all other Expedients, before he proceed to Arms or Violence [3]. For inaſmuch as all Combat and forcible Contention is of uncertain Iſſue, it would be adviſable firſt to make Experiment of ſafer Remedies and Redreſſes, e'er we enter the Liſts, and come to a formal Engagement [b]. Thus, if I can cut off the Invader's Acceſs to me, I am a Fool if I unneceſſarily meet him hand to hand. And if I can defend myſelf with a Wall or a Gate, 'tis abſurd in me to expoſe my [4] Breaſt to my Foe. Farther, Wiſdom adviſes us to put up a ſmall Injury, if we can with Convenience, and ſo rather to recede in ſome degree from our *Right*, than by an unſeaſonable Defence, to expoſe ourſelves to a greater Danger: Eſpecially if that Thing or Concern of ours, upon which the Attempt is made,

a *Iſocrates* adverſ. *Callimach. Is it not ridiculous and abſurd, that he ſhould petition you for Mercy in ſuch a Danger, as purely depended on his own Will; which he freely run into at firſt, and from which he has ſtill Means of being deliver'd?*

b *Liban.* Declam. 1. Πρῶτον μὲν γὰρ τὰ δίκαια τῷ λόγῳ πειρᾶσθαι λαμβάνειν, ἀλλα μὴ τοῖς ὅπλοις ἐπιπηδᾶν, ἀνδρωπινώτερον δήπουθεν. *It is a more worthy and more manly Way of Proceeding, not to run preſently to Arms and Violence, but to try firſt if our Right may not be recover'd by fair Means.*

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1 *Liban.* Declam. 23. Ὃς γὰρ οὐκ ἔπαθεν, οὐκ ἀδικῶν, ταῦτα αὐτὸν ἔδρασεν ἀδικούμενος. He who, unleſs he had offer'd one Injury, had not ſuffer'd another, is equally the Cauſe of both.

2 Declam. 7. *Omnium beneficiorum iſta natura eſt, ut non ſit neceſſitas, ſed poteſtas. Quicquid in honorem alicujus inventum eſt, deſinit, privilegium vocari poſſe, ſi cogas. Coacta, ſi videtur, jura percurrite, nuſquam adeò pro nobis ſolicita lex eſt, ut quæ præſtat, extorqueat.* See Mr. *Domat*'s *Civil Laws*, Tit. 1. Sect. 4. But we ought here to obſerve, contrary to our Author's Hypotheſis, That Self-defence is not a ſimple Right, which we may uſe or not, at all Times as we ſee fit. The Law of Nature not only allows us to defend ourſelves, but poſitively commands us to do ſo, and that for this very Reaſon, that it enjoins us to love ourſelves, and conſult our own Preſervation. See Mr. *Vander Muelen*'s Commentary on *Grotius*, Lib. 2. Chap. 1. §. 8 & 9. and Mr. *Titius*'s Obſervat. 121. As, alſo, Mr. *Gribner*, Profeſſor at *Wittemberg*, in his *Principia Juriſpr. Naturol.* Lib. i. Cap. v. §. 2. The Obligation, far from being weaken'd here, is rather ſtronger; becauſe the greateſt Dangers, to which our Lives are expos'd, are thoſe we have to fear from other Men. We may often guard ourſelves ſufficiently againſt the Effect of natural or inanimate Cauſes, or againſt the Fury of Beaſts, whether Savage or Domeſtic. All theſe have certain phyſical Bounds, beyond which we have nothing to dread. But the Malice of Men is ſuch, that it is frequently impoſſible to prevent its Effects, or take juſt Meaſures for our Preſervation. Their Rage has no fix'd Limits, but may be carried to infinite Lengths, by the Force of the Paſſions which govern it. If we were not under this Obligation, it would follow, that any Man might ſuffer himſelf to be kill'd as often as he was attack'd, and no Man need to be concern'd for his Preſervation. Now, who ſees not that this tends to the Deſtruction of a Community, and to deprive it of the moſt honeſt Men? Beſides, ſuch as are weary of Life, would have a fair Occaſion to leave the World. It is true, that the Creator hath provided by a natural Inſtinct, that every one ſhould defend himſelf, inſomuch that we are more apt to offend on the other ſide than this; but this ſhews, that Self-defence is not a Thing abſolutely indifferent in its own Nature, or barely permitted, ſo that it is always at our Liberty to ſuffer ourſelves to be ſlain. All that has been ſaid tends only to this, that a Man may, yea, ought ſometimes to renounce his Right of defending himſelf, as we ſhall ſhew below. And that, in theſe laſt Caſes, the Fear, into which the Greatneſs of Danger, and the Force of our Natural Inſtinct throws us, may excuſe or free them from Blame, who ſave their own Lives by the Loſs of theirs, whom they ought rather to have ſpared with the Expence of their own. We may, alſo, believe, on the other hand, that if one ſacrifices his Life through great Kindneſs, or ſome other weighty Conſideration which he has for the unjuſt Aggreſſor, who does not of himſelf deſerve ſuch a Sacrifice, he is excuſable, for yielding to a Motive of that Nature, as to be of Force enough to overcome Self-love and Fear of Death. See §. 5. *Note* 1. following.

3 *Omnia prius experiri verbis, quàm armis, Sapientem decet.* Ter. Eunuch. Act. 4. S. 7. v. 19.

4 Terent. Eunuch. Act. 4. S. 6. *Tu quod cavere poſſis, ſtultum admittere eſt, i. e.* " 'Tis extreme Folly to meet a Danger " which you may avoid."

may

may be eaſily made amends for, or repair'd [1]. Thus a Man who hath a Debt owing him from another, I ſuppoſe to the Value of ten Pounds, would act more wiſe, in my Judgment, if he made up the Buſineſs by any kind of Compoſition, than if he engag'd in a troubleſome Suit, where the Lawyers Fees might exceed the main Sum which he endeavours to recover [a].

At the ſame time it may be obſerv'd, that the injur'd Party doth not owe this Patience and Moderation to the Perſon from whom he receiv'd the Damage; who, as far as lay in his Power, hath broke off all Duties of Humanity and Commerce with him; but to his own Security and Quiet. And therefore if a Man provok'd by Anger or Pain ſhould happen to exceed theſe Bounds, he does no Injury to the Provoker, but can only be ſaid to have [2] acted imprudently, or without ſufficient Temper and Diſcretion.

But when, by the Application of theſe moderate Expedients, I cannot ſecure myſelf from the impending Danger, I am then to oppoſe Force with Force, and am compell'd to enter the Combat. During which, if the injurious Party continue to puſh on his malicious Deſigns againſt me, and do not declare his Sorrow and Repentance for his Fault, and his Willingneſs to renew the Peace, I am at liberty to kill him. And although he do not directly attack my Life, as ſuppoſe he only attempts to load me with a great Number of Blows, or to maim me by the Loſs of ſome member not *vital*, or to rob me of my Goods; yet, ſince he hath once broke the Peace with me, and ſince he gives me no Caution or Security, that he will not from theſe leſſer Injuries proceed to much greater, I may, even in theſe Caſes, make uſe of *Extremities* for my own Deliverance. For, at the ſame Inſtant, as a Man profeſſes himſelf my Enemy, (which he doth, while he injures me without ſhew of Repentance) he gives me, as far as 'tis in his Power to give it, an [3] *infinite Liberty* of proceeding againſt him. Some indeed there are who do not approve of this Liberty of *reſiſting in infinitum: For* (ſay they) *there can be no natural Right of Defence, and of Reſiſtance againſt Injuries, but ſuch as is conſiſtent with that Order which is the chief End and Deſign of a ſocial Life. Therefore, in reſiſting by natural Right, this Exception is always underſtood*, unleſs the ſocial Order be infring'd by my preſent reſiſting, *to which Order Nature hath the firſt and chiefeſt Regard. And, if*

[a] Martial. l. 7. Epig. 64.

Ab miſer & demens! viginti litigat annis
Quiſquam, cui vinci, Gargiliane, licet?

Would any Wretch prolong his Suit, a Score
Of doubtful Terms, that might be *caſt* before?

Theocrit. Idyll. 22. v. 180.

Ὀλίγῳ τοι ἔοικε καλῷ μέγα νεῖκος ἀναιρεῖν.

———'Tis wiſe to cloſe
A great Contention with a little Loſs.

Pindar. Olymp. Od. 10. v. 47.

Νεῖκος ὑπερτέρων ἀποδέσθαι πόρον.

'Tis hard to end a quarrel with the Great.

And *Iſthm.* Od. 4. v. 52.

Ἔστιν ἀφάνεια νύκτας καὶ μαινομένων, πρὶν τέλος ἄκρον ἰκέσθαι.

War is as blind as Chance: The doubtful Day
Oft cheats the Fighter, e'er it end the Fray.

It was very wiſe Conduct that which *Iſocrates* reports of himſelf (*de Permut.*) *Theſe*, ſays he, *were the Arts I made uſe of; never to offer any Damage or Treſpaſs: And, in caſe I receiv'd any Injury from others, not to make myſelf my own Redreſſer; but to refer the Controverſy to the Deciſion of Friends.* Lucian. Eunuch. *This is highly ridiculous, that Men who pretend to Philoſophy, ſhould engage in Suits and Quarrels; whereas they ought to compoſe, in a friendly manner, their Differences of the greateſt Conſequence.* Add. l. 4, ſ. 1. *D. de alienat. jud. mut.* That which *Polybius* (in *Excerpt. Pieresc.*) applies to the *Achæans*, proves a Truth in many other Caſes, εἰ μὴ ταχέως ἀπολόμεθα οὐκ ἂν ἐσώθημεν: *Unleſs we had been quickly loſt, we had never been ſav'd.* *Seneca*, de Irâ, l. 2. c. 14. *Reaſon often preſcribes Patience, when Anger calls for Revenge: And when we might have eſcap'd ſmaller Evils, we ſink ourſelves into greater. Some, upon the Reſentment of one affronting Word, have been caſt into Baniſhment. They have incurr'd the ſevereſt Troubles, by not being able to digeſt a ſlight Injury; and been made arrant Slaves, by their diſdaining a petty Encroachment on their Liberty.* See *Stobæus*, Serm. 19. To this may be apply'd, the * Interpretation of *Matth.* v. 25. offer'd by *Grotius*, l. 1. c. 1. ſ. 8. Though others will have that Saying to relate to Men who are under Oppreſſion, and who cannot obtain Juſtice. (Comp. *Lamentat.* iii. 28, 29, 30.) Whereas in a well-order'd Commonwealth every one is oblig'd to apply himſelf for Redreſs of Injuries to the Judge, (*Levit.* v. 1.) not for the ſake of Revenge, (*Levit.* xix. 17, 18.) but with a good Deſign of defending the Laws and Juſtice of his Country, and to hinder wicked Men from reaping any Gain, or any Pleaſure from their Crimes. *Lyſias*, Orat. contrà *Theomneſt. I take it to be a Sign of a moſt litigious and a moſt ungenerous Temper, to ſue a Man for an affronting Word.* It was a Law amongſt the *Cyrenians, that the* Ephori *ſhould bring the litigious Citizens before the Court of Juſtice, and impoſe a Fine on them, with the Addition of a Diſgrace.* Arrian. Epictet. l. 1. c. 28. *Suppoſe I ſtand as deaf as a Stone when I am abus'd; what Advantage can the Slanderer reap from his Calumny?* *Seneca* de Irâ. *To deſpiſe Injuries is a Mark of a great and generous Mind. 'Tis one of the moſt grating Ways to be reveng'd upon a Man, by ſeeming not to think him worthy our Revenge. He is truly brave and noble, who, like ſome Princely Beaſt, can hear the puny Dogs barking about him with Scorn and Security.*

* This Explication does not give us the true Meaning of CHRIST's Words, whoſe Senſe is certainly this, as Mr. *Le Clerc* expreſſes it: "JESUS CHRIST would not have us to go to Law for ſmall Matters, leſt, having ſuffer'd one Injury, we "bring upon us another. Moderation gains much and ſweetens Mens Minds, and ſooner makes an end of Quarrels than the Pe- "nalties which the Magiſtrates inflict according to Law. The Revenge which is exerciſed by their means, is often the Cauſe of "irreconcileable Animoſities between Families."

[1] *Plautus Amphitr.* Act. 2. Sc. 2. v. 71.

Bacchæ bacchanti ſi velis adverſarier,
Ex inſanâ inſaniorem facies, feriet ſæpius:
Si obſequare, una reſolvas plaga.

Oppoſe the raving Gypſy in her Fit,
She'll get more Fury, and you'll get more Blows.
Be gentle, and her conſecrated Wand
May then excuſe you with a ſingle Stroke.

See, alſo, *Trucul.* Act. 4. Scen. 2. v. 55.

Martial, Epig. 64. L. 6.

Sed miſerere tui, rapido nec perditus ore
Fumantum naſi vivi tentaveris urſi.

Have Pity on yourſelf, and, tho' you'r ſtout
As Maſtiff Breed, don't take a Bear by th' Snout.

What the Author ſays of a Thing which may be eaſily repair'd or compenſated, regards the Caſe, where an unjuſt Aggreſſor propoſes not directly to take away our Life, but only ſuppoſing we reſiſt him, in defending ſomething of ſmall Value, or which we might eaſily recover another Way. Of this we ſhall treat hereafter, when we come to ſpeak of the Defence of Property.

[2] Theſe are a confuſed Heap of Citations.

[3] *Antiphon.* Orat. 11. Οὐ γὰρ πάντα, ἀλλὰ μείζονα καὶ πλείονα δίκαιοι οἱ ἄρξαντες ἀνταπολαβεῖν εἰσὶ, *i. e.* "The firſt Aggreſſors "in an Injury not only deſerve to ſuffer the ſame, but much greater Evils."

this

this Caution were not interpos'd, upon our failing to maintain that neceſſary and natural Order, we ſhould render Society itſelf unſociable [a]. But we do by no means aſſert, that this *infinite Liberty* of *reſiſting* is to be actually made uſe of in all Caſes; becauſe ſeveral intervening Conſiderations may prevail with the injur'd Party not to proceed to Extremities: But only that the injurious Perſon cannot complain of hard Meaſure, though he be repell'd with the utmoſt Violence and Severity. The Life of Men would be then indeed moſt properly render'd *inſociable*, if, in a *natural State*, any Bounds were ſet to the Liberty of Reſiſtance. For what an Age of Torments ſhould I undergo, if another Man were allow'd perpetually to lay me on only with moderate Blows, whoſe Malice I could not otherwiſe ſtop or repel, than by compaſſing his Death? Or, if a Neighbour were continually to infeſt me with Incurſions and Ravages upon my Lands and Poſſeſſions, whilſt I could not lawfully kill him, in my Attempts to beat him off? For, ſince the chief Aim of human *Sociableneſs* is the Safety of every Perſon, we ought not to fancy in it any ſuch Laws, as would make every good and modeſt Man of neceſſity miſerable, as often as any wicked Varlet ſhould pleaſe to violate the Law of Nature againſt him. And it would be highly abſurd to eſtabliſh Society amongſt Men on ſo deſtructive a Bottom as a Neceſſity of enduring Wrongs. Wherefore, he is to be reckon'd a fooliſh and baſe Traytor to his own Safety, who, whilſt an Enemy perſiſts in the Exerciſe of Hoſtility, vainly ſpares his Life, and chuſes rather to periſh than to deſtroy. For the Law of Nature obliges me thus far only to be mild and merciful towards my Enemy, as that if he ſhall expreſs a Sorrow for what is paſt, and an Inclination to deſiſt from farther Injury, ſhall make Retribution for my preſent Damage, and give Security for his not offending hereafter, I may entirely ſpare and pardon him, and, renewing the Peace, may perform all friendly Offices towards him, as he ſhall towards me [1]. For *meer Revenge*, which propoſes no Aim but the Grief, or the Deſtruction of him who hath hurt us, is deteſted and diſcarded by *Nature*, as falling under the Vice of *Cruelty*. Whence it follows, that the Remembrance of Enmities and Contentions ought, as ſoon as poſſible, to be defaced out of our Minds. On this Account, as we find the Story in *Tully*, the *Thebans* were accus'd in the General *Dyet* or *Council* of *Greece*, for ſetting up a *Brazen* Trophy of their Victory over the *Lacedemonians*; inaſmuch as *it did not become one* Grecian *State to fix an eternal Monument of their Quarrel with another*. For, it ſeems, the Cuſtom was to raiſe their Trophies only of Wood, to prevent their long and reproachful Continuance [2].

But farther, Perſons in a *natural State* may not only repel a preſent Danger that threatens them, but, having got rid of that Fear, may purſue their Succeſs againſt the Aſſailant, till ſuch time as, upon ſufficient *Caution* given, they ſhall think themſelves *ſecure* of him for the *future*. Concerning which *Caution* this is to be obſerv'd; if a Man having injur'd me, ſhall, preſently after, repenting of what he had done, deſire my *Pardon*, and offer *Reparation* of the Damage, I am then oblig'd to be reconcil'd to him, and cannot fairly demand any farther Security than his *Faith* and Promiſe. For his voluntary Repentance, and Application to me for Pardon, are a ſufficient Argument of his firm Reſolution to offer me no wrong for the future. But he who muſt be brought to *Repentance* by main Force, and who then only thinks of *begging Pardon*, when his Strength fails him in proſecuting his Violences; ſuch an one is not ſafely to be truſted on his bare Promiſe: And, therefore, in order to our farther Security, we muſt either cut off from him all Power of doing miſchief, or we muſt lay ſuch Bond or Confinement on him, as ſhall hinder him from appearing ever after formidable to us: Inaſmuch as his Malice having been once expreſs'd, and never rightly purg'd or amended, hath render'd him a juſt Object of our perpetual Suſpicion.

IV. But that which is a lawful Practice in Men living under a *natural Liberty*, who are to work out their Safety by their own Strength, and according to their own Judgment, can by no means be indulg'd in the Members of *Civil States*; and eſpecially in regard to their Dealings with their Fellow Subjects. For againſt thoſe who live under the ſame Government and Laws, (either perpetually, or only for the *time being*) they ought to be ſo moderate in the Uſe of this *violent Self-defence*, as then only to betake themſelves to it, when the Time and Place will not admit of any Application to the *Magiſtrate* for his Aſſiſtance in repreſſing ſuch an Injury, as puts either their Life, or ſomething as valuable as their Life, or [4] ſome Good which can never be repair'd, into preſent and manifeſt Danger. And even in ſuch a Caſe we are, by our own Strength only, to rid ourſelves of the preſent Miſchief, leaving both the Puniſhment, and the Caution for future good Behaviour, entirely to the Magiſtrate's Determination. *Cicero* [5] tells us, that *nothing is ſo contrary to Rights and Laws, as the uſing Force in a well-order'd Commonwealth:* But then 'tis

[a] Vid. *Bæcler.* ad *Grot.* l. 1. c. 4. ſ. 2.

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[1] It is a Rule of *Heſiod's*, *Oper. & Dier.* l. 1. v. 710.

Ἤγνιτ' ἐς φιλότητα, δίκλυω δ' ἐθέλην παραχεῖν,
Δίξασθαι.

But if the injurious Friend the Wrong repair,
And beg a Re-admiſſion to thy Care,
Reject him not———

[2] *De Invent.* l. 2. See *Flor.* l. 3. c. 2. *in fin.* *Seneca Herc. Fur.* v. 362, *&c.*

Si æterna ſemper odia mortales agant,
Nec cæptus unquam cedat ex animo furor,
Sed arma felix teneat, infelix paret;
Nihil relinquent bella.———

———Should Men maintain immortal Hate,
Nor quell the Fury riſing in their Breaſt;
But ſtill the Fortunate their dreaded Arms
Shake, and th' Unfortunate new Force prepare,
To try another Field; the General War
Would clear the World, and drive a common Spoil.

[3] See a Paſſage of *Arrian* quoted a little lower, at §. 19. *Note* 1.

[4] *Some Good.* In all the Editions of the Original, not excepting that of 1706, there is a groſs Fault, which ſpoils the Senſe, *i. e. Damnum* for *Bonum*; but it is corrected in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 16. where this Sentence is Word for Word.

[5] De L. L. Lib. 3. c. 18. *Nihil eſt enim exitioſius civitatibus, nihil tam contrarium juri, & legibus, nihil minus civile, quàm compoſita Republica, quicquam agi per vim.* Pro Milone, c. 4. *Silent enim leges inter arma, nec ſe expectari jubent, cum ei, qui expectare velit, ante injuſta pœna luenda ſit, quàm juſta repetenda.* See Mr. *Noodt, ad Leg. Aquil.* C. 4.

his

his own Obſervation in another Place, that *theſe Laws are ſilent, when Arms appear bent againſt us; and do not command us to wait for their Help and Protection, when we ſhould moſt certainly ſuffer an unjuſt Violence, before we could procure a juſt Redreſs.*

By theſe Rules and Foundations which we have laid, may be decided moſt of thoſe Diſputes, which are uſually debated in Authors, concerning the Meaſure and the Moderation of *unblameable Self-Defence.*

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this Caution were not interpos'd, upon our failing to maintain that necessary and natural Order, we should render Society itself unsociable [a]. But we do by no means assert, that this *infinite Liberty* of *resisting* is to be actually made use of in all Cases; because several intervening Considerations may prevail with the injur'd Party not to proceed to Extremities: But only that the injurious Person cannot complain of hard Measure, though he be repell'd with the utmost Violence and Severity. The Life of Men would be then indeed most properly render'd *insociable*, if, in a *natural State*, any Bounds were set to the Liberty of Resistance. For what an Age of Torments should I undergo, if another Man were allow'd perpetually to lay me on only with moderate Blows, whose Malice I could not otherwise stop or repel, than by compassing his Death? Or, if a Neighbour were continually to infest me with Incursions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For, since the chief Aim of human *Sociableness* is the Safety of every Person, we ought not to fancy in it any such Laws, as would make every good and modest Man of necessity miserable, as often as any wicked Varlet should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men on so destructive a Bottom as a Necessity of enduring Wrongs. Wherefore, he is to be reckon'd a foolish and base Traytor to his own Safety, who, whilst an Enemy persists in the Exercise of Hostility, vainly spares his Life, and chuses rather to perish than to destroy. For the Law of Nature obliges me thus far only to be mild and merciful towards my Enemy, as that if he shall express a Sorrow for what is past, and an Inclination to desist from farther Injury, shall make Retribution for my present Damage, and give Security for his not offending hereafter, I may entirely spare and pardon him, and, renewing the Peace, may perform all friendly Offices towards him, as he shall towards me [1]. For *meer Revenge*, which proposes no Aim but the Grief, or the Destruction of him who hath hurt us, is detested and discarded by *Nature*, as falling under the Vice of *Cruelty*. Whence it follows, that the Remembrance of Enmities and Contentions ought, as soon as possible, to be defaced out of our Minds. On this Account, as we find the Story in *Tully*, the *Thebans* were accus'd in the General *Dyet* or *Council* of *Greece*, for setting up a *Brazen* Trophy of their Victory over the *Lacedemonians*; inasmuch as *it did not become one* Grecian *State to fix an eternal Monument of their Quarrel with another*. For, it seems, the Custom was to raise their Trophies only of Wood, to prevent their long and reproachful Continuance [2].

But farther, Persons in a *natural State* may not only repel a present Danger that threatens them, but, having got rid of that Fear, may pursue their Success against the Assailant, till such time as, upon sufficient *Caution* given, they shall think themselves *secure* of him for the *future*. Concerning which *Caution* this is to be observ'd; if a Man having injur'd me, shall, presently after, repenting of what he had done, desire my *Pardon*, and offer *Reparation* of the Damage, I am then oblig'd to be reconcil'd to him, and cannot fairly demand any farther Security than his *Faith* and Promise. For his voluntary Repentance, and Application to me for Pardon, [3] are a sufficient Argument of his firm Resolution to offer me no wrong for the future. But he who must be brought to *Repentance* by main Force, and who then only thinks of *begging Pardon*, when his Strength fails him in prosecuting his Violences; such an one is not safely to be trusted on his bare Promise: And, therefore, in order to our farther Security, we must either cut off from him all Power of doing mischief, or we must lay such Bond or Confinement on him, as shall hinder him from appearing ever after formidable to us: Inasmuch as his Malice having been once express'd, and never rightly purg'd or amended, hath render'd him a just Object of our perpetual Suspicion.

IV. But that which is a lawful Practice in Men living under a *natural Liberty*, who are to work out their Safety by their own Strength, and according to their own Judgment, can by no means be indulg'd in the Members of *Civil States*; and especially in regard to their Dealings with their Fellow Subjects. For against those who live under the same Government and Laws, (either perpetually, or only for the *time being*) they ought to be so moderate in the Use of this *violent Self-defence*, as then only to betake themselves to it, when the Time and Place will not admit of any Application to the *Magistrate* for his Assistance in repressing such an Injury, as puts either their Life, or something as valuable as their Life, or [4] some Good which can never be repair'd, into present and manifest Danger. And even in such a Case we are, by our own Strength only, to rid ourselves of the present Mischief, leaving both the Punishment, and the Caution for future good Behaviour, entirely to the Magistrate's Determination. *Cicero* [5] tells us, that *nothing is so contrary to Rights and Laws, as the using Force in a well-order'd Commonwealth*: But then 'tis

[a] Vid. *Bæcler.* ad *Grot.* l. 1. c. 4. s. 2.

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[1] It is a Rule of *Hesiod*'s, *Oper. & Dier.* l. 1. v. 710.

Ἤγῃσ' ἐς φιλότητα, μάλα δ' ἐξελὼ παρὰ χεῖν,
Δέξασθαι.

But if the injurious Friend the Wrong repair,
And beg a Re-admission to thy Care,
Reject him not———

[2] *De Invent.* l. 2. See *Flor.* l. 3. c. 2. *in fin.* *Seneca Herc. Fur.* v. 362, *&c.*

Si æterna semper odia mortales agant,
Nec captus unquam cedat ex animo furor,
Sed arma felix teneat, infelix paret;
Nihil relinquent bella.———

———Should Men maintain immortal Hate,
Nor quell the Fury rising in their Breast;
But still the Fortunate their dreaded Arms
Shake, and th' Unfortunate new Force prepare,
To try another Field; the General War
Would clear the World, and drive a common Spoil.

[3] See a Passage of *Arrian* quoted a little lower, at §. 19. *Note* 1.

[4] *Some Good.* In all the Editions of the Original, not excepting that of 1706, there is a gross Fault, which spoils the Sense, *i. e. Damnum* for *Bonum*; but it is corrected in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 16. where this Sentence is Word for Word.

[5] De L. L. Lib. 3. c. 18. *Nihil est enim exitiosius civitatibus, nihil tam contrarium juri, & legibus, nihil minus civile, quàm in composita Republica, quicquam agi per vim.* Pro Milone, c. 4. *Silent enim leges inter arma, nec se expectari jubent, cum ei, qui expectare velit, ante injusta pœna luenda sit, quàm justa repetenda.* See Mr. *Noodt, ad Leg. Aquil.* C. 4.

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Liberty are allow'd a longer Space in making their Defence by Violence, than thoſe who live under the Protection and Aſſiſtance of a Government.

Inaſmuch as Nature obliges us to maintain Peace with others, it may and ought to be *preſum'd* that every one will fulfil this Obligation, unleſs he gives manifeſt Evidence of contrary Deſigns, and unleſs it be apparent that he quits his Obedience to ſound Reaſon, which adviſ'd him to this Duty. But, conſidering how prone the greateſt Part of Mankind are to violate this Precept of Reaſon, whoever hath a true Concern for his own Safety, will fortify himſelf betimes by all innocent Methods of Defence; as ſuppoſe by ſhutting up the Avenues againſt ſuch as are plotting any hoſtile Deſign; by providing Arms and all other [1] Neceſſaries for offenſive or defenſive Force; by entring into Confederacies and Alliances; by keeping a watchful Eye upon the Motions and Attempts of others, and the like. Thus we juſtly eſteem it Wiſdom in a Commonwealth, to think of War during the full Enjoyment of Peace. And altho' Innocency will always find a ſtrong Guard and Support in the Divine Providence, yet is it moſt ſenſeleſs Vanity for that Man to expect Miracles from Heaven for his Deliverance, who lies ſtill in a drowſy Idleneſs, and neglects all Care of his own Affairs. And even in Civil States, where our Goods are in ſome meaſure ſecur'd againſt Thieves and Ravagers, by the Severity of Penal Sanctions, he would be reckon'd a very ill Huſband, who ſhould forbear to ſecure his Doors in the Night, or to lock up his Cloſets and his Cheſts. To this purpoſe we are inform'd, that the old *Romans* us'd to ſeal their meaneſt Utenſils and Houſhold Goods with their Rings, to ſecure them from pilfering Slaves; over whom, at the ſame time, they had the free Power of Life and Death [a].

But now, though my providing thus far for my Security can be injurious to none, yet before I can actually aſſault another, under colour of my own Defence, I muſt have Tokens and Arguments amounting to a moral Certainty, that he entertains a Grudge againſt me, and hath a full Deſign of doing me a Miſchief, ſo that, unleſs I prevent him, I ſhall immediately feel his Stroke. Amongſt theſe Signs and Tokens, giving me a Right to make a violent Aſſault on another Man, I muſt, by no means, reckon his bare Superiority to me in Strength and Power; eſpecially if that Happineſs deriv'd its Increaſe from harmleſs Induſtry, or from the Bounty of Providence, without the Oppreſſion of others. For 'twould be inhuman Malice to envy another, and to endeavour to take from him a Bleſſing which he came ſo fairly by. 'Tis a very groſs Way of philoſophizing which ſome Men have got, when they tell us, by way of Advice, *He that is able to hurt you, undoubtedly is willing; and therefore, without farther Warning, down with him, as you love your own Safety.* This kind of Doctrine is manifeſtly deſtructive of all ſociable Commerce amongſt Men; and the Authors commonly cited in Defence of it, either are ſuch whoſe Character prevents their Authority, or elſe in the Paſſages alledg'd from them, they ſpeak only of Precaution in our dealing with thoſe Wretches, who have given us ſufficient Tokens of their Reſolution to hurt us [b] [2]. And whereas ſome Men bring Examples inſtead of Arguments for ſo baſe a Practice, this is to make another's Sin the Rule and Standard of my acting [c]. Yet, becauſe any Man may abuſe his Strength to ill Purpoſes, therefore, as we ſaid before, we ought to fence againſt Danger, by timely and by harmleſs Methods.

Nay, although ſuch a mighty Neighbour hath ſhewn himſelf to have the Will of hurting as well as the Power, he doht not yet give me directly a juſt Cauſe of ſetting upon him, becauſe he doth not yet expreſs this ill Will towards me in particular. For it is not ſufficient Proof that a Man deſigns to hurt me, becauſe he hath already hurt others; inaſmuch as he might be provok'd to his Attempt on them by ſome particular Reaſons, which he doth not find againſt me. An Injury then done to another, gives me no Licenſe of falling on the Aggreſſor, whilſt I am tied to both Parties only by the common Band of Humanity. But I may happen to be united by a more peculiar Obligation to the injur'd Perſon; as if, upon his Deſire, I have promis'd and engag'd to aſſiſt him. For it is very agreeable to *Social Nature*, that a Man who hath himſelf receiv'd no Wrong, ſhould yet join Forces on Covenant with another, to help him to drive off an unjuſt Aſſault, as being allied to him by thoſe general Ties which hold together all Mankind. Becauſe, ſuppoſing the two Parties to be otherwiſe indifferent to me, yet it is a ſtanding Rule, that an Injury *receiv'd* ought to incline me to Favour, and an Injury *offer'd* [3], to Hatred and Averſion [d]. But farther, if on good and probable Grounds I ſuſpect that

[a] Vide *Tacit. An.* II. 1.

[b] And as for that Saying of *Cicero*, (*Epiſt. Fam.* 11. *Ep.* 28.) *Even Slaves have been always allow'd this Liberty* to fear *according to their own Judgment, not another's*; we may oppoſe to it the ſharp Return of *Vibius Criſpus*, (in *Quintilian.* l. 8. c. 5.) *Who ever gave you Permiſſion* to fear *ſo unreaſonably?* Nay, *Cicero* himſelf hath ſufficiently overthrown this Opinion, *If*, ſays he, *ever made ſuch an Ordinance as this, or to whom can this be granted, without the manifeſt Danger of the whole Community, that a Man may lawfully kill him, by whom he ſhall pretend to fear being hereafter kill'd? Orat. pro Tull.* in *Quintil.* l. 5. c. 13.

[c] Add. *Alberic. Gentil. de Jure Belli*, l. 1. c. 14.

[d] *For that of* Exodus ii. 14. *only holds in a* Civil *State.*

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§. VI. [1] Such are principally in relation to States, Fortreſſes built on the Frontiers of Kingdoms. See Mr. *Thomaſius*'s Diſcourſe upon this Subject, entitled, *Non-Ens actionis Forenſis contra ædificantem ex æmulatione*, §. 18, *&c.*

[2] Our Author quotes theſe Words of a Letter wrote to *Cicero*, as favouring the Opinion which he confutes: *At hæc etiam ſervis ſemper libera fuerunt, timerent, gauderent, dolerent ſuo potius, quàm alterius arbitrio.* But if we conſider the following part of the Diſcourſe, we ſhall find that the Words will not bear the Senſe which he gives them. The *Latin* of the following Paſſage in *Quintilian* is, *Quis hoc ſtatuit unquam, aut cui concedi ſine ſummo omnium periculo poteſt, ut eum jure potuerit occidere, a quo metuiſſe ſe dicat, nè ipſe poſterius occideretur?* Add here *Grotius de Jur. Bel. & Pac.* Lib. II. Cap. I. §. 5.

[3] That the Laws of Nature, which tend to the Preſervation of Mankind, may be obſerv'd, without which they are uſeleſs, and that no Man may offer an Injury to his Neighbour, Nature has given every Man a Right to puniſh the Violation of its Laws, both in reſpect to all Mankind, and to private Perſons. The Laws of Nature, as well as others, which are impoſed upon Men here below, would be altogether uſeleſs, if no Body, in the free State of Nature, had Power to execute them, by protecting and preſerving the Innocent, and reſtraining the Inſolent. For all Men being naturally equal, it follows, that if in that State every one have a Right to puniſh the Breach of the Law of Nature, there is no Man but hath it in as large an Extent as another. Theſe are the Principles of the illuſtrious Mr. *Locke*, in Part I. of his excellent Treatiſe of *Civil Government*. Lib. 2. Chap. 2. We ſhall elſewhere obſerve the Conſequences which he draws from it in Relation to other Matters of Importance. See Lib.

that this *powerful* Aggressor, when he hath dispatch'd his first Prey, will turn his Force upon me, and use his former Conquest for the Instrument of another; I may then more readily assist the distress'd Party, because his Preservation is likely to ensure mine own Safety. As a wise Man will lend his best Help towards quenching a Fire in his Neighbour's House, when his own is the next in Danger.

More than this, if it appear by clear Tokens that a Man is at present under a real Design of hurting us, though he doth not yet proceed to the open Execution of it, supposing us to live in a *natural State*, we may immediately enter on our own Defence by violent Methods, and prevent the Foe; provided that either upon a friendly Admonition he is not likely to be driven from his hostile Intentions, or that the giving such an Admonition would prove of ill Consequence to our Affairs. For no Man is oblig'd to expect patiently the Insult of another, that he may thereby build the Justice of his Violence on the absolute Necessity of his Defence. And, therefore, in this Case, he is to be accounted the *Aggressor*, who made the first Motion towards hurting his Neighbour, or who conceiv'd the first Design of Mischief, and was preparing to accomplish it, though the other Party, using greater Expedition, may have surpriz'd and oppress'd him before he could bring his Plot to Perfection. For it is not absolutely necessary to the Notion and Business of Defence, that a Man receive the first Stroke, or that he only ward off or elude the Blows that are aim'd at him; but he too shall be interpreted to act by way of *Self-defence*, who, taking his Foe unexpectedly, hath prevented the Mischief that was plotting against him [1].

VII. But we must, by no means, allow an equal Liberty to the Members of *Civil States*. For here, if the Adversary be a Foreigner, we may resist and repel him any way, at the Instant when he comes violently upon us: But we cannot, (without the Sovereign's Command) either assault him whilst his Mischief is only in Machination, or revenge ourselves upon him after he hath perform'd the Injury against us [2], lest we should, by this rash and unwarrantable Proceeding, involve our Country in an unnecessary and unseasonable War. And a much greater degree of Caution must be used in our Dealings with our Fellow-Subjects. For though I understand that such an one is now coming to do me a Mischief, or that he threatned me desperately in publick, this will, on no account, excuse me in assaulting him; but I am to inform against him before the common Magistrate, who is to require Security for his good Behaviour. But if the Magistrate refuse to interpose, I may then consult my own Safety by what Means I can, with the same Freedom as if I were plac'd under a *natural* State and Condition. Those Moralists are widely mistaken, who, as *Grotius* [a] says, maintain, "That "I may lawfully kill, not only the Man who offers me present Violence, but him to whom I "shall have discover'd to plot and conspire against "me; as by Poison, by false Accusation, false "Witness, the Procurement of an unjust Sentence, "or the like." Nor is the Absurdity at all lessen'd by that Restriction which they add [4], *if either the Danger cannot otherwise be avoided, or if we are not sufficiently assur'd that it cannot.* Because such a Delay of Time as is here suppos'd, how short soever, may put us on many good Ways of Redress and Relief;

[a] L. 2. c. 1.

Lib. 8. Chap. 3. §. 4. *Note* 3. Hence it appears, that our Author is mistaken, when he affirms, That unless we are under some particular Engagement to help a Person who is wronged by another, we are not obliged to oppose this latter, unless he insults us directly. Much rather, we not only have a Right to espouse the Quarrel of the Injured; but, also, according to the Laws of Humanity, we are indispensibly engaged to defend him, if we find ourselves able to do it. This is the Consequence of the Principle of Sociableness, as Mr. *Titius*, with much Reason, maintains, Observ. 131. And I wonder our Author did not mind it, since, in Lib. 1. Chap. 5. §. 14. he approves of that fine Maxim of *Cicero*, *Qui non defendit, nec obsistit, si potest, injuriæ, tam est in vitio, quam si parentes, aut amicos, aut patriam deserat, i. e.* "He that does not prevent or resist an Injury, if he "be able, is as much to blame, as he that forsakes his Friends, Parents, or Country." *Menander*, also, has a fine Sentence relating to this Matter, "If any one, (says he) would be as much concern'd for the Injuries done to another, as if he receiv'd "them himself, and vigorously undertake the Defence of them that are oppress'd, there would not be so many Evil-doers, and "those that are would not be so daring."

Εἴπερ τὸ ἀδικεῖν τ' ἀσμένως ἠμύνετο
Ἕκαστος ἡμῶν, καὶ συνηγωνίσατο
Ἴσως νομίζων ἴδιον εἶναι τὸ γενόμενον
Ἀδίκημα, καὶ συνέπραττον ἀλλήλοις πικρῶς,
Οὐκ ἂν ἐπὶ πλεῖον τὸ κακὸν ἡμῖν ηὔξετο
Τὸ τῶν πονηρῶν, εἶτα παρατηρούμενοι,
Καὶ τυγχάνοντες, ἧς ἔδει τιμωρίας
Ἦτοι σπάνιοι σφόδρ' ἂν ἦσαν, ἢ πεπαυμένοι.

In *Stobæus*, Tit. 43. See Mr. *Le Clerc*'s Note on this Fragment, p. 3. *Ed. Amst.* 1709.

[1] *Demosthenes, Philip.* 3. Ὁ γὰρ οἷς ἂν ἐγὼ ληφθείην, ταῦτα πράττων, κατασκευαζόμενος, οὗτος ἐμοὶ πολεμεῖ, κἂν μήπω βάλλῃ, μηδὲ τοξεύῃ, *i. e.* "He who is preparing and contriving Wiles for my Destruction, is most certainly engag'd in a "hostile State with me, though he has not yet attack'd me with his Darts or his Spears." *Thucydid* l. 6. "We ought, not "only to chastise the open Actions of our Enemies, but to prevent, by due Punishments, their secret Counsels and Designs: "For they will be before-hand with us, if we neglect to be so with them." *Procop. de Bel. Persic.* l. 2. c. 3. Λύουσι γὰρ τὴν εἰρήνην οὐχ οἱ ἐν ὅπλοις γένοιντο πρῶτοι, ἀλλ' οἱ ἂν ἐπιβουλεύοντες ἐν σπονδαῖς τοῖς πέλας ἁλῶσι, τὸ γὰρ ἔγκλημα τοῦ ἐγχειρεῖν κἂν ἀπῇ τὸ κατορθοῦν, μετακέκληται, *i. e.* "Those break the Peace, not who first take up Arms, but who are discover'd in any "Plot against their Neighbours and Friends. For whoever attempts and designs Mischief, hath really committed the Crime, "though his Endeavours prove unsuccessful." *Phil. Jud. de Leg. Special.* "We do not only reckon them our Enemies, who as-"saults us with Fleets or Armies, but them too who by Sea or Land make Preparations against us." See *Alberic. Gentil. advoc. Hispan.* l. 1. c. 9. *Leges Wisogoth.* l. 6. tit. 4. c. 6.

[2] See what this Author says, Lib. 8. Chap. 17. §. 8. and *Grotius*, Lib. I. Cap. III. §. 2. N. 2.

[3] We may add, *and that of ours.* So *Moses* seeing one of his Brethren, an *Israelite*, suffer Wrong, he defended him; and, in vindicating the Person injured, slew the *Egyptian*, *Exod.* ii. 11, 12. and *Acts* vii. 24. for, as Mr. *Le Clerc* says upon this last Passage, "*Moses* knew very well that the *Israelites* could obtain no Justice of the *Egyptian* Judges. And when Tyranny is "arrived at that Height, that Justice can't be had, and the Foundations of Civil Society are destroy'd, we return again to the "State of Nature, in which 'tis lawful for every one to defend himself and his Friends, against all Force, without seeking Help, "in vain, from them who will not assist us. But this Right can't be made use of but in extreme Confusion, as *Egypt* was at that "time, where any Injuries might be done the *Israelites*, without any fear from the *Egyptian* Judges."

[4] *Grotius* reads it thus, but carelesly. He maintains, that all the Reasons which he mentions there, are not sufficient to give a Right to prevent a Person, who has ill Designs against us, or to kill him, while we can find any other way to escape the Danger, or are sure we cannot save ourselves; which Determination he founds upon the Remedies and Accidents, which a little Space of Time may produce. But he adds, that there are some Divines and Lawyers, who extend this Favour farther, *i. e.* as any one may see, who grant to the Person against whom any thing is attempted, a greater Liberty, believing that he hath a Right to prevent his Enemy, although he could avoid the Danger some other way. So these Moralists do not perplex themselves in any manner with the Restriction of which our Author speaks. *Grotius*, who lays down this Exception to the Negative, maintains it against them. Nevertheless I assert, That if you examine the Thing in itself, he doth not sufficiently distinguish between the State of Nature and Civil State, as will appear by what our Author says afterwards.

Relief; besides [1] the Variety of Accidents which may, perhaps, work our Deliverance. It is manifest, that these Authors suppose a *Civil State*, because, in that only, we can conceive such Things as unjust Judgments, Accusations, Witnesses, &c. For the Suppression of which Injuries, if we permit the Subjects to inflict Death, what occasion have we for Magistrates or for Laws? No Man is in Danger of being condemn'd, if he can prove the Accuser guilty of Calumny and Forgery. Yet, if being unable to make this out, he assaults his Life, 'twill be hard to excuse him from the Legal Censure and Penalty of Murther [2]. But when a Man is already actually set upon, and reduc'd to such Streights, that he hath not Power or Opportunity to implore the Assistance of the Magistrate, or his Neighbours, he may then make use of Extremities in repelling the Assailant: Yet the Reason and Ground of his proceeding to such Violence must not be, that he may thus *revenge* himself for the Injury offer'd; but only because he could not otherwise secure his Life from the imminent Danger. And, therefore, supposing that Danger to be more easily driven off, he cannot lawfully pursue the Aggressor, so as to strike or harm him in his Flight [a].

VIII. It appears then from these Considerations, that under the Civil Governments the *Time* of making an *unblameable Self-defence*, is set within very narrow Bounds, and indeed reduc'd almost to a *Point* or Instant, yet such as admits some small Latitude, and in which a slight Excess will escape the Magistaate's Censure. And, therefore, altho' an understanding Judge will be best able to settle the Innocency of any Defence, from the Circumstances of the particular Facts: Yet we think it may be asserted in general, that the exact Time when a Man may fairly destroy another in his own Defence, begins at the Instant, when the Aggressor shewing plainly his Design upon my Life, and being furnish'd with Strength and Weapons for the Execution, is already got into a Place where he may perform his Mischief; Allowance being only made me for just so much *Space* as is necessarily requir'd for me to attack him in, before he attacks me. For Example, if a Man is making towards me with a naked Sword, and with full Signification of his Intention to stab me, and I, at the same time, have a Gun in my Hand, I may fairly discharge it at him, whilst he is at a Distance, and cannot yet reach me with his Weapon; because, should he get too near me, my Arms would be of no use. And the same holds more strongly in relation to Bows, and Instruments of that nature, which signify nothing at all, unless we give them full Room and Space to exert their Force in. Again, suppose a Man approach me with full Design upon my Life, and is only arm'd with Pistols, or the like, whilst I am furnish'd with a longer *Piece*, I am not oblig'd to wait till he comes within Pistol-shot, but may prevent him with my Arms before he can use his own. For this is what the Laws call [3] *to meet a Danger in time, which is esteem'd much better, than to revenge it after it hath taken Effect*. The Continuance of this *Time* for *innocent Defence* is so long as till the Aggressor either is repuls'd, or hath retreated of his own accord, whether repenting of the mischievous Design in the very Moment that he was performing it, or else because he sees he is like to lose his Aim; as suppose his Sword is broke, or his Piece hath miss'd fire, or shot beside us; so that at present he can hurt us no farther, and we have an Opportunity of retiring into a Place of Safety. For the *Revenge* for past Injury, and the *Caution* for future Security, belong to the Care of the Magistrate, whom we are to address on those Accounts [b]. Whoever, enjoying the Protection of a Civil Government, shall kill another beyond these Bounds and Conditions, under the Notion of *Self-defence*, cannot be acquitted as entirely guiltless. Whence we may perceive how unreasonable the Assertion of old *Baldus* is, when he declares, *If a Man chance to say to me, I'll kill you wherever I find you from henceforward, I may, without incurring any Penalty, take away his Life by way of Prevention, either in the midst of his Threats, or whenever I can do it with most Convenience* [c]. For though I be not oblig'd to wait till he performs his Threats, yet in a Commonwealth I ought to pursue other ways of Safety than by killing him: Even when it appears from the former Course of his Life, that he is not backward in making good such bold Resolutions; which Condition is, by some Authors, added to mitigate *Baldus*'s Opinion.

IX. As to the common Determination, that this killing a Man in our own Defence is then only innocent, *when we cannot possibly escape the Danger by other Means*; this is not to be interpreted in too strict a Sense, but admits of a reasonable Latitude, upon account of that Perturbation of Mind which arises from so surprizing and so imminent a Mischief. For it is scarce possible that a Man under so terrible Apprehension should be so exact in considering and discovering all Ways of Escape, as he who being set out of Danger can sedately deliberate on the Case. Hence, as it is meer Rashness for me to come out of a safe Hold to him who challenges me, so if another assault me in an open Place, I am not strictly oblig'd to betake myself to Flight, unless there be near at hand a Place of most secure Refuge; nor am I always bound to draw back from the Onset. Because I then turn my defenceless Parts to the Danger, and there is great Hazard of tripping or falling; and, besides, when I have once quitted my Posture of Guard, 'tis not very easy to recover myself. Neither doth it render my Defence

[a] Vide l. 3. s. 9. *D. de vi & vi armata.* [b] Vide l. 45. s. 4. *D. ad L. Aquiliam.* [c] Mention'd by *Sichard. ad C. Cod.*

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[1] See *Aul. Gellius, Noct. Attic.* Lib. 13. Chap. 17. and *Erasmus* upon the two Proverbs taken from thence.

[2] This is true. The Judges must inflict the Penalty, but that does not remove the Difficulty. A Man may concert his Measures so, as to conceal the Murther, or to escape after he has given the Blow. And even tho he should fail in this, the Question still remains, whether he is not, nevertheless, innocent before the Tribunal of Conscience, as in other Cases, where a Man is necessarily condemn'd according to the Law. It is better than to say in this Circumstance, that it is hard to conceive how we can have such a Certainty of the ill Intention of the conceal'd Accuser, and the Success of his Calumny, as to see no Remedy; or, at least, have no time to save ourselves by Flight. But for what relates to the Fear of being poison'd, or depriv'd of Life by some other Means, it is not impossible but Cases may happen, where the Danger (morally speaking) is as inevitable, as when a Man attacks us Sword in Hand. *Zeigler* gives us an Instance of it in his Notes upon this Place of *Grotius*. Travellers may fall into an Inn, which they discover to be a dangerous Place, and from whence they cannot escape, without preventing the ill Designs of their Host. There are abundance of Stories of this kind.

[3] The Words of the *Code* are, *Melius enim est occurrere in tempore, quàm post exitum vindicare.* Cod. Lib. 3. Tit. 27. *Quando liceat unicuiq; sine judice se vindicare, &c.* Leg. 1.

blameable,

blameable, if I chose to run the Hazard of such Accidents, rather than omit such Business, which was either a part of my Duty, or which, however, I had a Liberty of acting: As suppose, whilst I am going to any publick Place, about my Affairs, I kill a Man that sets upon me in the Way, I am not the less innocent [1], because, if I had staid at home, the Thing had not happen'd. For the publick Security would be ill guarded, and our Liberty would stand us in little stead, if we might not make use of it in opposing [2] those sudden Violences which others offer us, out of pure Malice and wicked Design.

There is no need of proving *Balsamon*'s Distinction [a] to be ridiculous; *A Man*, (says he) *who kills another in his own Defence, is free from all Guilt, if the other Person had first given him a Mortal Wound, or the like Mischief; but if the Hurt that was first offer'd him be slight and cureable, the Slaughter of the Aggressor is then unjust, and he must answer for the Fact.*

Much more pleasant is their Nicety, who make it a Question, *Whether an Equality of Weapons be necessary to the rendering a Defence innocent?* As if the Aggressors were so generous, as constantly to give Notice to the other Party of their Design, and of the Arms they purpos'd to make use of; that they might have Leisure to furnish themselves in like manner for the Combat. Or if, in these Rencounters, we were to act on our Defence by the strict Rules of the common Sword Plays, and Trials of Skill, where the Champions and their Weapons are nicely match'd and measur'd for our better Diversion.

But it must be observ'd on this Head, that the Plea of *Self-defence* shall not excuse or indemnify him, who being challeng'd to meet in the way of *Duel*, doth, by so appearing, put himself into such a Condition, that he must either kill or be kill'd [3]. For in the Estimation of such a Fact, the Danger will not be consider'd, since the Laws forbad him to meet it; and, therefore, he will not only be guilty of *Manslaughter*, but will stand obnoxious to those other Penalties which are particularly ordain'd against the Custom of Duelling.

X. There is one Enquiry commonly made farther on this Point; and that is, Whether it be lawful for a Man to kill another, who comes upon him, not with a Design to take away his Life, but only to *maim* him; provided the Danger cannot be otherwise avoided? And here, as to a *Natural State*, we may safely hold the affirmative Side of the Question. For Nature hath inspir'd us with so tender a Care to preserve our Bodies whole and entire, that we cannot but make use of all Ways and Methods for that purpose; and the Loss of one Member, especially if it be of the most noble Kind, is reckon'd almost equal to the Loss of Life itself. Besides, Death is frequently the Consequence of such barbarous Treatment; and I have no Security but that the Villain will proceed to greater Mischief. Lastly, as we have formerly hinted, such an Attempt declares a Man my open Enemy; and, consequently, gives me a License *in infinitum* of acting against him.

Nor do the Laws, even in Civil Governments, seem to engage the Subjects to such hard Conditions, as that they must rather suffer themselves to be *maim'd*, than use Extremities in repelling the Assailant: For since such a degree of Patience surpasses the ordinary Strength and Constancy of Mankind, 'twould look very rigid to require it, only in favour of a malicious Rogue. But when such an Injury is once actually receiv'd, the Prosecution of the Malefactor is to be left entirely to the Magistrate.

XI. The Defence of *Chastity* is, in almost all Nations, esteem'd equal to the Defence of Life, and doth, in the same manner, excuse the Slaughter of those who attempt it. The Reason of this Favour is grounded on the natural Consideration, that the *Honour* of Women is their chief Treasure and Ornament; together with the Respect had to the Weakness of the Fair Sex, which 'twas convenient should be guarded by all possible means from [4] Violence and Abuse [b]. Even in Civil States, as the Legislators might very reasonably appoint Capital Punishments

[a] Ad *Epist. Basil.* ad *Amphiloch.* Can. 43.

[b] *Quintil.* Declam 349. *You have drawn a Virgin into as great an Injury, as War itself could have offer'd.*

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[1] In this Case the unjust Aggressor has not the least Subject for Complaint, nor can the Offender be lawfully punished. However, if it only relates to a Danger which is present, and that our Business is not pressing, or of the last Consequence, both Prudence and Charity require that we should wave our Right, and stay at home. The Constraint is not so great as it would be, were we oblig'd to keep the House a long time to shun a Man who watches to attack us.

[2] All the Editions have it *ob periculo improvisa*. But if the Danger be entirely unforeseen, this is nothing to the Point; for in such Cases the Matter is past all doubt. We must necessarily suppose here, that there is a previous Suspicion that somebody waits to attack us; without our being able to demand Assistance, either for want of legal Proofs, or because the Time does not allow us to apply to the Magistrate. Therefore our Author should have said just the contrary, *etiam ob præviſa pericula, &c.* Perhaps he even intended to have express'd himself so, and it was an Error of his Pen. If he has not corrected it in the subsequent Edition, it is no wonder, since such Omissions have escap'd Writers much more exact than he.

[3] It is not in my Opinion necessary that the Laws should expressly forbid *Duels*, in order to constitute them illegal Combats; nor does it always follow, that he who kills his Man on these Occasions, is a real Murtherer. This appears even from the Frame of civil Society. One of the principal Reasons why Men first united together, was, that each Man might not be his own Judge in his own Cause; where it is easy for Self-love to deceive us, and carry us beyond the Bounds of Equity. It is, besides, one of the most distinguishing Prerogatives of sovereign Power, to procure every Subject Reparation for the Injuries he may have receiv'd. Hence it follows, that whoever attempts to do Justice to himself, (except in Cases where he cannot legally obtain it) encroaches upon the Rights of the State, and sets himself up for a Sovereign. This is the more unreasonable, as the Injury is often imaginary. See what I have said below, §. XII.

[4] The Affront is so much the greater, because a Woman of Honour may be reduced to that hard Necessity, to raise up, from her own Blood, a Child to an Enemy, *Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 22. I have added there some other Reflections, which I see with Pleasure have been approv'd by Mr. *Gundling*, in his *Jus. Nat.* Cap. viii. §. 13. It is certain that the good of Society requires the Honour of the fair Sex should be placed in the same Degree with her Life. I might say some other Things, but this is sufficient to answer all the Objections of those who are of a contrary Opinion. I see now the celebrated M. *Buddeus*, who had taken this Side, has since confess'd, that the thing appear'd dubious to him, in his *Theologia Moralis*, Page 494. Edit. 1719. See Mr. *Thomasius*, *Jurispr. Div.* Lib. II. Cap. II. §. 114. *& seq.* Mr. *Wherner*, *Diss. Jur. Nat.* VI. 13. Mr. *Gribner*, *Jurispr. Nat.* Lib. i. Cap. v. §. 3, *&c.* Mr. *Bayle*, in his *Answer to the Question of a Provincial*, Tom. 4. Chap. 28, p. 412. affirms, That if that Law of the Decalogue, *Thou shalt do no Murder*, doth not oblige a Woman, who breaks it to save her Life or Chastity, it follows, that the other Laws of the Decalogue include the same Condition in observing them, provided it be no Damage to my Life or Honour; and so often as the Observation of any of these Articles of the Decalogue expose us to any certain Danger of losing our Life or Honour, we may excuse ourselves from it, as well as from the Observation of this Precept, *Thou shalt not Kill*. To me the very Recital of such an Argument is its own Confutation.

And

Punishments for Offences of this kind, so they might farther give a Liberty to all honest Women, to use *Extremities* in their own Defence, upon danger of losing what 'tis impossible for them to recover, and for which no Reparation can be made them. Amongst the *Jews*, as Mr. *Selden* [a] tells us, a Man was allow'd to kill another, not only in his own Defence, but in the Defence of a third Person, if unjustly assaulted, whether with regard to Life, or to Chastity of either kind [b]. And thus the Sentence of *C. Marius* was highly applauded amongst the *Romans*, when he not only absolv'd, but crown'd the Soldier who had kill'd his Nephew, a *Tribune*, or Colonel in the Army, for soliciting him to an unnatural Debauch [c]. [1] St. *Augustine* [d] hath a Saying, that *the Holiness or Purity of the Body is never lost, whilst the Purity of the Mind remains, tho' the Body suffer Violence* [e]. But it follows no more from hence, that forcible Ravishers are not to be repell'd with Extremities, than that because a good Man is translated to eternal Happiness by *Death*, therefore he ought not to defend himself with Violence against a Villain who attempts his Life.

'Tis [2] observable what [f] *Lysias* reports, that the *Attic* Laws decreed a severer Punishment against him who *persuaded* a Woman to an unchaste Compliance, than against him who compell'd her by mere Force. The Reason we find subjoin'd, *Because* (says he) *a Man who commits a violent Rape is suppos'd to be hated by whom he abuses. Whereas those who by Flattery and Insinuations tempt Women to their Desires, do by this Means gain a greater Interest and Authority with them than their own Husbands, and, consequently, have the whole Family in their Power and Disposal: Besides the Inconvenience of confounding the Childrens Birth, and hindring all Distinction between those who came lawfully, and those who came unlawfully into the World* [g].

XII. 'Tis another famous Question, Whether the Danger of receiving *a Box on the Ear*, or some such ignominious, though slight Injury, will excuse the killing of a Man in our own Defence. And *Grotius*'s Decision [h] makes it *not to be repugnant to expletive Justice*. The Sense of which Expression is this, that since expletive Justice is equally violated by denying one that which he had a *perfect Right* to possess, or by bringing somewhat on him which he had, likewise, a *perfect Right* not to suffer; when a Person is kill'd for offering an Injury of this Nature, there can be no Complaint made that a Breach of *expletive Justice* hath been committed upon him. For he who first makes an Attempt of any Mischief against another, retains no Right why the other should not proceed to Extremities in returning it; or (what comes to the same thing) gives the other an *infinite Right* of opposing him: though other Considerations may frequently hinder the injur'd Party from a full and rigorous Use of this Right. Nor will it signify any thing to object, that in such Returns that *Equality* is neglected, which Justice commonly requires. For that *Equality* is chiefly concern'd with the Exchanges of Things, and the Distribution of common Goods. But Evils, which, by way of War, are mutually offer'd, cannot be exactly reduc'd to any such Measure, nor is it necessary they should [3]. As for *Grotius*'s Remark, that *the degree of hurting in War should be stated according to the Manner of Restitution and Reparation in Civil Damages*; there is good Reason for this Limitation to it, *as nearly as we can*: And then that Moderation doth not arise from any Right inherent in the Enemy, but from the Generosity and Courage of the Victor. *Grotius* adds, that *Charity doth not, of itself, require our patiently suffering such an Affront, in favour of the Person who offer'd it*; *tho' the Doctrine of the Gospel doth indeed forbid the Repulse of such Attempts by violent Means.*

For our Parts, we have already shewn, that, in a *natural State*, a Man cannot be requir'd to bear even a slight Injury, (especially if it be continued) without endeavouring, even by the utmost Violence, to keep it off. And we read, that the most holy king *David*, for an Affront put upon his Ambassadors, rais'd a War, to almost the utter Ruin of a Nation [i].

a L. 4. c. 3.

b *Lex Wisogoth*, l. 3. t. 3. c. 6. *Constitut. Sicul. l.* 1. tit. 22.

c *Plutarch* in *Mario*. *Plato de LL.* l. 9. *He that hath debauch'd a* young *Person of either Sex, shall be lawfully kill'd, not only by the abused Party, but by the Father, Brothers, or Children.*

d *De Civitate Dei*, l. 1. c. 18.

e Add. *Gratian. Caus.* 32. *qu.* 5. *c.* 1, 2, 3, 4. *Plautus Amphitr.* Act. 5. Sc. 2. *Haut promeruit quamobrem vitio vertam? mea vi subacta est facere:* You can't lay to her Charge, what she did upon my Compulsion. *Senec. Hippolit.* v. 727.

Mens impudicam facere, non casus, solet

——— Not on Chance, but on the Will
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f *Orat.* 1.

g *Liban.* Declam. 2. *It is a much greater Wickedness to tempt and entice a Maid to be consenting to her own Abuse, than to injure her by mere Force.*

h L. 2. c. 1. s. 10.

i 2 *Sam.* x. 4, *&c.*

And I should wonder that Mr. *Bayle* should suffer himself to be blinded with such weak Reasons, if I did not plainly see, that he has espoused the false Notions of such as pervert the Moral Doctrines of the Gospel, by such Explications as are contrary to the Rules of good Sense and Criticism. A late Author (Mr. *Wollaston*) has adopted this false Consequence. "*Puffendorf*, says he, "and those who follow him, reply, That the Prohibition of killing and stealing ceases in Points of extreme Necessity; but, if "it ceases then, it will cease in all Cases where Life is in danger; and to how many Crimes would not this Principle open the "Door?" See the Supplement to *The Religion of Nature Delineated*, Page 408. This needs no Reply. It is sufficient to refer the Reader to what is said in the following Chapter, both in the Text and Notes, concerning the Foundation of the Privileges of Necessity. In the mean time, till they can find good Reasons to destroy these Principles, I shall continue in my present Opinion.

1 In the Passage cited here St. *Augustine* makes use of this Reason to condemn a Woman who kills herself, in order to avoid even the involuntary Loss of her Honour. In this Case the Application is just, as I have remark'd in the preceding Chapter, §. 19. *Note* 1. Page 178. But we find this Father, in another Place, employs the same Reason very improperly to the Case in question, which is quite different. See his Treatise, *De Libero Arbitrio*, Lib. i. Cap. v. Num. 12.

2 See *Digest.* Lib. 11. Tit. 3. §. 3. where is the like Decision in the Case of Slaves. See, also, what is said Lib. 6. Chap. 1 §. 21. *Note* 1. Page 580.

3 Our Author cites these Words as *Grotius*'s, and even in the manner in which he expresses himself one would expect to find them in the Place he refers to. But he has mistaken himself, by confounding the Words of *Boecler*, his Commentator, with the Text of that Author, whom *Boecler* has attempted to confute upon his own Principles.

But

But 'tis very doubtful, whether in Members of a *Civil State* the same violent Procedure is excusable. It is indeed in common Judgment a most high Affront to receive a *Box on the Ear*, and the Reason of this Opinion amongst many of us *Europeans* seems to be, because we treat our Servants in this Manner, and other Inferiors plac'd under our Discipline. And hence 'tis a Custom in some Places, when Persons are first allow'd the Use of Arms, or come out of their Apprenticeship, and the like, to give them a *Box on the Ear*, in formal Manner, to put them in mind of their former Condition, and to let them understand, that they are above such Treatment for the future. Therefore, to offer such an Affront highly disgraces the Sufferer, and supposes him to be unworthy of bearing Arms, or of being reckon'd amongst free and grown Men. But here we must observe, that such a Blow never appears ignominious and disgraceful, but when it is given before the other Party prepares for Resistance: For thus Slaves and Children are beaten without the Liberty of Opposition. Therefore those who fall by mutual Consent to Fifty Cuffs, and deal freely with each others Face and Head, can, on neither side, complain of an Injury of this affronting Nature. Nor is it easy to conceive how a Man that bears Arms, and is preparing to use them for his Defence, can be capable of receiving a Blow under the same Notion and Aggravation of Contempt. Beside, 'tis a great Mistake to fancy that a Man's Honour is really impair'd by such a Trifle; for Honour would be a most fragile, and a most precarious Good, if 'twere in the Power of every saucy Fellow to diminish, or infringe it. And as for the Contempt which is shewn in such an Action, this may be either quite taken off; or, however, easily repair'd by the Magistrate, by setting a heavy Fine on the Offender, and by enjoining him farther to perform in publick some Marks of Honour and Respect to the Persons whom he hath injur'd. Nor is the Vulgar Notion of any Weight, which fancies the Courage of Men, and especially of Soldiers, to be indamag'd in its Character, by the receiving these kinds of Affronts; and that, therefore, their Credit must be vindicated by Sword and Duel. For that Man shews sufficient Testimonies of his Courage, who bravely maintains and discharges the Office assign'd him by the State [2]. And there are much more noble and more shining Occasions of exercising Valour, than, contrary to the Laws of Reason and of our Country, to pursue an immoderate Passion, or to engage in the Hazard of an unnecessary and unprofitable Combat. Yet if, as it commonly falls out, upon the offering of such an Injury, Swords are immediately drawn, and the Man who thus began the Fray happens to be kill'd, or desperately wounded, 'tis reasonable that the other *Party* should have his Penalty mitigated, upon account of the high Provocation. But 'tis an intolerable Paradox which some maintain, that a Man may fairly kill another, not only to avoid an Affront of this kind, but for the Recovery of his Honour, after the Affront has been actually given, and the Party who offer'd it is fled.

We may add to these Observations, that though the Rate and Estimation of Things is not to be determin'd by the Multitude, but by the Judgment of wise Men, yet, if in any State, the Receipt of some particular Injury is attended with extraordinary Scandal and Disgrace, there ought to be a most severe Punishment ordain'd against Delinquents in this Point; inasmuch as all Men have not Philosophy enough to put up those provoking Indignities; and because it would be inconsistent with the Characters and Stations which some Men are to maintain in the Commonwealth, should they be expos'd to the Contempt and Derision of the meanest Subjects. The Magistrate then hath little Reason to be angry, if he neglecting or refusing to give Redress in Complaints on this Score, a Man asserts his own Honour by what Means he can, though only in Regard to the Opinion of the Vulgar, since the same Opinion would otherwise load him with so much Reproach. Therefore, those Governors who would effectually suppress all Duels and private Combats, ought to enact the most grievous Penalties against those who shall offer such a Blow or other Affront as is reckon'd ignominious in the Opinion of the particular Country. For the Course and Manner of Civil Life will not bear that refin'd Philosophy of *Grotius*; *since Honour is no more than an Opinion of Excellence, and the Sufferer of such an Injury shews himself excellently patient, his Honour is rather increas'd than impair'd* [a].

XIII. From what hath been said it may, likewise, be understood, whether in Cases of Assault, a Man is oblig'd, if he can conveniently, *to betake himself to Flight*, so as that the Slaughter of the Assailant is never justifiable under a Possibility of running from him? Now here 'tis plain, that in a State of Nature the Aggressor hath no *Right*, by which the other Party is bound to decline his Violence in this Matter, rather than oppose it. And the Reason why a Man, (under this Natural Condition) sometimes, chuses rather to fly than fight, is not out of any Favour to him who sets upon him, but because he thinks it most convenient for his own Affairs [3]. Distinct Nations and Kingdoms are set, we know, in this natural State towards each other: And who will ever maintain, that when one King unjustly invades the Realm of another, the injur'd Prince is oblig'd to save himself, if possible, by flying; for fear he should kill some of his Enemies by making Resistance?

But, under Civil Governments, we are to fly, if we can with Convenience, rather than take away the Assailant's Life. Nor can such a Flight be at all base or unworthy of a Man at Arms; inasmuch as it is not undertaken out of Cowardice or Neglect of Duty; and because Reason can never think this a fit Occasion of exerting my Valour, when I only kill a Fellow Subject without any Necessity, from

a Vide *Acts* xvi. 37.

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[1] See Lib. 8. Chap. 4. §. 8. following.

[2] "*It is* a monstrous Injustice, (says *Silhon*) that a Man who is grown grey in the Service, and who has escap'd victorious from "innumerable Battles and Sieges, should be oblig'd to put his Fame and Reputation in Competition against a young Fop, who "has never seen any Field of Battle but a Fencing-School, and whose Courage is only supported by the Agility of his Body, "the Nimbleness of his Hands, and his Address in Pushing." See his *Minister of State*, Part 2. Dis. 1. Page 14. *Edit. de Holl.* 1643.

[3] ——Πόδες ὅπλα λαγῶων, says *Oppian, Cyneget.* Lib. 4. ver. 35. *Hares have their Armour in their Feet.* A needless Quotation.

whom

Punishments for Offences of this kind, so they might farther give a Liberty to all honest Women, to use *Extremities* in their own Defence, upon danger of losing what 'tis impossible for them to recover, and for which no Reparation can be made them. Amongst the *Jews*, as Mr. *Selden* [a] tells us, a Man was allow'd to kill another, not only in his own Defence, but in the Defence of a third Person, if unjustly assaulted, whether with regard to Life, or to Chastity of either kind [b]. And thus the Sentence of *C. Marius* was highly applauded amongst the *Romans*, when he not only absolv'd, but crown'd the Soldier who had kill'd his Nephew, a *Tribune*, or Colonel in the Army, for soliciting him to an unnatural Debauch [c]. [1] St. *Augustine* [d] hath a Saying, that *the Holiness or Purity of the Body is never lost, whilst the Purity of the Mind remains, tho' the Body suffer Violence* [e]. But it follows no more from hence, that forcible Ravishers are not to be repell'd with Extremities, than that because a good Man is translated to eternal Happiness by *Death*, therefore he ought not to defend himself with Violence against a Villain who attempts his Life.

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But 'tis very doubtful, whether in Members of a *Civil State* the ſame violent Procedure is excuſable. It is indeed in common Judgment a moſt high Affront to receive a *Box on the Ear*, and the Reaſon of this Opinion amongſt many of us *Europeans* ſeems to be, becauſe we treat our Servants in this Manner, and other Inferiors plac'd under our Diſcipline. And hence 'tis a Cuſtom in ſome Places, when Perſons are firſt allow'd the Uſe of Arms, or come out of their Apprenticeſhip, and the like, to give them a *Box on the Ear*, in formal Manner, to put them in mind of their former Condition, and to let them underſtand, that they are above ſuch Treatment for the future. Therefore, to offer ſuch an Affront highly diſgraces the Sufferer, and ſuppoſes him to be unworthy of bearing Arms, or of being reckon'd amongſt free and grown Men. But here we muſt obſerve, that ſuch a Blow never appears ignominious and diſgraceful, but when it is given before the other Party prepares for Reſiſtance: For thus Slaves and Children are beaten without the Liberty of Oppoſition. Therefore thoſe who fall by mutual Conſent to Fiſty Cuffs, and deal freely with each others Face and Head, can, on neither ſide, complain of an Injury of this affronting Nature. Nor is it eaſy to conceive how a Man that bears Arms, and is preparing to uſe them for his Defence, can be capable of receiving a Blow under the ſame Notion and Aggravation of Contempt. Beſide, 'tis a great Miſtake to fancy that a Man's Honour is really impair'd by ſuch a Trifle; for [1] Honour would be a moſt fragile, and a moſt precarious Good, if 'twere in the Power of every ſaucy Fellow to diminiſh, or infringe it. And as for the Contempt which is ſhewn in ſuch an Action, this may be either quite taken off; or, however, eaſily repair'd by the Magiſtrate, by ſetting a heavy Fine on the Offender, and by enjoining him farther to perform in publick ſome Marks of Honour and Reſpect to the Perſons whom he hath injur'd. Nor is the Vulgar Notion of any Weight, which fancies the Courage of Men, and eſpecially of Soldiers, to be indamag'd in its Character, by the receiving theſe kinds of Affronts; and that, therefore, their Credit muſt be vindicated by Sword and Duel. For that Man ſhews ſufficient Teſtimonies of his Courage, who bravely maintains and diſcharges the Office aſſign'd him by the State [2]. And there are much more noble and more ſhining Occaſions of exerciſing Valour, than, contrary to the Laws of Reaſon and of our Country, to purſue an immoderate Paſſion, or to engage in the Hazard of an unneceſſary and unprofitable Combat. Yet if, as it commonly falls out, upon the offering of ſuch an Injury, Swords are immediately drawn, and the Man who thus began the Fray happens to be kill'd, or deſperately wounded, 'tis reaſonable that the other *Party* ſhould have his Penalty mitigated, upon account of the high Provocation. But 'tis an intolerable Paradox which ſome maintain, that a Man may fairly kill another, not only to avoid an Affront of this kind, but for the Recovery of his Honour, after the Affront has been actually given, and the Party who offer'd it is fled.

We may add to theſe Obſervations, that though the Rate and Eſtimation of Things is not to be determin'd by the Multitude, but by the Judgment of wiſe Men, yet, if in any State, the Receipt of ſome particular Injury is attended with extraordinary Scandal and Diſgrace, there ought to be a moſt ſevere Puniſhment ordain'd againſt Delinquents in this Point; inaſmuch as all Men have not Philoſophy enough to put up thoſe provoking Indignities; and becauſe it would be inconſiſtent with the Characters and Stations which ſome Men are to maintain in the Commonwealth, ſhould they be expos'd to the Contempt and Deriſion of the meaneſt Subjects. The Magiſtrate then hath little Reaſon to be angry, if he neglecting or refuſing to give Redreſs in Complaints on this Score, a Man aſſerts his own Honour by what Means he can, though only in Regard to the Opinion of the Vulgar, ſince the ſame Opinion would otherwiſe load him with ſo much Reproach. Therefore, thoſe Governors who would effectually ſuppreſs all Duels and private Combats, ought to enact the moſt grievous Penalties againſt thoſe who ſhall offer ſuch a Blow or other Affront as is reckon'd ignominious in the Opinion of the particular Country. For the Courſe and Manner of Civil Life will not bear that refin'd Philoſophy of *Grotius*; *ſince Honour is no more than an Opinion of Excellence, and the Sufferer of ſuch an Injury ſhews himſelf excellently patient, his Honour is rather increas'd than impair*'d [a].

XIII. From what hath been ſaid it may, likewiſe, be underſtood, whether in Caſes of Aſſault, a Man is oblig'd, if he can conveniently, *to betake himſelf to Flight*, ſo as that the Slaughter of the Aſſailant is never juſtifiable under a Poſſibility of running from him? Now here 'tis plain, that in a State of Nature the Aggreſſor hath no *Right*, by which the other Party is bound to decline his Violence in this Matter, rather than oppoſe it. And the Reaſon why a Man, (under this Natural Condition) ſometimes, chuſes rather to fly than fight, is not out of any Favour to him who ſets upon him, but becauſe he thinks it moſt convenient for his own Affairs [3]. Diſtinct Nations and Kingdoms are ſet, we know, in this natural State towards each other: And who will ever maintain, that when one King unjuſtly invades the Realm of another, the injur'd Prince is oblig'd to ſave himſelf, if poſſible, by flying; for fear he ſhould kill ſome of his Enemies by making Reſiſtance?

But, under Civil Governments, we are to fly, if we can with Convenience, rather than take away the Aſſailant's Life. Nor can ſuch a Flight be at all baſe or unworthy of a Man at Arms; inaſmuch as it is not undertaken out of Cowardice or Neglect of Duty; and becauſe Reaſon can never think this a fit Occaſion of exerting my Valour, when I only kill a Fellow Subject without any Neceſſity, from whom

[a] Vide *Acts* xvi. 37.

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[1] See Lib. 8. Chap. 4. §. 8. following.

[2] "It is a monſtrous Injuſtice, (ſays *Silbon*) that a Man who is grown grey in the Service, and who has eſcap'd victorious from "innumerable Battles and Sieges, ſhould be oblig'd to put his Fame and Reputation in Competition againſt a young Fop, who "has never ſeen any Field of Battle but a Fencing-School, and whoſe Courage is only ſupported by the Agility of his Body, "the Nimbleneſs of his Hands, and his Addreſs in Puſhing." See his *Miniſter of State*, Part 2. Dif. 1. Page 14. *Edit. de Holl.* 1643.

[3] ——Πόδες ὅπλα λαγῶων, ſays *Oppian, Cyneget.* Lib. 4. ver. 35. *Hares have their Armour in their Feet.* A needleſs Quotation.

whom the Magiſtrate could have ſufficiently ſecur'd me. We added this Reſtriction, *if we can with Convenience*, becauſe (as hath already been hinted in part) we are not always oblig'd to retreat and to turn our Backs, ſince we thus expoſe ourſelves to a greater Danger of Wounds and Miſchief, as well as to the additional one of falling; and ſince a Man who hath once betaken himſelf to his Heels, if he meet with a Stop, or if the Aggreſſor happen to overtake him, cannot eaſily recover himſelf into a Poſture of Defence. Therefore, in caſe there be not a Place of ſafe Refuge near at hand, he doth not tranſgreſs the Bounds of *innocent Self-defence*, who oppoſes an Aſſailant Breaſt to Breaſt, rather than he will lay himſelf open to his Violence, by running off on a Diſadvantage.

Laſtly, *Grotius* hath done well to cenſure thoſe Authors, who allow that *we may lawfully kill a Man who hath ſaid any ſuch Thing of us, as we think will injure our Reputation and Character with good Men.* For, if the Man hath ſpoken falſe, have we not many more convenient ways of wiping off the Calumny? And, if he hath ſaid nothing but Truth, muſt we ſtudy the Concealment of one Sin by the Commiſſion of another? How much better is *Plato*'s Law [1], *If a Man kill a Slave who hath not injur'd him, only out of Fear he ſhould diſcover ſome baſe Action, or on the like account; he ſhall undergo the ſame Penalty as if he had murther'd a free Subject or Citizen?*.

XIV. All this ſeems plainly enough deducible from Reaſon. But many raiſe a Scruple about theſe Doctrines, in regard to the peculiar Temper and Genius of Chriſtianity, aſſerting, that although it be indeed lawful to kill a Man who unjuſtly attempts our Life, yet 'tis an Action [2] more praiſe-worthy to loſe our own Life in ſuch a Caſe, than to take his. Becauſe he thus dying in the Commiſſion of a Mortal Sin, incurs the Danger of Damnation: And that it is not conſiſtent with Juſtice to rid ourſelves of a leſs Evil, by bringing a greater on another Man. Now, tho' the Solution of this Difficulty doth not properly fall under our Buſineſs; yet we think the Maintainers of this high Notion would do well to conſider, that in the Conſternation of Danger, and in the Heat of fighting, a Man hath little Leiſure for a nice Reflection on ſuch Reaſons; inaſmuch as all his Thoughts and Faculties are taken up with conſulting how to ſave himſelf from preſent Death. Again, the Perſon who is thus aſſaulted, is not always ſo well prepar'd, as not to need ſome farther Time for compoſing his Mind and Conſcience, and for *making up his Bundles*, before he takes his long Journey, as *Varro* [3] ſpeaks. Beſides, it doth not appear very probable, that I ought, in this Caſe, to be more ſolicitous for the Soul of the other Man, than he himſelf is. And, therefore, if he, neglecting this great Concern, invade my Life, ought I to pay ſo precious and irrecoverable a Ranſom, for reſcuing him from the Danger of incurring ſo ſad a State [4]? For it is very doubtful, whether, if I ſhould now ſpare him, to my own Ruin, he will not, for all my Charity, ſtill deſerve, and ſtill meet with the ſame terrible Sentence. 'Tis a Maxim vulgarly known, that no Regard is to be had to ſuch a Danger as a Man throws himſelf into by his own Default, and from which he may deliver himſelf if he pleaſes. Now, in the Caſe before us, provided he draws off, or forbear to treat me in this injurious Manner, the Danger to which he expoſes his Soul, ceaſes as to the preſent Matter. And doth not this Opinion allow greater Favour and Indulgence to Wickedneſs, than to Goodneſs, whilſt it makes the former, as it were, ſacred and inviolable? For, according to ſuch Rules, the moſt holy and virtuous Men would be always oblig'd to yield their Throats to Villains and Murderers; leſt, by reſiſting, they ſhould ſend them immediately on their Road to Hell [a]. The Saying of our Saviour, in which he commands us to *love our Neighbours as ourſelves*, Matt. xxii. 39, ſeems not ſo fitly to be interpreted of the *degree* of Love, as of the *Truth* and *Sincerity*; inaſmuch as no Man diſſembles or counterfits a Paſſion towards himſelf. And that Phraſe, *As thyſelf*, looks like a proverbial Speech, importing a ſincere and hearty Kindneſs [b]. But ſhould we take the Expreſſion in the higheſt Senſe [5], it would ſcarce follow, that ſuppoſing the Love of ourſelves, and of our Neighbour, not capable (in ſome Inſtance) of being anſwer'd both together, the former ought to yield to the latter [6]. Nor are the Proofs which we find ſometim-

a Comp. *Grotius*, L. 1. c. 2. ſ. 8. & c. 3. ſ. 3.
b Vid. 1. *Sam.* xviii. 1, 3.

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1 *De Legib.* Lib. 9. Ἐὰν δέ τις δοῦλον κλείνῃ ἀνδρὸς ἀδικοῦντα, φόβῳ δὲ μὴ μείων τὴς αἰσχρῶν ἔργων καὶ κακῶν ἀπορίᾳ γίγνηται, ἢ τοῦ ἕνεκα ἄλλου τοιούτου, καθάπερ ἂν εἰ πολίτην κλείνας ὑπεῖχε φόνου δίκας, ὡσαύτως καὶ τὸν δοῦλον καὶ τὰ αὐτὰ ἀποθανόντος, ὑπεχέτω.

2 Mr. *Fortſchius*, Profeſſor of Divinity at *Tubinger*, undertakes to defend St. *Ambroſe*, and ſome other Fathers, who maintained, that Chriſtian Charity would not allow a Man to ſlay an unjuſt Aggreſſor, and that he ought rather to ſuffer himſelf to be ſlain. But if we examine the Words of this Divine, *Diſſert.* 1. *in Offic. Ambroſii*, we ſhall find, that after he has diſcourſed long, he does not touch upon the Reaſons of our Author. I find only one thing reaſonable, which I have obſerved above, *Note* 2. Page 182. *viz.* That in following the Principles of Mr. *Pufendorf*, he aſſerts, That he that ſlays his unjuſt Aggreſſor ought to have more than a ſimple Permiſſion.

3 *De Re Ruſticâ*, Lib. 1. Chap. 1. *Annus enim Octogeſimus admonet me, ut ſarcinas colligam, antequam proficiſcar è vitâ.*

4 *Plin.* l. 2. Epiſt. 10. *Parum eſt providum ſperare ex aliis, quod tibi ipſe non præſtes, i. e.* "You are very improvident, "you expect that from others, which you will not do yourſelf." This Paſſage does not make the leaſt to our Author's Purpoſe.

5 If as often as a Man finds himſelf in the ſame Danger as another, he ought indiſpenſibly to reſolve to periſh to ſave his Neighbour, he is obliged to love his Neighbour better than himſelf. Moreover, this Commaud of CHRIST is a general Maxim, which can't be of uſe to determine a particular Caſe, and inveſted with the Circumſtances of all Particulars, ſuch as this, where a Man finds he can't at the ſame time ſatisfy the Love of himſelf and Neighbour; for, all Things elſe being equal, the Love of a Man's Self ought to be preferred, as appears by St. *Paul*'s Words, 2 *Cor.* viii. 13. The Determination of that Caſe, in which there is an Oppoſition between the Love of a Man's Self and Sociableneſs, depends upon other Principles; from which it may be inferred, That as there are ſome Caſes in which the Love of a Man's Self is to be preferred before every other Thing, ſo there are other Caſes, when the Preſervation of another may be preferred before his own. This is taken out of the Apology of our Author, which is in the *Eris Scandica*, §. 32.

6 *Præclarum illud eſt, & ſi quæris, rectum quoque, & verum, ut eos, qui nobis cariſſimi eſſe debeant, æquè ac noſmet ipſos amemus; at verò plus fieri nullo pacto poteſt; nè optandum quidem eſt in amicitia, ut me ille plus quàm ſe, ego illum plus quàm me diligam. Perturbatio vitæ, ſi ita ſit, atque officiorum omnium, conſequatur, i. e.* "Thus much indeed is brave, and right, and true, to

ſometimes alledg'd from *Exodus* xxiii. 4, 5. and *Deuteronomy* xxii. 4. ſufficient to evince, that the Love of our Neighbour ought to take place before our own real Advantage: For it cannot thence be gather'd, that we are firſt to help our Neighbour's Beaſt out of the Ditch, if our own be in the ſame Condition; or that we are oblig'd to give ſuch an Aſſiſtance, when the Buſineſs we muſt neglect for that good Office is of more Conſequence, than the Thing we thus endeavour to ſave or reſcue for another. And, beſides all this, it may very fairly be queſtion'd, whether a Perſon, who aſſaults us in a violent manner, ought to keep the Title of a *Neighbour*, as the Word ſeems to be meant in our Saviour's Command [a].

Lactantius [b] hath cenſur'd *Tully* [1] for deſcribing a *Good Man* to be one *that doth good to as many as poſſible, and that hurts nobody, unleſs provok'd. O what a moſt excellent and moſt true Sentence* (ſays [2] the Father) *hath he ſpoil'd by the Addition of two Words! For what occaſion had he to ſay*, unleſs provok'd? *If a good Man may thus hurt another when provok'd, the very offering that Hurt will make him loſe his Character and Name: It not being leſs evil to return an Injury, than at firſt to give it. For whence ariſe all the Contentions and the Combats which we behold amongſt Men, unleſs from this Miſcarriage, that Impatience oppoſing Wickedneſs, occaſions ſo many Tempeſts in the World? Whereas, if in oppoſing the ſame Wickedneſs we ſhould make uſe of Patience, than which there is no truer Virtue, and none more worthy of human Nature, we ſhould as effectually extinguiſh the ill Deſign, as if we were pouring Water upon Fire.* But indeed, as the Impatiency of the injur'd Party is frequently the occaſion of unneceſſary Combats, which might with Convenience have been avoided; ſo, on the other hand, Patience is not always infallible in the Cure of Malice and Villany. Nor doth the Virtue which, under that Name, is ſo highly recommended to Chriſtians, equally oblige us to the putting up [3] all Injuries promiſcuouſly, without Difference and Diſtinction. He that defends himſelf in a lawful manner, doth not act directly for the Hurt of another, but for his own Preſervation: And he who repels a Wrong is not injurious, but he who offers it. 'Tis one thing to exerciſe an unblameable Defence, and another thing to proſecute an unmerciful Revenge. The latter may be as great a Sin as the firſt Offer of an Injury, but the former can never fall under ſo hard a Cenſure.

But farther, thoſe who maintain that in Caſes of this Nature it is more commendable *to be kill'd* than *to kill* [c], add this Exception, *Unleſs the Party aſſailed be a more uſeful Perſon than the Aſſailant.* As if it were always poſſible for me, under the Apprehenſion of ſo imminent Danger, to weigh my Abilities nicely with thoſe of the other Man, and to determine, whether the World would have more occaſion for his Service than mine! This is beyond diſpute, that he on whom the Safety of many depends, and whoſe Office or Duty is to keep off Violence from others, ought not to reſign his own Life for the ſparing an unjuſt Invader; tho' he ſhould be of ſo mild a Diſpoſition as, with *Piſo* in *Tacitus* [4], *to think it as great a Miſery to kill another, as to die himſelf.* And the Reaſon is evident, becauſe, by throwing himſelf away, he betray'd the Safety of ſo many other Perſons. This is the Caſe of thoſe who accompany Travellers, by way of Guards; as, likewiſe, of Princes, of Generals, and other Commanders, whoſe Deaths are uſually attended with ſo wide a Ruin, and to whom we may apply that Saying of *Lucan*, ℣. 685.

Cum tot in hac anima populorum vita ſaluſque
Pendeat, & tantus caput hoc ſibi fecerit orbis,
Sævitia eſt voluiſſe mori.——

Since one dear Life enſures and guards us all,
And with the World's great Head, the World muſt fall,
'Twere Cruelty to court your Fate [5].

[a] See *Luke* x. 29. *&c.* where, by the Term of *Neighbour*, we are to underſtand every Man who hath need of our Help, and whom we have Opportunity of benefiting.

[b] Inſtitut. L. 6. c. 18.

[c] And that of *Alexander*'s Friends in *Quintus Curtius*, L. 9. c. 6. *What God can ſecure to us a long Enjoyment of this Light, this Bulwark of* Macedon; *when you ſo often, with a kind of Greedineſs, expoſe your Perſon to certain Danger; not reflecting how many Thouſands of Lives you hazard in one?*

" we ſhould love thoſe who ought to be moſt dear to us, as well as ourſelves. But to love them better, is abſurd and impoſſible. " 'Twould be ridiculous for me to wiſh, that my Friend and I ſhould each of us prefer the other's Perſon and Intereſt to his " own; becauſe ſuch a Change of Hearts could not but be follow'd with a Confuſion of all Offices of Life." *Cicero Tuſc. Quæſt.* l. 3. c. 29.

[1] *Tully*'s Words are, *Eum virum bonum eſſe, qui proſit quibus poſſit, noceat nemini, niſi laceſſitus injuriâ.* Our Author might here have oppoſed to this Cenſure of *Lactantius* other Words of *Cicero*, which will ſhew, that that Orator believed, that a good Man ought to ſpare his greateſt Enemies, when he can do it without any Danger to his own Life. *Jugulare civem, nè jure quidem quiſquam bonus vult. Mavult enim commemorare ſe, cum poſſet perdere, peperciſſe, quam cum parcere potuerit, perdidiſſe. Hæc in homines alieniſſimos, denique inimiciſſimos, viri boni faciunt, & hominum exiſtimationis & communis humanitatis cauſa: at cum ipſi nihil alteri ſcientes incommodarint, nihil ipſis jure incommodi cadere poſſit.* Orat. pro Quintio, c. 16.

[2] *Lactantius*'s Words are, *O quàm ſimplicem, veramque ſententiam duorum verborum adjectione corrupit! Quid enim opus fuerat adjungere, Niſi laceſſitas injuriâ?* —— *Nociturum eſſe dixit bonum virum, ſi fuerit laceſſitus; jam ex hoc ipſo viri boni nomen amittit, neceſſe eſt, ſi nocebit. Non minus enim mali eſt, referre injuriam, quam inferre. Nam unde certamina inter homines, unde pugnæ, contentioneſque naſcuntur, niſi quod improbitati oppoſita impatientia, magnas ſæpe concitat tempeſtates? Quod ſi patientiam, quâ virtute nihil verius nihil homine dignus inveniri poteſt, improbitati oppoſueris, extinguetur, protinus, tanquam igni aquam ſuperfuderis.*

[3] This may be inferred from the Words of CHRIST, *Matth.* v. 39, 40. in which Patience is moſt earneſtly recommended. For that divine Teacher ſays not, *If any one will ſlay, wound, or ſmite you mortally, bear it patiently*; but, *If any one ſmite you on the right Cheek, turn to him the other alſo*; for a Blow on the Cheek is a ſmall Injury in itſelf, and eaſy to be born. Moreover, in theſe Words there is a proverbial Expreſſion, which imports thus much, That rather than revenge ourſelves of them that have done us any perſonal Wrong, we ſhould ſuffer ourſelves to receive ſome new Injuries. Nor doth JESUS CHRIST ſay, *If any Man will take away all your Goods, or the greateſt Part of them, do not reſiſt the Spoiler, nor oppoſe his Injuſtice, neither by your own Act and Deed, nor by ſeeking Protection from the Magiſtrate*; but, *If any Man ſue you at the Law, and take away thy Coat, let him take thy Cloak alſo, i. e.* rather than engage thyſelf in a Law-ſuit for ſo ſmall a Matter, be ready to undergo a freſh Loſs. See *Grotius*, and Mr. *Le Clerc* on this Place. The Heathens alſo acknowledge, that we ought, ſometimes, though not always, to relax from ſomething of our Right. See *Cicero De Offic.* Lib. 2. c. 18.

[4] *Tacitus*'s Words are, *Si nobis aut perire hodiè neceſſe eſt, aut quod æquè apud bonos miſerum eſt, occidere.* Hiſt. Lib. 1. c. 29.

[5] See *Grotius*, Lib. 1. c. 1. §. 8, 9. with my Notes.

whom the Magiſtrate could have ſufficiently ſecur'd me. We added this Reſtriction, *if we can with Convenience*, becauſe (as hath already been hinted in part) we are not always oblig'd to retreat and to turn our Backs, ſince we thus expoſe ourſelves to a greater Danger of Wounds and Miſchief, as well as to the additional one of falling; and ſince a Man who hath once betaken himſelf to his Heels, if he meet with a Stop, or if the Aggreſſor happen to overtake him, cannot eaſily recover himſelf into a Poſture of Defence. Therefore, in caſe there be not a Place of ſafe Refuge near at hand, he doth not tranſgreſs the Bounds of *innocent Self-defence*, who oppoſes an Aſſailant Breaſt to Breaſt, rather than he will lay himſelf open to his Violence, by running off on a Diſadvantage.

Laſtly, *Grotius* hath done well to cenſure thoſe Authors, who allow that *we may lawfully kill a Man who hath ſaid any ſuch Thing of us, as we think will injure our Reputation and Character with good Men.* For, if the Man hath ſpoken falſe, have we not many more convenient ways of wiping off the Calumny? And, if he hath ſaid nothing but Truth, muſt we ſtudy the Concealment of one Sin by the Commiſſion of another? How much better is *Plato*'s Law [1], *If a Man kill a Slave who hath not injur'd him, only out of Fear he ſhould diſcover ſome baſe Action, or on the like account; he ſhall undergo the ſame Penalty as if he had murther'd a free Subject or Citizen?*.

XIV. All this ſeems plainly enough deducible from Reaſon. But many raiſe a Scruple about theſe Doctrines, in regard to the peculiar Temper and Genius of Chriſtianity, aſſerting, that although it be indeed lawful to kill a Man who unjuſtly attempts our Life, yet 'tis an Action [2] more praiſe-worthy to loſe our own Life in ſuch a Caſe, than to take his. Becauſe he thus dying in the Commiſſion of a Mortal Sin, incurs the Danger of Damnation: And that it is not conſiſtent with Juſtice to rid ourſelves of a leſs Evil, by bringing a greater on another Man. Now, tho' the Solution of this Difficulty doth not properly fall under our Buſineſs; yet we think the Maintainers of this high Notion would do well to conſider, that in the Conſternation of Danger, and in the Heat of fighting, a Man hath little Leiſure for a nice Reflection on ſuch Reaſons; inaſmuch as all his Thoughts and Faculties are taken up with conſulting how to ſave himſelf from preſent Death. Again, the Perſon who is thus aſſaulted, is not always ſo well prepar'd, as not to need ſome farther Time for compoſing his Mind and Conſcience, and for *making up his Bundles*, before he takes his long Journey, as *Varro* [3] ſpeaks. Beſides, it doth not appear very probable, that I ought, in this Caſe, to be more ſolicitous for the Soul of the other Man, than he himſelf is. And, therefore, if he, neglecting this great Concern, invade my Life, ought I to pay ſo precious and irrecoverable a Ranſom, for reſcuing him from the Danger of incurring ſo ſad a State [4]? For it is very doubtful, whether, if I ſhould now ſpare him, to my own Ruin, he will not, for all my Charity, ſtill deſerve, and ſtill meet with the ſame terrible Sentence. 'Tis a Maxim vulgarly known, that no Regard is to be had to ſuch a Danger as a Man throws himſelf into by his own Default, and from which he may deliver himſelf if he pleaſes. Now, in the Caſe before us, provided he draws off, or forbear to treat me in this injurious Manner, the Danger to which he expoſes his Soul, ceaſes as to the preſent Matter. And doth not this Opinion allow greater Favour and Indulgence to Wickedneſs, than to Goodneſs, whilſt it makes the former, as it were, ſacred and inviolable? For, according to ſuch Rules, the moſt holy and virtuous Men would be always oblig'd to yield their Throats to Villains and Murderers; leſt, by reſiſting, they ſhould ſend them immediately on their Road to Hell [a]. That Saying of our Saviour, in which he commands us to *love our Neighbours as ourſelves*, Matt. xxii. 39, ſeems not ſo fitly to be interpreted of the *degree* of Love, as of the *Truth* and *Sincerity*; inaſmuch as no Man diſſembles or counterfrits a Paſſion towards himſelf. And that Phraſe, *As thyſelf*, looks like a proverbial Speech, importing a ſincere and hearty Kindneſs [b]. But ſhould we take the Expreſſion in the higheſt Senſe [5], it would ſcarce follow, that ſuppoſing the Love of ourſelves, and of our Neighbour, not capable (in ſome Inſtance) of being anſwer'd both together, the former ought to yield to the latter [6]. Nor are the Proofs which we find ſometimes

a Comp. *Grotius*, L. 1. c. 2. ſ. 8. & c. 3. ſ. 3.
b Vid. 1. *Sam.* xviii. 1, 3.

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1 *De Legib.* Lib. 9. Ἐὰν δ' τὶς δῆλον κλείνῃ ωνδὲν ἀδικῆνλα, φόβῳ δ' μὴ μλωνπὶς αἰσχρῶν ἔργων καὶ κακῶν ἀνπῦ γίγνηπαι, ἢ πῖς ἕνεκα ἄλλε πινός, καθάπερ ἂν εἰ πολίπλω κλείνας ὑπεῖχε φόνε δίκας, ὡσαύπως καὶ τὸν πινὸς δῆλα κπ' τὰ αὐπὰ ἀποθανόνπος, ἔπω ὑπεχέπω.

2 Mr. *Fortſchius*, Profeſſor of Divinity at *Tubinger*, undertakes to defend St. *Ambroſe*, and ſome other Fathers, who maintained, that Chriſtian Charity would not allow a Man to ſlay an unjuſt Aggreſſor, and that he ought rather to ſuffer himſelf to be ſlain. But if we examine the Words of this Divine, *Diſſert.* 1. *in Offic. Ambroſii*, we ſhall find, that after he has diſcourſed long, he does not touch upon the Reaſons of our Author. I find only one thing reaſonable, which I have obſerved above, §. 5. *Note* 2. Page 182. *viz.* That in following the Principles of Mr. *Pufendorf*, he aſſerts, That he that ſlays his unjuſt Aggreſſor, ought to have more than a ſimple Permiſſion.

3 *De Re Ruſticâ*, Lib. 1. Chap. 1. *Annus enim Octogeſimus admonet me, ut ſarcinas colligam, antequam proficiſcar è vitâ.*

4 *Plin.* l. 2. Epiſt. 10. *Parum eſt providum ſperare ex aliis, quod tibi ipſe non præſtes, i. e.* "You are very improvident, if you expect that from others, which you will not do yourſelf." This Paſſage does not make the leaſt to our Author's Purpoſe.

5 If as often as a Man finds himſelf in the ſame Danger as another, he ought indiſpenſibly to reſolve to periſh to ſave him, he is obliged to love his Neighbour better than himſelf. Moreover, this Commaud of CHRIST is a general Maxim, which can't be of uſe to determine a particular Caſe, and inveſted with the Circumſtances of all Particulars, ſuch as this, where a Man finds he can't at the ſame time ſatisfy the Love of himſelf and Neighbour; for, all Things elſe being equal, the Love of a Man's Self ought to be preferred, as appears by St. *Paul*'s Words, 2 *Cor.* viii. 13. The Determination of that Caſe, in which there is an Oppoſition between the Love of a Man's Self and Sociableneſs, depends upon other Principles; from which it may be inferred, That as there are ſome Caſes in which the Love of a Man's Self is to be preferred before every other Thing, ſo there are other Caſes, when the Preſervation of another may be preferred before his own. This is taken out of the Apology of our Author, which is in the *Eris Scandica*, §. 32.

6 *Præclarum illud eſt, & ſi quæris, rectum quoque, & verum, ut eos, qui nobis cariſſimi eſſe debeant, æquè ac noſmet ipſos amemus; at verò plus fieri nullo pacto poteſt; nè optandum quidem eſt in amicitia, ut me ille plus quàm ſe, ego illum plus quàm me amemus; Perturbatio vitæ, ſi ita ſit, atque officiorum omnium, conſequatur, i. e.* "Thus much indeed is brave, and right, and true, that

ſometimes alledg'd from *Exodus* xxiii. 4, 5. and *Deuteronomy* xxii. 4. ſufficient to evince, that the Love of our Neighbour ought to take place before our own real Advantage: For it cannot thence be gather'd, that we are firſt to help our Neighbour's Beaſt out of the Ditch, if our own be in the ſame Condition; or that we are oblig'd to give ſuch an Aſſiſtance, when the Buſineſs we muſt neglect for that good Office is of more Conſequence, than the Thing we thus endeavour to ſave or reſcue for another. And, beſides all this, it may very fairly be queſtion'd, whether a Perſon, who aſſaults us in a violent manner, ought to keep the Title of a *Neighbour*, as the Word ſeems to be meant in our Saviour's Command [a].

Lactantius [b] hath cenſur'd *Tully* [1] for deſcribing a *Good Man* to be one *that doth good to as many as poſſible, and that hurts nobody, unleſs provok'd. O what a moſt excellent and moſt true Sentence* (ſays [2] the Father) *hath he ſpoil'd by the Addition of two Words! For what occaſion had he to ſay*, unleſs provok'd? *If a good Man may thus hurt another when provok'd, the very offering that Hurt will make him loſe his Character and Name: It not being leſs evil to return an Injury, than at firſt to give it. For whence ariſe all the Contentions and the Combats which we behold amongſt Men, unleſs from this Miſcarriage, that Impatience oppoſing Wickedneſs, occaſions ſo many Tempeſts in the World? Whereas, if in oppoſing the ſame Wickedneſs we ſhould make uſe of Patience, than which there is no truer Virtue, and none more worthy of human Nature, we ſhould as effectually extinguiſh the ill Deſign, as if we were pouring Water upon Fire.* But indeed, as the Impatiency of the injur'd Party is frequently the occaſion of unneceſſary Combats, which might with Convenience have been avoided; ſo, on the other hand, Patience is not always infallible in the Cure of Malice and Villany. Nor doth the Virtue which, under that Name, is ſo highly recommended to Chriſtians, equally oblige us to the putting up [3] all Injuries promiſcuouſly, without Difference and Diſtinction. He that defends himſelf in a lawful manner, doth not act directly for the Hurt of another, but for his own Preſervation: And he who repels a Wrong is not injurious, but he who offers it. 'Tis one thing to exerciſe an unblameable Defence, and another thing to proſecute an unmerciful Revenge. The latter may be as great a Sin as the firſt Offer of an Injury, but the former can never fall under ſo hard a Cenſure.

But farther, thoſe who maintain that in Caſes of this Nature it is more commendable *to be kill'd* than *to kill* [c], add this Exception, *Unleſs the Party aſſailed be a more uſeful Perſon than the Aſſailant.* As if it were always poſſible for me, under the Apprehenſion of ſo imminent Danger, to weigh my Abilities nicely with thoſe of the other Man, and to determine, whether the World would have more occaſion for his Service than mine! This is beyond diſpute, that he on whom the Safety of many depends, and whoſe Office or Duty is to keep off Violence from others, ought not to reſign his own Life for the ſparing an unjuſt Invader; tho' he ſhould be of ſo mild a Diſpoſition as, with *Piſo* in *Tacitus* [4], *to think it as great a Miſery to kill another, as to die himſelf.* And the Reaſon is evident, becauſe, by throwing himſelf away, he betray'd the Safety of ſo many other Perſons. This is the Caſe of thoſe who accompany Travellers, by way of Guards; as, likewiſe, of Princes, of Generals, and other Commanders, whoſe Deaths are uſually attended with ſo wide a Ruin, and to whom we may apply that Saying of *Lucan*, V. 685.

Cum tot in hac anima populorum vita ſaluſque
Pendeat, & tantus caput hoc ſibi fecerit orbis,
Sævitia eſt voluiſſe mori.——

Since one dear Life enſures and guards us all,
And with the World's great Head, the World muſt fall,
'Twere Cruelty to court your Fate [5].

[a] See *Luke* x. 29, *&c.* where, by the Term of *Neighbour*, we are to underſtand every Man who hath need of our Help, and whom we have Opportunity of benefiting.

[b] Inſtitut. L. 6. c. 18.

[c] And that of *Alexander*'s Friends in *Quintus Curtius*, L. 9. c. 6. *What God can ſecure to us a long Enjoyment of this Light, this Bulwark of* Macedon; *when you ſo often, with a kind of Greedineſs, expoſe your Perſon to certain Danger; not reflecting how many Thouſands of Lives you hazard in one?*

" we ſhould love thoſe who ought to be moſt dear to us, as well as ourſelves. But to love them better, is abſurd and impoſſible. " 'Twould be ridiculous for me to wiſh, that my Friend and I ſhould each of us prefer the other's Perſon and Intereſt to his " own; becauſe ſuch a Change of Hearts could not but be follow'd with a Confuſion of all Offices of Life." *Cicero Tuſc. Quæſt.* l. 3. c. 29.

[1] *Tully*'s Words are, *Eum virum bonum eſſe, qui proſit quibus poſſit, noceat nemini, niſi laceſſitus injuriâ.* Our Author might here have oppoſed to this Cenſure of *Lactantius* other Words of *Cicero*, which will ſhew, that that Orator believed, that a good Man ought to ſpare his greateſt Enemies, when he can do it without any Danger to his own Life. *Jugulare civem, nè jure quidem quiſquam bonus vult. Mavult enim commemorare ſe, cum poſſet perdere, peperciſſe, quam cum parcere potuerit, perdidiſſe. Hæc in homines alieniſſimos, denique inimiciſſimos, viri boni faciunt, & hominum exiſtimationis & communis humanitatis cauſa: ut cum ipſi nihil alteri ſcientes incommodarint, nihil ipſis jure incommodi cadere poſſit.* Orat. pro Quintio, c. 16.

[2] *Lactantius*'s Words are, *O quàm ſimplicem, veramque ſententiam duorum verborum adjectione corrupit! Quid enim opus fuerat adjungere, Niſi laceſſitas injuriâ? —— Nociturum eſſe dixit bonum virum, ſi fuerit laceſſitus; jam ex hoc ipſo viri boni nomen amittit, neceſſe eſt, ſi nocebit. Non minus enim mali eſt, referre injuriam, quam inferre. Nam unde certamina inter homines, unde pugnæ, contentioneſque naſcuntur, niſi quod improbitati oppoſita impatientia, magnas ſæpe concitat tempeſtates? Quod ſi patientiam, quâ virtute nihil verius nihil homine dignus inveniri poteſt, improbitati oppoſueris, extinguetur, protinus, tanquam igni aquam ſuperfuderis.*

[3] This may be inferred from the Words of CHRIST, *Matth.* v. 39, 40. in which Patience is moſt earneſtly recommended. For that divine Teacher ſays not, *If any one will ſlay, wound, or ſmite you mortally, bear it patiently*; but, *If any one ſmite you on the right Cheek, turn to him the other alſo*; for a Blow on the Cheek is a ſmall Injury in itſelf, and eaſy to be born. Moreover, in theſe Words there is a proverbial Expreſſion, which imports thus much, That rather than revenge ourſelves of them that have done us any perſonal Wrong, we ſhould ſuffer ourſelves to receive ſome new Injuries. Nor doth JESUS CHRIST ſay, *If any Man will take away all your Goods, or the greateſt Part of them, do not reſiſt the Spoiler, nor oppoſe his Injuſtice, neither by your own Act and Deed, nor by ſeeking Protection from the Magiſtrate*; but, *If any Man ſue you at the Law, and take away thy Coat, let him take thy Cloak alſo, i. e.* rather than engage thyſelf in a Law-ſuit for ſo ſmall a Matter, be ready to undergo a freſh Loſs. See *Grotius*, and Mr. *Le Clerc* on this Place. The Heathens alſo acknowledge, that we ought, ſometimes, though not always, to relax from ſomething of our Right. See *Cicero De Offic.* Lib. 2. c. 18.

[4] *Tacitus*'s Words are, *Si nobis aut perire hodiè neceſſe eſt, aut quod æquè apud bonos miſerum eſt, occidere.* Hiſt. Lib. 1. c. 29.

[5] See *Grotius*, Lib. 1. c. 1. §. 8, 9. with my Notes.

But it cannot be hence inferr'd, that ſuppoſing a Man to have the Lives of none, or of very few depending on him, ſuch an one may not fairly kill an Aſſailant, who is, perhaps, of more Service to the Publick, or in whoſe Life the Intereſt of more Perſons are concern'd. For, at this rate, a Man who is either unmarried, or without Children, muſt, in no Caſe, kill an Invader, who hath a Family, for fear his Wife and Children ſhould be left Deſolate, and in Want. But if the Affection and Concern for theſe Relations could not hinder the injurious Party from attempting his Villany, what Reaſon hath the other Perſon to give his own Life for the Prevention of their Misfortune and Trouble?

Plato [1] in his Syſtem of Laws, hath been very nice and exact on this Point: *If the Life of a Son*, ſays he, *be attempted by his Parents, did ever any Law allow him in ſuch a Caſe to kill thoſe who gave him Being, although in his own Defence? So far from this, that he is obliged and commanded to ſuffer all Extremities, rather than to engage in ſo unnatural a Deed. But if, upon account of Tumult, or Sedition, or the like Occaſion, a Brother kills his Brother, to preſerve himſelf from his Violence and Aſſault, he ſhall be equally guiltleſs as if he had ſlaughter'd an Enemy.* As for the additional Clauſe, *If a Slave in his own Defence kill a free Man, he ſhall be obnoxious to the ſame Penalties as a Parricide*, this was not the Fault of the Lawgiver, but of the Age.

XV. From what hath been obſerv'd on this Head, it appears, that a Slaughter committed within the juſt Bounds of Self-defence, doth not taint the Author with any real Blemiſh or Guilt; and, conſequently, doth not render him obnoxious to any Puniſhment; and that it is not to be rank'd amongſt thoſe Actions, which, though they are in themſelves ſinful, yet human Laws favour with Impunity, upon account of the violent and almoſt unavoidable Tranſports of Paſſion: As when they allow the Huſband to kill the Adulterer [2]. If, therefore, in any Places ſome Penalty or Expiation hath been enjoin'd the Actors of juſt Slaughter, it either belong'd not to the Caſe of *innocent Defence*, or it was introduc'd without any true Ground or Reaſon; or, laſtly, it might be apply'd for the making Men underſtand how heinous a Crime it was to kill unjuſtly, [3] when the killing, even upon a juſt Account, ſtood in need of ſome Satisfaction. [4] *Philo* the Jew, in his Life of *Moſes*, Lib. i. tells us, *He commanded the Prieſt to perform a ſolemn Purgation on thoſe who return'd freſh from the Slaughter of their Enemies;*

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[1] *De LL.* Lib. 6. Οὐδ' ἀμωμοφίῳ θάνατον, μέλλοντι ὑπὸ τ γονέων τελευτήσειν, παρείξῃ νόμος ἀδεὶς κτεῖναι τ πατέρα, ἢ μητέρα, τὸν εἰς φῶς τ ἐκείνῳ φῦσιν ἀγαγόντας, ἀλλ' ὑπομείναντα τἀ πάντα πάσχειν, εἴ τι δρᾶν τοιοῦτον. Ἀδελφὸς ὃ ἂν ἀδελφὸν κτείνῃ, ἐν στάσει μοχθηρᾷ γενομένης, ἢ πῃ τεύτῳ τιθεὶς ἀμωμοφίῳ ἄρχοντα χειρῶν κρείττονα, καθάπερ πολέμιον ἀποκτείνας, ἔστω καθαρός. Ἐὰν ὃ αὖ δοῦλος ἐλευθέρου ἀμωμοφίου ἀποκτείνῃ καθάπερ ὁ κτείνας πατέρα, τοῖς αὐτοῖς ἔνοχος ἔστω νόμοις.

To treat of this Queſtion more exactly, I obſerve, That in truth the Laws may, by reaſon of ſome Inconveniences, punish all Children, who ſhall ſlay their Father or Mother, though in Defence of their own Perſons; becauſe we may ſuppoſe the Caſe ſo very rare, that it would be to no Purpoſe to make ſuch an Exception, which might be an Occaſion of ſuffering a real Parricide to go unpuniſhed. But if the Thing be conſidered as it is in itſelf, without any relation to Civil Tribunals, we muſt, in my Judgment, thus think of it. 1. If a Father be hurried by his Paſſions, which he can't maſter, to kill his Son, and knows not what he is doing, as I have ſpoken in the Caſe of one attacked by his Sovereign, *Note* 1. of §. 5. ſo I ſay here, that he ought to ſuffer himſelf to be ſlain, rather than imbrue his Hands in his Father's Blood. 2. But if we have reaſon to fear, that a Father is inclined, with ſome Knowledge and Deliberation, to put us in Danger of our Life, we ought to avoid the leaſt Occaſions to provoke him, and abſtain from doing many of thoſe things which we have Right to do, if we were concerned with any other. 3. But if, after we have done all on our Part, we ſee ourſelves infallibly in danger to loſe our Life by the Hand of him, who, above all Men, is bound to preſerve it, though, in this Caſe, we may, if we will, ſuffer ourſelves to be ſlain, out of Exceſs of Love and Kindneſs, and in regard to him from whom we have derived our Being, yet I do not believe him guilty of Murder and Parricide, if, in defending himſelf, he ſlays the Aggreſſor. The Right of defending ourſelves is prior to any Obligation we have to another; and a Father, if he ſo far forgets himſelf, as to fall into ſuch an extravagant Paſſion againſt his own Son, deſerves not to be looked upon as a Father. The innocent Son is, in this Caſe, truly worthy of Compaſſion; ſince, while the Father ſeems to have renounc'd all Sentiments of Tenderneſs, he himſelf cannot, without great Reluctance, follow that natural Inclination, which leads every Man ſo ſtrongly to preſerve his own Life. Indeed the Caſe may happen ſeldom; and a Son, unleſs he be as unnatural as his Father, will defend himſelf but feebly, when he ſees how fatal his Defence may be to an Aggreſſor he would ſave, tho' unworthy. But it is enough that the Thing be poſſible: And, therefore, the Queſtion ought not to be omitted, under Pretence that the Deciſion may be abus'd; nor decided, upon the ſpecious Pretences ariſing from the Relation between Father and Son. The Duties between theſe two are reciprocal; and if the Balance inclines more to one Side than the other, there is no Reaſon we ſhould throw in more Weight. The Principles of the Law of Nature, well examin'd, will always furniſh out Caſes curious and difficult enough to employ our Judgment in determining the juſt Bounds of particular Duties, as well as reconciling thoſe which ſeem to interfere. To conclude, I may here produce the Authority of ſeveral Writers, who have maintain'd the Affirmative purely and ſimply, without any of the Diſtinctions or Reſtrictions I have laid down. I find in *Sophocles* a Paſſage, which *Grotius* has not forgot, in his *Excerpta ea vet. Com. & Trag.* *Oedipus* is there introduc'd, ſaying, *That tho' he had known his Father, when he kill'd him in his own Defence, he had not been guilty of Parricide:*

——Καὶ τοι πῶς ἐγὼ κακὸς εἰμι,
Ὅστις παθὼν μὲν, αὐτὸς ὢν δ' ἐκτείνατο
Ἔφρασαν, οὐδ' ἂν ὧδ' ἐπιγνόμην κακός.

Antigon. ver. 260, & *ſeq.* And a little lower he expreſſes himſelf more ſtrongly, ver. 984, & *ſeq.* Amongſt the Moderns, ſee, for Example, M. *Gundling*, Profeſſor at *Hall*, *Jus Natur.* Cap. 9. §. 9. M. *Wherner*, Profeſſor at *Wittenberg*, *Diſ. Jur. Nat.* 8. §. 20. *Gribner Juriſpr. Nat.* Lib. i. Cap. v. §. 2. And the deceas'd M. *Voet in Pandect. Tit. de Leg. pomp. de Parricid.* N. 6.

[2] Of which ſee Lib. 20, 22, 24. 32. D. ad *L. Jul. de Adulter.* and *Lyſias Orat.* 1. *pro cæde Eratoſthen.* where he ſhews, that by the *Attick* Conſtitutions it was allowable to kill, if catch'd in the Fact, the Abuſer, not only of a Wife, but of a Concubine; and, as *Demoſthenes* extends it, of a Mother, a Siſter, or a Daughter. And the Reaſon he gives is this; *Becauſe whatſoever Perſons we fight for againſt our Enemies, to reſcue them from Injury or Affront, for the ſake of the ſame Perſons the Law permits us to kill even Friends, if they offer them any unjuſt Violence. For ſince Enemies and Friends are to be judg'd and diſtinguiſh'd by their Actions, thoſe who practiſe Hoſtility, we may proſecute it in hoſtile manner.* Amongſt the *Perſians*, he that kills the Adulterer, and the Adultereſs, at the ſame time, is preſented with a new Garment, as a Reward of his Service to the State. Add, *Olear. Itin. Perſic.* L. 5. c. 22. *Val. Max.* L. 9. c. 1. ſ. 13. *Ant. Matthæ. de Crimin.* ad L. 48. D. tit. 5. c. 3. ſ. 13, &c.

[3] *Porphyry*, as Mr. *Hertius* obſerves, ſpeaks very well, That the Reaſon why Lawgivers command, that Murthers committed without any Deſign, and upon Neceſſity, ſhould not be wholly exempted from Puniſhment, is, for fear it ſhould be a Pretence to any to attempt it on ſet Purpoſe. Ἐπεὶ καὶ τ ἀκούσιον φόνον οὐκ ἔξω πάσης ζημίας κατέστησαν οἱ νομοθέται, ὅπως μηδὲ τοῦτο ἐπίδοιεν τοῖς ἐπιτήδες δρᾶν τὸ ἔργα μιμεῖσθαι προαιρουμένοις. *De Abſtinent.* L. 1.

[4] The hiſtorical Remarks made here by the Author had better have been placed under a Note. See Numb. xxxv. 10, &c. Deut. xix. 1, &c.

beginning

becauſe, tho' the Laws did, by no means, forbid ſuch Attempts, yet he who kills a Man, tho' by Compulſion, and in repelling an Injury, ſeems to contract ſome Stain, upon account of the near Relation which Mankind bear to one another, being all deriv'd originally from the ſame Head. And this, therefore, was the reaſon of the Ceremony to take off the very Appearance and Shadow of Guilt. As for the Benefit of the *Aſylums*, or Places of Refuge and Sanctuary, a Man who preſerv'd his own Life by the Death of an Aſſailant, ſeems to have had no occaſion for theſe Reliefs; but only he who had been the Author of another's Death by an involuntary Stroke; yet ſuch as, upon exact Care and Diligence, he might have forborn and avoided. That Place in the Firſt of the *Chronicles*, Chap. xxix. ver. 3. doth not belong to the Caſe of *Self-defence*; and [1] the Building of a Temple ſeems to have been forbidden *David*, not ſo much becauſe he had gather'd any Pollution by his Slaughters in War, as becauſe he who had acquir'd ſufficient Honour to himſelf by martial Atchievements, ought not to have robb'd his Son of ſuch an Occaſion of growing glorious by the Works of Peace. The Scholiaſt on the *Oreſtes* of *Euripides* informs us, that 'twas an antient Cuſtom amongſt the *Grecians*, for thoſe who kill'd any one upon a juſt Reaſon, immediately to ſhew their Weapons to the *Sun* for a Token of their Innocence; as deſiring him to be Witneſs of the Fact, who, in their Opinion, *overlook'd and overheard all things.* And, beſides this Formality, they apply'd ſome Means of Expiation, and were oblig'd to undergo one Year's Baniſhment: Which Baniſhment is, likewiſe, mention'd by *Plato de LL.* l. ix. Vid. l. xvi. ſ. 8. *D. de Pœnis, & Grot. in flor. Sparſ. ad loc.* And we learn farther from *Demoſthenes*, and from the Scholiaſt on *Ariſtophanes*, that at *Athens*, when a Man had kill'd another, and pleaded to have done it juſtly, the Cauſe was try'd in a peculiar Court, call'd the *Delphinian*, with Alluſion to the Oracle of *Apollo* at *Delphi*. Amongſt the *Ethiopians*, whoever had ſlain a Man involuntarily, quitted his Country, till ſuch time as the *Gymnoſophiſts* had purg'd him by their Ceremonies [a]. And we find *Æneas* in *Virgil* declaring in reference to the holy Reliques,

Me bello è tanto digreſſum & cæde recenti
Attrectare nefas; donec me flumine vivo
Abluero.

In me 'tis impious holy Things to bear,
Red as I am with Slaughter, new from War:
Till in ſome living Stream I cleanſe the Guilt.
Mr. *Dryden.*

In the 18th Canon of the Council of *Nantes*, held under Pope *Formoſus*, we have this nice Injunction; *If a Man by accident, and unwillingly, hath been Author of another's Death, let him repent forty Days with Bread and Water; when this Courſe is over, let him for two Years be ſeparated from the Congregation of the Faithful, and let him neither communicate nor offer. After the ſpace of two Years, let him offer with the Congregation, but not communicate. At the end of the five Years let him be receiv'd to full Communion, but let his Abſtinence from Meats continue at the Diſcretion of the Prieſt.* Yet neither doth this Canon touch the Caſe of Defence, nor can it well be vindicated from too much Rigor. Thus too what we meet with in the Laws of the *Lombards* [b], ſeems not capable of being extended to the Buſineſs in hand, or if it be, may deſervedly fall under the Cenſure of unreaſonable Severity. *De Mornay* [c] tells us, that 'tis religiouſly obſerv'd by the Judges in *France*, ſcarce ever to abſolve Perſons in Cauſes of this Nature, without enjoining them, at the ſame time, to beſtow peculiar Largeſſes upon the Poor, and *ſometimes to be at the Charge of Chriſtian Sacrifices, or Propitiations for the Soul of the Party kill'd.* And tho' the latter Part of this Cuſtom ſmells too much of Superſtition; yet every good Man hath reaſon to be deeply afflicted and concern'd, when he is put under the Neceſſity of depriving another of Life, by any ſuch unfortunate Means.

XVI. Indeed, the Defence of Life, of Limbs, and of Chaſtity, as of irreparable Goods, admits ſo large a Degree of Favour, as to ſtand exempted from one of the poſitive Divine Laws, and to be conſtrued as no Breach of the Sabbath. *Vide* 1 *Maccab.* i. 32, *&c. Joſeph.* Antiq. L. xii. c. 8. [2] For thoſe who maintain'd the contrary Opinion, are not without Reaſon cenſur'd by *Plutarch* and *Agatharchides*, as *Joſephus* obſerves in his *Antiquities* [d]. And, therefore, 'tis ſtrange, that the ſame Author, in his firſt Book againſt *Appion*, ſhould celebrate, as worthy of all Commendation, that Act of the *Jews*, which we read of in the Hiſtory of the *Maccabees*, whilſt refuſing to make Reſiſtance on the Sabbath-Day, they preferr'd this Command of GOD to their own Lives, and to the Liberty of their Country: Unleſs he is to be underſtood as rather praiſing the good Intention than the Deed itſelf.

But in reference to the Defence of Things or Goods, which, as they may be reſtor'd or compenſated, ſo they ſeem not all of them abſolutely neceſſary to Man's Happineſs, it will bear a Diſpute, whether *theſe* may be preſerv'd and ſecur'd by the Uſe of Extremities: Eſpecially ſince many are very ready to approve of what *Taxilles* ſaid to *Alexander* in *Plutarch*, *What occaſion is there*, Alexander, *that you and I muſt needs quarrel and fight; ſince you neither came to rob us of our Water, nor of our Food, which are the only two Things that Men in their Wits think worth contending for?*

Euripid. Supplic. ver. 775.
Τὸ γὰρ μόνον βεβοῖς, *&c.*

For, Life alone's th' irreparable Loſs;
Breaches of Fortune have an eaſy Cure.

The Judgment and the Cuſtom of all Nations is manifeſt in this Point, whilſt they allow Men to

[a] Vid. *Philoſt.* de Vit. *Apolon.* l. 6.
[b] L. 1. tit. 9. l. 19. & capit. *Carol.* l. 4. tit. 27. & lib. 7. tit. 295.
[c] Ad. Leg. 3. *D. de Juſt. & Jure*, in which there appears but little Superſtition.
[d] L. 12. c. 1. Add. *Grot.* ad 1 *Maccab.* ii. 37.

[1] See M. *Le Clerc* upon that Place, who gives another Reaſon more apparent.
[2] I may add, That as Mr. *Le Clerc* obſerves, *Jeſus Chriſt* alludes to this Opinion of the *Jews*, when he ſays to them who were offended becauſe he did Cures upon the Sabbath-Day, *Is it lawful to do good on the Sabbath-Day, or to do evil, to ſave Life, or to deſtroy it?* Mark iii. 4.

fight for their Goods and Poſſeſſions, even to the Slaughter of thoſe who wrongfully invade them. It is plain, likewiſe, that moſt War is engag'd in, not for the ſake of deſtroying Mens Lives, but of winning their Lands or their Wealth. And it would be reckon'd a very pleaſant Humour in an Enemy, if to hinder himſelf from being oppos'd by violent Means, he ſhould make Proteſtation that he came not to kill, but to rob. Thus much, therefore, is certain, that he who is kill'd in the Attempt of plundering or of waſting another Man's Goods, hath no Injury done him: Tho', in other reſpects, thoſe Goods do not bear an equal Proportion to the Life of a Man. For, in a *natural State*, he who offers any kind of Injury with a malicious Intent, immediately becomes an Enemy; and then he can have no Right inherent in himſelf to forbid the Uſe of the utmoſt Extremities againſt him. And, ſince another hath no more Right to invade my Poſſeſſions than to aſſault my Life, I have certainly an equal Licenſe and Power to defend them both. Beſides, ſince Liſe cannot be preſerv'd without a Competency of Goods, he that goes about to rob me of *theſe*, doth, by conſequence, endeavour to deprive me of *that* [1]. And, indeed, it is clearly evident, that the Security and Peace of Society, and of Mankind, could very hardly ſubſiſt, if a Liberty were not granted to repel, by the moſt violent Courſe, thoſe who come to pillage our Goods, for which Men have commonly a very hearty Love and Concern.

Thoſe who have tormented themſelves in maintaining the more rigid Side of the Queſtion, build chiefly on two Suppoſitions; firſt, That a juſt Puniſhment ought always to be ſo equal to the Crime, that the guilty Perſon be not depriv'd of a greater Good than what he attempted to hurt or to deſtroy in another [2]. The Falſeneſs of which we ſhall elſewhere prove. Secondly, That the Hurts which we offer to an unjuſt Invader, in defence of ourſelves and our Poſſeſſions, are *Puniſhments* in a proper Senſe; and, conſequently, ought to be ſtated by the Rules of vindicative Juſtice. But this Hypotheſis is no truer than the former [3]. For all Puniſhment proceeds from a Superior againſt a Subject, by virtue of his Sovereign Right; and the Degree of it is meaſur'd with reſpect to the publick Good. But Defence is a Thing of more antient Date than any civil Command, and chiefly takes place amongſt thoſe, neither of whom are ſubject to the other; and is moderated with regard to our own Safety, and to the Neceſſity of Self-preſervation. Indeed, amongſt thoſe who live under the ſame civil Government, the Liberty of *natural* Defence is very much reſtrain'd. Becauſe the inward Tranquility of a State could not ſubſiſt, if the Subjects were to return Hoſtilities to each other for every Injury or Affront. The Members then of a Community may ſo far only make uſe of violent Defence, as it is not taken off or forbidden by the Genius of civil Society, or by the Laws of the State. And the Laws of moſt Places, tho' they allow one Subject to repel another who invades him, by offering a greater Evil, than the Invader deſign'd againſt him [4]; yet, according to the regular Courſe of Proceeding, they would not have private Perſons apply Extremities, in oppoſing ſuch Injuries as are levell'd only againſt Things that may be reſtor'd or repair'd. Inaſmuch as ſuch Reparation or Reſtitution may eaſily be procur'd by the help of Government; whereas when there is no Government to interpoſe, Men cannot be forc'd to make Requitals, but by War. There is no need then of being ſo ſolicitous with *Grotius*, [a] *to make up the Inequality between the Thing invaded, and the Life of the Invader, by our Favour to the Defendant, and our Hatred and Rigor againſt the guilty Party.* Unleſs we join with *Bœcler* in his Explanation of the Place, and ſay no more than this, that ſince in a Cauſe or Action of this kind it is generally very difficult to determine what was done within, and what beyond the due Bounds, it is not repugnant to Nature that we turn our Favour on the ſide of the Perſon who ſuffer'd, or was likely to ſuffer the Damage, and our Hatred upon the Plunderer or Thief; that is, when the Caſe is doubtful, we may fairly pardon in the former the Death of the latter. In civil States, therefore, it is ſufficient, thnt a Man do not exceed the Limits of Defence appointed by the Laws of his Country. And yet if he ſhould tranſgreſs theſe Meaſures he doth no Injury to the Invader, but only is guilty of a Breach of *Civil Law*. But it may be aſk'd farther, whether it is not, at leaſt, a Sin againſt Charity to kill one who comes to plunder us of a repairable Good? In anſwer to which, it is our Judgment, that Charity towards one who profeſſes Hoſtility againſt us, takes place only ſo long as we have probable Hopes of bringing him, by this means, to Repentance and to Peace. But when theſe Hopes appear fruitleſs, he that ſpares his Enemy betrarys himſelf. Or if, at any time, my Reaſon perſuades me, that a Thing of little and deſpicable Value is not to be defended with the ſame Eagerneſs and Violence, I forbear, in this Caſe, not for the ſake of the Robber or Invader; but, partly, becauſe I would not give myſelf ſo much Trouble about a Matter of ſo ſlight Concern; and, partly, becauſe I would not ſeem narrow-ſpirited and covetous, by reſenting to ſo deſperate a height ſo inconſiderable a Damage.

XVII. It may be proper for us, on the preſent Occaſion, to reflect on that moſt noble Law giving Licenſe to kill a Night-Robber, but not one that comes in the Day-time [5]; which we read in *Exod.*

[a] L. 2. c. 1. ſ. 11.

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[1] See my Notes of the Abridgment of *The Duties of a Man and a Citizen*, Lib. i. Cap. v. §. 23. Note 1. laſt Edition.

[2] See Lib. 8. Chap. 3. §. 23, 24.

[3] This is what all the World are not agreed about, and we ſhall ſhew the contrary in this Place. But tho' we ſhould acknowledge, that in a State of Nature the Uſe of Puniſhments may take place, and be exercis'd between Equals; this no way favours the Opinion, which our Author refutes. For all Puniſhments ſuppoſe a Crime already committed, whereas the Queſtion here is to prevent the Execution of a Crime, by uſing the natural Right of Self-defence.

[4] Such was the antient *Athenian* Law mention'd by *Demoſthenes*, (adverſ. *Ariſtocrat.*) ordaining, *That he who kill'd another in defence of his Property, which this other Perſon was taking or carrying off by Violence, ſhould not be chargeable with any Guilt.* The *Greek* is, Καὶ ἐὰν φέροντα, ἢ ἄγοντα βίᾳ ἀδίκως, ἐυθὺς ἀμυνόμενος κτείνῃ, ναπονεὶ τεθνάναι κελεύει. But this Law only extended to thoſe who robb'd by Night. See the following Note.

[5] The Words are, *If a Thief be found breaking up,* [an Houſe] *and be ſmitten that he die, there ſhall be no Blood ſhed for him. But, if the Sun be riſen upon him, there ſhall be Blood ſhed for him, for he ſhould make full Reſtitution; if he hath nothing, then he ſhall be ſold for his Theft,* [to make Satisfaction.]

XVII. It

xxii. 2. and which hath been ſo often imitated in the *Grecian* and the *Roman* Conſtitution. Thus the Law of *Solon*, recited by *Demoſthenes*, (contra *Timocrat.*) [1]. *If any one, in the Day-time, ſteal above fifty* Drachmæ, *all Perſons are impower'd to bring him before the Court of the* Eleven. *But if he ſteal in the Night, whatever the Value be, it ſhall be allowable, either to bring him before the Judges, or to purſue, and wound, or kill him.* For which *Ulpian*, the Rhetorician, gives this Reaſon, [2] *In the Day we may call for Aſſiſtance, which in the Night cannot ſo well be had.* So *Plato* de LL. l. ix. *He that kills a Thief entring his Houſe in the Night ſhall be blameleſs.* The ſame we find in the *Roman* Twelve Tables. Tho' as to this, *Caius* (L. iv. ſ. 1. D. ad L. Aquil.) affirms, *That the* Roman *Law doth indeed permit a Man to kill the Night Thief; but then it obligeth him to give notice of it by crying out.* The latter Part of which Aſſertion, *Jac. Gothofredus* (ad LL. vi. Tali) obſerves to be a Specimen of *Tribonian*'s mild Diſpoſition, inaſmuch as that there was no Clauſe originally in the Twelve Tables, appears from *Cicero* Orat. pro *Milon. The Twelve Tables*, ſays *Cicero, allow the killing of the Night Thief by any means poſſible; but the Day Thief only if he defend himſelf with his Weapon. M. Senec.* l. x. Controvert. ult. *The Law which permits the killing of the Night Thief any way poſſible, doth not ſpeak of him as condemn'd, but as ſurpriz'd in the Fact. A. Gel.* l. xi. c. *ult.* when he reports that *Draco* made Theft capital, and *Solon* only double Reſtitution; adds, that the *Roman* Decemviri *took the middle way between the Severity of the former, and the Mildneſs of the latter; then only permitting a Thief, taken in the Act, to be kill'd, if either the Thing happen'd in the Night, or if being in the Day-time, he defended himſelf with his Arms againſt the Diſcoverer.* As for the Sign of *Crying out*, the Twelve Tables requir'd it only in the Caſe of the Day Thief, when he fought in his own Defence. *Si luci furtum faxint, ſi ſe telo defenſint, quiritato, endoque plorato: Poſt deinde ſi cæſi eſint, ſe fraude eſto.* Comp. l. iii. S. D. ad L. *Aquil.* where the Term *Æque* is mollified by *Tribonian.* Yet it is not improbable, that in courſe of Time, and upon the Authority of wiſe Men, that antient Law was plainly mitigated, as *Cujacius* allows, L. xiv. *Obſerv.* 15. This appears from *Ulpian*, L. v. *ad Edict.* whoſe Words are fully recited in the *compariſon of the* Jewiſh *and* Roman *Laws*, firſt publiſh'd by *Peter Pithæus.* Which are maim'd, as we have them in L. v. *D. ad L. Aquil.* (Add. L. ix. *D. ad L. Cornel. de Sicar.*) The Reaſon of which Alteration perhaps might be, that it was a Practice, ſometimes, with Villains to ruſh out of their Houſes and murder Perſons, and then pretend that they found them in the Act of Thievery: As, likewiſe, becauſe Houſes which are ſtrongly built, and ſtand thick together, cannot eaſily be robb'd without the Maſter's Negligence; or, at leaſt, cannot afford Rogues ſo frequent Opportunities. Compare *Juſtin*, L. ii. c. 2. ſ. 9. Whence *Cujacius* conjectures, that the ſaid Law as by L. i. *C. quando hic uniquique*, was abrogated in Towns and Cities, and only allow'd to hold good in the Country. Tho', indeed, this Order which he cites, doth not ſpeak of Thieves who make their Attempts in Privacy and Silence, but of violent Robbers and open Aſſailants; as appears from the Reaſon ſubjoin'd, *That they may meet the Death which they threaten'd, and incur that which they deſign'd againſt others. Sextus Cæcilius* in *Gell.* L. xx. c. 1. explains this Law of the Twelve Tables falſly, when he makes it relate to the *inſidious Violence of nightly Murtherers* [3]. Now the Reaſon of ſuch Diſtinction we take to be this, that in the Day we may eaſily ſeize the Thief, and recover our Goods; whereas in the Night he may ſlip from the Houſe undiſcover'd; it being difficult to know him in the dark; or if one Perſon ſhould chance to have a Knowledge of him, yet this would not convict him, unleſs, which cannot be done without great Trouble, more Witneſſes are call'd out of their Beds. But in this Opinion there is one Thing which ſtartles moſt Men, and puts them to ſome Loſs and Difficulty; for they are apt to argue thus: Since the Laws which make this Allowance do not decree a capital Puniſhment againſt Robbers, it looks like an Abſurdity, that private Perſons ſhould be indulg'd with a Licenſe of proceeding farther in theſe Caſes, than the Sovereign Power thinks proper for itſelf to do. In anſwer to which it may be obſerv'd, that all thoſe Laws concerning the Puniſhment of Thieves, ſuppoſe the Things ſtolen to be reſtor'd or compenſated, upon the Apprehenſion of the Felon. And, in order to this, they judg'd the giving of two-fold; or, ſometimes, of four-fold, to be ſufficient; according to the different Cuſtom of particular Commonwealths. But it doth not hence follow, that, therefore, the ſame Laws, in Caſes where Reparation was not to be had, could not furniſh the Subject with ſome larger Power taken out of the Stock of natural Liberty. For the Lawgivers of Kingdoms and Republicks have not always thought it neceſſary, in ordaining Penalties for Offences, to take their Standard from what in a State of Nature the Right of War allow'd to be done. Thus there are ſome States in the World, where Adultery is not a capital [4] Crime; and yet the Huſbands are indemnified, if they kill the Adulterers upon ſurpriſing them in the Act. Now, ſuppoſing Men to be plac'd in a *natural Liberty*, the Performance, or the very Offer of an Injury to their Bed, is plainly a ſufficient Cauſe of War, and how far the Licenſe of War extends every one is ſenſible. And yet theſe Laws would not ſtretch the Puniſhment of Adultery, when once actually committed, to ſuch Violence as might be allowable in a War undertaken upon that Score. But for

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[1] The *Greek* of *Demoſthenes* is, Ἐι ὃ τὶς νύκτωρ ὁπῶν κλέπτοι, τοῦτον ἐξεῖναι, καὶ ἀποκτεῖναι, καὶ τρῶσαι δικαίως.

[2] *Ulpian*'s *Greek* is, Ἐν νυκτὶ μείζονα τὴν τιμωρίαν ἔδειξεν, ἐπειδήπερ μειζόν ἐστι τὸ ἔγκλημα ἡ νυκτὸς, ἐν ᾗ ἡμέρᾳ δύναται τὶς καὶ βοηθὸς καλέσαι ἑαυτῷ, ἐν ᾗ νυκτὶ, οὐκέτι.

Plato's Words are, Νύκτωρ φῶς εἰς οἰκίαν εἰσιόντα ὅτῳ κλοπῆς χρημάτων, ἐάν ἕλῳ κλείνῃ τὶς, καθαρὸς ἔστω.

[3] Mr. *Noodt* has ſhew'd in §. 1. of *Law* IV. *ad Leg. Aquil.* that there was no Addition of *Tribonian*'s, nor any thing contrary to the Law of the Twelve Tables. He treats there of *Reſtitution*, not *Puniſhment*. The *Cornelian* Law, as well as that of the Twelve Tables, allows an abſolute Impunity to them who ſlew a Thief in the Night, whether they cry'd out or no, whether they might have avoided killing of him or no; but the *Aquilian* Law did not exempt them from paying Damages and Fines, unleſs when there was an abſolute Neceſſity of ſlaying the Aggreſſor to ſave their own Lives, *Obſervat.* Lib. 1. Chap. 15. and his *Probabil. Juris*, Lib. 1. Chap. 9. as, alſo, *ad Leg. Aquil.* Chap. 5. And what I have ſaid upon *Grotius*, Lib. ii. Chap. i. §. 12. *Note* 10.

[4] This took place only according to the antient *Roman* Law, for Adultery did not begin to be puniſhed with Death, till the Reign of *Conſtantime*. See the *Dioclet & Maximian* of M. *Noodt*, Cap. xix.

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their Indulgence to private Perſons of farther and ſeverer Methods, we may borrow this very good Reaſon from Dr. *Cumberland* [a]; that inaſmuch as Offences of this kind, eſcaping the Cognizance of the Civil Magiſtrate, frequently paſs unpuniſh'd; therefore, whenſoever their Circumſtances make them capable of receiving Puniſhment, it hath been thought proper to allow the moſt rigorous and extreme; that the Boldneſs of wicked Men, as much as it increaſes by common Impunity, ſo much it may be leſſen'd and kept under by the Fear of meeting, ſometimes, with ſo grievous and ſo terrible a Return. That Clauſe in the *Roman* Law giving Authority to kill a Day Thief, *Si telo ſe defenderit, If he defends himſelf* [1] *with his Weapon*, plainly intimates, that I am hereby permitted to kill him, tho' barely for the Preſervation of my Goods; and not then, only when he firſt aſſaults me with his Weapon; but when, upon my endeavouring to recover my Things from him, he employs it againſt me for his own Security.

XVIII. And, therefore, it is clear, that they are in the wrong, who make the Reaſon of the foreſaid Law to be only this, *Leſt if the Robber eſcap'd in the Night, the Crime ſhould paſs unpuniſh'd.* As to *Grotius*'s [b] Diſcuſſion of this Point, there are many Things in it to which we cannot ſubſcribe. He makes the Laws we have been ſpeaking of to be founded on this Principle, that the *Legiſlators hereby intimated, that no Man ought to be kill'd directly for the ſake of our Goods.* Which is more than we can diſcover in thoſe Laws, which treat of ſuch Thieves as creep into Houſes, with deſign to carry Things privily away. 'Tis true, in the Caſe of the nightly Thief, it may happen, that whilſt I endeavour to ſave my *Goods*, my *Life* too may be in danger: And then the Slaughter of the Thief is permitted me upon a double Account. Nor here will it be an Objection againſt my Innocence, that I ſeem to throw myſelf into this Danger, by attempting to retain, or to recover my Matters. For I am then engag'd in a lawful, and almoſt a neceſſary Act; from which no Effect that ariſes without my Fault, can be *imputed* to me. But, were it not lawful to kill another, purely on the Account of Goods, how can we utterly clear him from all Guilt, who, for the Preſervation of thoſe Concerns caſts himſelf deliberately into ſuch a Condition, as makes it neceſſary for him, either to kill, or to be kill'd? As we do not allow him the Plea of *Self-defence*, who kills a Man in a Duel voluntarily undertaken.

The other Reaſon, which *Grotius* aſſigns for the *Hebrew* Law, ſeems not of ſufficient Strength and Solidity. *Inaſmuch*, (ſays he) *as by Night-Witneſſes of the Fact are difficult to be procur'd; therefore* [2] *more eaſy Credit is given to him who ſhall affirm* [3], *that he kill'd the Thief in defence of his own Life; as having found him with an Inſtrument that might have done hurt.* For granting that the *Hebrew* Word in the Text cited by him ſignifies an [4] *Inſtrument* of *Digging* or *Stabbing*; yet, if the Intent of the Law had been as he makes it, 'twould have been much plainer to have ſaid, *If he be found with a Weapon.* Nor, indeed, is it, after all, a good Conſequence to ſay, that becauſe the Thief was found arm'd with a Weapon, therefore, he came certainly to aſſault the Life of the Perſon who kill'd him. No more doth it follow, that becauſe, by the Law of the Twelve Tables, the Day-thief could not be kill'd, unleſs he defended himſelf with his Weapon, therefore, there lies a fair Preſumption againſt the nightly Thief, that he actually made uſe of his Weapon in the ſame manner. For that Law gave Commiſſion to kill the nightly Thief [5] without Conditions, and by any Means poſſible. In after Ages, indeed, [6] this farther Clauſe was added to it,

[a] L. 5. ſ. 26. [b] L. 2. c. 1. ſ. 12.

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[1] See the Authorities alledged in Note 2. Page 194. and chiefly *Cicero*'s *Orat. pro Milone*, Chap. 4. and the Commentators on it.

§. [2] Then (ſays *Gronovius* the Father, in his Notes upon *Grotius*) here is only a bare Fiction of Law, as in the Caſe of *Preſcription* and *Poſtliminium*. But can ſuch a weak Foundation be of Force ſufficient to give one Right to ſlay a Man whoſe Life he ought to have preſerved? We ought rather to hold, that he ought to call for the Aſſiſtance of his Fellow Citizens againſt the Attempts of an unjuſt Aggreſſor; and more, as the Laws grant us an extraordinary Protection and ſpecial Privileges. Among the antient *Scythians*, as *Juſtin* relates, Lib. 2. Cap. 2. Robbery was a Crime puniſh'd with the greateſt Severity and greateſt Reaſon, becauſe if that had been permitted, what could they have enjoy'd whoſe Goods conſiſted in Herds of Cattle, which could never be ſhut up? For this Reaſon the driving away of Cattle (*Abigeatus*) is puniſh'd more ſeverely even by the Law of GOD, than ſimple Theft, *Exod.* xxii. 1. altho' the Thing ſtole be of much greater Value than the Beaſt. (See Mr. *Le Clerc*'s Notes upon that Text.) So that in the Night, while Men ſleep, the Law's awake, as we may ſay; and, when the Proprietors of Goods are leſs able to take care of themſelves, and defend their Goods, it deters Thieves, by making them apprehenſive of a greater Puniſhment, than if they rob in the Day-time. Moreover, There is a great Preſumption, that a Night Thief comes arm'd, and Lawgivers ſuppoſe it is a Thing undoubted; for all Things being commonly made faſt in the Night, can a Thief be ſuppoſed, with his Hands only, to break thro' a Wall, force open Gates, Cheſts, and Cupboards? Wherefore, for this Reaſon, becauſe all Things are ſhut faſt, we can't believe that a Thief will come in the Night, without Arms and Engines, to enter by Force a Place, which he ought to look upon as ſacred. See *Cicero*'s *Orat. pro Domo*, Chap. 41. Of all theſe Reaſons, which the learned *Gronovius* alledges, there is only the firſt, which is general and inconteſtable; and, indeed, there needs no more. The ſecond will not always hold no more than the third; for Thieves may ſteal into Houſes, and hide themſelves during the Day as well as the Night, and that without uſing Weapons, or any dangerous Inſtruments. The Reader may conſult my Notes upon the Paſſage of *Grotius* in queſtion.

[3] If the Affirmation or Word of every Particular ſtood for a legal Evidence in this Caſe, this great Inconvenience would follow, that any malicious Perſon, (tho' his Credit be no better than his Temper) might, with Impunity, deſtroy his Neighbour, if he would but give his Word his Neighbour firſt aſſaulted him.

[4] Our Author hath reaſon to doubt, whether במיחתרת *Bammahhtereth*, ſignifies, *with an Inſtrument to break thro'*, 'tis more probable it means, *in breaking thro'*, as the LXX and Vulgar tranſlate. But Mr. *Le Clerc* has very well obſerv'd, that it comes much to the ſame, ſince none can break thro' a Wall but with an Inſtrument. We may add, with the ſame Commentator, that this Expreſſion is founded upon the Eaſineſs of breaking thro' Walls; for it appears, that heretofore, as well as at this day, that moſt of the Houſes in the *Eaſt*, as well in the Country as Cities, were built with Clay, ſtruck upon Laths placed acroſs, and whited over with Lime. Hence *Job*, Chap. iv. 10. alludes to it, when he ſays, *That Men dwell in Houſes of Clay.*

[5] *Duodecim Tabulæ nocturnum furem, quoquomodo; diurnum autem, ſi ſe telo defenderit, interfici impunè voluerunt.* Cicero pro Milone, cap. 3.

[6] *Furem nocturnum ſi quis occiderit, ita demum impune feret, ſi parcere ei ſine periculo ſuo non potuit.* Digeſt. Lib. 48. tit. 8. ad Leg. Cornel. de Sicar. Leg. 9. But Mr. *Noodt* hath ſhewed very well, that that Law is ill placed, and that *Tribonian* had taken no more Care than *Ulpian*, from whom 'tis taken, Lib. 37. *ad Edictum*, where he ſpeaks of the Reparation of the Damage to which the *Aquilian* Law condemned him, and not of the Puniſhment ordered by the *Cornelian*. See his *Probabil. Jur.* Lib. 1. c. 9. §. 6.

Si parcere ei sine periculo suo non potuit, dum rem servare conatur[a]: *If, whilst he endeavours to save his Goods, he cannot spare the Robber's Life without manifest Danger.* But before this Addition it cannot be prov'd, that a Person stood guilty of Homicide, who had kill'd a nightly Thief, tho' there were Witnesses to prove that the Party slain never brought him into danger of his Life. The Example of a Maid ravish'd in the Field, which *Grotius* here alledges, is nothing at all to his Purpose: For, in that Case, the Law expresly commands us to *presume* that Violence was offer'd her. But, in the Matter we are now concern'd about, we cannot discover that any *Presumption* of mortal Danger is made or suppos'd by the Laws. As, indeed, it is not the Business of these purloining Rascals to fight, but to run. Yet, after all, we are ready to confess, that a Man, who, in defence of his Goods, only lays hold on the Night-robber, (if he can with Safety and Convenience) and carries him before the Magistrate, acts much more generously than if he had unnecessarily depriv'd him of Life[b].

XIX. The last Point usually disputed on this Subject, is, whether the Party who first gave and begun an Injury, may fairly resist the other Man, when he endeavours to return, or to revenge it? Many here take the affirmative side, upon this Reason, that whilst Men undertake to right themselves by their own Pleasure, and their own Force, they are seldom very exact in proportioning the Punishment to the Crime. But we conceive the Question ought to be determin'd with more Caution, and with more Distinction. The Law of Nature then commands, that he who has injur'd another should offer him Satisfaction: And, at the same time, it obliges the other Party to pardon the Offender, when he intreats him with Signs[1] of Penitence, offering Reparation for past Damages, and Security for his future good Behaviour[c]. He, therefore, that refuses to make Satisfaction, and hereupon *resists* the Person demanding it, manifestly heaps one Injury upon another. But when a Man refuses to accept fair Satisfaction, when offer'd him, and resolves to prosecute his Revenge by open Arms, in this Case he practises *unjust Force*; and, consequently, it can be no Fault to make Resistance against him[d][2].

[a] *In* l. 9. *D. ad L. Cornel. de Sicar.*

[b] Add. *Goenewegen de Leg. abrogatis*, ad *L. Aquil.* where he observes that the *Dutch* Laws do not require the Signs of *Crying out* in the dispatching of a Night-thief. Comp. *Leg. Wisogoth.* l. 7. tit. 2. cap. 16. *Leg. Burgundion.* addit. 1. tit. 16. c. 1, 2. *Leg. Frisiorum*, Tit. 5. *Constitut. Sicul.* Tit. 13. Capital. *Carol.* & *Ludovic.* L. 6. c. 19.

[c] *Quintilian* Declam. 5. *There's nothing more honourable than the Conclusion of a Quarrel. But, whilst the Parties are hot with secret Desires of Mischief, 'tis in vain to pretend an outward Reconciliation.* M. Antoninus, L. 1. s. 7. *rejoiceth in this Happiness of his own Temper, that he was easily placable, and willing to be reconciled to those who had given him any Cause of Offence, so soon as they desired it.* Add. &. l. 9. s. 8. & Senec. de Irâ, L. 2. c. 34. L. 3. c. 26, 27, 42. *Amongst the* Chinese, *who prefer moral Philosophy to all other Parts of Knowledge, there is scarce any one so cruel as to desire to revenge an Injury with the Death of him who offer'd it: And they reckon it a true Mark of a brave, and wise, and worthy Man, to put up the Hurts and Affronts he receives, without any Inclination to harm the Author.* Neuhof. Descript. Chin. c. 1.

[d] Comp. *Liv.* L. 9. & *Grot.* L. 2. s. 18. & *Bæcler* ad loc. See the Story of the private Combat in *Davila*, l. 15. p. 1027.

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[1] The Philosopher *Arrian* says, That the only way to attone for a Crime, is, in his Opinion, to confess it. and shew Repentance; for, adds he, the Fault appears not so great to him that has received it, when the Offender acknowledgeth that he hath done ill, and he hath reason to hope that he will do so no more, because he seems so much troubled for what he has done. Μόνη γὰρ ἐμοιγε δοκεῖ ἴασις ἁμαρτίας, ὁμολογεῖν τε ἁμαρτόντα, καὶ δῆλον εἶναι ἐπ' αὐτῷ μεταγινώσκοντα. ὡς τοῖς παθοῦσιν τὰ ἀχθη ἧττον τὰ παθήματα φαινόμενα, εἰ ὁ δράσας αὐτὰ ξυγχωρεῖ, ὅτι ἃ κακὰ ἔδρασεν, αὐτῷ τε πνὶ ἐς τὸ μέλλον τουτῳ ἐλπίδα ἀγαθὴν ὑπολειπομένην, καὶ ποτε ἂν ὀξαπλήσιόν τι ἁμαρτεῖν, εἰ πῆς ὀφόσον πλημμελήσαι ἀχθομένῳ φαινοιτο. De Expedit. Alexand. Lib. 7. cap. 29. I now see that the deceas'd M. *Baron Spanheim* (in the Proofs of his *Remarks on the Cæsars of the Emperor Julian*, p. 137. *Edit.* Amster. 1728.) cites this, and several other Passages of Antiquity, to shew, that *the Heathens believ'd that Crimes were expiated by Penitence.* The deceas'd M. *Gronovius* sharply criticis'd him for this, in a Note upon this very Passage of *Arrian*. But tho' the Question here is not directly about the Effect of Repentance, with regard to the Expiation of the Crime in itself, and before God; yet *Arrian*, both as *a Philosopher* and *Historian*, might insinuate his Opinion how Men do, and ought to judge of a Person who expresses a Concern for his Fault, This appears by his last Words, Αὐτῷ τε πνὶ ἐς τὸ μέλλον ἀγαθὴν ἐλπίδα ὑπολειπομένην, &c. Which do not relate to the *Offended*, (as the *Latin* Translator misunderstood them) but to the *Offender*. M. *Gronovius*, who was aware of this, criticises the Nobleman just mention'd, in such a Manner, as shews he would quarrel for Straws, and that he did not himself understand the Nature of Repentance. The *Baron* having said, that, according to the Philosopher *Arrian*, *if there was any thing which could excuse* Alexander *for the Murther of* Clitus, *it was his sudden Repentance.* *Gronovius* pleasantly objects, that a Murtherer does not cease to be call'd a Murtherer after he has committed the Crime; because what is once done cannot be undone. Did ever any Man of Understanding conceive such an Idea of the Effects of Repentance.

[2] This hath place, chiefly, in the Quarrels that happen between two Sovereigns, two States; in a word, between those who live in the Independance of a State of Nature; only, we must observe, that they will not take a slender Reparation for a sufficient Satisfaction, or some Signs of Repentance for Recompence. But as to those Damages which Fellow-citizens do one to another, and for which the Laws prescribe a Satisfaction, it is more easy to determine which of the Contenders shall pass for the Aggressor. *Titius Observ. on Pufendorf*, CXL. But before I end this Chapter, we shall supply a considerable Omission of our Author, which neither he nor *Grotius* have taken notice of; and that is, the Right which every one hath to defend his Liberty. Mr. *Locke* hath proved the Justice and Extent of that Right, which all have to defend themselves; *Whoever*, says he, *endeavours to usurp an absolute Power over any one, puts himself into a state of War with him; so that this last cannot look upon the Proceedings of the former, but as a plain Attempt against his Life.* Indeed, from the Moment that a Man labours to bring me into Subjection to him against my Will, I may presume, that if I fall into his Hands, he may treat me as he pleases, and make no scruple to slay me in his Humour. Liberty, if I may so say, is the Bulwark of my Preservation, and the Foundation of all Things that belong to me; so that he that will make me his Slave, authorizes me to repel him all manner of ways, that I may secure my Person and Property. But here we must carefully distinguish the State of Nature from the Civil State; for 'tis upon this that the extent of our Right, that we have to defend ourselves against them who would bring us into Subjection to them, depends. Man's natural Liberty consists in acknowledging no superior Authority upon Earth, and following the Laws of Nature, without any Dependance upon any other Man. Liberty, in a Civil Society, in not submitting to any Legislative Power, but that which is established by the general Consent of the whole Body, nor to any other Government than what they acknowledge, nor to any other Laws than those which the same Legislative Power may make, according to the Extent of the Right which it hath received. But of this I shall speak more largely elsewhere. See that *English* Author's Treatise of *Civil Government*, whose Notions I have mentioned, Lib. 2. Chap. 3, & 4. §. 17, & 22.

CHAP. VI.

Of the Right and Privilege of Neceſſity.

The CONTENTS.

I. *How many kinds of* Neceſſity *there are.*
II. *Wherein the Right and Privilege of* Neceſſity *conſiſts.*
III. *What Right it gives every one over himſelf, and directly over others.*
IV. *And what indirectly.*
V, VI, VII. *What Right it confers over other Men's Goods.*
VIII. *What we may do to others Goods to preſerve our own.*

THE *Caſe* of *Neceſſity* is a thing in every body's Mouth, and the Force of it generally acknowledg'd in the World: Hence we commonly ſay, that it *hath no Law*, that 'tis a *ſuppos'd* or *preſumptive* Exception to all human Ordinances and Conſtitutions; and that, therefore, it gives a Right of doing many things otherwiſe forbidden [a]. Now whence this Force or Power ariſes, and how far it extends, we ought with the more Accuracy to examine; becauſe ſome Caſuiſts ſeem to allow it none, or very little Efficacy, as to the Morality of human Actions. But, before we proceed to this Enquiry, we may obſerve in general, that [1] *Tully*, in his ſecond Book of *Invention*, c. 57, 58. makes a twofold *Neceſſity*, the one *ſimple* and *abſolute*, which can, by no poſſible means, be reſiſted, alter'd, or abated; and the other *conditional* or *reſpective*. This again he divides into three kinds, with regard either to *Honeſty* [b], to *Safety*, or to *Convenience*. Of which, he ſays, the firſt is, by many degrees, the higheſt, the ſecond of next Moment and Conſideration, and the third very much inferior, and not able to ſtand in Competition with the reſt. He proceeds to give it for a Rule, that altho' *Honeſty* be better than *Safety*, yet, in ſome Caſes, we may give the Preference to the latter; when what we take from Honeſty, in the conſulting our preſent Safety, may be recover'd and made up by our future Virtue and Integrity: When this cannot be done, Honeſty is abſolutely to be preferr'd and embrac'd. Others chuſe to ſay, that when the *Neceſſity* of *Safety* is preferr'd to the *Neceſſity of Honeſty*, ſuch a Fact cannot be defended in a direct way, and by any Preſcription of Right, but leans wholly on the Excuſe which we allow to human Infirmity, and on the Indulgence of our Mercy and Pity. But that *Neceſſity of Convenience* is ſtill much weaker, and weighs very little, either in the Defence, or the Excuſe of Actions; unleſs, when the Cauſe comes before ſuch a Judge, as hath more regard to his own partial Inclination, than to the Suggeſtions of Wiſdom, and to the Demands of Right.

Now our Buſineſs, on this Subject, lies chiefly in examining and ſtating the *Neceſſity of Safety*, and in conſidering what Force it hath to exempt any Action from the Obligation of common Laws: that is, whether we may not ſometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own Fault) caſt into ſuch Streights, that we cannot otherwiſe ſecure our own Preſervation [2]? And here it is apparent, that the *Favour*, the *Right*, the *Leave*, or whatever it is that in ſuch Caſes we attribute to *Neceſſity*, ſprings from this ſingle Principle, that it is impoſſible for a Man not to apply his utmoſt Endeavour towards preſerving himſelf; and that, therefore, we cannot eaſily conceive or ſuppoſe, ſuch an Obligation upon him, as ought to outweigh the Deſire of his own Safety.

II. No good and pious Man can queſtion, but that GOD Almighty, who is the abſolute Maſter of our Lives, and whoſe free Bounty gave us the precarious Enjoyment of them, may impoſe on us ſo ſevere a Law, that we ought rather to die, than to recede the leaſt degree from it. Of which kind the *Jews* took their Law againſt eating Swine's Fleſh to be; as we find in the Hiſtory of the *Maccabees*. And their Judgment was then indeed right; becauſe, as the Caſe ſtood with them, to eat that ſort of Fleſh was look'd on as an open Denial of the true Religion. Whereas, were they under no ſuch hard Circumſtances, it was no Sin for a Man to keep himſelf from ſtarving, by feeding on this forbidden Meat, when no other could be procur'd. Sometimes too, by the Authority of a Civil Sovereign, Men may receive ſo ſtrict and rigorous Commands, that they muſt rather part with their Lives, than omit the Duty enjoin'd them. But the Obligation of *Poſitive Laws* is not always preſum'd to be ſo harſh and ſevere. For inaſmuch as the Au-

[a] *M. Senec.* L. 4. Controv. 27. *Neceſſity is the great Patronage and Shelter of human Infelicity.* *Callimach.* Hymn. in *Del.* *Neceſſity's a mighty Goddeſs.* ——— Add. Orat. *Lentul.* in *Liv.* L. 9. c. 4.
[b] To which belongs the Saying of *Pliny*, L. 1. Epiſt. 12. *The beſt and higheſt Reaſon paſſeth for Neceſſity with wiſe Men.*

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[1] *Tully*'s Words are; *Atque etiam hoc mihi videor dicere, eſſe quaſdam cum adjunctione neceſſitudines, quaſdam ſimplices & abſolutas.* ——— *Puto igitur eſſe hanc neceſſitudinem, cui nullâ vi reſiſti poteſt; quæ neque mutari, neque leniri poteſt.* ——— *Quod adjungitur* ——— *omni tempore, id pertinebit* ——— *aut ad honeſtatem* ——— *aut ad incolumitatem* ——— *aut ad commoditatem.* ——— *Ac ſumma quidem neceſſitudo videtur eſſe honeſtatis; huic proxima, incolumitatis; tertia, ac leviſſima commodatis: quæ cum his nunquam poterit duabus contendere. Haſce autem inter ſe ſæpe neceſſe eſt comparari, ut quamquam præſtet honeſtas incolumitati, tamen utri potiſſimùm conſulendum ſit, deliberetur.* ——— *Quâ in re fieri poterit, ut cum incolumitati conſuluerimus, quod ſit in præſentiâ de honeſtate delibatum, virtute aliquando & induſtriâ recuperetur, incolumitatis ratio videbitur habenda: cùm autem id non poterit honeſtatis.* Farther, we muſt obſerve, that that Neceſſity which we muſt ſuppoſe always happens without his Fault who is reduced to it, begets a Conteſt not only between Self-love and Sociableneſs, but, alſo, between Self-love and Religion; as, alſo, between the divers Duties of Self-love. The Conteſt between Self-love and Sociableneſs happens, when the Perſons with whom we ought to have dealt otherwiſe, have no Part in the Neceſſity to which we are reduced: For our Author hath ſpoken in the foregoing Chapter of the Conteſt produced in conſequence of another's Fact, whether malicious, or not. See the Notes in the following Paragraph.

[2] Either in our Perſons or Goods, as it appears from the following Part of this Chapter.

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thors of theſe, or of any other Rules and Conſtitutions in the World, chiefly deſign'd by them to promote the Safety or Convenience of Mankind, we may ſuppoſe them, generally ſpeaking, to have had before their Eyes the weak Condition of human Nature; and to have reflected on the Impoſſibility which every Man lies under, not to avoid, and to drive off, all things which aim at his Deſtruction. Upon this account then, [1] moſt Laws, eſpecially thoſe which we call *Poſitive*, are judg'd to except the *Caſes of Neceſſity*; that is, not to *oblige*, when the Obſervance of them muſt be attended with ſome Evil, deſtructive of our Nature, or exceeding the ordinary Patience and Conſtancy of human Minds: Unleſs when this very *Caſe* is included plainly in the Injunction, either by expreſs [2] mention, or becauſe the Nature of the Buſineſs cuts off all Exception and Reſerve. [3] Hence it is clear, that no ſuch Power ought to be attributed to *Neceſſity*, as that it ſhould give us the Privilege of directly violating a Law, or of committing a Sin; but we only preſume, from the favourable Intention of Legiſlators, and from the Conſideration of the Nature of Man, that the *Caſe of Neceſſity* is not comprehended under the general Terms of a Law. An Inſtance of this our Saviour himſelf hath been pleas'd to give us, in *David*'s eating the *Shew-bread* [a], intimating, that the Matter, and the Reaſon of the Law, which forbad that Action in general, could not be ſuppos'd to have any ſuch rigorous Deſign, as that a Man ought rather to die with Hunger, than to touch the conſecrated Food [4].

It is plain then, that as to *poſitive Laws* this Privilege of *Neceſſity* is admitted and allow'd: But 'tis a Point much more difficult to determine, whether the ſame Favour can take place in [5] the Laws of Nature; that is, whether in *neceſſary Caſes* we may fairly omit what is *naturally* commanded, or perform what is *naturally* forbidden? As for the firſt Queſtion, it appears from the Nature of *affirmative* Precepts, that whenever they oblige a Man to the actual exerting of ſuch a Performance as is enjoin'd, they, at the ſame time, ſuppoſe him to have Opportunity, Subject, and Power of acting: But now we may fairly judge theſe Conditions to be wanting, when I cannot do a thing without the Loſs of my Life. Since, to throw off the Love and Care of ourſelves, is juſtly rank'd amongſt impoſſible Attempts; or, however, amongſt ſuch as ſurpaſs the common Strength of Mens Souls. Therefore, unleſs it either be expreſsly, and particularly provided by the Law, or deducible from the Quality of the Buſineſs to be undertaken, that I muſt rather lay down my Life than omit the Duty, all affirmative Edicts of Nature may be underſtood to except the Caſe of extreme Neceſſity: Eſpecially, when a Man hath not fallen under ſuch Neceſſity through his own Neglect and Default. Thus I am not bound to furniſh an hungry Perſon with Bread, when I want it for my own Suſtenance [b]; or to help a Man that is drowning, when I cannot ſave him without loſing myſelf. *Seneca*'s Reſolution is good in both Caſes, *I will give* (ſays he) [c] *to thoſe who are in need; but ſo as not to put myſelf in the ſame needy Condition: I will ſuccour thoſe who are*

[a] See *Matt.* xii. 4. Add. *Caſaubon* Exercitat. ad *Baron.* 1. n. 9.
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[1] Otherwiſe, as Mr. *Thomaſius* obſerves, the publick Good reſults from the Good of private Perſons; and, for the moſt part, the Preſervation of a private Perſon is more advantageous to the State, than the Obſervation of any human Law. *Inſtit. Juriſpr. Div.* Lib. 2. Chap. 2. §. 131.

[2] It is thus, that among the *Romans*, according to the *Senatus-conſultum*, Slaves were obliged rather to periſh than neglect any thing that might in the leaſt contribute to ſave their Maſters; ſuch, for Inſtance, was crying for Help, tho' threaten'd with preſent Death. See *Digeſt.* Lib. xxix. Tit. 6. *De Senatus-conſult. Silan.* Leg. 1. §. 28.

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[5] The following Principles are moſt exact, and proper to decide all Queſtions which can be propoſed in this Matter; they are borrowed, partly, from *Titius*'s Obſerv. CXLI. and, partly, from *Thomaſius*'s *Inſtit. Juriſpr. Divin.* Lib. 2. Chap. 2. §. 130, *&c.* For we muſt diſtinguiſh between the Laws which concern GOD, and thoſe that relate to Men. As to the firſt of theſe, we may lay down theſe two Rules; 1. That always, when in doing, or not doing a certain Action, we ſhew directly, or indirectly, ſome Contempt of the Divine Majeſty; the Law which forbids, or orders this Action, admits of no Exception in Caſes of Neceſſity; for, in this Caſe, the Nature of the Thing itſelf makes it evident, that no Man ought to preſerve his own Life by any thing whereby GOD is diſhonoured. Thus we ſhould ſuffer every thing rather than blaſpheme, or do any idolatrous Action, or renounce the Profeſſion of a Religion we think true, to embrace another we believe falſe, *&c.* To which may be referr'd the Example of *Daniel*, found in his Prophecy, Chap. vi. verſ. 10. 2. But if in doing, or not doing a certain Action, we do not directly, or indirectly, ſhew any Contempt of the divine Majeſty, the Law which forbids, or orders that Action otherwiſe, does not indiſpenſibly oblige, in a Caſe of extreme Neceſſity; for then the Glory of GOD not ſuffering any Affront, his infinite Goodneſs will not allow us to preſume, that he will oblige us to expoſe our Lives needleſly, or our Property. So that when we cannot commit any Action poſitively by the Law of Nature, without ſhewing, at leaſt, indirectly, ſome Contempt of the Supreme Legiſlator, theſe ſort of negative Laws admit of no Exception in the Caſe of Neceſſity; and ſo much the more, if we do not find ourſelves reduced to this Dilemma, either to die, or break ſome negative Maxim of the natural Law, which, thro' the Violence of him that propoſes it, either formally, or by Interpretation, may make us contemn the Authority of the Supreme Legiſlator. Wherefore, we muſt reſolve rather to die, than lie (for Example) with our Mother, or ſlay a Perſon whom we know to be innocent. See what we have ſaid *Note* 3. Page 17. But we may, to avoid a great Evil, with which we are threatned by an unjuſt Aggreſſor, promiſe ſomething, even with an Oath, without Intention of ſwearing, or contracting by ſuch a forced Act, any valid Obligation; for, in that Caſe, 'tis neither a true Oath nor Promiſe; and he who forces us unjuſtly, does it only becauſe he thinks we have a great Reſpect to the Deity, otherwiſe he would not value it; ſo far is he from engaging us to violate our Duty, that he would be much troubled that we ſhould. See what is ſaid, Lib. 4. Chap. 2. §. 8. As for ſuch Actions as are forbidden by ſome poſitive divine Law, as they are otherwiſe indifferent in themſelves, the Exception of the Caſe of Neceſſity hath place, or not, in that reſpect, according as in doing of them we ſhew, or not, ſome Contempt of the divine Majeſty, which muſt be judged of by Circumſtances. The firſt is ſeen in the Example of *David*, and the other in the ſeven Brethren ſpoken of in the Hiſtory of the *Maccabees*, upon which our Author reaſons well. As to the natural affirmative Laws, which concern the Divinity, Mr. *Titius* believes with Mr. *Thomaſius*, that they do not indiſpenſibly oblige to an outward poſitive Worſhip, whoſe Omiſſion may be a Sign of ſuch a Contempt. See what is ſaid *Note* 6. Page 152. But altho' ſome Acts of outward Worſhip are expreſsly commanded by ſome poſitive Law, we are not obliged to practiſe them in the Caſe of extreme Neceſſity, unleſs the Omiſſion paſſes for an open, or tacit Abjuration of the Religion which we eſteem true, as in the Caſe of *Daniel*, Chap. vi. ver. 10. or when it ſhews a Contempt of the Divinity directly or indirectly; which does not commonly happen. I ſhall ſpeak in *Note* 5. of the Privileges of Neceſſity, with relation to the Duties which concern Men themſelves.

CHAP. VI.

Of the Right and Privilege of Neceſſity.

The CONTENTS.

I. *How many kinds of* Neceſſity *there are.*
II. *Wherein the Right and Privilege of* Neceſſity *conſiſts.*
III. *What Right it gives every one over himſelf, and directly over others.*
IV. *And what indirectly.*
V, VI, VII. *What Right it confers over other Men's Goods.*
VIII. *What we may do to others Goods to preſerve our own.*

THE *Caſe* of *Neceſſity* is a thing in every body's Mouth, and the Force of it generally acknowledg'd in the World: Hence we commonly ſay, that it *hath no Law*, that 'tis a *ſuppos'd* or *preſumptive* Exception to all human Ordinances and Conſtitutions; and that, therefore, it gives a Right of doing many things otherwiſe forbidden [a]. Now whence this Force or Power ariſes, and how far it extends, we ought with the more Accuracy to examine; becauſe ſome Caſuiſts ſeem to allow it none, or very little Efficacy, as to the Morality of human Actions. But, before we proceed to this Enquiry, we may obſerve in general, that [1] *Tully*, in his ſecond Book of *Invention*, c. 57, 58. makes a twofold *Neceſſity*, the one *ſimple* and *abſolute*, which can, by no poſſible means, be reſiſted, alter'd, or abated; and the other *conditional* or *reſpective*. This again he divides into three kinds, with regard either to *Honeſty* [b], to *Safety*, or to *Convenience*. Of which, he ſays, the firſt is, by many degrees, the higheſt, the ſecond of next Moment and Conſideration, and the third very much inferior, and not able to ſtand in Competition with the reſt. He proceeds to give it for a Rule, that altho' *Honeſty* be better than *Safety*, yet, in ſome Caſes, we may give the Preference to the latter; when what we take from Honeſty, in the conſulting our preſent Safety, may be recover'd and made up by our future Virtue and Integrity: When this cannot be done, Honeſty is abſolutely to be preferr'd and embrac'd. Others chuſe to ſay, that when the *Neceſſity* of *Safety* is preferr'd to the *Neceſſity of Honeſty*, ſuch a Fact cannot be defended in a direct way, and by any Preſcription of Right, but leans wholly on the Excuſe which we allow to human Infirmity, and on the Indulgence of our Mercy and Pity. But that *Neceſſity of Convenience* is ſtill much weaker, and weighs very little, either in the Defence, or the Excuſe of Actions; unleſs, when the Cauſe comes before ſuch a Judge, as hath more regard to his own partial Inclination, than to the Suggeſtions of Wiſdom, and to the Demands of Right.

Now our Buſineſs, on this Subject, lies chiefly in examining and ſtating the *Neceſſity of Safety*, and in conſidering what Force it hath to exempt any Action from the Obligation of common Laws: that is, whether we may not ſometimes do things forbidden, and omit things commanded by the Laws, when we are (not by our own Fault) caſt into ſuch Streights, that we cannot otherwiſe ſecure our own Preſervation [2]? And here it is apparent, that the *Favour*, the *Right*, the *Leave*, or whatever it is that in ſuch Caſes we attribute to *Neceſſity*, ſprings from this ſingle Principle, that it is impoſſible for a Man not to apply his utmoſt Endeavour towards preſerving himſelf; and that, therefore, we cannot eaſily conceive or ſuppoſe, ſuch an Obligation upon him, as ought to outweigh the Deſire of his own Safety.

II. No good and pious Man can queſtion, but that GOD Almighty, who is the abſolute Maſter of our Lives, and whoſe free Bounty gave us the precarious Enjoyment of them, may impoſe on us ſo ſevere a Law, that we ought rather to die, than to recede the leaſt degree from it. Of which kind the *Jews* took their Law againſt eating Swine's Fleſh to be; as we find in the Hiſtory of the *Maccabees*. And their Judgment was then indeed right; becauſe, as the Caſe ſtood with them, to eat that ſort of Fleſh was look'd on as an open Denial of the true Religion. Whereas, were they under no ſuch hard Circumſtances, it was no Sin for a Man to keep himſelf from ſtarving, by feeding on this forbidden Meat, when no other could be procur'd. Sometimes too, by the Authority of a Civil Sovereign, Men may receive ſo ſtrict and rigorous Commands, that they muſt rather part with their Lives, than omit the Duty enjoin'd them. But the Obligation of *Poſitive Laws* is not always preſum'd to be ſo harſh and ſevere. For inaſmuch as the Au-

[a] *M. Senec.* L. 4. Controv. 27. *Neceſſity is the great Patronage and Shelter of human Infelicity.* *Callimach.* Hymn. in *Del.* *Neceſſity's a mighty Goddeſs.* ——— Add. Orat. *Lentul.* in *Liv.* L. 9. c. 4.
[b] To which belongs the Saying of *Pliny*, L. 1. Epiſt. 12. *The beſt and higheſt Reaſon paſſeth for Neceſſity with wiſe Men.*

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[1] *Tully*'s Words are; *Atque etiam hoc mihi videor dicere, eſſe quaſdam cum adjunctione neceſſitudines, quaſdam ſimplices & abſolutas.* ——— *Puto igitur eſſe hanc neceſſitudinem, cui nullâ vi reſiſti poteſt; quæ neque mutari, neque leniri poteſt.* ——— *Quæ adjungitur* ——— *omni tempore, id pertinebit* ——— *aut ad honeſtatem* ——— *aut ad incolumitatem* ——— *aut ad commoditatem.* ——— *Ac ſumma quidem neceſſitudo videtur eſſe honeſtatis; huic proxima, incolumitatis; tertia, ac leviſſima commodatis: quæ cum his nunquàm poterit duabus contendere. Haſce autem inter ſe ſæpe neceſſe eſt comparari, ut quamquam præſtet honeſtas incolumitati, tamen utri potiſſimùm conſulendum ſit, deliberetur.* ——— *Quâ in re fieri poterit, ut cum incolumitati conſuluerimus, quod ſit in præſentiâ de honeſtate delibatum, virtute aliquando & induſtriâ recuperetur, incolumitatis ratio videbitur habenda: cùm autem id non poterit honeſtatis.* Farther, we muſt obſerve, that that Neceſſity which we muſt ſuppoſe always happens without his Fault who is reduced to it, begets a Conteſt not only between Self-love and Sociableneſs, but, alſo, between Self-love and Religion; as, alſo, between the divers Duties of Self-love. The Conteſt between Self-love and Sociableneſs happens, when the Perſons with whom we ought to have dealt otherwiſe, have no Part in the Neceſſity to which we are reduced: For our Author hath ſpoken in the foregoing Chapter of the Conteſt produced in conſequence of another's Fact, whether malicious, or not. See the Notes in the following Paragraph.

[2] Either in our Perſons or Goods, as it appears from the following Part of this Chapter.

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thors of theſe, or of any other Rules and Conſtitutions in the World, chiefly deſign'd by them to promote the Safety or Convenience of Mankind, we may ſuppoſe them, generally ſpeaking, to have had before their Eyes the weak Condition of human Nature; and to have reflected on the Impoſſibility which every Man lies under, not to avoid, and to drive off, all things which aim at his Deſtruction. Upon this account then, [1] moſt Laws, eſpecially thoſe which we call *Poſitive*, are judg'd to except the *Caſes of Neceſſity*; that is, not to *oblige*, when the Obſervance of them muſt be attended with ſome Evil, deſtructive of our Nature, or exceeding the ordinary Patience and Conſtancy of human Minds: Unleſs when this very *Caſe* is included plainly in the Injunction, either by expreſs [2] mention, or becauſe the Nature of the Buſineſs cuts off all Exception and Reſerve. [3] Hence it is clear, that no ſuch Power ought to be attributed to *Neceſſity*, as that it ſhould give us the Privilege of directly violating a Law, or of committing a Sin; but we only preſume, from the favourable Intention of Legiſlators, and from the Conſideration of the Nature of Man, that the *Caſe of Neceſſity* is not comprehended under the general Terms of a Law. An Inſtance of this our Saviour himſelf hath been pleas'd to give us, in *David*'s eating the *Shew-bread* [a], intimating, that the Matter, and the Reaſon of the Law, which forbad that Action in general, could not be ſuppos'd to have any ſuch rigorous Deſign, as that a Man ought rather to die with Hunger, than to touch the conſecrated Food [4].

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[5] The following Principles are moſt exact, and proper to decide all Queſtions which can be propoſed in this Matter; they are borrowed, partly, from *Titius*'s Obſerv. CXLI. and, partly, from *Thomaſius*'s *Inſtit. Juriſpr. Divin.* Lib. 2. Chap. 2. §. 130, *&c.* For we muſt diſtinguiſh between the Laws which concern GOD, and thoſe that relate to Men. As to the firſt of theſe, we may lay down theſe two Rules; 1. That always, when in doing, or not doing a certain Action, we ſhew directly, or indirectly, ſome Contempt of the Divine Majeſty; the Law which forbids, or orders this Action, admits of no Exception in Caſes of Neceſſity; for, in this Caſe, the Nature of the Thing itſelf makes it evident, that no Man ought to preſerve his own Life by any thing whereby GOD is diſhonoured. Thus we ſhould ſuffer every thing rather than blaſpheme, or do any idolatrous Action, or renounce the Profeſſion of a Religion we think true, to embrace another we believe falſe, *&c.* To which may be referr'd the Example of *Daniel*, found in his Prophecy, Chap. vi. verſ. 10. 2. But if in doing, or not doing a certain Action, we do not directly, or indirectly, ſhew any Contempt of the divine Majeſty, the Law which forbids, or orders that Action otherwiſe, does not indiſpenſibly oblige, in a Caſe of extreme Neceſſity; for then the Glory of GOD not ſuffering any Affront, his infinite Goodneſs will not allow us to preſume, that he will oblige us to expoſe our Lives needleſly, or our Property. So that when we cannot commit any Action poſitively by the Law of Nature, without ſhewing, at leaſt, indirectly, ſome Contempt of the Supreme Legiſlator, theſe ſort of negative Laws admit of no Exception in the Caſe of Neceſſity; and ſo much the more, if we do not find ourſelves reduced to this Dilemma, either to die, or break ſome negative Maxim of the natural Law, which, thro' the Violence of him that propoſes it, either formally, or by Interpretation, may make us contemn the Authority of the Supreme Legiſlator. Wherefore, we muſt reſolve rather to die, than lie (for Example) with our Mother, or ſlay a Perſon whom we know to be innocent. See what we have ſaid *Note* 3. Page 17. But we may, to avoid a great Evil, with which we are threatned by an unjuſt Aggreſſor, promiſe ſomething, even with an Oath, without Intention of ſwearing, or contracting by ſuch a forced Act, any valid Obligation; for, in that Caſe, 'tis neither a true Oath nor Promiſe; and he who forces us unjuſtly, does it only becauſe he thinks we have a great Reſpect to the Deity, otherwiſe he would not value it; ſo far is he from engaging us to violate our Duty, that he would be much troubled that we ſhould. See what is ſaid, Lib. 4. Chap. 2. §. 8. As for ſuch Actions as are forbidden by ſome poſitive divine Law, as they are otherwiſe indifferent in themſelves, the Exception of the Caſe of Neceſſity hath place, or not, in that reſpect, according as in doing of them we ſhew, or not, ſome Contempt of the divine Majeſty, which muſt be judged of by Circumſtances. The firſt is ſeen in the Example of *David*, and the other in the ſeven Brethren ſpoken of in the Hiſtory of the *Maccabees*, upon which our Author reaſons well. As to the natural affirmative Laws, which concern the Divinity, Mr. *Titius* believes with Mr. *Thomaſius*, that they do not indiſpenſibly oblige to an outward poſitive Worſhip, whoſe Omiſſion may be a Sign of ſuch a Contempt. See what is ſaid *Note* 6. Page 152. But altho' ſome Acts of outward Worſhip are expreſsly commanded by ſome poſitive Law, we are not obliged to practiſe them in the Caſe of extreme Neceſſity, unleſs the Omiſſion paſſes for an open, or tacit Abjuration of the Religion which we eſteem true, as in the Caſe of *Daniel*, Chap. vi. ver. 10. or when it ſhews a Contempt of the Divinity directly or indirectly; which does not commonly happen. I ſhall ſpeak in *Note* 5. of the Privileges of Neceſſity, with relation to the Duties which concern Men themſelves.

ready to periſh; but ſo as not to expoſe myſelf to certain Ruin.

As for the *negative* Precepts, or the Prohibitions of natural Laws, this, in the firſt place, is moſt certain, that no *Neceſſity* can make it allowable for us to undertake an Action directly diſhonouring Almighty GOD; as, ſuppoſe, to blaſpheme, or to deny him, and renounce his Worſhip and Service, tho' for the avoiding of preſent Death. For, inaſmuch as GOD is able to inflict on a Man a much more grievous Evil than *natural Death* can be imagin'd to be, our Reaſon doth, with good Probability, aſſure us, that he will requite us with a much more noble Happineſs, when we part with our Lives for his Sake: On the other hand, it would be abſurd, as well as impious, to ſin againſt the Divine Honour, for the eſcaping of a leſſer Evil, than what he incurs by ſuch an Offence [a]. Yet the unhappy Caſe of thoſe who yield to the Force and Violence of Tortures, is not altogether unworthy of our Pity.

Concerning thoſe Laws which which contain the mutual Duties [1] of Men, it may be firſt obſerv'd, that ſome of theſe natural Precepts preſuppoſe ſome Human Deed or Inſtitution; which, as may be gather'd from its End and Purport, not extending to the Caſe of extreme Neceſſity, the ſame Exception may be fairly underſtood in the Law. And then we may remark farther, that a Man cannot be ſaid by his own Act, *immediately*, to have violated a Law, unleſs the Act can be rightly *imputed* to him. Now an Act may proceed from a Man two ways, either as he is the *Principal*, or as he is the *Inſtrumental Cauſe of it*. And this *Inſtrumental Cauſe* is again of two kinds, either as it exerciſes no Motion, but what is impreſs'd on it by the *principal Cauſe*, and againſt its own natural Inclination, if it have any; or, as it applies itſelf upon its own proper and internal Impulſe to ſuch a Performance, tho' the Influence, and the Direction of the firſt Cauſe do, likewiſe, aſſiſt in the Operation. If then a Man be, according to this latter way, *Inſtrumental* in an Act, the Act may not only be *imputed* to the *principal* Cauſe; but, alſo, to him, as his true and proper Work. But if he be *inſtrumental*, or concurrent only in the former manner, the Act ſhall not be *imputed* to him, but only to the *principal* Agent. What farther Conditions are requiſite to this Caſe ſhall hereafter be [2] more largely explain'd.

III. Thus much being premiſed, we may go on to diſcuſs the particular Caſes and Queſtions uſually diſputed on this Head. In reference, then, to a Man's ſelf; tho', otherwiſe, he hath no ſuch Right and Power over his Members, as to deſtroy, to diſtort, or to maim them at his Pleaſure; yet it ſhall be lawful for him to cut off a Limb; that is, either poſſeſs'd by an incurable Gangrene, or that is rendred uſeleſs by a Wound; in the former Caſe; to keep the whole Body from periſhing, or the ſound Parts from being infected; and, in the latter, that the uſe of the other Members be not hindred by the Clog of an unſerviceable and cumberſome Appendage. Whether the extremeſt Neceſſity farther gives a Man any Right over his own Life; that is, whether for the eſcaping a Death of Ignominy, or of Torture, he may lay hold on more gentle Means of leaving the World, we have enquir'd, and ſtated in the preceding Chapter. We may proceed, therefore, to examine what Right *Neceſſity* can give us over others. To feed on Man's Fleſh, in the deſperate Extremity of Famine, when no other Suſtenance can be procur'd, is a lamentable, indeed, but not a ſinful Expedient. But as for thoſe Inſtances, when in Diſtreſs, and Want of all Proviſions, Men have been kill'd to preſerve their Fellows, either by Compulſion, and againſt their Conſent, or elſe by the Determination of Lot, the Deciſion of them is a Point of ſome Difficulty and Uncertainty. Inaſmuch as whatever the Law againſt Murther ſuggeſts on one ſide, the Sharpneſs of Hunger pleads as loud on the other; and the Belly, that Advocate without Ears: Eſpecially, conſidering, that unleſs this *unhappy* Means was made uſe of, the whole Company muſt have inevitably periſh'd. This is one of thoſe Caſes, in which

[a] *Carpyllid.* in Antholog.

———"Η εὖ δικαίοις
Ἀνδράσιν εὐσεβίης ἀπόλαυε χάρις.

Good Men, whatever Scenes of Fate they ſee,
Shall ne'er be Loſers by their Piety.

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1 "Every time that, in doing an Action, otherwiſe prohibited, which either reſpects ourſelves or others, we find a phyſical "Means, morally ſure, to ſhun a great Evil, without a greater accruing to ourſelves or others, than that we would avoid; and "without any other Perſon, who finds himſelf in the like Caſe, claiming a particular Right to the Means which offer themſelves: Then the Law permits the Exception of the Caſe of Neceſſity. But, if any one of theſe Conditions be wanting, we "muſt keep to the general Rule." To this I ſay, firſt, that the *Means* ſhould be *phyſical, i. e.* ſolely furniſh'd by Providence. Now this excludes all the Caſes, where the Connection of the Means, with the avoiding the Danger, depends upon the Will of another Perſon. For ſuch Will naturally renders the Effect uncertain; and is, beſides, here, always accompanied with Malice; or, at leaſt, an indirect Deſign openly to deſpiſe the Authority of the Legiſlator. See what I have ſaid on the Abridgment of *The Duties of a Man and a Citizen*, Lib. i. Cap. xxv. *Note* 1. of the laſt Editions. Secondly, it is ſufficient, however, that the Means be *morally ſure*. I do not here mean abſolute and infallible Certainty. It ſhould rather be underſtood in a Negative, than a poſitive Senſe. That is to ſay, that without ſuch a Means we are undone, not that we are ſure of being ſav'd, if we uſe it. A Fugitive, for Example, may be overtaken, tho', in order to ſave Time, he ſhould throw down a Cripple who ſtood in his Way. This does not, however, hinder him from having a Right to force a Paſſage, even at the Hazard of hurting a Man, who was in no Condition to get out of his Way; for Nature here allows every one to keep their Ground as long as poſſible. Thirdly, we muſt take Care, that in thus counter-acting the common Rules, ſome Evil does not ariſe greater, with reſpect to ourſelves or others, than that which we would avoid. For inſtance, we ought not to ſave our Property by endangering the Life of an innocent Perſon. And, if we cannot ſave our own Life, without expoſing that of another, whoſe Preſervation is of much more Importance to Society; then the great Diſproportion between the Loſs of ſuch a Perſon, and our own Danger, leaves no room for excepting the Caſe of Neceſſity. Fourthly, if any other Man, reduced to the ſame Neceſſity, or expos'd to the ſame Hazard, by the uſe of the Means which offer themſelves to us, has a particular Right to make uſe of thoſe Means, it is certain the Care of our own Preſervation muſt yield to the double Claim of ſuch a Competitor.

2 See Lib. VIII. Chap. 1. §. 6. and what I ſhall ſay upon it contrary to our Author's Notions.

3 We may, in this place, apply the Principles laid down in *Note* 5. Page 201. Indeed the loſs of a Member is, without Contradiction, a leſſer Evil than the Loſs of Life, and is, alſo, a ſure Means to keep ourſelves from Danger. The ſame Thing hath place, as any one may ſee, in the Caſes where to ſave a more noble and neceſſary Member, we are contented to be deprived of one leſs conſiderable and uſeful. But we ought to obſerve, 1. That it is ſufficient here to ſuppoſe a bare Permiſſion, there being but few Men, who have Courage ſufficient to bear ſuch a painful Operation as the cutting off a Member dangerouſly affected is; and, therefore, had rather die of their Wounds in Eaſe. 2. That Neceſſity to which we were reduced ought not to be underſtood in its utmoſt rigor. So that when we have, in ſome manner, contributed, by our own Fault, to put ourſelves into ſuch an Extremity, we may not lawfully, to retrieve our Affairs, reſolve upon a thing otherwiſe unlawful. See Mr. *Titius*'s Obſerv. CXLII.

a Man

a Man ought to die rather than commit the Fact, it being directly contrary to the Laws both of GOD and Nature [a]. To this purpoſe we have a Story of ſeven *Engliſhmen*, who being toſs'd in the main Ocean without Meat or Drink, kill'd one of their Number, on whom the Lot fell, and who had the Courage not to be diſſatisfied, aſſuaging, in ſome meaſure with his Body, their intolerable and almoſt famiſh'd Condition: Whom when they at laſt came to ſhore, the Judges abſolv'd of the Crime of Murther. *Zeigler* upon *Grotius* [b], giving this Relation, is of opinion, That *the Men were all guilty of a great Sin, for conſpiring againſt the Life of one in the Company, and (if it ſhould ſo happen) every one againſt his own; thus regarding bodily Peril more than the Danger of their Souls: That no one ought to have ſet ſo little a Value on his Life, as to loſe it for ſatisfying the Hunger of the reſt: And that the reſt ought not to have been ſo cruel to their Fellow, in compliment to their own Stomachs.* But to this it might be anſwer'd, that 'tis too harſh and rigorous a Cenſure, to ſay thoſe Men *conſpire againſt the Life of another*, who agree to take the Chance of dying one of them, for preſerving the Lives of all the reſt [c]. And, conſequently, they could put their Souls into no danger by this unfortunate Reſolution. Nor, is the Charge of *undervaluing their Lives* any better grounded; ſince he only can fall under this Imputation, who throws himſelf away without Neceſſity. Nor, in the third place, doth there lie any Objection of Cruelty, when the Perſon dying for the Safety of his Companions, receives the Inſtrument of Death with leſs Grief and Reluctancy than the others apply it. There is another Caſe worth examining, [2] ſuppoſe in a Shipwreck more Men leap into the little Boat than it is able to carry, and the Boat belongs to no one by a more peculiar Right than to the reſt; whether they may not fairly draw Lots, who ſhall be caſt overboard; and whether, if any one refuſe thus to take his Chance, he may not be thrown out without farther Deliberation, as one who ſeeks the Deſtruction of the whole Company? But theſe Caſes being ſuch as very rarely happen, [3] we chuſe at preſent to ſuſpend our poſitive Judgment concerning them.

IV. This may more frequently happen, that two Perſons being under imminent Danger of their Lives, both muſt unavoidably periſh, unleſs one of them, for his own Deliverance, haſtens, by ſome Act, the Fate of the other, which would, however, have ſoon arriv'd: Or, that upon Neceſſity we may bring on another, indirectly, the Danger of Death, or of ſome grievous Hurt; not deſigning to harm him, but only to exerciſe ſuch an Act as may, probably, prove miſchievous to him; at the ſame time deſiring any other way to get rid of our Neceſſity and Streights; and endeavouring, as far as lies in our Power, to make the Damage fall light on the Suffering Party. Now this kind of Hurt, as we judge it not to cauſe any Sin in the Giver, ſo we think the Receiver ought to look on it as purely an accidental Evil, upon account of which he has no reaſon to be angry with the Author. Let us conſider an Inſtance or two of both Caſes. If I, being a ſkilful Swimmer, fall into deep Waters with another utterly ignorant of that Art; and he, as the uſual way is, clings faſt about me, and I am not able to drag out both Burthens; who will blame me for uſing all my Strength to get rid of him, and ſo to prevent my own Death, tho' perhaps I could, with hard ſhift, have held him ſome few Minutes above Water? So in a Wreck [4], if I have taken Poſſeſſion of a Plank which will not hold two, and another ſwimming towards me, ſhall endeavour to throw himſelf upon it, to the Deſtruction of us both; there ſeems to be no Reaſon why I ſhould not apply the utmoſt Violence in keeping him off. And thus, likewiſe, if two Men are purſued hard by an Enemy, bringing Death in his Hand, if both cannot be ſaved, one of them may, for his own Security, either by breaking down a Bridge, or ſhutting a Gate after him, leave the other in imminent

a *Homer* Odyſſ. vii. 216. Ου' γὰρ τι συγκρῦψαι, &c.
The Belly, like a bold Petitioner,
Breaks rudely in, and forceth you to hear.

b Ad *Grot.* L. 2. c. 1. from *Nich. Tulpius Obſervat. Medicin.* L. 1. c. 43.

c See *Jonah*, c. 1. ver. 7, &c.

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[1] Mr. *Titius*, Obſerv. CXLIV. thinks it neither unlawful, nor of an indiſpenſible Obligation; but he ſays, "That they "who are reduced to this Extremity, ought never to reſolve upon a Thing ſo ſad and inhuman; for, altho', commonly the "Affections of Men one to another, eſpecially ſuch as are neither Parents nor Friends, are very cool; yet, when they are in-"volved in any common Danger, the Senſe of that naturally awakens our Thoughts of Humanity and Compaſſion, which "make us chuſe rather to die ourſelves, or wait the unforeſeen Events of Divine Providence, than have recourſe to ſuch an "irkſome and barbarous Expedient, by which we are not yet ſure that we ſhall ſave our Lives." I add, that the Means here is not of ſuch a Nature as to be regarded as one of thoſe which Providence alone furniſhes. In other Caſes, where Neceſſity gives a Right, the Evil we do another is only an accidental Conſequence of our uſing the Means, which have a natural Connection with our own Preſervation. We do not propoſe directly to take away a Man's Life, we only leave him in Danger; or, if we do any thing to put him in that Condition, it is not always, in a manner, infallibly fatal to him. There often remains, ſome ſmall Hopes of his Delivery. But, in the laſt Caſe, we muſt neceſſarily, and deliberately kill a Perſon, and that to procure ourſelves a Food, which no one but a *Cannibal* will regard without ſuch Horror and Diſguſt, as is equally inſupportable with the ſevereſt Hunger. Indeed, thoſe who are reduc'd to ſuch an Extremity rather deſerve our Compaſſion, than to be conſider'd as guilty of Murther. But this is becauſe we juſtly conſider their Action as the Effect of Deſpair, in which the Will has no Part, and which very nearly borders upon Frenzy.

[2] In truth, the Maſter of the Shallop doth not ſeem to be obliged to draw Lots with the others, whom he permitted, out of Pity to come into it; and, conſequently, might have excluded to have ſav'd himſelf. *Titius*, Obſer. CXLIV. He is in the ſame Caſe of Neceſſity with them, and has this Advantage, that he is Proprietor, which gives him a double Right to the Means of ſaving himſelf. See what I have ſaid, *Note* 1. Page 202.

[3] Our Author determines it by ſaying, *It ſeems ſo to me*, in his *Abridgment of the Duties of a Man and Citizen*, Lib. 1. Chap. 5. §. 22.

[4] But if that other being ſtronger than I, drive me from my Plank, the Neceſſity of ſaving his Life will not excuſe him, becauſe he brings upon me as great an Evil directly, as that he ſaves himſelf from. Moreover, I am here the firſt in time, the Plank belonged to me by the Right of the firſt Occupant, and ſo he could not drive me from it without Injuſtice. We muſt ſay the ſame Thing of a Man, who, when an Army is routed, will ſeize upon an Horſe, which belongs to a wounded Perſon, and leaves him infallibly expos'd to the Fury of the Enemy, to ſave his own Life the more certainly. Theſe are the two Caſes mention'd by *Carneades*, as cited by *Lactantius*, in the Place above quoted, *Note* 2. Page 125. It is in vain to oppoſe to the Deciſions, that which *Lactantius* gives himſelf in the Chapter, which follows the Words of the Academic Philoſopher. In reality, the Caſes propos'd are not altogether the ſame, and it is eaſy to ſee the good Father had but very confus'd Ideas on this Subject.

Danger of being kill'd. This kind of Neceſſity often happens in War; where 'tis a Rule, that, at any time, ſome few are to be left in diſtreſs for ſecuring the main Body. *Arrian* de Expedit. *Alex.* Lib. vi. c. 25. *It was neceſſary to ſet aſide the Care of ſingle Perſons, in proſecution of the Common Safety.* *Virgil*, Æn. ix. v. 722. *&c.*

PANDARUS, ut fuſo germanum corpore cernit,
Et quo ſit fortuna loco, qui caſus agat res;
Portam vi multa converſo cardine torquet,
Obnixus latis humeris: multoſque ſuorum,
Mœnibus excluſos, duro in certamine linquit.

When *Pandarus* beheld his Brother kill'd,
The Town with Fear and wild Confuſion fill'd:
He turns the Hinges of the heavy Gate,
With both his Hands, and adds his Shoulders to the Weight.
Some happier Friends within the Walls inclos'd;
The reſt ſhut out to certain Death expos'd.
Mr. *Dryden.*

And again, Lib. xi. ver. 884, *&c.* after the Defeat of the *Latin* Horſe,

——Pars claudere portas,
Nec ſociis aperire viam, nec mœnibus audent
Accipere orantes.
Then in a Fright the Folding Gates they cloſe,
But leave their Friends excluded with their Foes.
Mr. *Dryden.*

Compare *Livy*, Lib. xxvi. 15. Where the *Thurini* made a wicked and treacherous Uſe of this Pretence. *Florus* (Lib. ii. c. 18.) ſays of the *Numantines*, *At length they enter'd into a Reſolution of Flight: But this their Wives prevented, by cutting in pieces the Harneſs of their Horſes; committing a baſe Cruelty thro' an Extremity of Love.* *Tacitus* (Ann. xiv. c. 32, 33.) cenſures it as the Effect of ill Conduct, or of Treachery, that when the *Romans* were beſieg'd in *Camolodunum*, *Non motis ſenibus & fœminis juventus ſola reſtiterit*; the young and able Men did not throw out the Women, and Perſons uſeleſs through Age, and ſo clearing the Place make it more capable of Defence. (Add. *Livy*, Lib. v. c. 40.) On the contrary, he tells us in the ſame Story, that Suetonius *reſolv'd to hazard the Loſs of one Town for the Security of the whole Province; and, therefore, he would not be mov'd by the Cries and Intreaties of thoſe who begg'd him to ſtay and protect them: But giving the Sign for marching, he receiv'd all into his Troops that were willing and able to follow him; and as for thoſe, whom either the Weakneſs of their Sex, or the Burthen of their Age hinder'd from ſtirring, they were left to the Mercy of the Barbarians.* Yet *Darius*, in *Quintus Curtius*, Lib. iv. c. i. 16. when Things were not brought to deſperate Extremity, bravely refus'd to break down the Bridge of the River *Lycus*, which he had paſs'd with ſome part of an Army in a Retreat; making this generous Declaration, *That he had rather give a Paſſage to thoſe who purſu'd, than take it from thoſe who fled.*

An Inſtance [1] of the other Caſe which we mention'd in general, may be this: Suppoſe a Perſon of more Strength than myſelf follows me cloſe with Intention to kill me, and I meet one in a narrow Paſſage, thro' which I muſt take my Flight; if, upon my Requeſt, he will not get out of the way, or if he has not Time or Room to ſtand off, I may throw him down and run over him, tho' the Fall, in all probability, will be very grievous and hurtful to him: Unleſs he be ſuch an one as, by virtue of ſome peculiar *Obligation*, I am bound, at any time, to ſerve voluntarily with my own Danger [2]. And if the Perſon who thus ſtops my Flight be not able to look to himſelf upon my calling to him, as ſuppoſe a lame Man or a Child, I ſhall certainly deſerve Excuſe, if I attempt to leap over them, (either being on Horſeback or a-foot) rather than to fall into my Enemy's Hands by my Delay. As for that other Example, which ſome give, it plainly appears not to be without Fault: The Caſe is this, [3] *A Captain flying from a Battle; and, being cloſely follow'd by the Enemy, one of his Men happening to be got juſt before him in the Crowd, he runs him thro' to get off with the more Expedition.* Now here the Captain was ſtrong enough to have made his way only by puſhing down the Fellow that ſtopp'd him, and, therefore, ought not to have us'd ſo violent Means. Yet, if in getting by him, he had undeſignedly hurt him with his Arms, the Miſchance would have been very pardonable. But, in caſe a Man either out of a frolickſome, or a cruel and barbarous Humour, ſtops me on purpoſe, and refuſes to make room for me to eſcape, I may preſently uſe him as an Enemy, and thruſt him down by any means I can, how much ſoever he is like to ſuffer by the Bruiſe [a]. To conclude this Point, as the declining Death any way admits of much Favour and Excuſe, ſo if the Danger offer'd be no more than a maiming, or a grievous Wound, and we fly from it with the Hurt of thoſe who chance to ſtop us, the Fact will bear much the ſame Apology or Defence. For he who offers ſuch a Vio-

[a] Comp. *Lactant.* Inſtitut. l. 5. c. 17. *which ſome have vainly oppos'd to the Opinion here deliver'd.*

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[1] Theſe ſort of Caſes have no Difficulty in them, for he treats of the Affirmative Precepts of the Law of Nature, which oblige not when there is no occaſion of practiſing them, and much more in a Caſe of Neceſſity, in which we can't practiſe them, but at the Expence of our own Preſervation. See Mr. *Titius*, Obſerv. CXLV. But there is in this laſt Inſtance ſomething more than barely with-holding our Aſſiſtance. We do not remain in ſimple Inaction, but do ſomething poſitive, which deprives the other Perſon of a Reſource he expected in his Danger, but which we were not oblig'd to leave him, in order to periſh ourſelves.

[2] See *Note* 1. Page 262. and what I have ſaid in the Abrigment of *the Duties of a Man and a Citizen*, Lib. i. Cap. v. §. 27. *Note* 1. Mr. *Trevor*, Profeſſor at *Helmſtadt*, ſays, in his Note on the ſame Place of his Edition, that I was in the wrong to aſſert, that we ſhould here have regard to the Degrees of Uſefulneſs, which the Perſons might have in Society. His Reaſon is, becauſe ſuch a Compariſon belongs rather to the Rules of *Honeſty*, than to thoſe of *rigorous Juſtice*. Call this as you will, I ſhall not diſpute about Words. But *Humanity*, *Gratitude*, *Virtue*, in my Opinion, here impoſe an Obligation no leſs ſtrong than that of *rigorous Juſtice*; tho' there may be ſome Difference with regard to the external Effect, or the Manner of requiring the Duties which flow from theſe two Principles. Now I have ſaid nothing, which could poſſibly infer, that he, who, in the Caſe in queſtion, prefers his own Safety to that of a Perſon more uſeful to Society, could poſſibly be regarded, as doing him any real Injury. As to the reſt, I very much fear, that too much Streſs is laid on the Diſtinction, which ſome make between the *Juſtum*, *Honeſtum*, and *Decorum*; as I could eaſily ſhew.

[3] It is eaſy to ſee, that the Action here alledged is not innocent. This Officer might have made way for himſelf forcibly, by thruſting the Soldier aſide, but if he had wounded him with his Arms undeſignedly, he was excuſed. Theſe Words, which our Author criticiſes are *Boecler*'s in his Notes upon *Grotius*, Lib. ii. Cap. i. §. 4.

lence

lence may be reſiſted, as much as if he directly attempted to murther us; and when we are compell'd to conſult our Safety by Flight, the Conſternation we muſt needs lie under vindicates our Innocence, as to any ſudden and unfortunate Accident that we chance to treſpaſs in.

V. Let us enquire, in the next place, whether the Neceſſity of preſerving our Life can give us any Right over other Mens Goods; ſo as to make it allowable for us to ſeize on them for our Relief, either ſecretly, or by open Force, againſt the Owner's Conſent. For the more clear and ſolid Determination of which Point, we think it neceſſary to hint, in ſhort, on the Cauſes upon which diſtinct *Proprietes* were firſt introduc'd in the World; deſigning to examine them more at large in their proper Place [a]. Now, the main Reaſon on which *Proprieties* are founded, we take to be theſe two, that the Feuds and Quarrels might be appeas'd, which aroſe in the *Primitive Communion* of Things; and that Men might be put under a kind of Neceſſity of being induſtrious, every one being to get his Maintenance by his own Application and Labour. This Diviſion, therefore, of Goods was not made, that every Perſon ſhould ſit idly [1] brooding over the Share of Wealth he had got, without aſſiſting or ſerving his Fellows; but that any one might diſpoſe of his Things how he pleas'd; and, if he thought fit to communicate them to others, he might, at leaſt, be thus furniſh'd with an Opportunity of laying Obligations on the reſt of Mankind. Hence, when *Proprieties* were once eſtabliſh'd, Men obtain'd a Power not only of exerciſing Commerce to their mutual Advantage and Gain; but, likewiſe, of diſpenſing more largely in the Works of Humanity and Beneficence; whence their Diligence had procur'd them a greater Share of Goods than others: Whereas, before, when all Things lay in common, Men could lend one another no Aſſiſtance, but what was ſupply'd by their corporal Ability, and could be charitable of nothing but of their *Strength* [b]. Farther, ſuch is the Force of *Propriety*, that the *Proprietor* hath a Right of delivering his Goods with his own Hands; even ſuch as he is oblig'd to give others. Whence it follows, that when one Man has any thing owing from another, he is not preſently to ſeize on it at a venture, but ought to apply himſelf to the Owner, deſiring to receive it from his Diſpoſal. Yet, in caſe the other Party refuſe thus to make good his Obligation, the Power and Privilege of *Propriety* doth not reach ſo far as that the Things may not be taken away without the Owner's Conſent, either by the Authority of the Magiſtrate in *Civil Communities*, or in a *State of Nature*, by Violence and hoſtile Force. And tho', in regard to bare *Natural Right*, for a Man to relieve another in Extremity with his Goods, for which he himſelf hath not ſo much occaſion, being a Duty obliging only *imperfectly*, and not in the manner of of a *Debt*, ſince it ariſes wholly from the Virtue of *Humanity*; yet there ſeems to be no reaſon why, by the additional Force of a Civil Ordinance, it may not be turn'd into a ſtrict and perfect Obligation. And this *Selden* obſerves to have been done among the *Jews*: Who, upon a Man's refuſing to give ſuch Alms as was proper for him, could force him to it by an Action at Law. 'Tis no wonder, therefore, that they ſhould forbid their Poor, on any account, to ſeize on the Goods of others, enjoining them to take only what private Perſons, or the publick Officers, or Stewards of Alms, ſhould give them on their Petition. Whence the ſtealing of what was another's, tho' upon extreme Neceſſity, paſs'd, in that State, for Theft or Rapine. But now, ſuppoſing, under another Government, the like good Proviſion is not made for Perſons in want; ſuppoſing, likewiſe, that the covetous Temper of Men of Subſtance cannot be prevail'd on to give Relief, and that the needy Creature is not able, either by his Work or Service, or by making Sale of any thing that he poſſeſſes, to aſſiſt his preſent Neceſſity, muſt he, therefore, periſh with Famine? Or can any human Inſtitution bind me with ſuch a Force, that in caſe another Man neglects his Duty towards me, I muſt rather die, than recede a little from the ordinary, and the regular way of acting? We conceive, therefore, that ſuch a Perſon doth not contract the Guilt of Theft, who happening, not through his own Fault, to be in extreme Want, either of neceſſary Food, or of Cloaths to preſerve him from the Violence of Weather [2], and cannot obtain them from the voluntary Gift of the Rich, either by urgent Intreaties, or by offering ſomewhat equivalent in Price, or by engaging to *work it out*, ſhall either forcibly, or privily, relieve himſelf out of their Abundance; eſpecially if he do it with full Intention to pay the Value of them, whenever his better Fortune gives him Ability. Some Men deny that ſuch a Caſe of *Neceſſity*, as we ſpeak of, can poſſibly happen. But if a Man ſhould wander in a Foreign Land, unknown, friendleſs, and in want, ſpoil'd of all he had by Shipwreck, or by Robbers, or having loſt, by ſome Caſualty, whatever he was worth in his own Country; ſhould none be found willing, either to relieve his Diſtreſs, or to hire his Service; and ſhould they rather, (as it commonly happens) ſeeing him in a good Garb, ſuſpect him to beg without Reaſon, muſt the poor Creature ſtarve [3] in this miſerable Condition? It may be objected indeed, that in *Proverbs* vi. 30, 31. he is call'd a Thief, and pronounced obnoxious to the Penalty of Theft, who ſteals only to ſatisfy his Hunger. But whoever cloſely views and conſiders that Text, will find that the Thief there cen-

[a] Lib. 4. c. 4.
[b] See *Epheſ.* iv. 28.

[1] *Aut qui divitiis ſoli incubuere repertis,*
Nec partem poſuere ſuis, &c.
Virg. Æn. VI. 610, 611.

[2] If in a Caſe of Neceſſity a Man may innocently do ſome Wrong to another in his Perſon, ſo far as to put him in danger of his Life to ſave his own, by a much ſtronger Reaſon will he be permitted, in like Caſes, to take away or deſtroy the Property of another, which are of much leſs Value than Life and Members. *Thomaſ. Inſtit. Juriſprud. Div.* Lib. 2. Chap. 2. §. 168. *Note* 1. and *Tisius*'s Obſerv. CXLVII.

[3] Mr. *Hertius* has alledged another Example here, which is this; when the Magiſtrate, in a great Scarcity of Proviſions, conſpires with thoſe that will not open their Granaries, that they may ſell the Corn the dearer; or, at leaſt, he neglects to hinder the Monopoly, and puniſh the barbarous Covetouſneſs of thoſe, who, to enrich themſelves, care not how many Men they bring to Beggary. This Caſe may happen, alſo, when ſeveral Perſons travel together through an uninhabited Country, as the Eaſtern Caravans do.

ſur'd is neither in ſuch extreme *Neceſſity*, as we are now ſuppoſing, nor ſeems to have fallen into his needy Condition, meerly by ill Fortune, without his own Idleneſs or Default: For the Context implies, that he had a Houſe and Goods ſufficient to make [1] ſevenfold Reſtitution; which he might have either ſold or pawn'd; a Chapman or Creditor being eaſily to be met with in Times of Plenty and Peace. For we have no Grounds to think, that the Fact there mention'd is ſuppos'd to be committed, either in the Time of War, or upon account of the extraordinary Price of Proviſion. Beſides, this Thief was faulty upon another Account: For if he had not wherewithal to maintain himſelf, the Laws oblig'd him to ſell himſelf for a Slave [a].

VI. *Grotius* [b] propoſes another way of ſolving the Difficulty under our preſent Debate: He ſays, that the firſt Introducers of diſtinct *Proprieties* muſt be underſtood to have done it with this Exception and Limitation, that the Right of this Propriety excluding others from the Uſe of every Man's proper Goods, ought then to expire, and to give place, when another cannot poſſibly without making uſe of them, be ſuſtain'd or preſerv'd: And, conſequently, that in ſuch a Caſe of *Neceſſity* a Thing poſſeſs'd in *peculiar*, when another Man's Life cannot be ſav'd without it, is turn'd again into *common*. Or, what amounts to the ſame Purpoſe, that when Men originally inſtituted ſeparate Proprieties, they agreed by mutual Covenant, to forbear uſing the particular Goods of each other, any farther than the Owner ſhould give leave: Yet ſo as to make it allowable in extreme Neceſſity, for a Man to ſeize on any thing abſolutely requiſite for his own Preſervation, as if it ſtill lay in its primitive Indifference and Community. For ſince in *written Laws*, that Interpretation is to be follow'd, which recedes the leaſt from natural Equity, he preſumes this will hold more ſtrongly in regard to Cuſtoms, which obtain only by tacit Agreement. And, ſurely, it muſt be, in the higheſt Degree, equitable, that a Man be permitted to ſave his Life, by uſing any thing at hand, when all other Means fail him.

But this Expoſition lies open to ſeveral Exceptions and Difficulties: For if *Neceſſity* gives a Man a Right of ſeizing on the Goods of others, as if they lay in common, what hinders but that, if he have ſufficient Strength, [2] he may take them from the Owners, when they themſelves are, at the ſame time, pinch'd with the like *Neceſſity?* Yet this *Grotius* doth by no means allow. Again, *Grotius* requires *Reſtitution* to be made in theſe Caſes: But I am oblig'd to no ſuch Duty, when I take a Thing by virtue of my Right. Beſides, he forgot to mention how different the Caſe is, when a Man falls under ſuch Neceſſity by his own Sloth or Negligence, and when it comes on him without his Fault: Which Diſtinction being omitted, a Right ſeems to be given to idle Knaves, whoſe Vices have brought them into Want, to ſeize forcibly for their own Uſe the Fruits of other Mens honeſt Labours; and ſo continuing their Poverty and their Lazineſs together, to put a Neceſſity on induſtrious Perſons of feeding ſuch uſeleſs Bellies for nothing. But all wiſe Men, as they allow ſuch as are innocently miſerable to deſerve Aſſiſtance and Relief; ſo they adviſe us to pack off mendicant Drones and Lubbards, with the old Anſwer, that the Ant gave the Graſhopper in the Fable [c]. Since then it is lawful for every Proprietor to diſtinguiſh between ſuch as are indigent out of Misfortune, and ſuch as are reduc'd to the ſame Condition by their own Demerit and Neglect; 'tis plain, that he has ſuch a Right over his own Goods, as ſhall, in ſome meaſure, prevail even againſt a Perſon in extreme Neceſſity: So far, at leaſt, as that he ſhall have the Privilege of judging, whether the Man be an Object worthy of his Relief, or not; that it may be in his Power to oblige and win a neceſſitous Perſon by his ſeaſonable Succours: For nothing raiſes the Value of a Kindneſs ſo much as its being done for the Removal of an extreme Diſtreſs. But all this Merit and Obligation is cut off, when we give another only what he might, otherwiſe, as his own Right and Due, violently take from us.

We think, therefore, that this Point of Diſpute will be more clearly determin'd by the Principles, and the Method which we have laid down; that is, by ſaying, in ſhort, that the wealthy Perſon is bound to relieve him who innocently wants, by an imperfect Obligation; to the performing of which, though regularly no Man ought to be compell'd by

a See *Levit.* xxv. 39. *Selden*, L. 6. c. 7. Nothing can be drawn to the contrary from *Prov.* xxx. 9. Other Authors give this Example of extreme Neceſſity: *A Man being in an unknown Country, is attack'd by an unjuſt Aſſailant, and cannot otherwiſe ſave himſelf than by ſpeedy Flight. He finds ready at hand a Horſe belonging to ſome Perſon of the Country, but which he ſees no means of reſtoring, as well becauſe he is ignorant of the Owner, as becauſe he may be oblig'd to ride far to eſcape the Danger.*

b L. 2. c. 2. ſ. 6.

c And thus in *Plutarch*, (Apophthegm.) when a Captain of Coaſting-robbers made an Inroad into the Territories of *Lacedemon*; and, being taken, urg'd in his own Defence, *That he was neither able of himſelf to pay his Companions, nor could prevail with thoſe that had Money to ſupply him; and, therefore, he ventur'd to take it by Force. Cleomenes* call'd this Proceeding, συντομος η πονηρια, *A very compendious Wickedneſs.* Add. *Pandulf.* Collenut. rer. *Neapolit.* l. 5. p. 373.

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1 *Grotius*, in his Notes upon this Text, affirms, that it ought to be render'd, *That he, if he ſhould be taken ſeven times in the Fact, he ſhall reſtore, i. e.* He ſhall not be oblig'd to any thing but Reſtitution, according to the Law preſcribed, which ſuppoſes always, that the Thief hath always ſomething, ſince he muſt reſtore more than he has taken. See *Exod.* xxii.

2 I do not perceive how this can follow from *Grotius*'s Hypotheſis. It is certain, that when a Proprietor can't ſpare the Bread, for Example, or Corn, which he hath for his preſent Uſe himſelf, 'tis not permitted to any other, tho' he be in ever ſo great Neceſſity, to take them away from him by Force. But yet the Maxim is no leſs true, which ſuppoſes, that in theſe laſt Caſes all Things become common, as they were at firſt; for Community does not at all hinder, but that all which every one is poſſeſſed of for his own Uſe, ſhould not belong to him only, who is in actual Poſſeſſion of it, altho' the Property is his, and we can't take any thing from him, but when he hath an Overplus, and we cannot, otherwiſe, find any Means to ſupply our Wants. See what is ſaid on Lib. 4. Chap. 4. So that our Author has done well to depend upon other Reaſons, which he alledges afterward, and which are ſufficient for his Purpoſe.

3 See what I have ſaid on *The Abridgment of the Duties of a Man and a Citizen*, Lib. i. Cap. v. §. 30. *Note* 1. laſt Edition. We may ſay, in general, with regard to all theſe Caſes of Neceſſity, that the Rights which it gives, are not leſs, on account of any Fault, which might have preceded, or brought them on. It is requiſite, that there be a near Connection between the Fault, and the Extremity to which we are reduc'd; ſuch a Connection, I mean, as proceeds either from a determin'd Will of needleſsly expoſing ourſelves to the Danger, or an indirect Will, which, by our doing or neglecting certain Things, which we might eaſiy foreſee, hazard our Lives. The preceding Faults, having but a diſtant Influence, afford rather Matter for Repentance, and caution us to be wiſer another time.

Violence,

Violence, yet the Force of *extreme Neceſſity* is ſo great, as to make theſe Things recoverable by the ſame Means as thoſe which are truly and rightfully due: That is, by making Complaint [1] to the Magiſtrate, or when the Urgency of the Diſtreſs cannot allow Time for ſuch an Expedient, than by ſeizing what is ready at hand, either in a ſecret, or in an open manner. Now the chief Reaſon why we affirm thoſe Things, which proceed purely from the Virtue of *Humanity*, to be owing only by an imperfect Right, is, that Men may be allow'd both an Occaſion of ſhewing their voluntary Propenſion to the Diſcharge of their Duty; and, likewiſe, of endearing others to them by their voluntary Benefits. But now, if a Man ſhould deſpiſe theſe Conſiderations, muſt a poor neceſſitous Creature be famiſh'd, becauſe he cannot prevail on the unmerciful Miſer? Certainly ſuch an inflexible Churl ought rather to be depriv'd of his Gift, and of his Merit together; ſince he had not Heart enough to venture on an Act of common Humanity.

From what has been hitherto offer'd, it is eaſy to gather the Reaſonableneſs of thoſe Exceptions, which *Grotius* ſubjoins to his and our main Aſſertion. For ſince nothing but inevitable Neceſſity can juſtify the taking by Force what is owing only upon an *imperfect Obligation*; in the firſt place, it is clear, that all fairer Courſes are firſt to be tried, as complaining to the Magiſtrate, begging and intreating, promiſing Reſtitution, if we are ever able, or offering to diſcharge the Debt by equivalent Labour and Service. *Secondly*, This Licenſe can by no means take place, when the Owner of the Thing which we want, lies under as great a Neceſſity as we ourſelves: On the contrary, we ſuppoſe the Owner to *abound*. This Caution or Exception may be extended farther; and, we may ſay, that a diſtreſs'd Perſon cannot fairly take a thing from the Owner without his Conſent, if it be only manifeſt, that, upon the Loſs of that Thing the Owner will hereafter fall into the like indigent Condition. For in theſe Caſes 'tis fit *Charity ſhould begin at home*. That Rule of the *Civil Law* which *Grotius* applies to the preſent Buſineſs, that *when the Conſiderations on both ſides are equal, the Caſe of the preſent Occupant* [2] *is to be preferr'd*: doth not ſeem ſo exactly to hit the Purpoſe. For that Maxim only imports, that Judgment ought to be given for the *Poſſeſſor*, whilſt the *Claimant's* Title and his are alike diſputable. But, in the Matter before us, the Poſſeſſor's Right and Title are granted, and the only Queſtion is, whether I am oblig'd, by the bare Law of Humanity, to periſh myſelf for the ſake of preſerving another? which is a Paradox that no Man will pretend to maintain. The other Sentence which *Grotius* applies out of *Curtius* [a], is much more proper and more agreeable to the Point; *Melior eſt cauſa ſuum non tradentis, quàm poſcentis alienum. He who refuſes to deliver what is his own, has a fairer Cauſe than he who demands what is another Man's.*

Thirdly, We lay it down as an indiſpenſible Condition, that Reſtitution is to be made, if poſſible; eſpecially if the Thing taken were of great Value, and ſuch as the Owner could not well part with without ſome Conſideration. But if the Thing were ſmall and inconſiderable, and the Loſs ſo light, that the Owner's Fortune could not feel it, 'twill be ſufficient, when Opportunity ſerves, to ſhew that we ſhould not have been wanting in Gratitude, if his Greedineſs would have given us leave to be obliged to him. As for *Grotius's* requiring [3] Reſtitution, it ſeems not to ſuit with his Hypotheſis. For if upon a Caſe of Neceſſity the Right of *Primitive Communion* returns, ſo as to give a Man a juſt Title to the Goods of others, then Reſtitution can, on no account, be deſir'd or demanded. But ſince this is neceſſarily to be made, it appears, that the Right of the Owner doth not expire thro' the Neceſſity of the Petitioner; but that he ought voluntarily to have given Relief, either *gratis*, or upon receipt of the Price of the Thing, or any other Compenſation. Which Duty, when he neglects to perform,

[a] L. 7. c. 1.

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[1] This is the only Refuge that they have, who believe that the greateſt Neceſſity cannot authorize any Man to take another Man's Goods; but, as Mr. *Thomaſius* has obſerv'd, *Inſtit. Juriſp. Div.* Lib. 2. Chap. 2. §. 171. they acknowledge tacitly, by this, that he who is reduced to that troubleſome Neceſſity, has a full Right to require what he wants; for only thoſe Things which are due, by virtue of a compleat Obligation, can be the Subject of the Magiſtrate's Interpoſition. Now I ſpeak of *perfect Obligation*, I owe my Author, or rather *Grotius*, a ſmall Juſtification, againſt the raſh Cenſures of a late Writer, who has taken occaſion from hence to ſay, ironically, *What a fine Caſuiſt is Pufendorf!* And to add, in the ſame Tone, *An Obligation founded upon Nature, is but an imperfect Obligation: A rare Principle truly!* (See the Sup. to *Mr. Wollaſton's Religion of Nature Delineated*, Page 406.) If the Perſon who thus ſpeaks had read *Pufendorf* attentively, he would never have imagin'd that, by *imperfect Obligation*, that Author underſtood, ſuch a one, as only in Conſcience impos'd an imperfect Neceſſity of conforming to. It appears thro' his whole Work, that, according to him, the Neceſſity is equally binding in this reſpect, let the Obligation be of what Nature it will. The Imperfection, here meant, regards only the external Effect, in relation to other Men, who are the Objects of the Obligation, and who have no Right to force us to fulfil them: So that we may, without Fear of *Puniſhment*, tho' not without Breach of *Honeſty*, fail in what we owe them. But this is evident from the Words he quotes, which render the Critic inexcuſable. After this I cannot forbear retorting the unjuſt Reproach he has thrown out in the following Page. *Pufendorf* (ſays he) *affirms, that a Man may ſteal, kill, or* ſin, *to ſave his Life.* Where has he ſaid we may *ſin?* He has maintain'd the contrary below, §. 2. and 'tis the Cenſor's Buſineſs to prove, *That Power does not change Nature, let Neceſſity be ever ſo preſſing?* or that to *kill* a Man, to ſave our own Life, be any thing but an innocent Action. To confute his falſe Reaſoning, it is ſufficient to refer the Reader to *Note* 4. Page 189. where I have inſerted it purpoſely to ſhew its Weakneſs.

[2] But this is only an Accommodation, which *Grotius* makes of a Maxim of the *Roman* Law, *In pari cauſâ poſſeſſor potior haberi debet.* Digeſt. Lib. 50. Tit. 17. *De Diverſis Regulis Juris*, Leg. 128.

[3] Mr. *Van der Muelen* (in his Commentary, Tom. 2. p. 88.) affirms, that *Grotius* means the *Right of Uſage*, and not the *Right of Property*, which, according to him, are two diſtinct Things; ſo that a Man may have a Right to uſe a Thing, which, for all that, may properly belong to another. But this doth not take off the Difficulty; for the Queſtion is to know upon what the *Right of Uſage* is founded? *Grotius* delivers himſelf fully, (*num.* 2.) "That the antient and original Right, which every "Man hath to the uſe of all Things, revives in the Caſe of extreme Neceſſity, as if they remained in common; for ſo long as a "Community of Goods continued, no Man was obliged to reſtore what he had taken for his Uſe, becauſe nothing belonged to "one more than another, and every Man had an equal Right to uſe every thing; inſomuch, that if a Man were poſſeſs'd of a "greater quantity of Things than he had an abſolute need of, every other Man had a full Right to take from him, by Force, "whatever was ſuperfluous, and unneceſſary, for his Support in extreme want." On the contrary, *Grotius*, alſo, openly rejects the Opinion of them, who eſtabliſh the Right of taking the Goods of another, in the like Caſe, upon this Foundation, "That "every Proprietor is obliged, by the Rules of Charity, to impart to ſuch as are in Neceſſity." (*num.* 4.) So that I ſee not how the Hypotheſis of that great Man can be made good, and preſerve itſelf from falling in with the Principles of our Author, who has produced a Solution more natural and coherent.

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then indeed the Neceſſity of the diſtreſs'd Perſon gives him a Right of taking the Thing by Force; but ſtill with the ſame *Burden*, or under the ſame Condition which the Owner might have impos'd on him; that is, either to revoke the Value hereafter, or, at leaſt, to make a grateful Acknowledgment of the Benefit.

VII. If we look on other Authors, we ſhall find them much divided about this difficult Point. The fourth Chapter of the fifth Book of the *Decretals*[a], enjoining *Penance* to *Thieves who ſteal out of Neceſſity*, is by the *Gloſs* expounded of *little and indifferent Neceſſity*, not of ſuch as is extreme and inſupportable. *Covarruvias*[b] delivers his Opinion almoſt to the ſame purpoſe as *Grotius*: *The Reaſon* (ſays he) *why a Man in extreme Neceſſity may, without incurring the Guilt of Theft or Rapine, forcibly take the Goods of others for his preſent Relief, is, becauſe this Condition renders all things common. For it is the Ordinance and Inſtitution of Nature itſelf, that inferior things ſhould be deſign'd and directed to ſerve the Neceſſities of Men. Wherefore, the Diviſion of Goods, afterwards introduc'd into the World, doth not derogate from that Precept of natural Reaſon, which ſuggeſts, that the extreme Wants of Mankind may be, in any manner, remov'd by the Uſe of temporal Poſſeſſions.* There is alledg'd a Paſſage of St. *Ambroſe* from *Gratian*, Decret. c. *Sicut*. ii. §. 4. diſt. 47. *It is the Bread of the Hungry which you detain: It is the Raiment of the Naked which you lock up.* *Pereſius*[c], arguing on the ſame ſide, alledges, that in this Caſe a Man is compell'd to the Action by a Force which he can't reſiſt; and then, that the Owner's Conſent may be preſum'd on, becauſe Humanity obliges him to ſuccour thoſe who are in Diſtreſs. Beſides, he obſerves, that the neceſſitous Perſon doth not properly take the Goods which were another Man's, but which lay in common: And yet he is bound, when he has obtain'd deliverance from his Want, to make fair Reſtitution. *Anton. Matthæus*[d] is of Opinion, that a Diſtinction ſhould be made, in this Caſe, between the *Crime* and the *Puniſhment*; the Crime of the Theft, he ſays, is not taken off even by extreme Penury, but he would have the Puniſhment either wholly remitted, or conſiderably mitigated and abated. Now that the Crime of Theft is committed, even under theſe Circumſtances, he endeavours to prove from the Definition of *Theft* in the Civil Law, which he makes to reach this Action: *Theft*, the Emperor *Juſtinian* tells us, *is a fraudulent ſeizing on the Goods of others, for the ſake of making a Gain of them.* But we may fairly plead, (in Oppoſition to *Matthæus*) that neither of theſe Imputations can fall on the Fact which we defend. For how can this be term'd a *fraudulent ſeizing on another Man's Goods*, when both the Owner lay under an imperfect Obligation of giving the Thing deſir'd; and the other Perſon had a Right, by virtue of his preſent Condition, to poſſeſs himſelf of it by the moſt convenient means he could? Nor can he well be ſaid to take a thing of another's Man's, for the ſake of making a Gain of it, who deſigns it purely for the Relief of his extreme Diſtreſs, with full Wiſhes and Reſolutions to reſtore, or to repay it as ſoon as poſſible. That Part of his Argument is meer Bravado, where he tells us, that no Violence can compel a wife and a good Man to defile himſelf wilfully with any uncomely Action: And that, in theſe Caſes, every one ſhould, as *Tully*[e][1] adviſes, *rather patiently endure his own Inconvenience, than treſpaſs on the Conveniences of others.* Now, beſides, 'tis an eaſy matter to talk philoſophically, whilſt we do not ourſelves feel the *Hardſhip* any farther than in Speculation[f]; the Fact under Debate can, according to our way of determining it, include no other Turpitude or Indecency, than ſuch as Perſons of Breeding and Quality are guilty of, when the Severity of Famine compels them to feed on the baſeſt and moſt filthy Meats. And then the Rule about Conveniences and Inconveniences is beſide the Queſtion, which only ſuppoſes ſome little Matter to be taken from a wealthy Perſon, who doth not feel the Loſs, to keep another from periſhing by the Extremities of Hunger, or of Weather. The ſame Author obſerves, on[2] the *Lex Rhodia de jactu*, that tho', for the publick Benefit, in a time of Scarcity, every Man is oblig'd to bring what Corn he has by him into the common Market; yet People are not hereupon impower'd to carry off what they pleaſe, becauſe they are in want, and others abound; but the whole Buſineſs is to be left to the Care, and Direction of the Magiſtrate. But muſt the Poor, therefore, be content to ſtarve, when the Magiſtrates neglect to make due Proviſion for their Suſtenance?

As to what ſome urge, that there doth not appear any *Diſpenſation of the Law in this Matter*, 'tis an Objection that may be eaſily ſpar'd. For ſufficient Reaſons have been given, why we may well preſume, that the Law which forbids Theft is not to be extended to the preſent Caſe.

VIII. *Laſtly*, The Danger and Neceſſity of our own Goods ſeems to allow us the Privilege of deſtroying, or of invading thoſe which belong to other Men: Yet, with theſe Proviſo's, that the Danger did not happen thro' our Fault; that we cannot find a more convenient way of [3] removing it; that we do

[a] *Cap. ſi quis*, Lib. 5. tit. 18. *De furtis.*
[b] P. 2. ſ. 1. n. 3.
[c] Ad. *Tit. Cod. de furtis*, ſ. 3.
[d] Ad. l. 47. D. tit. 1. ſ. 7.
[e] Offic. l. 3. c. 5.
[f] Vid. *Oppian.* Halieut. l. 3. v. 197.

[1] *Tully*'s Words are; *Suum cuique incommodum ferendum eſt potius, quam de alterius commodis detrahendum.*

[2] The Digeſts have, alſo, another Law, commanding, that if Proviſions fail at Sea, every one ſhould bring out their Store, and leave it in common, *Eò magis quòd, ſi quando ea* [cibaria] *defecerint in navigatione, quod quiſque haberet, in commune conferret.* Lib. 14. Tit. 2. *De Lege Rhodiâ de Jactu.* Leg. 2. §. 2.

[3] We muſt take care that this Method appear ſure. *Titius*'s Obſerv. 148. I add, that when the Danger of loſing our Property is not join'd either with the Hazard of our own Life, or that of others, and that beſides the Property of another runs no riſk, I do not ſee how we can always have a Right to ſave our own Property, at the Expence of another's, without his Conſent. The Reaſon drawn from the Diſproportion of the Value is not ſufficient: for a Commodity of leſs intrinſic Value in itſelf, may be as dear, or dearer to another, than that we would preſerve. It is, therefore, neceſſary, in my Opinion, as to the Caſe in queſtion, that the Property we would ſave ſhould be greatly ſuperior in Value; and that we ſhould be in a Condition, whatever happen'd, to indemnify the Proprietor for his Loſs, ſo as to make it an equal Choice to him to have what was taken from him, or

do not ruin a more valuable Thing of our Neighbour's, for ſaving one of our own, inferior in Price and Conſideration; that, in caſe the other Thing had *not* been loſt but for our ſake, we pay the Price of it; and, laſtly, that if what belong'd to our Neighbour muſt have otherwiſe been deſtroy'd, together with ours, if we had not preſerv'd [1] the latter, by making away with the former, that then we conſent to bear a part in the Damage. On this Foundation is grounded the Equity of the *Rhodian* Law *de jactu*, by [2] which it was provided, that *if for the lightening of a Ship the Men were compell'd to throw any Goods overboard, the Loſs ſhould be made up by general Contribution, ſince it happen'd upon account of the general Safety* [a]. Thus, too, if my Veſſel be driven upon the Cables, or the Nets belonging to another, I have Liberty to [3] cut them in Pieces, if I cannot otherwiſe get clear. And if my own Neglect did not bring me into that Trouble, I am to anſwer but for half the Coſt. Thus in a Fire, I may pull down my Neighbour's Houſe for the Security of mine, if I am willing to make good all that he ſuffers by the Miſchief. For tho' in [4] one of the *Roman* Conſtitutions [b], it is determin'd, that in caſe the Fire had actually reach'd to the Houſe which was pull'd down, the Perſon who procur'd it ſhall not be reſponſible; yet the common Opinion inclines more to Equity [c], which aſſerts, that upon ſuch Demoliſhment of one Houſe, for the Security of many, the Damage ſhall be repair'd by thoſe neighbouring Inhabitants who thus eſcap'd the Danger; though the Houſe which they, in this manner, ruin, hath not been touch'd by the Flames. For it would be indeed unreaſonably hard, that when [5] I have ſav'd my own Concerns, by deſtroying thoſe of another Man, the whole Loſs ſhould be thrown upon him, whilſt the whole Advantage lights on me. From the ſame Rules and Principles the *Roman* Lawyers deduce moſt of their Doctrine concerning that kind of *Damage*, which they call *Damnum Infectum* [d 6]. Thus, for Example, if my next Neighbour has a ruinous Houſe, very likely to tumble to the Prejudice of my Effects, he ſhall be oblig'd to give me Security for anſwering all Damages that I ſuſtain; and if he refuſe this Condition, upon applying myſelf to the *Prætor*, I obtain [7] an Edict, impowering me to enter the ruinous Place. On the ſame Account they aſſert, that [8] in caſe a Man has a Field ſurrounded in ſuch a manner on all ſides, by the Lands of others, that he cannot get to it without ſeemingly committing a Treſpaſs; the Borderers ſhall be compell'd by the Judge to grant him Paſſage, at leaſt upon the offering of a reaſonable Conſideration.

Grotius [e] makes this farther Deduction from the Doctrines we have been now laying down, that it is lawful for him who wages a *juſt* War to poſſeſs himſelf of a Place ſeated in a Country that is at Peace with him; if there be certain (and not only imaginary) Danger, that the Enemy will otherwiſe

a Vid. *Tot. titul.* together with the Commentators on that and on the Naval Laws.
b L. 7. ſ. 4. *D. quod vi aut clam.*
c Add. L. 49. ſ. 1. *D. ad L. Aquil.*
d *De Damno infecto.* Vid. *Digeſt.* XXXIX. tit. 11.
e L. 2. c. 2. ſ. 10.

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or what he gets. Otherwiſe, there is no Reaſon why another Man ſhould forfeit his Property more than we ſhould ours. This would certainly be to accommodate ourſelves at his Expence, and to turn upon him the Misfortune to which Providence ſuffer'd us to be expos'd. We may here juſtly apply the fourth of thoſe Conditions laid down, Note 1. Page 202. preceding; with regard to thoſe Caſes, where Life is in queſtion.

1 We may add, That the Proprietor not foreſeeing, or before he foreſaw that Neceſſity, did not conſent to the Loſs of his Goods.

2 The Words of the Digeſts are, *Lege Rhodiâ cavetur, Ut ſi levandæ navis gratiâ jactus mercium factus eſt, omnium contributione ſarciatur, quod pro omnibus datum eſt*, Lib. 14. Tit. 2. *De Lege Rhodiâ de jactu*, Leg. 1. See the Treatiſe of divers Authors, *De Legibus Nauticis.* He had apparently in view the Collection publiſh'd by *Vinnius*, in 1647, and reprinted at *Amſt.* 1668. See, alſo, *Francois Baudouin, Ad Leges, Voconiam, &c. Rhodium, &c. Baſil.* 1559. As, alſo, Mr. *Domat*'s Civil Laws in their natural Order, Part 1. Lib. 2. Tit. 9. §. 2. 6, *&c.*

3 *Item Labeo ſcribit* (ſay the Digeſts) *ſi cum vi ventorum navis impulſa eſſet in funes Anchorarum alterius, & nautæ funes præcidiſſent, ſi nullo alio modo, niſi præciſis funibus explicare ſe potuit, nullam actionem dandam. Idemque Labeo & Proculus, & circa Retia Piſcatorum, in quæ navis inciderat, æſtimarunt. Planè ſi culpâ nautarum id factum eſſet, Lege Aquilia agendum.* Lib. 9. Tit. 2. *Ad. Leg. Aquil.* L. 29. §. 3. See Mr. *Noodt*'s excellent Treatiſe, *Ad Leg. Aquil.* Chap. 18. *in fin.* and Chap. 29.

4 The Words of the *Digeſts* are, *Si perveniſſet* [*ignis, eo uſque*] *abſolvi eum oportere* —— *quoniam nullam injuriam aut damnum dare videtur, æquè perituris ædibus.* Lib. 43. Tit. 24. *Quod vi aut clam*, Leg. 7. §. 4. See Lib. 9. Tit. 2. *Ad Leg. Aquil.* Leg. 49. §. 1. and what Mr. *Titius* ſays in his Obſervations *in Compend. Jur. Lauterbach.* Obſerv. 420. as, alſo, Mr. *Noodt ad Leg. Aquil.* Chap. 19.

5 Mr. *Titius* has reaſon to ſay, that theſe Rules are good in Speculation, but the Application is very hard, and almoſt impracticable in Civil Societies. Indeed, we can't, for the moſt part, be aſſured, that he who hath beat down his Neighbour's Houſe, had reaſon to think that he could ſave his own that way, and that he was obliged to it by Neceſſity; for without this how can we determine, whether he ought to make good the Damage? Moreover, Burnings almoſt always happen by ſome Fault, or, at leaſt, by Imprudence and Negligence, and very often we know not whom to charge them on, or how they began; and if the Author be, ſometimes, diſcover'd, 'tis found uſually that he is unable to make up the Damages of ſuch as have ſuffer'd. Laſtly, When the Fire is come by meer Chance, we can't exactly tell how the neighbouring Houſes can be preſerved from the Fire by the demoliſhing of one beat down, and ſo 'tis impoſſible to ſtate exactly, who are bound to make good the Damage, and how much each ſhall contribute. Experience, alſo, proves, that upon theſe ſad Occaſions, they who received the Damage are conſtrained to bear it themſelves, unleſs the way of Reparation be fixed beforehand by ſome Agreement, or Order of State, or the Bounty of others affords them a voluntary Relief. The Order, therefore, eſtabliſh'd in ſome Places, that the Damages, that come by ſuch Accidents ſhould be ſatisfied by the Publick, and ſo every one is obliged to contribute to the Relief of the Miſerable, is highly commendable, Obſerv. on *Puffendorff* CL. and on *Lauterbach* CCCCXX. There was a wiſe Eſtabliſhment made in *Pruſſia*, in 1709. but has ſince been aboliſh'd for I know not what Reaſon. By this all Proprietors of Houſes were bound annually to contribute a ſmall Sum, for which, the Directors of the *Fire-Cheſt*, out of the Fund compos'd by theſe annual Collections, ſatisfied the Owners for ſuch Houſes as were burnt, according to the Value deliver'd, in proportion to which each Subſcriber paid annually.

6 See Mr. *Domat*'s Civil Laws in their Natural Order, Part I. Lib. 2. Tit. 8. Sect. 3.

7 So the Digeſts ſay, *Si intra diem à Prætore conſtituendum non caveatur, in poſſeſſionem ejus rei mittendus eſt. De Damno Infecto, &c.* Leg. 4. §. 1. See *Titius*'s Obſervat. on *Lauterbach.* 989.

8 They build upon this Law, to which I have elſewhere referred, Lib. 3. Chap. 3. §. 7. *Si quis ſepulchrum habeat, viam autem ad ſepulchrum non habeat, & à vicino ire prohibeatur —— Præſes —— compellere debet, juſto pretio ei iter præſtare.* Digeſt. Lib. 11. Tit. 7. *De Religioſis, &c.* Leg. 12. *init.* This Law became introduced by Degrees; for, according to the antient *Roman* Law, nobody could be conſtrain'd to do this. See Mr. *Noodt*'s Treatiſe *De Uſufructu*, Lib. i. Cap. viii.

ſurprize

ſurprize it, and from thence annoy him with irreparable Miſchief: Provided he take nothing but what is neceſſary to his own Security, as the bare *Cuſtody* of the Place, leaving both the Juriſdiction and the Profits to the right Owner; and fully purpoſing to reſtore the *Cuſtody* too, ſo ſoon as the Neceſſity that brought him thither ſhall ceaſe. To theſe Conditions it ſhould be added, that the Lord of the Place is firſt to have frequent Notice given him, and to be deſir'd that he would himſelf ſecure and defend the Place, upon a Promiſe from the other Prince to defray the Charges; or that he would demoliſh and render it untenable, if he thinks that the moſt proper Method. And another equitable Caution is, that in caſe the new Poſſeſſor has expended any Sum in raiſing Works and Fortifications, the proper Lord is not oblig'd to refund, unleſs he intended to have built the ſame Defences himſelf; inaſmuch as the other did not make it his Aim purely to improve the Place, but chiefly to ſecure his own Territories. *Bœcler*, in his *Notes* on this Paſſage of *Grotius*, well obſerves, that it is apparent from the Uſage of all Ages, and of all Nations, that no one thinks himſelf oblig'd to allow another thus to ſeize on any Fort or Place of his[1], if he be able to hinder his Attempt. And that, therefore, if the other do actually take Poſſeſſion, the Fact is ſuch as may admit of eaſy Pardon, but not ſuch as can be fairly and ſtrictly defended on the Grounds of *Natural Law*. To which Purpoſe we may conſider farther, that 'tis very probable the Enemy may hence entertain a Suſpicion, that the Lord of the Place is in ſecret Confederacy againſt him; and ſo the whole Burthen of the War may be eaſily devolv'd on the third Party. And tho' the Enemy be well ſatisfied that the Place was ſeiz'd without the Leave or Concurrence of the Lord, yet if he reſolve and endeavour to diſpoſſeſs thoſe who hold it, the innocent Prince cannot but feel ſome Part of the Calamities of Arms; which, if he keeps off by any means, he cannot juſtly fall under Reprehenſion. And thus too in a leſſer Caſe, it can never be adviſable for a Man to admit more *Strangers* into his Houſe, than he can conveniently get rid of when he pleaſes: Since, otherwiſe, he is under a Neceſſity of being at their Diſpoſal; and muſt, perhaps, be content to walk out of Doors, and to leave all to his new Maſters[2].

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[1] This has place no leſs, when the Owner of the Houſe has no Power to defend himſelf; for if he can, and doth not, 'tis the ſame as if he gave Paſſage to his Neighbour's Enemy; ſo that this laſt may look upon him himſelf as a new Enemy.

[2] There is leſs Difficulty in the Example alledged by *Grotius*, in the ſame Place, concerning them, who, having need of Ships, to ſave or defend themſelves, take the firſt they meet, and uſe them upon the Conditions required. See *Xenophon de Expedit. Cyri*, Lib. v. Chap. 1, and Mr. *Hertius*'s Diſcourſe *de Colliſione Legum*, Sect. II. §. 14. in Tome I. of his *Opuſc.* and *Comment.*

OF

OF THE

LAW of NATURE AND NATIONS.

BOOK III.

CHAP. I.

That no Man be hurt; and if a DAMAGE *be done to any Man, that* REPARATION *be made.*

The CONTENTS.

I. *That no Man ought to do any Damage to another, or his Concerns.*
II. *That if any be done, it ought to be repaired.*
III. *What a Damage or Hurt is.*
IV. *Who are they that do an Hurt.*
V. *How such as hurt others are obliged.*
VI. *How many ways a Damage may be done.*
VII. *An Example of Reparation in a Murderer.*
VIII. *In one that has maimed another.*
IX. *In an Adulterer.*
X. *In a Ravisher.*
XI. *In a Thief.*

WHAT Duties the Law of Nature enjoins a Man to exercise towards himself; and what Indulgence, what License, or Favour it allows him in the Preservation of his own Person or Goods, we have hitherto endeavour'd to explain (*). We may now pass on to those other Natural Precepts, which contain the Duties we are to practise towards other Men. These we have formerly divided into *Absolute*, and *Hypothetical* or *Conditional*. In the Series of *absolute* Duties, or such as oblige all Men antecedently to any human [1] Institution, this seems, with Justice, to challenge the first and noblest Place, *that no Man hurt another* [2]; *and that, in case of any Hurt or Damage done by him, he fail not to make Reparation* [3]. For this Duty is not only the largest of all in its Extent, comprehending *all Men*, on the bare Account of their being *Men*; but it is, at the same time, the most easy of all to be perform'd, consisting, for the most part, purely in a negative Abstinence from [4] acting; except that its Assistance is sometimes necessary in restraining the Lusts and Passions, when

(*) B. II. C. 3.

[1] Not that they are always independent upon every human Act or Establishment. Our Author intimates the contrary clearly at the End of this Paragraph, in numbring up the Things to which this first Maxim extends. No Man can be ignorant that we ought not to neglect such Duties of Humanity, as concern Bargaining, as for Example, to refuse to sell any Man what he stands in great need of. But the Reason why he calls those Duties, which he treats of in this and the following Chapter, *absolute*, is because they are the natural Consequence of the universal and original Constitution of Mankind, and ought to be paid to all Men, though they have no other Relation to us, but a bare Similitude of Nature. Whereas *conditional Duties* always suppose some human Act, Agreement, or other accessory State, and oblige only under certain Circumstances, and with relation to certain Persons.

[2] *Nefas est nocere patriæ, &c.* It is a Crime to injure one's Country; and, consequently, a Citizen, who is a Member of it. Then we must injure no Man, because every one is our Fellow-citizen of the great City of the World. Do the Hands endeavour to hurt the Feet, or Eyes the Hands? As, therefore the Members of the Body keep a fair Correspondence with one another for the Preservation of the whole: So Men ought to deal friendly one with another, because they are born for Society, which cannot be preserved, unless all the Parts, of which it is compounded, love one another, and endeavour mutually their own Preservation. *Sen. de Irâ*, l. 2. c. 31. Besides this Passage, which our Author refers to a little lower, please to read, *Epist.* 95. p. 464, *&c. Edit. Lugd. Bat.* 1672. and *Epist.* 103.

[3] All Duties which relate to Society may be compriz'd under these three generals: 1. To do Evil to no Man. 2. To prevent the Evil with which others are threaten'd. 3. To do all the good we can sincerely. These three Principles yield an infinite Number of particular Consequences, according to the difference of Objects. Our Author speaks here of the first, and of the other two together in Chap. III. of this Book. *Titius* Obs. 151.

[4] St. *Basil* says it is more easy to abstain from all bad Actions, than to do a good Action of the slightest kind. *Thou shalt not kill: Thou shalt not commit Adultery: Thou shalt not steal.* To prevent our violating these kind of Laws, we need only remain barely inactive: Ὅλως δὲ πᾶσα ἀ γία, καὶ τῆς τυχούσης πράξεως ἐστὶν ἐμμαρεστέρα ὅσον, οὐ φονεύσεις· Οὐ μοιχεύσεις. Οὐ κλέψεις· Ἀρχὰς τούτων ἔκαστον καὶ ἀκινησίας δεῖται. *In Psalm* i. Page 96. Tom. I. I shall only remark, by the bye, that this Passage, excepting the last Words, is quoted by the deceas'd Mr. *Wollaston*, in his *Religion of Nature Delineated.*

they fight and ſtruggle againſt Reaſon; amongſt which rebellious Deſires, that boundleſs Regard which we ſometimes ſhew to our own private Advantage, ſeems to be the Principal, and the Ring-leader. Beſides, it is the moſt neceſſary of human Duties, inaſmuch as a Life of Society cannot poſſibly be maintain'd without it. For ſuppoſe a Man to do me no good, and not ſo much as to tranſact with me in the common Offices of Life; yet, provided he do me no harm, I can live with him under ſome tolerable Comfort and Quiet. And, indeed, this is all we deſire from the greateſt Part of Mankind; a mutual Intercourſe of good Turns lying only between a few. But what Poſſibility is there of my living at Peace with him who hurts and injures me; ſince Nature has implanted in every Man's Breaſt ſo tender a Concern for himſelf, and for what he poſſeſſes, that he cannot but apply all Means to reſiſt and repel him, who in either reſpect attempts to wrong him [a]? Now, as the Strength of this Precept is a Guard and a Fence to thoſe Things, which we receive from the immediate Hand of Nature, as our Life, our Bodies, our Members, our Chaſtity, our Reputation, and our Liberty; engaging Men to keep them ſacred and inviolable: So muſt it be ſuppoſed to ſpread itſelf thro' all thoſe Compacts or Inſtitutions, by which the Propriety of any Thing is made over to us; ſince without it they could obtain no Force or Effect. Whatever, therefore, we can, on any good Title, call our own, Men are by this Precept forbidden to take away, to endamage, or to impair, or any way to withdraw it from our Uſe, in whole or in part. The ſame Duty is virtually contain'd in many affirmative Commands, which enjoining ſome one poſitive Practice, remove and reſtrain the contrary Enormities. How plainly the Neceſſity of this Law inſinuates itſelf into the Minds of all Men, let *Seneca*'s Obſervation inform us. *Aſk a common Rogue*, (ſays he) *whether he had not rather obtain, by honeſt Means, what he now gets by Theft and Villany? He who makes it his Gain to aſſault and pillage all he meets, would be more willing to find the Money by Chance, than to take it by Violence. There is no one who would not be better pleas'd to enjoy the Fruits of his Wickedneſs without the Practice of it* [b]. *Tully* ſays excellently to the ſame purpoſe, that *for a Man to rob and injure another to promote his own Advantage, is more againſt Nature than Death, or Poverty, or Pain* [c].

II. Farther, it follows from this Precept, that *in caſe a Man be hurt or injur'd by another, in any reſpect, the Perſon who ſtands juſtly charg'd as Author of the Wrong, ought, as far as it lies in his Power, to make Reparation* [2]. For, otherwiſe, it would have been a vain Command not to harm another, if the Party who actually ſuffers ſuch a Harm, muſt be content to put it up without farther Notice, and leave the Offender to enjoy in Peace the Fruit of his Injury [3], never obliging him to refund, or to reſtore. Furthermore, were not Reſtitution made a neceſſary Duty, neither would wicked Men ever abſtain from wronging others; nor would thoſe who have been injured, find it an eaſy Taſk to compoſe their Mind in ſuch a manner, as to maintain Peace with the other Party, ſo long as they have obtain'd no Recompence or Conſideration for their Sufferings.

III. The Word *Damage* [4], which ſeems properly to refer only to Goods and Poſſeſſions, we here uſe in an extended Senſe, ſo as to make it take in, likewiſe, all manner of Harm that may be offer'd to a Man's Body, his Chaſtity, or his good Name. In this Latitude, then, it implies all Hurt, Spoil, or Diminution of whatſoever is already actually our own; all Interception of what, by a perfect and abſolute Right, we ought to receive, whether ſuch Right be the original Gift of Nature, or whether it be allow'd us by human Inſtitution and Law. And, laſtly, all Omiſſion or Denial of any Duty, or Performance, which others, by a perfect Obligation, ſtand bound to pay us [5]. We ſay by a *perfect Obligation*;

[a] *Seneca* of Anger, B. II. C. 31. It is a Sin to injure one's Country; and, therefore, to injure a Fellow Subject, inaſmuch as he is a Member of our Country. The Parts ought to be held ſacred, if the whole deſerve our Veneration. And hence, likewiſe, the Perſon of every Man ought to be inviolable, becauſe every Man is our Fellow Citizen in the great and univerſal Society. What a Diſtraction would ariſe, ſhould the Hand practiſe Miſchief againſt the Feet, or the Eyes prove treacherous to the Hands? As all the Members conſpire in an exact Union and Agreement, becauſe the Safety of each in particular is the Intereſt of the whole Body; ſo particular Men ought to ſpare each other, becauſe we are all born for Society. And no Society can remain ſecure, without a firm Love and Concord amongſt the Members of which it is compoſed.

[b] *Sen. de Benef.* l. 4. c. 17.

[c] *De Offic.* l. 3. c. 5.

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[1] Nay, *Cicero* further ſays, That there is no Man, who had not rather ſatisfy his Deſires without incurring any Guilt, though he were ſure to go unpuniſhed. For, ſays he, Lib. 3. *de fin.* c. 11. who is there, or ever was of that covetous Temper, or extravagant Deſires, who had not much rather obtain that which he is reſolved to get by ſome wicked Means, without making uſe of them, though he were aſſured of Impunity?

[2] That a Man be obliged to make Satisfaction for any Wrong done to another, it is neceſſary, 1. That the Injury done be forbidden by ſome Law, either Natural or Poſitive. 2. That it was done through our Fault, and that the Will did either directly or indirectly concur in that Action, by which the Injury is done. 3. Laſtly, That he who has ſuffer'd the Damage, is no way conſenting to it. For if he give his Conſent, either directly or indirectly, though with the Reſtrictions laid down, *Note* 3. Page 85. the Prohibition of the Law ceaſes; and, conſequently, ſo does the Obligation to Reſtitution. Our Author ought to have taken notice of theſe Three Conditions diſtinctly, becauſe they are the Foundation and Key of all the Chapter.

[3] The Neceſſity of repairing the Damage is ſo indiſpenſible, that no Rank or Condition, however elevated, can exempt us from it. Kings are bound to it towards their Subjects, as much as the meaneſt private Man. Nay, even they ſhould acquit themſelves of this Obligation the more carefully, as they are liable to no Puniſhment if they neglect it. See the Inſtances given by *Grotius*, Lib. II. Cap. 17. §. 20. and Lib. III. Cap. 17. §. 2. Num. 6.

[4] In the *Roman* Law the ordinary Signification of *Damage* is this, ſome Hurt done to our Goods or Poſſeſſions, produced immediately by the Perſon, who is the Author of it. This Suppoſition is founded entirely upon the *Aquilian* Law, and ſerves only to diſtinguiſh the different Sorts of Actions, which are brought to Juſtice by their ſeveral Circumſtances. *Titius Obſ.* 155. *Juſtin. Inſt. & Digeſt.* l. 39. tit. 2. leg. 3.

[5] From hence it appears by this firſt Law of Natural Right, *viz.* That we ought to do evil to no Man, that all ſorts of Actions in general are forbidden, by which any Wrong or Injury is done to our Neighbour, in reſpect to all Things to which he has an undoubted Right, *viz.* Murder, Wounds, Blows, evil Words, Affronts, Calumnies, Rapine, Extortion, Theft, Pillaging, Fraud, and Force, either direct or indirect, mediate, or immediate, *&c.* as this Author expreſſes himſelf in his Abridgment of the Duties of a Man and Citizen, l. 1. c. 6. §. 3. *Quintilian* (Declam. XIII.) maintains, That a Man who poiſon'd the Flowers of his Garden, in order to kill his Neighbour's Bees, was anſwerable for the Damage. The ſtrongeſt Argument on this

gation; because, if the *Obligation* in the other Party be only *imperfect*; and we, consequently, have only an *imperfect Right*, the with-holding of any such Due cannot really be esteem'd a Damage. For since all Performances of this kind ought to proceed from the voluntary Motion of some virtuous Principle in the Giver, and since I have no Power or License to exact the Payment of them by force, it would by no means be convenient that I should think myself damaged, in not receiving such things as I could not otherwise expect, than in the way of free Gift and Benefit. And as I cannot reckon those things amongst my own, which I have only a *Fitness* or *Capacity* to possess; so I have no reason to complain of injurious Practice, if they happen to be kept from me. *Aristotle* says elegantly to this Purpose, *he who out of a narrowness of Spirit refuses to assist another with his Wealth, doth not hereby increase it*, Eth. v. 4. and since *he* has not *more*, the Person whom he thus sends away unreliev'd has not *less*. On the same Principle is founded the Argument which *Cicero* makes use of in his Defence of *Plancius*, that altho' the other Gentleman *Lateranensis* might, perhaps, be the more worthy Competitor, yet it was in the Power of the People to pass him by, and to chuse *Plancius* into the Office of *Ædile*, inasmuch as neither of the Candidates had a *perfect Right* to that Honour. *It is a Privilege*, says he, *belonging to the very Condition and Constitution of free States, that they be able, by their Votes, to give to a Person, or to take from him what they will.* Yet, in the same place, the Orator distinguisheth between what People *could* do, and what they *ought* to do; the Term *ought* implying that *less perfect Obligation*, by which we stand engaged to the Exercise of every Virtue. But here * *Grotius* well advises us to take heed of confounding Points which belong not to the same Head. For the People in a Commonwealth, who are obliged to confer Honours on the most deserving, only by the Rules of State-Prudence; yet, in case they intrust any Person with this their Power of chusing Officers, if we prefer those who are less worthy, the others who are past by, cannot bring an Action of Injury or Damage against the Elector [1]. Yet the *People*, by whose Deputation he acted, have a Right of calling him to an account for his Proceedings; and may require *Reparation* for any Damage, which the Commonwealth hath sustain'd by his unworthy Choice [2]. And thus to a *Citizen* endued with Arts and Abilities sufficient for the discharge of an Office, tho' in reference to obtaining it, he has no Right which will hold good against the State; yet he has an equal Right with others to sue for it; in which Right, if any Person by Force or Fraud shall prejudice or obstruct him, he may demand Satisfaction; tho' not the full Value of the Office desired, yet to the Value of his uncertain Expectation [3]. And now we are settling the Notion of *Damage*, we are farther to remark, that it affects not only the thing itself, which being either our Possession or our Due, *is hurt*, destroy'd, or intercepted; but, likewise, the Fruits or Profits accruing from the thing, whether they have been already received, (though then indeed they may be valued as particular Goods or Things) or whether they are yet only in Hope and Prospect, if the Owner had a Right of receiving them [a]; provided still a Deduction be made of the Expences he would have been put to in securing and gathering in such Fruits [4], lest he enrich himself at the Charge of the other Party. Now the *value* of Fruits in Expectation rises and falls, according as the Time of receiving them is more or less distant; and, consequently, the Issue more or less uncertain. Thus the losing a Field of Corn in the *Blade* will not be rated so high, as if it had been destroy'd in the *Ear*. Some Consideration too is allow'd for what we call *Civil Fruits*. Thus he who sets on fire another Man's House [b], is not only bound to rebuild it; but, likewise, to make good the Rent, which it would, in the mean time, have brought to the Owner. *Philo Judæus* [c] informs us, that in his Nation, when a Man had any way *damaged* his Neighbour, and done Penance for the Fact, he was obliged, besides paying to the full Value, to add one fifth part more, as a Comfort to the Person who had sustain'd the Wrong.

Lastly, it is a clear Point, that all Evils or Mischiefs following by a natural Consequence from any *Damage* given, ought to be adjudg'd Parts

* *Lib.* II. *c.* 17. §. 3.

[a] *Vid.* l. 6. t. 1. *D. de rei vindic.*
[b] *Vid.* l. 3. *C. de rei vindic. Add.* l. 22. f. 1. l. 23. *princ. D. ad L. Aquilian.*
[c] *De Victimis.*

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this Side, according to our Author, consists in this, that Bees being free Insects cannot be fixt in any certain Place to get their Nourishment; so that whoever has Hives is suppos'd to have a kind of Right of *Servitude* over the adjacent Grounds, by virtue of which his Neighbour ought to suffer his Bees to fly up and down without Obstacle. See Digest. Lib. ix. Tit. ii. *Ad Leg. Aquil.* Leg. XXVII. §. 12. & Leg XLIX. which our Author points to, and Mr. *Noodt Ad Leg. Aquil.* Cap. XVIII. It ought, also, further to be observed, that a Damage or Hurt may be done to the Soul, by neglecting to inform the Mind, or regulate the Passions of such as we are obliged to instruct or reform, by virtue of a perfect Obligation, and much more by leading them on purpose into any Error or Vice, from which we ought to restrain them. A Damage more considerable, and the rather to be avoided, as it is commonly irreparable, especially with regard to Morals. For there is nothing more difficult than to recover a Person, who has contracted bad Habits, which have had Time to strengthen. And yet this is the only proper and direct Method of repairing such a Damage.

[1] That is to say, as *Grotius* expounds it, he doth nothing contrary to Justice, properly so called. See l. 1. c. 7. §. 11, 12. above.

[2] See *Justinian*'s Novels, 128. c. 16. *in fine*, & 124. of *Julian*'s Abridgment, c. 556. which is quoted and corrected in *Gronovius*'s Notes upon *Grotius*.

[3] *Grotius* maintains, (§. 3.) that the same thing takes place, when any one hinders another from giving a Legacy, either by Violence or Fraud; for it being a kind of Right to be capable of a Legacy, it is a real Injury to deprive a Testator of the Liberty or Will, which he hath to give any Person a Legacy, which he is in Expectation of. It is thus *a Man, who, by the Artifices of his Enemies, finds himself disappointed of a Place promis'd him, and on which he depended for his Livelihood, has Reason to complain, that his Bread is taken out of his Mouth:* Whatever Mr. *Bayle* may say to the contrary, (in his *Rép. aux Quest d'un provincial, Tom.* III. Page 621.) the Promise gives this Man a double Right to pretend, that no Person should hinder its Effect. The Case is the same, *When by Prayers and Menaces, a Woman contracted is induc'd to violate her Faith to marry another Man:* This is certainly *to deprive the Person she is contracted to of his Right.* Thus our Historians very justly say, that *Charles* VIII. took by Force *Anne* of *Bretagne* from the Arch-Duke *Maximilian*, whom she had married by Proxy.

[4] *Grotius* adds, or for the Improvement of the Thing. See for the Distinction of Fruits, what is said, l. 4. c. 7. §. 3.

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of it [a]. *Strabo* [b] relates of King *Ariarathes* of *Cappadocia*, that having ſtopt up the little Paſſages, by which the River *Melas* emptied itſelf into the *Euphrates*, that ſo covering the greateſt part of the neighbouring Plain, he might divert himſelf with the childleſs Play of making little *Iſlands*; at length the Damms all giving way on a ſudden, the Flood pour'd itſelf ſo violently upon *Euphrates*, as not only to make it carry off part of the *Cappadocian* Country, and ſome of their Houſes, but to cauſe great Waſte and Miſchief in the Lands of their Neighbours, the *Galatians*: Whereupon the matter being referr'd to the Arbitration of the *Romans*, they condemn'd the King in Damages of thirty Talents [c] [z].

IV. In ſtating who are to be eſteem'd Authors of *Damage*, it will be neceſſary to recollect from our firſt Book, Chap. 5. how many ways the Act of one Man may be imputed to another. A Perſon then may damnify his Neighbour, not only immediately by himſelf; but, likewiſe, by the Miniſtry of others. And, farther, a Damage immediately done by one Man, may be chargeable upon another, (who is, conſequently, obliged to make Reparation) inaſmuch as he contributed ſomewhat to the Action, either by doing what he ought not, or by omitting what he ought to have done [d] [3]. He may ſtand guilty of this Charge in three Ways and Degrees; for he may either be the principal Cauſe, or he may be equally concern'd with the Actor; or, laſtly, he may be only an Acceſſary, and an inferior Cauſe. Of all which Caſes this may, in general, be obſerv'd, that the Perſons thus chargeable are bound to *Reſtitution*, according as they were either the real Cauſe of the Damages, or contributed to it in whole, or in part. For it often happens, that Perſons may concur leſs principally to the Fact of another Man, by ſome Omiſſion or Commiſſion; and yet that he would moſt certainly have done the ſame Damage, whether they had thus concurr'd or no; ſo as to render their Concurrence altogether ſuperfluous. Now here, tho' they are juſtly puniſhable for the Will and the Endeavour; yet, ſince no Part of the preſent *Damage* flow'd from them, they cannot be required to make *Reſtitution*. Some, indeed, are for bringing off all Acceſſaries at a venture; becauſe, ſay they, if theſe had not lent their Counſel or Aſſiſtance, there would not have been wanting others to help forward with the Miſchief; and, conſequently, the Damage had been done without their Means. But this Argument is of no Weight, 'tis ſufficient to make them guilty, if their Aid had any real Efficacy in producing the Treſpaſs; and had thoſe other Perſons join'd their Hands to the Buſineſs, they too would have been proportionably reſponſible. This Rule then may be fix'd as an univerſal Standard, to know who are bound to make Reparation, and who are not; that when any one did not give real Aſſiſtance in the Act of Damage, nor by any antecedent Motion or Default, caus'd it to be undertaken, nor came in for any Part of the Advantage, ſuch a Perſon, tho' by giving any, the leaſt Occaſion, to an ill Action, he contracts a Sin, yet ſhall not be obliged to Reſtitution [4]. And hence 'tis eaſy to conclude,

[a] See *Exod.* XXII. 6. l. 27. f. 8. l. 30. f. 3. *D. ad L. Aquil. M. Seneca*, l. 5. *Excerpt. Controverſ.* 5.

[b] *L.* 22.

[c] *Liban. Progym.* Τὸ παρέχον τὴν ἀφορμὴν καὶ τῆ ἀκολουθήσεν των νομίζεται τὸν λόγον. That which gave the Occaſion, is eſteem'd the Cauſe of all Accidents that follow. *Add.* l. 7. *D. ad L. Aquil. Lex Wiſigothorum*, l. 7. Tit. 2. c. 1, 2, 3. & Tit. 3. c. 3.

[d] *Nemo damnum facit* (ſay the *Roman* Lawyers) *niſi qui id fecit, quod facere jus non habet*, Digeſt. Lib. 50. Tit. 17.

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[z] So *Libanius Progym.* ſays, he that gives the Occaſion muſt be anſwerable for all the Conſequences. See *Exod.* 22. 6. *Digeſt.* l. 9. t. 2. *ad Leg. Aquil.* leg. 7. §. 7. leg. 27. §. 8. leg. 30. §. 3.

[2] The Lawyers here diſtinguiſh between *damnum emergens* and *lucrum ceſſans*, (i. e.) an *emergent Damage*, and a *ceaſing Profit*. The firſt is the Loſs which one ſuffers by the diminiſhing his preſent Goods. The other is the Damage one receives by the Loſs of that Gain which he might make. But we ought, alſo, to obſerve, that there are ſome Events which are the direct and immediate Conſequents of the Action, from which the Damage proceeded, inſomuch, that it may be ſaid, it was the Cauſe of it; others there are, that have a particular Cauſe independent on that Action, that was the Occaſion of it; or, at leaſt, had no relation to it, but by ſome mere Accident. See concerning this the Civil Laws drawn up in their natural Order by *Domat*, Part. 1. Lib. 3. Tit. 5. where you'll, alſo, find, in the Preliminaries to this Title, ſome Obſervations very important about the difference there is between the Damage that ariſes from ſtoppage of Payment, and other ſorts of Damages and Intereſts. Upon which ſee the Treatiſe of Mr. *Noodt de Fœn. & Uſur.* Lib. ii. Cap. vi. Every thing which is a direct and immediate Conſequence of the Action, which cauſes the Damage, ought, without Diſpute, to be regarded as a Part of that Damage, and Reſtitution made accordingly. But, with regard to the Ill which happens accidentally, we ſhould, in my Opinion, diſtinguiſh, on the one hand, between thoſe Events, which, tho' caſual, may eaſily happen; and thoſe which happen very rarely: And, on the other, whether the Damage be caus'd maliciouſly and wilfully, or fall out through meer Negligence. No, he who has caus'd a Damage maliciouſly and purpoſely, is anſwerable for all Events, however unforeſeen or extraordinary they may be. He has himſelf, in a voluntary manner, become liable to all the Conſequences of his own wicked Act and Intention; and, therefore, merits no Indulgence. If he neither foreſaw, nor could foreſee what happen'd, he might, at leaſt, have reflected upon the Conſequences. But when the Author of the Damage is only guilty of Negligence or Inadvertence, it would be hard to lay to his Charge any extraordinary Accidents which he never could have foreſeen, had he reflected ever ſo much. Human Weakneſs will not always permit us to be as attentive as we ſhould, to the Prejudice another may receive from what we do, or omit to do without Thought. But there is nobody who may not avoid doing Ill to another, when he does it wilfully and knowingly, becauſe then his Intention is manifeſt to all.

[3] This ſeems to be contrary to what our Author proves in other Places, *viz.* lib. 4. c. 13. §. 6. For though one does not what he ought to do, he does not do any ſuch real Damage, as to be obliged to Reſtitution. It is ſufficient that a Man have a Right to do a Thing to ſecure him from a juſt Imputation of any ill Conſequences that may reſult from it to another. The *Roman* Lawyers maintain the Truth of this Maxim, that no Man does wrong to another, unleſs it be he that does that which he has no Right to do, *Digeſt.* l. 50. Tit. 17. *De diverſis reg. Jur.* Leg. 151. If, in theſe Caſes, any one receives a Damage through our Means, 'tis his Misfortune; but ſince 'tis none of our Fault, it cannot be reaſonably expected that we ſhould make any amends.

[4] By the *Roman* Law the Approvers and Authors of any Miſchief are liable to the ſame Puniſhment. *Imo & ſi erat ſervus, &c.* If a Servant be about to run from his Maſter, or rob him, and another commends his Deſign, he is actionable on that account, for he ought not to encourage his Wickedneſs by Commendation. *Digeſt.* l. 11. Tit. 3. *De ſervo corrupto*, leg. 1. §. 4. Mr. *Bayle*, in his Diſcourſe about Defamatory Libels, and *Grotius* before him, approve of this Law, which, they ſay, is built upon this ſure Maxim, That they who approve an Action, 'tis very likely, would do it if they could, *i. e.* if ſome reaſon of Self-love did not hinder them from engaging in it. The firſt, alſo, cites the Law of *Valentinian* and *Valens*, which make thoſe Men liable to a Capital Puniſhment, who accidentally meeting with a Libel, diſperſe it; whereas they ought to have torn it, or burnt it. *Vide Cod.* l. ix. Tit. XXXVI. *De famoſis Libellis.* For (he adds) I can't conceive, but he, who, in the like Caſe, diſperſes a Libel, has as great a Deſire to injure, as he that compoſed it; and, conſequently, deſerves as great a Puniſhment as the Author. For, certainly, in this laſt Caſe, there is ſomething more than a meer Approbation. To diſperſe a Libel, which might

conclude, on the other ſide, who ſhall be oblig'd. Thoſe who inſult over their afflicted Neighbours, and rejoice in their Calamities brought on them by wicked and injurious Men, are ſinful, no doubt, in an heinous manner [a]; and yet it would be abſurd to affirm, that they are bound to repair ſuch Damages as they delight to ſee. The ſame muſt be ſaid of thoſe who defend, excuſe, or praiſe a Treſpaſs already committed, provided they do not hereby hinder the Duty of Reſtitution; as, likewiſe, of thoſe who either wiſh Succeſs to ſuch a Fact before it is committed, or entertain a ſilent Joy and Satisfaction during the Performance. There is no ground to build a contrary Opinion on the Paſſage of *Cicero* [b], which ſome would make make uſe of to that Purpoſe [1]. *What Difference is there*, ſays he, *between him who perſuades a Man to an ill Action, and him who afterwards approves of it? Or what ſignifies it whether I would have a Thing done, or whether I rejoice when it is done?* For the Orator employs this Sentence, not to expreſs his Mind ſeriouſly [2], but to refute an impertinent Objection. And had it been ſpoken never ſo gravely, it could not be ſtrain'd ſo high, as to aſſert the Neceſſity of Reparation in theſe Caſes. And, therefore, *Ammianus Marcellinus* [c] ſeems not very properly to apply this Saying of *Tully* to the Buſineſs of *Probus*, *Præfectus Prætorii*, to the Emperor *Valentinian*, who, as he relates, *did indeed never command any of his Clients or Servants to undertake an unlawful Action; yet, if he found them to have committed any Crime, he protected and defended them in ſpite of Juſtice itſelf, without ever enquiring into the Fact, and without the leaſt regard to Honeſty or Truth.* For here the Dependance on ſo great a Patron, added Strength and Boldneſs to their Enormities; and his Protection interpoſing, hindred them from making good the Damages they had been guilty of [3]. As to the Point of counſelling or adviſing, this is moſt certain, that he who ſuggeſts to another the way and manner of committing a Treſpaſs, is bound to Reparation. Whereas the ſame Obligation doth not ſeem to lie on thoſe, who either perſuade a Man in general Terms to apply himſelf to an ill Courſe, as to Theft or Robbery, for inſtance, or join their Approbation and Conſent [4] to his Reſolution, when already fixt and ſettled; as is often the Caſe with timorous Counſellors, or baſe Flatterers of Princes [d]. Laſtly, concerning thoſe who concur to an injurious Action, by omitting ſomewhat which they ought to have perform'd, this may be obſerv'd, that their Omiſſion doth then only bind them to repair the Damage, when it is of a Duty, to which they ſtood engag'd by a *perfect Obligation*; not if the Thing was only a Matter of Charity and Humanity. For, ſince what is owing to me in this imperfect Manner, I cannot yet account my own; neither, if it be intercepted, can I go about to recover it [5], whatever *Zeigler*, in his Obſervations on *Grotius* [e], alledges to the contrary.

V. Where, therefore, many Perſons have concurr'd to one Act of Damage, in making Reparation this Order ſhall be obſerv'd; thoſe ſhall be in the firſt place chargeable, who ſet forwards the Miſchief [6], either by their Commands, or by ſome other powerful Means, amounting almoſt to a neceſſary Influence. And the immediate Actor of the Crime, or he who was thus forced to lend his Hands for its Performance, ſhall, in theſe Caſes, be eſteem'd only as the *Inſtrument*. Where any one appears to have engag'd himſelf in the Enterprize, without being driven on it by Neceſſity, he ſhall be firſt obnoxious, and then the reſt who contributed their Aſſiſtance; yet ſo, that if the former

See *Pſalm* cxxxvii. ver. 7.
[b] *Philip.* II. c. 12.
[c] L. 27.
[d] Compare *Ant. Matthæus de Crimin. Proleg.* c. 1. ſ. 7, 8, 9.
[e] L. 2. c. 17. ſ. 9.

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might and ought to have been ſuppreſſed, either altogether, or in part, is to do an Injury directly to the Party defamed, and join with the Author of the Libel. As to the Law of *Ulpian*, if a Slave is fully reſolved to rob his Maſter, or get away from him, the Approbation given to theſe Actions, which he is about to do, ſince it neither encourages, nor confirms him in this criminal Reſolution, I do not ſee (to conſider the Thing in itſelf independently of Civil Laws) that this ſimple Approbation is ſufficient to oblige the Perſon to repair the Damage, as Mr. *Bayle* infers. The Lawyer ſays, that by that we *augment the bad Intention of the Slave*. Be it ſo: but this Augmentation influencing only a future Crime, contributes nothing, according to this Suppoſition, to the Crime which is actually committed. It would be better to ſay, that becauſe of the Difficulty of proving that the Praiſes given to the Slave had not a little contributed to his ill Deſign; as well as becauſe of the Facility of exempting ourſelves by that from the Damages demanded; the public Good requires, that the Preſumption ſhould always lie againſt him, who, ſo far from diſſuading the Slave from his Purpoſe, by his Approbation expreſs'd an Inclination to aſſiſt him. Thus, however true we may ſuppoſe Mr. *Bayle*'s Principle to be, the Conſequence he draws from it will admit of ſome Diſpute. Becauſe a Man would with Pleaſure do any certain Action, which does not otherwiſe interfere with his own Intereſt, it no way follows, that he is always puniſhable, or reſponſible for the Damage before a human Tribunal, eſpecially as the Action is not yet committed; much leſs when he no way thinks of doing it himſelf, but only ſimply commends it in another, without his Approbation any way contributing to encourage the Agent. *Grotius* alledges upon this Subject the Law of the *Digeſt*. Lib. II. Cap. XVII. §. 7. *Note* 2. upon which I have juſt made ſome Reflections. But it is not clear, whether he underſtands or approves it in the ſame general Extent with Mr. *Bayle*. We might almoſt infer the contrary from what he ſays in Paragraph 10. to wit, That all thoſe he ſpeaks of are not bound to repair the Damage, unleſs they have contributed to it, either in the whole, or in part.

[1] The *Latin* is, *Quid intereſt inter ſuaſorem facti, & probatorem? aut quid refert, utrum voluerim fieri, aut gaudeam factum?* Cic. Philip. ii. c. 12.

[2] *Cicero* does not ſeem to ſpeak any otherwiſe than a Man, who delivers his Thoughts ſeriouſly. 'Twere better to anſwer, as this Author does afterwards, that he ſpeaks not of a Reparation of Damages, but only of the Viciouſneſs of the Intention of ſuch as approve others Crimes.

[3] The *French* Tranſlator here adds, *So that there was ſomething elſe beſides a mere Approbation, or Defence of the Wrongs done to others*, which ſeems to make our Author's Reaſoning more clear.

[4] That this Reſtriction ought to be added, eſpecially if by the fundamental Laws of a Kingdom, the Miniſters are obliged to deny their Conſent to their Prince, as it is in *England*. See the Paſſage cited out of Dr. *Bates*'s *Elench. Mot. Nup. Angl.* Part I. compar'd with our Author, l. 1. c. 5. §. 14.

[5] Certainly of the Perſon himſelf, who has refuſed to do any of theſe Duties; but if he was hindred by ſome other Perſon, he has a Right to require Damages of this latter, if not before human Tribunals, which often ſuffer many Wrongs, yet by the immutable Rules of Juſtice and Equity. Note 3. Page 213.

[6] For the Rule of the Law is this: He does the Wrong, who commands it to be done; but he is in no Fault, who is under a Neceſſity to obey. *Digeſt*. Lib. L. Tit. XVII. *De Diverſis Reg. Jur. Leg.* CLXIX. We muſt apply here the Principles I have eſtabliſh'd, in a few Words, in the laſt Edition of my Abridgment of *the Duties of a Man and a Citizen*, Lib. I. Cap. I. §. 27. Note 1. *& ſeq.*

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of theſe Parties concern'd ſhall have made good the Damage, the others ſhall be then clear, as to Reparation, tho' not as to Puniſhment. But what if an Act proceeds from many Perſons, who are all Authors or Cauſes of it in the very ſame degree; ſhall each Party be reſponſible for the whole, or only for an equal Share of the Damage? *Grotius*[a] pronounces in this Caſe, that each *Perſon is to anſwer for all, if the whole Fact proceed from each, tho' not from each alone.* Which Rule is ſomewhat obſcure, unleſs we illuſtrate it by an Inſtance. Here are three Men then, who, at the ſame time; tho', perhaps, in different Parts, all ſet fire to an Houſe. This Fact of burning the Houſe ſeems to have proceeded from each Man entire, and in whole, although not from each alone; inaſmuch as the ſame Miſchief would have follow'd, had *one only* applied the Fire. But ſuppoſe ſeveral Perſons join in beating or cudgelling a Man, one of whom, perhaps, gives him a Wound in the Head, another breaks his Arm, and a third ſtrikes out his Eye; here each Perſon ſhall not anſwer for the whole Hurt, but only for that part of it, which he himſelf effected. Though in Caſe one of them eſcape, it is uſual to condemn the reſt who are taken, in the whole, eſpecially when it appears, that they combined together to execute the Miſchief. We may ſtill ſet this Matter in a clearer Light, by diſtinguiſhing between *diviſible* and *indiviſible Acts.* The latter which we are concern'd with, are ſuch in which many Perſons concur, but in ſuch a manner that the whole Act would have follow'd from the Endeavours of one only; and, therefore, cannot conveniently be divided into Shares amongſt them all; of this kind are the firing of Houſes, the breaking down of Banks and Dams, or the like. For the ſame Damage would have enſued, had one only of the many Parties ſet his Hand to the Exploit; ſo that it is impoſſible to define and ſettle what part of the Fire, or of the Flood, proceeded from each in particular. When many join in an Action of this Nature, each Perſon ſhall be thus far reſponſible for the whole, that in caſe they are all apprehended, they ſhall contribute equally to the Reparation; but if, upon the Eſcape of the reſt, one only be taken, he ſhall then be charg'd with the entire Sum. After the ſame manner, if ſome of the Perſons apprehended prove inſolvent, the whole Burthen ſhall be laid on thoſe who have more Subſtance and Ability. In this too the *Reparation of Damage* differs from the *Exaction of Puniſhment*; that in the former, if full Payment or Reſtitution be made by one of the Parties concern'd, the reſt are cleared and excus'd; ſince it is not conſiſtent with Equity, that the ſame Damage ſhould be twice made good, (though by way of Puniſhment, this is frequently practis'd) but, on the other hand, in penal Caſes, nothing is more uſual, than that every particular Accomplice in a Crime be made to ſuffer all that the Law inflicts[b].

VI. Now whenever we hurt or endamage another, we do it either out of full Purpoſe and premeditated Guilt, or by a Fault of Negligence only, and not of Deſign, (and this Negligence, as it is more or leſs groſs and ſupine, is more or leſs culpable) or, laſtly, we may do it by *meer Chance*, ſo that the Injury cannot rightly be *imputed* to us[c]. Among ſome People. thoſe *Damages* are not only *imputed* to a Man, which are committed with his Aſſiſtance or Concurrence; but thoſe, likewiſe, which are cauſed by his Servants or Cattle, without his poſitive Influence. It is beyond doubt, that he who offers Damage to another, out of an *evil Deſign*, is bound to make Reparation, and that to the full Value of the Wrong, and of all the Conſequences flowing from it. But thoſe, likewiſe, ſtand reſponſible, who commit an Act of Treſpaſs, tho' not deſignedly, yet by ſuch a Piece of Neglect as they might eaſily have avoided[1]. For it is no inconſiderable Part of ſocial Duty to manage our Converſation with ſuch Caution and Prudence, that it do not become terrible or pernicious to others; and Men under ſome Circumſtances and Relations are obliged to more exact and watchful Diligence[d 2]. Indeed the ſlighteſt Default in this Point is ſufficient to impoſe a Neceſſity of *Reparation*, unleſs under one of theſe Exceptions; either that the Nature of the Buſineſs was ſuch as diſdain'd a Care more nice and ſcrupulous, or that the Party who receives the Wrong is no leſs in fault than he who gives it; or, laſtly, that ſome Perturbation of Mind in the Perſon, or ſome extraordinary Circumſtances in the Affair, leaves no room for accurate and conſiderate Circumſpection; as ſuppoſe a Soldier in the Heat of an Engagement ſhould hurt his next Man with his Arms, whilſt he brandiſhes, and employs them againſt the Enemy. To this Purpoſe the Story in *Ælian*[e] is remarkable; "A "young Man travelling towards *Delphi*, as he de"fended his Companion from the Robbers, hap"pen'd to kill him by an unlucky Turn of his "Weapon; and, upon Application to the Oracle, "receiv'd his Pardon in this comfortable Anſwer:

a *Ibid.* f. 11.

b Such a Caſe we have in *Quintilian Inſtitut.* l. 7. c. 6. Two Thieves had ſtolen together Ten Thouſand *Seſterces*, they were ſued in Court, and Forty Thouſand demanded of each Man, according to the *Law* enacting, that every Thief ſhall pay *Four-fold.* They petition, that each may pay no more than Twenty Thouſand. Here the Judgment ought to go againſt the Thieves, inaſmuch as, by the *Roman* Laws, theſe *Actions* of *Reſtitution* are reckon'd under the Head of *Puniſhments*, ſ. ult. *de Oblig. quæ ex delict. naſc.* l 7. f. 5. l. 8. *D. de Juriſdictione*, l. 6. *prin. D. arborum furtim cæſarum:* l. 34. *D. de injuriis. Add.* l. 11. f. 2, 4. *D. ad L. Aquil.* l. 5. 1. f. 2. Ibid. l. 15. §. 2. *D. quod vi aut clam.* l. 2. f. 9. *D. de furtis, Hotoman. illuſt. Quæſt.* 33.

c *Lyſias*, Orat. xxx.

Οὐδενὶ ἑδὲν ἐκούσιον δυσύχημα γίγνεται.
No Misfortune happens to any Man by his good Will.
See *Exod.* xxi. 28, &c. 33. &c. & *Grot. ibid.*

d *Vid.* l. 6. f. 7. l. 14. *D. de Offic. Præſidis*, l. 27. f. 9. *in fin.* f. 29, 34, 35. l. 27, 29. f. 2, 3, 4. *ad L. Aquil. Deuter.* xxii. 8.

e *Var. Hiſt.* l. 3. c. 44.

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1 See the Civil Laws drawn up in their Natural Order, by Mr. *Domat.* Part 1. l. 2. *Tit.* 8. where you will find a great Number of theſe ſorts of Caſes decided, wherein it appears, that there is nothing but the indirect and interpretative Will of him that cauſes the Damage.

2 Among the Laws of *Moſes.*

Ἔκτειναs τὸν ἑταῖρον, ἀμύνων, ἔ σ' ἐμιάνεν
Αἷμα· πέλεις ὑ χέρας καθαρώτερος ἢ πάρος ἦεν.

Striving to save your Friend, you have him slain;
His Blood will cleanse your Hands, it ne'er can stain [a].

But in Cases of pure Chance, where the hurtful Action is not mix'd with any Fault of ours [1], it is evident we are not oblig'd to Reparation. For when I have done nothing that can be fairly laid to my Charge, there seems to be no Reason why the Misfortune, and the Damage of a Harm which I unwillingly caus'd, should rather fall on me than on the Person who receiv'd it [b]. Yet if a Person of Wealth hurt a poor Man, though meerly by Chance, it will become him, by some Act of Liberality, to support and comfort the Sufferer. As for those *Actions* which lie against us for any Trespass or Hurt committed by our Cattle or Slaves, and the like, * *Grotius* is of opinion, that they owe their Rise to Civil and Positive Laws; inasmuch as the Master or Owner being innocent of the Fact, is not by any natural Obligation made responsible for it. Yet others hold that *Actions* of this kind are most agreeable to natural Equity, although they are not precisely suggested by the Law of Nature. It is one of *Plato*'s [c] Constitutions, "If a Man or "Woman being a Servant, shall injure the Goods "of another Person, either by an unskilful, or by "an immoderate Use of them, the Person who re-"ceives the Wrong, not being himself the Cause "of it; the Master shall either make him Satis-"faction for the Damage sustain'd, or shall deliver "the offending Servant into his Power and Plea-"sure." And the same way of proceeding is observable in the old *Roman* Story of *Evander*, delivering up his Servant *Cacus* to *Hercules*, who had convicted him of stealing his Cattle [2]. But why the Owner of a Beast should rather suffer Damage, than he, who upon provoking a [3] Creature not violent by Nature, has, without the Owner's Fault, receiv'd a Hurt, the Reason seems to be this, that the Settlement of *Proprieties* does not impair or pre-

* Lib. ii. c. 17. §. 12.

[a] *Add Epict. Enchir.* c. 39. *& Simplic. in eum circa fin.* S. L. 44. l. 5. §. 4. *D. ad L. Aquil. & ibi Interp.*
[b] *Add.* l. 5. f. 2. l. 7. f. 3. *ad L. Aquil.*
[c] *De Leg.* l. 11.

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[1] This Restriction ought carefully to be observed. For when the accidental Case is an Effect of some Fault, which produced it, we are indispensibly required to make good the Damage, the Obligation to repair being the Effect of the Fault, and not of the Chance. See Mr. *Domat*, Civil Laws, Part I. l. 2. Tit. 9. We ought to remember that we may be engaged by some Agreement to answer for some accidental Cases; and then, as any one may see, the Obligation to make good a Damage is an Act of our Will, and the Accident gave us only an Opportunity to fulfil our Promises. See l. 5. c. 9. following. Mr. *Thomasius* goes farther, and maintains, that a Man is bound to make good any Damage, of which he is the true *Physical Cause*, altho' he does not do any wilful Injury; but the Welfare of human Society does not seem to require, that our Obligation to satisfy a Damage should extend so far. The Reader may consult the Reasons which this learned Lawyer brings to support his Opinion in a Thesis intitled, *Larva Legis Aquiliæ detracta actioni de damno data, receptæ in foro Germanorum*, maintain'd publickly at *Hall* in *Saxony*, in 1703. I, for my Part, think it no way necessary to the Happiness of Mankind, that we should extend the Obligation to Restitution so far. The Peace of Society would be sufficiently secur'd, if every one would carefully abstain from injuring another, whether wilfully, or thro' the least Negligence. Besides, the Author of the Damage should be the *Moral*, and not simply the *physical* Cause of it. Otherwise it would follow, that a Man, who, having the Misfortune to fall from a House, bruises another to his own Regret, should indemnify him for the Injury he has receiv'd. I scarce believe any Person will assert such a Paradox. Mr. *Thomasius* proposes another Instance. A Person visiting a Friend, and desirous to look at a precious Glass, lets it fall accidentally, to the great Surprize and Loss of the Owner. But this Example appears no way proper to establish the Justice of Reparation in such Cases. For the Proprietor of this costly, but brittle Ware, by permitting his Friend to handle and view it, tacitly consents to support the Loss, in case of Misfortune. It would not be reasonable, that a Man, who thinks he does an equal Pleasure to his Friend and himself, in admiring such a Rarity, should pay so dear for his Curiosity. But the Case would be otherwise, if, after having sufficiently view'd the Glass, he should often take it up again without any apparent Necessity: For then there is Reason to think the Owner cannot be pleas'd to see a Thing carelessly handled, which is so liable to be broke. And the Person who did it would not be wholly excusable. The *Roman* Lawyers distinguish'd thus in speaking of one to whom we give any thing to look at. If it were only for our own Interest, the Person is only responsible, with regard to his Honesty, just as a Depository. But if the Thing we give to look at be for the Advantage of the Person to whom we intrust it, or if we have a mutual Interest, then he becomes answerable, not only as to Breach of Trust, but of a slight Injury: *Secundum hæc, si cui inspiciendum dedi, sive ipsius causâ, sive utriusque & dolum & culpam mihi præstandam esse dico propter utilitatem: periculum non. Si vero mei dumtaxat causâ datum est, dolum solum: quia prope depositum hoc accedit.* Digest. Lib. xix. Tit. v. De Præscript. Verb. Leg. xvii. §. 2. See upon this Law, *Cujas Recit. in Papinian.* Page 180. Tom. iv. *Opp. Edit.* Fabrott. *Merillus Observ.* Lib. viii. Cap. xi. and M. *Van de Water*, Obs. III. 9. Mr. *Gundling*, however, tacitly rejects the Opinion of Mr. *Thomasius*'s Colleague, and does me the Honour to quote me upon that Subject, in his *Jus Naturæ & Gentium*, *Edit.* 1728. Cap. x. §. 19.

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of theſe Parties concern'd ſhall have made good the Damage, the others ſhall be then clear, as to Reparation, tho' not as to Puniſhment. But what if an Act proceeds from many Perſons, who are all Authors or Cauſes of it in the very ſame degree; ſhall each Party be reſponſible for the whole, or only for an equal Share of the Damage? *Grotius* [a] pronounces in this Caſe, that each *Perſon is to anſwer for all, if the whole Fact proceed from each, tho' not from each alone.* Which Rule is ſomewhat obſcure, unleſs we illuſtrate it by an Inſtance. Here are three Men then, who, at the ſame time; tho', perhaps, in different Parts, all ſet fire to an Houſe. This Fact of burning the Houſe ſeems to have proceeded from each Man entire, and in whole, although not from each alone; inaſmuch as the ſame Miſchief would have follow'd, had *one only* applied the Fire. But ſuppoſe ſeveral Perſons join in beating or cudgelling a Man, one of whom, perhaps, gives him a Wound in the Head, another breaks his Arm, and a third ſtrikes out his Eye; here each Perſon ſhall not anſwer for the whole Hurt, but only for that part of it, which he himſelf effected. Though in Caſe one of them eſcape, it is uſual to condemn the reſt who are taken, in the whole, eſpecially when it appears, that they combined together to execute the Miſchief. We may ſtill ſet this Matter in a clearer Light, by diſtinguiſhing between *diviſible* and *indiviſible Acts.* The latter which we are concern'd with, are ſuch in which many Perſons concur, but in ſuch a manner that the whole Act would have follow'd from the Endeavours of one only; and, therefore, cannot conveniently be divided into Shares amongſt them all; of this kind are the firing of Houſes, the breaking down of Banks and Dams, or the like. For the ſame Damage would have enſued, had one only of the many Parties ſet his Hand to the Exploit; ſo that it is impoſſible to define and ſettle what part of the Fire, or of the Flood, proceeded from each in particular. When many join in an Action of this Nature, each Perſon ſhall be thus far reſponſible for the whole, that in caſe they are all apprehended, they ſhall contribute equally to the Reparation; but if, upon the Eſcape of the reſt, one only be taken, he ſhall then be charg'd with the entire Sum. After the ſame manner, if ſome of the Perſons apprehended prove inſolvent, the whole Burthen ſhall be laid on thoſe who have more Subſtance and Ability. In this too the *Reparation of Damage* differs from the *Exaction of Puniſhment*; that in the former, if full Payment or Reſtitution be made by one of the Parties concern'd, the reſt are cleared and excus'd; ſince it is not conſiſtent with Equity, that the ſame Damage ſhould be twice made good, (though by way of Puniſhment, this is frequently practis'd) but, on the other hand, in penal Caſes, nothing is more uſual, than that every particular Accomplice in a Crime be made to ſuffer all that the Law inflicts [b].

VI. Now whenever we hurt or endamage another, we do it either out of full Purpoſe and premeditated Guilt, or by a Fault of Negligence only, and not of Deſign, (and this Negligence, as it is more or leſs groſs and ſupine, is more or leſs culpable) or, laſtly, we may do it by *meer Chance*, ſo that the Injury cannot rightly be *imputed* to us [c]. Among ſome People. thoſe *Damages* are not only *imputed* to a Man, which are committed with his Aſſiſtance or Concurrence; but thoſe, likewiſe, which are cauſed by his Servants or Cattle, without his poſitive Influence. It is beyond doubt, that he who offers Damage to another, out of an *evil Deſign*, is bound to make Reparation, and that to the full Value of the Wrong, and of all the Conſequences flowing from it. But thoſe, likewiſe, ſtand reſponſible, who commit an Act of Treſpaſs, tho' not deſignedly, yet by ſuch a Piece of Neglect as they might eaſily have avoided [1]. For it is no inconſiderable Part of ſocial Duty to manage our Converſation with ſuch Caution and Prudence, that it do not become terrible or pernicious to others; and Men under ſome Circumſtances and Relations are obliged to more exact and watchful Diligence [d 2]. Indeed the ſlighteſt Default in this Point is ſufficient to impoſe a Neceſſity of *Reparation*, unleſs under one of theſe Exceptions; either that the Nature of the Buſineſs was ſuch as diſdain'd a Care more nice and ſcrupulous, or that the Party who receives the Wrong is no leſs in fault than he who gives it; or, laſtly, that ſome Perturbation of Mind in the Perſon, or ſome extraordinary Circumſtances in the Affair, leaves no room for accurate and conſiderate Circumſpection; as ſuppoſe a Soldier in the Heat of an Engagement ſhould hurt his next Man with his Arms, whilſt he brandiſhes, and employs them againſt the Enemy. To this Purpoſe the Story in *Ælian* [e] is remarkable; "A "young Man travelling towards *Delphi*, as he de- "fended his Companion from the Robbers, hap- "pen'd to kill him by an unlucky Turn of his "Weapon; and, upon Application to the Oracle, "receiv'd his Pardon in this comfortable Anſwer:

[a] *Ibid.* ſ. 11:

[b] Such a Caſe we have in *Quintilian Inſtitut.* l. 7. c. 6. Two Thieves had ſtolen together Ten Thouſand *Seſterces*, they were ſued in Court, and Forty Thouſand demanded of each Man, according to the *Law* enacting, that every Thief ſhall pay *Four-fold.* They petition, that each may pay no more than Twenty Thouſand. Here the Judgment ought to go againſt the Thieves, inaſmuch as, by the *Roman* Laws, theſe *Actions* of *Reſtitution* are reckon'd under the Head of *Puniſhments*, ſ. *ult. de Oblig. quæ ex delict. naſc.* l 7. ſ. 5. l. 8. *D. de Juriſdictione*, l. 6. *prin. D. arborum furtim cæſarum:* l. 34. *D. de injuriis. Add.* l. 11. ſ. 2, 4. *D. ad L. Aquil.* l. 5. 1. ſ. 2. Ibid. l. 15. §. 2. *D. quod vi aut clam.* l. 2. ſ. 9. *D. de furtis, Hotoman. illuſt. Quæſt.* 33.

[c] *Lyſias*, Orat. xxx. Οὐδενὶ ἀδὲν ἐκούσιον δυσύχημα γίγνεται. *No Misfortune happens to any Man by his good Will.* See *Exod.* xxi. 28, &c. 33. &c. & *Grot. ibid.*

[d] *Vid.* l. 6. ſ. 7. l. 14. *D. de Offic. Præſidis*, l. 27. ſ. 9. *in fin.* ſ. 29, 34, 35. l. 27, 29. ſ. 2, 3, 4. *ad L. Aquil. Deuteron.* xxii. 8.

[e] *Var. Hiſt.* l. 3. c. 44.

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[1] See the Civil Laws drawn up in their Natural Order, by Mr. *Domat.* Part 1. l. 2. *Tit.* 8. where you will find a great Number of theſe ſorts of Caſes decided, wherein it appears, that there is nothing but the indirect and interpretative Will of him that cauſes the Damage.

[2] Among the Laws of *Moſes.*

Ἔκτειναs τὸν ἑταῖρον, ἀμύνων, ἔ σ' ἐμιάνεν
Αἷμα· πέλεις ὑ χέρας καθαρώτερος ἢ πάρος ἦσθα.

Striving to save your Friend, you have him slain;
His Blood will cleanse your Hands, it ne'er can stain[a].

But in Cases of pure Chance, where the hurtful Action is not mix'd with any Fault of ours[1], it is evident we are not oblig'd to Reparation. For when I have done nothing that can be fairly laid to my Charge, there seems to be no Reason why the Misfortune, and the Damage of a Harm which I unwillingly caus'd, should rather fall on me than on the Person who receiv'd it[b]. Yet if a Person of Wealth hurt a poor Man, though meerly by Chance, it will become him, by some Act of Liberality, to support and comfort the Sufferer. As for those *Actions* which lie against us for any Trespass or Hurt committed by our Cattle or Slaves, and the like, * *Grotius* is of opinion, that they owe their Rise to Civil and Positive Laws; inasmuch as the Master or Owner being innocent of the Fact, is not by any natural Obligation made responsible for it. Yet others hold that *Actions* of this kind are most agreeable to natural Equity, although they are not precisely suggested by the Law of Nature. It is one of *Plato*'s[c] Constitutions, "If a Man or "Woman being a Servant, shall injure the Goods "of another Person, either by an unskilful, or by "an immoderate Use of them, the Person who re-"ceives the Wrong, not being himself the Cause "of it; the Master shall either make him Satis-"faction for the Damage sustain'd, or shall deliver "the offending Servant into his Power and Plea-"sure." And the same way of proceeding is observable in the old *Roman* Story of *Evander*, delivering up his Servant *Cacus* to *Hercules*, who had convicted him of stealing his Cattle[2]. But why the Owner of a Beast should rather suffer Damage, than he, who upon provoking a[3] Creature not violent by Nature, has, without the Owner's Fault, receiv'd a Hurt, the Reason seems to be this, that the Settlement of *Proprieties* does not impair or pre-

* Lib. ii. c. 17. §. 12.

a *Add Epict. Enchir.* c. 39. *& Simplic. in eum circa fin.* 8. L. 44. l. 5. §. 4. *D. ad L. Aquil. & ibi Interp.*
b *Add.* l. 5. f. 2. l. 7. f. 3. *ad L. Aquil.*
c *De Leg.* l. 11.

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judice this antecedent natural Precept of Reparation [1]. And, therefore, since supposing Things to lie in their primitive Community, in case I had been hurt by a Beast, I had the Power of requiting, or satisfying myself upon the Beast, by any means I thought fit; this Power or Liberty of proceeding is not suppos'd to be taken from me by the Introduction of distinct Proprieties. And inasmuch as the Owner of such a Beast makes a *Gain*, of him, and I suffer'd *Loss* by him, the Reparation of Damage taking place in Equity and common Favour before the Procurement of Profit, it hence appears, that I can rightly demand of the Owner, either to make good the Loss sustain'd; or, in case such a Charge would rise higher than the Value of the Beast, then to deliver him up as a Criminal, to be destroy'd [2]. The same Rule holds much stronger in the Case of a *Slave*, since he is by Nature made liable to answer for any Damage he shall give. But now, since he has no Goods of *his own* to repay or requite the Loss, and since his very Body is his Master's, it follows in Equity, that the Master either repair the Wrong, or give him up to the Sufferer. Especially since, without this Provision, a Slave would be impower'd to act what Hurt and Mischief he pleas'd; whilst neither he, (who is Possessor of nothing, nor indeed of himself) nor his Master, could be oblig'd to Restitution. Nor should the Master, by the severest Course of Blows, or of Imprisonment, punish the Offender, would this be any real Satisfaction to the injured Party [a].

Much more then is it clear, beyond the least Doubt or Dispute, that the Owner stands responsible for those Damages which his Beasts commit, either by his own Fault or Instigation, or by their natural and accustom'd Violence, and the common Force of their peculiar Instinct. For the Owner ought either not to keep such Creatures [3], or carefully to restrain them from doing Mischief [4].

Of Reparation in general, we have this farther to observe, that when the Hurt or Wrong is done by an evil and criminal Act, there to make good the Damage is not sufficient to take off the Punishment [b]. Though the voluntary Offer of Requital, as a Sign of Penitence and Sorrow, frequently lessens the Severity of farther Prosecution [5] [c].

It is time now to illustrate this Doctrine by such Instances and Examples as *Grotius* [6] chiefly will supply us with.

VII. An *unjust Slayer* is obliged to defray the Charge

[a] *Vid. Interp. Jur. Roman. ad Tit. Si quadrupes pauperiem, & ad L. Aquiliam, & De damno infecto.*

[b] *Vid.* l. 48. *D. de furtis.*

[c] The *French* Translation puts the following Citation into the Text after [c], and 'tis so in the Original. See *Luk.* xix. ver. 8. 'Tis remarkable, what *Glycas* tells us, in his *Annals* of *Michael* the *Paphlagonian*. But the Emperor *Michael*, says he, "Did "not forbear all his Life-time to lament his Villany towards *Romanus* III. and endeavour'd by building Monasteries, by Cha- "rity to the Poor, and other good Works, to appease the Anger of GOD. And this Method might have prov'd beneficial to "him, had he laid down the Empire, (for the sake of which the Fact had been committed) and throwing off the Adultress, the "Empress, for the Love to whom he had done that Wickedness, bewail'd his Sin in a private Condition. But he neglecting "such Means of Repentance, and still using *Zoa* as his Wife, still holding fast the Imperial Dignity, and only making a Shew "of doing good at the publick Charge, thinking thus to obtain his Pardon, betray'd an impious Opinion of GOD Almighty, "as if he would suffer us to buy our own Forgiveness at the Loss of other Men." But this Passage seems no way to relate to the Obligation of Restitution, which is the Point in question. *Valerius Maximus* (Lib. ii. Cap. 8. §. 4.) informs us, that *Q. Fulvius*, after the Reduction of *Capua*; and *Lucius Opinius*, after having oblig'd the *Fregelians* to surrender, could neither of them obtain from the Senate the Honour of Trial. Upon which the Historian makes this Reflection: "That the Denial was "not owing to any Jealousy of the Senate, but to their scrupulous Exactness of adhering to the Laws. One of which was, "That the Honour of Trial was only decreed for those who should extend the Bounds of the *Roman* Empire, not to those who "should only recover what it had lost. *For* (adds he) *there is as much Difference between a new Acquisition, and regaining what* "*formerly belong'd to us; as there is between doing good to a Man, and ceasing to do him harm.*" I leave the Reader to judge how far this Authority makes to his Purpose; but, that he may the better see the Mistake, I have added the *Latin*. *Tantum enim interest, adjicias aliquid, an detractum restituas; quantum distat beneficii initium ab injuriæ fine. Seneca* says in the same Sense, "That the Cessation of an Injury is no Benefit: *Non est beneficium injuriæ finis.* De Benefic. Lib. 6. Cap. xxvi. And *Quintilian Declam.* 329. *Nox tamen inter beneficia ducerem, injuriæ finem.*

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[1] I have, in a long Note upon *Grotius*, (Lib. ii. Cap. 17. §. 21.) shewn the Weakness of our Author's Arguments, and prov'd that it should be decided quite otherwise, when the Damage is done by a Slave. Those who affirm, (as Mr. *Hertius* does, and after him M. *Gundling*, in his *Jus Naturæ*, Cap. x. §. 24.) that the Proprietor of the Beast, who refuses to deliver him up, is by that look'd upon to approve the Damage, or bound to Restitution; these, I say, manifestly suppose the thing in question. The Proprietor only uses his Right, till the Civil Law intervenes, which obliges him to chuse the Alternative already mention'd.

[2] Besides this, we may observe with Mr. *Hertius*, that it may be commonly presumed, that the Master of such a vitious Beast knows its Fault; and if, when it has done a Mischief, he will neither resign it, nor pay the Damage, he may be thought to approve it.

[3] The Question here is not about wild Beasts, as Bears, Lyons, Wolves, &c. These Animals, far from being useful in Life, are so dangerous, that it is good to chase and exterminate them as much as possible. Therefore, nobody has a Right to keep any such about him; or, if he does, he is certainly bound to repair the Damage they may do, whether he keeps them strictly or carelessly. He is the rather oblig'd to this, as there is no apparent Necessity of having such Creatures, as, in spite of the greatest Circumspection, are capable of doing Mischief, when it is least expected.

[4] If a Slave or Beast be put on by any other Person than the Master of it, 'tis plain that such a Person is obliged to make good the Damage. But we must then suppose, that the Person hurt has not, through his own Fault, occasion'd the Damage done him by the Slave or Beast; for, in this Case, he can blame none but himself, and the Slave did nothing but what he might do in his own Defence. In a word, no Proprietor is obliged to satisfy a Damage, where he is guilty of no Fault, unless his Slave or Beast have done a Mischief of their own accord. *Vid.* The Civil Laws in their Natural Order, by Mr. *Domat*. Part I. l. 2. *Tit.* 8. §. 2. And *Titius Observat.* 168.

[5] But there can be no true Repentance without Restitution.

[6] As Damage may be occasion'd a great number of Ways, so the manner of Restitution, accordingly varies. Sometimes the Loss may be repair'd of itself, by setting things in the same State they were before it happen'd. If a Man, for Instance, has taken a thing, he may restore it in so short a time, that the Owner can receive no great Injury by the want of it: He has his Property again, so that no Trace of the Wrong remains. Sometimes the Damage is in itself irreparable, and can no way be made up, with regard to the suffering Persons; as in the Cases of Murther and Adultery. For it is no more possible to restore a Woman's Honour, when taken away, than a Man's Life. Sometimes the Damage can be repair'd but imperfectly, as when a Man has blacken'd another by Calumny; for all the Satisfaction, or Recantation in the World, can never efface the ill Impressions this Vice makes in the Minds of Men, who are generally more inclin'd to believe Evil than Good. Sometimes, tho' the Damage is not irreparable, in its own Nature, yet it is so with regard to those who have occasion'd it, either through their Ignorance how far it extends, or because of their Inability to make Satisfaction. (See my Remark upon *Grotius*, Lib. iii. Cap. x. §. 4. *Note* 1.) A Servant, for Instance, who, by his Negligence or Malice, has occasion'd a Fire, which has burnt many

Charge of Phyſicians and Chirurgeons, and give to thoſe Perſons, whom the Deceas'd was by full and perfect Duty bound to maintain, as Parents, Wife and Children, (not to any whom he kept out of Charity and Pity) ſo much as the Hope of their Maintenance ſhall be fairly valued at; Regard being had to the Age [a], both of the Deceas'd [1], and of themſelves [b] [2]. As to *Zeigler*'s Opinion on this Place of *Grotius*, that ſome Conſideration is to be allow'd for the Gain, which the Deceas'd might have acquired, had he liv'd longer, which, conſequently, would have made their Portions the larger, we think it would ſcarce hold good, inaſmuch as all Advantage of this kind being yet uncertain, cannot be reckon'd amongſt our Poſſeſſions; and ſince future Time lies equally open to Loſs as to Gain; and, laſtly, ſince it cannot clearly be made out, how much the Deceas'd would have ſpent of any ſuch Gain, had he been ſuffer'd to live, and to procure it [3].

Now he is an *unjuſt Slayer* who kills a Man, who had a Right not to be kill'd by him, and who, therefore, by the Act that caus'd his Death was truly injur'd. And this Right appears to belong to every individual Perſon, ſince Nature, by a general Command, binds all Men to live like ſociable Creatures, and to abſtain from mutual Hurt. Which Right a Man may, as far as in him lies, renounce; at leaſt ſo as to make it fair and juſt for him to be hurt by ſuch or ſuch particular Perſons; and this may be done either *tacitly* or *expreſly*. He *tacitly* di claims this Right, who, in a violent manner ſets upon another without juſt Cauſe. For ſince the other has a Right of repelling the Violence, by any Means he can, the Aſſailant is to accuſe himſelf only for any Harm he ſuffers in the Repulſe of his own unlawful Force. The ſame Right is [4] *expreſsly* renounced by him who enters into *War* with another upon mutual Appointment and Conſent. For 'tis a Law of War, that every one have fair Liberty to uſe his full Endeavours for the Defeat and Suppreſſion of his Enemy [c]. And though in ſuch War the prevailing Perſon may, perhaps, ſin againſt Charity, yet the Violation of Charity only will not oblige to repair the Loſs he has thus occaſion'd.

The Life of a Freeman does not admit of any Rate or Valuation; and had it any, there is no Perſon to whom the Debt ſhould be paid. For his Life does not properly belong to his near Relations, it is only their Intereſt that he ſhould live; and, therefore, the Value of that Intereſt or Advantage being paid to them, they can demand no ſuch farther Recompence, as the full Worth of his Life. The Caſe is otherwiſe with a Slave or Vaſſal, who being entirely the Property of his Maſter, and falling under Exchange and Commerce, in the manner of other Goods, has really a Price ſet upon him, which, if he be wrongfully kill'd, the Maſter has a Right to demand. If it ſeem hard, and ſomewhat like Inhumanity, to rate our Slave thus, in the ſame manner as we would our Beaſt, it may be anſwer'd, that we do not make this *Valuation* of his Perſon, but only of the Work and Service which he would have done us.

Thoſe, in like manner, ſtand bound to *Reparation*, who kill another in their Sports or Recreations, which is eſteem'd equal to deliberate Miſchief [d]. And thoſe, alſo, who commit the ſame mortal Violence, through their own Unwarineſs and Neglect. Examples of which Caſe we find ſet down in the *Inſtitutions* [e] [5]. As if a Soldier practiſing with his Arms in another place, than what is ſet apart for thoſe Exerciſes, ſhould ſlay a Man who was

[a] See Mr. *Placette*'s Treatiſe of Reſtitution, l. 3. c. 4.

[b] The way of reckoning the Maintenance we learn from L. 68. *D. ad L. Falcidiam.*

[c] To this purpoſe we have a Story in *Plutarch*'s *Laconian Apophthegms*; that two Boys, one of them with a Sickle, gave the other a mortal Wound; when the Companions of the wounded Boy, who had haſten'd to part the Fray, promis'd him to revenge his Death on his Murderer; By no means, ſays he, this would be to act unjuſtly: For what he hath done to me is no more than I had done to him, had I been ſtrong enough to have prevented him. *Add.* l. 4, 5, 7. ſ. 4. l. 52. ſ. 1. *D. ad L. Aquil.*

[d] *Vid.* l. 4. ſ. 1. *D. ad L. Cornel. de Sicar. & ib. Gothofred.* l. 10. *D. ad L. Aquil. Digeſt.* l. 48. Tit. 8.

[e] *De L. Aquil.* ſ. 5. *&c.*

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many Houſes, will never have it in his Power (without a Miracle) to make Satisfaction for the Loſs. In theſe Caſes, either a corporal Puniſhment is inflicted, by way of Atonement, or the Author of the Damage eſcapes, meerly on the Account of the Impoſſibility of his repairing it.

[1] But it may be objected, How can it be known how long the Perſon ſlain might have lived? Mr. *Placette*, in his Treatiſe of Reſtitution, l. 3. c. 4. thus anſwers, That the Length of no Man's Life can certainly be known, but it may be probably gueſſed at two ways: As, 1. By what the Law has determined about it, which fixes it to 60 Years, and ſo if the Perſon ſlain was 40 Years old, the Perſons intereſted muſt be ſatisfied for the Gains of 20 Years; but then he muſt not be much above, and all Deductions muſt be conſidered. 2. But the beſt way ſeems to be to refer the Matter to the equitable Judgment of one or more Arbitrators, who are wiſe and prudent Men, who, conſidering the Conſtitution, Health, and Frugality of the dead Perſon, may determine beſt what is moſt reaſonable to allow.

[2] The manner of computing the Value of their Maintenance is ſet down in *Digeſt.* l. 35. *Tit.* 2. *ad Legem Falcidiam, Leg.* 68. But *Titius*, upon this Author, obſerves, that no exact Eſtimation can be made of a Damage by this and the following Examples; and, therefore, in this Caſe, we ought to ſubmit to an Accommodation. I may add, that every one ought to conſult his own Conſcience well; and conſider, that it is better always to make ſuch a Reparation, as may ſeem ſomething more than the Damage done, than expoſe himſelf to be thought not to have done enough; for the Cauſe of the Perſon damag'd is always more favoured, than of him that did it. It is not always ſufficient to ſatisfy the Perſons concern'd, according as the Laws or Judges may decree. Human Tribunals ſeldom trouble themſelves to procure ſuch a Reparation; or, when they do, they ſeldom fix it upon a Footing equal to the Greatneſs of the Loſs. The *Roman* Law paid no regard to it, under pretence that there could be no right way of making an Eſtimation. It was not even till late Ages, that an Action of Juſtice was allow'd to the Relations of the Dead, to pay the Coſt of the Phyſicians and Surgeons, in the Caſe of a Perſon who died of his Wounds. See Mr. *Noodt*, *Ad L. Aquil.* Cap. ii. And the *Collatio Moſaic. & Roman.* L. L. Tit. i. §. ii. With the Notes of Mr. *Schulting Juriſp. Ante-Juſtin.* Page 734. And, alſo, *Cujas*, *Obſerv.* xiv. 4.

[3] Mr. *Van Muelen*, in his Commentary upon *Grotius*, l. 2. c. 17. §. 16. believes that the Nature and Certainty of the Gain, which the dead Perſon might have made, ought to be examined. If his Gain were altogether uncertain, ſo that it depended more upon Chance than the Induſtry of the dead Perſon, no Satisfaction ought to be made; but if his Gain were morally certain, and would have, in all Appearance, been produced by the Labour and Induſtry of the dead Perſon, as the Gain of ſome Traders, Merchants, and Artificers is, then he ought to ſatisfy the Perſons concern'd for the Ceſſation of the Gain, according to the equitable Eſtimation of an Arbitrator, who ſhall make as exact Deductions for all Expences, which the Dead would have been at, as poſſible, and conſider the Circumſtances our Author mentions.

[4] See Lib. v. Cap. ix. §. iii. following.

[5] See that excellent Treatiſe upon this Subject, compoſed by Mr. *Noodt*, *Ad Legem Aquiliam*,

caſually paſſing by; or if one who is not a Soldier ſhall happen to do the ſame; though in the Place ordain'd for the publick training of Military Men. But if a Soldier in the ſame place of common Duty ſhall undeſignedly take away a Man's Life, he ſhall ſtand excuſed; for he was performing his proper Buſineſs, and the other Party was in the fault for throwing himſelf into the Danger [a]. If a Feller of Wood ſhall, with a Limb of a Tree which he is cutting down, kill a Servant paſſing by in the high Road, or in a Way near a Town; without having firſt cried out to give Warning: But, in caſe he did thus cry out, and the Servant neglected to ſave himſelf upon timely Notice, the Feller ſhall not be charged with his Death. No more ſhall he if the ſame Misfortune happen'd at a diſtance from the Highway, or in the middle of a Field, although he did not give the uſual ſign of crying out; becauſe *there the Stranger had no Right of paſſing*; and, conſequently, ventured at his own Peril [b].

If a Phyſician deſtroy his Patient, either by plain Neglect and Deſertion, or by adminiſtring, through Ignorance, improper, and dangerous Medicines [c].

If a Muletier, through Weakneſs or Unſkilfulneſs, ſhall have ſuffer'd his Mules to run over any Perſon; provided he undertook this Buſineſs of driving at his own Choice, or made it his Profeſſion; not if he was preſs'd and compell'd to the Service, proteſting, at the ſame time, his want of Art, or of Strength [d].

In the *Alcoran* [e], he who ſhall ignorantly kill a Muſulman, is enjoin'd to make good to his Relations the Damage they ſuſtain'd by his Death; and to redeem one Perſon of his own Religion from Slavery.

It ſeems probable that thoſe, likewiſe, were obliged to ſome ſuch Method of Reparation, who, by the Favour of the *Jewiſh* Law, enjoy'd the Privilege and Protection of the *Aſylums*, or Cities of Refuge [f]. Since, in the Caſe there ſpecified, of a Man's killing his Neighbour by the Fall of the *Head* of his Axe from the *Helve*, the Man is not entirely blameleſs, inaſmuch as he ought to have ſtrengthned his Inſtrument better, for the Prevention of ſuch a ſad Miſchance [g]. But how it came to be allow'd, that the [h] *Revenger of Blood* ſhould diſpatch ſuch an *innocent Slayer*, if taken without the Bounds of his Sanctuary, which ſeems not altogether conſiſtent with a regular State of Government, we have this only Reaſon to aſſign, that GOD was pleas'd to grant ſome little Inſtances of Indulgence to the cruel and implacable *Genius* of that People [i].

VIII. He who has maimed a Man ſhall be obliged to pay the Charges of the Cure, and to make up what he now gains leſs than before, by his Labour or Calling [k]. On this Head the *Jewiſh* Conſtitutions are very worthy of Remark, as we find them deliver'd in *Conſtantine l'Empereur* [l]. He that hurts his Neighbour is reſponſible on five Accounts; for the *Damage*, for the *Pain*, for the *Cure*, for the *Ceſſation of Work*, and for the *Affront* or Diſgrace. The *Damage* they compute in this Method: If, for example, he has beat out the other's Eye, or cut off his Hand, or broke his Leg, they then conſider the ſuffering Party as if he were a Slave to be ſold in the Market, and ſo reckon how much he would have yielded in Sale before the Hurt, and how far his Price is now fallen. For they judged there would be no certain Way of ſettling theſe Rates and Accounts. ſhould they in this Caſe diſtinguiſh between the different Qualities and Conditions of Men; ſince the Profeſſions of Life, and the States of Perſons admitting ſo endleſs a Variety, the Sufferer would be always throwing in ſome new Reaſon to enhance the Damage, and aggravate the Hurt; and, conſequently, to enlarge his Demands of Compenſation. They thought it convenient, therefore, to ſet all Men, with regard to this Buſineſs, in the one general Condition of Slaves, the juſt Value of whom was diſcoverable beyond diſpute. So that if the maim'd Perſon, ſuppoſed to be a Slave, would before the Hurt have brought fifty *Shekels*, and could be ſold afterwards for no no more than thirty, the Maimer was enjoin'd to pay him twenty *Shekels*.

As to the Point of *Pain*, if a Man, for inſtance, had *burnt* another, although in the Nails, where no Bliſter follows, they conſider'd how much a Perſon of that State and Fortune would have taken to ſuffer voluntarily ſuch a Pain. For one may find a wealthy, or a nice and delicate Perſon, who would not be hired at any rate to endure a ſlight and moderate Smart; and, at the ſame time, one may light upon a poor and hardy Labourer, who would be content to undergo ſome ſharp Degree of Torture for the earning of a Penny. Farther, in rating the Pain, they proceeded thus; they ſuppoſed, for inſtance, that a Perſon of that Condition was condemn'd to have his Hand cut off, and then they conſider'd how much he would give to loſe his Hand, rather by ſome eaſy conſuming Application, than by the violent Stroke of a Sword; and ſo much the Party, from whom the Hurt was receiv'd, was bound to give him on Account of the *Pain* [k].

Concerning the *Cure*, they obſerv'd theſe Rules: If, after the Cure perform'd, any Sores or Tumours

[a] *Add.* l. q. ſ. 4. *D. ad* l. *Aquil. & Antiphon. Orat.* VII.
[b] *L.* 31. *D. ad L. Aquil. Add. Leg. Burgundion,* Tit. 46.
[c] Vid. *Plin.* l. 29. c. 1. *Leg. Wiſigothor.* l. xi. *Tit.* 1. c. 6.
[d] *Add.* l. 5. ſ. 3. l. 7. ſ. 2. 5, 6, 8. l. 8. l. 9. *princip.* l. 31. l. 52. ſ. 2. *D. ad L. Aquil. & confer cum* c. 8, 9. *Sect.* x. *de Homicid.*
[e] In the Chapter *of Wives.*
[f] *Num.* XXXV. *& Deuteron.* XIX.
[g] Compare *Tacitus German.* c. 21. *Homer Odyſſes,* O. *v.* 272.
[h] *Confer.* l. 13. *prin. D. ad* l. *Aquil.* l. 7. *D. de his qui dejec. vel effud.*
[i] In *Babakama,* c. 8. ſ. 1.
[k] *Conf.* l. 5. *princ. &.* ſ. 1. *D. de Injuriis.* Where, ſince there is this Difference made between *Verberatio* and *Pulſatio,* that the former is *with,* and the latter *without Pain,* it ſeems to follow that even *Pain* may fall under Valuation.

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[1] Our Author obſerves a little higher, that the *Alcoran,* in the Chapter of Women, appoints, that if a Perſon againſt his Will, kills a *Muſulman,* he muſt not only make Satisfaction to the Parents of the Perſon ſlain; but, alſo, redeem a captive *Muſulman* at his own Charge.

[2] The Revenger of Blood was evidently the next Heir, or neareſt Relation of the dead Perſon. See Mr. *Le Clerc*'s Notes. The Author quotes *Hom. Odyſſ.* l. 15. l. 272. *& Tacit. German.* c. 21. See, alſo, Mr. *Hertius*'s Diſſertation, entituled, *De Hærede Occiſi Vindice, in Tom.* III. of his Comments, and ſmall Tracts, *&c.*

Certainly ſuch a Permiſſion cannot be allowed under the Goſpel. See the Interpreters of *Matth.* v. 38, *&c.* Compare this with *Grotius,* Lib. i. Cap. 1. §. 17. *Note* 3.

aroſe,

aroſe, in caſe it appear'd that the former Wound was the real Occaſion of them, the Perſon who gave it ſtood farther bound to pay for his ſecond Cure; if they proceeded from any other Cauſe, he was not reſponſible. As often as the Wound being imperfectly heal'd broke out again, he was ſtill charged with the Expences, but not after it had been once brought to a perfect Cure. It might be added, that this Obligation continued only in caſe the Wound thus broke out *of itſelf*; not if the Thing happen'd thro' the Fault of the Patient, or thro' the Unſkilfulneſs of the Chirurgeon.

In rating the Allowance to be made the Sufferer for the *Ceſſation of his Work*, they conſider'd him as a *Keeper of Cucumers*. The *Jewiſh* Doctors thus enlarge on the Point; they ſuppoſe him already to have receiv'd Satisfaction for the Defect or Damage ſuſtain'd in his Body; and, likewiſe, for the Pain he has endured. And, therefore, ſuppoſing him (for inſtance) to have loſt the Uſe of a Hand, or a Foot, they do not now conſider what Gain he would have made, had thoſe Limbs remain'd entire; but becauſe he hath been already paid for the diſabled Part, they only compute what Damage he ſuffers during his Sickneſs, in reſpect of ſuch Work, as he could have perform'd, though maim'd in Body, if well in Health. And they think he may fairly demand ſo much for every Day of his Sickneſs, as his daily Wages had been for watching a Cucumer Garden. But becauſe it is a different Thing, whether a Man loſes a Hand, or a Foot; whether only lying ſome time ſick of his Wound, he afterwards recovers without prejudice, or whether he is actually depriv'd of a Limb, *Maimonides* propoſes a nicer and more exact Way of rating the *Ceſſation of Work*, according to particular Caſes. If the Sufferer ſhall not be maim'd, but only caſt into a Sickneſs, and confined to his Bed, or if the affected Limb only ſwell for a time, and afterwards regain its Soundneſs and Uſe, the other Party ſhall allow him daily for the Loſs of his Work, according to the uſual Wages or Hire receiv'd by Men of the ſame Calling. But if he is maim'd in a Limb, or has loſt a Hand, Satisfaction being already made him for that Loſs, or what they call *Damage*, being before diſcharged, as to the bare *Ceſſation of his Work*, they then conſider him as a Keeper of Cucumers, and computing the Pay generally allowed for this Work, order him ſo much for every Day of his Illneſs. In like manner, if he has loſt a Leg, they conſider him as a Centinel or Watchman at a City Gate; if an Eye, they ſuppoſe him to work at turning a Mill; and ſo agreeably of all other Hurts and Miſchiefs.

Laſtly, In rating the Affront, or *Diſgrace*, they conſider the Condition and Degree of both Parties. Since an Affront is much more provoking from a mean and vile Perſon, than from one of Quality or Power; and ſince the ſame Piece of Diſreſpect may be light and inconſiderable to one of vulgar Condition, and yet be heinous and intolerable, if offer'd to a Man of Honour. And here we may, by the bye, obſerve the Diſtinction added, concerning the *Place*, or the Scene of the Action, which, ſometimes, very much varies this Point. Thus if a Man ſliding down from the Roof of a Houſe, ſhall *hurt* one that paſſes by, and, at the ſame time, *affront* him, for inſtance, by making the Dirt fall on him, he ſhall be reſponſible for the *Damage* or *Miſchief*, not for the *Ignominy*. Thus much we have gather'd from the [1] *Jewiſh* Laws; and, on the ſame Head, the Reader may conſult the *Roman*; particularly *l. ult. D. De his qui effuderint vel dejec. & l. 3. D. Si quadrupes.* Where we muſt take notice, that when 'tis ſaid *Scars* and *Deformity* are not capable of being prized or rated, the Rule [2] will hold good only in the Caſe of Freemen. For ſince the debauch'd Manners of that Nation ſet a higher Price than ordinary on handſome Slaves, they might, conſequently, claim a pecuniary Satisfaction from thoſe who ſhould rob a Slave of this Advantage, by a Wound in the Face, or any Injury of that kind. So the diſfiguring the Face of a Virgin or unmarried Woman, whoſe Beauty, ſometimes, is the beſt part of their Fortune, may be reckon'd amongſt Hurts requiring Compenſation. And, indeed, Deformity, if very remarkable, is in general a ſad Unhappineſs, rendring us diſagreeable to others, and expoſing us to the Contempt and Deriſion of proud, and of ſatyrical Men. Yet Scars receiv'd in War paſs for Marks of Honour and Valour by the common Vote of Mankind [a].

As to the Compenſation after an Act of *Maiming*, this is farther obſervable, that in ſuch Caſes the Limb itſelf is not properly rated or valued, it being a Thing really incapable of a pecuniary Price; but the Deſign of theſe Proceedings is only to repair the Damage ſuſtain'd by the Loſs, or by the Diſuſe of ſuch a Part, with regard to the Difference of Times, of Perſons, and of Abilities; and whilſt the Judge is ſettling theſe Points, 'tis neceſſary he ſhould ſpeak of the Members themſelves [b].

IX. The next Inſtance produced by *Grotius* [3] of the Adulterer and the Adultereſs, who he ſays are

[a] See the Example of *M. Servilius* in *Livy*, l. 45. c. 39. *Add. Senec. de Benefic.* l. 5. c. 24. l. 13. *Princ. D. ad L. Aquil.*
[b] *Bœcler. ad Grot.* l. 2. c. 1. ſ. 6.

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[1] What the Rabbins ſay, in this laſt Caſe, is viſibly abſurd, unleſs one could ſuppoſe that a Man in his right Senſes, would wantonly throw himſelf from the Top of an Houſe, which is very improbable. Even tho' a Priſoner, for inſtance, ſhould do this to ſave himſelf, we ought to regard the Damage the Perſon receives, who is bruis'd by his Fall, as a Misfortune rather than a Crime. In ſuch Circumſtances the Mind is too diſturb'd to be anſwerable for the Conſequences.

[2] And the Reaſon, which the *Roman* Lawyers give, is, becauſe *Liberum corpus nullam recipit æſtimationem, i. e.* the Body of a Freeman is not capable of any Valuation, as the Body of a Slave is; but Mr. *Titius*, as well as this Author, diſapproves of this Reaſon; and ſays, that though Freemen are not commonly bought and ſold as Slaves are; it is not a good Inference, that a Freeman who is hurt may not reaſonably require a Reparation by a certain Price for the Scars and Deformities, which are the neceſſary Conſequents of the Wounds he has received. His Reputation, for example, is as little capable of a Valuation as his Scars; yet we allow, that a Man who is injured by Calumnies may demand, that the Offender be obliged to make a pecuniary Satisfaction for his impaired Honour. Some Men indeed, through a Greatneſs of Soul, either real or affected, think it below them to take Money, in Compenſation for the Blows and Hurts they have received; but this hinders not, but that they have a right to require ſuch a Satisfaction, if they pleaſe, and that it may be made by Money; for as *Grotius* ſays, Lib. 2. Chap. 17. §. 22. Money is the common Meaſure of all Things, which are profitable to Man.

[3] With regard to the Injuſtice and Enormity of the Crime of Adultery, ſee Mr. *Wollaſton*'s *Religion of Nature Delineated*, Page 141. and following. As to the Reparation of Damages in this Caſe, the Reader may conſult Mr. *La Placette*'s *Treatiſe of Reſtitution*, Lib. iii. Chap. xiii, xiv. where, however, I do not approve of all he ſays, as will appear by comparing his Deciſions with the following Notes.

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bound not only to ſave the Huſband harmleſs, as to the Maintenance of the ſpurious Iſſue; but, likewiſe, to make good to the Legitimate Children any Damage which they ſhall ſuſtain, in caſe ſo falſe a Sharer ſhould be admitted with them into the Inheritance, falls under that *kind* of *Damage*, which Men are ſaid to cauſe only *indirectly*, and *by Conſequence*. For as to the *direct* Crime of Adultery, *that* does, by no means, belong to *pecuniary Damage*. On this Point *Ziegler* obſerves that *Grotius* is indeed in the right, when he aſſerts, that the Huſband ought to be ſecured from the Burthen of keeping the adulterous Offſpring: But that it will bear a Diſpute, whether Reſtitution ſhould be made to the Legitimate Children for what they ſuffer by ſuch a Partner in the Inheritance. For he ſays the Queſtion here is concern'd only about the Mother's Eſtate [1], to which the adulterous Children cannot be admitted, but by the Ordinance and Preſcription of Law. *And, therefore,* when the Law of any Nation does thus actually allow them to ſhare in the maternal Inheritance with the Legitimate, the Damage here given proceeds from the Law itſelf, and not from the Adulterers. To which might be added, that the Adulterers are not obliged to ſuch Reparation, for this farther Reaſon, That Children have not a *perfect Right* to the Goods of their living Parents; and no Neceſſity of Reparation can ariſe but from the Breach of a *perfect Right*. Thus a Parent cannot be ſaid properly to *injure* the Children by paſſing to a ſecond Marriage, though their Hopes of Inheritance may ſink conſiderably by ſuch a Proceeding. But the Truth is, the Inſtance alledged by *Grotius* abſtracts both from the Proviſions made by Civil Laws, about the Succeſſion of adulterous Children to the Goods of their Parents; and, alſo, from the Penalties decreed againſt the Adulterers, if convicted; and 'tis but Reaſon to affirm with him, that the Adulterers, tho' unconvicted or undiſcover'd, really owe ſuch Reparation, both to the Huſband, and to the Legitimate Children [2]. For by the End and Deſign of the matrimonial Covenant, the Children had a perfect Right, that no one ſhould thruſt new Coheirs amongſt them, beſides the lawful Huſband of their Mother. And, by the ſame Covenant, the Huſband had a Right of refuſing to maintain, not only out of his own proper and ſeparate Goods, but, likewiſe, out of his Wife's Dowry, the baſe Progeny of his polluted Bed.

X. If a Man has either by Force or Fraud defiled a Virgin, he is obliged to pay her ſo much as ſhe appears to be damnified in her hopes of Marriage, by the Loſs of her Honour. For pure Virginity is a very valuable Poſſeſſion; and, as it were, the common Portion which Nature gives her Daughters [a]. And, therefore, he who robs a Maid, againſt her Will, of this Treaſure, ought ſo largely to refund to her, that the Improvement of her Fortune may hide the Blemiſh of her Body. Though indeed the true Way of proceeding is, that he marry her himſelf; unleſs hinder'd by the Diſparity of their Conditions, or ſome other extraordinary Circumſtances [b]. But ſhe, who, by a luſtful Compliance, voluntarily parts with her Chaſtity, is to thank herſelf for the Loſs. Yet, commonly ſpeaking, the Man, in theſe Caſes, is preſum'd to be more faulty than the Woman. He who ſhall entice a Virgin to proſtitute herſelf on the Promiſe of Marriage, ſhould be bound to make good that Engagement. Nor will the Objection hold here, that Covenants about baſe or diſhoneſt Things are invalid. For ſince the Law of Nature requires no Interval betwixt the Covenant and the Completion of Matrimony [c], (all ſuch Diſtance being introduc'd by Civil Cuſtoms and Conſtitutions) [d] with regard to that Law, we can ſcarce call this a *baſe Condition*, "You ſhall be "my Wife [3], provided you conſent, that I ſhall "immediately uſe you as ſuch." Or if there be any Thing which ſeems foul in ſo over-haſty a Match, it is not judg'd ſufficient to invalidate the Contract; becauſe Marriage is, in this Caſe, the more *favourable* Side.

XI. A Thief or Robber is bound to reſtore the Thing taken away, with its natural [4] Increaſe or Improvement [e]; and to make good, not only the Damage [5] actually enſuing to the Owner; but, likewiſe, the ſurceaſing of his Gains; and this, al-

a *Apuleius* in *Apolog.* A beautiful Maid, though in the Condition of Poverty, hath a ſufficient Portion, ſhe brings her Huſband Sweetneſs of Spirit and Diſpoſition, fair Charms and honeſt Purity. And, indeed, Virginity alone is commonly, and ought to be eſteemed by the other Sex, a full and juſt Recommendation.

b See *Exod.* xxii. 16, 17. *Deuteron.* xxii. 28, 29.

c See *Tobit* vii. 10, 18.

d *Vid. Gratian. Cauſ.* 27. *Quæſt.* 2. *cap.* 39.

e *Vid.* l. 4. c. 7. ſ. 3.

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1 On the contrary, maternal Succeſſion is here quite out of the queſtion. Baſtards naturally belong to the Mother as much as legitimate Children. She is equally oblig'd to maintain them; and, according to the Law of Nature, they may equally pretend to the Mother's Inheritance, while ſhe makes no Difference between them. (See what I ſhall ſay on Lib. iv. Cap. ii. §. 6) Thus, in this reſpect, a married Woman who bears a Child, not to her Huſband, does no more Wrong to her legitimate Children, properly ſpeaking, than when ſhe lawfully marries again; or than the Huſband himſelf would do them, if he had Baſtards of his own, whom he might admit equally to ſhare in his Succeſſion. But if the legitimate Children can claim no Reparation of Damages on the Mother's Side, they may certainly demand it of the Adulterer, who is the Cauſe they have the leſs Portion of the maternal Eſtate. It was neceſſary to add this Diſtinction, in order to explain and decide the Queſtion better than our Author had done. See the following Note.

2 Mr. *Thomaſius*, in his *Inſtit. Juriſpr. Div.* l. 2. c. 5. §. 50. ſays, that the Reaſon produced here by our Author, taken from the Contract of Marriage, is far-fetched, and agrees not with the Nature of Contracts in general; for (as he adds) all Contracts of Marriage are made between the Man and Woman only, and no ways include the Children; (*ſunt extra pacta*) but our Author does not ſay, that Children are not comprehended in the Engagement of Marriage from whence they proceed, and which were made before they were brought into the World; but ſays only, that by virtue of the End of Marriage-Contracts the Children have a Right to demand their Birth-right. Now it is certain, that if the Father or Mother had not committed Adultery, the Portion of the legitimate Children out of the Goods already gotten, had been much greater; ſo that all the Difficulty which remains is about the Goods which the Father or Mother may get after the Birth of an illegitimate Child. But however uncertain the Gains are, the leſſening of the Inheritance of the lawful Children is not leſs real, nor a leſs neceſſary Conſequent of Adultery, ſeeing they are already gotten; for the Reparation of the Damage muſt be made firſt. And it imports, that the Damage proceeded immediately from the Will of the Father, (which is another Reaſon of *Thomaſius*'s) for the Father's Will could not have acted without an Objection propounded to it.

3 From henceforth the Marriage is made and conſummated, in a State of Nature, ſays *Thomaſius*, *ubi ſupra*, §. 51.

4 See Book iv. Cap. vii. §. 3.

5 See §. 3. Note 2. Page 214.

though

though he be compell'd to ſuffer the juſt *Puniſhment* of his Crime. For 'tis the injur'd Party who demands Reparation, and it is the Commonwealth which requires Puniſhment for the publick Good; and the Judge can, by no means, reckon this as a Satisfaction to the private Perſon, ſo as to make him loſe his Goods, without Remedy and Reſtitutoin. Therefore, 'tis an abſurd way of proceeding in ſome States, where [1] the Magiſtrate claims the Goods found on the Robber, and commands the true Owner of them to content himſelf with ſeeing the Villain brought to publick Juſtice [a]. Nor is it more agreeable to the Law of Nature, that the Charges of puniſhing the Thief ſhould be laid on the Perſon he has robb'd, ſince the inflicting due Penalties belongs entirely to the Government; to effect which, if more Expences are requir'd, than the Eſtate of the Criminal *amounts* to, the Remainder is to be made up by the Publick; eſpecially ſince, at other Times, the Treaſury gains ſo conſiderably by Forfeits and Confiſcations. For inſtance, if a State engage in a War, upon account of ſome private Members who have been injured, all are obliged to contribute to the Charges, as well as thoſe whoſe Defence is particularly undertaken. The Caſe is otherwiſe, if the Judge puts it to the injured Party's Choice, whether he had rather recover his Goods, or ſee the Thief executed; for here if he prefer the latter Condition, he can lay no Claim to farther Satisfaction. Though the Judge cannot fairly propoſe ſuch Terms, ſince the Puniſhment of Malefactors ought not to depend on the Pleaſure or Humour of private Men, but on the publick Advantage of the State.

If the Thing ſtolen be ſpent and embezzel'd, *Grotius* will have it to be paid for according to a middle Valuation; not to the full Worth, nor yet conſiderably leſs. Which Direction *Ziegler* does not without reaſon diſlike. For what Title has the Thief, in this caſe to Favour? If I can demand the full and higheſt Price, when, to oblige a Perſon, I ſell a Thing otherwiſe not *vendible*, why ſhould I here make any Abatement to the Thief, who ſeizes my Goods againſt my Will, and is my Chapman only upon Compulſion [b 2]? And, in this caſe too, Reparation is due from the Thief, or from his Heirs [3], yet not beyond the Value of the Inheritance, although he has ſuffer'd the corporal Penalty of his Crime. For it *does*, by no means, look like Injuſtice or Cruelty, that the Offender, after he has thus ſatisfied the Law, either by Death, or other bodily *Pain*, ſhould, likewiſe, recompenſe the Perſon he has endamaged. The trite Objection of *Mors omnia ſolvit* [c], *Death pays all*, has no manner of Force in the preſent Buſineſs. Death, indeed, diſcharges perſonal Performances, but not proper *Debts*, which cleave, as it were, to the Goods and Poſſeſſions, and follow them to any new Maſter. And ſuch is this Debt for Damage given.

The other Species of *Hurt* are more eaſy to be ſettled and decided; and ſome of them will hereafter be particularly inſiſted upon in their proper Places [d 4].

[a] *Vid. Caroli* V. *Ord.* 218. *Add.* l. 3. f. 12. *P. De Peculio.* l. 56. f. 1. *D. De furtis*, l. 7. *princ. D. De incendio, ruina.*

[b] *Add.* l. 9. *D. De in litem jurando*, l. 2. *princ. D. ad L. Aquil. verb. quanti id in eo anno plurimi fuit*, l. 8. f. 1. l. *ult. D. de Condict. furtiv.*

[c] *Ex. Novell.* 22. c. 20.

[d] As for the Treſpaſſes done by Beaſts, which the *Roman* Lawyers term *Pauperies*, conſult their Obſervations, *ad Tit. D. ſi quadrupes.*

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[1] See *lib.* 4. c. 13. §. 4. following, near the End, and what Mr. *Hertius* ſays upon it there, and his Diſcourſe *De Superioritate territoriali*, §. 56. Nevertheleſs Mr. *Thomaſius* in his Treatiſe *De Stat. Imper. poteſt. Legiſlat.* §. 41. maintains, that this Confiſcation, although it is eſteemed by ſome Nations to be contrary to all natural Law, may be juſtified by very good Reaſons, when long Cuſtom, or an expreſs Law, has ſettled it in that Country. As for example, The Intention of the People, or Legiſlator, may be to make the Proprietors more watchful to preſerve their Goods, or they may appoint ſuch ſtolen Goods as they have recovered to bear the neceſſary Charges of the Officers of Juſtice, who are to puniſh Thieves, which, otherwiſe, muſt be born by the Publick. I do not pretend to examine whether theſe Reaſons are ſufficient to authorize any Man, in Conſcience, to take the Benefit of ſuch a Law, however eſtabliſh'd it may be by legal Authority. I ſhall only obſerve, that, ſuppoſing there was nothing in it contrary to natural Equity, it could only ſubſiſt between Members of the ſame State, who might be ſuppos'd to conſent to ſuffer an equal Loſs upon this Occaſion. But, at leaſt, when the Caſe relates to Goods ſtolen from a Stranger, we muſt have reſource to the Maxims of the pure natural Law, which, in my Opinion, will never authorize ſuch a Cuſtom. Mr. *Thomaſius* pretends here to make uſe of the Opinion of ſuch as are of a contrary Judgment, who acknowledge that ſtolen Goods may be confiſcated, and given to ſuch Subjects of the State to whom they are of uſe; for he ſays, in the Opinion of all our Doctors, the Right of Repriſals is not contrary to Law or Nature: Hereupon he alledges the Example of Theft and Adultery. But it is here much the ſame to put a Man to Death, or ſeize his Effects by way of Repriſal, which, otherwiſe, would be contrary to the Law of Nature, we do but defend ourſelves againſt one kind of Hoſtility. Add here what I have ſaid in my Diſſertation on the Benefit of the Laws, Page 14, 15. *Edit. Amſter.*

[2] The *Roman* Law, on the contrary, will have that which is ſtole or loſt to be valued at the higheſt Rate; for ſo it ſpeaks. *Placet tamen id tempus ſpectandum, quo res unquam plurimi fuit, Digeſt.* l. 13. Tit. 1. *De condict. ex cauſa furti*, Leg. viii. §. 1. but *lib.* 9. *Tit.* 2. *ad Leg. Aquil. Leg.* ii. adds, *quanti id in eo anno plurimi fuit*, and *lib.* 12. *Tit.* 3. *De in litem Jurando, Leg.* 9.

[3] See *lib.* 4. *ch.* 11. §. 19. following.

[4] Our Author has collected ſeveral Examples more particularly in his Elements of the Civil Law, p. 453, &c. but before we end this Chapter, let us, in a few Words, after the Example of *Buddeus*, (*Element. Phil. Practic. Par.* ii. Cap. iv. §. 5.) make an Application of theſe Maxims, which we are about to eſtabliſh for the Right of Nations, taken in the Senſe our Author intends it, *l.* 1. c. 3. §. 23. Nations then may do ill to, or offend each other, with regard to the Body of the State, which is anſwerable for the Life of Man; or with regard to Eſteem; or with regard to perfect Rights; or, laſtly, ſome of the Members, or Citizens, who may be damaged either in their Perſons, or their Goods, or Reputation, or their Rights. Moreover, one Nation may offend another, either directly, when by the Order of their Sovereign, who reigns in Chief, they cauſe a Damage to be done to another in any manner; or indirectly, when a Sovereign does not puniſh the Miſchiefs done by his Subjects to another People, or, if he could hinder them, and doth not; as, for example, If he does not uſe the beſt means he can and ought to prevent or reſtrain Robberies and Pyracies; if, inſtead of paying his Troops, he reduces his Soldiers to a Neceſſity of pillaging both Friends and Enemies; if he affords a Retreat to thoſe who have wronged and injured the neighbouring State. (See *Grotius*, l. 2. c. 17. §. 20.) In all theſe Caſes he is obliged to Reſtitution. And the other State has not only Reaſon to take Arms, if the Thing be troubleſome, but to continue a War, till it can gain itſelf a Security for the future, which is not allowed to one Citizen againſt another. But of this we ſhall treat more largely, when we come to ſpeak of the Laws of War.

CHAP.

CHAP. II.

That all Men are to be accounted by Nature equal.

The CONTENTS.

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VIII. *Whether any be Servants by Nature.*
IX. *Whence has proceeded that Inequality that is found among Men.*

I. BESIDES that Affection which every Man maintains for his own Life, and Body, and Poſſeſſions, by which he cannot but reſiſt and repel whatever threatens Deſtruction to thoſe dear Concerns; we may diſcover, likewiſe, deeply rooted in his Mind, a moſt tender *Eſteem* and *Value* for himſelf; which, if any one endeavour to impair, he is ſeldom leſs (and ſometimes much more) incens'd, than if a Miſchief had been offer'd to his Perſon, or to his Eſtate. This Paſſion, though it may be heighten'd and improv'd by various external Cauſes, yet ſeems to lay its firſt Foundations in the very Conſtitution of human Nature. The Word MAN is thought to carry ſomewhat of *Dignity* in its Sound; and we commonly make uſe of this, as the laſt and the moſt prevailing Argument againſt a rude Inſulter, *I am not a Beaſt, a Dog, but I am a Man as well as yourſelf* [a]. Since then human Nature agrees equally to all Perſons, and ſince no one can live a ſociable Life with another, who does not own and reſpect him as a *Man*; it follows as a Command of the Law of Nature, *that every Man ſhould eſteem and treat another as one who is naturally his Equal, or who is a Man as well as he* [1].

II. For the better underſtanding this *Equality* amongſt Men, we may obſerve, that Mr. *Hobbes* [b] reſtrains it to a Parity of Strength, and of other human Abilities which attend a ripe and perfect Age; and would from hence infer, that all Men have good cauſe naturally to fear each other [2]. For he, indeed, can ſtrike no Terror into me, whoſe Power reaches not far enough to hurt me. But now amongſt Men, he who is inferior to another in bodily Strength, may either by treacherous Contrivance, or by Art and Dexterity, take away the Life of the ſtouteſt Mortal [c]. Since, therefore, the greateſt of natural Evils which can proceed from human Power, is Death, which any grown Perſon is able to bring upon another; ſince thoſe may be term'd *Equal*, who can do equal Miſchief to each other, and ſince to kill is equally (becauſe in the higheſt degree) miſchievous, it follows hence that Men are by Nature equal [d]. When he ſubjoins, that *the preſent Inequality has been introduc'd by Civil Law*, he ſeems to me very much to have forgotten himſelf. For he had been ſpeaking before of the natural Equality of Mens Strength, to which it is a great Impropriety to oppoſe the Unequalneſs ariſing from politick Inſtitutions, which does not affect or regard the Strength of Men, but their State and Condition; does not make one Man ſtouter than another, but greater in Quality and Honour. Nor has the ſame Author much better Succeſs, when he pretends [e] to diſcover *in the Faculties of the Mind a greater Equality than that of Strength*. He ſays indeed, that *all Prudence is but Experience, which Nature in equal time equally beſtows on all Men, in thoſe things they equally apply their Minds unto*. But do not we ſee one Man piercing more deeply than another into the Conſequences of things [f], applying more dexterouſly what he obſerves, and diſtinguiſhing with more Perſpicacity the Likeneſs or Unlikeneſs of Caſes and Circumſtances? And hence it frequently comes to paſs, that of two Men who have been employ'd an equal

[a] Statius, *Thebaid.* 12. ver. 565.
——*Hominum inclyte Theſeu,*
Sanguis erant omnes, eademque in Sydera, eoſdem
Sortitus animarum, alimentaque veſtra creati.

Brave *Theſeus*, they were *Men* like all before,
And human Souls in human Frames they bore,
With *You* to take their Parts in earthly Feaſts,
With you to climb to Heaven, and ſit immortal Gueſts.

[b] *De Cive*, c. 1. ſ. 2.
[c] *Seneca de Ira*, l. 1. c. 4. There is no Man ſo contemptibly weak, who may not hope, ſome way or other, to wreck his Revenge on the braveſt Perſon breathing. We are all ſtrong enough to do Miſchief.
[d] It is the Argument of *Pallas* in *Virgil*'s Æn. 10. ver. 376.
——*Totidem nobis animæq; manuſq;* Our Hands are equal, and our Lives the ſame.
[e] *Leviathan*, c. 13.
[f] See the Earl of *Clarendon*'s Survey of the *Leviathan*. *Lowde* on the Nature of Man, cap. 5.

[1] This is a Conſequence of the Maxim which has been explained in the preceding Chapter; for every one having a perfect Right to expect that he be regarded and treated as a Man, he that doth otherwiſe to another does him a real Damage. This Duty being founded on an immutable Condition, *viz.* That Men ſhould be uſed preciſely as Men, is not only general, but of perpetual Obligation; inſomuch, that, notwithſtanding all the Inequality produc'd by the Changes and Diverſity of *acceſſory Eſtate*, the Rights of Natural Equality always remain invariable, and agree to every one in relation to another, of whatever Rank he be. There are, nevertheleſs, ſome Superiors ſo inſolent, that they plainly violate this Duty, treating their Inferiors after an inhuman manner, by exacting of them exceſſive Labours, ſlaying them, or expoſing their Lives to Danger without Neceſſity, as if they were Beaſts; for though it be common for Men to contemn each other, yet we ought to look upon thoſe we deſpiſe, as of the ſame Nature with ourſelves. We ordinarily content ourſelves to account others as fooliſh and inconſiderable Perſons; in a word, as Perſons of no Merit or Accompliſhments, in compariſon of ourſelves. *Titius Obſ.* 172.

[2] In the Original this Paragraph is full of Miſtakes, Omiſſions, and Superfluities, which, ſometimes, render the Diſcourſe very intricate; I have endeavoured to clear it, and rectify it, as well as I can, by following the Notions both of the Author, and Mr. *Hobbes*, whoſe Principles he recites with all Exactneſs.

equal

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CHAP. II.

That all Men are to be accounted by Nature equal.

The CONTENTS.

I. *Every Man is to account another his equal.*
II. *What is a Natural Equality.*
III. *The popular Reasons for it.*
IV. *The Opinion of such an Equality makes Men helpful to one another.*
V. *How Things are to be divided by it among many.*
VI. *Men offend against it by Pride.*
VII. *And by Affronts offered to others.*
VIII. *Whether any be Servants by Nature.*
IX. *Whence has proceeded that Inequality that is found among Men.*

I. BESIDES that Affection which every Man maintains for his own Life, and Body, and Possessions, by which he cannot but resist and repel whatever threatens Destruction to those dear Concerns; we may discover, likewise, deeply rooted in his Mind, a most tender *Esteem* and *Value* for himself; which, if any one endeavour to impair, he is seldom less (and sometimes much more) incens'd, than if a Mischief had been offer'd to his Person, or to his Estate. This Passion, though it may be heighten'd and improv'd by various external Causes, yet seems to lay its first Foundations in the very Constitution of human Nature. The Word MAN is thought to carry somewhat of *Dignity* in its Sound; and we commonly make use of this, as the last and the most prevailing Argument against a rude Insulter, *I am not a Beast, a Dog, but I am a Man as well as yourself* [a]. Since then human Nature agrees equally to all Persons, and since no one can live a sociable Life with another, who does not own and respect him as a *Man*; it follows as a Command of the Law of Nature, *that every Man should esteem and treat another as one who is naturally his Equal, or who is a Man as well as he* [1].

II. For the better understanding this *Equality* amongst Men, we may observe, that Mr. *Hobbes* [b] restrains it to a Parity of Strength, and of other human Abilities which attend a ripe and perfect Age; and would from hence infer, that all Men have good cause naturally to fear each other [2]. For he, indeed, can strike no Terror into me, whose Power reaches not far enough to hurt me. But now amongst Men, he who is inferior to another in bodily Strength, may either by treacherous Contrivance, or by Art and Dexterity, take away the Life of the stoutest Mortal [c]. Since, therefore, the greatest of natural Evils which can proceed from human Power, is Death, which any grown Person is able to bring upon another; since those may be term'd *Equal*, who can do equal Mischief to each other, and since to kill is equally (because in the highest degree) mischievous, it follows hence that Men are by Nature equal [d]. When he subjoins, that *the present Inequality has been introduc'd by Civil Law*, he seems to me very much to have forgotten himself. For he had been speaking before of the natural Equality of Mens Strength, to which it is a great Impropriety to oppose the Unequalness arising from politick Institutions, which does not affect or regard the Strength of Men, but their State and Condition; does not make one Man stouter than another, but greater in Quality and Honour. Nor has the same Author much better Success, when he pretends [e] to discover *in the Faculties of the Mind a greater Equality than that of Strength*. He says indeed, that *all Prudence is but Experience, which Nature in equal time equally bestows on all Men, in those things they equally apply their Minds unto.* But do not we see one Man piercing more deeply than another into the Consequences of things [f], applying more dexterously what he observes, and distinguishing with more Perspicacity the Likeness or Unlikeness of Cases and Circumstances? And hence it frequently comes to pass, that of two Men who have been employ'd an

[a] Statius, *Thebaid.* 12. ver. 565.
——*Hominum inclyte Theseu,*
Sanguis erant omnes, eademque in Sydera, eosdem
Sortitus animarum, alimentaque vestra creati.

Brave *Theseus*, they were *Men* like all before,
And human Souls in human Frames they bore,
With *You* to take their Parts in earthly Feasts,
With you to climb to Heaven, and sit immortal Guests.

[b] *De Cive*, c. 1. s. 2.
[c] *Seneca de Ira*, l. 1. c. 4. There is no Man so contemptibly weak, who may not hope, some way or other, to wreck his Revenge on the bravest Person breathing. We are all strong enough to do Mischief.
[d] It is the Argument of *Pallas* in *Virgil*'s Æn. 10. ver. 376.
——*Totidem nobis animæq; manusq;* Our Hands are equal, and our Lives the same.
[e] *Leviathan*, c. 13.
[f] See the Earl of *Clarendon*'s Survey of the *Leviathan*. *Lowde* on the Nature of Man, cap. 5.

[1] This is a Consequence of the Maxim which has been explained in the preceding Chapter; for every one having a perfect Right to expect that he be regarded and treated as a Man, he that doth otherwise to another does him a real Damage. This Duty being founded on an immutable Condition, *viz.* That Men should be used precisely as Men, is not only general, but of perpetual Obligation; insomuch, that, notwithstanding all the Inequality produc'd by the Changes and Diversity of *accessory Estate*, the Rights of Natural Equality always remain invariable, and agree to every one in relation to another, of whatever Rank he be. There are, nevertheless, some Superiors so insolent, that they plainly violate this Duty, treating their Inferiors after an inhuman manner, by exacting of them excessive Labours, slaying them, or exposing their Lives to Danger without Necessity, as if they were Beasts; for though it be common for Men to contemn each other, yet we ought to look upon those we despise, as of the same Nature with ourselves. We ordinarily content ourselves to account others as foolish and inconsiderable Persons; in a word, as Persons of no Merit or Accomplishments, in comparison of ourselves. *Titius Obs.* 172.

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corded by *Montaign* [a], who, coming to *Roan* in the Reign of *Charles* IX. and being aſk'd what he obſerv'd that was ſingular in *France*, anſwer'd, that, amongſt other things, he could not but wonder to ſee ſome Perſons abounding in all manner of Plenty, and others oppreſs'd with the moſt grievous Want, begging at their Doors, and not rather chuſing to invade and pillage them for their own Support. For as thoſe who excel in the Goods of the Mind, of the Body, or of Fortune, ought not to treat Men of lower Condition with Haughtineſs and Inſolence; ſo neither ought theſe to envy or rifle their Superiors.

And this *Equality* we may call an *Equality of Right*; the Principle from which it ſprings is this, that the Obligation to a ſocial Life *equally* binds all Men, inaſmuch as it is the inſeparable Companion of human Nature, conſider'd ſimply as *ſuch*. Where we may obſerve farther, that between Obligations enjoy'd by a Superior, and thoſe which ariſe from mutual Compact, *there ſeems to be this Difference*, that the latter immediately ceaſe to a Man, when the other Party hath broken the Agreement; whereas the former may ſtill engage us to ſome Performances towards a Perſon who is wanting in a natural return of Duty. And the Reaſon of this is, becauſe the Author and Impoſer of the Obligation is able to make up to us ſome other way what we loſe by being more juſt than our Neighbours. But our Obligation to the Practice of natural Duty and Right, although impoſed by the ſupreme Lawgiver, does thus far agree with Obligations of common Bargains and Covenants, that ſo ſoon as one Perſon recedes from it [f], he can no longer require the ſame Offices from another; and beſides, the other Party does hence acquire a Right of compelling him by Force to make Satisfaction. Though the *Genius* of Civil Society makes it neceſſary to abridge and allay this Liberty adhering to a State of Nature, for the ſupport and maintenance of Government and Peace.

III. Other Reaſons there are popular and plauſible, which might give us no little Aſſiſtance in diſcovering, and in illuſtrating this *Equality*. Amongſt which this is not the leaſt conſiderable, that we all derive our Being from one Stock, from the ſame common Father of human Race. On this Conſideration *Boetius* checks the Pride of inſulting Nobility, *l.* iii. *metr.* 6.

Quid genus & proavos ſtrepitis?
Si primordia veſtra,
Autoremq; Deum ſpectas,
Nullus degener extat,
Ni vitiis pejora fovens,
Proprium deſerat ortum.

Fondly our high Deſcent we boaſt;
If whence at firſt our Breath we drew,
The common Springs of Life we view,
The airy Notion ſoon is loſt.

Th' Almighty made us equal all:
But he that ſlaviſhly complies
To do the Drudgery of Vice,
Diſowns his high Original. Mr. *Itchiner.*

Farther, that our Bodies are all compoſed of the ſame Matter, frail and brittle, liable to be deſtroy'd by a thouſand Accidents of Miſchief. We all owe our Exiſtence to the ſame Method of Propagation, we are all by the ſame Degrees faſhion'd and compacted in the Womb of our Mother; and the Nobleſt Mortal, in his Entrance on the Stage of Life, is not diſtinguiſh'd by any difference of Pomp, or of Paſſage, from the loweſt of Mankind [b]. Our Growth and Nouriſhment is perform'd alike, and the groſs Remainders of our Food are carried into the ſame *Common Sewer*. Laſtly, our Life haſtens to the ſame general Mark; Death obſerves no Ceremony, but knocks as loud at the Barriers of the Court, as at the Door of the Cottage [c]; and, after Death, our Bodies are reſolv'd into the ſame Duſt and Corruption [d]. Beſides, wiſe Men are ever preſſing it upon our Conſideration, that we are alike obnoxious to the Sports of Fortune, to the endleſs variety of Dangers or Miſchances; or rather, that the divine Diſpoſer of all Things *enſures* no Man in his preſent State, or in the Poſſeſſion of unſhaken Felicity: But according to the ſecret Counſels of his Providence, expoſes divers Men to various Changes and Troubles, as if he pleaſed himſelf in raiſing the Poor out of the Duſt, and caſting the High down to the Ground [e]. Our Chriſtian Profeſſion ſuggeſts many Motives to the ſame Purpoſe; as that God

[a] B. 1. C. 30.

[b] See *Wiſdom* VII. 5.

[c] *Horat. Od.* i. iv. 13. ——— *Mors æquo pulſat pauperum tabernas* ——— *Regumque turres.*
Θανάτῳ πάντες ὀφειλόμεθα. The World owes us all to Death.

[d] *Claudian. in Rufin.* l. 2. ver. 473.

Huc poſt emeritam mortalia ſecula vitam,
Deveniunt, ubi nulla manent diſcrimina fati,
Nullus honos, vaniq; exutum nomine regem
Proturbat plebeius egens. ———

Hither as to the grand retiring Room,
From Earth's wide Stage, the mortal Actors come,
And here partake an undiſtinguiſh'd Doom.
Aſide their Honours with their Robes they throw;
The Herald and his Trade are loſt below.
The King depos'd, forgets the Duſt he made;
And the rude Peaſant crouds the *Royal Shade.*

Phocylides, Πάντες ἴσοι νέκυες, the Dead are all upon a Level. Ἰσοτιμία γὰρ ἐν ἅιδᾳ καὶ ὁμοιότ ἅπαντες, the Grave admits no Difference in Title or Degree. *Cicero de Leg.* l. 2. c. 23. It is moſt agreeable to Nature, that Death ſhould take off all Diſtinction of Fortune. *Statius Theb.* X. 712. ——*Titulique in morte latentes.* ——Titles hid in Duſt. *Add. Sirach.* X. 9, *&c.*

poſſeſſed of; whereas *Cicero* ſpeaks only of an extraordinary Caſe, *viz.* in extreme Neceſſity; and then, as rigid as he ſeems to be, builds his Determination, not upon that Right which every one has to preſerve himſelf, but upon the good of Society, whoſe Intereſt it is to preſerve ſuch a Perſon; for he ſays, that excepting ſuch a Caſe, the moſt honeſt Man in the World, tho' he be almoſt famiſhed, may not take a Morſel of Bread from any Man, who is of no uſe to others. In a word, *Cicero* had taken ſuch great Care to prevent any ſuch looſe Interpretation of his Words, that it is aſtoniſhing, how our Author could ſo ſtrangely pervert his Meaning.

[f] See Book II. c. 5. §. 1. above. We muſt be cautious not to extend this to all ſorts of reciprocal Duties. A Man, for inſtance, has debauch'd another's Wife; but has the injur'd Huſband, in his turn, a Right to violate the Wife of the Adulterer? This is what our Author will hardly affirm. Undoubtedly he means no more here, than thoſe things which are ill in themſelves, and are of no uſe, either for Self-preſervation, or the Support of our Rights. All that can be ſaid in the Caſe juſt mention'd is, that the Perſon, againſt whom we make Repriſals, has no Cauſe of Complaint; he deſerves to ſuffer, ſince he firſt ſet the Example.

[e] ———*Valet ima ſummis* *Mutare, & inſignem attenuat Deus.*
Obſcura promens, Hor. l. 1. *Od.* 34. God can quite change the Conditions of Affairs, and the Stations of Men. *Idem*, l. 1. *Od.* 13. *Quod quiſque vitet nunquam homini ſatis cautum eſt in horas.* No Man is provided againſt the Accidents of the next Hour. *Manil.* lib. 3. ver. 521.

——*Tacita*

GOD does not eſteem Men according to their Nobility, their Power, or their Wealth, but according to their ſincere Piety and Goodneſs. And that at the laſt Day of Judgment, of the Diſtribution of Rewards and Puniſhments in another Life, no regard will be had to thoſe who ſwell in Port and Figure, beyond their Neighbours of this World.

IV. This *Equality* being admitted, there flow from it ſeveral Precepts, the Obſervation of which bears a very great Force in the maintaining of Peace and Friendſhip amongſt Men. And this, in the firſt place, is moſt manifeſt, that he who would uſe the Aſſiſtance of others in promoting his own Advantage, ought as freely to be at their Service, when they want his help on the like Occaſions. *One good Turn requires another*, is the common Proverb. For *he* muſt certainly eſteem others *unequal* to himſelf, who conſtantly demands their Aid, and as conſtantly denies his own. And whoever is of this inſolent Temper, cannot but highly diſpleaſe and provoke thoſe about him, and ſoon give occaſion to a Breach of the common Peace[a]. It was a manly and gallant Reproof which *Caractacus* gave the *Romans*, *Num, ſi vos omnibus imperitare vultis, ſequitur ut omnes ſervitutem accipiant? Becauſe you deſire to be Maſters of all Men, does it follow that all Men muſt deſire to be your Slaves*[z]*?* And indeed, it as much implies a Contradiction to determine differently in my own Caſe, and another's, when they are exactly parallel, as to make contrary Judgments on things really the ſame. Since then every Man is well acquainted with his own Nature, and as well, at leaſt, as to general Inclinations, with the Nature of other Men, it follows, that he who concludes one way as to his own Right, and another way as to the ſame Right of his Neighbour, is guilty of a Contradiction in the plaineſt Matter; an Argument of a Mind unſound in no ordinary degree. For no good Reaſon can be given, why what I eſteem juſt for myſelf, I ſhould reckon unjuſt for another in the ſame Circumſtances. Thoſe, therefore, are moſt properly ſociable Creatures, who grant the ſame Privilege to others, which they deſire ſhould be allow'd themſelves[a]; and thoſe who, on the other hand, are moſt unfit for Society; who, imagining themſelves a degree above vulgar Mortals, would have a particular Commiſſion to do whatever they pleaſe; they give themſelves a free Pardon for all things, and vouchſafe not to others the leaſt Indulgence; they demand the principal Share of common Honours, and of common Goods; though their Right and Title is not diſtinguiſh'd by any peculiar Excellence or Advantage. For as in raiſing an Edifice, a Stone, which by reaſon of its rough and angular Figure, robs others of more room than it fills itſelf, and upon account of its exceeding Hardneſs, cannot conveniently be cut into Regularity, and ſo hinders the whole Frame of Building from cloſing together, is thrown aſide by the Workman, as unfit for all Uſe and Service; ſo thoſe πλεονέκται, thoſe greedy Churls, whoſe rough and ſavage Temper inclines them to heap Superfluities on themſelves, and to deprive others of mere Neceſſaries, and whoſe violence of Paſſion makes them uncapable of being reclaim'd, are indeed the great Impediments of Society, and the Plagues of Mankind. Hence it is a Command of Nature's Law, that *no Man who has not obtain'd a particular and eſpecial Right, ſhall arrogate to himſelf a larger ſhare than his Fellows; but ſhall admit others to an Enjoyment of equal Privileges with himſelf*[b]. Therefore the Commiſſioner in *Livy*[c], who came to treat with the common People in Sedition, was guilty of Inſolence, when he told them, *Satis ſuperq; humilis eſt, qui æquo jure in civitate vivit, nec inferendo injuriam, nec patiendo. He is humble enough, and indeed too humbly in a State, who is content to live upon equal Terms and Rights, neither doing an Injury, nor taking one.* As if it were a hard Caſe, that the Privilege of Nobility ſhould not be ſtrong enough to diſpenſe with that fundamental Law of Equity, *Do as thou wouldſt be done by*[d]*!* On this Principle is built that gallant Compliment of[3] *Pliny* to the Emperor *Trajan*, *Unum ille ſe ex nobis, & hoc magis excellit atque eminet, quod unum ex nobis ſe putat: nec minus hominem ſe quam hominibus præeſſe meminit. He thinks himſelf one of us, and 'tis this makes him more our Superior, that he paſſes in his own Judgment for our Equal, and remembers himſelf to be no leſs a Man than the meaneſt Subject whom he governs.* For that excellent Prince, when he accepted the ſupreme Command, had pro-

[a] *Qui ne tuberibus propriis offendat amicum*
Poſtulat, ignoſcat verrucis illius: æquum eſt
Peccatis veniam poſcentem reddere rurſus.
Hor. 1. Sat. 3.

He that would have his *Botches* not offend,
Muſt wink at *puny Pimples* in his Friend.
Indulgence ſhould be mutual; they that *want*
The largeſt Pardon, ſhould the largeſt *grant*.

[b] Thus the *Tribune* of the *Commons* ſpeaks in *Dionyſius Halicarnaſſæus, Antiq. Rom.* lib. 7. c. 41. "With regard to the unwritten Laws of Nature, O ye Senators, we demand that the People may thus far enjoy the ſame Rights with you. We grant that thoſe of your Number who excel in Virtue and in Fortune, ought to poſſeſs the chief Offices and Honours of the State: But this Privilege, we preſume, may be fairly challeng'd by every Member of a Commonwealth, to be ſecured from Injuries, and to obtain Juſtice againſt thoſe who offer them." *Lactant. Inſtit. Div.* l. 3. c. 22. He that would bring Men to an Equality, muſt take off all the vain Humour of Arrogance and Pride; and ſhew thoſe who ſwell with Power and Grandeur, that they are indeed on the Level with their moſt needy Vaſſals. *Add. Sen. de Ira*, l. 2. c. 28. [c] Book III. Chap. 53.
[d] See the arrogant Manner of the Satisfaction given by the Duke of *Joinville* to *Mareſcote* in *Gramond. Hiſt. Gal.* l. 8.

——Tanta eſt rerum diſcordia in ævo,
Et ſubtenta malis bona ſunt, lacrymæq; ſequuntur
Vota, nec in cunctis ſervat fortuna tenorem,
Uſque adeo permixta fluit, nec permanet unquam,
Amiſitq; fidem variando cuncta per omnes.

——Hence there ſprings
That various Diſcord which is ſeen in Things:
In one continued Stream no Fortune flows,
Joy mixes Grief, and Pleaſure's urg'd by Woes:
Inconſtancy in every Part appears,
Which Wiſdom never truſts, but Folly fears. Mr. *Creech.*

A moſt noble Strain we have to the ſame Purpoſe in *Seneca*'s Thyeſtes, ver. 597. *Ille qui donat diadema fronti*, &c.

Adrian (*in Epict.*) tells a Story of a poor Shoemaker, whom his Maſter *Epaphroditus* ſold off as a Slave of little uſe. In ſome time the Man got the Honour of working at his Trade for the Emperor; and then 'twas pleaſant to ſee how *Epaphroditus* made his Court to him.

[z] The *French* Tranſlator in this place goes on thus: "For, according to the Remarks of a judicious ancient Chriſtian Doctor, (*viz. Lactantius Inſt. Div.* l. 3. c. 23.) *Nihil ſapienter fit, &c.* Nothing is conformable to the Rules of Wiſdom, which being practiſed by every one, becomes hurtful and evil."

[3] The Author here ſets down a Speech of *Caractacus*, a great Commander of the *Britains*, the ancient Inhabitants of *England*, which he ſpoke with much Courage to the *Romans*. *Num ſi vos, &c.* but this Paſſage were better placed elſewhere, ſince he doth not here treat at all of the Right of commanding others, but only of requiring a Duty. This Authority, however, makes, at leaſt, indirectly for his Purpoſe, as it agrees with *Lactantius*'s Maxim. For if every one would command others, who would obey?

[a] Plin. Panegyr. c. 2. n. 4.

miſed that private Men ſhould find him ſuch an Emperor, as he himſelf deſired to find, whilſt a private Man [1]. *Galba* in *Tacitus* [a], gives *Piſo* an admirable piece of Advice to the ſame Purpoſe. *Utiliſſimus idem ac breviſſimus bonarum malarumq; rerum delectus eſt cogitare, quid aut volueris ſub alio principe, aut nolueris. The beſt, and the ſhorteſt Rule to obtain the true Art of good Government, is to conſider what you would yourſelf approve, and what you would condemn in another Prince; and, accordingly, to practiſe the former, and to avoid the latter.* And *Seneca* [b] joins in the ſame wiſe Direction; *This* (ſays he) *is the Sum of my Advice, Shew ſuch Behaviour towards an Inferior, as you would have a Superior ſhew towards you* [c].

V. The ſame *Equality* teaches a Man how to carry himſelf, in caſe he be appointed Arbitrator of any Right betwixt others; namely, *that he treat them as Equals, and give no Favour or Indulgence to one above the reſt, except ſuch as can claim by virtue of ſome peculiar Right.* For he who, by a partial Preference of one Perſon to another, violates the Rule of natural Equality, is, at the ſame time, guilty of an Injury, and of an Affront, by denying a Man what is his juſt Due, and by detracting from that Worthineſs, which Nature gives him in common with his Fellow [2]. It follows as a Corollary from this Doctrine, that if the thing which is to be diſtributed amongſt many, admit not of a Diviſion, the Perſons who have an equal Right to it, uſe it in common, and without reſtraint, if the Quantity of the thing will allow it; if not, that they then uſe it in a certain and limited manner, and with proportion to their Number. For it is not poſſible to find out any other way of obſerving an Equality in theſe Caſes. But if the thing can neither be divided, nor poſſeſs'd in common, then the uſe of it ſhall either be taken by turns [3 d]; or, if this Courſe too fail of Succeſs, and if, likewiſe, one of the Contenders cannot give the others an Equivalent to ſecure to himſelf the whole Enjoyment of the thing deſired, then one ſhall carry it from the reſt, by the fair Deciſion of a *Lot*; which is the moſt proper Remedy that can be applied to all Differences of this kind, inaſmuch as it takes away the Notion of Contempt, by ſetting all the Parties on a Level; and if it does not favour a Man, yet does it not in the leaſt diſgrace him [c]. *Hobbes* [f] has divided *Lots* into two ſorts, *arbitrary* and *natural*. The former is ſuch as the Competitors agree upon, engaging to ſtand to the Event, whilſt they cannot, by any Art, govern or foreſee it; and, therefore, this kind of Lot, with regard to Men, depends entirely on meer Chance and Fortune. *Natural Lot*, he ſays, is either *firſt Seizure*, by which a Thing, which can neither be enjoy'd in common, nor divided, paſſes to him who ſhall firſt lay Hands on it with a deſign to keep it; or *Primogeniture*, by virtue of ſuch paternal Goods as can neither be divided nor poſſeſs'd in common by many Children, and are adjudg'd to the Firſt-born. Yet, if we accurately conſider Things, there will appear to *be* no proper *Lot* but what we call *arbitrary*. For 'tis not eaſy to aſſign a Reaſon why ſuch an Event, as a Man cannot procure by his own Induſtry, ſhould give him a Right which ſhould hold good againſt his Equals, unleſs this *Right* was aſſign'd or adjudg'd to this particular *Event*, by the *arbitrary* Appointment and Agreement of Men. Thus a Thing, which no one has a particular Right to claim, belongs [4] by Compact to the firſt Seizer; becauſe when diſtinct Proprieties were introduced, there ſeems to have paſs'd this tacit Agreement amongſt Men, that thoſe Things which were not peculiarly aſſign'd to any Owner, and yet could not, without a Prejudice to Mankind, be always left in common, ſhould be the Right of the firſt Poſſeſſor. And thus too the Right of *Primogeniture* owes its Original to human Conſtitution and Compact. For, otherwiſe, why ſhould the younger Brothers, born of the ſame Parents, be placed in a worſe Condition than the eldeſt, barely upon account of an Accident or Circumſtance, which it was not in their power to hinder [g]? Now the Reaſon why theſe two Claims by *Promigeniture*, and *firſt Seizure*, are ſometimes, tho' improperly, call'd *Lots*, is this, becauſe they cannot be foreſeen, or directed by any Power of human Induſtry, and becauſe it reflects no real Diſgrace on a Man to loſe the Preference, for want of theſe Advantages [5].

VI. This Rule of *Equality* is, likewiſe, tranſgreſs'd by [6] *Pride*, when a Man [7] for no Reaſon, or without ſufficient Reaſon, prefers himſelf to others, bearing

[a] *Hiſt.* 1. 16. [b] *Epiſt.* 47. [c] Hence appears the intolerable Inſolence of that Saying in *Lucan.* l. v. v. 340.

——Nunquam ſic cura Deorum
Se premit, ut veſtræ morti veſtræq; ſaluti,
Fata vacent; procerum motus hæc cuncta ſequuntur;
Humanum paucis vivit genus.

——Heaven thinks not on the vulgar Herd,
Their Deaths to haſten, or their Lives to guard;
Fortune diſdains to court ſo mean a Care,
Nor leſs than *Ceſar* is a Mark for her.
The Fate of Subjects on their Lords muſt turn,
And *little* Mortals for the *great* are born.

This my Lord *Bacon* calls a *Gygantean* Temper of Mind, poſſeſſing thoſe great Diſturbers of the World, who ſeem to aim at nothing leſs than to render all Men happy or miſerable, according as they appear their Friends or Foes; and, as it were, to make all Nature bear their own Image; which is properly fighting againſt Heaven. *De Augment. Scient.* l. 7. c. 2.

[d] *Curtius*, l. 7. c. 6. In this hot Contention between the two Parties of Horſe and Foot, for the Honour of carrying their Prince, *Alexander* finding it would be difficult for him to make the Choice, and that he could not ſatisfy one Order without diſguſting the other, commanded they ſhould bear his Litter by turns.

[e] *Proverb.* XVIII. 18.

[f] *De Cive*, c. 3. ſ. 18, *&c. Leviath.* Engl. p. 78.

[g] Therefore *Ariſtotle* ſays, Brothers are equal, except they differ in Age, *Ethic.* 8. c. 12.

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1 The excellent Saying of *Seneca* to this Purpoſe is very remarkable, *Sic cum inferiore vivas, quemadmodum tecum velles ſuperiorem vivere*, Deal ſo with your Inferiors, as you would have your Superiors deal with you. *Epiſt.* 47. *& de ira*, l. 2. c. 28.

2 For as an antient Author (*viz. Livy*, l. 34. c. 4.) ſpeaks, *Quod ut alii liceat, tibi non licere, aliquid naturalis aut pudoris aut indignationis habet.* That what is lawful for another, ſhould not be lawful for you, creates a natural Shame, or a natural Indignation.

3 When Things are enjoyed by turns, the Lot muſt decide who ſhall have the firſt Turn. *Hobbes*, c. 3. §. 17.

4 We ſhall make it appear in its proper Place, that this is a falſe Suppoſition. See Lib. 4. c. 4.

5 This Point is more largely diſcourſed of, Lib. 4. c. 11. §. 8. & Lib. 5. c. 9. §. 2. & Lib. 7. c. 7. §. 11.

6 Pride taken in its moſt extenſive Meaning does not always directly oppoſe the natural Equality of Men, as may appear from §. 1. *Note* 1. All that our Author ſays here refers only to Mens Reputation in general. For Pride in general ſignifies nothing elſe than a very high Opinion of a Man's ſelf. See *Titius* Obſerv. 179, *&c.* and *Thomaſius*'s *Inſtit. Juriſpr. Div.* l. 2. c. 4.

7 When any one has lawfully gotten a Right, which gives him a Preeminence above others, he ought to value and maintain it, provided that he avoid all vain Oſtentation, and all Contempt of his Inferiors. And, on the other ſide, Inferiors ought not, in this Caſe, to refuſe them a Preference, but pay them the Honours which they may lawfully require, as our Author ſays in his Treatiſe of the Duties of Men and Citizens, Lib. 1. c. 7. §. 5. Our Author cites at the Bottom of this Paragraph a Paſſage out of

ing a lofty Carriage towards them, as baſe Underlings, unworthy of his Conſideration or [1] Regard. How vaſtly diſtant this Temper is from the Virtue of Generoſity and true Greatneſs of Mind, *Des Cartes* has moſt elegantly ſhewn in his Treatiſe *of the Paſſions*. He lays it down as a Principle, "That it is one of the chief Parts of Wiſdom to "know how and on what Accounts every one ought "to eſteem or diſeſteem himſelf; *and then he* "*proves, that* the only juſt Cauſe of eſteeming our"ſelves, ariſes from the lawful Uſe of our Power "of *free Choice*, and from the Command and Au"thority which we exerciſe over our Wills; ſince "beſides the Actions which depend on that Fa"culty, there is nothing in us that can properly "merit Praiſe or Diſpraiſe. *Hence he concludes*, the "true Notion of Generoſity, which prompts a "Man to value himſelf as highly as in reaſon he "ought, to conſiſt in this, that he acknowledge "nothing to be truly *his own*, but this free Diſpo"ſition of his Will; that he be ſenſible he cannot "purchaſe Blame or Commendation, otherwiſe "than by the ill, or the good Uſe of this Power; "and that, at the ſame time, he feel within himſelf "a full Purpoſe and Reſolution of uſing it well. *He* "*proceeds to obſerve*, that thoſe who have ſuch a "true Senſe of themſelves, are eaſily inclin'd to "think, that every Man judges of his own Worth "in the ſame manner, ſince there is nothing in this "Notion, which hath any Dependence on external "Things or Perſons. *That* for this Reaſon they "never deſpiſe others, but are ready to excuſe their "Faults, as proceeding rather from Miſtake than "Deſign. *That* as they think themſelves not much "inferior to thoſe who exceed them in Wealth, "Honour, Beauty, Wit, or Learning, knowing "that theſe Advantages ought not to come into the "Account; ſo when they find themſelves poſſeſs'd "of the like Goods, they do not fancy they are "much ſuperior to thoſe who want them. Hence, "*he ſays*, there is diſcoverable in the moſt generous "Spirits an honeſt Humility; a Virtue conſiſting "in the Reflection which we make on the Infirmity "of our Nature, and upon the Miſcarriages which "we either have formerly been guilty of, or may "be hereafter, theſe being no leſs than we ſee com"mitted by others; whence it comes to paſs, that "we prefer not ourſelves to any Perſon living, "wiſely conſidering, that all Men have the ſame "Faculty of Free-will, and may all employ it to "as good Uſe. *He remārks farther, that* thoſe "who entertain a good Opinion of themſelves for "any other Cauſe, are not endued with real Ge"neroſity, but puffed up with empty Pride, which, "as it is always vitious, ſo it is aggravated the "more, the more unjuſt the Cauſe is on which the "Self-conceit is founded. And the moſt unjuſt "Cauſe of Pride is the being proud without Cauſe; "that is, when a Man, being conſcious to himſelf, "that he has no real Merit which ſhould entitle "him to Eſteem, imagines Glory to belong to "every one who pleaſes to uſurp it, and that the "greater ſhare a Man claims of it, the greater he "really enjoys [2]. A Vice ſo extremely abſurd, "that 'tis ſcarce credible any ſhould proſtitute "themſelves to ſuch a Baſeneſs, were there not a "Pack of idle Flatterers in the World, who, by "their falſe Praiſes, ſwell Men of heavy Parts into "this moſt ſtupid Degree of Folly, which the "Poet [a] calls a kind of Madneſs."

Nor does a Man's Advancement to Honour, or Power, give him any juſt Reaſon to be proud; on which Point *Menelaus* in *Euripides* [b], thus admirably expoſtulates with *Agamemnon*:

Οἶσθ' ὅτ' ἐσπάδας ἄρχειν Δαναΐδας, &c.

You know, when with ambitious Aim you ſtrove,
To lead the Greeks *to* Troy, *and rule the War,*
How meek you look'd, how low you ſtoop'd to reach
The meaneſt Hand; your hoſpitable Gate,
Free of Acceſs, let in the vulgar Tide;
You, as in order thro' the Ranks you paſt,
With courteous Arts of popular Addreſs,
Saluted, Man by Man, the gaping Crowd,
And forc'd your Honours on unwilling Clowns:
That low Compliance might advance your Pride,
And in the common Market purchaſe Praiſe.
But Maſter of your Wiſh, and voted Chief
Of our united Force, lofty you grew
In Manners, as in Place; your Doors were barr'd,
Four Friends (once Friends, but now intruding Slaves)
Drove back with Scorn; yourſelf, like ſome rich Gem,
Deeply encas'd, and veil'd from vulgar View.
But a good Man, if Wealth or Dignity
Exalt his State, ſhould keep his Soul unmov'd
From Virtue's Centre, and elude the Charms
Of ſwelling Inſolence; ſhould freely ſmile
On Friends beneath, and ſerve them with more Will,
When his improv'd Condition gives more Power.

Lucian [c] has left an excellent Obſervation to the ſame purpoſe; *No Man*, ſays he, *will envy one advanced to Eminence and Grandeur, if he ſee him bear his Fortune with Moderation.*

VII. A much heavier Breach of this *Equality* is it, for a Man to ſhew his Contempt of others by outward and open Signs, whether by Actions or Words, by a Look or a Laugh, or any ſuch Affront; one kind of which is often expreſs'd by troubling another with a ridiculous or a diſagreeable Preſent [d]. Which Sin is to be reputed ſo much the

a *Pindar. Olymp.* 9. Τὸ καυχᾶσθαι ἐν δίκᾳ καιρὸν μανίαισιν ὑποκρέχει. To boaſt unſeaſonably is the Character of Madmen.
b *Iphigen. in Aul.* c *De Imaginibus.* d *Add.* l. 5. f. 1. *D. qui ſatiſdare cogantur*, Matt. v. 22.

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of *Euripides*, ſhewing us, that if any one is arrived at a Degree of Diſtinction, he ought not to be proud; but, on the contrary, have the greater Affection for his Friends, by how much he ſees himſelf in a better Condition to do them Service. *Iphig. in Aulid.* v. 343. He, alſo, recites a Paſſage out of *Lucian*, Tom. II. p. 14. *Ed. Amſt.* of Images. Οὐ γὰρ ἂν φθονήσειε, &c. No Man will envy Perſons in Authority, if they uſe their Power with Moderation. 'Tis the Abuſe of Power that begets Envy. What goes before, and what follows after, deſerves Reading.

[1] Theſe moral Reflections are juſt and beautiful: but they do not properly touch the Point in queſtion. Let a Man eſteem himſelf as much as he will, either without Cauſe, or beyond his real Merit; yet, while he requires nothing from others by virtue of this high Idea of himſelf, we cannot affirm, that he offends againſt the natural Equality of Mankind: It is, indeed, an Error or Vice of his Mind, which may, if not corrected, lead him to the Violation of the Precept we ſpeak of. Whatever external Signs he may ſhew of his Pride, he gives nobody occaſion to complain. He injures himſelf more than others, but his Partiality no way diminiſhes the Merit of thoſe who are more worthy than he, nor will it ever procure him thoſe Honours and Advantages, which are not due to him.

[2] This Vice is not only ridiculous in itſelf, and with relation to him who is guilty of it, being ſo fooliſh as to value himſelf without any Ground, but is very injurious to others; ſince he muſt, at leaſt, imagine, that the reſt of Mankind are ſuch Sots and Fools, as to pay their Reſpects to Perſons of no manner of Merit.

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more heinous, as it gives the higheſt Provocation imaginable, and inflames the Sufferer with the greateſt Violence of Anger and Revenge. For we find many Perſons who will expoſe their own Life to preſent Danger, and much more break the Peace with others, rather than put up ſuch a grating Indignity: Inaſmuch as every Act of this Nature is a Wound to a Man's Glory or Reputation, of which Goods we are more proud, and more tenderly ſenſible, than of any Thing elſe we poſſeſs; and, in the ſafe and flouriſhing State of which, almoſt the whole Pleaſure of our Mind conſiſts [f].

VIII. From what has been offer'd on this Head, it is eaſy to diſcover the Abſurdity of that Opinion, derived from the antient *Greeks*, *of ſome Mens being Slaves by Nature*. Which, if taken in the ſame Crudeneſs of Senſe, as it bears in the Expreſſion, is directly repugnant to that *natural Equality*, which we have been endeavouring to eſtabliſh [a]. Thus much indeed is moſt evident, that ſome Men are endued with ſuch a Happineſs of Wit and Parts, as enables them not only to provide for themſelves and their own Affairs, but to direct and govern others. And that ſome again are ſo extremely ſtupid and heavy, as to be unfit to govern themſelves, ſo that they either do miſchief, or do nothing, unleſs others guide and compel them. And farther, that theſe laſt being commonly furniſh'd by Nature with ſtrong and hardy Bodies, are capable of bringing many notable Advantages to others by their Labour and Service. Now when theſe have the Fortune to live in Subjection to a wiſe Director, they are, without doubt, fix'd in ſuch a State, as is moſt agreeable to their *Genius* and Capacity. If therefore theſe two Parties of Men voluntarily conſent to the eſtabliſhing of ſome common Government amongſt them, it is conſonant to Nature, that the former be inveſted with the Power of *Commanding*, and the latter with the Neceſſity of *Obeying*, by which Method the Intereſts of both will be beſt promoted and ſecured. And, in this Senſe, we may without Danger admit of *Ariſtotle*'s Aphoriſm, laid down in his firſt Book of *Politicks*, c. 2. Τὸ μὲ δυνάμενον τῇ διανοίᾳ προορᾶν, *&c.* which, according to [z] *Heinſius*'s Paraphraſe runs to this purpoſe; *Nothing is more ſuitable to Nature, than that thoſe who excel in Underſtanding and Prudence, and are able to judge of things at a diſtance, ſhould rule and controul thoſe who are leſs happy in theſe Advantages; on the other hand, thoſe whoſe bodily Strength and Vigor enables them to put the Commands of wiſer Men in Execution, are by Nature framed and deſigned for Subjection and Obedience. From this Conſtitution of Things the Sovereign and the Slave receive equal Advantage, the Benefits and the Conveniencies are alike on both Sides* [b]. Yet it would be the greateſt Abſurdity imaginable to believe, that Nature actually inveſts the Wiſe with the Sovereignty over the Weak and Imprudent, or with a Right of forcing them to ſubmit and obey againſt their Wills. For no Sovereignty can be actually eſtabliſh'd, unleſs ſome human Deed or Covenant precede. Nor does a natural Fitneſs for Government preſently make a Man Governor over another, who is as naturally adapted for Subjection; nor, ſuppoſing a Thing to be profitable for another, is it therefore lawful for me to force it upon him againſt his Inclination. For all Men enjoy a* *natural Liberty* in the ſame Meaſure and Degree, which, before they ſuffer to be impair'd or diminiſh'd, there muſt intervene either their own *Conſent*, Expreſs, Tacit, or Interpretative, or ſome Fact of theirs, by which others may obtain a Right of abridging them of their Liberty by Force, in caſe they will not part with it by a voluntary Submiſſion. 'Twas therefore well urged by *Quintilian*'s Declaimer [c]: *What hath Nature produced amongſt all her Works, which ſhe hath not ſet in a State of Freedom? I forbear to ſpeak of Slaves, whom the hard Chance of War hath deliver'd up as a Prey to the Conquerors, though they were born by the ſame Laws, by the ſame Neceſſity, by the ſame Accidents contributing to their Original. They draw Breath out of the ſame free and common Air; and 'twas not the Decree of Nature which gave them Maſters, but the Unkindneſs of Fortune.* 'Tis a Maxim of *Ulpian*, that *all Men by a natural Right are born free* [d]; which Freedom *Grotius* interprets, "To be ſuch as is only a *Privation* of Servitude, not a *Contradiction* to it; that "is, it provides that a Man ſhall not be by Nature "a Slave; but it gives him no Right that he ſhall "not become a Slave afterwards; for no Man is "in ſuch a Senſe *free*, *as that* it ſhall be impoſſible "for him to loſe his Liberty." The ſame Truth may be thus explain'd in other Words; ſince Nature hath produc'd all Men *equal*, and ſince *Servitude* cannot be conceiv'd without Inequality, (for *Servitude* neceſſarily brings in a Diſtinction of Superior and Inferior; whereas in the Notion of *Liberty*, it is not requiſite that we ſhould have an Inferior; but 'tis ſufficient that we are ſubject to no Superior) it follows that all Men naturally, and antecedently to any human *Deed*, are conceiv'd to be *free*. But *natural Ability*, or the Poſſeſſion of ſuch Qualities, as are requiſite for any State, do not immediately ſet a Man in that State. Every one who hath Capacity enough to rule a People, or to command an Army, is not without more ado a King or a General. Nor can ſuch an accompliſh'd

[a] And therefore *Strabo*, l. 1. ſpeaking of thoſe who adviſed *Alexander* to treat all *Grecians* as Friends, and all *Barbarians* as Enemies, wiſely obſerves, that the Diſtinction ought rather to have been founded in the Goodneſs or Badneſs of the Perſons, many *Grecians* being wicked and cruel, many *Barbarians* virtuous and obliging.

[b] *Apuleius* in *Philoſoph.* delivers the ſame Opinion. It is moſt agreeable, ſays he, that a Man who is neither by Nature nor Induſtry prepared for a right way of living, ſhould not govern, but be govern'd; ſhould be a Servant, not a Maſter; ſhould, upon account of his own Weakneſs and Incapacity, be under the Controul of others; ſhould ſuſtain the Part of Obeying, not of Commanding.

[c] *Declam.* 13.

[d] *Utpote cum jure naturali omnes liberi naſcerentur, &c. Digeſt.* l. 1. *De Juſtitia & Jure.*

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[f] There is a Paſſage in Mr. *De la Bruyere*'s Characters in the Chapter, *Of Man*, worthy of our reading, becauſe it confirms and illuſtrates the Notion of our Author. 'Tis this: They who take away our Goods by Force or Injuſtice, and rob us of our Honour by Calumny, ſhew their Hatred to us ſufficiently; but this does not equally prove that they have no eſteem for us. Nor are we incapable of Regard for them, ſo as one Day to reſtore them our Friendſhip. On the contrary, Raillery is an Injury, which leaſt of all meets with Pardon; it is the Language of Contempt, and ſuch an one as is eaſilieſt underſtood; it attacks a Man in his laſt Entrenchments, *i. e.* the Opinion of himſelf; it aims to render a Man ridiculous in his own Eyes, and convince him that they who uſe it has the worſt Diſpoſition to him poſſible, and ſo renders him irreconcileable.

[z] There is a Letter of *Dan. Heinſius*'s in the various Reading of *Janus Rutſius*, l. 4. c. 3. wherein he ſhews, that *Ariſtotle* did not ſpeak of the natural Condition of ſuch, whom he calls Slaves by Nature, but of their ſervile Diſpoſition. And he endeavours to reconcile the Maxims of Philoſophy with the Civil Lawyers, who ſay, that Slavry is contrary to Nature. See the following *Note*, and Lib. 6. c. 3. §. 2.

Man

Man as *Horace's Lollius* preſently challenge to himſelf the *Conſular Faſces*; tho' he fully anſwer that fine Character,

——Eſt animus tibi
Rerumque prudens, & ſecundis
Temporibus dubiiſque rectus,
Vindex avaræ fraudis, & abſtinens
Ducentis ad ſe cuncta pecuniæ;
Conſulque non unius anni, &c. Lib. iv. Od. ix.

A Soul with ſage Experience fraught,
Whoſe generous Worth and ſtedfaſt Thought,
Nor Frowns of adverſe Fate could grieve,
Nor ſmiling Happineſs deceive.
A mortal Enemy to Knaves,
And Gold that makes them: Gold enſlaves
The wicked World, but owns its Charms
A Match too weak for *Virtue's* Arms:
Not Conſul of a ſingle Year, *&c.*

And what *Plutarch* reports of *Pelopidas*, that he held the Supreme Command longer than the Laws allow'd of, leſt his Succeſſors, thro' Idleneſs or Miſmanagement, ſhould prejudice the Affairs of the State, muſt be look'd on as an Inſtance, not of any ſtanding Right, but of an extraordinary Indulgence [a].

And here too we have an Opportunity of interpreting that Saying of *Albutius* in *Seneca* [b], which is commonly cited on this Subject. *By Nature a Man is neither Bond nor Free: 'twas Fortune that afterwards introduc'd theſe Names:* That is, ſo long as all Men were *equal*, they could not be diſtinguiſh'd in our Mind by ſuch a State as is oppoſite to their natural State of Equality. But, afterwards, when thoſe who loſt or quitted that natural State, got the Appellation of *Bondmen*, in like manner, thoſe who retain'd it did now entirely engroſs the Title of *Free*. The Thing may be explain'd by this familiar Inſtance in a like Caſe; ſo long as there are no military Men in a State, the Subjects all keep the ſame common Name and Condition; but when part of the Subjects are liſted into armed Troops, the Diſtinction of the *Soldiery* and the *Country* immediately ariſes. And, according to this Explication, may we admit of that Notion, which *Ariſtotle* [c] cites and rejects, that *Bondage and Freedom owe their Original to Law*. For were not *Servitude* introduced by human Compacts and Conſtitutions, ſuch a Difference would be unintelligible, all Men being placed by Nature in the ſame equal State; as the Emperor ſpeaks in the Inſtitutions [d], *Whereas before all Men enjoy'd the ſame general Name, the Law of Nations brought in three kinds of Men*, Liberti, Servi, *and* Libertini; *Men that are born Free, Men who are Slaves, Men who being at firſt Slaves have obtained their Freedom.* Or it may be enough to juſtify that Saying, which *Ariſtotle* diſlikes, to give it this Senſe, *the Rights of Liberty and Servitude, as they are conſider'd in Men living under ſettled Governments, are defined by Civil Laws.*

Many other Conſiderations there are of ſufficient Strength, to overthrow that vain and groſs Opinion of *Slaves by Nature*. For there is ſcarce any Man ſo dull and ſtupid, but he fancies it will be more proper and convenient for him to live according to his own Inclinations, than to ſubmit himſelf to the Command, and to the Pleaſure of another. This natural Deſire appears more evidently in whole Nations, none of which are ever ſo low-ſpirited, as to prefer a Foreign Governor to a Prince of their own Country and Race. Laſtly, ſince Nature does not actually conſtitute any Superiority or Government, and ſince thoſe *natural Slaves*, whom *Ariſtotle* ſpeaks ſo much of, are commonly Men of ſtrong Hands and able Bodies, there would be a hard Scuffle betwixt them and their wiſer Neighbours for the Maſtery; in which Contention the latter Party, with all their Sagacity, could not promiſe themſelves any infallible Succeſs. *Ariſtotle's* Argument borrow'd from the Poets, deſerves, likewiſe, to be thrown out as moſt arrogant and unreaſonable. *Therefore*, ſays he [e], *the Poets tell us, 'tis juſt* [f] *the* Greeks *ſhould rule the* Barbarians; *as if to be a* Barbarian, *and to be a Slave, were naturally the ſame Thing* [f]. For, according to this Doctrine, if we had a mind to deſtroy any Nation differing from us in Cuſtoms and Manners, it were only to brand them with the reproachful Name of *Barbarians*, and then to invade them without farther Colour or Excuſe. It is manifeſt, that this abſurd Notion of the *Grecians* aroſe chiefly from hence, that they were wholly inclin'd to a Democratical Government: Whereas their mighty Neighbours the *Perſians* were conſtant Maintainers of a Monarchy, whom for this, and other Reaſons, they mortally hated beyond all Bounds of Juſtice or Humanity. On this account *Iſocrates* [g] calls the *Perſians* Φύσει πολεμίους, *Enemies by Nature* to the *Greeks*, "and ſays, that in the general Councils or Aſſem-"blies, before any Buſineſs was tranſacted, a ſo-"lemn Curſe was denounced againſt thoſe who "ſhould deſire Peace or Friendſhip with the *Per-"ſians*; and that at the great Feaſt of the *Myſte-"ries*, the publick *Heralds* forbad all of that Na-"tion, as Murderers, to be preſent at the holy Ce-"remony."

As for *Ariſtotle's* whole Diſcourſe on this Subject, we ſhall put a more reſpectful, and a more favourable Conſtruction on his Words, if we ſay that by making two kinds of Servitude, natural and legal,

[a] Add. *Cornel. Nep.* in *Epaminond.* c. 7. *& Liv.* l. 26. c. 2.
[b] III. *Controverſ.* 21. [c] *Polit.* l. 1. c. 3.
[d] Lib. 1. tit. 5. ſ. 1. [e] *Polit.* 1. c. 2.
[f] *Euripid. Iphig.* in *Aulid.* ver. 1400. Βαρβάρων δ' Ἕλληνες, &c.
'Tis fit *Barbarians* own the *Grecian* Sway,
And not that *Greece* ſhould ſerve a barbarous Lord.
[g] *Panegyr. & Panathenaic.*

[1] This Notion proceeded partly (as our Author obſerves) from hence, that the *Greeks* were paſſionately in Love with the Liberty of a Democracy, whereas the *Perſians* were devoted to Monarchy; partly from the exceſſive and inhuman Hatred which the *Greeks* had to the *Perſians*. Hence it is that *Iſocrates* ſays in his *Panathen.* that the *Perſians* are by Nature Enemies to the *Greeks*. We may, alſo, obſerve, that the *Greeks*, in their publick Aſſemblies, before they made any Decrees, pronounced an Anathema or Curſe againſt all thoſe Citizens who ſhould ſeek to make Peace, or have any Friendſhip with the *Perſians*; and in the Celebration of their Myſteries, the *Eumolpides* and publick Heralds excluded from that Ceremony, in hatred to the *Perſians*, all other *Barbarians* as we would do Murderers, *Panegyr.* In fine, the illuſtrious *Algernoon Sidney*, (in his excellent Diſcourſe on Government) ſays, that the natural Liberty of Man is a Principle receiv'd by the *Greeks*, *Romans*, *Spaniards*, *French*, *Germans*, *Britains*; and, in a word, by all Nations, who profeſs'd any Generoſity, long before the Nativity of our Saviour; inſomuch, that the *Aſiatics* and *Africans*, a lazy and effeminate People, becauſe they never attempted to preſerve their Liberty, nor were able to govern themſelves, deſerved the Name of Slaves by Nature, a Name given them by *Ariſtotle*, and the Philoſophers of his Time, who made a very little Difference between them and Beaſts. See §. 1. in the Notes. Nevertheleſs, 'tis hard to excuſe *Ariſtotle* altogether for thoſe falſe Notions which he had about the manner how thoſe Nations ought to reſpect and treat one another. See the Places cited in my *Preface* out of *Plutarch*, *Strabo*, and *Ariſtotle* himſelf, Notes 6, 7. Page 21. N. 8, 9. Page 47. and N. 6, 7. Page 54.

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he means the former to be when a Man of more Strength than Wit, ſerves another, whoſe Parts and *Genius* diſpoſe him for Command; in which Caſe both enjoy a Condition moſt agreeable to their Nature and their Neceſſities. And that the legal Servitude which he ſpeak of, is when a Perſon of good Endowments and Abilities of Mind, is, thro' the Meanneſs of his Birth, or the Hardneſs of his Fortune, compell'd either by his own Fear, or by publick Conſtitutions, to ſerve a Maſter inferior to himſelf in thoſe Accompliſhments of Mind; and whenever this happens, 'tis ſcarce poſſible but that the Vaſſal ſhould hate his Lord; whereas, on the other hand, theſe Relations produce a firm Love and a kind of Friendſhip, when each Party bears that Character which is moſt ſuitable to his Diſpoſition, and to his Power. But ſtill this muſt be fix'd as a moſt undoubted Principle, that the bare Force of ſuch a *natural Aptitude* does neither give the one a Right of impoſing a Condition of Servitude, nor oblige the other to receive it.

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CHAP.

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Of the common Duties of HUMANITY.

The CONTENTS of every Paragraph of the third Chapter.

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I. IT is but a poor Thing not to have hurt another, or not to have robb'd him of his juſt Eſteem [a]: This negative Kindneſs to a Man will barely hinder him from having any fair Reaſon to hate, but can give him little Encouragement to love us. To knit Mens Minds more ſtrongly together, it is neceſſary to add to this Forbearance of mutual Evil, the real Practice of mutual Good. The Debt, which I owe upon Account of my being a ſociable Creature, I have not yet diſcharged, whilſt I have not eſtranged a Man's Affection from me by any miſchievous or diſtaſteful Deed; but I ought farther to promote his actual Profit and Benefit, that I may ſhew it is a Pleaſure to me to ſee others Partners of my Nature, and Sharers with me in the Goods which we poſſeſs. The near Relation, which Men naturally bear to one another, is loſt, unleſs it be cheriſh'd and kept up by a conſtant Commerce of kind Offices betwixt them [b]. It was a noble Saying of *Plato* [c]. Ἕκαστος ἡμῶν οὐχ αὑτῷ μόνον γέγονεν, ἀλλὰ τῆς γενέσεως ἡμῶν τὸ μὲν τι ἡ πατρὶς μερίζεται, τὸ δέ τι οἱ γεννήσαντες, τὸ δὲ οἱ λοιποὶ φίλοι. Which Paſſage *Tully* has thus borrowed and enlarged upon in his *Offices*: *Non nobis ſolum nati ſumus*, &c. *We are not born for ourſelves alone; our Country, our Parents, and our Friends have all a Share and an Intereſt in our Being. 'Tis a Maxim with the* Stoicks, *that as the Earth and all the Productions of it were created for the Uſe of Men, ſo Men themſelves were, for the Sake of Men, brought into the World, that they might aſſiſt and benefit each other. In this we ought to follow the Guidance of Nature, to bring common Goods together, and freely lay them in common, and by an Intercourſe of giving and receiving kind Offices, by Art, Induſtry, and by all our Faculties, to cement the Society of Mankind* [d].

Now if the Law of Nature engages us to concern ourſelves with ſo much Earneſtneſs for the Good of our Fellow-creatures, it muſt on the contrary condemn it, as a Thing vile and unworthy of a Man, to rejoyce in the Afflictions and Calamities of others, eſpecially of innocent Perſons; or, on the other Side, to grieve and repine at the Proſperity of his Neighbours.

II. Now we may promote the Good of other Men, either *indefinitely*, or *definitely*, and this either ſo as to part with ſomewhat of our own, or not. A Man *indefinitely* advances the common Benefit, when he ſo poliſhes and prepares his Mind or his Body, as to render them uſeful to the Publick; particularly by Sagacity of Parts and Judgment, he diſcovers ſuch *Inventions*, as may ſerve the Neceſſities or the Conveniencies of human Life. *Columella* [e] obſerves with great Wiſdom, "That it "would be a Thing of the higheſt Value and "Advantage in the World, if every one were "ſenſible of his own Ignorance, and always de"ſirous to learn what he knew himſelf at preſent "to be defective in.

Hence it appears, that thoſe Perſons are guilty of a Sin againſt Nature's Law, who neglect to exerciſe themſelves in ſome honeſt Art or Employment, by living unprofitable to themſelves, and troubleſome to others, uſe their Soul only for Salt, to keep their Body from ſtinking.

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Homo ſum, humani nihil a me alienum puto.

"I am a Man, and I eſteem nothing a Stranger to me, which is of Kin to Humanity." Let us lay our natural Powers in common. Human Society is built like an Arch of Stones, which is by this Means only ſupported and upheld from Ruin, that each Part hinders the Fall of the other. Add. *Bacon's* Eſſ. 13. [c] *De re ruſtic.* l. 11. c. 1.

brought in a falſe Account, or practiſed an unlawful Way of Gain, was puniſh'd with Death [1] [a]. In the ſame Rank we may juſtly place thoſe, who having a ſufficient Fortune left them by their Anceſtors, think their own Induſtry would be an unneceſſary Trouble, ſince they have gained ſo fair a Subſiſtence by the Induſtry of others; and accordingly ſacrifice their Time and Thoughts to Sottiſhneſs and Sloth. Nor does *Virgil* without good Reaſon aſſign a Station in Hell, to thoſe uſeleſs and unmerciful Wretches,

——— *Qui divitiis ſoli incubuere paratis,*
Nec partem poſuere ſuis [b].

——— Who to *Lucre ſold,*
Sit brooding on unprofitable Gold;
And dare not *give,* and ev'n refuſe to *lend*
To their poor Kindred, or a wanting Friend.
Mr. *Dryden.*

It was a Law amongſt the *Mileſians*, that he who had ſpent his Father's Eſtate, ſhould be denied the Benefit of his Father's Sepulchre [c], Such an extravagant *Spendthrift Manillius* deſcribes:

Ille patri, natiſq; reus, quas ceperit ipſe,
Non legabit opes, cenſumq; immerget in ipſo.
Tanta fames animumq; cibi tam dira cupido
Corripit, ut capiat ſemet, nec compleat unquam,
Inque epulas funus revocet, pretiumq; Sepulchri [d].

——— Who minds himſelf alone,
He wrongs his Father, and he cheats his Son:
His Race in vain with Expectation wait,
For in himſelf he buries his Eſtate.
So vaſt his Gluttony, his Luſt ſo wild,
That he devours himſelf, yet is not fill'd;
And whilſt his Appetite proceeds to crave,
He eats his Funeral, and he ſpends his Grave.
Mr. *Creech.*

The *Apoſtle*, amongſt the Reaſons obliging a Man to labour, ſets down this as no inconſiderable one, Ἵνα ἔχῃ μεταδιδόναι τῷ χρείαν ἔχοντι. *that he may have to give to him that needeth* [e]. And *Horace* could ask the covetous Man,

Cur eget indignus quiſquam, te divite?

Why ſhould any one, undeſervedly reduced to Poverty, continue to want, whilſt you abound?

Such great Churls are like Swine, good for nothing till they are dead. The old *Greek Epigram* rallies them very pleaſantly, and repreſents them very juſtly:

[2] Πλουτεῖν φασί σε πάντες, ἐγὼ δέ σε φημὶ πένεσθαι,
Χρῆσις γὰρ πλούτου μάρτυς, Ἀπολλόφανες.
Ἂν μετέχῃς αὐτῶν σύ, σὰ γίγνεται. ἂν δ' ὑφ' ἑτέρῳ
Κληρονόμοις, ἀπὸ νῦν γίγνεται ἀλλότρια.

The World may think you rich, I'll ſay you're poor;
None e'er was rich, but he who us'd his Store.
Uſe it, and 'tis your own; but if you ſpare
Till Death, you're only Steward for your Heir.

In my Opinion we ought not to judge more favourably of thoſe uſeleſs Burthens to the Earth, who, under the Pretence of Religion, ſtudy only the Improvement of a fat Carcaſe, and in a lubberly Lazineſs conſume the Fruits of other Mens honeſt Labour. *Zozimus* the Hiſtorian, though in other Things as prophane as *Paganiſm* could make him, yet has paſs'd a Cenſure juſt enough on ſome of theſe *Monaſtick Brethren*; they abſtain (ſays he) *from lawful Wedlock* [f], *and fill City and Country with numerous Swarms of Men, uſeful neither for War, nor for any other Service of the Commonwealth. Yet they have purſued their Deſigns with ſo much Succeſs from thoſe Times to the preſent Age, that they have engroſs'd to themſelves the greateſt Part of the Lands and Eſtates, and, under Colour of communicating all Things with the Poor, have almoſt reduced all others to Poverty.* To theſe we may add ſuch begging Strolers, as they tell us are found amongſt the *Chineſe*, who fight with their Heads like *Rams*, till you part them with ſome Piece of Bounty; or ſuch as threaten to lay violent Hands on themſelves, unleſs you give them what their Lazineſs craves [g]. *Valerius Maximus* juſtly commends the Cuſtom of the old *Maſſilians*, who, as he reports the Matter, "uſed to ſhut "up their Gates againſt all ſuch who made the "Plea of Religion a Cloak and Shelter for Idleneſs; thinking it highly worth their Care to remove, by all the Methods of Diſcouragement, "ſuch a falſe and drone-like Superſtition. (*Lib.* II. *Ch.* VI. §. 7.) [3].

On the other hand, thoſe worthy Perſons have been ever celebrated with the higheſt Praiſes, whoſe happy Parts and Study have invented new Arts and Advantages of living; and then have not kept the Benefit of them to themſelves, but communicated them freely to all Mankind. For as *Horace* obſerves,

Paulum ſepultæ diſtat inertiæ
Celata virtus, L. iv. *Od.* 9.

Conceal'd Virtue, or Worth, has little Advantage above the dulleſt Idleneſs.

Virgil has wiſely placed in his *Elyſian* Paradiſe,

Inventas —— qui vitam excoluere per artes,
Quiq; ſui memores alios fecere merendo [h].
Æn. vi. 663.
Thoſe who by Arts invented, Life improv'd,
Or by deſerving made themſelves remember'd.
Sir *William Temple* [4].

Thus *Antiquity* advanced many [5] to Divine Honours, who had renderd human Life more com-

[a] *Diodor. Sic.* l. 1. c. 77. *Ælian.* Var. Hiſt. l. 4. c. 1. mentions ſuch a Law amongſt the *Sardinians.* [b] *Æn.* vi. 610. [c] *Diog. Laert. in Democrit.* [d] *Lib.* 4. *ver.* 535. [e] *Epheſ.* IV. 28. [f] *L.* 6. 5. [g] Of whom ſee *Neuhof. in Leg.* p. 267. [h] Thoſe who inſtructed and adorned Life by the Invention of Arts. He means thoſe Philoſopers that advanced any uſeful Improvement in the World. *Servius in loc. Lucret. Lib.* 5. *in init.*

[1] The People of *Sardis* had a Law to the ſame Effect, as *Ælian* relates in his *Var. Hiſt.* l. 4. c. 1. where alſo ſee *Perizon.* To this we may add, that the Senate of the *Areopagus* was obliged, by *Solon*, to enquire how every Man got his Livelihood, and puniſh them who had no Buſineſs. The ſame Lawgiver alſo made a Law, that no Son ſhould be obliged to maintain his Father, who had not in his Youth took Care to bring him up to ſome Trade. See the Life of *Solon* in *Plutarch.*

[2] Theſe Verſes have no known Author, but they are found in the *Anthologia.*

[3] See alſo *Eraſmus*'s Letter to *Servatius*, inſerted in his Life, which is alſo at the Beginning of his Letters. *Edit. Lond.* 1642.

[4] So *Cicero* ſpeaks, *Impellimur autem natura*, &c. We are vehemently inclined by Nature to endeavour the Profit of many, chiefly by teaching them, and laying before them the Rules of Prudence, and Reaſons of Things. *De fin. bon. & mal.* l. 3. c. 8.

[5] See what *Diodorus Siculus* alledges as the Reaſons why the *Egyptians* worſhipped *Iſis* and *Iſiris* as Gods. *Lib.* I. c. 13, 14, 15, as alſo c. 43.

modious,

modious, by being the Authors of useful Discoveries, or of wise and wholesome Institutions [a] [1]. Hence the *Retirement* of great Men, whilst they are capable of serving their Country in publick Employments, is an Humility not altogether commendable. And therefore it was too high a Strain of Philosophy in *Similis*, chief Minister to the Emperor *Adrian*, when quitting all his Honours and Offices, and spending his last seven Years in the Country, he left this Sentence for his *Epitaph: Here lies* Similis, *whose Life was* so many *Years long, but he lived only Seven.* Xiphilin.

By these, and the like Methods, then may we promote the Good of others *indefinitely*, and in general; or without proposing to serve particularly such or such a Person; but by laying, as it were, our Benefits in common, and offering them to the publick Use [2]. But some on this Point will have the Curiosity to enquire, whether, supposing a Man to find such a famous Secret, as what they call the *Philosopher*'s *Stone*, the Art of changing, with little Trouble, the meanest Materials into the richest Metals; whether I say, he ought to communicate so rich a Discovery? And if any one ask so nice a Question, we may venture to resolve it in the negative, since were it possible to bring this grand Invention into ordinary Practice, Trade would be ruined, Inheritances and all kind of Riches would lose the good Force and Authority which they now bear in the World; and the whole Method and decent Orders of Life would be changed into endless Tumults and Confusion [3].

III. We may be said to serve or benefit others, more *definitely* and expresly, when we confer on particular Persons any thing that may be useful and profitable to them. And this we may often perform, not only without our own Loss and Prejudice, but likewise without giving ourselves any Labour or Trouble. To deny, or to grudge another a Kindness of this easy Nature, is justly censured as most detestable Malice and Inhumanity. For such a *Power*, by which we may oblige others, and not injure ourselves, unless it be on due Occasion, put into Action and Effect, appears to be *vain*, and only turns to the Reproach of him that has it. Hence it is usual to compare such unreasonable Churls to the Dog in the Fable, who refused that Provender to the Oxe's Hunger, which was so improper to satisfy his own. Therefore when we dispense this kind of Benefits, we regard only *Man* in general, or the common *Nature* which we all enjoy. Thus *Aristotle*, when some reproved him for bestowing an Alms on a vicious Person, wisely answered, οὐ τὸν τρόπον ἀλλὰ τὸν ἄνθρωπον ἠλέησα [b]. *I did not relieve the Manners, but the Man*; or as some report it, οὐκ ἀνθρώπῳ ἀλλὰ τῷ ἀνθρωπίνῳ. *Not the Man, but Humanity.*

But supposing me to be unwilling to keep a Thing any longer; either because I am overstock'd, or because the Possession of it is some way troublesome, how barbarous would it look in me, not rather to leave it safe and entire, that it might prove serviceable to others, than to embezle and destroy it? The Case indeed is otherwise in War, where we ruin what we cannot keep, least the Enemy should employ it to our Prejudice.

In like Manner we are to allow freely to others, those Things which they call *res innoxiæ utilitatis*, Things of *innocent Profit*, or of *harmless Use*. Let us hear *Tully* settling this Point: *As to those Things*, says he, *which Men ought to hold in common, we may apply to many Cases the Instructions which* Ennius *gives us in one Instance:*

Ut Homo qui erranti comiter monstrat viam,
Quasi lumen de suo lumine accendat facit:
Nihilominus ipse luceat, cum illi accenderit.

To set a wandring Traveller in his Way,
Is but to light one Candle with another:
Yet put not out your own; let that no less
Shine clear, and not be Loser by its Bounty.

From this one Example we may sufficiently apprehend, that whatsoever we can part with to another, without any Damage to ourselves, this it is our Duty to give, though to a Stranger. Of which Kind are these cheap and common Benefits, to afford Water from a River, Fire from Fire, good Council [4] *to a Man that is in Doubt or Distress. All these Things are profitable to the Receiver, without any Loss or Trouble to the Giver. Wherefore we ought both to use them ourselves, and likewise to exhibit them to the common Good. But in regard, that particular Persons have not much to give, whereas the Number of those that want it is almost infinite, in exercising this Duty of common Bounty we must have a Respect to* Ennius's *wise Caution*, NIHILOMINUS IPSI LUCEAT; that is, *we must keep enough to have the Means of being liberal to our own Relations and Dependents* [c].

Of these Favours then none is to be debarr'd, unless such an one, as by his abominable Villany has rendred himself detestable to Mankind, and unworthy the common Privileges of his Nature. Thus *Plutarch* [d] reports of those false Accusers, who took away *Socrates* his Life, "That the *Athe-*
"*nians*, thinking them the vilest Men that lived,
"expres'd so high a Degree of Hatred and Aver-

[a] Vid. *Diodor. Sic.* l. 1. c. 13, 14, 15, &c. 43. [b] *Diog. Laert.* l. 5. [c] *Offic.* i. 16. & l. 3. Amongst the *Athenians* a publick Curse was denounc'd against him, who should refuse to set a Man in the right Way. [d] *De Invid. & Odio.*

[1] Here the *French* Translator confirms our Author's Judgment from *Cicero* and *Seneca*: Of which the former says, "Nature her-
"self stirs us up to do all the Service to Mankind which we are able; and above all, to teach Men some new Thing, and instruct
"them in the Manner how they ought to govern themselves," *De Nat. Deor.* l. 1. c. 14. To which the latter adds, "The most
"curious and profitable Knowledge would be no Pleasure to me, if I should keep it to myself. If any one would communicate
"to me any Thing, be it Wisdom itself, upon Condition that I must keep it secret, and impart it to no Man, I would refuse
"it without farther Thought. The Possession of nothing is pleasing, which we must enjoy alone." *Epist.* 6. See *Sophocles Oedip. Tyran.* p. 164. *Ed. H. Steph.* as also *Salmasius* upon *Spartian in Adrian.* c. 9.

[2] On the other Side, when any one labours to make himself a general Benefactor to Mankind, others ought, as much as in them lies, to encourage such a noble Attempt, or, at least, not hinder his Success, by putting a Bar in his Way through Envy. And if Men can't make any other better Acknowledgment, they should not forget to publish their Commendations, and make their Memory immortal, which is indeed the principal Reward of such as devote themselves to the Service of the Publick, and for which others are encouraged to imitate their Example, as our Author speaks in his *Duties of a Man and Citizen*, l. 1. c. 8. §. 3.

[3] See the Discourse of Mr. *Buddeus*, intitled, *Whether Chymists may be suffered in a Kingdom*, §. 26, &c. where you'll find besides many curious and diverting Things. 'Tis composed in the Form of a *Thesis*, and was printed at *Hall* in *Saxony*, *A. D.* 1702.

[4] *Plato* says truly, that Counsel is a sacred Thing, λέγεταί γε συμβουλὴ ἱερὸν χρῆμα εἶναι. *In Theagen.* Tom. I. The *Pythagoreans* also held the same Maxim, and obliged those of their Sect to give the best Advice they could to such as desired it. See *Jamblich. de Vit. Pythag.* c. 18. §. 85.

" ſion to them, that they would neither lend them " Fire, nor ſo much as anſwer them when they " ſpoke, nor bathe themſelves in the ſame Water " which they had uſed; but would order their Ser- " vants to pour it away as polluted and defiled, till " impatient of a State of conſtant Reproach, the " Wretches became their own Executioners." [1] In the ſame City, when Men were condemn'd for ſome heinous Crimes, it was held unlawful lo let them *light Fire*, to be in their Company at an Entertainment, or at any Part of Religious Worſhip [a].

When *Seneca* ſays, *Who will call it a Courteſy or Benefit, to give a Piece of broken Bread, an Alms of ſmall Money, not worth keeping, or the Favour of lighting a Fire?* he does by no Means deny the Obligation that lies on all Men freely to diſpenſe their Kindneſſes; he only ſhews how impudent and how baſe it would be for a Man to value himſelf on ſuch petit Bounty, and to expect a Return like ſome mighty Benefactor. For although theſe inconſiderable Offices prove ſometimes of great Value and Conſequence to the Receiver, yet the Cheapneſs of them, in reſpect of the Giver, be they never ſo luckily timed, hinders them from being *placed to Account* [2].

IV. For the farther Illuſtration of theſe Offices of Humanity, *Plutarch* will do us good Service, whilſt he diſcourſes ſo admirably on thoſe old *Roman* Cuſtoms of leaving ſomething always upon the Table, and of never putting out their Lamps. *Theſe Practices* (ſays he) [b] *ſerved as Leſſons of Humanity. For neither is it lawful for us, when we have ſatisfied our own Hunger, to throw away the Reſidue of our Proviſion, nor to ſtop up, or any way to conceal a Spring, when we have drank enough of the Water ourſelves; nor to remove the Marks and Directions of ſailing and journeying, after they have ſerv'd our own Occaſions. But all theſe Things are to be left behind us, that they may afterwards prove uſeful to other Men. In like Manner, it is a very unbecoming Niggardlineſs to put out a Candle, when we have made what Uſe of it we intended; but we ought to leave it, that thoſe who come after us may have the Benefit of its Light. Nay, were it poſſible to be effected, we ought to lend others our Sight, and our Hearing, and even our Wiſdom and Courage, to employ for their Service, whilſt going to our Repoſe, we for ſome Time loſe the Uſe of them ourſelves* [c].

Prometheus, in *Lucian*, charged the Gods with Envy, and Narrowneſs of Spirit, that they ſhould reſent ſo highly his Action of communicating Fire to Mankind: " Since this could not be the leſs for " being made publick, nor be itſelf extinguiſh'd " by lending its Light to others.

To the ſame Head belongs *the Uſe of running Water*, for the ordinary Occaſions of Life. For though Rivers may be the *Property* of whole States, or of private Perſons, yet Humanity enjoins us to allow the Privilege of drinking, or of drawing for other Uſes to any one, not actually engaged in Hoſtility againſt us. We think the Point is ſettled with more Clearneſs this Way, than if we ſhould ſay with *Grotius*, that *the River* [3], *as a River, is the peculiar Right of ſuch a People, but as running Water* [4] *it remains in common.* For it ſeems leſs agreeable to call the ſame Thing in different Reſpects, *proper* and *common*, than to affirm that the *Uſe* of a Thing ought, by the Laws of Humanity, to lie freely open to all, tho' the Thing itſelf may be really a *Propriety* or *Peculiar* [5]. Now to impute this as a *Loan*, which would otherwiſe be loſt, and will be immediately repair'd by the Springs, would look moſt ridiculouſly ſordid [d]. Thus *Latona* argues with the *Lycian* Clowns in *Ovid. Metam.* VI. 349.

Quid prohibetis aquas? uſus communis aquarum eſt,
Nec ſolem proprium natura, nec aera fecit;
Nec tenues undas: ad publica munera veni.

What Rudeneſs *Water* for my Uſe denies,
Whoſe endleſs Store the common World ſupplies?
Nor *Light*, nor *Air* did Heaven create for one;
Nor gentle Streams: I crave a *publick* Boon.

For tho' the *Uſe of* Water is *common*, yet the *Poſſeſſion* of them may, no doubt, be turn'd into a Propriety. On this Account we find the *Iſraelites* offering to pay for what Water they, or their Cattle,

[a] *Vid Orat. Dinarch. contra Ariſtogit. Add. Sophocl. Oedip. Tyran. v.* 244, &c. *Euripid. Oreſt. v.* 46, & 513. [b] *Quæſt. Sympoſ. L.* VII. *Q.* 4.

[c] *Idem Quæſt. Rom.* Or doth this Cuſtom teach us, that we ought not to loſe any of thoſe Things which we have in Plenty, as Fire, Water, or other Neceſſaries; but when we have ſerved our own Occaſions, to leave them for the Uſe of others?
Theocrit. Idyl. 26. *Mercury* of all the Gods reſents it moſt, When we deny a Stranger what is juſt. Mr. Creech.
It is one of *Pythagoras*'s Aphoriſms in *Diog. Laert.* Not to cut down, nor to hurt, a Tree capable of bearing Fruit. See *Menage*'s Notes upon it.

[d] *Plautus Trucul.* ii. 7. *De fluvio qui aquam derivat ſibi, Niſi derivetur, tamen omnis ea aqua abeat, in mare.*
Ovid. *A. A.* iii. 1 93. *Quis vetet adpoſito lumen de lumine ſumi; Atque cavo vaſtas in mare ſervet aquas?*

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1 The Author here might have added the Example of thoſe condemned by the *Romans* to what they call'd *Interdictio aquæ & ignis*, by which they were forbid the Uſe of Fire and Water, and by that Means were conſtrained to baniſh themſelves from their Country. See *Lib* VIII. *Cap.* XL. §. 7. *Not.* 2. following.

2 For according to the Maxim of * *Terence*, 'tis by no Means the Part of an ingenious Man to expect our Acknowledgments without his Merit. Nor ought we to think that we lay a great Obligation upon others by ſuch a Preſent as the *Latin* Poet † *Horace* ingeniouſly banters. The *Calabrians*, when they preſent their Fruits to ſuch as come to viſit them, ſay, *Eat, ſpare not.* If their Friends anſwer, We have eat enough, they ſay, Take them, put them into your Pockets, they'll be an acceptable Preſent to your Children. If they reply, We are as much obliged to you as if we carried them all away. They again ſay, If you will not take them, we'll give them the Hogs. Who ſees not that they can't tell what to do with what they ſo prodigally give? Such Prodigality has and does make many Perſons ungrateful.

(*) *Ego Charine, neutiquam officium liberi eſſe hominis puto,*
Cum is nihil promereat, poſtulare id gratiæ apponi ſibi.
Ter. Andr. Act. II. Scene I.

(†) *Non quo more pyris veſci Calaber jubet hoſpes,*
Tu me feciſti locupletem; veſcere ſodes.
Jam ſatis eſt. At tu quantumvis tolle. Benigne
Non inviſa feres pueris munuſcula parvis.
Tam tenor dono, quam ſi dimittar onuſtus.
Ut libet; hæc porcis hodie comedenda relinques.
Prodigus & ſtultus donat, quæ ſpernit, & odit,
Hæc ſeges ingratos tulit, & feret omnibus annis.
Horat, Lib. I. Epiſt. 7. v. 14, &c.

3 *i. e.* Conſidering it as a Maſs of Water, which runs in a certain Bed.

4 Which runs off every Moment, and properly belongs to none but him who draws it.

5 The *French* Tranſlator places the following Period from the Word *Now* to *Boon*, becauſe he thinks it improperly placed here, at the End of this Patagraph, and adds, This Chapter is one of thoſe which wants divers Amendments, as may be diſcern'd by comparing his Tranſlation with the Original. See *Lib.* 4. *c.* 5. §. 2.

ſhould

ſhould drink, in paſſing through the Country of *Edom* [a]. However, if the Waters are in great Plenty, what the Curent throws out at random we ought freely to afford to all; ſo far as our Indulgence brings no Trouble or Inconvenience on ourſelves [f].

We ſee then that Duties of this Kind do originally belong to the Law of Nature; yet 'tis not unuſual to have many of them farther confirm'd and enjoin'd by Civil Conſtitutions. It may not be improper to ſet down an *Inſtance* or two. *Solon*'s Law about Wells we find thus recorded by *Plutarch*: *Becauſe the Country hath but few Rivers, Lakes, or large Springs, and moſt uſe Wells, which have been dug, he made a Law, that where there was a publick Well within four Furlongs, all ſhould draw at that; but when it was farther off they ſhould ſearch after a private Well. And if upon digging ten Fathom deep they could find no Water, that then they ſhould fetch from their Neighbours to the Quantity of about ten Gallons every Day. For he thought it prudent to make Proviſion againſt Want, yet not to encourage Idleneſs.* "The ſame Author tells us, that *Plato* "in his Laws permits none to borrow Water from "their Neighbours, but ſuch as having firſt dug "in their own Ground as deep as the *Clay*, could "find no Spring." *For he would have thoſe only come in for a Share with others, who could not provide for themſelves.* And the *Spartan* Legiſlator *Lycurgus*, allows a Perſon in Neceſſity to make Uſe of the Servant, the Beaſt, and even the Food of another Man [b].

V. Amongſt the ſame *Duties of Humanity*, *Grotius*, L. ii. c. 2. "reckons the granting *free Paſ-* "*ſage* through any Lands, Rivers, or Parts of the "Sea, which have fallen under our Propriety, if "any have juſt Occaſion to deſire it; as, ſuppoſe "when any People, expell'd out of their own Coun-"try, are going to find a new Seat; or when they "deſire to trade and correſpond with a Nation, "which we divide from them; or when they are "marching to recover what is their own in a juſt "War; or when, being at a Diſtance from home, "they are haſtening to the Defence of their Coun-"try, at preſent under ſome extraordinary Danger "or Diſtreſs." But we ought to allow this Point a fuller Diſcuſſion. Thus much then is clear beyond all Doubt, that in caſe the Requeſt be made by a ſmall Number of Men unarm'd, and willing to live at their own Charge, Paſſage is to be granted them, provided they ask it upon an honeſt and neceſſary Account. But the Caſe of great Armies is not ſo eaſily to be decided; ſince the admitting of them may create juſt Fears and Suſpicions in us, not only on their own Account, but in reſpect of the *People* whither they are bound. *Grotius* maintains, that notwithſtanding any ſuch Fear, their Petition is to be complied with for this Reaſon; "Becauſe in that grand Diviſion of Things, "by which the Primitive Community was abo-"liſh'd, and diſtinct Proprieties introduced, all "may be ſuppos'd to have reſerv'd to themſelves "ſo far the Uſe of each other's Poſſeſſions, as "ſhould be ſerviceable to their Wants, and not "injurious to the Owner; and that therefore when "any ſtand in need of ſuch a *Uſe*, they have a "*Right* to demand it." If any diſlike this Argument, a plainer Reaſon may be thus offer'd, that the Law of Humanity obliges every Man to allow another the *harmleſs Uſe* of his Goods or Poſſeſſions; which, upon urgent Neceſſity, may be challenged in a forcible Manner, inaſmuch as the Denial of it is preſumed to ſpring, either from groundleſs Diffidence, or from wicked Perverſeneſs of Mind. Yet in ſuch Caſes, Leave is firſt to be ask'd fairly and peaceably, and Violence muſt not force a Paſſage, whilſt it is yet uncertain, whether the Lord of the Place grounds his Refuſal on any juſt Reaſon, or acts only out of a barbarous and inhoſpitable Temper. When *Cimon* the *Athenian* General, going to aſſiſt the *Lacedemonians* with his Troops, broke through the Territories of the *Corinthians*, without giving Notice to the State, *Lachartes* the *Corinthian* gave him that handſome Reprooof, Καὶ γὰρ θύραν κόψαντας ἀλλοτρίαν, οὐκ εἰσιέναι πρότερον ἢ τὸν κύριον κελεῦσαι [c], *That when a Man knock'd at another's Door, he forbore* in Civility *to enter, till the Maſter bad him* come in [d z].

Thoſe who take the ſame Side of the Queſtion with *Grotius*, add, that a Fear upon Account of the

[a] *Numb.* xx. 19. compared with 2 *Chron.* xxxii. 3. See likewiſe *Gen.* xxvi. 20, 21, 22.

[b] *Xenophon de Rep Lac.* A Stranger travelling alone, or with one Companion only, ought to have the Liberty to taſte the Fruit which he meets with in his Way, by the common Law of Hoſpitality. *Add. Lex Burgund. Tit.* 28. f. 1. *It. Selden.* l. 6. c. 6. *Phocylides*, Ἄσσιγον εἰς οἶκον δέξαι, &c.

Receive the Baniſh'd, and conduct the Blind;
And let the ſhipreck'd Sailor move thy Mind,
For Sailing is uncertain; kindly run
To lift the Weak; ſupport a Wretch undone;
Pity thy Foe, and ſave his ſinking Beaſt;
Direct the Stranger, ſuccour the Diſtreſs'd, &c.

Add. l. 10. *D. De incendio ruina. Quinctil. Declam.* 5. GOD hath made us for mutual Support and Succour; and that each Man ſhould endeavour to defend others from what he fears himſelf. This is not properly Love, or any perſonal Eſteem and Reverence; but a provident Fear of the like Accidents, and a religious Apprehenſion of common Dangers. When we relieve a miſh'd Wretch *, we do but, as it were, pity ourſelves. Hence in a Siege we lay our Proviſion in common. Hence in a Diſtreſs at Sea the Food of one Paſſenger hath ſupported the whole Company. And hence too ariſeth that Affection which puts us on covering with Earth † the dead Body of a Stranger; and how haſty ſoever our Journey be, we never fail ſtopping to perform, in ſome Sort or other, this pious Office. With regard to the Senſibility we ſhould have for the Misfortunes of others, ſee the Reflections of Mr. *Wollaſton* in his *Religion of Nature delineated.*

* This is well expreſſed in the ancient Verſe of *Publius Syrus*: *Homo, qui in homine calamitoſo eſt miſericors, meminit ſui.*

† See the Notes above on *Chap.* 3. *Lib.* 2. §. 23.

[c] *Plutarch in Cim.* [d] And thus *Telephus* in *Dictys Cretenſis* rightly accuſeth the *Greeks*, that profeſſing to come as Friends, they ſhould give no Notice of their Viſit. *Lib.* 2. *c.* 5.

[f] The Laws of divers Nations preſcribe alſo ſometimes the ſame Offices. By the Law of *Moſes* the Proprietor, *Lev.* xix. 9, 10. xxiii. 22. *Deut.* xxiv. 19, 21. was obliged to leave the Corners of his Field unreaped, and not to glean up the Ears ſcattered by the Reapers. He was to leave them for the Poor and Strangers. The ſame Thing he was to do with the Grapes that remained after the Vintage upon the Tree, or were fallen upon the Ground; as alſo the Olives that did not fall from the Tree when it was ſhaken. It was alſo allowed to Travellers to pick a Bunch of Grapes in the Vineyard, or an Ear of Corn in the Field, provided they eat only to ſatisfy themſelves, and carried nothing away. *Selden. de Jur. Nat. & Gent.* l. 6. c. 6. *Joſ. Ant. Jud. Lib.* 4. *c.* 8. So alſo in the *Roman* Law it is forbid Fiſhers to kindle a Fire upon the Shore in the Night, for fear that ſuch as are ſailing on the Sea ſhould take it for a Signal of a ſafe Port, and ſo run the Hazard of being caſt away. *Digeſt.* l. 47. *D. incendio, ruina*, &c. *Tit.* 9. *Leg.* 10.

[z] The *Carthaginians*, to ſhew that they had a Right to a Country, which *Maſſiniſſa* King of *Numidia* laid Claim to, alledged, among other Reaſons, that *Maſſiniſſa* himſelf had granted it; becauſe when he purſued *Ciphires*, who had eſcaped out of his Kingdom, and took his Rout round *Cyrene* with a Party of *Numidians*, he begged Leave of the *Carthaginians* to paſs through that very Country, as then depending upon *Carthage* without Contradiction. See farther about this Right of Paſſage, as about a Right of Trading where we pleaſe, *Selden*'s Tract, entituled, *Mare Clauſum*, Chap. 20.

Numbers

Numbers of thoſe who would enter, doth not ſeem a ſufficient Reaſon to deny Paſſage; ſince a Multitude, as well as a few Perſons, may inoffenſively uſe this Privilege, and not treſpaſs againſt the Law of Nature. However, the ſame Law empowers us to take Security of the Men whom we admit, to engage them to do no Damage, or to repair what they do. For the common Proverb tells us, that *Opportunity makes the Thief*; and he is a very unwiſe Maſter of a Houſe, who lets in ſo many Strangers, as to be turn'd out himſelf. Nor are there wanting Inſtances of ſeveral Cities, which have loſt their Liberty, by unwarily receiving too great a Number of armed Gueſts. And what ſhould make us more cautious is, that few Generals deſerve the *Encomium*, which *Tully* [a] on this Score hath given of *Pompey the Great, that he march'd his Legions thro'* Aſia, *in ſuch a Manner, as to keep not only the the Hands, but even the Feet of ſo vaſt an Army, from committing the leaſt Treſpaſs on any peaceful and friendly Perſon.* When the *Helvetians*, or *Swiſs* in the *Gallick* War, ſent Deputies to *Cæſar*, to beg a Paſſage through the *Roman Province*, we find *Ceſar* rejecting their Petition on this very good Account, "He remember'd how the ſame People had formerly defeated and kill'd *L. Caſſius*, the *Roman* "Conſul, and forced his Soldiers to paſs ignominiouſly *under the Yoke*; and he imagined it ſcarce "poſſible, that Men who were Enemies in their "Hearts ſhould purſue their Way fairly, and "without launching out into ſome Injury or "Diſorder [b].

Many Ways of taking *Caution* or *Security* in this Caſe are propoſed; as firſt, that they ſhall paſs thro' without their Arms; but 'tis very hard to get this Condition accepted of by military Men; ask them *to part with their Weapons*, and they take it as if you deſired Leave *to cut off their Hands* [1]. It may be a more proper Expedient, that the Forces make their Paſſage in ſmall and ſeparate Bodies, or that Hoſtages be given for their peaceable Behaviour. For what ſome propoſe, that thoſe who grant the Paſſage, ſhall hire ſufficient Guards at the Charges of thoſe who deſire it, would take up too much Money as well as too much Time.

It is farther ſaid, on the ſame Side, that it will not juſtify us in denying this Favour, to alledge, that Paſſage may be had elſewhere, upon taking a larger Circuit; becauſe ſhould this Pretence always be uſed, the Requeſt would never be granted, tho' in the moſt reaſonable Caſe, and ſo the *Right* would utterly ceaſe and come to nothing. It is ſufficient therefore, in their Opinion, if without any fraudulent Deſign, Paſſage be there deſired, where it lies moſt ready and convenient.

Some there are who maintain the Right of *free Paſſage*, on this Argument [2], that *Highways* are common to all Mankind, and do not come under the Propriety of thoſe, in whoſe Territories they lie. As if, at the firſt Creation of the World, the Roads had been chalk'd out immediately by the Divine Hand, and left as univerſal Benefits. A Notion too ridiculous to deſerve a ſerious Refutation.

On the other Side, there have been good Arguments offer'd, to evince that this [3] *Liberty of Paſſage* for an Army of Strangers is not owing to a mere natural Right, without any Compact or Conceſſion intervening; eſpecially when the Caſe is, that an Enemy to ſome of our neighbouring States deſires Leave to carry his Troops againſt them, thro' our Territories. For it ſeems to be Part of the Duty, which we owe to our Neighbours, eſpecially ſuch as have been kind and freindly, not to ſuffer any hoſtile Power to march along our Country to their Prejudice, provided we can hinder the Deſign with no great Inconvenience to ourſelves [c]. And it is indeed one expreſs Article in moſt Leagues, that neither Party ſhall grant Paſſage to the Foes of the other [d]. Nor will it ſolve the Difficulty, to ſay that we ought to allow *Paſſage*, if the War which is undertaken be *juſt*; not if it be *unjuſt*. For there is commonly much Time and much Thought requir'd to make ſuch a Judgment; and beſides it is look'd upon as a Piece of Raſhneſs, to thruſt in our Arbitration between two armed Parties, without their deſiring it, and to conſtitute ourſelves Judges of ſo great a Cauſe. But farther, ſuppoſing we grant the Requeſt, it is very poſſible, we may by this Means fix the Seat of the War in our own Country. For what if the other Party ſhould meet and [4] ſtop his Adverſary, whilſt

[a] *Pro Lege* Manil. *c.* 13. [b] *Cæſar Comment. de B. G.* l. 1. c. 7, 8. [c] And therefore 'twas unreaſonable for the *Romans* in *Livy*, B. 21. c. 20. to deſire the *Gauls*, that they would not grant the *Carthaginians* a free Paſſage into *Italy*, becauſe they would thereby turn the War upon themſelves, and expoſe their own Country to be waſted for the Security of another, to which they had no Obligation. We have not (ſay they) received any Advantage from the *Romans*, nor Damage from the *Carthaginians*, which may oblige us to take up Arms for the one, or againſt the other. [d] See the League of the *Romans* with the *Carthaginians* in *Livy*, B. 38. c. 38. and with the *Etolians*, *Polyb. Excerpt. Legat.* 28.

[1] As *Florus*, l. 2. c. 18. ſays, That the People of *Numantia* are ſaid to have looked upon ſuch a Propoſal, when it was offered them, as a Condition of Peace. See *Freinſhemius*'s and *Grevius*'s Notes upon the Place.

[2] Mr. *Hertius* cites here a Treatiſe of *Adrian Beier* upon this Subject, *An & quatenus tranſitus pro exercitu per territorium alterius poſtulari & denegari poſſit*, i. e. How far a Paſſage for an Army thro' another Prince's Territories may be demanded or denied.

[3] In this Caſe the Service demahded of us, is not an Office of meer Utility; for there is a preſent Damage, and a great Hazard of a future. For if an Army in its March cauſes ſometimes Waſte and Diſorder in an Allies Country, and among their own Countrymen themſelves, what will it not do in a ſtrange Nation? Hiſtory, both ancient and modern, and preſent Tranſactions furniſh us with many Examples. See *Tacitus*'s Hiſt. l. 2. c. 12. §. 87. *Plin Panegyr.* c. 20. numb. 4. *Phil. de Comines* l. 6. c. 2. Farther, a great Number of Men, which paſs through a Country, muſt of Neceſſity make Proviſions dearer, by which Means the greateſt Part of the Natives ſuffer; but the Conſequences, which may be apprehended, are far more burdenſome, which we ſhall hereafter diſcourſe of, when we come to ſupply the Defects of the Author, according to the Senſe of *Gronovius* in a large Note upon *Grotius*, l. 2. c. 2. §. 13. numb. 1. from whence I have drawn this, and to which I refer the Reader.

[4] This is not the only Danger. For he to whom Paſſage is granted, may be overcome, aud put to the worſt; and if ſo, let the Cauſe of making War be juſt or not, he will certainly revenge himſelf upon thoſe who did not keep his Enemy from invading him. But ſuppoſing there be nothing to fear from the ſtrange Troops which are ſuffered to paſs, the Abettors of the contrary Opinion agree, that many Precautions ought to be obſerved. Men that are always in Arms are eaſily tempted to abuſe them, and commit great Outrages. Moreover, if they are very numerous, and find an Opportunity to ſeize on a conſiderable Prey, how often have we ſeen Armies of Strangers ravaging or ſeizing, to their own Uſe, the Country of a People who have called them to their Succour? Nor have their moſt ſolemn Oaths and Treaties been able to deter them from this foul Perfidiouſneſs. See *Juſt.* l. 4. c. 4. n. 5. & l. 8. c. 3. *Tit. Liv.* Lib. VII. chap. 38. and what *Wittikind* ſays concerning the *Saxons*, l. 1. *Annal.* What then may we not apprehend from ſuch as are under no ſuch ſtrict Engagements, but only barely promiſe to do us no Injury? Furthermore, as in the Bodies of living Creatures the Parts moſt tender, and ſubject to be dangerouſly affected, are the Vitals; ſo all States, almoſt, have this in common, that the farther Men advance into the Heart of a Country, they find it more weak and unarmed. The *Carthaginians*, otherwiſe invincible, were conquered near *Carthage* by *Agathocles* and *Scipio*. *Hannibal* ſaid he could never beat the *Romans* but in *Italy*. It is then a very dangerous Thing, conſidering the Covetouſneſs of Men, which are never ſatisfied, to lay open theſe Secrets to Strangers, who having Arms at Hand, may make an Advantage of our Weakneſs, and

whilst yet in our Borders? And I do not see how we could blame him for this Proceeding, since he is by no Means oblig'd to receive the Foe into his own Dominions, on Purpose to rid us of the Burthen and of the Trouble. It seems therefore the safest Way of acting, in this Case, if we can without any considerable Prejudice to our own Affairs, to deny the Enemy Passage, and actually to oppose him, if he endeavour to force it, without our Consent. But if we are either too weak to hinder his Progress, or must on this Score engage in a dangerous War; the Plea of Necessity will fairly justify us to our Neighbour [a].

Ziegler in his Observations on *Grotius* asserts, that in this Case no one can naturally have a Right of passing through the Lands of another, but all such Right must be obtain'd by Compact; just as no Man has the Liberty of going through the Fields of a private Person, unless such a *Service* is imposed on the Fields by Virtue of their particular *Tenure*. He says this will especially hold good, when we have just Reason to apprehend Danger from such a Concession [1]. And this Point too he illustrates by a parallel Case betwen private Persons. You may have a Right of making a Thoroughfare of *Titius*'s Yard; but if you appear there often with Fire and Torches, so as to endanger the Buildings, *Titius*'s Fear cannot indeed in this Case absolutely take away your Right; but he may hinder you from going in so dangerous a Manner, and consequently may abridge your Privilege, though he cannot annul it. But as to this Way of arguing we must observe, that in the Question now before us, we do not by the Liberty of Passage understand any settled and constant *Service*; but only an occasional, and as it were a momentary Use of another's Territories or Possessions, to which we are driven, either by Necessity, or by the Prospect of some extraordinary Advantage, when it would be Inhumanity, in the other Party, not to comply with our Wants, and with our Request.

Examples, which are of so great Weight in determining other Questions, have little Force as to the Decision of this. For generally as People have been stronger or weaker, they have required *Passage* with Modesty, or with Confidence, and have in like Manner granted or refused it to others [2]. "*Agesilaus* in *Plutarch*, when the *Trallians* [b] demanded an hundred Talents, and as many Women for the Price of his Passage through their Country, ask'd them pleasantly, *Why the Commissioners were not there ready at Hand to receive them?* and without farther Delay march'd forward, encounter'd, and routed them. He sent to the King of *Macedon*, to desire the same Favour, who answering, that he would take Time to consider of it; Let him consider of it, says *Agesilaus*, and in the mean while we will go forward. The *Macedonian* admiring, and fearing such Spirit and Resolution, humbly requested him to pass at his Pleasure."

But the chief Example produced on this Point, is that of the *Israelites*, when desiring to pass thro' the *Edomites* Country, they voluntarily offer'd the following Conditions: "That they would march "along the King's Highway, without turning in- "to the private Fields or Vineyards, and would "immediately tender Money for every Thing "of theirs, which they should have Occasion to "use." The *Edomites* rejecting these Terms, and endeavouring, in a hostile Manner, to hinder their Passage, they did not think it justifiable to obtain it by Force, but took a large Compass round about their Borders; and when at length they were oblig'd just to touch on [3] some Part of their Coast, they did not take Occasion from the former most inhuman Treatment, to commit any Violence or Trespass in their March [c]. As to the same People, when *Sihon* King of the *Amorites*, not only refused them the like Privilege, but came out arm'd to oppose them, probably before they had reach'd his Coasts, and therefore set upon them without any Reason or Provocation, we find he was overthrown in the Combat; but he seems to have suffered this Fate, not so much for denying them Passage, as for rashly encountring them upon so little Colour or Pretence. For otherwise it would have seem'd too hard to punish the Neglect of a Piece of Humanity with the Ruin of a whole Nation; since it appears that these *Amorites* were seated without the Borders of the [4] *Land of Promise*, the Inhabitants of which God Almighty had, by a special Decree, adjudg'd to utter Extirpation and

[a] 'Tis remarkable what *Plutarch* reports in his Life of *Lysander*, that when the City of *Athens* was oppress'd by the Thirty Tyrants, the *Thebans* pass'd a Law, that whoever should carry Arms through *Bœotia* against the *Athenian* Tyrants, should be free from the Notice of the *Theban* Eyes or Ears. [b] Or the *Troades* as we find them called in the *Lacon. Apophthegm.* of the same Author. [c] See *Deut.* ii. 6, 34. *Numb.* xx, xxi.

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and punish our Imprudence. To this we may add, that in all States there never want Men turbulent and disaffected, who are ready to stir up Strangers, either against their Fellow-Citizens, Sovereign, or Neighbours, as we are told by *Francis Beaucaire* in his Commentaries on the *French* Affairs; and *Phil. de Comines*, l. 7. c. 7. speaking of the Inhabitants of *Pisa*, to whom King *Charles* VIII. restored Liberty, when he passed through the Kingdom of *Naples*, to conquer it; and by *Tacitus* about the People of *Lyons*, Hist. l. 1. c. 65. These Precautions are always necessary to be observed, unless where such a Passage can't be oppos'd, for we may be often deceived, tho' we use all imaginable Circumspection. And whoever allows a Stranger to enter his Country, he gets either a Master or an Equal. But if we have no Reason to fear any Thing, either from him that would pass, or from him against whom he marches; yet he certainly deprives his Subjects of the Advantage of the Commerce, which they might have with that Neighbour, upon whom they let in an Enemy. See what is farther spoken according to *Gronovius*, Note 9.

[1] If a Prince may forbid the Inhabitants of his own Country to go armed in all Parts of his Dominions, with much more Reason may he hinder Strangers. See *Cicero*, Lib. V. *in Verrem*, c. 3. Moreover, a private Person has a Right to keep any from coming upon his Ground to hunt so much as Birds, *Institut.* l 2. Tit. 1. *de Rerum Divis.* §. 12. And shall not a Sovereign have Power to deny Passage to a foreign Army? See *Just.* Lib. 9. c. 2. *Tit. Liv.* l. 37. c. 7. *Cæsar de Bell. Gall.* l. 1. c. 8. *Jo. Fred. Gronov.* As also the Discourse on Mr. *Bynkershoek*, *De Dominio Maris*, c. 4. published *A. D.* 1703.

[2] To these Examples, which rather prove what was done, than what ought to be done, we may oppose some Examples more remarkable, *viz.* of some People who have been badly rewarded for their Easiness, in suffering Foreign Troops to pass their Country. So it was that *Phœbidas* got Possession of the Castle *Cadmæa*, *Diod. Sic.* Lib. 45. c. 20. And the City of *Messina* was taken by the Captains of *Agathocles*'s Army, *Polyb. Hist.* Lib. I. as *Gronovius* observes. See the Discourse of *Buddeus* upon the *Crusade*, or Expedition to the *Holy-Land* among his *Selecta Jur. Nat. & Gen.* §. 30.

[3] They never entred into *Idumea*, but marched near the Borders of it, and bought their Provisions of the *Idumeans*. See M. *Le Clerc* upon *Deut* 2. 9.

[4] It is a Wonder that our Author, contrary to several express Passages in Scripture, should exclude the *Amorites* from the Number of the Seven Nations which God had ordered to be destroy'd, *viz. Deut* 7. 1. and 20. 17. Nevertheless, it is true, that those whom he here speaks of were not in the *Land of Promise*, properly so called, which contained all the Country between *Jordan* and the *Mediterranean Sea*; and consequently if King *Sihon* had granted the *Israelites* a quiet Passage, they had not executed the Sentence which God had pronounced upon that Part of the *Amorites*. See Mr. *Le Clerc* upon *Gen.* 10. 16. and *Numb.* 21. 22.

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Deſtruction [1]. "Nor will it alter the Caſe to ſay, "with ſome, that the *Amorites* here, to make their "Fear juſtifiable, ought not to have rejected ſo "fair Conditions, but ſhould have immediately "treated about accepting and regulating them; "but that now by refuſing all peaceable Con-"ference and Commerce, they had rendred them-"ſelves liable to be dealt with as the moſt unjuſt "and moſt unfaithful of Men:" For by the common Right and Privilege of Mankind, a Breach [2] of the Law of *Humanity* does not deſerve the utmoſt Rigour and Extremity of Proceeding.

VI. Amongſt theſe Matters of *harmleſs Profit*, which Nature engages us to allow freely to all Men, *Grotius* reckons the permitting Goods and Merchandize to be carried through our Dominions. *Ziegler* accuſes *Grotius* of a Contradiction on this Point, whilſt in one Place he ſays, That *no one can have a Right of hindering any Nation from maintaining Traffick and Commerce with any other* [3] *Nation that is remote from them*; and yet in another Place of the ſame Chapter he grants, That *it is lawful for one Nation to contract with another for all the Goods of one Kind not to be found elſewhere; ſo that no other People ſhall have the Liberty of buying them.* But now by this Contract of Engroſſment, it is plain other Nations are thus far hinder'd from trading in the ſame Country. Yet it is eaſy to bring off *Grotius*, by ſaying, that in the former Paſſage, by *hindering* he underſtands not hindering them by virtue of ſome precedent Bargain or Covenant, but *hindering* them by open Methods of Violence. Yet on the Whole it muſt be confeſs'd, that he has not brought the preſent Queſtion to a full and clear Deciſion. For, truly ſpeaking, the Law of Humanity does not ſeem to oblige us to grant a Paſſage to any other Goods, except ſuch as are abſolutely neceſſary for the Support of their Life, to whom they are thus convey'd. But as for thoſe who import ſuch Commodities as improve and encourage Luxury, or from which thoſe who deal in them do not ſeek any Supply of real Wants, but rather an exceſſive Gain, and an Indulgence to covetous Deſires, I do not ſee what Right they have to demand Paſſage thro' our Coaſts for this Kind of Traffick, or on what Pretenſions they can claim ſuch a Privilege as their *Due*. I confeſs, there ſcarce appears any probable Colour on which we ſhould deny unarmed Veſſels the Liberty of an open Sea, which we are Maſters of, whilſt they are bound to a third People, with whom we are at Peace. And to this Point chiefly relate all thoſe Authorities and Teſtimonies of Authors, uſually produced in the main Diſpute. But thus much we may reaſonably do, we may ſtop the Veſſel in ſuch a Caſe, and force them to leave their *Cargo* in our Territories, that we may have the Benefit of the firſt Purchaſe. For beſides that the frequent Paſſage of Strangers may ſome Time create Danger, or at leaſt may give Suſpicions to our State, what ſhould hinder us from deriving that Profit on our own People, which would otherwiſe be made by Foreigners? ſince in Matters of Favour we ought conſtantly to prefer the former to the latter. And tho' in Strictneſs it be indeed no *Damage* to us, if we permit the free Tranſportation of theſe Commodities, and tho' the third Party, who receives them, does not properly *injure* us by making a Gain, which 'twas in our Power to have ſecured before him; yet ſince he has no Right of excluding us from ſuch a Gain, why ought we not to love ourſelves beſt, and to be before-hand with him in the Advantage? Which we ſhall be, if whilſt we lie thus in the Midſt between two People, we take care not to let ſuch Goods paſs from one to the other, without going firſt thro' our own Hands [4]. And unleſs this be admitted for fair and equitable Dealing, I ſee not on what Grounds we can defend thoſe [5] *Staples*, and other Rights which

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[4] As the Duties of Humanity are reciprocal, and he that has received a Benefit ought to make ſome Acknowledgment of it, Strangers have no juſt Reaſon to complain that they are obliged to expoſe their Goods to Sale in the Country, provided they can ſell them at a reaſonable Price, becauſe by that Means they will ſtill get by them, though perhaps not ſo much as they would have done, if they had carried their Merchandizes farther. But if the Merchandizes or Wares be ſuch, as we are well ſtored with, or trade with ourſelves, we may poſitively refuſe them coming in; becauſe 'tis evident, that ſo much Profit as theſe Traders make in paſſing through our Country to go to another, 'tis ſo much Loſs to ourſelves. But if in refuſing a Paſſage, we deprive the Strangers that demand it of that Profit they might make, without any Advantage to ourſelves, 'tis inhuman to envy others the Benefit which we can't obtain ourſelves; and ſo much the more, if the other People, to whom they would carry theſe Merchandizes, can't have them any where elſe, but at an exorbitant Price. See Mr. *Buddeus*, as above, §. 4, 5. Mr. *Hertius*, in his Note upon this Place of our Author, agrees, that nothing hinders but the Right of *Staple* may take Place among Citizens of the ſame State, either with relation to Strangers, who come to ſell their Merchandizes and Wares in their Country, *i. e.* they may not allow them to ſet them to Sale but in a certain Place; but he does not ſee why ſuch Perſons as bring Foreign Commodities, whether of their own Growth or Manufacture, to carry them into a third Country, ſhould be obliged to put them to Sale; eſpecially if the People, through whoſe Country they are carried, have no great need of them. For my Part, there ſeems to me to be no Injuſtice in it, provided we are willing to furniſh theſe Strangers with ſuch Things as they are ſeeking elſewhere, when they have paſſed our Country, whether of our own Growth or Manufacture, at a reaſonable Rate. For why ſhould they go far for what they may have near at hand? And why ſhould they not accommodate themſelves among us, who are nearer than others? So long as they may make a tolerable Gain, though not ſo great as if they were ſuffered to go farther. So that in all theſe Caſes we are at Liberty, either to allow Paſſage, or not, for Foreign Commodities; all that we are to beware of is, that in denying we do not prejudice the Commerce of the Inhabitants of our own Country, or bring ſome other Inconvenience on them; but this is a Matter of Prudence only: I ſay nothing here of the Influence Treaties may have upon this Subject, for it is eaſy to ſee, that while they are in Force, we are bound to fulfil them.

[5] *Stapula*; this Word comes from the *German*, *Stapelen*, which ſignifies to put into an Heap or Pile. See Mr. *Menage*'s *Etymolog. Diction.* & *Marquard. de Jur. Mercat.* Lib. 2. c. 6. *Lewis Guicciardin* pretends on the contrary, that the *German* Word is derived from the *French Eſtaple*, and that again from the *Latin Stabulum*. See his Hiſtory of the *Low-Countries*, where the Reader will find the Name of ſeveral Cities which enjoy this Right. He may farther conſult on this Head, *Hadr. Junii Batavia* cap. XVII. *Martini Schoock Belg. Fœder.* lib. IV. cap. IX. *Ziegler de Jureb.* lib. I. cap. XLII. *Struvius Syntagm. Jur. Pub. Rom. Germ.* cap. XII. § 28, *& ſeqq.*

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we find in ſome Countries, by virtue of which Fo-
reign Commodities are ſtopp'd, and carried to the
publick Place of Sale; and Strangers are permitted
to traffick, not immediately betwixt themſelves,
but at ſecond-hand with the natural Subjects.

VII. From what has been ſaid, there may well
riſe this farther *Queſtion*, Whether the Law of
Humanity will permit us to require *Toll*, or *Cuſtom*
for Goods tranſported thro' any Land, River, or
narrow Sea, ſubject to our Dominion? For at firſt
Sight it ſeems inhuman, not to grant ſuch a Privi-
lege without *Price*, which the Law before-menti-
on'd allows freely to all Mankind.

Now why *Cuſtom* ſhould be impoſed on Goods
carried over *Land*, there is this manifeſt Reaſon, be-
cauſe ſuch heavy Conveyance ſometimes treſpaſſes
on the Fields adjoining to the common Roads; and
becauſe the Sovereign of the Country is put to
Charge, both in repairing the Ways, and in ſecu-
ring the Paſſengers [1]. And farther, if it be neceſ-
ſary to erect Bridges for this Purpoſe, it is plain in
Equity that the Sovereign may ſet up a Toll to re-
imburſe himſelf for thoſe Expences; and at the
ſame Time, he who does require ſuch Toll, is obliged
not only to let the Bridges ſtand, but, likewiſe, to
keep them in conſtant Repair. *Grotius* on the
1 *Kings* x. 19. obſerves, that a great Toll was paid
to *Solomon* for the Horſes brought through *Judea*
from *Egypt*, to the *Syrians*, or to the *Hittites*; and
thus too no *Frankincenſe* was tranſported without
Cuſtom. The like *Impoſitions* are reaſonable in thoſe
Places, where, by the Induſtry of the Natives, the
Roads are render'd more ſhort or more eaſy; as by
the filling up of Pits and Ditches, or by other uſe-
ful Labours, for the Convenience of Paſſengers
and of Goods. Thus of old, had any one cut thro'
the *Iſthmus*, and join'd the *Ionian* and *Egean* Seas,
he might fairly have required ſome moderate Toll
of the Merchants and Sailors; which they would
not have been unwilling to give, the Voyage be-
ing now perform'd with more Expedition and
more Security. And though this Project was never
ſet on Food, *Strabo* informs us, "That the Mer-
"chants of *Aſia* and *Italy*, rather than paſs out of
"one of theſe Seas into the other, by the tedious
"and dangerous Coaſt of *Malea*, were extremely
"well ſatisfied to put in at *Corinth*, and ſo carry
"their Effects over Land; notwithſtanding the
"Duties to be paid there for all imported or ex-
"ported Goods." Another Reaſon, which ſome
bring to aſſert the Equity of Impoſitions on Land-
Carriage, is this, that by ſo perpetual a Confluence
of Strangers, the Price of Proviſions is exceedingly
raiſed. To which we may add, in Concluſion,
that a Sovereign, on this Account, requires ſome
Acknowledgment from the Goods of *Foreigners*,
becauſe he ſuffers them by paſſing thro' his Ter-
ritories, to receive ſuch Goods *immediately* from a
third People; whereas, ſhould he erect a *Staple*, the
Gain and Benefit would be fairly intercepted by his
own Subjects.

As to the *River* Tolls, this, amongſt other Ar-
guments, may be offer'd to juſtify them, that ſince
the Water, by continually preying on the adjoining
Lands, and ſometimes by over-flowing them, is the
Cauſe of no inconſiderable Damage; for the Pre-
vention of which, it is often neceſſary to ſecure them
with Banks and other *Works* of great Charge and
Labour; it ſeems by no Means unreaſonable, that
towards the making up of theſe Loſſes, ſome mo-
derate Conſideration ſhould be allowed by thoſe
who gain Advantage by the River, without being
concern'd in its ordinary Miſchiefs. It is true, in the
Capitularies of *Charles the Great* [a], one Order for-
bids to take Toll in thoſe Rivers, *Ubi nullum adju-
torium præſtatur itinerantibus*, *Where no Aſſiſtance is
given to the Paſſengers* [2]; but this Conſtitution
ſeems to have been made in Favour of the natural
Subjects; and there is no Neceſſity of extending
it to Foreigners [b].

It is a more difficult Point to ſtate the Equity
of Tolls demanded in *Seas*. This indeed is be-
yond Diſpute, that the Sovereign of a Sea may
impoſe Duties anſwerable to the Charge which he
beſtows about it; as for the ſetting up of Marks
near Rocks and Quickſands, for the keeping of
Fires to direct Veſſels in the Night, or for ſcowring
the Coaſts of Pirates. But whatever is demanded
farther than upon theſe Accounts, will not admit
of ſo good Defence; inaſmuch as the Paſſage of
unarmed Ships is plainly one of thoſe harmleſs Be-
nefits, which *Humanity* lays in common. Yet,
where ſuch Pretenſions are made, the Pleas which
ſupport them do not ſeem altogether abſurd; as
that no one ought to be blamed for making the
beſt of his Dominions, or for raiſing ſuch Profits
from his Waters, as others do from their Land.
That ſince he, who enters the Territories of ano-
ther, is for that Time his *Subject*, we may compel
the Ships of Foreigners, whilſt they paſs through
our Sea, to let our Subjects have the firſt Pur-
chaſe of their Goods; and that, if we give up this
Claim, we may require ſome reaſonable Conſidera-
tion in lieu of it. That although we cannot per-
haps ſet up a *Staple* in ſuch a Sea, becauſe the third
Nation, whither thoſe Ships are bound, may not
have the Uſe of Sailing, and therefore cannot
fetch the Goods from us; neither have we, it may
be, the Liberty of carrying them thither; yet it
ought not to be thought hard, if we put in for
ſome little Share in the Gain, ſince we permit
Strangers to ſail through our Water, with ſo much
Expedition and Convenience. But upon the Whole,
it muſt be confeſs'd, that ſince this Toll by *Sea*
is, for I know not what Reaſon, accounted more
odious than what is demanded by *Land*, it ought
to be exerciſed with great Prudence and Modera-
tion, and without the leaſt Appearance of Extor-
tion or Avarice. And, after all, there may, 'tis very
likely [3], be a Sovereign or two, who ſhall claim
an Exemption from the common Duty, and build
his Pretenſions on good Reaſon; as that his Do-

[a] Lib. 3. c. 12. [b] *V. Lex Longobard.* lib. 3. Tit. 1. Leg. 21.

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[1] In ſome Countries, they, who received theſe Tolls, were obliged to make the Roads ſafe. So that if a Man was robbed, in the Day-time, they were bound to make good what he had loſt. Some ſay, that this Cuſtom is uſed at this Day in ſome Places of *England* and *Italy*. See *Furetiere's Diction.* in the Word *Peage*, and the *Saxon* Laws, *Lib.* 2. *Art.* 27. The *German* Doctors lay down for a Maxim, That the Sovereign of the Country is obliged to this Indemnification. See *Gail. Obſ. practic.* lib. II. cap. LXIV. *Mynſinger Cent.* 5. *Obſ.* 50. *Titii Juſ. priv. Rom. Germ.* lib. VIII. cap. XIII. §. 14. But I know not if this Cuſtom ſubſiſts at preſent any where in *Germany*, or if the Whole be not a Speculation, which has neither Effect nor Foundation in the *Roman* Law, from whence they pretend to derive it.

[2] Either in taking Care that the Commodities be not damaged, or for the Safety of their Perſons.

[3] Our Author has a principal Reſpect here to the Streight of the *Sound*, for he was, at the Time he publiſhed this Work, Profeſſor at *Lunden* in the Province of *Schonen*, belonging to the *Swedes*, after the Peace of *Rotſchild*. I leave the Reader to examine, if he has not

Deſtruction [1]. "Nor will it alter the Caſe to ſay, "with ſome, that the *Amorites* here, to make their "Fear juſtifiable, ought not to have rejected ſo "fair Conditions, but ſhould have immediately "treated about accepting and regulating them; "but that now by refuſing all peaceable Con-"ference and Commerce, they had rendred them-"ſelves liable to be dealt with as the moſt unjuſt "and moſt unfaithful of Men:" For by the common Right and Privilege of Mankind, a Breach [2] of the Law of *Humanity* does not deſerve the utmoſt Rigour and Extremity of Proceeding.

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[3] *Grotius* ſeems to underſtand, either *mediately or immediately*. This appears from the Reſtraints that he puts upon the Treaty which he ſuppoſes to be allowed between the two Eſtates, of which the one engages to ſell the other a certain Sort of Proviſion, which grow no where elſe; always provided, (adds he) that the Nation, who have obtained the Privilege of buying theſe Proviſions only, ſhould be ready to ſell them again to others at reaſonable Rates. For granting, that we have Neceſſaries of Life ſufficient to ſatisfy Nature, it matters not of whom we have them, nor to whom we ſell them. So that our Author's Diſtinction might have been ſpared. See what *Gronovius* ſays in his Note upon the former Place.

[4] As the Duties of Humanity are reciprocal, and he that has received a Benefit ought to make ſome Acknowledgment of it, Strangers have no juſt Reaſon to complain that they are obliged to expoſe their Goods to Sale in the Country, provided they can ſell them at a reaſonable Price, becauſe by that Means they will ſtill get by them, though perhaps not ſo much as they would have done, if they had carried their Merchandizes farther. But if the Merchandizes or Wares be ſuch, as we are well ſtored with, or trade with ourſelves, we may poſitively refuſe them coming in; becauſe 'tis evident, that ſo much Profit as theſe Traders make in paſſing through our Country to go to another, 'tis ſo much Loſs to ourſelves. But if in refuſing a Paſſage, we deprive the Strangers that demand it of that Profit they might make, without any Advantage to ourſelves, 'tis inhuman to envy others the Benefit which we can't obtain ourſelves; and ſo much the more, if the other People, to whom they would carry theſe Merchandizes, can't have them any where elſe, but at an exorbitant Price. See Mr. *Buddeus*, as above, §. 4, 5. Mr. *Hertius*, in his Note upon this Place of our Author, agrees, that nothing hinders but the Right of *Staple* may take Place among Citizens of the ſame State, either with relation to Strangers, who come to ſell their Merchandizes and Wares in their Country, *i. e.* they may not allow them to ſet them to Sale but in a certain Place; but he does not ſee why ſuch Perſons as bring Foreign Commodities, whether of their own Growth or Manufacture, to carry them into a third Country, ſhould be obliged to put them to Sale; eſpecially if the People, through whoſe Country they are carried, have no great need of them. For my Part, there ſeems to me to be no Injuſtice in it, provided we are willing to furniſh theſe Strangers with ſuch Things as they are ſeeking elſewhere, when they have paſſed our Country, whether of our own Growth or Manufacture, at a reaſonable Rate. For why ſhould they go far for what they may have near at hand? And why ſhould they not accommodate themſelves among us, who are nearer than others? So long as they may make a tolerable Gain, though not ſo great as if they were ſuffered to go farther. So that in all theſe Caſes we are at Liberty, either to allow Paſſage, or not, for Foreign Commodities; all that we are to beware of is, that in denying we do not prejudice the Commerce of the Inhabitants of our own Country, or bring ſome other Inconvenience on them; but this is a Matter of Prudence only: I ſay nothing here of the Influence Treaties may have upon this Subject, for it is eaſy to ſee, that while they are in Force, we are bound to fulfil them.

[5] *Stapula*; this Word comes from the *German*, *Stapelen*, which ſignifies to put into an Heap or Pile. See Mr. *Menage*'s *Etymolog. Diction. & Marquard. de Jur. Mercat.* Lib. 2. c. 6. *Lewis Guicciardin* pretends on the contrary, that the *German* Word is derived from the *French Eſtaple*, and that again from the *Latin Stabulum*. See his Hiſtory of the *Low-Countries*, where the Reader will find the Name of ſeveral Cities which enjoy this Right. He may farther conſult on this Head, *Hadr. Junii Batavia* cap. XVII. *Martini Schoock Belg. Fœder.* lib. IV. cap. IX. *Ziegler de Jureb.* lib. I. cap. XLII. *Struvius Syntagm. Jur. Pub. Rom. Germ.* cap. XII. § 28, *& ſeqq.*

We

we find in ſome Countries, by virtue of which Foreign Commodities are ſtopp'd, and carried to the publick Place of Sale; and Strangers are permitted to traffick, not immediately betwixt themſelves, but at ſecond-hand with the natural Subjects.

VII. From what has been ſaid, there may well ariſe this farther *Queſtion*, Whether the Law of Humanity will permit us to require *Toll*, or *Cuſtom* for Goods tranſported thro' any Land, River, or narrow Sea, ſubject to our Dominion? For at firſt Sight it ſeems inhuman, not to grant ſuch a Privilege without *Price*, which the Law before-mention'd allows freely to all Mankind.

Now why *Cuſtom* ſhould be impoſed on Goods carried over *Land*, there is this manifeſt Reaſon, becauſe ſuch heavy Conveyance ſometimes treſpaſſes on the Fields adjoining to the common Roads; and becauſe the Sovereign of the Country is put to Charge, both in repairing the Ways, and in ſecuring the Paſſengers [1]. And farther, if it be neceſſary to erect Bridges for this Purpoſe, it is plain in Equity that the Sovereign may ſet up a Toll to reimburſe himſelf for thoſe Expences; and at the ſame Time, he who does require ſuch Toll, is obliged not only to let the Bridges ſtand, but, likewiſe, to keep them in conſtant Repair. *Grotius* on the 1 *Kings* x. 19. obſerves, that a great Toll was paid to *Solomon* for the Horſes brought through *Judea* from *Egypt*, to the *Syrians*, or to the *Hittites*; and thus too no *Frankincenſe* was tranſported without *Cuſtom*. The like *Impoſitions* are reaſonable in thoſe Places, where, by the Induſtry of the Natives, the Roads are render'd more ſhort or more eaſy; as by the filling up of Pits and Ditches, or by other uſeful Labours, for the Convenience of Paſſengers and of Goods. Thus of old, had any one cut thro' the *Iſthmus*, and join'd the *Ionian* and *Egean* Seas, he might fairly have required ſome moderate Toll of the Merchants and Sailors; which they would not have been unwilling to give, the Voyage being now perform'd with more Expedition and more Security. And though this Project was never ſet on Food, *Strabo* informs us, "That the Mer-"chants of *Aſia* and *Italy*, rather than paſs out of "one of theſe Seas into the other, by the tedious "and dangerous Coaſt of *Malea*, were extremely "well ſatisfied to put in at *Corinth*, and ſo carry "their Effects over Land; notwithſtanding the "Duties to be paid there for all imported or ex-"ported Goods." Another Reaſon, which ſome bring to aſſert the Equity of Impoſitions on Land-Carriage, is this, that by ſo perpetual a Confluence of Strangers, the Price of Proviſions is exceedingly raiſed. To which we may add, in Concluſion, that a Sovereign, on this Account, requires ſome Acknowledgment from the Goods of *Foreigners*, becauſe he ſuffers them by paſſing thro' his Territories, to receive ſuch Goods *immediately* from a third People; whereas, ſhould he erect a *Staple*, the Gain and Benefit would be fairly intercepted by his own Subjects.

As to the *River* Tolls, this, amongſt other Arguments, may be offer'd to juſtify them, that ſince the Water, by continually preying on the adjoining Lands, and ſometimes by over-flowing them, is the Cauſe of no inconſiderable Damage; for the Prevention of which, it is often neceſſary to ſecure them with Banks and other *Works* of great Charge and Labour; it ſeems by no Means unreaſonable, that towards the making up of theſe Loſſes, ſome moderate Conſideration ſhould be allowed by thoſe who gain Advantage by the River, without being concern'd in its ordinary Miſchiefs. It is true, in the Capitularies of *Charles the Great* [a], one Order forbids to take Toll in thoſe Rivers, *Ubi nullum adjutorium præſtatur itinerantibus*, *Where no Aſſiſtance is given to the Paſſengers* [2]; but this Conſtitution ſeems to have been made in Favour of the natural Subjects; and there is no Neceſſity of extending it to Foreigners [b].

It is a more difficult Point to ſtate the Equity of Tolls demanded in *Seas*. This indeed is beyond Diſpute, that the Sovereign of a Sea may impoſe Duties anſwerable to the Charge which he beſtows about it; as for the ſetting up of Marks near Rocks and Quickſands, for the keeping of Fires to direct Veſſels in the Night, or for ſcowring the Coaſts of Pirates. But whatever is demanded farther than upon theſe Accounts, will not admit of ſo good Defence; inaſmuch as the Paſſage of *unarmed Ships* is plainly one of thoſe harmleſs Benefits, which *Humanity* lays in common. Yet, where ſuch Pretenſions are made, the Pleas which ſupport them do not ſeem altogether abſurd; as that no one ought to be blamed for making the beſt of his Dominions, or for raiſing ſuch Profits from his Waters, as others do from their Land. That ſince he, who enters the Territories of another, is for that Time his *Subject*, we may compel the Ships of Foreigners, whilſt they paſs through our Sea, to let our Subjects have the firſt Purchaſe of their Goods; and that, if we give up this Claim, we may require ſome reaſonable Conſideration in lieu of it. That although we cannot perhaps ſet up a *Staple* in ſuch a Sea, becauſe the third Nation, whither thoſe Ships are bound, may not have the Uſe of Sailing, and therefore cannot fetch the Goods from us; neither have we, it may be, the Liberty of carrying them thither; yet it ought not to be thought hard, if we put in for ſome little Share in the Gain, ſince we permit Strangers to ſail through our Water, with ſo much Expedition and Convenience. But upon the Whole, it muſt be confeſs'd, that ſince this Toll by *Sea* is, for I know not what Reaſon, accounted more odious than what is demanded by *Land*, it ought to be exerciſed with great Prudence and Moderation, and without the leaſt Appearance of Extortion or Avarice. And, after all, there may, 'tis very likely [3], be a Sovereign or two, who ſhall claim an Exemption from the common Duty, and build his Pretenſions on good Reaſon; as that his Dominions

[a] Lib. 3. c. 12. [b] *V. Lex Longobard.* lib. 3. Tit. 1. Leg. 21.

[1] In ſome Countries, they, who received theſe Tolls, were obliged to make the Roads ſafe. So that if a Man was robbed, in the Day-time, they were bound to make good what he had loſt. Some ſay, that this Cuſtom is uſed at this Day in ſome Places of *England* and *Italy*. See *Furetiere*'s *Diction.* in the Word *Peage*, and the *Saxon* Laws, *Lib.* 2. *Art.* 27. The *German* Doctors lay down for a Maxim, That the Sovereign of the Country is obliged to this Indemnification. See *Gail. Obſ. practic.* lib. II. cap. LXIV. *Mynſinger Cent.* 5. *Obſ.* 50. *Titii Juſ. priv. Rom. Germ.* lib. VIII. cap. XIII. §. 14. But I know not if this Cuſtom ſubſiſts at preſent any where in *Germany*, or if the Whole be not a Speculation, which has neither Effect nor Foundation in the *Roman* Law, from whence they pretend to derive it.

[2] Either in taking Care that the Commodities be not damaged, or for the Safety of their Perſons.

[3] Our Author has a principal Reſpect here to the Streight of the *Sound*, for he was, at the Time he publiſhed this Work, Profeſſor at *Lunden* in the Province of *Schonen*, belonging to the *Swedes*, after the Peace of *Rotſchild*. I leave the Reader to examine, if he has not

minions

minions bordering on the ſame Sea [1], incloſe it ſo, at both Ends, as to give him a fair Title to its Uſe; or that on ſuch a Uſe of it, his Commerce with Foreign Nations, and, conſequently, the Good and Safety of his own People, almoſt entirely [2] depends. For in theſe Caſes it would be unreaſonable, that to obtain the Liberty of a harmleſs Paſſage by Sea, he ſhould be reduced to a Kind of [3] tributary Condition; nor will any one be much inclined to cenſure him, if, upon ſo odious a Provocation, he endeavours by any poſſible Means to free himſelf from ſuch Exaction and Oppreſſion. Nor will it render his Reſentments leſs juſtifiable, to alledge, on the other Side, that other Nations have agreed to pay the Impoſition; becauſe their Support and Safety is not ſo immediately concern'd in the Uſe of ſuch a Sea, and therefore they may afford to allow the Sovereign of the Sea a Share in their Gains, without grudging or repining. As the Caſe is very different [4], whether a Man deſires Way through my Grounds, becauſe without this Privilege he would be, as it were, excluded from the World, and confined to Solitude, or becauſe he could not, otherwiſe, carry off the Fruit of his own Land; and whether he makes the ſame Demand, purely to ſhorten his Paſſage, and impoſes a Burthen on my Eſtate, not to relieve his own Neceſſity, but to promote his Convenience and Eaſe.

They tell us, that the King of *Abyſſinia*, or *Ethiopia*, pretended, of old, to a certain Tribute from *Egypt*, upon Account that the River *Nile*, to which that Country owes its Fruitfulneſs, took its Riſe in his Dominions; and that afterwards, when the *Turks* had ſeized on *Egypt*, and uſed great Severities toward the *Chriſtians*, the *Abyſſinian* Prince made an Attempt to have turn'd the Channel of the *Nile* into the *Red Sea*, but without Effect. Theſe Pretenſions, and theſe Proceedings, which bear ſome Relation to the Caſe before us, we cannot but look upon as unjuſt [5].

Some would determine this whole Buſineſs by the Means of Compact and Covenant, which Method we think not to be altogether accurate and deciſive. For it remains ſtill in Queſtion, what was the original Reaſon of theſe Covenants; and whether the Maſter of the Sea may deny Paſſage to others, until ſuch Time as they ſhall enter into the ſame Articles of Agreement. Though indeed when ſuch a Covenant has once paſs'd without any natural Flaw or Weakneſs, which might render it invalid, both Parties are obliged ſtrictly to obſerve it; ſo that the People, who uſe the *Paſſage* deſired, ought on no Account to deny the ſettled *Impoſition*, and the Maſter of the Sea ſhall not raiſe the Duty higher than what has been thus eſtabliſhed by joint Conſent [a]. *Nicephoras Gregoras* [b] reports, that the *Caliph* of *Egypt* obtain'd, by Covenant of the Emperor of *Conſtantinople*, Licence for the Merchants of his Country to paſs through the *Thracian Boſphorus*: Which Privilege was therefore ſo eaſily granted, at firſt, becauſe it ſeem'd a Matter of little Importance. But when, in Courſe of Time, it appear'd to be a Point of very conſiderable Conſequence, it was found impoſſible to revoke the *Grant*, after it had been, by long Cuſtom, enforced and eſtabliſh'd [6].

But in Caſe the oppoſite Shore is poſſeſs'd by another People, ſo that the Sea is either held in common by both, or elſe as a middle Point divides the Confines of the two Dominions, though here perhaps one of the States only may by Compact or Conceſſion require Toll of Paſſengers, yet the Subjects of the other State ſhall by no Means be

[a] *Add. Bœcler. ad Grot. L. 2. c. 2. ſ. 14.* [b] Lib. 4.

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not fallen into that Partiality that moſt Writers are accuſed of, who have treated of the *Dominion of the Sea.* For my Part, I ſhall content myſelf, in the following Notes, to make ſome ſhort Reflections on the Arguments of our Author taken in general, without any particular Application. Since the Firſt Edition of this Work, I obſerve, with Pleaſure, that ſeveral celebrated Authors, of the ſame Country with Mr. *Puffendorf*, have approved of my Sentiments. As Mr. *Gundling*, Profeſſor at *Hall* in *Saxony*, in his *Juſ Naturæ & Gentium*, Cap. XXXVI. §. 223. Mr. *J. Gabr. Woolfius*, *Juriſpr. Nat.* Part. II §. 1. Cap. IV. par. 8. and Mr. *Otto*, Profeſſor at *Utrecht*, in his Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. I. Cap. VIII. §. 4.

1 This Reaſon proves nothing. Let the Subjects of this Prince trade together by Land, but if they will tranſport their Merchandizes by an Arm of the neighbouring Sea, why ſhould they refuſe, more than other People, to pay an Impoſt to the Maſter of the Streight, either as a Satisfaction for the Charge he is at to ſecure them a commodious Navigation, or as a ſmall Acknowledgment of the Profit they reap themſelves from an open Paſſage, which ſhortens their Courſe, and makes their Trade more flouriſhing? And tho' there ſhould be no other Way of Communication between the Countries of that Prince, which are above and below the Streights, this does not at all leſſen the Right of him that has the Poſſeſſion of it. Otherwiſe it would follow, that he that hath Territories ſurrounded with another's States, ſuch, for Example, as are *Avignon* and *Orange* in the Kingdom of *France*, hath a Right to aſſert, that the Lord of that Country, which incloſes his, muſt ſuffer all his Merchandizes and Goods to paſs backward and forward, without paying any Tax or Impoſt, which our Author will never grant. And I can't ſee what Privilege Navigation can pretend to more, ſince the Gulphs and Streights of the Sea, according to our Author's own Principle, Lib. 4. c. 5. §. 8. belong no more to any Prince, whoſe Country they border on, than the Highways taken out of his Lands. See Mr. *Bynkerſhoek*'s Diſcourſe, *De Dominio Maris*, c. 4. p. 28.

2 Suppoſe that the People be ſo poor, that a moderate Tax, laid upon their Goods and Merchandizes which they tranſport, would diſable them from trading, and providing themſelves the Neceſſaries of Life. In this Caſe, the Maſter of the Streight will be bound, and that by a perfect Obligation, to ſuffer the Veſſels of that People to paſs without exacting any Cuſtoms of them. But yet he may take them of Foreign Merchants for their Paſſage; becauſe, tho' it ſeems to be a leſſening their Profits, yet they know how to indemnify themſelves in ſelling their Merchandizes, without which their Fellow-Citizens, to whom they ſell them, muſt either want ſome of the Neceſſaries of Life, or buy them at an exorbitant Price. And tho' perhaps, if the Maſter of the Streight ſhould altogether refuſe them a Paſſage, they would be in great Want of ſeveral Things; yet it does not follow, that they muſt therefore be exempted from ſuch Cuſtoms, becauſe that open Paſſage procures a flouriſhing Trade, and a great Abundance of all Things they have need of, and much more.

3 That Prince is no more tributary to the Maſter of a Streight, for paying a Cuſtom, than a Traveller, in a ſtrange Country, paying the Toll of a Bridge or River, is tributary to the Lord of the Country who receives it. It is not (as an *Engliſh* Author, *viz.* my Lord *Moleſworth* in his *Memoirs* affirms) a ſervile Acknowledgment of the Sovereignty of that Prince over the Seas, of which the Streight is a Key. We may as well ſay, that by paying the Toll over a Bridge or River, which are on the Border of a Prince's Country, we attribute to him the Sovereignty over all the Country beyond it.

4 But our Author himſelf, reciting the ſame Example above, l. 2. c. 6. §. 8. ſays, according to the Interpreters of the *Roman* Law, that he is obliged to grant a Paſſage, eſpecially if he make ſome Acknowledgment. See *Digeſt.* l. 11. Tit. 7. *de Relig. & Sumpt. fun. &c.* Leg. 12. Let any Man then conſider, whether the Conſequences, which our Author draws from the Circumſtances he ſuppoſes in Favour of his Prince, be well grounded; and if this Prince has any Right to uſe Force to oblige the Maſter of the Streight to let him carry his Merchandizes free of all Toll, ſince other People pay it willingly.

5 This Inſtance, tho' our Author paſſes a true Judgment as to the Pretenſions of the *Abyſſine* Prince, yet has little or no Relation to the Cuſtom or Toll which the Maſter of a Streight exacts of the Merchandizes which paſs through it.

6 What does this prove?

liable

liable to the ſame Impoſition, ſince they fail in their own Water [1].

VIII. Under the ſame Head, of common and innocent Privileges, *Grotius* [a], likewiſe, reckons the Liberty of Sailors, to touch and to reſt a little on any Shore, for the Sake of Health, or of freſh Water, or on any other juſt Account. Thus the *Trojans* complain in *Virgil* [b].

Quod genus hoc hominum? quæve hunc tam barbara morem
Permittit patria? hoſpitio prohibemur arenæ,
Bella cient, primâq; vetant conſiſtere terrâ.
Si genus humanum & mortalia temnitis arma,
At ſperate Deos memores fandi atque neſandi.

What Men, what Monſters, what inhuman Race;
What Laws, what barbarous Cuſtoms of the Place,
Shut up a deſert Shore to drowning Men,
And drive us to the cruel Seas again?
If our hard Fortune no Compaſſion draws,
Nor hoſpitable Rights, nor human Laws;
The Gods are juſt, and will revenge our Cauſe.
Mr. *Dryden.*

But 'tis obſervable that they profeſs'd before,

Non nos aut ferro Libycos populare Penates
Venimus, aut raptas ad littora vertere prædas;
Non ea vis animo, &c.

We come not with Deſign of waſteful Prey,
To drive the Country, force the Swains away:
Nor ſuch our Strength, nor ſuch is our Deſire.
Mr. *Dryden.*

Whence we are taught, that the Party, who deſires this Favour, ought to appear, on ſuch Coaſts, with moſt innocent Intention, ſo as neither to create any Danger to the Inhabitants, nor any probable Grounds of Fear. And therefore *Dido*'s Anſwer to this Speech is exceedingly wiſe and proper:

Res dura, & regni novitas, me talia cogunt
Moliri, & late fines cuſtode tueri:

——————— My cruel Fate,
And Doubts attending an unſettled State,
Force me to guard my Coaſts.———————
Mr. *Dryden.*

For before we grant any Thing of this Kind, we ought to be well aſſured, whether the Perſons approaching come as Friends, or as Enemies, what Appearance the Fleet makes, what Force and Figure the Men bear who are to land; and farther, whether they are free from all contagious Diſtempers [c]. When there ariſes no Obſtacle on either of theſe Accounts, as it would be then moſt barbarous Inhumanity to deny the Liberty of harmleſs Acceſs to Shore, ſo that Favour being once granted, calls for one more altogether as reaſonable, the Privilege of erecting little *momentary* Huts for preſent Shelter, which is neither any Prejudice to the Shore, nor any Abridgment of our Right and Property. Indeed, Reaſon forbids that any one ſhould raiſe a *laſting* Structure or Edifice on the Strand, without expreſs Allowance from the Sovereign [2], eſpecially if it could not be done but by endamaging others [d].

Altho' ſome Nations have, by formed Compact, ſettled the Point of Acceſs to Shores and Ports [3]; yet this does not hinder the like Kindneſs from being due by natural Right, ſince many Duties, ariſing from thoſe Virtues which impoſe only an *imperfect* Obligation, are frequently ſtrengthen'd and confirm'd by civil Covenants and Laws [4]. Beſides, our preſent Aſſertion regards chiefly this extraordinary Caſe, when Perſons, contrary to their Intentions, are driven, by ſome Violence, on a foreign Coaſt; whereas theſe Covenants, which ſometimes paſs betwixt Nations, uſually have for their Subject the Point of conſtant and continual Acceſs on common Occaſions. Therefore, for this latter Indulgence, it is on no Account abſurd to require ſome moderate Conſideration. But in the former Caſe it would be extremely baſe and ſordid to charge as a Debt ſo ſmall a Relief of Perſons in Diſtreſs, and, as it were, to ſet a Price upon our Charity.

IX. Another Duty of *Humanity* is the Admiſſion of Strangers, and the kind Reception and Entertainment of *Travellers*. Some of the Ancients carried this Point to the Heighth of Ambition and Oſtentation, conceiving the Right of Hoſpitality to found the ſtricteſt Relation, and the moſt ſacred Friendſhip [e]. But to give a natural Right to theſe Favours, it is requiſite that the Stranger be abſent from his own Houſe on an honeſt, or on a neceſſary Account; as, alſo, that we have no Objection againſt his Integrity, or Character, which might render our Admiſſion of him, either dan-

[a] L. 2. c. 2. ſ. 15. [b] *Æneid.* 1. ver. 542. [c] Add. *Plin. N. H.* l. 26. c 1. [d] Vid. l. 50. *D. de acq; rer. dom.* [e] *Ariſtot. Mag. Moral.* l. 2. 11. Of all Kinds of Friendſhips, that ſeems to be the firmeſt which is expreſs'd in the courteous Entertainment of Strangers; becauſe the Perſons here, having not the ſame Ends and Intereſts to propoſe, cannot, ſo eaſily, fall into Contention, as thoſe who are Members of the ſame State. *Homer* ſays, the Poor and Stranger are the Care of *Jove*: And again, the ſuppliant Stranger craves a Brother's Love. In *Lucian* (*de Dea Syria*) amongſt the Crimes which brought *Deucalion*'s Flood upon the World, we find theſe which follow. They practiſed all Kinds of Injuſtice; for they neither kept their Oaths, nor received Strangers, nor gave a patient Hearing to the Requeſt of the Miſerable. Of the Humanity which the *Indians* ſhew to Strangers, ſee *Diod. Sic.* l. 2. c. 42. *Add. Plato de L. L.* l. 12. *Ælian* (*V. H.* l. 4. c. 1.) recites this Law of the *Lucanians*, If at Sun-ſet a Stranger arrives, and deſires Reception in a Houſe, in Caſe the Maſter refuſe to admit him, let him be puniſh'd as an Offender againſt the Laws of Hoſpitality. *Add. Lex Burgund.* Tit. 30. ſ. 1. *Helmoldus* (*in Chron. Sclav.* l. 1. c. 28.) reports of the ancient *Sclavi*, If a Man be diſcover'd to have denied Lodging to a Stranger, (a Rudeneſs which ſeldom happens amongſt them) the People join in a Body to pull down his Houſe, and to ruin his Eſtate; which Way of Proceeding is permitted by the Laws. *Philo Jud.* in his Life of *Moſes*, ſays, that Strangers have the ſame Rights as Suppliants.

[1] But our Author elſewhere acknowledges, *viz.* Lib. 4. c. 5. §. 8. that whoever has ſettled himſelf firſt upon one of the Coaſts of the Streight, and has taken Poſſeſſion of the whole Streight, he that comes afterward to inhabit on the other Side, is Maſter only of his own Ports and Shore. So that in this Caſe, the firſt Occupant has a Right to require Cuſtoms of the Veſſels of the other, as if he had both Sides of the Streight, unleſs he be diſpenſed with by any Agreement.

[2] See Mr. *Noodt*'s Book called, *Probabilia Juris*, (i. e.) *The Probabilities of the Law*, Lib. 4. c. 1.

[3] Sometimes, on the contrary, as our Author obſerves a little below, one People agree with another, that they will not come into the Ports, nor on the Coaſts of each other, as appears from two Treaties made long ago between the *Romans* and *Carthaginians*, That the *Romans*, and their Allies, ſhall not ſail beyond the *Fair Promontary*, unleſs they are driven farther by a Tempeſt, or by the Purſuit of their Enemies; and if, through theſe Means, they paſſed their Bounds, they ſhould buy nothing, nor meddle with any Thing but what was either neceſſary for Sacrifice, or to repair their Veſſels, and ſet ſail again to return within five Days. *Polyb.* l. 3. This was their firſt Treaty. The ſecond was, That no *Roman* ſhould trade into *Sardinia* or *Africk*; that they ſhould not build any City there, nor even land, unleſs to victual or refit; and if they were driven aſhore, by a Tempeſt, they ſhould depart within five Days. *Ibid.*

[4] See §. 4. above, and Lib. 2. c. 6. §. 5. where you'll find Examples of theſe imperfect Obligations, which have been made perfect by the Determination of the Legiſlator, who has made them effectual by Law: As alſo, ſee Lib. 4. c. 2. below.

gerous or diſgraceful; and farther, that he cannot at preſent hire Lodgings for his Money. And therefore, in ancient Times, when publick Inns either were not in Uſe, or elſe accounted ſcandalous, and unworthy to receive a good and virtuous Gueſt, the Neceſſity of this Duty was greater and more ſtrictly binding, than it is now in moſt Parts of *Europe*; where we meet with ſo many of theſe Houſes exactly fitted and furniſh'd, not only for all Uſe and Convenience, but even for Ornament and Splendor.

Now although *Inhoſpitality* be commonly, and, for the moſt Part, juſtly cenſured, as the true Mark of a ſavage and inhuman Temper, yet the Point will now and then bear a Diſpute, eſpecially as to the Caſe of thoſe who wander into foreign Countries purely on Account of Curioſity; whether or no ſuch Perſons may claim free Admiſſion by any natural Right [1]. The *Spartans*, to juſtify themſelves in driving all Strangers from their Coaſts, thought this one Reaſon ſufficient, leſt the Converſe of Strangers ſhould introduce a Corruption, or a Contempt of their received Manners and Cuſtoms [a]. In Anſwer to which it is well urged, by ſome, that what we practice at home is not always the beſt, nor what others do abroad the worſt; if then a *foreign* Cuſtom be really *better*, it is abſurd to deſpiſe, and to reject it on the Score of its being *foreign*. That this is the Temper and Property of Curs to fawn on *domeſtick* Slaves, and to bark at the moſt noble and excellent of *Strangers*. That thoſe Men uſually contract a Roughneſs and Clowniſhneſs of Behaviour, who never breathe out of their native Air, and ſee no more of the World than what paſſes under their Noſe [b]. As to the Queſtion before us then, thus much is certain, that if our People are kindly received by any Nation abroad, we ought to entertain the Men of that Nation with an equal Return of Civility. As on the other Hand, thoſe who drive us from their Coaſts, cannot, without the moſt ſtupid Impudence, petition us for a more courteous Treatment. But ſuppoſing that any one Nation, contented with what it finds at Home, utterly refrains from all foreign Travel, it does not appear what Obligation ſuch a State can have to admit thoſe who would viſit it, without a neceſſary or weighty Cauſe. The Caſe is ſomewhat like that of a private Man, who, in his Houſe or Gardens, poſſeſſes ſome rare Curioſity, or other valuable Sight; ſuch an one does not apprehend himſelf tied freely to let in all Spectators; but whoever is thus gratified, either rewards, or at leaſt acknowledges, it as an extraordinary Favour. And this ſeems the more reaſonable, becauſe the Grounds of prudent Caution and Suſpicion are ſo numerous, that we may eaſily make Uſe of one or other of them, to juſtify us in keeping ſuch Perſons at a Diſtance, as would too curiouſly examine and pry into our Affairs.

Therefore the *Spaniſh Caſuiſt* [c] has not made many Converts by the Reaſons he lays down to juſtify his Countrymen in their Proceedings againſt the *Indians* [2]. The firſt Right on which he founds their Title, is that of natural Society and Communication, which he draws up into this Aſſertion, *The* Spaniards *had a Right of travelling and of living in thoſe Countries, provided they did the Natives no Harm, and from this Privilege none could reſtrain them.* In Reply to which it is well urged, that this *natural Communication* does not hinder a juſt Proprietor from communicating his Goods by ſuch Methods, and upon ſuch Conſiderations as he finds neceſſary. And farther, that it ſeems very groſs and abſurd, to allow others an indefinite or unlimited Right of travelling and living amongſt us, without reflecting either on their Number, or on the Deſign of their coming; whether, ſuppoſing them to paſs harmleſly, they intend only to take a ſhort View of our Country, or whether they claim a Right of fixing themſelves with us for ever. And that he who will ſtretch the Duty of Hoſpitality to this extravagant Extent, ought to be rejected as a moſt unreaſonable, and moſt improper Judge of the Caſe. The ſecond Principle he lays down is, *That it was lawful for the* Spaniards *to traffick with thoſe People, and the Sovereigns on either Side could not hinder their Subjects from ſuch Intercourſe.* But here Men of more ſober and moderate Judgments confeſs themſelves unable to find out any ſuch Liberty of trading, as Princes may not abridge their Subjects of, for the Good of the Commonwealth; much leſs ſuch as ſhall force and obtrude Strangers upon us, whether we will or no. His third Reaſon is this, *If the* Indians *had amongſt them any Rights and Privileges allowed in common to Natives and Foreigners, in theſe they ought not to hinder the* Spaniards *from their Share: For Example, If other Strangers were permitted to dig Gold, the* Spaniards *might fairly claim the ſame Liberty.*

On which Point ſome have judged it worth conſidering, firſt, whether thoſe Privileges were granted to others by way of *Debt*, or by way of free Gift and Favour. For of thoſe Things which Men cannot claim from me as *ſtrictly* their *Due*, I may be more liberal to one than to another. And in the next Place, whether theſe new Comers will behave themſelves with the ſame Juſtice and Modeſty as the former, who made Uſe of our Goods without our Prejudice or Inconvenience; and whether theſe late Gueſts propoſe no other End of their Viſit. Suppoſe I give one or two of my Neighbours Leave to come into my Garden, as often as they pleaſe, and to gratify themſelves with taſting my Fruit; it may be, there breaks in afterwards a rude Hector, who is for tearing up my Trees, and would kick me out, to plant his own Body in my proper Land; my Caſe is bad if I may not be allow'd to ſhut the Gate againſt ſuch an intruding Villain [d]. But let others ſettle this Controverſy. As to our main Queſtion, it is look'd on by moſt as the ſafeſt Way of reſolving it, to ſay, That it is left in the Power of all States, to take ſuch Meaſures about the Admiſſion of Strangers, as they think convenient; thoſe being ever excepted, who are driven

[a] The *Chineſe* have much the ſame Conſtitutions in reference to Strangers. *Vid. Nieuhof. Ged. Deſcript. Chin.* c. 1.

[b] (In *Livy* l. 41. c. 24.) The Decree of the *Achæans*, by which they forbad the *Macedonians* to enter their Territories, is call'd, *exſecrabilis velut deſertio Juris Humani*, as it were a deteſtable Violation of the Law of human Nature. 'Tis a Saying of *Periander* in *Plutarch*, (*Sympoſ.*) I commend thoſe States, and thoſe Magiſtrates, which firſt give Audience to Strangers, and then to their own Subjects.

[c] *Franciſcus a Victoria Relect.* 5. ſ. 3.

[d] Add the Anſwer given by ſome of the *Americans* to the *Spaniards*, in *Montaigne's* Eſſays, l. 3. c. 6.

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[1] For the ſame Reaſons *Lycurgus* forbad the *Lacedemonians* to travel out of their own Country, leſt they ſhould learn the bad Cuſtoms and coarſe Manners of Strangers. *Plut. Inſt. Lac.* See *Potter's Archæol. Græc.* l. 4. c. 21.

[2] *Ziegler* has examin'd, at full Length, theſe and other Reaſons of the *Spaniſh* Divine, in his Treatiſe *De Juribus Majeſtatis*, Lib. I. Cap. 23. §. 54, *& ſeqq.*

on

on the Coasts by Necessity, or by any Cause that deserves Pity and Compassion. Not but that it is barbarous to treat, in the same cruel Manner, those who visit us as Friends, and those who assault us as Enemies [a]. The free Admission of Ambassadors is deduced from another Head [b] [1].

But having once admitted Strangers and foreign Guests, to turn them out again, unless by *good Reason*, is usually censured as some Degree, at least, of Inhumanity [c]. From the Number of these *good Reasons*, St. *Ambrose*, and with him [d] *Grotius*, excludes the Case of grievous Scarcity and Dearth afflicting a People. To whose Judgment we subscribe with this Supposition, That there are still Means left, though perhaps very hard and pressing, to save both Natives and Strangers, and if the latter have been formerly, or may be hereafter, useful and serviceable to us, and of such only St. *Ambrose* speaks. But in case we are not *obliged* to the Foreigners amongst us, and there be no Necessity of their perishing, should we send them off, there seems to be no Reason why the Subject, on their Account, should be content to struggle with a Famine [e].

X. In the same Class of Duties *Grotius* [f] places the allowing of a perpetual Habitation to Strangers, who, being driven by Violence out of their own Country, are forced to seek out a new Seat; provided still, that they submit to the establish'd Government, and behave themselves with such Prudence and Decency, as to administer no Occasion to Factions and Seditions [g].

Humanity, it is true, engages us to receive a small Number of Men expelled their Home, not for their own Demerit and Crime; especially if they are eminent for Wealth or Industry, and not likely to disturb our Religion, or our Constitution. And thus we see [2] many States to have risen to a great and flourishing Height, chiefly by granting Licence to Foreigners to come and settle amongst them; whereas others have been reduced to a low Condition, by refusing this Method of Improvement.

But no one will be fond of asserting, that we ought in the same Manner to receive and incorporate a great Multitude, especially if now in Arms, or naturally addicted to War; since it is scarce possible, but that their Admission should highly endanger the Natives. Therefore every State may be more free or more cautious in granting these Indulgences, as it shall judge proper for its Interest and Safety. In order to which Judgment, it will be prudent to consider, whether a great Increase in the Number of Inhabitants will turn to Advantage; whether the Country be fertile enough to feed so many Mouths; whether upon Admission of this new Body, we shall be straitned for Room; whether the Men are industrious, or idle; whether they may be so conveniently placed and disposed, as to render them incapable of giving any Jealousy to the Government. If on the whole, it appears that the Persons deserve our Favour and Pity, and that no Restraint lies on us from good Reasons of State, it will be an Act of Humanity to confer such a Benefit on them, as we shall neither feel very burthensome at present, nor are likely to repent of hereafter. If the Case be otherwise, we ought so to temper our Pity with Prudence, as not to put ourselves in the ready Way of becoming Objects of Pity unto others. Farther, since whatever we bestow on such Petitioners, we may justly reckon as a Matter of free Bounty in us, hence it follows, that they are not presently to lay Hands on what they please, nor to fix themselves, as it were, by some Right, in any Spot of Waste-ground they find among us; but that they ought to rest satisfied with the Station and Privileges we assign them [h].

XI. The next Office of Humanity mention'd by

[a] Vid. *Diod. Sic.* l. 1. c. 67. [b] Add *Ziegler ad Grot.* l. 2. c. 2. §. 23. [c] Vid. *Liv.* l. 2. c. 37, 38. [d] *De Offic.* l. 3. c. 7. *Grot.* l. 2. c. 2. §. 19. [e] Vid. *Sueton. August.* c. 42. & *Bœcler. ad Grot. d. l.* [f] Lib. 2. c. 2. §. 16, 17. [g] *Euripides* Medea Χρὴ δὲ ξένον, &c. ver. 222.

——————A Stranger should conform
In Manners to the State that protects him.

So among the Articles of Peace proposed by *Æneas* in *Virgil, Æn.* xii. 192. we find this for one:

——————*Socer arma Latinus habeto,*
Imperium solenne socer; mihi mœnia Teucri
Constituent, urbiq; dabit Lavinia nomen.

Latinus shall the Regal Scepter bear,
Latinus first in Peace, and chief in War.

[h] What hath been said may be illustrated by these historical Examples. *Latinus*, in *Virgil Æn.* 11. ver. 316. offers the *Trojans* this Condition:

Est antiquus ager Tusco mihi proximus amni,
Aurunci Rutuliq; serunt, & vomere duros
Exercent colles, atque horum asperrima pascunt.
Hæc omnis regio & celsi plaga pinea montis
Cedat amicitiæ Teucrorum, & fœderis æquas
Dicamus leges; sociosq; in regna vocemus.

A Tract of Lands the *Latines* have possess'd,
Along the *Tiber*, stretching to the West,
Which now *Rutulians* and *Auruncans* till,
And their mix'd Cattle graze the fruitful Hill;
Those Mountains fill'd with Firrs, that lower Land,
If you consent the *Trojans* shall command,
Call'd into Part of what is ours; and there
On Terms agreed the common Country share.

Mr. *Dryden.*

Servius on this Passage observes, from *Cato*'s *Origines*, that the Land, here mention'd, contain'd 100 Acres. He tells us, likewise, for fear we should think that the King was liberal of what did not belong to him, that to those Words *Aurunci Rutuliq; serunt*, we must join *mihi* in the preceding Verse; the *Auruncans* and *Rutulians* having that Country allowed them in a Way of free Stipend, or else being placed there by the King as his Husbandmen, to manage the Crown Lands. The Story is told more at large by *Dionys. Halicarnass.* L. 1.

The *Cimbrians* in *Florus* (l. 3. c. 3.) petition the *Roman* Senate, that so brave and warlike a People would give them a little Portion of Land as a kind of Pay, promising in Return, that their Hands and their Weapons should be ever employed in the Cause of *Rome*. But (as the Historian there reflects) what Land could the *Romans* give them without quarrelling amongst themselves, on the Point of such arbitrary Distributions? And how could the Senate, without manifest Injustice, dispose of the Property of private Men? Besides, possessing so many Things as were likely to raise the Appetite of needy Strangers, they judg'd it unsafe to admit so strong, and so fierce a Nation into their Limits.

In *Cæsar* (*de B. G.* l. 4.) the *Tenctteri* and *Usipetes* petition'd in this boasting Manner: That they did not voluntarily leave their own Country to seek a foreign Seat; that if the *Romans* would accept of their Service, they were able to shew themselves no unprofitable Friends; only they desire some Lands to be assign'd them, or to have the Privilege of keeping what they had already gotten by their Arms. The Answer which *Cæsar* sent them was to this Purpose; That 'twas unreasonable in those Men to invade another Country, who could not defend their own. That there were no vacant Lands in *Gallia*; especially not to hold so vast a Multitude,

[1] See what is said above, L. 2. c. 3. §. 23. and below, Lib. 8. c. 9. §. 12. Note 1.
[2] See *Parrhasiana*, Tome 1. p. 265, &c. and a Discourse *De conscribendo Milite*, §. 18. among the Select Discourses, *Jur. Nat. & Gen.* of Mr. *Buddeus*.

Grotius,

Grotius, is that we allow every Man the Privilege of procuring for himſelf, by Money, Work, Exchange of Goods, or any other lawful Contract, ſuch Things as contribute to the Convenience of Life, and that we do not abridge him of this Liberty, either by any civil Ordinance, or by any unlawful Combination, or Monopoly. For that as Trade and Commerce highly promote the Intereſt of all Nations, by ſupplying the Unkindneſs of the Soil, which is not every where alike fertile, and by making thoſe Fruits ſeem to be born in all Places of the World, which are to be found in any one [a]: So it cannot be leſs than Inhumanity to deny any *Son of the Earth* the Uſe of thoſe good Things, which our common Mother affords for our Support; provided our peculiar Right and Propriety be not injured by ſuch a Favour. And therefore the *Megarenſians* (in *Plutarch*) when the *Athenians* had forbidden them Entrance to all their Ports and Mart-Towns, complained that this was done παρὰ τὰ κοινὰ δίκαια, *contrary to the Law of Nations.*

But this Aſſertion will admit of many Reſtrictions. For we do not ſeem in Duty obliged to communicate to others ſuch Goods, as belong not to the Neceſſities, but to the Pleaſure and the Superfluity of Life. And then, if Scarcity lies upon us, we may juſtly keep what we have to ourſelves. Could *Joſeph* have diſcovered that the Corn of *Egypt* was not ſufficient to ſupport the Natives, under the ſeven Years Famine, he might, with good Reaſon, have forbid the Exportation of it to Foreigners [b]. So the *Athenians* once decreed it to be *capital* for any Subject of that State to carry Corn, for Sale, any where but to *Athens* [c]. Beſides, we may fairly exclude others from trafficking with us for Things not abſolutely needful for the Support of Life, when by ſuch a Permiſſion our own Country would loſe a conſiderable Advantage, or ſuſtain (though by indirect Conſequence) ſome notable Evil. For Example, one Kingdom, ſuppoſe, produces admirable Horſes; what ſhould hinder the Government there from paſſing an Act to prohibit the carrying into foreign Parts, any that are fit for breed? For ſhould the fine Strain grow common, the Country would loſe its greateſt Profit, and its greateſt Ornament. And this beautiful Race is affected abroad, not for neceſſary Uſe, but for Pomp and Pride, for Elegance and Eaſe [d]. In one of the old *Roman* Conſtitutions it is made capital to carry Wine, Oil, or Arms to the barbarous Nations [1]. They thought the Prohibition about the Wine and Oil no leſs neceſſary, than the other about the Weapons, fearing leſt the *Barbarians*, by taſting ſuch generous Productions of the Empire, ſhould endeavour to make themſelves Maſters of ſo rich a Soil. And we find in *Livy* [e], that when *Arruns* of *Cluſium* invited the *Gauls* into *Italy*, he made them a Preſent of *Italian* Wines, as the Encouragement and the Reward of their Expedition [f].

Laſtly, there lies no Reſtraint on a State, why, in reference to the Exportation of Goods, it ſhould not favour its own Subjects more than Strangers; as by demanding leſs *Cuſtom* of the former than of the latter, or by giving them the Right of *firſt Purchaſe*.

XII. Though, as has been ſhewn, we are *oblig'd* in many Caſes to ſell, yet, as *Grotius* [g] obſerves, no Law ties us to a Neceſſity of *buying*. In as much

Multitude, without Prejudice or Danger. Though indeed he had ſtill another more ſecret Reaſon, why he would not have thoſe new Neighbours.

In *Tacitus* (*A.* xiii. c. 55.) the *Antibarii*, being at a Loſs for a Dwelling, having therefore ſeated themſelves in ſome Lands beyond the *Rhine*, belonging to the *Romans*, excuſed themſelves, not altogether unreaſonably, in theſe Words: That the main Part of the Land was uſeleſs; being only employed, now and then by Chance, in feeding Beaſts for the Army. That the *Romans* ought to reſign a Place which was fill'd only with Beaſts, when they might relieve the Diſtreſs of Men; and prefer Friends and Subjects to Deſerts and Solitudes. That as Heaven was poſſeſs'd by the Gods, ſo the Earth was given to Mankind; and what Parts were void of Inhabitants, lay in common to all the World. (Which Principle Sir *Thomas Moore* eſtabliſheth amongſt his *Utopians*, l. 2.) This Meſſage deſerv'd a more favourable Anſwer than thoſe moſt haughty Words of *Avitus*, That they ought to ſubmit to the Pleaſure of their Betters. That the Gods, whoſe Aſſiſtance they now implore, had choſen the *Romans* to be Commanders of the World, and to diſpoſe of it as they ſhould think convenient, without ſuffering any other Judges but themſelves.

The Emperor *Probus* ſettled an hundred Thouſand of *Baſtarnæ* in the *Roman* Territories; who all proved fruitful and quiet. But he uſing the ſame Liberty of Tranſplanting vaſt Numbers from other Nations, as from the *Gepidi*, the *Gautumni*, the *Vandals*, &c. all theſe broke their Promiſe, and, whilſt the Emperor was engaged in the War againſt the * *Tyrants*, wandered by Sea and Land almoſt through the whole World, and ſpread no ſmall Cloud on the Glory of *Rome*. *Flav. Vopiſc.*

* *Theſe Tyrants were ſuch as revolted from the Emperor then reigning, and cauſed themſelves to be proclaimed Emperors by the Soldiers.* *See* Salmaſius *upon the Thirty Tyrants of* Trebellius Pollio.

So likewiſe in *Ammianus Marcellinus*, the *Goths*, deſerting their Seat for Fear of the *Huns*, begg'd Leave of *Valens* to fix themſelves in *Thrace*, promiſing to live quietly, and to lend him their Service when he ſhould have Occaſion. Soon after, other barbarous People put up the ſame Requeſt, to whom *Valens* granted the like Favour, hoping that from theſe Numbers he might draw Men for his Troops, without any great Charge. Yet this Indulgence proved afterwards his Ruin; as the Hiſtorian demonſtrates at large. *Add. Socrat. Hiſt. Eccleſ.* l. 4. c. 28.

[a] *Liban Orat.* 3. God hath not enriched every Place with all his Bleſſings; but hath divided his Gifts according to the Difference of Countries, that he might incline Men to Society, by the Want of mutual Aſſiſtance; and he diſcover'd to Men the Way of Trading, that what was the Product of any particular Soil, might, by this Means, be enjoy'd in common by the whole World.

[b] *Quintil. Declam.* 12. Whilſt we were ſelling to the neighbouring Nations, and urged on by the Hopes of ready Gain, we neglected a due Regard to the publick Safety; and, having emptied our Stores abroad, brought a Famine upon ourſelves at home.

[c] *Lycurg. Orat. contra Leocrat.* [d] In *Livy* (l. 43. c. 5.) Upon the Requeſt of the *Gallick* Ambaſſadors, it was order'd that they ſhould have the Liberty of buying Ten Horſes, and of carrying them out of *Italy*, now this was otherwiſe forbid. [e] L. 5. c. 33. [f] Add. *Numb.* 13, 24. *Judith* 10. 20.

[g] L. 2 c. 2. §. 20. *Plato de L. L.* 8. Let no Man import Frankincenſe, nor other foreign Things uſed in Sacrifices, nor Purple, nor any Colours which are produced at home; nor, in ſhort, any Commodity, but ſuch as is abſolutely neceſſary; and, on the other Side, let no Man export what is of neceſſary Uſe in our own Country. *Cæſar de B. G.* l. 2. reports of the *Nervii*, that they allow no Entrance to Merchants, ſuffer no Wine, or any other Incitement to Luxury, to be imported; imagining that the Uſe of theſe Delicacies muſt needs weaken Mens Minds, and unbend the Stiffneſs of their Courage. The ſame Author tells us of the *Suevi*, that if Beaſts be brought from other Parts for their Aſſiſtance, they refuſe to make Uſe of them; and as for Wines, they abſolutely forbid the Importation of them, being of Opinion, that thoſe Liquors ſoften and effeminate the Spirits of Men, and render them unfit for laborious Employments.

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[1] *Ad Barbaricum transferendi vini, olei, & liquaminis nullam quiſquam habeat facultatem: nec guſtûs quidem cauſa, aut uſus commercorum, &c. Si quis aliquod armorum genus quarumcunque Nationum Barbaris alieni-genis contra pietatis noſtræ interdicta ubicunque vendiderit: bona ejus univerſa protinus fiſco addici, ipſum quoque capit olem pœnam ſubire decernimus.* "That Nobody preſume to "tranſport into the Country of the *Barbarians*, Wine, Oil, Ointments, Pickles, &c. If any Man ſhall ſell to the *Barbarian* "Nations any kind of Arms whatſoever, contrary to the Imperial Edicts, let all his Goods be confiſcated, and let him ſuffer "Death." Leg. IV. Tit. XLI. *Quæ res exportari non debeant.* Leg. I, II. See *Briſſon Select. Antiquit. Jur. Civ.* Lib. IV. Cap. IV. and the Commentary of M. *Noodt* on the *Digeſt*. Tit. *De contrat. emp.* pag. 395, 396.

as every Man is naturally free to accept, or to refuſe, what Purchaſe he pleaſes; and no one has juſt Reaſon to complain, becauſe another is content to want ſomewhat which he could ſupply him with. And therefore we find it forbidden in many Places, as well ancient as modern, to import ſome particular Commodities; either, leſt any Damage ſhould by this Means ariſe to the State; or to excite the Induſtry of our own Subjects; or to hinder our Money from paſſing into foreign Hands.

Therefore the *Spaniſh* Caſuiſt, lately mentioned, is widely miſtaken, when he aſſerts, that by the *Law of Nations, every one has a Right of trading into foreign Parts, of importing what the People there want, and of exporting Gold, Silver, and other Goods in which they abound.* For ſuppoſing I declare myſelf well ſatisfied with what I poſſeſs of my own, with what Face can another force his Things upon me, whether I will or no?

When the contrary is enacted, for Example, when, in ſome Places, every Houſholder is obliged to buy yearly ſuch a Quantity of Salt, this ariſes from the Power of Princes over their Subjects, and that Neceſſity of buying is a kind of Tax or Tribute. Thus too a Ruler may enjoin his People, that if they want ſuch a particular Commodity, they ſhall buy it only of ſuch a Perſon. Which kind of Laws are very juſt, when they promote the Intereſt of the Commonwealth. In the ſame Manner we find it often commanded by Authority, that the Subject do immediately buy up Corn and other Neceſſaries, even in remote Parts, when there is Danger of a Scarcity (eſpecially upon Apprehenſion of a Siege) or to bring down Proviſions to a more reaſonable Price amongſt us. But that I ſhould go about to compel a Man, over whom I have no Power, to the Purchaſe of my Commodities, this is what no Reaſon will juſtify, or excuſe [1]. For upon what Pretence can I aſſume ſuch Authority over the Purſe of another, who is not my Subject, as to preſcribe the Matter, and the Meaſure of his Expences, and to teach him how he ſhould provide for his Neceſſities, or for his Pleaſures? And though my Gain be, in the mean Time, hinder'd, or leſſen'd, yet this Conſideration can by no Means abridge the other Party of his natural Liberty. Or, if I would have him thus contribute to my Advantage, I ought to encourage him by mutual good Offices, and render myſelf worthy of the Favour. But if a Man being ſtock'd with ſuch particular Commodities, offers to vend his *Abundance*, where-ever he can find Chapmen, it would, in this Caſe, be moſt inhuman, and unjuſt to hinder him from thus furniſhing himſelf with other Things, which he *wants* for the neceſſary Occaſions of Life [a].

XIII. Another Duty of the ſame Rank, is the giving Licence to Men of other Nations, eſpecially if ſeated in our Neighbourhood, to ſolicit, and contract Matrimony with our Subjects, when they are at a Loſs for Women amongſt themſelves [2]. As for Inſtance, if a People compos'd only of *Men*, either being expell'd their own Country, or upon ſome other neceſſary Account, are fix'd near us, and deſign to form a new State. For to live without the Aſſiſtance of the other Sex, is what the Frame and Temper of few Men can bear. Celibacy in a healthy Conſtitution is the Gift only of excellent Souls; and to ſeek other Satisfactions, in this Caſe, than Nature adviſes, or allows, would be foul and brutal. Beſides, as *Florus* obſerves, *Res tantum unius ætatis eſt populus virorum* [3], A State made up of one Sex, *viz.* Men, can laſt but one Age. Upon this Principle many are willing to defend, or at leaſt to excuſe, the famous Exploit of *Romulus*, the *Rape* of the *Sabine* Women. Authors indeed are divided about the Reaſon, and the Manner, of this Proceeding. *Dionyſius Halicarnaſſeus* reports, that the main Deſign of *Romulus* was to obtain the Friendſhip and Alliance of the neighbouring Nations, by joining with them in Marriage; and that, though he began this Project in an injurious Way, yet he imagin'd that in Time this ill Beginning would produce a good Concluſion, and that a fair Correſpondence and Familiarity would be eſtabliſh'd, ſo ſoon as they ſhould have clear'd themſelves to the new Brides, by the Plea of Love, and to the Fathers and Relations, by urging that the *Stratagem* was ſet on Foot, not out of Affront and Abuſe, but as a neceſſary Relief to a deſperate Condition. Yet it muſt be confeſs'd, this ſeems a very prepoſterous Way of gaining Friendſhip. See *Tacit.* An. l. I. c. 55. What he reports of *Segeſtes*, that when *Arminius* had ſtolen his Daughter againſt his Conſent, *Gener inviſus*, &c. The Names of Son-in-Law, and Father-in-Law, which, when there is a mutual Conſent of Parties, uſed to be a Band of Love and Endearment, prove now the Seed of Hatred, and the Incitement to mortal Diſcord.

Others pretend, that *Romulus*, by this Attempt, only ſought an Occaſion of quarrelling with his Neighbours, which ſeems very improbable. The common Defence of the Fact is to alledge the Want of Women, and ſo to have Recourſe to Neceſſity; but then Authors take Care to tell us, that Commiſſioners were firſt ſent about to treat with the People on the Affair, and to beg that they would not think it hard to let Men, like themſelves, mix with them in Race and Blood; and that when theſe Agents were diſmiſſed after a reproachful Manner, it was then at laſt thought proper to gain Relief, by the joint Application of Cunning and of Force. And what makes the Thing ſtill carry a better Face is, That this Way of *catching Wives* was, in thoſe Times, not only a common, but a laudable Practice; *Dionyſius* calls it, *An Ancient and a* Grecian *Cuſtom, and the moſt renowned Method of obtaining Maids in Maraiage.* L. 2. c. 30. Add. *Judges* XXI. 22. It is true, Violence can ſeldom be neceſſary in this Caſe, ſince it is never difficult to find Women enough, who ſhall be ready, of their own Accord, to accept of any Husbands that are not abominably vile and ſcandalous.

To reject thoſe who ſeek our Alliance, by ſuch Propoſals, would be very hard Dealing. And tho' the Denying of a Woman for a Wife be not, *in itſelf*, a juſt Cauſe of commencing a War, yet it is, if the Refuſal were accompanied with Reproach. As the Inhabitants of *Rhegium*, when *Dionyſius* of *Sicily* ſent to deſire a Wife amongſt them, returned in Anſwer, That they would grant him none but the Daughter of their common Executioner. See *Diodor. Sic.* l. xiv. c. 108. & *Strab.* l. vi. a like Inſtance is to be met with in *Paulus Venetus*, l. I. c. 52.

[a] *Add.* Bœcler. *in loc. citat.* Grot.

[1] See the Diſcourſe of Mr. *Thomaſius*, entitled, *De pretio affectionis in res fungibiles non cadente*, c. 2. §. 1, 2, 5.
[2] See Mr. *Buddeus*'s Diſcourſe, entitled, *Juriſpr. Hiſtoricæ Specimen*, §. 9. among his *Selecta Juris Naturæ & Gentium.* But ſee, at the ſame Time, what I have ſaid upon *Grotius*, Lib. II. Cap. II. §. 21, Not. 1.
[3] *Res erat unius ætatis, populus virorum.* Flor. 1. c. 1. numb. 10.

On

On the other hand, ſhould a Prince, by Virtue of his ſovereign Authority, compel the Women of his Country to accept of ſuch Husbands as have nothing in them to deſerve Affection, this would look like Inhumanity; eſpecially in caſe the Fortunes and Conditions of the Parties were unequal. The Speech of *Canuleius* in *Livy*, where, in the Name of the Populacy [1], he intreats the Senate, that they would allow them the Privilege of Marriage, a Favour granted to Foreigners, and to Neighbouring Nations; and that they would not exclude them from the Number of Mankind, does not belong to the Queſtion before us, although produced as an Inſtance by *Grotius*. For the *Plebeians* did not then feel a ſcarcity of Women, but the Aim and Deſign of this Petition was to raiſe themſelves to an equal Pitch with the *Nobility*, by Means of marrying into *Patrician* Families. Otherwiſe, when Women are plenty, there is no Occaſion of winning a Bride by main Force of Arms: *Invenies aliam, ſi te hæc faſtidit.* As for thoſe civil Laws which forbid Marriage with Foreigners, or between Subjects of different Ranks, they always preſuppoſe, that every one is able to find out a Match ſuitable to his Condition; and they are generally founded on ſuch Reaſons as theſe; that the Splendor of great Families may be preſerv'd; that our Women may more eaſily get Husbands at home, whilſt our Men are not allow'd to get Wives abroad; or that the [2] Riches and the Affections of our People, may not, by the Means of Inter-Marriages, be eſtrang'd from us, and ſettled on a foreign State.

XIV. Laſtly, *Grotius* adds, that any Right common to all, and, conſequently, an Obligation to a Duty to be perform'd towards all, ariſes from this *Suppoſition*, that we grant ſuch an Indulgence promiſcuouſly to every Stranger; becauſe then, if any one be excluded from the Privilege, he is manifeſtly *injur'd*. For it is an Affront and Reproach to debar a Man, without particular Reaſon, from a *common* Advantage; this being to make him unequal and inferior to others. Hence *Grotius* concludes, that if it be in any Place permitted to Strangers to hunt, to fiſh, to hawk, to gather Pearls, to receive Legacies, to ſell Goods, to contract Marriages (even without being compell'd to it by Scarcity of Women) no Nation can be denied the ſame Liberties, except they have forfeited them by their own Default. But this Aſſertion will ſcarce hold. For the Conceſſions here ſpoken of muſt be made either *expreſly*, or *tacitly*. When we grant a Thing *expreſly* to another, we do it either *precariouſly*, or in the Manner of a *Pact*, or *perfect Promiſe*. Now that any one ſhould give a *perfect* Right over a Thing of his (not due by the Law of Nature) to all Nations, known and unknown, without Limit or Reſtraint, is a Caſe, which, I believe, never did, nor never will happen. For every one is deſirous to know, at leaſt, on whom he beſtows his Benefit, and in what Meaſure. But when a Man, either by *Pact*, or *free Favour*, has granted ſuch a particular Privilege to all that come under his Friendſhip or Acquaintance, for a meer Stranger to pretend a Right to the ſame Indulgence, would be very impudent, and very wicked. As for thoſe Things which we permit *tacitly*, or, as it were, overlook, they are reckon'd of Courſe to be of the ſame Nature with precarious Favours; and ſuch may be fairly revok'd, either upon the Change of our Affairs and Circumſtances, or becauſe the Perſons who enjoy'd them did not make ſo prudent and modeſt a Uſe of them as they ought. *Bœcler. ad Grot.*

XV. What we have hitherto touch'd on, are but vulgar Degrees of *Humanity*, the Omiſſion of which implies a moſt baſe and abject Temper of Mind. A much higher, and more illuſtrious Strain of the ſame Duty, is when a Man, out of pure Benevolence and Inclination, ariſing either from a native Generouſneſs of Soul, or from Pity and Compaſſion to a Perſon in Diſtreſs, is at ſome Pains or Charge in beſtowing freely on another, what may relieve his Neceſſity, or procure his Advantage. Kindneſſes of this noble Rank are, by Way of Eminence, ſtiled *Benefits*; the Manner and Meaſure of diſpenſing which are commonly to be adjuſted with regard to the Condition of the *Giver*, and of the *Receiver*. And theſe are the Things which open to Mankind the largeſt Field of doing Good, and of acquiring Glory, if they are temper'd and regulated by true Prudence and Greatneſs of Mind. For to throw about Favours without Reaſon and Judgment, ought, as *Pliny* [3] obſerves, to be called Ambition or Oſtentation, or any Thing rather than Liberality. Wiſe Men have made it their chief Buſineſs to preſcribe Rules for the guiding and perfecting of theſe Obligations: And the ancient Books of Morality are not on any Subject more copious, or more clear. [4] *Tull.* Off. I. c. 14. *Beneficentia, qua nihil eſt naturæ humanæ accommodatius, multas habet cautiones*, &c. The Duties of Liberality or Bounty, than which there is nothing more agreeable to the Nature of Man, fall under many Limitations [5]. For in the firſt Place it ſhould be our Care to ſee that our Bounty prove not a Prejudice, either to the Perſon we would oblige, or to any other Body; and then that we do not give above our own Ability, nor above the

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[1] *Canuleius*'s Words are, *Connubium petimus, quod finitimis, externiſque dari ſolent —— ut hominum —— numero ſimus.* Liv. Dec. 1. Lib. 4. c. 3.

[2] This Clauſe, in Mr. *Hertius*'s Edition, with his Notes, is thus rendered, *Ne opes aut effectus noſtrorum in alias Civitates ſit Connubia transferantur*; whereas other Editions have it, as it ought to be, *affectus*. This renders it credible, that 'tis not a Fault in the Impreſſion, but, as *Hertius* remarks, by way of Supplement, a Thing omitted in the Author's Expreſſion. For Fear, (ſays he) a Citizen, by Favour of the Alliance and Riches of ſome powerful Stranger, ſhould exalt himſelf above others, or, on the contrary, for Fear a powerful Stranger ſhould make Uſe of his Alliance to a Citizen to become a Maſter of the State. So ſo *Ariſtotle* obſerved, that *Dionyſius* the Younger, having married a Woman of *Locris*, found a Way, by Means of that Alliance, to poſſeſs himſelf of the Government of that Republick, *Polit.* l. 5. c. 7. But all this is comprehended in the Word *affectus*, which is certainly that of our Author, for *effectus* here has no Meaning.

[3] *Ambitio enim, & jactantia, & effuſio, & quidvis potius, quam liberalitas exiſtimanda eſt, cui ratio non conſtat.* Plin. Paneg. *chap.* 38. *numb.* 4.

[4] See the Commentators upon theſe, and ſeveral other, Paſſages, where *Tully* treats of *Beneficence*. See *Marc. Antonin.* Lib. 5. c. 6. with *Gataker*'s Notes, and *Pliny* the Younger, *Lib.* 9. *c.* 30. But above all, I muſt commend to your Reading a little Book, wherein Mr. *Le Clerc* gives a fine Idea of Liberality, and wherein he ſhews, excellently well, the falſe Notions which Men ordinarily have of that excellent Virtue. 'Tis the 12th Chapter of his Book, which he entitles, *Reflections upon our good or ill Luck, as we commonly call it, in the Buſineſs of Lotteries.* A Work printed at *Amſterdam* in 1696.

[5] Under the Notion of *Beneficence* we may comprehend all the Services we do to others, in averting the Dangers they are threaten'd. 'Twas a Precept of the ancient *Gymnoſophiſts*, as appears from a Saying of *Charicles* in *Heliodorus*, which our Author cites above, Οὐδὲ γὰρ ἦν μοι θεμιτὸν ἐν κινδύνῳ ψυχὴν ἄπαξ ἐνανθρωπήσασαν παριδεῖν, ἐν γὰρ κῷ τοῦτο παράγγελμα τῶν γυμνοσοφῶν ἡμῖν σοφῶν. I muſt not leave my Soul, which is entred into an human Body, in Danger, as the *Gymnoſophiſts* inſtruct us, *Lib.* 2. *c.* 6. The Caſe related to a Child expoſed, which he ſaved.

Merit

Merit of the Receiver. As to this laſt Point, we are principally to regard thoſe, to whom we ourſelves already ſtand obliged, and then others, as they have more or leſs Need of our Aſſiſtance. We are, likewiſe, to conſider the ſeveral Degrees, by which we ſtand related in the World. Of theſe the firſt, and moſt extenſive, is the univerſal Society of Mankind. Nearer than this is the Alliance between Perſons of the ſame Nation, of the ſame Province, of the ſame Language, of the ſame City. There is yet a nearer Tye of Kindred. And here the firſt Society is in Wedlock, the next in Children; the Relation of Brothers comes afterwards, and then of Brothers and Siſters, Children and Men, the Matches and Alliances between different Families. But the moſt excellent and ſtrongeſt of all Alliances is, when good and virtuous Men join in Familiarity upon Account of the Agreement of their Manners.

Idem de Finib. l. v. c. 23. *In omni honeſto*, &c. *In all the Compaſs of Honeſty there is nothing ſo illuſtrious, or of ſo great a Latitude, as the Conjunction and Society of Men with Men, including a mutual Communication of Conveniences, and general Love for Mankind. This Dearneſs begins immediately upon one's Birth, when the Child is moſt affectionately beloved by the Parent; from the Family, it by Degrees ſteals abroad into Affinities, Friendſhips, Neighbourhoods; then amongſt Members of the ſame State, and amongſt States themſelves, united in Intereſts and Confederacies; and at length ſtretcheth itſelf to the whole Extent of human Race. In the Exerciſe of all theſe Duties, we are farther to obſerve what every Man hath moſt need of, and what, with our Help, he may, what, without our Help, he cannot attain; ſo that in ſome Caſes the Tye of Relation muſt yield to the Point of Time; and ſome Offices there are, which we would rather pay to one Relation than to another. Thus you ought ſooner to help a Neighbour in with his Harveſt, than either Brother, or a familiar Acquaintance; but, on the other Side, in a Suit at Law, you ought to defend your Brother, or your Friend, before your Neighbour.* See *Seneca*'s Treatiſe *of Benefits*, which it would be tedious here to abridge. *Plutarch* (in *Sympoſ.*) tells us, 'twas a Rule amongſt the *Pythagoreans*, not to take a Burthen from their Fellow, but to help him to bear it; and this they did to exclude all Idleneſs and Eaſe. Tho' St. *Paul* could have taught them a better Reaſon, 2 *Cor.* viii. 13. *Not that other Men be eaſed, and you burthen'd, but by an Equality*, &c.

Add *Ambroſ.* Offic. *l.* i. *c.* 30. and from him *Gratian* Diſt. lxxvi. *c.* 14, *&c.* & Cauſ. i. Queſt. 2. *Chap.* 6, 7. *Socrates* in *Xenophon* (A'πομν.) lays down this as a Rule in our Aſſiſtances, to our Friends or to Strangers, and in almoſt all the Concerns of Life, *To do according to our Ability* [1].

XVI. The Virtue anſwering to *Beneficence* in the Giver, is *Gratitude* in the Receiver, by which he demonſtrates, that the Kindneſs was acceptable to him, and, upon this Score, entertains a hearty Reſpect for the Author of it, ſeeking all Occaſions of making a Requital, as far as his Abilities [2] will give him Leave. For it is by no Means abſolutely neceſſary, that our Return ſhould be preciſely as much in Value, as the Courteſy amounts to; but good Will and earneſt Endeavour are frequently allow'd to ſatisfy an Obligation. Ovid. *de Ponto* l. iv. El. 8. ver. 37.

Sed qui, quam potuit, dat maxima, gratus abunde eſt;
Et finem pietas contigit illa ſuum.

He that repays to the Extent of Power,
Were not more grateful with the nobleſt Store.

The Reaſon of this Duty ceaſes, whenever we have a juſt Exception againſt the Donor, and are fully aſſured, that his Bounty was more in Pretence than in good Will [3]. But here wiſe Men give us an excellent Caution, that we ſhould not be too curious in enquiring upon what Grounds and Motives a Man has been our Benefactor; becauſe this Niceneſs of Examination will ever afford a Plea and a Colour to *Ingratitude*.

The more apt, in their own Nature, Benefits are to unite and to engage the Minds of Men, the more ſtrictly does Reaſon enjoin us to apply ourſelves with Vigour and Induſtry to a juſt Requital. When a Man has expreſs'd ſo much Dependance upon me, as to confer the *prior* Obligation, I am bound, at leaſt, not to ſuffer him to be the worſe for his Kindneſs; and I ought never to receive a good Turn, but with a Reſolution to hinder the Author, if poſſible, from repenting of what he has done. If, upon ſome particular Reaſon, we are unwilling to be obliged to a certain Perſon, in this Caſe it is lawful for us to refuſe the Benefits he offers. But then great Care muſt be taken to do this without giving the leaſt Suſpicion of Contempt; ſince otherwiſe, to reject a voluntary Favour [4], carries in it a manifeſt Affront.

Take away the Neceſſity of *returning* Kindneſſes, and no Man will ever begin them; for then it would plainly be acting againſt Reaſon, to part with our Bounty, whilſt we know it would be thrown away. And thus all Beneficence, all mutual Truſt and good Will, muſt be baniſh'd out of the World; there muſt be no ſuch Thing as free Help, or antecedent Merit, no Way of endearing or engaging one Man to another. *Comp. Hobbes de Cive*, c. iii. ſ. 8. *Ariſtot. ad Nicom.* l. ix. c. 2 [5]. It will hold good for the moſt part, that we are rather to return a Benefit, than to ſerve a Friend in the Way of Gratuity; as we ought likewiſe rather to pay a Debt, than give away our Money to our deareſt Confident. In general, what we owe of any Kind

[1] To theſe rare Paſſages of the Ancients, we may add a ſmall Sentence taken out of our Author himſelf, in his Abridgment of *the Duties of a Man and Citizen*, l. 1. c. 8. §. 5. The Manner of exerciſing *Beneficence* and *Liberality* much enhances the Value of Benefits, as when a Man does a good Office with an Air of Chearfulneſs and Briskneſs, and with all the Signs of a good Will.

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[5] *Ariſtotle* maintains, that as it is a greater Duty to reſtore what one has borrowed, than to lend to a Friend; ſo it is ordinarily to make an Acknowledgment of a Kindneſs, than to do one to a Friend; at leaſt there is a greater Reaſon drawn from Honeſty and Neceſſity, to engage us to the Duties of Gratitude, than Friendſhip, according to the Paſſage our Author quotes out of *Ariſtotle*, Καὶ τὰς μὲν ἐυεργεσίας ἀνταποδοτέον ἐπὶ τὸ πολὺ μᾶλλον, ἢ χαριστέον ἑταίροις, ᾧ ὅσπερ δάνειον, ᾧ ὀφείλει ἀποδοτέον μᾶλλον, ἢ ἑταίρῳ δοτέον — ἐὰν δὲ ὑπερτείνῃ ἡ δόσις τῷ καλῷ, ἢ τῷ ἀναγκαίῳ, πρὸς ταῦτ' ἀποκλιτέον.

On the other hand, ſhould a Prince, by Virtue of his ſovereign Authority, compel the Women of his Country to accept of ſuch Husbands as have nothing in them to deſerve Affection, this would look like Inhumanity; eſpecially in caſe the Fortunes and Conditions of the Parties were unequal. The Speech of *Canuleius* in *Livy*, where, in the Name of the Populacy [1], he intreats the Senate, that they would allow them the Privilege of Marriage, a Favour granted to Foreigners, and to Neighbouring Nations; and that they would not exclude them from the Number of Mankind, does not belong to the Queſtion before us, although produced as an Inſtance by *Grotius*. For the *Plebeians* did not then feel a ſcarcity of Women, but the Aim and Deſign of this Petition was to raiſe themſelves to an equal Pitch with the *Nobility*, by Means of marrying into *Patrician* Families. Otherwiſe, when Women are plenty, there is no Occaſion of winning a Bride by main Force of Arms: *Invenies aliam, ſi te hæc faſtidit.* As for thoſe civil Laws which forbid Marriage with Foreigners, or between Subjects of different Ranks, they always preſuppoſe, that every one is able to find out a Match ſuitable to his Condition; and they are generally founded on ſuch Reaſons as theſe; that the Splendor of great Families may be preſerv'd; that our Women may more eaſily get Husbands at home, whilſt our Men are not allow'd to get Wives abroad; or that the [2] Riches and the Affections of our People, may not, by the Means of Inter-Marriages, be eſtrang'd from us, and ſettled on a foreign State.

XIV. Laſtly, *Grotius* adds, that any Right common to all, and, conſequently, an Obligation to a Duty to be perform'd towards all, ariſes from this *Suppoſition*, that we grant ſuch an Indulgence promiſcuouſly to every Stranger; becauſe then, if any one be excluded from the Privilege, he is manifeſtly *injur'd*. For it is an Affront and Reproach to debar a Man, without particular Reaſon, from a *common* Advantage; this being to make him unequal and inferior to others. Hence *Grotius* concludes, that if it be in any Place permitted to Strangers to hunt, to fiſh, to hawk, to gather Pearls, to receive Legacies, to ſell Goods, to contract Marriages (even without being compell'd to it by Scarcity of Women) no Nation can be denied the ſame Liberties, except they have forfeited them by their own Default. But this Aſſertion will ſcarce hold. For the Conceſſions here ſpoken of muſt be made either *expreſly*, or *tacitly*. When we grant a Thing *expreſly* to another, we do it either *precarioufly*, or in the Manner of a *Pact*, or *perfect Promiſe*. Now that any one ſhould give a *perfect* Right over a Thing of his (not due by the Law of Nature) to all Nations, known and unknown, without Limit or Reſtraint, is a Caſe, which, I believe, never did, nor never will happen. For every one is deſirous to know, at leaſt, on whom he beſtows his Benefit, and in what Meaſure. But when a Man, either by *Pact*, or *free Favour*, has granted ſuch a particular Privilege to all that come under his Friendſhip or Acquaintance, for a meer Stranger to pretend a Right to the ſame Indulgence, would be very impudent, and very wicked. As for thoſe Things which we permit *tacitly*, or, as it were, overlook, they are reckon'd of Courſe to be of the ſame Nature with precarious Favours; and ſuch may be fairly revok'd, either upon the Change of our Affairs and Circumſtances, or becauſe the Perſons who enjoy'd them did not make ſo prudent and modeſt a Uſe of them as they ought. *Bæcler. ad Grot.*

XV. What we have hitherto touch'd on, are but vulgar Degrees of *Humanity*, the Omiſſion of which implies a moſt baſe and abject Temper of Mind. A much higher, and more illuſtrious Strain of the ſame Duty, is when a Man, out of pure Benevolence and Inclination, ariſing either from a native Generouſneſs of Soul, or from Pity and Compaſſion to a Perſon in Diſtreſs, is at ſome Pains or Charge in beſtowing freely on another, what may relieve his Neceſſity, or procure his Advantage. Kindneſſes of this noble Rank are, by Way of Eminence, ſtiled *Benefits*; the Manner and Meaſure of diſpenſing which are commonly to be adjuſted with regard to the Condition of the *Giver*, and of the *Receiver*. And theſe are the Things which open to Mankind the largeſt Field of doing Good, and of acquiring Glory, if they are temper'd and regulated by true Prudence and Greatneſs of Mind. For to throw about Favours without Reaſon and Judgment, ought, as *Pliny* [3] obſerves, to be called Ambition or Oſtentation, or any Thing rather than Liberality. Wiſe Men have made it their chief Buſineſs to preſcribe Rules for the guiding and perfecting of theſe Obligations: And the ancient Books of Morality are not on any Subject more copious, or more clear. [4] *Tull.* Off. I. c. 14. *Beneficentia, qua nihil eſt naturæ humanæ accommodatius, multas habet cautiones*, &c. The Duties of Liberality or Bounty, than which there is nothing more agreeable to the Nature of Man, fall under many Limitations [5]. For in the firſt Place it ſhould be our Care to ſee that our Bounty prove not a Prejudice, either to the Perſon we would oblige, or to any other Body; and then that we do not give above our own Ability, nor above the

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[1] *Canuleius*'s Words are, *Connubium petimus, quod finitimis, externiſque dari ſolent —— ut hominum —— numero ſimus.* Liv. Dec. 1. Lib. 4. c. 3.

[2] This Clauſe, in Mr. *Hertius*'s Edition, with his Notes, is thus rendered, *Ne opes aut effectus noſtrorum in alias Civitates ſe Connubia transferantur*; whereas other Editions have it, as it ought to be, *affectus*. This renders it credible, that 'tis not a Fault in the Impreſſion, but, as *Hertius* remarks, by way of Supplement, a Thing omitted in the Author's Expreſſion. For Fear, ſays he) a Citizen, by Favour of the Alliance and Riches of ſome powerful Stranger, ſhould exalt himſelf above others, or, on the contrary, for Fear a powerful Stranger ſhould make Uſe of his Alliance to a Citizen to become a Maſter of the State. So ſo *Ariſtot.* obſerved, that *Dionyſius* the Younger, having married a Woman of *Locris*, found a Way, by Means of that Alliance, to poſſeſs himſelf of the Government of that Republick, *Polit.* l. 5. c. 7. But all this is comprehended in the Word *affectus*, which is certainly that of our Author, for *effectus* here has no Meaning.

[3] *Ambitio enim, & jactantia, & effuſio, & quidvis potius, quam liberalitas exiſtimanda eſt, cui ratio non conſtat.* Plin. Paneg. *chap.* 38. *numb.* 4.

[4] See the Commentators upon theſe, and ſeveral other, Paſſages, where *Tully* treats of *Beneficence*. See *Marc. Antonin.* Lib. 5. c. 6. with *Gataker*'s Notes, and *Pliny* the Younger, *Lib.* 9. *c.* 30. But above all, I muſt commend to your Reading a little Book, wherein Mr. *Le Clerc* gives a fine Idea of Liberality, and wherein he ſhews, excellently well, the falſe Notions which Men ordinarily have of that excellent Virtue. 'Tis the 12th Chapter of his Book, which he entitles, *Reflections upon our good or ill Luck, as we commonly call it, in the Buſineſs of Lotteries.* A Work printed at *Amſterdam* in 1696.

[5] Under the Notion of *Beneficence* we may comprehend all the Services we do to others, in averting the Dangers they are threaten'd. 'Twas a Precept of the ancient *Gymnoſophiſts*, as appears from a Saying of *Charicles* in *Heliodorus*, which our Author cites above, Οὐδὲ γὰρ ἦν μοι θεμιτὸν ἐν κινδύνῳ ψυχὴν ἅπαξ ἐνανθρωπήσασαν παριδεῖν, ἐν γὰρ κ) τοῦτο παράγγελμα τῶν γυμνοσοφῶν ἡμῖν σοφῶν. I muſt not leave my Soul, which is entred into an human Body, in Danger, as the *Gymnoſophiſts* inſtruct us, *Lib.* 2. c. 6. The Caſe related to a Child expoſed, which he ſaved.

Merit

Merit of the Receiver. As to this laſt Point, we are principally to regard thoſe, to whom we ourſelves already ſtand obliged, and then others, as they have more or leſs Need of our Aſſiſtance. We are, likewiſe, to conſider the ſeveral Degrees, by which we ſtand related in the World. Of theſe the firſt, and moſt extenſive, is the univerſal Society of Mankind. Nearer than this is the Alliance between Perſons of the ſame Nation, of the ſame Province, of the ſame Language, of the ſame City. There is yet a nearer Tye of Kindred. And here the firſt Society is in Wedlock, the next in Children; the Relation of Brothers comes afterwards, and then of Brothers and Siſters, Children and Men, the Matches and Alliances between different Families. But the moſt excellent and ſtrongeſt of all Alliances is, when good and virtuous Men join in Familiarity upon Account of the Agreement of their Manners.

Idem de Finib. l. v. c. 23. *In omni honeſto*, &c. *In all the Compaſs of Honeſty there is nothing ſo illuſtrious, or of ſo great a Latitude, as the Conjunction and Society of Men with Men, including a mutual Communication of Conveniences, and general Love for Mankind. This Dearneſs begins immediately upon one's Birth, when the Child is moſt affectionately beloved by the Parent; from the Family, it by Degrees ſteals abroad into Affinities, Friendſhips, Neighbourhoods; then amongſt Members of the ſame State, and amongſt States themſelves, united in Intereſts and Confederacies; and at length ſtretcheth itſelf to the whole Extent of human Race. In the Exerciſe of all theſe Duties, we are farther to obſerve what every Man hath moſt need of, and what, with our Help, he may, what, without our Help, he cannot attain; ſo that in ſome Caſes the Tye of Relation muſt yield to the Point of Time; and ſome Offices there are, which we would rather pay to one Relation than to another. Thus you ought ſooner to help a Neighbour in with his Harveſt, than either Brother, or a familiar Acquaintance; but, on the other Side, in a Suit at Law, you ought to defend your Brother, or your Friend, before your Neighbour.* See *Seneca*'s Treatiſe *of Benefits*, which it would be tedious here to abridge. *Plutarch* (in *Sympoſ.*) tells us, 'twas a Rule amongſt the *Pythagoreans*, not to take a Burthen from their Fellow, but to help him to bear it; and this they did to exclude all Idleneſs and Eaſe. Tho' St. *Paul* could have taught them a better Reaſon, 2 *Cor.* viii. 13. *Not that other Men be eaſed, and you burthen'd, but by an Equality*, &c.

Add *Ambroſ.* Offic. *l.* i. *c.* 30. and from him *Gratian* Diſt. lxxvi. *c.* 14, *&c.* & Cauſ. i. Queſt. 2. *Chap.* 6, 7. *Socrates* in *Xenophon* (A'πομν.) lays down this as a Rule in our Aſſiſtances, to our Friends or to Strangers, and in almoſt all the Concerns of Life, *To do according to our Ability* [1].

XVI. The Virtue anſwering to *Beneficence* in the Giver, is *Gratitude* in the Receiver, by which he demonſtrates, that the Kindneſs was acceptable to him, and, upon this Score, entertains a hearty Reſpect for the Author of it, ſeeking all Occaſions of making a Requital, as far as his Abilities [2] will give him Leave. For it is by no Means abſolutely neceſſary, that our Return ſhould be preciſely as much in Value, as the Courteſy amounts to; but good Will and earneſt Endeavour are frequently allow'd to ſatisfy an Obligation. Ovid. *de Ponto* l. iv. El. 8. ver. 37.

Sed qui, quam potuit, dat maxima, gratus abunde eſt;
Et finem pietas contigit illa ſuum.

He that repays to the Extent of Power,
Were not more grateful with the nobleſt Store.

The Reaſon of this Duty ceaſes, whenever we have a juſt Exception againſt the Donor, and are fully aſſured, that his Bounty was more in Pretence than in good Will [3]. But here wiſe Men give us an excellent Caution, that we ſhould not be too curious in enquiring upon what Grounds and Motives a Man has been our Benefactor; becauſe this Niceneſs of Examination will ever afford a Plea and a Colour to *Ingratitude*.

The more apt, in their own Nature, Benefits are to unite and to engage the Minds of Men, the more ſtrictly does Reaſon enjoin us to apply ourſelves with Vigour and Induſtry to a juſt Requital. When a Man has expreſs'd ſo much Dependance upon me, as to confer the *prior* Obligation, I am bound, at leaſt, not to ſuffer him to be the worſe for his Kindneſs; and I ought never to receive a good Turn, but with a Reſolution to hinder the Author, if poſſible, from repenting of what he has done. If, upon ſome particular Reaſon, we are unwilling to be obliged to a certain Perſon, in this Caſe it is lawful for us to refuſe the Benefits he offers. But then great Care muſt be taken to do this without giving the leaſt Suſpicion of Contempt; ſince otherwiſe, to reject a voluntary Favour [4], carries in it a manifeſt Affront.

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is first to be made good; yet if a free Gift to another Person would at the same Time plead more Honesty, and more Necessity, it is then to have the Preference in our Disposal. Add *Socrates*, his Discourse of brotherly Love, in *Xenophon.* Ἀπομν. 2. [1] *Tully* is admirable on this Point of *Gratitude: It is*, says he, *of all Duties, the most indispensibly necessary. If* Hesiod *bids us* restore what we borrow, if we can, in a larger Measure; *what ought we to do, when we are as it were* challenged *by a* prior *Obligation? Are we not, in this Case, to imitate fruitful Fields, that still return more than they receiv'd? For if we make no Scruple to oblige those whom we hope to be the better for hereafter, how then should we behave ourselves towards such as we are the better for already? Since there are two Sorts of Liberality, the one of* bestowing *a Benefit, the other of* returning it; *it is at our Choice whether we will* give *or no; but an honest Man is not at Liberty in the Point of* returning, *provided it can be done without Injury.*

It is observable, that *Cicero* here makes *Gratitude* a Part of *Liberality*, and, consequently, hints, that it is not tied up to Laws altogether so strict as those of *Justice*, which commands us to repay what we owe upon Contract most punctually and precisely [a]. It may be remark'd farther, that when he says the former Kind of Liberality, the *bestowing* of Benefits *is in our Choice*, he ought not to be understood in an absolute Sense; for it is plain we are under some Obligation even to *antecedent Beneficence*: but the Point is, that this Obligation does not carry so much Strictness in it, as that which binds a Man to *Gratitude*; or to endeavour the approving himself by all good Will, and good Service to his Benefactors.

It happens, 'tis true, very frequently, that in the doing a Kindness there is more true Love on the Part of the *Giver*, than of the *Receiver*. The Reason of this is enquired into by *Aristotle* in his *Ethicks*, Book ix. c. 7. there being too much Ground in Fact for that politick Remark of *Tacitus*, *Beneficia eo usque læta sunt, dum videntur exsolvi posse; ubi multum antevenere, pro gratia odium redditur. An.* iv. 8. Add *Hobbes Leviathan*, c. 11, *&c.* Where he tells us, that the receiving great Benefits from a *Superior* inclines to *Love*, but the receiving of the like from *Equals* or *Inferiors* does not, unless there is Hope of being able to requite them. "Good Turns do so far yield an agreeable "Satisfaction, as we fancy ourselves able to repay "them; when they much exceed this Measure, "the Debt grows desperate, and so produces a "sullen and a secret Hatred, instead of a real "Kindness and Affection.

XVII. But tho' the bare Notion of *Ingratitude* does not imply a real *Injury*, inasmuch as it is not the Violation of any full and perfect *Right*, yet it passes in common Censure for a Vice more foul, more odious, and detestable, than *Injustice* itself: For it is look'd on as an Argument of a most abject and degenerate Soul, for a Man to declare himself unworthy of the fair Opinion which another entertain'd of his Honesty, to be Proof against [3] Benefits, and consequently past all Sense of Humanity [b].

The Account which *Des Cartes* (*in his Discourse of the Passions*, Artic. 194.) gives of Ingratitude, is very rational and very elegant. "It is "the Vice, *says he*, of Men, who are either madly "proud and vain, and so imagine every Thing to "be due to their Merit; or else senselessly stupid, "and so unable to reflect on the Benefits they re-"ceive; or, lastly, pitifully weak and abject, who, "when they feel their own Infirmity and Want, "sue, with the meanest Submission, for the As-"sistance of others; which, if they chance to ob-"tain, they immediately hate the Persons to whom "they have been obliged, because either wanting "*Will* to make Requital, or despairing of *Ability*, "and at the same Time fancying all the World to "be mercenary, and that no good Turn is done "without Hopes of Retribution; they apprehend "themselves to have exceedingly baulk'd and dis-"appointed their Benefactors [c].

Learned Men have disputed, whether or no there ought to lie an [4] *Action* against this *Vice*, in Courts of Civil Judicature. *Seneca* [d] takes the negative Side of the Question, and the Reasons he proceeds upon are chiefly these; "*First*, That if "a Benefit be strictly to be repaid like a Sum of "Money, or as if it were let out to him, it then "loses the [5] Name of a Kindness, and becomes a

[a] *Vid.* Ambros. *de Offic.* l. 1. c. 31. *Gell.* l. 1. c. 4.

[b] *Lucian* in *Antholog.* Φαύλῳ ἀνῇ, &c.

A thankless Wretch is like a broken Sieve,
Lets out, and loses faster than you give.

Add *Pherula*'s Judgment concerning the Nature of Man in *Xenophon.* Cyropæd. 8.

[c] *Sophocles Ajace.*

A Favour should be treasured in the Soul,
And made the Mother of a kind Return.

A Wretch that stifles Benefits bestow'd
Scarcely deserves the generous Name of *Man.*

[d] *De Benef.* l. 3. c. 6, *&c.*

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[1] His Words in the *Latin* are, *Nullum enim officium referenda gratia magis necessarium est. Quod si ea, quæ utenda acceperis majore mensura, si modo possis, jubet reddere Hesiodus, quidnam beneficio provocati facere debemus? An imitari agros fertiles, qui multò plus efferunt, quam acceperunt? Etenim si in eos quos speramus nobis profuturos, non dubitamus officia conferre, quales in eos esse debemus, qui jam profuerunt? Nam cum duo genera Liberalitatis sunt, unum dandi beneficii, alterum reddendi, demus, necne, in nostra potestate est; non reddere viro bono non licet, modò id facere possit sine injuria.* De Offic. l. 1. c. 15.

[2] The Reason that *Tully* gives, why we look upon Ingratitude as so heinous a Crime, is; *Omnes immemorem beneficii oderunt, eamque injuriam in deterrendo Liberalitate sibi etiam fieri, eumque qui faciat, communem hostem tenuiorum putant,* (i. e.) The Ungrateful are hated by all the World, for their Proceedings discourage them who are inclined to Liberality, which is an Injury that every Man shares in; insomuch that the ungrateful Man is accounted the common Enemy of all those who need Help from powerful Persons. *Cicer. de Offic.* l. 2. c. 18.

[3] Ὃν γὰρ τὸ χρηστὸν οὐκ ἐποίησεν ἥμερον
Τί δ' ἂν δράσειεν ἄλλο τῶν πάντων πότε;

If Benefits will not affect the Mind,
There's nothing in the World will make us kind. *Greg. Nazianz.*

Lucian, also, speaks to the same Purpose, as in (*b*). See also the Reflections which Mr. *De Evremont* makes upon ungrateful Persons, *Tom.* III. *p.* 79. and in his Miscellanies. Printed at *Amsterdam* 1706.

[4] This was practised heretofore not only among the *Persians*, (as appears from *Xenophon* Cyropæd. *Lib.* 1. *p.* 3. *Ælian. Hist. Animal.* l. 8. c. 3. & *Themistius Orat.* 22. *De Amicitia*) but, also, among the *Athenians.* For *Valerius Maximus* says, *In qua urbe* (*Athenis*) *adversus ingratos actio constituta est.* Lib. 5. c. 3. §. 3. *extern.* See also *Lib.* 2. *c.* 6. §. 6. & *Petit. de Legib. Athen.* Lib. 2. Tit. 6. & Lib. 7. Tit. 8. Which Passages Mr. *Bayle* did not remember, when he said, in his *Thoughts about a Comet*, That none but the *Medes* have made any Laws against ungrateful Persons, for which he quotes *Xenophon* and *Seneca de Beneficiis*, Lib. 3. c. 6. in which last the Editions read *Macedonum* for *Medorum*; about which, see *Muret. Var. Lect.* Lib. 12. c. 3. See also *Brisson. de Regn. Persarum*, Lib. 2. p. 198, 199.

[5] *Seneca*'s Words are these, *Primum omnium, pars optima beneficii periit, si actio, sicut certæ pecuniæ, aut ex conducto, aut locato datur.——Deinde, cum res honestissima sit referre gratiam, desinit esse honesta, si necessaria est.——Adjice nunc, quod huic uni legi omnia fora vix sufficient.* *De Benef.* Lib. 3. c. 7.

"Loan

" Loan or Debt. *Secondly*, That whereas the re-
" quiting of a good Turn is esteemed an Act high-
" ly *virtuous*, it must cease to be *virtuous*, were
" it once made *necessary*. *Thirdly*, That there must
" needs arise more *Causes* on this Head, than all
" the [1] Courts in the World would be sufficient to
" try, *Themist. Orat.* iii." By the *Persian* Constitution, there is a settled Penalty decreed against Ingratitude, as being the readiest Incentive to Hatred and Ill-will. And where this Vice is not punishable by Law, it produceth more desperate Enmity, and more fatal Contention. Add. *Xenophon* Cyrop. l. i. And *M. Antonin.* l. ix. c. 42. *& Val. Max.* l. ii. c. 6. s. 6, 7. *&* l. v. c. 3. s. 5. To these Instances and Arguments, other Authors have answer'd at large. See *Bæcler*'s *Actio Ingrati.* Our Design leads us no farther than to observe, that from every Transgression of the Law of *Nature*, it does not presently follow, that there must lie an *Action* (or the Resemblance of an *Action*) against a Man in *Nature's Court.* This is certain, that the Divine Justice hath reserved severe Punishments to be inflicted on ungrateful Persons in another Life; and in this present World they ought to suffer the Hatred and Detestation of all Mankind, and to be adjudged unworthy of the least Benefit or Favour. But why a Man cannot be sued in an *Action* at the *Civil Bar*, for *simple Ingratitude*, that is, forgetting a good Turn, or for neglecting to requite it when he had Opportunity, there seems to be this plain Reason, that the very Cause of my conferring the Kindness, (that is, of my giving somewhat without taking Security for its Return) was to afford the Party an Opportunity of shewing himself grateful out of pure Honesty, not out of Fear of Compulsion; and, on my own Part, to demonstrate, that what I bestow'd was not done out of a sordid Desire of Gain, but out of Humanity and good Nature, since I required no *Caution*, or Insurance of being repaid. *Antoninus* [2] will teach us better *Philosophy*. *When thou accusest a Man* (says he) *of Falseness or Unthankfulness; turn the Censure upon thyself. For the Fault is without doubt thine; that thou didst not confer the Favour freely and undesignedly, without looking for any farther Fruit than the Action itself. Is it not sufficient Satisfaction to have relieved and assisted one that is a Man as thou art? Dost thou demand a Reward for doing what thy Nature obliges thee to do?*

But when a Man is guilty of *mix'd Ingratitude*, or when he not only neglects to requite a Courtesy, but answers it with Injuries and Abuses; the Injury thus offer'd founds an *Action in Nature's Court*, or a *Cause of War*; and its being accompanied with an ungrateful Mind, as it highly aggravates the Fact, and renders it more vile and odious, so it engages the Sufferer more speedily to seek Redress, and to punish the Villain the more severely, in regard that Benefits themselves could not reclaim him [a].

[a] How far the Necessity of returning a Benefit is taken off by a subsequent Injury, *Seneca* teacheth us, *De Benef.* l. 6. c. 4, 5. & Epist. 81.

[1] In Effect, besides, that there is hardly any Man but complains, if he has been ungratefully dealt with, it is very hard to weigh exactly the Circumstances which increase or lessen the Value of any Benefit. See what *Seneca* says of this, and join the eighth Question of the *Essays of Jurisprudence*, written by the deceased M. *de Tournell.*

[2] Ὅταν (says *Antoninus* in the *Greek*) ὡς ἀπίστῳ ἢ ἀχαρίστῳ μέμφῃ, εἰς ἑαυτὸν ἐπιστρέφε, προδήλως γὰρ σὸν τὸ ἁμάρτημα. εἴτε περὶ τῦ τοιαύτην τὴν διάθεσιν ἔχοντ@ ἐπίστευσας, ὅτι τὴν πίστιν φυλάξει, εἴτε τὴν χάριν διδοὺς, μὴ καταληκτικῶς ἔδωκας, μηδὲ ὥστε ἐξ αὐτῆς σῆς πράξεως εὐθὺς ἀπειληφέναι πάντα τὸν καρπόν. Τί γὰρ πλέον θέλεις, ἐν ποίησας ἄνθρωπον; ἐκ ἀρκεῖ σοι; κατὰ φύσιν τὴν σὴν τ ἔπραξας; τέτυ μισθὸν ζητεῖς; ὡς εἰ ὁ ὀφθαλμὸς ἀμοιβὴν ἀπήτει, ὅτι βλέπειν, ἢ οἱ πόδες, ὅτι βαδίζυσιν ὥσπερ γὰρ ταῦτα πρὸς τόδε τι γέγονεν, ἅπερ κατὰ τὴν ἰδίαν καλασκευὴν ἐνεργῦντα ἀπέχει τὸ ἴδιον, ὕτως κ ὁ ἄνθρωπ@ εὐεργέτικ@ πέφυκὸς, ὁπόταν τι εὐεργέτικον, ἢ ἄλλως εἰς τὰ μέσα συνεργέτικον πράξῃ, πεποίηκε πρὸς ἀκαλασκέυασαι, κ ἔχει τὸ ἑαυτε, Lib. 9. §. 42.

CHAP. IV.

Of the Duty of keeping Faith, and the Diversity of Obligations to it.

The CONTENTS of every Paragraph of the fourth Chapter.

I. *There must be Covenants and Agreements in all human Societies.*
II. *Covenants are to be kept.*
III. *Obligations are natural, or adventitious.*
IV. *Atheism destroys all natural Obligations.*
V. *A natural, or civil Obligation.*
VI. *What is the Force of each of them.*
VII. *A perpetual and temporary Obligation.*
VIII. *Obligations not mutual.*
IX. *Obligations perfectly, or imperfectly, mutual.*

I. THE Duties hitherto explain'd, are mutually owing upon Account of that common Relation which *Nature has* established amongst Men, altho' we suppose no antecedent *Act* to have pass'd between them [1]. But it would be unreasonable to confine, within these narrow Limits, all the Offices that Men are to exercise towards each other: For, in the first Place, all are not of so good and honest Dispositions, as to perform every Thing whereby they can benefit their Neighbours, out of pure Humanity and Charity, without being secure of Retribution. And then many Things, which we should be glad to receive from others, are of such Value and Consequence, that we cannot, in Modesty, desire them *gratis*: Or, perhaps, it does not become our Fortune or Station to be *beholden* to another for such a Benefit. Therefore, unless an *Equivalent* be paid, commonly the other Party is unwilling to *give*, and frequently we are unwilling to *receive*. Again, *others* are many Times ignorant, how they might serve and oblige us. *Lastly*, Inasmuch as the Power of Man, being *finite*, cannot, in the same Manner, extend itself to all Persons, it is agreeable to Reason, that such Acts as are not already *bespoken* by an antecedent Obligation lying on us, should *be made sure* to those, who, by entring into Covenant with us, first obtain a Right to receive them [2].

[1] See *Chap.* 1. §. 1. *Note* 1. aforegoing, and *Chap.* 9. §. 8. with the Note on it.

[2] The Period, which is placed here, and is joined to the foregoing by the Word *denique*, finally, seems design'd for a new and the 3d Reason to prove the Necessity of voluntary Engagements. But, as any one may discern, that Period supposes a Necessity of such Engagements already establish'd; for it endeavours to shew the Right which an Agreement or Promise gives over the Actions of another; and so has bred Confusion in our Author's Work. This has proceeded evidently from the Negligence of our Author in inserting his Additions; for the Sentence, which causes this Disorder, is not found in the first Edition.

Therefore, that the true Fruits of a ſocial Nature, the *mutual Offices* of Mankind, might be practiſed with more Frequency, and more Regularity, it was neceſſary for Men to bargain, and agree amongſt themſelves, that they would perform to each other ſuch and ſuch Services, as they could not be abſolutely ſecure of by the bare *Law of Humanity*. So that their Buſineſs muſt be to ſettle beforehand what every Man ow'd to another, and what he ſhould, by virtue of his *Right*, accept and challenge in Return [1].

Hence it is eaſy to apprehend, how the Offices of Humanity, or Charity, differ from thoſe which are required by full and *proper Right*, and which are the Objects of *ſtrict Juſtice*. The former are not owing upon any Covenant, either *expreſs* or *implicit*; but purely by Force of that *common Obligation* which *Nature* has laid upon Mankind. But what I owe another upon *Pact*, or *Agreement*, I therefore owe him, becauſe he has obtain'd a *new Right*, holding good againſt me by virtue of my free Promiſe or Conſent. Farther, whatever I tranſact with another by Way of Covenant, is deſign'd not for his Profit, but for my own; whereas in Duties of Humanity the Caſe is quite otherwiſe. For, although the Performance of theſe be *in general neceſſary* for the rendering the Life of Man comfortable and commodious, and, conſequently, be an Advantage to the Performer, by giving him good Grounds to expect fair Treatment; yet, with regard to *particular* Acts of Kindneſs, a Man does them not for his own Sake, but for the Sake of the Party who receives them. For a *Benefit*, if conferr'd upon a Principle of *private Intereſt*, loſes its Nature and its Name.

Thus then the Duties of *Humanity*, or *Charity*, and thoſe ariſing from *Covenant*, do afford a mutual Aſſiſtance and Supply to each other; whilſt thoſe Things, which *Charity* either cannot or does not ordinarily procure, are obtain'd by *Pact*; and in Matters about which no *Pacts* have paſs'd, *Charity* comes in, and ſerves our Turn as well. And although, to fix the Subject, and the Conditions of Covenants, be left to the Pleaſure of particular Perſons; yet that there ſhall be ſome ſuch Agreements, the Law of Nature does (indefinitely, and in general) command; in as much as without theſe Tranſactions there would be no poſſible Means of preſerving Peace and Society in the World. So ſpeaks *Iſocrates adverſ. Callimach.* *So great is the Force of Leagues and Covenants, that ſcarce any Affairs, either of* Grecians *or* Barbarians, *are tranſacted in any other Manner. By Means of theſe, we traffick abroad, and bargain at home. By Means of theſe, we terminate private Diſſentions and publick Wars. Theſe we all make uſe of, as an univerſal Good to be enjoy'd in common by Mankind* [2].

II. When Men have once engaged themſelves by *Pacts*, their Nature obliges them, as ſociable Creatures, moſt religiouſly to obſerve and perform them. For were this Aſſurance wanting, Mankind would loſe a great Part of that common Advantage, which continually ariſes from the mutual Intercourſe of *good Turns*. *Ariſtot.* Rhet. l. I. c. 15. *Take away Covenants, and you diſable Men from being uſeful and aſſiſtant to each other* [3]. Tull. Off. l. II. c. 11. *So great is the Force of Juſtice, that even thoſe, who live by Outrage and Villany, cannot ſubſiſt without ſome Shadow and Semblance of this Virtue.* Which he ſhews in the Inſtances of Thieves and Pirates. Farther, were not Men more ſtrictly and neceſſarily tied to keeping their Promiſes, we could not, with any Certainty, build on the Aſſiſtance of others, in the ordinary Affairs of Life. And then *Breach of Faith* is the apteſt Thing in the World to found an endleſs Succeſſion of Quarrels and Complaints. For in Caſe I have actually perform'd my Part of the Contract, and the other Perſon fails, whatever I have *done* or *given*, is abſolutely *loſt*. And if I have not as yet proceeded to any actual Performance, it is however a Trouble, and, it may be, a Prejudice to me, to have the Courſe of my Deſigns and Buſineſs overturn'd; ſince I could have ſettled Things by other Ways and Meaſures, had not this Man offer'd to tranſact with me. And 'tis moſt unreaſonable, that I ſhould be expoſed to Scorn and Cenſure, for entertaining a kind Opinion of a Perſon's Goodneſs and Honeſty. We are therefore to eſteem it a moſt ſacred Command of the Law of Nature, and what guides and governs, not only the whole Method and Order, but the whole Grace and Ornament of human Life, *that every Man keep his Faith* [5], or, which amounts to the

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1 I have added the following Words to compleat our Author's Reaſoning, as he has done himſelf in his Abridgment of *the Duties of a Man and Citizen*, Lib. 1. c. 8. §. 2. *This is what is done by Agreements or Promiſes.* For though theſe Reaſons of our Author tend only to ſhew the Neceſſity of voluntary Engagements to produce new Obligations; yet they are ſtill very neceſſary, and that for three Reaſons, 1. To re-eſtabliſh Obligations that are interrupted or extinct. 2. To deliver us entirely from thoſe we lie under. 3. To enforce ſuch as are imperfect. See *Titius Obſerv.* 198. To which add my Note on the Abridgment of *The Duties of a Man and a Citizen*, Lib. I. Cap. IX. §. 2. laſt Edition.

2 *Iſocrates*'s Greek is this, Τὸ σάυτην δ' ἔχυσι δύναμιν [αἱ συνθήκαι] ὥϛε τὰ πλεῖϛα τῦ βίυ, κ) τοῖς Ἕλλησι, κ) τοῖς Βαρβάροις, διὰ συνθηκῶν εἶναι. ταύταις γὰρ πιϛεύοντες, ὡς ἀλλήλυς ἀφικνύμεθα, κ) πωριζόμεθα. ὧν ἕκασοι τυγχάνομεν δεόμενοι. μετὰ τύτων κ) τὰ πο- Ϭόλαια τὰ πρὸς ἡμὰς αὐτὺς ποιύμεθα, κ) τὰς ἰδίας ἔχθρας, κ) τὺς κοινὺς πολέμυς διαλυόμεθα, τύτῳ νόμῳ κοινῷ πάντες ἄνθρωποι διαλυμεν χρώμενοι.

3 The Greek of *Ariſtotle* is this, Ὥϛε ἀκύρων γιγνομένων [τῶν συνθηκῶν] ἀναιρεῖται ἡ πρὸς ἀλλήλυς χρεία τῶν ἀνθρώπων.

4 *Cicero*'s Words are, *Cujus* [*Juſtitiæ*] *tanta vis eſt, ut nec illi quidem, qui maleficio & ſcelere paſcuntur, poſſint ſine ulla particula Juſtitiæ vivere.* Conſult alſo *Plato* about this Matter, in a Paſſage which *Grævius* quotes, and *Simplicius* upon *Epictetus*, Chap. 58. near the End.

5 We muſt add, *Of what Condition or Religion ſoever he be, to whom we engage ourſelves for any Thing.* It is a Precept of the Scholars of *Zoroaſtres*, a Sort of Men in this not ſo looſe, and more honeſt, than many Chriſtians: *Cum quocunque feceris pactum, id ne frangas.*——*Nec putes tecum dicere, Quamvis pactum fregero, id tamen non erit mihi peccatum, & ſive ſit cum aliquo in Religione noſtra, ſive extra eam, res perinde eſt,* (i. e.) With whomſoever you make an Agreement, you muſt not break it—— Nor muſt you ſay with yourſelf, If I break my Agreement, I do not ſin, whether it be made with a Perſon of our own Religion, or not. In *Tho. Hyde de Relig. Vet. Perſarum, &c.* In *Sadder. Porta.* 28. See, alſo, the fine Thoughts of *Montaigne*, upon the indiſpenſible Neceſſity of keeping a Man's Word, *Lib.* 3. *c.* 9. The *Pythagoreans*, to accuſtom themſelves to keep their Words in Matters of Importance, ſhewed the greateſt Exactneſs in Things of a trifling Nature. And of this they tell a pleaſant Story. "One *Lyſis*, "a Philoſopher of that Sect, coming one Day out of *Juno*'s Temple, met one of his Fellow-Diſciples, named *Euryphamus*, going "into it, who deſired him to ſtay till he had paid his Devotions: Whereupon he ſets him down before the Temple; but *Eury-* "*phamus* having unhappily fallen into a deep Meditation, forgot his Promiſe, and departed at another Door. Nevertheleſs *Lyſis*, "without Diſcouragement, ſtaid patiently all that Day, the next Night, and good Part of the next Day, when being in their "School, and hearing ſome talking of *Lyſis*, as if they knew not what was become of him, he called to Mind what he had pro- "miſed, and went to relieve this ſcrupulous Obſerver of his Word. *Jambl. de Vita Pithag.* c. 30. §. 185. *Ed. Kuſt.* Doubtleſs this is an over-nice Exactneſs; but 'tis better to offend on this Side, than to ſuffer ourſelves to be guilty of the leaſt Negligence.

ſame

ſame, that he fulfil his Contracts [1], and diſcharges his Promiſes [a].

III. But in as much as Pacts or Covenants, thoſe eſpecially which are *expreſs*, impoſe an *Obligation* on us, which Nature did not before enjoin, at leaſt not in ſo preciſe and determinate a Manner; it may not be here inconvenient to run over the principal Kinds and Diviſions of *Obligations*. *Obligations* then, in the firſt Place, are diſtinguiſh'd into *connate* and *adventitious* [2]. *Vid.* Sander. *de Oblig. Jur. Prælect.* I. ſ. 11. The former are ſuch as all Men fall under by Virtue of their being Creatures endued with Reaſon, or ſuch as neceſſarily attend and accompany the rational Nature, conſider'd in that *ſimple* and general Notion. Altho', in regard that all Men are born Infants, and as yet incapable of the Exerciſe of Reaſon, theſe Obligations do, for ſome Time, lie without Act or Force; and do then at length exert their Power, and render Men capable of contracting Guilt, when the Underſtanding, improving by Age and Uſe, makes us ſenſible of them. And from this Period they date their Influence, and produce their penal Effects, ſhould a Man be never ſo negligent in weighing and conſidering their Authority. Therefore *Ignorance of the Law of Nature* is an inſufficient Plea, to excuſe a Perſon of mature Years; tho' he ſhould urge, that it never came into his Head to reflect whether this Law had ſettled ſuch a Point or not. *Adventitious* Obligations are ſuch as fall upon Men by the Intervention of ſome human Deed, not without the *Conſent* of the Parties, either *expreſs*, or at leaſt *preſumptive*.

IV. Amongſt *connate* Obligations, ſuch as are planted, as it were, in our *Being*, the moſt eminent is that which lies on all Men with reſpect to Almighty GOD, the ſupream Governor of the World; by Virtue of which, we are bound to adore his Majeſty, and to obey his Commandments and his Laws. Whoever wholly violates and breaks through this Obligation, ſtands guilty of the moſt heinous Charge of *Atheiſm*; becauſe he muſt, at the ſame Time, deny either the Exiſtence of God, or his Care of human Affairs. Which two Sins, with regard to their moral Conſequences and Effects, are equivalent to each other; and either of them overthrows all Religion, repreſenting it as a frightful Mockery, introduced to awe the ignorant Vulgar into ſome Decency and Duty [b]. Therefore we ought, in Juſtice, to diſcard and explode, as moſt foul and ſcandalous, that Notion of *Hobbes* [c], in which he would rank *Atheiſm* amongſt the Faults of Imprudence or Ignorance; as if it were not properly *Sin*, but a *Miſtake*, or *Folly*, more worthy of Pardon than of Puniſhment. The Argument he makes Uſe of runs thus, *The Atheiſt never ſubmitted his Will to the Will of God, in as much as he never believed there was ſuch a Being. But now it is impoſſible any one ſhould have a ſovereign Power over us, unleſs he obtain'd it by our Conſent. Therefore ſince the* Atheiſt *was never under the Kingdom of God, it follows that he is not obliged by the Laws of that Kingdom.* But here it is moſt groſly falſe, that all Sovereignty is conſtituted by the Conſent of the Subject; for this will hold only with regard to human Dominion; where, unleſs by our own Contract and Conſent, we cannot loſe the Power of reſiſting another, who is *by Nature* [3] *our Equal*. But who will pretend to aſſert, that GOD has not a Power of commanding his Creatures, unleſs they voluntarily agree to inveſt him with ſuch Authority? Nay, *Hobbes* [d] has ſufficiently confuted himſelf, by deducing the Right, which GOD has of ruling and of puniſhing in *his Kingdom of Nature*, from his *irreſiſtible Power*: But did any one ever imagine, that an *Atheiſt* was able to *reſiſt the Power of* GOD? And therefore *Atheiſts* are not, ſtrictly ſpeaking, GOD's *Enemies*, (as *Hobbes* defines Enemies, *who are neither under a common Sovereign, nor under each other*) but his rebellious Subjects, and conſequently guilty of *Treaſon* againſt the Divine Majeſty, as *Hobbes* himſelf has elſewhere [e] expreſly acknowledged. And agreeably to this he defines *Treaſon* againſt human Power to be: "When "one either, by Word or Deed, does in general ma- "nifeſt and declare, that he will no longer ſubmit "to that Man or Council of Men, in whom is "lodg'd the ſupream Adminiſtration of the State, or "when a Man wholly throws off the Bond of civil "Obedience." It is no ſuch obſcure Matter therefore to aſſign the particular Species of *Sin*, to which *Atheiſm* belongs. Nor is the following Aſſertion built on better Grounds, *That Atheiſts cannot be puniſhed any otherwiſe than by the Right of War*; as the Poets repreſent the Gods, routing by Force of Arms the old Giants that aſſaulted Heaven. On the contrary, that Evils inflicted in *martial* Encounters are not properly *Puniſhments*, we ſhall hereafter have Opportunity to ſhew. A *Sovereign* muſt not preſently be ſaid to make uſe of the *Right of War*, when he reclaims his refractory Subjects. For the bare *Right of Sovereignty* includes thus much, That the Perſon inveſted with it ſhall have the Power of reducing thoſe to Obedience by Force, who refuſe a voluntary Submiſſion. Much leſs are thoſe rebellious Oppoſers of lawful Authority to be accounted *juſt Enemies*, or ſuch as have a Right of making Reſiſtance.

It does not excuſe *Hobbes* to alledge that Paſſage of the *Pſalmiſt*, *The Fool hath ſaid in his Heart, There is no God*. As if there was any ſuch Nicety in the Scripture Language, to call thoſe only *Fools*, who ſin out of *Miſtake*, and not thoſe who offend *wilfully*: Or, as if this too were not the higheſt *Folly*, by a *wilful* Sin, to incur the moſt intolerable Torments, for the Sake of a very ſlender Pleaſure, or perhaps no Pleaſure at all. Again, it is by no Means a Matter of ſuch a Difficulty, to diſcover the Being of a GOD by natural Reaſon, as to *find out the Proportion between a Sphere and a Cylinder*; the Inſtance which *Hobbes* makes uſe of. It may not be indeed in the Power of every unlearned Perſon to form, or to apprehend, an artificial and philoſophical

[a] See *Dionyſ. Halicarn.* l. 2. where he tells the Story of the Conſecrating *Faith* amongſt the Goddeſſes by *Numa*. *Euripides* Heracl. ver. 890. Χρὴ ἀψευδὲς εἶναι τοῖῶι γενναίοις σόμα. Truth's the beſt Mark of Honour and of Race

[b] *Ambroſ.* Offic. l. 1. c. 26. Nothing hath more Influence in promoting an honeſt Life, than our Belief, That we have ſuch a Judge of our Actions, as no Secrecy can eſcape, no Indecency but will diſpleaſe, no good Performance but will delight. Add *Lactant. de Ira Dei*, c. 8. [c] *De Cive*, c. 14. ſ. 19. c. 15. ſ. 2. [d] C. 15. ſ. 5. [e] C. 15. ſ. 19.

[1] The Author begins here to diſtinguiſh between Agreements, or Contracts, and Promiſes; whereas, in other Places, he uſes the Word *Contract* in ſuch a general Senſe, as to comprehend Promiſes; becauſe in every Promiſe there muſt be an Acceptation which unites the Will of the two Parties, tho' there be no mutual Stipulation on the Part of him to whom we promiſe any Thing. But, to avoid all Ambiguity, and not confound Things without Neceſſity, I have uſed, as far as I could, the Word *Engagement*, which is general, and includes Promiſes as well as Conventions, properly ſo called, which the Author diſtinguiſhes by the Word *Pactum*.

[2] *Arrian*, in his Diſſertation on *Epictetus*, Lib. 3. c. 2. diſtinguiſhes alſo between Σχέσεις φυσικαὶ, καὶ ἐπίθετοι, Habitudes or Relations natural and impoſed. As for the reſt, I have uſed the Word *adventitious* in the ſame Senſe which I have fix'd to it, in tranſlating the *Status adventitius* of our Author. See Lib. I. Cap. I. §. 7.

[3] Compare here what our Author has already ſaid, Lib. I. Cap. VI. §. 10.

philoſophical Demonſtration of God's Exiſtence; but he cannot thence claim a Privilege of ſecurely doubting or denying it. For in as much as the whole Race of Men, in all Ages, have conſtantly held this Perſuaſion, whoever would attempt to aſſert the contrary, muſt, of Neceſſity, not only ſolidly confute all the Arguments produced on the other Side, but, alſo, alledge better and more plauſible Reaſons for his own particular Opinion. And farther, ſince the Safety and Happineſs of Mankind have been hitherto thought to depend chiefly on this Belief, it is requiſite, that he, likewiſe, prove *Atheiſm* to contribute more to the Intereſt and the Good of all Men, than the Acknowledgment of a Deity. Which being a Task manifeſtly impoſſible, the Atheiſts are to be judg'd Offenders, not only againſt the Divine Majeſty, but againſt all Mankind. And they deſerve the leſs Favour on this Account, becauſe theſe very Men, whó would reverſe the Judgment of all People and of all Ages, do arrogantly aſſume to themſelves a deeper Sagacity, and a clearer Light of Underſtanding than the World [1] was ever acquainted with before. And conſequently, tho' their Unbelief be indeed an Error, and a moſt fatal and deſtructive one, yet it is ſuch as they did not fall into thro' Imprudence or Simplicity, but by a vain and impudent Pretence of more than ordinary Degrees of Wiſdom [a].

It will be a very eaſy Labour to refute thoſe Arguments, which *Spinoſa* [b] has alledged in Defence of this Notion of *Hobbes*. The *Theſis* he lays down to work upon is this, *Every one who cannot govern himſelf by Reaſon, may by the higheſt Right of Nature live according to the Laws of his Appetite*. And foreſeeing is might be here objected, That the Aſſertion was contrary to the Reveal'd Law of God, he anſwers, That *a natural State is both in Nature and Time antecedent to Religion*; which, with Regard to *natural* Religion, is as abſolutely falſe, as what he ſubjoins, *That no Man knows by Nature any Obligation lying on him to obey GOD; and that no Reaſon can obtain this Knowledge, but ſuch as is confirm'd by the Signs of Revelation*. Therefore the Conſequence he draws is moſt abſurd, *That before Revelation, no Man was bound by any ſuch Divine Law, as it was impoſſible for him to be ignorant of*; and, That *a natural State is to be conceiv'd without Religion, or Law; and for that Reaſon without Sin, or Injury*. In all this he only ridiculouſly confounds the *natural* with the *poſitive* Divine Law. He proceeds to aſſert, That Man, conſider'd in a *State of Nature*, is free from all *Religion, not only upon Account of Ignorance, but by Virtue of that common Liberty, in which all are born. For*, ſays he, *if Men were by Nature bound to the Divine Law, or if the Divine Law were a Law by Nature, it would be ſuperfluous that GOD ſhould afterwards enter into a Contract with Men, and oblige them by Oath and Covenant*. Now it is clear that theſe Pacts or Covenants paſs between God and Men in *reveal'd Religion*, not in *natural*, to which a Man immediately ſtands obliged, upon Account of his being created by God a reaſonable Creature. So that *Spinoſa*'s Concluſion is moſt vain and ſenſeleſs, That *Divine Law began from that Time, when Men, by expreſs Compact, promiſed to obey GOD in all Things; by which Deed they receded, as it were, from their natural Liberty, and tranſferr'd their Right upon GOD, juſt as Sovereignty is confer'd in civil States*. For the Support of which Doctrine it is neceſſary to ſuppoſe, that Men, in a State of Nature, had not their Exiſtence from God Almighty.

From this Obligation, by which Men are bound to pay Obedience unto God, ſprings the Obliga-

[a] *Comp. Jean de Eſpagne de Erroribus Popularibus*, ſ. 1. c. 6. *Bacon* Eſſay 16. and Advancement of Learning, *l.* 3. *c.* 2. Add *Plato de L. L. L.* l. 9. near the End, where he diſtinguiſheth the ſeveral Kinds of *Atheiſts*, and directs with what Penalties they ought to be reſtrained. [b] *Tractat. Theolog. Politic.* c. 16.

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[1] Mr. *Bayle*, in his Thoughts about a Comet (*Art.* 177.) diſtinguiſhes between two Sorts of *Atheiſts*, the one which begins with Doubting, and the other who ends with it. Of the firſt Sort are ordinarily all thoſe who bear the Name of Learned; but falſely; and glory in their Reaſon, and their Contempt of bodily Pleaſure; the others are thoſe, whoſe Souls are ſullied with all Sorts of Vices, and capable of the greateſt Wickedneſs; who perceiving that the Fears of Hell cauſe them no ſmall Diſquiet, and imagining that 'tis their Intereſt there ſhould be no God, endeavour to perſuade themſelves that 'tis ſo. The laſt become *Atheiſts* becauſe they have been great Sinners, and are full of as much Malice as can croud into any Man's Soul. The firſt Sort are Infidels without Deſign, and moral good Men. Mr. *Bernard*, in his *News of the Republick of Learning, November* 1701, calls them both *Atheiſts by Reflection*; but he after diſtinguiſhes them thus, giving the Name of *Atheiſm in Fancy* to him who begins to doubt, and of *Atheiſm in Heart* to him who is paſt doubting. According to this Author 'tis undeniable, That there are *Atheiſts in Heart* in the World; for, ſays he, Perhaps, 'tis hard to maintain, that there are *mental Atheiſts* in the World, who are confirm'd in Atheiſm; but there are ſuch, perhaps, as labour under ſo many Scruples concerning the Being of a God, that they think it a Thing ſo very dubious, that they can have no Certainty of it, and come to have poſitive and confirm'd Doubts upon this Subject. But the ſame Author ſays, There are *Atheiſts without Reflection*, who believe no God, becauſe they have never thought of it, but being ſo wholly taken up with ſenſible Objects, it never came into their Minds to ſuſpect that there is any Thing in the World but what they ſee, never enquiring after the Principle of their Being. There is no Doubt but there are ſuch *Atheiſts* without treating as fabulous the Relations we have of the greateſt Part of the *Chineſe* and *Caffres*. In my Opinion, there is nothing more judicious than theſe Reflections, and this Syſtem of *the different Sorts of Atheiſts*. The Notions of our Author abovemention'd is not much different from the common Hypotheſis of Divines, who, with regard to common Experience, determine a Matter of Fact by metaphyſical Reaſons. I can't then but wonder, that he gives ſuch a careleſs Solution of the Queſtion, which he touches by the bye, *viz.* Whether Atheiſts ought to be puniſh'd? He maintains elſewhere (*viz.* in his Book, *Of the Duties of a Man and Citizen*) that they ought to ſuffer the moſt ſevere Puniſhments, *Graviſſimis pœnis eſt coercenda eorum impietas*. But on the contrary, Mr. *Titius* ſays, that ſuch Men ought not to be treated ſo ſeverely. For, ſays he, that Method of Puniſhment and Force is not proper to cure a Man of Atheiſm; the only Puniſhment of ſuch as are in Error, if they will not be inſtructed, is to leave them to God's Judgment, *Obſerv.* 95. on *Pufend.* For my Part, I profeſs, that if an Atheiſt makes an open Declaration of his Opinion, and labours to get himſelf Followers by miſleading ſuch weak Judgments as are not able to anſwer his Sophiſms and Subtilties, or by encouraging thoſe vitious Perſons, who are ready, thro' the Wickedneſs of their Hearts, to embrace his Tenets, ſuch a Perſon may, with as much Juſtice, be puniſhed, as he that teacheth others to thieve, murder, or cheat. In this Caſe our Author's Reaſons are very good: For thoſe who diſturb a Society, by endeavouring to deſtroy an Opinion ſo univerſally received, and which is look'd upon as one of the ſtrongeſt Props of it, deſerve as much to be treated as Criminals, as an Atheiſt, conſider'd as ſuch, for perplexing the common Belief of a God. Let him be content that he has found out the unhappy Secret of ſhaking off all Ties of Religion, and applauding his own Impiety, and not hope that others ſhould follow his Example, but be eaſy, that they reſolve to continue in the common Opinion for the Advantage of human Society, knowing how ſtrong Impreſſions the Fear of God has upon moſt Men. (See *Epictetus*'s Reaſoning againſt the *Epicureans*, *Arrian*. Lib. II. Cap. XX. and ſee the *Philoſophick Comment.* &c. *Tom.* II. *p.* 482, 483.) But if *Atheiſts*, whether *mental* or *practical*, do not pretend to propagate their Opinions, why ſhould they be puniſh'd purely as *Atheiſts?* The Nature and End of Puniſhments, as they are uſed in human Judicatures, do not, in my Judgment, require that they ſhould be uſed upon ſuch. Their Impiety will be ſufficient Puniſhment, if they continue in it to their Death; but 'tis poſſible they may ſee their Error, and, by Conſideration, remove the Sophiſms by which they are at preſent blinded. Theſe Arguments will have a ſtronger Force, as to *Atheiſts without Reflection*, and therefore need not be enlarged on here.

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tion of all *Men* towards all *Men, as ſuch*; by Virtue of which they are engaged to lead a *ſocial Life*. How this is to be diſcover'd, it has been formerly our Buſineſs to ſhew.

V. There is another famous Diviſion of *Obligation*, into *natural* and *civil*; but ſuch as is by different Authors differently ſtated [a]. *Grotius* obſerves, that the Lawyers ſometimes call a Thing of *natural Obligation*, the doing of which Nature ſhews to be good and honeſt, altho[1] it be not ſtrictly a Debt: As for an Executor to pay the entire Legacies, without reſerving to himſelf what the [1] *Falcidian* Law allows him; to requite [2] a Courteſy receiv'd; to pay Debts which the *Creditor* has in Law forfeited; or to the exacting of which the *Macedonian* Decree may be oppoſed [3]. When any Thing of this Kind is voluntarily paid [4], a Man cannot recover it again, on Pretence that it was not due [5], though he might at firſt have refus'd to pay it.

Sometimes we call that a *natural Obligation*, which truly binds us; whether it cauſe in the other Party a *perfect*, or whether only an *imperfect Right*. In like Manner, by a *civil Obligation* we ſometimes mean ſuch, as is void by the *Law of Nature*, but depends purely on a *civil Law*, of which the *Obligatio literarum* [6] (when a Man confeſſes a Debt in Writing, which he really never contracted) is commonly brought as an Inſtance; at other Times it ſignifies ſuch as is grounded on both *Laws*, *natural* and *civil*; or ſuch as will bear a good *Action* in Courts of civil Judicature.

Others, with more Clearneſs, aſſign three Species of *Obligation*, *purely natural*, *purely civil*, *and mix'd*. The firſt depends entirely on *natural Equity* [7], and in ſuch a Manner, as not to found an *Action* in civil Courts. The ſecond ariſes merely from the Force of *civil Law*, in the Strictneſs and Rigour of which it will bear an *Action*; though ſuch an [8] *Action* will

[a] L. 2. c. 14. f. 6.

[1] Which is the 4th Part of the Inheritance, which the *Roman* Laws aſſign the Heir; inſomuch that if the Legacies exceed this 4th Part, the Heir is not oblig'd to pay the Overplus. See the *Digeſts*, Lib. 35. Tit. 2. *ad Leg. Falcid.* and *Domat*'s *Civil Laws* in their Natural Order, *Part.* II. *Lib.* 4. *Tit.* 3.

[2] In this Example, and that of an Heir who pays the whole Legacy, without deducting the *Falcidium*, we may diſtinguiſh between *an Error of Fact*, and *an Error of Law*. A Man may be thought to have promiſed ſomething by way of Reward for a Benefit received, tho' he enter'd into no formal Engagement, or perhaps imagin'd that he really purchas'd the Thing given him: He is miſtaken in the Fact (and yet, according to *Grotius* and our Author, who make no Diſtinction between theſe two Kinds of Error) he cannot legally re-demand the Thing he has given through Miſtake, either as a Recompence or a Debt. But this is neither agreeable to the *Law of Nature*, (for Error can never render an imperfect Obligation perfect) nor to the *Roman Law*, as I have obſerv'd upon the Place of *Grotius*, Note 4. See alſo Mr. *Noodt* on the Title of the *Digeſt. De Condict. Indebit*, p. 299, *& ſeqq.* We may ſay the ſame Thing with regard to an Heir who pays the Legacy entire, under a miſtaken Notion that he has the fourth Part of the Inheritance remaining in his Hands, all the Lawyers agree in this Point, tho' otherwiſe much divided, with regard to the Effect of the *Error of Right*. Theſe are the plain Words of the Law: *Error facti quartæ ex cauſâ fideicommiſſi non retentæ repetitionem non impedit*, &c. *Cod.* Lib. VI. Tit. L. *Ad. Leg. Falcid.* For tho' the Queſtion is here about the *Trebellianic* fourth Part, yet, it may be applied to the *Falcidium*, where the ſame Reaſon takes Place, and which is the Subject of this *Title*. As to the Point of *Error of Right*, even thoſe who hold that it authorizes us to re-demand what is given, admit here an Exception with regard to the *Falcidium*, founded upon the ſame Law, where it is ſaid expreſly: *Quin etiam ſi jus ignoraverit, ceſſat repetitio.* Some alſo except the Caſe, in which, through Miſtake, we think ourſelves bound to Acknowledgment, without which we ſhould not have given. But it has never yet been ſufficiently proved, that both theſe Caſes are not agreeable to the general Rule of the *Roman* Law; and this Expedient was only contrived to illude the Force of the X Law of the *Cod.* Tit. *De Jur. & facti ignorant*; which forms, in this Caſe, an invincible Objection. For the ſame Reaſon the *Roman* Lawyers gave an equal Power to the *Error of Law*, and the *Error of Fact*, in the *Condictio indebiti* in general, only becauſe they were ſenſible that it was contrary to natural Equity, to give the one a greater Privilege than the other. But theſe great Men were no way infallible, and they were deceiv'd here by a Principle which has otherwiſe its Uſe, *viz. That every one may, and ought to know, what concerns his Right.* See Mr. *Noodt*'s Commentary, p. 298, 299.

[3] See the *Digeſts*, Lib. 14. Tit. 6. §. 4. See alſo the Interpreters of *Suetonius* in the Life of *Veſpaſian*, Chap. 11. and *Domat*'s civil Laws, Part I. Lib. I. Tit. VI. §. 4. But if the Heir, being deliver'd from his Father's Power, paid what he had borrow'd, he could not afterwards re-demand it, even though he knew he could not be oblig'd to pay. See Leg. IX. *in fin.* and *Leg.* X. D. *ibid.* and what I have ſaid, upon the Place of *Grotius*, where our Author relates this. There was alſo a Law like it among the *Lucanians*, Ἐάν τις ἀσὸτῳ δανείσας χρέος ἐλεγχθῇ, σέρεται αὐτῦ. If any ſhall lend Money to a Prodigal, he ſhall loſe it. *Nicol. Damaſcen. de Moribus Gent.* Our Author adds this, by way of Example, and 'tis certainly the ſame which *Grotius* had in his Thoughts, as appears by the parallel Laws he cites. *Gronovius* applies it in a Manner, which neither agrees with *Grotius*'s Sentiment, nor the *Roman* Law, from whence theſe Examples are drawn. He affirms that the Caſe in Queſtion here relates to Perſons proſcrib'd, or to thoſe who are ſubjected to the Puniſhment call'd *Interdictio aquâ & igni*. But as the Effects of ſuch were confiſcated, ſo that if you paid the Criminal the Debt, the Treaſury had ſtill the ſame Demand upon you; and as, moreover, the Criminal could not be ſummoned in any Court of Juſtice; it is evident that the Caſe of re-demanding a Thing, *as not due*, could not take Place here. The Debtor only chang'd his Creditor, and if he paid the Debt to him who had loſt his Right, he wilfully expos'd himſelf to pay twice over. We may only add here a Queſtion relating to another Caſe, *viz.* Whether, when the Debt was not apparent, it was better for the Debtor to pay to the Criminal than to the Treaſury? Upon which ſee what I ſhall ſay hereafter, Lib. IV. Cap. XIII. §. 5. To conclude, The *Macedonian* Edict, (ſo call'd from a certain Uſurer nam'd *Macedo*) forbad all Loans to a young Heir, under Penalty of loſing the Debt, becauſe the Creditor either had no Action in Juſtice, or could recover nothing.

[4] That is to ſay, without Conſtraint, but through Error. Nevertheleſs, Mr. *Hertius*, both here and in his Diſſertation of an Action for a Debt due naturally, but not by *human Laws*, which is in *Tom.* III. *of his ſmall Tracts and Comments*, criticiſes upon *Grotius* and our Author, as if they had ſpoken of a *Payment by Miſtake*. He muſt ſuppoſe that they had forgot the Principles of Law, and did not remember what the *Roman* Lawyers had laid down as an eſſential Condition of requiring again a Thing not due. He that pays a Thing which he knows not to be due, muſt be ſuppoſed to give it. *Et quidem, ſi quis indebitum ignorans ſolvit, per hanc actionem condicere poteſt, ſed ſi ſciens ſe non debere ſolvit, ceſſat Repetitio.* Digeſt. Lib. 12. Tit. 6. *De Condict. indeb. Leg.* 1. *Cujus per Errorem Dati repetitio eſt, ejus conſulto dati donatio eſt.* Lib. 50. Tit. 17. *De Diverſ. Reg. Jur. Leg.* 53. In effect, we ought the rather to be ſuppos'd to renounce this Right of re-demanding, as in ſtating a Debt we expreſs our Willingneſs that he, to whom we are Creditor, ſhould own his Acknowledgment.

[5] *Conditio indebiti* is a Right of requiring a Thing in Juſtice, which one has paid, but was not due. See *Digeſt.* Lib. 12. Tit. 6. But that ſuch a Right has no Place by the *Falcidian* Law, appears from theſe Words of the *Roman* Lawyers, *Solutum verò non repetitur.* Digeſt. Lib. 35. Tit. 2. Leg. 1. §. 17. As to the *Macedonian* Law, their Opinion is very plain, *Quanquam autem ſolvendo non repetant, quia naturalis obligatio manet.* Digeſt. Lib. 14. Tit. 6. Leg. 9. in the end, and 10.

[6] *Obligatio, quæ fit per literas*, or, as the *Roman* Lawyers call it, *Literarum Obligatio*, i. e. when a Perſon acknowledges in Writing the Receipt of a certain Sum, of which however he only had Part, notwithſtanding which he is obliged to repay the Whole, if he ſuffers two Years to paſs without re-demanding his Note, or taking up his Security. See *Inſtitut.* Lib. III. Tit. XXII. *De literar. Obligat.* with the Commentators upon it. As, alſo, our Author, Lib. V. Cap. II. §. 6.

[7] As for Example, If a Minor has borrow'd any Thing without the Conſent of his Guardian, the Creditor can demand nothing of him in Juſtice; but the Minor is ſtill oblig'd, by natural Right, or, in Conſcience, to pay what he has borrow'd. See *Chap.* 6. §. 4. *Note* 5. following.

[8] This appears by full Reſtitutions, but, in the main, this Obligation, being purely civil, comes to nothing, as the *Roman* Lawyers themſelves have acknowledged, ſaying, It matters not, if a Man has no Right, if it can be made void by an Exception. *Digeſt. De Diverſ. Reg Jur. Leg.* 112. See Mr. *Noodt. De Forma emendandi doli mali*, Chap. 5.

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always in Point of *Equity* be invalidated [1] by the Judge [2], as the *Obligatio literarum* before-mention'd. The third is such as is at the same Time supported by *natural Equity*, and confirm'd by the Authority of *civil Constitutions*. This is the Distinction commonly made by the Interpreters of the *Roman* Laws.

VI. This Division of Obligations into *natural* and *civil*, is a Subject which we ought to insist farther on in our present Enquiry; yet not so much to derive thence the *Original* of such Ties, but the *Efficacy* or Force, which they bear in common Life. So that by *natural Obligation* we mean such as binds us only by Virtue of the *Law* of *Nature*; and by *civil Obligation*, such as is supported and assisted by *civil Laws* and *civil Power*. The Efficacy of both is consider'd with Regard either to the *Subject*, the Person in whom the Obligation inheres; or the *Object*, the Person in whom it terminates, or to whom it is directed. In the first Respect, the Efficacy or Virtue of *natural Obligation* chiefly consists in this, That it binds a Man's Conscience; or that every Person, at the same Time when he fails of performing it, is sensible that he has displeased Almighty God; to whose Mercy as he owes his Being, so he knows he ought to pay all possible Obedience to his Laws. And altho' we cannot indeed, in the *Law of Nature*, discover any precise and determinate *penal Sanctions*, yet we ought, on all Accounts, to acknowledge, that it is enforced by some such due Fruits and Consequences; and that the Author of Nature will infallibly inflict great Evils on those who violate this *Obligation*, which the just Performers of it shall as infallibly escape. For the Truth of which Belief, amongst many Arguments, one very considerable Presumption is that Remorse of Conscience, which attends the Actors of Wickedness, even whilst they are in fair Hopes of escaping human Discovery, and human Punishment. A Disquiet, which no good and wise Man can imagine to proceed from bare Simplicity, from Custom, or from Fear of secular Justice; but from a much higher Principle, a Sense of God's Sovereignty, and a Dread of his Vengeance. *Cicero pro S. Roscio*, c. 24. *Every Man that is dishoneſt, lives in a perpetual Fright, every Man's Wickedness haunts him, his Folly and his Madness disturb him; his evil Thoughts and guilty Conscience terrify and distract him. These are the constant and the domestick Furies, which plague and torture the impious.* Add *Selden. de J. N. & G.* l. 1. c. 4. p. 37, *&c.* Nor can I believe that any Man, by flying to the impious Refuge of *Atheism*, ever found there so good Security against these Terrors, but that his wicked Mind would frequently recoil, and shake him with more Violence than before. And we have scarce had an Instance of any such bold Defier of Heaven, who has not, at length, been driven into a Consternation by his own Crimes, and turn'd a Penitent in Horror, according to that of *Horace* [a] [3].

Although to bind the Consciences of Men, be principally the Effect of *natural Obligation*, yet the same Power is communicated to *civil Obligation*, provided the Object of the latter be not repugnant to the former. And therefore *civil Laws*, also, bind the Conscience, so far as they are consistent with the *Law of Nature*. Both *Obligations* farther agree in this Respect, that the Duties they enjoin, a Man ought to perform voluntarily, and, as it were, upon his own internal Motion.

And it is this which makes the chief Difference between *Obligation* and *Compulsion*; by the latter, the Mind is, by external Violence, driven upon a Thing contrary to its inward Inclinations; but whatever we perform on the former Account, is supposed to be done upon the Approbation of our own Judgment, and the hearty Disposition of our Will.

If we consider these *Obligations* again, as they regard the *Object*, or as they produce some Effect in the Person, to whom, by Virtue of them, something is due, they have this Force common to both, That what being thus due, is paid or perform'd, may be fairly accepted and possessed. But when the other Party neglects or refuses to make good his *Obligation*, there is then a Difference in the Manner of compelling him, between the *natural* and the *civil Obligation*, or between those who live in a *State of Nature*, and those who are settled under a *Polity*, or *Government*. To those who live in their *natural Liberty*, the Precepts of the *Law* of *Nature*, being of two Kinds, do cause the same Distinction in the *Obligation* to perform them. Those Things which *Nature* enjoins one Man to pay to another, without any antecedent *Pact*, as are the Offices of Charity and Humanity, we cannot challenge any otherwise, than by gentle and easy Methods; as by persuading, admonishing, desiring, or entreating. But we must not apply *Force* to the most obstinate Refuser; unless in Case of extream Necessity [4]. The Reason of which Proceeding seems to be this, That human Society cannot be preserv'd in a very easy or peaceful Con-

[a] Hor. l. 1. Od. 34.

Parcus Deorum Cultor, & infrequens
Insanientis dum Sapientiæ
Consultus erro: Nunc retrorsum
Vela dare, atque iterare cursus
Cogor relictos.

These Words of *Horace* our Author uses here without attending, as Mr. *Dacier* very well observes, that the Poet speaks there ironically.

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[1] The Right of the *Prætor* (*Jus prætorium*) makes a considerable Part of the *Roman* Law, and derives its Origin from the annual *Decrees* publish'd by each *Prætor*, who, as every one knows, was a Magistrate invested with the Civil Jurisdiction of the City for one Year only. These Decrees (by which he explain'd, corrected, or supply'd what was obscure or defective in the written Law, or establish'd Customs) could not but vary very much, nor did they acquire the Force of a Law, till *Julius Salvianus*, by Order of the Emperor *Adrian*, compos'd out of them *one perpetual Edict*. This Collection, since that Time, acquir'd the same Authority with the other Parts of the *Roman* Law, from which it, nevertheless, remain'd distinguish'd, both by its Effects, and by the Name of *Prætorian*, which was oppos'd to the *Civil Law*. For by this latter the *Romans* understood, 1. *The Laws*, properly so call'd, which had been establish'd on the Proposition of their *Consuls*, or some other Magistrate of the Senatorial Order. 2. The *Plebiscita*, or Decrees of the People, made in their own Assemblies. 3. The *Sanatus-consulta*, or Edicts of the Senate alone. 4. *Custom*, which had of itself the Force of a Law. 5. The *Decisions* of their *Lawyers*, founded upon Custom. 6. The *Constitutions* of their Princes or Emperors. See the Commentators upon this Subject, especially Mr. *Noodt*, and Mr. *Schulting*, *in Ff. Dig. De Orig. Juris*; and the *Interpretationes Juſ. Civ.* of *M. Averani*, Lib. I. Cap. VI.

[2] See the *Institut.* Lib. 4. Tit 13. §. 9. De *Exceptionibus*. These Exceptions did not all proceed from the Edict of the *Prætor*, as appears by the Example of *Macedonian Senatus-consultum* cited above, and by the 7. Title of the Institutes.

[3] Is the same with [a] above.

[4] See Lib. 1. c. 7. §. 8. and Lib. 2. c. 6. §. 5. aforegoing.

dition,

dition, without the conferring of thoſe mutual good Offices; and therefore Nature ſeems to have ſet them aſide, as conſtant Subjects of exerciſing Mens particular Benevolence, by Means of which they might win on the good Opinions and the Affections of each other. And now it is clear that thoſe Things which may be recovered by Force, are not ſo apt to procure the Favour, or to unite the Minds of Men, as thoſe which we give only upon our own free Motion, and which we might deny without Fear or Danger. But what is due to us, upon an intervening *Pact*, if not voluntarily tender'd, we may procure by *forcible* Means. As we may, likewiſe, defend by *Force*, our juſt Poſſeſſions and Goods, when an Attempt is made upon them by any injurious Aſſailant. *Civil Obligations*, or ſuch as have been confirm'd by the Authority of *civil Laws*, create an *Action* in Courts of *Juſtice*, by virtue of which I am to carry the Defailant before the Magiſtrate, who has a Power of compelling him to the Performonce of his Duty. But even in *States*, *Obligations* purely *natural*, or ſuch as have been enforc'd by the Sanction of *civil Laws*, are left wholly to the common Modeſty and Conſcience of Men, and to their juſt Dread of a Divine Sovereign and Judge; and the Subject ought not, by a Courſe of Violence, to be brought to the Obſervance of them.

What *Obligations* ought to be confirm'd by *civil Ordinances*, it is the Buſineſs of *Legiſlators* to determine; and they are to meaſure their Expediency and Uſe, according as they ſeem likely to contribute to the inward Happineſs, and Tranquillity of the State [1]. As it would be ridiculouſly troubleſome, to diſturb the Judge on every *petit* Account, ſo it would be an Error on the other hand, to imitate the Cuſtom of the *Seres*, (in *Strabo* l. 15.) who [2], he tells us, had no Hearings in Court, but upon Murder, or Scandal; theſe being ſuch Miſchiefs as the Sufferer could not prevent, whereas it is in every Man's Power not to be cheated in a Bargain, only by conſidering well whom he truſts. Much to the ſame Purpoſe, is what he reports of the *Indians*, That they have no Action at Law upon Matters of Faith and Truſt, nor do they make uſe of Witneſſes, or Seals, but believe each other on their bare Words. *Comp.* Ælian. *V. H.* l. iv. c. 1. *Add.* Senec. *de Benef.* l. iii. c. 15.

VII. Obligation may again be divided into *perpetual* and *temporary*. The former is that which cannot be taken off ſo long as the Perſon exiſts, in whom it inheres. Such is our *connate Obligation* towards God; which, even with reſpect to the Exerciſe, can at no Time be ſuſpended or diminiſh'd. Such, likewiſe, is the *connate Obligation* of all Men towards all, as Partners of the ſame Nature, which no Perſon can throw off, ſo long as he makes a Part of Mankind; yet the Exerciſe of it may ſometimes, with regard to ſome particular Perſons, be ſuſpended. And this happens, when I devolve into a *State of War* with another. For the *Obligation* being *reciprocal*, in caſe one Party break it, and return Hoſtilities for the good Offices of Humanity, the other Party is no longer bound to deal with him in a friendly Manner; but may maintain his own Safety, and his own Rights, although with the Hurt of the unjuſt Oppoſer. Yet the ſame *Obligation* may ſtill be ſaid to remain *perpetual* in this Reſpect, That as ſoon as our own Safety is provided for, and enſured, we ought to be ready to renew the Peace, and to return to the Exerciſe of all Courteſy and Humanity, towards the Party who began the Contention. Amongſt *adventitious Obligations* we commonly reckon *perpetual*, the *Obligation* of Children towards their Parents, and that which paſſes between Husband and Wife; which ſhall elſewhere be explain'd at large [3].

Temporal Obligations are ſuch as may ceaſe and be cancell'd, whilſt the Perſons, in whom they inhere, do yet exiſt in the World.

VIII. Farther, ſince it generally happens, that *Obligations* anſwer one another, it may be uſeful to divide them into *mutual*, and *not mutual*. An *Obligation not mutual* is, when one Party ſtands bound to perform ſomewhat towards another; yet ſo that the other Party ſhall lie under no correſponding *Obligation*, nor be tied to make equivalent Requital. Such is the *Obligation* of Men towards GOD, by which they are engaged to pay him abſolute Obedience; but he, on his Part, is not conſtrain'd, by Virtue of any ſuch external *Obligation* [4], to make any Return for their Obedience. Amongſt thoſe *Obligations*, where both Parties are Men, (if we except a few Contracts, binding only one Side) there are none to be met with of this Sort. And the Reaſon is, becauſe it ſeems repugnant to the *natural Equality* of Men, that one Perſon ſhould be bound to another, and the other Perſon lie under no Engagement towards him. For we cannot [5] apprehend them to be ſociable Creatures, who are not united by a common Tie, who have not a mutual Communication of Services; but of whom one ſeems to be made, as it were, for the Sake of the other, and the other is not bound in Return to contribute any Thing towards his Intereſt or Happineſs. Nor, when Men by political Inſtitutions introduced a State of Inequality, was it in their Power, to inveſt any Perſon with ſuch an extraordinary and tranſcendent *Right*, as ſhould diſengage him from all Obligation and Duty towards other Mortals [6].

IX. *Mutual Obligations* are ſuch as anſwer to one another; ſo that the Party who on the one hand receives a *Due*, on the other hand is bound to repay it [7]. Theſe again are ſubdivided into *imperfectly mutual*, and *perfectly mutual*. The former are ſuch as anſwer unequally, one of them being oppos'd to another, which is either different in Kind, or in Virtue and Efficacy. This ſeems to happen chiefly on Account of one of theſe two Reaſons, either that the Perſons are unequal, one having a Right of commanding, the other a Neceſſity of

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[1] See Lib. 8. c. 1. §. 1.
[2] See Lib. 5. Chap. 2. §. 3. where the Author recites the ſame Thing.
[3] See Lib. 6. c. 1, and 2.
[4] Our Author expreſſes himſelf thus by way of Oppoſition to that which the Attributes of God requires of him. See Lib. 2. c. 1. §. 3. and c. 3 §. 5. aforegoing.
[5] This Period, not containing, at leaſt directly, a Reaſon of what the Author was ſpeaking of before, I ſuſpect that the Word *enim* has crept into the Text inſtead of *etiam*, either through the Careleſneſs of the Author or Printers; altho' it is found in the laſt Edition of 1706, of which Mr. *Hertius* had the Overſight.
[6] We can't maintain this, without encroaching upon the Prerogative of God, who impoſes theſe Duties on Men by the Conſtitution of their Nature. This we ought nicely to obſerve, that we may underſtand the juſt Extent of the Rights of the Sovereign, which are founded upon the Power which every Man can and is willing to grant to him over himſelf. See my Notes on Lib. 7. c. 8. following.
[7] See Lib. 5. c. 2. §. 5. following.

obeying; or becauſe Perſons, in other Reſpects equal, as to ſome particular Buſineſs, refuſe to receive an *Obligation* of the ſame Strictneſs on both Sides. For it is clear that *Obligations* do thus differ in Force, or Efficacy, ſome producing a *perfect Right* in the Perſon towards whom they are directed; ſo as to found an *Action* in human Cogniſance, to be proſecuted either by War, or before the Judge, according as the Parties live, either in a State of Nature, or under a Form of civil Government; whereas others produce only an *imperfect Right*; ſo that the Performance of them ought not to be extorted by Violence. From the former of theſe Cauſes ariſe the *Obligations imperfectly mutual*, betwixt Princes and Subjects, betwixt States and particular Members, betwixt Maſters and Servants, Parents and Children; all which will be examined in their proper Places. The latter Cauſe of making *Obligations imperfectly mutual*, chiefly happen in Caſes of *gratuitous Promiſes*, and the Performances of them. For whilſt I promiſe any Thing to another out of free Favour, I perfectly oblige *myſelf* to give it, and the other Party has a Right of requiring it from me. But becauſe I did not engage him to pay me an Equivalent, he is bound to me only by the Law of *Gratitude*, which ties him much more looſly than if he were my Debtor upon *Pact*. For we cannot on ſuch unlimited *Obligation* build our Hopes or our Affairs, and therefore ſhould the Party prove ungrateful in the higheſt Degree, we do not reckon ourſelves properly to have receiv'd any Loſs or Prejudice: For 'tis a Miſtake in ſome Authors to aſſert, "That Nature gives us a *perfect Right* to claim a "Return of our Benefit, from an ungrateful Perſon [1]; though in moſt Commonwealths, the "Courts of Law refuſe to admit an Action on that "Score." Nor is this a good Conſequence, *The Neceſſity of returning a Kindneſs is greater than that of giving one; therefore the latter is founded upon an imperfect Right, the other upon a perfect.*

For, however the Caſe may ſtand before, yet when I have once promis'd to do a Favour, there lies a greater *Neceſſity* on me to perform it, than on the other Party to return it [2]. For there may be different Degrees in *Obligations* of the ſame kind; eſpecially when we are to compare ſuch Duties as concur in Point of Time [3].

[a] *Comp.* Bœcler. ad Grot. *l.* 1. *c.* 1. *ſ.* 4. See what ſhall be ſaid hereafter in *Lib.* 5. *c.* 12. *ſ.* 23.

[1] See c. 3. §. 17. aforegoing.

[2] To perfect the Reaſoning of our Author, we muſt remember, that the Foundation of the Difference between perfect and imperfect Right, ariſeth from the neceſſary or unneceſſary Influence that a Thing hath in eſtabliſhing Peace and Society among Men, and not ſimply the Degree of Obligation under which we lie, with regard to the Thing. So that though we are more indiſpenſibly obliged to the Duties of Gratitude than thoſe of ſimple Beneficence, the firſt ought not to authorize us to uſe Force or Juſtice to make us perform them, rather than the laſt; becauſe neither of them are of that Nature, that the Continuance of Peace or Society doth neceſſarily require their Practice. There are even Caſes in which the Duties of Gratitude ought to give Place to thoſe of Beneficence, as when a Benefactor may want, or at leaſt ſpare, without any great Loſs or Trouble, a Thing of which another Perſon has great Need.

[3] See my Notes on *Lib.* 5. *c.* 12. §. 23. following.

CHAP. V.

Of the Nature of Promiſes, and Pacts, or Covenants, in general.

The CONTENTS of every Paragraph of the fifth Chapter.

I. *Whence adventitious Obligations ariſe.*
II. *What is Mr.* Hobbes's *transferring of Right.*
III. *No Man has a Right to all Things, as Mr.* Hobbes *aſſerteth.*
IV. *In what a transferring of Right conſiſts.*
V. *A meer Aſſertion doth not oblige.*
VI. *An imperfect Promiſe obligeth, but does not give another a Right.*
VII. *A perfect Promiſe.*
VIII. *Promiſes in the future Tenſe give no Right.*
IX, X, XI. *Whether there be a Power of obliging in bare Pacts or Covenants.*

I. IT now follows in Courſe, that we enquire how ſuch *Obligations*, as are not *born* with Men, ſhould, by Virtue of ſome Act of theirs, be laid upon them, by which Means there ariſes, at the ſame Time, in other Perſons a *Right* which before they wanted. For theſe two moral Qualities have ſuch a mutual Relation and Dependance, that whenever there is produced an *Obligation* in one Man, there immediately ſprings up a correſpondent *Right* in another; for 'tis impoſſible to apprehend that I am *bound* to any Performance, unleſs there be ſome Perſon in the World, who can either fairly require it, or, at leaſt, fairly receive it of me. Tho' the Remark will not hold *vice verſa*, that where-ever there is a *Right* in one, there muſt preſently be an *Obligation* in another. For Example, the Magiſtrate has a *Right* of requiring Puniſhment for Crimes; but ſuch a *Right* as is attended with no *Obligation* in the Criminal [1] [a]. Unleſs we ſolve the Doubt by this Diſtinction, That if we

[a] 'Tis true, Puniſhments are not due to Criminals by virtue of any Compact; but ſince the Right of Life and Death, or the Right of the Sword is conferr'd upon Sovereigns, we are obliged not to reſiſt 'em when they make Uſe of that Right, tho' it be upon our own Perſons. See Mr. *Barbeyrac*'s *French* Tranſlation of this Book, *Lib.* 8. *c.* 3. *ſ.* 4. and *ſ.* 5.

[1] This is not abſolutely true. See my Notes on *Lib.* 8. *c.* 3. §. 4, 5. But Mr. *Thomaſius*, to ſhew that Right and Obligation do not always anſwer to each other, alledges the Example of two Perſons, who, in a Shipwreck, getting upon one Plank, which was ſo ſmall that it could not ſave them both, had each of them a Right to thruſt off his Companion, and, conſequently, there was no mutual Obligation on either Side. *Fundam. Jur. Nat. & Gent.* Lib. 3. *c.* 7. §. 10. But this only proves, that there may be Caſes where one Man's Right becomes uſeleſs by the Oppoſition of an equal Right in another Perſon. In like Manner, certain Duties ſo claſh ſometimes, that one of them muſt give Place in certain Circumſtances, without being leſs obligatory in general. In the Example of the Plank, we muſt ſuppoſe, as I have ſaid elſewhere, that it belong'd no more to the one than to the other, and neither of them was the firſt Poſſeſſor. For then the Right of Property, or that of the firſt Occupier, would lay an Obligation of giving Place to him for whom any of theſe Titles could be alledged. But every other Perſon, who ſhould find himſelf in the ſame Circumſtance, even were it the Owner of the Plank himſelf, might lawfully hinder him from uſing that Inſtrument to ſave his Life, which Providence had furniſh'd him with; ſo far is it from this, that he ought to help us, if he can, to ſeize it. Mr. *Gundling*, Profeſſor at *Hall*, has cited this Example againſt me, as if it was his own, in his *Juſ. Nat. & Gent.* Cap. XXXVI. §. 44. without taking any Notice of what I had ſaid upon it in the firſt Edition of this Work, publiſh'd in 1712. I ſhall examine in its proper Place what he has aſſerted.

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take *Right* in a ſtrict and cloſe Senſe, for a Power or Aptitude to *have* any Thing, then there is always in ſome other Perſon an *Obligation* anſwering to it; but not if the Word be taken for a Power of *doing* any Thing. This then, in the firſt Place, is clear, that all *adventitious Obligations* proceed either from a *ſimple*, or from a *mutual Act*; of which the former is properly call'd a *free Grant* [1] or *Promiſe*, the latter a *Pact* or *Covenant*.

II. But inaſmuch as all acknowledge that *Promiſes* and *Pacts* do *transfer* a *Right* to others, before we proceed, it may not be improper to examine *Hobbes*'s Opinion [a] about the *transferring* of *Right*. He then, from his Project of a *State of Nature*, having inferr'd, that *every Man hath naturally a Right to every Thing*, and having farther ſhewn, that, from the Exerciſe of this *Right* there muſt needs ariſe a War of every Man againſt every Man, a State very unfit for the Preſervation of Mankind; he concludes, "That whilſt Reaſon commands Men to paſs out of *this State of War*, into a Condition of Peace, which Peace is conſiſtent with a Right of every Man to every Thing, it at the ſame Time preſcribes that Men ſhould lay down ſome Part of this univerſal Right. A Man, he ſays, may lay down, or diveſt himſelf, of his Right two Ways, either by *ſimply renouncing it*, or by *transferring* it to another. The former is done, if he declares, by ſufficient Signs, that he is content it ſhall hereafter be unlawful for him to do a certain Thing, which before he might have lawfully done. The latter, if he declare by ſufficient Signs to another Perſon, who is willing to receive ſuch a Right from him, that he conſents it ſhall be for the future, as unlawful for himſelf to reſiſt him in the doing of a certain Thing, as he might before have juſtly reſiſted him." Hence he infers, That the *transferring of Right conſiſts purely in Non-reſiſtance*; or that he, who, in a *State of Nature*, transfers a Right to another, does not give the other Party a new Right, which before he wanted; but only abandons his *own* Right of reſiſting ſuch a Perſon in the Exerciſe of *his*. Which Aſſertion, according to his *Hypotheſis*, he thus makes out; "Before any ſuch Act of transferring "Right, the Perſon, to whom it is ſaid to be "transferr'd, had a Right to all Things, and therefore it was impoſſible to give him a new one; "but the Perſon *transferring*, loſes his Liberty of "juſt Reſiſtance, which before hinder'd the other "from exerciſing his Right in its full Extent. "Therefore, whoſoever, in a State of Nature, acquires a Right, only gains this Privilege, to enjoy his primitive Right ſecurely, and without "juſt Diſturbance; for Example, If a Man, in a "State of Nature, by Sale or Gift, makes over his "Field to another, he only takes away his own "Right to that Piece of Ground, not the Right "which all other Men have to it; or which comes "to the ſame, he declares that he will not reſiſt, "or hinder ſuch a particular Perſon, who has a "Mind to make Uſe of the Field; but he does "not by this Act prejudice the reſt of Mankind, "who ſtill keep their primitive Right, as well to "this Spot of Earth, as to every Thing elſe which "Nature affords.

III. But as we have formerly made out [b]; that this *Hobbeſian State* is by no Means *natural* to Man, a Creature deſign'd for a *ſocial Life*; ſo neither can we admit of what the ſame Author thus eſtabliſhes as the Conſequence and Reſult of it, ſuch a Right of each Man to all Things, as ſhall produce any Effect in reference to other Men. For the clearer Illuſtration of this Point, it is neceſſary to obſerve, That not every natural Licence, or Power of doing a Thing, is properly a *Right*; but ſuch only as includes ſome moral Effect, with regard to others, who are Partners with me in the ſame Nature. Thus, for Inſtance, in the old Fable, the Horſe and the Stag had both of them a natural Power or Privilege of feeding in the Meadow; but neither of them had a *Right*, which might reſtrain or take off the natural Power in the other. So Man, when he employs, in his Deſigns and Services, inſenſible or irrational Beings, barely exerciſes his natural Power, if, without regard to other Men, we here preciſely conſider it in *reference* to the Things, or Animals, which he thus uſes. But then, at length, it turns into a proper Right, when it creates this moral Effect in other Perſons, that they ſhall not hinder him in the free Uſe of theſe Conveniences, and ſhall themſelves forbear to uſe them without his Conſent. For 'tis ridiculous Trifling to call that Power a *Right*, which, ſhould we attempt to exerciſe, all other Men have an *equal Right* to obſtruct or prevent us. Thus much then we allow, that every Man has naturally a Power or Licence of applying to his Uſe any Thing that is deſtitute of Senſe, or of Reaſon. But we deny that this Power can be call'd a *Right*, both becauſe there is not inherent in thoſe Creatures, any *Obligation* to yield themſelves unto Man's Service; and, likewiſe, becauſe all Men being *naturally* equal, one cannot fairly exclude the reſt from poſſeſſing any ſuch Advantage, unleſs by their Conſent, either *expreſs* or *preſumptive* [2], he has obtain'd the peculiar and ſole Diſpoſal or Enjoyment of it. And when this is once done, he may then truly ſay he has a *Right* to ſuch a Thing. Or, to decide the Buſineſs more briefly, we may make Uſe of this Diſtinction, that a Right to all Things, antecedent to any human Deed, is not to be underſtood *excluſively*, but *indefinitely* only; that is, we muſt not imagine one may engroſs all to himſelf, and *exclude* the reſt of Mankind; but only that Nature has not *defined*, or determined, what Portion of Things ſhall belong to one, what to another, till they ſhall agree to

[a] *De Cive*, c. 2. ſ. 3, &c. & *Leviath*. Engl. Book I. c. 14.

[b] *Lib*. 2. *c*. 2. §. 7, &c.

[1] Mr. *Carmichael*, Profeſſor at *Glaſcow*, (in his Notes on the Abridgment of *The Duties of a Man and Citizen*, Lib. I. Cap. IX. §. 5.) objects to our Author, That Engagements obligatory on one Side only, are not always free; and he inſtances the Caſes of Loan (*mutuum*) and *Tranſactions*. But this proves only that in certain Engagements there is a Mixture of *free Promiſe* and *Agreement*. If we conſider the Act of him who either promiſes, or actually lends, another a Sum of Money, without exacting any Intereſt, there is no reciprocal Obligation which anſwers to it; for ſince he, who receives the Money, is not bound to give any Thing for the Use of it, and the Creditor has no Engagement to bind him, as he wholly leaves him the Uſe of the Money for a certain Time, either determinate or indeterminate. But as the Money ſo lent is not a Gift, it follows, That the Debtor is bound to repay it; which only puts Things upon the ſame Footing they ſhould be, not to extend the Creditor's Engagement beyond what he has promis'd. The Reſtitution of the Sum, ſo lent, brings the Creditor no Advantage equivalent to the Service he does in lending it. What I have ſaid appears plainly in thoſe *Tranſactions*, where we yield up Part of our Right, but not the Whole.

[2] Our Author reaſons here upon a falſe Suppoſition, which I ſhall confute in its proper Place. See my Notes on *Lib*. 4. *c*. 4. All that can be ſaid is this, that before the Property of Goods was ſettled, no Man had a Right to exclude another always from the Uſe of any one Thing, and when they had no farther Uſe of it, it returned to the firſt Occupier, as if he had enjoy'd it himſelf by that Title.

obeying; or becauſe Perſons, in other Reſpects equal, as to ſome particular Buſineſs, refuſe to receive an *Obligation* of the ſame Strictneſs on both Sides. For it is clear that *Obligations* do thus differ in Force, or Efficacy, ſome producing a *perfect Right* in the Perſon towards whom they are directed; ſo as to found an *Action* in human Cogniſance, to be proſecuted either by War, or before the Judge, according as the Parties live, either in a State of Nature, or under a Form of civil Government; whereas others produce only an *imperfect Right*; ſo that the Performance of them ought not to be extorted by Violence. From the former of theſe Cauſes ariſe the *Obligations imperfectly mutual*, betwixt Princes and Subjects, betwixt States and particular Members, betwixt Maſters and Servants, Parents and Children; all which will be examined in their proper Places. The latter Cauſe of making *Obligations imperfectly mutual*, chiefly happen in Caſes of *gratuitous Promiſes*, and the Performances of them. For whilſt I promiſe any Thing to another out of free Favour, I perfectly oblige *myſelf* to give it, and the other Party has a Right of requiring it from me. But becauſe I did not engage him to pay me an Equivalent, he is bound to me only by the Law of *Gratitude*, which ties him much more looſly than if he were my Debtor upon *Pact*. For we cannot on ſuch unlimited *Obligation* build our Hopes or our Affairs, and therefore ſhould the Party prove ungrateful in the higheſt Degree, we do not reckon ourſelves properly to have receiv'd any Loſs or Prejudice: For 'tis a Miſtake in ſome Authors to aſſert, "That Nature gives us a *perfect Right* to claim a "Return of our Benefit, from an ungrateful Per"ſon [1]; though in moſt Commonwealths, the "Courts of Law refuſe to admit an Action on that "Score." Nor is this a good Conſequence, *The Neceſſity of returning a Kindneſs is greater than that of giving one; therefore the latter is founded upon an imperfect Right, the other upon a perfect.*

For, however the Caſe may ſtand before, yet when I have once promis'd to do a Favour, there lies a greater *Neceſſity* on me to perform it, than on the other Party to return it [2]. For there may be different Degrees in *Obligations* of the ſame kind [3], eſpecially when we are to compare ſuch Duties as concur in Point of Time [a].

[a] *Comp.* Bœcler. ad Grot. *l.* 1. *c.* 1. *ſ.* 4. See what ſhall be ſaid hereafter in *Lib.* 5. *c.* 12. *ſ.* 23.

[1] See c. 3. §. 17. aforegoing.

[2] To perfect the Reaſoning of our Author, we muſt remember, that the Foundation of the Difference between perfect and imperfect Right, ariſeth from the neceſſary or unneceſſary Influence that a Thing hath in eſtabliſhing Peace and Society among Men, and not ſimply the Degree of Obligation under which we lie, with regard to the Thing. So that though we are more indiſpenſibly obliged to the Duties of Gratitude than thoſe of ſimple Beneficence, the firſt ought not to authorize us to uſe Force or Juſtice to make us perform them, rather than the laſt; becauſe neither of them are of that Nature, that the Continuance of Peace or Society doth neceſſarily require their Practice. There are even Caſes in which the Duties of Gratitude ought to give Place to thoſe of Beneficence, as when a Benefactor may want, or at leaſt ſpare, without any great Loſs or Trouble, a Thing of which another Perſon has great Need.

[3] See my Notes on *Lib.* 5. *c.* 12. §. 23. following.

CHAP. V.

Of the Nature of Promiſes, and Pacts, or Covenants, in general.

The CONTENTS of every Paragraph of the fifth Chapter.

I. *Whence adventitious Obligations ariſe.*
II. *What is Mr.* Hobbes's *transferring of Right.*
III. *No Man has a Right to all Things, as Mr.* Hobbes *aſſerteth.*
IV. *In what a transferring of Right conſiſts.*
V. *A meer Aſſertion doth not oblige.*
VI. *An imperfect Promiſe obligeth, but does not give another a Right.*
VII. *A perfect Promiſe.*
VIII. *Promiſes in the future Tenſe give no Right.*
IX, X, XI. *Whether there be a Power of obliging in bare Pacts or Covenants.*

I. IT now follows in Courſe, that we enquire how ſuch *Obligations*, as are not *born* with Men, ſhould, by Virtue of ſome Act of theirs, be laid upon them, by which Means there ariſes, at the ſame Time, in other Perſons a *Right* which before they wanted. For theſe two moral Qualities have ſuch a mutual Relation and Dependance, that whenever there is produced an *Obligation* in one Man, there immediately ſprings up a correſpondent *Right* in another; for 'tis impoſſible to apprehend that I am *bound* to any Performance, unleſs there be ſome Perſon in the World, who can either fairly require it, or, at leaſt, fairly receive it of me. Tho' the Remark will not hold *vice verſa*, that where-ever there is a *Right* in one, there muſt preſently be an *Obligation* in another. For Example, the Magiſtrate has a *Right* of requiring Puniſhment for Crimes; but ſuch a *Right* as is attended with no *Obligation* in the Criminal [1] [a]. Unleſs we ſolve the Doubt by this Diſtinction, That if we

[a] 'Tis true, Puniſhments are not due to Criminals by virtue of any Compact; but ſince the Right of Life and Death, or the Right of the Sword is conferr'd upon Sovereigns, we are obliged not to reſiſt 'em when they make Uſe of that Right, tho' it be upon our own Perſons. See Mr. *Barbeyrac*'s *French* Tranſlation of this Book, *Lib.* 8. *c.* 3. *ſ.* 4. and *ſ.* 5.

[1] This is not abſolutely true. See my Notes on *Lib.* 8. *c.* 3. §. 4, 5. But Mr. *Thomaſius*, to ſhew that Right and Obligation do not always anſwer to each other, alledges the Example of two Perſons, who, in a Shipwreck, getting upon one Plank, which was ſo ſmall that it could not ſave them both, had each of them a Right to thruſt off his Companion, and, conſequently, there was no mutual Obligation on either Side. *Fundam. Jur. Nat. & Gent.* Lib. 3. *c.* 7. §. 10. But this only proves, that there may be Caſes where one Man's Right becomes uſeleſs by the Oppoſition of an equal Right in another Perſon. In like Manner, certain Duties ſo claſh ſometimes, that one of them muſt give Place in certain Circumſtances, without being leſs obligatory in general. In the Example of the Plank, we muſt ſuppoſe, as I have ſaid elſewhere, that it belong'd no more to the one than to the other, and neither of them was the firſt Poſſeſſor. For then the Right of Property, or that of the firſt Occupier, would lay an Obligation of giving Place to him for whom any of theſe Titles could be alledged. But every other Perſon, who ſhould find himſelf in the ſame Circumſtance, even were it the Owner of the Plank himſelf, might lawfully hinder him from uſing that Inſtrument to ſave his Life, which Providence had furniſh'd him with; ſo far is it from this, that he ought to help us, if he can, to ſeize it. Mr. *Gundling*, Profeſſor at *Hall*, has cited this Example againſt me, as if it was his own, in his *Juſ. Nat. & Gent.* Cap. XXXVI. §. 44. without taking any Notice of what I had ſaid upon it in the firſt Edition of this Work, publiſh'd in 1712. I ſhall examine in its proper Place what he has aſſerted.

take

take *Right* in a ſtrict and cloſe Senſe, for a Power or Aptitude to *have* any Thing, then there is always in ſome other Perſon an *Obligation* anſwering to it; but not if the Word be taken for a Power of *doing* any Thing. This then, in the firſt Place, is clear, that all *adventitious Obligations* proceed either from a *ſimple*, or from a *mutual Act*; of which the former is properly call'd a *free Grant* [1] or *Promiſe*, the latter a *Pact* or *Covenant*.

II. But inaſmuch as all acknowledge that *Promiſes* and *Pacts* do *transfer* a *Right* to others, before we proceed, it may not be improper to examine *Hobbes*'s Opinion [a] about the *transferring* of *Right*. He then, from his Project of a *State of Nature*, having inferr'd, that *every Man hath naturally a Right to every Thing*, and having farther ſhewn, that, from the Exerciſe of this *Right* there muſt needs ariſe a War of every Man againſt every Man, a State very unfit for the Preſervation of Mankind; he concludes, "That whilſt Reaſon commands Men to paſs out of *this State of War*, into a Condition of Peace, which Peace is conſiſtent with a Right of every Man to every Thing, it at the ſame Time preſcribes that Men ſhould lay down ſome Part of this univerſal Right. A Man, he ſays, may lay down, or diveſt himſelf, of his Right two Ways, either by *ſimply renouncing it*, or by *transferring* it to another. The former is done, if he declares, by ſufficient Signs, that he is content it ſhall hereafter be unlawful for him to do a certain Thing, which before he might have lawfully done. The latter, if he declare by ſufficient Signs to another Perſon, who is willing to receive ſuch a Right from him, that he conſents it ſhall be for the future, as unlawful for himſelf to reſiſt him in the doing of a certain Thing, as he might before have juſtly reſiſted him." Hence he infers, That the *transferring of Right conſiſts purely in Non-reſiſtance*; or that he, who, in a *State of Nature*, transfers a Right to another, does not give the other Party a new Right, which before he wanted; but only abandons his *own* Right of reſiſting ſuch a Perſon in the Exerciſe of *his*. Which Aſſertion, according to his *Hypotheſis*, he thus makes out; "Before any ſuch Act of transferring "Right, the Perſon, to whom it is ſaid to be "transferr'd, had a Right to all Things, and therefore it was impoſſible to give him a new one; "but the Perſon *transferring*, loſes his Liberty of "juſt Reſiſtance, which before hinder'd the other "from exerciſing his Right in its full Extent. "Therefore, whoſoever, in a State of Nature, acquires a Right, only gains this Privilege, to enjoy his primitive Right ſecurely, and without "juſt Diſturbance; for Example, If a Man, in a "State of Nature, by Sale or Gift, makes over his "Field to another, he only takes away his own "Right to that Piece of Ground, not the Right "which all other Men have to it; or which comes "to the ſame, he declares that he will not reſiſt, "or hinder ſuch a particular Perſon, who has a "Mind to make Uſe of the Field; but he does "not by this Act prejudice the reſt of Mankind, "who ſtill keep their primitive Right, as well to "this Spot of Earth, as to every Thing elſe which "Nature affords."

III. But as we have formerly made out [b], that this *Hobbeſian State* is by no Means *natural* to Man, a Creature deſign'd for a *ſocial Life*; ſo neither can we admit of what the ſame Author thus eſtabliſhes as the Conſequence and Reſult of it, ſuch a Right of each Man to all Things, as ſhall produce any Effect in reference to other Men. For the clearer Illuſtration of this Point, it is neceſſary to obſerve, That not every natural Licence, or Power of doing a Thing, is properly a *Right*; but ſuch only as includes ſome moral Effect, with regard to others, who are Partners with me in the ſame Nature. Thus, for Inſtance, in the old Fable, the Horſe and the Stag had both of them a natural Power or Privilege of feeding in the Meadow; but neither of them had a *Right*, which might reſtrain or take off the natural Power in the other. So Man, when he employs, in his Deſigns and Services, inſenſible or irrational Beings, barely exerciſes his natural Power, if, without regard to other Men, we here preciſely conſider it in *reference* to the Things, or Animals, which he thus uſes. But then, at length, it turns into a proper Right, when it creates this moral Effect in other Perſons, that they ſhall not hinder him in the free Uſe of theſe Conveniences, and ſhall themſelves forbear to uſe them without his Conſent. For 'tis ridiculous Trifling to call that Power a *Right*, which, ſhould we attempt to exerciſe, all other Men have an *equal Right* to obſtruct or prevent us. Thus much then we allow, that every Man has naturally a Power or Licence of applying to his Uſe any Thing that is deſtitute of Senſe, or of Reaſon. But we deny that this Power can be call'd a *Right*, both becauſe there is not inherent in thoſe Creatures, any *Obligation* to yield themſelves unto Man's Service; and, likewiſe, becauſe all Men being *naturally* equal, one cannot fairly exclude the reſt from poſſeſſing any ſuch Advantage, unleſs by their Conſent, either *expreſs* or *preſumptive* [2], he has obtain'd the peculiar and ſole Diſpoſal or Enjoyment of it. And when this is once done, he may then truly ſay he has a *Right* to ſuch a Thing. Or, to decide the Buſineſs more briefly, we may make Uſe of this Diſtinction, that a Right to all Things, antecedent to any human Deed, is not to be underſtood *excluſively*, but *indefinitely* only; that is, we muſt not imagine one may engroſs all to himſelf, and *exclude* the reſt of Mankind; but only that Nature has not *defined*, or determined, what Portion of Things ſhall belong to one, what to another, till they ſhall agree to

[a] *De Cive*, c. 2. ſ. 3, &c. & *Leviath.* Engl. Book I. c. 14.

[b] *Lib.* 2. *c.* 2. §. 7, &c.

[1] Mr. *Carmichael*, Profeſſor at *Glaſcow*, (in his Notes on the Abridgment of *The Duties of a Man and Citizen*, Lib. I. Cap. IX. §. 5.) objects to our Author, That Engagements obligatory on one Side only, are not always free; and he inſtances the Caſes of Loan (*mutuum*) and *Tranſactions*. But this proves only that in certain Engagements there is a Mixture of *free Promiſe* and *Agreement*. If we conſider the Act of him who either promiſes, or actually lends, another a Sum of Money, without exacting any Intereſt, there is no reciprocal Obligation which anſwers to it; for ſince he, who receives the Money, is not bound to give any Thing for the Uſe of it, and the Creditor has no Engagement to bind him, as he wholly leaves him the Uſe of the Money for a certain Time, either determinate or indeterminate. But as the Money ſo lent is not a Gift, it follows, That the Debtor is bound to repay it; which only puts Things upon the ſame Footing they ſhould be, not to extend the Creditor's Engagement beyond what he has promiſ'd. The Reſtitution of the Sum, ſo lent, brings the Creditor no Advantage equivalent to the Service he does in lending it. What I have ſaid appears plainly in thoſe *Tranſactions*, where we yield up Part of our Right, but not the Whole.

[2] Our Author reaſons here upon a falſe Suppoſition, which I ſhall confute in its proper Place. See my Notes on *Lib.* 4. *c.* 4. All that can be ſaid is this, that before the Property of Goods was ſettled, no Man had a Right to exclude another always from the Uſe of any one Thing, and when they had no farther Uſe of it, it returned to the firſt Occupier, as if he had enjoy'd it himſelf by that Title.

ſhare her Stores amongſt 'em, by ſuch Allotments and Diviſions. Much leſs will the ſame *Equality* amongſt Men admit, that one ſhould naturally claim a *Right* over another. It is rather true, that no Perſon will have a Right to govern any other Perſon, unleſs he acquire it in a peculiar Manner, either by his Conſent, or by ſome other antecedent Deed; as ſhall be made out more at large in its proper Place [1].

IV. The proper Notion then, of transferring and of acquiring Right, will appear with more Exactneſs, if we premiſe, that ſome *Rights* bear a Regard to Perſons, others to Things; and that the latter kind of Rights is again divided into Original and Derivative. I acquire a *Right* over a Perſon, if he either expreſly or tacitly conſents, that I ſhall preſcribe to him what he ought to do, to ſuffer, or to forbear; by virtue of which Agreement he both obliges himſelf voluntarily to ſtudy Obedience to my Pleaſure, and, at the ſame Time, grants me a Right of compelling him, in caſe of Default, to his Duty, by propoſing ſome conſiderable Evil, which I ſhall otherwiſe bring upon him. A Man then acquires an *Original Right* over *Things*, when all others, either expreſly or tacitly, renounce their Liberty of uſing ſuch a Thing, which before they enjoy'd in common with him. This original Right being once eſtabliſh'd, by virtue of which the primitive Community of Things was taken off, the transferring of Right is nothing elſe but the paſſing it away from me to another, who before was not Maſter of it. Hence appears the Abſurdity of ſaying, That *the transferring of Right conſiſts barely in Non-reſiſtance.* Inaſmuch as that negative Term cannot expreſs the Force of the *Obligation* ariſing from ſuch an Act; which properly implies an inward Inclination to make good the Contract: Tho' Non-reſiſtance be indeed one Conſequence of the *Obligation*, and without which it cannot be fulfilled. The Inſtance about the *Field*, propoſed by *Hobbes*, does not come up to the Point in hand; for beſides, that it is very abſurd to call that an Act of *Selling*, when I only quit my Pretenſions to a Thing, whilſt all other Men ſtill keep *theirs*; even according to his own Doctrine, *Propriety* of Things had its Riſe from civil Government [2], after the *State of Nature* was ſuppoſed to be paſſed and gone. Therefore, during the *State of Nature*, no Man could call the Field *his own*, and, conſequently, not *ſell* it. He ought indeed to have expreſs'd himſelf thus: "Since in a State of mere Nature "Things belong'd no more to one than to another, therefore if a particular Perſon deſired the "ſole Uſe of any Thing, to make him Maſter of "his Wiſh, it was neceſſary, that all other Men "ſhould renounce the Uſe of the ſame Thing. If "they did this *gratis*, the Act had ſomewhat in it "like a *Gift*; if with ſome Burthen, or under ſome "Condition, it was then a Kind of a *Contract*, "for which we have no Name. But ſhould one "Man have renounced his Power over ſuch a "Thing, this could have been no Prejudice to "others [4], and, conſequently, he only would have "been debarr'd from the Uſe of it, who had thus "freely quitted all Title to it.

V. Let us now carry on our Enquiries, and examine how a Man may contract an Obligation, and confer a Right on another, by Means of his own *free Promiſe.* To underſtand the Nature and Effects of this Kind of *Tye*, we muſt, in the firſt Place, obſerve, that there are two Ways of ſpeaking about giving, or doing a Thing to another, which now is, or, which we imagine, will hereafter be in our Power. The firſt Way is, when we barely expreſs our preſent Mind about a future Act; yet ſo as to lay no Neceſſity on ourſelves, of perſevering always in the ſame Reſolution. An Inſtance we have in what *Tiberius* in *Tacitus* [5] writes to his Favourite *Sejanus*, *Ipſe quid intra animum volutaverim, quibus adhuc neceſſitudinibus immiſcere te mihi parem, omittam ad præſens referre. I forbear to tell you, at preſent, by what Fortunes, and by what Alliances, I am conſidering to unite you to myſelf.* Such a bare Aſſertion neither founds an Obligation in me, nor a Right in the other Party [6]. And to render it virtuous and unblameable, there is only this Condition requiſite, that we *ſpeak* as at preſent we really *think*, and do not impoſe upon a Man by Falſehood and Diſſimulation. But we are by no Means obliged to continue always in this Deſign; ſince the Mind of Man has not only a *natural Power* of changing Opinion, but, likewiſe, a *Right*; ſo as to do it without Fault, when there is no particular Obligation impoſing a Neceſſity of holding firmly to a Reſolution already taken and declared. Yet theſe Changes of Purpoſe are liable to juſt Cenſure, if either the former Judgment, from which we receded, was better than this laſt; or by altering our Meaſures ſo unexpectedly, we expoſe a Perſon to Diſappointment and Deriſion, who did not deſerve ſo unkind Treatment at our Hands. See the Paſſage between *Q. Cæcilius* and *T. Marius Urbinas in Valer. Max.* l. viii. c. 8. §. 5, 6. See *Grot. Book* II. c. 11. ſ. 2. Tho' it be often a juſt [7] Puniſhment to baſe Flatterers and Deſigners, to

[2] We ſhall explain this Term in *Lib.* 5. *c.* 2. *ſ.* 7.

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[1] See *c.* 2. §. 7. of this Book, and *Lib.* 1. *c.* 6. §. 12. and *Lib.* 6. *c.* 2, 3. and *Lib.* 7. *c.* 2, 3.

[2] See Mr. *Hobbes*'s Treatiſe *De Cive*, c. 6. §. 16. and c. 14. §. 10. and what our Author ſays, *Lib.* 8. *c.* 1. §. 2. following.

[3] I ſhall explain this Term, *Lib.* 5. *c.* 2. §. 7.

[4] This is grounded upon a falſe Hypotheſis, as I have ſhewn in *Note* 1. of the aforegoing Paragraph. The Truth is, that till a Man abandons a Thing, of which he had poſſeſſed himſelf, with a Deſign to make Uſe of it, it belongs to him, and no Man may diſpoſſeſs him of it; but if he gives it to another, as from Hand to Hand, this latter acquires the ſame Right, and conſequently excludes the Right of all others, until he again, in his Turn, leaves to the firſt Occupier the Thing which he had Power to diſpoſe of all the while he had it, becauſe the Ceſſion of him, who was in Poſſeſſion before him, gave him Power to prevent any other who would be Maſter of it.

[5] *Tac. Annal.* Lib. 4. c. 40. Numb. 9. Ed. Ricq.

[6] *Nulla promiſſio poteſt conſiſtere, quæ ex voluntate promittentis ſtatum capit.* Digeſt. Lib. 45. Tit. 1. *De Verborum Obligationibus*, Leg. 108.

[7] The Author plainly ſpeaks here only of thoſe chimerical Hopes which we ſuffer others to conceive, rather than encourage them to diſappoint the Covetouſneſs of thoſe who would cheat us, or deceive us of our Inheritance. So that here is no real Promiſe, nor any true Declaration of our Will fully, nor irrevocable; but only ſuch Hope as was formed at the Time when the Words, or other equivocating Signs, were given, by which the Deceiver was deluded himſelf, and pleaſed himſelf with Smoke. See *Lib.* 4. *c.* 10. §. 3. following. Nothing hinders but we may give a Perſon ſome Hopes, without any fix'd Deſign, or, at moſt, only a conditional one of anſwering their Expectations. This, for Inſtance, we may do to try how well they will acquit themſelves of their Duty, or how far, and from what Motives they may be diſpos'd to ſerve us. After all, Nobody has Occaſion to depend much upon ſuch Declarations, and therefore it is almoſt always rather the Fault of thoſe who are deceiv'd, than of thoſe who give Occaſion to the Deceit. It may be convenient here to ſay ſomething of ſuch Promiſes, which, tho' made in Jeſt, were valid among the *Romans*, provided they were made in the Form of a Stipulation. For if one ſaid to another, Doſt thou promiſe me this or that? And he ſaid, I do promiſe; the firſt had a juſt Action againſt the other, and he was adjudged to make good his Promiſe, tho' he had no Deſign to engage himſelf. But, at length, they found out an Expedient to hinder the Effect of this ſcrupulous Obſervation of Laws, contrary to all natural Right: It was this, Although ſuch a Promiſe would bear a juſt Action, it was eluded, and made null by the Right of the *Prætor*, who found out a poſitive Exception. See upon this Subject the *Julius Paulus* of Mr. *Noodt*, Chap. 11. and his Treatiſe *De forma emendandi Doli mali, &c.* publiſh'd in 1709. *Chap.* 6.

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to balk them of their greedy Hopes, and to cheat the gaping Crows, when they have prepared their Mouths for the Morsel. Vid. *Plin.* 2. Epist. 20. Comp. *Grot.* l. ii. c. 11. s. 2.

VI. We may call it an *imperfect Promise*, when a Man determines his Will to the doing a Favour hereafter, with a sufficient Sign to make it firm and lasting, or so as fully to declare his Willingness to lie under an *Obligation*, but not so as to give the other Party any proper Right of compelling him to stand to his Word. The like to which happens in the Duty of returning Kindnesses, where the Receiver is obliged to make a grateful Acknowledgment, tho' the Giver has not a full *Right* to require it. Some are of Opinion, that it is hardly possible to produce an Instance of this Kind of *Promise*, in the *Law of Nature*, barely consider'd. It is usual to alledge for Examples, the Promise of an absolute Prince made to his Subject, of a Master to his Servant, of a Father to his Son, whilst yet under his Power; by all which the Parties promising, stand obliged to make good their Engagement; but the others seem to want a *Right* of demanding it from them, because they are allow'd in no *Court* to bring an *Action* against them upon Default. But now the Lameness or Defect of these Promises does not arise from any intrinsick Weakness or Invalidity; but from that superior Quality or Station in the Promisers, which hinders the *Obligation* from taking its full outward Effect. Others instance in an imperfect *Stipulation*; when the civil Laws enjoin, that Promises shall be made under such a particular Form of *stipulating* Words; and will not permit a Man to sue another upon his Promise, if it did not run precisely in those Terms. Here they observe, That in case the Parties concern'd fully intended to contract a perfect Obligation, and omitted the set Form of Law, only thro' Error or Imprudence, the Promiser is, by natural Equity, engag'd to perform his Word, tho' the other Person cannot force him to it by an *Action* in Courts of civil Judicature. But neither have we in this Example a *Promise*, which is *imperfect* upon Account of the Law of Nature, but by virtue of a positive Law, which ties up its Effect to such a punctual Form of Speech, a Restraint, which naturally it did not lie under. A true Instance then of all *imperfect Promise* is, when I express myself in this Manner, *I really design to do this, or that for you, and I desire you'd think I am in earnest, and speak Truth.* In which Case I am bound to perform my Word, rather by the Law of *Veracity*, than of *Justice*; I lay an Obligation on myself, but I give the other Party no Right of forcing me to perform it. Men have naturally somewhat of Greatness and Generosity in their Temper, upon Account of which they had much rather seem to do a good Office, purely on the free Motion of their own *Virtue*, than for the Sake of any *Right* which another has to challenge it from them. To this Head we may refer the Promises of Men in Favour and Authority, when, not by fair Words and general Complements [1], but in a serious and particular Manner, they engage to assist us by their Recommendation, Interceſſion, Promotion, or Suffrage; which yet they would not have a Man challenge from them by virtue of any *Right*, but desire they should be imputed wholly to their Generosity and Honour. Even the Law of Nature does not seem to allow, that a Man should be *compell'd* to the Performance of these Promises; since, in the very Act of engaging himself, he made a tacit Reserve against such Proceeding; that his Benefit might carry the more Grace and Beauty in it, by being removed, as far as possible, from Necessity and Constraint.

VII. A *perfect Promise* is, when a Man not only determines his Will to the Performance of such or such a Thing for another hereafter, but, likewise, shews that he gives the other a full *Right* of challenging or requiring it from him. When we engage to give away a particular Thing, or to perform a particular Service, the former is a Kind of *Alienation* of our Goods, or at least somewhat in order to it; the latter is an Alienation of some Part of our natural Liberty; inasmuch as we are now to stick to the Restraint and Confinement of our Promise about a Matter, which before we might have used, done, or omitted at our Pleasure. It must be well observ'd, that what we here deliver, concerns only such Promises as are made betwixt Men [2], tho' it be impossible, that the Divine Promises should fail, yet it would be highly arrogant and indecent to say, That these seeming Engagements on GOD's Part do give a *Right* to Man, which shall hold valid against his Maker. Add *Grot. loc. cit.* s. 3, 4.

VIII. It is a nice Remark of Mr. *Hobbes* [a], and worthy our Notice, That, *in relinquishing or transferring Right, if we make Use of no Signs except Words, those Words ought to be of the Time present or past.* For he, for Instance, who shall say in the *future*, *Tomorrow will I give*, plainly shews that he has not given already; and therefore the Right he has over the Thing promised, continues firm and entire all this Day, and all the next Day too, and so on, unless in the mean Time he actually give it, or pass away the Right of it by a new Promise. Yet in case, besides his Words, he made Use of other Signs sufficiently arguing, that it was his Will to transfer the Right at present; then the Words, tho' Grammatically future, shall not hinder the Engagement from taking full Effect. But where these other Signs are wanting, we ought to be very tender of putting so wide and forc'd an Interpretation on Verbs of the future Tence, as to make them imply a present Act of Alienation. For since we are not wont to make over our Goods to others, without the Prospect of some Advantage to ourselves, which Advantage does not, in these Acts of Grace or free Gift, visibly appear; therefore, in construing such an Act, to which Men are commonly averse, we ought not to presume on any Thing farther, than what is, by express Tokens of the Will, declar'd. Especially since it is usual, by these Terms, to signify only a *simple Mark of good Will* [3], and such as shall, at present, at least, have no Effect. So that whilst a Man speaks in the future [4], he is supposed to be yet under Deliberation; and before

[a] *De Cive*, c. 2. s. 6, &c. & *Leviath.* Engl. Patr I. *c.* 14. (c) In the last Editions of the Original there is *effectum* for *affectum*, which entirely corrupts the Sense; and yet Mr. *Hertius* has retained it in the last Edition of 1706.

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[1] See §. 10. following.

[2] See *Lib.* 2. *Chap.* 1. §. 3. foregoing.

[3] Is the same as (a) above.

[4] We may observe here, as *Hertius* directs us, what the modern Lawyers call, *Tractatus ineundarum Conventionum*, i. e. a Treaty in order to an Agreement; or *Pacta contractuum præparatoria*, i. e. some previous Covenants in order to Contracts, which we may call, Preambles or Discourses, by which we seem disposed to enter upon a Bargain, and testify some Desire of Agreement, but

before the Time prefix'd, perhaps his Affection, and the Merits of the Perſon, may alter; or ſome Misfortune may intervene, rendring it incommodious for him to part with what he intended. In the ſame Manner as he that makes his *Will*, does not transfer his Right immediately on the Heir; but he is ſuppoſed ever to have this Clauſe or Condition in his Mind, *Such a Perſon ſhall be my Heir, unleſs I alter my Will before my Deceaſe.* Tho' indeed it be look'd upon as an Argument of Levity and Inconſtancy, for a Man to cheat and delude another with falſe Hopes and Expectations.

The Caſe is very different, if I expreſs myſelf thus, *I have given, or do give to be deliver'd Tomorrow:* For this is plainly giving a Man To-day the Right of having a Thing To-morrow, or transferring to him To-day the Right over a Thing, which ought To-morrow to be actually deliver'd to him. Nor is it any Objection againſt what we have been aſſerting, that, according to the ordinary Form and Manner of Speech, moſt Promiſes are expreſs'd in Terms of Futurity. For in the moſt ſolemn Engagements by formal *Stipulation*, or by Oath, we uſe the ſame Way of Speaking, *You* ſhall *have ſuch a Thing of me, I will give ſuch a Thing*, &c. The Reaſon of which Cuſtom is, that the delivering of a Thing promis'd, generally follows at ſome *Diſtance.* And, indeed, we can ſcarce call it a Promiſe, when, at the ſame Time, the Intention of giving is declared, and the Thing actually tender'd; inaſmuch as there ſeems here, either to have been no *Obligation*, or ſuch as expired in the very Minute that it was contracted. However, it is plain the Generality of Men never think they properly *have* a Thing, till they get firm Hold and full Poſſeſſion of it. If then theſe Terms of Futurity occur in a *perfect Promiſe*, as for Inſtance, *Tomorrow I will give you an hundred Pounds*, the Senſe of them amounts to this, I *now give you a Right to have and to require of me the ſaid Sum; and I, likewiſe, oblige myſelf on the Day appointed, to deliver it to you accordingly.* We may ſettle the whole Point with more Brevity, by only ſaying, that Verbs of the future Tenſe, made Uſe of in Promiſes, and eſpecially the Term of *Giving*, do either imply an *Obligation* hereafter to be contracted, and then they neither transfer the Thing, nor the Right, to another; or elſe they import the delivering of a Thing hereafter, the Right to which either is now, or has been formerly transferr'd; and then they do not hinder the *Promiſe* from being moſt perfect and compleat.

IX. It is requiſite, that whilſt we are engaged on this Point, we endeavour to ſettle a famous Queſtion, which has been much canvaſs'd by Authors, Whether there can be a Force of *obliging* in bare Promiſes, or in bare Pacts, whilſt they are no more than verbal Agreements, and are not ſtrengthen'd by any actual [1] Performance betwixt the Parties? *Connanus* the *Civilian* has been the principal Aſſertor of the negative Side; whom *Grotius*[a] and others have labour'd to confute. And, indeed, it has been the fix'd Opinion of wiſe and learned Men in all Ages, that *Faith* ought to be kept inviolably, though given only in *Words*; or that a Man, by *ſpeaking* only, without the Intervention of any *Deed*, may lay on himſelf a Neceſſity of ſome future Performance [2 4]. *Tull.* Off. I. c. 7. *The Foundation of Juſtice is Faith*, that is to ſay, *a Firmneſs and Truth in our Words, Promiſes, and Contracts. Hence ſome will have the Word* Fides *to be call'd* Quia fit quod dictum eſt, *becauſe that which was ſaid is done, Ulpian in* l. i. *D. de pactis.* What is ſo agreeable to human Faith, as to obſerve mutual Agreements? *Vid.* D. l. ii. c. 14. *de Pactis.* It was a very wicked Jeſt of the petit Prince of *Bantam*, when, being reproved for Breach of Promiſe, he anſwered, His Tongue had no Bone in it, to make it more ſtiff than was neceſſary for his Intereſt [5]. Whether *Connanus* has, with any Colour, oppoſed this univerſal Judgment, will appear, if we beſtow a little Time on taking his chief Arguments under Conſideration. In the firſt Place then, he ſays, that *he who raſhly believes a Promiſe made without Cauſe, is no leſs to blame, than the vain Perſon who made it.* Now here all the Difficulty lies in explaining what he means by a Promiſe made without *Cauſe.* If he would be underſtood of ſuch Promiſes as if not perform'd, it brings no Loſs or Prejudice to the Party, to whom they were directed, and, if fulfill'd, muſt needs create Trouble or Damage to the Performer; we are willing to allow, that Engagements of this Kind produce no *Obligation.* For how can a Man have any Right of requiring me to put myſelf to any Charges, or any Toil, in doing a Thing which ſhall profit him nothing [b 6]? And it

[a] L. 2. c. 11. ſ. 1, & 4. [b] Vid. *D. L.* 2. T. 14. Leg. 61.

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but conclude nothing poſitively. For in this Caſe every Man is free, and there muſt be a new Treaty to render the Agreement full and entire. Hence it is ſaid in the *Digeſts*, That if any one hath promiſed to lend us any Money, we may receive it, or not, as we pleaſe, *Qui pecuniam creditam accepturus ſpopondit creditori futuro, in poteſtate habet, ne accipiendo ſe ei obſtringat*, Lib. 12. Tit. 1. *De Rebus Creditis*, &c. Leg. 30. See what Mr. *Hertius* ſays there, and in his *Paræmia Jur. German.* Lib. 1. c. 8. §. 5. But there is, in this Caſe, a *Stipulation*, by which a Perſon is engaged to borrow of another; and this (even according to the Principles of the *Roman* Law) binds ſo far, that tho' the Borrower may, if he will, refuſe the Money, and ſo not contract the Debt, yet he is liable to Damages and Intereſt, towards the Lender, who might have employ'd his Money to Advantage elſewhere, if he had not promis'd to take it. This indeed even the Nature of the Caſe ſuppoſes. It is upon this Foundation that M. *De Bynkerſhoeck* decides a parallel Caſe in his *Obſerv. Jur. Rom.* Lib. I. Cap. IX. *in fin.* But if we here conſider the Simplicity of the natural Law, an Agreement, like this in Queſtion, leaves indeed the Contract, to which it is a Preample, imperfect, becauſe no Man certainly can be a Debtor before he receives the Money, and here is no actual Loan: But yet, if it be a true Contract, as it may certainly be, it ought to ſecure the Accompliſhment of the Agreement. This Power of retracting a Man's Word, which the ancient Lawyers ſo much encourag'd, is not at all agreeable to natural Equity, which requires a Compenſation, except where the Caſe is impoſſible, or an Alternative is left free by a ſpecial Clauſe in the Agreement. See Cap. VII. §. 4. following, and Lib. V. Cap. V. §. 2.

[1] Συνάλλαγμα. See what is ſaid, *Lib.* 5. *c.* 2. §. 2, 3. and what is ſaid on *Grotius*, Lib. II. Cap. XI. §. 1.

[2] *Comment. Jur. Civ.* Lib. 5. c 1. But Mr. *Buddeus*, in his *Element. Philoſ. Pract.* Part II. c. 4. §. 9. aſſerts, That this Lawyer is falſely accuſed of any ſuch Opinion. Mr. *Hertius*, alſo, rejects the Opinion of a certain nameleſs Perſon, who juſtified *Connanus*, and maintains, That that Perſon ſpake only of ſimple Contracts, conſidered as they are uſed in the *Roman* Judicature. For he ſays, We muſt here diſtinguiſh between theſe two Propoſitions; the one is, That Promiſes produce a natural Obligation, and the other, That the natural Obligation, which ariſes from a Promiſe, does not produce a Civil Obligation, which is founded upon a Maxim of the Law of Nature, which authorizes a Sovereign Prince to declare, what Obligations ſhall be valid, and what null. Nevertheleſs, according to Mr. *Hertius*, we need only to read *Connanus*'s Reaſons to convince us, that he denies Promiſes to produce any Obligations able naturally, and of themſelves, to give a perfect Right, without the Aſſiſtance of the Civil Law.

[3] The *Latin* of *Cicero* is, *Fundamentum Juſtitiæ eſt fides*, i. e. *dictorum conventorumque conſtantia & veritas, eaque de cauſa fides appellatam, quia fiat quod dictum eſt.*

[4] And *Ulpian*'s, *Quid tam congruum fidei humanæ, quam ea, quæ inter eos placuerunt ſervare?*

[5] *Mr.* Barbeyrac's *fifth Note is inſerted in the Text.*

[6] We muſt certainly here ſuppoſe ſome Advantage, which ariſes, or may ariſe, from the Performance of our Promiſe, to the Perſon to whom it is given. Such is the Cuſtom and natural Aim of all our reciprocal Engagements; and this is found as well in *free*

Promiſes

it is indeed againſt Reaſon, to undertake an Action, which can produce no Good, and may produce Evil. Thus, for Inſtance, ſuppoſe you had got me to promiſe you that I would forbear eating four Days together; upon what Account ſhould I ſtand to ſuch a raſh Eugagement, if ſo long a Faſt would prejudice my Health, and yet would contribute nothing to your Intereſt or Advantage? Therefore, in this Caſe, it is alike vain and fooliſh in one Man to make the Promiſe, and, in the other, ſeriouſly to challenge the Performance. Beſides, ſince Promiſes are Matters of *Grace*, or free Favour, they ought to be interpreted under this Condition or Limitation, *Provided I can compaſs the Thing I ſpeak of, without any conſiderable Damage to myſelf.* Nor can the Perſon, to whom I make the Promiſe, be ſo impudent and unreaſonable, as to deſire that my Kindneſs ſhould be an Injury to me, and that I ſhould enrich him by my own Loſſes [1]. It often falls out [2], that even not to keep one's Promiſe ſhall be juſt. For all muſt be referr'd to the fundamental Rules of Juſtice; as, firſt, that no Man be wrong'd; and, ſecondly, that the publick Good be, as far as poſſible, promoted. It may, likewiſe, happen, that the Performance of a Promiſe or Contract would prove highly prejudicial [3], either to one of the Parties, or to the other. For if *Neptune* (as it is in the Story) had not made good his Promiſe to *Theſeus*, *Theſeus* had not been ſo unfortunately deprived of his Son *Hippolytus*. Therefore, neither are we to keep thoſe Promiſes which are unprofitable to the Perſon to whom they are made; nor thoſe which are more hurtful to ourſelves than advantageous to him. It is a Breach of Duty to prefer a greater Damage to a leſs. If you promiſe to plead another Man's Cauſe, and, in the *Interim*, your Son falls dangerouſly ill, it will be no Violation of your Duty to recede from the *prior* Engagement; and the Fault will be much greater in the other Party, if he complain of ſuch a Diſappointment. *Tull.* Off. I. Vid. *D. L.* 50. T. 17.

Add. *Senec.* de Benef. l. iv. c. 35, 39. *Tull.* Off. l. iii. c. 24. This Caſe is propoſed, *I have a Remedy given me for the Dropſy, upon this Condition, That if it cures me, I am never to uſe that Medicine again. Within a few Years after I have been thus cured, I relapſe into the ſame Diſeaſe, and the Perſon, with whom I contracted, will not give me leave to make any farther Uſe of it. What am I to do here? It is Inhumanity in him to refuſe me, beſides, that my uſing it would do him no Hurt. I may therefore ſafely conſult my Life and Health.*

But if, by a *Promiſe made without Cauſe*, [4]*Connanus* underſtands only a gratuitous, or free Promiſe, without Proſpect of Gain; then his Aſſertion will overthrow the whole Buſineſs of Beneficence and Liberality, [5] and make all the Offices of Humanity baſe and mercenary Performances. For why ſhould not I credit a Man, who, knowing his own Abilities, has bid me expect ſome free Gift from him, purely that I may have Occaſion to love and to eſteem him? And ſince, if he had pleaſed, he might ſafely have forborn the Promiſe, why did he order me to depend upon his Word, if he deſign'd not fully to oblige himſelf to the making it good? For the denying of a Benefit is then only void of Injury, when a Man is bound to confer it only by the Law of Humanity; not when, by expreſs Promiſe, he has given another a *Right* to receive it.

X. *Connanus* urgeth farther, "That ſince Promiſes of this Kind commonly ariſe from Oſtentation rather than good Will, or, at leaſt, from Raſhneſs and Inconſiderancy, ſuppoſing the Deſign to be real; the Fortunes of Men would be in great Danger, were they bound to perform every Thing they ſaid." It was, perhaps, on ſome ſuch Principle, that the Ancients imagined the Oaths and Proteſtations of Lovers were invalid, and that the GODS excuſed the Breach of them, as proceeding from Minds blinded with Paſſion. *Plato in Sympoſ. & Poetæ paſſim.* But, indeed, the Danger, here mention'd, is chiefly in Imagination: For we do not attribute a Power of *obliging* to any Promiſes, but to ſuch as are made upon ſerious and deliberate Purpoſe; and he, that miſtakes Jeſt for Earneſt [6], ought to pay for his Want of Apprehenſion. On the other hand, to promiſe really more than one can conveniently perform, as it

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Promiſes, as in *mutual Engagements*. But as, in theſe laſt, it is not in the Power of one contracting Party to judge of the Advantage the other will, or will not, receive from the Execution of the Engagement; ſo there is no room to ſay, but the Caſe is the ſame with regard to gratuitous Promiſes. This would be to furniſh the Promiſer with a Pretence for trifling and eluding the Obſervation of his Promiſe. It is ſufficient he was under no Conſtraint, when he gave his Word according to the Rules eſtabliſhed, and that the Nature of the Thing would admit of no tacit Exception. As it is the Will alone that makes the Promiſe obligatory, ſo the Motive propoſed hath no Place here: That is a Point commonly conceal'd, and is what the Perſon, to whom the Promiſe was given, has no Buſineſs to trouble himſelf about. See my Remark upon *Grotius*, Lib. II. Cap. X. §. 21.

[1] This is contrary to Nature, according to the *Roman* Lawyers. *Jure Naturæ æquum eſt, neminem cum alterius detrimento & injuria fieri locupletiorem*, Digeſt. Lib. 50. Tit. 16. De Diverſ. Reg. Jur. Leg. 206.

[2] The *Latin* of *Cicero* is this, *Sed incidunt ſæpe tempora, cum ea, quæ maxime videntur digna eſſe juſto homine, eoque, quem virum bonum dicimus, commutantur, fiuntque contraria; ut reddere depoſitum, promiſſum facere, quæque pertinent ad veritatem, & ad fidem, ea migrare interdum, & non ſervare ſit juſtum. Referri enim decet ad ea, quæ propoſui in principio, fundamenta juſtitiæ, primum, ut ne cui noceatur; deinde, ut communi utilitati ſerviatur. Cum tempora commutantur, commutatur officium, & non ſemper eſt idem; poteſt enim accidere pomiſſum aliquod, & conventum, ut id effici ſit inutile, vel ei, cui promiſſum ſit, vel ei, qui promiſerit. Nam ſi, ut in fabulis eſt, Neptunus, quod Theſeo promiſerat, non feciſſet, Theſeus filio Hippolyto non eſſet orbatus. Ex tribus enim optatis, ut ſcribitur, hoc erat tertium, quod de Hiſpolyti interitu iratus optavit.* (See Eurip. Hippolyt. *v.* 1315, &c.) *quo impetrato, in maximos luctus incidit. Nec promiſſa igitur ſervanda ſunt ea, quæ ſint iis, quibus promiſeris, inutilia, nec ſi plus tibi noceant, quam illi proſit, cui promiſeris. Contra officium eſt majus non antcponi minori, ut ſi conſtitueris te cuipiam advocatum in rem præſentem eſſe venturum, atque interim graviter ægrotare filius cæperit, non ſit contra officium, non facere, quod dixeris, magiſque ille cui promiſſum ſit, ab officio diſcedat, ſi ſe deſtitutum queratur.* Cicero de Offic. L. 1. c. 10. *Si quis medicamentum cuiquam dederit ad aquam intercutem, pepigeritque ne illo medicamento unquam poſtea uteretur, ſi eo medicamento ſanus factus fuerit, & annis aliquot poſt inciderit in eundem morbum, nec ab eo quicum pepigerat impetret, ut item eo liceat uti, Quid faciendum ſit? Cum is ſit inhumanus, qui non concedat uti, nec ei quicquam fiat injuriæ, vitæ & ſaluti conſulendum.* Ib. Lib. 3. c. 24. where there, alſo, ſome other Examples.

[3] See *Lib.* 1. *c.* 3. §. 7.

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before the Time prefix'd, perhaps his Affection, and the Merits of the Perſon, may alter; or ſome Misfortune may intervene, rendring it incommodious for him to part with what he intended. In the ſame Manner as he that makes his *Will*, does not transfer his Right immediately on the Heir; but he is ſuppoſed ever to have this Clauſe or Condition in his Mind, *Such a Perſon ſhall be my Heir, unleſs I alter my Will before my Deceaſe.* Tho' indeed it be look'd upon as an Argument of Levity and Inconſtancy, for a Man to cheat and delude another with falſe Hopes and Expectations.

The Caſe is very different, if I expreſs myſelf thus, *I have given, or do give to be deliver'd Tomorrow:* For this is plainly giving a Man To-day the Right of having a Thing To-morrow, or transferring to him To-day the Right over a Thing, which ought To-morrow to be actually deliver'd to him. Nor is it any Objection againſt what we have been aſſerting, that, according to the ordinary Form and Manner of Speech, moſt Promiſes are expreſs'd in Terms of Futurity. For in the moſt ſolemn Engagements by formal *Stipulation*, or by Oath, we uſe the ſame Way of Speaking, *You* ſhall *have ſuch a Thing of me, I will give ſuch a Thing*, &c. The Reaſon of which Cuſtom is, that the delivering of a Thing promis'd, generally follows at ſome *Diſtance.* And, indeed, we can ſcarce call it a Promiſe, when, at the ſame Time, the Intention of giving is declared, and the Thing actually tender'd; inaſmuch as there ſeems here, either to have been no *Obligation*, or ſuch as expired in the very Minute that it was contracted. However, it is plain the Generality of Men never think they properly *have* a Thing, till they get firm Hold and full Poſſeſſion of it. If then theſe Terms of Futurity occur in a *perfect Promiſe*, as for Inſtance, *Tomorrow I will give you an hundred Pounds*, the Senſe of them amounts to this, I *now give you a Right to have and to require of me the ſaid Sum; and I, likewiſe, oblige myſelf on the Day appointed, to deliver it to you accordingly.* We may ſettle the whole Point with more Brevity, by only ſaying, that Verbs of the future Tenſe, made Uſe of in Promiſes, and eſpecially the Term of *Giving*, do either imply an *Obligation* hereafter to be contracted, and then they neither transfer the Thing, nor the Right, to another; or elſe they import the delivering of a Thing hereafter, the Right to which either is now, or has been formerly transferr'd; and then they do not hinder the *Promiſe* from being moſt perfect and compleat.

IX. It is requiſite, that whilſt we are engaged on this Point, we endeavour to ſettle a famous Queſtion, which has been much canvaſs'd by Authors, Whether there can be a Force of *obliging* in bare Promiſes, or in bare Pacts, whilſt they are no more than verbal Agreements, and are not ſtrengthen'd by any actual [1] Performance betwixt the Parties? *Connanus* the *Civilian* has been the principal Aſſertor of the negative Side; whom *Grotius*[a] and others have labour'd to confute. And, indeed, it has been the fix'd Opinion of wiſe and learned Men in all Ages, that *Faith* ought to be kept inviolably, though given only in *Words*; or that a Man, by *ſpeaking* only, without the Intervention of any *Deed*, may lay on himſelf a Neceſſity of ſome future Performance [3 4]. *Tull.* Off. I. c. 7. *The Foundation of Juſtice is Faith*, that is to ſay, *a Firmneſs and Truth in our Words, Promiſes, and Contracts. Hence ſome will have the Word* Fides *to be call'd* Quia fit quod dictum eſt, *becauſe that which was ſaid is done*, *Ulpian in* l. i. *D. de pactis.* What is ſo agreeable to human Faith, as to obſerve mutual Agreements? *Vid.* D. l. ii. c. 14. *de Pactis.* It was a very wicked Jeſt of the petit Prince of *Bantam*, when, being reproved for Breach of Promiſe, he anſwered, His Tongue had no Bone in it, to make it more ſtiff than was neceſſary for his Intereſt [5]. Whether *Connanus* has, with any Colour, oppoſed this univerſal Judgment, will appear, if we beſtow a little Time on taking his chief Arguments under Conſideration. In the firſt Place then, he ſays, that *he who raſhly believes a Promiſe made without Cauſe, is no leſs to blame, than the vain Perſon who made it.* Now here all the Difficulty lies in explaining what he means by a Promiſe made without *Cauſe.* If he would be underſtood of ſuch Promiſes as if not perform'd, it brings no Loſs or Prejudice to the Party, to whom they were directed, and, if fulfill'd, muſt needs create Trouble or Damage to the Performer; we are willing to allow, that Engagements of this Kind produce no *Obligation.* For how can a Man have any Right of requiring me to put myſelf to any Charges, or any Toil, in doing a Thing which ſhall profit him nothing [b 6]? And it

[a] L. 2. c. 11. f. 1, & 4. [b] Vid. *D.* L. 2. T. 14. Leg. 61.

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but conclude nothing poſitively. For in this Caſe every Man is free, and there muſt be a new Treaty to render the Agreement full and entire. Hence it is ſaid in the *Digeſts*, That if any one hath promiſed to lend us any Money, we may receive it, or not, as we pleaſe, *Qui pecuniam creditam accepturus ſpopondit creditori futuro, in poteſtate habet, ne accipiendo ſe ei obſtringat*, Lib. 12. Tit. 1. *De Rebus Creditis*, &c. Leg. 30. See what Mr. *Hertius* ſays there, and in his *Paræmia Jur. German.* Lib. 1. c. 8. §. 5. But there is, in this Caſe, a *Stipulation*, by which a Perſon is engaged to borrow of another; and this (even according to the Principles of the *Roman* Law) binds ſo far, that tho' the Borrower may, if he will, refuſe the Money, and ſo not contract the Debt, yet he is liable to Damages and Intereſt, towards the Lender, who might have employ'd his Money to Advantage elſewhere, if he had not promis'd to take it. This indeed even the Nature of the Caſe ſuppoſes. It is upon this Foundation that M. *De Bynkerſhoeck* decides a parallel Caſe in his *Obſerv. Jur. Rom.* Lib. I. Cap. IX. *in fin.* But if we here conſider the Simplicity of the natural Law, an Agreement, like this in Queſtion, leaves indeed the Contract, to which it is a Preample, imperfect, becauſe no Man certainly can be a Debtor before he receives the Money, and here is no actual Loan: But yet, if it be a true Contract, as it may certainly be, it ought to ſecure the Accompliſhment of the Agreement. This Power of retracting a Man's Word, which the ancient Lawyers ſo much encourag'd, is not at all agreeable to natural Equity, which requires a Compenſation, except where the Caſe is impoſſible, or an Alternative is left free by a ſpecial Clauſe in the Agreement. See Cap. VII. §. 4. following, and Lib. V. Cap. V. §. 2.

[1] Συναλλαγμα. See what is ſaid, *Lib.* 5. *c.* 2. §. 2, 3. and what is ſaid on *Grotius*, Lib. II. Cap. XI. §. 1.

[2] *Comment. Jur. Civ.* Lib. 5. c 1. But Mr. *Buddeus*, in his *Element. Philoſ. Pract.* Part II. c. 4. §. 9. aſſerts, That this Lawyer is falſely accuſed of any ſuch Opinion. Mr. *Hertius*, alſo, rejects the Opinion of a certain nameleſs Perſon, who juſtified *Connanus*, and maintains, That that Perſon ſpake only of ſimple Contracts, conſidered as they are uſed in the *Roman* Judicature. For he ſays, We muſt here diſtinguiſh between theſe two Propoſitions; the one is, That Promiſes produce a natural Obligation, and the other, That the natural Obligation, which ariſes from a Promiſe, does not produce a Civil Obligation, which is founded upon a Maxim of the Law of Nature, which authorizes a Sovereign Prince to declare, what Obligations ſhall be valid, and what null. Nevertheleſs, according to Mr. *Hertius*, we need only to read *Connanus*'s Reaſons to convince us, that he denies Promiſes to produce any Obligations able naturally, and of themſelves, to give a perfect Right, without the Aſſiſtance of the Civil Law.

[3] The *Latin* of *Cicero* is, *Fundamentum Juſtitiæ eſt fides*, i. e. *dictorum conventorumque conſtantia & veritas, eaque de cauſa fides appellatam, quia fiat quod dictum eſt.*

[4] And *Ulpian*'s, *Quid tam congruum fidei humanæ, quam ea, quæ inter eos placuerunt ſervare?*

[5] *Mr.* Barbeyrac's *fifth Note is inſerted in the Text.*

[6] We muſt certainly here ſuppoſe ſome Advantage, which ariſes, or may ariſe, from the Performance of our Promiſe, to the Perſon to whom it is given. Such is the Cuſtom and natural Aim of all our reciprocal Engagements; and this is found as well in *free* Promiſes

it is indeed againſt Reaſon, to undertake an Action, which can produce no Good, and may produce Evil: Thus, for Inſtance, ſuppoſe you had got me to promiſe you that I would forbear eating four Days together; upon what Account ſhould I ſtand to ſuch a raſh Eugagement, if ſo long a Faſt would prejudice my Health, and yet would contribute nothing to your Intereſt or Advantage? Therefore, in this Caſe, it is alike vain and fooliſh in one Man to make the Promiſe, and, in the other, ſeriouſly to challenge the Performance. Beſides, ſince Promiſes are Matters of *Grace*, or free Favour, they ought to be interpreted under this Condition or Limitation, *Provided I can compaſs the Thing I ſpeak of, without any conſiderable Damage to myſelf.* Nor can the Perſon, to whom I make the Promiſe, be ſo impudent and unreaſonable, as to deſire that my Kindneſs ſhould be an Injury to me, and that I ſhould enrich him by my own Loſſes [1]. It often falls out [2], that even not to keep one's Promiſe ſhall be juſt. For all muſt be referr'd to the fundamental Rules of Juſtice; as, firſt, that no Man be wrong'd; and, ſecondly, that the publick Good be, as far as poſſible, promoted. It may, likewiſe, happen, that the Performance of a Promiſe or Contract would prove highly prejudicial [3], either to one of the Parties, or to the other. For if *Neptune* (as it is in the Story) had not made good his Promiſe to *Theſeus*, *Theſeus* had not been ſo unfortunately deprived of his Son *Hippolytus*. Therefore, neither are we to keep thoſe Promiſes which are unprofitable to the Perſon to whom they are made; nor thoſe which are more hurtful to ourſelves than advantageous to him. It is a Breach of Duty to prefer a greater Damage to a leſs. If you promiſe to plead another Man's Cauſe, and, in the *Interim*, your Son falls dangerouſly ill, it will be no Violation of your Duty to recede from the *prior* Engagement; and the Fault will be much greater in the other Party, if he complain of ſuch a Diſappointment. *Tull.* Off. I. Vid. *D. L.* 50. T. 17.

Add. *Senec.* de Benef. l. iv. c. 35, 39. *Tull.* Off. l. iii. c. 24. This Caſe is propoſed, *I have a Remedy given me for the Dropſy, upon this Condition, That if it cures me, I am never to uſe that Medicine again. Within a few Years after I have been thus cured, I relapſe into the ſame Diſeaſe, and the Perſon, with whom I contracted, will not give me leave to make any farther Uſe of it. What am I to do here? It is Inhumanity in him to refuſe me, beſides, that my uſing it would do him no Hurt. I may therefore ſafely conſult my Life and Health.*

But if, by a *Promiſe made without Cauſe*, [4]*Connanus* underſtands only a gratuitous, or free Promiſe, without Proſpect of Gain; then his Aſſertion will overthrow the whole Buſineſs of Beneficence and Liberality, [5] and make all the Offices of Humanity baſe and mercenary Performances. For why ſhould not I credit a Man, who, knowing his own Abilities, has bid me expect ſome free Gift from him, purely that I may have Occaſion to love and to eſteem him? And ſince, if he had pleaſed, he might ſafely have forborn the Promiſe, why did he order me to depend upon his Word, if he deſign'd not fully to oblige himſelf to the making it good? For the denying of a Benefit is then only void of Injury, when a Man is bound to confer it only by the Law of Humanity; not when, by expreſs Promiſe, he has given another a *Right* to receive it.

X. *Connanus* urgeth farther, "That ſince Promiſes of this Kind commonly ariſe from Oſtentation rather than good Will, or, at leaſt, from Raſhneſs and Inconſiderancy, ſuppoſing the Deſign to be real; the Fortunes of Men would be in great Danger, were they bound to perform every Thing they ſaid." It was, perhaps, on ſome ſuch Principle, that the Ancients imagined the Oaths and Proteſtations of Lovers were invalid, and that the GODS excuſed the Breach of them, as proceeding from Minds blinded with Paſſion. *Plato in Sympoſ. & Poetæ paſſim.* But, indeed, the Danger, here mention'd, is chiefly in Imagination: For we do not attribute a Power of *obliging* to any Promiſes, but to ſuch as are made upon ſerious and deliberate Purpoſe; and he, that miſtakes Jeſt for Earneſt [6], ought to pay for his Want of Apprehenſion. On the other hand, to promiſe really more than one can conveniently perform, as it

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Promiſes, as in *mutual Engagements*. But as, in theſe laſt, it is not in the Power of one contracting Party to judge of the Advantage the other will, or will not, receive from the Execution of the Engagement; ſo there is no room to ſay, but the Caſe is the ſame with regard to gratuitous Promiſes. This would be to furniſh the Promiſer with a Pretence for trifling and eluding the Obſervation of his Promiſe. It is ſufficient he was under no Conſtraint, when he gave his Word according to the Rules eſtabliſhed, and that the Nature of the Thing would admit of no tacit Exception. As it is the Will alone that makes the Promiſe obligatory, ſo the Motive propoſed hath no Place here: That is a Point commonly conceal'd, and is what the Perſon, to whom the Promiſe was given, has no Buſineſs to trouble himſelf about. See my Remark upon *Grotius*, Lib. II. Cap. X. §. 21.

[1] This is contrary to Nature, according to the *Roman* Lawyers. *Jure Naturæ æquum eſt, neminem cum alterius detrimento & injuria fieri locupletiorem*, Digeſt. Lib. 50 Tit. 16. De Diverſ. Reg. Jur. Leg. 206.

[2] The *Latin* of *Cicero* is this, *Sed incidunt ſæpe tempora, cum ea, quæ maxime videntur digna eſſe juſto homine, eoque, quem virum bonum dicimus, commutantur, fiuntque contraria; ut reddere depoſitum, promiſſum facere, quæque pertinent ad veritatem, & ad fidem, ea migrare interdum, & non ſervare ſit juſtum. Referri enim decet ad ea, quæ propoſui in principio, fundamenta juſtitiæ, primum, ut ne cui noceatur; deinde, ut communi utilitati ſerviatur. Cum tempora commutantur, commutatur officium, & non ſemper eſt idem; poteſt enim accidere promiſſum aliquod, & conventum, ut id efficì ſit inutile, vel ei, cui promiſſum ſit, vel ei, qui promiſerit. Nam ſi, ut in fabulis eſt, Neptunus, quod Theſeo promiſerat, non feciſſet, Theſeus filio Hippolyto non eſſet orbatus. Ex tribus enim optatis, ut ſcribitur, hoc erat tertium, quod de Hippolyti interitu iratus optavit.* (See Eurip. Hippolyt. *v.* 1315, &c.) *quo impetrato, in maximos luctus incidit. Nec promiſſa igitur ſervanda ſunt ea, quæ ſint iis, quibus promiſeris, inutilia, nec ſi plus tibi noceant, quam illi proſit, cui promiſeris. Contra officium eſt majus non anteponi minori, ut ſi conſtitueris te cuipiam advocatum in rem præſentem eſſe venturum, atque interim graviter ægrotare filius coeperit, non ſit contra officium, non facere, quod dixeris, magiſque ille cui promiſſum ſit, ab officio diſcedat, ſi ſe deſtitutum queratur.* Cicero de Offic. L. 1. c. 10. *Si quis medicamentum cuiquam dederit ad aquam intercutem, pepigeritque ne illo medicamento unquam poſtea uteretur, ſi eo medicamento ſanus factus fuerit, & annis aliquot poſt inciderit in eundem morbum, nec ab eo quicum pepigerat impetret, ut item eo liceat uti, Quid faciendum ſit? Cum is ſit inhumanus, qui non concedat uti, nec ei quicquam fiat injuriæ, vitæ & ſaluti conſulendum.* Ib. Lib. 3. c. 24. where there, alſo, ſome other Examples.

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[6] See §. 5. aforegoing.

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muſt be acknowledged a Fault, ſo it would be a much greater, and, indeed, a Piece of Barbarity. ſtrictly to challenge and require it. Aurelian, *in* Flavius Vopiſcus, *c.* 35. *Setting out on an Expedition, and promiſing the People to beſtow Crowns of two Pound Weight on them, if he return'd victorious; when the Diſtribution was to be made, the Crowns proved only of Bread, whereas the People expected them of Gold* [1]. And beſides, we ſhould take care to diſtinguiſh between ſuch Terms of [2] Honour and Eſteem, as Perſons make Uſe of to expreſs, in an indefinite Manner, their good Affection towards us; and ſuch particular Engagements as they bind themſelves by, to perform ſomewhat on our Behalf: For Men of good Nature, and good Breeding, often expreſs their Kindneſs and Civility in very ample Terms; they declare themſelves to be *entirely ours*, and offer all they have to our Service and Diſpoſal [3 a]. Old *Æolus*, in *Virgil*, had this Piece of Gallantry:

——— *Tuus, O Regina, quid optes,*
Explorare labor; mihi juſſa capeſſere fas eſt.
Æn. 1. *v.* 80, 81.

——— Great Queen, be pleas'd to ſay
The Thing you wiſh; my Duty's to obey.

Here the Goddeſs had been uncivil, ſhould ſhe have taken Advantage of his general Compliment. Words of this Nature then, however ſeriouſly deliver'd, oblige a Man to no certain Performance; but only ſerve to teſtify his hearty Reſpect and kind Inclination towards another [b]. But thoſe Promiſes, by which we empower another to expect ſome particular and determinate Service from us, ought moſt ſtrictly to be fulfill'd, becauſe the other Party, building on our Word, has adjuſted his Affairs accordingly. So, though there now and then happens an Inſtance of a vain Prodigal, who ſhould have been put under Government for a Fool, or a Madman, that ruins himſelf by profuſe and inconſiderate Engagements, this ought to be no Reaſon why we ſhould affirm all verbal Obligations to be invalid, and baniſh them from the Uſe of human Life; as we don't condemn *Suretiſhip* in general, though many have ſuffer'd ſo ſeverely by it. Upon the Whole, ſince an expreſs Promiſe paſſes into a Debt, Men ought to be very cautious of engaging for more than they are able to compaſs. And 'tis not Modeſty, but a vicious Weakneſs in any Perſon to be ſo eaſy and tender, that he dares not deny the moſt impudent and unreaſonable Petitioner [4].

XI. What *Connanus* alledges more in Defence of his Opinion, may be ſolved with little Difficulty: He ſays, "'Tis fit that ſome Things ſhould be left "to every Man's Honeſty and free Bounty, and "that all Matters ſhould not be reduced to the "Rigour and Neceſſity of ſtrict Obligation. That "the Study of Integrity and Conſtancy would improve amonſt Mankind, were there but a Field "left for thoſe Virtues to exert and exerciſe themſelves in; which is hardly poſſible, if Men are "compel'd to obſerve all the Promiſes they make. "But that otherwiſe, it was a great and glorious "Thing to perform, what by Words or other "Signs, you ſhew'd your Intention of doing; and "ſo much the more glorious, the leſs it ſeem'd "conſtrain'd." But, indeed, there is ſtill left Scope enough for Liberality, though you give a Man a Right of demanding ſomewhat from you, which at firſt you might have ſecurely denied him.

And ſince there muſt needs paſs ſuch a mighty Number of Promiſes amongſt Men, whilſt they continually want the Aſſiſtance of each other, it is more for the Intereſt of human Affairs, that there ſhould be leſs Glory in the Act of keeping Faith, than that ſo many Perſons ſhould be deluded by other Mens Inconſtancy and Irreſolution. The Law of Nature commands us to lend to another, ſo far as we can do it without any conſiderable Prejudice to ourſelves. But the Obligation is render'd more ſtrict and binding, if, by our own free Offer, we reduce this general and unlimited Injunction of Nature to a particular Engagement, and aſſure the Party that he may expect, for certain, it ſhall be fulfill'd. So that this Argument is plainly falſe, *If I had not promis'd, it had been nevertheleſs the Duty of a juſt and good Man to relieve the Indigence of others; therefore it is laudable to ſtand to Promiſes, not becauſe we have bound ourſelves by giving our Word, but becauſe the Party is in real Want of our Succour.*

He is willing to grant thus much, That if a Man by breaking his Promiſe, has cauſed the other Party to ſuffer Damages, (who, for Inſtance, might depend perhaps on his Word, and ſo neglect to provide for his own Neceſſities) that, in this Caſe, he ſhould be bound to make good the Loſs ſuſtained. And from this Conceſſion we may as fairly infer, That Promiſes may be challenged, and that we ſtand obliged to perform them, leſt we prejudice the Perſons to whom they were directed. But it is very dangerous to draw thence ſuch Conſequences as theſe; That *when you would not be in a worſe Condition, ſhould I break my Promiſe, than you was before I made it, I may then have Liberty of revoking it; ſuppoſing that nothing has yet been done towards the Performance. And it is more againſt Nature for you to require me to make good this Engagement againſt my Will for*

[a] See what *Ahab* ſaid to *Benhadad*, 1 Kings xx. 3, &c. though *Joſephus*, in his Antiquities, *l.* 8. *c.* 8. otherwiſe interprets the Place. *Grotius* ſaith, *Ahab* underſtood the Words in this Senſe, *I give up myſelf, and all I have, in way of Homage and Fealty*; but *Benhadad* took them in a ſtricter Meaning, *for the very Propriety and Poſſeſſion. Add. Polyb. excert. Leg.* 13. & Liv. *l.* 35. *c.* 28. concerning *Phaneas* the *Ætolian* Ambaſſador. That *Benhadad*'s Anſwer to *Ahab* was not a meer Complement, ſee the Commentary of M. *le Clerc*, and M. *Thomaſius*'s Diſſertation, *De oblig. ex promiſſione rei incertæ*, §. 25, & *ſeqq.* publiſhed in 1715. We may ſay the ſame Thing with regard to the Example taken from *Polybius*.

[b] *Add. Fern. Vaſq. Controverſ. illuſtr.* l. 1. c. 10, f. 20, &c.

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[1] Mr. *Thomaſius* thinks, that the People were beſotted, when they believed the Crowns ſhould be of that Weight; but, on the other hand, that the Emperor mocked his Subjects, by giving his Promiſe ſuch a ſtrait Interpretation, which looked like a Trick. There was really Cauſe to believe, that the Crowns, promiſed by the Emperor, were not Crowns made of Dough.

[2] *Ea autem ſola Dicta ſive Promiſſa admittenda ſunt, quæcunque ſic dicuntur, ut præſtentur, non ut jactentur*, Digeſt. Leg. 21. Tit. 1. *De Ædilitio edicto*, Leg. 19. See Mr. *Hertius*'s *Paræmia Jur. German.* Lib. 1. c. 10.

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[4] To which Purpoſe *Terence* ſpeaks in his *Andria*, Act 4. Scene 1. v. 5, &c.

——— *Imo, id genus eſt hominum peſſimum*
In denegando modo queîs pudor eſt paululum:
Poſt, ubi jam tempus eſt promiſſa perfici,
Tum coacti neceſſariò ſe aperiunt & timent,
Et tamen res cogit eos denegare. Ibi
Tum impudentiſſima eorum oratio eſt,
Quis tu es? Quis tu es? Quis mihi eſt? Cur meam tibi? Hem
Proximus ſum egomet mihi! attamen, ubi fides?
Si roges, nil pudet. Hic, ubi opus eſt,
Non verentur, illic, ubi nihil opus eſt, ibi verentur.

Plutarch alſo, in *Brutus*, relates it thus; Τὴν ἀπὸ τῶν ἀναισχύντων λαπαρεύσιν ἥτλαν, &c. It is unbecoming a great Man to yield to impudent Petitioners. *Brutus* uſed to ſay, They do not ſeem to have employed their Youth well, who are not able to deny any Thing.

your Gain and Benefit, than it would be for me to re-call it without your Detriment. For the Duty of *Humanity* is not fulfill'd by your not hurting another; but you ought, as far as you are able, positively to advance his Good. Therefore, when you have peculiarly engaged yourself to such a kind Performance on his Behalf, to repent of your Design only with this Consideration, That he is not like to be the worse for your Inconstancy, looks as if it were a Thing not worth a Man's Regard to improve the Condition of his Neighbour. The Case then is the same with these *verbal* Promises, as with those *Pacts* which have received the farther Confirmation of some Deed between the Parties; and no one will pretend, that we may run from those, when we see that our Change of Mind will not render the other Person's Condition worse, but only negatively, *not better*. Besides, as *Grotius* well observes from this Opinion of *Connanus*, taken in so gross and general a Manner as he expresses it, 'twill follow, That [1] Articles of Agreement made between the Princes and the People of different Nations, so long as nothing has yet been perform'd on either Side, are invalid; and especially in such Places where no particular Forms of Leagues or Covenants have been received into Use. And were this true, a general Diffidence and Jealousy must reign amongst Mankind, and no one must *believe* another any farther than he can *see* him. Which close and immediate Way of transacting, the Condition and Circumstances of many Men will not admit of; who may, nevertheless, have Occasion to settle Business with each other.

The last Argument of *Connanus*, taken from the Practice of the *Roman* Courts of Law, which granted an *Action* only upon such Promises as were confirm'd by *Stipulation*, is easily answer'd by observing, That the Reason of this Caution in the Civil Law, was not because serious Promises do not bind by the meer Law of Nature; but that the Ceremony of these solemn [2] Forms might put Men on considering thoroughly, whether it was expedient for them to enter into a Promise, which it would be impossible afterwards to revoke. As, likewise, that the Things promised might, by this Means, be express'd more punctually and plainly, lest any Obscurity, in that Respect, might give Occasion to future Cavils and Disputes [a].

[a] *Add.* l. 19. Tit. 5. *D. præscript. verb.*

[1] We shall treat of this, Lib. 8. c. 8, and 9, following.

[2] See Lib. 5. c. 2. §. 3. following. But Mr. *Thomasius* maintains, nevertheless, that they, that established these Forms among the *Romans*, had such Designs, as tended more to advance their private Interest, than the publick Good. The *Patricians* labour'd, by this Means, to keep the People in a Dependence upon them, and, by making the Laws obscure, interpreted them as they pleased, and, by multiplying Forms of Law without End, opened a large Field for Contentions and Divisions. This *Pomponius* the Lawyer tells us plainly, in a Fragment preserved in the *Digests*. *Deinde ex his Legibus* [*duodecim tabularum*] *eodem tempore fere actiones compositæ sunt, quibus inter se homines disceptarunt; quas actiones, nè Populus prout vellet institueret, certas solennesque esse voluerunt*, &c.——*Et quidem ex omnibus qui scientiam* [*Juris civilis*] *nacti sunt, ante Tiberium Coruncanium* (he was the first of the People that arrived at the Dignity of *Pontifex Maximus*, i. e. the High-Priest) *publicè professum neminem traditur, cæteri autem ad hunc vel in latenti jus civile retinere cogitabant, solumque consultoribus* [*vacare*] *potius, quam discere volentibus præstabant*, Lib. 1. Tit. 2. *De Origine Juris*, Leg. 2. §. 6. 35. See the *Nævi Jurispr. Rom.* by Mr. *Thomasius*, l. 1. p. 12, &c. and his *Divine Civil Law*, l. 2. c. 11. §. 60. in the Notes. Mr. *Gundling*, in his Commentary on the *Digest*. (*Tit. de Pactis* §. 8.) does not think this Proof convincing, though he owns there is great Room to think the *Patricians* guilty of the Crime laid to their Charge. Mr. *Heineccius*, without Hesitation, closes with the Opinion of Mr. *Thomasius*; for which see *Antiq. Rom. Jurispr. illustr.* Lib. III. Tit. XIV. §. 1. However this be, tis certain, on the one Hand, from the most ancient Times, the *Romans* were very fond of Form in all their Affairs; and, on the other Hand, it is very difficult to discover the first Origin, and precise Reason of any particular Rule of their civil Law. What the ancient and modern Lawyers say upon this Head, appears often an Imagination of their own, founded on this Supposition, That no Laws were ever made without some wise View in the Legislator, a Point that will admit of some Doubt. The Case may be the same, with another Reason more specious advanced on this Subject, which is, that the Ancients, in refusing a legal Action for simple Agreements, design'd to lessen the Number of Law-suits, and prevent rash Promises from hurting any Body. M. *De Rynkersboek* has long ago rejected these Kind of Reasons, and, after all, the most we can say is this, That such was the Custom, though we are ignorant of its Original. See *Dissertation de Pact. Jur. Stricti Contract.* in *Contin. adjectis*, Cap. I.

CHAP. VI.

Of the Consent required in making Promises and Pacts.

The CONTENTS of every Paragraph of the sixth Chapter.

I. *Consent is required to make Promises and Pacts.*
II. *Consent is signified openly, or tacitly.*
III. *Consent supposes the Use of Reason.*
IV. *Great Drunkenness hinders it.*
V. *Of such as are under Age.*
VI. *Of Error in Promises.*
VII. *Of Error in Promises and Contracts.*
VIII. *Of Fraud.*
IX. *A Suspicion of a Cheat makes Pacts void.*
X. XI. XII. XIII. *Fear makes Promises and Pacts void.*
XIV. *How Promises, null in themselves, may be made valid.*
XV. *Of the Consent of the Persons to whom a Promise is made.*
XVI. *Of the Signs and Instruments of Consent.*

I. SINCE the regular Effect of Pacts and Promises is to abridge and restrain our Liberty, and to lay on us the Burthen of necessarily doing such or such a Thing, which before we might have perform'd or omitted at our Pleasure; there can be no better Argument to hinder a Man from complaining of this Burthen, than to alledge, That he took it upon him by his own free Will and *Consent*, when he had full Power to refuse it [1].

II. This *Consent* is usually declared by express Signs, as by *Speaking*, *Writing*, *Nodding*, &c. Yet sometimes, without the Healp of any such Tokens, it is sufficiently gather'd from the Nature and Circumstance of the Business [2 a]. And it is well known that [3] *Silence* itself, in many Cases, is

[a] *Labeo ait convenire posse vel re, vel per epistolam, vel per nuncium; inter absentes quoque* [*posse*]: *sed etiam tacite consensu convenire intelligitur. Digest.* l. 2. Tit. 14. *de Pactis, Leg.* 2. *Conventiones etiam tacitæ valent.* Ibid. Leg. 4. See also l. 13. Tit. 6. *Commod. vel contr.* Leg. 13. §. 2. in fin.

[1] The wise King *Solomon* has expressed this Matter well in these Words, which *Grotius* has quoted, *My Son, if thou hast promised any Thing to another, and thou hast bound thy Hands in Favour of him for whom thou art engaged, thou art snared with the Words of thy Mouth, thou art taken with the Words of thy Mouth*, Prov. vi. 1, 2. Hence it is that the *Hebrews* call Promises a Bond, *Numb.* xxx. 5. See also what *Grotius* says, Lib. 2. c. 11. §. 4. numb. 1.

[2] Is the same with [a] above.

[3] *Qui tacet, non utique fatetur, sed tamen verum est, cum non negare.* Digest. l. 50. Tit. 17. *De diversis Regulis Juris.* Leg. 142. See Numb. xxx. 5. with Mr. *Le Clerc*'s Notes, and Mr. *Hertius*'s *Paræmia Jur. German.* c. 7.

muſt be acknowledged a Fault, ſo it would be a much greater, and, indeed, a Piece of Barbarity. ſtrictly to challenge and require it. Aurelian, *in* Flavius Vopiſcus, *c.* 35. *Setting out on an Expedition, and promiſing the People to beſtow Crowns of two Pound Weight on them, if he return'd victorious; when the Diſtribution was to be made, the Crowns proved only of Bread, whereas the People expected them of Gold* [1]. And beſides, we ſhould take care to diſtinguiſh between ſuch Terms of [2]Honour and Eſteem, as Perſons make Uſe of to expreſs, in an indefinite Manner, their good Affection towards us; and ſuch particular Engagements as they bind themſelves by, to perform ſomewhat on our Behalf: For Men of good Nature, and good Breeding, often expreſs their Kindneſs and Civility in very ample Terms; they declare themſelves to be *entirely ours*, and offer all they have to our Service and Diſpoſal [3 a]. Old *Æolus*, in *Virgil*, had this Piece of Gallantry:

——— *Tuus, O Regina, quid optes,*
Explorare labor; mihi juſſa capeſſere fas eſt.
Æn. 1. *v.* 80, 81.

——— Great Queen, be pleas'd to ſay
The Thing you wiſh; my Duty's to obey.

Here the Goddeſs had been uncivil, ſhould ſhe have taken Advantage of his general Compliment. Words of this Nature then, however ſeriouſly deliver'd, oblige a Man to no certain Performance; but only ſerve to teſtify his hearty Reſpect and kind Inclination towards another [b]. But thoſe Promiſes, by which we empower another to expect ſome particular and determinate Service from us, ought moſt ſtrictly to be fulfill'd, becauſe the other Party, building on our Word, has adjuſted his Affairs accordingly. So, though there now and then happens an Inſtance of a vain Prodigal, who ſhould have been put under Government for a Fool, or a Madman, that ruins himſelf by profuſe and inconſiderate Engagements, this ought to be no Reaſon why we ſhould affirm all verbal Obligations to be invalid, and baniſh them from the Uſe of human Life; as we don't condemn *Suretiſhip* in general, though many have ſuffer'd ſo ſeverely by it. Upon the Whole, ſince an expreſs Promiſe paſſes into a Debt, Men ought to be very cautious of engaging for more than they are able to compaſs. And 'tis not Modeſty, but a vicious Weakneſs in any Perſon to be ſo eaſy and tender, that he dares not deny the moſt impudent and unreaſonable Petitioner [4].

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He is willing to grant thus much, That if a Man by breaking his Promiſe, has cauſed the other Party to ſuffer Damages, (who, for Inſtance, might depend perhaps on his Word, and ſo neglect to provide for his own Neceſſities) that, in this Caſe, he ſhould be bound to make good the Loſs ſuſtained. And from this Conceſſion we may as fairly infer, That Promiſes may be challenged, and that we ſtand obliged to perform them, leſt we prejudice the Perſons to whom they were directed. But it is very dangerous to draw thence ſuch Conſequences as theſe; That *when you would not be in a worſe Condition, ſhould I break my Promiſe, than you was before I made it, I may then have Liberty of revoking it; ſuppoſing that nothing has yet been done towards the Performance. And it is more againſt Nature for you to require me to make good this Engagement againſt my Will for*

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Tum coacti neceſſariò ſe aperiunt & timent,
Et tamen res cogit eos denegare. Ibi
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Plutarch alſo, in *Brutus*, relates it thus; Τὴν ἀπὸ τῶν ἀναισχύντων λαπαρείνων ἥτταν, &c. It is unbecoming a great Man to yield to impudent Petitioners. *Brutus* uſed to ſay, They do not ſeem to have employed their Youth well, who are not able to deny any Thing.

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The last Argument of *Connanus*, taken from the Practice of the *Roman* Courts of Law, which granted an *Action* only upon such Promises as were confirm'd by *Stipulation*, is easily answer'd by observing, That the Reason of this Caution in the Civil Law, was not because serious Promises do not bind by the meer Law of Nature; but that the Ceremony of these solemn [2] Forms might put Men on considering thoroughly, whether it was expedient for them to enter into a Promise, which it would be impossible afterwards to revoke. As, likewise, that the Things promised might, by this Means, be expres's'd more punctually and plainly, lest any Obscurity, in that Respect, might give Occasion to future Cavils and Disputes [a].

[a] *Add.* l. 19. Tit. 5. *D. præscript. verb.*

[1] We shall treat of this, Lib. 8. c. 8, and 9, following.

[2] See Lib. 5. c. 2. §. 3. following. But Mr. *Thomasius* maintains, nevertheless, that they, that established these Forms among the *Romans*, had such Designs, as tended more to advance their private Interest, than the publick Good. The *Patricians* labour'd, by this Means, to keep the People in a Dependence upon them, and, by making the Laws obscure, interpreted them as they pleased, and, by multiplying Forms of Law without End, opened a large Field for Contentions and Divisions. This *Pomponius* the Lawyer tells us plainly, in a Fragment preserved in the *Digests*. *Deinde ex his Legibus* [*duodecim tabularum*] *eodem tempore fere actiones compositæ sunt, quibus inter se homines disceptarunt; quas actiones, nè Populus prout vellet instituerent, certas solenneſque esse voluerunt*, &c.——*Et quidem ex omnibus qui scientiam* [*Juris civilis*] *nacti sunt, ante Tiberium Coruncanium* (he was the first of the People that arrived at the Dignity of *Pontifex Maximus*, i. e. the High-Priest) *publicè professum neminem traditur, cæteri autem ad hunc vel in latenti jus civile retinere cogitabant, solumque consultoribus* [*vacare*] *potius, quam discere volentibus præstabant*, Lib. 1. Tit. 2. *De Origine Juris*, Leg. 2. §. 6. 35. See the *Nævi Jurispr. Rom.* by Mr. *Thomasius*, l. 1. p. 12, *&c.* and his *Divine Civil Law*, l. 2. c. 11. §. 60. in the Notes. Mr. *Gundling*, in his Commentary on the *Digest.* (*Tit. de Pactis* §. 8.) does not think this Proof convincing, though he owns there is great Room to think the *Patricians* guilty of the Crime laid to their Charge. Mr. *Heineccius*, without Hesitation, closes with the Opinion of Mr. *Thomasius*; for which see *Antiq. Rom. Jurispr. illustr.* Lib. III. Tit. XIV. §. 1. However this be, tis certain, on the one Hand, from the most ancient Times, the *Romans* were very fond of Form in all their Affairs; and, on the other Hand, it is very difficult to discover the first Origin, and precise Reason of any particular Rule of their civil Law. What the ancient and modern Lawyers say upon this Head, appears often an Imagination of their own, founded on this Supposition, That no Laws were ever made without some wise View in the Legislator, a Point that will admit of some Doubt. The Case may be the same, with another Reason more specious advanced on this Subject, which is, that the Ancients, in refusing a legal Action for simple Agreements, design'd to lessen the Number of Law-suits, and prevent rash Promises from hurting any Body. M. *De Rynkershoek* has long ago rejected these Kind of Reasons, and, after all, the most we can say is this, That such was the Custom, though we are ignorant of its Original. See *Dissertation de Pact. Jur. Stricti Contract. in Contin. adjectis*, Cap. I.

CHAP. VI.

Of the Consent required in making Promises and Pacts.

The CONTENTS of every Paragraph of the sixth Chapter.

I. *Consent is required to make Promises and Pacts.*
II. *Consent is signified openly, or tacitly.*
III. *Consent supposes the Use of Reason.*
IV. *Great Drunkenness hinders it.*
V. *Of such as are under Age.*
VI. *Of Error in Promises.*
VII. *Of Error in Promises and Contracts.*
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IX. *A Suspicion of a Cheat makes Pacts void.*
X. XI. XII. XIII. *Fear makes Promises and Pacts void.*
XIV. *How Promises, null in themselves, may be made valid.*
XV. *Of the Consent of the Persons to whom a Promise is made.*
XVI. *Of the Signs and Instruments of Consent.*

I. SINCE the regular Effect of Pacts and Promises is to abridge and restrain our Liberty, and to lay on us the Burthen of necessarily doing such or such a Thing, which before we might have perform'd or omitted at our Pleasure; there can be no better Argument to hinder a Man from complaining of this Burthen, than to alledge, That he took it upon him by his own free Will and *Consent*, when he had full Power to refuse it [1].

II. This *Consent* is usually declared by express Signs, as by *Speaking*, *Writing*, *Nodding*, &c. Yet sometimes, without the Healp of any such Tokens, it is sufficiently gather'd from the Nature and Circumstance of the Business [2 a]. And it is well known that [3] *Silence* itself, in many Cases, is

[a] *Labeo ait convenire posse vel re, vel per epistolam, vel per nuncium; inter absentes quoque* [*posse*]: *sed etiam tacite consensu convenire intelligitur. Digest.* l. 2. Tit. 14. *de Pactis, Leg.* 2. *Conventiones etiam tacitæ valent.* Ibid. Leg. 4. See also l. 13. Tit. 6. *Commod. vel contr.* Leg. 13. §. 2. in fin.

[1] The wise King *Solomon* has expressed this Matter well in these Words, which *Grotius* has quoted, *My Son, if thou hast promised any Thing to another, and thou hast bound thy Hands in Favour of him for whom thou art engaged, thou art snared with the Words of thy Mouth, thou art taken with the Words of thy Mouth*, Prov. vi. 1, 2. Hence it is that the *Hebrews* call Promises a Bond, *Numb.* xxx. 5. See also what *Grotius* says, Lib. 2. c. 11. §. 4. numb. 1.

[2] Is the same with [a] above.

[3] *Qui tacet, non utique fatetur, sed tamen verum est, cum non negare.* Digest. l. 50. Tit. 17. *De diversis Regulis Juris.* Leg 142. See Numb. xxx. 5. with Mr. *Le Clerc's* Notes, and Mr. *Hertius's Paræmia Jur. German.* c. 7.

interpreted for Consent. Thus, *to be silent, is to own your Crime*, Eurip. Iphigen. in Aulid. *v.* 1142. *Vid. D.* L. 1. Tit. 17. But in all these Exceptions it is strictly required, That the State and Condition of Affairs be such, as shall, on every Side conspire to ground the Presumption; and that not so much as one probable Conjecture appears to the Contrary. For otherwise, it would be very hard Measure to put a Man under *Obligation*, upon any little Hint or Symptom of Agreement. And thus we see wherein the proper Nature of *tacit Pact* consists; that it happens, when we express not our Consent by the Signs generally made use of in human Commerce and Transactions; but leave it to be supposed, from the Business itself, and from the Circumstances that attend it [1]. What we most commonly meet with of this Kind is, That when some principal and leading Contract has been entred upon by *express* Agreement, some other *tacit* Pact is included in it, or flows from it, as we cannot but apprehend, upon considering the Nature of the Affair. In the same Manner most Covenants leave some *slight* Exceptions and Conditions to be *understood*. But we must have a Care of stretching these Indulgences any farther than is well consistent with the carrying on of Trade and Business in the World; lest they should prove of ill Consequence to the Validity of Contracts, by rendering them too slippery and uncertain.

Of *Tacit Pacts*, it may not be amiss to offer these few Instances: A Stranger comes into a *State*, where Foreigners are treated with great Civility, and he comes in a friendly Manner here; though he does not expressly swear Fealty to the Government, yet he is supposed, by the very Act of his coming, tacitly to have engaged, That, according to his Rank and Condition, he will conform to every Law of the Place, so soon as he shall understand, that such a Law was designed to reach all Manner of Persons, who should abide in those Territories. And, on the other Side, the Government tacitly engages to grant him Security and Protection, and the Benefits of publick Justice.

A Man is abroad at a Distance from his Family, and his Concerns; in the mean Time, a Neighbour, without particular Orders, transacts some Business for him: Here again we must suppose a *tacit* Pact, by Virtue of which, the one having lent his free Assistance and Service, the other is bound to requite the Pains, and to refund the Charge. In as much as it may be fairly presumed [2], That had the absent Party known how Affairs stood, he would readily have consented to the whole Management.

A Guest sits down to a Table at a Publick-House; and though he has not exchanged a Word with the Host about the Price of his Dinner, yet, by the bare Act of sitting down to eat, he is supposed to consent to the Payment of the Scot; since all know, that this is not a Place where Men are treated for nothing.

In like Manner, the *Obligation* between a *Guardian* and his *Ward* [3] has its Rise from a *tacit* Contract [a].

As for those *tacit* Pacts, which we observ'd to flow from principal Contracts, and which we may call *accessary*, these Examples will shew the Nature and the Manner of them. A Man, that bargains with another to have free *Ingress* to a Place [4], is supposed, at the same Time, to obtain Liberty of *Regress* from it, though this be not expressly mentioned; because, otherwise, the former Agreement would be to no Purpose. A Prince, or Magistrate, who, by Covenant, gives Leave to Strangers to frequent his Markets, is supposed to consent, likewise, That they shall carry home the Goods they purchase there. As, on the contrary, it would be most ridiculous Madness for me, supposing I have sold a Field to another, to deny him the Liberty of possessing it here, and to desire he would translate it to another Place. In the same Manner, he who lets out a Chamber to hire, is supposed to consent withal, that the Lodger shall make Use of such other Parts of the House as he cannot be without; as, of the Doors, Entries, and the like; at least so far as to have free Access to his Apartment, and free Passage from it.

Instances of *tacit* Exceptions and Conditions are so frequent, that 'tis not necessary to set down any in particular. But we must observe this of them in general, That they were ever to be interpreted with the greatest Strictness and Severity of Judgment; and that they will hold good no farther than it appears from very sure Grounds and Presumptions, that they were consented to by the Parties whom they concern. *Add. D.* XXII. *tit.* 3. *de Probation. & Præsumptionib. Leg.* XXIV. For otherwise, it would be easy to thrust a troublesome *Obligation* upon a Man against his Will: And were too great a Licence given to these secret and *implied* Reserves, there is scarce any Covenant which might not be either annull'd or evaded [5 b].

[a] *Add. Grot.* l. 3. c. 24. See what we shall say hereafter in Book 4. c. 4. s. 15. [b] The *Roman* Lawyers give this Instance of a *tacit Pact* in l. 2. tit. 14. *D. de Pactis*, leg. 2. If I restore to my Debtor his Bond or Caution, it should seem there is a tacit Agreement between us, that I demand not the Loan. Yet here, according to the Simplicity of natural Law, there appears to

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[1] A tacit Consent properly arises from certain Things, which appear done, or omitted on Purpose; but yet, of themselves, do not imply directly an Approbation of the Thing that is doing. The Circumstances then may be reasonably supposed to explain the Will of him, who knowing them, also knows the Consequences which those concern'd may draw from them. But there is another Sort of Consent, which the *Roman* Lawyers, or their Interpreters, call'd sometimes *tacit*, or *presumptive*, tho' it be purely imaginary, as they own'd themselves. This is when a Person doth not think, nor, indeed, can think, of the Engagement he enters into, because he is ignorant on what it is founded; yet he is still supposed to acquiese in it, because we presume, that if he knew the Thing, either he would, or should, consent to it, according to the Maxims of natural Equity; or, because the Laws, on Account of the publick Good, take it for granted, that every Man is bound to fulfil his Engagements, and assume an Authority to constrain him to keep his Word. We might, indeed, sometimes, without such a Deduction, found the Obligation, in this Case, on more natural and simple Principles. But, provided these Reasons be just, we ought to excuse the *Roman* Lawyers for having Recourse to Fiction, on this, and other Subjects; either because they did not always see the most natural Foundation to decide the Cases they examined; or, because they were reduced to the Necessity of taking a Circuit to elude the Force of certain established Rules, from which they durst not openly depart. Our Author distinguishes neither the Terms nor Notions, as appears from the Examples he alledges of them, that do another's Business without his Knowledge, and of those who take upon them a Guardianship. *Titius*'s *Observ. on Pufendorf*, 205, 206, and in *Compend. Lauterbach. Observ.* 56. See l. 4. c. 13. §. 5. Note 11. We may, also, find some very good Remarks upon this Distinction of a *tacit* and *presumptive* Consent, in Mr. *Thomasius*'s *Instit. Jurisprud. Divin.* l. 2. c. 7. §. 19, *&c.* whose Notions, tho' they seem different, may easily be made to agree with our Author's, which I have recited and represented in my Manner. See, also, Mr. *Thomasius*'s Discourse, intitled, *Philosophia Juris de Obligationibus & Actionibus*, which is the Third among his Disputations at *Leipsick*, c. 2. §. 132, *&c.* As, also, Mr. *Noodt de Pact. Transact.* Cap. II. Mr. *Gundling* in Digest. Lib. II. Tit. XIV. §. 46, *& seqq.*

[2] See the foregoing Note, and what is said farther, l. 4. c. 13. following.

[3] See l. 4. c. 4. §. 15. and l. 5. c. 4. §. 1.

[4] See *Grotius, De Jure Belli & Pacis*, l. 3. c. 21. §. 16. and Mr. *Hertius*'s Discourse, *De Literis Commeatûs pro Pace*, §. 13.

[5] Is the same with [b] above.

III. To

III. To make a Man capable of [1] giving a ſerious and firm *Conſent*, 'tis, above all Things, neceſſary that he be Maſter of his Reaſon, ſo far as to underſtand the Buſineſs in Hand, to know whether it be convenient for him, and whether he have Strength and Ability to perform it; and, when he has well conſider'd theſe Points, to be able to expreſs his Agreement by ſufficient Indications. Hence it follows, that the Promiſes of Infants [2], of Madmen, and of Idiots [3], are utterly invalid. But, as to the Caſe of Madneſs, it is particularly to be obſerved, that this does not render a Man's Actions null and void in moral Eſteem, any longer than during the actual Continuance of it. But ſo long as he enjoys lucid Intervals [4] of Senſe, there's nothing hinders why he ſhould not be able, *effectually*, to oblige himſelf for ſuch Time as the Diſtemper allows him the Uſe of his Reaſon. Yet the Fit returning ſuſpends his Power of contracting, or of performing any Buſineſs, till he again recovers the Government of himſelf and of his Actions. Therefore the common Maxim in the Civil Law, That *Madneſs, coming upon a Man, deſtroys not any Buſineſs which he had before duly perform'd*, is to be underſtood of ſuch Actions, or Concerns, as can be compleated and diſpatched at once. Of this Kind is a *Will*, or *Teſtament* [5], which, being once rightly made, ſtands good, unleſs it be revoked by a ſufficient Declaration to the contrary; ſuch as a diſtracted Perſon cannot give. But in Caſe a Man lies under ſuch an Obligation, as is to be fulfill'd by diſtant Acts, all requiring the Uſe of Reaſon, it is plain, that if he fall into Diſtraction, the Duty is thereby ſuſpended. Thus, if a Perſon bargain with me to work at my Affairs for a certain Time; if he happen to be ſeized with a Phrenſy, the Obligation expires, in as much as he is now incapable of making it good: Altho', indeed, in Hopes that a Perſon in this Condition may recover his Health, we uſually ſuppoſe him ſtill to have inherent in him all his former Obligations, Powers, and Rights, the Charge of exerciſing which is, for a Time, committed to others. But if the Madneſs be judged incurable, the Perſon is, in all legal and moral Conſideration, to be accounted *dead* [6]. Vid. Dig. l. I. *tit.* 6. *De his qui ſui vel al. jur. ſunt Leg.* viii. *tit.* 18. *De Offic. Præſid. Leg.* xiv. *& l.* ii. *tit.* 3. *De Procurat. & Defenſor. Leg.* ii. *& l.* ix. *tit.* 2. *Ad leg. Aquilian. leg.* v. *ſ.* 2.

IV. Farther [7], ſince the Uſe of Reaſon is exceedingly hinder'd, and ſometimes entirely oppreſs'd by Drunkenneſs, it is an uſual Queſtion, Whether a Perſon under that Diſorder can bind himſelf by any Covenant or Promiſe? Which, we think, ought to be decided in the negative, in Caſe the Intemperance were ſo great, as entirely to drown and overwhelm the Underſtanding. For it can by no Means be eſteemed a real and deliberate Conſent, if a Man ſhould, with never ſo much Eagerneſs of Inclination run into an Engagement, and expreſs his Agreement by Signs, which would, at other Times, be valid, whilſt his Mind lies, as it were, under a ſtupifying Charm, and he is bewitcht out of his Reaſon. It would, indeed, be highly impudent for a Perſon to challenge the Obſervance of ſuch a Promiſe, eſpecially if it could not be perform'd without conſiderable Burthen or Trouble. And if it farther appear, that he purpoſely took Advantage of the other Man's Weakneſs, and cunningly drew him into an Engagement under that Diſtemper of his Brain, he ſtands liable to be puniſh'd as an arrant *Cheat*. But when a Man, after the drunken Fit is over, ſhall, upon being put in Mind of his Promiſe, acknowledge and confirm it, it ſhall then be *obligatory*; yet not by Virtue of what paſs'd when he was

to be no Occaſion of introducing a *tacit Pact*, ſince it is much plainer to ſay, That, by the returning back the Caution, the Debt is ſuppoſed to be forgiven, and, conſequently, no Room left for an *Action* upon it. But that the *Civil* Law choſe this round about Way of Proceeding, was the Effect of Caution, leſt an Obligation, really contracted, ſhould ſeem to be cancel'd by bare Conſent. See below, Book V. Chap. I. §. 6. and Chap. XI. §. 7. Another Example they produce, and ſay, Suppoſe that in a Leaſe of a Farm there be this Clauſe, That in Caſe the Farmer does not till the Ground as he ought, the Proprietor may lett it to another; always provided the Farmer ſhall be bound to indemnify the Landlord, in Proportion as the Farm is lett again at a lower Price; But, on the contrary, if it happens to be lett at an higher Price, 'tis for the Advantage of the Proprietor; becauſe there ſeems to have been a tacit Agreement between them, that the Surplus of the new Farm ſhould not come to the Farmer who has left it. *Digeſt.* l. 19. tit. 2. *Locati, conducti*, leg. 51. in the Beginning, *Ea Lege fundum locavi, ut ſi non ex Lege coleretur, recolare eum mihi liceret, & quo minoris locaſſem, hoc mihi præſtaretur (nec convenit, ut ſi pluris locaſſem, hoc tibi præſtaretur) videtur autem in hac ſpecie id ſilentio conveniſſe, nequid præſtaretur, ſi ampliore pecunia fundus eſſet locatus,* (i. e.) *ut hæc ex conventione pro locatore tantummodo interponeretur.* But yet, in the Caſe propoſed, without ſuppoſing any ſuch tacit Agreement, it is more natural to affirm, that the Conditions, on which this Kind of Contract was founded, cannot be extended ſo far, as to benefit the Farmer, who is, indeed, worthy of no Manner of Favour, in as much as he hath neglected to cultivate his Land according to his Bargain. Here our Author is quite in the Right. See upon this Law *Anthony Favre. Ration.* Tom. V. p. 613. Our Author gives ſeveral other Examples of *tacit* Conventions. *Vid. D.* l. 17. tit. 1. *Mandati, vel contra*, leg. 6. ſ. 2. l. 19. tit. 2. *Locati, conducti*, leg. 13. *in fine, &* 14. *Cod.* l. 2. tit. 3. *De Pactis*, leg. 2. Let me add, that there is a remarkable Inſtance on this Subject, in *Quinctilian* (*Declam.* 336.) where that Author reaſons very juſtly upon the Point in Queſtion.

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[1] Every true Conſent ſuppoſes, 1. A Phyſical Power of conſenting. 2. A Moral Power. 3. A ſerious and free Uſe of theſe two. Our Author treats of the firſt here, and the others afterwards. *Titius Obſerv.* 208, where that Author treats, very well, of requiſite Liberty: But for what regards the ſerious Deſign of Engaging, he makes it conſiſt in the external Tokens of Conſent. See §. VI. following.

[2] *Infans, & qui infantiæ proximus eſt, non multum à furioſo diſtant.* Inſtitut. Lib. 3. Tit. 20. *De Inutil. Stipul.* §. 9.

[3] *Furioſus nullum negotium gerere poteſt, quia non intelligit quod agit.* Inſtitut. l. 3. tit. 20. *De Inutil. Stipul.* §. 8. *Furioſi, —— nulla voluntas eſt.* Digeſt. Lib. 50. Tit. 17. De Diverſ. Reg. Juris Leg. 40.

[4] The true Queſtion is to know, Whether, in theſe Intervals, which we regard as lucid, the Madman recovers the Uſe of his Reaſon ſufficiently to judge as he would do if he were entirely free from his Diſtemper. See, upon this Head, a Diſſertation of Mr. *Thomaſius*, publiſhed in 1719, and intitled, *De Præſumptione Furoris & Dementiæ.*

[5] *Nam neque teſtamentum recte factum, neque ullum aliud negotium recte geſtum, poſtea furor interveniens perimit.* Inſtit. Lib. 2. Tit. 12. §. 1. See, alſo, Cod. Lib. 6. tit. 22. *Qui teſtamenta facere poſſunt*, &c. Leg. 9.

[6] We call properly a Civil Death, the State of them who are condemned to Death, perpetual Baniſhment, or any other Puniſhment, which implies an Excluſion from Society, and a Civil Life; upon which Account, they are as if they were not. Among the ancient *Romans*, ſuch as loſt their Freedom, or Right of Incorporation, either both together, or the laſt only, were accounted in the ſame State, which was called *Capitis Maxima, & Media Diminutio*, as the *Digeſts* ſpeak. *Intereunt autem homines quidem maxima aut media capitis diminutione.* Dig. Lib. 17. tit. 2. Pro Socio, Leg. 63. §. 10. See alſo, *Inſtit.* Lib. 1. tit. 16. *De capit. Diminutione.*

[7] I have tranſpoſed this Paragraph, and put the Author's fifth Section inſtead of it, making this my fifth, becauſe the Author, after he had ſpoken of the Promiſes of ſuch as have loſt their Reaſon, ought, according to his own Method, to have went on to the Promiſes of Infants, and not have interrupted the Thread of his Diſcourſe, by treating of the Promiſes of Drunkards, which might better make a Chapter by itſelf, becauſe Drunkenneſs is a tranſient Accident; whereas Infancy, and Folly, are States of long Continuance. By this Tranſpoſition, not at all inconvenient, I preſerve the natural Order of Things, which will be my Excuſe.

drunk, but of what he ſince did when he was ſober [1]. Yet the Merriment of a chearful Cup, which rather revives the Spirits, than ſtupifies the Reaſon, is no Hindrance to the Contracting of juſt Obligations; eſpecially, if they be afterwards renew'd at more ſober Seaſons. To this Purpoſe, the Account which *Tacitus*, *De Mor. Germ.* c. 22. gives us of the old *Germans*, is very remarkable. *'Tis at their Entertainments*, ſays he, *that they commonly make up Differences, contract Alliances, chooſe Princes, and, in fine, diſpatch moſt Affairs of Peace and War. They think no Time ſo proper as this, becauſe the generous Heat of the Liquor, as it opens their Hearts, and takes off all Diſguiſe from their Thoughts, ſo it inſpires them with brave Reſolutions and hardy Attempts. They are Strangers to Craft and Diſſimulation, and the Liberty of the Table gets out all they know, and all they deſign. But the Settling and Finiſhing of Buſineſs is left to the next Day, when their Minds are cloſed, and their Judgments grown cool. Thus they make the right Uſe of each Time; they conſult whilſt they cannot diſſemble, and they reſolve when they cannot miſtake.* The like is reported of the *Perſians* by *Herodot.* in *Clio*, l. i. c. 133. *Athenæus*, l. iv. c. 10. *Curtius*, l. vii. c. 4. *Add. Plutarch Sympoſ. Quæſt.* l. vii. c. 9, & 10 [2].

It is true, indeed, that Faults committed in Drunkenneſs are not, on that Account, excuſable [3]. Legiſlators have then thought fit to puniſh even Ignorance, when the Perſon is the Cauſe of his own Ignorance; and, therefore, a double Penalty is uſually enacted againſt drunken Offenders. For here the Exceſs, and, conſequently, the Ignorance, was of the Man's own procuring, it being in his Power to avoid them. *Ariſtot. Ethic.* l. i. c. 5. ſ. 10. It was one of *Solon*'s Laws, That a Governor, taken in Drunkenneſs, ſhould be put to Death; and *Pittacus* decreed, That a Fault committed under this Diſorder, ſhould have a twofold Puniſhment. *Laert.* l. i. in *Pittac.* Becauſe, though a Perſon, whilſt the Fit is on him, knows not, perhaps, what he does; yet, in as much as he voluntarily applied himſelf to the Uſe of ſuch Things as he knew would caſt a Cloud on his Underſtanding, he is ſuppoſed to have yielded Conſent to all the Effects of that Diſorder. Yet it will not follow from this Conſideration, that the Promiſes of drunken Men are *obligatory*; becauſe there is great Difference between committing a Crime, and contracting an Obligation. For ſince there lies an abſolute Prohibition againſt all Sin, therefore Men are to avoid all Occaſions that may probably draw them into a Violation of their Duty. And how many Enormities Drunkenneſs betrays a Man to, is obvious to the meaneſt Apprehenſion. An Action then, in itſelf ſinful, can by no Means loſe that Character by proceeding from another Sin which led and diſpoſed a Man to it. But, on the other hand, ſince it is left to our free Pleaſure, whether we will contract new Obligations, or no, we are not (as in the other Caſe) bound to avoid all Occaſions which may render our Conſent imperfect and invalid: As we are not bound to decline Sleeping out of a Fear that others ſhould interpret our * Nodding or Winking for a Token of Agreement to ſomewhat which they propoſed. To this Purpoſe, *Sueton* tells us a jeſting Piece of Knavery in *Caligula*. He made an Auction of his ſuperfluous Gladiators; and, as the Cryer was performing the Sale, *Aponius Saturnius*, a Gentleman of the *Pretorian* Dignity, happening to ſleep upon one of the Benches, the Emperor commanded the Cryer to take Notice of the worthy Chapman that nodded * to the Price propoſed. And the Buſineſs was ſo managed, that the poor Gentleman had laid out ninety thouſand Seſterces before he knew a Word of his Bargain. *Vit. Calig.* Chap. 38. Therefore, if Drunkenneſs had no other ill Effect, but that it made a Man ſeem to give ſome Indications, which, at another Time, would imply Conſent, it would not, on this bare Account, be eſteem'd unlawful. And ſince a Man cannot contract an Obligation by Promiſe or Pact, without agreeing to it, and, at the ſame Time, underſtanding the Buſineſs, we cannot infer his Conſent to ſuch an Engagement, from his firſt conſenting to make uſe of a Thing, which would probably hinder the Exerciſe of his Reaſon: Eſpecially, if we conſider, that Men ſeldom drink meerly for the Sake of ſtupifying their Brain, but their general Deſign is to comfort and chear up their Spirits; and the former Effect ſteals upon them almoſt inſenſibly, whilſt they unwarily proſecute the latter. To make the Difference appear more manifeſtly we may add, that ſince the Property of a Crime or Offence is to bring ſome Evil upon ſome Man, and of a Promiſe to bring him ſome Good, which before was not his Due, and ſince to be *poſitively hurt*, or injured, is more odious in the Eyes of common Juſtice, than barely *not to acquire* ſome Benefit, there is much more Reaſon why Drunkenneſs ſhould invalidate a Promiſe, than why it ſhould cancel a Tranſgreſſion. As for a Man's being bound to pay for that uſeleſs Load of Wine which he pours down, after his Stomach is already overcharg'd, and which he would refuſe, were he in his Senſes; this Obligation ariſes from the Contract made at the firſt ſitting down, by which he engaged himſelf to give the Price of whatever he ſhould drink, though he drank it to no Purpoſe. If, during his Fit of ſottiſh Extravagance, he be guilty of any miſchievous Frolicks, as throwing away the Liquor, deſtroying the Veſſels, or the Windows, and the like, he ſtands bound to make Satisfaction by the general Law of *Reparation of Damages*.

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1 'Tis a general Rule, that ſuch Agreements, as are null upon Account of ſome Incapacity of the Perſons making them, may become valid, if that Incapacity ceaſes, and the Perſon approves or ratifies the ſaid Agreement. So if a Minor, being come to Age, ratifies or executes a Contract which he made in his Minority, it becomes as irrevocable as if it were made after he came of Age. See *Digeſt.* l. 26. tit. 8. *De Authoritate & Conſenſu Tutorum & Curatorum*, leg. 5. §. 2. & Cod. l. 2. tit. 46. *Si major factus ratio habuerit.* See, alſo, what our Author ſpeaks §. 14. in this Chapter, and what I have ſaid in my *Treatiſe of Sports*, l. 2. c. 1. §. 7. Let me add, that Ratification, in the Caſes in Queſtion, is neceſſary, by the natural Law, every Time that (without being ſo drunk as to loſe our Reaſon) we are warm'd with Liquor ſo far as to give our Conſent to a Thing which we ſhould never, or with great Difficulty, approve if we were ſober. With reſpect to voluntary Engagements, there muſt not be the ſlighteſt Check upon our natural Liberty. So that no Man, eſpecially in Affairs of Conſequence, can honeſtly take Advantage of the Eaſineſs of Temper, which drinking produces in ſome People.

2 See Mr. *Thomaſius*'s Diſcourſe, *De Hominibus propriis, & Liberis Germanorum*, §. 12. *Max. Tyrius*, l. 12. and Dr. *Potter*'s *Greek Antiquities*, l. 4. c. 20. as alſo *Briſſon. de Reg. Perſ.* l. 2.

3 Some Nations inflicted a double Puniſhment upon ſuch as had committed any Crime in their Drink. See a Paſſage of *Ariſtotle* quoted above, Lib. I. Cap. V. §. 10. And by one of *Solon*'s Laws it was enacted, If a Ruler, or Magiſtrate, were found drunk, he ſhould be put to Death. The Words are, Τῷ Ἄρχοντι, ἂν μεθύων ληφθῇ, θάνατον εἶναι τὴν ζημίαν. *Diog. Laert. in Solone*, l. 1. §. 57. See *Menage* upon this Paſſage.

4 In all the Editions of the Original it is *nictando*; but beſides, that Winking is no Sign at all of Conſent, the Paſſage of *Suetonius*, which our Author quotes, ſhews, that either he or the Printers ſet it down for *nutando*.

* *Crebro capitis motu nutantem.*

V. How [1] long Children continue under ſuch a Weakneſs of Reaſon, as renders them incapable of contracting Obligations, we cannot univerſally determine; in as much as ſome arrive at a Maturity of Judgment ſooner than others. Therefore, in ſettling this Point, regard is to be had to the daily Actions and Proceedings of the Perſons, from whence the beſt Conjectures are to be made about their Underſtanding; or commonly we have Recourſe to the poſitive Laws of the Country; all *States*, almoſt, having fix'd this Period by their particular Conſtitutions, and ſooner or later [2], according as they found their People to be naturally more brisk and apprehenſive, or more ſluggiſh and heavy. Amongſt the *Jews*, a young Man might oblige himſelf by Promiſe after thirteen Years of Age, and a young Woman after Twelve. But becauſe Perſons of tender Age, though they may ſometimes tolerably *underſtand* Buſineſs, yet, for the moſt part, act with too much Vehemence and Raſhneſs, are too free and eaſy in their Promiſes, eager and over-confident in their Hopes, proud of being thought generous and liberal, ambitious and haſty in contracting Friendſhips, and not furniſh'd with prudent Caution and Diffidence, it has been wiſely order'd in moſt Commonwealths, That in contracting all Obligations [3], they ſhall be ſway'd by the Authority of graver Heads; till ſuch Time as their Raſhneſs and Heat of Youth ſhall appear in a good Meaſure to be abated. Hence, in ſome Places, whatſoever they do in their own Names, during their Minority, is declared null and void; in others, if they have been cozen'd or over-reach'd, they are allow'd to recover full Satisfaction [4]. *Vid.* l. xi. ſ. 3, *&c.* l. xxiv. ſ. 1. l. xliv. *D. de Minoribus.* The Law of Nature itſelf plainly directs, that theſe Proviſions ſhould be made by poſitive Conſtitutions. Eſpecially ſince he would juſtly forfeit the Character of his Honeſty, who ſhould make his Advantage upon this *eaſy* Age, and enrich himſelf at the Coſt of thoſe, who, for Want of Judgment and Experience, either could not foreſee, or do not rightly apprehend the Loſs [a] [5]. The ſame Law of Nature enjoins, that when any Statutes or Cuſtoms of this Kind have been eſtabliſh'd in a Commonwealth, they ſhall be ſtrictly obſerved; not only by the Subjects amongſt themſelves, but in all their Tranſactions with Foreigners. Not ſo much as (as *Grotius* ſays in B. ii. c. 11. §. 5.) becauſe he, who enters into Contract in any Place, is, during that Affair, bound by the Laws of the Country as a Kind of temporary Subject, as becauſe no State will admit of an [6] *Action* in its Courts of Juſtice, upon a Buſineſs not conformable to its Conſtitutions, unleſs it has particularly declared, that in judging the Cauſes of Strangers the bare Law of Nature ſhall be followed. The ſame is to be ſaid of Contracts made by Letter, between the Subjects of different States, when, upon Default, either of them ſues the other in the Courts of his own Country. For though here the injured Party may not have made himſelf, ſo much as for a Time, a Subject of the other Commonwealth; yet, if he deſires Redreſs by its Aſſiſtance, he muſt ſubmit his Caſe to the ſtanding Laws [7]: Or, ſuppoſing two

[a] *Demens eſt, qui fidem præſtat errori.* Sen. de Benef. l. 4. c. 36.

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[1] This Paragraph ſhould, according to the Author's Method, have been the fourth in the Original. See Note 7. on the former Paragraph.

[2] This Age is not the ſame for all Contracts, for there are ſome Things that they can do at fourteen Years of Age, and others not till twenty-five.

[3] The *Attick* Law, in this Reſpect, put *Women* in the Caſe with *Minors*; not allowing them to bargain for any Thing beyond a Buſhel of Barley, διὰ τὸ τῆς γνώμης ἀσθενὲς, on Account of the Weakneſs of their Judgment. *Dion. Chryſoſt. Orat.* 75. *Iſæus. Orat.* 9. We may add, with regard to Women, the perpetual Guardianſhip under which they were placed by the ancient *Romans* in certain Circumſtances, upon which Mr. *Otto*, Profeſſor at Utrecht, has lately publiſh'd an entire Diſſertation, which is the fourth in his Collection. (*Diſſert. Juris publici & privati.*) The Reader will find this Matter illuſtrated in the deceaſed M. *de Tourcil*'s *Eſſais de Juriſpr.* Tom. I. Quæſt. 20.

[4] The Law grants this Privilege to him, who hath been injured by an Act, as a Party to it, to look back to the Age he was of before that Act, if there be a juſt Cauſe. See *Digeſt.* l. 4. tit. 1. and what Mr. *Titius* ſays upon that Title, in his *Obſervat. in Compend. Juris Lauterbach*, where he carefully diſtinguiſhes the Maxims which may be drawn from natural Law, from the Subtilties which the *Roman* Lawyers have perplexed the Matters with. See, alſo, *Domat*'s *Civil Laws*, Part 1. l. 4. tit. 6. which will give ſome Information to thoſe, who do not underſtand the Language of the *Roman* Lawyers.

[5] We ought to obſerve, (as Mr. *Placette* ſpeaks in his Treatiſe of *Conſcience*, p. 60.) That if, for Example, we meet with ſuch a dull Underſtanding at the Age aſſigned by Law, that there is not Senſe enough to oblige them ſufficiently, we ought not to abuſe their Simplicity, and engage them to do what we pleaſe upon that Pretence. Doubtleſs, ſuch an Action would be unjuſt; and, in this Caſe, we ought to ſay, as in many others, We ought to attend more to the Intention of the Law, than the Terms uſed by the Legiſlator. But here is another important Queſtion to be examined, and that's this, Whether, if a young Man engages himſelf before he arrives at the Age fixed by the Law, he is bound in Conſcience to do what he has promiſed? For Example, If he has borrowed any Thing before that Age, is he bound to pay it when he comes to it? Mr. *Placette* ſeems to have determined this Queſtion very well in theſe Words, The Caſuiſts of the Church of *Rome*, even the ſtricteſt of them, anſwer by making this Diſtinction, If the young Man has made a good Uſe of what he borrowed, and, in general, if the Agreement he has made be profitable and advantageous to him, he is obliged to ſtand to it; but he is not obliged, if he hath got nothing by the Bargain, as if for Example, he has ſpent what he borrowed upon his Debaucheries, and other Exceſſes. But Mr. *La Placette* adds, That this is not my Opinion, and ſays, I can't allow that a Man ſhould get by an ill Action, and free himſelf from his Engagement by a Fault. We may have Regard to other Things, and, in the firſt Place, conſider whether he, with whom we have contracted, loſeth any Thing otherwiſe by the Breaking the Bargain. For if he loſeth nothing, but all the Damage he ſuffers, is only, that his Hopes of Gain are diſappointed, I believe we are not obliged to make Good the Promiſe we have made in that Manner. Did he foreſee the ill Uſe that was likely to be made of what he lent? If he did foreſee it, and did lend with an evil Intention, he ought to loſe what he lent, and impute the Loſs to himſelf; but if he had no ill Deſign, and lent freely, 'tis my Opinion he ought to be paid; and, I am perſuaded, to do the contrary, and take the Advantage of the Law, is a Fault, which not only a tender Conſcience, but an honeſt Man in the Eſteem of the World, ought to be aſhamed of. See my Treatiſe of *Sports*, l. 2. c. 4. §. 12. and what this Author ſays, l. 4. c. 2. §. 11. following.

[6] Our Author here attempts to refute *Grotius*. But *Grotius* ſuppoſes, that a Stranger has contracted with a Minor in the Country of the latter; ſo that he is, and ought to be, regarded, as having acted agreeably to the Laws of the Country. There is, therefore, no Need to ſeek a new Reaſon. That which our Author looks on here as the ſtrongeſt Argument, has no Force, but by ſuppoſing, that the Stranger, having treated with the Minor out of his own Country, comes and ſues him there, to hold him to his Bargain. So that, in this Caſe, the Queſtion is to know, Whether the Term of Minority ſhall be adjudged by the Laws of that State, of which the Minor is a Native, or the Laws of that State where the Contract is made? Mr. *Hertius*, in his Diſſertation *De Colliſione Legum*, (which is in Tom. 1. of his Tracts, and where he treats at Length of thoſe Matters) ſays, (§. IV. Par. XI.) that he ſhould always have Regard to the Laws of the Place where the Minor lives. But if we reaſon according to the *natural Law*, independently of Cuſtoms eſtabliſhed among different Nations, I do not ſee for what Reaſon any one State is ſtrictly obliged to receive Laws from another, to the Prejudice of its own Subjects. Another Point is to know, upon what Footing the Parties have profeſs'd to contract, and, conſequently, how far they are bound in Conſcience; for here, as on many other Occaſions, we cannot always honeſtly take Advantage of the Benefit of the Laws.

[7] *Grotius* is of Opinion, l. 2. c. 11. §. 5. numb. 3. that in this Caſe we ought to judge only according to the Rules of natural Right; and Mr. *Hertius* agrees to his Opinion. See the fore-mentioned Diſcourſe, §. 56. and another of the ſame Volume, *De Commercatu Literarum*, §. 16, *&c.* But I believe our Author is in the Right. We are no more obliged ſtrictly to apply the Rules of the natural Law againſt the Subjects of a State, than to follow in this the Laws of another Country. We muſt, therefore, here content ourſelves to make Uſe of the Diſtinction I have laid down in the preceding Note.

Subjects

Subjects of the ſame Nation ſhall enter into a Pact, or Promiſe, in ſome Place which acknowledges no Sovereign, as on the wide Ocean, or in ſome deſert *Iſland*, they muſt, nevertheleſs, have Recourſe to the Laws of their Country, if they would obtain a full and perfect Right to what they bargain'd for; or an *Action* to hold good in Court upon Failure on either Side. How the Caſe ſtands, with reference to the Acts of thoſe Perſons, who are placed above the Power of civil Laws, it will be our Buſineſs elſewhere to enquire [1].

VI. Another Thing, which invalidates *Conſent* [2], and, by Conſequence, the Promiſes or Pacts that are built upon it, is *Error* or Miſtake [3]; through which it comes to paſs, that the Underſtanding is cheated in its Object, and the Will in its Choice and Approbation. We ought here carefully to diſtinguiſh, whether the Caſe relate to *Promiſe*, or to a *Pact*. As for Promiſes, we may lay down this for a certain Rule, that if a Promiſe be grounded upon Belief and Preſumption of ſome Fact [4] which really never was, or when, in making an Engagement of this Kind, I ſuppoſed ſuch an Action, or ſuch a Quality, without regard to which I ſhould never have given my Conſent; in this Caſe, my Promiſe is naturally null and void, provided it appear evident, from the Nature and Circumſtances of the Buſineſs, that I agreed to the Propoſal, purely on Account of that Fact, or of that Quality, which I took for granted: Becauſe, here I did not promiſe abſolutely, but upon Preſumption of a neceſſary Condition; which Condition failing, whatever was built upon it, muſt, conſequently, come to nothing [a]. Thus, for Inſtance, ſuppoſe I have been inform'd, that you have done me a Kindneſs, in promoting and well-ordering my Affairs, and, upon this Score, I have promiſed you a Gratification; you will not ſay I am bound to ſtand to my Word [5], when I find the Intelligence was abſolutely falſe. By the ſame Rule we may decide the Caſe propoſed by *Cicero*, in *Lib.* i. *De Oratore*, c. 38. "A "falſe Report was brought home of the Death "of a certain Soldier abroad in the Wars. His "Father, believing the Story, alter'd his *Will* in "Favour of another Heir, and afterwards died. "The Soldier at laſt returning ſafe, ſues the Poſ-"ſeſſor of his Inheritance." It was here urged for the Plaintiff, that the *civil Law* declares ſuch Wills of a Father to be *null* [7], in which the Son is neither made Heir, nor yet particularly, and by Name diſinherited; neither of which was done in the *Will* now under Conſideration. But to this the Defendant might have return'd, that the Law, cited on the other Side, plainly ſuppoſed, that the Father knew his Son to be living, which here he knew not, but imagin'd the quite contrary. Therefore it might, perhaps, have been a more clear and eaſy Way of aſſerting the Soldier's Title, to proceed only upon the *Law of Nature*, and to alledge, that the Father's Will was grounded upon Suppoſition of his Son's Death, which proving falſe, the Will became void and ineffectual, ſince it appears, that his Belief of that Report was the ſole Reaſon of his altering his Meaſures. And hence too it is eaſy to anſwer that over-nice Queſtion of Sir *Thomas Browne* in his *Religio Medici*; *Whether it was lawful for*

[a] 15. *D. de Juriſdict.*

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[1] See l. 8. c. 10.

[2] The Third of the general Conditions of a full and free Conſent, as I have noted above, §. 3. are not to be met with, 1. In Promiſes made in Jeſt, and by way of Compliment. 2. In Promiſes of thoſe who deceive themſelves. 3. In Promiſes of thoſe who are deceived by another. 4. Nor in ſuch as are made through Fear. See the remaining Part of this Note, §. 5. cap. 5.

[3] This the Law ſays, *Non videntur, qui errant, conſentire*, Digeſt l. 50. tit. 17. leg. 116. §. 2. See, alſo, *Leg.* 76. & l. 2. tit. 1. *De Juriſdictione*, leg. 15. So *Seneca*, *Demens eſt, qui fidem præſtat errori*. De Benef. l. 4. c. 36. He muſt be a Fool, who will perform what he has promiſed through Error. But here we muſt mean an *efficacious* Error, as this Term is expounded, l. 1. c. 3. §. 10. and not a *concomitant* Error: For, by this Diſtinction, our Author's Rules, in ſome Places, muſt be explained and rectified. *Titius Obſerv.* 212. See the Notes upon the next Paragraph.

[4] The Lawyers diſtinguiſh between an Error of *Fact*, and an Error of *Law*, *i. e.* of Law *poſitive*, and build divers Determinations upon it. See *Daumat*'s *Civil Laws*, Part I. l. 1. tit. 18, §. 1. And Mr. *Noodt*, on the Title of the *Digeſt*. *De Juris & facti ignor.* p. 481, *& ſeqq.* But according to the Simplicity of the *Law of Nature*, all Error, be it of what Nature it will, annulls thoſe Promiſes or Conventions, of which it has been the only Cauſe; and when the Perſon deceived, has given the other Party Notice of it in ſuch a Manner as to ſhew that he is ſenſible of the Deceit.

[5] Mr. *Thomaſius*, in his *Juriſprud. Divin.* l. 2. c. 7. §. 43, ſays, That a Man is obliged, in this Caſe, to keep his Word, eſpecially if he did not expreſly inſert that Condition in his Promiſe, or he in whoſe Behalf he is engaged, uſed no falſe Pretences to perſuade him. But from the Moment that he knows, in any wiſe, that he promiſed upon the Account of ſome Service done by him to whom he made the Promiſe, the Condition is of the ſame Nature as the Thing: And ſo the Non-performance of the Condition makes the Promiſe null, as much as if he had declared it before-hand in expreſs Terms; ſince, as we may ſuppoſe, nothing elſe could incline him to promiſe. Another Thing is, in the Caſe of Horſes bought upon a falſe Report, as our Author ſpeaks in the following Paragraph. Mr. *Thomaſius*, however, has ſince ſeem'd to alter his Opinion: For he ſays, in the fourth Edition of his *Fundamenta Jur. N. & Gentium*, (§. XIII. *in idem Cap.*) that we muſt add here, *Suppoſing the Promiſer keeps reſerved in his Mind, the Reaſon why he promiſed it. Sed cauſâ tamen in mente retentâ.* But in this Caſe there is no Difficulty, ſince he, to whom the Promiſe was made, had Reaſon to look upon it as abſolute; whence it follows, by the Rule of Contraries, that the Promiſe was null, when we diſcover the ſole Condition which induced us to make it. But, if we may judge by the natural Law, after we have actually given what we promiſed, the Donation remains valid; though the *Roman* Lawyers decide otherways upon frivolous and precarious Principles. Theſe are their Words: *Id quoque quod ob cauſam datur, puta quod negotia mea ab eo adjuta putavi, licet non ſit factum: quia donare volui, quamvis falſo mihi perſuaſerim, repeti non poſſe.* Digeſt. Lib. XII. Tit. VI. *De condict. indeb.* Leg. LXV. §. 2. See, alſo, Leg. LII. with *Anthony Favre*'s Note, *Ration*, p. 415. As, alſo, *Cujas*, in *Rubr.* COD. *de Condict. ob cauſ. dat.*

[6] The Words in *Latin* are, *De cujus* [*Militis*] *morte, cum domum falſus ab exercitu nuncius veniſſet, & Pater ejus, re credita, teſtamentum mutaſſet, & quem ei viſum eſſet, feciſſet hæredem, eſſetque ipſe mortuus; res delata eſt ad Centumviros, cum Miles domum reveniſſet, egiſſetque lege in hæreditatem paternam teſtamento exhæres filius.* See, alſo, *Val. Maximus*, l. 7. c. 7. §. 1. and Mr. *Schulting*'s Oration *de Juriſprud. M. T. Cicer.* p. 260. But, above all, his Notes on the *Juriſpr. Ante-Juſtin*, p. 638. To which we may add, *Cujas Obſerv.* 26. 9. Mr. *Thomaſius*, in the Place before quoted, §. 44. obſerves, that this Example is nothing to the Purpoſe. For, he ſays, the Interpretation of a Will ought to be expounded in a clear different Manner from an Agreement or Propoſe, as well becauſe a Will gives no immediate Right to him to whom the Teſtator has bequeathed his Goods, as becauſe he requires no Acceptation on his Part. Beſides, in Wills we ought to have, ſometimes, Regard to the Laws; and, above all, to ſuch Conſtitutions as are made in Behalf of Children. But it is evident, that our Author, who quotes this Example from *Grotius*, ſpeaks like him of the Manner how the Queſtion ought to be determined by natural Law only. Even the Civil Law here has a Regard to the Error of the Teſtator, not only when it makes to the Prejudice of his Children, but, ſome Times, when it affects ſtrange Heirs, nominated in a former Will. Of this we find a remarkable Example in the *Digeſt*. Lib. XXVIII. Tit. V. *de Her. Inſt.* Leg. *ult.* See *Merillus Obſerv.* II. 23. I ſhall ſhew, in its proper Place, that a Will gives a Right to him that is appointed an Heir, altho' it be not an irrevocable Right.

[7] So the Law ſpeaks, *Inter cætera, quæ ad ordinanda teſtamenta neceſſario deſiderantur, principale jus eſt de liberis hæredibus inſtituendis, vel exhæredandis; ne præteritis iſtis, rumpatur teſtamentum.* Digeſt. l. 28. tit. 2. *De liberis & poſthumis hæredibus inſtituendis. &c.* Leg. 30. Here the Word *rumpatur* is taken very improperly.

the Perſon, whom Lazarus *had made his Heir*, to poſſeſs the Goods [1]; or whether the Owner, upon his being reſtored to Life, had not a Right to challenge them again? Where the latter muſt without Doubt be affirm'd. For the Reaſon why the Goods of the Deceas'd paſs away to others is, becauſe they themſelves are taken out of the World, and, conſequently, have no farther Need of theſe Poſſeſſions. Hence, in many Places, ſome Part of the Goods are ſet aſide to be given to the Poor, or to the Church, for the Benefit of the Soul of the Deceas'd. And in the *Pagan* Superſtition, it is uſual to bury or burn ſome of the Goods with the dead Body, for the Service of another Life.

But in Caſe the Promiſer was negligent in ſearching into, and examining the Condition upon which he built his Conſent, he ſhall be bound to repair any Damage that is ſuſtain'd by the other Party, upon account of his idle Engagement [2].

If the Promiſe was not grounded upon the Preſence or Abſence of ſuch a Quality, as a neceſſary Condition, then, tho' the Promiſer was miſtaken in that Point, yet his *Obligation* ſhall ſtand good. If the Promiſe were but *in Part* occaſion'd by an Error, it may, as to the reſt of it, remain valid, unleſs one Part were included by way of Condition in another, or unleſs the Parts cannot ſeparately be perform'd; for then an Error in Part deſtroys the Whole.

VII. As for *Miſtakes* in *Pacts*, it ſeems neceſſary to diſtinguiſh, whether the *Perſon* was, thro' Error, drawn into the Bargain, or, whether there proves to be an Error as to the Thing or *Subject* for which he bargain'd. In the former Caſe, we ſhould again enquire, whether any Step is made towards Performance, or not. If I am prevail'd with to enter into a Pact or Contract upon Miſtake, and I find this Miſtake out, before any Thing is done in order to the fulfilling of the Agreement, it is but equitable, that I ſhould have Liberty to retract; eſpecially if, upon making the Engagement, I plainly declared the Reaſon of my Proceedings [3]. But if the *Error* be not diſcover'd till the *Pact* is either wholly or in Part perform'd, then the Perſon, who lay under the Miſtake, cannot demand a Releaſement any farther than the other ſhall, upon a Principle of Humanity, be content to allow him [4]. For Inſtance, a Man being at a Diſtance from Home, receives falſe Intelligence, that he has loſt all his Horſes. Upon this Information he enters into Contract for the Purchaſe of new ones; but before the Money or the Horſes are deliver'd, he finds himſelf to have been deceived in the former News. Here we judge, he is not bound to fulfil the Bargain, inaſmuch as the Seller very well knows, that the falſe Account of his Misfortune at Home, was the Reaſon of his Purchaſe. Yet he is in Equity obliged to make ſome Conſideration to the Seller; at leaſt to repay the Damage which he ſuſtains by loſing the Bargain. But in Caſe the Money and Horſes were on both Sides deliver'd, tho' the Buyer ſhould now find that he has no Occaſion for his Purchaſe, yet he cannot force the Seller to refund the Price, and to take back his Horſes, unleſs this Condition was expreſly mention'd in the Agreement.

But when there happens to be a Miſtake about the *Thing* which is the Subject of the Contract, then the Buſineſs is *null*; not ſo much upon Account of the Miſtake [5], as becauſe the Laws and Terms of the Agreement are not really fulfill'd. Inaſmuch as in all Bargains, the *Matter*, about which they are concern'd, and all the Qualities of it, good or bad, ought to be clearly underſtood, and without ſuch a diſtinct Knowledge the Parties cannot be ſuppoſed to yield a full Conſent. And, therefore, upon Diſcovery of any Defect, the Perſon, who was likely

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[1] There was a Book printed in 1705, wherein this Queſtion was ſeriouſly handled: The Title is, *Henrici Verduyn.* &c. *Diſquiſitio Juriſp. ud. de Teſtam. & Hæredit. Lazari bis mortui; aliorumque bis mortuorum. In ordinem redegit & — auxit Tobias Boel, Junior Ictus.* We may ſee a ſhort Extract of it given in the Works of the Learned, printed at *Paris*, *Anno* 1705, &c.

[2] See what I have ſaid upon *Grotius*, Lib. II. Cap. XI. §. 6.

[3] Provided (as our Author ſays in his Abridgment *of the Duty of a Man and Citizen*) that the other Party who makes the Contract receives by it no Damage, or that it be repair'd to him. The Example, that is alledged a little lower, ſhews, that it is another Condition which the Author puts, according to his Principles; and he actually does put it in the Abridgment of *the Duties of a Man and Citizen*. Lib. 1. Cap. 9. §. 12. But ſee Note 4.

[4] The Author is not conſiſtent with himſelf here: For if, in the firſt Caſe, there is any good Reaſon to excuſe him who has made a Miſtake, ſo that he may lawfully retract, why ſhould not the ſame Reaſon be good in the ſecond Caſe? [The Delivery of the Thing conſider'd in itſelf is a phyſical Act, which cannot deprive him of his Right, who has it; nor give it to him that has none. Whence it comes to paſs, that when one had paid what he did not owe, he has no leſs Right to redemand his Money, than if he had, for this End, given to another what he had not paid. See Mr. *Thomaſius*'s *Juriſprud. Div.* l. 2. c. 7. §. 45, 46.] Further, if in the firſt Caſe, we have Right to retract, why are we obliged to repair the Damage? The Truth is, in both Cales we are indiſpenſibly obliged to keep our Word: For if the Error be *invincible*, 'tis, nevertheleſs, only *accidental* and concomitant, (ſee *l.* 1. *c.* 3. §. 10.) and, conſequently, does not exclude a neceſſary Conſent in our Agreements. In fine, this Reaſon obliges us to conclude, that the Price doth not at all influence the Engagement. It is purely a caſual Circumſtance, which regards only the particular Condition of the Buyer, and with which the Seller has no Buſineſs, ſo long as the other only hints it in Converſation, without inſerting it formally in the Contract, as a Condition, the Failer of which ſhall make it void. Thus the Error of the Buyer, upon this Head, has no Effect with regard to the Validity of the Contract. The *Roman* Lawyers own the Truth of this Principle in a like Caſe, I mean, in the Subject of a Delegation made thro' Miſtake. See *Digeſt.* l. 46. tit. 2. *De Novationibus & Delegationibus*, Leg. 12, 13. [and thereupon *Cujas Recit. in Paul.* Tom. 5. p. 482. Opp. *Edit. Fabrott.*] The ſame Thing has Place in an *Erroneous Contract*. For Example, in a Bargain of Sale, when there is a Miſtake, as to the Perſon with whom we treat, taking him for another. For this is only a *concomitant* Error, while there is nothing in the Contract which neceſſarily requires, that he, with whom we treat, ſhould be preciſely ſuch or ſuch a Man, or, at leaſt, while we do not formally declare, that we intend only to treat with *Peter* (for Example) and no other. Moſt of the Interpreters of the *Roman* Laws do, indeed, quote ſome Laws, which ſeem to eſtabliſh the contrary in Caſes of *onerous Contracts*, as in thoſe of Sale. But if we examine thoſe Places, we ſhall find, that they treat of ſome Act of Liberality, or ſuppoſe in the Perſon dealt with ſome Care, Induſtry, or other particular Quality; for then 'tis eſſential to the Contract, that the Contractor be certainly he whom we believe him; inſomuch, that if we are miſtaken in that, the Error is *efficacious*. *Titius Obſerv. in Pufend.* 214. and in *Lauterbach.* 513.

[5] The Author oppoſeth Things, which have no Appearance of Oppoſition, but are the Conſequents one of another. For the Error, in which one of the Contractors was, ſhews, that he conſented to a Thing that did not really exiſt, and, conſequently, that the other Contractor did not ſatisfy the Intention of the firſt. *Titius Obſerv.* 215. This takes Place even when the Buyer honeſtly believes, as well as the Seller, that the Tin Baſon is Silver: For the mutual Error of the two Contractors does not hinder it from being a Condition eſſential to the Bargain, that the Baſon ſold ſhould be of Silver, and of no other Metal. See *Digeſt.* Lib. 18. Tit. 1. *De contrahen. a emptione*, Leg. 14. There is here not ſo much as a Conſent on both Sides; for both the Buyer and the Seller believed, the one that he bought, and the other that he ſold, a Thing quite different from what it really was. But, in this Caſe, it might, alſo, happen, that only one of the contracting Parties was deceived, without inferring from thence, that the other acted diſhoneſtly. See the Abridgment of *the Duties of a Man and Citizen*, Lib. 1. Cap. IX. §. 12. Note 4. of the laſt Edition, where I have ſhewn how this may happen. But if there plainly appears no Intention of Fraud in either of the contracting Parties, nor no Marks of Deſign in him, who ſays he is deceived, we muſt then lay this down as a general Maxim, That in a Doubt, if a Man miſtakes, 'tis ſo much the worſe for him, becauſe it belong'd to him to explain himſelf. See *Juriſprud. Divin.* l. 2. c. 7. §. 39, &c. and *c.* 11. §. 22, 23. and what ſhall hereafter be ſaid, *l.* 5. *c.* 12. §. 5.

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to ſuffer, may either draw back from the Engagement, or may compel the other to ſupply what is wanting [1], and, likewiſe, to make Satisfaction for Damage, if occaſion'd by his Deceit or Default. And this, not only if the Defect be immediately found out, but if it appear at ſome Diſtance of Time. Which Period or Interval, when it is not fix'd by the civil Laws, is to be determin'd by the Arbitration of ſome honeſt Referee, that no Indulgence may be given, either to the Fraud of the one Party in concealing, or to the ſupine Negligence of the other, in examining the Buſineſs: And the larger Space of Time is to be allow'd, if the Defect were ſuch as did not appear to external View, or could not be diſcover'd but by Men of extraordinary Sagacity and Skill.

As to that common Maxim with the *Civilians*, that an Error in the *Eſſentials* of a *Pact* diſannuls the Agreement [a], but not an Error in the *Accidentals*, or Circumſtances; we are ſo to interpret it, as, by the *Eſſentials*, to underſtand not only what makes up the *phyſical Eſſence* of the Thing bargain'd for, but, likewiſe, thoſe Qualities of it, to which the Contractor had an eſpecial Eye and Regard [2]. For it frequently happens, that, in a Bargain, ſome *Quality* of the Thing ſhall be chiefly eſteem'd and valued, and the *Subſtance* or natural Conſtitution be only look'd on as a neceſſary Adjunct or Vehicle: Thus my Contract will not only be void, if I buy ſuch a particular Slave of a Merchant, and he ſends me a different Perſon [4]; but, likewiſe, if I bargain'd with him for one skilful in the Art of Cookery, and the Man whom I receive proves utterly ignorant of the Buſineſs, and incapable of ſerving me in that Condition [b].

VIII. Much more ought a *Miſtake* to render a Promiſe or Pact *invalid*, if it were occaſion'd by the [5] *Fraud* of one of the Parties, who, by that Means, drew the other into the Engagement. What Force, or Effect, the Practice of Deceit, in theſe Matters, will bear, may be clearly ſtated by making theſe Enquiries; firſt, as to the Author of the Knavery, whether it be he with whom we bargain'd, or a third Perſon; and, in the next Place, whether the

[a] Vid. *l.* 57. *D. de Oblig. & Act.* [b] *Add.* l. 9, 10, 11, 14, 41. ſ. 1. *D. de contrab. emptione.*

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[1] This is too much from the Purpoſe. Somthing more exact ought to have been ſaid to give us an Idea of the Effects of an *efficacious* Error. This Maxim may be added (from *Titius Obſerv. in Pufend.* 216. and in *Lauterbach* 511.) to thoſe of our Author. If he, that is miſtaken, aims at that chiefly wherein the Error lies, the Agreement is abſolutely void, and he hath Liberty to recant; but if he had not the Thing itſelf in View, altho' he could heartily wiſh it had been what he believed it, the Agreement is good, and he can have a Right only to demand ſome Satisfaction for the Fault he overlook'd. As, for Example, if a Man in a great Neceſſity buys an Houſe, which afterwards he finds to be ſubject to ſeveral Taxes, as he did not principally endeavour to have it free from all Taxes, that alone don't break the Bargain; but he may demand of the Seller, that he leſſen the Price in Proportion to the Inconvenience that thoſe Taxes bring, with which he did not think the Houſe was charged. The *Roman* Lawyers, for Want of Attention to theſe plain and natural Principles, entertained very falſe Notions. Some (thinking it enough, if the contracting Parties were agreed about the *Subſtance* of the Thing) had no Regard to its moſt eſſential Qualities, ſo that they went ſo far as to hold the Sale valid, where the Buyer took *Vinegar* for *Wine*; *Copper* for *Gold*; *Lead* for *Silver*, &c. Others, ſenſible of this Abſurdity, nevertheleſs granted, (and this Opinion at laſt prevailed) that the Contract was good, provided the Wine was not perfect Vinegar, tho' it began to ſour. They, alſo, aſſerted, it was ſufficient, if a Piece of Metal, which the Buyer thought to be Gold, was Copper gilt. *Emptionem eſſe & venditionem, quia in corpus conſenſum eſt, etſi in materia ſit erratum. Ego in vino quidem conſentio, quia eadem prope ουσία, id eſt,* ſubſtantia *eſt: ſi modo vinum acuit: ceterum ſi vinum non acuit, ſed ab initio acetum fuit, ut embamma, id eſt,* intinctus, *aliud pro alio veniſſe videtur.* —— *Quid tamen decemus, ſi in materiâ & qualitate ambo errarent: ut puta ſi & ego me vendere aurum putarem, & tu emere, quum æs eſſet; at puta coheredes viriolam, quæ aurea dicebatur, pretio exquiſito uni heredi vendidiſſent, eaque inventa eſſet magnâ ex parte ænea? Venditionem eſſe conſtat ideo, quia auri aliquid habuit; nam ſi inceratum aliquid ſit, licet ego aureum putem, valet venditio; ſi autem æs pro auro veneat, non valet.* Digeſt. Lib. 18. *De contrah. emt.*. Leg. 9. §. 2. Leg. 14. Tit. 1.

[2] The Intention of the Contractors muſt be known by the Circumſtances. Here's an Example taken out of the Determinations of the *Roman* Lawyers, wherein yet they do not expreſs exactly the preciſe Foundation of the Difference between the two Caſes propounded, it appears only, they reaſon'd upon this Principle, that the Word *Woman* equally comprehended ſuch as were Virgins, and ſuch as were not; and that one, who paſſes for a Virgin, though ſhe be really not ſo, has, however, ſomething belonging to the Sexes; juſt as a Veſſel of Copper gilt, which we believe to be of maſſy Gold, is thought ſo on Account of its external Appearance. Mr. *Noodt* explains, alſo, the following Law in his Commentary, *p.* 408. *Quod ſi me virginem emere putarem, cum eſſet jam mulier, emptio valebit, in ſexu enim non eſt erratum. Cæterum ſi ego mulierem venderem, tu puerum emere exiſtimaſti, quia in ſexu error eſt, nulla emptio, nulla venditio eſt.* Digeſt. l. 18. tit. 1. *De contrahenda Emptione*, &c. Leg. 11. §. 1. But the true Reaſon why the Contract of Sale ſtill ſubſiſts, (tho' the Slave, we believe to be a Virgin, proves a Woman) is this, That, having no other external Mark but the Size to diſtinguiſh between a Woman and a Virgin, the Buyer has no Room to pretend he bought the one for the other, unleſs he explain'd himſelf formally upon the Subject. Thus the Error here is but a *concomitant* or accidental one, which can no Way turn to the Prejudice of the Seller. But 'tis not the ſame as to the Sex, which are ſo differenced by the Habits, that they can't be miſtaken, unleſs by ſome Fraud or Diſguiſe; and ſo the Buyer muſt be ſuppoſed to make his Markets for the Sexes according to their Habits, and then the Error is *efficacious*, and, conſequently, the Bargain is null. *Titius in Lauterbach. Obſ.* 514. But if the Buyer believes he purchaſes a Virgin, and the Seller, to whom he ſufficiently declares that Belief, confirms him in his Error, and delivers her, without informing him ſhe was a Woman; the *Roman* Lawyers, in this Caſe, declares the Contract to be null. *Si quis virginem ſe emere putaſſet, cum mulier veniſſet, & ſciens errare venditor cum taceret ſit, redhibitionem quidem ex hac cauſa non eſſe, verum tamen ex empto competere actionem ad reſolvendam emptionem, & pretio reſtituto, mulier reddatur.* Digeſt. l. 19. tit. 1. *De Action. Empt. & Vendit.* leg. 11. §. 5. See what Mr. *Noodt* ſays upon this Law, in his Treatiſe, *de forma emendandi Doli mali*, &c. *c.* 9.

[3] *Pleraſque res aliquando propter acceſſiones emimus, ſicut cum Domus propter Marmora, & Statuas, & Tabulas pictas ematur.* Digeſt. l. 18. tit. 1. leg. 34. *in initio.*

[4] *Cicero* gives us an Example of this in a Slave called *Panurgus*, whoſe Maſter *Famius* had yielded Half the Right he had over his Perſon to *Roſcius*, on Condition that he would learn him the Profeſſion of a Comedian. *Cicero*, in his Pleading for *Roſcius*, ſpeaks thus, "I maintain, that *Panurgus* belongs wholly to *Roſcius*, and my Reaſon is, that *Famius* poſſeſs'd properly only the "Body of *Panurgus*; whereas the Quality of a good Comedian, in which *Panurgus* excels, appertains entirely to *Roſcius*, who has "learn'd him the Buſineſs. Now if *Panurgus* was to be ſet up to Sale at a high Price, it would certainly not be on Account of "his Bodys but his Qualifications. In the Part which *Famius* claims, he is not worth fifty Thouſand *Seſterces*; but in the Part "that belongs to *Roſcius*, is worth double the Sum." *At ego totum* Roſcii *fuiſſe contendo. Quid erat enim* Fannii? *corpus. Quid* Roſcii? *diſciplina. Facies non erat, ars erat pretioſa. Ex qua parte erat* Fannii, H-SIↃↃↃ. *ex qua parte erat* Roſcii, *amplius erat* H-SCCIↃↃↃ. Orat. *pro* Q. *Roſcio Comœdo*, Cap. X.

[5] By Fraud, (which the *Civilians* call *Dolus malus*, or *Dolus* only) is underſtood any Sort of Surprize, Deceit, Craft, Cheat, or Diſſimulation. In a Word, any corrupt Methods, direct, or indirect, poſitive, or negative, by which Men malicioufly deceive others. For there is an innocent Kind of Deceit, like that of a Phyſician, who makes his Patient believe any Thing, in order to cure him. *Itaque ipſe* [*Labeo*] *ſic definiit, Dolum malum eſſe omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera eſt.* Digeſt. l. 4. tit. 3. *De Dolo malo*, leg. 1. §. 2. *Non fuit autem contentus Prætor DOLUM dicere, ſed adjecit, MALUM, quoniam veteres dolum etiam bonum dicebant, & pro ſolertia hoc nomen accipiebant*, &c. ibid. §. 3. See Mr. *Noodt*'s Treatiſe *de forma emendandi Doli mali*, c. 1, & 2. As I have, alſo, ſhewn in my Remark on the Abridgment of *the Duties of a Man and Citizen*, Lib. I. Cap. IX. §. 13. In fine, tho', where there is a Fraud on the one Part, there is always an Error in the other; yet, ordinarily, the Invalidity of a Contract is entirely founded upon the evil Intention of one of the Contractors: For that Reaſon alone is, in the main, ſufficient to make an Engagement void.

Deceit

Deceit was really the Cauſe of our Engagement, without which we had not ventur'd upon it, or whether it was only accidental to the Buſineſs, which we had nevertheleſs undertaken, but were now cheated in the *Thing*, and its Qualities, or the true Price and Value of them. If the Trick was put upon us by a third Man, the Party with whom we tranſact not having been acceſſory to it, and the *Thing* for which we bargain'd proves without Fault [1]; in this Caſe, the Agreement ſhall ſtand good [2]; but we may recover of the Knave whatever we loſe by his Contrivance. If the Party himſelf, with whom I [3] contract, by ſome Deceit draws me into the Buſineſs [4], I am then free from all Obligation to Performance. If the Deceit were not *antecedent* to the Contract, but happen'd *in it*, with reference to the *Thing* bargain'd for, its Qualities, *&c.* the Agreement ſhall be ſo far void, as that it ſhall be at the Pleaſure of the ſuffering Party, either to reverſe the whole Buſineſs, or to require Satisfaction for his Damage [5]. A Matter not *eſſential* to the Agreement, nor expreſly conſider'd in it, ſhall not prejudice its Validity; tho', perhaps, one of the Parties might have a ſecret and ſly Reſpect to ſome ſuch Thing in the very Act of driving the Bargain [6]. Upon what Right a Man may proceed, in Caſe he be egregiouſly cheated, as to the *Price* of any Thing contracted for, we ſhall hereafter examine and declare.

IX. It comes now in Courſe, that we conſider the Point of FEAR, what Power it has in rendring human Acts incapable of producing an *Obligation*. There are two Species of Fear, which eſpecially fall under this Enquiry; the former ariſes from ſome Vice, or ill Diſpoſition, in the Perſon with whom we tranſact, or elſe from his ill Will to us in particular; whence we entertain a probable Suſpicion, that he will deceive us: The other denotes a vehement Terror of the Mind, cauſed by the Threatning of ſome grievous Miſchief, unleſs we engage in the Promiſe or Pact deſired. As to the firſt Sort of Fear, this is evident, beyond Diſpute, that if I ſee a Man, who makes it his common Practice to cheat all the World, and reckons every Piece of Knavery a Piece of Wit [7]; or if, as to the preſent Buſineſs, I find he has a manifeſt Deſign upon me, I ſhall be a ridiculous Fool, if, by truſting to his Faith, I expoſe myſelf to his Fraud, and to his Scorn. For

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[1] The Lawyers call a Damage without Deceit, *Dolus in reipſa*, which is grounded on this Law of the *Digeſts*, l. 45. tit. 1. *De Verbor. Obligation.* leg. 36. *Si nullus Dolus interceſſit ſtipulantis, ſed ipſa res in ſe Dolum habet*, &c. But we ought rather to call it the Vice or Fault of a Thing, than a Fraud. For the Word *Fraud* agrees properly only to a perſonal Cheat, (as we ſay) which ſuppoſes an ill Deſign in one of the Parties, or a Third, and an actual Performance of ſome Deceit. *Fraudis interpretatio* (as the *Roman* Lawyers themſelves ſpeak) *ſemper in Jure civili, non ex eventu duntaxat, ſed ex conſilio quoque deſideratur.* Digeſt. l. 50. tit. 17. *De diverſ. Regul. Jur.* leg. 79. Otherwiſe the Law, from whence this Diſtinction of a perſonal and real Fraud is inferred, is commonly miſunderſtood, as Mr. *Thomaſius* obſerves in his Diſcourſe, *de æquitate Cerebrina*, leg. 2. *Cod. de reſcindend. Vendit.* c. 2. §. 4. See *l.* 5. *c.* 3. §. 9.

[2] It being underſtood, that the Motive which, by the Deceit of a third Perſon, inclined us to promiſe or treat, hath no neceſſary Relation to the Foundation of the Engagement, *i. e.* that the Error is purely *concomitant*. For if (for Example) any one makes me believe that all my Horſes are dead, and I declare to him that ſells me others, that I did not buy them but upon this Suppoſition, that the News is true; the Moment that I diſcover the Falſhood, the Bargain is void, by virtue of the Condition which was formerly inſerted, and the Seller is to ſue him that hath deceived me. See §. 7. before-going.

[3] *Diodorus Siculus* gives us an Example, to which this Rule may be applied. *Arbaces*, King of the *Medes*, had granted to *Beleſis*, whom he made Governor of *Babylon*, the Permiſſion of tranſporting thither the Ruins of the Palace of *Sardanapolus*; but the Deſign of this Nobleman (who pretended to erect a Cauſeway with them near the Temple of *Belus*) was in Reality to ſecure to himſelf the immenſe Treaſure which he knew was conceal'd among thoſe Ruins. *Bibl. Hiſtor.* Lib. 2. Cap. 28. Had the King diſcover'd the Affair in Time, he might certainly, without Breach of his Word, have hinder'd *Beleſis* from going to *Nineveh*, and even puniſh'd him ſeverely, as he made a Shew of doing, in order to heighten the Clemency he exerciſed in Pardoning.

[4] Indeed, 'tis abſurd to imagine, that a Man can, by a deſign'd and wicked Cheat, lay a valid Obligation upon another in his own Favour. *Nemo ex ſuo delicto meliorem ſuam conditionem facere poteſt* (ſay the moſt judicious *Roman* Lawyers.) *Digeſt.* l. 50. tit. 17. *De diverſ Reg. Jur.* leg. 134. §. 1. Nevertheleſs, theſe ſame Lawyers, as Mr. *Titius* obſerves, (on *Lauterbach. Obſ.* 1116, 1117.) deliver here many vain Diſtinctions. For they affirm, that a Fraud, which has been the Cauſe of a Contract, does not render it null in itſelf, and by Law, (*ipſo Jure*) unleſs when Sincerity may be pretended, *i. e.* when a favourable Conſtruction can be put upon it by the Rules of Equity, if we do not inſiſt rigorouſly upon the Terms. But in an Act of rigorous Law, where we muſt ſtrictly obſerve what is ſaid or written, the Fraud does not hinder the Contract from being valid, altho' it may be reverſed by a full Reſtitution. For the Laws, in this Caſe, always allow the Benefit of Reſtitution, which comes to the ſame Thing, with regard to the Indemnification of the Perſon cheated. But, according to the natural Law, a Fraud does no leſs diſannul a Contract of ſtrict Law, than a Contract *de bona fide*. Mr. *Titius* (*in Lauterb. Obſerv.* 1148, *&c*) maintains, alſo, with Reaſon, that this Diſtinction of Acts of *good Faith* and *rigorous Law* is not conformable to the *Law of Nature*, by the Principles of which all Acts ſhould be interpreted, which admit of an equitable Conſtruction, as Mr. *Noodt* acknowledges, *de Forma emend. Doli mali*, &c. *c.* 4. where he obſerves, that before the Prætor *Caius Aquilius Gallus* there could be no Action of Fraud in Contracts of ſtrict Law, unleſs there were ſome formal Agreements, and the Perſon cheated were a Minor. See *l.* 5. *c.* 2. § 8. *infra.*

[5] The Interpreters of the *Roman* Law have hitherto affirm'd, that, in this laſt Caſe, a Contract is neither null by Law, nor ſubject to be made void by a full Reſtitution, when it is tranſacted by a Contract *de bona fide*, and that then we had no other Remedy but the Action *de bona fide*, or the Exception of Deceit. But the famous Mr. *Noodt*, who has made admirable Diſcoveries in the moſt knotty Parts of the Civil Law, undertakes to prove, in his excellent Treatiſe *De Forma emendandi Doli mali in contrahendis negotiis admiſſi apud Veteres*, printed in 1709, That this Diſtinction of the modern Lawyers has no Foundation in the Writings of the Ancients, and that every Fraud, whether it conſiſts in the Way of Treating, or be found in the Thing itſelf, or the Price, renders the Contract *de bona fide* always null in itſelf, and by the Civil Law, inſomuch that the Perſon cheated, being ſummoned by the other Contractor to anſwer it, has no more to do but prove the Cheat againſt his Adverſary, without oppoſing to him the Exception of a Fraud, and the Prætor, or Judge, declared the Contract null by Law. But if he, who is injured, becomes the Plaintiff, he may either declare the Contract entirely null, or ſuffer it to be in Force, if he judges it convenient, ſaving to himſelf, in both Caſes, a Right to require a Reparation of the Damage which he received by the Cheat, and that even tho' the Defendant ſhall demand a Diſſolution of the Contract. This laſt Circumſtance is remarkable, and I took the more Notice of it, becauſe it confirm'd the Notion I had deliver'd in my Treatiſe of *Sports*, where I had ſaid (before Mr. *Noodt*'s Treatiſe appear'd) following the ſole Light of Reaſon, *l.* 2. *c.* 1. §. 11. That there is this Particular in all Contracts made by Force or Error, or, in a Word, which are not perfectly free on the Part of one of the Contractors, that it is lawful for one of them to make what Advantage he can of it, but the other hath no Right to eaſe himſelf of the Damage done him contrary to his Intention, *&c.* Mr. *Noodt* hereupon quotes a Law of the *Code*, which imports, that after a Matter concluded, if he who has ſome Way been guilty of a Cheat, requires a Nullity of the Contract; ſuch a Demand, which is ſhameful, ought not to be granted to its Author. *Tranſactione finita, quum ex partibus tuis magis dolum interceſſiſſe, quam eorum, contra quos preces fundis, confitearis, inſtaurari grave, necnon criminoſum tibi eſt.* Lib. 2. Tit. 6. Leg. 30. Add here what I have ſaid on the Caſe, wherein a Man, who would deceive another, is deceived himſelf, in the Abridgment of *the Duties of a Man and Citizen*, Lib. 1. Cap. 9. §. 13. Note 3.

[6] Altho', adds our Author, in his Abridgment of *the Duties of a Man and Citizen*, l. 1. c. 9. §. 13. the other Contractor has directly led us into that Thought, till the Bargain was concluded.

[7] *Plautus* has given us a good Character of theſe Sort of Men, in the Perſon of a Seller of Slaves, who demanding if he had

he, that runs into a Snare with his Eyes open, falls not only without Help, but without Pity [1].

(**) *Promiſi lingua, eadem nunc nego ;*
Dicendi, non rem perdendi gratia hæc nata eſt mihi ;
Plaut. Curcul. Act. v. Scen. iii. ver. 27, 28.

'Twas my Tongue ſaid it ; and my Tongue unſays it. Nature never gave me a Voice to be the Inſtrument of my own Undoing. And again, in *Rudent :* Act. v. Scen. ii. ver. 68. and Scen. iii. ver. 17, 18.

Quæ hæc factio eſt ? non debes ? non tu juratus es mihi ?
Leno. *Juratus ſum, & nunc jurabo ſi quid voluptati eſt mihi.*
Jus jurandum rei ſervandæ, non perdendæ, conditum eſt.

What a Stir's here ? Don't you owe it ? Did not you ſwear Payment ?

Pimp. Yes, I ſwore, and I'll ſwear again, whenever it pleaſeth my Fancy. Oaths were invented to preſerve Men's Goods and Eſtates, not to ruin them.

The Character, which *Polybius*, in *B.* VI. *p.* 498. *A.* Ed. *Wech. Caſaub.* gives of the *Grecians*, is not much better. The publick Bankers of *Greece*, (ſays he) if you lend them only a ſingle Talent with ten Bonds, as many Seals, and twice as many Witneſſes, yet will never be prevail'd upon to be honeſt. But whether this Fear or Suſpicion of being deceived, can render [2] invalid a *Pact* already made, and can abſolve the ſuſpecting Party from a Neceſſity of Performance, will appear, when we ſhall have conſider'd the Opinion of Mr. *Hobbes*, on this Point. He then lays it down for a Rule, that *a Covenant, wherein neither of the Parties perform preſently, but truſt one another, in a State of Nature, becomes void, if on either Side there ariſe a juſt Fear* [a]. Which Aſſertion we cannot admit of, but under this Conſtruction, that one Party, after tha[t] Covenant is made, has juſt Reaſon to fear, that when he has perform'd the Engagement on his Side, the other Perſon will fly off : And, by a *juſt Reaſon to fear*, we mean ſuch as is grounded on plain Indications and Proofs. For it is highly injurious to queſtion a Man's Fidelity without good Evidence, when we have experienced it in former Inſtances. And, indeed, Mr. *Hobbes* himſelf, by a ſubjoin'd *Note*, brings his Words to this qualified Senſe ; *Unleſs*, ſays he, *there ariſe ſome new Cauſe of Fear from ſome Fact, or other Sign of the Will, in one Party, tending to Non-performance, the Fear cannot be eſteem'd juſt. For that which could not hinder a Man from Promiſing, ought not to be admitted as an Hindrance of Performing.* That is, tho' before the Entring into the Covenant, one of the Parties might entertain ſome Suſpicion, that the other would impoſe upon him ; yet, by the very Act of Covenanting with ſuch a Perſon, he, as it were, renounces this Fear, and declares it inſufficient to hinder his believing and truſting him. For otherwiſe, no Engagement could paſs between them. But at firſt this ſeems to have been *Hobbes*'s Judgment, that a *Pact*, thus made, would be *void*, tho' there ſhould no ſuch Fear ariſe after the Concluſion of it, as appears both from his Work *of a Body Politick*, written in the *French* Tongue, where we do not meet with this Reſtriction ; and from the Reaſon aſſigned by him in the *Latin* Treatiſe, for that Rule of his at preſent under our Examination : And the Reaſon he gives for it is this, *Becauſe he that performs firſt, betrays himſelf to the covetous Deſigns of the other Party, upon account of the ill Diſpoſition of moſt Men, inciting them to ſtudy and advance their own Intereſt by Right or Wrong. But it is againſt Reaſon, that one ſhould perform now, whilſt it is improbable that the other will perform hereafter.* Whence it is plain [b], That he derives the Cauſe of this Suſpicion and Diffidence from the general Pravity of Mankind. And by this Means muſt the greateſt Number of Mortals be branded as Perſons unfit to deal with ; and, in general, all Faith and Truſt be baniſh'd from amongſt thoſe, who are not ſubject to a common Ruler or Judge. For ſince we cannot be infallibly certain of any Man's Honeſty, and ſince the World is, for the moſt Part, inclin'd to Wickedneſs ; and farther, ſince, in a State of Nature, every Man orders his Buſineſs according to his own Opinion, *and is Judge of the Juſtneſs of his own Fears*, it will follow, that a Suſpicion, though vain and groundleſs, ſhall render a Contract invalid ; and, therefore, that *Pacts* are of no Manner of Uſe, except under civil Governments. And it is an exceeding hard Cenſure, to think the greateſt Part of Men ſo groſly vile and wicked, as that (ſetting aſide the Civil Power) the Fear of God, the Regard to Faith and Truſt, and the Force of ſound Reaſon, ſhall have ſo little Influence on their Minds : Whereas, on the Contrary, there ſeems to be ſtampt, on the Souls of all Men, in indelible Characters, a juſt Senſe of the Duty of keeping their *Faith* ſacred and inviolable ; an Argument for which Truth we may draw from this eaſy and natural Reflection, That we can find no Man who will openly profeſs *Perfidiouſneſs*, but every one, who recedes from his Word or Bargain, pretends to have done it on very juſt and weighty Reaſons. A Commonwealth, which breaks its Faith with one of its neighbouring States, immediately engages its Faith again, to procure the Alliance and Confederacy of another ; and thus

[a] *De Cive*, c. 2. ſ. 11. [b] And much more plain from his expreſs Words in the *Engliſh Leviathan*, where the ſame Doctrine is thus deliver'd : If a Covenant be made, *&c.* p. c. 68.

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not promiſed to pay the Money for which he had ſold a Girl, in Caſe any one would warrant her to be free, anſwers, as in the *Latin* Quotation at (**) in the Text.

[1] Our Author leaves us here to gueſs at his Meaning about the Validity of an Agreement, which, notwithſtanding the Knowledge of the ill Deſign of the other Contractor, we have engaged ourſelves in with him for ſomething ; but he explains himſelf in his Abridgment of *the Duty of a Man and Citizen*, l. 1. c. 9. §. 14. where he lays down this Rule, He that truſts to the Promiſes or Agreements of a Perſon, who makes no Scruple of violating his Faith, and breaking his moſt ſacred Engagements, acts with a great deal of Imprudence ; but that is not a Reaſon ſufficient to render the Engagement null, and of no Effect. The Reaſon is plain, he ought to have taken Care not to engage ; and, if he be deceived, 'tis his own Fault, he can blame none but himſelf.

[2] Our Author denies this, upon the Suppoſition he makes, that the Party, knowing the Foundation of theſe Suſpicions, ſtill ventures to engage himſelf. This Matter he explains more diſtinctly, in his Abridgment of *the Duties of a Man and Citizen*, Lib. 1. Cap. 9. §. 14. where he lays down three Rules, which are the Keys of the Paragraph.

[3] This is a Miſtake of our Author, for 'tis only a Tranſlation into *French*, as Mr. *Barbeyrac* obſerves. The Place he ſpeaks of is, Chap. 2. Sect. 10. of this Work. As for the reſt, *Hobbes* appears here no Way to have changed his Opinion, as our Author conjectures. But the Danger of the *Engliſh* Philoſophers Opinion conſiſts in this, That he leaves every Man at Liberty to judge, without Appeal, *whether it is likely or not* the other Party will perform his Engagements, after the other has fulfilled his according to Agreement : So that he regards the ſlighteſt Suſpicion conceiv'd as a ſufficient Ground for Breach of Faith ; becauſe he founds Diſtruſt on the extravagant Ideas of univerſal Malice or Hatred, and ſo admits every Man to judge as he thinks fit in his own Caſe. See my Remark on Lib. 2. Cap. 2. §. 3. preceding.

endeavours

endeavours to avert the Danger it lay under from that Baſeneſs and Treachery, by the Help of the ſame Duty which before it violated. We ought therefore, to preſume, that every Man will do what is juſt and honeſt, till his contrary Practice forces us to change our Opinion. To diſtruſt every Body, ſays *Lucian*, is a moſt ridiculous Folly [1]. From all which, we may venture to conclude, That this *Diſtruſt of Mens Faith, ariſing from the general Pravity of human Nature, is not ſufficient to juſtify the Non-performance of Contracts* [2]. And, therefore, the Excuſe of the *Mitylenians*, for deſerting the Confederacy of the *Athenians*, was vain and groundleſs, as it is given by their Ambaſſadors in *Thucydides*, B. iii. c. 12. Edit. *Oxon.* Pag. 154. *When they had War, they, for Fear, courted us; and when they had Peace, we, for Fear, courted them. Thus our Faith on both Sides was not preſerved, as is uſual, by mutual good Will, but by mutual Diſtruſt; and they who could be firſt encouraged by Security, were likely to be the firſt that ſhould break the Union.*

Nay, ſhould we diſcover ſome particular Vices in a Perſon, this is not always a good Reaſon for us to recede from an Engagement made with him [3]. For there are many Vices which have no ill Influence on the Duty of keeping Faith. Thus, ſuppoſe a Man be inclin'd to Luſt, Drunkenneſs, or Cruelty, thoſe ill Habits, conſider'd barely in themſelves, do not hinder but that he may be a ſtrict Obſerver of his Word, and a conſtant Performer of his Covenants. And farther ſtill, ſhould we find a Perſon addicted to ſuch Vices as do commonly prejudice Fidelity and Truſt; as if we obſerve in him a deſultory Lightneſs and Inconſtancy of Mind, an inſatiable Deſire of Riches, or a violent Strain of Ambition; yet even theſe Qualities do not give us an abſolute Liberty of refuſing to make good our Word, when we have paſs'd it on his Account. For, in the firſt Place, it may often happen that a Man, out of a particular Inclination, may practiſe Diſhoneſty towards *others*, and yet may live fairly and juſtly with *me*. And then (as has been lately obſerved) by my very Act of bargaining with a Perſon whoſe Diſpoſition I am acquainted with, I declare thoſe Vices which I know him guilty of, to be inſufficient to hinder me from truſting him, and ſo renounce all my Privilege of making Exception againſt his preſent Morals, after the Buſineſs is concluded between us. For, otherwiſe, nothing would have been firmly tranſacted, ſuppoſing one Party at firſt to have made ſuch a Reſerve as ſhould, when he pleaſed, overthrow the whole Proceedings [4]. Though, indeed, when I have been once deceived by a Man, I ſhall act very imprudently, if I engage in any Contract with him again, without requiring particular Security. And the very Proverb will tell me, That if ſuch a Knave cheats me once, 'tis *his* Fault; but if he cheats me a ſecond Time, 'tis *my own*. *Add.* [5] *Senec. de Benef.* l. iv. c. 27. *Civ. de Invent.* l. i. c. 39. Or even after the *Pact* is concluded; ſuppoſe I find, by evident Tokens, that he is contriving to play me a Trick, I ſhall be an an egregious Fool, if I betray myſelf voluntarily to his Deſigns. *Cicero de Invent.* l. i. c. 39. It's the higheſt Pitch of Madneſs to rely on their Fidelity, whoſe Perfidiouſneſs you have often experienced. Hence *Menelaus* cries out in *Homer*, l. iii. Iliad. v. 105, 106.

Ἄξετε δὴ Πριάμοιο βίην, ὄφρ' ὅρκια τάμνῃ
Αὐτὸς, ἐπεὶ οἱ παῖδες ὑπερφίαλοι καὶ ἄπιστοι.

Bring *Priam*'s ſelf to ſee the Contract made,
For *Priam*'s Sons are faithleſs and unſtaid.

Add. Polyb. l. viii. c. 1, 2. l. x. c. 34. *Cicero in Verr.* i. 15. He who hath proved falſe to his own Party, is the common Enemy of Mankind. No wiſe Man ever truſted a Traytor. *Idem pro Rabir.* 13. When a Man hath been once perjur'd, he ought to be no more believed, tho' he ſwear by all Heaven together. *Add. Senec. de Benef.* l. iv. c. 27.

Thus much we willingly allow, that in Caſe a Man openly diſclaims all Religion, or if he entertain ſuch Opinions as amount to the ſame, we ought to place no farther Truſt in his Pacts or Promiſes, than as either his manifeſt Advantage and Intereſt obliges him to ſtand to them; or as we can by Force reduce him, if he fly off. Such Perſons are thoſe profeſs'd Atheiſts [6], who either deny the *Being*, or the *Providence* of God; and nearly related to them, are

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[1] The Author here cites a Paſſage from *Lucian*'s Dialogue, of the Liar or Incredulous, Γελοῖα ποιεῖς, ἔφη ὁ Ἴων, ἀπιστῶν ἅπασι. Theſe are the Words of a Man very credulous in Matters of Magick, who reproved another that did not believe his Relations concerning it; but if our Author had minded the Connection of the Diſcourſe, he would have found that he had miſapplied theſe Words; to which the judicious Maxim of the Philoſopher *Seneca* had been more pertinent, *Utrumque enim vitium eſt, & omnibus credere, & nulli; ſed alterum honeſtius dixerim vitium, alterum tutius*, (i. e.) We muſt neither truſt all the World, nor diſtruſt them, both of theſe Things are faulty; but the firſt, in my Opinion, is moſt honeſt, and the other moſt ſafe, *Epiſt.* 3 See *Heſiod* in his Book *de Oper. & Diebus*, ver. 372. And as to the following Maxim of our Author, ſee l 8. c. 4. §. 3. following

[2] The *Greek* is, Καὶ οἱ μὲν ἡμᾶς ἐν τῷ πολέμῳ δεδιότες ἐθεράπευον, ἡμεῖς δὲ ἐκείνους ἐν τῇ ἡσυχίᾳ τὸ αὐτὸ ἐποιοῦμεν· ὅ τε τοῖς ἄλλοις μάλιστα ἔννοια πίστιν βεβαιοῖ, ἡμῖν τοῦτο φόβος ἐχυρὸν παρεῖχε, δέει τε τὸ πλέον ἢ φιλίᾳ κατεχόμενοι, σύμμαχοι ἦμεν, καὶ ὁποτεροις θάσσον παράσχοι ἀσφάλεια θάσσων, ἕτοι πρότεροί τι καὶ παραβήσεσθαι ἔμελλον.

[3] Mr. *Hertius* here quotes, to this Purpoſe, certain Words of *Terence*, which he makes a Slave Merchant to ſpeak, *Leno ſum, fateor, pernicies communis adoleſcentium, perjurus, peſtis; tamen tibi a me nulla eſt orta injuria*, (*i. e.*) I own, I am a Slave Merchant, the Ruin of young Men, a perjured Perſon, a common Plague; but for all this I have done you no Injury. *Adelph.* Act 2. Scene 1. v. 34, 35.

[4] There is a Paſſage in *Cicero*, very pertinent to this Purpoſe, *Nam illud quidem, Neque dedi, neque do fidem infideli cuiquam, idcirco recte a poeta, quia cum tractaretur Atræus, perſonæ ſerviendum fuit; ſed ſi hoc ſibi ſumunt, nullam eſſe fidem, quæ infideli data ſit, videant ne quæratur latebra perjurio*, (*i. e.*) When the Poet makes *Atræus* ſay, I never have, nor do believe a faithleſs Perſon, he had Reaſon to make that wicked King ſay ſo, to ſupport his Character. But if we lay down this as a general Rule, That Belief, given to a faithleſs Man, is void, I fear, under that Pretence, an Excuſe will be found for Infidelity and Perjury. *De Offic.* l. 3. c. 29.

[5] *Cicero*'s Latin is, *Primo quidem decipi incommodum eſt, iterum ſtultum, tertio turpe —— ſumma igitur amentia eſt, in eorum fide ſpem habere, quorum perfidia toties deceptus ſis.* De Invent. l. 1. c. 39. See, alſo, *Homer*'s *Ilias*, l. 3. v. 105. *Cicero*, l. 1. *in Verrem*, c. 15. *Sen. de Benef.* l. 4. c. 27. *Polyb.* l. 8. c. 1, 2. and l. 10. c. 34. See M. *de Sacy*'s *Traite de l'Amitie.*

[6] Mr. *Vander Muelen*, in his Commentary upon *Grotius*, Tom. 2. dares not agree to the Opinion of our Author. For he ſays, Experience ſhews, that thoſe Sort of Men, unleſs they have altogether put off Humanity, are uſually conformable to the Rules of Honeſty and Decency eſtabliſhed among Men; and if they do not act thus from any Fear of a Deity, yet they do it with the Proſpect of their own Advantage and Preſervation. So that, though we know that a Man is infected with that deteſtable Opinion, we have no Right, under that Pretence, to break our Word with him, and neglect to perform the Agreements made with him. We were at our Liberty to agree with him, or not; but, from the Moment that we have concluded an Agreement with him, we are neceſſarily obliged to perform it. It is a clear different Thing when we deal with Traitors, Thieves, Pirates, &c. Mr. *Bayle* has, alſo, proved, at large, in his Thoughts upon a Comet, and the Continuation of that Work, that Atheiſts are not always wicked and faithleſs, and that they may, through a Principle of Honour, or other human Motives, abſtain from groſs Vices.

the Maintainers of the Mortality and Impunity of human Souls. For 'tis impoſſible, but that Men of theſe Principles ſhould meaſure all Right and all Juſtice by their own Profit and Convenience. Into the ſame Herd we may pack all thoſe who practiſe ſome Villany or Vice for their ſet Trade and Employment; as Pirates [1], Thieves, Murtherers, Pimps, Courteſans, and other profligate Wretches, who take Perjury for a Trifle, and make a Jeſt of ſacred *Obligations*. Thus *Tacitus* ſpeaks, upon the Occaſion of one *Gannaſcus*, who having ſerved the *Romans* a long Time, run over to the *Germans*. *Nec irritæ aut degeneres inſidiæ fuere adverſus tranſfugam & violatorem fidei*, i. e. (*Ann.* xi. c. 19.) the Treachery ceaſed to be diſhonourable, by being practiſed againſt a perjured *Renegado* [2].

And this we are farther ready to acknowledge, that although the Argument of Mr. *Hobbes*, which we have here endeavour'd to refute, does not perform the Service he intends it for, that is, does not take off the Validity of *Pacts* in a *natural State*; yet is in ſome Meaſure capable of good Uſe, in as much as we may draw from it the following Rules of Prudence; Never to depend much on a Covenant, but when we know that the Intereſt of the other Party is concern'd in the Performance of it, as well as our own; and that, upon Default, he is likely to ſuffer ſome greater Evil or Inconvenience, than he can incur by ſtanding to the Agreement.

That he, who enters into a Contract with his Superior, ſhould ſo order Matters, as that his Superior ſhall be obliged to be the firſt Performer. For if the weaker Perſon diſcharge his Part firſt, the Effect will probably be, either that he ſhall be diſappointed and deluded; or that he muſt depend entirely on the Favour and good Grace of the other, for what he expects in Return.

Thus *Socrates* of *Achaia* replied to the Demands of King *Artaxerxes*; The King deals moſt unreaſonably by us; what he deſires to receive from us, he would have to be immediately deliver'd; but what he is to give us in Return, he expects we ſhould afterwards humbly ſue for. *Diod. Sic.* l. xiv. c. 24. For the ſame Reaſon, *facilior fides ſperatur ex pari*, we may truſt more ſafely to the Faith and Honeſty of an Equal, *Quintil. Declam.* 312.

And, laſtly, that he expoſes his Safety to manifeſt Danger, who, by performing a Covenant, weakens himſelf, and ſtrengthens the other Party, upon Hopes, that in Requital, and according to the Agreement, he ſhall afterwards receive the like Aſſiſtance and Succour. For 'tis a Piece of Folly to give a real and ſubſtantial *Good*, in Exchange for Words, Writings, or Seals, when we have nothing to oppoſe to the Charms of Ambition and Covetouſneſs, but the ill-grounded Hopes of Honeſty and Fidelity [3].

Maurocen. Hiſt. Venet. l. v. p. 193. *Ed. Ven.* I dare not venture to place the Security of our Affairs in a League. For ſuch is the Nature of Confederacies, that they are frequently hindred and interrupted by the various Events of Things; different Ends propoſed, draw the Strength and Minds of the Allies different Ways; and whilſt each State purſues its own private Intereſt, the common Good is diſregarded or betray'd. Reinforcements and Supplies are neither ſent in equal Proportion, nor at the Time agreed upon: Hence ariſe Suſpicions, and Eſtrangement of Affections, from this open Quarrels, and from Quarrels utter Deſertions, and Violations of the main Contract; and thus, at length, thoſe of the Confederates who are leaſt able to make Reſiſtance, become a Prey not only to their Enemies, but to their Allies.

X. We are now to proceed to that other Species of *Fear*, *ariſing* from the Approach or the Apprehenſion of ſome grievous Miſchief. And, in ſtating this Point, it is neceſſary that we go back to furniſh ourſelves with ſome clear and fundamental Principles. And ſuch is this undoubted and original Truth, That *our Will naturally inclines to what it looks upon as good.* Now it appears no leſs good and deſirable to the Will, to avoid an imminent Evil, than to acquire an abſent Benefit; and, towards the attaining of both theſe Ends, we employ the moſt likely *Means*, although they be ſuch as we ſhould not barely, on their Account, chooſe or embrace. For we commonly make uſe of Methods, in themſelves ungrateful and troubleſome, for the Eſcaping of a Danger, as for the acquiring of a Pleaſure [4]. Though, indeed, the Hopes of compaſſing a Good does more ſweeten the Grievouſneſs of theſe Means or Methods, than the Care of preventing an Evil. For which Reaſon *Ariſtotle* [a] calls thoſe only *mixt* (that is, partly voluntary, partly involuntary) Actions [5], which are undertaken for the Sake of declining ſome Miſchief which we are like to ſuffer; as in that common Inſtance, of throwing Goods over-board in a Storm. Though as great Hardſhips as any of this Kind are undergone by the Wreſtlers, and other Engagers in the publick Games, to prepare their Body for thoſe Exerciſes [b]. What we would obſerve then is this, That although Actions, perform'd upon Fear of a greater Evil, ought to be accounted ſpontaneous, and tho' the leſſer Evil, which, in thoſe Caſes, we chooſe, is, as Things then ſtand, the real Object of our Deſire; yet all this is not ſufficient to found an *Obligation* in us towards another. For ſince every *Obligation* is

[a] *Ethic.* l. 3. c. 1. See what we have ſaid of theſe in l. 1. c. 4. ſ. 9. [b] Vid. *Epictet. Enchir.* c. 35.

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[1] The Author here ſpeaks only of that Circumſpection that we ought to uſe in treating with ſuch Men: For he denies not but we are obliged to obſerve what we have freely promiſed. See what he ſpeaks a little lower, §. 11. in the Place where he examines the Maxim of *Cicero*. *De Offic.* l. 3. c. 29. See, alſo, l. 8. c. 4. §. 5.

[2] We may eaſily diſcern, that this Paſſage is not very pertinently alledged. If we may deliberately deceive ſuch Sort of People, we may much more diſtruſt their Promiſes.

[3] This Quotation is not very neceſſary, becauſe that Hiſtorian there treats, in general, of the Inconveniences which ariſe by Alliances of one State with another.

[4] As for Example, The ancient Wreſtlers, as our Author obſerves a little lower, underwent chearfully the *Regimen* of a very auſtere Life, and great Fatigues, that they might win the Crown of the Olympick Games. See *Epictet. Enchirid.* c. 35. *in fin.* What our Author ſays here, is not contrary to the Maxim which we have defended above after him, l. 1. c. 6. §. 14. For tho', in general, Man is more ſenſible of Evil than Good, that hinders not but that ſometimes he may reſolve to do ſome Things diſagreeable in themſelves upon ſome Occaſions, to obtain a Good which he looks upon as much more conſiderable, or to avoid an Evil more troubleſome. And then the Hope of Good makes us think the Means leſs troubleſome, than the Deſire of avoiding the Evil does, as well becauſe we embrace theſe Means with an entire Liberty in the firſt Caſe, and not in the latter, as, becauſe the Acquirement of Good is ſomething poſitive, which produces a new Pleaſure and Advantage; whereas a Deliverance from Evil leaves us in the ſame Condition we were.

[5] See l. 1. c. 4. §. 9. before going.

directed

directed towards ſome other Party, to whom it is to be made good, and who thereby obtains a correſpondent Right of compelling us to Performance; to produce ſuch an Engagement, 'tis not enough that one Perſon has in him the due Grounds or Principles of an *Obligation*, but it is requiſite that there be, in ſome other Perſons, Principles fit to create a *Right*. For we can have no Notion of an *Obligation*, unleſs a *Right* anſwer to it, or be conſequent upon it: As I can owe nothing, if there be no Perſon, who can rightly demand any Thing from me. Therefore ſuch *Fear* alone invalidates and deſtroys an *Obligation*, as is cauſed by ſome *Vice* or Imperfection in the other Party, rendering him incapable of acquiring a *Right* [1]. And ſuch a Defect is every *injurious* Action, which cannot be ſaid to produce a *Right* without a manifeſt Contradiction [2]. For to pay what another has a *Right* to demand, is a Precept of the *Law of Nature*; and ſhould an Injury (*that is*, a *Deed*, or Fact, directly contrary to that *Law*) be able to cauſe any ſuch Effect, the *Law of Nature* would lend Strength and Aſſiſtance to its Enemy, and manifeſtly contribute to its own Deſtruction. We may as well ſay, that a Law, which forbids Thieves, may, at the ſame Time, reckon their Trade and Practice amongſt the honeſt Ways of Gain [3].

XI. But, before we apply theſe Remarks more cloſely to the Point, it is neceſſary that we make farther Enquiry, whether the Author of the *Fear* was the Party with whom we are engaged in Buſineſs, or ſome other Perſon. And then again, whether he had a juſt Power and Authority of preſenting ſuch a Fear to our Mind, or not. For this is true, beyond Diſpute, that in Caſe I have taken an *Obligation* upon me through Fear of Miſchief, threatened by a *third Perſon*, neither at the Inſtigation, nor with the Confederacy of the Party

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[1] *Nihil conſenſui tam contrarium eſt, qui ac bonæ fidei judicia ſuſtinet, quam vis atque metus, quem comprobare contra bonos mores eſt.* Digeſt. l. 50. tit. 18. De diverſis Reg. Jur. leg. 116. See tit. 2. l. 4. *Quod metûs cauſa geſtum erit*, and Mr. *Domat*'s Civil Laws in their natural Order, Part 1. l. 1. tit. 18. §. 2. We may add, alſo, what *Cicero* ſays, *Jam illis promiſſis ſtandum non eſſe, quis non videt, quæ coactus quis metu, quæ deceptus dolo promiſerit? Quæ quidem pleraque Jure Prætorio liberantur, nonnulla Legibus.* De Offic. l. 1. c. 10. (*i. e.*) As for Promiſes extorted by Fear, or ſurprized by Fraud, who ſees not that we are not obliged to keep them? The Prætor himſelf frees us from many of them, and the Laws from others. "*Solon* (as *Plutarch* relates) by allowing Men, who had no Children, to give all they had, by Will, to whom they pleaſed, yet did not thereby approve of all "Sorts of Donations indifferently, but of thoſe only that were given freely without any Violence, and without a Mind corrupted "with the Potions, Spels, or the Careſſes of a Woman, being juſtly perſuaded, that there is no Difference between Seducement "and Force; and placing, in the ſame Rank, Surprize and Violence, Pleaſure and Pain, as Things which equally cloud our Reaſon." Εὖ πάνυ καὶ προσηκόντως τὸ πεισθῆναι παρὰ τὸ βέλτιστον, ἑδὲν ἡγεμένῳ τῷ βιαθῆναι διαφέρειν, ἀλλ' εἰς ταυτὸ τὴν ἀπάτην τῇ ἀνάγκῃ, καὶ τῷ πόνῳ τὴν ἡδονὴν θέμενον, ὡς ἐκ ἦττον ἐκιστῆσαι λογισμὸν ἀνθρώπου δυναμένην.

[2] See the Law of the *Digeſts* cited §. 8. Note 4. p. 281.

[3] To clear this Matter, it is neceſſary to make ſome Reflections. 1. The Reaſon, which our Author alledges, taken from the Incapacity in the Author of the Fear, to acquire any Right from the other Contractor, is very good; but there is another drawn from the Perſon on whom the Fear acts; That his Conſent is not ſo free as is required in all Promiſes and Agreements, which ought to be perfectly voluntary. 'Tis not here as it is in Actions criminal and evil in themſelves, which ought not to be committed for Fear of the greateſt Menaces, though the Fear, to which we yield, may leſſen the Crime. Becauſe, as we ought and may obey the Law that forbids them, we are thought to be free ſo far as is neceſſary to make us culpable, though we have nothing in View but the Danger which we are immediately threatened with. But in the Caſe of Promiſes and Agreements, all that is not done without Artifice and Conſtraint from him with whom we engage, is looked upon, with Reaſon, not to have a good Ground of Conſent, and, conſequently, is void in itſelf, becauſe we act about Things indifferent, which we need not determine farther than we ſee convenient. The Law, that leaves us at Liberty to do them, or not to do them, lays no Neceſſity upon us to fulfil what we are engaged to, contrary to our Will and Intereſt. Reaſon and Prudence, in theſe Caſes, will oblige us rather to depart from our Rights, than expoſe ourſelves to the ill Effect of Force; but, after the Danger is over, nothing can oblige us to make good an Act which is null in itſelf, unleſs we fear a worſe Conſequence than appears in doing it. Mr. *Domat*, who has uſed (in his Civil Laws reduced to a natural Order, Part 1. Lib. 1. Tit. 18. §. 2.) this Reaſon to ſhew the Nullity of forced Engagements, but explains them obſcurely, has not forgot the other Reaſon taken from the Inſtance of him who is conſtrained to promiſe or treat. Mr. *Gundling*, in a very curious and uſeful Treatiſe, (*De efficientiâ Metus, tum in promiſſionibus liberarum Gentium, tum etiam Hominum privatorum*, &c. Cap. 1, 25 *& ſeqq.*) rejects this Principle, of the full Liberty there ſhould be in Contracts. He who acts by Conſtraint, ſays he, not only wills, but ardently wills, that to which he is determined. His Action is, therefore, as voluntary, when influenced by this Motive, as if the ſame Motive ſhould engage him to commit a Crime. Nobody denies but that there is here an Act of the *Will*. I will even allow there is a Kind of *Liberty*; for, properly ſpeaking, a Man, in the Caſe before us, may refuſe, for Inſtance, an Hundred Pounds to a Robber who holds a Piſtol to his Breaſt, and rather ſuffer himſelf to be killed, than make ſuch a Promiſe. But that he does this with Ardour, (*vehementer cupere*) is what will never be granted by any one, who can reflect on what paſſes in his own Mind. The Deſire of his Soul, his Wiſh, his Inclination, are all manifeſtly on the Side oppoſite to that he takes. Nor would he take it, if he did not judge it neceſſary to avoid a greater Evil. Therefore, he is no Way ſo free in this Senſe as he ſhould be, with regard to ſuch Engagements, as nothing obliges him to contract, while they are contrary to his Deſires. Whereas, with reſpect to criminal Actions, from which he ought wholly to abſtain, it is ſufficient to avoid their Imputation, that he can reſiſt, though with Difficulty, the Sight of ſome great impending Danger. This Difficulty diminiſhes his Fault, becauſe it implies a Reluctance to yield, and a Deſire not to be reduced to that Extremity: But yet it does not excuſe him entirely, and when he has Courage enough to ſurmount it, it ſerves to heighten the Merit of his Obedience to the Law. It is needleſs to add more on ſo clear a Subject. 2. Our Author ſeems to think, that the Evil, which, being apprehended, is ſufficient to make forced Promiſes and Agreements void, ought to be very terrible, whoſe Proſpect may affright the moſt courageous Perſons. 'Tis certainly the Opinion of the *Roman* Lawyers, who confine this Fear to the Danger of Death, Slavery, Torments, Confinement, &c. *Metum accipiendum Labeo dicit, non quemlibet timorem, ſed majoris malitatis —— qui merito & in hominem conſtantiſſimum cadat.* Digeſt. l. 4. tit. 2. leg. 5, 6. *Talem metum probari oportet, qui ſalutis periculum, vel corporis cruciatum contineat.* Cod. l. 2. tit. 4. *De Tranſactionibus, leg.* 13. But as we always ſuppoſe, that the Fear is unjuſt, I do not ſee why the Apprehenſion of a ſmall Evil is not ſufficient to make Promiſes and Agreements void, ſince that was the principal Motive, and without it Conſent had not been given. The leaſt Injuſtice, in my Opinion, gives no more Right to the Author of it than the greateſt. But the Fear muſt not be a vain one, for he that reſigns himſelf up to panick Fears, muſt blame himſelf. *Vani timoris juſta excuſatio non eſt*, Digeſt. l. 50. tit. 17. *De diverſis Reg. Jur. Leg.* 184. Otherwiſe, as Mr. *Domat* obſerves, all the World would not have the ſame Reſolution to reſiſt Force and Menaces. There are ſome Men ſo very weak and timorous, that they yield to the leaſt Impreſſions; ſo that the ſlighteſt Force prevails as much on them, as the Greateſt on the moſt Courageous, and 'tis principally for their Sake that the Laws puniſh Violence and Oppreſſions. But if the ſame Laws do not allow the Fear of a ſmall Evil to be ranked among the Cauſes of nulling a Contract, it proceeds from hence, according to the judicious Reflection of Mr. *Placette*, in his Treatiſe of Reſtitution, that the Lawgivers would prevent the Multiplication of Suits, which are, without Contradiction, a great Evil; but they have left, adds he, the Rights of Conſcience entire, and their Authority hinders not but that we may obſerve exactly what that inward Law preſcribes upon that and the like Subjects. We muſt then conclude, that, by natural Right, all Force, and every Kind of Violence, direct or indirect, all Menaces, and, in general, all unlawful Influences, which oblige Men, contrary to their Inclination, to give their Conſent, which, otherwiſe, they would not, takes away that Liberty which is neceſſary to make an Engagement valid, and, conſequently, renders all Promiſes and Agreements, in ſuch Caſes, null and void. I ſhall farther add only one Paſſage of *Plato*, wherein that Philoſopher, aſſerts, that the Agreements to which a Man is obliged by an unjuſt Force, ought to be valid no more than thoſe which are contrary to the Laws, or are not in our Power to execute, by Reaſon of ſome unforeſeen Accident, Ὅσα τὶς ἂν ὁμολογῶν ξυνθέσθαι, μὴ ποιῇ κατὰ τὰς ὁμολογίας, πλὴν ὧν ἂν νόμοι ἀπείργωσιν, ἠψήφισμά ἤ τινος ὑπὸ ἀδίκου διαθεὶς ἀνάγκης ὁμολογήσῃ, καὶ ἐὰν ἀπὸ τυχης ἀπροσδοκήτου τις ἄκων κωλυθῇ, δίκας εἶναι τῶν ἄλλων ἀτελῶς ὁμολογίας ἐν ταῖς φυλετικαῖσι δίκαις, &c. *De Legibus*, l. 11. Tom. 2.

to whom the Engagement was made [1], I ſtand firmly bound to perform what I promiſed him. For there appears no Fault in him, which might render him incapable of acquiring a *Right* upon me; and, on the contrary, he may juſtly challenge a Requital, in that he lent me his Aſſiſtance, in warding off the Danger I apprehended from another Quarter [2]. Thus, if I hire a Guard of Soldiers to defend me againſt Robbers, I am, no Doubt, obliged ſtrictly to pay them the Price of their Service. And a Man, who, being reduced to a low Condition, procures, by large Promiſes, the Help of others, and having, by their Means, eſcaped the Danger, is afterwards backward in performing, contracts the double Guilt of Perfidiouſneſs, and of Ingratitude.

A Promiſe is, likewiſe, valid, if made to a third Perſon, through our Awe and Dread of a lawful Superior [3]; who had a juſt Right of commanding us, and of denouncing a Penalty upon Default. For here the Party, to whom I make the Engagement, is in no Fault; and I can only blame myſelf for being driven to a Thing through Fear of Puniſhment, which I ought voluntarily to have undertaken. Thus, ſhould a King lend a Body of his Soldiers, for Guards, to a Foreign Prince, and for the greater Security, command them to ſwear Obedience to the Stranger; they ſhall not afterwards fly from their new Obligation, upon Pretence that they were brought to it by *Fear*; ſince the *Fear* proceeded from *him*, who had a Sovereign Right of laying this Injunction on them, and of forcing them by any Methods to their Duty. In the ſame Manner, ſhould we ſuppoſe that a Father might betroth his Daughter to a Man, quite againſt her Inclination; and, in this Caſe, when ſhe, out of Fear of her Father's Authority, has given her Faith to the leſs agreeable Spouſe, ſhe cannot afterwards diſappoint him: For there is no Fault in him, to prejudice his *Right*, accruing from that *Promiſe*; and the Daughter ought freely to have obeyed her Father's Pleaſure; and ſo cannot plead *Compulſion*, when ſhe has no Right to reſiſt. Thus far then it is a Point of Moment to conſider, who was the Author of the *Fear*. But, in other Caſes, the Rule of the *Roman* Lawyers holds good, That it *makes no Difference from what Perſon the Fear proceeds*; that is, when one has a *Right* of putting us into ſuch a Fear; and when the Fear is actually the *Cauſe*, not the bare *Occaſion* only of the *Promiſe*, or *Pact*, conſequent upon it [4].

Thoſe *Promiſes* then, or *Pacts*, we take to be invalid, which a Man is compel'd to engage in by the unjuſt Force of the Party to whom they are made. For ſince he, who extorts any Thing from another, by uſing unjuſt Terrors, is, by the *Law of Nature*, bound to reſtore it, and muſt, conſequently, make good what the other Perſon loſes by ſuch a forced Bargain. So [5] *Seneca l.* iv. *Controv.* 26. The Queſtion is, Whether Force and Neceſſity render a Buſineſs invalid, when they did not proceed from the Party contracting? "What Influence (will he ſay) can your Compulſion have on me, when it "was not I that compel'd you? The Puniſhment "cannot be mine, unleſs the Fault were mine. "But the other denies this Way of arguing. The "Law, ſays he, as to the preſent Caſe, doth not "proſecute him that offers the Violence, but aſſiſts and relieves him that ſuffers it; it ſeeming "unreaſonable, That a Man ſhould be bound by "an Engagement thruſt upon him againſt his "Will. Whence the Neceſſity proceeded, is a Point "of no Weight in the Diſpute. That which renders the Contract unjuſt, is the hard Fortune of "the Sufferer, not the Perſon of the Doer." *Idem. Controv.* l. iv. c. 8. If it be ſaid, it was not I that applied the Force, but another; the Anſwer is, That Man, who makes his Advantage by Violence offer'd by ſome other Hand, is no leſs guilty than if he had been himſelf the actual Performer.

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1 Whether the Evil be at a Diſtance, and uncertain, or it be, according to all Appearance, juſt ready to happen. In the firſt Caſe it is plain, that Fear, from a third Perſon, can't invalidate a Promiſe or Agreement. In the other, though the Fear be preſent, it has no Manner of Influence upon the Nature of a Promiſe or Agreement. All that is done is, that it gives the Perſon engaged a Right to accuſe the third Perſon, by whoſe unjuſt Force he made the Engagement, and without which he had made no Contract. *Titius*'s *Obſerv.* 224. We ſhall find this Rule more diſtinctly explained in my Remarks upon *Grotius, de Jur. Bel. & Pac.* Lib. 2. Cap. 11 §. 7. Note 5.

2 *Si quo magis te de vi hoſtium vel latronum, vel populi tuerer, vel liberarem, aliquid à te accepero, vel te obligavero; non debeo me hoc edicto teneri, niſi ipſe hanc tibi vim ſummiſi. Cæterum ſi alienus ſum à vi, teneri me non debere; ego enim operæ potius meæ mercedem accepiſſe videor.* Digeſt. l. 4. tit. 2. leg. 9. §. 1.

3 *Non eam vim quam Magiſtratus intulit, ſcilicet jure licito, & jure honoris, quem ſuſtinet.* Ibid. leg. 3. §. 1. This Author, in his Abridgment of *the Duties of a Man and Citizen*, l. 1. c. 9. §. 15. adds, With Reſpect or Deference to a Perſon to whom we have great Obligations. And 'tis for this Reaſon that he reports an Example of a Child, who married againſt his own Inclinations to pleaſe his Father, although he could have abſolutely avoided it. See l. 6. c. 2. §. 14. following. Such a Conſtraint leaves the Engagement in its full Force, and ſo the *Roman* Law has decided it; for, according to that, a Son, even in his Non-age, could not be forced by his Father to marry; but the Caſe was otherways with the Daughters: *Si patre cogente ducit uxorem* [Filius familias, qui non cogitur uxorem ducere] *quam non duceret, ſi ſui arbitrii foret, contraxit tamen matrimonium quod inter invitos non contrahitur, maluiſſe hoc videtur.* Digeſt. Lib. 23. Tit. 2. *de ritu nupt.* leg. 21, & 22. See Mr. *Noodt*'s Commentary on this Title, p. 489, 490. Mr. *Boehmer*, in a Diſſertation *de Matrimonio coacto*, publiſhed 1721, (p. 29.) has ventured to give a new Explanation of this Law. He ſays, That it relates to a Son whom the Father has conſtrained to marry, only leaving him the Choice of a Wife. I do not know if many People will reliſh this Conjecture, but to me it appears quite ſtrained.

4 *In hac actione non quæritur, utrum is qui convenitur, an alius metum fecit; ſufficit enim hoc docere, metum ſibi illatum, vel cum ex hac re eum qui convenitur, etſi crimine caret, lucrum tamen ſenſiſſe. Nam cum metus habeat in ſe ignorantiam, merito quis non aſtringitur, ut deſignet, quis ei metum, vel vim adhibuit, & ideo ad hoc tantum Actor aſtringitur, ut doceat metum in cauſe fuiſſe, ut alicui acceptam pecuniam faceret, vel rem traderet, vel quid aliud faceret.* Digeſt. l. 4. tit. 2. *Quod metus cauſa*, leg. 14. §. 3. The *Roman* Lawyers, grounding themſelves on an intricate Point of the Law (according to which, an *Action*, brought *on Account of Fear*, was partly perſonal, partly real) did not here diſtinguiſh, whether the Perſon contracting knew, or was ignorant of, the Fear by which he was influenced. There is, nevertheleſs, a Law of the *Code*, which ſeems to ſuppoſe, That the Party knew this Motive. The Caſe there relates to a forced Sale: *Non intereſt à quo vis adhibita ſit Patri & Patruo tuo, utrum ab emtore, an vero* ſciente emtore, *ab alio, ut vi metuve, poſſeſſionem vendere cogeretur.* Cod. Lib. 2. Tit. 20. *de his quæ vi*, &c. leg. 3. But beſides, that theſe Words (*ſciente emtore*) are not found in the *Baſilica*, they infer no Conſequence to found a general Rule upon, becauſe they are taken from a *Reſcript*, accommodated to the particular Caſe in Queſtion, as has been juſtly obſerved by Mr. *Noodt*, p. 110, and by Mr. *Schulting*, on the Title of the *Digeſt*. *Quod metûs cauſâ*, &c. §. 5. So there is no Probability that the Emperor *Gordian*, who publiſhed this *Reſcript*, ever thought of ſuch a Diſtinction. It is, however, in my Opinion, very well founded to judge of it by the Principles of natural Equity.

5 The *Latin* of *Seneca* is, *An, ſi eſt in re vis & neceſſitas, ita tamen reſcindantur, quæ per vim & neceſſitatem geſta ſunt, ſi vis & neceſſitas à paciſcente adhibita eſt? Nihil, inquit, meâ, an tu cogaris, ſi non à me cogeris, meam culpam oportet eſſe, ut mea pœna ſit. Non, inquit, neque enim Lex adhibenti vim iraſcitur, ſed paſſo ſuccurrit, & iniquum illi videtur, id ratum eſſe, quod aliquis, non quia voluit pactus eſt, ſed quia coactus eſt. Nihil autem refert, per quem illi neceſſe fuit. Iniquum enim, quod reſcinditur, facit fortuna ejus qui paſſus eſt, non perſona facientis.* And again, *Non mea, inquit, ſed aliena vis fuit; æquè dignus eſt pœna, qui ipſe vim adhibet, & qui ab alio admota ad lucrum ſuum utitur.* See, alſo, Mr. *Noodt, de Jurisdict. & Imperio*, Lib. 2. cap. 14.

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The Neceſſity of *Reparation* in the Party who offer'd the Violence, takes off all Obligation to *Payment* in the Party who ſuffer'd it; becauſe, ſhould he offer to *do* [1], or to give what, in the Agreement, he promiſed, he ought, in common Juſtice, immediately to receive full Recompence, or full Reſtitution [2]. And 'twould be a fooliſh and idle Way of acting, when we are once got clear of the Danger, to pay *voluntarily* what we promiſed *upon Force*, and then to require Reparation of the Damage [3]. *Martial* L. XI. *Epig.* 59.

Quid ſi me tonſor cum ſtricta novacula ſupra eſt,
Tunc libertatem divitiaſque roget[a]*?*
Promittam: Nec enim rogat illo tempore tonſor,
Latro rogat; res eſt imperioſa timor.
Sed fuerit curva cum tuta novacula thcca,
Frangam tonſori crura manuſque ſimul.

My Barber with his Razor on my Throat,
Asks me for Wealth and Freedom, and what not:
I promiſe all, whilſt Danger ties my Hands,
For not the *Barber*, but the *Rogue* demands;
But when fierce Razor to ſafe Sheath withdrew,
I'd ſpoil his Dancing, and his Fiddling too.

Eſpecially ſince the other Party, when he demands or accepts our Promiſe, does, by that very Act, declare manifeſtly, that 'tis far from his Thoughts and Deſigns to make us any Satisfaction. Beſides, how ridiculous would it be in you to reckon it a Piece of *Merit*, when you forbear a Miſchief, which the Laws forbid you to commit, to pretend that you do a Man a *Kindneſs*, by refraining from ſome notorious Villany? And, therefore, *Cicero* [a] utterly denies himſelf to have been *obliged* to *Antony*, for not killing him at *Bruduſium*. *What Benefit, what Favour is it*, (ſays he) *that you withhold your Hands from the fouleſt Wickedneſs? What Kindneſs can Thieves boaſt of, but that they ſpared a Man's Life, when it was in their Power to have murder'd him?*

Horat. l. I. Epiſt. 16.

Non furtum feci, nec fugi, ſi mihi dicat
Servus, habes pretium loris, non ureris aio.
Non hominem occidi; non paſces in cruce Corvos.

Id. de Arte P.

——— vitavi denique culpam,
Non laudem merui.

Speak, Slave, your Merits I ne'er fled nor ſtole;
You've 'ſcaped the Scourge, and ſtill your Hide keeps whole:
I've done no Murther; and you feed no Fowl.

I merit Pardon, but I win no Praiſe.

Add. l. vii. ſ. 3. *D. de pactis.* Seneca, l. ii. *Controv.* 13. Not to do a Villany will never paſs for a Benefit. *Quinctil.* Declam. 330. To make an End of an Injury, is by no Means to begin a Kindneſs.

No more is a Man bound to perform his Promiſe, who, in a Caſe of this Nature [5], gives *Security* for the Perſon in Diſtreſs; although his own Fear is not the Cauſe of his entring into the Engagement. For ſince *Suretiſhip* is a Kind of inferior Contract, admitted to confirm and ſtrengthen the main Buſineſs; it would be abſurd (at leaſt with regard to natural Law) to attribute more Efficacy to the former, than to the latter; to make the principal Debtor leſs ſtrictly obliged, than he who comes into the Buſineſs purely for his Aſſiſtance [b]. The Caſe is otherwiſe, if this third Party, for the Relief of the Sufferer, contract an Obligation, in which he himſelf is the Principal, not the Surety, or the Acceſſary. For Inſtance, if a Man, out of Kindneſs and Pity, ſhould promiſe ſome Reward to a Villain, upon Condition he will ſet a poor Wretch at Liberty, whom he has got under his Power [6]. For here the Contractor himſelf is not properly put under *Fear*, nor can he uſe thoſe Exceptions, which might be made by the Perſon he delivers; in as much as he engages upon his own Score, not in the Name of the other, and cannot be ſaid to build his Bargain on a primary Obligation; ſince, indeed, none paſs'd but what he freely ſet on Foot, and of which he took the whole Burthen on himſelf. And he ought to eſteem it a Thing well worth his Pains or Coſt, to have ſaved the Life of an innocent Man, and to have acquired the Glory of Beneficence in ſo extraordinary a Degree.

But if a Perſon, in this captive Condition, upon making Terms for his Liberty, ſhall leave Hoſtages to continue under the Power of the Villains, till ſuch Time as he ſhall have perform'd what he promiſed; he is then, indeed, bound to make good his Word, yet not by virtue of his Contract with the Rogues, but of that whereby he ſtands engaged to the Friends whom he has left in his Room. In *Morocco*, and other Parts of *Africk*, the whole Body

[a] *Philip* 2. [b] Vid. *Inſtit.* l. 3. tit. 21. *De Fidejuſſor.* §. 5.

[1] There is no Neceſſity here to have Recourſe to this Fiction of Law; and our Author ought the more to have avoided it, becauſe he condemns it himſelf, when he criticiſes upon *Grotius*'s Opinion, at the End of §. 12. of this Chapter. He had better have inſiſted upon the Principle he laid down above, *viz.* The Incapacity of the Author of the *Violence* to obtain any Right by ſuch extorted Engagements, and the Want of Liberty in the Perſon who gives ſuch a forced Conſent. See §. 10. The Argument our Author uſes here, can only be regarded as an Argument *ad hominem* againſt the *Roman* Lawyers, who, ſeeking vain Evaſions on this Subject, as they have done in other Matters, maintain, That the Contracts of rigorous Law, extorted by an unjuſt Fear, are valid in Equity, altho' they ought afterwards to be diſannulled by the *Prætor*. See *Inſtitut.* l. 4. tit. 13. *De Exceptionibus*, §. 1. and Mr. *Noodt*, *de Forma emendandi doli mali*, c. 16.

[2] This is a Term of Law, by which is underſtood a mutual Releaſe, between two Perſons who were Debtors to each other, of this our Author will treat in Lib. 5. c. 11. §. 5. Vid. *Digeſt.* l. 44. tit. 4. *De doli mali & metus Exceptione*, leg. 8.

[3] This Note is put into the Text.

[4] *Horace* is there treating of another Matter, and ſo the Quotation is not proper.

[5] This is the Deciſion of the *Roman* Lawyers, who ſay, at the ſame Time, That if the Surety has engaged thro' Fear, and he, for whom he is Surety, engageth himſelf voluntarily, the Engagement of this latter is good, but of the other null. *Labeo ait, Si is per metum Reus ſit conſtitutus, & fidejuſſorem nolentem dederit, ipſe & fidejuſſor liberabitur. Si ſolus fidejuſſor metu acceſſit, non etiam reus, ſolus fidejuſſor liberabitur.* Digeſt. l. 4. tit. 2. *Quod metus cauſa*, leg. 14. §. 6. See l. 5. c. 10. §. 9. following.

[6] Mr. *Hertius* maintains, That in this laſt Caſe the Engagement is not valid, unleſs there be an open Donation of what is delivered or promiſed on that Account. For, ſays he, though he be engaged in his own Name, 'tis only to ſave another, who is unjuſtly oppreſſed. The Author himſelf, in the following Chapter, §. 9. regards, as null, all Promiſes or Agreements made in View of a Thing, to which the Perſon, in whoſe Favour we contract, is rigorouſly bound. For my Part, I think this Obſervation juſt. Mr. *Vitriarius* is of the ſame Opinion in his *Inſtit. Jur. Nat. & Gent.* Lib. 2. cap. 11. §. 16.

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of *Chriſtian* Slaves paſs their *Faith* for each particular Man of their Number, that he ſhall not go off; and, by Means of this *Security*, they are allowed to walk the City without their Chains; and in Caſe one of them make their Eſcape, the reſt are obliged to pay the Price he was valued at. Whether an *Oath*, added to Promiſes of this Kind, does more confirm and eſtabliſh their Force, we ſhall hereafter examine.

It is a noted Saying of *Tully*, in his third Book of *Offices*, c. 29 [1]. *If you have agreed with Thieves to give them ſuch a Sum to ſave your Life, it is no Deceit to recede from your Promiſe, though you have given your Oath too for the Performance. For Robbers or Pirates are not in the Number of any particular and lawful Enemies, but ſhould be looked on as the Adverſaries of Mankind; and, therefore, no true Faith or Oath can properly paſs between us and them.* Which Aſſertion we thus far allow, holds good, that a Promiſe, made to ſuch Men through the Compulſion of Fear, ſhall not be binding. But the Reaſon, on which *Tully* proceeds, is not ſatisfactory to many Perſons; eſpecially, if extended to ſuch *Pacts* or *Promiſes* as we commence with the ſame Villains, without being brought to it by Violence. For tho', by the common Cuſtom of Nations [2], a lawful Enemy and a Robber are treated in a different Method, yet the latter cannot be ſaid immediately to loſe all *Rights* of Humanity; at leaſt, if he ſtill deal with ſome Perſons in a fair and peaceable Manner. For when he tranſacts with me, without influencing my Conſent by Fear, he bargains not as a *Robber*, but like any other Man. Now a Robber is called a *common Adverſary*, becauſe he does not, like other Enemies, offer War peculiarly to any Party; but practiſes hoſtile Force upon all, without Diſtinction, that fall into his Hands. Upon which Account, in order to quell and to ſuppreſs him, there is no Need of the Formalities of denouncing War, and liſting Soldiers againſt him; but Nature commiſſions every Man to proſecute him in a military Way. But it may ſtill be affirm'd, that as, by *Tully*'s own Confeſſion, a State of Hoſtility does not hinder us from being bound to obſerve Faith with an Enemy; ſo neither is this *common Hoſtility* of the Robber an Hindrance to our performing a Covenant made with him, eſpecially if, as we have all along ſuppoſed, he lays aſide the Part of an Enemy in the Act of Covenanting.

Grotius forms another Objection to this Purpoſe; "Such as are notoriouſly wicked, and are no Part "of any civil Society, may, if we regard the *Law* "*of Nature*, be, by any Man, puniſh'd." ('This *Hypotheſis* we ſhall examine in another Place.) "Now they, who may be puniſh'd, and even with "Death, may, likewiſe, be deſpoil'd of their "Goods, may be diſpoſſeſs'd of their Rights. But, "amongſt their *Rights*, that which accrues to them "from our Promiſe is one; and therefore, that too "may, by way of Puniſhment, be taken from "them." But *Grotius* anſwers this Argument with great Eaſe: For he that voluntarily bargains with a Thief, knowing him to be ſuch, does, by that very Act, renounce all Exception againſt his Perſon, which might otherwiſe render the Promiſe invalid. Elſe the Buſineſs was vain and inſignificant, and nothing really paſs'd between them. Should I be got out of my Road, and promiſe a Thief ſome Reward for ſetting me Right again, there is no Doubt to be made, but I ought freely to pay it. And thus too the *Roman* Lawyers rightly maintain, "That whatſo-"ever is depoſited with us by a Thief, ought to "be reſtored to him [4], if the true Owner of it "does not appear." To which they ſhould add this farther Condition, That the Man, who receives the Thing in Truſt, does not know the Fraud of the other: For in Caſe he is ſatisfied that the Perſon is a Villain, and that the Goods are ſtolen, I do not ſee how he can take them in Charge, without bringing himſelf in as an Acceſſary to the Crime.

XII. But many, indeed, there are, who maintain, that *Pacts* and *Promiſes*, though extorted through Fear, have yet the Force and Power of *obliging* [5]. Some urge the Authority of the *Roman* Law, which, by giving full Reſtitution [6], ſhould ſeem to ſuppoſe, that thoſe Engagements are in ſtrict Juſtice *binding*, but ought to be relieved and corrected in Courts of *Equity*. But 'tis eaſy to vindicate the Practice, without drawing any ſuch Concluſion from it. For ſince the Parties are Members of a civil State, the *Court* does not preſently take it for granted, that one of them offer'd Violence to the other; and ſince that Point may bear a Diſpute, it ſeems convenient ſo long to keep up ſuch a Contract, and to ſuppoſe it good, till the Judge ſhall receive manifeſt Evidence, That the Allegation of *Fear*, on which the *Action* was grounded, was really juſt and true. But it does

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1 *Cicero*'s *Latin* is this, *Ut ſi prædonibus pactum pro capite pretium non attuleris, nulla fraus eſt, ne ſi juratus quidem id non feceris. Nam pirata non eſt perduellium numero definitus, ſed communis hoſtis omnium; cum hoc nec fides debet, nec jusjurandum eſt commune.* See, alſo, what is ſaid, l. 4. c. 2. §. 8.

2 *Heliodor. Æthiop.* l. 1. c. 3. p. 56. Never a War with Robbers was terminated by Treaty. The *Greek* is, Αὐ γὰρ ἐπὶ ληϊστοῖς ποτὲ λῃστικῷ ἔληξε πόλεμος, οὐδὲ ἐν σπονδαῖς ἔσχε τὴν τελευτήν. But ſee *Grotius*, l. 3. c. 19. §. 2. Numb. 2.

3 See l. 8. c. 3. § 4. following.

4 *Quod ſi ego* [*cui ſpolia abſtulit Latro*] *ad petenda ea non veniam, nihilominus ei reſtituenda ſunt, qui depoſuit, quamvis male quæſita depoſuit.* Digeſt. l. 16. tit. 3. *Depoſiti vel contra*, leg. 31. §. 1. See l. 4. c. 13. §. 5. following. And the Commentary of Mr. *Noodt* on this Title, p. 366.

5 This is the Opinion of Mr. *Montagne*, in his Eſſays, *l.* 3. *c.* 1. What *Fear* has once made me reſolve, I am obliged to make good without Fear; and though nothing forces me to it, but my Tongue without my Will, yet I am obliged to make good my Word. As for myſelf, whenever I have inconſiderately out-run my Thoughts, I have made a Conſcience, nevertheleſs, of disowning them. Otherwiſe we ſhall come, by Degrees, to aboliſh all the Right which a third Perſon obtains by our Promiſes. *Quaſi vero forti viro vis poſſet adhiberi*, (*Cicero de Offic.* l. 3. c. 30. upon which ſee *Grævius*'s Notes.) In this alone private Intereſt has the Force of a Law, to excuſe us in the Non-performance of our Promiſes, if we have promiſed a Thing wicked and unjuſt in itſelf, for the Right of Virtue ought to prevail above the Right of an Obligation.

6 This hath only Place in Contracts of ſtrict Right, for thoſe *de bona fide* would be null in themſelves, and by the Civil Law. It is true, that, according to the *Roman* Lawyers, the Words, *annul*, *make void*, *reſcind*, *make good fully*, may be indifferently applied to both Sorts of Contracts, becauſe, when we are ſummon'd by the Contractor, who would oblige us to keep them, the Judge muſt declare them null one Way or other, either as having no Force in themſelves, by the Tenure of the Civil Law, or being void by ſome Exception made by the Defendant. See §. 8. foregoing; and Mr. *Noodt*'s Treatiſe, *de Forma emendandi doli mali*, &c. *c.* 15, 16. Whence it appears, that our Author's Reaſon to excuſe the Courſe of Proceedings in the *Roman* Court is no Way ſolid, ſince, tho' it was always neceſſary to prove the Violence in Court, this was not ſufficient in all Sorts of Contracts. The ordinary Judges, aſſigned by the *Prætor*, had no Power to annul ſuch as were ſtrictly legal, and to which we had been forced. It was neceſſary the *Prætor* ſhould interpoſe his own Authority, to grant to the injured Party an entire Reſtitution, which ſuppoſed the Contract valid in itſelf by the Civil Law.

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not follow hence, that Contracts of this Kind, or other Buſineſs which may be diſannul'd by a *peremptory Exception* at Law, are, in themſelves, firm and obligatory; ſince the Formality of that Way of Proceeding, though proper *civil* Judicature, yet is not agreeable to the Simplicity of *the Law of Nature*; at leaſt, when the Caſe happens between Perſons who do not acknowledge a common Judge.

Grotius aſſerts [a], "That a Man, who makes a "Promiſe through *Fear*, is, therefore, naturally "obliged to perform it, becauſe he plainly gave "his Conſent, and ſuch Conſent as was full and "abſolute, according to the preſent Poſture of "Things [1]. For, as *Heliodorus* ſays, l. v. c. 15. "p. 253. Edit. *Lugd.* Life is ſo precious, that we "ſeldom think we buy it too dear; though he "had never paſs'd his Conſent, had he been ſe"cure from the Danger." But in Anſwer to this, 'tis ſufficient to repeat what we formerly obſerved, That ſince every *Obligation*, ariſing from a Contract, ſuppoſes a correſpondent *Right* in the other Party, it is not enough that I have in me the neceſſary Cauſes and Principles of an *Obligation*; but 'tis requiſite, that the Perſon with whom I deal, be free from all ſuch Defects as might hinder him from obtaining a *Right* upon me. And, therefore, my having the *Power* to give a Thing, does not preſently make another have a *Power* of receiving it. Since then an *Obligation*, without a *Right* anſwering to it, is of no Uſe or Purpoſe; it cannot be imagined, that my bare Cōnſent ſhould bind me to a Performance, which *the Law of Nature* forbids the other Perſon to receive at my Hands. And this is manifeſtly the preſent Caſe; for the ſame Law, which prohibits the Application of Violence and Terror, muſt needs, at the ſame Time, prohibit the Acquirement of any *Right*, or any *Gain*, by ſuch wicked Means. What *Grotius* ſubjoins, appears not altogether agreeable, "That if he, to whom "the Promiſe was made, did obtain it of the other "Party, by putting him in a *Fear*, though never "ſo ſlight, he is obliged to releaſe the Promiſer, if "he deſire it; not becauſe the Engagement was in"valid, but by reaſon of the Damage which he un"juſtly occaſioned. Now if I can, at my Pleaſure "or Deſire, be freed from my Obligation, I am al"ready actually quit of it." What Need is there, then, of this round-about Way of Application? *You ought to releaſe me from my Obligation, if I requeſt it.* Is it not more eaſy, and more natural to ſay, *Since you compel'd me by Force to make the Promiſe, I owe you nothing; and 'tis idle in you to demand that of me, which, ſhould I pay, you are obliged immediately to reſtore* [2]? *Add.* Senec. *Controverſ.* iv. 26.

XIII. The ſame Opinion is defended by Mr. *Hobbes* [b], though by different Arguments. He ſays, *Covenants, entred into by Fear, are not, therefore, invalid, becauſe they proceed from Fear; for then it would follow, that thoſe Covenants, by which Men unite in Civil Life, and make Laws, muſt be invalid; for the Fear of mutual Slaughter is the Cauſe of one Man's ſubmitting himſelf to the Government of another. It would follow, likewiſe, that a Man acts irrationally, who believes his Captive bargaining with him for his Ranſom.* Now, in the firſt of theſe Reaſons, there is a plain Ambiguity in the Term *Fear*. For that *Fear*, which engages Men to enter into *Civil Societies*, is of a quite different Kind from that which we are now conſidering [3]. The former is a Caution againſt ſome Evil which may happen indefinitely; I know not when, nor which Way: The latter is a dreadful Apprehenſion of grievous Evil juſt now coming upon me, and which I am not able to reſiſt. Therefore, the Covenants, which we make for the Procurement of mutual Aſſiſtance againſt a common Enemy, are entirely of another Nature, from thoſe by which we promiſe ſome Reward, to free ourſelves from a Danger, which a Villain unjuſtly brings upon us [4]. As to the latter Reaſon, we readily acknowledge, that a Rogue acts very *irrationally*, when, having firſt extorted a Promiſe by Force, he afterwards yields Credit to the Perſon, as if the whole Buſineſs had been honeſtly and fairly tranſacted. For that Wickedneſs and Folly ſhould meet together, is no Contradiction. On the other Side, we may venture to ſay, That he would not act very *rationally*, who being got ſafe from a Miſchief with which he was unjuſtly threatened, ſhould freely pay the Ruffian the Price of his Villany [5]. (**) *Dionyſ. Halicar.* l. viii. p. 509, *in fin.* Edit. *Lipſ.* "Whatever is extorted from pri"vate Men, or from publick States, by Force and "Neceſſity, holds no longer than the Neceſſity "itſelf continues."

He adds, *'tis univerſally true, that Pacts oblige, whenſoever a Good is received, and when the Act of Promiſing, and the Thing promiſed, are both lawful. But is it lawful for me both to make a Promiſe for the Reſcuing of my Life, and, alſo, to give what I will of my own, even to a Robber?* But, indeed, what the Robber in this Caſe performs for the Traveller, in forbearing to take away his Life unjuſtly, cannot be called a *Good*. The abſtaining from an *Injury* ought not to paſs for a *Benefit*. And we are then only ſaid to have done ſome Good to a Man, when we have conferr'd ſome Advantage on him, which he wanted, or ſecured and preſerved ſome which he before enjoy'd, or have deliver'd him from ſome Evil or Danger, which fell upon him *without our Fault* [6]. As to the latter Part of the Argument, it is no good Conſequence to ſay, "It "is *lawful* for me to promiſe and to pay the Vil"lain; therefore he has a Right of requiring the "Performance from me; or therefore I ſtand "bound towards him by ſome inward Tie upon "my Conſcience." We may do many Things *lawfully*, which we cannot be engaged to do by any *Obligation*. I may *lawfully* throw away my Goods;

[a] *Lib.* 2. *c.* 11. §. 7. [b] *De Cive*, c. 2. §. 16.

[1] *Heliodorus*'s Greek is, Ἀνθρώποις ψυχὴ πάντων πρωτιμότερον. A trivial Sentence.

[2] Here we may apply the Maxim of the *Roman* Lawyers on another Subject, *Non videtur quiſquam id capere, quod ei neceſſe eſt alii reſtituere*, (*i. e.*) He ſeems not to receive any Thing, that muſt of Neceſſity reſtore it. *Digeſt. de diverſ. Reg. Juris*, leg. 51. On which ſee the Note of *Dion. Gothofred.*

[3] See Lib. 7. c. 1. §. 7.

[4] For, as our Author adds, nothing hinders but that a Man may be both wicked and imprudent at the ſame Time, according to the Saying of *Menander* recorded by *Stobæus*, Serm. 2. Ἀσυλλόγιστόν ἐστιν ἡ πονηρία, Malice is blind and bold.

[5] The Words of the *Roman* Ambaſſadors to *Marcius Coriolanus* make to our Purpoſe, as they are cited by *Dionyſius Halicarnaſſenſis*, as at (**) in the Text:

[6] And, therefore, it was a fooliſh Excuſe alledged by *Polycrates* in *Herodotus*, l. 3. p. 112. *Thal.* Edit. Græc. *H. Steph.* when he pillaged his Friends and Enemies without Diſtinction; that, by reſtoring to his Friends what he took from them, was a greater Obligation, than if he had altogether forborn the Injury.

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but does it therefore follow, that another can *oblige* me to ſuch an Extravagance? So that the Rule, which the ſame Author lays down on this Subject in his *Leviathan* [a], is, likewiſe, falſe; *Whatſoever I may lawfully do without Obligation, the ſame I may lawfully covenant to do through Fear; and what I lawfully covenant, I cannot lawfully break.* For he ought to have added this Condition, provided the other Party can honeſtly demand it of me.

XIV. There is, on this Point, ſtill one Queſtion behind, which requires our Examination, ſince Promiſes, made through Miſtake, or through Fear, are void; ſuppoſe the Party, after he gets rid of his Miſtake, or of his Fear, is inclined to ſtand to his Bargain, What muſt be the Way of ratifying ſuch Promiſes, and of putting them in full Force? For an *Obligation*, that was at firſt invalid [1], may afterwards recover its Strength by the Intervention of ſome new Cauſe, fit to create a *Right*; which, in the preſent Caſe, muſt be a clear and voluntary Conſent. Some then are of Opinion, That for the Confirmation of ſuch a Promiſe, no more is requiſite, than an internal Act of the Mind, or a full and free Agreement to the Buſineſs, tho' it be not expreſs'd by any outward Sign. For the outward Sign, they ſay, has paſs'd before; and this being now enforced by the clear and free Determination of the Mind, nothing is wanting to the Production of a firm Engagement. Others diſlike this Way of deciding the Controverſy; becauſe they conceive, that the internal Conſent, and the external Sign, ought to exiſt together, and that, therefore, an antecedent external Act cannot be a Token of a ſubſequent internal Act, which, perhaps, was not then thought of. And, upon this Account, they, to make ſuch a Promiſe valid, require a new verbal Promiſe and Acceptance. *Grotius* [b] offers a middle Judgment, that 'tis, indeed, abſolutely neceſſary ſome Signs ſhould be uſed to declare ſuch a ſubſequent internal Conſent, becauſe the other Party would elſe have no Aſſurance of his Right; but there is no Neceſſity the Signs ſhould be *verbal*, ſince others may ſerve as well to the Purpoſe; as ſuppoſe the [2] Promiſer underſtanding his Error, or, being deliver'd from his Fear, ſhall voluntarily give what he engaged for, or, if the Thing be already given, ſhall not endeavour to recover it, when he has convenient Means; or ſhall treat afterwards with the other Party about the ſame Things, as he would about any Thing elſe, which the ſaid Party lawfully poſſeſſes. To which Deciſion we readily ſubſcribe.

XV. We are farther to obſerve, That to the rendring of a Promiſe good and valid, there is required, not only the Conſent of the Perſon who makes it, but, likewiſe, of him to whom it is made [c] [3]; and this latter Conſent too (as well as the former) muſt be expreſs'd by Signs ſufficient; and, for this, a bare Nod will ſerve, if the Thing offer'd, be either a Matter of free Bounty, or have been before requeſted. For if the other Party do not conſent, or do abſolutely reject the Propoſal, the Thing promiſed ſtill remains in the Power of the Promiſer, though he had *ſworn* to part with it; for even an Oath cannot transfer a Right before *Acceptance*, and has only this Effect, That it makes it unlawful for me to revoke my Offer, till I am aſſured of the other Man's Refuſal. For he that prefers any Thing of his own to another, does neither intend to force it upon him againſt his Will, nor quite to give it over, and throw it away at a Venture; and, therefore, he loſes nothing of his Right and Title to it, in Caſe the other Perſon refuſe to take it. If a *Requeſt* paſs'd before-hand, it ſhall continue in Force, unleſs it be expreſly revoked; and, in this Caſe, the *Acceptance* is ſuppoſed to have been made in the very Petition; provided ſtill, that what is offer'd, be equal to what was deſired. For if a Man ask me to lend him a greater Sum, and I profer a leſs, to make ſuch an Engagement good, his *expreſs Acceptance* is neceſſary; in as much as this leſſer Sum may, perhaps, no Ways anſwer his Occaſions, or turn to his Profit; and, therefore, unleſs this *expreſs Acceptance* intervened, he ſhall be reſponſible only for ſuch a Sum as he firſt ask'd me to ſupply him with [4]. It may

[a] Cap. 14. [b] Lib. 2. c. 11. §. 20. [c] Lib. 19. §. 2. *Digeſt. de Donatione.*

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[1] There is, among the general Rules of the *Roman* Law, a Maxim, which appears quite contrary, *Quod initio vitioſum eſt, non poteſt tractu temporis convaleſcere*, Digeſt. l. 50. tit. 17. *De diverſis Reg. Jur.* leg 29. And this Maxim is afterwards applied to the making of an Heir, *Quæ ab initio inutilis fuit inſtitutio, ex poſt facto convaleſcere non poteſt* Ibid. leg 210. But it appears from divers Examples of the *Roman* Law, that this Principle has not always been followed, even in the Matter of Wills. ee *Digeſt.* l. 12. tit. 1. *de Rebus Creditis*, &c. leg. 12, *&c.* and *Dionyſ. Gothofredus* upon the Rules quoted above; as, alſo, Mr. *Domat*'s Civil Laws, in their natural Order, Part 2. l. 1. tit. 1. Sect. 2. §. 31.

[2] This is determined in the *Code*, on the Account of a Perſon who complained, that a Bill, for a Sum of Money, was extorted from him, which he, upon that Account, paid. *Quum te non ſolum caviſſe, verum etiam ſolviſſe pecuniam confitearis, qua ratione, ut vim paſſus reſtitui, quod illatum eſt, poſtules, perſpici non poteſt; quando veriſimile non ſit, ad ſolutionem te properaſſe, omiſſa querela de Chirographo, utpote per vim extorto, niſi & in ſolvendo vim te paſſum dicas*, (i. e.) Seeing you confeſs, that you did not only give Security for, but paid the Money, we can't ſee how you can obtain a Reſtitution, as if it were forced from you, becauſe you ſhould have complained of the Bill, as extorted, unleſs you can aver, that you were, alſo, forced to pay it, l. 2. tit. 20. *De his, quæ vi*, &c. leg. 2. It is, alſo, ſaid in *leg.* 4. of the ſame Title, that Conſent, after the Force offered, makes the Contract valid. *Si per vim vel metum mortis, aut cruciatûs corporis, venditio à nobis extorta eſt, & non eam poſtea conſenſu corroboraſtis*, &c.

[3] *Non poteſt liberalitas nolenti acquiri*, Digeſt. l. 39. tit. 5. *de Donation.* leg. 19. §. 2. Liberality can't be attributed to a Perſon unwilling. And again, *Invito beneficium non datur*, l. 50. tit. 17. *de diverſ. Reg. Jur.* leg. 69. A Kindneſs can't be done to a Man againſt his Will. See l. 41. tit. 7. *de Obligat. & Act.* leg. 55. But as to the abandoning a Thing, ſome of them maintain, (and treated thoſe as ridiculous, who thought otherwiſe) that it was ſufficient that a Man had an Intention to diveſt himſelf of his Property, and had deliver'd it, tho' on the Part of the Receiver there was no Acceptation. *Si furioſo, quem ſuæ mentis eſſe exiſtimas, eo quòd forte in conſpectu inumbratæ quietis fuit conſtitutus, rem tradideris: licet ille non erit adeptus poſſeſſionem, tu poſſidere deſinis. Sufficit quippe dimittere poſſeſſionem, etiamſi non transferas. Illud enim ridiculum eſt dicere, quod non aliter quis vult dimittere, quam ſi transferat: immo vult dimittere, quia exiſtimat ſe transferre.* Digeſt. lib. 41. tit. 2. *de adquir. vel amitt. Poſſ.* leg. 18. §. 1. This, however, was the Opinion which at laſt prevailed, and was confirmed by the Emperor *Juſtinian*. Thoſe, who would know the Niceties on which this Law is grounded, may conſult *Cujas*, Tom. 8. *Opp* p. 302.

[4] The *French* changes the Order of the Author here, to render his Reaſonings more clear.

[5] *Plutarch*'s Greek is, Κυριότερον εἶναι τὸν τῶ προκεκλημένω λόγον —— οἱ δὲ δεξάμενοι κ᾽ ὑπακούσαντες ἐκέτι κύριοι προσιθέντες. Farther, Mr. *Hertius* obſerves here, that there is this Difference between Engagements advantageous to one Party only, and ſuch as are for the Advantage of both, that in this laſt, the Promiſe muſt exactly anſwer to the Demand; whereas, in the firſt, no ſuch Thing is required For if any one (as the *Roman* Lawyers expreſs it) ſays thus, Wilt thou give me ten Crowns? And I anſwer, Twenty: I am engaged for Ten only. But, on the contrary, if he ſays, Wilt thou give twenty Crowns? And I anſwer, Ten; I am engaged for no more than Ten; for Ten is included in Twenty, but Twenty is not in Ten. But in a Contract of Hire, for Example, if the Leaſor require ten Crowns, and the Leaſee thinks he has hired for Five, the firſt is not obliged to go beyond that, tho' Five be contained in Ten. On the contrary, if the Leaſor believes he has lett for five Crowns, and the Leaſee

may not here be amiss, to consider *Plutarch*'s Observation, *Sympos.* l. ix. q. 13. p. 742. B. Edit. *Wech.* That the Words of the Person that proposeth the Conditions, have much more Power and Authority, than his to whom they are offer'd, in as much as he has no Liberty of adding to them; that is, because the latter can obtain no Right, but what results from the Consent of the former. If the Promiser shew his Agreement to the Request of the other Party, barely by nodding, or any other Sign of the like Nature, it shall be supposed, that the Request was tacitly repeated [1]. *Add. Grot.* l. ii. c. 16. s. 32.

Add. l. iii. *D. de pollicit. Vid. D.* l. L. tit. 12. *de pollicit.* Whence some have concluded, That, to render a Promise valid, the bare Act of the Promiser is sufficient. *Grotius* (l. ii. c. 11. s. 14.) answers, That a Promise, once made, cannot, indeed, be revoked; so as always to lie [illegible] for Acceptance, tho' before Acceptance, the Obligation is not fully contracted. But those, who look more closely on that Passage in the Civil Law, may find, That *Ulpian* teaches no more than this [2], a Covenant is the Consent and Agreement of two Persons, but a Promise is only on the Part of the Offerer; where it is not denied, but that Acceptance makes even the latter firm and obligatory. And, indeed, the State or City, of which *Ulpian* speaks, had before signified its Acceptance, in Case the Promise were made on the Account of Honours already granted, or now desired; and only refused it when the Promise was made without Cause [3], *Vid.* l. I. s. 1. *d. t.* l. xix. *D. de donat.* And again, l. iii. s. 1. *d. t.* Things thus deliver'd, without Cause [4], are forbidden to be claimed, because the Propriety of the Things being already transferr'd on the Community, they could not properly be deliver'd without the publick Acceptance.

Since, in all *Obligations* whatsoever, there is required the Consent of the Person to whom they are directed [5], or who obtains a *Right* by them; declaring (by himself, or Deputy) that he accepts the *Obligation*, and the *Right* which it transfers to him; and this with Signs sufficient to express the inward Purpose of his Mind; we may hence understand somewhat as to the [6] *Firmness of Religious Vows*, or Engagements voluntarily undertaken with regard to Almighty God. And it seems impossible to make these with any *Force*, unless God has, by Revelation, declared his Acceptance of them; or unless he has constituted some Vicegerent upon Earth, to judge of their Validity. For otherwise, a Man cannot be certain, whether it is the Will of God he should, or should not bind himself in this Manner; whether his *Vows* are pleasing or displeasing to Heaven. Especially since the Subject of *Vows* must be such Matters as God has not, by way of Command, punctually and precisely required at our Hands. For 'tis absurd and contradictory to reckon, that an extraordinary Performance, which is a Matter of strict and necessary Duty; and how can we be assured, except by Revelation, that any Act, which God has not enjoin'd, will be acceptable to him? And to engage in *Vows*, without knowing whether they will be received, or not, is idle and useless. But may we not, in many Cases, reasonably presume on the Divine Consent and Approbation? This, we think, can only be done in those Things which are *indefinitely* agreeable to the *Law of Nature*, and therefore to the Will of God; but in which the Application to Persons, *Places*, and *Times*, and the Al-

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Lease understood him Ten; this last is obliged to pay no more than the former meant, as the Laws following directs. *Si stipulanti mihi decem, tu viginti respondeas, non esse contractum obligationem, nisi in decem constat; ex contrario quoque si me viginti interrogante, tu decem respondeas, obligatio nisi in decem non est contracta; licet enim oportet congruere summam, attamen manifestissimum est viginti & decem inesse.* Digest. l. 45. tit. 1. *de verb. Obligat.* leg. 1. §. 4. *Si decem tibi locem fundum, tu autem existimes quinque te conducere, nihil agitur. Sed etsi minoris me locata sensero, tu pluris te conducere, utique non pluris erit conductio, quam quanti ego putavi,* Lib. 19. tit. 2. *Locati conducti,* leg. 52. But the Distinction of the *Roman* Lawyers, with regard to *Stipulation*, is neither well founded in itself, for the Reason our Author has just given; nor is it compatable with the Form which this Contract bore, according to their Civil Law, or with the ancient Rule laid down by *Justinian* himself, without any Exception. See *Institut.* lib. 3. tit. 20. *de inutil. Stipulat.* §. 5. It is long since *Hotoman* observed this Contradiction. And *John de la Coste*, in his Commentary on the Paragraph of the *Institutes*, has no other Expedient to excuse this, than to say, That they had soften'd the Law in the Time of *Ulpian* and *Paul*, (the two Lawyers whose Names it bears.) Mr. *Schulting* seems to approve this, in his Notes on the *Jurispr. Ante-Justin.* p. 157. See, also, on the same Place, the Note of *Oiselius.*

[1] For Example, if one says to another, Wilt thou lend me a thousand Crowns, and I will pay thee 5 *per Cent.* Interest, and repay it in five Months? And he only answers, Yea, or, I will; 'tis as much as if he had said, Yea, I will lend you a thousand Crowns, for which you shall pay me Interest at 5 *per Cent.* and repay me in five Months; and so he engages himself under those Conditions, and he can require no more of him, and, on the other Side, he can do no less lawfully to oblige us. The *Roman* Law decides thus in Case of Stipulation: *Nam si hoc solum respondeas,* promitto, *breviter videris in eandem diem, vel conditionem spondisse. Neque enim necesse est in respondendo eadem omnia repeti, quæ stipulator expresserit. Instit.* Lib. 3. tit. 20. §. 5.

[2] *Ulpian*'s Words are these, *Pactum est duorum consensus, atque conventio; pollicitatio vero offerentis solius promissum, & ideo est illud constitutum, ut si ob honorem pollicitatio fuerit facta* [*municipibus*] *quasi debitum exigatur.* Digest. l. 50. tit. 12. *De Pollicitationibus,* leg. 3. *in princip.*

[3] *Si quidem ob honorem promiseris, decretum sibi, vel decernendum, vel ob aliam justam causam, tenebitur ex pollicitatione; sin vero sine causa promiserit, non erit obligatus,* (i e.) If one promise for some Honour conferred, or to be conferred, or for some other just Cause, he shall be obliged by his Promise; but if he promises for no Cause, he is not obliged, *Ibid.* leg. 1. §. 1. See, also, lib. 39. tit. 5. *De Donat.* leg. 19. The Explanation, which our Author gives of the Words of *Ulpian*, about the Distinction between *Pactum* and *Pollicitatio*, is not quite just. This Lawyer, on the Contrary, by the Word *Pactum*, means an Agreement, where only one of the Parties promises, while the other, at the same Time, only consents and excepts this Promise; whereas, in the Case of *Pollicitatio*, the Whole consists in the Offers of him, who engages any Thing to the State. This appears, as *Pollicitatio* is distinguished from a Donation made the State, which, in its own Nature, necessarily implies an Acceptance. Hence, also, ariseth a considerable Difference, *viz.* That the State may exact the Interest for whatever Sums are offer'd in this Manner, if the Payment be delay'd; whereas it is not the same to that which has been given it freely and simply: *Si moram facere cœperit, usuræ accedunt,* &c. Ibid. *princip. Liberalitatis in Republicam factæ usuræ non exiguntur.* Digest. lib. 22. tit. 1. *De usuris,* &c. See Mr. *Noodt, de Fact. & Usur.* lib. 3. cap. 7.

[4] *Si quis, quam ex pollicitatione tradiderat rem municipibus, vindicare velit, repellendus est à petitione,* Ibid. leg 3. If any Man require a Thing, which he hath given to his Freemen, he is to be denied his Petition. It is not there said, as our Author supposes, that we promise the State without Cause; for it appears from other Instances, besides this, That if once a Man began to execute what he had promised, it was no longer in his Power to go back; he was obliged to finish: *Item si sine causâ promiserit, cœperit tamen facere, obligatus est, qui cœpit.* Leg. 1. §. 2.

[5] Mr. *Thomasius*, in his *Fundament. Jur. Nat. & Gent.* l. 2. c. 7. §. 5. draws a Consequence from hence, to shew the Vanity (*palliatam ambitionem,* he calls it) of such Authors, who say, in their Prefaces, that 'tis to make good their Promises to the Publick that they put out this or that Work. And Mr. *Bayle* had before said, in his Advertisement of his Continuation of divers Thoughts about a Comet, that the Promises of such Authors is not looked upon as an Engagement by Contract; nor is the Publick concerned, if they break their Word.

[6] See Mr. *Le Clerc*'s Notes upon *Gen.* xxviii. 21. and *Numb.* xxx. 3.

lotment of the particular *Quantity* are left to the Pleaſure, and the Judgment of Men. Thus we take thoſe *Vows* to be good and juſtifiable, by which a Man binds himſelf to beſtow ſuch a Sum of Money in Charity to the Poor, or on other pious Uſes; provided that ſuch an Act of Bounty be no Hindrance or Prejudice to any Duty abſolutely neceſſary: Or if he enjoin himſelf ſet Days of Faſting, or reſolve to abſtain from ſome particular Meats and Drinks, within a fixt Meaſure and Quantity; or if he deny himſelf the Uſe of ſome ſuperfluous Ornaments; as the Wearing of Jewels, Pearls, and Gold; or lay any Command or Prohibition on himſelf of the like Nature; all which Performances fall under ſome general *Virtue*, tho' the determinate Manner and Proportion of them are not Matters of ſtrict Precept. On the contrary, ſuch Vows as only create Trouble to the Undertaker, and no Benefit to other Men; we eſteem no better than idle and ſuperſtitious, eſpecially if they prove an Hindrance to other Duties.

A Scruple has been moved ſometimes, whether the *Obligation* in the *Promiſer* begins at the very Moment, when the Offer is *accepted* by the other Party; or whether it is farther neceſſary, that the *Acceptance* be formerly made known to the Promiſer? And here it is certain, a *Promiſe* may be deſign'd and expounded two Ways, either thus, *I engage myſelf to do the Thing, if it ſhall be accepted*; or thus, *I engage myſelf to do the Thing, if I ſhall underſtand that it will be accepted.* Now which of theſe two *Senſes* the Promiſer intended, is to be gather'd and preſumed from the Nature of the Buſineſs. If the *Promiſe* were a Matter of pure Generoſity, without Reſtriction or Limitation, we are to believe it was meant in the former Senſe; becauſe here the Promiſer haſtens, as it were, to *bind* himſelf, without ſtaying for any Formality in the other Party. But thoſe Promiſes are to be underſtood in the latter Senſe, which expreſs ſome arbitrary or mixt Condition eſſential to the Engagement [1]. Compare *Grot.* l. 2. c. 11. ſ. 15.

XVI. It remains that we add a Remark or two about the *Signs* of Conſent, which are abſolutely neceſſary to the producing of any Obligation, in as much as the bare Acts of the Will can have no Effect amongſt Men, unleſs manifeſted and declared by ſome external Tokens. Of *Signs*, the more imperfect are ſome particular Motions and Geſtures, neceſſary to be uſed in Commerce, when the Parties tranſacting, are unacquainted with the Language of each other. The more perfect are *Words*, and ſuch Words as are underſtood on both Sides [2]. See 1 *Cor.* xiv. 11. And to make theſe declare the Will more clearly and more firmly, it has been a conſtant Practice, both to make uſe of Witneſſes in Contracts of Weight and Moment [3], to whoſe Memory and Conſcience, Appeal might be made, in Caſe either of the Parties denied the Engagement, or cavil'd at the Expreſſion; and, alſo, (as a higher Degree of Confirmation) to ſet down the Terms of the Covenant in *Writing* [4]. Inſtead of which, the *Grecians* ſometimes uſed *Tallies*, v. *D. L.* xxii. *Tit.* 4. *de fide inſtrum.* For the Memory of Witneſſes may be treacherous, or their Integrity capable of Corruption [5]; but Writings are a much ſtronger Security, both againſt Forgetfulneſs, and againſt Unfaithfulneſs. And, as for *bare Words*, it is an uſual Way to elude them, by pleading, that they were utter'd thro' Raſhneſs, before the Thing had been conſider'd. But *Writings* exclude all ſuch Prevarication; whilſt they are drawing up, they ſet the Buſineſs clearly and leiſurely before the Eyes of the Contractor; ſo that if he once declare his Approbation of them, he muſt be judged to have yielded full Conſent to the Engagement, and cannot afterwards pretend, that he was drawn in by Paſſion, or Precipitancy. Nor are *Writings* liable to ſuch violent and crafty Interpretations, as are often put upon Men's Diſcourſe; in which one Particle artificially inſerted, and through the Quickneſs of the Pronunciation paſſing undiſcover'd, ſhall unravel and overturn the whole Affair. And, therefore, it is not without good Reaſon, that more Credit is given to authentick and unqueſtion'd *Inſtruments*, than to the Depoſitions of *Witneſſes*; ſince what a Man teſtifies againſt himſelf, is much ſtronger Evidence than what can be offer'd by others; and ſince the Charge never lies ſo heavy upon him, as when his own Authority is produced againſt him: Yet the Force of unqueſtionable Witneſſes muſt then be admitted as Superior, when they make out, by ſufficient Proofs, that the Inſtruments produced are ſuppoſititious or corrupted.

Farther, although the Strength and Firmneſs of *Covenants* does not abſolutely depend on ſuch Writings or Deeds, in as much as they may rightly be made without them [6], and may, as to the *Law of Nature*, ſtill hold good, tho' theſe Tokens ſhould,

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1 We muſt decide this Caſe in a quite contrary Manner, as the Reader will ſee, in my Remark on the Place of *Grotius*, cited in the Text. Mr. *Gundling*, in his *Juſ. Nat. & Gent.* Edit. 2. 1728, has made a Shew of refuting me on this Head, *Cap.* ii. §. 10. But he has neither comprehended nor anſwer'd my Arguments; ſo that I ſee no Reaſon to alter my Opinion.

2 Hence it comes to paſs, perhaps, (as our Author adds in his later Editions) that the *Turks* do not think themſelves obliged to keep any Contracts or Treaties, which are not written in their own Language and Characters. See *Marſelaer Legat.* l. 1. c. 30. But, provided that Contractors underſtand each other, it matters not in what Language the Contract is written, as the Roman Law has judiciouſly determined. *Utrum autem Latina, an Græca, vel qualibet alia lingua ſtipulatio concipiatur, nihil intereſt, ſcilicet, ſi utrumque ſtipulantium intellectum ejus lingua habeat. Nec neceſſe eſt eadem lingua utrumque uti, ſed ſufficit congruenter ad interrogata reſpondere. Quin etiam duo Græci Latina lingua obligationem contrahere poſſunt.* Inſtit. l. 3. tit. 16. *De Verborum Obligat.* §. 1. but this Point was not ſettled till in later Ages; for, according to the ancient Rules, it was abſolutely neceſſary that both the *Stipulation*, and the *Promiſe* which anſwer'd to it, ſhould be in *Latin.* This may be infer'd from even the Form of the Contract itſelf, and the *Digeſt.* lib. 45. tit. 1. *De Verbror. Obligat.* leg. 1. §. 6.

3 *Teſtimoniorum uſus frequens & neceſſarius eſt* ——— *ad fidem rei geſtæ faciendum.* Digeſt. l. 22. tit. 5. *De Teſtibus*, leg. 1. in *princip.* & leg. 11. The Uſe of Teſtimonies is uſual and neceſſary to prove Matters of Fact. We ſhall treat of the Uſe of Witneſſes, l. 5. c. 13. §. 9.

4 *Fiunt enim de his Scripturæ, ut quod actum eſt, per eas facilius probari poteſt.* Writings are made in Covenants, that the Matters of Fact may be more eaſily proved, *Digeſt.* l. 22. tit. 4. *De Fide Inſtrumentorum*, &c. leg. 4. See Mr. *Domat*'s Civil Laws in their natural Order, Part 1. l. 1. tit. 1. Sect. 1. §. 10, &c. and l. 3. tit. 6. Sect. 2. See, alſo, *Pollux*, l. 9. c. 6. §. 72. and Mr. *Hemſterhuis*'s Note on it.

5 Writings on Parchment were invented to put Men in Mind, or convince Men of their Word, the Diſgrace of Mankind, (as Mr. *de la Bruyere* ſpeaks in his Characters, Chap. *Of Man*) which, 'tis likely, he took out of *Seneca*, (*De Benef.* l. 3. c. 15.) *Adhibentur ab utraque parte teſtes, ille per tabulas plurium nomina, interpoſitis parariis, facit,* ——— *O turpem humano generi fraudem, ac nequitiæ publicæ confeſſionem! Annulis noſtris plus quam animis creditur* ——— *in quid imprimunt ſigna! Nempe, ne ille neget accepiſſe, quod accipit,* (i. e.) Witneſſes are produced on both Sides, the one produces a Scroll of many Names drawn up by the Scrivener ——. Oh horrid Confeſſion of the publick Fraud, and Wickedneſs of Mankind! We truſt more to our Seals than Souls! Why do we impreſs our Seals? Leſt ſuch as we deal with ſhould deny what they received.

6 *Si res geſta* (ſay the *Digeſts*, l. 22. tit. 4. *De fide inſtrumentorum*, &c. leg. 5.) *ſine literarum quoque conſignatione, veritate ſuum præbeat, non ideo minus valebit, quod inſtrumentum nullum de ea interceſſit.* See l. 5. c. 13. §. 8. following, (*i. e.*) If a Matter of Fact were duly and truly done, without any Writings ſealed, 'tis not of leſs Force, becauſe there is no Inſtrument made concerning it.

by any Accident, be loſt[1]: Yet, in Courts of Civil Judicature, where they proceed on full and manifeſt Evidence, the greateſt Regard imaginable is had to Credentials of this Kind. And, commonly, if ſuch are not produced, the Party who ſues another upon a Debt, or Promiſe, loſes his Cauſe, unleſs he can make it appear, that they were once actually in his Cuſtody, and that he has been deprived of them by ſome Misfortune. And, for this Reaſon, it will become a careful Man to ſecure his Buſineſs by good and legal Inſtruments; and not to rely too much on the bare Words, or Faith of thoſe he deals with. Thus King[2] *Perſeus* (in *Plutarch, De vitioſo pudore*, p. 533. *B. T.* 2. Ed. *Wech.*) lending a Friend Money, required Security in the common Form. The Gentleman deſiring the Reaſon of his Strictneſs; I lend according to Law, (replied *Perſeus*) that I may receive without Law; in a fair and friendly Manner. *Juvenal, Sat.* 13. *ver.* 75.

Tam facile & pronum eſt Superos contemnere teſtes,
Si mortalis idem nemo ſciat.

When *Muræna* (in *Appian. Mithridat.* p. 214. C. Ed. *H. Steph.*) made War upon *Mithridates*, and was accuſed by that King's Commiſſioners of Acting againſt the League, he ſophiſtically denied, that he ever ſaw any League. The Meaning of which was, that *Pompey* had not, indeed, left *Articles* of Peace in Writing, but thought it ſufficient to ſhew his Agreement by *Fact*, and accordingly had drawn off his Army. *Richerius* reports of the *Turks*, that they are ſo conſtant to their Promiſe, ſo ſecure of mutual Fidelity, that in their Bargains they uſe no Bond or Writing, but the whole Buſineſs depends on the Word of the Parties, if preſent; if not, on the bare Mentioning of their Names. *Garcilas de la Vega* teſtifies the like of the old Inhabitants of *Peru, Royal Comment.* l. viii. c. 16. It is vulgarly known, that if a Creditor ſhall reſtore the Inſtrument of Obligation[3], or ſhall cancel or deſtroy it with his own free Conſent, and with the Privity of the Debtor, he ſhall be ſuppoſed, that the Debt is forgiven; but not if the Debtor got the Writings out of his Hand by Stealth, or any other unlawful Means. And from all this it appears, that *Seneca*[3 4] carries his Philoſophy a Strain too high, when he calls Bonds, and Papers of Contract, by no better a Name, than *Inania habendi ſimulachra*, vain and idle Images of Title and Poſſeſſion.

[2] *Benef.* l. 7. c. 10.

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[1] *Nec oberit tibi amiſſio inſtrumentorum, ſi modo manifeſtis probationibus eos debitores apparuerit*, (i. e) The Loſs of a Bond is no Prejudice, if the Debt can be fully proved. *Cod.* l. 4. tit. 21. *De fide Inſtrum.* leg. 1. See, alſo, leg. 4, 5, 7, 8, 10, and l. 4. tit. 19. *De Probationibus*, leg. 20, 21.

[2] This Note is in the Text.

[3] See §. 2. above.

[4] *Seneca*'s Words are, *Video iſtic diplomata, & ſyngraphas, & cautiones, vacua habendi ſimulachra.*

CHAP. VII.

Of the Matter of Promiſes and Covenants.

The CONTENTS of every Paragraph of the ſeventh Chapter.

I. *We are obliged to Things poſſible to be done only.*
II. *Promiſes of Things impoſſible are void.*
III. *Impoſſibilities which ariſe about Covenants.*
IV. *Whether our utmoſt Endeavour is ſufficient?*
V. *Whether a Man be obliged to bear ſuch Afflictions as are above Man's Courage and Strength?*
VI. *There is no Obligation to Things unlawful.*
VII. *Diſhoneſt Bargains do not oblige, though in our Power.*
VIII. *Nor ſuch as can't be performed, but by ſome foul Action.*
IX. *Whether Things, diſhoneſtly given, can be recover'd.*
X. *Other Men's Goods are promiſed in vain.*
XI. *Yea, and our own, if they are under any Obligation to another.*

I. WE are, in the next Place, to enquire into the Matter or Subject of Promiſes, and of Covenants; or to what Things only we can bind ourſelves by our Word or Bargain. In this Reſpect then, it is indiſpenſibly requiſite, that we have both a *natural* and a *moral Power* of doing what we engage for; or that the Performance be neither above our *Strength*, nor forbidden us by any *Law*. For when a Thing is placed within my Reach and Ability, and I have likewiſe a Liberty to diſpoſe of it, there is no Reaſon why I ſhould not voluntarily *oblige* myſelf to confer it on another, ſo often as I can, by this Means, contribute to the Uſe and Advantage of human Life. On the other Hand, it would be vain and impertinent to contract an Obligation about ſuch Matters, as either exceed our Strength, or are prohibited by a ſtronger Obligation lying upon us; in as much as, directly and lawfully, it could produce no Effect.

II. It follows evidently from hence, That *no Obligation can lie to Impoſſibilities*[1]; a Sentence commonly in the Mouths of all Sorts of Perſons, but ſuch as cannot fully be underſtood without a clear and accurate Examination. In order to which it may be, in the firſt Place, convenient to diſtinguiſh between thoſe Obligations which we voluntarily bring on ourſelves by our own Act, and thoſe which are laid on us by the Command and Authority of our Superiors. He that, of his own free Motion, binds himſelf to perform a Thing which

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[1] I am at a Loſs to know wherein conſiſts the Difference, which our Author here places between theſe two Sorts of Obligations: For he no where explains it through this whole Chapter, where he only treats of *Promiſes* and *Agreements*. Beſides, according to the Rule he has laid down himſelf, (*Lib.* 1. *cap.* 5. §. 8.) no Man, in Point of Law, is obliged to Impoſſibilities; nor is he leſs ſubject to Puniſhment, when, by his own Fault, he has put himſelf out of a Condition of obeying the Sovereign Power.

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he *knows to be impoſſible*, cannot be reckon'd well in his Wits [1]: For he reſolves and engages to do that, which, at the ſame Time, he foreſees he ſhall never be able to compaſs.

But it does not always follow, that he who, by Pact or Promiſe, undertakes an *Impoſſibility*, ſhall be entirely free from all *Neceſſity* of Performance, tho' the Thing itſelf cannot ſtrictly be accompliſh'd. Indeed, if I have promiſed a Man ſomewhat, which I had then good Grounds to think would be in my Power, but which is now above my Power, or will be rendred ſo before the Day of Performance, by an Accident of which, at the Time of the Bargain, I was invincibly ignorant; I ſeem, in this Caſe, neither obliged to make good my Word, nor to repair the Loſs which the other Party ſuffers by the Diſappointment: Eſpecially, if the Poſſibility of the Thing were either expreſly mentioned as a neceſſary Condition, or tacitly preſuppoſed on both Sides [2]. For Inſtance, I promiſe to lend a Horſe, which, at preſent, is at ſome Diſtance from me; and the Horſe dies before he gets to me; as I cannot here be bound to make the Horſe forth coming, ſo neither am I reſponſible for any Damage the Man ſuſtains, who was to have uſed him. For he muſt conceive me to have built my Promiſe on this tacit Condition, *provided the Horſe arrive ſafe at my Hands*; which Condition failing without my Default, the Force of the Promiſe ſinks, and is ineffective. If both the Promiſer, and the other Party, know the Thing to be impoſſible, and know each others Conſciouſneſs as to this Point, the Engagement ſhall paſs for no better than a Jeſt. But if the Promiſer only knew the Impoſſibility, and not the other Party, he ſhall pay to him what he loſes by being thus impoſed on. If the Promiſer was careleſs, and neglected to examine and weigh his own Strength, ſo as to promiſe an Impoſſibility, which, upon due Conſideration, he might have found to be ſuch, the main Obligation ſhall be void; becauſe he ſuppoſed the Thing to be poſſible, as a tacit Condition of the Agreement: Yet, upon Account of his Neglect and Default, he ſhall be bound to anſwer the Damage which befals the other Party, through the Diſappointment; but then it muſt be obſerved, that the Hope and Expectation of Advantage from ſuch an inſignificant Promiſe ought not to come under the Notion of [2] Damage. The ſame Rule holds good in Covenants; ſo that he, who, through Negligence, has bargain'd to perform what is impoſſible, ſhall be free upon paying what the other Party ſuffers; but then he muſt, likewiſe, releaſe the other Party from any Obligation made on his Side; or, if the Thing be already given, or perform'd, he muſt either reſtore it, or offer an Equivalent.

III. But farther, when the Thing, at the Time of making the Promiſe or Pact, appear'd poſſible, and afterwards becomes impoſſible, we muſt enquire, whether this happen'd by meer Chance, or by Default and Deceit. In the former Caſe, the *Pact* is diſannul'd, if nothing has yet been perform'd on either Side. If any Thing have been already done towards it by one of the Parties, the other ſhall give it back, or pay the Value of it [3]; if neither of theſe can be done, he is to uſe his beſt Endeavours that the Man be not a Loſer by him. For, in Contracts, the firſt Regard is had to the Thing expreſly mention'd in the Agreement; when this cannot be obtain'd, it is ſufficient to give an Equivalent; but whatever happens, all imaginable Care is to be uſed, that the other Party ſuffer no Prejudice. But, when a Man ſhall, by Trick and Deſign, render himſelf incapable of performing his Part, he ſhall not only be bound to do the beſt he can, but he ought, likewiſe, to have ſome Puniſhment inflicted on him, as it were in Supply to his Defect.

Theſe Principles, well applied, might determine moſt of the Doubts in the Caſe of *Inſolvent Debtors*. A Man, that falls into ſuch a Condition by Misfortune, and without his own Default, is obliged only to uſe his utmoſt Endeavour to give every one their Due. And here Equity and Humanity [4] engage us to make an Allowance of Time, ſo much as ſhall be neceſſary for him to look about him, and to ſeek out all honeſt Ways and Means of Payment [b]. For to ſeize immediately on all he poſſeſſes, and to ſend him and his Family a Begging, would be a moſt unmerciful Barbarity. The *Roman Laws* [5] were ſo favourable to certain Perſons, in Caſes there ſpecified, as to order that they ſhould be condemned in no deeper Sum than they were able to make good [c]. Yet, unleſs the Creditor ſhall have forgiven all that exceeds their preſent Abilities, they ſhall be bound to pay the Reſidue, upon the Improvement of their Fortune and Condition. Thoſe, who have turned Bankrupt out of Knavery, or ſome other Way, by their own Fault, may be juſtly compel'd to undergo ſome painful Puniſhment [6]; that their Body may, in ſome Meaſure, pay for the Defect of their Purſe [d].

In the Caſe between the Creditor and the Debtor,

[a] Vid. lib. 2. ſ. 3, *&c. Digeſt. Si quis cautionibus*, &c. [b] See *Matth.* xviii. 25, 26. [c] Vid. l. 12. *Digeſt. De ſoluto matrimonio*, l. 6. l. 16, 17, 19, 21. *Digeſt. de Re judicata*, l. 49, 50. d. t. l. 4. l. 6. l. 7. *Digeſt. de Ceſſione Bonorum.* [d] Vid. *Gell.* l. 20. c. 1. *circa fin.* as, likewiſe, *Appius*'s Diſcourſe on *Dionyſ. Halicarn.* l. 5. p. 330, *&c.* Edit. *Lypſ. in fin.* compared with *Livy*, l. 8. c. 28.

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IV. It is proper for us, on this Subject, to examine the Notion of Mr. *Hobbes* [a], which he ſeems to lay down in too general a Manner, That *Covenants do not oblige to the Thing itſelf, but only to the utmoſt Endeavour*; that is, ſince we are not obliged to Impoſſibilities, and ſince nothing is in our Power but our utmoſt Endeavours, what we cannot by its Means obtain, is to us impoſſible, and, conſequenly, is excluded from being the Matter of Obligation. But he ought, indeed, to have inſerted this Condition, *Provided we have not, by our own Fault and Fraud, incapacitated ourſelves for ſuch a Performance.* For if this be our Caſe, the Obligation is not ſatisfied by our utmoſt Endeavour; but when our Power of Payment ceaſeth, our Puniſhment muſt come in to make up the reſt. Therefore, the Aſſertion ought to be limited to thoſe Covenants, in which, upon Account of ſome *Thing* or *Action* at preſent offered to us, we promiſe ſome future Labour or Aſſiſtance. For here, ſince ſuch Futurities are uncertain to human Foreſight, ſo that either our Strength may, by ſome Accident, be impair'd, or ſome unaccountable Turn of Things may render it extremely difficult, if not utterly impoſſible for us to meet with an Opportunity of Performance; and farther, ſince our Sagacity may be miſtaken, either in rating our own Power, or in weighing the Difficulty of the Undertaking; the Contractors muſt, for theſe Reaſons, be ſuppoſed to have been mindful of their own frail Nature, and, conſequently, not to have agreed on any future Action or Work, but with this Condition and *Proviſo*, That their Abilities and Opportunities remain'd the ſame, and that they had not over-rated their preſent Strength. In theſe Caſes then, he, who has uſed his utmoſt Endeavour, may be rightly ſaid to have done his Duty; eſpecially when, in the very Midſt of the Performance, ſome croſs Adventure, which we could not poſſibly have prevented, falls in, and either quite intercepts, or wreſts aſide the Fruit of our Labour.

That the Rule will hold good only in this Kind of Covenants, is farther evident from what Mr. *Hobbes* diſcourſeth immediately before. *We very frequently*, ſays he, *contract about ſuch Things as then, indeed, ſeem poſſible, but which, afterwards, we find to be impoſſible* [b]; *yet this does not free us from all Obligation. And the Reaſon is, becauſe he who promiſes an Uncertainty hereafter, receives a preſent Good, on the Condition of returning the like. But now the Will of him, who offers the preſent Good, has for its abſolute Object any Return of Good equal in Value to the Thing expreſly promiſed by the other Party; but the Thing itſelf is affected, not ſtrictly and abſolutely, but under Condition of its Poſſibility.* Yet, on the contrary, I would chooſe to ſay, That whoſoever exhibits to another any preſent Good, does abſolutely and directly bend his Deſire towards that particular future Good expreſs'd in the Bargain; and this as well in Contracts of *giving*, as in Contracts of *doing*. For the *Law of Nature* doth not ſeem to afford Ground for that Diſtinction, which ſome make, that in Bargains of *giving*, a Man is preciſely obliged to give [3], whereas in Bargains of *doing*, he is not preciſely obliged

[a] *De Cive*, c. 2. ſ. 14. [b] It muſt be ſuppoſed, that we have not had Opportunity of making Tryal.

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[1] *Seneca*'s Latin is this, *Quid tu tam imprudentes judicas majores noſtros fuiſſe, ut non intelligerent iniquiſſimum eſſe, eodem loco eum haberi, qui pecuniam, quam a Creditore acceperat, libidine, aut alea inſumpſit, & eum, qui incendio, aut latrocinio, aut aliquo caſu triſtiore, aliena cum ſuis peredidit? Nullam excuſationem receperunt, ut homines ſcirent fidem utrique præſtandam; ſatius enim erat à paucis etiam juſtam excuſationem non accipi, quam ab omnibus aliquam tentari.* De Benef l. 7. c. 16.

[2] This was for a Time only, and in Proportion to the Debt. At leaſt, we find it mentioned ſo in a Deſcription of *Muſcovy*, printed by *Elzevir* 1630. p. 262. But I queſtion very much, if this Cuſtom has not been ſince aboliſhed. Among the *Athenians*, alſo, inſolvent Debtors were given to their Creditors to be made their Slaves, or to ſell them into Foreign Countries, and many were forced to ſell their Children; but *Solon* aboliſhed that inhuman Cuſtom. See *Plutarch* in his Life Some, alſo, have thought, that among the *Romans* there was a Law of the Twelve Tables, which allowed Creditors to cut their Debtors in Pieces, and part them among them; which Opinion is ſupported by the Authority of *Quinctilian*, *Inſtit. Orat.* l. 3. c. 6. *Aul. Gell. Noct. Attic.* l. 20. c 1. and *Tertull. Apologet.* c. 4. But Mr. *Bynkerſhoek* proves fully, in his Obſervation, l. 1. c. 1. that it allowed only the Sale of his Perſon to his Creditor, by way of Auction. We may compare with this Book, a Memoir found in the *Acta Eruditorum* at *Leipſick*, Febr. 1710.

[3] It is a Principle of the *Roman* Law, *Si minus, quia non facit, quod promiſit, in pecuniam numeratam condemnatur*; *ſicut evenit in omnibus faciendi obligationibus*, (i. e.) If a Man performs not his Promiſe, he is fined a certain Sum, as is uſual in other Obligations of doing a Thing. *Digeſt.* l. 42. tit. 1. *De Re Judicata*, &c. leg. 13. §. 1. *Secundum quem Celſus ait poſſe dici, juſta æſtimatione*

facti

he *knows to be impoſſible*, cannot be reckon'd well in his Wits [1]: For he reſolves and engages to do that, which, at the ſame Time, he foreſees he ſhall never be able to compaſs.

But it does not always follow, that he who, by Pact or Promiſe, undertakes an *Impoſſibility*, ſhall be entirely free from all *Neceſſity* of Performance, tho' the Thing itſelf cannot ſtrictly be accompliſh'd. Indeed, if I have promiſed a Man ſomewhat, which I had then good Grounds to think would be in my Power, but which is now above my Power, or will be rendred ſo before the Day of Performance, by an Accident of which, at the Time of the Bargain, I was invincibly ignorant; I ſeem, in this Caſe, neither obliged to make good my Word, nor to repair the Loſs which the other Party ſuffers by the Diſappointment: Eſpecially, if the Poſſibility of the Thing were either expreſly mentioned as a neceſſary Condition, or tacitly preſuppoſed on both Sides [2]. For Inſtance, I promiſe to lend a Horſe, which, at preſent, is at ſome Diſtance from me; and the Horſe dies before he gets to me; as I cannot here be bound to make the Horſe forth coming, ſo neither am I reſponſible for any Damage the Man ſuſtains, who was to have uſed him. For he muſt conceive me to have built my Promiſe on this tacit Condition, *provided the Horſe arrive ſafe at my Hands*; which Condition failing without my Default, the Force of the Promiſe ſinks, and is ineffective. If both the Promiſer, and the other Party, know the Thing to be impoſſible, and know each others Conſciouſneſs as to this Point, the Engagement ſhall paſs for no better than a Jeſt. But if the Promiſer only knew the Impoſſibility, and not the other Party, he ſhall pay to him what he loſes by being thus impoſed on. If the Promiſer was careleſs, and neglected to examine and weigh his own Strength, ſo as to promiſe an Impoſſibility, which, upon due Conſideration, he might have found to be ſuch, the main Obligation ſhall be void; becauſe he ſuppoſed the Thing to be poſſible, as a tacit Condition of the Agreement: Yet, upon Account of his Neglect and Default, he ſhall be bound to anſwer the Damage which befals the other Party, through the Diſappointment; but then it muſt be obſerved, that the Hope and Expectation of Advantage from ſuch an inſignificant Promiſe ought not to come under the Notion of [2] Damage. The ſame Rule holds good in Covenants; ſo that he, who, through Negligence, has bargain'd to perform what is impoſſible, ſhall be free upon paying what the other Party ſuffers; but then he muſt, likewiſe, releaſe the other Party from any Obligation made on his Side; or, if the Thing be already given, or perform'd, he muſt either reſtore it, or offer an Equivalent.

III. But farther, when the Thing, at the Time of making the Promiſe or Pact, appear'd poſſible, and afterwards becomes impoſſible, we muſt enquire, whether this happen'd by meer Chance, or by Default and Deceit. In the former Caſe, the *Pact* is diſannul'd, if nothing has yet been perform'd on either Side. If any Thing have been already done towards it by one of the Parties, the other ſhall give it back, or pay the Value of it [3]; if neither of theſe can be done, he is to uſe his beſt Endeavours that the Man be not a Loſer by him. For, in Contracts, the firſt Regard is had to the Thing expreſly mention'd in the Agreement; when this cannot be obtain'd, it is ſufficient to give an Equivalent; but whatever happens, all imaginable Care is to be uſed, that the other Party ſuffer no Prejudice. But, when a Man ſhall, by Trick and Deſign, render himſelf incapable of performing his Part, he ſhall not only be bound to do the beſt he can, but he ought, likewiſe, to have ſome Puniſhment inflicted on him, as it were in Supply to his Defect.

Theſe Principles, well applied, might determine moſt of the Doubts in the Caſe of *Inſolvent Debtors*, A Man, that falls into ſuch a Condition by Misfortune, and without his own Default, is obliged only to uſe his utmoſt Endeavour to give every one their Due. And here Equity and Humanity [4] engage us to make an Allowance of Time, ſo much as ſhall be neceſſary for him to look about him, and to ſeek out all honeſt Ways and Means of Payment [b]. For to ſeize immediately on all he poſſeſſes, and to ſend him and his Family a Begging, would be a moſt unmerciful Barbarity. The *Roman Laws* [5] were ſo favourable to certain Perſons, in Caſes there ſpecified, as to order that they ſhould be condemned in no deeper Sum than they were able to make good [c]. Yet, unleſs the Creditor ſhall have forgiven all that exceeds their preſent Abilities, they ſhall be bound to pay the Reſidue, upon the Improvement of their Fortune and Condition. Thoſe, who have turned Bankrupt out of Knavery, or ſome other Way, by their own Fault, may be juſtly compel'd to undergo ſome painful Puniſhment [6]; that their Body may, in ſome Meaſure, pay for the Defect of their Purſe [d].

In the Caſe between the Creditor and the Debtor,

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Livy (l. xl. c. 21. p. 661. *in fin.* Ed. *Gronov.*) reports of *Antigonus*, That, being in great Diſtreſs at Sea, when he had all his Friends with him in the Ship, he call'd his Children about him, and ſtrictly charged them both to remember themſelves, and to caution their Poſterity, That they never engaged with their whole Family together in Difficulty or Danger.

Yet, it is plain, the ancient *Romans* had little Regard to theſe different Circumſtances. For thus *Seneca* argues, (*Benef.* l. vii. c. 16.) 'Can you imagine our Forefathers were ſo imprudent, as not to apprehend, how unjuſt it muſt be to put a Man, who had waſted a Loan in Dice or Lewdneſs, in the ſame Caſe with him, who, by Fire, Thieves, or ſome ſadder Misfortune, had loſt other Men's Money with his own? They allow'd no Excuſe, that Men might learn, in all Caſes, moſt ſtrictly to keep their Faith. And it were more ſafe to reject the juſt Plea of a few, than to admit all to a Privilege of offering their Apologies. In *Muſcovy*, inſolvent Debtors are firſt ſoundly whip'd, and then compel'd to be Slaves to their Creditors [2].

IV. It is proper for us, on this Subject, to examine the Notion of Mr. *Hobbes* [a], which he ſeems to lay down in too general a Manner, That *Covenants do not oblige to the Thing itſelf, but only to the utmoſt Endeavour*; that is, ſince we are not obliged to Impoſſibilities, and ſince nothing is in our Power but our utmoſt Endeavours, what we cannot by its Means obtain, is to us impoſſible, and, conſequenly, is excluded from being the Matter of Obligation. But he ought, indeed, to have inſerted this Condition, *Provided we have not, by our own Fault and Fraud, incapacitated ourſelves for ſuch a Performance.* For if this be our Caſe, the Obligation is not ſatisfied by our utmoſt Endeavour; but when our Power of Payment ceaſeth, our Puniſhment muſt come in to make up the reſt. Therefore, the Aſſertion ought to be limited to thoſe Covenants, in which, upon Account of ſome *Thing* or *Action* at preſent offered to us, we promiſe ſome future Labour or Aſſiſtance. For here, ſince ſuch Futurities are uncertain to human Foreſight, ſo that either our Strength may, by ſome Accident, be impair'd, or ſome unaccountable Turn of Things may render it extremely difficult, if not utterly impoſſible for us to meet with an Opportunity of Performance; and farther, ſince our Sagacity may be miſtaken, either in rating our own Power, or in weighing the Difficulty of the Undertaking; the Contractors muſt, for theſe Reaſons, be ſuppoſed to have been mindful of their own frail Nature, and, conſequently, not to have agreed on any future Action or Work, but with this Condition and *Proviſo*, That their Abilities and Opportunities remain'd the ſame, and that they had not over-rated their preſent Strength. In theſe Caſes then, he, who has uſed his utmoſt Endeavour, may be rightly ſaid to have done his Duty; eſpecially when, in the very Midſt of the Performance, ſome croſs Adventure, which we could not poſſibly have prevented, falls in, and either quite intercepts, or wreſts aſide the Fruit of our [b] about.

That the Rule will hold good only in this Kind of Covenants, is farther evident from what Mr. *Hobbes* diſcourſeth immediately before. *We very frequently*, ſays he, *contract about ſuch Things as then, indeed, ſeem poſſible, but which, afterwards, we find to be impoſſible* [b]; *yet this does not free us from all Obligation. And the Reaſon is, becauſe he who promiſes an Uncertainty hereafter, receives a preſent Good, on the Condition of returning the like. But now the Will of him, who offers the preſent Good, has for its abſolute Object any Return of Good equal in Value to the Thing expreſly promiſed by the other Party; but the Thing itſelf is affected, not ſtrictly and abſolutely, but under Condition of its Poſſibility.* Yet, on the contrary, I would chooſe to ſay, That whoſoever exhibits to another any preſent Good, does abſolutely and directly bend his Deſire towards that particular future Good expreſs'd in the Bargain; and this as well in Contracts of *giving*, as in Contracts of *doing*. For the *Law of Nature* doth not ſeem to afford Ground for that Diſtinction, which ſome make, that in Bargains of *giving*, a Man is preciſely obliged to give [3], whereas in Bargains of *doing*, he is not preciſely obliged

[a] *De Cive*, c. 2. ſ. 14. [b] It muſt be ſuppoſed, that we have not had Opportunity of making Tryal.

[1] *Seneca*'s Latin is this, *Quid tu tam imprudentes judicas majores noſtros fuiſſe, ut non intelligerent iniquiſſimum eſſe, eodem loco eum haberi, qui pecuniam, quam a Creditore acceperat, libidine, aut alea inſumpſit, & eum, qui incendio, aut latrocinio, aut aliquo caſu triſtiore, aliena cum ſuis perdidit? Nullam excuſationem receperunt, ut homines ſcirent fidem utrique præſtandam; ſatius enim erat à paucis etiam juſtam excuſationem non accipi, quam ab omnibus aliquam tentari.* De Benef. l. 7. c. 16.

[2] This was for a Time only, and in Proportion to the Debt. At leaſt, we find it mentioned ſo in a Deſcription of *Muſcovy*, printed by *Elzevir* 1630. p. 262. But I queſtion very much, if this Cuſtom has not been ſince aboliſhed. Among the *Athenians*, alſo, inſolvent Debtors were given to their Creditors to be made their Slaves, or to ſell them into Foreign Countries, and many were forced to ſell their Children; but *Solon* aboliſhed that inhuman Cuſtom. See *Plutarch* in his Life Some, alſo, have thought, that among the *Romans* there was a Law of the Twelve Tables, which allowed Creditors to cut their Debtors in Pieces, and part them among them; which Opinion is ſupported by the Authority of *Quinctilian*, *Inſtit. Orat.* l. 3. c. 6. *Aul. Gell. Noct. Attic.* l. 20. c. 1. and *Tertull. Apologet.* c. 4. But Mr. *Bynkerſhoek* proves fully, in his Obſervation, l. 1. c. 1. that it allowed only the Sale of his Perſon to his Creditor, by way of Auction. We may compare with this Book, a Memoir found in the *Acta Eruditorum* at *Leipſick*, Febr. 1710.

[3] It is a Principle of the *Roman* Law, *Si minus, quia non facit, quod promiſit, in pecuniam numeratam condemnatur; ſicut evenit in omnibus faciendi obligationibus*, (i. e.) If a Man performs not his Promiſe, he is fined a certain Sum, as is uſual in other Obligations of doing a Thing. *Digeſt.* l. 42. tit. 1. *De Re Judicata*, &c. leg. 13. §. 1. *Secundum quem Celſus ait poſſe dici, juſta æſtimatione facti*

obliged to do the Work, but may be releaſed by a Commutation. But when he cannot obtain what was peculiarly promiſed, he then, to keep himſelf from ſuffering Loſs, deſires ſomething of equal Value. And if this too cannot be paid him, nor the Thing reſtored, which he firſt gave on his Part, the other Man fully ſatisfies his Obligation, by offering what his Abilities will admit of.

But in Contracts of *Lending*, and others of the ſame Nature, it will not hold that the Debtor is freed from this Obligation, by uſing his utmoſt Ability and Endeavour. For when any Thing is taken in Way of *Loan*, (eſpecially if it be not in a Caſe of extreme [1] Neceſſity) the Creditor ſuppoſes that the Debtor is both willing and able to pay, and the Debtor himſelf pretends as much; and on this Suppoſition the whole Contract is founded. If then, at the Time prefix'd for Payment, the Debtor, with all his Stock and Effects, cannot make up the Sum; tho' here it be at preſent impoſſible to ſqueeze more out of him; yet he ſhall ſtand engaged to make good the reſt hereafter [a].

In *ſimple Promiſes*, when we engage to do a Thing which is not, as to the Event, fully and abſolutely in our Power; ſome ſuch Condition as this ought always to be underſtood, *If Fortune favour me, if no croſs Accident intervene*, or what better becomes the Piety of a Chriſtian, *if it pleaſe God* [b]. But poſitively to ſwear or vow, that we will accompliſh ſuch an uncertain Enterprize, is not only moſt extravagant Raſhneſs, but moſt wicked Preſumption. Such was the Oath of *Labienus* and his Party, recorded by *Cæſar*, by which they engaged themſelves not to return into their Camp without obtaining the Victory [c].

V. There is another knotty Queſtion propoſed by Mr. *Hobbes*, which we ought here to diſcuſs, Whether a Man can, by Covenant, oblige himſelf to ſuffer ſuch Evils, as exceed the ordinary Strength and Conſtancy of human Minds? For Inſtance, whether he can bind himſelf *not to reſiſt another, who ſhall go about to kill, or to wound him?* Now, whoever cloſely and carefully conſiders this Point, will be able to diſcover on what Account Mr. *Hobbes* thought proper to take the negative Side; namely, to ſhew, that bare Pacts are not a ſufficient Guard and Caution to the Security of Mankind; and that 'tis not enough for a Man to engage by Covenant, that he will freely undergo due Puniſhment ſo often as he ſhall commit an Injury; but for the Preſervation of Peace in the World, it is farther neceſſary that Civil Governments ſhould be eſtabliſh'd, which may bring Offenders to Juſtice, tho' againſt their Wills. Which Principle we acknowledge to be moſt juſt and true, and ſhall enlarge upon it in its proper Place: At preſent it may be worth our while to examine more nearly the Arguments which he produces. He ſays then, *No Man is, by any Covenant which he ſhall make, obliged not to reſiſt another, when he offers mortal Violence, or Wounds, or any bodily Miſchief. For there is implanted in every one the higheſt Degree of Fearfulneſs, by which he apprehends the threaten'd Evil, as the greateſt imaginable, and, therefore, by a natural Neceſſity, flies and avoids it as much as poſſible, and is ſuppoſed incapable of doing otherwiſe. When he is arrived at ſuch a Height of Fear, it cannot be expected but that he will conſult his own Safety by Flight, or by Combat. Since then no Man can be obliged to an Impoſſibility, thoſe to whom Death, or Wounds, or other corporeal Pains are preſented, and who have not Conſtancy enough to bear them, are not bound to venture the Trial.* Upon this Argument we may remark, that to ſuffer Death without Reluctancy, is not a Thing abſolutely beyond human Strength. And, therefore, if God has commanded us to lay down our Lives, rather than commit ſome particular Action, no doubt but we are ſtrictly bound to yield a ready Obedience. But thus much we are willing to acknowledge, that ſince ſuch a Degree of Conſtancy is beyond the Strength of the Generality of Men, no one ſhall be preſumed to have bound himſelf, by his own free Covenant, to ſuch a rigorous Task. For human Laws, and human Contracts, ought all to be made with an Eye and Regard to human Infirmity.

Yet this Conſideration ought not to be drawn ſo far, as to prejudice the Force of military Diſcipline; as if a Soldier, under imminent Peril of Death, might deſert his Poſt, upon Pretence, that a Man cannot be *obliged to undergo Death*, as being a Thing *impoſſible*. For we deny that it is a Thing above the Fortitude of Mankind, eſpecially of the military Sex, to ſuſtain a probable Danger of Death, ſtill join'd with a Power of reſiſting to the laſt. And there ſcarce ever happens ſuch a Caſe in War, that ſome Perſons muſt be thrown away, and offer'd up as Victims to the Enemy, without a Liberty and an Opportunity of defending themſelves by Courage, or by Craft. So that it appears from the Neceſſity of preſerving Commonwealths, and from the Uſe and Practice of all Nations, that whenever it is requiſite, a Commander may lawfully enjoin a Soldier to oppoſe the Enemy in ſuch a Station aſſign'd him, to his laſt Breath, tho', 'tis probable, he may die upon the Spot; and may as lawfully inflict capital Puniſhment on thoſe who ſhall quit their Poſt, after ſuch an expreſs Order to the contrary. For he, that liſts himſelf in the Number of armed Men, does, by that Act, lay aſide all Claim to the Excuſe of natural Fearfulneſs, and is bound not only to enter the Field, but, likewiſe, not to leave it without the Order of his Leader. Neither is there any Abſurdity in that martial Puniſhment of *killing a Man, becauſe he declined being killed.* For is it not much worſe to ſuffer ignominiouſly under the Hand of the Executioner [2], than to fall with

[a] See *Matth.* xviii. 25, *&c.* [b] See *James* iv. 15. [c] *Cæſar de Bel. Civ.* l. 3. c. 87. n. 6. Add. *Acts* xxiii. 21. & Selden *de J. N. & G.* l. 4. c. 7.

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facti dandum eſſe petitionem, (i. e.) According to whom *Celſus* ſays it may be affirmed, that the Deſire may be anſwered by the Value of the Deed, l. 45. tit. 1. *De Verbor. Obligat.* leg. 72. *in init.* But this is obſerved, at this Day, in many Caſes, and in the *Roman* Law there are divers Limitations about it, as Mr. *Hertius* obſerves, with others before him, that the Reaſon of this Maxim was, That the *Romans* eſteemed it a Kind of Slavery to be conſtrained to do any Thing for another. *Et ſunt quidem hæ Pœnæ, quas generaliter tractare velit, inciviles, invitum hominem jubere facere, quod facere non poteſt*, (i. e.) They are Puniſhments, generally ſpeaking, unfit for Society, to force a Man to do that againſt his Will, which he cannot do. *Digeſt.* l. 48. tit. 19. *D. Pœnis*, l. 9. §. 10. See *Vinnius* upon the *Inſtit.* l. 3. tit. 16. *De Verbor. Obligat.* §. 7. And Mr. *Thomaſius*'s Diſcourſe *de Pœnis crimin.* c. 2. §. 4. The *Roman* Lawyers extended this even to Actions, whoſe Effect is to transfer the Poſſeſſion or Property of a Thing. Hence it comes, according to them, that a Seller cannot be conſtrained to deliver his Goods, but only to pay Damages and Intereſt to the Buyer. See *Lib.* 5. *cap.* 5. §. 5. Note 2. following.

[1] See my Treatiſe of *Sports*, l. 3. c. 5. §. 31.

[2] This fully proves, that when a Puniſhment is once fixed, it is better to die fighting courageouſly, than run the Riſque of the Scaffold or Halter; but this doth not prove, that there is nothing abſurd or unjuſt in eſtabliſhing ſuch a Puniſhment. To clear this, we muſt affirm, that it is ſometimes neceſſary that a Man expoſe himſelf to Dangers, yea, to Death, for the Preſervation and Defence of many others, the Safety of the Publick being to be preferred before our private. And when one is engaged, as in the Caſe of which we are ſpeaking, and many others, we have no Reaſon to complain of him that inflicts the Puniſhment, to which we have openly or tacitly conſented, if we perform not our Engagements. See what is ſaid, *l.* 8. *c.* 2. following.

Honour

Honour under the Sword of the Enemy [1]? *Add.* l. i. f. 28. *De Senatuſconſulto Silaniano & Claudiano*, &c. By one of the *Roman* Laws, Servants, who prefer'd their own Lives before their Maſters, were puniſh'd with Death, *D. B.* 29. *t.* 5. We muſt add, that in Caſe a Perſon be of ſo weak and cowardly a Temper, as to ſhrink at thoſe Dangers which the common Hardineſs of Men is able to ſuſtain, his peculiar Infirmity of Mind ſhall, by no Means, abſolve him from his *Obligation.*

Mr. *Hobbes* [a] proceeds to obſerve, that ſince *we dare truſt him, who is bound to us by Covenant, whilſt we lead Criminals to Execution in Chains, and under Guards; it ſhould ſeem that they are not, by Covenant, ſufficiently obliged to Non-reſiſtance.* The Remark, in moſt Caſes, is true [2], yet ſometimes Perſons, really bound by Covenant to us, are not ſo abſolutely truſted, but that we think it expedient to provide againſt their Perfidiouſneſs by a Security of armed Men [b]. He adds, A *Covenant of this Kind would be uſeleſs; a Man, indeed, may covenant thus*, Unleſs I do this or that in the appointed Day, kill me; *that is, you ſhall have a Right of proceeding to capital Puniſhment againſt me, upon my Default; but to covenant thus, Unleſs I do ſo or ſo, I will not reſiſt you when you come to kill me, is a Thing both unpractiſed and inſignificant.* He proves his Point after this Manner: "Such a Covenant muſt be made, either be- "tween a State and a Subject, or between two "Subjects of the ſame State, or between two Per- "ſons living in a Condition of natural Liberty. "In the firſt Caſe it would be uſeleſs, becauſe 'tis "enough to ſecure to a State the Power of puniſh- "ing Offenders, if each particular Subject engages, "by Oath or Fealty, that he will not forcibly de- "fend or reſcue any Perſon, who ſhall be thus led "to ſuffer Juſtice. In the ſecond Caſe it would be "alike impertinent, becauſe, in civil Governments, "private Men have not the Right of killing. In "the third and laſt Caſe, it would be of no more "Uſe or Force than in the former, becauſe, if the "Parties covenanted that one of them ſhould be "kill'd upon Non-performance, a preceding Cove- "nant muſt be ſuppoſed to have paſs'd, importing "that he ſhall not be kill'd before the Day fix'd "for Performance." For, according to his *Hypotheſis*, in a *State of Nature*, before any Pacts have been introduced, each Man hath a Right of killing each Man elſe. "Therefore, upon Default of Perform- "ance, on the ſet Day there returns a Right of "War, or a hoſtile State, in which it is lawful for "any Man to attempt what he pleaſes againſt ano- "ther, and, conſequently, the Right of reſiſting "will return at the ſame Time." I would rather chooſe to eſtabliſh the Truth of the Aſſertion another Way, by ſaying, that the Force of Covenants, if ſtrain'd to the higheſt, reaches ſo far, as not only to lay on the Parties an intrinſical Neceſſity of performing the Conditions, but, likewiſe, to give each of them a Right of compelling the other to a Compliance [3], in Caſe he draw back, by propoſing and preſenting ſome Evil. And that, therefore, every Covenant may be reſolved into this Senſe, *I engage to do this or this for you; if I fail, you ſhall have a Power of compelling me by violent Means.* Now, to add a ſecond Covenant about Non-reſiſtence, would here be uſeleſs and abſurd. For then this ſecond Covenant muſt be enforced again by a Third, including ſome Penalty, as, *if I reſiſt you, when you attempt to compel me to Performance, you ſhall have a Power of offering Violence or Evil to me.* Thus it is plain, the ſecond Covenants add nothing at all to the Firſt; for the Firſt gave a Power of reducing the Defailant by Violence; and 'tis as eaſy to break this as that. What Need is there, then, of backing one Covenant with another, when ten may as well be broken thro' as one?

The laſt Argument, urged by Mr. *Hobbes*, runs thus: *Could there be ſuch a Thing as a Covenant for Non-reſiſtance, we ſhould by it be obliged, out of two preſent Evils, to chooſe that which appear'd the greater. For certain Death is a greater Evil than Reſiſtance and Combat. But of two Evils, it is impoſſible for us not to chuſe the leſſer; therefore, by ſuch a Covenant we ſhould be tied to an Impoſſibility, which contradicts the whole Nature of mutual Engagement.* Now here it is neceſſary, that the Rule about *chooſing the leſſer Evil*, be accurately ſtated and explain'd. And this, properly ſpeaking, can take Place only in two *unprofitable* or *hurtful Evils*, conſider'd as ſuch. In which Caſe, it looks like a Kind of Gain, to ſuffer only a Part of an inevitable Loſs or Damage: But the ſame Rule muſt, by no Means, be extended and applied to the Caſe of two *diſhoneſt Evils*, or of two Evils, the one *diſhoneſt*, the other *unprofitable*. For of two Evils of Commiſſion, we are to chooſe neither [4]. But it ſometimes happens, that we cannot fulfil two affirmative Precepts, the Omiſſion of which, ſeparately conſider'd, would be ſinful; yet, upon their Meeting together, the Omiſſion of one of them is look'd upon as lawful: And, in this Caſe, of the two *Evils of Omiſſion*, the leſſer is to be choſen, or rather the Interfering with a more noble Precept, ſhews the Omiſſion of the leſs noble Precept to be no *Evil*, or *Sin*. For, in all inferior and ſubordinate Laws, this Reſtriction is ever underſtood, *So far as we can comply with them, and not intrench on Engagements of a higher Nature.* Thus, not to obey God, and not obey the Civil Magiſtrate, if taken aſunder, are both notoriouſly Sins; and yet, ſuppoſing both the Obligations cannot at once be anſwer'd, as when the Magiſtrate commands any Thing contrary to the Divine Law, in this Caſe, Diſobedience to our earthly Governors ceaſes to be

[a] *De Cive*, c. 2. f. 18. [b] *Senec. Thyeſt.* ver. 644, 645, 646.

——— *Arx urbem premit*
Et contumacem regibus populum ſuis
Habet ſub ictu ———

——— A Caſtle awes a Town,
And holds a People, ſtubborn to their Kings, under the Stroke.

[1] *Servi quotiens Dominis ſuis auxilium ferre poſſunt, non debent ſaluti eorum ſuam anteponere* ——— *Ultimum itaque ſupplicium pati debet* [*Ancilla, cui percuſſor Dominæ mortem minatus erat, ſi proclamaſſet*] *vel hoc, ne cæteri ſervi credant, in periculo Dominorum ſibi quemque conſulere debere.*

[2] I am ſurprized how our Author could imagine, that the Caſe here in Queſtion ſhould be excepted. There was the leſs Reaſon to do ſo, as a Criminal has, by his own Fault, thrown himſelf into the Danger: Whereas a Soldier is reduced to this Neceſſity by the Will of another, and without having it in his Power, if he would, to ſhun the Evil. This is more than ſufficient to balance the Uncertainty, which ſome make here on one Side and the other: Or rather, indeed, this Diſtinction is nothing to the Purpoſe. The Sight of an approaching Danger, tho' there may remain ſome ſlight Hope of Safety, has an equal Influence upon the human Mind, as that of an Evil morally certain. Beſides, the Soldier, who quits his Poſt, is not certainly ſure of Death, for he may hope to eſcape by Flight. Therefore, our Author muſt grant *Hobbes*'s Principle, or he muſt neceſſarily acknowledge the Application of it to the preſent Caſe, in the Manner it has been explained.

[3] And, by Conſequence, the other is obliged not to reſiſt, when the other makes Uſe of his Right, otherwiſe his Right will be uſeleſs. See, concerning this, Mr. *Thomaſius*'s *Juriſprud. Divin.* l. 3. c. 7. §. 88, *&c.*

[4] See *l.* 8. *c.* 3. §. 1. aforegoing, and what I have ſaid in my Treatiſe of *Sport*, l. 4. c. 5.

Evil; becauſe that Law, which binds us to conform to the Will of human Sovereigns, is always underſtood with this Proviſo and Condition, that they enjoin nothing repugnant to the Laws of God.

We are, in many Caſes, likewiſe, permitted, rather to chooſe the bare Execution of another Man's Sin [1], or a Concurrence by way of Inſtrument, than ſome Evil, very prejudicial, or very grievous to be born, with which we are threaten'd upon Refuſal. Which Point we have elſewhere more largely diſcuſs'd.

Neither is it allowable, as was juſt now hinted, to make any ſuch Compariſon between an Evil, troubleſome or damageable, and a Sin, ſo as to chooſe the latter rather than the former: As for Inſtance; If a Man ſhould rather act contrary to his expreſs Duty, than ſlip the Opportunity of ſome Advantage, or ſuſtain ſome real Loſs; how poſitive ſoever his corrupt Judgment may be, in concluding the Sin to be the leſſer Evil: For, were this admitted, the Force and Efficacy of Obligations would depend upon every Man's Opinion; and, conſequently, would vaniſh into nothing, if I were not bound to an Action, when the Omiſſion of it, upon Account of ſome external Regard, appear'd to me more deſirable than its Performance. Thus it would be but a poor Excuſe for a Thief, to allege for himſelf, that he thought it a leſs Evil to lay Hands on the Goods of his Neighbours, than to get his Livelihood by his own Pains and Labour. Indeed, Obligations are ſo far from loſing their Force in theſe Caſes, that they never exert it more vigorouſly; for 'tis the very Nature of ſuch Engagements to produce, in Men, an intrinſical Neceſſity of ſuch Performances, as they would otherwiſe be averſe to, upon outward Conſiderations and Reſpects.

VI. To make a Promiſe or Pact truly *obligatory*, it is farther requiſite, that we have a *moral Power* of performing the Thing agreed upon. And if the Thing be unlawful, and we, conſequently, want this Power, we cannot tie ourſelves by any ſuch Engagement [a 2]. For every Promiſe receives its Force from the Ability of the Promiſer [3], and re-

Yet

[a] 'Tis indiſputably certain, that *Pacts* againſt Laws, Conſtitutions, and good Manners, have no Power of binding Men. C. 4 *Pactis*, leg. 6. *Vid. D.* 28. tit. 7. *de Condition. Inſtitut.*

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[1] See what is ſaid above, *l.* 1. *c.* 5. §. 9. and hereafter, *l.* 8. *c.* 1. § 6. with the *Notes.*

[2] *Pacta quæ contra Leges Conſtitutioneſque, vel contra bonos Mores fiunt, nullam vim habere indubitati Juris eſt.* Cod. de Pactis, *leg.* 6. See, alſo, the *Digeſt.* l. 28. tit. 7. *De Conditionibus Inſtit.* leg. 15. l. 45. tit. 1. *De Verborum Obligat.* leg 35. §. 1. & leg. 123 & *Inſtit.* l. 3. tit. 20. *De inutil. Stipulat.* § 24.

[3] The Validity of unlawful Agreements not being ſufficiently explain'd by our Author, who has treated of it too generally, and without Regard to ſuch true Principles, on which the Solution of divers Caſes contain'd in it depends, I have thought fit to give what occur'd to my Mind ſince the firſt Edition of this Work. I obſerve,

I. That every Act, which is attended with ſomething contrary to the Rules of Virtue, is not invalid upon that Account barely, provided that the Thing, in which we are engaged, be innocent in itſelf; that is to ſay, permitted both by the *natural* and Civil Law; it is of no Conſequence, whether the one or the other of the Contractors, or both together, offend in certain Reſpects the Engagement, conſider'd as to the Parties, has the full Force of Law. Not to ſpeak of ill Motives, which render the moſt innocent Actions criminal. As for Example; a Merchant, who deals in contraband Goods, may act againſt his own and Family's Intereſt, without being obliged to perform the Bargains he has made for them. A Vintner, who ſpends all his Time in drinking with Drunkards, certainly does ill, as well as they to whom he gives an Opportunity to be drunk; yet he is not obliged to pay for the Wine theſe Men have drank, nor are they leſs obliged to pay him for it. Gameſters, by Profeſſion, commit divers Sorts of Sin by playing, as I have ſhew'd in my Treatiſe of *Games*; but that does not hinder, that ſuch as have gain'd by fair Play, may lawfully take their Winnings, and require what is due to them. Further, we ought to conſider, that the End of a Law, which forbids certain Things, is not only to make void all that may be done upon that Account; but to hinder their Commiſſion, and, above all, to ſtrip the Offenders of the Claims of Law they would have had without theſe Prohibitions. So, for Example, if a Judge, who is corrupted, gives an unjuſt Sentence, he, in whoſe Favour it is given, may, in Conſcience, take the Benefit of the Judgment; but if the Effect of an Engagement, contracted by Means of ſome unlawful Thing, exiſts entirely, the Law will not authorize it, but leaves the Things in the State they were, and denies the Contractor its Protection, as he has not deſerved. This being laid down, we muſt,

II. Diſtinguiſh between that which is contrary to natural Right, and that which is unlawful only, becauſe it is forbidden by ſome Civil Law. As to thoſe Sorts of Agreements, which proceed from the firſt Sort of Things unlawful, I ſhall reduce them to theſe following Rules, 1. If, after any one has engaged himſelf in a Thing bad in itſelf, he will not perform it, he, to whom he is engaged, has no Right to force him, and he cannot reaſonably complain, that the latter has broke his Word, whether he hath got any Thing by it, or no. The Reaſon of it is, not only becauſe (as our Author ſpeaks very well) the Lawgiver, by forbidding it, takes away all Power to do it, and, by Conſequence, alſo, all Right of requiring it of any Perſon whatſoever; but, alſo, in every Matter wherein he is engaged contrary to his Duty, it may be preſumed that he did not give his full and free Conſent, eſpecially if he be apt to act any enormous Crime, as if a Man promiſe to blaſpheme, or commit Sacrilege, or Perjury, or murder a Man, &c. When then he comes to repent of his criminal Engagement, 'tis not a bare Preſumption, tho' that be ſufficient, but 'tis an infallible Sign that he did not conſider what he did in promiſing ſuch Things, and the Perſon to whom he promiſed them, ought to acquit him for that Reaſon, tho' we ſhould not other Ways be obliged to it, by the ſame Principle which leads us to break our Word. If he has got nothing by it, he has loſt nothing, tho' he deſerves it: But if he hath given any Thing, as it was under a Condition, and that ſuch an one as is thought morally impoſſible, the other muſt reſtore it, becauſe it was not given with any Regard to him, and ſo much the more, becauſe he can't keep it without giving ſome Reaſon to believe, that he does not really repent; and that to his Fault in promiſing, he adds another, of having a Deſign of making an Advantage of his Error, and cheating him of his Subſtance. Reſtitution is, in this Caſe, indiſpenſibly neceſſary, ſince he that gave it, thought he did well in promiſing a Thing upon a bad Foundation; as if a blind Perſon, thro' a falſe Zeal, ſhould promiſe another to change his Religion againſt the Dictates of his own Conſcience. 2. If he, whom we have engaged to commit a Crime, doth actually execute it, we are not obliged to pay him what we have promiſed him. This were to reward a Crime, and encourage thereby, not only him who has already broken the Law, but others to break it hereafter for the like Motives. On the other Side, he to whom the Promiſe is made, may, and ought to know, that he builds upon a Thing to which any Man would engage himſelf with mature Deliberation; and if he pretends certainly to enjoy the Reward of his Crime, he is a Fool to truſt to a bare Promiſe. The only reaſonable Foundation for hoping that a Man's Word will be kept, is his Honeſty; and can we repoſe any Confidence in that Man, who requires Things contrary to Honeſty? How faithful ſoever he may be known to be to his Engagements in Time paſt, yet, from the Moment he ſolicits us to do an ill Thing, have we not Reaſon to think, that he will no more ſcruple to break his Word, than to require what he propoſed, when he gave it us? He certainly offends againſt Charity, who will oblige any Man to do an ill Thing for a Reward's Sake. But ſince it belongs to us to reject his Propoſition, and we are indiſpenſibly obliged ſo to do, he can't require the Performance of our Promiſe, upon a Pretence that we do him an Injury, or fruſtrate his Expectation; becauſe, tho' he ſeems to be injured, he muſt blame himſelf for it. As he ought to repent that he hath attempted with too much Succeſs, ſo he muſt preſume that we promiſed but ſlightly, and thro' the Influence of our own Paſſions. I ſee that Mr. *Gundling* (in his *Juſ. Nat. & Gent.* Edit. 1728.) endeavours to refute me here. His Words are theſe. "I own that thoſe, who thus laviſh their "Property, do not always ſeriouſly examine, neither what is for their real Advantage, nor what is honeſt; but they know, how-"ever, what they do for the preſent; for Example, what Miſtreſs they court, what they give, to whom, and upon what Ac-"count." I grant all this. But I may ſay as much, and with equal Juſtice, of a *Fool*, who is not a Madman, and who appears to reaſon upon many Subjects. Such a Man may know all theſe Circumſtances as well, and better, than a Man tranſported with a violent Paſſion. Mr. *Gundling* ſhould have taken Notice of the other Reaſons I alledge here; but inſtead of that, he changes the State of the Queſtion, and makes me ſay, *That when a Man has promiſed, or given any Thing on a diſhoneſt Account, the Deed muſt be*

ver reacheth farther; for a Man cannot bind himſelf with any Effect to a Buſineſs, which he wants Ability to compaſs. But now the Law, by forbidding any Action, takes from us the *moral Power* or *Ability* of ſetting about it, and of entring on any Obligation to perform it. For would it not be moſt abſurd and contradictory, that an Obligation, which derives its Virtue from the Law, ſhould put us under a Neceſſity of doing ſomewhat which the Law abſolutely prohibits? And when we are once placed

be held as void in itſelf. Now it is evident, that I ſpoke here only of the Caſe of Promiſe, and that as to the other Caſe, in which the Reward was given, I decided it quite otherwiſe, as will appear by the following Head. 3. But when we have actually given any Thing, on the Occaſion or Proſpect of an evil Action, we can demand nothing again from him who hath received it. For when the Wickedneſs is done, there is no Remedy; we do not render ourſelves more culpable by leaving that which is not in our Power to take away. While there is only a bare Promiſe, the Will of transferring the Thing promiſed, upon that Account, muſt not be thought full and entire: We promiſe much eaſier than we give; and when we have promiſed on the View of ſome criminal Action, there is a Space before the Execution following to preſume we may recant our raſh Engagement; but the ſame Moment we deliver the Thing agreed on, we ſtrip ourſelves abſolutely of the Right of Property, and he, to whom we gave it, acquires it, by a Title diſhoneſt indeed, but not unjuſt in relation to us; becauſe it ſhews the ſame Conſent of the Proprietor, as if the Caſe related to ſomething honeſt or indifferent. The Validity of an Alienation, conſider'd in itſelf, doth not depend on the Nature of the Subject for which we part with a Thing in Favour of another. Let the Motive be commendable, or not, we are Maſters of our own Goods, and may diſpoſe of them as we pleaſe; all the Abuſe of them is, when we beſtow them not with a Proſpect of ſomething honeſt, or, at leaſt, indifferent. If a Transferring of Property becomes null only becauſe there was ſomething diſhoneſt in the Subject, we ſhall eaſily find a thouſand Pretences to elude the moſt lawful Contracts. A Man, for Example, who has borrow'd Money at the moſt reaſonable Intereſt, may refuſe to pay any Intereſt, or redemand what he hath paid, under a Pretence, that he believes (as ſome do) paying of Uſury unlawful, and contrary to natural Right. But (ſays Mr. *Titius Obſ. in Lauterbach.* 354.) one of the Contractors gains, and the other loſes; and why ſhould either of them have any Advantage, ſince they are both in Fault? I anſwer with our Author, §. 9. That he who hath given, *believes himſelf to have received a Thing of equal Value.* So much taken, ſo much paid. 'Tis not material, whether, in the main, there be any Advantage; 'tis ſufficient that the Pleaſure of Satisfaction is reputed for a real Gain. Further, tho' if we conſider him who hath received, that he deſerves no Reward for his Crime, no more doth the other deſerve to recover what he hath given. For he that rewards another for committing a Sin, is commonly eſteem'd, and that with Reaſon, more to blame than he who ſuffer'd himſelf to be corrupted, becauſe he committed the Wickedneſs with more Deliberation, and bribed a Perſon to do Evil, who, perhaps, would not have been guilty of ſuch a foul Action. To deprive a Man, then, of all Right of recovering what is actually given for an Action evil in its own Nature, it may ſuffice, that the Acquiſition was made near to the Rules of Contracts uſed in Caſes honeſt or innocent, that is to ſay, there was no Fraud or Force practiſed on the Part of the Receiver, and the Price was not exorbitant. See the Example alledged by our Author, §. 9. But it may be further ſaid, Can any Man, in Conſcience, retain the infamous Reward of the Crime he has committed? No, without Doubt. If we ſuppoſe a Perſon to examine himſelf, and conſult his own Conſcience, the Queſtion is needleſs: For ſuch an one cannot but repent, and then he will neither regard nor demand the Reward of Iniquity, nor keep it, if he has received it already. But tho' it be reſtored, it will not follow that he has any Right to require it; and if he knows that he may require what he has given on this Occaſion, he may have Recourſe to thoſe Means which are proper to recover what the other refuſes to give. The Caſe is important with regard to thoſe who live in the Independence of the State of Nature, and, it ſeems to me, that then the Reſtoration is not more juſt in reſpect to him who gave it, than the Confeſſion of the Subject for which he gave, can be a Commendation to him. 'Tis upon this that we muſt ground the Maxim of the *Roman* Law, which imports, That if an Agreement be diſhoneſt, both in reſpect to him that gives and him who receives; the firſt can't require any Thing again, becauſe, in this Caſe, the Poſſeſſor has the Advantage. *Porro autem, ſi & dantis & accipientis turpis cauſa ſit, poſſeſſorem potiorem eſſe, & ideo repetitionem ceſſare, tametſi ex ſtipulatione ſolutum eſt,* Digeſt. l. 12. tit. 5. *De conditione ob turp. & injuſt. cauſam,* leg. 8. In which, nevertheleſs, the *Roman* Lawyers do not always follow their own Principles, ſince when the Queſtion is about Games of *Chance,* which were forbidden, and look'd upon as diſhoneſt, they allow'd the Loſer to require his Money again, even beyond the ordinary Term of *Preſcription.* But as I have ſhew'd in my Treatiſe of *Gaming,* l. 3. c. 9. §. 15. in this laſt Caſe the unhappy Gameſter can have no Recourſe to Juſtice to recover his Money, becauſe in Gaming he renounces the Benefit of the Law. The ſame Thing may have Place, in my Judgment, and for the ſame Reaſon, in all other diſhoneſt Engagements, ſuppoſing that the Law permits Men to redemand what they have given on that Account. II. Thus much of Things evil in themſelves, and contrary to the unchangeable Rules of natural Law; after which, it will not be hard to ſtate the Validity of ſuch Agreements as are not unlawful, otherwiſe than as they border upon ſuch Things as Civil Laws forbid. But here we muſt diſtinguiſh between a Stranger and a Fellow-Citizen. 1. If we treat with a Stranger about Things forbidden in our Country, he either knows them forbidden, or not. If he knows them, he has either ſought the Agreement, or not; if he has ſought the Agreement, we are neither obliged to do the Thing, nor to make good the Damage he may have by it, but only to reſtore what he has already given. The Reaſon is, becauſe, in this Caſe, he may and ought to ſuppoſe, that we are but ſlightly engaged, and that we are tempted by the advantageous Propoſitions that he made us. Beſides, we often expoſe ourſelves to great Fines, and other Puniſhments more troubleſome, of which we can't ſuppoſe that any Perſon would willingly run the Riſque. But if we ourſelves have deſired the Agrement, tho' we are not really obliged to execute the ſame Thing, but we muſt indemnify him with whom we are engaged. I ſay, we are not obliged to execute the ſame Thing; but tho' Strangers are not ſtrictly obliged to inform themſelves of what paſſes among us, and may behave themſelves as they ſee convenient, without enquiring into the particular Laws of our State, yet they ought, in Equity, to preſume, that a Citizen, who recants an Engagement which he has entred into contrary to his Duty, did not engage with mature Deliberation, or, at leaſt, did not foreſee the Obſtacles that oppoſed the Execution of his Promiſe. But ſince he has deſired the Agreement, and ſeems to have paſſed all theſe Conſiderations, 'tis juſt that, ſome Way or other, he ſhould indemnify him that has truſted to him. But if the Stranger knows not of the Prohibitions, whether he has ſought the Agreement, or no, then we have a more indiſpenſible Obligation to reſtore him all that it has coſt him in truſting to our Word; and we ought to think ourſelves happy that he doth not impute it to us as an Injury that we are ſilent, and let him take other Meaſures than he would have done, if we had ſpoken our Minds freely. But if the Prohibitions come after the Bargain is made and concluded, then we are not obliged to make good any Damages. For, in this Caſe, we ought to be ſuppoſed not to have conſented, but under a tacit Condition, that there was no Obſtacle from the Sovereign. 2. But if thoſe who treat together about a Thing forbidden by the Law, are Members of the ſame State, they are both ſubject to the Puniſhment, becauſe they could not be ignorant of the Law, and, upon that Account, they are looked upon to treat together as if there were no Law about it, and ſo to renounce the Benefits which might accrue thereby to either of them. So, though they did Ill to engage themſelves, they ought, as far as in him lies, to ſuffer their Engagement to continue in Force, and neither of them to break it without the Conſent of the other; yet, if we cannot execute the Thing to which we are engaged, without ſome great Prejudice, he, to whom we have promiſed, ſhould content himſelf with an Equivalent. I ſay, every one ought, as far as in him lies, to ſuffer the Engagement to take Effect; for ſo long as there is nothing done on either Part, each of them is free to recant, as if they had done a Thing evil in its own Nature, becauſe, in this Caſe, they may be thought not to have conſulted well, or acted with mature Deliberation. As for Example, if I have promiſed any Man to game with him contrary to Law, I am no more obliged to meet him, than to preſent myſelf in the Field to that Man who has challenged me to a Duel, which I have accepted; but when I have actually play'd and loſt, I cannot have a Recourſe to Law to recover my Money, nor uſe any forcible Way to regain it; eſpecially if there was no Cheat put upon me by him who has won it of me. See my Treatiſe of *Gaming,* l. 3. c. 9. §. 15, 16. So again, If a Merchant has promiſed another to furniſh him with certain contraband Goods; when they have agreed for the Price, the one may refuſe to ſtand to the Bargain that he ought not to have made, and the other, with whom he has not kept his Word, ought to repent that he had promiſed ſuch a Thing, and be glad that it took not Effect; but if the Merchandize be actually deliver'd, or any Thing be received as an Earneſt of Delivery, neither the Buyer can lawfully refuſe to pay the Price agreed on in the firſt Caſe, nor the Seller himſelf to deliver the Bargain without ſome Prejudice to himſelf, and incurring a great Puniſhment: For then 'tis ſufficient to reſtore what he has received, or an Equivalent. With theſe Limitations nothing hinders but that an Engagement, contrary to the Civil Laws, may be of Force between one Bargainer and another. There are Agreements which the Laws forbid, but they ſuffer them, nevertheleſs, after they are made, to ſubſiſt contrary to their Prohibition, for they may be valid between the Parties, altho' the Law, as much as poſſible, annuls them, and the Magiſtrate allows no Action for the Relief of the Complainant, after he has conſented with full and entire Liberty. To conclude, ſince this Note was publiſhed, I have had Occaſion to explain and defend my Principles, as applied to a very important Subject, I mean *Gaming.* See my Letter, in Anſwer to that of M. *de Tremblai,* in the Journal *des Scavans, Auguſt* 1712; and my firſt and ſecond Reply to the ſame Author, *December* 1713.

in Subjection to Laws, the bare Act of our own Will is not ſufficient to repeal or avade them. Therefore he, who promiſeth a Thing unlawful, ſins, but he ſins doubly, who performs it [a]. Whence this farther Conſequence may be drawn, that thoſe Promiſes are not to be kept [1], which would prove hurtful to the Perſon to whom they are made; it being a general Command of the *Law of Nature*, that we do no Harm to another, knowingly and wilfully, tho' he, out of Folly, ſhould deſire it.

Moreover, ſince a good and valid Obligation cannot be contracted about unlawful Matters, it follows, that Acts, undertaken againſt legal Conſtitutions, are, by Virtue of the ſame Law, null and void, or the Magiſtrate is ſuppoſed to have already declared them ſo [b]. Yet, in many Caſes, it is a conſtant Practice in Commonwealths, to impoſe a Fine on the Performer of ſome unlawful Act, and not to diſannul the Act, becauſe there was, perhaps, more Indecency in the momentary Performance, than in the Effects conſequent upon it; and becauſe frequently, the Inconveniences attending a Diſanulment would be greater than the Act itſelf, if permitted to ſtand valid, would produce [2] [c].

VII. To proceed diſtinctly in a cloſer Examination of this Point, it is firſt moved as a Queſtion, whether an Obligation, for the Performance of an Act in itſelf vicious, be good and valid, whilſt Things ſtand as at firſt, and no Stop is made towards the Execution? And here, it is certain, That ſuch a vicious [3] Agreement does produce an Obligation on neither Side, and that Parties ought, in Honeſty, to recede from their Bargain [4]. *Senec. Hercul. Oet.* v. 480, 481.

Præſtare fateor poſſe me tacitam fidem,
Si ſcelere careat; interim ſcelus eſt fides,

Thus, for Inſtance, if a Man hire an Aſſaſſine to commit a Murther, and the Aſſaſſine, upon better Thoughts, reſolves againſt the Villany, the Hirer cannot compel him to fulfil his Covenant. And, on the other Hand, if the Hirer, repenting of his wicked Deſign, orders the Aſſaſſine not to proceed, the Aſſaſſine ſhall not force him to continue in his Reſolution for Fear of loſing the promiſed Wages. Neither ſhall he, in this Caſe, demand the Money of the Hirer, as on whoſe Account purely he now deſiſted, and was hindred from earning it. Nay, if after he has been thus countermanded, he go on, and accompliſh the Miſchief, the Hirer ſhall not be guilty of the whole Fact, but ſhall be condemn'd only, in ſo much as ſhall ſeem a proportionable Penalty for conceiving a Murther in his Imagination, of which he repented before it was put in Execution.

Grotius [d] obſerves, That a Promiſe of this Kind is, therefore, *vicious* and *void*, becauſe it is made to excite a Man to do a wicked Act [e].

VIII. It is a ſecond Point of Enquiry, whether, in Caſe ſuch a Villany having been once committed according to the Bargain, the other Party be obliged to pay the Price agreed upon? Which *Grotius* affirms; becauſe, ſays he, the Price or Reward, before the Fact was accompliſh'd, had, indeed, a Blemiſh and Imperfection, as being the Incentive to Wickedneſs; which Blemiſh ceaſeth, when the Wickedneſs is once paſt, and the Crime perform'd. But we cannot but declare ourſelves of a contrary Opinion; for a Bargain of this Kind is ſo far from ceaſing to be vicious, when the Deed is over, that it ſeems then to arrive at its higheſt Pitch of Baſeneſs, as having gain'd its End; unleſs it be a ſmaller Degree of Sin to have ſtolen, than to think of ſtealing; to receive the Wages of Villany, than to hope for and expect them; to pay the Reward, than to promiſe it. Indeed, if the Promiſe be, in itſelf, vicious, becauſe it is the *Incentive to Wickedneſs*, the fulfilling of the Promiſe will certainly be vicious, as being the *Recompence of Wickedneſs*, and an Encouragement and Invitation to new Miſchiefs. And, on this Account, ſome ſecret Stain or Blemiſh is commonly thought to ſtick on ſuch Rewards, even after they have paſs'd to a third Poſſeſſor by a juſt Tittle; becauſe they were at firſt the *Wages of Iniquity*. Thus the *Jews* were forbidden to bring the Price of Whoredom, as an Offering, into the Houſe of God [f]. Thus, when *Judas* brought back the Wages of his Treaſon, the chief Prieſts thought it not lawful to put it into the Treaſury. And thus it is a known Proverb, That *a Family ſeldom thrives on an ill-gotten Eſtate* [5]. Therefore, we can, by no Means, aſſent to what *Grotius* delivers, That till *the Time of performing the Villany, the Force and Efficacy of a vicious Perſon remains in Suſpenſe*; juſt as doth the Efficacy of conditional Promiſes, till the Condition be made good, and of Promiſes about Things at preſent impoſſible, till the Things really fall under our Power, as we have probable Hopes they will, at our firſt making the Bargain: But that *when the Fact is once committed, the Obligation then breaks out, and exerts its Force, which was not at firſt entirely wanting, (in as much as the Thing was done by mutual Conſent) but was only hindred from diſplaying itſelf by that Vice or Defect, with which it is attended*; namely, its contributing to the Commiſſion of a Sin. But ſhould we admit this Doctrine, the Edict of natural Law forbidding us to enter into Covenant about unlawful Matters, would be void, if when the wicked Terms of the Covenant, on one Side, were put in Execution, the other Party muſt, by the *Law of Nature*, be bound to ſtand to his Agreement. What an inſignificant Order would it be to prohibit Theft, if the Act of Stealing being once over, the Goods were to remain in the Poſſeſſion of the Thief, without Blame or Danger? And that Remark is very falſe, "That there was not originally wanting to "the vicious Covenant, an internal Force of obli-

[a] *Add.* l. 15. *D. de Condition. Inſtitut.* l. 35. ſ. 1. l. 123. *D. de Verb. Obligat.* [b] *Lex Viſigothorum*, l. 2. tit. 5. c. 7. [c] Thus in *Apollonius Rhodius*, *Argon.* l. 4. *Alcinous* being conſtituted Umpire between the *Colchians* and the *Argonautes*, gave Judgment as follows, "That if *Medea* had been acquainted with *Jaſon*'s Bed, ſhe ſhould ſtill remain in his Poſſeſſion; if not, ſhe ſhould be re-"ſtored to her Father. We have the ſame Story in *Hygin. Fab.* 23. *Apollodor. Biblioth.* l. 1. ſ. 25, *Orpheus in Argon.* [d] Lib 2. c. 11. ſ. 9. [e] Thus *Apollonius Tyanæus* (*in Philoſtrat.* l. 3. c. 7. p. 130. Edit. *Morel.* Pariſ.) having promiſed to bring a Veſſel, richly laden, into the Hands of Pirates, led them a quite contrary Courſe, and deluded their Expectations of Booty. [f] *Deuteronom.* xxiii. 18. *Joſeph.* Antiq. 4. 8. [g] See *Matth.* xxvii. 6.

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[1] See what is ſaid, l. 5. c. 12. §. 22. in the End.

[2] See *Grotius*, l. 2. c. 5. §. 14, 16. with the Notes of *Gronovius* the Father, and what our Author ſays above about imperfect Laws, *l.* 1. *c.* 6. §. 16.

[3] This is the Determination of the *Roman* Law, *Generaliter novimus turpes ſtipulationes nullius eſſe momenti. Veluti ſi quis homicidium vel ſacrilegium ſe facturum promittat.* Digeſt. l. 45. tit. 1. *de Verbor. Obligat.* leg. 26, 27.

[4] Thus *Apollonius Tyanæus* (in *Philoſtrat.* l. 3. c. 7. p. 130. Ed. *Morel.* Pariſ.) having promiſed to bring a Veſſel, richly laden, in the Hands of Pirates, led them a quite contrary Courſe, and deluded their Expectation of Booty.

[5] This Proverb, as any Man may perceive, makes not much to our Author's Purpoſe; becauſe it is deſigned to ſhew, that ill-gotten Goods will not proſper, and that they vaniſh as they came.

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" ging; but that it was only kept in Suspence upon " Account of the attending Wickedness, till such " Time as it ceased to be an Incentive to Sin." For to give a Pact an inward obligatory Force, it is not enough that it be made with the Consent of both Parties, but the Subject of it ought to be such a Thing as Men have a Right and Power of disposing of at their Pleasure. Otherwise, if mutual Consent were sufficient to produce an Obligation, it would be easy to overthrow all Laws, should Men but enter into a *Covenant* to break them; and thus the *Law of Nature* would manifestly contribute to its own Destruction. It is our Judgment then, that, with regard to the *Law of Nature*, neither the Actor of a Villany can, by any proper Right, demand the Wages promised him; nor is the Person, who hired him, bound to pay the Reward by any inward Tie affecting the Conscience. And that, therefore, the Court of natural Justice does not think itself concern'd to enquire, whether or no a Man has committed a Wickedness *gratis*, or to trouble itself in giving him Relief. Indeed, if the Assassine here, or any other Man, retain'd for the Execution of some unjust Violence, shall, upon the other Party's refusing to pay him his Hire, do him some Mischief in Revenge, no Body will pity the Sufferer, nor think that he had been treated injuriously, but only that he has been dealt with in his own Way. This then we must observe, That although Covenants, in themselves *vicious*, are not obligatory by any intrinsical Force or Virtue, not fit to produce an *Action* in Courts of Justice, yet they have some Kind of Effect upon a Man, who having at first freely consented to them, refuses afterwards to make them good. For they hinder him from having any Right to complain of hard Usage, in Case the other Person violently bring him to a Compliance, or inflict some Evil on him for his Refusal. It is true, the *Law of Nature* forbids, that a Man should have forfeited his *Claim* by another's dealing injuriously, or be compel'd to pay what he does not justly owe, or should be punish'd for denying so unreasonable a Demand. But he, who agrees to a vicious Covenant, does, by that very Act, quit all Claim to the Favour of this Law, in as much as he endeavours, so far as he is able, to give another an unjust Power over him. And these Evils are adjudg'd to fall very deservedly on Persons, to which they give Occasion by their own Fault [1]. For Instance, the *Law of Nature* forbids, that a Virgin should be robb'd of that Title and Character against her Will; yet, if she once consents to her own Dishonour, she has suffer'd, indeed, an irreparable Loss, but she cannot complain of any Injury that has been done her [2]. And thus too in Commonwealths, where *Duels* are prohibited by Law, a Man, who has receiv'd a Challenge, is not bound to come into the Field, tho' he has given his Word to appear. Yet, if he freely meets his *Antagonist*, and happens to be wounded in the Encounter, he cannot say, that he has suffer'd Wrong, or demand the Charge of his Cure.

Grotius, in Favour of his Opinion, urges the Example of the Patriarch *Judah* in the Scripture [a], who appear'd very earnest and solicitous to send *Thamar* the Price of her playing the Harlot. To this Mr. *Selden* [b] answers: " That, in the Judgment " of those Times, it pass'd for lawful, for a Wo- " man, free from Marriage, and other Restraints, to " bestow herself upon a Man, without any Con- " dition of living together; and this either *gratis*, " or for a Reward. And that, therefore, this Agree- " ment was able to produce a good and valid Ob- " ligation, being made about a Matter, which, if " not naturally, yet was *civilly* lawful, or accord- " ing to the Opinion of States and People in those " Days." We may say farther, That most Men think they ought, in Point of Generosity, to pay something for the Purchase of their Pleasures. And besides, *Judah* might not express so much Care and Concern [3], lest the Harlot should lose her Wages, but lest he himself should lose his Staff and Ring, the Pledges he had left in her Hands. Another Argument on *Grotius*'s Side may be alledg'd in that Passage of the *Roman Laws* [c] [4]. *What is given to a Strumpet cannot be recover'd; yet not because both Parties are in a Fault; for, indeed, the whole Offence, as to this Point, is on the Side of the Giver. 'Tis vicious in the Strumpet to practise such a Profession, but 'tis not vicious in her to receive the Fees of her Profession.* The Meaning of which Determination is no more than this: Tho' to make an open Trade of Lewdness, and to own as much before the *Ædiles*, did not fall under the Penalty of the Laws in the *Roman* State; yet all good and virtuous Men thought it most base and scandalous to engage in such a Way of Life. However, when Persons had once fix'd themselves in so vile a Calling, they contracted no new Vileness, by making the usual Gain and Advantage of it. Or, to speak more concisely, the Business was thus; the *Romans* granting Toleration to *Courtesans*, the Bargains and Contracts made on the Score of that Profession, were, in their Law, adjudg'd to hold good and valid. *Ovid*, indeed, hath accused these Bargains of Injustice upon another Score.

Sola viro mulier Spoliis exultat ademtis:
Sola locat noctes, sola locanda venit.
Et vendit quod utrumque juvat, quod uterque petebat,
Et pretium, quanti gaudeat ipsa, facit.
Quæ Venus ex æquo ventura est grata duobus;
Altera cur illam vendit, & alter emit?
Amor. Lib. I. El. 10. *v.* 29, &c.

'Tis the Nymph's Privilege the Spoils to win,
To let her Nights to hire, and traffick with her Sin.
She sells what both enjoy, what both invite,
And sets the Price upon her own Delight.
What both with Pleasure doth alike supply,
'Tis hard if *one* must sell and t'other buy.

This still remains true, That a Man cannot fairly pretend to be displeased with a Piece of Wickedness, which has been undertaken with his Consent, and for his Service.

[a] *Gen.* xxxviii. 20, &c. [b] *De J. N. & G.* l. 5. c. 4. [c] Lib. 4. f. 3. *D. de Condict. ob turp. caus.* & l. 12. tit. 5.

[1] It is a Maxim of the *Roman* Lawyers, *Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire*, He that brings a Loss on himself, by his own Fault, is not supposed to suffer any. *Digest.* l. 50. tit. 17. §. 203.

[2] Though, in this Case, *Ovid*'s Rule commonly holds true ——————— *Et ipso.*
Crimine dotata est, demeruitque virum. Epist. *Heroid.* 6. *ver.* 137, 138.
She brings her Portion in her Crime, and wins the Husband in the Spark.

[3] He mightily fear'd, and that with Reason, that if his Pledge were known to the World, his Wickedness would be divulged, and himself exposed to the Scoffs of the Inhabitants. And for this Reason 'twas that he did not go himself to find *Thamar*.

[4] *Sed quod meretrici datur, repeti non potest, ut Labeo & Marcellus scribunt. Sed nova ratione, non ea, quod utriusque turpitudo ver- [illegible] dat tolunt dantis; illam enim turpiter facere, quod sit meretrix, non turpiter accipere, cum sit meretrix.* Digest. l. 12 tit. 5. *De Condictione ob turp. vel injust. causam*, leg. 4. §. 3. See upon this Head *Didier Herauld.* Observ. cap. 31, 32 and what Mr. *Ott[illegible]* ley, in his Preface to the second *Tom.* of the *Thesaurus Juris*, p. 20.

Medea

Medea to *Jaſon*, in *Ovid*'s Epiſt. *Ep.* 12. *v.* 131, 132.

Ut culpent alii, tibi me laudare neceſſe eſt,
Pro quo ſum toties eſſe coacta nocens.

Others may blame, you muſt of Force commend,
For whoſe ſweet Sake I dared ſo oft offend.

Niſus to *Minos*, *Metamorph.* l. viii. v. 130, 131.

Scelus hoc patriæque, patrique, officium tibi ſit.

What's to my Country, and my Friends a Sin,
To you's a Kindneſs.

Senec. in Medea, v. 500, 503.

—— *Cui prodeſt Scelus, is fecit,*
Tibi innocens ſit, quiſquis pro te eſt nocens.

The Gainer, by a Villany, is deem'd the *Actor*; he that ſins for you ſhould, in your Eyes, be ſpotleſs Innocence.

Though it be a very uſual, and a very good Cuſtom of Princes to take the Benefit (in ſome Caſes) of Mens *Treaſons* and *Villanies*, and to puniſh the *Traytors* and the *Villains*, that the Infection may not ſpread by Encouragement. Of this Proceeding, we have a very remarkable Inſtance, recorded by *Paulus Oroſius*, in his Hiſtory [a]. *Sulpitius* having been voted in Senate a *publick Enemy*, was brought into their Hands by the Treachery of his own Slave; the *Conſuls*, with a wiſe Diſtinction, order'd the Fellow to be preſented with his *Freedom*, as a Reward for his Service to the State, and to be caſt headlong down the *Tarpeian* Rock, as a Puniſhment for betraying his Maſter. Add *Zonar. Tom. 3. in Theoph. in init.*

IX. The third Queſtion moved on this Head is, whether a Reward, given for villainous Service, may be redemanded or recover'd? And here the *Law of Nature* affords no Pretence for ſuch a Recovery, provided the *Receiver* has not dealt deceitfully with the other Party; and the other has not ſuſtained a great Damage [1]. In as much as the *Giver*, by delivering up the Thing promiſed, intended, no doubt, to transfer the Propriety of it; and this too in way of Debt, in Conſideration of a Service perform'd for him, which he himſelf valued at this Rate. Now we know, that when any Thing is given, even *gratis*, all Right of Recovery ceaſeth. Nor will it alter the Caſe to urge, That the Thing was here obtain'd on an unjuſt Title, and by Ways and Means expreſly forbidden by the Laws. For this Allegation cannot, with any Colour, be made by the Perſon who gave the Reward; in as much as he voluntarily bargain'd for the wicked Service, and when that was perform'd for him, thought himſelf to receive ſomewhat equal in Value to the Price agreed upon; nor can he complain of a Villany, of which he himſelf was the principal Author. Indeed, the *Illegality of the Means* by which the Reward was required, if conſider'd in regard to the publick Authority, ſhall produce this Effect, That it ſhall be in the Magiſtrate's Power to take the Thing from the Receiver by way of Puniſhment, and (if he ſees fit) to reſtore it to its firſt Owner. For Inſtance, if a cunning Strumpet ſhould chouce an unwary young Man out of a conſiderable Sum of Money, ſhe may fairly be obliged to refund; ſince, even in the moſt vicious Bargains, ſome Shadow of Juſtice is kept up, and the Laws of Contracts in ſome Sort obſerved.

But farther, ſince it is accounted moſt baſe and vile in a Man, to demand a Reward for doing a Thing, which it his Duty to perform *gratis*, it is made another Queſtion, whether what we have promiſed or given for a Thing before juſtly due to us, may be with-held or recover'd? Some anſwer abſolutely [b], That, if we reſpect the *Law of Nature*, Promiſes of this Kind are good and valid, ſince thoſe, likewiſe, are ſo, which we make without any particular Reaſon or Proſpect. Yet, at the ſame Time, whatſoever Damage is ſuſtain'd by violent Extortion, ought to be fully repair'd. Perhaps the Buſineſs may be more clearly ſettled, if we diſtinguiſh, whether the Thing, which we ſay was before due to us, was due upon an imperfect, or upon a perfect Obligation: If the former, our Promiſe of a Reward for it ſhall hold good, and we cannot ſue for Recovery. Thus, for Inſtance, altho' the Law of Humanity obliges me to ſet a Traveller in his Way, and though ſuch a Piece of Service may, perhaps, coſt me no Trouble, yet, if I bargain to receive ſome Conſideration on that Account, I may fairly demand the Payment, and the other Perſon cannot recover what he thus parts with; unleſs I forced him to make a large and unreaſonable Promiſe, by filling his Head with falſe Frights, or any other Stratagem of Knavery. Thoſe Promiſes are, likewiſe, valid, which we make to incite another to the more ready, and the more exact Performance of his Duty. For theſe paſs for Matters of free Bounty and Gratuity. But if the Thing was before [2] owing to us in a *perfect* Manner [c], and yet the Perſon, who is to perform it, refuſes Compliance, unleſs, upon our Promiſe of a new Reward, we take this Caſe to be the ſame, as in Engagements made thro' Fear or Guile; and, therefore, to require the ſame Way of Proceeding. If then, in a State of natural Liberty, a Man refuſe to pay me my Due, it is plain he does it upon Preſumption of his own Strength, and becauſe he believes it is not in my Power to compel him. And, conſequently, if he deny to fulfil a Covenant fairly made, without a new ſupplemental Condition, he immediately gives me juſt Cauſe of uſing Hoſtility to reduce him. And, if my preſent Affairs will not permit me to engage in a Method of War, but incline me to agree, though on hard Terms [3], I may afterwards require Satisfaction for the Damage I now ſuffer,

[a] L. 5. c. 18. [b] See *Grotius*, l. 2. c. 11. ſ. 10. [c] *Add.* l. 12. tit. 5. *D. de Condict. ob. turp. Cauſ.*

[1] See what I have ſaid, about this Matter, in my large Note on §. 6. and l. 4. c. 13. §. 16.

[2] As for Example, when a Judge will not pronounce Sentence in Favour of a Perſon, (whoſe Cauſe he acknowledges to be right) unleſs he receives a Bribe. Our Author cites here a Paſſage of *Libanius Orat.* 5. importing, That the Judge only doing his Duty, we owe him nothing, not even Thanks. He refers, alſo, to what the Interpreters of the *Roman* Law ſays, in explaining the Title, *De Conditione ob turpem vel injuſtam cauſam*; which reduces the Point to this Diſtinction; Either that Turpitude is only on the Side of the Receiver, or ſolely on the Side of the Giver, or equally on both Sides. In the firſt Caſe there is a Right of Reſtitution, but not in the two laſt. An Inſtance of the firſt Caſe is, when a Man has given any Thing to another not to commit a Sacrilege, Theft, or Murder. An Example of the ſecond Caſe may be ſeen in the preceding Paragraph. An Inſtance in the laſt Caſe is the Judge above-mentioned, which is decided quite otherwiſe than our Author would have done. The Reaſons, upon which the prevailing Opinion is grounded, are, that the Party, who makes a Preſent to the Judge to engage him to his Duty, is ſuppoſed to have an Intention to corrupt him, and, conſequently, offends. For as Mr. *Noodt* obſerves, (*Commentary*, p. 297.) however convinced a Man appears of the Juſtneſs of his Cauſe, he may not only deceive himſelf, but be willing to deceive his Judge; that is, bring him over to his Opinion without Examination, which is a bad Precedent. *Sed ſi dedi*, ut ſecundum me in bonâ cauſâ Judex pronuntiaret, *eſt quidem relatum, conditioni locum eſſe; ſed hic quoque crimen contrahit; Judicem enim corrumpere videtur.* Digeſt. lib. 12. tit 5. leg 2. § 2. Upon this Footing the two Opinions may be eaſily reconciled.

[3] Mr *Hertius* affirms the contrary, and his Reaſon is, that, by ſubmitting to a new Treaty, tho' upon hard Conditions, we deprive ourſelves of our Right. And if ſuch an Agreement, adds he, made after War, be valid, Why ſhould it not be ſo when Men claim by that Means to avoid it? But ſee l. 8. c. 8. §. 1.

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unleſs I end the Matter by an Act of voluntary Forgiveneſs. Yet it quite alters the Caſe, if his Denial did not proceed from meer Unfaithfulneſs and Wickedneſs; but from his being able to ſhew, that he was exceedingly injured in the former Covenant, to which he now demurs. As for the Members of Commonwealths, if *they* refuſe to anſwer an old Bargain without ſome additional Reward, they will be compel'd to be honeſt by a Courſe of publick Juſtice.

To this we may add the Diſtinction of the *Roman* Lawyers [a] in Caſes of *vicious Service*, whether the Fault or Wickedneſs was on the Part of the Receiver only, or of the Giver only, or of both. In the firſt Inſtance, they allow an Action of Recovery; not in the other two.

X. We are, likewiſe, *morally* unable or uncapable to perform any Thing [1], or to oblige ourſelves to ſuch Performance, about the Goods or Action of other Men; which are not ſubject to our Pleaſure and Diſpoſal. And being thus independent from us, we cannot, by any Act of ours, whether of Promiſe or of Bargain, give another a Right over them, by Virtue of which he ſhould claim them as his Due. Hence 'tis a Rule with the Civilians [2], "That in "Caſe one Man promiſe that another ſhall give or "ſhall do ſuch or ſuch a Thing, neither of them "ſhall ſtand obliged." Which is very juſt and true, if we ſtick to the bare Words of ſuch a Promiſe: But becauſe it ſeems inconvenient, that an Act, ſeriouſly undertaken, ſhould produce no Effect, we are apt commonly to interpret Promiſes of that Kind in this Senſe, that the Perſon promiſing will take the Care to bring the other Party to Performance [4], in whoſe Name he now ſeems to make the Engagement: But if I make a Promiſe to a Man, in ſo expreſs and direct Terms as theſe, that I will endeavour to prevail on a third Perſon, to do for him ſo or ſo; I am then obliged to labour by all Means *morally poſſible*, to move that Perſon to a Compliance. We ſay, by all *Means morally poſſible*, that is, ſo far as the other Man can honeſtly deſire me, and ſo far as is conſiſtent with the Nature and Method of civil Life. And if, in this Caſe, I omit nothing on my Part [5], and yet the third Perſon refuſe to grant the Requeſt, I am not bound to make good the Default; unleſs this was an expreſs Part of my Promiſe, or was implied in the Nature of the Buſineſs [6]. But if I promiſe in this Manner, *Unleſs a third Perſon do ſo or ſo, I will forfeit thus much*, it is manifeſt, that if the third Perſon fail, my Engagement will ſtand good againſt me. Somewhat like this we meet with in the *Roman* Conſtitutions [7], which decree, that in Caſe a Perſon diſpoſes, by way of Legacy, a Thing which belong'd to another Man, and which he knew ſo to belong, the *Heir* ſhall be obliged to redeem, and to reſtore it, or, if it cannot be redeemed, to give the Value of it to the Owner. Yet certain it is, that a Promiſe, of what Kind ſoever, cannot lay an Obligation on the third Perſon, nor give the other Man a Right of requiring any Thing immediately from him.

But if the third Perſon be once placed under my Governance and Command, his Things or Actions are not accounted another's [8], but my own; ſo far as my Authority over him extends. And thus far I can, by Promiſe or other Engagements, effectually diſpoſe of them, ſo as not only to bind myſelf to ſee the Agreement made good, but to cauſe that the Perſon, in whoſe Behalf I tranſact, ſhall, as ſoon as he is acquainted with my Pleaſure, be obliged, by virtue of my Power over him, to perform the Condition. Though the common and regular Way of proceeding, in theſe Caſes, is, to apply to the principal Promiſer, and to require him to force the Perſon, under his Care and Direction, to a Compliance; and, upon the Obſtinacy and Default of the govern'd Party, the Action at Law ſhall lie againſt his Governor, unleſs he has reſign'd his Charge, and left him wholly to his own Diſpoſal.

XI. *Laſtly*, I am morally incapacitated to make a Promiſe, with any Effect, to a third Perſon, about ſuch Things or Actions of mine, to which another

[a] *Liban. Orat.* 5. I receive only thoſe Advantages which the Law allows me; and where is the Favour in this Caſe? He that hath been obliged with Kindneſs, ought to make Requital to his Benefactor. But we can owe no ſuch Return to a Judge, who doth not act out of Favour to us, but as the Neceſſity of the Law directs him.

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[1] Add, alſo, the Things which are not in our Diſpoſal, although otherwiſe they really belong to us. See what I have ſaid in my Treatiſe of *Games*, l. 2. c. 4. §. 4, &c.

[2] The Words are, *Si quis alium daturum facturumve quid promiſerit, non obligabitur; veluti ſi ſpondeat, Titium quinque aureos daturum.* Inſtitut. l. 3. tit. 20. *de inutil. Stipulat.* §. 3. See *Cujas, Obſer.* 12. 36.

[3] See, alſo, the *Digeſts* direct, *Quæcunque gerimus, cùm ex noſtro contractu originem trahunt, niſi ex noſtra perſona obligationis initium ſumant, inanem actum efficiunt, & ideo, neque ſtipulari, neque emere, vendere, contrahere, ut alter ſuo nomine rectè agat, poſſumus.* Digeſt. de Obligat. & Action. *l.* 44. *tit.* 7. *leg.* 11. *Certiſſimum enim eſt ex alterius contractu neminem obligari.* Cod. l. 4. tit. 12. *Ne Uxor pro Marito*, &c. leg. 3.

[4] In this latter Caſe, the *Roman* Lawyers themſelves affirm, that the Promiſe obliges. *Quod ſi effecturum ſe, ut Titius daret, ſponderit, obligatur*, i. e. If he promiſed to procure that *Titius* ſhould give, he is obliged, *Inſtitut. ubi ſupra.* See Mr. *Hertius*'s Diſſertation, *de Oblig. alium datur. facturumve* in *Tom.* III. of his Commentaries and ſmall Tracts, printed in 1700.

[5] So *Livy*, l. 2. c. 31. He ſeem'd to have ſatisfied his Obligation, inaſmuch as he contributed nothing, on his Side, to hinder the Buſineſs from being perform'd. See *Grotius, Book* II. *c.* 11. *ſ.* 22. and *Book* III. *c.* 21. *ſ.* 30.

[6] This hath Place only in ſuch Engagements, where both Parties have an Intereſt, and not in ſuch as are the pure Effect of the Liberality of one of the Parties. See the Examples cited by Mr. *Hertius*, in the Diſcourſe laſt mentioned, *Sect.* 1. §. 8.

[7] Theſe are the Words, *Non ſolum autem Teſtatoris vel Hæredis res, ſed etiam aliena legari poteſt; ita ut Hæres cogatur redimere eam, & præſtare; vel ſi non poteſt eam redimere, æſtimationem ejus dare —— Quod ita intelligendum eſt, ſi defunctus ſciebat alienam rem eſſe, non ſi ignorabat.* Inſtit. l. 2. tit. 20 *de Legatis*, §. 4. *Idemque Juris eſt, ſi potuiſſes emere, & non emeres.* Dig. *l.* 32. *leg.* 30. §. 6. There was no other Way of giving theſe Kind of Legacies a rational Interpretation. I even very much ſuſpect, that it was meant contrary to the Intention of the Teſtator. A Man, in his Senſes, will never think of bequeathing a Thing which he knows does not belong to him, without adding ſome Clauſe to direct how his Will ſhall be fulfilled. It is very likely that the firſt Perſons, who left theſe Kinds of Legacies, deſign'd to make a Fool of their Legatees, by leaving them Things to which they had no Right. The Lawyers had no Mind to authorize ſo unſeaſonable a Piece of Raillery, and ſo to ſpare the Legatee an Affront which he no Way deſerved, they ſuppoſed the Teſtator wiſer than he really was. 'Tis upon the ſame Principle that they held impoſſible or diſhoneſt Conditions as invalid. See the following Chap. §. 5. But they ſhould, for another Reaſon, have regarded the Legacy as good, where the Teſtator thought the Thing bequeathed truly belonged to him. "Perhaps, ſay they, that "had he known it belong'd to another, he would not have bequeathed it." *Forſitan enim ſi ſciſſet alienam rem eſſe, non ligaſſet.* Be it ſo: Then he ſhould not then have bequeathed a Thing of which he could not diſpoſe. But, ſurely, he might have left an Equivalent for it out of his own Goods. This Suppoſition is the moſt agreeable to the Deſign of the Teſtator, which was to give the Legatee Marks of his Good-will; and, conſequently, to follow the Rules of right Interpretation, we muſt admit it till the Contrary can be proved, which, in my Opinion, will very ſeldom happen.

[8] Here is another Exception, that is, when a Perſon is engaged to keep, or preſerve the Effects of a third Perſon who is abſent, and whoſe Buſineſs we have undertaken to manage without any Commiſſion from him, but only becauſe we believe we ſhall do him a Kindneſs; for, in this Caſe, there is all the Reaſon in the World to preſume the Proprietor will approve of what is tranſacted in his Name, as his Rights are no Way infringed.

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has already acquired a Right; unleſs, perhaps, this other Party be content to wave his Claim [1]. For he who, by a former Engagement, has made over his Right, can have no Power left to diſpoſe of it anew. And all Pacts and Promiſes might be cancel'd and eluded with very little Trouble, were we allow'd to enter into new ones, either directly contrary to the former, or any way inconſiſtent with them, as to the Performance. In this Caſe, therefore, the latter Contract is diſannul'd, and render'd ineffectual by the former, or, as we ſhould rather ſpeak, the former ſhews, that the latter can be of no Force or Uſe. Hence, for Inſtance, are all thoſe Covenants void, which Subjects make either among themſelves, or with others, in Prejudice of the Duty and Allegiance they owe to their lawful Sovereigns [a 2].

It is a common Rule, That *he who has the Precedency in Time, has the Advantage in Right*: Not that Time, conſider'd barely in itſelf, can make any ſuch Difference; but becauſe the whole Power over a Thing, being formerly ſecured to one Perſon, bars all others from obtaining a Title to it afterwards. And hence too it comes to paſs, that a Servant cannot diſpoſe of his Labour [3], otherwiſe than his Maſter pleaſes, to whom, by virtue of a former Contract, it entirely belongs. By the *Roman* Laws, a Slave could not enter into any *Obligation*, even with his own Maſter, beſides the general *Obligation* implied in that State and Condition of Servitude; and the Reaſon of this was, becauſe his Maſter had before a full Right over all that he poſſeſs'd, and all that he could do to any advantageous Purpoſe.

If a Man, contrary to theſe Duties, ſhall have deceived and prejudiced another, by promiſing a Thing, which either was not his own, or was before otherwiſe beſtow'd and ſecured, he ſhall be obliged to make good the Damage; and, in many Caſes, ſhall be liable farther to ſuffer the Penalty of *Cozenage* [4].

[a] *Gramond.* Hiſt. Gall. *l.* 5. He that is born under a Prince, doth originally engage his Faith and Allegiance to him; and whoſoever attempts to draw them away, is a moſt unjuſt Invader of another's Rights; nor will any ſuch Covenant hold good, being made contrary to the Laws and Conſtitution of the Kingdom. He that gives his Promiſe againſt his Prince, is, by the very Act, releaſed from the Obligation.

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[1] This Author, in his Abridgment *of the Duties of a Man and Citizen*, expreſſes himſelf after a more general Way, *l.* 1. *c.* 9. §. 10. Unleſs the other loſes his Right, (*Niſi forte in eum caſum quo alterius jus expiraverit*) which may fitly be added here. Mr *Thomaſius* in his *Inſtit. Jurisprud. Divin* l. 2. c. 7. §. 95, 96, 97. adds another Reſtriction with regard to the Words recited: Unleſs he, that hath promiſed, may fairly hope that the Caſe may happen. So a Servant may ſafely engage himſelf to ſerve another Maſter, when the Time, which he is hired to ſerve his preſent Maſter, is expired. And the Owner of an Houſe may promiſe to let an Apartment of his Houſe to another, when the Time, which the preſent Occupier is to enjoy it, is expired. But it is an unlawful Promiſe, and, conſequently, null, to engage himſelf to become a Subject of another Prince or State, upon Condition, that the State, of which he is a Member, be ruin'd by a Civil War, or deſtroy'd after ſome other Manner. By the *Roman* Laws no Man can legally promiſe to give a Man a Freeman, ſuppoſing he ſhould become a Slave, nor a publick Thing, upon Supposition that it may become our private Poſſeſſion. *Nec in pendenti erit ſtipulatio ob id, quod publica res in privatum deduci, & ex libero ſervus fieri poteſt — Sed protinus inutilis eſt.* Inſtit. l. 3 tit. 20. *De inutil. Stipulat.* §. 2. And 'tis not without Reaſon, adds Mr. *Thomaſius*, that Chriſtian Princes declare a Promiſe of Marriage made by a Perſon married, in Caſe his Wife or her Husband die, to be null, and puniſh both Parties that have made ſuch a Promiſe. Nevertheleſs, the ſame Author, in his *Fundam. Jur. Nat. & Gent.* and his Notes upon *Huber. de Jur. Civ.* ſays, that the Puniſhment inflicted in this Caſe, ſeems to be very rigorous, and ſavours of Popiſh Principles about the Sacrament of Marriage. But *Grotius* thinks ſuch a Promiſe valid in its own Nature, *l.* 2. *c.* 11. §. 8. *n.* 3. where the Reader may ſee my Remark.

[2] See Mr. *Hertius*'s *Paræmiæ Jur. German.* l. 1. c. 49, 50. The ſame Author, in his Notes upon this Place of our Text, obſerves, that the Maxim takes Place chiefly in conditional Bargains, which, by the *Roman* Law, are contracted by a ſingle Agreement; but, as to other Engagements, 'tis not always true. Whereupon he alledges an Example of a Thing ſold to two Buyers, but deliver'd to the laſt. But ſee what our Author further ſays, *l.* 5. *c.* 5. §. 5. againſt *Grotius*, whoſe Principles Mr. *Hertius* follows, tho' here he ſays nothing in Defence of them. See, alſo, what I have ſaid upon *Grotius*, lib. 2. cap. 12. §. 15. Not. 6.

[3] Our Author obſerves here, that, according to the *Roman* Laws, a Slave can't oblige himſelf to his Maſter, *Sed Servus quidem non ſolum Domino ſuo obligari non poteſt, ſed re quidem ulli alii.* Inſtitut. l. 3 tit. 20. *De inutil. Stipulat.* § 6. And the Reaſon is, adds he, that the Maſter has a Right to all the Goods, and profitable Actions, or Labour and Service of his Slave, as he is ſo. So that a Slave can't oblige himſelf to his Maſter, but by the general Engagement he is under as his Slave.

[4] Thus Cheats and Tricking is called in the *Roman* Law, which have not a proper Name; but chiefly that Sort which our Author is ſpeaking of, as, when one engages for a Thing that belongs to another, or one Thing for another; eſpecially if the firſt be of more Value than the laſt. As for Example, If one gives Copper gilt for Silver gilt. See *Digeſt.* l. 47. tit. 20. *Stellionatu.* And Mr. *Domat*'s Civil Laws, *&c.* Part I. l. 1. tit. 18. Sect. 3.

CHAP. VIII.

Of the Conditions of Promiſes.

The CONTENTS of every Paragraph of the eighth Chapter.

I. *How many Ways is a Promiſe made?*
II. *What is a Condition?*
III. *A Condition refers to the Time preſent, or the Time to come.*
IV. *A Condition is either caſual, arbitrary, or mixt.*
V. *An impoſſible and unlawful Condition.*
VI. *The Addition of Place.*
VII. *The Addition of Time.*
VIII. *The Difference between Bargains and conditional Promiſes.*

I. CONcerning Engagements by Promiſe, this is farther to be obſerved, that ſome are made *purely* or *ſimply*, and ſome under *Condition* [1], or that ſometimes we oblige ourſelves *abſolutely* to ſuch or ſuch a Performance, and ſometimes we ſuſpend our Obligation, till certain Clauſes or Proviſo's are made good.

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[1] The *Roman* Lawyers add, in treating of *Stipulations*, the Determination of the *Time* and *Place* of their Performance. *Inſtit. Book* III. *tit.* 16. *ſ.* 2, & 5. Our Author himſelf, alſo, ſpeaks of theſe two Circumſtances a little farther. The Words in the *Inſtitutes* are, *Omnis ſtipulatio aut purè, aut in diem, aut ſub conditione fit —— Loca etiam inſeri ſtipulationi ſolent —— Puri, ex luti, QUINQUE AUREOS DARE SPONDES? Idque confeſtim peti poteſt.*

II. A *Condition* is an *Appendage* [1] added to ſuch Acts, as are productive of Rights and Obligations, by virtue of which their whole Force and Efficacy is made to depend on ſome particular *Event*, proceeding either from Fortune, or from human Pleaſure [2]. So that to the true Nature of a *Condition*, theſe two Things are requiſite, firſt, that it have the Power of deferring and ſuſpending the Force of the Obligation, and, ſecondly, that the *Event*, expreſs'd in it, do not as yet appear; at leaſt, that it be at preſent uncertain, as to our Underſtanding.

III. Hence we may conclude, that thoſe additional Clauſes are not properly *Conditions*, (tho' they ſeem to be ſuch in a Grammatical Senſe) which refer to the Time preſent, or paſt. For *Futurities* only are dark and obſcure to mortal Apprehenſions, but as for Things which are now before us, or have already gone over our Heads, we have uſually a clear Knowledge of them; and, therefore, they can include no Power capable of ſuſpending our Aſſent. And, therefore, it is given as a Rule in the *Inſtitutions* [3], that Conditions, which regard the Time preſent, or the Time paſt, as, ſuppoſe I ſhould ſay, I will give ſuch or ſuch a Thing, *if* Titius *has been Conſul*, or, *if* Mævius *be ſtill alive*, do either immediately cancel and annul the Obligation, or elſe do not put it off at all, nor hinder it from being pure and abſolute. For if the Things, annex'd for Conditions, are not, as they are ſuppoſed to be, the Engagement is to no Purpoſe; but if they are ſo, the Promiſe is valid as ſoon as it is made, and begins *abſolutely to oblige*. Yet here it muſt be obſerved, that a Condition, regarding the Time preſent or paſt, may be added to an Obligation, in Caſe both or either of the Parties tranſacting, be uncertain of the Thing. And Promiſes of this Kind ſeem to imply a convenient Space of Delay. Inaſmuch as nothing can be demanded by virtue of them, until it ſhall be made clearly apparent to the Promiſer, that the Matter, inſerted as a Condition, has really happen'd; and the Proof of this muſt neceſſarily take up ſome Time. For Inſtance, a Man, unskil'd in Hiſtory, may be drawn in to promiſe another Perſon ten Pounds, if *Cæſar* ever paſs'd the *Rhine*. Now here, before the Sum can be claim'd, it muſt be made evident, from the Authority of creditable Hiſtorians [4], that ſuch an Adventure was actually perform'd. Again, if I promiſe in this Manner, "I will give ſo much Money, in Caſe *Mævius*, "who is travelling Abroad, be ſtill alive;" the other Perſon can then only require the Money, when I have received certain Aſſurance of *Mævius*'s Life. But if we take a cloſer View of theſe Matters, we ſhall find that the above-mentioned Promiſes, and the reſt of the ſame Nature, ought to be interpreted in this Senſe, I will give you ſo much, *if you prove to me* that *Cæſar* paſs'd the *Rhine*, or that *Mævius* the Traveller is now living; and thus they become truly *conditional*; but then the *Condition* is not the Truth and Certainty of the *preſent*, or *paſt* Act, conſider'd in themſelves, but the *future* Proof of it to the promiſing Party. It is certain, therefore, that if the Truth of the Matter inſerted, was known on both Sides, and the Perſons were in Earneſt, the Promiſe is not *conditional*, but *abſolute*. Again, if both knew

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[1] *Sub conditione ſtipulatio fit, cùm in aliquem caſum differtur obligatio; ut ſi aliquid factum fuerit, vel non fuerit, committatur ſtipulatio. veluti, SI TITIUS CONSUL FUERIT FACTUS, QUINQUE AUREOS DARE SPONDES?* Inſtit. ubi ſuprà, §. 4. We ought, alſo, to obſerve, that there are tacit Conditions included in an Agreement, which are not expreſſed. As if a Perſon, ſelling his Eſtate, makes a Reſerve of the Year's Profits; this Reſerve ſuppoſes a Condition, that there ſhall be ſome Fruits on it, *Interdum pura ſtipulatio ex reipſa dilationem capit, veluti ſi id quod in utero ſit, aut fructus futuros, aut domum ædificari ſtipulans ſit. Digeſt.* l. 45. tit. 1. *De Verbor. Obligat.* leg. 73. *In Princip.* See what is ſaid above, *c.* 6. §. 2. Further, Mr *Hertius* obſerves here, that we muſt diſtinguiſh Conditions properly ſo called, *viz.* what the Lawyers call a *Modus*, and what we call a *Condition*. For Example, I have Land engaged, and I ſell it upon Condition of freeing of it at ſuch a Time. In this Caſe, the *Roman* Law allows the Buyer to have an Action againſt the Seller, to force him to free his Land at the Time appointed, or let him into Poſſeſſion. *Nam ſi id actum eſt, ut omni modo intra Kalendas Julias venditor fundum liberaret, ex empto erit actio, ut liberet; nec ſub conditione emptio facta intelligetur, veluti ſi hoc modo emptor interrogaverit, Erit mihi fundus emptus, ita ut intra Kalendas Julias liberes? vel ita, ut intra Kalendas à Titio redimas? Si vero ſub conditione emptio facta eſt, non poterit agi, ut conditio impleatur.* Digeſt. l. 18. tit. 1. *De contrahend. empt.* &c. leg. 41. *init.* So that ſuch a Clauſe does not ſuſpend the Obligation, nor diſannul it, that it has no Effect, but only prevents the Performance of the Engagement till it takes Place. This Sort of Agreement may be referred to the Laws, which the Lawyers call *ſub Modo*, on Condition that the Legatee ſhall do this or that Thing, or with a Proſpect of it. See the Interpreters upon the *Digeſts*, l. 35. tit. 1. *De Conditionibus & Demonſtrat.* &c. Hence it is, that Mr. *Hertius* calls the like Clauſe conſider'd in mutual Promiſes and Engagements, *Cauſa finalis, propter quam aliquid fit vel præſtatur*, which is not altogether juſt, ſince, in the Example that I have alledged after him, we may clearly ſee, that there is no final Cauſe or Motive, but only a Stipulation, by which the Seller puts off the Delivery of the Thing ſold, till he can redeem it, which he engages to do at a certain Time. Theſe Sorts of Promiſes may be referred to thoſe which are made for a certain Day, becauſe the Time is always prefix'd, or which is ſuppoſed to come ſooner or later, tho' it be not appointed. Mr. *Hertius* maintains with Reaſon, as ſome others do, that where there is a Doubt, a Promiſe ought to be thought purely conditional, rather than made on a ſure Foot. This is only true with regard to Gratuities promiſed; for as to Agreements, wherein the Parties are mutually intereſted, they naturally ſuppoſe ſome Condition that renders them difficult to be annul'd; becauſe this would be a Prejudice to the Party, who depends upon their Accompliſhment.

[2] Of theſe two Things included in the Idea of the Condition, the firſt, as we may ſee, is a Conſequence of the laſt, and, therefore, ought naturally to precede it; for the Suſpenſion of the Obligation proceeds from the Uncertainty of the Event. Beſides, our Author confines here too much the Effect of Conditions, for they not only ſuſpend the Effect of an Engagement, but diſannul or change them where they are already. Mr. *Domat*, in his *Civil Laws*, &c. *Part* 1. *l.* 1. *tit.* 1. *Sect.* 4. §. 6. ſays well, that Conditions are of three Sorts, according to the different Effects which they produce. The firſt is, ſuch as accompliſh the Engagements that depend on them, as when 'tis ſaid the Sale ſhall take Place, if the Goods be deliver'd on ſuch a Day. The ſecond is, ſuch as diſſolve a Bargain, as when 'tis ſaid, in Caſe ſuch a Perſon comes at ſuch a Time, the Hire of the Houſe ſhall be void. The third is, ſuch as neither accompliſh nor diſſolve an Agreement, only making ſome Change in it, as if one agree, that in Caſe an Houſe, that is lett, be reſign'd to the Tenant without certain Moveables which are promiſed him, the Hirer ſhall have it ſo much the cheaper. Read the fore-quoted Section of Mr. *Domat*.

[3] *Conditiones quæ ad præſens vel præteritum tempus referuntur, aut ſtatim infirmant obligationem, aut omnino non differunt; veluti, SI TITIUS CONSUL FUIT, vel SI MÆVIUS VIVIT, DARE SPONDES? Nam ſi ea ita non ſunt, nihil valet ſtipulatio; ſin autem ita ſe habent, ſtatim valet*, Inſtit. l. 3. tit. 16. *De Verbor. Obligat.* §. 6. See M. *Bynkerſhoek*'s *Obſervat. Jur. Rom.* l. 4. c. 15.

[4] I know not on what our Author grounds himſelf here, ſince, in the Moment which Men treat, the Fact, either preſent or future, on which the Effect of a Promiſe depends, is poſitively true or falſe, the Obligation, from that Inſtant, ſeems either abſolutely null or valid, and, conſequently, no Condition, properly ſo call'd, can ſuſpend the Engagement. The *Roman* Lawyers ſay, *Nulla eſt conditio, quæ in præteritum confertur, vel quæ in præſens.* Digeſt. lib. 28. tit. 7. *De condit. Inſtitution.* Upon which ſee the *Obſerv. Jur. Rom.* of M. *de Bynkerſhoek*, lib. 4. cap. 15. All that reſults from ſuch a Clauſe is, that the Promiſe cannot be claimed till the Truth of the Fact be proved; for as the *Roman* Lawyers ſpeak very well, *Quæ per rerum naturam ſunt certa, non morantur obligationem, licet apud nos incerta ſint.* Inſtitut. l. 3. tit. 16. *De Verbor. Obligat.* §. 6. Theſe Sorts of Promiſes paſs for conditional only, when we treat about a Matter of Fact, of which there is no Certainty whether it can be verified or not. For then the Uncertainty produces the ſame Effect, as if the Clauſe depended upon a future Accident.

the Matter to be falſe, the Promiſe ſhall paſs for a Jeſt, and, conſequently, produce no Obligation. If a *future* Thing be added, which they knew muſt infallibly come to paſs; as ſuppoſe, *if the Sun riſe To-morrow*, 'tis generally agreed that ſuch a Clauſe ought not to be reckon'd a *Condition*; inaſmuch as the *future* Event being already known to be moſt certain and neceſſary, does not delay the Obligation, nor hinder it from taking Place this very Inſtant. Yet, becauſe we ought not eaſily to preſume that the Clauſe is added for no Reaſon, it is worth while to conſider, whether, in ſuch a Promiſe, the Particle *if* be not put for the other Particle *when* [1]; ſo that the Engagement ſhall not be conditional, but only made for a Day hence; as ſuppoſe thus, *I will give ſuch or ſuch a Thing To-morrow, when the Sun riſeth.*

And thus we find, that every *Condition*, properly ſo called, includes ſomewhat which is, at preſent, uncertain, at leaſt to one of the Parties, between whom the Buſineſs is tranſacted; and the Obligation remains in Suſpence [2], till the Thing ſhall hereafter come to paſs, or ſhall be demonſtrated, by good Evidence, to have already happen'd. When the *Condition* appears true, the *Obligation* begins to have a *pure* and abſolute Force; if the *Condition* fail, the *Obligation* expires with it.

IV. Conditions are commonly divided into *poſſible* and *impoſſible*; the former are ſuch as make an Obligation depend on ſome Event, which may *naturally* or *morally* happen. And are again ſubdivided into *caſual*, *arbitrary*, and *mixt* [3]. A *caſual Condition* is ſuch as depends, either on the Pleaſure of a third Perſon, not obnoxious to our Power and Authority, or elſe on meer Chance and Fortune in reſpect of us; as, ſuppoſe in ſuch a Promiſe as this, *I will give you Ten Pounds, if* Caius *marries* Titia; *or if it don't rain within theſe three Days*, &c. An *arbitrary* Condition is ſuch as depends, as to its being or not being, on the Will and Power of him, to whom a Promiſe is made under that Limitation [4]. But ſhould a *Condition* be annexed, depending on the Pleaſure of the Promiſer [5], the Engagement would be inſignificant; as if one ſhould ſay, *I will give you Ten Pounds, if I think fit.* For the Senſe of ſuch a Speech amounts to no more than this: I make you an abſolute Promiſe, that at preſent, and hereafter too, it ſhall be my Choice to promiſe abſolutely, or not. And, therefore, the other Party can hence acquire no *Right*, unleſs the Offer be afterwards improved to a full and perfect Engagement; ſince the *Condition* here mention'd may be perpetually ſtopt, or eluded by the Promiſer. So that we may reaſonably ſay, that *what is perfectly in our Power, ought not to be confounded with, or thrown amongſt, Matters of Chance or Accident.* If the Condition be, indeed, in the Power of the Promiſer, and yet ſuch as he is not able, or is not willing always to elude, it muſt be enforced by ſuppoſing a particular Time, beyond which it cannot be deferr'd; as if I ſay, *I will give you ſuch a Sum of Money, if I marry*, that is, *when I marry.*

From what has been hitherto offer'd, we may be able to explain, more accurately, the Aſſertions of *Grotius* [a] upon the ſame Head. He ſays, That *if the Thing promiſed be not at preſent in the Power of the Promiſer, but may be hereafter, then the Strength and Efficacy of the Promiſe lies in Suſpence; for it muſt then be ſuppoſed to have been made conditionally, that is, in Caſe the Promiſer ſhould have it in his Power.* Now this Rule we allow to hold good, provided that the other Party knew the Thing not to be at preſent in the Power of the Promiſer. For otherwiſe it looks like Knavery, when a Man expects an abſolute Promiſe, which ſhall begin to bind immediately, to put him off with a conditional one,

[a] Lib. 2. c. 11. ſ. 8. n. 2.

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[1] The Conjunction *ſi*, which cannot be expreſs'd in our Language, is elegant in the *Latin*.

[2] *Quia quæcunque ſub conditione traduntur; ita demum fieri poſſunt propria & peculiaria, ſi conditio conſummata eſt.* Quintilian Declam. 336. Mr. *Hertius*, who quotes this Paſſage, obſerves, at the ſame Time, that the Diſtinction, made by the *Roman* Law about this Matter, agrees not with the Natural Law. The Lawyers ſay, that there is a Difference between Engagements upon Condition, and ſuch as depend on a Promiſe at a certain Time. In the firſt, nothing is due before the Thing ſuppoſed exiſts; whereas in the other, there is a Debt from the Moment the Promiſe is made, tho' the Perſon can't demand any Thing till the Time is come. *Cedere diem ſignificat, incipere deberi pecuniam. Venire diem ſignificat, eum diem veniſſe, quo pecunia peti poſſit. Ubi pure quis ſtipulatus fuerit, & ceſſit, & venit dies; ubi in diem, ceſſit dies, ſed nondum venit, ubi ſub conditione, neque ceſſit, neque venit dies, pendente adhuc conditione*, Digeſt. l. 50. tit. 16. *De verbor. ſignif.* leg. 213. Hence they infer, that what Men pay through Miſtake, before the Condition exiſts, may be recovered, as if it were not due; but 'tis not ſo in Payments made before the Time. *In diem Debitor, adeo Debitor eſt, ut ante diem ſolutum repetere non poſſit* ——— *ſub conditione debitum, per errorem ſolutum, pendente quidem conditione repetitur, conditione autem exiſtente, repeti non poteſt*, l. 12. tit. 6. *De conditione indeb.* leg. 10. 16. See Laws 17, 18. But Mr. *Hertius* thinks, that if we judge by the Light of Reaſon only, we may require Reſtitution as well in the laſt as the firſt Caſe. For (ſays he) in both Caſes, according to the *Roman* Law, neither of the Parties can recant without the Conſent of the other, before the Exiſtance of the ſuppoſed Fact, or the Term agreed on. In both of them the Obligation deſcends to the Heirs, in both Caſes there can be no Action at Law. All the Difference then, that can be, is this, That the Condition may fail ſometimes; whereas the Term, either fixed or uncertain, will certainly come. Hence Mr. *Hertius* concludes, contrary to the Opinion of many Doctors, that when we promiſe a Thing, which is not in Nature, and which can't take Place, but, on the Account of a future Engagement, regulated by the Laws, the Promiſe is really conditional, tho' it ſeems to reſemble thoſe where a certain Time is fixed; as if a Man promiſes any one the Crop of a Year, and to give ſuch a Portion with his Daughter. For it ſuppoſes that there will be a Crop, and that the Marriage will be compleated. *Vid. Digeſt.* l. 23. tit. 3. *De Jure Dotium*, leg. 21. & l. 45. tit. 1. *De Verb. Obligat.* leg. 73.

[3] We find this Diviſion in the *Code*, l. 6. tit. 51. *De Caducis tollend.* §. 7. *Sin autem aliquid ſub conditione relinquatur, vel caſuali, vel poteſtativa, vel mixta, quarum eventus ex fortuna, vel ex honoratæ perſonæ voluntate, vel ex utroque pendeat*, &c. Mr. *Gerling* (in his *Juſ. Nat. & Gent.* cap. 11. §. 32.) rejects this Diſtinction as groundleſs. His Reaſon is, becauſe every Condition has ſomething caſual in it, without which it could not ſubſiſt. But it is certain there are ſome Things which no Way depend on the Will of the Perſon to whom we promiſe; others which depend abſolutely on it; others, in fine, which depend only partly on it, and which always ſuppoſe ſome other Thing, without which the Agreement can never be perfect. Now the granting this is enough to eſtabliſh the Diviſion in Queſtion. The Example, which our Author alledges of the laſt Sort, or *mixt Conditions*, is undeniable. We ſhall give an Example of the ſecond Kind, or *arbitrary Conditions*. All thoſe, who impoſe Neceſſity of abſtaining from certain Things, (to which we are no otherways obliged) are undoubtedly of this Kind. If I ſay, for Inſtance, *I will give you ſo much, provided you will not game, or will not marry ſuch a Woman*, &c. This always depends upon the Will of the Promiſer; but if I ſay, *I will give you this or that, provided you will go up to the Top of St.* Paul's, *or if you will take a Journey to ſuch a Place*; Some intervening Accident may prevent a Man from executing theſe Conditions, but moſt commonly the Promiſer has it in his Power to fulfil his Engagement.

[4] Theſe Sorts of Conditions, as our Author obſerves here, are, alſo, called promiſcuous in the *Digeſts*, l. 35. tit. 1. *De Conditionibus & Demonſtrat.* &c. leg. 11. §. 1. If we would know the Senſe or Meaning of this Denomination, we may ſee the Sentiments of *Cujas* Obſerv. lib. 14. cap. 2. *& in* Papinian. Quæſt. lib. 13. p. 348. *& ſeqq.* Opp. Tom. 4. *Edit. Fabrot.*

[5] *Stipulatio non valet, in rei promittendi arbitrium collata conditione*, Digeſt. l. 45. tit. 1. *De Verb. Obligat.* leg. 17. *Illam autem ſtipulationem, SI VOLUERIS DARI? inutilem eſſe conſtat*, Ibid. leg. 46. §. 3. See, alſo, the 108th Law, §. 1. & l. 18. tit. 1. *De contrahenda Emptione*, &c. leg. 7. *princip.* &c. & l. 44. tit. 7. *De Obligat. & Action.* leg. 8.

which cannot take place till hereafter. He adds, *If the Condition, whereby the Thing is promiſed, may be brought into our Power, be itſelf in our Power*[a], *we are obliged to do whatever is morally fit and juſt, for the Performance of it*; that is, if I promiſe you any Thing, which at preſent is impoſſible to me, but may, by my Pains and Care, be hereafter rendred poſſible, I am bound to uſe all my Endeavours, that I may become able to diſcharge my Engagement [1]. For Inſtance, a young Student in the Law promiſes a Man to plead all his Cauſes in the Court, if he arrive at any good Skill in his Profeſſion. Here, according to *Grotius*'s Rule, the Student is under an Obligation to ply his Buſineſs with his utmoſt Strength and Diligence, that he may make himſelf fit for the Bar. But this will not hold, unleſs the Perſon promiſing has expreſly declared, or given fair Preſumption, that he will ſet himſelf in Earneſt to the acquiring Strength for the Performance; otherwiſe the Condition may be delay'd *in infinitum*. We may obſerve too, that *Grotius* here uſeth the Term, *Conditio Poteſtativa*, quite contrary to that Senſe in which we have above defined it; he makes it to be in the Power of the Promiſer, we in the Power of him to whom the Promiſe is directed.

Laſtly, A *mixt* Condition is, that the Fulfilling of which depends partly on the Power of him who receives the Promiſe, and partly on Chance; as thus for Inſtance, *I will give you a Sum of Money, if you marry ſuch a Gentlewoman.* Now this is not purely at your Pleaſure; for the Gentlewoman may refuſe your Suit, or may die before the Match is finiſh'd.

We have only this to add, That a Condition is then look'd upon as perform'd, when the other Party concern'd, does himſelf hinder it from being perform'd [2].

V. *Impoſſible* Conditions [3] are either *naturally* or *morally* ſo; that is, ſome Matters by the Nature of Things, *cannot* be done, others, by the Laws, *ought not* to be done. Such Conditions annex'd [4], eſpecially if both Parties knew them to be ſuch, do, according to the plain and ſimple Conſtruction of the Words, render the Promiſe negative, and therefore null. In Buſineſs tranſacted between thoſe who live in a State of natural Liberty, a *Condition, naturally impoſſible*, plainly ſhews, that the whole Thing is void: Only with this Difference, that to deny ſome Requeſts in ſuch a round about Way, by making the Anſwer run affirmatively, but clogg'd with an impoſſible Condition, is uſually reckon'd an Affront; when a plain Denial might not have been taken ill [b]. And, as to this Point, if the Condition be morally impoſſible, the Caſe is the ſame,

[a] *Si conditio poteſtativa.* [b] When *Militiades* in *Corn. Nep.* c. 1, 2. ſummon'd the *Lemnians* to yield up their Iſland to the *Athenian* Power, they anſwer'd, in a ſcoffing Manner, that they'd then ſurrender, when the North Wind, which was directly contrary to *Athens*, brought him from Home to *Lemnos*. The General took no more Notice, but, ſailing by them, poſſeſſed himſelf of *Cherſoneſus*, and there fix'd his Seat and Command; and ſoon after return'd to *Lemnos*, whither the North Wind directly carried him, and claim'd their Promiſe; his Home, as he ſaid, not being now *Athens*, but *Cherſoneſus*. The Inhabitants not daring to make Reſiſtance, fairly quitted the Iſland; but it was, *non dicto, ſed ſecunda fortuna adverſariorum capta*, not won by the Force of their Words and Engagement, but by the good Fortune of their Enemy. Such was the Promiſe of *Leſdeguier*, made to *Mapheo Barberini* about profeſſing the *Romiſh* Religion, which we find in *Gramond.* Hiſt. *Gal.* l. 16. p. 708.

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[1] Probably (ſays Mr. *Thomaſius*, in his *Inſtit. Juriſpr. Divin.* l. 2. c. 7. §. 112.) *Grotius* had ſome Example in his Mind, as this, *I'll marry you, if I commence Doctor.* From whence Mr. *Thomaſius* would have us underſtand, that as it requires no great Stock of Knowledge to commence Doctor in an Univerſity; a young Man, who promiſes Marriage on that Condition, may eaſily keep his Word.

[2] The Author ſays here, the other Contractor, (*Si per alterum ſtet, quo minus conditio impleatur*). But the Law, to which he refers us, ſhews, that 'tis badly expreſſed thro' Inadvertence. This is the Fact: A Man buys a Library, upon Condition that the Magiſtrates ſhall ſell him a Place to ſet it in; but he is the Cauſe himſelf why they deny him a Place. Hereupon the Lawyers determine juſtly, that the Seller may force him to take away the Books, and pay the Price agreed on, becauſe the Buyer prevented the Performance of the Condition. *Labeo ſcribit, Si mihi Bibliothecam ita vendideris, ſi Decuriones Campani locum mihi vendidiſſent, in quo eam ponerem, & per me ſtet, quo minus id à Campanis impetrem, non eſſe dubitandum, quin præſcriptis verbis agi poſſit. Ego etiam ex vendito agi poſſe puto, quaſi impleta conditione, quum per emptorem ſtat, quo minus impleatur*, Digeſt. l. 18. tit. 1. *De contrahend. Emptione*, &c. leg. 50. Further, it is certain, and it is a Maxim of the *Roman* Law, That if either of the two Contractors hinder the Accompliſhment of the Condition, which 'tis their Intereſt not to be fulfilled, whether the Thing depend upon his own Fact, or not, the Condition is accounted as fulfilled to the Prejudice of the Failer. The *Roman* Lawyers extend this to all the Caſes wherein he, whoſe Intereſt it is that the Condition ſhould fail, is himſelf the Cauſe of that Failure: As if a Teſtator had given Liberty to a Slave, or left a Legacy, or appointed an Heir, upon a Condition, whoſe Accompliſhment depended on the Teſtamentary or legal Heir, while the Perſons nominated in the Will neglected nothing in their Power. *In Jure civili receptum eſt, quoties per eum, cujus intereſt conditionem non impleri, fiat, quo minus impleatur, perinde haberi, ac ſi conditio impleta fuiſſet, quod ad Libertatem, & Legata, & ad Hæredem inſtitutiones perducitur; quibus exemplis ſtipulationes quoque committuntur, cum per promiſſorem factum eſſet, quo minus ſtipulator conditioni pareret*, Digeſt. l. 50. tit. 17. *De diverſ. Regul. Jur.* leg. 161. See, alſo, leg. 39. 174. of the ſame Title, and l. 35. tit. 1. *De Condit. & Dem.* leg. 24. where we muſt read with *Hotman, Obſerv.* 4. 28. *Cujus intereſt conditionem NON impleri.* See *Jac. Godefroi* on the Law cited in the Title, *de diverſis Reg. Jur.* As to *arbitrary* Conditions, they impoſe a Neceſſity of doing a Thing, or they forbid it. In the firſt Caſe, either there is a Time fix'd, and then we muſt judge from Circumſtances, if he, who has preſcribed the Condition, ſuppoſes any Thing which determines ſome ſet Time for its Accompliſhment, or if he ſuppoſes it may be fulfilled at any Time. If, for Inſtance, the Condition be, That a Perſon is forbid to game, or to frequent the Tavern, it ſhould happen, either at the End of the Time, during which he promiſed to abſtain from theſe Things; or if it ſhould happen, when there was no longer Danger of his doing them, that is, if he ſhould die in the Interim.

[3] Impoſſible Conditions are not, properly ſpeaking, true Conditions: For they neither ſuſpend an Engagement, nor diſannul or change an Agreement which is already valid. For they either cauſe the Promiſe to be abſolute from the Beginning, or cancel the Engagement forthwith, or hinder it from being form'd afterward. Before we defined a Condition, we have diſtinguiſhed the different Significations. *Titius Obſervat.* 237. Further, the Clauſe, which contains an impoſſible Condition, is either affirmative or negative. Our Author ſpeaks only of the firſt Sort: As for the other, 'tis evident that it renders an Engagement abſolute; as if we promiſe a Thing to any one, on Condition that he will catch the Moon in his Teeth, or commit Parricide. See the ſame Mr. *Titius Obſerv.* 239. We may, alſo, find ſeveral Things about Conditions in general in Mr. *Thomaſius*'s Diſcourſe, *De Filios ſub conditione ſi ſe filium probaverit, hærede, inſtituto*, and principally Chap. 2. It is the 10th in thoſe printed at *Leipſick*. The *Roman* Lawyers decide thus, with regard to Conditions naturally impoſſible. *At ſi ita ſtipulatur*, Si digito cœlum non adtigero, dare ſpondes? *purè facta intelligitur, ideoque ſtatim peti poteſt.* Inſtit. *de inutil. ſtipulat.* §. 11. But, on the contrary, they affirm, That a Condition morally impoſſible, tho' negative, annuls the Engagement. As for Example, If any Man has promiſed another ſomething on Condition he commits no Theft or Murder. *Si ob maleficium*, ne fiat, *promiſſum ſit, nulla eſt obligatio ex hac conventione.* Digeſt. lib. 2. tit. 14. *De Pactis*, leg. 7. §. 3. The Reaſon of this is, That the Law ſuppoſes that Men ſhould abſtain from Evil thro' a Principle of Virtue, and Regard for Juſtice, and not from any View or Hope of Reward. Nothing, however, hinders us (to conſider the Matter in itſelf) from believing ſuch a Promiſe valid. But there is no Occaſion to conſider it as abſolute. The Reader may judge, from what I have ſaid above, §. 4. of *arbitrary Conditions.*

[4] *Sub impoſſibili Conditione factam ſtipulationem conſtat inutilem eſſe*, Digeſt. l. 44. tit. 7. *De Obligat. & Action.* leg. 1. §. 11. *Non ſolum ſtipulationes —— ſed etiam cæteri quoque contractus, veluti emptiones, locationes —— quia in ea re, quæ ex duorum pluriumve conſenſu agitur, omnium voluntas ſpectetur, quorum proculdubio in hujuſmodi actu, talis cogitatio eſt, ut nihil agi exiſtiment appoſita ea conditione, quam ſciunt eſſe impoſſibilem*, Ibid. leg. 31. See, alſo, the *Inſtitutes*, l. 3. tit. 20. *de inutil. ſtipul.* §. 11.

as if it were naturally ſo. Should the other Party accept of this vile Condition [1], and actually fulfil it, how far he may then claim the Performance of the Promiſe [2], is eaſily to be gather'd from the preceding Chapter, §. 8.

In Commonwealths, Proviſion may be made by civil Ordinances, that in a Promiſe utter'd under a Condition naturally impoſſible, eſpecially if the Party, to whom it is directed, knows not that it is impoſſible, the Condition ſhall be null, and the Man reſcued from the Cheat and Deluſion. As for thoſe Pacts and Promiſes, to which vicious Conditions are annex'd [3], the Laws of all Countries moſt wiſely declare them void, leſt the Contracts of private Men ſhould tend to the Subverſion of the publick Puniſhment. And thus the *Roman* Laws diſannul'd all impoſſible, vile, or jeſting Conditions inſerted in *Wills* [4]; becauſe it was thought moſt abſurdly unreaſonable, that Men in a Buſineſs ſo very ſerious and grave, ſhould be put upon with trifling and impertinent Clauſes [a].

VI. If, in Promiſes, Mention be made of a certain Place, without Mention of a certain Time, it is taken for granted, that ſo much Time ſhall be allow'd for performing the Promiſe, as will ſerve to bring a Man conveniently into the Place of Action [5].

VII. But in Caſe a limited Time be expreſly added, this will cauſe, that the Obligation ſhall not exert its Effect till ſuch a Space be expired, or that no Demand ſhall be made before the appointed Day [6].

VIII. It may be convenient, in the laſt Place, to examine in what Points theſe *conditional Promiſes* differ from *Pacts*, and in what Points they may be reſembled to them. In this, then, both thoſe Kinds of Engagements ſeem to agree, that as the former do not bind, unleſs the Condition be made good; ſo the latter, when one Party forbears to perform the Articles, do, by no Means, oblige the other. And hence it is a common Remark, that the particular Heads of a Contract are in the Manner of ſo many *Conditions*. Some, indeed, make one Exception to our Rule about *Facts*; that in Caſe any Article ſhould be added, not for Uſe, but, perhaps, out of Gallantry or Compliment, the Non-performance of ſuch a Matter ſhall not releaſe the other Party from his Obligation. But as little Indulgence as poſſible ſhould be granted to this Exception; as well leſt Men ſhould abuſe it, by applying it to the principal Articles, as becauſe it is not to be preſumed, that Perſons would clog a ſerious Covenant with Clauſes impertinent and unneceſſary. *Gramond.* Hiſt. *Gall.* l. xvi. obſerves of the ſecret Articles of Marriage between *Charles* the Firſt, when Prince of *Wales*, and *Henrietta* of *Bourbon*, that they were added by the moſt *Chriſtian* King in Compliment to the Court of *Rome*; neither Party imagining that they were intended to be kept.

Promiſes, under a *poteſtative* or *arbitrary Condition*, in this agree with *Pacts*, that in both a Man muſt perform ſomewhat on his Side, before he claim the Promiſe or Bargain of the other Party: But in this they differ, that in the former the Perſon promiſing does not think it much his Intereſt, whether the Thing be perform'd, or no; at leaſt he does not intend to oblige the other Party to a Compliance, but leaves him to uſe his own Pleaſure. But in *Pacts*, as the Reaſon, why I have undertaken any Performance, is the Proſpect of ſomewhat to be done for me by the other Perſon; ſo if he fail in his Part, I am not only releaſed at preſent from mine, but I may oblige him by Force to ſtand to the Agreement.

[a] Thus *Eumolpus*'s Will runs in *Petronius*, "Let all thoſe, to whom I have given Legacies, beſides my Children, receive "them upon theſe Terms and Conditions, That they cut my Body in Pieces, and eat it amongſt them before the People." Of the ſame Kind is *Tireſias*'s merry Story in *Horace*, l. 2. ſ. 5, 84, *&c.*

Me Scene, quod dicam, factum eſt. Anus improba Thebis
Ex Teſtamento ſic eſt elata: Cadaver
Unctum oleo largo nudis humeris tulit Hæres:
Scilicet elabi ſi poſſet mortua: Credo
Quod nimium inſtiterat viventi.——

Which Place the Scholiaſt thus interprets, "The old Gentlewoman order'd by Will, that her officious Heir ſhould carry her Body "naked, well oil'd, upon his Shoulders to the Grave, with this pleaſant Thought, That ſhe might at leaſt ſlip from him now ſhe "was dead, tho' he had ſtuck ſo cloſe to her during her Life, that ſhe could never before eſcape his Importunity." See more on this Point in the *Civilians*, in *Lib.* 7. tit. 8. *D. de uſu & habit.*

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[1] *Generaliter novimus turpes ſtipulationes nullius eſſe momenti, veluti ſi quis homicidium vel ſacrilegium ſe facturum promittit*, Digeſt. l. 45. tit. 1. *De Verbor. Obligat.* leg. 26, 27. *Item quod Leges fieri prohibent — veluti ſi ſororem ſuam nupturam ſibi aliquis ſtipuletur*, Ibid. leg. 35. §. 1. The ſame Lawyers ſay, with Reaſon, that it hath Place, when, likewiſe, the Thing is afterward allowed by the Laws, becauſe we muſt judge of a Promiſe according to the Time it was made in. *Nullius momenti fore ſtipulationem, perinde ac ſi ea conditio, quæ natura impoſſibilis eſt, incerta eſſet, nec ad rem pertinet, quod jus mutari poteſt, & id quod nunc impoſſibile eſt, poſtea poſſibile fieri; non enim ſecundum futuri temporis jus, ſed ſecundum præſentis debet æſtimari ſtipulatio*, Ibid. leg. 137. §. 6. But to judge by the natural Rules of Interpretation, it is not always diſhoneſt to ſuppoſe ſuch a Caſe; and thus the Promiſe may be valid, when it is made under this Condition, That the Thing promiſed ſhall become permitted by the Laws.

[2] It is plainly not ſo. For every Promiſe, made on ſuch a Condition, is null in itſelf, inſomuch that none hath Right to require the Accompliſhment. 'Tis another Queſtion, Whether we may redemand a Thing actually given by virtue of a Promiſe made on ſuch a Condition already executed? See what is ſaid upon §. 6. of the foregoing Chapter.

[3] See the Text quoted in Note 3. and *Digeſt.* l. 7. tit. 8. *De uſu & habitat.* leg. 8. §. 1.

[4] That is to ſay, the Legacies, which the Teſtator makes to depend upon ſuch a Condition, were ſtill effectual, tho' the Condition has loſt its Effect. *Sub Impoſſibili Conditione vel alio modo factam inſtitutionem placet non vitiari*, Digeſt. l. 28. tit. 7. *De Conditionibus*, Inſtit. leg. 1. *Conditiones contra Edicta Imperatorum, aut contra Leges, aut quæ Legis vicem obtinent ſcriptæ, vel contra bonos mores, vel deriſorias, aut hujuſmodi, quas Prætores improbaverunt, pro non ſcriptis habentur, & perinde acſi conditio Hæredi, ſive Legato adjecta non eſſet, capitur Hæreditas Legatumve*, Ibid. leg. 14. See Mr. *Domat*'s Civil Laws in their natural Order, Part 2. l. 3. tit. 1. Sect. 8. § 18, *&c.* 'Tis eaſy to diſcern the Reaſons of the Difference, as to Validity, which the Laws make here between Promiſes and Agreements made between Men when they are alive, under an impoſſible, or diſhoneſt Condition, and the Diſpoſitions of a Teſtator attended with the like Condition. In the firſt, the Condition is ſettled by the Conſent of both Parties, who knowing it, and both ſeeing the Impoſſibility and Baſeneſs of it, muſt be preſumed to treat together in Jeſt; ſo that if either of them depend upon the Agreement, ſo much the worſe for him, ſince he knew how the Thing paſs'd, and could have no Reaſon to look upon it as a ſerious Action. See leg. 31. of the *Digeſts*, *De Obligat. & Action.* quoted before. But 'tis not ſo with the laſt Kind of Wills. The Legatee has no Knowledge of the Teſtator's Deviſes, and is ſo far from looking upon his Declaration as a Trifle, that he believes he acted ſeriouſly in his laſt Moments, although the Condition affix'd ſeem'd to inſinuate the contrary.

[5] *Loca etiam inſeri ſtipulationi ſolent, veluti CARTHAGINI DARE SPONDES? Quæ ſtipulatio licet pure fieri videatur, tamen reipſa habet tempus adjectum, quo promiſſor utatur ad pecuniam Carthagini dandam*, Inſtit. l. 3. tit. 16. *De Verbor. Obligat.* § 5. See *Digeſt.* l. 45. tit. 1. leg. 73. *in princip.* & leg. 137. §. 2. As, alſo, Mr. *Domat*'s Civil Laws, *&c.* Part I. l. 1. tit. 1. Sect. 3. §. 6. And *Digeſt. Tit. De eo quod certo loco dari oportet*, l. 13. tit. 4.

[6] *Id autem quod in diem ſtipulamur, ſtatim quidem deletur, ſed peti prius quam dies venerit, non poteſt*, Inſtit l. 3. tit. 16. §. 2. See Mr. *Domat* in the Place above-cited, §. 7. Farther, it is certain, that whenever there is no Time fix'd for the Performing of the Thing engaged, it is preſumed the Promiſe ſhould be forthwith executed, and no more Delay ſuffer'd than the Nature of the Thing requires. *Quotiens autem in obligationibus dies non ponitur, præſenti die pecunia debetur, niſi locus adjectus ſpatium temporis inveniat, quo illo poſſit pervenire*, Digeſt. l. 45. tit. 1. *De Obligat. & Action.* leg. 41. §. 1. See, alſo, *Lib.* 50. tit. 17. *De diverſ. Reg. Jur.* leg. 14. And *Seneca*'s *Excerpt. Controv.* 3, 5. *ſub fin.*

[7] See what is ſaid *Lib.* 5. *c.* 11. §. 9.

CHAP. IX.

CHAP. IX.

Of the Miniſters or Agents concern'd in contracting Obligations for other Men.

The CONTENTS of every Paragraph of the ninth Chapter.

I. *We may promiſe and bargain for another.*
II. *How many Sorts of Commiſſions there are?*
III. *How, if a Deputy die before he has finiſh'd?*
IV. *The Difference between a Deputy and Mediator.*
V. *How far another may accept a Promiſe for us.*
VI. *Heirs cannot accept a Promiſe for a Perſon dead.*
VII. *Of a Burden annex'd to a Promiſe.*
VIII. *The general Diviſion of Pacts or Bargains.*

I. IT is very uſual for us to confirm and ratify Pacts and Promiſes, not immediately by ourſelves, but by ſome Agent or Proxy. What Rules are to be obſerved in ſuch Proceedings, it is now our Buſineſs to explain. This then is certain, that a Man is *obliged*, not only when he makes known his Conſent to the Perſon towards whom the *Obligation* is directed, immediately from his own Mouth, but, alſo, when he ſignifies the ſame to another Man, whom he has impower'd to tranſact on his Behalf. The Agent, in ſuch an Affair, is to be look'd on as a Kind of *inſtrumental* Cauſe; inaſmuch as he not only does all by another's Authority [1], but, likewiſe, acquires no proper Right, brings no Obligation to himſelf, referring to the Perſon with whom he is appointed to treat; but obtains a Right only for the Perſon who has employ'd him, and to him, indeed, he ſtands under an Obligation to manage his Concerns with Honeſty and Faithfulneſs. For thoſe Actions of another produce an *Obligation*, or a *Right* in us, and are, conſequently, to be eſteem'd *ours*, for the performing of which we have inveſted the other Perſon with full Power, and have openly profeſs'd, that we will acknowledge them for our own. But before a third Man can treat to any Effect or Purpoſe with ſuch a Perſon, 'tis neceſſary he be well aſſured, that we have choſen and conſtituted him the Interpreter of our Will, and that we will account whatever he acts, as perform'd by ourſelves. On this Foundation depend moſt of the Rules of the *Roman* Law concerning Deputations againſt the [2] Maſters of Ships for the Facts of their Deputies againſt [3] Merchants, for the Tranſactions of their Factors, and againſt the [4] Maſter of a Family for the Deed of his Slave, or his Son.

II. Now we are wont to depute another to covenant in our Name, either by a general Commiſſion [5], impowering him to do whatever he thinks moſt convenient for our Affairs; or, by an expreſs and limited Form, preſcribing him both the Subject and the Manner of his proceeding. In the former Caſe, I ſtand obliged by whatſoever he has concluded about the Buſineſs in Hand, honeſtly, or *bona fide*. It is neceſſary to add this Reſtriction; for he cannot bind me by what he does treacherouſly, and with a knaviſh Deſign of circumventing and abuſing me; inaſmuch as when I conferr'd ſuch Authority upon him, I muſt be thought to have ſuppoſed his Integrity as an eſſential Condition. Nay, the acting *bona fide*, or uprightly and faithfully, implies this farther, that what the *Subſtitute* performs, ſhall not derogate from the Honour and Advantage of his *Principal*; at leaſt ſo far as the preſent Poſture of Things will bear. For to be ignorant of theſe Points is almoſt as groſs a Fault, as open Diſhoneſty [6]. The ſame muſt be ſaid of thoſe blank Papers with our Names ſubſcribed at the Bottom, which we often deliver to our Agents to be fill'd up and turn'd into Inſtruments of Obligation. Theſe ſhall not bind us at all, if any ſuch Matters be inſerted in them, as are diſagreeable to the Nature of the Affair given in Change, and ſuch as we cannot be preſumed to have conſented to [7].

We have a famous Inſtance of ſuch a Cheat in Blanks recorded by *Zonaras*, Tom. iii. and by *Glycas*, Tom. iii. in *Roman. Lacapen. circa princip.* The Patriarch *Trypho*, being accuſed of extreme Ignorance, and as one that was not ſo much as capable of writing, to confute the Cenſure, wrote down his Name in a fair Paper, before the Judges appointed. This Paper *Theophanes* of *Cæſarea* fill'd up with a formal Reſignation, and ſo brought it to the Emperor; who, as the Plot had been laid, took hence an Occaſion to eject the Patriarch. A *Latin* Poet, as our Author obſerves, ſharply reproves the Pope, who, by ſigning blank Papers, hath been the Cauſe of a thouſand Forgeries.

An pulchrum ſatis eſt, & ſummo Præſule dignum,
Impreſſas ſigno vacuas emittere chartas,
Quas poſſit lator variis inſcribere nugis,
Cum volet, & miſeris falſas affingere culpas?
Gunther. Ligurin. v. 656.

If I depute a Man with limited Orders, he cannot lay an *Obligation* on me beyond the Bounds of his Inſtructions.

If any Aſſent be ſent with a double Commiſſion, one *open*, to ſhew the Perſon with whom he is to

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[1] *Uſus autem procuratoris perquam neceſſarius eſt, ut qui rebus ſuis ipſi ſupereſſe, vel nolunt, vel non poſſunt, per alios poſſint, vel agere, vel convenire*, Digeſt. lib. 3. tit. 3. *De Procuratoribus*, leg. 1. §. 2. *Poteſt quis per alium, quod poteſt facere per ſeipſum*, Decretal. Lib. 6. *De Regul. Jur.* c. 68. *Qui facit per alium, eſt perinde ac ſi faciat per ſeipſum*, Ibid. c. 72.

[2] It is called, *Actio Exercitatoria*, which is treated of *Digeſt.* Lib. 14. tit. 1.

[3] *Actio Inſtitutoria*, ſee *Digeſt.* Lib. 14. tit. 3. *Code*, Lib. 4. tit. 25. And Mr. *Domat*'s Civil Laws, &c. Part 1. l. 1. tit. 16. Sect. 2, 3.

[4] See *Inſtit.* Lib. 4. tit. 7. *Quod cum eo qui in aliena poteſtate eſt, negotium geſtum eſſe dicitur*, and *Digeſt.* Lib. 15. tit. 4. *Quod juſſu.*

[5] *Procurator autem vel omnium rerum, vel unius rei eſſe poteſt*, Lib. 3. tit. 3. *De Procuratoribus*, §. 1.

[6] *A Procuratore dolum, & omnem culpam, non etiam improviſum caſum præſtandum eſſe, Juris auctoritate manifeſte declaratur*, *Code* Lib. 4. tit. 35. leg. 13. See, alſo, leg. 21. and upon this whole Matter, Mr. *Domat*'s Civil Laws, &c. Lib. 1. tit. 16. Sect. 1, &c.

[7] In fine, 'tis certain that a Man is bound by his own Hand, altho' he, to whom the Blank is committed, fills it up otherwiſe than he intended, provided there be no falſe Dealing between the third Perſon and him. This appears by the Example which Mr. *Hertius* brings, of a Man of Buſineſs, who being employ'd by his Maſter to borrow a thouſand Crowns, took up two thouſand upon his Blank Note; for here was no Fault in the Lender, but in him only who imprudently intruſted his Deputy. Add what I have ſaid afterwards, Lib. 5. cap. 4. §. 3.

tranſact,

tranſact, the other *ſecret*, preſcribing what Steps he ſhall take, and how far he ſhall proceed; it may be made a Queſtion, Whether the *Agent* ſhall oblige his *Principal*, if he exceed his private and ſecret Orders, yet ſo as to keep within his *open Commiſſion*, where the affirmative Side ought to be maintain'd [a]. For by my *own Inſtructions* I bind myſelf to the third Perſon, with whom the Contract is made, that I will ratify and make good what my Agent ſhall conclude on. And, by my *ſecret Orders*, I bind my Agent not to recede from ſuch poſitive Terms; in which Point if he tranſgreſs, he ſtands accountable to me for ſo much as I loſe by his Miſmanagement: But I am ſtill tied to perform to the third Perſon, what was thus granted in my Name. For otherwiſe, there could be no Manner of Safety in treating by Commiſſioners, it being ever to be fear'd, leſt their *ſecret Directions* ſhould differ from their *open Powers*; neither could there be a more ſpecious Pretence made uſe of to overthrow all Affairs tranſacted by Mediation, and to deceive and abuſe Men with vain Treaties [b]: But it muſt be obſerved, we ſuppoſe, here, as in the former Caſe, that the Agent, when he thus tranſgreſſes the Bounds of his private Inſtructions, did it not out of a diſhoneſt and treacherous Deſign [1].

III. If we make Uſe of a Deputy in tranſmitting a Promiſe to another Man, and the Perſon employ'd happen to die before he have declared our Propoſal to the other, or obtain'd his Aſſent, it is plain his Promiſe may be revoked [2]. For my expreſs Will, in this Caſe, was to contract an Obligation by the Words of this Perſon only, whom I intruſted with the Affair; and, therefore, although he may have declared his Meſſage to a third Man, whence it may come to the Ears of the Party to whom it was directed; yet this Way of communicating the Matter can lay no Tie upon my Conſcience. For it was neither my Deſign, in the leaſt, to render myſelf *obliged* by the Means of this third Perſon, nor is he ſo fully acquainted with my Will, as to give another any good Aſſurance of it. But the Caſe is otherwiſe as to a Bearer, whom I intruſt only with Letters of mine, expreſſing my Pleaſure to a Perſon at a Diſtance. Though the Bearer die before he reach the Perſon, and the Letters are deliver'd by another, yet this is no Hindrance to the Contracting of a firm Obligation. For here the Letters, and not the Bearer, are the inſtrumental Cauſe of the Engagement; and it ſignifies nothing to either of the Parties concern'd, by what Hands the *Deeds* were convey'd and preſented.

IV. On many other Accounts there is a great Difference, whether a Man act by my Deputation purely as a Meſſenger, and a Bearer of my Opinion and Pleaſure, or as an Agent and Mediator, with a Liberty of interpoſing his own Judgment in ſome Points of the Buſineſs. Which *Grotius* in l. ii. c. 11. ſ. 17. thus expreſſeth in other Words: *Whether the Perſon be pitch'd on to ſignify the Promiſe I make, or whether he be authorized to make the Promiſe himſelf.* In the former Caſe, if I revoke my Promiſe before it hath been accepted by the other Party, my Revocation ſhall ſtand good, although the Meſſenger, being unacquainted with it, ſhould go on in ſignifying my firſt Reſolution. But if a Man acts for another in the latter Way of Deputation, unleſs the Change of Mind be notified to him, it ſhall be void, and his *Principal* ſhall ſtand *obliged*, if he proceed to ſettle the Buſineſs [3], as he was at firſt commiſſion'd. For the *Principal*, when he choſe to offer his Promiſe by ſuch an Agent, lodg'd the *obliging Power* in his *Perſon*, and not in his *Pocket*; that is, he intended him not barely for the Meſſenger of his Purpoſe, but for one that ſhould employ his own Judgment, as well as his bodily Service in the Affair [4]. The ſame Diſtinction the *Civilians* apply to the Queſtion, Whether a Grant ſhould hold good, in Caſe the Donor die before it be accepted? Which they affirm, if the Perſon, deputed to carry the Grant, were of the former Kind, becauſe then nothing would be wanting on the Donor's Part. But they deny it, if the Agent was of the latter Sort; becauſe the Donor did not fully make the Grant, but only order'd it to be made; or had not yet actually offer'd the Thing, but only given Commands for its being offer'd. Yet ſee *Ziegler* on *Grotius*, lib. ii. c. 11. ſ. 17. where he delivers it as his Judgment, that the Donation may be accepted, in Caſe the Perſon deputed made Offer of it during the Donor's Life. But one would wonder how the other Party ſhould make any Stop or Delay at Acceptance, if the Donation be ſuppoſed to have been thus communicated. *Grotius* ſays, that the ſame Rule is to be followed in deciding the Controverſy, Whether a Perſon, thus acting by a Commiſſion, can bring an Action againſt the Heir of the *Principal*, or *Donor*, for Recovery of the Charges he hath been at ſince the Donor's Death, in executing his Orders [5]? In which Caſe, the

[a] See *Grot.* l. 2. c. 11. ſ. 12. [b] Vid. *Wicquefort*'s *Memoires touchant les Ambaſſadeurs*, p. 582, 583, 588.

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[1] That is to ſay, there was no Colluſion between him and the third Party, otherwiſe he is to make good the Damages and Intereſt of him whoſe Buſineſs he manages; but the Engagement itſelf is not leſs valid in reſpect to the other Contractor, by virtue of his known Orders, which are the Foundation of the Treaty, as I have hinted in the firſt Edition of this Work. Nevertheleſs, I have obſerved, that Mr. *Hertius* maintains the ſame Thing, and refers us to his Diſcourſe, *De Obligatione mandatis & mandatoris, contemplatu tertii*, §. 11. which is in Tom. 3. of his ſmall Tracts and Comments, printed in 1700.

[2] *Si adhuc integro mandato mors alterutrius intervenit*, i. e. *vel ejus qui mandaverit, vel illius qui mandatum ſuſceperit, ſolvitur mandatum*, Inſtit. Lib. 3. tit. 27. §. 10.

[3] The Lawyers apply this Law here, *Si mandaſſem tibi ut fundum emeres, poſtea ſcripſiſſem ne emeres, tu antequam ſcires me revocaſſe emiſſes, mandati tibi obligatus ero, ne damno afficiatur is qui ſuſcepit mandatum*, Digeſt. Lib. 17. tit. 1. *Mandati vel contra*, leg. 15. See, alſo, Lib. 1. tit. 18. *De Officio Præſidis*, leg. 17. *Clementin.* Lib. 1. tit. 4. Chap. *De Renunciatione*, and *Coſtalius* on Dig. Lib. 3. tit. 3. *De Procurat. & Defenſoribus*, leg. 65.

[4] Mr. *Thomaſius*, in his *Juriſprud. Divin.* Lib. 2. c. 7. §. 118. ſays, That we muſt diſtinguiſh ſeveral Caſes here, and examine chiefly, whether the Revocation of an Engagement be addreſſed to the Meſſenger, or to him to whom we are engaged by his Means? And further, whether the Revocation be ſent before the Promiſe was accepted? If the Revocation be addreſſed to the Meſſenger, and he, to whom he is to deliver his Commiſſion, has accepted the Promiſe before he knew of the Revocation, the Promiſer is obliged to make good his Engagements, whether he, who was obliged to let him know it, received the Countermand either before or after the Acceptation. And ſo all that can be done is this, if the Meſſenger has given it contrary to Order, he may be charged with an ill Management of his Commiſſion. But if the Revocation be addreſſed to him to whom our Engagements are made, and he has accepted the Promiſe before he received the Revocation, we muſt then obſerve, whether we had a Deſign to engage ourſelves in Caſe the Promiſe were once accepted, or we were only ſuppoſed to have Notice of an Acceptation? For it is clear, that we may revoke our Word by Means of the laſt Suppoſition. But if he, to whom we are engaged, has known our Revocation before he accepted our Promiſe, the Engagement is null, whether it be addreſſed to a third Perſon, or himſelf. For in this laſt Caſe there is a Fraud in reſpect of the latter. See Cap. 6. of this Book, §. 15.

[5] 'Tis a Rule of the Civil Law, That a Commiſſion ceaſes, when he, who gave it, dies before the Execution; and that although he has expreſly ordered his Proctor to do ſuch or ſuch a Thing after his Death, unleſs it be to build him a Tomb, or buy a Place

the Author of the Books to *Herennius*, l. ii. c. 13. informs us, that two *Roman* Judges gave a quite contrary Sentence.

V. As we may declare our Consent to an Engagement by an Agent or Minister, so it is a farther Question, Whether a third Person may accept, in our Behalf, a Promise made to us by another? And here the Dispute is not about those Persons whom we have commissioned to make Acceptance in our Name; for what we do by them, we are supposed to have done ourselves; and when we have intrusted a Matter to another Man's Pleasure, our Will and Consent is included in his. But the Doubt regards only those whom we have not in this Manner authorized. And here *Grotius*[a] observes, "That we ought to distinguish, "whether he, who makes us a Promise on Behalf "of a third Person, does address and bind himself "immediately to us, or whether he promises di-"rectly to the absent Party, and useth us only for "Witnesses of the Act;" that is, whether the Words run thus, *I promise you that I will give* Seius *such a Thing, and you are Witness of this my Resolution.* In the former Case, according to the natural Sense and Import of the Promise, so soon as I have accepted it, I acquire a Right of taking Care, that the Thing mentioned be transferr'd to the third Person, if he too will accept it; so that the Promiser, in the mean Time, cannot revoke his Engagement. Yet he, to whom the Promise was immediately directed, may remit it before the third Man has declared his Acceptance. The Promise then seems, on the Whole, to amount to this, *I will give* Seius *such a Thing, if you please.* And, consequently, it is in your Power and Choice, whether you will transfer the Promise on *Seius*, or whether, by refusing the Offer, you will hinder it from coming to him by your Means. And this is all you can do; for if I am absolutely resolved to confer the Kindness, I may perform it without your Mediation or Assistance. But if you declare your Approbation of the Proposal, I am not then at Liberty to repent, before the Matter hath been made known to *Seius*; and if he join his Acceptance to yours, the Promise shall, by the *Law of Nature*, be good and valid. Indeed, the *Roman* Laws declared all those *Stipulations* to be *null*[1], which were made for the Benefit of a third Man, without having a Penalty annexed to them. And the Reason they gave for their Judgment is this, That the original Design of inventing *Stipulations*, was to enable a Man to obtain somewhat for his own Advantage; whereas, if the Thing promised be to pass to a third Man, he, who obtains the Promise, does not serve his own Interest, nor is himself concern'd in the Gain. But if I make a *penal Stipulation*, that is, if I procure such an Engagement as this, *Unless you give* Seius *an hundred Pounds, you shall, by way of Punishment, pay me Fourscore*; I then acquire thus much *Right* at least, that if you do not make good the first Sum on my Friend's Account, I can demand the latter on my own. This Rule of the *Roman Courts* seems to have been introduced for the lessening the Number of *Suits*. For the Judge might well rebuke the Importunity of such a Complainant, who should give him and others a publick Trouble, without being himself concern'd or interested in the Affairs. And tho' it cannot, indeed, be said to be no Advantage to us, when, by our Means, we derive a Benefit on a third Person, in as much as we thereby oblige him to a grateful Sense of our Service; yet it was thought very improper to grant a Man an *Action* for the Recovery of a Thing in *another's Name*, which that *other* Party could not demand in *his own*; and, consequently, to give a Man the Privilege of purchasing the Friendship of a third Person at the Charges of a second.

But, in the other Case, when the Promise runs after this Manner, *I engage, or I declare before you, that I will give* Seius *such a Thing*, if you are not commission'd by *Seius* to accept the Offer[2], your Agreement to it will have no Force or Virtue; you neither acquire a Right for yourself, nor for *Seius*, who does not acknowledge your Act for his own. And, therefore, it signifies nothing, whether the Witness here yield his Consent to the Promise, or not, since it is not directed to his own proper Person. And the Promiser, in as much as *Seius* obtains no Right by the Witnesses Acceptance of the Proposal, may revoke it without Injury, tho' not always without a Breach of Constancy and Truth.

VI. It is farther certain, that if any Offer be made to a Person yet living, by Letter, Messen-

[a] Lib. 2. c. 11. §. 18.

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of Ground for that End. This Mr. *Noodt* has shewed very well, against the Opinion of the most famous Lawyers, in his *Observat.* Lib. 2. c. 1, 2, 3, 4. But this was founded upon the meer Niceties of the *Roman* Law, for if we consider the Thing according to the *Law of Nature*, we may decide it by other Principles. The whole Point consists in examining whether the Nature of the Thing, or the Circumstances, do probably make it appear, that he who gave the Commission intended it should be executed after his Death. For, in this Case, the Proctor ought to execute it, and all Persons concern'd ought to yield to it. We must, also, suppose that the Proctor knew of the Death of him who gave the Commission; for if he were ignorant of it, whatever he did, during that Time, is valid by the Civil Law, which here follows the Principles of Equity. *Nam mandatum solvitur morte* [*Mandatoris*] *si tamen per ignorantiam impletum est, competere actionem utilitatis causa dicitur*, Digest. Lib. 17. *Mandati vel contra*, leg. 6. §. 10. *princ.* See, also, the *Institutes*, Lib. 3. tit. 27. §. 10.

[1] The Words are, *Alteri stipulari —— nemo potest. Inventæ enim sunt hujusmodi stipulationes sive obligationes ad hoc, ut unusquisque adquirat sibi, quod sua interest. Cæterum si alii detur, nihil interest stipulatoris. Planè si quis velit hoc facere, pœnam stipulari conveniet, ut nisi sit ita factum, ut est comprehensum, committatur pœnæ stipulatio etiam ei, cui nihil interest. Pœnam enim cum stipulatur quis, non illud inspicitur, quid interfit ejus, sed quæ sit quantitas in conditione stipulationis. Ergo si quis ita stipuletur, Titio dari, nihil agit, sed si adjecerit pœnam, NISI DEDERIS TOT AUREOS DARE SPONDES? Tunc committitur stipulatio*, Institut. l. 3. tit. 20. *De inutil. stipulat.* §. 19.

[2] Mr. *Thomasius*, in his *Institut. Jurisprud. Divin.* lib. 2. c. 7. §. 119. observes, That we must carefully distinguish whether he, whom we take to witness, have any Interest, or no, that we give to a third what he accepts in his own Name, altho' without his Consent; a Distinction which the *Roman* Lawyers have not forgotten, and of which they alledge an Example of a Guardian, who making over the Management of the Estate of his Pupil to another, engaged, that he should manage his Affairs well; or of a Person who obliged himself to give such or such a Thing to his Commissioner; or of a Debtor, who engaged something for his Creditor, that he may not be obliged himself to pay, what he is engaged to give him, if he do not discharge to acquit himself of the Engagement in a certain Term, or to hinder him from selling a Thing engaged till a certain Time. For in this and like Cases, the Engagement is as valid as if the Promise had been directly made to him to whom we have promised. *Sed & si quis stipuletur alii, cum ejus interesset, placuit stipulationem valere. Nam si is, qui pupilli tutelam administrare cæperat, cesserit administrationem contutori suo, & stipuletur rem pupilli salvam fore, quoniam interest stipulatoris fieri, quod stipulatus est, cum obligatus futurus sit pupillo, si male res gesserit, tenet obligatio. Ergo & si quis Procuratori suo dari stipulatus sit, quod sua interest, ne forte vel pœna committatur, vel prædia distrahantur, quæ pignori data erant, valet stipulatio*, Instit. lib. 3. tit. 20. *De inutil. Stip.* §. 19. Therefore it was no Way necessary that Mr. *Thomasius* (*Instit. Jurispr. Div.* lib. 2. cap. 7. §. 119.) should censure our Author for having omitted this Distinction, because he manifestly supposes it.

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ger, or the like, and he happen to die before he has accepted of it, his Heirs cannot accept of it for him; and, conſequently, that ſuch a Promiſe may fairly be revoked. For the Promiſer ſeems plainly to have referr'd the Acceptance to the Choice of the deceaſed Party, not to his Heirs. Nor is he preſumed to have thought of this Accident, or to have been willing that his Promiſe ſhould ſtand good upon ſuch a Suppoſition. We are often inclined to make a Grant to a Perſon, to be afterwards by him transfer'd to his Heirs, which we are, by no Means, diſpoſed to give to his Heirs immediately; it being a very material Point to conſider on whom we beſtow our Favours [1].

VII. It may, in the laſt Place, be enquired, whether a Man can add a *Charge* or *Burthen* to his *Promiſe*, after the Words have been once delivered [a]? For that he may *before* annex what Conditions he pleaſeth, is true beyond Diſpute. This then may be done, ſo long as the Promiſe is not yet perfected by Acceptance, nor made irrecoverable, by the Plighting of Faith for his Performance. For the other Party, before he accepts of the Profer, can acquire no Right to it; and, therefore, in the mean Time, as the Promiſer may, if he thinks fit, utterly withdraw it, ſo he may load and clog it with new Conditions. But when a Grant is compleated by the Act of both Parties, no farther Terms can be annexed to it [2]. *Vid. Cod.* lib. iv. *De Donat. quæ ſub modo.*

'Twill be ask'd, What if the Burthen be added for the Sake and Benefit of a third Perſon; as ſuppoſe I ſay, *I'll give you ſuch a Sum of Money, provided you'll ingage to maintain* Seius *a Year at the Univerſity?* We anſwer, that he who binds himſelf under this Burthen, may recall it ſo long as *Seius* has not yet confirm'd the Promiſe by his Acceptance; before which it does not of *Right* belong to him.

VIII. The moſt general Diviſion that can be applied to *Pacts*, ſeems to be this, all of them create a *Right*, but in ſome that *Right* extends itſelf to the common Uſe of Mankind, in others it is limited to the particular Benefit of certain Perſons. For the Life of Men would have proved too plain and ſimple, had they not, to the Ordinances of Nature, added their own Inſtitutions; by Means of which their Proceedings were regulated, not only with more Convenience, but with more Comelineſs and Grace. Of this latter Kind, the Principal are [3], *Speech*, or *Diſcourſe*, the *Propriety*, and the *Value* of Things, together with *Sovereignty*, or Command; all which preſuppoſe ſome univerſal *Pacts*, *tacit* or *expreſs*, by virtue of which they have been tied up to certain *Forms* and Rules. And the Introducing and Settling of theſe Engagements was what Nature herſelf, ſuppoſing the Increaſe of Mankind to a great Number, directed and adviſed; as conducing, in the higheſt Degree, to the Peace, and to the Ornament of human Life. Having, therefore, finiſhed our Enquiries about Covenants in general, we will proceed to examine theſe Inſtitutions, to diſcover on what *Pacts* they are founded, and what Precepts of the *Law of Nature*, ſuch as we have already term'd *Hypothetical* or Conditional, ariſe from them.

[a] Vid. *Grot.* l. 2. c. 11. ſ. 19.

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[1] The Law is this, *Neratius conſultus, an quod beneficium dare ſe, quaſi viventi, Cæſar reſcripſerat, jam defuncto dediſſe exiſtimaretur? Reſpondit, non videri ſibi, principem, quod ei quem vivere exiſtimabat, conceſſiſſet, defuncto conceſſiſſe, quem tamen modum eſſe beneficii ſui vellet, ipſius æſtimationem eſſe*, Digeſt. l. 50. tit. 17. *De diverſ. Reg. Jur.* leg. 191. See upon this Caſe (which apparently relates to certain Articles of the *Julian* and *Pappian-poppean* Laws) the learned Treatiſe of Mr. *Heineccius*, publiſhed in 1726, Lib. 3. cap. 3. p. 387.

[2] The Words are, *Perfecta donatio conditiones poſtea non capit.*

[3] Mr. *Titius*, in his *Obſervat.* 241, reproves many Things here, of which I ſhall mention ſuch only as to me appear well grounded, *viz.* 1. All the Duties of Society, of which our Author treats hereafter, flow from thoſe three Generals, which I have ſpoken of above, Chap. 1. §. 1. and are only the Conſequences applied to divers Objects, which preſent themſelves in civil Life; Conſequences from whence reſult ſuch Maxims, which take Place either without ſuppoſing any other Thing than the Quality of a Man, or ſuppoſing ſome Deed or human Eſtabliſhment. So that the Eſtabliſhments of which our Author ſpeaks, compoſe the Duties of natural Law, as well abſolute as conditional. 2. All the Eſtabliſhments, of which our Author treats, are not founded upon an Agreement. The Introduction and Uſage of *Language* in general depends not upon any Agreement, either expreſs or tacit, if by Agreement we mean a Conſent obligatory in itſelf, and independent of any other Thing, as is ſuppoſed here. See what is ſaid, Chap. 1. of the following Book, §. 5. The Property of Goods is no more originally founded upon any Agreement, as ſhall be ſhewn, c. 4. of the ſame Book, §. 4.

BOOK IV.

BOOK IV.

CHAP. I.

Of SPEECH; *and the* OBLIGATION *which attends it.*

The CONTENTS of every Paragraph of the firſt Chapter.

I. *Of the Uſe of Speech.*
II. *Of the Diverſity of Signs.*
III. *Of the Origin of Speech.*
IV. *Words ſignify according to Impoſition.*
V. *Impoſition is attended with a Compact.*
VI. *This Compact is either general, or particular.*
VII. *Whence the Obligation of diſcovering our Mind to another.*
VIII. *What Truth is, and what a Lye.*
IX. *Every Untruth is not a Lye; and, therefore, not criminal.*
X. *Of the Right which is violated by Lying, and whence 'tis derived.*
XI. *How far Part of the Truth may be honeſtly concealed.*
XII. *Simulation in Things, how far lawful.*
XIII. *Of ambiguous Speech.*
XIV. *Of mental Reſervations.*
XV. *How far we may be allowed in ſpeaking falſely to Infants.*
XVI. *It is lawful to ſpeak what is falſe, for the Preſervation of others.*
XVII. *How far the Governors of States may be indulged in giving out falſe Reports.*
XVIII. *In what Manner it is lawful to deceive an ill-deſigning Curioſity.*
XIX. *It is lawful to ſpeak falſe to a profeſs'd Enemy.*
XX. *Whether a guilty Perſon arraign'd, may deny the Charge.*
XXI. *What the Advocates or Council may, in this reſpect, do for their Client.*

I. THAT Man was deſign'd by Nature for a Life of Society, this alone might be a ſufficient Argument, that he only, of all living Creatures, is endued with the Power of expreſſing his Mind to others by articulate Sounds: A Faculty, which, abſtracting from this ſocial Condition, we cannot conceive to be of any Uſe or Advantage to Mankind. 'Tis well obſerved by *Ariſtotle*[1], *Nature doth nothing in vain; and Man is the only Animal whom ſhe hath inveſted with the Privilege of Speech:* Not ſuch as conſiſts in the bare Repetition of borrow'd Sounds, like the Talk of Parrots, but ſuch as is join'd with a Senſe and Underſtanding of what the Words import. By Means of which one may be able to teach another; one may, in the moſt convenient Manner, command another, and the other apprehend his Commands; without which Aſſiſtance, there would ſcarce be any Shadow of Society, Peace, or Diſcipline, among Men; or, at beſt, ſuch only as would be in the higheſt Degree rude and unpoliſh'd. *For* (as the Philoſopher goes on) *Voice* (or a certain Kind of inarticulate Sound) *is no more than an Indication of Pleaſure or Pain, and is, therefore, to be found in other Animals: Nature having in them proceeded ſo far, as to give them a Senſe of what is agreeable or diſtaſteful, and an Ability of ſignifying, in ſome Sort, theſe Affections amongſt themſelves.* Whence it appears, that the Sounds, utter'd by Brutes, of whatſoever Kind, are determin'd by Nature, not by Cuſtom and Inſtitution, (like human Diſcourſe.) *But Speech was given to ſignify farther what was uſeful, or prejudicial; juſt, or unjuſt: It being the Prerogative and Property of Men, above their Fellow-Creatures, to have a Senſe of Good and Evil, of Juſtice and Injuſtice, and the like; ſince from their Society and Communication proceed the united Bodies of Families and Commonwealths*[a]. And ſince that Want and Weakneſs, which particular Men lye under, may, by the Aſſiſtance of others, be conveniently removed, and yet another cannot apply himſelf to my Aid, unleſs he firſt underſtand what I deſire; which he may do moſt readily by Means of ſome Signs and Tokens, and eſpecially by articulate Words; therefore, that the moſt uſeful Inſtrument of human Life may duly obtain its End, in uniting Men in Society; and leſt, by the Abuſe of Speech, Man ſhould be render'd leſs ſociable, than if he were dumb or ſilent, it muſt be ſuppoſed a Precept of the *Law of Nature, That no Man deceive another by thoſe Signs, which have been inſtituted to expreſs our Meaning and our Thoughts.*

II. Now to trace this Point from its firſt Head, we muſt underſtand, that the Nature and Ability of thoſe Objects, which affect our Senſes, is ſuch, as not only gives us Notice of their own Preſence or Approach, but, likewiſe, affords our Reaſon an Opportunity of attaining the Knowledge of other

[a] Add. *Iſocrat. ad Nicocl. paulo poſt princip. Plin.* N. H. l. xi. c. 51. That Power of explaining our Mind, which hath diſtinguiſhed us from the Beaſts, hath cauſed another Diſtinction between Man and Man, no leſs conſiderable than that between Man and Beaſt. *Quinctilian* is large on this Subject, ——— *Inſtitut. Orat.* l. 2. c. 16.

Sophocl. Oedip. Colon. p. 310. Edit. *H. Steph.*

'The wiſe Inventions which our Mind conceive,
Our Speech declares ———

Pliny (N. H. l. 7. c. 1.) expreſſeth the Neceſſity of Speech in a very ſmart Sentence, when he obſerves that, *Externus alieno non eſt hominis vice;* one Foreigner is not a Man to another. Add. *Garcilas de la Vega*, Comm. Reg. l. 7. c. 1.

[1] Οὐθὲν γὰρ, ὡς φάμεν, μάτην ἡ φύσις ποιεῖ, λόγον δὲ μόνον ἄνθρωπος ἔχει τῶν ζώων· ἡ μεν οὖν φωνὴ τῆς ἡδέως καὶ λυπηρῆς ἐστι σημεῖον, διὸ καὶ τοῖς ἄλλοις ὑπάρχει ζώοις· μέχρι γὰρ τούτου ἡ φύσις αὐτῶν ἐληλυθεν, ὥστε αἰσθάνεσθαι τῆς λυπηρῆς, καὶ τῆς ἡδέως, καὶ ταῦτα σημαίνειν ἀλλήλοις· ὁ δὲ λόγος ἐπὶ τῷ δηλῦν ἔστι τὸ συμφέρον, καὶ τὸ βλαβερον, ὥστε καὶ τὸ δίκαιον, καὶ τὸ ἄδικον· τοῦτο γὰρ πρὸς τὰ ἄλλα ζῶα τοῖς ἀνθρώποις ἴδιον, τὸ μόνον ἀγαθῆς τε καὶ κακῆς, καὶ δικαίου, καὶ ἀδικου, καὶ τῶν ἄλλων αἰσθεσιν ἔχειν· ἡ δὲ τούτων κοινωνία ποιεῖ οἰκίαν καὶ πόλιν. Ariſtot. Politic. l. 1. c. 2.

ger, or the like, and he happen to die before he has accepted of it, his Heirs cannot accept of it for him; and, conſequently, that ſuch a Promiſe may fairly be revoked. For the Promiſer ſeems plainly to have referr'd the Acceptance to the Choice of the deceaſed Party, not to his Heirs. Nor is he preſumed to have thought of this Accident, or to have been willing that his Promiſe ſhould ſtand good upon ſuch a Suppoſition. We are often inclined to make a Grant to a Perſon, to be afterwards by him transfer'd to his Heirs, which we are, by no Means, diſpoſed to give to his Heirs immediately; it being a very material Point to conſider on whom we beſtow our Favours [1].

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XVIII. *In what Manner it is lawful to deceive an ill-deſigning Curioſity.*
XIX. *It is lawful to ſpeak falſe to a profeſs'd Enemy.*
XX. *Whether a guilty Perſon arraign'd, may deny the Charge.*
XXI. *What the Advocates or Council may, in this reſpect, do for their Client.*

I. THAT Man was deſign'd by Nature for a Life of Society, this alone might be a ſufficient Argument, that he only, of all living Creatures, is endued with the Power of expreſſing his Mind to others by articulate Sounds: A Faculty, which, abſtracting from this ſocial Condition, we cannot conceive to be of any Uſe or Advantage to Mankind. 'Tis well obſerved by *Ariſtotle*[1], *Nature doth nothing in vain; and Man is the only Animal whom ſhe hath inveſted with the Privilege of Speech:* Not ſuch as conſiſts in the bare Repetition of borrow'd Sounds, like the Talk of Parrots, but ſuch as is join'd with a Senſe and Underſtanding of what the Words import. By Means of which one may be able to teach another; one may, in the moſt convenient Manner, command another, and the other apprehend his Commands; without which Aſſiſtance, there would ſcarce be any Shadow of Society, Peace, or Diſcipline, among Men; or, at beſt, ſuch only as would be in the higheſt Degree rude and unpoliſh'd. *For* (as the Philoſopher goes on) *Voice* (or a certain Kind of inarticulate Sound) *is no more than an Indication of Pleaſure or Pain, and is, therefore, to be found in other Animals: Nature having in them proceeded ſo far, as to give them a Senſe of what is agreeable or diſtaſteful, and an Ability of ſignifying, in ſome Sort, theſe Affections amongſt themſelves.* Whence it appears, that the Sounds, utter'd by Brutes, of whatſoever Kind, are determin'd by Nature, not by Cuſtom and Inſtitution, (like human Diſcourſe.) *But Speech was given to ſignify farther what was uſeful, or prejudicial; juſt, or unjuſt: It being the Prerogative and Property of Men, above their Fellow-Creatures, to have a Senſe of Good and Evil, of Juſtice and Injuſtice, and the like; ſince from their Society and Communication proceed the united Bodies of Families and Commonwealths*[a]. And ſince that Want and Weakneſs, which particular Men lye under, may, by the Aſſiſtance of others, be conveniently removed, and yet another cannot apply himſelf to my Aid, unleſs he firſt underſtand what I deſire; which he may do moſt readily by Means of ſome Signs and Tokens, and eſpecially by articulate Words; therefore, that the moſt uſeful Inſtrument of human Life may duly obtain its End, in uniting Men in Society; and leſt, by the Abuſe of Speech, Man ſhould be render'd leſs ſociable, than if he were dumb or ſilent, it muſt be ſuppoſed a Precept of the *Law of Nature, That no Man deceive another by thoſe Signs, which have been inſtituted to expreſs our Meaning and our Thoughts.*

II. Now to trace this Point from its firſt Head, we muſt underſtand, that the Nature and Ability of thoſe Objects, which affect our Senſes, is ſuch, as not only gives us Notice of their own Preſence or Approach, but, likewiſe, affords our Reaſon an Opportunity of attaining the Knowledge of other

[a] Add. *Iſocrat. ad Nicocl. paulo poſt princip.* *Plin.* N. H. l. xi. c. 51. That Power of explaining our Mind, which hath diſtinguiſhed us from the Beaſts, hath cauſed another Diſtinction between Man and Man, no leſs conſiderable than that between Man and Beaſt. *Quinctilian* is large on this Subject, ——— *Inſtitut. Orat.* l. 2. c. 16.

Sophocl. Oedip. Colon. p. 310. Edit. *H. Steph.*

The wiſe Inventions which our Mind conceive,
Our Speech declares ———

Pliny (N. H. l. 7. c. 1.) expreſſeth the Neceſſity of Speech in a very ſmart Sentence, when he obſerves that, *Externus alieno non eſt hominis vice*; one Foreigner is not a Man to another. Add. *Garcilas de la Vega*, Comm. Reg. l. 7. c. 1.

[1] Οὐθὲν γὰρ, ὡς φάμεν, μάτην ἡ φύσις ποιεῖ, λόγον δὲ μόνον ἄνθρωπος ἔχει τῶν ζώων· ἡ μεν οὖν φωνὴ τῦ ἡδέως καὶ λυπηρῦ ἐστι σημεῖον, διὸ καὶ τοῖς ἄλλοις ὑπάρχει ζώοις· μέχρι γὰρ τύτυ ἡ φυσις αὐτῶν ἐληλυθεν, ὥστε αἰσθάνεσθαι τῦ λυπηρῦ, καὶ τῦ ἡδέως, καὶ ταῦτα σημαίνειν ἀλλήλοις· ὁ δὲ λόγος ἐπὶ τῷ δηλῶν ἔστι τὸ συμφέρον, καὶ τὸ βλαβερον, ὥστε καὶ τὸ δίκαιον, καὶ τὸ ἄδικον· τυτυ γὰρ πρὸς τὰ ἄλλα ζῶα τοῖς ἀνθρωποις ἴδιον, τὸ μόνον ἀγαθῦ τε καὶ κακῦ, καὶ δικαίυ, καὶ ἀδικῦ, καὶ τῶν ἄλλων αἴσθεσιν ἔχειν· ἡ δὲ τυτων κοινωνία ποιεῖ οἰκίαν καὶ πόλιν. Ariſtot. Politic. l. 1. c. 2.

Things. And this either becauſe there is a natural Alliance and Connexion between thoſe Objects and the Things with which they thus bring us acquainted; or becauſe Beings, endued with Senſe and Underſtanding, have, without this natural Relation, fix'd ſuch Notions upon them, as to make them capable of repreſenting continually the Images of certain Things to the Mind. Hence ariſeth the Diſtinction of *Signs* into thoſe which are natural, and thoſe which owe their Force and Validity to Cuſtom and Compact. Of the former Kind, we are, on every Side, ſupplied with Inſtances from the Frame of Nature; as the Day-break is the Sign of the Sun's riſing quickly after, Smoak is the Sign of Fire; and the like. By Compact, Men have impoſed the Uſe and Power of *Signifying*, on certain Things, Actions, and Motions, and, above all, on *Words*, or articulate Sounds form'd by the Tongue, and afterwards reduced into Letters: And all theſe are found to be in Uſe either with ſome certain Perſons, or with the greateſt Part of Mankind, or, in general, with all the World. Under the firſt of theſe Claſſes may be ranked the Light-houſes and nightly Fires on the Coaſts, for the Direction of Veſſels: By the Abuſe of which, *Nauplius* of old is reported to have driven the *Grecians*, in a Tempeſt, upon the Rock of *Caphareus*, to revenge the Death of his Son *Palamedes* [a]. As, likewiſe, thoſe other Marks ſet up to guide Ships by Day, and to point out the Rocks and Quickſands, together with the *Mercuries*, pointing Hands, and other Conveniences for Information of Land-travellers. And thus, heretofore, the *Perſians*, by lighting Fires all along on the Tops of their Hills[1], uſed in a very little Time to ſpread ſome Reports or Alarms thro' every Part of the Kingdom [b]. An infinite Variety of theſe Signs are met with in Commonwealths, employ'd for the Acquainting the Subjects with ſome particular Matters. To which Head belong Clocks, Bells, Spears ſet up at Auctions, Buſhes, Signs before Houſes, and the like. In War, the Sound of Trumpet, Beat of Drum, Diſcharge of Cannons, Waving of Colours, *&c.* And ſo too, certain Geſtures and Motions have been taken up amongſt moſt People to denote ſuch or ſuch Intentions of the Mind: To go out of the Way, to riſe up, to bow, to kiſs the Hand, are Signs of Honour and Reſpect with the greateſt Part of the World. To uncover the Head, in the Ceremony of Saluting, or to pluck off the Shoes in ſome Places, is interpreted as a Mark of Honour, in others of Contempt. It is in ſome Countries look'd on as reproachful to point with the Finger, to bend the Noſe, to bid *a Fig for one* (*fare le fica* [2], as the *Italians* call it) with many the like Motions. To take by the Beard is, in ſome Nations, the higheſt Affront, with others it paſſes for a Token of Veneration; as with the *Tartars*, with ſome of the *Indians*, and, as ſome think, with the ancient *Gauls* [c]. 'Tis, likewiſe, a common Practice to expreſs, by ſome Geſture, our Deſire of performing ſuch an Action as would require that particular Motion of the Body, by which, in ſtrange Countries, we, after a Sort, ſupply our Ignorance of the Language. To affirm a Thing by gently bending our Head; to deny by throwing it on our Shoulders; to refuſe by turning our Back, are Cuſtoms almoſt univerſally received. As for our pointing out a certain Thing or Place by ſtretching our Hand or Finger towards it, this, perhaps, ought to be reckoned amongſt the natural, rather than amongſt the arbitrary Signs. What Diſcoveries may be made by Nods, Winks, Motions of the Fingers, or of the Feet, when particular Men have once agreed on thoſe Ways of Intelligence, is vulgarly known, and need not be farther inſiſted upon in our preſent Deſign [d]. *Lucian* [e] tells us of a famous Artiſt in *Nero*'s Court, who expreſs'd the Amour of *Mars* and *Venus* as well by Dancing, as he could have done by Narration; whom, for this Reaſon, a certain barbarous Prince begg'd of the Emperor for an Interpreter. And the Sieur *De Sancy*, the *French* Ambaſſador at the *Ottoman* Court, gives an Account of two *Mutes* whom he ſaw there, one by Nation a *Turk*, the other a *Perſian*, who, by reaſon of their uſing different Signs and Motions, could not underſtand each other; till at length a third *Mute* was found out, who was able to perform an Interpreter's Part between the two former.

III. But that which we are chiefly concern'd about in our preſent Enquiries, is Speech or Diſcourſe, the moſt common and the moſt uſeful Sign amongſt Men, and introduced for the Sake of communicating Notions and Thoughts. Of the Riſe of which *Diodorus Siculus*, Lib. i. p. 8. Edit. *Rhodom.* thro' his Ignorance of the true Origin of Mankind, gives this fabulous Account: *The firſt Men, who were born into the World, led a ſavage Life, without Culture or Refinement; going out in Herds to the Paſtures, and feeding on the moſt juicy Plants, and the Fruits which plain Nature produced. Being infeſted with the Wild Beaſts, Uſe taught them to aſſiſt each other, and Fear compel'd them into Society; by Means of which, they grew acquainted, by Degrees, with the Reſemblance of their Shapes and Features. And having, from confuſed Voice, and without Signification, arrived, by ſlow Attempts, to pronounce articulate Words, ſhewing every Thing by Signs, that they had Occaſion to obſerve, and to communicate; they, at length, gain'd Ability to inform one another of all Matters by Diſcourſe. But, inaſmuch as there were many of theſe Communities eſtabliſhed in different Parts of the World, and every Man join'd his Words together meerly as it happen'd, all did not ſpeak in the ſame Manner. And hence aroſe the Number and the Variety*

[a] Add. l. 10. *D. de incend. ruin. naufrag.* & Lib. 47. tit. 9.

[b] Which Cuſtom is deſcribed by *Barclay* in his *Argenis*, l. 1. Add. *Polyb.* l. 10. c. 39, *&c.* Περὶ πυρσείας καὶ φρυκτωρίας, *Cabon.* Epiſt. 812. Edit. *Græv. Jul. African.* κεστῶν, l. 2. c. penult. See, likewiſe, *Ferdinand Pinto*, c. 61. where he ſpeaks of the Horn, which, amongſt the *Japoneze*, every Man keeps in his Houſe for a Signal upon Occaſion.

[c] From that Place in *Livy*, l. 5. c. 41.

[d] *Æſchyl.* Agamem.

Σὺ δ' ἀντὶ φωνῆς φράζε κορβάνῳ χερὶ.

——— *Barbarian*, let your *Hand*
Supply your Want of Speech ———

[e] *De Saltatione*, Tom. I. p. 807. Edit. *Amſterd.*

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[1] *Apuleius* informs us from *Ariſtotle, de Mundo*, cap. 6. *Ex eo numero erant excuſores diurni, atque nocturni exploratores, & nec non ſpecularum incenſores aſſidui. Tum horum per vices incenſæ faces, ex omnibus regni ſublimibus locis, in uno die Imperatori ſignificabant quod erat ſcito opus.* By this Method the *Perſian* Court was conſtantly informed of whatever happen'd extraordinary in the remotest Parts of the Kingdom. The ſame Thing is at preſent practiſed in *Switzerland*, to give Notice of the Approach of an Enemy, and put the *Militia* under Arms.

[2] The Dictionaries will explain the Senſe and Origin of this Expreſſion; for which the Reader may conſult *Albert Krantz*, *Saxo.* Lib. 6. cap. 36. where the Hiſtory of it is related.

[3] Mr. *Hertius* gives us ſeveral Inſtances of Motions eſtabliſhed to ſignify certain Things. But theſe more properly belong to an hiſtorical Treatiſe, than a Work of this Nature.

of all Sorts of Languages. *Lucretius*'s Deſcription is exactly of a Piece with this, *l.* v. *v.* 1027, *&c.*

At varios linguæ ſonitus natura ſubegit
Mittere, & utilitas expreſſit nomina rerum;
Non alia longè ratione, atque ipſa videtur
Protrahere ad geſtum pueros infantia linguæ,
Cum facit ut digito, quæ ſint præſentia, monſtrent.
Proinde putare aliquem tum nomina diſtribuiſſe
Rebus, & inde homines didiciſſe vocabula prima,
Deſippere eſt: nam cur hic poſſet cuncta notare
Vocibus, & varios ſonitus emittere linguæ,
Tempore eodem alii facere id non poſſe putentur?
Præterea, ſi non alii quoque vocibus uſi
Inter ſe fuerant, unde inſita notities eſt
Utilitatis? & unde data eſt huic prima poteſtas,
Quid vellet, facere ut ſcirent, animoque viderent?
Cogere item plures unus, victoſque domare
Non poterat, rerum ut perdiſcere nomina vellent;
Nec ratione docere ulla ſuadereque ſurdis,
Quid ſit opus facto: faciles neque enim paterentur;
Nec ratione ulla ſibi ferrent amplius aures
Vocis inaudito ſonitus obtundere fruſtra.

Kind *Nature* Power of framing *Sounds* affords
To Man, and then *Convenience* taught us *Words*;
As *Infants* now, for want of *Words* deviſe
Expreſſive Signs, they ſpeak with Hands and Eyes,
Their *ſpeaking* hand the Want of Words ſupplies.
That *One* the various *Names of Things* contriv'd,
And that from *him* their Knowledge *all* deriv'd,
'Tis fond to think: For how could that Man tell
The Names of Things, or liſp a Syllable,
And not another Man perform't as well?
Beſides, if others us'd not *Words* as ſoon,
How was their *Uſe*, and how their *Profit* known?
Or how could he inſtruct the other's Mind,
How make them underſtand what was deſign'd?
For *his*, being *ſingle*, neither Force nor Wit,
Could conquer *many* Men, nor would they ſubmit
To learn his *Words*, and practiſe what was fit.
How *he* perſuade *thoſe* ſo unfit to hear?
Or how could *ſavage they* with Patience bear
Strange *Sounds* and *Words* ſtill *rattling* in their Ear?

Mr. *Creech.*

He concludes, that ſince brute Creatures could, by different Sounds, expreſs different Motions of their Mind,

—— *Quid in hac mirabile tantoperè eſt re,*
Si genus humanum, cui vox & lingua vigeret,
Pro vario ſenſu varias res voce notarent[a]*?*

—— Since *Organs* fit, ſince *Voice* and *Tongue*,
By *Nature*'s Gift beſtow'd to *them* belong;
What Wonder is it then, that *Men* ſhould frame,
And give each *different* Thing a *different* Name?

Mr. *Creech.*

The chief Deſign of *Lucretius*, in theſe Arguments, ſeems to have been to oppoſe *Cratylus* in *Plato*[1], who celebrates the firſt Inventor of Words, and the firſt Author of the Names of Things, as a Perſon of the higheſt Wiſdom: An Opinion which we ſhall examine by and by. And, indeed, thoſe who believed the firſt Mortals to have crawl'd out of the Earth,

Mutum & turpe pecus,

A Dumb and Dirty Heard,

could not eaſily hit on any other Account. For 'tis manifeſt, that no Languages are born with a Man, but all are learnt by Uſe and Experience. Whence it comes to paſs, that Perſons born deaf are, likewiſe, dumb. And 'tis look'd on almoſt as a Prodigy, when ſuch an one is taught to ſpeak; as hath been, in the preſent Age, perform'd on the Brother of *Velaſco*, Conſtable of *Caſtile*; who, having been deaf from his Cradle, was made to ſpeak, to write, to read, and to underſtand Authors. And an Inſtance of the like wonderful Operation was not long ſince given by Dr. *Wallis* at *Oxford*. Nor doth it ſeem probable, that ſome one Man, in the Beginning, ſhould have framed a whole Language, with an exact Contexture of Words, and a juſt Agreement and Conformity to the Things which they were to repreſent. But 'tis the general Opinion of *Chriſtians*, founded on the Authority of the Holy Scriptures, that the firſt Language was by Almighty God immediately infuſed[b] into the original Pair, which their Children eaſily learnt, by the Uſe and Cuſtom of Hearing. And that, as for the Diverſity of Tongues, this was miraculouſly[2] produced by the Confuſion at *Babel*. Yet ſome have doubted, whether even the Language, which *Adam* ſpoke, was, at firſt, compleatly full and perfect, and rich enough to expreſs all Manner of Conceptions; inaſmuch as the Scripture directly mentions only the Names which he ſet on living Creatures. As it is certainly true of moſt Tongues, that they were, at firſt, very poor, and very plain, but were enrich'd in Time with Copiouſneſs and Elegance: As, likewiſe, that they have, in a long Courſe of Years, undergone very ſignal Alterations; and that, from their Corruption and Confuſion, many new ones have, within the Compaſs of a few Ages, ſprung up in the World[c].

IV. But this is moſt clear and evident, That the Power of Signifying determinately, thus or thus, that is, of raiſing ſuch certain Ideas in our Mind, doth not belong to Words by Nature, but ariſeth purely from the Pleaſure and the Impoſition of Men[3]; for otherwiſe, no Reaſon could be given, why different Words ſhould, in different Languages, be applied to expreſs the ſame Thing. Which is, likewiſe, true concerning the different Forms and Characters of Letters. St. *Auſtin* (*de Doctrin. Chriſtian.* l. ii. c. 24.) hath made this Obſervation on the Point; "That one Letter faſhion'd like a "Croſs (X) imports one Thing amongſt the "*Greeks*, and another amongſt the *Latins*; not "by the Appointment of Nature, but by the "Pleaſure and Conſent of Men, in fixing ſuch "different

[a] Add. *Diog. Laert.* l. 10. p. 754. Edit. *Steph. Vitruv.* Architect. l. 2. c. 1.

[b] The Scripture plainly ſuppoſes this, which is not more difficult to conceive than the Miracle wrought upon the Apoſtles the Day of *Pentecoſt*, when they ſuddenly ſpoke Languages they had never learn'd. See Mr. *Vander Meulen* upon *Grotius*, Tom. III. p. 15. and Mr. *Le Clerc* upon *Gen.* ii. 23. and his Remarks upon the Critical Hiſtory of Father *Simon*, p. 422. See, likewiſe, the Preliminary Diſſertation upon the Bible, by Mr. *Dupin*, p. 122. Edit. *Holl.*

[c] Comp. *Hobbes*'s *Leviathan*, c. 4.

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[1] Who in this, as well as other Things, follow'd the Notions of *Pythagoras*. See *Cicero. Tuſc. Diſputat.* Lib. 1. cap. 25. with Mr. *Davies*'s Note

[2] Others affirm, with greater Probability, that the *Confuſion of Tongues*, ſpoken of *Gen.* xi. was nothing elſe but the Diſſention which aroſe amongſt Men, and was the Cauſe of their Diſperſion. The *Hebrew* Style will bear this Interpretation, which has been maintained by Mr. *Le Clerc*, in the Book juſt cited, p. 431; and by M. *Vitringa*, Profeſſor at *Franeker*, in his *Obſerv. Sacra*; and by M. *Simon.*

[3] See the Art of ſpeaking by *P. de Lami*, Lib. 1. c. 14.

" different Significations; and a Perſon, who un-
" derſtands both Languages, when he would ex-
" preſs his Mind in Writing to a *Grecian*, uſeth
" this Character differently from what he doth
" when he writes to a *Roman*. Thus too the
" Word *Beta*, under one and the ſame Sound, in
" *Greek*, is the Name of a Letter, in *Latin* the
" Name of a Pot-herb: And when I ſay, *Lege*,
" theſe two Syllables are, by thoſe different People,
" underſtood in different Senſes. See the *Art of*
" *Speaking*, by Father *Lami*, B. I. c. 14. Edit. *Amſt.* 1699. Nor is it any Preſumption to the contrary, that we believe *Adam* [1] to have given Names to the Creatures, not as it fell out by Chance, but with the higheſt Reaſon and Deſign; ſuch as were taken from the peculiar Nature of the Things, and fully and accurately expreſs'd their diſtinguiſhing Properties, ſo as that, upon the firſt Sound of the Words, the Nature of each Thing might be underſtood; as *Philo* the *Jew* reports [a]. For although we ſhould grant, that the Names ſet on Animals, and ſome other Things (for no Man can eaſily prove this of *all*) were ſuch as denoted their Genius and Diſpoſition, or their principal Affection; yet thoſe very *Primitives*, whence theſe Names were derived, ſignify merely at Pleaſure. For Inſtance, though *Adam* gave this Reaſon for the Name of *Eve*, *Becauſe ſhe was the Mother of all living*; yet, that the Word *hava* ſhould import *to live*, is abſolutely owing to Impoſition: And though, in all Languages, Things allied by Nature, are uſually allied in Name, there being obſerved, in moſt Words of this Kind, ſome Conformity of Structure, and which the Grammarians term *Analogy*; yet this is by no Means conſtant and regular, many Words having very particular Ways and Methods of Variation; and even this *Analogy* itſelf, inaſmuch as it conſiſts in a certain Inflexion and Combination of Words, is itſelf eſtabliſh'd by human Appointment. This is the Judgment of *Quinctilian* himſelf [b]; *We muſt remember* [2], ſays he, *that the Rule and Method of* Analogy *cannot univerſally be drawn, ſince in many Places it is apparently inconſiſtent with itſelf: For* Analogy *was not, at the firſt Production of Mankind, ſent down immediately from Heaven, to teach them the due Form of Speech; but was invented after they had accuſtom'd themſelves to Diſcourſe, and had obſerved the particular Cadences of every Word. It is not, therefore, built upon Reaſon, but Example; nor is it the Law, but the Experiment or Remark of Speaking*; Analogy *being, indeed, the Effect of nothing but Cuſtom.*

In *Plato*'s *Cratylus* [3], the Opinion of the Perſon whoſe Name the Dialogue bears, is to this Purpoſe; that *every individual Being includes, in its Nature, the true Reaſon of its Name*, which is vain and abſurd: *And that that is not properly the Name of a Thing, by which Men agree to call it, by uttering ſuch or ſuch a Portion of their Voice*, which, in one Senſe, may be admitted for true; that is, when ſome particular Men, contrary to common Uſe, impoſe odd Names on Things for the Deception of others: As in the Caſe of Jugglers, Strowlers, and Gypſies; with regard to which, *feign'd Names* are oppoſed to *true*; being fix'd on Perſons, or Things, contrary to the publick Impoſition; *but there is one and the ſame true Reaſon of Names, innate alike to the* Greeks *and* Barbarians; which Aſſertion is, likewiſe, falſe. *Hermogenes*, in the ſame Dialogue, thus delivers his Opinion on the other Side; *I can never be perſuaded that there is any other Rule or Standard for the Names of Things, than Compact or Conſent: 'Tis my Judgment, that the Name which a Man fixeth on any Thing, whatever it be, is true and proper; and that if he afterwards alter that Name for another, the laſt is no leſs true and right than the former; as 'tis uſual with us to change the Names of our Servants*, (which will hold good, provided no Prejudice be hence done to the common Agreement) *for nothing naturally hath ſuch or ſuch an Appellation, but derives it purely from the Law and Cuſtom of Speaking.* What *Socrates* diſputes on the Side of *Cratylus*, doth by no means turn the Cauſe; thus, for Inſtance, when he ſays it is an Abſurdity, *If I ſhould give the Name of a Horſe to what we commonly call a Man, it would follow, that the ſame Thing might be truly ſtiled, A Horſe and a Man.* It may be anſwer'd, in ſhort, that Words of publick Uſe derive all their Force from publick Impoſition, which private Perſons ought not, to its Prejudice, to contradict; as we ſhall ſhew more at large hereafter. Again, that Argument of his is no better than a Fallacy; *If a whole Propoſition may be falſe, therefore a Part of it, as ſuppoſe the Noun, or Name of a Thing, may be, likewiſe, falſe.* For a ſingle Word is not capable of that Falſity, which we ſometimes diſcover in entire Propoſitions. The long Diſcourſe he afterwards makes about the Propriety of Terms, will only hold in ſome Derivatives, but not in Primitives. And ſince the ſame Things are, in different Countries, expreſs'd by different Words, it, likewiſe, frequently happens, that Words, which ſignify the ſame Thing,

[a] This Opinion is ill founded, as Mr. *Le Clerc* makes it appear in his Notes upon *Gen.* ii. 19. See *Malbranche*'s Search after Truth, p. 387. [b] *Inſtit. Orat.* l. 1. c. 6.

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[1] This is the Opinion of *Philo* the *Jew*, in the Creation of the World. For Mr. *Hertius* quotes another Paſſage here very unfitly, where he treats of the Ability of the *Seventy's* rendering the original *Hebrew* into *Greek*, as *Philo* affirms, who ſays, that they have found the moſt proper Words to expreſs the Senſe of the Law of *Moſes*, Καὶ ἔτοι συντρέχοντα τοῖς πραγμασιν ὀνόματα ἐξεῦρον. From which laſt Word Mr. *Hertius* might have obſerved, that he ſpeaks of more than one Perſon, and that it ought not to be tranſlated *adinvenit*, *he* found out, but *they*, ſeeing the Sequel of the Diſcourſe cannot otherwiſe be clear. The Paſſage is in the Life of *Moſes*, Lib. 2. Several of the *Rabbins*, and moſt of the Chriſtian Interpreters follow *Philo*'s Opinion; but nothing worſe grounded. See Mr. *Le Clerc* on *Gen.* ii. 19. and *F. Malbranche* in his Enquiries after Truth, p. 387.

[2] The *Latin* of *Quinctilian* is this, *Sed meminerimus, non per omnia duci analogiæ poſſe rationem, cùm & ſibi ipſa plurimis in locis repugnet —— Non enim cùm primùm fingerentur homines, Analogia demiſſa cælo formam loquendi dedit, ſed inventa eſt, poſtquam loquebantur, & notatum in ſermoni, quid quoque modo caderet, itaque non ratione utitur, ſed exemplo; nec lex eſt loquendi, ſed obſervatio, ut ipſam Analogiam nulla alia res fecerit, quam conſuetudo.* Inſtit. Orat. *Lib.* 1. *cap.* 6. But here *demiſſa* is falſely printed for *dimiſſa*, which is, doubtleſs, a Fault in the Printing, though it is not ſet down among the *Errata*.

[3] Our Author gives himſelf Liberty in theſe four firſt Paragraphs of this Chapter, to enlarge upon Things very evident in themſelves, and well known; and, therefore, ought rather to be ſuppoſed than proved in a Work of this Nature; and here is, particularly in this Place, a long Confutation of ſome Arguments, which are met with in one of *Plato*'s Dialogues. I would willingly have left it quite out, but not daring to aſſume that Power, have thought it ſufficient to let the Reader know, that it is an entire Digreſſion. Mr. *Wollaſton* thinks, (in his *Religion of Nature delineated*, p. 12.) that there is Reaſon to doubt, whether *Plato* meant any more than, *that certain Words are more natural or more proper than others to expreſs certain Things.*

Plato's Words are, Ὀνόματος ὀρθότητα εἶναι ἑκάστῳ τῶν ὄντων φύσει πεφυκυῖαν, καὶ οὐ τοῦτο εἶναι ὄνομα, ὃ, τι ἂν τινες ξυνθέμενοι καλῶσι, τῆς αὐτῶν φωνῆς μόριον ἐπιφθεγγόμενοι. ἀλλὰ ὀρθότητά τινα ὀνομάτων πεφυκέναι, καὶ Ἕλλησι καὶ βαρβάροις τὴν αὐτὴν ἅπασι. Hertius: Οὐ δύναμαι πεισθῆναι, ὡς ἄλλη τις ἐστὶν ὀρθότης ὀνόματος, ἢ συνθήκη, καὶ ὁμολογία, ὁ γὰρ φύσει ἑκάστῳ πεφυκέναι ὄνομα οὐδὲν οὐδαμοῦ νόμῳ καὶ ἔθει τῶν ἰδισάντων, καὶ καλούντων.

h[illegible] *Etymology* utterly distinct. Thus Θεὸς the *Greek* Name for *God*, is derived from Θέειν, *to run*; because the Stars, which are perpetually *running* their Course, were look'd on as Gods by the Ancients: But what Affinity is there in the *Latin* Tongue between *Deus* and *Curro*? So Man is, in *Greek*, term'd ἄνθρωπος, *quasi* ἀναθρῶν ἃ ὄπωπε, from *considering* or *contemplating the Objects which he beholds*. But must we, therefore, say, that *homo*, in *Latin*, comes from *contemplatio*? The Soul, in *Greek*, is named ψυχὴ, from ἀναψύχειν, *to cool or refresh*: But is *Refrigeratio*, in *Latin*, for this Reason, the Theme of *Anima*? And the same may be shewn in any other Instances. In short, however diligent any Person may be in tracing Etymologies, and assigning the Reasons of Words; yet, when he hath gone as high as he can, to the primitive and simple Terms, he will be forced to acknowledge, that they are purely owing to Imposition [a]. What can be more ridiculous than that of *Socrates*, when, in the Disputation of which we have been speaking, he is required to give a Reason for the Words πῦρ and ὕδωρ, he can say nothing else, but that they owe their Original to the *Barbarians*? Indeed, he himself confesseth, that there can be no farther Questions or Answers, about Reasons and Derivations, when we are once arrived at the *first Element of both*. Though he afterwards is very ingenious to no Purpose, in tracing out the Reasons even of primitive Words: And yet, after all, when he hath argued so long, in all Appearance, for *Cratylus*'s Opinion, he, at last, fairly doubts on the whole Matter.

Sosipater Charisius [1] [b] the Grammarian, thus discourseth out of *Varro*, *The* Latin *Tongue is made up of Nature, Analogy, Custom, and Authority. The Nature of Verbs and Nouns is immutable, and delivers to us neither less nor more than what is received. Thus, if a Man should say* scrimbo *instead of* scribo, *he would be convinced, not by the Power and Virtue of Analogy, but by the very Constitution of Nature* [c]. But we must confess ourselves at a Loss to find out this Necessity of Nature, unless it be said, that the *Latin* Tongue, having in it an extraordinary Sweetness, wonderfully agreeable to the Ear, it must hence come to pass, that we reject, at the first Hearing, any harsh and untunable Conjunction of Letters in that Language [d]. *Arnobius* [2] [e] speaks excellently to this Point: *No Way of Speaking*, says he, *is by Nature either true and right, or false and improper: For what natural Reason can be given, or what Law, in the general Constitution of the World, that we should say*, hic paries, *and* hæc sella? *Since neither do those Things admit of different Sexes, so as to be distinguished by the Masculine and Feminine Genders; nor can the most learned Critick inform me of the original Reason and Meaning of these Terms*, hic *and* hæc; *or why the first should be applied to the Male, and the second to the Female Sex. All this proceeds from the arbitrary Appointment of Mankind.*

Grotius [f] rightly rejects the Opinion of those who make this to be the Difference between *Things* and *Words*, that the latter are naturally the Signs of our Thoughts, the former not. Indeed, if the Meaning of the Assertion be no more than this, that Words were instituted for no other End, but to be the Signs of our Conceptions, and that, therefore, their whole Nature and Essence consists in their Power of Signifying; whereas when *Things* are used for Signs, this is merely extrinsical and accidental to them, we ought then by all Means to admit it as true. But if it be intended in this Sense, that the Power of signifying such or such a particular Matter inheres naturally in Words, but not in Things, the Position is false and groundless. And, on the contrary, it is true, that Words naturally, and without respect to human Imposition, signify nothing at all, unless it be some such confused and inarticulate Sound as we make use of in Sorrow, or in Laughter, which ought rather to be called *Noise*, than *Speech*. If the said Notion be thus explain'd, that such is the Nature of Man, above all other Animals, that he can signify to others the Conceptions of his Mind, and that Words were invented to be the Instruments of Communication, then the Assertion is true, but not compleat: For it should be added, that these Discoveries are conveyed, not by Words alone, but by Nods and other Motions. As we find several dumb Persons who are able to express their inward Conceptions after a very surprizing and artificial Manner. Hence, in the *Roman* Law [g], those who have not the Gift of Speech, are yet supposed to say thus or thus, *By that Striving and Straining which they use, and that Sound and inarticulate Voice which is utter'd by them.* And 'tis a Rule in the same Law [h], That dumb Persons may contract Matrimony by *mutual Consent, without Words*; that is, it shall be sufficient if they express their Agreement by dumb Signs. Nay, *Pliny* [i] tells us of some Nations of *Ethiopia*, who had no other Speech among them, besides these Gestures and Motions of the Body [k].

To the same Head belong those Marks and Characters which do not denote Voices or Words, but immediately the very Things themselves. And this, either upon Account of some Agreeableness which they bear to the Things represented, as in most of the *Egyptian Hieroglyphicks*; or because the Imposition of Men hath invested them with such a Power, as in the *Chinese* Characters, by which they express entire Notions and Sentences.

It may not be inconvenient to remark somewhat concerning that Kind of Imposition, by which such a peculiar or proper Name is affix'd to Persons, Places, and some other Things; the Design of which is, that one Man, one Place, one City or

[a] To this we may add the Remark of *Quinctilian*, Instit. Orat. l. 1. c. 6. p. 64. Edit. *Lugd. Bat.* Shall it be affirm'd, likewise, that Man took his Name of *Homo*, because he was *humo natus*, born of the Earth? As if all Animals had not the same Original! Or, as if those primitive Mortals first set a Name upon the Earth, and then upon themselves! [b] *Institut. Grammat.* l. 1. *ex Varrone.* [c] We meet with the same in *Diomedes*, l. 2. [d] Vid. *Huart.* Tryal of Wits, c. 11. The Reason alledged by *P. Nigidius*, to prove, that Words signify according to Nature, in *Aul. Gell.* l. 10. c. 4. is altogether vain and frivolous. [e] Lib. 1. *adverss. gent.* p. 45. Edit. *Paris.* 1605. [f] Lib. 3. c. 1. s. 8. [g] Lib. 33. tit. 13. *D. de Supell leg.* 7. [h] Cap. 25. X. *de Sponsal.* [i] N. H. l. 6. c. 30. [k] Add. *Quinctilian*, l. 11. c. 3. *Instit. Orat.* Of the Marks or Signs used by the *Peruvians* under their *Yncas*, see *Garcilas de la Vega*, l. 6. c. 9.

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[1] His Words are, *Latinus sermo constat natura, analogia, consuetudine, authoritate; natura verborum nominumque immutabilis est, nec quicquam aut plus aut minus tradidit nobis, quam quod accepit. Nam si quis dicat scrimbo, pro eo quod est scribo, non analogiæ virtute, sed naturæ ipsius constitutione convincitur.*

[2] *Arnobius*'s Words are, *Nullus sermo natura est integer, vitiosus similiter nullus. Quænam enim est ratio naturalis, aut in mundi constitutionibus Lex scripta, ut hic Paries dicatur, & hæc Sella? Cum neque sexus habeant fœmininis generibus, masculinisque discretos, neque quisquam docere doctissimus me possit ipsum hic & hæc quid sint, aut cur ex his unum sexum virilem designet, fœmininis generibus id quod sequitur applicetur. Humana ista sunt placita.*

Country,

Country, may be diſtinguiſhed from another; and that by theſe Marks there may be a mutual Underſtanding between Men, in determining their Words or Actions. Now as the proper Terms of other Things follow the Manner of appellative, or common Nouns, ſo, with regard to the proper Names of Men, it is to be obſerved, that the Power of impoſing them uſually belongs to thoſe who have others under their Authority and Government. Thus Parents are want to give Names to their Children, Maſters to their Slaves and Vaſſels, and Princes to thoſe of their Subjects, on whom they confer any ſignal Honour. In Caſe this Office be omitted by thoſe Superiors who have ſuch a Right to perform it, or in Caſe many have been inveſted with the ſame Title, it ſhall be lawful for every Perſon to take upon himſelf ſome Term and Note of Diſtinction: But as no Man ought to aſſume another Name [1], when by ſuch an Act of his, the general End of impoſing Names may be intercepted and hindred; or when, upon this Alteration, any Damage or Prejudice, or any probable Danger and Suſpicion of it, is likely to accrue to another Perſon; ſo neither ought any Man to hide or diſſemble his true Name; unleſs in ſuch a Caſe, when, by this Concealment, we do not prejudice the Rights of others, and yet procure ſome Advantage to ourſelves, or effect our Deliverance from Loſs or Danger, according to thoſe Rules which we ſhall hereafter deliver about the Obligation to ſpeak Truth. Add. *Valer. Max.* l. ix. c. *ult.* and l. vii. c. 3. n. 8, 9. See the Oration of *M. Anton. Majoragius* on the ſame Subject, and *Caſaubon* ad *Baron.* Exercitat. XIII. n. 13.

V. As all Signs, except thoſe which we call *natural*, denote ſome determinate Thing by virtue of human Impoſition, ſo this Impoſition is attended with a certain Agreement, Conſent, or Compact, tacit or expreſs; from the Force of which [2] there ariſeth a Neceſſity of applying ſuch a Sign to ſuch a particular Thing, and to none elſe. The like Covenant muſt be ſuppoſed in relation to all thoſe *Things* which we uſe for *Signs*, whatever Account we follow of the Origin of human Speech. For although we conceive the primitive Languages to have been immediately infuſed into Men, yet, ſince each Perſon ſeparately enjoy'd his Power of Diſcourſe, and could uſe it freely as he pleaſed, by applying any Words to any Things; this Faculty would not have obtain'd its proper End and Uſe, unleſs an Agreement had paſs'd between Men, that each Party ſhould exerciſe their Talent in the ſame uniform Manner, and conſtantly expreſs the ſame Things by the ſame Words [3]. For ſince he, who is placed in a State of natural Liberty, doth not hold his Powers at the Beck and Controul of others, but hath the Privilege of uſing them as his own Judgment ſhall direct, another Perſon would have no Manner of Right to require of me, that I ſhould apply my Powers in ſuch a particular Way [4], and no otherwiſe, ſo as to enable him to apprehend my Thoughts and Intentions, unleſs we had before ſettled this Point by ſome Pact between us: The full Extent and Force of which Pact is this, that altho' Signs do not inform us of the Minds of others by an infallible, but only by a probable Certainty, Men being naturally capable of Diſſimulation and Diſguiſe. (To this Purpoſe the Saying of *Archidamus* in *Plutarch*, Apophth. *Lacon.* p. 219. B. Edit. *Wech.* is obſervable: *A Sheep always uſeth the ſame Tone* [5]; *but a Man hath the Art of varying his Expreſſion and Addreſs, till he carries his Deſign.* *Moſchus* Idyll. i. v. 8, 9. Κακαὶ φρένες, &c.

——— The fouleſt Heart, the faireſt Tongue:
His Mouth belies his Mind ———).

Yet that which any Perſon hath expreſs'd by theſe Signs, ſhall be preſumed to be his ſerious Purpoſe. And, therefore, as to Matters of *Right*, the Effect ſhall follow the Conſent of the Party, as by Signs declared; though, perhaps, his inward Thoughts and Reſolutions were really different from theſe outward Indications [a]; for otherwiſe the Uſe and Deſign of ſuch general Marks would be utterly fruſtrated. But the mutual Communication of good Offices amongſt Men could not be exerciſed, unleſs they had ſome certain Information of the Wants and Wiſhes of each other; and ſince the Condition of human Nature would not allow this to be conveyed in any other Way than by Signs ſtriking upon the Senſes; therefore the Uſe of thoſe Signs was by ſome ſettled Compact to be ratified and circumſcribed, that every Perſon might clearly apprehend what Service or Aſſiſtance was deſired of him by others [6].

[a] Add. *Grot.* l. 2. c. 4. ſ. 3.

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1 Nor Sirname, which may have the ſame Effect: For both of them are forbidden by the *Roman* Law, under Pain of ſuffering the ſame Puniſhment, as they who are found guilty of Fraud. *Falſi nominis vel cognominis adſeveratio pœna falſi coercetur*, Dig. l. 48. tit. 10. *De Legg Cornelia de falſis*, &c. Leg. 13 *princ.* See the Notes of *Dion. Gothofred.* on it. As, alſo, *Julius Paulus*, *Recept. Sentent.* Lib. 5. tit. 25. *num.* 11. with the Notes of *Cujas* and of M. *Schulting*, and *Peter Pithou* on the *Collatio Legg. Moſaicar.* and *Roman.* tit. 7. §. 7.

2 It is more probable, that the Signification of Words is ſettled by a bare Conſent, where there is no Obligation to conſider it in itſelf. For, 1. Men never met together to agree upon the preciſe Signification of Words, or Rules of Speech. It came to paſs inſenſibly, and without any Reflection; neither was there any tacit Agreement properly ſo called. We may every Day diſcern new Words, Expreſſions, and Turns of Speech to come into Uſe, which put a new Senſe upon the Terms already received. And how comes it to paſs that they are practiſed by others? No Man pretends to lay any Obligation upon them, farther than as they ſerve to convey the Truth from one to another in Converſation. 2. If the Signification of Words were ſettled by any obligatory Agreement, either expreſs or tacit, the leaſt Change, contrary to common Uſage, would be criminal, though no Man received any Damage by it, which none will dare to maintain, and which is daily confuted by our uſual Practice, which all muſt own, and which, on the contrary, ſerves marvelouſly to ſet off and enrich all Languages. This is very nearly what Mr. *Titius* ſays, *Obſerv.* 245.

3 This proves well enough the Neceſſity of a bare Conſtitution, but not of an obligatory Conſent. The Obligation, which reſpects the Uſe of a Word, depends upon other Principles, as will appear from what is ſaid, §. 7, *&c.* both in the Text and Notes. Whenever we are obliged to ſpeak and manifeſt our Thoughts clearly, we ought to follow the common Uſage, and chooſe the moſt ſuitable Terms, becauſe there is no other Way of acquitting ourſelves of our Duty to others: But in any other Caſe we may put a different Senſe upon Words, which is not uſed, and ſpeak in Terms clear contrary to what we think, which could not be done, if there were any Agreement, either open or tacit, which accompanied the Inſtitution of Language.

4 It is in the Latin, *the ſame Faculties* or *Powers*. But good Reaſoning, and what the Author adds, that their Thoughts may be underſtood by that Means, ſhew, that he would, or ought, at leaſt, to have placed that Word at the End of the Sentence, which he ſpeaks at the Beginning, of the Faculties of Men in general, altho', in my Opinion, he expreſſes himſelf utfitly in all the Editions.

5 The *Greek* is, Πρόβατον μὲν ἀεὶ τὴν αὐτὴν φθέγγεται φωνὴν, ἄνθρωπος δὲ πολλὰς, καὶ ποικίλας, ἕως ἂν τὸ δύξαν ἐπιτελίσῃ.

6 On this Occaſion we may obſerve, by the bye, that we find the People of *Cuma* obtaining Leave to uſe the *Latin* Tongue in common Talk, and to have their Sales proclaimed in it, after their humble Petition for this Privilege, *Liv.* l. 40. c. 42, Tho' generally the *Romans* appeared to have been very ambitious of ſpreading their own Language, without being ſolicited to that Purpoſe. Vid. *Valer. Max.* l. 2. c. 2. ſ. 2.

VI. This

VI. This Compact and Agreement, about the Uſe of Signs, and eſpecially of Words, is either *general*, or *ſpecial*. The former is ſuppoſed to paſs between Men who ſpeak the ſame Language, engaging them to expreſs particular Things, and principally thoſe which belong to daily Intercourſe and Commerce, by ſuch certain Words as the Uſe of the preſent Times will approve and authorize: For 'tis this Uſe,

Quem penes arbitrium eſt & jus & norma loquendi,

And at the Will of which,

Multa renaſcentur quæ jam cecidere, cadentque
Quæ nunc ſunt in honore vocabula ——

Uſe may revive the obſoleteſt Words,
And baniſh thoſe that now are moſt in Vogue;
Uſe is the Judge, the Law, and Rule of Speech.
My Lord *Roſcommon* [a].

There are, ſays *Sextus Empiricus* [b] [1], *and were, and ever will be, various Alterations and Revolutions of Words; for the Age is ſtill delighted with Change; and not more in Plants and Animals, than in Speech.* And the ſame Author [c] hath this admirable Remark to the ſame Purpoſe [d]: *As in a City or Country, he who is contented to take the Money that commonly paſſeth, may live under that Government, and buy and ſell, drive Bargains, and trade without Moleſtation or Hindrance; but he who will not comply with the Coin ordinarily current, but frames a new Kind according to his own Fancy, and offers it in Payment, is manifeſtly out of his Senſes; ſo in Life, he who will not follow the common Speech, (like the common Coin) when eſtabliſhed by Uſe and Cuſtom, but invents a new Language peculiar to himſelf, is not many Degrees removed from a Madman.* Indeed, that ſuch a Compact is abſolutely neceſſary, appears from hence; that Men could receive no Manner of Uſe or Benefit from Speech, unleſs the Parties ſpeaking were mutually underſtood. *We are all deaf*, ſays *Tully* [e], *in thoſe Languages with which we are not acquainted.* And ſo [e] *Ovid* complains in his Baniſhment,

Barbarus hic ego ſum, quia non intelligor ulli,

Not underſtood, I'm a *Barbarian* here.

We may obſerve farther, that as moſt Tongues are varied by Dialects, ſo it often happens, that Words of the ſame Tongue have, in different Places, different Significations. The Meaning and Importance therefore of ſuch Words ſhall be determined by the Cuſtom of the Place where the Buſineſs is tranſacted; unleſs it ſhall appear that the Stranger hath not yet agreed to quit his own native Phraſe, to conform to the Idiom of the other Party. And thus too there are ſeveral Words, which, in ſome Places and Times, are look'd on as ſcandalous and reproachful, in others not. Of this the Name of *Tyrant* is a known Inſtance. In the ſame Manner, the Term of *Barbarian*, which the *Greeks* and *Romans* held to be ſo diſgraceful, the *Gothic* King *Theodoric* frequently applies to his own Nation. And in *the Law of the* Burgundians, *Barbari* is very often the Style which thoſe People beſtow on themſelves. It is here, likewiſe, worthy to be conſider'd, that moſt Terms of Speech, beſides their principal, have a Kind of acceſſory [3] or additional Signification, by which we, at the ſame Time, expreſs our Judgment, Paſſion, or Eſteem. And this is the Reaſon, that of many Words, which, as to their main Importance, exactly fall in with each other, ſome are opprobrious and injurious, others not; becauſe this additional Signification is found in ſome, and not in the reſt. Thus, if I give a Man *the Lye*, I not only ſignify that his Speech is diſagreeable to his Thought, but farther denote, that he did this with an ill Intention, and on Account of procuring my Prejudice or Hurt: And 'tis on the Score of this latter Indication that the Words are look'd upon as contumelious and injurious. So if I call any Perſon an *Impoſtor*, or an *Ignoramus*, I affront him, becauſe thoſe Names, beſides their proper Meaning, include, by the bye, ſomewhat of Contempt and Reproach; whereas there are many other Words, by which I may, without any ſuch Affront or Abuſe, ſignify myſelf to have been hurt by another, or ſhew, that another is ignorant of ſome Things; and which, conſequently, ſhall only declare the direct Senſe, without any ſuch Indication of Diſgrace. Sometimes this *additional Mark* ariſeth, not from the general Impoſition of Men, but from the Tone of the Voice, (which is different according as we either teach and admoniſh, or flatter and court, or chide and reprove) from the Lines of the Face, from particular Geſtures, and other natural Signs, which are wont very conſiderably to alter, diminiſh, or increaſe, the principal Signification of Words. And thus too a figurative Speech very often denotes ſome Paſſion in the Speaker, whereas a plain Expreſſion barely imports the Thing aſſerted: *Uſque adeone mori miſerum eſt* [f]? denotes no more than if we ſhould ſay barely, *non eſt uſque adeo miſerum mori*; becauſe it includes a Contempt of Death. From the ſame *acceſſory Meaning* it comes to paſs, that ſome Words are accounted obſcene, others not; tho' as to the main, they ſignify the ſame Thing; nay, tho' the Thing be not really in itſelf foul or indecent. The Reaſon of which Difference ſeems in Part to be this; that ſince ſome Words expreſs a Thing or an Act more looſely and generally, others in a more diſtinct Manner, and with particular Circumſtances; therefore, he who makes Uſe of the latter Sort, at the ſame Time betrays his Luſt, with regard to ſuch a Thing or Act, and diſcovers a Satisfaction and Approbation, which a Man of Virtue and Breeding would be aſham'd of. Sometimes too the Obſcenity of Words proceeds from hence, that they either denote a Contempt of the Thing ſignified,

[a] *Horat.* A. P. v. 70, &c. *Quinctilian*, Inſtit. Orat. l. 1. c. 6. p. 60. Edit. *Lugd. Bat.* * To retain Words that have been long aboliſhed and abrogated, is a Mark of Inſolence, and of Vain-boaſting in Things of no Importance. Add. *Gell.* l. 1. c. 10.
[b] *Adverſ. Mathemat.* l. 1. c. 3. p. 17. Edit. *Genev.* [c] Ibid. c. 10. [d] *Tuſc. Quæſt.* l. 5. c. 40. [e] *Triſt.* 5. *El.* 10. v. 37.
[f] *Virgil. Æn.* 12. v. 646.
* The Author's Words are, *Sed abolita atque abrogata retinere inſolentiæ cujuſdam eſt, & frivolæ in parvis jactantiæ.*

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[1] His Words are, Καὶ μὲν παντοῖαι γίνονται τῶν φωνῶν μεταβολαὶ, κ᾽ πρὸ τῦ γεγόνασι, κ᾽ εἰσαῦθις γενήσονται, φιλομετάβολον γὰρ τὸ ἐστιν ὁ αἰὼν, ὐκ εἰς φυτὰ μόνον, κ᾽ ζῶα, ἀλλὰ κ᾽ εἰς ῥήματα.

[2] The *Greek* is, Ὥσπερ γὰρ ἐν πόλει νομίσμαΘ τινὸς προχωρῦνΘ κατὰ τὸ ἐγχώριον, ὁ μὲν τύτῳ χοιχῶν δύναται κ᾽ τὰς ἐν ἐκείνῃ τῇ πόλει διεξαγωγὰς ἀπαραποδίστως ποιεῖσθαι, ὁ δὲ τῦτο μὲν μὴ παραδεχόμενΘ, ἀλλὸ δέ τι καινὸν χαράσσων ἑαυτῷ, κ᾽ τῦτο νομισεύεσθαι θέλων, μάταιΘ καθέστηκεν, ὕτω κἂν τῷ βίῳ ὁ μὴ βυλόμενΘ τῇ συνήθως παραδεχθείσῃ, καθάπερ νόμισματι. ὁμιλίᾳ κατακυλυθεῖν, ἀλλ᾽ ἰδίαν αὐτῷ τέμνειν, μανίας ἐγγύς ἐστιν.

[3] Our Author has taken all this from *The Art of Thinking*, Part I. c. 14. where we may find the Reflection better managed. I do not know why he did not quote the Book, ſince he is not ſparing of Citations.

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or elſe are uſed only among the baſer People, or towards ſuch to whom we owe no Reverence or Reſpect [a]. *Caſaubon*, in his Comment on *Perſius* [b], hath diſputed at large, whether it be allowable to apply obſcene Words even to the Reproof and Correction of Vice, which is the ordinary Practice of ſatyrical Writers.

Theſe Words are grounded on *ſpecial Compact*, which either have been inveſted with a peculiar Signification, different from what they bear in common Uſe, or which are utterly unknown to the ordinary Methods of Speech. Of which Kind are all thoſe *Terms of Art*, uſed by Mechanicks, and others; which, on Account of either the Multiplicity and Confuſion of Things, or the meer Pleaſure of the Authors, have either been invented a-new, or applied to another Meaning than what they obtain'd in vulgar Diſcourſe. Now that no Man may be deceived by theſe Terms, amongſt Perſons who underſtand the particular Art, the very Nature of the Buſineſs in Hand will be a ſufficient Caution and Security: And, amongſt the Unskilful, they ought to be explain'd and limited by common Words. Which Explication and Settlement is, likewiſe, neceſſary, when either Artificers differ about the Uſe of their Terms; or when any Perſon, for ſome particular Reaſons, thinks fit either to coin new Words, or to fix a new Senſe on old ones [c]. Some few Perſons, in Confederacy, may, and often do frame to themſelves peculiar Words and Marks of Things, or put a different Signification on vulgar Terms, ſo as to be underſtood by each other, and by none beſides. (And how far this Practice is lawful, will appear from the Sequel of our Enquiry.) In which Point it is enough, if thoſe Words or Marks rightly diſcover my Mind to thoſe, with whom I have thus enter'd into a particular Covenant about their Uſe: And this holds too in other Signs, determin'd by the peculiar Impoſition of certain Men. Amongſt theſe, the principal are the military Tokens and Signals of War; of which *Silence* itſelf hath been ſometimes uſed for one. Thus in *Polyænus* [d] the *Arcadian* General undertaking, by Night, to ſurprize the *Spartans* at the *Togæa*, gave his Soldiers no other Sign but this, That they ſhould kill all who ask'd for any Sign. The *Arcadians*, therefore, were ſilent; but the *Spartans*, not knowing their Fellows in the Dark, and ſo demanding the *Word*, were ſlaughter'd by the Enemy. And ſo *Pammenes*, in the ſame Author [e], put a Cheat upon his Enemies, by altering the Signal of the Trumpet, and quite inverting the ordinary Method and Uſe; commanding his Men to fall on when a Trumpet ſounded a Retreat, and to retire when it ſeem'd to call them to a cloſe Engagement.

VII. But we muſt carefully obſerve, that altho', by this general and ſpecial Compact, we are bound to uſe our Words, and other Signs, in the Manner that hath been agreed upon; yet we are not hereby, in the leaſt, obliged to open and diſcover our Minds to all Perſons. To which may be applied the Saying of *Apollonius Tyanæus*, (in *Philoſtrat.* l. iv. c. 11. p. 191. Edit. *Par. Morel. An.* 1608.) Palamedes *invented Letters, not only for the Sake of Writing, but, likewiſe, that Men might come to the Knowledge of thoſe Things which were not to be written.* But to effect this, it is neceſſary that another Obligation be added, ariſing either from ſome particular Covenant, or from the general Command of the *Law of Nature*: Or, laſtly, from the Quality and Condition of the Buſineſs, which is, at preſent, to be tranſacted by Speech [1]: Thus, for Inſtance, if I undertake to be an Inſtructor to any Perſon,

[a] *Vid.* Ciceron. *Epiſt. ad Famil.* IX. 22. [b] *Sat.* 4. p. 342. [c] Add *Bacon*'s Advancement of Learning, *l.* 3. *c.* 4. in the Beginning. [d] *Stratagem.* l. 1. c. 11. & l. 5. c. 16. *Numb.* 4. [e] *Lib.* 5. *c.* 19.

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[1] To explain this Matter diſtinctly, we are to obſerve, that Speech, as all other Actions of an indifferent Nature, is to be govern'd by three great Principles of Duty, of which we have ſpoken before, but muſt now repeat them, *viz. Religion, Self-love*, and *Sociability*. I. When we ſpeak to GOD, we muſt always ſpeak the Truth freely. This is evident of itſelf, though our Author proves it briefly in the Beginning of §. 10. Nor ſhould we ever abuſe our Speech, when we ſpeak to Men, to the Diſhonour of GOD. See the Abridgment *of the Duties of a Man and Citizen*, Lib. 1. cap. 4. §. 7. *numb.* 5. 6. II. When we make Uſe of Speech in Behalf of ourſelves, either to ſecure or defend ourſelves, or to procure ourſelves ſome innocent Advantage, which neither entrenches upon the Glory of GOD, or the Rights of our Neighbour. In theſe Caſes 'tis not only permitted, but expreſly ordain'd by *the Law of Nature*, either to ſpeak the Truth, or be ſilent; or even to feign and diſſemble, as a lawful Defence of ourſelves, or our innocent Advantage requires. III. The Duties of *Sociability* oblige us, alſo, either to ſpeak the Truth plainly, or be ſilent, or feign and diſſemble, if by that Means we can either do Good to others, or avert the Danger which threatens them, without doing any Thing contrary to the Glory of GOD, or to the Damage of any Man. Thus, as our Author ſpeaks, *Lib.* 2. *c.* 3. § 4. we muſt give Counſel faithfully to them who deſire it, and ſhew them the right Way, who are out of it. But, on the contrary, we muſt be ſilent in Things which may be prejudicial to any Perſon when ſpoken, either as to their Perſon, Goods, or Reputation. Thus, if a Mad-man, running after another with a Sword in his Hand to ſlay him, asks us which Way he went, we may not only, but we ought to ſhew him another Way than that which the Perſon purſued took to ſave himſelf. And I cannot think that any Man will dare to maintain the contrary. For the ſame Reaſon the wiſe Midwives of *Egypt* did very well to find out ſo good an Excuſe to *Pharaoh*, as we may ſee by the Reward GOD gave them. In ſhort, the greateſt Abuſe of Speech is, without Contradiction, an Inſtrument of Damage to another. See §. 15. following. Hence it follows, that Men ought, above all Things, to act ſincerely in Bargains, and keep their Word inviolably when they have made a ſerious Engagement. Moreover, we ought to remember what I have elſewhere obſerved, that when the Duties of Society and Self-love are equally balanced, the laſt ought to out-weigh; and ſo we may lawfully uſe our Speech for our own Advantage rather than any others. This is grounded upon Mr. *Titius*'s *Obſerv.* 248, *&c.* though his Opinion is not a Whit the leſs ſingular. It is certain, that, as *Grotius* has obſerved, *Lib.* 3. *c.* 1 §. 9. moſt of the Heathen Philoſophers and ancient Chriſtians believed before St. *Auguſtin*, That whatever may be called a *Lye*, is not always unlawful, although that Matter be not well explained, as our Author has done after *Grotius*. And ſince theſe two famous Works have appeared in the World, very few, who have been converſant in the Study of natural Law, but have embraced their Notions. See, for Example, Mr. *Thomaſius, Juriſprud. Divin.* Lib. 2. c. 8. Mr. *Buddeus, Elem. Phil. Pract.* Part II. Sect. 6. §. 3, *&c.* Mr. *Fabricius*, in a Note upon the falſe *Abdias*, which makes a Part of the Book called, *Codex Apocryphus N. Teſtament.* Mr. *Noodt, De forma emend. doli mali*, &c. c. 1, 2. And ſeveral other famous Writers. I might, alſo, alledge a great Philoſopher of our Time, who had not Occaſion to explain this Point in his Writings. But the Buſineſs here is not to produce Authorities, but to examine Reaſons. Thoſe who maintain, that all Speech, which is utter'd contrary to our Thoughts, is eſſentially criminal, ought to alledge good Proofs for it, taken either from the Nature of the Thing, or from ſome deciſive Paſſage of Scripture. 1. As to the Nature of the Thing, I have not yet ſeen any Thing ſatisfactory produced. Our Author proves it well; and I will examine, in a few Words, the new Hypotheſis of a modern Author in my Notes on §. 10. All that has hitherto been ſaid, with any Shew of Reaſon, may be reduced to theſe two or three Difficulties, which are not hard to be reſolved. The firſt is this, If the Opinion, ſay they, that allows Men to feign and diſſemble upon certain Occaſions, either in Deed or Word, be once received, all Confidence in one another muſt be baniſhed from the Earth, and, by conſequence, all Society deſtroy'd. For a Man cannot open his Mouth, or do the leaſt Thing, but it will be firſt demanded of him, Whether he does not believe, that he may, in that Caſe, do otherwiſe than he thinks? But this Argument ſeems to be built on a Suppoſition entirely falſe, *viz.* That the Confidence, by which our Dealings in this Life are maintain'd, is grounded only on this Perſuaſion, that they, who ſpeak, ought to ſay or do nothing but what anſwers exactly to their Thoughts; their own Conſcience being Judge. But Experience, and the Knowledge of the World, prove the contrary evidently. I own, that

Perſon, I am engaged (by the Contract *of Letting and Hiring*) to explain and communicate to him all that belongs to that Art or Profeſſion. If I ſend a Perſon with a Commiſſion to ſearch into the State

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that profeſſed Liars, natural Diſſemblers, falſe Dealers, or Slaves to vile Intereſt; in a Word, all thoſe, whoſe Honeſty is dubious, are not proper Objects of our Confidence, and we ought not to truſt them, but with very great Caution, whether they ſhew that they believe that one may lawfully ſpeak contrary to Truth, or profeſs, that they believe it never allowable. But when we have to do with honeſt Men, we put not the leſs Confidence in them, becauſe we know they may uſe an innocent Feint or Diſſimulation, and becauſe we have ſeen them uſed ourſelves, in certain Caſes, with good Reaſon, either for their own particular Advantage, or that of their Relations and Friends. As every one is glad to have that Liberty, ſo he readily grants it to others; and he cannot refuſe it them, or impute it to them as a Crime, without being accounted, and that juſtly too, unreaſonable and fooliſhly nice. But, ſay they, the Benefit which may be obtain'd by a Lye will vaniſh into nothing, if we once teach that a Lye is allowable. For a Lye can be of no Advantage but upon this Suppoſition, that they, to whom we lye, believe that we do not lye, and that we make a Conſcience of ſpeaking the Truth. If there be an Occaſion offer'd, wherein it is lawful to lye, it is to adminiſter a Medicine to a ſick Perſon that may ſave his Life. But ſuppoſing that we allow, that Phyſicians are exempted from ſpeaking Truth upon that Occaſion, it will happen that they will not be believed, though they ſpeak Truth; and ſo we ſhall fall into Inconveniencies infinitely greater than thoſe which we endeavour to avoid, by allowing them ſometimes to lye. Either the ſick Perſon believes that the Phyſician will not lye, or, at leaſt, that he may as well ſpeak the Truth; but how can he believe the firſt, if he knows that, upon ſuch Occaſions, he may lye? And of what Uſe will the Doubt be to him, if it does not prevent him from taking the Medicine preſented to him? To this I anſwer, That all this is made evidently falſe by Experience. Whatever rigid Divines and Caſuiſts may ſay, it is certain, that there are a thouſand little Lyes, which almoſt all the World believe allowable, and which, nevertheleſs, fail not to produce their Effect. When one is, in general, perſuaded, that others are innocent, he is not always upon his Guard to examine, upon every Occaſion, particularly, whether the Perſon we hear may not have Reaſon to perſuade us, that a Thing is falſe, which is not. We are not ſo ready to diſtruſt one another, when we have no Cauſe of Suſpicion; and there is ſcarce any Man, who, though he has been innocently deceived by his Phyſician or Friend, will not, nevertheleſs, believe them again upon the like Occaſion, if they know how to take a proper Opportunity, and put on a fair Outſide. He may, perhaps, doubt a While after, but the firſt Impreſſions, and the innocent Artifice, when it has had Effect, is ſoon forgotten; but if ſometimes it is not ſucceſsful, it only proves, that there were not good Meaſures taken, or that ſome Circumſtances render'd the Thing unprofitable, but that proves not that it was unlawful and criminal in itſelf. Some object farther, that if to ſpeak contrary to a Man's Thought, is an Action of like Nature with local Motion, and other outward Actions, which, having nothing unlawful in themſelves, may become good or evil, according to the different Intentions by which they are done, there will be no Evil to make uſe of that Means for our moſt ſlighteſt Intereſts, as if I deſire a Pin when it is neceſſary, or ſtoop to take it up when I ſee it lie upon the Boards of my Chamber, nothing hinders but that I may tell a Lye to get it, provided I do no Man any Wrong by it. But this Conſequence does not ſeem to be well drawn. For the Uſe of Speech is not only guided by Juſtice, Humanity, and Charity, but, alſo, by moſt Maxims of Prudence. For no wiſe Man will have Recourſe to the leaſt Diſguiſe, but in Caſes of Neceſſity. Let us hear an agreeable ancient Writer upon this Subject, whom neither *Grotius* nor our Author have quoted. *Οὐ δὲ περὶ τύ των ἠρόμεν, ὁποσοι τῆς χρείας ἕνεκα ψεύδονται, συγγώμης τοιγάρων ἄτοι γε μᾶλλον κ) ἐπάινυ τινὲς αὐτῶν ἄξιοι, ὁπόσοι ἢ πολεμίυς ἐξηπάτησαν, ἢ ἐπὶ σωτηρίᾳ τῷ τοιύτῳ φαρμάκῳ ἐχρήσαντο ἐν τοῖς δεινοῖς, οἷα πολλα, κ) Ὀδύσσευς ἐποίει, τήν τε ἀυτῦ, ψυχὴν σῳζύμενος, κ) τὸν νόσον τῶν ἑταίρων, ἀλλὰ περὶ ἐκείνων, ὦ ἄριστε, φημὶ, οἳ ἀυτὸ ἀνὺ τῆς χρείας τὸ ψεῦδος περὶ πολλῦ τῆς ἀληθίας τίθενται, ἡδόμενοι τῷ πράγματι, κ) ἐνδιατρίβοντες ἐπ' ἀδεμία προφάσει αναγκαίᾳ, Lucian in Mendac. vel Incredul. in Princip.* "I ſpeak not, ſays the Speaker in "the Dialogue, of them who lye for their Profit, they are to be excuſed, and ſometimes even commended; as, for Example, "ſuch as lye to deceive their Enemy, or thoſe who make uſe of it as a Means to eſcape ſome great Danger, as *Ulyſſes* often did to "ſave his Life, or to procure the Return of his Companions; but that which ſurprizes me moſt, is to ſee ſome Men, without "any Advantage to themſelves, to delight more in Lying, than ſpeaking the Truth, and continue in it all their Days without "Neceſſity." Indeed, when Men lye wantonly, and make a Trade of it, they loſe all Credit with the Wiſe. Otherwiſe, though an honeſt Man believes he may innocently, for ſome good Reaſon, by his Diſcourſe and Actions, impoſe upon another, yet he ſtill regards the Correſpondence between his Words, Actions, and Thoughts, as the moſt natural Uſe of the Tongue, and other outward Motions; ſo that this Agreement is diſturbed againſt his Will, being forced to it by the Conſtitution of human Affairs, and by the Indiſcretion, Imprudence, and Malice of the greateſt Part of Mankind; at leaſt, if he be not engaged in a Thing of Importance, his Candour and Freedom, which are the Characters of a truly good Man, will hinder him from ſpeaking or doing any Thing which may make his Sincerity and Fidelity be ſuſpected in the leaſt. But there is another Thing which ought to keep us from uſing any Diſguiſe, but with much Reſerve and Circumſpection, which is, that we ought not only to avoid all Evil, but every Thing that tends to it. Now it is certain, that by Lying, Feigning, and Diſſembling, upon ſlight Occaſions, Men get a Habit of Diſſimulation and Counterfeiting, which degenerates into a Vice, becauſe it will incline us to be inſincere with thoſe to whom we ought faithfully to diſcover our Thoughts. For this Reaſon it is, that we ought to take very great Care to keep Children from Lying, (ſee *Montagne*'s Eſſays upon this Subject, *l.* 1. *c.* 9. and the Treatiſe on *Education*, by Mr. *Locke*, §. 134, *&c.*) as this Artifice can ſerve only to hide their Faults, and they are not of Age ſufficient to diſcover the Occaſions, when Diſſimulation and Counterfeiting are innocent, and ſo they will come in Time not to ſpeak one Word of Truth, but always have a Lye ready for the leaſt Thing. But as to ſuch as are become Men of Underſtanding, 'tis not to be feared but that they will be able to ſet due Bounds to this Permiſſion of Feigning and Diſſimulation, provided they ſeriouſly labour to regulate their Conduct by the Light of right Reaſon, without which they may abuſe the moſt inconteſtable and commonly received moral Principles. Let a Man be full of Reverence for the Deity, a Lover of Juſtice, careful to give every Man his Due, averſe to all fraudulent Dealing, and, in a Word, a truly good Man; and, I dare anſwer for him, he will never be guilty of any unlawful Diſſimulation, and, as far as is poſſible, he will ſo order himſelf, that his Words and Actions ſhall exactly agree with his Thoughts. I ſay, as far as is poſſible, for as the famous *Engliſh* Chancellor the Lord *Bacon*, judiciouſly obſerves, "*Serm. fidel.* c. 6. 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Nevertheleſs, there is no *Medium*; either we muſt condemn ourſelves for it, and reſign ourſelves to the Indiſcretion, Imprudence, and often to the Malice of another, by a general and unreſerved Sincerity, or we muſt allow a Permiſſion to ſpeak and act contrary to our Thoughts. Farther, to ſhew the Weakneſs of the Opinion I am now oppoſing, I deſire it may be conſider'd, what Abſurdities they fall into, who maintain the contrary Opinion: For theſe are three Maxims of St. *Auguſtin*, which Mr. *La Placette* approves in *Part* 1. *Moral Eſſays*, 1. That if all Mankind were at the Point of Deſtruction, and it were poſſible to ſave them all by a Lye, the Lye muſt be avoided, and all Mankind periſh. 2. That if, by telling a Lye, we could prevent one or more of our Neighbours from ſinning, we ought rather to ſuffer our Neighbour to ſin, than tell a Lye. 3. If, by Lying, we could keep our Neighbour from eternal Damnation, we ſhould rather leave him to periſh, than ſave him by the Expence of Truth. I own, we ſhould never do Evil that Good may come of it, and therefore we ſhould admit theſe Propoſitions, if we ſuppoſed, that Lying is Evil in its own Nature. But this is the Queſtion; and if we diſcover in the Thing a Turpitude attach'd to it, we can never ſeriouſly condemn a Lye, which anſwer'd ſuch good Ends. In fine, it is in no wiſe neceſſary to

or elſe are uſed only among the baſer People, or towards ſuch to whom we owe no Reverence or Reſpect [a]. *Caſaubon*, in his Comment on *Perſius* [b], hath diſputed at large, whether it be allowable to apply obſcene Words even to the Reproof and Correction of Vice, which is the ordinary Practice of ſatyrical Writers.

Theſe Words are grounded on *ſpecial Compact*, which either have been inveſted with a peculiar Signification, different from what they bear in common Uſe, or which are utterly unknown to the ordinary Methods of Speech. Of which Kind are all thoſe *Terms of Art*, uſed by Mechanicks, and others; which, on Account of either the Multiplicity and Confuſion of Things, or the meer Pleaſure of the Authors, have either been invented a-new, or applied to another Meaning than what they obtain'd in vulgar Diſcourſe. Now that no Man may be deceived by theſe Terms, amongſt Perſons who underſtand the particular Art, the very Nature of the Buſineſs in Hand will be a ſufficient Caution and Security: And, amongſt the Unskilful, they ought to be explain'd and limited by common Words. Which Explication and Settlement is, likewiſe, neceſſary, when either Artificers differ about the Uſe of their Terms; or when any Perſon, for ſome particular Reaſons, thinks fit either to coin new Words, or to fix a new Senſe on old ones [c]. Some few Perſons, in Confederacy, may, and often do frame to themſelves peculiar Words and Marks of Things, or put a different Signification on vulgar Terms, ſo as to be underſtood by each other, and by none beſides. (And how far this Practice is lawful, will appear from the Sequel of our Enquiry.) In which Point it is enough, if thoſe Words or Marks rightly diſcover my Mind to thoſe, with whom I have thus enter'd into a particular Covenant about their Uſe: And this holds too in other Signs, determin'd by the peculiar Impoſition of certain Men. Amongſt theſe, the principal are the military Tokens and Signals of War; of which *Silence* itſelf hath been ſometimes uſed for one. Thus in *Polyænus* [d] the *Arcadian* General undertaking, by Night, to ſurprize the *Spartans* at the *Togæa*, gave his Soldiers no other Sign but this, That they ſhould kill all who ask'd for any Sign. The *Arcadians*, therefore, were ſilent; but the *Spartans*, not knowing their Fellows in the Dark, and ſo demanding the *Word*, were ſlaughter'd by the Enemy. And ſo *Pammenes*, in the ſame Author [e], put a Cheat upon his Enemies, by altering the Signal of the Trumpet, and quite inverting the ordinary Method and Uſe; commanding his Men to fall on when a Trumpet ſounded a Retreat, and to retire when it ſeem'd to call them to a cloſe Engagement.

VII. But we muſt carefully obſerve, that altho', by this general and ſpecial Compact, we are bound to uſe our Words, and other Signs, in the Manner that hath been agreed upon; yet we are not hereby, in the leaſt, obliged to open and diſcover our Minds to all Perſons. To which may be applied the Saying of *Apollonius Tyanæus*, (in *Philoſtrat.* l. iv. c. 11. p. 191. Edit. *Par. Morel. An.* 1608.) Palamedes *invented Letters, not only for the Sake of Writing, but, likewiſe, that Men might come to the Knowledge of thoſe Things which were not to be written.* But to effect this, it is neceſſary that another Obligation be added, ariſing either from ſome particular Covenant, or from the general Command of the *Law of Nature*: Or, laſtly, from the Quality and Condition of the Buſineſs, which is, at preſent, to be tranſacted by Speech [1]: Thus, for Inſtance, if I undertake to be an Inſtructor to any Perſon,

[a] *Vid.* Ciceron. *Epiſt. ad Famil.* IX. 22. [b] *Sat.* 4. p. 342. Beginning. [c] Add *Bacon*'s Advancement of Learning, *l.* 3. *c.* 4. in the [d] *Stratagem.* l. 1. c. 11. & l. 5. c. 16. *Numb.* 4. [e] *Lib.* 5. *c.* 19.

[1] To explain this Matter diſtinctly, we are to obſerve, that Speech, as all other Actions of an indifferent Nature, is to be govern'd by three great Principles of Duty, of which we have ſpoken before, but muſt now repeat them, *viz. Religion, Self-love*, and *Sociability*. I. When we ſpeak to GOD, we muſt always ſpeak the Truth freely. This is evident of itſelf, though our Author proves it briefly in the Beginning of §. 10. Nor ſhould we ever abuſe our Speech, when we ſpeak to Men, to the Diſhonour of GOD. See the Abridgment *of the Duties of a Man and Citizen*, Lib. 1. cap. 4. §. 7. *numb.* 5. 6. II. When we make Uſe of Speech in Behalf of ourſelves, either to ſecure or defend ourſelves, or to procure ourſelves ſome innocent Advantage, which neither entrenches upon the Glory of GOD, or the Rights of our Neighbour. In theſe Caſes 'tis not only permitted, but expreſly ordain'd by *the Law of Nature*, either to ſpeak the Truth, or be ſilent; or even to feign and diſſemble, as a lawful Defence of ourſelves, or our innocent Advantage requires. III. The Duties of *Sociability* oblige us, alſo, either to ſpeak the Truth plainly, or be ſilent, or feign and diſſemble, if by that Means we can either do Good to others, or avert the Danger which threatens them, without doing any Thing contrary to the Glory of GOD, or to the Damage of any Man. Thus, as our Author ſpeaks, *Lib* 2. *c.* 3. § 4. we muſt give Counſel faithfully to them who deſire it, and ſhew them the right Way, who are out of it. But, on the contrary, we muſt be ſilent in Things which may be prejudicial to any Perſon when ſpoken, either as to their Perſon, Goods, or Reputation. Thus, if a Mad man, running after another with a Sword in his Hand to ſlay him, asks us which Way he went, we may not only, but we ought to ſhew him another Way than that which the Perſon purſued took to ſave himſelf. And I cannot think that any Man will dare to maintain the contrary. For the ſame Reaſon the wiſe Midwives of *Egypt* did very well to find out ſo good an Excuſe to *Pharaoh*, as we may ſee by the Reward GOD gave them. In ſhort, the greateſt Abuſe of Speech is, without Contradiction, an Inſtrument of Damage to another. See §. 15. following. Hence it follows, that Men ought, above all Things, to act ſincerely in Bargains, and keep their Word inviolably when they have made a ſerious Engagement. Moreover, we ought to remember what I have elſewhere obſerved, that when the Duties of Society and Self-love are equally balanced, the laſt ought to out weigh; and ſo we may lawfully uſe our Speech for our own Advantage rather than any others. This is grounded upon Mr. *Titius*'s *Obſerv.* 248, *&c.* though his Opinion is not a Whit the leſs ſingular. It is certain, that, as *Grotius* has obſerved, *Lib.* 3. *c.* 1 §. 9. moſt of the Heathen Philoſophers and ancient Chriſtians believed before St. *Auguſtin*, That whatever may be called a *Lie*, is not always unlawful, although that Matter be not well explained, as our Author has done after *Grotius*. And ſince theſe two famous Works have appeared in the World, very few, who have been converſant in the Study of natural Law, but have embraced their Notions. See, for Example, Mr. *Thomaſius*, *Juriſprud. Divin.* Lib. 2. c. 8. Mr. *Buddæus*, *Elem. Phil. Pract.* Part II. Sect. 6. §. 3, *&c.* Mr. *Fabricius*, in a Note upon the falſe *Abdias*, which makes a Part of the Book called, *Codex Apocryphus N. Teſtament.* Mr. *Noodt*, *De forma emend. doli mali*, &c. c. 1, 2. And ſeveral other famous Writers I might, alſo, alledge a great Philoſopher of our Time, who had not Occaſion to explain this Point in his Writings. But the Buſineſs here is not to produce Authorities, but to examine Reaſons. Thoſe who maintain, that all Speech, which is not conſ'd contrary to our Thoughts, is eſſentially criminal, ought to alledge good Proofs for it, taken either from the Nature of the Thing, or from ſome deciſive Paſſage of Scripture. 1. As to the Nature of the Thing, I have not yet ſeen any Thing ſatisfactory produced. Our Author proves it well; and I will examine, in a few Words, the new Hypotheſis of a modern Author in my Notes on §. 10. All that has hitherto been ſaid, with any Shew of Reaſon, may be reduced to three or three Difficulties, which are not hard to be reſolved. The firſt is this, If the Opinion, ſay they, that allows Men to feign and diſſemble upon certain Occaſions, either in Deed or Word, be once received, all Confidence in one another muſt be baniſhed from the Earth, and, by conſequence, all Society deſtroy'd. For a Man cannot open his Mouth, or do the leaſt Thing, but it will be firſt demanded of him, Whether he does not believe, that he may, in that Caſe, do otherwiſe than he thinks? But this Argument ſeems to be built on a Suppoſition entirely falſe, *viz.* That the Confidence, by which our Dealings in this Life are maintained, is grounded only on this Perſuaſion, that they, who ſpeak, ought to ſay or do nothing but what anſwers exactly to their Thoughts, their own Conſcience being Judge. But Experience, and the Knowledge of the World, prove the contrary evidently [illegible]

Perſon, I am engaged (by the Contract *of Letting and Hiring*) to explain and communicate to him all that belongs to that Art or Profeſſion. If I ſend a Perſon with a Commiſſion to ſearch into the State

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that profeſſed Liars, natural Diſſemblers, falſe Dealers, or Slaves to vile Intereſt; in a Word, all thoſe, whoſe Honeſty is dubious, are not proper Objects of our Confidence, and we ought not to truſt them, but with very great Caution, whether they ſhew that they believe that one may lawfully ſpeak contrary to Truth, or profeſs, that they believe it never allowable. But when we have to do with honeſt Men, we put not the leſs Confidence in them, becauſe we know they may uſe an innocent Feint or Diſſimulation, and becauſe we have ſeen them uſed ourſelves, in certain Caſes, with good Reaſon, either for their own particular Advantage, or that of their Relations and Friends. As every one is glad to have that Liberty, ſo he readily grants it to others; and he cannot refuſe it them, or impute it to them as a Crime, without being accounted, and that juſtly too, unreaſonable and fooliſhly nice. But, ſay they, the Benefit which may be obtain'd by a Lye will vaniſh into nothing, if we once teach that a Lye is allowable. For a Lye can be of no Advantage but upon this Suppoſition, that they, to whom we lye, believe that we do not lye, and that we make a Conſcience of ſpeaking the Truth. If there be an Occaſion offer'd, wherein it is lawful to lye, it is to adminiſter a Medicine to a ſick Perſon that may ſave his Life. But ſuppoſing that we allow, that Phyſicians are exempted from ſpeaking Truth upon that Occaſion, it will happen that they will not be believed, though they ſpeak Truth; and ſo we ſhall fall into Inconveniencies infinitely greater than thoſe which we endeavour to avoid, by allowing them ſometimes to lye. Either the ſick Perſon believes that the Phyſician will not lye, or, at leaſt, that he may as well ſpeak the Truth; but how can he believe the firſt, if he knows that, upon ſuch Occaſions, he may lye? And of what Uſe will the Doubt be to him, if it does not prevent him from taking the Medicine preſented to him? To this I anſwer, That all this is made evidently falſe by Experience. Whatever rigid Divines and Caſuiſts may ſay, it is certain, that there are a thouſand little Lyes, which almoſt all the World believe allowable, and which, nevertheleſs, fail not to produce their Effect. When one is, in general, perſuaded, that others are innocent, he is not always upon his Guard *to examine, upon every Occaſion*, particularly, whether the Perſon we hear may not have Reaſon to perſuade us, that a Thing is falſe, which is not. We are not ſo ready to diſtruſt one another, when we have no Cauſe of Suſpicion; and there is ſcarce any Man, who, though he has been innocently deceived by his Phyſician or Friend, will not, nevertheleſs, believe them again upon the like Occaſion, if they know how to take a proper Opportunity, and put on a fair Outſide. He may, perhaps, doubt a While after, but the firſt Impreſſions, and the innocent Artifice, when it has had Effect, is ſoon forgotten; but if ſometimes it is not ſucceſsful, it only proves, that there were not good Meaſures taken, or that ſome Circumſtances render'd the Thing unprofitable, but that proves not that it was unlawful and criminal in itſelf. Some object farther, that if to ſpeak contrary to a Man's Thought, is an Action of like Nature with local Motion, and other outward Actions, which, having nothing unlawful in themſelves, may become good or evil, according to the different Intentions by which they are done, there will be no Evil to make uſe of that Means for our moſt ſlighteſt Intereſts, as if I deſire a Pin when it is neceſſary, or ſtoop to take it up when I ſee it lie upon the Boards of my Chamber, nothing hinders but that I may tell a Lye to get it, provided I do no Man any Wrong by it. But this Conſequence does not ſeem to be well drawn. For the Uſe of Speech is not only guided by Juſtice, Humanity, and Charity, but, alſo, by moſt Maxims of Prudence. For no wiſe Man will have Recourſe to the leaſt Diſguiſe, but in Caſes of Neceſſity. Let us hear an agreeable ancient Writer upon this Subject, whom neither *Grotius* nor our Author have quoted. Οὐ δὲ περὶ τῦ των ἠρώμεν, ὁποσοι τῆς χρείας ἕνεκα ψεύδονται, συγγώμης τυγχάνειν ἔτοι γε μᾶλλον ϗ ἐπαίνυ τινὲς αὐτῶν ἄξιοι, ὁπόσοι ἢ πολιμίυς ἐξηπατησαν, ἢ ἐπὶ σωτηρίᾳ τῷ τοιύτῳ φαρμάκῳ ἐχρήσαντο ἐν τοῖς δεινοῖς, οἷα πολλα, ϗ Ὀδύσσευς ἐποίει, τήν τε ἀυτῦ, ψυχὴν σῳζόμενος, ϗ τὸν νόσον τῶν ἑταίρων, ἀλλὰ περὶ ἐκείνων, ὦ ἄριστε, φημὶ, οἳ ἀυτὸ αἰτὺ τῆς χρείας τὸ ψεῦδος περὶ πολλῦ τῆς ἀληθίας τίθενται, ἡδόμενοι τῷ πράγματι, ϗ ἐυδιατρίβοντες ἐπ' ἀδεμία προφάσει αναγκαία, *Lucian in Mendac. vel Incredul. in Princip.* "I ſpeak not, ſays the Speaker in "the Dialogue, of them who lye for their Profit, they are to be excuſed, and ſometimes even commended; as, for Example, "ſuch as lye to deceive their Enemy, or thoſe who make uſe of it as a Means to eſcape ſome great Danger, as *Ulyſſes* often did to "ſave his Life, or to procure the Return of his Companions; but that which ſurprizes me moſt, is to ſee ſome Men, without "any Advantage to themſelves, to delight more in Lying, than ſpeaking the Truth, and continue in it all their Days without "Neceſſity." Indeed, when Men lye wantonly, and make a Trade of it, they loſe all Credit with the Wiſe. Otherwiſe, though an honeſt Man believes he may innocently, for ſome good Reaſon, by his Diſcourſe and Actions, impoſe upon another, yet he ſtill regards the Correſpondence between his Words, Actions, and Thoughts, as the moſt natural Uſe of the Tongue, and other outward Motions; ſo that this Agreement is diſturbed againſt his Will, being forced to it by the Conſtitution of human Affairs, and by the Indiſcretion, Imprudence, and Malice of the greateſt Part of Mankind; at leaſt, if he be not engaged in a Thing of Importance, his Candour and Freedom, which are the Characters of a truly good Man, will hinder him from ſpeaking or doing any Thing which may make his Sincerity and Fidelity be ſuſpected in the leaſt. But there is another Thing which ought to keep us from uſing any Diſguiſe, but with much Reſerve and Circumſpection, which is, that we ought not only to avoid all Evil, but every Thing that tends to it. Now it is certain, that by Lying, Feigning, and Diſſembling, upon ſlight Occaſions, Men get a Habit of Diſſimulation and Counterfeiting, which degenerates into a Vice, becauſe it will incline us to be inſincere with thoſe to whom we ought faithfully to diſcover our Thoughts. For this Reaſon it is, that we ought to take very great Care to keep Children from Lying, (ſee *Montagne*'s Eſſays upon this Subject, *l.* 1. *c.* 9. and the Treatiſe on *Education*, by Mr. *Locke*, §. 134, *&c.*) as this Artifice can ſerve only to hide their Faults, and they are not of Age ſufficient to diſcover the Occaſions, when Diſſimulation and Counterfeiting are innocent, and ſo they will come in Time not to ſpeak one Word of Truth, but always have a Lye ready for the leaſt Thing. 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Diſſimulation is a neceſſary "Conſequence of Silence and Secrecy, (*Taciturnitatis*) inſomuch, that whoſoever would be conceal'd, becomes a Diſſembler, whe-"ther he will or no. In Truth, Men are too cunning to ſuffer us to remain in a perfect Indifference, without ſhewing any Incli-"nation to one or other of the Things which they deſire to know. They'll attack you, examine and pump you with a thouſand "Queſtions, ſo artful, that unleſs you maintain an obſtinate and ridiculous Silence, you muſt diſcover ſomething of your Senti-"ments; and if you do nothing to diſcover them, they'll make ſuch Conjectures upon your Silence, that it will be all one as if "you had ſpoken. You may guard yourſelf a long Time by Equivocation, and dark Expreſſions. In a Word, there can be no "perfect Concealment, if ſome Degree of Diſſimulation be not allow'd; and ſo Diſſimulation is nothing elſe but a neceſſary De-"pendent upon Silence. To keep a juſt Temper, every Man muſt get himſelf a Reputation for Sincerity and Veracity, an Habit "of Silence and Secrecy, and an Ability to feign and diſſemble when it is neceſſary." I would be eaſy to anſwer all the other Difficulties raiſed againſt the Opinion of our Author, and to bring ſtronger Arguments to the contrary. It ſhall content myſelf in obſerving, that if this laſt be true, we muſt condemn a thouſand Actions, which all the World thinks innocent, and which are every Day deliberately practiſed, not only by the moſt zealous Defenders of his Opinion, but by almoſt all Men in general. The Queſtion comes to this, Whether (for Example) a Man may ſay, that ſuch an one is not at Home, or find out ſome Evaſion to free ourſelves from an indiſcreet and importunate Perſon? I do not believe that any Man of Senſe will own that theſe are Faults, or have any Remorſe for them. Nevertheleſs, there is no *Medium*; either we muſt condemn ourſelves for it, and reſign ourſelves to the Indiſcretion, Imprudence, and often to the Malice of another, by a general and unreſerved Sincerity, or we muſt allow a Permiſſion to ſpeak and act contrary to our Thoughts. Farther, to ſhew the Weakneſs of the Opinion I am now oppoſing, I deſire it may be conſider'd, what Abſurdities they fall into, who maintain the contrary Opinion: For theſe are three Maxims of St. *Auguſtin*, which Mr. *La Placette* approves in *Part* 1. *Moral Eſſays*, 1. That if all Mankind were at the Point of Deſtruction, and it were poſſible to ſave them all by a Lye, the Lye muſt be avoided, and all Mankind periſh. 2. That if, by telling a Lye, we could prevent one or more of our Neighbours from ſinning, we ought rather to ſuffer our Neighbour to ſin, than tell a Lye. 3. If, by Lying, we could keep our Neighbour from eternal Damnation, we ſhould rather leave him to periſh, than ſave him by the Expence of Truth. I own, we ſhould never do Evil that Good may come of it, and therefore we ſhould admit theſe Propoſitions, if we ſuppoſed, that Lying is Evil in its own Nature. But this is the Queſtion; and if we diſcover in the Thing a Turpitude attach'd to it, we can never ſeriouſly condemn a Lye, which anſwer'd ſuch good Ends. In fine, it is in no wiſe neceſſary to

State of such or such an Affair, he is bound, by Covenant to acquaint me with all the Discoveries and Informations he hath gain'd about that Matter. If I am to exercise, towards another, any Duty of Humanity, which must be perform'd by Speech, it is manifest my Words must be agreeable to my Thoughts and Intentions. If a Man undertake to write an History [1], he is to deliver nothing which he knows to be false, by virtue of that general Obligation by which we are bound to promote the Use and Benefit of others. As we are, likewise, by a common Engagement tied to express our Minds by the clearest and plainest Signs, in all such Cases, when, if we do otherwise, we may bring some Hurt or Prejudice on innocent Persons. So, lastly, in all Commerce and Business between Men, in which, by the Consent of the Parties, some Right or Obligation is to be produced, we are to declare our Meaning openly and clearly to the Persons with whom we deal. For otherwise, there could be no possible Way of rightly adjusting those Concerns. But since it doth not always so happen, that I am bound by any of these Rules to open my Thoughts to another about any Affair, especially such as is private and particular, it is evident from hence, that I am not under an Engagement to unfold all my Opinions and Intentions to Men alike, but those only which they have a Right (either perfect or imperfect) to understand; which Right supposeth a correspondent Obligation on my Part: And that, therefore, I may fairly conceal and dissemble those Things, which another hath no Right to know, and which I myself have no Obligation to disclose [a]: Nay, in such Cases, where no body else is injured in his Right, and where the Advantage or the Safety of myself, or of some other Person, cannot otherwise be procured, it shall be allowable for me to apply the common Signs in such a Manner, as to express what is really contrary to my Judgment. For since the Compact, about applying Signs in such a certain Way, bears a Regard to other Obligations, which are, by the Means of these Signs, to be fulfilled; therefore, when those Obligations cease, there appears no Reason why I may not make a different Use of the Signs, if I injure no Man, and, at the same Time, have no greater Convenience of benefitting myself or others.

VIII. From these Principles, and fundamental Rules, it is easy to understand both the Nature of *Truth*, which Men are obliged to speak and profess; and the Nature of a *Lye*, which is so abhorr'd by all the Good and Honest, and the Imputation of which every Man looks on as the foulest Disgrace [b] [2]. The former then consists in this, That the Signs which we make use of, and especially our Words, do, in a proper and convenient Manner, represent our Thoughts to another, who hath a Right to understand them; and to whom we are bound, either by a perfect, or an imperfect Obligation to discover them: And this to the

[a] *Æschyl.* Cœphor. σιγᾶν θ' ὅπῃ, &c. v. 580. The Art of Science and of well-term'd Speech. [b] *Sophocl. Trachin.* p. 347. Edit. *H. Steph.* ὡς ἐλευθέρῳ ψευδεῖ καλεῖσθαι, &c.

What Fate so grievous to a Free-born Man
As to be call'd a Lyar ———————— ?

Add *Montaign*'s Essays, l. 1. c. 9. l. 2. c. 18.

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determine, when and how many Times we are permitted to lye; that depends upon Circumstances, which are infinite, and every Man's Judgment. Here, as in many other moral Subjects, we can give general Rules only. As often as they, to whom we speak, have no Right to require of us to speak freely what we think, we do them no Injury, if we conceal the Truth from them. And so the Disguising of the Truth has not the principal Property of a true Lye, which is to give them, with whom we treat, Reason to complain, that we have not dealt sincerely with them. But it does not follow, that we may always speak or act in a Manner different from our Thoughts, even though a Person should have no Right to require the contrary of us. I have given above the Reasons which relate to ourselves, and to the Consequences of taking too large a Liberty. I own, that this Permission may be easily abused, and, therefore, the surest Way is to use it as little as possible; but a good Use may be made of it; and in what a bad Case shall we be, if we must condemn and disuse all those Things, by which Men take an Occasion to excuse or justify their Irregularities? But, II. If it be true, as we have shewed, that the Principles of natural Law afford nothing to prove, that all Discourse, and, in general, every exterior Sign differing from our Intentions and Knowledge, is criminal of itself. Nor is there any more Evidence to prove, that the Holy Scriptures condemns it absolutely, at least, unless we may say, (what, indeed, I do not believe) that the Law, which forbids Lying and Dissimulation, is a positive Law only. Thus we cannot alledge any Text, either in the Old or New Testament, where Lying or Dissimulation is mentioned, but it is accompanied with some Fraud or Cheat, and by which, at least, some Duty of Charity is broken. Nothing is more common in the Style of the *Hebrews* and *Hellenists*, than to understand, by Truth, Fidelity in keeping our Engagements; and by Lying, Perfidiousness, Deceit, and Injury done our Neighbour, after some Manner or other. The Reason that St. *Paul* gives for his Exhortation, *To avoid Lying, and speak the Truth each Man to his Neighbour*, insinuates plainly enough, that he did not extend his Prohibition to Lyes profitable, and altogether innocent. *For*; says the Apostle, *we are all Members one of another*: That is to say, that the good of Society is the Foundation of this Duty. Therefore we must not extend it farther than the Advantages of Society requires. But this will never prove, that we may, on this Account, speak the Truth to all Men, at all Times and Places. On the contrary, it is for the Interest of Society, that we should often speak and act otherwise than we think. See *Veltbuysen de Princ. Justi & Decori*, where we may find Reflections which I have omitted. Farther, we may observe in the Scripture several Examples of good Men, who are not blamed for having used some Dissimulation or innocent Lye. See Mr. *Le Clerc* on *Gen.* xii. 13. Moreover, there is one Case which proves plainly, that it is sometimes commendable to speak contrary to what we think, and that is, of the *Egyptian* Midwives mentioned before by the Bye. See *Exod.* i. 20, 21. As to myself, I think an unanswerable Argument for my Opinion may be drawn from it. 'Tis evident, these Women did not speak the Truth to *Pharaoh*; and if any one doubt of it, he will be convinced, if he reads what Mr. *Le Clerc* says about it, in his Remarks upon the seventeenth Question of his Uncle; and most of our Interpreters and Divines agree with him. Nevertheless, God greatly rewarded that Lye, and, consequently, not only excused it, but approved it. For it is an empty metaphysical Subtilty to say with St. *Augustin*, That God rewarded not the Lye, but the Act of Mercy, which those wise Women shewed. *Non est itaque in eis* [Hebræis obstetricibus & *Rahab* Jerichuntina] *renumerata fallacia, sed misericordia; benignitas mentis, non iniquitas mentientis.* Contra Mendac. ad Consent. *cap* 23. As if one and the same Action could be good and evil in divers Respects, or as if a good Intention could render an Action, in its own Nature evil, good. But if this Example do not satisfy, behold another; which will make it plain, that God permits, yea, requires sometimes, that Men use an innocent Delusion. 'Tis of the Prophet, who is spoken of, 1 *Kings* xx. 35, &c. This holy Man, by God's Order, having caused himself to be wounded, set himself in the Way where King *Ahab* was to pass, and cover'd himself with a Veil, that it might not be known that he waited for him; when he perceived him coming, he cried out, and implored his Help; and he tells him how he came in that Condition by an Accident, which he had feigned. He says, That being in the Middle of the Battle, a certain Man brought a Prisoner to him, and charged him to keep him safe, upon Pain of Life, or paying a Talent; but while he was busy up and down, his Prisoner got away. Hereupon the King tells the Prophet, that he had condemned himself; and then the Prophet unveiled himself, declared to him why God had ordered him to use such an Artifice, *viz.* That *Ahab* might condemn himself by judging in the like Case. See Mr. *Le Clerc*'s Notes upon the Place. Add, also, here what I have said in several Notes upon *Grotius*, Lib. 3. cap. 1. where I have had Occasion to make some new Reflections upon this Subject. The Reader will there find an Answer to all the Objections brought against this Opinion, which, I think, I have fully established.

[1] See what our Author has said in his Discourse, *De Obligatione erga Patriam*, §. 23.

[2] See §. 10. following.

End

End that he, by apprehending our Meaning, may obtain ſome Benefit, or may eſcape ſome undeſerved Evil, which would have follow'd upon our deceiving him. So that beſides that *Logical Truth*, which conſiſts in a Conformity between Words and Things, this *Ethical* or *Moral Truth*, of which we are now treating, ſuperadds the Intention and Obligation of the Speaker: On which Score, he who declares the Truth out of Error, or Imprudence, hath barely recited the *Logical* Truth, but hath not exerciſed the *Moral*. And he who blabs out any Matter without any Obligation in himſelf, or any Right in the other Party, ought to be eſteem'd rather an idle Pratler, than a Speaker of Truth. And hence it is eaſy to gather, what muſt be the Nature of a *Lye*; namely, that it is, when our Signs or Words bear a different Senſe from our real Conceptions; whereas the Perſon to whom the Signs were directed, had a Right to underſtand, and to judge of thoſe Conceptions; and we, on our Part, lay under an Obligation to make him apprehend our Meaning. I take this to be a more clear and diſtinct Way of ſhewing the Neceſſity we ſtand under to declare our real and undiſguiſed Intentions, than if I ſhould derive the Sin and the Baſeneſs of *Lying*, barely from that general Rule of *natural Law*, that *No Man is to be hurt*; as if the whole Nature of a Lye conſiſted in its Power of *hurting*. For, ſtrictly ſpeaking, we do not *hurt* another by with-holding from him what he hath only an *imperfect Right* to receive; and yet the Violation of ſuch an *imperfect Right* is ſufficient to conſtitute a Lye. For the ſame Reaſon *Philoſtratus*'s Notion of a Lye is confuſed and unaccurate, when he reports [a], That amongſt ſome of the *Indians*, any Student in Philoſophy, who was found guilty of this Vice, was render'd incapable of bearing any Magiſtracy or Honour, *Becauſe he had, by Lying, cheated the common Society of Mankind.* But, as in all Acts by which we recede from Law, Error, Imprudence, and Raſhneſs, are diſtinguiſh'd from *Malice*, or wicked Deſign; ſo neither is any Man properly ſaid to *lye*, but he who, with evil Intention, and pre-conceived Malice, tells another what is really different from his Sentiments or Reſolutions, either to prejudice or to delude him. And hence, he who having been deceived by another Man, delivers Things, which he himſelf takes to be true, reports a *Lye*, but is not himſelf the Lyar. Yet a Perſon, who catching up Things with too haſty a Credulity, afterwards diſperſeth them amongſt others, expoſes himſelf to the Cenſure of Raſhneſs and Folly. Nay, the Spreading of another Man's Lye, or of a Matter not certainly known, may, in ſome Caſes, bring an Obligation on the Publiſher to repair the Damage occaſioned by the Report; eſpecially when ſuch a Publication approacheth near to that Treſpaſs, which the *Civilians* term *culpa lata* [b] [1].

IX. Having thus diſcover'd the true Source, and the genuine Foundation of Truth and of Lyes, we may aſſure ourſelves, that thoſe Authors are miſtaken, who aſſert, That a *Lye* and an *Untruth* are really the ſame Thing, and that he deſerves to be branded with the Name of a *Lyar*, who ſays any Thing differing from his Judgment; and that, conſequently, to ſpeak otherwiſe than we think, is in its own Nature baſe and ſinful. An *Untruth* is when you apply Words in ſuch a Manner, as that another ſhall conceive from them a Senſe not agreeable to your inward Imaginations. But now, if the other Party have no Right, by Virtue of which he ought clearly to underſtand my Meaning; and if I do not hereby prejudice any Man without Cauſe, there ſeems to be no Reaſon why, if I find it convenient for me, I may not uſe thoſe Words rather according to my own Pleaſure, than the Pleaſure of another. Hence every *Lye* is an *Untruth*, but every *Untruth* cannot come under the Name of a *Lye*: And if we take *Ariſtotle* [2] in this Senſe, when he affirms, *That a Lye is in itſelf foul and diſgraceful*, there will be no Need of *Grotius*'s Limitation, who explains καθ' αὐτὸ, *in itſelf*, by *generally*, or *without Regard to the Circumſtances* [c]. For ſuch an *Untruth* as eſcapes Cenſure, by virtue of ſome particular Circumſtances, ought, on no Account, to ſuffer the odious Character of a *Lye*. And, on the other Side, that every *Lye*, properly ſo called, is in its own Nature baſe and ſcandalous, ſeems to be beyond Diſpute.

It is worth remarking on this Head, that the very ſpeaking what is true, may ſometimes create and conſtitute a *Lye*: Which not only happens, when a Perſon affirms the Truth with the Air and Addreſs of a *Lye*, and by his [3] Manner, his Geſtures, and his Action, which uſed to be, as it were, the Life and Soul of Diſcourſe, makes his Hearers believe the contrary to what he delivers; as *Quinctilian* ſhews us how it is poſſible to be guilty of a *Lye*, as well as of a *Solæciſm*, by a baſe Action, when we ſpeak one Thing, and hint another, by a Poſture or a Nod; but it chiefly takes Place in thoſe, who, by a Practice of frequent Lying, have deprived themſelves of all Credit and Belief. Now ſuch Perſons, as they are not eaſily regarded, how willing ſoever they may be to deliver ſerious Truths; ſo they have an Opportunity of abuſing the Diffidence of a Hearer [4], to his Deception and Deluſion; who, thinking them to be always like themſelves, may eaſily be cheated by believing quite the contrary of what they averr. The Inſtance in the Fable is well known, where the Boy ſo often tricked the Countryman with a falſe Alarm of the Wolf, that, at length, when the Wolf really appear'd, he could not gain Credit enough for their Aſſiſtance. *Ageſilaus* [5] turn'd this Fetch into a Stratagem of War. For in as much as it is reckoned moſt impolitick in a General

[a] *Apollon. Tyan.* l. 2. [b] See the Story of *Caſſ. Baſſus* in *Tacit.* Ann. l. 16. c. 1, &c. [c] Lib. 3. c. 5. 9.

[1] See Lib. 3. c. 1. § 4. before-going.

[2] His Words are, Καθ' ἀυτὸ δὲ τὸ μὲν ψεῦδος φαῦλον, καὶ ψεκτὸν, *Eth. Nicom.* l. iv. c. 13.

[3] According to the Judgment of *Quinctilian*, Inſtit. Orat. l. i. c. 5. *In geſtu etiam nonnulli putant idem vitium ineſſe, cum aliud voce, aliud nutu, vel manu demonſtratur*; which is the Senſe of our Author.

[4] 'Twas upon this Principle that the judicious Conduct of *John de Vega* was grounded, when he told *Diego de Mendoza*, who ſucceeded him in his Embaſſage, That he would not find the leaſt Truth in the Miniſters of that Court. *Mendoza* replied, Then they have met with their Match; for if they tell me one Lye, I'll tell them an Hundred. But, ſays *Vega*, I took another Courſe ſometimes, for I anſwer'd their Lyes with as many Truths; and I found that it turn'd to as good an Account; for they never believed me. Thus we ſee how Lyars may be deceived. This is related by *John Antonio de Vera* in Diſc. ii. concerning an Ambaſſador, quoted by *Amelot de Houſſaie*, upon the thirteenth Letter of *Oſſat*.

[5] Here we may add ſome Verſes of *Horace*, Epiſt. l. i. Ep. 17. v. 55.

Nota refert Meretricis acumina, ſæpe catellam,
Sæpe periſcelidem raptam ſibi fientis, uti mox
Nulla fides damnis, veriſque doloribus adſit, &c.

openly

State of ſuch or ſuch an Affair, he is bound, by Covenant to acquaint me with all the Diſcoveries and Informations he hath gain'd about that Matter. If I am to exerciſe, towards another, any Duty of Humanity, which muſt be perform'd by Speech, it is manifeſt my Words muſt be agreeable to my Thoughts and Intentions. If a Man undertake to write an Hiſtory [1], he is to deliver nothing which he knows to be falſe, by virtue of that general Obligation by which we are bound to promote the Uſe and Benefit of others. As we are, likewiſe, by a common Engagement tied to expreſs our Minds by the cleareſt and plaineſt Signs, in all ſuch Caſes, when, if we do otherwiſe, we may bring ſome Hurt or Prejudice on innocent Perſons. So, laſtly, in all Commerce and Buſineſs between Men, in which, by the Conſent of the Parties, ſome Right or Obligation is to be produced, we are to declare our Meaning openly and clearly to the Perſons with whom we deal. For otherwiſe, there could be no poſſible Way of rightly adjuſting thoſe Concerns. But ſince it doth not always ſo happen, that I am bound by any of theſe Rules to open my Thoughts to another about any Affair, eſpecially ſuch as is private and particular, it is evident from hence, that I am not under an Engagement to unfold all my Opinions and Intentions to Men alike, but thoſe only which they have a Right (either perfect or imperfect) to underſtand; which Right ſuppoſeth a correſpondent Obligation on my Part: And that, therefore, I may fairly conceal and diſſemble thoſe Things, which another hath no Right to know, and which I myſelf have no Obligation to diſcloſe [a]: Nay, in ſuch Caſes, where no body elſe is injured in his Right, and where the Advantage or the Safety of myſelf, or of ſome other Perſon, cannot otherwiſe be procured, it ſhall be allowable for me to apply the common Signs in ſuch a Manner, as to expreſs what is really contrary to my Judgment. For ſince the Compact, about applying Signs in ſuch a certain Way, bears a Regard to other Obligations, which are, by the Means of theſe Signs, to be fulfilled; therefore, when thoſe Obligations ceaſe, there appears no Reaſon why I may not make a different Uſe of the Signs, if I injure no Man, and, at the ſame Time, have no greater Convenience of benefitting myſelf or others.

VIII. From theſe Principles, and fundamental Rules, it is eaſy to underſtand both the Nature of *Truth*, which Men are obliged to ſpeak and profeſs; and the Nature of a *Lye*, which is ſo abhorr'd by all the Good and Honeſt, and the Imputation of which every Man looks on as the foulest Diſgrace [b] [2]. The former then conſiſts in this, That the Signs which we make uſe of, and eſpecially our Words, do, in a proper and convenient Manner, repreſent our Thoughts to another, who hath a Right to underſtand them; and to whom we are bound, either by a perfect, or an imperfect Obligation to diſcover them: And this to the

[a] *Æſchyl.* Cœphor. σιγᾶν θ' ὅπου, &c. v. 590. The Art of Science and of well-term'd Speech. [b] *Sophocl. Trachin.* p. 345. Edit. *H. Steph.* ὡς ἐλευθέρῳ ψευδεῖ καλεῖσθαι, &c.

What Fate ſo grievous to a Free-born Man
As to be call'd a Lyar ———— ?

Add *Montaign*'s Eſſays, l. 1. c. 9. l. 2. c. 18.

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determine, when and how many Times we are permitted to lye; that depends upon Circumſtances, which are infinite, and every Man's Judgment. Here, as in many other moral Subjects, we can give general Rules only. As often as they, to whom we ſpeak, have no Right to require of us to ſpeak freely what we think, we do them no Injury, if we conceal the Truth from them. And ſo the Diſguiſing of the Truth has not the principal Property of a true Lye, which is to give them, with whom we treat, Reaſon to complain, that we have not dealt ſincerely with them. But it does not follow, that we may always ſpeak or act in a Manner different from our Thoughts, even though a Perſon ſhould have no Right to require the contrary of us. I have given above the Reaſons which relate to ourſelves, and to the Conſequences of taking too large a Liberty. I own, that this Permiſſion may be eaſily abuſed, and, therefore, the ſureſt Way is to uſe it as little as poſſible; but a good Uſe may be made of it; and in what a bad Caſe ſhall we be, if we muſt condemn and diſuſe all thoſe Things, by which Men take an Occaſion to excuſe or juſtify their Irregularities? But, II. If it be true, as we have ſhewed, that the Principles of natural Law afford nothing to prove, that all Diſcourſe, and, in general, every exterior Sign differing from our Intentions and Knowledge, is criminal of itſelf. Nor is there any more Evidence to prove, that the Holy Scriptures condemns it abſolutely, at leaſt, unleſs we may ſay, (what, indeed, I do not believe) that the Law, which forbids Lying and Diſſimulation, is a poſitive Law only. Thus we cannot alledge any Text, either in the Old or New Teſtament, where Lying or Diſſimulation is mentioned, but it is accompanied with ſome Fraud or Cheat, and by which, at leaſt, ſome Duty of Charity is broken. Nothing is more common in the Style of the *Hebrews* and *Helleniſts*, than to underſtand, by Truth, Fidelity in keeping our Engagements; and by Lying, Perfidiouſneſs, Deceit, and Injury done our Neighbour, after ſome Manner or other. The Reaſon that St. *Paul* gives for his Exhortation, *To avoid Lying, and ſpeak the Truth each Man to his Neighbour*, inſinuates plainly enough, that he did not extend his Prohibition to Lyes profitable, and altogether innocent. *For*; ſays the Apoſtle, *we are all Members one of another*: That is to ſay, that the good of Society is the Foundation of this Duty. Therefore we muſt not extend it farther than the Advantages of Society requires. But this will never prove, that we muſt, on this Account, ſpeak the Truth to all Men, at all Times and Places. On the contrary, it is for the Intereſt of Society, that we ſhould often ſpeak and act otherwiſe than we think. See *Veltbuyſen de Princ. Juſti & Decori*, where we may find Reflections which I have omitted. Farther, we may obſerve in the Scripture ſeveral Examples of good Men, who are not blamed for having uſed ſome Diſſimulation or innocent Lye. See Mr. *Le Clerc* on *Gen.* xii. 13. Moreover, there is one Caſe which proves plainly, that it is ſometimes commendable to ſpeak contrary to what we think, and that is, of the *Egyptian* Midwives mentioned before by the Bye. See *Exod.* i. 20, 21. As to myſelf, I think an unanſwerable Argument for my Opinion may be drawn from it. 'Tis evident, theſe Women did not ſpeak the Truth to *Pharaoh*; and if any one doubt of it, he will be convinced, if he reads what Mr. *Le Clerc* ſays about it, in his Remarks upon the ſeventeenth Queſtion of his Uncle; and moſt of our Interpreters and Divines agree with him. Nevertheleſs, God greatly rewarded that Lye, and, conſequently, not only excuſed it, but approved it. For it is an empty metaphyſical Subtilty to ſay with St. *Auguſtin*, That God rewarded not the Lye, but the Act of Mercy, which thoſe wiſe Women ſhewed. *Non eſt itaque in eis* [Hebræis obſtetricibus & *Rahab* Jerichuntina] *renumerata fallacia, ſed benevolentia; benignitas mentis, non iniquitas mentientis.* Contra Mendac. ad Conſent. *cap* 23. As if one and the ſame Action could be good and evil in divers Reſpects, or as if a good Intention could render an Action, in its own Nature evil, good. But if this Example do not ſatisfy, behold another; which will make it plain, that God permits, yea, requires ſometimes, that Men uſe an innocent Deluſion. 'Tis of the Prophet, who is ſpoken of, 1 *Kings* xx. 35, *&c*, This holy Man, by God's Order, having cauſed himſelf to be wounded, ſet himſelf in the Way where King *Ahab* was to paſs, and cover'd himſelf with a Veil, that it might not be known that he waited for him; when he perceived him coming, he cried out, and implored his Help; and he tells him how he came in that Condition by an Accident, which he had feigned. He ſays, That being in the Middle of the Battle, a certain Man brought a Priſoner to him, and charged him to keep him ſafe, upon Pain of Life, or paying a Talent; but while he was buſy up and down, his Priſoner got away. Hereupon the King tells the Prophet, that he had condemned himſelf; and then the Prophet unveiled himſelf, declared to him why God had ordered him to uſe ſuch an Artifice, *viz.* That *Ahab* might condemn himſelf by judging in the like Caſe. See Mr. *Le Clerc*'s Notes upon the Place. Add, alſo, here what I have ſaid in ſeveral Notes upon *Grotius*, Lib. 3. cap. 1. where I have had Occaſion to make ſome new Reflections upon this Subject. The Reader will there find an Anſwer to all the Objections brought againſt this Opinion, which, I think, I have fully eſtabliſhed.

[1] See what our Author has ſaid in his Diſcourſe, *De Obligatione erga Patriam*, §. 23.

[2] See §. 10. following.

End

End that he, by apprehending our Meaning, may obtain ſome Benefit, or may eſcape ſome undeſerved Evil, which would have follow'd upon our deceiving him. So that beſides that *Logical Truth*, which conſiſts in a Conformity between Words and Things, this *Ethical* or *Moral Truth*, of which we are now treating, ſuperadds the Intention and Obligation of the Speaker: On which Score, he who declares the Truth out of Error, or Imprudence, hath barely recited the *Logical* Truth, but hath not exerciſed the *Moral*. And he who blabs out any Matter without any Obligation in himſelf, or any Right in the other Party, ought to be eſteem'd rather an idle Pratler, than a Speaker of Truth. And hence it is eaſy to gather, what muſt be the Nature of a *Lye*; namely, that it is, when our Signs or Words bear a different Senſe from our real Conceptions; whereas the Perſon to whom the Signs were directed, had a Right to underſtand, and to judge of thoſe Conceptions; and we, on our Part, lay under an Obligation to make him apprehend our Meaning. I take this to be a more clear and diſtinct Way of ſhewing the Neceſſity we ſtand under to declare our real and undiſguiſed Intentions, than if I ſhould derive the Sin and the Baſeneſs of *Lying*, barely from that general Rule of *natural Law*, that *No Man is to be hurt*; as if the whole Nature of a Lye conſiſted in its Power of *hurting*. For, ſtrictly ſpeaking, we do not *hurt* another by with-holding from him what he hath only an *imperfect Right* to receive; and yet the Violation of ſuch an *imperfect Right* is ſufficient to conſtitute a Lye. For the ſame Reaſon *Philoſtratus*'s Notion of a Lye is confuſed and unaccurate, when he reports [a], That amongſt ſome of the *Indians*, any Student in Philoſophy, who was found guilty of this Vice, was render'd incapable of bearing any Magiſtracy or Honour, *Becauſe he had, by Lying, cheated the common Society of Mankind*. But, as in all Acts by which we recede from Law, Error, Imprudence, and Raſhneſs, are diſtinguiſh'd from *Malice*, or wicked Deſign; ſo neither is any Man properly ſaid to *lye*, but he who, with evil Intention, and pre-conceived Malice, tells another what is really different from his Sentiments or Reſolutions, either to prejudice or to delude him. And hence, he who having been deceived by another Man, delivers Things, which he himſelf takes to be true, reports a *Lye*, but is not himſelf the Lyar. Yet a Perſon, who catching up Things with too haſty a Credulity, afterwards diſperſeth them amongſt others, expoſes himſelf to the Cenſure of Raſhneſs and Folly. Nay, the Spreading of another Man's Lye, or of a Matter not certainly known, may, in ſome Caſes, bring an Obligation on the Publiſher to repair the Damage occaſioned by the Report; eſpecially when ſuch a Publication approacheth near to that Treſpaſs, which the *Civilians* term *culpa lata* [b] [1].

IX. Having thus diſcover'd the true Source, and the genuine Foundation of Truth and of Lyes, we may aſſure ourſelves, that thoſe Authors are miſtaken, who aſſert, That a *Lye* and an *Untruth* are really the ſame Thing, and that he deſerves to be branded with the Name of a *Lyar*, who ſays any Thing differing from his Judgment; and that, conſequently, to ſpeak otherwiſe than we think, is in its own Nature baſe and ſinful. An *Untruth* is when you apply Words in ſuch a Manner, as that another ſhall conceive from them a Senſe not agreeable to your inward Imaginations. But now, if the other Party have no Right, by Virtue of which he ought clearly to underſtand my Meaning; and if I do not hereby prejudice any Man without Cauſe, there ſeems to be no Reaſon why, if I find it convenient for me, I may not uſe thoſe Words rather according to my own Pleaſure, than the Pleaſure of another. Hence every *Lye* is an *Untruth*, but every *Untruth* cannot come under the Name of a *Lye*: And if we take *Ariſtotle* [2] in this Senſe, when he affirms, *That a Lye is in itſelf foul and diſgraceful*, there will be no Need of *Grotius*'s Limitation, who explains καθ' αὐτὸ, *in itſelf*, by *generally*, or *without Regard to the Circumſtances* [c]. For ſuch an *Untruth* as eſcapes Cenſure, by virtue of ſome particular Circumſtances, ought, on no Account, to ſuffer the odious Character of a *Lye*. And, on the other Side, that every *Lye*, properly ſo called, is in its own Nature baſe and ſcandalous, ſeems to be beyond Diſpute.

It is worth remarking on this Head, that the very ſpeaking what is true, may ſometimes create and conſtitute a *Lye*: Which not only happens, when a Perſon affirms the Truth with the Air and Addreſs of a *Lye*, and by his [3] Manner, his Geſtures, and his Action, which uſed to be, as it were, the Life and Soul of Diſcourſe, makes his Hearers believe the contrary to what he delivers; as *Quinctilian* ſhews us how it is poſſible to be guilty of a *Lye*, as well as of a *Solœciſm*, by a baſe Action, when we ſpeak one Thing, and hint another, by a Poſture or a Nod; but it chiefly takes Place in thoſe, who, by a Practice of frequent Lying, have deprived themſelves of all Credit and Belief. Now ſuch Perſons, as they are not eaſily regarded, how willing ſoever they may be to deliver ſerious Truths; ſo they have an Opportunity of abuſing the Diffidence of a Hearer [4], to his Deception and Deluſion; who, thinking them to be always like themſelves, may eaſily be cheated by believing quite the contrary of what they averr. The Inſtance in the Fable is well known, where the Boy ſo often tricked the Countryman with a falſe Alarm of the Wolf, that, at length, when the Wolf really appear'd, he could not gain Credit enough for their Aſſiſtance. *Ageſilaus* [5] turn'd this Fetch into a Stratagem of War. For in as much as it is reckoned moſt impolitick in a General

[a] *Apollon. Tyan.* l. 2. [b] See the Story of *Caſſ. Baſſus* in *Tacit.* Ann. l. 16. c. 1, &c. [c] Lib. 3. c. 5. 9.

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[1] See Lib. 3. c. 1. § 4. before-going.

[2] His Words are, Καθ' αὑτὸ δὲ τὸ μὲν ψεῦδος φαῦλον, καὶ ψεκτὸν, *Eth. Nicom.* l. iv. c. 13.

[3] According to the Judgment of *Quinctilian*, Inſtit. Orat. l. i. c. 5. *In geſtu etiam nonnulli putant idem vitium ineſſe, cum aliud voce, aliud nutu, vel manu demonſtratur*; which is the Senſe of our Author.

[4] 'Twas upon this Principle that the judicious Conduct of *John de Vega* was grounded, when he told *Diego de Mendoza*, who ſucceeded him in his Embaſſage, That he would not find the leaſt Truth in the Miniſters of that Court. *Mendoza* replied, Then they have met with their Match; for if they tell me one Lye, I'll tell them an Hundred. But, ſays *Vega*, I took another Courſe ſometimes, for I anſwer'd their Lyes with as many Truths; and I found that it turn'd to as good an Account; for they never believed me. Thus we ſee how Lyars may be deceived. This is related by *John Antonio de Vera* in Diſc. ii. concerning an Ambaſſador, quoted by *Amelot de Houſſaie*, upon the thirteenth Letter of *Oſſat*,

[5] Here we may add ſome Verſes of *Horace*, Epiſt. l. i. Ep. 17. v. 55.

Nota refert Meretricis acumina, ſæpe catellam,
Sæpe periſcelidem raptam ſibi fientis, uti mox
Nulla fides damnis, veriſque doloribus adſit, &c.

openly

openly to proclaim his Reſolutions, for which Reaſon the Enemy is not wont to believe what is given out in this free and *ſecure* Manner, *Ageſilaus*, by this Piece of Subtilty, prevail'd on the *Perſian* Nobleman who oppoſed him, to march his Army quite another Way than what he had thus publiſhed that he would take himſelf [a].

But as no Man will preſume to condemn the wiſe Gravity of *Epaminondas* [b], who could not bear to utter a Lye, though in Jeſt: So, on the other Hand, it is very weak to believe, that a Perſon always incurs a heinous Guilt, when, without injuring any one elſe, and for the Advantage of himſelf and others, he delivers Words differing from his real Thoughts. It were, therefore, to be wiſh'd with *Cicero* [1], *That all Simulation and Diſſimulation were utterly baniſhed from human Life*, and that Men were arrived at ſuch a happy Temper, as that no one ſhould envy the Goods of another, or plot to rob him of them; that no one ſhould abuſe the Simplicity and Credulity of others to their Prejudice or Deception; and, laſtly, that no one ſhould, in any Inſtance, reſiſt the Command of right Reaſon. Such a ſtrict and accompliſh'd Perſon *Achilles* pretends to be in *Homer* [c]; it is his brave Declaration,

Ἐχθρὸς γάρ μοι κεῖνος, ὁμῶς Ἀΐδαο πύλῃσιν,
Ὅς γ' ἕτερον μὲν κεύθει ἐνὶ φρεσὶν, ἄλλο δὲ βάζει.

Like Hell I hate the Man, whoſe Tongue reveals
A different Tale from what his Heart conceals.

But ſince he, who is ever freely publiſhing and declaring his own Concerns, lays himſelf open to the Fraud of wicked Men; and ſince moſt Perſons are inclined rather to be won upon by Artifice and Shew, than to be convinced by ſolid Plain-dealing; therefore it may not be adviſeable for us to exclude, from human Society, the Art of innocent Diſſimulation, till all the Wickedneſs, and all the Folly of Mankind is turn'd into Probity and Wiſdom. *Pindar*'s Remark is excellent to this Purpoſe, *Nem.* Od. v. v. 30, *&c.*

[2] *Not Truth with open Face and open Heart*
Is ſerviceable always, always wiſe:
But often 'tis in Life the nobleſt Art,
To know the prudent Uſe of Silence or Diſguiſe.

Theſeus's Wiſh in *Euripides*, *Hippol. Coron.* v. 925, *&c.* is but vain and fruitleſs. Though 'tis certain, at the ſame Time, that he, who makes uſe of theſe Practices of Concealment and Cunning, farther than is neceſſary for his own Defence, renders himſelf unfit to be truſted, and uncapable of being dealt with in any honeſt Affair or Buſineſs; in as much as 'tis impoſſible, but that ſuch a Perſon muſt be ſuſpected in all that he ſays or does.

The Arguments, by which ſome attempt to prove, that every *Untruth* is in itſelf odious and ſinful, are of no Weight. They tell us, "That the "Falſe-ſpeaker defileth and diſgraceth his Tongue, "that moſt noble Member, by ſuch an Abuſe; "that he deprives himſelf of Credit, to the great "Stop and Hindrance of many good Offices "amongſt Men; ſince he never fails to gain this "amongſt other Diſadvantages, *not to be believed, "tho' he ſpeak the Truth.* But this Charge holds good only againſt a ſtrict and proper Lye, not againſt ſuch Falſities as Prudence often adviſeth and recommends. They add, "That to falſify ar-"gues a Man to be of a low and abject Spirit; "ſince he, who could rely upon ſolid Plainneſs and "Truth, would have no Need to ſeek Refuge in "Tricks and Shifts." But thoſe Untruths, which are both innocent and unneceſſary, do not always proceed from Meanneſs of Soul: And, ſometimes, amongſt wicked Men, Honeſty and Truth itſelf cannot be ſupported, but by indirect and artificial Methods. Others are more fond of this Argument; "Speech is given to be an Interpreter of "the Mind; ſince then, every Untruth is contra-"ry to this End, it ought, likewiſe, to be eſteem-"ed repugnant to the Order of Nature; and far-"ther, that to have the Tongue differ from the "Mind, quite diſturbs that Harmony, which "ſhould appear in the Powers and Faculties of "Man." In Reply, we willingly allow, that Speech is the Interpreter of the Mind; but 'tis in ſuch a Manner, as that it ought not to blab out more than the Mind gives it Commiſſion to diſcloſe, the Mind being to judge what is convenient to be declared, and what to be concealed.

X. We have aſſerted every Lye to be a Violation of ſome Right; but what Kind of Right this is, and how acquired by Men [3], all are not agreed in explaining. Some conceive, that ſince both GOD and Man have a natural Ability to underſtand the Truth, which is obſtructed by the contrary Speeches, therefore they have, on this very Account, a Right of requiring others to expreſs themſelves in an intelligible Manner. Now with regard to Almighty GOD, the Thing is beyond Diſpute; for to uſe any Kind of Falſity in our Addreſſes to him, is not only extremely irreverent, as if bare and open Truth were not as prevalent with the Divine Majeſty, as Colours and Fictions; but, alſo, in the higheſt Degree fooliſh, ſince GOD doth not ſtand in Need of the Information of Men. And therefore *Cain* [d] was not only impious, but ſtupid, in endeavouring to conceal his Brother's Murder from GOD, eſpecially by ſo impudent and ſo rude a Reply. And thus far that of *Sophocles* [e] will hold good, *I hate a Man, who being taken in*

[a] *Xenophon.* Rer. Græcar. l. 3. c. 4. p. 292. Edit, *H. Steph.* *Cornel. Nep.* in *Ageſil.* c. 3. To this Head, likewiſe, belongs the Sleight of the Old Fox in *Terence*, *Heautontimor.* Act. iv. Scen. 3. [b] See *Cornel. Nep.* c. 3. n. 1. [c] *Iliad.* ix. v. 312, 313. [d] *Geneſ.* iv. 9. [e] *Antigone.* p. 234. *init.* Edit. *H. Steph.*

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[1] Offic. l. 3. c. 15. *Quod ſi Aquilliana definitio vera eſt, ex omni vita ſimulatio, diſſimulatioque tollenda eſt.* *Cicero* ſpeaks here only of Feigning and Diſſimulation, accompanied with Injuſtice and Falſe-dealing; although in the Manner our Author expreſſes it in the Original, he ſeems to take the Orator's Words in a general Senſe, as *Grotius* has, indeed, done in §. 13. of the Chapter often quoted. See Mr. *Noodt*, *De Forma emendandi doli mali in contractibus admiſſi apud Veteres*, c. ii.

[2] *Pindar*'s Greek is this, Οὐ τοι ἅπασα κερδέων φαίνουσα πρόσωπον ἀλάθεϊ ἀτρεκὴς Καὶ τὸ σιγᾶν πολλάκις ἐσὶ σοφώτατον, ἀνθρώπων νοῆσαι.

[3] Our Author (in §. viii. before-going) recites the Words of *Philoſtratus*, *De Vit. Apoll. Tyan.* Lib. 2. c. 12. That among the *Indians*, if a Student in Philoſophy was taken in a Lye, he was condemned not to be capable of any Office or Dignity, becauſe, by Lying, he would deceive the univerſal Society of all Mankind, ὡς παραποιήσαντα βίον ἀνθρώπῳ. The Reaſon, which our Author makes Uſe of upon this Occaſion, is very improper to diſcover diſtinctly the Foulneſs of Lying; but he had done better, if he had ſaid, that *Philoſtratus* ſpeaks nothing of it: For this is one of the Places where our Author miſtakes the Senſe of the Writer he quotes. For theſe are his Words, "When any *Indian* is dead, there is a Magiſtrate appointed to go to the dead Perſon's Houſe, "and enquire how he hath lived. If that Magiſtrate lye, or ſuffer himſelf to be deceived for want of making an exact Enquiry, "the Laws put him out of his Office, and render him incapable of all Offices: Becauſe he has repreſented the Man's Life other-"wiſe than it was." This is all *Philoſtratus* ſays, l. ii. c. 30.

Wickedneſs

Wickedneſs, attempts to make his Excuſe. But otherwiſe, this is no good Conſequence; a Perſon is naturally capable of underſtanding a Matter, therefore he hath a Right to underſtand it; nor doth a *phyſical* Ability always infer a *moral.* As for that which ſome add to what we are now ſaying, That he who hears an *Untruth*, doth yet underſtand the Words; and therefore, that Falſe-ſpeaking doth not take away the Right of *Underſtanding*; this is nothing at all to the Purpoſe. For ſuch an one underſtands indeed; but he underſtands only a Shadow and Fiction, inſtead of the Truth which he deſires.

Others there are, which derive that Right which is violated by *Lying*, not from *Nature*, but from the Art of Men; that is, from ſome tacit Compact: For, ſay they, ſince Diſcourſe, and other the like Marks and Tokens, were introduced by human Inſtitution, Men, at the ſame Time, laid a mutual Obligation on each other to uſe theſe Signs in ſuch a Manner, as to be able hence to make a Judgment of the Perſon's Sentiments, with whom they ſhould confer [1]: Becauſe, without ſuch an Obligation, and if every Perſon were allow'd to apply Words how he pleaſed, and to hinder others from apprehending his Meaning, this Invention of Signs had been altogether vain and fruitleſs. This is the Opinion of *Grotius* [a], on which we may make this Remark: That there is not ſufficient Care taken in it to diſtinguiſh between thoſe two Obligations, one of which regards the applying Signs in general, in ſuch a due Manner, that another may underſtand our Thoughts; and the other engageth us to diſcover, by thoſe Signs, our real Meaning to ſuch or ſuch a particular Perſon; which two are very different, and proceed from diſtinct Principles: For in as much as Words borrow their Signification from the Force of Impoſition, we muſt ſuppoſe ſome [2] Agreement to have paſſed between Men who ſpeak the ſame Language, that in common Uſe they would apply ſuch Signs to expreſs ſuch Things. But the Obligation, which ties me actually to addreſs thoſe Signs to another, or to open my Mind to him about ſuch a certain Affair, ariſeth either from ſome general Command of the *Law of Nature*, or from a particular Covenant, as has been above explain'd. Hence it appears what Judgment we ſhould make of their Notion, who deny the Nature of a Lye to conſiſt in the Violation of a Pact, on this Principle, "That whatever "is conſtituted, not by Nature, but by the Com-"pact of Men (eſpecially *tacit*) is to be derived "and to be valued from the Point of Profit, and "from that alone;" *Whereas that Men ſhould underſtand all that others ſay, doth not ſeem to be a Thing ſo very profitable and beneficial. On the contrary, it is much for our Intereſt, that we ſhould have a full Liberty of covering either with Silence or proper Colours, ſuch Matters as may be kept ſecret without the Prejudice of other Men, and with our own Advantage.* Here thoſe Points are confounded, which ought to have been with Accuracy diſtinguiſhed. For in this, that a Man ſhould underſtand the Thoughts of all others; or that all others ſhould underſtand his, there is indeed no Profit; nor did Men, by introducing of Speech, lay any ſuch mutual Obligation on themſelves. But we have already ſhewn how far any Perſon is bound to declare himſelf to another, and how far the other hath a Right to underſtand him. Suppoſing then an Obligation in us to communicate our Thoughts to ſuch or ſuch a Man, upon this, the other Obligation, which attended the Introduction of Speech, falls in, and exerts its Force, engaging us ſo to apply our Words, that the Party may apprehend our Meaning: And of this the Profit or Advantage is ſo very great, that without it there would be no Manner of Uſe in Speech.

XI. Thus much being premiſed, it will not be difficult to judge how rightly thoſe ſeveral Caſes, in which the Truth is not preciſely ſpoken, are yet, in common Eſtimation, exempted from the Character of Lyes. And here firſt of all, ſome diſtinguiſh between ſpeaking what is *falſe*, and not ſpeaking or diſſembling ſome Part of what is *true*; affirming the former to be unlawful, but the latter to be often innocent. On which Point we are to know, that although to hold our Tongue cannot properly be term'd a Lye, eſpecially if we uſed no other Sign equivalent to Speech; yet our *Silence* may, on another Account, become criminal; as ſuppoſe we hinder by it ſome Good, which we were obliged to procure; or cauſe ſome Evil, which we were bound to avert. This is what the Poet calls,

——— *animumque nefas ſcelerare ſilendo,*
Sil. Ital. l. xvi. ver. 610.
The Soul with ſilent Miſchief to defile.

Thus a Watchman, who is ſet to give Notice of the Enemy's Approach, ſhall incur the ſevereſt Puniſh-

[a] Lib. iii. c. 1. ſ. 11. [b] Lib. 12. c. 7. p. 660. B. Edit. *Caſaub. Wech.*

[1] Mr. *Placette*, in his Treatiſe of *Lying*, c. 6. affirms, "That that which makes a Lye evil in itſelf, is, that this Sin violates "not the original Compact, which is much eaſier to imagine than prove; but a new and particular Compact, which is made with "them to whom we ſpeak, every Time we ſpeak to them. For indeed, *adds he*, when I ſpeak to any Man, I do two Things; "I oblige myſelf to ſpeak what I think, and require that he ſhould believe me. If he, to whom I ſpeak, believes what I ſay, the "Bargain is not only made, but executed on the Part of him to whom I ſpake. If I lye on my Part, I break the Treaty I am "making with him, and, conſequently, I ſin againſt the *Law of Nature*, which requires, that all Agreements be faithfully executed. "When he, to whom I ſpeak, refuſes to believe what I ſay, and ſo accepts not the Agreement I propound, he ſtill appears to "diſcredit my Proceedings, as if I deſigned to make an Agreement which I would not keep. So that whether a Man believes "what I ſay, or not, I am always obliged to ſpeak Truth." But I fear that this new and particular Compact of Mr. *Placette* will be more hard to prove than the original Compact, which he rejects. For in both theſe Sorts of Agreements the Conſent is only tacit. There ought to be ſomething to ſecure it by a clear Conſequence. And ſo it lies upon Mr. *Placette* to prove, that we are obliged to this *always*, and by a neceſſary Conſequence reſulting from the Nature of Speech, for here the Queſtion lies. He muſt alſo ſhew, That we always *require* thoſe we ſpeak to, *that they believe us.* I doubt if we ever require this, ſo as to *oblige them by Compact*, as this Argument ſuppoſes. But whether the Perſons we ſpeak to believe us or not, that is their Buſineſs, not ours. Their Concern is to judge how far what we ſay deſerves Credit, or not; and when they do believe us, it is no Way on Account of this pretended Convention, but becauſe they ſee no Reaſon to doubt our Sincerity. On the contrary, 'tis they who require, that we ſhould ſpeak to them in ſuch a Manner, as to gain their Belief; but as they have not always a Right to exact this, ſo, conſequently, we do not always engage ourſelves.

[2] This is true; but, as has been obſerved, this Conſent has nothing obligatory in itſelf, and is no Way neceſſary to eſtabliſh our Author's Opinion. For it is of no Importance, whether we are agreed, or not, to expreſs certain Things by certain Terms. It is ſufficient, that thoſe who ſpeak the ſame Language, actually make Uſe of theſe Terms, inſomuch that without them they could not be mutually underſtood. Now from hence it follows, that when we are under any Obligation of communicating our Thoughts, we muſt employ theſe Terms in the Senſe they are commonly received, that being the only Means for attaining our End. As to the reſt, if we can make ourſelves underſtood by inventing new Phraſes, or giving a new Senſe to thoſe in Vogue, nothing hinders us from doing it. But this would not be the Caſe, if (as is ſuppoſed here) there was a general Agreement between all who ſpeak the ſame Language, which would produce its Effect.

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ment upon Neglect of Information. *Polybius* [a] ſays, *That an Hiſtorian, who profeſſeth to give an Account of Affairs, is no leſs a* Lyar, *if he ſuppreſs and conceal what really happen'd, than if he relate what is falſe.* But in a Matter which I am not obliged to declare to another, if I cannot with Safety conceal the whole, I may fairly diſcover no more than a Part. An Inſtance of this is uſually given in the Caſe of *Jeremiah*, who, in the xxxviith Chapter of his Prophecy, v. 25. *&c.* [b] being conſulted by the King concerning the Iſſue of the Siege, prudently hides that Particular from the Princes, as the King expreſly order'd him; aſſigning another Reaſon of the Conference, which, notwithſtanning, was, alſo, really true. Here the Prophet told only a Part of the Truth, being in no wiſe obliged to diſcloſe the whole. To the ſame Purpoſe the Story of *Athanaſius* is produced, who meeting himſelf with thoſe who were ſent to apprehend him, and being ask'd, Whether he had ſeen *Athanaſius?* anſwer'd, *That he ſaw him lately paſs by this Way, and that he was now gone on board.* For here he was under no Obligation to betray himſelf. As to the Example of *Abraham* in *Geneſis*, xx. 12. ſome queſtion whether that moſt holy Man acted prudently in calling *Sarah* his Siſter, and concealing their Marriage: For he knew her Beauty to be ſuch, as might kindle a Paſſion in the Beholders, and, at the ſame time, that unmarried Perſons are reckon'd more capable of Addreſſes than others [2]. Nor, ſay they, was *Abimelech*'s Expoſtulation with him unjuſt; and, on the contrary, it was moſt inhuman in *Abraham* to ſuppoſe, that there was no Piety or Honeſty in a State, before he arrived to be their Inſtructor: Others excuſe the Patriarch on this Argument, That the Hope of Life commonly bends the greateſt and moſt ſtubborn Souls; and that ſcarce any thing is look'd on as baſe and infamous, which is undertaken on the Score of declining Death. But this Point we leave undecided.

XII. *Grotius* diſtinguiſhes, likewiſe, between thoſe Signs which have been invented and determin'd μετὰ συνθήκης, or, *with a mutual Obligation*, and other Things, about which no ſuch Agreement hath paſs'd, (for, no doubt, when a Compact hath been made concerning the Uſe of any thing, we are exactly to conform to that ſpecified Uſe); and as to the latter Sort, he is of Opinion, that 'tis allowable to miſapply them, even when we foreſee that the other Party will thence be led into a falſe Judgment, provided either that no farther Hurt follow this Deception, or that the Hurt which follows it, is, (ſetting aſide the Conſideration of the Deceit) lawful; and when we might fairly have hurt him in an open Manner: And to this we willingly ſubſcribe. For, ſince no Agreement, either general, or particular, is ſuppos'd to have paſs'd, which might have laid a Neceſſity on me to apply the Thing in ſuch a Manner, and no otherwiſe, to the End that the ſaid Party might gather my Meaning from it; therefore, I am preſumed to be left at full Liberty as to its Uſe, ſo long as I hurt no Man injuriouſly, or without Cauſe. The Party may thank himſelf for the wrong Notion he hath form'd; and attribute it to his over-curious Impertinence in paſſing Judgment on other Mens Buſineſs. Whilſt I am exerciſing my proper Right, I am not always obliged to hinder another from taking up a falſe Opinion, in other Reſpects, harmleſs. For Inſtance, if a Man, to keep himſelf from being frighted in the Night, or to have a Light always at Hand for ſome Occaſion, ſhould ſleep with a Candle in his Chamber; he is not bound to put it out, how deeply ſoever his Neighbour may fancy that he ſits up at his Buſineſs. The Example of our Saviour, *Luke* xxiv. 28. is a Caſe of no Difficulty. For every Man may, at his Pleaſure, uſe the Geſture there repreſented: And nothing is in common Life more frequent, than to feign ourſelves in a Readineſs to be gone, that we may diſcover whether or no we are welcome Gueſts: We being ſeriouſly reſolved to depart, unleſs we are ſolicited and importun'd to ſtay. The Caſe of St. *Paul*, in *Acts* xvi. 3. ſeems a Matter of higher Conſideration [3]. But as to the other Inſtance, alledged by *Grotius*, of deceiving an Enemy, by counterfeiting Flight, Clothes, Colours, Sails, Arms, and the like; this Practice is allowable beyond Diſpute; ſince we might lawfully have done him what Miſchief we could, by the moſt plain and open Means.

XIII. It is the Judgment of the ſame Author [c], "That we do not always contract the Guilt of "*Lying*, when we uſe an ambiguous Word or Expreſſion, which admits of divers Significations, "either in common Speech, or by the Cuſtom of "*Art*, or by ſome Figure unuſual or not intelligible, provided our inward Meaning is agreeable "to any one of theſe Significations; although we "believe that the Perſon to whom we ſpeak, will "underſtand it in a different Senſe. But he very "rightly adds, That ſuch equivocal Speeches are "not raſhly to be approv'd of and allow'd; being only juſtifiable, when they ſerve for the Inſtruction of one committed to our Care; or for "the avoiding ſome pernicious and inſnaring "Queſtion [d]; or for the procuring ſome Benefit "to ourſelves, without the Damage of others [e];" For elſe, if you are under an Obligation to diſcover your Mind clearly to me, 'tis the ſame thing whether you deceive me by a plain Lye, or by a doubtful Expreſſion; eſpecially ſince the latter muſt, to ſerve your Purpoſe, be ſo fram'd and contriv'd, that I may lay hold on the more obvious and vulgar Senſe, whilſt the more abſtruſe and uncommon Anſwers to your inward Conceptions; otherwiſe, if both Significations are alike probable

[a] Lib. 12. c. 7. p. 660. B. Edit. *Caſaub. Wech.* [b] See *Grot.* l. 3. c. 1. ſ. 7. [c] *De Æquivocis*, i. 3. c. 1. §. 10. n. 1, 2. [d] *Vid.* Senec. *Troad.* v. 597, *&c.* [e] 1 *Sam.* xxvii. 10.

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[1] Ἀγνοῶν ὅτι τὸ ψεῦδος οὐχ ἧττον ἐστι περὶ τὰς μὴ τὰ γεγονότα γράφοντας ἐν ταῖς ἱστορίαις, l. 12. c. 7.

[2] But, as Mr. *Le Clerc* has obſerved, *Abraham* might have feigned many other Excuſes to let them know that *Sarah* could not be his Wife, or to put off his Anſwer about his Marriage, till he could get out of *Egypt*. Whereas, had he owned her for his Wife, he had laid Snares for his own Life to take him off, and get rid of him; becauſe he was the only Obſtacle that hindered the Enjoyment of *Sarah*.

[3] We may be well ſatisfied with what *Grotius* hath ſaid about this Matter, which I ſhall ſet down. St. *Paul* was not ignorant that the *Jews* went this way, that the Command to be circumciſed, which was then aboliſhed, did yet oblige the Poſterity of the *Iſraelites*, and as even St. *Paul* and *Timothy* himſelf were once perſuaded. But this was not in St. *Paul*'s Intention, but his Deſign was thereby to gain a familiar Converſe himſelf with the *Jews*, and procure it, at the ſame time, for *Timothy*. In truth, the very ſame Moment that the Divine Law, which commanded Circumciſion, was abrogated, Circumciſion could no longer be a Sign of the Inſtitution which every one was indiſpenſably to bear. But the Evil, which the Error in which the *Jews* were for ſome Time, and which they ought to be deliver'd from, was not ſo conſiderable as the Good which St. *Paul* labour'd to draw from it, I mean the Eſtabliſhment of the Doctrine of the Goſpel. The *Greek* Fathers often give the Name of *Oeconomy*, or *Wiſe Management*, to this Diſſimulation, *&c.* See *Gataker* upon *Marcus Antoninus*, l. 11. §. 18.

probable, ſcarce any Perſon will be ſo ſupinely negligent, as not to ask you which Way you would be underſtood? But to ſpeak ambiguouſly or obſcurely to one whom we intend to inſtruct, or whoſe Proficiency we would thus try and examine, is on no Account faulty; if the good End we propoſe may by this Means be better obtain'd, than by more plain and direct Application. To this Purpoſe is the Inſtance in St. *John*, vi. v. 5, *&c.* [a]. So if I am not obliged to declare my Mind at all to ſuch or ſuch a Perſon, nothing hinders but that I may as well let him be miſtaken, as let him be ignorant, if, beſides that Miſtake, he incur no other undeſerv'd Prejudice. And therefore no one will cenſure *Athanaſius* [1] for the Deception he put on his Purſuers, which we have already recited [b].

It is hence evident, that we ought to interpret *Grotius* with ſome Caution, when he ſays [c], "It "is requiſite to the general Notion of a *Lye*, that "what is either ſpoken or written, or by any "Marks and Tokens expreſs'd, cannot other-"wiſe be underſtood, than in ſuch a Senſe as is "different from the Intention of the Perſon thus "declaring." For in Caſes where a Man is bound clearly to diſcover his Meaning, he ought ſo to frame his Expreſſions, as that the ſame Senſe, which either the Nature of the Buſineſs in Hand, or the common Uſe and Cuſtom of Speech ſuggeſts, ſhall be, likewiſe, agreeable to his real Thoughts; nor can he, with the leaſt Reaſon, bid the Hearer thank himſelf for the Miſtake or Damage he ſuffers, only on the Account of not diving into all the remote Quirks and Terms of Expreſſion, utterly foreign to the preſent Affair; that is, for not being a Conjurer. And the Remark of *Iſocrates* [1] muſt be own'd for a certain Truth [2], *That to uſe ambiguous Sayings in judicial Contentions about Bargains, and Matters of Intereſt and Moment, is ſcandalouſly baſe, and ſhews a very high Degree of Wickedneſs.*

XIV. Much more ought we to abhor and deteſt thoſe *mental Reſervations* [3], which the wicked Artifice of ſome Men hath invented, by wreſting Words to a quite contrary Senſe to what they outwardly and plainly import; and this even in Caſes where there was an Obligation to ſpeak the Truth, and in Aſſertions confirm'd by Oath. The Effect of which is, that a Perſon ſeems outwardly to affirm what he inwardly intends to deny, and ſo *vice verſa*. A Practice, by which the whole Uſe and Deſign of Speech is utterly perverted, no Man being ſure in what Senſe he ought to take the Words of another. Nor is the Invention leſs abſurd, than it is pernicious. For ſince Diſcourſe was originally introduced as a Means of declaring what we conceive in our Minds; and ſince our Thoughts, ſo long as they do not come abroad, are of no Manner of Uſe or Effect in human Life; by what Authority can theſe ſecret Reſerves, ſo repugnant to the common Cuſtom of Mankind, take away that Effect, which the uttering of Words would otherwiſe naturally produce? Thus much indeed is uſual with us, to annex to a general Expreſſion, ſome tacit Condition or Reſtriction, taken from the ſubject Matter, or ſome other Circumſtances; by Means of which we dexterouſly adapt our Speech to the Buſineſs under Debate, and free it from Confuſion or Inconvenience. But where would be the Reaſon, or where the Subtilty of my Pooceeding? If, for Inſtance, being ask'd, whether I have done ſuch a Thing, I ſwear *I have not done it*, meaning another Thing, or the ſame at another Time? Or, if when a Man deſires Money of me, I tell him, *I have none*; that is, none to give him? Or, if I promiſe that *I will give it him*; that is, meerly for Form and Faſhion's Sake, ſo as to take it immediately again? 'Tis a fooliſh Argument which is urged to excuſe ſuch Perſons from the Sins of *Lying* and of *Perjury* [4], *That they do not indeed ſpeak that particular determinate Truth which the Hearers apprehend, and which the Words imply, yet they ſpeak another Truth of a different Kind.* As if it were at all ſatisfactory to my Queſtion, to be told a Truth of any other different Kind, and utterly foreign to the Buſineſs which I am now upon: Or, as if a Man did at all promote my Purpoſe, or the Reaſon of my Enquiry, if when I ask of *Chalk*, he anſwers me of *Cheeſe* [b]! No leſs ridiculous is that other Plea, that if in theſe Caſes we put the open Speech and *mental Reſervation* together, they will make an entire Propoſition; which taken in that united Senſe, ſhall not be falſe. As for Inſtance, if I ſay, *I am not a Prieſt*, keeping this Clauſe in my Mind, *ſo as to be under any Obligation of telling you that I am*; this whole Propoſition taken together will be true, *I am not a Prieſt, ſo as to be under any Obligation of telling you that I am.* But, in as much as Diſcourſe was invented with regard to others, not that every Man ſhould talk to himſelf; ſo the Truth or Falſhood of it is meaſured according to that which we openly declare to thoſe with whom we converſe.

XV. That we are not guilty of *Lying*, tho' we ſpeak a Thing which bears a wrong Signification [5], to Children or Perſons out of their Senſes, is generally aſſerted; and therefore 'tis thought very allowable. The Reaſon aſſign'd by *Grotius* [6] is, *Becauſe ſince ſuch Perſons have not the Liberty of Judging, they cannot ſuffer Injury with reſpect to that Liberty which they want.* This Principle we do not take to be ſufficient: For to ſpeak chiefly of the Caſe of Infants, it is plain indeed, that they ſo far want the Faculty of Judgment, as ſimply and raſhly to catch at any thing, ſpoken or repreſented to them in a wrong Manner; not being able, by Reaſoning, to diſtinguiſh Truth from Falſhood: Yet ſince they make a Part of Mankind, and on

[a] *Vid.* Grot. *ubi ſupra.* [b] *Vid.* Theod. *Hiſt. Eccl.* l. 3. c. 9. [c] Lib. 3. c. 1. f. 11. n. 1. [d] *Panathenaic. p.* 486. Edit. *Par.* 1021. [e] Add Mr. *Paſchal*'s Letters Provincia, *Lett.* 9.

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[1] See the News of the Republick of Learning, *March* 1699.

[2] The *Greek* is, Οἷς χρῆσθαι [λόγοις ἀμφιβόλοις] περὶ μὲν συμβολαίων, καὶ πλεονεξίας ἀγωνιζόμενον, αἰσχρὸν, καὶ πονηρίας δὲ μικρὸν σημεῖον.

[3] See Mr *Placette* in his Treatiſe of Lying, *&c.* c. 8.

[4] Theſe are the Words of *Sanchez* the *Jeſuit*, of whom the Reader will find ſeveral Paſſages upon this Subject in the Tranſlations of the *Provincial Letter*, to which our Author refers; for *Wendrock*, or *Nicole*, have cited theſe Paſſages more fully than they are in the Original of *Paſcal*.

[5] For the ſame Reaſon, we may invent ſomething falſe to deceive an Infant innocently, and to accommodate ourſelves to its Capacity: As, alſo, we may, with regard to grown Perſons, make uſe of weak Reaſons, which we ourſelves think trifling, when they are ſuitable to their Underſtandings, or they are prepoſſeſs'd, and there is no other Way to make them receive the moſt profitable Truth. Hence it is, that we find in the New Teſtament ſeveral Texts of the Old deliver'd, in a Senſe in which the *Jews* commonly underſtood them, tho' they did not agree to the Original; and ſeveral Arguments *ad hominem* founded upon them, or upon falſe Opinions of the *Jews*, which were falſe and uncertain. See the *Latin* Notes of Mr. *Le Clerk* upon the New Teſtament, particularly upon the Epiſtle of the *Galatians*, and his *Parrhaſiana*, Tom. I. of the firſt Edition, pag. 82, *&c.*

[6] *Grotius*'s Words are, *Quia cum illis non ſit Judicii Libertas, non poteſt eis circa illam Libertatem injuria fieri.*

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that Account have a Right not be hurt by others, as they have, likewiſe, to receive the common Office of Humanity, and to be furniſhed with good Notions, particularly by their Parents, and thoſe who have the Care of their Education [a], and are, at leaſt, capable of apprehending what is eaſy and familiar; we are, by all Means, to hold, that they have thus far the ſame Right with Perſons of advanc'd Age, that what ought to be ſhewn or declar'd to them, ſhall be propoſed in ſuch Manner as that they may underſtand it. But for as much as through the Weakneſs of their Reaſon, and the Strength of their Paſſions, they have ſcarce any Reliſh for plain Truths, therefore 'tis convenient to inſtruct them by Fables, and to keep them in Awe by falſe Terrors, till ſuch time as they grow weary of Trifles, and are able to apprehend and to value the real Solidity of Things. And thus we addreſs to them by Fiction and Diſguiſe, not to ſport with their Ignorance, or to procure their Harm; but only becauſe they cannot well be applied to in any more ſerious Method of Information [1]. *Strabo* is admirable on this Point [2 b]: "Not the Poets "alone, *ſays he*, but long before them, publick So- "cieties and States made Choice of the Art of Fa- "bles; and the Lawgivers themſelves, in regard "to the common Advantage, when they had firſt "reflected on the Genius and Temper of Rational "Creatures. For Man is led on with a moſt gree- "dy Deſire of Knowledge; and our earthly Ac- "quaintance with theſe feigned Relations, is the "firſt Step this Paſſion makes towards its own Sa- "tisfaction. Here Children begin their Informa- "tion, and willingly improve their Stock, for the "ſake of communicating it to others. The Reaſon "of all this is, becauſe Fables do ever carry ſome- "what of Novelty in them, whilſt they report "not common and conſiſtent Things, but what is "very ſtrange and unuſual. But now whatſoever "is thus new and ſurprizing, and what Men never "heard of before, cannot fail to be ſweet and agree- "able: And 'tis this which breeds in them a cove- "tous Solicitude, and an Eagerneſs after farther "Delight. In caſe the Story be wonderful and pro- "digious, this Delight is highly increas'd; which "is the Bait that tempts the young Learners to "Induſtry and Study. It is fit therefore that they "ſhould at firſt be thus caught and inſnared with "Pleaſures, but when they have attain'd to a "more mature Age, they are to be diſciplin'd and "inſtructed in the ſolid Knowledge of Things; "their Mind and Judgment being now ſtrengthned "and confirm'd, and they no longer ſtanding in "need of being flatter'd and humour'd in their "Good [c]". In the ſame Manner it is very lawful to apply Fictions to Perſons out of their Senſes, in all ſuch Caſes where they are not capable of apprehending true Reaſon.

XVI. And indeed, all in general, upon whom we cannot by plain Speech obtain the good End we deſign, we may, without the Cenſure of *Lying*, by feign'd Addreſſes, lead into a Miſtake, for their own Intereſt and Safety. Nor it is needful to draw the Reaſon of this Practice from hence; "That "we may preſume, in ſuch a Caſe, the other Par- "ty will not think hard of our Treſpaſs on his Li- "berty of Judgment; nay, that he will give us "Thanks for the Advantage he receives from it: "And therefore what is done with his Conſent and "Approbation, can be no Injury to him." For he had indeed a Right, that our Speech ſhould procure him ſome Benefit, or deliver him from ſome Miſchief; but not that it ſhould produce the quite contrary Effect; which it would have done, had he underſtood the plain Buſineſs without Art or Colour. And therefore, in theſe Caſes, we ought as much to accommodate our Diſcourſe to the Temper and Condition of the Hearer, as Phyſicians do their Medicines to the Patient's Strength and Conſtitution. Since then no Perſon can be ſaid to have had a Right of hearing Words under ſuch a Form as would have prov'd fatal to him, it cannot be properly affirm'd, that there is any waving or remitting of Right in the preſent Caſe. And then for the Speaker, ſince he was on his Part obliged to perform this Office thro' the Mediation of Speech, either by the Law of Humanity, or by ſome ſtricter Engagement, 'tis manifeſt, that he cannot be bound to apply his Speech in ſuch a Manner as ſhall make it loſe its End and Effect. Therefore all ſuch feigned Speeches, as either ſave and protect Innocence, appeaſe Rage, aſſwage Grief, or procure any Benefit or Convenience to others, which could not have been obtain'd by direct and open Expreſſions, are not only to be exempted from the Number of Lyes, but to be applauded as ſo many Inſtances of Wiſdom. Vid. *Exod.* i. 17, 19. 1 *Sam.* xix. 12, *&c.* xx. 5, 28, 29. 2 *Sam.* xiv. 4, *&c.* 2 *Cor*, ix. 2, 3, 4. *Plin.* l. iii. Epiſt. 16. Of *Arria*, *Hor.* Od. l. iii. 11. v. 35, 36. Of *Hypermneſtra*,

Splende mendax, & in omne virgo
Nobilis ævum;

Gallantly falſe, and prais'd in Endleſs Fame.

Euripid. Phœniſſ. v. 998, *&c.* Sadi Roſar. Perſic. c. 1. *A beneficial Falſity is better than a deſtructive*

[a] Add *Matt.* xviii. 10. [b] Lib. I. p. 19. Geor. *Par, Ed.* [c] See the Fables of *Æſop* peculiarly recommended by *Plutarch*, Apollon. l. v. c. 5. As, alſo, the Fables of *De la Fontaine*, and the Diſcourſe of Mr. *Buddeus*, Entitled, *Philoſophorum Fabularum Amator*, among his *Analecta Hiſtoriæ Philoſophicæ*.

[1] *Lucretius* expreſſeth this by a fine Similitude, l. i. v. 935.. *&c.*

Sed veluti pueris abſinthia tetra medentes
Cum dare conantur, prius oras pocula circum
Contingunt mellis dulci flavoque liquore,
Ut puerorum ætas improvida ludificetur,
Labrorum tenus; interea perpotet amarum
Abſinthi laticem, deceptaque non capiatur,
Sed potius tali facto recreata valeſcat.

Phyſicians uſe
In giving Children Draughts of bitter Juice
To make them take it, tinge the Cup with Sweet,
To cheat the Lip: this firſt they eager meet,
And then drink on, and take the bitter Draught,
And ſo are harmleſly *deceiv'd*, not *caught*:
For by this Cheat they get their Health, their Eaſe,
Their Vigour, Strength, and baffle the Diſeaſe.
Mr. *Creech.*

So the Mother in *Theocritus*, Idyll. 15. v. 40.

——οὐκ ἀξῶ τυ, τέκνον, μορμὼ δάκει ἵππος.

——You muſt not go, my dear Delight.
For there are Bug-bears, and the Horſes bite.

[2] The Greek is, Καὶ πρῶτον ὅτι τὺς μύθυς ἀνελέξανλο, οὐχ οἱ ποιηταὶ μόνον, ἀλλὰ καὶ αἱ πόλιες πολὺ πρότερον καὶ οἱ νομοθέται τὺ χρησιμον χάριν, βλέψανλες εἰς τὸ φυσικὸν πάθος τῦ λογικῦ ζώυ. Φιλειδήμων γὰρ ὁ ἄνθρωπος, προοίμιον δὲ τύτυ τὸ φιλόμυθον· ἐντεῦθεν οὖν ἄρχονται τὰ παιδία ἀκροᾶσθαι καὶ κοινωνεῖν λίγων ἐπὶ πλεῖον. Αἴτιον δὲ ὅτι καινολόγια τίς ἐσιν ὁ μῦθος, ἃ τὰ καθεςηκότα φράζων, ἀλλ' ἕτερα παρ' αὐτὰ ἡδὺ δὲ τὸ καινον, καὶ ὁ μὴ πρότερον ἔγνω τίς· πᾶτο δ' αὐτό ἐσι, καὶ τὸ ποιῶν φιλειδήμονας. Ὅταν δὲ σροσῇ καὶ τὸ θαύμασον, καὶ τὸ τερατῶδες, ἐπὶ τὴν ἡδονὴν, ἥπερ ἐσὶ τῦ μανθάνειν φίλτρον. Καταρχὰς μεν ὖν ἀνάγκη τοιύτοις δελέασι χρῆσθαι προϊύσης δὲ τῆς ἡλικίας ἐπὶ τὰ τῶν λόγων μᾶλλον ἄγειν ἤδη τῆς διανοίας ἐξῳωμένης, καὶ μηκέτι δεομένης κολάκων.

Strabo

Truth. Heliodor. Æthiop. l. i. c. 3. p. 52. Edit. Ludg. Batav. *Feigned Speeches are then good and commendable, when they turn to the Advantage of the Hearer, and do not prejudice the Speaker* [1]. We have a famous Example of this Proceeding in the Story of [2] *Rhahab* the Harlot, *Josh.* ii. 4. And though *Grotius* observes, on this Place, that *before the Gospel, a Lye, which contributed to the Preservation of good Men, was not esteem'd faulty; and that therefore this Act is commended by the Apostles*, Hebr. xi. 31. and *James* ii. 25. as *agreeable to the Times in which it was perform'd*; yet 'tis our Judgment, that the same Thing may, even now, be lawfully done, provided no civil Obligation be prejudiced by it [a]. To the same Head belongs the Case of those Commanders, who, in the Heat of an Engagement, raise the drooping Spirits of their Men by some false Insinuation or Report, on the Strength of which Encouragement they may force their Way to Victory and Safety: Or those who, before a Battle, lessen and undervalue the Number of the Enemy. Vid. *Cornel. Nep.* Eumen. c. 3. The like Instances are frequent in all Histories. *Xenoph.* Apomn. l. iv. p. 462, 463. Edit. Græc. *H. Steph. If a General observing his Men to be in a Consternation, falsely tells them, that there are fresh Succours ready at Hand for their Relief, and by this Stratagem composeth their Fears, and keeps them in Heart; under what Species of Actions shall we reckon it? In all Appearance, under those that that are just and good.* In *Sophocles* (*Philoct.* v. 108, 109.) when *Neoptolemus* asks *Ulysses*, [3] *Don't you think it base to affirm a Falsity?* His Answer is, *No, in Case the Falsity be a Means of Safety.* Add *Frontin.* Stratag. l. i. c. 11. l. ii. c. 7. *Polyæn.* l. i. c. 33. Stratag. Of *Leotychydes, Maxim. Tyrius*, Dissert. iii. p. 29. Edit. Lugd. *The bare telling the Truth is no such brave and comely Thing, unless it be done to the Benefit of those we are to instruct. Thus a Physician often deceives his Patients, a General his Soldiers, a Master of a Ship his Crew; and we censure neither of them upon this Account. For, in some Cases, a feigned Story doth Men good, when the plain Truth would do them Harm* [4]. Though I know not whether *Agesilaus*'s Stratagem of this Kind deserves Commendation; who, when he saw his Soldiers in some Fright and Concern at their being like to be over-power'd by the opposite Forces, wrote in his Hand the Word *VICTORY*; and taking the Beast's Liver out from the Sacrificer, printed those Letters upon it, and then shew'd it to the Troops, as a Divine Promise of Success [b]. For the same Reason Physicians are not to be accounted *Lyars*, when they persuade a nice or a froward Patient of the Sweetness or Mildness of what they apply for his Cure. *Liban.* Declam. 29. p. 664. D. Edit. *Paris. Morell. We see the Physicians beguiling their Patients Appetite with harmless Deceits. The same we ought to practise towards those who are in Health, so often as it would be better for them to be deceived, than to be truly informed* [5]. Yet I question whether the Artifice of *Erasistratus*, Physician to King *Seleucus*, in making him believe that his Son *Antiochus* was in Love with his Wife, may be admitted into this Number. *Vid.* Lucian, *De Dea Syra.* The Conduct of *Joseph* is justifiable on the like Account, who, to work his Brothers to a serious Repentance for their Crime in selling him, and to judge how they stood affected towards his Father and towards *Benjamin*, held them a long Time in Consternation and Suspence, by feigned Accusations [c]. Lastly, that the Fables of the Poets, by which they insinuated *Truth* under a taking Disguise, are not to be condemn'd for criminal Falsities, every one will easily admit [d]. And thus far the Saying of *Sophocles* will hold good:

Δοκῶ μὲν οὐδὲν ῥῆμα οὐν κέρδει κακόν [e].
I judge no Speech amiss that is of Use [6].

XVII. The Governors of States may sometimes too very lawfully use a Manner of Speaking not strictly true [f]; in as much as their Counsels and Resolutions, if divulged, frequently come to nothing, or, perhaps, turn to the Prejudice of the Commonwealth. And, therefore, when bare Silence is not a sufficient Covering, they may veil their Designs with feigned Speeches, to divert the Curiosity of inquisitive Men. *Lying*, says *Plato* [g] [7], *is useful to*

[a] Add *Socrat.* Eccles. Hist. l. iii. c. 14. [b] *Plutarch. Apophth. Lacon.* p. 214. E. T. 2 Edit *Wech.* [c] *Gen.* xlii, &c. *Joseph.* Antiq. Jud. l. ii. c. 3. [d] Vid. *Plutarch.* de audiend. *Poet.* [e] *Electra*, v. 61. [f] Vid. *Grot.* l. iii. c. 1. §. 15. [g] *De Repub.* l. iii. p. 611. Edit. *Wech.*

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[1] The Greek is Καλὸν γάρ ποτε κὴ τὸ ψεῦδος ὅταν ὠφελῇ τοὺς λέγοντας, μηδὲν παραβλάπτῃ τοὺς ἀκούοντας.

[2] She knew that GOD, by an extraordinary Judgment, would deliver the *Canaanites* to the *Israelites*, otherwise she did not act the Part of a good Citizen in hiding the Spies of a People who came to invade their Country. See Mr. *Le Clerc*'s Note upon that Place, and St. *Chrysostom de Pœnitentia*, Orat. 2. p. 774, 775. Tom. 6. Edit. *Savil.* As, also, a Passage cited by *Grotius*, Lib. 3. cap. 1. §. 16. Not. 2. of my Translation.

[3] The Greek is, Neopt. Οὐκ αἰσχρὸν ἡγῇ δῆτα τὰ ψευδῆ λέγειν; Ulysses, Οὐκ εἰ τὸ σωθῆναί γε τὸ ψεῦδος φέρει.

[4] The Greek is, Οὐδὲν γὰς σεμνὸν τὸ τ' ἀληθῆ λέγειν, εἰ μὴ γίγνοιτο ἐπ' ἀγαθῷ τῷ μαθόντος, ἔτω, κὴ ἰατρὸς νοσοῦντα ἐξαπᾶτᾷ, κὴ στρατηγὸς στρατόπεδον, κὴ κυβερνήτες ναυτας· κὴ δεινὸν ἐδὲν, ἀλλὰ ἥδη ψεῦδος ὤισεν ἀνθρώπους, κὴ τ' ἀληθὲς ἔβλαψεν.

[5] The Greek is, Καὶ μὴν κὴ τὲς ἰατρὲς ὁρῶμεν τὰς τῶν καμνόντων ἐπιθυμίας ἅπαταις ἀναβαλλοντας; ἤδή που κὴ πρὸς ὑγιαινόντας τοῦτο ποιοῦμεν ὅταν ἧ χεῖττον, τοῦ τ' ἀληθὲς ἀκουσαι, τὸ παρακρουσθῆναι. But our Author, who quotes this Passage, also, observes, that it may be doubted, whether we may regard that as an innocent Cheat, which *Erasistratus* made Use of to cure the Prince *Antiochus* who was in Love with his Mother-in-Law *Stratonice*. We may find the Story in *Lucian*'s Work, *De Dea Syriaca*, and Mr. *Fontinelle*'s Dialogues of the Dead, both Ancient and Modern, *Dial.* 5. Our Author, a little higher, also, disapproves a Piece of Craft which *Agesilaus* made Use of to encourage his Soldiers: Without doubt, because it implied a Contempt of the Deity.

[6] But these Words do not signify what our Author supposes, following the *Latin* Translation (not excepting the *Oxford* Edition in 1705. of the two Tragedies of this Poet). There is nothing that one may not speak innocently, if it tends to our Advantage. Mr. *Dacier* translates them differently, but perhaps to no better Purpose. He gives us the whole Train of the Discourse, to shew us, that these Words ought to have a different Sense. To procure himself some Advantage. In the main, saith *Orestes*, "What Evil "can happen to me, if I pass for dead, if I shew, by my Actions, that I am full of Life, and I have gained an immortal Name? "As for me, I am persuaded there can be no sad Presage, where there is so much Profit." But there may be, as I believe, a better Translation given, more agreeable to *Orestes*'s Thoughts, and to the *Greek*, thus: "I am persuaded, that no Report can "tend to our Dishonour, and hurt our Reputation, when so much Profit may arise from it." This appears from what follows. "How many of the Sages, who were, for a long Time, taken for dead, have returned to Life again, and were the more ho-"noured by all the World? I hope I shall have the same good Luck, and after the Report of my Death is dispersed every where, "I shall of a sudden appear again to my Enemies, &c." In these last Words the Original thus imports, τῆς δὲ τῆς φημης απὸ, &c. From whence it appears, that ῥῆμα is the same as φήμη. In fine, we may compare this Expression, ῥῆμα κακὸν, with a like one in the New Testament, *Happy are ye, when Men shall speak all Manner of Evil* (πᾶν πονηρὸν ῥῆμα) *against you falsely*, Matt. v. 11.

[7] The Greek is, Ἀνθρώποις δὲ ψεῦδος χρήσιμον, ὡς ἐν φαρμάκου εἴδει, δῆλον, ὅτι τό γε τοιοῦτον ἰατροῖς δοτέον, ἰδιώταις δὲ ἐχ ἁπτέον — Τοῖς ἄρχουσι δὴ τ' πόλεως, εἴπερ τισὶν ἄλλοις προσήκει ψεύδεσθαι, ἢ πολεμίων, ἢ πολιτῶν ἕνεκα, ἐπ' ὠφελείας τῆς πόλεως, τοῖς δὲ ἄλλοις πάσιν ἐχ ἁπτέον τοῦ τοιουτου. We ought to observe, that *Plato* treats here of such Lyes only as concern a State, as appears by what follows, and does, by no Means, condemn such innocent Lyes as private Men use one with another. This Philosopher, at the End

of

to Mankind only in the Way of Physick, and, therefore, should be allow'd to publick Physicians, but ought not to be touch'd by private Patients. Princes and Governors (if any Persons else) may be permitted to use the same Stratagem[1]*, either for the Ruin of the Enemy, the Preservation of the Subjects, or any Way for the Advantage of the Community: But all others ought strictly to abstain from this Practice.* A famous Instance we have in *Solomon*'s Judgment, 1 *Kings* iii. 25. And so *Claudius* in *Sueton*[a], brought a Woman to own her Son, whom she first, on probable Arguments, denied, by commanding her to marry him. Thus a Father and a Son being arraign'd together for the Murther of a Priest, when it could not be made out which of the two had committed the Fact, each refusing to accuse the other; *Charlemagne*, as we are told, gave Sentence of Death upon them both; upon which the Father confess'd himself the Murtherer. So, it being a Law in *Spain*, that in Case a Female-slave be with Child by her Master, she shall be immediately restored to Liberty. Once it happen'd, that a Nobleman's Maid was discover'd to be in this Condition; the Nobleman denied the Thing, and the Proofs alledg'd not being evident, King *Alphonso* order'd the Child to be publickly sold into Servitude; the News of which Sentence moved the Father to discover himself. So when *Neleus*, being about to lead abroad a Colony, was commanded by the Soothsayers to purge his Army of all polluted Persons, he pretended that he himself had murder'd a Child, and so stood in need of Expiation; and, by this Means, persuading others to confess themselves guilty, he left all those behind him, whom he had thus convicted of Impurity[b]. 'Tis a Proverb with the *Spaniards*, *Tell a Lye, and you'll get out the Truth.* To the same Head belongs the Dissimulation and Concealment about the Sickness or Death of Princes, for the Prevention of Tumults. Though we are not willing to extend this Liberty so far as to justify the politick Devices of *Numa*[c]. Nor will the same Privilege hold at all in the Case of Promises and Engagements[d].

XVIII. But farther, *Grotius*[e] having thus asserted, "That every Lye ariseth from the Impairing "of some Right, which one Man may have to "understand the Mind of another; *concludes from* "*hence*, That we cannot be charged with this "Fault[2], when we direct a feigned Discourse to "one who is not deceived by it, though a third "Person should thence happen to entertain a wrong "Opinion." For 'tis to be supposed, that I and he, to whom I address'd myself, are transacting some private Business, which doth not at all belong to the Person who overhears us. Therefore the Man, with whom I am dealing, is certainly not deceived with my Manner of Speech, because he well apprehends my Meaning by it, just as if I should relate a Fable, or use an Irony or Hyperbole to one who knew how to put the right Construction upon the Words. And as for the third Man, I do not contract the Guilt of Lying in respect of *him*, because I have no Business with him, and, consequently, he hath no Right to understand my Sentiments. So that if he take up a false Notion, from Expressions applied to another Person, not to himself, he is to lay all the Blame on his own Curiosity and Impertinence. But lest this Position should be abused to ill Purpose, we are to add, as a necessary Caution, that 'tis, by no Means, allowable for two Persons to make use of such Occasions as these, by way of Stratagem, to delude or expose a Third. For altho' it be never so true, that this third Man hath not a perfect Right to know my Judgment, yet the Law of Humanity and Charity requires, that my Speech do not occasion his undeserved Prejudice. Therefore we ought, on all Accounts, to make this Distinction, whether the third Party overhears our Discourse without his own Fault, or whether, out of a busy, or a malicious Humour, he purposely intrudes into our Secrets. And, therefore, this Assertion chiefly holds good against these inquisitive, gossipping Knaves, who make it their Employment treacherously to catch up what other Persons drop in private Company. Now when we apprehend ourselves to be watch'd by such sly Designers, and yet are not inclined to be altogether silent, we are wont to disappoint their busy Curiosity, by throwing in a Sett of Talk quite impertinent to the Affair which we were before debating of; or by agreeing to tell some Story, which our politick Eves-dropper, hugging as a mighty Discovery, may, upon his communicating it to others, be sufficiently laughed at for his Pains; provided neither he, nor any Person else, suffer any farther Damage by this Contrivance. We know very well 'tis a general Duty not to lessen the Honour and Reputation of others, nor to ridicule and expose them. Yet, as we do not think ourselves guilty of any Sin, when we discover the Mistake of another, supposing it to be done without either Bitterness or Insolence, (Things so unworthy of Men of Sense and Breeding) although we should hereby rather diminish, in some Respect, than improve his Credit: So what should hinder us from correcting a Fault in a Man's Morals, when it proves troublesome to us, even by Sport and Ridicule, that we may incline him to leave off the Habit? For to amend and reform others cannot, therefore, be judged unlawful, because it tends

[a] Cap. 15. [b] *Ælian Var. Hist.* l. viii. c. 5. [c] Add *Polyæn.* Stratagem. l. ii. in *Epaminond.* n. 6, & 12. *Polyb.* l. xvi. c. 11. [d] Add *Bacon*'s Ess. vi. [e] Lib. iii. cap. 1. §. 13. n. 1.

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of the foregoing Dialogue, owns, that there is a profitable Lye, which is not to be hated. As for Example, when one speaks a false Thing to one's Enemy, to procure himself some Advantage, or to a Friend out of his Senses, to hinder some Mischief. These Sort of Lyes are like salutary Remedies. Here *Plato* keeps to the Notion of a Medicine, and represents the Sovereign and his inferior Magistrates, as so many publick Physicians, who alone, consequently, may make Use of a Lye for the Benefit of the State. But he always supposes, that in Matters which do not concern the Government, whoever can procure an Advantage to another by a Lye, or some other innocent Piracy, he is the true Physician to whom it belongs to administer that Medicine. Τὶ δὲ δὴ; τὸ ἐν τοῖς λόγοις ψεῦδος, πότε καὶ τί χρήσιμον, ὅτε μὴ ἄξιον εἶναι μίσους· ἀρ' ὲ πρός τε τὲς πολεμίες, καὶ τῶν καλουμένων φίλων, ὅταν διὰ μανίαν, ἤτινα ἄνοιαν, κακόν τι ἐπιχειρῶσι πράττειν, τότε ἀποτροπῆς ἕνεκα, ὡς φάρμακον, χρήσιμον γίνεται. See, also, Lib. ii. & *de Legibus*, Lib. ii. & Lib. xi. So that *Grotius* had not throughly examined the Sense of *Plato*, when he says, That that Philosopher seems sometimes to allow, and sometimes to deny Physicians, properly so called, a Liberty to speak contrary to their Thoughts; and *Grævius*, who criticises *Grotius*, does not much mend the Matter, by affirming, that *Plato* allows it only to Magistrates and Physicians.

[1] See what our Author says in his Discourse, *De Concordia veræ Politiciæ cum Relig. Christiana*, §. 10.

[2] Some of the Fathers of the Church, as *Grotius* observes, recite here the Censure which St. *Paul* passed on St. *Peter*, who, being at *Antioch*, withdrew himself from the Company of the new-converted *Gentiles*, because he would not offend the *Jews*, *Gal.* ii. 11, &c. For say St. *Chrysostome* and St. *Jerome*, St. *Peter* knew very well, that St. *Paul* did not censure him in Earnest, but did it seemingly only to comply with the Weakness of the Brethren present. But 'tis plain that St. *Paul* spoke very seriously, and blames St. *Peter*'s Carriage, as attended with inexcusable Hypocrisy, because, by withdrawing from the *Gentiles*, he gave an Occasion to believe, that the Observation of the Ceremonies of *Moses*'s Law was absolutely necessary to render them acceptable to GOD; now this is contrary to the End and Design of the Gospel. See the Interpreters on the Place.

to

to the Diſparagement of their Worth and Excellency. Thus, ſince 'tis the common Intereſt of Mankind, that each Man ſhould not underſtand the Secrets of all, it is eſtabliſhed as 'twere by the general Conſent of Nations, that ' ſeal'd Letters, ſhould be opened by him only to whom they are directed: Therefore if I find any Perſon intercepting and ſearching my Letters, it can be no Crime, if I contrive to let ſome Writing fall into his Hands, which ſhall give him no great Satisfaction in the reading. As a greedy Boy, who hath got a trick of plundering the Cupboard, ſuffers no Injury, if amongſt the other Proviſion he meets with a Bait not very ſweet or ſavoury. It was a pleaſant Piece of Deception, which *Herodotus* [a] reports of *Nitocris* or *Samiramis*, who ordered the following Words to be engraven on her Sepulchre, *If any* Babylonian *Prince happens to be in great Diſtreſs for Money, let him open this Tomb, and take out as much as he pleaſeth.* King *Darius* [2] afterward removing the Stone, found no Treaſure, but only this Rebuke, *If thou hadſt not been inſatiably covetous, thou wouldſt never have plundered Coffins to enrich thee:* Or, as *Maximus Tyrius* [b] gives the Story, *All Curſes follow thee, thou moſt greedy of Mankind; who, for the Sake of Gold, haſt preſum'd to diſturb and violate the Dead* [3]. To give Credit to ſuch Inſcriptions is no more an Argument of Avarice than Folly. In the Story of *Papyrius* in *Gellius* [4] [c], the Senators rightly commend the Cauſe of the young Gentleman's Fiction; that is, the Wit and Secrecy of ſo unexperienced Years; but adjudge the *Manner* of it to be a little undutiful and diſreſpectful to his Mother; eſpecially ſince the Jeſt occaſion'd a Petition not much to the Honour and Credit of the Ladies, That one Wife ſhould rather have two Husbands, than one Husband two Wives. Nor could I ever prevail with my ſelf to be heartily angry with that Senator in *Plutarch* [d], who, to divert his Wife's Importunity in asking about the Secrets of the Houſe, told her a ſtrange Tale of a *Quail* [5], ſaid to be ſeen to fly through the *Forum* with a golden Helmet. Tho' he ought, indeed, at the ſame time, to have taken care that this babling Dame ſhould not put others into a groundleſs Fright by her Report. For then the preſent Miſtake, which laſted but an Inſtant, would have been ſufficiently recompenſed by the Diverſion and Satisfaction which follow'd it. Now if we are bound to uſe Caution, that the Perſon, whom we have juſtly and deſervedly impos'd upon, ſhould not deceive others; much leſs will it be allowable to perſuade one Man of what is falſe, with Deſign that he may delude a third Perſon; although perhaps the former do not hereby ſuffer any particular Hurt. For indeed to be thus made the Inſtrument of deceiving another, is, in itſelf, mean and unworthy: And as for our Part, 'tis the ſame thing, whether we abuſe a Man immediately by our own Act, or by the Intervention of ſome Perſon elſe, whom we have ſuborn'd for that Service. Though 'tis an Art which many practiſe; firſt, to cheat thoſe whom they intend to make uſe of for the cheating of others. Vid. *Senec. Thyeſt.* v. 320. As *Davus* obſerves [6], there's a great deal of Difference, *ex animo omnia, ut fert natura, facias, an de induſtria?* Whether a Man acts according to real Intention and the plain Guidance of Nature, or according to the Affectation of Art and Deſign, *Terent. Andr.* Act iv. Scen. 4. Add *Gell.* l. xii. c. 12.

XIX. This is manifeſt, that ſince the Obligation to diſcloſe our Mind ceaſeth with regard to Enemies, it cannot fall under the Sin of *Lying*, to give them a feign'd Relation [e], to terrify them with falſe Rumours, or any ways to procure their Prejudice, provided no undeſerved Loſs or Damage enſue to a third Party who is our Friend. For why may not we, by Stratagem and Subtilty, and without endangering our own Perſons, hurt him whom we have Licence to attack with open Violence? The Reaſon why ſome have diſdain'd this Method of Hoſtility [f], was not becauſe they thought any Right to be violated by it, but becauſe among the moſt fierce and martial Souls no Actions againſt an Enemy is look'd on as glorious, but ſuch as carries in it ſome Sort of Vigour, and Force of Body and Mind. But what we ſpeak about deceiving and circumventing an Evemy, is, by no Means, to be extended to any Pacts [7] or Treaties ſet on Foot about concluding or intermitting the War. For ſince the Law of Nature commands us to maintain Peace, as far as may be done with Convenience, and to repair any Breach that may happen in it, we muſt ſuppoſe ourſelves commanded, at the ſame Time to uſe thoſe Means, without which this End can never be obtain'd. But now Enemies cannot poſſibly come to an Accommodation, unleſs there be on both Sides an Obligation to the clear Diſco-

[a] Lib. 1. p. 48. Edit. *H. Steph.* [b] *Diſſertat.* 10. *in fin. Vid.* Olearii *Itin. Perſic.* l. iv. c. 7. [c] Lib. i. c. 23. [d] *De Garrulitate*, p. 507. Tom. ii. Edit. *Wech.* [e] See *Grot.* l. iii. c. 1. ſ. 17, 18. [f] *Vid.* Grot. *ubi ſupra*, & ſ. 20.

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[1] See Mr. *Hertius*'s Diſcourſe, *De Commeatu Literarum*, §. 3. in Tom. i. of his Comments, and ſmall Tracts, where he, alſo, obſerves, that it has always been taken for a great Incivility, and a Piece of notorious Meanneſs, to publiſh the Letters we receive from others, when it brings ſome Prejudice to the Writer. Upon which Occaſion it may be ſeaſonable to rehearſe the lively Reproof which *Cicero* gave *Marc Antony* long ago. "He, alſo, read a Letter, which he ſaid he had received from me. O Man without "Humanity; and who is ignorant of common Life! For is there any Man, who has converſ'd ever ſo little with honeſt Men, as "upon a little Difference with a Friend to make no Scruple to publiſh and read the Letters he has received from him before all "the World? Is it not to baniſh all Friendſhip out of the World, to take away the Liberty of Friends writing one to another when "they are abſent? How many Trifles do we put into our Letters, which, being divulged, will appear ridiculous? And how many "ſerious Things, which ought not to be made publick?" *At etiam literas, quas me ſibi miſiſſe diceret, recitavit, homo, & humanitatis expers, & vitæ communis ignarus! Quis enim unquam, qui paululum modo bonorum conſuetudinem nôſſet, literas ad ſe ab amico miſſas offenſione aliqua interpoſita, in medium protulit, palamque recitavit? Quid eſt aliud tollere è vita vitæ ſocietatem, quam tollere amicorum colloquia abſentium? quam multa joca ſolent eſſe in epiſtolis, quæ prolatæ ſi ſint, ineptæ videantur? quam multa ſeria, neque enim ullo modo divulganda*, Philip. ii. 4. See an Example of this indiſcreet Rudeneſs in the News of the Republick of Letters, *December* 1685, where Mr. *Bayle* cenſures the Author of the Dialogue between *Photinus* and *Irenæus*, &c. which was the deceaſed Mr. *Guatier*, a Miniſter.

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to Mankind only in the Way of Physick, and, therefore, should be allow'd to publick Physicians, but ought not to be touch'd by private Patients. Princes and Governors (if any Persons else) may be permitted to use the same Stratagem[1]*, either for the Ruin of the Enemy, the Preservation of the Subjects, or any Way for the Advantage of the Community: But all others ought strictly to abstain from this Practice.* A famous Instance we have in *Solomon*'s Judgment, 1 *Kings* iii. 25. And so *Claudius* in *Sueton*[a], brought a Woman to own her Son, whom she first, on probable Arguments, denied, by commanding her to marry him. Thus a Father and a Son being arraign'd together for the Murther of a Priest, when it could not be made out which of the two had committed the Fact, each refusing to accuse the other; *Charlemagne*, as we are told, gave Sentence of Death upon them both; upon which the Father confess'd himself the Murtherer. So, it being a Law in *Spain*, that in Case a Female-slave be with Child by her Master, she shall be immediately restored to Liberty. Once it happen'd, that a Nobleman's Maid was discover'd to be in this Condition; the Nobleman denied the Thing, and the Proofs alledg'd not being evident, King *Alphonso* order'd the Child to be publickly sold into Servitude; the News of which Sentence moved the Father to discover himself. So when *Neleus*, being about to lead abroad a Colony, was commanded by the Soothsayers to purge his Army of all polluted Persons, he pretended that he himself had murder'd a Child, and so stood in need of Expiation; and, by this Means, persuading others to confess themselves guilty, he left all those behind him, whom he had thus convicted of Impurity[b]. 'Tis a Proverb with the *Spaniards*, *Tell a Lye, and you'll get out the Truth.* To the same Head belongs the Dissimulation and Concealment about the Sickness or Death of Princes, for the Prevention of Tumults. Though we are not willing to extend this Liberty so far as to justify the politick Devices of *Numa*[c]. Nor will the same Privilege hold at all in the Case of Promises and Engagements[d].

XVIII. But farther, *Grotius*[e] having thus asserted, "That every Lye ariseth from the Impairing "of some Right, which one Man may have to "understand the Mind of another; *concludes from* "*hence*, That we cannot be charged with this "Fault[2], when we direct a feigned Discourse to "one who is not deceived by it, though a third "Person should thence happen to entertain a wrong "Opinion." For 'tis to be supposed, that I and he, to whom I address'd myself, are transacting some private Business, which doth not at all belong to the Person who overhears us. Therefore the Man, with whom I am dealing, is certainly not deceived with my Manner of Speech, because he well apprehends my Meaning by it, just as if I should relate a Fable, or use an Irony or Hyperbole to one who knew how to put the right Construction upon the Words. And as for the third Man, I do not contract the Guilt of Lying in respect of *him*, because I have no Business with him, and, consequently, he hath no Right to understand my Sentiments. So that if he take up a false Notion, from Expressions applied to another Person, not to himself, he is to lay all the Blame on his own Curiosity and Impertinence. But lest this Position should be abused to ill Purpose, we are to add, as a necessary Caution, that 'tis, by no Means, allowable for two Persons to make use of such Occasions as these, by way of Stratagem, to delude or expose a Third. For altho' it be never so true, that this third Man hath not a perfect Right to know my Judgment, yet the Law of Humanity and Charity requires, that my Speech do not occasion his undeserved Prejudice. Therefore we ought, on all Accounts, to make this Distinction, whether the third Party overhears our Discourse without his own Fault, or whether, out of a busy, or a malicious Humour, he purposely intrudes into our Secrets. And, therefore, this Assertion chiefly holds good against these inquisitive, gossipping Knaves, who make it their Employment treacherously to catch up what other Persons drop in private Company. Now when we apprehend ourselves to be watch'd by such sly Designers, and yet are not inclined to be altogether silent, we are wont to disappoint their busy Curiosity, by throwing in a Sett of Talk quite impertinent to the Affair which we were before debating of; or by agreeing to tell some Story, which our politick Eves-dropper, hugging as a mighty Discovery, may, upon his communicating it to others, be sufficiently laughed at for his Pains; provided neither he, nor any Person else, suffer any farther Damage by this Contrivance. We know very well 'tis a general Duty not to lessen the Honour and Reputation of others, nor to ridicule and expose them. Yet, as we do not think ourselves guilty of any Sin, when we discover the Mistake of another, supposing it to be done without either Bitterness or Insolence, (Things so unworthy of Men of Sense and Breeding) although we should hereby rather diminish, in some Respect, than improve his Credit: So what should hinder us from correcting a Fault in a Man's Morals, when it proves troublesome to us, even by Sport and Ridicule, that we may incline him to leave off the Habit? For to amend and reform others cannot, therefore, be judged unlawful, because it tends

[a] Cap. 15. [b] *Ælian Var. Hist.* l. viii. c. 5. [c] Add *Polyæn.* Stratagem. l. ii. in *Epaminond.* n. 6, & 12. *Polyb.* l. xvi. c. 11. [d] Add *Bacon*'s Ess. vi. [e] Lib. iii. cap. 1. §. 13. n. 1.

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of the foregoing Dialogue, owns, that there is a profitable Lye, which is not to be hated. As for Example, when one speaks a false Thing to one's Enemy, to procure himself some Advantage, or to a Friend out of his Senses, to hinder some Mischief. These Sort of Lyes are like salutary Remedies. Here *Plato* keeps to the Notion of a Medicine, and represents the Sovereign and his inferior Magistrates, as so many publick Physicians, who alone, consequently, may make Use of a Lye for the Benefit of the State. But he always supposes, that in Matters which do not concern the Government, whoever can procure an Advantage to another by a Lye, or some other innocent Fallacy, he is the true Physician to whom it belongs to administer that Medicine. Τὶ δὲ δὴ; τὸ ἐν τοῖς λόγοις ψεῦδος, πότε καὶ τί χρήσιμον, ὅτε μὴ ἄξιον εἶναι μίσους· ἀρ' ὲ πρός τε τὰς πολεμίας, καὶ τῶν καλουμένων φίλων, ὅταν διὰ μανίαν, ἤτινα ἄνοιαν, κακόν τι ἐπιχειρῶσι πράττειν, τότε ἀποτροπῆς ἕνεκα, ὡς φάρμακον, χρήσιμον γίνεται. See, also, Lib. ii. & *de Legibus*, Lib. ii. & Lib. xi. So that *Grotius* had not throughly examined the Sense of *Plato*, when he says, That that Philosopher seems sometimes to allow, and sometimes to deny Physicians, properly so called, a Liberty to speak contrary to their Thoughts; and *Gronovius*, who criticises *Grotius*, does not much mend the Matter, by affirming, that *Plato* allows it only to Magistrates and Physicians.

[1] See what our Author says in his Discourse, *De Concordia veræ Politiciæ cum Relig. Christiana*, §. 10.

[2] Some of the Fathers of the Church, as *Grotius* observes, recite here the Censure which St. *Paul* passed on St. *Peter*, who, being at *Antioch*, withdrew himself from the Company of the new-converted *Gentiles*, because he would not offend the *Jews*, *Gal.* ii. 11, &c. For say St. *Chrysostome* and St. *Jerome*, St. *Peter* knew very well, that St. *Paul* did not censure him in Earnest, but did it seemingly only to comply with the Weakness of the Brethren present. But 'tis plain that St. *Paul* spoke very seriously, and blames St. *Peter*'s Carriage, as attended with inexcusable Hypocrisy, because, by withdrawing from the *Gentiles*, he gave an Occasion to believe, that the Observation of the Ceremonies of *Moses*'s Law was absolutely necessary to render them acceptable to GOD; now this is contrary to the End and Design of the Gospel. See the Interpreters on the Place.

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to the Diſparagement of their Worth and Excellency. Thus, ſince 'tis the common Intereſt of Mankind, that each Man ſhould not underſtand the Secrets of all, it is eſtabliſhed as 'twere by the general Conſent of Nations, that [1] ſeal'd Letters, ſhould be opened by him only to whom they are directed: Therefore if I find any Perſon intercepting and ſearching my Letters, it can be no Crime, if I contrive to let ſome Writing fall into his Hands, which ſhall give him no great Satisfaction in the reading. As a greedy Boy, who hath got a trick of plundering the Cupboard, ſuffers no Injury, if amongſt the other Proviſion he meets with a Bait not very ſweet or ſavoury. It was a pleaſant Piece of Deception, which *Herodotus* [a] reports of *Nitocris* or *Samiramis*, who ordered the following Words to be engraven on her Sepulchre, *If any* Babylonian *Prince happens to be in great Diſtreſs for Money, let him open this Tomb, and take out as much as he pleaſeth.* King *Darius* [2] afterward removing the Stone, found no Treaſure, but only this Rebuke, *If thou hadſt not been inſatiably covetous, thou wouldſt never have plundered Coffins to enrich thee:* Or, as *Maximus Tyrius* [b] gives the Story, *All Curſes follow thee, thou moſt greedy of Mankind; who, for the Sake of Gold, haſt preſum'd to diſturb and violate the Dead* [3]. To give Credit to ſuch Inſcriptions is no more an Argument of Avarice than Folly. In the Story of *Papyrius* in *Gellius* [4] [c], the Senators rightly commend the Cauſe of the young Gentleman's Fiction; that is, the Wit and Secrecy of ſo unexperienced Years; but adjudge the *Manner* of it to be a little undutiful and diſreſpectful to his Mother; eſpecially ſince the Jeſt occaſion'd a Petition not much to the Honour and Credit of the Ladies, That one Wife ſhould rather have two Husbands, than one Husband two Wives. Nor could I ever prevail with my ſelf to be heartily angry with that Senator in *Plutarch* [d], who, to divert his Wife's Importunity in asking about the Secrets of the Houſe, told her a ſtrange Tale of a *Quail* [5], ſaid to be ſeen to fly through the *Forum* with a golden Helmet. Tho' he ought, indeed, at the ſame time, to have taken care that this babling Dame ſhould not put others into a groundleſs Fright by her Report. For then the preſent Miſtake, which laſted but an Inſtant, would have been ſufficiently recompenſed by the Diverſion and Satisfaction which follow'd it. Now if we are bound to uſe Caution, that the Perſon, whom we have juſtly and deſervedly impos'd upon, ſhould not deceive others; much leſs will it be allowable to perſuade one Man of what is falſe, with Deſign that he may delude a third Perſon; although perhaps the former do not hereby ſuffer any particular Hurt. For indeed to be thus made the Inſtrument of deceiving another, is, in itſelf, mean and unworthy: And as for our Part, 'tis the ſame thing, whether we abuſe a Man immediately by our own Act, or by the Intervention of ſome Perſon elſe, whom we have ſuborn'd for that Service. Though 'tis an Art which many practiſe; firſt, to cheat thoſe whom they intend to make uſe of for the cheating of others. Vid. *Senec. Thyeſt.* v. 320. As *Davus* obſerves [6], there's a great deal of Difference, *ex animo omnia, ut fert natura, facias, an de induſtria?* Whether a Man acts according to real Intention and the plain Guidance of Nature, or according to the Affectation of Art and Deſign, *Terent. Andr.* Act iv. Scen. 4. Add *Gell.* l. xii. c. 12.

XIX. This is manifeſt, that ſince the Obligation to diſcloſe our Mind ceaſeth with regard to Enemies, it cannot fall under the Sin of *Lying*, to give them a feign'd Relation [e], to terrify them with falſe Rumours, or any ways to procure their Prejudice, provided no undeſerved Loſs or Damage enſue to a third Party who is our Friend. For why may not we, by Stratagem and Subtilty, and without endangering our own Perſons, hurt him whom we have Licence to attack with open Violence? The Reaſon why ſome have diſdain'd this Method of Hoſtility [f], was not becauſe they thought any Right to be violated by it, but becauſe among the moſt fierce and martial Souls no Actions againſt an Enemy is look'd on as glorious, but ſuch as carries in it ſome Sort of Vigour, and Force of Body and Mind. But what we ſpeak about deceiving and circumventing an Evemy, is, by no Means, to be extended to any Pacts [7] or Treaties ſet on Foot about concluding or intermitting the War. For ſince the Law of Nature commands us to maintain Peace, as far as may be done with Convenience, and to repair any Breach that may happen in it, we muſt ſuppoſe ourſelves commanded, at the ſame Time to uſe thoſe Means, without which this End can never be obtain'd. But now Enemies cannot poſſibly come to an Accommodation, unleſs there be on both Sides an Obligation to the clear Diſco-

[a] Lib. 1. p. 48. Edit. *H. Steph.* [b] *Diſſertat.* 10. *in fin. Vid.* Olearii *Itin. Perſic.* l. iv. c. 7. [c] Lib. i. c. 23. [d] *De Garrulitate*, p. 507. Tom. ii. Edit. *Wech.* [e] See *Grot.* l. iii. c. 1. ſ. 17, 18. [f] *Vid.* Grot. *ubi ſupra*, & ſ. 20.

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very of their Mind, in reference to what is transacted between them; and, consequently, unless their mutual Diffidence be remov'd by a Necessity and Engagement to speak the Truth in all Articles and Conditions of Peace. And when it is asserted as lawful to delude or hurt an Enemy by any feign'd Report; this ought, on no Account, to be carried so far as to justify the Spreading of false Crimes and Imputations, in order to the Impairing his Honour and Credit. The State of Hostility doth, indeed, license me to conceal my Meaning from my Foe, or by scattering false News to open my Way to his Hurt. But he who goes about to charge an Enemy with any grievous Crime, and would have his Accusation [1] believed by those who are at Peace with him, must lay aside all the Stratagems and Deceits of War, and set up for an Assertor of plain Truths; and, therefore, with regard to those Persons, who are supposed to be his Hearers, he is to play the Part of an Historian, or ordinary Relator. Whence, if he voluntarily recede from the Truth and Reality of Things, he cannot avoid the double Guilt of Lying and Slandering. Again, to charge an Enemy falsely to his Face, is a Mark of a low and impotent Reviler. To return Lyes for Lyes, is to imitate the Folly and Vanity of the Adversary [a]. As for the Notion of *Lipsius*, in his Treatise *of Politicks* [b], who reckoning up the Persons towards whom we may be allow'd to practise Simulation, or Dissimulation, joins Foreigners to Enemies; this ought no farther to be admitted, than as it is for our Advantage to hide our Designs, or our Affairs, from their Notice. For that we should, by feign'd Speeches, procure their Harm or Loss, is what Nature itself will not bear, on Account of that Nearness of Blood by which all Mankind stand related and allied to each other.

XX. 'Tis a Question of more Difficulty, Whether a Criminal or an Offender, arraigned on any Account, may deny the Fact [2] with which he is charged, or endeavour to elude the Accusation by feigned Arguments, and yet not incur the Guilt of Lying? And here we do not speak of the Divine Tribunal, in respect to which, the safest Course is to fly immediately to humble Confession, and an earnest Imploring of Pardon; since it would not be less Impiety than Folly, to use Excuses or Denials before an Omnipotent Judge. And it was on this Principle that *Joshua* made the Exhortation to *Achan*, which we have in *Josh.* vii. 19, 20. For there the Criminal was before detected by the Hand of Heaven. The present Enquiry, therefore, is confined to human *Judgments*; which are principally designed for these two Ends and Uses: *First*, that every Man may obtain what is his Right and Due: And, *secondly*, that fit Punishments may be inflicted for the Correction and Restraint, both of those, who have dared, with wicked Purpose, actually to violate the Rights of others; and of those too, who, by reason of their cold Affection towards Justice, would have proceeded to the same Commissions, did they not dread the Suffering those Evils, which they have seen fall so heavily on other Offenders. Now, to decline the Severity of this Process, some think it by no Means allowable to make use of false Speeches: First, because the Judge hath an especial Right to understand the Truth. Wherefore, neither the Sanctity of the Magistrate, who presides in the Name of GOD, nor the Necessity which the Subject lies under to Obedience, will give the least Place or Countenance to Contumacy or Circumvention. Besides, they say, this Permission appears rather dangerous than needful or beneficial; in as much as conceal'd Crimes do the more Mischief. Especially, if what is delivered in Excuse, be not only false in *Fact*, but in *Theory*; every such Untruth being of ill Consequence, not only consider'd by itself, but, likewise, in regard that one Error gives Occasion and Rise to an infinite Train of others. Yet the contrary Opinion is by many preferr'd, who say, we ought to distinguish, in every Crime, between the Damage done, and the base Guilt or Commission; to the former of which Restitution properly answers, and to the latter Punishment. By the *Law of Nature* every Man ought to make Restitution for Damage occasion'd by his Fault; and, at the same Time, the suffering Party ought, upon his Sorrow and Reparation, to admit him to Pardon. Therefore, every guilty Person is, by an Obligation strictly so call'd, bound to be always ready to repair any Damage he hath caused.

But no Man is tied to offer up himself freely to Punishment, and to be an Informer against himself. So that if the Fact be not known, and an open [3] Restitution would be a Confession of the Guilt; in this Case, the Restitution is to be made in some indirect and secret Manner. All Punishment must be inflicted upon Men against their Wills; otherwise it could never obtain its due End, which is to deter the present Offender, and all other Persons from Sin. But whatever we lie under an *Obligation* to perform, is to be undertaken by our own free and voluntary Motion. Since then no Person is properly *obliged* to invite and call down Punishment on his own Head [4], but must, indeed, as he is a Man, naturally abhor it in

[a] Add Mr. *Pascal*'s Epist. 15. *cum Annotat.* [b] Lib. iv. c. 14. n. 32. [c] Vid. *Digest.* 48. tit. 21. *De bonis eorum qui antesentent. &c.* Leg. 1.

[1] Our Author does not answer directly, and has forgot the best Reason, which is, that Calumny has no Manner of Relation with the End of War: It neither tends, of itself, to weaken our Enemy, or procure us Justice, or to promote Peace. It is, therefore, always a bad Thing, and equally detestable at all Times. Add here what I have said upon *Grotius*, Lib. 3. cap. 1. §. 2. Not. 2.

[2] *Plato*, without Doubt, would have taken the negative Part here. For he will not allow a private Person to lye before a Magistrate, and says, 'tis a great Fault for a sick Man to lye to his Physician, a Scholar to his Master, *&c.* His Words are, Ἀλλὰ πρός γε δὴ τοὺς τοιούτους ἄρχοντας ἰδιώτην ψεύσασθαι, ταυτὸν ϗ μεῖζον ἁμάρτημα φήσομεν, ἢ κάμνοντι πρὸς Ἰατρὸν, ἢ ἀσκοῦντι πρὸς παιδοτρίβην, περὶ τῶν τοῦ αὐτοῦ σωματος παθημάτων μὴ τ' ἀληθῆ λέγειν, &c. *De Republ.* l. iii. p. 389. *Ed. Steph.* Nay, he goes farther, and maintains, that every one, of his own Accord, is to accuse himself and Relations, that they may suffer the Punishments which the Law inflicts, though they be Capital, as his Words import. Εἰ μὴ εἰ τις ὑπολάβοι ἐπὶ τύραντίσι κατήγορεῖν δεῖν, μάλιστα μὲν ἑαυτὸν, ἔπειτα δὲ ϗ τῶν οἰκείων, ϗ τῶν ἄλλων, ὃς ἂν ἀεὶ τῶν φίλων τυγχάνῃ ἀδικῶν, ϗ μὴ ἀποκρύπτεσθαι, ἀλλ' εἰς τὸ φανερὸν ἄγειν τὸ ἁμάρτημα, ἵνα δῷ δίκην, ϗ ὑγιὴν γένηται. Ἀναγκαζειν δὲ ϗ αὐτὸν, ϗ τὰς ἄλλας μὴ ἀποδειλιᾶν, ἀλλὰ παρέχειν μυσαντα ϗ ἀνδρείως, ὥσπερ τύραννον κάπειτα Ἰατρῷ, τὸ ἀγαθὸν, ϗ καλὸν διώκοντα, μὴ ὑπολογιζόμενον τὸ ἀλγεινὸν, ἐὰν μέν γε πληγῶν ἄξια ᾖ δικηκὼς ἢ, τύπτειν παρασκευάζειν, ἐὰν δὲ δεσμῶ, δεῖν· ἐὰν δὲ ζημίας ἀποτίνοντα· ἐὰν δὲ φυγῆς, φεύγοντα· ἐὰν δὲ θανατῳ, ἀποθνήσκοντα. In Gorgia, p. 480. Ed. *H. Steph.* We may add here, what *Montagne* says with regard to Part of this Passage, *viz. That this Precept is carried too far.*

[3] Mr. *Thomasius*, who, in his Treatise *De Jurisp. Divin.* l. ii. c. 8. §. 85, *&c.* is of a contrary Judgment to our Author, and objects, that this Condition of making good the Damage, tends to divulge the Crime, as we may suppose; because, by making good the Damage, the Crime is owned. But he afterwards answers it himself, in his Book, intituled, *Fundam. Jur. Nat. & Gent.* where he changes his Opinion, and says, that the guilty Person may, either by way of Accommodation, or by Friends, satisfy the Person injured in such a Manner, that he shall not know who it was that wrong'd him, or if he has some Knowledge of him, the Thing shall not be so notorious as to bring him to Punishment.

[4] The Words are, *Ignoscendum censuerunt Principes ei, qui sanguinem suum qualiter qualiter redemptum voluit.* By the first of these Laws it is ordained, That a Man shall not be held as convicted, who, being accused of a capital Crime, bribes his Accuser to desist from the Prosecution. In this Case, the Law has regard to the invincible Inclinations, which leads every Man to try always to save himself from the Death which threaten'd him. See Mr. *Noodt*'s *Diocletian. & Maxim.* Cap. 8.

the higheſt Degree; eſpecially if it tend to Death, or ſome other grievous Evil; there appears no Reaſon why he may not decline it any Way poſſible, provided he do not hereby injure a third Party [a]. Nor can it much conduce to the Intereſt of a Commonwealth, that, after Reparation hath been made for the Damage, any ſuch Fact, as we now ſpeak of, ſhould be puniſhed; that is, a Fact not open and notorious, and which, conſequently, might be diſguiſed or excuſed by ſome Colour or Plea. Therefore, as none but a Fool will deny manifeſt Faults; ſo from what hath been here alledged, it ſeems allowable for a Man to wipe off an Imputation by a falſe Defence. Though for a Priſoner to urge falſe Opinions, can ſeldom turn to his Advantage, the Court being ſuppoſed well skilled in Right and Equity. A Judge, indeed, hath Power and Liberty to get out the Truth by any poſſible Means [1], in Caſe the Fact be of ſuch Conſequence, that the Safety of the Publick abſolutely requires it ſhould be puniſhed. And, therefore, he cannot be taxed with Lying, if, to bring the Party to a Confeſſion, he make uſe of ſome Stratagem or Fiction: As, ſuppoſe, by pretending that he hath received full Information ſome other Way, or by threatning that he will proceed to ſuch or ſuch Severities, if the Perſon accuſed perſiſt in his Obſtinacy, and the like. But it cannot hence preſently be concluded, that the Criminal himſelf is bound to own the Charge: Becauſe neither doth every Power, which denotes the bare Exerciſe of ſome Act, infer an [2] *Obligation* in the Object towards which it is directed: And beſides, there are other Ways for the Judge to penetrate into the Buſineſs, as by Arguments and Witneſſes; which Witneſſes, when examin'd about the Crimes of others, are obliged, though unſworn, to declare the Truth, in Obedience to the Command of Authority. Farther, Self-preſervation is a Thing which challengeth ſo much Favour and Allowance, that 'tis reckoned odious to puniſh the moſt notorious Offenders, without giving them a Hearing [3] [b]. On which Account, no Perſon is blamed for caſting any Veil or Colour over his Fault. The Divine Tribunal and the Human are not, in all Reſpects, alike; nor doth a mortal Judge preſide with ſuch Majeſty and Authority as Almighty God. And if a Priſoner be not bound to make a voluntary Confeſſion, his Denial cannot, in the leaſt, impair that Obedience which he owes to the Civil Power. 'Tis true, a Crime, which hath been reſolutely and ſtubbornly diſowned, commonly meets with the ſeverer Puniſhment; becauſe free Confeſſion is generally a Sign of Penitence, which much leſſens the Malignity of the Offender: Yet whether it be more advantageous cunningly to deny a Fact, or to embrace the Ingenuity of an open Acknowledgment, is a Point which belongs to another Kind of Enquiry, not to that which we are now engaged in, and which confines itſelf to Matters of ſtrict Duty, what a Man is bound to do, and what not [4]. Which of theſe two Opinions ought to be choſen rather than the other, any Man will apprehend, who hath Judgment enough to weigh the Arguments offer'd on both Sides. 'Tis very remarable, that which *Hayton* reports, in his Hiſtory of the *Tartars*, c. 48. *That altho', in other Reſpects, they are moſt notorious Lyars, yet in two Things they ſtrictly obſerve the Truth: Firſt, that no Man among them arrogates to himſelf the Glory of an Exploit which he really hath not perform'd: And, ſecondly, that whoever hath committed a Crime, though ſuch as he knows will coſt him his Life, when examin'd by his Lord, never conceals the Matter.* And amongſt the *Japoneſe*, to be diſcover'd in a Lye before the Judge, is a capital Offence.

XXI. But it will be ask'd, What Liberty may the Council or the Advocate fairly take in this Caſe? Our Opinion is, that we ought here to diſtinguiſh between *Civil Caſes* and *Criminal*. In the former it doth not appear that the Advocate can, with a ſafe Conſcience, hinder the injured Party from obtaining his Right as ſoon as poſſibly he may. And, therefore, in ſuch Controverſies, we condemn, as unlawful, not only falſe Allegations and feign'd Reaſons, but, likewiſe, all dilatory Exceptions and Demurs; in as much as all theſe are a Let and Hindrance to the one Party from paying what he owes; and to the other, from receiving what is due to him [c]: But, in criminal Caſes, where the Diſpute regards only the Puniſhment, we judge it ought farther to be conſider'd, whether the *Council* be aſſign'd by the publick Authority, or by the particular Appointment of the Priſoner. If by the former, it doth not ſeem allowable for them to make uſe of feign'd Arguments, and falſe Colours? ſince the Deſign of the Court, in deputing them, was only, that they might wipe off any Calumny thrown upon the Priſoner, and take Care that he ſuffer no Injuſtice. Which End is ſufficiently anſwer'd by a bare Refutation of the Proofs offer'd by the Accuſer. But he, whom the Priſoner particularly chooſeth and retains to plead in his Behalf,

[a] Yet compare l. xiii. *D. De cuſtodia & exhibitione reorum.* & *Grotii* Annotat. in *Flor. Sparſionib.* [b] Vid. l. xlviii. tit. 17. *Princ. D. De requir. vel abſent. demand.* [c] Comp. l. ix. §. *ult. D. Ad L. Cornel. de falſis.*

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[1] Yet *Grotius* on *Deut.* xii. 8. obſerves, that the *Jews* were allow'd to uſe Artifice in the Diſcovery of the Criminal, only when the Party was accuſed of enticing others to Idolatry.

[2] There is always ſome Obligation, though it is not ſo far extended as the Right. See l. iii. c. 5. §. 1. n. 1, And l. viii. c. 3. §. 4. The Queſtion here is to know, If the End of Puniſhment requires that a Criminal ſhould own a Crime, of which he can be no other Ways convicted, but by his own Confeſſion, or whether Citizens are obliged to do this at the Hazard of their Lives? Now we can affirm neither the one nor the other of theſe. The publick Good, for which all Puniſhment is deſign'd, no Way requires, that every Crime, committed againſt the Law, be puniſh'd, but only thoſe which are notorious, and ſufficiently proved. If a Crime, for Want of Proof, remains unpuniſhed, this does not hinder others from being aw'd, ſo as not to commit the like for Fear of Juſtice; becauſe no Man can aſſure himſelf of Safety, or guard himſelf againſt Diſcovery. The Eyes of the Magiſtrate, though they may wink, are not always ſhut. As to the Criminal himſelf, who cannot be condemn'd but by his own Confeſſion, the Caſe here does not relate to a Villain harden'd in Wickedneſs. With regard to ſuch, the Queſtion is needleſs. We muſt ſuppoſe here a Perſon who is penitent, and who has, otherwiſe, his Duty at Heart. Now granting this, and the Obſcurity of the Caſe rendring the Puniſhment uſeleſs, as to its chief End, it is certainly better for the State that ſuch a Man ſhould eſcape, and, conſequently, he is not bound to own the Fact. The Magiſtrate may, indeed, examine him, and employ all his Addreſs, to get a Confeſſion from him; but it no Way follows, that the Criminal is obliged to accuſe himſelf. Here are not two Rights diametrically oppoſite to each other, with regard to the ſame Subject, but a reaſonable Exception to that Right which the Magiſtrate has of extorting the Truth.

[3] The Words are, *Neque enim inaudita cauſa quenquam damnari æquitatis ratio patitur.* We may here make another Reflection, that is, That no Credit was given to the Declaration of a Man, who accuſed himſelf, or, who being accuſed, made a voluntary Confeſſion, unleſs there were other Proofs, both that the Crime was committed, and that he was the Perſon who committed it. *Divus* Severus *reſcripſit confeſſiones Reorum pro exploratis facinoribus haberi non oportere, ſi nulla probatio religionem cognoſcentis inſtruat.* Digeſt. lib. 47. tit. 18. *De Queſtionib.* leg. 1. §. 17. See, alſo, the laſt Section; and M. *Schulting*'s Diſſertation at the End of his *Enarratio Pandectarum*, §. 4. *& ſeqq.*

[4] We may eaſily diſcern, that our Author embraces the laſt Opinion.

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ſince he only acts as his Client's Interpreter, may, in our Judgment, lawfully uſe the ſame Method of Defence which the Priſoner might have uſed, had he anſwer'd for himſelf. *He is under a very great Miſtake*, ſays *Tully* [1], *that fancies he hath got our real Opinion and Authority for all that he meets with in our Judiciary Orations. Whatever we deliver'd on thoſe Subjects, is to be aſcribed to the Cauſes, and to the Times, not to the Man, or to the Pleader.* And in his ſecond Book of *Offices* [2], he maintains, ſometimes to defend a guilty Perſon, is not contrary to any Duty of Religion. Nor is Juſtice in any great Danger of ſuffering by this Permiſſion: For, ſince the Judge is ſuppoſed fully to underſtand the Law, the Advocate, by producing falſe Laws or falſe Authorities, is not likely to prevail to any Purpoſe; and he is never credited upon his bare Aſſertion, but obliged to produce ſufficient Proof. And, therefore, if a guilty Perſon do, by this Means, ſometimes eſcape unpuniſh'd, the Fault is not to be charged on the Advocate, or on the Priſoner, but on the Judge, who had not the Wiſdom to diſtinguiſh between Right and Wrong: Yet *Plato* [a] would not grant even this Degree of Indulgence in his Commonwealth. And the ancient *Egyptians* held it for a certain Maxim, That the *Harangues* of the Lawyers very much darken'd and perplex'd the Law [b]. Eſpecially, ſince, as *Euripides* [c] obſerves, *Truth always ſpeaks plain*; and, therefore, doth not ſtand in Need of the Windings and Turnings of Interpreters: Whereas, [3] *unjuſt Speeches being always ſick and weak in themſelves, require ſtrong and ſubtil Medicines for their Support.* 'Tis a Saying of *Pindar* [4], *Three Words are enough to ſet off a good Cauſe.* And *Iſocrates*, amongſt his other Rules to *Demonicus*, adviſeth him, *Never to undertake in Court the Defence of a wicked Man: For*, ſays he, *People will think you are inclined to thoſe Practices yourſelf, which you defend in others* [5].

It is hence evident how far we may admit of *Quinctilian*'s Aſſertion [6 d]; *A wiſe Man*, ſays he, *is on ſome Occaſions allow'd the Privilege of Lying, and an Orator, if he cannot otherwiſe bring the Judge to Reaſon and Equity, muſt neceſſarily apply himſelf to the Moving his Affections.* And again, *That which, at the firſt Propoſal, appears ſo harſh and ſtrange, may, however, be maintain'd upon reaſonable Grounds; namely, that a good Man, in defending a Cauſe, may ſometimes go about to perplex the Truth, and deceive the Judge* [7 e]. But the Inſtances, which he offers, requires a more ſtrict Examination. Firſt, he affirms, *That a Perſon, arraign'd for plotting againſt a Tyrant, may be defended by falſe Allegations* [8 1]. And this is built upon the *Grecian* Hypotheſis, which makes the Killing of Tyrants lawful. Otherwiſe, to defend, by feign'd Arguments, a Perſon, guilty of Treaſon againſt the Prince to whom we have ourſelves ſworn Allegiance, is, therefore, unlawful, becauſe every Subject is bound to guard and preſerve his Sovereign to his utmoſt Ability: Whereas the Deſire or Endeavour of ſheltering a Conſpirator from juſt Puniſhment would be utterly inconſiſtent with that Obligation. He proceeds to urge, *What if a Judge ſhould be about to condemn a Man for ſome good Actions, unleſs we can prove the Actions not to have been perform'd, ſhall not the Orator, who appears in his Behalf, be allow'd the Uſe of ſuch Means to preſerve this innocent, and what is more, this worthy and commendable Member of the State* [8 2]? But, indeed, ſuch a Caſe as this can hardly be ſuppoſed. For nothing ought to be honour'd with the Name of a good Action, but what is agreeable to the Laws of the Commonwealth. And it doth not appear how any Man ſhould be brought into Judgment for ſuch a Performance. Let us imagine, therefore, that a Perſon, by ſome good and noble Piece of Service, hath incurr'd the Envy of wicked Men, and that theſe wicked Men have afterwards got Poſſeſſion of the Seat of Juſtice. Here if the Fact were openly known, and an Accuſation brought againſt him for it, it would ſignify nothing to diſown it. As it would have been idle for *Cicero*, had he been arraign'd for putting to Death the Aſſociates of *Catiline*, to deny the Charge. But if the Fact may ſtill be diſſembled with ſome Colour and Probability, there is no Reaſon why an innocent Priſoner may not be defended by feign'd Arguments before a wicked Judge. As for the other Inſtance of *Quinctilian*, *When a Man is to diſſuade from ſome Undertaking, juſt indeed naturally and in itſelf, but, in the preſent Juncture of Affairs, diſadvantageous to the State* [8 3]; there is no Need he ſhould endeavour, by falſe Reaſons, to prove thoſe juſt Things to be unjuſt; but it is ſufficient for him to ſhew, that what may juſtly be done, is not always neceſſary to be done; and that the Times now require us to chooſe what is uſeful and profitable, rather than what, in Strictneſs, may ſeem more commendable and right; and all this may be urged without receding from the Truth. Another Caſe propoſed by *Quinctilian* is, *When an Orator hath good Hopes of the Criminal's future Reformation* [8 4]. And this, indeed, may prevail with him to be the more willing to lend the Priſoner all his Parts and Cunning, in or-

[a] *De LL.* l. xi. *ſub fin.* [b] *Diodor. Sicul.* l. i. c. 6. [c] *Phœniſſ.* ver. 475. [d] *Inſtit.* l. xi. c. 17. [e] *Inſtit.* l. xii. c. 1.

1 *Tully*'s Words are, *Sed errat vehementer, ſi quis in orationibus noſtris, quas in Judiciis habuimus, authoritates noſtras confugiata ſe habere arbitratur. Omnes enim illæ orationes cauſarum & temporum ſunt, non hominum ipſorum & Patronorum. Nam, ſi cauſa ipſa pro ſe loqui poſſent, nemo adhiberet Oratorem.* Orat. *pro A. Cluentio*, cap. 50. In Truth, *Cicero* ſtretches this Maxim too far, and extends it to Things which our Author approves not of. See Mr. *Le Clerc*'s Queſtions taken out of *Jerom.* Quæſt. 8. §. 14.

2 His Words are, *Nec tamen habendum eſt Religioni, nocentem aliquando, modo ne nefarium impiumque, defendere. Vult hoc multitudo, patitur conſuetudo, fert etiam humanitas.* Our Author only gives us the Beginning of this Paſſage, and even there he falls into a pleaſant Miſtake: For having read theſe Words of *Cicero*, *Habendum eſt Religioni*, he ſuppoſes him to mean, that 'tis not contrary to Religion; and ſo ſays of him, *Religioni non contrarium tradit*; whereas Boys know, that *habere Religioni* ſignifies only, *to make a Scruple of a Thing.*

3 His Words are, Ὁ δ' ἄδικος λόγος Νοσῶν ἐν αὐτῷ, φαρμάκων δεῖται σοφῶν.

4 The *Greek* is, Εὐώνυμον ἐς δίκαν τρία ἔπεα διαρκέσει· Nem. vii. 70.

5 *Iſocrates*'s Words are, Μηδενὶ πονηρῷ πράγματι μήτε παρίσασο, μήτε συνηγόρει, δόξεις γὰρ κὴ αὐτὸς τοιαῦτα πράττειν, οἷάπερ ἂν τοῖς ἄλλοις πράττεσι βοηθῇς.

6 His Words are, *Et mendacium dicere etiam ſapienti aliquando conceſſum eſt: & affectus, ſi aliter ad æquitatem perduci Judex non poterit, neceſſariò movebit orator.* ii. 18.

7 The *Latin* is, *Verum & illud quod prima propoſitione durum videtur, poteſt afferre ratio, ut vir bonus in defenſione cauſæ velit auferre aliquando Judicii veritatem.* xii. 1.

8 The *Latin* of this long Sentence of *Quinctilian*, which our Author exemines in the following Part of the Chapter, is this, [1] *Sit aliquis inſidiatus Tyranno, atque ob id reus: utrumne ſalvum eum nolet is, qui à nobis finitur Orator? an ſi tuendum ſuſceperit, non tam falſis defendet, quam qui apud Judices malam cauſam tuetur?* [2] *Quid ſi quædam bene facta damnaturus eſt Judex, niſi ea non eſſe facta convicerimus: non vel hoc modo ſervabit Orator non innocentem modo, ſed etiam laudabilem civem?* [3] *Quid ſi quædam juſta naturâ, ſed conditione temporum inutilia civitati ſciemus: nonne utemur arte dicendi, bona quidem, ſed malis artibus ſimili?* [4] *Ad hoc nemo dubitabit, quin ſi nocentes mutari in bonam mentem aliquo modo poſſint, ſicut poſſe interdum conceditur, ſalvos eſſe eos magis è Republica ſit, quàm puniri. Si liceat igitur Oratori, futurum bonum virum, cui vera objicientur, non id aget, ut ſalvus ſit? Da nunc ut crimine manifeſto prematur Dux bonus, & ſine quo vincere honeſtè Civitas non poſſit: nonne ei communis utilitas Oratorem advocabit?* Ib.

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der to his Deliverance, becauſe he is aſſured that it will not be to the Prejudice of the Publick, that ſuch a Perſon ſhould go unpuniſh'd. But to reſcue a good Commander from ſuffering for a manifeſt Crime, when his Life is neceſſary for the Honour and Succeſs of the State, the beſt Expedient is, not to have Recourſe to Falſhood and Fiction, but rather to take that plain and open Method which *Tully* [a] tells us, was uſed by *Antonius* the Orator, in his Defence of *M. Aquilius* [1].

[c] In *Verrem*, l. v. c. 1. *circa finem*.

[1] This *Aquilius* being accuſed of cruel Extortion and Oppreſſion, *M. Antony* the Orator open'd his Breaſt to ſhew the Judges the honourable Wounds he had received in the Defence of the Commonwealth.

CHAP. II.

Of an OATH.

I. *The Sanctity of an Oath.*
II. *What an Oath is.*
III. *It muſt be taken only by the Name of GOD.*
IV. *And according to the Religion of him that ſwears.*
V. *Of the Intention of him that ſwears.*
VI. *An Oath is an additional Bond of an Obligation.*
VII. *Of Oaths obtained by Deceit.*
VIII. *Of Oaths obtained by Fear.*
IX. *Oaths to perform Things unlawful bind not.*
X. *Nor thoſe which hinder a greater Good.*
XI. *An Oath doth not alter the Nature of thoſe Actions to which they are joined.*
XII. *An Oath excludes all Cavils.*
XIII. *But is not always to be interpreted ſtrictly.*
XIV. *Or without ſome tacit Conditions and Limitations.*
XV. *An Oath is to be explained by the Intention of the Impoſer.*
XVI. *Of an Oath made in another's Stead to oblige him.*
XVII. *How an Heir is obliged by the Oath of the Dead.*
XVIII. *A Diviſion of Oaths; as,* 1. *For Confirmation.* 2. *In bearing Witneſs.* 3. *Deciſive of a Controverſy.* 4. *Suppletory or Clearing.*
XIX. *Whether every Breach of an Oath is Perjury.*
XX. *Of the Ways of diſpenſing with Oaths.*

I. WE proceed to examine and ſtate the Nature of an *Oath*, which is judged to add great Strength and Confirmation to our Diſcourſe, and to all our Acts which have any Dependence upon Speech; which, tho' we might have treated of very properly and conveniently hereafter, when we come to explain the Enforcements of Pacts and Covenants, yet we choſe to aſſign it this particular Place rather than any other, becauſe the Cuſtom of Swearing is uſed for the Eſtabliſhment and Security not only of Covenants, but of bare Aſſertions. (To which Purpoſe it may not impertinently be obſerved, that amongſt the *Jews* no Oaths or Vows were eſteemed obligatory, but ſuch as were openly deliver'd in [a] Words.)

An *Oath*, the very *Heathens* look'd on as a Thing of ſo great Force, and of ſo ſacred Authority, that they believed the Sin of Perjury to be purſued with the ſevereſt Vengeance; ſuch as extended itſelf to the Poſterity of the Offender, and ſuch as might be incurr'd by the bare Thought and Inclination, without the Act. Vid. *Grot.* l. ii. c. 13. ſ. 1. *Philo Jud.* de Sacrificiis *Abel.* & *Cain.* p. 113. E. Edit. *Genev. Our Aſſertion derives its Force from the Oath, the Oath from GOD* [1]. Thus *Diodorus Siculus* [2 b] reports of the *Egyptians, That by their Laws, Perſons, who had forſworn themſelves, were adjudg'd to capital Puniſhment, as guilty of the two greateſt Crimes; in violating that Piety which they ow'd to GOD; and in deſtroying Faith from amongſt Men, the ſtrongeſt Pillar of human Society.*

II. An *Oath*, then, is a Religious Aſſeveration, by which we either renounce the Mercy, or imprecate the Vengeance of Heaven, if we ſpeak not the Truth. That this is the Senſe and Purport of *Oaths*, appears from thoſe Forms of Words in which they are commonly expreſs'd; as, *So help me GOD, GOD be my Witneſs, GOD be my Avenger*, and other equivalent Terms, which amount to much the ſame. For when a Superior, who hath a Right of Puniſhing, is appeal'd to as a Witneſs, his Vengeance is, likewiſe, invoked in Caſe of Breach of Faith; and GOD, who knows all Things, being ever a Witneſs, is ever an Avenger. *Plutarch*, Quæſt. *Roman.* 44. obſerves [3], that *every Oath terminates in the Curſe of Perjury*; or, that is the Ground and Bottom upon which all Swearing depends. In the ſame Place enquiring into the Reaſons why the *Flamen Dialis* amongſt the *Romans* was not allow'd to ſwear, he delivers himſelf to this Purpoſe: *Was it becauſe an Oath is a Kind of Torture, or the only Force that may be applied to the Souls of free Subjects; whereas the Prieſt ought to be exempt from all Violence, as well in Mind as in Body: Or, becauſe every Oath terminates in the Curſe of Perjury; whereas all Curſing is ominous and unlucky; which is the Reaſon that the Prieſts are forbidden, by the Laws, to uſe Imprecations towards others? And, indeed, the Conduct of the* Athenian *Prieſt was commended, who, being order'd by the People to devote* Alcibiades *with the uſual Ceremonies, refuſed; alledging, That his Buſineſs was to preſide in good Wiſhes, not in bad. Or, was it becauſe the Guilt of Perjury might turn to the Danger of the Publick, if an impious forſworn Wretch were to offer Vows and Prayers in Behalf of the State, and to perform the Offices of Religious Worſhip?* Nor can a more grievous Puniſhment light upon Mankind, than their loſing all Title to the Protection

[a] Vid. *Grot.* in *Levit.* v. 4. *Numb.* xxx. 3. *Deut.* xxiii. 23. [b] Lib. i. c. 77. p. 69. A. Edit. *Rhodom.*

[1] The Paſſage of *Philo* the *Jew*, which our Author quotes, reſpects the Difference between Oaths made by GOD, and ſuch as are made by Men; which conſiſts in this, That an Oath adds a Force to our Words, whereas GOD's Oath takes all its Force from his Word. So are his Words, Καὶ συμβέβηκε τὴν μὲν ἡμετέραν γνώμην ὄρκῳ, τὸν δὲ ὅρκον αὐτὸν Θεῷ πεπιστῶσθαι. I am miſtaken, if our Author did not think that *Philo* meant by theſe laſt Words, *That the Force of Oaths, made by Men, proceeds from the Fear they have of GOD.* The Impropriety of the *Latin* Tranſlation, conſider'd with the following Part of the Diſcourſe, was apparently the Cauſe he ſo underſtood it, otherwiſe he could not have quoted this Paſſage, which had been nothing to his Purpoſe.

[2] *Diodorus*'s Words are, Πρῶτον μὲν ὃν κατὰ τῶν ἐπιορκων θάνατος ἦν παρ' αὐτοῖς [Αἰγυπτίοις] τὸ πρόσιμον, ὡς δύο τὰ μέγιστα ποιούντων ἀνομήματα, Θεούς τε ἀσεβούντων, καὶ τὴν μεγίστην τῶν παρ' ἀνθρώποις πίστιν ἀνατρεπόντων. See ſeveral other Authorities in *Grotius*, l. i. c. 13. §. 1.

[3] The *Greek* is, Πᾶς ὅρκος εἰς κατάραν τελευτᾷ τῆς ἐπιορκίας. See, alſo, *Grotius*, lib. ii. c. 13. §. 10.

and

and Assistance of Providence. Yet when we say, that GOD is invoked as a Witness in Swearing, it ought, on no Account, to be hence inferr'd, that an Oath should be look'd on as the Testimony of GOD; or as if GOD himself gave Attestation to the Veracity of the Swearer [f]; which seems to be the Opinion of Bishop *Sanderson* [a]. But when an Omniscient and Omnipotent Being is call'd to be both a Witness or Guarantee, and, likewise, an Avenger, we, therefore, presume upon the Truth of what is deliver'd, because we cannot conceive any Person to be arrived at such a Pitch of Impiety, as lightly to stir up the Divine Vengeance against himself. And hence Perjury appears to be a most monstrous Sin, in as much as by it the forsworn Wretch shews, that he, at the same Time, contemns the Divine, and yet is afraid of human Punishment; that he is a daring Villain towards GOD, and a sneaking Coward towards Men [b]. The Scope and Meaning of *Oaths* is, likewise, suggested by the End for which they have been introduced; and that is, that Persons might be the more firmly engaged to declare the Truth, or to perform their Promises, by the just Awe and Dread of the Divinity, infinite in Knowledge, and infinite in Power; whose Wrath they thus invite down upon their own Heads, if they knowingly deceive: Whereas, perhaps, there would not have been Force and Security enough in the Fear of Men, whose Strength they might fancy themselves able to baffle or to decline; or whose Discovery they might hope to escape [c]. For in Cases where the Party with whom we transact, if he deceive us after his bare Word, or Promise, cannot possibly lie conceal'd, nor avoid human Punishment, it seems superfluous to put him to his *Oath*. 'Tis the Advice of *Demosthenes* [d], *Those who escape your Justice, leave to the Vengeance of the GODS; but those, on whom you can lay Hands, never consign over to Providence, without punishing them yourselves.* And, for this Reason, we should judge it to be an Absurdity in the *Civil Law* [e], when, on the contrary, it allows a Woman to swear that she is not with Child. This Caution will appear to have the more Weight, if we consider that the too frequent Use of Oaths doth in many Persons much impair the Reverence due to them. It was an excellent Lesson which *Pythagoras* [3] gave his Scholars; *Very rarely and very hardly to be brought to an Oath; but if they had once sworn, most inviolably to observe it.* Nor is *Isocrates*'s Precept, on the same Subject, to be despised: *Never swear*, says he, *on the Account of Money, though you could do it with the greatest Safety and Assurance; lest you draw upon yourself a double Imputation, of Perjury with some, and of Avarice with others* [f].

But as 'tis just and right to pay the most Religious Reverence to *Oaths*, so is it a vain Presumption to expect or desire, that their Truth or Falshood should be evinced by an immediate Miracle; as if GOD were obliged to exercise his judicial Office, at the Pleasure and Humour of Men. And yet this was a Superstition which very much obtain'd of old, not only amongst the Heathens, but in the ignorant and barbarous Ages amongst Christians themselves. *Sophocles* [g h] plainly speaks of the *Fiery Ordeal*;

Ἦμεν δ' ἕτοιμοι χὠ μύδρος αἴρειν χεροῖν,
Καὶ πῦρ διέρπειν, χὠ Θεοὺς ὁρκώμοτεῖν.

Prepar'd we stood to lift the burning Steel,
To tread the Flames, and by all Heaven to swear.

'Tis remarkable what *Phil. Baldæus*, in his Treatise of the Idolatry of the *Indians* [i] reports of the *Malabars*, *That amongst them, the Person, who is to take a Purgative Oath, hath his three first Fingers dipt in melting Butter, and then wrapt up in Leaves, which, three Days after, are uncover'd, to see the Effect. Others are order'd to swim over a River between* Colchis *and* Cranganor, *full of Crocadiles: Others to reach an Apple out of a Pot stuft with Serpents, and, by the Success of these Attempts, a Judgment is made of their Innocence* [k].

And, indeed, if we would confess the Truth, Oaths either infer or presuppose the Diffidence, Unfaithfulness, Ignorance, and Impotency of Mankind. For what need would there be of such Engagements, if we could securely rely on the Faith and Constancy of others; or, if there were no Examples extant of Perfidiousness; or, if we had Strength enough to compel Persons to make good what they owe? Lastly, what Occasion would the Judge have to enquire the Truth of sworn Witnesses, unless he were ignorant of it himself? And from this Principle I should draw the Reason of that Speech of the Emperor *Frederick* in the Poet [l].

Juramenta petis? Regem jurare minori
Turpe reor. Nudo jus & reverentia verbo
Regis inesse solet, quovis juramine major.

Dost thou desire an Oath? it is below
A Prince to Subjects such Respect to show.
The sacred Awe that guards a Prince's Word,
Hath stronger Tyes than strictest Oaths afford.

Not only to have Faith and Honesty kept up inviolably in the World, is, in the highest Manner, the Interest of Princes; but, likewise, because 'tis unbecoming their Majesty, to seem liable to the least Suspicion of Perfidiousness, Falshood, or Deceit. Thus we are told, that amongst the old *Peruvians*,

[a] *De Obligat. Juament. Prælect.* 1. s. 6. [b] *Vid.* Charron. *de la Sagesse*, l. iii. c. 8. n. 7. [c] *Lucian.* Phalar. 1. p. 751. Edit. *Amst.* *It may, perhaps, be an easy Matter to deceive Men, but 'tis impossible to lie conceal'd from GOD,* Plin. l. iv. Epist. 25. n 4. Edit. *Cellar.* *Men of wicked Inclinations take Confidence and Encouragement from that Reflection,* quis sciet? *Who will ever know what we do?* [d] *De falsa legat.* p. 209. Edit. *Genev.* [e] *Vid.* l. iii. s. 3. *D. de jurejur.* [f] *Ad Demonic.* Hobbes *De Cive*, c. 2. s. 23. Add *Valer. Max.* l. ii. c. 10. s. 2. *ext.* They are the truest Men, *qui colendo fidem jurant*, who have no other Oath than to keep their Word without Swearing. *Vid. Curt.* l. vii. c. 8. n. 29. Edit. *Cellar.*

In *Sophocles*, *Oedip. Colon.* *Oedipus* thus bespeaks *Theseus*, ver. 642.

I'll not require an Oath as from the Wicked,

Theseus replies, Oaths could not force more than my Word shall pay.

Epict. *Enchir.* c. 44. & *Simplic. in loc.* *Vid. Not.* Grot. *in* Matth. v. 34.

[g] *Antigon.* v. 269. [h] See Dr. *Potter*'s Græcian. Antiq. l. 2. c. 6. [i] See the Forms of Exorcisms in *Marculph.* cap. ult. [k] See, likewise, *Bern. Varen.* Descript. *Japon.* c. 18. & *Jadoc. Schouten.* in Descript. Regn. *Siam.* where he gives an Account of their judicial Proceedings. *Eusеb.* in *Stob.* Serm. xxvii. *It is the Advice of many Men, that we should strictly make good what we swear: But I think it no less a Duty of Religion to consider well before we swear.* Add *Grot.* in *Matth.* v. 34. [l] *Gunther. Ligurin.* l. iii. v. 510, &c.

[f] We must not, says our Author, expect or require, that GOD would work a Miracle upon the Spot, to shew whether a Person has sworn falsely or not; as if he was bound to exercise his Judgments according to the Humour of Men. This superstitious Opinion, however, has very much prevailed, not only among the Heathens, but even among Christians, in the Ages of Ignorance and Barbarism. The Proof was commonly made by Fire, Water, and divers other Ways. See Mr. *Placette*'s Treatise about an *Oath*, lib. i. c. 1.

[3] His Words are, Σπανίως μὲν ὀμνύναι, χρησαμένους δὲ τοῖς ὅρκοις πάντως ἐμμένειν.

Oaths

Oaths were not at all in Uſe; but the Perſons who were to give their Teſtimony, barely promiſed *they would confeſs the Truth to the* Ynca [a].

III. Since GOD alone is of [1] infinite Knowledge, and of infinite Power, the Abſurdity is manifeſt of Swearing by any Thing which we do not look upon as Divine; in ſuch a Senſe as to invoke it for a Witneſs of our Speech, and for an Avenger of our Perjury. Hence, as it was uſual for the Heathens to ſwear by the Stars, becauſe they judged them to be ſo many Deities; ſo for a Chriſtian to imitate them in that Practice, would be a Mixture of Impiety and Folly. As for thoſe Forms attributed to ſome of the Ancients, as that of *Socrates* [z], *by a Dog*, *by a Gooſe*, (whatever *Porphyry* [b] pretends to the contrary) and by the *Plane-Tree*, that of Zeno, *by a Caper*; and that of others, *by Crambe* [c], we are to eſteem them meerly jocular. They ſwore by theſe, as *Apollonius* [d] ſaith, *not as by GODS, but to avoid Swearing by the GODS*; when by the Practice of the Generality of Men it was grown into an ill Cuſtom, to apply Oaths as the ſupplemental Ornament of Speech.

But that which was moſt in Uſe by the Ancients, was to ſwear by thoſe Things which each Perſon held moſt dear, or ſet uppermoſt in his Veneration and Eſteem. So *Aſcanius* in *Virgil*,

Per caput hoc juro, per quod pater ante ſolebat;
Æn. IX. v. 300.
By this my Head; my Father's Oath before.

So we every where read of Perſons ſwearing by their own Life and Soul, and by the Life and Soul of thoſe Friends who ſtood firſt in their Affections. And the Lovers thought themſelves very Religious in ſwearing by the *Bright Eyes*, the *Sweet Lips*, the *Golden Treſſes* of their Miſtreſs [e]. All which Speeches are, by no Means, to be interpreted in this Senſe; either that thoſe Things were invoked as Witneſſes and Avengers of Falſhood, as *Apuleius* [f], amongſt others, believed; nor that they were cited to give Teſtimony under the Notion of belonging to GOD, and expreſſing ſomewhat of the Divinity; namely, his Truth, Goodneſs, and Power, and which the Perſon, thus ſwearing, hereby acknowledgeth, that he enjoys by GOD's Mercy; and that he is unwilling to loſe by GOD's Juſtice; as if he ſhould ſay, *I ſwear by my Life*, that is, *by GOD to whom I owe my Life*; which is the Opinion of many, and particularly of Biſhop *Sanderſon* [g]. But they only thus invoked GOD himſelf, deſiring, that if they ſwore falſely, he would be pleaſed to puniſh their Crime in thoſe Things eſpecially, for which they were moſt nearly and tenderly concern'd [h]. Thus it was the ordinary Cuſtom of the *Athenians*, in their ſolemn Oaths to devote themſelves and their Family to Deſtruction, if they deceived; and, on the contrary, to beg all Happineſs from the GODS on themſelves and Friends, if they ſwore truly; as is evident from frequent Inſtances in *Demoſthenes* [i]. And they firmly believed, that the Violation of ſuch Engagements would draw down the Anger of Heaven upon the Heads of others, as well as upon their own. *Pliny* [k] tells a Story of one *Regulus*, who made a gainful Trade of Perjury, in relation to Wills and Teſtaments; that giving a Viſit to a ſick Lady (*Verania* Wife to the famous *Piſo*) and perſuading her, that by his Aſtrological Obſervations he foreſaw ſhe ſhould recover. The Lady being eaſily credulous under ſo great an Apprehenſion of Danger, call'd for her Will, and ſet down *Regulus* for her Heir; but ſoon after falling into Extremities, ſhe died with this Exclamation againſt her Deceiver; *O wicked and perfidious! O worſe than perjur'd Villain, who forſwore himſelf by the Life and Safety of his own Son!* The Reflection which *Pliny* makes on the Thing is this, Regulus *uſeth this Stratagem not more frequently than wickedly; whilſt he imprecates the Wrath of the GODS, whom he every Day deceives, upon the Head of the unfortunate Youth* [l].

And hence too we may gather the Meaning and Deſign of thoſe Oaths, which were heretofore made by the *Life*, the *Genius*, the *Safety* of Princes; which, we are told, are ſtill cuſtomary amongſt the

[a] *De la Vega*, Comment. Reg. l. ii. c. 3. [b] Lib. iii. περὶ ἀποχῆς. [c] Vid. *Athenæum* Deipnoſoph. l. ix. c. 2. [d] In *Philoſtrat*. l. vi. c. 9. [e] *Ovid. Amor*. l. iii. El. 3, 13, 14.

Perque ſuos illam meper juraſſe recorder,
Perque meos oculos; & doluere mei.
On her own Eyes and mine a Curſe ſhe laid;
And mine have ſmarted for the perjur'd Maid.

[f] De Deo *Socrat*. [g] *De Jurament. Obligat. Prælect*. 1. Sect. 4.
[h] *Ovid*. Triſt. l. v. El 4, 45, 46.

Per caput ipſe ſuum ſolitus jurare, tuumque
Quod ſcio, non illi vilius eſſe ſuo.
By his own Head how often would he ſwear,
And yours, not leſs the Darling of his Care?

[i] Add *Antiphon*. Orat. 15. [k] Lib. ii. Epiſt. 20. n. 5, 6. [l] *Lyſias* Orat. adverſ. *Diagiton*. "I am ready, with a well aſſured "Mind, whenever you pleaſe to require it, to ſwear by the Lives of theſe my Children, and of thoſe which I have ſince had by "a ſecond Bed. And I am not yet arrived at ſo deſperate a Degree of Miſery, nor am ſo unreaſonably covetous of Money, as "that I ſhould be willing to devote my Family to a Curſe, only that I may leave them a Maintenance; or by an unnatural Wickedneſs to rob my Father of his Eſtate." And here, likewiſe, it may be remarked, by the Bye, that the *Banjans* in *India*, who ſet the higheſt Value and Reſpect on their Cows, eſteem it a moſt ſacred Oath to hold a Knife near the Cow, and ſay, *If what I affirm be falſe*, or, *if I do not perform my Bargain, may the Cow be ſtruck through with this Knife*, Pietr. della Valle *Itin. Part* ii. *Epiſt*. 1.

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[1] However confuſed and mixed with Abſurdities and Contradictions the Notions of the Heathens were, theſe two Attributes of the Deity, which are the Foundation of an Oath, were ſo well known to them, as to give a great Force to that Act of Religion. They believed that GOD was preſent in all Places, and ſaw all Things, the moſt ſecret Thoughts of the Heart not being excepted. This appears, for Example, by this Fragment of the Comedian *Philemon*, who takes the *Air* for *Jupiter*.

Ἐγὼ δ' ὃ Θεοῦ 'στιν ἔργον, εἰμὶ πανταχοῦ.
——— Ὁ δὲ πανὼν ἀπανταχοῦ,
Πάντ' ἐξ ἀνάγκης οἶδε, πανταχοῦ πανών.
Stob. de Rerum Nat. Tit. 3. p. 339. Collect. Cler.

I'm ev'ry where as a God ought to be.
And ſo know all Things neceſſarily.

And ſo in the Prologue of *Plautus*'s *Amphitryo*, ver. 57, &c. *Mercury* thus ſpeaks,

Utrum ſit, annon, voltis? Sed ego ſtultior,
Quaſi neſciam vos velle qui Divus ſiem,
Teneo quid animi veſtri ſuper hac re ſiet.
I know your Minds, for I am GOD,
And can't be ignorant of your Thoughts.

See *Lucian* in Chronoſol. Tom. ii. p. 614. Ed. *Amſt*. As, alſo, the Notes of the deceaſed Baron *Spanheim* on the *Ceſars of Julia*. As for the reſt, whoever is curious to know the Ideas and Cuſtoms of the Ancients about Oaths in general, may conſult a Philological Diſſertation of *Jacobus Lydius*, intitled, *De Jurejurando*, and join'd to his *Syntagma Sacrum de Re Militari*. As, alſo, two *Memoirs* of the deceaſed *Abbe Maſſieu*, inſerted in the *Literary Memoirs* of the Academy of *Belles Lettres*, Vol. ii. and vii. As to GOD's Omnipotence, theſe Verſes of *Ovid* are ſufficient to alledge.

——— *Immenſa eſt, finemque potentia Cœli*
Non habet: & quicquid Superi voluere, peractum eſt.
GOD's Power's immenſe, and has no Bounds:
Whate'er the GODS will have done, muſt be perform'd.

[z] See *Menage* upon *Diogenes Laertius*, lib. ii. §. 40. where he hath amaſſed together many Things relating to this Matter. It ſhall ſuffice, at preſent, to relate the Words of *Philoſtratus*, of which our Author quotes only a Part. Πρὸς ταῦτα ὁ Θεσπεσίων, ἐγένετό τις ἔφη, Σωκρατης, Ἀθηναῖος, ἀνόητος, ὥσπερ ἡμεῖς, γέρων, ὃς τὸν κύνα, καὶ τὴν χῆνα, καὶ τὴν πλάτανον, θεὰς τε ἡγεῖτο, καὶ ὤμνυ· ἐκ ἀνοητος, ἦπεν, ἀλλὰ θεῖος, καὶ ἀτεχνῶς σοφὸς· ὤμνυ γὰρ ταῦτα, οὐχ ὡς θεὰς, ἀλλ' ἵνα μὴ θεὰς ὄμνυ.

Perſians

Perſians, and are eſteemed more ſtrict and ſacred than thoſe in which the Name of GOD is immediately invoked. For they did this, not as thinking there was any Divinity in their Princes, whilſt alive, nor as imprecating their Diſpleaſure if they ſpoke falſe; but becauſe many of them, either in good Earneſt, or, at leaſt, in Flattery, intended hereby to ſhew, that they preferr'd their Prince's Safety to their own; and, therefore, look'd upon it as a more horrid Perjury to devolve the Wrath of GOD upon *Him*, than upon *Themſelves* [1]. So that the Senſe of thoſe *Proteſtations* was properly this; *So may my Prince be happy and ſafe, as I perform what I now promiſe*; that is, unleſs I fulfil my Engagement, I deſire the Divine Judgment may light upon my Prince's Head. St. *Auguſtin* [a] ſpeaks very pertinently to this Purpoſe. *What elſe*, ſaith he, *is that which we call* (Jurare) *to ſwear, but* (Jus reddere) *to pay the Due or Right; to GOD, if we ſwear by GOD; to our Children, if we ſwear by them? And what Right do we owe to our own Safety, to our Children, or to our GOD, but the Right of Love and of Truth, not of Treachery and Falſhood? When any Man ſays*, By my Safety, *he pawns and engageth his Safety to Providence, for the Truth of what he affirms; when he ſays*, By my Children, *he conſigns over his Children as ſo many Pledges to GOD; deſiring, that whatever comes out of his own Mouth, may fall upon their Head; Truth, if he declares Truth; Falſhood, if he ſpeaks falſly. Whatſoever, therefore, a Perſon names in his Oath, whether his Children, his own Life, or Safety, or any Thing elſe, he devotes and binds it over to Almighty GOD.* And hence, although *Philo* the *Jew* is juſtly to be praiſed for condemning raſh and profane Swearing; yet we can, by no Means, approve of his Doctrine, when he delivers himſelf ſo looſely, as in the following Terms [b]: *If*, ſays he, *the Exigency of Affairs neceſſarily requires an Oath, it is more becoming to ſwear by the Health, or the proſperous Age of our Father or Mother, if alive; or by their happy Memory, if they are dead. For their Act of producing their Children into Life from nothing, makes them the Images and Repreſentatives of the Divine Nature* [2]. *They too deſerve Commendation, who, as often as they are urged to ſwear, by delaying and heſitating ſtrike an Awe, not only into the Spectators, but into thoſe very Perſons who require the Oath at their Hands. For 'tis a Cuſtom with ſome, when they have pronounced the firſt Words of the Form*, So help me, *leaving off abruptly, adding what they pleaſe beſides in their Mind and Thoughts. For the Sentence may be fill'd up by ſubjoining not only the* Higheſt, *or* the Creator of all Things, *but* the Earth, the Sun, the Heavens, *or* the World. Nor do I ſee any Excuſe that can be brought to juſtify that Oath of the Chriſtian Soldiers recited by *Vegetius* [c], which carries in it too groſs an Exceſs of Reverence towards the Emperors. *They ſwear*, ſays he [3], *by GOD, and by Chriſt, and by the Holy Spirit, and by the Emperor's Majeſty, which, next to GOD, is to be loved, and to be worſhipped by Mankind. For when our Prince hath been once inveſted with the Title of* Auguſtus, *we are to pay to him, as to a preſent mortal GOD, faithful Devotion, and moſt watchful Service.* For though we ſhould grant the following Clauſe, *A civil or a military Perſon then ſerves GOD, when he faithfully loves him who reigns by GOD's Appointment and Authority*; yet this is, by no Means, a Reaſon why they ſwear by the Majeſty of the Emperors, in the ſame Manner as by the Name of GOD. Nor is it to be ſuppoſed, that common Soldiers ſhould be capable of ſo much Subtilty, as to diſtinguiſh the Words (*by*) in the ſame Form into two different Senſes, one as apply'd to GOD, another as ſpoken of the Emperor. This is certain from *Euſebius*'s Eccleſiaſtical Hiſtory [d], that to ſwear by the Fortune of the Emperor was accounted one of the Marks of abjuring Chriſtianity; which, therefore, St. *Polycarp* reſolutely refuſed to the laſt. And ſo too it may be juſtly queſtion'd, whether we ought to approve of that Oath preſcribed by *Charles Gonzaga* to his new Order of Knights, in the Form following; *I ſwear by the Immortal GOD, and by the ancient Nobility which I profeſs* [e]. Hence, likewiſe, it appears, That the Ancients had good Reaſon for puniſhing, with the utmoſt Severity, Perſons who had forſworn themſelves by their Prince's Life or Safety; inaſmuch as they were thought hereby to make him obnoxious to the Divine Puniſhment, whoſe Succeſs and Preſervation is yet ſo cloſely connected to the publick Security [f]. Thus we find the *Scythians* in *Herodotus* [g], as often as their King happen'd to be ſick, making ſtrict Enquiry, whether any of the Subjects had ſworn falſly by the Royal Throne; and if ſuch a Perſon was diſcover'd, he ſuffer'd Death for his Perjury. In *Zozimus* [h] the *Roman* Magiſtrates declared they could not accept of the Propoſals of *Alaric*, though fair and juſt, becauſe they had ſworn by the Life of their Prince, that they would never conſent to a Peace with the Invader. *If their Oath had been directed to GOD*, they ſay, *they might poſſibly have waved it in this Neceſſity, relying on the Divine Mercy for the Pardon of ſo impious a Crime; but ſince they had bound themſelves by the Life of the Emperor, they thought it abſolutely unlawful for them to break through ſo ſolemn an Engagement.* In

[a] Citat. à *Grotio* in Flor. Sparſ. ad l. xxxiii. *D. de Jurejur.* [b] *De Special. legib.* [c] *De Re Militar.* l. ii. c. 5. [d] Lib. iv. c. 15. [e] *Grammond.* Hiſt. Gall. l. v. [f] Vid. *Grot.* in *Sparſ. Flor.* ad leg. 23. *D. de Jurejur.* [g] *Melpomen.* p. 154. init. Edit. *H. Steph.* [h] L. v. *in fine.*

[1] Hence it appears, ſaith our Author, that ſuch Perſons were, with Reaſon, puniſhed very rigorouſly, who were perjur'd, after they had ſworn by the Head, Throne, or Health of the Prince, becauſe they believed, that by ſuch an Oath they expoſed that ſacred Perſon, upon whoſe Safety the whole Kingdom depended, to Divine Vengeance. See what *Herodotus* ſays of the *Scythians*, lib. iv. and *Zoſimus*, lib v. In the Capitularies of *Charles the Great*, Men are forbid to ſwear by the Life of the King or his Children, lib. iii. c. 42. See the *Digeſts*, lib. xii tit. 2. *De Jurejur.* &c. leg. xiii. §. 6. See what our Author ſays. Mr. *Otto* affirms, againſt him and *Grotius*, that when the Heathens ſwore by the Genius or Health of the Prince, they only meant to ſay, *This is as true, as the Health of my Sovereign is dear to me.* See his Diſſertation *De Perjurio per Genium Principis*, lib. v. cap. 2.

[2] *Philo*'s Words are, Ἄξιον ἐπαινεῖν καὶ τὸς, ὁπότε βιασθεῖεν ὀμνύναι, τῷ μέλλειν καὶ βεάδυνειν καὶ ἀποκνεῖν ἐμποιοῦντας δέος ἃ μόνοι τοῖς ὁρῶσιν, ἀλλὰ καὶ τοῖς προκαλουμένοις εἰς τὸν ὅρκον, ἐιωθασι γὰς ἀναφθεγξάμενοι τοσοῦτον, νὴ τὸν, ἢ μὰ τὸν, μηδὲν προσλαμβάνοντες, περᾶν τῆς ἐποκοπῆς, φανὲν ὅρκον ἃ γενόμενον· ἀλλὰ καὶ παρασλαβέτω τὶς, εἰ βούλοιτο, μὴ μὲν τὸ ἀνωτατο καὶ πρεσβύτατον εὐθυς αἴτιον, ἀλλα γῆν, ἥλιον, ἀςέρας, ἐρανὸν, τὸν σύμπαντα κόσμον. See the Interpreters upon St. *Matthew* v. 34. and *Ariſtophanes*'s *Ranæ*, ver. 1422. where Mr. *Spanheimius* quotes this Paſſage of *Philo*, *De Spectaculo*, for *De Legibus Special.* which is certainly an Error of the Preſs.

[3] The Hiſtorian's Words are, *Jurant autem per Deum, & per Chriſtum, & per Spiritum Sanctum, & per Majeſtatem Imperatoris, quæ ſecundum Deum generi humano diligenda eſt & colenda. Nam Imperatori, cum Auguſti nomen accepit, tanquam præſenti & corporali Deo, fidelis eſt præſtanda devotio, & impendendus pervigil famulatus. Deo enim vel privatus, vel militans ſervit, cum fideliter cum elegit, qui Deo regnat authore.*

[4] I have recited the Paſſages of *Origen* and *Tertullian* about this Matter, in my Notes upon Dr. *Tillotſon*'s twenty-ſecond Sermon, which, though a ſhort one, contains a ſtrong Confutation of ſuch Chriſtians, who abſolutely condemn the Uſe of all Oaths.

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the *Capitulary* of *Charles* the *Great* [a], we find a Prohibition againſt Swearing *by the Life of the King, or of his Sons.* As to the *Civil Law*, *Ulpian* doth not deny it to be an Oath, when a Man ſwears by his *own Safety* [1]; but ſays, it is not valid, unleſs it were expreſly propos'd to him in thoſe particular Terms [b]. Becauſe Oaths being taken for the Benefit and Security of him who requires them; therefore Cuſtom makes it neceſſary they ſhould be form'd in the Words which he propoſeth, ſo that they may fully bear his Meaning, and anſwer his Deſign [c]. Whereas, if the Party who is to ſwear might chooſe his own Words, he would have an Opportunity, by inſidious or equivocal Expreſſions, to evade the Force of his Obligation. Another Reaſon for *Ulpian*'s Aſſertion may be, becauſe ſuch Speeches and Proteſtations continually loſing ſomewhat of their Reverence by daily Uſe, no Man can be bound to let the common Form of another Party (with which he often lards his Diſcourſe when he doth not think on't) paſs for a ſerious and ſolemn *Oath.* And Mr. *Hobbes* [d] is in the Right, when he cenſures theſe cuſtomary Expreſſions, as not properly *Oaths*, but profane Abuſes of the Name of GOD, ariſing from an ill Habit of being too poſitive and vehement in Talk.

From what hath been offer'd it is clear, that Execrations, although ſtrictly taken, as when a Man barely lays Curſes, or imprecates Miſchief on himſelf or others, are not Oaths; yet are, on all Accounts, to be reckon'd Part of an Oath, as they reſpect any Aſſertion or Promiſe, which they are added to bind [e]. And this is to be extended, likewiſe, to thoſe Prayers or Wiſhes, by which a Man makes the Performance of his Oath the Condition of his obtaining ſuch or ſuch a Bleſſing. As that of the Boy in *Ælian* [f], *So may I crack* Timeſias's *Skull.* Thus we find *Julian*, to encourage his Army, conſtantly ſwearing (as the Hiſtorian ſpeaks [g]) not by the *Graces*, but by the Greatneſs of his commenc'd Exploits; *So may I bring the* Perſians *under the Yoak*; *ſo may I relieve the weak Condition of the* Roman *World:* As *Trajan* is reported ſometimes to have confirm'd his Speeches, by adding, *So may I ſee* Dacia *reduc'd into the Form of a Province*; *So may I lay Bridges over the* Danube *and* Euphrates [h]. 'Tis remarkable in the *Patanes*, a People of *Indoſtan*, that they are ſo extravagantly proud, as to uſe for an Aſſeveration, *May I never come to be a King in* Dehli, *if I don't make good my Promiſe.* And hence too it appears what Interpretation we ought to put on thoſe Oaths which we meet with in Scripture, when even good and pious Men ſwear by ſome created Thing [i]. That amongſt the *Jews* of the latter Ages, nothing was more common than Oaths [2], *By the Head, by Heaven, by the Earth, by the Temple, by the Gold of the Temple, by the Altar, by the Gift upon the Altar*, is evident from St. *Matthew* xxiii. v. 16, *&c.* Where our Saviour reproves them ſeverely for their profane Abuſes, and impertinent Cavils in this Matter. The *ναὶ μὰ τόδε σκῆπτρον* in *Homer* [k], *Dydimus* thus expounds, *We are to know*, ſays he, *that in ſwearing by the Sceptre they ſwear by GOD himſelf, the great Governour and Controller of Kingdoms* [l]. Yet *Ovid* hath given us another Sort of an Explication:

Nam ſibi quod nunquam tactam Briſeida jurat
Per ſceptrum; ſceptrum non putat eſſe Deos [m].

Who by his Sceptre ſwore *Briſeis* free,
Ne'er took the Wood to be a Deity.

We learn from *Procopius* [n], that the *Perſians*, in the latter Times of that Nation, uſed to ſwear by *Salt.* And in one of the *Byzantine* Hiſtorians, we find *Mahomet* the *Turkiſh* Emperor adjuring, *by Bread and Salt*, his Vizier *Bajazet* [o].

IV. To proceed: That Part of the Form in *Oaths*, under which GOD is invok'd as a Witneſs, or as an Avenger, is to be accommodated to the religious Perſuaſion [3] which the Swearer entertains of GOD: It being vain and inſignificant to compel a Man to ſwear by a GOD whom he doth not believe, and therefore doth not reverence. And no one thinks himſelf bound to the Divine Majeſty in any other Words, or under any other Titles, than what are agreeable to the Doctrines of his own Religion; which, in his Judgment, is the only true Way of Worſhip. And hence, likewiſe, it is, that he who ſwears by falſe Gods, yet ſuch as were by him accounted true, ſtands oblig'd; and if he deceives it, is really guilty of Perjury. Becauſe whatever his peculiar Notions were, he certainly had

[a] Lib. iii. c. 42. [b] Add. l. iii. f. 4. l. iv. l. v. princ. d. t. [c] Comp. *Liv.* l. xxii. c. 38. init. [d] *Leviath.* c. 14. [e] Comp. *Ziegler* ad *Grot.* l. ii. c. 13. f. 10. [f] V. H. l. xii. c. 9. [g] *Ammian. Marcellin.* l. xxiv. c. 3. [h] Add *Grot.* ad *Gen.* xxiv. 2. [i] Vid. *Gen.* xlii. 15. 1 *Sam.* xxv. 26. 2 *Sam.* xiv. 19. 1 *Kings* ii. 23. 2 *Kings* ii. 4, 6. [k] Iliad *α*, v. 234.

[l] This Place of *Homer* is thus imitated by *Valerius Flaccus*,

Hanc ego, magnanimi ſpolium Didymaonis, haſtam,
Quæ neque jam frondes, vividas nec proferet umbras,
Ut ſemel eſt excuſſa jugis & matre perempta,
Fida miniſteria, & duras obit horrida pugnas;
Teſtor, & hoc omni ductor tibi numine firmo. l. iii. 707.

Comp. *Virgil.* Æn. xii. v. 206.

This Spear the Spoils from ſtout *Didymaon* won,
Which ne'er ſhall bud, or form a ſhady Crown,
Since from its dying Mother rudely torn
On bloody Services it hath been born,
(Faithful in rough Encounters!) here I call
To bind my Oath, whilſt I engage for all.

[m] Ovid. *De Remed. Amor.* 783, 784. Add *Grot.* l. ii. c. 13. f. 11. [n] *De Bell. Perſic.* l. i. c. 3. [o] *Ducaſ.* Hiſt. *Byſant.* c. 22.

[1] The Words of the Civil Law are, *Qui per ſalutem ſuam jurat, licet per Deum jurare videtur (reſpectu enim Divini Numinis ita jurat) attamen ſi non ita ſpecialiter jusjurandum ei delatum eſt, juraſſe non videtur: & ideo ex integro ſolemniter jurandum eſt*, Digeſt. l. xii. tit. 2. *De Jurejurando*, &c. Leg. 33. The firſt Explanation which our Author gives of this Law is the only true one. See M. *Noodt*'s Commentary, pag. 280.

[2] As the Heathens did. See Mr. Baron *Spanhemius* upon *Ariſtophanes*'s *Plutus*, v. 129.

[3] *Divus Pius, jurejurando, quod propria ſuperſtitione juratum eſt, ſtandum reſcripſit.* Digeſt. lib. xii. tit. 2. *De Jurejurando*, &c. leg. 6. §. 1. Our Author adds, that §. 3. of the ſame Law is not contrary to this he has cited; the Appearance of Contradiction lies here, it is ſaid in § 3. of the Law refer'd to, That we ought not to hold for a true and legal Oath one which is unlawful; that is to ſay, (adds *Ulpian*) one which relates to a Religion condemn'd by publick Authority: *Sed ſi quis illicitum jusjurandum detulerit, ſcilicit improbatæ publicè religionis, videamus an pro eo habeatur atque ſi juratum non eſſet? Quod magis exiſtimo dicendum.* The Lawyer decides in the firſt Paragraph, That if we make any one ſwear by a Deity, tho' we do not acknowledge that Deity ourſelves, nor would invocate him in ſuch a Manner, yet the Oath is ſtill valid and good. But in the third Paragraph he excepts ſuch Oaths as contain any thing contrary to the Laws, thoſe, for Inſtance, which authorize a Religion forbid. And it is very probable that *Ulpian*, who was no Friend to the Chriſtians, had them in his Eye. See *Duaren. De Jurejur.* Tract. I. cap. xi. and tit. ii. cap. iv. Our Author, alſo, here refers to the *Canon Law*, *Cauſ* xxii. *Quæſt.* v. *Can.* x. where we find a Paſſage from St. *Auguſtine* which affirms, That the true GOD puniſhes the Perjuries of ſuch as even ſwear by a *Stone.* Further, as *Gronovius* obſerves in his Notes upon *Grotius*, Hiſtory furniſhes us with Examples of ſuch Heathens as have been puniſhed for their Impieties committed againſt their falſe Gods, ſuch as *Cambyſes* in *Juſtin.* l. i. 9. The *Gauls*, who robb'd the Temple of *Delphos*, ibid. l. xxiv. 8. *Pyrrhus* and a Roman Garriſon, *Liv.* xxix. 18. See Mr. *Bayle*'s Thoughts on a Comet, *Art.* 118.

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ſome Senſe of the Deity before his Eyes; and therefore by wilfully forſwearing himſelf he violated, as far as he was able, that Awe and Reverence which he ow'd to Almighty GOD [a]. Yet when a Perſon requiring an Oath from another, accepts it under a [1] Form agreeable to that Worſhip which the Swearer holds for true, and he himſelf for falſe, he cannot in the leaſt be ſaid hereby to approve of that Worſhip. Thus a *Chriſtian*, when he admits of the Oath of a *Jew*, doth, on no Account, ſubſcribe to his Opinion, who denies the one only true GOD, the Maker of Heaven and Earth, to be the Father of our *Lord Jeſus Chriſt*. Yet I doubt whether the Example [2] of *Laban* in this Caſe, alledg'd by *Grotius* [b], from *Gen.* xxxi. 53. comes up to the Purpoſe; for *the God of* Abraham, *and the God of* Nahor, *and the God of the Fathers, was the living and true GOD* [c].

V. But farther, it is requiſite to the Force and Obligation of an Oath, that it be taken with deliberate Thought, and real Deſign [3]. And therefore he ſhall, by no Means, ſtand bound, who, not thinking himſelf to ſwear, hath happen'd to utter Words which imply an Oath; or who hath barely recited the Form; or who, being by Virtue of ſome Office appointed to give other Perſons their Oath, tells them how they ſhall ſpeak after him [d]. In this Caſe *Lucian*'s Saying will hold good, *We are not to conſider his Mouth, but his Heart* [e]. It was vain therefore in *Cypidde* to fanſy herſelf religiouſly oblig'd, by reading the Oath which *Acontius* had wrote upon the Apple. And ſo indeed *Ovid* [f] hath taught her to argue,

Quæ jurat, mens eſt; nil conjuravimus illâ.
Illa fidem dictis addere ſola poteſt.
Conſilium prudenſque animi ſententia jurat,
Et niſi judicii vincula nulla valent.
Si tibi nil dedimus præter ſine pectore vocem,
Verba ſuis fruſtra viribus orba tenes.
Non ego juravi; legi jurantia verba, &c.

The Mind muſt ſwear; with that *we* never ſwore;
Yet that alone can add a binding Power.
Oaths are the Act of Wiſdom and of Thought;
Words give the Thread, but Judgment ties the [Knot.
Since all we ſaid an empty Sound we prove,
Sound without Senſe hath loſt its Force to move.
We did not *take*, we did but *read* the Form, &c.

But 'twould be moſt ſenſeleſs and abſurd, if a Man deſigning to ſwear, or at leaſt pretending ſuch a Deſign, ſhould yet refuſe to be ty'd by what he ſays; and ſhould urge in Excuſe, that when the *Oath* was adminiſter'd to him, his Intention was barely to recite the formal Words, but not to lay any Obligation on his Conſcience [g]. Not ſo much (if we conſider the immediate Reaſon) becauſe Obligation is the neceſſary Effect of an *Oath*, and inſeparable from it; as becauſe, otherwiſe, the whole Uſe of Oaths, nay and the whole Method of engaging each other by mutual Signs, would be baniſh'd out of human Life; if any Perſon might be able, by his ſecret Intention, to hinder an Action from obtaining ſuch an Effect as it was firſt inſtituted to produce. Therefore, whatever your inward Purpoſe might be, you ſhall certainly be bound by your Oath, when both the Party to whom you ſwore, apprehended this to be your Meaning and Deſign, and you yourſelf, when you utter'd the Words, evidenc'd by all outward Tokens, that you were in Earneſt, and not in Jeſt. And 'tis indeed a downright Contradiction to deſire to take an Oath, and yet not to be obliged by the Oath; to deſire to promiſe, and not to be bound by your Promiſe; to deſire to utter Words in a ſerious Manner, and yet not to let them bear that Uſe and that End which hath been aſſign'd them by the common Agreement of Men. Thus 'twas groſly ridiculous for the *Milaneſe* to tell *Frederick* I. *We ſwore indeed, but we did not promiſe to keep our Oath* [h]. And 'tis much to the ſame Effect, what Father *Paul* reports in his Hiſtory of the Council of *Trent* [i]; That *during the Vacancy of the Holy See, the Cardinals are wont to draw up a Form, conſiſting of ſo many Heads, for the Reformation of the Papal Government, which each of them ſwears he will exactly obſerve, in caſe the Election falls on him. Tho' the Experience of all Ages teſtifies, that not one of them ſtands to the Engagement; inaſmuch as immediately after their being choſe* Popes, *they declare, that either they could not be tied by any ſuch Bonds;*

[a] *Juvenal.* Sat. xv. 37. 38.

——— *Numina vicinorum*
Odit uterque locus; cum ſolos credat habendos
Eſſe Deos, quos ipſe colit.

Each calls the other's God a ſenſeleſs *Stock*,
His own *Divine*, though from the ſelf-ſame Block.
Mr. *Tate.*

[b] Lib ii c. 13. ſ. 12. [c] *Pro Lapſ. inter ſalutand.* [d] Add. l. lxiv. t. 7. l. iii. ſ. 2. *D. de Obligat. & Action.* [e] Add. *Juſ. Can.* xvi. *Quæſt.* 5. *Cauſ.* 22. [f] Epiſt. *Heroid.* xxi. v. 135, &c. [g] See *Grot* l. ii. c. 13. ſ. 2, 3. [h] *Radevic.* l. ii. c. 25. Add. *Grot.* ad *Matt.* v. 33. [i] Lib. i. Add. l. v. p. 358. Edit. *Gorinch.* 1658.

Add. l. xii. t. 2. l. v. ſ. 1. *De Jurejur.* which is not contradicted by §. 3. d. l. &c. or the Deciſion of *Canon-Law*, Queſt. 5. Cauſ. 22.

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[1] Mr. *Placette*, in his Treatiſe of an Oath, l. i. c. 13. diſtinguiſhes here between requiring an Infidel to ſwear by his falſe Gods, and propoſing an Oath barely to him. In the firſt he is induced to commit an Act of dolatry, which can never be allowed; but in the other he tempts him not to Idolatry, though he has Reaſon to believe that he will commit the Sin in doing what is required. The Reaſon is, becauſe what is required of him is innocent; for 'tis unlawful to ſwear. But if he adds any thing criminal to what is required, he does it of his own Accord, without being determined or induced by him who propoſed the Oath. If it were otherwiſe, no Man, who hath an urgent Occaſion for a Sum of Money, which no body will lend him at reaſonable Intereſt, could be permitted to borrow it of an Uſurer, who he knows very well will not lend but at an exorbitant Uſe, &c. This is what is ſaid, but to me this diſtinction of Mr. *Placette* ſeems not neceſſary. To require an Oath of a Heathen is, in my Opinion, the ſame Thing as to deſire him to ſwear by his falſe Gods. He can't ſwear but by the Object of his Religious Worſhip; and if he ſwears by any thing elſe, no Man will take it for an Oath. The Truth is, though an Oath, conſider'd in itſelf, is a Religious Act, yet in common Dealing it ought to be look'd upon as no more than a Civil Act. 'Tis a Security that is required, and whoſe Force depends upon the Impreſſion that the Fear of the Deity makes upon Mens Minds; it is of no Conſequence whether he who ſwears, calls the true or ſome falſe God to Witneſs, provided we ſwear not lightly and without Neceſſity. I compare it to *Naaman*'s Action, who, to diſcharge his Office, went into the Temple of *Rimmon*, and bowed himſelf there, to ſupport his Maſter the King of *Syria*, which the Prophet *Eliſha* did not diſallow. See 2 *Kings* v. 18. and *Joſh.* xxiii. 7. where the *Iſraelites* are forbidden to ſwear by other Gods, which refers to the Remainder of the *Canaanites*, with whom they were to have no Converſe, leſt they ſhould be won to ſerve and worſhip their Gods, to which they were too much diſpoſed.

[2] This Example is very well apply'd. It is very clear from *Joſh.* xxiv. 2. that *Terah*, the Father of *Abraham*, and *Nahor*, the Father of *Terah*, ſerved ſtrange Gods. See Mr. *Le Clerc* upon that Place in *Geneſis*, and on c. xiv. 33. of the ſame Book.

[3] To render an Oath valid, it ought to have theſe two Conditions: The one, That the Perſon who ſwears do it with mature Deliberation. The other, That he, to whom he ſwears, has nothing to make him incapable of the Right he acquires by our Oath. Theſe two Conditions are, indeed, Conſequences of the Act itſelf. The more we conſider the Relation it has with the Deity we call to Witneſs, the more we ſhall be convinc'd how unſuitable it is to the Majeſty of that Sovereign Being, to authorize (under the Cover of an Oath pronounc'd without Reflection, or extorted by Fear) Engagements which are only ſo in Appearance, and upon which no Man can reaſonably depend.

[4] We may find the like Adventure in *Anton. Liberalis Metamorph.* chap i.

or that their very Inveſtiture with that Dignity quite releaſes them from the Obligation. If therefore any Perſon ſhall pretend that he took an Oath with ſuch a prepoſterous Deſign, the Excuſe ſhall avail nothing towards reverſing what he promis'd, but ſhall paſs for meer Trifling. We may illuſtrate the Caſe by a like Inſtance: A Perſon who hath his Doctor's Degree conferr'd on him in the Schools, is nevertheleſs a Doctor, though we ſhould ſuppoſe, that he, who pronounc'd the Form of his Promotion, thought all the while of dignifying an Aſs. But if a Player upon the Stage inveſt another with the Habit and Formalities of that *Degree*, he ſhall be juſt as much a Doctor as he was before. *Ipſa ſtatim ſcena rem fictam eſſe teſtatur*, as *Quinctilian* [a] obſerves on a like Occaſion; *the Place ſhews the Action to have been inſignificant.* Whence we ſee that 'tis an idle Queſtion, Whether a Perſon be obliged, who deliberately utters the Words of an Oath, yet with an Intention not to ſwear? for if he barely rehears'd the Words without any farther Purpoſe, 'tis plain he hath neither ſworn, nor is oblig'd. But when the Matter hath been perform'd in Earneſt; that is, when he, who ſpoke the Words, gave all Proofs of his real Deſign to ſwear, and the other Party underſtood him in that Senſe, no doubt but the Oath is properly taken, and the Obligation contracted, whatever ſecret Drift the Swearer might entertain in his own Mind [1].

VI. We ought, likewiſe, carefully to obſerve, That Oaths do not, of themſelves, produce a new and peculiar Obligation [2], but are only applied as an additional Bond to an Obligation in its Nature valid before. For whenever we ſwear, we always ſuppoſe ſome Matter, upon Non-performance of which we thus imprecate the Vengeance of Heaven. But now this would be to no Purpoſe [3], unleſs the Omiſſion of the thing ſuppos'd had been before unlawful, and, conſequently, unleſs we had been before oblig'd. Tho' indeed it frequently happens, that we comprehend in one Speech both the principal Obligation, and the additional Bond of the Oath; as for Inſtance, if I ſay, *So God be my Helper, as I ſhall pay you an Hundred Pounds.* And yet it doth not follow, that an Oath is unneceſſary or ſuperfluous, becauſe it is thus added to an Obligation before firm and good in itſelf. For although all Men, except downright Atheiſts, believe that God will puniſh the Violation of Promiſes, not confirm'd by Oath; yet they believe, at the ſame Time, and with good Reaſon, that thoſe Wretches will feel a more ſevere Vengeance, who have, in expreſs Terms, call'd down the Wrath of God upon themſelves, and, ſo far as in them lies, have ſhut themſelves out from all Hopes of Mercy; whilſt they engag'd in Wickedneſs with ſo full a Purpoſe and Deſign, as to ſhew, that they valued not the Diſpleaſure of Him who is able to beſtow the greateſt Good, and to inflict the greateſt Evil. Whence we may conclude, that thoſe Acts which were before attended with ſome inward Flaw hindring any Obligation to ariſe from them, cannot be rendred obligatory even by the Addition of an Oath. As neither can a prior Obligation, truly valid, be diſannull'd by a ſubſequent Oath, or the *Right* which it gave another Perſon, be revers'd. Thus for a Man to ſwear that he will not pay a juſt Debt, can be no Prejudice to the Claim of the Creditor.

VII. And hence too it follows, that ſince in Promiſes and Pacts, Conſent, grounded upon Miſtake, is not effectual towards producing an Obligation, therefore an Oath is not binding, in caſe it be evidently made out, that the Perſon who ſwore ſuppos'd ſome Matter to be otherwiſe than it really proves to be; and which, if he had not thus ſuppos'd, he would not have taken the Oath: eſpecially, if his Miſtake was caus'd by the Deceit of the Party to whom he ſwore. For here the Point ſuppos'd was in the Nature of a Condition, which failing, all that was built upon it falls of Courſe. Thus if a Perſon brings me ſome very welcome News

[a] *Declam.* 342.

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[1] Except Oaths extorted by ſome unjuſt Fear, which are treated of §. 8.

[2] *Grotius*, Lib. ii. c. 13. §. 14. ſuppoſes, on the contrary, that every Oath, by which we engage ourſelves to do or not do any thing to another, contains a double Promiſe; the one reſpecting the Perſon who took the Oath, and the other the GOD by whom we ſwear; and that one of theſe Promiſes may oblige, though the other does not. Mr. *La Placette*, who had been once of this Opinion, in his Treatiſe of Conſcience, hath retracted it publickly. He maintains, in his Treatiſe of an Oath, lib. ii. c. 2. "That, "properly ſpeaking, we promiſe nothing to GOD in an obligatory Oath, otherwiſe there would be no difference between a Vow "and ſuch an Oath. See what our Author ſays, §. 8. Moreover, we often ſwear to do things wherein GOD is not at all concerned, and ſometimes with which he is diſpleaſed. Now it is ridiculous to ſay that we have promis'd a thing to any Man, who has no Intereſt by it, or which will be no Advantage to him, becauſe it diſpleaſes him. Laſtly, Promiſes become void in themſelves, when they are not accepted. If then an Oath confirms a Promiſe made to GOD directly, it can't be of Force, till we know that GOD accepts it; and how can we be aſſured of this, that GOD accepts a thouſand Promiſes confirmed by an Oath, if they have no Reſpect at all to his Service? what then is there in an Obligatory Oath, more than in a bare Promiſe made to the Perſon to whom we ſwear? Mr. *La Placette* finds nothing that can give us a better Notion of this, than Treaties of Guarantee ſo common among Princes. "Two Men, *ſays he*, make an Agreement, but one ſuſpects the other will break it; to aſſure him"ſelf of the contrary, he propounds an Oath, *i. e.* to take GOD for the Guarantee of the Agreement, and conſents, that in caſe "he breaks it, GOD ſhall declare againſt him, and puniſh his Perfidiouſneſs." I thought, when I read theſe Words, that he had been of our Author's Opinion, which ſeems to be a Conſequence of it; and I believed, when I publiſh'd the firſt Edition of this Work, I had given three good Reaſons for my Opinion, as may appear from the Extract made of them by Mr. *Bernard* in the News of the Republick of Letters, *June* 1701. but I now ſee, that Mr. *La Placette* ſtill maintains, That Oaths may be of Force and obligatory, although the Promiſes to which they are added be null. This he pretends to prove in the End, but the Reaſons he brings are weak, and not to the Purpoſe, as I ſhall ſhew hereafter. And we may eaſily foreſee, that he can produce nothing ſatisfactory in this Matter, and agreeable to his own Principles. He rejects the Opinion of a double Promiſe included in an Oath, becauſe we can have no Certainty that GOD accepts an infinite Number of Things indifferent in their own Nature, to which we engage ourſelves by Oath. But then he ought to be ſure that GOD will be the Guarantee of the Oath taken, after the ſame Manner as the Prince, who is Guarantee in a Treaty, ought to agree to it. For here is no Revelation, and I defy Mr. *La Placette*, and all the rigid Caſuiſts, to prove that we have Room to preſume that GOD will be Guarantee in an Engagement otherwiſe invalid, much leſs, that it is his Will, that the Holineſs of an Oath may ſecure to the wicked Man the Benefit of his Extortion. According to Mr. *La Placette*, Fraud diſpenſes with keeping an Oath, and why ſhould not Violence have the ſame Effect? Add here what I have ſaid in my Notes upon the Paſſage of *Grotius*, cited in the Beginning of this Note.

[3] This Reaſon does not appear to be good, or at leaſt is not well expreſs'd. For, as the Author ſays a little after, and §. 19. it happens ordinarily, that we engage ourſelves and ſwear at the ſame Time, otherwiſe we can't conceive an Obligation antecedent to an Oath, and valid, without any Dependence upon that religious Act. The Notion of an additional Bond, which the Author mentions above, is ſufficient to prove what he maintains. Men engage not themſelves by ſwearing, but ſwear to confirm their Engagements. An Oath, in reſpect of the Obligation we take on us, is as Modes and Accidents are to the Subſtance, without which they can't ſubſiſt. So that from the Moment that the Engagement, to which we have called GOD to witneſs, includes ſomething that makes it null in itſelf, an Oath loſeth all its Force, and we ſwear only with the Mouth, as all thoſe apparently do, from whom a Promiſe by Oath is extorted either through fear of Death, or ſome other great Danger.

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from a remote Place, in Conſideration of which I ſolemnly ſwear to reward him; in caſe I afterwards find his Relation to have been falſe, my Oath ſhall fix no Tie upon me. *Grotius* [a] adds, *If it be doubtful whether a Man would not have ſworn, altho' he had not been thus miſtaken, then he ſhall ſtand to his Oath. Becauſe Simplicity and plain Meaning are the moſt agreeable Attendants of Oaths, and all Tricks and Evaſions are ſtrictly to be baniſh'd from them: And, likewiſe, becauſe the Promiſe was not built on that Miſtake only, though ſuch a falſe Proſpect might be the Occaſion of its being expreſs'd in larger Terms.* But this doth not clearly ſettle the Caſe; for who ſhall be the Judge whether, in this Caſe, abſtracting from the Miſtake, the Promiſe would have been nevertheleſs made? Certainly, not the Party towards whom the Oath was addreſs'd: For how is it poſſible he ſhould be able rightly to diſcern what Mind the other Perſon would have been of, upon ſuppoſal of ſuch or ſuch a Condition? But neither can the Perſon who ſwore give a full Determination of this Difficulty; ſince we are not wont to be equally pleas'd with the ſame things propos'd at different Times, or at the ſame Time in different Manners. It ſeems probable therefore that even ſuch an Oath is not valid; at leaſt, ſo far as it is founded upon Miſtake. Yet if the Party who made it, thinks he ſhall pay ſome kind of Regard to the Honour of God, in not receding from it altogether, he ought to judge by the Condition of his Affairs, how far he may conveniently go in the Performance. And whilſt we are ſpeaking of this Caſe, it will not be improper to make a Reflection or two on the Oath which *Joſhua* perform'd to the *Gibeonites* [b]. Where we may firſt obſerve, That the Subtilty uſed by that People was not [1] culpable, nor did fall under the Notion of a *Lye* ſtrictly ſo term'd. For who will blame a Man for endeavouring, by ſome Fiction of Speech, to preſerve his Life from an Enemy bent upon his Deſtruction? Nor, properly ſpeaking, was this Stratagem the Cauſe of any Damage to the *Iſraelites*: For what doth a Man loſe by being hinder'd from ſhedding the Blood of another Perſon, whom he may nevertheleſs ſpoil of all his Poſſeſſions, and drag into perpetual Servitude, ſo weaken'd and diſarm'd, as to be incapable of future Oppoſition or Reſiſtance? The whole Point therefore turns upon this Queſtion, Whether or no it was the expreſs Command of GOD, that they ſhould kill all and each of the Inhabitants of *Canaan*, without Diſtinction; even ſuch as ſhould voluntarily ſubmit to their Yoke, and from whom they could apprehend no Danger hereafter? If this be abſolutely affirm'd, *Joſhua*'s Oath was void. For then the only Uſe of it would have been to evade a Divine Injunction; that is, *Joſhua* would have invok'd GOD to puniſh him, if he did not break his Command. Nor can it be urg'd, that *Joſhua* was therefore willing to keep his Oath, leſt it ſhould ſomewhat abate the Awe and Reverence towards the Divine Majeſty, in thoſe Nations, to ſee him break a Covenant which he had call'd GOD to atteſt. For the Inconvenience in this reſpect would have been the ſame, had he neglected to put the Divine Command in Execution. *Grotius* [c] therefore is of Opinion that the Order in *Deut.* vii. 2. and xx. 16. is to be underſtood with this Limitation [2], *unleſs any People ſhould ſubmit upon the firſt Summons*; which he urgeth

[a] Lib. ii. 13. ſ. 4. n. 1. [b] *Joſh.* ix. [c] Ibid.

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[1] It is in vain that St. *Baſil*, in the ſame Place where he commends the *Egyptian* Midwives and *Rahab*, condemns the Stratagem of the *Gibeonites* as wicked: Πανηρῶς κατε πανερ γένσαντο τὲς Ἰσραηλίτας οἱ Γαβαωνίται. In *Princip. Proverb.* Tom I. p. 302. C. *Edit. Pariſ.* 1638. For it is one Thing to know, whether, on account of this Artifice, the Treaty ſhould be regarded as null, and another Thing to affirm, That the Artifice itſelf was a Crime. The laſt is by no Means a neceſſary Conſequence of the firſt.

[2] In this Hypotheſis there is no Difficulty. For when *Joſhua* knew how things were, he ſtill certainly determined to receive the *Gibeonites*; not indeed to treat with them as Equals, and make them his Allies, but as Tributaries, or at leaſt as Slaves to the Children of *Iſrael*. So that he could not diſpenſe with his Word, though an Oath had not intervened in the League concluded with them. But Mr. *Le Clerc* has fully proved, that *Grotius* is miſtaken in his Notion, and confutes him thus: The Law expreſly excepts the Seven Nations of the *Canaanites* from the Number of ſuch as they ought to be ſpar'd, if they would yield at Diſcretion. See *Deut.* xx. 15, 16. Farther, there is a great Difference between a Law which orders the Deſtruction of a People, for fear that if they ſpared them they would enſnare their Conquerors into Idolatry, and a Law that orders the Deſtruction of all, at leaſt every one of them that does not voluntarily become tributary, and embrace the Religion of their new Maſters. If the laſt had been *Moſes*'s Meaning, he would have deliver'd himſelf clearly in ſome of the Places where he mentions the *Canaanites*. This Matter ought to have been taught the *Hebrews* carefully, yet we do not find any Footſteps of an Exception to that ſevere Order given by GOD in ſeveral Places to ſlay the Seven Nations of *Canaan* with the Edge of the Sword, and make no Treaty with them. Again, the Vow, which the *Hebrews* call'd *Cherem*, was of that Nature, that he who had vow'd it could not be ranſom'd, but muſt be deſtroy'd. See *Lev.* xxvii. 29. Now it appears, from ſeveral Places, that the Seven *Canaaniticſh* Nations ought to be regarded in this Light, as may be ſeen in the Law mention'd, *Deut.* vii. 2. The Examples alledg'd by *Grotius* do not proves the contrary. For, 1. The Hiſtory of *Rahab* is a particular Inſtance, from whence no Conſequence can be drawn. 'Tis no Wonder if the *Hebrews*, to whom ſhe had done ſo conſiderable a Piece of Service, ſpared her; and ſo much the more, becauſe ſhe did it before they had declared War againſt her Country. 2. 'Tis certain that *Solomon* contented himſelf to make the Poſterity of the Remnant of the *Canaanites* tributary to him, 1 *Kings* ix. 20, 21. But the Law, which order'd the Deſtruction of that People, did not extend to their Poſterity; it is enough to ſuppoſe that it reached to them only, over whom GOD made the *Iſraelites* victorious in *Joſhua*'s Time, or after, till they were well ſettled, and in Poſſeſſion of as great an Extent of Country as was neceſſary. So that if any of the *Canaanites* eſcaped into the neighbouring Countries, as the Text above quoted plainly proves, and they after fell into the Hands of the *Iſraelites*, or their Poſterity, they ought not to be ſlain without Mercy. 3. As to what is ſaid in the Book of *Joſhua*, chap. xi. v. 19, 20. That there was no Town of the Seven Nations of the *Canaanites* that would make Peace with the *Iſraelites*, becauſe GOD had hardned their Hearts, ſo that they fought againſt *Iſrael*, that he might deſtroy them utterly without ſhewing them any Mercy. 'Tis not meant, as *Grotius* tells us, that the *Iſraelites* were obliged to ſpare them who yielded to them at Diſcretion, but that, through the Influence of Divine Providence, all the Seven *Canaaniticſh* Nations, except the *Gibeonites*, agreed together to fight, and would not ſubmit to the *Hebrews*, who would not have had the Courage to have put them all to the Sword without Mercy, as Divine Juſtice had reſolved to puniſh them, had they laid down their Arms and open'd their City-Gates to the Conquerors. Theſe are Mr. *Le Clerc*'s Reaſons, to which I freely aſſent. But if this be ſo, what ſhall we ſay to *Joſhua*'s Oath? As for me, I can ſee no Reaſon but we may ſay, that his Oath was raſh and null in itſelf. The Sacred Hiſtorian ſeems to grant the firſt, when he ſays, v. 14. that they did not ask Counſel at the Mouth of the Lord, *i. e.* of *Urim* and *Thummim*. In Truth, ſince he ſuſpected ſomething, as appears from Verſe 7. he ought to have been cautious how he engaged himſelf by Oath in a Matter of ſuch Conſequence, and in a Manner run the Hazard of oppoſing GOD's Command. And theſe Orders being ſo formal and abſolute, it follows, that as ſoon as the Artifice of the *Gibeonites* was diſcover'd, the Oath of *Joſhua* and the *Elders* of *Iſrael* were of no Force. For all the World agrees, that an Oath engaging us to a Thing unlawful is invalid. ſee §. ix. following. Nevertheleſs we ſee that *Joſhua* thought himſelf obliged to keep his Oath. 'Tis poſſible that GOD, by ſome poſterior Act, might ratify this Oath, though the Holy Scripture, which omits many Circumſtances, ſpeaks nothing of this Ratification. They had forgot to conſult the *Urim* and *Thummim* till it was too late; and after they had ſeen by Experience the Fault they committed in Swearing without examining Things. *GOD* indeed had more Regard to the good Intention of the Elders of the People, and to the Circumſtances of the Affair, than to the Quality of the Act itſelf, and the Rigour of Juſtice. He therefore approv'd of their keeping the Oath, notwithſtanding the Error on which it was founded, and which might have deſerv'd

urgeth many Reaſons to confirm. Mr. *Selden*, likewiſe, has ſhewn at large [a]; that the utter Slaughter and Extirpation of thoſe People was rather a Permiſſion to the *Iſraelites*, than a Command. And others think this the more probable, becauſe the Reaſon aſſign'd for that Commiſſion againſt the *Canaanites* was, partly leſt the *Iſraelites* ſhould imitate their Idolatry, being then ſtrangely prone to foreign Superſtition; and partly leſt the ancient Inhabitants, if left in any conſiderable Numbers, ſhould gain Strength to turn out their new Gueſts; eſpecially in Caſe they were allow'd to live with them upon equal Terms [b]. This Danger, therefore, being once ſurmounted, they judge it would have been no Fault to admit ſome to Mercy and Favour; eſpecially ſuch as ſhould abjure their Idolatrous Worſhip. However this were, 'tis plain that *Joſhua*, upon Diſcovery of their Fraud, interpreted his Oath in a more ſtrict and ſevere Senſe. They had profeſs'd themſelves the Servants of the *Iſraelites*, a Phraſe common with the *Eaſtern* Nations, and had deſired a League. *Joſhua* had promiſed them their Lives, and had enter'd into League with them, according to their Petition: And by this Agreement (had they proved ſuch as they pretended, that is, none of the Number of thoſe Nations which GOD had deſign'd to Deſtruction) they had been left in Poſſeſſion of their Goods and Liberties [c]. But on Account of the Deception they had uſed, he inſiſts ſtrictly upon his Words; and, as it appears, left them nothing but their Lives and neceſſary Maintenance [d].

VIII. But what are we to think of Oaths extorted by unjuſt Fear? Surely the Perſon who, by Means of this Fear, procured a Promiſe upon Oath, is no leſs obliged to releaſe the Promiſe thus violently obtain'd, than if no Oath had been added to confirm it. Therefore there appears no Reaſon, why [1] Compenſation ſhould not be admitted in this Caſe, in Oppoſition to the Claim of the injurious Party; according to the Rules laid down by us, when we treated of the general Subject of Fear. Indeed, 'tis the Opinion of *Grotius* [e], *that if either the Words of the Oath do not reſpect the Man, by conferring any Right upon him; or, if they do reſpect him, yet ſo as that ſomewhat may be oppoſed to his Claim, then the Effect of the Oath ſhall be this: That the Man ſhall obtain no Right, but that the Swearer ſhall, nevertheleſs, ſtand to his Oath, by virtue of his Obligation to Almighty GOD.* And he urgeth, as an Inſtance, the Caſe of one who, by ſome unlawful Fright, or Terror, hath forced a Promiſe from another. But if

[a] Lib. vi. c. 16. [b] See *Judg.* i. 34. ii. 2. iii. 5, 6. [c] 1 *Kings* xx. 4. [d] Add *Ambroſ.* Off. l. iii. c. 10. [e] Lib. ii. c. 13. ſ. 14.

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pens'd with their Obſervation of it. The ſevere Puniſhment which GOD laid on the *Iſraelites* and Poſterity of *Saul*, for ſlaying the Deſcendants of theſe *Gibeonites*, 2 *Sam.* xxi. 1, *&c.* may give Ground to ſuch a Conjecture, although the Action of *Saul* was otherwiſe inhuman and cruel; becauſe, as I ſay with Mr. *Le Clerc*, the Law which order'd the Deſtruction of the *Canaanites* was not in Being. But be that as it will, it is certain, that a Superior may render an Act good contrary to his own Prohibition, eſpecially in the Caſe of a poſitive Law ſo rigorous as this we are treating of. Moreover, we know that the Civil Law, following the Principles of the Canon Law, authorizes certain Acts confirmed by an Oath to be valid, though theſe Acts would be otherwiſe null by thoſe Laws, and ſo the Oath does not render them effectual of themſelves. See *Grotius*, lib. ii. c. 5. §. 14. n. 4. and §. 16. and c. xiii. §. 20. n. 4. and what our Author ſays §. 19. following. Nor is it hard to diſcover, why God would ratify *Joſhua*'s Oath. The Breach of ſo ſolemn a Promiſe made with an Oath, which is accounted by all People in the World, a moſt ſacred and inviolable Act, would have, doubtleſs, begat an ill Opinion both of the *Iſraelites* and of their GOD, with all the neighbouring Nations, with whom they were to live in Peace, ſo that they would have had no Commerce with them, nor rely upon their Word. In vain our Author pretends, that the ſame Inconvenience will follow upon our Neglect to execute an abſolute Order of GOD; becauſe it is not in the leaſt to be feared, that the neighbouring People would make ſuch Reflection. They might think it ſtrange, that the *Iſraelites* ſhould treat the People they conquer'd with ſo much Rigour, but they could never be offended, in the leaſt, to ſee that Rigour mitigated by the Sanctity of an Oath. See what I have ſaid in the firſt Edition of this Work. But Mr. *Le Clerc* has changed his Opinion, as appears from his Comments upon the other Books of the *Old Teſtament*, printed in 1708. where he ſays, That the *Iſraelites* did ill in not informing themſelves fully of the Place from whence the *Gibeonites* came, although theſe laſt might uſe any innocent Arts to ſave their Lives; but he believes, that they did not inſert that Clauſe in the Treaty, but it was made upon the Suppoſition, that the *Gibeonites* were a People who dwelt at a great Diſtance; upon which Account it was null. But the *Iſraelites* not inſiſting upon that, and having directly ſworn, that they would do them no Harm, they were obliged to keep their Word, which they had confirmed with an Oath, and ſo much the more, becauſe it engaged them to do nothing contrary to their Law, as he proves by the ſame Reaſons that *Grotius* had uſed. To this Action of the *Iſraelites* we may apply a Sentence of *Publius Syrus*, which ſhews, that we do well to keep our Word, though we have committed a Fault in giving it. *Etiam in peccato rectè præſtatur fides*, v. 192. We muſt look into Mr. *Le Clerc*'s new Edition of the Pentateuch, to ſee how he confutes his own Reaſons; for I hear, that while I am writing this Comment, (in 1709.) he has reprinted that firſt Part of his uſeful Work on the *Old Teſtament*. I now add, that the Author had left Things as they were in the firſt Edition. Therefore there remains a Difficulty in the Solution of this Caſe, which is founded on contrary Principles. Beſides, granting (what can never be proved) that there was no expreſs Clauſe in the Treaty, by which it appears that it was concluded upon the Suppoſition that the *Gibeonites* had told the Truth, it no Way follows but the Treaty itſelf might be well grounded. There are often tacit Conditions flowing from the Nature of the Thing, and the Intention of one or other of the contracting Parties ſufficiently notify it. Such, for Example, in this Caſe, was the Situation of the Country from whence the *Gibeonite* Embaſſadors pretended to be ſent. Nothing can prove this more plainly, than theſe Words of the Elders of *Iſrael*, *Perhaps you dwell among us, how then ſhall we treat with you?* ver. 7. After ſuch a Declaration, it is natural to infer, That the Treaty, upon whatever Footing it was made, and whether thoſe, who concluded it, could, or could not diſpenſe with the Orders of Heaven; it is natural, I ſay, to infer, That the Foundation of this Treaty was a Suppoſition, that the *Gibeonites* were not of the Number of the Seven Nations condemned to Deſtruction. This appears, alſo, by the Murmurs of the *Iſraelites*, when they ſaw the *Gibeonites* was ſpared, who themſelves took no Advantage of the Treaty, but threw themſelves upon the Mercy of thoſe whom they had deceived, verſ. 18, 25. Moreover it appears to me, that, according to the *Hypotheſis* of *Grotius*, neither the Treaty was executed, nor the Oath accompliſhed, in the Manner they ſhould have been: For if the Law permitted the *Iſraelites* to ſpare, without Diſtinction, all who demanded Peace, and became tributary, by what Right did they deprive the *Gibeonites* not only of their Effects, but, alſo, of their Liberty? Becauſe, you will ſay, they deceived them. But, as this Deceit was the main Condition of the Treaty, ſo that ſtill ſubſiſts in its full Force. In Reality, the Artifice which the *Gibeonites* uſed thro' Fear of an Enemy, who put all to the Sword, deſerved they ſhould meet with better Treatment than they would have done, if they had honeſtly told where they lived. Nor is this a ſufficient Reaſon why they ſhould be called *Curſed*, ver. 23. But the Moment we acknowledge the Treaty null, for the Reaſons alledged, all theſe Objections vaniſh. The *Gibeonites* had nothing to pretend, and it was a Favour in the *Iſraelites* to grant them their Lives, which they might have lawfully taken away.

[1] See what is ſaid Note 2. Page 287. As to the Queſtion itſelf, we ſhall find in Mr. *Vander Muelen*'s Comment on *Grotius*, Tom. ii. p. 487. the Reaſons brought on each Side, tho' what is ſaid by our Author may be ſufficient for any Man of Judgment. Add here my Notes upon *Grotius*, lib. 2. cap. 13. §. 14. *Euripides* has ſaid, "That the Deity knows very well how to diſtinguiſh between Oaths extorted by Force, and thoſe made with a Deſign to deceive the Perſon to whom we ſwear; and that he eaſily pardons the firſt which are occaſion'd by the Fear of Death, Slavery, or any other external Violence.

——— Οὐ γὰρ ἀσυνέτων
Τὸ θεῖον, ἀλλ' ἔχει συνίναι τὰς κακῶς
Ὁρκους ὀμόσσας, ἢ κατηναγκασμένους.
Συγγνωμονάς τοι πᾶς θεὸς εἶναι δόκει,
Ἐαν τις ὅρκοις θάνατον ἐκφυγεῖν θέλῃ,
Ἢ δισσὸν ἢ βίαιος πολιμίων κακά.
Incert. Tragœd. Verſ. 993 *& ſeqq.*

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we would truly ſettle this Point, we ought to diſtinguiſh between the different Kinds and Natures of Oaths. *Firſt*, for thoſe Words which are directed not to Man, but to GOD; as if I ſay either alone, or before Witneſſes, *I ſwear to GOD that I will give* Seius *thus* or *thus* [a]. Here the Oath hath the Nature of a Vow, by which I promiſe to GOD that I will perform ſomewhat in reſpect to his Honour; and, conſequently, by which I intended to transfer a Right on GOD, and not on Man. The Caſe is quite otherwiſe in Oaths which are directed to Men, or in which I promiſe a Man ſomewhat, calling GOD to witneſs. For here the Obligation ſeems altogether to expire, if it appears that the Perſon, to whom the Promiſe was made, lay under ſome Fault which render'd him uncapable of receiving it. Thus, in a Promiſe to a Thief, I neither directed the Engagement towards GOD, nor expreſs'd myſelf thus, That I would, in regard to the Honour and Glory of the Divine Name, pay the Man what was mention'd. And tho' we ſhould grant never ſo freely and abſolutely, that even ſuch an Oath hath, likewiſe, the Force of a Vow; yet, ſince a Vow binds not, unleſs it be accepted by GOD, how ſhall I be ſure that 'tis conſiſtent with the Divine Pleaſure and Approbation, that I, an innocent Perſon, ſhould rob myſelf of my Goods, to beſtow them on an ungodly Villain, only to put him into a Way of making ſome Gain of his Wickedneſs? And then there is no Fear that my Neglect of my Oath ſhould leſſen the Awe and Reverence of GOD in ſuch a Wretch, who, by his very Profeſſion, and Way of Living, ſhews how little he values GOD and Religion. Yet if there be any Man, who, in this Caſe, to avoid giving Scandal to the Weak, and, that he may not ſeem, now he hath eſcaped the Danger, to treat the Divine Name in a ſlighting or irreverent Manner, which before was the Cauſe of his Deliverance; if any Man, we ſay, on theſe Conſiderations, is reſolved to part with the Sum thus promiſed, it ſeems not only to be more ſafe and expedient, but, likewiſe, more acceptable to GOD, that he ſhould rather convert it to pious Uſes, than to the Maintaining of the Wretch in his villainous Courſes. And this Method of proceeding is the more juſtifiable and ſecure in Governments, where all Oaths of this Kind are, by the municipal Laws, declared void [1]. The Examples, alledged by *Grotius* to the contrary, will, to thoſe who rightly conſider Things, appear not at all to reach the Purpoſe. 'Tis ſtrange that *Matthæus* the *Civilian* [b] ſhould, in his Diſcourſe on this Point, commend the Act of *Julius Cæſar*, *who being taken by Pyrates, and made ſwear to pay his Ranſom, ſent the Money, but afterwards putting to Sea, took them, and brought them to Execution*. For *Plutarch* [c], *Velleius* [d], *Sueton* [e], and *Polyænus* [f], who, tho' all tell the Story, yet none of them mention a Word about any ſuch Oath: And [g] *Matthæus* ſeems, in this, to follow the Notion of thoſe who fancy that a Perſon, thus compel'd to ſwear, may ſatisfy his Oath by paying, juſt for the preſent, what he promiſed; yet ſo as that it ſhall be lawful for him, immediately after, to recover what he gave, either by his own Strength, or by calling in the Aſſiſtance of the Magiſtrate. Which is, indeed, but a vain Piece of Superſtition; it being the ſame Thing not to pay, and immediately to take back what we paid. *Tully* aſſerts [g], That it is no Fraud to with-hold from a Robber, a Ranſom promiſed him for ſaving our Life [3], for this Reaſon, *Becauſe a Robber is a common Enemy*

[a] Add *Paul Servit.* de Inquiſit. p. 55, 56, 57. Speaking of Perſecutions, and the Puniſhment of thoſe called *Hereticks*, makes a Diſtinction between an Oath addreſs'd to GOD, (*Giuramento ad Deo*) and an Oath taken before Man, (*Giuramento in mano*). The Deſign of this learned Man is to ſhew, that neither at *Venice*, nor even in *Spain*, the Tribunal of the Inquiſition is independent of the Sovereign Authority. But as the Clergy objected, that the *Doge* of *Venice*, and the *Kings* of *Spain*, ever ſince *Philip* II. on their Acceſſion to their Dignity, ſware not to tolerate *Hereticks*: He replies, that the Oaths of the Kings of *Spain* implies no Promiſe of Obedience to what they call the *Holy Office*, (which depends entirely upon the King, and receives its Orders from him) but is only an Engagement towards GOD, and that by this the King cuts his Subjects from all Hope of obtaining Liberty of Conſcience. In the like Manner, adds he, the Oath which the *Doge* formerly made at his Inſtallation, to puniſh *Hereticks*, was not given to the Tribunal of the *Inquiſition*, but to GOD and the Republick; for he affirms, there is a great Difference between *ſwearing abſolutely, and ſwearing to any particular Perſon*. [b] *De Criminibus*, tit. *de perjur.* n. 5. [c] *In ejus vita init.* [d] Chap. 41, 42. [e] Chap. 4, & 74. [f] Lib. viii. c. 23. [g] Offic. l. iii. c. 29.

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[1] This is thus decided by a Conſtitution of the Emperor *Frederick* II. inſerted in the *Code*, lib. ii. tit. 28. *Si adverſus venditionem*, Leg. 1. *per vim autem, vel per juſtum metum*, i. e. not by a juſt Fear, but by ſuch a Fear as is ſufficient to move a Perſon not very timorous. *Extorta etiam à majoribus* [*ſacramenta*] (*maximè ne querimoniam maleficiorum commiſſorum faciant*) *nullius momenti eſſe jubemus*. The Poet *Gunther*, alſo, makes Mention of a like Conſtitution of the Emperor *Barbaroſſa*, in his *Ligurinus*, l. viii. v. 793, &c.

Juramenta metu, mortiſque dolore coacta,
Præcipuè ne quis multis nocitura loquendo
Publicet, aut in ſe crudeliter acta queratur,
Nullius meriti, vel ponderis eſſe jubemus.

Oaths took on Force, or Fear of threat'ned Fate:
And chiefly thoſe, forbidding to relate
Deſigns of publick Harm, or to complain
Of cruel Wrongs, we here revoke as vain.

Our Author quotes theſe Verſes at the End of the next Chapter. See *Feud.* lib ii. tit. 53. §. 3.

[2] The *Dutch* Lawyer has been deceived by what *Suetonius* ſays, (cap. 74.) that *Cæſar* ſwore to crucify the *Pyrates*. He confounds this Oath with the Promiſe of the Ranſom.

[3] Mr. *La Placette*, in his Treatiſe of an *Oath*, l. ii. c. 21. takes our Author's Words in a wrong Senſe. Theſe are his Words, "He makes *Cicero* ſay, That there is a Fraud in keeping theſe Sort of Promiſes." Whereas theſe are Mr. *Pufendorf*'s Words, *Cicero quoque, prædoni pactum pro capite pretium, ſine fraude non aſſerri aſſerit*. Where the whole Connexion of the Diſcourſe ſhews, that there is no Appearance of any ſuch Imputation to *Cicero* by our Author, but that he fairly relates the Opinion of that famous Orator. For he ſays not, *non ſine fraude aſſerri*, *ſed ſine fraude non aſſerri*; which is very different, and comes up exactly to the Senſe of *Cicero*'s Words, which are, *Si prædonibus pactum pro capite pretium non attuleris, nulla fraus eſt, ne ſi juratus quidem id non feceris*, &c. Mr. *La Placette*, after he has made this Miſtake, infers from it what our Author never did, and of which none ought to ſuppoſe him guilty without good Reaſon, ſuppoſing, that through Careleſſneſs it had been ill expreſs'd, as it happens ſometimes; he infers, I ſay, from thence, that Mr. *Pufendorf* ſeems to aſſert, That a Traveller cannot in Conſcience, to ſave his Life, either promiſe Thieves the Sum that they demand of him, or pay it them; and that it is an Offence againſt the Publick to do either of them. So that this Oath is ſinful, and we ought not to make it, ſince no Man may innocently oblige himſelf to that which he cannot do without a Sin. And ſo, upon ſuch Occaſions, a good Man ought rather to ſuffer himſelf to be killed, than promiſe a Shilling to ſuch Thieves as offer to ſpare his Life, provided he will oblige himſelf to do a Thing which is in his Power. I am of Opinion, that Thieves trouble not themſelves, whether it be in their Power, or no, to perform the Promiſe which they have extorted with or without an Oath. In fine, there is not the leaſt Thing in our Author, which can give Ground to ſuſpect any ſuch Notion as he attributes to him; nor can it be inferred from his Principles, but by ſuppoſing the Thing in Queſtion. He affirms, that a Man is not bound to keep a forced Oath, but he elſewhere leaves him at Liberty to obſerve it, or not, as he ſees fit, and ſo makes it a Matter of Prudence; and though he believes he cannot keep it without offending againſt the Publick; yet it follows not, that he may never do it, becauſe he ſuppoſes, (to ſpeak properly) that it is no true Oath; and as he makes no Engagement with the Thief, who had no Right to require or accept it, ſo he called not GOD to witneſs; and ſo 'tis paſt all Contradiction, that he only ſwore with his Mouth. Mr. *La Placette*, after theſe weak Reaſonings, concludes, nevertheleſs, with this ſharp Cenſure. "See how the Liberties, which the Enemies of ſevere Morality propound, uſually end! They carry the Severity and Rigour "much farther than thoſe whom they accuſe of caſting good Souls into Deſpair." But I will refer it to any judicious Man to examine

Enemy to all Mankind, to whom no Faith can be engag'd, with whom no Covenant can be tranſacted. For which he is cenſured by *Grotius* [a], who obſerves, That although a Robber hath no Title to thoſe common Rights which the Law of Nations hath eſtabliſh'd between Enemies, in a fair and open War, yet he ought to be admitted to Fellowſhip and Communion ſo far as the Law of Nature extends; one Precept of which is, That Covenants be faithfully obſerv'd. And yet there are not wanting Arguments which might be urg'd in *Tully*'s Defence [1]; as, That ſince a Robber is a common Foe to all Men, or ſuch an one as without any precedent Injury or Provocation ſpoils and murthers all that fall into his Hands, and, conſequently, makes it his very Profeſſion to break and diſturb that Society which GOD hath ordain'd amongſt Men; therefore he ought to receive no Benefit from any ſuch common Bond (as Oaths are) invented by Men to knit themſelves more firmly together, after the Divine Appointment hath made them ſociable Creatures. And that a Way of Life, which declares for Atheiſm, ought not be admitted to any Gain or Advantage from Religion. As, on the other Side, the Oaths and Proteſtations of ſuch Villains are little regarded or relied on by wiſe Men [b]. And we find the *Pander* in *Terence* [c] reckoning it amongſt the neceſſary Accompliſhments of his Art, *to have the knack of Perjury*. Nic. Machiavel. Hiſt. Florent. l. iii. *When Religion and the Fear of GOD are once extinct, the Conſequence is, that Men regard and obſerve their Oaths only ſo far as ſuits with their Advantage; uſing them not with an Intention of Performance, but as Means and Inſtruments of deceiving with greater Eaſe; and thinking themſelves to have won the more Praiſe and Glory, the leſs Trouble and the greater Security they have met with in bringing about their knaviſh Deſigns.*

IX. It is farther requiſite, in order to the Validity of an Oath, that the Obligation be lawful, which it is added to confirm [2]. Therefore a Promiſe, tho' ſworn to, ſhall be of no Force or Effect, if the Subject of it were a Matter either repugnant to the Natural or Divine Law, or to any Human Law (if the Party lives under Civil Government) inconſiſtent with the Natural and Divine [d]. The Example of *David* is moſt illuſtrious in this Caſe [e]; who having in his Paſſion ſworn to deſtroy the Houſe and Family of *Nabal*, for denying him a reaſonable Kindreſs in abuſive and ſlanderous Language, yet being pacified by the Interceſſion of *Abigail*, he thanks GOD, that he hath been thus hindred from a more ſinful Performance of a ſinful Engagement [3]. And ſo *Alboinus* was no doubt in the Right, for retracting a Vow which he had made to cut off all the Inhabitants of *Pavia*, upon their refuſing to ſurrender at his Summons. For 'tis abſurd to invoke the Divine Vengeance upon any Action [f], but ſuch as GOD himſelf hath, under a ſevere Penalty, forbidden. To do otherwiſe would be to abuſe the Awe and Reverence which we owe to the Divine Majeſty, in making it, as it were, a Means of affronting Him. And the Deſign of introducing Oaths amongſt Men was, that they might add Strength to good Actions, not that they might afford Excuſe and Protection to bad. *Dionyſ. Halicarn.* l. xi. p. 694. Edit. *Lipſ. The Gods would have us make uſe of Covenants for juſt and honeſt Deſigns, not for thoſe that are vicious and unreaſonable* [4]. The very *Alcoran* forbids Men to ſwear unlawfully [g]; as ſuppoſe, That they will never come near their Wives: And injoins any Perſon who hath happen'd to make ſuch an Oath, to ſet a Slave at Liberty by way of Expiation, before he preſumes to break it. And here 'tis made a Queſtion, Whether a Man falling amongſt Thieves, and being by them compell'd to ſwear that he will for ever keep Silence, and, as far as in him lies, provide for their Security, be bound to ſtand to his Oath? To which we are inclined to anſwer in the Negative; in caſe his Silence be likely to prove the Occaſion of expoſing many other Perſons to Danger. For as to his own Part he might lawfully enough ſuffer the Villains to eſcape with Impunity; but not if their Safety was to be follow'd by the Murther and Ruin of many innocent Men. And we might apply to a

[a] Lib. ii. c. 13. ſ. 15. & lib. iii. c. 19. ſ. 2. [b] See what has been ſaid in l. iii. c. 6. towards the End. [c] *Adelph.* Act. ii. Scen. 1. v. 35. [d] See the Paſſages collected out of the Fathers by *Gratian*, Cauſ. 22. Queſt. 4. See *Grotius*, lib. ii. c. 13. ſ. 6. [e] 1 *Sam.* xxv. [f] See *Grotius*, lib. ii. c. 13. ſ. 7. [g] *Paul Warnefrid.* de Geſt. *Longobard.* l. ii. c. 27. Add. l. v. c. 40. in fin. *Æn. Sylv.* Hiſt. Bohem. c. 18. [h] Cap. *de Diſputat.*

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examine what Books have done more Harm and leſs Good, whether thoſe, who are of our Author's Judgment, or thoſe Moral Divines, who are full of Myſteries, ſcholaſtick Notions, metaphyſical Reaſonings carried to Exceſs, and impracticable Maxims. Mr. *La Placette* affirms, alſo, "That to maintain that a forced Oath doth not oblige, is to do great Miſchief to Society, by making "Pyrates and *Banditti* deſperate, and hindering them from coming to any Treaty." But he may aſſure himſelf, that they will neither read this Author's nor his own Works. They depend more upon the Fear, which ſuch Men have of falling into their Hands again, than upon the Obligation which lies upon them, indiſpenſibly to keep their Word or Oath. See what is ſaid upon the *Corſairs* of *Barbary*, l. viii. c. 4. §. 5. following. As for the Treaties, in which we engage ourſelves to an Enemy or Conqueror through Fear, we ſhall ſpeak of that, l. viii. c. 8. I ſhall add here, that uſually a Robber, who makes a Traveller ſwear to pay him a certain Sum, by holding a Piſtol at his Breaſt, requires of him, by the ſame Oath, that he will not diſcover him to Juſtice. He would be very fooliſh, if he did not take this Precaution, without which the Hazard he runs would be greater than the Advantage he expects. Now Silence, in this Caſe, is contrary to the publick Good, and, conſequently, makes the Oath void. (See the End of the following Section.) But to pay what we have promiſed on ſuch an Occaſion is, alſo, prejudicial to Society, becauſe it encourages the Robber to continue his Villainies in Hopes of the like Succeſs. The Oath is, therefore, invalid as well as unlawful upon a double Account.

[1] With the Limitation which our Author makes above, lib. iii. c. 6. §. 9, and 11. about the End.

[2] 'Tis in this Senſe that we may allow the common Maxim to be true, That an Oath which ought not to be made, ought not to be kept; for if the Thing to which we oblige ourſelves be good or indifferent in itſelf, the Oath is valid and obligatory, whether we ſin or not in making it. Here are two Examples which will clear this Matter: A Man obliges himſelf by Oath never to ſwear all his Life; nevertheleſs ſome time after he ſwears, and by this ſecond Oath obliges himſelf to reſtore ſomething he has borrowed. Doubtleſs he ſins by making the ſecond Oath, which he ought not to have done, but yet is bound to keep it. Another borrows, and ſwears he will reſtore what he has borrowed, having yet no Deſign to do it. He commits an horrible Sin by it, but will any Man ſay he is not obliged to perform his Oath? The Maxim in Queſtion is not true, but in reſpect to ſuch Oaths by which he engages himſelf to do ſome wicked Action, or forbear ſome good one, which he ought to do. This is what Mr. *La Placette* ſays, l. ii. c. 5. of his Treatiſe of an Oath.

[3] See the Comment of Mr. *Le Clerc* upon this Story. Mr. *Hertius* obſerves here, that *David* was not yet King, and the Refuſal of ſuch a Service did not authorize him to uſe Violence with the Refuſer. He was not in extreme Neceſſity, and, if he had, that was not Cauſe ſufficient to revenge himſelf in that terrible Manner.

[4] The Greek is, Θεοὶ γὰρ ἐπὶ καλαῖς, καὶ δικαίαις παραλαμβάνεσθαι φιλῶσιν ὁμολογίαις, ἐκ ἐπ' αἰσχραῖς καὶ ἀδίκαις. See what Mr. *Buddeus* ſays about the Oath that *Hamilcar* made his Son *Hannibal* to ſwear when he was a Child, That he never ſhould have Peace or Amity with the *Romans*, *Juriſprud. Hiſt. Spec.* §. 68, &c. among his *Selecta Jur. Nat. & Gent.*

Perſon, under theſe Circumſtances, the Saying of *Ateius Capito* to *Tiberius* in *Tacitus*, *Sane lentus in ſuo dolore eſſet: reipublicæ injurias ne largiretur: So far as he was concern'd himſelf, or, in regard to his own particular Grievance, he might be as merciful as he pleas'd; but he ought not to forgive the Injury done to the Commonwealth.* Ann. III. c. 70. In *Gunther. Lugurin.* l. viii. *ubi ſupra*, *Frederick* makes the following Ordinance:

Juramenta metu mortiſve dolore coacta,
Præcipue, ne quis multis nocitura loquendo
Publicet, aut in ſe crudeliter acta queratur,
Nullius meriti vel ponderis eſſe jubemus.

Oaths took on Force, or Fear of threat'ned Fate;
And chiefly thoſe forbidding to relate
Deſigns of publick Harm, or to complain
Of cruel Wrongs, we here revoke, as vain.

X. But to go farther, altho' the Thing promis'd be not in itſelf unlawful, yet the Oath ſhall be invalid, in caſe it hinders any greater moral Good [1], or if we are by it with-held from diſcharging any Duty of Humanity or Piety [a]. And under this Head we may rank thoſe Oaths, by which Men tie themſelves up from diſcovering and communicating to others any honeſt Art, tending to the Uſe and Benefit of Mankind [b]: "Unleſs I or others, "who are already privy to the Secret [2], can ſuffi- "ciently ſupply the Needs of Men in this Particu- "lar; and upon Suppoſal that my Diſcovery can- "not prejudice and endamage the Party who re- "quired the Oath from me." Such an Oath we find in *Lucian* [*Tragopodag.*] Tom. ii. p. 118. in fin. Edit. *Amſt. The Sacred Oath of Silence which I have taken, ſuffers me not to declare what you deſire. To which is added the Command of my dying Father, enjoining me never to diſcloſe the Force of this Compoſition.* Plin. Nat. Hiſt. l. xxv. c. 1. *It adds ſome kind of Strength and Authority to our Knowledge, when we refuſe to communicate it to others.* The Reaſon of all which is, becauſe we owe all our Proficiency in good and uſeful Things to Almighty GOD, and are each of us bound to carry our Endeavours to the higheſt Degree that we are capable of attaining: So that 'tis not in our Power to abridge ourſelves of this Liberty, or by our own Acts to abſolve our Conſciences from a Duty enjoin'd by the Law of GOD. Oaths of this Kind were not uncommon amongſt the *Jews*, which are inſiſted on at large by other Authors [c]. Thus too we judge that Oath to have been invalid, which *Narſes* in *Paulus Diaconus* [d] requir'd of an old Man who had dug up a Quantity of Gold, engaging him never to acquaint any Perſon with his good Fortune. And the old Man was in the Right, when upon the Death of *Narſes* he diſcover'd the Treaſure to *Tiberius* the Emperor. And in this reſpect the Caſe of a Vow is the ſame with that of an Oath: For neither is a Vow to be look'd on as good and valid, not only if it be unlawful, but if it be ſilly and impertinent. The *Spartan* who had ſworn to throw himſelf headlong down the Promontory *Leucate*, when he beheld the dreadful Height, turn'd back at the Proſpect; and being reproach'd for his Want of Reſolution, wiſely anſwer'd, [e], *I did not conſider that my firſt Vow ſtood in need of a much greater Vow to bind and confirm it* [f].

XI. *Laſtly*, That Oaths do not alter the Nature and Subſtance of thoſe Promiſes and Pacts to which they are join'd [3], is ſufficiently evident. Thus an Oath about a Thing abſolutely impoſſible, is not obligatory; though the Party is guilty of a very heinous Sin, in thus raſhly abuſing the Divine Name. So an Oath added to a Promiſe which was before conditional, doth, by no means, render it abſolute. For the Oath, which ſuppoſeth ſuch a Condition, doth no leſs ſtand and fall with that Condition, than the bare Promiſe would have done without this Confirmation. Thus too an Oath, as well as any other Promiſe, ceaſeth and expires upon Failure of the Quality which the Perſon held when he ſwore, and with regard to which alone the Oath was made. For Inſtance, a Magiſtrate, when he leaves his Office, is no longer bound by the Oath which he took at his Admiſſion. And, on the other Side, the Subjects owe no farther Obedience to a Magiſtrate, who hath either quitted his Dignity, or been fairly depriv'd of it; though no ſuch Releaſe be expreſly and in formal Manner granted them. For thus much is implied in the very Nature of the Affair [g]. So, likewiſe, it is no leſs requiſite to Promiſes confirm'd by Oath, than to others which are not ſo confirm'd, that they be accepted by the other Party. And he who obtains a Right by any Covenant, may equally releaſe the Performance of it, whether it was ſworn to, or not. In the ſame Manner we are to judge from the Nature of Covenants, whether an Act, undertaken contrary to Oath, be only unlawful, or whether it be, likewiſe, void and ineffectual [h]. For unleſs the Swearer did by his Promiſe diveſt himſelf of his Right, and confer it on another, though he afterwards give the Thing to a third Perſon, yet the Act ſhall be valid. If a Man, for Inſtance, hath ſworn that he will leave ſuch a Thing in Legacy to any Party, and afterwards ſells it to another Party, the Sale ſhall not be void, though the Seller is perjur'd [4]. Thus if a Perſon, who, in the Life-time of his Parents, hath promis'd them upon Oath that he will never marry ſuch a particular Woman, ſhall nevertheleſs, after their Deceaſe, take her for his Wife; the Man indeed will be guilty of Perjury,

[a] See *Grot.* l. ii. c. 13. ſ. 7. [b] Vid. *Matt.* xxv. 27. [c] Vid. *Grot.* l. ii. c. 13. ſ. 7. & notas ſuas ad *Matt.* xv. 4, &c. *Selden.* de J. N. & G. ſecund. *Hebr.* l. vii. c. 2. *Conſtantin. l'Empereur in Babakama*, c. 9. ſ. 20. *Gratian.* c. 21. Cauſ. 22. Quæſt. 5. [d] Lib. xvii. Add. *Gratian.* c. 2. Diſtinct. 13. [e] Vid. *Plutarch.* Apophtheg. Lacon. in fin. [f] See the Paſſage of *Guntherus* above-mentioned. [g] Add. *Grot.* d. l. ſ. 18. [h] Vid. *Grot. ubi ſupra*, ſ. 19.

[1] Moſt of the Examples alledged by *Grotius* and *Pufendorf* relate to things abſolutely unlawful, as Mr. *Thomaſius* very well obſerves, *Juriſpr. Divin.* lib. ii. c. 9. §. 20. In Truth every one is neceſſarily obliged to honour and help his Father and Mother; and although no Man hath Right to require our Service rigorouſly, the Law of Humanity lays an indiſpenſible Obligation on us to do all the Good we can to another. And ſo no Man may directly ſwear with a good Conſcience that he will forſake his Father or Mother in their Need, to do no Kindneſs to ſuch or ſuch a Man, &c. We may then ſuppoſe here, I think, this Caſe, that a Man may do a Thing innocent and lawful in itſelf, yet he can't well diſcharge himſelf of it, without putting himſelf out of the Way of doing ſome other Duty; or a Thing good and laudable in itſelf, but joined with ſomething better, which lays a greater Obligation upon him, as our Author ſpeaks in ſeveral Places. As for Example, every Man is free to give his Eſtate to whom he pleaſes; but ſuppoſe any one imprudently ſwears to give out of it, to any one who has no need of it, or to the Poor, a Sum from which he can't diſengage himſelf with Reputation, without entrenching upon his Duty to ſuch Perſons as are more nearly related to him, and whom he is obliged to maintain. In this Caſe an Oath is altogether void.

[2] See Mr. *Placette*'s Treatiſe of an Oath, l. ii. c. 10. §. 183, &c.

[3] See *Cujacius*'s Obſerv. 22.

[4] That is to ſay, adds Mr. *Hertius*, ſuppoſing we have no good Reaſons to revoke our Promiſe given by Oath to him from whom we take the Legacy.

but

but the Marriage ſhall ſtand good and firm, unleſs the municipal Laws ordain the contrary. Farther, an Oath added to a Promiſe or Pact ſhall derive its Force and Efficacy either from natural or from civil Law, according to the Nature of that Promiſe or Pact. For the Oath hath not in itſelf a Power of cauſing that which otherwiſe produced only a natural Obligation, to produce, likewiſe, a civil; unleſs the municipal Laws interpoſe particularly in the Matter. As neither can it change the Species of an Act: A bare Donation, for Inſtance, cannot, by the Addition of an Oath, be turned into a *chargeable Contract*, nor *vice verſa*. And here we fall in with the common Queſtion, Whether a Contract, confirm'd by Oath, in which the ſwearing Party is remarkably prejudiced, may be revers'd, and the Party reſtor'd in full to what he loſt? *Grotius* [a] takes the negative Part, adding for a Reaſon, *That although, in this Caſe, we may perhaps owe the Man nothing, or however leſs than is required, yet we are bound to perform our Oath to GOD:* Which Argument we juſt now conſider'd and rejected. The Expounders of the *Roman* Law handle the ſame Queſtion at large in their Obſervations upon *Lib.* ii. *tit.* 28. *C. Si adverſus vendit.* and the *Authentick* ſubjoin'd: Which many *Civilians*, and eſpecially thoſe of the *French* Nation, cenſure as unjuſt. To the Reſcript of *Alexander* they anſwer [1], *That it doth, by no Means, contain a general Deciſion, but was directed wholly to a particular Caſe.* For the Matter ſtood thus: The Emperor was petition'd here by a Soldier, who muſt, conſequently, be a Man of ripe Judgment, being in his eighteenth Year; and yet he alledg'd no extraordinary Loſs or Damage, but only his Defect of Age. Now the Contract, which this Perſon had made and confirm'd by an Oath, that religious Prince would, on no Account, evacuate: And his pious Caution had no leſs a Precedent than *Hercules* himſelf; who, as the Hiſtorian [b] reports, never ſwore but once in his Life. And then as for the *Authentick*, they ſay it was extorted by Force from the Emperor *Frederick* by Pope [2] *Honorius* III. who refus'd to grant him his Imperial Crown on any other Terms: And that *Frederick* had reſolv'd to alter it, but was prevented by Death. The Reaſon why [3] the Pope ſhould inſiſt on obtaining that Decree, is eaſy to be diſcover'd by all thoſe who are acquainted with the Policy of the *Roman* Court [c]. We, for our Parts, muſt think it neceſſary, to the clear Determination of the Point, firſt of all to obſerve, that thoſe Pacts, in which there appears a very conſiderable Inequality, thoſe which depend on any Deceit, Fraud, or unjuſt Fright, and thoſe which are ſtruck without Thought and Deliberation, have all of them a natural and intrinſick Defect, and are therefore ſuch as the Law of Nature enjoins ſhould be either revers'd, or corrected. But that the Party's being under the Age of Five and Twenty, is not ſufficient of itſelf to render the Covenant defective. Tho' thus much indeed may fairly be preſum'd, that the Minor had ſuffer'd ſome Damage in the Tranſaction, on account of his weak and unexperienc'd Judgment, which lays him open to the Circumvention and Treachery of others. But if there appears no ſuch Damage, no Reaſon can be given why the Act ſhould be diſannull'd. This being premis'd, we affirm, that if a Covenant or Promiſe made under Oath be in no other Reſpect faulty, it cannot be revers'd on this bare Score, that it was made by a Minor, provided he was capable of underſtanding the Buſineſs in Hand. But if the other Party was guilty of any Deceit; or if, without any ſuch Deceit, the Minor happens to ſuffer any ſignal Prejudice, only thro' Infirmity of Age, the Oath ſhall not hinder him from petitioning either to have the Bargain revers'd, or, at leaſt, amended to his Advantage. For in this Caſe, the Youth, who ſwears to the Contract, ſuppoſes it to be free from all Defect, and the other Party pretends as much. This then is, as it were, the Condition on which his Oath is founded, and upon Failure of which, it comes to nothing. The Caſe is different, if a Youth, without any Deceit in the Perſon with whom he deals, hath knowingly and deliberately given more than the Purchaſe was worth. For then the Buſineſs was a mix'd Act, made up partly of a Contract, and partly of a Donation. It is unneceſſary to add, as a general Remark, that a Perſon, ſubject to the Power and Authority of another, cannot oblige himſelf farther than he is by that Authority allow'd [d]. If he exceeds theſe Bounds, the Governour may, if he thinks fit, declare the Buſineſs to be void, whether ſworn to, or not.

XII. Yet in as much as Oaths are made by the Invocation of the Divine Majeſty, whom no Man can fraudulently deceive, and whom no Man can ſecurely mock and deride, they ought to be allow'd this Effect; that, on their Account, all Tricks and Cavils ſhall be excluded from every Buſineſs which they are added to confirm [4]. Hence the *Roman* Cenſors juſtly condemn'd the Subtilty of that Captive, who, having obtain'd Leave to depart from the Enemy's Camp, giving his *Oath* to re-

[a] d. l. [b] *Plutarch.* Quæſt. *Rom.* xxviii. [c] That this Law is not obſerv'd in *France*, we have the Teſtimony of *Mornay*, add. *d. l.* See likewiſe *Auguſt. Barbaroſa* ad d. l. & *Groenewegen.* de LL. *abrogat.* [d] See the laſt Section of this Chapter.

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[1] The Reſcript of *Alexander* is this, *Imp. Alex. A. Florentino Militi. Si minor annis viginti quinque emptori prædii caviſti nullam de cætero te eſſe controverſiam facturum, idque etiam jurejurando corporaliter præſtito ſervare confirmâſti, neque perfidiæ, neque perjurii ne auctorem tibi futurum ſperare debuiſti.* The New Conſtitution of *Frederick* is, *Sacramenta puberum ſponte facta ſuper contractibus rerum ſuarum non retractandis inviolabiliter cuſtodiantur*, Code l. ii. tit. 28. *Si adverſus venditionem.* See what I have ſaid upon *Grotius*, lib. ii. cap. 13. §. 20. And *Panzirollus De claris Legum Interpretib.* lib. ii. cap. 14.

[2] Our Author here follows the Sentiment of *Duaren*, who, tho' a rigid Catholic, has aſſerted this in the Commentary on the Title of the *Code*, where the original Record in Queſtion is inſerted. But as M. *Reinold*, Profeſſor at *Frankfort* on the *Oder*, juſtly obſerves in a Diſſertation publiſh'd in 1717, (Ad L. J. C. *Si adverſus vendit, Sect.* 13.) they confound here, *Fredric* I. otherwiſe call'd *Barbaroſſa*, with *Fredric* II. For under the firſt of thoſe Emperors, who was the Author of the Conſtitution, there was no Pope *Honorius*, which effectually deſtroys the Reaſon for which they pretended it was made; whereas, in the Reign of *Fredric* II. the Papal Chair was fill'd by *Honorius* III. Our Author was therefore deceiv'd in following the *French* Lawyer without Examination. In this he was certainly wrong, yet he does not deſerve the rude Cenſure of the *German* Doctor, who accuſes him of wilfully impoſing upon his Readers. (*Fucum Lectori facere*).

[3] This has afforded the Clergy a Means to gain to themſelves, under a Pretence of Religion, the Eſtates of Children under Age, *viz.* Boys at fourteen Years, and Girls at twelve. If it was not at the Sollicitation of Pope *Honorius* III. that *Fredric* II. eſtabliſh'd this Law, it is, at leaſt, certain, that the Lawyer *Martin* took his Opinion from the Principles of the *Canon* Law, and perſuaded the *Emperor* to take this Step. It is undoubtedly by Favour of this Cuſtom relating to Oaths, that the Clergy have endeavour'd to engroſs, as much as poſſible, the Cognizance of civil Cauſes for their own Ends.

[4] The Oath makes the Cavil the more criminal; but indeed every Action done without an Oath excludes, alſo, all vain Subtilties. See what is ſaid upon the Paragraph following.

Perſon, under theſe Circumſtances, the Saying of *Ateius Capito* to *Tiberius* in *Tacitus*, *Sane lentus in ſuo dolore eſſet: reipublicæ injurias ne largiretur: So far as he was concern'd himſelf, or, in regard to his own particular Grievance, he might be as merciful as he pleas'd; but he ought not to forgive the Injury done to the Commonwealth.* Ann. III. c. 70. In *Gunther. Lugurin.* l. viii. *ubi ſupra*, *Frederick* makes the following Ordinance:

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XI. *Laſtly*, That Oaths do not alter the Nature and Subſtance of thoſe Promiſes and Pacts to which they are join'd [3], is ſufficiently evident. Thus an Oath about a Thing abſolutely impoſſible, is not obligatory; though the Party is guilty of a very heinous Sin, in thus raſhly abuſing the Divine Name. So an Oath added to a Promiſe which was before conditional, doth, by no means, render it abſolute. For the Oath, which ſuppoſeth ſuch a Condition, doth no leſs ſtand and fall with that Condition, than the bare Promiſe would have done without this Confirmation. Thus too an Oath, as well as any other Promiſe, ceaſeth and expires upon Failure of the Quality which the Perſon held when he ſwore, and with regard to which alone the Oath was made. For Inſtance, a Magiſtrate, when he leaves his Office, is no longer bound by the Oath which he took at his Admiſſion. And, on the other Side, the Subjects owe no farther Obedience to a Magiſtrate, who hath either quitted his Dignity, or been fairly depriv'd of it; though no ſuch Releaſe be expreſly and in formal Manner granted them. For thus much is implied in the very Nature of the Affair [g]. So, likewiſe, it is no leſs requiſite to Promiſes confirm'd by Oath, than to others which are not ſo confirm'd, that they be accepted by the other Party. And he who obtains a Right by any Covenant, may equally releaſe the Performance of it, whether it was ſworn to, or not. In the ſame Manner we are to judge from the Nature of Covenants, whether an Act, undertaken contrary to Oath, be only unlawful, or whether it be, likewiſe, void and ineffectual [h]. For unleſs the Swearer did by his Promiſe diveſt himſelf of his Right, and confer it on another, though he afterwards give the Thing to a third Perſon, yet the Act ſhall be valid. If a Man, for Inſtance, hath ſworn that he will leave ſuch a Thing in Legacy to any Party, and afterwards ſells it to another Party, the Sale ſhall not be void, though the Seller is perjur'd [4]. Thus if a Perſon, who, in the Life-time of his Parents, hath promis'd them upon Oath that he will never marry ſuch a particular Woman, ſhall nevertheleſs, after their Deceaſe, take her for his Wife; the Man indeed will be guilty of Perjury,

[a] See *Grot.* l. ii. c. 13. ſ. 7. [b] Vid. *Matt.* xxv. 27. [c] Vid. *Grot.* l. ii. c. 13. ſ. 7. & notas ſuas ad *Matt.* xv. 1, &c. *Selden.* de J. N. & G. ſecund. *Hebr.* l. vii. c. 2. *Conſtantin. l'Empereur in Babakama*, c. 9. ſ. 20. *Gratian.* c. 21. Caus. 22. Quæſt. 5. [d] Lib. xvii. Add. *Gratian.* c. 2. Diſtinct. 13. [e] Vid. *Plutarch.* Apophtheg Lacon. in fin. [f] See the Paſſage of *Guntherus* above-mentioned. [g] Add. *Grot.* d. l. ſ. 18. [h] Vid. *Grot. ubi ſupra*, ſ. 19.

[1] Moſt of the Examples alledged by *Grotius* and *Pufendorf* relate to things abſolutely unlawful, as Mr. *Thomaſius* very well obſerves, *Juriſpr. Divin.* lib. ii. c. 9. §. 20. In Truth every one is neceſſarily obliged to honour and help his Father and Mother; and although no Man hath Right to require our Service rigorouſly, the Law of Humanity lays an indiſpenſible Obligation on us to do all the Good we can to another. And ſo no Man may directly ſwear with a good Conſcience that he will forſake his Father or Mother in their Need, to do no Kindneſs to ſuch or ſuch a Man, &c. We may then ſuppoſe here, I think, this Caſe, that a Man may do a Thing innocent and lawful in itſelf, yet he can't well diſcharge himſelf of it, without putting himſelf out of the Way of doing ſome other Duty; or a Thing good and laudable in itſelf, but joined with ſomething better, which lays a greater Obligation upon him, as our Author ſpeaks in ſeveral Places. As for Example, every Man is free to give his Eſtate to whom he pleaſes; but ſuppoſe any one imprudently ſwears to give out of it, to any one who has no need of it, or to the Poor, a Sum from which he can't diſengage himſelf with Reputation, without entrenching upon his Duty to ſuch Perſons as are more nearly related to him, and whom he is obliged to maintain. In this Caſe an Oath is altogether void.

[2] See Mr. *Placette*'s Treatiſe of an Oath, l. ii. c. 10. §. 183, &c.

[3] See *Cujacius*'s Obſerv. 22.

[4] That is to ſay, adds Mr. *Hertius*, ſuppoſing we have no good Reaſons to revoke our Promiſe given by Oath to him from whom we take the Legacy.

but

but the Marriage ſhall ſtand good and firm, unleſs the municipal Laws ordain the contrary. Farther, an Oath added to a Promiſe or Pact ſhall derive its Force and Efficacy either from natural or from civil Law, according to the Nature of that Promiſe or Pact. For the Oath hath not in itſelf a Power of cauſing that which otherwiſe produced only a natural Obligation, to produce, likewiſe, a civil; unleſs the municipal Laws interpoſe particularly in the Matter. As neither can it change the Species of an Act: A bare Donation, for Inſtance, cannot, by the Addition of an Oath, be turned into a *chargeable Contract*, nor *vice verſa*. And here we fall in with the common Queſtion, Whether a Contract, confirm'd by Oath, in which the ſwearing Party is remarkably prejudiced, may be revers'd, and the Party reſtor'd in full to what he loſt? *Grotius* [a] takes the negative Part, adding for a Reaſon, *That although, in this Caſe, we may perhaps owe the Man nothing, or however leſs than is required, yet we are bound to perform our Oath to GOD:* Which Argument we juſt now conſider'd and rejected. The Expounders of the *Roman* Law handle the ſame Queſtion at large in their Obſervations upon *Lib.* ii. *tit.* 28. *C. Si adverſus vendit.* and the *Authentick* ſubjoin'd: Which many *Civilians*, and eſpecially thoſe of the *French* Nation, cenſure as unjuſt. To the Reſcript of *Alexander* they anſwer [1], *That it doth, by no Means, contain a general Deciſion, but was directed wholly to a particular Caſe.* For the Matter ſtood thus: The Emperor was petition'd here by a Soldier, who muſt, conſequently, be a Man of ripe Judgment, being in his eighteenth Year; and yet he alledg'd no extraordinary Loſs or Damage, but only his Defect of Age. Now the Contract, which this Perſon had made and confirm'd by an Oath, that religious Prince would, on no Account, evacuate: And his pious Caution had no leſs a Precedent than *Hercules* himſelf; who, as the Hiſtorian [b] reports, never ſwore but once in his Life. And then as for the *Authentick*, they ſay it was extorted by Force from the Emperor *Frederick* by Pope [2] *Honorius* III. who refus'd to grant him his Imperial Crown on any other Terms: And that *Frederick* had reſolv'd to alter it, but was prevented by Death. The Reaſon why [3] the Pope ſhould inſiſt on obtaining that Decree, is eaſy to be diſcover'd by all thoſe who are acquainted with the Policy of the *Roman* Court [c]. We, for our Parts, muſt think it neceſſary, to the clear Determination of the Point, firſt of all to obſerve, that thoſe Pacts, in which there appears a very conſiderable Inequality, thoſe which depend on any Deceit, Fraud, or unjuſt Fright, and thoſe which are ſtruck without Thought and Deliberation, have all of them a natural and intrinſick Defect, and are therefore ſuch as the Law of Nature enjoins ſhould be either revers'd, or corrected. But that the Party's being under the Age of Five and Twenty, is not ſufficient of itſelf to render the Covenant defective. Tho' thus much indeed may fairly be preſum'd, that the Minor had ſuffer'd ſome Damage in the Tranſaction, on account of his weak and unexperienc'd Judgment, which lays him open to the Circumvention and Treachery of others. But if there appears no ſuch Damage, no Reaſon can be given why the Act ſhould be diſannull'd. This being premis'd, we affirm, that if a Covenant or Promiſe made under Oath be in no other Reſpect faulty, it cannot be revers'd on this bare Score, that it was made by a Minor, provided he was capable of underſtanding the Buſineſs in Hand. But if the other Party was guilty of any Deceit; or if, without any ſuch Deceit, the Minor happens to ſuffer any ſignal Prejudice, only thro' Infirmity of Age, the Oath ſhall not hinder him from petitioning either to have the Bargain revers'd, or, at leaſt, amended to his Advantage. For in this Caſe, the Youth, who ſwears to the Contract, ſuppoſes it to be free from all Defect, and the other Party pretends as much. This then is, as it were, the Condition on which his Oath is founded, and upon Failure of which, it comes to nothing. The Caſe is different, if a Youth, without any Deceit in the Perſon with whom he deals, hath knowingly and deliberately given more than the Purchaſe was worth. For then the Buſineſs was a mix'd Act, made up partly of a Contract, and partly of a Donation. It is unneceſſary to add, as a general Remark, that a Perſon, ſubject to the Power and Authority of another, cannot oblige himſelf farther than he is by that Authority allow'd [d]. If he exceeds theſe Bounds, the Governour may, if he thinks fit, declare the Buſineſs to be void, whether ſworn to, or not.

XII. Yet in as much as Oaths are made by the Invocation of the Divine Majeſty, whom no Man can fraudulently deceive, and whom no Man can ſecurely mock and deride, they ought to be allow'd this Effect; that, on their Account, all Tricks and Cavils ſhall be excluded from every Buſineſs which they are added to confirm [4]. Hence the *Roman* Cenſors juſtly condemn'd the Subtilty of that Captive, who, having obtain'd Leave to depart from the Enemy's Camp, giving his *Oath* to re-

[a] d. l. [b] *Plutarch.* Quæſt. *Rom.* xxviii. [c] That this Law is not obſerv'd in *France*, we have the Teſtimony of *Mornay*, add. *d. l.* See likewiſe *Auguſt. Barbaroſa* ad d. l. & *Groenewegen.* de LL. *abrogat.* [d] See the laſt Section of this Chapter.

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[1] The Reſcript of *Alexander* is this, *Imp. Alex. A. Florentino Militi. Si minor annis viginti quinque emptori prædii caviſti nullam de cætero te eſſe controverſiam facturum, idque etiam jurejurando corporaliter præſtito ſervare confirmâſti, neque perfidiæ, neque perjurii me auctorem tibi futurum ſperare debuiſti.* The New Conſtitution of *Frederick* is, *Sacramenta puberum ſponte facta ſuper contractibus rerum ſuarum non retractandis inviolabiliter cuſtodiantur*, Code l. ii. tit. 28. *Si adverſus venditionem.* See what I have ſaid upon *Grotius*, lib. ii. cap. 13. §. 20. And *Panzirollus De claris Legum Interpretib.* lib. ii. cap. 14.

[2] Our Author here follows the Sentiment of *Duaren*, who, tho' a rigid Catholic, has aſſerted this in the Commentary on the Title of the *Code*, where the original Record in Queſtion is inſerted. But as M. *Reinold*, Profeſſor at *Francfort* on the *Oder*, juſtly obſerves in a Diſſertation publiſh'd in 1717, (Ad L. J. C. *Si adverſus vendit, Sect.* 13.) they confound here, *Fredric* I. otherwiſe call'd *Barbaroſſa*, with *Fredric* II. For under the firſt of thoſe Emperors, who was the Author of the Conſtitution, there was no Pope *Honorius*, which effectually deſtroys the Reaſon for which they pretended it was made; whereas, in the Reign of *Fredric* II. the Papal Chair was fill'd by *Honorius* III. Our Author was therefore deceiv'd in following the *French* Lawyer without Examination. In this he was certainly wrong, yet he does not deſerve the rude Cenſure of the *German* Doctor, who accuſes him of wilfully impoſing upon his Readers. (*Fucum Lectori facere*).

[3] This has afforded the Clergy a Means to gain to themſelves, under a Pretence of Religion, the Eſtates of Children under Age, *viz.* Boys at fourteen Years, and Girls at twelve. If it was not at the Sollicitation of Pope *Honorius* III. that *Fredric* II. eſtabliſh'd this Law, it is, at leaſt, certain, that the Lawyer *Martin* took his Opinion from the Principles of the *Canon* Law, and perſuaded the *Emperor* to take this Step. It is undoubtedly by Favour of this Cuſtom relating to Oaths, that the Clergy have endeavour'd to engroſs, as much as poſſible, the Cognizance of civil Cauſes for their own Ends.

[4] The Oath makes the Cavil the more criminal; but indeed every Action done without an Oath excludes, alſo, all vain Subtilties. See what is ſaid upon the Paragraph following.

turn, when he was got a little Way, ſtept back, on the Pretence of having left ſomething behind him, and then fix'd himſelf at *Rome*, as if he had fulfill'd what he ſwore [1]. The Fallacy of *Dercyllides* deſerves a Cenſure no leſs ſevere; who, beſieging the Tyrant of *Scepſis*, ſolemnly ſwore to him, *That if he would come out to a Parly, he ſhould immediately return into the City.* The Tyrant coming out on his Promiſe, *Dercyllides* commanded him, on Pain of Death, to ſet open the Gates, and then told him, *Now I give you Leave to return into the City, and I intend too with my Army to bear you Company* [a]. For *Fraud*, as *Tully* obſerves [b], *doth not looſen Perjury, but bind it ſtronger than before.* Thus *Henry Stephens*, in his Preliminary Treatiſe to his Apology for *Herodotus* [c], is very pleaſant on the common Sophiſm of the Tradeſmen, when they ſwear they cannot afford a Thing under ſuch or ſuch a Price, unleſs they deſign to loſe by it; obſerving, that in this Conduct they have always an Eye to the Proverb, *A Tradeſman loſeth when he doth not get.* I know not whether we are to rank, under this Head, the Act of the Count *de la Fontain*, who, in the Battle at *Rocroy*, was carried in a Chair; having bound himſelf by Oath, *Never to fight againſt the* French *on Foot, or on Horſeback* [d]. Or that of Pope *Alexander* VII. who having, at his Admiſſion to the *Papal Dignity*, ſworn, that *he would never receive his Kinſmen in* Rome (*di non recivere i ſuoi parenti in* Roma) by the Advice of the *Jeſuits*, made Uſe of this Evaſion; he received his Relations firſt at the Caſtle of *Gandolf*, and then brought them with him into the City [e]. Or what *Tavernier* reports [f] of the *Dutch* Agents of their *Eaſt-India* Company; who, before they leave *Holland*, engage themſelves, by Oath, never to drive any Trade on their own private Account, but to reſt ſatisfied with the Salary allow'd them by the Publick. Yet when they once arrive at the *Indies*, many of them marry, and ſuffer their Wives to carry on that forbidden and clandeſtine Traffick. It is a barbarous Story which *Ælian* [g] tells of *Cleomenes* the *Spartan*, that making *Archonides* privy to his Deſign on the Kingdom, he ſwore to him, *If his Enterprize ſucceeded,* πάντα σὺν τῇ αὐτοῦ κεφαλῇ πράττειν, *that he would do nothing without his Head.* But having ſecured the Government, he cut off his Friend's Head, and kept it in a Veſſel of Honey, and before he undertook any Buſineſs turn'd towards the Veſſel, and declared his Reſolutions. *Aryandes*, in *Polyænus* [h], treating with the *Barcæans*, brought their Commiſſioners to a Trench, which he had contrived for that Purpoſe, lightly cover'd with Earth and Wood, and there ſwore to them, That he would obſerve the Articles of Agreement, *as long as the Earth continued.* And preſently after throwing down the Trap, ruſh'd upon the City, when under no Suſpicion of Violence [i]. To the ſame Caſe belongs the common Inſtance of two Rogues; one of which ſteals a Thing, and the other hides it; the former ſwearing that he hath it not, the latter, that he did not take it; who are both to be judged guilty of Perjury. It was a moſt groſs Evaſion of the *Turkiſh* Emperor *Solyman*, when, having ſwore to [2] *Ibrahim Baſſa*, that *he would never hurt him while he lived*, he order'd him to be kill'd in his Sleep, as if he were not then to be reckon'd amongſt the Living. On the other Hand, the Ancients extol the Conſtancy of Q. *Metellus Numidicus* [k], for refuſing to ſwear to the Law propoſed by *Saturnius*; though *Marius* the Conſul, and others, endeavoured to perſuade him to a Compliance, by telling him, That *the preſent Neceſſities of the Commonwealth would juſtify him in taking the Oath, and that he might decline the Force of it by this ſecret Reſerve, That he ſwore to the Law, provided it were a Law*; that is, if it were duly propoſed and enacted. Whereas it would be eaſy for him afterwards to ſhew, that it was, indeed, no Law, being made in the Time of *Thunder*, when, by the Rites of their Religion, they were forbidden to tranſact any Buſineſs in the Aſſemblies of the People. Yet, that good Man choſe rather to go into Baniſhment, than to make uſe of this Shift; knowing, that when Perſons ſwore to a Law, they muſt, at leaſt in Pretence and Appearance, acknowledge the Manner of its Enactment to be right and true. But we think *Lycurgus* to have been over ſolicitous, when he order'd his Aſhes to be thrown into the Sea, for Fear, if they ſhould be brought to *Sparta*, the People ſhould fancy their Oath to expire, by which they had bound themſelves not to repeal his Laws, till he ſhould return Home. For the bringing back of a dead Body can, with no Propriety, be look'd on as the Return of the Perſon to whom it belongs [l].

XIII. Yet, on the other Side, the Interpretation of Oaths is not always to be extended, but ſometimes to be made in the cloſeſt and narroweſt Senſe, if the Subject ſeem to require it [3]; as, ſuppoſe we ſwore to the Prejudice of another, and confirm'd, in this ſolemn Manner, not Promiſes, but Threats, which are not in themſelves capable of conferring any Right on another [m]; the common Inſtance of which Caſe is the Example of the *Iſraelites* in

[a] *Polyæn.* Strateg. l. ii. c. 6. The wicked Shuffling of the *Locrians* is, likewiſe, to be condemn'd, as we find it reported by *Polyb.* l. xii. c. 4. [b] Off. iii. *ubi ſupra.* Add. *Stobæ.* Serm. xxviii. of *Lydia.* *Tacitus* Ann. xii. *Rhadamiſtus*, as if he would pretend to be mindful of his Oath, doth not uſe his Sword or his Poiſon againſt his Uncle or Siſter; but, as they lay upon the Ground, ſtifles them with a Load of heavy Garments. [c] Chap. xvi. [d] *Benj. Prioli* Hiſt. Gall. l. 2. [e] *Il Nepotiſm. Rom.* Part I. l. iii. [f] Voyages, Part II. c. 14. [g] V. H. l. xii. c. 8. [h] Lib. vii. c. 34. *Strateg.* [i] Yet *Herodotus*, *Melpom. cir. fin.* attributes this Action to the *Perſians.* [k] Vid. *Appian.* l. i. *de Bell. Civil.* p. 368. Edit. *H. Steph.* *Plutarch.* in *Mario.* [l] Vid. *Plutarch. Lycurg.* *Juſtin.* l. iii. c. 3. [m] See *Grot.* l. ii. c. 13. ſ. 5.

[1] For the Fraud heightens, and doth not take away the Perjury. *Fraus enim aſtringit, non diſſolvit perjurium,* Cicero de Offic. l. iii. c. 32.

[2] Our Author unjuſtly imputes this to *Ibrahim.* See the Continuers of *Chalcondylus* upon *Solyman* II. *Paulus Jovius*, from whom our Author takes this Story, adds, that it was the *Muſti Taliſman*, who ſuggeſted to the Emperor this ridiculous and perfidious Interpretation. *Hiſt.* lib. xxxiii. *ad fin.*

[3] It is certain, that we ought to reſtrain the Senſe of the Words of an Oath, as the Nature of the Thing requires, but that is not peculiar to an Oath, ſingle Promiſes and Agreements neceſſarily require it alſo. As for the Examples which our Author alledges, they have, moſt of them, an Air of Subtilty, either wicked, or unprofitable and ſuperſtitious. It is not ſufficient to give the Words of an Oath a Senſe that may rigorouſly be put upon them; we muſt, alſo, ſee, if, in the Circumſtances in which they were pronounced, that Senſe is ſuitable, and agrees with the Intention of him who ſwears, and him to whom the Oath is made. If it be not ſo, and the Senſe, in which the Terms of the Oath are taken, contains nothing that can render it null, I do not know how any can ſecure themſelves from Perjury, by putting another Senſe upon them, which was not thought on in taking the Oath; but if, according to the Senſe which was in View when the Oath was taken, the Oath is null in itſelf, we ought not to put another Senſe upon the Words, tho' they are capable of it; and we may, without Scruple, diſpenſe with keeping a like Oath in any Manner. See Mr. *Titius*'s *Obſerv.* 275. and Mr. *Thomaſius*'s *Inſtit. Juriſp. Divin.* l. ii. c. 8. §. 50, *&c.* where he maintains the ſame Thing againſt our Author, as I have ſeen myſelf ſince the firſt Edition of that Work, but 'tis the eleventh and not the eighth Chapter. I ſhall ſpeak ſomething of each of theſe Examples in particular, in the following Notes.

Judges

Judges xxi. who having ſworn not to give their Daughters to the *Benjamites*, afterwards perſuaded them to ſteal themſelves Wives, and interceded for them with the Virgins Fathers: For 'tis one Thing to *give*, and another Thing *not to reſume* what hath been forcibly taken [1]. And there was the more Reaſon for inſiſting thus cloſely on the Words of the Oath, becauſe it had been Cruelty to extinguiſh a whole Tribe [2], though for the moſt heinous Offence; and perhaps they had, in their Oaths, excepted this very Caſe [a]. In *Ammianus Marcellinus* [b], *Athanaricus* the *Gothick* Judge and Commiſſioner for the Treaty of Peace; alledging, that he was bound by a dreadful Curſe, and by the Commands of his Father, "Never to tread upon the *Roman* "Ground, and no Arguments proving ſufficient "to move him to the contrary; it being, likewiſe, "diſhonourable for the Emperor to paſs over to "him; the wiſe Heads found out this Expedient, "to have the Emperor and the Judge meet in "their Boats about the Midſt of the River, (the "*Danube*) and thence to ſettle the Articles of "Agreement between their People on both Sides [3]". So when the *Romans*, in *Livy* [c], required the *Achæans* to repeal ſome Decrees which they had made, the latter urged, in their own Excuſe, *That they were engaged, by Oath, not to do it*. But *Appius*, the *Roman* Commiſſioner in the Affair, telling them, *he would, by all Means, adviſe them to undertake that willingly, which, otherwiſe, they would be brought to by Compulſion*; they were ſo terrified, as only to requeſt, *That the* Romans *would give themſelves the Trouble of making what Alterations they thought fit, and not bring the* Achæans *under the Curſe of Perjury*. Here, we ſee, they look'd on the Caſe of not oppoſing a formidable Superior in cancelling the Laws, to be different from that [4] of repealing them by their own free Act. Thus *Agamemnon*, in *Euripides*, refuſeth to puniſh *Polymneſtor* of *Thrace* [d], in regard that he was the Friend and Ally of the *Grecians* [5], yet he promiſed *Hecuba* not to hinder her from taking any Revenge on him by her own Force, and on her own Account [e]. Thus the knaviſh Servant in *Terence* [f], begging the Maid to take the Child which he had in his Arms, and to lay it at his Maſter's Door, being demanded, why he could not do it without Aſſiſtance? anſwers, *Becauſe, if my Maſter makes me ſwear, that I did not lay it here by myſelf, I may do it with a ſafe Conſcience*. But *Davus* was, in our Opinion, but a very poor *Caſuiſt*; it being, in this reſpect, the ſame, to perform a Thing by one's ſelf, or by another. The Emperor *Aurelian*, when he found the Gates of *Thyan* ſhut, ſwore in a Rage, *That he would not leave in it one Dog alive* [g 6]. *Alexander* the Great having reſolved to deſtroy the City *Lampſacus*, when *Anaximenes* came to petition him on the Behalf of the City, immediately ſwore, *He would do nothing which* Anaximenes *ſhould deſire*. *Anaximenes* took the Advantage of the Oath, and deſired him to deſtroy *Lampſacus* [h 7]. *Antigonus*, on Account of a ſtrange Dream which he had [i], fully deſigning to kill *Mithridates*; and diſcovering the Matter to his Son *Demetrius*, after he had forced him to ſwear, that *he would never ſpeak of it*; *Demetrius*, being concerned for the Life of the young Prince, took him once aſide from the Company, and ſaying nothing to him [8], only wrote

[a] Add. *Joſeph. Archæol.* l. v. c. 2. & *Ambroſ.* Off. l. iii. c. 14. [b] Lib. xxvii. c. 4. [c] Lib. 39. c. 37. [d] *Hecub.* v. 869, *&c.* [e] Add. *Polyb.* Excerpt. leg. viii. *circa fin.* [f] *Andr.* Act. iv. Scen. 3. [g] *Aurelian* was but juſt in interpreting his Threats according to the ſtricteſt Senſe, when he commanded his Men to run up and down, and kill all the Dogs they met with, *Flav. Vopiſc. Aurelian.* c. 22. Add. *Valer. Max.* l. vii. c. 3. Sect. 4. *inter extern.* [h] When *Etearchus* in *Herodotus*, (in *Melpom.* p. 171, 172. Edit. *H. Steph.*) had obliged *Themiſon*, by Oath, to aſſiſt him in any Service he ſhould command, and afterwards order'd him to throw his Daughter into the Sea; *Themiſon*, tying the young Lady to Ropes, let her down amongſt the Waves, but preſently pull'd her up again without Harm. [i] Vid. *Appian.* de Bello *Mithridat.* p. 176. Edit. *H. Steph.*

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[1] But as Mr. *Vander Muclen* has, alſo, obſerved in his Comment upon *Grotius*, Tom. ii. p. 472. if, at the Time that the *Iſraelites* ſwore, they had been demanded what they meant by not giving their Daughters in Marriage, could they ſincerely ſay, that they intended thereby to hinder them from taking them; and the rather, becauſe, without any Prejudice to their Oath, they were free to adviſe the *Benjamites* to have Recourſe to ſuch an Expedient, and afterwards to intercede for them to the Fathers of the Virgins they had taken away? We may add, that theſe Sort of Oaths, which give no Right to any Perſon, are, properly ſpeaking, Vows. Now what Aſſurance can we have that GOD accepts them? And, on the contrary, ought we not to ſuppoſe that he rejects them, ſince they only proceed from a Principle of Hatred and Animoſity? In a Word, all minatory Oaths have two eſſential Marks which render them null? the firſt is, That ſo long as there is any Acceptation of them in the Perſon againſt whom any Thing is threatened to be done, or not, he always hopes that they will not be performed; the other is, That theſe Sort of Oaths are always made raſhly, and without Conſideration; for they either proceed from Hatred carried to Exceſs, or ariſe from a ſudden Paſſion, which makes us threaten with an Oath, thoſe we are angry with, only becauſe we love them, and would make them ſenſible that they have committed Things which have provoked our Indignation. In all theſe Caſes we ought to beg GOD's Pardon for thoſe unwarrantable Paſſions with which we have ſuffer'd ourſelves to be tranſported, and for the Raſhneſs we have been guilty of in uſing his holy Name, as if he ought to authorize our Paſſions and Weakneſſes? but we are not obliged to keep ſuch Oaths, and we often ſin doubly in executing our Threatnings with Rigour.

[2] Mr. *La Placette*, in his Treatiſe of an *Oath*, l. ii. c. 9. maintains, That it is impoſſible to prove, with the leaſt Solidity, that this Oath was evil. "There was, indeed, *ſays he*, a great deal of Severity in this Treatment; but we muſt, alſo, own, that it "was deſerved." This Deciſion, certainly, is not moderate, if we conſider the Nature of the Thing determined, for it authorizes an Action very harſh, or rather extremely cruel; but, as to the Deciſion itſelf, it ſeems to me, that, to qualify it with the Name of *Moderation*, is a Term too ſoft for it. It is not neceſſary that I ſhould prove this, but refer the Reader to the Hiſtory itſelf, and to Mr. *Le Clerc*'s Commentary upon it.

[3] If the Peace could not have been concluded, unleſs *Athanaricus* had went into the *Romans* Country, he had been diſcharged of his Oath by this only, that Caſes of Neceſſity are always excepted.

[4] We muſt ſay the ſame Thing in this Example, as in the preceding: Otherwiſe, all publick Deliberations may be revoked, when it is neceſſary for the Good of the State, there being nothing in which this Condition is not tacitly included.

[5] In this Example there is no Oath, and the Explication of *Agamemnon*'s Words comes afterwards.

[6] This Way of keeping Oaths is to burleſque them. The *Hebrews* have a proverbial Expreſſion, ſomething like this of *Aurelian*, which is to make them paſs under the Edge of the Sword, underſtanding it of Men, and not of Beaſts, although the Words, properly taken, belong only to Dogs. See 1 *Sam.* xxv. 22. and what Mr. *Le Clerc* ſays of it againſt *Bochartus*. The Truth is, the Emperor's Oath was null. See what I have ſaid in Note 1. above. And ſo was *Alexander*'s for the ſame Reaſon, even though *Anaximenes* ſhould have begged the contrary to what he wiſhed for.

[7] As the Propoſition of *Etearchus* was wicked, it is clear that *Themiſon*'s Oath was null, and that he ought not to keep it in the Senſe that the Tyrant took the Words, as, alſo, that he did Wrong in putting the Virgin into the Sea, although he reſolved to pull her out again; for he could not be ſure that the Cords would not break, or that he ſhould not do her ſome Miſchief in throwing her into the Sea.

[8] This Expedient was ſuperfluous, and could not have preſerved *Demetrius* from Perjury, if the Oath had been valid. For every one is indipenſibly obliged, as much as in him lies, to avert the Evil from others with which they are threatened unjuſtly. So that *Demetrius* might, without any Evaſion, have delivered *Mithridates* from the Danger he was in. All that Mr. *de Sacy* has ſaid, in his Treatiſe of *Friendſhip*, p. 110, *&c.* upon the Queſtion, *Whether a Man may break his Oath to diſcover to his Friend a Secret of that Nature*,

wrote with his Javelin in the Duſt, ſo as to be obſerved by him, *Fly, Mithridates* [a]. To the ſame Head belongs that Inſtance which [1] *Sueton* [b] gives of *Cæſar*'s great Clemency of Nature: That having ſworn to crucify the Pirates by whom he had been taken, he orders them firſt to be ſtrangled, and then faſtened to the Croſs. Of the like Kind was *David*'s Oath of Safety to *Shimei*. 2 *Sam.* xix. 23. notwithſtanding which, on his Death-bed, he commands *Solomon* to take due Care that ſuch a wicked Rebel ſhould not die a peaceable Death, 1 *Kings* ii. 9. For *David*'s Promiſe of Pardon was made only in his own Name. Nor did he here properly enjoin *Solomon*, that he ſhould drag the Man to Puniſhment for his old Crime, but only that he ſhould diligently watch ſo notorious a Villain, and, by no Means, ſpare him, if taken in a ſecond Fault. And *Solomon* acted with great Wiſdom [c], in obliging ſo turbulent and ſo implacable an Offender to live in the Royal City under his Eye, for Fear he ſhould engage in new Treaſons, threatning him with Death upon his Diſobedience in this Particular; which Condition *Shimei* himſelf gladly approved of, and accepted. Nor did it fall out without the ſpecial Direction of Providence, that, being caught tranſgreſſing this Command, he ſuffer'd the juſt Reward of his former, as well as of his preſent Guilt. Add. *Montaign*'s Eſſ. l. i. c. 7. Perhaps we ought to allow a Place under this favourable Head to the Action of *Mary* Queen of *Hungary*, Wife to the Emperor *Sigiſmund*, who, having promiſed Indemnity to *Hervatus*, Governor of *Croatia*, by whom ſhe had been taken, and very hardly uſed, upon the Recovery of her Liberty, is ſaid to have put her [2] Huſband upon revenging the Injury; alledging, *That ſhe had no Power to engage for* him, *though ſhe might for herſelf*. *Bonfin.* Rer. *Hungar.* l. iii. c. 2. I know not whether we may put in the ſame Rank, the Act of *Timoleon*, recorded by *Polyænus*; he was engaged in Purſuit of *Milarchus* [d] the Tyrant, an impious Wretch, who had cheated many Perſons out of their Lives, by ſwearing to preſerve them and afterwards deſpiſing his Oath. The Tyrant made an Overture of coming in Perſon to *Syracuſe* to take his Tryal, provided *Timoleon* would not be his Accuſer. *Timoleon* ſwore he would not; and on theſe Terms *Milarchus* came to *Syracuſe*: *Timoleon* bringing him into the open Aſſembly, addreſſed him in the following Manner, *I will not accuſe you, for ſo I covenanted before-hand; but I'll command you inſtantly to be executed; for he who hath deceived ſo many to their Ruin, may juſtly be thus deceived himſelf.*

XIV. In like Manner an Oath doth not exclude any tacit Conditions or Limitations, properly ariſing from the Nature of the Subject. As, ſuppoſe I have given a Perſon his Option to deſire of me whatever he pleaſed; if his Requeſt ſhall be either unjuſt, or abſurd, I am not tied by my Engagement. For he who makes an indefinite Grant to another, before he knows what he will ask, preſuppoſeth that the other Party will petition for what is honeſt, what is morally poſſible, what is not ridiculous, and what is not miſchievous either to himſelf, or to any beſides [3]. 'Twas a good Caution of *Phœbus* to his raſh Son,

> *Ne dubita, dabitur* (*Stygias juravimus undas*)
> *Quodcunque optâris; ſed tu ſapientius opta* [e].
>
> I've ſworn by *Styx*, doubt not, I'll not refuſe
> Whate'er you ask; but with more Wiſdom chuſe.

Such a Caſe as this gave Occaſion to that noted Saying of *Hippolytus* in *Euripides* [f], which *Tully* ſo much commends, ἡ γλῶσσ' ὀμώμοχ', ἡ δὲ φρὴν ἀνώμοτος, *My Tongue hath ſworn, my Mind unſworn remains*. For it ſeems he had ſworn to the Nurſe, that he would keep ſecret whatever ſhe diſcover'd to him. But when ſhe made a Propoſal of Adultery and Inceſt with his Mother-in-Law *Phædra*, he denies that his Oath obliged him to conceal ſo foul a Villany. Though the *Poet* makes him ſo ſcrupulous, as to recede from this Judgment, and to keep cloſe the Matter in regard to his Oath. *Nicomachus* in *Quintus Curtius* [g] makes the ſame Exception, *reſolutely denying that he had given his Oath in Confirmation of the Parricide, or that any Tye of Religion ſhould be able to hinder him from declaring ſo barbarous a Treaſon* [4]. For it is, indeed, one Part of the Duty and Obligation of a Subject, not to hide any Deſigns that he ſhall obſerve to be carrying on againſt the Perſon or the Government of his Prince. So *Tully* (Offic. 1.) *It may ſo happen, that the Performance of a Promiſe or an Engagement ſhould be prejudicial to the Party to whom it was made. For if* Neptune, *as we have it in the Story, had not made good what he promiſed to* Theſeus *upon* Oath, Theſeus *had not loſt his Son* Hippolytus. *The Death of his Son being one of the three Wiſhes, which, in his Paſſion, he put up to* Neptune. (Comp. *Euripid. Hippolyt. Coron.* ver. 315.) *Theſe Promiſes, therefore, are not to be kept, which would be hurtful to the Perſons, whom, in promiſing, you deſign'd to ſerve.* Add *Diod. Sic.* l. iv. c. 65. And thus too *Herod* ought not to have ſold the Head of *John the Baptiſt* to his Daughter-in-Law for a Dance; becauſe, ſince there can lie no Obligation to what is unlawful; in ſuch a general Promiſe this Condition ought to have been underſtood, If ſhe deſired any Thing which he might lawfully perform [h]. We find King *Solomon* not adhering to his indefinite Grant, when his Mother ask'd a Favour which was

[a] *Plutarch. Demet.* [b] *Jul.* c. 74. [c] Verſ. 36, &c. [d] Stratag. l. v. c. 12. n. 3. [e] *Ovid.* Metamorph. l. ii. v. 101, 102. [f] *Hippolyt.* v. 612. [g] Lib. vi. c. 7. n. 7. [h] *Matth.* xiv. 6, &c.

Nature, that he hazards his Life, if he hides it from him? All, I ſay, that this ingenious Author has ſaid upon this Subject, taking the negative Part, is void, and of no Force. The Reaſons, which he himſelf alledges for the affirmative, are ſufficient to ſhew, that his Determination is extremely wrong.

[1] If *Julius Cæſar* had thought proper, for good Reaſons, he might have as eaſily remitted the Puniſhment, as ſoften'd it by an Interpretation of which he had no Thought when he ſwore. See what I have ſaid upon minatary Oaths in Note 1. Page 349.

[2] It is the ſame Thing to do a Thing one's ſelf, as to ſolicit another to do it. But the Oath of this Princeſs was null, becauſe it was extorted thro' unjuſt Fear; therefore ſhe might herſelf have puniſhed the dreadful Injuries ſhe received from *Hervatus*.

[3] Our Author cites this Paſſage out of *Ovid*'s *Metamorphoſes*, lib. ii. v. 101, 102. but it is ſo far from eſtabliſhing, that it contradicts his Principles. *Phœbus* ſuppoſes here, and the Sequel of the Story proves it plain enough, That an Oath, made by the Waters of *Styx*, was inviolable, although the Performance of it was fatal to him, for whoſe Sake it was made. This is contrary to both Reaſon, and the Syſtem of the Author.

[4] *Curtius*'s Words are, *Quibus juvenis* [Nicomachus] *auditis, ſe vero fidem in parricidio dediſſe conſtanter abnuit, nec ulla religione, ſcelus tegat, poſſe conſtringi.*

likely

likely to turn to the Prejudice of his Government [1], 1 *Kings* ii. 20, *&c.* There is a very remarkable Story in *Diodorus Siculus* [a], which bears ſome Relation to the Point now under Debate: "*Xerxes*, "being warmly engag'd in proſecuting a new Ex- "pedition againſt *Greece*, deſired *Themiſtocles*, who "was then in his Court, to be his Guide and Di- "rector in the War. *Themiſtocles* conſented, upon "Condition the King would ſwear, *never to attack* "*the* Grecians *without him.* A Bull being ſacri- "fic'd, and the Oath taken with the uſual Solem- "nity, *Themiſtocles* took a Cup of the Blood, and "drinking it off, immediately expired." And by this Means diverted *Xerxes* from his Reſolution. But here, if *Xerxes* had no other Reaſon to alter his Purpoſe, he need not have been deterr'd by his Oath, in which *Themiſtocles*'s Life was a Condition ſuppos'd; it being no more than if he had promis'd that *Grecian* Captain never to undertake any thing againſt his Countrymen, whilſt he liv'd, without his Counſel and Aſſiſtance. So that upon his Death the Force and Virtue of the Oath died with him [2].

XV. Although the Invocation of the Divine Name in Oaths is to be adjuſted according to the Perſuaſion of the Perſon who ſwears, yet the whole Propoſition ſhall bear that Senſe which he, who requires the *Oath*, proteſteth to underſtand it in [b]. For 'tis on his Account chiefly that the *Oath* is taken, and not on the Swearer's: And therefore it belongs to him too, to ſettle the Form of Words; and he ought to do this ſo plainly and clearly, as both to ſignify how he underſtands them himſelf, and to bring the Swearer to acknowledge that he apprehends his Meaning. And, to conclude the Buſineſs, the Swearer is to pronounce the ſame Words openly and diſtinctly, ſo as to leave no poſſible Room for Cavil or Evaſion. Therefore, thoſe Wretches whom *Tacitus* ſpeaks of [c], in vain declined to attempt the Guilt of Perjury, when, *being conſcious to themſelves of the Wickedneſs with which they were charg'd, they trembled and faulter'd in their Oath, changing the Words with much Artifice and Slight.* So *Ulyſſes* and *Diomedes* in *Dictis Cretenſis* [d], like true Maſters of Sophiſtry and Guile, ſware to the *Trojans*, That *they would ſtand by the Agreement they had ſettled with* Antenor: By which Agreement they meant the Articles for betraying the City, which *Antenor* and they had adjuſted. As for that Form us'd in adminiſtring Oaths amongſt the *Romans*, *ex animi ſui ſententia*, *according to their Judgment and Opinion*, it is not ſo to be expounded, as if Oaths receiv'd all their Force and Validity from the Notion which Men form'd of them in their Mind; but to ſhew, that thoſe who ſwore ought to perform ſo ſolemn an Act in the moſt ſerious Manner, and with the moſt real Intentions [3], not in the Way of Diſſimulation, of Fiction, or of Sport. This too was an uſual Form of the Queſtions put by the *Cenſors*; as for Inſtance, *Ex animi tui ſententia habes uxorem? Have you a Wife according to your real Mind?* Which a *Roman* Knight once anſwering with this cavilling Jeſt, *I have a Wife, according to my Mind, not according to your Mind*, incurr'd the Penalty of a Fine for his indiſcreet Wit. *Cicero*, in his *Academical Queſtions* [e], endeavouring to prove that human Knowledge can reach no higher than Probabilities, in a very elegant Manner alledgeth this and other the like Cuſtoms as Proofs of what he aſſerts. *This is evident*, ſays he, *in the diligent Caution of our Anceſtors, who firſt required Men to ſwear only according* to the beſt of their Judgment; *and then told the Party, who took the Oath, that he ſhould be rendred guilty by it, only*, if he knowingly deceiv'd. *As, likewiſe, when they order'd a Witneſs to ſay no more than that he thought ſuch or ſuch a Matter, though perhaps he had ſeen it with his Eyes; and pronounc'd a Fact, which the ſworn Judges had examin'd and determin'd, not* to be, *but only* to ſeem, *or* to appear *thus or thus.* 'Tis a Remark of the ſame Author [4], That *what is ſworn agreeable to the Mind and Intention of him who requires the Oath, ought ſtrictly to be perform'd; but what is not, may without Perjury be omitted*; that is, if a Man happens to miſunderſtand the Party who puts him to his Oath, ſo as to ſwear in a different Senſe from what the other conceives, he is not perjur'd by Non-performance. For ſince the other Perſon had a contrary Meaning, he muſt be ſuppos'd not to have accepted of this Propoſal made upon Oath by the Juror; and without Acceptance there ariſeth no Obligation from a Promiſe. *For it is not*, as *Tully* goes on, *always Perjury to ſwear what is falſe*; that is, to aſſert by Oath thro' ſome Miſtake what is really otherwiſe; *but you are then perjur'd, when you fail in making good what you*

[a] Lib. xi. c. 58. p. 44. A. Edit. *Rhodom.* [b] See *Grot.* l. ii. c. 13. ſ. 3. n. 2. [c] Hiſt. 4. c. 41. [d] Lib. v. c. 10. [e] Lib. iv. c. 47. *ſub fin.* & l. iii. c. 29. *de Offic.*

[1] The Promiſe was not granted with an Oath. *Solomon* did not ſwear, till having refuſed his Mother's Petition; he on the contrary declared, that what *Bathſheba* came to do, ſhould coſt *Adonijah* his Life. The Rigour of this Prince is very hard to be excuſed, being againſt his Brother, whoſe evil Deſigns he might have prevented another Way. See Mr. *Le Clerc* upon 1 *Kings* ii. 24.

[2] The *Roman* Lawyers ſay, That if a Man has promiſed with an Oath to appear before a Judgment Seat, and is prevented by ſome lawful Reaſon, he is not perjur'd. *Qui jurato promiſit judicio ſiſti, non videtur pejeraſſe, ſi ex conceſſa cauſa hoc deſeruerit,* Digeſt. l. ii. tit. 8. *Qui ſatis dare cogantur*, &c. Our Author here criticizeth upon the Reflection which *Homer* makes upon the Oath of *Hector*, by which that *Trojan* Hero had promiſed to *Dolon* to give him the Horſes and Chariot of *Achilles*. Καὶ ἐπίοχον ἀπωμοσε, &c. *He ſwore and was perjur'd*, ſays the Poet. But our Author ſays, *Hector* ſwore only under this tacit Condition, "If we take the Horſes and Chariot, and if you return from the Battle ſafe and ſound." So that he underſtands by the Word ἐπίοχος, *perjur'd*, an Oath that had no Effect.

[3] Our Author quotes this from his Memory, and does not tell us where he had it. He has it from *Aulus Gellius*, where the Perſon ſpoken of is not call'd a *Roman* Knight, but a captious Fellow. Moreover, the laſt Edition of Mr. *Gronovius* reviewed by the MSS. relates the Jeſt after a different Manner, ſo that it had nothing offenſive to the Cenſor himſelf; for he who made this unſeaſonable Jeſt, ſaid only, that he had a Wife, but not to his Humour; for his Anſwer was, *Habeo equidem, inquit, uxorem, ſed non hercle ex animi mei ſententia.* Vid. *Cicero* de Orat. l. ii. c. 64. & *Juſt. Lipſius* Var. Lect. l. i. c. 1. In fine, a famous Lawyer, very unjuſtly concludes from this Paſſage of *A. Gellius*, That Women were ſubject to the Reproof of the Cenſors. See Mr. *Thomaſius*'s Diſcourſe, *De Judicio ſeu Cenſura morum*, c. 2. §. 12, *&c.*

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wrote with his Javelin in the Duſt, ſo as to be obſerved by him, *Fly, Mithridates* [a]. To the ſame Head belongs that Inſtance which [1] *Sueton* [b] gives of *Cæſar*'s great Clemency of Nature: That having ſworn to crucify the Pirates by whom he had been taken, he orders them firſt to be ſtrangled, and then faſtened to the Croſs. Of the like Kind was *David*'s Oath of Safety to *Shimei*. 2 *Sam.* xix. 23. notwithſtanding which, on his Death-bed, he commands *Solomon* to take due Care that ſuch a wicked Rebel ſhould not die a peaceable Death, 1 *Kings* ii. 9. For *David*'s Promiſe of Pardon was made only in his own Name. Nor did he here properly enjoin *Solomon*, that he ſhould drag the Man to Puniſhment for his old Crime, but only that he ſhould diligently watch ſo notorious a Villain, and, by no Means, ſpare him, if taken in a ſecond Fault. And *Solomon* acted with great Wiſdom [c], in obliging ſo turbulent and ſo implacable an Offender to live in the Royal City under his Eye, for Fear he ſhould engage in new Treaſons, threatning him with Death upon his Diſobedience in this Particular; which Condition *Shimei* himſelf gladly approved of, and accepted. Nor did it fall out without the ſpecial Direction of Providence, that, being caught tranſgreſſing this Command, he ſuffer'd the juſt Reward of his former, as well as of his preſent Guilt. Add. *Montaign*'s Eſſ. l. i. c. 7. Perhaps we ought to allow a Place under this favourable Head to the Action of *Mary* Queen of *Hungary*, Wife to the Emperor *Sigiſmund*, who, having promiſed Indemnity to *Hervatus*, Governor of *Croatia*, by whom ſhe had been taken, and very hardly uſed, upon the Recovery of her Liberty, is ſaid to have put her [2] Huſband upon revenging the Injury; alledging, *That ſhe had no Power to engage for* him, *though ſhe might for herſelf*. *Bonfin.* Rer. *Hungar.* l. iii. c. 2. I know not whether we may put in the ſame Rank, the Act of *Timoleon*, recorded by *Polyænus*; he was engaged in Purſuit of *Milarchus* [d] the Tyrant, an impious Wretch, who had cheated many Perſons out of their Lives, by ſwearing to preſerve them and afterwards deſpiſing his Oath. The Tyrant made an Overture of coming in Perſon to *Syracuſe* to take his Tryal, provided *Timoleon* would not be his Accuſer. *Timoleon* ſwore he would not; and on theſe Terms *Milarchus* came to *Syracuſe*: *Timoleon* bringing him into the open Aſſembly, addreſſed him in the following Manner, *I will not accuſe you, for ſo I covenanted before-hand; but I'll command you inſtantly to be executed; for he who hath deceived ſo many to their Ruin, may juſtly be thus deceived himſelf.*

XIV. In like Manner an Oath doth not exclude any tacit Conditions or Limitations, properly ariſing from the Nature of the Subject. As, ſuppoſe I have given a Perſon his Option to deſire of me whatever he pleaſed; if his Requeſt ſhall be either unjuſt, or abſurd, I am not tied by my Engagement. For he who makes an indefinite Grant to another, before he knows what he will ask, preſuppoſeth that the other Party will petition for what is honeſt, what is morally poſſible, what is not ridiculous, and what is not miſchievous either to himſelf, or to any beſides [3]. 'Twas a good Caution of *Phœbus* to his raſh Son,

> *Ne dubita, dabitur* (*Stygias juravimus undas*)
> *Quodcunque optâris; ſed tu ſapientius opta* [e].
>
> I've ſworn by *Styx*, doubt not, I'll not refuſe
> Whate'er you ask; but with more Wiſdom chuſe.

Such a Caſe as this gave Occaſion to that noted Saying of *Hippolytus* in *Euripides* [f], which *Tully* ſo much commends, ἡ γλῶσσ' ὀμώμοχ', ἡ δὲ φρὴν ἀνώμοτος, *My Tongue hath ſworn, my Mind unſworn remains.* For it ſeems he had ſworn to the Nurſe, that he would keep ſecret whatever ſhe diſcover'd to him. But when ſhe made a Propoſal of Adultery and Inceſt with his Mother-in-Law *Phædra*, he denies that his Oath obliged him to conceal ſo foul a Villany. Though the *Poet* makes him ſo ſcrupulous, as to recede from this Judgment, and to keep cloſe the Matter in regard to his Oath. *Nicomachus* in *Quintus Curtius* [g] makes the ſame Exception, *reſolutely denying that he had given his Oath in Confirmation of the Parricide, or that any Tye of Religion ſhould be able to hinder him from declaring ſo barbarous a Treaſon* [4]. For it is, indeed, one Part of the Duty and Obligation of a Subject, not to hide any Deſigns that he ſhall obſerve to be carrying on againſt the Perſon or the Government of his Prince. So *Tully* (Offic. 1.) *It may ſo happen, that the Performance of a Promiſe or an Engagement ſhould be prejudicial to the Party to whom it was made. For if* Neptune, *as we have it in the Story, had not made good what he promiſed to* Theſeus *upon* Oath, Theſeus *had not loſt his Son* Hippolytus. *The Death of his Son being one of the three Wiſhes, which, in his Paſſion, he put up to* Neptune. (Comp. *Euripid. Hippolyt. Coron.* ver. 315.) *Thoſe Promiſes, therefore, are not to be kept, which would be hurtful to the Perſons, whom, in promiſing, you deſign'd to ſerve.* Add *Diod. Sic.* l. iv. c. 65. And thus too *Herod* ought not to have ſold the Head of *John the Baptiſt* to his Daughter-in-Law for a Dance; becauſe, ſince there can lie no Obligation to what is unlawful; in ſuch a general Promiſe this Condition ought to have been underſtood, If ſhe deſired any Thing which he might lawfully perform [h]. We find King *Solomon* not adhering to his indefinite Grant, when his Mother ask'd a Favour which was

[a] *Plutarch. Demet.* [b] *Jul.* c. 74. [c] Verſ. 36, &c. [d] Stratag. l. v. c. 12. n. 3. [e] *Ovid.* Metamorph. l. ii. v. 101, 102. [f] *Hippolyt.* v. 612. [g] Lib. vi. c. 7. n. 7. [h] *Matth.* xiv. 6, &c.

Nature, that he hazards his Life, if he hides it from him? All, I ſay, that this ingenious Author has ſaid upon this Subject, taking the negative Part, is void, and of no Force. The Reaſons, which he himſelf alledges for the affirmative, are ſufficient to ſhew, that his Determination is extremely wrong.

1 If *Julius Cæſar* had thought proper, for good Reaſons, he might have as eaſily remitted the Puniſhment, as ſoffen'd it by an Interpretation of which he had no Thought when he ſwore. See what I have ſaid upon minatary Oaths in Note 1. Page 349.

2 It is the ſame Thing to do a Thing one's ſelf, as to ſolicit another to do it. But the Oath of this Princeſs was null, becauſe it was extorted thro' unjuſt Fear; therefore ſhe might herſelf have puniſhed the dreadful Injuries ſhe received from *Hervatus*.

3 Our Author cites this Paſſage out of *Ovid*'s *Metamorphoſes*, lib. ii. v. 101, 102. but it is ſo far from eſtabliſhing, that it contradicts his Principles. *Phœbus* ſuppoſes here, and the Sequel of the Story proves it plain enough, That an Oath, made by the Waters of *Styx*, was inviolable, although the Performance of it was fatal to him, for whoſe Sake it was made. This is contrary to both Reaſon, and the Syſtem of the Author.

4 *Curtius*'s Words are, *Quibus juvenis* [Nicomachus] *auditis, ſe vero fidem in parricidio dediſſe conſtanter abnuit, nec ulla religione, ſcelus tegat, poſſe conſtringi.*

likely

likely to turn to the Prejudice of his Government [1], 1 *Kings* ii. 20, *&c.* There is a very remarkable Story in *Diodorus Siculus* [a], which bears ſome Relation to the Point now under Debate: "*Xerxes*, "being warmly engag'd in proſecuting a new Ex"pedition againſt *Greece*, deſired *Themiſtocles*, who "was then in his Court, to be his Guide and Di"rector in the War. *Themiſtocles* conſented, upon "Condition the King would ſwear, *never to attack* "*the* Grecians *without him.* A Bull being ſacri"fic'd, and the Oath taken with the uſual Solem"nity, *Themiſtocles* took a Cup of the Blood, and "drinking it off, immediately expired." And by this Means diverted *Xerxes* from his Reſolution. But here, if *Xerxes* had no other Reaſon to alter his Purpoſe, he need not have been deterr'd by his Oath, in which *Themiſtocles*'s Life was a Condition ſuppos'd; it being no more than if he had promis'd that *Grecian* Captain never to undertake any thing againſt his Countrymen, whilſt he liv'd, without his Counſel and Aſſiſtance. So that upon his Death the Force and Virtue of the Oath died with him [2].

XV. Although the Invocation of the Divine Name in Oaths is to be adjuſted according to the Perſuaſion of the Perſon who ſwears, yet the whole Propoſition ſhall bear that Senſe which he, who requires the *Oath*, proteſteth to underſtand it in [b]. For 'tis on his Account chiefly that the *Oath* is taken, and not on the Swearer's: And therefore it belongs to him too, to ſettle the Form of Words; and he ought to do this ſo plainly and clearly, as both to ſignify how he underſtands them himſelf, and to bring the Swearer to acknowledge that he apprehends his Meaning. And, to conclude the Buſineſs, the Swearer is to pronounce the ſame Words openly and diſtinctly, ſo as to leave no poſſible Room for Cavil or Evaſion. Therefore, thoſe Wretches whom *Tacitus* ſpeaks of [c], in vain declined to attempt the Guilt of Perjury, when, *being conſcious to themſelves of the Wickedneſs with which they were charg'd, they trembled and faulter'd in their Oath, changing the Words with much Artifice and Slight.* So *Ulyſſes* and *Diomedes* in *Dictis Cretenſis* [d], like true Maſters of Sophiſtry and Guile, ſware to the *Trojans*, That *they would ſtand by the Agreement they had ſettled with* Antenor: By which Agreement they meant the Articles for betraying the City, which *Antenor* and they had adjuſted. As for that Form us'd in adminiſtring Oaths amongſt the *Romans*, *ex animi ſui ſententia*, *according to their Judgment and Opinion*, it is not ſo to be expounded, as if Oaths receiv'd all their Force and Validity from the Notion which Men form'd of them in their Mind; but to ſhew, that thoſe who ſwore ought to perform ſo ſolemn an Act in the moſt ſerious Manner, and with the moſt real Intentions [3], not in the Way of Diſſimulation, of Fiction, or of Sport. This too was an uſual Form of the Queſtions put by the *Cenſors*; as for Inſtance, *Ex animi tui ſententia habes uxorem? Have you a Wife according to your real Mind?* Which a *Roman* Knight once anſwering with this cavilling Jeſt, *I have a Wife, according to my Mind, not according to your Mind*, incurr'd the Penalty of a Fine for his indiſcreet Wit. *Cicero*, in his *Academical* [c] *Queſtions*, endeavouring to prove that human Knowledge can reach no higher than Probabilities, in a very elegant Manner alledgeth this and other the like Cuſtoms as Proofs of what he aſſerts. *This is evident*, ſays he, *in the diligent Caution of our Anceſtors, who firſt required Men to ſwear only according* to the beſt of their Judgment; *and then told the Party, who took the Oath, that he ſhould be rendred guilty by it, only*, if he knowingly deceiv'd. *As, likewiſe, when they order'd a Witneſs to ſay no more than that he thought ſuch or ſuch a Matter, though perhaps he had ſeen it with his Eyes; and pronounc'd a Fact, which the ſworn Judges had examin'd and determin'd, not* to be, *but only* to ſeem, *or* to appear *thus or thus.* 'Tis a Remark of the ſame Author [4], That *what is ſworn agreeable to the Mind and Intention of him who requires the Oath, ought ſtrictly to be perform'd; but what is not, may without Perjury be omitted*; that is, if a Man happens to miſunderſtand the Party who puts him to his Oath, ſo as to ſwear in a different Senſe from what the other conceives, he is not perjur'd by Nonperformance. For ſince the other Perſon had a contrary Meaning, he muſt be ſuppos'd not to have accepted of this Propoſal made upon Oath by the Juror; and without Acceptance there ariſeth no Obligation from a Promiſe. *For it is not*, as *Tully* goes on, *always Perjury to ſwear what is falſe*; that is, to aſſert by Oath thro' ſome Miſtake what is really otherwiſe; *but you are then perjur'd, when you fail in making good what you*

[a] Lib. xi. c. 58. p. 44. A. Edit. *Rhodom.* [b] See *Grot.* l. ii. c. 13. ſ. 3. n. 2. [c] Hiſt. 4. c. 41. [d] Lib. v. c. 10. [c] Lib. iv. c. 47. *ſub fin.* & l. iii. c. 29. *de Offic.*

[1] The Promiſe was not granted with an Oath. *Solomon* did not ſwear, till having refuſed his Mother's Petition; he on the contrary declared, that what *Bathſheba* came to do, ſhould coſt *Adonijah* his Life. The Rigour of this Prince is very hard to be excuſed, being againſt his Brother, whoſe evil Deſigns he might have prevented another Way. See Mr. *Le Clerc* upon 1 *Kings* ii. 24.

[2] The *Roman* Lawyers ſay, That if a Man has promiſed with an Oath to appear before a Judgment Seat, and is prevented by ſome lawful Reaſon, he is not perjur'd. *Qui jurato promiſit judicio ſiſti, non videtur pejeraſſe, ſi ex conceſſa cauſa hoc deſeruerit*, Digeſt. l. ii. tit. 8. *Qui ſatis dare cogantur*, &c. Our Author here criticizeth upon the Reflection which *Homer* makes upon the Oath of *Hector*, by which that *Trojan* Hero had promiſed to *Dolon* to give him the Horſes and Chariot of *Achilles*. Καὶ ἐπίοχον ἀπωμοσε, &c. *He ſwore and was perjur'd*, ſays the Poet. But our Author ſays, *Hector* ſwore only under this tacit Condition, "If we take the Horſes and Chariot, and if you return from the Battle ſafe and ſound." So that he underſtands by the Word ἐπίοχος, *perjur'd*, an Oath that had no Effect.

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ſwore, ex animi tui ſententia (*as the Form is in our common Practice*) *according to your real Sentiments and Perſuaſion.*

XVI. It hath been a Diſpute amongſt ſome of our modern Caſuiſts, whether an Oath could be taken by Proxy [1]; that is, whether one Man could, in the Place and in the Name of another, take an Oath which ſhould bind the abſent Party? On which Point our Judgment is this: As a Perſon may in his Abſence contract an Obligation, ſince Conſent may as well be ſignify'd in Writing, as *viva voce*; ſo there ſeems no Reaſon why an Oath, likewiſe, may not be expreſs'd in the ſame Manner. Which, after it hath been once ſolemnly recited, ſhall as fully oblige, as if the Party were there preſent, and had taken it by Word of Mouth. Yet before it hath been rehears'd in this ſolemn Manner, it ſeems allowable to revoke it; ſo that a Perſon who retracts an Atteſtation which he made upon Oath at a Diſtance, before it be convey'd to the Place for which it was deſign'd, ought not to be look'd on as perjur'd. But in the common Proceedings of Courts in this Affair, there ſeems to be ſomewhat not very proper or convenient, as that the Proctors who read the Inſtrument, uſe ſuch a Poſture and Ceremony, as if they were to ſwear in their own Name, and that, for Fear they ſhould ſeem to be themſelves obliged, they change the concluding Clauſe of the Oath after this Manner, *So help him GOD*. Whereas it might be ſufficient barely to recite the Oath of the abſent Party, as it lies in the Writing. However, ſince it hath been, with good Reaſon, the receiv'd Cuſtom of moſt Nations to render Oaths more ſacred and auguſt by the Ceremonies of Religion, and, by ſome Sign of Devotion, to ſet the Awe and Reverence of the Divine Majeſty more ſenſibly before the Eyes of the Juror, as by Sacrifice, by approaching to the Altar, and the like Acts of Worſhip; therefore we are of Opinion, that if the Matter be of very important Concern, the abſent Party ought to be put to his Oath with the uſual Solemnity, in the Place where he lives; eſpecially ſince the Caſe requires a *corporal Oath* [2]; which Name we cannot give to an Oath expreſs'd and convey'd in the Manner we before deſcrib'd. For it is much more to invoke GOD as a Witneſs, in the midſt of thoſe ſacred Rites; which, not without ſome kind of pious Horror, ſignify the Divine Preſence; than to write ſo many Words on Paper, which never *bluſheth*. And 'tis a material Conſideration, that Evidences thus given in Writing at a Diſtance, are by the Lawyers themſelves term'd *Teſtimonia cæca* [a], *Blind Teſtimonies*.

XVII. Laſtly, It is a *Queſtion* uſually diſcuſs'd on this Head, Whether or no, and how far an Heir is bound by the Oaths of the Perſon to whom he ſucceeds? In which Caſe this is certain, that if by ſuch an Oath ſome other Party obtain'd a perfect Right, which ought to be ſatisfy'd either in Whole or in Part out of the Goods of the deceas'd; then the Heir is oblig'd to ſee it fulfil'd: Since this Burthen, or Debt inhering in the Poſſeſſion, paſſeth to him with it. But when the Oath hath given no one a perfect Right, and the Obligation itſelf was founded barely in the Piety, Fidelity, or Conſtancy of the Juror, then it's plain that the Heir doth not ſtand bound, inaſmuch as he doth not repreſent another, as to thoſe Obligations which terminate ultimately and ſolely in the Perſon deceas'd. Thus, for Inſtance, if a Man hath ſworn or vow'd with an *Oath*, That *he will faſt once every Week*; that *he will continue in Celibacy five Years*; or, that *he will undertake a Pilgrimage to the Holy Land*; if he die before he hath fulfill'd his Engagement, his Heir ſhall, by no Means, be tied to perform it. But the Caſe is different, if a Perſon hath been Heir expreſly under ſuch a Condition. So, likewiſe, if a Man hath ſworn to *give an Hundred Pounds yearly to the Poor for ten Years to come*; and dies before the Time is expir'd, his Heir ſhall be free from the Obligation; unleſs the former Grant conferr'd on certain Perſons a Right of demanding the ſaid Sum. For he who makes a Promiſe, and doth not withal give the Party a Right of challenging it as his Due, intends to engage his own Word only, and not his Eſtate; and therefore upon his Deceaſe the Obligation ſhall not in the leaſt affect his Poſſeſſions, or his Heir, unleſs an eſpecial Injunction to that Purpoſe were added in the Will. *Grotius* [b] obſerves farther, That *if ſuch a Promiſe, confirm'd by Oath, was in ſome Reſpect faulty, ſo as to produce a Right, not in Regard of Man, but of GOD only, then the Heir ſhall not be charg'd with the Performance.* Which we allow, if it be ſuppos'd that the Party who ſwore, reſolv'd, either out of a Point of Honour, or a Scruple of Conſcience, to fulfil ſuch a defective Oath, which he might, if he pleas'd, have utterly evacuated, by alledging ſome Deceit, or ſome Fear unlawfully caus'd. For otherwiſe the Queſtion is inſignificant; we having above ſhewn that the Juror himſelf is not in this Caſe effectually oblig'd. But what if the Heir neglects to perform a Promiſe or Covenant under Oath made by the Deceaſed, doth he hereby contract the Guilt of Perjury? It ſeems reaſonable to anſwer in the Negative. For that which, ſtrictly ſpeaking, we call an Oath, or the Invocation of the Divine Vengeance ſuper-added to a common Engagement, paſſeth no farther than the Perſon of him who ſwears [3]. Since we cannot ſay that the Heir put a Slight on the Reverence due to the Divine Majeſty,

[a] Vid. leg. *Wiſogoth.* l. ii. tit. 4. c. [b] Lib. ii. c. 13. ſ. 17.

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[1] Our Modern Lawyers call it, *Jurare in animam alterius*. Mr. *Hertius* recites here a Paſſage out of a Letter of *William* the *Good* King of *Sicily* to *Henry* II. King of *England*, written *A. D.* 1176, where that Prince ſays, That from Time immemorial it has been a Cuſtom in his Realm, and among his Anceſtors, not to ſwear, but it is all one to lift up our Hand, or cauſe another to lift up his Hand for us in our Preſence. *Quum unum & idem putemus Sacramentum, quod vel manu propria fit, vel in animæ jubentis & præſentis juratur.* That the antient *Romans* ſometimes ſwore after this Manner, appears by an Example which Mr. *Hertius* alledges of an Oath which *Anthony* made to *Pompey* by the Ambaſſadors he ſent to him. *Dion.* Hiſt. Lib. XLIX. *Sub.* *Livius* alſo tells us, That *C. Valerius Flaccus* not being able to ſwear himſelf, his Brother *L. Valerius Flaccus* ſwore for him by the Allowance of the Senate and People, who eſteem'd ſuch an Oath good, and for the Advantage of him for whom it was made. *Plebeſq; ſcivit, ut perinde eſſet, ac ſi ipſe Ædilis juraſſet*, Lib. xxxi. c. 50. & *ult.* But it is certain that the *Civil* Law authoriz'd no Oath taken by Proxy; this is an Invention of the *Canon* Law. See the *Jus Eccleſiaſticum Proteſtantium*, of Mr. *Bohmer*, Lib. ii. tit. 7. §. 5. & *ſeqq.* This Matter was carried ſo far, that Princes, tho' preſent themſelves, caus'd ſome Body to ſwear for them, eſpecially if the Perſon to whom they took the Oath, was their Inferior. The Reader may ſee Inſtances of this in the *Corps Univerſel Diplomatique*, (publiſh'd in 1726.) *Tome.* I. *Artic.* ccxii. & ccxvi.

[2] *Juramentum Corporale*, or, as it is called in the *Code*, *Juramentum corporaliter præſtitutum*. See the Law cited about this Matter, *Note* 1. p. 347. and l. ii. tit. 43. *Si minor ſe majorem*, &c. leg. 3. *in fin.* 'Tis an Oath that a Man takes himſelf with the ordinary Formalities.

[3] *Bodin, De Republ.* l. v. c. *ult.* concludes hence very unjuſtly, That Princes are not obliged to ſtand to the Treaties made by their Predeceſſors, though confirmed by Oaths, as *Grotius* has obſerved, *De Jur. Bel. & Pac.* l. ii. c. 16. §. 16. n. 4. "For, "ſays Grotius *very well*, Nothing hinders but that the Promiſe of the Deceas'd may oblige the Heir, though the Obligation of it

Majeſty, becauſe it was not he who call'd GOD to Witneſs; and, therefore, he ſhall be chargeable only with Breach of Truſt. It alters the Matter, if the Oath were taken by a whole People: It being the Judgment of many, that a People, whilſt they remain ſuch, are, by their publick Oaths, put under perpetual Obligation. Which Opinion, neverthelefs, ſeems to us not altogether clear and deciſive: For an Oath, and the Breach of it, affects only the natural Will, or the Will of particular Men, and reacheth the compound Body, or *moral Perſon*, only by Communication from each Individual. The People, therefore, as a *moral Perſon*, cannot invoke the Wrath of GOD upon themſelves; but this is done by thoſe ſingle natural Perſons, of whom the Community was made up. And, conſequently, upon the Violation of a Promiſe or Pact made by Oath in the Name of the State, thoſe Perſons only ſhall be guilty of Perjury, who corporally ſwore to the Buſineſs, if they are now conſenting to the Omiſſion of it; but the reſt ſhall be only branded with the Mark of ordinary Perfidiouſneſs [1]. And for this Reaſon we ſhould be unwilling to accuſe the *Spartans* of Perjury, in receding, after ſo many Ages, from *Licurgus*'s Inſtitutions: Or, the *Romans*, in Caſe they had inveſted the *Ceſars* with the Title of Kings, notwithſtanding the Oath which *Brutus*, of old, impoſed on the People to the contrary. Which will appear yet more evidently, if we conſider, that this Oath conferr'd a Right on no Perſon; but the Deſign of the *Romans* in it was only to lay a Reſtraint on the Liberty of their Will, that they might not think of reſtoring that Form of Government, which had proved ſo unfortunate to them. By which Means they might, indeed, bind *themſelves*, never to ſet up a *Monarchy* in *Rome*; at leaſt, ſo long as the publick Safety could be preſerved without it. For, in this Caſe, the very Perſons, who took the Oath, muſt be ſuppoſed to be releaſed from it; becauſe then the Neceſſities of the State, which is conceived incapable of ſubſiſting without a ſingle Governor, render the Matter or Subject of the Oath unlawful. But their Poſterity, unleſs they repeated the Oath, could not be tied by it; as well becauſe their Anceſtors had no Authority thus to impoſe arbitrarily upon them, as becauſe the Conſent of Poſterity was wanting, as, at preſent, we ſuppoſe. Nor is it any Argument to the contrary to urge, that a Nation is reckoned the ſame, tho' the particular Members, who compoſed it, are all changed: And that, therefore, the Acts of paſt Generations ſeem juſtly enough to be attributed to the preſent. For the Acts of former Ages can then only be imputed to the latter, when ſome other Party obtain'd any Right as the neceſſary Conſequence of thoſe Acts. But, in ſuch Things as reſult to the whole Body, from the Actions of particular Members, the Deſcendents in a People do not always repreſent the Progenitors. As tho' a People have been heretofore eminent for Martial Glory, yet their lazy and degenerate Race can claim no Share in their Triumph, or in their Fame. Yet ſtill the Caſe would be quite otherwiſe, if ſuch an Oath, as we are ſpeaking of, hath been ſolemnly renewed by Poſterity, each particular Man engaging for himſelf. But, in regard to theſe publick Obligations, *Sophocles*'s Advice [2] might paſs for a general Rule;

Let nothing thus be ſworn beyond Recal;
For Men are frail, and human Thoughts will change.
Antigon. ver. 394.

And 'tis no trivial Remark, which *Joan. Labardæe* makes in his Hiſtory of *France* [a], *That the Leagues of Monarchs are more firm and ſacred than thoſe made by Republicks, or popular Governments: Becauſe when one Perſon only engageth his Faith, he is ſtruck with a more Religious Concern for the Obſervation of it, than can affect each Man in a Multitude, where every one conſiders, that but a little of the publick Faith, if any at all, comes to his Share; by which Means all are eaſily induced to recede from the common Engagement.*

XVIII. The two principal Ends to which Oaths

[a] Lib. vi. p 329. Comp. *Anton. Matth.* de Crimin. tit. *De Perjurio*, n. 15.

" an Oath, added to that Promiſe, be purely perſonal." Upon which *Gronovius* affirms, " That a Prince and his Succeſſor be-
" ing one Perſon, becauſe they both repreſent the People, who always ſubſiſts; and the King having ſworn in the Name of the
" People, the Force of the Oath binds the Succeſſor." But what I ſhall ſay, with our Author, in the following Note, will make it appear, that the Repreſentation falls only upon the Engagement, and not upon the Oath that attends it.

[1] Mr. *Hertius* declares here againſt the Opinion of our Author, and much depends upon the Authority of *Grotius*, which yet ſeems to make nothing for him: For this great Man, treating of the Agreements made with rebellious Subjects, ſays, Lib. iii. c. 19. §. 8. n. 1. " That they may be confirmed by Oath, not only by the King or Senate, but, alſo, by the Body of the State, as
" *Lycurgus* and *Solon* made, the one the *Lacedemonians*, the other the *Athenians*, to ſwear to preſerve their Laws; and, THAT
" THEIR OATH MIGHT NOT LOSE ITS FORCE BY ANY CHANGE OF PERSONS, who had any Share in the
" Government, they order'd it to be renew'd every Year. In this Caſe, ſays *Grotius*, the Sovereign ought indiſpenſibly to keep
" his Word, even tho' the publick Good ſhould require the Contrary; for the State may diveſt itſelf of its Right, and the Terms
" of the Treaty may be ſo clear as to admit of no Exception." Either I am much miſtaken, or theſe Words ſuppoſe the clear Contrary to what Mr. *Hertius* infers from them, as appears from thoſe Words which I have written in Capital Letters, eſpecially if we compare them with the following Places of the ſame Author, *viz. Grot.* l. ii. c. 13. §. 17. & l. iii. c. 19. §. 5. In ſhort, *Grotius* does not ſpeak at all of the Poſterity of them with whom the Treaty was concluded, much leſs would he have us underſtand that the Obligation of an Oath has as much Force upon Poſterity, as the Promiſe to which it is annexed. The Reaſon of Mr. *Hertius* is no whit ſtronger. He ſays, " A People may be ſworn as a People." Be it ſo, yet the People, which is to Day, is not the ſame it was an hundred Years ago; it is only thought ſo, by reaſon of the perpetual Succeſſion of new Citizens, who fill up the Place of thoſe who are dead, or have left their Country, and the Continuation of the Government. So that he comes under the real Engagements of his Anceſtors, by which he hath acquired a true Right, and which are, by Nature, perpetual, and not into that which muſt be looked upon as purely perſonal. Now ſuch is the Oath here. In a Word, the People, who are to Day, have no other Relation to the People who lived an hundred Years ago, than an Heir has to a dead Perſon, whoſe Promiſes, confirmed by an Oath (as Mr. *Hertius* holds) are to be performed, not upon Account of the Oath, but upon the Account of the Promiſe. For the Oath is only a Thing accidental, a ſimple Confirmation of the Engagement, which were not leſs valid without it, a Kind of Religious Formality, which hath no other Effect, than to aſſure him more of our Fidelity, with whom we reſolve to keep our Word. The Example which Mr. *Hertius* brings of the *Iſraelites*, who about 150 Years after the Death of *Joſeph*, made good what that Patriarch had made their Anceſtors to ſwear, *viz.* to carry his Bones out of *Egypt* into the *Land of Promiſe*. This Example, I ſay, proves only, that the *Iſraelites* did think themſelves obliged to perform the Promiſe of their Anceſtors; but there is nothing which inſinuates, that if they had not done it, they had been guilty of Perjury. We may ſay the ſame of the Murther of the *Gibeonites*, ſuppoſing, that *Saul* did it under a Pretence that the Oath of *Joſhua* was null. But Mr. *Le Clerc* has well obſerved, that that Prince had another Pretence. See 2 *Sam.* xxi. 1, 2. As to Oaths, which give no Right to a Perſon, as when a People, having made a Law, ſwear, ever after, to obſerve it, it is clear that theſe are Vows which have no Force, any farther than as we may preſume GOD accepts them; ſo that as no Perſon can oblige himſelf, but as he judges it for his Advantage, nothing hinders, but that not only Poſterity, but the People, who have engaged themſelves by Oath to obſerve a Law, may afterward abrogate it, if they find it prejudicial to the End for which it was eſtabliſhed; for that Exception is included in all Engagements, which concern them only that enter into them, and we may believe that GOD no farther requires the conſtant Performance of Vows. See Lib. i. c. 6. §. 6. and Lib. iii. c. 6. §. 15. aforegoing.

[2] The *Greek* is,

Ἀναξ βροτοῖσιν οὐδέν ἐς' ἀπώμοτον.
Ψευδεῖ γὰρ ἡ πίνοια τὴν γνώμην.

may

may be, and commonly are applied, are, either to ſtrengthen and confirm a Promiſe by ſuch a ſolemn Act of Religion; or to open a Way to the Clearing ſome Fact, which is, at preſent, doubtful, and cannot be conveniently made out any other Way. And it is in this Senſe we ought to interpret *Ariſtotle*'s Definition of an Oath, when he ſtiles it [1], *an undemonſtrable Aſſertion made with an Appeal to the Divinity*; that is, an Aſſeveration not demonſtrated by any Arguments, but credited purely on Account of the Piety and Religion of the Swearer. For, when the Matter may be proved by evident and convincing Reaſons, 'tis not fair or regular to have Recourſe to Oaths. On the other Hand, when Oaths are to decide a Cauſe, no Search is made after other Proofs [2]. Why Oaths are admitted only in determining Matters of Fact, not Matters of Law, or Right, is very obvious. For we cannot ſwear whether a Thing be done well, or ill, but barely whether it were done, or not done. Which being once known, the Court may proceed upon the Points of Right and Law, by infallible Evidences and Rules. As for the Oath, which the Judges themſelves take, it is not aſſertory, but promiſſory; for they engage by it, *That they will give Sentence, in the Caſe before them, as Juſtice and Equity ſhall direct.* And this Diviſion of Oaths, into *promiſſory* and *aſſertory*, may comprehend them all, with regard to the two Ends or Uſes but now mentioned.

XIX. It hath been generally the Cuſtom to make uſe of *promiſſory Oaths* in publick, as well as in private Cauſes, and, perhaps, more frequently than was neceſſary [3]. Concerning which Authors have obſerved, That ſome of them are taken to introduce an Obligation, and are call'd *Promiſſory in Specie*; others are added to confirm ſome Act already in Being. Which Diſtinction is not to be underſtood as if every Oath were not acceſſory to another Obligation; but becauſe ſome Promiſes include an Oath in the Compaſs of the ſame Propoſition; as when one ſays, *I ſwear to do ſo or ſo on your Account*: Whereas many Times the principal Buſineſs is expreſs'd in a different Sentence from the Oath which confirms it. Now it is rightly obſerved by the Expoſitors of the *Roman* Law, and it is no more than we have already proved, That all Oaths are void, which Men apply to ſtrengthen any Buſineſs in itſelf unlawful or vicious [4]. and which tends either to the Impairing of the publick Good, or to the Prejudice of a third Perſon, tho', at the ſame Time, there are ſome Sort of Tranſactions which are of themſelves, in civil Cognizance, invalid, and yet are render'd good and effectual by the Addition of an Oath [5]. The Reaſon of which is, becauſe they are not defective in their own Nature, but only capable of being eaſily turn'd to the Harm of the Party, who thus, by ſwearing to them, ſhews his full Conſent and Approbation. For ſince any Man may wave a Privilege or Favour not deſign'd for his Benefit, he, who thus refuſeth to lay hold on the Invalidity of the Affair, and peremptorily proceeds to the Confirming it by an Oath, is preſumed to have conſider'd, very ſeriouſly, whether it makes for his Intereſt, or not.

XX. *Aſſertory Oaths*, or ſuch as are applied to the Deciſion of Controverſies not to be terminated by other Proofs, are taken either by the Party concern'd in the Buſineſs, or by a third Man: Thoſe, who ſwear to the Facts of others, are term'd Witneſſes [6]; whoſe Honeſty and Fidelity, unleſs by ſome probable Token rendered ſuſpicious, are, with Juſtice, allowed a very great Weight and Sway; it being well ſuppoſed, that no Man, of any Religion or Goodneſs, will expoſe himſelf to the Divine Vengeance, for the Affair of another Perſon: Yet is it a wiſe Conſtitution in moſt Civil Governments, not lightly to admit Perſons to give Evidence in the Caſe of others, engaged to them by Nearneſs of Birth; which is ſo ſtrong a Motive to Affection and Love: It being conſider'd, that ſuch Perſons might eaſily ſuffer their Paſſion to gain the Aſcendent of their Religion [7]. Nor was it altogether without Reaſon, that the *Romans* of old required Witneſſes of Wealth and Subſtance, eſpecially in difficult and important Cauſes [8].

XXI. But a Man may, likewiſe, in his own Buſineſs, when 'tis his Intereſt to do ſo, ſolve the Diſpute by Oath, and this either by Agreement of the Parties [9], or by Order of the Judge. For when a Controverſy ariſeth concerning ſome Due demanded by one Man, and denied by another, the Claimant may challenge the other Party to his Oath, promiſing to decline the Suit, if he ſwears the Thing not to be owing, which is required: And if the Perſon, thus challenged, be doubtful whether he can ſwear clearly and peremptorily to the Matter, as, ſuppoſe the Debt was transferred to him from another, then he may return the Oath to the Claimant, engaging to pay, if he ſhall ſwear it is his Due [10].

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[1] The *Greek* is, Ὅρκός ἐστι μετὰ θείας παραλήψεως φάσις ἀναπόδεικτος. Rhet. c. 18.

[2] See §. 21, 22. following.

[3] Theſe Sorts of Oaths are either unjuſt or raſh, for the moſt Part. To make them innocently, we ought to know, with the utmoſt Exactneſs, that the Deed or Omiſſion, to which we are obliged, is allowable or innocent; whether it be a Thing that depends on us, and is in our Power; and we ought to examine, whether it will not bring us into ſome Danger, though inconſiderable, of offending GOD, and breaking his Law, and if there be a Neceſſity of Swearing. See the Treatiſe of Mr. *Placette*, l. ii. c. 4, & 25.

[4] The Words of the Law are, *Secundum itaque prædictam regulam, qua ubicunque* [*non*] *ſervari factum lege prohibente cenſuimus, certum eſt nec ſtipulationem hujuſmodi tenere, nec mandatum ullius eſſe momenti,* NEC SACRAMENTUM ADMITTI, *Cod.* l. i tit. 14. *De Legibus*, &c. leg. 5. §. 1. See, alſo, the *Digeſts*, l. ii. c. 14. *De Pactis*, leg. 7. §. 16. & l. 30. tit. 1. *De Legat.* leg. 112. §. 1.

[5] 'Tis a Maxim of the Cannon Law, That every Oath ought to be performed, which can be kept, without any Prejudice to our Eternal Salvation. On this Account the Engagements of a Woman, the Promiſes of a Minor, and other Acts which are null by the Civil Law, are valid by the Pope's Sentence, upon the Account of the Oath which is joined with them. See the *Decretal*, l. ii. tit. 24. *De Jurejurando*, c. 9. 28. & §. 11. above. But Mr. *Thomaſius* obſerves, with Reaſon, in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 9, *&c.* That this is contrary to the Nature of an Oath, which, as our Author ſufficiently proves, is only a ſimple Acceſſary to our Engagements, and that the *Roman* Clergy would by it uſurp a Power to correct the Civil Law, and the Sentences of the Judges; as, alſo, hinder, that the Promiſes and Donations, made to the Church, ſhould not be weaken'd by ſuch juſt Exceptions. See the Notes of the ſame Author upon *Lancelot*, lib. iii. tit. 3. §. 3. p. 1391, *& ſeqq.*

[6] See l. v. c. 13. §. 9. following.

[7] The *Latin* of the *Digeſts* is, *Teſtium fides diligenter examinanda eſt* —— *an amicus ei ſit, pro quo teſtimonium dat.* Dig. l. xxii. tit. 25. *De teſtibus*, leg. 3. See the following Law.

[8] *An locuples, vel egens ſit, ut lucri cauſa quid facile admittat*, ibid.

[9] So the *Roman* Law directs, *Maximum remedium expediendarum litium in uſum venit jurisjurandi religio: qua vel ex facultate ipſorum litigatorum, vel ex auctoritate Judicis deciduntur controverſiæ*, Digeſt. lib. xii. tit. 2. *De Jurejurando*, &c. See *Domat*'s Civil Laws in their natural Order, Part I. l. iii. tit. 6. Sect. 6.

[10] The *Roman* Law ſpeaks thus, *Alterum itaque eligat reus: aut ſolvat, aut juret* —— *Datur autem & alia facultas rei, ut, ſi voluit, referat jusjurandum; & ſi is, qui petet, conditione jurisjurandi non utetur, judicium ei Prætor non dabit: æquiſſime enim hoc fiet, cum non deberet duplicare conditio jurisjurandi ei, qui detulit*, Digeſt. ibid. leg. 34. §. 6, 7. *Manifeſtæ turpitudinis & confeſſionis eſt, nolle nec jurare, nec jusjurandum referre*, ibid. leg. 38.

And

And this giving and returning of the Oath between the Parties, may be made either in Court, or out of Court; yet, with this Difference, that out of Court I am not neceſſarily obliged to take the Oath when offer'd me, becauſe it implies a Contract [1]; by Means of which I ſhall, upon my refuſing, become a Debtor. But now no Perſon, who is not inveſted with an Authority over me, can compel me to a Contract or Agreement, which ſhall be burthenſome to me [2]. Whereas, in Court, when the Oath is offer'd by one Party, the other ſhall not decline it, unleſs upon very weighty Reaſons; but ſhall either take it himſelf, or return it to his Adverſary; that is, when the Judge conceives the Claim not to be groundleſs, and yet there is no full Evidence of the Matter ready at Hand; then, if one of the Parties think fit to refer the Buſineſs to the Conſcience of the other, the Judge may fairly look on him as Convict, who neither dares, in this Religious Manner, to deny the Debt, nor yet, in Return, challenge the other to affirm it with the like Solemnity. For this Starting and Boggling can be attributed to nothing but to his inward Conſciouſneſs of the Debt; becauſe, if he pretend to fear that Men ſhould think he ſwears only on the Account of Gain, 'tis eaſy for him to avoid this Suſpicion, by returning the Oath to the Claimant [3]. If he is afraid that the other will be perjur'd [4], why doth not he ſwear himſelf? Yet *Plato*, in his Laws [a]. admits of an Oath, only *in ſuch Caſes, where, according to the Judgment of Men, no Advantage can be got by forſwearing; but where any Profit may be reaped from the Perjury, there he orders, that the Proceſs ſhall be managed without Oaths.*

XXII. And, laſtly, in ſome Caſes, when other Proofs are not ſufficient [5], the Judge may put the Party to his *Oath*, though he do not deſire it; and this either that he may poſſeſs himſelf of ſome Right, or clear himſelf from the Suſpicion of ſome Fact. But here it muſt be obſerved, that it is never the Cuſtom to offer theſe *Oaths*, when either capital Puniſhment, or any grievous [6] Inconvenience, muſt be the Conſequence of confeſſing the Truth. For, beſides, that it looks very hard to bring a Man into ſo dangerous a Neceſſity on the Account of an uncertain Fact, as that he muſt either deeply wound his Conſcience, or incur ſome very conſiderable Damage; little Truſt is to be given to an *Oath* thus exacted, the Minds of Men being always ready to entertain this Hope, That GOD Almighty may again be appeaſed, whoſe Mercy, even the perjur'd Sinner, is not forbidden to implore. 'Tis a good

[a] Lib. xii. p. 987. C. Edit. *Francof.*

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[1] 'Tis a Kind of Tranſaction ſay the *Roman* Lawyers, very well. *Jusjurandum ſpeciem tranſactionis continet*, Digeſt. *ubi ſupra* leg. 2.

[2] But when we have once accepted the Oath, we cannot go back, becauſe, by accepting it, we engage either to ſwear, or to acknowledge the Debt which the Party puts to our Oath, or elſe to renounce the Right of whatever Demand we have upon him. *Jusjurandum, quod ex conventione extra judicium defertur, referri non poteſt*, ibid. leg. 17. But if he, who adminiſters the Oath, acquits the other, he is either diſcharged by that, as much as if he had ſworn, or has a Right to demand the Sum in Diſpute. *Jurejurando dato, vel remiſſo, reus quidem adquirit exceptionem ſibi aliiſque: actor vero actionem adquirit*, &c, ibid. leg. 9. §. 1. Much more does this take Place, after the Oath is actually taken by virtue of the Agreement. The Affair is then finiſhed, and neither Party can go back. But, according to the *Roman* Law, the Caſe is not the ſame with regard to an Oath, which the Judge exacts by his own Authority. For as the Party, from whom he acquires it, cannot refuſe it; and as there is here no Agreement with the other Party, he has a Right to demand a Reverſion of the Cauſe, provided he has any new Proofs to bring. *Admonendi ſumus, interdum etiam poſt jusjurandum exactum permitti conſtitutionibus principum, ex integro cauſam agere, ſi quis novâ inſtrumenta ſe invenisse dicat, quibus nunc ſolis uſurus ſit* ——— *Quod ſi alias inter ipſos jurejurando tranſactum ſit negotium, non conceditur eamdem cauſam retractare*, Ibid. leg. 31. See Mr. *Titius*'s Obſervation on *Lauterb.* 338.

[3] Nevertheleſs, *Plato*, as our Author obſerves here, allows not an Oath in all Affairs of Intereſt, and where Perjury may bring ſome Advantage in the Judgment of Men. See l. xii. of the Laws of this Philoſopher, p. 948. Edit *Steph.*

[4] This is a nice Queſtion, Whether an Oath may be required of a Perſon, when we have Reaſon to believe, that he will ſwear falſely? We ſpeak not here of a Judge; for as Mr. *La Placette* ſpeaks very well, in his Treatiſe of an *Oath*, l. i. c. 13. "The "Laws, in certain Caſes, order him to adminiſter an Oath, and he muſt conform himſelf to them without troubling himſelf about "the Manner how they, who take the Oath, can do it. They, alſo, ſuppoſe, without Doubt, that ſome conſiderable Intereſt is "concerned." This being allow'd, I am of Mr. *Thomaſius*'s Opinion, who ſays, "That this Queſtion is more curious than pro"fitable, *Inſtit. Jurispr. Divin.* l. ii. c. 9. For we cannot be certain that any one reſolves to forſwear himſelf; for though he have "often ſworn falſely, he may have repented, and may reſolve never again to commit ſuch a foul Crime deliberately; but if he "makes a Shew of doing it, we may believe, that he does it that we may not put him upon Swearing." Add here, what the ſame Author ſays in an Academical Diſſertation, intituled, *De emendandis quibuſdam litium protractionibus in materia Juramenti parti à parte in Judicio delati, &c.* §. 9. I may add, That there are Men, who are otherwiſe inclinable enough to do great Wickedneſſes, and yet dare not ſwear, either through ſome Scruple of Conſcience, or through I know not what monſtrous Pretence of Piety, which they make after their Way, tho' they are free, as they think, to accommodate themſelves to another's Intereſt, as far as they can, without falling into ſuch enormous Crimes as incenſe the Deity. Further, ſuppoſing we have Reaſon to preſume, That he, for Example, who denies a Debt, or Thing truſted, cannot be convicted judicially; and he is willing to clear himſelf by Oath, is it not almoſt the ſame Thing, as if he had ſworn falſely, ſince he is willing to do it? Mr. *La Placette* owns, that what ſuch a Perſon adds to his horrible Diſpoſition, by actually ſwearing falſely, is ſo ſmall a Thing, as is not to be regarded; yet he determines, that an Oath ought not to be adminiſter'd in ſuch a Caſe, for Fear of provoking GOD's Anger, and offending our weak Brethren. But the Fear of Scandal does not indiſpenſibly require, that a Man ſhould loſe his Goods without trying all Ways poſſible to recover them, if it be a Thing of Conſequence, as we ſuppoſe here it is. Beſides, the Scandal is leſs, if we declare the Reaſon why he will not have the Party ſworn. As to GOD's Anger, that is not ſo much excited by the outward Act, as by the inward Diſpoſition, which, in this Caſe, is ſuppoſed full and entire, and is looked upon before him as the Act.

[5] *In bonæ fidei contractibus, necnon* [*etiam*] *in cæteris cauſis, inopia probationum, per Judicem jurejurando cauſa cognita res decidi oportet.* C. Lib. iv. tit. 1. *De rebus creditis & jurejurando*, Leg. 3. This Law is ordinarily quoted to prove, that, according to the *Roman* Law, the Judge may adminiſter an Oath when there is an half Proof on the Side of one of the Parties, as, for Example, but one Witneſs, who ſhould not be credited, though he ſhould be a Senator. But Mr. *Noodt* has well ſhewed, in his *Probabilia Juris*, l. iii. c. 6. and in his *Commentary*, p. 287, 288. that *inopia probationum*, (i. e.) want of Proofs, is, when there are ſuch Proofs on both Sides, that the Judges know not how to determine. For when a little Matter would weigh down the Balance, we ought not raſhly to adminiſter an Oath. See *Digeſt.* l. xii. tit. 2. leg. 31. where the Words are, *in dubiis cauſis* It is not the ſame with an Oath, where one Party accuſes the other in Court. For, according to the *Roman* Law, the Perſon muſt either ſwear, or refuſe the Oath, even tho' nothing ſhould be proved againſt him, otherwiſe he muſt pay what is demanded. See Mr. *Noodt*'s Commentary, p. 285. and Mr. *Schulting*, in his *Juriſpr. Ante-Juſtinian.* p. 267.

[6] M. *Van-de-Water*, in his *Obſerv. Jur. Rom.* lib. ii. cap. 10. has undertaken to prove, contrary to the common Opinion of the modern Lawyers, that, according to the *Roman* Law, they neither adminiſter'd an Oath in criminal Cauſes, nor in ſuch civil Cauſes, where the Condemnation was attended with any Mark of Infamy; ſo that he, to whom the Oath was offer'd, was indiſpenſibly obliged to ſwear, or refer the Matter to the Oath of the other Party, who gave him his Choice. The Reader may examine the Reaſons of this Author, which appear to me not unanſwerable.

Remark of *Libanius* [1], *He who deſpairs of all other Means, and hath but one Remedy left, which is not to be obtain'd otherwiſe than by Lying, will certainly dare to change one Danger for another, knowing the preſent Miſchief which is before his Eyes to be unavoidable; but, as for the future Evil, often flattering himſelf that he ſhall be able, by Worſhip, Sacrifices, Gifts and Oblations, to bribe Heaven into a Pardon.* But for an Account of theſe ſeveral Kinds of *Oaths*, the Writers on the Civil Laws are to be conſulted at large [2].

XXIII. In relation to the Breach of *Oaths*, this Queſtion ſtill remains to be reſolv'd, ſince it is uſual, in civil Governments, to bind Men by *Oaths* to the faithful Diſcharge of their reſpective Truſts and Imployments, whether he is always to be deem'd guilty of Perjury, who hath neglected any one Part of this Duty? Where the Controverſy is not about thoſe *Oaths* which regard ſome peculiar Act; as, when a Man gives his Evidence, denies a Truſt, forſakes a particular Promiſe, and the like, (for he who violates theſe ought, no doubt, to be branded as forſworn) but about ſuch in which the Party binds himſelf to many Things together: As when Perſons are admitted to any Office, to be diſcharg'd by different Performances. And here there ſeems to be no Reaſon why we ſhould ſcruple to take the affirmative Side, in caſe the Breach was made againſt Knowledge, and with deliberate Wickedneſs. Only, that there are different Degrees of Perjury, as well as of other Crimes. For as he is reckon'd leſs guilty, who hath tranſgreſs'd a Law or two, than he who hath at once renounc'd all civil Government, or hath committed Treaſon againſt his Prince; ſo he, who hath violated the whole Sum of his Duty, contracts a more heinous and aggravating Perjury, than he who hath broken only a Part [a]. Nor ought we to give any heed to thoſe Authors, who are of Opinion, that Perſons in theſe Circumſtances may be abſolv'd from the Sin of Perjury, by ſubmitting to the Penalty of the Law. For unleſs, when the Obligation was firſt entred upon, it was expreſly left to the Choice of the Perſon, either to perform what he promis'd, or, at a certain Price, to purchaſe the Liberty of doing the contrary [b], the Puniſhment ſhall, by no Means, render him clear from the Crime [3]; as we ſhall prove more at large hereafter. Thus he who hath ſuffer'd a Whipping for Thievery, is no leſs a Rogue [4], than if he had never felt the Laſh.

XXIV. What is uſually debated amongſt Authors about the Diſpenſations, and Relaxations of *Oaths* and of *Vows*, may be wholly determin'd by the fixing two Principles, or Rules. The firſt, That a Perſon, who in Regard both to his Actions and his Poſſeſſions is under the Government of another, can diſpoſe of nothing to his Governour's Prejudice; and if any ſuch Diſpoſal be made, it ſhall be lawful for the Governour to revoke it. The other is, That he, who is inveſted with ſuch Authority over any Perſon, may, as he ſhall think convenient, retrench and confine any Rights, which the Party under his Direction hath already obtain'd; and much more thoſe which he ſhall obtain hereafter. Whence it appears, that the Acts of Superiors are not of ſufficient Force to hinder the Performance of an *Oath*, ſo far as it was truly obligatory; that is, an *Oath* not defective in it ſelf, and made about a Thing, which the Juror may diſpoſe of at his Pleaſure, cannot be diſannull'd by a Superior. Thus the *Roman* [c] Senate could not revoke the *Oath* which *Regulus* made to the *Carthaginians*, engaging him to return: Though indeed in this particular Caſe there was another Reaſon; inaſmuch as *Regulus* was now in a Condition of Slavery under his Conquerors, and therefore the *Romans* had loſt all their Power and Authority over him. But when the Subject of the *Oath* is any Thing or Action falling under the Direction of the Superior, it ſhall then borrow all its Force from the Superior's Conſent, either tacit or expreſs; and he may, if it diſpleaſe him, declare it null and void. Nor is there the leaſt Danger of Perjury to be fear'd, when an *Oath* is thus revers'd. Since the Perſon under Government ought to have preſuppoſed his Governour's Approbation as a neceſſary Condition. Nor doth the Superior ſin in thus cancelling what the other hath ſworn; becauſe he only exerciſeth his Right in hindring the Inferior from acting in Prejudice of his juſt Prerogative. And 'tis the ſame Thing as to the Nullity of the *Oath*, whether the Superior prohibits all *Oaths* on ſuch certain Subjects beforehand, or whether, when they have been already made, he forbids their Performance. Though, in the former Caſe, the Inferior incurs a very heinous Guilt, in thus raſhly preſuming to ſwear againſt the Prohibition. The Father, by the *Jewiſh* Law, *Numb.* xxx. 4, *&c.* was allow'd to revoke the ſworn Vows of his Daughter, whilſt under his Direction; the Husband of his Wife, the Maſter of his Servant, if they thought convenient: For, otherwiſe, the Parties here, who were to live in Obedience, might, by ſwearing, and vowing, have render'd the Power of their Governours wholly uſeleſs. Nay, *Leo Mutinenſis* [d] reports, *That if any Perſon had entred on an Oath or Vow of what Kind ſoever, and afterwards upon good Reaſons repented of it; and if it did not lead to the Prejudice of a third Party, the Reaſon of his re-*

[a] Yet add *Sanderſon* de Oblig. *Juramen.* prælect. iii. ſ. 18. *Wales* and *Hamietta*, in *Gramond.* Hiſt. *France*, B. xvi. Artic. 23. *Hebræorum*, Par. II. c. 4. ſ. 4.

[b] See the Articles of Marriage between *Charles* Prince of

[c] See *Grot.* l. ii. c. 13. ſ. 20. n. 1, 2.

[d] *De ritibus*

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[1] *Libanius*'s Greek is, Ὅτῳ δὲ τὰ μὲν ἄλλα ἀπέγνωσαι, εἰς δὲ ὑπολείπεται πόρος, ὃν οὐκ ἔστι μὴ ψευσάμενον ἔχειν. ὁ δὲ τοιοῦτος τολμᾷ κίνδυνον ἀνταλλαττόμενος κινδύνῳ. τὸν μὲν ἐν ὀφθαλμοῖς ἄφυκτον εἰδὼς, ὑπὲρ δὲ ἐκείνου πολλάκις αὐτὸν ἀπατῶν· ὡς καὶ θυσίαις, καὶ θεραπείαις καὶ εὐχαῖς, καὶ ἱερείοις καὶ κάλλει ἀναθημάτων, συγγνωμόνας ἂν κατασκευάσαι τοὺς θεούς ἔπειτα τῷ μὲν τὴν δίκην μέλλειν ἡγεῖται, τῷ δὲ τὸ δεινὸν εὐθὺς ἐφεστάναι· ἐλαττοῖ δὲ τῆς ἐπικειμένης, τὴν ὅπῃ παρεῦσαν κρίνει, κατ' αὐτὸν τὸν χρόνον.

[2] Such is the Oath called *Juramentum Calumniæ*, or *de Calumnia*; The Uſe of which was made general by the *Roman* Law in after Times, (for before they only requir'd it in certain Caſes, and from one Party only;) here both Parties ſwear when they enter their Action, that they act honeſtly, *i. e.* the one, that he believes his Demand well grounded, and the other, that his Defence is juſt, and that neither of them deſign to find out Tricks and Evaſions to hinder or delay an equitable Determination. See *Cod.* l. ii. tit. 59. *De Jurejurando propter calumniam dando*, and the *Novel* xlix. c. 3. §. 1. And the Commentary of *Cujas* upon theſe Places. But ſince this Oath is often an Occaſion of Perjury either to the Plaintiff or Defendant, and ſometimes to both, it is with much Reaſon baniſh'd moſt Courts. Another Sort of Oath famous in the *Roman* Law is *Juramentum in litem*, which the Judge in certain Caſes adminiſters to the Plaintiff, for the Eſtimation of what he declares to be due to him, when the Defendant either will not, or cannot pay him, and either acts diſhoneſtly, or is guilty of ſome groſs Fault. See *Digeſt.* l. xii. tit. 3. *De in litem jurando*, & *Cod.* l. v. tit. 53. Mr. *Thomaſius* in his Diſſertation, *De pretio affectionis in res fungibiles non cadente*, reprinted at *Hall* in 1707, has many curious Things on this Subject, and which may rectify the Notions of our Modern Lawyers. Above all, ſee the Commentary of M. *Noodt*, p. 289. *& ſeqq.*

[3] See Lib. viii. c. 3. §. 4. at the End.

[4] See Lib. i. c. 9. §. 6. above.

trafting

tracting having been produc'd and approv'd, he might by one Rabbin, *or three other Men, be absolv'd.* Another Way there is, by which the Effect of an Inferior's *Oath* may be made to depend on the Pleasure of his Superior; namely, if the Superior so constitute and ordain, that what the Inferior shall swear in such a particular Case, shall not be valid 'till it hath receiv'd his Approbation. And thus, in the *Civil Law*, under the Head of *Oaths*, it [a] is inserted as a necessary Caution, That *the Right of Superiors is always excepted in the Case of Swearing*: Or, that all *Oaths* are to be construed with a Salvo to that Right. Now it is evident, in all these Instances, that the Relaxation of an *Oath* can only be made by him who is invested with Authority over the Swearer, and with such Authority, as implies in it this degree of Power. And therefore it was of old very properly claim'd and executed by the *Roman* Emperors: As appears from *l. ult. D. ad municipalem* [1], where *Antoninus* and *Verus* dispense with a certain Person's *Oath*, who, having sworn never to come into the Assemblies of his Order, was afterwards created *Duumvir*: Because a Subject cannot, by any *Oath* of his, with-hold his Service, when requir'd by the Commonwealth. And so *Tiberius*, in *Sueton* [b], granted a *Roman* Knight the Power of being divorced from his Lady, whom he had taken in Adultery with his Son-in-Law, though he had before sworn never to put her away: The Emperor declaring, *That the Oath could not be so far extended, as to reach the present Case, where the Wife, by so infamous a Crime, had rendred herself unworthy of cohabiting any longer with her Husband.* Afterwards the Christian Emperors very frequently delegated the Bishops to preside and to determine in the Affair of Dispensations; that if any Scruple should happen to arise, the Opinion of their Sanctity and Goodness might satisfy the Minds of less intelligent Judges. Yet it is too notorious how extravagantly some Ecclesiasticks, and especially he who pretends to be the Chief of that Order, the Bishop of *Rome* [2], have stretch'd this Privilege, and what a Flood of Mischiefs hath over-spread the Christian World from its Abuse. And, indeed, since we are to proceed by the Principles of Law in determining what Kinds of *Oaths* may be releas'd, and for what Reasons, I know not why the Clergy should assume more Authority in this Point, than the Men of the other Profession.

And farther, sometimes, when an *Oath* cannot be made void on the Side of the Swearer, the Force and Efficacy of it may yet be stopp'd by the Superiority of the Party towards whom the *Oath* is directed, and who obtains a Right upon it; either by taking this Right from him, or by forbidding him to make use of it, in receiving what the other hath sworn to pay. And this may be done either in the Way of Punishment, or on account of the publick Advantage, by virtue of the Superior's Prerogative. In which Case the Swearer is free from all Danger of Perjury, because he is not the Occasion of the Non-performance; and he is releas'd from all Necessity of fulfilling his *Oath* by the Party, who, either in a direct, or in a more eminent and extraordinary Manner, acquir'd a Right by virtue of it [c]. To conclude, a Prince who, upon just Reasons, dispenseth with an *Oath*, doth not commit the least Sin, in thus hindring an Act, which was solemnly undertaken with the Invocation of the Divine Majesty, from producing its regular Effect: Though the Subject may sometimes incur a Guilt, by rashly using the Name of GOD to confirm an Act, which he ought to have known was prejudicial to the Right of his Superior.

[a] Vid. *Jus. Can.* c. 19. Add. tit. 55. l. ii. *Feudorum. Matt.* v. 37.

[b] *Tiber.* 35.

[c] Comp. *Grot.* loc. cit. Sect. 20. n. 3. & ad

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[1] The Latin is, *Imperatores* Antoninus & Verus *rescripserunt, gratiam se facere jurisjurandi ei qui juraverat, se ordini non interfuturum, & postea Duumvir creatus esset*, Digest. l. 50. tit. 1. *Ad municipalem, & de incolis*, leg. 38.

[2] See Mr. *La Placette*'s Treatise of an Oath, l. ii. c. 24. It is evident, that an Oath is one of those Things by which the Clergy have most effectually advanced their temporal Interests, and encroached upon the Rights of the Magistrate. Before the Emperors were Christian, an Oath was not always required of Witnesses. 'Twas *Constantine* that made the Formality absolutely necessary. See Mr. *Thomasius*'s Discourse, *De Fide Juridica*, c. 2. §. 61, &c. and in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 9. §. 3. But this learned Lawyer did not attend to a Passage of *Seneca*, which plainly proves the Contrary, and which M. *Noodt* has cited in his Commentary, p. 480. It is in his Treatise *De Ira*, where this Philosopher says, That no Regard was paid to the Deposition of a Witness, who was not upon his Oath: *De parvulâ summâ judicaturo tibi res sine teste non probaretur; testis sine jurejurando, non valeret.* Lib. ii. cap. 29. All the Innovation made by *Constantine* was, That he ordain'd the Witnesses should be sworn before they were allow'd to give their Testimony: *Jurisjurandi religioni testes, prius quam perhibeant testimonium jamdudam arctari præcipimus.* Cod. lib. iv. tit. 20. *De Testibus*, lib. ix. This is, also, the Opinion of *Jaques Godefroi*, in his Commentary on the *Theodosian Code*, Tom iv. p. 322. where, nevertheless, he does not pronounce decisively, probably because he had never seen the Passage of *Seneca* just cited. However this be, 'tis otherwise certain, that after the Use of Oaths was introduced into the greatest Part of the Affairs of Life; and as the Clergy artfully took upon them the Right of judging of the Validity of Oaths, they, by that Means, drew to themselves the Cognizance of almost all Civil Causes. We know that the Pope has assumed the Authority of disannulling Treaties most solemnly sworn to, as *Eugenius* IV. did in Favour of *Ladislaus*, King of *Hungary*, with Regard to Sultan *Amurath* II. and to absolve Subjects from the Oath of Allegiance made to their lawful Sovereigns. In a Word, the Clergy have omitted nothing in this Respect, no more than in other Things, to strengthen and increase their Power under the Name of Spiritual, which they have extended as far as they could, and proportionably lessen'd the Temporal, which they have left with Regret to Magistrates and Princes.

CHAP. III.

Of the Power of Mankind over the Things of the World.

I. *The greatest Part of the Law is employed about worldly Things.*
II. *Man uses other Creatures by GOD's Ordination.*
III. *Man does no Injury by destroying Vegetables.*
IV. *Some Doubts about killing and eating living Creatures.*
V. *Which yet is proved to be lawful.*
VI. *The Abuse of our Right over living Creatures is to be reproved.*

I. SUCH is the Constitution of Man, that it cannot be preserved by its own internal Substance, but needs continually to take in the Assistance of certain Things from without, as well for its Nourishment and Support, as for its Defence against those many Enemies which seek to ruin and dissolve its Frame. Again, a great Part of what the World affords, turns another Way to the

the Service of Mankind, in rendering Life more commodious and more eaſy. *Heſiod.* Op. & Dier. ver. 684. *For Riches are the Soul of feeble Men* [1]. Now, with Regard to theſe Matters, a Multitude of Buſineſs and Tranſactions paſs betwixt Men, and large Occaſion is adminiſtred to Controverſies and Strifes: And leſt the common Peace of Mankind ſhould be diſturb'd by ſuch Diſputes, as the Law of Nature hath, with due Caution, provided, ſo the civil Ordinances of moſt Nations are, in this Reſpect, found moſt careful and Solicitous. For the full Illuſtration of which Subject, we ought, firſt of all, to enquire, by what Right it is that human Race claims the Diſpoſal of other Creatures, whether animate, or inanimate; for their Uſe, their Conveniency, or their Pleaſure; as, likewiſe, on what Principle this Power is founded, in Reſpect both of the Creator, and of the Creatures themſelves, which Man not only uſeth, but, very often, perverts, embezzles, and deſtroys.

II. It is therefore beyond Diſpute, that Almighty GOD, inaſmuch as he is the Maker and the Preſerver of all Things, doth, likewiſe, hold, as it were, an originary and ſuper-eminent Property over all, and they belong ſo ſtrictly to him, as that no one can pretend to the leaſt Right in them, without his Permiſſion or Conſent. Concerning which Dominion or Property of Almighty GOD, *Philo* the *Jew* (lib. de *Cherubim* p. 97. Ed. *Genev.*) treats at large, and with Regard to that ſuperior Right, called the Right which Men hold over Things [2] *Uſufructuary* only. Yet becauſe he himſelf ſtands in Need of no foreign Succour, and becauſe it is not poſſible for any Thing beſides to make an Addition to his Happineſs; therefore his Goodneſs inclin'd him to be bountiful and gracious to his Creatures, and to give them the Privilege of uſing each other for their mutual Benefit. But Man eſpecially hath in ſo extraordinary a Manner taſted of the Divine Favour, that all other Creatures are, by a common Strain of Speech, ſaid to have been at firſt made for his Uſe and Service. Though this Right of GOD over all Things is very different from the Right of Men to the ſame Poſſeſſions. So that the Reaſoning of *Diogenes* the *Cynic* [a] was falſe and vain, when he thus argued, *All Things belong to the GODS; wiſe Men are the Friends of the GODS; all Things are common amongſt Friends; therefore all Things belong to wiſe Men.* Yet it is too bold and arrogant a Pretenſion in ſome Authors, whilſt they tell us, That ſhould any Thing fail of turning to the Advantage of Mankind, it muſt follow, that ſuch a Thing was created in vain; and that 'tis hence apparent, that the whole World is the common Poſſeſſion of human Race, and what they may (if thus taken as a general Body) not unjuſtly term *their own.* This was *Ariſtotle*'s Miſtake; *If then,* ſays he, *Nature* [b] *makes nothing imperfectly, and nothing in vain, ſhe muſt of Neceſſity have made all theſe Things for the Sake of Men. Lucian* [c] delivers himſelf to the ſame Purpoſe; *Had not Men been created, the Conſequence of the Omiſſion had been no leſs than this, That all the Grace and Beauty of the reſt of the World had ſhone without a Witneſs, or Beholder; and that the* GODS *themſelves had deſpis'd their own Wealth, as not worth the Enjoying* [3]. But certainly the great Frame of the Univerſe might, in all Appearance, have been more compendiouſly erected and adorn'd, had it been the Intention of its Author to make nothing but what ſhould, in ſome Reſpect or other, ſerve the Occaſions of Men [d 4]. And it was not ill ſaid of *Seneca, Nimis nos* [e] *ſuſpicimus, ſi digni nobis videmur, propter quos tanta moveantur: We are too much taken with the Admiration of our own Nature, if we fancy ourſelves worthy to have all theſe glorious Works move only on our Account.* Yet let this be as it will, thus much is evident; that Man makes his Advantage of other Creatures, by the Grant and Licence of Heaven: As we may apprehend from this eaſy Argument, That, without the Uſe of thoſe Things, human Life could not be preſerv'd, for which Service ſome of them do, as it were, freely deliver themſelves up into our Hands. Since then GOD Almighty hath conferr'd on Man the Privilege of Life, he is, at the ſame Time, ſuppos'd to have allow'd him the Uſe of every Thing neceſſary for the keeping and maintaining of that his Gift [f]. The ſame Truth is confirmed by the Authority of the Holy Scriptures, which expreſly mention GOD's inveſting Man with Power and Dominion, not only over Vegetables, but over every living Thing, produced either in the Air, in the Earth, or in the Sea [g h]. Yet this Conceſſion hath not the Force of a Command, but only the Allowance and Indulgence of a Privilege; which any Perſon may uſe ſo far as he thinks fit, but is not bound to exerciſe it at all Times, and upon all Occaſions. For otherwiſe Man would offend againſt the Divine Law, ſhould he let any Animal go free, or ſhould he neglect any Opportunity of bringing the ſame Creature again under his Subjection; which no Man in his Wits will affirm [5]. But ſtill this Power of Man over Brute Creatures is of a different Nature from that Dominion or Sovereignty which is exerciſed over Men: Becauſe Brutes are

[a] Apud *Diogen. Laert.* l. vi. ſ. 37. ubi vid. *Menag.* [b] *Politic.* l. i. c. 8. p. 304. C. Edit. *Pariſ.* [c] *Prometh.* p. 181. tom. 1. Edit. *Amſt.* [d] See the Honourable Mr. *Boyle*'s Diſſertation concerning the final Cauſes of Natural Things. See Archbiſhop *King*'s Treatiſe *De Origine Mali*, c. iv. ſ. 2. §. 5. [e] De Ira, l. ii. c. 27. Add *Charron* de la Sageſſe, l. i. c. 40. n. 3, 4, 5. [f] Add. *Arrian. Epictet.* l. i. c. 16. initio. [g] *Gen.* i. 28, 29. [h] See *Pſalm* cxv. 16.

1 See *Gronovius*'s firſt Note on *Grotius*, l. ii. c. 1. §. 11.
The Greek of *Heſiod* is, Χρήματα γὰρ ψυχὴ πέλεται δειλοῖσι βροτοῖσι.

2 *Seneca* uſes the ſame Expreſſion, as Mr. *Hertius* has obſerved, *Uſusfructus noſter eſt, cujus tempus ille arbiter muneris ſui temperat*, Conſol. ad. Marc. c 10. As for that Paſſage of *Euripides* which M. *Hertius* joins to it, beſides that the Notion is much the ſame, our Author quotes it in the next Chapter, §. 1.

3 See an *Engliſh* Treatiſe written by Mr. *Boyle*, call'd, *A Diſcourſe concerning the final Cauſes of natural Things*, the Extract of which may be found in the Univerſal Library, Tom. ix. p. 63. And, alſo, a Treatiſe, *De Origine Mali*, written by Dr. *King*, Biſhop of *Londonderry*, and ſince Archbiſhop of *Dublin*, cap. 4. §. 2. p. 5.

4 *Montaigne*, in his Eſſays, ſpeaks ſomething like this, l. ii. c. 12. Let a Man convince me by his Eloquence upon what Foundations theſe great Advantages are built, which he prides himſelf to have over the other Creatures. Who has perſuaded him that this admirable Architecture of the World, conſiſting of the Celeſtial Arch, bedeck'd with the inextinguiſhable Lights of the Sun and Stars moving ſo ſwiftly above our Heads, the prodigious Tides of the vaſt Ocean, were at firſt created, and have continued ſo many Ages for his Convenience and Service? See *Charron* on Wiſdom, l. i. c. 40. N° 3, 4, 5. Mr. *Bayle*, alſo, in his Thoughts about a Comet, p. 226. cites another Paſſage of *Seneca*, where the Philoſopher ſays, that the Cares of Providence do indeed extend to us, and we have a Part in it, but their End is more conſiderable than our Preſervation. *Et quanquam majus illis* [*Soli, Lunæ, & cæteris Cœleſtibus*] *propoſitum ſit majorque actûs ſui fructus, quàm ſervare mortalia; tamen in noſtra quoque utilitates à principio rerum præmiſſa mens eſt, & is ordo mundo datus, ut appareat curam noſtri non inter ultima eſſe habitam.* De Benefic. l. vi. c. 23.

5 This Remark of our Author's ought to be placed at the End of this Paragraph, where it will much better agree with the Senſe.

not capable of any correſpondent Obedience ariſing from the Obligation; and becauſe this is a much more abſolute Sway, than that with which Men govern each other. The Divine Prohibition to the *Jews*, from feeding on ſome certain Animals, doth by no Means retrench or impair the Right of Men over Beaſts, the Reaſon of that Injunction ſeeming to have been taken from Phyſick [1]. Mr. *Selden* [a] reports it, as the Opinion of the ancient *Rabbins*, That *Adam* was forbidden to eat any Manner of Fleſh, (GOD having commanded him to feed on the Herbs of the Field [b]) but that *Noah* afterwards was diſpenſed with in this Particular, by the Grant in *Gen.* ix. 3. yet ſo as to be ſtill under an Obligation to abſtain from Blood, and from any Joint or Limb of any Creature, taken from it whilſt alive [c]. The ſame Author adds, That the Blood of Fiſhes was excepted from the Prohibition; nay, that they might eat theſe Creatures alive, as Oyſters, *&c.* or ſuch of them as died by Chance; neither of which it was lawful for them to do, with regard to terreſtrial Animals.

III. If, in the next Place, we conſider this Power of Mankind, with reſpect to the Things themſelves, whether animate or inanimate, which Men uſe, waſte, and deſtroy; that no Injury is hereby offer'd to thoſe Creatures, may clearly be evinced, as well from the Nature of Man, as from the Grant and Allowance of GOD. For it can, on no Account, ſeem probable, that a Maker of infinite Goodneſs, and of infinite Wiſdom, would impoſe ſuch a Neceſſity on Man, the Principal of earthly Creatures, as that he ſhould not be able to preſerve himſelf without injuring others, and, conſequently, without the perpetual Commiſſion of Sin. To which, if we add the expreſs Licence of GOD, that muſt remove all Doubt and Scruple, which might, otherwiſe, have riſen, eſpecially about the Slaughter of Animals. And, if there appear any Cruelty or Barbarity in ſuch a Practice, it is ſufficiently taken off by this one Conſideration, That their Divine Author hath appointed theſe his Creatures to ſuch a Condition, and to ſuch a Service in the World, and hath granted to Men ſuch an Authority over them, which, if they exerciſe, (whether by the Deputation, or only by the Permiſſion of GOD) they certainly do no Injury. Now, as for Vegetables, and other Things deſtitute of Senſe, there ſeems, with regard to them, to be no more of Difficulty in this Point; it being impoſſible to diſcover that they ſuffer any hard Treatment, or unjuſt Hurt, when they are conſumed by Men; eſpecially, ſince they muſt neceſſarily periſh, and be deſtroy'd, either by Beaſts [2], or by the ſpeedy Turn of the Year, and the Change of the Seaſons; and farther, ſince many of them had never been produced without human Pains and Endeavours. The Superſtition of the *Egyptians*, in abſtaining from certain Pot-herbs, is not of Weight enough to give us any Stop in the preſent Determination [d].

IV. But then, as to living Creatures, which are endued with a Senſe of their own Being, and cannot leave it without Pain and Trouble, the Point appears, in ſome Meaſure, dubious to many, who have conſider'd the Liberty of Men againſt Brutes, only on the Principles of Reaſon. For, from GOD's allowing the firſt Man to have Dominion over other Animals, it doth not preſently flow as an evident Conſequence, that he was, at the ſame Time, inveſted with ſo wide a Commiſſion, ſo infinite a Licence, that he might ſlay them even for unneceſſary Uſes [e]: For Man hath Dominion too over Man, and yet cannot, in the leaſt, pretend to any ſuch Licence as this againſt his Fellows. Nor could Men have complain'd, that the Divine Goodneſs was ſparing towards them, or had made an ill Proviſion for their Neceſſities, tho' they ſhould have been denied a Power over the Life of Animals; at leaſt of ſuch as did not threaten any Hurt or Danger to the Life of Men: Inaſmuch as the Work of thoſe Creatures, in cultivating the Earth, together with what comes from them otherwiſe, as Milk, Eggs, (ſuch as are not neceſſary for the Propagation of the Species) Wooll, and the like, might have been ſufficient to ſuſtain Men in a tolerable Way of Living. Nor did GOD, by commanding Men to ſacrifice them, as a Token of Divine Worſhip, confer any Power or Privilege of turning them, at Pleaſure, into Food. For ſuch Things as are lawful to Mankind, only by ſome peculiar Command of GOD, may ſtill remain unlawful, except in that particular Caſe. Hence it was, that many of the ancient Philoſophers utterly diſapproved of this Practice. For why ſhould Man, on the bare Account of ſuperfluous Pleaſure, rob an harmleſs Animal of that Life, which it enjoys by the Gift of the ſame common Creator? Eſpecially, ſince even the Examples of the fierceſt Wild-Beaſts, of Lions, Wolves, and other Devourers of Fleſh, will do them no Service, if urged in their Excuſe. For theſe are ſo fram'd by Nature, as not to be able to ſupport Life without feaſting on Blood, and to loath and reject that common Proviſion afforded by the Earth. Whereas Men are not under the like Caſe of Neceſſity; receiving very commodious Nouriſhment from other Food, and being obliged to prepare Fleſh by dreſſing or ſeaſoning it, before they can make it agreeable to their Digeſtion. We hear, indeed, of ſome barbarous Nations, which make Uſe of no Fleſh or Fiſh but what is raw, and ſupport themſelves with that; as *Rochefort* [f] reports of the Coaſts on *Davis*'s Streights. But the ſame Author tells us [g] of the Inhabitants of the Province of *Paſto* in *Peru*, That *they eat no Manner of Fleſh*; *and that, if deſired but only to taſte any*, their Anſwer is, *They are not Dogs.*

Others have obſerved, in relation to the preſent Enquiry, that whereas thoſe Animals, which naturally feed on Fleſh, have their Fore-teeth oblong, ſharp, and divided from each other, that ſo, by cloſing them with a deeper Stroke, they may grind and ſeparate the Pray; Man's Teeth are ſhort, joined one to the other, and ſpreading round, after the Manner of thoſe Animals, which live on Herbs and

[a] *De Jur. Nat. & Gent. ſec. Heb.* l. vii. c. 1. [b] See *Gen* i. 29. [c] Add *Deuteron.* xii. 20. [d] Vid. *Diodor. Sic.* l. i. c. 89. [e] Add *Grot.* ad *Gen* ix. 3. *Selden.* de Jur. Nat. & Gen. ſec. Heb. l. vii. c. 1. [f] Deſcript. *Antillar.* Par. I. c. 18. [g] Part II. c. 11.

[1] This is a little dubious, whatever other Authors may ſay, and particularly Mr. *Fleury*, in his Treatiſe of the *Manners of the Iſraelites*. The *Iſraelites* had not a better Conſtitution, nor a more vigorous Health, than the other Nations, who eat of ſuch Sorts of Food as they abſtained from. It ſeems that the Prohibitions of the Law were grounded upon mere politick Reaſons, ſo far as concerned their particular Notions, Opinions, and the Conſtitution of their Commonwealth. See Mr. *Le Clerc*'s Note upon *Lev.* xi. 2. and *Grotius, De Verit. Relig. Chriſt.* l. v. §. 9. But be that how it will, whatever Motive we attribute to the Legiſlator, as this Law was only poſitive, it in no wiſe deſtroys the natural Right which Man has over the Beaſts, and all other earthly Creatures.

[2] Our Author ſpeaks very pleaſantly here in all his Editions, *By other Beaſts*, as if the Beaſt Man did not ſpend and deſtroy the Vegetables, the other Beaſts would. And Mr. *Hertius* has overlook'd this great Miſtake in his Edition of 1706.

Fruits,

Fruits; and that on this Account we are neceſſitated to make uſe of Knives for dividing the Fleſh we eat; whilſt the Creatures, which eat this as their natural Food, ſtand in no Need of ſuch Aſſiſtances or Inventions: That thus we ſee Children, by the bare Impulſe of Nature, loving Fruit beyond all other Proviſions, and preferring Apples, Cherries, and Nuts, to the moſt exquiſite Dainties of Fleſh; becauſe in them Nature is not yet corrupted, nor their Appetites debauch'd by ill Cuſtoms of Eating [a]. It is farther evident, that the Fierceneſs and Cruelty of Men, having been firſt excited, encouraged, and hardened by the Slaughters of Beaſts, afterwards broke out againſt their own Kind; and thoſe, who had taken a Delight in deſtroying the harmleſs Race of dumb Creatures, made it their next Step to murther weak and defenceleſs Men. *Diogenes Laertius*, in his Life of *Pythagoras* [b], reports that Philoſopher to have forbid the killing of Animals [1], κοινὸν δίκαιον ἡμῖν ἐχόντων ψυχῆς, *As enjoying the ſame common Right of Life and Soul with ourſelves. This, indeed,* (as the Hiſtorian goes on) *was his Pretence: But the true Reaſon of his commanding his Followers to abſtain from all living Creatures, was, That he might exerciſe and train Men up in a more eaſy Method of Food, by Means of which they might always have ready at Hand, a large Proviſion of Meat, requiring no Fire to dreſs it; and as much Drink as they had plain Water. For this Way of Suſtenance he thought moſt proper to produce Health of Body, and Quickneſs of Mind.* Tho' *Lucian* (*in ſomnio ſeu Gallo*, Vol. II. p. 174.) bringing him in under the Shape of a Cock, makes him give this Reaſon for his Opinion: "I conſider, *ſays he*, that if "the Precepts I ſet on Foot were common, and "ſuch as many had deliver'd before, I ſhould not "be able to prevail with the World to look upon "me as any extraordinary Perſon; but the more "ſtrange and unuſual the Doctrine ſhould be, "which I offer'd, the more new and ſurprizing I "ſhould appear, and gain the more Admiration." *Add* Jo. Scheffer. *de Philoſoph. Ital.* c. 14.

Plutarch in *Grill.* "Man, with a craving Appetite, drawing all Things to himſelf, trying all "Things, taſting all Things, as being ſtill ignorant "of his own Nature, or what is agreeable to it, is "the only Creature in the World that lives, in general, upon every Thing which comes to his "Hands. *Firſt*, He uſeth Fleſh without the Excuſe "of Want or Neceſſity, when he might, at any "Time, gather other Food from the Seeds and "Plants, with an inexhauſtable and never-failing "Store. But thro' Luxury, and Diſdain of his proper and neceſſary Proviſion, he follows ſtrange "and polluted Diet in the Slaughter of Beaſts, exceeding the moſt ſavage Creatures in Fierceneſs "and Cruelty: For Blood, and Slaughter, and "Fleſh, are the proper Suſtenance of the Kite, the "Wolf, and the Dragon, as Fiſh and Spoon-meat "are of Men." The ſame Author, in his ſecond Oration *about the Eating of Fleſh*, among many other Things, offers what follows: "At firſt they fed, "perhaps, on ſome wild or hurtful Animal; then "on Birds and Fiſh, 'till their Appetite, thus taught "and accuſtom'd, proceeded to the Ox that labours in our Service; to the Sheep that cloaths "and adorns us; to the watchful Cock that guards "our Houſe. Hence, by Degrees, adding Strength "and Force to their inſatiable Deſires, they broke "out into the Murther of their Brethren, and the "Miſeries of Blood and War.

Aratus Phænom.

"The faithful Ox, accuſtom'd to the Plough,
"Defil'd the Table.———

"Add *Plin.* l. vii. c. 45. & *Val. Max.* l. viii. c. 1. "*inter damnatos*, n. 8.

"*Sueton. Domitian.* c. 9. *Ælian.* V. H. lib. v. "cap. 14. *Dio Chryſoſt.* Orat. 64. p. 592. Edit. *Morell. Cicero de nat. Deor.* lib. ii. c. 60.

"*Nicol. Damaſcenus* reports of the *Phrygians*, "That it was a capital Crime amongſt them to kill "a labouring Ox, or to ſteal any Inſtrument of "Agriculture. So *Aloys Cadamuſt*, in his Voyages, "c. 57, 60. tells us, That the People of the Kingdom of *Calecut* ſhew the like ſacred Veneration "to Oxen. And the *Nomades*, as *Diodor.* &c. relates, l. iii. c. 32. p. 165. Ed. *Rhodom.* gave the "Bull and the Cow, as, likewiſe, the Ram and the "Ewe, the Name of *Parents*, as affording the "daily Support of Life. *Strabo*, l. xv. p. 409. obſerves of the *Brachmans*, that they eat the Fleſh "of thoſe Creatures only, which do not aſſiſt "Mankind in their Works. *Varenius*, Deſcript. "*Japon*, c. 23. reports much the ſame of the *Japoneſe*; who are ſaid, likewiſe, to profeſs an Averſion to Blood, and no leſs to Milk, which they "take to be nothing elſe but white Blood.

"We may here, likewiſe, by the Way, remark "what is in *Plutarch*'s *Sympoſiac.* lib. iv. c. 4. to "prove that Fiſh are the moſt proper Diet. For, "ſays he, as to the Creatures which live with us "upon the Earth, ſuppoſing them to have no other "common Rights with Mankind, yet, at leaſt, they "receive the ſame Nouriſhment, they breathe, and "waſh, and drink as we do; and when we kill "them, their piteous Cries make us bluſh for our "Cruelty: Beſides, that the greateſt Part of them "are made familiar to us, by dwelling and feeding "ſo near. Whereas, on the contrary, the Race of "Sea Animals is utterly ſtrange to us, is born and "bred, and lives, as it were, in another World; nor "are we reſtrain'd from killing thoſe Creatures by "their Cry, by their Aſpect, or by any Service "that they can do us. For they can, indeed, be no "Way uſeful in our Buſineſs, not being able ſo "much as to live in our Element. Our Earth is a "Kind of Hell to them; they die almoſt as ſoon "as they touch it. On the other Side, the *Pythagoreans* were more averſe to eating Fiſh than any "other Animals; the Grounds of which Opinion "are examin'd at large by the ſame Author, *Sympoſ.* l. viii. c. 8. So, likewiſe, *Xiphilin.* reports, "That the *Caledonians* never taſted Fiſh; nay, tho' "they had them in great Plenty, *Epit. Dion.* in "*Sever.* One of the Reaſons there given, is this, "That other Animals deſerve their Death at our "Hands, by ſome Way or other doing us Miſchief; "whereas the Fiſh neither hurt us, nor are able to "hurt us. That, amongſt other Animals, ſome "ought neceſſarily to be kill'd, leſt, by multiplying "too faſt, they ſhould rob Men of their Suſtenance;

[a] Vid. *Anton. le Grand.* Inſtit. Philoſ. *Carteſ.* Part VI. Art. 3. [b] Lib. viii. Sect. 13.

[1] The original *Greek* is this, Τοῦτον γὰρ καὶ τὸ φονεύειν ἀπαγορέυειν, μὴ ὅτι γε ἅπτεσθαι τῶν ζώων κοινὸν δίκαιον ἡμῖν ἐχόντων ψυχῆς, καὶ τὸ μὲν ἦν τὸ πρόσχημα· τὸ δ' ἀληθὲς, τῶν ἐμψύχων ἀπεγόρευεν ἅπτεσθαι, συνασκῶν καὶ συνεθίζων εἰς εὐκαλίαν βίου τοὺς ἀνθρώπους, ὅτε εὐπορίστως ἔχοιεν πρὸς τὰς τροφὰς, ἀπυρα προσφερομένοις, καὶ λιτὸν ὕδωρ πίνουσιν, ἐντεῦθεν γὰρ καὶ σώματος ὑγίειαν, καὶ ψυχῆς ὀξύτητα περιγίνεσθαι. Διὸ καὶ Πυθαγόραν, *Pithagoras*'s Speech in *Ovid*'s Metam. xv. Fab. 2. v. 75, &c. *Grot.* ad *Gen.* xlvi. 34. *Plato Timæo* circ. fin.

" as Cunnies and Hens. Whereas (again) the Fiſh, " being born, as it were, in another World, give " us no Occaſion to hurt them : But we are ſet " againſt them only becauſe our extravagant Gree- " dineſs and Luxury is ſupplied by their Deſtruc- " tion." *Porphyry* [a] is very prolix in attempting to ſhew, that Abſtinence from Fleſh is, in the higheſt Manner, the Duty of Philoſophers, who place all their Happineſs in GOD, and in the Imitation of the Divine Nature. Amongſt a great Number of Arguments, the Subſtance of which hath been, for the moſt Part, already deliver'd, he endeavours to demonſtrate, That all Souls, endued with Senſe and Memory, are, likewiſe, Partakers of Reaſon ; and that ſince we may diſcover thus much in other Animals, we ought to extend our Juſtice to them, which conſiſts principally in offering no Hurt without due Cauſe : And that we have a convincing Evidence of the Reaſon of Brutes, in their being capable of Madneſs and Diſtraction. To this Time the *Benjans* in *Cambay*, believing the Souls of Men to remove, at Death, into the Bodies of Beaſts, never hurt any living Creature, nor dare to turn them into Food ; nay, they have Hoſpitals erected on Purpoſe, for the Reception of diſeaſed and maimed Birds [b]. *Phill. Baldæus*, in his Deſcription of the Iſland *Ceilon* [c], reports, *That the* Bramines, *even when converted to Chriſtianity, keep their old Method of Living; and that if they be encounter'd with that Text of Scripture,* To the Clean all Things are clean ; *they reply in another, that,* the Kingdom of GOD is not in Meat and Drink : *That they have been ever accuſtom'd to their light and eaſy Diet, and find themſelves very well upon it.* Thus the whole Nation of the *Apalchitæ*, of old, never taſted Fleſh or Fiſh, till they learnt this Cuſtom from the *Europeans* [d].

V. But though, in theſe Arguments and Authorities, ſo much ought juſtly to be commended, as makes for the Encouragement of Temperance and Frugality, and for the hindering the finer Spirits from being obſtructed, and, as it were, mir'd up with too groſs Feeding ; yet, that the killing and the eating of animate Creatures is really not ſinful, may be ſufficiently proved by the bare Strength of Reaſon : And the main Evidence ſeems to be this, That no mutual Right or Obligation paſſeth [1] between Men and Brutes, nor ought to paſs by the Direction of Nature [e]. For we neither find that the *Law of Nature*, by virtue of its abſolute Authority, commands us to maintain Friendſhip and Society with Brutes ; nor are they capable of ſuſtaining any Obligation towards Men ariſing from Covenants. From which Defect of all common Right there follows, as it were, a State of War, betwixt thoſe who both are able to hurt each other, and are, upon very probable Grounds, ſuppoſed to be willing. And, in this State, each Party hath Liberty to do to the other, with whom he is thus engaged in Hoſtility, whatſoever he thinks conducive to his own Intereſt and Convenience. Yet ſuch a State of War, in which Men ſtand towards Brutes, is very different from that which ſometimes ariſeth from Men's Claſhing amongſt themſelves : Inaſmuch as the latter is neither univerſal, nor perpetual, nor extends itſelf promiſcuouſly to all Manner of Licenſe againſt each other. As for the fiercer Animals, they give evident Proofs of their being placed in this hoſtile State, whilſt, upon every Advantage and Opportunity, they are ready to exerciſe their Violence againſt Men ; and he that would have us ſpare theſe, doth, at the ſame Time, require us to put them under fiercer Circumſtances, and a more ſecure Condition than ourſelves. And then the more mild and gentle Creatures do not offer themſelves to the Service of Men, by virtue of any Obligation, but as they are either bribed by Food, or conſtrained by Force ; upon Removal of which Inducements they will return to their natural Liberty, and ſome of them will be ſo hardy as to aſſault and encounter Man. Again, others increaſe ſo prodigiouſly, that it is neceſſary for us to retrench their Number, leſt we ſhould be ourſelves reduced to a narrow and inconvenient Dwelling [f]. It is to no Purpoſe denied by ſome, that the Lawfulneſs of hurting and of eating Brute Creatures may be inferr'd from this Defect of common Right between them and Men : *Becauſe,* (ſay theſe Authors) *though no Injury be done to the Brutes, yet we injure the Creator of them, (unleſs we are ſure of his Conſent) as, likewiſe, their Owners or Proprietors.* But this Objection is vain and idle : For that very Conſideration, that the Divine Creator hath not eſtabliſhed a Right common to Men with Brutes, is a ſufficient Evidence, that he ſuſtains no Injury, when they are hurt by Men ; becauſe he himſelf was pleaſed to ordain this State and Condition between the former and the latter. And, as to the other Part of the Objection, it is a different Queſtion, Whether Man can do any Injury to a Brute ? And whether, by the Intervention or Occaſion of a Brute, he may injure another Man ? The firſt is only denied by what we are now aſſerting, and not the ſecond : Nor will it be impertinent to the Argument in Hand, to add this farther Remark, That ſince the tame and harmleſs Beaſts would be otherwiſe expoſed an eaſy Prey to the Violence and to the Hunger of the wild and ravenous, their Condition is rather better'd than impair'd by that high Degree of Power which Men exerciſe over them ; which, in affording them a conſtant Proviſion of Food, doth, as it were, pay them the Price of their Life, and, likewiſe, protects them againſt the Aſſaults of their ſavage Enemies [2]. Now, what hath been here ſuppoſed, That there is

[a] Lib. iv. περὶ ἀποχῆς. [b] Add *Abrah Roger.* de *Bramin.* Par. I. c. 1. & 18. [c] C. 47. [d] *Rochefort* deſcript. *Antillar.* P. II. c. 8. [e] Cicero *de Finib. bonorum & malorum,* l. iii. c. 20. [f] See *Exod.* xxiii. 29. *Deut.* vii. 22. Add *Gaſſend.* Syntagm. Philoſoph. *Epicur.* Part III. c. 27.

[1] See l. ii. c. 3. §. 2. before-going, and *Grotius*, l. i. c. 1. §. 11. *Cicero* has a Paſſage, alſo, from whence this Conſequence ſeems to be drawn, *homini nihil juris eſſe cum beſtiis. Præclare enim Chryſippus, cætera nata eſſe hominum cauſa & Deorum, eos autem communitatis & ſocietatis ſuæ, ut beſtiis homines uti ad utilitatem ſuam poſſint ſine injuriâ.* The ſame Author, alſo, has another Paſſage, ſhewing the Right that Man has over Beaſts, and other Creatures : *Itaque ad hominum commoditates & uſus tanta rerum ubertatem natura largita eſt, ut ea, quæ gignuntur, donata conſulto nobis, non fortuito nata videantur ; nec ſolum ea quæ frugibus atque baccis terræ fætu profunduntur, ſed etiam pecudes ; quod perſpicuum ſit, partim eſſe ad uſum hominum, partim ad fructum, partim ad veſtendum procreatas.* De Legibus, l. i. c. 8.

[2] It will be proper here to add two Reflections made by Mr. *Le Clerc*, in his Phyſicks, l. iv. c. 12. §. 15. " 1. The Beaſts, which " we kill, would die of themſelves in a few Years ; and when they die, their Souls die as well as their Bodies ; ſo that they loſe no- " thing by Death. It is, certainly, a Piece of Cruelty to deprive thoſe Beings, that have Senſe, of a Thing, whoſe Loſs they feel, " and which gives them Pain, but not to deſtroy a Being which has no Senſe after its Deſtruction. So that a Man, who kills ano- " ther, ought to be regarded as cruel, becauſe Mens Souls ſurvive their Bodies, and paſs into an Eſtate, where they may lament " their Deprivation of Life. But Beaſts, being once dead, feel nothing, becauſe their Soul periſhes at the ſame Time, tho' we " know not in what Manner ſoever it be done. 2. It is Cruelty to ſeparate, from the Body of a living Creature, a Nature that

" hath

is no common Right uniting and equally affecting Men and Brutes, others have long ſince demonſtrated [a]. Which too is the Reaſon (as we may here add by the Way) why Property obtains its Force and Effect only againſt other Men, and not, in like Manner, againſt Brutes; inaſmuch as they, when they devour what we poſſeſs, cannot be ſaid to do us an *Injury*. Thus GOD, in the Language of Scripture, [b] *feeds the Birds* [1], even when they conſume the Corn produced by our Toil and Labour. Yet the Owner of Beaſts may ſometimes do us Injury or Damage, when they break in and deſtroy our Harveſt, for not keeping them with a ſtricter Care. In one Reſpect, indeed, and in a very wide Senſe, the Beaſts themſelves may be ſaid to have the ſame Right with us; when, by the ſame Right (as it were) by which they invade our Poſſeſſions, by the ſame we drive them from thence.

VI. Yet, that the Abuſe of this Power, and eſpecially ſuch as is attended with fooliſh Cruelty and Barbarity, deſerves to come under Cenſure [2], is beyond Diſpute: For, as it is the Intereſt of particular States, that no Perſon ſquander away, or waſte and ſpoil his Poſſeſſions; ſo it turns to the Prejudice of the univerſal Society of Mankind, and to the Diſhonour of GOD, the Giver of ſo great Gifts, to conſume them idly and wantonly, without promoting any Benefit or Advantage of Life. Thus GOD was pleaſed eſpecially to command the *Jews*, to allow their Cattle Reſt from all Work on the Seventh Day [c]. *Plutarch* [d] tells us, *The* Athenians *inflicted a Penalty on a certain Perſon who had ſtript a Ram of his Skin whilſt alive* [3]. And the Followers of *Pythagoras*, as *Porphyry* obſerves, made Gentleneſs and Mercy towards Beaſts, the Introduction to Love and Pity towards Men, l. iii. c. 20. p. 125. Ed. *Cantab. de Abſtinentia*. Nor was the Advice of the *Chineſe* Philoſopher *Mentius*, altogether amiſs, *That the King ſhould give no Perſons Leave to uſe Nets with ſmall Maſhes; that by this Means the greater Fiſh only ſhould be taken, and the leſſer have Power to eſcape; which, ſufficiently growing up in the following Years, would afford a Supply at all Times, and for all Perſons.* As, likewiſe, *that none ſhould be allow'd to kill* Hens, Porkers, *or other Animals, before they were come to their full Growth; that they might the more eaſily give a full and conſtant Proviſion of Fleſh. Whence it became a Cuſtom, amongſt the* Chineſe, *never to kill any living Creatures, till they had attain'd that Pitch and Maturity, which Nature had aſſign'd them.* Comp. *Deut.* xxii. 6, 7. agreeable to which is that of *Phocilydes*:

The Neſt's whole Family you muſt not ſeize,
But leave the Dam a future Brood to raiſe.

The Action of *Alexander Severus* [4] (recorded by *Lampridius*, c. 22.) is, likewiſe, worthy to be mention'd on this Occaſion. When the People of *Rome* complain'd to him of a great Dearth and Scarcity, he ask'd them, by a publick Officer, what Kind of Meat was dear; and finding, by the common Cry, that *Beef* and *Pork* were the Subject of the Complaint, he did not lower the Price, but order'd that none ſhould kill a *Cow* or *Heifer*, a *Sow* or Sucking *Pig*; and by this Means, within a Year, or leſs than two Years, there was ſuch Plenty of both Sorts, that from Eight-pence the Pound, they came to Three-pence.

[a] See Lib. ii. c. 3. ſ. 2. & *Grot.* l. i. c. 1. ſ. 11. [b] *Matt.* vi. 26. [c] *Exod.* xx. 10. xxiii. 12. *Deut.* v. 14. xxv. 4. 1 *Cor.* ix. 9. *Num.* xxii. 28, 32. *Prov.* xii. 10. Comp. *Deut.* xx. 19. *Rom.* viii. 19, &c. [d] Orat. 1. *De Uſu Carn.*

" hath Senſe, and is profitable to another ſo long as it is united to the Body, as it happens when a Man is ſlain, whoſe Loſs is an " Injury to the Society of which he was a Member. But it is no Cruelty to ſlay a living Creature, which is of no Uſe to another " but when it is dead, and would do Miſchief if it lived. For it is evident, that if no Beaſts were ſlain, their great Number would " be noxious to Man." All theſe Reaſons prove, beyond Contradiction, that Men do Beaſts no Injury by ſlaying and eating them. But it may not be improper to ſhew, after Archbiſhop *King*, *De Origine Mali*, c. 4. Sect. 5. §. 5. That Beaſts cannot complain, that they were appointed by the Creator to be Food for Men. GOD gave them Life upon that Condition, and they had never been, had it not been for that. Wherefore they ought, if they had Senſe enough, to praiſe their Creator, of whom they hold it, becauſe it is better to enjoy Life and Senſe for ſome Time, than to be always a Lump of Matter, and void of all Perception. Beſides, Beaſts enjoy preſent Satisfaction always, without remembring what is paſt, or diſquieting themſelves with what is to come; and, after all, they ſuffer leſs by being kill'd, than they would if they died of a Diſeaſe, or old Age.

1 See Note 3. p. 365.

2 *Marcus Antoninus* ſpeaks to this Purpoſe, in his fine Paſſage of his Reflections, Τοῖς μὲν ἀλόγοις ζώοις καὶ καθόλα πράγμασι, καὶ ὑποκειμένοις, ὡς λόγον ἔχων, λόγον μὴ ἔχουσι, χρῶ μεγαλοφρόνως, καὶ ἐλευθέρως, τοῖς δὲ ἀνθρώποις, ὡς λόγον ἔχουσι, χρῶ κοινωνικῶς, l. vi. c. 23. i.e. uſe all Creatures, and all other Things, nobly and freely, as a Man, who hath Reaſon, ought to uſe ſuch Things as have none. As for Men, uſe them according to the Laws of Society, as Men of Reaſon ought to be uſed. See, alſo, *Sad-der*, in the Religion of the ancient *Perſians* publiſhed by Mr. *Hyde*, Port. 38. In ſhort, the Abuſe of that Power, which Men have over Beaſts, is the more criminal, becauſe it often tends to the Prejudice of Men. Hence it is, that the Laws of *Triptolemus* forbid the killing of any Creatures in Agriculture, &c. *Porphyr. de Abſtinen.* l. iv. §. 22. And it was a capital Crime among the *Phrygians*, as *Nicolas Damaſcenus* teſtifies. See *Grotius*, lib. iii. cap. 12. numb. 2, 3.

3 The *Greek* is, Οἱ δὲ Πυθαγόρειοι τὴν πρὸς τὰ θηρία πραότητα μελέτην ἐποιήσαντο τῆ φιλανθρώπῳ καὶ φιλοικτίρμονος, *Porphyr. de Abſtinen.* l iii. c. 20. See Mr. *Le Clerc*'s Comment. on *Gen.* ix. 4. and what I have ſaid in my Treatiſe of *Gaming*, l. iii. c. 5. §. 7.

4 This Example is not much to the Purpoſe, becauſe it reſpects an Expedient which *Alexander Severus* made uſe of upon a particular Occaſion, wherein it does not appear that there was otherwiſe any Abuſe.

CHAP. IV.

Of the Origin of Dominion or Property.

I. *Property and Community are moral Qualities.*
II. *What is Property and Community.*
III. *That it has no Place, but where there are more Men than one.*
IV. *It proceeds immediately from an Agreement among Men.*
V. *Of the ancient Community of Goods.*
VI. *By what Degrees Men departed from it.*
VII. *That it was profitable to Mankind.*
VIII. *The Opinion of the Ancients about the Original of Dominion or Property.*
IX. Grotius's *Judgment conſider'd.*
X. XI, XII, XIII. *The Arguments of thoſe who deny the Community of Goods uſed among the Ancients.*
XIV. *In what Senſe Dominion is ſaid to be by natural Right.*
XV. *How far Infants are capable of Property.*

I. THAT this Power of Mankind over Things ever began to take Effect in relation to other Men, (for no human Property ought to be oppoſed to the tranſcendent Right

Right of GOD) [a] [1] or, that this indefinite Right was converted into *Dominion* [2], by virtue of which such or such a Thing belongs to one Person, and to none else, is all owing to another Principle: Of which, before we proceed to treat, it seems necessary to premise, that *Property* and *Communion* are moral Qualities, which do not affect the Things themselves, as to their intrinsick Nature, but only produce a moral Effect with Regard to other Persons: And that these Qualities, as all others of the same Kind, derive their Birth from Indispolition. And therefore 'tis an idle Question, Whether the Property of Things arise from Nature, or from Institution? Since we have plain Evidence, that it proceeds from the Imposition of Men; and that the natural Substance of Things suffers no Alteration, whether Property be added to them, or taken from them.

II. In the next Place, we ought, with due Accuracy, to weigh and examine what *Communion* is, and what *Property*, or *Dominion*. The Term *Communion* is taken either negatively, or positively. In the former Manner Things are said to be common, as consider'd before any human Act or Agreement had declared them to belong to one rather than to another. In the same Sense, Things thus consider'd are said to be *No Body*'s, rather negatively, than privatively, *i. e.* that they are not yet assign'd to any particular Person, not that they are incapable of being so assign'd. They are, likewise, term'd *res in medio quibusvis expositæ*, Things that lie free for any Taker. But in the positive Signification of the Word, common Things differ from appropriate only in this Respect, That the latter belong to one Person only, the former to many Persons together, though in the very same Manner. To proceed, *Property* or *Dominion*, is *a Right, by which the very Substance* [3], *as it were, of a Thing, so belongs to one Person, that it doth not in whole belong, after the same Manner, to any other.* For we take *Dominion* and *Property* to be the very same. Though some affirm the *Right*, as separated from the *Use* and *Profit*, to be *Property*, and as join'd with the *Use* and *Profit*, to be *Dominion*; which nevertheless is a Difference that doth not perpetually hold. Some again are over-nice, whilst by *Property* they understand the Thing it self under that Quality, by which it belongs to me, and to none besides; and by *Dominion* a Right to dispose of the said Thing, as I please, which flows from *Property* in the Manner of an Effect; so that the *Dominion* shall be lodg'd in the Person, but the *Property* shall seem rather to inhere in the Thing [b]. In which Distinction it is falsly suppos'd, that *Dominion*, is as it were, the Effect of *Property*; whereas if a Man thinks it at all necessary thus to divide them, the Reverse of this is rather true. For the *Right*, strictly speaking, inheres in the Person, from which the Things themselves derive some Kind of extrinsical Denomination. And this appears sufficiently evident from hence, That the *Right* dying with the Person, the Things cease to be appropriated, without any change in their Substance, or in other natural Qualities and Affections.

Now the Force of *Property* is such, that we may, at our Pleasure, dispose [4] of the Things which we hold by this Right, and may keep any other Person from the Use of them; unless he hath obtain'd from us, by Covenant, a particular Right to this Purpose: And that therefore whilst they continue ours, they cannot, after the same Manner, and in whole [5], be another's. I say, *after the same Manner*; for neither as there is no Reason to the contrary, so Custom informs us, that the same Thing may belong to several Persons at once, according to their different Ways of holding or owning it. Thus the Commonwealth, the Landlord, and the Tenant, by Copy or Lease, may be said each of

[a] Vid. *Euripid.* Phœniss. v. 558, &c.

[b] Vid. *Ziegler* ad *Grot.* l. ii. c. 2. f. 1.

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[1] *Euripides*'s Words are,

Οὗτοι τὰ χρήματ' ἴδια κέκτηνται βροτοὶ,
Τὰ τῶν Θεῶν δ' ἔχοντες ἐπιμελούμεθα.
Ὅταν δὲ χρῄζωσ', αὐτὰ ἀφαιροῦνται πάλιν.

Men possess nothing of their own, but are
The Stewards of the Goods, which to their Care
The GODS commit, and take away when they see fit.
See *Lev.* xxv. 23. *Psal.* xxiv. 1.

[2] Men, by the Concession of the Creator and Supreme Sovereign of the Universe, have naturally a full Power to make use of the Creatures, as they see fit, according to the Light of their Reason. If there had never been but one Man in the World, as *Adam* was alone for a little Time, the Effect of his Power had been reduc'd to this, That he would not have offended against the Will of his Creator, tho' he had dispos'd, according to his own Humour, of whatever came in his Way. But Mankind beginning to increase and perpetuate themselves from Generation to Generation, from the Moment that they became more than one Man, since by Nature one had not more Power than another over the Beasts and inanimate Creatures. Every one acquir'd a Right, by virtue of which another ought to permit him to enjoy, as well as himself, all those Things which their Creator had granted them the Use of in common. When any one found a Thing to please him, from the Time he had got the Possession of it, no other Man had a Right to take it from him, but supposing it to be of that Nature, as not to be consumed by the Usage, might appropriate it to himself, but when he had done with it, others did him no Wrong if they made use of it in their Turn. So long as there were but few Men, and they contented themselves with such Fruits of the Earth as grew up without Tillage, they needed to possess themselves of nothing but what was for the present Use, therefore we have Reason to believe that here all their Cares and Claims were bounded, and so all Things were common. But when Mankind was considerably multiply'd, and they had begun to till the Ground, and seek out Ways to render their Lives more commodious and agreeable, there was no Way left to live in that Community; but Men must fix upon something, and 'twas just, that the Produce of each Man's Labour and Industry should be so far his own, that no other might have to do with it without his Permission. Wherefore every one possessed himself of certain Things with a Design to keep them always, and not to part with them unless it was by disposing of them to whom they thought fit, either in their Life-time, or at their Death, unless they openly abandon'd them, and so left them to the first Occupant. Thus the *Property of Goods* was first establish'd, of which the Characteristic is, *That others are always excluded*, whereas when all Things were common, others were not excluded from the Things of which every one was possessed but for a little Time, *i. e.* as long as they were actually in Use. Civil Societies becoming afterwards form'd, the Rights of Property were confirm'd and modify'd divers Ways, by a Consequence of these Laws which led Men to enter into a Confederacy. Thus have I given, as I think, in a few Words, a clear and exact Notion of this Matter, about which our Author enlarges much, and yet reasons obscurely; and which has long been perplex'd with vain Subtilties. If we join this with Note 2. p. 366. we shall have Principles sufficient to judge well of it, and to rectify the Notions of other Authors, who have written about it. See also chap. vi. §. 1. Note 1. It is with Pleasure I observe that M. *Buddeus* has approv'd of my Sentiments on this Subject, in his *Theologia Moralis*. This Suffrage, tho' very considerable in itself, is the more so as this Author has chang'd his Opinion.

[3] See Note 2. above, where you'll find a more natural and exact Definition. Our Author gives us a Notion of a particular Kind of Property, rather than that of Property in general, consider'd in Opposition to an universal Community.

[4] So says the Civil Law, *Nam suæ quidem quisque rei moderator, atque arbiter, &c. Cod.* l. iv. tit. 35. *Mandati*, &c. leg. 21. See Mr. *Wollaston*'s *Religion of Nature delineated*

[5] So the Civil Law speaks, *Et ait* [*Celsus filius,*] *duorum quidem in solidum dominium, vel possessionem esse non posse*, Digest. l. xiii. tit. 6. *Commodati vel contra*, leg. 5. §. 15.

them to have the Property of the ſame Piece of Ground; the firſt an *eminent Property* [1]; the ſecond a *Direct* [2], and the laſt an *Uſeful* [3]. It was added likewiſe, *in Whole* [a]; for many Perſons may, even in the ſame Way, hold the ſame Thing, yet not in Whole, but each according to his determinate Share. As is the Caſe in thoſe Goods which are, without Diviſion [4], poſſeſs'd by many together, who all happen to have the ſame Kind of *Property* with Regard to the ſame Thing.

Sometimes we conceive *Property* to be divided into ſeveral Parts; or (if any one likes this Expreſſion better) to admit of ſeveral Degrees. For thus 'tis frequently diſtinguiſh'd into *plenary*, and *diminutive*. The former is either join'd with what they call *eminent Property*, in which Manner, civil States, or the Heads and Governours of them, poſſeſs their Goods; or elſe disjoin'd from it, and term'd *vulgar*; by which a private Man enjoys a full Power of diſpoſing of his Goods, except ſo far that the Uſe of them be not under the Direction of the municipal Laws. *Diminution* of *Property* may be made ſeveral Ways, as that the bare Exerciſe or Adminiſtration of it ſhall be reſtrain'd; or that the Profit and Advantage of it ſhall be leſſen'd; or laſtly, that ſomewhat ſhall be cut off from the very *Property* it ſelf. The firſt happens [5], when by Covenant, or by Teſtament, or by the Command and Authority of Law, on account either of the Condition of the Perſons, or of the Quality of the Things, or for ſome other juſt Cauſes, the Alienation of Poſſeſſions is either prohibited, or confin'd within certain Limits [6], yet ſo as that no Right to the ſaid Poſſeſſions is hereby derived upon others. Add *Theophraſtus*'s Will in *Diog. Laert.* l. v. ſ. 53. The Advantage of Property is leſſen'd, if either the full Uſe and Enjoyment of my Goods is in the Hands of another, without Loan or Hire; or otherwiſe, if I am bound to allow another ſome particular Uſe of them, by way of *Service*. Laſtly, the Property it ſelf is then retrench'd, when we grant to another, beſides the full Right of uſing and enjoying what is ours, a Right, likewiſe, of alienating it after a certain Manner; and ſuch a Right too, as is in ſome Sort perpetual. In which caſe, he who retains the Property, though thus abridg'd, and holds a ſuperior Power over the Poſſeſſion, is ſaid to have a *direct Property*; and he who, together with the Right of uſing and enjoying, partakes likewiſe, of the Property in the Manner before deſcrib'd, is ſaid to have an uſeful *Property* in the Poſſeſſion thus granted to him [b]. Where we may obſerve, by the Way, what Limitation ought to be added to that common Rule with the Lawyers, *What is already a Man's own, can't become more his own* [7]. Whence they conclude, that no Pawn, no Charge, no Bargain of Buying, or of Letting to Hire, can poſſibly ſtand, when made to him who is already the Proprietor of the Thing thus diſpos'd of. As, likewiſe, if a Teſtator happens to bequeath to the *Legatee* what was his own before, the Act is void and fruitleſs [9]. And ſo too, that no one can [10], to any Purpoſe, ſtipulate or bargain for a Thing that will be his own without ſuch Conditions; with other the like Caſes. All which are true, unleſs it ſo happen, that a *diminutive Property* ſhould, by any of theſe Means, be advanc'd to a greater Degree of *Plenitude*.

Farther, ſince the ſame Thing may be poſſeſs'd either in whole by one, or elſe by many [11], without falling under a Diviſion; ſo that each Perſon, according to his determinate Share, ſhall have an equal Right in it; hence it comes to paſs, that Things are, in this Reſpect, diſtinguiſh'd into *proper*, and *common*, as the Word *common* is taken in its latter Signification; implying that the ſame Thing is, by the ſame Kind of *Dominion*, held by ſeveral Men, without being divided, or parcell'd out amongſt them. And this *Communion* differs from *Property*, ſtrictly ſo called, only with Regard to the Subject in which it is terminated and lodg'd; a *proper* or appropriated Thing belonging to one Perſon alone, a *common* Thing to ſeveral, but not with Regard to the Manner or the Virtue of the *Dominion*: for many Perſons have the ſame Right over a *common* Thing, as a ſingle Perſon hath over a *proper* Thing: And as the Propriety of a Thing appertaining to one only, excludes all others from an equal Right in the ſame Thing; ſo a *common* Thing excludes all others but thoſe to whom it is ſaid to be *common*. Now ſince neither of theſe Commoners hath a Right extending it ſelf to the whole Thing, but only to a Part of it, though ſuppos'd to remain undivided; it is manifeſt that no one Perſon can, by his own Right, diſpoſe of the Thing entirely, but only according to his fix'd Proportion [12]: And that if any Reſolution is to be taken,

[a] *Plures eandem rem in ſolidum poſſidere non poſſunt*, D. l. iv. tit. 2. *De acquirenda vel amittenda poſſeſſione*, leg. 3. ſ. 5.
[b] Comp. *Struvi*. Syntagm. Exerc. 11. Th. 55, &c. Seneca *de Beneficiis*, l. vii. c. 12. It's no Argument that a Thing is not your own, becauſe you cannot ſell or ſpend it; becauſe you cannot change it for better or for worſe. For that, likewiſe, may be truly call'd your own, which is your own under certain Terms and Conditions. [c] As *Lucilius* in the *Anthologia*, l. ii. jeſts ſmartly on the old Miſer *Hermocrates*, in feigning that he had ſet down himſelf in his Will as Heir to his own Goods.

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[1] See Lib. viii. c. 5. ſ. 7.
[2] Our Author explains, in the next Paragraph, what is meant by direct and uſeful Property, as the Modern Lawyers diſtinguiſh. In ſhort, uſeful Property imports a greater Right than direct Property, and, while the other ſubſiſts, is rather a Right Perſonal than Real, as Mr. *Titius* obſerves in his *Jus Privatum Romano Germanum*, &c. which was publiſh'd in 1709. lib. ii. c. 11. §. 3.
[3] See Chap. viii. §. 3. following.
[4] So the Civil Law ſpeaks, *Nec quenquam partis corporis dominum eſſe, ſed totius corporis pro indiviſo pro parte dominium habere*. Digeſt. l. xiii. tit. 6. *Commod. vel contra*, leg. 5. §. 15.
[5] See the *Inſtitutes*, l. ii. tit. 8. *Quibus alienare licet, vel non licet*.
[6] *Seneca*'s Words are, *Non eſt argumentum, ideo aliquid tuum non eſſe, quia vendere non potes, quia conſumere, quia mutare in deterius aut melius. Tuum enim eſt, etiam quod ſub lege certa tuum eſt.*
[7] *Quod propriam eſt ipſius* [*Legatorii*] *amplius ejus fieri non poteſt*, Inſtit. l. ii. tit. 20. *de Legatis*, ſ. 10. See, alſo, l. iv. tit. 6. *de Actionibus*, §. 14. & *Digeſt*. l. xliv. tit. 2. *de exceptione rei judicatæ*, leg. 14. §. 2.
[8] *Neque pignus, neque depoſitum, neque precarium, neque emptio, neque locatio rei ſuæ conſiſtere poteſt*, Digeſt. l. l. tit. 17. *De Diverſ. Reg. Juris*, l. xlv.
[9] *Sed ſi quis rem Legatarii ei legaverit, inutile eſt legatum*, Inſtit. l. ii. tit. 20. ſ. 10. See, alſo, *Cod.* l. vi. tit. 37. *de Legat.* leg. 13. And Mr. *Domat*'s Civil Laws in their Natural Order, Part II. l. iv. tit. 2. Sect. 3. §. 8, &c.
[10] *Nemo rem ſuam futuram, in eum caſum, quo ſua ſit, utiliter ſtipulatur*, Inſtit. l. iii. tit. 20. *De inutilib. Stipulat.* ſ. 21.
[11] So the Civil Law ſpeaks, *Servus communis ſic omnium eſt, non quaſi ſingulorum totus, ſed pro partibus utique indiviſis, ut intellectu magis partes habeant, quam corpore*, Digeſt. 45. tit. 3. *De Stipulat. Servorum*, leg. 5. See alſo Lib. xxxi. *de Legatis & Fideicom.* 2. leg. 66. §. 2.
[12] Thus the Civil Law commands, *Nemo ex ſociis plus parte ſua poteſt alienare, etſi totorum bonorum ſocii ſint*, Digeſt. l. xvii. tit. 2. *Pro Socio*. leg. 68. *prin*. See *Cod*. Lib. iii. tit. 37. *Communi dividendo*.

taken, any Bargain to be made about the Whole, the Conſent and Act of each Commoner is neceſſarily required. *Ziegler* [a], *Felden* [b], and *Bæcler* [c], in their Obſervations on *Grotius*, have all confounded *negative* Communion with *poſitive*: On account of which Miſtake, many Arguments have been thrown away to no Purpoſe, in diſcuſſing this Point; as will appear hereafter. What *Seneca* hath deliver'd about the ſeveral Kinds of Communion, may not be impertinent to our preſent Subject [d]: *I hold all Things*, ſays he, *in common with a Friend* [1], *not as I do with a Sharer, ſo that one Part ſhould be mine, and another Part his; but as Children are common to their Father and Mother, who, ſuppoſing the Children to be two, are not ſaid to have each one, but each both. The Knights Seats belong to all of that Order, yet in them, by taking Poſſeſſion of a Place, I appropriate it to my ſelf. And if I reſign this Place to another Perſon, though he had an equal Right to it, yet it ſeems to be my Gift. Some Things belong to ſome Men under a certain Condition. Thus, again, I have a Place in the Knights Seats, not to ſell, not to let out, not to make my Home, but barely to ſit in whilſt I am a Spectator. It will be no Falſity then, if I ſhould ſay, I have a Place in the Knights Seats; yet if they happen to be full when I come into the Theatre, I both have a Place there by Right, becauſe I am allow'd to uſe them; and I have not a Place, becauſe it is already poſſeſs'd by thoſe who had a common Right to it with my ſelf.*

III. From what hath been offer'd, 'tis evident that as well poſitive Communion, as Propriety, doth imply the Excluſion of others from the Thing thus ſaid to be either *common*, or *proper*, and, conſequently, doth preſuppoſe more Perſons in the World than one. As then, if there were but a ſingle Man upon Earth, it could by no Means be ſaid, that Things were appropriated to him; ſo thoſe Things, from the Uſe of which no Perſon is excluded, or which belong no more to any one than to another, are to be ſtiled *common* in the former, not in the latter Senſe of the Word. And thus it appears in what Reſpect we may attribute the Dominion of Things to *Adam*, whilſt he yet ſtood alone in the World. Namely, although by reaſon of the vaſt Extent of the Earth, and his ſmall Occaſions, he needed to apply to his Service but a very inconſiderable Portion of Things; yet ſuppoſing him to have had Inclination, and, likewiſe, Ability and Convenience to turn all that GOD had given him to his own Uſe, there was no Right of others to oppoſe or hinder him. Therefore the Right of *Adam* over Things was of a different Kind from that Dominion, which is now ſettled amongſt Men: We may call it an indefinite Dominion [2], not formally poſſeſs'd, but abſolutely allow'd; not actual, but potential. It had, indeed, the ſame Effect which Dominion now obtains; that is, the uſing Things at Pleaſure; yet was it not Dominion, ſtrictly ſpeaking, by reaſon that there was no other Perſon againſt whom this Effect might pravail; but 'twas capable of paſſing into Dominion, when the Number of Mankind ſhould afterwards Increaſe. And thus, on the Whole, whilſt *Adam* was the only Man, Things, in Reſpect of him, were neither *proper*, nor *common*. For Community ſuppoſeth a Partner in the Poſſeſſion; and Propriety denotes an Excluſion of the Right of others to the Thing enjoy'd: So that neither of them can be underſtood, 'till the World was furniſh'd with more than one Inhabitant.

IV. But farther, it ought no leſs carefully to be obſerv'd, that the Grant of Almighty GOD, by which he gave Mankind the Uſe of earthly Proviſions, was not the immediate Cauſe of Dominion, as this is directed towards other Men, and with relation to them takes Effect, (which is evident, likewiſe, from hence, that even Brutes [3], by the Divine Permiſſion, uſe and conſume the Fruits of the Earth, and yet they are certainly incapable of Dominion) but that Dominion neceſſarily preſuppoſeth ſome human Act [4], and ſome Covenant either tacit or expreſs. GOD indeed authoriz'd Mankind to apply to their Service and Convenience the Earth, with the Product of it, and the living Creatures upon it; or, he gave Man an indefinite Right to all theſe Poſſeſſions; but ſtill it was left to their own Choiſe and Diſpoſal, what Manner, what Degree, what Extent they would fix to this Power; that is, whether they would circumſcribe it with certain Bounds, or leave it unconfin'd; as, likewiſe, whether they would allow each Perſon a Right to all Things, or only to one and the ſame determinate Part of Things; or whether they would aſſign to every particular Man his own Portion, with which he ſhould reſt contented, and pretend no Right or Claim to any Thing beſides. *Ambroſ.* Off. L. i. c. 28. Nature pour'd out all Things in common to all Men: For ſo GOD commanded the whole Stock of Things to be produc'd, that Men ſhould have a general Supply of Suſtenance, and ſhould hold the Earth as a general Seat. Common Right therefore was the Work of Nature; private and peculiar Right the Work of long Uſe and Poſſeſſion. *Add.* Selden. *de J. N. & G. ſec. Hebr.* l. vi. c. 1. 'Tis in vain therefore to diſpute whether GOD conferr'd the Dominion over Things on our firſt Parents, as the Repreſentatives of all human Race; or whether

[a] Add *Grot.* l. ii. c. 2. ſ. 1. *init.* [b] d. l. ſ. 2. [c] d. l. p. 47. [d] *De Benef.* l. vii. c. 12.

[1] *Seneca*'s Latin is, *Non enim mihi ſic cum amico communia omnia ſunt, quomodo cum ſocio, ut pars mea ſit, pars illius; ſed quomodo Patri Matrique communes Liberi ſunt; quibus cum duo ſunt, non ſinguli ſingulos habent, ſed ſinguli binos———Deinde pluribus modis communia ſunt: Equeſtria omnium Equitum Romanorum ſunt: in illis tamen locus meus ſit proprius, quem occupavi. Hoc ſi cui caſſ, quamvis illi communi receſſerim, tamen aliquid dediſſe videor. Quædam quorundam ſub certa conditione ſunt. Habeo in Equeſtribus locum, non ut vendam, non ut locem, not ut habitem; in hoc tantum, ut ſpectem. Propterea non mentiar, ſi dicam me habere in Equeſtribus locum: ſed cum in theatrum veni, ſi plena ſunt Equeſtria, & jure habeo locum illic, quia ſedere mihi licet, & non habeo, quid ab his, cum quibus jus miki loci commune eſt, occupatus eſt.*

[2] The Author expreſſes himſelf here in a very ſcholaſtic Manner, ſaying, *Quod quis vocare poſſit dominium indefinitum, non formaliter, ſed conceſſive; non actu, ſed potentiâ*; which I think may be thus better expreſs'd: A Shadow of Property, or a Power of poſſeſſing with Property, rather than a true and actual Property.

[3] I wonder our Author ſhould, in this Place, make uſe of ſo weak a Reaſon. For he himſelf obſerves, in more than one Place, that Beaſts are not capable of any Right or Obligation, neither among themſelves nor with others, nor is there any Law for them, properly ſo call'd; ſo that tho' in one Senſe GOD permits the Beaſts to uſe what is for their Convenience, yet 'tis not ſuch a real Conceſſion, as can produce the Effect of Right; and, in that Reſpect, we can no more ſay, that GOD wills (for ſexample) that the Birds ſhould eat the Fruits and Corn where-ever they find it, than that GOD would have a Bear or a Lion to pull that Man in Pieces, who has the Misfortune to fall into their Paws.

[4] I grant it is a human Act, that is to ſay, taking Poſſeſſion, by virtue of which each acquires a particular Right over that which before he had only a common one. But Contracts are no way neceſſary, unleſs where a Thing is to be parted, of which ſeveral have Poſſeſſion at the ſame Time.

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he gave it them as their own Peculiar [1], and ſo as to terminate in their ſingle Perſons; that they, by their own proper Right, ſhould hold the Lordſhip of the whole World, and that all other Mortals ſhould owe their private Dominion to their Bounty and Favour. For that Divine Grant only confirm'd Men in a fuller Aſſurance of the Goodneſs of their Maker towards them, and ſatisfy'd them that it was his Pleaſure they ſhould diſpoſe of other Creatures for their own Uſe and Service. But it was left to the Reaſon of Men to determine what Meaſures ſhould be taken to prevent any Diſcord that might ariſe amongſt them from the Exerciſe of this Right. But we can, by no Means, ſay, That there was any univerſal Rule and Manner of Poſſeſſing preſcrib'd by GOD himſelf, which all Men ſhould be obliged to obſerve. Therefore Things were rendred neither *proper*, nor *common* (that is, in a *poſitive* Communion) by the expreſs Command of GOD: But this Matter was afterwards adjuſted, by the Diſpoſal of Men, according as the Peace of human Society ſeem'd to require. Whence, thoſe Authors muſt needs be under a Miſtake, who deliver themſelves in ſo groſs Terms as theſe: *The Diviſion of Things belongs to the Law of Nature; that is, it doth not only receive its Riſe and Foundation from Nature, ſo as afterwards to be turn'd into Law by the Conſent of Mankind; but Nature herſelf frames and compleats this Law by her own Act and Authority.* And again, *The Diviſion of Things is one Command of the Decalogue; that is, one Head of the Law of Nature. For he who ſaid,* Thou ſhalt not ſteal, *in Effect ſaid, Let there be a Property and Diſtinction of Things; let every one hold what is his own, and not covet what is another's.* For, there is no Precept of natural Law to be diſcover'd, by which Men are enjoin'd to make ſuch an Appropriation of Things, as that each Man ſhould be allotted his particular Portion, divided from the Shares of others. Though the Law of Nature doth indeed ſufficiently adviſe the introducing of ſeparate Aſſignments, as Men ſhould appoint, according to the Uſe and Exigencies of human Society; yet ſo as to refer it to their Judgment, whether they would appropriate only ſome particular Things, or whether they would poſſeſs ſome Things without bringing them to a Diviſion, and leave the reſt as they found them, only forbidding any particular Man to challenge them to himſelf alone. Hence too, the Law of Nature is ſuppos'd to approve and confirm all Agreements made by Men about the Poſſeſſion of Things, provided they neither imply a Contradiction, nor tend to the Diſturbance of Society. Therefore the *Property* of Things flow'd immediately from the Compact of Men, whether *tacit*, or *expreſs*. For altho', after the Donation of GOD, nothing was wanting but for Men to take Poſſeſſion; yet that one Man's ſeizing on a Thing ſhould be underſtood to exclude the Right of all others to the ſame Thing [2], could not

[a] Vid. *Bæcler.* ad *Grot.* in præfat. p. 9.

[1] An Engliſh Author, Sir *Robert Filmer*, maintains this with a great Deal of Heat, and makes uſe of it to prove the abſolute Power which he attributes to Sovereigns, and which, as he pretends, has come down by Succeſſion from the Authority of *Adam*, whom he makes the firſt Sovereign. He chiefly inſiſts on this Text, *Gen.* i. 28. where GOD ſays to our firſt Parents, *Increaſe and multiply, and repleniſh the Earth, and ſubdue it: and have Dominion over the Fiſh of the Sea, over the Fowls of the Air, and over every Beaſt that moveth upon the Earth.* But Mr. *Locke*, who has confuted that Book in an *Engliſh* Work, of which we may find an Extract in the Univerſal Library, *Tom.* 19. anſwers judiciouſly, 1. That in theſe Words GOD gives *Adam* no Power but over the Beaſts. 2. That he gave him no Property over theſe living Creatures to poſſeſs them as his own, but as a Right common to all his Poſterity. This the Author proves at large from diverſe parallel Paſſages of the Holy Scripture, and particularly by the very Grant that GOD repeated to *Noah* and his Sons. The Text in *Pſalm* cxv. 16. is unanſwerable. *GOD*, ſaith the Pſalmiſt, *hath given the Earth to the Children of Men*; which, according to the *Hebrew* Stile, is to Men in general, or to Mankind. Treatiſe of Government, l. i. c. 4.

[2] Not at all. It is certain, on the contrary, that the immediate Foundation of all particular Right, which any Man has to a Thing which was before common, is the firſt Poſſeſſion. This is, alſo, the moſt antient Way of Acquirement. For, indeed, when ſeveral Things are given in general to a Number of Men, which exiſt not at the ſame Time, and who neither can nor will poſſeſs all Things in common, and ſuch are Men, when conſider'd in all Times and Places, the Intention of the Donor doubtleſs is, That thoſe who come firſt ſhall gain a particular Right to thoſe Things that they have gotten, excluſive of the Pretenſions of all others, without any Conſent of their's needful to be given. All Poſſeſſion, according to the Will of the Donor, hath in it an effectual Virtue to make the firſt Occupant appropriate to himſelf lawfully any Thing before held in common, provided he takes no more than he needs, and leaves enough for others. This is what Mr. *Titius* ſays judiciouſly, *Obſ.* [illegible] n. 2. but however, Mr. *Locke* had ſaid this before, in his excellent Treatiſe of Civil Government, where, amongſt other Things, he has, with great Accuracy and Solidity, clear'd up the Manner how the Property of Goods is acquired. Take, in ſhort, his Judgment, how Men may poſſeſs, as their own, divers Parts of what GOD gave them in common, and enjoy it without any Agreement made between all thoſe, who have the ſame natural Right. GOD, by giving Man the Earth, and all Things in it, for his Subſiſtence and Convenience, intended, without doubt, that they ſhould put them to ſuch an Uſe, as would be moſt advantageous to their Life, and moſt conformable to that Reaſon which they hold of him. Now no Man could receive any Benefit from the Fruits which are produced of themſelves, and the Beaſts which are brought up by the Care of Nature only, unleſs he appropriated to himſelf, ſome Way or other, Part of theſe Fruits and Animals. If it were a Crime to take the leaſt Thing which is in common, before we had the Conſent of all others who had any Right, we might periſh a Thouſand Times with Hunger in the midſt of Plenty. When a Maſter of a Family provides a Diſh of Meat for his Children or Servants, he does not divide to each of them a Part; but what each of them fairly takes, belongs to him, although before none of them had more Right than others, and although none of them had an Allowance given them to take this or that Portion. Farther, ſeeing every one is the ſole Maſter of his Perſon and Actions, the Fruits of his Labour and Work of his Hands entirely and only belongs to him, as his own proper Goods. So that all that he has derived from the State of Nature by his Labour and Induſtry, what he has gotten by his Pains, belongs to him only, and others cannot pretend to them, unleſs there does not remain enough of the ſame Things, or as good, among thoſe that are common. A Man who feeds on the Acorns he has gather'd under an Oak, or wild Apples which he has gather'd in a Wood, certainly makes them his own. But when is it that theſe Acorns and Apples come to be his Property? when he eats them, or when he dreſſes them, or when he carries them home, or when he gathers them? 'Tis plain, that nothing but his Labour in gathering them can make them his own. *Quod omnibus naſcitur, indefinitum præmium eſt*, Quintil. Declam. 13. 'Tis our Labour that diſtinguiſhes theſe Fruits of the Earth from other common Goods, and which adds ſomething more than the common Mother of all Men, I mean Nature, hath beſtow'd. See *Plautus* in his [illegible] or *Fortunate Shipwreck*, Act iv. Scene 3. v. 33, &c. By the ſame Reaſon, the Graſs that a Man's Horſe hath eaten, the Turf which his Servant hath cut, the Ditch he hath digged, and the Water which he hath drawn, become his own Goods and Inheritance, without the Conſent of any other. 'Tis the ſame Thing now with Regard to the Stag which we have kill'd, the Fiſh we have taken, the Ambergriſe or Pearls which we have fiſh'd up, and the Hare which we have hunted down, in the Places where Hunting and Fiſhing are allow'd to every body, or in them that belong to no body, as the vaſt Ocean. So that ſo many Acres of Ground as a Man can till, ſow, cultivate, and whoſe Fruits he can conſume in his Maintenance, ſo much belongs properly to him, and he hath a Right to incloſe that Space with Hedges, Ditches, Walls, or after any other Manner, without any Man's Permiſſion. And this is the rather true, becauſe the Creator himſelf, in giving the Earth to Men in common, hath commanded them to labour, and, by his natural State, has laid him under a Neceſſity not to be idle. But it doth not hence follow, that we may gather as many Fruits, take as many Beaſts, or poſſeſs our ſelves of as many Acres of Land; or, in a Word, appropriate to our ſelves as many Goods as we pleaſe. For the ſame Law of Nature, which hath given every one a particular Right:

not proceed but from mutual Agreement. And though right Reaſon mov'd and perſuaded Men to introduce diſtinct Properties, yet this doth not hinder, but that they might derive their Riſe and Original from human Covenant.

V. Thus much being premis'd, it is manifeſt, that, antecedently to any Act or Agreement of Men, there was a Communion of all Things in the World; not ſuch as we have before term'd a poſitive, but a negative Communion; that is, all Things lay free to any that would uſe them, and did not belong to one more than to another. But ſince Things could afford no Service to Men, were we not allow'd to lay Hands at leaſt on the Fruits and Products of them, and ſince this would be to no Purpoſe, if others might lawfully take from us what we had before actually mark'd out for our own Uſe: Hence we apprehend the firſt Agreement, that Men made about this Point, to have been, that what any Perſon had ſeiz'd out of the common Store of Things, or out of the Fruits of them, with deſign to apply to his private Occaſions [1], none elſe ſhould rob him of. This [a] may be illuſtrated by the Caſe of Beaſts, amongſt which none can claim a peculiar Right to any Thing above others [2]; but each ſatisfies his Appetite with what he firſt meets with in his Way: And if any of them hath been ſo provident as to lay up a Stock for future Uſe, the reſt are under no Obligation to forbear invading and plundering it: Inaſmuch as no Agreement can have paſs'd amongſt them, which might lodge the chief Right to any Thing in the firſt Taker.

The Author of the Treatiſe *De Principiis juſti & decori* [b] hath advanc'd ſomewhat on this Subject, which may ſerve to ſet it in a fuller Light. *He preſuppoſeth, that Man may lawfully poſſeſs and uſe Creatures void of Reaſon; and thence infers, that ſince Men are by Nature equal, all muſt have an equal Right to the Creatures* [3]; *there being in reſpect of the Creatures themſelves no Rule aſſigning one Part to me, and another to my Neighbour: What remains then, but that the Diſtinction and Diviſion of Goods muſt be deduc'd from Compact? But foraſmuch as all human Inſtitutions and Ordinances are made with the Exception of extreme Neceſſity, therefore when ſo deſperate a Caſe happens, the primitive Right to all Things revives: Becauſe, in the common Agreement for the Diviſion of Things, every one is ſuppos'd to have renounc'd his Right to thoſe Things which were allotted to others with this Reſerve and Reſtriction,* Unleſs I am unable otherwiſe to compaſs my own Preſervation. *My Calamity doth not give me a Right to thoſe Things, to which I had none before; but the Extremity of my Danger makes that Condition ceaſe, under which I gave up my firſt Right. For the ſame Reaſon it is lawful in War to ſeize the Goods of the Enemy: Becauſe all Compacts being diſſolv'd* [4], *the original Right returns.* He adds, p. 110. *That, before the ſettling of Covenants, firſt Occupancy did not, by its own Force, confer any Right. Becauſe firſt, in whatever neceſſitous Condition I was plac'd, I could then have no Right to recal theſe Goods to my own Uſe; this Privilege taking Place only in Goods which I voluntarily reſign'd to my Neighbour: But there are not many Perſons to be met with, who would allow ſuch a Prerogative to Things thus acquired.*

Which Reaſon might be thus propoſed in clearer Terms.

If firſt Occupancy of itſelf conferr'd a Right excluſive of all others, it would follow that, even in a Caſe of Neceſſity, Goods thus attain'd could not be made uſe of by any other Perſon than the Poſſeſſor: Becauſe the Right of Neceſſity follows from an Exception added to the firſt Compact about the Diviſion of Goods; but we before ſuppoſed, that no ſuch Compact had paſs'd about Things which came into Mens Poſſeſſion by theſe Means. It being then abſurd and unreaſonable, that a Perſon, reduc'd to Extremity, ſhould not be allow'd to uſe what another hath by Occupancy made his own; it follows, that the Right, by virtue of which Occupancy fixeth a Property, is likewiſe owing to Covenant. Though this Argument is at the beſt but very feeble [5].

He proceeds *Secondly* to affirm, *That there is in Nature no more Reaſon why Men ſhould deſire a Right from the firſt Occupancy of Things* [6], *than from the firſt Diſcovery of them with the Eye. Therefore the*

[a] To this belongs l. xli. t. 2. *D. De acquir. vel admittenda poſſ.* l. i. [b] *Velthuyſen*, p. 100, &c. Ed. in 12°.

Right to thoſe Things which, by his own Induſtry, he has taken from that common Stock, wherein they lay; the ſame Law, I ſay, has ſet certain Bounds to this Right. *God hath given all Things abundantly*, 1 *Tim.* vi. 17. Why? to enjoy them. This is the Voice of Reaſon confirm'd by Revelation. Wherefore, the Property of Goods, acquir'd by Labour, muſt be regulated by the good Uſage which may be made of them for the Neceſſity and Convenience of Life. See what our Author ſays, c. vi. §. 3. following. But if we paſs the Bounds of Moderation, and take more than we have Occaſion for, without doubt we take that which belongs to others; eſpecially, if having got any Thing ſuperfluous, we leave not ſufficient to relieve their Neceſſities, and ſupply them with Things convenient and uſeful. We muſt not ſuffer any Thing, which GOD hath created for the Service of Man, to periſh or become uſeleſs. If we conſider, with Attention, the Abundance of natural Proviſions which have been a long Time in the World, the ſmall Number of thoſe who can uſe them, and for whom they are appointed, and how little a Man can appropriate to himſelf to the Excluſion of others, eſpecially if he keep himſelf in the juſt Bounds preſcribed by Reaſon, we muſt be obliged to acknowledge, that the Property of Goods, ſo eſtabliſh'd, would not produce the leaſt Diſputes and Quarrels. We may ſee this diſcourſed at large in the Work of Mr. *Locke*, Lib. ii. c. 4. Moreover, Mr. *Vander Muelen* hath, alſo, confuted our Author in his Comment upon *Grotius*, l. ii. §. 1. p. 56.

[1] This Agreement is in no wiſe neceſſary, as may appear from what has been ſaid in the preceding Note. The *Roman* Lawyers do not ſuppoſe any, even in that Law to which our Author refers; and to ſhew, that Property of Goods commenc'd from Poſſeſſion, they ſay, there remains to this Day ſome Foot-ſteps of it in Things which remain common, and belong to the firſt Occupant. *Dominiumque rerum ex naturali poſſeſſione cœpiſſe Nerva filius ait, ejuſque rei veſtigium remanere, de his, quæ terra, mari, cœlo capiuntur; nam hæc protinus eorum fiunt, qui primi poſſeſſionem eorum apprehenderint*, Digeſt. l. xli. tit. 2. *De acquirenda aut amittenda poſſeſſione*, leg. 1. There is, alſo, a Place in the *Inſtitutes*, which I ſhall quote, p. 418. from whence it will appear, that, according to the Notion of the *Roman* Lawyers, Poſſeſſion is all that transfers Property, by virtue of the Intention of him who [illegible] Thing to many in common.

[2] See §. iv. Note 3. p. 365.

[3] This is true, but they have it only for their Uſe. All that follows from this Equality of Right is, that no Man ought to poſſeſs himſelf of ſuch a great Quantity of Goods, that there remain not ſufficient for others. See Note 2. p. 366.

[4] This is not ſo; but the true Reaſon is the State of War, where two are Enemies the one to the other. And, indeed, ſuppoſing that they, who have each their Goods in Property, ſhould come of a ſudden to ſuffer them to be common by an unanimous Conſent, and without ceaſing to be Friends, every one may, after this, take what is convenient, and none have Right to deprive others of what they are poſſeſſed of for their Uſe. Thus *Velthuyſen* argues upon the falſe Principles of *Hobbes*.

[5] The Rights and Privileges of Neceſſity are not ſo bounded as to diſpenſe, in certain Caſes, with ſuch Duties, as ſuppoſe an Agreement. They, alſo, make Exceptions to ſeveral natural Laws, which in no wiſe depend upon human Agreements.

[6] The Reaſon of it is very clear, and 'tis this, That he declares thereby an Intention to ſet apart ſuch a Thing for his Uſe, or to appropriate it to himſelf, as he may by virtue of his common Right to uſe it, which, without that, would become uſeleſs to any Man. The meer Sight of a Thing can't have the ſame Effect, becauſe we ſee many Things without any Deſign of taking them to ourſelves only. But if, at the ſame Time, we perceive a Thing firſt, and we diſcover any ways an Intention of reſerving it to ourſelves, others ſhould no more pretend to it, than if we were actually ſeized of it. See what is ſaid on c. vi. So that 'tis not neceſſary to prove, that the third and laſt Reaſon of *Velthuyſen* is of no Force.

Difference

he gave it them as their own Peculiar [1], and so as to terminate in their single Persons; that they, by their own proper Right, should hold the Lordship of the whole World, and that all other Mortals should owe their private Dominion to their Bounty and Favour. For that Divine Grant only confirm'd Men in a fuller Assurance of the Goodness of their Maker towards them, and satisfy'd them that it was his Pleasure they should dispose of other Creatures for their own Use and Service. But it was left to the Reason of Men to determine what Measures should be taken to prevent any Discord that might arise amongst them from the Exercise of this Right. But we can, by no Means, say, That there was any universal Rule and Manner of Possessing prescrib'd by GOD himself, which all Men should be obliged to observe. Therefore Things were rendred neither *proper*, nor *common* (that is, in a *positive* Communion) by the express Command of GOD: But this Matter was afterwards adjusted, by the Disposal of Men, according as the Peace of human Society seem'd to require. Whence, those Authors must needs be under a Mistake, who deliver themselves in so gross Terms as these: *The Division of Things belongs to the Law of Nature; that is, it doth not only receive its Rise and Foundation from Nature, so as afterwards to be turn'd into Law by the Consent of Mankind; but Nature herself frames and compleats this Law by her own Act and Authority.* And again, *The Division of Things is one Command of the Decalogue; that is, one Head of the Law of Nature. For he who said,* Thou shalt not steal, *in Effect said, Let there be a Property and Distinction of Things; let every one know what is his own, and not covet what is another's.* For, there is no Precept of natural Law to be discover'd, by which Men are enjoin'd to make such an Appropriation of Things, as that each Man should be allotted his particular Portion, divided from the Shares of others. Though the Law of Nature doth indeed sufficiently advise the introducing of separate Assignments, as Men should appoint, according to the Use and Exigencies of human Society; yet so as to refer it to their Judgment, whether they would appropriate only some particular Things, or whether they would possess some Things without bringing them to a Division, and leave the rest as they found them, only forbidding any particular Man to challenge them to himself alone. Hence too, the Law of Nature is suppos'd to approve and confirm all Agreements made by Men about the Possession of Things, provided they neither imply a Contradiction, nor tend to the Disturbance of Society. Therefore the *Property* of Things flow'd immediately from the Compact of Men, whether *tacit*, or *express*. For altho', after the Donation of GOD, nothing was wanting but for Men to take Possession; yet that one Man's seizing on a Thing should be understood to exclude the Right of all others to the same Thing [2], could not

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not proceed but from mutual Agreement. And though right Reaſon mov'd and perſuaded Men to introduce diſtinct Properties, yet this doth not hinder, but that they might derive their Riſe and Original from human Covenant.

V. Thus much being premis'd, it is manifeſt, that, antecedently to any Act or Agreement of Men, there was a Communion of all Things in the World; not ſuch as we have before term'd a poſitive, but a negative Communion; that is, all Things lay free to any that would uſe them, and did not belong to one more than to another. But ſince Things could afford no Service to Men, were we not allow'd to lay Hands at leaſt on the Fruits and Products of them, and ſince this would be to no Purpoſe, if others might lawfully take from us what we had before actually mark'd out for our own Uſe: Hence we apprehend the firſt Agreement, that Men made about this Point, to have been, that what any Perſon had ſeiz'd out of the common Store of Things, or out of the Fruits of them, with deſign to apply to his private Occaſions [1], none elſe ſhould rob him of. This [a] may be illuſtrated by the Caſe of Beaſts, amongſt which none can claim a peculiar Right to any Thing above others [2]; but each ſatisfies his Appetite with what he firſt meets with in his Way: And if any of them hath been ſo provident as to lay up a Stock for future Uſe, the reſt are under no Obligation to forbear invading and plundering it: Inaſmuch as no Agreement can have paſs'd amongſt them, which might lodge the chief Right to any Thing in the firſt Taker.

The Author of the Treatiſe *De Principiis juſti & decori* [b] hath advanc'd ſomewhat on this Subject, which may ſerve to ſet it in a fuller Light. *He preſuppoſeth, that Man may lawfully poſſeſs and uſe Creatures void of Reaſon; and thence infers, that ſince Men are by Nature equal, all muſt have an equal Right to the Creatures* [3]; *there being in reſpect of the Creatures themſelves no Rule aſſigning one Part to me, and another to my Neighbour: What remains then, but that the Diſtinction and Diviſion of Goods muſt be deduc'd from Compact? But foraſmuch as all human Inſtitutions and Ordinances are made with the Exception of extreme Neceſſity, therefore when ſo deſperate a Caſe happens, the primitive Right to all Things revives: Becauſe, in the common Agreement for the Diviſion of Things, every one is ſuppos'd to have renounc'd his Right to thoſe Things which were allotted to others with this Reſerve and Reſtriction,* Unleſs I am unable otherwiſe to compaſs my own Preſervation. *My Calamity doth not give me a Right to thoſe Things, to which I had none before; but the Extremity of my Danger makes that Condition ceaſe, under which I gave up my firſt Right. For the ſame Reaſon it is lawful in War to ſeize the Goods of the Enemy: Becauſe all Compacts being diſſolv'd* [4], *the original Right returns.* He adds, p. 110. *That, before the ſettling of Covenants, firſt Occupancy did not, by its own Force, confer any Right. Becauſe firſt, in whatever neceſſitous Condition I was plac'd, I could then have no Right to recal theſe Goods to my own Uſe; this Privilege taking Place only in Goods which I voluntarily reſign'd to my Neighbour: But there are not many Perſons to be met with, who would allow ſuch a Prerogative to Things thus acquired.*

Which Reaſon might be thus propoſed in clearer Terms.

If firſt Occupancy of itſelf conferr'd a Right excluſive of all others, it would follow that, even in a Caſe of Neceſſity, Goods thus attain'd could not be made uſe of by any other Perſon than the Poſſeſſor: Becauſe the Right of Neceſſity follows from an Exception added to the firſt Compact about the Diviſion of Goods; but we before ſuppoſed, that no ſuch Compact had paſs'd about Things which came into Mens Poſſeſſion by theſe Means. It being then abſurd and unreaſonable, that a Perſon, reduc'd to Extremity, ſhould not be allow'd to uſe what another hath by Occupancy made his own; it follows, that the Right, by virtue of which Occupancy fixeth a Property, is likewiſe owing to Covenant. Though this Argument is at the beſt but very feeble [5].

He proceeds *Secondly* to affirm, *That there is in Nature no more Reaſon why Men ſhould deſire a Right from the firſt Occupancy of Things* [6], *than from the firſt Diſcovery of them with the Eye. Therefore the*

[a] To this belongs l. xli. t. 2. *D. De acquir. vel admittenda poſſ.* l. i. [b] *Velthuyſen*, p. 100, &c. Ed. in 12°.

Right to thoſe Things which, by his own Induſtry, he has taken from that common Stock, wherein they lay; the ſame Law, I ſay, has ſet certain Bounds to this Right. *God hath given all Things abundantly*, 1 *Tim.* vi. 17. Why? to enjoy them. This is the Voice of Reaſon confirm'd by Revelation. Wherefore, the Property of Goods, acquir'd by Labour, muſt be regulated by the good Uſage which may be made of them for the Neceſſity and Convenience of Life. See what our Author ſays, c. vi. §. 3. following. But if we paſs the Bounds of Moderation, and take more than we have Occaſion for, without doubt we take that which belongs to others; eſpecially, if having got any Thing ſuperfluous, we leave not ſufficient to relieve their Neceſſities, and ſupply them with Things convenient and uſeful. We muſt not ſuffer any Thing, which GOD hath created for the Service of Man, to periſh or become uſeleſs. If we conſider, with Attention, the Abundance of natural Proviſions which have been a long Time in the World, the ſmall Number of thoſe who can uſe them, and for whom they are appointed, and how little a Man can appropriate to himſelf to the Excluſion of others, eſpecially if he keep himſelf in the juſt Bounds preſcribed by Reaſon, we muſt be obliged to acknowledge, that the Property of Goods, ſo eſtabliſh'd, would not produce the leaſt Diſputes and Quarrels. We may ſee this diſcourſed at large in the Work of Mr. *Locke*, Lib. ii. c. 4. Moreover, Mr. *Vander Muelen* hath, alſo, confuted our Author in his Comment upon *Grotius*, l. ii. §. 1. p. 56.

[1] This Agreement is in no wiſe neceſſary, as may appear from what has been ſaid in the preceding Note. The *Roman* Lawyers do not ſuppoſe any, even in that Law to which our Author refers; and to ſhew, that Property of Goods commenc'd from Poſſeſſion, they ſay, there remains to this Day ſome Foot-ſteps of it in Things which remain common, and belong to the firſt Occupant. *Dominiumque rerum ex naturali poſſeſſione cœpiſſe Nerva filius ait, ejuſque rei veſtigium remanere, de his, quæ terra, mari, cœlo capiuntur; nam hæc protinus eorum fiunt, qui primi poſſeſſionem eorum apprehenderint*, Digeſt. l. xli. tit. 2. *De acquirenda aut amittenda poſſeſſione*, leg. 1. There is, alſo, a Place in the *Inſtitutes*, which I ſhall quote, p. 418. from whence it will appear, that, according to the Notion of the *Roman* Lawyers, Poſſeſſion is all that transfers Property, by virtue of the Intention of him who gives any Thing to many in common.

[2] See §. iv. Note 3. p. 365.

[3] This is true, but they have it only for their Uſe. All that follows from this Equality of Right is, that no Man ought to poſſeſs himſelf of ſuch a great Quantity of Goods, that there remain not ſufficient for others. See Note 2. p. 366.

[4] This is not ſo; but the true Reaſon is the State of War, where two are Enemies the one to the other. And, indeed, ſuppoſing that they, who have each their Goods in Property, ſhould come of a ſudden to ſuffer them to be common by an unanimous Conſent, and without ceaſing to be Friends, every one may, after this, take what is convenient, and none have Right to deprive others of what they are poſſeſſed of for their Uſe. Thus *Velthuyſen* argues upon the falſe Principles of *Hobbes*.

[5] The Rights and Privileges of Neceſſity are not ſo bounded as to diſpenſe, in certain Caſes, with ſuch Duties, as ſuppoſe an Agreement. They, alſo, make Exceptions to ſeveral natural Laws, which in no wiſe depend upon human Agreements.

[6] The Reaſon of it is very clear, and 'tis this, That he declares thereby an Intention to ſet apart ſuch a Thing for his Uſe, or to appropriate it to himſelf, as he may by virtue of his common Right to uſe it, which, without that, would become uſeleſs to any Man. The meer Sight of a Thing can't have the ſame Effect, becauſe we ſee many Things without any Deſign of taking them to ourſelves only. But if, at the ſame Time, we perceive a Thing firſt, and we diſcover any ways an Intention of reſerving it to ourſelves, others ſhould no more pretend to it, than if we were actually ſeized of it. See what is ſaid on c. vi. So that 'tis not neceſſary to prove, that the third and laſt Reaſon of *Velthuyſen* is of no Force.

Difference

Difference must ariſe from the Inſtitution of Men, ordaining, That the Right to a Piece of Land, for Inſtance, ſhould be in him who firſt took Poſſeſſion of it, not in him who ſaw it before others. Thirdly, he ſays, *Let us ſuppoſe two Men, one ſwift, and one ſlow of Foot, 'tis evident what an ill match'd Couple we have here, as to the Buſineſs of acquiring Property; and, by Conſequence, that the Right by which he who firſt ſeizeth the Thing, in this Caſe, ſhould be the true Owner of it, is not borrow'd from Nature, but from implicit Covenant or Agreement.* He might have ſaid more briefly, upon Suppoſition that all Men had originally an equal Power over Things, we cannot apprehend how a bare corporal Act [1], ſuch as Seizure is, ſhould be able to prejudice the Right and Power of others, unleſs their Conſent be added to confirm it; that is, unleſs a Covenant intervene. What the ſame Author diſputes farther; *That* [a] *in the primitive State one Man might have brought the whole World under his Subjection*, is vain and idle, and is confuted by Mr. *Hobbes* himſelf [b].

VI. To proceed, Men left this original negative Communion, and, by Covenant, ſettled diſtinct Properties, not at the ſame Time, and by one ſingle Act, but by ſucceſſive Degrees; according as either the Condition of Things, or the Number and the Genius of Men, ſeem'd to require. Thus the *Scythians* of old appropriated only their Cattle, and the Furniture of their Houſes; leaving their Land in its primitive Communion [c]. Indeed, the Peace and Tranquillity of Mankind, for which the *Law of Nature* appears eſpecially concern'd, gave no obſcure Intimation, what would be moſt convenient for Men to appoint in this Affair. For that each Man ſhould retain an equal Power over all Things, or that the univerſal Proviſion ſhould be laid in common, ready for the promiſcuous Uſe of every Perſon, was not conſiſtent with the Safety and Quiet of human Race; eſpecially after they were multiplied into conſiderable Numbers, and had cultivated and improved the Method of living. Becauſe [d] there could not but ariſe almoſt infinite Claſhings, from [e] the Deſire of many Perſons to the ſame Thing, which was not able to ſatisfy them all at once; it being the Nature of the greateſt Part of what the World affords, to be incapable of ſerving more than one Man at the ſame Time. As for the preciſe Order, and the particular Cauſes of Things paſſing into Properties, I conceive we may thus come to an Apprehenſion of them: Moſt Things of immediate Uſe to Men, and which are applied to the Ends of Nouriſhment and Cloathing, are not, by bare unaſſiſted Nature, produced every where in ſo great Abundance, as to yield a plentiful Supply to all. As often, therefore, as two or more ſhould want the ſame Thing, which could not content them all together, and ſhould endeavour to ſeize and ſecure it for themſelves; ſo often there muſt ariſe a moſt probable Occaſion of Quarrels and Hoſtilities. Again, many Things ſtand in Need of human Labour and Culture, either for their Production, or to fit and prepare them for Uſe. But here it was very inconvenient that a Perſon, who had taken no Pains about a Thing, ſhould have an equal Right to it with another, by whoſe Induſtry it was either firſt raiſed or exactly wrought and framed, to render it of further Service. It was highly conducive then to the common Peace, that immediately, upon the Multiplication of Mankind, Properties ſhould be appointed in moveable Things, eſpecially ſuch as require the Labour and Improvement of Men; and in the Immoveables, which are of immediate and neceſſary Uſe, as Houſes, for Inſtance; ſo that the Subſtance of them ſhould belong either ſeparately to particular Perſons, or to ſuch a Number of Men as had, by peculiar Covenant, agreed to hold them in the Way of *poſitive Communion*. Farther, although there appears ſome Reaſon in theſe Things, why they ſhould rather belong to ſome than to others; yet the Dominion or Property of them, ſuch as implies the Excluſion of all Perſons beſides, was to be confirm'd, at leaſt, by tacit Compact [2]: And this tacit Compact involved a tacit Ceſſion of the reſt of Mankind; intimating, that whatever had been aſſigned for any one's private Share, they would never challenge any Right or Title to, upon Pretence of its receiving its Matter, or its Nouriſhment, from the Earth, the common Habitation of Men. As for thoſe Immoveables, which Nature produced without the Concurrence of human Induſtry, that is, Lands, ſince they were ſo widely extended, as abundantly to ſatisfy the ſmall Number of the firſt Men; ſo much of them was, from the Beginning, taken into Poſſeſſion, as Men thought convenient for their preſent Occaſions; the reſt being left in its natural and negative Communion, to be poſſeſs'd by any Perſon who ſhould afterwards think fit to uſe it. Here therefore [3] we muſt conceive a Covenant to have paſs'd to this Effect: That thoſe Lands, which had been aſſign'd to particular Men, by the expreſs Agreement of the reſt, or ſuch as the reſt were ſuppoſed to have reſign'd all their Title to, by permitting a ſingle Perſon quietly to enjoy, and by taking to themſelves other Lands in the ſame Manner, ſhould belong to the Manurers and Improvers of them: And that what remain'd ſhould paſs into the Property of thoſe who would afterwards fix upon it.

VII. That the ſettling diſtinct Properties turn'd to the real Benefit and Advantage of Men, when grown more numerous, may be illuſtrated from the ſame Arguments, which *Ariſtotle* [f] brings to overthrow the *Platonick* Communion of Goods. Tho', indeed, his Deſign was to refute a *poſitive* Communion; whereas our Enquiry proceeds about the Reaſons inclining Men to quit that Communion which

[a] Ibid. & 103, 266. [b] *De Cive*, c. 1. ſ. 11. [c] *Juſtin.* l. ii. c. 2. [d] Vid. *Digeſt.* l. viii. tit. 2. *De ſeruitut. præd. urbanor.* leg. 26. [e] Vid. *Hobbes de Cive*, c. 1. ſ. 6. [f] *Polit.* l. ii. c. 5. p. 316. Ed. *Pariſ.*

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[1] It is available by virtue of the Intention of the Creator, who has only given Men this common Right, that they may make Uſe of it. And while each Man takes no more than he needs, he no Way prejudices the Rights of others, who, in their Turn, may one Way or another plead the Privilege of the firſt Occupant. See Mr. *Woollaſton*'s *Religion of Nature delineated*, p. 152. where he has exactly followed theſe Ideas.

[2] By what I have ſaid in the foregoing Notes, we may ſee, that there is no Need here of any Renunciation, either expreſs or tacit. This may ſuffice to direct the attentive Reader, in underſtanding all that our Author, in the following Part of this Work, builds upon that falſe Principle, without which I ſhould be obliged to enlarge my Notes to no Purpoſe, every Moment, to correct it.

[3] Our Author here criticizes upon an Expreſſion of the *Jewiſh* Hiſtorian *Joſephus*, l. i. c. 3. where he ſays, That *Cain* was the firſt who ſet bounds to Lands, Ὅρους τὰ γῆς πρῶτος ἔθετο, p. 7. in which he deſerves, ſays our Author, not to be believed more than in what he ſays in the ſame Place, that *Cain* barbarouſly uſed and inſolently treated all thoſe who dwelt with him; that he gather'd great Wealth by Rapine and Violence, and that he aſſembled Companies of Thieves. For how can ſuch Things be attributed to the eldeſt Son of the firſt Man and firſt Woman, from whence all Mankind are deſcended? See *Bayle*'s Diſſertation, entitled, *An Exercitation upon* Fl. Joſephus's *Antiq. Jud.* Lib. i. c. 2. printed in 1701. and what is ſaid, §. 10, &c. about the Primitive Community of Goods.

we have already ſhewn to be negative [a]: *If*, ſays he, *Men labour'd in common, and laid up all they got in one Heap, out of which they were freely to take for their Support; 'tis impoſſible but that Heats and Quarrels ſhould ariſe from the Inequality which muſt be obſerved between ſome Mens getting and Spending* [2]. *In general*, (as he well remarks) *the living together, and upon the ſame Stock and Maintenance, is grievous and uneaſy. Which is the Reaſon that we are never ſo highly diſpleaſed with other Perſons, as with our Servants and Family-Dependents, who are continually under our Eye. But now, upon the Introducing of Property, all theſe Complaints are ſilenced* [3], *every one grows more induſtrious in improving his peculiar Portion; and Matter and Occaſion is ſupplied for the Exerciſe of Liberality and Beneficence towards others. It were better, therefore, that Goods ſhould be made proper, as to the Poſſeſſion* [4], *and ſhould be common only in the Uſe.* Again, *To conſider a Thing as our own, raiſeth the Pleaſure we take in enjoying it* [b]. *To gratify and aſſiſt a Friend, a Gueſt, or a Companion, fills us with ſenſible Satisfaction and Delight; and this we cannot do, unleſs we have a ſeparate Share of good Things to ourſelves. Beſides, ſince there are few Things which can be made Uſe of by all Men at once, when many Perſons ſhould happen to ſet their Mind on the ſame Object, which could not ſuffice them together; they muſt of Neceſſity fall out, were not the deſired Object already aſſigned to a particular Owner.* It muſt be confeſs'd theſe Reaſons did not weigh ſo much with Sir *Thomas Moor* and *Campanella*, as to hinder them from ſetting up a Communion of Goods, the former in his *Utopia*, the latter in his *Realm of the Sun*: It being much more eaſy to fancy perfect Men, than to find them [5]. But farther, we may hence too diſcover the Falſity of that vulgar Saying [6], Meum *and* Tuum *are the Cauſe of all the Wars and Quarrels in the World.* For, on the contrary, the Diſtinction of *Meum* and *Tuum* was rather introduced to prevent all Contention. Hence *Plato*, LL. l.viii. p. 214. Ed. *Wech.* calls the *Meer-ſtone* [7], *the Boundary of Friendſhip and Enmity, confirm'd by Oath, and approved of by the Gods.* Of the Sacredneſs of the Landmark; ſee, likewiſe, *Deut.* xix. 14. *Job* xxiv. 2. L. xxvii. t. 21. *D. de Termino moto. Collat.* leg. *Moſaicarum cum Rom.* tit. 13. *Paul. Sentent.* i. 16. v. 22. *Frontinus de re agrar.*. *Let every one keep his own Bounds, and not diſturb thoſe of other Men; for, therefore, was the Mark-ſtone ſet up*, litem ut diſcerneret agris, —— *to end the Quarrels of the Field.* But that infinite Field of Hoſtilities and Strifes ariſeth only from hence [8], That the Avarice of Men is ever aiming to break through thoſe Bounds of *Meum* and *Tuum*, which have been, by Law or Covenant, eſtabliſh'd [c].

VIII. Tho' what hath been here deliver'd ſeems plain and evident, yet we think it not impertinent to examine more largely the Opinions of ſome ancient and ſome modern Writers on this Subject. Amongſt the former, *Diodorus Siculus* [d] reports, *That the firſt Earth-born Men led a wild and irregular Life, went out in Herds to ſeek their Food, which conſiſted of the moſt juicy Herbs, together with ſuch Fruits as the Trees ſpontaneouſly produced: But not knowing how to bring their Proviſion together, and to lay up a Store for future Uſe, many periſh'd during the Winter, partly through the Inclemency of the Air, and partly through Want of Suſtenance, 'till, by Degrees, gaining Inſtruction from Experience, they began to retire into Caves in the cold Seaſon, and to reſerve a ſufficient Stock of ſuch Fruits as were fit for keeping: Some new Advantage or Improvement being every day added to Life* [e]. This Hypotheſis, concerning the Origin of Mankind, though falſe, being taken for granted, it follows, that Men, in the Beginning, lived upon the Supplies of Nature in common; afterwards ſettling, by Covenant, the Property of Houſes, and of Fruits treaſured up for

[a] To which add *Ariſtophan.* Concionatr. ver. 585.
Eſt aliquid quocunque loco, quocunque receſſu,
Unius ſe Dominum feciſſe lacertæ.

[b] *Juvenal.* Sat 3. ver. 230.
'Tis ſomewhat to be Lord of ſome ſmall Ground,
In which a Lizard may, at leaſt, turn round. Mr. *Dryden.*

[c] *Iſæus* Orat. 17. *De Niciæ bonis publicatis*, chap. iv. *The main Cauſes of Diſſentions among Subjects are, that ſome covet other Mens Poſſeſſions, exhibit ſome again, are rob'd of their own.* [d] Lib. i. [e] *Plin.* Nat. Hiſt. l xxiii. Proœm. de Arborib. *Pomona* urgeth this in her own Honour and Defence, "That the firſt Food of Men was owing to Trees; and that this taught them to look up-"right towards Heaven: Nay, that they might ſtill find a Suſtenance from the ſame Stores, without Corn and other Products of "the Earth."

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[1] The *Greek* is, Καὶ γὰρ ἐν ταῖς ἀπολαύσεσι, καὶ ἐν τοῖς ἔργοις μὴ γινομένων ἴσων, ἀλλ' ἀνίσων, ἀναγκαῖον ἐγκλήματα γίνεσθαι πρὸς τὰς ἀπολαύσεις τὰς μὲν ἢ λαμβάνοντας πολλὰ· ὀλίγα δὲ πονοῦντας τοῖς ἐλάττω μὲν λαμβάνουσι πλείω δὲ πονοῦσιν.

[2] The *Greek* is, Ὅλως δὲ τὸ συζῆν καὶ κοινωνεῖν τῶν ἀνθρωπικῶν παντῶν χαλεπὸν, καὶ μάλιστα τῶν τοιούτων· δηλοῖ δ' αἱ τῶν συνεποδημούντων κοινωνίαι· σχεδὸν γὰρ αἱ πλεῖστοι διαφερόμενοι ἐκ τῶν ἐν ποσὶ, καὶ ἐκ μικρῶν προσκρούοντες ἀλλήλοις. ἔτι δὲ θεραπόντων τούτοις μάλιστα προσκρούομεν, οἷς πλεῖστα προσχρώμεθα πρὸς τὰς διακονίας τὰς ἐγκυκλίους.

[3] So *Ariſtotle* expreſſes it, Αἱ μὲν γὰρ ἐπιμέλειαι διηρημέναι, τὰ ἐγκλήματα πρὸς ἀλλήλους οὐ ποιήσουσι· μᾶλλον δὲ ἐπιδώσουσιν, ὡς πρὸς ἕκαστα προσοδρεύοντος. This is well expreſſed in a Law of the *Code*, *Naturale quippe vitium, negligi quod communiter poſſidetur; utique ſi nihil habere, qui non totum habeat, arbitretur: denique ſuam quoque partem corrumpi patiatur, dum invidet alienæ*, Lib. x. tit. 34. *Quando & quibus quarta pars, &c.* leg. 2. *in princip.*

[4] And again, Φανερὸν τοίνυν ὅτι βέλτιον εἶναι μὲν ἰδίας τὰς κτήσεις, τῇ δὲ χρήσει ποιεῖν κοινὰς ——— ἔτι δὲ πρὸς ἡδονὴν οὐμύθητον ὅσον διαφέρει τὸ νομίζειν ἴδιόν τι ——— ἀλλὰ μὴν καὶ τὸ χαρίσασθαι, καὶ βοηθῆσαι φίλοις, καὶ ξένοις, καὶ ἑτέροις ἥδιστον ὧν γίνεται τῆς κτήσεως ἰδίας ἔστι. *Epicurus* (to uſe Mr. *Bayle*'s Words in *Hiſt. Diction.*) would not imitate *Pythagoras*, who taught that, among Friends, Goods ought to be common. (*Diog. Laert.* l. x. §. 11.) He was ſenſible, that ſuch an Eſtabliſhment betray'd Diffidence; he liked better that Things ſhould remain on ſuch a Footing, that every one might voluntarily contribute to the Wants of others, when there was a Neceſſity. He aſſures himſelf, that this Notion comes nearer Perfection, than to maintain a Community of Goods; and we cannot ſufficiently admire the Union of *Epicurus*'s Followers, and the Goodneſs by which they aſſiſted one another, while every one remain'd Maſter of his own Eſtate. See *Cicero de finib. bonorum & malorum*, l. i. c. 20.

[5] An univerſal Community of Goods, which might have Place among Men perfectly juſt and free from all irregular Paſſions, cannot but be unjuſt, chimerical, and full of Inconveniences among Men ſo diſpoſed as we are. For the Agreement, which is obſervable ſometimes among the Members of certain particular Communities, is no Rule for an univerſal Society of one whole Nation or People; nay, not ſo much as of a Town, or any other Place, which contains ſeveral Families of different Conditions, and makes an unequal Number of Perſons. See Mr. *Domat*'s Civil Laws in their natural Order, Part II. in the Preface, §. ii. and the Diſcourſe of *Ulric Obrecht*, *de Communione*, which is the firſt of the Collection publiſhed in 1704, at *Strasburg*. To this we may add, that Mr. *Bruyere* (in *Charact. penult. du dern* chap) ſays, That if Men abound with Goods, and no body, in this Caſe, was to live by his Labour —— we ſhall want Neceſſaries and Conveniences. If there be no Wants, there will be no Arts, Sciences, Invention, or Mechanick Trades. Farther, this Equality of Poſſeſſions and Riches would eſtabliſh an Equality of Condition, baniſh all Subordination, reduce Men to a Neceſſity of ſerving themſelves, and exclude all mutual Aſſiſtance, render Laws frivolous and uſeleſs, introduce an univerſal Anarchy, and bring in Violence, Injuries, Maſſacres, and Impunity. The reſt of the Character is pleaſant to read, but too long to be inſerted whole in this Place. See, alſo, *Quintil.* Declam. 261.

[6] *Quota vota iis qui tollunt, Meum, Tuum.* Publ. Syr. *Sentent.* v. 620.

[7] *Plato*'s Words are, Χωμικὸν λίθον ὁρίζοντα φιλίαν, καὶ ἐχθράν.

[8] *Iſæus*'s Words are, Διαφέρεσθαι δὲ πρὸς ἀλλήλους ἐκ τῶν τοιούτων μάλιστ', ὅταν οἱ μὲν τῶν ἀλλοτρίων ἐπιθυμῶσιν, οἱ δὲ ἐκ τῶν ἴδιων ἐκπίπτωσι.

future

future Service, till, by ſlow Advances, the Appropriation of Land was introduced. To the ſame Purpoſe is frequently alledged what *Juſtin* [a] relates of *Saturn* [1], King of the *Aborigines*, who, he tells us, was ſo remarkable for exact Juſtice, *As that no Perſon, under his Reign, lived in a Condition of Slavery, or held any private Poſſeſſions; but all Things, like one univerſal Patrimony, lay undivided, and in common to all.* The Authorities of the *Poets* are, likewiſe, produced in great Numbers, where they deſcribe the happy State of their golden Age, *Virgil.* Georg. I. 125, *&c.*

Ante Jovem nulli ſubigebant arva coloni;
Nec ſignare quidem, aut partiri limite campum
Fas erat: in medium quærebant; ipſaque tellus
Omnia liberius, nullo poſcente, ferebat [b].

Before *Jove*'s Reign none vext the peaceful Ground,
Which only Turfs and Greens for Altars found.
No Fences parted Field; nor Marks, nor Bounds
Diſtinguiſh'd Acres of *litigious* Grounds:
But all was common, and the fruitful Earth
Was free to give her unexpected Birth.
Mr. *Dryden.*

Tibull. Eleg. 3. B. I. ver. 41, *&c.*

Illo non validus ſubiit juga tempore taurus,
Non domito frænos ore momordit equus:
Non domus ulla fores habuit; non fixus in agris,
Qui regeret certis finibus arva, lapis.

No ſturdy Ox did to the Yoke ſubmit,
No broken Courſer champ'd the galling Bit:
No Door the fearleſs Cottager conceal'd,
And the wide Earth was but a common Field.

Senec. Octav. ver. 402, *&c.* Act. ii.

——— *Cingere aſſuerant ſuas*
Muris nec urbes; pervium cunctis iter.
Communis uſus omnium rerum fuit:
Et ipſa tellus læta fœcundos ſinus
Pandebat ultro.

——— Nor had they yet begun
To fence their Towns with Walls, but Nature's Scene
Lay a free Road: The univerſal Store
Supply'd Mankind; at large they liv'd and fed.
The willing Earth her fruitful Boſom ſhook,
Rich with diffuſive Plenty ———

Again in his *Hippolytus*, Act. ii. ver. 525, *&c.*

——— *Prima quos mixtos Deis*
Profudit ætas, nullus his auri fuit
Cæcus cupido; nullus in campo ſacer
Diviſit agros arbiter populis lapis.

——— The firſt good Race of Men,
Companions of the GODS and mixt with Heaven,
Not blindly led by Avarice and Gold,
Forbore to fix the conſecrated Stone
To bound the Fields, and judge between the Swains.

Thus 'tis one of the *Alterations*, which *Ovid.* Met. ver. 135, *&c.* deſcribes in the Iron Age,

Communemque prius, ceu lumina ſolis, & omnia,
Cautus humum longo ſignavit limite meſſor.

Then firſt the wary Swain incloſ'd his own;
All common was before, as Air, or Sun.

Theſe [2], and the like poetical Relations, *Lactantius* [d] interprets in the following Manner:

" *Nec ſignare quidem aut partiri limite campum*
" *Fas erat: in medium quærebant.*

That is, GOD Almighty gave the World in common to Men, that they ſhould live freely together, not that pernicious Avarice ſhould claim the whole Store to itſelf, or that any one ſhould want what was produced for the Sake of all. This Saying of the Poet we ought not to take ſo ſtrictly, as to imagine, that, in thoſe Times, there was no private Poſſeſſion; but in a figurative Senſe, ſo uſual in thoſe Compoſitions; giving us to underſtand, that Men were ſo generous and liberal, as not to ſhut up to themſelves the Fruits of the Earth, or to lie hovering over a conceal'd and ſeparate Store; but that they admitted their poorer Neighbours to the common Enjoyment of what they had gotten by their own Pains. But, indeed, as no ſenſible Perſon will let the Poet perſuade him, that theſe primitive Mortals had *omnia in medium quæſita*, or a poſitive Communion of Goods; ſo the Reaſon which *Lactantius* aſſigns to thoſe Expreſſions, doth not, in our Judgment, appear ſatisfactory: For, as on the one Side, Men were not then, perhaps, greatly inclined to Covetouſneſs, being yet ignorant of Wealth, and finding an eaſy Supply of Food from Nature's Store, whilſt they remain'd Strangers to Delicacies and Exceſs; ſo, on the other Side, we do not ſee what Matter they could have for Bounty, when there was no Occaſion to ſcrape up Treaſure. 'Tis a good Conſideration that ſome recommend to us, in order to a right Underſtanding of the whole Fable of the Golden Age; that the Diſpoſitions of ruſtick and barbarous People make them almoſt natural Friends to Eaſe and Lazineſs, and Enemies to Labour; that the more rude and ſimple Way of Life any Perſons are engaged in, the leſs inclinable they would be to Plenty and Luxury, to Magnificence and Splendor, which commonly require much Induſtry and Pains [e]. And that, laſtly, 'tis the general Vice of old Perſons to commend the Times of their young and flouriſhing Days, to deſpiſe, for the moſt part, preſent Things, and what they ſee before them; extolling whatever comes mark'd with the Advantages of Age; and this, therefore, it ſeems very probable, thoſe rude and

[a] Lib. xliii. c. 1. [b] See this Place illuſtrated by *Seneca*, Epiſt. 90. [c] *Macrob. Saturn.* i. c. 8. " The *Romans* appointed the Temple of *Saturn* to be their Treaſury, for this Reaſon, becauſe, during the Time of his Reign in *Italy*, no Robbery was committed: Or, becauſe under him there were no diſtinct Poſſeſſions, or private Eſtates,

Nec ſignare *quidem aut partiri limite campum*
Fas erat: in medium quærebant.

therefore it was thought convenient to lodge the common Treaſure under his Protection, in whoſe Reign all Things had been common to all Men." [d] Inſtitut. l. v. c. 5. [e] Add *Montaign*'s Eſſays, lib. i. c. 30.

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[1] *Juſtin*'s Words are, *Italiæ cultores primi Aborigines fuere, quorum rex Saturnus tantæ juſtitiæ fuiſſe traditur, ut neque ſervus ſub illo quiſquam, neque quicquam privatæ rei habuerit; ſed omnia communia & indiviſa omnibus fuerint, veluti unum cunctis patrimonium eſſet.*

[2] *Lactantius*'s Words are, *Quippe cum Deus communem omnibus terram dediſſet, ut communem degerent vitam, non ut rabidi, & feri avaritia ſibi omnia vindicaret, nec ulli deeſſet, quod omnibus naſceretur. Quod Poetæ dictum* [viz. *Virgilii in his verſibus, nec ſignare, &c. ſupra memoratis*] *ſic accipi oportet, non ut exiſtimemus nihil omnino tum fuiſſe privati, ſed more Poetico figuratum, ut ſolerent tam liberales fuiſſe homines, ut natas ſibi fruges non includerent, nec ſoli abſconditis incubarent, ſed pauperes ad communionem fructuum horti admitterent.*

ignorant Men, when the Legiſlators compel'd them to a Life of Manners and of Induſtry[1], might be very uneaſy under the Change, and frequently ſend out a Wiſh for their Acorns and their Idleneſs. From which Complaints of their old *Sires*, Poſterity might frame their Dreams about their Golden Age. This Conjecture is ſtrengthen'd by the Character which *Saluſt* [a] gives of the *Aborigines*, the People of thoſe primitive Tims; *They were*, ſays he, *a clowniſh Race of Men, without Laws or Government, tied up to no Order or Rule.* And *Ovid* [3] himſelf placeth the Happineſs of the Golden Days chiefly in this; that Men obey'd Faith and Honeſty *without Law*, and fear'd no Puniſhment, becauſe no civil Societies were yet eſtabliſh'd.

Contentique cibis nullo cogente creatis,
Arbuteos fœtus, montanaque fraga legebant,
Cornaque, & in duris hærentia mora rubetis,
Et quæ deciderant patulâ Jovis arbore glandes [b].

Content with Food which Nature freely bred,
On *Wildings* and on *Strawberries* they fed;
Cornels and *Bramble-berries* gave the reſt,
And falling *Acorns* furniſh'd out a Feaſt.
Mr. *Dryden.*

There's a famous Place produced, on this Head, from *Tully*'s firſt Book of *Offices*, c. 7. [4] *'Tis the Part of Juſtice to diſtinguiſh between Things common and peculiar, and to uſe them accordingly. Now nothing is private by Nature, but as it becomes ſo, either by ancient Poſſeſſion, as appropriated by the firſt Occupant, or by Conqueſt, upon the Right of Arms; or elſe by Law, Agreement, Condition or Lot. Hence come the Names of the* Arpinate *and the* Tuſculan Lands. *And in like Manner are private Poſſeſſions ſettled and deſcribed. Since, therefore, the Things which Nature made common, have, by this Means, been turn'd into Property, let every Man quietly enjoy his Lot: Whoever covets more than this, ſhall be deem'd to have violated the Law of human Society.*

Horace is ſometimes brought in, giving his Judgment amongſt the reſt.

Nam propriæ telluris herum natura, neque illum,
Nec me, nec quenquam ſtatuit: nos expulit ille;
Illum aut nequities, aut vafri inſcitia juris;
Poſtremùm expellet certè vivacior hæres.
Nunc ager Umbreni ſub nomine, nuper Oſelli
Dictus erat; nulli proprius; ſed cedet in uſum
Nunc mihi, nunc alii.
Lib. ii. Sat. 2. ver. 129, &c.

Nature, nor him, nor me, nor any made
The proper Maſter of the Stage we tread.
He turns out me; and him ſome vile Deceit,
Or a dull Head at Law ſhall ſend to ſhare my Fate.
At leaſt he one Day muſt, with all his Care,
Yield to the ſtronger Vitals of his Heir.
Ofellus lately gave the Farm its Name,
And now *Umbrenus:* None of Right may claim
The *Property*; the *Uſe* is paſſing ſtill;
And all are Fortune's *Tenants at* her *Will.*

——— *Tanquam*
Sit propriùm cuiquam, punctо quod mobilis horæ
Nunc prece, nunc pretio, nunc vi, nunc ſorte ſuprema
Permutet dominus, & cedat in altera jura.
Sic quia perpetuus nulli datur uſus, & hæres
Hæredem alterius, velut unda ſupervenit undam,
Quid vici proſunt, aut horrea? L. ii. Ep. 2. ver. 171, &c.

As if the treach'rous World had ever ſhown
A Thing we might preſume to call *our own!*
Since in one fleeting Point of Time convey'd
By Grant or Sale, to Force or Fate-betray'd,
New Lords it may enrich, new Titles wear:
And thus, ſince none are fix'd, but Heir to Heir
Succeeds, as Wave to Wave; in vain we learn
To lengthen out a Street, or croud a uſeleſs Barn.

We have an Epigram of *Lucian*, Tom. ii. p. 838. which is, alſo, recited in the *Anthologia*, much to the ſame Purpoſe. 'Tis a Farm that ſpeaks [5].

Ποτ. Ἀμὲν ἀθάρης, ἢ μέλανος ζωμῷ πλέοι,
Διὰ τῶν σεναπῶν τοιθολυγῶντες ἔρρεον
Ἀνταῖσι μυτίλεσι καὶ ναστῶν τρύφη
Φύσκαι δὲ καὶ ζέοντες, ἀλλάντων τόμοι παρὰ
Τοῖς πυταμοῖς σίζοντες ἐκέχυντ' ἀντ' ὀσφάκων,
Ὀπταὶ κιχλαὶ γὰρ ἀναβρὰς ἠρτυμέναι περὶ τὸ σῶμα
Ἔπετον' ἀντιβολέσαι καταπιεῖν.

The Rivers run with Oatmeal and Black Broth,
Murmuring, when new-bak'd Biskets ſtopp'd their Speed.
Links and hot Sauſages in Fiſh-pools ſtood,
And fatted Oyſters skimm'd the wealthy Stream.
Fowls nicely dreſs'd ſerv'd up themſelves, and flew
About Mens Mouths, ſtill courting them to feaſt.
See *Athenæus*, l. vi. c. 19. and *Pollux*'s *Onomaſticon*, l. vi. §. 58.

[a] *Cantilinar. Bell. init.* Add the Character given of the ſame People by *Dion. Halicarn.* l. i. p. 8, &c. Edit *Oxon.* ver. 103, &c. As for what follows about the perpetual Spring, the ſpontaneous Production of the choiceſt Fruits, and the Rivers overflowing with Milk and Nectar, 'tis no truer than that extravagant Rant of *Pherecrates*;

[b] *Met.* i.

[1] Mr. *Le Clerc* has throughly proved, that the Men, who lived in the Times when the Golden and Silver Ages were ſaid to have been, were not a Whit better than thoſe of the following Ages. See his Notes upon *Heſiod*'s *Theogonia*, ver. 211. and what he has extracted out of it himſelf, in an Article added to his Memoirs, *De Trevoux* in *March* and *April* 1701, Tom. i.

[2] *Saluſt*'s Words are, *Cumque his* [*Trojanis*] *Aborigines, genus hominum agreſte, ſine legibus, ſine imperio, liberum atque ſolutum.*

[3] This Poet makes the Felicity of the Golden Age partly to conſiſt in this, That they had neither Laws nor Puniſhments, but every one was free, in theſe Lines,

Aurea prima ſata eſt ætas, quæ vindice nullo,
Sponte ſua ſine lege fidem rectumque colebat.
Pœna metuſque aberant. ———

becauſe they had no Cities.

[4] *Tully*'s Words are, *Deinde juſtitiæ munus eſt, ut communibus utatur quis pro communibus, privatis ut ſuis. Sunt autem privata nulla natura, ſed aut veteri occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello poſiti ſunt, aut lege, pactione, conditione, ſorte. Ex quo fit, ut ager Arpinas Arpinatum dicatur, Tuſculanus Tuſculanorum, ſimiliſque eſt privatarum poſſeſſionum deſcriptio. Ex quo, quia ſuum cujuſque ſit, eorùm quæ fuerant naturâ communia, quod cuique obtigit, id quiſque teneat, ex quo ſi quis ſibi appetet, violabit jus humanæ ſocietatis.* But Mr. *de Bynkerſhoek*, in his Treatiſe *de Dominio Maris*, printed 1703, Chap i. believes, that about the Middle of this Paſſage there is a Corruption, which he thus amends, *aut lege, PACTIONE, CONDITIONE, ex quo fit, ut ager FORTE Arpinas Arpinatum dicatur.* Upon this Suppoſition the Tranſlation muſt be, *either of Laws or Conventions*, whence it is that the Country of *Arpinas*, for Example, belongs to that City, &c. The Reaſon why this Author changes *ſorte* into *forte*, and puts it in another Place, is, becauſe the Parting of Goods, made by Lot, always ſuppoſes an Agreement publick or private. He might, likewiſe, have ſaid, that *Cicero*, who often uſes Words ſynonymous, and is not very exact in his Diviſions, would, after he had ſpoken of Covenants in general, add ſome particular Kind, as he knew is very common in the beſt *Latin* Authors. But then ſtill there will a Doubt remain, whether, in *Cicero*'s Days, the Word *FORTE* was uſed to ſignify, for Example, as the *Roman* Lawyers uſe it now. Nor is the Law, which Mr. *Bynkerſhoek* quotes here very ſuitable, in my Opinion, to eſtabliſh that Senſe, for there it is *niſi forte*, an Expreſſion very common, in which the laſt Word gives no Idea of the Words *verbi gratia: NISI FORTE ſalicti ei, vel ſilvæ paloris, vel arundineti uſusfructus legatus ſit*, &c. *Digeſt.* l. vii. tit. 1. *De uſufructu*, &c. leg 9. §. 7.

[5] The *Greek* is thus,

Ἀγρὸς Ἀχαιμενίδε γενόμην ποτὲ, νῦν δὲ Μενίππε,
Καὶ πάλιν ἐξ ἑτέρε βήσομαι εἰς ἕτερον.
Καὶ γὰρ ἐκεῖνος ἔχειν με ποτ' ὤετο. καὶ πάλιν ἄλλος
Οἴεται, εἰμὶ δ' ὅλως οὐδενος, ἀλλὰ τύχης.

Once

Once *Achemenides* I ſerv'd, and now
Menippus, and to Thouſands more ſhall go:
Each vain Poſſeſſor cheats himſelf a While,
But Fortune is the *Miſtreſs* of the Soil.

The ſame Author hath told us as much in Proſe. *Nature* [1], ſaith he, *hath made us Lords and Proprietors of nothing; but obtaining by Law and Succeſſion the Uſe of Things, for an uncertain Period, we paſs for the* ὀλιγοχρόνιοι δεσπόται, *the temporary Maſters or Poſſeſſors of them; and when the appointed Term is over, then another receives them from our Hands, and enjoys the ſame Name and Title.* But indeed theſe kind of Speeches refer rather to the Inſtability of Fortune and of human Poſſeſſions, than to the Original of Property [a].

IX. We proceed to examine *Grotius*'s Opinion; [b] in which we ſhall paſs over what he delivers contrary to the receiv'd Doctrine of the Church, as ſufficiently refuted by other Hands. He tells us then, That *GOD conferr'd on Mankind a Right in General to Things of this inferior Nature, both immediately upon the Creation of the World, and again upon the repairing of it after the Flood.* This we allow in the following Senſe, that GOD impower'd Mankind to uſe theſe earthly Things, *in a General Manner*; that is, without determining whether they ought to poſſeſs, either under Diviſion, or in Common, all, or only ſome Things; but leaving this whole Matter to the Judgment and the Choice of Men, to ſettle it according as they ſhould think moſt convenient for the publick Peace and Welfare. But we ought, by no Means, to ſuppoſe, that any poſitive Communion was, at the Beginning, inſtituted by divine Appointment; from which Men afterwards departed by their own Decree; for, on the Contrary, with regard to Almighty GOD, Things were rather laid, as a Free-Stock, to be us'd in any Service that Men ſhould apply them to. Amongſt whom, ſo long as the very Subſtances of Things were not aſſign'd to particul r Perſons, we muſt conceive this tacit Compact to have prevailed, That every Man ſhould take for his Occaſions whatever he pleas'd, eſpecially of the Fruits, and ſhould conſume what was in its Nature conſumeable. And ſuch a univerſal Uſe of Things ſupplied, in ſome Sort, the Room of Property; and what any Perſon had thus taken for himſelf, none could deprive him of without Injuſtice. Now as the Simile, borrow'd from the Theatre, which *Grotius* produceth, fitly enough illuſtrates this Matter [a] [c], ſo his other Inſtance of the *Aborigines* is not applicable, as *Juſtin* deſcribes them [d]. For the Hiſtorian's Words repreſent ſome poſitive Communion, quite different from the Primitive; as if the whole Country was indeed the Poſſeſſion of the People, but not yet divided into private Eſtates; whilſt Men reſted ſatisfied with the Fruits produced without their Aſſiſtance, ſuch as the vaſt Extent of the Lands and Woods afforded them in great Abundance, their Number being as yet inconſiderable: But that they gathered theſe Fruits into a common Store doth not ſeem probable. Thus far *Grotius* [e] is in the Right, that were the firſt negative Communion to continue, without diſturbing the general Peace, Men muſt live with great Plainneſs and Simplicity, contented to feed on what they found, to dwell in Caves, and either to go naked, or to cover their Bodies with the Barks of Trees, and the Skins of Beaſts: Whereas, if they grew more inclined to a Life of Elegance and Refinement, the Conveniences of which muſt be acquir'd by Diligence, there was a Neceſſity of introducing diſtinct Properties. But when he adds, *That this Communion might have laſted, had Men liv'd under the Influence of an eminent Charity and Friendſhip towards each other*; he confounds *negative* Communion with *poſitive*; ſuch as was obſerved by the *Eſſenes* of Old, [f] by the primitive Chriſtians inhabiting *Jeruſalem*, and by thoſe who now follow an Aſcetick Life [g]. For this can never be conſtituted nor kept up, except amongſt a few Perſons, and thoſe endued with ſingular Modeſty and Goodneſs. When Men are ſcattered into different Places, and fixed at a Diſtance from each other, 'twould be a fooliſh Labour to gather all the Proviſion into one Heap, and to diſtribute it out of the common Mass. And where ever there is a great Multitude of People, many muſt of Neceſſity be found, who, through Injuſtice and Avarice, will refuſe to maintain a due Equality, either in the Labour required for the getting of the Fruit, or afterwards in the Conſumption of them. *Plato* inſinuates as much as this [h], when he makes only Deities, and the Sons of Deities, Members of the Republick where he would have this Communion abſolutely obtain. But 'tis idle to believe, that when Men were divided into numerous Families, they neither actually eſtabliſh'd, or had any deſign to eſtabliſh ſuch a Communion [i]. Laſtly, it's a true Remark of *Grotius*', *That Things were at firſt turn'd into Property, not by the bare Act of the Mind, or by Thought and inward Inclination.* For neither could others know what any Perſon intended to keep for his own, to direct them in abſtaining from it; and beſides, 'twas very poſſible that many ſhould be Competitors

[a] As *Tully*, for the ſame Reaſon, affirms, *prædiorum nullam eſſe gentem*, That Eſtates are not enſured to Families and Kindred, pro *Balb.* c. 25. in fin. [b] Lib. ii. c. 2. ſ. 2. [c] Vid. *Arrian. Epict.* l. ii. c. 4. [d] Lib. xliii. c. 1. [e] L. b. ii. c. 2. ſ. 1. n. 4. [f] Of whom amongſt other Authors, ſee *Phil. Jud.* in his Book inſcrib'd, *that every good Man is free.* [g] Add *Martin.* Hiſt. *Sin.* l. v. c. 31. [h] LL. l. v. p. 847. Edit. *Wech.* [i] Add *Jo. Strauch.* diſſert. de *Imper. Maris*, c. 1. ſ. 8. [k] *Ubi ſupra*, n. 5.

[1] *In Nigrino. Natura quidem nullius rei Domini ſumus, lege autem, & per ſucceſſionem uſum earum in tempus incertum adquirentis,* ὀλιγοχρόνιοι δεσπόται, *temporarii poſſeſſores habemus; ac poſtea quam terminus ille conſtitutus præterierit, tunc rurſus alius eadem accipiens nomine illo fruitur.*

[a] The Compariſon is taken out of *Cicero de finib. bonorum & malorum*, l. iii. c. 20. *Sed quemadmodum theatrum, quum commune ſit, recte tamen dici poteſt, ejus eſſe eum locum, quem quiſque occuparit; ſic in urbe mundove communi non adverſatur jus, quo minus ſuum quodque cujuſque ſit.* And in the Note he quotes a Part of a Paſſage in *Seneca*, which we may ſee at length, §. ii. n 16. Our Author, alſo, refers us to a Paſſage in *Arrian*'s Diſcourſe on *Epictetus*, where we find the ſame Thought. It is the Anſwer which *Diogenes* gaves to a *Debauchée*, who being ſurpriz'd in Adultery, alledg'd for his Excuſe, that, according to the Law of Nature, all Women were common. "So (replies the Philoſopher) the Theatre is common to all Spectators; but as ſoon as "the Places are taken up, you have no Right to remove your Neighbour to get his Place. Women are common the ſame "Way. But as ſoon as the Legiſlature has diſpos'd of them, and they are married, you ſhould content your ſelf with your "own Wife, and not meddle with your Neighbours. If you do this, you are no longer a Man, but a Monkey or a Beaſt of "Prey." Ἄγε, τὸ δὲ θεάτρον οὐχ ἑτὶκοινὸν τῶν πολιτῶν ὅτε ἂν καθίσωσιν, ἔλθων, ἂν σοι φανῇ, ἔκβαλέ τινα αὐτῶν. ἔτι καὶ αἱ γυναῖκες φύσει κοιναὶ, ὅταν δὲ ὁ νομοθέτης, ὡς ἑτιατως, διελῃ αὐτὰς, ἃ θέλεις καὶ αὐτὸς ἴδιον μέρος ζητεῖν, ἀλλὰ τὸ ἀλλότριον ἐρᾷς· πάζεις καὶ λιχνεύεις, l. ii. c. 4. in the End. This Example might prove to our Author, that there is no need of any Agreement to acquire a particular Right over what is otherwiſe common, ſince every one ſeats himſelf in a Theatre, where he can, without the Conſent of others, who have a Right as well as he to take the firſt vacant Place. But of this I have ſpoken enough in the Notes before-going.

tors for the same Thing. There was need, therefore, of some external Act [1], or of formal *Seisin*, which, that it might be capable of producing a Moral Effect, or an Obligation in others to forbear what each Man had thus taken for his Peculiar, must necessarily have depended on the Force of some precedent Covenant: When Things, which lay together in Common, were to be parted amongst many, then the Business was transacted by *express* Covenant. But a *tacit* Covenant was sufficient, when Men fix'd a Property in Things which the first Dividers had left for Waste [2]. For we must suppose them to have agreed, that whatever, in the primary Partition, had not been assign'd to any particular Owner, should belong to him who first took Possession of it.

X. Amongst the other Moderns, many, as to the Origin of *Property*, establish a quite contrary Notion. Let us take the Pains to see what Strength their Arguments afford. They acknowledge then a double Sense of the Term *Communion*, so as to import either that which being undivided, and having its Property fix'd in many together, affords a common Service to each Person; or that which being in no Manner appropriated, lies free for the promiscuous Use of all. But then they exclude from the primitive State of Things, not only the former Communion (which is no more than we have done) but, likewise, the latter; and so deny that Things were in the Beginning exposed as a general Store, void of Property in every Kind; and therefore (which is the Consequence of this) that Properties sprung originally from Division, and from first Possession. The Reason they lay down is to this Purpose; [3] *Whatever Right that was, which, either in Kind or Degree, the first Man enjoy'd over other Creatures, he receiv'd it all in that very Manner from his Creator. If therefore he receiv'd a bare Power of using, without any settled Property, his Descendents could not afterwards usurp a Property, without incurring the Guilt of unlawful and covetous Desire, and of arrogating that to themselves, which their Maker had forbidden them to assume.* The Answer to this is easy, from what hath been formerly advanced: Man receiv'd indeed, by the Divine Donation, a Right to Things; but such a Right as was indefinite, general, and indifferent, neither restrain'd to Property, nor to Communion; and such as Men might reduce, as it were, into any particular Form, according as Reason or Necessity should advise. Whence it is, also, clear, that the primitive Communion did not denote a bare *Usus fructus*, but Men were at their Liberty to quit it by Agreement, and to establish either Property or positive Communion in its Stead. Nor is this any Consequence; the first Man did not receive or assume a Right to Things in the formal Nature of Property, therefore his Posterity could not exercise it under that Formality. Neither doth that Divine Grant, express'd in holy Scripture, describe any determinate Manner of Property, but only an indefinite Right of applying Things to such Uses as should be agreeable to the Wisdom, and to the Occasions of Men; which Right may be exercis'd full as well in a *negative* Communion, as in a *positive*. Besides, 'tis not fair thus to conclude; *Men receiv'd a Right to Things from the Donation of GOD, therefore Property did not first arise from Occupancy and Division.* For this Donation of GOD only gave Men full Security and Satisfaction, that 'twas consistent with the Divine Will they should consume on their Necessities, the Works of their common Maker. But Property, strictly so called, ought to have produc'd this Effect, in relation to other Men, that none else should invade what had been adjudg'd to one particular Possessor. And here certainly there was need of some human Act and Agreement, that others might know what belong'd to every distinct Person, so as to quit all Pretensions to it, when thus appropriated before. A Theatre is erected by the State for the common Use of the Subjects: But that in the Time of the Show, this or that Person should obtain a particular Seat, of which others ought not to deprive him, is owing to some corporal Act, that is, to his first seizing upon it. Nay, each Person may, with the Consent of the Publick, acquire a Seat which he shall hold by a perpetual Right. Thus, before any human Act had pass'd capable of introducing Property, every Thing must be conceiv'd to have lain free and *common* (in a negative Sense) to all; that is, not to have appertained to one rather than to another. But when Divisions were establish'd by *express*, or Possessions confirm'd by *tacit* Covenant, then Things passed out of this nagative Communion, into settled Properties.

If any will come so low as to assert, *That by the Dominion which GOD conferr'd on Men antecedently to any Acts of theirs, is meant only a potential Dominion, or a Power of taking and possessing; and, consequently, no more than a Dominion* in actu primo; *from which they pass'd on to Possession, and from Possession to Dominion* in actu secundo: These Men differ from our Opinion in Words only, not in Sense. Yet in this respect they are not sufficiently accurate, who call the Power of entring upon Things, Dominion *in actu primo*; and the Right which follows Possession, Dominion *in actu secundo*. For the Power of acquiring any Right, and the Right it self now habitually inhering, yet without Operation or Exercise, are different Things. As 'tis quite another case to be a Musician *potentially*, and not to use the Art, when the Habit of it hath been fully attain'd. Nor is their potential Dominion very aptly illustrated by the Example they bring of Inheritances; *the Dominion of which, upon the Testator's Death, passeth out of the Habit, or Power, directly and immediately upon the Heir, without the Formality of taking Possession.* For, besides that to pass *out of a Habit*, or, *out of Power*, is by no Means the same Thing; there is always a Fiction of Civil Law conceiv'd to interpose in the Case which they alledge. 'Tis the Rule of Nature, that in the transferring of Dominion from one to another, it shall be requisite for the former Person to tender what is thus convey'd, and for the latter to accept and receive it. But inasmuch as the Laws have con-

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[1] An external Act, I grant, but not always an actual and corporal Possession, properly so call'd, as shall appear by what is said c. 6. much less an antecedent Agreement, as I have shewed above.

[2] This first Parting or Division of Goods, which our Author supposes, is a meer Chimera. Mankind never met together to regulate and order, what every one for the Future should possess as his own, out of those Goods, which were before common. They possessed themselves of them by insensible Degrees, one got one Thing, another another; some to Day, others To-morrow; one after this Manner, another after that. All that can be said is, that those who made themselves Masters of a Country all at the same Time, or were near at Hand to possess themselves of it, for Example, did agree sometimes to part it among them for Peace-sake, and to secure themselves quiet Possession of what fell to them. Sometimes, also, several Persons agreed together, that one should go and search one Way and another another, where to provide for and settle themselves.

[3] Our Author here tacitly refutes *Strauchius*, a learned Lawyer of his own Nation, whose Words these are, in his Dissertation, *De Imperio Maris*, cap. i. §. 5. *& seqq.*

sented,

ſented, that the Will of the Teſtator ſhall remain uncertain and changeable 'till his laſt Breath, and ſhall be accounted ſecret 'till after his Deceaſe; they therefore hold, as 'twere, in Suſpence, the Will of the deceas'd Perſon importing the Conveyance of Goods on his Heir, 'till ſuch Time as the Heir ſhall have ſignified his *Acceptance*; or (as ſome may chooſe to expreſs it) they bring back the Heir's Acceptance to the Moment in which the Teſtator expired, his Will being then properly fix'd and ſettled; ſo that from that Time the Goods are conceiv'd to paſs immediately to the Heir, as deliver'd to him. This Fiction produceth ſo far the Effect of Dominion in the Heir, as that he may challenge the Inheritance, even before he is actually poſſeſſed of it. And without ſuch a *Fiction* [1], the Dominion would no more belong to a Man in an Inheritance before actual *Entrance*, than it doth in a Donation before *Acceptance*. And hence too, amongſt Perſons who live only under the Direction of the Law of Nature, which is, for the moſt Part, unacquainted with theſe *Fictions* introduced by civil Conſtitutions, there will be no Admittance given to any *poteſtative Poſſeſſion* as oppoſed to *actual*; nor will the bare Right and Power of acquiring Poſſeſſion obtain the Name of Poſſeſſion it ſelf [a].

XI. Many have thought fit to appeal to the Authority of Scripture in this Point; whence they have ſuppos'd that it may be made evident, that there never was any ſuch *Communion*, as we have aſſerted, in the World: They tell us, *That the univerſal Maſs of Things paſs'd immediately to* Adam, *by virtue of the Divine Donation; ſo that he held it as his own proper and entire Poſſeſſion. The Force of which Propriety was ſuch, that it not only excluded all others from the univerſal Poſſeſſion which he enjoy'd, but, likewiſe, from the Right of taking to themſelves any one particular Thing: Inſomuch that even his Children could claim no Property, ſo long as they continued in the Family of their Father, unleſs he convey'd ſomewhat to them in the Manner of a* peculium, *or ſeparate Stock: That they became Proprietors, firſt, by poſſeſſing that Share which he aſſigned them, when diſmiſs'd from under his Tuition; and afterwards, upon his Death, by dividing his Store amongſt themſelves* [b]. They explain their Notion in this Manner: *The Form of GOD's Grant conferr'd a Right only on the primitive Pair, before they had Children. Therefore either the Property of Things was given to* Adam *and* Eve *originally, ſo that their Deſcendents were to derive from them all their Title to any Poſſeſſion; or elſe the whole World was, in the Perſon of* Adam, *beſtow'd in common on all Mankind. The latter of theſe, as it implies ſeveral Difficulties, ſo it is particularly repugnant to the Right of* Occupancy, *which obtains only in Things void of a Poſſeſſor. For if the entire Maſs was given to all Mankind, it doth not appear, how a particular Perſon could, by ſeizing any Thing to himſelf, convert it into his diſtinct Property, excluſive of human Race in general, or, ſo as to hinder Men from making any Pretenſions to it by virtue of their common Right. For ſuch is the Nature of Things which lie in common, and which admit only of undivided Shares, that every ſingle Atom of their Subſtance is no leſs common, and no leſs undivided, than the Whole; ſo that if any private Man apply it to himſelf alone, he is an injurious Robber of the Community. But now, they who defend a primitive Communion, confeſs that the firſt Occupants of Things did, by that Act, acquire ſuch a diſtinct Right over thoſe Things, as excluded the Right of all others to the ſame.* What Reply may be made to all this, is evident from the Aſſertions already confirm'd [2]. The Divine Donation conferred on Man a Right of applying other Creatures to his Uſe; which Right was indifferent to poſitive Communion, or to Property; being of Neceſſity to be turn'd into one of theſe, before it could take any Effect with relation to other Men. And therefore when others add further, *That the common or publick Dominion of Mankind over Things, was given by GOD, under Condition, that they ſhould parcel it out, and conſtitute it private; for which Reaſon, it neither can, nor ought to be conceived without a Reſpect and Tendency towards private Dominion, ſo to be eſtabliſhed as was agreeable to a rational and a ſocial Nature:* This we may, without any Inconvenience, interpret on our Side. That is, GOD by his firſt Grant plac'd Things in a negative Communion: But ſince that was unable to procure the Safety and Peace of Society, when human Race was multiplied, and Life began, by the Arts of Induſtry, to be poliſh'd and improv'd, Men eaſily apprehended that 'twas the divine Pleaſure they ſhould introduce diſtinct Properties. In order to the actual Settlement of which, it was requiſite that ſome Tranſactions and Agreements of Men ſhould precede. For that a Thing ſhould be appointed by the Will of GOD, and yet ſhould not be introduced but by ſome antecedent Compact of Men, ought not to be look'd on as an Inconſiſtency: As it is certainly none, that GOD would have Mankind propagated by Marriage, not by uncertain Luſt; and yet Marriage is not actually contracted between particular Perſons, without ſome Covenant paſſing before. Farther, ſince poſitive Communion and Property both imply a Relation to other Men, it can with no Manner of Accuracy be ſaid, That all created Things were proper to *Adam*; but only thus, That he held the Dominion of all Things, not *formally*, but *permiſſively*; inaſmuch as there was then no Right of any Perſon elſe to interfere with his, and to hinder him from converting every Thing to his own Uſe, had there been Occaſion. When GOD was pleaſed to give him a dear Partner and Companion, they agreed to hold this indefinite Right over Things without dividing it; as being united to each other in the ſtricteſt Band of Society: For which Reaſon many Nations at this Day obſerve a Communion of Goods between the Husband and the Wife. Nor was there any need of ſeparate Properties, ſo long as *Adam*'s Children, being yet in their Minority, were to be maintain'd by their Father, and made but one Houſe. For, tho' in the Uſe of Things, they were, at that Time, obliged to conform to their Father's Pleaſure, yet this proceeded not from his *Dominion* (ſtrictly ſpeaking) over the *Things*, but from his paternal *Power* and *Authority* over the *Perſons*. Therefore the *Property* of Things came then to be diſtinct, when, by Conſent of the Father, the Sons fell into ſeparate Fami-

[a] Vid. *Strauch. de imp. mar.* c. 1.

[b] Comp. *Ziegler.* ad *Grot.* l. ii. c. 2. ſ. 2.

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[1] So the Civil Law ſpeaks, *Omnis hæreditas, quamvis poſtea adeatur, tamen cum tempore mortis continuatur*, Digeſt. L. l. tit. 18. *De diverſ. Regul. Juris*, leg. 138. See c. 9. §. 2. following.

[2] Mr. *Hertius* obſerves here, that this Permiſſion, which was given to *Adam*, and renewed to *Noah*, makes no Mention of any Thing but living Creatures, as I have already obſerved above, on §. 4. out of Mr. *Locke*, and it appears, from other Places, that Mr. *Hertius* had ſeen the Treatiſe of Civil Government in the *French* Tranſlation which was printed in 1691. lies;

lies; which Separation was undoubtedly owing to the Emulation between Brothers; and to another good Reaſon, that every one's own Induſtry might be his own Advantage; as the Idleneſs of others might be a Puniſhment only to themſelves. Nor muſt we believe that the whole World was preſently ſhar'd out amongſt that ſmall Number of Perſons; or that all Things were turn'd into *Property* by one Act, and at one Time. But it was ſufficient, at firſt, to fix a *Property* in thoſe Things, which either afford an immediate Uſe, not capable of being divided amongſt many; as Cloaths, Cottages, and Stores of Proviſion already gather'd by particular Men; or which require Induſtry and Improvement to make them fit for Service; as Houſhold Goods, and Inſtruments, Cattle and Fields [1]. By Degrees, what remain'd was brought under the ſame Condition, according as either the Inclination or the Number of Men directed and adviſed. Thus the Paſturage continued a great While in its firſt and common State; till, upon the abundant Increaſe of Cattle, Quarrels ariſing, the Diviſion of this, likewiſe, was made neceſſary to Peace and Concord. As for that Part of the Argument, *That the Right of Occupancy cannot be admitted, where Poſſeſſion belongs to a general Body*; this will hold good againſt thoſe who pretend any poſitive Communion to have been the primitive State of Things; in which, indeed, no private Perſon can take any Thing to himſelf, excluſive of the whole Society. But the primitive Condition, in which we have placed Things, is equally diſtant from poſitive Communion, and from Propriety, in the ſtrict Senſe of the Word: And we aſſert, that before Occupancy can produce Dominion, it is neceſſary that ſome Compact (a tacit one at leaſt) ſhould have been firſt ſettled to that Effect.

XII. Others form their Scripture-Account of the Origin of Dominion in this Manner: *That GOD gave our firſt Parents that common Dominion which he deſign'd for all Men in general, to be held undivided; inaſmuch as the primitive Pair repreſented the Perſon of all human Race. In which Senſe it may ſtill rightly enough be ſaid, That the Dominion of the World, or of the Things in the World, as they are capable of paſſing into Property, belongs to Mankind. But this common Dominion doth not exclude private; ſince we neither can, nor ought to conceive it without a Reſpect and Tendency to private Dominion, ſo to be conſtituted, as ſhould be agreeable to a rational and a ſocial Nature. But in* Adam *the latter of theſe Dominions met in Conjunction with the former, excluding his Children without any previous Ceſſion or Surrendry* [a]. Now, as to this Account, we will not diſpute about Words; that is, we allow the Name of *common* Dominion to what we ourſelves have rather choſe to call a Right of uſing the Creatures, inherent in Men by virtue of the Divine Conceſſion; provided this *common* Dominion, conſider'd by itſelf, be ſuppoſed to obtain no Effect between Man and Man. On which Point we have before affirm'd, that Men might have reſted ſatisfied with that Right of uſing Things as they lay in common; and that it was not neceſſary ſeparate Dominions ſhould immediately be introduced, ſo long as Men were yet few in Number, and follow'd a ſimple unimproved Way of living; but when their Race was conſiderably multiplied, and when Induſtry had advanc'd the Conveniences of Life, then the neceſſary Regard to the Preſervation of Society recommended the Diſtinction of Properties; yet ſo as that Things did not paſs all at once into this Condition, but ſucceſſively, according as the occaſional Methods of Peace and Agreement ſeem'd to demand. But that *Adam* held a *private* Dominion over all Things, before his Sons had left him, to ſet up Families of their own, is a very negligent Aſſertion.

For firſt, private Dominion always takes its Riſe from ſome human Act; therefore *Adam* could not have ſuch a Dominion over thoſe Things, which he was ſo far from having taken Poſſeſſion of, that they did not ſo much as fall under his Knowledge.

That Place of the *Civil Law* [2], L. iii. §. 1. *D. de adquir. poſſeſſ.* [b] is very unfitly applied to the preſent Buſineſs; as if *Adam*, by ſetting his Feet on one Part of the Earth, ſhould be ſuppoſed to have taken Poſſeſſion of the whole World. If any one perſiſts in giving the Name of Property to that Right of uſing Things, which Men received by the Grant of their Creator, then we might admit what theſe Authors lay down, *That Property was the Cauſe of Occupancy and Diviſion*; or that it was therefore lawful for Men to challenge Things to themſelves, by laying Hands upon them, and by parting them into ſeparate Shares, becauſe GOD had given them a general Commiſſion to apply other Creatures to their own Uſe. But if we take the Word *Property* in its ſtrict and general Senſe, as it denotes the Excluſion of all others from a particular Thing already aſſign'd to one; then it is altogether true, that *Diviſion* and *Occupancy* are the Cauſes of *Property*. Farther, *Adam*'s Children, whilſt they yet continued Part of their Father's Family, were bound, indeed, to obey his Pleaſure, in regard to their Uſe of Things; yet this, as was before obſerved, proceeded not from the Force of any private Dominion in *Adam*, but from the Force of his paternal Power: For whilſt they were young and helpleſs, he was obliged to maintain them. And when they were capable of doing ſome Service, ſtill the ſame paternal Authority required both that in uſing the common Store they ſhould be guided by their Father's Directions, leſt they ſhould incur any Miſchief by Intemperance; and, likewiſe, that ſuch Things as they had either gather'd from a ſpontaneous Growth, or had produced by their own Induſtry, they ſhould deliver into the Hands of their Father, to be given out as he ſhould think fit: And he, ſo long as he enjoy'd this Right, was bound to provide Neceſſaries for his Children, even after they were arrived at Maturity, as Time and Occaſion ſhould require. And hence, if any one of his Sons ſhould, for Inſtance, contrary to his Prohibition, have privately feaſted with too much Greedineſs on ſome particular Fruit, the Youth had been, by no Means, guilty of Theft, but of Diſobedience to his Father's Command. Or, if *Adam* had order'd one who was grown up to ga-

[a] Vid. *Bæcler.* ad *Grot.* d. l. [b] Vid. l. xli. tit. 2. *D. De acquirend. vel admittend. poſſeſſ.*

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[1] It appears from the Sacred Hiſtory, that in *Abraham*'s Time Men went from one Place to another with their Families, Servants, and Flocks, which were then their Riches. We, alſo, ſee that this Patriarch followed that Cuſtom in the Land, wherein he was a Stranger. So that, at that Time, great Part of the World was common, and when there was not Room enough, in one Place, to feed the Flocks of divers Perſons, they parted by common Agreement, as *Abraham* and *Lot* did. 'Tis, alſo, obſerved, that the moſt ancient Inhabitants of *Greece* led ſuch a wandering Life; about which conſult the Hiſtorical Explication of the Fable of *Ceres* by Mr. *Le Clerc*, in the *Bibliothec. Univerſal.* Tom. 6. p. 104, 105.

[2] This Law will be quoted, c. ix. §. 7. following.

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ther Provision for the Sustenance of a young Brother, and the Party, thus employ'd, had either devour'd it himself, or laid it up secretly for his future Use, he deserved Correction, not for Theft, but for violating the Charge which his Father laid upon him. During this Period, therefore, neither *Adam*, nor his Children, had any *private* Dominion: The Right of *primitive* Communion was sufficient for *his* Turn; and as for *them*, they, in the Exercise of the same Right, depended on his Care and Guidance. So that *Adam*'s private Dominion then began, when he dismissed his Sons from under his Tuition, and gave them Leave to erect separate Families for themselves.

XIII. Let us consider too the Arguments of those who maintain that this *primitive Communion* was impossible [a]. They say, That *such a Communion neither could have been, nor ought to have been, in the State of Innocence; because, as every Order and Method is conformable to right Reason; so the most comely Order of possessing those Things, the Dominion of which GOD had granted to Mankind, agreed in an especial Manner to that State, in which the Virtue of abstaining from what was another's deserved to bear an honourable Name. Whence the Decalogue, as it establisheth the Duty of forbearing the Goods of others, so it secures every one in the Enjoyment of a certain and separate Possession.* To this we answer,

First, That we can have no such clear Evidence what Kind of Life (with respect to these external Things) Men would have led, had they continued in their first sinless Condition; and, consequently, whether the Community, or the Propriety, of Things would have been most suitable to that State.

But farther; we may venture to make it a Question, whether it be not a higher Degree, a greater Perfection of Virtue, to enjoy quietly a common Provision, and to desire no particular Advantage above the rest, who have the same Title to it, than to abstain from the distinct Portion of others?

Lastly, Whatever we are to say, as to the Eternity of the *Law of Nature*, thus much is certain; that there is no Necessity every Object of that Law should have always existed[1], many of them proceeding, in the Course of Time, from the Agreements and Institution of Men: Thus the Law against Murther had no Object, whilst *Adam* was the only Person in the World: nor the Law against Adultery, whilst none of his Sons were arrived to Man's Estate; nor the Law against Theft, before the Division of Things; nor the Law against bearing False-witness, before the judicial Processes were introduced; nor the Law against coveting the House, the Man-servant, or Maid-servant, of others, whilst they lodged in Caves, and e're Servitude was established; nor, lastly, the Law of honouring Parents, before *Eve* was a Mother [b]. They proceed to tell us, That *neither was such a Community possible in the State of Men after the Fall:* First, *because we cannot so much as form any Notion of it in our Mind: For* Grotius *so describes its Laws and Rules, as that every Person might immediately seize for his Use what he pleased, and might consume any Thing that was consumable. But such an Exercise of the general Right served then instead of Property; for what any one had thus seized, none else could take from him without Injury. Therefore this Notion establisheth a Property in Community, and, consequently, implies a Contradiction; the only End and Effect of Property being this, That one Person should not rob and plunder another.* But here they vainly pretend a Difficulty where there is none: For, antecedently to any human Act, and to the Use of any Thing in the World, when the bare Case is thus, That each Thing belongs no more to one Man than to another, and, consequently, belongs alike to neither; the primitive Communion bears a different Aspect from what it hath, after Men begin to lay Hands upon the general Store, and to employ it in their Service: Since, in the latter Case, by virtue of a previous Covenant, whatever any Man hath seized for his private Use, becomes his Property. Otherwise Men must altogether abstain from the Use of Things. Hence, in this *qualified Communion*, as we may call it, the Substances of Things belong to none, but their Fruits become Matter of *Property*, when gather'd. This Notion of *Community*, temper'd with such a Degree of *Property*, may, we think, be easily apprehended by Persons of no very nice or philosophical Heads. To give a plain Instance: The Acorns were his who took the Pains of getting them, but the Oak had no particular Owner. Thus much being laid down, the Way is the better clear'd towards answering what they farther object. They pretend, that *such a Communion could not possibly last one Moment of Time, that it was contrary to the human or rational Nature, savage, and unsociable; and, consequently, is capable of affording no other Use, than that from it, as a feign'd Hypothesis, may be shewn the Necessity of a distinct or private Dominion in a civil State.*

It is true, this *Communion*, consider'd precisely in itself, and before any Application and Exercise of it, could not subsist, unless Men could have always walk'd naked, and lived without eating. Yet why it should not subsist, when thus qualified with a Mixture of *Property*, there was nothing to hinder whilst the Number of Men was yet few, and their Life plain and unrefined. It is certain, however, that the more Mankind was multiplied, and the more Life was improved, the greater Necessity there was of appropriating more Things than before. Hence those People lead but a rude and barbarous Life, who make the nearest Approach to the primitive Communion; those, suppose, who live on Herbs, Roots, Fruits of chance Growth, and what they take in hunting and in fishing, and who claim no other Estate and Wealth than a Cave with its wretched Furniture. Farther, when we assert that all Things were by Nature negatively common, we do not mean that the *Law of Nature* commands Men perpetually to preserve such a State; but that Things, if consider'd antecedently to any Act of Men, were so disposed, as that no one Person should claim them rather than another. On the other Side, in affirming that Men left this Communion upon the Advice and Direction of Reason, we pretend not that it was necessary all Things should be appropriated in the same Moment; but, according as the Temper or Condition of Men, the Nature of the Things themselves, and the Difference of Place required; and as was judged most convenient for the cutting off all Manner of Quarrel or Dissention. And therefore, neither are we, who are utterly banish'd the primitive Communion, nor those barbarous Nations, which still retain many Foot-steps of

[a] *Vid.* Bœcler. *ubi supra.* [b] See above, l. ii. c. 3. s. 22.

[1] See l. ii. c. 3. aforegoing §. 22, 24. and the Author's Preface of his *Abridgment of the Duties of a Man and Citizen*, §. 8. in the *French* Translation printed at *Amsterdam* in 1707.

it, guilty, in this Reſpect, of a Breach of the *Law of Nature.* Thus too, what they add hath little Difficulty: *After the Fall,* ſay they, *Men could not live without Law, and yet maintain a ſocial Life; therefore, neither without the Diſtinction of Properties; ſince the Communion of Things is inconſiſtent with Law, which is wont to aſſign and diſtribute particular Poſſeſſions.* But ſince all Laws do not preſuppoſe ſeparate Dominion, why might not thoſe others be obſerved, ſo as to keep up a Life of Society under that *qualified Communion?* Though it muſt be confeſs'd, that before the Diviſion of Properties a very few Heads of Law might have been ſufficient for the Government of Mankind. Therefore when *Servius,* in his Obſervations on *Virgil*[a], reports it as the Reaſon why *Ceres* was, by the Ancients, called *Legifera*[1], and her Rites *Theſmophoria, becauſe ſhe is ſaid to have been the Foundreſs of Laws; inaſmuch as before the Invention of Corn, Men wander'd about without Law or Government; which wild Condition was taken off, after Corn came into Uſe, and after Laws had been inſtituted upon the Diviſion of Land.* This Account ought not to be admitted without ſome Limitation. Indeed, a more pompous Train of Laws became needful after Properties were fixed, Men being ruled before by a ſmall Number of Ordinances; yet Communion, conſider'd by itſelf, doth not render Life altogether lawleſs and unſociable, but only more ſimple and unpoliſh'd; and, as it were, not well ſettled and compacted. As for *Platonical* Community, it hath nothing to do with the Caſe before us; it being profeſſedly *poſitive,* and extended not only to Goods, but to Wives and Children.

XIV. We may hence diſcover in what Senſe we are to take that Aſſertion laid down by ſome Authors, *That Property and Dominion belong to the* Law of Nature, *ſtrictly ſo called, and which is written in the Minds of Men*[2]. Where it is to be obſerved, that this Expreſſion, ſuch or ſuch a Thing *belongs to,* or *is of the Law of Nature,* hath a different Meaning, according as it implies either any expreſs or immediate Command, or elſe of ſome Cuſtom or Inſtitution eſtabliſhed in human Life. In the firſt Senſe it imports, that the *Law of Nuture* enjoins the doing, or the not doing of ſuch a Matter: In the ſecond, that ſound Reaſon adviſeth the Reception and Settlement of ſuch a Thing amongſt Men, from the general Conſideration of a ſocial Life. For as for thoſe Cuſtoms or Regulations which are introduced for the particular Advantage of ſeparate Commonwealths, ſuch are ſaid to proceed from *civil* or *poſitive* Law. When, therefore, it is demanded whether or no *Property* owes its Original to the *Law of Nature,* the latter Senſe of the Word is to be regarded, and not the former; that is, inaſmuch as a ſocial Life is the very Foundation of a natural Law, and ſince it is, at the ſame Time, ſufficiently evident, from the Temper and Genius of Mankind, that in a great Multitude, where all join their Endeavours towards improving Life with various Inventions, the Peace and Beauty of Society could not be kept up without diſtinct Dominions of Things; ſuch Dominions were, therefore, ſettled; and this very rightly and agreeable to the Aim of Nature's Laws, human Affairs plainly requiring it to be done. And after this Eſtabliſhment, the ſame Law commands the Obſervance of every Thing that may conduce to the End for which theſe private Dominions were erected: Yet was there no expreſs and determinate Command of the *Law of Nature,* by virtue of which all Things ought to be brought under *Property,* immediately upon the Origin of Mankind, or in all Places alike; but *Property* was gradually introduced, according as it appear'd requiſite to the common Peace. But the Precept of Nature, about abſtaining whom what is another's, then firſt began to exert its Force, when, at length, Men, by mutual Agreement, had mark'd out and appointed what ſhould belong to others, and what each Perſon ſhould claim as his own. Before this Time it lay conceal'd (as it were virtually or potentially) in that general Precept which enjoins us to ſtand to our Covenants, and not to injure the Right of our Neighbour. Nor is it any Abſurdity to affirm, that the Obligation we lie under, not to invade the Goods of others, is co-eval with human Race. And yet that Diſtinction of *meum* and *tuum* was afterwards ordained. Thus we are often bound to yield Obedience, before we know what will be enjoin'd: As when we have an Obligation in general to follow the Directions of ſome certain Perſon in all Things that he ſhall hereafter require us to perform; or when we may ſuppoſe ſeveral particular Commands to be implied in ſome general Rule[3].

XV. It is needful, in this Place, to add a Word or two concerning the Subject of *Property*; on which Head, the principal Queſtion is, Whether thoſe are capable of being Proprietors, who have not the Uſe of Reaſon, as Infants and delirious Perſons? Now here it is certain, that neither of theſe can originally acquire the Property of any Thing, or make it their own by taking immediate Poſſeſſion of it. The Reaſon is, becauſe in this Method of acquiring Property, the Intention of the Acquiſitor is neceſſary, ſignifying that he will, for the Future, hold ſuch a Thing as his own; and he ſhould, at the ſame Time, be able to underſtand, that ſuch an Act is effectual towards the creating a Right in him. But this cannot be ſuppoſed in the Perſons of whom we ſpeak. Yet, as to the obtaining the Property of ſuch Things as are derived upon them from others, the Caſe is different. For tho' here, likewiſe, to make a Thing paſs to me from another, it is in the common and regular Courſe required, that I have an Underſtanding able to judge of what is done[4], and to ſhew, by Signs proceeding from real Intention, that I am willing to receive ſuch a Thing, and to keep it to myſelf; yet it is the received Practice of all civilized Nations to permit Children, in their moſt tender Age, and even before their Birth[b], to receive and to retain a Property deſcending to them. And this is no more than what is dictated by natural Rea-

[a] *Æn.* iv. ver. 58. [b] Vid. l. vii. c. 26. *D. De ſtatu hominum,* l. iii. *D. Si pars hæred. petatur.*

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[1] *Legiferæ Cereri.*] *Leges enim ipſa dicitur inveniſſe. Nam & ſacra ipſius Theſmophoria,* i. e. *legum latio, vocantur. Sed hoc ideo fingitur, quia ante inventum frumentum à Cerere paſſim homines ſine lege vagabantur, quæ feritas interrupta eſt, invento uſu frumentorum, poſtquam ex agrorum diſcretione nata ſunt jura. Servius ad Æneid.* iv. ver. 58. See, alſo, *Callimachus*'s *Hymn. in Cerer.* ver. 19. and Baron *Spanheim*'s Comment on it, as, alſo, the hiſtorical Explication of the Fable of *Ceres* by Mr. *Le Clerc* in Tom. vi. of his *Bibliothec. Univerſal.* p. 106.

[2] Theſe are *Baccler*'s Words, in his Commentary upon *Grotius,* lib. ii. cap. 2. p. 42.

[3] See l. i. c. 6. §. 2. aforegoing.

[4] See l. i. c. 1. §. 7. aforegoing, and l. iv. c. 12. following §. 10. Add here *Grotius,* lib. ii. cap. 3. §. 6. and cap. 5. §. 2. numb. 3. with my Notes.

ſon and Equity; inaſmuch as the Things which Men uſually appropriate, belong to the Uſe and Service of Life, and are no leſs neceſſary for Infants than for grown Perſons; nay, indeed, ſomewhat more neceſſary for the former, who, by reaſon of their Weakneſs in Body and Mind, cannot ſo well provide for their own Occaſions. In Infants, therefore, a preſumed Conſent is judged equivalent to a formal Acceptance; it being taken for granted, that no one will refuſe what conduceth to his Benefit. Yet, on Account of their Immaturity of Judgment, the Poſſeſſion only, and not the Exerciſe, of this Right could be conferr'd upon them. The general Cuſtoms of Nations in their Favour, might allow them to hold, but not to diſpoſe of any Thing by their own Judgment[a]. However, leſt their Right ſhould, by this Means come to nothing, Humanity farther requir'd, that Perſons of Years and Diſcretion ſhould act as their Repreſentatives, in the Management of their Goods, till they are capable of underſtanding it themſelves. This Management is either committed to a certain Perſon, by him who transfers the Goods upon them, or, in civil States, the Matter is ſettled by Direction of the Laws, and of the Magiſtrates; or, where both theſe Proviſions are wanting, Nearneſs of Blood, or of Habitation, or the bare Law of general Kindneſs, recommends the good Office to fit Hands [1]. But all Perſons, who have engaged themſelves in this Caſe, by what Means ſoever they came to be entruſted with it, are obliged to diſcharge it with the utmoſt Fidelity, in regard to that tender Age, inſufficient for its own Guidance and Defence. Therefore *Heſiod* ranks, in the ſame Claſs of Sinners, him that hath hurt a Stranger, or one that ſued to him for Protection; him that hath defiled his Brother's Bed; him that hath uſed rigorous Treatment toward an ancient Parent;

Ὅς τέ τευ ἀφραδίῃς ἀλιταίνεται ὀρφανὰ τέκνα.
Op. & Dier. l. i. ver. 330. Edit. *Cleric.*

And him whoſe Fraud the Orphan's Hope beguiles.

Plato [2], in his Books of Laws, (lib. xi. p. 972. *Edit. Wechel.*) calls Orphans, *The greateſt and moſt ſacred Charge*: Where he, likewiſe, offers many Conſiderations about the Duty of Guardians. Yet that a Man ſhould ſuſtain this Office and Truſt without Reward or with Expence, Humanity and Equity do not always require. *Grotius*, and his Commentators, *viz. Bæcler*, *Ziegler*, and *Felden*, may be conſulted farther on this Subject, in their Obſervations upon *Grotius*, B. II. l. iii. c. 6. where they endeavour to prove, contrary to his Judgment, that Infants have a Propriety in their own Goods, not only in reſpect of the firſt Act, or Right of poſſeſſing, but, alſo, in reſpect of the ſecond Act, or Adminiſtration of their Goods by themſelves; for, ſay they, "The "Guardians have only the bare Management of the "Right and Goods of another." In all Appearance this Conteſt is about Words only.

[a] *Gal.* iv. 1.

[1] On this Occaſion we may mention the Law of *Charondas*, (recorded by *Diodor. Sic.* l. xii. c. 15. p. 81. Edit. *Rhodom.*) which aſſigns the Goods of Minors to the Care of the Kindred by the Father's Side, but their Education to the Kindred by the Mother. Judging it probable, that the latter, to whom the Inheritance could not deſcend, would make no Attempt on the Life and Safety of the Wards; and that the former would have no Opportunity for any Deſign againſt their Perſons; and yet, at the ſame Time, would be very diligent in managing their Fortunes, becauſe after their Death, whether natural or caſual, the Eſtate would fall to themſelves. So, alſo, *Publius Syrus*, *Male ſecum agit æger, medicum qui hæredem facit.*
He that makes an Heir of his Phyſician,
Is a good Patient, but a bad Politician.
Diogenes Laert. gives us a Law of *Solon*'s much to the ſame Purpoſe; ordaining, That no Guardian ſhould cohabit with the Mother of his Ward, and that he ſhould be incapable of the Guardianſhip, to whom the Eſtate fell upon the Minor's Deceaſe. See, alſo, *Menage* upon this Paſſage of *Diog. Laert.* As for the reſt, according to the *Roman* Law, Things were regulated in ſuch a Manner, as ſerved no Way to prevent the Inconveniences, which *Solon* and *Charondas* had wiſely foreſeen and ſtudied to avoid. They choſe rather to imitate *Lycurgus*, who ordain'd the Guardianſhip of Minors to the neareſt Relations. See *Inſtit.* lib. i tit. 15. *De legitima Adgnatorum tutelâ.* But the *Romans* were never ſo diſintereſted as the *Lacedemonians*: And it appears plainly, by the Precautions which the *Prætor* judged proper to take with regard to the Education of Children, that they acknowledged the Danger to which they expoſed their Wards in the Hands of thoſe, who, with the Guardianſhip, had the Title to the immediate Succeſſion. See the Article in the *Digeſt.* and *Code. Ubi pupillus educari vel morari debeat*, &c. Compare this with what M. *Hineccius* ſays, in his *Antiq. Roman. Juriſprudentiam illuſtrant.* l. i. tit. 13. §. 5, 6.

[2] His Words are, Παραχαταθήκη μεγίστη, καὶ ἱεροτάτη, where are, alſo, divers other Things of the Duties of Guardians. See, alſo, Mr. *Domat*'s Civil Laws in their natural Order, Part I. l. ii. tit 1. and the Interpreters of the *Digeſts*, l. xxvi. tit. 1, &c. By the *Roman* Law, a Guardian, who was convicted of unjuſt Dealing, was expoſed to Diſgrace, if it appear'd that it was owing to Diſhoneſty; but if his Fault proceeded from Negligence only, tho' groſs, he was acquitted; as Mr *Noodt* very well proves in his *Probabilia Juris*, l. i. c. 13. againſt the common Opinion of the Doctors, who affirm'd, that the Puniſhment was to be inflicted in both Caſes alike.

CHAP. V.

Of the Object of Dominion or Property.

I. *What is required to make Things our own.*
II. *Things conſumed in their Uſe are in vain made our own.*
III. *A Thing become our own ſhould be capable of keeping.*
IV. *The Uſe of ſome Things, made our own, is common to all.*
V. *The Divine Grant is not contrary to our Dominion over the Sea.*
VI. *Reaſons againſt all Property of the Sea.*
VII. *What the Uſe of the Sea is.*
VIII. *What Parts of the Sea are made a Poſſeſſion.*
IX. *The main Ocean cannot be in any Man's Dominions.*
X. *How far Navigation and Commerce on the Sea is free.*

I. WE are, in the next Place, to enquire into the Object of *Property*, or to examine what Things are capable of coming under that Condition. Now to give a Thing this Capacity, we judge theſe two Qualifications to be neceſſary [1]: *Firſt*, That it be able to afford ſome Uſe to Men, mediately or immediately;

[1] It is very hard to bring an Example of any Thing altogether uſeleſs, as Mr. *Thomaſius* obſerves, in his *Juriſprud. Divin.* l. ii. c. 10. §. 123. It is ſufficient, in my Opinion, that we find ſome Pleaſure in poſſeſſing, and ſo all that we enjoy is, in ſome Meaſure, uſeful. I think then, that this Condition ought to be omitted as ſuperfluous. This is the more ſo, becauſe if any Man oppoſed another, who would appropriate to himſelf any Thing, becauſe it was uſeleſs, the latter might firſt conteſt the Inutility with him, and might then ſay, *What does it ſignify to you, if I want to have it?* To this there could be no Reply.

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immediately; by itſelf, or by its Connexion with ſomewhat elſe: And *Secondly*, That it be ſome way or other ſo far under the Power of Men, as that they may take Poſſeſſion of it, and keep it for their Occaſions. And farther, ſince *Property* implies a Right of excluding others from your Poſſeſſion, without which Right would be altogether inſignificant, if it could not be effectually exerciſed; it would be in vain for you to claim that as your own, which you can by no Means hinder others from ſharing with you.

II. Yet ſome Things there are, which, tho' very beneficial to Mankind, yet, by reaſon of their vaſt Extent, are inexhauſtible, ſo that all may enjoy them together, and yet no Man ſuffer in his particular Uſe. To appropriate Things of this Nature, would be malicious and inhuman: And on this Account it is uſual to attribute an Exemption from Property [1] to the Light and Heat of the Sun [2], to the Air, to the running Water, and the like [a] [3]. Although ſince Nature, by denying Men Wings, hath made the Uſe of the Earth neceſſary to their uſing the Light; hence it comes to paſs, that ſome Perſons may be utterly debarr'd from the latter; as Criminals, for Inſtance, in their Dungeon. In like Manner, ſince the Air is in ſome Places more clear and pure than in others, in this Reſpect the Value of a Place may be inhanced. As we ſee Men, who allow Pleaſure any Share in their Choice, very highly regard the Proſpect of Buildings, or of Lands, and eſpecially of the former: For which Reaſon thoſe *Services* [4] have been introduc'd [b], of not raiſing a Building higher; of Lights, and of not hindring Lights; of Proſpects, and of not hindring Proſpects. So, though on other Accounts, no one will pretend to fix a Property in the Wind [5], yet we may appoint a *Service* or Duty of not intercepting the Wind to the Prejudice of our Mills [6].

III. We are, likewiſe, to obſerve, That as the Subſtances of thoſe Things, which Men have Dominion over, are compos'd of different Kinds of Matter; ſo each Thing is taken and poſſeſs'd in that Way which the Condition of its Nature admits: For the more cloſely any Thing can be confin'd, and, as it were, ſhut up, the more eaſily will it produce the Effects of *Property* againſt the Claims of others. And, conſequently, the more capable a Thing is of being guarded from unjuſt Invaders, the greater Security we promiſe ourſelves in the Property of it. Yet, as we are not immediately to conclude a Thing exempt from Property, becauſe it cannot, without ſome Trouble, be kept from other Hands; ſo in Caſe a Thing be in ſo wide a Manner ſpread and diffus'd, as that either it is morally impoſſible it ſhould fall under any Method of keeping, or that it cannot be kept without much greater Charges than the Fruits and Advantages of it would countervail, it is not to be ſuppoſed, that any Perſon deſires to fix a Property which can bring him nothing but Burthen and Expence in defending it [7]. Though, to render a Thing capable of being appropriated, it is not ſtrictly neceſſary that we ſhould incloſe it, or be able to incloſe it within artificial Bounds [8], or ſuch as are different from its own Subſtance; it is ſufficient if the Compaſs and Extent of it can be any way determin'd. And therefore *Grotius* hath given himſelf a needleſs Trouble, when, to prove Rivers capable of *Property*, he uſeth this Argument, [c] *That although they are bounded by the Land at neither End, but united to other Rivers or the Sea, yet it is enough that the greater Part of them, that is, their Sides, are incloſed.*

IV. Laſtly, we farther diſcover, that the Uſe of ſome Things is confin'd, as it were, within narrow Limits, and cannot admit of Shares; the Appropriation of which was highly expedient to the Peace of Mankind.

Again, There are Things, which as they afford us different Uſes, may in Regard to ſome Uſes be ſpent and exhauſted, and yet in Regard to other Uſes yield a never-failing Abundance. Now, as on the one Side, there is no Reaſon why ſuch Things

[a] *Petron.* "Is there any one of the moſt excellent Works of Nature, which ſhe hath not made common to all the World? "The Sun ſhines with an univerſal Influence. The Moon, attended with her numberleſs train of Stars, lights the very Beaſts to "their Food. What is there in Nature more bright and beautiful than the Waters? Yet they flow for publick Uſe. *Latona* thus pleads in *Ovid*, Metam. l. vi. ver. 349.

Quid prohibetis aquas? uſus communis aquarum eſt;
Nec ſolum proprium natura, nec aëra fecit,
Nec tenues undas; ad publica munera veni.

What Rudeneſs Water for my Uſe denies,
Whoſe endleſs Store the common World ſupplies?
Nor Light nor Air did Heaven create for *One*,
Nor gentle Streams: I crave a publick *Boon*.

[b] See hereafter, c. 8. ſ. 6. [c] Lib. ii. c. 3. ſ. 7.

[1] *Cujacius* in his Obſervations, l. x. c. 7. brings two Examples; the one of the Shadow of the Plane-tree, the other of the Air; upon which a Tax was laid. The one is found in *Pliny*, l. xii. c. 1. The other is in *Cedrenus*, who aſcribes it to the Emperor *Michael Palæologus*. See Mr. *Selden*'s *Mare Clauſum*, c. 21. But this Paſſage of *Pliny* has been miſunderſtood by *Cujacius*, and others who have follow'd him. For, as F. *Hardouin* explains him, §. 3. n. 4. That natural Hiſtorian only means, That the tributary Nations planted in their Grounds, Trees which produc'd no Revenue, ſuch as the Plane-Tree, which is only fit for Shade; ſo that, in one Senſe, by this they ſubjected themſelves to pay Tribute for the Shade: *Ac tributarium etiam detinens ſolum, ut gentes vectigal & pro umbra pendant.* This is the Explication which M. *Burman* propoſes in his Treatiſe *de Vectigalibus Populi Romani*, c. 12. p. 254.

[2] Nothing however hinders but we may appropriate theſe Things to ourſelves in ſome Manner, as to ſuch an Extent as is contained within our own Lands. Our Author himſelf agrees to this as to running Waters, l. iii. c. 3. §. 4. But we muſt ſay, that by the Laws of Humanity we are obliged not to deny any Man the lawful Uſe of theſe Things, *Titius Obſerv.* 287. See, alſo, Mr. *Thomaſius*'s *Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 127. I obſerve, alſo, that our Author follows that Notion in his *Elements Juriſprud. Univerſal.* p. 84. See, alſo, §. 4. following. And what I have ſaid in my Notes upon *Grotius*, l. ii. c. 2. §. 3. and c. 3. §. 7.

[3] *Petronius*'s Words are, *Quid autem non commune eſt, quod natura optimum fecit? Sol omnibus lucet. Luna innumerabilibus comitata ſideribus etiam feras ducit ad pabulum. Quid aquis dici formoſius poteſt? in publico tamen manant*, c. 100. See *Ovid Metamorph.* vi. 349. The *Roman* Lawyers ſay poſitively, that theſe Sorts of Things are common by natural Law. *Naturali jure communia ſunt omnium hæc; aer, aqua profluens, & mare, & per hoc littora maris*, Inſtit. l. ii. tit. 1. *De rerum diviſ.* &c. §. 1. They, alſo, call them publick, in the ſame Senſe, tho' they ordinarily make a diſtinct Claſs of them. See Mr. *Noodt*'s *Probabilia Juris*, l. i. c. 7, 8.

[4] The Author will treat of this, c. 8. §. 6. following.

[5] See l. v. c. 1. §. 5. following.

[6] See Mr. *Thomaſius*'s Diſcourſe, entitled, *Non ens Actionis forenſis contra ædificantem ex æmulatione*, §. 28. Mr. *Titius* treats in general of the Right of Mills, in his *Jus Privatum Romano-German.* l. viii. c. 16.

[7] We cannot do it tho' we would. The Will alone is not ſufficient here; we muſt, beſides this, be within Reach, ſo as to get the Poſſeſſion of the Thing, and moreover, the Thing itſelf muſt be of ſuch a Nature, as to be poſſeſs'd in ſome Manner or other. We ſeize upon a Thing, that we may poſſeſs it; and nothing is more ridiculous, than to pretend to poſſeſs what we cannot either hold, nor preſerve in any Sort.

[8] The Bounds of a Thing appropriated, are the ſame with thoſe of Poſſeſſion. Whatever a Man gets is his as far as he can poſſeſs it, or do actually poſſeſs it; which is eaſy to determine. We have no Buſineſs with any other Limits. See Mr. *Bynkerſhoek*, *De Dominio Maris*, c. 9. p. 69, 70.

as thoſe ſhould not be brought under *Property*; ſo, on the other Side, the Law of Kindneſs and Humanity forbids us to deny the inexhauſtible *Uſe* of them to any Perſon that, in a friendly and peaceable Manner, deſires it. But if any Thing could be found inexhauſtible in all its Uſes, it would be abſurd not to leave that in its primitive Community. Indeed, in a poſitive Communion, if the Object be ſufficient to ſerve all, when divided, nothing hinders but that we may divide it; if it would not be thus ſufficient, it is beſt to poſſeſs it ſtill without Diviſion: But that a Thing, lying in common to Mankind, and ſufficient for the promiſcuous Uſe of all [1], ſhould be ſhared out into diſtinct Parts, is certainly repugnant to Reaſon. The Earth is of ſuch a Magnitude, as to ſerve the Occaſions of all People in all Uſes to which they can apply it; yet it would not thus ſerve them, were it poſſeſs'd, without Diviſion, by ſuch vaſt Bodies of Inhabitants as it now contains: Becauſe it could never afford them Suſtenance, unleſs manur'd and improv'd. Therefore there is plainly this particular Reaſon, why the Extent of the Earth ſhould not hinder its being divided; and yet the ſame Reaſon would make the Diviſion of the Ocean appear a ridiculous Abſurdity [a].

V. Indeed all other Things have little Difficulty in this Point; but as to the Sea, whether or no that be capable of *Property*, hath been diſputed by the greateſt Genius's of the preſent Age. On which Controverſy it is eaſy to remark, that many of the *Writers* engaged in it were more guided by their Affection to their Country, than by their Regard to Truth. Yet by theſe, and by others who have ſhewn themſelves more diſ-intereſted and impartial, the whole Subject hath been ſo fully diſcuſs'd, that it is hard to ſay any Thing that others have not already offer'd. We may therefore be allow'd to uſe more Brevity on the Queſtion before us; the *Authors* [2], who have throughly debated it, being ſo univerſally read. This then is manifeſt, that the ſame Divine Grant, which firſt gave Man a Right of aſſuming the Sovereignty of the Earth, included, likewiſe, the Sea. The Commiſſion as well runs, *have Dominion over the Fiſhes of the Sea*, as *over the Beaſts of the Land*. And we cannot conceive any Supremacy and Rule over Animals, without a Right of uſing the Element which they inhabit, according as the Nature of it will allow. Indeed Mention is, likewiſe, made of the Fowls of the Air, yet ſince we cannot move and ſupport ourſelves in that Element alone, therefore we are unable to exerciſe Dominion over the Air any farther than we can reach while we ſtand upon the Earth. But on the Sea we ſtretch our Empire much farther, by the Means of Ships, now brought to their higheſt Perfection; which are not only ſerviceable in tranſporting Burthens, but, likewiſe, carry *Mars* through the Kingdoms of *Neptune* in a far more dreadful Array, than he is attended with when he rageth by Land. No one is now ſo Superſtitious as to join in the *Poet*'s Scruple;

Nequicquam Deus abſcidit
Prudens Oceano diſſociabili
Terras, ſi tamen impiæ
Non tangenda rates tranſiliunt vada.

In vain did Nature's wiſe Command
Divide the Waters from the Land,
If daring Ships, and Men profane
Invade th' inviolable Main. *L.* i. *Od.* 3. 21, &c.
Mr. *Dryden.*

Nor doth the Sea appear to have any Privilege above the Earth, by virtue of which Men ought leſs to apply it to their Occaſions and Uſe. However, ſince the Donation of GOD doth not immediately conſtitute ſuch Dominion as ſhall take Effect againſt the Claims of others; therefore it was left to the Choice of Men, whether they would appropriate the Sea likewiſe, as they had done the greateſt Part of the Land; or, whether they would let it remain in its primitive State, belonging no more to one Perſon than to any beſides.

VI. The Queſtion is, therefore, Whether any Thing particular may be diſcover'd in the Sea, which ſhould hinder it from being an Object of *Property*? This ſome have undertaken to affirm, partly upon *natural*, and partly upon *moral* Reaſons. Amongſt the former they have alledg'd the Fluidity of the Sea; that [3], according to the common Nature of all liquid Bodies, the Parts of it are held together by no proper Bands; whereas Poſſeſſion can take Place only in Things that are fix'd and terminated. To which others make anſwer, That Fluidity, conſidered in itſelf, is no Bar againſt Property: And beſides, that the Sea is not without its Limits [4], being ſurrounded by the Shore; and that it is a Work of no ſuch great Difficulty to confine the ſeveral Parts and Tracts of it within ſtricter Bounds. It may be added, that as Rivers are not the leſs capable of *Property*, becauſe they paſs away in a perpetual Stream; ſo neither is the Sea, on account of its being driven about by the Force of the Winds and Tide. The River is one Thing, and the Stream or Current another: And in the ſame Manner the Sea is conſider'd diſtinctly from the Waters which it contains. The vaſt Extent of the Sea doth, by no Means, render it impoſſible to be kept, and therefore doth not altogether hinder it from coming under *Property*. For we may abridge others of the Uſe of the Sea, either by Forts upon the Shore, where it toucheth our Territories in narrow Creeks, and Streights; or by Ships of War, which are able to perform the ſame Service on the Water, as Caſtles and Forts on the Land. Though it cannot be denied, but that for one People to keep the whole Ocean, is morally impoſſible: Nor would it be worth their while to maintain Fleets in all Parts, for the Defence of it againſt all others who ſhould deſire to ſhare with them in the Uſe. Now

[a] Comp. *Zeigler* ad *Grot.* l. ii. c. 2. ſ. 3.

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[1] This Reaſon is of Force only when a Thing is joined with an Impoſſibility of poſſeſſing it. For on this Account alone, that a Thing is in ſo great an Abundance, that whatever Quantity we take of it, others have enough ſtill remaining, it follows, on the other Side, that we may appropriate as much as we will, or can poſſeſs, ſince every one may do the ſame in their Turn, and no Man loſeth any Thing. I am ſurpriz'd that our Author made not this Remark.

[2] The moſt conſiderable are *Selden* in his Book, entitled, *Mare Clauſum*, and *Grotius* in his Book, entitled, *Mare Liberum*. A few Years ſince Mr. *Bynkerſhoek* publiſh'd a Diſcourſe, which I have quoted ſeveral Times before; in which, tho' it is ſhort, this Matter is treated of, in my Judgment, more exactly, and with more Elegancy than it was ever yet. It was printed in 1703, join'd to a Commentary upon the Law of *Rhodes*, *De Jactu*, and reprinted ſince in 1730, in the *Opera Minora* of that great Lawyer.

[3] See Mr *Selden*'s *Mare Clauſum*, c. 21, 22.

[4] As for Example, the Rocks which appear above Water, the Banks of Sand, the Capes which are one over againſt the other, the Iſles ſcattered up and down in diverſe Places.

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it is great Folly to covet what one can't keep; eſpecially when by ſuch a Purſuit we do not aim at the Neceſſities of Life, but at the Gratification of vain Ambition, and of needleſs Avarice. For though otherwiſe the Defect of natural Ability doth not preſently extinguiſh a moral Capacity, yet inaſmuch as the latter, by reaſon of the Corruption of Mankind, is almoſt inſignificant, Prudence adviſeth us to graſp at no more than we can well ſecure our ſelves in the Enjoyment of. *Grotius*'s Limitation on this Point ſeems ſuperfluous, when he remarks [a], *That Rivers, or Part of the Sea, may be appropriated, upon Suppoſition that either the former or the latter are but inconſiderable in Reſpect of the Land, or however, are not ſo large, but that when compared with the Land, they may only ſeem to have the Proportion of a Part to the Whole.* For let us conſider a People ſeating themſelves on the Side of a vaſt River, on a long and narrow Slip of Land; here the River will, by no Means, be inconſiderable in Compariſon with the Land; and yet we don't imagine that this would hinder it from a Capacity of Appropriation. Thus there are Kingdoms, which in Extent are far exceeded by their Provinces and Appendages.

The *moral* Reaſon which theſe Authors urge to prove the Sea incapable of becoming Property, is taken from this Conſideration, that the Uſe of it is inexhauſtible [1], and therefore ſufficient for the promiſcuous Service of all. So that it would be vain and impertinent to attempt the Diviſion of it into ſeparate Portions and Shares. Which Argument we would indeed acknowledge to be the ſtrongeſt that can be produced in the preſent Caſe, were it once made appear that the Sea is, with Reſpect to all its Uſes, ſufficient for all Men in all Parts. Becauſe the Appropriation of Things was introduced on no other Account but to preſerve the Peace of human Society. And ſince one Effect of it is this, That he who, againſt my Will, invades and uſurps my Peculiar, really doth an Injury to me, which I might juſtly revenge in an hoſtile Manner; therefore thoſe, who ſhould have deſired to turn a Thing into *Property*, which, whilſt expos'd to common Uſe, was not likely to breed any Quarrel amongſt Men, ought to have been look'd upon not as Promoters of the Peace of Mankind, but as Perſons who brought in new Occaſions of breaking and diſturbing it. But whether the Sea be thus inexhauſtible in all its Parts, with Reſpect to every Uſe, will be made more evident, if we examine more diſtinctly the particular Services which it affords.

VII. The Uſe of Bathing and of drawing Water is indeed inexhauſtible; but then this is of no great Conſequence, and extends no farther than to the Inhabitants of the Shore. The Sea-water is, likewiſe, ſerviceable for the making of Salt: But this Advantage, as well as the former, is confin'd to thoſe who dwell on the Coaſts. Farther, as to the Convenience of Navigation, the Sea is inexhauſtible, and ſuffers no damage from being thus imploy'd [b] [c]. But then, beſides theſe, there are other Uſes, Part of which are not altogether inexhauſtible; and Part may prove an Occaſion of Damage to maritime Countries, whoſe Intereſt will not admit that the Sea ſhould every where lie promiſcuouſly free to all. Of the former Kind is Fiſhing, as, likewiſe, the gathering of any Thing which grows in the Water. As for Fiſhing, though it be much more abundant in the Sea, than in Lakes or Rivers; yet it is manifeſt that it may in Part be exhauſted; and that if all Nations ſhould deſire ſuch a Right and Liberty near the Coaſts of any particular Country, that Country muſt be very much prejudic'd in this Reſpect; eſpecially ſince it is very uſual, that ſome particular Kind of Fiſh; or perhaps ſome more precious Commodity, as Pearls, Coral, Amber, or the like, are to be found only in one Part of the Sea, and that of no conſiderable Extent. In this Caſe there is no Reaſon why the Borderers ſhould not rather challenge to themſelves this Happineſs of a wealthy Shore or Sea, than thoſe who are ſeated at a Diſtance from it: And other Nations can with no more Juſtice grudge or envy them ſuch an Advantage, than they can be angry that,

——————*Non omnis fert omnia tellus.*
India mittit ebur, molles ſua thura Sabæi, &c. [d] [e]

All ſorts of *Goods* their ſeveral Countries know,
Black Ebon only will in *India* grow,
And odorous Frankincenſe on the *Sabean* Bough.
Mr. *Dryden.*

An Uſe of the latter Kind it is, that the maritime Countries are guarded and defended by the Sea, as a Rampart. Hence the Duke of *Somerſet*, *Protector of England* under *Edward* VI. in an Epiſtle to the *Scots*, which we find in *Sleidan*'s Commentaries [f], tells them, *Oceano claudimur undique, tanquam mœnibus & vallo firmiſſimo: We are on all Sides encloſed with the Ocean, as with the ſtrongeſt Wall and Bulwark.* And we may with much more Juſtice beſtow on the Sea that Name of ἀθάνατον τεῖχος [2], *an immortal Wall*, than *Iſocrates* [g], complemented the River *Nile* with it. Yet this Defence is not altogether certain and ſecure. It hinders indeed any Expedition on Foot, but lies open to the Approach of Veſſels. For which Reaſon it muſt needs be a Diſadvantage to any People thus ſeated, that other Nations ſhould have free Acceſs to their Shore with Ships of War, without asking their Leave, or without giving Security for their peaceful and inoffenſive Paſſage. But we cannot, with any Accuracy [3], determine in general how large a Space of the Sea ought to be allow'd for ſuch a Defence, in Reſpect of which it may be for the Safety and Intereſt of the Borderers to claim a diſtinct Dominion over it. Yet certainly it would argue a very unreaſonable Fear and Jealouſy, ſhould any Kingdom, barely on this account, deſire to extend their Sovereignty over the Sea for ſome Hundreds of Leagues together. What *Cæſar* reports of the *Germans* may ſerve to illuſtrate this: *The particular Communities look on it as the higheſt Honour to make a vaſt Extent of Deſert round about them, waſting all the Confines of their Neighbours; this they reckon the ſureſt Mark of an extraordinary Valour, that*

[a] Lib. ii. c. 3. ſ. 7. 8. [b] Vid. l. xxiii. ſ. 1. *D. De Servitut. præd. ruſtic.* [c] Vid. l. viii. t. 3. *D. De Servit. præd. ruſtic.* [d] See *Pliny*, l. ix. c. 15. of the happy Shore about *Byzantium*. [e] Vid. *Virgil.* Georg. l. i. ver. 57, &c. [f] Lib. xx. [g] Encom. *Buſir.*

[1] See Note 1. p. 380. aforegoing, and Mr. *Bynkerſhoek*'s Treatiſe, c. 9. p. 68.
[2] A firm and everlaſting Wall.
[3] Mr. *de Bynkerſhoek*, in his Diſſertation, c. 2. ſays, "That ſo much of the Sea may be thought to belong to the Land, as "can be defended by our Arms, *i. e.* according as we expreſs it, ſo far as is within Cannon-ſhot." He thereupon cites an Order which the States-General of the United Provinces gave the Captains of their Men of War in 1671. to ſalute as they paſs'd the Coaſts of any Foreign Prince, as ſoon as they were within Cannon-ſhot of the Places of that Country.

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the former Borderers have retired, and been driven to a greater Diſtance, and that none dare ſeat themſelves in ſo formidable a Neighbourhood. And then, beſides, they thought themſelves the ſafer by this Policy, having taken away all Fear of ſudden Incurſions, De Bell. Gall. l. vi. c. 23. However, we ſee, by what hath been offer'd, that there may be very weighty Reaſons for a People ſo far to appropriate to themſelves ſome Part of the Sea, as to oblige all others to acknowledge the Uſe of the ſame Part, as a Permiſſion from them, and an Act of Bounty and Favour.

VIII. But ſince all Dominion, capable of producing any Effect againſt the Claims of others, takes its Riſe from ſome Act of Men; therefore how far the Bounds of any People ought to reach on the Sea, is to be diſcover'd either from their own Right of Poſſeſſion, or from their Treaties with their Neighbours. Thus *Iſocrates* (in his Panegyr. p. 111. Ed. *Pariſ.*) boaſts that the *Athenians*, by their Articles of Peace with the King of *Perſia*, had obliged him not to come beyond *Phaſelis* with his Ships of War. Yet ſuppoſing the Matter to be dubious, and that there are no clear Memorials to be found of ſuch Acts, as might prove the Occupancy to be real, which is alledg'd; what Preſumptions are to be made in this Caſe, we may underſtand from the following Remarks. In the Beginning then, whilſt we were yet ignorant of Navigation, it is not probable that the People, which had taken Poſſeſſion of any Territories, extended their Dominion farther than to the neighbouring Shore. For, inaſmuch as the Fiſhing-Trade was yet but poor and barren for want of Boats, and the utmoſt Advantage they could make was to pick up the Shell-Fiſh which were left by the Tide, or to angle from the Rocks; there was no Fear that they ſhould, in this Reſpect, ſuffer from their Neighbours; who, being neceſſitated to make their Approaches by Land, might be repuls'd with little Difficulty. Nay, after the Invention of Shipping, moſt Nations, for a conſiderable Time, left each other at full Liberty to fiſh where they pleas'd: Becauſe they imagin'd that an Imployment of ſo great Labour and Hardſhip would not engage ſuch a numerous Train of Followers, as that any publick Diſturbance ſhould be apprehended from their Diſputes and Contentions. And whilſt hoſtile Heats were yet unknown, the Sea was a ſufficient Defence without other Aſſiſtances. And afterwards, when they began to build Ships of War, Men were contented a long while to appropriate only the Havens and Bays, leaving the other Parts of the Sea in their primitive Community. This Moderation embolden'd the Pirates to carry on their Profeſſion with greater Liberty; whilſt they were of Opinion, that it was a leſs heinous Breach of the general Peace to commit theſe Outrages in Places ſubject to no Juriſdiction. At length, when they had found out the Benefit of Merchandize, and the Conveniency of ſo ſhort a Paſſage by Water for Goods and Traffick, ſome Governments ſeated near the Streights, or narrow Seas, challeng'd to themſelves a Property in them; that, by requiring Toll and Cuſtom[1], they might come in for a Share in the Gain, or that their Towns might be frequented by the Trading Part of the World. After this, other Parts of the Sea were, likewiſe, brought under Subjection, either on account of their great Plenty of Fiſh, or becauſe this was a neceſſary Expedient for the Security of the bordering Provinces.

Yet in theſe Times they ſcarce exerciſed any other Right of Sovereignty beſides the giving out Injunctions, that all who paſs'd within ſuch Bounds ſhould abſtain from all Harm and Violence; that no Piracies ſhould be there committed, and no Veſſels of War enter without Permiſſion. Thus when the *Lacedemonians*, in *Thucydides* [a], had convey'd ſome Forces to *Epidaurus* by Sea, the *Argives*, in an Embaſſy to the *Athenians*, complain'd, that they having promis'd by League not to grant the Enemies of *Argos* Paſſage thro' their Dominions, had nevertheleſs ſuffer'd them to ſail by unmoleſted. And accordingly the *Athenians* interpreted this Act of the *Lacedemonians* as a Breach of Peace. We ſee it is now the receiv'd Cuſtom, in order to the Acknowledgment of this Sovereignty, that foreign Veſſels, as they paſs by any Fort on the Shore, or any Ship of War belonging to the Prince, who, at preſent, carries himſelf as Lord of the Sea[2], ſhall pay ſome Mark of Reſpect.

It doth not ſeem neceſſary that particular Nations ſhould make out the preciſe Time when they obtain'd the Dominions of ſuch or ſuch Parts of the Sea, by taking Poſſeſſion of it: But, inaſmuch as the Exerciſe of this Dominion may not at all Times be of Uſe and Advantage, it is enough if they then perform'd any Act of Sovereignty, when the Intereſt of the Commonwealth ſeem'd to require it: Nay, in our Judgment, it might be no Abſurdity to affirm, that when Naval Forces are once brought into common Uſe, the Parts of the Sea, ſo far as they ſerve only for a Defence or an Appendage, do, without any ſpecial corporal Act, paſs immediately under the Dominion of that People whoſe Shores they waſh [b]. For, in this Reſpect, the Sea is to be look'd on as an Increment of the Land, as the adjoining Moors and Fens are reckon'd the Increment of a City. Now, as in the Occupancy, or the taking Poſſeſſion of Immoveables, it is not neceſſary that our Body ſhould touch each Part, but the touching of one Part only is conceiv'd to create a Property over the Whole; ſo when a People have ſeiz'd on one particular Region incloſed within ſettled Bounds, ſtill under the Notion of taking all the void Space about that they ſhall afterwards have Occaſion for, tho' at firſt they have no Deſign to enlarge, or exerciſe their Dominion farther than thoſe Bounds, as not thinking what lies beyond to be of Uſe or Service to them; yet when they come at length to find, that there is a Neceſſity of adding ſuch a void Space to their preſent Poſſeſſions, their bare Intention and Reſolution ſhould ſeem ſufficient to extend their Sovereignty over it, as a Part or Appendage of their Empire. Eſpecially when it once appear'd, that other Nations had thus ſtretched

[a] Lib. v. c. 56. Edit. *Oxon.* [b] Comp. *Ziegler* ad *Grot.* l. ii. c. 3. ſ. 11.

[1] See *Grotius*, l. ii. c. 3. §. 15.

[2] Mr. *Bynkerſhoek* in his Diſcourſe, c. 5. near the End, maintains, That this is not always an Acknowledgment of the Sovereignty of that Prince (to whom the Honour is granted) over that Part of the Sea where it is paid. As for Example, ſays he, "The States-General, in their Treaties of Peace made in the Years 1654, 1662, 1667, 1674, and 1684, obliged themſelves to "pay the Honours of the Flag to the Ships of the King of *England* in all the Northern Seas as far as Cape *Finiſter*; but that "was only, becauſe, according to the Law of Nations, all Republicks ought to give Place to a crown'd Head, and to thoſe that "repreſent him." In ſhort, the Cuſtom of ſaluting, in ſome ſhape or other, the Veſſels of ſuch Nations to whom we own our Inferiority, is not ſo new as our Author would inſinuate; for we find in *Appian*, as *Juſtus Lipſius* has long ſince obſerved, *Elect.* i. 23. p. 729. that *Mark Anthony* and *Domitius Ænobarbus* meeting one another, the firſt *Lictor* of *Anthony* ſtanding on the Prow according to the Cuſtom, cry'd out to the other Veſſel, that he ſhould lower his Enſign, which was then us'd inſtead of a Flag (καθιλεῖν τὸ σημεῖον) to pay his Homage to his Maſter. *De Bell. Civil.* l. v. p. 1118. *Edit. Tollii.*

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their Command over the void Sea. Whence 'tis a fair Presumption, that the rest of the World pretend not that they should be behind with them in this Advantage [a 1]. From which Considerations it is manifest, that in these Times, when Shipping is brought to its highest Perfection, it is presumed, that every Maritime People, at all acquainted with Navigation [2], are Lords of the Sea, where it toucheth their own Shore, so far as it may be accounted a Defence, especially in Ports and other Places where there is Convenience of Landing [3]. In like Manner the Gulphs and Channels, or Arms of the Sea, are, according to the regular Course, supposed to belong to the People with whose Lands they are encompassed. But in Case different Nations border on the same Channel, the Sovereignty of each shall be conceived to reach into the Middle of the Water, from every Part of their respective Shore, unless either all the States have agreed, by Covenant, to use the whole Water promiscuously amongst themselves, and to exercise a general undivided Sovereignty over it, against Foreigners; or else, if one particular People has obtain'd a Dominion over the Whole by Pact, or by the tacit Concession of the rest, or by the Right of Conquest, or because they first fix'd their Station near it, and immediately took it into full Possession, exercising Acts of Sovereignty against the People of the opposite Shore. In which latter Case, nevertheless, the other neighbouring States, their Fellow-Borderers, shall be supposed to be Lords of each of their particular Ports, and of so much of the Sea as the convenient Access to the Shore requires. Of the Effects of the Sovereignty (if it may be so term'd) over the Sea, *vid. Alberic. Gentil. Advocat. Hispan.* l. i. c. 8, & 14. and *Selden. Mar. Claus.* l. ii. c. 20, 21, 22. To which we may add, by the way, what Dr. *Chamberlain* takes Notice of in his *Present State of England*, Part I. c. 4. *That Persons, born on Shipboard, upon those Seas which are subject to the* English *Dominion, are accounted Natives of* England, *and have no Need of Naturalization, as others born without the Realm.*

IX. But what shall we say of the main Ocean, which spreads itself between those vast Continents of *Europe*, *Africa*, *America*, and the unknown Southern Coasts? Was this ever brought under *Property*, or doth it still remain in its primitive State, free and common to all the World? As for the prodigious Extent of it, this, however, doth not absolutely render it incapable of being appropriated. Yet we must confess, the Dominion of it would not be only unprofitable, but unjust; should either any one Nation challenge it all to themselves, or several States divide it into so many Shares, excluding all the rest of Mankind. Navigation, or the Convenience of Water-passage, is a Thing which suffers no Damage by being enjoy'd; on the bare Account of which, the Appropriation of the Sea is needless and superfluous; since Men may sail no less commodiously, were the Sea common to all Nations, than if it were peculiarly subject to one. The Fishing-Trade is of no very great Consequence in the main Ocean; and since you do but vainly call a Thing your own, when it is morally impossible to hinder others from using it promiscuously with yourself; we cannot think any State would find it tantamount to maintain Fleets in all Parts of the Sea, only to secure the Fishing against Interlopers. But what if a particular Nation, either through Ambition and the Vanity of being stiled Lords of the Ocean, or prompted by Avarice, and the Hopes of drawing to themselves all the Advantages of Navigation and Trade, should claim the Ocean as their peculiar Possession? Especially if they urged by way of Title, That they were the first who entred upon the Use of it with Sails and Shipping, and that they possess Lands in every Continent round it: And that, since the Sea was originally a void Space, he, who before the rest attempted to fix a Use and Occupancy in it, might thereby acquire a *Property* exclusive of all others. To this we answer, That Men have, indeed, a Privilege of making waste Places their own, by first seizing upon them: But then they are always to remember, that GOD gave the World not to this nor to that Man, but to human Race in general; as, likewise, that all Men are, by Nature,

[a] In all the Editions of the Original, the Word *cum* is wanting, which makes our Author very difficult to be understood.

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[1] When our Author says, That they may, without taking new Possession, seize on a Thing which they had before neglected, as a Thing of no Profit, it is not to be understood, that they have called to Mind some new Reason, which of itself renders it necessary to acquire that which before they had not troubled themselves to make a Property of. Thus, since the Invention of Cannon, the Sea, which adjoins to a Country, hath, upon that Account, been thought to belong to the Lord of the Country as far as a Cannon can shoot. But yet there must be a formal Act of taking Possession necessary, without which every one may look upon those Seas and Lands to be common, because they do not appear possessed by any; for why may not he, who finds them convenient for him, seize on them?

[2] See Note 3. p. 581. As for all that Space of the Sea, which cannot be defended from the Land, Mr. *Bynkershock* thinks none can make themselves Masters of it farther than they sail, with a Design to appropriate it to themselves; and he adds, That they cannot preserve the Property of what they have seized on, but by constant Sailing, and having always a Fleet abroad. Hence it was, that the *Romans* heretofore, when their Empire extended through *Europe*, *Africa*, and *Asia*, were Masters of the *Mediterranean* Sea, because they always kept four Fleets a-foot; the first at the Port of *Misenum*, the second at *Ravenna*, the third at *Frejus*, and the fourth at *Byzantium* or *Constantinople*. They commanded, also, that Part of the Ocean which is between *England* and the Continent, as well because they possess'd the Lands on both Sides, as because they had a Fleet in the *English* Channel. But now, according to Mr. *Bynkershock*, there is no Part of the main Ocean, nor of any Sea inclosed with Land, that belongs to any Power farther than he can command it from the Shore, because there is no Power in actual Possession, after the Manner we have before mentioned. As to the Question of Fact, I will not meddle with it. Our Author may be consulted about that. As for the Matter of Right, altho', as I shall shew hereafter, I do not rest altogether in the Opinion of that learned and judicious Lawyer, who lays it down for a general Maxim, That, independently of the Civil Laws, Property is always extinguish'd with the actual Possession; yet I think he hath Reason to maintain it in respect to the Sea, and other Things of like Nature, which remain such as Nature has produced them. As the Industry of Man has added nothing but the bare Act of Possession, it follows, that from the very Moment we cease, in any Manner, to possess them, the Things are and may be look'd upon as quite abandon'd. As for Example, suppose there be a great Extent of Land unoccupied, which is not encompassed on any Side with the Lands of any State, though they are near, if the Master of the Country takes no Care to till them, or secure them; or if, having sometimes done it, he discontinues it, another may seize it as well as he, especially if the Neighbours have resigned all their Right to him; and, in this Case, also, the Renunciation of these last no Way affects others who would settle there, so long as they are not actually possessed. By a much stronger Reason we must acknowledge the Necessity of a continual Possession in respect of the Sea, which, excepting a little Distance from the Shore, is much less in Use both in itself, and by all the Care that any Man can take to make it profitable in any Manner; wherefore nothing but unsatiable Avarice, and a prodigious Disregard to the Equality of all Men by Nature, can suggest such vast Pretensions, and so difficult, not to say impossible, to maintain. See §. ix. following.

[3] *Bodinus de Republ.* l. i. c. ult. on the Authority of *Baldus*, affirms, That by a Kind of common Right, enjoy'd by all Princes of Maritime Countries, the particular Sovereign may command and controul those who approach within sixty Miles of his Shore.

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equal. Wherefore, that tacit Convention between the firſt Introducers of *Property*, aſſigning the Right of thoſe Things which did not fall under their prime Diviſion [1], to the Perſons who ſhould firſt take Poſſeſſion of them, can, by no Means, be extended to ſuch an Object, which, if one ſhould hold alone, he might oppreſs all others with moſt unjuſt Slavery, or might intercept ſome moſt important Advantages, which would otherwiſe accrue to all Nations in common. Inaſmuch as ſuch a Caſe as this could not enter into the Imagination of thoſe primitive Diviſors. As then no one would deſerve Cenſure for taking out of a common Store whatever is neceſſary for his own Occaſions, though in order to future Uſe; ſo *he* is not to be endured, who, out of a vain and ſenſeleſs Greedineſs, ſhould lay Claim to more than he could ever ſpend; and ſhould deſire infinitely to enlarge his own Dominion, for no other Reaſon, but to debar others from the Uſe of thoſe good Things which Nature affords. There can then no probable Ground or Colour be alledged, why any one People ſhould pretend to the Dominion of the whole Ocean, ſo as, by virtue of this Right, to aim at excluding all others from ſailing there. Not one of thoſe Reaſons, which firſt moved Men to the Settlement of *Property*, doth affect the main Sea. To make it fit for Navigation, there is no Need (in regard to the Sea itſelf) of the Pains and Induſtry of Men. The Winds labour no more to drive all the Fleets in the World, than a ſingle Veſſel. Nor do thoſe Tracts, which the Keels plough up, make the Way rougher to thoſe that follow them. As for the Paſſage to the other Continent, this is not rendered leſs convenient to one Nation, though another uſeth the ſame Road. And to have been the firſt Travellers through any Place doth, by no Means, give a People the Dominion of it, or prohibit others from turning it to the ſame Advantage. It is a moſt imprudent Plea to urge, *That any one State, by intercepting the naval Affairs of all others, may be able to draw to itſelf the whole Profit of a Sea Trade, which Intereſt all Perſons ought induſtriouſly to purſue.* As if all the reſt of Mankind ought to be oppreſs'd by a moſt unjuſt Monopoly, to gratify the inſatiable Avarice of a ſingle Government: Or, as if all others muſt voluntarily turn Slaves, becauſe the wicked Ambition of one Prince or State luſts after the Sovereignty of the whole World. Such hath been the Bounty of Providence towards Mankind, as to give an abundant Supply of all Things uſeful to their Neceſſities. But, as to the Manner of poſſeſſing theſe Things, Reaſon enjoins Men to uſe ſuch Moderation in it, as to reſt contented with the Acquiſition of ſo much as is likely to ſuffice for the Service of themſelves and of their Dependents. Nor doth the ſame Principle forbid them to be concern'd for the Future, provided they do not, either by Envy or Avarice, hinder others from gaining a needful Maintenance and Rlief. If any one carries his Purſuits farther, and ſcrapes up ſuperfluous Stores, to the Injury and Oppreſſion of others, it can be no Fault in the reſt, if, when Opportunity ſerves, they engage in a timely Enterprize of reducing him to Reaſon.

X. From what we have obſerved, it is clear, that to ſail the Ocean in a peaceful Manner both is and ought to be the free Privilege of all Nations: *It is*, becauſe no one People have attain'd ſuch a Right over the Ocean, as will juſtify them in ſhutting out all others from the ſame Benefit: And *it ought to be*, becauſe the Law of general Kindneſs and Humanity requires it. Whence it follows, that no Sovereign can hinder the Nations which border on the main Sea, and are not under his Government, from maintaining a Trade with each other; unleſs [2] he have, by Covenant, obtain'd ſuch a Right, as either that ſome particular State is bound, on his Account, to exclude ſome certain People from all Commerce with them, (of which Kind was the Contract between the *Dutch Eaſt-India* Company and the Emperor of *Ceylan* [a]) or that ſome whole Nation have ſurrendred up to him their Right of ſailing to another [3]. For ſince I may, at my Pleaſure, either retain or alienate my Goods, eſpecially ſuch as regard rather the Superfluities of Pleaſure, than the Neceſſities of Life; there is no Reaſon but that I may, on ſome certain Conſiderations, oblige myſelf to diſpoſe of them to one Perſon, and to none beſides. And this, indeed, is one proper Effect of Liberty, that Men may, by Covenant, give up their Rights between themſelves; though no ſuch Covenant ſhall be allowed, if really prejudicial to a third Perſon. Hence, likewiſe, as a Prince may juſtly ordain, that no Goods, of the Growth or the Manufacture of his Dominions, ſhall be exported by Foreigners, unleſs by ſuch as have obtain'd this Privilege, either upon Covenant, or by free Grant, (tho' the *Law of Nature* doth not at all oblige him to ſtrike ſuch a Covenant, or to make ſuch a Grant, unleſs ſome Nation abroad be reduced to ſuch Extremity, as that, without this Liberty of Commerce, they muſt neceſſarily periſh) ſo if a People of *Europe*, for Inſtance, have appropriated any Country in *Africk*, or the *Indies*, by ſuch Means, and in ſuch Manner, as the Cuſtom of Nations makes effectual towards the acquiring *Dominion*; they may, with like Juſtice, if they think fit, cut off from others all Paſſage thither on Account of Traffick, or not allow it, but under certain Conditions, or ſome ſettled Burthens and Duties. And this we now ſee in every Day's Practice: Nor doth it appear to be, in any Reſpect, repugnant to natural Reaſon. For that Liberty of Commerce, on which ſome ground ſuch high Pretenſions, doth not hinder but that a State may allow more Favour to its own Subjects, than to Strangers.

[a] Vid. *Phillip. Baldæ.* Deſcript. Oræ *Malabar.* & *Coromandel.* c. 10, & 12.

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[1] It is not neceſſary to have Recourſe to the Intent of this Agreement, which, as I have ſhewed above, is a meer Chimera. The Impoſſibility of ſeizing upon the main Ocean, and preſerving an uninterrupted Poſſeſſion, is ſufficient to prove the Ridiculouſneſs and Injuſtice of theſe extravagant Pretenſions. See Note 2. p. 383. before-going: And Mr. *de Bynkerſhoek*'s Diſcourſe, c. 7.

[2] I have had Occaſion to eſtabliſh this by a remarkable Example, in my *Defence of the Rights of the* Dutch East-India *Company againſt the new Pretenſions of the* Oſtenders. This Piece was publiſhed, 1725.

[3] See lib. iii. c. 3. §. 6, 9, 11. above.

CHAP. VI.

CHAP. VI.

Of Occupancy.

I. *The ſeveral Ways of acquiring Dominion.*
II. *The Original Method of acquiring it.*
III. *Occupancy is gained in whole, or by Parcels.*
IV. *The Poſſeſſion of Moveables depends on the Diſpoſal of the chief Governor.*
V. *In ſome Places the Catching of wild Beaſts is allowed to every one.*
VI. *In other Places it is the Privilege of great Men only.*
VII. *Whether he that hunts contrary to the Law, has a Property in the Beaſt he takes.*
VIII. *When things occupied are underſtood to be immoveable.*
IX. *When they are moveable.*
X. *Whether a wild Beaſt becomes mine as ſoon as I have wounded it.*
XI. *Whether the Fiſh are ours, that are in our Ponds.*
XII. *Things left become immediately the firſt Occupant's.*
XIII. *Of Treaſures.*
XIV. *Of Poſſeſſions obtained by War.*

IT follows in courſe, that we conſider the ſeveral Ways of acquiring *Dominion* [1], which, according *Grotius*'s Judgment [2], may conveniently be divided into *originary* and *derivative*. The former are thoſe by which the *Property* of any thing was firſt introduced: The latter thoſe by which a *Property*, already ſettled, paſſeth from one Man to another.

Again, the *originary* Way of acquiring *Property* [2] is either *ſimple* and *abſolute*, as when we obtain *Dominion* over the Subſtance and Body of a thing:

[a] Lib. ii. c. 3. ſ. 1.

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[1] Before we proceed farther, we muſt determine a Queſtion which Mr. *Bynkerſhoek* has given us an Occaſion to examine. That able Lawyer maintains, "That by the Law of Nature, Property, which begins with a corporal Poſſeſſion, ends with it alſo." According to him, that ſame Moment that a thing is out of our Power it becomes again common. And if for a long time there has been an Uſage that every one remains a Proprietor of his own Goods, although he keeps not the corporal Poſſeſſion of them, this is the Effect of civil Laws, and of the Agreement of the Members of every State. "Inſomuch, *adds he*, that if a thing belonging "to any Man be found in a ſtrange Country, he being abſent, and not ſecuring it, it belongs to the firſt Occupant, provided there "be not ſome particular Treaty between the two States, by virtue of which they ought to be looked upon as Friends; for if they "are only engaged not to make War upon each other, this Agreement leaves every one's natural Right entire to ſeize upon that "which is not in the poſſeſſion of the former Owner." Mr. *Bynkerſhoek* alledges here the Authority of the *Roman* Law, and a Paſſage of St. *Auſtin* quoted in the Canon-Law; but ſince he treats there only of the Light of Reaſon, I will not ſtay to examine whether thoſe Paſſages are ill applied, or no, as a *German* Lawyer affirms, who endeavours to confute the firſt Chapter of a *Dutch* Lawyer, *De Dominio Maris*. It was Mr. *Titius*, who in 1704, the Year after Mr. *Bynkerſhoek*'s Book was publiſhed, maintained a publick Diſputation at *Leipſick*, *De Dominio in rebus occupatis ultra poſſeſſionem durante*, a Diſcourſe which I never ſaw; but the Author himſelf gives the Abridgment of it in his *Jus Privatum Romano-Germanicum*, &c. l. iii. c. 6. As to the Quotations of the Civil Law, I ſhall only obſerve, that the *Roman* Lawyers did not agree perfectly among themſelves about the Continuance of the Right of Property, for Mr. *Noodt* has proved, that they differed as to the manner of getting Poſſeſſion, *Probabilia Juris*, l. ii. c. 6. As for the Proofs taken from the thing itſelf, Mr. *Titius*, as above, delivers himſelf briefly thus: "1. That the Hypotheſis of "Mr. *Bynkerſhoek* deſtroys all ſorts of Right, and particularly reduces Property to nothing. For of what Uſe can that Right be "which ends with the very Act by which it is acquired? 2. That there is no plauſible Reaſon to be given why ſuch Power "ſhould be attributed to Poſſeſſion, but that the Continuance of Right and Property depends fully and abſolutely upon it. 3. Laſt-"ly, As to human Right, perpetual Poſſeſſion is impoſſible, and ſo we ought not to believe that it is neceſſary to preſerve them. *From* "*whence he concludes*, That, to follow the Maxims of the Law of Nature, we muſt, on the contrary ſay, That Property being "once admitted continues always, though there be no Poſſeſſion; eſpecially if the Conſent of the Proprietor himſelf, or the civil "Laws do not order it otherwiſe." Theſe Reaſons, in my Judgment, prove ſufficiently what they were intended for, but we muſt explain them a little, and add what is wanting to them. I ſay then, that ſince Property has its Original from taking Poſſeſſion, it doth not follow that the Right ſo acquired ceaſes, when there is no Poſſeſſion. The Intention of Nature in making all things common to Man is, that every one ſhould uſe and diſpoſe of what he has gotten according to his own Pleaſure, until he leaves it, and permits it a-new to be ſeized by the firſt Occupant, without which this Right will be of little Uſe. So that Poſſeſſion is of no Force but as far as it is an indiſputable Mark of the Will to retain what a Man has ſeized. To authorize us then to believe that he has renounced his perſonal Right to it. Now, as I have obſerved in *Note* 6. §. 8. of the foregoing Chapter, we may preſume this in reſpect to thoſe things which remain ſuch as Nature has produced them, eſpecially ſuch as are very numerous, or are of a vaſt Extent; though Mr. *Titius* does not make that Diſtinction, and maintains, that one may be Maſter of the Sea, although he be not in Poſſeſſion. But as for all other things, as they are the Fruits of human Induſtry, which has produced them from Nature, or given them a new Form, or are tamed, or are hunted out of their Holes; all this is done with great Labour and Contrivance uſually; and it cannot be doubted but every one would preſerve his Right to them, until he makes an open Renunciation; and ſo they ought to be looked upon as his, though he does not keep them ever after, or he loſes the Poſſeſſion by ſome Accident, which may eaſily happen, and is almoſt unavoidable. In the main there is nothing but what is juſt in this Claim, as may appear from what is ſaid, c. iv. §. 4. n. 4. of this Book. And Mr. *Bynkerſhoek* owns, that the firſt Men left nothing common but what they could not diſtinctly poſſeſs. Their Covetouſneſs and Deſire of Poſſeſſion was ſo great, that, to expreſs it, the Fable of ſcaling Heaven was invented, c. 2. p. 10. Can we then believe, that Men, of this Temper, would conſent that the Right of Property ſhould be always extinguiſhed with corporal Poſſeſſion, which can never be without Interruption? Having thus taken the liberty to ſpeak my Thoughts about Mr. *Bynkerſhoek*'s Principle, I ſhall declare my Indignation that Mr. *Titius* (as above, §. 2. 5.) treats him ſo rudely. He ought, on his firſt reading of that Diſcourſe, to have conſidered the Worth of the Author, and he could not have accuſed him of favouring *Hobbes*'s Opinions, if he had attended to the End of Chap. iii. So far from founding Right and Juſtice only on the Agreement made between Members of the ſame civil Society, Mr. *Bynkerſhoek* prevents the Objections he foreſaw might be made to him, that he gives the Dominion of the Sea to the ſtrongeſt. "I do not (*ſays he*) follow the Principles of the civil Law. I reaſon upon "thoſe of the Law of Nature, which grants an equal Right to every Man, to the Weak as well as to the Strong, to thoſe un-"armed as well as armed. I mean that every one ſhould be maintained in his Poſſeſſion: If another would deprive him of it, "and he finds himſelf in a Condition to make head againſt the unjuſt Aggreſſor, he may repel of Force by Force. Nature autho-"rizes him, and he has every Law on this Side.

[2] This Diviſion may, alſo, agree with *Acquiſitions deritative*. See what is ſaid upon the following Chapter, §. 7. Farther, we muſt diſtinguiſh, alſo, the manner of acquiring Property, into *natural* and *civil*. Natural Acquiſition is that which is made either by the Will alone of the Acquirer, in relation to ſuch things as belong not to any Perſon, or by the mutual Conſent of him who tranſfers the Property, and of him that obtains it, as to ſuch things as belong to any Perſon. Civil Acquiſition is that which either transfers a Property without the Conſent of the particular Owner, or requires ſomething more than the mutual Conſent of Parties. *Titius*'s Obſerv. 290. We find the like Diviſion in the *Inſtitutes*: *Quarundam enim rerum dominium nanciſcimur jure naturali*—— *quarundam vero jure civili*, l. 2. tit. 1. §. 11. See Chap. 10. §. 1. n. 1. and c. 12. §. 1. n. 1. following.

Or only *primitive* and *with reſpect*, as when we add to a Thing, already our own, ſome further Improvement and Increaſe.

II. We have ſufficiently made it appear in our former Remarks [a], that after Men came to a Reſolution of quitting the primitive Communion [1], upon the Strength of a previous Contract, they aſſigned to each Perſon his Share out of the general Stock, either by the Authority of Parents, or by univerſal Conſent, or by Lot, or ſometimes by the free Choice and Option of the Party receiving. Now it was at the ſame time agreed, that whatever did not come under this grand Diviſion, ſhould paſs to the firſt Occupant [b]; that is, to him who, before others, took bodily Poſſeſſion of it [2], with Intention to keep it as his own. Hence, when *Grotius* [c] affirms, That *original Acquiſition antiently, whilſt it was poſſible for all Mankind to meet in one place, might be made by Diviſion alſo, whereas now it can be made only by Occupancy*: The Words ought to be explained in the following Senſe. When Mankind firſt began to ſeparate into many Families, diſtinct *Dominions* were ſettled by Diviſion: After this Diviſion, he is ſaid originally to acquire a thing lying void and without a Poſſeſſor, who happens to be the moſt early *Occupant* of it; *i. e.* he who lays hold on ſuch a thing before others, or gets the ſtart of them in putting in his Claim to it. Thus the Word is uſed in [3] *Seneca Thyeſt.* ver. 202, & 203.

In medio eſt ſcelus poſitum occupanti.

In *Tacitus*, H. l. v. c. 1. *in fin. Multi quos urbe atq; Italia ſua quemq; ſpes acciverat occupandi principem adhuc vacuum.*

In *Pliny*, l. iv. Epiſt. 15. *In ea civitate, in qua omnia quaſi ab occupantibus aguntur, quæ legitimum tempus expectant, non matura, ſed fera ſunt.*

III. In Relation to the Occupancy of [4] Immoveables, eſpecially of Lands, we are carefully to obſerve and diſtinguiſh, whether it be made by one Perſon

[a] Chap. iv. ſ. 4.
[b] *Quod enim nullius eſt, id ratione naturali occupanti conceditur*, Digeſt. l. xli. t. 1. leg. 3 princip.
[c] *Ubi ſupra.*

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[1] We have ſhewn in c. 4. §. 4. n. 4. That the firſt Occupier by this Act alone (without ſuppoſing any Convention) appropriates to himſelf whatever belongs to No-body, or is in common; ſo that taking Poſſeſſion was in itſelf the only Way of getting an original Property, as well from the Beginning as at this Day. *Quod enim nullius eſt, id ratione naturali occupanti conceditur*, ſay the Lawyers, Digeſt. l. xli. tit. 1. leg. 3. princip. But if ſeveral Perſons ſeize upon one thing in common without an Owner, and part it among them, that Diviſion will then be, in relation to every one of thoſe who make up that Multitude, the original Title of their Acquiſition, *i. e.* the immediate Foundation of that particular Right, which each has acquired by what has fallen to him, and to which he had before only a common Right. Mr. *Titius*'s Obſerv. 291. on *Puffend.* And what I have ſaid upon *Grotius.* Let. II. Cap. II. §. 1. Note 2.

[2] What our Author means by, *Qui primus eadem corporaliter apprehendiſſet animo*, &c. he will explain himſelf in §. 8, 9. Yet we may obſerve, with Mr. *Titius*, that taking Poſſeſſion actually (*Occupatio*) is not always abſolutely neceſſary to acquire a thing that belongs to no body. It is only a means to let all others know, that we have an Intention to appropriate ſuch a thing. Indeed, that which properly conſtitutes the Right of the firſt Occupier is, that he makes known to others his Deſign to ſeize upon a thing. If then he declares his Will by ſome other Act, as ſignificative, or if others have openly renounced, with reſpect to him, the Right which they had to any thing which belonged no more to him than to them, he may then acquire the original Property without any actual Poſſeſſion. *Obſerv.* on *Puffend.* 292. and in *Lauterb.* 1010. We may, alſo, add, that he muſt be within Reach of taking what he declares his Deſign to ſeize on, otherwiſe the boundleſs Covetouſneſs of moſt Men will render his Right unprofitable to others, and be a Foundation for perpetual Diſputes and Quarrels. Another Thing we muſt remark is, That the Effect we aſcribe here to a ſimple Declaration of our Intentions, to appropriate any thing before common, is only reduced to this, that it prevents thoſe who might have the ſame Deſign. For it was never pretended, that this was ſufficient to acquire a full Right of Property to the Excluſion of every other Claim. If being within Reach of taking corporal Poſſeſſion of what we had a Mind to, we neglected to do it, we ſhould give Room to believe we did not value it, and had altered our Opinion. The Deſire of Appropriation, and the Signs we give of it, to exclude other Concurants, tend in themſelves to the Enjoyment of that Right, which is imperfect without Poſſeſſion. Therefore, from the Moment we neglect to procure this Enjoyment, we renounce the Right we began to acquire, and the others, with whom we were before-hand, recover theirs. Hence it appears how eaſy it is to anſwer Mr. *Carmichael*'s Objection (in his *Latin* Notes on *the Abridgment of the Duties of a Man and a Citizen*, Lib. I. Cap XII. §. 6. not. 6.) which conſiſts in this, "There is (ſays he) in a ſimple Declaration of our Will, no Trouble, no Induſtry, things which (according to the Principles of Mr. *Locke*) are eſſentially neceſſary to give a Right to the firſt Occupant." But this Objection is only founded on a Miſtake, and, at preſent, it is evident that my *Hypotheſis* is entirely connected. The Author who has rejected it, would not have treated it as a Paradox, if he had remembered what I had cited from Mr. *Noodt*, *Probabilia Juris*, l. ii. c. 6. That among the Antients, as, alſo, the old *Roman* Lawyers, there were ſeveral of the moſt famous who were exactly of the ſame Opinion, though none took notice of it before this judicious and quick-ſighted Lawyer.

[3] This Grammatical Remark, that the *Latin* Word *occupare*, *i. e.* to occupy or poſſeſs, often ſignifies *prævenire* or to prevent others, might have been ſpared by our Author.

[4] We muſt put among Immoveables, firſt of all, Space, which is in its own Nature altogether immoveable. We may divide it into *Common* and *Particular*. The firſt is publick Places, as Markets, Temples, Theatres, great Roads, *&c.* The other is that which is perpendicular to the Ground of any Man's Poſſeſſion, by Lines drawn, as well from the Center of the Earth to the Surface, as from the Surface to the Heaven. The Poſſeſſion of this Space, as far as we can reach above the Earth, is abſolutely neceſſary to the Poſſeſſion of the Ground; and conſequently the Air included in it (though ſubject to inceſſant Change) ſhould be regarded as belonging to the Proprietor, becauſe he has a Right to hinder any one from uſing, or filling it without his Conſent: though, by the Laws of Humanity, he is bound to refuſe no Perſon the innocent Uſe of this Air, or to demand any thing for ſuch a Uſe. Every one, alſo, has a Right to raiſe a Building upon his Ground as high as he will, and nothing hinders but he may continue it in a direct Line, as far as the Atmoſphere of the Moon, and even farther ſuppoſing that Planet not inhabited. But if he would dig in his Ground as low as he pleaſed, he muſt not paſs the Center of the Earth; all beyond that, with regard to us, belonging to the *Antipodes*: Though the Civil Laws, in certain Countries, adjudge to the Treaſury whatever is found in the Grounds of private Perſons, at a greater Depth than a Plow-ſhare can reach. We muſt, however, always take care that theſe Lines ſo drawn be exactly perpendicular to the Surface, both above Ground and below. Thus as my Neighbour cannot lawfully erect a Building which may any way anſwer to my Ground, even though not built upon it, or laid upon Beams ſtretched horizontally: ſo neither can I build a *Pyramid*, whoſe Foundation or Sides extend beyond my Space, unleſs there be ſome previous Agreement between us. After Space comes the Subſtance of the Earth, which we call the Ground, ſuch as the Places for Building, Meadows, Fields, and Vineyards. We may next account for things immoveable, whatever ſticks faſt to the Surface of the Earth; either by Nature, as the Trees; or by Man's Labour, as Houſes and other Buildings; although theſe ſort of things may be ſevered and become Moveables. Such are, alſo, not only Wind-mills, whoſe Foundation is faſtened to the Earth, but, alſo, Water-mills; for though they may be carried about, they cannot be made uſe of without ſome Anchor or Stake, which is firſt fixed in the Ground. Whatever, alſo, is faſtened to Houſes or other Buildings, as what is joined together with Iron, Lead, Plaiſter, or other ſe for a perpetual Continuance, is alſo reputed immoveable. Things moveable are conſequently all things that are ſeparated from the Earth and Water; whether they have been looſened from it, as Trees fallen or cut down, Fruits fallen or gathered, Stones dug out of the Quarries; or are naturally ſeparated as living Creatures. There are two ſorts of things Moveable; the one ſuch as live and move of themſelves, and they are called living Moveables, or living Creatures; others are inanimate, and may be called dead

Perſon only, or by many in Conjunction. One Man is then adjudged to be the Occupant of Land, when he tills and manures it, or when he encloſeth it with ſettled Boundaries and Limits: Yet ſtill with this Proviſo, That he graſp at no more than what, upon a fair Account, ſeems tenable to one Family, however enlarged and multiplied. Should one Man, for Inſtance, be, with his Wife, caſt upon a deſert Iſland, ſufficient to maintain Myriads of People; he could not, without intolerable Arrogance, challenge the whole Iſland to himſelf upon the Right of Occupancy, and endeavour to repulſe thoſe who ſhould land on a different part of the Shore.

But when any number of Men jointly poſſeſs themſelves of a Tract of Land, this Occupancy is wont to be made either *by the Whole*, or *by Parcels* [a].

The former happens, when Men in an united Body ſeize on ſome deſolate Region, encompaſſed with certain Bounds, either by Nature, or by human Appointment. The ſeveral Parcels of which Region are either granted to the particular Members of the Community, to take and to hold as each ſhall think fit (a Method but rarely practiſed) or what ſeems more convenient for the Prevention of Quarrels and Diſputes, are allotted to every Perſon by publick Deſignation. For that a promiſcuous Occupancy is apt to breed Confuſion, we may obſerve from that Deſcription which [b] *Livy* gives us of *Rome*, *Forma urbis erat occupatæ magis quam diviſæ ſimilis*; *ſuch was the Appearance of the City, as if it had been firſt poſſeſſed rather by Occupancy than by a regular Diviſion.* *Tacitus* and *Cæſar* will furniſh us with Inſtances. The former reports of the antient *Germans* to this Purpoſe [c]; *Such a number of Men dwelling together* (for *Grotius* reads *Vicos*, not *Vices*) *occupy or poſſeſs ſuch a Portion of Land, which they afterwards parted into private Shares, according to the Worth and Eſteem of particular Perſons; the vaſt Extent of the Country making theſe Partitions eaſy and practicable. They change their arable Ground every Year, and are never at a loſs on this account.* So, likewiſe, *Cæſar* tells us of the *Suevi* [d], *They have an hundred Cantons, from each of which they draw every Year a thouſand Men for the Camp-ſervice; the reſt keep at home, and till the Ground for themſelves, and for their abſent Friends. The next Year they relieve each other; thoſe who ſerved in the Army return to take care of the Land; and thoſe who tarried behind liſt themſelves for the Wars. Thus they never interrupt either the Buſineſs of Huſbandry, or the Uſe and Diſcipline of Arms. But there is no ſuch thing as ſeparate or private Fields known among them; nor are they allowed to inhabit any one Place longer than the Space of a Year.* And again, [e] ſpeaking of the *German* Nations in common; *No Perſon*, ſays he, *hath any certain Quantity of Land, any ſettled or proper Boundaries. But the Princes and Magiſtrates every Year aſſign the ſeveral Tribes their Reſidence, in what Place, and to what Extent they judge convenient; and, the Year after, force them to remove to a new Seat.* The Deſign of which Inſtitution was, no doubt, to preſerve the antient Simplicity of Life, ſo unacquainted with Avarice and with Luxury. We find *Horace* alluding to this Cuſtom in *Lib.* III. *Od.* xxiv. *ver.* 9. *&c.*

Campeſtres melius Scythæ
(Quorum plauſtra vagas rite trahunt domos)
Vivunt, & rigidi Getæ:
Immetata quibus jugera liberas
Fruges & Cererem ferunt,
Nec cultura placet longior annua;
Defunctumque laboribus
Æquali recreat ſorte vicarius [f].

The Rovers of the *Scythian* Plains,
Whom peaceful Want inur'd of old
To wheel their Houſes in their Wains,
And *Getans* ſtiff with native Cold,
In ſolid Happineſs outvy
The Pomp and Pride of *Italy.*
Unmeaſured Lands free Plenty yield,
And *Ceres* loves to ſhift the Scene;
A ſingle Harveſt loads the Field,
A ſingle Year confines her Reign:
And, if the Farmer weary grow,
His honeſt Second takes the Plough.

IV. As for this Occupancy in *general*, or *by the whole*, we are farther to obſerve, that it confers on the Community, as ſuch, a Dominion over all things contained within the Tract which they thus poſſeſs, not only immoveable, but likewiſe moveable Goods and Animals; at leaſt, it gives them ſuch a Right of taking the latter kind, as excludes all others from the ſame Privilege. And ſuch an *univerſal Dominion*, as is here deſcribed, is ſo very different from the *Dominion* of private Men, that the latter may be transferred to a Stranger or Alien, whilſt the former remains ſafe in the Hands of the Community [g]. Nor is it neceſſary that all things which are firſt occupied in this general Way, ſhould be afterwards divided amongſt particular and diſtinct Proprietors. Therefore, if in a Region thus poſſeſſed, any thing ſhould be found, which is not aſcertained to a private Owner, it muſt not preſently be looked on as *void* and *waſte*, ſo that any one Perſon may ſeize it as his *Peculiar*; but we muſt ſuppoſe it to belong to the whole People [h]. And the

[a] See *Grot.* l. ii. c. 2. ſ. 4. [b] Lib. v. in fin. [c] *German.* c. 26. [d] De Bell. Gall. l. iv. c. 1. [e] Lib. vi. c. 22. [f] Of the Inhabitants of the Iſland *Lipare*, ſee *Diodor. Sic.* l. v. c. 9. p. 222. B. Edit. *Rhodom.* The ſame Author, l. v. c. 34. p. 310, 311. attributes to the *Vaccæans* a more ſtrict kind of Communion, "The Nation of the *Vaccæans*, *ſays he*, "divide their Land yearly into ſo many Partitions, in order to the tilling it: The Fruit and Product they bring into a common "Stock, out of which they aſſign every Man his Share. If the Countrymen imbezzle any Part, it is a capital Crime. See likewiſe, l. v. c. 45. Ibid. c. 45. p. 320. *D.* Of the Commonwealth of the *Panchæans*. So too the *Apalchitæ* labour for the common, and each Houſholder, according to the Number of his Family, received every full Moon his Proportion out of the publick Store-houſe. Vid. *Rochefort.* Deſcript. *Antillar.* Part. II. c. 8. n. 8. Comp. *Grot.* l. ii. c. 3. ſ. 4. [g] *Dio Chryſoſtom.* Orat. 31. in *Rhodiac.* "The whole Country belongs to the civil State; yet this doth not in the leaſt hinder, but that every Man is Lord of his own Poſſeſſions. [h] Vid. *Grot.* l. ii. c. 2. ſ. 4.

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dead Moveables. I have taken all this partly out of the Elements of *Juriſpr. Univerſal.* of this Author, p. 87, 88. and partly out of the Civil Laws of Mr. *Domat. Prælim.* tit. iii. Sect. 1. §. 4, *&c.* The *Roman* Lawyers often call Immoveables, *Res, quæ ſoli ſunt. Labeo ſcribit, edictum ædilium Curulium de venditionibus rerum eſſe, tam earum, quæ ſoli ſunt, quam earum, quæ mobiles, aut ſe moventes*, Digeſt l. xxi tit. 1. *De Ædilitio Edicto*, &c. leg. 1. §. 1. It would be too long for me to recite here the other Paſſages of theſe Lawyers to ſhew particularly what things they comprehend under the Name of *Immoveables.*

[i] *Dio's* Greek is, Ἡ χώρα τῆς πόλεως, ἀλλ' οὐδὲν ἧττον τῶν κεκτημένων ἑκαστος κύριός ἐστι τῶν ἑαυτοῦ. See, alſo, l. viii. c. 1. §. following.

ſame Rule may, in our Judgment, be extended to ſuch deſolate Iſlands as lie in any Sea under the Dominion of a particular Commonwealth [a]; or ſuch as, though they do not now appear, yet happen to riſe afterwards in the ſame place; of which we find ſeveral Examples recorded by *Pliny*. Now in the Diſpoſal of ſuch things as theſe, the People take different Methods: Sometimes the Profits of them are laid up in a publick Stock, to be taken out again for publick Uſes; ſometimes all the Subjects, ſometimes thoſe only of a certain Order or Degree; and ſometimes Foreigners too are allowed to hold and enjoy them, as Tenants of the State. Yet in all Caſes, whatever Right private Perſons obtain over theſe things, depends on the Appointment of the whole Community. But there is ſome Difference, as to this Point, between Immoveables and Moveables. The former, in regard that they lie in open View, and cannot be forced out of their Place, are, by virtue of that univerſal or general Occupancy, immediately ſuppoſed to belong to the People, ſo far as concerns the Body and Subſtance of them. But now, as to moveable things [1], ſome of theſe are ſo framed or diſpoſed, as that the Region may indeed be the Seat of their Production; and yet there is need either of Labour in finding or gathering them, as Metals in the Bowels of the Earth, Jewels, Pearls, and the like, ſcattered about the Shores and other Places: Or elſe of particular Care in taking and ſecuring them, that they may not afterwards get out of our Hands; as Beaſts, Fiſh, and Fowl, Men having no Power over theſe things, ſo as to uſe them at their Pleaſure, before they are found or taken; it follows, that a People, by poſſeſſing themſelves in this general manner of the Seat where they are to be met with, do not properly acquire a *Dominion* over them, but only a Right of obtaining ſuch a *Dominion* hereafter, by particularly taking and ſecuring them. Hence, for Inſtance, we cannot rightly ſay, that the wild Beaſts of any Country, which ſtill remain in their natural Freedom, are the Property of the Prince: But the Prince alone hath the Right of taking them, inaſmuch as he is Lord of the Soil where they run; and he may communicate this Right to others, in what Degree, and under what Reſtraints he pleaſeth. Therefore he, who is Sovereign of the reſpective Lands or Waters, may grant a Right of taking and appropriating things of this Nature, either promiſcuouſly to all Perſons, or to none but his own Subjects, or ſtill only to his Subjects of ſuch a Quality: Or, laſtly, he may, if he thinks fit, reſerve the Privilege wholly to himſelf. For though the things themſelves be not yet, in a ſtrict Senſe, under Dominion, yet foraſmuch as the Act of appropriating them cannot be accompliſhed without uſing ſome other things which are ſubject to Dominion; as ſuppoſe the Earth, or the Water; it follows, that he who hath the Sovereignty of the latter things, may, by a Decree to this Purpoſe, prohibit others from uſing them, as Means of acquiring the former [b].

V. Hence it is apparent, that it depends on the Will of the Sovereign, and not on any natural and neceſſary Law, what Right the private Members of a State ſhall enjoy, as to the gathering of Moveables not yet poſſeſſed, as Hunting, Hawking, Fiſhing, and the like: Nay, and as to the Occupancy of deſolate Regions; which the ſupreme Governors may hinder any of their Subjects from entring upon. Such a Prohibition cannot indeed prejudice Foreigners [2], who, by taking poſſeſſion of thoſe Regions, may make them their own: But it will be a ſtop to the Subjects of the reſpective Governors, ſo that none of them ſhall acquire the ſaid things, but thoſe only who have obtained a Grant and Commiſſion ſo to do. For in ſome Places private Men are allowed more of theſe Advantages, and in ſome leſs, according as the Rulers in every State have judged convenient. By the *Jewiſh* Cuſtom, as Mr. *Selden* [c] informs us, *Whatever was found in deſolate Places, or in ſuch as were void of the Dominion and Culture of private Perſons, became the Property of the Occupant; as Graſs, Fruit, Wood, and the like. Alſo the Fiſh, whether in ſalt or freſh Water, and the wild Beaſts and Birds: Yet no one was permitted to hunt or to hawk in another Man's Ground; though, even there, if he had once taken any Game, it was his own. But to rob the Parks and Ponds was utterly unlawful.* The *Roman* Lawyers talk much to the ſame purpoſe. For thus *Gaius* [3]; *All Animals taken on the Land, on the Sea, or in the Air, that is, wild Beaſts, Birds, and Fiſh, belong to thoſe who take them: For what is yet no Body's, natural Reaſon aſſigns to the firſt Occupant.* On theſe and the like Places the Expoſitors of the Civil Law obſerve, that under the Term *Feræ* are comprehended all living Creatures, which Nature hath endued with an unlimited Power of ſtraying up and down about their proper Elements; ſo as to take in thoſe, likewiſe, which have been tamed by the Uſe and Company of Men.

[a] Vid. *Plin.* Nat. Hiſt. l. iv. c. 12. ſec. *Hebr.* l. vi. c. 4.

[b] Comp. *Grot.* l. ii. c. 2. ſ. 5. & c. 3. ſ. 5, & 19.

[c] De Jur. Nat. & Gen.

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[1] This Diſtinction is founded upon a falſe Notion of Poſſeſſion. See §. 2. n. 2. above. The Truth is, we may appropriate to ourſelves things *moveable*, as much as *immoveable*, becauſe they are often additional to them. See Mr. *Thomaſius*'s *Jurisprud. Divin.* l. ii. c. 10. §. 147, *&c.* Our Author to maintain his Principles runs himſelf into manifeſt Abſurdities. See §. 7. n. 3. following.

[2] Our Author, doubtleſs, means a deſert Country, bordering upon a Kingdom, but not taken into it. For every thing that is encompaſſed with ſomething already occupied, muſt, alſo, be ſo eſteemed, and, conſequently, others cannot pretend to it. So that I cannot ſee why Mr. *Hertius* ſhould criticize our Author, as if he ſuppoſed the contrary. For this is no way the Conſequence of Mr. *Puffendorf*'s falſe Hypotheſis concerning the Foundations of the Right of Property. Becauſe the Agreement which he ſuppoſes neceſſary to make one Maſter of a thing, extends itſelf, in his Judgment, to every thing that has a neceſſary Dependence on it, which appears plainly by what I have ſaid above about the Sea, c. 5. §. 8. But as it may be the Intereſt of a State to keep its Members from ſeizing any deſert Lands without its Juriſdiction, by their own Authority, the Author here obſerves upon this Occaſion, and expreſſeth it in this manner; *Sovereigns may likewiſe*, &c. which makes it plain enough to be underſtood. It is certainly a thing much more conſiderable to ſeize upon a large Extent of Ground, than to take a few Deer or Fiſh; ſo that this Word LIKEWISE is ill placed, if he treats of any thing which belongs already to the State in general.

[3] The Words of the Civil Law are, *Feræ igitur beſtiæ, & volucres, & piſces, & omnia animalia, quæ mari, cælo, & terra naſcuntur, ſimul atque ab aliquo capta fuerint, jure gentium ſtatim illius eſſe incipiunt. Quod enim ante nullius eſt, id naturali ratione occupanti conceditur.* Inſtit. l. ii. tit. 1. *De rerum diviſione, & adquirendo ipſarum Dominio*, §. 12. Concerning Fiſh there is an elegant Paſſage in *Plautus*'s *Rudens*, Act iv. Scen. 3. ver. 32, *&c. Ecquem eſſe dices*, &c. "Can you ſay that any one of the Fiſh be-
"longs to me, whilſt in its own Element? Yet thoſe which I catch are my own, and I reckon them amongſt my proper Goods.
"No one lays hands on them to challenge them from me; no one claims a ſhare in the Booty. I ſell them all fairly in the open
"Market as my honeſt Store." Though the Fiſherman was ſomewhat out when he applied this Argument to the Bag of Money.

Though

Though perhaps the Diſtinction between wild and tame Creatures might be thus better expreſſed; that the former are more averſe to human Society, take greater delight in enjoying their boundleſs Liberty, and cannot, without great Difficulty, be accuſtomed to live with us; nor may we, after all, depend very ſafely on their Fidelity: Whereas the latter are quite different in each of theſe reſpects. Yet it is a Saying of *Grotius* [a], *That the Reaſon why ſome Creatures fly and avoid us, is not the want of Gentleneſs and Mildneſs on their Side, but on ours:* Which he grounds on the Obſervation of Travellers; that in the moſt remote Parts, where Men had ſcarce ever, or very rarely, came before, Birds have been found, which offered themſelves freely to be taken. Some may rather chooſe to form the Diſtinction by ſaying, that wild Creatures have naturally a more intractable, a more rough and ſtubborn Diſpoſition than the tame.

We may here remark, by the way, that in one place of the *Inſtitutions*, [b] and another of the *Digeſts*, Pigeons and Peacocks are falſly reckoned among thoſe Fowls which we term Wild [1]. The Miſtake about the Peacocks hath been already noted by *Gothofredus*, on that Paſſage of the *Inſtitutions:* And as for Pigeons, the Reaſon which in the very next Section is there given to prove Hens and Geeſe to be tame [2], will teach them, likewiſe, there being other Pigeons expreſly denominated Wild. And therefore, by the *Jewiſh* Cuſtoms, none might take them, unleſs at thirty Furlongs Diſtance from the Dove-houſe [c].

Yet Bees are, no doubt, wild by Nature [3], ſince their Cuſtom of returning to their Hive doth not proceed from their Familiarity with Mankind, but from their own ſecret Inſtinct: They being, in all other reſpects, utterly unteachable. It is nevertheleſs one of *Plato*'s Laws, [d] *Whoever ſhall purſue the Swarms which belong to others, and, by ſtriking on the Braſs, ſhall draw them, with the delightful Sound, to fix near himſelf, let him make Reſtitution for the Damage.* Where he ſeems to pre-ſuppoſe, that the Owner of the Bees did not follow them, when they left his Hives [e]. *Pliny* [f] will have the Bees to be neither *wild* nor *tame:* Others divide them into both thoſe kinds. [g] But that, ſo long as they return to our Hives, they are properly our own, and cannot be hurt without our Loſs and Damage, is very laboriouſly proved in that Declamation of *Quinctilian*, entituled, *The poor Man's Bees* [h].

According to the *Roman* Laws, it is the ſame thing whether a Man take Game in his own Land [4], or in thoſe of others: Becauſe wild Creatures, in whatſoever place they are found, are no Body's Property, whilſt they retain their natural Freedom. Yet the Owner of Land may hinder others from coming there to follow their Sport [5]. But ſtill what another hath taken with his Dogs or his Hawks, though againſt the expreſs Prohibition of the Lord of the Soil, he thereby makes his own. Indeed, as to this laſt Particular, *Cujacius* [i] is of a different Opinion; grounding his Exception on a Law of the *Digeſts* [6] [k].

VI. But in moſt Places the Privilege of Hunting is left wholly to the Governors of the Commonwealths; who, in ſome Countries, admit their principal Subjects to be Sharers with them: Only Beaſts of Prey are almoſt every where allowed to be killed by all Perſons without Diſtinction. Many Reaſons may be aſſigned for this general Cuſtom. It did not ſeem convenient that Countrymen and Labourers ſhould be permitted to quit their Work, that they might ramble about the Woods; which Indulgence might have drawn them on by degrees to the Practice of Robbery and Plunder [l]. Sometimes too it is reckoned unſafe to truſt the common People with Arms. *Tully* [m] mentions one *Lucius Domitius*, who executed a Slave only for ſtriking a large Boar with a hunting Spear, when after the *Servile War* in *Sicily* an Order had paſſed, forbidding any Slave to appear with a Weapon. On the other ſide, for the Princes and Nobles, on whoſe Arms the Safety of the Commonwealth was to depend, Hunting was eſteemed a moſt agreeable Exerciſe, as a Repreſentation of War, and very proper to inure them in bearing the Hardſhips and Labours of the Field. On which account what a high Value the *Parthians*, *Medes*, and *Perſians* ſet on this manly Sport, we may learn from *Xenophon* [n] and other Authors [o]. *Bajazet* the *Turk* is ſaid to have maintained ſeven thouſand Men only for the Care and Management of his Hawks; and to have had ſix thouſand Dogs for the Chace. When he was taken Priſoner by *Tamerlane*, and upbraided with this Fancy by a Preſent of Hawks and Dogs from the Conqueror, he fiercely replied, *For me, who owe my Birth and Education to* Amurath *the Son of* Orchan, *both Sovereign Princes, Hounds and Hawks are proper Diverſion: Not for you a rambling Free booter of* Scythia, *bred up to Thieving and Rapine* [p]. And indeed it was but equitable to allow this manly Recreation to Princes and Chief Men, by whoſe Toils and Cares the publick Welfare is ſecured. But ſhould the ſame Favour, in great and flouriſhing Countries, be granted promiſcuouſly to all Perſons, it would be of very little Benefit and Advantage to any one in particular [q]. For theſe, therefore, and the like Reaſons,

[a] Hiſt. *Belg.* l. v. [b] Sect. 15. *De rer. diviſ.* [c] Vid. *Conſtantin. l'Empereur Baba Kama*, c. 7. f. 7. Add *Selden* de *J. N. & G.* ſec. Heb. l. vi. c. 11. [d] De L. L. l. viii. p. 915. C. Edit. *Wech.* [e] Comp. f. 14. *Inſtit.* dict. Tit. *rerum divi.* [f] Lib. xi. c. 5. [g] Vid. l. xlvii. t. 2. *Digeſt. De Furtis*, l. xxvi. & lib. xl. t. 1. l. v. f. 3. [h] Lib. viii. f. 1. *D. Famil. erciſcundæ.* [i] Obſerv. 4, 2. [k] Leg. 55. t. 1. Lib. xli. *D.* de *A. R. D.* I ſhall cite this Law, §. 9. Note 2. following, where I ſhall give an Explanation, which will deſtroy the Argument which *Cujacius* draws from this Law, *Obſervat.* §. 2. [l] Vid. *Conſtitut. Frederic.* II. l. ii. feud. t. 27. f. 5. *Si quis ruſticus.* [m] Lib. v. c. 3 *in Verr.* [n] *Cyropæd.* l. i. *initio.* [o] *Cornel. Nep.* Alcibiad. c. 11. *Juſtin*, l. xli. c. 3. *Tacit.* Annal. l. ii. c. 2. *Sueton. Caligul.* 5. [p] Laconick *Chalcondyl.* l. iii. [q] *Plin.* Panegyr. "These were the Arts and Exerciſes in which their future Generals were trained for their Country's Service; "to contend with the ſwifter Beaſts in Speed, with the bolder in Strength, with the more cunning in Policy and Craft: Nor was "it looked on as an inconſiderable Ornament and Triumph of Peace, to remove from the Field the Inroads of the ſavage Herd, "and to deliver, as it were, from a Siege the Labours of the Countrymen.

[1] The Words of the Digeſts are, *Pavonum quoque & columbarum fera natura eſt.* See, alſo, *Digeſt.* l. xli. t. 1. leg. 5. §. 5. & *Dion. Gothofred.* upon that place of the *Inſtitutes.*

[2] *Gallinarum & anſerum non eſt fera natura, idque ex eo poſſumus intelligere, quod aliæ ſunt gallinæ, quas feras vocamus, item alii ſunt anſeres, quos feros appellamus,* Ibid. §. 16.

[3] *Apium quoque fera natura eſt. Itaque, quæ in arbore tua conſederint, antequam à te alveo includantur, non magis tua intelliguntur eſſe, quam volucres, quæ in arbore tua nidum fecerint,* Ibid. §. 14. See *Hieron. Magii Miſcel.* l. i. c. 3.

[4] The Law is, *Nec intereſt, feras beſtias & volucres utrum in ſuo fundo quis capiat, an in alieno.* Ibid. §. 12.

[5] *Plane qui alienum fundum ingreditur venandi aut occupandi gratia, poteſt à domino, ſi is præviderit, prohiberi ne ingrediatur,* Ibid.

[6] I ſhall cite this Law Sect. 9. N. 2. following, where I ſhall give an Explanation which will deſtroy the Argument which *Cujacius* draws from this Law, *Obſerv.* IV. §. 2.

a Sove-

a Sovereign, if he thinks it for the Intereſt of the Kingdom, may, againſt the Conſent of the common People, abridge them of the Liberty of Hunting, without any Injuſtice. For he doth not hereby take from them what was their own, but barely forbids them to uſe certain Means of acquiring things, which the meer Law of Nature, if it obtained without any civil Conſtitutions, would allow them. For as to what ſome ignorant Perſons have urged, that the Prohibition of Hunting is therefore unlawful, becauſe God Almighty inveſted Men in general with the Dominion over Beaſts, the pooreſt Subjects being no leſs Men than their Superiors: Or, as to that common Aſſertion of the *Roman* Lawyers, that Hunting is free to all by the Law of Nature and of Nations; learned Men have long ſince put an end to theſe Doubts, by diſtinguiſhing between the *preceptive* and *permiſſive* Law of Nature, and by explaining the different Acceptations of thoſe Terms *Jus Gentium*, or *the Law of Nations* [a].

But farther, it is very probable, that in many Places this Right was conferred on Princes by the voluntary Motion and Act of the People [b]. For ſince there was a Neceſſity of aſſigning them ſome Advantages for the ſupporting their Dignity with a ſufficient Train and Splendor; it was wiſely conſidered, that it would be moſt convenient to allot them ſuch things as might be given without the Damage or Prejudice of any Man: And of this kind are all thoſe in which no other Perſon can yet claim a Property [c].

VII. But ſuch Laws as theſe did not, ſtrictly ſpeaking, confer on Princes the Dominion over wild Beaſts, but only a Right, by virtue of which they alone ſhould afterwards make them their Property, by ſeizing and poſſeſſing them. Which Right, nevertheleſs, had this effect in common with Dominion, that, in caſe any other Perſon had illegally taken the ſaid Beaſts, they might be challenged at his Hands. For it doth not ſeem reaſonable to admit the Opinion of ſome, who tell us, that, even before actual Occupancy, the Law might fix the Dominion of theſe things, nothing more being required towards the producing of Dominion than a legal Appointment. Thus much indeed the Law of any Country may effect, that a Dominion already eſtabliſhed over things ſhall paſs from one Subject to another, without any antecedent Act of the Parties. But the Law alone is not ſufficient to introduce originally a Dominion over ſuch things as have not yet been actually brought under the Power of Men: But there is required farther ſome corporal Action; eſpecially as to the Poſſeſſion of living Creatures. But now the firſt conſtituting Dominion, and the preſerving it after it hath been once conſtituted, are different things.

Some again there are who aſſert, that Prohibitions of this Nature by civil Ordinances only ſtop the Right of taking Game, not of keeping what hath been already taken. *For two things*, they ſay, *there were which the Law of Nations allowed with reference to wild Beaſts*: Firſt, *That all Men ſhould enjoy the liberty of Hunting*: *And* Secondly, *That the Dominion of theſe Beaſts ſhould be acquired by the way of Occupancy. The former of which Privileges ſeems in this caſe to be reſtrained, but by no means the latter. Whence if a Perſon, who was forbidden to hunt, ſhall nevertheleſs have followed the Chace, and ſucceeded in it, any Game found upon him may be forced away; not becauſe he had not made it his own, but in way of Puniſhment he was unworthy to poſſeſs it. In the ſame manner, as Nets, Spears, and other hunting Inſtruments are ſeized in ſuch Mens Hands; though none can deny theſe to be their real Property. For which Reaſon, if Game, thus taken contrary to Law, be given in charge to another as a matter of honeſt Truſt, it may not be forcibly challenged from him by the Magiſtrate: As it might be, were it indeed ſtolen, ſome other Perſon being the juſt Owner of it. But the Prince cannot be called the Owner of theſe Beaſts, before he hath actually caught them; and therefore he, who hunts contrary to the Royal Prohibition, doth not commit Theft, nor take away the Goods of another; but only acquires a thing which another had a privative or excluſive Right of acquiring; and therefore he may be puniſhed; but as for the thing which he thus got into his Poſſeſſion, it ought not to be looked on as matter of Theft, or to be challenged accordingly* [d e]. But indeed it is very ſimple to imagine, that a Man is, by any natural Neceſſity, made Proprietor of the things which he firſt lays his Hands on; we having already ſhewn, that this Right is grounded on the Strength of a previous Covenant [1]. Therefore if a Prince ſhall forbid his Subjects to uſe this Method of Acquiſition, in regard to ſome particular things; their being the firſt Takers ſhall avail them nothing in order to the obtaining of Dominion over them. And that Law of the Prince hath ſo far the Effect of Property, as that after it the Subject ought not to lay hands on the ſaid Beaſts; or if he doth ſo, he cannot thereby make them his own. Nor doth it follow, that becauſe it is not uſual in theſe Caſes to challenge the Fleſh, eſpecially from a third Perſon, when perhaps it is ready to corrupt; therefore the unlawful Hunter was the juſt Proprietor of it. Again, *taking* muſt not preſently be conſtrued *acquiring*: The former being a bare natural Action, whereas the latter includes a moral Effect. It may rather be ſaid, that the Poſition of theſe Men is a plain Contradiction; for thus it runs, *The Right of Hunting belongs to Princes alone, and if any private Perſon takes Game, he thereby acquires the Dominion*

[a] Vid. *Grot.* l. ii. c. ſ. 5.

[b] Vid. *Grot.* l. ii. c. 8. ſ. 5.

[c] Of the Hunting allowed the *Peruvians* under their *Yncas*, conſult at your Pleaſure *Garcilaſſo de la Vega*, Comm. Reg. l. vi. c. 6.

[d] Vid. *Gudelin.* de jure noviſſimo, l. ii. c. 2. and from him *Arnold. Vinn.* ad Sect. 13. Inſtit. *De rer. diviſ. Ziegler* upon *Grotius* (l. ii. c. 2. ſ. 5.) ſpeaks much to the ſame Purpoſe; "That a Law may indeed hinder the taking of Game, but that no Law can hinder it, when taken, from immediately "paſſing into Property, as acquired. For that the Right of prohibiting is conſiſtent enough with this Right of *Acquiſition*. That, "whether a Man by taking Game acquires it as his Property, and whether a Man ought to make uſe of this way of *acquiring*, are "two different Queſtions. That, as to the former, the Sovereign hath no Authority to interpoſe: Becauſe, as he cannot make "thoſe things become ſome body's, which are no body's, or theſe to be poſſeſſed which are not poſſeſſed (l. iii. ſ. 14. *D. De "adquir. poſſ.*) ſo neither can he hinder *Acquiſition*, or cauſe that thoſe things which are already *acquired*, ſhall not be *acquired*. "But that, as to the latter of theſe Queſtions, the Sovereign is free to enact what he pleaſeth.

[e] Vid. D. l. 41. tit. 2. *De acquirend. vel admittend. poſſeſſ.*

[1] We have proved the contrary, c. 4. §. 4. n. 4.

of

of it; that is, Princes alone may uſe that Means by which the lawful Dominion over wild Beaſts is gained and eſtabliſhed; and yet another Perſon may acquire the ſame Dominion, whilſt he cannot lawfully apply the ſame Means.

But what if it ſhould be demanded, Who then is the Proprietor of Game thus taken contrary to Law? We have abſolutely denied the Taker himſelf to be ſo [1]; and as for the Prince, how could he fix a Property in the Game, when he was not concerned in the Sport? It ſeems reaſonable, in this Caſe, to affirm, that here the Hunter, though in a very unacceptable way of Service, labours for the Prince; and, conſequently, by taking the Game, he makes it the Prince's, in the ſame manner as other Huntſmen, who act by a Royal Commiſſion and Deputation.

It is, moreover, certain, that a Stranger, likewiſe, is bound by ſuch Conſtitutions as theſe; tho' perhaps in his own Country the Liberty of Hunting may be univerſally allowed. Foraſmuch as this is a neceſſary Law of all States, without which their inward Peace and Tranquility cannot be ſecured, that he, who enters upon the Territories of another Prince, tho' only for a Time, ought ſo long to conform to the Cuſtoms and Orders of the Place; at leaſt to all thoſe, the Reaſon of which will hold good againſt him as well as againſt others, and from which the Legiſlator hath not peculiarly exempted Foreigners [a]. But, on the whole, 'tis the Admonition of wiſe Men, that Statutes of this kind ought, with great Moderation, to be put in force; unleſs ſome particular Aggravation in the Offender deſerves a greater Severity of Proceedings [b].

VIII. We are then ſaid to have *occupied* any thing, when we have actually taken poſſeſſion of it; and this commenceth at our joining Body to Body, either immediately, or by a proper Inſtrument. The regular Courſe therefore is, that the Occupancy of Moveables be made with the Hands; the Occupancy of Soil with the Feet, together with an Intention of manuring it, and the Action of ſetting Boundaries to it, whether exactly, or with a wider Liberty. But the bare ſeeing a thing, or the knowing where it is, is not judged a ſufficient Title of Poſſeſſion [2]. Thus *Ceres* ſpeaks in *Ovid*, *Metamorph.* l. v. ver. 518, 519.

En quæſita diu tandem mihi nata reperta eſt.
— — — — — — — — — Si
Scire ubi ſit, reperiſſe vocas.——

Sought for ſo long, my Maid, I've found thee now;
If we have found, when where to find, we know.

Whether Poſſeſſion of an immoveable thing may be taken by an Inſtrument, we may underſtand from the famous Story which *Plutarch* [c] relates to this Purpoſe: *The People of* Andros *and* Chalcis *made a Progreſs together into* Thrace, *to find out new Seats where they might fix and inhabit; and ſoon after their Arrival the City* Sana *was by Treachery put into their Hands: After this, being informed that the* Barbarians *had deſerted the City* Acanthus, *they ſent two Spies to diſcover the Truth of the Intelligence. Theſe, as they drew near, ſaw the Place to be really forſaken. Whereupon the* Chalcidian Spy *ran with all his Force to take poſſeſſion of it in the Name of his People; but the* Andrian, *ſeeing himſelf outrun, threw the Spear which he had in his Hand at the City Gate, and, as it ſtuck there, cried out,* That by this Caſt of his Spear he had taken the prior Poſſeſſion in Behalf of his Countrymen. *A Diſpute ariſing hereupon, the* Eretrians, *the* Samians, *and the* Parians *were choſen Umpires; of whom the two former gave Judgment for thoſe of* Chalcis, *and the laſt for thoſe of* Andros. *The diſappointed Party were ſo enraged at the Arbitrators, as to engage themſelves by Oath, never to make or to allow any Marriages with them.* Indeed a Spear ſeems a very improper Inſtrument for the Occupancy of Immoveables, ſince we may ſtrike many things with ſuch a Weapon which we can never approach ſo near as to touch with our Body [3].

IX. It is the general Opinion, that moving things cannot be made our own but by bodily Seizure; and this we are to uſe in ſuch manner, as to take them from the Place where they were found [4], into

[a] Vid. *Grot.* l. ii. c. 2. ſ. 5. [b] Vid. *Bæcler.* ad *Grot.* ibid. Sect. 4. [c] *Quæſt. Græc.* 30. p. 298. *Ed. Wech.*

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[1] This Fiction, to which our Author is obliged to have recourſe, and which does not appear to be the leaſt ſatisfactory, is ſufficient almoſt to ſhew that he reaſons upon falſe Principles, and that he knows not how to keep himſelf from yielding to what we have ſaid in the Note before quoted.

[2] This Paſſage, tho' quoted by *Grotius*, l. ii. c. 8. §. 3. as well as our Author, upon this Occaſion, can be no farther to the Purpoſe, than as an Illuſtration, becauſe he treats here of another thing. He might much better have mentioned that Diſpute which *Plautus* feigns to have been between two Servants, one of which had fiſh'd out of the Sea a Cloak-bag, and the other claimed a Part, becauſe he ſaw him from the Shore. For thus they argue;

Gripus. *Quemme* vidulum *ego excepi in mari?*
Trachal. *At ego inſpectavi è littore.* Rudens, Act. iv. Scen. 3. ver. 79.

Nothing is more impertinent than this Reaſon. For beſides that *Gripus* could not know the Intention of *Trachalion*, this laſt could not be within reach of the Cloak-bag, 'till the other was poſſeſſed of it. The Reaſons which follow are not at all convincing. I ſhall give them according to Madam *Dacier*'s Tranſlation. "Should the Man to whom the Cloak-bag belongs come now, ſhall "not I that ſtood by, and beheld afar off, be counted the Thief as well as you who fiſhed it up? How then can you prove, that I, "who muſt be an Accomplice in the Theft, ſhould not, alſo, ſhare in the Gain?

[3] The Determination of the Arbitrators, and that of our Author, are not at all ſatisfactory. He had better have ſaid, that when two Perſons at the ſame time declare their Intention to ſeize a thing that belongs to neither of them, the thing is common to both, *Titius* Obſerv. 293. Indeed, as I have already ſaid, that which properly conſtitutes the Right for the firſt Occupant is, that he has declared previouſly, ſome way or another, his Intention to make a thing his own; inaſmuch, as ſoon as he hath ſo done, all others, who have yielded him the firſt Place, ought not to interfere, becauſe it would be as diſhoneſt and unjuſt as if one ſhould over-bid another; but if two Perſons declare at the ſame time that they'd have a thing, and one makes known his Deſign one way, and the other another, ſuch a Competition gives them equal Right, inſomuch that neither of them can by any Means appropriate the thing to the Excluſion of his Companion; wherefore they muſt accommodate the Matter between themſelves. Hence comes the Proverb, *I cry Halves.* See the Interpreters of the Paſſages quoted by Mr. *Noodt*, *Prob. Jur.* 2. 6. & *P. Vanaſſor*, *De vi & uſu quarund. locut.* p. 165. But I am amazed that he did not ſee, that in the Example he uſes there was a ſpecial Reaſon, why neither the Running of the *Chalcidian* Spy, nor the Dart ſhot by the *Andrian*, was of any Uſe to ſecure the Poſſeſſion of the City that they went to for their Countrymen. They were both ſent, doubtleſs, in Behalf of the whole Colony; ſo that they could not ſeize upon the City but in common, whatever Notion they might otherwiſe have of the nature of taking Poſſeſſion by the Right of the firſt Occupier.

[4] This is not always neceſſary, as is before proved. So that in the Example propounded by our Author, ſuppoſing that one finding a Neſt, and ſeeing that the young ones need to remain yet with their Dam, leaves them, with a Deſign to come again another

to our Lordſhip, or, at leaſt, into our ſafe Cuſtody. Thus a Neſt of Birds, tho' I lay my Hands upon them, yet are not my own, unleſs I carry them home. If I find a Litter of young Beaſts of Prey, I then fix a Property in them, when I either remove them as Priſoners to my own Quarters; or, for ſome Time, ſet a Guard over them where they lie, to hinder their Eſcape. Now this Seizure is made not only with our Hands, but with Inſtruments; as ſuppoſe, Snares, Gins, Traps, Nets, Weels, Hooks, and the like [a]: Provided the Inſtruments be, as they term it, *in noſtra poteſtate*, under our Power; that is, ſet in a Place where we have a Right of following the Game, and not yet broken by the Prey, but holding them faſt, at leaſt till ſuch time as we might probably come up. And hence we may decide the noted Caſe of *the Boar in the Toil*, propoſed in the *Digeſts* [1]. For if the Beaſt were ſo entangled, that he could not poſſibly break thro', and the Snare were laid either in your peculiar Lordſhip, or in a publick Place where you had a right of Hunting, then he was certainly your own; and I, if I had loos'd him, and reſtor'd him to his natural Liberty, ſhould have been bound to make full Satisfaction, whatever Name ſuch an Action might bear at Law, or under what Head ſoever it might be ranked. But if the Snare were ſet on my Ground, as I might at firſt have hinder'd your Entrance thither, ſo, if I afterwards break what you placed there without my Leave, you have no Reaſon to think yourſelf injured.

X. It hath, likewiſe, been diſputed, Whether by by giving a Beaſt a Wound in Hunting we preſently make him our own? *Trebatius* [2] long ſince declared on the Affirmative ſide; but then he ſuppoſeth us to purſue the Beaſt, which if we omit to do, he ſays, *We loſe our Property, and the Right paſſeth to the firſt Occupant.* Others are of the contrary Opinion, maintaining, That we can by no other means appropriate the Beaſt, but by actually taking him, becauſe many Caſualties may hinder him from ever coming into our Hands. The Emperor *Frederick* made this Diſtinction in the Caſe [b]: *If the Beaſt were followed with the larger Dogs or Hounds, then he was the Property of the Hunter, not of the Chance-Occupant; and in like manner, if he were wounded or killed with a Lance or Sword. But if he were followed with Beagles only, then he paſſed to the Occupant, not to the firſt Purſuer. If he was ſlain with a Dart, a Sling, or a Bow, he fell to the Hunter, provided he was ſtill in Chace after him, and not to the Perſon who afterwards found or ſeized him.* According to the Conſtitution of the *Lombards* [c], he who found or kill'd a Beaſt wounded before by another, was to

[a] See *Grot.* l. ii. c. 8. ſ. 14. [b] *Godofred.* ad iſtam leg. ex *Radevico* de geſt. *Frederic,* l. i. c. 26. [c] Lib. i. tit. 22. l. 4, & 6.

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ther time; they to whom he tells it, declaring to them his Intention, at the ſame time, do not deal well with him, if they do as the Curate, of whom *Bourſault* ſpeaks in one of his Letters, did to a Countryman; who to revenge himſelf went to him to put a falſe Confidence in him about ſomething curious; whereupon the Curate, deſirous to know all the Particulars of the Matter, to play a like Trick with the Countryman, received for Anſwer, *A Bubble, the Birds are gone.* By the Laws of *Saxony*, if any one has found a Swarm of Bees in the Hollow of a Tree, and makes a Mark whereby it may be known that he is gone to ſeek an Hive to put them in, no Man may meddle with them; they are thought by Right to belong to him that firſt diſcovered them, as the firſt Occupier, becauſe he has manifeſted his Deſign to make them his own. This Account I have from Mr. *Thomaſius*'s Notes upon *Huber. De Jure Civitatis*, l. ii. Sect. 4. c. 2. p. 455. where, nevertheleſs, he affirms, that this Law is not agreeable to the Law of Nature and Nations; but it does not appear to me that he has ſaid any thing which deſtroys theſe Principles, upon which my Arguments are built, no more than in the following Caſe, where he determines otherwiſe than I do. Suppoſe that one ſeizes upon a thing which he finds in a publick Place, but which he can't carry with him that Moment; whereupon he leaves it, declaring to ſome other preſent, that he intends to take it, and will come ſoon for it. In this Caſe, ſays Mr. *Thomaſius*, the firſt can't complain, if the laſt takes it, ſeeing it is out of his Poſſeſſion, and left in a publick Place; but in my Opinion the contrary muſt be underſtood, that either the latter ſhould wait till he that took poſſeſſion of the thing has relinquiſhed it, or that he may reaſonably preſume it, becauſe he delays long his Return to take it, and ſo may be thought not to mind it. In fine, I can't but take notice, that in the Place which I have quoted, p. 452, *&c.* Mr. *Thomaſius* confutes the Hypotheſis of Mr. *de Bynkerſhoek*, upon which I have given my Opinion above, §. 1. n. 1. but I had not then ſeen the Note of that able and judicious Lawyer when I wrote mine, which I have not ſince changed; yet I muſt own, that I have not always the ſame Notions, tho' for the main we are agreed.

[1] The Words of the *Digeſts* are, *In laqueum, quem venandi cauſa poſueras, aper incidit; cùm eo hæreret, exemptum eum abſtuli;* ——— *Reſpondit Proculus, laqueum videamus, ne interſit in publico an in privato poſuerim: & ſi in privato poſui, utrum in meo, an alieno: & ſi in alieno, utrum permiſſu ejus, cujus fundus erat, an non permiſſu ejus poſuerim? Præterea, utrùm in eo caſu ita hæſerit aper, ut expedire ſe non poſſit ipſe, an diutius luctando expediturus ſe fuerit? ſummam tamen hanc eſſe puto, ut ſi in meam poteſtatem pervenit, meus factus ſit. Sin autem aprum meum ferum in ſuam naturalem laxitatem dimiſiſſes, eo facto meus eſſe deſiſſet, & actionem mihi in factum dari oportere, veluti reſponſum, cum quidam poculum alterius ex nave ejeciſſet,* Digeſt. l. xli. tit. 1. *De acquirendo rerum dominio,* leg. 55. This Law has not been underſtood as it ought by the Interpreters; no, not by *Trebonianus*. Mr. *Noodt*, with his uſual Sagacity, has happily diſcovered the true Senſe of that antient Lawyer; for he proves in his *Probab. Juris*, l. ii. c. 6. §. 3. That *Proculus* was one of thoſe who believed, that to obtain a thing by the Right of firſt Occupancy it was not always neceſſary to take a corporal Poſſeſſion; and he proves theſe Words, *Ut ſi in meam poteſtatem PERVENIT, meus factus ſit,* ſignify, provided that he who laid the Nets, was within reach of corporally ſeizing the Boar taken, whenever he had a Mind; *i. e.* that no other Perſon can get before him if it be in a public Place; or, if it be upon the Ground of a private Perſon, that the Proprietor does not hinder him, as he has a Right to do, and deprive him of his Game. Mr. *Noodt* afterwards quotes, and, at the ſame time corrects, another Law; from whence it appears, that *Paul* the Lawyer, reaſoning upon the ſame Principle, maintains, that a Perſon is entitled to a Treaſure found in his Field, as ſoon as he knows it, and will make it his own. NERATIUS & PROCULUS *& ſolo animo non poſſe nos adquirere poſſeſſionem, ſi non antecedat naturalis poſſeſſio. Ideoque ſi theſaurum in fundo meo poſitum ſciam, continuo me poſſidere, ſimulatque poſſidendi adfectum habuero: quia, quod deſit naturali poſſeſſioni, animus implet.* DIG. lib. xli. tit. 2. *De adquir. vel admit. poſſ.* leg. 3. §. 3. After the Manner in which theſe Words are conceived, the Argument is abſurd. For it may be reduced to this: The Intention of Appropriation is not ſufficient unleſs it be attended with a corporal Seizure of the thing; therefore the Proprietor poſſeſſes the Treaſure which is in his Ground the Moment he knows it, and has a Mind to engroſs it. Mr. *Noodt* therefore reads thus: NERATIUS & PROCULUS *aiunt,* SOLO ETIAM *animo poſſe nos,* &c. (For it is apparently thro' Miſtake, that after the following Words *adquirere poſſeſſionem* he adds *tradiderunt,* which is ſuperfluous, there being already the Word *aiunt* in the Beginning of the Period.) I think it is ſufficient to take away the Negative *non*. The Particle & has the ſame Senſe with *etiam,* which this great Lawyer ſubſtitutes in its Place. And the Verb *aiunt* may be eaſily underſtood, eſpecially as in the Original of *Paul* it is expreſſed before. So that the Compilers, by cutting off the preceding Words, did not attend to the Defect they left in the Text.

[2] The Words are, *Illud quæſitum eſt, an fera beſtia, quæ ita vulnerata ſit, ut capi poſſit, ſtatim noſtra eſſe intelligatur? Trebatio placuit, ſtatim noſtram eſſe, & eo uſque noſtram videri, donec eam perſequamur. Quod ſi deſierimus eam perſequi, deſinere noſtram eſſe, & rurſus fieri occupantis. Itaque ſi per hoc tempus, quo eam perſequimur, alius eam ceperit, eo animo, ut ipſe lucrifaceret, furtum eum videri nobis commiſiſſe. Plerique non aliter putaverunt eam noſtram eſſe, quàm ſi eam ceperimus, quia multa accidere poſſunt, ut eam non capiamus, quod verius eſt,* ibid. leg. 5. §. 1.

carry

carry off a Shoulder and the Ribs, and to leave the Reſidue as the Hunter's Right: Though this Right to the Remainder continued no longer than the Space of twenty-four Hours. We judge it may in general be affirmed, That if the Beaſt be mortally wounded, or very greatly maimed, he cannot fairly be intercepted by another Perſon whilſt we are in Purſuit of him, provided we had a Right of paſſing through ſuch a Place: But the contrary is to be held, in caſe the Wound were not mortal, nor ſuch as would conſiderably retard the Beaſt in his Flight [1]. Therefore when *Meleager* in *Ovid* [a] admits *Atalanta* to a Share in the Glory of killing the *Calcdonian* Boar, it was not ſo much an Act of Juſtice, as of Love. But the Game which my Dogs kill, when I did not ſet them on, doth not become my Property, 'till I have actually taken hold of it [b].

XI. The *Jewiſh* Cuſtoms, as Mr. *Selden* informs us [c], decided theſe, and the like Points, in the manner following: *Fiſh or Beaſts were not to be taken from the Repoſitories or Places of Store: Yet it was lawful to take Fiſh out of another Man's Net, whilſt yet in the Sea, and Beaſts out of another Man's Snare, if it were laid in a deſert Place. He that ſpread a Net in another's Ground might poſſeſs the Game he had caught, unleſs it were found by the Lord of the Soil, and challenged as his Right, by virtue of that Property. Fiſh that leapt into a Ship belonged to the Maſter: Inaſmuch as a Ship may be eſteemed a Place of firm and ſecure Cuſtody, not of ſuch as is paſſing and uncertain; the Motion it hath not proceeding from its Nature, but from the Force of the Waters.* It is worth while to examine that Law of *Nerva* [2] on the ſame Subject, which determines, *That we are properly the Poſſeſſors of the Fiſh in our Pond, not of thoſe in our Lake: And ſo of the Beaſts in our cloſe Park, not of thoſe in our Woods and Foreſts, though ſurrounded with a Fence.* Which Diſtinction *Grotius* [d] diſlikes, becauſe Fiſh and Beaſts are no leſs ſecured in the larger Priſons of private Lakes, and well-fenced Woods, than in the cloſer, of Ponds and Parks. Yet *Nerva*'s Aſſertion is indeed founded on very good Reaſon. For the Propriety both of wild Beaſts and Fiſhes commenceth upon their being taken [3]. Now the Fiſh preſerved in our Pond, and the Beaſts in our Park, were once actually taken by us, but not the Fiſh which ſwim in our Lake, nor the Beaſts which run in our Woods, enjoying thus far their natural Liberty, though perchance they are ſo incompaſſed, as not to be able to wander without End. For to take theſe Creatures, and to beſet them with an Incloſure for the more eaſy taking them hereafter, are different Things; yet inaſmuch as I alone have a Right to take them, I may therefore both hinder others from doing the like, and may challenge what I find in their Hands; ſo that, as to this Effect, it is all one as if I were ſtrictly the Proprietor. And the Beaſts thus ſurrounded at large, may ſo far only be ſaid to enjoy their natural Liberty, as that they never yet were caught by any Perſon; not as that all Perſons without Diſtinction have a Right to catch them.

XII. We, likewiſe, acquire by Occupancy Things in which the *Dominion* they before lay under is extinct [4]: And this happens if a Perſon either openly throws aſide a certain Thing, with ſufficient Indications, that he deſires it ſhould no longer be his own, but ſhould lie free for the firſt Taker, without deſigning hereby to gratify any Man elſe [5]: Or, if having at firſt loſt Poſſeſſion againſt his Will, he afterwards gives the Thing over [6]; either as deſpairing to recover it, or becauſe the Recovery of it is not tantamount. For otherwiſe, a Man, though he loſeth the actual Poſſeſſion [7], yet never forfeits the Dominion and Property of a Thing (unleſs it be taken from him in Way of Puniſhment, or by the Chance of War) but he ſtill keeps a Right of regaining it, 'till ſuch Time as his Inclinations to that Purpoſe have ceaſed, or may be preſumed to have ceaſed. Wherefore the *Dominion* of ſuch Things as theſe cannot be acquired by Occupancy, ſo long

[a] *Metam.* l. viii. ver. 427. [b] Add. *Alberic. Gentil.* Advoc. Hiſpan. l. i. c. 4. [c] *De Jur. Nat. & Gen. ſec. Hebr.* l. vi. c. 4. [d] Lib. ii. c. 8. ſ. 2.

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[1] This Diſtinction is not neceſſary. The Author always reaſons from a falſe Notion of the Nature of taking poſſeſſion. The Truth is, that 'till we ceaſe purſuing the Beaſt, and ſo leave it to the firſt Occupant, it belongs to us as much as can be; ſo that no Man can lawfully put in a Claim to it.

[2] The Words are, *Item Nerva filius ait, feras beſtias, quas vivariis incluſerimus, & piſces, quos in piſcinas conjecerimus, à nobis poſſideri; ſed eos piſces qui in ſtagno ſint, aut feras quæ in ſilvis circumſeptis vagantur, à nobis non poſſideri, quoniam relictæ ſint in libertate naturali. Alioquin etiamſi quis ſylvam emerit, videri eum omnes feras poſſidere, quod falſum eſt*, Digeſt. l. xli. t. 2. *De adquirenda vel amittenda poſſeſſione*, leg. 3. §. 14. But in this Sentence there is a Word omitted, which makes this antient Lawyer ſpeak what he never thought. For it ought certainly to be read, *Feras quæ in ſilvis NON circumſeptis vagantur.* And ſo *Nerva* oppoſes the wild Beaſts in a Park, whether it be great or ſmall, to thoſe in a Foreſt not incloſed, and the Fiſh in a Stew-pond, to thoſe which are in a Lake or Pool, which lies open on all Sides. And he affirms, that by theſe Incloſures, within certain Bounds, we are in actual Poſſeſſion of the Beaſts ſo incloſed. *Francis Hotman* made this Correction firſt, and Mr. *Noodt* has ſolidly confirmed it, as he uſually does, in his Obſervations publiſhed in 1706. l. i. c. 11. See, alſo, what he ſays in the foregoing Chapter, p. 54, 55.

[3] We have ſufficiently confuted this in the foregoing Notes, and, conſequently, the Cenſure of *Grotius* would be well grounded, if the Words of *Nerva*, recited in the Law of which he ſpeaks, be not corrupted, as I have obſerved in the foregoing Note.

[4] 'Tis a Determination of the *Roman* Lawyers. *Qua ratione verius eſſe videtur, ſi rem pro derelicto à domino habitam occupaverit quis, ſtatim eum dominum effici. Pro derelicto autem habetur, quod dominus ea mente abjecerit, ut id in numero rerum ſuarum eſſe nolit, ideoque ſtatim dominus ejus eſſe deſinit*, Inſtit. li. ii. t. 1. *De rerum diviſ.* &c. §. 47. Thoſe Things which are forſaken, having once belonged to a private Perſon, cannot be thought to belong to the State in general; but it is natural to ſuppoſe them to belong to no body, and, conſequently, they become the firſt Occupant's, at leaſt if there be no Law to hinder private Perſons from making them their own, *Titius Obſerv.* 296. In fine, Things immoveable become the firſt Occupant's, when they are abandoned. Mr. *Hertius* obſerves here, that the Word *abjicere* is uſed to expreſs a Renunciation of the Proprietor to theſe Sort of Things, and grounds it upon the Clauſe of a Will explained by *Æſop*, where that wiſe Slave ſays, that the Harlot alienated the Lands which had fallen to her in Co-heireſship, *Phædr.* l. iv. Fab. 4. ver. 42. but as the Interpreters expound it, *abjicere* ſignifies to ſell it at a good Price, and not to leave it to the firſt Perſon that ſhall ſeize it.

[5] As when we caſt Money or other Things to the common People, which become the Property of thoſe that firſt catch them. We do not, in this Caſe, know into whoſe Hands ſuch Things will fall, but we know they will be catched by ſome Body; and, beſides, it is a Kind of Donation made to a Multitude in general upon the Footing above-mentioned. See the *Inſtitutes*, lib. ii. tit. 1. *De rerum diviſ.* ſ. 46. But, properly ſpeaking, what we thus abandon, we do, without a Regard to any particular Perſon, or a Multitude in general; for the Caſe may happen in a deſart Place, or without our knowing into whoſe Hands the Things we abandon may fall.

[6] See what is ſaid, c. 12. §. 8. following about the Foundation of Preſcription.

[7] See §. 1, of this Chapter, and n. 1. on it, where I have examin'd the Opinion of ſuch as maintain the contrary.

as the Right of the former Owner ſtill ſubſiſts [a]. But ſince to make a Thing compleatly *abandoned* or forſaken, Two Points are neceſſary; Firſt, That the Perſon refuſe to own it for the future; and Secondly, That he diveſt himſelf of the Poſſeſſion, by leaving the Thing, or caſting it away: If either of theſe Conditions be wanting, the Property is not evacuated. Thus if I throw a Thing by, yet without Intention to quit my *Right* in it, I do not prejudice myſelf by that Action. And, on the other Hand, though I am reſolved utterly to quit my Title to a Thing, yet unleſs I actually caſt it off, I am ſtill the Proprietor [b].

Amongſt the Things which by this Means are brought under *Dominion*, we may reckon wild Beaſts, or any Sort of Game, when eſcaped out of our Hands, and repoſſeſſed of their natural Liberty. *Grotius* is not pleaſed with this Poſition of the *Roman Laws* [1], *Becauſe*, ſays he, [c] *the loſing our Dominion over wild Beaſts, doth not immediately follow upon their Eſcape from us, but ariſeth from this probable Conjecture; That, by reaſon of the great Difficulty of purſuing and recovering them, we may be preſumed to have given them over.* But the ſame Laws hint as much as this; for they tell us [d], *A wild Beaſt is then ſuppoſed to recover his natural Liberty, either when he is quite out of our Sight; or when, tho' he is within View, yet it yould be very difficult to follow him.* And again they determine [2], *That what the Wolf takes from us, is ſo long our Property, as there is a Poſſibility of recovering it* [c] *.

By theſe Reſtrictions we muſt qualify the Argument laid down by *Zeigler* in his Remarks on *Grotius* [f]; *That ſince wild Beaſts are made ours by loſing their Liberty, therefore by regaining their Liberty they ceaſe to be ours; and, by Conſequence, the Dominion of them is judged to conſiſt in Actual Poſſeſſion.* For a wild Beaſt is not ſuppoſed to have recovered its Freedom, ſo long as any Perſon purſues, with probable Hopes of retaking it. As a Priſoner, though he be got out of Hold, yet hath not clearly made his Eſcape, ſo long as the Officers are in ſearch of him, and he remains in a Place where 'tis poſſible for them to find him. As for what *Grotius* conjectures, that by Means of ſome γνωρίσματα [3], ſome *Badges*, or *Marks* we may retain the Property of wild Beaſts, after they have broke from our Cuſtody, ſo that they ſhall not paſs to the firſt Taker: We are of Opinion, that this ought to be confin'd to thoſe only, which, by the Application of Men, have been diveſted of their native Ferity, and are therefore deſervedly admitted to the ſame *Rights* as tame Creatures. Hence if *Tyrrhus*'s Deer in *Virgil* [g], was thus diſtinguiſhed by any proper Mark, *Aſcanius* offered a fair Occaſion for the Commotions that followed. But thoſe which are only kept in Parks, though they ſhould happen to wear any ſuch Note of Diſtinction, yet when they get looſe into their natural Liberty, it ſeems more agreeable that they ſhould paſs to him who firſt lays hold on them. For there is Need of a moſt ſtrict Guard, or a Kind of perpetual Occupancy, for the retaining a Creature, which is by Nature impowered to wander without Bounds [4], and which always ſtruggles, and is uneaſy under the Confinement of a Poſſeſſor; no Mark or Badge being in the leaſt effectual towards the bridling this natural Diſpoſition [h]. Therefore *Juvenal* makes the Informers about the Turbot argue very wrong, though very ornamentally to his Deſign;

Non dubitaturi fugitivum dicere piſcem,
Depaſtumque diu vivaria Cæſaris; inde
Elapſum veterem ad Dominum debere reverti.
Si quid Palphatio, ſi credimus Armillato,

[a] See 1 *Sam.* ix. 3. *D.* l. xli. t. 2. l. 13. & Lib. xiv. tit. 2. *princip. D. De acquir. poſſeſſ.* l. ii. *De jactu.* Sect. 8. l. 8. *D. ad leg. Rhodiam.* [b] Vid. l. xli. tit. 2. l. 17. ſ. 1. *D. De acquir. poſſeſſ.* [c] Lib. ii. c. 8. ſ. 3. [d] *D. ib.* & l. v. *princip. D. de A. R. D.* [e] Vid. l. viii. ſ. 2. *D. Famil. erciſcund.* [f] *Dict. loc.* [g] Æn. vii. 483. *&c.* Add. *L. Salic.* t. 35. Under this Head we may take Notice of what *Pliny*, N. H. l. ix. c. 59. reports of the Fiſh *Antias*, whom the Fiſhers make uſe of to betray the reſt of his Kind. "There is this Advantage, ſays he, in knowing the Leader, that he may not "be caught with the reſt; the Fiſherman ſpares him, that he may deceive and miſlead another Company. It is upon Record, "that a certain Fiſher, to do his Partner an ill Turn, againſt whom he had ſome Grudge or Quarrel, took this Captain of the "Shoal, whom he might eaſily diſtinguiſh from others: His Partner eſpying the Fiſh in the Market, brought an Action againſt "the *Taker*, and, as *Mucianus* adds, recovered ten Pounds for Damage." [h] Vid. *Zeigler* in *Grot.* ubi ſupra.

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[1] *Quicquid autem eorum ceperis, eo uſque tuum eſſe intelligitur, donec tua cuſtodia coercetur. Cum vero tuam evaſerit cuſtodiam, & in libertatem naturalem ſeſe receperit, tuum eſſe deſinit, & rurſus occupantis fit. Naturalem autem libertatem cepiſſe intelligitur, cum vel oculos tuos effugerit, vel ita ſit in conſpectu tuo, ut difficilis ſit ejus perſecutio,* Inſtit. l. ii. tit. 1. *De rerum diviſ. & adquir. ipſarum Dominio.* §. 12. See, alſo, *Digeſt.* l. xli. tit. 1. leg. 3, 5.

[2] *Et ſane melius eſt dicere, & quod à lupo eripitur, noſtrum manere, quam diu recipi poſſit id, quod ereptum eſt.* Dig. lb. leg. 44. But we cannot fairly infer from this Law, that the ancient Lawyers were of the Opinion which our Author aſcribes to them, with Regard to wild Beaſts which have eſcaped. See what I have ſaid upon *Grotius*, lib. ii. cap. 4. §. v. n. 2. The Principle upon which the *Roman* Law is founded in this Caſe, is, that wild Beaſts, having recovered their natural Liberty, by that return to the firſt Occupant. This is certainly deduced from hence, that, with Regard even to tame Animals, the Proprietor is ſuppoſed to loſe his Right from the Moment that they loſe the Habitude of returning home: *In iis autem animalibus, quæ ex conſuetudine abire & redire ſolent, talis regula comprobata eſt, ut eo uſque tuæ eſſe intelligantur, donec animum revertendi habeant,* &c. Inſtit. *ubi Supr.* §. 15. Now how can this be a certain Sign, for Example, that the Proprietor abandons a Pidgeon which he finds in his Neighbour's Dove-houſe? Had the *Roman* Lawyers ſuppoſed, in this Caſe, a real Deſertion on the Part of the ancient Proprietor, they would never have founded it on the ſimple *Difficulty* of recovering the Animal which is eſcaped; and they would, beſides, have allow'd the Proprietor to prove that he no Way renounced his Right; which we find they did not grant. Neither did they except the Caſe where the wild Beaſt may be known again, and reclaimed by Virtue of ſome Mark placed about him for this Purpoſe. *Francis Baudouin* obſerves, that all this does not hinder the Animal from having recovered its natural Liberty, which is the ſole Point the *Roman* Lawyers attended to. Hence it would follow, that Monkies, Parrots, and other rare Animals, bought at a dear Rate, would become the Property of the firſt Occupier as ſoon as they were out of our Sight, or that we found it difficult to recover them. Happily the modern Practice does not always follow ſuch Deciſions which are given us, as flowing from the pureſt Principles of natural Equity.

* *Conciliatorem noſſe ad hoc prodeſt, ne capiatur, parcit piſcator fugituro in reliquum gregem; ferunt diſcordem ſocium duci inſidiatum pulchre noto cepiſſe malefica voluntate, agnitum in macello à ſocio, cujus injuria erat, & dati damni formulam editam condemnatumque addidit Mucianus, æſtimata lite decem libris.*

[3] As Chains, See *Scheffer, De Antiquorum torquibus*, §. 13. and laſt.

[4] This Reaſon is not good. Our Author always follows his falſe Notions about the Nature of Poſſeſſion. But we muſt ſay, that the Difficulty, or rather Impoſſibility, that there uſually is to know theſe Sort of Beaſts, when they are eſcaped out of their Incloſures, is a ſufficient Ground to preſume, that the Proprietor has relinquiſhed them; but if they have any Mark by which they can be diſtinctly known, the Proprietor has no leſs Right to reclaim them, than any other Thing he has unwillingly loſt, and of which he never ſhewed any Signs of his Neglect.

Quicquid

Quicquid conſpicuum, pulchrumque eſt æquore toto,
Res fiſci eſt, ubicunque natat.
Sât. IV. 50, &c.

— — — — — — They'd ſwear,
The Fiſh had long in *Cæſar*'s Ponds been fed;
And from its Lord undutifully fled;
So, juſtly ought to be again reſtor'd;
If we may take the greateſt Lawyers word,
Who tells us, that all fine Things in the Sea
Belong alone to *Cæſar's* Treaſury.

As to the Caſe of fugitive Slaves, the *Roman* Laws particularly ordained [1], That their Maſters ſhould ſtill retain ſuch a [2] Poſſeſſion of them as is termed *civil* (a Poſſeſſion in *Right*, though not in *Act*) in Oppoſition to the *natural* or *corporeal*; that it might not be in the Power of the Slaves to deprive their Maſters of ſo great an Advantage [a b].

This is certain, that if we loſe the Poſſeſſion of any Thing elſe, againſt our Will; as ſuppoſe we drop a Thing by the Way, the Property doth not paſs from us, or accrue to the Finder [3], till it appears we abſolutely give it over for loſt; which is uſually underſtood by our forbearing to ſearch or enquire after it. Hence, if a Man find ſomewhat, which 'tis not probable the Owner ſhould voluntarily reject, he ought to give fair Notice, that upon a juſt Claim it may be reaſſumed. But if the Owner can't be diſcovered, then 'tis but right the Thing ſhould be kept by him that found it. Yet *Ælian* [c] reports it as a Law of the *Stagirites*, ἃ μὴ κατέθου, μὴ λάμβανε; *Take not up what you did not lay down.* And elſewhere [d] he tells us of the *Biblians*; That *if they light upon any Thing in their Way, they never touch it, unleſs they laid it there themſelves: To do otherwiſe*, they ſay, *is not to find, but to ſteal.* Amongſt *Solon*'s Laws there was one to the ſame Purpoſe; ἃ μὴ ἔθου, μὴ ἀνέλε [e]. And the *Chineſe*, in Obedience to the Doctrine of *Confucius*, exactly obſerve the like ſcrupulous Nicety [f 4]. The antient *Jews*, as Mr. *Selden* informs us [g], held that the Law of *Deut.* xxii. 1. belonged to thoſe of their own Religion, not to a *Gentile*; yet ſo as if ſuch a Beaſt were utterly relinquiſhed by the Owner, it became his who found it and took it into his Poſſeſſion. They diſtinguiſhed, likewiſe, between thoſe Things which were marked, and thoſe which were unmarked. The latter they preſumed to be given over by the Proprietor, but not the former; unleſs he made expreſs and open Declaration to that Purpoſe. So again, they thought it unlawful to keep the former, till they had been twice or thrice publickly cried, but not the latter. For which Uſe there was a Scaffold erected in the Suburbs of *Jeruſalem*, from which the Cryer made Proclamation of loſt Goods. But in Caſe they belonged to an Apoſtate, they did not look on themſelves as bound to reſtore them. As for Things loſt by *Gentiles*, they judged it reaſonable to deliver them again to their Owners, only on this Conſideration, that by ſo kind and friendly a Treatment they might purchaſe a like Return of Humanity and Favour. Wherefore they concluded, that the Dominion of the *Gentiles* Goods did, by the Law of Nature, immediately expire upon the Loſs of them; but that the Reſtitution of the ſame Goods depended wholly upon the Force of civil Conſtitutions. Which falſe Opinion, like many others, flowed from the covetous Temper of that Nation, and from their extream Hatred and Averſion to all the reſt of the World.

XIII. Amongſt the Things in which the Dominion or Property is extinct, the *Civilians*, likewiſe, reckon what they term *Theſaurus, Treaſure-Trove* [5], or Money found, the Owner of which is not known. If, therefore, a Man, either on the Account of Fear, or for the better Defence and Security, ſhall have hid his Money in the Earth, it doth not fall under this Name of a Chance Treaſure; and he that takes it, is guilty of Theft. As the Slave in *Plautus*'s *Aulularia*, that carried off *Bucklion*'s Pot of Gold. But ſuch caſual Treaſure, as we firſt mentioned, doth naturally, and without the particular Interpoſition of [6] civil Ordinances paſs to the Finder; that is, to him who firſt lays Hands on it and removes it out of

[a] Lib. i. c. 14. *D. De acquir. poſſeſſ.* [b] Vid. *D.* l. xli. tit. 2. *De adquir. vel amitt. poſſeſſ.* leg. 3. *princip.* [c] V. H. l. iii. c. 45. [d] Lib. iv. c. 1. p. 302. Edit. *Perizon.* [e] *Diog. Laer.* l. i. ſ. 57. Add *Platon.* de *L. L.* l. xi. *ſub init.* [f] *Martin. Hiſt. Sin.* l. iv. c. 21. Add Edict. *Theodoric.* c. 58. [g] *De J. N. & G. ſec. Heb.* l. vi. c. 4.

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[1] The Words of the Law are, *Namque fugitivus idcirco à nobis poſſideri videtur, ne ipſe nos privet poſſeſſione*, Dig. l. xli. tit. 2. *De acquirend. vel amitt. poſſeſſione*, leg. 13. *in princip.* See, alſo, leg. 1. §. 14. But why ſhould a Beaſt deprive its Maſter of the Right he has over it every Time it has a Mind to eſcape? I ſee no ſolid Reaſon for this Difference.

[2] See c. ix. §. 7. following.

[3] The *Roman* Lawyers ſay very well, that it matters not, whether we know, or not, to whom the Thing we have found belongs, if we take it to our own Uſe without a Deſign to reſtore it to its Owner, or endeavouring to find him out, we really commit a Robbery. *Qui alienum quid jacens, lucrifaciendi cauſa ſuſtulit, furti obſtringitur, ſive ſcit cujus ſit, ſive ignoravit; nihil enim ad furtum minuendum facit, quod cujus ſit, ignoret*, Digeſt. l. xlvii. tit. 2. *De Furtis*, leg. 43. §. 4. *Plautus*, in his *Rudens*, or *Naufrag. Fæl.* brings in a Servant endeavouring to perſuade his Maſter to keep a Cloak-bag which he had fiſhed out of the Sea, his Maſter, who was an honeſt Man, ſaid to him,

Egone, ut quod ad me allatum eſſe alienum ſciam,
Celem? Minime iſtuc faciet noſter Dæmones.

Although I know to whom the Thing belongs,
And might conceal't, I will not, for ſuch Wrongs
Our *Dæmones* will not bear.

The *Roman* Lawyers, alſo, maintain, with much Reaſon, that the Goods which are caſt into the Sea to lighten a Ship in a Tempeſt, when Men are in Danger of being loſt, do not leſs belong to thoſe who caſt them in. So that if any one fiſh them up, or find them on the Shore, they can't keep them to themſelves without being guilty of Robbery. *Alia ſane cauſa eſt earum rerum quæ in tempeſtate levandæ navis cauſa ejiciuntur. Hæ enim dominorum permanent, quia palam eſt eas non eo animo ejici, quod quis eas habere nolit, ſed quo magis cum ipſa navi maris periculum effugiat. Qua de cauſa, ſi quis eas fluctibus expulſas, vel etiam in ipſo mari nactus, lucrandi animo abſtulerit, furtum committit*, Inſtit. l. ii. tit. 1. §. 48. See, alſo, *Levit.* vi. 3. with the Notes of Mr. *Le Clerc*, and what ſhall be ſaid, c. xiii. §. 4. following in the End.

[4] Theſe Opinions of the *Jewiſh* Doctors had no other Foundation, than the inſatiable Avarice of that Nation, and the implacable Hatred which they bore to other People.

[5] The Words of the Law are, *Theſaurus eſt vetus quædam depoſitio pecuniæ, cujus non extat memoria, ut jam dominum non habeat, ſic enim fit ejus qui invenerit, quod non alterius ſit. Alioquin ſi quis aliquid vel lucri cauſa, vel metus, vel cuſtodiæ, condiderit ſub terra, non eſt theſaurus, cujus etiam furtum fit*, Digeſt. l. xli. tit. 1. *De acquirend. rerum Dominio*, leg. 31. See, alſo, l. vi. tit. 1. *De rei vindic.* leg. 67. & Lib. xli. tit. 2. *De acquir. vel amitt. poſſeſſ.* leg. 3. §. 3.

[6] According to the Law of Nature alone, a *Treaſure*, as well as other Things, which have no Owner, belong to the Body of the State, or to thoſe who repreſent it, that is, in a Word, to the ſovereign Power. But on the other Hand, the Sovereign is ſuppoſed to leave theſe Sort of Things to the firſt Occupant, ſo long as he does not reſerve them expreſsly to himſelf. But when he allows private Perſons, either openly or tacitly, to appropriate them, he who finds a Treaſure becomes the Proprietor of it,

of its Place. Becauſe a Thing, the Proprietor of which is undiſcovered, is, in moral Eſtimation, judged the ſame as if it were under no Property, or belonging to no Body, and, conſequently, is the Right of the firſt Occupant. On which Point, nevertheleſs, this Queſtion will ariſe, Whether a Perſon living in a Place where the Laws adjudge ſuch Things to him that finds them, is bound, for the making his Title good in Conſcience, to give publick Notice of what he hath found, though it ſhould appear to have lain hid a very conſiderable Time? (For if it proves to have been lately hid, we doubt not but ſuch a publick Diſcovery is always neceſſary.) In the Caſe propoſed, it ſeems moſt reaſonable thus to determine: If a Man dig up Money in his own Ground, he is not in Conſcience obliged to diſcover his good Fortune, but may enjoy it in Silence, till ſuch Time as another of his own accord makes Enquiry, and withal produceth probable Reaſons, both of his hiding his Money at firſt, and of his omitting to ſpeak about it till now. For here the former Owner, from whom the Land or Tenement paſſed to the preſent (the Finder of the Treaſure) cannot be preſumed to have knowingly left a ſecret Store in a Place, which he alienated and conveyed from himſelf. Again, he who hath hid any ſuch Treaſure in another's Ground, without acquainting the Lord of the Soil, is judged to have ſlipt his Opportunity, and neglected his Means of claiming and ſecuring it; ſince there was at firſt good Reaſon for him to fear leſt it ſhould fall into other Hands, which he ought to have provided againſt. But if the Ground belong to another, then the Finder ſeems engaged by his Conſcience to enquire, at leaſt indirectly of him concerning the Matter: Becauſe without this it cannot certainly be known, but that the Money was laid there by the Maſter of the Place, only for the greater Security, or by ſome Perſons elſe with his Privity and Conſent.

But as for *poſitive Laws*, we find them, in different Countries [a], very various on this Point. [b] *Plato* orders, *That neither Treaſure, nor any kind of loſt Goods ſhall belong to the Finder, but that the* Oracle *ſhall be conſulted in order to the Diſpoſal of them.* Which, without doubt, was too ſcrupulous a Superſtition; ſomewhat like the Humour of *Chiungai* thé *Chineſe* Philoſopher, who, as *Martinius* obſerves, [c] *held it unlawful to touch any thing that was ſuſpected, either to be in itſelf evil, or to have proceeded from evil, and unjuſt Men: For which Reaſon he refuſed to dwell in his Father's Houſe, believing the Builders to have been wicked Perſons; nor would he take his Meat from the Hands of his Parents or Brethren, fearing it might be ill gotten.* It ſeems to have been the Law of the *Jews*, That Treaſure found ſhould paſs to the Owner of the Land [d], as is gathered from *Matt.* xiii. 44. *Spartian* in *vit. Adriani* mentions a Decree of the Emperor *Adrian* to this Purpoſe; *That if a Man found Money in his own Land, he ſhould enjoy it all himſelf; if in another's, he ſhould reſtore it to the Owner of the Soil; if in a Place that belonged to the Publick, one Moiety ſhould go to himſelf, and the other to the Treaſury.* And to the ſame Purpoſe, *in Vit. Severi. Zonaras*, Tom. ii. in *Nerva*; we read a Story of *Atticus*, *Herod*'s Father, That, lighting upon a vaſt Treaſure in his Houſe, he wrote to *Nerva*, deſiring to know his Pleaſure about diſpoſing of it; the Emperor returned no other Direction than this, *Utere quæ inveniſti, Uſe what you have found.* And when *Atticus* in a ſecond Letter complained, *That the Sum was too great for his Occaſions, and quite overloaded him*, *Nerva* anſwered, *Abutere invento, quando tuum eſt*; *Why e'en abuſe it, and, ſince Fortune has made it your own, get rid of it how you can.* [e] *Philoſtratus Apollonius*, [f] in a *Contention* about this Point between the Buyer and the Seller of a Field, orders Enquiry to be made which was the beſt Man of the two; an Expedient which can never paſs into a general Rule.

XIV. The *Roman* Lawyers, to the Claſs of things acquired by Occupancy [2], add farther, the Goods of Enemies. For the right underſtanding of which we are to know, that by a State of War, as all other peaceful *Rights* are interrupted, ſo Dominion thus far loſeth its Effect, with regard to the adverſe Party, as that we are no longer obliged to abſtain from their Poſſeſſions, than the Rules of Humanity and Mercy adviſe us. In War therefore the Goods of one Party, in reſpect of the other, are rendered, as it were, void of Dominion: Not that Men do, by virtue of the [3] *Right* of War, ceaſe to be Proprietors of what was before their own; but becauſe their Propriety is no Bar againſt the Enemy's Claim, who may ſeize and carry away all for his own Uſe. As the bare taking hold of a Thing, which lay void, is a ſufficient ground for Dominion. Though indeed, in the Caſe of War, thoſe who come to make uſe of this Claim, and to take a violent Poſſeſſion, may very juſtly be reſiſted and repulſed with equal Violence; as we ſee in daily Practice. We may therefore obſerve, that the Dominion of things taken in a War doth then at length gain its full Strength and Validity, when the Perſon, from whom they were taken, renounceth his Pretenſions to them, by conſenting to a Peace.

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[a] Vid. *Grot.* l. ii. c. 8. ſ. 7. [b] Lib. xi. *de L. L.* [c] Hiſt. *Sin.* l. v. [d] Add *Plaut. Trinumm.* Act. i. Scen. 2. ver. 141. & *Philoſtrat. Apollon.* l. ii. c. 15. [e] Add Conſtitut. *Sicul.* l. iii. t. 3. [f] Lib. ii. c. 15.

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even though it ſhould be diſcovered in another Man's Ground, at leaſt if the Civil Laws have not declared otherwiſe: becauſe the Treaſure is not an Acceſſory of the Ground, as Metals, and Minerals, which naturally adhere to it, and which are therefore regarded as belonging to the Owner. The *Roman* Laws which gave the Half of a Treaſure to the Proprietor of the Ground, and the other Half to the Finder, extended this to a Workman, who is paid by an Husbandman, or Maſon, for his Labour. For he acts not in his Maſter's Name, who has hired him, but in the Work that he has to do. *Nemo enim ſervorum opera theſaurum quærit, nec ea propter tunc terram fodiebat, ſed alii rei operam inſumebat, & fortuna aliud dedit,* Digeſt. l. xli. tit. 1. *De acquir. rerum Domino*, leg. 63. §. 3. See, alſo, Mr. *de Bynkerſhock*'s Obſervations, l. ii. c. 4. where he confutes the contrary Opinion.

[1] See l. v. c. 3. §. 3. and Not. 1. following. *Grotius*, l. ii. c. 8. § 7. *Philoſtrat. in vit. Sophiſt.* l. ii. and in *Herod.* §. 2. Mr. *Domat*'s Publick Right, l. i. tit. 6. Sect. 3. §. 7. and Mr. *Titius*'s *Jus Privatum Romano-German.* l. viii. c. 13. §. 3. *&c.*

[2] The Law is, *Item ex, quæ ex hoſtibus capimus, jure gentium ſtatim noſtra fiunt. Bello capta——ejus fiunt, qui primus eorum poſſeſſionem nactus eſt*, Inſtit. l. ii. tit. 1. §. 17. And Digeſt. l. xli. tit. 2. leg. 1. §. 1. See what our Author ſays, l. viii. c. 6. §. 17.

[3] But even in War, this Right is founded on the Conſent of our Enemies made Priſoners, as our Author acknowledges, lib. vi. cap. 3. §. 5. Thus until a Priſoner has expreſsly or tacitly conſented to the Loſs of his Liberty, the Subjection in which his Conqueror holds him is an Act of Violence, and is only ſupported by Force.

Farther,

Farther, and what is very particular, this violent Seizure, in a hoſtile Method, may, likewiſe, intitle us to a Sovereignty over Men [1]: Whereas otherwiſe [2], Men [3] do not come under the Object of Occupancy, whether ſubject to a Lord, or enjoying their natural Freedom; excepting only that one ancient Caſe of *expoſed Infants* [a] [4], who belonged to thoſe that found and preſerved them. For Liberty, as well as all other *Rights*, is attended with this Effect, that it cannot paſs without my Conſent, into the Power of any other Man beſides an Enemy. But now Occupancy in thoſe Things which are capable of it, ſuppoſeth no Conſent; but to the Completion of it theſe two Points only are required; *Firſt*, The Act of the Occupant, in ſeizing on ſuch Things; and *Secondly*, The Abſence of all *Right* on the Part of the Objects, which might elſe hinder them from being acquired by this Means. Hence when upon the Deceaſe of a Man *who hath no Heir to ſucceed him* [5], either by Teſtament, or by Law, all thoſe *Rights* die with him, which he held over Things or Perſons, the Things paſs to the next Occupant, but the Perſons recover their natural Liberty. For we can hardly imagine, that there was ever one Inſtance of a Wretch ſo baſely low-ſpirited, as that he would voluntarily deſert his Freedom, and, as it were, give it up to any one that would accept of the Reſignation. Should Men in this Caſe beever ſo much inclined to continue in a ſervile Condition, yet, at leaſt, they will reſerve to themſelves the Power of chooſing their own Maſter.

Indeed *Grotius* [b] ſeems to reckon Sovereignty amongſt the Objects of Occupancy; whilſt he tells us, *That in Things which belong to no Body, there are two Rights which may be in this manner acquired, Sovereignty, and Dominion, as diſtinguiſhed from Sovereignty.* But this Aſſertion muſt be explained with great Caution and Dexterity. For Sovereignty in proper Speech is applied only to Men; which, except in War, and in the Caſe but now mentioned, cannot be obtained by Occupancy: Becauſe he who is not *Another's*, is not therefore *No Body's* but *his Own.* But we improperly uſe the Term of Sovereignty in ſpeaking of [6] Places or Territories; for then the Effect of it is only this, That no one can fix in ſuch a Place without the Sovereign's Conſent; and they who come to ſojourn there only for a Time, are, during that Space, obliged to acknowledge his Juriſdiction.

But now this Sovereignty is really nothing elſe but [7] the Effect of that Dominion or Property which was before eſtabliſhed over the Place, and includes a Power and Command over *Men*, indirectly, and by Conſequence. Becauſe what is *mine*, none can take to his own Uſe, without my Leave: And he that enters a Place belonging to me, is ſo far at leaſt under my Rule and Guidance, as that I may hinder him from endamaging my Dominion, or may provide that my *Right* over the Place ſhall not ſuffer on his Account.

CHAP. VII.

Of Additional Acquirements.

I. *How many ſorts of Additions there are.*
II. *Additions properly belong to the Owner of the thing.*
III. *How many ſorts of Fruits.*
IV. *The young ones of Beaſts belong to the Owner of the Damm or Mother.*
V. *Things planted paſs with the Soil.*
VI. *How Buildings go along with the Soil.*
VII. *The Paper goes along with the Writing.*
VIII. *The Canvaſs with the Picture.*
IX. *The Purple with the Garment.*
X. *Of New Models in Things.*
XI. *Of whole Countries left by Waters.*
XII. *Of Fields belonging to private Perſons.*

MOST of thoſe things which are ſubject to the Dominion of Men, have this common Affection, That they do not always continue in the ſame State, but abound with great variety of Increaſe. Some of them ſwell their inward Subſtance to larger Dimenſions, ſome receive external Improvements; others are attended with ſeveral Fruits and Advantages of a different kind from themſelves; many riſe very conſiderably in Value, from the Faſhion and Figure which human Induſtry hath put upon them. All theſe additional Profits may be compriſed under the general Term of *Acceſſions* [8], and will, for the moſt part, fall under one of theſe two Claſſes: Thoſe which proceed pure-

[a] Vid. *Hobbes*, De Cive, c. 9. ſ. 4.

[b] Lib. ii c. 3. ſ. 4.

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[1] *Adeo quidem ut & liberi homines in ſervitutem noſtram deducantur; qui tamen, ſi evaſerint noſtram poteſtatem, & ad ſuos reverſi fuerint, priſtinum ſtatum recipiunt.* Vid. *Inſtit.* ubi ſupra.

[2] Although the *Turks* pretend, that, when a Stranger comes into their Country, they have a Right to confiſcate his Goods, and take him for their Slave, eſpecially if he belongs not to a Nation in Amity or Alliance with them. See Mr. *de Bynkerſhock*'s Diſcourſe, *De Dominio Maris*, c. 1. p. 4, 5.

[3] Conſult here what *Grotius* ſays, lib. ii. cap. ix. §. 1. *numb.* 3.

[4] See what is ſaid, l. vi. c. 2. §. 3. following.

[5] I have here left out a Sentence which I met with a little higher, where it is much better placed.

[6] See the illuſtrious Mr. *Bynkerſhock*'s Treatiſe, entitled, *The competent Judge of Ambaſſadors*, with my Notes, cap. ii. §. 3. & *ſeqq.*

[7] Add here what I have ſaid upon *Grotius*, lib. ii. cap. 3. §. 9. not. 5.

[8] All that our Author means by this Word *Acceſſiones*, or Acceſſions, may be looked upon as an Acceſſory, which follows the Principal or Body of the Thing. For, to ſpeak with the *Roman* Lawyers, it ſignifies, *Quæcunque aliis adjuncta, ſive adjecta, acceſſionis loco cedunt*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 23. §. 5. In truth, as Mr. *Titius* obſerves, *Obſerv.* 297. our Author does not well to refer the Acquiſition of Acceſſories to primitive Acquiſitions. See §. 1. of the foregoing Chapter. For it appears

purely from the Nature of the things, without the Aſſiſtance of any human Act; and thoſe which the Labour and Diligence of Men doth either wholly, or in part, procure.

II. It is a general Rule in this Caſe, That whoever is Owner of a thing, to him, likewiſe, belong the *Acceſſions* of it [1]: Which evidently flows from the very Nature of Property, and from the End for which it was firſt introduced; inaſmuch as the Poſſeſſion of many things would be vain and uſeleſs, ſhould the Fruits of them accrue to others; and the common Peace of Mankind would be very little promoted, if other Perſons might challenge theſe Improvements with the ſame *Right* and *Title*, as the Proprietor of the Subſtance to which they adhere. It is needleſs therefore to derive the Dominion of *Acceſſions* from the Title of a *feigned Occupancy*, by which we ſhould ſeem, through the Intervention of a thing belonging to us, to take poſſeſſion of any After-improvement; or, by virtue of which, a Thing already our own, ſhould be ſuppoſed, on account of its Pre-eminence, to make ſome other inferior thing cleave to it, as an Appendage.

III. The Increments [2], Multiplication, and Profits of any kind of things are uſually ſtiled *Fruits* [3]; except that the Increaſe of Animals hath the peculiar Name of *Fœtus*, or the *Breed*. *Fruits* are moſt commonly divided into thoſe of which the thing itſelf is the proper Cauſe and Original, and thoſe of which it is only the Occaſion. The former are called *natural*: The latter *legal* or *civil* [4]. Amongſt the *natural*, ſome ariſe from the bare Operation of Nature [5], without the Culture or Labour of Men: In others, we aſſiſt Nature's Strength [6], and render her more kind and fertile by our own Pains, whether in a greater or leſſer Proportion: On which account theſe are wont, likewiſe, to be termed, *The Fruits of Induſtry*. As for *civil Fruits*, we ſee Inſtances of them in *Uſury* [7], *Hire*, *Carriages*, and the like. It is obſervable, that *Fruits* of the former kind, ſo long as they are not ſeparated from the thing whence they proceed, are looked on as Parts of it; but when ſeparated [8], they are conſidered as diſtinct Beings: But both kinds agree in this; That they belong to him who is Maſter of the thing from which they flow.

IV. As for the Breed of Animals [9], it hath been generally determined, That they ſhould follow the *Venter* [10], and ſo ſhould belong to the Owner of the Female, not of the Male; not only for this Reaſon, becauſe the Male is for the moſt part unknown, but, likewiſe, becauſe the young was once a Part of the Female, as it never was of the Male; and becauſe what the former contributes to the Birth, is much more conſiderable than what proceeds from the latter; though we ſhould allow them to be equal, when looked on barely as natural Cauſes: For the Queſtion here is not whether the Exiſtence of the Calf is to be aſcribed more to the Cow, or to the Bull; but whether the Calf belongs rather to the Proprietor of the one, than of the other. Now the Male is obliged to little Trouble, ſo that his Service in this reſpect brings very little or no Damage to the Owner. But the Female, whilſt ſhe carries her Burthen, is almoſt uſeleſs to all other Purpoſes, and beſides requires, at this time, more than ordinary Care and Charge in the keeping: Therefore, at leaſt, the Owner of the Male cannot pretend to ſo much Merit as the Owner of the Female. Eſpecially, ſince one Sire is ſufficient for a great number of Breeders. Yet in caſe a Man keeps Males purely for this Uſe, it is but juſt he ſhould receive ſome Conſideration from others who ſhall deſire to imploy them [a].

V. It is, likewiſe, a common Rule [11], That things planted

[a] Add *Ziegler* ad *Grot.* l. ii. c. 8. ſ. 18. & *Selden*, ibid.

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pears, by the Examples here treated of, that we often acquire, by an acceſſorial Right, Things belonging to others. There are, alſo, ſeveral ſorts of Acceſſories which interpoſe without producing any Acquiſition themſelves, and which only gain an Opportunity of getting ſomething, either by the Conſent of Parties, or by virtue of ſome poſitive Conſtitutions of Law.

[1] This Rule is very uncertain and imperfect, and we may better put theſe two inſtead of it. I. If the Addition made to a Thing belonging to us, proceed from the Thing itſelf, or from any Act of our own; and if coming otherways it belongs to Nobody, it is naturally our Acquirement, or, at leaſt, we cannot be deprived of it upon the Account of any other. II. But if the Thing or Work which is added to our Poſſeſſion belongs wholly or in part to another, it naturally follows, that there muſt be a kind of Community in relation to the whole between us and him, ſo that one of us muſt transfer his Right to the other, though this does not often happen; for this Community ends, and, conſequently, the additional Acquirement is then made, either by the mutual Agreement of the Parties, or by the Settlement of ſome poſitive Law, which ends the Difference according to the Nature of the Circumſtances, and Maxims of Equity, *Titius*'s *Obſerv.* 298. See, alſo, his Obſervations in *Compend. Lauterbach. Obſerv.* 1018. and his *Jus Privatum-Romano-German.* printed in in 1709. l. iii. c. 5. §. 25, *&c.*

[2] The *Roman* Lawyers underſtand by Fruits what remains over and above any recent Acts or Deeds. So they ſay, *Fructus intelliguntur deductis expenſis, quæ quærendorum, cogendorum, conſervandorumque eorum gratia fiunt*, Digeſt. l. v. tit. 3. *De hæreditatis petitione*, leg. 36. §. 5. See, alſo, *Cod.* l. vii. tit. 51. *de fructibus, &c.* leg. 1.

[3] This Author obſerves here, that that which is brought forth by a Beaſt has a particular Name given it, *viz.* the *Fœtus*; but this takes Place only in *Latin*; and we, likewiſe, (as every one knows) uſe the ſame Word, *Fœtus*, in ſpeaking of Plants. I may add, alſo, that the Word *Fructus* is ſometimes attributed to young Beaſts, as Mr. *Noodt* ſhews us in his Obſervations, l. i. c. 10. p. 55.

[4] Or *Legitimi*, which cannot be well expreſſed in *French*, but imports, that they ariſe from a Right founded on the Law.

[5] As for Example, Forage, Fruits of Trees that grow wild, Underwoods, the Ore of Mines, and Stones of Quarries.

[6] As Bread-Corn, and other ſorts of Grain, *&c.*

[7] So, according to the *Roman* Lawyers, Fruits hanging on the Boughs, which are not yet gathered, or fallen, but joined with the Tree, are Part of the Ground. *Fructus pendentes pars fundi videntur*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 44.

[8] So the Civil Law, *Prædiorum urbanorum penſiones pro fructibus accipiuntur*, Digeſt. l. xxii. tit. 1. *De uſuris & fructibus*, &c. leg. 36. *Operæ quoque ſervorum in eadem erunt cauſa, qua ſunt penſiones, item vecturæ navium & jumentorum*, l. v. tit. 3. *De hæredit. petit.* leg. 29. §. 31, 32.

[9] The *Roman* Lawyers do not reckon the Children of a Female Slave among Fruits; becauſe, ſay they, according to the Principles of the *Stoicks*, it is abſurd to look upon a human Creature as a Fruit, for whoſe Uſe Nature has allotted all other Fruits which it produceth. *In pecudum fructu etiam fœtus eſt, ſicut lac, pilus, & lana. Partus vero ancillæ in fructu non eſt——absurdum enim videbatur, hominem in fructu eſſe, cum omnes fructus rerum natura gratia hominis comparaverit*, Inſtit. l. ii. tit. 1. *De rerum diviſ.* &c. §. 37. See c. 8. §. 7. following. Others ſay, it is only becauſe a Female Slave is ordinarily bought to do the Service ſhe is able, and not bring Children into the World; *Quia non temere ancillæ ejus rei cauſa comparantur, ut pariant*, Digeſt. l. v. t. 3. *De hæredit. petit.* leg. 27. *in init.* See, alſo, *Vinnius* upon that Part of the *Inſtitutes*, which we have cited a little above.

[10] So the Law appoints, *Si equam meam equus tuus prægnantem fecerit, non eſſe tuum, ſed meum, quod natum eſt*, Digeſt. l. vi. t. 1. *De rei vindic.* leg. 5. §. 2. See the ſame Title in the *Code*, leg. 7.

[11] The *Roman* Law is, *Si Titius alienam plantam in ſolo ſuo poſuerit, ipſius erit; & ex diverſo, ſi Titius ſuam plantam in Mævii ſolo poſuerit, Mævii planta erit: Si modo utroque caſu radices egerit; ante enim quam radices egerit, ejus permanet cujus erat——*

planted or ſown ſhall go with the Soil; becauſe they are not only nouriſhed by it, but, growing into a moſt ſtrict Union, are made, as it were, Parts of the ſame Body. For which Reaſon it is farther required, that they ſhall have taken Root; they belonging until then to their firſt Owner [1]. Yet *Grotius* [a] is of Opinion, *That this Appointment proceeds only from poſitive, and not from natural Law; ſince the Nouriſhment of a thing already exiſtent, being no more than a part of that thing, the Lord of the Soil can only pretend to a part in the Right over it; which, naturally ſpeaking, cannot take away the Right of him who owned the Seed, the Plant, or the Tree: And therefore in this Caſe the thing muſt be held in common by them both.* But notwithſtanding what is thus objected, the *Roman* Laws, in giving the former Judgment, went on very good Reaſon. For they did not hereby deſign that the Owner of the Seed, the Plant, or the Tree, provided he acted with honeſt Intention, ſhould ſuffer an utter Loſs; nor do they forbid but that the two Proprietors may, if they pleaſe, hold the thing henceforth in common [2], according as the Uſe and Benefit of the Ground on the one ſide, and the Worth and Excellency of the Plant on the other ſide, ſhall aſſign them their fixed Proportions. But becauſe they would compel no Man to hold on in a common Poſſeſſion againſt his Will, and becauſe ſuch things as theſe are incapable of Diviſion, therefore they take the Queſtion to be, Whether it will not be more equitable to aſſign the whole thing to one of the two Proprietors, with this Burthen, That he ſhall be obliged to pay the other the Value of what he receives from him? Now here, ſince it happens moſt frequently, that the things we ſpeak of, being cloſely knit and faſtened to the Earth about them [3], cannot conveniently be tranſplanted, or be any way preſerved out of their Place, it was thought fit to ordain in general, that things ſet or ſown ſhould go with the Soil; yet ſo, as that the Lord of the Soil ſhall ſatisfy the other Party for his Seed, or his Plant, in caſe he acted like an honeſt Man [4]. Yet if a Perſon ſows my Field with a meaner Grain, when I deſigned it for one more generous, here I do not ſeem obliged ſo much as to pay him for the Seed; it being really a Damage to me, that my Ground is like to afford ſo ignoble a Crop. But ſhould the Plants admit of being removed, eſpecially if they be more in Value than the Uſe of the Soil amounts to, it would, no doubt, be equitable that the Owner of the Plants ſhould be allowed to take them away, only paying the other for the Uſe of his Ground. On which Point the Law of *Solon* is remarkable; *He commanded* (ſays *Plutarch*, in *Sol.* p. 91. *Ed. Wech.*) *that every Perſon, who planted the common kinds of Trees in his own Ground, ſhould ſet them at five Feet diſtance from his Neighbours. But that he who ſet a Fig-Tree, or an Olive-Tree, ſhould enlarge the Diſtance to nine Feet; becauſe theſe not only caſt a longer Root, but are very miſchievous, when they ſtand too near ſome others; either by drawing away the Nouriſhment from them, or by ſending out a Steam offenſive and hurtful to them.*

VI. Moſt of what hath been here offered may, likewiſe, be applied to the Caſe of Buildings, raiſed either on the Ground, or out of the Materials of other Men. Indeed if the Structure be moveable, it is certain the Lord of the Soil can claim no *Right* to it [5]; provided it be removed, and Satisfaction made him to the Value of what his Ground ſuffered by it. If another builds a Houſe with my Materials, it is commonly beſt for me to receive the Value rather than the things themſelves; ſince what is thus fitted to one Building will not ſerve again for the like Uſe. But if the Materials are not prejudic-

[a] Lib. ii. c. 8. §. 22.

Qua ratione autem plantæ, quæ terræ coaleſcunt, ſolo cedunt; eadem ratione frumenta quoque, quæ ſunt ſata, ſolo cedere intelliguntur, Inſtit. l. ii. tit. 1. §. 31, 32. As for a Tree, whoſe Roots ſpread into our Neighbour's Field, ſee *Hieron. Magius Miſcell.* 4. 7. and Mr. *Titius* on *Lauterbach. Obſerv.* 1020, as, alſo, a curious Diſcourſe of Mr. *Thomaſius*'s, *De Pretio affectionis in res fungibiles non cadente*, c. 3. §. 63. This laſt, from §. 38. to the End of the Chapter, endeavours to ſhew that the *Roman* Lawyers were very much perplexed in determining the Caſes which preſented themſelves about this Matter, becauſe they argued upon ſubtile Principles, rather than by an attentive Conſideration of the Nature and Uſage of Things, or upon that plain Rule which Mr. *Thomaſius* lays down, *viz.* That we ought to content ourſelves with an Equivalent in ſuch Things as are capable of Reſtitution (*res fungibiles*) and that they ought not to be prized in this Caſe, by the particular Value ſet upon them by the Owner.

[1] The *Roman* Lawyers add this Reſtriction only with Regard to Trees and Plants, as appears from the Place of the *Inſtitutes*, which I have quoted in the foregoing Note, and better by this Law of the *Code*; *Si quis ſciens alienum agrum ſevit, vel plantas impoſuit, poſtquam hæ radicibus terram fuerint amplexæ, ſolo cedere rationis eſt*, l. iii. tit. 32. *De rei vindic.* leg. 11. In ſhort, by what Means was it poſſible to recover the Grain once ſown? Yet, to follow the Principle upon which they reaſoned, we muſt apply this to Grain ſown in another's Field; for they affirm that a Tree or a Plant belongs to the Owner of the Ground, becauſe whenever theſe Things have taken Root, and are nouriſhed by the Juices of the Earth, they are no longer the ſame; but are conſidered as belonging to the Proprietor of the Field by Right of the firſt Occupant. *Arbor radicitus eruta, & in alio poſita priùs quàm coaluerit, prioris domini eſt: ubi coaluit, agro credit: & ſi rurſus eruta ſit, non ad priorem dominum revertitur; non credibile eſt, alio terræ alimento aliam factam.* DIG. Lib. XI. Tit. I. *De adquir. rer. dom.* Now, upon this Footing, it is certain that all Grain ſown remain the ſame until they have taken Root.

[2] The *Roman* Law admits of no Community in this, and other Caſes of the ſame kind. See my Remark upon *Grotius*, lib. ii. cap. viii. §. 19. Not. 4.

[3] Mr. *Thomaſius*, in the Diſcourſe before quoted, ſays, that theſe Sorts of things are of that Nature, that they may be reſtored either by other Things of the ſame kind, or their Value may be given in Money. There are but few People but will be contented to recover them in that manner; and it rarely happens, that there is any particular Reaſon which may make to inſiſt upon recovering what is planted or ſown in the ſame kind. We muſt add this Conſideration to thoſe of our Author. Or, rather, it it is the principal one to which we ſhould attend.

[4] We muſt here obſerve this. For if there was a knaviſh Deſign in him who planted or ſowed, I mean, if he knew that the Land did not belong to him, he deſerves to loſe both his Labour and Property, which he has maliciouſly mixed with the other. Without this every Man would be expoſed to ſee his Land ſown or planted with Trees by ſome other, who would get free by loſing the Things themſelves. See the Law of the *Code* cited above, Note 2. and *Inſtit.* l. ii. tit. 1. §. 32. We ſhall add a Remark made by *Thomaſius*, *Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 227. which is this, When a Perſon, with a good Deſign, ſows another Man's Field, if there happens a great Dearneſs of Corn, Equity obligeth the Maſter of the Soil to permit the Perſon who ſowed it to take the Crop, and be contented to accept of Satisfaction for the Uſe of the Ground.

[5] This is determined in the *Digeſts*, l. xli. tit. 1. *De acquirend. rerum Dominio*, leg. 60. *Titius horreum frumentarium novum, ex tabulis ligneis factum, mobile in Seii prædio poſuit. Quæritur, uter horrei dominus ſit? Reſpondit, ſecundum quæ proponerentur, non eſſe factum Seii.* See, alſo, l. vi. tit. 1. *De rei vindic.* leg. 38.

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ed by being thus applied, and I have occaſion for them, and cannot conveniently furniſh myſelf with others of the ſame kind, then I ought in Equity to be allowed the Privilege of ſeizing them for my own Service. And though this is forbidden by the Law of the Twelve Tables, yet they relieve the Owner of the Materials another way, by granting him an *Action* for double their Value [1]. In Caſe a Man builds with his own Materials upon another's Ground, if he knew what he did [2], it ſeems hardly poſſible but that he muſt have had a diſhoneſt Deſign; and it being preſumed that he purpoſed to ſteal the Ground, the Owner of it doth not ſeem obliged to pay the Price of the Materials, or the Hire of the Workmen; or to permit the other Party to pull down, and carry off what he brought thither [a]. If there was no Knavery in the Deſign, and the Building cannot be removed without being utterly demoliſhed, the *Roman* Law enact, [3] *That it ſhall go along with the Soil; yet ſo, as that, in caſe the Builder be in actual Poſſeſſion, the Lord of the Soil ſhall pay the Price of the Materials, and the Expence of the Work* [b]. For though the Pile which is raiſed be for the moſt part of greater Value than the Soil and Surface on which it ſtands, yet they judged it inconvenient, than an immoveable thing ſhould cleave as an Appendage to another, which, at leaſt, if taken to pieces, is moveable. Yet ſtill, if the Owner of the Ground can conveniently be without the Spot on which the Building is erected, and cannot ſo well purchaſe the Building itſelf, it ſeems moſt reaſonable, that, upon receiving the Worth of his Ground, he ſhould leave the Building to be enjoyed by the other [c].

VII. But when the *Roman* Lawyers extend this Rule, That *things built and ſown ſhall go with the Soil*, to Papers and Parchments, we cannot ſubſcribe to their Opinion [4]. As if when I, with a good and honeſt Intention, have wrote ſomewhat on another Man's Paper, I muſt be obliged immediately to reſign it to him, only receiving ſome Conſideration for my Pains in writing. But rather, ſince commonly the Writing is of more Worth than the Paper, it is much the faireſt Method that the other ſhall reſt ſatisfied with being paid for his Paper [5]. Eſpecially, if we reflect on what ſome have added, and not without Reaſon, That Paper being uſed, doth, as it were, die and periſh; and that therefore Writing is of a quite different Nature from Building. For the true and proper Eſſence of Paper ſeems to remain no longer than it continues clean and fair, capable of admitting any Characters. When it is once filled, it paſſeth in the Name of a Book, a Letter, a Roll, or the like. Therefore Writing Paper is, in this reſpect, loſt and dead to me, that I have no longer the Power of committing to it what I pleaſe. And hence, if I do but receive the Value of it, I have no Cauſe to complain, ſince I can furniſh myſelf with new, which will ſerve my Occaſions as well.

[a] *Lex Longobard.* l. i. tit. 27. Sect. 1. [b] *Edict.* Reg. Theodoric. c. 137. [c] Comp. l. 7. §. 10, 11, 12. *D. de* A. R. D.

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[1] This Action is called, *actio de tigno junctо*, underſtanding by *tignum* all ſort of Materials for Building. The Reaſon why the Twelve Tables ſo ordered it was, to hinder a Building, that was a great Ornament to the City, from being demoliſhed ſoon after it was raiſed. *Cum in ſuo ſolo aliquis ex aliena materia ædificaverit, ipſe intelligitur dominus ædificii, quia omne quod ſolo inædificatur, ſolo cedit. Nec tamen ideo is, qui materiæ dominus fuerat, deſinit dominus ejus eſſe; ſed tantiſper neque vindicare eam poteſt, neque ad exhibendum de ea re agere, propter legem duodecim tabularum, qua cavetur, NE QUIS TIGNUM ALIENUM ÆDIBUS SUIS JUNCTUM EXIMERE COGATUR, ſed duplum pro eo præſtet per actionem, quæ vocatur de tigno junctо; appellatione autem tigni omnis materia ſignificatur, ex qua ædificia fiunt. Quod ideo proviſum eſt, ne ædificia reſcindi neceſſe ſit*, Inſtit. l. ii. tit. 1. §. 29. But if the Building was pulled down for any other Reaſon, then he, to whom the Materials appertained, might recover them if he had not already received double Damages. *Quod ſi aliqua ex cauſa dirutum ſit ædificium, poterit materiæ dominus, ſi non fuerit duplum jam conſecutus, tunc eam vindicare, & ad exhibendum de ea re agere.* Many of the Interpreters think, and the Sequel of the Diſcourſe ſhews, that the Paragraph of the *Inſtitutes* that I have quoted a Part of, grants an Action for double Damages to the Owner of the Materials againſt the Proprietor of the Ground, provided the other had an honeſt Deſign in Building, *i. e.* he made uſe of the Materials, not knowing that they belonged to another. See *Arn. Vinnius* upon this Place. But Mr. *Thomaſius*, in his Diſcourſe already quoted, *De pretio affectionis*, &c. c. 3. §. 59, &c. maintains, That *Tribonianus*, in compoſing the *Inſtitutes*, miſapprehended the antient Lawyers, and the Senſe of the twelve Tables, which ſpeaks only of him who builds with an ill Deſign with another's Materials; whence it comes, that in the *Digeſts*, the Title, *De tigno junctо*, l. xlvii. tit. 3. is placed immediately after that, *De furtis*. See, alſo, *Jan. Vincent Gravina*'s *Orig. Jur. Civil.* l. ii. p. 356, 357. M. *Noodt* is of another Opinion, *Comment. in Dig. Pag.* 192. but, in order to maintain it, he muſt leave out of the Paragraph in Queſtion theſe Words, *ſi non fuerit duplum jam conſequutus.*

[2] *Ex diverſo, ſi quis in alieno ſolo ex ſua materia domum ædificaverit, illius fit domus, cujus & ſolum eſt; ſed hoc caſu materiæ dominus proprietatem ejus amittit, quia voluntate ejus intelligitur eſſe alienata, utique ſi non ignorabat ſe in alieno ſolo ædificare, & ideo licet diruta ſit domus, materiam vindicare non poteſt*, Inſtit. l. ii. tit. 1. §. 30.

[3] *Certe illud conſtat, ſi in poſſeſſione conſtituto ædificatore, ſoli dominus petat ſuam eſſe, nec ſolvat pretium materiæ & mercedes fabrorum, poſſe eum per exceptionem doli mali repelli, utique ſi bonæ fidei poſſeſſor fuerit qui ædificavit. Nam ſcienti alienum ſolum ſi, poteſt objici culpa, quod ædificaverit temere in eo ſolo, quod intelligebat alienum eſſe*, Ibid. See *Digeſt.* l. xli. tit. 1. *De acquir. rerum Dominio*, leg. 7. §. 10, 11, 12. It appears by this, and other Laws, that when he, who built upon another's Ground, was not in Poſſeſſion of the Building, the *Roman* Law left him no Remedy to indemnify him for the Value of his Materials, or his Expences in Building, though the great *Cujas* is of another Opinion. See *Vinnius* upon the Paragraph of the *Inſtitutes* juſt cited.

[4] *Literæ quoque licet aureæ ſint, perinde chartis membraniſque cedunt ac ſolo cedere ſolent ea quæ inædificantur, aut inſeruntur; ideoque ſi in chartis membraniſve tuis carmen, vel hiſtoriam, vel orationem Titius ſcripſerit; hujus corporis, non Titius, ſed tu dominus eſſe videris; ſed ſi à Titio petas tuos libros, tuaſve membranas, nec impenſas ſcripturæ ſolvere paratus ſis, poterit Titius ſe defendere, per exceptionem doli mali, utique ſi earum chartarum, membranarumve poſſeſſionem bona fide nactus eſt.* Inſtit. l. ii. tit. 1. §. 33. See Note 22. upon §. following. "This Place, ſays Mr. *Domat*, in his Civil Laws in their natural Order, Part I. l. iii. tit. 7. Sect. 2. "§. 15. ought to be underſtood of ſome other Matter more precious than our Paper, or of a Writing, the Matter of which is not of "ſuch Value, as to deſerve to be taken from the Owner, as, for Inſtance, what is written upon waxed Tables, which may eaſily "be blotted out afterwards. But as for writing on ſuch Paper as ours is, *he ſays*, that the Owner of the Paper does not become "the Owner of the Writing, if it were only a ſimple Letter; and much leſs, if they are Writings or Acts of ſome Conſequence." This Explication ſalves in Part the Abſurdity of the Deciſion of the *Roman* Lawyers; but the Misfortune is, it has no Foundation. The Text is too clear to admit of a favourable Interpretation; and nothing can better prove that the Notions, which the *Roman* Lawyers have framed of what is to be looked upon as an Acceſſory, are falſe and very ill connected, ſince they make a clear different Deciſion as to Painting, although the Caſes be exactly the ſame.

[5] *Francis Hotman*; and it comes to the Rule of Mr. *Thomaſius* ſpoken of before. See his Diſcourſe, *De Pretio affectionis*, &c. c. 3. §. 65, 66. and *Vinnius* upon the Paragraph of the *Inſtitutes*, which I have ſet down in the foregoing Note. See, alſo, the deceaſed M. *De Tourtil's Eſſais de Juriſpr. Quæſt.* I. where, with his uſual Eloquence, he gives the Reaſons on both Sides.

VIII. They

VIII. They are more in the right, when they determine [1], that the *Table* ſhall go along with the *Picture* [2]; the latter being uſually of far greater Value than the former; and it being eaſy for a Man to part with ſo common a thing, upon receiving its Price. Yet this very Reaſon ſhews, that in ſome Caſes Equity will direct a contrary Deciſion. As ſuppoſe a vulgar Dawber, whoſe Skill never carried him beyond a Sign-poſt, ſhould have laid his vile Colouring upon ſome precious Wood, which we ſhould gladly reſcue, as ſoon as poſſible, from the Injury it ſuffered; or if ſome awkard Figures ſhould be cut in Plates of Gold or Silver, or in Pearls and Gems. As it would be an unparalleled Impudence for a Raſcal that rubs his Bruſh upon my Walls, on that account to claim my Houſe; nay farther, ſince this Labour was performed purely for his own Humour, he can hardly require to be paid for the Work, unleſs perchance the Owner of the Houſe be in ſo good Circumſtances, as that we may think he would willingly have put himſelf to ſuch an Expence [a] [b].

IX. The ſame Lawyers declare [3], that *Purple* applied to, or engrafted on another's Garment, ſhall go with the Garment, however the former may exceed the Value of the latter. Now this may be underſtood two Ways; either that a Perſon ſhall interweave among his own viler Thread ſome Purple Yarn belonging to another [4], or that he ſhall fit another's Purple Cloth to his own Garment. In the former Caſe there is ſcarce the leaſt Doubt, but that the Cloth thus made ought to be judged to the Owner of the Purple. For that without which another thing cannot exiſt [5], and which is, as it were, the natural Ground to ſupport and uphold it, is not always to be looked on as an *Acceſſion* to that other thing [6]; but we ought, by all means, to take the Value of each thing into the Account; ſo that if they are equal in all other Reſpects, that which is more precious ſhall draw to it that which is leſs. Indeed if we ſpeak of the phyſical Concomitancy or Adherence of things, it is neceſſary that Thing ſhould go along with another, which cannot be without the other; or that the *Adjunct* ſhall follow the *Subject*. But in aſſigning the Property of Things, where we are chiefly to conſider the Price and the Uſe of them, and how eaſily a Perſon may bear the want of ſuch or ſuch a part of his Poſſeſſions; this Reaſon cannot always prevail.

As for what *Grotius* [c] affirms in this Matter, *That for the greater Part to ſwallow up the leſs, is natural only in Fact, not in Right*; we allow it under the following Senſe. In *Fact* what is ſtronger may draw to itſelf what is weaker; but it is not always *rightful* or *juſt*, that a ſtrong Man ſhould carry off the Goods of his weaker Neighbours; or that a Perſon ſhould loſe a Thing of his own, which is leſs, if it happen to be joined with ſomewhat of another's, which is greater. For he who hath but the twentieth Part in a Field, is as much a Lord and Proprietor, as he who hath the other nineteen. But indeed the Queſtion we are now upon is not ſtrictly, whether he who hath the greater Part in a Thing, ought, on that Score, to gain the leſs; but what Expedient may be found out to decide the Buſineſs, in Caſe two Perſons happen to be joint Proprietors of a Thing, which they are unable or unwilling to hold in common, or to divide. Now here certainly the entire Thing ought to be adjudged to one of the Parties, upon Condition that he ſatisfies the other to the Value of his Share. And which of the two Perſons ought, in this Caſe, to carry the whole Thing, is to be determined from the Price and Excellency of one Share above the other, and from conſidering which of the Men is in the greateſt Want of that for which they conteſt. Thus ſuppoſe a Man to have uſed my Purple in a Garment for himſelf, though poſſibly the Purple be of much the greater Value, yet it will be my beſt way to leave him his Garment ſafe and whole, upon receiving Satisfaction: for ſhould the Garment be taken to Pieces, the other Party muſt needs be endamaged; and where's my Advantage in receiving my Cloth, when reduced to Rags? And as for the whole Garment, this being already fitted to the Body of another, is commonly diſproportioned and

[a] Lib. xxxviii. *D. De rei vindic.* [b] Vid. lib. vi. tit. 1. *D. De rei vindic.* [c] *Dict. loc.* §. 21.

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[1] *Si quis in aliena tabula pinxerit——nobis videtur melius eſſe, tabulam picturæ cedere. Ridiculum eſt enim picturam Apellis vel Parrhaſii in acceſſionem viliſſimæ tabulæ cedere*, Inſtit. l. ii. tit. 1. §. 34. See *Thomaſius*'s Diſcourſe, §. 67, and Mr. *Titius*'s *Jus Privatum Romano-German.* l. iii. c. 5. §. 55, *&c.* As, alſo, *Eamond Merillus*, Obſerv. Lib. VIII. Cap. XXVIII. And, after him, Mr. *Schulting de Juriſpr. Ante-Juſtin.* pag. 28. Who both acknowledge that the *Roman* Lawyers had done better, according to their own Principles, to have conſidered the Canvas, or Board, as aſſuming, by the Painting, a new Form, in Conſequence of which the Ground or Subſtance ceaſe to exiſt, and therefore the Work belonged to the Painter.

[2] Moſt Lawyers pretend here, that as to what hath been ſown or built in another's Ground, ſo here a good Deſign is neceſſary to give right to recover and preſerve the Picture, paying the Value of the Cloth to him to whom it belongs. And indeed, *Juſtinian* or rather *Trebonian* tells us in §. 34. before quoted, *Utique ſi bonæ fidei poſſeſſor fuit ille, qui picturam impoſuit.* See *Vinnius* above. But to me this Deciſion ſeems to deſerve Amendment. If we judge of it by the Law of Nature, which the *Roman* Lawyers profeſſed to follow in theſe Caſes. The Matter on which we paint, as well as that on which we write, is uſually of a ſmall Value; ſo that we can have little Reaſon to ſuppoſe an ill Deſign, and that it can happen very rarely; and when it evidently appears, the Principle that hath produced it can never be ſo ill, but he muſt ſee ſo much Worth as to deſerve a much greater Value than can belong to him, and ſo not deſire that the Thing which it is incorporated with ſhould be returned to its true Owner. So that, unleſs ſome extraordinary Circumſtance aggravate the Fact, Equity, in my Opinion, will engage every Man to be content to recover the Value of the Paper, the Canvas, or the Board, or at leaſt, by preſerving the Picture or Writing, indemnify the Painter or Writer from loſing his Labour, or without depriving him of the Things, which not being poſſible to be reſtored, would be abſolutely loſt, as to him, with all that depends on it.

[3] *Si alienam purpuram veſtimento ſuo quis intexuerit, licet pretioſior ſit purpura, tamen acceſſionis vice cedit veſtimento*, ib. §. 26.

[4] The *Roman* Law does not relate here the Caſe of Specification, of which our Author ſpeaks in the following Paragraph. But in both Caſes we may ſay with Mr. *Thomaſius*, that it ought to be indifferent to the Owner of the Purple, whether he reſtore the Wool, or Cloth in kind, or give him another like it, of the ſame Nature, and the ſame Price. So that it is juſt, that he content himſelf with this Equivalent, knowing that the other has acted with an honeſt Intention. As to the reſt, in this Example, the *Roman* Lawyers ſpeak of what they call *Purple-Studs*, in which conſiſted the *Latus clavus*, and *Anguſtus clavus*, worn as Ornaments upon their Gowns, and even on their Furniture. The Reader may conſult the *Antiquaries* who have treated on this Subject, particularly, *P. De Montfaucon, Antiq. Expliq.* Tom. III. Liv. I. Chap. VI.

[5] The Text ſpeaks the contrary expreſly, ſaying, That without which another cannot exiſt, and which ſupports it, as we may ſay *phyſically*. The Author here through Inadvertence has confounded the *Principal* with the *Acceſſory*.

[6] As the *Roman* Lawyers affirm, ſaying, *In omnibus igitur iſtis, in quibus mea res, per prævalentiam, alienam rem trahit, meamque efficit, ſi eam rem vindicem, &c. Digeſt.* l. vi. tit. 1. *De rei vindic.* leg. 23. §. 4. There went before immediately, *Sed neceſſe eſt ei rei cedi, quod ſine illa eſſe non poteſt*, §. 3.

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unſerviceable for mine. So indeed in all the Compaſs of this Subject it is more eaſy to judge what is fit and equitable from the Conſideration of particular Caſes, than from any general Deciſion.

X. As for *Specification* [1], or the turning a Thing into ſuch a Form or Shape, we are firſt of all to obſerve, that it cannot ſtrictly and properly be ranked amongſt the originary Ways of Acquiſition: For ſince, in the Courſe of Nature, nothing can be made but out of ſome Matter before exiſting, we ought to enquire whoſe that Matter is. If it were our own, then, upon the introducing of a new Shape, our Dominion ſtill continues. If it were no Body's, then we ſhould obtain the Dominion of it by the preſent Act of Occupancy. But if it were another's, then the Queſtion lies, Whether 'tis now to be adjudged to the Owner of the Matter, or to the Author of the Form? On which Point the old Maſters of the *Roman* Law being divided [2], at length they came to this middle Reſolution; That if the Form could be reduced to the firſt rude Maſs, then the Thing ſhould go to the Owner of the Matter; if not, to him who gave it the new Shape and Figure. Some have thought this Diſtinction to be founded on moſt evident Reaſon; *Becauſe*, ſay they, *when the Shape cannot be thus unmade, the Thing ſeems to have utterly periſhed, and ſome new Being to have riſen in its Place; Wherefore it ought, in this Caſe, to be adjudged to him who cauſed it to exiſt under this new Form: Whereas, when the Figure may be reduced to the firſt Lump, then the Thing is ſuppoſed ſtill to exiſt, and not to have periſhed at the Arrival of the new Form, and, conſequently, not to have changed its Owner.* Others, on the contrary, are of Opinion, that the whole Buſineſs turns on this Iſſue, Which of the two, the Matter or the Form, is higheſt in Value [a] [3]. In our Judgment, neither of theſe Determinations can, with Equity, be applied to all Caſes; but the other particular Circumſtances ought, likewiſe, to come under Conſideration and Regard. Thus ſuppoſe a Man hath made Wine, Oil, or Bread out of my Grapes, Olives, and Corn, or hath taken my Honey and Wine to mix in a compound Liquor, why ſhould he have a Right to the Forms thus produced rather than I, only becauſe they cannot be reſtored to their original Matter? Therefore, if the Things of which we are ſpeaking, will admit of Diviſion, they ought to be parted according to the Value of the Matter, or the Labour in working out the Form. Yet in Caſe the Owner of the Matter hath Occaſion to enjoy the Thing entire, we think that his Claim ought, on all Accounts, to be preferred to that of the Faſhioner. Thus, if a Man caſts or ſhapes a Work out of another's Metal, where the Form is much more precious than the Matter, 'tis but fair that however capable the Thing is of being brought back to its Principles, yet it ſhould be left in the Poſſeſſion of the Faſhioner; provided he either reſtore the like Metal in Quantity and Kind, or pay the juſt Value of it. But a contrary Deciſion ſeems moſt reaſonable, if I had deſigned that Metal for the very ſame Work, of which I ſtand in great Neceſſity, and cannot procure new Metal for that Purpoſe. For here Equity will favour the Owner of the Matter, though the Form or Make ſhould perchance far excel in Value.

Others conceive, that, in the Caſe before us, we ought farther to enquire, whether the *Power* which the Matter had to receive a particular Form was *near*, or *remote*: If the former, they think the Owner of the Matter ought to be preferred; if the latter, the Faſhioner. For Inſtance, That if a Ship be thus made out of the rough Wood belonging to another, then it ſhall go to the Builder; but if the Timber were before fitted and prepared for the building a Ship, then the Ship ſhall go to him who owned the Timber: That, if a Man works my *Wool* into a Garment for himſelf, he ſhall keep it, when he hath done; but if he cuts a Coat out of my Cloth, I have a Right to challenge the Coat, and to refuſe any Equivalent: That a Medicinal Compoſition, if the Ingredients were before perfected and prepared, ſhall go to the Owner of thoſe Ingredients; if not, to the Author of the Compoſition. But neither will this Diſtinction alone be always agreeable to the Rule of Equity: For if I hold any ſuch *Matter* in my Poſſeſſion, whether rude and unwrought, or whether fitted or diſpoſed to receive a *Form*, which I either keep for Sale, or elſe have in ſuch Abundance, as to be ſtill furniſhed for my own Occaſions, there's no Reaſon why I ſhould not leave ſuch a Thing to the Faſhioner of it, upon his refunding the Price of the ſaid *Matter*. But if I have deſigned any Quantity of *Matter* to my own particular Uſe, and have no Convenience of procuring the like, then the Want which I am in, turns the Favour of my Sentence on my Side, though perhaps the *Matter* was only in *potentia remota*, had only a diſtant Capacity, not an immediate Fitneſs for this Work [b]. Nay, tho' a Man ſhould frame a Thing partly out of his own Matter, and partly out of another's, yet even this doth not, in all Caſes, make it undubitably certain, that the Thing ought to be aſſigned to him that made it, on this Reaſon; becauſe the Shape and Figure is not only owing

[a] Vid. *Connan.* Comm. Jur. Civ. l. iii. c. 6.

[b] Vid. l. vi. tit. 1. & l. 61. *D. De rei vindic.*

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[1] Mr. *de Courtin* (in his *Indic.*) defines *Specification* to be the Introduction of a new Form in a Matter belonging to another.

[2] The Words are, *Quum ex aliena materia ſpecies aliqua facta ſit ab aliquo, quæri ſolet, quis eorum naturali ratione dominus ſit?* ——— *Et poſt multam Sabinianorum & Proculianorum ambiguitatem, placuit media ſententia exiſtimantium, ſi ea ſpecies ad priorem & rudem materiam reduci poſſit, eum videri dominum eſſe, qui materiæ dominus fuerit; ſi non poſſit reduci, eum potius intelligi dominum qui fecerit; ut ecce vas conflatum poteſt ad rudem materiam æris, vel argenti, vel auri reduci, vinum autem, vel oleum, vel frumentum ad uvas, vel olivas, vel ſpicas reverti non poteſt, ac ne mulſum quidem ad vinum vel mel reſolvi poteſt. Quod ſi partim ex ſua materia, partim ex aliena ſpeciem aliquam fecerit quis, veluti ex ſuo vino & melle alieno mulſum miſcuerit, aut ex ſuis & alienis medicamentis emplaſtrum aut collyrium, aut ex ſua lana & aliena veſtimentum fecerit, dubitandum non eſt, hoc caſu eum eſſe dominum qui fecerit, cui non ſolum operam ſuam dederit, ſed & partem ejuſdem materiæ præſtiterit.*

[3] The moſt plain and general Rule which can be given here is Mr. *Thomaſius*'s before-mentioned, according to which the Whole, or the Work which ariſeth from two Things belonging to two Perſons, uſually appertains to him that brought it into a new Form, becauſe the Matter, for the moſt Part, is of that Nature, that it may be reſtored either in itſelf, or by its Value in Money. But if the Matter be wrought upon, and even tho' the Owner had ſome particular Reaſon to prize it above its juſt Value, as if it be a Silver Cup given us by a Prince, which we have made into a Baſon, the Owner of the Cup ought to be contented with another Cup of like Weight, or with the Value of it. For if he ſhould give him the Baſon, or make it again into a Cup of the ſame Form, it will not be the ſame Cup which the Prince gave him. The Sum of all is this, if he that turned the Cup into a Baſon, knew that the Cup was another Man's, the true Owner may make him pay for the Cup according to his particular Eſtimation. See the Diſcourſe, *De pretio affectionis*, &c. c. 3. §. 43, *&c.*

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to his Pains, but he, likewiſe, contributed Part of the *Matter*: For, it may be, his Pains were of little Worth, and, likewiſe, his Part of the *Matter* inconſiderable, ſo that the *Matter* belonging to the other Perſon exceeds both. And again, there are ſome Things which take up a certain Quantity of *Matter*; ſo that in any Degree to leſſen it renders it unſerviceable, if not abſolutely, yet however to that particular Deſign. In this Caſe Judgment is to be given for him who ſtands moſt in need of the Thing thus framed.

As for what remains, *Grotius*'s Aſſertion [a] is univerſally true, *That ſince Things conſiſt of Matter and Form, as their conſtituent Parts, if the Matter belong to one, and the Form to another, there naturally follows a Community to each, according to their reſpective Proportions* [1]: *Juſt as a whole Body compoſed by the Mixture of two Parcels of Matter of the ſame Kind, is common to the two Owners* [b]. *But when a Thing can neither conveniently be held in common, nor divided, then either poſitive Laws or Equity muſt determine which Party ſhall reſign the whole to the other, upon receiving the Value of his Share* [c]. It is ſtill, in all Caſes, to be enquired, Whether the Perſon who beſtows a Shape on another's *Matter*, doth it with an honeſt or with a diſhoneſt Deſign? For he who acts thus out of a knaviſh Principle, can, by no Means, pretend that the Thing belongs to him, rather than to the Owner of the Matter, tho' all the former Reaſons ſhould concur; that is, tho' the Figure ſhould be moſt valuable; tho' the *Matter* ſhould, as it were, be loſt and ſwallowed up in the Work; and tho' he ſhould be in very great want of what he had thus compacted. For the greater Part of the two doth not draw to itſelf the leſs, barely by its own Virtue, or on its own Account; but there is required farther ſome probable Ground and Plea in the Owner of that Part which exceeds, on which he may build his Claim. Hence, if a Man, out of wilful and deſigned Fraud, puts a new Shape on my Matter, that he may, by this Means, rob me of it, he neither gains any *Right* over the *Matter* by this Act, nor can demand of me a Reward for his Labour, any more than a Thief who digs thro' my Walls can deſire to be paid for his great Trouble in making a new Door into my Houſe; or than one can deſire a Fee, who breaks an Impoſthume, otherwiſe incurable, with a Blow that he deſigned for my Death; or than [2] *Autolycus* could have ask'd a Price for painting the Horſes he firſt ſtole. And all this doth not proceed from any poſitive Conſtitutions, but from the very Dictate and Appointment of natural Reaſon [d], tho' Nature doth not determine any particular Penalty in the Caſe. For to have exerciſed ſuch a Villany *gratis*, is not properly a Puniſhment: And, on the other Hand, 'tis moſt juſt and reaſonable, that I ſhould not be obliged to pay a Man Wages for endeavouring to do me a Miſchief.

XI. What the antient and modern Lawyers have ſo laborioufly delivered concerning Increment by Rivers, depends, for the moſt Part, not ſo much on any conſtant and natural Reaſon, as on the poſitive Ordinances of particular Nations: And therefore we may be allowed to uſe more Brevity on this Subject.

The two chief Enquiries made in the Caſe before us are, Firſt, *Whether the Rivers, by thus ſecretly forſaking their Banks, do add to the Dominion of whole Territories?* And, Secondly, *Whether they improve, in the like Manner, private Eſtates?*

The former Queſtion is of greater Moment, in as much as it may often prove the Occaſion of great Controverſies between Nations; it being uſual for Rivers to lie as the common Boundaries of different States. Now when ſuch a River hath any Way altered its Courſe, the Point in Diſpute is, *Whether the Limits of the Seigniories, are, likewiſe, changed, and whether the additional Land goes to them whoſe Banks it augments?* Here we are firſt of all to ſuppoſe a Diſtinction between ſuch States as are *limited* [3], or encompaſſed with artificial Bounds (with which we may reckon thoſe that are parcelled out by Meaſure, as by the Number of Acres, being as to the preſent Buſineſs the ſame) and *arciſinian*, ſuch as are naturally fenced againſt Invaders, with the Boundaries of Rivers and Mountains. After this we are to enquire, Whether the neighbouring People of the two oppoſite States left the River between them void of particular Dominion, and common to the Uſe of both; or whether they agreed to fix their reſpective Limits in the midſt of it, ſo that half ſhould belong to one People, and half to the other? And laſtly 'tis to be conſidered, Whether the whole River belongs to one People, ſo that the Limits of their Dominions reach to the Bank of their Neighbours? If then both the States are bounded in the Manner firſt deſcribed,

[a] *Dict. loc.* ſ. 19. [b] Ibid. ſ. 27. Vid l. vi. tit. 1. leg. 3. ſ. 2. & leg. 5. *Dig. De rei vindic.* [c] Vid. l. vi. t. 1. l. 23. ſ. 2, 3. *D. De rei vindic.* [d] Add *Leg. Wiſigoth.* l. x. t. 1. c. 7.

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[1] The *Latin* is, *Si duorum materiæ ex voluntate dominorum confuſæ ſint, totum id corpus, quod ex confuſione fit, utriuſque commune eſt, veluti ſi qui vina ſua confuderint, aut maſſas argenti vel auri conflaverint; ſed & ſi diverſæ materiæ ſint, & ob id propria ſpecies facta ſit, forte ex vino & melle mulſum, aut ex auro & argento electrum, idem juris eſt, nam & hoc caſu communem eſſe ſpeciem non dubitatur. Quod ſi fortuitu, & non ex voluntate dominorum, confuſæ fuerint, vel ejuſdem generis materiæ, vel diveſræ, idem juris eſſe placuit.*

[2] See *Hyginus*, Fab. 201, with the Note of *Muncker*.

[3] *Grotius*, from whom our Author took this Diſtinction, had not read carefully enough the antient Writers, who treated upon the Bounds of Lands, which is the Cauſe that he has miſtaken their Senſe. They call that *ager limitatus*, Land bounded, which is diſtributed by the Order of the Prince, to every one a certain Number of Acres compaſſed about with Fences, whence it is that they are called Lands divided and appropriated. We underſtand by Lands contained within a certain meaſured Extent, *ager menſura comprehenſus*, i. e. a Space of Ground meaſured into Acres, of which a certain Number are given to Men in general, without aſſigning any particular Part to each Man, which from hence is called *ager aſſignatus per univerſitatem*. Laſtly, *arciſinian* Lands (for we muſt preſerve the *Latin* Word, having no Term in our Language to anſwer it) are thoſe which were not meaſured; *ager eſt arciſinius, qui nulla menſura continetur*, ſays *Frontinus*, *De re agraria*, c. 1. and of which the firſt Occupier appropriates to himſelf as much as he pleaſeth, and he can till, from whence they are named *agri occupatorii*. Theſe laſt have not always natural Bounds, and every one fixes them as he pleaſeth, *viz.* an Hedge, Rail, Ditch, *&c.* Thus *Gronovius* the Father (on *Grotius*, l. ii. c. 3. §. 16.) delivers himſelf in general, and he is a ſufficient Judge in theſe Matters; but his Notes of another Sort, which he makes on *Grotius*, would have been much better, if he had applied himſelf more to the Study of the Law of Nature, and Matter of good Reaſoning in general, than to grammatical Niceties and Criticiſm, as Mr. *Le Clerc* obſerves in his *Biblioth. Choiſe*, tom. iv. p. 266. But tho' our Author has made a Miſtake here, by following *Grotius* inconſiderately, yet the Fault had not been great, if he had otherwiſe reaſoned well from this Diſtinction taken in the Senſe he gives it. See my Notes on the Chapter of *Grotius* juſt cited, §. 16. *& ſeq.* And on Cap. viii. §. 8. *& ſeq.*

by artificial Encloſures, or by Meaſure, which immediately touch each other, without any void Space between, tho' the River ſhould change its Courſe, yet the Territories will remain of the ſame Extent: Nor can there here be any Room for the Caſe before us, ſince whatever Space ſhould thus happen to be left, already belongs to one or to the other State. If the River in the Middle were left void and common, then the Ground added to the Bank or little Iſlets which ſtart up, ſhall go to thoſe who firſt take them into Poſſeſſion: Yet 'tis moſt convenient, that both the former and the latter ſhould be occupied by that People to whoſe Banks they are moſt nearly ſeated. If the whole River belong to a ſingle State, the Iſlets riſing in it ſhall belong to the ſame State only; but as for what is gotten from the River by the oppoſite Banks, it ſeems moſt reaſonable that it ſhould belong entirely to the other People. But it moſt commonly happens, as 'tis moſt agreeable, that the Lands reaching to the Stream on each Side are ſuppoſed to be fenced only with theſe natural Bounds; and that, conſequently, the End of each Dominion is to be conceived in the Midſt of the Channel: For here the Water, as it plainly ſeparates and diſtinguiſheth the reſpective Lordſhips, ſo it affords to each Country a kind of natural Bulwark. Yet ſtill it is requiſite, in this Caſe, that the River do not, as it were, make a common Cuſtom of drowning its Banks, and of cutting itſelf out a new Channel every Year. When therefore two neighbouring Nations poſſeſs Lands thus bounded by Nature (which, in a doubtful Caſe, is always preſumed) the River, by gradually changing its Current, changeth, likewiſe, the Limits of the Dominions, and whatever Addition it makes to either Side belongs to thoſe on whoſe Banks it falls, provided that this [1] Alteration be made by ſmall Degrees, and that the River do not at one ſudden Rupture forſake its Channel, and force a new Way. For the gaining or loſing of inſenſible Parts, or any ſuch Change as entirely leaves the old Shape and Figure, ſuffers a Thing to remain, in all [2] Appearance, the ſame as it was. And the Conveniency of a natural Boundary is too great to be ſlighted and forſaken upon a ſmall Damage. But if a River, deſerting the Channel it once filled, ſhall have broke up another Paſſage for its whole Current; and the People, through whoſe Lands it now runs, do not think the Advantage of a natural Boundary to be of ſo great Conſequence, as that, for the Sake of it, they ſhould reſign ſo conſiderable a Part of their Territory, then the Borders ſhall continue as before, in the Middle of the forſaken Channel. For as a Stone is uſed for a Boundary, not on the Account of its Nature, but of its particular Poſition; ſo a River concludes and ſeparates different Countries, not in its vulgar Notion, as 'tis a Bulk of Water gathered from certain Fountains and Rivulets, and from other Streams of Note and Size, and then diſtinguiſhed by a particular Name; but as it runs in ſuch a Channel, and hath ſuch Banks to encompaſs and confine it [a].

XII. As to the Lands of private Perſons, in this Caſe, we are of Opinion it ought firſt to be conſidered, whether the River on which ſuch a particular Eſtate happens to lie, divides the Territories of two diſtinct Governments; or whether it only paſſeth thro' the Dominions of one: And then, whether the River be publick or private. In the former Caſe it depends abſolutely on the Pleaſure of the Government, either to leave ſuch Increments in private Hands, or to challenge them for the common [3]. For at firſt it generally happened, that *ſuch or ſuch a People ſeized on this or that* Tract of Land by the *Great*, and afterwards parcelled out to each Man a particular Poſſeſſion in it, uſually contained under a certain and definite Meaſure. As therefore what remained of the Territory, after this Allotment to private Perſons, was ſtill the publick Poſſeſſion of the State; ſo whatever happens to be added to any particular Share, is, likewiſe, ſuppoſed to accrue to the Publick. Yet inaſmuch as the adjoining Fields frequently ſuffer great Damages from the Rivers by Floods, and becauſe the Increments we are ſpeaking of, advancing by ſlow Degrees, ſeem to be of little Conſequence to the publick Revenue; therefore many Governments have thought it a reaſonable Favour and Bounty to grant theſe Improvements to the Perſons on whoſe Lands they happen to fall. And there is the more Equity in this Conſtitution, in Caſe the reſpective Perſons were wont to keep up the Banks at their own Charge. This *Right* is preſumed to accompany any Piece of Land aſſigned to a private Perſon, not by any determinate Meaſure, but in groſs; though perchance in the formal Delivery of it ſome Kind of Meaſure might be expreſſed [b]: And 'tis the ſame Caſe, when in aſſigning the Bounds of any Land, the neighbouring River is mentioned at large. But if this Increment be very conſiderable, and far exceeding the Meaſure of the private Poſſeſſion, then it ſhall be adjudged to belong to the Community. As for the Iſlets which ariſe, theſe no private Man can claim to himſelf, without the expreſs Grant of the State; becauſe, being plainly ſeparated from the particular Demeſn, they can on no Account be eſteemed a

[a] Comp. *Grot.* l. ii. c. 3. ſ. 16. *& ad eum loc.* Bœcler. & Ziegler. [b] Vid. l. xix. t. 1. l. 13. ſ. 14. *D. De act. empt. & vendit.*

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[1] Hence it is, that the *Roman* Lawyers take it for certain, *Eſt autem alluvio incrementum latens; per alluvionem autem id videtur adjici, quod ita paulatim adjicitur, ut intelligi non poſſit, quantum quoquo temporis momento adjiciatur,* Inſtit. l. ii. c. 1. §. 20. See, alſo, *Digeſt.* l. xli. tit. 1. *De acquir. rerum Dominio,* leg. 7. §. 1.

[2] The Law is, *Quapropter cujus rei ſpecies eadem conſiſteret, rem quoque eandem eſſe exiſtimari,* Digeſt. l. v. tit. 1. *De Judiciis,* &c. leg. 76. See *Grotius,* lib. ii. c. 9. §. 3.

[3] On the contrary, it is credible, as Mr. *Hertius* obſerves, that, for the moſt Part, ſuch as united themſelves together in civil Societies, were already every one in particular poſſeſſed of Lands. He alledges a Paſſage in *Cicero* to this Purpoſe, *De Offic.* l. ii. c. 21. which is quoted, l. viii. c. 5. §. 2. in the Notes; but it doth not fully prove it; for they who went together to find out ſome vacant Country to eſtabliſh themſelves, and build Towns, did, doubtleſs, deſign as much to ſecure themſelves the peaceable Enjoyment of the Lands, which ſhould be aſſigned them, as thoſe who poſſeſſing it already, by Right of firſt Occupancy, united to ſeveral other Families to form one State. It does not, nevertheleſs, follow from hence, as Mr. *Hertius* affirms, that the Right which a Subject may have to appropriate ſuch Things as he finds without an Owner, within the Bounds of the State, as the firſt Occupier does not depend either upon the tacit or expreſs Will of the Sovereign. After what Manner ſoever the State is formed, the whole Country belongs to all the Community; and ſo it follows, that the Laws of Union extend ſo far as to give the People, or thoſe that repreſent them, Right to diſpoſe, in divers Manners, the Goods of each particular Perſon, as far as the publick Good requires. See l. viii. c. 5. This is ſo much the more certain at preſent, becauſe Sovereigns have, for a long Time, enjoyed this Right by the Conſent of the People.

Part

Part or Increment of it. And their being ſeated next to ſuch a Poſſeſſion, is no more an Argument that they ought to paſs to the particular Proprietor of it, than that any other Man ſhould challenge a Part of a Street, or a publick Place, only becauſe it lies juſt by his Door.

If a River ſeparates the particular Lands of Perſons, ſubject to the ſame State, then, ſince it can add nothing on one Side, but what it took from the other, 'tis, by all Means, reaſonable, that the Increment ſhall go to him on whoſe Land the Damage is committed. Thus the *Roman* Laws [1] rightly ordained, That, in Caſe the Violence of the Current adds a Piece to my Land, which it hath torn from yours, it ſhall remain your Property as before. Which Judgment will more eſpecially hold good in floating Lands, ſuch as *Strabo* [a] mentions in the Fens of *Euphrates*, built upon Hurdles of Reeds, and moved with Boat-Poles into their former Seat, when the Water had carried them off. But if it hath ſtuck long upon my Banks, and the Trees which it brought with it have there taken Root, from that Time forward it ſhall be deemed an Acquiſition to my Eſtate. Whence 'tis clear, that the Owner of the loſt Fragment ought to have brought it back again to its former Place, before it was incorporated with my Land, if he intend to reſume the Property of it. When 'tis uncertain what and how much hath been waſted from another's Soil, the Sufferer is hereby hindered from putting in his Claim to the Increment; which yet, according to natural Law, doth not accrue to him who owns the Ground where it faſtens, but to the People who are Sovereigns of the River. For 'tis, in the higheſt Manner, agreeable to Reaſon, that not only the Water of a common River, and the Things contained in it ſhould be publick, but, likewiſe, the Channel, and the Banks, and whatever Improvement either that or theſe happen to gain. For it ſeems very improper to ſay, that the Channel, conſidered in itſelf, is a Part of the adjacent Land, but that it is looked on as publick, ſo long as it's covered with the publick River; which being once removed, it becomes private, according to its primitive Nature: As if 'twas only a Burthen or Service laid on the Grounds of particular Men, that they ſhould grant the River a Paſſage thro' them.

If a River forſakes its Channel, or any Part of it, and [2] cuts out a new Way, ſince the latter is taken from the oppoſite Land, the former deſerted Channel ought, in Equity, to be adjudged to the Owner of the Land, who now ſuffers, to comfort him for his Loſs: And in Caſe the River forſakes, likewiſe, this new Paſſage, the Ground ſhall then return to the antient Proprietor, and not to thoſe who poſſeſs the Country about it. But whatever is determined in thoſe Caſes of the Increments left by the Current, and of the Alteration of Channels; this, no Doubt, is but juſt, that the Burthen which before lay on any Ground, ſhould be leſſened in proportion to what it loſeth by ſuch an Accident. Which Point, as [b] *Herodotus* informs us, was ſettled amongſt the *Egyptians* by a particular Law.

It is not leſs equitable, that Land drowned by a Flood ſhould belong to the former Owner, either when the Water [2] is gone off without Trouble, by one violent Outlet, or by ſlow Degrees; or when his Pains and Labour have cut out a Paſſage for it. But 'twill be asked, *To whom ſhall the new Bulk of Water belong, 'till ſuch Time as the Land, by draining, ſhall be recovered?* Here we judge it neceſſary to enquire, Whether the drowned Land hath paſſed into the Form of a Lake, or a Fen, or whether it is added to the Channel of a publick River? In the former Caſe, the Lake or the Fen ſhall for ever appertain to the Owner of the Ground; and in like Manner in the latter Caſe [3], for ſo long Time as he ſhall entertain any Deſign of reducing the Current to its former Banks. As for private Rivers, which give me in one Place as much as they rob me of in another, the Matter is clear beyond Diſpute. But what if a River belonging to my private Eſtate ſhall make itſelf a new Channel through the Ground of another Man, ſhall that Part of it which covers my Neighbour's Ground belong to me or to him? In our Opinion Judgment ought to be given for the latter. Yet ſtill I retain a Right of turning the Current to its proper Place. But if I refuſe thus to bring back the Current to my own Demeſns, I cannot oblige the other Party to pay for the Water, nor ſo much as pretend that it ought to be common to us both in that Part. For thoſe Things which are our own barely on Account of their being contained within our Limits or Space, and which therefore ſeem Acceſſions to the ſaid Space [4], when they once happen to get out of it, are either to be recalled by our Care and Diligence, or elſe to paſs out of our Propriety, and to be reckoned henceforward the natural Increments of the new Space to which they are removed. But in all theſe Caſes the poſitive Laws of different Governments may variouſly determine, as ſhall appear convenient. In *Argenus Urbicus*'s Comment we find the following Rules laid down, *If this be done in Lands taken by Occupancy, whatever the Force of the Water hath ſtolen away, no one may have the privilege of recovering: which Conſideration lays a Neceſſity on Men to keep up their Banks, yet ſo as not to endamage their Neighbour. But if it be done in Lands that have been meeted out, and aſſigned in Portions to diſtinct Owners, then the Poſſeſſor ſhall loſe nothing; becauſe every one knows the exact Form and Dimenſions of what was allotted for his Share in the Hundred to which he belongs.*

[a] *Geograph.* l. xvi. p. 528. Edit. *Genev. Caſaub.* [b] *Euterpe*, p. 81. Edit. *H. Steph.*

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[1] The Words of the *Roman* Law are, *Quod ſi vis fluminis de tuo prædio partem aliquam detraxerit, & vicini prædio attulerit, palam eſt eam tuam permanere. Plane ſi longiore tempore fundo vicini tui hæſerit, arboreſque, quas ſecum traxit, in eum fundum radices egerint; ex eo tempore videntur vicini fundo acquiſitæ eſſe.* (It ought to be read *Videtur———adquiſita*, as the *Florence MSS.* has it.) See *Vinnius* upon the Place, *Inſtit.* l. ii. c. 1. §. 21. and *Digeſt.* l. xli. leg. 7. §. 2. and l. xxxix. tit. 2. *De damno infecto*, &c. leg. 9, §. 2. But in the Sequel, as upon this whole Subject, our Author follows Principles very different from thoſe of the *Roman* Lawyers, as it would be eaſy to ſhew, if this was the Place for it.

[2] As theſe Inundations happen, for the moſt Part, thro' the Negligence of the Proprietors, who take not ſufficient Care to ſecure the Banks of the Rivers bordering upon their Poſſeſſions; ſo the *Roman* Law did not reſtore Lands overflowed to their former Owner, unleſs they had not changed their Form, *i. e.* when they were only covered with Water for a ſmall Time, without making a true Channel. This Mr. *Noodt* proves againſt the common Opinion of the Lawyers in his *Probab. Juris*, l. i. c. 1.

[3] Our Author inconſiderately mentions Lakes and Fens in this Place.

[4] See Mr. *Thomaſius's Juriſprud. Divin.* l. ii. c. 10. §. 151, *&c.*

Concerning

Concerning the Lands which border on the *Po*, **Caſſius** thus determines; *Whatever the Water waſheth away in its ordinary Channel, the Poſſeſſor ſhall loſe: Becauſe he ought to defend his own Bank, without prejudicing other Mens Property. But if the Flood fall down with a greater Force, ſo as to alter its Channel, every Man ſhall regain his own Meaſure; becauſe it is manifeſt the Damage happened not through the Neglect of the Poſſeſſor, but through the Violence of the Torrent. If, in this Caſe, the Water form an Iſlet, it ſhall be his Property from whoſe Land it was taken; but if it was borrowed from out of ſeveral Eſtates together, each Perſon ſhall receive his own.* Comp. *Grot.* l. viii. c. 8. f. 8, *&c.* and Ziegler *ad dict. loc.*

CHAP. VIII.

Of Right over other Mens Goods or Poſſeſſions.

I. *A Man may have a Right over other Mens Goods diverſe Ways.*
II. *How many Sorts of Right we have over others Goods.*
III. *The Right of holding in Fee.*
IV. *The Right of a Ground-plat.*
V. *The Right of an honeſt Poſſeſſor.*
VI. *Services, what; and of how many Sorts?*
VII. *The Uſe with the Profits.*
VIII. *The bare Uſe.*
IX. *The Habitation,*
X. *The Works of Servants.*
XI. *The Services of City Eſtates:*
XII. *And of Country Farms.*

I. SUCH is the Force of Property or Dominion, that the *Proprietor* alone hath Power to diſpoſe of his own Goods; and all others are bound to abſtain from them. Yet inaſmuch as the Diviſion of Things amongſt Men was not introduced with this Deſign, That all Communication of Goods ſhould thereupon ceaſe; it hence comes to paſs, not only that we are often, by the Law of Humanity, engaged to grant others the Subſtance or the Uſe of our own Poſſeſſions, but, likewiſe, that others may acquire a [1] *Right* to them, either perfect or imperfect, and, conſequently, may procure, by a good and juſt Title, ſome Benefit or Advantage from our Peculiar.

We ſhall here obſerve, in ſhort, how many Ways this may happen; the whole Subject being ſo largely explained by the Expoſitors of the *Civil Law* [2].

II. The chief *Rights* over the Things of others, accruing to Perſons who are not the Proprietors, are by ſome reduced to theſe five: The *Right* of holding in Fee; the *Right of Ground plats*; the *Right of Poſſeſſion upon an honeſt Preſumption*; *Pledges* or *Mortgages*, and *Services* [2].

III. The [3] *Right* of holding in *Fee*, which is granted to another by the Owner of an immoveable Thing, upon condition of paying ſuch a reſerved Acknowledgment, impowers the Tenant in *Fee*, not only to uſe and enjoy the ſaid Thing after the fulleſt Manner, but, likewiſe, to diſpoſe of it; though not without ſome little Reſtraint as to the Point of Alienation. The particular Contract, by virtue of which this Sort of *Right* is immediately ſettled, can be ranked neither under *Buying and Selling*, nor under *Letting and Hiring*; ſince it doth not confer an abſolute Property on the other Party, and yet a much greater Degree than in ordinary Leaſes; but eſpecially ſince the reſerved Acknowledgment is (commonly ſpeaking) far leſs conſiderable than the Rent of vulgar Tenants. As the Rules obſerved either by common Law, or by particular Agreement, in the renewing of this Contract, in the Paying of the ſettled Rent, in the Alienation of the *Fee*, and in the Continuance of it, the Civilians afford us large Information.

IV. He that either upon paying ſuch a Fine, or engaging for ſuch a certain Rent, hath obtained *the* [4] *Right of a Ground-Plat*, may enjoy the ſame, and make any Diſpoſal or Conveyance of it, as much as if he were the firſt Proprietor [5]; and, conſequently, may claim the Lordſhip, though not of the Soil itſelf,

[2] To whom add *Selden*, de *Jur. Nat. & Gent.* l. vi. c. 2.

[1] The Author expreſſes himſelf more clearly in his Abridgment of the *Duties of a Man and Citizen*, l. i. c. 12. §. 8. thus; either by ſome Agreement, or ſome other Way, a Right greater or leſs to obtain ſome certain Profit or Advantage from a Thing that belongs to us, *&c.*

[2] We may add *the Right of Fealty*, of which we ſhall ſpeak in Note *ult.* of this Chapter. I ſhall, alſo, by and by ſhew that Mr. *Hertius* hath taken Notice of this plain Omiſſion.

[3] The Word *Emphyteuſis*, from which this *Jus Emphyteuticum* is derived, comes from the *Greek* Word ἐμφυτεύειν, which ſignifies to engraft or plant. As the Owners of barren Land could not eaſily find ſuch as would farm them, it has been thought expedient to make over theſe ſort of Inheritances for ever, to till, plant, and improve them any Way. By this Agreement the Proprietor of the Ground reſerves to himſelf a certain Rent for ever, and the Emphyteute or Leſſee on the other ſide entitles himſelf to the Profit of his Labour and Induſtry by gathering the Fruits of another's Eſtate, which he has enriched by his own Care, only paying ſome ſmall Rent. In the Iſſue the Lands became reſtorable to the Leſſor, not only fertile and in a good Condition, but the Eſtate, likewiſe, which, in its own Nature, produces no Fruits, although it is otherwiſe of ſome Value, as Houſes and other Buildings are. See *Inſtit.* l. iii. c. 25. *De Locatione & Conductione*, §. 3. *Digeſt.* l. vi. tit. 3. *Si ager vectigalis*, i. e. *Emphyteuticarius, petatur*, *Cod.* l. iv. tit 66. *De Jure Emphyteutico*, and Mr. *Domat*'s Civil Laws reduced to their natural Order, Part. I. l. i. t. 4. Sect. 10. Mr. *Titius*, in his Obſervat. on *Lauterbach*, 209. affirms, That it is not neceſſary to make any particular kind of the Contract *Emphyteuſis*. "For, *ſays he*, when we have transferred to another the Property of a Thing either in Whole or in Part, if it be done gratuitouſly, it is a Donation; if at a certain Price, it is a Sale, although there may be ſome particular Clauſes which relate to an annual Rent." See the ſame Author's *Jus Privatum Romano-German.* l. iii. c. 11. §. 5, *&c.* where he, alſo, treats of the Right of Place.

[4] See Chap. 4. §. 2. above.

[5] This Right may be moſt properly called *Dominium utile Fundi*, and not *Jus Superficiarium*, as our Author does. For he that has this Right has Power to place any Thing upon the Surface of that Ground, though it belongs to another. I ſee now that in the *German* Language they expreſs themſelves ſometimes in the ſame Manner. And Mr. *Hertius* has an entire Diſcourſe (among his Comment. and Opuſc. Tom. 3.) which he entitles, *De Jure Superficiario*. And the *Roman* Lawyers call him that has this Right *Superficiarius*, i. e. as they expound it, *qui in alieno ſolo ſuperficiem ita habet, ut certam penſionem præſtet*, Digeſt. l. vi. tit. 1. *De rei vindic.* leg. 74, 75. The Buildings, alſo, which are poſſeſſed after that Manner are named *Bona Superficiaria*, Digeſt. lib. l. t. 16.

ſelf, yet of all that is built upon it. It was otherwiſe in the former Caſe; where even *profitable Dominion* of the Soil belongs to the Tenant of the *Fee*: The Reaſon of introducing ſuch a *Right* was this; That *Perſons* were willing to admit Strangers upon their Land, yet ſo as not to loſe any Thing in the Bulk and Dimenſions of it. Therefore they made a Grant of the Surface, reſerving the main Soil to themſelves, and requiring a moderate annual Rent to be paid on this [a] Conſideration. If the Surface be loſt, as ſuppoſe, if the Buildings fall, or are conſumed by Fire, the *Right of the Ground Tenant* [1] expires, ſo that the Lord of the Ground may again diſpoſe of it as he thinks fit.

V. *The Right of Poſſeſſion* [2] *upon an honeſt Preſumption* (belonging to thoſe who with a good and ſincere Intention receive a Thing of another's from a falſe Proprietor, yet upon a juſt Title, and ſuch as would otherwiſe be ſufficient to convey the *real Dominion* to them) is thus far equivalent to *ſtrict Property*, That ſuch a *Poſſeſſor* may challenge all the [3] *Fruits* and *Profits* as his own, may diſpoſe of the Thing as he pleaſeth, and defend his Poſſeſſion, nay, and ought to be maintained in it by the Laws againſt all Claimants, except the juſt Lord. And this Poſſeſſion after a certain Term of Years will give the Poſſeſſor an irrevocable Dominion, and ſuch as ſhall hold good even againſt him who was at firſt the lawful Proprietor. On which Point we ſhall hereafter enlarge.

Now this Right was at firſt ſet on Foot for the Benefit of human Commerce, and the Peace of Society and Government; to the Intent that he who endeavours to obtain a Thing upon a good Title, and with an honeſt Mind, ſhould not afterwards be unreaſonably oppreſſed, or incommoded; as he muſt needs be, were all other Perſons for ſuch a Space allowed to diſturb him in his Hold; or were he bound, upon the true Proprietor's challenging the Thing, to refund, likewiſe, the Fruits and Profits which he had conſumed: Or, Laſtly, If his Poſſeſſion were always to hang in an uncertain fluctuating Condition. As indeed it is a Rule not only enacted by *civil Conſtitutions*, but, likewiſe, founded on natural Reaſon, that every Man ſhall be left to enjoy what he hath got with an honeſt Intention [4], till ſuch Time as the Claimant ſhall have demonſtrated a ſtronger *Right* than *Poſſeſſion*. For what Troubles and Diſquiets might be every Day brought on any Perſon, if upon Suit of every Petitioner he ſhould be obliged to relinquiſh what he fairly holds, and to proſecute the other Party in order to a Recovery [b]? The Caſe of *Pledges* or *Mortgages* will hereafter be explained [c].

VI. *Services*, in reſpect of the Perſon to whom they are due, are ſo many *Rights* of receiving certain Profits or Advantages from Things which belong to others, or of abridging the right Owner in the Uſe of what he poſſeſſeth, ſo that he ſhall not be able to apply it to all Purpoſes. But in reſpect of the Perſon who is to pay them, they are ſo many Obligations to grant another ſomewhat out of a Man's own Poſſeſſion [5]; or, for the Benefit of another to forbear uſing his own Property in ſuch a particular Manner. *Services* [6], in reſpect of the Object towards which the Payment of them is directed, are divided into *perſonal* and *real*: Not as if the Benefit of each did not ultimately terminate in the Perſon, but becauſe ſome Profits of this kind accrue to a Man, only on account of his poſſeſſing ſome certain Eſtate [d]. Which Diſtinction others expreſs in this Manner: *Advantages ariſing from other Mens Things, either come to a Perſon directly and immediately, on the Score of his being ſuch a Perſon, or elſe mediately, by the Intervention of ſomewhat which he holds as his Property, and to which this Service is owing.*

VII. In the *Liſt of perſonal Services* are commonly reckoned thoſe which follow, *Uſe and Profits*, *Uſe*, *Dwelling*, and *the Works of Servants* [7]. *Uſe* and *Profits* is a *Right* of enjoying freely what belongs to another, yet ſo as not to impair the main Subſtance [8]; or, a *Right* of receiving all ſuch Advantages from another's *Property*, as can ariſe from it without injuring the Principal. For, though in the ordinary Courſe of Nature, he who is Lord of the Thing is, alſo, Lord of the *Fruits*, yet there is nothing to hinder, but that theſe two may be ſeparated, and the *Dominion* or *Property* lodged in one Perſon, whilſt another hath a *Right* to all the Benefits.

[a] Vid. *Juſtin.* l. xviii. c. 5. n. 14. Edit. *Græv.* [b] See the Expoſitors of the Civil Law, *ad* t. 6. l. 2. *D. De Publiciana in rem actione.* [c] Lib. v. c. 10. ſ. 13, &c. [d] Vid. *Grot.* l. i ſ. 4. *Add.* l. viii. t. 2. leg. 32. ſ. 1. *in fin. D. De ſervit. præd. urb.*

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16. *De verborum ſignificatione*, leg. 49. and the Rent paid *Solarium*. *Vectigal enim hoc ſic appellatur, Solarium, ex eo, quod pro ſolo pendatur*, Digeſt. l. 43. t. 8. *Ne quid in loco publico vel itinere fiat*, leg. 2. §. 17. See a whole Title in the *Digeſts* upon this Matter, l. xliii. t. 18. *De Superficiebus.*

[1] Others differ in their Opinion, becauſe, ſay they, this Part of the Property which the Owner of the Ground transfers to him that hath Right of Place, *Superficiario*, falls in ſome Manner upon the Ground itſelf. See a Book printed at *Wittemberg* in 1704, entitled, *Balthaſaris Wernheri Juris profeſſ. publici, &c. Elementa Jur. Nat. & Gent.* &c. c. 14. § 37. And Mr. *Hertius* is of the ſame Opinion. He ſays, unleſs the Parties have agreed otherwiſe, and there be no Rule of the Civil Laws about it, we muſt believe that no Man can affirm otherwiſe, than that the Right of Place ends with the firſt Building. "Real Servitudes, *adds* "*he*, have not ſo great an Effect as this Right of Place, and yet they may be renewed, when the Building to which they are annexed, comes to be rebuilt." *Digeſt.* l. viii. t. 2. *De Servitut. Prædiorum urban.* leg. 20. §. 2. See, upon this Law, Mr. *Noodt, De uſufructu*, lib. ii. cap. 11. The Truth is, That all here depends upon knowing upon what Footing the Convention was made, or how the particular Laws of each Country determine in ſuch Caſes.

[2] The Law ſays, *Vel etiam poteſt dividi poſſeſſionis genus in duas ſpecies, ut poſſideatur, aut bona fide, aut non bona fide*, Digeſt. l. xli. tit. 2. *De acquir. vel amitt. poſſeſſione*, leg. 3. §. 22.

[3] The Law is, *Bonæ fidei emptor non dubie percipiendo fructus etiam ex aliena re ſuos interim facit, non tantum eos qui diligentia & opera ejus pervenerunt, ſed omnes; quia quod ad fructus attinet, loco domini pæne eſt.* Digeſt. xli. tit. 1. *De adquir. rerum Dominio*, leg. 48. *in princip.* See, alſo, Mr. *Noodt*'s *Probab. Juris*, l. ii. c. 7. and what will be ſaid, c. 13. §. 8. following.

[4] See l. ii. c. 6. §. 4. and 5. aforegoing, and l. iv. c. 12. §. 9. and l. v. c. 13. §. 6. as, alſo, Mr. *Domat*'s Civil Laws in their natural Order, Part I. l. iii. t. 6. Sect. 4. §. 1.

[5] The *Roman* Lawyers ſay, That the Nature of Servitude conſiſts not in doing ſomething in favour of another, but in ſuffering or not doing certain Things. *Servitutum non ea natura eſt, ut aliquid faciat quis, veluti viridia tollat, aut amæniorem proſpectum præſtet, aut in hoc, ut in ſuo pingat; ſed ut aliquid patiatur aut non faciat*, Digeſt. l. viii. tit. 1. *De Servitutibus*, leg. 15. §. 1.

[6] The Words of the Law are, *Servitutes, aut perſonarum ſunt, ut uſus, & uſusfructus; aut rerum, ut ſervitutes ruſticorum prædiorum & urbanorum*, Digeſt. ibid. leg. 1.

[7] *Uſusfructus eſt jus alienis rebus utendi & fruendi ſalva rerum ſubſtantia*, Digeſt. l. vii. t. 1. *De uſufructu, & quemadmodum quis utatur, fruatur*, leg. 1. and *Inſtit.* l. ii. t. 4. *princip.* We ought to obſerve, that Uſufruit and other Sort of Servitudes are Rights which we enjoy gratuitouſly: For if we pay an Annual Rent, it will be then a kind of Letting or Hiring.

[8] See l. vi. c. 2. §. 8. following, and Mr. *Noodt*'s excellent Treatiſe, *De Uſufructu*, in the 1ſt. Tome of his Works.

And

And this may be ordained and appointed, either by the ſtanding Laws of any Government, or by the occaſional Sentence of the Judge; as when a Thing held before in common, cannot conveniently be divided any other way [1]: Or by the Act of private Men, as by Teſtament [2], or by Compact [3]. Only there is one Caſe which ſeems to require Service by the bare Notion of Nature and Reaſon; and that is, That the Father ſhall have the *Uſe* and *Profits* of all Goods which fall to the Son in his Minority [4]. It is evident that *Uſe* and *Profits* can be appointed properly in thoſe Things alone which afford ſome outward Uſe of themſelves diſtinct from their Subſtances, or which are not conſumed by being enjoyed; provided they are really capable of yielding any Service, Ornament, or Delight. But there can be no proper room for the like Tenure in Things which are no way ſerviceable; but in being ſpent: Inaſmuch as the very Body and Subſtance, and, conſequently, the Propriety of any Thing, is preſumed to belong to him, who hath a *Right* to waſte or conſume it at his Pleaſure. Yet it is a Rule in the *Civil Law*, That Money and other conſumable Things may be turned by *Will* [5] into this kind of Tenure, and be given in Legacy; in which Caſe the Money or Things are ſo made over to the Legatee, as to be his own; but under this neceſſary Condition, That he give Security to the Heir to reſtore the like Sum, and the like Things, or the Value of the Things, when the Term of his Grant is expired. So that the Security here given to the Proprietor doth, as it were, ſupply the Place of the real Subſtance.

He that holds *the Uſe and Profits* of a Thing hath a *Right* to claim all the Advantages proceeding from it, as well natural as civil [6]. Yet the *Roman* Laws excepted [7] the Iſſue of a Maid-ſervant; probably on this Reaſon, That the Deſign of granting another the Uſe of our Servants reſpected their Work only, and not their Off-ſpring. As for the other *natural Fruits*, they become the *Tenants of Uſe and Profit*, by taking or gathering them; [8] that is, when he hath ſeparated them from the Body or Subſtance, and laid them by themſelves. Whence it follows, that the Fruits or Profits, if not yet ſeparated, belong to the Proprietor; and in Caſe the *Tenant for Uſe and Profit* dies before he hath gathered them, they cannot be challenged by his Heir: Though, if it appear that any Pains were ſpent, or any Induſtry imployed [9], in bringing the Fruits to Perfection, it will then be equitable to admit the Heir

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[1] *Conſtituitur adhuc uſusfructus, & in judicio familiæ erciſcundæ, & communi dividundo, ſi judex alii proprietatem adjudicaverit, alii uſumfructum*, Digeſt. l. vii. t. 1. *De uſufructu, &c.* l. vi. §. 1.

[2] *Uſusfructus pluribus modis conſtituitur, ut ecce ſi legatus fuerit, ſed & proprietas deducto uſufructu legari poteſt, ut apud hæredem maneat uſusfructus*, ibid. princ. *Item alii uſumfructum, alii deducto eo fundum legare poteſt*, Inſtit. l. ii. tit. i. §. 1. As a Teſtator may bequeath a Property, and leave an Uſufruct, either to an Uſufructuary, or to his Heir, or any other Legatee, ſo, alſo, he may make a Reſerve of his Uſufruct in a Portion, in a Gift among Survivors, in a Sale, Exchange, Tranſaction, or any other Affair of like Nature. *Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſumfructum ejus retinuerit*, &c. *Cod.* l. viii. t. 54. *De Donationibus*, leg. 28. See, concerning this whole Matter, Mr. *Domat*'s Civil Laws in their natural Order, Part. I. l. i. t. 11.

[3] *Et ſine teſtamento autem, ſi quis velit uſumfructum conſtituere, pactionibus & ſtipulationibus id efficere poteſt*, Digeſt. l. vii. t. 1. leg. 3. *princip.*

[4] As an Houſe, Land, a Slave, a Beaſt, *&c.* But Wine, Oil, Corn, Money, *&c.* are not capable of Uſufruit. *Conſtituitur autem uſusfructus non tantum in fundo & ædibus, verum etiam in ſervis & jumentis, & cæteris rebus, exceptis iis, quæ uſu conſumuntur. Nam hæ res, neque naturali ratione, neque civili recipiunt uſumfructum; quo in numero ſunt vinum, oleum, frumentum, veſtimenta, quibus proxima eſt pecunia numerata. Namque ipſo uſu aſſidua permutatione quodammodo extinguitur*, Inſtit. l. ii. t. 4. §. 2. *Trebonianus* very improperly reckons, among theſe, Clothes, as *Cujacius* has obſerved, for they are not conſumed by the firſt Uſe. See Mr. *Noodt*'s *Probab. Juris*, l. ii. c. 4. and Mr. *Thomaſius*'s Diſcourſe, *De Pretio affect.* c. 1. §. 18. Medals, and ſuch Pieces of Money as are not current, but are collected for their Antiquity, are capable of Uſufruct, as appears by the following Law, which Mr. *Noodt* explains learnedly after his Manner in his Obſervations, l. i. c. 5. *Nomiſmatum aureorum vel argenteorum veterum, quibus pro gemmis uti ſolent, uſusfructus legari poteſt*, Digeſt. l. vii. tit. 1. leg. 28. We may ſay the ſame Things of Pictures and Statues. *Statuæ & imaginis uſumfructum poſſe relinqui magis eſt, quia & ipſæ habent aliquam utilitatem, ſi quo loco opportuno ponantur*, Ibid. leg. 41 The Antient Lawyers were not agreed upon this Queſtion, Whether we can have the Uſufruct of a Thing incorporeal, or ſuch as belong to ſimple Right, as a Permiſſion to paſs through another Man's Ground, or to carry Water through it, *&c.* See the *Probabilia Juris* of Mr. *Noodt*, lib. ii. cap. 3. And his Treatiſe *De Uſufructu*, lib. i. cap. 22. As for myſelf I am of Opinion, that if we conſider the Thing in itſelf, without any of the Subtilties of the *Roman* Lawyers, there is no Difficulty in it, and we may, without ſcruple, affirm it: For theſe Sort of Rights are capable of Eſtimation, and do not periſh in the uſing. Nor is it neceſſary that the Ground of an Uſufruct ſhould be a ſenſible Thing, and really exiſt any where but in the Mind. It is ſufficient, that it is a Thing that belongs to any one, and from whence we may receive ſome Advantage, without its ceaſing to exiſt. So, alſo, Debts owing may be reputed a real, good, and a true Fund.

[5] *Quaſi uſusfructus*, it is an Expreſſion of the *Roman* Law, *ſed utilitatis cauſa ſenatus cenſuit, poſſe etiam earum rerum uſumfructum conſtitui, ut tamen eo nomine hæredi utiliter caveatur. Itaque ſi pecuniæ uſusfructus legatus ſit, ita datur legatario, ut ejus fiat, & legatarius ſatisdet hæredi de tanta pecunia reſtituenda, ſi morietur, aut capite minuetur. Cæteræ quoque res ita traduntur legatario, ut ejus fiant, ſed æſtimatis his ſatisdatur, ut——tanta pecunia reſtituatur, quanti hæ fuerint æſtimatæ. Ergo ſenatus non fecit quidem earum rerum uſumfructum (nec enim poterit) ſed per cautionem quaſi uſumfructum conſtituit*, Inſtit. l. ii. tit. 4. §. 2. See the Title of the *Digeſts*, which treats, *De uſufructu earum rerum quæ uſu conſumuntur vel minuuntur*, l. vii. t. 5.

[6] *Uſufructu legato, omnis fructus rei ad fructuarium pertinet*, Digeſt. l. vii. tit. 1. *De uſufructu, & quemad. quis utatur, fruatur*, leg. 7. *prin.* where we may find all the Particulars at length in the reſt of this Law and the next. The Uſufructuary for Example may open Mines, Quarries, Beds of Chalk, Coal, *&c.* which are found in the Ground, of which he has the Profit, although the Proprietor himſelf knows nothing of them, provided nevertheleſs that he do no Damage to the Corn, Trees, Vines, and in a Word, all Things uſed in Huſbandry, to which the Owner of the Ground has deſigned it. See Mr. *Noodt*'s Obſervations, l. i. c. 9. This able Lawyer in the following Chapter of the ſame Work examines how, and by Virtue of what, the Uſufructuary of the Ground, where there is Game, may appropriate the Profit and Revenue to himſelf. We may read all this in the Original, and withal the Reflection which Mr. *Bernard* makes thereon in his Extract of the News of the Republick of Letters, *April* 1706. p. 430, 431.

[7] See the Notes on c. 7. §. 4. aforegoing.

[8] *Is vero ad quem uſusfructus fundi pertinet, non aliter fructuum dominus efficitur, quam ſi ipſe eos perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis, deceſſerit, ad hæredes ejus non pertinent, ſed domino proprietatis acquiruntur. Eadem fiet, & de colono dicuntur*, Inſtit. l. ii. tit. 1. *De rerum diviſione*, &c. §. 36.

[9] This is no Point of the *Roman* Law; but the *Saxon* Law follows a Maxim ſo juſt, requiring that, in this laſt Caſe, all the Fruits ſhould belong to the Heir. See *Balth. Wernher*'s *Element. Jur. Nat. & Gent.* chap. xiv. §. 42. The Reaſon why the *Roman* Lawyers took from the Heir of the Uſufructuary the Profits not yet received, was that, when a Teſtator, for Inſtance, left to one Man the Uſufruit of an Eſtate, and the Property of it to another, the Fruits which were then arrived at Maturity, belonged to the Uſufructuary, who had contributed nothing to their Production, and not to the Proprietor. So the Advantage which accrued, in this Caſe, to the Uſufructuary, attoned for the Loſs of his Expences, in cultivating the Land, in the other Caſe. See *Digeſt.* lib. vii. tit. 1. *De Uſufruct.* leg. xxvii. and lib. xxii. tit. 1. *De Uſuris*, leg. xxv. §. 1. The Queſtion is to know, if they have reaſon to eſtabliſh this Obligation to make Compenſation.

to a Participation of them; ſo far, at leaſt, as to compenſate the Pains of the Deceaſed, and to hinder him from labouring in vain. *Civil Fruits* belong to the *Tenant for Uſe and Profit*, till the Time is lapſed, [1] for which the Grant was firſt made.

Farther, As he who holds a Thing in this Manner, ought to uſe it like an honeſt Man [2], or as becomes a good Huſband, and ſo apply it to that particular kind of Advantage, which either the Nature of the Thing, or the Will of the Proprietor requires; ſo is he, likewiſe, bound to guard, maintain, and keep it ſafe, and whole [3]; as, alſo, to pay Taxes [4], Dues, and other Burthens, ordinary and extraordinary, at leaſt ſuch as do not exceed the main Profits. For all theſe Troubles, as well as that of Culture and Improvement, neceſſarily fall on him who deſires to reap the Benefit and Gain: Nor is it preſumed that any Perſon would lay ſo grievous a Hardſhip on himſelf, as not only to grant another the Profits of his Goods or Eſtate, but, likewiſe, to reſerve the Burthens to be diſcharged at his own Expence.

This Way of holding is ſaid to expire at the Deceaſe of the Tenant [5]; becauſe, commonly ſpeaking, at the firſt making ſuch a Grant, the Merit of the Party was conſidered, which cannot deſcend to others. And inaſmuch as it is a great Burthen upon a Man to have the Fruits of his Property paſs ſtill into other Hands, therefore the Words in theſe Grants are to be interpreted in the ſtreighteſt Manner; ſo that if the Form ran thus, *to him and his Heirs*, it ſhall not be extended to the Heirs in a ſecond Deſcent [6]; ſince the Property of a Thing for ever excluded from the Uſe [7], is utterly inſignicant: In which Senſe we are to take *Cicero*'s Definition, *Id cujuſque proprium eſt, quo quiſque fruitur atque utitur: That's truly the Property of every Man, which he uſeth and enjoys.* Hence, if a Legacy only for *the Uſe and Profits* was left to a publick Community, which, in other Reſpects, may be perpetual, yet the *Roman* Laws ordered [8], *That the Grant ſhould expire at the End of a hundred Years:* As it muſt ceaſe before, if the State or City be diſſolved or razed by the Violence of an Enemy [9]. From the ſame Grounds it follows, that a Tenure of this kind cannot be alienated [10]; becauſe, at that rate, the Proprietor's Claim might be for ever ſhifted off, and

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[1] For Example, if a Rent commence at the Beginning of the Year, and the Uſufructuary die in *October*, the Heirs ſhall have the Produce of the Rent for that Time, and the reſt to *January* following ſhall return to the Proprietor. See Digeſt. l. vii. tit. 1. leg. 26, and 58. *princip.*

[2] *Cavere autem debet uſufructuarius viri boni arbitratu perceptum iri uſumfructum, hoc eſt, non deteriorem ſe cauſam uſusfructus facturum, cæteraque facturum, quæ in re ſua faceret,* Digeſt. l. vii. tit. 9. *uſufructuarius quemadmodum caveat,* leg. 1. §. 3. *Debet enim omne quod diligens paterfamilias in ſua domo facit & ipſe facere.* Ibid. tit. 1. *De uſufructu,* &c. leg. 65. *mancipiorum quoque uſusfructus legato non debet abuti, ſed ſecundum conditionem eorum uti,* Ibid. leg. 15. §. 1. So that the Uſufructuary may neither ſurvey the Ground, nor impoveriſh it, nor change what the Proprietor hath deſigned for his bare Diverſion, though it be to augment his Revenue. For Example, he may not cut up the Trees which are planted in a Walk to make himſelf a Garden, or ſow it with Corn. *Et ſi forte voluptare fuit prædium, viridaria, vel geſtiones, vel deambulationes arboribus infructuoſis opacas, atque, amœnas habens, non debebit dejicere, ut forte hortos olitorios faciat, vel aliud quid, quod ad reditum ſpectat,* Ibid. leg. 13. §. 4. There are ſeveral Laws with this Title that may be conſulted.

[3] *Eum, ad quem uſusfructus pertinet, ſarta tecta ſuis ſumptibus præſtare debere, explorati juris eſt, Cod.* l. iii. tit. 33. *De uſufruct. & habit. & miniſterio ſerv.* leg. 7. This extends to the leaſt Reparations, and other neceſſary Expences to improve and preſerve the Goods they have the Profit of. For if a Part of a Houſe, for Example, tumble down without the Fault of the Uſufructuary, he ſhall not be obliged to rebuild it. *Si quæ vetuſtate corruerunt, reficere non cogitur, modica igitur refectio ad eum pertineat, quoniam & alia onera agnoſcit, uſufructu legato,* &c. Digeſt. l. vii. t. 1. leg. 7. §. 2. See §. following of the ſame Law.

[4] *Ut puta ſtipendium, vel tributum, vel ſalarium, vel alimenta ab ea re relicta.* See, alſo, Law 27. §. 3. and Lib. xxxiii. tit. 2. *De uſu & uſufr.* &c. leg. 28.

[5] *Morte quoque amitti uſumfructum, non recipit dubitationem; cum jus fruendi morte extinguatur, ſicuti ſi quid aliud quod perſonæ cohæret,* Digeſt. l. vii. t. 4. *Quibus modis uſusfructus vel uſus amittitur,* leg. 3. §. 3. This hath Place even when the Uſufructuary dies before the Time his Uſufruct expires, or before the Accompliſhment of the Condition, which ſhould put an End to it. See *Cod.* l iii. t. 33. *De uſufr. & habit.* &c. leg. 12. For the Reaſon why a certain or uncertain Time is fixed, is only, that the Uſufructuary, if he lives beyond it, may not preſerve his Right; ſo that if he dies before, the general Rule holds in its full Force as to him. Farther, our Author ought not to have forgotten another Way by which his Uſufruct may be loſt; and that is, when the Time of its Continuance is at an End, or when a certain Condition is accompliſhed.

[6] This is proved commonly by this Law of the *Code*, l. iii. t. 33. *Sancimus & hujuſmodi legatum firmum eſſe [ſi quis fundum, vel aliam rem cuidam teſtamento relinqueret, quatenus uſusfructus apud hæredem maneret] & talem uſumfructum una cum hærede finiri, & illo moriente, vel aliis legitimis modis eum amittente, exſpirare,* leg. 14. But it is evident, as others have obſerved, that he treats there of the Heir of a Teſtator, and not of the Heir of an Uſufructuary. See *Vinnius* upon the *Inſtitutes*, l. ii. t. 4. §. 3, and Mr. *Titius* upon *Lauterbach. Obſerv.* 225. But above all the Treatiſe of Mr. *Noodt*, ſo often cited, lib ii. cap. 5. Indeed it was no way neceſſary to have any expreſs Law upon this Subject; for this Point is a neceſſary Conſequence of the Nature of Uſufruit itſelf

[7] This is the Reaſon which the *Inſtitutes* give, to ſhew how many Ways the Right of an Uſufruct may be extinguiſhed. *Ne tamen in univerſum inutiles eſſent proprietates, ſemper abſcedente uſufructu, placuit certis modis extingui uſumfructum, & ad proprietatem reverti,* l. ii. t. 4. §. 1.

[8] They regarded this Term as that to which the longeſt Life of Man can extend. *Et placuit centum annis tuendos eſſe in uſufructu municipes, quia is finis vitæ longævi hominis eſt,* Digeſt. *De uſufructu,* &c. l. vii. t. 1. leg. 56. See alſo l. xxxiii. t. 2. *De uſu & uſufructu,* &c. leg. 8.

[9] The Law does not ſpeak at all of an Enemy; it only ſays, If the Plough had paſſed upon the City, &c. (*i. e.*) if it be deſtroyed any manner of Way, which may happen by the Order of the Sovereign for the Puniſhment of the Inhabitants. *Si uſusfructus civitati legetur, & aratrum in eam inducatur. Civitas eſſe deſinit; ut paſſa eſt Carthago, ideoque quaſi morte deſinit habere uſumfructum,* Digeſt. l. vii. t. 4. *Quibus modus uſusfr. vel uſus amittitur,* leg. 21. The Sacking of a City is expreſſed here with an Alluſion to a Cuſtom of which *Horace* ſpeaks, l. i. Ode 16.

..... Imprimeretque muris
Hoſtile aratrum exercitus inſolens.

Th' inſulting Army brought unto the Wall
The Hoſtile Plough to ſhake it till it fall.

See the Notes of *Dion. Gothofred.* upon the Law itſelf, of which he treats. And Mr. *Noodt, de uſufructu,* lib. ii. cap. 10.

[10] *i. e.* The Uſufruct being a Right purely perſonal, it cannot be transferred to a Third; ſo that he acquires and enjoys it in his own Name, as if he held it immediately of the Proprietor. But this does not hinder but that the Uſufructuary may not only let it out to farm, but reſign, ſell, or give the Enjoyment of it to a Third. All the Difference is, that the Third Perſon ſhall enjoy it no longer than the Uſufructuary would have it himſelf, and not as long as he would, if he had had the proper and immediate Uſufruct. *Uſufructuarius vel ipſe frui ea re vel alii fruendam concedere, vel locare, vel vendere poteſt; nam & qui locat, utitur, & qui vendit, utitur. Sed & ſi alii precario concedat vel donet, puto eum uti, atque ideo retineri uſumfructum,* Digeſt. l. vii. t. 1. leg. 12. § 2. Whence it appears, that when the Uſufructuary diſpoſeth of the Enjoyment of the Goods, of which he has the Uſufruct, according to his Mind, it is the ſame as if he enjoyed it himſelf; and in this Caſe the Right of the Uſufruct remains always in the Uſufructuary, though he has transferred the Enjoyment of the Fruits to a Third, as the Expreſſion of the *Roman* Lawyers implies, *Ut ipſum quidem jus remaneat penes maritum [qui poſt divortium reddere teneretur uſumfructum fundi dotis nomine acceptum] preceptio vero fructuum ad mulierem pertineat,* Digeſt. l. xxiii. t. 3. *De Jure Dotium,* leg. 66. This Law is a Matter

of

and the Thing might pass to one whom he would look upon as an Intruder into his Rights and Possessions. A Grant of *Use and Profits* was, likewise, according to the *Roman* Laws, made extinct by the two higher Degrees of the *Capitis diminutio*, or Disfranchisement of a Citizen [1]. For as they were unwilling to let this Burthen lie on the Proprietor, after the Party, in whose Favour it was at first appointed, could receive no Benefit from it; so they judged it, by no Means, convenient, that a Person, who had forfeited the Privilege of a free Subject, should be still capable of holding such a Right over the Goods of those who were true and lawful Members of the State.

To proceed; this Right, by Virtue of some publick Law, or of some private Covenant, may, in a certain Period of Time, [2] be lost by Disuse (which alters many Things for the worse) or by using it in a different Manner from the Rules prescribed [3]; or by impairing the Thing, either through designed Wickedness, or gross Neglect. The Right is, likewise, extinct, if the Thing happen to perish [4]; nor doth it revive, though the Thing be renewed or repaired; by Reason of that strict Interpretation which this Affair demands. For Instance; *If I build a House in the same Place with another which I lost by Fire, it is not judged to be the same as the former.* And indeed, since the Work must have put me to considerable Charges, it would be very hard, if I must raise a Building which, on my Side, will turn to no Account.

Lastly, If either the Proprietor make over his Right to the Tenant [5], or the Tenant resign to him, the *Use and Profit* expires; since a Man cannot receive *Service* from what is his own; or, because this and all other *Services* properly denotes a Right over somewhat that belongs to another. But when a Person useth his own Possession, and receives Advantages from it; this he does by Virtue of his Dominion [6], and wants not a new Title or Commission.

VIII. *Use*, as they term it, is when a Man receives from a Thing belonging to another [7], only the daily and necessary Service, the Substance remaining as before. And this is of less Extent than *Use and Profits*, the Person to whom it is granted being only allowed to take so much Advantage from the Thing, as is sufficient for himself and his Dependents; which Allotment is measured according to his Dignity and Condition [8]. Thus for Instance; *As he, who hath obtained the Use of another's House, may dwell in it with his own Family; so he cannot fairly receive either a Guest of long Continuance* [9], *or an Inmate who shall lodge there without being a Member of the same domestical Society; in Case the* Proprietor *himself dwells, likewise, under the same common Roof*; (but it is otherwise if the Grant runs for the sole *Use* of the entire Tenement) *nor can he, according to the regular Course, transfer the Use to another; it being a Matter of very weighty Consideration, and of great Difference, whom a Man takes to cohabit with him.* As to the Preservation and

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of Dispute among the Interpreters of the *Roman* Law, about which we may consult *Vinnius* on the *Instit.* l. ii. t. 4. §. 3. numb. 4. and Mr. *Titius* on *Lauterb. Obser.* 226. This Law supposes a Disposition of the antient *Roman* Law, according to which, when the Usufructuary had yielded his Right to another Person with certain Formalities of Justice, the Cession was null, and yet the Usufruct returned to the Proprietor. See the Treatise of Mr. *Noodt*, lib. ii. cap. 10.

[1] *Finitur autem ususfructus morte usufructuarii, & duabus capitis diminutionibus, maxima & media*, Instit. l. ii. t. 4. §. 3. See, also, the *Code*, l. iii. t. 33. leg. 16. §. 2. *in fin.* And for *Diminutio capitis*, (i. e.) the Disfranchisement of a Citizen, of which he speaks, see what I have observed above, l. iii. c. 6. §. 3. n. 6.

[2] That is to say, If he neither enjoys himself, nor by any other, the Goods of which he has the Usufruct. This is what is called, *non uti per tempus*, Instit. §. 3. *ut supra*. *Non utitur* (say the Lawyers elsewhere) *usufructuarius, si nec ipse utatur, nec nomine ejus alius*, Digest. l. vii. t. 1. leg. 38. See Note 10. pag. 409. Before *Justinian* the Usufruct of Things Moveable was lost, if they were not used for a Year, and of Things Immoveable in two Years. But that Emperor ordered that the Usufruct of both should not be lost, but by Non-usage for ten Years, if the Usufructuary was in the Place where the Goods were, and Twenty, if he were at a Distance. See *Code*, l. iii. t. 34. *De servitut. & aqua.* leg. 13. And Mr. *Noodt*'s Treatise, lib. ii. cap. 8.

[3] This is not agreeable to the *Roman* Law. For they misunderstood *Justinian*'s Words: *Et non utendo* PER MODUM *& tempus* [finitur Usufructus] INSTIT. *ubi supra*, §. 3. where he speaks only of Non-usage during the Time he has determined it. *Code*, lib. iii. tit. xxxiii. *De usufructu.* Mr. *Noodt* in his Treatise, lib. ii. cap. ix, gives good Proofs of this, and explains the Words in Question, by a Manner of speaking very frequent among the antient Writers; but which, it must be owned, *Trebonian* might have over-passed in Order to avoid all Mistake.

[4] *Rei mutatione interire usumfructum placet. Veluti ususfructus mihi ædium legatus est, ædes corruerunt vel exustæ sunt, sine dubio extinguitur.* In this Case the Usufructuary hath neither Right to the Materials nor Place where the House stood. *Certissimum est* ——— *nec areæ, nec cæmentorum usumfructum deberi*, Digest. l. vii. t. 4. leg. 5. §. 2. See also, leg. 8, 9, 10, 12. 23. *Est enim jus in corpore, quo sublato, & ipsum tolli necesse est*, Instit. l. ii. t 4. *in princ.* But this must be some particular Usufruct, for when we have an universal Usufruct, (*i. e.*) over all the Goods, the Enjoyment of the rest is preserved. *Bonorum autem usufructu legato, areæ* [*ædium incensarum*] *ususfructus peti poterit, quoniam qui bonorum suorum usumfructum legat, non solum eorum quæ in specie sunt, sed & substantiæ omnis usumfructum legare videtur, in substantia autem bonorum etiam area est*, Digest. l. vii. t. 1. *De usufructu, &c.* leg. 34. §. 2. Farther, the Interpreters of the *Roman* Law say, That to know whether the Thing of which we have the Usufruct be destroyed, we must consider whether the Name be changed. See *Vinnius* upon the *Institutes*, l. ii. t. 4. §. 3. n. 5, 6. See the Treatise of Mr. *Noodt*, lib. ii. cap. 11.

[5] *Item finitur ususfructus, si Domino proprietatis ab usufructuario cedatur* ——— *vel contrario, si usufructarius proprietatem rei acquisierit, quæ rei consolidatio appellatur*, Instit. l. ii. t. 4. §. 3.

[6] *Nulli enim res sua servit*, Digest. l. viii. t. 2. *De servitut. præd. urban.* leg. 26. *princip.* See also l. vii. t. 6. *Si ususfructus petetur, &c.* leg. 5. *princip.*

[7] *Minus autem Juris est in usu, quam in usufructu. Nam is qui fundi nudum habet usum, nihil ulterius habere intelligitur, quam ut oleribus, pomis, floribus, fœno, stramentis & lignis ad usum quotidianum utatur.* By the same *Roman* Laws the User can neither sell, hire, or give away his Right. *Nec ulli alii jus quod habet aut locare, aut vendere, aut gratis concedere potest*, Instit. l. ii. t. 5. *De usu & habit.* §. 1. This Right is established, and ceased in the same Manner as the Usufruct. *Iisdem illis modis, quibus ususfructus constituitur, etiam nudus usus constitui solet, iisdemque illis modis finitur, quibus & ususfructus desinit.* ibid. *princip.* See Mr. *Domat*'s Civil Laws in their Natural Order, Part I. l. i. t. 11. Sect. 2.

[8] *Aliquo enim largius cum usuario agendum est pro dignitate ejus, cui relictus est usus*, Dig. l. vii. t. 8. *De usu & habit.* leg. 12. §. 1.

[9] All that our Author says here, about the Use of an House, is not at all agreeable to the *Roman* Law. Therefore the *Roman* Lawyers differed very much upon this Head, not to speak of the Sophistry, with which they perplext the Subject, as well as that of Servitude in general, about which they strove who should be most obscure. See *John De la Coste*, on the Title of the Institutes, *De usu & habitione*, and Mr. *Noodt* upon the same Place. One general Remark may be, also, made upon all the Rights treated of in this Chapter, which is, That the Laws of each State, and the mutual Agreements of Parties, or the Will of him that gives freely, may be diversified a Thousand Ways. So that no Rule can be made which can absolutely and unchangeably agree to all Cases, and we must seriously attend to the particular Circumstances of every Affair to decide at last (according to the Nature of the Thing and Maxims of Equity) what are the Engagements both of him that confers any of these Rights, and of him who receives them.

Reparation

Reparation of the Thing in which any Perſon hath thus obtained a *Uſe*, it ſeems moſt agreeable to Equity, that if ſuch a Uſe be once granted, there remains no farther Fruit or Benefit to the Proprietor, than the *Uſer* ſhall be obliged to keep the Thing ſafe and ſound. If the Profit accruing to both be equal, they ſhall maintain or repair the Thing at joint Charges [1]. But if the *Uſe* be inconſiderable in compariſon with the Profits which the Owner ſtill reſerves to himſelf; in this Caſe it is eaſily preſumed, that he intended not to charge it with any Burthen.

IX. *Dwelling*, in the *Civil Law*, is a *Right* by which a Man receives all the Advantages commonly proceeding from the letting out the Houſes of others [2]. This is of a narrower Compaſs than the *Uſe and Profits* of the ſame Houſes; the latter taking in, likewiſe, the Benefit ariſing from the Reception of Goods, and many the like Cauſes. And yet it is of a wider Extent than the bare *Uſe*; inaſmuch as the Perſon who hath obtained it, may let out the reſpective Buildings to other Tenants, inſtead of inhabiting them himſelf.

X. By the Right *of Servants Works* is received all the Benefit ariſing from the Labour of another's Servant [3]. Which *Right* the *Roman* Laws make more contracted, than the *Uſe and Profits* of the ſame Servant [4]; becauſe he is capable of bringing in Advantage by other Means beſides his Work.

XI. *Real Services*, due to any Perſon on account of ſome Eſtate or Poſſeſſion, are, in general, ſo many Rights, by Virtue of which my Neighbour's Eſtate is charged with yielding ſome certain Advantage to mine. The *Civil Law* divides them into *Services of City-Eſtates* [5], and *Services of Country-Eſtates*. By *Country-Eſtates* are meant Lands, and inferior Buildings, erected only for the Convenience of Agriculture, and Preſervation of Cattle. Under the Term of *City-Eſtates* [6] are comprehended all Buildings deſigned for the Reception of human Inhabitants, for the Exerciſe of Commerce, and the like Uſes, though ſeated at any Diſtance from the City. The Occaſion of eſtabliſhing all theſe Services was generally taken from *Neighbourhood*; a Relation which may juſtly be thought to border very near on that of Friendſhip. For, inaſmuch as it contributed highly both to the Profit and the Pleaſure of Men, that many of them ſhould join their Dwellings and Poſſeſſions, which Convenience could ſcarcely ſubſiſt, ſhould each Perſon go about to exclude another from the Uſe of his Property in every Degree, therefore Neighbours were wont to ſettle it amongſt themſelves, *That no Man ſhould uſe his own Things to all Purpoſes, and in all Reſpects, leſt others ſhould thereby be reduced, as it were, to Hardſhips and Streights; but that each Perſon ſhould allow others ſuch a moderate Uſe of what he himſelf poſſeſſed, as they could not want without great Prejudice to their Affairs* [7]. Vid. D. lib. vii. t. 6. l. 1. §. 1, 2. *D. Si uſusfr. petatur.* & lib. viii. t. 1. l. 15. *D. De Servit.* l. 10. *D. De Servit. Urb. præd.* l. xx. §. 2. l. 31. *d. t.*

Heſiod. Op. & Dier. l. i. ver. 343, &c.

Τὸν δὲ μάλιϛα καλεῖν, ὅϛις σέθεν ἐγγύθι νάιει
Εἰ γάρ τοι καὶ χρῆμ' ἐγχώριον ἄλλο γένηται·
Γείτονες ἀζῶοι ἕκιον, ζώσαντό δε πῶῆοι
Πῆμα κακὸς γείτων, ὅσσον τ' ἀγαθὸς μέγ' ὄνειαρ
Ἐμμορέ τοι τιμῆς, ὅς' ἔμμορε γείτονος ἐσθλῦ.

In *Engliſh* thus;

Call Neighbours firſt, when *Work* is to be done;
Your Kinſmen ſtay to dreſs, undreſs'd your Neighbours run;
Ill Neighbours Heaven for Puniſhments deſign'd,
As good for Bleſſings: If one good you find,
Think you have found a Treaſure——

Socrates (in *Xenophon.* Ἀπομν. Lib. ii. p. 432. *in fin.* Ed. *H. Steph.*) reckons up theſe Advantages of a Neighbour's Service; *To light your Fire when you have Occaſion; to aſſiſt you in any good Office; to be ready at Hand for the affording you his kind Succours, if you happen to fall into any Misfortune*, Add. *Plato de* LL. lib. viii. p. 915. *Edit.* Francof. 1602. On

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[1] *Si domus uſus legatus ſit ſine fructu, communis refectio eſt rei in ſartis tectis, tam hæredis, quam uſuarii. Videamus tamen ne ſi fructum hæres accipiat, ipſe reficere debeat. Si vero talis ſit res, cujus uſus relegatus eſt, ut hæres fructum percipere non poſſit, Legatarius reficere cogendus eſt. Quæ diſtinctio rationem habet*, Digeſt. l. vii. t. 8. leg. 18.

[2] *Sed ſi cui habitatio legata, ſive aliquo modo conſtituta ſit, neque uſus videtur, neque uſusfructus, ſed proprium aliquod jus——non ſolum in ea degere, ſed etiam aliis locare*, Inſtit. l. ii. t. 5. § 5. See, alſo, the *Code*, l. iii. t. 33, *De uſufruct. & habit.* &c. leg. 13. We neither loſe this Right by Non-uſage, or by a civil Death. See the *Digeſts*, l. vii. t. 8. *De uſu & habit.* leg. 10.

[3] *Operis ſervi legatis neque uſus neque uſusfructus in eo legato eſſe videtur*, l. xxxv. t. 2. *Ad legem Falcidiam*, leg. 1. §. 9. This Right is loſt only by the Death of the Slave, and not by the natural or civil Death of him who might ſo diſpoſe of the Slave, nor even by Non-uſage. See *Digeſt.* l. vii. t. 7. *De operis ſervorum*, and l. xxxiii. tit. 2. *De uſu & uſufructu*, &c. leg. 2. With the Commentary of *Cujas*, *Rec. in Dig.* tom. vi. Opp. *Edit. Fabrot.* pag. 1418. & *ſeqq.*

[4] As, for Example, when he gains any Thing by Trading, with what belongs to the Uſufructuary. See *Inſtit.* lib. ii. tit. 9. *Per quas perſonas cuique adquir.* §. 4.

[5] The Law is, *Servitutes ruſticorum prædiorum & urbanorum*, Digeſt. l. viii. tit. 1. *De Servitut.* leg. 1. Some maintain, that this Diſtinction is of no Uſe, becauſe it ſhews no Difference as to the Effects of Right. See Mr. *Thomaſius*'s Diſcourſe, *De ſervit. Stillicidii*, which is the fifteenth among his Diſcourſes at *Leipſick*, §. 14. as, alſo, Mr. *Titius*'s Obſerv. on *Lauterbach.* Compend. Obſerv. 243.

[6] The Words of the Law are, *Urbana prædia omnia ædificia accipimus, non ſolum ea quæ ſunt in oppidis, ſed & ſi forte ſtabula ſunt, vel alia meritoria in villis & in vicis, vel ſi Prætoria voluptati tantum deſervientia, quia urbanum prædium non locus facit, ſed materia*, Digeſt. lib. l. t. 16. *De verbor. ſignificat.* leg. 198. This Law, uſually cited here, does not relate to the Matter of *Servitudes*, but to the Manner in which we muſt underſtand the Words, *Prædia ruſtica vel ſuburbana*, in Oppoſition to that of *Urbana*, as they ſtand in a Conſtitution of the Emperor *Severus*, touching the Alienation which Tutors or Guardians might make of the Effects of their Pupils or Minors. See *Cujas* upon this Law, and in his *Obſervations*, lib. vii. cap. 3. With Regard to *Servitudes* by thoſe which belonged to *Town-Eſtates*, they underſtood thoſe which were attached to the Surface, or the Building; ſo that on Account of theſe, whether ſituated in Town or Country, they had a Right to ſubject their Neighbour to certain Services. And, by *Servitudes* of *Country-Eſtates*, they meant thoſe that were due to the Soil, wherever the Inheritance lay. *Servitutes prædiorum, aliæ in ſolo, aliæ in ſuperficie conſiſtunt.* Digeſt. lib. viii. tit. 1. *De Servit.* leg. 3. *Ædificia urbana quidem Prædia adpellamus: ceterum & ſi in Villâ ædificata ſunt, æquè Servitutes Urbanorum Prædiorum conſtitui poſſunt*, tit. 4. *Communia Prædiorum*, &c. leg. 1. We muſt, however, obſerve, that in Proceſs of Time the Lawyers forgot this Diſtinction, and blended theſe two kinds of Servitude together. This is what Mr. *Noodt* has proved, as much as the Diſorder and Obſcurity of the Fragments left us will permit, ſo that by this Means he has reconciled Things which before appeared inexplicable. See his Commentary, p. 219. & *ſeqq.*

[7] The Rights of Service are not confined to what is abſolutely neceſſary for the Uſe of the Eſtate on which it depends, but they extend, alſo, to whatever is for the Convenience and Pleaſure of the Owner, as much as for his Profit. See Mr. *Noodt*'s *Probab. Juris*, l. i. c. 2. where we may find many curious Obſervations for the underſtanding of ſeveral of the *Roman* Laws about Services.

the other ſide; it is a general Rule to be obſerved in the challenging theſe Services, that they be not carried too far, and that they be uſed with Modeſty, ſo as to cauſe no Trouble or Uneaſineſs to thoſe that live about us.

The particular *Services of City-Eſtates* are reckoned (for the moſt Part) as follows: *The Services of bearing a Burthen* [1], by which any *Neighbour* is bound to let my Houſe reſt upon his Wall or Pillar. The Conſequence of which is, That the Perſon who owes me this Service, ſhall be, likewiſe, engaged to repair the ſaid Wall or Pillar, becauſe, otherwiſe, if the Support ſhould fall, the *Service* comes to nothing. *The Service of letting in a Beam* [2], by which I am allowed to carry on a Rafter or Beam, or any other Piece which joins my Building together, till it enters into my Neighbour's Houſe, and is there faſtened.

The Service of jutting or ſhooting out [3], which impowers me to extend any kind of Building over the Houſe or Ground of another Man, yet ſo as not to make it reſt upon the ſaid Houſe or Ground: As in Balconies, Pent-houſes, and the like. *The Service of raiſing a Building higher* [4], by which we are bound, though to our own Inconvenience, to give another leave, for his Benefit and Advantage, to raiſe his Houſe; which we might otherwiſe forbid, or prevent.

The Service of not raiſing a Building higher [5]; by which a Man, for the Profit and Convenience of the adjoining Tenements, is conſtrained to keep his Houſe low, or not to raiſe it beyond ſuch a fixed Height.

The Service of Lights [6], by which my Neighbour is obliged to admit my Lights, or my Windows for the Conveyance of *Light*.

The Service of not hindering Lights; by Means of which my Neighbour can attempt nothing towards the leſſening or obſcuring the Lights of my Houſe.

The Service of Proſpect; by which my Neighbour is bound to let me look freely into his Eſtate, and cannot deprive me of that Benefit.

The Service of not hindering Proſpect; by which a Man is tied up from doing any Thing in his Eſtate, which might interrupt a free Proſpect on any Side, eſpecially towards any delightful Place.

The Service of receiving Dropping Water [7], denotes an Obligation to ſuffer any ſuch Conveyances to empty themſelves upon our Ground, though to our Burthen and Trouble.

The Service of not receiving Dropping Water, denotes an Obligation not to turn the ſame little Spouts or Gutters, which are already uſeful to our Neighbour, into a new Courſe for our own Advantage.

The Service of receiving the River [8], by which my Neighbour is bound to grant Paſſage to the larger Currents which flow (like a River) through my Houſe in Pipes, or Canals.

The Service of not turning away the River, reſtraining my Neighbour from diverting any ſuch Channel or Stream which iſſues out of his Houſe, ſo as to hinder it from paſſing through my Eſtate, to my great Benefit.

Laſtly, We are to refer to the ſame Head [9], *The Service of imploying Sinks and Kennels*; *of pouring out any Thing upon a Neighbour's Ground*, and whatever there are beſides of the ſame kind.

XII. *The Services of Country-Eſtates* [10]; or which are due to Lands and Hereditaments imployed in Rural Affairs, are commonly reckoned in this Catalogue. *Paſſage*; the Right of a Path for Men to walk through my Neighbour's Ground into mine, for the Benefit of the latter. *Carriage*; the Right of driving Beaſts or Wains. *Road*, or *Way*; the Right of going, walking, driving; as, likewiſe, of carrying, leading, bearing, and drawing any Thing which makes for the Advantage of my Eſtate. *Water-courſe*; the Right of bringing *Water* through my Neighbour's Field, for the Benefit of my own;

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1 *De ſervitute, quæ oneris ferendi cauſa impoſita erit*, &c. Digeſt. l. viii. t. 5. *Si ſervitus vindicetur*, &c. leg. 6. §. 2. *Eum debere columnam reſtituere, quæ onus vicinarum ædium ferebat, cujus eſſent ædes, quæ ſervirent*, l. viii. t. 2. *De ſervit. præd. urban.* leg. 33.

2 *Jus immittendi tigna in parietem vicini.* ibid. leg. 2. See Mr. *Thomaſius*'s Diſcourſe, *De Servit. Stillicidii*, §. 59.

3 *Projiciendi, protegendive*, ibid. *Inter projectum & immiſſum hoc intereſſe, ait Labeo, quod projectum eſſet id quod ita proveheretur, ut nuſquam requieſceret, qualia mæniana & ſuggrundia eſſent; immiſſum autem quod ita fieret, ut aliquo loco requieſceret, veluti tigna, trabes, quæ immitterentur*, lib. i. t. 16. *De verbor. ſignificat.* leg. 242. See l. v. c. 5. §. 4. *infra.* and *Amm. Marcellinus*, l. xxvii. c. 9. *in fine*, quoted alſo by Mr. *Hertius.*

4 *Altius tollendi——aut non extollendi*, l. viii. t. 2. *ut ſupra.* leg. 2. As every one has a Right of Building, as he pleaſes on his own Ground, the Servitude of *Altius tollendi* (by which he has a Right to heighten his Edifice, though it may incommode his Neighbour) ſuppoſes, that, according to the Laws, there was a certain determinate Height which no Perſon was to exceed, though he built upon his own Ground. Now that there was ſuch a Law at *Rome*, has been ſhewn by ſeveral learned Men, among others *Juſtus Lipſius, Magnitud. Rom.* lib. iii. cap. 4. *Briſſon. Select. Antiq. Jur. Civ.* lib. i. cap. 1. See, alſo, *Vinnius* on the *Inſtitutes*, and Mr. *Noodt*'s Commentary on the *Digeſt.* p. 211. Conſequently the Servitude of *Altius non tollendi* conſiſted in the Right of hindering our Neighbour from raiſing his Building as high, as otherwiſe he might lawfully do: For, with Regard to what was under that Height, there was no need of Servitude. See Mr. *Noodt* on the ſame Place.

5 *Luminum ſervitute conſtituta id acquiſitum videtur, ut vicinus lumina noſtra excipiat. Cum autem ſervitus imponitur, ne luminibus officiatur, hoc maxime adepti videmur, ut jus ſit vicino invitis nobis altius ædificare, atque ita minuere lumina noſtrorum ædificiorum*, ibid. leg. 4. Theſe two Servitudes which our Author diſtinguiſhes, as is commonly done, are, according to the *Roman* Laws, one and the ſame Thing. For every Proprietor, as ſuch, may make Windows in his Houſe, which look into his Neighbour's Ground; and it was never yet proved, that there was any Law that forbad it. See Mr. *Noodt*'s Commentary, pag. 211.

6 *Inter ſervitutes, ne luminibus officiatur, & ne perſpectui offendatur, aliud & aliud obſervatur, quod in proſpectu plus quid habet, ne quid ei officiatur ad gratiorem proſpectum & liberum.* ibid. leg. 15. We may here apply the ſame Thing, as has been ſaid in the preceding Note. See Mr. *Noodt ubi ſupra*, pag. 214.

7 *Item ſtillicidium avertendi in tectum, vel aream vicini, aut non avertendi*, ibid. leg. 2. See, alſo, leg. 20. §. 2, 5, 6. See, alſo, Mr. *Thomaſius*'s Diſcourſe on the ſame Subject. And Mr. *Noodt*'s Commentary, pag. 214.

8 *Ut flumen recipiat quis in ædes ſuas vel in aream*, Inſtit. l. ii. t. 3. §. 1. See Mr. *Noodt* in the ſame Place.

9 *Jus cloacæ mittendæ ſervitus eſt*, Digeſt. l. viii. t. 1. leg. 7. This Service is alſo for Country-Dwellings. See t 3. *De ſervit. præd. ruſtic.* leg. 2. *princip.*

10 All this is expreſſed by three different Terms, about the Senſe and Extent of which, the Interpreters are very much divided. *Servitutes ruſticorum prædiorum ſunt hæ:* ITER *eſt jus eundi, ambulandi homini, non etiam jumentum agendi.* ACTUS *eſt jus agendi, vel jumentum, vel vehiculum.* VIA *eſt jus eundi, & agendi, & ambulandi*, Digeſt. l. viii. t. 3. *De ſervit. præd. ruſtic.* leg. 1. See, about this, Mr, *Bynkerſhoek*'s Obſervations, l. iv. c. 7. *Aquæductus eſt jus aquam ducendi per fundum alienum. In ruſticis computanda ſunt aquæ hauſtus, pecoris ad aquam adjuljus, jus paſcendi, calcis coquendæ, arenæ fodiendæ——Etiam ut——pedamenta ad vineam ex vicini prædio ſumantur*, &c. ibid. leg. 3.

whether

whether I uſe this *Water* for the Ground, or for the Beaſts, or only to free my Land from an unneceſſary Burthen and Flood. It is the Nature of theſe *Services*, that they cannot be granted in part [1], being of no Uſe unleſs entire. For, as the *Civil Law* obſerves in one of theſe Inſtances; *A* Road *or* Way *is then wont to be finiſhed, when it reacheth either to a Town, or to ſome high and publick Way, or to a Ferry, or to ſome other Farm of the ſame Lord.* Therefore it would be vain and uſeleſs to obtain a Paſſage only through half another's Ground, if we were not allowed to go farther. *Water-draught*; the Right of fetching *Water* from a Spring, or other Place, for the neceſſary Occaſions of our Ground: Which *Grant* is preſumed to include alſo another [2], of free Paſſage to the Spring, or Well. *Waterage for Cattle*; a Right to drive the Beaſts which feed in our Ground, to drink at our Neighbour's Pool. To the ſame Head belongs *The Right of feeding our Cattle on another's* Paſture: Concerning which Right it hath been obſerved, That the Lord of the Ground, which is charged with this Service, is not hereby hindered from feeding his own Cattle in the ſame Place, provided he do not over-ſtock it, ſo as to intercept the Right of the other Party. And ſo too he, who hath the Right of Paſturage, ought not to bring in diſeaſed or ſcabby Beaſts, which might communicate the Infection to others.

Laſtly, To theſe are added, *The Right of burning Lime, of digging Sand, of cutting Stakes, of felling Wood, and of hewing Stone*; as they turn to the Advantage of Country Eſtates. All which have been by others explained more at large [3].

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[1] *Quia via conſummari ſolet, vel civitate tenus, vel uſque ad viam publicam, vel uſque ad flumen, in quo pontonibus trajiciatur, vel uſque ad proprium aliud ejuſdem Domini prædium*, ibid. leg. 38.

[2] *Qui habet hauſtum, iter quoque habere videtur ad hauriendum*. ibid. leg. 3. §. 3.

[3] See Mr. *Domat*'s Civil Laws in their natural Order, Part I. l. i. t. 12. As to the Right of Fiefs or Fealty (which our Author has omitted) it is the common Opinion, that they are derived from the People of the antient *Germany*. See *Grotius, De Jure Belli & Pacis*, l. i. c. 3. §. 23. and *Paul Hachenberg*'s *Germania Media*, &c. Diſſert. 9. or the Extract in *Bibliothec. Univerſ.* Tom. vi. p. 356, &c. as alſo Mr. *Thomaſius*'s Diſcourſe, intitled, *Selecta capita hiſtoriæ juris feudalis Germanici*, which is among his *Selecta feudalia*, printed at *Hall* in *Saxony* 1708. Yet ſome, among whom is our Author, as we may ſee, l. viii. c. 4. §. 30. following, believe that it had its Original from the *Romans*. See Mr. *Hertius* upon the Place, and his Diſcourſe, *De feudis oblatis*, Sect. i. §. 2. which is in his Tom. ii. of his Comments and Opuſc. Mr. *Thomaſius* himſelf thought formerly, that Fiefs were in uſe among ſeveral People before the *Germans*, though he could not find out the firſt Riſe of them. See his Diſcourſe, *De Origine & Natura Feodi oblati*, which is the twelfth among his Diſputations at *Leipſick*. But be that as it will, there are ſeveral Sorts of Fiefs, of which at this Time we ſhall ſpeak of the moſt common only. A Fief then is a Right of enjoying fully an immoveable or incorporeal Eſtate that belongs to another, to whom we have obliged ourſelves to pay Homage and Fealty with certain Services and Duties upon that Account. This Right paſſes to the Heirs, but moſt commonly to the Males only in a right Line, or the collateral Relations on the Father's Side; for thoſe on the Mother's have no Title. He that grants theſe Lands in Fealty is the Lord, and he that receives them is called his Vaſſal. Where the lineal Heirs capable of Succeſſion are extinct, or the Vaſſal is found guilty of Felony, *i. e.* hath broken the Engagements he was under to his Lord, or neglects certain Forms in his Tenure: Or, laſtly, performs not the Conditions by which he holds his Fief, it then returns to the Lord. We may find the Cuſtoms of Fiefs in the Body of the Civil Law, which Collection was made about the Year 1154. But Mr. *Thomaſius* has publiſhed an Author more antient, *De Beneficiis*, as Fiefs are called, written before the eleventh Century, and has joined with it two fine Diſſertations; the one concerning the Author and Antiquity of that Work; the other of the Uſe of it; and in them proves, that the Author wrote in the tenth Century, and at the Bottom of each Paragraph has made References to parallel Places in the *Speculum Saxonicum & Suevicum*; all which are found in his *Selecta Feudalia* beforementioned. In fine, Multitudes of Authors, all over *Germany*, have publiſhed Treatiſes about the Nature of Fiefs.

CHAP. IX.

Of Transferring of Property in General.

I. *It proceeds from Property, that we may alienate a Thing.*
II. *The Conſent of two Perſons is required in every Alienation.*
III. *Which is to be expreſſed by ſome Signs.*
IV. *An Alienation is made entirely, or upon Conditions.*
V. *Whether Livery be required in every Alienation.*
VI. *Property is either accompanied with, or ſeparated from Poſſeſſion.*
VII. *What, and how manifold Poſſeſſion is.*
VIII. *How Property is gained by bargaining only.*
IX. *True, and feigned Delivery.*

WE are now to conſider the *derivative Ways of Acquiſition*, by which Dominion or Property already eſtabliſhed paſſeth from one to another: Which, before we proceed particularly to examine, it may be convenient to premiſe ſomewhat about the Transferring of Property [1] in general. The Power and Privileges then [2] of alienating our own Poſſeſſions, or of conveying them to others, ariſeth from the Nature of *full Property* [3]: For, ſince this enables a Man to diſpoſe of his own how he pleaſeth, it ſeems the very principal Part of that Ability, that he may, if he thinks convenient, transfer the Thing to another, by which Means he may either procure to himſelf ſomething more ſerviceable, or, at leaſt, may have an Opportunity of obliging a Friend by his own Turn.

II. Now as the Conveyance of Rights and of Things is tranſacted between two Parties, the one

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[1] The Words of the Law are, *Eſt autem alienatio omnis actus per quem Dominium transfertur*. Cod. lib. v. t. 23. *De Fundo Dotali*, leg. 1.

[2] *Nihil enim tam conveniens eſt naturali æquitati*, ſay the *Roman* Lawyers, *quam voluntatem Domini, volentis rem ſuam in alium transferre, ratam haberi* Inſtit. l. ii. t. 1. *De rerum diviſ.* §. 40.

[3] To ſpeak properly, we cannot ſay that the Power of Alienation is the Conſequence of the Right of Property, becauſe it is the Property that is alienated, and one and the ſame Thing cannot be the Cauſe and Matter of an Alienation. The Truth is, the Power of transferring a Man's Goods to another proceeds from the natural Liberty which every one hath to preſerve his Right, or make it over to whom he pleaſes. Whence it comes, that he may alienate not only the Property, but, alſo, all other Rights, unleſs there be ſome Law, Agreement, or ſuch like Act, which reſtrains this Liberty within certain Bounds. *Titius*'s Obſervations, 312. numb. 2.

from

from whom, and the other to whom they paſs [a]; ſo in thoſe Methods of Acquiſition which flow from the Force and Virtue of Property, the Concurrence of two *Wills* is required [1], the Giver's and the Receiver's [b]: For Alienation doth eſpecially denote, that the Thing paſſeth from the Proprietor with his free Conſent, and is not taken from him by meer Violence againſt his Will. Again, To make a Thing change Maſters, it is neceſſary, likewiſe, that the latter agree, as well as the former; it being inconvenient, that a Thing, which, as to its natural Subſtance, exiſts ſeparately from me, ſhould be, as it were, joined and united to me, unleſs I embrace it with my own Conſent and Choice. But in Caſes where the Property is ſaid, of Right, to paſs to Men without their Knowledge, as in [2] Inheritances, there the Law is preſumed to make an Acceptance by way of *Fiction*, in Favour of the Heir. Of which this is an Evidence, that the Heir may refuſe the Inheritance [3]; and unleſs, either in Perſon or by Proxy, he takes actual Poſſeſſion of it, he is not affected by thoſe Obligations which ariſe from it, or are charged upon it.

III. Farther, ſince Alienations ought to be made with the Conſent of both Parties, and ſince it is inconſiſtent with human Society, that bare internal Acts ſhould be allowed a Power of producing Rights to hold valid and effectual with regard to other Men; therefore it is required, on both Sides, as well on the Giver's as on the Receiver's, that they declare their Conſent by ſufficient Signs, that others may be fully aſſured of it: Such as Nods, Geſtures, Words, Writings; to which, in ſome Places, are added ſolemn Profeſſion before a Magiſtrate, publick Regiſtring, and the like [4].

IV. It is evident, moreover, that when a Tranſlation or Alienation hath been perfectly and unconditionally made, the Alienator retains no manner of Right or Title to the Thing which was before his own. Which Conſequence, though it be naturally implied in every Act of this kind, yet it is uſual, in ſolemn Renunciations and Surrendries, expreſly to declare, That neither we ourſelves, nor our Heirs, ſhall hereafter make any Pretenſion or Attempt upon what we have now given up; and that if any ſuch Motion happens, it ſhall be null and void: Becauſe, when we have once made a Thing another's, we cannot, to any Purpoſe, claim the Diſpoſal of it again. Yet frequently, after a Thing hath been alienated, the former Owner reſerves ſome kind of Claim, or a Sort of Chance Right, which, in Caſe of ſome particular Event, now unknown, exerts its Force. And this, either becauſe in the Act of Alienation it was thus expreſly covenanted; as is the Practice in Sales with Liberty of Refuſal [5], in Things alienated under an Exception or Condition [6], and when only a diminutive or imperfect Property is transferred [7], as happens in the Grant of *Feuds*, and of *Copies* and *Leaſes*: Or, becauſe the Alienation includes a tacit Condition, which Condition coming to paſs, the Right of the former Owner to the Thing thus conveyed revives; whence ariſe thoſe ſeveral Actions in Civil Law [8], of *Falſe Debt*; of Things given upon a certain Cauſe [9], which Cauſe did not follow [10]; of the Recovery of ſpouſal Preſents upon not proceeding to Marriage; of Recovery of Dowry upon Divorce or Separation [11].

Vulcan, in *Homer* [c], upon his taking *Venus* in Adultery [12], challengeth the ἕεδνα, the Preſents he made his Father-in-Law, in Proſpect of the Match. It is a Rule in the *Alcoran*, *That if a Suitor put away his Spouſe before Conſummation, ſhe ſhall retain half of what he gave her, unleſs ſhe choſe to throw him back all.*

V. But the chief Point uſually controverted on this Subject is, *Whether or no in the Transferring of* Property *the Law of Nature requires* Delivery? For others have already well obſerved, That *Delivery* cannot rightly be placed amongſt the Ways of *acquiring* [13], ſince it is only an Act intervening in the *Conveyance* of it. *Grotius* [d] is of Opinion, *That, according to the* Law of Nature, Property may *be tranſferred by bare Covenant; and that* Delivery *is only required by a civil or poſitive Ordinance; which, being received by many States, is through Miſtake ſtyled, The* Law of Nations. On the other hand, the Expoſitors of the *Roman* Laws declare, *That the Dominion of Things cannot be transferred by bare Covenants* [14], *though thus much be expreſly intimated in the Tranſaction; but that* Delivery *is ſtill requiſite.* The Reaſon of which Neceſſity they take to be this: *That Dominions firſt took their Riſe from* natural Poſſeſſion, *and that therefore, in paſſing them away, ſuch an Act muſt intervene, by which the* natural Poſſeſſion *of the Thing may be immediately obtained.* Some

[a] Vid. *Grot.* l. ii. c. 6. §. 1, 2. [b] See what has been ſaid upon this in l. iii. c. 6. §. 15. [c] *Odyſſ.* l. viii. v. 18.
[d] Lib. ii. c. 6. §. 1. & c. 8. §. 25. and elſewhere.

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1 So the Law ſpeaks; *In omnibus rebus quæ Dominium transferunt, concurrat oportet affectus ex utraque parte contrahentium, nam ſive ea venditio, ſive donatio, ſive conductio, ſive quælibet alia cauſa contrahendi fuit, niſi animus utriuſque conſentit, perduci ad effectum id quod inchoatur non poteſt.* Digeſt. l. xliv. t. 7. *De obligat. & action.* leg. 55. See l. iii. c. 6. §. 15. above.

2 *Ipſo Jure*, This takes Place, according to the *Roman* Law, when the Heir is a Minor under his Father's Power, upon which Account he is called, *Suus neceſſarius hæres. In ſuis hæredibus additio non eſt neceſſaria: quia ſtatim ipſo jure hæredes exiſtunt.* Digeſt. lib. xxxviii. tit. 16. *De ſuis & legit. hæred.* leg. 14.

3 See the Title of the Digeſts, *De acquirenda vel amittenda hæreditate*, l. xxix. t. 2.

4 Certain Marks or Signs; for Example, when any one among the *Germans* alienated an immoveable Thing, he delivered a Rod, which Action was called *Effeſtucatio*; or he took up ſome Duſt or other Piece of the Soil, and caſt it upon the Folds of the Robes of the Buyer. See Mr. *Hertius*'s Notes upon this Place.

5 See hereafter, in l. v. c. 5. §. 4. 6 See the ſame Place. 7 See what we have ſaid in c. 4. §. 2.

8 *Condictio indebiti*, That is, when we pay, through Miſtake, a Thing we believe due, but which, in reality, was not ſo. See Mr. *Noodt* on the Title of the Digeſt. *De Conditione indebiti.*

9 *Condictio cauſa data, cauſa non ſecuta.* This is when a Thing, which was given upon a Condition, which was not performed, is required. See the Interpreters upon the *Digeſt.* l. xii. t. 4. and Mr. *Noodt*'s *Probab. Juris*, l. iv. c. 4, 5.

10 See, upon this Subject, *Cod.* l. v. t. 1. *De Sponſalibus & Arris ſponſalitiis & proxeneticis*, & t. 3. *De Donationibus ante nuptias, vel propter Nuptias, & Sponſalitiis.*

11 See the Digeſt. l. xxiv. t. 3. *Soluto Matrimonio dos quemadmodum petatur.*

12 This was the Cuſtom in thoſe Times. See Mr. *Le Clerc*'s Notes upon *Gen.* xxxiv. 12. and Mr. *Perizonius*'s upon *Ælian.* Hiſt. l. iv. c. 1. p. 301, 302.

13 It is a Precedent in the *Roman* Law, *Per traditionem quoque jure naturali res nobis acquiruntur*, as the Lawyers ſpeak, *Inſtit.* l. ii. t. 1. *De rerum diviſione*, §. 40. See my Remark upon *Grotius*, lib. ii. cap. 6. §. 1 not. 5.

14 *Traditionibus & uſucaptionibus Dominia rerum, non nudis pactis transferuntur*, Cod. l. iii. *De pactis*, leg. 20. See, alſo, l. vi. t. 1. *De rei vindic.* leg. 50. and the *Code* with the ſame Title, l. iii. t. 32. leg. 15, 20. as alſo l. iv. t. 39. *De hæredit. vel actione vend.* leg 6. have

have further remarked, *That in* originary Acquisitions, *as ſuppoſe in Occupancy, or firſt Seizure, the* Title, *or* Cauſe, *and the Manner of acquiring, fall in with each other.* But that in *derivative Acquiſitions* theſe two are ever diſtinct: *Delivery* and *Acceptance* being the Manner of transferring *Property*, or rather the Acts which occur in transferring it; whilſt *Donation* [1], *Buying*, and *Selling*, *&c.* are the Titles or Cauſes upon which the Conveyance is made. Tho' we have already ſhewn, that bare *Occupancy* is not a ſufficient Title for *Dominion*, but that it muſt, in all Caſes, be grounded on ſome precedent Covenant [2]. Others take a [3] middle Judgment in the Point; and as they deny that *Delivery* is, by the Law of Nature, *neceſſary*, ſo they maintain, that it is however agreeable to *Reaſon*; inaſmuch as I cannot exerciſe *Dominion* over a Thing, unleſs I apply it, as it were, *corporally*, to myſelf; which can be done only by *Delivery* on the one Side, and by *actual Seizure* on the other [4].

VI. In our Judgment, the Matter may be clearly reſolved, by obſerving, that *Dominion* is capable of two different Conſiderations; either as it denotes a bare *moral Quality*, by Virtue of which we underſtand that a Thing belongs to ſome Perſon, and that it ought to be ſubject to his Diſpoſal; or as it implies, farther, ſome Degree of *natural Power*; by which we are enabled to put immediately in Execution any Purpoſe that we have made concerning the ſaid Thing: Or, what amounts to the ſame, *Dominion* is ſometimes conſidered as abſtracted from *Poſſeſſion*, and ſometimes is conceived as united to it; this being, as it were, the final Completion of *Property*; upon the Arrival of which it fully exerts its direct Effects. For the better Illuſtration therefore of the Point, it will not be inconvenient to ſay ſomewhat of Poſſeſſion in general.

VII. By *Poſſeſſion* then we underſtand, not the bare Retention of a Thing; ſuch as a *Keeper* [5], an *Adminiſtrator*, a *Borrower*, or a *Tenant for Uſe and Profit*, have with regard to the Goods of others; but ſuch as carries along with it an Affection and Deſire of having the Thing to one's ſelf [6]. This they divide into [7] *natural* and *civil*: Which Diviſion may again be conſidered in two Reſpects; either as to the outward *Manner* of poſſeſſing or retaining; or as to the inward Form or Eſſence of Poſſeſſion. In the former Senſe we are then ſaid to have natural Poſſeſſion, when, having once taken a Thing, we ſtick to it, not only by the Inclination of our Mind, but by *actual*, and, as it were, *corporal Application*. *Civil* Poſſeſſion may, in this Senſe, be kept in Mind only, when it is loſt as to the Body. Inaſmuch as national Laws, in ſome particular Caſes, ſtill allow the Advantages, which follow Poſſeſſion, to thoſe who have quitted their actual Hold [8], or loſt Things out of their Hands. In the latter Reſpect natural Poſſeſſion is, when we have indeed a Mind and Inclination to keep a Thing as our own, yet without any juſt Perſuaſion of Property, ſuch as might ariſe from a lawful Title. But *civil Poſſeſſion* implies not only a Deſire, but, likewiſe, a reaſonable Ground for that Deſire; which, according to the common and regular Courſe, is always underſtood in national Conſtitutions, when they allow any Favour to Poſſeſſion [a].

Now the proper Subject of *Poſſeſſion* are bodily Subſtances [9], whether with or without Motion: The leſs proper or the analogous Subject are *incorporeal* Things [10], as *Rights*, which we poſſeſs by uſing them, and by the Power of ſo uſing them; as, likewiſe, *Deeds* and *Writings*, upon which an Action may be grounded towards ſome certain Claims. To the conſtituting and compleating the Nature of Poſſeſſion, it is requiſite that the Perſon to be put into Poſſeſſion ſhall, either by himſelf, or by Proxy, [11] corporally take to him the Thing itſelf, or the Badge and Sign of it, or the Inſtrument of Cuſtody, according as the Nature of the Thing permits;

[a] Vid. *Polyb.* l. xii. c. 7.

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[1] *Nunquam nuda traditio transfert Dominium, ſed ita, ſi venditio aut aliqua juſta cauſa præceſſerit, propter quam traditio ſequeretur*, Digeſt. l. xli. t. 1. *De acquir. rerum Dominio*, leg. 31. *in princip.* See *Vinnius* upon the *Inſtitutes*, l. ii. t. 1. §. 40.

[2] I have proved the contrary above, c. 4. §. 4. in the Notes. See alſo Note 5. pag. 416. following: But the Title is here otherwiſe ſufficiently diſtinguiſhed from the Manner of acquiring the Property; for it conſiſts in the Right which every one has to Things which are common, and by Virtue of which he appropriates what he firſt occupies.

[3] This is taken from a Paſſage of *Leſſius*, which we find cited in *Boecler*'s Commentary upon *Grotius*, lib. ii. cap. 6. pag. 205.

[4] See Mr. *Domat*'s Civil Laws in their natural Order, Part I. l. i. t. 2. Sect. 2. §. 10. with the Note.

[5] The Law ſays, *Denique ait ab eo, apud quem depoſita eſt, vel commodata, vel qui conduxerit, vel qui legatorum conſervandorum cauſa, vel dotis, ventriſque nomine, in poſſeſſione eſſet, vel cui damni infecti nomine non cavebatur, quia hi omnes non poſſident, vindicari non poſſe*, Dig. l. vi. t. 1. *De rei vindic.* leg. 9. See l. xli. t. 2. *De acquir. vel amittend. poſſeſſione*, leg. 3. §. 20.

[6] *Et apiſcimur poſſeſſionem corpore & animo, neque per ſe animo, aut per ſe corpore*, Digeſt. l. xli. t. 2. *De acquirend. vel amittend. poſſeſſione*, leg. 3. §. 1. *Is qui pignori accepit, aut qui precario rogavit, non tenetur noxali actione, licet enim juſte poſſideant, non tamen opinione Domini poſſident*, Dig. l. ix. t. 4. *de noxal. actionibus.* leg. 22. §. 1. See *Cujacius*'s *Obſervat.* l. ix. c. 33. Farther, here are ſome great Diſputes (which are for the moſt Part but Brangles about Words) among the *Roman* Lawyers themſelves, but more among their Interpreters, the one fixing one Senſe upon the Word *Poſſeſſion*, and the other another, as well as to the Diviſion of it into *Natural* and *Civil*. See Mr. *Domat*'s Civil Laws in their natural Order, Part I. l. iii. t. 7. and Mr. *Titius*'s Obſervations on *Lauterbach.* 1022, *&c.* as alſo his *Jus Privatum Romano-German.* printed in 1709. l. ii. c. 7, 8. And Mr. *Thomaſius*, *Note in Dig. Tit.* De adquir. vel amit. Poſſeſſ. pag. 311, 312.

[7] *Ut poſſeſſio non ſolum civilis, ſed etiam naturalis intelligatur*, Digeſt. l. xli. t. 5. *Pro hærede, vel pro poſſeſſore*, &c. leg. 2. §. 1.

[8] See above, c. 6. §. 12.

[9] This is a Diſtinction of the *Roman* Law. By Things corporal is underſtood every Thing that is the Object of our Senſes, and may be touched, as the Ground, Man, a Garment, a Piece of Gold or Silver, *&c.* Whereas Things incorporeal are not obvious to our Senſes, and conſiſt only in a certain Right that Men have; ſuch are, an Inheritance, an Obligation, a Pawn, an Uſufruct, a Service, *&c. Corporales hæ ſunt, quæ tangi poſſunt, veluti fundus, homo, veſtis, aurum, argentum, & denique aliæ res innumerabiles. Incorporales autem ſunt, quæ tangi non poſſunt, qualia ſunt ea quæ in jure conſiſtunt, ſicuti hæreditas, uſus, uſusfructus & obligationes quoquo modo contractæ*, Inſtit. l. ii. t. 2. §. 1. 2. *Cicero* in his Topicks calls the firſt, Things that really exiſt; and the other, Things that have no Exiſtence but in our Minds. *Eſſe eo dico* (ſays he) *quæ cerni tangive poſſunt, ut fundum, ædes, parietem, ſtillicidium, manicipium, pecudem, ſupellectilem, penus, & cætera. Non eſſe rurſus ea dico, quæ tangi demonſtrarive non poſſunt, cerni tamen animo & intelligi poſſunt, ut ſi in uſucapionem, ſi tutelam, ſi gentem, ſi agnationem definias, quarum rerum nullum ſubeſt quaſi corpus, eſt tamen quædam conformatio inſignita & impreſſa intelligentia, quam notionem voco*, c. 5. See Mr. *Noodt*'s *Probab. Juris*, l. ii. c. 3. See Mr. *Noodt*'s *De Uſufructu*, lib. ii. cap. 2.

[10] *Ego puto uſum ejus juris pro traditione poſſeſſionis accipiendum eſſe*, Dig. l. viii. t. 1. *De ſervit.* leg. 20.

[11] *Generaliter quiſquis omnino noſtro nomine ſit in poſſeſſione, veluti procurator, hoſpes, amicus; nos poſſidere videmur*, Dig. l. xli. t. 2. *De acquir. vel amitt. poſſeſſione*, leg. 9.

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and, conſequently, that the Thing be after ſuch a a manner ſubjected to his Power, as that he may be able actually to diſpoſe of it. If many Bodies are united and connected to each other, then the *taking* any one Part, with a Deſire of poſſeſſing the whole, is conſtrued for *taking* the whole, ſo far as it lies free and void of Owners. Thus, for Inſtance, *he who would take Poſſeſſion of a Field, or of a Houſe, is not obliged to walk over every Foot of Ground, or to creep into every Garret; but it is enough for him to enter on any Part* [1]. A complex Body made up of particular ſeparate Bodies, as a *Flock*, for Example; if all the Parts are preſent, it is ſuppoſed to be *taken* all by laying hold on any one. But if the Parts are divided as to Place, one Part of the Flock, for Inſtance, in this Field, and another in that [2]; here each Part is to be *taken* by itſelf. *Incorporeal* Things, when they adhere to a *corporeal*, are preſumed to be *taken* together with it. But if they are to be acquired in the Goods of others, then they are *taken* either when we are introduced to a Thing, over which [3], for Inſtance, we deſign to appoint a *Right* or *Service*; or when we exerciſe any Act which flows, as it were, from ſuch a *Right*.

In *negative Rights* [4] it is equivalent to *Poſſeſſions*, if I forbid a Man any Thing, or oppoſe him in his Deſign upon it, and if he reſts ſatisfied after my forbidding or oppoſing him. To proceed; ſuch a Seizure, or the Exerciſe of ſuch an Act is neceſſarily required in the obtaining of every Poſſeſſion: Though it may by *civil Ordinances* be appointed, That the Property of a Thing ſhall otherwiſe by Right paſs to a Man ſo effectually, as that he ſhall bring as ſtrong an Action againſt one who detains the Thing from him, as if he had taken corporal Poſſeſſion of it [a].

Farther; As to the acquiring a Thing by *Occupancy*, it is neceſſary, that the Thing lay free and vacant: So if a Thing is to paſs from another to me, with ſuch Force and Virtue, as that I may be able hereafter actually to diſpoſe of it, it is, likewiſe, neceſſary that he abdicate and diveſt himſelf of the Poſſeſſion, and remove it, as it were, out of his Cuſtody, that I may have Power immediately to ſeize on it. And this is enough to make it properly be ſaid, that a Thing is delivered by another; there being no need that he ſhould directly put it into my very Hands. As I may very well be ſaid to feed a Man, tho' I do not chew his Meat for him, and then thruſt it into his Mouth, but only lay it in ſuch a Place, whence he may conveniently reach it for his Uſe [b].

VIII. Theſe Rules being laid down, it is evident, that *Dominion* conſidered merely as a *moral Quality*, and as it abſtracts from Poſſeſſion [5], may certainly be transferred by bare Covenants; but that as it is underſtood to include, likewiſe, ſome Degree of natural Power, by means of which it may immediately be put in Act, beſides Covenants, *Delivery* is farther required: Which doth not ariſe from the Force of poſitive Law, but from pure natural Reaſon. Nor yet is it neceſſary to affirm, That before *Delivery* the Alienator retains ſome kind of imperfect Dominion; unleſs we would very unartificially aſcribe the Name of Dominion to a bare natural Ability, actually to diſpoſe of a Thing, without a *moral Power* or *Right*.

For after the Covenant is compleated, or after the *Right* is by Covenant transferred on another, the Thing immediately commenceth *his*, and regards purely his Intereſt and Advantage; and the Alienator can lawfully exerciſe no Act about it, but ſuch as tends towards delivering up the Poſſeſſion to the other Party. If, before Delivery, he makes any other Diſpoſal of the ſaid Thing, he doth this only *de facto*, and not *de jure*. And *Delivery* itſelf is not properly the final Act of Dominion, but the Releaſement and Abdication of corporal Cuſtody. For that only is eſteemed an Act of Dominion, which, by Virtue of Dominion, is *freely* performed. But *Delivery* is made not *freely*, but upon Neceſſity, or Obligation. As the Reſignation of a Magiſtrate cannot be ſtiled an Act of his Office, if we conſider that Office as denoting a Power to command others.

But though a Thing can no longer be reckoned my own, when I have made over the full *Right* of it to another Man, yet it is ſomewhat different whether I ſtill corporally detain the ſaid Thing, or whether the other Party hath already got poſſeſſion of it. For in the former caſe he is both unable to apply it preſently to his actual Uſe; and beſides, if I refuſe to deliver it, he muſt compel me to grant him poſſeſſion in a forcible Way. And if Matters ſtand thus, beſides the Inconvenience of wanting the thing in

[a] To which Point belongs what is alledged by *Grotius*, lib. ii. c. 8. §. 25. [b] Vid. lib. xli. t. 2. l. i. §. 21. l. li. Dig. *De acquir. poſſeſſ.*

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[1] *Non utique ita accipiendum eſt, ut qui fundum poſſidere velit, omnes glebas circumambulet, ſed ſufficit quamlibet partem ejus fundi introire, dum mente & cogitatione hac ſit, uti totum fundum uſque ad terminum velit poſſidere*, ibid. leg. 3. §. 1.

[2] This follows from the Principles of the *Roman* Law, upon which our Author reaſons here, nor is it neceſſary to cite upon this Occaſion the Digeſt. *De Uſurp. & Uſucap.* §. 2. as is commonly done. Beſides, the Queſtion there is about a Subtilty of the antient Lawyers, with Regard to *Uſucaption*, or *Perſcription*: For they affirm that a Man muſt not be looked upon to poſſeſs a whole Flock in general, but each Beaſt in particular; ſo that if any ſtolen Animal ſhould be intermixed, the Owner of the Flock ſhould have no Pretenſions to it. But ſince all in general, and each in particular, belong really to him, ſince they compoſe one whole, though made up of ſeparate Parts; when they are aſſembled in the ſame Place, it does not appear any more neceſſary (according to the *Roman* Law) to take them ſingly, than for a Man to count every Clod of Earth which compoſes his Eſtate. As for the reſt, our Author ſeems here to have had in view, as well as upon other Occaſions, the *Syntagma Jur. Civ.* of *George Adam Struvius*. See *Exercitat.* 42. of that Book, Sect. 16.

[3] *Dare enim* (*hæres uſumfructum*) *intelligitur, ſi induxerit in fundum legatarium, eumque patiatur uti, frui*, Digeſt. l. vii. t. 1. *De uſufructu*, &c. leg. 3. *in princip.*

[4] That is to ſay, which conſiſts in hindering a Perſon from doing certain Things. As in Caſe of *Servitudes*, for Example, if we have forbid our Neighbour to build upon his Ground, or to do any other Thing that may incommode us, and he has acquieſced long enough for to plead a Right from his Complaiſance. See the *Syntagma* of *Struvius*, in the Place juſt cited §. 15. and *Exercitat.* 13. §. 36. *& ſeqq.*

[5] It is evident, that in this Queſtion every Body underſtands a moral Power, or Right of diſpoſing of a Thing that appertains to them, and no Man doubts, but, to exerciſe this Right actually, he ought to be in Poſſeſſion of the Thing; ſo that the Diſtinction of our Author is uſeleſs, and he might better attain the Affirmative plainly. Farther, according to the Maxims of the Civil Law, a ſettled Poſſeſſion does not require to preſerve a perpetual Keeping of it, nor is it neceſſary to have the Thing poſſeſſed in our Hands, or under our Eyes. *Licet poſſeſſio nudo animo acquiri non poſſit, tamen ſolo animo retineri poſſit*, *Cod.* l. vii. t. 32. leg. 4. Why then cannot a Property be gained, as it is a Right purely Moral, by a bare Agreement, without taking any Poſſeſſion? See *Balthaſ. Wernher. Elem. Jur. Nat. & Gent.* c. 14. §. 50.

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the mean time, if you live under civil Government, you muſt be at the trouble of making out your Right to the Judge; and if he either through Corruption or Neglect ſhall pronounce a falſe Sentence, you muſt ſit down contented: But if you are in a ſtate of natural Liberty, you muſt try out the Matter by the doubtful Fortune of War.

On this account it is that the *Roman* Laws affirm [1], That thoſe Contracts which treat of the alienating of Things, give only a *Right to the Thing*; as if before Delivery the Perſon were plac'd, as one may ſay, at a diſtance from the Thing, only with a Right of joining it to himſelf hereafter. But that when Dominion hath received its final Completion from corporal Seizure, then a Right is eſtabliſhed *in the Thing*. Yet the Law frequently ſupplies the former Deficiency: As for Inſtance, by reckoning, amongſt the *Rights in a Thing*, the *Right* of Inheritance [2], or that which the Heirs have to the Goods of the Deceaſed, although they have not yet got Poſſeſſion. As for the other Diſtinction of the *Roman* Laws, in granting a [3] *real Action* upon a *Right in a Thing*, and a *perſonal Action* upon a *Right to a Thing*, the Ground of it ſeems to be this, That when a thing once perfectly belongs to me, I have nothing to do but to purſue and take it whereſoever I find it; and there is no new and peculiar Obligation required in the other Party to engage him to deliver it. But a bare Right to a thing preſuppoſeth that the thing is not yet fully united to me, and that the other Party is, by a peculiar Obligation, tied to procure that it ſhall be thus united: therefore I am to urge him, that he would leave the thing, as it were, vacant for me, ſo that I may take it into my own Poſſeſſion.

As to what remains, tho' it be a common Saying, That *a Thing in hand is better than an Action in the Court*; yet 'tis certain, that our Eſtate may be increas'd by a bare *Right* to a thing, and by *perſonal Actions*. As on the contrary, what a Man, by a perfect Obligation, owes to another, he cannot, to any purpoſe, reckon amongſt his Goods and Fortunes, tho' he retains, as yet, the corporal Poſſeſſion of it. Hence he, who poſſeſſeth a thouſand Pounds, and owes a thouſand, hath nothing; and he that owes more than he poſſeſſeth, hath leſs than nothing. For in the Words of the Civil Law, *Id ei abeſſe videtur, in quo eſt obligatus* [a]; *So much ſeems wanting to him, as he is bound to make good.*

IX. We are to obſerve beſides, that *Delivery* is either *true*, or *feigned* and *ſuppoſed*; the latter of which is done *manu brevi* [4], in ſhort, and without Formality, to ſave Time and Trouble. Now this chiefly takes place, when I make over by Grant the Property of my Goods to another, reſerving, for a certain Term [5], the *Uſe* and *Profits* to myſelf.

[a] Lib. iii. t. 5. leg. 28. Dig. *De negot. geſt.*

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[1] *Jus ad rem.* This Diſtinction is not expreſsly found in the Body of the *Roman* Law, as our Author ſuppoſes it, but it is in the Canon Law, which uſes it in treating of the Collation of Benefices. "Jus vero quod ſecundo *AD PRÆBENDAM*, "*NON IN PRÆBENDA*, hujuſmodi competebat, *&c. Decretal.* l. iii. t. 4. *De præbendis & dignit. in* 6. Can. 40. Quarum "gratiarum ratione tunc non erat ad collationem proceſſum, & ſic per conſequens *JUS IN RE* non fuerat ipſis impetrantibus "adquiſitum, *&c.* ibid. t. 7. *De conceſſione præbendæ*, &c. Can. 8. Per ordinationem ſeu diviſionem noſtram prædictam *JUS* "*AD REM* expectantibus, *&c. Extravag. Joan.* 22. t. 4. *De conceſſ. præbend.* c. 1." See Mr. *Thomaſius*'s Diſcourſe, intitled, *Philoſophia Juris de obligat. & action.* c. 2. §. 115. 'Tis the third among his Diſputations at *Leipſick*. So that the Interpreters of the *Roman* Law have borrowed their Diſtinction of *Jus in re* & *ad rem* from the Canon Law, and they apply this Diſtinction to what the antient Lawyers ſay, that no bare Agreements transfer any Property, and therefore a thing muſt be delivered, unleſs there has been a Poſſeſſion for ſome time, as it happens in Preſcription. See the Law quoted above, in the Notes on §. 5. Hence it follows, that when, for Example, a Bargain of Sale is paſſed, no Right is acquired to the thing itſelf (*Jus in re*) but only a Right to oblige the Seller to deliver it to us, that we may take Poſſeſſion of it, and by that means acquire a Right to it. This is what the Interpreters call *Jus ad rem*, as much as to ſay, a Right to have or acquire a thing; whereas, by *Jus in re*, they underſtand the Right which is already acquired to the thing.

[2] But, according to the *Roman* Law, even the Heir has not the civil Poſſeſſion 'till he is corporally ſeized of the Goods belonging to the Inheritance: *Quum heredes inſtituti ſumus, aditâ hereditate, omnia quidem jura ad nos tranſeunt: poſſeſſio tamen, niſi naturaliter comprehenſa, ad nos non pertinet.* Digeſt. Lib. xli. tit. 2. *De adquir. poſſ.* Leg. 23. See, upon this Subject, *Cujas* Op. Tome 8. pag. 307.

[3] A perſonal Action is, when we proſecute at Law a Perſon who is obliged to give or do ſomething on our account, by virtue of a real and particular Obligation that he is under, whether by ſome voluntary Engagement, (*i. e.*) a Promiſe, or by a Contract, or for ſome Crime or Fault, as having ſtolen ſomething from us, or endamaged our Goods, *&c.* And this Obligation is ſo perſonal, that he can't engage himſelf to a third, who is Poſſeſſor by a juſt Title for the thing due to him, till we have actually releaſed him. As for Example, if a Tradeſman, after he has ſold me a Stuff, ſells and delivers it at the ſame time to another, I have no Right to require that this ſecond Buyer ſhould let me have it; but the *Roman* Laws allow me an Action of Warranty againſt the Seller, to indemnify me for the Prejudice he has done me. See *Digeſt.* l. vi. t. 2. *De publiciana in rem actione*, leg. 9. §. 4. and *Code*, l. iv. t. 39. *De hereditate vel actione vendit.* leg. 6. On the contrary, a real Action is, when a Man ſeizes, as we may ſay, upon a thing as fully belonging to him already, ſo that he has a Right to demand it of any one that has it in his Poſſeſſion, and the Defendant is obliged to yield it to him, not by a particular and perſonal Obligation, but by virtue of that general one, by which every one is bound to reſtore the Goods of another. This ſort of Action is called *Vindicatio*, or even a bare *Demand*, whereas a Perſonal Action is uſually ſtiled *Conditio*. "Omnium autem actionum, quibus inter aliquos apud "Judices arbitroſve de quacunque re quæritur, ſumma diviſio in duo genera deducitur, aut enim in rem ſunt, aut in perſonam. "Namq; agit unuſquiſq; aut cum eo qui ei obligatus eſt, vel ex contractu, vel ex maleficio, quo caſu proditæ ſunt actiones in "perſonam, per quas intendit adverſarium ei dare aut facere oportere, & aliis quibuſdam modis. Aut cum eo agit, qui eſt ei "nullo jure obligatus, movet tamen alicui de aliqua re controverſiam, quo caſu proditæ actiones in rem ſunt, veluti ſi rem cor"poralem poſſideat quis, quam Titius ſuam eſſe adfirmet, poſſeſſor autem Dominum ejus ſe eſſe dicat——— Appellamus au"tem in rem quidem actiones, vindicationes, in perſonam vero, conditiones. Inſtit. l. iv. t. 6. §. 1. & 15. In the firſt, *Res, non perſona convenitur*, Digeſt. xlix. t. 14. *De jure fiſci*, leg. 19.

[4] I ſuſpect there is ſome Omiſſion here, either thro' the Negligence of the Printers, or the Inadvertence of the Author, for all the Editions perfectly agree. For, beſides that the Author treats in the Sequel of the Deliverance, *De manu longa*, without telling us, whether it is a *real* or *feign'd* Deliverance, he ſpeaks of it in ſuch a Manner as would incline us to think, he conſiders it as of the laſt kind, ſince he ſays nothing of the former, ſuppoſing it too well known: Beſides all this, I ſay, the Lawyers, from whom he has borrowed this Diſtinction, make the Deliverance *De manu longa* a *feign'd Deliverance*, as well as that effected *Manu brevi*. A *real Deliverance*, according to them, conſiſts in a corporal Act, by which we give the thing, if I may ſo ſay, from Hand to Hand. Thus it is poſſible, that our Author might have wrote, or intended to write: *quæ* [*vel linguâ, vel*] *brevi manu fieri dicitur*. I am the more inclined to believe this, as he ſeems here to have copied *Struvius*, who diſtinguiſhes thus the *feign'd Deliverance*, in his *Syntagma Jur. Civil.* Exercit. xli. §. 57. As for the Reſt, we find the Words *brevi manu* uſed in this Senſe in the *Digeſt*. Lib. xxiii. Tit. iii. *De Jure Dotium*, Leg. xliii. §. 1.

[5] "Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſumfructum ejus retinuerit; etiamſi ſtipulatus non fue"rit, eam continuo tradidiſſe credatur, nec quid amplius requiratur, quo magis videatur facta traditio, *Cod.* l. viii. t. 54. *De Do*nationibus, leg. 28.

and, consequently, that the Thing be after such a a manner subjected to his Power, as that he may be able actually to dispose of it. If many Bodies are united and connected to each other, then the *taking* any one Part, with a Desire of possessing the whole, is construed for *taking* the whole, so far as it lies free and void of Owners. Thus, for Instance, *he who would take Possession of a Field, or of a House, is not obliged to walk over every Foot of Ground, or to creep into every Garret; but it is enough for him to enter on any Part* [1]. A complex Body made up of particular separate Bodies, as a *Flock*, for Example; if all the Parts are present, it is supposed to be *taken* all by laying hold on any one. But if the Parts are divided as to Place, one Part of the Flock, for Instance, in this Field, and another in that [2]; here each Part is to be *taken* by itself. *Incorporeal* Things, when they adhere to a *corporeal*, are presumed to be *taken* together with it. But if they are to be acquired in the Goods of others, then they are *taken* either when we are introduced to a Thing, over which [3], for Instance, we design to appoint a *Right* or *Service*; or when we exercise any Act which flows, as it were, from such a *Right*.

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Farther; As to the acquiring a Thing by *Occupancy*, it is necessary, that the Thing lay free and vacant: So if a Thing is to pass from another to me, with such Force and Virtue, as that I may be able hereafter actually to dispose of it, it is, likewise, necessary that he abdicate and divest himself of the Possession, and remove it, as it were, out of his Custody, that I may have Power immediately to seize on it. And this is enough to make it properly be said, that a Thing is delivered by another; there being no need that he should directly put it into my very Hands. As I may very well be said to feed a Man, tho' I do not chew his Meat for him, and then thrust it into his Mouth, but only lay it in such a Place, whence he may conveniently reach it for his Use [b].

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[b] Vid. lib. xli. t. 2. l. i. §. 21. l. li.

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[1] *Non utique ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet, sed sufficit quamlibet partem ejus fundi introire, dum mente & cogitatione hac fit, uti totum fundum usque ad terminum velit possidere*, ibid. leg. 3. §. 1.

[2] This follows from the Principles of the *Roman* Law, upon which our Author reasons here, nor is it necessary to cite upon this Occasion the Digest. *De Usurp. & Usucap.* §. 2. as is commonly done. Besides, the Question there is about a Subtilty of the antient Lawyers, with Regard to *Usucaption*, or *Perscription*: For they affirm that a Man must not be looked upon to possess a whole Flock in general, but each Beast in particular; so that if any stolen Animal should be intermixed, the Owner of the Flock should have no Pretensions to it. But since all in general, and each in particular, belong really to him, since they compose one whole, though made up of separate Parts; when they are assembled in the same Place, it does not appear any more necessary (according to the *Roman* Law) to take them singly, than for a Man to count every Clod of Earth which composes his Estate. As for the rest, our Author seems here to have had in view, as well as upon other Occasions, the *Syntagma Jur. Civ.* of *George Adam Struvius*. See *Exercitat.* 42. of that Book, Sect. 16.

[3] *Dare enim (hæres usumfructum) intelligitur, si induxerit in fundum legatarium, eumque patiatur uti, frui*, Digest. l. vii. t. 1. *De usufructu*, &c. leg. 3. *in princip.*

[4] That is to say, which consists in hindering a Person from doing certain Things. As in Case of *Servitudes*, for Example, if we have forbid our Neighbour to build upon his Ground, or to do any other Thing that may incommode us, and he has acquiesced long enough for to plead a Right from his Complaisance. See the *Syntagma* of *Struvius*, in the Place just cited §. 15. and *Exercitat.* 13. §. 36. *& seqq.*

[5] It is evident, that in this Question every Body understands a moral Power, or Right of disposing of a Thing that appertains to them, and no Man doubts, but, to exercise this Right actually, he ought to be in Possession of the Thing; so that the Distinction of our Author is useless, and he might better attain the Affirmative plainly. Farther, according to the Maxims of the Civil Law, a settled Possession does not require to preserve a perpetual Keeping of it, nor is it necessary to have the Thing possessed in our Hands, or under our Eyes. *Licet possessio nudo animo acquiri non possit, tamen solo animo retineri possit, Cod.* l. vii. t. 32. leg. 4. Why then cannot a Property be gained, as it is a Right purely Moral, by a bare Agreement, without taking any Possession? See *Balthas. Wernher. Elem. Jur. Nat. & Gent.* c. 14. § 50.

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the mean time, if you live under civil Government, you muſt be at the trouble of making out your Right to the Judge; and if he either through Corruption or Neglect ſhall pronounce a falſe Sentence, you muſt ſit down contented: But if you are in a ſtate of natural Liberty, you muſt try out the Matter by the doubtful Fortune of War.

On this account it is that the *Roman* Laws affirm [1], That thoſe Contracts which treat of the alienating of Things, give only a *Right to the Thing*; as if before Delivery the Perſon were plac'd, as one may ſay, at a diſtance from the Thing, only with a Right of joining it to himſelf hereafter. But that when Dominion hath received its final Completion from corporal Seizure, then a Right is eſtabliſhed *in the Thing*. Yet the Law frequently ſupplies the former Deficiency: As for Inſtance, by reckoning, amongſt the *Rights in a Thing*, the *Right* of Inheritance [2], or that which the Heirs have to the Goods of the Deceaſed, although they have not yet got Poſſeſſion. As for the other Diſtinction of the *Roman* Laws, in granting a [3] *real Action* upon a *Right in a Thing*, and a *perſonal Action* upon a *Right to a Thing*, the Ground of it ſeems to be this, That when a thing once perfectly belongs to me, I have nothing to do but to purſue and take it wherefoever I find it; and there is no new and peculiar Obligation required in the other Party to engage him to deliver it. But a bare Right to a thing preſuppoſeth that the thing is not yet fully united to me, and that the other Party is, by a peculiar Obligation, tied to procure that it ſhall be thus united: therefore I am to urge him, that he would leave the thing, as it were, vacant for me, ſo that I may take it into my own Poſſeſſion.

As to what remains, tho' it be a common Saying, That *a Thing in hand is better than an Action in the Court*; yet 'tis certain, that our Eſtate may be increas'd by a bare *Right* to a thing, and by *perſonal Actions*. As on the contrary, what a Man, by a perfect Obligation, owes to another, he cannot, to any purpoſe, reckon amongſt his Goods and Fortunes, tho' he retains, as yet, the corporal Poſſeſſion of it. Hence he, who poſſeſſeth a thouſand Pounds, and owes a thouſand, hath nothing; and he that owes more than he poſſeſſeth, hath leſs than nothing. For in the Words of the Civil Law, *Id ei abeſſe videtur, in quo eſt obligatus* [a]; *So much ſeems wanting to him, as he is bound to make good.*

IX. We are to obſerve beſides, that *Delivery* is either *true*, or *feigned* and *ſuppoſed*; the latter of which is done *manu brevi* [4], in ſhort, and without Formality, to ſave Time and Trouble. Now this chiefly takes place, when I make over by Grant the Property of my Goods to another, reſerving, for a certain Term [5], the *Uſe* and *Profits* to myſelf.

[1] Lib. iii. t. 5. leg. 28. Dig. *De negot. geſt.*

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[1] *Jus ad rem.* This Diſtinction is not expreſsly found in the Body of the *Roman* Law, as our Author ſuppoſes it, but it is in the Canon Law, which uſes it in treating of the Collation of Benefices. "Jus vero quod ſecundo *AD PRÆBENDAM*, "*NON IN PRÆBENDA*, hujuſmodi competebat, *&c. Decretal.* l. iii. t. 4. *De præbendis & dignit. in* 6. Can. 40. Quarum "gratiarum ratione tunc non erat ad collationem proceſſum, & ſic per conſequens *JUS IN RE* non fuerat ipſis impetrantibus "adquiſitum, *&c.* ibid. t. 7. *De conceſſione præbendæ*, &c. Can. 8. Per ordinationem ſeu diviſionem noſtram prædictam *JUS* "*AD REM* expectantibus, *&c. Extravag. Joan.* 22. t. 4. *De conceſſ. præbend.* c. 1." See Mr. *Thomaſius*'s Diſcourſe, intitled, *Philoſophia Juris de obligat. & action.* c. 2. §. 115. 'Tis the third among his Diſputations at *Leipſick*. So that the Interpreters of the *Roman* Law have borrowed their Diſtinction of *Jus in re & ad rem* from the Canon Law, and they apply this Diſtinction to what the antient Lawyers ſay, that no bare Agreements transfer any Property, and therefore a thing muſt be delivered, unleſs there has been a Poſſeſſion for ſome time, as it happens in Preſcription. See the Law quoted above, in the Notes on §. 5. Hence it follows, that when, for Example, a Bargain of Sale is paſſed, no Right is acquired to the thing itſelf *(Jus in re)* but only a Right to oblige the Seller to deliver it to us, that we may take Poſſeſſion of it, and by that means acquire a Right to it. This is what the Interpreters call *Jus ad rem*, as much as to ſay, a Right to have or acquire a thing; whereas, by *Jus in re*, they underſtand the Right which is already acquired to the thing.

[2] But, according to the *Roman* Law, even the Heir has not the civil Poſſeſſion 'till he is corporally ſeized of the Goods belonging to the Inheritance: *Quum heredes inſtituti ſumus, aditâ hereditate, omnia quidem jura ad nos tranſeunt: poſſeſſio tamen, niſi naturaliter comprehenſa, ad nos non pertinet.* Digeſt. Lib. xli. tit. 2. *De adquir. poſſ.* Leg. 23. See, upon this Subject, *Cujas* Op. Tome 8. pag. 307.

[3] A perſonal Action is, when we proſecute at Law a Perſon who is obliged to give or do ſomething on our account, by virtue of a real and particular Obligation that he is under, whether by ſome voluntary Engagement, (*i. e.*) a Promiſe, or by a Contract, or for ſome Crime or Fault, as having ſtolen ſomething from us, or endamaged our Goods, *&c.* And this Obligation is ſo perſonal, that he can't engage himſelf to a third, who is Poſſeſſor by a juſt Title for the thing due to him, till we have actually releaſed him. As for Example, if a Tradeſman, after he has ſold me a Stuff, ſells and delivers it at the ſame time to another, I have no Right to require that this ſecond Buyer ſhould let me have it; but the *Roman* Laws allow me an Action of Warranty againſt the Seller, to indemnify me for the Prejudice he has done me. See *Digeſt.* l. vi. t. 2. *De publiciana in rem actione*, leg. 9. §. 4. and *Code*, l. iv. t. 39. *De hereditate vel actione vendit.* leg. 6. On the contrary, a real Action is, when a Man ſeizes, as we may ſay, upon a thing as fully belonging to him already, ſo that he has a Right to demand it of any one that has it in his Poſſeſſion, and the Defendant is obliged to yield it to him, not by a particular and perſonal Obligation, but by virtue of that general one, by which every one is bound to reſtore the Goods of another. This ſort of Action is called *Vindicatio*, or even a bare *Demand*, whereas a Perſonal Action is uſually ſtiled *Conditio*. "Omnium autem actionum, quibus inter aliquos apud "Judices arbitroſve de quacunque re quæritur, ſumma diviſio in duo genera deducitur, aut enim in rem ſunt, aut in perſonam. "Namq; agit unuſquiſq; aut cum eo qui ei obligatus eſt, vel ex contractu, vel ex maleficio, quo caſu proditæ ſunt actiones in "perſonam, per quas intendit adverſarium ei dare aut facere oportere, & aliis quibuſdam modis. Aut cum eo agit, qui eſt ei "nullo jure obligatus, movet tamen alicui de aliqua re controverſiam, quo caſu proditæ actiones in rem ſunt, veluti ſi rem cor- "poralem poſſideat quis, quam Titius ſuam eſſe adfirmet, poſſeſſor autem Dominum ejus ſe eſſe dicat——— Appellamus au- "tem in rem quidem actiones, vindicationes, in perſonam vero, conditiones. Inſtit. l. iv. t. 6. §. 1. & 15. In the firſt, *Res, non perſona convenitur*, Digeſt. xlix. t. 14. *De jure fiſci*, leg. 19.

[4] I ſuſpect there is ſome Omiſſion here, either thro' the Negligence of the Printers, or the Inadvertence of the Author, for all the Editions perfectly agree. For, beſides that the Author treats in the Sequel of the Deliverance, *De manu longa*, without telling us, whether it is a *real* or *feign'd* Deliverance, he ſpeaks of it in ſuch a Manner as would incline us to think, he conſiders it as of the laſt kind, ſince he ſays nothing of the former, ſuppoſing it too well known: Beſides all this, I ſay, the Lawyers, from whom he has borrowed this Diſtinction, make the Deliverance *De manu longa* a *feign'd Deliverance*, as well as that effected *Manu brevi*. A *real Deliverance*, according to them, conſiſts in a corporal Act, by which we give the thing, if I may ſo ſay, from Hand to Hand. Thus it is poſſible, that our Author might have wrote, or intended to write: *quæ [vel linguâ, vel] brevi manu fieri dicitur.* I am the more inclined to believe this, as he ſeems here to have copied *Struvius*, who diſtinguiſhes thus the *feign'd Deliverance*, in his *Syntagma Jur. Civil.* Exercit. xli. §. 57. As for the Reſt, we find the Words *brevi manu* uſed in this Senſe in the *Digeſt.* Lib. xxiii. Tit. iii. *De Jure Dotium*, Leg. xliii. §. 1.

[5] "Quiſquis rem aliquam donando, vel in dotem dando, vel vendendo uſumfructum ejus retinuerit; etiamſi ſtipulatus non fue- "rit, eam continuo tradidiſſe credatur, nec quid amplius requiratur, quo magis videatur facta traditio, *Cod.* l. viii. t. 54. *De Donationibus*, leg. 28.

(Tho' in ſome Grants of this kind it is now an uſual Practice for the Donor to deliver the Keys to the other Party, who immediately reſtores them again.) As, likewiſe, when I reſolve that a thing of mine, which another now hath in his Poſſeſſion [1], ſhall, for the future, be his Right and Property: Or when, having firſt lent or ſet out to hire, or given in truſt, a certain thing to you, I afterwards ſell it you [2], or reſign it in way of Profit or Portion. This *feign'd Delivery* is, likewiſe, of uſe between three Perſons by Delegation [3]; as if, for Inſtance, a Man out of Bounty or Debt would give me ſomewhat, and I order him to give it a third Perſon. For that's the ſame as if it had been firſt offer'd to me, and by me deliver'd into the other Party's Hands.

Delivery then is ſaid to be made *manu longa* [4], or by a round-about Way, when a thing is not immediately brought to another Body, but only ſhewn or pointed out at a leſs or a greater Diſtance [5]. For I have, as far as in me lies, deliver'd that, of which I have quitted the Poſſeſſion, and have put another in a Method of obtaining it for himſelf. And to this Head they refer alſo thoſe Caſes, in which any Sign or Inſtrument of Cuſtody (as Keys [6], for Inſtance) is given up. As for the Caſe of throwing or ſcattering Largeſſes among the common People, the Deſign of it is not, that the things thus diſperſed ſhould be look'd on as *derelict*, or forſaken, and ſo be afterwards acquired in the way of [7] *Occupancy*, by the firſt Takers; but ſuch a piece of Bounty is really a Species of *Donation*, reach'd out indefinitely to all the Members of the Crowd; ſo that the thing thus thrown in common is ſuppos'd to be deliver'd, as it were, to the firſt Man in the Multitude that lays Hands on it. Yet *Cæſar* ſpeaks otherwiſe in his Compliment to the Soldiers, upon granting them the Liberty of Plunder:

> ——— *Neque enim donare vocabo,*
> *Quod ſibi quiſque dabit.*
>
> I call it not my Gift what each brave Man
> Shall give himſelf.

Sometimes only Tickets are ſcatter'd, upon producing of which the Bearers receive the Import and Contents of them. Thus *Titus* the Emperor, in ſome of the Shows which he preſented, threw about little round Tablets of Wood, each with ſome kind of Prize inſcribed, as Garments, Gold, Horſes, Oxen, Sheep, and Slaves. Thoſe who had the good Fortune to catch theſe Tables, upon carrying them to the Managers and Stewards, were gratified with the Purport of the Inſcription.

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[1] Si rem meam poſſideas, & eam velim tuam eſſe, fiet tua, quamvis poſſeſſio apud me non fuerit. *Dig.* l. xli. t. 1. *De acquir. rerum Dominio*, leg. 21.

[2] "Interdum etiam ſine traditione, nuda voluntas Domini ſufficit ad rem transferendam. Veluti ſi rem, quam commodavi, aut "locavi tibi, aut apud te depoſui, vendidero tibi; licet enim ex ea cauſa tibi non tradiderim, eo tamen quod patior eam ex cauſa "emptionis apud te eſſe, tuam efficio. *Ibid. leg.* 9. §. 5. Veluti ſi rem quam quis tibi accommodaverit —— poſtea aut vendi- "derit tibi, aut donaverit, aut dotis nomine dederit. *Inſtit.* l. ii. t. 1. *De rerum diviſ.* §. 43.

[3] See Lib. v. c. 11. §. 13. following.

[4] As when a Man tells Money on a Table to any one. "Pecuniam, quam mihi debes, aut aliam rem, ſi in conſpectu meo "ponere te jubeam, efficitur, ut & tu ſtatim libereris, & mea eſſe incipiat. Nam tum quod à nullo corporaliter ejus rei poſſeſſio "detineretur, adquiſita mihi & quodammodo manu longa tradita exiſtimanda eſt." *Dig.* l. xlvi. t. 3. *De ſolutionibus & liberationibus*, leg. 79. See alſo l. xli. t. 2. *De acquir. vel amitt. poſſeſſione*, leg. 1. §. 21. and Mr. *Noodt*'s *Probab. Juris*, Lib. ii. cap. 6. *Num.* 5. *& ſeqq.* where he, alſo, ſhews, that the Preſence of a thing is not always neceſſary by the *Roman* Law, to prove it to be delivered to him on whoſe Account we paid it.

[5] If, for Example, he that ſells me a Field, ſhews me it from the top of my Houſe, declaring at the ſame time that he releaſes it to me, it is as much mine as if I were carried to the Place and ſet my Foot in it. "Aut ſi mihi fundum vicinum mercato "venditur, in mea turre demonſtret, vacuamque ſe poſſeſſionem tradere dicat, non minus poſſidere cœpi, quam ſi pedem finibus "intuliſſem." *Dig.* l. xli. t. 2. *De acquir. vel amitt. poſſeſſ.* leg. 1. §. 21.

[6] "Item ſi quis merces in horreo repoſitas vendiderit, ſimul atque claves horrei tradiderit emptori, transfert proprietatem mer- "cium ad emptorem." *Dig.* xli. t. 1. *De acquir. rerum Dominio*, leg. 9. §. 6. and l. xviii. t. 1. *De contrahend empt.* leg. 74. See alſo the *Code*, l. viii. t. 54. *De donat.* leg. 1.

[7] "Hoc amplius interdum & in incertam perſonam collata voluntas Domini transfert rei proprietatem, ut ecce Prætores & "Conſules, cum miſſilia jactant in vulgus, ignorant, quod eorum quiſque ſit accepturus, & tamen quia volunt, quod quiſque "acceperit, ejus eſſe, ſtatim eum Dominum efficiunt." *Inſtit.* l. ii. t. 1. *De rerum diviſ.* §. 45. *Dig.* l. xli. t. 1. *De acquir. rerum Dominio*, leg. 9. §. 7.

CHAP. X.

Of Wills and Teſtaments.

I. *How many derivative Ways of Acquiſition.*
II. Grotius's *Definition of a Will is examined.*
III. *What is a Will to us.*
IV. *Whether Wills proceeded from the Law of Nature is doubted.*
V. *The Antients diſpoſed of their Goods while they were living.*
VI. *How far Wills proceeded from the Law of Nature, and how far from poſitive Laws?*
VII. *An Inheritance given by Will, wanting due Form, may be enter'd upon, if none oppoſe it.*
VIII. *But the Heir may null that Will, as if his Anceſtor had died inteſtate.*
IX. *Donation in caſe of Death.*

AMONGST the derivative Ways of *Acquiſition*, ſome regard the Chance of Death, and ſome transfer things whilſt both Parties are alive [1]. In both Caſes the things are convey'd from one Perſon to another, either by expreſs Will of the former Proprietor, or by the Appointment of ſome Law interpoſing in the Affair. Varro *De Re Ruſtica*, l. ii. *Somewhat muſt neceſſarily*

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[1] Here is a more exact Diviſion of derivative Acquiſitions: I. In reſpect to the Law, by virtue of which Property is transferr'd, we may divide them into Acquiſitions; 1. *Natural*; 2. *Civil*; 3. *Mixt*. Natural Acquiſitions are ſuch as are conformable to

rily intervene, before what was another's can become mine[1].

II. On account of Death 'tis the common Practice of Mankind to transfer things by *Teſtament*: The Nature and Origin of which Act we ought, with ſome Care, to examine. According to *Grotius*[a] therefore a Teſtament is the *Alienation of a whole Eſtate in caſe of Death, and before that time revocable; in the mean while the Right of Poſſeſſing and of Enjoying being reſerv'd.* Whereas 'tis not altogether certain, whether a *Teſtament* can rightly be call'd an Alienation, in that ſtrict Senſe under which it denotes ſuch an Act, by which a Man makes a thing that was his own become another's. For Alienation, being, in this Senſe, a Transferring of Right from one to another Perſon, conſequently ſuppoſeth the Exiſtence of the two Parties at the time of its Date; ſo that henceforward the thing may be ſaid to be eſtrang'd from him who thus tranſferr'd it. But the Teſtator[2], ſo long as he draws Breath, retains a full and abſolute Right to all his Goods, without the leaſt Diminution. Therefore, whilſt he lives, he cannot properly be ſaid to have alienated any thing: And at the Moment of his Death he loſeth immediately all the Right he held whilſt alive, and is reckoned as no body in civil Conſideration. Therefore an Alienation cannot be ſaid to be made at that time, when, in reſpect of the Party who ſhould alienate, nothing can be call'd his own or another's. Nor is the Difficulty taken off, if we affirm, That the Alienation is indeed made when the *Will* is ſign'd, but depends in the mean while upon the Caſualty of Death, as upon a neceſſary Condition. For in every Act of Alienation two Parties muſt join Conſents; the one from whom, and the other to whom the thing is transferr'd; and theſe Conſents muſt be united by conſpiring, as it were, together at the ſame time. But now nothing happens more frequently, than that a Man ſhall not know himſelf to be Heir 'till the *Will* comes to be opened upon the *Teſtator*'s Deceaſe. And, likewiſe, when the Will is thus open'd, 'tis at the Choice of the Heir appointed, whether he will enter upon the Inheritance, or wave and refuſe it.

Again, Since all the Right of the Heir by *Will* commenceth at the Teſtator's Death; he hath not, before that Moment, any Right which can be ſaid to depend on the Death of the Party as on a Condition. Beſides, when any kind of Alienation is made, though ſuch as may be recall'd, yet it ought to transfer ſuch a Right on the Perſon towards whom it is directed, that it ſhall not be diſannull'd at the bare Pleaſure of the Alienator. For otherwiſe, neither the Alienator can be ſuppoſed to have contracted any Obligation, nor the other Party to have acquired any Right, if the whole Tranſaction amounted to no more, for Example, than this ſlight Promiſe, *You ſhall have, one time or other, ſomewhat which I now poſſeſs, provided you don't diſpleaſe me in the mean while; but then you ſhall have no Right to hinder me from being diſpleas'd at any time when I think fit, or without any manner of Reaſon.* Such an Act as this cannot be ſtiled an Alienation, being a bare Declaration of a Man's preſent Deſign, without any Neceſſity of continuing the ſame Reſolution; which is incapable of producing any Obligation on the one ſide, or any Right on the other[b]. But a Teſtament is really ſuch a Declaration of a Man's Intentions, as doth not confer any Right on the other Party before the Teſtator's Death; ſuch, at leaſt, as may have the effect of full and perfect Right againſt the Claim of the Teſtator himſelf. For, after the Will is drawn up, the Teſtator doth not only retain the moſt abſolute Right of poſſeſſing and enjoying, making over to the Heir only the bare Property; but indeed the Property itſelf is ſtill, without the leaſt Diminution, his own. Of which we have this evident Token, That after all this he may alienate his Goods, or may ſtrike out thoſe who at preſent ſtand Heirs, without any Poſſibility of Redreſs. But now even revocable Alienations ever ſuppoſe ſome Caſualty, or ſome Con-

[a] Lib. ii. c. 6. §. 14. [b] Vid. *ſupra*, l. iii. c. 5. §. 5.

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to the Rules of the Law of Nature only, *i. e.* which depend only upon the mutual Conſent of Parties. Thus we acquire by virtue of all Engagements, where the civil Law leaves every one at their full Liberty. Civil Acquiſitions are ſuch as transfer a Property without the particular Conſent of the Proprietor. The principal Way of acquiring here is the Preſcription, principally with regard to the Time limited for preſcribing; for, as to the Reſt, Preſcription has, alſo, its Foundation in the Law of Nature. See Chap. xii. §. 1. in the Notes following. Mixt Acquiſitions are made by the mutual Conſent of Parties, either expreſs or tacit, but yet in ſuch a Manner, however, that there intervenes ſome Diſpoſition of the civil Laws, which Rules, if they be not conformed to, the Act may be annull'd. Thus we get Things by a Will or Contract, when the Laws of the State preſcribe certain Forms to be uſed in ſuch Sort of Actions. II. Theſe three Sorts of Acquiſitions may be conſider'd either with reſpect to the Time they were made, or in reſpect to the Thing acquired. As to the Thing, they are univerſal or particular, according as we acquire the Goods of a Perſon, in whole, or in part. As to Time, they have place either in caſe of Death, or in time of Life. See Mr. *Titius*'s Obſerv. on *Puffend.* 300, *&c.* The firſt ſort comprehends Wills, and Gifts in caſe of Death, which are treated of in this Chapter. The other comprehends all Agreements and Contracts in which any Alienation is concerned, to which we may alſo refer Donations among the Living, altho' our Author in his *Abridgment of the Duties of a Man and Citizen*, l. i. c. 12. has rank'd them under a different Head, and ſo has not touch'd on them in the Place where he treats of Contracts. But we ſhall ſupply this Defect by a Note, the rather becauſe he has not treated of them in this Work.

[1] *Quod alterius fuit, id, ut fiat meum, neceſſe eſt aliquid intercedere.* Varro De Re Ruſtica, l. ii. c. 1.

[2] See above, §. 4. n. 5. pag 120. All that our Author ſays here proves only, that in a Will the Alienation is neither real, clear, nor irrevocable; but that hinders not, but that the Teſtator's Act may be look'd upon as a kind of imperfect Alienation, and which may become perfect, and give the Heir a true Right, tho' liable to miſs its Effect. So that there is a great Difference between an Alienation by Will, and a bare verbal Declaration of a preſent Deſign to give ſomething, one Time or another, to a certain Perſon. For the Effect of ſuch a Declaration depends always upon the pure Humour of him that made it, and can't take place without a new Act on his Part. Whereas, ſo long as the Teſtator has not revoked his Will, the Right of the Heir continues, whatever Humour he is in; but if the Teſtator having reſolved to change the Diſpoſition he has made of his Goods, but for want of Time does it not, or becauſe he flatters himſelf that he ſhall have Time enough when he comes to die, the Heir and Legatees have acquired a full and irrevocable Right, which they have Power to enjoy. Upon this Principle the *Roman* Law ordains, That a Perſon reſolved to make his Will, but who has not perfected it, ſhall be conſidered as a dying *Abinteſtate*; and that this Will ſhall not be reckon'd as a Codicil, unleſs the Teſtator inſerts ſome Clauſe bearing that this Declaration of his Intentions ſhall paſs for a Codicil, if it cannot hold good as a Will: *Illud quoque pari ratione ſervandum eſt, ut Teſtator, qui decrevit facere Teſtamentum, ſi id adimplere nequiverit, inteſtato videatur eſſe defunctus, nec tranſducere liceat ad fidei-commiſſi interpretationem velut ex Codicillis ultimam voluntatem, niſi ille complexus ſit, ut vim etiam Codicillorum ſcriptura debeat obtinere.* *Cod.* Lib. vi. tit. 36. *De Codicillis*, leg. 8. §. 1.

dition under which they are to be revers'd, and which doth not depend merely on the Alienator's Pleaſure or Humour.

III. We ſhall expreſs the Nature of a Teſtament more plainly, and more agreeably to the Senſe of the *Roman* Lawyers, if we call it, *A Declaration* [1] *of our Will touching the Succeſſors to our Goods, after our Deceaſe, yet ſuch as is mutable and revocable at our Pleaſure, whilſt we live, and which creates a Right in others to take Place only, when we are gone.* Concerning which Mutability the Law of general Kindneſs commands thus much, *That no Man, unleſs on Account of his Demerit, be wheedled and cajol'd with falſe Hope* [2], *or be ridiculed and expoſed.* Whence, tho' we can hardly diſapprove of what *Pliny* reports of *Domitius Tullus*, who had chous'd ſome hungry Raſcals in the wicked Tribe of the *Hæredipetæ*; *Others on the contrary*, ſays he [a], *commended this Humour; in that he fruſtrated the evil Hopes of ſuch Men, whom, conſidering the Practice of the Age* [3], *it is a Part of Prudence thus to deceive* [b]: yet *Valerius Maximus* [c] had good Reaſon to cenſure *Q. Cæcilius* and *T. Barrulus*, of whom the former put a Trick of this kind on *L. Lucullus*, the latter on *Lentulus Spinther*, their greateſt Friends and Benefactors.

IV. Whether theſe Teſtaments owe their Original to natural or to poſitive Law, is diſputed amongſt the Learned. The Meaning of which Queſtion is not, Whether a Man be obliged by the Law of Nature to make a Will (for that certainly is in every Man's Choice, unleſs ſo far as it proves neceſſary to prevent Quarrels amongſt his [d] Relations) but whether, after Property hath been introduc'd, it neceſſarily follows from the Nature of that Eſtabliſhment, that a Man may effectually diſpoſe of his Goods by Will, or whether this Power is granted to Proprietors by poſitive Conſtitution? *Grotius*'s Judgment [e] in the Caſe is, *That a* Teſtament, *as many other Acts, may indeed receive a particular Form from civil Ordinances; yet the Eſſence and Subſtance of it is nearly allied to Property, and upon Suppoſition of Property, belongs to the Law of Nature.* Or, that the Power of diſpoſing effectually of what we poſſeſs, is deriv'd from the Law of Nations [4], which the *Civilians* term *Jus Primarium*, the firſt or principal Law; but the Reſtraint which lies upon us to diſpoſe of them, only after ſuch a certain manner, is owing to civil Appointment. In regard to which Aſſertion, 'tis not improbable, but that ſome Scruple may ariſe [5]. For ſince the Things, over which Property was firſt eſtabliſhed, are

[a] Lib. viii. Epiſt. 18. [b] Add *Lucian* in Dialog. *Simyl. & Polyſtrat.* Tom. i. p. 275. Edit. *Amſt.* [c] Lib. vii. c. 8. §. 5. 8. [d] Comp. *Iſa.* xxxviii. 1. [e] Lib. ii. c. 6. § 14.

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[1] Their Words are, *Teſtamentum eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri velit*, Dig. l. xxviii. t. 1. *Qui teſtamenta facere poſſunt*, &c. leg. 1. *Ambulatoria enim eſt voluntas defuncti uſque ad vitæ ſupremum exitum*, l. xxxiv. t. 4. *De adimendis vel transferendis legatis*, &c. leg. 4.

[2] Hear what the Oracle of *Gaſcoigne* (which is the Title that the Abbot of St. *Real* in his Preface to *Cicero*'s Epiſtle to *Atticus* gives *Montague*) ſays, "I now ſee 'tis time loſt to beſtow much Pains in Sollicitations; one Word ill conſtrued blots our "the Merit of Ten Years. Happy is he that can hit the Time, pleaſe their Humour at the laſt Gaſp! The neareſt Action pleaſes "moſt; not the beſt or moſt frequent good Offices, but the freſheſt and moſt preſent do the Work. Theſe Men manage their "Wills as Apples or Rods, to encourage or correct every Action of their Dependents. 'Tis a thing of too much Attendance "and Weight to be thus hurried every Moment, and againſt which wiſe Men reſolved once for all, reſpecting, above all, Rea"ſon and publick Obſervation. Eſſay, l. ii. c. 8. p. 284, 285." See, alſo, a fine Paſſage in Mr. *de la Bruyere*'s Characters, in the Chapter about certain Uſages, printed at *Bruſſels* in 1697. The Character begins thus; "It is true, there are a ſort of Men "whoſe laſt Will nothing can determine but Death, becauſe ſo long as they live they were never reſolved nor quiet, *&c.*

[3] The Latin is, *Alii contra hoc ipſum laudibus ferunt, quod* [*Domitius Tullus, cum ſe captandum præbuiſſet*] *ſit fruſtratus improbas ſpes hominum, quos ſic decipere pro moribus temporum prudentia eſt.* See, alſo, what is ſaid above, l. iii. c. 5. §. 5. n. 7. pag. 268. As to ſuch Men in general, and the Effects, which the Succeſs of their Addreſſes in hunting after a rich Succeſſion may have, according to the *Roman* Law, the Reader may conſult and examine two curious Diſcourſes of Mr. *Thomaſius*; the one intitled, *De Jure in juſto Hæredipetarum*, publiſh'd at *Hall* in *Saxony* in 1695, and the other, *De Captatoriis Inſtitutionibus*, in 1696, and reprinted in 1703. As alſo that of the illuſtrious M. *De Bynkerſhoek* under this laſt Title, in his *Opuſcula Varii Argumenti*, publiſhed in 1719.

[4] The Diſtinction of the Law of Nations into primæval and ſecondary was not made by the *Roman* Lawyers, but their Interpreters. Moreover, the Power of making Wills ought to be referred to that Law of Nations which they call ſecondary, and not to the primæval, which is nothing elſe, according to them, but the Law of Nature taken in the Senſe which I have elſewhere explained it, l. ii. c. 3. §. 2.

[5] Our Author in my Opinion makes a Difficulty where there is none. I am miſtaken if his falſe Notion about the Original of Property, which we have above confuted, hath not made him without Reaſon reject *Grotius*'s Judgment, and multiply Beings without Neceſſity. Another Author, whom I have ſeen ſince my firſt Edition of this Work, infers, That the Power of making Wills is only from civil Law; and this he does from a Principle worſe grounded in my Judgment, as I have ſhewn above, c. vi. §. 1. n. 1. I ſhall now only ſpeak of this Poſition of his, That the Right of Property ends and is extinct with Poſſeſſion itſelf. See Mr. *Bynkerſhoek*'s Obſervation, l. ii. c. 2. Theſe Syſtems being then confuted, 'twill be eaſy to invert the Conſequence. I aſſert then, That the Settlement of Property being neither founded on any Agreement, nor limited by the time of Poſſeſſion, but depending only (as we have ſhewn) upon this, That every one has ſeized for ever a certain reaſonable Portion of the Goods of this World, which naturally belong no more to one than another, it follows from thence, that when a Man hath appropriated to himſelf any thing after that manner, no other Perſon can pretend to it, unleſs he abandons it anew to the firſt Occupant, or transfers it to ſome other in particular; but has he only a Right to diſpoſe of his Goods during his Life, and has he not, alſo, a Power of leaving them to whom he pleaſes at his Death? Certainly I cannot ſee why this ſhould not be a Conſequent of the Right of Property. Suppoſe Men were immortal, ſhould not a Proprietor eternally preſerve the Right he has once gotten? The Neceſſity of Dying, to which all Men are ſubject, will permit them to enjoy their Goods but a few Years, and then it is but natural to make up the Loſs, and perpetuate, as far as they can, their Right of Property after their Death, by declaring to whom they will have it paſs; and ſo the Heir taking the place of the Dead, and repreſenting him in ſome manner, no other can pretend to his Goods any more than if he had poſſeſſed them himſelf. In the *Code* 'tis laid down as an uncontroverted Maxim, That Men can deſire nothing more reaſonable, than to have a liberty to diſpoſe of their Goods at their Death. *Nihil eſt enim quod magis hominibus debeatur, quam ut ſupremæ voluntatis, poſtquam jam aliud velle non poſſunt, liber ſit ſtilus, & licitum, quod iterum non redit, arbitrium*, l. i. t. 2. *De Sacroſanctis Eccleſiis*, leg. 1. See the Paſſage of *Quinctilian* quoted below, §. 5. n. 1. pag. 423. All the World agree, That Men, while they live, may transfer, as it were from Hand to Hand, to others, either abſolutely, or upon certain Conditions, the Right of Property which they have to a thing; and why then may they not do the ſame at their Death, and in a manner revocable or irrevocable? I can't ſee the great Difference there is between theſe two things, eſpecially if we conſider the Donations in caſe of Death, of which this Author treats at the End of the Chapter, and which without doubt purely belong to the Civil Law. Further, the Goods which Men ordinarily leave at their Death being uſually either the ſole Fruits of the Induſtry of the Proprietor, or things which are cultivated and improved by his Care and Labour, would it not be unjuſt to have them abandoned after his Death to the firſt Occupier; ſo that he can't have the Satisfaction before his Death of thinking that he ſhall leave them to ſuch Perſons as he loves? It is true, that (as Mr. *Bynkerſhoek*

are deſigned only to ſerve the Uſes of Men in this Life, and ſince the Dead loſe all their Title to worldly Poſſeſſions, it ſeemed not altogether ſo needful, that Property ſhould contain in it a Power of ordering what ſhould become of a Man's Goods after his Deceaſe. But it might have been ſufficient to have allowed every Perſon the Command of his Goods during Life, diſabling him to extend it farther, and to have left to the Care of the Living the Management of what belonged to the Dead, who are no longer Members of human Society.

Farther, ſince Death removes Men from all Concerns below, it ſeemed that the Diſpoſals and Declarations made in their Life-time might be afterwards neglected with Impunity.

Id cinerem & manes credis curare ſepultos [a] ?

Think you cold Duſt and Shadows feel ſuch Cares ?

[a] *Vid. Virgil.* Æn. iv. 34.

An Evidence of this ſeems to be, that the moſt antient Men we read of in Story, were wont to engage their Friends by Oaths to fulfil their laſt Commands, as if no human Bonds were ſtrong enough to oblige them in this Caſe. See *Gen.* xxiv. 2, 3. xlvii. 29. *Diodor. Sic.* l. ii. p. 119. Ed. *Rhodom.* c. 33. ſpeaking of *Parſodes*'s Death.

Thus too in *Sophocles* (*Trachin.* 1192, *&c.*) *Hercules* requires an Oath from *Hillus*, for the Performance of his laſt Commands.

So *Conſtantinus Ducas* obliged his Wife *Eudocia* by Oath never to enter on a ſecond Marriage after his Deceaſe. Yet by what Stratagem ſhe recovered her Writing from the *Patriarch*, who had the keeping of it; and how, as if ſhe had hereby been releaſed from her Engagement, is very ſtrange, ſhe married *Diogenes*, as we read in *Zonar.* Tom. iii. in *Eudocia*, and in *Michael Glyc.* Ann. Tom. iv.

ſhoek ſays) the Earth was appointed for the Service of Men in all Ages, and that all Generations, that ſucceed each other, ought to have a Proviſion for themſelves by their Labour and Induſtry. But it does not follow from thence (by the natural Law) that, when a Perſon dies, "his Goods remain to him who poſſeſſed them in common with him, or to the firſt Occupant." For it is ſufficient that at his Death he leaves his Effects to ſome Body, as he muſt neceſſarily do, no Man being able to carry any Thing away with him to the Grave; and there are in the World beſides Things enough which belong to the firſt Occupant, if we will take the Pains to find them out. Mr. *de Bynkerſhoek* himſelf acknowledges, that if every Man's Goods after his Death were left to the Pillage of others, it would cauſe infinite Diſorders; and therefore, to prevent this, the civil Laws have regulated Succeſſions and allowed Wills. This Reaſon ought not to have leſs Force between thoſe who live in the Independence of the State of Nature, or, rather, it is there more neceſſary to authorize theſe two Kinds of Succeſſion, becauſe there is more Danger, in that Caſe, that the Effects of a Perſon ſhould become a Prey after his Death. We ſhould then more frequently ſee Children, or other Perſons, for whom the Deceaſed was naturally obliged to provide, deprived of what he deſigned them, and which he had gained by his own Diligence. Farther, it is not neceſſary that they, to whom we diſpoſe our Goods, ſhould know and accept, when we are alive, what we intend to bequeath them at our Death. Our Author maintains, that in reality the Will of him who transfers his Right, and the Will of him to whom it is transferred, ought always to be united in a mutual Conſent at the ſame time; but in this he doth not agree with himſelf, for he acknowledges above, l. iii. c. 9. §. 4, That a Gift is valid, though the Donor be dead before it is accepted by the Legatee, if he who ought to declare it be only a bare Reporter of the Will of the Third. Becauſe the dead Perſons have nothing to do with the Things of this World, it doth not follow that they never had, while they were yet alive, a Right to order the Diſpoſal of their Goods after their Death, but only they are not in a Condition to make it of Force themſelves. If the Antients, of whom our Author ſpeaks, made their Relations ſwear to perform the Orders they made when they died, it was to engage them more ſtrictly by the Solemnity of an Oath, and not that they believed no other Reaſon ſufficient to oblige them to fulfil the Will of a Perſon dead. We ſee that in the remoteſt Antiquity, ſuch as were not Members of any civil Society, diſpoſed of their Goods before they died, without Controul. *Abraham*'s Example is remarkable; he had Relations at *Charran* in *Meſopotamia*, and without going far; he had with him in *Canaan*, where he dwelt, his paternal Nephew *Lot*; nevertheleſs, when he thought he ſhould have no Children, he deſigned to exclude all his Relations, and make *Eleazar*, his Steward or chief Slave, his Heir, *Gen.* xv. 2. M. *Polycarp Muller*, Profeſſor of *Leipſic* (in a Diſſertation, intitled, *De Teſtamento licito, ſed non honeſto*, publiſhed in 1718, pag. 24.) wonders how I could take this Declaration of *Abraham*, as relating to his Will. "The *Patriarch* (ſays he) ſpeaks of "what would happen in Caſe he died without Children, and not of what ſhould be done, or what he deſigned to do himſelf." But I would fain know, why *Abraham* ſaid, that *Eleazar* ſhould be his Heir, if not on the Suppoſition that he had appointed him ſuch? Sure the *Patriarch* did not mean that he would leave him his Goods to pillage, or that his Steward would ſeize them after his Death. On the contrary, this Office which *Eleazar* held ſhews plainly, that as *Abraham* had judged this Slave worthy of his Affection, and the Superintendance he had given him over his Houſhold; he intended to reward him by leaving him his Effects, to the Excluſion of his Nephew, though he was near enough to have enjoyed the Succeſſion. As for the reſt, I obſerve with Pleaſure, that the Author in Queſtion approves of the Method I have taken to ſhew that a Power of diſpoſing of our Goods in Caſe of Death, in a Manner, either revocable or irrevocable, reſults from the Right of Property, and, by Conſequence, is founded on the Maxims of the Law of Nature and Nations. So that, if the civil Laws preſcribed certain Limitations and Forms to that Power, it proceeds from the Authority which the Sovereign hath to limit the Right of Property, and to regulate the Uſe that Citizens ought to make of their Goods; as you may ſee, l. viii. c. 5. §. 3. following. In fine, what I have ſaid is ſo true, that our Author himſelf, after an uſeleſs Circle, returns again to the ſame Point, ſince in the following Chapter he builds the Succeſſion to a Perſon inteſtate upon the Preſumption of the Will of the dead Perſon. All the Difference is, that, inſtead of making the Power of diſpoſing his Goods at his Death to depend upon the Right of Property, he refers it to a tacit Agreement of the People, by which he ſuppoſes, without Neceſſity, that they entered into a common Covenant to put ſuch a Power in Property, as, according to him, it had not before. This Notion is the more ſatisfactory to me, becauſe Mr. *Buddeus*, in his Diſcourſe, intitled, *De Teſtamentis Summorum Imperantium*, maintains, alſo, againſt the Opinion of our Author, That the Power of making Wills proceeds from natural Law, and not from civil only. He, alſo, there obſerves among other Things, that though the Diſpoſals of the Teſtator cannot be executed without the Conſent of the Heir; yet the want of that Conſent does not deprive the Teſtator of that Right which he naturally has to diſpoſe of his Goods; a Right which hath ſuch a Virtue and Effect, that no Man can lawfully appropriate to himſelf the Goods of a dead Perſon, before he knows whether the Heir will accept the Inheritance deviſed to him, or no. If this be obſerved, the Will of the Dead is fully ſatisfied, becauſe, without Doubt, he intended not to force his Goods upon his Heir againſt his Will. The Heir, alſo, has ſome Right during the Life of the Teſtator, although it is not irrevocable, nor becomes his until the Teſtator is dead, without a Change of Reſolution. They who affirm the contrary, are fallen into this Error for want of diſtinguiſhing well between Acts imperfect and not conſummated, and ſuch as are null and of no Effect. It is certain, that, by natural Law, a Will cannot be entirely fulfilled, until the Heir accepts of the Succeſſion after the Death of the Teſtator, yet it doth not follow that before that it is a vain Act, and of no Force. It is valid ſo far as the Nature of the Thing will permit, and in this, that no other Perſon can claim the Goods of the Deceaſed, until he that is appointed the Heir refuſes to inherit. The reſt of Mr. *Buddeus*'s Diſcourſe is worth the reading. See, alſo, *Nicho. Pragimannus, Juriſp. Natural. Exercit.* vii. §. 50. *& ſeqq.* At preſent I ſhall only obſerve, that Mr. *Thomaſius*, who heretofore forſook the Opinion now oppoſed, is returned to it again; but I cannot find that either in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 10. §. 9. *&c.* nor in his Diſcourſe, *De Origine Succeſſionis Teſtamentariæ*, printed at *Hall* in 1705, he has confuted any of the Reaſons now laid down. I may ſay the ſame Thing of a Refutation, which M. *Trever*, Profeſſor at *Helmſtadt*, has undertaken, in his Notes on the Abridgment of *The Duties of a Man and a Citizen*, lib. i. cap. 12. §. 13. as I could eaſily ſhew, if this Note was not already too long. In a Word, whether it be advantageous to civil Society to leave every one at their Liberty to diſpoſe of their Goods by Will, is a Queſtion of a different Nature, and which our Author himſelf will treat of in the laſt Paragraph of the following Chapter.

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dition under which they are to be revers'd, and which doth not depend merely on the Alienator's Pleaſure or Humour.

III. We ſhall expreſs the Nature of a Teſtament more plainly, and more agreeably to the Senſe of the *Roman* Lawyers, if we call it, *A Declaration*[1] *of our Will touching the Succeſſors to our Goods, after our Deceaſe, yet ſuch as is mutable and revocable at our Pleaſure, whilſt we live, and which creates a Right in others to take Place only, when we are gone.* Concerning which Mutability the Law of general Kindneſs commands thus much, *That no Man, unleſs on Account of his Demerit, be wheedled and cajol'd with falſe Hope*[2], *or be ridiculed and expoſed.* Whence, tho' we can hardly diſapprove of what *Pliny* reports of *Domitius Tullus*, who had chous'd ſome hungry Raſcals in the wicked Tribe of the *Hæredipetæ*; *Others on the contrary*, ſays he[a], *commended this Humour; in that he fruſtrated the evil Hopes of ſuch Men, whom, conſidering the Practice of the Age*[3], *it is a Part of Prudence thus to deceive*[b]: yet *Valerius Maximus*[c] had good Reaſon to cenſure *Q. Cæcilius* and *T. Barrulus*, of whom the former put a Trick of this kind on *L. Lucullus*, the latter on *Lentulus Spinther*, their greateſt Friends and Benefactors.

IV. Whether theſe Teſtaments owe their Original to natural or to poſitive Law, is diſputed amongſt the Learned. The Meaning of which Queſtion is not, Whether a Man be obliged by the Law of Nature to make a Will (for that certainly is in every Man's Choice, unleſs ſo far as it proves neceſſary to prevent Quarrels amongſt his Relations) but whether, after Property hath been introduc'd, it neceſſarily follows from the Nature of that Eſtabliſhment, that a Man may effectually diſpoſe of his Goods by Will, or whether this Power is granted to Proprietors by poſitive Conſtitution? *Grotius*'s Judgment[c] in the Caſe is, *That a* Teſtament, *as many other Acts, may indeed receive a particular Form from civil Ordinances; yet the Eſſence and Subſtance of it is nearly allied to Property, and upon Suppoſition of Property, belongs to the Law of Nature.* Or, that the Power of diſpoſing effectually of what we poſſeſs, is deriv'd from the Law of Nations[4], which the *Civilians* term *Jus Primarium*, the firſt or principal Law; but the Reſtraint which lies upon us to diſpoſe of them, only after ſuch a certain manner, is owing to civil Appointment. In regard to which Aſſertion, 'tis not improbable, but that ſome Scruple may ariſe[5]. For ſince the Things, over which Property was firſt eſtabliſhed, are

[a] Lib. viii. Epiſt. 18. [b] Add *Lucian* in Dialog. *Simyl. & Polyſtrat.* Tom. i. p. 275. Edit. *Amſt.* [c] Lib. vii. c. 8. §. 5. 8. [d] Comp. *Iſa.* xxxviii. 1. [e] Lib. ii. c. 6. § 14.

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[1] Their Words are, *Teſtamentum eſt voluntatis noſtræ juſta ſententia, de eo quod quis poſt mortem ſuam fieri velit*, Dig. l. xxviii. t. 1. *Qui teſtamenta facere poſſunt*, &c. leg. 1. *Ambulatoria enim eſt voluntas defuncti uſque ad vitæ ſupremum exitum*, l. xxxiv. t. 4. *De adimendis vel transferendis legatis*, &c. leg. 4.

[2] Hear what the Oracle of *Gaſcoigne* (which is the Title that the Abbot of St. *Real* in his Preface to *Cicero*'s Epiſtle to *Atticus* gives *Montagne*) ſays, "I now ſee 'tis time loſt to beſtow much Pains in Sollicitations; one Word ill conſtrued blots out "the Merit of Ten Years. Happy is he that can hit the Time, pleaſe their Humour at the laſt Gaſp! The neareſt Action pleaſes "moſt; not the beſt or moſt frequent good Offices, but the freſheſt and moſt preſent do the Work. Theſe Men manage their "Wills as Apples or Rods, to encourage or correct every Action of their Dependents. 'Tis a thing of too much Attendance "and Weight to be thus hurried every Moment, and againſt which wiſe Men reſolved once for all, reſpecting, above all, Rea"ſon and publick Obſervation. Eſſay, l. ii. c. 8. p. 284, 285." See, alſo, a fine Paſſage in Mr. *de la Bruyere*'s Characters, in the Chapter about certain Uſages, printed at *Bruſſels* in 1697. The Character begins thus; "It is true, there are a ſort of Men "whoſe laſt Will nothing can determine but Death, becauſe ſo long as they live they were never reſolved nor quiet, *&c.*

[3] The Latin is, *Alii contra hoc ipſum laudibus ferunt, quod* [*Domitius Tullus, cum ſe captandum præbuiſſet*] *ſit fruſtratus improbos ſpes hominum, quos ſic decipere pro moribus temporum prudentia eſt.* See, alſo, what is ſaid above, l. iii. c. 5. §. 5. n. 7. pag. 268. As to ſuch Men in general, and the Effects, which the Succeſs of their Addreſſes in hunting after a rich Succeſſion may have, according to the *Roman* Law, the Reader may conſult and examine two curious Diſcourſes of Mr. *Thomaſius*; the one intitled, *De Jure in juſto Hæredipetarum*, publiſh'd at *Hall* in *Saxony* in 1695, and the other, *De Captatoriis Inſtitutionibus*, in 1696, and reprinted in 1703. As alſo that of the illuſtrious M. *De Bynkerſhoek* under this laſt Title, in his *Opuſcula Varii Argumenti*, publiſhed in 1719.

[4] The Diſtinction of the Law of Nations into primæval and ſecondary was not made by the *Roman* Lawyers, but their Interpreters. Moreover, the Power of making Wills ought to be referred to that Law of Nations which they call ſecondary, and not to the primæval, which is nothing elſe, according to them, but the Law of Nature taken in the Senſe which I have elſewhere explained it, l. ii. c. 3. §. 2.

[5] Our Author in my Opinion makes a Difficulty where there is none. I am miſtaken if his falſe Notion about the Original of Property, which we have above confuted, hath not made him without Reaſon reject *Grotius*'s Judgment, and multiply Beings without Neceſſity. Another Author, whom I have ſeen ſince my firſt Edition of this Work, infers, That the Power of making Wills is only from civil Law; and this he does from a Principle worſe grounded in my Judgment, as I have ſhewn above, c. vi. §. 1. n. 1. I ſhall now only ſpeak of this Poſition of his, That the Right of Property ends and is extinct with Poſſeſſion itſelf. See Mr. *Bynkerſhoek*'s Obſervation, l. ii. c. 2. Theſe Syſtems being then confuted, 'twill be eaſy to invert the Conſequence. I aſſert then, That the Settlement of Property being neither founded on any Agreement, nor limited by the time of Poſſeſſion, but depending only (as we have ſhewn) upon this, That every one has ſeized for ever a certain reaſonable Portion of the Goods of this World, which naturally belong no more to one than another, it follows from thence, that when a Man hath appropriated to himſelf any thing after that manner, no other Perſon can pretend to it, unleſs he abandons it anew to the firſt Occupant, or transfers it to ſome other in particular; but has he only a Right to diſpoſe of his Goods during his Life, and has he not, alſo, a Power of leaving them to whom he pleaſes at his Death? Certainly I cannot ſee why this ſhould not be a Conſequent of the Right of Property. Suppoſe Men were immortal, ſhould not a Proprietor eternally preſerve the Right he has once gotten? The Neceſſity of Dying, to which all Men are ſubject, will permit them to enjoy their Goods but a few Years, and then it is but natural to make up the Loſs, and perpetuate, as far as they can, their Right of Property after their Death, by declaring to whom they will have it paſs; and ſo the Heir taking the place of the Dead, and repreſenting him in ſome manner, no other can pretend to his Goods any more than if he had poſſeſſed them himſelf. In the *Code* 'tis laid down as an uncontroverted Maxim, That Men can deſire nothing more reaſonable, than to have a liberty to diſpoſe of their Goods at their Death. *Nihil eſt enim quod magis hominibus debeatur, quam ut ſupremæ voluntatis, poſtquam jam aliud velle non poſſunt, liber ſit ſtilus, & licitum, quod iterum non redit, arbitrium*, l. i. t. 2. *De Sacroſanctis Eccleſiis*, leg. 1. See the Paſſage of *Quinctilian* quoted below, §. 5. n. 1. pag. 423. All the World agree, That Men, while they live, may transfer, as it were from Hand to Hand, to others, either abſolutely, or upon certain Conditions, the Right of Property which they have to a thing; and why then may they not do the ſame at their Death, and in a manner revocable or irrevocable? I can't ſee the great Difference there is between theſe two things, eſpecially if we conſider the Donations in caſe of Death, of which this Author treats at the End of the Chapter, and which without doubt purely belong to the Civil Law. Further, the Goods which Men ordinarily leave at their Death being uſually either the ſole Fruits of the Induſtry of the Proprietor, or things which are cultivated and improved by his Care and Labour, would it not be unjuſt to have them abandoned after his Death to the firſt Occupier; ſo that he can't have the Satisfaction before his Death of thinking that he ſhall leave them to ſuch Perſons as he loves? It is true, that (as Mr. *Bynkerſhoek*

are deſigned only to ſerve the Uſes of Men in this Life, and ſince the Dead loſe all their Title to worldly Poſſeſſions, it ſeemed not altogether ſo needful, that Property ſhould contain in it a Power of ordering what ſhould become of a Man's Goods after his Deceaſe. But it might have been ſufficient to have allowed every Perſon the Command of his Goods during Life, diſabling him to extend it farther, and to have left to the Care of the Living the Management of what belonged to the Dead, who are no longer Members of human Society.

Farther, ſince Death removes Men from all Concerns below, it ſeemed that the Diſpoſals and Declarations made in their Life-time might be afterwards neglected with Impunity.

Id cinerem & manes credis curare ſepultos [a] ?
Think you cold Duſt and Shadows feel ſuch Cares ?

[a] Vid. *Virgil. Æn.* iv. 34.

An Evidence of this ſeems to be, that the moſt antient Men we read of in Story, were wont to engage their Friends by Oaths to fulfil their laſt Commands, as if no human Bonds were ſtrong enough to oblige them in this Caſe. See *Gen.* xxiv. 2, 3. xlvii. 29. *Diodor. Sic.* l. ii. p. 119. Ed. *Rhodom.* c. 33. ſpeaking of *Parſodes*'s Death.

Thus too in *Sophocles* (*Trachin.* 1192, *&c.*) *Hercules* requires an Oath from *Hillus*, for the Performance of his laſt Commands.

So *Conſtantinus Ducas* obliged his Wife *Eudocia* by Oath never to enter on a ſecond Marriage after his Deceaſe. Yet by what Stratagem ſhe recovered her Writing from the *Patriarch*, who had the keeping of it; and how, as if ſhe had hereby been releaſed from her Engagement, is very ſtrange, ſhe married *Diogenes*, as we read in *Zonar.* Tom. iii. in *Eudocia*, and in *Michael Glyc.* Ann. Tom. iv.

ſhoek ſays) the Earth was appointed for the Service of Men in all Ages, and that all Generations, that ſucceed each other, ought to have a Proviſion for themſelves by their Labour and Induſtry. But it does not follow from thence (by the natural Law) that, when a Perſon dies, "his Goods remain to him who poſſeſſed them in common with him, or to the firſt Occupant." For it is ſufficient that at his Death he leaves his Effects to ſome Body, as he muſt neceſſarily do, no Man being able to carry any Thing away with him to the Grave; and there are in the World beſides Things enough which belong to the firſt Occupant, if we will take the Pains to find them out. Mr. *de Bynkerſhoek* himſelf acknowledges, that if every Man's Goods after his Death were left to the Pillage of others, it would cauſe infinite Diſorders; and therefore, to prevent this, the civil Laws have regulated Succeſſions and allowed Wills. This Reaſon ought not to have leſs Force between thoſe who live in the Independence of the State of Nature, or, rather, it is there more neceſſary to authorize theſe two Kinds of Succeſſion, becauſe there is more Danger, in that Caſe, that the Effects of a Perſon ſhould become a Prey after his Death. We ſhould then more frequently ſee Children, or other Perſons, for whom the Deceaſed was naturally obliged to provide, deprived of what he deſigned them, and which he had gained by his own Diligence. Farther, it is not neceſſary that they, to whom we diſpoſe our Goods, ſhould know and accept, when we are alive, what we intend to bequeath them at our Death. Our Author maintains, that in reality the Will of him who transfers his Right, and the Will of him to whom it is transferred, ought always to be united in a mutual Conſent at the ſame time; but in this he doth not agree with himſelf, for he acknowledges above, l. iii. c. 9. §. 4, That a Gift is valid, though the Donor be dead before it is accepted by the Legatee, if he who ought to declare it be only a bare Reporter of the Will of the Third. Becauſe the dead Perſons have nothing to do with the Things of this World, it doth not follow that they never had, while they were yet alive, a Right to order the Diſpoſal of their Goods after their Death, but only they are not in a Condition to make it of Force themſelves. If the Antients, of whom our Author ſpeaks, made their Relations ſwear to perform the Orders they made when they died, it was to engage them more ſtrictly by the Solemnity of an Oath, and not that they believed no other Reaſon ſufficient to oblige them to fulfil the Will of a Perſon dead. We ſee that in the remoteſt Antiquity, ſuch as were not Members of any civil Society, diſpoſed of their Goods before they died, without Controul. *Abraham*'s Example is remarkable; he had Relations at *Charran* in *Meſopotamia*, and without going far; he had with him in *Canaan*, where he dwelt, his paternal Nephew *Lot*; nevertheleſs, when he thought he ſhould have no Children, he deſigned to exclude all his Relations, and make *Eleazar*, his Steward or chief Slave, his Heir, *Gen.* xv. 2. M. *Polycarp Muller*, Profeſſor of *Leipſic* (in a Diſſertation, intitled, *De Teſtamento licito, ſed non honeſto*, publiſhed in 1718, pag. 24.) wonders how I could take this Declaration of *Abraham*, as relating to his Will. "The *Patriarch* (ſays he) ſpeaks of "what would happen in Caſe he died without Children, and not of what ſhould be done, or what he deſigned to do himſelf." But I would fain know, why *Abraham* ſaid, that *Eleazar* ſhould be his Heir, if not on the Suppoſition that he had appointed him ſuch? Sure the *Patriarch* did not mean that he would leave him his Goods to pillage, or that his Steward would ſeize them after his Death. On the contrary, this Office which *Eleazar* held ſhews plainly, that as *Abraham* had judged this Slave worthy of his Affection, and the Superintendance he had given him over his Houſhold; he intended to reward him by leaving him his Effects, to the Excluſion of his Nephew, though he was near enough to have enjoyed the Succeſſion. As for the reſt, I obſerve with Pleaſure, that the Author in Queſtion approves of the Method I have taken to ſhew that a Power of diſpoſing of our Goods in Caſe of Death, in a Manner, either revocable or irrevocable, reſults from the Right of Property, and, by Conſequence, is founded on the Maxims of the Law of Nature and Nations. So that, if the civil Laws preſcribed certain Limitations and Forms to that Power, it proceeds from the Authority which the Sovereign hath to limit the Right of Property, and to regulate the Uſe that Citizens ought to make of their Goods; as you may ſee, l. viii. c. 5. §. 3. following. In fine, what I have ſaid is ſo true, that our Author himſelf, after an uſeleſs Circle, returns again to the ſame Point, ſince in the following Chapter he builds the Succeſſion to a Perſon inteſtate upon the Preſumption of the Will of the dead Perſon. All the Difference is, that, inſtead of making the Power of diſpoſing his Goods at his Death to depend upon the Right of Property, he refers it to a tacit Agreement of the People, by which he ſuppoſes, without Neceſſity, that they entered into a common Covenant to put ſuch a Power in Property, as, according to him, it had not before. This Notion is the more ſatisfactory to me, becauſe Mr. *Buddeus*, in his Diſcourſe, intitled, *De Teſtamentis Summorum Imperantium*, maintains, alſo, againſt the Opinion of our Author, That the Power of making Wills proceeds from natural Law, and not from civil only. He, alſo, there obſerves among other Things, that though the Diſpoſals of the Teſtator cannot be executed without the Conſent of the Heir; yet the want of that Conſent does not deprive the Teſtator of that Right which he naturally has to diſpoſe of his Goods; a Right which hath ſuch a Virtue and Effect, that no Man can lawfully appropriate to himſelf the Goods of a dead Perſon, before he knows whether the Heir will accept the Inheritance deviſed to him, or no. If this be obſerved, the Will of the Dead is fully ſatisfied, becauſe, without Doubt, he intended not to force his Goods upon his Heir againſt his Will. The Heir, alſo, has ſome Right during the Life of the Teſtator, although it is not irrevocable, nor becomes his until the Teſtator is dead, without a Change of Reſolution. They who affirm the contrary, are fallen into this Error for want of diſtinguiſhing well between Acts imperfect and not conſummated, and ſuch as are null and of no Effect. It is certain, that, by natural Law, a Will cannot be entirely fulfilled, until the Heir accepts of the Succeſſion after the Death of the Teſtator, yet it doth not follow that before that it is a vain Act, and of no Force. It is valid ſo far as the Nature of the Thing will permit, and in this, that no other Perſon can claim the Goods of the Deceaſed, until he that is appointed the Heir refuſes to inherit. The reſt of Mr. *Buddeus*'s Diſcourſe is worth the reading. See, alſo, *Nicho. Pragimannus, Juriſp. Natural. Exercit.* vii. §. 50. *& ſeqq.* At preſent I ſhall only obſerve, that Mr. *Thomaſius*, who heretofore forſook the Opinion now oppoſed, is returned to it again; but I cannot find that either in his *Fundam. Jur. Nat. & Gent.* l. ii. c. 10. §. 9. *&c.* nor in his Diſcourſe, *De Origine Succeſſionis Teſtamentariæ*, printed at *Hall* in 1705, he has confuted any of the Reaſons now laid down. I may ſay the ſame Thing of a Refutation, which M. *Trever*, Profeſſor at *Helmſtadt*, has undertaken, in his Notes on the Abridgment of *The Duties of a Man and a Citizen*, lib. i. cap. 12. §. 13. as I could eaſily ſhew, if this Note was not already too long. In a Word, whether it be advantageous to civil Society to leave every one at their Liberty to diſpoſe of their Goods by Will, is a Queſtion of a different Nature, and which our Author himſelf will treat of in the laſt Paragraph of the following Chapter.

So

So in *Joſephus* (*Archæolog. Jud.* xvii. 10.) *Herod*'s Commands for ſlaying the chief of the *Jews* are neglected by his Siſter and her Huſband. So;

Juſſerat hæc rapidis aboleri carmina flammis
Virgilius, Phrygium quæ cecinere Ducem.
Tucca vetat, Variuſque ſimul; tu, maxime Cæſar,
Non ſinis.

Virgil thoſe Strains which rais'd the *Trojan*'s Fame,
Dying, bequeath'd to feed th' injurious Flame.
Tucca and *Varius* ſtop the raſh Deſign,
And you, great *Cæſar*, ſave the Glories of your Line.

Dio Caſſius, lib. lix. relating how *Tiberius*'s Will was declared null by *Caligula* and the Senate, adds this Reflection, *That no Counſel or Foreſight can prevail againſt the Ingratitude of Men, and the Power of Poſterity.* To which may be applied that Saying of *Lucan*,

—*Nulla fides rebus poſt terga relictis*, l. ii. v. 628.

In vain we truſt to Things we leave behind.

Therefore it was at the Pleaſure of the Survivors, whether or no a Man's Will ſhould take Effect, even after he was dead. And, conſequently, they were to determine by ſome Agreement amongſt themſelves, how far they ſhould comply with the Deſires of thoſe who had now loſt the common *Rights* of Men. Without ſuch an Appointment any precedent Diſpoſal would have been vain and uſeleſs, which the *Author* could not, and others who would not maintain and put in Execution.

But, on the contrary, it manifeſtly appears, that it was not ſufficient, in order to the Peace of human Society, to introduce ſuch a Property or Dominion of Things, as ſhould turn only to the preſent momentary Uſe; but it was needful to make it ſuch as ſhould hold good hereafter: Man, ſo far as Nature allows, having no leſs a Right to preſerve Life for the future, and to provide Means towards obtaining that End, than for the preſent Moment. To which if we add, That we are enjoined to take a particular Care of thoſe who are allied to us in Blood, whoſe Race we wiſh may continue to an indefinite Extent of Ages, it will, on the whole, appear to have been conducive to the Peace of Mankind, not to make the Force of Property depend on any fixed Period of Time; ſince this would have created no leſs Confuſion and Trouble than the primitive Community: But to aſſign it, as it were, an Indefinite Duration, by means of which it might paſs down and be continued to others. Now as to the preſerving and the continuing this Property, thoſe who live in a ſtate of natural Freedom, appoint Means according to their own Judgment. But in civil Governments, as it is ſupported by the publick Strength, ſo it hath been variouſly tempered and retrenched, as particular Nations have at any time thought it to be for their Intereſt.

As for the Notion invented by the *Author* of the *New Method of Law* [1], I queſtion whether it will meet with the Approbation of ſound Judges. *Teſtaments*, ſays he, *by mere Right*, that is, *without the Confirmation of civil Ordinances, would be of no Force or Weight, unleſs the Soul were immortal; but, becauſe thoſe who are taken out of this World do really ſtill live, therefore they remain Proprietors of their Goods; and thoſe whom they appoint their Heirs are to be looked on as their Stewards and Managers.*

V. But as no one will be forward to maintain, that for a Man to be able to diſpoſe of his Goods at ſuch a time as he is the true Proprietor, and to fix the Effect of his Diſpoſal on a time when he ſhall not be Proprietor, is repugnant to the Law of Nature: So, on the other Hand, it doth by no means appear that this flows by any neceſſary Reaſon from the Eſſence of Property.

Thus much indeed flows from thence, That a Man whilſt alive may confer a Right to his Goods on another living Perſon, which ſhall not be extinct upon the Death of the Collator, being ſtill kept alive in the other Party who ſurvives [2]. For, inaſmuch as the Efficient and the Effect are diſtinct and ſeparate Beings, there's no Neceſſity that the latter ſhould always die with the former. And therefore, as a Man in his Life-time may fully transfer ſomewhat which he poſſeſſeth on another, who ſhall not loſe the Property of it by the Death of him from whom it was received; ſo nothing hinders but that a Man may make over the Property of any thing to ſome Perſon elſe, yet ſo as to reſerve ſtill to himſelf a certain Right over the ſaid thing during his Continuance in this World. Hence in the moſt antient Times we find the Fathers of Families diſpoſing of their Goods at the Approach of Death [3]; (for as to the Paſſage in *Gen.* xv. 3. *Abraham* ſeems not to have already made his Servant's Son his Heir, but only to have thought of making him, in Caſe he happened himſelf to die without Iſſue) yet ſo, as that they themſelves opened and publiſhed their Will to their Children, that theſe, by acquieſcing in it, might ſeem to confirm it by mutual Covenant among themſelves. By this Means the Right immediately paſſed from the living Parents to the living Children; and the latter were admitted preſently, as it were, into Poſſeſſion of the Goods. And it is probable, that thoſe primitive Men, who followed ſo plain and frugal a Way of Life, commonly were not cut off by our ſudden and violent Diſtempers, but decayed leiſurely by the gentle Waſting of the radical Moiſture; ſo that they were Maſters of their Reaſon to the laſt,

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1 This Notion is abſurd, and contrary to what is ſaid, *Eccleſ.* xi. 19. and *Luke* xii. 20. and ſo is juſtly diſapproved by our Author. It is that of a Writer who had compoſed (before the firſt Edition of this Work) a Book, intitled, *Nova Methodus Jurisprudentiæ*. This Author is certainly the celebrated M. *Leibnitz*. I imagined this at firſt from a *Memoir*, inſerted in the *Journal de Trevoux*, *April* 1703. *Art.* 4. But I have ſince ſeen the Book itſelf, printed at *Francfort* on the *Maine* in 1667; with the Initial Letters, by which this great Genius was accuſtomed to deſign his Name, G. G. L L. The Place in Queſtion is the 50th Page of this Work. M. *Muller* in the Diſſertation juſt cited (Note 2.) ſays, That this Opinion is deſtitute of all Appearance of Truth, unleſs we ſuppoſe, with *Plato*, whoſe Ideas M *Leibnitz* often follows, that the Dead know, and are concerned for what paſſes in this Life. See *Plato de Legibus*, Book XI. (pag. 927. A. Tome II. *Edit. H. Steph.*) As, alſo, another very expreſs Paſſage of this antient Philoſopher, Tome III. pag. 311. C.

2 But the Deceaſed could give the Survivor no more Right than he had himſelf. This is an undeniable Point. Therefore ſuppoſing the Proprietor, as ſuch, had only a Right of diſpoſing of his Effects during his Life; he to whom he transfers them, living, can only enjoy them upon that Condition. I do not ſee how it is poſſible to illude this Conſequence.

3 By this it appears, that it was a Cuſtom in the Times of the Patriarchs to diſpoſe of their Goods as they ſaw fit in Caſe of Death. But if we examine the Paſſages of the Old Teſtament which our Author quotes, and are ſet down in the Margin, we ſhall ſee that they prove not what he would infer from them, that the Transferring of Property was made among the Living, and, as it were, from Hand to Hand.

and

and were never ſummoned by Death unawares, and upon a Surprize [a].

After the ſame manner *Cyrus*, in *Xenophon* [b], allots his Sons with his own Mouth the Diviſion of their Father's Fortunes. And indeed theſe laſt Diſpoſals ought to obtain great Favour and Allowance; it being thought no ſmall Comfort under our mortal Condition, that what a Man hath laboured for in his Life, ſhould afterwards fall to that Perſon rather than others, whom he particularly chooſeth and deſires [1]. *It is eſtabliſhed*, ſays *Quintilian* [c], *by the Laws and Cuſtoms of the State, that, as often as it can poſſibly be done, the Teſtaments of the Deceaſed ſhould be ſtrictly obeyed. And this upon no ordinary Grounds and Reaſons. For there ſeems no greater Conſolation in Death, than to have a Will which ſhall hold good after Death, Otherwiſe a Man might think an Eſtate a Burthen, if he had not the full Diſpoſal of it; and if all the Right which we are allowed to have over it, whilſt we live, were to be taken from us when we die.* Nor is *Statius*'s Reflection on Barrenneſs unworthy of Conſideration:

Orbitas omni fugienda niſu,
Quam premit votis inimicus hæres,
Optimo poſcens (pudet heu!) propinquum
Funus amico.
Orbitas nullo tumulata fletu!
Stat domo capta cupidus ſuperſtes
Imminens leti ſpoliis, & ipſum
Computat ignem.

From Barrenneſs, good Providence defend!
Which feeds the Wiſhes of th' ungodly Heir,
Begging the ſpeedy Funeral of his Friend.
Barrenneſs buried with no parting Tear!
The eager Succeſſor in th' empty Seat
Stalks like a Victor in a Fortreſs won,
Greedy to faſten on the Spoils of Fate;
And counts, with grudging Care, the Charges of a Stone. *Sylv.* iv. vii. 34, *&c.*

Add to theſe a Paſſage out of *Pindar*, who thus ſpeaks,

Ἐπεὶ πλοῦτος ὁ λα-
χὼν ποιμένα ἐπακτὸν ἀλλότριον
Θνάσκοντι συγγεράτατος.

Od. X. ver. 106, *&c.*

The Rich Man much doth grieve,
That, when this World he leaves,
Strangers his Wealth receive.

VI. But the *Queſtion* under Debate doth not proceed ſo much with regard to theſe actual Diſpoſals during Life, as to thoſe Teſtaments by which a Man ſo conveys his Poſſeſſions, as to retain the Liberty of altering them to his laſt Breath, ſo that the Right of the Heir to the reſpective Goods ſhall not commence until the Teſtator's Deceaſe: Which Method of Appointment many have, with very good Reaſon, preferred to that other, but now mentioned, by which Men upon the Brink of Death diſtributed their Goods amongſt their Heirs with their own Hands. For ſome ſudden unforeſeen Fate frequently either hurries Men out of the World, or however removes them far from their Friends, ſo as they want Time or Opportunity to expreſs by Mouth their laſt Reſolution.

And again, Perſons who ſeemed to have had more than one Foot in the Grave, have often, by ſome ſtrange Turn, recovered their Health, when they utterly deſpaired of it. And it was, likewiſe, judged more convenient, that a Man ſhould diſpoſe of his Goods rather whilſt he was in Eaſe and Quiet, and Maſter of a ſound and clear Reaſon, than when he was trembling at his laſt Hour, or when his Mind was ſhocked and weakened by the Force of his Diſtemper.

Beſides, it was more advantageous for each Perſon to remain Lord of his own Poſſeſſions to his final Gaſp, and to give no Man ſuch a *Right* over them as could not, without Inconvenience, at any Time be revoked, when either the Merit of the Party, or his own Inclination ſhall alter [d]. (As the *French* tell us. *It is ſenſeleſs to put off our Clothes before we are near going to Bed.*) For though the Conveyance of *Right*, in this Caſe, might be made reverſible, or ſuch as the Conveyer might diſannul, upon Appearance of ſome *Condition*, either caſual or voluntary [2], on the Part of him to whom the Conveyance was made; yet the Doubts which muſt neceſſarily have ariſen about the Proof of this *Condition*, and which each Perſon would have urged for his own Title, muſt have occaſioned endleſs Diſputes. At leaſt he, who had been once declared Heir, would have conceived the higheſt and moſt mortal Reſentment againſt the Diſpoſer, ſhould he, for any ſlight Reaſon, be deprived of what he had already ſeized upon in Hope and Expectation. Many, likewiſe, have expoſed themſelves to very great Dangers, by openly naming their Heir too ſoon. Thus *Caligula*, when Perſons had put him down in their Wills amongſt their Children, and had made open Profeſſion of it, and yet ſtill lived on, gave them the Name of *Mockers*, and ſent many of them a poiſonous Meſs to diſpatch them [e].

When *Herod* had taken up a Deſign of dividing his Kingdom amongſt his Sons, *Auguſtus* forbad him to proceed, ordering him, ſo long as he lived, to keep both his Kingdom and his Sons in due Subjection [f]. As the Family of *Auguſtus* himſelf was afterwards diſtracted with a very fatal Emulation, upon his naming a Succeſſor in his Life-time: It hath therefore been thought ſafe to take care Mens Wills ſhould only be publiſhed after their Death, that they may bring no *Odium*, and no Danger upon them, whilſt they live.

On the ſame Ground it hath been looked on as a moſt deteſtable and barbarous Villany to unſeal and divulge a Teſtament during the Life of the Teſtator. So when *Cæſar*, upon the breaking out of the Civil War, cauſed *Antony*'s Will, which he had depoſited in the Hands of the *Veſtal* Virgins, to be rehearſed in open Senate; many took very great Offence at the Act. *For*, as *Plutarch* obſerves [g], *they judged it to be moſt monſtrous and unreaſonable,*

[a] See *Gen.* xxv. 5, 6.—xlviii. 22. *Deut.* xxi. 16, 17. [b] *Cyropæd.* l. viii. c. 7. [c] Declam. 308. *princip.* [d] See *Sirac.* xxxiii. 20, *&c.* [e] *Sueton Calig.* c 38. Add. *Sueton. Galb.* c. 9. *Liv.* 40. c 54. [f] *Joſephus* Antiq. *Jud.* l. xvi. c. 8. [g] In *Anton. p.* 942. *Dio Caſſ.* lib. l. calls this Act of *Cæſar*, *A moſt unjuſt Proceeding.*

[1] His Words are, *Et in more civitatis, & in legibus poſitum eſt, ut quotiens fieri potuerit defunctorum teſtamento ſtetur, idque non mediocri ratione. Neque enim aliud videtur ſolatium mortis, quam voluntas ultra mortem; alioqui poteſt grave videri etiam ipſum matrimonium, ſi non integram legem habet, & cum omne jus nobis in id permittatur viventibus, auferatur morientibus.*

[2] See lib. iii. c. 8. §. 4.

that

that a Man ſhould be obliged to give an Account, whilſt alive, of thoſe Things which he intended ſhould be done after his Death. Eſpecially ſince amongſt the *Romans* it was an uſual Thing to give Judgments and Characters of particular Perſons in theſe laſt Inſtruments [1]. As appears from frequent Inſtances in *Tacitus*. *Add.* leg. 1. §. 38. *D. Depoſiti*, l. i. §. 5. *D. ad L. Cornel. De Falſis.*

Now though the Reaſons here alledged, and others the like, highly recommend to moſt Nations this Way of final Diſpoſal, yet we cannot hence prove, that ſuch Teſtaments do naturally flow from the *Propriety* of Things, and conſequently are preſcribed by the Law of Nature. For though we ſhould ſuppoſe, that, by the common Conſent of Mankind, ſuch a Force was granted and affixed to *Property*, as that a Perſon might conſtitute whom he pleaſed to poſſeſs his Goods after his Deceaſe; yet that this ſhould be done in ſuch a particular manner, whereby both the Teſtator's Will ſhould remain ambulatory or changeable during his Life [2], and the *Right* of the Heir not begin until the Teſtator's Death, and the Party who is Heir not know ſo much till then; all this is invented and eſtabliſhed by poſitive Ordinances. For otherwiſe, in tranſferring *Right* from one to another, according to the regular Courſe, it had been neceſſary that the Conſents of the two Parties ſhould exiſt together at the ſame Time [3], and, as it were, meet and unite: From which Union the Tranſlation of Right is conceived to ariſe. But now in the Caſe before us, it is ſo far from being neceſſary, that the Conſents of the Teſtator and of the Heir ſhould be united; that there is allowed an Interval of Time, even between the Death of the former, and the Entrance of the latter; the Law, in the mean while, ſupporting the Heir's *Right*, which might otherwiſe ſink.

VII. It is uſual, likewiſe, with great Pains and Labour, to be diſputed, Whether the Heir by Will can with a ſafe Conſcience enter upon the Inheritance, when the Will was defective in any Point or Form required by civil Ordinances? As, likewiſe, Whether the Heir at Law, or he who was to ſucceed in Caſe the Party had died Inteſtate, can honeſtly overthrow ſuch a Will, upon a Failure of theſe Formalities, though he is aſſured that the Teſtator ſeriouſly deſigned to bequeath his Goods to the Perſon there ſpecified? Thoſe who take the Negative Side of both Queſtions, rely chiefly on the Hypotheſis formerly mentioned [4], that the making of Wills is a Precept of the Law of Nature. Whence they conceive that he, who overthrows a Will thus defective, may indeed defend his Proceeding in outward Cogniſance, or in Civil Courts, but not in the inward Judicature, or in the Court of Conſcience.

For the thorough Underſtanding of theſe Matters we ought beforehand to obſerve, that national Laws are ſcarce in any Point more careful, or more ſtrictly exact in requiring certain Forms and Ceremonies, than in Teſtaments; as well to prevent the many Frauds and Jugglings which might creep into thoſe written Inſtruments, as to cut off thoſe moſt grievous Contentions, which Avarice would have raiſed upon the Caſe; ſcarce any Thing being gotten with leſs Pains than a rich and plentiful Inheritance. Hence, inaſmuch as every Perſon of competent Years, and not ſtupidly rude and ignorant, is preſumed either to have known himſelf, or to have been able to learn from more ſkilful Heads, after what Manner the Laws of his Country command Teſtaments to be made; no one is ſuppoſed to have expreſſed his ſerious Reſolution in ſuch a Way as he knew would not hold good againſt thoſe who ſhould oppoſe it in Court; eſpecially conſidering that Men are allowed ſo vaſt a Time for the ſettling this Buſineſs. When therefore a Teſtament is found diſagreeable to the Civil Conſtitutions, it is eaſily preſumed that there hath been ſome fraudulent Contrivance, or that the Teſtator either was not well in his Wits, or elſe drew up the Inſtrument negligently and haſtily, and more by the Inſtigation of others, than by his own free Motion: So that the only End and Deſign of thoſe Forms was, that a forged Teſtament ſhould not be ſet a-foot inſtead of a true One; or a ſudden and unadviſed Impulſe be admitted for a deliberate Reſolution: Eſpecially ſince, without any ſuch Act, the Law calls to the Inheritance the next of Kin, thoſe who are ordinarily ſuppoſed to have ſtood faireſt in the Opinion and Wiſhes of the Deceaſed. But though it may ſo happen, that one who goes about to declare his Mind in this Matter, upon ſerious Thoughts and mature Deliberation, may miſtake as to the uſual Forms; yet Courts of Judicature have no other Means to be informed what was the Intention of the Deceaſed, than by theſe Inſtruments. And ſince it was at firſt allowable for the Civil Authority to put this Power of making Wills under ſuch Rules, as ſhould render it more ſerviceable to the publick Good, there's no need to recede from the common Decrees, for the ſake of one or two private Perſons; ſince if ſuch a Precedent were once admitted, endleſs Cheats and Quarrels would ever be ſtarting up.

Again, He who is baulked of an expected Inheritance upon a Failure in the Writings, cannot complain of hard Uſage; For, neither can he plead the Prerogative of Blood and Birth (becauſe then he would have ſucceeded without Will) nor can any

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[1] See Mr. *Thomaſius*'s Diſcourſe, already quoted, *De Captatoriis Inſtitutionibus*, §. 19. You will find in the following Paragraphs many curious Things about the Precautions that the *Romans* took to hinder Men from knowing the Contents of their Wills.

[2] I own, that a Man ought to diſpoſe of his Goods like a wiſe Man, and not raſhly change his Mind out of Caprice, as thoſe do, of whom Mr. *de la Bruyere* ſpeaks in a pleaſant Raillery in the Place I referred to above. "Spight, while they live, induces "them to make Wills, they are reconciled, and then they tear or burn their Draughts; they have as many Wills in their Cheſt, "as Almanacks on their Table; that is one for every Year." But it doth not follow from hence, that they may not, by the Law of Nature, diſpoſe of their Goods in Caſe of Death, but in an irrevocable manner. On the contrary, as, upon the moſt mature Deliberation a Man can bring, he may eaſily miſtake in the Choice of his Heirs, or ſuffer himſelf to be prejudiced by ſome crafty Perſon, or change his Mind, ſo alſo a thouſand unforeſeen Caſes may happen, from which great Inconvenience may ariſe, if the Diſpoſition of our Goods, which we have once made, muſt remain unchangeable. It is very natural, that no Man ſhould tie his own Hands, and that Death alone ſhould fix a Teſtator's Will entirely. Without this the Effects of the Right of Property will be limited where it ought to have the greateſt Liberty, I mean, by the Diſpoſal of his Goods for a Time, and ſo be inevitably ſtript of them through the ſad Conſequences of the natural Condition of Mankind.

[3] See what is ſaid on §. 2. n. 2. pag. 419. and §, 4. n. 5. pag. 420.

[4] I do not ſee how ſuch a Conſequence can be drawn from hence in reſpect to the firſt Queſtion; for whether the Power of making a Will proceed from natural Law, or only from civil, as it always is a bare Permiſſion in reſpect of the Teſtator, the Forms requiſite are, alſo, an Advantage to thoſe who might otherwiſe pretend to his Goods, ſo that it belongs to them to renounce it, and they are thought to do ſo, when they do not require the diſannulling the Will.

Man

Man by Teſtament acquire a Right which ſhall hold good, at leaſt, in Caſe of Oppoſition, unleſs it be executed according to the Statute. Wherefore ſuch a Perſon muſt attribute his Diſappointment rather to his own Misfortune, than to any Injury of others. But, notwithſtanding all this, if the Will be not called in Queſtion, then the nominated Heir may fairly enter upon the Poſſeſſions. For the Flaw which the civil Ordinances ſuppoſed upon Defect of Formalities, doth, in this Caſe, vaniſh (it being taken for granted that the Teſtator ſeriouſly deſigned this Perſon for his Heir) and really the Goods belong to him rather than to any others, after thoſe, who, according to the general Courſe of the Law, would have ſucceeded by Birth, acquieſce in his Claim, and tacitly wave their own *Right*. Becauſe a ſerious Purpoſe not declared with due Solemnity is ſo far only adjudged by the Civil Laws inſufficient to transfer *Right*, as it ſeems to require that others ſhould be excluded, who might challenge a Right to the ſame Thing upon another Bottom. Therefore, if the Buſineſs be not brought into Court, the want of thoſe ſolemn Forms required by poſitive Statutes, doth not, in the leaſt, affect or impair it, provided it hath all Conditions beſides, which otherwiſe, and according to the general Law of Nature, are ſufficient to conſtitute a *Right*. So that the Failure in Point of Form ſeems to prejudice the Heir by Will only, if he is oppoſed by thoſe whom the Law would have advanced to the Succeſſion, in Caſe the Party had died without Will. But when theſe are ſilent, and forbear to plead their Title, then for the Teſtator to have any Way ſignified in earneſt whom he intended for his Heir, is judged ſufficient to transfer the Property. And this ſome Nations which were either unacquainted, or diſguſted with the ſcrupulous Exactneſs of the *Roman* Law, have thought enough to make a Will perfectly Valid. After all, it is certain, beyond Diſpute, that they who receive any Thing by Virtue of a Will, which they know to be forged, are really guilty of a Sin, though they were not themſelves concerned in the Cheat [1]. Hence *Tully* juſtly cenſures the Act of *M. Craſſus* and *Q. Hortenſius*, who in the Caſe of a forged Will, becauſe they were not conſcious to themſelves of any Share in the Cheat, did not refuſe a Share in the Advantage. *De Offic.* l. iii. c. 18. Add. *Valer. Max.* l. ix. c. 4. §. 1. For, in the firſt Place, the Teſtator did not intend that his Goods ſhould come to them; and then, the ſame Goods were already aſſigned by the Laws to others, upon the not appearing of any legal Teſtament of the deceaſed.

VIII. Nor (as to the ſecond *Queſtion*) doth the Heir at Law, by overthrowing ſuch a defective Will, whatever Aſſurance he may have that it was the ſerious Intention of the deceaſed, properly do any Injury either to the Teſtator himſelf, or to the teſtamentary Heir. Not to the former, becauſe he had no Right of beſtowing his Goods by his laſt Diſpoſal on any others than the natural Heirs, unleſs he had obſerved the Form preſcribed by the Laws of the Country. Not to the latter, becauſe no Right which ſhall hold good againſt the natural Heirs can be conferred on him in any other Way, than by a Teſtament framed as the civil Conſtitutions direct. Nevertheleſs Perſons, who have courted the Fame of extraordinary Humanity, have thought it more generous to ſtick cloſe to the Will of the deceaſed, though not exactly expreſſed according to the Forms of Law; either to avoid the Imputation of Avarice, or becauſe tender and compaſſionate Minds are ſo ſenſibly affected with the Thoughts of Death, as not to ſuffer that what a Man intended for his laſt Appointment ſhould be intended in vain [2]. *Pliny*, Lib. iv. Epiſt. 10. *You are wont moſt religiouſly to obſerve the Wills of the deceaſed; the bare Underſtanding of which (however it be expreſſed) is to a good Executor the ſame as the niceſt Form of Law.* Idem, Lib. ii. Epiſt. 16. *I have fixed it as a kind of private and peculiar Law to myſelf, to defend a Will as perfect, though deficient in ſome legal Point*, Idem, Lib. v. Ep. 7. *This Teſtament, if you regard the Law, is null; but, if you conſider the Intention of the deceaſed, is firm and valid. As for my Part (though I fear the Men of my own Profeſſion will not reliſh very well ſuch a Declaration) I am more ſwayed by the Teſtator's Intention, than by any Exactneſs of Law.* He that will follow this Example, ought certainly to be applauded for a noble and bountiful Spirit. For the ſame Reaſon thoſe who deſire the Character of great Benevolence, are careful to perform the laſt Commands or Requeſts of their Relations or Friends, though ſomewhat burthenſome to themſelves. On which Occaſion we may take Notice of that irregular Will in *Lucian* [3], *where a poor Man bequeaths to one of his rich Friends his Mother to keep, and to another his Daughter to marry her, and to give her a Portion.* Yet ſtill on the other hand he is not to be cenſured, who doth not refuſe an Advantage allowed him by the Laws of his Country [3].

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[2] In *Toxar.* p. 47. t. 2. Edit. *Amſt.*

[1] The Story is this; In the Time of *Cicero* certain Men brought from *Greece* to *Rome* a forged Will of *L. Minutius Baſilus*, who left a great Eſtate; and that they might make it of Force the more eaſily, they made *Marcus Craſſus* and *Q. Hortenſius*, two Men of the greateſt Reputation at that Time, Joint-Heirs with them. Theſe Men miſtruſted that the Will was forged; but, becauſe they were not concerned in the Forgery, they thought they might take Advantage of it. But *Cicero* blames them with Reaſon for their Mean-ſpiritedneſs, by which Means they became not only Favourers and Defenders, but Complices in the Injuſtice, *De Offic.* l. iii. c. 18. See, alſo, *Valerius Maximus*, l. ix. c. 4. §. 1. To this we may add the excellent Sentence which *Cicero* immediately ſubjoins, *Mihi quidem etiam veræ hæreditates non honeſtæ videntur, ſi ſint malitioſis blanditiis officiorum, non veritate, ſed ſimulatione quæſitæ, i. e.* To me thoſe real Inheritances ſeem not honeſt which are gained by fawning Courtſhips and Attendance, and not by fair Dealings.

[2] The Latin is, *Religioſiſſime ſoles cuſtodire defunctorum voluntatem, quam bonis hæredibus intellexiſſe pro jure eſt. Neque enim minui apud nos honeſtas, quam apud alios neceſſitas valet* Again, *Ego propriam quandam legem mihi dixi, ut defunctorum voluntates etiamſi jure deficerentur, quaſi perfectas tuerer.* And again, *Hoc, ſi jus aſpicias, irritum eſt, ſi defuncti voluntatem, ratum & firmum eſt: mihi autem defuncti voluntas (vereor quam in partem Juriſconſulti, quod ſum dicturus, accipiant) antiquior jure eſt, utique in eo, quod ad communem patriam voluit pervenire.*

[3] See Mr. *Hertius*'s Diſcourſe, *De Colliſione legum*, Sect. 3. §. 2. in Tom. i. of his Comments and Opuſc. Mr. *Buddeus* ſeems to be of a contrary Opinion in his Treatiſe, *De Teſtamentis Summor. Imperat.* c. 1. §. 8. but I do not ſee that he has anſwered our Author's Reaſons. It is one Thing to know, Whether he that has diſannulled a Will can, in Conſcience, make void all the Legacies? And another, Whether one may always in Conſcience diſpenſe with the Payment of ſome Legacies of a Teſtator, which are null in Law, though the Will is otherwiſe valid in itſelf? To this, I anſwer, That if a Teſtator has given any Legacies for juſt Cauſes, as for an Acknowledgment of ſome Services done him to procure ſome Advantage to Society, *&c.* it is not only Avarice but Injuſtice not

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The *Queſtions* which remain are to be determined by the Cuſtoms and Ordinances of particular States [1]: As how far a Man may be authorized to divide his Eſtate amongſt many, either all Co-heirs, or ſome Heirs, and others Legatees. As, likewiſe, Whether an Inheritance paſſeth down with a full Conveyance of *Right*; or whether under the Nature and Burthen of a *Truſt?* On which Points the Civilians diſcourſe at large [2]. But this the Law of Nature manifeſtly requires, *That the Burthens and Debts incumbring an Eſtate ſhall lie on the Heir* [3], *by whatever Means he ſucceeds:* Yet not beyond the Value of the Inheritance, nor ſo as that he ſhould be bound to make up the Deficiency out of his own ſeparate Fortunes, unleſs he hath laid a particular Obligation on himſelf to that Purpoſe [4].

IX. We uſually diſtinguiſh from Teſtaments *Donations in Caſe of Death*; by which both Parties living and conſenting [5], one transfers on the other a Right to his Goods, if he chance to die. Of theſe there ſeem to be two kinds eſpecially remarkable.

One [6], When a Man, conceiving himſelf to be under a Probability of mortal Danger, ſo grants a Thing to another, as not to make it his immediately upon his Acceptance, but only if the Danger really proves mortal, as he expects: Or, when a Man makes his own Death, which he apprehends to be near, on Account of the preſent Danger, the Condition of his Grant; ſo that if he eſcape the Danger, the Grant is void [7]. See an Example in *Homer*, Odyſſ. lib. xvii. ver. 78, &c. It may not be altogether improper to rank under the ſame Head the Act of King *Philip* in *Livy*, lib. xxxii. c. 38. who, finding himſelf under a Neceſſity of engaging with the *Romans* in Battle, delivered the City *Argos* to *Nabis*, *as it were to hold in Truſt*; *to be reſtored in Caſe he got the Victory*, *but to be kept*, *if he proved unfortunate*.

Add. *Diodor. Sic.* lib. xv. c. 19. p. 341. C. Ed. *Rhodom.* Where he ſpeaks of *Amyntas*'s Gift to the *Olynthians*.

Thus *Hercules* ſpeaks in *Euripides*, *Alceſt.* ver. 1020, &c.

Γυναῖκα δ' ἐμοὶ σῶσαι λαβὼν
Ἕως ἂν ἵππους δεῦρο Θρήϊκας ἄγων
Ἔλθω, τύραννον Βιστόνων κατακτανών·
Πράξας δ' ὃ μὴ τύχοιμι, νοσήσαιμι γὰρ
Δίδωμι τὴν δὲ σοῖσι πρόσπολον δόμοις.

With you I leave the Dame, to be reſtor'd
When I return, and lead in Triumph home
The *Thracian* Steeds, when firſt the Tyrant's Fate
This Hand hath ſeal'd. But if my Wiſhes fail
(Which Heav'n avert!) then keep her as your own:
Add a new Honour to your Family.

The other, [8] When any Perſon makes over to another his Poſſeſſions after his Death, reſerving to himſelf, in the mean time, the Poſſeſſion, and the full Uſe and Profits; but in ſuch a Manner, that the Donation ſhall, before his Death, be revocable on ſome particular Cauſe; as if the other Party ſhould afterwards offer ſome ſignal Injury; or if he himſelf, being childleſs when the Grant was made, ſhall afterwards have Iſſue of his own.

But, if the Donor made his Grant reverſible, not on any external Condition, but merely of his own Pleaſure, then the Grantee ſhall acquire no *Right*, ſo long as the Donor retains a natural Ability to change his Mind; that is, ſo long as he continues Maſter of his Reaſon. For as, on the other Side, he is not under any *Obligation* who may releaſe himſelf, when he pleaſeth, without any Payment or Performance; ſo on the other Side, a bare Hope, which may be taken away purely at another's Fancy, cannot come under the Name of *Right*. The *Right* therefore of the Grantee ſhall commence only upon the Donor's Deceaſe; and, conſequently, this Act approacheth near to the Caſe of a Teſtament, ſtrictly ſo called.

But, when a Perſon moved with the Thoughts of any Danger which threatens his Life, ſo grants

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to diſcharge them. The Reaſon is, becauſe he knows it to be the Will of the Dead, though there is ſome Defect in the Form, and his Will is ſo reaſonable, that ſometimes the Perſons concerned have an imperfect, if not a perfect Right, to require the Gifts. Whereas, when he that ſucceeds a Perſon *Abinteſtate*, makes void his Will, he may ſuppoſe that the Teſtator was ſurprized, or that there was ſome Fraud in making the Will; and ſo much the more, if the Teſtator labours to diſinherit the lawful Heir, it is very hard, if he cannot find the Means, to obſerve exactly all the neceſſary Formalities; ſo that the Heir at Law may look upon it as a Thing morally impoſſible, and, by Conſequence, count that Act null, which is not agreeable to that Law, by Virtue of which he has a Right to claim the Succeſſion, reſerving to himſelf (as I have ſaid) the Execution of all thoſe wiſe and equitable Diſpoſals which may be found in a Will ſo made void. ' Add here what I have ſaid in my *Diſcourſe on the Benefit of the Laws*, pag. 41, 42. *Edit. Amſter.*

[1] See, about the Subject of Succeſſions, as well by Law as Will, the ſecond Part of Mr. *Domat*'s Civil Laws in their Natural Order, and the Interpreters of the *Digeſts*, l. xxviii. to xxxix. excluſive, or upon the *Inſtitutes*, l. ii. from t. 10. to the End.

[2] This is when the Heir is obliged to reſtore to another, either at the End of a certain Term, or in certain Caſes, either all the Inheritance, or Part of it only. See the *Inſtitutes*, l. ii. t. 23, 24. and the Interpreters upon the *Digeſts*, l. xxxvi. t. i. *ad Senatus conſult. Trebellian.* Moreover, a Feoffment in Truſt is often *odious*, becauſe it is uſed to evade the Law, or to fruſtrate the lawful Heirs. See an excellent Paſſage to this Purpoſe in Mr. *de la Bruyere*'s Characters, in the Chapter, *Of certain Cuſtoms*, printed at *Bruſſels* in 1697. The Character begins thus: "The Law which forbids Murder, does it not comprehend in it the Prohibition of "a Sword, Poiſon, Fire, Water, Treachery, open Force, and all the Means by which Murder may be effected?"

[3] See the following Chapter, in the laſt Section.

[4] This is what he is ſuppoſed to do, by the *Roman* Law, from the Moment he accepts the Inheritance: *Hereditas autem quin obliget nos æri alieno, etiamſi non ſit ſolvendo, plus quam manifeſtum eſt.* Digeſt. lib. xxix. tit. 2. *De adquir. vel omitt.* leg. 8. *princip.*

[5] *Mortis cauſa donatio eſt, quæ propter mortis ſuſpicionem——cum magis ſe quis velit habere, quam eum qui donat, magiſque ei cui donat, quam hæredem ſuum,* Inſtit. l. ii. t. 7. §. 1. See the Interpreters upon this Title, and upon that of the *Digeſts*, which is quoted in the following Note.

[6] *Tertium genus eſſe donationis ait, ſi quis periculo [mortis] motus non ſic det, ut ſtatim faciat accipientis: ſed tunc demum, cum mors inſecuta,* Dig. l. xxxix. t. 6. *De mortis cauſa donat.* &c. leg. 2.

[7] *Aliam eſſe ſpeciem mortis cauſa donationum ait, cum quis imminente periculo commotus ita donat, ut ſtatim fiat accipientis,* ib.

[8] This is regarded by the *Roman* Lawyers, as a Donation made in a Man's Life-time. See lib. v. cap. iv. §. 1. note 1. following. In Effect, That the Donation in Caſe of Death be connected with the Will, and the better to diſtinguiſh it from Donations made during Life; it is proper to conceive it, either as null the Moment the Danger is paſt, or as ſubject to be revoked without any other Reaſon than the good Pleaſure of the Donor, when it is ſimply made in Caſe he dies, and he is at that Time in no immediate Danger. The Donation made, in this laſt Caſe, always ſubſiſts until it is expreſly recalled, and the Reaſon is plain; whereas the other has no need of a Revocation. See *Julius Paulus Recept. Cent.* lib. iii. tit. 7. with the Notes of M. *Schulting*.

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a Thing, as to make it immediately upon Acceptance belong to the other Party, and doth not recal it, upon eſcaping the Danger, then the Promiſe ſhall be rather put in the Claſs of ordinary Donations [1], or ſuch as are made without any regard to Death. Though in Caſe the Grant was very large, and ſuch as will weaken the Donor's Eſtate, much more if it comprehend the whole Poſſeſſion, it ſhall be preſumed to have been made only upon his preſent Proſpect of Death, and not to hold good, unleſs he ſo miſcarried.

That kind of Grant, likewiſe, by which a Man transfers Property on another, without the Power of retracting, yet ſo as to enjoy the Uſe and Property during his own Life [2], is to be reckoned amongſt the ordinary Donations, or ſuch as are made between living Parties.

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[1] *Ubi ita donatur mortis cauſa, ut nullo caſu revocetur, cauſa donandi magis eſt, quam mortis cauſa donatio, & ideo perinde haberi debet, atque alia quævis inter vivos donatio,* Ibid. leg. 27. There are ſome who affirm that this Law does not agree with the others, and that the *Roman* Lawyers were here divided in their Opinions. See the *Obſervations* of the deceaſed M. *Brunchu*. Tome I. *Obſerv.* 4.

[2] See what is ſaid, l. v. c. 4. §. 1. n. 1. following, concerning Gifts among the Living.

CHAP. XI.

Of Succeſſions to Perſons who die Inteſtate.

I. *Succeſſion to Perſons that die inteſtate depends upon a Preſumption of their Will:*
II. *Yet as it is agreeable to Reaſon.*
III. *Children are preferred before all others.*
IV. *Parents are to maintain their Children.*
V. *What is meant by Maintenance.*
VI. *Who are to be accounted Children.*
VII. *What more than Maintenance is due to Children, and why.*
VIII. *It is not neceſſary that Goods ſhould always be equally divided among Children.*
IX. *Legitimate Children are to be preferred before natural:*
X. *Provided that the Father owns them.*
XI. *Or does not diſinherit them.*
XII. *Of the Right of Repreſentation.*
XIII. *Parents muſt ſucceed for want of Children.*
XIV. *And for want of them the neareſt Relations in their Order.*
XV. *Whether Friends may be preferred before Kindred?*
XVI. *Or Benefactors before Relations?*
XVII. *The Order among Kindred.*
XVIII. *The Civil Laws allow a larger Power of diſpoſing Eſtates.*
XIX. *The Heir of the deceaſed, how far he is obliged to pay his Debts.*

ACcording to the Diſpoſal of the Law of *Nature*, without any particular expreſs Act of the former Lord, the Properties of things are ſaid to paſs in *Succeſſion to Inteſtates* [1]. For Property having been at firſt endued with ſuch a Force and Power, as that by virtue of it a Man was enabled not only to do what he pleaſed with his Goods during his own Life, but, likewiſe, effectually to transfer them upon others after his Death; it did not ſeem probable, that if a Perſon was found to have made no Settlement of his Goods, whilſt he lived, he was therefore willing they ſhould after his Death become, as it were, derelict, and lie free to any that would take Poſſeſſion of them [a]. In this Caſe then natural Reaſon ſuggeſted, That Men ought to follow the *preſumed Will* of the deceaſed, or ſuch a Diſpoſal as he might moſt probably be ſuppoſed to have deſigned. Now in doubtful Matters every one is ſuppoſed to have deſigned that, which is moſt agreeable both to his *natural Inclination*, and to the Engagements of his Duty [b].

II. The regular Courſe of *natural Inclination* is this, That we ſhould labour to make the moſt plentiful Proviſion for thoſe who deſcend from our own Body, and next to theſe for the reſt who are allied to us in the Degrees of Conſanguinity: For Nearneſs of Blood commonly uniteth and engageth Mens Minds in a particular Affection; and almoſt all Perſons have this Deſire implanted in them, that they eſpecially wiſh well to their own Families, and would have them ſucceed and flouriſh as much as poſſible.

As to natural *Duties*, one of the chief of them is, *That we take due Care for the Maintenance of thoſe whom Nature hath enjoined us to cheriſh with a peculiar Concern and Regard*; *as, likewiſe, that we ſhew ourſelves grateful towards our Benefactors.*

Now although it might ſo happen, that theſe *Preſumptions* ſhould often vary from the real Intention of the deceaſed, yet the Peace and Tranquillity of Mankind required, That no particular Conjectures ſhould be eaſily admitted againſt theſe common Rules; ſince, by this Means, a Door would be opened to endleſs Contentions. And therefore the preſent Affair in the Intentions of the deceaſed is conſidered, not ſo much according to what it was, as according to what it ought to have been, and agreeably to the Rules of *Duty* [2]. Amongſt which one

[a] *Pindar. Olymp.* Od. x.

Πλέτος ὁ λαχὼν ποιμένα, &c.
——— Thoſe Riches grieve the dying Man
Which Strangers Hands muſt ſeize ———

[b] Comp. *Grot.* l. ii. c. 7. §. 3.

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[1] As this Sort of *derivative Acquiſition* is founded upon the tacit Will of the dead Perſon, it is, conſequently, *natural* according to the Diviſion laid down above in c. 10. §. 1. n. 1. But becauſe there may intervene divers Diſpoſals of the Civil Law, which, for the promoting of Peace, do or ought to regulate as exactly as poſſible all that concerns Succeſſions to Perſons that die inteſtate, in this reſpect Acquiſition is *mixt*, ſince it contains as much and ſometimes more of the civil than of natural Law.

[2] This may ſuffice in my Judgment to anſwer the Difficulties which Mr. *Bynkerſhoek*, Obſerv. l. ii. c. 1, propounds, where he ſays, "That Fathers and Sons often do not love each other, and Brothers rarely live amicably, much leſs other Relations: That

one of the firſt Rank is this; *That no Man give occaſion to* Ruptures and Quarrels *amongſt others.* Hence it is expedient for the common Peace, that ſome general Method ſhould be followed in this Buſineſs, though the Intention of ſome few ſhould happen to be neglected, rather than that, by endeavouring to ſatisfy the Deſire of every private Perſon, we ſhould involve ourſelves and others in endleſs Difficulties.

Beſides, he who would have his own particular Purpoſe abſolutely obey'd, ought to have expreſsly ſignified thus much. Thus nothing is more uſual, than for a Father to love one of his Children with a more ardent Affection than the reſt: And then who doubts but he is willing an extraordinary Proviſion ſhould be made for his Darling's Subſiſtence? Yet if he die inteſtate, they ſhall divide the Inheritance by equal Shares; not as if it were repugnant to the Law of Nature to allot one Child a larger Portion than another, but becauſe there would ariſe infinite Diſputes in Families, if the Father's Affection were to be the Meaſure of parcelling out Eſtates. The ſame Inconvenience would follow, if a Man dying childleſs ſhould leave ſeveral Brothers, to whom he expreſſed very different Degrees of Kindneſs in his Life-time.

Again, 'Tis no uncommon thing for a Man at his Deceaſe to leave behind him a Kinſman in ſome remote Degree, for whom he had never any particular Paſſion, and to whom he was never obliged for any Service or Favour; whereas, on the other ſide, he may have ow'd all his Fortunes to the Kindneſs of a Stranger: Who will not ſay, That the Deceas'd ſet a much greater Value on his Benefactor, in this Caſe, than on his Relation? Yet, becauſe to enter into a Compariſon between the Ties of Blood, and of Gratitude, muſt have occaſion'd many Controverſies difficult to be reſolv'd, it hath been the Judgment of all Nations, that in the caſe of Inteſtates a Kinſman ſhall be preferred to a Patron or Benefactor. Eſpecially, ſince if a Perſon on account of a Kindneſs beſtow'd were to ſtand in the Roll of Inheritance, before the Relations of the Deceas'd, he might ſeem to have performed the former Act more as a Uſurer, than as a Friend. But if the Benefactor were preferred in the expreſs Will of the Deceas'd, 'tis but Equity that the ſaid Will ſhould be obeyed.

From all which it appears, that natural Reaſon in deciding the caſe of Succeſſion, upon Default of teſtamentary Diſpoſals, regards the Intention of the deceas'd Party, not as it was ſtrictly in itſelf, concerning which there is often very little Aſſurance; but according as it agrees with the common Inclinations of Mankind, and with the Meaſures of Duty, and ſo as that no Fuel may be adminiſtred to Controverſies and Contentions [a].

This Judgment of natural Reaſon is ſeconded in all States by civil Ordinances; as well that the Avarice of ſome Perſons might not ſtir up deſperate Quarrels amongſt thoſe who ſeem'd to have equal Reaſon on their ſide; as that this whole Affair might be wiſely accommodated to the publick Safety.

III. In the Succeſſion therefore to *Inteſtates*, by the Guidance of Reaſon, and by the Conſent of all the known Kingdoms, Children have the Preference of all others, even of Parents themſelves [1]. See 2 *Corinth.* xii. 14. *Rom.* viii. 17. *If Children, then Heirs. Ariſtot. Nicom.* viii. 14.

Parents have a more certain Knowledge that ſuch Perſons are their Children [2], *than Children can have that ſuch are their Parents. And, in this Caſe, there ſeems to commence a ſtronger Relation from the Cauſe to the Effect, than from the Effect to the Cauſe.*

Iſæus, Orat. V. [3].

The Law itſelf aſſigns over to the Son the Goods of the Father, and allows not him to make a contrary Will who hath legitimate Iſſue. Idem. Orat. ii. *If a Man deceaſing leave Daughters lawfully begotten, he can give away nothing, nor make any Diſpoſal without their Conſent.* And again, a little after, *The Law ſays, a Man ſhall diſpoſe of his Goods at his own Pleaſure, if he leave no legitimate Sons; but if he leave Daughters, their Pleaſure is to determine his Diſpoſal, and not his own. Therefore, with their Daughters Conſent, they may give and bequeath, or appoint any Method of Succeſſion. But without ſuch Approbation they cannot adopt an Heir, or put their Fortunes into other Hands.*

[a] Add *Bæcler. ad Grot.* l. ii. c. 7. §. 13.

" they, alſo, who are neareſt related by Blood moſt eaſily quarrel, and conceive more implacable Hatred againſt each other than " Strangers or indifferent Perſons. *The ſame Author, alſo, maintains,* That to prove that the Laws are not founded upon the Pre- " ſumption of the Will of the Dead, 'tis ſufficient to conſider that a Wife is excluded from ſucceeding to her inteſtate Husband, " although ſhe muſt be ſuppoſed dearer to him than a Parent, and quotes, thereupon, *Gen.* ii. 24." But beſides that there are diverſe kinds of Affection, and tho' he may love his Wife with much Paſſion, as it ſometimes happens, though not often, it doth not therefore follow, that he would have her to be the Heir of all his Goods. It only proves, that, in regulating Succeſſions to inteſtate Perſons, Regard is had to the Intereſt of the State, and the Preſervation of Families, as well as the ordinary Inclination of private Perſons, who, nevertheleſs, often ſecond the Intentions of the Legiſlator. For every Body deſires that his Eſtate ſhould ſtay in his Family. Moreover, Mr. *de Bynkerſhoek* furniſhes us with Arguments to prove that the *Roman* Law engages us to follow, if not altogether, yet, at leaſt, ſo far as the publick Good permits, the Will and Affection of the dead Perſon, as appears from a whole Chapter of the ſame Work, l. i. c. 19. where the Author explains that Law very well, which ſays, That a Father diſcharges his Duty agreeably when he makes his Son his Heir. *Perinde habebitur atque ſi ſua manu pater tuus te hæredem ſcripſiſſet.* FUNCTUS DULCI OFFICIO, Cod. l. ix. t. 23. *De his qui ſibi adſcribunt in teſtam.* leg. 1. We, alſo, know, that Wives were not altogether excluded from ſucceeding to the Goods of their Husbands, and that the Laws admitted them to it, to the Excluſion of the Treaſury, when the Relations by Father's and Mother's Side were wanting. *Maritus & Uxor ab inteſtato ſibi invicem pro antiquo jure ſuccedunt, quoties deficit omnis parentum liberorumve ſeu propinquorum legitima vel naturalis ſucceſſio, fiſco excluſo,* Cod. l. vi. t. 18. leg. 1. *Unde Vir & Uxor.* See the ſame Title in *Digeſt.* l. xxxviii. t. 11. and the Interpreters upon it.

[1] *Cum ratio naturalis, quaſi lex quædam tacita, liberis parentum hæreditatem addiceret, velut ad debitam ſucceſſionem eos vocando, propter quod & in jure civili ſuorum hæredum nomen iis inductum eſt, ac ne judicio quidem parentis, niſi meritis de cauſis ſummoveri ab ea ſucceſſione poſſunt,* &c. Dig. l. xlviii. t. 20. *De bonis damnatorum,* leg. 7. princ. See, alſo, Mr. *Bynkerſhoek*'s Obſervations, l. i. c. 19. above quoted. And the Remarks of the deceas'd M. *Baron Spanheim*, on the Paſſage cited here, in his *French* Tranſlation, *Edit. Amſt.* 1728.

[2] Μᾶλλον ἴσασιν οἱ γονεῖς τὰ ἐξ αὐτῶν, ἢ τὰ γεννηθέντα, ὅτι ἐκ τέτων καὶ μᾶλλον συνοικείωται τὸ ἀφ' ἑ τῷ γεννηθέντι, ἢ τὸ γεννάμενον τῷ ποιήσαντι.

[3] *Iſæus*'s Greek is, Ὁ νόμος αὐτὸς ἀποδίδωσι τῷ υἱεῖ τὰ τὸ πάτρος, καὶ ὁ διαθέσθαι ἐᾷ ὅτῳ ἂν ὦσι παῖδες γνήσιοι, Orat. 5. And again, Οὔτε γὰρ διαθέσθαι οὔτε δοῦναι ἐδενὶ ἐδέν. ἔγεσι τῶν ἑαυτῦ, ἄνευ τῶν θυγατέρων, ἐὰν τὶς καταλιπὼν γνησίας τελευτᾷ.

Add.

Add. Lib. xlviii. tit. 20. Leg. 7. *Princip. D. De bonis damnator.*

Julian in Cæſarib. †. *It is the legal Cuſtom to let the Sons ſucceed to what the Fathers poſſeſs; and this is a Rule which we all deſire to ſee obſerved.*

Thus *Valerius Maximus* obſerves, Lib. viii. C. 7. Sect. 2. that the *procreationis vinculum*, *the Band of Generation*, is the ſtrongeſt and cloſeſt Tye which can affect Mankind.

That which ſo highly favours the the Childrens Claim is, not only the Obligation laid by Nature on their Parents to provide for their Maintenance and good Inſtitution, but, likewiſe, that ſtrong and vehement Affection, which can only be extinguiſh'd (and that very rarely) either by the enormous Wickedneſs of the Children, or by the unuſual Barbarity of the Parents.

IV. As to that Maintenance, which Parents owe their Children [1], it hath been doubted by Authors, whether the Obligation to pay it were perfect or imperfect, or whether it belonged to expletive or to attributive Juſtice [a]. 'Tis the Opinion of ſome, *That Parents indeed owe their Children Maintenance, but then 'tis by the latter kind of Juſtice only, and not by the former; ſo that Parents would act very inhumanly, ſhould they deny them this Aſſiſtance; yet Children have no Right to challenge it from them againſt their Wills, this being the proper Effect of expletive Juſtice: though civil Statutes may inveſt Children with a full and perfect Right in this Matter.* But we are rather inclined to think, That *Parents* lie under a *perfect Obligation* to maintain their *Children*, ſo long as they are unable to maintain themſelves; and this Duty ſeems to be laid upon them, not only by Nature itſelf, but by their own proper Act, in bringing them into the World [2]. For they would be in the higheſt manner injurious to their Iſſue, ſhould they have given the Children Life, for no other Reaſon, but that they might afterwards ſee them periſh. By the *Act of Generation* therefore they ſeem to have voluntarily bound themſelves, to endeavour, as far as in them lies, that the Life which they have beſtowed ſhall be ſupported and preſerved. And thus the Children will have a *perfect Right* of receiving Maintenance from their Parents. Yet this Right is hinder'd from producing all its Effects by the natural Weakneſs of Children under that Age, in which they cannot provide for their own Support. And, conſequently, they do not ſo much want Right as Power and Strength to execute that Right; only in ſome Points the civil Ordinances help them out, and compel their *Parents* to keep and feed them, upon Refuſal. But, through the wiſe Ordering of the Creator, the natural Affection of *Parents* is of ſo great Force, as that, commonly ſpeaking, they joyfully undertake and diſcharge their *Duty*, without the Compulſion of the civil Government.

V. Not only thoſe things which are neceſſary for the Preſervation of natural Life fall under the Term of Maintenance or *Alimony*, but thoſe, likewiſe, which fit and prepare a Man for a ſocial and civil Life. And the former are due, 'till ſuch time as the Children are able to ſupport themſelves by their own Induſtry. As for the Meaſure of what ought to be ſpent on Education, in training up Children for a civil Life [3], it is to be ſtated according to the Fortunes of the Parents, and the Genius and Capacity of the Children. Thus much, at leaſt, is required, *That they be enabled to become honeſt and uſeful Members of human Society.* But this is a general Rule in the whole Affair; *That as Nature doth not command Parents to pinch and defraud their own Inclinations, and to make themſelves miſerable for the ſake of their Iſſue; ſo a Parent placed in a high and wealthy Condition is, no doubt, in fault, if he do not take care that his Children be brought up after the moſt exact and accompliſh'd Manner of Inſtitution.*

VI. Under the general Name of Children [4] are comprehended not only thoſe of the firſt Degree, but thoſe too of the ſecond, *&c.* whether deſcending from Sons or Daughters; in caſe their nearer and more proper Parents are not able to maintain them [5].

Farther, Maintenance is due not to legitimate Children alone; but to natural, and even to inceſtuous Iſſue [6]. For what Reaſon is there that the poor innocent Infant ſhould be ſuffer'd to famiſh for another's Sin? Yet if the latter be left together with the legitimate Iſſue, they ſhall not eaſily challenge to be admitted to equal Shares, unleſs

[a] Vid. *Grot.* dict. loc. Sect. 4.

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† His Words are, Παισὶν νομιμὸν ἐπιτρέπειν τὰς διαδοχὰς, καὶ τοῦτο ἅπαντες εὔχονται.

[1] Every one almoſt knows, that among the antient *Greeks* and *Romans* 'twas thought that they had a Power to expoſe or ſlay their own Children, and that Chriſtianity had much ado to aboliſh that barbarous Cuſtom, as appears by Mr. *Noodt*'s Treatiſe, *De partus expoſitione & nece apud veteres*, which was reprinted in 1709.

[2] See lib. vi. c. 2. §. 4. following.

[3] See lib. vi. c. 2. §. 6, 12. following.

[4] *Liberorum appellatione nepotes & pronepotes, cæterique, qui ex his deſcendunt, continentur* ——— *Etenim idcirco filios filiaſque concipimus atque edimus, ut ex prole eorum earumve diuturnitatis nobis memoriam in ævum relinquamus*, Dig. lib. i. t. 16. *De verborum ſignificatione*, leg. 220. See, alſo, leg. 56. and *Inſtit.* l. i. t. 14. *Qui teſtamento tutores dari poſſunt*, leg. 5.

[5] *Ipſum autem filium vel filiam, filios vel filias, & deinceps, alere patri neceſſe eſt, non propter hæreditates, ſed propter ipſam naturam & leges, quæ & à parentibus alendos eſſe liberos imperaverunt, & ab ipſis liberis parentes, ſi inopia ab utraque parte vertitur*, Cod. l. vi. t. 61. *De bonis quæ liberis in poteſtate patris, &c.* leg. 8. §. 5. See, alſo, the *Digeſt.* l. xxv. t. 3. *De agnoſcendis & alendis liberis*, leg. 5. §. 1. 5. and leg. 8.

[6] See *Grotius*, l. ii. c. 7. §. 4. numb. 4. and §. 6. and Mr. *Domat*'s Civil Laws in their Natural Order, Part II. l. i. t. 1. Sect. 2. §. 8. 'Tis certain that naturally a Baſtard has as near a Relation to his Father as a lawful Child; and many among the *Greeks* made no difference between theſe two ſorts of Children, as Mr *Le Clerc* has obſerved upon *Gen.* xxi. 10. where he alledges this Authority,

Ὁ δὴ νόθος τοῖς γνησίοις ἴσον σθένει
Ἅπαν τὸ χρηστὸν γνησίαν ἔχει φύσιν.
Soph. in Aleadis apud Stob. Serm. 77.

A Baſtard's equal to a lawful Heir,
An honeſt Man is always rightly born.

The *Egyptians*, as Mr. *Le Clerc* proves, in the ſame Place, by a Paſſage out of *Diodorus Siculus*, counted none of their Children Baſtards, though they were begotten of their Slaves which they had bought. And we may obſerve, that the Patriarchs of the Old Teſtament had an equal Regard to the Children of their Concubines, as of their lawful Wives, as appears from the Example of *Jacob*, who divided his Goods equally between the Children he had by *Leah* and *Rachel*, and thoſe he had by his two Concubines. The ſame thing is ſtill in uſe among the *Mahometans*, as our Author obſerves below, §. 9.

the Parents made expreſs Declaration to this Purpoſe.

In reſpect of theſe ſeveral Parts of Maintenance, upon the Parents Deceaſe during the Minority of the Children, the Inheritance is not only theirs, if he died inteſtate, but farther, it cannot rightly be taken from them by his expreſs Will; ſo far as is neceſſary for the obtaining this End. For it doth not ſeem probable that a Child of theſe Years ſhould be capable of committing any ſuch Offence as might render him unworthy of ſo needful a Support [1].

VII. Whatever exceeds this Proportion of Maintenance, is due to the Children, when able to provide for themſelves, not ſo much by any expreſs Command of the Law of Nature, as upon this Principle, That, commonly ſpeaking, Parents deſire that none ſhould fare better than their own Children [2]. Therefore 'twas a very ſingular Diſpoſal of *Crates* the *Theban*, who lodg'd his Money in the Hands of a Banker upon theſe Terms, *That if his Children proved ignorant, it ſhould be reſtored to them; but if they happened to be Philoſophers, it ſhould be diſtributed amongſt the common People*; becauſe Men of that Profeſſion could be in want of nothing. As to what ſome have advanced, That Parents get all for the ſake of their Children, and therefore the Children, even in the Parents Life-time, have ſuch a Right to their Goods, as ſhall be valued againſt them, in other Caſes, beyond the Neceſſaries of Maintenance; this is abſolutely falſe: For every Man in his Gettings hath firſt of all an Eye to himſelf, and labours chiefly on his own Account. *Horat.* lib. ii. Epiſt. 2. v. 190, *&c.*

Utar, & ex modico, quantum res poſcet, acervo
Tollam; nec metuam quid de me judicet hæres,
Quod non plura datis invenerit.

Juv. Sat xiv. ver. 136, 137.——*Maniſeſta phreneſis*
Ut locuples moriaris egenti vivere fato.

But what remains above his private Neceſſaries, he is willing ſhould paſs to thoſe who are deareſt to him, as commonly his Children [3] are preſumed to be. And Children have thus far only a peculiar Title to hope for their Parents Eſtate, as that, in caſe of no expreſs Will to the contrary, their Claim is preferr'd to all others; and becauſe it very rarely happens, that Parents are induc'd to lay aſide this ordinary Affection.

It is well enacted by the *Roman* Laws, *That every Parent, who diſinherits his Child, ſhall be oblig'd expreſsly to give his Reaſon for ſo doing*; and that ſome certain Cauſes only ſhall be ſufficient to juſtify him in this Proceeding. Nay farther, the ſame Laws gave the diſinherited Children an Action [4] *de inofficioſo Teſtamento*; *Of a Will not made according to natural Affection and Duty.* The Deſign of which was not to bring into Diſpute, Whether or no the Teſtator had a Power of tranſmitting his Goods to others, rather than to his Children, upon juſt Cauſes; but to diſcuſs and examine the Reaſons which mov'd the deceas'd to make a Settlement contrary to the common Inclinations of Mankind. And if, upon ſuch a Hearing, it was diſcovered that the Father thus neglected his Iſſue, either through his own abſurd Fancy and Humour, or through the fraudulent Intruſion of others, the Inheritance was, by publick Authority, avowed to thoſe to whom it would otherwiſe have deſcended, had the Father conſulted with Reaſon and Conſcience in his laſt Diſpoſal. And therefore *Cicero* [5] well replies upon *Erucius*, who charg'd his Client *Roſcius* with a Deſign to diſinherit his own Son, *It ought to have been the Buſineſs of the Accuſer, to lay open all the Sins and Vices of the young Man, which might be ſuppoſed able to incenſe the Father to ſuch a Height, as that he ſhould once entertain a Reſolution of doing Violence to Nature itſelf, of baniſhing that affection which was ſo deeply rooted in his Mind; and, in a word, of forgetting utterly that he was a Father.* 'Tis remarkable under what Colour the diſinherited Children, by the ſame Laws, mov'd for Relief: For it being neceſſary that they ſhould ground their Complaint on a Suppoſition that the Cauſe of their Diſinheritance was unjuſt, they pretended in the Form of the Action, *That their Parents, at the time of making ſuch a Will, had loſt the uſe of their Reaſon.*

Still, as to other Matters, a Father ought ſo to favour his Children, as not to lay aſide his juſt Regard to other Duties. Hence, when he may be judg'd to have made ſufficient Proviſion for his own Family, he is not, in the leaſt, hindered from imploying his Goods in Acts of Gratitude and Liberality [6], though to the leſſening of his Childrens Fortunes. Thus in caſe a Man hath either receiv'd extraordinary Kindneſſes from another, or is able by a ſeaſonable Beneficence to put ſome great Genius, now ſtruggling with Poverty, into a way of doing great Service; what Reaſon is there but that he ſhould be allow'd to deviſe ſome part of his Goods to ſuch excellent Uſes? It's plain, Antiquity highly celebrated the Action of King *Attalus*, who, having been oblig'd by his Brother *Eumenes* with very ſingular Favours, left his Kingdom to *Eumenes*'s Son, though he abounded in male Iſſue of his own? [7]

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1 *Juſtinian* had the Cruelty to refuſe even Maintenance out of the Father's Effects to Children born in Inceſt, or otherwiſe condemned by the Laws. *Novel* 89. Cap. *ult.* See Mr. *Noodt* on the *Digeſt.* pag. 534.

2 This ſhort Story might have been put better in another place.

3 See Mr. *Thomaſius*'s Diſcourſe, entitled, *De legitima viventis*, c. 3. §. 23, *&c.* publiſhed and maintained by way of Diſputation at *Hall* in 1700, where it appears what we are to think of Legitimacy, or of that Portion of Goods, be it greater or leſs, of which, according to the Laws and Cuſtoms, Children can't juſtly be deprived by the Authentick Will of their Father. For, as *Grotius* obſerves, l. ii. c. 7. n. 3, Natural Law obliges to give a neceſſary Maintenance to Children, but what is more than that, they have no other Right to than what the Conſtitutions of the civil Laws give them. But if any deſire to know the exact Quota of the Goods that ought to deſcend to Children, and other things which concern their Legitimacy, according to the *Roman* Law, let them conſult the Interpreters of the *Digeſts* quoted in the following Note, and Mr. *Domat*'s Civil Laws in their Natural Order, Part II. l. iii. t. 3.

4 *Inofficioſa querela*, which is when the Diſpoſals of Parents are looked upon as contrary to their Duty. See, upon this Subject, *Inſtit.* l. ii. t. 18. and Mr. *Noodt* upon the *Digeſt.* l. v. t. 2. *De inofficioſo teſtamento*, as, alſo, Mr. *Domat*'s Civil Laws in their Natural Order, Part II. l. 3. t. 2. and the Obſervations of Mr. *de Bynkerſhoek*, l. ii. c. 12.

5 *Cicero*'s Words are, *Id erat certi accuſatoris officium, qui tanti ſcelcris argueret, explicare omnia vitia & peccata filii, quibus incenſus parens potuerit animum inducere, ut naturam ipſam vinceret, ut amorem illum penitus inſitum ejiceret ex animo, ut denique patrem eſſe ſeſe oblivi ſceretur.*

6 See Mr. *Le Clerc*'s Reflections upon what he calls good or bad Luck in the matter of Lotteries, c. 12. p 189, *&c.*

7 The Story in *Plutarch* is of *Attalus Philadelphus*, to whom *Eumenes* his Brother when he died left his Wife and the Crown of *Pergamus*: For although he had ſeveral Children by his Queen, yet he left his Crown to *Attalus* the Son of her firſt Husband, till that Prince came to be of full Age to reign. Neither of theſe Examples is much to our Author's Purpoſe.

VIII. Neither doth a Father lie under any Neceſſity of dividing his Goods amongſt his Children in equal Shares; but he may aſſign to one or two ſomewhat above the reſt, as an extraordinary Bounty; either on account of ſingular Merit, or of great and illuſtrious Hopes, or even of particular Affection [a]. So, likewiſe, in diſtributing Portions, a juſt Regard may be had to the Credit of the Family, that it may hereafter retain its Strength and Splendor. If this Intereſt cannot be ſecur'd upon an equal Diviſion of the Patrimony between many Children, the Father may, without any Breach of the Law of Nature, deviſe the chief part of his Goods to one, and command the reſt to ſit down contented with ſmaller Portions. Hence the Rights of Primogeniture [1] obtained among many Nations, which, according to the moſt antient Inſtitution, conferr'd on the eldeſt Son the regal Government of the Family, the domeſtical Prieſthood [2], and double Share of what his Father poſſeſſed. Which double Proportion was deſign'd to defray the Charge of Entertainments, and of religious Ceremonies; as *Grotius* conceives [b] [c].

On the contrary there have not been wanting Nations, where the younger Brothers ſucceed to the largeſt Share of the Inheritance, or, at leaſt, have their Option, to chooſe what part they like.

Which Cuſtom is built on this Principle, *That the elder Brothers have, for a long time, enjoy'd the Benefit of Education from their Parents; of which the younger being often deprived by too untimely a Loſs, they deſerve ſome Conſideration to requite and comfort them under their Diſadvantage.*

Tho' the latter of theſe Inſtitutions ſeems more agreeable to low and mean Families, the former to the great and noble.

So again, when Daughters marry into other Families [3], it is not neceſſary that they ſhould receive Fortunes out of their Father's Eſtate equal to their Brothers Shares. For it is a very fooliſh Argument to imagine, that a Father muſt needs act contrary to his Duty, in making an unequal Diſtribution of his Goods amongſt thoſe whom he hath equally begotten. Therefore *Pliny* [d] ſpeaking of a Lady who had left Two Thirds of her Eſtate to a Nephew, and but One Third to a Niece, calls it, *Honeſtiſſimum Teſtamentum, A moſt honeſt and worthy Teſtament.*

And hence too it may be appointed not only by Statute, but by bare Covenant, likewiſe, That Children born in Concubinage, or in ſuch Marriage [4] as is conſtrued good and juſt only in a natural ſenſe, not in the Eye of the Law, ſhall claim no more than neceſſary Maintenance, or, at leaſt, ſhall be excluded from the main Inheritance [e].

And here, by the Way, we cannot but wonder why St. *Auſtin* [f] ſhould paſs ſo ſevere a Cenſure on the *Voconian* Law, by which female Iſſues were incapacitated to receive an Inheritance above ſuch a certain Sum. It is plain the *Spartan* Law was far more grievous, which utterly forbad the giving Portions to Virgins; for this Reaſon, as *Plutarch* tells us [g]; *Leſt ſome ſhould remain unmarried for want of larger Fortunes; and others again be courted for their Riches; but that every Man, in ſeeking out a Partner for himſelf, ſhould look wholly into the Manners of the Woman, and make Virtue alone the Rule and Standard of his Choice.* Nevertheleſs, this is a Point which requires great Caution and Prudence, leſt a Father ſhould ſow the Seeds of Envy and Hatred amongſt his Children, if, without very weighty Reaſons, he ſhould ſeem to have treated with unequal Favour thoſe who were equal in Merit and [h] Degree. And the Divine Law of *Deut.* xxi. 17. is grounded on the ſtrongeſt Reaſon; leſt the Father, charmed with the Enticements of his now *beloved* Wife, ſhould either frame a falſe Cauſe for diſcarding the Firſt-born, the Son of a former *hated* one; or ſhould catch at every little Failing to his Diſadvantage. It is indeed altogether the ſafeſt Courſe [5], not

[a] See *Gen.* xlviii. 22. [b] Add *Deut.* xxi. 17. Of the extraordinary Prerogative of the Firſt-born amongſt the *Japoneſe*, ſee *Bern. Varen.* Deſcript. *Japon.* c. 15. [c] *In locum* Deut. *cit.* [d] Lib. vii. Epiſt. 24. [e] Vid. *Grot.* l. ii. c. 7. §. 8. *ſub fin.* & Bœcler. add. l. [f] De Civit. Dei, l. iii. c. 31. His Words are, *Ea lege quid iniquius dici aut cogitari poſſit, ignoro, I know not what could be ſaid or thought of more unjuſt than that Law.* The Law he ſpeaks of was made at the Motion of *Cato* the Cenſor, and Enacted, That none ſhould leave a Daughter above five and twenty thouſand Seſterces in Inheritance, as *Paulus Manutius* (*de L. L. Rom.*) ſhews from *Dio. Caſſ.* l. 56. Though *Aſconius Pædianus* (*ad Orat. Cicer. in Verrem de prætura urb.*) reports the Thing thus: *Voconius* preferred a Law, *That no Cenſus*, i. e. *no very Rich Perſon, ſhould make his Daughter his Heireſs.* He had ſaid before, *the Antients called thoſe Perſons Cenſi, who owned themſelves before the Cenſor to be worth an hundred thouſand Seſterces.* Add *Liv.* Epit. l. xli. *Quintil.* Declam. 264. *Gell.* l. vii. xii. xvii. xx. [g] Apophth. *Lacon.* 227, 228. Edit. *Wech.* [h] See *Gen.* xxxvii. 4.

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[1] See, upon this Subject, Mr. *Buddeus*'s excellent Diſcourſe, intitled, *De Succeſſione Primogenitorum.* It is the third among his *Selecta Juris Nat. & Gen.* to which we may join another Diſcourſe in the ſame Volume, intitled, *De Comp. offic.* §. 31, &c.

[2] It is not certain that Prieſthood was a Right of Primogeniture. See Mr. *Le Clerc* on *Gen.* xxv. 31.

[3] See chiefly the Diſcourſe of Mr. *Perizonius, De Lege Voconia*, where he ſhews that that Law fixed at an hundred thouſand Seſterces, which make 2500 Crowns of our Money, the Portion of any Woman, whether an only Daughter or Siſter.

[4] Hence it is that Princeſſes and other Women of Noble Families, when they marry into other Families, ſometimes renounce the Succeſſion to a Kingdom, or to the Eſtates of the Families from whence they are deſcended; ſo that neither themſelves nor Heirs can put in any Claim to them. See Mr. *Buddeus*'s Diſcourſe, *De Teſtamentis Summorum Imperantium, ſpeciatim Caroli* II. *Hiſpaniæ Regis*, c. i. §. 39, &c. and c. ii. §. 10, &c.

[5] In general the ſafeſt Diſtribution of our Goods when we die is according to the Uſage of our Country, in my Opinion. The Laws have better contrived it than we can, and we had better commit a Miſtake by their Direction, than hazard it raſhly by our own Choice. They are not properly ours, ſince by a civil Preſcription made without us they are deſigned for the Good of our Succeſſors. And though we have ſome Liberty allowed by them, yet I take it we ſhould have the greateſt and moſt apparent Cauſe, before we ſhould deprive any of thoſe Eſtates to which their good Fortune entitled them, and common Juſtice would have given them, and ſo we abuſe our Liberty without Reaſon to follow our idle and private Fancy.——We take too much to Heart our Succeſſions by a Male Iſſue, as though we could make our Names eternal, and value too much our vain Conjectures of what ſhall be, which fill us with childiſh Hopes. ——— It is mere Folly to make extraordinary Choices upon the Account of ſuch Imaginations, in which we are ſo often deceived. The agreeable Dialogue of *Plato* between a Lawgiver and his People (*De Legibus*, l. xi. Tom. 2.) will be a Reputation to this Paſſage. "Is it not then, ſay they, lawful for us, when we find our End approaching, to diſpoſe of "our Goods as we pleaſe? O God, what Cruelty is this! May we not, according as we find our Family or Friends have been "ſerviceable to us in our Sickneſs, old Age, or Buſineſs, give them more or leſs, as we think fit?" To whom the Lawgiver replies in this Manner: "My Friends, who muſt certainly ſoon die, it is hard for you to know yourſelves, and what belongs to you, "according to the Inſcription at *Delphos*. As for me, who make Laws, I hold, that you know not what is good for yourſelves, "nor what is fit for you to enjoy. Both yourſelves and Goods belong to your Family, as well in preſent as to come, but both "your Family and Goods belong more to the State. Wherefore, for fear that ſome Flatterers in your old Age, Sickneſs, or ſome "other

not to recede in this Matter from the Direction and Diſpoſal of the Laws of our Country. Which made my Lord *Bacon* [a] obſerve, That *younger Brothers, though otherwiſe commonly fortunate, are ſeldom or never ſo, where the Elder are diſinherited.*

Hence it is, that in Caſe the Father dies inteſtate, and the Laws of the Land ordain nothing to the contrary, Children ſucceed to the Inheritance with equal Shares: Becauſe, when the Point is doubtful, thoſe who ſtand related to the deceaſed in an equal Degree, are preſumed to have been equally beloved. Now thoſe, likewiſe, are accounted *equal* Shares, which, though not ſtrictly ſo, becauſe inferior perhaps in Value to the reſt, yet have been taken by any one of the Coheirs, either by his own Choice, with the Conſent of his Fellows, or by their Aſſignation, or by the Deciſion of Lots. *Quintilian*'s Obſervation (Declam. v. p. 65, 66. Edit. *Lugd. Bat.*) is not unworthy our Remark: *We have the ſame natural Affection towards all our Children, without any Difference or Degree; yet taking each one of them by themſelves, we commonly find ſome peculiar Reaſon for our Fondneſs, and, without breaking the Equality of their Endearment to us, there is ſomewhat again, which, by a tacit Inſtinct of the Mind, engageth us to ſet our Love deeply upon each in particular, as if he were the only Object of it. One is recommended by his Precedency in Birth; another by the Innocence of Infancy; a third by a ſweet Aſpect, and a Face that invites a Kiſs: Some are eſpecially valued for their honeſt Gravity and ſevere Plainneſs of Temper: In ſome we love their very Misfortunes and Calamities, and embrace with a peculiar Pity a maimed Limb, or a weak and diſtempered Body. But ſtill the general Equality holds good; whilſt whatever any of them ſeems to want to render him amiable in one reſpect, is made up to him by ſome other Advantage above the reſt.*

IX. But we are obliged to add, on this Subject, that not only the Laws of particular States, but natural Reaſon itſelf allows more Favour to legitimate, than to natural Children; though the latter partake no leſs of the Father's Blood than the former. For they who owe their Birth to a Man's irregular Luſt, without any ſerious Intention, can, on no Account, enter into compariſon with thoſe who were begotten for the Increaſe and Defence of his Family, and upon the Deſire of having Heirs to ſucceed him. But if any Perſon is inclined to advance a natural Son to the Station and the *Rights* of legitimate Iſſue, in a State of Nature, he may fairly do it after he hath once taken care that no Injury ſhall thereby accrue to his Children who are properly legitimate, or to any who have obtained the next *Right* after them: Under civil Government he muſt proceed in the Affair as the Laws permit and direct [b] [1]. *Ariſtophanes* [c] reports, it was one of *Solon*'s Laws, *That, upon Failure of legitimate Offspring, the Inheritance ſhall be ſhared by the next of Kin: But that a Baſtard ſhall not be deemed next of Kin, nor any Relation be ſuppoſed between him and the proper Sons.* On the contrary, amongſt the *Mahometans*, as to the Point of ſharing the Father's Eſtate, there is no Difference obſerved between the Sons of the Wife, the Concubine, or the Servant-Maid.

When a Man is deſirous to raiſe Iſſue rather by a Concubine [2] who hath engaged herſelf to be true to his Bed, than by a proper Wife, for the Benefit of his Children by a former Marriage, the Sons of the Concubine ſhall, even without [3] any expreſs Will of the Father, be poſtponed; and, upon receiving moderate Portions, ſhall leave the main Inheritance to the others. Yet in Caſe a Man hath therefore taken a Concubine, that he might avoid the Pride or the Expences of a Wife, or will not admit her to his Name and Honour, or for ſome other political Reaſons, or on Account of ſome Covenant or Obligation which he lies under; then the publick Ordinances of the Commonwealth are to determine, whether ſuch Children ſhall be admitted to an Equality with others born in lawful Wedlock; or whether, upon Failure of theſe, they ſhall exclude the next of Kin. For, if the Man were abſolutely free from the Reſtraint of poſitive Laws, I ſee nothing that could be offered in prejudice of the concubinary Iſſue in this Caſe; ſince the Cohabiting of their Father and Mother amounted, in natural Conſideration, to a true Marriage: Eſpecially if the Father in the Buſineſs of their Education, and in his Actions and Expreſſions of Affection towards them, hath never made any Diſtinction. Hence I ſhould be of Opinion, that *Jacob*'s Sons, born of his Handmaids, ſhould have ſucceeded to equal Shares with the reſt, even upon Suppoſition that their Father had made no ſuch expreſs Diſpoſal; becauſe we do not find that he ever treated them in a different Manner. But ſtill, if the Father ſhall particularly declare, that he refuſeth to enter into ſolemn Marriage, for this Reaſon, *That what he hath may deſcend to the neareſt of his collateral Kindred* (as ſome political Conſiderations may now and then move a Man to do) then even the concubinary Children in the faireſt Caſe ſhall be allowed to claim no more out of the Eſtate than a bare Maintenance, or whatever the Will of their Father, or the Laws of the Land aſſign them more [c].

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wholly owing to poſitive Conſtitutions. Which, likewiſe, as they may upon Account of ſome Reaſons of State poſtpone the concubinary to the legitimate Race, and not admit them with the *aſcending Line* upon Failure of the *deſcending*: So they can ſcarce in Equity utterly exclude them, if there was no original Fault in the Act of Generation. But then theſe are, by all means, to be diſtinguiſhed from Children begotten in a Way naturally ſinful, as in Adultery or Inceſt: Who, how clear ſoever they may be of any Share in their Parents Guilt [a], yet ſhall on Account of it be obliged to reſt ſatisfied with Maintenance only, and ſhall not be admitted with the other Children, who were begotten on the Hope and Proſpect of inheriting their Father's Poſſeſſions. But the Parties could entertain no ſuch Hope of raiſing Heirs, when they concurred in theſe Impurities; ſince they wiſh that their Sin may perpetually lie concealed, rather than be the Means of producing thoſe who ſhould, as it were, bear publick Teſtimony to the Shame and the Wickedneſs of their Parents.

X. *Grotius* [b] farther remarks, that there are two more Conditions ſtill required in the Succeſſion to *Inteſtates*, *That the Children appear to have been really begotten by him whoſe Eſtate they claim, and that there be no Tokens extant of a contrary Will.* For no Man ſhews a fatherly Affection for Children begotten by others; and a preſumed Will muſt always give Place, when contradicted by an expreſs Declaration and Diſpoſal. As to the firſt of theſe Conditions, that ſuch a Perſon was the Father of another, cannot always be either demonſtrated by indubitable Arguments, or ſo clearly made out by Teſtimony, as in the Mother's Caſe; eſpecially where Women live under no other Guard or Reſtraint beſides their own Modeſty and Conſcience: The main Proof therefore in this Point is, the Certainty of Marriage; by which Union the Wife both engageth her Faith to be true to her Huſband's Bed, and, likewiſe, is placed, as it were, under his Inſpection, he, at the ſame Time, receiving a Power over her Body. Now all Perſons are preſumed both to obſerve the Faith they have engaged, and to exerciſe the Power they have received, unleſs there be direct and manifeſt Evidence of the contrary. So that every one ſeems to be, as it were, in Poſſeſſion of this *Right*, that he ſhall be deemed the Son of him who appears to be joined in Marriage with his Mother [1]. And no Man, unleſs he is out of his Wits, will diſturb himſelf in this Poſſeſſion, and accuſe his Mother of Adultery for the ſake of finding a new Sire. Julius Sabinus *with his natural Vanity was ſtrangely exalted by aſcribing to himſelf the Glory of a falſe Original; pretending that his Great Grandmother had been very nearly acquainted with* Julius Cæſar *in his* Gallick *Expedition*, Tacit. *Hiſt.* l. iv. c. 55.

Jupiter aut falſus pater eſt, aut crimine verus.

Jove's a *falſe* Father, or in Sin a *true*.

If others attempt to bring this Matter into Diſpute, it ſhall be incumbent on them to prove their Charge: As for Inſtance, *That the pretended Father at the Time of the Conception was diſabled by Sickneſs, or was abſent in a diſtant Country* [2]. In *Xenophon* (Hiſt. *Græc.* l. iii. p. 289. Edit. *H. Steph.*) *Ageſilaus*, after the Death of *Agis* King of *Lacedemon*, his Brother, endeavours to prove *Leotychides* illegitimate upon theſe Reaſons, That his Father had ſome Time diſowned him; that he exceeded his Father in Comelineſs of Body; that he was born ten Months after the parting of his Father and Mother; that his Father *Agis* had expelled his Mother from the Royal Bed.

XI. As to the ſecond Condition, it is judged another Exception againſt a Son's ſucceeding to an *inteſtate* Father, if it appear that his Father hath expreſly deſired and declared the contrary: As ſuppoſe [3], if he hath either abandoned (as was uſual amongſt the antient *Greeks*) or diſinherited him, as it was a Cuſtom among the *Romans*.

We have before intimated, that very great and weighty Cauſes [4] are required to juſtify either of theſe Proceedings. *Grotius* adds, *That Suſtenance is ſtill to be allowed to the abandoned or diſinherited Son, unleſs his Crime deſerved Death.* Though I can hardly ſee how it is poſſible, that a Son, during thoſe Years of Minority, in which his Father naturally owes him Suſtenance, can be guilty of ſuch an Offence, as ſhall deſerve either capital Puniſhment, or *Diſ-heriſon*.

XII. On the Propoſition which we before advanced, *That Parents are obliged to afford Suſtenance to their Children, not only of the firſt, but of farther Degrees, in Caſe their proper Parents, who ought to perform this Office, are extinct*, is chiefly founded the *Equity* of that *Right* termed, *The Right of Repreſentation*; by Virtue of which Children are ſuppoſed to fill the Place of their deceaſed Father [5], ſo as to be allowed the ſame Share in the Family Inheritance, as their Father, were he now living, would receive; and, conſequently, to ſucceed on the

[a] Vid. *Gratian.* c. 3, *&c.* Diſtinct. 56. [b] Dict. loc. Sect. 8.

[1] *Semper certa eſt mater, etiamſi vulgo conceperit. Pater vero is eſt, quem nuptiæ demonſtrant*, Digeſt. l. ii. t. 4. *De in Jus vocando*, leg. 5.

[2] The Words of *Ageſilaus* are ſo miſrepreſented by our Author for want of thoroughly underſtanding the *Greek*, that I have thought fit to give the Reader a new Tranſlation of them. *Ageſilaus* then alledges, "That *Agis* never owned *Leotychides* for his Son "and that *Leotychides* his Mother, who muſt needs know better than *Agis*, had diſowned that ſhe ever bore him" (for there is no ſuch Thing in *Plutarch*, as that he exceeded his Father in Comelineſs of Body, as our Author tranſlates πολὺ καλλίων ἐκείνου, which ſignifies only better than he.) "That, by an Earthquake cauſed by *Neptune*, *Agis* was toſſed out of his Bed from his Wife in the ſight "of all the World, which evidently proves that he was not the Father of *Leotychides*, which was better confirmed by the Time of "his Conception, which is an infallible Sign in theſe Matters. For when *Leotychides* was born, it was Ten Months after *Agis* had "eſcaped, and never, after lay with his Mother." See, alſo, *Plutarch* in the Life of *Alcibiades*, p. 203. Edit. *Steph.* Theſe Reaſons are not very concluſive, and the *Phyſicians* will conteſt that Point with him. See upon the laſt Article *Joan. Vincent. Gravinæ Origines Juris Civilis*, l. ii. p. 301. *&c.* And a Diſſertation of *Charles Hanibal Fabrail. De Juſtu Partû*, printed at *Paris* in 1651.

[3] See Dr. *Potter*'s *Greek* Antiquities, l. iv. c. 15. *in fine*, and *Iſaac Caſaubon* upon *Diogenes Laertius*, l. i. §. 94.

[4] *Antenor* (in *Dictys Cretenſ.* l. iii. c. 26.) reſolved to baniſh his Son *Glaucus* from his Family, for making one of *Paris*'s Company at the Stealing of *Helen*.

[5] *Sine dubio nepos filii loco ſuccedit*, Digeſt. l. i. t. 6. *De his qui ſui vel alieni juris ſunt*, leg. 7. *Quotcunque autem nepotes fuerint ex uno filio, pro uno filio numerantur*, ib. l. xxvii. t. 1. *De excuſationibus tutorum*, &c. leg. 2. §. 7.

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[3] In the Original *Latin* the Words are, *Etiam expreſſa voluntate patris*, which is kept in all the Editions, the laſt put out by Mr. *Hertius*, in 1706, not excepted. But there can be no doubt the Word *ſine* after *etiam* is omitted, and ſo it ought to be rendered as the *Engliſh* Tranſlator has, without any expreſs Will of the Father: For certainly, if the Father had declared his Will about it, it muſt have been followed.

wholly

wholly owing to poſitive Conſtitutions. Which, likewiſe, as they may upon Account of ſome Reaſons of State poſtpone the concubinary to the legitimate Race, and not admit them with the *aſcending Line* upon Failure of the *deſcending*: So they can ſcarce in Equity utterly exclude them, if there was no original Fault in the Act of Generation. But then theſe are, by all means, to be diſtinguiſhed from Children begotten in a Way naturally ſinful, as in Adultery or Inceſt: Who, how clear ſoever they may be of any Share in their Parents Guilt [a], yet ſhall on Account of it be obliged to reſt ſatisfied with Maintenance only, and ſhall not be admitted with the other Children, who were begotten on the Hope and Proſpect of inheriting their Father's Poſſeſſions. But the Parties could entertain no ſuch Hope of raiſing Heirs, when they concurred in theſe Impurities; ſince they wiſh that their Sin may perpetually lie concealed, rather than be the Means of producing thoſe who ſhould, as it were, bear publick Teſtimony to the Shame and the Wickedneſs of their Parents.

X. *Grotius* [b] farther remarks, that there are two more Conditions ſtill required in the Succeſſion to *Inteſtates*, *That the Children appear to have been really begotten by him whoſe Eſtate they claim, and that there be no Tokens extant of a contrary Will.* For no Man ſhews a fatherly Affection for Children begotten by others; and a preſumed Will muſt always give Place, when contradicted by an expreſs Declaration and Diſpoſal. As to the firſt of theſe Conditions, that ſuch a Perſon was the Father of another, cannot always be either demonſtrated by indubitable Arguments, or ſo clearly made out by Teſtimony, as in the Mother's Caſe; eſpecially where Women live under no other Guard or Reſtraint beſides their own Modeſty and Conſcience: The main Proof therefore in this Point is, the Certainty of Marriage; by which Union the Wife both engageth her Faith to be true to her Huſband's Bed, and, likewiſe, is placed, as it were, under his Inſpection, he, at the ſame Time, receiving a Power over her Body. Now all Perſons are preſumed both to obſerve the Faith they have engaged, and to exerciſe the Power they have received, unleſs there be direct and manifeſt Evidence of the contrary. So that every one ſeems to be, as it were, in Poſſeſſion of this *Right*, that he ſhall be deemed the Son of him who appears to be joined in Marriage with his Mother [1]. And no Man, unleſs he is out of his Wits, will diſturb himſelf in this Poſſeſſion, and accuſe his Mother of Adultery for the ſake of finding a new Sire. Julius Sabinus *with his natural Vanity was ſtrangely exalted by aſcribing to himſelf the Glory of a falſe Original; pretending that his Great Grandmother had been very nearly acquainted with* Julius Cæſar *in his* Gallick *Expedition*, Tacit. *Hiſt.* l. iv. c. 55.

Jupiter aut falſus pater eſt, aut crimine verus.

Jove's a *falſe* Father, or in Sin a *true*.

If others attempt to bring this Matter into Diſpute, it ſhall be incumbent on them to prove their Charge: As for Inſtance, *That the pretended Father at the Time of the Conception was diſabled by Sickneſs, or was abſent in a diſtant Country* [2]. In *Xenophon* (Hiſt. *Græc.* l. iii. p. 289. Edit. *H. Steph.*) *Ageſilaus*, after the Death of *Agis* King of *Lacedemon*, his Brother, endeavours to prove *Leotychides* illegitimate upon theſe Reaſons, That his Father had ſome Time diſowned him; that he exceeded his Father in Comelineſs of Body; that he was born ten Months after the parting of his Father and Mother; that his Father *Agis* had expelled his Mother from the Royal Bed.

XI. As to the ſecond Condition, it is judged another Exception againſt a Son's ſucceeding to an *inteſtate* Father, if it appear that his Father hath expreſly deſired and declared the contrary: As ſuppoſe [3], if he hath either abandoned (as was uſual amongſt the antient *Greeks*) or diſinherited him, as it was a Cuſtom among the *Romans*.

We have before intimated, that very great and weighty Cauſes [4] are required to juſtify either of theſe Proceedings. *Grotius* adds, *That Suſtenance is ſtill to be allowed to the abandoned or diſinherited Son, unleſs his Crime deſerved Death.* Though I can hardly ſee how it is poſſible, that a Son, during thoſe Years of Minority, in which his Father naturally owes him Suſtenance, can be guilty of ſuch an Offence, as ſhall deſerve either capital Puniſhment, or *Diſ-heriſon*.

XII. On the Propoſition which we before advanced, *That Parents are obliged to afford Suſtenance to their Children, not only of the firſt, but of farther Degrees, in Caſe their proper Parents, who ought to perform this Office, are extinct*, is chiefly founded the *Equity* of that *Right* termed, *The Right of Repreſentation*; by Virtue of which Children are ſuppoſed to fill the Place of their deceaſed Father [5], ſo as to be allowed the ſame Share in the Family Inheritance, as their Father, were he now living, would receive; and, conſequently, to ſucceed on the level

[a] Vid. *Gratian.* c. 3, *&c.* Diſtinct. 56. [b] Dict. loc. Sect. 8.

[1] *Semper certa eſt mater, etiamſi vulgo conceperit. Pater vero is eſt, quem nuptiæ demonſtrant*, Digeſt. l. ii. t. 4. *De in Jus vocando*, leg. 5.

[2] The Words of *Ageſilaus* are ſo miſrepreſented by our Author for want of thoroughly underſtanding the *Greek*, that I have thought fit to give the Reader a new Tranſlation of them. *Ageſilaus* then alledges, "That *Agis* never owned *Leotychides* for his Son "and that *Leotychides* his Mother, who muſt needs know better than *Agis*, had diſowned that ſhe ever bore him" (for there is no ſuch Thing in *Plutarch*, as that he exceeded his Father in Comelineſs of Body, as our Author tranſlates πολὺ κάλλιον ἐκείνου, which ſignifies only better than he.) "That, by an Earthquake cauſed by *Neptune*, *Agis* was toſſed out of his Bed from his Wife in the ſight "of all the World, which evidently proves that he was not the Father of *Leotychides*, which was better confirmed by the Time of "his Conception, which is an infallible Sign in theſe Matters. For when *Leotychides* was born, it was Ten Months after *Agis* had "eſcaped, and never, after lay with his Mother." See, alſo, *Plutarch* in the Life of *Alcibiades*, p. 203. Edit. *Steph.* Theſe Reaſons are not very concluſive, and the *Phyſicians* will conteſt that Point with him. See upon the laſt Article *Joan. Vincent. Gravinæ Origines Juris Civilis*, l. ii. p. 301. *&c.* And a Diſſertation of *Charles Hanibal Fabrail. De Juſu Partû*, printed at *Paris* in 1651.

[3] See Dr. *Potter*'s *Greek* Antiquities, l. iv. c. 15. *in fine*, and *Iſaac Caſaubon* upon *Diogenes Laertius*, l. i. §. 94.

[4] *Antenor* (in *Dictys Cretenſ.* l. iii. c. 26.) reſolved to baniſh his Son *Glaucus* from his Family, for making one of *Paris*'s Company at the Stealing of *Helen*.

[5] *Sine dubio nepos filii loco ſuccedit*, Digeſt. l. i. t. 6. *De his qui ſui vel alieni juris ſunt*, leg. 7. *Quotcunque autem nepotes fuerint ex uno filio, pro uno filio numerantur*, ib. l. xxvii. t. 1. *De excuſationibus tutorum*, &c. leg. 2. §. 7.

level with thoſe who ſtand in their Father's Degree [1]. And it would indeed be a lamentable Misfortune, if, beſides the untimely Loſs of their Father, they ſhould farther be deprived of thoſe *Poſſeſſions*, which either the Rule of the Law, or the Deſign of their *Progenitors*, had given their *Parents* juſt Hopes of enjoying [a]. But if in any Place the *civil Conſtitutions* will not admit of this *repreſentative Right*, the Children, who have been ſo unhappily bereaved of their Father and of their Hopes, muſt endeavour to bear the Calamity as an Affliction which Providence hath laid upon them.

XIII. Upon Failure of Iſſue in the firſt, and the other deſcending Degrees, [b] Reaſon ſuggeſted that *Inheritance* ought to turn back into the Line of *Aſcendents*; as well in Conſideration that, for the moſt Part, either the *Poſſeſſions* themſelves, or, at leaſt, the firſt Seeds and Principles of them, which the Children afterwards increaſed, proceed from the *Parents*, as becauſe their extraordinary Benefits give them an eſpecial Title to this Reward: Who ſince they would much rather have deſired, *That their Children ſhould inherit their Fortunes*, yet when they ſurvived them, contrary to the ordinary Courſe of *Nature*, it was but equitable they ſhould receive, however, this melancholy Comfort, of ſucceeding to what the Children poſſeſſed. *It is a Condition* (as *Pliny* obſerves) *abundantly unhappy for a Father to be the ſole Heir of his own Son* [2]. Panegyr. c. 38. Vid. l. v. t. 2. l. 15. *D. De inoffic. teſtam.* Lib. xxix. t. 4. *D. Si quis, omiſſa cauſa, &c.* leg. 26. Cod. lib. iii. t. 28. *De inoffic. teſtam. &* t. 25. *De Inſtitut. &c.* leg. 9. *&* Lib. vi. t. 56. ad Senatuſconſ. *Tertull. &* Lib. iii. t. 3. de Senatuſconſ. *Tertull.*

Philo the *Jew* [3], reporting, That *Moſes* eſtabliſhed this Order of Inheritance, *That the Sons ſhould ſtand firſt, the Daughters next, then the Brothers, and in the fourth Place the Uncles by the Father's ſide*, uſeth this an Argument to prove, that Fathers, likewiſe, may inherit what their Sons leave behind; *For it would be ſenſeleſs* (ſays he) *to imagine, that the Uncle ſhould be allowed to ſucceed his Brother's Son, as a near Kinſman to the Father, and yet the Father himſelf be abridged of that Privilege. But inaſmuch as the Law of Nature appoints, that Children ſhould be Heirs to their Parents, and not Parents to their Children*, Moſes *paſſed this Caſe over in Silence, as ominous and unlucky, and contrary to all pious Wiſhes and Deſires: Leſt the Father and Mother ſhould ſeem to be Gainers by the immature Death of their Children, who ought to be afflicted with moſt inexpreſſible Grief. Yet, by allowing the Right of Inheritance to the Uncles, he obliquely admits the Claim of the Parents, both for the Preſervation of Decency and Order, and for the continuing the Eſtate in the ſame Family.*

Some Parents too have the additional Title of an infirm and indigent old Age; under which ſad Condition their Children were otherwiſe obliged to maintain them: As one of the *Attic* Laws expreſly enjoined [4]. *Iſæus* Orat. vii. *The Law commands us to maintain our Parents, under which Name are comprehended not only our Father and Mother, but our Grandfather. For theſe are the firſt of our Kindred, and from theſe deſcend the Goods and Fortunes which their Poſterity enjoy. Theſe therefore we are neceſſarily bound to ſupport, even though they ſhould have nothing to leave us.* Add. *Grot. d. l.* Sect. 5. & *Ziegler* ad *d. l.* Yet in Caſe a Father hath, without Reaſon, grievouſly hated and injured his Son, without any ſubſequent Reconciliation, the Son may juſtly exclude him from the Right of Inheritance [5]. It is the ſame with him who expoſed his Son, when an Infant, utterly neglecting his Support: For here no doubt the Claim of the Foſter-father, who hath undertaken the Care and Burthen of the Child's Education, ought firſt to be admitted. Nay, farther it ſeems reaſonable, That an adoptive Father ſhould, in this Point, be preferred to a natural Parent; that he may recover what he hath expended on bringing up another's Child. We are, likewiſe, to obſerve, that the Lawyers do not admit of *Repreſentation* in the aſcending Line, as they do in the deſcending; that is, if a Man die without Iſſue, leaving a Father, and a Grandfather by his Mother's ſide, the latter of theſe ſhall not be allowed to make Claim in the room of his Daughter. A Rule which ſeems to be grounded on this Conſideration, That naturally the Hopes of Succeſſion do not aſcend, but deſcend: Wherefore, the Son had indeed Hopes of ſucceeding his Father, and might tranſmit the ſame Hopes to his own Iſſue; but the Mother had never any Hope or Deſire of inheriting after her Children; and ſo could not, contrary to the Order of Nature, convey back any ſuch Hope to her own *Parents:* And, conſequently, the nearer Claimant here excludes very juſtly the more remote [6].

XIV. When the deſcending and the aſcending Lines both fail, the Succeſſion to *Inteſtates* devolves on the collateral Kindred. As to the Order in which they are to be admitted, where the *civil Statutes* do not expreſly ſettle it, it is to be determined by *natural Conjecture:* Which always favours that Perſon, whom we preſume to have ſtood faireſt in the Affection of the Deceaſed; yet ſo, as that we

[a] Add *Bœcler.* ad *Grot.* d. l. Sect. 6.

[b] Vid. *Grot.* l. ii. c. 7. §. 5. *ibique Ziegler.*

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[1] This Succeſſion by Deſcent *(ſucceſſio per ſtirpes)* is diſtinguiſhed from Succeſſion by Heads *(ſucceſſio per capita)* thus: In the laſt each of the Coheirs have an equal Portion, whereas in the other ſeveral Children have no more all together than a Portion in the Inheritance equal to what their Father had, and to what every one of the Coheirs had; who are in the ſame Degree as he was whom they repreſent. See *Juſtinian's* Novels, 118. c. 1.

[2] *Pliny's* Words are, *Sic quoque abunde miſera res eſt, pater filio ſolus hæres.*

The Words of the *Digeſt* are, *Nam etſi parentibus non debetur filiorum hæreditas propter votum parentum, & naturalem erga filios charitatem, turbato tamen ordine mortalitatis, non minus parentibus quam liberis piè relinqui debet.*

[3] *Philo's* Greek is this, Καὶ τετάρτην δὲ θείοις πρὸς πατρὸς ἀπονέμει τάξιν, αἰνιττόμενος ὅτι καὶ πατρὸς γένοιντ' ἂν υἱῶν κληρονόμοι, πάνυ γὰρ ἔυηθες ὑπολαβεῖν, ὅτι πατρὸς ἀδελφῷ νέμων κλῆρον ἀδελφιδοῦ διὰ τὴν πρὸς τὸν πατέρα συγγένειαν, αὐτὸν ἀφείλετο τὸν πατέρα τῆς διαδοχῆς, ἐλλ' ἐπειδὴ ὁ νόμος φύσεώς ἐστι κληρονομεῖσθαι τοὺς γονεῖς ὑπὸ παίδων, ἀλλὰ μὴ τούτους κληρονομεῖν, τὸ μὲν ἀπευκταῖον, καὶ παλίμφημον ἡσύχασεν, ἵνα μὴ πατὴρ καὶ μήτηρ προσοδεύεσθαι δοκοῖσι τὰ ἐπὶ ὠκυμόροις τέκνοις ἀπαρηγόρητα πένθη, πλαγίως δ' αὐτοὺς ἐκάλεσε τοῖς θείοις ἐφιείς, ἵνα καὶ ἀμφοτέρων σοχάσηται, καὶ τοῦ μὴ πρέποντος, καὶ τοῦ μὴ τὴν ἁσίαν ἀλλοτριωθῆναι.

[4] That *Greek* Orator's Words are, Κελεύει γὰρ ὁ νόμος τρέφειν τοὺς γονέας γονεῖς δὲ εἰσὶ μήτηρ, καὶ πατὴρ, καὶ πάππος, καὶ τήθη. καὶ τέκνων μήτηρ καὶ πατὴρ, ἐὰν ἔτι ζῶσιν· ἐκεῖνοι γὰρ ἀρχὴ τοῦ γένους εἰσὶ, καὶ τὰ ἐκείνων παραδίδοσθαι τοῖς ἐγγόνοις, διόπερ ἀνάγκη τρέφειν αὐτοὺς ἐστι, κἂν μηδὲν καταλίπωσι.

[5] See *Juſtinian's* Novels, 115. c. 4. and Mr. *Domat's* Civil Laws in their Natural Order, Part II. l. iii. t. 2. Sect. 2. §. 4.

[6] The Words of the Novel are, *Si autem plurimi adſcendentium vivunt, hos præponi jubemus, qui proximi gradu reperiuntur, maſculos & fœminas, ſive paterni, ſive materni ſint.*

measure

meaſure this Affection more by the common Inclination of wiſe and ſober Men, and according as it tends to the Prevention of Quarrels, than by the moroſe Humour of ſome few particular Perſons. Now, according to the Judgment of wiſe Men, natural Reaſon, in this Caſe, pays an eſpecial Regard to Nearneſs of Blood, yet ſo as, at the ſame Time, to conſider from what Source the reſpective *Poſſeſſions* ſeemed to flow to the deceaſed [1], or who formerly parted with any Thing [2], or ſuffered any Loſs upon account of his coming into the World. Thus *Ariſtotle*'s firſt Rule [a] is, *The Affection between Parents and Children*; and his next, *The Love between Brethren, ariſing from their Relation to the ſame common Stock, and improved by the Likeneſs of Years and Education.* After theſe follow Brothers Children, and other Relations joined to us by Virtue of that fraternal Union. And then (all theſe being firſt conſidered, whom Nature, as it were, *neceſſitates* us to love and eſteem) in the laſt Place thoſe are admitted, whom either paſt Kindneſſes or Agreeableneſs of Temper and Manners, or peculiar Likeneſs of Inclinations, or known Fidelity, recommends and endears. *Tully* [3] placeth the Degrees of Kindred in the Order following: *The firſt Society is in Wedlock; the next in Children; it comes then to a Family, and a Community of all Things. The Relation of Brothers comes next; and after that, of Brothers and Siſters Children; who, when they are too many for one Houſe, are tranſplanted into others, as into Colonies. And then follow Matches and Alliances, with Increaſe of Kindred, conſequent upon them. Now the Relation of Blood and the Kindneſs that ariſeth from it neceſſarily endears Men to each other.*

XV. But the high Encomiums given to Friendſhip in Authors may raiſe a Doubt, whether Friends are not ſometimes to be preferred to Relations [4]? *Of all Societies*, ſays *Tully*, *none hath more of Excellency, or of Strength, than when good Men, alike in Manners, are united by a familiar Acquaintance.*

So *Homer*;
A hearty Friend deſerves a Brother's Love.

And *Euripides*;
——— A Stranger to our Line,
If once in Mind and Manners firmly tied,
Is worth a thouſand Kinſmen. ———

And indeed it frequently happens, that we take more Satisfaction in the Company and Converſation of an indifferent Perſon, than of one related to us in Blood, and intruſt many Things with the Secrecy and Fidelity of the former, which we conceal from the latter. In fine, we addreſs ourſelves more readily to ſerve the Friend than the Relation; becauſe he, on the other ſide, is the more ready of the two to aſſiſt us in any Difficulty.

But it cannot hence be concluded, That by virtue of a general Cuſtom, coming up almoſt to the Force of a Law, a Friend is to take place of Relations, though the deceaſed Party ſhould chance to have expreſſed more Tokens of Affection towards him, than towards them. For, in the Buſineſs of tranſmitting an Inheritance, we are not guided only by Kindneſs and Good-will, but we conſider farther, on whom it is moſt proper and convenient that our Fortunes ſhould deſcend. And ſince Men are carried on by a general Propenſion to wiſh the Family in as good a Condition as poſſible, from which they derive their Original, therefore it is commonly moſt convenient that our Goods ſhould continue in our own Line. Beſides, it is no neceſſary Conſequence to ſay, I was highly delighted with this Perſon's Familiarity and Converſation, therefore it was my Inclination, likewiſe, to transfer my Poſſeſſions upon him. For this Friendſhip between Perſons, not allied in Race, generally extends no farther, than to a mutual Signification of Good-will, a Communication of Deſigns, and the ordinary Services and Offices of Life. But before I can be conceived to have joined Houſes, as it were, with a Stranger, by conveying to him my Eſtate, it will be neceſſary to produce an expreſs and legal Will to this Purpoſe. Thus, although according to the antient Manners of the *Romans*, in the Order of common Duties, *After Parents and Children, the firſt Place was given to Pupils or Wards; the ſecond to Clients or Dependents* [5]; *the third to Gueſts; and the laſt to the Kindred by Blood and Marriage, according to the Degree of Nearneſs in which they ſtood*; yet in tranſmitting *Poſſeſſions* this Method of proceeding was not, in the leaſt, regarded. Farther, if Friends, in the caſe of *Inteſtates*, were, at any Time, to have the Advantage of Kinſmen, this would open a wide Field for Quarrels and Contentions, as well amongſt the Friends themſelves, if they happened to be more than one, as between them and the Relations. For to take more Pleaſure in a Man's Company, or to communicate Affairs more freely with him, is not preſently to be looked on as

[a] *Nicom.* viii. c. 14.

[1] That is to ſay, if the Goods or Eſtate came by the Father, they ought to paſs to the collateral Kindred on the Father's ſide; but, on the contrary, if they came by the Mother, the collateral Relations of her ſide ought to be preferred.

[2] That is to ſay, That what Right a Man hath parted with to another Perſon, as ſoon as he is dead, it ſhall return to the ſame Man again, or to his Heirs. See §. 17. following.

[3] *Off.* i. c. 16. Of the Relation between Brothers ſee *Plutarch. De fratern. amor.* and *Xenophon*, l. viii. *Cyrop.* in *Cyrus*'s laſt Speech, and l. ii. *Socrat. Memorab.* Add *Bæcler.* ad *Grot. dict. loc.* §. 9, 10. 11. Towards illuſtrating the Obligation between thoſe of the ſame Blood it may not be improper to mention the Law received in the Kingdom of *Tonquin*, by which all Quarrels ariſing amongſt Perſons thus allied, are referred to the Deciſion of their common Kindred, and not brought into the ordinary Courts of Juſtice; as we are told by *Alexander de Rhodes, Itiner.* l. ii. c. 7, 8. Mr. *Hertius* adds, That there is a Law of the like Nature at *Padua*, about which *Marcus Antonius Planco* has compoſed a Book on Purpoſe.

[4] The Original of this Quotation is, *viz.* Of *Tully*, *Omnium ſocietatum nulla præſtantior, nulla firmior, quam cum viri boni, moribus ſimiles, ſunt familiaritate conjuncti.*

Of *Homer*. ——— Οὐ μέν τι κασιγνήτοιο χερείων
Γίνεται ὃς κεν ἑταῖρος ἐὼν φεπνυμένα εἰδῇ. Odyſſ. 8. ult.

And of *Euripides*. Ὡς ἀνὴρ ὅστις τρόποισι συντακῇ, θυραῖος ὢν
Μυρίων κρείσσων ὁμαιμόνων ἀνδρὶ κεκλῆσθαι φίλος. Oreſt. 806.

Farther, we may conſult upon this Queſtion Mr. *Buddeus*'s Diſcourſe, entitled, *De Comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*, §. 35, &c. among his *Selecta Jura Nat. & Gent.*

[5] *Aulus Gellius*'s Words are, *Conveniebat autem facile, conſtabatque ex moribus populi Romani primum juxta parentes locum tenere pupillos debere fidei, tutelæque noſtræ creditos* [*ſi neceſſe eſſet in opera danda faciendoq; officio alios aliis anteferre*] *ſecundum eos proximum locum, clientes habere, qui ſeſe itidem in fidem, patrociniumque noſtrum dediderunt, tum in tertio loco eſſe hoſpites, poſtea eſſe cognatos adfineſque.* Lib. v. c. 13.

an infallible Token that he ſtands higheſt in our Affection. Many times a jocoſe or eaſy Temper, Equality of Years, or Sagacity of Judgment, render the Acquaintance of a Friend more pleaſant or more profitable to us, than that of a Relation, who poſſibly may want the ſame Advantages. Yet when we are about to diſpoſe of our Goods, we are ſeldom ſwayed by this Conſideration to favour the former more than the latter. *Heſiod*'s Advice will here be good,

Let not thy Friend thy Brother's Rights invade [1].

Laſtly, The Degrees of Kindred are eaſily diſtinguiſhed and reckoned up; but who will undertake to ſettle the Degrees of Friendſhip in ſo exact an Order, as to leave no room for Cavil and Diſpute?

XVI. But ſtill it is urged with better Pretence, That thoſe Friends, at leaſt, are to be preferred to Relations in the Caſe of Succeſſion to Eſtates, by whoſe Bounty, Counſel, or Aſſiſtance the reſpective Eſtate was acquired; it being but equitable, that the Goods ſhould return to the Place whence they originally flowed. Yet here, likewiſe, there will be moſt plentiful Matter for Contentions; the Cutting off of which ought to be made the chief Aim and Deſign of all Laws. For a Friend, putting in his Claim with ſuch a Plea, might be well anſwered to this Purpoſe: That either what he takes for Merit was not the conferring, but the returning a Kindneſs; or, that if he was the firſt Benefactor, he hath ſince received a ſufficient Requital; or, that he gave without any Hope or Proſpect of Return; and deſired, that his Bounty ſhould reach not to the Perſon only, but to the Family of his Friend; or, that what he did was undertaken upon the Principle of Glory, or of preſent Advantage; that, in Caſe we had not found his Aſſiſtance, we did not want Opportunity of being relieved in our Diſtreſs by other Means; that it cannot certainly be determined how much his Aid contributed to our acquiring thoſe Goods which he demands to inherit: And then again, that he, who hath been only uſeful to to us in getting a thing, cannot preſently require, that we ſhould admit him to hold the thing in common with us. Farther, That the good Offices of Friends would be turned into a mercenary Service, or rather into perfect Uſury, if they were to be advanced to the Eſtate of *Inteſtates*, before the Relations of the deceaſed: For then a Kindneſs to another could not be ſuppoſed to be conferred with any other Deſign, than that the Receiver ſhould only for a little Time be the Steward and Keeper of what was beſtowed, or ſhould reſtore it with large Increaſe at his Death. Therefore, when there is no expreſs Diſpoſal extant in Favour of the Friend, the *Right* of the Kinſmen ſhall obtain: Yet ſo as that, together with the Goods of the deceaſed, they ſhall, likewiſe, take upon themſelves his Obligation towards this great Benefactor; and ſhall endeavour, as far as in them lies, to repay it in a moſt grateful manner, acknowledging by whoſe Aſſiſtance they arrive at ſo ample an Inheritance. Nor is it reaſonable for any Man obſtinately to urge againſt this Judgment that Saying of *Ariſtotle* [2]: *We ought rather to requite a Benefactor than to oblige a Friend, if both cannot be done together:* Or that of *Cicero* [3], *There is no Duty more neceſſary, than that of repaying Kindneſſes.* And again; *There being two Kinds of Liberality, one of beſtowing, the other of returning a Benefit; whether or no we will beſtow, depends on our own Choice; but not to return the Favours of a good Man, is abſolutely unlawful, provided it may be done without injuring any other Perſon:* Or that of *Phocion* [4] (in *Plutarch*'s Apophthegms) who being ſeveral Times called upon to give ſomewhat towards the Expence of a Sacrifice, whilſt all the reſt contributed that were about him, anſwered, *It would be a Shame to give you, before I pay this honeſt Man*; pointing to a Creditor of his that ſtood by. *Add.* lib. xxxix. t. 5. leg. 12. *D. de Donation.* Becauſe, indeed, the Buſineſs of Succeſſions to *Inteſtates* by no Means can be, or ought to be exactly ſquared in all reſpects according to the Rules obſerved in conferring and in returning Benefits. For the latter are guided by the Virtues of Humanity and Bounty, and, properly ſpeaking, are vouchſafed to thoſe only, who had no ground to expect them from us, but what is owing to the Suggeſtions of theſe Virtues in our Mind. Whereas the former are built on other Foundations, on the Obligation we lie under of making Proviſion for ſome particular Perſons, on Nearneſs of Blood, and on that Propenſion to advance, improve, and preſerve our own Family, enjoined by the Dictate of Nature. *Iſæus* Orat. 6. [5]. *All Perſons, as they approach near their End, are provident in diſpoſing of what they poſſeſs, leſt they ſhould bring their Family to Ruin and Deſolation.* And in this Affair, that which ought to be our principal Care is, That we eſtabliſh ſo clear a Method, as ſhall be expoſed, as little as poſſible, to Controverſy and Doubt. Now, there can be no Way or Method more ready than this, That, in Default of an expreſs Diſpoſal by Will, the Inheritance ſhall paſs down according to the different Degrees in which the Relations of the deceaſed ſtood nearer to him one than the other.

Hence Authors have remarked, That Succeſſions to *Inteſtates* proceed in in a contrary Courſe to the Rule of common Kindneſs; it being in the former the more neceſſary *Duty to give*, in the latter to *repay:* As, in the Caſe before us, our Children have the Preference of our *Parents*, to whom we are much more indebted and engaged. *Lucian* Abdicat. *It is the Ordinance and Appointment of Nature, that the Affection of Parents towards their Children ſhould exceed that of Children towards their Parents.* Comp. *Bæcler.* ad *Grot.* d. l. Yet, in what hath been here offered, we would not be underſtood to inſinuate, as if the *Duty* of Gratitude were to be allowed no Place in the laſt Diſpoſal of our Fortunes; but only that it would be inconvenient to go about to ſettle a general Method for the Eſtate of *Inteſtates* to be guided by, taken barely from the preſumed Will of the Party deceaſed, touching the Exerciſe of this Virtue.

XVII. From what hath been laid down, it appears, that of all the collateral Line the Brothers ſtand neareſt to the Inheritance; as well on the account of the moſt ſweet and hearty Affection by

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1 *Heſiod*'s Words are, Μηδὲ κασιγνήτῳ ἶσον ποιεῖσθαι ἑταῖρον. See alſo Mr. *Sacy*'s Treatiſe of Friendſhip, p. 155.

2 *Ariſtotle*'s Words are, Ἐυεργέτῃ ἀνταποδόσεον χάριν μᾶλλον, ἢ ἑταίρῳ δόσιν, ἐὰν ἀμφοῖν μὴ ἐνδέχηται.

3 *Cicero*'s Words are, *Nullum officium referenda gratia magis neceſſarium eſt.* Alſo *Cum liberalitatis genera ſint, unum dandi beneficii, alterum reddendi, demus necne in noſtra poteſtate eſt, non reddere bono viro non licet, modo id facere poſſit ſine injuria.*

4 *Phocion*'s Words are, *Puderet me vobis dare, & huic,* (δανεισὴν *demonſtrans*) *non reddere.*

5 *Iſæus*'s Greek is, Πάντες οἱ τελευτήσειν μέλλοντες προνοιαν ποιοῦνται σφῶν αὐτῶν, ὅπως μὴ ἐξερημώσωσι τὺς σφετέρους αὐτῶν οἴκους.

which

which they commonly are engaged to us, as becauſe they, on the Score of raiſing their Brother's Fortunes, received ſmaller Portions out of their Father's Eſtate. *Quintil.* [1] Declam. 321. pag. 509. *init.* Edit. *Lugd. Bat. What Friendſhip can be ſo happy as that which imitates brotherly Affection? Certainly, when we would compliment thoſe whom we take for our Friends, Flattery itſelf cannot invent a higher Endearment than the Name of Brothers.* With whom the Siſters are, likewiſe, to be admitted, at leaſt to thoſe Goods which were either brought by the Mother, or lately acquired; but they have not the ſame Title to the Father's Poſſeſſions, which are uſually deſigned to preſerve the Splendor of the Family; whereas Women, for the moſt part, marry out of their own Line. Brothers by the Father's ſide, in the paternal Inheritance, exclude thoſe by the Mother's ſide; as again, in the Fortunes left by the Mother, the latter have the Preference of the former. In Goods newly gotten ſince the Time my Father married the Mother of my [2] Half Brother, it is convenient that I ſhould carry off the largeſt Share; ſince toward the acquiring theſe Goods the Man uſually contributes more than the Woman. Upon Default of Brothers, the Brother's Sons ſhall come in; though it ſhould ſeem that theſe ought, at the ſame Time, to let in the Great-Uncles, becauſe they too had ſmaller Fortunes, on account of dividing the Eſtate with the Father of the deceaſed. The ſame is to be ſaid of Siſter's Sons, and their Great-Uncles by the Mother, with regard to the Mother's Goods. And this Order and Method ſhall be continued down in all other Inſtances; but ſtill with this Proviſo, That, where the paternal Line fails, there the Mother's Kindred ſhall be admitted to the Father's Eſtate, and ſo the Kinſmen by the Father, to the Mother's Goods, upon Failure of her own Line.

XVIII. But we ought well to obſerve, That the Rules which we have propoſed for the determining this Matter are ſtiled *natural*, not becauſe they are ſo exactly preſcribed by any Precept of the Law of *Nature*, as that they cannot be altered; but becauſe they are, in the higheſt Manner, agreeable to the Law of *Nature*, and ſeem to be the moſt ready Means of cutting off all Diſpute, in Caſes where either the expreſs Will of the deceaſed, or the National Laws are ſilent. Yet, indeed, in the whole Subject and Compaſs of the civil Ordinances, there is ſcarce any Thing about which they are found more careful and ſollicitous, than about the Diſpoſal of Inheritances, not only for the Prevention of Quarrels amongſt Relations, but, likewiſe, becauſe it is the Intereſt of the Publick to have this Buſineſs ſettled, and moderated according to the Ends and Reaſons of particular Governments. Hence in ſome Places the Power of making Wills is left very free and wide; in others it is more or leſs abridged and reſtrained. Amongſt the *Romans* it was one of the Laws of the Twelve Tables [3], That *whatever a Maſter of a Family ſettled or bequeathed with regard to his Family, or to his Fortunes, ſhould ſo ſtand.* Which was borrowed from the Syſtem of *Attic* Laws compoſed by *Solon:* For thus *Plutarch* [4] reports, That *the Ordinances of his, by which he gave free Subjects the liberty of making Wills, which they never enjoyed before, was moſt agreeably embraced, and was eſteemed moſt juſt and right.* Now the Reaſon which moved *Solon* to the paſſing this Act, was not that he intended to defraud the neareſt Relations of their Right of Kindred, but that, by ſetting before Mens Eyes this common Advantage, he might engage them all to contend with each other in good Offices, and that Relations might keep the greater Affection and the ſtricter Ties amongſt themſelves, conſidering that they muſt exceed Strangers in Kindneſs and Good-will, if they deſired to be admitted before them to the Wealth of the Family. *Demoſthen.* adverſ. *Leptin.* p. 374. Edit. *Genev. When* Solon *enacted by Law, That every Man who wanted legitimate Iſſue, ſhould appoint for his Heir whom he pleaſed: he did not rob the next of Blood or Affinity of their Right of Kindred, but that, by propoſing this common Advantage, he might engage Men to contend with each other in good Offices* [5]. Beſides, it ſeems more ſuitable to Liberty, and to the full Extent of Properties, That *no one ſhould be forced to leave his Goods, but to thoſe only whom he loved more than others.* To which we may add, That *we often conceive more probable Hopes, that a Stranger to our Blood may better employ our Poſſeſſions in the Service and Aſſiſtance of Virtue, than ſome near Kinſman, whom the Expectation of a rich Inheritance frequently ſeduceth to Luxury and Idleneſs* [a]. And laſtly, That [b] *it is ſome Comfort, under the Neceſſity of a mortal Condition, if a Man may conſign over what he hath got by his own Labour, to thoſe whom he looks upon as his deareſt Friends.* This Exception only there was in *Solon*'s; That *thoſe ſhould not be permitted to make Wills, who had legitimate Male Children living, to whom the paternal Inheritance was, beyond all Controverſy, due.* It cannot be denied, but that, under this ample Power of diſpoſing of Goods by *Teſtament*, there crept in, as

[a] *Theocrit.* Idyl. xvi. 59, *The Living waſte the Fortunes of the Dead.* [b] *Iſocrat. Æginet.*

[1] *Quinctilian*'s Words are, *Quæ poteſt amicitia eſſe tamen felix, quæ imitetur fraternitatem? Certe quotiens blandiri volumus his qui eſſe amici videntur, nulla adulatio procedere ultra hoc nomen poteſt, quam ut fratres vocemus.* Read *Cyrus*'s Speech to his Children in *Xenophon Cyropæd.* Lib. viii. *Val. Maximus*, l, v. c. 5. and *Stobæus*, Serm. 82.

[2] There is in all the Editions of the Original: *Ex quo tempore pater meus fratrum* MEORUM *uterinorum matri nupſit*, &c. But is not the Mother of my *uterine* Brother alſo mine? Therefore we muſt ſuppoſe here that the Children in queſtion were born of the ſecond Marriage; and upon this Footing our Author would have alledged a Reaſon no way ſuitable to the Caſe: For, as the Diſpute turned upon the Succeſſion to the Goods of a Brother born of the ſecond Marriage, it would be the Brother born of the Father and Mother, who would inconteſtably have a greater Right over the new Eſtate, as coming from both, than a Child which the Mother had by a former Huſband, and who, conſequently, could bring but half the Title. Our Author, without doubt, inadvertently wrote *fratrum* MEORUM *uterinorum* for *fratrum* DEFUNCTI *uterinorum*, as I have expreſſed it in my Tranſlation, which plainly ſhews the Caſe in Queſtion, and the Reaſon of the Deciſion. I am indebted for this Correction to Mr. *Carmichael*, the learned Profeſſor at *Glaſgow* in *Scotland*, who has had the Goodneſs to communicate to me, at the ſame Time, a Note of four or five other Places, wherein I had, without Reflection, committed ſome groſs Faults, which conveyed Ideas very different from my Intentions.

[3] See this Law quoted, lib. i. c. 6. §. 6. n. 6. aforegoing. See, alſo, two Diſcourſes of Mr. *Thomaſius*'s about the Original of Wills, and the Formalities uſed in making them, &c. entitled, the one, *Prima & initia ſucceſſionis teſtamentariæ apud Romanos*; the other, *De ſenſu legis Decemviralis teſtamentariæ*; both printed at *Hall* in 1705

[4] *Plutarch*'s Words are, Ὁ δὲ, ὦ βέλτιστε, εἴ τις ἐπιξέψας, εἰ μὴ παῖδες εἶεν αὐτῷ, δοῦναι τὰ αὑτοῦ φίλῳ τε συγγενείας ἐτίμησε μᾶλλον, ἢ χάριν ἀνάγκης, ἢ τὰ κτήματα τῶν ἐχόντων ἐποίησε.

[5] *Demoſthenes*'s Greek is, Ὁ μὲν Σολὼν ἔθηκε νόμον, ἐξεῖναι δοῦναι τὰ ἑαυτοῦ ὅτῳ ἂν τις βούληται, ἐὰν μὴ παῖδες ὦσι γνήσιοι, οὐχ ἵν' ἀποστερήσῃ τοὺς ἐγγυτάτω τῷ γένει τῆς οὐσίας, ἀλλ' ἵνα εἰς τὸ μέσον καταθεὶς τὴν εὐφιλίαν, ἐφαμιλλον ποιήσῃ τὸ ποιεῖν ἄλλους εὖ.

well

well at *Athens* as at *Rome*, a prodigious Spawn of Cheats, like a peſtilential Infection; ſuch as paraſitical Flattery and Inveigling, eſpecially of old and childiſh Perſons, Circumventions, Forgery of Writings, and the like.

Bodinus [a] chiefly objects againſt theſe teſtamentary Conſtitutions of *Solon*, That *they allowed Men to bequeath by Will* Real *as well as Perſonal Eſtates*. By which means, as he obſerves, whilſt many of thoſe Eſtates might happen to fall on one Perſon, there aroſe a vaſt Inequality of Wealth between the Subjects, whence the Poor grew envious towards the Rich; the Rich proud and inſolent towards the Poor; Miſchiefs that have a peculiar Tendency to the diſturbing and ſubverting of Government: Eſpecially ſince the Proverb is often made good, That *the more a Man hath, the more he ſhall have*. But *Bodinus* obſerves, That *'tis the Intereſt of States, where the ſupreme Power is lodged in the People, to take care that ſome few Perſons do not exceed the reſt by too vaſt a Diſproportion*. Which, likewiſe, was the Reaſon of that *Jewiſh* Law [b], forbidding the perpetual Alienation of Land; and of that other, by which Women who had received Land in Inheritance, were enjoin'd to marry into their own Tribe, leſt otherwiſe the Land ſhould paſs from one Tribe to another [c].

Ariſtotle [1], amongſt his Rules for preſerving a democratical Government, gives this as one, That *Inheritances ſhould deſcend not by Teſtament, but by Kindred, and that no Perſon ſhall have more than one Inheritance, becauſe thus the Fortunes of Men will be kept more upon a Level*. What Miſchiefs were introduced into the *Spartan* Commonwealth by that Liberty of Teſtaments, which *Epitades* the *Ephorus* ſet up in oppoſition to *Lycurgus*'s Laws, may be read at large in *Plutarch*'s Life of *Agis* [d]. Amongſt other Nations Men were allowed no Liberty in this Point; or, if they had any ſuch Privilege, it was very much abridged, and reſtrained.

Of the *Hebrew* Laws in this Particular, *Selden* [e] and *Grotius* [f] give a full Account. Of the antient *Germans* *Tacitus* [g] reports, *That they had no ſuch things as Wills or Teſtaments, but every Man's Children were his Heirs and Succeſſors; and, in default of Children, thoſe of the next Degree, as Brothers and Uncles by both Parents*. Which Place of the [2] Hiſtorian, why we ſhould interpret with ſome in this manner, that the *Germans*, who had not yet learnt the Uſe of Letters, did not make uſe of formal and written Wills after the *Roman* Cuſtom, which *Tacitus*, for the moſt part, hath an Eye to in that Deſcription, we cannot yet find ſufficient Reaſon. For amongſt the *Romans* themſelves *Teſtaments* by Word of Mouth [3], and without Writing, were, alſo, allow'd. And therefore if *Tacitus* had deſigned to obſerve, *That only written Wills were thoſe with which the* Germans *were unacquainted*; he would have expreſſed himſelf more particularly and diſtinctly.

Beſides, That the *Rights* of Kindred were honour'd with the higheſt Reverence and moſt ſacred Veneration amongſt thoſe People, appears from what the ſame Hiſtorian afterward remarks. *The greater number of Relations any Man hath, whether by Blood or by Marriage, the more Reſpect is paid him in his Old Age: Nor are any Rewards allowed to comfort Perſons under the Misfortune of being childleſs. Every one looks on it as his neceſſary Obligation, to undertake the Quarrels of his Father or of any near Kinſman, as well as their Friendſhips and Alliances*. In many Parts of *Germany* at this Day, if a Man hath a Son born to him, 'tis an uſual Expreſſion to ſay, *He hath got an Heir*.

Again, it doth not appear why a Nation, ſuch as the old *Germans* then were, quite ignorant of the Ways of heaping up Wealth, content with the poor Accommodation of houſhold Conveniences, and ſcarcely deſiring any farther Advantage from their Fields, their Cattle, and their Pains in hunting, than a daily Subſiſtence; why ſuch a Nation ſhould have any Reaſon to deſire the Privilege of *Teſtaments*. It being an idle and unneceſſary Care, for thoſe who follow this Way of Life, to covet to themſelves any large Extent of Land. Nor is the making of a Will ſo neceſſary a Conſequence of *Property*, but that a State or People may introduce ſome one uniform Method of Inheritance, without any ſuch expreſs Diſpoſal. And this will eſpecially hold good of that People, who, as *Tacitus* informs us, *aſſigned ſuch a Tract of Land to ſuch a number of People; who afterwards parcell'd it out into private Shares, according to the Worth and Eſteem of particular Perſons*. If it be ſaid, That theſe Men were wont, however, at their Deceaſe, to leave ſome ſort of Orders and Injunctions to their Family, we deny that every Act of this kind comes up to the nature of a *Teſtament* [h].

This Method of Succeſſion, as 'tis the moſt plain and ſimple, and moſt agreeable to the common Inclinations of Nature, ſo hath it an eſpecial Tendency to the keeping up an equal Proportion in the Wealth of the Subjects, to the ſecuring a Supply of Natives in a juſt and proper Number, and to the preſerving the Eſtates and the Perpetuity of Families [i].

It hath, likewiſe, been the common Opinion, that this muſt prove a new Bond of Affection between Relations, and engage them more heartily to promote each other's Good, whilſt they conſidered, that they were of neceſſity to ſucceed each other in their Poſſeſſions. To this Point belongs the Paſſage of *Plato*, lib. xi. *De Legibus*, quoted by *Grotius*, and explained by *Bœcler*. Alſo that of *Pliny* in his Panegyr. c. 37. where he highly commends, that the twentieth Part was releaſed to the Heirs of Families, *Quod manifeſtum erat, quanto cum dolore latum, diſtringi aliquod*, &c. becauſe 'tis plain, that Men would bear it with great Grief, or rather never endure

a Lib. v. c. 2. *De Republ.*
b *Levit.* xxv. 10. Upon which ſee Mr. *Le Clerc*'s Comments.
c See *Numb.* xxxvi. 8.
d Add *Ariſtot.* Polit. xi. 9.
e *De Succeſſionibus ad bona Hebræorum*, eſpecially in c. 24.
f Add *Numb.* xxvii. 8. &c.
g Cap. 20.
h The *Arabian* Impoſtor hath likewiſe publiſhed Laws to regulate Succeſſions, in his *Alcoran* under the Chapter of Wives.
i See *Bacon*'s *Hen.* VII. p. 127.

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1 *Ariſtotle*'s Words are, Καὶ τὰς κληρονομίας μὴ κατὰ δόσιν εἶναι, ἀλλὰ κατὰ γένος, μηδ' ἐὰ πλειόνων ἢ μιᾶς τὸν αὐτὸν κληρονομεῖν· ἧττω γὰρ ἂν ὁμαλώτεραι αἱ οὐσίαι εἶεν, καὶ τῶν ἀπόρων εἰς εὐπορίαν ἂν καθίσαιντο πλείες, *Ariſtot.* l. v. c. 9. *in fin.* See, alſo, l. ii. c. 9. p. 329. See Mr. *Thomaſius*'s Diſcourſe, *De origine ſucceſſionis teſtamentariæ*, § 39, &c.

2 *Viz.* Mr. *Bœcler* upon *Grotius*, c. vi. p. 235. See Mr. *Buddeus*'s Diſcourſe, *De Teſtamentis Summor. Imperant.* &c. c. 1. §. 9.

3 We call all theſe ſort of Wills, *Teſtamenta Nuncupativa*, or Nuncupative Wills, becauſe the Teſtator *nuncupabat hæredem* and *voluntatem ſuam*, i. e. he named his Heir publickly, or declared his laſt Will in this formal Manner, *ſuam voluntatem nuncupabat*. By the *Roman* Laws they were as good as written Wills, provided that the Teſtator declared his Will by Word of Mouth in the preſence of ſeven Witneſſes, *Inſtit.* l. ii. t. 10. §. 14.

dure it, to have any cut off and taken from thoſe Goods which they, by Blood and Relation, merited, and which they looked upon as their own, and to deſcend to the next akin, as their Inheritance. And *Publius Syrus* [1] ſaith, *Hæredem ſcire utilius eſt, quam quærere*, i. e. It is better to know than ſeek an Heir, ver. 255. And yet thoſe Governments ſeem to have ſettled the Matter with moſt Prudence, which left Men the Privilege of diſpoſing by Will thoſe Goods only which they acquired by their proper Induſtry, ordaining, That *whatever they received from their Parents or Anceſtors, ſhould paſs down again to their neareſt Relations*. For by this Method all the Reaſons produced on both ſides of the preſent Queſtion are moſt happily brought to a Temperament and Union.

It is altogether ſtrange to the Manners and Cuſtoms of us *Europeans*, what we are told of the People of the Kingdom of *Siam*, *That thoſe who are Men of Subſtance amongſt them, are commonly obliged to parcel out their Wealth into three Diviſions, one of which goes to the King, another to the Prieſt (whence likewiſe the funeral Charges are defrayed) and the third only to the Children.* And no leſs ſtrange is the Practice of the *Ethiopians* on the Coaſts of *Guinea*; where the Goods of either *Parent* do not deſcend to their *Children*, but to the neareſt of their other Kindred.

XIX. The Heir by *Will*, and the Heir at *Law*, though they ſucceed in a different manner to their reſpective Eſtates, yet have this Obligation common to them both, *That they ſhall diſcharge the Debts of the Deceas'd*. And that not ſo much on account of any tacit Engagement which they have entered into for this Purpoſe [a], as becauſe theſe Debts are a neceſſary Burthen affecting the Poſſeſſions in the manner of a tacit Mortgage. For, as *Quinctilian* obſerves [2], *Such is the Nature and Condition of Inheritance, that the Creditors muſt firſt be ſatisfied before it can effectually take place.* And ſo much only is to be reckoned a Man's Eſtate, as remains when all are paid their own [3]. Whence, likewiſe, 'tis moſt highly agreeable to natural Equity, that the Heir be not charged with Debts above the Value of the Inheritance. Nor ſhould we omit what *Gabriel* the *Sionite* tells us in his Book of the Manners of the *Eaſtern* Nations, *That the* Muſſulmanni, *when they make their laſt Will, are bound to reſtore all that they have taken by Robbery or Violence, to the proper Owner, from whom they receive a formal Diſcharge in Writing: And if they know not the Perſon to whom Reſtitution ſhould be made, they lay out the Sum in publick Buildings, as Hoſpitals, Moſques, or Bagnio's, or elſe bequeath it to the Poor, or to ſome religious Order.*

In *Ferdinand Pinto*, Cap. 21. the *Chineſe* Hermit adviſeth *Antony de Faria*, who had been guilty of Sacrilege, to do theſe three things for his Soul's Health; to reſtore what he had taken away, to beg Pardon for his Offences with Tears, and to diſtribute largely in Charity to the Poor. Add *Cap.* 60.

[a] On which Reaſon depends that Diſpoſal of the old *Roman* Law, which we meet with in l. xxix. t. 2. l. 8. *Dig. De acquir. vel omitt. hæred.*

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[1] *Gruter*, in his late Edition of *Publius Syrus* reprinted in 1708, reads theſe Words diverſely thus, *Hæredem ferre honeſtius eſt, quam quærere*, It is more prudent to reſolve to leave that Perſon for an Heir, whom the Laws appoint for our Succeſſor, than to ſeek for another to whom to give our Goods, which is a different Senſe from the other Reading.

[2] *Quinctilian*'s Words are, *Nam patrimonii in alium tranſituri ea ratio eſt, ut primum credito ſatisfiat.* The ſame Author had before ſaid, *Bona porro quæ ſunt? ut opinor, ea quæ detractis alienis deprehenſa ſunt.*

[3] So the Law teaches, *Id enim bonorum cujuſque intelligitur, quod æri alieno ſupereſt*, Digeſt. l. xlix. t. 14. *De jure fiſci*, leg. 11. See l. iii. t. 6. *De calumniatoribus*, leg. 5. *in princip.* Lib. xi. t. 7. *De religioſis & ſumpt. funerum*, leg. 14. §. 1. Lib. xvi. t. 3. *Depoſiti vel contra*, leg. 7. §. 1. *Lex Wiſigothorum*, l. vii. t. 2. c. 19.

CHAP. XII.

Of Uſucapion or Preſcription.

I. *How Uſucapion and Preſcription differ.*
II. *What Uſucapion is by the* Roman *Laws, and where it takes place.*
III. *How far honeſt Dealing is required in Uſucapion.*
IV. *Continual Poſſeſſion is required.*
V. *The Reaſons of introducing Uſucapion.*
VI. *Whether the Law for Uſucapion be penal.*
VII. *Many refer Uſucapion to civil Right.*
VIII. *Whether Uſucapion can ariſe from a tacit Dereliction of the Proprietor.*
IX. *It ſeems to depend upon the tacit Agreement of Nations.*
X. *How Uſucapion may be prejudicial to Children not yet born.*
XI. *Uſucapion is alſo in uſe among divers Nations.*

IT belongs to our preſent Deſign to enquire, likewiſe, concerning that Method of Acquiſition, by which he who hath gotten Poſſeſſion of what was really another's [1], by a juſt Title, and with honeſt Intentions, and hath, alſo, held it for a conſiderable Time, without being diſturbed or oppoſed, obtains the full Propriety of the thing thus poſſeſſed, ſo as to extinguiſh all the *Rights* and *legal* Claim of the former Owner. This the *Roman* Law terms *Uſucapio*, becauſe the thing is, as it were, taken and acquired by long *Uſe* or *Poſſeſſion*.

The Word *Præſcriptio* in the Senſe of the ſame Law imports ſtrictly [2] that Plea, Demur, or Exception, by which the Perſon thus in Poſſeſſion invalidates the Claim of the firſt Proprietor. Though theſe different Names are frequently taken for the

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[1] This is a very conſiderable ſort of civil Acquiſition. See n. 1. upon §. 1. of chap. x. It hath, alſo, a Place among Nations in the manner, which ſhall hereafter be explained. The Author in his Abridgment of the Duties of a Man and Citizen, l. i. c. 12. §. 14, ſpeaks of two other kinds of *civil* Acquiſition. The firſt is that which is made when the Sovereign, or the Laws, deprive a Criminal of all, or at leaſt Part of his Goods, and confiſcates them to the Treaſury, or to the Perſon damaged, which is treated of at large, l. viii. c. 3. The other is obtained by Arms, or Right of War. But ſee what is ſaid of this, c. 6. §. 14. above.

[2] The Word *Præſcription* will beſt expreſs the Latin *Uſucapio* in our Language, and therefore we ſhall treat of it under that Name, unleſs ſome ſpecial Reaſon oblige us to uſe the Word *Uſucapion*.

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very ſame Notion: *and the latter now prevails in common Uſe, and is the Term by which we render the former.*

It may be worth our while to premiſe what the *Roman* Law appointed or directed in this Matter; becauſe we ſhall hence eaſily gather how far the Buſineſs depends on poſitive Conſtitutions, and how far on the Laws of Nature.

II. *Preſcription*, as *Modeſtinus* [a] [1] defines it, is the *Addition of a Property, by means of long Poſſeſſion continued to the Term of Years fixed by the Law.* *Cujacius* and others, on the Authority of *Ulpian*, uſe the Word *adeptio* inſtead of *adjectio*, *Acquiſition* inſtead of *Addition*; but we do not apprehend that this makes the leaſt Difference in the Thing. For he, that, having got Poſſeſſion of a Thing with honeſt Intention, continues his Poſſeſſion to that determinate Period which the Law expreſſeth, may be ſaid to have ſomewhat *added* to him, which he hitherto wanted. And again, he, to whom the Law thus *adds* any new Property, may be ſaid to have *acquired* or obtained it.

To proceed; as every Man, who is otherwiſe capable of acquiring Dominion, is, likewiſe, capable of preſcribing; ſo by this *Right of Preſcription* we may acquire Dominion over both ſorts of Things, moveable and immoveable, unleſs they are particularly excepted by the Laws.

And *Firſt*, Freemen are thus excepted [2]: For ſince Liberty is ſo ſweet a Comfort, as no one can be preſumed to have neglected any Opportunity of recovering, it is juſtly ſuppoſed that the Party in this Caſe continued ſo long under Servitude, and did not put in his Claim to be releaſed, only out of Ignorance of his preſent Condition, not that by this Continuance he tacitly conſented to be a Slave. So that this long Patience under his Misfortune ought rather to make him a more worthy Object of Pity, than to be interpreted to his Diſadvantage. Things conſecrated or ſet apart for the Service of Religion are, likewiſe, excepted; and ſo too are the Goods of Minors, during their Non-age: For by reaſon of their unexperienced Years the Neglect of challenging what is their own, cannot be ſo far charged upon them, as that they ought, on this account, to loſe it; and it would be too hard and ſevere, if they were to ſuffer for the Careleſneſs of their Guardians. Further, the Law excepts ſtolen Goods, runagate Servants, and Things gotten by [3] Violence, though ſome

[a] *Digeſt.* l. xli. t. 3. l. 3. *D. De Uſucap.* leg. 3

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1 *Uſucapio eſt adjectio dominii per continuationem poſſeſſionis Lege definiti.* Digeſt. lib. xli. tit. 3. *De Uſurpationibus & Uſucapionibus*, leg. 3. Beſides, Preſcription has not only reſpect to Property, but it deſtroys other Rights and Actions, when Men are not careful to maintain them, and preſerve the Uſe of them during the Time limited by the Law. Thus a Creditor, who has not demanded his Debt during that Time, diſcharges the Debtor. And he that has enjoyed the Rent of certain Lands ſo long, cannot be diſpoſſeſſed, though he has no other Title but his long Poſſeſſion. He, who has ceaſed to enjoy a Servitude during the ſame Time, loſes his Right: and, on the contrary, he who enjoys it without any Title enjoys a Right by his long Poſſeſſion. See Mr. *Domat* upon this Subject in his Civil Laws in their Natural Order, Part. II. l. iii. t. 7. §. 4. and Mr. *Titius*'s Obſervations on *Lauterbach*, Obſ. 1033. As, alſo, in his *Jus Privatum Romano-Germ.* l. ii. c. 9. We ſhall hereafter explain, how far Preſcription is of natural Right, and what Civil adds to it. As to what we have to ſay about the Preſcription of Things Incorporeal and their Rights; we are to obſerve, that by Natural Right only Preſcription does not aboliſh Debts; ſo that though neither the Creditor, nor his Heirs, have demanded any Thing for a long Time, his Right is not extinguiſhed, nor is the Debtor fully diſcharged. This Mr. *Thomaſius* proves in his Diſcourſe, *De Perpetuitate debitorum pecuniariorum*, printed at *Hall* in 1706. "Time, *ſays he*, in itſelf is of no "Force, either to get or loſe one's Right; it muſt be accompanied with ſomething elſe, which muſt give it that Power. For no "Man can be deprived againſt his Will of that Right he has got by the Conſent of another, but by his own free Releaſe. He does "not diſengage himſelf by acting contrary to his Engagements; and, in delaying to execute them, he lays no new Obligations "upon him to indemnify the Perſon intereſted; ſo that the Engagements of a bad Paymaſter become greater and ſtronger every Day, "and cannot be judged by Natural Right alone to change their Nature, and come to nothing at a certain Period of Time. It is "alledged in vain, that it is the Intereſt of all Mankind, that Proceedings in Law ſhould not be eternal: For it is no leſs the com-"mon Intereſt of Man, that every one ſhould keep his Word, and that bad Paymaſters ſhould not enrich themſelves without Pu-"niſhment at the Expence of the Lender; that Juſtice be done, and every one obtain his own Right. Moreover, it is not the "Creditor that troubles Mankind in requiring what is due to him, but the Debtor who owes, and will not pay. For if he paid "his Dues, there would be no ground for an Action. By uſing his Right, he injures no body, and therefore very ill deſerves the "odious Title of a *Barreter*, or a Diſturber of the publick Repoſe. Nor is that Pretence better grounded, that it is the Negli-"gence of the Creditor in not demanding his Debt, that is the Cauſe of his loſing his Right, and authorizes Preſcription. This "can only have Place among ſuch as live one with another in the Independent State of Nature. Suppoſe the Creditor be very neg-"ligent, can his innocent Negligence deſerve more to be puniſhed than the noxious Malice of the Debtor? Or ought he not rather "to be puniſhed for his Injuſtice? Did he defer the Payment ſo long a Time, without any ill Deſign, yet is he not as much to be "blamed for his Negligence? Does not the Obligation of keeping one's Word oblige the Debtor to apply to his Creditor, "rather than the Creditor to the Debtor? Why then, if ſo much Prejudice muſt come by Negligence, why ſhould it fall rather "upon the Creditor than the Debtor? Or rather ought not the Negligence of this laſt to be puniſhed; and ſo much the more, be-"cauſe he gets by Preſcription, and the other loſes? But if we conſider Things abſtractly from the Civil Laws, which require that "a Debt ſhall be demanded within a certain Space of Time, the Creditor cannot reaſonably be accuſed of Negligence, becauſe he "forbears the Debtor; ſince, when he lent the Money, a Time was fixed when it was to be paid. And every Man is free to allow "more Time than he has promiſed, and it is ſufficient for the Debtor, that the Time is come, when he agreed to pay. Beſides, "the Creditor may have many commendable Reaſons for his Action, *viz.* Prudence, Neceſſity, and Charity; for which he de-"ſerves rather to be praiſed, than accuſed of Negligence, as Mr. *Thomaſius* proves particularly. Laſtly, There is no Cauſe to be-"lieve that the Creditor has renounced his Debt, as a Matter ſubject to Preſcription; ſince the Debtor being not obliged to pay a "Thing in kind, but the Value of what he borrowed, he does not properly poſſeſs the Goods of another; and ſo cannot be "thought to keep it as his own. On the contrary, the Creditor muſt be eſteemed to be always in Poſſeſſion of his Right, until he "has renounced it expreſly, and confirmed it under his Hand." After this, Mr. *Thomaſius* explains how a Debt may be loſt by Time for want of Proofs, and ſhews, that, without this, Preſcription can have no Place by the Laws of all People yet known to us, nor even by thoſe of the *Romans* as far as the Emperor *Conſtantinus*'s Time. See *Jaques Godefroi* on the *Theodoſian Code*, lib. iv. tit. 13. *De longi temporis præſcriptione*, Tome I. pag. 182. *& ſeqq.* This whole Diſcourſe is worth our reading.

2 In general, all that has nothing to do with Trade. Our Author has forgotten, in his Enumeration of Things not ſubject to Preſcription, publick Places, Goods that belong to the Publick, what is due to the Treaſury, and the Prince's Demeſnes, which are all mentioned in theſe Laws. *Sed aliquando etiamſi maxime quis bona fide rem poſſederit, non tamen illi uſucapio ullo tempore ſuccedit, veluti ſi quis liberum hominem, vel rem ſacram, vel religioſam, vel ſervum fugitivum poſſideat*, Inſtit. l. ii. t. 6. *De uſucapionibus & longi temporis præſcriptionibus*, §. 1. *Furtivæ quoque res, & quæ vi poſſeſſæ ſunt, nec ſi prædicto longo tempore bona fide poſſeſſæ fuerint, uſucapi poſſunt*, ibid. §. 2. *Res fiſci noſtri uſucapi non poteſt*, ibid. §. 9. *Uſucapionem recipiunt maxime res corporales, exceptis rebus ſanctis, ſacris, publicis populi Romani & civitatum, item liberis hominibus.* Dig. l. xli. t. 3. leg. 9. *Præſcriptio longæ poſſeſſionis ad obtinenda loca juris gentium publica concedi non ſolet*, ibid. leg. 45. *Veluti ſi pupilli ſint*, &c. ibid. t. 1. leg. 48. We may, alſo, except ſuch adventitious Goods of an Heir, which the Father had alienated before his Son was of Age, *Cod.* l. vii. t. 40. *De annali except.* leg. 1. §. 2. Things which a Teſtator has forbid to alienate. See *Cod.* l. vii. t. 26. *De uſucapionibus transformandis*, leg. 1. 2. An Eſtate in Dower, *Dig.* l. xxiii. t. 5. *De fundo dotali*, leg. 4. 16. and ſuch like Things.

3 *Quod ſubreptum erit, ejus rei æterna auctoritas eſto*, as the *Atinian* Law ſays, mentioned by *Aulus Gellius*, l. xviii. c. 2. and

ſome third Perſon hath obtained the Poſſeſſion of them by honeſt Means.

Thus the Laws of the Twelve Tables ordain, *Rei furtivæ æterna authoritas eſto. Let the Claim againſt Things ſtolen hold good everlaſtingly.* For, as to the Robber himſelf, his Crime hinders him from preſcribing. And the third Perſon, the honeſt Poſſeſſor, is, likewiſe, ſtopped in his *Right*, by that Fault which is ſuppoſed to affect and attend the Thing ariſing from the unjuſt Means by which it was before acquired: For though, properly ſpeaking, there is no Fault or Blemiſh in the Thing conſidered by itſelf, yet, inaſmuch as it was taken from the former Owner, in an unjuſt and villainous manner, it ſeemed equitable to enact, That his *Right* ſhould not hereby ceaſe or be extinct; and, at the ſame Time, to take effectual Care, that no one ſhould be a Gainer by his Wickedneſs. For ſince three Years Preſcription is ſufficient for moveable Things, it had been eaſy for Thieves ſo to ſecure their Booty by carrying it off, and putting it into other Hands, as that the lawful Owner ſhould not be able, in a Search of three Years, to diſcover it.

Beſides, amongſt the Reaſons on which the *Right of Preſcription* is founded, one is the Negligence of the Owner, in ſeeking after them. But now, ſince ſtolen Goods are uſually concealed with the ſtricteſt Caution and Cunning, this Reaſon cannot take Place againſt the Perſons who loſt them. Yet notwithſtanding all this, ſince it was by ſome ſubſequent Laws enacted, That all Actions, after a conſtant Silence of thirty or forty Years [1], ſhould utterly drop, and be extinct, the *Preſcription*, likewiſe, of ſtolen Goods, as well as other *Preſcriptions*, ſhall be valid, at Civil Law, after ſo long a Period [2], and ſhall overthrow the Claim of the former Proprietor: Which, how unreaſonable ſoever it may appear to ſome, who look upon it as very abſurd that Injury and Impunity ſhould, by Length of Time, turn into a Foundation for Equity and *Right*; yet it deſerves Excuſe on Account of the general Advantage ariſing from it to the Publick. Becauſe it highly concerns the publick Peace, that Suits and Quarrels ſhould, at length, be finally quaſhed, and not ſuffered to run for ever, and that the Propriety of Things ſhould not hang perpetually in Uncertainty and under Diſpute [3]. And, becauſe with the Compaſs of thirty Years Mankind ſeem to put on a new Face, it was thought very inconvenient that the following Age ſhould be diſturbed upon every ſlight Occaſion.

Beſides, when a Man had been without ſuch a Part of his Goods for thirty Years together, he was juſtly ſuppoſed to have ſat down quietly under the Loſs; ſo that there was no need of troubling ſo long a Poſſeſſion on his account. The ſame Reaſon will hold for that [4] *Preſcription* which is ſometimes allowed in criminal Caſes, it ſeeming unneceſſary to bring to the Bar Offences committed almoſt an Age *ſince*, *the ill Effects* of which Time itſelf hath ſufficiently purged and effaced; ſo that the true End of Puniſhment is ſuperſeded.

III. But that *Preſcription* may effectually proceed, it is requiſite that the Party, receiving the thing at the Hands of a falſe Proprietor, do obtain this Poſſeſſion by a juſt Title [5], or upon ſuch Grounds as are eſteemed ſufficient in other Caſes for the transferring and the acquiring of *Property*: And, conſequently, that he acts in this Matter *bona fide*, with a fair and honeſt Intention; that is, that he is able to alledge a ſufficient Reaſon why he thus poſſeſſeth it, and be perſuaded in his Mind, that the *Property* was transferred really on him, and himſelf conſtituted true Owner [6]. *Liban.* Declam. i. pag. 194. Edit. *Pariſ. A Man doth not become juſt Poſſeſſor of a thing barely by taking it to himſelf, but by holding it innocently.* Hence when the Lands, which formerly belonged to King *Apion*, were left to the *Roman* People, and every Man ſeized on what Part he liked beſt: *Tacitus* calls this Way of

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taken out of the Twelve Tables, where we may ſee that *Authoritas* ſignifies here a *Right of Property*, or a Right of reclaiming his Goods. The Laws of the Twelve Tables had already rendered Things ſtolen incapable of *Preſcription*, as *Juſtinian* proves, *Inſtitat.* lib. ii. tit. 6. *De Uſucap.* §. 2. and at this Time, as well as when the *Atinian* Law was made, but one Year was neceſſary to acquire, by Right of *Preſcription*, *moveable* Goods, and two Years for *immoveable*.

[1] *Quæ ergo antea non motæ ſunt actiones, triginta annorum jugi ſilentio, ex quo jure competere cæperunt vivendi ulterius non habeant facultatem*, Cod. l. vii. t. 39. *De præſcriptione* 30 & 40. *annorum*, leg. 3. See, alſo, the following Law, and leg. 8. §. 1. as, alſo, the following Title, *De annali except.* &c. leg. 1. and *Cujacius*'s Obſervations, l. x. c. 12.

[2] *Præſcriptio longiſſimi temporis*, ſo called to diſtinguiſh it from *præſcriptio longi temporis*, the ordinary Term, *Cod.* l. vii. t. 22, 33, 34, 35, and which was regulated upon the Footing mentioned, n. 3, 4. pag. 443. following. The Emperor *Juſtinian* being overperſuaded by the Clergy of *Emeſa* or *Emiſa*, a City of *Syria*, who by reaſon of ſome feigned Titles contrived to plunder ſome of the richeſt Familes of the City, made a Law, That the Goods of the Church, City, Hoſpitals, and other Places ſet apart for religious and charitable Uſes, ſhould not be ſubject to *Preſcription* under the Space of an hundred Years, *Cod.* l. i. t. 2. *De ſacroſanctis Eccleſiis*, leg. 23. But the Fraud being diſcovered, and this new Law cauſing a great number of Law-ſuits, *Juſtinian* himſelf corrected it, and reduced the Privileges to the Term of forty Years, at leaſt for the Eaſtern Churches, Nov. 9. 111. See *Cujacius*'s Obſervations, l. v. c. 5. and a good Diſcourſe of Mr. *Wherlhof*, Profeſſor at *Helmſtadt*, entitled, *Vindiciæ Grotiani Dogmatis de Præſcriptione inter liberas gentes*, §. 30. Yet we muſt not confound Preſcription of an hundred Years with that of *Time immemorial*, though they often come much to the ſame. See *Grot.* l. ii. c. 4. §. 7. and the Diſcourſe above quoted, printed in 1696, §. 18, &c. In fine, it was *Theodoſius* the Younger, and not *Theodoſius* the Great, that eſtabliſhed the Preſcription of Thirty and Forty Years. See the ſame Diſcourſe, §. 29. and Mr. *Thomaſius*, *De Perpetuitate Debitor. Pecun.* §. 27. But above all, two Diſſertations printed at *Hall* in 1724. the one entitled, *De fundamentis in doctrinâ de Præſcriptione*, &c. and the other *De Præſcriptione Immemoriali*, &c. It is there proved that we very improperly give the Right in Queſtion the Name of *Preſcription*, and that it would be better to call it, *Poſſeſſion from Time Immemorial:* Becauſe it conſiſts in this, That the Proprietor, for ſome good Reaſons, is ignorant of the Origin and Title of his Poſſeſſion, though thoſe who form a Claim to the Thing poſſeſſed, can bring no good Proofs for it. The laſt Diſſertation is wrote by M. *Hoheiſel*, and is the ſecond Part of the firſt which was publiſhed in Form of an *Inaugural Theſis* maintained by the ſame Author before Mr. *Thomaſius*, and founded on the Principles of that celebrated Lawyer.

[3] It is upon this Reaſon, as well as upon the Negligence of the Proprietor to claim his Goods again, that the *Roman* Lawyers have founded the Right of *Preſcription*. *Bono publico uſucapio introducta eſt, ne ſcilicet quarundarum rerum diu & fere ſemper incerta dominia eſſent, cum ſufficeret domino ad inquirendas res ſuas ſtatuti temporis ſpatium*, Dig. l. xli. t. 3. leg. 1.

[4] *Querela falſi temporalibus præſcriptionibus non excluditur, niſi viginti annorum exceptione, ſicut cætera fere crimina*, Cod. l. ix. t. 22. *Ad legem Cornel. De falſis*, leg. 12. See l. i. c. 9. §. 6. above, and what Mr. *Titius* ſays, *Obſervat.* on *Lauterbach. Obſervat.* 1124. As, alſo, Mr. *Thomaſius*'s Diſcourſe, entitled, *De Præſcriptione Bigamiæ*, which is the eighth among thoſe at *Leipſick*.

[5] *Ut qui bona fide ab eo qui Dominus non erat, cum crederet eum Dominum eſſe, rem emerit, vel ex donatione aliave quavis juſta cauſa acceperit, is——uſucaperet*, Inſtit. l. ii. c. 6. princip. *Diutina ſucceſſio tantum jure ſucceſſionis, ſine juſto titulo obtenta, prodeſſe adpræſcriptionem hac ſola ratione non poteſt*, Cod. l. vii. t. 33. *De præſcript. longi temp.* &c. leg. 4. *Nullo juſto titulo præcedente poſſidentes, ratio juris quærere Dominum prohibet. Ideirco cum etiam uſucapio ceſſet, intentio Dominii nunquam abſumitur.* Lib. iii. t. 32. *De rei vindic.* leg. 24.

[6] *Libanius*'s Greek is, Οὐ γὰρ ἐν τῷ λαβεῖν ἐστὶ τὸ δικαίως κήσασθαι, ἀλλὰ τῷ χρῆσις ἐγκλημάτων ἔχειν.

Proceeding, *Diutina licentia, A long continued Licentiouſneſs and Injuſtice.* According to the civil Law, it is enough if a Man had this *bona fides* [1], this Uprightneſs and Integrity of Thought at his firſt entring on the Poſſeſſion, though he happen afterwards to diſcover, that the Perſon who conveyed it to him was not the juſt Proprietor. But the Canon Law requires the ſame Integrity through the whole Term of Years on which the *Preſcription* is built [2]; ſo that if a Man comes in the mean time to know, that the Thing was made over to him by one who had no Right to diſpoſe of it, he begins immediately to be obliged to reſtore it to the lawful Owner, and from thence forward detains it *mala fide*, foully and diſhoneſtly; eſpecially in caſe he go about to hide it from the Owner's Knowledge by Craft and Deſign. Which Judgment ſeems to approach neareſt to the Strictneſs and Sanctity of the Law of Nature [3]: Inaſmuch as, upon the introducing of diſtinct Properties, all Men were ſuppoſed to enter into an Obligation, *That they would, to the utmoſt of their Power, let every Perſon enjoy his own again, when they ſhould happen to be in Poſſeſſion of it without his Conſent.* But the Compilers of the Civil Law were contented with ſecuring the outward Innocence of Mens Actions; and authorized the Poſſeſſor quietly to enjoy what he had honeſtly gotten; leaving to the reſpective Owners the whole Care of ſeeking after their Goods, and of challenging them upon a timely Diſcovery.

IV. Another neceſſary Condition, in order to *Preſcription*, is, *That it be founded on a conſtant Poſſeſſion, ſuch as hath not been interrupted either* naturally [4], *as if the Thing hath returned in the mean while to the former Owner, or hath, at any time, lain abandoned or forſaken: Or civilly* [5], *as if the Owner hath been actually engaged at Law with the Poſſeſſor for the Recovery of what he loſt; or, at leaſt, by ſolemn Proteſtations has put in a Salvo to his Right.*

Bœcler and *Ziegler*, in their Annotations on *Grotius* [a], obſerve farther on this Subject, *That the Space of Time, during which the prime Poſſeſſor holds the Thing of which we ſpeak, ſhall be reckoned to the*

[a] Lib. ii. c. 4. §. 9.

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[1] *Ut in his omnibus caſibus ab initio eam bona fide capiat——Quod & in rebus mobilibus obſervandum eſſe cenſemus, ut in omnibus juſto titulo poſſeſſionis anteceſſoris juſta detentio, quam in re habuit, non interrumpatur ex poſteriore forſitan alienæ rei ſcientia, licet ex titulo lucrativo ea cæpta eſt,* Cod. lib. vii. t. 1. *De uſucapione transformanda, & ſublata differentia rerum mancipi, & nec mancipi,* &c. leg. 1.

[2] *Unde oportet, ut qui præſcribit, in nulla temporis parte rei habeat conſcientiam alienæ,* Decretal. l. ii. t. 26. *De præſcript.* Can. 20. See, alſo, Can. 5.

[3] Mr. *Thomaſius* maintains, That by natural Law an honeſt Intention is not neceſſary to make a *Preſcription* even in the Beginning of Poſſeſſion, provided ſo long a Time is run out, that it may reaſonably be preſumed, that the true Proprietor has relinquiſhed his Goods. "For, *ſays he*, in whatever manner we get into the Poſſeſſion of the Goods which belong to another, from the Moment "that he to whom they belong, knowing that they are in our Hands, and being able, if he pleaſes, to claim them, declares either expreſly or tacitly, that he will let them reſt there, we become the lawful Owners of them as much as if we had a juſt Title "to them originally. *Theodoſius the younger*, who eſtabliſhed the *Preſcription* of Thirty Years, did not require any good Intention in the Poſſeſſor; it was *Juſtinian*, who, at the Perſuaſion of his Counſellors, added that Condition in certain Caſes, and the "Canon Law afterward improving upon the civil required a perpetual good Intention in all ſorts of *Preſcription*. The Clergy of "the *Roman* Church by this means found out a Way to recover ſooner, or later, all the Eccleſiaſtical Revenues that had been "alienated in whatever manner, and although the Poſſeſſors had peaceably enjoyed them for Time immemorial. Ambitious "Princes, alſo, made their Advantage of this Hypotheſis to uſurp the Lands which they pretended to re-unite to their Dominions, "under this Excuſe, that the Lands of the Crown could not be alienated; and ſo thoſe, who enjoyed Goods which had been "alienated, poſſeſſed themſelves of them by a bad Deſign; ſince they ought to know, that in ſuch Caſes no good Purchaſes can "be made. Hence it appears, that the Maxim of the Canon Law, whatever Shew of Piety it may ſeem to carry, is built on a "Foundation contrary to natural Law, ſince it creates many Diſturbances among Men, whoſe Quiet requires that there ſhould "be an End of all Actions and Differences, and, at the End of a certain Time, Poſſeſſors, by fair Dealing, ſhould be ſecure againſt all "Claims." Theſe are Mr. *Thomaſius*'s Notions, which I have collected from divers Parts of his Works. See his Diſcourſe concerning the Perpetuity of pecuniary Debts, §. 3. in Not. lit. K. & §. 27, 32. As, alſo, his *Inſtit. Juriſprud. Divin.* l. ii. c. 10. §. 193, 195, 201. with the Chap. *Fundamenta Jur. Nat. & Gent.* which anſwers it, §. 14, &c. As for myſelf, I own, that if the true Maſter of a Thing taken or uſurped and gotten from him, in a Word, acquired by foul Dealing, doth not put in his Claim, nor declare any Deſire of recovering it for a long Space of Time, though he knows very well in whoſe Hands it is, and there is nothing to hinder him from making good his Right; in this Caſe, I ſay, the unjuſt Poſſeſſor becomes at laſt the lawful Proprietor, provided that he hath ſome Way or other declared that he was ready to reſtore it, if it had been demanded: For then the antient Owner acquits him, and manifeſtly renounces, though tacitly, all his Pretenſions to it. And thus our Author determines it in his *Element. Juriſprud. Univerſ.* p. 76, 77. But if he who takes Poſſeſſion honeſtly of the Goods of another, comes to diſcover his Error before the Time of *Preſcription* is expired, he is obliged to do the Duty of an honeſt Poſſeſſor. See what is ſaid in the next Chapter. But if, continuing always in his honeſt Intention, he gains the Time of *Preſcription*, whether it agrees with the Maxims of the natural Law only, or the civil Laws have reduced it to ſomething leſs, the Right of the antient Owner is entirely extinct, as I ſhall hereafter hew. The whole amounts to this, That as the honeſt Poſſeſſor who preſcribes is the Occaſion, though innocent, that the other is debarred of all his Pretences, he ought to aſſiſt him as far as he can to revenge the Wrong done by a third Perſon, who ſold him the Goods which he knew were not his own, and ſo was the Cauſe of this *Preſcription*. In fine, though a good Intention is always neceſſary to keep the Conſcience quiet, yet this is no Impediment but that human Laws may overlook this Condition either wholly or in Part, to avoid great Numbers of Law-Suits. And to obtain this End, it may be very fit not to require a good Intention in *Preſcriptions*, to which they have fixed ſo long a Time, or to demand it at leaſt in the Beginning of the Poſſeſſion; and ſo the Maxim of the Civil Law, in my Judgment, is better grounded than that of the Canon Law. The Artifice of the Clergy conſiſts not ſo much in this, that the Determinations of the Popes require a perpetual good Intention in him that preſcribes, as in this, that they will have the Goods of the Church looked upon as not capable of being alienated, either abſolutely, or under ſuch Conditions as will make all *Preſcriptions* void. As for what Mr. *Thomaſius* ſpeaks of Princes, who affirm that the Demeſnes of the Crown cannot be alienated juſtly, and that *Preſcription* has no Place among ſuch who have no Dependence one upon another in a State of Nature, ſee the laſt Paragraph of this Chapter, and Lib. viii. c. 5. §. 9.

[4] Not only that, but every Time the honeſt Poſſeſſor has loſt his Poſſeſſion any Way whatſoever, and has again recovered it: for then he muſt begin again upon a new Footing, and conſequently act *de bona fide* at the Beginning of the new Poſſeſſion. See the *Digeſts*, l. xli. t. 3. *De uſurpat. & uſucapion.* leg. 5. & 15. Thus we loſe a Thing, or are deprived of it.

[5] *Utramque autem poſſeſſionem ita demum eſſe legitimam, cum omnium adverſariorum ſilentio & taciturnitate firmatur; interpellatione vero & controverſia progreſſa, non poſſe eum intelligi poſſeſſorem, qui licet poſſeſſionem corpore teneat, tamen ex interpoſita conteſtatione, & cauſa in judicium deducta ſuper jure poſſeſſionis vacillet ac dubitet,* Cod. l. vii. t. 33. De acquir. & retinenda poſſeſſione, leg. 10. According to the *Roman* Law, *Preſcription* was not interrupted by a Claim made in Juſtice; for if the Poſſeſſor was acquitted, or the Plantiff did not carry on his Suit, ſo that the Time of *Preſcription* expired, the Poſſeſſor became irrevocably Maſter. *Si rem alienam emero, & quum uſucaperem, eamdem rem dominus à me petierit: non interpellari uſucapionem meam, litis conteſtatione.* Dig. lib. xli. tit. 4. *Pro emptore*, leg. 2. §. *ult.* There are even ſome Doctors who believe that this takes Place in *Preſcription for a long Time*, or for Ten, and Twenty Years, to which *Juſtinian* reduced the Form of the antient Preſcription. See *Giphanius* on the *Code*, Tome II. pag. 241, & *ſeqq.* And *Bachovius* on the *Title* of the *Inſtitutes de Uſucapione*, §. 7.

Benefit

Benefit of him that ſucceeds [1] *in the Poſſeſſion; provided that both the former and the latter firſt entered upon it with honeſt Minds, and upon a juſt Title: For otherwiſe the prime Poſſeſſor ſhall not be allowed to make over his Time to the next Holder; and, conſequently, if the former came to the Poſſeſſion by diſhoneſt Means, the Time he paſſed in it ſhall not be computed towards the Preſcription of the latter, though he, for his own Part, obtained the Poſſeſſion fairly and juſtly.*

And this Rule takes Place as well in a general Succeſſor, an Heir, as a particular, a Buyer, a Grantee, *&c.* But then here is the Difference between theſe two kinds of Succeſſors; the laſt of them, though he cannot reckon the Time of the diſhoneſt Acquirer to lengthen out his own, yet, in Caſe he himſelf was not privy to the wrongful Dealing, the Fault of the ſaid Acquirer, if it cannot be uſed for his Advantage, ſhall not turn to his Prejudice; but he ſhall be allowed to compleat the Term of *Preſcription* in his own Perſon [2]. Whereas it is otherwiſe in the Caſe of a general Succeſſor, or an Heir [3]: For he cannot, by his own Ignorance and honeſt Intention, atone for the Fault of the deceaſed whom he repreſents, and whoſe *Rights* he takes in full upon himſelf.

A longer Space of Time is required for preſcribing againſt one that is abſent, than one that is preſent [4].

So again, moveable Things may paſs into Preſcription ſooner than immoveable [a]. The Reaſon of which latter Conſtitution ſeems to be, That Immoveables are judged a much greater Loſs than the contrary; that they are not ſo frequently made the Subject of Commerce between Man and Man; that it is not ſo eaſy to acquire the Poſſeſſion of them without knowing whether the Party that conveys them be the true Proprietor, or the falſe; and, conſequently, that they are likely to adminiſter much leſs Occaſion to Controverſies and Suits. *Plato*'s Rules for the Preſcription of Moveables are as follow; *If a Thing of this kind be uſed openly in the City, let it paſs into Preſcription in one Year; if in the Country, in five Years; if it be uſed privately in the City, the Preſcription ſhall not be compleated in leſs than three Years. If it be thus held with Privacy and Security in the Country, the Perſon that loſt it ſhall have ten Years allowed him to put in his Claim* [b]. As for the Preſcription of Immoveables, this the Conſtitution of *Plato*'s Commonwealth was not acquainted with.

V. The chief Reaſons, which the Learned in the *Roman* Law aſſign for the firſt introducing of Property are to this Purpoſe; *That in Order to the avoiding of Confuſion, and the cutting off of Diſputes and Quarrels, it is of great Conſequence to the publick Welfare, that the Proprieties of Things ſhould be fixed and certain amongſt the Subjects.* Which would be impoſſible, ſhould perpetual Indulgence be allowed to the Negligence of former Owners, and ſhould the new Poſſeſſors be left in continual Fear of loſing what they held.

Then again, Trade and Commerce could not otherwiſe ſubſiſt in the World: For who would ever contract with another? Who would ever make a Purchaſe, if he could never be ſecured in the quiet Poſſeſſion of any Thing conveyed to him? Nor would it be a ſufficient Remedy in this Caſe, That if the Thing ſhould be thus challenged by a third Party, the Perſon from whom we receive it ſhould be obliged to make it good [5]; for after ſo long a Courſe of Time thouſands of Accidents might render him incapable of giving us this Satisfaction. And what grievous Commotions muſt ſhake the Commonwealth, if, at ſo vaſt a Diſtance of Years, ſo many Contracts were to be diſannulled [6], ſo many Succeſſions to be declared void, and ſo many Poſſeſſors to be ejected? It was therefore judged ſufficient to allow ſuch a Space, as large as in Reaſon could be deſired, during which the lawful Proprietors might recover their own. But if through Sloth and Neglect they ſuffered it to ſlip [7]; the *Prætor* might fairly reject their too late Importuni-

[a] Vid. *Juſtit. ubi ſupra.* [b] *De* LL. l. xii. p. 990, 991. Edit. *Wech.*

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[1] *Plane tribuuntur acceſſiones poſſeſſionum his, qui in locum aliorum ſuccedunt, ſive ex contractu, ſive voluntate; hæredibus enim & bis, qui ſucceſſorum loco habentur, datur acceſſio teſtatoris.* Dig. l. xliv. t. 3. De diverſis temporalibus præſcript. & de acceſſionibus poſſeſſ. leg. 14. §. 1. *Præterea nec vitioſæ quidem poſſeſſioni ulla poteſt accedere, ſed nec vitioſa ei quæ vitioſa non eſt,* l. xli. t. 3. De acquir. vel amitt. poſſeſſ. leg. 13.

[2] *Si quis loci vacantis poſſeſſionem propter abſentiam aut negligentiam Domini, aut quia ſine ſucceſſore deceſſerit, ſine vi nanciſcatur, quamvis ipſe mala fide poſſideat (quia intelligit ſe alienum fundum occupaſſe) tamen ſi alii bona fide accipienti tradiderit, poterit ei longa poſſeſſione res acquiri,* Inſtit. l. ii. t. 6. § 7. *Diutina poſſeſſio quæ prodeſſe cœperat defuncto, & hæredi & bonorum poſſeſſori continuatur, licet ipſe ſciat prædium alienum eſſe. Quod ſi ille initium juſtum non habuit, hæredi, & bonorum poſſeſſori, licet ignoranti, poſſeſſio non prodeſt,* ibid. 12. *Cum hæres in jus omne defuncti ſuccedit, ignoratione ſua defuncti vitia non excludit——uſucapere non poterit, quod defunctus non potuit,* Dig. xliv. t. 3. De diverſ. temp. præſcript. *&c.* leg. 11.

[3] According to the new *Roman* Law, the honeſt Poſſeſſor preſcribes in Ten Years againſt a Perſon preſent, but not under Twenty Years againſt one abſent, although he that keeps the Thing be poſſeſſed of it unjuſtly, *Cod.* l. vii. t. 33. *De præſcript. longi temporis decem vel viginti annorum,* leg. 11. & Novel. *Juſtin.* 119. c. 7. See the next Note.

[4] Preſcription for Moveables is gained in Three Years, whereas for Immoveables it is not gained under Ten Years againſt a Perſon preſent, and Twenty againſt a Perſon abſent. *Ne Domini maturius ſuis rebus defraudentur——cautum eſt, ut res quidem mobiles per triennium, immobiles vero per longi temporis poſſeſſionem* (i. e. *inter præſentes decennio, inter abſentes viginti annis*) *uſucapiantur,* Inſtit. l. ii. t. 6. princ. By the Perſons preſent, is meant ſuch as are in the ſame Country, whether the Eſtate be in that Country, or any other. See *Cod.* l. vii. t. 33. *De præſcript. longi temp.* &c. M. *De Toulieu*, my worthy Colleague, has very well proved, in an Academical Diſſertation, entitled, *De præſentia & abſentiâ, mixtoque ex utraque tempore in Præſcriptionibus,* that this Deciſion of *Juſtinian* is very unreaſonable. For, ſays he, it follows from thence, that when the true Owner has his Dwelling in the Place where his Eſtate is ſituated, if the honeſt Poſſeſſor lives in another Country, the Owner has Twenty Years to diſcover and reclaim his Effects. Whereas when both of them live in the ſame Province, the Proprietor is allowed but Ten Years for this, even though the Lands ſhould lie in another Province. Now who does not ſee, that, in the firſt Caſe, it is much more eaſy for the true Owner to find out, and make good his Right, than in his laſt? The ſame Author points out a great Abſurdity in a Regulation of *Juſtinian* (Novel. 119. cap. 8.) concerning the Years of Abſence intermixt with thoſe in which the Owner was preſent. But the Bounds of a Note will not permit me to relate this, nor is this a Place to expoſe the Miſtakes of that Emperor and his Council.

[5] See Lib. v. c. 5. §. 5. following, at the End.

[6] It was a judicious Reflection made by *Aratus* of *Sicyon* in *Tully*'s Offices, l. ii. c. 23. *Et quinquaginta annorum poſſeſſiones moveri non nimis æquum putabat, propterea quod tam longo ſpatio multa hæreditatibus, multa emptionibus, multa dotibus tenebantur ſine injuria.* He did not think that Poſſeſſions of fifty Years ſhould be diſturbed, becauſe in ſo long a Time many Things in Inheritances, Purchaſes, and Portions might be held without an Injury to any.

[7] The *Roman* Lawyers hold, That they who ſuffer their Goods to become ſubject to Freſcription, may be thought to alienate them. *Alienationis verbum uſucapionem continet. Vix eſt enim ut non videatur alienare, qui patitur uſucapi,* Dig. 50. t. 16. *De verbor. ſignificat.* leg. 38. *in princip.*

ty. And though it might ſo happen, that now and then a particular [1] Perſon loſt his Advantage of recovering his Goods utterly againſt his Will, and without his Fault, only becauſe he was unable to find out the Poſſeſſor; yet the Damage and Inconvenience ariſing from that general Statute to ſome few private Men, is compenſated by the Benefit it affords to the Publick. But we ought well to obſerve, That, before we can charge the antient Proprietor with Careleſneſs and Sloth, we muſt ſuppoſe, That he had a convenient Seaſon to exert his Diligence.

Hence it is highly agreeable to Reaſon and Equity, That the Time during which a Country hath been the Seat of War, ſhall not avail towards Preſcription: As *Honorius* particularly decreed, *That no one ſhould reckon towards the procuring of Preſcription on that Space of Time in which the* Vandals *ſtaid upon the* Roman *Ground* [a].

VI. But there's no Neceſſity, that, in order to aſſert the Juſtice of civil Governments, in eſtabliſhing the Right of *Preſcription*, we ſhould have Recourſe (with a certain *Author* [b]) to that Power of executing Puniſhment on the Guilty, with which the chief Magiſtrate is inveſted. As if the Law denied an *Action* to thoſe, who, for ſo long a Time, forbore to challenge their own, for this Reaſon only, becauſe the Parties deſerve to be put into the Liſt of Criminals, for ſuffering *Preſcription* to be pleaded againſt them; whilſt, by thus neglecting their Property, they not only prejudice the common Good of the Society, but, likewiſe, ſin againſt their own Nature, which hath, in all Caſes, an eſpecial Regard to the publick Advantage: And that therefore as *Solon* ordained a [3] Penalty againſt thoſe who were idle and negligent, ſo here the Neglect of the Proprietor is puniſhed with the Loſs of his *Property*.

But indeed the principal Aim and Deſign of the Law concerning *Preſcription* is not to puniſh Mens Defaults in this Reſpect, but to provide, that the State be not diſturbed by uncertain Titles, and by Properties in conſtant Doubt and Suſpence. Though it is true, that by a Perſon's being denied to ſue for Recovery, when he hath long neglected it, he ſuffers ſome Loſs or Damage as a neceſſary Conſequence.

Beſides, to be excluded from ſome Advantage, lying open to thoſe only who are vigilant and induſtrious in their own Affairs, doth not come up ſtrictly to the nature of a Puniſhment. For we certainly uſe a Figure when we ſay, *That an idle Temper is a ſufficient Revenge to itſelf*: Or, *That it is Puniſhment enough to the Slothful and Unactive, that, being ſhut out from all Poſts of Honour, they are conſtrained to paſs their Days in Obſcurity.*

Beſides, the Aſſertion is not true, *That thoſe who ſuffer their Goods to be with-held from them by Preſcription, are really Offenders againſt the Commonwealth.* They indeed manifeſtly injure the Publick, who either abuſe and ſquander away their Subſtance, or whilſt they ſit brooding over it, and are Proprietors only in Name, let it grow uſeleſs for want of Application. But now a Thing that is gained by *Preſcription*, is however under the Care and Management of ſome Perſon; ſo as ſtill to be ſerviceable to the Occaſions of the Community. And it is altogether the ſame Thing to the State, whether ſuch a Piece of Ground, for Inſtance, be in the Hands of this Man, or of that, provided it doth not lie quite neglected, without any one to cultivate and improve it.

To theſe Reaſons we may add farther, That, when any private Perſon receives Advantage from another's Puniſhment, it is neceſſarily ſuppoſed, that he was before conſiderably hurt or endamaged by the Party offending. Whereas he who commenceth a Proprietor by the Right of *Preſcription*, can, on no Account, be ſaid to have ſuffered Harm from the Neglect of the Party, whom he thus ſucceeds. Nor doth he rightly apply to the preſent Purpoſe thoſe Words of Book xvi. t. 3. *D. Depoſiti, &c. Male meritus publice*, &c. "He that "hath deſerved ill of the Publick by embezzling "what was delivered to him in Charge, ought to "be left to ſtruggle with Poverty, that he may "ſerve for an Example to deter others from "Wickedneſs."

Since then the Law concerning *Preſcription* is not a *penal Statute*, it is idle to diſpute, why the Negligence of the *Proprietor* ſhould be rather puniſhed by the Loſs of the neglected Goods, than by ſome pecuniary Mulct. Though it is very evident, that ſuch a Mulct could not procure the true End of the *civil Conſtitutions* in this Affair, which was, "To cut off all thoſe Suits and Quarrels that "would for ever have been ſpringing up, and to "enſure, at leaſt, a quiet Enjoyment to long Poſſeſſors, whoſe Caſe entitles them to more than ordinary Favour."

For, in the firſt Place, the Matter muſt have been brought into Court by the Claim of the former Proprietor, where the Cauſe would have been the more difficult and perplexed, by reaſon of the Things continuing ſo long in other Hands; and then the preſent Poſſeſſor was to be ejected, whence

[a] *Procop.* Hiſt. *Vandal.* l. i. c. 3.

[b] *Hugo de Roy, de eo quod juſtum eſt*, l. iii. t. 3, 4.

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[1] This Ignorance of the antient Owner hinders not the *Preſcription*. The Civil Law orders Things ſo, that he who loſeth the Poſſeſſion of his Goods may claim them again, if he can diſcover in whoſe Hands they are; but it doth not ſuppoſe it a Thing abſolutely neceſſary that he ſhould actually diſcover them. The Proof of that Condition, ſays the Emperor *Juſtinian*, would run us into new Perplexities. *Ut bono initio poſſeſſionem tenentis, & utriuſque partis domicilio requiſito, ſit expedita quæſtio pro rebus ubicunque poſitis*, NULLA SCIENTIA *vel* IGNORANTIA EXPECTANDA, *ne altera dubitationis inextricabilis oriatur occaſio*, Cod. l. vii. t. 33 *De præſcript. longi temporis*, &c. leg. 12. It is ſufficient then that we have Reaſon in general to preſume, that he againſt whom the Poſſeſſor preſcribes has a competent Knowledge; and it was from the little Appearance of ſuch a Preſumption, that the ſame Emperor was obliged to prolong the Time of Preſcription, which according to the Laws of the Twelve Tables was but one Year for Moveables, and two for Immoveables. *Sed & ſi quis res alienas, Italicas tamen, bona fide poſſidebat per biennium, miſeri rerum Domini excludebantur, & nullus eis ad eas reſervabatur regreſſus, quæ & neſcientibus Dominis procedebant, quo nihil inhumanius erat. Si Homo* ABSENS & NESCIENS TAM ANGUSTO TEMPORE SUIS CADEBAT POSSESSIONIBUS, Ibid. t. 31. *De uſucap. transform.* &c. leg. 1.

[2] See *Grotius*, lib. iii. cap. 9. §. 13. not. 4. This Law ſubſiſted only for a Time, and it is for this Reaſon *Trebonian* has not inſerted it in the *Code*, and the learned *Jaques Godefroi* has obſerved, in his Commentary upon the *Theodoſian Code*, Tome V. pag. 411. The *Rule*, *That Preſcription has no Courſe during Time of War*, is borrowed from the *Canon* Law, and from Cuſtom. Conſult upon this Head a Diſſertation of M. *Bohmer*, *De eo quod juſtum eſt, durante Juſtitia*, §. 13. & *ſeqq.* publiſhed in 1705.

[3] According to the *Athenian* Laws, Prodigals were noted with a Mark of Infamy, and excluded the Privilege of mounting the *Tribune* to harangue the People. See *Meurſius Themid. Attic.* lib. ii. cap. 10. This is probably the Puniſhment of which that *Doctor* ſpeaks, whom our Author criticizes in this Paragraph.

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a new Hardſhip would ariſe. For if the Fine were to go to the Magiſtrate, then the Poſſeſſor's juſt Title and honeſt Intentions were likely to ſtand him in no ſtead. Nor if the Poſſeſſor himſelf were to receive the Fine for a Comfort and Recompence, would all the Doubts be hereby reſolved. Becauſe, ſhould the Fine be leſs in Value than what the Poſſeſſor loſeth by quitting his Hold, he muſt ſtill be, in Part, a Sufferer: But were it as much, or more, then the antient Claimant would get little by his Suit. Therefore there cannot be, in the Point before us, a more ready Way to Peace and Quietneſs, than to declare, that, after the Term of Years appointed for *Preſcription*, the Right of the former Owner ſhall ceaſe and be extinct.

VII. By what Law *Preſcription* was firſt ſet on Foot, the Learned are not well agreed: Moſt aſcribe its Original to *civil* or *poſitive Law*, and oppoſe it to thoſe Methods of Acquiſition, which are commonly ſaid to proceed from the *Law of Nations*. Nay, *Cujacius* [a] goes ſo far as to affirm, *That Preſcription really contradicts the Law of Nations, in that it takes a Man's Property from him, without his Conſent: That it interferes, likewiſe, with natural Equity, though only for the Sake of publick Good; whilſt it endamageth private Owners, but turns to the Benefit and Advantage of the Community.* To which *De Roy* anſwers, [b] *That each particular Proprietor, in ſubjecting himſelf to thoſe Laws which eſtabliſh Preſcription* [1], *doth, at leaſt, implicitly conſent to that Tranſlation of his Right.* Another Reaſon urged by *Cujacius*, to prove this Eſtabliſhment to be contrary to the Law of Nations, is as follows: *That, according to the ſaid Law, no Man can conſtitute another as the true Proprietor of a Thing, unleſs he were himſelf ſo before:* Whereas, by the civil Law, he who receives a Thing from one who was not the Proprietor, may yet obtain the Property of it himſelf, if he can preſcribe for it in the uſual manner. To which *De Roy* [c] again replies, *That in the Buſineſs of Preſcription the Seller, or any other Non-proprietor, conveys nothing more than the Title and honeſt Poſſeſſion; but that the Property is wholly added either by the ſtanding Law, or by the publick Magiſtrate, who even, according to the Law of Nations, is inveſted with juſt Power to make new Ordinances, and to transfer Properties from one Perſon to another, out of a fair and reaſonable Regard to the publick Good; the Party, who thus ſuffers for his own Neglect, really conſenting to this Conveyance of his Property, or, at leaſt, being preſumed to conſent by his long Silence.*

Some maintain *Preſcription* to proceed from *civil* and *poſitive Law*, upon the Strength of this Argument; that in caſe a Man hath not originally obtained a Right on ſome other Bottom, the bare Length of Time can give none, as being deſtitute of all Power to produce any Effect. *For though every Thing*, ſay they, *is done in Time, yet Time itſelf can do nothing.*

Now as to the Reaſon here propoſed, thus much indeed is certain, *That it depends wholly on the Determination of poſitive Law, why Preſcription ſhould be rather compleated at the Tenth or Twentieth Year (for Inſtance) than at the Ninth, or the Sixteenth:* Yet no one can deny but that the Conſent of all Nations, to which they were moved by the Care of the common Peace, might be able *to aſſign* ſome moral Efficacy to the Courſe of Years; at leaſt ſo far, as that in Proceſs of Time ſome certain Preſumptions and Favours, on the ſide of Perſons in Poſſeſſion, ſhould be granted to defend and confirm their Right, though attributed to other Cauſes than the bare Time itſelf. For though pure natural Reaſon, and the Agreement of all the World, do not fix any one Point of Time as the neceſſary Condition of obtaining a future Right, yet they might allow this Effect to a Space of very conſiderable Extent and Latitude.

Others have choſe to expreſs themſelves doubtfully and timorouſly in the Matter; being ſenſible of the vaſt Advantage which the Law for Preſcription brings to the Publick; they thought it probable, that from the very Nature of the thing, and its Antecedency to any poſitive Ordinance, *Preſcription* is of Force to transfer *Property*; ſince natural Reaſon, in the ſtricteſt manner, commands the doing of thoſe things which conduce to the common Benefit and Peace. But then they qualify this Aſſertion, by adding, *That though the Light of Reaſon ſuggeſts, that the Thing is highly fitting, and that 'tis expedient it ſhould be enacted by a poſitive Conſtitution, yet 'tis not altogether ſo neceſſary, as to be immediately eſtabliſhed by the meer Law of Nature.*

Again, many do not ſcruple to acknowledge, that *Preſcription* is not repugnant to the Law of Nature, and, conſequently, that it may be pleaded as a fair Title amongſt thoſe who are wholly govern'd by the ſaid Law, in relation to each other, and lay

[a] Add *Leg.* 1. *Dig. De Uſucap.* [b] Dict. loc. [c] Lib. iii. t. 4. §. 8.

[1] This is a very good Reaſon. For the Laws may limit the Right of Property many Ways, and make them paſs from one to another without expreſs Conſent, nay, ſometimes, againſt the Will of the antient Proprietor. So that though *Preſcription* had no other Foundation than the Law of Nature, yet it would not be unjuſt, that the Laws give it an Authority among Members of the ſame State. But, as I ſhall ſhew hereafter, it is ſo far from being contrary to natural Equity, that it is very conformable to it, and is a Conſequence of the End and Deſign of Property itſelf. Upon the whole, a good Deſign is neceſſary to preſcribe with a good Conſcience, as I have ſaid, n. 3. pag. 442. whether the civil Laws require it or no. I, alſo, ſuppoſe, that Preſcription is fixed at a Time long enough, as we ordinarly reckon it. For, in my Judgment, an honeſt Man could never have taken Advantage of it among the *Romans*, when the Preſcription for moveable Goods was made in one Year, and immoveable in two, in which the Emperor *Juſtinian* did acknowledge there was ſome Injuſtice, as I have ſhewed before, n. 4. pag. 443. Upon this Footing, the Law of Preſcription is not an *odious Law*, and inconſiſtent with the Law of Nature, although Mr. *Placette* ſays it is, and in his Treatiſe of Reſtitution, l. v. c. 6, compares it to an unjuſt Decree, which yet does not free from the Obligation to Reſtitution. He aſſerts, "That the Law "of God does not admit of this Law, and that the Jubilee always reſtored the antient Proprietors to the Poſſeſſion of their "Goods, though voluntarily alienated." But this has no relation to the Right of *Preſcription*. God, for Reaſons ariſing from the Conſtitution of the *Jewiſh* Republick, forbad the perpetual Alienation of their immoveable Eſtates; and not of their Goods in general, as Mr. *La Placette* expreſſes it. See l. v. c. 5. §. 4. following. In fine, there is nothing in the Law of *Moſes* that condemns *Preſcription* as an unjuſt Eſtabliſhment, and we can no more infer it, from the Example he brings, than we may conclude perpetual Alienation of Lands is odious, and not conformable to natural Law. The other Example which this Author not better applied. Although the *Jebuſites* had maintained themſelves ſeveral Years in the Poſſeſſion of the City of *Jeru-* God had given the Children of *Iſrael* all the Land of *Canaan*, yet *David* drove them from thence. This is a ſpecial which no Conſequence can fairly be deducted; and Mr. *La Placette* ought to remember, that when the *Ammonites* re- in Lands, which they affirmed to be theirs, *Jeptha* oppoſed them with this Argument, That the *Iſraelites* had enjoy- eable Poſſeſſion of them three hundred Years, which was enough to ſecure the Property to them. See *Judges* xi. 25.

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the Foundation of it in the *tacit Dereliction* of the former Proprietor: For the Proof of which [1], they ſuppoſe [a] before-hand, "That Nature allows every Man to renounce [b] and abdicate [b] his Right, "when he thinks fit to hold it no longer. Now, "that this Deſire of abdicating ſhould be able to "produce any Effect, in relation to others, 'tis "neceſſary that it diſcovers itſelf by ſome certain "Tokens; it being incongruous to human Nature to derive any outward Efficacy from the "bare internal Acts of the Mind. Theſe Tokens "are either Words, or Deeds. If the Will be expreſs'd by Words, then there is no need of waiting for the Term of Preſcription, ſince the Right "is immediately transferr'd on the other Party. "And it is the ſame when a Man declares his Reſolution concerning a thing by ſome poſitive "Deed; as ſuppoſe, if he either caſt it from him, "or abandon it; unleſs the Circumſtances be ſuch, "as that we ought to conclude, that he either "rejected, or relinquiſh'd it only for a Time, with "Intention to demand and reſume it again hereafter [c]. Thus if the right Owner of a thing "ſhall knowingly deal and bargain about the ſame "thing, with another who hath the actual Poſſeſſion of it, he ſhall juſtly be deem'd to have given "up his own Right, ſo that it ſhall fall and be "extinct upon the very Moment of compleating "any ſuch Bargain and Tranſactions. *Preſcription* "therefore can take place in thoſe things alone, "which the former Owner hath not renounced either by Words, or by any expreſs Deed, or "overt Act; but in which we preſume his Inclination to leave them, from his neglecting to enquire after them, and to challenge them again. "For even Non-performance or Omiſſions, conſider'd with their due Circumſtances, do, in moral Account, paſs for actual Deeds, and may "prejudice the Non-performer [d]. But, before we "can preſume upon a Man's Intention from ſuch "an Omiſſion, 'tis neceſſary that the Omiſſion "aroſe from pure inculpable Ignorance. Wherefore thoſe, who are in Poſſeſſion of other Mens "Goods, then only gain the Property of them "by the tacit Conſent of the former Owner, when "he knows them to be thus poſſeſs'd, and yet forbears to challenge them upon a convenient Opportunity. For there can no other Reaſon be aſſign'd, why a Perſon who thus knows the "Matter, and hath his free Choice to determine "accordingly, ſhould yet be utterly negligent and "ſilent in it, but this, that he hath no longer any "Care or Concern for the thing detained, nor will "reckon it his own for the future [e].

"Farther, As to the raiſing this Preſumption "of a Man's voluntary Neglect to demand his "Property, Length of Time affords a very ſtrong "Conjecture: For 'tis hardly poſſible, but that in "a Courſe of many Years we ſhould gain Intelligence that our Goods are in other Hands, and "have Opportunity of recovering them, or at leaſt "of interrupting the Poſſeſſor's Title, by declaring "and proteſting againſt it.

"Again, If we were at firſt hinder'd from putting in our Claim thro' Fear, this Fear too will, "in time, vaniſh, and we ſhall be, likewiſe, able to "provide ſo well for our own Security, as to be "in no Danger of ſuffering from the unjuſt Detainer.

As to the Objection [2], *That no one can eaſily be preſum'd to throw away his own*; "'Tis anſwer'd "by affirming, on the other Hand, that no one can "be thought willing, that a thing which for ſo "vaſt a while he hath not at all regarded, nor "given any one Indication of Care about it, "ſhould any more appertain to him.

Tho' all this be very plauſibly alledg'd, yet 'tis certain that a long continued Silence doth not always give us ſufficient Ground to ſuppoſe a *tacit Dereliction*. For, as it may happen, that a Man, for the longeſt Space we can fix, might either have been ignorant of his Right, or hinder'd from aſſerting it thro' want of Power and Apprehenſion of Danger; [f] ſo again, if he claims his Goods, tho' after never ſo long a Seaſon, 'tis manifeſt that he did not before abſolutely abandon and give them over. And, conſequently, this Foundation for *Preſcription* will not be ſuch, as ſhall hold univerſally, or extend to all Caſes.

As to that other Reaſon offer'd by *Grotius* [3], to prove

[a] Add *Grot.* l. ii. c 4. §. 9. *Bœcler.* & *Ziegler.* ad dict. loc. §. 1. [b] Lib. ii. c. 4. §. 3, &c. [c] Add Lib. xli. t. 1. l. 9. Sect. *alt.* D. De A. R. D. f. 8. Lib. xiv. t. 2. ad L. *Rhod.* l. 8. Lib. xlvii t. 2. leg. 43. f. 11. *D. De furtis.* Lib. ii. t. 14. l. 2. f. 1. *D. De pactis.* [d] Vid. *Numb.* xxx. 5, 12. D. lib. xxii. t. 1. l. 17. §. 1. *De Uſuris* &c. Lib. xli. t. 1. leg. 44. D. De A. R. D. [e] Add. *Bœcler.* ad *Grot.* d. l. Sect. 5. & *Ziegler.* ad. l. d. [f] Vid. *Can.* xiii. xiv. *Cauſ.* 16. *Quæſt.* 3. in *Gratian.*

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[1] We may conſult Mr. *Wherlhof*'s Diſcourſe already quoted, *viz. Vindiciæ Grotiani Dogmatis de præſcript. inter gentes liberas.* §. 9, &c. where he makes a kind of Comment upon that Place of *Grotius*. M. *Thomaſius*, in his Diſſertation cited above (§. 2. not. 5.) *De fundamentis in doctrina de præſcript. & derelictione Gentium tacitâ*, &c. has endeavour'd to prove §. 9. & ſeq. that *Grotius* does not found *Preſcription*, among Members of the ſame civil Society, upon the tacit Deſertion of the Owner. But if the Reader will examine well the Sequel of that Author's Diſcourſe with my Notes upon it, he will find that this was the true Principle of that great Man; and that he diſtinguiſhes this ſort of *Preſcription* from that which took place between Nations, only with reſpect to Time, and thoſe other Effects of Right, which may be determin'd by the civil Law.

[2] *Grotius* comes at length to the Concluſion, and having anſwer'd directly in oppoſing the Reaſon which our Author himſelf confutes afterwards, he infers, that we ought to ſuppoſe every Man honeſt 'till the contrary appears.

[3] In truth the Silence of the Proprietor proceeds commonly from theſe Things only, *viz.* either he knows not who hath his Goods, or he is ignorant of his own Right to them, or he hath ſome Reaſon, more or leſs ſtrong, why he doth not put in his Claim. So that we can't lay it down for a Principle in general, that there is a tacit Forſaking of Goods properly ſo called. 'Tis almoſt always againſt a Man's Will that he ſees himſelf depriv'd by the Effects of a long Poſſeſſion; and if the civil Laws ſuppoſe the voluntary Negligence of the antient Owner, they ſuppoſe no leſs the Poſſibility, which I have obſerved above, n. 1. pag. 444. Men are not commonly ſo careleſs as not to know their Intereſts, nor ſo indolent, as not to maintain them, eſpecially when the thing in Queſtion is conſiderable. And the *Preſcription* is made moſt commonly not only againſt the Proprietor of the thing himſelf, but againſt his Heirs, who are very ſubject to be ignorant of their Right, or are unable to preſerve it by a ſimple Proteſtation. We muſt find out ſome other Principle which ſuppoſes rather the Sentiments that the antient Owner ought to be of, than what he really is. And this, in my Opinion, will not be hard to find, if we attend to the Nature and Deſign of Property itſelf. I ſay then, that the natural Uſe and Effect of the ſettling of Property of Goods is not to aſſure every one of a perpetual Right of what once belonged to him for ſo long a Time as he ſhall be diſpoſſeſſed againſt his Will. In reality the Duration of the Right of Property depends not abſolutely on the Length of Poſſeſſion, as I have ſhewed above, c. 6. §. 1. n. 1. This would reduce Right to nothing, and deſtroy the End for which it was eſtabliſh'd. But yet it is not leſs contrary to that End, that the longeſt Poſſeſſion of another ſhould deſtroy his Claim, who has not voluntarily renounced his Right to ſuch Goods as are

prove that a *Dereliction* may be preſum'd from long Silence, *Becauſe we muſt not believe that Men are ſo uncharitably diſpos'd towards each other, as that they would ſuffer any Perſon to continue in a perpetual Courſe of Sin, for the ſake of a periſhable Enjoyment*; this doth not at all affect the preſent Queſtion. For, beſides, that it ſeems a little too ſimple to flatter ourſelves with ſo large Promiſes of Mens Conſciences and Piety; [a] he that comes to a Poſſeſſion by honeſt Means, and with Innocency of Intention (and him only we have pronounced capable of commencing Proprietor by *Preſcription*) is really in no Sin; becauſe the Manner of his obtaining the Poſſeſſion fully perſuades him, that he obtain'd the Property together with it. And it doth not appear that any Man is obliged voluntarily to call in queſtion his own Right, eſtabliſhed upon a lawful and probable Title. But if the detaining of another's Goods, after this manner, were indeed in itſelf ſinful, the Guilt were to be taken off, not by the Silence of the Owner, but by his expreſs Confeſſion, and the Renunciation of his *Right*, did he reſolve to give full Relief and Satisfaction to the Conſcience of the Poſſeſſor. But, in this Caſe, the Poſſeſſor's Right would not be owing to *Preſcription*, but to the ſolemn Act of the former Proprietor.

IX. Amongſt theſe different Opinions this ſeems to be clear and evident, That as the Propriety of things was introduced out of a regard to the *common Peace*, ſo it flows as a Conſequence from the ſame Principle, that they who have been let in to the Poſſeſſion of any thing upon a fair and honeſt Preſumption, ſhould, at length, be ſecured in the Enjoyment of it; and that others ſhould not be allowed to raiſe perpetual Suits and Quarrels about their Title. But the particular Space of Time within which ſuch an innocent Poſſeſſion grows up to the Force and Strength of Property, we do not find preciſely determined, either by natural Reaſon, or the univerſal Conſent of Nations; but it is to be adjudg'd by the Opinion of good and true Men upon the Caſe, not without ſome conſiderable Degree of Latitude. Yet ſo as that this Latitude ſhall not be cavill'd and pick'd at, with the like Sophiſtry as *Horace* hath uſed on another Occaſion:

Scire velim chartis pretium quotus arroget annus:
Scriptor abhinc annos centum qui decidit, inter
Perfectos vetereſque referri debet, an inter
Viles atque novos? excludat jurgia finis.
Eſt vetus atque probus centum qui perficit annos.
Quid, qui deperiit minor uno menſe vel anno,
Inter quos referendus erit? veteresne poetas,
An quos & præſens & poſtera reſpuet ætas?
Iſte quidem veteres inter ponetur honeſte,
Qui vel menſe brevi, vel toto eſt junior anno.
Utor permiſſo, caudæque pilos ut equinæ
Paulatim vello, & demo unum, demo etiam unum, &c.
Epiſt. iii. lib. i. ver. 35, *&c.*

I'd know what Years an *Author's* ripe for Fame;
Suppoſe a Century gone; where ſhall his Name
Be fix'd? I'th' antient Roll of finiſh'd Wit,
Or the vile modern? Let the Bounds be ſet.
He's old and ſtanch at a full Century's Date.
What if he drop'd a Month, a Year too late;
With the old Heroes ſhall he ſhare the *Prize*,
Or ſink with thoſe our Children ſhall deſpiſe
Upon their Father's Judgment? *We'll preſume*
Him of full Age, who comes ſo near the Sum.
I'll hold you to't, 'till by Degrees I clear
The Horſe's Tail, and pick it Hair by Hair.

But, in fixing the particular Period, a Regard ſhall be had both to the antient Owner, and to the new Poſſeſſor. To the former, leſt he ſhould be too ſoon excluded from the Privilege of following and finding out what he had loſt. In which Point natural Equity requires that *Preſcription* ſhould not be compleated in ſo little Time between abſent Parties, as between thoſe who are both on the Spot. To the latter, leſt he ſhould undeſervedly ſuffer Damage, when 'tis too late for him to gain Redreſs by convicting the firſt injurious Detainer [1], from whom the thing was honeſtly receiv'd; or when the thing is ſo riveted to his Fortunes and Eſtates, as to make the chief Bottom upon which they depend. Hence, inaſmuch as moveable things paſs in Commerce to others more frequently than Immoveables, ſo that having gone thro' ſo many Hands, 'tis more difficult to find out the Perſon by whom they were firſt convey'd, 'tis but reaſonable to allow a longer Space for the recovering the former than the latter; eſpecially, ſince thoſe, likewiſe, much ſooner ſuffer and decay by Uſe than theſe: For it would little avail the former Proprietor to receive his Goods when impair'd, waſted, and render'd

[a] Add *Ziegler* ad *Grot. loc. citat.* Sect. 8.

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are not in his Power. All our Goods which we enjoy are of that nature, that a thouſand Accidents can deprive us of them againſt our Will, and make them paſs innocently into another's Hands. They are deſigned to maintain Commerce in the World, and ſo to remain no longer in the Patrimony or Family of the Proprietor, to whom they are often leſs Uſe in themſelves, than by the Power they give him by parting with them, to furniſh himſelf with ſomething he wants. Moreover, if the End of Property requires that the Proprietors ſhould enjoy what they have peaceably, and not be in danger of loſing their Right from the Moment that they are no longer in Poſſeſſion of a thing, it is no leſs requiſite, in my Judgment, that he who believes, and has Reaſon to believe himſelf the lawful Proprietor, ſhould not always be ſubject to be deprived of what he has honeſtly got, and to which he has a juſt Title. It may be every one's Caſe, and no Man can be certain that there is no ſecret Fault in the Acquiſition he is poſſeſſed of. Beſides, in things of a moral Nature we muſt judge according to Appearance, and according to the common Proverb, *Not to be*, and, *Not to appear*, are all one. So that when a putative Property, if I may ſo ſpeak, produces the ſame Effect as a more real and more inconteſtable one, while the Right of the true Owner does not appear, theſe two ſorts of Property may well paſs for one and the ſame in Time, and the Right of the putative Proprietor may quite exclude the Claim of him who might revive his. This is the more juſt, becauſe the contrary would produce a thouſand Troubles in Society; and the greater the Number of honeſt Poſſeſſors are, through whoſe Hands the things have paſs'd ſucceſſively, the greater Right will the laſt Poſſeſſor have, how ſmall a Time ſoever the others may have kept it. From whence I conclude, that the antient Owner, and much more his Heirs, ought at the End of a conſiderable Time to renounce freely all their Pretenſions, and that if they do not, the Right of the honeſt Poſſeſſor is not a whit the leſs well-founded. There is nothing to be perceived, as we ſuppoſe it, neither in the Nature of the thing itſelf, nor in the Quality of the Perſon of whom he held it, that can give him occaſion to ſuſpect that there is any Defect in his Title; and 'tis not his Fault, if he, to whom it appertains, without knowing it, has not diſcover'd, or not been earneſt in ſearching into it. In a Word, it is a ſimple Misfortune for the antient Proprietor, for which he has Reaſon to comfort himſelf: And if the Poſſeſſor become at laſt the true Owner, is ſometimes obliged to give him any thing, it is not by the Rigour and Rule of Juſtice properly ſo called, but by a free Motion of ſome of thoſe Virtues that require us to releaſe our Right, as if a rich Man had preſcrib'd againſt a poor Man, or one in mean Circumſtances, *&c.*

[1] The Original in all the Editions of it has *per Evictionem*. This is an Inadvertency of our Author, who doubtleſs meant *per Evictionis præſtationem*.

unfit

unfit for his Service. And tho' a Man, at his firſt gaining ſuch a thing of another's, may have made a very advantageous Bargain, or tho' his Title coſt him little, yet it ſeems hard, and an obvious matter of Complaint, that any one ſhould be forced to part with a thing that hath now a long Time grown, as it were, into his Patrimony and Inheritance: And the rather, becauſe, on the other hand, we have Reaſon to believe, that he who hath contentedly wanted a thing during a great part of his Life, within which he hath been able to make ſufficient Proviſion for himſelf by other Means, will not think it an Injury or Hardſhip that he be obliged to want it for ever. To which may be apply'd that of *Tully*, Off. ii. c. 22. *Where's the Equity, that an Eſtate, poſſeſs'd many Years before, ſhould be got by him that had it not, and be loſt by him that had it* [1]? See the Story of *Aratus* the *Sicyonian* in the next Chapter. So that upon taking in all theſe Conſiderations, it will be no difficult Task for a fair and honeſt Arbitrator to find out ſuch a Term for *Preſcription* in particular Caſes, as ſhall be agreeable to natural Equity. Tho' 'tis the better Way in civil States, that all the Points of Controverſy may be brought within a narrow Compaſs, to fix in general ſome certain and neceſſary Bounds, at which *Preſcription* ſhall commence valid, according to the Nature of the Subject. We are therefore altogether of Opinion, that *Preſcription*, as it abſtracts from the Points of Time eſtabliſh'd by civil Ordinances, is, as it were, the Corollary or Appendix of Property. And, by Conſequence, that, when the Property was firſt introduc'd [2], it was, likewiſe, agreed upon by general Conſent, for the ſake of the publick Peace, that he who poſſeſſed a thing in his own Name, neither by violent Detention, nor by fraudulent Concealment, nor by a precarious Title, ſhould be preſum'd the true Proprietor of it, 'till any one was able to prove the contrary: And that he who had held a thing honeſtly obtain'd, a very long Seaſon, during which any Man of ordinary Diligence would have enquired after his own, ſhould defend his Hold againſt the tardy Claimant, who ſo long neglected to make his Challenge.

X. Upon theſe Principles, and if we place the Reaſon of *Preſcription* not barely in the Dereliction of the former Owner, we may, with the more Eaſe, reſolve this very intricate Queſtion, *Whether or no, or after what manner, Children, not come into the World, can loſe their Right by the tacit Dereliction of their Parents and Anceſtors?* Which we may underſtand two Ways; either of ſuch *Preſcription* as was compleated before the Children were born, or of ſuch as only commenced in their Father's Time, and was compleated at his Death. In the former Senſe, if we take the negative ſide, we are encounter'd with this Difficulty, that *Preſcription*, thus underſtood, will not, in the leaſt, contribute to the Peace of Empires and Dominions; moſt Goods being in their Nature capable of deſcending by Inheritance to Poſterity; and therefore 'twould be in vain for the Preſcriber to overthrow the Claim of the Father, if the Son might afterwards renew the Suit. But if we incline to the affirmative Part, it will ſeem ſtrange, how Silence or Negligence ſhould prejudice thoſe who were unable to prefer an *Action*, or ſo much as to ſpeak a Word, and indeed, who were not yet in Being; or how the Default of one Perſon ſhould thus turn to the Damage of another. Which Doubt *Grotius* [a] hath ſolv'd by the following Remark: *That a thing not yet exiſtent can have no Accidents, ſo a Perſon, who is, as yet, no part of Nature, can have no Right, and, conſequently, nothing can be ſaid to be taken from him* [b]. *By him, who is as yet no part of Nature, we mean him who is not conceiv'd, not he who is conceiv'd, but not born: Becauſe the latter, in many Inſtances of Right* [3], *is already ſuppos'd to be a Member of human Society* [c]. It may be added, in Confirmation of this Judgment, That Goods of Parents only then begin to belong to their Children, when the Parents themſelves hold and enjoy them, 'till the very Time at which the Children ought to inherit them. Which Rule may be thus extended to a larger Compaſs: He that is not yet in Being can acquire no *Right*, unleſs by the Intervention of another already in Being, from whom the *Right* ſhall be deriv'd to him upon his coming into the World, yet ſo as that it ſhall obtain no Effect in relation to him, 'till after he is actually born. And this happens when any thing is acquir'd or deliver'd to another, to be held in ſuch a manner as that he ſhall be able to tranſmit it to his Succeſſors. Yet here there is an obſervable Difference; for ſome things are ſo conferr'd on another, as that the Intereſt of the Giver is not at all affected, whether the thing deſcend to the Heir, or not; though, ſo far as he is concerned, he grants the Receiver free leave thus to tranſmit it. But other things are conferr'd after ſuch a ſort, as that the Donor retains a *Right* over the Manner of holding, which he himſelf appointed, ſo that it cannot be altered without his Conſent. Now which ſoever of theſe Ways we ſuppoſe a thing poſſeſſed by any Man, with the Power of tranſmitting it to his unborn Poſterity, if it happen, by any means, to be intercepted or alienated before the Birth of the Heir, he is not the leaſt injured thereby; unleſs the Title or Pretenſion to it (if not the thing itſelf) were expreſly left him in the manner of an Inheritance. For, in the former Caſe, ſince both the thing holden, and the way of holding it are fully in the Poſſeſſor's Diſpoſal, if he convey it away from himſelf; or if, by any Change whatſoever, it ceaſe to be his, all the *Right* he had to it is immediately extinguiſhed; and, conſequently, cannot be derived upon his Heir as yet unborn, who can claim no Right to Goods of this Nature held by his Anceſtors [4], but what they deliver to him,

[a] Lib. ii. c. 4. §. 10. n. 2. [b] M. Senec. *Controver.* l. 1. c. 6. p. 93. towards the End, *Edit.* Gronov. *Before we obtain'd any actual Exiſtence, Nature hath the whole Government of us, and caſts us into what Fortune ſhe pleaſeth. Our true Rate and Value then commenceth, when we are at our own Diſpoſal.* [c] Vid. lib. xxxvii. t. 9. l. 7. *princ. D. De ventre in poſſ. mittend.* & Lib. xxxviii. t. 16. l. 7. *D. De ſuis & legitim. hæred.* & Lib. l. t. 16. l. 231. *D. De verb. ſignif.*

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[1] The *Latin* of *Cicero* is, *Quam autem habet æquitatem, ut agrum multis annis, aut etiam ſeculis ante poſſeſſum, qui nullam habuit habeat, qui autem habuit amittat?*

[2] There needs no Agreement to be ſuppoſed. See what is ſaid n. 3. pag 446. The Author argues upon the falſe Notion he has formed to himſelf of the Original of Property, which we have confuted in its Place.

[3] See l. 1. c. 1. §. 7. above.

[4] The Words of the *Roman* Law are, *Item Labeo ſcribet etiam eum, qui poſt mortem patris ſenatoris natus ſit, quaſi ſenatoris filium eſſe. Sed——non proprie ſenatoris filius dicetur is, cujus pater ſenatu motus eſt, antequam iſte naſceretur. Si quis conceptus ſit*

him, as it were, from hand to hand, after he is actually in Being. But, in the latter Caſe, inaſmuch as the prime Donor ſtill reſerved to himſelf a Power over the Tenure [1], if his Conſent be obtained, the Poſſeſſor doth not at all damnify thoſe that come after him, ſhould he either alienate the thing, or give it over for loſt, by whatever Accident it was convey'd from him. Tho' all this be true, yet *Piſiſtratus* was of another Opinion, as appears from his Epiſtle to *Solon*, where he gives the following Reaſon, amongſt others, for his ſeizing on the Government; *I have not uſurped what belong'd to others; I only claim that by my own juſt Right and Title, which the* Athenians, *having firſt confirmed by Oath to* Codrus *and his Family, afterwards took away* [a].

The Queſtion taken in the latter of the two Senſes, which we obſerved it to be capable of, is denied by the Civilians; for they ſay, *That Preſcription, heretofore begun, ſtops during the Years of Minority* [2], *and upon their Expiration runs on effectually again.* Yet I am of Opinion, there may be a Caſe, in which the Favour of Poſſeſſion ſhall over-balance the Favour of Minority: As for Inſtance, ſuppoſe it ſhould ſo happen, that when I want only a Month or two of compleating my *Preſcription*, and it is morally certain that the antient Proprietor will not, within that Space, give me any Trouble about the Title, and if he ſhould then deceaſe, leaving an Infant Heir, it would be unreaſonably hard, if after five and twenty Years Poſſeſſion I ſhould be thruſt out of my Hold for want of thoſe two Months: Eſpecially, if it be now impoſſible for me to recover Damages of him, from whom I received what is thus challenged; as I might have done, had the Diſpute been ſtarted before the Goods devolv'd upon the Minor. Here certainly, if the Buſineſs be referr'd to the Arbitration of an honeſt Man, and one who knows that the Grounds and Reaſons of *Preſcription* are not to be drawn barely from the Neglect of the former Owner, he will give Judgment for me rather than for the other Party. Nor doth it ſeem ſo very grievous, that a *Right* which under the Father was, as we may ſay, at its laſt Gaſp, ſhould utterly expire under the minor Son: And eſpecially, becauſe Men eſteem it a much greater Hardſhip to let go a thing which they have held a conſiderable Time, than to be debarr'd of what is not yet come to their Hands.

XI. From hence it appears, that they too [3], who are ſubject to no common Law beſides that of *Nature and Nations*, may alledge, againſt each other's Claim, a long, uninterrupted, and honeſtly obtained Poſſeſſion: And ſo much the rather, as publick Poſſeſſions cannot be diſturbed without far greater Confuſion and Danger than private. Though it muſt be confeſſed, that in Controverſies between Princes and States it is frequently not altogether ſo neceſſary to appeal to *Preſcription*, ſince the *Right* of the Poſſeſſor [4] may, or at leaſt ſhould, be deduced more ſolidly from other Foundations. And *Bæcler* [b] hath obſerved before us, *That thoſe who in this Buſineſs of Preſcription mention only the Point of Time, often intend to ſum up their whole Claim in this ſhort Expreſſion: Under which are, likewiſe, to be underſtood the Adjuncts of Time, as the quitting the thing which is now the matter of Diſpute, or the Intention of quitting it, or any Tokens of renouncing the Right and Title. And ſince the Plea of Time is, in the main, plauſible, eſpecially with vulgar Hearers, as (if it gave an Advantage to other Proofs) it is a politick Stratagem to urge this Notion in general, and in groſs, wilfully avoiding all Explications or Additions which might be able to give Strength to ſuch a thing as Time, which of itſelf can produce no Effect; and, inſtead of them, to heap up Inſtances and Examples of former Diſputes, that the Diſcourſe may ſeem more full, and may carry a fairer Colour as to the main Point.*

Tacitus [c] calls it by no better Name than *Vaniloquentia*, *Impertinence* or *idle Talk*, in *Artabanus*, when he laid claim to the antient Bounds of the *Perſian* and *Macedonian* Empires.

Sapores, as *Ammianus Marcellinus* [d] informs us, renewed the ſame Claim many Ages after; to whom *Conſtantius* gave this Anſwer in his own Way; *That 'twas ſtrange he ſhould forget how the* Perſians *were enſlaved by the* Macedonians; *the latter of which Nations being ſubdued by the* Roman *Power, their Bondſmen could not but fall under the ſame Dominion* [e].

Thus, likewiſe, *Solyman*, the grand *Turk*, would often ſay, *That he had a Right to the City of* Rome, *and to all the Weſtern Empire, as being the lawful Succeſſor of* Conſtantine, *who had remov'd the impe-*

[a] *Diogen. Laert.* in *Solon.* l. i. §. 53. [b] Add *Grot.* dict. loc. Sect. 2. [c] Ann. vi. c. 31. [d] Lib. xvii. c. 5. [e] In *Zonaras*, Tom. iii. ad ann. 354. See likewiſe *Herodian*, l. vi. c. 6.

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dem ſit, antequam pater ejus ſenatu moveatur, natus autem poſt patris amiſſam dignitatem, magis eſt, ut quaſi ſenatoris filius intelligatur, tempus enim conceptionis ſpectandum pleriſque placuit, i. e. An Infant that is born after the Death of his Father, who was a Senator, ſhall be eſteemed a Senator's Son, if his Father kept his Dignity to his Death; but he ſhall not be eſteemed a Senator's Son, if his Father were removed from the Senate before he was born; but if he were conceived before his Father's Degradation, but not born, he ſhall be accounted as it were a Senator's Son in regard to his Conception.

[1] See l. viii. c. 5. §. 9. following.

[2] The Words of the Civilians are, *Non eſt incognitum id temporis, quod in minore ætate tranſmiſſum eſt, longi temporis præſcriptioni non imputari. Ea enim tunc currere incipit, quando ad majorem ætatem Dominus rei pervenerit*, Cod. l. vii. t. 35. Quibus non objicitur longi temporis præſcriptio, leg. 3.

[3] The famous *Peter du Puy*, Counſellor and Library-Keeper to the King of *France*, maintains the contrary, in a Diſcourſe, intitled, *Whether Preſcription is of force amongſt Sovereign Princes?* It is found in a Collection of ſeveral Treatiſes touching the Rights of *The moſt Chriſtian King*, printed at *Paris* 1655, and at *Roan* in 1670; but Mr. *Wherlhof*, Profeſſor at *Helmſtadt*, has confuted it fully in his *Vindiciæ Grotiani dogmatis de præſcriptione inter gentes liberas contra illuſtrem ſcriptorem Gallicum Petrum Putcanum.* This Work, quoted before, is worth the reading, tho' after what I have ſaid in my Notes, as well as this Author in the Text, 'tis eaſy to ſee on which ſide the Truth lies. I ſhall only obſerve, that Mr. *Wherlhof* requires that he would explain by what Right the Crown of *France* has paſs'd to the *Carlovingian* Line, by the means of *Pepin*, and to the *Capetian* Branch by *Hugh Capet*, if it be true, according to the Principle of that *French* Author, That the Succeſſors of an Uſurper can never acquire a lawful Right of Force againſt the Poſterity of the King unjuſtly dethroned.

[4] But it is true, alſo, that moſt Times the other Titles are not ſufficient, becauſe in aſcending from one Poſſeſſor to another, and by different Titles, we ſhall find, at laſt, ſome of them diſhoneſt and faulty, which will deſtroy and render uſeleſs all that depend on it, how good ſoever they be in themſelves, if the Length of Time, which has paſſed ever ſince, will not purge the Foulneſs of the Original.

rial Seat to Byzantium. Yet, in the moſt noble Examples upon Record, you will find, that, beſides the Argument of long continued Poſſeſſion, ſome Title or other capable of producing Sovereignty hath been, at the ſame Time, alledg'd.

Thus *Iſocrates* [1] under the Perſon of *Archidamus*, having ſhewn, in the firſt Place, that the *Lacedemonians* became Maſters of *Meſſene* by the Title of a juſt War, afterwards brings in the Length of Poſſeſſion, as a kind of ſecondary and inferior Proof: *Nor are you ignorant*, ſays he, *that all the World agree, Poſſeſſions, whether publick or private, ſhould, after a long Period of Time, be fix'd and confirm'd, and paſs as lawful Inheritance.* To which he ſubjoins, that the Title of his Country to *Meſſene* was not controverted heretofore, when a fair Opportunity was offer'd to that Purpoſe [a]. And indeed, in Cauſes of this Nature, 'tis always a fair Preſumption in favour of the *Poſſeſſor*'s *Right*, that, during ſo long a Space, no Perſon elſe hath put in his Pretenſions. For theſe Matters are uſually of ſo very great Importance, and are tranſacted ſo openly and in broad Day, that if a third Party hath any Right in the Caſe, he can neither be long ignorant of it, nor want Occaſion of preſerving it, at leaſt by declaring and proteſting againſt the Uſurper.

Therefore there can happen very few Caſes, in which *Dominion* and *Sovereignty* ſhall not be the Conſequences of *Preſcription*, when a State or People have poſſeſs'd themſelves of any thing upon a peaceful Title. And as for what they gain in War, it is hardly neceſſary to plead *Preſcription* on that Account. For, ſo long as the Hoſtility continues, the Poſſeſſion of all that hath been won from the Enemy is ſupported only by Force and Violence; and, at the ſame Time, the Enemy hath a Right of recovering his Loſſes by any Means he can uſe: Eſpecially if, having given any unjuſt Occaſion for the Quarrel, he is ready to make Satisfaction. Hence, inaſmuch as a War may be protracted for more than Fifty Years, they, who loſt any Place at the firſt Breaking out of the Difference, may regain it by Force at any Time before the Buſineſs is adjuſted by a Peace.

The *Numidians*, in *Livy* [b], pleading *Preſcription* againſt the *Carthaginians* for a Tract of Land (which bore the Name of *Emporia*) talk to this Purpoſe; *That the Right was ſometimes held by the State of* Carthage, *and ſometimes by the Kings of* Numidia, *as either had Opportunity to ſeize upon it; and that the Poſſeſſion was always in the Hands of thoſe who appear'd ſtrongeſt in the Field.*

When a Peace is concluded, 'tis eaſy to ſee what both ſides are to hold for the future; and then what is yielded up by one Party, the other immediately acquires with full Right, and hath no need to wait for the Title of *Preſcription*. If any third Perſon lays claim to the ſame thing, he will be ſure to declare his Pretenſions in good Time; and, if poſſible, whilſt the Treaty is in agitation: For afterwards Warriors will not eaſily be prevail'd upon to reſtore what they have won by the Sword, to thoſe who were idle Spectators of the Quarrel [c].

[a] Add *Alberic. Gentil. De Jure Belli*, l. i. c. 22. [b] Lib. xxxiv. c. ult. [c] Vid. *Grot.* l. iii. c. 6. Sect. 7.

[1] *Iſocrates*'s Words are, Ἀλλὰ μὲν δὴ ἐκεῖνο ὑμᾶς λέληθεν, ὅτι τὰς κτήσεις, καὶ τὰς ἰδίας, καὶ τὰς κοινὰς, ἣν ἐπιγένηται πολὺς χρόνος, κυρίας, καὶ πατρῴας ἅπαντες εἶναι νομίζουσι.

CHAP. XIII.

Of the Obligations which ariſe immediately from Property.

I. *Every one is obliged to abſtain from another's Goods.*
II. *Others Goods kept by us are to be reſtored.*
III. *Which is proved.*
IV. *And illuſtrated.*
V. *Contracts made about others Goods are void, as ſoon as they are known.*
VI. *What is gained by another's Goods muſt be reſtor'd.*
VII. *An honeſt Poſſeſſor is not bound to reſtore, if the Goods are decay'd, or loſt.*
VIII. *But he is bound to reſtore the preſent Fruits.*
IX. *And ſuch as are ſpent, if he muſt have ſpent others of the like Value.*
X. *But not them he has neglected to gather.*
XI. *He is not obliged, who has given away what was given him, but with a Diſtinction.*
XII. *Nor if he has ſold what he bought with a Diſtinction alſo.*
XIII. *How he may recover the Price, who has really ſold another Man's Goods.*
XIV. *Whether, if a Man buys another's Goods, he ought to reſtore them to the Seller.*
XV. *He that has another's Goods, and knows not the Owner, may keep them.*
XVI. *Whether what's given for a bad Reaſon muſt be reſtored.*

HAving enquired into the Nature and Origin of *Property*, as, likewiſe, into the ſeveral Ways by which it is eſtabliſh'd, it follows that we conſider thoſe Obligations, which, upon the Introducing of *Property*, affect Mankind immediately [1] and on their own Account, without the Intervention of other Duties. Of theſe the firſt is, That every Man ſhall ſuffer another, who is not engaged in Hoſtility againſt him, to diſpoſe of his own Poſſeſſions, and likewiſe quietly to hold and enjoy them; nor ſhall, either by Force or Fraud, impair, divert, or draw them to himſelf. Whence it appears, that Theft [2], Rapine, Removing of Boundaries, and the like Crimes are forbidden by the

[1] The Duties which concern Property may, alſo, be conſidered with Relation to the Owner himſelf, who is obliged to obſerve, according to the Uſage of Right, all the Law of Nature. And ſo he'll do very ill to abuſe his Goods in any manner, which may redound to the Contempt of the Deity, or Prejudice of his Neighbour. On the contrary, he ought to make uſe of them firſt to the Glory of God well underſtood, and to the putting his Laws in Practice; and laſtly, to procure an Advantage to other Men, as well as to himſelf. *Titius*'s *Obſerv.* 313.

[2] The *Roman* Lawyers ſay poſitively, that Theft and Robbery are contrary to natural Law. *Furtum eſt contrectatio rei fraudulosa, lucri faciendi gratia, vel ipſius rei, vel etiam uſus ejus, poſſeſſioniſve, quod lege naturali prohibitum eſt admittere*, Dig. lib. xlvii. tit. 2. *De furtis*, l. 1. §. 3. See, alſo, lib. l. tit. 16. *De verb. ſignif.* l. 42. *Salmaſius* in his Treatiſe *De Uſuris*, c. ix, raiſes great Difficulties about it, but in Mr. *Hertius*'s Judgment not worth repeating.

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bare *Law of Nature*. *Euripides* [a] ſpeaks excellently to this Purpoſe;

God hates the Violent, commanding all [1]
To live on what their honeſt Pains procure;
And not to feed their Wants with mutual Spoils.
Oppreſſors ſhould be baniſh'd human Race,
Unworthy of the Name. One common Heaven
Gives Light and Air to Man; one Earth a Seat;
A Scene of Induſtry, where all may ſtrive
To raiſe their Stock, and ſpread their Fortunes wide;
But not to rob, or force their Neighbour's Store.

II. Farther, When the Things of one Man come into the Hands of another without the latter's Fault (where under the general Name of things we comprehend, likewiſe, our Right over Perſons, ſo far as it may be profitable to us, as the Right of Maſters over their Servants) we are to conſider, whether the things be ſtill remaining, or not.

As to Things which remain, there ariſeth this Obligation concerning them; That he, who is in poſſeſſion of what belongs to us, ought to imploy his utmoſt Ability towards putting it again under our Command. Which Obligation doth not exert its Force, 'till ſuch time as the Party in Poſſeſſion comes to know that the thing is ours.

We add, That he imploy his utmoſt Ability, or do as much as in him lies; for no one can be bound to an impoſſible Performance. Nor is he oblig'd to put himſelf to Charges in making the Reſtitution; and whatever Expences he hath been at on any thing, on that Account, he may fairly demand of the Owner, and may detain the thing 'till they are paid. But 'tis enough if he ſignify, that another's Goods are in his Hands [b], and that he will be no Hindrance to the Owner in the Recovery of them. And theſe Rules are ſo true, that the *Roman* Laws forbid Men to challenge their own, when found by others *ſine pactione*, without ſome Bargain in order to give the Finder Satisfaction [c]; whilſt they affirm, at the ſame Time, *That he who takes up any thing of another's with a Deſign of converting it to his own Uſe, is guilty of Theft, whether he knows the particular Owner, or not* [d e]. Yet if I become Maſter of a thing upon a juſt Title, and with an honeſt Intention, I am not bound to call my own Right into diſpute, and to give publick Notice that ſuch a thing is in my Cuſtody, to the end that it may be chalenge'd, if it ſhould happen to belong to another. For, when the Manner of my getting the Poſſeſſion was in no reſpect faulty [2], my Innocence and Integrity clear me from all Imputation of Guilt in detaining another's Goods.

This farther Reſtriction is, likewiſe, to be underſtood in the preſent Duty; *If he who was before the true Owner, hath ſtill any probable Means left of his recovering what he loſt*; that the Obligation we are now aſſerting, may not be thought to overthrow the Right of *Preſcription* [f].

III. Now that this Obligation is ſufficiently founded in the bare Notion of *Property*, appears evident. For ſince a Perſon may happen, by many Accidents, to loſe his Hold, and be thrown out of the Poſſeſſion of what is really his own; our Goods, and eſpecially thoſe which are moveable, would be in a very ſlippery and uncertain Condition, if, when they ſtray into another Man's Hands, he might intercept or conceal them from us; much more, if he might detain ſuch a thing openly, and repulſe us with Violence, when we attempted to make good our Claim. And therefore, as in a State of Communion 'tis a matter of Right that each Perſon ſhall be allow'd to uſe the common Store as fully and freely as the reſt; ſo upon the firſt Appropriation of things, when all other Perſons did, as it were, renounce their Right to what any one had received as his private Share, the diſtinct Proprietors are ſuppoſed to have made this Agreement amongſt themſelves [3] *That he who chanced to be in poſſeſſion of another's Goods, after he knew*

[a] *Helen.* ver. 909, *&c.* [b] Vid. *D.* Lib. x. t. 4. l. 1. §. 3. *De fugitiv.* We ſpeak here all along of the innocent and well-meaning Poſſeſſor; for the Obligations which lie on the diſhoneſt Poſſeſſor are open'd in another Place. See the next Paragraph towards the End. [c] *Vid.* Lib. xlvii. t. 2. l. 43. §. 9. *D. De furtis.* Lib. xix. t. 5. l. 15. *D. De Præſcript. verbis.* & Lib. xii. t. 5. l. 4. §. 4. *D. De cond. ob turp. cauſ.* [d] *Joſiphus* Antiq iv. c. 8. *He that takes up Gold or Silver in the Way, let him ſeek out the Perſon who loſt it, and by the Help of the Cryer let him reſtore it in the ſame Place where 'twas found; and let him be perſuaded, that 'tis a very ill Way of gaining Profit, to enrich himſelf by the Damage of others.* [e] Concerning this, ſee c. 6. §. 12. [f] Comp. *Grot.* in the Place above cited.

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[1] *Euripides*'s *Greek is,*

Μισεῖ γὰρ ὁ Θεὸς τὸν βίαν, πτηνὰ δὲ
Κτᾶσθαι κελεύει πάντας, οὐκ ἐς ἁρπαγὰς
Ἕκτεος ὁ πλοῦτος ἀδίκους τις ὤν,
Κοινὸς γὰρ ἐς ἐν ἁρμὸς πᾶσι βροτοῖς
Καὶ γᾶ, ἐν ᾗ χρὴ δάιον' ἀναπλήρους ἑνὸς
Τ' ἀλλότρια μὴ χεῖν, μηδ' ἀφαιρεῖσθαι βίᾳ.

We have, alſo, two fine Fragments of *Menander* upon this Subject, both of them cited by *Clemens* of *Alexandria*, *Stromat.* lib. v. p. 605, 606. and by *Euſebius*, *Præp. Evang.* l. xiii. c. 13. and which are, alſo, found in Mr. *Le Clerc*'s Collection lately publiſh'd. They are the more remarkable, becauſe they confirm what I have proved at large, N. 2. pag. 153. before going. For we there ſee by the common Notions of the Heathens deliver'd in their Plays, that, to pleaſe the Gods, we muſt not covet other Mens Goods, nor debauch our Neighbour's Daughter, or Wife, but be kind, ſerviceable, charitable, *&c.*

[2] The Edition of this Work publiſh'd in 1706 adds, after *Vitioſi*, theſe Words, *aut ſuſpecti*, i. e. faulty or ſuſpicious, Words too important to be left out; for if we have the leaſt Suſpicion, that the thing belongs not really to him, who is about to make it over to us, we muſt not take it; and if we do receive it, we reduce ourſelves to a Neceſſity of reſtoring it fully, leſt our Suſpicion ſhould prove true.

[3] There is no need of ſuppoſing ſuch a general Agreement, as we have proved upon c. 4, 6. preceding the Obligation of reſtoring the Goods of another which are fallen into our Hands is as natural a Conſequence of Property, as the Obligation we are under not to take them. But this Obligation ought to be underſtood in ſuch a Manner as not to deſtroy the Rights of an honeſt Poſſeſſion, or a putative Property, which, as I have before obſerved, on §. 8. produces the ſame Effect as a Property more real and inconteſtable, ſo long as the true Owner does not appear. This neither *Grotius*, nor our Author, nor any other that I know of, were aware of, and therefore have been puzzled very much to determine ſeveral Caſes which have offer'd themſelves upon this Subject, as well as the Reaſon why their Solutions were inconſiſtent one with another, which proves ſufficiently, that their Principle, upon which they argued, was not found. I ſay then, that one of the principal Uſes of our Goods being to trade withal, and this Uſe requiring that the honeſt Poſſeſſor ſhould be reputed, in all reſpects, the lawful Proprietor, ſuch a Poſſeſſor can be obliged to reſtore only what is in Being, *i. e.* what he has not parted with, nor is any manner periſhed; for he then has nothing, and ſo can reſtore nothing, as our Author himſelf acknowledges, in reſpect to what is given away, or ſold again, as it was acquired, and to what is ſpent or loſt. Moreover, all that the honeſt Poſſeſſor hath done, or performed, as ſuch, upon the account of the Goods of another, which he believed his own, is as valid, as to him, as if he had diſpoſed of a thing to him, of whom no

knew it to be another's, should cause it to return to its Owner. For the Power and Virtue of Property would be too weak, and the Keeping of Things would require too much Expence, as well as too much Care and Trouble, if these stray'd Goods were only then to be restor'd, when the Owner made a formal Challenge of them; because he must very frequently be ignorant which way they are gone, or where they are lodg'd.

As to a Man's being bound to restore a thing, when claim'd by the Owner, 'tis altogether the same Case, whether he got Possession by honest, or by dishonest Means: For this Obligation doth not arise from any Default, or any Fact of ours, or from any particular Covenant made with the Claimant, but from the thing itself; or rather from that general Covenant to this Purpose, which we suppose to be the necessary Attendant of Property. He then, who obtain'd the thing honestly, is barely oblig'd to make Restitution; but he who procur'd it dishonestly, besides the Necessity of Restitution, hath, likewise, contracted a Guilt, and is, on that account, liable to Punishment. *Good Faith*, or honest Intention, doth then cease, at least, in the Court of Conscience, when a Man hath full Assurance, that what he holds belongs to another [a]. Though it is enough to secure him from human Punishment, if he were thus well-meaning and sincere only at his first entering on the Possession.

IV. This is confirm'd and illustrated by the Divine Law itself, *Deut.* xxii. 1, 2, 3. And, lest any should imagine that the Duty there enjoined is to be paid to Friendship only, 'tis expresly added, *Exod.* xxiii. 4, that the same ought to be perform'd to an Enemy.

Josephus [b] hath given us this Gloss on the Law which we are now mentioning: *If any Man*, says he, *find Gold or Silver in his Way, let him seek out the Party who lost it, and restore it by the Hands of the publick Cryer, in the very Place where he took it up, judging with himself, that no Advantage can be good, which ariseth from another's Damage. The same he must do with regard to the stray Sheep and Cattle he meets with in the Desert. If he cannot presently find out the Owner, let him retain the things in his own Custody, calling God to witness, that he intended not to make a Gain of what belonged to his Neighbour.* Yet the mortal Hatred, which the *Jewish* Nation profess'd against all others, afterwards turn'd this natural into a Civil Law, to be put in practice only towards their own Country-men. [c]

One of the most remarkable Instances of *Restitution*, which History affords, is that of the Emperor *Theophilus*, who, when a Woman cry'd after him in his Progress, and claim'd the Horse on which he rode, finding, upon Enquiry, that the Governor of a certain Province had taken it away, and presented it to him in his own Name, he immediately gave back the Horse to the poor Woman; and, having no others at hand from his own Stable, was content to make use of the next he could borrow. Which, they tell us, was the Rise of that Custom, which afterwards obtain'd, for the Emperors to carry in their Train a great Number of Horses, for Supplies, in case of any such Accident [d].

The Example of the *Spartans*, which *Grotius* mentions [e], who condemn'd their General *Phœbidas* for seizing on the *Cadmean* Fort, and yet still kept the Place in their Hands [f], doth not come up to our Point: For they were, no doubt, injurious and dishonest Possessors, and therefore were bound to Restitution by another Principle. Nor is the Story of *M. Crassus*, and *Q. Hortensius*, more proper in the present Question, as *Tully* [g] gives the Report: *Some Persons*, says he, *brought out of* Greece *to* Rome *a forged Will of* L. Minutius Basilius, *a very wealthy Man; and, the more easily to carry their Point, put down* M. Crassus *and* Q. Hortensius, *two who had the greatest Power and Interest in the City, as Joint Heirs with themselves. The two Gentlemen, though they suspected the Deed to be counterfeit, yet, relying upon their own Innocence in the Mat-*

[a] Vid. Lib. xvi. t. 3. l. 1. §. ult. D. l. ii. l. iii. l. iv. *Depositi, vel contra.* [b] *Antiq.* l. iv. c. 8. [c] Vid. *Seld. De Jure Nat. & Gen. sec. Hebr.* l. vi. c. 4. & *Grot.* in Annot. ad d. l. §. 1. Add *Polyb.* l. vi. c. 31. *princip.* [d] *Curopalat.* de Off. *Constant. & Cedren.* [e] *Ubi supra*, n. 3. [f] *Plutarch & Cornel. Nep.* in *Pelopid.* [g] Off. iii. c. 18.

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other Person can claim any thing, and the Profit, which might redound to him by such Goods, while he was in the Possession of them, or when he parted with them, belongs to him by Consequence. For as he was, and ought to be supposed the true Proprietor, the Rights and Profits of the Property did absolutely accrue to him, so long as he had no Reason to suppose otherwise. And then if the antient Owner recovers his Goods, he begins again, as we may say, at a new Expence to follow his Business. The peaceable Enjoyment of the honest Possessor is as a kind of *Interregnum*, which, interrupting the Power of the true Proprietor, insures to the putative Proprietor the Effects of his Management, while he was in full Authority. This being agreed on, we may see, in my Judgment, how far the natural Obligation of restoring the Goods of another extends, when Men have had an honest Possession with a just Title. If he hath disposed of them by any good and irrevocable Act to a third Person, who has honestly received them, he is only obliged to assist, as much as he can, the old Owner to make him, who has wrongfully taken and retain'd his Goods, to give him Satisfaction, and to declare to the new Possessor the Discovery of the Right of the true Proprietor, that he may do what he ought in the Case. But if the thing is yet in the Hands of the honest Possessor, or he has got the Possession of it without Charge, or it has cost him some small thing. In the first Case, as when a Person has obtained a thing by Free-gift, or has found a thing, he ought to return it fairly and readily without any Demand, at least if it has occasioned no greater Expence to him than is made up by the keeping of it. In the other Case, as if one has bought it, or taken it to pawn, it is just that the true Owner, who would recover his Goods, should repay the honest Possessor what he has given, otherwise he may keep the thing; and if the other do not redeem it before the Time of *Prescription* is come, it then entirely changes the Owner, so that the first can have no Title to it. By these Principles it is easy to determine clearly all the Questions, which can concern this Matter, as we shall see in the Notes upon the following Paragraphs, where I shall rectify our Author's Notions. Although he is not of the same Sentiments with *Grotius*, yet he reasons in general according to the Notions of that great Man, whose Authority seems to oversway him here. This I mention not by mere Conjecture; for, in his Elements of *Jurisprud. Univers.* which was the first Sketch of this Work, he was sensible of the Weakness of *Grotius*'s Opinion, and determines it in such a Manner, as can't be well grounded but by supposing the Principles that I have distinctly established; for he says, "That tho' the civil Laws of several People permit any one to take Goods where "he finds them; nevertheless, if we consider natural Law, the true Proprietor may not come upon the honest Possessor, "though he may upon the Person who deprived him of his Goods; for, *adds he*, why should the honest Possessor lose it, "or be prosecuted more than the true Owner, seeing 'tis not his Fault?" Lib. i. *Def.* 5. §. 25. p. 77, 78. I observe with Pleasure, that M. *Trevet*, professor at *Helmstadt*, has absolutely approv'd of my Sentiments on this Subject, in the Chapter which answers to this, of his Abridgment of the *The Duties of a Man and a Citizen*, publish'd with Notes in 1717.

[1] But *Grotius* alledges these two Examples to shew, that it is not sufficient to acquire the Possession *de bona fide*, or to believe, we have a Right to take advantage of a Will which is forg'd, tho' we are ignorant of it. Now upon this Footing the Application is just. See my Remark on the same Place in *Grotius*, Not. 6. 8.

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ter, did not refuſe to make this ſmall Advantage of the others Wickedneſs. What then? Is it enough that they appear to have had no Hand in the Fact? I am not of that Opinion: For he certainly is to be cenſured as unjuſt, who not only forbears to drive off an Injury from another, but aids and encourages it. Here the Gentlemen had as great a ſhare in the Crime of Forgery, as Receivers are ſaid to have in that of Theft; inaſmuch as they apprehended themſelves to have been put into the Will for no other Reaſon, but that their Name and Authority might protect the Authors of the Cheat.

From the ſame Head we may diſcover the Cuſtom of awarding *Wrecks* to the Prince [1], or to the State, to be diſagreeable to Equity [a]. As we may, likewiſe, gather the Abſurdity of that Practice in ſome Countries, by which the ſtolen Goods, when diſcovered [2], are not reſtored to the Owner, but are claimed by the publick Treaſury [b].

V. Inaſmuch as this Engagement to reſtore the Goods of others ariſeth from a general Agreement amongſt all Mankind, a Bar is hereby put to all particular Contracts made about a Thing which is any way kept from the true Owner; the Effect of which is, that, when the Thing is known to be another's, any Bargain about the conveying it to a third Party becomes null and void [3]. And this too is the Ground of *Diogenes*'s Jeſt on two Thieves, one of which had plundered the other; *One*, he ſaid, *had ſtolen ſomewhat, but the other had laſt nothing* [c].

As to that Law of the *Digeſt* [4], produced by *Zeigler* [d], to prove that a Contract made after ſuch a Diſcovery is not always evacuated or hindered by the Force of Property, it is really no Prejudice to what we now aſſert: For in the Caſe there alledged the Intereſt of the Creditor is more concerned that the Pledge ſhould remain ſafe, than the Intereſt of the Debtor who owns it; and the Debtor cannot challenge the Pledge, unleſs upon Payment [e].

The Judgment of *Tryphoninus*, in the ſame Place of the *Digeſt*, upon the other Caſe which he there propoſeth, doth not, to me, appear ſatisfactory. *A Man caſt for a capital Crime*, ſays he, *hath depoſited an hundred Pounds in your Hands; the Man is afterwards tranſported, and his Goods confiſcated; the Queſtion is, Whether you ſhall reſtore the hundred Pounds to him who gave it you in Charge, or whether you ſhall pay it into the Treaſury? If we regard only the Law of Nature and of Nations* [5]. *the Money is to be given back* [6] *to the Party who committed it to your Truſt;*

[a] Vid. *Grot.* l. ii. c. 7. §. 1. & *Boecler.* ad. d. l. *Jac. Godofred.* De Imperio Maris, c. 11. *Jo. Loccenius* De Jure Maritimo, l. i. c. 7. §. 9. *Bodin.* De Repub. l. i. c. 10. *Gramond* Hiſt. *Gall.* lib. xvi. and others. [b] Vid. *Ant. Matthæ, De crimin.* tit. *De furtis*, c. 4. §. 4. [c] *Diog. Laert.* l. vi. §. 54. [d] Add. *Grot.* d. l. §. 1. [e] See a full Inſtance in B. xvi. t. 3. l. 31. §. 1. *D. Depoſiti vel contra.*

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[1] See Mr. *Hertius*'s Note on that Place, and his Diſcourſe, *De Superioritate Territoriali*, §. 56. in Tom. ii. of his *Comment. & Opuſc.* There are ſome Places in *Germany*, where the Preachers ſcruple not to pray to God in the Pulpit, that he would caſt many Shipwrecks upon their Coaſts. And Mr. *Thomaſius* maintains, that neither theſe Prayers, nor the Cuſtom itſelf, are abſolutely unreaſonable, or diſagreeable to the Rules of Charity or Juſtice; for though, as he ſays, in the Time of the Wreck there is no Deſign to abandon utterly what is caſt away, yet there is no Hopes ordinarily of recovering it, and we know that there is as much Reaſon to fear that the Goods are utterly loſt, as if they had been caſt into the main Ocean: Beſides, the Lord of the Coaſts may, inſtead of the Duties he has a Right to demand from Strangers, take this Means to repay himſelf for the Expences he is at in maintaining his Ports and Shores. We may add to this, that it is often very hard to know whoſe Goods and Merchandizes thoſe are that the Sea throws upon the Shore. So that it is here, as in the Caſe of Inundations, which, by the Law of Nations, are allowed to be a legal Method of acquiring. The publick Prayers, made on this Subject, ought not to be underſtood as if they begged of God that he would make a great number of Shipwrecks, but only that he would cauſe that the Sea ſhould not retain the Goods caſt into it, but diſcharge itſelf of them by throwing them upon their Coaſts rather than any other; for what Reaſon is there for us to ſuppoſe, that ſuch holy Churchmen ſhould every Day beg God's Help for a Thing contrary to all natural Law; or, at leaſt, that ſome of their Brethren ſhould not charitably adviſe them of ſuch a deteſtable Sin, which they had been guilty of ſo long a Time? Theſe are the Reaſons of the Author in queſtion, which he delivers in his Diſcourſe, *De Statuum Imperii poteſtate Legiſlatoria contra Jus commune*; printed at *Hall* in 1703, §. 42. To which we may add what is ſince ſaid in another Diſcourſe of the ſame Author, *De Regalibus Fiſci Principum Germaniæ*, &c. printed in 1717. where he ſays, That the Cuſtom of appropriating indiſcriminately the Goods of ſuch as are ſhipwrecked, is *inhuman* and *partial*, but not *unjuſt*. The Manner in which he juſtifies the Prayers ſo manifeſtly abſurd (to ſpeak no worſe of them) would make us believe that he is not in earneſt, and that he diverts himſelf at the want of Conſcience in the Clergy. As for the Confiſcation of the Goods belonging to ſuch as have ſuffered Shipwreck, the Proprietors who caſt them away, do not look upon them as ſo wholly loſt, but that they reſerve to themſelves a Right of *reclaiming them, if ever* they happen to be caſt upon the Shore, as they know it often comes to paſs. See above, c. 6. §. 12. And it is not by theſe Misfortunes, that the Maintenance of Ports and Shores ought to be upheld: The Toll would be too exorbitant and odious; ſuch as loſe their Goods would, at this Rate, pay for thoſe that have the good Luck to ſave them, and get to the End of their Voyage. That it is no leſs a Shipwreck, than if it happened in the main Sea, as Mr. *Thomaſius* ſays, ſhews plain enough how frivolous the Pretence of making Satisfaction is, and the Difficulty of knowing the true Owners of the Merchandizes, which the Sea caſt up, proves only, that they ought to be adjudged to the firſt Comer, without examining if there be Reaſon to demand them; and if the Owner cannot be found, they belong to the Lord of the Country as firſt Occupant: In a Word, the Cuſtom of which we are ſpeaking, cannot be juſtified, but by ſuppoſing that Property is loſt with actual Poſſeſſion; an *Hypotheſis*, which I have ſufficiently confuted above, Chap. vi. §. 1. See, alſo, my Diſcourſe on *The Benefit of the Laws*, pag. 11. *Edit. Amſt.*

[2] See l. iii. c. 1. §. 11. foregoing.

[3] This is only when there is no honeſt Intention. But when the Contract is performed already, before we are aſſured that the Thing belongs to another, we neither can, nor ought to break the Bargain. And the antient Proprietor hath nothing to demand of him, who is not in Poſſeſſion of his Goods, and had a full Right to diſpoſe of them, as I have ſhewed above, n. 3. pag. 451.

[4] The Words are, *Item Pomponius*, l. xxxiv, *ſcribit, parvi referre res noſtras, an alienas intulerimus, ſi tamen noſtra interſit ſalvas eſſe. Etenim nobis magis, quam quorum ſunt, debent ſolvi, & ideò ſi pignori merces accepero* [*ob pecuniam nauticam*] *mihi magis, quam debitori, nauta tenebitur, ſi ante eas ſuſcepit*, Digeſt. Lib iv tit. 9. *Nautæ, Caupones, Stabularii*, &c. l. 1. §. 7. In theſe laſt Words ſome antient Editions bear: *ſi A ME eas ſuſcepit*; and M. *Schulting* juſtly believes it is better to read it ſo, *Enarr. in Pand. ad dict.* tit. 3. §. 3. In ſhort, the Intereſt of the Creditor conſiſts in this, That he is indiſpenſably obliged to reſtore the Merchandizes to the Debtor, if he has paid the Debt; ſo that if the Merchandizes be ſtolen from the Veſſel, as the Creditor ſhould not have expoſed them to that Hazard, he is to be anſwerable for them. See *Digeſt.* lib. xlvii. tit. 2. *De furtis*, leg. 15. *princip.*

[5] *Incurrit hic & alia inſpectio, an bonam fidem inter eos tantum, inter quos contractum eſt, nullo extrinſecus adſumpto, æſtimare debeamus, an reſpectu etiam aliarum Perſonarum, ad quas id, quod geritur, pertinet; exempli loco, latro ſpolia, quæ mihi abſtulit, commiſit apud Scium inſcium de malitia deponentis, utrum latroni an mihi reſtituere Seius debeat? Si per ſe dantem, accipientemque intuemur, hæc eſt bona fides, ut commiſſam rem accipiat is, qui dedit, ſi totius rei æquitatem, quæ ex omnibus perſonis, quæ negotio iſto continguntur, impletur, mihi reddenda ſunt, quoi* (for ſo we muſt read with *Grotius*) *facto ſceleſtiſſimo adempta ſunt, & probo hanc eſſe juſtitiam, quæ ſuum cuique ita tribuit, ut non diſtrahatur ab ullius perſonæ juſtiore repetitione*, Digeſt. l. xvi. *Depoſiti vel contra*, Leg. 31. §. 1. See l. iii. c. 6. §. 11. at the End aforegoing.

[6] *Reus capitalis Judicii depoſuit apud te centum libras, is deportatus eſt, bona ejus publicata ſunt; utrumne ipſi hæc reddendæ, an in publicum deferendæ ſunt? ſi tantum Naturale Jus & Gentium intuemur, ei, qui dedit, reſtituendæ ſunt; ſi Civile Jus, & Legum*

Truſt; if we conſider the End of civil Government, and the Rule and Method of poſitive Laws, you ought rather to throw it into the publick Stock. For he, who hath deſerved ill of the whole State, ſhould be left to ſtruggle with Poverty too amongſt his other Inconveniencies, that his Example may deter others from offending.

But, indeed, ſince Sovereign Rulers have, even by the Law of Nations, Power to puniſh Criminals in their Fortunes and Eſtates; when ſuch a Penalty is juſtly accreed againſt a Malefactor, it is agreeable to the very Law of Nature, that all his Goods ſhould be forfeited to the Government: Yet that the Confiſcation of Goods ſhould attend any one particular Crime rather than others, is purely owing to the Appointment of poſitive Conſtitutions. The Conſideration of that Benefit which accrues to the Publick from Penalties duly inflicted (the Reaſon urged by *Tryphoninus*) indeed ſhewed that ſuch a penal Sanction ought to be approved of; but it was not properly the Cauſe, why the [1] Treaſury ſhould have the advantage of the Criminal, as to challenging the Sum which he had lodged in other Hands. For by the Sentence of the Court all the Right and Property of the condemned Criminal over his Goods was taken from him, and conferred on the Government; and, conſequently, what he formerly gave in Truſt is to be delivered back, not to him, but to the publick Receivers. Becauſe all kind of Property, whether it ariſeth from poſitive Ordinances, or from the Law of Nations, hath this Effect amongſt others, That he, who is in Poſſeſſion of any Thing over which the ſaid Property extends, ſhall be bound to reſtore it to the Party who at preſent appears to be the true Owner [2]. What Demurs and Exceptions the Law of reſtoring Things given in Charge admits in other Caſes upon Account of particular Circumſtances, is frequently ſhewn by Authors. Vid. *Cic.* Off. iii. c. 25. *Seneca* De Benef. l. iv. c. 40. *Ambr.* De Off. l. i. c. ult. To which may be added what *Polybius* (in excerpt. *Peireſc.* p. 172.) reports of *Ariarathes* King of *Cappadocia*, who, having recovered the Kingdom from *Orophernes*, demanded of the *Prienians* the forty Talents which *Orophernes* had put into their Hands; and, upon their refuſing to deliver them to him, fell upon their City with Fire and Sword, in *Polybius*'s Opinion, very unjuſtly. Though this Action of *Ariarathes* may be commended, if we firſt ſuppoſe that *Orophernes* had injuriouſly deprived him of his Crown.

Upon this natural Obligation to *Reſtitution*, the Compilers of the civil Law have built a great number of additional Rules [3]. And this too is the Ground of claiming, by judicial Proceſs [3], what is detained from us, together with all the Actions which border on that Claim; and in ſome ſort, the *Action* of falſe Debt [4]; the *Action* for Recovery of what we have given [5], either upon ſome Reaſon, which Reaſon hath not been made good, or elſe upon no Reaſon at all [6]. Though theſe *Actions* are ſaid, likewiſe, to depend upon a kind of imaginary Contract [7]. For when we deliver a Thing without intending it for a matter of pure Bounty, it is ſuppoſed to be given by the one Party, and received by the other on this Condition, That it ſhall be delivered back, in Caſe there appear no Reaſon why it was given.

What hath been ſaid about the *Reſtitution* of the main Thing or Subſtance, extends, likewiſe, to the Fruits or Profits of it, ſuch as are now remaining; ſo much ſtill being deducted as amounts to the Charges of producing, gathering, or preſerving them.

VI. But if what we have honeſtly gotten, though really belonging to another, hath been as honeſtly

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[2] Vid. l. xxv. t. 2. l. 25. *D. De act. rerum amotar.*

gum ordinem, magis in publicum deferendæ ſunt. Nam malè meritus publicè, ut exempla aliis ad deterrenda maleficia ſit, etiam egeſtate laborare debet. Ibid. princip.

[1] See Mr. *Noodt*'s *Probabilia Juris*, l. iii. c. 2. As to the Thing itſelf, there ought, as I think, ſome Diſtinction to be made; if we ſpeak of a truly wicked Perſon, who is guilty of enormous Crimes, and who appears to be hardened in Sin, it will be a means to make him go on in his evil Courſes to reſtore what he has intruſted us with. But if the Criminal be condemned for Things which are not evil, but only as they are forbidden by the Laws; or if ſome violent Paſſion, Temptation or Habit, aſſiſted by his Temper, has hurried him into the Commiſſion of an Action heinous in its Nature; we may not only, but we ought, in my Judgment, to reſtore our Truſt faithfully to the unhappy Perſon. And in this we do nothing contrary to the Duty of a good Citizen. For the End and Deſign of the Laws, which puniſh with a general Confiſcation of Goods, requires that all that appears, or can be diſcovered, ſhould be confiſcated; but it doth not require that every one ſhould go and declare what he has in his Hands, belonging to the Criminal. This were to extend the Severity of the Law, whereas it ought to be mitigated as far as poſſible; and if it expreſly commands, that none ſhall conceal any Thing that is his, it ought to be interpreted in ſuch a Manner, as to imply, that he ſhall be guiltleſs if he undergo the Puniſhment to be inflicted on ſuch as have the Courage to run the Hazard of ſerving an unhappy Perſon. The Ties of Relation and Friendſhip, which it is the Intereſt of the Publick to favour and cheriſh, make this Interpretation more reaſonable, ſince it is common to truſt a Thing with a Relation or Friend; and if he find, that, by putting the Thing intruſted to him into the Treaſury, he deprives Children or other innocent Perſons of a Thing that ought to deſcend to them, how great a Criminal ſoever the Offender may be, whoſe Goods are confiſcated, and how horrid ſoever the Crimes which have brought this Puniſhment on him, there is no human Law can be ſo underſtood as to oblige him, in Conſcience, to diſcover the Secrets, or betray the Intereſt of thoſe who ought to inherit the Thing intruſted to us, and have done nothing to deſerve to be diſappointed of it.

[2] There are, adds our Author here, other Caſes, in which the Law, which commands to reſtore our Truſt, admits of Exceptions; as when a Man who has put his Sword into our keeping, falling afterwards delirious, and then comes to demand it; or, when he, that hath put a Sum of Money into our Hands, raiſes War againſt the State.

[3] *Rei vindicatio.* See *Digeſt.* l. vi. t. 1. and what I have ſaid above, on c. 9. §. 8.

[4] See above, l. iii. c. 4. §. 5.

[5] See Chap. ix. of this Book, §. 4.

[6] *Conditio ſine Cauſa* is, when we promiſe or give a Thing for a Cauſe which is ſuperſeded, or upon a Condition which was never performed; as if one receives a Portion in order to a Marriage, which was never accompliſhed, or was diſannulled. See *Digeſt.* lib. xii. tit. 7. with the Commentary of M. *Noodt.*

[7] Under the Prejudice which the *Roman* Lawyers lay, there is no Obligation to another, which is not founded on the Conſent of him, who is bound by it; when there appear no Signs of a Conſent in certain Things, wherein Men are nevertheleſs obliged, they ſuppoſe it, and call it a *Quaſi Contract* It is upon this that they found the Managment of another's Buſineſs by Commiſſion; the transacting of publick Affairs in Societies; the Adminiſtration of a Guardianſhip; the Addition or Acceptation of an Inheritance, and the Payment of a Thing not due. But in all theſe Caſes the Obligation proceeds either from a tacit Agreement, properly ſo called, or from a poſitive Law, or from the Maxims of natural Equity only; ſo that, here, either there is a true tacit Conſent, and then there is no need of Diſſimulation: or, there is no Neceſſity for a Conſent, either expreſs or tacit, the Authority of the Law, or the Nature of the Thing itſelf, being ſufficient to eſtabliſh an Obligation; and ſo there is no need of feigning the formal Conſent of a Perſon wholly ignorant of what paſſes. See what I have ſaid above, on l. iii. c. 4. §. 2. and *Inſtitut.* l. 3. t. 28. *De obligationibus, quæ quaſi ex contractu naſcuntur.*

ſpent,

ſpent, then it ſeems moſt agreeable to natural Equity, that we ſhould not pay the whole Value of it to the Owner, but only the Advantage they brought us, or ſo much as we were made the richer by it; provided ſtill that the Owner hath not been requited for what he loſt, ſome other Way. For if I honeſtly acquire and conſume what was ſtolen from you, when you have already received full Satisfaction from the Thief, you can then demand nothing of me, how much ſoever I have been a Gainer by my Bargain. The Ground and Reaſon of this Aſſertion is not ſo much to be taken from the End of *Property* [a] (which was eſtabliſhed that every Man might, according to Proportion, enjoy his own: Whereas he, who gains by what is mine, hath more than his Proportion, as I on the contrary have leſs) as from the following Conſideration: That a thing in which I have not loſt my Property, either by my own free Conſent, or by Default, or by the Right of War, ſtill belongs to me; as doth, likewiſe, all the Fruit and Product of it. When ſuch a Thing therefore hath fallen into another Man's Hands, who hath made an Advantage by ſpending it; his Honeſty and good Intention ſecure him indeed from all Guilt and Cenſure; yet he can, on no Pretence, with-hold the Profits, when I lay Claim to them [1], becauſe they are to be looked on as the Reſidue, or the ſurviving Part of the Thing, at leaſt they are the proper and neceſſary Fruit proceeding from it. Hence it is one of the moſt common and proverbial Sayings [2], *That no Man ought to gain by another's Loſs*; that is, by ſuch a Loſs as he did not himſelf procure, either by his Conſent or Default, ſo as to be the Cauſe of the Damage, or to have it any Way imputed to him. For it can be no Sin in me to take an Occaſion of Advantage from the Loſs or Damage of another [3], when it was not of my own procuring [b]. It is obſervable, that in the Books of the *Roman* Laws many Caſes are determined according to the Equity of this general Rule [4], with ſome Difference from the ordinary Tenure and Strictneſs of the Letter. Vid. *Inſtit.* lib. iv. tit. 7. Upon the ſame Foundation the *Action* which they term [5] *de in rem verſo* ſeems to depend. *Vid. D.* lib. xv. tit. 3.

VII. From the Rules already propoſed may be drawn a ſatisfactory Deciſion of many Points uſually controverted as well by Lawyers as Divines; which we think it may be proper to tranſcribe out of *Grotius*: Firſt, *He that honeſtly and innocently gains Poſſeſſion of what is another's (for of him only we would here be all along underſtood; inaſmuch as the diſhoneſt Poſſeſſor doth not only ſtand obliged on Account of the Thing itſelf, but is farther obnoxious by his own Crime) ſo long as he continues in this Integrity* [c], *is bound to no Reſtitution, in Caſe the Thing periſh or be loſt; becauſe he neither enjoys the Subſtance, nor any Fruit or Advantage of it* [d]. We add, That he doth not ſtand bound, though it ſhould have happened to periſh by his Default: For his honeſt Intention was to him in the Place of Property [6]. Now a Proprietor, though he loſe his Goods through his own Neglect [7], yet is thought to ſuſtain ſufficient Damage by the Loſs, and is liable to no farther Puniſhment: But we are to pronounce otherwiſe, if the Perſon in Poſſeſſion, underſtanding the Thing to be another's, voluntarily made away with it to avoid *Reſtitution*.

VIII. Secondly, *Such a Poſſeſſor through honeſt Miſtake is bound to reſtore, not only the Thing itſelf,*

[a] Vid. *Grot.* l. ii. c. 10. §. 2. [b] See *Montaigne*'s Eſſ. l. i. c. 20. *Cicero*, Off. iii. c. 5. *It is againſt Nature to increaſe our own Advantage by the Damage of another Man.* Which is borrowed from that of *Terence*, Andr. A. 4. Scen. 1.

Hoccine eſt credibile aut memorabile,
Tanta vecordia innata cui quam ut ſiet,
Ut malis gaudeat, atque ex incommodis
Alterius, ſua ut comparet commoda?

Is this to be believ'd, or can't be thought
That one can be ſo vile and naught,
As to rejoice in th'Ills of other Men,
That to themſelves Advantage they may gain?

See *Digeſt.* lib. l. t. 17. *De diverſis regulis Juris*, leg. 206.

[c] Comp. *Ziegler.* ad *Grot.* d. l. [d] *Vid.* D. l. v. t. 3. l. 40. *D. De hæred. petit.* & l. vi. t. 3. *D. De rei vindic.*

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[1] He may very well diſpenſe with it, ſince as I have ſhewed above, §. 3. Note 1, all the Time that he was the honeſt Poſſeſſor, he acted as Maſter, and was ſo really; ſo that the Profit he had from it was a Part or Revenue which came from the Goods of another, but was an Acquiſition made by Virtue of his Right of Poſſeſſion, and it ought to remain his with ſo much the greater Reaſon, becauſe it is almoſt always one way or other the Fruit of his Induſtry. As to the reſt, ſee my Notes on *Grotius*, lib. ii. cap. 10. §. 2.

[2] The Words of the *Digeſt* are, *Juræ Naturæ æquum eſt, neminem cum alterius detrimento & injuria fieri locupletiorem.*

[3] "*Demades*, the *Athenian*, condemned a Man of his City, who profeſſed the Trade of ſelling Things neceſſary for Funerals, "under Pretence of taking too much Profit, and becauſe that Profit could not be compaſſed but by the Death of many Men. This "Judgment ſeems to have been ill given, becauſe he made no Profit but by ſome Man's Damage, and by the ſame Reaſon all Gain "may be condemned. The Merchant cannot manage his Buſineſs but by the Corruption of Youth, the Huſbandman thrives by the "Dearneſs of Corn, the Builder by Pulling down of Houſes, the Officers of Juſtice by Law-Suits and Quarrels, the Grandeur and "Calling of the Clergy is ſupported by Mens Deaths and Vices; no Phyſician is much pleaſed with the Health even of his Friends, "as an antient *Greek* Comedian ſpeaks; nor a Soldier with the Peace of his Country, and ſo of the reſt. And which is worſe, if "every one would ſearch themſelves, he would find that our inward Wiſhes are, for the moſt Part, raiſed and ſupported at the Expence "of another; this being conſidered, it comes into my Mind, that Nature does not in this ſwerve at all from her general Courſe; for "Phyſicians hold, that the original Growth and Increaſe of every Thing is the Alteration and Corruption of another; for as *Lucretius* ſays, lib. ii. ver. 752, 753.

Nam quodcunque ſuis mutatum finibus exit,
Continuò hoc mors eſt illius, quod fuit ante.

This Chapter of *Montaigne*'s Eſſay, to which the Author refers us, and which is the twenty-firſt of the firſt Book, was ſo ſhort that I thought that the Reader would no more grudge to read it, than I have done to copy it out. See *Seneca De Benef.* l. vi. c. 38. from whence this is almoſt all taken.

[4] See Examples of this in *Grotius*, B. ii. c. 10. §. 2. n. 2, &c.

[5] The Words are, *Quod cum eo, qui in alienâ poteſtate eſt, negotium geſtum eſſe dicitur, & Digeſt.* l. xv. t. 3. *De in rem verſo.*

[6] This Confeſſion of the Author is remarkable, but he ſaw not the Conſequences of it, and it follows from quite other Principles than the Deciſion of the following Caſes.

[7] The *Roman* Law, alſo, diſpenſes with the honeſt Poſſeſſor from reſtoring what is loſt through his Negligence, and what he has conſumed, or laviſhly ſpent, believing it was his own. *Quemcunque igitur ſumptum fecerint ex hæreditate, ſi quid dilapidaverunt, perdiderunt, dum re ſua ſe abuti putant, non præſtabunt*, Digeſt. l. v. t. 3. *De Hæreditatis Petitione*, l. xxv. §. 11. *Sicut autem ſumptum, quem fecit, deducit, ita ſi facere debuit, nec fecit, culpæ hujus reddat rationem niſi bonæ fidei poſſeſſor eſt; tunc enim, quia quaſi ſuam rem neglexit, nulli querelæ ſubjectus eſt ante petitam hæreditatem*, Ibid. leg. 31. §. 3. Mr. *La Placette* nevertheleſs in his Treatiſe of Reſtitution, l. iv. c. 5. p. 257, adds this Reſtriction, At leaſt, if there be no Fault in the Acquirer. Indeed, this appears more agreeable to the common Principles, on which he reaſons, but yet we may diſcern from hence that thoſe Principles are ſtretched too far.

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but, likewiſe, ſuch Fruits or Products of it as are ſtill remaining; becauſe, in natural Eſtimation, he that is Owner of the Thing, is Owner too of the Fruits [a]. *Yet here they diſtinguiſh between the Fruits of the Thing, and the Fruits of the Man's own Labour.* Grotius *is of Opinion, that the former only ought to be given up, and not the latter;* [1] *becauſe theſe are not due to the Thing itſelf, though perhaps they could not have been procured without it.* Others think, that even the latter Fruits ſhould be reſtored, and alledge a Law of the *Code* [b] in favour of their Aſſertion [2]. And, indeed, this Judgment ſeems to come neareſt to the Rule of Kindneſs and Humanity; provided this Clauſe be ſubjoined, That the honeſt Poſſeſſor may, in this Caſe, deduct, as well the Expence which the Thing hath put him to, as a due Reward for his Labour [c]: As, likewiſe, that, to prevent troubleſome Suits, the Proprietor upon claiming his own ſhould not be too raking and greedy, ſhould not (as we ſay) *ſweep Duſt and all:* For, after the Buſineſs hath been qualified by theſe two Alleviations, it will ſeldom happen that the honeſt Poſſeſſor ſhall have much to give up out of the Advantage he made by his own Induſtry.

IX. Thirdly, *Such a Poſſeſſor is bound not only to reſtore the Thing, but, likewiſe, to ſatisfy forthe Fruits which he hath ſpent* [3], *if it appear that he would have ſpent as much otherwiſe* [d]: *For he is judged to be ſo much the richer, whilſt, by ſpending another's Goods, he hath ſaved his own* [e]. Yet here we are of Opinion, That, beſides the Limitation above added, it ſhould be, likewiſe, conſidered, whether the well-meaning Poſſeſſor be able to recover of the Party, who ſold him the Thing, ſo much as he loſeth upon its being claimed by the true Owner [4]. If this is impoſſible to be done, the Poſſeſſor is never the richer by the Bargain, when he is forced to reſtore what he bought, and yet cannot make himſelf whole by recovering the Price he gave. As to the Example of *Caligula* produced from [f] *Sueton*, who tells us, *That, when he reſtored any exiled Princes to their Dominions, he gave them up, likewiſe, the Revenues, which had been brought in the mean Time into the* Roman *Treaſury.* We may obſerve, that he believed their Kingdoms to have been unjuſtly taken from them, and, conſequently, himſelf to be in diſhoneſt Poſſeſſion. Or, if he did not condemn his Predeceſſor's Act in this Matter, yet it may ſtill be queſtioned, whether he reſtored theſe Fruits and Profits out of ſuppoſed Duty and Conſcience, or out of mere Generoſity. So that we take it to be the truer Judgment to affirm, that the innocent Poſſeſſor is obliged to reſtore the Value of what he hath ſpent, when he cannot recover Damages of the Perſon who cheated him with this falſe Title. For, in that Caſe, he cannot be ſuppoſed to have enriched himſelf by the Purchaſe. And it ſeems a greater Hardſhip to pay the Value of a Thing that is ſpent and gone, than to reſtore the Thing itſelf, were it forth-coming.

X. Fourthly, *Such a Poſſeſſor is not bound to make good thoſe Fruits or Profits which he neglected to take; becauſe he neither hath them, nor any thing elſe in their Room* [5]. And his Negligence about what was his own, or in all Reſpects the ſame as if it had been his own, is adjudged to be a ſufficient Prejudice to him [g].

XI. Fifthly, *If ſuch a Poſſeſſor, having received the Thing as a free Gift, ſhall have afterwards beſtowed it on another, he is not obliged to make Satisfaction to the Owner, unleſs it appear that he would have given as much ſome other Way* [6]; *for then the ſparing his own Stock will be reckoned a matter of Gain and Advantage to him.* This Account ſeems to ſuppoſe a Diſtinction beween Donations out of Duty, and Donations out of mere Bounty; as that the former only are to be made good in the Caſe before us, and not the latter. Becauſe, ordinarily ſpeaking, no Man is preſumed to give in this gratuitous Manner, unleſs he thinks himſelf to have ſomewhat ſuperfluous; and, conſequently, his Inclination to give is judged to have proceeded from his Opinion, that the Thing which he thus diſpoſed of, and which proved to be another's, was more

[a] *Add.* l. vi. t. 1. l. 20. 50. *D. De rei vindic.* [b] Lib. iii. t. 32. leg. 22. *De rei vindic.* [c] Vid. l. 5. t. 3. l. 36. §. 5. l. 38, 39. *D. De hæred. petit.* & lib. vi. t. 1. l. 27. §. 5. l. 31. l. 48. l. 65. *D. De rei vindic.* [d] *Vid.* lib. *ubi ſup.* l. 25. §. 8, 9. *D. De hæred. petit.* & l. vi. t. 1. l. 52. *D. De rei vindic.* [e] *Add.* lib. xlvi. t. 3. l. 47. §. 1. *D. De ſolution.* [f] *Calig.* c. xvi. [g] *Vid.* lib. vi. t. 1. l. 78. *D. De rei vindic.*

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[1] They ground themſelves, as our Author ſays, on the *Code* Lib. iii. tit. 32. *De rei vindicat.* leg. 22. See Mr. *Noodt's Probabilia Juris*, cap. 7. & *Comment. in* DIGEST. pag. 197, & *ſeqq.* We muſt however obſerve, that, according to the Principles of the *Roman* Law, the honeſt Poſſeſſor appropriated the Fruits, the Moment they were gathered, of what Nature ſoever they were: But if they were not gathered when the true Owner reclaimed his Poſſeſſion, the Acquiſition, in this Caſe, was null, as appears by the *Digeſt.* leg. 48. tit. *De Adquir. rer. domin.*

[2] The Truth is, the honeſt Poſſeſſor may keep both, as belonging to him by a full Right according to the Principles that we have above eſtabliſhed, n. 3. pag. 45. So that, let the Rules of the civil Law be what they will, I believe, that, conſidering natural Law only, upon the whole Matter, a good Intention produces the ſame Effect, as to the Poſſeſſor, as a real Property, as the *Roman* Lawyers themſelves have eſtabliſhed as a Maxim (making only an Exception in ſuch Caſes, as the Law has ordered otherwiſe), *Bona fides tantundem poſſidenti præſtat, quantum veritas, quotics Lex impedimento non eſt.* Digeſt. lib. l. t. 17. *De diverſ. Reg. Ju.* leg. 136.

[3] If the honeſt Poſſeſſor can lawfully keep the Fruits which are in being, and which he has already gathered (as I have remarked in the preceding Note) much more is he diſpenſed from the Value of the Fruits conſumed. The Interpreters of the *Roman* Law do not agree that the civil Law, in this Caſe, obliges us to Reſtitution; though the Author has here quoted ſeveral Texts, which, however, only relate to the Reſtitution of an Inheritance. In which laſt Caſe, the Lawyers, for a particular Reaſon, gave a greater Privilege to the Plantiff than to thoſe who reclaimed any other kind of Thing. See *Vinnius* upon the *Inſtitutes*, Lib. ii. tit. 1. *De Rerum Diviſione*, §. 35. *Num.* 9, 10. And the Commentary of Mr. *Noodt*, pag. 179. & *ſeqq.*

[4] Either this Exception is ill grounded, or it may be extended to other Caſes, which the Author does not. From whence it appears that theſe Determinations are not very coherent.

[5] But if the honeſt Poſſeſſor has not, as ſuch, an equal Right with the true Owner, there will always remain here a Pretence to call him to an Account for his Negligence; eſpecially when he has the Thing from a third Perſon unknown to him, and the Juſtice of whoſe Title he has not the Means of enquiring into. For this laſt Caſe adminiſters juſt Cauſe for Suſpicion, and therefore, however honeſt the Purchaſer may be, he is bound, in common Prudence, to make the beſt of his Bargain, that, in Caſe the true Owner ſhould appear, he may be ſome Way indemnified.

[6] It is true, it is of ſome Advantage, but then it is as true, that as he might receive the Preſent, and make it his own, ſo he had, alſo, Right to alienate it in what manner he pleaſed. And ſo what he ſpared of his own Goods is lawfully gotten by him, and, conſequently, all the Diſtinctions, which our Author hereafter makes, are as ſuperfluous, as needleſs, becauſe they cannot be reduced to Practice.

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than he wanted for his own Uſe. And as to that Obligation which ariſeth from ſuch a Bounty in the Receiver, it is, by no means, reckoned amongſt thoſe Things which are capable of being rated at a ſet Price; and therefore he, who only expects an uncertain Return for what he hath actually beſtowed, doth not, in the leaſt, appear to have been made richer by what he parted with on this Proſpect [a]. But it is to be conſidered likewiſe farther, whether the Preſent be ſtill remaining in the laſt Receiver's Hands or not: If it be, the Proprietor ſhall claim it directly of him, and not trouble the intermediate Receiver: If not, the main Burthen ſhall ſtill fall on the Perſon who either now poſſeſſeth the Thing, or hath been made richer by it. But the intermediate Poſſeſſor ſhall only come in for a ſmall Share in the Burthen, inaſmuch as he too perhaps had an Opportunity of making ſome Advantage [b].

XII. Sixthly, *If ſuch a Poſſeſſor, having firſt bought the Thing ſhall afterwards have alienated it, he ſhall not be bound to give the Owner any more than the Overplus of the prime Coſt* [1]; *or ſo much as he hath gained by his Bargain. But if it firſt coſt him nothing, and yet he hath ſold it, he ſhall then be obliged to give up the Price received* [2], *in Caſe the Owner cannot recover the Thing itſelf of the preſent Poſſeſſor; and unleſs the former Party hath ſquandered away the Price he took, which, if not ſo eaſily gotten, had not been ſo prodigally ſpent.* But he who puts a Thing off for juſt ſo much as it coſt him, is no Gainer, being ſuppoſed only to recover his own. Nor can it be ſaid in this Caſe, that the Price ſupplies the room of the Thing; unleſs he parted with it out of a knaviſh Deſign: Becauſe otherwiſe the Owner is to challenge his Goods from the Hands of him who is now in Poſſeſſion.

There is a Law of the *Digeſts* [c] urged in the preſent Caſe, which runs thus; *If after a Thief hath ſold the Goods he ſtole, the Owner of them ſhall, by violent Means, get the Price out of his Hands, he ſeems to be guilty of the Robbery as much as the other Party was before, and to be equally obnoxious to the Law.* For all agree, that the Advantage of a ſtolen Thing, or the Money into which it is turned, is not itſelf, likewiſe, ſtolen. But this Law properly reſpects civil Governments. For thoſe who live in a State of natural Liberty, may as fairly ſeize by Violence the Price of what hath been ſtolen from them, as the Thing itſelf.

XIII. Seventhly, *Such a Poſſeſſor, though he purchaſed the Thing at a conſiderable Expence, yet is bound to reſtore it, and cannot require his Charges of the Owner, but of the Seller. For, otherwiſe, the Right of challenging would turn to no Account* [3], *if the Challenger were to refund the Price. And he who buys a Thing of another, whom he might ſuſpect not to be the true Proprietor, ought to have provided particularly for his own Security, in Caſe the Thing ſhould afterwards happen to be claimed: Though this Condition of ſecuring the Buyer's Title is indeed implied in all Contracts of Sale, according to natural Equity* [d].

To the Rule above-mentioned the following Exception ought to be added; *Unleſs in a Caſe where the true Proprietor could not in all Probability have recovered Poſſeſſion of his own, without ſome Expence: As ſuppoſe the Goods were detained in the Hands of Thieves or Pirates, and from them purchaſed.* For here the honeſt Man, who delivers the Goods, may fairly deduct ſo much as the Proprietor would have gladly ſpent to regain them: Becauſe the actual Poſſeſſion, eſpecially when not to be recovered without Difficulty, is capable of being rated at a certain Value, and the Proprietor, when re-inſtated in it, is adjudged to be, on this account, ſo much the richer [4]. Whence aroſe the Cuſtom for Perſons who have loſt any Thing, to promiſe Μήνυτρον, a Reward and Encouragement to the Finder. [e] For the ſame Reaſon, though the Buying of what's already our own be void, according to the ordinary Courſe of the Civil Law, yet *Paulus* affirms it to be good and

[a] *Vid.* lib. v. t. 3. l. 25. §. 8. *D. De hæred. petit.* Comp. *Zeigler.* ad *Grot.* d. l. §. 7. [b] *Add. Struv.* Exercitat. xi. §. 13. [c] *Vid.* lib. xlvii. t. 2. l. 48. Sect. ult. *D. De furtis.* [d] *Vid.* Lib. v. t. 3. l. 22. & *D. De Hæred. petit.* l. 25. princ. Sect. 1. & Lib. xviii. t. 1. *De Contrab. Emp. &c.* leg. 16, &c. *C.* Lib. vi. t. 32. l. 3. & *C. D rei vindic.* Lib. xxi. t. 2. l. 1. *D. De evict. &c.* Lib. xiv. t. 2. l. 2. §. 3. *D. De L. Rhodia.* & Lib. viii. t. 45. l. 16. *D. De evict.* & Lib. vi. t. 2. l. 2. *C. De furtis.* [e] *Vid.* Moſch. Idyll. 1. imitated by *Apuleius,* Metam. l. vi.

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[1] From what has been ſaid in the foregoing Notes it follows, that the honeſt Poſſeſſor is not obliged to reſtore the Value of the Thing, nor the Gain he has made by parting with it, whether he bought it, or it was given him. So that the Author's Diſtinctions here are, alſo, ſuperfluous.

[2] It is for this Reaſon that Mr. *La Placette* maintains, and upon this Suppoſition ſays, "That as it is agreed that we muſt reſtore "a Thing if it be in Being, he is perſuaded, that we cannot juſtly keep the Price that aroſe from it." Treat. of *Reſtitution,* l. iv. c. 5. Obſerve how far rigid Principles will carry Men, when they are once engaged in them!

[3] It is ſufficient, that the Proprietor can always recover the ſame Thing in Specie from whomſoever is in Poſſeſſion of it by an honeſt Intention. We are ſometimes glad to recover our Goods at any Expence, either becauſe the Things are rare, or we have great need of them, or becauſe we take ſingular Pleaſure in the Poſſeſſion. Further, Either we know not that the Thing belongs to us, and in this Caſe we do or ought to count that it is all Profit, if we obtain Reſtitution; or we know not what is become of it, and in that Caſe we ought to look upon it as either intirely loſt, or very hard to be recovered, ſo that we ought to be ſatisfied to have it again by paying the honeſt Poſſeſſor that which he has given. But if we believe that it is bought too dear at that Price, and ſo had rather leave it in the Hands of the honeſt Poſſeſſor, it is not the Fault of this latter; and there is no Reaſon why he ought to loſe his Money rather than we our Goods. You will ſay, perhaps, he ſhould have taken greater Precaution. But we ſuppoſe he hath taken all the Care he ought, or could. The Neceſſity and Nature of Commerce in this Life does not permit us to have any Certainty, that the Perſon of whom we buy, for Example, or take a Thing to pawn, is the lawful Proprietor of it, or can make a valid Contract with us about it, much leſs require perſonal Securities, and make them in Force in Caſe of Eviction. See above, §. 3. not. 1. Upon the whole Matter I grant, it appears to me, as far as natural Equiry requires, That the Rights and Intereſt of the Proprietor, and thoſe of the honeſt Poſſeſſor, are equally eſtabliſhed. I leave the Proprietor in full Power of reclaiming his Goods, where *Preſcription* has not excluded him; and I ſcreen the honeſt Poſſeſſor from a Loſs which his Probity ſhould ſecure him againſt, and which the Proprietor has no Reaſon to make him ſuffer. M. *Gundling,* who (in his *Jus Nat. & Gent. Edit.* 2. cap. 20. §. 102.) has endeavoured to refute me, no way deſtroys the Foundation of my Principles, and brings but very weak Objections. He alledges, for Inſtance, *That it is a Contradiction for a Proprietor to buy his own Goods, as if they belonged to another.* But here is no *Sale,* properly ſo called. The Proprietor only indemnifies the honeſt Poſſeſſor for a Loſs he would otherwiſe undergo, and which he is no way obliged to ſubmit to. *Truth,* adds M. *Gundling, ought to have more Force than Opinion.* But this is manifeſtly Begging the Queſtion. I may make the ſame Reply to what M. *Otto* has advanced, in his Notes on the Abridgment of *The Duties of a Man and a Citizen,* lib. 1. cap. 13.

[4] See the Interpreters of *Petronius,* Chap. xcvii. *Edit. Burman.* And *Julii Pauli Recept. Sentent.* lib. ii. tit. 31. *numb.* 24. with the Note of *Cujas.*

valid [1], if it be firſt agreed upon, that the Poſſeſſion of what is our own may be purchaſed, when remaining with another.

It is propoſed as a farther Queſtion on this Point, *Whether a Man who buys a Thing thus detained, purely with Deſign to convey it to the Owner, may demand the Price to be refunded?* Some take the negative Part; becauſe, ſay they, *The Right accruing to the Proprietor cannot be taken off by this Allegation of the Buyer.* [a] But indeed, if ſuch a Purchaſer foreſaw with fair Probability, that the true Owner would hardly recover his Goods by other Means, and if the Price which he gave do not riſe above what the actual Poſſeſſion which he reſtores may be valued at, then it is abſolutely requiſite that what he expended ſhould be repaid him. But whether he who redeems the Thing in this Caſe ſhall be allowed an Action [2] againſt the Proprietor, ſuch as they term *Negotiorum geſtorum*, or to recover the Charges he hath been at in the Proprietor's Buſineſs, it is the Province of the Civilians more nicely to ſtate and enquire. [b] The Reaſon, which *Grotius* offers for his omitting to determine that Matter, is, *Becauſe the aforeſaid Action ariſeth purely from the Civil Law, having none of thoſe Foundations to reſt upon, from which bare Nature introduceth an Obligation in the Caſe.* But though it is not indeed the Concern of the Law of Nature to examine, or determine, to what particular Action at civil Law the preſent Caſe may be, or ought to be reduced; yet it cannot be denied but that the very Action above ſpecified, of recovering Charges on account of Buſineſs managed for another, hath a Foundation in natural Equity, and in tacit Compact. For it cannot, on any Pretence, be required of me, that I ſhould by my kind and generous Aſſiſtance preſerve or improve another Man's Goods altogether gratuitouſly, and without receiving what I am out of Pocket in his Service [3]. It ſeems therefore the moſt plain and natural Way of reſolving ſuch Caſes, that the Party who redeems a Thing after this Manner, as, likewiſe, he who tranſacts any Buſineſs on another's Behalf, be ſuppoſed to hold the Thing which he hath redeemed, or about which he hath imployed his Money or his Pains, as a Pledge or Mortgage, till ſuch Time as he receives Satisfaction. Yet if there be no Fruits of his Labour remaining, which he might take hold on for his own Security, and if the other barbarouſly deny to pay him for his ſo uſeful and profitable Aſſiſtance, I am not of Opinion that he may apply the ſame Means towards aſſerting his Right as are uſed in that other kind of Right which ariſeth from expreſs Contract; but all he can do ſhall be to expoſe the ungrateful Wretch to publick Hatred and Deteſtation, as one who doth not deſerve the leaſt Inſtance of Good-will from Mankind [4]. The *Roman* Laws have conſidered the Equity of ſuch a Reſtitution in handling the like Caſes [c]. And in the whole Compaſs of this Affair *Terence*'s Remark ought to paſs for a general Caution, that *Jus ſummum ſumma ſæpe eſt malitia* [d]; *The higheſt Right is very often the higheſt Wrong.*

XIV. Eighthly, In the Opinion of *Grotius*, *He who buys another Man's Goods cannot return them upon the Hands of the Seller, and demand back his Money in their ſtead. Becauſe, ſo ſoon as ever they came under his Power, there commenced in him an Obligation of reſtoring them to their true Owner.* In which Caſe we are of a different Judgment: For certainly I am not bound to purchaſe a Thing which I know to be another's, only that the true Maſter may recover his Goods, and that I may loſe my Money [5]. When therefore I find the Thing which I bought to belong to another Owner, and am unwilling the Claim ſhould be directed againſt me, either to avoid the Trouble of the Diſpute, or becauſe I deſpair of getting my Money again of the Seller, I ſhould think that I might fairly recede from ſuch a Bargain (provided it were not too late) to avoid the drawing upon myſelf an unneceſſary and unprofitable Contention; yet ſo as that I ſhould be, at the ſame Time, obliged to diſcover to the Owner, upon his Demand, where his Goods are lodged, that he may have an Opportunity of regaining them [e].

XV. Ninthly, *He who comes honeſtly by the Poſſeſſion of a Thing, and knows not whoſe it is, is not, by the Law of Nature, bound to give it to the Poor; though ſuch an Appointment by civil Ordinances would be very juſt and commendable.* The Reaſon is, becauſe by the Force of Property none can claim a Right in the Thing beſides the Proprietor. But now to the Party here concerned, the not appearing of a Proprietor is the ſame as if there were none:

[a] *Vid.* Lib. I. t. 17. l. 11. *D. De diverſ. reg. juris.* [b] An *Actio negotiorum geſtorum* is, when one Man has done for another a Buſineſs unknown to him, without any Commiſſion or any expreſs Order from him. See B. iii. t. 5. *D. De negotiis geſtis.* [c] Vid. lib xi. t. 7. l. 14. §. 13. *D. De religioſ. & ſumpt. funerum.* & Lib. iii. t. 5. l. 6. §. 3. *D. De negot. geſt.* & Lib. xiv. t. 2. l. 1. *D. De lege Rhodia.* [d] *Heautontim.* Act. iv. Scen. v. ver. 47, 48. [e] Vid. Lib. vi. t. 1. l. 17. princip. *D. De rei vindic.* & *Zeigler. ad Grot.* d. l. Sect. 10.

[1] The Words are, *Rei ſuæ emptio tunc valet, cùm ab initio agatur, ut poſſeſſionem emat, quam fortè venditor habuit, & in judicio poſſeſſionis potior eſſet*, Digeſt. lib. xviii. t. 1. *De contrahen. Emptione*, &c. l. 34. §. 4. In this Caſe, as we ſee, the Seller was in Poſſeſſion of the Thing, ſo that, in this Reſpect, he had the Advantage of the Proprietor himſelf, according to the judicial Proceedings of the *Roman* Law. See CUJAS *Recit. in* PAUL. *ad Edict.* pag. 536. tom. 5. *Opp. Edit. Fabrott.* And ANTON. FAVER. *Rational.* tom. 5. p. 265.

[2] *Actio negotiorum geſtorum*, is when one does the Buſineſs of any Man, without any Commiſſion, or expreſs Order on his Part. See *Digeſt.* l. iii. t. 5. *De negotiis geſtis*, and l. v. c. 4. §. 1. following.

[3] This tacit or rather feigned Agreement is no ways neceſſary. It is ſufficient to ſay, that if we do not repay, nor ſatisfy him, who out of his meer good Will has done ſome Buſineſs for us, we ſhall do him Wrong, which is forbidden by the Law of Nature, *Titius's* Obſervat. on *Lauterbach.* 96. See above, §. 5. not. 11.

[4] *David* in 1 *Sam.* xxv. 7, 15, 21. ſent his Men to demand a Reward for their Pains in guarding *Nabal*'s Flocks, and was angry at his Denial, which he reſolved to revenge, and not a verbal Affront only.

[5] But he treats not here of a Bargain of Sale, which was never performed; for no body, I think, can imagine, that in this Caſe we ought to pay the Money; and, having got the Thing to be ſold, cauſe it to be reſtored to the true Owner. The Author ſeems to leave us to gueſs at his Senſe, which conſiſts in a tacit Conſequence from what he has before formerly aſſerted, and ſeems to be this: One is not obliged to hold to his Bargain, when he diſcovers that the Goods are not the Seller's own; nay, he may endeavour to break it, though he has already paid the Price agreed on, and received the Goods. It is not however altogether the ſame Thing, eſpecially if we argue from the Author's Principles. He had better, as the Commentator upon *Grotius*, have applied the Proverb, *True Charity begins at Home*; and what I have ſpoken of the Rights of the honeſt Poſſeſſor will put the Thing out of doubt. The Law quoted by the Author makes nothing to his Purpoſe, as will be diſcerned at the firſt Sight. For the Queſtion here is about a Man, who having bought a Slave, ſells him again, not to the Perſon from whom he purchaſed him, but to a Third, and this after the true Owner had ſued him to reclaim his Slave. See upon this Law *Cujas Recit. in* DIGEST. tom. vii. *Opp.* pag. 284. *& ſeqq.*

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Which is indeed a general Rule in other Cases. And therefore there's no body who hath a better Title to hold the Goods, whilst the Owner is unknown, than he who after this fair and upright manner is at present in Possession of them.

XVI. Tenthly, What *Grotius* asserts, *That a Fee taken either on a dishoneſt Account, or for an honeſt Service, yet such as ought to have been perform'd* gratis, *is not to be restor'd*, we allow; if the Necessity of Restitution is to be deriv'd wholly from the Propriety of the Thing consider'd by itself[1]. For thus he, to whom any Thing hath pass'd with the Consent of the former Owner, cannot be oblig'd to refund it. But when the Cause of receiving such a Fee was dishoneſt, as suppose Extortion, then there ariseth an Obligation to restore it from another Principle. And under the general Name of Extortion ought to be comprehended all Ways and Methods (tho' not so violent) of picking Mens Pockers by corrupt Dealings: As when Magistrates refuse to administer Justice without a Bribe [a 2].

a See 1 *Sam.* xii. 3, 4. Where *Samuel*'s Intention seems to have been, not to make shew of any extraordinary Sanctity, but to declare, by that solemn Protestation, that he had, in no respect, transgress'd the common Duty of a Judge; and consequently, that he had not deserv'd by any Fault of his to be thrust out of his Office by the Creation of a King. See before, B. iii. c. 7. Sect. 9.

1 See what is said above, l. iii. c. 7. §. 6. Note 2.
2 Our Author quotes here 1 *Sam.* xii. 3, 4. upon which see Mr. *Le Clerc*'s *Comment*.

BOOK V.

CHAP. I.
Of PRICE.

I. *After Property, the Measure of Things must be introduced.*
II. *What is the moral Quantity of Things.*
III. *How many kinds of Price.*
IV. *What is the Foundation of the common Price of Things.*
V. *Many profitable Things have no Price, and why?*
VI. *Why the Prices of Things rise.*
VII. *Of the Price of Fancy.*
VIII. *Of the lawful Price.*
IX. *Of the common Price.*
X. *The Causes why the common Price rises and falls.*
XI. *The common Price is not sufficient for the Commerce of Man's Life.*
XII. *Hence an eminent Price was set in Money.*
XIII. *Which, for the most part, was made of Metals.*
XIV. *How far the Governors of Societies may set an Estimate upon Money.*
XV. *In so doing, they ought to have respect to Land.*
XVI. *The Value of Money is, also, subject to an Alteration.*

I. SINCE Things that are the Subject of Property are of different Natures, and administer differently to human Necessities; and since it often happens, that either the same Thing belongs to many (the Parts of which are not in all Respects alike) or that [1] Things of a different Nature are to be exchang'd for one another: Hence it becomes necessary for Men to agree upon some common Measure, by which Things of a different Nature may be compared together, and made equal to one another. Now Things are thus compared, and found to be equal, or unequal, in respect of their Quantities; for Equality is nothing else but an Agreement of Quantities: And therefore we must consider the Quantity of Things and Actions, as far as they are useful to human Life, together with the Foundation and common Measure of that Quantity.

II. We find then, that Things are said to be equal, not only as they agree in *their Dimensions*, but in some other Respect. Thus Honour, Labour, and Wages are said to be equal, or unequal, not by reason of their agreeing or disagreeing in Dimension, but upon some other Account. And therefore there must be some other Quantity, besides that which is term'd Physical and Mathematical, tho' Philoso-

1 Commerce is a Consequence of Property of Goods, and the Price is the Consequence of Commerce, or a Thing absolutely necessary to accommodate each other by Way of Exchange, to which all Commerce in general is to be reduced. So that the *Roman* Lawyers have Reason to refer the Settlement of Commerce to the Law of Nations, understood in the manner that I have explain'd it elsewhere, N. 1. pag. 148. *Ex hoc jure gentium ——— Dominia distincta, agris termini positi, ædificia collocata: commercium, emptiones, venditiones, locationes, conductiones, obligationes institutæ, exceptis quibusdam, quæ* [à] *jure civili introductæ sunt.* Digest. lib. i. tit. 1. De Justitiâ & Jure, leg. 5. Mr. *Thomasius* nevertheless maintains that Commerce does not belong to the Law of Nations farther, than it relates to such general Customs as proceed from the corrupted Manners of Mankind, and which are settled by corrupted Reason; seeing that the Necessity, Diversity, and great Increase of Commerce is the Effect of Vice, and the Growth of it. See the Discourse, *De Jure Statuum Imperii dandæ Civitatis*, §. 14. and that, *De Pretio affectionis in res fungibiles non cadente*, Chap. i. §. 5. both printed at *Hall* in *Saxony*. But this respects another Question, which rather relates to Divinity, than the Civil Law. (See *lib.* i. *cap.* 1. §. 11. aforegoing.) It is sufficient, that in the State that Things now are, Commerce, as well as Property, is necessary among Men in the Condition they are; so that we may say, that the Settlement of Commerce in general is very conformable to the most pure Reason, and the Law of Nations, so called in the most favourable Sense. The Abuse which several make of it to favour their private Passions, does not hinder, but Commerce in itself is a very innocent thing. Lastly, As Commerce is a Consequence, and one of the chief Uses of Property, so we must be careful not to extend the Rights of Property so far as to do any considerable Hurt to Commerce. We have seen the Use of this Remark in the two last Chapters of the preceding Book; and 'tis probable that it may serve elsewhere to decide several Cases better than they usually are decided

phers have hitherto talk'd of no other. Which is evident, if we conſider, that the Nature of Quantity in general does not conſiſt in the Extenſion of Subſtance, but in Things being capable of having a Value put upon them, and, conſequently, of being compared together. But ſince things receive a Value, not only from their natural Subſtance, but alſo in reſpect of ſome moral Conſideration; it follows, that beſides the natural there muſt be, alſo, a moral Quantity [a]. However, Things of the ſame Nature and Goodneſs receive a Value even from their natural Quantity, as a great Diamond, *cæteris paribus*, is more valuable than a ſmall one; which yet we have not always a regard to in the Valuation of Things of a different Species, or Goodneſs; for a great Dog is not always more valuable than a little one, or a great Maſs of Lead than a ſmall Piece of Gold.

How Perſons are morally valued according to Opinion [b]; and their Actions, according as they are productive of Merit or Demerit, has already been diſcourſed of in its proper Place [c]. My Deſign here is only to treat of the moral Quantity of Things and Actions, as they are conceived to have ſome Uſe in the common Affairs of Life, and as they are capable of being compared together in order to Commerce. This we call *Price*, which is the *moral Quantity or Value of Things or Actions, by which they are uſually compared together in order to Traffick.*

III. *Price* may be divided into [1] *proper* and *eminent*; the *firſt* is placed in Things and Actions, ſo far as they are capable of procuring either the Neceſſaries, Conveniencies, or Pleaſures of Life: the *other* is placed in Money, which is ſuppoſed to contain *virtually* the Prices of all Things elſe, and to be the common Meaſure and Standard of them.

IV. For the right underſtanding the Nature of the *proper Price*, it is neceſſary to conſider diſtinctly, firſt, upon what it is founded; ſecondly, what it is that raiſes or ſinks it. The Foundation of the Price or Value of any Action or Thing is, [2] Fitneſs to procure either mediately, or immediately, the Neceſſaries, Conveniencies, or Pleaſures of human Life. Hence, in common Diſcourſe we call thoſe Things that are uſeleſs, Things of no Value; and thoſe Men too we ſay are of no Value, who are unprofitable Burthens of the Earth. Thus the Cock in the Fable ſet no Value upon the Jewel, becauſe of no Uſe to him. *Grotius*, l. iii. c. 12. §. 14. is of Opinion, That *Want is the moſt natural Meaſure of the Price of Things*. Where if he means, that Want, in its own Nature, is the Foundation of Price, or that therefore Men only value a thing, becauſe they want it, it will not univerſally hold true. For, if ſo, thoſe Things that are ſubſervient to our ſuperfluous Pleaſures would bear no Price, which yet the Luxury of Man has ſet a great Rate upon. For we do not really want any thing, but what we cannot, unleſs with great Inconvenience, be without, *Mat.* ix. 12. But if his Meaning be, that the Want of the Buyer raiſes the Price, I own it is commonly ſo; but that it is the natural Meaſure of Price, that the more a Man's Neceſſities preſs him, the more may be juſtly exacted of him, no honeſt Man will admit: Nor does that [3] Place of *Ariſtotle*, cited by *Grotius*, make for the Purpoſe; for the χρεία, or [4] *Want*, he ſpeaks of there, which in a manner preſerves and holds together all Commerce, is not the Foundation of Price, but of Bartering only. For, if Men wanted nothing but what they could ſupply themſelves with, there would be no bartering, or exchanging Commodities, but every one would keep and enjoy his own [5].

V. Yet it is obſervable, that ſome of the moſt uſeful Things of human Life have no Price ſet upon them; either becauſe they are and ought to be free from Property, or becauſe they are excluded from Commerce, or laſtly, becauſe they come within the reach of it, no otherwiſe than as Appendages of ſome other thing; beſides, the Law has remov'd ſome Actions from Commerce, and thereby exempted them from Price. Thus the Air, the ſky, the heavenly Bodies, and the vaſt Ocean not being appropriated, can bear no Price, how ſerviceable ſoever they may be to human Life. And the Law having forbid [6] things ſacred to be brought into Commerce [7], has thereby exempted them from Price, although ſome of them have nothing in their own Nature, to render them incapable of it. Nor can any Price be aſſign'd for a Freeman's Head;

[a] See B. i. c. 1. §. 22. [b] See B. viii. c. 4. [c] See B. i. c. 8. See B. viii. c. 3. §. 18, &c.

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1 The Author ſaith *Pretium vulgare*; but if we ſhould tranſlate it ſo, *viz. a vulgar* or *common Price*, we ſhould confound that ſort of Price with the other which is treated on at §. 9. *Pretium commune*, i. e. the Genus with the Species. Moreover, the Terms *Proper*, or *Intrinſick*, do in themſelves much better expreſs the Notion in which our Author underſtands the Word *vulgare* in this Place, as one may eaſily perceive.

2 It is one of the general Reaſons; for that which is of no Uſe, paſſes commonly for a Thing of no Value. But whence comes it then, that Water, and ſome other Things very uſeful for Life, are not rated at any Price? as our Author ſpeaks a little lower. We muſt therefore add another Reaſon here, I mean, That Things which are capable of Price ought to be not only of ſome Uſe, if not truly, yet at leaſt in the Opinion and Affections of Men; but, alſo, of ſuch a Nature, as not to be ſufficient for the Neceſſities of all the World. And ſo the more uſeful and rare a Thing is in this laſt Senſe, the higher or lower the proper and intrinſick Price will be. If the Faſhion of a Thing paſſes away, or few Men eſteem it, then it becomes a good Bargain, how dear ſoever it was before. On the contrary, if a Thing that is common, and coſts little or nothing, becomes rare, nothing more needs to ſet a Price on it, and ſometimes to make it very dear; as appears, for Example, by Water in dry Places, and at certain Times, as in a Siege, &c. By this Principle we muſt explain and rectify all that our Author hath ſaid concerning the Foundation of Price in general. See *Titius*'s *Obſervat.* on *Puffendorf*, CCCXXXI. and on *Lauterbach. Obſervat.* DIII. as alſo Mr. *Thomaſius*'s *Juriſprud. Divin.* Lib. ii. c. 11. §. 33, &c. and his Diſcourſe *De Pretio Affectionis*, c. 1. §. 10, &c. To which we may add Mr. *Locke*'s Treatiſe on the Leſſening of Intereſt, and the Heightening the Value of Coin.

3 *Ariſtotle*'s Words are, Δεῖ ἄρα ἑνί τινι πάντα μετρεῖσθαι——τοῦτο δ' ἐστὶ τῇ μὲν ἀληθείᾳ ἡ χρεία, ᾗ πάντα συνέχει.

4 So *Ariſtotle* expreſly ſpeaks, Ὅτι ἡ χρεῖα συνέχει ἕν τι ὄν, δῆλοῖ, ὅτι ἂν μὴ ἐν χρείᾳ ὦσιν ἀλλήλων, ἢ ἀμφότεροι, ἢ ἕτερος, οὐκ ἀλλάττονται. i. e. *Want includes one thing; which ſhews, that if Men ſtood not in need of one another, neither both, nor either of them would change.* Nicom. lib. v. c. 8.

5 *Ariſt.* Polit. i. c. 6. (9) *Bartering obtains in every Thing, and began naturally from ſome People's having more than they had occaſion for, and others having leſs: For then they were forced to exchange, 'till they had furniſh'd themſelves with what they wanted.*

6 By *Res Religioſæ* the *Roman* Law underſtands principally Places where any thing had been buried. See *Inſtit.* B. ii. t. 1. §. 8, 9. and *Dig.* B. xi. t. 7. *De Religioſ. & Sumptib. Funerum*, &c.

7 This Privilege, which is granted to Things ſacred, belongs not only to Temples, and other Things ſet apart immediately to the Service of God, but, alſo, to what's neceſſary for the Maintenance of Miniſters, and all that appertains to them. This Privilege, I ſay, owes its Original to the pious Fraud of the Miniſters intereſted; and in the Chriſtian Church the Clergy have not only imitated the Pagan Prieſts in that Reſpect, but have perhaps outdone them. See Mr. *Thomaſius*'s Diſcourſe *De Bonorum Sæculariſatorum Natura*, §. 2, &c. printed at *Hall* in 1707.

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it being a Contradiction to be free, and, at the same Time, expos'd to Sale; for he is no sooner expos'd to Sale, but he ceases to be free: And therefore, even upon this Account, [1] Liberty is said to be an invaluable Thing, because the Advantages of it are so great, as to exceed all Value. Here 'tis worth observing what *Philo Judæus*, *De Spec. Leg.* p. 597. *Edit. Genev.* delivers, *Prices were set upon those who had devoted not only their Goods, but themselves; not according to their Beauty, or Stature, or such like, but according to their Age and Sex; for the Law fixes two hundred Silver Pieces as a Price for a Man, from the twentieth to the sixtieth Year of his Age, and one hundred and twenty upon a Woman; from the fifth to the twentieth Year eighty for a Man, and forty for a Woman; from Infancy to the fifth Year twenty for a Man, and twelve for a Woman; if past the sixtieth Year for a Man sixty, for a Woman forty. All of the same Age and Sex are rated at the same Price for three good Reasons; first, because the Dignity of the Vow is the same, whether great or mean Persons make it. Secondly, in the Case of a Vow Persons ought not to be rated upon the same Terms with Slaves exposed to Sale; for those are more or less esteem'd, according to the Beauty and Vigour of their Bodies. Thirdly and chiefly, because with GOD there is no Respect of Persons, as there is with Men.* See *Levit.* chap. xxvii.

Many things, also, have no Price, because they are not capable of being possessed separately by themselves, which yet very much enhance the Price of the thing they appertain to; as the want of them takes from it not a little [2]. Thus the lying open to the Sun, a clear and wholesome Air, a pleasant Prospect, the Winds, Shades, *&c.* consider'd separately in themselves, bear no Price, because they cannot be enjoy'd without the Land they belong to; but yet of what Moment they are in the Purchase of Lands and Tenements, no Man is ignorant.

Pliny, Nat. Hist. lib. xii. cap. 1, says of the *Plane-Tree*, That the People pay Taxes for the very Shade of it. Thus in *Holland*, those who have [3] Windmils pay a yearly Tribute for the publick Wind, as is pretended. And hence, by the way, it appears how the Cause that [4] *Demosthenes* pleaded before the Judges, about the Shadow of the Ass, ought to be decided: For he who hired the Ass could not hinder the Owner from lying down where the Shadow of the Beast fell, but might immediately have taken it away, by driving the Ass to some other Place. Lastly, whatsoever Actions either divine or [5] human Laws command to be done *gratis*, or forbid to be done at all, and so exclude from Commerce, cannot be brought under any Price. Of which Nature are those several Actions which have some supernatural Effect assign'd to them by divine Institution; as Remission of Sin, by the Absolution of the Priest; the Application of spiritual Benefits, by means of the Sacraments; and such like: Which whoever confers upon another for any valuable Consideration, is guilty of Simony; and to measure such things with Money, is look'd upon as Impiety and Irreverence towards the divine Author [a]. Unlawful too it is to bestow ecclesiastical Preferments for Money, upon unworthy Persons, which ought to be given to deserving Men *gratis* [b]. Neither ought the Rewards and Testimonials of Virtue and Learning to be sold to those that don't deserve them; not only because by this means they grow cheap, but because such Men are often, by a pompous Title, recommended to publick Imployments, to the great Prejudice of the Commonwealth [c]. And indeed 'tis a Shame to the Men of Letters, that some should take such Liberty, as *Fabius* of *Bentivoglio* [d] express'd in Jest, who, going to make a certain Person a Doctor, met by chance an Ass, that, yawning with an open Mouth, look'd as if he were laughing: To whom, *Why laugh you*, says he, *you silly Creature? We can make you a Doctor too, if you have but Money* [e]: The Practice of the *Chinese* is otherwise, of whose Examinations and Preferments, *vid.* Neuhof. *in Gener. Descript. Sinæ*, c. 3. Plin. *Nat. Hist.* l. xvi. c. 4. "Oaken Crowns were the noble Badge of the Soldiers Valour, but now of late are Marks of the "Emperor's Clemency; since, by reason of the Licentiousness of our civil Wars, it seems meritorious not to kill a Subject. O happy Times! which "have rewarded such noble Services with Honour "only, and when other Crowns were valued for "the Gold they were made of, would not allow "the preserving a Subject to be rewarded with any "thing that might bear a Price; thereby clearly "professing, that they thought it a Sin even to save "a Subject for the sake of Lucre." Thus a Judge ought not to sell that Justice which he should administer *gratis* [6].

[f] *Non bene conducti vendunt perjuria testes,*
Non bene selecti judicis arca patet.
Turpe reos empta miseros defendere lingua,
Quod faciat magnas turpe tribunal opes.
Turpe tori reditu census augere paternos,
Et faciam lucro prostituisse suam.

Plutarch, in the Life of *Romulus*, p. 25, talking of the Duty of Patrons towards their Clients, adds,

[a] See *Acts* viii. 20. [b] Add. *Decretum Gratiani*, Caus. 1. Quæst. 1, 2, 3. [c] *Vid.* Plin. *Nat. Hist.* l. xvi. c. 4. [d] Vid. *Janum Nicium Erythræum*, Pinacotheca 2. c. 29. [e] *Ovid. De Arte Amandi*, lib. ii. ver. 163. *Secum habet ingenium, qui, cum libet, Accipe dicit.* [f] Ovid. *Amor.* Lib. i. El. x. ver. 37, *&c.*

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[1] *Libertas inestimabilis res est*, Digest. lib. l. tit. 17. *De Div. Reg. Juris*, leg. 106. I rather quote this Law, than that Passage of *Philo*, cited by the Author at large, because it speaks only of the Valuation of Persons devoted to God, which are to be redeemed; a Valuation made according to Age and Sex, without any Regard to Stature, Beauty, or such like Things. *De Legib. Special.* pag. 774. *Edit. Paris.* But, tho' free Persons are not the Subject of Commerce, it doth not follow that they cannot be made so, as Mr. *Hertius* observes, in respect of the Advantages which arise from it. See lib. iii. chap. 1. §. 7, 8. before-going. The Right of governing free Men is, also, capable of Valuation, and of a Nature that may be alienated, if we will. See *Grotius*, lib. i. chap. 3. §. 12. and what this Author says, lib. vii. chap. 6. §. 16. following.

[2] See lib. iv. c. 5. §. 2. above.

[3] See *Fran. Zypæus*, *Notit. Jur. Belgiæ. Lit.* x. pag. 244. *Edit. Antwerp*, 1644.

[4] See *Plutarch de Dec. Oratoribus*, and the Scholiast of *Aristophanes de Vespis*, ver. 191.

[5] See what I have observ'd on the Abridgment of *The Duties of a Man and a Citizen*, Lib. i. Cap. xiv. §. 3. Not. 2. 4. last Edition.

[6] The Words of the *Digest.* are, *An & Philosophi Professorum numero sint? Et non putem——quia hoc primùm profiteri eos oportet, mercenariam operam spernere. Proinde ne Juris quidem Civilis Professoribus jus dicent: est quidem res sanctissima Civilis sapientia, sed quæ pretio nummario non sit æstimanda, nec dehonestanda*, lib. l. tit. 13. De Extraordinariis Cognitionibus, &c. l. 1. §. 4, 4, 5. See chiefly Mr. *Trad. Brimmer. ad Legem Cincian.* Cap. ii. To which we may join the *Ennaratio Pandectarum* of *M. Schulting*, Lib. iii. tit. 1. §. 11. We may add, That the *Roman* Law allowed neither the Immunities, Privileges, nor Rewards to Poets, that it did to the Professors of other Sciences, of which Monsr. *Le Clerc* gives the Reasons in Tom. i. of his *Parrhasiana*, p. 51, *&c.*

'Tis

'Tis accounted a mean and ſordid thing for thoſe who are rich to accept of a Fee from thoſe that are poor. From whence the *Cincian* Law afterwards had its Original. *Hic clamoſi rabioſa fori Jurgia vendens improbus, iras & verba locat*, Sen. *Herc. fur.* ver. 171, *&c.* Vid. Quint. *Inſtit. Orat.* l. xii. c. 9. The *Roman* Laws thought it mean to ſet a Price upon Philoſophy and civil Knowledge. *Vid. Dig.* lib. l. t. 13. leg. 1. §. 4, 5. *D. De extraordin. cognit.* and *Grot.* in *Flor. Spar.* in *h. l.* and *Quint.* Inſtit. Orat. l. xii. c. 7. where diſputing whether a Price ought to be ſet on Eloquence, among other things he ſays, *It may be a Means of rendering things cheap to put a Price upon them.* A Ruffian, or a Sorcerer, can't juſtify his being hired for Money to kill a Man. A Scholar ought not to debaſe his Style and Learning in writing Scandal; nor ought any Man to proſtitute his Credit, by maintaining an unjuſt Cauſe, or ruining a juſt one by Perjury; and many more of the ſame Stamp.

VI. There are ſeveral Reaſons why the Prices of things ſhould riſe, or fall; why one thing ſhould be preferr'd before another of as great, or greater Uſe. For here the Neceſſity of the thing, and the Eminency of its Uſe does not always take place. Nay, we generally find the moſt neceſſary things are cheapeſt; becauſe, by the peculiar Providence of God, Nature affords a greater Increaſe of them. "Whatſoever is neceſſary for Mankind, the divine "Providence has contriv'd that it ſhould not be "dear, or hard to be got, as are Pearls, Gold, Silver, and other Things, which neither our Body, "nor Nature requires; but as for thoſe things we "cannot ſafely be without, ſhe has plentifully "diſpers'd them throughout the World [a]." That which chiefly raiſes the Price, is Scarcity. *Thoſe things that are ſcarce*, ſays *Sextus Empiricus* [b], *are valued: thoſe that grow amongſt us, and are every where to be had, are quite otherwiſe. If Water were difficult to be met with, how much more valuable would it be than the things we moſt value now? Or, if Gold, lay in the Streets as common as Stones, who do you think would value it, or lock it up?* And therefore ſome have thought it a Maſter-piece in Trade to procure a Scarcity. As the *Dutch*, in many Parts of the *Indies*, root up the Trees which bear the *Cloves* and *Nutmegs* to prevent too great a Plenty of thoſe Spices. "The *Egyptians* do "not permit their *Paper-reed* to grow in many "Places; by which they procure a Scarcity, and, "conſequently, raiſe the Price, but hinder the "common Uſe and Advantage of it, *Strabo*, lib. "xvii. p. 799. *Edit. Par.* That which is ſcarce is "valuable: Water is not valued, altho' the moſt "uſeful thing in the World, *Plato Euthydemo*, p. 211. "C. *Ed. Wech.* Curious Dainties are not valued "for their Taſte, but for their being hard to be "gotten, *Mamertin.* Paneg. *Julian.* c. xi. n. 3. *Ed.* "*Cellar.*" Beſides, a thing is ſtill more valuable, when 'tis not only ſcarce, but, alſo, comes from remote Places. *Pliny* [c] tells us of two Boys, the one born in *Aſia*, the other in *France*, who were wonderfully alike, and whom therefore the Merchant ſet a prodigious Rate upon, and the Purchaſer look'd upon nothing in his whole Eſtate to be more valuable. For the Ambition of Mortals eſteems thoſe things moſt, which few Men have in common with them; and, on the other ſide, thinks meanly of thoſe which are ſeen in the Hands of every one. Nay, ſo perverſe we often are, as to eſteem a thing the more, becauſe it is forbidden; its being forbidden excites our Curioſity. And therefore *Lucian* [d] with Reaſon ridicul'd thoſe, *who in Winter load themſelves with Roſes, and are pleas'd with them when ſcarce and out of Seaſon; but nauſeate and deſpiſe what is in Seaſon, and agreeable to Nature.*

But generally we ſet a great Value upon nothing but what raiſes us, in ſome meaſure, above the Rank and Condition of others; and, for this Reaſon, Honours particularly are more valuable for being ſcarce. "The Rewards of Virtue ought to be chaſte and "ſacred, not to be communicated to wicked or "mean Perſons; for things that are ſcarce and "difficult, are recommended to Men by the Re-"wards that attend them [e]." Tho' indeed it proceeds from the Corruption and Pravity of human Nature, that we value real Goods more or leſs, according as few or many poſſeſs them in common with us. For my Goods are never the worſe, becauſe others poſſeſs the like; nor the better, becauſe others want them. Thus my Health is not the leſs valuable to me, becauſe others, alſo, enjoy theirs; nor the more, becauſe others are ſick. Nor is my Knowledge leſs worth, becauſe others are knowing too; nor would the Value of my Wiſdom riſe, ſhould other People prove Fools. He therefore that prides himſelf in ſeeing others want the good things which he is Maſter of, ſeems indeed to take pleaſure in other Mens Misfortunes: And, on the other ſide, he who thinks his own Goods the worſe, becauſe others poſſeſs them in common with him, ſeems to be moved with Envy [f].

But indeed, as in many things, ſo in this, the general Courſe of Mens Lives deviates from right Reaſon. Hence it is, that the Luxury of Man has ſet moſt unreaſonable Rates upon many things, which human Nature could eaſily be without: Which ſome think were contrived on Purpoſe, that there might be ſome Uſe in prodigious Riches. What mighty Rates ſome Pearls bear, *Whoſe Goodneſs conſiſts in ſuch a Degree of Whiteneſs, Largeneſs, Smoothneſs, and Weight,* [1] *Qualities ſo hard to be match'd, that never any two of thoſe Pearls are found alike!* Plin. Nat. Hiſt. l. ix. c. 35. *Pearls bear the greateſt Price of any thing; they were firſt brought to* Rome, *when* Alexandria *was taken, not long before* Sylla's *Time; but a little after were ſo much in Faſhion, that even ordinary Women affected to wear them; for they uſed to ſay, A Pearl to Women, when they appear'd in publick, was as good as a Lictor*, Idem. ibid. *Some Jewels are ſo valuable, that no Price can be ſet upon them.* Id. l. xxxvii. Proœm.. *Our Coral amongſt the* Indians *bears as great a Price as their Jewels do amongſt us*, Idem l. xxxii. c. 2. Ad. Idem. c. xvii. 34. l. x. c. 29. l. xii. c. 14, 17, 19. l. xiii. c. 5. l. xxxvii. c. 4. l. vi. c. 7. Of Silk. *With ſo much Pains, and ſo far is it brought, that Women, when they appear in publick, may be ſeen through. At this Day* Amber *with us bears a moderate Rate in the* Eaſt

[a] Vitruv. *De Architect.* l. viii. *in the Preface.* cap. 12.
[b] Pyrrhon. *Hypoth.* lib. i. c. 14. p. 29. Ed. *Genev.*
[c] *Cic.* De Invent. l. ii. c. 39. Vid. *Corn. Nep. Miltiade*, c. 6. c Lib. vii.
[d] *In Nigrino*, p. 38, 39. Ed. *Amſt.*
[e] See *Numb.* xi. 28, 29. *Mark* ix. 38, 39.

[1] *Etenim qui modus eſt in his rebus cupiditatis, idem eſt æſtimationis.* i. e. In theſe Things the Value of them is according to Mens Deſires. *Difficile eſt enim finem facere pretio, niſi libidini feceris:* 'Tis hard to ſet Bounds to the Price 'till you have limited your Deſires after them. *Cicero in Verr.* lib. iv. chap. 7.

East *it is vaſtly dear*. [1] Nay, the Folly of Men fancies there muſt be ſomething extraordinary in what coſts much. *Heliogabalus* ordered the Prices of the Dainties provided for his Table to be repreſented to him greater than really they were; for that, he ſaid, created an Appetite to them —— *magis illa juvant, quæ pluris emuntur*, Juv. Sat. xi. ver. 16. *Luxury has impoſed a Price upon the very Dregs that the Sea caſts up*, Curt. l. viii. c. 9. n. 19. Ed. Cellar. *Old Plate receives a Value from the Fame of the Workmen; Braſs from a few Mens Folly*, Sen. Conſol. ad Helv. c. xi. *Janus Nicius Erithræus* [a] tells us of *Tulips*, that thirty Years ago (when he writ this) they lay upon the Tops of the *Alps*, without any Care or Notice taken of them: Yet, when they were brought to Town, the People, fond of them for their Rarity, ſet ſuch a Price upon them, as that every Root ſold for above a hundred Crowns. But after they had increaſed and grew common, their Price ſunk ſo low, that hardly any Thing was cheaper. *As our Deſires are, ſo is our Eſteem of Things; and there's no End of raiſing the Prices of Things, unleſs we firſt ſet Bounds to our Extravagancies*, Cicero in Verrem, l. iv. c. 7. China *and Earthen Wares are the dearer for being brittle: For it is an Argument of Riches, and a glorious Piece of Extravagacy to have a thing that ſhall immediately be wholly deſtroyed*, Plin. l. xxxiii. *The Brittleneſs makes* Cryſtal *the dearer: For among unskilful People the Danger, which ought to ſink the Price, raiſes it*, Sen. De Ben. l. vii. c. ix. Strab. l. ii. p. 87. Ed. Genev. *Of precious Stones, which are ſo much valued, yet thoſe that have them not, are as happy as thoſe that have them.* For Mankind is ſo whimſical and ſilly, as to think thoſe happy who poſſeſs Superfluities, rather than thoſe who abound in all the Neceſſaries and Conveniencies of Life. And therefore it ought to be ranked among the ſenſeleſs Opinions of the common People to value things either for their being new, or ſcarce, or hard to be gotten, or brought from far, unleſs their Goodneſs, alſo, and their Uſefulneſs recommend them. *Charron de la Sageſſe*, l. i. c. 39. num. 11. and l. ii. c. 9. num. 2. *Agatharchis de mari rubro*, c. xlix. ſpeaking of the *Alilæi* and *Caſſandrini*, whoſe Country abounded in Gold, ſays, *They bartered Gold for a triple Quantity of Braſs, but gave double for Iron. For they proportioned their Rates according to the Plenty or Scarcity of the Commodities, in which we have not ſo much Regard to the Nature of the Thing, as the Neceſſity of its Uſe.* But thoſe things that are of daily Uſe, and eſpecially ſuch as relate to Proviſion, Apparel, and Arms, riſe in their Price, when they become neceſſary as well as ſcarce; as in a Dearth of Corn, or in a Siege, or in ſlow Voyages, where Hunger and Thirſt are craving to be ſatisfied, and Life muſt be preſerved upon any Terms. *Plin. Nat. Hiſt.* l. viii. c. 57. *Quinctil. Declam.* xii. p. 176. *Ed. Lugd. Bat. In a very great Scarcity any thing that can be bought is cheap.* When *Hannibal* beſieged *Caſilinum*, a *Mouſe* [2] was ſold for two hundred Pieces of Gold; and he that ſold it died of Hunger, whereas he that bought it was preſerved. The Prices of artificial things, beſides the Scarcity of them, are much raiſed by the [2] Neatneſs of the Art. "In which *L. Mummius* was ſo ignorant, "that when he had taken *Corinth*, and thereby got "Poſſeſſion of the Statues and Pictures drawn by "the ableſt Maſters, he proclaimed to thoſe whom "he had hired to tranſport them into *Italy*, that if "they loſt them, they ſhould find him new ones," *Vell. Pat.* l. i. c. 13. The Reputation of the Artificer adds Credit to ſome, and others are the more valuable for the Character of their former Poſſeſſor. As *Lucian* [b] mentions one, who had bought *Epictetus*'s earthen Lamp at three hundred *Denarii*, hoping, no doubt, to get *Epictetus*'s Wiſdom, by ſtudying by that Light. Thus the City *Cuſco* in *Peru* was in ſo great Requeſt, that even the Seed that grew near it, though really no better than any other, was yet of more Value than that which grew elſewhere [c]. In ſhort, the Difficulty, the Elegancy, the Uſefulneſs, and Neceſſity of the Work, the Scarcity of Workmen, their being [d] Maſters in the Art, their not being under a Neceſſity of [3] Working, all contribute to the Raiſing of the Price. *That ſort of Work is moſt artificial, which depends leaſt upon Fortune; that the moſt ſordid, which moſt defiles the Body; that the moſt ſervile, which is of moſt Labour to the Body; that the moſt ignoble, which requires the leaſt Virtue*, Ariſt. Polit. l. i. c. 7. (11.) And again, *That Exerciſe, Art, or Diſcipline is to be reputed mean, which renders either the Body or the Soul unfit for the Practice of Virtue*, Polit. l. viii. c. 2. (4.) *As for the more noble Arts, ſome are more worth than they coſt: you purchaſe of a Phyſician Life and Health, Things invaluable; of a learned Tutor the liberal Sciences, and the Adornment of the Mind: And, therefore, in ſuch Caſes, we do not pay for Things they teach us, but for their Labour*, Sen. De Ben. l. vi. c. 15.

VII. But ſometimes it happens, that ſome certain Things are valued at an high Rate by ſome particular People only, which may be called the *Price of Fancy.* It was a Saying of a certain *Arabian, Whatſoever is dear, although it be dear, yet if I have a Fancy for it, it is not dear; nor can any Thing that pleaſes be ſaid to coſt too much*, Leo Afric. l. iii. *All Gifts are valued, as they are acceptable to*

[a] *Pinacoth.* lib. iii. c. 17. in the Life of *J. Barclay*, who was a great Admirer of them. [b] *Adverſus indoctum*, p. 386. *Ed. Amſtel.* [c] *Garcilaſſo de la Vega*, Comment. Reg. l. iii. c. 20. [d] "The *Athenians* had more need of good "ſtrong Roofs to their Houſes, than the famous Ivory Statue of *Minerva*; yet I had rather be *Phidias* than the beſt of Carpen-"ters. For a Man muſt be rated, not according to what he can do; but according to what Reputation he is in; eſpecially ſince "few can draw or carve finely; but any one is capable of being a Carpenter, or a Porter." *Cic. in Bruto*, c. 73. "Thus *Nicias* "gave a Talent for a Servant to look after his Silver-Mines." *Xen. Mem. Socrat.* p. 435. in fin. l. 2.

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[1] Hence it was, that by the *Roman* Law an Eunuch-ſlave, which was above ten Years old, and underſtood ſome Art, was valued for more than a Slave that practiſed Phyſick. See *Cod.* lib. vi. tit. 43. *Commun. de Legat.* & l. 3. princip. and Mr. *Thomaſius's* Diſcourſe, *De Pretio Affectionis*, &c. chap. ii. §. 15.

[2] It is becauſe excellent Works are rare. So that the Author improperly diſtinguiſhes between the Rarity of ſuch Things as relate to it; as is evident from other Examples alledged by him. See Mr. *Thomaſius*'s Diſcourſe, *De Pretio Affectionis*, chap. i. §. 11.

[3] *Reſpondetur, quædam pluris eſſe, quàm emuntur. Emis à Medico rem inæſtimabilem, vitam, & valetudinem bonam: à bonarum artium Præcèptore ſtudia liberalia, & animi cultum. Itaque his non Rei pretium, ſed Operæ ſolvitur, quòd deſerviunt, quòd à rebus ſuis avocati nobis vacant. Mercedem non meriti, ſed Occupationis ſuæ ferunt.* See *Quintil.* Inſtit. Orat. l. xii. c. 7. in fin. *Pythagoras* blamed thoſe who took Money of young Men for teaching them ſuch Things as were of no Importance: Μισθὸν τῶν ἀτιμήτων πράττοντας. Jambl. *de Vit. Pythag.* c. xxxiv. num. 245. *Ed. Kuſter.*

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the Receiver, Liban. Declam. xli. p. 870. D. Edit. Pariſ. And this, where Animals are the Object, proceeds from a ſort of Acquaintance with them; or, becauſe they know how to ſuit themſelves with our Humour; or, becauſe we have eſcaped ſome imminent Danger by their Aſſiſtance; or, perhaps, they are the Remembrancers of ſome ſignal Event. Beſides, ſome Things are recommended by the Friend who gives them, ſo that we would not part with them for ſeveral others of the ſame Goodneſs.

——— *Mihi linteum remitte,*
Quod me non movet æſtimatione,
Verum eſt μνημόσυνον mei ſodalis,
Catul. Carm. xii. 11, 12, 13.

——— *Acceptiſſima ſemper*
Munera ſunt, Author quæ pretioſa facit.
Ovid. Epiſt. xvii. ver. 71, 72.

Many, alſo, put a Value on Things, becauſe ſome great Man, whom they are willing to compliment, has expreſſed an Eſteem for them. Thus, this or that Proviſion or Apparel riſes in its Price, when the King is pleaſed to be taken with it. But here ſome obſerve, that the Fancy of the Buyer ought not to raiſe the Price of the Commodity, unleſs ſome other Cauſes concur. The [1] *Roman* Laws make no Allowance for the Fancy of the Party in the Reſtitution of Damage done by Chance [a]: And yet Merchants frequently raiſe the Price, when they ſee the Buyer fond of the Commodity. *Diodorus Siculus* [b] obſerves what an Advantage the *Italian* Factors made of the Drunkenneſs of the *Gauls*: *They brought them Wine, and ſold it at moſt unconſcionable Rates; for they had a Boy for a Hogſhead, and ſo exchanged their Wine for a Butler.*

However the Affection of the Seller may fairly raiſe the Price, if ſo be he ſignifies it to the Buyer; for to part with a beloved Thing, for the ſake of the Buyer, deſerves ſome Conſideration [c]. Laſtly, The Price of Things is ſometimes enhanced by ſome vitious Habit of Mind, as Vain-glory, Cruelty, and the like [d].

VIII. And theſe always riſe the Prices of Things, as their Contraries always lower them. But, in order to regulate the Prices of particular Things, *pro hic & nunc*, and to reduce them to a juſt Standard, we muſt remember, that in the State of Nature every one has Power to put what Price he pleaſes upon his own Goods, as being, in that State, the ſole and ſupreme Maſter of them. For, in this Caſe, ſhould another prize my Goods, it would ſtill be in my Power to accept or reject it; and thus I ſhould, in the End, put the Price upon them myſelf: and though I lay never ſo extravagant a Rate upon them, no Man can have any Cauſe to complain; for no one ought to be concerned how much I magnify my Riches in my own Fancy; and they who think the Price too great, may let it alone. And, therefore, if any one has a mind to my Goods, it is fit I ſhould put what Price upon them I pleaſe; as, on the other ſide, ſhould I force my Commodity upon another, I muſt take what the Buyer, who is indifferent, will be pleaſed to give me. Indeed, if any one through Ill-nature, or Hatred, or Envy, refuſes a Man in want, either to ſell at all, or at leaſt ſells upon hard [2] unreaſonable Terms, then, and only then, there is Cauſe to complain. From whence it follows, that, in a State of Nature, the Price of every Thing is to be determined by the Agreement of the Contractors; nor can any one be ſaid to have offended againſt the Law of Commerce for making the beſt of his Market, provided he has not been inhuman towards the neceſſitous [e].

But in a regular Government the Prices of Things are determined, either by an Order from the Magiſtrate, or ſome Laws, or elſe by the common Judgment and Eſtimate of Men, together with the Conſent of the Parties: The former may be called the *legal*, the other the *natural Price* [f]. The *legal* is always preſumed to be conſonant to Juſtice and Equity, unleſs the contrary evidently appears: For ſometimes groſs Ignorance, and more frequently Hatred or Favour, towards the Buyer or Seller, or ſome other Corruption, or private Intereſt, interpoſes. The *legal Price* is fixed, as it were, in a Point, and admits of no Latitude, but the leaſt Exceſs becomes Injuſtice. And when it is fixed (as moſt commonly it is) in Favour of the Buyer, the Seller cannot in Juſtice demand more; but the Buyer may, with the Conſent of the Seller, ſink below it, provided he does not fall ſhort of the loweſt Degree in the *natural Price*: and the Seller may lawfully take leſs, provided it does not tend to the Prejudice of others of the ſame Trade. But if the Price be fixed in Favour of the Seller, then the Buyer cannot lawfully preſs the Seller to

[a] Vid. Lib. ix. t. 2. l. 34 D. *ad* L. Aquil. & lib. xxxv. t. 2. l. 36. *ad* Leg. Falcid.

[b] Lib. v. c. 26. p. 304. The ſame d. l. c. 17. relates, "That the People of *Baleares* valued one Woman at the Rate of four Men, they were ſo prone to Venery."

[c] *Add.* l. lxii. §. 1. l. 63. D. *ad* L. Falcidiam.

[d] What Rates thē old *Gauls* ſet upon the Heads of their Enemies, ſee in *Diod. Sic.* l. v. c. 29. p. 307. and *Strabo*, l. iv. "neſs proceeds from a multitude of Sellers." *Tacit. An.* vi. c. 17.

[e] See *Gen.* xli. 49. & xlvii. 31, &c.

[f] "Cheap-

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[1] The Words are, *Si ſervum meum occidiſti, non affectiones æſtimandas eſſe puto (veluti ſi filium naturalem quis occiderit, quem tu magno emptum velles) ſed quanti omnibus valeret. Sextus quoque Pedius ait, Pretia rerum non ex adfectione, nec utilitate ſingulorum, ſed communiter fungi.* Digeſt. lib. ix. tit. 2. *Ad Leg. Aquil.* leg. 33. See, alſo, lib. xxxv. tit. 2. *Ad Leg. Falcid.* leg. 62, 63. and Mr. *Thomaſius*'s Diſcourſe *De Pretio Affectionis*, &c. c. iii. §. 12, 13. Where there was any Diſhoneſty, the Eſtimation was left to the Oath of the Plaintiff, and then he was at Liberty to rate the Thing according to his own Value. See Mr. *Noodt*'s Commentary on the *Digeſt. De in litem Jurando*, pag. 291. *& ſeqq.*

[2] That is, when the Things in Queſtion are abſolutely neceſſary to human Life. For, with regard to other Things, though we may be thought in refuſing to ſell them, or in rating them at an exceſſive Price, we do no *Injury*, properly ſo called. Mr. *Thomaſius*, in his *Juriſprud. Divin.* l. ii. c. 11. §. 13, diſtinguiſhes between a thing of the ſame kind, and a Thing which is capable of an Equivalent; for only the firſt can be valued as high as we pleaſe. As for the other, if in a Loan, or Exchange, for Example, one pretends to value his Wine or Corn at an higher Rate, although in reality they are of the ſame Nature and Goodneſs as that of the other Bargainer, Mr. *Thomaſius* ſays, "That he offends againſt the natural Equality of Mankind, which doth not allow us to weigh our "own and other Mens Intereſts in an unequal Balance, and judge differently of them, or of what appertains to them, without a juſt "Cauſe." We may, alſo, add, That the Nature of Commerce, by which Value is ſettled, requires Equality; for there is a viſible Inequality, when Things of the ſame Kind and Goodneſs are eſtimated at a different Rate: Whereas, when we are treating about Things of a different Nature, beſides that they cannot be ſo exactly equalled, the Eſteem which the Proprietor hath for it may be reſpected in the Valuation as a part of the Price, and ſo reduce the Exchange to a juſt Equality. Beſides, we would very often both counter-act the Nature of the Affair in queſtion, and the Laws of Agreement, if we would eſtimate at different Rates Things that are capable of being reſtored in the ſame kind.

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take leſs, who yet, if he thinks fit, may take it [1]; for any Man may recede from his own Right: However, in this Caſe, the Seller may take more, provided it does not exceed the [2] higheſt Degree in the *natural Price.* On Labour, the Price is generally fixed in Favour of the Labourer; on Commodities, in Favour of the Buyer. In ſome Places, a more ſubtle Method is taken to prevent unreaſonable Prices; as in *Greece*, the *Fiſhmongers* were not permitted to ſit, but obliged to ſell their Fiſh ſtanding, that ſo, by the Tediouſneſs and Tireſomeneſs of the Poſture, they might be forced to ſell them while they were ſweet, and at a moderate Rate.

IX. But the *natural Price*, which is not fixed by Law [3], admits of ſome Latitude, within which more or leſs may be demanded and given. Of this Price *Seneca* is to be underſtood, when he ſays, [4] *What matters how much it is, ſince the Buyer and Seller agree upon it?* The Value of Things is according to the Market; when you have commended them, they are worth ſo much as they can ſell for, and no more. *De Benef.* lib. vi. c. 15. And *Law* 63. of *Book* xxv. 1, 2. of the *Digeſt. ad L. Falcid. The Prices of Things* [5] *are not fixed according to the Fancy, or Uſe of particular People, but as they are valuable to every body.* See, alſo, *Law* 33. of *Book* ix. t. 2. of the *Digeſt. ad L. Aquiliam. In ſome Places* (ſays *Ariſtotle*, *Nicom.* ix. 1. towards the End) *the Laws allow no Action for voluntary Commerce; thinking it reaſonable that the Creditor ſhould entirely depend upon the Honeſty of the Debtor: For they thought the Debtor fitter to judge how much ought to be paid, than the other. For many Things are differently rated by thoſe who are in Poſſeſſion, and thoſe who deſire to be in Poſſeſſion of them; every one ſetting a great Rate upon his own. But a Return ought to be made according to the Opinion of him who is to make it; which, perhaps, ought to be adjuſted, not according to the Value he puts upon the Things, when in Poſſeſſion of them, but according to the Value he put upon them before he had them* [a]. By reaſon of this Latitude they generally divide the *natural Price* into three Degrees; the loweſt or favourable, the middle or reaſonable, and the higheſt or rigorous: within which Degrees, any Thing may be bought or ſold dearer, or cheaper. But of what Extent this Latitude may be, it is not eaſy to give a Rule that will reach all Caſes: But, that may be ſaid to be the juſt Price, which is generally agreed upon by thoſe who ſufficiently underſtand the Market and the Commodities. Hither may be referred that of *Varro de Ling. Lat.* lib. iv. [6] Pretium *eſt, quod æſtimationis emptioniſque cauſa conſtituitur: Dictum a* peritis, *quod hi ſoli poſſunt facere recte id.* Yet *Salmaſius*, *De Uſuris*, ridicules this Derivation, and that with Reaſon.

X. In regulating this *natural Price*, Regard is to be had to the Labour and Expence [b] of the Merchant, in importing and taking Care of his Goods; for upon this Principle it is that a Merchant can juſtify his Selling ſo much dearer than he bought: But this Regard is only to be had to thoſe Expences which they are uſually put to; extraordinary Chances have nothing to do here. And, therefore, it can be no Reaſon for a Merchant to raiſe his Rates, becauſe he happened to break his Leg, or to fall ſick, or becauſe Part of his Goods were caſt away, or ſtolen; unleſs ſuch Accidents contribute to the Scarcity of the Commodity; much leſs can he bring in his own extravagant and ſuperfluous Expences. But his Time, his Study, his Care, in getting, preſerving, and ſorting his Commodities, as, alſo, his Servants Wages, may fairly be rated by him. And it would be inhuman and tend to the Diſcouragement of Induſtry, to allow a Tradeſman, or a Man of any other Calling, no more Gain than juſt enough to ſupply him poorly and ſparingly with the Neceſſities of Life. The Difficulty, alſo, and Length and Danger of the Voyage, may be brought into the Account, as, alſo, the different Value of Monies and Commodities in different Countries. Beſides, the Way of Sale may alter the Caſe; for they who ſell by Retail may demand ſomewhat more than thoſe who ſell by Wholeſale; their Trouble being greater, and it being more advantageous to have a good round Sum paid down at once, than to receive the ſame by little and little. But what ſudden and frequent Alterations the Markets admit of by reaſon of the Plenty or Scarcity of Buyers, Money, or Commodities, is well known. For the Scarcity of Money and Buyers proceeding from ſome particular Cauſe, meeting with a Glut of Commodities, ſinks the *Price* [c]. As, on the other ſide, the Plenty of Buyers and Money, or the Scarcity of the Commo-

[a] *Vid.* Grot. l. ii. c. 12. §. 14. & Ciceron. Verrin. De Signis. *Qui modus eſt in his rebus cupiditatis, idem eſt æſtimationis.*
[b] See *Grot.* in the Place above-cited.
[c] "Cheapneſs proceeds from a Multitude of Sellers." *Tacit. An.* vi. c. 17.

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[1] It is not always allowed to give a Price beyond what is ſet by the Law; and this takes Place chiefly when the Taxation is fixed, not for the Intereſt of private Perſons only, but for the publick Good, and as a ſumptuary Law. Nor may we always contents ourſelves with leſs; which ought principally to be obſerved, when the Magiſtrate, by fixing a Price, endeavours to hinder Monopolies, or to encourage Merchandiſe and Commerce in general, as Mr. *Thomaſius* has very well obſerved in his *Juriſprud. Divin.* ubi ſupra, §. 56, 57.

[2] See *Athenæus*, l. vi. c. 2.

[3] This common Price takes Place in the Independence of a State of Nature. It is in that Caſe a Conſequence of the Trade they have together, as well as in civil Society. But in neither Caſe are Men always obliged rigorouſly to fix Things at a certain Price. Yet the Laws may impoſe a Neceſſity upon Subjects of the ſame State to rate their Goods at a certain Value. But if they did not do it, there would be no Imprudence in trading for any Man to rate his Goods at ſo high a Price that there ſhould be no Buyers. Now this is what would frequently happen both in civil Society as well as in a State of Nature, if we did not ſell Things upon the Footing which they are valued at by People, who know and want them. Beſides every Time that the Price is not fixed by ſome ſettled Agreement, and yet a Price is ſuppoſed, the Thing is reckoned to be ſold at the current Eſtimation: Juſt as in all Caſes of the ſame kind we tacitly ſubmit to the common Cuſtom. It is, alſo, the common Price we muſt follow both in eſtimating a Damage done without any ill Deſign, or when we do not alienate our Eſtate freely, as in the Diviſion of a Thing common, which it is agreed ſhall be left entire to one of the Parties, paying the other the Value of his Share.

[4] *Seneca*'s Words are, *Quid intereſt quanti ſint, cum de pretio inter ementem & vendentem convenerit——Pretium cujuſque rei pro tempore eſt.. Cum bene iſta laudaveris, tanti ſunt, quanto pluris venire non poſſunt.*

[5] He treats here of the Value of Damage, and not of what may be given or required in Buying and Selling, or making any other Contract. See the Diſcourſe quoted c. ii. §. 34.

[6] A Price, in Latin *Pretium*, is that which is appointed upon the Account of the Value and Buying of a Thing; it is ſo called from *Peritis, i. e.* ſuch as are ſkilful, becauſe they only are able to fix it.

dity, raiſes it [a] [1]. Beſides, it helps to lower the Price, when the Seller forces his Commodities upon us of his own Accord, as if they lay upon his Hands [2], for that proceeds from a Scarcity of Buyers; and beſides, in this Caſe, the Purchaſer has often no Occaſion for the Thing, nor would buy it, but that he thinks it a good Bargain: And, indeed, in ſuch a Caſe we often buy, not ſo much for our own, as for the Seller's ſake. And, therefore, when Things are ſold by Auction, or Inch of Candle, they often go off for leſs than otherwiſe they would ſell for; it being the Condition of that ſort of Sale, that [3] the Ware ſhould go to the higheſt Bidder: And yet, ſometimes, the Warmth and Emulation of the Company riſes above the ordinary Price; which is, indeed at all Times, raiſed by the Plenty of the Buyers. Again, the Seller ought to have Allowance made him for the Loſs enſuing, or the Gain he foregoes, by ſelling at that Time when the Buyer is importunate: For it would be unreaſonable to expect me to part with my Goods, but upon ſuch Terms as to be no Loſer by them. Beſides, the Loſs or Gain, by reaſon of ſlow or prompt Payment, may be, and, indeed, always is, brought into the Account: For [4] a Day is Part of the Price; which is more if paid down upon the Nail, than if paid ſome Time after; for in the mean Time I might, perhaps, turn and apply it another Way to my Advantage [b]. And, therefore, [c] *Polybius* commends the Generoſity of the younger *Scipio, for paying his Siſters their Portions forthwith, which he was not obliged to do until two or three Years after, and that too at* Rome, *a City where no Man gives away any Thing at all, or pays a Penny before it be due; ſo diligent is every Body in getting Money, and ſo much Advantage do they make of the Time.*

[5] Laſtly, We may add what *Themiſtocles*, when he was going to ſell his Farm, gave a publick Advertiſement of [d], *That he had a good Neighbour. A Houſe*, ſays *Sadus* [e], *that has got ſuch a Neighbour as you* (ſpeaking to a raſcally *Jew*) *may poſſibly ſell for ten* Drachmæ *of bad Money; but there is Hopes, that when you are gone, it may be worth an hundred.* A good Neighbour therefore raiſes the Price of a Farm; eſpecially in a Country where the good old Way of the *Spartans* obtains [f], *who made free with their Neighbours Servants, Dogs, and Horſes, as if they were their own: And when a Man wanted any Thing that his Neighbour was Maſter of, he need but to open his Store-houſe, and to furniſh himſelf from thence with what he had occaſion for.* The Cauſe of raiſing the Price of Slaves, in *Juſtin*, was very unuſual, and not a little owing to Cruelty: *The Price of the* Theban *Captives was raiſed*, ſays he, *not for their being ſerviceable to the Buyer, but out of Hatred to the Enemy* [g].

XI. But, when moſt Nations had degenerated from their primitive Simplicity, it is eaſy to imagine that this proper Price could not ſuffice for the Diſpatch of Buſineſs and Commerce, which daily increaſed: For Commerce conſiſted in Bartering only; and Work was paid in Work, or elſe in Commodities. But after our Luxury had increaſed our Neceſſities, and we, not content with the Produce of our own Soil, had a mind to the Delicacies of other Nations, it was hard for any one to poſſeſs ſuch Goods, for which any other would be willing to barter thoſe Commodities that we wanted, or which indeed could be exactly equivalent to them. And, in a well-regulated State, where the Subjects are divided into various Orders and Ranks, there muſt needs be ſeveral ſorts of Men which would not be able to ſubſiſt, or at leaſt very hardly, did the ſimple Way of bartering ſtill prevail. As it is very evident that thoſe Nations which are yet unacquainted with the Uſe of Money, are perfect Strangers to the more improved and cultivated Way of Living. Vid. *Buſbeq.* Epiſt. iii. where he treats of the Manners of the *Colchi*, *Add.* l. i. princ. l. xviii. t. 1. *D. De contrab. Empt.* And, therefore, *Maximus Tyrius*, Diſſ. xxxvi. p. 344. *Ed. Lugd. An.* 1630, is in a ſweet Dream, when he ſays, *Meat, Drink, and Raiment, and other Neceſſaries Men provide, by bartering Braſs and Iron; and thoſe of more Value, by Gold and Silver. But this is through the Corruption of Mankind: for without any Uſe of Metals they might communicate* gratis *to one another, by this moſt juſt Meaſure, that he who wants ſhould provide for his Neceſſity, by borrowing of him that abounds; and he that abounds, ſhould lend upon no other Condition, than that he in his Turn ſhould be ſerviceable to him.*

XII. And therefore the moſt civiliz'd Nations, by Agreement, thought fit to [6] ſet a certain *eminent* Price upon ſome particular thing, as a Meaſure and Standard for the Price of every thing elſe; by the help of which one might procure any ſaleable Commodity, and Commerce might be carried on

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[a] Vid. *Socrat. Hiſt. Eccleſ.* l. iii. c. 17. in the Beginning. [b] Vid. *Mart.* l. vi. ep. 30. [c] *In excerptis Peireſcianis. Add. Grot.* l. ii. c. 12. §. 14. [d] *Plut. Apophtheg.* p. 185. *D.* [e] *Roſar. Perſ.* c. iv. [f] Mentioned by *Plutarch, Inſtit. Laconicis*, p. 238. *Ed. Wech.* [g] *Juſt.* l. xi. c. 1.

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[1] I have added this Period taken out of our Author's Abridgment *De Officio Hom. & Civ. B.* l. i. c. 14. §. 6. where it is ſaid, a high Price is ſet upon a Thing, when it is ſold only to pleaſe one importunate to have it, and without which Intreaty it would not have been ſold. Any one may ſee that this ought not to have been omitted.

[2] Eſpecially, where *Cato*'s Rule of good Huſbandry is obſerved, which *Plutarch* relates in his Life, "Nothing is cheap that is "ſuperfluous; and what we have no Occaſion for, although it is ſold for a Farthing, is dear." It is a Proverb, *Merx ultronea putet*, Proffered Ware ſtinks. *Plutarch*'s Words are, Ὅλως δὲ μηδὲν εὔωνον εἶναι τῶν περιττῶν, ἀλλ' ὅτις ἃ δεῖται, κἂν ἀσσαρίου πιπράσκηται, πολλοῦ νομίζειν. In vit. Caton.

[3] See Chap. v. §. 6. following.

[4] *Nam Dies ſolutionis, ſicuti ſumma, pars eſt ſtipulationis*, Digeſt. l. ii. tit. 13. *De Edendo*, l. i. §. 2. See, alſo, l. xviii. t. 2. *De in Diem addictione*, l 4. §. 6: & l. 15. *in fin.*

[5] In all this Paragraph the Author treats only of the outward Circumſtances, which help to raiſe or leſſen the Price of Things: But we ought always to ſuppoſe that the natural and internal Qualities of the Things themſelves very much alter the Value, becauſe theſe intrinſick Qualities or Circumſtances increaſe or leſſen the Benefit we may have by it. To this the Example of *Themiſtocles*, alledged by this Author, is to be referred, &c.

[6] Our Author ſays, *Conventione quâdam.* He might not perhaps have meant an Agreement properly ſo call'd, but only a ſimple Cuſtom, with regard to which Men inſenſibly form a Compact, becauſe they find their Advantage in it. It is only in this Senſe we can admit of a Convention, except in civil Society, where it is maintain'd by the Authority of the Laws. I have always taken the Thing in this Light, and if I did not explain myſelf here, it was thro' Forgetfulneſs, or becauſe I apprehended no body could think otherwiſe. I am pleas'd to ſee that Mr. *Carmichael*, Profeſſor at *Glaſcow*, declares himſelf of the ſame Opinion in his Notes upon the Abridgment of *The Duties of a Man and a Citizen*, of which the firſt Edition appear'd in 1718.

on [1] more conveniently. [2] To this Purpoſe *Ariſtotle* [a] diſcourſes excellently; *When Want*, ſays he, *had made Bartering neceſſary, any ſimple Exchange of Commodity was ſufficient to anſwer our preſent Exigencies. But becauſe we knew not what, or how much we might have Occaſion for hereafter, the Uſe of Money was introduced; which is, as it were, a Pledge or Security, on which Men have agreed to impoſe ſuch a Power, as to make it capable of procuring any ſaleable Commodity.* And in another Place [b], *When Mens Neceſſities were to be ſupply'd from abroad, by importing what they wanted, and exporting what they abounded with, it was neceſſary to introduce the Uſe of Money. For every thing neceſſary for Life could not eaſily be convey'd backward and forward. And therefore to carry on ſuch a Barter they conſented to give and receive ſuch a thing at ſuch a Value, as Iron, Silver, or any thing elſe: which, at firſt, was determined by Quantity, or Weight; but after had a Stamp put upon it, to ſave the Trouble of Weighing; for the Stamp is a Token and Demonſtration of ſuch a Quantity.* Again [3] [c] *Becauſe an Architect deſerves more for his Work, than a Shoemaker does for his; and it would be difficult for theſe two to barter together, it being unreaſonable to give a Houſe for a Pair of Shoes; therefore, to render ſuch things ſaleable, Mankind have thought fit, by common Conſent, to make uſe of a Piece of Silver, which they call* Money: *And this, for the Maintenance of civil Communication, they have agreed ſhould be accepted for any Commodity, according to the Value and Price of it.*

XIII. For this Purpoſe the more noble and ſcarce Metals, Gold [d], Silver [e], and Braſs ſeemed moſt proper. For as we accept a Man of known Credit and Value, and not every common Fellow for a Surety, ſo no Man would part with his Goods, which perhaps he had acquired with great Labour and Induſtry, for what he might meet with any where, as a Handful of Duſt and Sand; it was neceſſary therefore Money ſhould conſiſt of ſuch a Matter, as might be convenient for keeping, and, by reaſon of its Scarcity, ſhould have the Value of many things crouded and united in it. Theſe Qualities are found in Metals, which are, alſo, of ſuch a cloſe compacted Subſtance, as not eaſily to be worn out, and yet capable of being divided into minute Pieces, both which are abſolutely neceſſary for that which is deſign'd to be a Standard and common Meaſure in Commerce. But ſince this Uſe of Money does not follow from the Nature

[a] *Nicom.* l. v. c. 8. "Money was found out as a common Meaſure to which all other Things ſhould be referred." *Nicom.* ix. c. 1. [b] *Polyb.* l. i. 6. (9) *Nicom.* l. v. c. 8. "All Things that are barter'd ought to be capable of being "compared together, to which Uſe Money is ſubſervient; which, in a manner, is a *Medium*, for it meaſures all Things: "For Money was ſubſtituted by Conſent, and is therefore call'd *νόμισμα*, as being ſuch, not *by Nature*, but *νόμῳ by the* "*Law*; it being in the Power of Man to alter it, or make it uſeleſs. Every thing ought to have a Price ſet upon it, for ſo "there will be continual Traffick; and where that is, there muſt be Society. Money therefore, as a *Medium*, renders Things "commenſurable, and, conſequently, equal. For there can be no Society, where there is no Exchanging; nor Exchanging, "where there is no Equality; nor Equality, but where Things are commenſurable. [c] *Magn. Moral.* l. i. c. 34. *Rhet.* l. i. c. 16. "Money is, as it were, the Rate of the Worth of other Things; and therefore all other Things are procurable "by it." [d] Which, why it is eſteemed the moſt noble, may be ſeen in *Plin. Nat. Hiſt.* l. xxxiii. c. 3. about the End. [e] *Vid. etiam* l. xxxiv. c. 14. *Plin. Nat. Hiſt.* & *Lucian. in Charon.* p. 350. *Edit. Amſt.* where *Iron* is preferr'd to Gold.

1718. M. *Branchu* (in his *Obſerv.* Tom. II. *Obſerv.* XI.) arrogates the Opinion of this to himſelf, as a new Thought. He alſo criticizes the deceas'd Mr. *Locke*, who, as he ſays, has maintain'd (in Conſequence of the *Hypotheſis*, upon which he makes him reaſon) "That Money ſhould be conſider'd as a Proof that we are ingag'd to give, for the Coin we receive "Merchandiſes of a certain Value, becauſe all Men are agreed upon that Point. Hence (as he ſays) it follows, That every "one is oblig'd to ſell his Goods to another, and that he may be forc'd to do it." But before he had treated this great Philoſopher in ſo diſdainful a Manner (a Philoſopher who never, without Neceſſity, ſuppos'd general Agreements between Men, as we have ſeen with regard to the Origin and Property of Goods) he ought to have firſt underſtood what he ſaid. Now in the Place he quotes there is nothing like this, and we may even infer the contrary from it. Mr. *Locke* lays it down, "That "Men, having agreed to place an imaginary Value on Gold and Silver, have eſtabliſh'd them as a kind of common Pledges, "by which they are aſſur'd to receive, in Trade, the Value of what they give for a certain Quantity of theſe Metals. Upon "this (according to him) depends the Neceſſity of the Proportion there ſhould be between the different kind of Coins and "Trade. For, adds he, a Note, a Bond, or any other Proof of a Debt, which we receive, would not be willingly taken "as a good Security by another Perſon, who does not know whether they be good, or whether the Debtor be ſolvent. The "Public Authority, in his Opinion, cannot make ſuch Securities current; for no Law can give Notes that intrinſic Value, "which the Conſent of Mankind has affix'd to Gold and Silver. Thus Strangers will never take our Notes or Writings "as any Part of Payment. And, tho' they may paſs among our own Countrymen, they are attended with this great Obſtacle, "That they are ſubject to inevitable Conteſtations and Diſputes; liable to be Counterfeited or Forg'd, and have need of "other Proofs of Authenticity and Security than our own Eyes or a Touch-ſtone," *&c.* See Mr. *Locke*'s *Conſiderations of the lowering of Intereſt, and raiſing the Value of Money.* Whoever will weigh theſe Words, and examine the Sequel of the Diſcourſe, or, rather, the whole Treatiſe, will not find the leaſt Foundation to pretend that Mr. *Locke* ſuppos'd a real Convention, by virtue of which *Men* were oblig'd to fix a certain Price to Things, in a certain Manner.

Let us now ſee what he ſays in another Treatiſe, where he ſhews, That the Introduction of Money has furniſh'd private People with the Means of extending their Poſſeſſions: "Men, ſays he, have render'd this unequal Diviſion practicable "(even out of civil Society, and without any previous Contract) only by affixing a Value to Gold and Silver, and tacitly "agreeing to uſe theſe Metals as current Coin. For, in a State, it is the Laws which regulate the Right of Property, and the "Poſſeſſions", *&c.* See Mr. *Locke*'s Treatiſe on Government. Book ii. cap. v. §. 50. With regard to this Author, whom M. *Branchu* criticizes ſo ſeverely, the Notion of a true Agreement, which deprives Men, in the independent State of Nature, of the Liberty of valuing, or not valuing, the Metals of which Money is made, this Notion, I ſay, does not agree with his own Principles; for there is not one Syllable in the Chapter, from whence it can be fairly inferr'd. On the contrary, the Reader may ſee, in more than one Place, that he diſtinguiſhes between *Inſtitution* and *human Agreement*; by which he gives us plainly to underſtand, that the *firſt* alone is the Foundation of the Value ſet on Money, between thoſe who are not Members of the ſame civil Society.

[1] The *Roman* Lawyers have well diſcover'd the Original and firſt Eſtabliſhment of Money, ſaying, *Origo emendi, vendendique à permutationibus cæpit. Olim enim non ita erat nummus, neque aliud merx, neque aliud pretium vocabatur; ſed umuſquiſque ſecundum neceſſitatem temporum, ac rerum, utilibus inutilia permutabat, quando plerumque evenit, ut quod alteri ſupereſt, alteri deſit; ſed quia non ſemper, nec facile concurrebat, ut cum tu haberes quod ego deſiderarem, invicem haberem quod tu accipere velles, electa materia eſt, cujus publica & perpetua æſtimatio difficultatibus permutationum, æqualitate quantitatis ſubveniret; eaque materia forma publica percuſſa, uſum dominiumque, non tam ex ſubſtantia præbet, quam ex quantitate: nec ultra merx utrumque, ſed alterum pretium vocatur.* Digeſt. l. xviii. tit. 1. De contrahenda emptione, *&c.* leg. 1.

[2] Theſe Paſſages our Author quotes at large, but without any great Neceſſity.

[3] The *Greek* of this Paſſage is, Ἐπεὶ δὲ ὁ οἰκοδόμος πλείονος ἄξιον ποιεῖ τὸ ἀυτῦ ἔργον, ἢ ὁ σκυτεὺς, καὶ ἦν ἔργον ἀντικαταλλάττεσθαι, καὶ τῳ σκυτεῖ πρὸς τὸν οἰκοδόμον, ἀνθ' ὑποδημάτων δ' ἐκ ἦν οἰκίαν λαβεῖν, ἐνταῦθα ἤδη ἐνόμισαν ταῦτα πάντα ἀνητὰ, καί τι ἀργύριον προσαγορεύσαντες νόμισμα, τέτῳ χρῆσθαι, καὶ πρὸς τὴν ἀξίαν ἕκασον ἑκάστε διδόνται, τὴν ἀλλαξιν ποιεῖσθαι παρ' ἀλλήλων, καὶ τέτῳ τῆν πολιτικὴν κοινωνίαν συνέχειν.

of Things, but the common Conſent and Agreement of Men [a]; any thing elſe, in Caſes of [1] Exigency, may ſerve in its ſtead. Thus Leather, Paper, and ſuch like, with ſome certain Stamp upon them, have often paſs'd for Money, in Times of Neceſſity; which, when thoſe Emergencies were over, have been exchang'd for the common Species [b]. Thus in the Kingdom of *Congo* and *Tombutto* in *Africa* [c], and in many Places of *North America*, a certain ſort of Sea-ſhell is in Uſe, inſtead of Money. The *Apalachites*, a People of *Florida* [d], uſe certain black and white Grains for Money. The ſmall Money of the Province of *Caniclu* are Lumps of Salt [e], which are, alſo, current among the *Abyſſines* [f]: Tho' certainly ſuch ſort of Money is capable of carrying on but a very ſmall Trade. In the Kingdom of *Siam* the great Money is Silver, the ſmall a certain ſort of Shell [g]. And here, by the way, we may obſerve, that in *Congo* they look upon Iron to be a nobler Metal than Gold, or Silver, becauſe theſe are of little Uſe, whereas that affords moſt convenient Inſtruments for the Service of Life. Among the *Ethiopians* Braſs was the moſt ſcarce and precious Metal [h]. And indeed, laying aſide the Uſe of Money, Mankind could better be without Gold and Silver, than without Iron [2]. The *Peruvians* [i] thought themſelves happy that the *Europeans* help'd them to Iron Inſtruments. And one of their Grandees could not enough admire a Pair of Sciſſars brought over by the *Spaniards*, ſaying, *Had the* Spaniards *brought nothing elſe but Razors, Sciſſars, Combs, and Looking-glaſſes, it would have eaſily oblig'd them to give all their Gold and Silver in Return.* For before [k] that they ſhaved themſelves with Knives of Stone, not without great Pain. As for their Gold, and Silver, and Jewels, they gave them their King, not as Tribute, but as a Gift [k]. In a certain Country of *Arabia* they barter'd an equal Weight of Gold and Silver for Iron; for they abounded in the former Metals, and wanted the latter [l]. Heretofore theſe Metals us'd to paſs by Weight [m]; inſomuch that ſtill, among ſome Nations, the Money is denominated from the Names of Weight. But, that growing inconvenient, it became cuſtomary every where for the ſeveral Princes of each Nation to coin Money of a certain Size [3], and to ſtamp it with a certain Mark to determine its Value. *Alexis Severus* gave Order, *That the Pieces of Money of two, three, four, and ten Pounds Weight, up to thoſe of fifty, and an hundred, which* Heliogabalus *had coin'd, ſhould be melted down, and no longer paſs in Payment; and that for the future the Money ſhould be denominated from the Quantity of the Metal. For he obſerved, that the Emperor was at a greater Expence in Largeſſes, by being under a Neceſſity of giving away ten Shillings, nay, ſometimes thirty, fifty, or a hundred in a ſingle Piece, becauſe he had not a ſufficient Stock of ſmaller Pieces to diſtribute.* Lamp. c. xxxix.

XIV. But altho' the Value of Gold, and Silver, and Money depend upon the Agreement of Men; yet the ſupreme Magiſtrate has not a Power at large of determining it, as he thinks fit, but muſt have regard to ſome certain Conſiderations. And firſt all Nations, that we know of, agree that Braſs is leſs worth than Silver, and Silver than Gold, and that Silver bears ſuch a certain Proportion to Gold [n]. Again, Money is not deſign'd for the Conveniency of Commerce between Natives only, but, alſo, between them and Foreigners. And therefore, if the Magiſtrate ſhould raiſe the Money extravagantly, he would render it uſeleſs in our Traffick with Foreigners. Indeed, among Subjects of the ſame Nation [o], *Neither the Banker, nor the Farmer, can refuſe the King's Money; but whether they like it or no, muſt take it in Payment.* But between us and Foreigners, ſhould not the Quantity and Goodneſs of the Metal be ſo adjuſted, as to render our Money, at leaſt, as good as that of the Country with which we traffick, it would be a great Clog and Hindrance to Merchandiſe, and would reduce us again to the Neceſſity of Bartering; which, of itſelf, would not be ſufficient to carry on Trade, unleſs we export as much or more than we import; and Foreigners ſtand in need of our Commodities, and we not of theirs [p]. And becauſe, where our Eſtate lies in Moveables, it chiefly conſiſts in Money, it muſt apparently be much leſſen'd, when that admits of ſo much Alloy, as to diſcover its own Baſeneſs in its Looks. [4] *Polyænus* [q] relates of *Leucon*, that he com-

[a] *Add. Philoſt. in Vita Apollonii Tyan.* l. ii. c. 3. *Seneca de Beneficiis*, lib. v. c. 14. at the End. [b] *Vid. Polyæn. Stratag.* lib. iii. c. 10. n. 1. of *Timotheus* and *Demetrius*. [c] In *Leo Afric.* lib. vii. [d] Concerning which, vide *Rochefort. Deſcript. Antillarum Inſul.* Part. II. c. viii. n. 8. [e] As *Paul* of *Venice* relates, l. ii. c. 38. [f] *Franc. Alvarez.* cxlvi. [g] Vid. *Tod. Schouten, in Deſcript. Regn. Siam. Add. Polydor. Virgil. De Invent. rer.* l. ii. c. 20. *Alexand. Neapol.* l. iv. c. 15. *Budeus ad* l. i. *D. De contrab. empt. Comment. Reg.* l. i. 21. [h] *Herodotus Thalia* concerning the *Ethiopians* [i] *Garcilaſſ.* [k] *Idem ibid.* l. v. c. 7. *Add. Th. Mor. Utopia*, l. ii. [l] *Diodor. Sic.* l. iii. c. 45. *Add. Strab.* l. xvi. "Iron is therefore ſaid to be better than Gold, becauſe this is defended by that." *Lucian in Charron.* d. l. And *Plin. Nat. Hiſt.* l. xxxiv. c. 14. [m] Vid. *Plin.* l. xxxiii. c. 3. [n] "If for half a Pound of Gold a Man "receives a double Proportion of Silver, he receives only a double, whereas he ought to receive a twelfth Proportion. "*Plat. in Hipparcho*, p. 514. *C. Ed. Wech.* In the League that the *Romans* made with the *Ætolians*, they were to give "one Pound of Gold for ten of Silver." *Polyb. excerp. leg.* l. xvii. 5. *Add. Bod. De Rep.* l. vi. c. c. 3. p. 1071, *&c.* [o] That of *Arrian* takes place, *Diſſert. Epiſt.* l. iii. c. 7. [p] Vid. *Polyb.* l. vi. c. 47. about the End. [q] Lib. vi. c. 9. *Add Bodin Re Rep.* l. vi. c. 3. *Greg. Tholoſan. Syntag. juriſ. univerſ.* l. xxxvi. c. 2.

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[1] In one of the Dialogues of *Eſchines* which are preſerv'd to us, it is ſaid, That among the *Carthaginians* they uſed, as Money, little leather Bags, in which every Body put what he pleas'd, of the Bigneſs of a *Statere*; ſo that, tho' thoſe to whom they gave thoſe Bags did not know the Contents, they yet receiv'd, and paid them away as ready Money. See Mr. *Le Clerc's* Note upon this *Dial.* 2. §. 24. *Eſchines* informs us, in the ſame Place, That, in *Ethiopia*, they made uſe of *ingrav'd Stones* for Money.

[2] See Mr. *Locke's* Philoſophical *Eſſay upon Human Underſtanding*, l. iv. c. 12. §. 11.

[3] From whence that of *Juvenal*, Sat. xiv. ver. 291.

Conciſum argentum in titulos, facieſque minutas.

[4] To avoid the Cheat of falſe Money, it ought not only to be mixed with a good Alloy, but ſo curiouſly wrought, that the Labour, joined with the intrinſick Value of every Piece, ſhould make it worth more than it commonly goes for. This is Mr. *Bernard's* judicious Reflection, made by him in his *News from the Republick of Letters*, Mar. 1704. But when falſe Money creeps into the publick Commerce, private Perſons ought not to bear it, but the State ought to take it upon the Footing they received it. Our Author commends the Juſtice of the Senate of *Venice* in this Caſe; and we have had as great an Inſtance lately of it in *England*. Under the Reign of King *William* III. the Money was in ſuch a bad Condition, becauſe it had been

commanded all his Subjects to bring in their Money to have it new coined; and, when he had coined it, he order'd every Piece to go for double; and so gain'd half of the Money, without doing Wrong to his People. Indeed, such a thing as this may admit of some Excuse, in case of Necessity, if remedied when that is over. But what *Zonaras* and others tell of *Nic. Phocas*, cannot be palliated: For he having coin'd a Quantity of light Money, besides the weighty that was current, would receive none but the weighty into his Treasury, but made all his Payments in the light [a]. Some Legislators indeed have taken this Course to extirpate Covetousness, Luxury, and such Vices, by introducing base Money. Lycurgus *cry'd down all the Gold and Silver of* Sparta, *and allow'd nothing to pass but Iron, having assign'd a small Price to a vast Weight and Bulk of it; so that* 10 *l. would take up a large Room, and require a Team of Oxen to bring it home. By this Means he utterly rooted out several sorts of Villany. For who would steal or cheat, or receive a Bribe which could not be concealed, and which no Man was the better for having in his Possession, since it could not be applied to any other Use? For, they say, he made all the Iron red hot, and quenched it in Vinegar, which, by that means, became brittle, and good for nothing.* By the same Methods were all idle superfluous Arts rooted out, when nothing could be got by them: For, the Iron Money not passing in *Greece*, none of the foreign Delicacies could be imported from thence into *Sparta*, which cut the very Nerves and Sinews of Luxury. *Lysander* [c] brought back Gold and Silver into *Sparta*, and with them Avarice. Indeed, among other Nations too, Covetousness crept in with the Use of Money. For as long as their Riches consisted in Corn, Cattle, and such like, the Cumbersomeness of their Goods, together with the Difficulty of managing and preserving that which was so liable to Corruption, was sure at length to put a stop to their boundless Desire of increasing their Store. But now, since the Use of Gold and Silver has been found out, a covetous Man may embrace his Millions. *Plato* [d] in his Commonwealth, to take off his Subjects from too great a Thirst after Lucre, commanded, *That no private Man should have any Gold or Silver: That the Money which the Subjects make use of, should be such as passes no where else. But yet that the Publick should have in Possession some of the current Money of* Greece, *in case they should have an Occasion of waging War, of Travelling, or of sending an Ambassy: That Travellers, at their Return home, should pay into the Publick all the foreign Money they bring with them, and receive that of their own Country for it.* The Great *Cham* at *Cambalu* put his royal Stamp upon a vast Sum of Money made of the Bark of Mulberry-Trees, which no Man in his Dominions, upon pain of Death, dared to refuse, or to coin and use other [e]. The Foreigners too, who traded into those Parts for the Gold, Silver, and the Jewels which they imported, were forced to take that Money, which they converted into the Commodities of the Country, and so exported again. By which means that Prince heaped up a prodigious Quantity of Gold and Silver. The *Persians* called the Leather-Money, which an unjust King had imposed upon them, *Shehreva*, i. e. Money imposed on the Subject at the Pleasure of the Prince. The Memory of which has made such an Impression upon them, that, when they would denote the Injustice of any King, they express it by saying, *He imposes Leather-Money upon his People* [f]. On the other hand, the Care that the *Venetian* Senate took of their Subjects is much to be commended: For when the small Money had been debased, and a vast Quantity of it crept in among them, that Calamity not being removeable any other Way, the Senate made a Decree, That whosoever within such a Time should bring in their bad Money, should have it exchanged for good. Upon which Account, above five hundred thousand Crowns were disbursed out of the Treasury [g].

XV. But since Money is the common Measure of the Value of other Things, its Value ought by no Means to be altered, but where the Interest of the Publick evidently requires it. And then too, [i] the more moderate the Alteration is, the less will the People's Accompts be confounded. And therefore such a sort of Matter was chosen for the carrying on of Commerce, the publick and unalterable Value of which, constantly applied to the same Quantity, might be able to relieve and supply all the Inconveniences that were found in simple Barter [h]. But yet, as to the unchangeable Value of the Money, we must observe what *Grotius* [i] asserts, *That the Currency of Money is not naturally derived from the Matter only, nor yet from this or that particular Form and Denomination; but from its Capacity of being compar'd with all other Things, or at least all those that are most necessary.* The Mean-

[a] *Add. Jo. Mariana, Hist. Hispan.* l. xv. c. 9. [b] *Plutarch. in Lycurg.* p. 44, 45. *Ed. Wech.* [c] *Vid. eund. in Lysandr.* [d] *De Legibus*, l. 5. p. 848. [e] See *M. Paul* of *Ven.* l. ii. c. 21. [f] *G. Gentius ad Sadi Rosarium Persicum*, c. iii. *Add. Buchanan. Hist. Scot.* l. xii. p. 450. [g] *Andr. Maurocenus Hist. Venet.* l. xiv. p. 641. We may observe out of *Plin. Nat. Hist.* l. vi. c. 22. "That the King of *Taprobanes* very much admired the Justice of the *Romans*, in that the "*Denarii*, which he had taken, were all of equal Weight, whereas the Stamp made it appear that they had been coined at "different Times." *Vid. Solin.* c. lxvi. [h] *Vid.* lib. xviii. t. 1. l. 1. *D. De contrah. Emp.* [i] B. ii. c. 12. §. 17.

been so much clipt in the foregoing Reigns, in which there was no Care taken to prevent it, that it was diminish'd above a third Part of the true Weight. This made Men believe that they had more than they had; for, tho' the Money had not been heighten'd by publick Authority, in Commerce the Value was one third Part less than its true Weight, which ruin'd Trade in many Respects. Mr. *Locke* took Notice of this Abuse, and foretold, That in a little Time, if some Remedy were not taken, *England* would want Money to buy Bread, which happen'd in 1695, insomuch that the Parliament was oblig'd to amend it in the Beginning of the next Year. This great Philosopher was one of those who helped to make it appear, that there was no other Way to save the Commerce of *England*, but to coin the Money anew at the publick Charge, without heightening the Price. Whereupon the Parliament following the Advice of this great Man, given them in two small Treatises, "Made, in the midst of a terrible War, a Reformation of the Coin, which many States would have been afraid "to attempt in Peace. We know there are Kingdoms where they heighten and lower the Money only to draw the Wealth "of private Men into the Prince's Treasury, not regarding what Loss the People have by it: But the Maxims of the *English* "Government are very different." Mr. *Clerc*'s *Biblioth. Choisi*, Tom. vi. p. 384, &c. The two Pieces in question are the at the Beginning of the first Volume of Mr. *Locke*'s Works, and may serve as an ample Commentary upon what our Author says here. Perhaps the Subject was never better illustrated.

[i] See the End of the foregoing Note. Mr. *Hertius* also quotes here the History of Mr. *Thuanus*, lib. viii. in the Year 1551, about the End; and lib. cxxix. in the Year 1602. *De Reide, Annal. Belg.* l. v. in 1586. and *Grotius*'s *Hist. Belg.* lib. v. in the Year 1595.

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ing of which Place is, that it does not proceed from [1] the *Matter* [a] of the Money only, *v. g.* its being Gold or Silver, that a certain Piece goes *pro hic & nunc*, for so much, and is equivalent to such a Commodity (for the Currency of Money does not only depend upon one Piece's being equivalent to another of the same Quantity and Quality, for all *consumable Commodities* are such) but upon its containing virtually the Prices of any thing else; nor from any particular Denomination, as that it is call'd a Ducat, Crown, Dollar, or Florin; nor from its having such a certain Stamp [b]; but from its Capacity of being compared, in respect of Plenty or Scarcity, with other things, especially those that afford the more necessary Supports of human Life. Now Land does this; for from it, mediately or immediately, proceed most Things that human Life subsists on. And, the Product of it being one Year with another pretty equal, it may be presum'd to have its natural Value fix'd and certain, to which the Prices of other Things, at least of such as have not received their Value from the Luxury or Folly of Man, are referr'd, as to a Standard. For 'tis very reasonable, that the Prices of such Things as are the Product of Land, or are maintain'd by it, should be regulated by the Price of the Land itself. Since therefore the Land every where is in private Hands (most Mens Estates being now in Land) the Value of Money must needs rise or fall, according as it is scarce or plentiful, in proportion to Land. For every civiliz'd Nation consisting chiefly of two sorts of Men, the *Farmer*, and the *Tradesman* or *Labourer*, if, in a great Plenty of Money, Land and its Product should sell cheap, it must needs break the *Farmer*; and, on the other hand, should Money be scarce, and Land and its Product dear, it must needs beggar the *Tradesman*. Which in Fact we find true; for when a plentiful Harvest makes Corn cheap, if the Work of the *Tradesman*, and those who earn their Living by their Labour, stand at the same Rate as in fruitful Years, the *Farmer* is found to get little by his plentiful Crop. And the same Inconvenience presses the *Tradesman* and *Labourer* when Corn is dear, if still their Labour keeps its old Price. Since therefore, in indifferent Years, the Commerce between the *Labourer* and the *Farmer* is best adjusted, and there is then least Complaint between them; it is evident, that in fixing the Price of Money the greatest Regard ought to be had to Land, especially where the Country does not subsist upon Merchandise only, but chiefly upon its own Produce.

XVI. From what has been said, we may judge, whether a Farm, that was rated at a hundred Pounds two hundred Years ago, ought not, *cæteris paribus*, to be rated more now; and whether the Wages, that were large enough then, are not in all Reason a little too scanty now. For it will not suffice to say, that the Pieces of Money have the same Weight, Goodness, Name, and Shape, which they had formerly; but we must consider, that within this two hundred Years such a vast Quantity of Gold and Silver has been imported into *Europe* from *Africa* and the *Indies*, not to mention the many Silver Mines of *Europe* itself, that the Value of Money has, by degrees, sunk very much insomuch that (as *Bodinus* [c] observes) Commodities bear ten times the Price they did formerly [2], by reason of the Plenty of Gold and Silver. And therefore the old Price of Land and Wages ought to rise, *cæteris paribus*, in the same Proportion [d]. For suppose Commerce to be carried on by pure Barter in any Country which affords very little Wine, but Abundance of Corn; here, for a small Parcel of Wine, we shall receive a great deal of Corn; but if, by good Management, the Vineyards should happen to produce a larger Vintage, without doubt, for the same Quantity of Corn, we must give a greater Proportion of Wine than formerly. In like manner, when Money is scarce in Comparison of other Things, a great many Things will be purchas'd with a little Money; but Money, on the other hand, increasing, more of it must be given for the same Things. For since the Metal, as to its *natural Price*, may be, and often is brought into Commerce, as well as other Commodities, its Value must rise and fall according to the Scarcity or Plenty of it. And the *eminent Price* of Money must necessarily follow the *natural Price* of the Metal: For it is unreasonable, that a Quantity of Silver, consider'd as a Commodity, should bear a very different Price from what it does when consider'd as Money. For so the same thing, consider'd as its own Measure, would be greater or less than itself, consider'd as the thing measured. And this is the Reason why, when the Prices of almost every thing else have been altered by reason of the Plenty of Money, Gold and Silver have still kept their old Price, an Ounce of Silver being worth a Crown now, as well as formerly. For if the Price of Bullion, like the Prices of other Things, had been *v. g.* quadrupled, an Ounce of Silver now would cost four Crowns, so that little would be got by coining Money.

When therefore the Price of a thing happens to be changed, we must carefully distinguish, whether that Change be made in the Value of the thing, or in the Value of Money. The former happens when, the Plenty of Money standing as it was, the Commodity begins to be more plentiful, or scarce,

[a] *Vid. leg. ubi supra.* [b] Vid. l. i. *D. De contrah. Empt. ubi supra,* "Money is of Use, not so much for its Substance, as "its Quantity." Also l. xlvi. t. 3. l. 94. §. 1. *D. De Solution.* "In Money the Species is not so much consider'd as the Quan- "tity. [c] *De Rep.* l. vi. c. 2. p. m. 1028. [d] *Add. Val. Max.* l. iv. c. 3. §. 12.

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[1] This is not the Sense of *Grotius*: But this great Man means, as *Gronovius* explains him, and as it will appear easily by attending to his Words, and the Sequel of his Discourse, That, if Money be capable of an Equivalent, 'tis not only because we may give Dollars, for Example, for Pistoles, or Pieces of fifteen or thirty Souses for Dollars, but because we may give Money for Corn, Wine, &c. for, says he, we must pay, unless we have otherwise agreed, for Things as much as they are worth at the Time and Place of Payment. *Quæ æstimatio, si aliud non convenerit, facienda erit tempore & loco solutionis.* 'Tis another thing to say, that we must have regard in Exchange to the intrinsick or extrinsick Value of the Species, which happen'd since the Beginning of the Debt: This Question shall be handled a little lower, ch. vii. §. 6, 7. The Author doth not speak here, at least directly, of the Value of Money, with respect to the Rareness or Abundance of other things. He speaks only of it in short, at the End of the Paragraph, when he explains the Words of *Michael* of *Ephesus*, a Commentator on *Aristotle*.

[2] Mr. *Hertius* quotes a *Flemish* Historian, who relates, that the City of *Arnheim* gave a splendid Entertainment to a Duke call'd *Arnaldus*, with his Dutchess, and an hundred and sixty six of his Retinue, at no greater Expence than fifty seven Dollars of that Country Money. *Jo. Isaac Pontanus*, in his *Hist. of Gelderl.* l. ix. Hence it comes, also, that there are Places of publick Employments which have such small Revenues. For Salaries, also, remain in the same State that they were appointed two or three hundred Years ago, not considering that a thousand Dollars now are of little more Value than an hundred were then.

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than uſual; the latter, when, the Commodity remaining as uſual, the Plenty of Money has increas'd, or decreas'd. Thus, when in a plentiful Seaſon I can buy a Buſhel of Wheat for one Crown, which in a Dearth I cannot have under three; the Reaſon is, becauſe the Value of Wheat, and not of Money, is changed; but when a Farm now lets for two hundred Pounds, which an Age ago let but for an hundred; the Value not of the Farm, but of the Money, is altered [a]. But although Money admits of vaſt Changes, and a common Meaſure ought to be fixed and unalterable, Money nevertheleſs is capable of being made a common Meaſure. For this Change in Money is never ſo ſudden, as in other Things, which depend very much upon the Uncertainties of the Weather, Storms, and other Caſualties; but the Value of it is leſſened by ſuch inſenſible Degrees, that we do not perceive it, while it decreaſes, but, after a long Time, find that it has decreaſed [b].

[a] "The royal Treaſure being brought into the City at the *Alexandrian* Triumph, cauſed ſuch a Plenty of Money, that the In-" tereſt of it ſinking very much (*Oroſius* ſays Half in Half) the Price of Land was raiſed." *Sueton. Auguſt.* 42. *Add Joſeph. De Bello Judaico,* l. vi. c. 32. *Franc. Lopez. de Gomora, Hiſt. Gen. Ind.* c. 117. [b] *Add. Jac. Godofredi Diſſert. De mutatione & augmento Monetæ aureæ.*

CHAP. II.

Of Contracts in general, that preſuppoſe the Price of Things.

I. *The Difference between Bargains and Contracts, according to Mr.* Hobbes.
II. *According to the Interpreters of the* Roman *Law.*
III. *Some Advice about what they have delivered.*
IV. *Our Opinion about the Difference.*
V. *Contracts are divided into ſuch as oblige;* 1. *One Party only; and* 2. *ſuch as oblige both Parties.*
VI. *And into real, of bare Conſent, verbal, and in Writing.*
VII. *In ſome particular Name, and without a Name.*
VIII. *Beneficial and chargeable.*
IX. *How many ſorts of chargeable Contracts.*
X. *Of mixed Contracts.*

I. WE come now to treat of ſuch Contracts as preſuppoſe Property and Price. And firſt, We will enquire into the Difference between *ſimple Pacts*, and *Contracts*. *Hobbes* [a] defines a Contract to be *the Action of two, or more, making over their Right to one another. But ſince in every Contract either both Parties perform their Bargain upon the Spot, ſo as neither truſts the other; or one performs, and the other is truſted; or neither performs, but each truſts the other:* To the firſt of theſe only he gives the general Name of *Contract*. The other two Sorts, where either one or both Parties are truſted, he calls *Pacts*. But this Difference does not concern the intrinſick Nature of *Contracts* and *Pacts*, but regards the Execution of them only: And it is againſt common Senſe, that a Sale, *v. g.* where the Goods are delivered for ready Money, ſhould be called only a *Pact*.

II. The *Roman* Lawyers almoſt all agree in making *Pact* the general Term which comprehends all the Affairs, wherein Men are concerned with one another, and they define it in general to be [1], *The Agreement of two or more in the ſame Thing*. Then they divide *Pact* into *Pact properly ſo called*, and *Contract*: The former is, *when the Object is ſome Matter of no Conſequence, and, in its own Nature,* [2] *incapable of bearing an Action in the civil Court.* This they again divide into *ſimple Pact*, and not *ſimple*; which latter they again ſubdivide into [3] *legal* and *additional*. They ſay farther, That an Agreement may become more than a *ſimple Pact*, either by its own intrinſick Nature, or by the external Confirmation of the Law; for it is *that* that properly renders Agreements *legal Pacts*. Moreover, they tell us, that this intrinſick Nature may be of two Sorts, for ſome do not retain the general Name of Agreements, but are called by ſome [4] particular Name of Contract; others, although of no particular Denomination or Form, yet exceed the Limits of *ſimple Pact*, by having a Matter of

[a] *De Cive,* c. 2. §. 9.

[1] *Pactum autem à pactione dicitur* ——— *Et eſt Pactio duorum, pluriumve in idem placitum conſenſus. Conventionis verbum generale eſt, ad omnia pertinens, de quibus negotii contrahendi tranſigendive cauſa conſentiunt, qui inter ſe agunt.* Digeſt. l. ii. tit. 14. De Pactis, l. 1. §. 1, 2, 3. Cujacius's Obſerv. l. ii. c. 15.

[2] *Nec obeſſe tibi poterit, quod dici ſolet, Ex pacto actionem non naſci.* Cod. lib. ii. tit. 3. De Pactis, leg. 10. *Nam ſi conventio, placiti ſine ſtetit, ex nudo pacto perſpicis actionem jure noſtro naſci non poſſe.* Lib. iv. tit. 65. De Locato & Conducto, leg. 27. But ſimple Conventions always afford a valid Exception, as our Author obſerves in the next Paragraph; I mean, That when a ſimple Promiſe is made to any one, to require nothing of him, or not to ſue him at Law, which we had a Right to do, if, after that we bring an Action againſt him, we have debarred ourſelves immediately of our Action, although the Agreement was not confirmed by an Engagement in Form, and the Defendant has done nothing on his Part to free himſelf from it. *Sed cum pactum conventum exceptionem perpetuam pariat,* &c. Digeſt. l. xx. tit. 6. *Quibus modis pignus, vel Hypotheca ſolvitur,* leg. 5. princip. *Igitur nuda pactio obligationem non parit, ſed parit exceptionem.* lib. ii. tit. 14. De Pactis, leg. 7. §. 4. *Si paciſcar ne pro judicati, vel incenſarum ædium agatur, hoc pactum valet.* ——— *Nam & de furto paciſci lex permittit. Sed & ſi quis paciſcatur, ne depoſiti agat, ſecundum Pomponium, valet pactum.* Ibid. §. 13, 14, 15. *Quædam actiones per pactum ipſo jure tolluntur: ut injuriarum, item furti. De pignore jure honorario naſcitur pacto actio, tollitur autem per exceptionem, quotiens paciſcor.* Ne Petam. leg. 17. §. 1, 2. See alſo leg. 27. §. 4. In this there is much Inconſiſtency: For why ſhould a ſimple Contract be of Force to hinder us from obtaining more than what we might otherwiſe lawfully ſue for, rather than give a Right to ſue for any Thing? That which can diſcharge an Obligation, is it not capable of producing a new one? See lib. iii. chap. 5. §. 11. not. 2. foregoing.

[3] *Ubi obiter monendum cordatiores rectè abſtinere à vocabulo* Pactorum veſtitorum. *Non enim quia dicitur, e. g. ex nuda gratiâ, ex nuda benevolentia, etiam dicendum fuerit ex gratia veſtita.*

[4] As that of Sale, Hire, Society, Loan, Pledge, &c. *Conventiones, quæ pariunt actiones, in ſuo nomine non ſtant, ſed tranſeunt in proprium nomen contractus, ut emptio, venditio, locatio, conductio, ſocietas, commodatum, depoſitum, & cæteris ſimiles contractus.* Digeſt. l. ii. t. 14. De Pactis, l. 7. §. 1. See §. 7. following.

[1] Conſequence

[1] Conſequence for the Object of them, as the Performance of a Promiſe, the Delivery of Goods, or the doing of Work; and theſe are properly *Contracts*, which by their own Force effectually oblige, and which, [2] in Juſtice and Equity, bear an Action. Yet they add, that [3] *ſimple Pacts* may be actionable, by Conſent of the Parties; and *Pacts* added to ſuch [4] Contracts as admit of Equity, partake of the Nature and Force of Contracts.

III. But ſince *Pacts* are not, in their own Nature, actionable in the civil Court, and it is our Buſineſs to explain the Force they have in their own Nature, we cannot therefore follow this Diviſion ſo cloſely. For it is evident, that the Law may deny Agreements, even in Matters of Conſequence, an Action in the civil Court [5]. To this Purpoſe, ſays *Strabo*, l. xv. p. 488. in the Beginning, *a Truſt of Charge cannot be recovered by Law; Witneſſes and Seals ſignify nothing, for it is but a bare Truſt.* [6] Sen. de Benef. l. iii. c. 15. wiſhes, *That no Debts had the Benefit of the Law, but were left entirely to depend on the Honeſty of the Party* [a]. But as to what the *Roman* Law ſays, that *ſimple Pacts* admit of no Action, we muſt diſtinguiſh between ſuch as are *affirmative*, and ſuch as are *negative*. The Force of *negative Pacts* (where the Agreement is, not to demand) is both in the Natural and Civil Law not to be productive of, but to exempt from an Action [b]: [7] For ſince they are deſigned in favour of the Debtor, that nothing may be demanded of him, they can be of no other Uſe, than to keep off the Demand of the Creditor, *i. e.* to exempt from an Action. But as for *ſimple affirmative Pacts*, they do not want in themſelves a Power of Obliging [8]. But the Reaſon why the *Roman* Law did not make them actionable, was, to prevent a vaſt Multitude of Law-Suits; eſpecially conſidering that ſome of theſe *Pacts* proceeded from Unadviſedneſs (for elſe they might have been made in Form of Law) and others were of no Uſe, as tending to no Conſequence, when put in Execution. That this is the Signification of the Word *Cauſa*, ſo often made uſe of by the Civilians, is plain from *Plaut. Aſinar.* Act. iii. Scen. 1. ver. 17. *Sola ego in caſteria* [9] *ubi*

[a] See *Grot.* B. ii. c. 18. §. 10.

[b] *Nuda pactio obligationem non parit, ſed parit exceptionem, D.* Lib. ii. t. 14. De Pactis, leg. i. §. 4.

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[1] *Sed ſi in alium contractum res non tranſeat, ſubſit tamen cauſa: eleganter Ariſto Celſo reſpondit, eſſe obligationem, ut puta, dedi tibi rem, ut aliam mihi dares, dedi, ut aliquid facias, hoc συνάλλαγμα*, i. e. *contractum eſſe, & hinc naſci civilem obligationem.* Ibid. §. 2. Conſult upon this the excellent Treatiſe of Mr. *Noodt De Pactis & Tranſactionibus*, where he has thoroughly, and with his uſual Accuracy, explained the Principles of the *Roman* Lawyers. Compare, alſo, my Remark upon *Grotius* (lib. ii. cap. 12. §. 3. not. 8.) on the Subject which the *Roman* Law places (as to the Effect of Obligation) between Contracts without a Name, and thoſe which have a feigned Name.

[2] *Legitima conventio eſt, quæ lege aliqua confirmatur, & ideo interdum ex pacto actio neſcitur, vel tollitur, quotiens lege vel Senatuſconſulto adjuvatur.* De Pactis, Leg. 6. Hence it is, that by the Prætor's Edict a Mortgage was good and valid, although it was founded upon a ſimple Contract only. See the ſame Title of the *Digeſts*, leg. 17. §. 2. and Mr. *Noodt*'s *Probab. Jur.* l. ii. c. 8. It is the ſame, when a Man ſimply promiſes to give ſo much in Portion with his Daughter. See *Cod.* l. v. t. 11. *De Dotis Promiſſione & nuda Pollicitatione*, leg. 6. I ſhall alledge but one Example more, and that is of Gifts among Perſons living: For the Emperor *Juſtinian* ordained, That though one had not delivered a Thing, of which he had promiſed to make a Preſent, nor was under any Engagement in Form, he ſhould nevertheleſs be obliged in Juſtice to keep his Word ſtrictly. See *Cod.* lib. viii. t. 54. *De Donationibus*, l. 35. §. 5. The End of this Law plainly ſhews (to mention it by the bye) that it was made at the Requeſt of the Clergy, who were always mindful of their Intereſts, that they might ſecure to themſelves all the Gifts which they could any ways obtain; for he treats thoſe as impious, who retracted, after they had promiſed to give ſomething to pious Uſes, or to the Clergy, and threatens them with divine Vengeance, TANTOQUE MAGIS HÆC FIRMA ESSE, *ſi piis actibus, vel* RELIGIOSIS PERSONIS, *donatio deputata ſit——ne in præfatis* [*piis*] *cauſis, ex quibuſdam machinationibus, non ſolum indevotus, ſed etiam* IMPIUS DONATOR *intelligatur*, POENASQUE *non ſolum legitimas, ſed etiam* COELESTES EXPECTAT, &c.

[3] *Hæc verba* (*Rogavit Titius, ſpopondit Mævius*) *non tantùm pactionis loco accipiuntur, ſed etiam ſtipulationis. Ideoque ex ſtipulatu naſcitur Actio.* Ibid leg. 7. §. 12. See §. 5. n. 1. following.

[4] Provided, ſay they, that they have been added ſoon after the Concluſion of the Contract; for it is not the ſame if they be added ſome time after *Solemus enim dicere pacta conventa ineſſe bonæ fidei judiciis; ſed hoc ſic accipiendum eſt, ut ſi quidem ex continenti pacta ſubſequuta ſunt, etiam ex parte actoris inſint: ex intervallo non inerant.* Ibid. §. 5. See what is ſaid §. 8. following, and ch. 10. §. 7. As to Contracts of ſtrict Right, ſimple Conventions, though made on the Spot, make no Part of a Contract, nor afford an Action in Juſtice, though they ſtrengthen an Engagement. But when they leſſen it, they enter into the Contract, and yield the Defendant an Exception valid in Law. See Mr. *Noodt*'s Treatiſe ſo often quoted, *De Pactis & Tranſact.* cap. 11, 12, & *ſeqq.*

[5] This Paſſage may be explained by another of *Nicholas Damaſcenus*, related by *Stobæus*, Serm. xlii. Παρ' Ἰνδοῖς ἐάν τις ἀποστερηθῇ δανείου, ἢ παρακαταθήκης, οὐκ ἔστι κρίσις, ἀλλ' αὐτὸν αἰτιᾶται ὁ πιστεύσας. Among the *Indians*, if any refuſe to reſtore Money lent, or a Pawn, the Creditor, or he that has truſted the Pawn, has no Action at Law againſt the Debtor, or Perſon who hath been truſted, but he muſt blame himſelf for truſting another. Which *Perizonius* explaining, ſays, They only imply, that theſe kinds of Suits were rare among the *Indians*. But there is a ſtronger Paſſage in the ſame Book, where *Strabo* ſays, upon the Credit of *Oneſicritus*, That thoſe who inhabit in that Part of the *Indies* that is ſubject to *Muſicanus*, had no Actions at Law but for Murder and Injuries, Δίκην δὲ μὴ εἶναι, πλὴν φόνου καὶ ὕβρεως· And that for two Reaſons; 1. Becauſe no Man can be aware of the Inſolence of another, ſo as to prevent Deception in Contracts: And, 2. Becauſe the State ſhould not be troubled with Multitudes of Law-Suits, as the *Greek* implies, Οὐκ ἐπ' αὐτῷ γὰρ τὸ μὴ παθεῖν ταῦτα· τὰ δ' ἐν τοῖς συμβολαίοις ἐπ' αὐτῷ ἑκάστῳ, ἀνέχεσθαι δεῖ, ἐὰν τις παραβῇ τὴν πίστιν, ἀλλὰ καὶ προσέχειν, ὅτῳ πιστευτέον, καὶ μὴ δικῶν πλήρεῖν τὴν πόλιν. This plainly ſhews, that it was a publick Eſtabliſhment to eaſe the Judges of many troubleſome Cauſes, and not the bare Effect of the Probity and Honeſty of private Perſons in fulfilling their Contracts; and ſo the οὐκ ἔστι κρίσις of *Damaſcenus*, and δικὴν μὴ εἶναι in *Strabo*, ſignify. But this is farther confirmed by *Ariſtotle*, who ſays, in *Ethic. ad Nicomach.* l. viii. c. 15. Διὸ παρ' ἐνίοις τάττων οὐκ εἰσὶ Δίκαι· And again, Ἐνιαχῆ τ' ΕΙΣΙ ΝΟΜΟΙ, τῶν ἑκουσίων συμβολαίων ΔΙΚΑΣ ΜΗ ΕΙΝΑΙ, lib. ix. c. 1. See *Grotius*, lib. ii. c. 17. §. 10. and *Cujacius*'s *Obſerv.* l. xi. c. 9. Moreover, in *Ælian.* l. iv. c. 1. we find, that among the *Sardians* there was a Law, importing, that they could bring idle Perſons to Juſtice, and make them give an Account how they lived, in theſe Words, Ἀργίας ἦσαν δίκαι, καὶ τὸν εἰκῇ ζῶντα ἔδει κρίνεσθαι, καὶ διδόναι τὰς εὐθύνας, ἀποδείκνυντα, ὅθεν ζῇ.

[6] *Seneca*'s Wiſh is good, and becoming a Philoſopher; but to aboliſh all Conſtraint to perform all voluntary Engagements, is impracticable in any State, as Things are, and cannot have Place but in an *Utopia*; as, indeed, *Seneca* owns, ſaying, *Sed neceſſaria optimis prætulerunt*, &c. Things neceſſary muſt be uſed inſtead of the beſt. See l. iii. c. 4. §. 6.

[7] See §. 2. Note 2. above.

[8] See l. iii. c. 5. §. 11. Note 2. above.

[9] *Plautus*'s Words are miſunderſtood by our Author; the true Senſe of them is, "All the Revenues, by which I maintain my "Family, muſt ceaſe, if I do not trade in my Art." See *Gronovius*'s *Obſervat.* l. iv. c. 26. Moreover, when the *Roman* Lawyers ſay, A Contract without a Cauſe obliges not; they do not underſtand ſimply by the Word *Cauſe*, an Affair that brings ſome Profit to one or other of the Contractors, but, a Thing actually made or given in the ſight of another, to whom we are engaged, without examining whether it be profitable or not. See Note 2. above. So when one ſays, I give you this, that you may give me that, or that you may do that for me; this is a Contract: But if one ſays, I will give you this, provided you will give me that; this

ubi quiesco omnis familiæ causa *consistit*, i. e. *omne emolumentum quod ex familia capis.* Thus, if any should agree, not to wash their Hands, or comb their Head, or change their Linen for such a Time (as some Slovens have done) what need would there be to trouble a Magistrate upon the Breach of such Agreements? Which, indeed, are scarce allowable by the Law of Nature [1].

IV. In my Opinion, the Difference between *Pact* and *Contract* may be best taken from the Object, so as to call that [2] *Contract*, which concerns those Things and Actions that are the Subject of Traffick, and so presuppose Property and Price; and that *Pact*, by which we covenant about other Things. By this means *Pacts*, strictly speaking, will take in all negative Agreements, by which we covenant not to do, or not to demand, what otherwise we might do or demand: As, also, those Agreements that have for their Object the Exercise of our natural Faculties, so far as they barely tend to the promoting mutual Profit and Advantage, considered meerly by themselves, without any regard to Price, or any valuable Consideration; in a Word, when we agree to do some Work that is not mercenary: Though some Agreements there are, which, not being conversant about Things, may indifferently be called either Pacts, or Contracts, as that of Matrimony [3].

V. All Contracts may be divided into three Sorts, First, [4] Those that lay an Obligation upon one Party * only, which Condition cannot be [5] changed by any Thing *ex post facto*; as in the Loan of a consumable Commodity, and [6] Stipulation. Secondly, Those that equally oblige both Parties †, as in buying and selling, letting and renting, Partnership, *&c.* Thirdly, Those of a middle Nature, as the Loan of a Thing not consumable, a Trust, a Pledge, *&c.* which naturally, as appears from the principal End of the Contract, oblige me only that am the Receiver; nor can they originally affect the Giver. But Accidents may fall out so as to lay an Obligation upon him also; as if I should be at necessary Expences for the thing, or suffer Damage by it, for which the Owner ought to be answerable. In this Case the Expences are to be repaired, and the Damage made good.

VI. Again, the *Roman* Lawyers frequently divide Contract [7] [a] into *real*, *consensual*, *literal*, and *verbal*. The *real* is so called, not because it is conversant about some real thing, for all Contracts are so; but because [8] a Pre-delivery of some real Commodity is necessary to intitle us to a Demand of that, which gives this Contract its Denomination [b]. Thus I must have received something of my Creditor, before I can stand obliged as a Debtor [c]: Nor can a Trust, or Loan be demanded, before it has been delivered to me. But, by the way, the Contract of lending is one thing; a Pact, or Promise to lend, another. A Trust, one thing; a Promise to take in Charge, another.

Consensual are so called [9] [d] (not because they alone require the Parties Consent) but because they immediately oblige, upon each Party's declaring his Consent by proper Signs. Nor is it necessary, that one thing should be first delivered, or some Work first done.

A *verbal* Contract, or Stipulation, [10] [e] as it consists in usual Forms of asking and answering Questions, is unknown to the Law of Nature.

Nor is it more agreeable to that Law, that a Man who has not received a Thing, should be obliged by bare *Writings* [11] [f] as much as if he had. But

* μονόπλευρος. † Δίπλευρος. [a] *Obligationum quæ ex contractu sunt, quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu*, Instit. l. iii. t. 14. *De Obligat.* [b] Vid. l. ii. t. 14. . 17. *D. De Pactis.* [c] Add. *Val. Max.* lib. viii. c. 2. §. 2. [d] Vid. *Institut.* lib. iii. t. 23. *De Obligat. ex consensu.* [e] Vid. *Institut. ubi supra*, t. 16. [f] Vid. *Institut. ubi supra*, t. 22.

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this is an Agreement without a Cause. And yet there is the same Advantage in both these Agreements. See *Vinnius* upon the *Institutes*, lib. iii. t. 14. §. 2. It is in this Sense, almost, that the Word *Causa* ought to be taken, when we speak of a personal Action, for a Thing given, and the Cause follows not: *Condictio causâ datâ, causâ non secutâ.* In fine, it is certain, that in the *Roman* Law, when we say, for Example, that we ought to restore the Goods of another, with the Fruits and Revenues that the Proprietor hath received from them, we make use of the Word *Causa*: *Nec enim sufficit, corpus ipsum restitui, sed opus est, ut & causa rei restituatur*, Digest. l. vi. t. 1. *De Rei vindicatione*, l. 20. And so we must understand it in t. 1. l. 22. *De usuris, & fructibus, & causis*, &c.

[1] See what I have said Note 6. pag. 270.

[2] Every Man is at liberty to distinguish and range his Notions, as he thinks proper. But, in truth, there is no Difference in the main between Contracts and simple Agreements, according to the Law of Nature alone.

[3] The *Roman* Lawyers do not nevertheless give the Name of Contract to Marriage, as Mr. *Hertius* observes, though they say, *Contrahere Matrimonium*, Digest. l. xxiii. tit. 2. *De Ritu Nuptiarum*, leg. 22. But the Agreement made upon the account of Marriage, as to what concerns Goods, may form a Contract, according to the Sense of the *Roman* Law, and the Definition of our Author. Whence it is, that *Justinian*, Novel cxix. c. 1, puts a Gift upon the account of Marriage among private Contracts.

[4] This Division is not found formally in the *Roman* Law; but there is a Law, *Digest.* lib. l. t. 16. *De verborum Signif.* leg. 19. which seems to intimate, that every Contract, properly so called, is obligatory to both Parties. But see *Vinnius* upon the *Institut.* l. iii. t. 14. §. 2. Or rather the great *Cujas*, from whom this Solution is borrowed.

[5] To understand this, we ought to read what the Author says a little lower of *mixt* Contracts. See *Vinnius* on the *Institutes*, l. iii. t. 15. §. 2. num. 2.

[6] In a Stipulation one of the Contractors must demand, and the other answer positively, after this manner: Dost thou promise to give me, or do such or such a Thing for me? Yea, I do promise it. *Verbis Obligatio contrahitur ex interrogatione & responsione, cùm quid dari fierive nobis stipulamur.* ——— *In hac re olim talia verba tradita fuerunt*, SPONDES? SPONDEO. PROMITTIS? PROMITTO. FIDE JUBES? FIDE JUBEO. DABIS? DABO. FACIES? FACIAM. Instit. lib. iii. t. 16. *De verborum obligationibus*, princip.

[7] *Harum* [*Obligationum quæ ex contractu sunt*] *æque quatuor sunt species. Aut enim re contrahuntur, aut verbis, aut literis, aut consensu.* Institut. l. iii. t. 14. *De Obligat.* §. 2.

[8] *Re enim non potest obligatio contrahi, nisi quatenus datum sit*, Digest. l. ii. t. 14. *De Pactis*, l. 17. in princip. See t. 15. of lib. iii. of the *Institutes*, *Quibus modis re contrahitur Obligatio.*

[9] Such are the Contracts of Selling, Hiring, Society, and Commission. *Consensu fiunt obligationes in emptionibus, venditionibus, locationibus, conductionibus, societatibus, mandatis. Ideo autem istis modis obligatio dicitur consensu contrahi, quia neque scriptura, neque præsentia omni modo opus est. At nec dari quicquam necesse est, ut substantiam capiat obligatio, sed sufficit eos, qui negotia gerunt, consentire.* Instit. l. iii. t. 23. *De Obligationibus ex consensu.*

[10] See Note 6. preceding.

[11] Before *Justinian*, Men might, for five Years after the Date of a Note Obligatory, plead and maintain, that he had not received the Money or Goods mentioned; but that Emperor confined it to two Years. See *Instit.* l. iii. t. 22. *De Literarum Obligationibus.*

But yet, there is good Reaſon why this ſhould obtain in the *Roman* Law: For ſince the Magiſtrate cannot be ſatisfied of the Truth of a Debt, but by Inſtruments and other Proofs, when Writings appear owning the Debt, he muſt preſume upon it, till the contrary be proved. Indeed there are no Contracts, but what may be expreſſed in Writing; and this may be done two Ways: For either the Contract may be made, and the Conſent of the Parties declared in Writing; and, in this Caſe, the Contract is then finiſhed, when the Writings are in all reſpects perfected; which obtains chiefly in *conſenſual*, and ſuch ſort of Contracts: or elſe the Writing is only an Evidence of a Contract already finiſhed. Which laſt is to be preſumed, if the Caſe be doubtful [a].

VII. Again, Contracts are divided into [1] *named* and *nameleſs*. The former ſort are thoſe, which by reaſon of their daily Uſe have a particular proper Name aſſigned them, expreſſive of the Form and Contents of the Buſineſs; and which, being mentioned, immediately ſignifies what was done (for although Bartering, which is reckoned amongſt the *nameleſs* Contracts, ſeems to have a Name, yet it is a general one, and does not expreſs, whether it be the Contract of [2] *Goods* for *Goods*, *Buying*, *Selling*, or any other). And, therefore, in the *Roman* Law theſe had certain fixed Forms of proceeding; whereas others of leſs frequent Uſe, containing no more than what was expreſly mentioned, had no proper Form of their own, but one accommodated to the Thing; and therefore an Action, upon Account of theſe was always expreſſed in a certain Form of Words [b].

VIII. The Diviſion of Contracts into † *gainful* and * *chargeable* makes moſt for our Purpoſe, whereof the firſt brings ſome Advantage to one Party *gratis*, as in the Caſe of a Loan, Commiſſion, or [3] Charge. The latter binds both to an equal Share of the Burthen; for here we act, or give, in order to receive an Equivalent. Upon this ſeems to be founded the Diſtinction of Contracts into thoſe that admit of Equity, and thoſe that are tied up to the Rigour of the Law. In *the former* the Magiſtrate has Liberty to weigh and eſtimate the thing, according to [4] Equity and Conſcience; in *the latter* he is obliged, right or wrong, [5] to proceed according to the ſtated Forms of Law. Now Reaſon tells us, that *chargeable Contracts* are of the former ſort, and admit of a more looſe Interpretation in the Courts of Equity; for, ſince the Obligation is mutual, neither Party ought to be over-burthened. But *gainful Contracts* belong to the latter, and do not allow of ſuch a looſe Interpretation, or that any one ſhould be bound to do more than he has expreſly declared; for elſe a

[a] Vid. *Grot.* l. ii. c. 16. §. 30. and hereafter in c. 5. §. 2. *in fin. ibiq. not.*
[b] Vid. *Grot.* l. ii. c. 12. §. 3.
* *Contractus beneficus.* † *Contractus oneroſus.*

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tionibus. The Proteſtation, or Declaration of not receiving, to which the Owner of the Note has recourſe, is called *Querela*, or, *Exceptio non numeratæ Pecuniæ*; and it belongs to him, of whom it is ſaid to be received, to prove that he did really receive it. The Reaſon of it was, as it is expreſſed in the *Code*, becauſe the Denial of a Fact is not capable of a Proof. *Quum inter eum, qui factum adſeverans, onus ſubiit probationis, & negantem numerationem (cujus naturali ratione probatio nulla eſt) & ob hoc ad Petitorem ejus rei neceſſitatem transferentem, magna ſit differentia*, l. iv. t. 30. *De non numerata Pecunia*, leg. 10. May we not ſay, that the Queſtion here is about a Diſpute in the Schools of Philoſophy? And if we examine the Thing well, is it not really the Author of the Note who affirms and maintains the Falſity of the Fact, of which the other is furniſhed with a Proof, reputed valid, till the contrary appears? And by Virtue of which this laſt ought to be ſuppoſed to hold to the Negative, and conſequently is exempted from Proof, according to the Maxim treated on? The deceaſed M. *Coccejus*, in a Diſſertation *De Directâ probatione Negativæ*, publiſhed in 1708, has endeavoured to demonſtrate, that, according to the natural Order of judicial Proceedings, it is his Part who affirms a dubious Fact to prove it. But, I. The Terms of this Law, and of another found in the *Title* of the *Code*, *De Probation.* (*quum ſit rerum naturam factum negantis probatio nulla ſit*, lib. iv. tit. 19. leg. 23.) will no way bear this Interpretation. The Terms are too clear, and too expreſſive to elude the Senſe which preſents itſelf at firſt Sight. II. The laſt Law eſpecially, if explained in this manner, would contain an abſurd Reaſoning, ſince it would be reduced to this: *The Plaintiff who affirms a Fact, ought to prove it.* Why? *Becauſe he who affirms is obliged to prove.* Now this is making an Argument of the Thing itſelf. Whereas, when we ſay (as the Terms manifeſtly ſignify) *becauſe the Negation of a Fact is not ſuſceptible of a Proof*; we have a Reaſon, which, whether true or falſe, is diſtinct from what we would eſtabliſh. III. Thus there is no Way of maintaining, as we do upon this Principle, (Sam. De Coccejii, *Jus Controverſ. Civ.* Tom. I. pag. 573.) That regularly, in the Caſe in Queſtion, the Debtor ſhould prove that he has not received the Money for which he gave the Creditor his Note; but that he is diſpenſed with it, becauſe the Preſumption is here againſt the Poſſeſſor of the Note. It is not upon this Preſumption that the Difference is founded in leg. 10. *De non numeratâ pecuniâ*, but upon the general Reaſon alledged in leg. 23. *De probationibus.* As to the Preſumption itſelf, it is drawn from this, that the Creditor is not accuſtomed to pay his Money before he receives his obligatory Note, which the Debtor is often obliged, by his Neceſſity, to put into his Hands before he advances the Sum. But to this we may oppoſe ſeveral Objections equally ſtrong. However wary and poſitive a Creditor may be, is it not enough he keeps his Money till he receives the Note? That may be drawn up and ready to give him before he pays the Sum. Or if it be not, it does not take up much Time. It may, alſo, happen that the Money may be paid without Witneſſes, and that a diſhoneſt Debtor may take Advantage of this to defraud the Creditor, and the rather, as the Space of Time granted the former to maintain that he has not received the Money, and thereby oblige the other to prove it is a little too long. However this be, from all this it appears that our Author here does not rightly repreſent the Notions and Maxims of the *Roman* Law; ſince he ſuppoſes that he who has given an obligatory Note may, and ought to prove, that he has not received the Money: Which has no Place, neither during the two Years that the Obligation is without Force, nor after that Time, beyond which all Remedy is taken away. He can therefore oppoſe nothing to the Demand of him, who confeſſes to have received the Money. I am ſurprized that this Inaccuracy of our Author has not been remarked by Mr. *Hertius*, who maintains otherwiſe in the Place he refers to, that the *Roman* Law, in this Caſe, is widely different from the Simplicity of the Law of Nature.

[1] See the Notes on §. 2. above.

[2] As for Example, if we give a Thing to a certain Perſon to ſell for us, upon Condition that he ſhall keep to himſelf all that he gets above a certain Price ſet him. This is a Contract without Name, which yields an Action in a Form preſcribed. *Cùm deficiant vulgaria atque uſitata actionum nomina, præſcriptis verbis agendum eſt, in quam neceſſe eſt confugere, quotiens contractus exiſtant, quorum adpellationes nullæ jure civili proditæ ſunt. Naturâ enim rerum conditum eſt, ut plura ſint negotia, quàm vocabula——Si tibi rem vendendam certo pretio dediſſem, ut quò pluris vendidiſſes, tibi haberes, placet neque mandati, neque pro ſocio eſſe actionem, ſed in factum, quaſi alio negotio geſto*, Digeſt. l. xix. t. 5. *De præſcriptis Verbis, &c.* leg. 2, 3, 4, 13. princip. Laſtly, As to what concerns the Nature of Contracts without Name, ſee Mr. Mr. *Titius* on *Lauterbach*, Obſ. 620.

[3] See *Digeſt.* l. xix. t. 4. *De Rerum permutatione*, leg. 1. §. 2.

[4] Our Author has forgot to mention *Donations made by living Parties*, as well in Chap. iv. as in this; but Mr. *Barbeyrac*, in his firſt Note upon the firſt Sect. of that Chapter, has ſupplied this Defect.

[5] *Tantundem in bonæ fidei judiciis officium judicis valet, quantum in Stipulatione nominatim ejus rei facta interrogatio*, Digeſt. l. iii. t. 5. De negotiis geſtis, leg. 7. Moreover, in the *Roman* Law, the Number of honeſt Contracts, called, *Bonæ Fidei*, is not determined clearly, though we find an Enumeration of them in the *Inſtit.* l. iv. t. 6. *De Actionibus*, §. 28, 29. nor do the Interpreters agree about them. See *Titius* in *Lauterbach.* Obſerv. 1148, *&c.*

Man's

Man's Generosity might prove too great a Burthen to him [a 1].

IX. All *chargeable Contracts* are reducible to four Heads; First, [2] † *Goods for Goods*; Secondly, * *Work for Work*; Thirdly, ‖ *Goods for Work*; Fourthly, *† *Work for Goods*. Where the Word *Work* is taken in a large Sense, so as to comprehend even the *Deed* of another Man. *Grotius* [b] admits of but three, leaving out *Goods for Work*; for that, he thinks, falls in with *Work for Goods*; and indeed there is no real Difference between them, for both express that Goods and Work are barter'd for one another: But in one, the Contract in a manner begins upon the Delivery of the Goods; in the other, upon doing the Work. So that in the one the Doer seems the Author of the Contract; in the other, the Giver: For in some Contracts, tho' both sides are equally obliged, yet they take their Rise from one only; as in *buying*, the Buyer begins the Contract; in *letting*, the Tenant, *&c.*

To the *first Head* belong all those Contracts, where one Thing is exchanged for another, as in Bartering strictly so call'd. Where we may observe a Distinction nice enough, which some make between the general Contract of *Goods for Goods*, and *Bartering*. The *former* is, when the Things exchanged are indefinite, as an Ox for a Mule; or where, at least, one Part is so; as a Horse for this particular Ox; Oil for Corn in general. But when the Goods in Contract are determined, *v. g.* this Ox for this Horse, it becomes *Bartering* [c]. Hither may be referred the giving Money for other Money of different Species, or in a different Place; which is now call'd *Exchange* [d]. Sometimes indeed Money is given for Money, so as to make it perfectly Buying and Selling; as the Money stamp'd with Victory, which *Pliny* [e] tells us, before it had received that Stamp [3], was accounted a Commodity. If Goods are given for Money, the Contract is call'd *Buying* and *Selling*. Sometimes the Use of a Commodity is given for a Commodity, as if I lend my Horse for a Book. Sometimes the Use of one Thing for the Use of another, as if I let you live in my House, upon Condition that you let me enjoy your Land. Sometimes the Use of a Thing for Money, which is properly called *Letting* and *Renting*. Some Things too we give, in order to receive as much of the same sort some Time after.

Of the *second* Head, *Work for Work*, there are innumerable sorts, according to the infinite Variety of useful or pleasant Actions, which may, in a manner, be exchang'd and perform'd for one another. In *Amm. Marcellinus*, l. xvi. c. 10. this sort of Contract is call'd *Pactum reddendæ vicissitudinis* And in *Apuleius* in Apolog. *Mutuarias operas cum vicinis cambire* [3].

To the *third* sort, *Goods for Work*, belong the letting-out, or hiring Work, or Day-labour for Money, as, also, that sort of Contract, by which Goods are secur'd and freed from Danger for Money, which is call'd *Insuring*. As, also, when any Commodity, consumable or not consumable, is given for the Performance of any Work.

To the *fourth* Head, *Work for Goods*, belong those Contracts, by which any Work is done for any thing, or for the Use of any thing, or such like [f]. Besides, there may be Contracts not reducible to any of these Heads, as implying Disjunction [4 5]. Such as were the nuptial Donatives among the *Muscovites*, of which *Sigismund* Baron of *Haberstein* gives this Account: *Those that are invited to the Wedding, present the Bride; all the Presents the Bridegroom marks, and lays up carefully; when the Wedding is over, he reviews them, and those that he likes, he sends to the Market to be priz'd; all the rest he returns back with Thanks. Those that he keeps, he makes amends for, at the End of the Year, according to the Value of them, either in Money, or something equivalent. If any one puts a greater Value upon his Gifts, the Bridegroom appeals to the sworn Appraisers, and forces him to stand to their Valuation. But if, in a Year's time, he does not make a Return, or send back the Gift, he is fined double. And if he forgets to have it valued by the sworn Appraisers, he is forced to repay it at the Value of the Giver. And this Custom the common People observe in all sorts of Donatives.* The same thing is related of the Presents the *Persians* give liberally to Strangers [h]; for which, if they do not receive a greater Return, they not only complain, but often revoke what they had given, or the Value of it.

All these sorts of Contracts have this in common, that when they are perform'd on both sides, the Parties have no longer any thing to do with one another upon this Score. And therefore [5] *Grotius* [i] calls them *Diremtorii*, and opposes them to those Contracts which he calls *Commutatorii*, the Completion of which consists in having Dealings continued

[a] Add. *Arn. Vinnius* ad §. 28. *Instit. de Actionibus*, l. iii. t. 4. † *Do, ut des.* * *Facio, ut facias.* ‖ *Do, ut facias.* *† *Facio, ut des.* [b] In the aforesaid Place. [c] Vid. *Mornacium ad* lib. v. *D. De præscriptis verbis.* [d] In Latin *Cambium*, in Greek Κολλυβὸς. [e] Nat. Hist. lib. xxxiii. c. 3. [f] Vid. *Totum*, t. 5. l. 19. *D. De præscript. verbis.* [g] As also the *Contractus æstimatorius, de quo vid.* l. xix. t. 3. *D. De æstimatoria actione.* Add. *Plaut. Captiv.* Act. ii. Scen. 3. ver. 18, *&c.* [h] Vid. *Petrum della Valle, Itin.* Part ii. Epist. 1. [i] In the aforesaid Place.

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[1] This goes so far, that if we require, for Example, one Dollar more than appears to be due, we lose our Cause. *Hic tu si amplius HS nummo petitisti, quàm tibi debitum est, causam perdidisti, propterea, quod aliud est Judicium, aliud Arbitrium*, Cicer. Orat. pro Q. Roscio Comœdo, c. 4. *Si quis agens, intentione suâ plus complexus fuerit, quàm ad eum pertineat, causâ cadebat*, i. e. *Rem amittebat: nec facile in integrum restituebatur à Prætore, nisi minor erat viginti quinque annis*, Instit. l. 4. t. 6. *De Actionib.* §. 33. See *Plautus*'s *Mostellar.* Act iii. Scen. 1. §. 123. *Sueton. Claud.* c. 14. *Seneca, ep.* xlviii. *init.* Moreover, this nice Exactness proceeded from this, because those who had the Cognizance of Civil Affairs were commonly inferior Judges, whose Power was limited by the *Prætor*. See Mr. *Noodt*'s curious Treatise *De Jurisdictione & Imperio*, lib. i. c. 13. And what I have said in my Dissertation on the Benefit of the Laws, pag. 30. *& seqq.*

[2] So the *Digests* distinguish them, *Totius ob rem dati tractatus ——— in his competit speciebus. Aut enim do tibi, ut des; aut do, ut facias; aut facio, ut des; aut facio, ut facias*, l. 19. t. 5. *De Præscript. Verb.* &c. l. 5. princip.

[3] See Mr. *Noodt*'s *Probabilia Juris*, l. iv. c. 4. where he recites a Law of the *Digest.* lib. xii. t. 4. *De conditione causâ datâ, causâ non sequutâ*, leg. ult. which being corrected by an happy Conjecture, which he proposes, shews, for Example, that the Lawyers looked upon it as an Exchange, and not a Sale, to give foreign Money for a Slave. See, also, *Bern. Brisson. select. Antiquit.* lib. i. c. 8.

[4] The last of these speaks of those who went up and down to do Husbandry Work the one for the other. *Ego adeo servos tu an habeas ad agrum colendum, an ipse mutuarias operas cum vicinis tuis cambias, neque scio, neque laboro*, Apolog. p. 20. cum notis Pricæi. And *Am. Marcellinus* treats of certain auxiliary Troops, hired on Condition of assisting as long as there is need. *His sequebantur potestate proximi reges numero quinque, regalesque decem, & optimatum series magna, armatorumque millia triginta & quinque, ex variis nationibus, partim mercede, partim pacto vicissitudinis reddendæ quæsita*, l. xvi. c. 12.

[5] This is, when one trusts a Thing to another to sell at a certain Price, on condition, that he either returns the Thing again, or

continued between the Parties, as in that of Partnerſhip, where, for one another's Advantage, two or more join, either Work or Goods, or Work on one ſide, with Goods on the other. And theſe, together with thoſe which we call *gainful*, are generally *ſimple* Contracts.

X. But ſome Contracts are *mixt*, and, as it were, compounded of two ſorts: as if I deſignedly buy a thing for more than the Value, and ſo give the Overplus of the Price to the Seller; or [1] ſell a thing for leſs than the Value, and ſo give what is wanting of the Price to the Buyer: This is partly Giving, partly Buying and Selling. Thus *Cæſar* ſold vaſt Farms to *Servillia* for a Trifle [a]. If I give greater Wages than the Work is worth, it will be partly Gift, partly Hire: which great Men ſometimes do out of Grandeur, thinking it for their Honour to reward any Man's Work more than it deſerves; and this is partly *Liberality*, partly Contract [b]. And, on the other ſide, a Man may accept of Part of his Wages, and forgive the reſt [c]. If I bargain with a Goldſmith to make me Rings out of his own Gold, it will be partly *Buying*, partly *Hiring* [d]. Tho' ſome look upon it to be only *Buying*; ſince, in buying, we not only pay for the Materials, but for the Workmanſhip too. And there is little Difference whether the thing is already made, or to be made [2]. Nor can I be properly ſaid to hire, where the Perſon of the Workman remains at his own Diſpoſal [e]. When Land is let out for Rent, it is a *mixt* Contract of *ſelling* and *hiring*, tho' the Law of *Zeno* makes it a Species of itſelf. A *Grant by Fee* is ſo far a *gainful* Contract, as being much greater than the *military Service* that is due for it. Indeed, as far as this *military Service* may be exacted for the Protection that the Lord gives his Vaſſal, it partakes ſomething of the *ſecond* ſort of Contract, *Work for Work*; yet that which is the Principal in the Contract, belongs to the *third* ſort, *Goods for Goods*. But if this *Fee* be charged with the Incumbrance of a certain Quit-Rent, ſo far it partakes of Land-renting. Laſtly, *nautick Intereſt*, or what we call *Bottomry*, which vaſtly exceeds all other common Uſury, is mixt of borrowing and inſuring. But in Partnerſhip, tho' one contributes Money and Work, another only Money, yet it does not ſeem to be a *mixt* Contract. For it does not become mixt from the different Performances (for if I hire a Man to dig in my Vineyard, to ſow my Ground, and plant my Orchard, it is all but the ſimple Contract of Hiring) but from our Agreements in Matters of a different Nature, by one and the ſame Covenant.

Grotius [f] is of Opinion, that a Contract becomes *mixt* by the *Acceſſion of one Act to another*, as in Suretiſhips and Pledges. But in this he ſeems not ſo very accurate; for a third Species muſt reſult from a Mixture properly ſo call'd: Whereas in Suretiſhip the Security is not mix'd with the principal Contract, but is only added to it, as an extrinſick Confirmation. For the giving Security makes no Alteration in the Debt; but only makes Proviſion for the Creditor, in caſe the principal Debtor ſhould prove inſolvent. However, to ſpeak more accurately, there are in Suretiſhip two Contracts, which ſeem to be but one, becauſe the ſame Surety hath to do with both Creditor and Debtor; for there paſſes but a bare Promiſe between the Surety and the Creditor; and yet, ſtrictly ſpeaking, that Promiſe only ſhews that he is obliged to make good the Debt, and is not that which obliges him; for that which obliges him is the principal Contract, whereby the Surety by his Promiſe has brought an Obligation upon himſelf to ſupply the Failure of the Debtor: So that his Promiſe partakes of the Nature of the Contract itſelf. Now this Suretiſhip is no Gain to the Creditor; for he gets nothing by it, but a proper Means of recovering his own. And altho' his Security is hereby provided for, yet not the Creditor, but the Debtor is beholden to the Surety; for without this Security the Creditor had never enter'd into Contract.

But when the Surety pays the Debt, then there ariſes an Account between him and the Debtor. For in this Caſe [3] he is ſuppoſed to have lent the Debtor the Money, or, which is all one, to have paid it by his Order and Commiſſion. Now this Act of Suretiſhip cannot be reckon'd an Act of Liberality; either in reſpect of the Debtor or Creditor; for the Debtor gets nothing by it, and the Creditor without it had not entered into any Engagement.

CHAP.

[a] *Suetonius Julio*, c. 1. [b] Add. *Matt.* xx. 9, &c. lib. xxvi. 1. 7. l. 12. §. 3. *D. De adminiſtr. & peric. tutorum.* [c] Add. *Val. Max.* l. v. c. 2. §. 10. [d] So ſays *Grotius* in the aforementioned Place, §. 5. [e] Vid. l. xviii. t. 1. l. 20. *D. De contrab. empt.* & Lib. iii. t. 25. §. 4. Inſtit. *De locat. & conduct.* [f] In the aforecited Place, §. 6.

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or the Value, according to the Price ſet on it. *Cum res æſtimata vendenda datur —— æſtimatio periculum facit ejus qui ſuſcepit. Aut igitur ipſam rem debebit incorruptam reddere, aut æſtimationem de quâ convenit*, Digeſt. lib. xix. t. 3. *De Æſtimatoria.* See *Plaut. Captiv.* Act. ii. Scen. 3. ver 18, &c.

5 *Grotius*'s Diviſion is into *Dirimtorii* and *Communicatorii*, and not *Commutatorii*, as our Author has it, which he makes the two kinds of Contracts, which he calls *Permutatorii*. Moreover, there is another conſiderable Miſtake in the Original; for we may obſerve that our Author underſtands *Grotius*'s Words, *Actus permutatorii aut dirimunt partes, aut communionem adſcruut*, as if *dirimere partes* ſignified to divide the Parties or Contractors, and cauſe them to have no Dealings one with another. But *Grotius* was too exact to uſe ſuch a barbarous Expreſſion; for if we examine his Words, we ſhall find his Notion to be this, that theſe ſorts of Acts either regulate the ſeparate Part that each Contractor ought to have, or make the Things about which they treat common.

1 That is to ſay, if the Sum be inconſiderable, in compariſon of the real Value of the Thing, altho' it be much below the true Price. For if one gives, for Example, as much for a Dollar as is worth thirty or forty, then the Gift ſo much exceeds, that it deſtroys the Sale; and if the Diſproportion be yet greater, it can't be call'd a Sale but in Jeſt. This was the pretended Sale practiſed among the *Romans*, when, whatever Price the Goods were of, which one was ſaid to buy, he gave to the Seller, with certain Formalities, a ſmall Price of current Money, which was called, *Nummo addicere*. Alſo *Ulpian* ſays in the Law quoted by Mr. *Hertius*, that a Sale, ſuch as is laſt mentioned, is not good and valid in ſuch Caſes, as there ought to be a true Sale; whereas, when a Man ſells a Thing at a very low Prize, the Sale is valid, and is only looked upon as bordering upon a Gift at leaſt, if it be not between ſuch Men as are forbidden to give any thing to each other. *Si quis donationis cauſâ minori, vendat, venditio valet. Totiens enim dicimus in totum venditionem non valere, quotiens univerſa venditio donationis cauſâ facta eſt; quotiens vero viliore pretio res, donationis cauſâ, diſtrahitur, dubium non eſt, venditionem valere. Hoc inter cæteros, inter virum vero & uxorem, donationis cauſâ venditio facta pretio viliore nullius momenti eſt.* Digeſt. lib. xviii. t. 1. *De contrahendâ Emptione*, leg. 38. See lib. xix. t. 2. *Locati conducti*, leg. 46. & lib. xli. t. 2. *De adquirendâ vel amittendâ poſſeſſione*, l. 10. §. ult. And Mr. *Noodt*'s Commentary on the firſt of theſe Titles, pag. 388.

2 The Words of the Digeſt are, *Nec poſſe ullam locationem eſſe, ubi corpus ipſum non detur ab eo, cui id fieret.*

3 Theſe Fictions of Law are nothing but an empty Circumlocution, uſed unneceſſarily: For the Rules of Equity alone are ſufficient

CHAP. III.

Concerning the Equality which ought to be obſerved in chargeable Contracts.

I. *The Equality to be obſerved in chargeable Contracts.*
II. *The Faults of a thing are to be diſcovered.*
III. *The Nature of a Contract requires it.*
IV. *Whether what concerns not the thing itſelf, muſt be diſcovered?*
V. *The Faults known on both ſides need not be mention'd.*
VI. *No Man is to be ſcared into a Contract.*
VII. *In gainful Contracts Equality need not to be obſerved.*
VIII. *In a chargeable Contract nothing is ſuppoſed to be given.*
IX. *How Inequality not foreſeen is to be corrected.*
X. *Whether Over-reaching in Buying be lawful.*

I. IN all [1] Contracts that are purely *chargeable*, and have nothing of the *gainful* mixt with them, where the Law, or the Market, has fix'd the Prices of Things, an Equality ought to be obſerved; or one Party ought to receive as much as the other; and if one happens to receive leſs, he has a Right to demand the reſt [2]. And this is plain from the End of ſuch Contracts; for therefore a Man enters into them, that for his Goods or Work he may receive an Equivalent; which, for certain Reaſons, he prefers to his own Goods or Work.

But yet this admits of a more accurate Demonſtration; for ſince Contracts are neceſſary for my obtaining thoſe Things which I had no Right to claim; and ſince it is preſumed that a Man gives nothing *gratis*, which he parts with upon Contract: We cannot therefore think, that any one deſigns to give away, by Contract, more than he ſuppoſes he receives; and, conſequently, a Contract can give a Right to another Man's Goods, no farther than as they are equivalent to ſomething which that other Man receives [3].

II. Now to find out and adjuſt this Equality, it is neceſſary that the Parties contracting be each of them alike acquainted with the Commodity and the [3] Qualities of it [4].

[5] *Conſule de gemmis, de tincta murice lana,*
Conſule de facie corporibuſque diem.
Ovid. De Arte amandi, l. i. ver. 250, 251.

And therefore he who is going to make over the Property of a Thing, ought to expoſe, not only the good Qualities, but, alſo, to the beſt of his [6] Knowledge, the Defects and Faults of it; for otherwiſe a juſt Price cannot be aſſigned [7]. To this Place belongs B. xix. t. 1. l. 1. §. 1. *D. De Act. empt. & vend.* L. xviii. t. 1. l. 43. §. 2. *D. De contrab. empt.* As, alſo, the whole firſt Title *De ædilit. edict.* B. xix. Where the Faults are reckon'd up one by one, which ought to be told in Sale of Cattle and Slaves; and which, if concealed, makes void the Bargain: So that the Seller muſt either take his Goods again, which is call'd *Redhibition*, or abate in the Price; but the firſt was not obſerv'd, if the Fault or Ail was inconſiderable. *Res bona fide vendita, propter minimam cauſam inempta fieri non debet*, Dig. l. xviii. t. 1. *De contrab. empt.* l. 54. So Mr. *Noodt* explains this Law very well in his Obſervat. l. ii. c. 11. Add. *Gell.* l. iv. c. 2. [8] *Cicer. Off.* l. iii. c. 16. *It is an Ordinance of the Civil Law, in the Matter of Eſtates, that the Vender ſhould ſtill tell the Purchaſer the Defects or Inconveniencies of the Eſtate; for it being ſufficiently provided by the twelve Tables, that every Man ſhould make good what he promiſes, or declares by Word of Mouth, upon Penalty of double Damages for denying it; the* Civilians *have ſet a Puniſhment upon Concealments too, by enacting, that if the Seller of an Eſtate knew any Fault or Error, without expreſly acquainting the Purchaſer with it, he ſhould be obliged to make it good.* Add the Example that follows in *Cicero*. Ambroſ. de Off. l. iii. c. 10. *In Contracts the Faults of the Commodity ought to be expreſſed; which, if it be neglected, although the Goods*

[a] Vid. *Deut.* xxv. 13, &c. Lib. xlvii. t. 2. l. 52. §. 22. *De furtis.* l. 6. §. 1, 2. *D. De extraord. crimin.* l. xxxii. §. 1. *De leg.* Cornel. *De falſis.*

ſufficient to ſhew, that the Debtor ought to have paid ſooner what the Surety paid for him to do him Service, otherwiſe he was the Cauſe of the Damage. The Surety, as ſuch, is not bound to make the Debtor a Preſent of what he has paid the Creditor. There is no Gift preſum'd in this Caſe, no more than in others. So that the Debtor is oblig'd to repay what the Surety has advanc'd for his Deliverance. See Chap. x. §. 9, *&c.* following.

[1] Here is a plain Overturning of all Order; for our Author does not treat of *gratuitous* Contracts till the next Chapter; and ſo he ought to have treated of *onerous* Contracts, and the *Equality* to be obſerved in them. He is guilty of the ſame Careleſneſs in his Abridgment of the Duties of a Man and Citizen, l. i. c. 5. but I eaſily helped that, by only changing the third and fourth Paragraphs for the ſixth and ſeventh; but ſince I muſt alter two Chapters here to do it, I dare not uſe that Liberty, and ſo have thought it enough to advertiſe the Reader of it.

[2] *Add*, or break off the Contract quite.

[3] That are of any Conſequence.

[4] In *Euripides*'s *Cyclops*, when *Silenus* came to ſell *Ulyſſes* Cheeſe and Milk, *Ulyſſes* bad him bring it out of his Cave; becauſe Contracts ought to be made in the open Day; Ἐκφέρετε. Φῶς γὰρ ἐμπολήμασι πρέπει. ver. 137.

[5] This Paſſage of *Ovid*'s concerns the Prudence of the Buyer, and the Caution he ought to uſe, that he be not cheated, rather than any Obligation the Seller is under to diſcover the Faults of his Goods.

[6] The *Roman* Law requires that it be done plainly, and without any Equivocation. *Dolum malum à ſe abeſſe præſtare venditor debet, qui non tantum in eo eſt, qui fallendi cauſâ obſcure loquitur, ſed etiam qui inſidioſe loquitur, obſcure diſſimulat.* There is alſo another Law to this Purpoſe, which treats of the Services of Inheritances; *Venditor, ſi cum ſciret deberi ſervitutem, celavit, non evadet ex empto actionem; ſi modo eam rem emptor ignoravit. Omnia enim, quæ contra bonam fidem fiunt, veniunt in empti actionem, ſed ſcire venditorem & celare, ſic accipimus, non ſolum ſi non admonuit, ſed & ſi negavit ſervitutem iſtam deberi, cum eſſet ab eo quæſitum.* About this whole Matter conſult Mr. *Domat*'s Civil Laws in their natural Order, l. i. t. 2. §. 11. Part I.

[7] It had better have been ſaid, Otherwiſe the Buyer will not give ſo much. Our Author ſeems to ſuppoſe a Price, below which nothing is to be ſold. But of this ſee what is ſaid §. 9.

[8] *Cicero*'s Words are, *Ac de jure quidem prædiorum ſancitum eſt, apud nos jure civili, ut in his vendendis vitia dicerentur, quæ nota eſſent venditori. Nam cum ex duodecim tabulis ſatis eſſet, ea præſtari, quæ eſſent linguâ nuncupata, quæ qui inficiatus eſſet, dupli pœnam ſubiret, à Juriſconſultis etiam reticentiæ pœna eſt conſtituta. Quicquid enim eſſet in prædio vitii, id ſtatuerunt, ſi venditor ſciret, niſi nominatim dictum eſſet, præſtari oportere.*

be in the Poſſeſſion of the Purchaſer, yet the Bargain may be vacated by an Action of Deceit. (Although what he there ſays of an *Action of Deceit* does not rightly agree with the [1] *Roman* Laws.) *Lactant*, l. v. c. 17. *He who does not correct the Error of the Seller (as ſuppoſe he ſees him deliver, by a Miſtake, a more precious Commodity than was agreed for) or who does not own his Servant to be a Run-away, or his Houſe to be infected, conſulting his own Profit and Advantage, is not a wiſe Man, as* Carneades *would have it, but a crafty Knave.*

Plato [a] makes it a Law, that if a Phyſician buys a Slave, who labours under any incurable Diſtemper of Body, or Mind, he muſt ſtand to the Bargain: But if an unskilful Perſon makes the Purchaſe, the Seller who impoſes upon his Ignorance, muſt be fined double: But if one unskilful Man buys of another, the ſingle Price is to be reſtor'd [b].

III. This Neceſſity of diſcovering the Faults ariſes from the Nature of the Thing, becauſe otherwiſe a juſt Price could not be aſſign'd; and not from the common Bond of Humanity (as if that received a cloſer Tie by Contract) nor from the Contractors [2] entering into ſome ſort of Acquaintance, which may ſeem to oblige them to other Duties than thoſe that are required by the Nature of Contracts; for when the Conditions are performed on both ſides, we don't think ourſelves more obliged to him we dealt with, than to any other Man, tho' indeed ſuch an Occaſion may ſometimes be the means of an Acquaintance and Friendſhip with him. And therefore, it is no Conſequence, that, becauſe it is not againſt the Law of Humanity to conceal a Thing, therefore it is not againſt the Law of Contract. For, if I be not engaged in Contract, I may lawfully conceal from others ſeveral Things, tho' I alone am Gainer by it, which if I ſhould diſcover, other People would ſhare with me. As in caſe I ſhould find a Treaſure in a deſert Place, without any Owner, no Law obliges me to tell another, that he too may partake of it [c] *Vid.* [3] *Matt.* xiii. 44. For here if the Purchaſer had told of the Treaſure, he had not bought the Field ſo cheap. *Vid. Grot.* l. ii. c. 8. §. 7. Hither may be referred the Story of *Anicas*, who firſt diſcovered the *Samoyedes*, and ſettled a Trade with them, related by *Londorpius* in his Continuation of *Sleidan*, *ad an.* 1607. *Cic. Off.* iii. c. 10. ſays well, *That we ought not to neglect our own Advantage, when we can improve it without Injury to another.* For as *Chryſippus* elegantly obſerves, *He who runs a Race, ought to endeavour might and main to get the Victory, yet he muſt not lay Hands on him that he runs with, or uſe any other foul Play. And juſt ſo it is in human Life; any one may lawfully endeavour to better his Condition, but not at the Expence and Injury of another.* *Ambr.* has expreſſed this Paſſage, *Off.* l. iii. c. 4. In Contracts that of [4] *Val. Max.* l. viii. c. 2. §. 1. ought to take place. *A fair Dealer ought, neither to magnify the good Qualities, nor conceal the ill ones of his Commodities.* [5] Hither may be referred that of *Plato de Leg.* l. xi. p. 966. *The Law which provides againſt the Seller's Over-reaching, ought alſo to be extended to the Workman: and therefore he had beſt take heed that he does not rate his Work at more than 'tis worth, for he cannot be ignorant of the Value of it. And certainly it ought to be allow'd, in a free State, that a Workman ſhould make uſe of Art, which is a plain Thing, and far from Deceit to impoſe upon the unskilful.* Hither too may be apply'd that which [6] *Socrates* ſays he heard of *Aſpaſia*, *Good Match-makers, that are ſincere in their Commendations of others, do good in making Alliances between Families; but thoſe that are falſe, do no good in commending. For when the Parties are undeceived, it ſo happens that they hate one another; and thoſe too that were inſtrumental in the Match.* Xen. Mem. l. ii. p. 439. *Ed. H. Steph.*

IV. But as it cannot be doubted but the Faults of the Thing itſelf ought to be declared; ſo whether circumſtantial Matters, which tho' they be not of the Subſtance of the Thing itſelf, yet help in the juſt prizing of it, ought to be laid open, both on the ſide of the Buyer, and of the Seller, has been controverted among the Antients. [7] *Cicero* [d] has

[a] *De LL.* l. xi. p. 965. *Ed. Wech.* [b] *Plato* in the ſame Place, "Let no Commendation or Oaths attend upon the Sale "of any Commodity." [c] See above, B. iv. c. 6. §. 13. and Mr. *Barbeyrac*'s ſecond Note upon this Section.
[d] Off. l. iii. c. 12.

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[1] But ſee Mr. *Noodt*, *De forma emendandi doli mali*, where he proves the Contrary.

[2] Our Author ſeems here to refer to *Grotius*, tho' he names him not; but he miſtakes his Senſe: For that great Man ſays, l. ii. c. 12. §. 9. 'That there is between Bargainers a more particular Society, than that of Men in general, which only ſignifies, that they who deal together, engage themſelves thereby to certain Things, to which they are not obliged as Men; becauſe, as he ſays a little lower, Contracts are made for the mutual Advantage of the Contractors. But we muſt not infer from hence, either that theſe Engagements extend farther than the Nature of a Contract; or, that beſides this Contract, the Contractors, as ſuch, are obliged to one another in any other Thing, more than thoſe who never had any Dealings one with another.

[3] This Example is only proper here, ſuppoſing that the Treaſure belongs of Right to the Owner of the Field; for if the Laws of the Country adjudged it to him (as *Grotius* concludes from that Place, that the *Jews* Law did) the Buyer was guilty of a criminal Artifice, or indirect Robbery, if we conſider the Action in itſelf, without any relation to the Parable, whoſe Circumſtances, we know, are not at all to be urged, no more in this than in the Parables of the unjuſt Steward, *Luke* xvi. 1. and Judge, *Luke* xviii. 2. But to ſpeak my Thoughts, 'tis very uncertain whether it was in Uſe among the *Jews*, that the Maſter of the Field ſhould have the Treaſure found in it, ſince *Grotius* alledges no other Proof than the Circumſtances of the Parable, which can't be ſafely depended on. Suppoſing then, that by the civil Laws the Treaſure, unknown to the Owner, ought not to be left to the Proprietor of the Place where it is found, nor to be kept for the Prince; in this Caſe I cannot ſee any Cheat in the Silence of the Buyer; for, inaſmuch as the Owner himſelf hath not diſcovered the Treaſure, he hath no more Right to do it than any other Man, and the Buyer is not obliged to tell him of what Diſcovery he has made. See l. iv. c. 6. §. 13.

[4] *Val. Maximus*'s Words are, *Bonæ fidei venditorem nec commodorum ſpem augere, nec incommodorum cognitione obſcurare oportet.* *Plato* forbids Sellers to advance their Goods too much; and above all, to ſwear that 'tis worth ſo much, or coſt ſo much, to ſet the true Price at firſt. Ἔπαιος δὲ ὅρκός τε περὶ παντὸς τοῦ πωλουμένου ἀπέχω, *De Legib.* l. xi. He orders a little higher, not to pitch two Prices, but Ὁ πωλῶν ἐν ἀγορᾷ, ὁτιοῦν, μηδέποτε εἴπῃ δυὸ τιμάς, ὧν ἂν πολῇ.

[5] *Plato*'s Words are, Καὶ ἀναιρουμένῳ δ' ἔργον ξυμβουλευτὴς νόμος ἅπερ τῷ πωλοῦντι ξυνεβούλευε, μὴ πλέονος τιμᾶν διαπερ ρώμενον, ἀλλ' ὡς ἀπλούστατα τῆς ἀξίας, ταυτὸν δὲ προσάττει, καὶ τὸ ἀναιρουμένῳ. Γιγνώσκει γὰρ ὅγε δημιουργὸς τὴν ἀξίαν, ἐν ἐλευθέρων δ' ἂν πόλεσιν ὁπόποτε χρὴ τέχνη, σαφεῖ δὲ καὶ ἀψευδεῖ φύσει πράγματι, διαπειρᾶσθαι τῶν ἰδιωτῶν τεχνάζοντα αὖλον τὸν δημιουργόν.

[6] *Socrates*'s Words are, Τὰς ἀγαθὰς προμνηστρίδας μετὰ μὲν ἀληθείας τ' ἀγαθὰ διαγγελλούσας, δεινὰς εἶναι συνάγειν ἀνθρώπους εἰς κηδείαν, ψευδομένας δ' οὐκ ὠφελεῖν ἐπαινοῦσας. Τὰς γὰρ ἐξαπατηθέντας, ἅμα μισεῖν ἀλλήλους τε, καὶ προμνησαμένην.

[7] *Cicero*'s Words are, *Si, exempli gratiâ, vir bonus Alexandriâ Rhodum magnum frumenti numerum advexerit, in Rhodiorum inopia & fame, ſummaque annonæ caritate, ſi idem ſciat, complures mercatores Alexandriâ ſolviſſe, naveſque in curſu frumento onuſtas, petentes*

has

has a Caſe to this Purpoſe: *An honeſt Man*, ſays he, *ſet ſail from* Alexandria *to* Rhodes, *with a Freight of Corn*; *the* Rhodians *being in great Diſtreſs for want of it, and the Commodity bearing an exceſſive Price: This Perſon knows that there are other* Alexandrian *Ships under way, and bound for the ſame Port, and with the ſame Cargo: Shall he tell the* Rhodians *there are other Merchants coming with Relief, or ſay nothing of it, and make the beſt Market of his Corn that he can? Antipater* is of Opinion, *That all the Circumſtances ought to be laid open; ſo that the Purchaſer may not be kept ignorant of any thing (though it does not concern the Subſtance of the thing in hand) which the other knows. Diogenes*, on the other ſide, ſays, *That the Vender is bound to diſcover all the Faults, ſo far as he is obliged to it by the Civil Law, and to manage his Bargain without Fraud; ſo that, being to ſell the Commodity, he may, without Deceit, make the beſt of it. Here*, ſays he, *I have brought my Corn; I have expoſed it to Sale; I ſet no higher a Rate upon it than others do, nay, perhaps, I can afford it cheaper, there being now a greater Quantity than there was before. How is that?* (replies *Antipater*) *Is it not our Duty to conſult the Good of Mankind, and ſerve human Society? Do not we lie under an Obligation, from our Cradle, to make our private Intereſt the ſame with the publick, and the publick the ſame with our private? Shall we then conceal that from the Publick, which it ſo much concerns them to be informed of?* To this *Diogenes*: *It is one Thing to conceal, and another not to tell. Do I tell you, at this Inſtant, what is the Nature of God, and what the Happineſs, or chief Good of Man, which it much more concerns you to know than the Price of Corn? And yet you will not ſay that I conceal this from you. But I am not obliged to tell whatever is for your Advantage to hear.* To this *Antipater* replies; *Yes, you are obliged, if you remember that Men are naturally linked together in Society. Well* (ſays *Diogenes*) *I do not forget it: But will you have it to be ſuch a Society, as that no Man ſhall have any Thing in particular of his own? If ſo, there's no longer any Buying and Selling, but only Giving* [1]. Here *Cicero* himſelf ſeems to incline towards *Antipater*'s Opinion [a]; for he ſays, [2] *This Concealment of the Corn-Merchant is not the Practice of an open, a frank, a juſt, a good Man; but rather of a ſhifting, a cloſe, a deceitful, a malicious Huckſter.* And yet *Cicero* himſelf ſeems to free him from the Imputation of Knavery; for, a little after [3] [b], he defines Knavery to be, *the pretending one Thing, and the doing another*, which cannot be objected in this Caſe. And therefore the Merchant did not act unjuſtly, in ſaying nothing of the Ships that were coming. For Juſtice only obliges us to expoſe what immediately concerns the Thing itſelf; *as if a Houſe, by reaſon of its being infected, had been commanded by the Magiſtrates to be pulled down*; with which Example *Cicero* illuſtrates this Paſſage. But nothing of this Nature was concealed; the Goodneſs of the Corn appeared openly, and, at the Time of the Contract, was really worth as much as it was ſold for, although likely to be leſs worth in a little Time. Nor had the *Rhodians* a Right, properly ſpeaking, to know this of the Merchant, as never having made any Bargain with him about it [4] [c]. But whether he acted againſt the Law of Courteſy and Good-nature, is another Queſtion, which I would not eaſily hold in the Affirmative. For Good-nature does not oblige me to do another Man a Courteſy *gratis*, except he be in extreme Want of it. But this was not the Caſe of the *Rhodians*, they wanted Corn indeed, but not Money; for they were famous among the Antients for their Riches. Beſides, I am not obliged to do a Kindneſs, when it is like to tend more to the Detriment of the Giver than the Benefit of the Re-

[a] Chap. xiii. d. l. [b] Chap. xiv. [c] Vid. *Grot.* l. ii. c. 12. §. 9. n. 3.

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tentes Rhodum viderit, diſſaruſne ſit id Rhodiis, an ſilentio ſuum quamplurimo venditurus? Sapientem, & bonum virum ſingimus, de ejus deliberatione & conſultatione quærimus, ſi celaturus Rhodios non ſit, ſi id turpe judicet, ſed dubitet, an turpe non ſit. In hujuſmodi cauſis aliud Diogeni Babylonio videri ſolet, magno & gravi Stoico, aliud Antipatro, diſcipulo ejus, homini acutiſſimo. Antipatro, omnia patefacienda, ut ne quid omnino, quod venditor nôrit, emptor ignoret. Diogeni, venditorem, quatenus jure civili conſtitutum ſit, dicere vitia oportere, cætera ſine inſidiis agere, & quoniam vendat, velle quàm optimè vendere. Advexi, expoſui, vendo meum non pluris, quàm cæteri, fortaſſe etiam minoris, cùm major eſt copia. Cui fit injuria? Exoritur Antipatri ratio ex altera parte. Quid ais? Tu cum hominibus conſulere debeas, & ſervire humanæ ſocietati, eaque lege natus ſis, & ea habeas principia naturæ, quibus parere, quæ ſequi debeas, ut utilitas tua communis utilitas ſit, viciſſimque communis utilitas tua ſit, celabis homines, quid iis adſit commoditatis & copiæ? Reſpondebit Diogenes fortaſſe ſic, Aliud eſt celare, aliud eſt tacere, neque ego nunc te celo, ſi tibi non dico quæ natura Deorum ſit, quis ſit finis bonorum, quæ tibi plus prodeſſent cognita quàm tritici utilitas; ſed non quicquid tibi audire utile eſt, id mihi dicere neceſſe eſt. Immo verò (inquit ille) neceſſe eſt, ſiquidem meminiſti eſſe inter homines naturâ conjunctam ſocietatem. Memini (inquit ille) ſed num iſta ſocietas talis eſt, ut nihil ſuum cujuſque ſit? Quod ſi ita eſt, ne vendendum quidquam eſt, ſed donandum.

[1] Mr. *Placette* is of our Author's Opinion alſo; but the Paſſage ſhews, that *Cicero* did not much favour the Scholar againſt the Maſter.

[2] *Tully*'s Words are, *Non igitur videtur——frumentarius ille Rhodios——celare debuiſſe. Neque enim id eſt celare, quicquid reticeas, ſed quum id, quod tu ſcias, ignorare emolumenti tui cauſâ velis eos, quorum interſit, id ſcire. Hoc autem celandi genus quale ſit, & cujus hominis, quis non videt? Certe non aperti, non ſimplicis, non ingenui, non juſti, non viri boni; verſuti potius, obſcuri, aſtuti, fallacis, malitioſi, callidi, veteratoris, vafri.*

[3] This is *Aquilius*'s Definition; for theſe are *Tully*'s Words, *Cum ex eo* [*i. e. Aquilio*] *quæreretur, Quid eſſet dolus malus? Reſpondebat, Cùm eſſet aliud ſimulatum, aliud actum.* See Mr. *Noodt*'s Treatiſe *De forma emendandi doli*, &c. *cap.* 2. where he ſhews us, that this is not an exact Definition, and that the *Prætor* only gives an Example of what is comprehended under *Dolus*, or Deceit; ſo that he does not exclude Diſſimulation, by which one ſimply conceals what he does, when he is obliged to declare it, as *Cicero* ſuppoſes in the Caſe in queſtion. Thus our Author's Reflection makes nothing againſt *Cicero*; and it is ſufficient to anſwer this great Author, That inaſmuch as thoſe, *from whom we conceal* a Thing, are not concerned to know it, there is no Wrong done them; ſince they have no Right to require a Diſcovery, which hath Place in the Thing we are now treating of, for ſome Reaſons already alledged, and others which will be added below.

[4] I ſhall here add two Reflections, taken out of Mr. *La Placette*'s Treatiſe of *Reſtitution*, p. 297. " I. It ſeems not worſe to ſell " that a little dear, which ſhall be ſoon ſold dearer, than to buy cheap, what we know we ſhall ſell dear ſome little Time " after: For the *Heathens*, and particularly *Ariſtotle*, have approved of the Action of *Thales*, who, foreſeeing that a great Scarcity " would happen in a little Time, bought a great Quantity of Corn, by which he got very much. See ch. v. following, at the " End. And as for what concerns the *Chriſtians*, they have an Example of *Joſeph*, who did the ſame in *Egypt*. II. If this Mer- " chant, being got to *Rhodes*, had found that Corn had been brought thither from ſome other Place, and he muſt ſell at a lower " Price than it coſt him at *Alexandria*, or if his Veſſel had been loſt in a Tempeſt, he muſt have borne the Loſs, and no Man would " have minded to make good his Damage. Why then might he not make uſe of his good Fortune, which brought him into the " Way of Gain? On this Account (ſays Mr. *La Placette*) I dare not condemn the Merchants, who make their Gains by the Advices " which they receive from their Correſpondents in other Countries. As theſe Correſpondences coſt them ſomething, it is juſt they " ſhould gain by them, nor can I think they are bound in Conſcience to diſcover them to any body."

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ceiver. But, in this Caſe, the Merchant would have loſt more than the Purchaſers would have got by the Intelligence. For, if he vended it to a great many Purchaſers at the Market-price, each would have felt it but little; and if any one Man had engroſſed the whole, he might thank his own Avarice, if he loſt by it; and, indeed, we cannot expect, in the common Way of the World, that Men ſhould be ſo very exact in the Performance of this Duty: For, provided the Love of Money does not tempt the Merchant to cheat us, we may eaſily excuſe them from what the Law of Courteſy and Good-nature may ſeem to oblige them to.

V. As for Faults already known to the Buyer, they need not be mentioned, for in this Caſe both Parties proceed upon the ſame Foot [a]. So, likewiſe, where the Seller has told the Faults, the Bargain ought to ſtand good, for then it is manifeſt that the Buyer conſents to them; [1] *Cicero* has a Caſe [b] to this Purpoſe. Gratidianus *ſold to* S. Orata *thoſe very Houſes which he himſelf had bought of him but a few Years before. Theſe Houſes paid a Duty to* Orata, (*which was out of his Mind*) *but* Gratidianus *made no mention of it in conveying his Right. The Cauſe was brought into the Court.* Craſſus *was for* Orata, *and* Anthony *for* Gratidianus. Craſſus *inſiſted upon the Law, that the Seller knowing it ought to have acquainted the Purchaſer with the Incumbrance, but did not do it.* Anthony *inſiſted upon Matter of Equity, that the Incumbrance was not unknown to* Orata, *who had ſold the Houſes, which made it needleſs for* Gratidianus *to ſay any Thing of it; nor could* Orata *be ſaid to be deceived, that knew what Title he had bought.* For as *Ulpian* ſays, lib. xix. t. 1. l. 1. §. 1. *D. De Act. empt.* [2] *He does not ſeem to have the Thing concealed, who knew it, nor ought he to be advertiſed of it, who was not ignorant.* Add. l. xviii. t. 1. l. xliii. §. 1. l. lvii. §. 3. *D. De contrab. empt. Lib. ult. D. De Ædilit. edicto* [3]. Upon the ſame Principle was founded the Sentence that *Marius* gave in the Caſe of [c] *Fannia*, who had been married to *Tinnius*; but upon a Divorce demanded back her Dowry, which was conſiderable. He objected Adultery againſt her. The Cauſe was brought before the Conſul. After a Hearing on both ſides, it appearing, that ſhe had been an immodeſt Woman, and that her Huſband, knowing her to be ſuch, had yet ventured to marry her: The Conſul reproved them both, and ordered him to reſtore her Dowry, and her to be fined four *Aſſes* for her ſcandalous Behaviour [d].

VI. Beſides, as in all Pacts, ſo eſpecially in Contracts, neither Party ſhould be forced into a Bargain by an unjuſt Fear. The *Lacedemonians* therefore did right in reſcinding the Purchaſe of the Land that the *Elians* had extorted from the Poſſeſſors through Fear: For they were of Opinion, *To force a Title from the weaker under the Pretence of Purchaſe, was no better than downright Robbery* [e 4]. Thus when *Cicero* [f] objected, againſt *Verres*, the Pictures and Statues which he had brought out of *Sicily*; *Verres* thought he could anſwer the Accuſation in a Word, by ſaying [5], *I bought them.* But *Cicero* replies, *That their Anceſtors had wiſely enacted, that whoſoever ſhould be ſent Governor into a Province, ſhould not be allowed to make any Manner of Purchaſe:*

[a] Vid. *Grot.* l. ii. *ubi ſupr.* n. 3. [b] *De Off.* l. iii. c. 16. [c] *Plutarch in Mario.* p. 427. *Ed. Wech.* and *Val. Max.* l. viii. c. 2. §. 3. [d] Vid. l. xlviii. t. 5. l. 13. §. 9, 10. *D. Ad. L. Jul. De adult.* [e] Xenoph. l. iii. *Rer. Græcarum*, p. 288. Vid. *Grot.* l. ii. c. 12. §. 10. [f] Orat. ix. l. 4. c. 5.

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[1] *Jus Craſſus urgebat* (ſays *Cicero*) *quod vitii venditor non dixiſſet ſciens, id oportere præſtari; æquitatem Antonius, quoniam id vitium ignotum Sergio non fuiſſet, qui illas ædes vendidiſſet, nihil fuiſſe neceſſe dici, nec eum deceptum, qui id, quam emerat, quo jure eſſet teneret.* To underſtand the State of this Suit we muſt ſuppoſe the following Caſe. *Sergius*, having two Houſes adjoining to each other, ſells one of them to *Marius*, and reſerves to himſelf a Right of Servitude over the other. After this he alienates the ſecond, and buys again the firſt from *Marius* to whom he had ſold it. *Marius* in ſelling it again mentions nothing of the Servitude. Upon this *Sergius* pretends to have been deceived, and that this Defect of the Houſe ſhould have been deducted out of the Price. I have ſaid, we muſt ſuppoſe that *Sergius* had, ſince the firſt Sale, alienated the neighbouring Houſe, over which he had reſerved a Right of Servitude; for if that had ſtill belonged to him, the Servitude had been extinguiſhed, and he would have had no Subject for Complaint. See *Digeſt.* lib. vii. tit. 2. *De Servitut. Præd. Urban.* leg. 30. It is, therefore, no way neceſſary to obſerve *Francis Baudouin*'s Correction of theſe Words (in his *Juriſpr. Mucian.* pag. 241. & *ad Papin. De Evictione*, in fin. pag. 364) who would have us read, *hæ ſerviebant*, for *hæ* SERGIO *ſerviebant.* He grounds his Opinion upon this, That even the Proprietor himſelf has no Right of Servitude over his own Property: As well as upon another Paſſage of *Cicero*, where ſpeaking of the ſame Affair, this great Orator ſays; *neque ſervire quandam earum ædium partem, in mancipii lege dixiſſet*, &c. *De Orat.* lib. i. cap. 39. But we can infer nothing from hence, for *Cicero* ſpeaks of the Caſe in ſo ſlight a manner, that it is difficult to know what he means: and he is quite ſilent as to this eſſential Circumſtance, that *Sergius* had himſelf formerly ſold the Houſe to *Marius*. Thus the Omiſſion of him to whoſe Ground the Servitude was due, does not authorize us to efface the Word *Sergio* in the other Paſſage, more eſpecially as all the Manuſcripts and printed Copies agree. And ſince we may eaſily explain the Caſe in the Manner I have done, ſo that the other Objection of *Baudouin*'s, taken from the Principles of Law, vaniſhes; there is no Neceſſity of having recourſe to his Criticiſms. It had nevertheleſs been better, if the Editors of *Cicero*'s Works had known the Correction of this great Lawyer, to have inſerted it at leaſt, and furniſhed others with an Opportunity of removing the Difficulties which they were not aware of. This would have been better than many Trifles with which their Notes are filled.

[2] *Ulpian*'s Words are, *Hæc ita vera ſunt, ſi emptor ignoravit ſervitutes, quia non videtur eſſe celatus, qui ſcit; neque certiorari debuit, qui non ignoravit.*

[3] To this belongs that of *Horace*, Lib. II. Ep. ii. ver. 14, &c. where he brings in a Fellow ſelling a Slave; who, after having reckoned up his good Qualities, adds,

——— Semel hic ceſſavit; &, ut ſit,
In ſcalis latuit, metuens pendentis habenæ.
Des nummos, excepta nihil te ſi fuga lædat,
Ille ferat pretium, pœnæ ſecurus, opinor.
Prudens emiſti vitioſum: dicta tibi eſt lex.

This Boy was faulty once, he ſtay'd at Play,
And, when he fear'd the Laſh, he ran away;
Buy, if you like him now, his Faults are told,
The Dealing's fair, and he may take your Gold,
And ne'er be thought a Cheat for what he ſold.
Mr. *Creech.*

Add. l. xxix. t. 5. l. 1. §. 33. *D. De Senatuſc. Silaniano.* Lib. xxi. t. 1. *D. De Ædilit. edicto*, l. 17. §. 10.

[4] *Plutarch*'s Words are, Γνόῦς μηδὲν δικαιότερον εἶναι βίᾳ πριαμένους, ἢ βίᾳ ἀφελομένους, παρὰ τῶν ἡττόνων λαμβάνειν. *Primùm ſi id quod vis, tibi ego concedam, ut emeris——quid eujuſmodi tu judicia Romæ putaris eſſe. ſi tibi hoc quenquam conceſſurum putâſti, te in Prætura, atque imperio, tot res, tam pretioſas, omneſque denique res, quæ alicujus pretii fuerint, tota ex Provincia coemiſſe. Videte Majorum diligentiam, qui nihil dum etiam iſtiusmodi ſuſpicabantur, veruntamen ea quæ parvis in rebus accidere poterant, providebant. Neminem, qui cum poteſtate, aut legatione in provinciam eſſet profectus, tam amentem fore putaverunt, ut emeret argentum; dabatur enim de publico, ut veſtem, præbebatur frumentum legibus; mancipium putaverunt, quo & omnes utimur, & non præbetur à populo. Sanxerunt,* NE QUIS EMERET MANCIPIUM NISI IN DEMORTUI LOCUM, *ſi quis Romæ eſſet demortuus? Imò, ſi quis ibidem: non enim te inſtruere domum tuam voluerunt in provincia, ſed illum uſum provinciæ ſupplere. Quæ fuit cauſa, cur tam diligenter nos in provincia ab emptionibus removerunt? Nempe Judices,*

[5] *Cicero*'s Words are, *Verbo jam uno repellar. Emi, inquit.——Primùm ſi id quod vis, tibi ego concedam, ut emeris——quid eujuſmodi tu judicia Romæ putaris eſſe. ſi tibi hoc quenquam conceſſurum putâſti, te in Prætura, atque imperio, tot res, tam pretioſas, omneſque denique res, quæ alicujus pretii fuerint, tota ex Provincia coemiſſe. Videte Majorum diligentiam, qui nihil dum etiam iſtiusmodi ſuſpicabantur, veruntamen ea quæ parvis in rebus accidere poterant, providebant. Neminem, qui cum poteſtate, aut legatione in provinciam eſſet profectus, tam amentem fore putaverunt, ut emeret argentum; dabatur enim de publico, ut veſtem, præbebatur frumentum legibus; mancipium putaverunt, quo & omnes utimur, & non præbetur à populo. Sanxerunt,* NE QUIS EMERET MANCIPIUM NISI IN DEMORTUI LOCUM, *ſi quis Romæ eſſet demortuus? Imò, ſi quis ibidem: non enim te inſtruere domum tuam voluerunt in provincia, ſed illum uſum provinciæ ſupplere. Quæ fuit cauſa, cur tam diligenter nos in provincia ab emptionibus removerunt? Nempe Judices,*

chaſe: And for that Reaſon, Money and Equipage was provided them by the Publick. Slaves indeed were not, becauſe there was ſcarce any Man of Figure in Rome, *but had ſome of them. And yet no Man, in his Province, could buy a Slave, but in the room of a dead one; for they looked upon it to be Plundering, and not Purchaſing, when the Seller could not ſell at his own Rate. And, in a Province, they were convinced, that if the Governor, backed with Power and Authority, ſhould be permitted to buy what he pleaſed, it would be brought to that Paſs, that he would have whatſoever he had a Fancy for, whether expoſed to Sale, or no, and at his own Rates.* Add. l. xviii. t. 1. l. xlvi. lxii. *D. de contr. empt. &* l. xlviii. t. 11. *L. penult. D. ad L.* Jul. *repetund.* l. vi. l. 2. t. 20. l. 11. *de his quæ vi metuſque cauſa*, &c. *Conſtitut. Sicularum*, l. 1. t. 88. §. 1. *Tacitus Ann.* xiv. c. 14. *in fin.* "When the Purchaſer can force him "to it, the Seller lies under a Neceſſity of parting "with his Goods. Hither may be *referred what* "*Dio Caſſius* relates of *Cæſar*, l. xlii. who, after "*Pompey*'s Defeat, ſeized upon that Money, which "he had no other Pretence of Levying, than un-"der the ſpecious Name of a Loan, though other-"wiſe he had taken it by Force, as if it had been his "Due, and never had any Deſign to reſtore it." But yet [a] ſometimes the Subject may be forced by the Government in Matters of Sale or Hire: As when Merchants are obliged to ſell that which the Government is in great Want of; or when their Waggons or Ships, or they themſelves are preſt; which, when the Good or Neceſſity of the Publick requires, and a juſt Rate is paid, may be fairly allowed of. Sometimes too, the State obliges us to buy ſuch a ſort of Commodity, of this or that Man only, and no where elſe.

VII. But it is plain, that in *gainful Contracts* this Equality does not take place; for where an Equality is to be obſerved, the Contract ceaſes to be *gainful* [1]. But when a Preſent is made by way of Recompence [2], the Contract is ſomething like Hiring. And yet, in a Charge, or a Commiſſion, an Equality may ſometimes be regarded, though indirectly, and by Accident; for if any thing, beſides Labour, has been laid out in ſolliciting the Buſineſs, or managing the Charge, it ought exactly to be refunded. And the Reaſon is, becauſe in ſuch Contracts as theſe the Labour is given *gratis*, but the Expence [3] tacitly agreed upon to be repaid [b].

VIII. But in *chargeable Contracts* an Equality is to be ſo ſtrictly regarded, that if one Party has received more than his Due, he muſt not retain the Overplus, upon Preſumption that it was deſigned for a Gift. For Men do not enter into ſuch Sort of Contracts, with a Deſign to give any thing [4]. And therefore ſuch a *mixt Contract* muſt not be preſumed, unleſs the Party expreſly conſents to it, or it appears that he knew the Thing to be under-rated. An Example we have in *Pliny*, l. vii. Epiſt. 11, & 14. where he ſays, "He had, upon the "Score of Friendſhip, ſold Lands for leſs than "they were worth. It was generouſly done of *Scæ-*"*vola*, who, being upon a Purchaſe, bid the Pro-"prietor tell him, in one Word, what he would "have for the Eſtate; who when he had done it, "*Scævola* told him he had undervalued it, and gave "him 10000 *Seſterces* more than his Bargain." *Cic. Off.* l. iii. c. 15.

IX. From what has been ſaid, it follows, that although all the Faults have been expoſed [c], and nothing demanded more than what was ſuppoſed to be the Value; yet if afterwards there appears to have been an Inequality, without any Fault of the Contractor (as ſuppoſe ſome Blemiſh lay undiſcovered, or they miſtook the Price) it ought to be corrected, and Amends made to the Sufferer [d]. Nor is it neceſſary, by the Law of Nature [5], that this Inequality ſhould exceed the half of the juſt Price. For that famous

[a] See l. 3. c. 3. §. 12. above. [b] Vid. l. 12. prin. D. depoſiti. d. l. [c] Vid. *Grot.* l. 2. c. 12. §. 12.
[d] Add. l. 19. t. 1. l. 13. *Princ.* §. 1, 2, 3, 4. *D. de act. emp.* & l. 21. t. 1. l. 1. §. 2. *D. de ædilit. edicto.*

Judices, quod putabant ereptionem eſſe, non emptionem, cum venditori vendere ſuo arbitratu non liceret. In provinciis intelligebant, ſi is, qui eſſet cum imperio & poteſtate, quod apud quemque eſſet, emere vellet, idque ei liceret fore uti, quod quiſque vellet, ſive eſſet venale, ſive non eſſet, quanti vellet, auferret.

[1] The Words are, *in ſummâ ſciendum eſt, mandatum, niſi gratuitum ſit, in aliam formam negotii cadere. Nam mercede conſtitutâ, incipit locatio & conductio eſſe; & (ut generaliter dicamus) quibus caſibus ſine mercede ſuſcepto officio, mandati ſive depoſiti contrahitur negotium, in caſibus intervenienti mercede locatio & conductio intelligitur contrahi. Vid.* S. Fin. inſtit. de Mandato, l. 3. t. 27. §. 13. & D. l. 16. t. 3. l. 1. §. 9. De Depoſ. &c. l. 1. §. 9.

[2] The *Roman* Lawyers call it *Honorarium.* See *Digeſt.* l. 11. t. 6. *Si menſor falſum dixerit. leg.* 1. *princ.* & l. 50. t. 13. *De extraordinariis cognitionibus, &c.* leg. §. 10.

[3] This Fiction of Law is no ways neceſſary. The Maxims of Equity are ſufficient only to ſecure to him, who has received a Truſt, or who is charged with another Man's Buſineſs, his Damages and Expences, which he is at in ſerving the Perſon who has entruſted, or given him a Commiſſion.

[4] See the foregoing Chapter, §. 10.

[5] The Words of the Code are, *Rem majoris pretii, ſi tu vel pater tuus minoris diſtraxerit; humanum eſt, ut vel pretium te reſtituente emptoribus, fundam venundatum recipias, auctoritate Judicis intercedente; vel ſi emptor elegerit, quod deeſt juſto pretio, recipias.* Mr. *Thomaſius* has publiſhed a curious Diſcourſe upon this Law in 1706. under this Title, *De Æquitate cerebrinâ Legis 2. Codicis de reſcind. vend. & ejus uſu practico:* Of which I ſhall give this Abſtract; A Sale or Contract made null for the Smallneſs of the Price, although there was no Deceit or Force otherwiſe uſed, was not known before *Diocleſian.* For before that Time it was a Maxim current among the Lawyers, that, by the Law of Nature, every one may make as advantageous a Market for himſelf as he caa, and to that End may make uſe of all innocent Artifices. Whence they make uſe of ſuch ſtrong Terms as theſe, *circumſcribere, circumvenire*, which are commonly taken in the worſt Senſe. See the Notes 1, 2. of pag. 483. After *Diocleſian*, the Emperors *Conſtantine the Great, Gratian, Valentinian* and *Theodoſius, Honorius* and *Arcadius*, eſtabliſhed formally a Rule contrary to the Edict of that Pagan Emperor. *Venditionis atque emptionis fidem, nullâ circumſcriptionis violentiâ factam, rumpi minime decet. Nec enim ſola pretii velioris querela, contractus ſine ullâ culpâ celebratus, ligitioſo ſtrepitu turbandus eſt*, Leg. 1. See, alſo, Leg. 4 and 7. *Diocleſian* himſelf ſeems to have retracted it at length, as appears by another Reſcript, which is found under the ſame Title of the Code, and which is cited in Note 5. pag. 483. It is true, that at the End of that Law we find a Clauſe conformable to the ſecond Law there treated on; but when we examine the foregoing Diſcourſe, it is only an Interpolation foiſted in by *Tribonian*; for if the Reaſons alledged in the eighth Law be good, as they really are, they prove that a Contract ought not to be null, even though one of the Contractors has paid more by the half, or received one half leſs than the Thing is really worth. There are all the Signs in the World that the End of the Second Law, where the Meanneſs of the Price, which nulls a Contract, is fixed to half the full Value of the Thing, is an Addition of *Tribonian*'s: For beſides, that it might have been better placed among the foregoing Words, the Laws of the *Theodoſian* Code contradict it, and ſimply and in general diſallow the Nullity of a Contract, upon the Account of the Smallneſs of the Price alone; and there appear no Footſteps of any Diſtinction of what is above or below the true Price. *Tribonian* having found in the *Gregorian* and *Hermogenian* Codes, whoſe Compilers not dreaming to bring the Law into the Form of a Syſtem, had collected all the Imperial Conſtitutions and Ordinances before *Conſtantine*, not troubling themſelves whether they

famous Law [a], which refuſes Relief, but where the Inequality is ſo notorious, is purely poſitive, and founded principally upon this, That it would be impoſſible to diſpatch Buſineſs, if the Magiſtrate might be appealed to for every little Injury of this kind. And beſides, the Nature of the Market requires that we ſhould look about us, if we would not be deceiv'd; for whatever Rate the Seller puts upon his Goods, the Price is ultimately determined by the Buyer [b]; though indeed the Determination of this Law is too groſs. For though the Magiſtrate ought not to be troubled for every Trifle, yet I ſee no Reaſon why he ſhould not relieve me, if I have been very much injured, although not half in half: As if I ſhould ſell a Houſe worth 900 *l.* for 600 *l.* it is hard I ſhould be debarred the Benefit of the Law, for the Recovery of the 300 *l.* when in much leſs conſiderable Caſes, an Action is allowed me. And therefore, as a ſmall Damage, even in the Law of Nature, is not ſufficient to break off a Bargain; ſo where the Damage is great, although it amounts not to half the juſt Price [c], the Bargain ought to be reſcinded, or the Price made up. And the Greatneſs of the Damage is to be eſtimated, either by the Exorbitancy of the Price, or the Poverty of the injured, which ſometimes renders the Loſs intolerable to him, which a richer Man would not be ſenſible of. Nay, even where the ſaid Law is in Force, the Buyer is obliged, in Conſcience, to make up a very great Damage, although it comes not up to half the Price; for that Law only deſigns the Eaſe of the Magiſtrate, and not that one Man ſhould be a Gainer, at another's Loſs. Indeed, they do well to extend the Benefit of the Law to the Buyer [d], as well as to the Seller; which too, they tell us, is to be extended to all other ſorts of Contracts.

Among the *Jews* [e], if one defrauded another, whether Buyer or Seller, the Law afforded no Relief, if the Cheat came under the Sixth Part of the juſt Price. But if it exceeded the Sixth Part, the Buyer might either immediately, or at any Time during the Negotiation, reſcind the Bargain, and recover the whole Price; But if the Seller had been the Sufferer, he was never barred from making a Recovery. And the ſame Law obtained in the Bartering of *conſumable Commodities*, as of Fruit, Corn, and ſuch like. But the *Jew* only, if injured, enjoyed the Benefit of this Law; and not the *Gentile*, if injured by a *Jew*.

X. To what has been ſaid, the *Roman* Lawyers have taken a great deal of Pains to reconcile a Paſ-

[a] *Cod. lib.* 4. *t.* 1. 44. *l.* 2. *C. de reſcinden. vendit.* [b] To which may be applied that of *Cicero. Off.* l. 3. c. 17. "Laws and Philoſophers provide againſt Frauds different Ways; the Laws regarding only Matters of Overt Act, whereas Philoſophers judge according to Equity and Reaſon." [c] *Selden de J. N. & G.* l. 6. c. 5.

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agreed one with another. *Tribonian*, I ſay, having found there theſe two Reſcripts of *Diocleſian*, of which the laſt was directly contrary to the firſt, but appeared more equitable, believed that they might be reconciled by a Limitation, which he annexed to each of them. Aftsr this he ſuppreſſed the firſt and ſeventh Laws of the *Theodoſian* Code, becauſe they could not eaſily be accommodated, in any ſuitable manner, to his Notions; and though he retained the fourth, which is now the fifteenth in the Title of the *Juſtinian* Code, he made ſeveral Alterations in it, that it might make for his Purpoſe evidently, as among others this: Inſtead of *Repetionis in Reliquam, PRETII NOMINE VILIORIS, copiam minime conſequator*, as the Laws of *Gratian, Valentinian*, and *Theodoſius* import, he put, *PAULO vilioris pretii nomine*, &c. This manifeſt Corruption made all that he had to ſay of *Diocleſian*'s two Reſcripts plauſible. And I will add, though Mr. *Thomaſius* did not obſerve it, that there is Reaſon to believe, that in Book VIII. the Word *Paulo* is alſo inſerted in the ſecond Period, before *Minore pretio*. The Canon-Law having afterward approved the Foundation of the Law of the *Juſtinian* Code, it was looked upon as a Concluſion flowing from indiſputable Equity, and paſſed for a Rule in all the Courts, except *Madgeburg*; where ſuch Political Ordinances are almoſt quite aboliſhed. Nevertheleſs Mr. *Thomaſius* maintains, that it cannot be brought into Practice, becauſe the common Price, by which the Damage muſt be regulated, is very changeable and uncertain; ſo that it is very hard to fix a Moiety or a Quarter, &c. Further, a great Damage, ſuch as that we are ſpeaking of, cannot be found in a Contract, without either ſome great Fraud in one of the Contractors at leaſt, and then there is no need of *Diocleſian*'s Law; or the Fault may be on both Sides; and then we muſt judge according to the Principles eſtabliſhed above: lib. 3. c. 6. §. 6. See more in the following Note. The Reader may, alſo, conſult *Ant. Faure, Error Pragmatic.* Dec. VIII. *Err.* VII. *Nem.* V. Mr. *Noodt*, whoſe Commentary has appeared in the laſt Edition of his Works in 1724, follows here the common Opinion, pag. 410. & *ſeqq.* But he does not appear to have been aware of the contrary Reaſons which I have juſt advanced, and which, it muſt be owned, carry in them ſomething very ſpecious, which, at leaſt, deſerve Attention. He ſuppoſes, that the common Explication of the Word *Naturaliter* is right. He affirms, That before the Reſcript of *Diocleſian* a Contract of Sale was ſubject to be annulled for any conſiderable Injury with regard to the Price; and that this Emperor only fixed the Sum, which before was left to the Determination of the Judges, but his Reaſons for this do not appear ſatisfactory. The learned *Jaques Gideſroi*, in his Commentary on the *Theodoſian* Code (lib. iii. tit. 1. leg. 1. pag. 242.) has confeſſed that the Deciſion of *Diocleſian* was not followed under the ſucceeding Emperor, and that it was for this Reaſon that *Tribonian* did not inſert in his *Code* the I. and VII. Laws of the *Theodoſian* Code, as alſo, that in the IV. he has made the Alteration above-mentioned.

[d] But Mr. *Hertius* obſerves here and in his Diſcourſe *De Lytro*, Sect. 2. §. 22. How doth this agree with what our Author ſays, c. 1. §. 8. of this Book? *Grotius*, alſo ſays, That, as to outward Actions, the Inequality to which both Parties have conſented, and there has been no Lying nor Concealment of any Thing that ought to have been diſcovered, ſuch an Inequality paſſes for Equality; ſo that, in the Civil Law, no Action in Juſtice lay before the Conſtitution of *Diocleſian* (*i. e.* before Law III. in the Title of the *Code de reſcindendâ conditione*, treated of in the preceding Note, and not in the Third Title of the *Code Projacio*, as *J. Fred. Gronovius* explains it here without Foundation) juſt as, between ſuch as are united only by the Law of Nations, no Reſtitution can be required, nor any Man be forced to make good ſuch Damages, l. 2. c. 12. §. 26. n. 1. It is true that he adds, that this is only an outward Permiſſion, which is of no Force in *Foro Conſcientiæ*, though it may be ſtrengthened by Cuſtom. But this ſuppoſeth, that the fixing a Price in Contracts is grounded on the Nature of Things themſelves, or depends on the Will of a third Perſon; whereas the Truth is, that laying aſide all Fraud, and all Orders of the Civil Law, it is the Conſent of Parties that fixes the juſt Price; ſo that after their Agreement upon whatever Footing it be made, there is no Injury done contrary to Juſtice, properly ſo called. See Mr. *Thomaſius*'s Diſcourſe, quoted c. 2. §. 15, &c. It is another Caſe to determine, whether we may conveniently uſe this Right (See c. 1. §. 9.) or whether we do amiſs in uſing it againſt the Laws of Liberality and Bounty, which require our Help to our Neighbour in his Need, and not to make an Advantage of his Want or Misfortune. Upon which Account he who compoſed *Diocleſian*'s Reſcript, may be freed from the Blame which Mr. *Thomaſius* charges on him, *ubi ſupr.* §. 32. that he confounds the Rules of Humanity and Juſtice: For, in the Stile of the *Roman* Lawyers, *Humanum eſt*, ſignifies, It is Juſt, Equitable, and Reaſonable, &c. See, for Example, *Code* l. 1. t. 14. *De Legib. & Senatus conſ. & Leg.* 8.

[e] *Cujacius* maintains, *Obſervat.* xvi. 18. & xxiii. 32, that it was not allowed by the *Roman* Law. But we muſt obſerve he was formerly of a different Opinion. However the laſt, which he embraced, has been followed by ſeveral able Lawyers, ſuch as ANT. FAURE *De Erroribus Pragmaticor.* Decad. VIII. Cap. VII. & *ſeqq.* EDMOND MERILLE, *Variant. ex Cuj.* II. 5. HUGO GROTIUS, *Sparſ. florum in Jus Juſtinian* pag. 296. *Edit. Amſt.* ULRIC HUBER, in Tit. Pand. *De Reſcind. Vend.* Num. 3. &c. However, Mr. *Noodt* has declared himſelf of the common Opinion, in his Commentary upon this Title, pag. 411. & *ſeqq.* For my Part I own that if *Cujas*'s Opinion has not the Preference, it appears, at leaſt, ſupported by Reaſons ſtrong enough to render the Queſtion dubious, if they be rightly attended to.

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sage in the *Digests* [a 1], which says, *That in Buying and Selling the Parties may* [2] *naturally over-reach one another.* Of which *Grotius* [b] seems to give a good Explication. For he shews, that *may* and *must* do not always denote that it is lawful, but only that it is so far permitted, as that the Sufferer can have no Remedy, in case the other insist upon the Bargain, and, being tax'd of Injustice, replies, that it was nothing but what was agreed upon betwixt them: And he that won't open his Eyes, as the Saying is, must open his Purse. *Add. Lex Cujavior. t.* 15. *c.* 9. §. 1. and *Capitulare Caroli, l.* v. *c.* 210. *In Xenoph. de Memorab. Socr. l.* ii. towards the End, this Rule is given, *'Tis a Piece of good Husbandry, when a valuable Thing can be bought cheap, to buy it.* Add a witty Saying of *Cicero*'s in *Gellius*'s l. xii. c. 12. *Vid.* Sen. de Beneficiis, *l.* vi. *c.* 38. Where he disputes whether *Demades* did well at *Athens* in condemning one who got his Livelihood by providing Things necessary for Funerals, having prov'd that he desir'd a quick Trade, which could not be without the Death of a great many People. Add *Capitulare Caroli*, l. i. *c.* 131. As for the Instance of *Jacob* [3], his Craftiness is the more excusable, because he had to do with a designing Man, who endeavoured every way to over-reach him, [c] and who impos'd hard Conditions upon him, giving him only Half of the Young for keeping his Sheep, and yet making him stand to all Accidents. So, also, the Word *naturally* [d] does not always signify what ought to be done by, or what is congruous to, the Law of Nature, but what is customary, as, 1 Cor. xi. 14. *Doth not even* [4] Nature *itself teach you, that if a Man have long Hair, it is a Shame unto him?* Yet here the Word Κομᾶν, *to have long Hair*, may be taken for too nice a Care in adorning the Hair, which Women seem to claim as their Right, and which seems too effeminate in a Man [e]. Tho' indeed it is disagreeable to the Dictates of natural Reason for a Man to assume that Habit, which Length of Time has appropriated to Women, and by which their Sex is distinguish'd from ours. But to return to the Matter in Hand. *Lib.* iv. *t.* 44. *l.* xlviii. *C. de rescind. vendit.* 5. "It is the constant Way of Buying "and Selling, for the Buyer to beat down the "Price, and the Seller to raise it, till, after many "Words on both Sides, the former rises in his "Bidding, and the latter falls a little from his "Demands; at last they agree in a certain Price." *Anacharsis* in *Diogenes Laertius*, B. i. §. 105, did not absurdly call the Market "A Place to cheat "one another in, and destin'd to Covetousness." *Add.* l. xviii. t. 19. *D. de ædilit. edicto.* Every Man has naturally a great Desire of increasing his Stock, and therefore Trade could hardly be carried on in a Society, were there not some Incouragement for Industry. Vid. *l.* xvii. *D. de contrah. empt.* "He "deserves to be laugh'd at, who suffers himself to "be imposed upon." *Plin.* l. i. *c.* 24. *princip.* "To "make a bad Bargain is the more ungrateful, be-"cause it exposes the Folly of the Maker."

——— *An tibi mavis*
Insidias fieri, pretiumque avellier ante
Quam mercem ostendi?
Hor. Sat. l. 1. §. 2. v. 103, 104, 105.

[a] *Add.* l. 19. t. 2. l. 22. §. 3. D. locati, &c. [b] L. c. c. 12. §. 26.
[c] *Gen.* xxxi. 39. [d] *Mornacius*, upon the Words *naturaliter licet circumvenire*, explains *naturaliter* by εὐφυῶς, dexterously: but he is in the wrong: For that Word does not belong to *circumvenire*, but to *licet*. [e] According to that of *Ovid*, Ep. 4. *Heroid.* v. 75. *Sint procul à nobis juvenes, ut fœmina, compti.*

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[1] *Idem Pomponius ait, in pretio emptionis & venditionis naturaliter licere contrahentibus se circumvenire.* Digest. l. 4. t. 4. *De* Minoribus, Leg. 16. §. 4.

[2] This Explication cannot be reconcil'd, in my Opinion, with the Word *Naturaliter*; for it is never taken by the *Roman* Lawyers, so far as I know, for Custom; and tho' it may signify so in Authors, yet it follows not, that we may so explain it here. Nothing is more common in the Body of the Law, than to signify, by *Naturaliter*, a Thing agreeable to natural Reason, or the Law of Nature; and so it is to be understood here. And so *circumvenire* (or, as another Law has it, *circumscribere*) signifies here any innocent Art to get as good a Bargain as we can. The Word *Dolus* here is taken in a good or bad Sense; and so *Lucretius* uses the Word *Decipere*, in these Verses:

Ut puerorum ætas improvida ludificetur,
——— *Deceptaque non capiatur.*

Mr. *Thomasius ubi supra* §. 29. prefers another Explication, but not so exact or natural, tho' in the End it comes much to the same. It seems, also, to me, that in the Law of the Digests, *lib.* 19. *tit* 2. *locat.* &c. *Leg.* 22. §. 3. These Words, *quod pluris & minoris sit*, signify that which is worth more or less, and not what the Buyer esteems less worth, and the Seller more, at the Beginning of a Market, as that able Lawyer understands them. As for the rest, the *Greek* Interpreters seem to understand the Word *Naturaliter* in my Sense, for they translate it simply κατὰ φύσιν, or φυσικῶς. See the *Basilica*, lib. 10. tit. 4. §. 16. and lib. 20. tit. 1. §. 22. as, also, *Hermenopulus*, lib. 3. tit. 3. Leg. 81. I observe that a Civilian of the last Century (RALPH FOURNIER *Rer. Quotidianar.* lib. 6. cap. 20.) has long defended this Explication. I refer the Reader to his Work, which is become common, since it was inserted in the *Thesaurus Juris Romani*, Tome II.

[3] See Mr. LE CLERC's Note upon *Gen.* xxxi. 12.

[4] St. *Paul* speaks there only of the Custom that was settled in his Time; from which he could not depart without a Mark of Singularity, and offending against common Decency. The Word *Nature* is often opposed to *Instruction*, and we know that Custom is a second Nature; so that we have no need of a Master to teach us what has been once settled in a Country.

[5] It will be convenient to set down the Law entire, for the Reason alledged by me Note 5. pag. 481. *Si voluntate suâ fundum tuum filius tuus venundedit, dolus ex calliditate atque insidiis emptoris argui debet, vel metus mortis, vel cruciatus corporis imminens detegi, ne habeatur rata venditio. Hoc enim solum, quod paulo minore pretio fundum venditum significas, ad rescindendum venditionem invalidum est. Quod si videlicet CONTRACTUS emptionis, atque venditionis cogitasses substantiam, & quod emptor viliore comparandi, venditor cariore distrahendi votum gerentes, ad hunc Contractum accedant, vixque post multas contentiones paulatim venditore de eo, quod petierat, detrahente, emptore autem huic, quod obtulerat, addente, ad certum consentiant PRETIUM, profecto perspiceres, neque bonam fidem, quæ Emptionis atque Venditionis conventionem tuetur, pati, neque ullam rationem concedere, rescindi propter hoc consensu finitum contractum, vel statim, vel post pretii quantitatis disceptationem, nisi minus dimidiâ justi pretii, quod fuerat tempore Venditionis, datum esset, Electione [jam] emptori præstitâ servandâ.* Cod. l. 4. t. 44. De rescind. Vendit. Leg. 8. *See the Title* De Ædilitio Edicto, Leg. 18, 19. & de contrahendâ emptione. Leg. 71. Tho' the Words, *Substantia contractûs emptionis, venditionis*, signify (as our Author explains them) the usual Practice of those who sell or buy, it does not follow we should thus uuderstand the Adverb *Naturaliter* in the Passage quoted above. Not. 5. pag. 481. For it can never be prov'd, that they who compos'd the VIIIth Law of the *Code* had a Design to explain these Words any more than he who made use of the Word ἐμπορικῶς in Novel. XCVII, which is alledg'd here. And supposing it probable that they had such an Intention, they might be deceiv'd by departing from the Notions of the antient Lawyers, a Fault they were commonly guilty of.

Wou'd you be cheated? the Occaſion's fair,
Since you wou'd buy before you ſee the Ware.
Mr. CREECH.

Beſides, each Party ſeems by tacit Conſent (ſince an exact Equality, even by the niceſt Scrutiny, is ſo difficult to be determin'd) to indulge one another the Liberty of deviating a little from the true Price. And therefore it ſeems to be the received Law of the Market, that every one ſhould be free to make his beſt Advantage of Buying and Selling, provided there be no Deceit in the Commodity itſelf[a]. For if there be, the Opinion of *Fulgentius*[b] will take place, who ſays, *That* Mercury *was therefore ſuppoſed to be the God of Trade and Thievery, becauſe there is no Difference between the Cheating and Lying of a Tradeſman and the Robbery and Perjury of a Thief.* "The *Ephori* fined a Young "Man for Buying a Farm at a cheap Rate; and "the Reaſon they gave was, Becauſe ſo young "a Man was ſo much given to Lucre." *Æl. V. H. l.* xiv. *c.* 44.

[a] Add. *Mich. Montaigne, Eſſ. B.* 1. *c.* 20. [b] *Mytholog.* l. 1. c. 23.

CHAP. IV.

Of gainful Contracts in particular.

I. *What a Commiſſion is.*
II. *The ſpecial Reſpect had to it by the* Romans.
III. *The Perſon Commiſſioned ought to be very diligent.*
IV. *How far he ought to be indemnified.*
V. *Whether a Commiſſion can be ſatisfied by an Equivalent?*
VI. *Of a Loan, and how it differs from a voluntary Grant.*
VI. *Of a Charge.*

I. WE come now to conſider ſome of the principal Contracts more particularly; which, tho' they have been handled very copiouſly by the *Roman* Lawyers, yet, ſince moſt of what they have ſaid has been taken from the Law of Nature and Nations, may fairly be brought back to their proper Place. Of *gainful Contracts*[1] the

[1] He ſhould have rather aſſign'd the firſt Place to Donations or Gifts, about which there is room to wonder the Author is quite ſilent; ſince the Definition he himſelf has given of Contract, chap. 2. §. 7. agrees as much with *Donations between the Living* (for with regard to Donations at Death, or Legacies, they are treated of lib. iv. cap. x. §. 9.) as with all the Contracts which our Author here gives for ſuch. What made him exclude Donations was doubtleſs too great Deference for the Notions of the *Roman* Law. For their Lawyers reſtrain'd the Word *Contract* to Engagements enter'd into purſuant to ſome Negotiation, by which two Parties, after having bargain'd, agreed between themſelves, what each, or only one of them, ſhou'd do in favour of the other. This Principle being laid down, we muſt give another Name to Donations which proceed from the voluntary Diſpoſition of the Donor, without any Sollicitation or Treaty. There are nevertheleſs ſeveral Places where we find Donations rank'd with Contracts, as in CODE, lib. ii. tit. xx. *De his, quæ vi metuſve cauſâ geſta ſunt.* lib. vii. tit. xxxix. *De præſcript.* 30 *vel* 40 *annor.* leg. viii. *princip.* which (according to Mr. THOMASIUS, *de ex his emptionum*, §. 51.) is an Effect of the inaccurate Style of the Lawyers of thoſe Times. But, according to the Law of Nature, *a Donation between the Living* (which is uſually expreſs'd by the ſimple Word *Donation*) is a true Contract, by which we diveſt ourſelves of the Right we have to any Thing to transfer it to another, who accepts the Benefit, and that whether we put him in immediate Poſſeſſion of it, or whether we keep it ſtill in our Hands. I ſay, *That we deprive ourſelves of our Right to a Thing belonging to us:* Which may be done either purely or ſimply, or under certain Conditions, as in other Contracts. See CODE lib. viii. tit. lvi. *De Revocand. Donat.* leg. x. I add, That this Transferring of our Right muſt be *accepted*, which is alſo a neceſſary Conſequence of all real Engagements; for nothing can be worſe founded than the inconſiſtent Notion of M. *Ludewig*, Profeſſor at *Hall*, who (in his Diſſertation *De differentiis Juris Rom. & Germanic. in* Donationib. *&c.*) affirms That *Acceptation* is no way neceſſary to conſtitute *Donation*, either by the *Roman* or *Natural* Law. I have added, *whether we put the Donee in immediate Poſſeſſion of it, or whether we keep it ſtill in our Hands:* For nothing hinders but the *Donation* may be irrevocable, tho' the *Donor* reſerves to himſelf the Property of it till his Death; as on the other Hand he may transfer the Property, and keep the Poſſeſſion with the Uſufruit. The laſt takes place in certain Caſes by the Conſtitutions of *Juſtinian.* See my Remark upon *Grotius*, lib. ii. cap. viii. §. 25. Not. 9.) This Emperor render'd a ſimple Agreement *of Gift* as obligatory as a Contract. So that the laſt Deciſions of the *Roman* Law reſtor'd Things to the Simplicity of the Law of Nature. See above, cap. ii. §. 2. *Aliæ autem donationes ſunt, quæ ſine ulla mortis cogitatione fiunt, quas* inter vivos *adpellamus quaſi fuerint perfectæ, temere revocari non poſſunt. Perficiuntur autem, cùm donator ſuam voluntatem, ſcriptis aut ſine ſcriptis, manifeſtaverit.* INSTITUT. lib. ii. tit. vii. §. 2. *Dat aliquis ea mente, ut ſtatim velit accipientis fieri, nec ullo caſu ad ſe reverti; & propter nullam aliam cauſam facit, quàm ut liberalitatem & munificientiam exerceat: hæc propriè donatio adpellatur.* Digeſt. lib. xxxix. tit. v. leg. i. *princ. Abſenti ſive mittas qui ferat; ſive, quod ipſe habeat, ſibi habere eum jubeas donari rectè poteſt. Sed ſi neſcit —— donatæ rei dominus non ſit,* &c. Ibid. leg. x. *Non poteſt liberalitas nolenti adquiri.* Ibid. leg. xix. §. 2. But tho' a pure and ſimple *Donation* be, in its own Nature, irrevocable, it may yet be revok'd for ſtrong Reaſons, which we may look upon as tacit Conditions. Such, for Inſtance, are I. An extreme Ingratitude in the *Donee*; as if he ſhould attempt the Life, or wound the Reputation, of the *Donor*; if he ſhould do him any great Injury or Violence; or maliciouſly occaſion him any conſiderable Loſs; or if, the *Donor* being reduc'd to Poverty, he refuſes to aſſiſt him: Tho', according to ſeveral Interpreters, the laſt Caſe is not included in the Extent of the following Line. *Si non donationis acceptor ingratis circa donatorem inveniatur, ita ut injurias atroces in eum effundat, vel manus impias inferat, vel jacturæ molem ex inſidiis ſuis ingerat quæ non levem cenſum ſubſtantiæ donatoris imponat, vel vitæ periculum aliquid ei intulerit.* Cod. lib. viii. tit. lvi. *De revoc. Donat.* leg. x. Another good Reaſon is, II. The unexpected Birth of Children to the *Donor*; for it may be reaſonably ſuppos'd, that he would have kept his Fortune for his Children if he had any; and therefore he beſtow'd it only under this tacit Condition, That on his having Children the Gift ſhould be null. *Si unquam libertis patronus filios non habens bona omnia, vel partem aliquam facultatum, fuerit donatione largitus, & poſtea ſuſceperit liberos, totum quidquid largitus fuerat, revertatur in ejuſdem donatoris arbitrio ac ditione manſurum.* Ibid. leg. viii. Several of the Interpreters however juſtly affirm, That the Caſe there only relates to the Thing expreſs'd; *viz.* A Donation made to a freed Man, by him who had been his Maſter, and had reſtor'd him his Liberty. See *Vinnius* on the *Inſtitutes*, lib. ii. tit. vii. §. 2. and Mr. *Noodt* on the *Digeſt.* pag. 15. But if we only conſider natural Law, tho' the particular Reaſon (for which the *Roman* Law allow'd the *Donor* to revoke what he had given) does not extend to any other Perſon; yet there is always a general Reaſon which uſually takes Place, and which I have explain'd above. I ſhall only add this Reſtriction, provided the *Donor* has given all, or the greateſt Part of his Fortune. For when the Donation is inconſiderable in Compariſon with his Eſtate, we may ſuppoſe that he would have given it even tho' he had Hopes of Children; eſpecially if the *Donee* be in low Circumſtances. III. The Donation may be partly revok'd, when the *Donor* has not reſerv'd enough to himſelf to leave what is due to thoſe Perſons, from whom he cannot legally withhold it; for, in this Caſe, it is juſt that the *Donee* ſhould reſtore what is deficient to make up their Portion, which the *Donor* could not alienate to their Prejudice. See *Code*, lib. iii. tit. xxix. *De inofficioſis donationibus*, & tit. xxx. *De inofficioſis dotibus.* Conſult, alſo, on this Subject, *The civil Laws in their natural Order*, by *M. Domat*, Part. 1. lib. i. tit. x.

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chief [a] is a [b c] *Commiſſion* [1], whereby one Man undertakes *gratis* another Man's Buſineſs, at his Requeſt, and upon his Authority. This Contract indeed does not, directly and in itſelf, preſuppoſe Property and the Price of Things, but only by Accident, ſo far as the Perſon giving the *Commiſſion* is concern'd to repay to the Perſon receiving it whatſoever Charges he happens to be at in the Management of it; for his Labour only is ſuppos'd to be promis'd *gratis*. Now, if any Man undertakes another's Buſineſs, unknown to him, and manages it with Succeſs, the *Roman* Law allows him [2] *an Action for Buſineſs done*, which is founded upon what we may properly call a [3] *tacit Commiſſion* [d], as is the [4] Obligation between a Guardian and a Minor [e].

II. The old *Romans* were extremely exact and conſcientious in the Diſcharge of this Truſt. For they look'd upon it to be founded upon good Nature and Friendſhip [5], the great Bands and Cements of human Society; and therefore deſervedly had thoſe in Deteſtation, who under ſuch ſpecious Pretences ſhould deceive one who lays himſelf open to their Mercy, by having too good an Opinion of their Probity [f]. [6] *In private Affairs*, ſays *Cicero*, *our Anceſtors thought guilty of the higheſt Crime, not only him who managed his* Commiſſion *knaviſhly for his own Gain and Advantage, but even him who was wanting in his Care; and therefore judged the Breach of Truſt to be as bad as Theft. For where we cannot be preſent ourſelves, the Fidelity of our Friends is preſumed to ſupply our Place; which, whoſoever violates, impugns the Safeguard of every Man, and, as much as in him lies, diſturbs Society. We cannot do every thing ourſelves; at ſome Things ſome are better than others. And therefore we contract Friendſhips, that by mutual good Offices our common Advantages may be carried on. Why do you undertake a* Commiſſion, *if you deſign to neglect it, or to make a Gain of it? Why do you intrude yourſelf into my Concerns, and by your pretended Kindneſs clog and hinder my Deſigns? Stand off, I can get another to do it for me. You undertake the Burthen of an Office which you think you can go through with, and which never ſeems heavy to thoſe who are not light themſelves: This therefore is the baſeſt of Crimes; becauſe it violates the two moſt ſacred Things, Friendſhip and Faith. For no Man commits his Buſineſs, but to a Friend, nor truſts any, but whom he thinks faithful. The greateſt of Villains therefore muſt he be, who breaks in upon Friendſhip, and at the ſame Time cheats him who had not been capable of being thus cheated, had he not believed the Villain honeſt.* Cic. *pro* S. Roſcio, *c.* 38, 39. [7] Plautus *Mercatore*, *Act.* ii. *Sc.* 3. *v.* 42. A Young Man ſays to his Father, "I have heard you often ſay, That every "Wiſe Man ought, in the firſt Place, to look "after a Commiſſion entruſted to him.

III. For the ſame Reaſon [8] the *Roman* Laws require

[a] Here our Author, as has been obſerved in another Place, has forgot to mention *Donations between Parties living* as Principal Contracts. See Note 1. pag. 484. [b] *Mandatum.* [c] See what we have ſaid upon this in B. 3. c. 9. [d] See above in *B.* 4. *c.* 13. §. 7. [e] Vid. *l.* 44. *t.* 7. *l.* 5. *princ. f.* 1. *D. de Obligat. & Action.* [f] Vid. *l.* 3. *t.* 2. *l.* 1. *D. de his qui not. infam.* & *l.* 17. *t.* 1. *l.* 1. §. 4. *D. mandati*, &c.

[1] See Mr. Noodt's *Probabil. Jur. l.* 4. *c.* 12. *& ult.* where he diſtinguiſhes between a Commiſſion, and certain Things which may be confounded with this ſort of Contract, tho' they have no relation to it.

[2] The Expreſſion of the *Roman* Law, *Utiliter gerere*, ſignifies only to do a Thing for the Advantage of him for whom we manage, which Prudence engages us to do, and 'tis likely he would have done himſelf; ſo that, provided it is not our Fault, we need not warrant the Succeſs, and we have Right to demand all neceſſary and needful Expences, tho' the Buſineſs has not ſo good an Event as we hoped for. *Is autem, qui negotiorum geſtorem agit, non ſolum, ſi effectum habuit negotium, quod geſſit, actione iſtâ utetur, ſufficit, ſi utiliter geſſit, & ſi effectum non habuit negotium, & ideo, ſi inſulam ſulſit, vel ſervum ægrum curavit, etiamſi inſula exuſta eſt, vel ſervus obiit, aget negotiorum geſtorem.* Digeſt. l. 3. t. 5. De negotiis geſtis, Leg. 10. §. 1. *Negotium gerentes alienum non interveniente ſpeciali facto* (and not *pacto*, as Mr. *Bynkerſhoek* has prov'd well, Obſ. l. 7. M. *Noodt* has join'd his Suffrage in his Commentary on the *Dig.* pag. 160.) *caſum fortuitum præſtare non compelluntur.* Cod. l. 2 t. 19. De negot. geſtis, Leg. 22. It is not ſo with him, who, having got Poſſeſſion of what belongs to another diſhoneſtly, has been at ſome Expences for his Maintenance; for if the Work he has employ'd them in comes to nothing, 'tis ſo much the worſe for him, for he cannot retain the Thing, till he has recovered his Damages; becauſe he muſt be thought to act for his own Intereſt only, without any Regard to the lawful Proprietors. On the contrary, he is anſwerable for all Things that are loſt thro' his Negligence; and the Owner of the Things has an Action againſt him for managing his Affairs. This is the Determination of the *Roman* Lawyers. See Mr. *Noodt's Probabil. Juris, l.* 3. *c.* 9. I further ſay, That, by the Law of Nature only, ſuch a diſhoneſt Poſſeſſor deſerves, in Strictneſs, to loſe all his Expence, tho' he had ſome regard to the other's Profit, and the Effect continued ſo that the Proprietor got by it. See above lib. iv. cap. vii. §. 5.

[3] See what has been ſaid above, *l.* 4. *c.* 13. §. 5.

[4] It is not neceſſary to ſuppoſe here either a tacit Commiſſion, or a Quaſi-Contract, as the *Roman* Lawyers ſpeak. The great Maxim of the Natural Law is, That we ought to do no Man a Damage; and, if we have done any, to make it good again. This Law is ſo general, indiſputable, and indiſpenſable, that it is ſufficient to eſtabliſh all relative Obligations, as well of Guardians and Pupils, as of thoſe who have taken upon them the Care of other Affairs, without their Knowledge, and of thoſe to whom they have faithfully diſcharged that Office. It were eaſy to prove it, if the Thing were not clear in itſelf. See what is ſaid, *l.* 3. *c.* 6. §. 2.

[5] *Mandatum, niſi gratuitum, nullum eſt; nam originem ex officio & amicitiâ trahit, contrarium ergo eſt officio merces: interveniente enim pecuniâ, res ad locationem & conductionem potius reſpicit,* Digeſt. l. 17. t. 1. Mandati vel contra, Leg. 1. §. 4.

[6] *Tully's* Latin is, *In privatis rebus, ſi qui rem mandatam non modo malitioſius geſſiſſet, ſui quæſtus aut commodi cauſâ, verum etiam negligentius, cum majores ſummum admiſiſſe dedecus exiſtimabant. Itaque mandati conſtitutum eſt judicium, non minus turpe quam furti. Credo propterea, quod quibus in rebus ipſi intereſſe non poſſumus, in his operæ noſtræ vicaria fides amicorum ſupponitur, quam qui lædit, oppugnat omnium commune præſidium, &, quantum in ipſo eſt, diſturbat vitæ ſocietatem. Non enim poſſumus omnia per nos agere, alius in alia eſt re magis utilis. Idcirco amicitiæ comparantur, ut commune commodum mutuis officiis gubernetur. Quid recipis mandatum, ſi aut neglecturus, aut ad tuum commodum converſurus es? Cur mihi te offers, & meis commodis officio ſimulato officis, & obſtas? Recede de medio, per alium tranſigam. Suſcipis onus officii, quod te putas ſuſtinere poſſe, quod minime videtur grave iis, qui minime ipſi leves ſunt. Ergo idcirco turpis hæc eſt culpa, quod duas res ſanctiſſimas violat, amicitiam & fidem; nam neque mandat quiſquam fere niſi amicis, neque ei niſi quem fidelem putat. Perditiſſimi igitur eſt hominis, ſimul & amicitiam diſſolvere, & fallere eum qui læſus non eſſet, niſi credidiſſet.*

[7] *Plautus's* Words are, *Sæpe ex te audivi, Pater, rei mandatæ omnes ſapientes primum prævorti docet.*

[8] The Words of the Code are, *Suæ quidem quiſque rei Moderator, atque arbiter, non omnia negotia, ſed pleraque ex propria animo facit; aliena vero negotia exacto officio geruntur, nec quidquam in eorum adminiſtratione neglectum ac declinatum culpâ vacuum eſt,* l. 4. t. 35. Mandati, vel contra, Leg. 21. The Interpreters do not agree about the Degree o Care and Exactneſs, for want of which the Perſon concerned is authorized to require Damages of him who has undertaken his Affairs, either without his Knowledge, or at his Requeſt. Some affirm that he is anſwerable both in the Management of the Affairs, and in the

require, that a *Commiſſion* ſhould be executed with the utmoſt Diligence, altho' undertaken purely for the Benefit of the Perſon intruſting it [a]. Of this *Cornelius Nepos* gives us *Atticus* as a perfect Pattern [b]. *He never made any Promiſe but with great Care and Caution; for he did not think it a piece of Generoſity, but rather Levity, to promiſe more than he could perform. But, when once he had undertaken any Thing, he was as indefatigable in the Proſecution of it, as if it had not been his Friend's, but his own Concern: In ſuch a Caſe he look'd upon his Reputation to be at ſtake, than which nothing was more dear to him* [c].

But if we hope to ſucceed well in giving a *Commiſſion*, we ought to conſider and form our Opinion of the Man from his paſt Diligence, and the Tenor of his former Life: For he that truſts a profligate Perſon may thank himſelf for his Diſappointments, unleſs he particularly takes upon him to be more diligent than ordinary [2], and is capable of being ſo. We read a pleaſant Story of a Man [d] who had ſore Eyes, and came to a Horſe-Doctor for Relief; the Doctor anointed his Eyes with the ſame Ointment he us'd amongſt his Horſes; upon which the Man falls blind, and the Cauſe is brought before the Judge, who acquits the Phyſician; *For if the Fellow*, ſays he, *had not been an Aſs, he had never applied himſelf to a Horſe-Doctor.*

IV. On the other hand, the [e] Agent ought to be repaid whatever Charges he has been at in the Execution of the *Commiſſion*. For having promis'd Nothing *gratis* but his Care, Diligence, and Fidelity, a tacit Compact is ſuppos'd to have been made for the Repayment of Charges: And indeed it would be hard to render a Man's Kindneſs expenſive to him [f]. And the ſame holds good of any Loſs which happens by reaſon of the Truſt, but not of ſuch a Loſs as is only occaſioned obliquely by it: And therefore thoſe Damages only are to be made up, which directly proceed from the *Commiſſion*, and not thoſe which happen only by the Bye, whilſt the Buſineſs was on foot. To this Purpoſe is that Paſſage in the [3] *Digeſts* [g]: *The Agent ſhall not account to the Perſon employing him all the Expences, tho' perhaps ſome of them he had not been at, were it not for his* Commiſſion [4], *as if he has been plunder'd, or ſhipwreck'd, or put*

[a] Vid. *Jac. Gothofred. ad Leg.* 23. *D. de Div. reg. juris.* [b] *In Vitâ* Attici. *c.* 15. [c] Ter. *And. Act.* 4. *Sc.* 1. *v.* 5, *&c.* [d] *Sadus, Roſar. Perſ. c.* 7. [e] *Mandatarius*, &c. [f] See *Grot. B.* 2. *c.* 12. §. 13. [g] *B.* 17. *t.* 1. *l.* 26. §. 6. *D. Mandati*, &c.

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the Commiſſion, for the leaſt Fault; but others ſay 'tis ſufficient to attend the Affairs of another with that Application that he ordinarily does his own. See *Vinnius* upon the *Inſtitutes*, l. 3. t. 27. §. 11. num. 2. & t. 28. §. 1. num. 3. and Mr. *Hertius*'s *Paræmiæ Juris Germanici*, l. 1. c. 35. §. 2, 3. See, alſo, *Select. Quæſt.* lib. 1. cap. iii. There are even two Laws where it is expreſsly ſaid, That the Perſon commiſſioned is only anſwerable for his Diſhoneſty, or ſome groſs Fault. Digeſt. lib. xvii. tit. 1. *Mandati, vel Contra*, Leg. viii. §. *alt.* Leg. x. And M. *Noodt*, who has try'd to reconcile this with the others, appears much perplex'd and even dubious of his own Conjecture, comment. pag. 376. Nor may we wonder at ſuch a Difference of Opinions, ſince the *Roman* Lawyers themſelves do not fully agree about the Nature and Degree of Negligence for which we are reſponſible in moſt Contracts, or, at leaſt, they expreſs themſelves very ambiguouſly in the Writings that we have left us. This Mr. *Thomaſius* makes appear at large in his Diſcourſe Printed at *Hall* in 1705, entituled, *De uſu practico Doctrinæ diſſillimæ Juris Romani de culparum præſtatione in Contractibus*. He, alſo, obſerves there, that, by reaſon of the infinite Variety of Circumſtances, it is impoſſible to ſettle any general Rule, which may extend to all Caſes in this Matter. As for myſelf, 'tis my Opinion, that in what manner ſoever we have taken in hand another Buſineſs, or are charged with their Affairs, we are always obliged by the Law of Nature, independent on the Civil Laws, to do all we can in them, but not more, at leaſt, if we have not thruſt ourſelves improperly and unneceſſarily upon a Thing, in which we could have no Proſpect of Advantage, or the Nature of the Engagements, either expreſs or tacit, into which we are entered, does not require a certain Degree of Ability and Accuracy, whether we attain to it, or not. For I underſtand, by what we are capable of, all that a Man can do for himſelf in the Things which he is moſt concerned for. But let it be well underſtood that we muſt not extend this beyond the End and Nature of a Contract; for we never engage to take care, or be at Expences extraordinary, nor to neglect other Affairs leſs important in themſelves, to attend other Mens, as perhaps one would do, if he acted for himſelf. Theſe Principles being laid down, 'twill not be hard, in my Opinion, to determine, after an attentive Examination of Circumſtances, when Men are reſponſible for the Faults they have committed in relation to Contracts. Mr. *Gundling*, the celebrated Profeſſor at *Hall* (in his *Jus Nat. & Gent.* Cap. xx. §. 80. *& ſeqq.*) is of M. *Thomaſius*'s Opinion with regard to the Impoſſibility of fixing any general Rule in this Caſe: it is therefore no Wonder if he diſlikes mine. He owns however, That it would not appear unjuſt to him, if it was authoriz'd by the Laws. "But, adds he, we cannot exact "more from a Contracting Party than he has promis'd: And becauſe a Perſon has charg'd himſelf, for Inſtance, with a "Truſt, which he might have refus'd, it does not follow, that he is bound to any certain Degree of Care and Exactneſs. "He does ſufficient Service to the Proprietor of the Thing intruſted, by allowing him to put his Effects in a Place of Secu"rity. It is his Buſineſs, if we will conſent to it, to require more, or to ſeek ſomewhere elſe a Perſon more diſpos'd to "ſerve him." This is all that is ſaid, which has only ſerv'd to confirm me in my Opinion, ſince I ſee it ſo weakly attack'd. Since in all Conventions and Contracts we muſt, without Diſpute, have regard to the Intention of the Party chiefly concern'd; an Intention deduc'd from the Nature of the Affair itſelf, even tho' it ſhould not be formally expreſs'd: I would ask, What a Man muſt think to whom another ſhould bring a Caſket full of Jewels, deſiring him to keep it for him? Could he ſincerely believe that the Owner requir'd no Care of him? The Confidence he repoſes in him would not ſuffer him barely to ſuſpect this. Tho' he ſhould not depend, as it often happens, upon the Friendſhip of the *Depoſitary*, which obliges a Man to do as much for his Friend as he would for himſelf, he relies, at leaſt, upon his Probity. And does Probity confine itſelf not to be diſhoneſt? It is a Service requir'd of us: but is not demanded with a Deſign that we ſhould loſe by it? Now we know, by Experience, whether the *Depoſitary* is careful of his Truſt, or we do not know it. If we do know it, have we not Cauſe to believe that it is on this Account that we intruſt him with the Care of our Effects, and, conſequently, he is bound to anſwer our Confidence? But if we do not know it, we know at leaſt, that every Man is careful to a certain Degree, as to what he undertakes, and therefore he may reaſonably expect ſuch a Care. This Rule is ſo ſimple and eaſy, that it is not difficult to diſcover the Truth of it: I am therefore ſettled in my firſt Opinion, till I ſee ſomething further advanc'd againſt it.

1 His Words are, *Quicquid rogabatur, religiosè promittebat, quod non liberalis, ſed levis arbitrabatur polliceri quod præſtare non poſſit. Idem in nitendo, quod ſemel admiſiſſet, tantâ erat curâ, ut non mandatum, ſed ſuam rem videretur agere. Nunquam ſuſcepti negotii ei pertæſum eſt, ſuam enim exiſtimationem in ea re agi putabat, quâ nihil habebat carius.*

2 Our Author had better have obſerved, That, when we do not know the Character of a Perſon, we cannot require greater Care than he uſually beſtoms on what he loves beſt; for he cannot be thought to engage himſelf farther; and it is not his Fault, if we have too good an Opinion of him, eſpecially if he has not contributed to beget it.

3 The Words are, *Non omnia, quæ impenſurus non fuit, mandatori imputabit, veluti quod ſpoliatus ſit à latronibus, aut naufragio res amiſerit, vel languore ſuo ſuorumque apprehenſus, quædam erogaverit. Nam hæc magis caſibus quam mandato imputari oportet.* See alſo Mr. DOMAT's Civil Laws in their Nat. Order, *Part* 1. *l.* 1. *t.* 15. §. 2. §. 6.

4 But when he makes a Journey on purpoſe, as we ſuppoſe, the Loſſes which happen by Chance ought to be look'd upon as the real Conſequents of the Execution of the Contract; for, if he had ſtaid at home, he had not been expos'd either to the

to Charges by his own, or his Servant's Sickneſs: For ſuch Expences as theſe ought to be imputed to Chance, and not to the Commiſſion. Indeed, when a Man of his own accord, upon no other Motive than his own Good-will, takes upon himſelf the Management of another's Buſineſs [1], he is ſuppos'd willingly to run the riſque of all Caſualties, that unexpectedly happen in human Affairs. But the Caſe is alter'd, when a Man is commanded to manage another's Buſineſs; for there he that commands is concern'd to bear him harmleſs, ſince, in this caſe, the Perſon in *Commiſſion* had not Power to act otherwiſe. But when a Man undertakes a Buſineſs in its own Nature hazardous and dangerous [2], he is ſuppos'd (unleſs he expreſly declares againſt it) to take upon him the common Accidents which uſually attend ſuch a Buſineſs [a].

V. It is a celebrated Queſtion, *Whether a* Commiſſion *can be ſatisfied by an Equivalent?* which we find elegantly debated in *Gellius* [b]. [3] *The Queſtion*, ſays he, *is*, "*Whether having a* Commiſſion *given, and* "Orders how to manage it, you ought to act "counter, if it ſeems for the Advantage of him who "gave it? Thoſe that hold the Negative, argue, "that many have determined to have their Buſineſs "done after ſuch a particular Manner; and there- "fore he whoſe Buſineſs it is, having deliberated "and fixed upon a Method, it ought not to be "done otherwiſe, although ſome ſudden unexpect- "ed Accident ſhould promiſe a better Iſſue; for "fear, in caſe of Diſappointment, the Guilt of "Diſobedience, and the Puniſhment due to it, "ſhould unavoidably follow: Whereas, ſhould the "Thing ſucceed right, Thanks be to Providence: "But yet an ill Precedent would be introduced, for "breaking in upon well-laid Counſels, and the Sa- "credneſs of a *Commiſſion*." Others, on the contrary, are of Opinion: "That the Inconveni- "encies that may happen, upon acting Counter to "Order, ought to be compared with the Probabi- "lity of ſucceeding; and if the former appears "lighter and leſs than the latter, then ought "we to proceed accordingly; for fear of loſing "an Opportunity, which Heaven in this Caſe "ſeems to offer: Neither need we fear ſuch a Pre- "cedent, if thoſe who follow the Example never "do it, but with the ſame Reaſon." Then follow ſome Precepts of Prudence, "Particularly, Regard "is to be had to the Temper and Nature of him "from whom the *Commiſſion* is receiv'd; that he "be not of a cruel, rough, untractable, inexorable "Diſpoſition [c], *for, in ſuch a Caſe, the ſafeſt Way* "*would be to ſtick to his Orders.*" He adds, as an Example, *Craſſus Mutianus*, "Who ſent an Ar- "chitect for the greater of two Beams, to raiſe his "Battering-ram with; but the Architect, thinking "the leſſer the fitteſt, brought that; upon which "Account *Mutianus* ordered him to be ſcourged, for "he imagined that Diſcipline would be trampled "upon, and Authority deſpiſed, if a Man, under "Command, inſtead of obeying the Orders of his "Superior, ſhould impertinently interpoſe his own "Judgment:" Though this is to be ſaid for the Architect, that *Mutianus* ſending a Man skilful in the Art, and ſignifying to him what Uſe he deſigned the Beam for, ſeemed, in a manner, to adviſe with him about it [4] [d]. On the other ſide, we have an Example of Mildneſs in the Emperor *Adrian* [e]: for

[a] *Vid.* Mornac. *ad l.* 26. §. 6. *D. Mandati, & l.* 17. *t.* 2. *L.* 52. §. 4. *pro Socio.* [b] *L.* 1. *c.* 13. [c] As was *Piſo in Seneca de Ira, l.* 1. *c.* 16. [d] Add. *Mich. Montaigne, Eſſ. l.* 1. *c.* 16. [e] Vid. *Xiphilin. Epit. Dionis ann.* 118. *& Zonaræ, Tom.* 2.

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the Tempeſt or the Thieves. And ſo they ought to be put among the Expences of attending upon his Commiſſion, when the Caſe relates to Clothes, Money, or other Things neceſſary for his Journey. But the Caſe is different if he falls ſick; for it is not a ſufficient Proof that it was an Effect of the Fatigues of his Journey: but if it were, he ought to be repay'd the Charges of his Sickneſs. But I doubt if he ought to be allow'd more on this Account, than it would have coſt him if he had fallen ſick at home. See the following Note.

[1] Upon what is that Preſumption grounded? I ſhould rather aſſert, that he who takes upon himſelf a Commiſſion, ſhould execute it at his own Charge; for, according to this Author, here is no Agreement to give any thing but his Trouble; and ſince Misfortunes may happen every Day, the Commiſſion may be very chargeable, if it be plac'd to the Account of the Agent. So that I do not ſee that he engages himſelf to bear the Loſſes to which he is expoſed, more than the Charges he muſt be at in executing his Commiſſion. The Truth is, We may, on the contrary, hold, that no Man willingly runs the Riſque of unforeſeen Accidents, which, it is probable, would not have happen'd to him without the Commiſſion, eſpecially if he has not fairly conſented to it, which is not common. Such as accept Commiſſions, in the Execution of which they are ſubject to the like Accidents, will not, nor can be ſerviceable in that Caſe; and thoſe who have Power and Will, may as well do it out of mere Liberality, ſo as to require no Satisfaction for their Misfortunes, nor any Repayment of the Expences they have been at in executing their Commiſſion.

[2] Not at all, unleſs he ſo declared. See the foregoing Note. On the contrary, The more dangerous a Thing is known to be, we have the leſs Reaſon to believe that he would meddle with it, if he did not think he ſhould be indemnified from all ill Accidents. It is the Buſineſs of the Principal, as the Perſon chiefly concerned, to ſee how far it ſuits him to run the risk of Indemnification, or to engage the Agent to diſpenſe with it.

[3] His Words are, *In Officiis capiendis, cenſendis, judicandiſque, quæ Græce,* Καθήκοντα, *Philoſophi adpellant, quæri ſolet, an negotio tibi dato, & quid omnino faceret definito, contra quid facere debeas, ſi eo facto videri poſſit res eventura proſperiùs, exque utilitate ejus, qui tibi id negotium mandavit? Anceps quæſtio, & in utrumque partem à prudentibus viris arbitrata eſt. Sunt enim non pauci, qui ſententiam ſuam unâ in parte defixerint, & re ſemel ſtatutâ, deliberatâque ab eo, cujus negotium id proficuúmque eſſet, nequaquam putaverint contrà dictum ejus eſſe faciendum, etiamſi repentinus aliquis caſus rem commodius agi poſſe polliceretur; nè, ſi ſpes fefelliſſet, culpæ imparentiæ, & pœna indeprecabilis ſubeunda eſſet; ſi res fortè melius vertiſſet, Diis quidem gratia habenda, ſed exemplum tamen intromiſſum videretur, quo bene conſulta conſilia Religione mandati ſoluta corrumperentur. Alii exiſtimaverunt incommoda priùs, quæ metuenda eſſent, ſi res geſta aliter foret quàm imperatum eſt, cum emolumento ſpei penſitanda eſſe, & ſi ea leviora, minorque, utilitas autem contrà gravior & amplior ſpe quantum poteſt firma oſtenderetur, tum poſſe adverſum mandata fieri, conſuetaxat hujuſmodi non adeſſent. Cum primis autem reſpiciendum putaverunt ingenium naturamque illius, cujus res, præceptumque eſſet, nè ferox, durus, indomitus, inexorabiliſque ſit, qualia fuerunt Poſthumiana imperia & Manliana; nam ſi tali Præceptori ratio reddenda ſit, nihil faciendum eſſe monuerunt aliter, quam præceptum eſt.* But our Author did not underſtand theſe Words, *Sunt enim non pauci qui ſententiam,* &c. for he alledges them as the Foundation of their Reaſons who held the Negative, as if they ſignified, That there are many Men, who having eſpouſed one Party, will never forſake it, *&c.* whereas *A. Gellius* ſays only, That there are ſome Men, who determine in Effect *Pro* and *Con* in the ſame Queſtion, *&c.* we ought to obſerve, that in the Sentence which begins with *Neque timendum exemplum,* &c. there is ſomething corrupted, though the Senſe does not clearly diſcover it. See *F. Fred. Gronovius*'s Note upon it.

[4] Mr. *Montaigne* ſpeaks ſomething to this Purpoſe; blaming Two *French* Ambaſſadors, who, under a Pretence of not engaging their Maſter in a troubleſome Affair, would not give an Account of what paſſed, and then goes on: "However that be, I would "not

for when the People had demanded ſomething in a tumultuous manner, he ordered the Cryer to proclaim Silence. But he, fearing the Conſequence of ſuch an harſh and unuſual Word, ſtretched out his Hand, and, having thereby procured Silence, cryed aloud, *This is what the Emperor would have*; with which the Emperor was not offended. "One time, "when *Commodus* found the Bath too warm, he or- "dered the Keeper of it to be thrown into the Fur- "nace: But the Servant who had received the "Order, threw in a Sheep-skin, by the Stink "thereof to induce the Emperor to believe his Or- "der to be put in Execution." *Lamprid. in Commodo*, *c.* 1. *Grotius* [a] is of Opinion, that a *Commiſſion* may be diſcharged by an Equivalent, provided it appears that it was not preſcribed to be managed under any particular Form, but under the general Conſideration and Proſpect of ſome Advantage, which may be obtained as well one Way as the other.

In ſhort, the State of the Caſe is this: In ſome *Commiſſions* the Buſineſs only is ſpecified, and the Management of it left to the Diſcretion of the *Agent*: Sometimes the Management too is preſcribed, but rather by way of Advice, as ſeeming beſt to him who gives the *Commiſſion*; but yet ſo as not to exclude the *Agent* from uſing his own Method [b], if it ſhould ſeem beſt at the Point of Execution. But laſtly, The Method is ſometimes ſo ſtrictly preſcribed, that the *Agent* cannot depart from it, let what will happen. Here it is plain that a *Commiſſion* is ſatisfied with an Equivalent in the ſecond Caſe, not in the Third. To this Purpoſe we have a Caſe in the *Digeſts* [c], *I* Commiſſion *you to be Surety to* Sempronius *for* Titius, *you do not make yourſelf a Surety, but give* Sempronius *a* Commiſſion *to truſt* Titius. *If you have been at Expences upon this Account the Queſtion is, Am I reſponſible?* Which is declared in the Affirmative. *For I gained my End, which was, that* Sempronius *ſhould truſt* Titius, *and whether he does it by your Suretiſhip, or your* Commiſſion, *it is all alike to me; and I am obliged by one, as well as the other to repay what you have laid out upon this Account.*

But, as I obſerved above, we muſt carefully diſtinguiſh [d] between the *Commiſſion of a Superior* and the *Commiſſion of a Friend*; which two are widely different, and agree in nothing but the Name: And therefore what the *Civilians* have ſaid upon the *latter*, are very injudiciouſly applied to the former. For, in private Affairs, it is eaſy to preſume, that the Method is preſcribed only by way of Advice, ſo as to leave room for the Diſcretion of the *Agent*. But when a Buſineſs is enjoined by a Superior, the bare Execution of it is ſuppoſed to be meant; and, in this Caſe, it will not be lawful to depart from the Method preſcribed, unleſs Leave be given (as frequently it is) by an expreſs Clauſe to deviate from it, as Occaſion ſhall require; or unleſs the Words, interpreted according to Reaſon, and the received Rules of Speech, ſo as to anſwer the Deſign of the *Commiſſion*, can warrant the doing of it. For that Senſe which the Meaning of his Words fairly imports, is to be preſumed the Meaning of the Perſon: Yet this Liberty is not to be taken, but in Caſes of Neceſſity, [z] for all the Force of Authority would be eluded, and the Commonwealth would be often brought into Danger, if a Miniſter, of his own Head, ſhould take upon him the Part of the Governor. So *Otho* in *Tacitus*, H. L. i. c. 73, ſpeaks; If every Man, when he is commanded, is allow'd to ask Queſtions, there is an End of all Authority. And again, l. ii. c. 39, it is a poor Commendation for a Soldier to comment upon, rather than execute the Commands of his Superior. *Add.* lib. xlix. t. 16. l. iii. §. 15. *D. de re militari &* Liv. l. xliv. c. 34. Yet Miniſters of great Abilities do well in neglecting the fooliſh Orders of their Prince. See 2 *Kings* xviii. 6. Vid. *Valerius Maximus* Lib. iii. Chap 8.

[a] L. ii. c. 16. §. 21. [b] As in the Proverb. *Mitte ſapientem, & ipſi nihil dicas.* [c] L. 17. t. 1. *l. ult.* §. 1. *De Mandati.* [d] Which *Bœcler* takes Notice of in his Diſſert. *de religione mandati.*

"not be ſo uſed in my low Sphere. We are ready to withdraw Obedience upon every Pretence, and uſurp upon our Maſters. Every "one aſpires naturally to Liberty and Authority, and therefore by a Superior no Advantage is to be ſo prized, as ſincere and na- "tive Obedience. The Office of a Command is abuſed when Men obey through Prudence, and not through Subjection (which is "*A. Gellius*'s Notion, who ſays, *Corrumpi atque diſſolvi officium omne imperantis ratus, ſi quis ad id, quod facere juſſus eſt, non obſequio debito, ſed conſilio non deſiderato reſpondeat*) as *Craſſus Mucianus* ſhews, *&c.* But if we ought to conſider that ſuch a ſtrict Obedience belongs only to poſitive and preciſe Commands, Ambaſſadors have more free Orders, which in many Things depend principally on their Management. They do not barely execute them, but frame and faſhion their Maſter's Will according to their own Judgment. I have known ſome Perſons acting by others Commands, reproved for following the Inſtructions of their Kings Letter, rather than the Opportunity of diſpatching Affairs. Men of Underſtanding blame the Cuſtom of the Kings in *Perſia* now in uſe, which ties up their Agents and Lieutenants ſo ſtrictly to their Orders, that they cannot do the leaſt Thing without ſending for new Orders. This Delay, in an Empire of ſo vaſt an Extent, has produced great Detriment to their Affairs. So *Craſſus* writing to an Artiſt, and telling him to what Uſe he deſigned the Maſt? Did he not forbid him to make Uſe of his Advice, or interpoſe his Determination? *Eſſays* l. 1. c. 6.

[z] The Words are, *Mandavi in hæc verba, Lucius Titius Gaio ſuo ſolutem. Peto & mando tibi, ut fidem dicas pro Publio Mævio apud Sempronium, quæque à Publio ſoluta tibi non fuerint, me repræſentaturum hæc epiſtolâ meâ manu meâ ſcriptâ notum tibi facio, quæro, ſi non fide juſſiſſet, ſed mandaſſet creditori, & alias egiſſet, quàm* [*quod*] *ei mandatum eſſet, an actione Mandati teneretur? Reſpondit, Teneri.* See *Arn. Vinnius* upon the *Inſtitutes*, lib. iii. c. 27. *De mandato*, §. 8. But when an Agent has really exceeded his Commiſſion, has he no Recourſe againſt his Principal? Or, may he not, at leaſt, claim the Reimburſement of what he has expended beyond the Bounds of his Commiſſion? The Lawyers are divided on this Point: But *Juſtinian* has determined for the Affirmative. See *Cujas Obſervat.* lib. xii. cap. 34. And the Interpreters, eſpecially *John De la Coſta*, on the *Inſtitutes*, lib. iii. tit. 26. §. 8. A Man, for Inſtance, gives Direction to buy a Houſe at Ten Thouſand Crowns, the Agent gives Twelve Thouſand, and generouſly is contented to loſe whatever he has paid beyond the Principal's Orders. Let us hear M. *De Toureil*'s Opinion upon this. "A Man, ſays he, who gives another a Power to buy him a Houſe, has two Deſigns. The one to buy him a Houſe, and the "other to buy it at a certain Price. Now theſe two Deſigns are fully accompliſhed when his Agent buys the Houſe, and is con- "tented to loſe whatever he has paid beyond his Commiſſion. What does it ſignify though it coſt more, ſince the Principal is no "ways out of Pocket by it? The Agent, indeed, loſes by his Delicacy, but the Perſon who employ'd him has no Reaſon to com- "plain of it, ſince it contributed to get him a good Bargain. The Fact is ſo rare, that there are few who would not wiſh to "be ſo ſerved. ——*Juſtinian* openly declares on the Side of *Proculus*, and I do not wonder at it. I am only ſurprized that this "Queſtion could ever appear problematical. The antient Lawyers muſt have been very fond of Sophiſtry to have made it the "Subject of Diſpute, *&c.*" See his *Eſſais Juriſprud. Quæſt.* 6. The reſt of the Chapter is worth reading, where the Author with his uſual Eloquence, gives the Reaſons on both Sides of the Queſtion.

[z] *Otho*'s Words are, *ſi, cur jubeantur, quærere ſingulis liceat, petcunte obſequio, etiam imperium intercidit.* See, alſo, *Lib.* ii. c. 39. *Tit. Liv. l.* xliv. *Ch.* 34. *& Digeſt. l.* 49. *t.* 16. *De Re militari, Leg.* 3. §. 15. A Vice-Roy of the *Indies*, having a good Occaſion to take the City of *Aden*, would not do it, though it had been a conſiderable Advantage, becauſe he had no Order for it from his Maſter, the King of *Spain*, as we are told by *Hieron. Oſorius, De Geſtis Emanuelis*, l. xi.

Sect.

Sect. 1. *Cor. Nepos, Epam.* Chap. 7, 8. "Thus "*Bavalan* did wisely in not putting in Execution "the Murther of *Clisson*, which his Master, the "Duke of *Bretagne*, had intrusted him with." See the Story in *Bussier*'s Hist. *Franc.* l. xi. p. m. 391. and *Mezeray*, p. 526. tom. 2. *Par.* Edit. "It is re-"markable, that the Viceroy of the *Indies* had a fair "Opportunity of seizing upon the City *Aden*, but "yet did not do it, because it was against the "King's Command, when yet the Taking of that "Place was of the greatest Importance." *Hier. Osor.* de gestis *Emmanuel.* l. xi.

VI. [a] A *Loan* (that is, when we allow another *gratis* [1] the Use of any Commodity not consumable) carries along with it these Conditions; that it be [2] carefully preserved, and with the same Diligence that prudent Men keep their own [b]; [3] that it be not put to any other Use, nor made use of any farther than the Person *lending* designed it [c]; lastly, that it be returned in the same State and Condition, as when it was borrowed [d]; indeed what Detriment it necessarily receives [4] from the ordinary Use of it, need not to be repaired, for that the *Owner* is supposed to give *gratis* [e]. Besides, if I *lend* a Thing for such a certain Time, and in the mean while, by some unforeseen Accident, want it myself, the *other* is obliged to deliver it immediately upon Demand: For no Man is presumed to *lend* his Goods, but so long as he can conveniently be without them. And he must be either very careless, or have a Design to impose upon another, who *lends* those Things which he is likely to want himself. And therefore a *Loan* for a certain Time is upon Condition, that the *Owner* shall not, in the mean time, have urgent Occasion for the Thing himself; but without such an urgent Necessity a *Loan* ought [5] not to be demanded before the Time [f].

Let us see therefore in what such a *Loan* as this and [g] *a Grant at Will and Pleasure* differ and agree. In respect of the Object and the Use, they agree; for the same Thing that may be *lent*, may be *granted* during Pleasure, and the Use in both Cases, is given *gratis*. But they differ, in that the *Loan* is a Contract, the *Grant* is not; the *former* obligatory on

[a] *Commodatum.* [b] L. 13. t. 6. l. 5. §. 5. *D. commodati.* [c] Vid. *Val. Max.* l. 8. c. 2. §. 4. And *Gellius*, l. 7. c. 15. *Vid.* l. 13. t. 6. l. 5. §. 8. *in fin. D. commodati, &* l. 47. t. 2. l. 54. §. 1 *De furtis.* [d] *Vid.* l. 13. t. 6. l. 3. §. 1. *D. commodati.* [e] *Add.* l. ult. *D. commodati.* [f] Vid. *D. ubi sup.* l. 17. §. 3, 4. *D. commodati.* [g] *Precarium.*

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[1] The *Roman* Law defines *Commodatum*, or a Loan, thus, *Commodata autem Res tunc propriè intelligitur, si nullâ mercede acceptâ vel constitutâ, Res tibi utenda data est, alioqui mercede interveniente, locatus tibi usus Rei videtur: Gratuitum enim debet esse commodatum.* Instit. l. iii. t. 15. §. 2. *i. e.* A Thing lent is properly then, when a Thing is granted to thee to be used without any Reward accepted or agreed for, otherwise if there be any Reward, the Use is hired, for Lending is free. See Mr. DOMAT's Civil Laws in their Natural Order. *Part* I. l. 1. tit. 5.

[2] The *Digests* thus speak in this Case, *Aliàs tamen* [is, *qui utendam accepit*] *exactissimam diligentiam custodiendæ rei præstare compellitur: nec sufficit ei eandem diligentiam adhibere, quam suis rebus adhibet, si alius diligentior custodire poterit,* l. 44. t. 7. De Obligat. & Action. l. 1. §. 4. Here let us apply and explain, at the same Time, what we have said, §. 3. *Note* 1. If we consider the Thing in itself, he, that borrows a Thing, is bound to take no greater Care of it than he does of such Things of his own, as he most esteems; I say, as he most esteems, because we may observe, that the most negligent Persons are very careful of some Things, which affect them much. Their Carelessness usually about their Affairs proceeds from this, that they do not affect them enough to make them resolute to conquer their Inclination to Ease, or to divert them from some Business they are about, or to keep them from some Pleasure, that they love better. As to what relates to the Objects which imploy their Mind, or when something extraordinary rouzes them, they know how to exert themselves and take good Precautions, and just Measures enough, unless they be Men very dull; so that the Rule I give, serves neither to authorize or excuse their Negligence. Every one has commonly Care enough of the Affairs and Goods of another, when he does as much as he would do for himself in Matters of the greatest Concern to him, and I require always this Degree of Exactness, whereas the Lawyers allow Men to come short of it in some Contracts. A Man cannot dispose of another's Interests, as he may of his own; and so when he has the Affairs or Goods of another in his Hands, he is thought to be engaged not to neglect any Thing that concerns them. But when he hath carried his Care and Diligence so far, it is all the Persons interested can require, if he is not evidently engaged to do any Thing more; but if the Care of our own Goods and Affairs so interferes with the Care of another's, that we cannot attend both at the same Time, it is natural for the first to prevail, every one being more thoughtful (all Things else being equal) of himself than of others; so that this Order ought not to be reversed, unless it be to satisfy some special Engagement, either express or tacit. We will now return to the Contract, of which he is treating. I say then, that although a Man be not mindful of his own Concerns, but neglects every Thing, yet he is no less answerable for his Negligence, when he has spoiled, or lost what he has borrowed; for it is certain, that if such a Thing had belonged to him, and he loved it much, or had some extraordinary Reason to keep it well, and do all he could to preserve it, he would have taken more Care of it. But when he has done all he can in this Case, the End and Nature of a Loan, considered in itself, can require no more of him, though other more fit and wiser Persons might have managed better, and secured it more from Mischances, unless there be some tacit Agreement, not only to indemnify the Proprietor, in case the Thing borrowed should be stole or much damaged, but, also, to pay for it, if it happen to perish in our Hands, even though it should not be through our Fault; provided, that it might have been safe in the Lender's Hands; and, indeed, few Persons will lend otherwise, especially, if they suffer by the Loss. We bear it, though with Trouble, and are uneasy to see a Thing defaced or abused, provided we can make use of it as formerly, or can restore it at a small Charge; but when it is quite spoiled, or lost, we trouble not ourselves in the least to distinguish, whether it was by the Fault of him, to whom we lent it to do him a Pleasure, or not. We believe it sufficient to consider, that, if he had taken Care of it, it had escaped that Accident, and that it was not our Fault, that it was exposed to it, while it was in the Hands of him who used it.

[3] To use it otherwise is a kind of Robbery according to the *Roman* Lawyers, whose Expressions here are a little extravagant. *Sive is, qui rem utendam accepit, in alium usum eam transferet, quam cujus gratiâ ei data est, furtum committit; veluti si quis argentum utendum acceperit, quasi amicos ad cœnam invitaturus, & id peregrè secum tulerit: aut si quis equum gestandi causâ commodatum sibi longiùs aliquò duxerit; quod veteres scripserunt de eo, qui in aciem equum perduxisset.* Institut. l. 4. t. 1. De obligationes quæ ex delicto nascuntur, §. 6. But the same Lawyers add, that if there be Reason to believe the Owner of the Thing borrowed permits us to make another Use of it it, than was expresly agreed for, and knows what is done, he is not then to blame. *Placuit tamen eos, qui rebus commodatis aliter uterentur, quàm utendas acceperint, ita furtum committere, si se intelligant id invito Domino facere, eumque si intellexisset, non permissurum; at si permissurum credant, extra crimen videri: optimâ sanè distinctione: quia furtum sine affectu furandi non committitur.* Institut. ubi sup. §. 7.

[4] The Words of the *Digests* are, *Si reddita quidem sit res commodata, sed deterior reddita, non videbitur reddita, nisi quod interest, præstetur.* Lib. xiii. t. 6. Commod. vel contra, l. 3. §. 1. *Si commodavero tibi equum, quo utereris usque ad certum locum, si nullâ culpâ tuâ interveniente, in ipso itinere deterior equus factus sit, non teneris commodati; nam ego in culpâ ero, qui in tam longum iter commodavi, qui eum laborem sustinere non potuit.* Ibid. l 23.

[5] Without which he must take other Measures to provide himself. *Sicut autem voluntatis, & officii magis, quàm necessitatis est, commodare, ita modum commodati, finemque præscribere, ejus est, qui beneficium tribuit. Cùm autem id fecit (id est postquam commodavit) tunc finem præscribere & retro agere, atque intempestivè usum commodatæ rei auferre, non officium tantùm impedit, sed & suscepta Obligatio inter dandum, accipiendumque, geritur enim Negotium invicem. Igitur si pugillares mihi commodasti,* ut debitor mihi caveret, *non rectè facies importunè repetendo; nam si negasset, vel emissem, vel testes abbibuissem.* Digest. ut supra, Leg. 17. §. 3.

both Sides, the *latter* only on one. The *Loan* is given for a certain Time or End; the *Grant* only during the [1] Will of the Giver. The Receiver of the *Loan* muſt make good all Damages; the Receiver of the *Grant* only thoſe that happen by his [2] Knavery, or groſs Negligence [a].

It may indeed be doubted, whether the Receiver of a *Loan* is bound to ſtand to thoſe Chances which it was not in his Power to prevent, and this [3] is generally held in the Negative [b]. But, in my Opinion, we ought to diſtinguiſh, whether or no the Damage had happened, if the Thing had continued in the *Owner*'s Cuſtody [c]; for if it had, no Reſtitution is due, but if it had not, it ſeems due in Equity; for otherwiſe a Man's Generoſity and Good-nature might be too expenſive to him, if, beſides [4] the free

[a] *Vid.* Wiſſembback *ad D. Diſp.* 24. §. 19. [b] *Vid.* l. 13. t. 6. *commodati*, &c. & l. 19. & l. 44. t. 7. l. 1. §. 4. *D. de oblig. & act.* [c] Vid. *Grot.* l. ii. c. 12. §. 13. n. 1.

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[1] So the *Digeſts* direct, *Precarium eſt, quod precibus petenti utendum conceditur tandiù, quamdiù is, qui conceſſit, patitur.* Lib. 43. t. 26. De Precario, Leg. 1. Princ.

[2] So the *Digeſts* order, *Illud adnotatur, quod culpam non præſtat is qui precario rogavit, ſed ſolum dolum præſtat; quanquam is qui commodatum ſuſcepit, non tantum dolum, ſed etiam culpam præſtat. Nec immerito dolum ſolum præſtat is, qui precario rogavit: cùm totum hoc ex liberalitate deſcendat ejus, qui precario conceſſit, & ſatis ſit ſi dolus tantum præſtetur. Culpam tamen dolo proximam continere quis merito dixerit.* Ibid. Leg. 8. §. 3. See CUJACIUS *Obſerv.* 4. 7. But Mr. THOMASIUS in his Diſcourſe, *De culparum Præſtatione in Contractibus*, Chap. 1. §. 48, &c. ſhews, that the Diſtinction beween a *Loan* and *Grant at Will* is grounded only upon the Subtilties of the *Roman* Law, and that there is ſomething ridiculous, in the Reaſon, that ULPIAN alledges here as well as in the Compariſon, which he elſewhere makes between a Grant at Will, and Gifts between the Living. See the ſame Author in another Diſſertation, *De naturâ precum Judicatarum*, §. 20. & ſeqq. Mr. *Noodt* in his *Commentary*, pag. 319, ſays, That he who has given the Uſe of a Thing by *Grant of Will*, ſince he can re-demand it as often, and when he will, can only blame himſelf if he has done it, when he has any Suſpicion of Negligence in the Borrower. But has he always ſufficient Reaſons for ſuch Suſpicions? Beſides, the want of Limitation, of Time, or Uſe, is often in favour of the Borrower, ſo that it is left to his Diſcretion to reſtore the Thing without our aſking it. And after all (to judge by the ſole Light of Reaſon, independently of Authority) I ſee no real Foundation for the prodigious Difference the *Roman* Law places between the Engagements of him to whom we freely grant the Uſe of our Goods, in a determinate Manner, and thoſe of another to whom we lend them without any Conditions. It appears to me, on the contrary, that, even by this, we reſerve to ourſelves the Liberty of reclaiming the Thing lent when we will; and therefore the Borrower ought to be attentive to have it always in a Readineſs to be reſtored.

[3] They are grounded upon this Law among others: *Quid verò Seneſtute contigit, vel morbo, vel vi Latronum ereptum eſt, aut quid ſimile accidit, dicendum eſt, nihil eorum eſſe imputandum ei, qui commodatum accepit, niſi aliqua culpa interveniat. Proindeet ſi incendio, vel ruinâ, aliquid contigit, vel aliquod damnum fatale, non tenebitur, niſi fortè, cùm poſſit res commodatas ſalvas facere, ſuas prætulit.* Digeſt. Lib. xiii. t. 6. *Commodati, vel contra*, Leg. 5. §. 4. See, alſo, Leg. 19. & l. 44. t. 7. *De Obligat. & Action.* l. 1. §. 4. But from theſe Words, *Niſi fortè, cum poſſit*, &c. ſeveral Lawyers infer, That in a common Danger a Man ought rather to ſave a Thing borrowed, than his own Goods; and they add this Proviſo, If the firſt be not of leſs Value. Whereupon Mr. TITIUS maintains, that theſe Words, *ſuas prætulit*, mean not, That he choſe rather to ſave his own own Goods, than what he had borrowed, but only that when he could have ſaved both, he took not care of any but his own, and ſo it became his Fault. Indeed, ſays he, all that goes before, ſhews, that ULPIAN will have the Borrower anſwerable for his own Negligence only, and not for Caſualties, which he could not foreſee; ſo that theſe laſt Words muſt be explained by ſuppoſing ſome Circumſtance, by which it may appear, that the Borrower was in Fault; for he is not always obliged to prefer the Preſervation of another Man's Goods before his own. The Interpreters generally hold, that the Thing borrowed ought to be of a very great Value; for otherwiſe, if we ſave it with a Prejudice to our own Goods, he who owes it ought to pay the Overplus. But this Determination is plainly falſe; for upon what Account is he, to whom the Thing borrowed belongs, obliged to pay the Value of that which is loſt, to ſave his? He is in no wiſe the Cauſe of the Damage received; and he has not promiſed to indemnify us in Caſe ſuch a Thing happens, which are the Foundations of every natural Obligation to make good the Loſſes of any other Perſon; nor is there any Civil Law that authorizes ſuch a Determination. And, indeed, who is there who would rather ſuffer his own Goods to be loſt than preſerve them, on the Condition of paying a Thing of a greater Price, than what he ſacrificed to ſave it? Laſtly, ſuppoſe, that the Borrower ſhould prefer the Preſervation of his own Goods before what he has borrowed, although they were of leſs Value, it would only follow from thence, that, ſince he has only uſed his own Right, the Owner of the Thing borrowed, can lawfully demand nothing in this Caſe; as on, the other ſide, if he neglects to uſe his own Right, he can lay the Fault on himſelf only. But it is ridiculous to affirm, that, becauſe he has preferred the Saving of the Thing borrowed before his own, that the Lender ought to account to him for it, and make good his Loſs, ſince he recovers no more than his own. Wherefore Mr. TITIUS concludes, that as often as it happens, that there is not Time to ſave Two Things of equal Value, and alike expoſed, whichever of them he ſaves, it is ſo much the better for the Owner, and ſo much the worſe for the other. *Obſ. on Lauterbach. Obſ.* 392. Moreover, the Author, before quoted, might have alledged a Paſſage in *Virgil*, where the Word, *Præferre*, bears much the ſame Senſe, by a like Figure, as he affirms it doth here. Mr. NOODT makes uſe of it in his Obſervat. l. ii c. 15. to explain another Law taken out of ULPIAN; it is in Lib. xii. of the *Æneids*, where *Juno* ſpeaks to the Nymph *Juturna*, That ſhe was loved better than all his other Miſtreſſes, now ſhe had vexed and perſecuted them all in her Power, *Scis, ut te cunctis——PRÆTULERIM.* See *Servius*, who, alſo, alledges a Paſſage in *Saluſt* of the like Import with *Q. Curtius*'s, Lib. vi. c. 4. num. 18. *Mare Caſpium dulcius cæteris.* The *Caſpian* Sea is ſweeter than the other, as if there were a certain Sea of ſweet Water. See the Art of Thinking, Part II. c. 10, &c. where it is, proved, that, in Comparative Propoſitions, the Poſitive doth not always agree with both Members of the Compariſon. Mr. NOODT treats upon this Matter more at large in his *Julius Paulus*, c. 7. where he produces other Examples of like Nature. But, notwithſtanding all this, I do not think it neceſſary to join in the Explication of Mr. TITIUS upon theſe Words. *Niſi fortè cum poſſit res commodatas ſalvas facere, ſuas prætulit*, which is alſo found in the *Receptæ Sententiæ* of *Julius Paulus*, l. 2. t. 4. §. 3. with this Difference, that there he reads, *rem commodatum & ſuam*, the Singular for the Plural, as if this Maxim had paſſed into a general Rule, that every one is reſponſible for the ſmalleſt Faults (*culpæ leviſſimæ*) in ſuch Things, as are borrowed for his own Advantage only. (See *Digeſt.* Lib. xiii. t. 6. Leg 5. §. 2.) The Lawyers look upon it as an Omiſſion, which amounts to the greateſt Fault and Neglect, for a Man to prefer the Saving of his own Goods before what he has borrowed, though there was no Way to preſerve both at the ſame Time. It is ſufficient, according to them, that he might have ſaved another's Goods, if he would, and they have no regard to the Concurrence of the Intereſt of the Owner, who hath lent the Thing, and that of the Borrower. *Ant. Favre* goes ſo far as to ſay, in this Caſe, That he who ſaves his own Goods, rather than thoſe he borrowed, is guilty, not of ſimple Negligence but of Diſhoneſty. If ULPIAN had only affirmed, that the Thing borrowed ought to be paid for, when it might have been ſecured, as well as a Man's own, he need not have added that Reſtriction, which was underſtood of itſelf. It had been ſufficient for him to have ſaid, *Niſi fortè res commodatas ſalvas facere potuerit*, ſince, whether he hath ſaved, or no, the Thing belonging to us, that Circumſtance alters not the Nature of the Fault, ſince the Thing borrowed might, at the ſame Time be ſaved. We then ſee that the Senſe of the Words mentioned, comes to this: *Unleſs he could have ſaved the Thing borrowed, though, to do it, it was neceſſary to loſe ſomething of his own.* But here the Lawyers are not aware that they make a ſpecial Caſe, which muſt be determined by ſome other Principle than their *Culpa leviſſima*, and ſince they will have the Owner of the Thing borrowed to bear the Loſs, when it happened by Chance, and without the Fault of the Borrower, they ought to eſteem, as a Thing of the greateſt Force, the Impoſſibility of ſaving the Thing borrowed, without ſacrificing our own Intereſts. Every Body, in theſe Caſes, being led by a natural, and almoſt invincible, Inclination to prefer their own Intereſt to that of others. Wherefore let us conſult what is ſaid, Note 2. pag. 489. where we ſhall find more natural and more coherent Deciſions of this Matter.

[4] This Reaſon, Mr. TITIUS, *Obſer. on Puffendorf*, 365, ſays, proves nothing, becauſe the Lender knows well, or at leaſt ought to know, that theſe ſorts of Accidents may happen, and ſo tacitly conſents that they be ſubject to theſe Hazards, Dangers, and Misfortunes. Otherwiſe it may be anſwered, that the Borrower had better have hired the Uſe of the Thing lent, than to be engaged

free Uſe of his Goods, he muſt be deprived of the Perpetuity of them, which he had not been but upon this Account. Nor is there any Reaſon why he, rather than the other, [1] ſhould bear the Burthen of the Misfortune, ſince the *other* [2] was the Occaſion of it. The *Roman* Law [a] gave the *Lender* Damages, if the *Loan* was ſtole; and yet ſuch a Robbery might be committed without any Fault in the Perſon robbed. Indeed, if a Man, by Fire [3] ſhould loſe all, and be reduced to extreme Poverty, it would be inhuman to demand the Value of the *Loan*; and ſince Fire, Shipwreck, and ſuch Chances often happen, the *Lender* may be preſumed willing to run the Riſque of them. And thus I think that Law the 18. *prin.* and l. v. §. 4. & 7. *D. commodati* ought to be limited. Neither can I well approve of what is ſaid in l. xix. *D. dict. tit.* which does not ſeem to agree with what is ſaid in l. xii. §. 1. *D. dict. tit.* But yet if the *Borrower*, when he might have ſaved the *Loan*, preſerves ſomething more valuable of his own, he becomes reſponſible. For though no Man can blame him for letting that periſh which was leſs valuable, yet ſince it might have been ſaved, and was loſt for the Benefit of the *Borrower*, there is no Reaſon, why the *Lender* ſhould ſtand to the Loſs [b]. [4] On the other ſide, it

[a] *Vid. D. ubi ſupra*, l. 21, 22.

[b] *Vid.* l. 5. §. 4. *D. commodati.*

engaged to pay for the Thing borrowed, if it be ſpoiled without his Fault. But beſides, that there is almoſt ever a tacit Engagement, contrary to what is ſuppoſed, as I have ſaid Note 2. pag 489. It is in vain that M. *James Gabriel Wolfius* (in his *Inſtit. Juriſp. Natur.* printed at *Hall* in 1720, pag. 260.) affirms, that this can never be proved. He ſhould, at leaſt, have refuted the Reaſons I have brought, and which I ſhall bring new Arguments to ſupport. It is free, without doubt, for every one to lend, or not lend, what belongs to him, and to lend it upon ſuch Conditions as he pleaſes. No one can deny, but if he ſtipulates, that the Borrower ſhall pay him the Value, in Caſe the Thing is accidentally loſt, but the Bargain is juſt. It is certain, alſo, that there are many People who would be glad to borrow on this Condition; and even ſome who would chuſe to do it no otherwiſe, and would think themſelves very imprudent to deſire a Favour ſo burdenſome to the Lender. They would make it a Point of Honour here not to take Advantage of the Benefit of thoſe Laws which diſpenſe with the Borrower from indemnifying the Lender for the Value of his Goods, when they are loſt without any Fault in the former. This being ſo, ſince we muſt neceſſarily ſuppoſe (though there was no previous Agreement, and the Civil Law had determined nothing in the Caſe) ſince, I ſay, we muſt ſuppoſe a tacit Agreement with Reſpect to the Loſs, which may happen by any unforeſeen, and inevitable Accident; the Queſtion is to know, which Preſumption is ſtrongeſt, whether that which condemns the Proprietor to loſe his Goods, as the Conſequence of the Service he has done, or that, which makes the Loſs fall upon the Borrower, who has been indeed, though innocent, the Occaſion of its being loſt, by that Uſe of it which was freely granted him. We can only here regulate ourſelves by Conjectures drawn from the different Diſpoſitions of Men, taking them as they really are. And it is principally to the Intention of the *Prætor* that we muſt have regard; for the Borrower, having the whole Benefit of the Contract, can have no further Right, than what the Lender, who is abſolute Maſter of the Conditions, has given him. Now, I lay down as a Matter of Fact, That out of a Hundred, or a Thouſand Perſons who lend, there is hardly one who would do it, if he did not believe that the Borrower would indemnify him for his Goods, in whatever Manner they were loſt. There are few, who are acquainted with the World, but muſt be ſenſible of this. The more valuable the Thing lent is, the ſtronger this Preſumption will be. But there are yet other Reaſons, taken from the Borrowers themſelves; for, though the Thing lent may be loſt, yet it may, alſo, be preſerved. Now they regard the former Caſe as very uncertain, and therefore think they run no great Hazard in indemnifying the Lender. Beſides we ought to believe that the Borrowers live at Eaſe (for, if they are in Streights, we may preſume that the Owner of the Thing borrowed, would generouſly take upon himſelf all fortuitous Accidents) and ſo have no Reaſon to complain, ſince the Uſage of what is lent them *gratis*, either ſpares them a Buying it, or is very advantageous, becauſe they could not, for the preſent, be accommodated any other Way, or, after all, the Benefit may be thought equivalent to the indemnifying againſt the Danger of unforeſeen Accidents. And it is more grievous for him who lends, to loſe his Goods to do a Kindneſs, than it ought to be to him who borrows, to reſtore the ſame Thing, or the Value, in Caſe any Accident happens, while he has them in Uſe. The Maxim uſed by the *Roman* Lawyers, upon another Occaſion, may be applied here. *Etſi iniquum, damnoſum cuique eſſe officium ſuum.* Digeſt. l. 29. t. 3. Teſtamenta quemadm. aperiantur. l. 7.

[1] The Reaſon of it is clear, anſwers Mr. TITIUS, *ubi ſuprà*, that when a Thing is ſpoiled without any Man's Fault, the Loſs muſt redound to the Proprietor, provided all Things elſe be equal. See the Note foregoing.

[2] This is true; but then the Owner of the Thing borrowed, has freely conſented to it, as Mr. TITIUS ſays, but a *Loan at Uſe* is uſually made on another Footing, as I have obſerved ſeveral Times before. The Laws of the antient *Germans* order expreſly, that if a Thing periſh, or be loſt, while it is in the Poſſeſſion of the Borrower, he muſt pay the Owner for it, as Mr. THOMASIUS tells us in his Diſcourſe already quoted, *De culparum præſtatione in Contractibus*, c. 2. §. 18. The ſame Author obſerves, that the ſame Law prevails in *Scotland*. See *Not. in Digeſt.* Tit. *Commodati*, as quoted by SCHILTER, *Exercit.* 25. §. 17.

[3] Let us examine this Caſe. In Law 18. and Law 5. §. 4. 7. it is decided, That all Accidents, without Diſtinction, are placed to the Account of the Proprietor, unleſs the Lender has been in Fault. See the Beginning of Not. 3. pag. 490. The xxth Law bears, That if a Man, who has borrowed ſome Plate, ſhall ſend it back by one of his Slaves, whom he believes to be honeſt, and this Slave ſhall be either robbed, or tricked by Villains out of what was delivered to his Care, the Loſs ſhall fall upon the Lender. The Caſe in Law xii. §. 1. is this, A Man having lent a Thing ſends to re-demand it by a Perſon, who, having received it, keeps it for himſelf, and eſcapes. Here they diſtinguiſh, whether the Lender has ſent a written Order to give the Thing to the Meſſenger, or whether he is contented to direct him, by Word of Mouth, to aſk for his Goods. Upon the firſt Suppoſition, they ſay the Loſs muſt fall upon the Owner; in the laſt Caſe, upon the Borrower. The Contradiction, which our Author finds between theſe two Laws, is, That they decide in ſo different a Manner in two parallel Caſes. For if he who has ſent back what he borrowed by one of his own Servants is diſpenſed from paying the Value, becauſe he thought him honeſt, and careful: why ſhould not he be equally indemnified when he delivers the Thing to a Perſon whom the Lender has ſent for that Purpoſe? He certainly has Reaſon to believe himſelf as ſecure in the laſt Caſe as in the firſt, unleſs the Lender had before given him ſome Caution on this Head: For, if the Proprietor did not think his Meſſenger ſuch as the Borrower might confide in, he ought not have charged him with a verbal Meſſage, ſince, under this Pretence, he might eaſily get the Thing to himſelf. And how ſhall the Borrower know whether he ſpeaks Falſehood or Truth? To avoid being deceived, and expoſing himſelf to the Hardſhip of paying the Value, the only Method he has, is, not to deliver the Thing lent to any Meſſenger upon whatever Footing he comes. And yet the Law ſuppoſes he may ſafely give the Thing to a Perſon who ſays he is ſent with an Order to receive it. Now a fraudulent Meſſenger will never pretend that he comes upon his own Authority. *Ant. Favre* (*Ration.* pag. 625. upon this Law) following the common Opinion of the Interpreters, affirms, That, in this Caſe, ſo much the worſe for the Borrower, ſince he only falls a Sacrifice to his own Credulity. But if this be ſo, the Diſtinction would be needleſs, ſince, whatever Way the Affair happened, the Loſs would always fall upon the Borrower. Beſides the Deciſion of Law xx. is, in itſelf, ſo hard upon him who generouſly grants another the Uſe of his Goods, that it ſufficiently ſhews, into what ſtrange Conſequences the *Roman* Lawyers were drawn by ſuch looſe Principles.

[4] *Moſes* there ſays, *If a Man borrow ought of his Neighbour, and it be hurt or die, the Owner thereof not being with it, he ſhall pay for it; but if the Owner thereof be with it, the Borrower ſhall not pay for it.* Here we ſee a Rule manifeſtly oppoſite to that of the *Roman* Lawyers. For the divine Legiſlator only diſtinguiſhes whether the Owner of the Thing be preſent or abſent at the Time it was loſt or ſpoiled. If abſent, he ordains, That the Owner ſhall be indemnified for his Loſs, though the Borrower was in no Fault. Whereas, if he was preſent, *Moſes* ſuppoſes he might, and ought to have taken Care of his own Goods, which he ſaw in Danger. Therefore the Lender, in his Abſence, is ſuppoſed to have intruſted the other. And as he could not ſave his Goods, he has no Remedy but to come upon the Borrower. Now this is exactly the Diſtinction which our Author makes, after *Grotius*. See SIMON EPISCOPIUS, *Inſtit. Theolog.* lib. iii. cap. 12. §. 13. pag. 126, 127. As to the Law of the *Digeſts* cited here by the Author, he entitles it *Commodati vel contra*, and it ſhould be *Depoſiti*, &c. As it is here determined, that Accidents are ſometimes to be put to the Account of the Perſon entruſting another, Mr. PUFFENDORF informs us, "That there is more Reaſon that the Bor-

both Sides, the *latter* only on one. The *Loan* is given for a certain Time or End; the *Grant* only during the [1] Will of the Giver. The Receiver of the *Loan* muſt make good all Damages; the Receiver of the *Grant* only thoſe that happen by his [2] Knavery, or groſs Negligence [a].

It may indeed be doubted, whether the Receiver of a *Loan* is bound to ſtand to thoſe Chances which it was not in his Power to prevent, and this [3] is generally held in the Negative [b]. But, in my Opinion, we ought to diſtinguiſh, whether or no the Damage had happened, if the Thing had continued in the *Owner*'s Cuſtody [c]; for if it had, no Reſtitution is due, but if it had not, it ſeems due in Equity; for otherwiſe a Man's Generoſity and Good-nature might be too expenſive to him, if, beſides [4] the free

[a] *Vid.* Wiſſembback *ad D. Diſp.* 24. §. 19. *D. de oblig. & act.* [b] *Vid.* l. 13. t. 6. *commodati*, &c. & l. 19. & l. 44. t. 7. l. 1. §. 4. [c] Vid. *Grot.* l. ii. c. 12. § 13. n. 1.

[1] So the *Digeſts* direct, *Precarium eſt, quod precibus petenti utendum conceditur tandiù, quamdiù is, qui conceſſit, patitur.* Lib. 43. t. 26. De Precario, Leg. 1. Princ.

[2] So the *Digeſts* order, *Illud adnotatur, quod culpam non præſtat is qui precario rogavit, ſed ſolum dolum præſtat; quanquam is qui commodatum ſuſcepit, non tantum dolum, ſed etiam culpam præſtat. Nec immerito dolum ſolum præſtat is, qui precario rogavit: cùm totum hoc ex liberalitate deſcendat ejus, qui precario conceſſit, & ſatis ſit ſi dolus tantum præſtetur. Culpam tamen dolo proximam continet quis merito dixerit.* Ibid. Leg. 8. §. 3. See CUJACIUS *Obſerv.* 4. 7. But Mr. THOMASIUS in his Diſcourſe, *De culparum Præſtatione in Contractibus.* Chap. 1. §. 48, &c. ſhews, that the Diſtinction beween a *Loan* and *Grant at Will* is grounded only upon the Subtilties of the *Roman* Law, and that there is ſomething ridiculous in the Reaſon, that ULPIAN alledges here, as well as in the Compariſon, which he elſewhere makes between a Grant at Will, and Gifts between the Living. See the ſame Author in another Diſſertation, *De naturâ precum Judicatarum*, §. 20. & *ſeqq.* Mr. *Noodt* in his *Commentary*, pag. 319, ſays, That he who has given the Uſe of a Thing by *Grant of Will*, ſince he can re-demand it as often, and when he will, can only blame himſelf if he has done it, when he has any Suſpicion of Negligence in the Borrower. But has he always ſufficient Reaſons for ſuch Suſpicions? Beſides, the want of Limitation, of Time, or Uſe, is often in favour of the Borrower, ſo that it is left to his Diſcretion to reſtore the Thing without our aſking it. And after all (to judge by the ſole Light of Reaſon, independently of Authority) I ſee no real Foundation for the prodigious Difference the *Roman* Law places between the Engagements of him to whom we freely grant the Uſe of our Goods, in a determinate Manner, and thoſe of another to whom we lend them without any Conditions. It appears to me, on the contrary, that, even by this, we reſerve to ourſelves the Liberty of reclaiming the Thing lent when we will; and therefore the Borrower ought to be attentive to have it always in a Readineſs to be reſtored.

[3] They are grounded upon this Law among others: *Quid verò Seneſtute contigit, vel morbo, vel vi Latronum ereptum eſt, aut quid ſimile accidit, dicendum eſt, nihil eorum eſſe imputandum ei, qui commodatum accepit, niſi aliqua culpa interveniat. Proinde et ſi incendio, vel ruinâ, aliquid contigit, vel aliquod damnum fatale, non tenebitur, niſi fortè, cùm poſſit res commodatas ſalvas facere, ſuas prætulit.* Digeſt. Lib. xiii. t. 6. *Commodati, vel contra*, Leg. 5. §. 4. See, alſo, Leg. 19. & l. 44. t. 7. *De Obligat. & Action.* l. 1. §. 4. But from theſe Words, *Niſi fortè, cum poſſit*, &c. ſeveral Lawyers infer, That in a common Danger a Man ought rather to ſave a Thing borrowed, than his own Goods; and they add this Proviſo, If the firſt be not of leſs Value. Whereupon Mr. TITIUS maintains, that theſe Words, *ſuas prætulit*, mean not, That he choſe rather to ſave his own own Goods, than what he had borrowed, but only that when he could have ſaved both, he took not care of any but his own, and ſo it became his Fault. Indeed, ſays he, all that goes before, ſhews, that ULPIAN will have the Borrower anſwerable for his own Negligence only, and not for Caſualties, which he could not foreſee; ſo that theſe laſt Words muſt be explained by ſuppoſing ſome Circumſtance, by which it may appear, that the Borrower was in Fault; for he is not always obliged to prefer the Preſervation of another Man's Goods before his own. The Interpreters generally hold, that the Thing borrowed ought to be of a very great Value; for otherwiſe, if we ſave it with a Prejudice to our own Goods, he who owes it ought to pay the Overplus. But this Determination is plainly falſe; for upon what Account is he, to whom the Thing borrowed belongs, obliged to pay the Value of that which is loſt, to ſave his? He is in no wiſe the Cauſe of the Damage received; and he has not promiſed to indemnify us in Caſe ſuch a Thing happens, which are the Foundations of every natural Obligation to make good the Loſſes of any other Perſon; nor is there any Civil Law that authorizes ſuch a Determination. And, indeed, who is there who would rather ſuffer his own Goods to be loſt than preſerve them, on the Condition of paying a Thing of a greater Price, than what he ſacrificed to ſave it? Laſtly, ſuppoſe, that the Borrower ſhould prefer the Preſervation of his own Goods before what he has borrowed, although they were of leſs Value, it would only follow from thence, that, ſince he has only uſed his own Right, the Owner of the Thing borrowed, can lawfully demand nothing in this Caſe; as on, the other ſide, if he neglects to uſe his own Right, he can lay the Fault on himſelf only. But it is ridiculous to affirm, that, becauſe he has preferred the Saving of the Thing borrowed before his own, that the Lender ought to account to him for it, and make good his Loſs, ſince he recovers no more than his own. Wherefore Mr. TITIUS concludes, that as often as it happens, that there is not Time to ſave Two Things of equal Value, and alike expoſed, whichever of them he ſaves, it is ſo much the better for the Owner, and ſo much the worſe for the other. *Obſ. on Lauterbach. Obſ.* 392. Moreover, the Author, before quoted, might have alledged a Paſſage in *Virgil*, where the Word, *Præferre*, bears much the ſame Senſe, by a like Figure, as he affirms it doth here. Mr. NOODT makes uſe of it in his Obſervat. l. ii c. 15. to explain another Law taken out of ULPIAN; it is in Lib. xii. of the *Æneids*, where *Juno* ſpeaks to the Nymph *Juturna*, That ſhe was loved better than all his other Miſtreſſes, now ſhe had vexed and perſecuted them all in her Power, *Scis, ut te cunctis——PRÆTULERIM.* See *Servius*, who, alſo, alledges a Paſſage in *Saluſt* of the like Import with *Q. Curtius*'s, Lib. vi. c. 4. num. 18. *Mare Caſpium dulcius cæteris.* The *Caſpian* Sea is ſweeter than the other, as if there were a certain Sea of ſweet Water. See the Art of Thinking, Part II. c. 10, &c. where it is, proved, that, in Comparative Propoſitions, the Poſitive doth not always agree with both Members of the Compariſon. Mr. NOODT treats upon this Matter more at large in his *Julius Paulus*, c. 7. where he produces other Examples of like Nature. But, notwithſtanding all this, I do not think it neceſſary to join in the Explication of Mr. TITIUS upon theſe Words. *Niſi fortè cum poſſit res commodatas ſalvas facere, ſuas prætulit*, which is alſo found in the *Receptæ Sententiæ* of *Julius Paulus*, l. 2. t. 4. §. 3. with this Difference, that there he reads, *rem commodatum & ſuam*, the Singular for the Plural, as if this Maxim had paſſed into a general Rule, that every one is reſponſible for the ſmalleſt Faults (*culpæ leviſſimæ*) in ſuch Things, as are borrowed for his own Advantage only. (See *Digeſt.* Lib. xiii. t. 6. Leg 5. §. 2.) The Lawyers look upon it as an Omiſſion, which amounts to the greateſt Fault and Neglect, for a Man to prefer the Saving of his own Goods before what he has borrowed, though there was no Way to preſerve both at the ſame Time. It is ſufficient, according to them, that he might have ſaved another's Goods, if he would, and they have no regard to the Concurrence of the Intereſt of the Owner, who hath lent the Thing, and that of the Borrower. *Ant. Favre* goes ſo far as to ſay, in this Caſe, That he who ſaves his own Goods, rather than thoſe he borrowed, is guilty, not of ſimple Negligence but of Diſhoneſty. If ULPIAN had only affirmed, that the Thing borrowed ought to be paid for, when it might have been ſecured, as well as a Man's own, he need not have added that Reſtriction, which was underſtood of itſelf. It had been ſufficient for him to have ſaid, *Niſi fortè res commodatas ſalvas facere potuerit*, ſince, whether he hath ſaved, or no, the Thing belonging to us, that Circumſtance alters not the Nature of the Fault, ſince the Thing borrowed might, at the ſame Time be ſaved. We then ſee that the Senſe of the Words mentioned, comes to this: *Unleſs he could have ſaved the Thing borrowed, though, to do it, it was neceſſary to loſe ſomething of his own.* But here the Lawyers are not aware that they make a ſpecial Caſe, which muſt be determined by ſome other Principle than their *Culpa leviſſima*, and ſince they will have the Owner of the Thing borrowed to bear the Loſs, when it happened by Chance, and without the Fault of the Borrower, they ought to eſteem, as a Thing of the greateſt Force, the Impoſſibility of ſaving the Thing borrowed, without ſacrificing our own Intereſts. Every Body, in theſe Caſes, being led by a natural, and almoſt invincible, Inclination to prefer their own Intereſt to that of others. Wherefore let us conſult what is ſaid, Note 2. pag. 489. where we ſhall find more natural and more coherent Deciſions of this Matter.

[4] This Reaſon, Mr. TITIUS, *Obſer. on Puffendorf*, 365, ſays, proves nothing, becauſe the Lender knows well, or at leaſt ought to know, that theſe ſorts of Accidents may happen, and ſo tacitly conſents that they be ſubject to theſe Hazards, Dangers, and Misfortunes. Otherwiſe it may be anſwered, that the Borrower had better have hired the Uſe of the Thing lent, than to be engaged

free Uſe of his Goods, he muſt be deprived of the Perpetuity of them, which he had not been but upon this Account. Nor is there any Reaſon why he, rather than the other, [1] ſhould bear the Burthen of the Misfortune, ſince the *other* [2] was the Occaſion of it. The *Roman* Law [a] gave the *Lender* Damages, if the *Loan* was ſtole; and yet ſuch a Robbery might be committed without any Fault in the Perſon robbed. Indeed, if a Man, by Fire [3] ſhould loſe all, and be reduced to extreme Poverty, it would be inhuman to demand the Value of the *Loan*; and ſince Fire, Shipwreck, and ſuch Chances often happen, the *Lender* may be preſumed willing to run the Riſque of them. And thus I think that Law the 18. *prin.* and l. v. §. 4. & 7. *D. commodati* ought to be limited. Neither can I well approve of what is ſaid in l. xix. *D. dict. tit.* which does not ſeem to agree with what is ſaid in l. xii. §. 1. *D. dict. tit.* But yet if the *Borrower*, when he might have ſaved the *Loan*, preſerves ſomething more valuable of his own, he becomes reſponſible. For though no Man can blame him for letting that periſh which was leſs valuable, yet ſince it might have been ſaved, and was loſt for the Benefit of the *Borrower*, there is no Reaſon, why the *Lender* ſhould ſtand to the Loſs [b]. [4] On the other ſide, it

[a] *Vid. D. ubi ſupra*, l. 21, 22.

[b] *Vid.* l. 5. §. 4. *D. commodati.*

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engaged to pay for the Thing borrowed, if it be ſpoiled without his Fault. But beſides, that there is almoſt ever a tacit Engagement, contrary to what is ſuppoſed, as I have ſaid Note 2. pag 489. It is in vain that M. *James Gabriel Wolfius* (in his *Inſtit. Juriſp. Natur.* printed at *Hall* in 1720, pag. 260.) affirms, that this can never be proved. He ſhould, at leaſt, have refuted the Reaſons I have brought, and which I ſhall bring new Arguments to ſupport. It is free, without doubt, for every one to lend, or not lend, what belongs to him, and to lend it upon ſuch Conditions as he pleaſes. No one can deny, but if he ſtipulates, that the Borrower ſhall pay him the Value, in Caſe the Thing is accidentally loſt, but the Bargain is juſt. It is certain, alſo, that there are many People who would be glad to borrow on this Condition; and even ſome who would chuſe to do it no otherwiſe, and would think themſelves very imprudent to deſire a Favour ſo burdenſome to the Lender. They would make it a Point of Honour here not to take Advantage of the Benefit of thoſe Laws which diſpenſe with the Borrower from indemnifying the Lender for the Value of his Goods, when they are loſt without any Fault in the former. This being ſo, ſince we muſt neceſſarily ſuppoſe (though there was no previous Agreement, and the Civil Law had determined nothing in the Caſe) ſince, I ſay, we muſt ſuppoſe a tacit Agreement with Reſpect to the Loſs, which may happen by any unforeſeen, and inevitable Accident; the Queſtion is to know, which Preſumption is ſtrongeſt, whether that which condemns the Proprietor to loſe his Goods, as the Conſequence of the Service he has done, or that, which makes the Loſs fall upon the Borrower, who has been indeed, though innocent, the Occaſion of its being loſt, by that Uſe of it which was freely granted him. We can only here regulate ourſelves by Conjectures drawn from the different Diſpoſitions of Men, taking them as they really are. And it is principally to the Intention of the *Prætor* that we muſt have regard; for the Borrower, having the whole Benefit of the Contract, can have no further Right, than what the Lender, who is abſolute Maſter of the Conditions, has given him. Now, I lay down as a Matter of Fact, That out of a Hundred, or a Thouſand Perſons who lend, there is hardly one who would do it, if he did not believe that the Borrower would indemnify him for his Goods, in whatever Manner they were loſt. There are few, who are acquainted with the World, but muſt be ſenſible of this. The more valuable the Thing lent is, the ſtronger this Preſumption will be. But there are yet other Reaſons, taken from the Borrowers themſelves; for, though the Thing lent may be loſt, yet it may, alſo, be preſerved. Now they regard the former Caſe as very uncertain, and therefore think they run no great Hazard in indemnifying the Lender. Beſides we ought to believe that the Borrowers live at Eaſe (for, if they are in Streights, we may preſume that the Owner of the Thing borrowed, would generouſly take upon himſelf all fortuitous Accidents) and ſo have no Reaſon to complain, ſince the Uſage of what is lent them *gratis*, either ſpares them a Buying it, or is very advantageous, becauſe they could not, for the preſent, be accommodated any other Way, or, after all, the Benefit may be thought equivalent to the indemnifying againſt the Danger of unforeſeen Accidents. And it is more grievous for him who lends, to loſe his Goods to do a Kindneſs, than it ought to be to him who borrows, to reſtore the ſame Thing, or the Value, in Caſe any Accident happens, while he has them in Uſe. The Maxim uſed by the *Roman* Lawyers, upon another Occaſion, may be applied here. *Etſi iniquum, damnoſum cuique eſſe officium ſuum.* Digeſt. l. 29. t. 3. Teſtamenta quemadm. aperiantur. l. 7.

[1] The Reaſon of it is clear, anſwers Mr. TITIUS, *ubi ſupra*, that when a Thing is ſpoiled without any Man's Fault, the Loſs muſt redound to the Proprietor, provided all Things elſe be equal. See the Note foregoing.

[2] This is true; but then the Owner of the Thing borrowed, has freely conſented to it, as Mr. TITIUS ſays, but a *Loan at Uſe* is uſually made on another Footing, as I have obſerved ſeveral Times before. The Laws of the antient *Germans* order expreſly, that if a Thing periſh, or be loſt, while it is in the Poſſeſſion of the Borrower, he muſt pay the Owner for it, as Mr. THOMASIUS tells us in his Diſcourſe already quoted, *De culparum præſtatione in Contractibus*, c. 2. §. 18. The ſame Author obſerves, that the ſame Law prevails in *Scotland*. See *Not. in Digeſt.* Tit. *Commodati*, as quoted by SCHILTER, *Exercit.* 25. §. 17.

[3] Let us examine this Caſe. In Law 18. and Law 5. §. 4. 7. it is decided, That all Accidents, without Diſtinction, are placed to the Account of the Proprietor, unleſs the Lender has been in Fault. See the Beginning of Not. 3. pag. 490. The xxth Law bears, That if a Man, who has borrowed ſome Plate, ſhall ſend it back by one of his Slaves, whom he believes to be honeſt, and this Slave ſhall be either robbed, or tricked by Villains out of what was delivered to his Care, the Loſs ſhall fall upon the Lender. The Caſe in Law xii. §. 1. is this, A Man having lent a Thing ſends to re-demand it by a Perſon, who, having received it, keeps it for himſelf, and eſcapes. Here they diſtinguiſh, whether the Lender has ſent a written Order to give the Thing to the Meſſenger, or whether he is contented to direct him, by Word of Mouth, to aſk for his Goods. Upon the firſt Suppoſition, they ſay the Loſs muſt fall upon the Owner; in the laſt Caſe, upon the Borrower. The Contradiction, which our Author finds between theſe two Laws, is, That they decide in ſo different a Manner in two parallel Caſes. For if he who has ſent back what he borrowed by one of his own Servants is diſpenſed from paying the Value, becauſe he thought him honeſt, and careful: why ſhould not he be equally indemnified when he delivers the Thing to a Perſon whom the Lender has ſent for that Purpoſe? He certainly has Reaſon to believe himſelf as ſecure in the laſt Caſe as in the firſt, unleſs the Lender had before given him ſome Caution on this Head: For, if the Proprietor did not think his Meſſenger ſuch as the Borrower might confide in, he ought not have charged him with a verbal Meſſage, ſince, under this Pretence, he might eaſily get the Thing to himſelf. And how ſhall the Borrower know whether he ſpeaks Falſehood or Truth? To avoid being deceived, and expoſing himſelf to the Hardſhip of paying the Value, the only Method he has, is, not to deliver the Thing lent to any Meſſenger upon whatever Footing he comes. And yet the Law ſuppoſes he may ſafely give the Thing to a Perſon who ſays he is ſent with an Order to receive it. Now a fraudulent Meſſenger will never pretend that he comes upon his own Authority. *Ant. Favre* (*Ration.* pag. 625. upon this Law) following the common Opinion of the Interpreters, affirms, That, in this Caſe, ſo much the worſe for the Borrower, ſince he only falls a Sacrifice to his own Credulity. But if this be ſo, the Diſtinction would be needleſs, ſince, whatever Way the Affair happened, the Loſs would always fall upon the Borrower. Beſides the Deciſion of Law xx. is, in itſelf, ſo hard upon him who generouſly grants another the Uſe of his Goods, that it ſufficiently ſhews, into what ſtrange Conſequences the *Roman* Lawyers were drawn by ſuch looſe Principles.

[4] *Moſes* there ſays, *If a Man borrow ought of his Neighbour, and it be hurt or die, the Owner thereof not being with it, he ſhall pay for it; but if the Owner thereof be with it, the Borrower ſhall not pay for it.* Here we ſee a Rule manifeſtly oppoſite to that of the *Roman* Lawyers. For the divine Legiſlator only diſtinguiſhes whether the Owner of the Thing be preſent or abſent at the Time it was loſt or ſpoiled. If abſent, he ordains, That the Owner ſhall be indemnified for his Loſs, though the Borrower was in no Fault. Whereas, if he was preſent, *Moſes* ſuppoſes he might, and ought to have taken Care of his own Goods, which he ſaw in Danger. Therefore the Lender, in his Abſence, is ſuppoſed to have intruſted the other. And as he could not ſave his Goods, he has no Remedy but to come upon the Borrower. Now this is exactly the Diſtinction which our Author makes, after *Grotius*. See SIMON EPISCOPIUS, *Inſtit. Theolog.* lib. iii. cap. 12. §. 13. pag. 126, 127. As to the Law of the *Digeſts* cited here by the Author, he entitles it *Commodati vel contra*, and it ſhould be *Depoſiti*, &c. As it is here determined, that Accidents are ſometimes to be put to the Account of the Perſon entruſting another, Mr. PUFFENDORF informs us, "That there is more Reaſon that the Bor-

"rower

it is but reasonable, that if any Expence has been laid out upon the *Loan*, besides what was necessary for the Use of it, [1] the *Owner* should repay it [a].

VII. [b] A *Charge* is [2] when we commit to another's Trust and Custody any Thing belonging to us, to be kept *gratis* [c]. And here the *Trustee* is bound to preserve it diligently, and to return it upon [3] Demand [d]. Yet sometimes Circumstances may so happen, as to excuse him from making a Return even then. *A* Charge [e]. *which you have received from a sober Person, you shall not* [4] *return when he is drunk, or extravagant, or mad; for in such a Condition he is not fit to make use of it. Nor shall you return it to Debtors or Slaves, whose Creditors and Masters lie in wait for them; for this would not be to return, but to betray the* Charge. *Suppose a* [5] *Man* [f], *in his Senses, leaves a Sword in your Keeping, and demands it when he is mad; in such a Case, to restore it is a Crime, and the Refusal of it a Duty. What if you should receive Money in Trust for him, and then find that he is taking up Arms against his Country, would you return the Money? Certainly not, because it would be against the Commonwealth, which ought to be preferr'd. To restore a* Charge [g] *is in itself a commendable Thing; yet all Times and Places may not be proper for it. Sometimes the restoring it may be as bad as the disowning it. The* Owner's *Advantage ought to be consulted, and if the restoring it tends to his Prejudice, it ought to be withheld. Ambr. Offic.* l. i. c. *ult.* brings these Instances: "If a Man, who had "entrusted Money to you, joins with the *Barba-*"*rians* against his Country; or, if any present be "likely to rob him of it; or, if he be mad, and "cannot keep it, you ought not to restore it. "Would it not be a Breach of Duty to give a mad "Man his Sword? Or to restore any thing stolen, "to the Prejudice of him that lost it?"

But if I had agreed to call for the *Charge* at such a certain Time, I may, nevertheless, if I please, change my Mind, and demand it [6] sooner [h]. A Passage in *Quinctilian* [i] seems counter to this. *Some* Charges, says he, *are depos'd to be return'd at Demand; some at such a Time. How was this deposed? To be paid you when you had left off being extravagant: But when you demanded it, you had not parted with your Extravagancies, and therefore it was not due; nor can he be said to have broke his Trust for refusing to restore it at a Time, when you yourself own he could not be forced to it.* To this I answer, If he that demanded it was the very Person that deposed it, it ought not to be withheld; but if another had depos'd it, suppose him whose Heir the Demandant is, the *Trustee* could not be obliged to restore it, before the Conditions required were performed [k].

As for the Degree, it is allow'd on all Hands, that ordinary Diligence is sufficient; for the Contract is not for the *Trustee*'s, but the *Deponent*'s Advantage, and it is his own Fault, if he deposes his Goods in the Hands of a careless Person: And for this Reason the *Trustee* does his Duty, if he takes the same Care of the *Charge*, as he does of other Things, and applies the same Diligence about that as about his own Affairs [7], be it never so small [l]. But since, in a *Charge*, some Offices of Friendship do

[a] *Add. ubi supra*, l. 18. §. 2. *D. commodati.* [b] *Depositum.*
[c] *Vid.* lib. 16. t. 3. *Depositi*, &c. leg. 1. *princ.* §. 8. [d] *Vid. Instit.* l. 3. t. 15. & l. 12. §. 3. *D. depositi, ubi supr.*
[e] Philo Jud. *de plantatione* Noach. [f] Cicero *Offic.* l. 3. c. 25. [g] *Vid.* Sen. *de Benef.* l. 4. c. 10. [h] *Vid.* lib. 16. t. 3. l. 1. §. 45, 46. *D. depositi.* [i] *Declam.* 245. [k] Add. *Val. Max.* l. 7. c. 3. §. 5. *inter externa.*
[l] *Vid* lib. 44. t. 7. l. 1. §. 5. *D. de obligat. & act.*

"rower should indemnify the Proprietor for the Loss that happens by a like Accident." See, also, *Exod.* xxii. 13, 14, 15. And *d. l.* 18. *princ. D. commodati.*

1 So he who has borrowed a Horse, or a Slave, ought to maintain them at their own Charge; but if either of them become sick, the Charge of the Cure must be borne by the Owner. *Possunt justæ causæ intervenire, ex quibus cum eo, qui accommodasset agi deberet: veluti de impensis in valetudinem servi factis, quæve post fugam requirendi, reducendique ejus causâ factæ essent; nam cibariorum impensæ, naturali scilicet ratione, ad eum pertinent qui utendum accepisset.* Digest. ubi supra, §. 2.

2 So the *Digests* define it, *Depositum est, quod alicui custodiendum alicui datum est.——Si vestimenta servanda Balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accepit, depositi eum teneri, & dolum dumtaxat præstare debere puto: quod si accepit ex conducto,* Dig. l. 16. t. 3. Depositi vel contra, Leg. 1. princ. & §. 8. See Mr. Domat's *Civil Laws in their Natural Order*, Part 1. l. 1. t. 7.

3 *Præterea & is, apud quem res aliqua deponitur, re obligatur (teneturque actione Depositi) quia & ipse de eâ re, quam accepit, restituenda tenetur,* Instit. l. 3. t. 15. *Quibus modis re contrahitur obligatio,* §. 3. See also *Digest. ubi supra, Leg.* 12. §. 3.

4 *Seneca*'s Words are, *Depositum reddere per se res expetenda est: non tamen semper reddam, nec quolibet loco, nec quolibet tempore. Aliquando nihil interest, utrum inficier, an palam reddam. Intuebor utilitatem ejus cui redditurus sum, & nocitura illi depositum negabo,* l. 4. c. 10. de Benef.

5 *Cicero*'s Words are, "Neque semper deposita reddenda; si quis apud te gladium sanâ mente deposuerit, repetat insaniens, "reddere peccatum sit, non reddere officium. Quid? si is, qui apud te pecuniam deposuerit, bellum inferat Patriæ, reddasne "Depositum? Non credo; facies enim contra Rempublicam, quæ debet esse carissima." *Plato* explaining that Maxim of *Simonides*, That Justice consists in rendering to every Man his Due, says, "A Thing entrusted, is due to him of whom we hold it; "yet we ought not to restore it to him, if he be not in his Senses; because among Men, who are not Enemies, this is not to ren-"der a Man his Due, when it may tend to the Prejudice both of the Giver and Receiver." His Words are, Τί φῂς τὸν Σιμωνίδην, λέγοντα, ἐρθῶς λέγειν ὡς δικαιοσύνης; Ὅτι (ἦ δ' ὅς) τὸ τὰ ὀφειλόμενα ἑκάστῳ ἀποδιδόναι δίκαιον ἐστί. —— δῆλον γὰρ ὅτι ἃ τοῦτο λέγει, ὅπερ ἄρτι ἐλέγομεν, τὸ, τινὸς παρακαταθεμένου τι ὁτῳοῦν, μὴ σωφρόνως ἀπαιτοῦντι ἀποδιδόναι, καίτοι γε ὀφειλόμενον που τοῦτο ἐστὶν, ἃ παρακατέθετο —— τοῖς γὰρ φίλοις οὐχ ὀφείλειν τοὺς φίλους ἀγαθὸν μέν τι δρᾶν, κακὸν δ' οὐδέν. Μανθάνω, ἦν δ' ἐγὼ, ὅτι ἃ τὰ ὀφειλόμενα ἀποδιδόασιν, ὃς ἂν τὸ χρύσιον ἀποδῶ παρακαταθεμένῳ, ἐάντε ἡ ἀπόδοσις, καὶ ἡ λῆψις βλαβερὰ γίνηται, φίλοι τ' ὦσιν, ὅ, τε ἀπολαμβάνων καὶ, ὁ ἀποδιδούς. *De Republ. l.* 1. *t.* 2. This remarkable Authority may be added to what Mr. Noodt in his *Probabil. Juris* has alledg'd, *l.* 3. *c.* 2.

6 The Words of the *Digests* are, *Si deposuero apud te, ut post mortem tuam reddas; & tecum & cum hærede tuo, possum depositi agere: possum enim mutare voluntatem, & ante mortem tuam depositum repetere.* But this hinders not, but that we may refuse to return our Trust, unless he who put it into our Hands order'd it to be given to some third Person, after a certain Term of Time. As for Example, If any one command us to deliver such and such a Thing to his Heir after his Death, unless he be debauch'd. And thus we may allow what *Quinctilian* hath said here. For as for the Person who hath entrusted us, we cannot lawfully refuse to deliver it at his Request. I shall add, That, according to the *Roman* Law, when any one was charg'd to restore the Thing entrusted to him to a third Person, the Lender had no Action in Justice against this last, unless he was Heir to the Depositary, who had receiv'd it upon such a Condition. But the Emperor *Diocletian* and *Maximianus* remedied this Defect by a Law of the *Code*, lib. iii. t. xlii. *ad exhibend.* leg. *penult.* See the Commentary of Mr. *Noodt*, on the *Digest*. pag. 366. & *seqq.*

7 The Words of the *Digest* are, "Sed is [apud quem rem aliquam deponimus etiamsi negligenter rem custoditam amiserit, "securus est;] quia enim non suâ gratiâ accipit, sed ejus à quo accipit, in eo solo tenetur si quid dolo perierit. Negligentiæ vero nomine

do uſually intervene (for no Man depoſes but with a Friend, or one that he has a good Opinion of) I think, generally ſpeaking, that Care is required in the Management of a *Charge*, which diligent, induſtrious Men uſually take about their own Affairs. Nay ſometimes a more exact Care is neceſſary, not only when it is expreſly promiſed, but when the Condition of the *Charge* requires it, as if it be very vaſuable, or if one's whole Fortune depends upon it [a]. Which Carefulneſs does not conſiſt in having it Day and Night before our Eyes, but that we lay it up in the ſafeſt Place we can, and where it is likely to receive leaſt Damage. And therefore although I ſatisfy the Laws of Friendſhip, if I take the ſame Care of my Friend's Goods as I do of my own, nor can any one in Modeſty deſire more; yet it is fit, when I cannot ſave both, that I neglect my own, if of little worth, to preſerve my Friend's that is more valuable; *for Inſtance*, in a Fire, I ought to preſerve a Cheſt of Gold and other precious Things, or full of Deeds and Writings of Moment, rather than ſome of my own poor Houſhold-ſtuff. But then the *Deponent* will be obliged to pay me the Value of thoſe Things which I ſuffered to periſh for the Preſervation of his, as well as other Expences and Loſſes received upon the Account of the *Charge*. But if a Man ſhould preſer the Preſervation of his own mean Goods to the more valuable *Charge* of his Friend (if it has not been covenanted to the contrary) he can be thought only to have violated the Laws of Friendſhip and good Nature, and cannot be forced to make good the Value of the Thing; for he is no Gainer by it, and the Intermiſſion of Acts of Friendſhip and good Nature does not oblige to the Reſtitution of what Loſſes may happen thereupon. But the Reaſon why the *Roman* Lawyers require a leſs Degree of Diligence in a *Charge* than in a *Commiſſion*, is, becauſe the Latter is managed by our own peculiar Act, and which therefore we have in our own Power to direct in every little Circumſtance of it. But in the *former* no body deſires that I ſhould be obliged to ſit up, and watch by my *Charge* Night and Day, it being enough if I lay it up in a convenient Place, and never view it, unleſs when ſome particular Occaſion requires,

[a] *Add.* Ambr. Off. l. 2. c. 29.

" nomine ideo non tenetur, quia qui negligenti amico rem cuſtodiendam committit, de ſe queri debet, magnam tamen negligen-
" tiam placuit in doli crimine cadere, *l.* 44. *t.* 7. *De Obligat. & Action. Leg.* 1. §. 5. Quod *Nerva* diceret, *latiorem culpam*
" *dolum eſſe*, PROCULO diſplicebit, mihi veriſſimum videtur; nam etſi quis non ad eum modum, quem hominum natura deſiderat,
" diligens eſt, niſi tamen ad ſuum modum curam in depoſito præſtat, fraude non caret; nec enim ſalvâ fide minorem iis quam
" ſuis rebus diligentiam præſtabit, *l.* 16. *t.* 3. *Depoſiti*, &c. *Leg.* 32. Mr. *Thomaſius*, in his Diſcourſe *De culp. præſt. in Contract. c.* 1. §. 42, obſerves very well, " That 'tis not without Reaſon that the *Roman* Lawyers, who require of an Agent
" the greateſt Exactneſs, make not a Perſon entruſted anſwerable for the moſt groſs Negligence: For a Contract of Commiſſion
" is not made more for the Intereſt of an Agent, than a Thing entruſted of the Perſon to whom it is entruſted; for a Truſt is a
" kind of Precaution, by which a certain Perſon is obliged to keep what he is entruſted with." Mr. *Noodt*, in his Commentary, pag. 376, acknowledges, that it ſeems hard to require from an *Agent* the utmoſt Exactneſs, while we are contented to render the *Depoſitary* anſwerable only in Caſe of Diſhoneſty, or a Negligence which reſembles it. But he aſſigns, as a Reaſon for this Difference, That, in a Contract of Truſt, there needs no more than to keep ſafe the Thing intruſted, for which the Honeſty of the Depoſitary is a ſufficient Qualification. Whereas the Execution of a Commiſſion requires a Skill and Care anſwerable to its Importance. Theſe the Perſon who gives the Commiſſion, is ſuppos'd to expect from his Agent by Right of Friendſhip; and the Agent, on his Side, tacitly engages, by freely undertaking the Affair, in which he has no Intereſt, to ſerve his Principal as far as poſſible. This Suppoſition is ſufficient to decide the Regulation of the Civil Law, but, if we conſider the Law of Nature alone, it can afford no Ground for a general and ſure Rule; becauſe it can only take place when we perſonally offer our Services to him who needs them, and who might otherwiſe find People enough ready to undertake the Commiſſions. But it happens full as often, That the Agent is himſelf applied to by the Principal, and, in that Caſe, the latter knows the Capacity of the former, or he does not. If he knows it, why does he require any thing elſe? A Man would be very fooliſh to truſt an Agent implicitly, if he is willing to give him better Security. But if the Principal is ignorant of his Ability and Care, he can only blame himſelf if the Agent fails in his Commiſſion, ſince no Man could promiſe more than was in his Power. I therefore return to the Principle I have laid down, which, it muſt be own'd, has this Advantage in it, That it is equally applicable to all Contracts, by Virtue of which, any Perſon is entruſted with the Affairs of another. *See Section* 3. *Not.* 1. *and* §. 6. *Not.* 2. *of this Chapter.* By this Rule we avoid a great Number of perplex'd Diſputes, and reduce Things to ſuch a Footing as the common Buſineſs of Life requires. The World would be too happy, if every Man, in theſe Caſes, would take care of another's Intereſts with the ſame Zeal and Aſſiduity he minds his own. It is true, that in both theſe Contracts we ought to take the greateſt Care and Exactneſs which we are capable of, *i. e.* as I have explained it above, as much as we would have for our own Intereſts, about Things we moſt prize. The Laws of Society and Neceſſity of Commerce engage us to it; ſo that any Man who leaves his Goods in the keeping of another may expect it. If the Truſtee will not do all he can for him that depends on him, he ought to *refuſe the Truſt*; but ſince he willingly accepts it, 'tis juſt that he ſhould take the ſame Care which he would readily do in his own Caſe.

[1] *Thomaſius*, in his Diſcourſe aforementioned, §. 44, does not think this Determination good; for he ſays, " We do not
" offend againſt the Laws of Humanity, unleſs there be no Engagement." And ſince, according to our Author, when one ſuffers the Loſs of his own Goods to ſave a Thing of greater Value, *with which he is entruſted*, he may make the Depoſitor pay for his Loſs: We muſt own, that in Strictneſs he is obliged to ſave a Thing committed to his Truſt at the Expence of another of leſs Value, which belongs to him, as he is, alſo, obliged to be at all neceſſary Expences to preſerve his Truſt. As for me, I believe that this laſt Caſe, and ſome others, are out of the Extent of our Engagement to general Contracts. The Interfering of our own Intereſt with that of a Perſon whoſe Buſineſs we have voluntarily taken in Hand, or Goods to keep, forms a tacit Exception, which may not take place; but then it muſt be judged of by other Principles. I am not indiſpenſably obliged to neglect my own Affairs, tho' leſs conſiderable in themſelves, to attend another Man's, that I have undertaken; at leaſt, if I am not expreſly engaged to ſuch a Preference, or the Nature of the Thing itſelf doth not require it neceſſarily. Nor are we any more obliged in Rigour to ſave what is committed to our Charge, to the Damage of a Thing of a leſs Value that belongs to us; for beſides that, whatever Diſproportion there may be, if we conſider the Things in themſelves, what is of leſs Value, may be of greater Worth to the Truſtee than the other is to him who has entruſted it to him. He may have ſometimes a very great Occaſion for the Thing he muſt ſacrifice, or he may ſet a great Eſteem on it for ſome particular Reaſon, or the Loſs cannot eaſily be made good. As therefore we do not commonly engage to do all we can for the Security of our Truſt, inaſmuch as at the ſame Time, we do not think of the Preſervation of our own Goods, we are not, properly ſpeaking, in Rigour obliged to ſuffer the Loſs of any Thing that belongs to us for this Reaſon only, becauſe it is of leſs Value than that which we have in our keeping. To this we may add, that, in the Trouble into which we fall by an unforeſeen Accident, we have not ſo much Preſence of Mind, for the moſt part, as to conſider what Things are beſt worth ſaving, or if we ſhall have Time enough to ſave this or that. We generally run to that which comes firſt into our Mind; and as it is natural to think of our own more than of another's Goods, no Man can complain of it as an Injury, if we preſer the Preſervation of our own Goods, tho' of leſs Value, before that of another's. It is, alſo, very often hard to know whether we can preſerve our Truſt, tho' we neglect our own Goods. I conclude, All muſt be left to the Conſcience and Friendſhip of the Truſtee.

as I uſe to do with ſuch Things of my own [1]. To the Law in *Exod.* xxii. 12. *If it be ſtolen from him, he ſhall make Reſtitution unto the Owner thereof*; *Grotius* adds this Gloſs, *Provided it be by palpable Negligence, which does not much differ from Knavery* [2].

It may bear a Queſtion, *Whether the* Truſtee *may make uſe of the Thing entruſted with him?* To which I anſwer, That if the *Charge* can poſſibly receive any Damage in the Uſe, he ought not to do it without the Owner's Conſent. *Scævola* in *Gellius*, l. vii. c. 1. "He that uſes a Thing which "was ſimply committed to his keeping, or puts it "to other Uſes than the Owner gave him leave, is "guilty of Theft [3]." But if the Thing be never the worſe for being us'd, as if I ſhould lay a ſilver Cup for Ornament on the Side-board, or make ſome uſe of it for the Entertainment of ſome extraordinary Gueſt, I don't ſee any Harm in this, provided the Owner is not particularly concerned, that no Body ſhould ſee it, and the *Truſtee* knows that he is to ſtand to whatever Riſque it may run by being ſo us'd. But when the *Owner* has lock'd or ſeal'd up the *Charge*, we ought not, upon any Account, to open it [a]. Nay, a *conſumable Commodity* given in *Charge*, altho' neither lock'd nor ſeal'd up, may not be made uſe of by the *Truſtee* [4], unleſs he be able to reſtore the ſame in Quantity and Quality upon Demand: For we are often in ſo great want of ſuch ſort of Things, that we cannot part with them on any Terms. Laſtly, 'tis well ordained in the *Roman* Law, that whoſoever ſhould diſown a *Charge*, which the *Deponent*, in Diſtreſs, had repoſed with him, as being in danger of Fire, Shipwreck, Tumult, or ſuch like, ſhould be fin'd double; for ſuch inhuman Villany deſerves to be ſeverely [5] puniſhed, which does not ſcruple to make a Gain of thoſe Men who are the Objects of Compaſſion, *Vid.* l. i. §. 1, 2, 4. *D. depoſiti*, d. l. *Quinctilian*, Decl. 245, adds, "A Charge ought "to be reſtored the ſooner for being deliver'd "ſecretly and without Proof." Add *Exod.* xxii. 7, 8, 9. *Lev.* vi. 2, *&c.* Nay, I think it a worſe Crime to diſown or withhold a *Charge*, than to commit a Robbery; for here only Juſtice and Property are violated, but there Friendſhip and good Nature to ſuffer [b]. Nor does it extenuate the Crime, that the *Truſtee*, having the *Charge* put into his Hands, has an Opportunity of playing the Knave (which is otherwiſe tempting enough) laid in his Way; whereas the Thief has no ſuch Temptation, but of his own Accord ſeizes upon other Men's Goods, and, which is more, breaks in upon that common Security which makes every Man's Houſe his ſafeſt Sanctuary. Nor is a *Guardian* guilty of a leſs heinous Crime, who debauches an Orphan committed to his *Truſt*, and received into his Houſe [c].

Since the Keeping only is given *gratis*, it is plain that all the Expences laid out upon the *Charge* ought to be repaid. Upon which Ground it is rightly declared in the Digeſts [d], *That if a* Charge *be received at* Aſia, *to be reſtor'd at* Rome, *it muſt be at the Expences of the* Owner, *not of the* Truſtee.

[a] *Add.* lib. 16. t. 3. l. 1. §. 36. *D. depoſit.* [b] In *Piſidia* the Breach of this Duty was Capital, *Nicolaus Damaſcenus.*
[c] *Add.* Ariſt. *Prob.* Sect. 29. Qu. 2. & 6. Alſo *l.* 1. §. 2. & 67. *princ. D. de furtis.* [d] Lib. 16. t. 3. l. 12. *princ. D. depoſiti.*

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[1] But ſays Mr. *Thomaſius*, *ubi ſupra*, §. 43. "As there are divers ſorts of Affairs which require a different Care, and more "or leſs Application on the Part of the Truſtee; ſo there are divers ſorts of Truſts, which muſt be differently kept, and with "more or leſs Watchfulneſs. One ſort of Care we muſt have of an Houſe, another of a Slave or Domeſtick Servant, another "of a Jewel, or ſome other precious Thing, another of ſuch Things as are not portable; and therefore we are ſatisfy'd to place "them in a Court, or ſome ſuch Place, *&c.* ſo that 'tis not true to ſpeak generally and without Reſtriction, *That it is "ſufficient to put a Thing in a convenient Place*; and when that's done, we cannot any more conclude that a Truſtee is only "anſwerable for his Knavery and groſs Negligence, than we may infer, for the ſame Reaſon, that the Seller, before "the Delivery of his Goods, is, alſo, reſponſible for his Knavery, and the ſame Degree of Negligence, and nothing elſe." See above Not. 2. pag. 490.

[2] Mr. Le Clerc fully ſhews, by the Connexion of the Diſcourſe, that it is underſtood, that the Theft was committed either in the Sight, or with the Knowledge of the Truſtee.

[3] The Words are, *Sive is apud quem res depoſita eſt, eâ re utatur ——— furtum commitit.*

[4] Mr. Sacy's Deciſion upon a Caſe which he propounds in his Treatiſe *of Friendſhip*, appears a little too ſevere, not to ſay extravagant. "I am not afraid to ſay (*theſe are his Words*) that he, to whom a hundred Thouſand Livres are entruſted, may "not make uſe of them to ſave the Life of his Friend, who is fallen into the Hands of Pyrates, who threaten to take it "away, if that Sum be not paid by a certain Time. This is a Caſe, in which we ought to forget that we have any "Truſt, becauſe, in having ſuch a Sum entruſted to us, 'tis as if we had none: For it is not lawful for us either to open or "force the Cheſt where it is. And if we dare do it, we commit no leſs Crime, than if we broke open our Neighbour's "Houſe, and took that Sum; the only Difference is, that the Law puniſhing this laſt with Death, and taking no Notice of "the other, leaves our Puniſhment to Infamy, tho', in the main, 'tis the ſame Thing. The Sum entruſted, is in the "Hands of the Perſon truſted, not as it were in his Houſe, but in his Houſe to whom it belongs; and ſo wher the "Truſtee makes uſe of it, he ſteals it no leſs than if it were not entruſted to him, or that he took it out of the Houſe of "the true Proprietor." *Pag.* 125, &c. This Author does not diſtinguiſh whether he be able or not to pay the Sum entruſted to him, which he made uſe of to ſave the Life of his Friend; all that he ſays tends only to prove, that, let the Reaſon be never ſo important and preſſing, for which the Thing entruſted is made uſe of, he is guilty of Theft for this alone, that he made uſe of what he had in keeping. But this is one of the Caſes of Neceſſity, which are above the common Rules, and whoſe Exception is included in all Engagements. Whatever a Man can do for himſelf, he can certainly do the ſame in the like Circumſtances for his Friend, who is his ſecond ſelf; and we ought to have ſuch a good Opinion of him who truſts us, as to believe that he would lend us his Money for that Uſe freely, and ſo he may be thought tacitly to conſent to it. I proceed farther, and ſay, That ſuppoſing the Sum depoſited be inconſiderable, in reſpect of the Eſtate of him to whom it belongs, I cannot ſee but that it may be made uſe of to ſave the Life of a Man and a Friend, tho' we do not think him rich enough to pay ſo great a Sum under a long Time, if ever. If it be allowable, as I have prov'd above, *l.* 2. *c.* 6, not only to take the Goods of another, but, alſo, to run the Hazard of one's Life to preſerve his, is it not much more excuſable to take the Liberty of diſpoſing of a Thing truſted to us, in ſuch a preſſing Neceſſity of a Friend? And yet there is a great deal of Difference between this Action and that of a Man who robs to ſave his Friend; for this laſt commits a manifeſt Violence and Injuſtice, whereas the other only makes uſe of the Opportunity that Providence has given him, where he may preſume upon the Conſent of him who has committed that Money to his Keeping. It is here juſt as if a Man, being purſu'd by his Enemies or Thieves, takes the firſt Horſe he lights of to make his Eſcape, tho' the Maſter is neither preſent, nor knows it.

[5] The Words of the *Digeſts* are, *Prætor ait, quod neque tumultus, neque incendii, neque ruinæ, neque naufragii cauſâ depoſitum ſit, in ſimplum, ex earum autem rerum, quæ ſupra comprehenſæ ſunt: in ipſum in duplum ——— cum extante neceſſitate depoſitæ creſcit perfidiæ crimen.*

CHAP.

CHAP. V.

Of chargeable Contracts *in particular*; *and, First, of* Bartering, Buying *and* Selling.

I. *Of Exchanging or Bartering.*
II. *When a Contract of Buying and Selling is compleat.*
III. *Of the Loss or Gain of a Thing sold.*
IV. *Of Agreements commonly join'd with Sales.*
V. *What the Buyer ought to perform to the Seller; and* e contra.
VI. *Of Buying in Hope and Expectation.*
VII. *Of Monopolies.*

I. OF *chargeable Contracts*, *Bartering* is deservedly esteem'd the Chief; for in antient Times [1], before Money was found out, there was no other Method of maintaining Commerce. The *Dutch* made use of the simple and antient Way of Bartering Commodities, *Vid.* Tacit. *de Morib.* Germ. *c.* 5 [a]. Now *Bartering* may be made two Ways; either the Commodities may be valued for Money, and then, instead of Money, exchanged for one another; or the Commodities may be immediately compar'd together. The *first* sort is, in a manner, *Buying* and *Selling*, for here the Things are rated according to their Prices on both Sides; which Sort of *Bartering* is at this Day very frequent.

And therefore there is no Reason to conclude, that *pure Bartering* was in use at the Time of the *Trojan* War, as most do from that Passage in *Homer*, Iliad. *η.* v. 472.

Ἔνθεν ἄρ᾽ οἰνίζοντο καρηκομόωντες Ἀχαιοὶ,
Ἄλλοι μὲν χαλκῷ, ἄλλοι δ᾽ αἰθωνι σιδήρῳ,
Ἄλλοι δὲ ῥινοῖς, ἄλλοι δ᾽ αὐτοίσι βόεσσιν,
Ἄλλοι δ᾽ ἀνδραπόδεσσι.

The *Grecian* Chiefs their chearful Bowls prepare,
And *barter* Brass and Steel for sumptuous Fare.
Some *truck* with Slaves or Skins of slaughter'd Kine,
And some the Ox itself *exchange* for Wine.

For, says Pliny [b], *I wish we could quite lay aside the Use of Gold, which all good Men speak against, and which was found out to the Destruction of Mankind. How much happier was it when one Thing was* exchang'd *for another? As* (if *Homer* may be believed) *was done at the Time of the* Trojan *War: For then, I suppose, Commerce was set on Foot for the Conveniences of Life.* He tells us, *That some purchas'd with Hides, some with Iron, others with Plunder: Tho' he himself was an Admirer of Gold, yet he so rated Things, as to make* Glaucus *exchange his golden Arms of a hundred Oxen Price, for* Diomedes's *of nine. Hence it is, that the Fines inflicted by the old Laws consisted of Cattle, even at* Rome. Indeed, at this Day, nothing is more common than for Soldiers to *exchange* their Booty for other Commodities; for their Booty does not always consist of Money, and they do not scruple to take other Things which come in their Way. And therefore it does not follow, that Money was not in Use at the Time of the *Trojan* War, because the Soldiers purchas'd Wine with their Plunder: Nay, there is mention made of Talents of Gold in *Homer*; for in *Iliad. ι.* v. 122. *Agamemnon* promises to give *Achilles* δέκα ὑ χρυσοῖο τάλαντα. *Ten Talents of Gold*, & *Odyss. θ.* v. 393. Each of the *Phæacian* Princes gives *Ulysses* χρυσοῖο τάλαντον τιμήεντος, *A Talent of venerable Gold.* And altho' that Gold in *Odyss. ν.* v. 11. is call'd, χρύσος πολυδαίδαλος, yet it is not probable, that all Gold was then *wrought*, or us'd only for Cups and such sort of Vessels. Nor does it appear why *Homer* should give such a Veneration to Gold, if it had not been then the Standard Price of other Things. Besides, πολυδαίδαλος may signify any Materials capable of being finely wrought upon. As for *Homer*'s calling *Glaucus*'s golden Arms ἑκατόμβοια, or *worth an hundred Oxen*, and *Diomedes*'s Brass ones, ἐννεάβοια, or *worth nine Oxen*, without doubt he did it, because, in old Time, the greatest Riches consisted in Cattle, of which Oxen being the chief, because of the absolute Necessity of them in Husbandry, it was usual to refer the Price of other Things to them; which common Way of speaking did not immediately grow out of use, after Money had been made the Measure of all Things. And therefore it is observ'd [c], that Maidens, who by reason of their Beauty received great Presents from their Gallants, were call'd παρθένοι ἑκατοστεβοίας, *Virgins who gain Oxen:* But granting that *coin'd Money* was not then known among the *Grecians*, yet the Use of Gold and Silver, by *Weight*, might possibly have obtain'd in Commerce. Indeed, that many Nations used Money before the *Trojan* War, is plain enough from Holy Writ.

This Place of *Homer* puts me in mind of the Controversy between *Cassius* and *Sabinus* [d], *Whether before Money was in use, or now, since the Use of it, it might be call'd* Selling, *if* v. g. *I should give my Cloak for a Coat? Sabinus* asserted that it was, from this Passage of *Homer*, as if the *Grecian* Army had bought Wine with Brass, Iron, and Men; but οἰνίζεσθαι does not properly signify to *buy Wine*, but to procure it by any means whatsoever, as among the Latines, *pabulari*, *lignari*, *frumentari*, signify to *forage*, *to get Wood*, *and Corn* by any Method whatsoever [2]. The *other* Opinion indeed seems more feasible, because it is one thing to *buy*, another to *sell*, the *Buyer* one Man, the *Seller* another; the *Price* one Thing, and the *Commodity* another; but for the same Man to be *Buyer* and *Seller*, and the same Thing both the *Commodity* and *Price*, seems absurd. But to this we reply what we just

[a] See *Grot.* B. 2. c. 12. §. 3. n. 3.
[b] L. 33. c. 1.
[c] As *Dydimus* remarks, *ad* Hom. *Il. ζ.* v. 36.
[d] *Vid.* Lib. 18. t. 1. l. 1. *D. de contrah. empt.*

[1] See about this Dispute Mr. *Gravina*, Professor of Law at *Rome*, his *Origines Juris Civilis*, l. 2. p. 248, &c.
[2] Of this Opinion the *Digests* speak thus, *Sed verior est* Nervæ & Proculi *sententia, permutationem, non emptionem hoc esse. Nam ut aliud est vendere, aliud emere, alius emptor, alius venditor; sic aliud est pretium, aliud merx, quod in permutatione discerni non potest, uter emptor, uter venditor sit. Dig. ubi suprà.*

now

now ſaid of the two Sorts of *Bartering*; for if we ſuppoſe the Things to be firſt rated by Money, the *Buying* will be reciprocal, and therefore not abſurd for the ſame Perſon, in a different Reſpect, to be both *Buyer* and *Seller*.

Under the Name of *Bartering* may be brought the reciprocal Donations which commonly paſs between Friends; which not being a Contract, do not require Equality [1]. And to this may be referr'd the Changing of Arms between *Glaucus* and *Diomedes* [2], which, for the Inequality, may perhaps be ſtil'd Fooliſhneſs on *Glaucus*'s Side, but cannot be call'd Injuſtice in *Diomedes*. *Maximus Tyr.* Diſſert. 23. ſays, "*Glaucus* rated his Purchaſe from the Occa- "ſion, not according to the real Value." And again, *Diſſert.* 24. "Nor had he who receiv'd "the golden Arms more than his Due, nor he "who receiv'd the brazen leſs; but both did gene- "rouſly; the Inequality of the Matter being made "up with the Equality of the Deſign that each "had of obliging the other." *Add.* Iſocr. *ad* Nicocl. *in princ.* Among the *Ruſſians* there is a Market for holy Images, which they do not pretend to *ſell*, but to *exchange* for Money [b].

II. But ſince Money has been introduc'd, the Contract of *Buying* and *Selling* has been moſt in Uſe [2], whereby the Property of a Thing, or ſome Right equivalent to it, is acquir'd for a certain Sum of Money: And here the firſt Enquiry is, *When the Contract is ſo compleated, that nothing remains but that the Seller relinquiſh the Thing, and the Buyer take Poſſeſſion of it?* According to the *Roman* Laws [3] the Contract is compleated as ſoon as both Sides have agreed upon the Price; and then the *Buyer* can force the *Seller* to deliver up the Thing; and the *Seller* can oblige the *Buyer* to take it, and to pay down the Price immediately, or at the Time appointed [c].

But the Contract may be *incompleat*, and not capable of bearing an Action, either upon a general or a particular Account. The *Firſt* is, when the *Buyer* and the *Seller* [d 4] are not agreed, but ſtill endeavour to bring one another to their own Terms; where they are both free to give back and break off the Bargain, having not yet contracted an Obligation, provided there be no Deceit nor Deſign in either Party to elude the other; which indeed obtains in all Contracts. The *Latter* is, when the Bargain turns upon ſome Conditions [e 5] either expreſſed or underſtood; as if the Ware is firſt to be ſeen or taſt-

[a] *Vid.* Hom. *Il.* d. l. [b] *Olearius* itin. *Perſ.* l. 1. c. 1. [c] *Add.* lib. 19. t. 5. *D. de præſcript. verbis*, &c. Leg. 5. §. 1. *Sine pretio nulla venditio eſt.* Lib. 18. t. 1. & l. 19. l. 34. §. 5, 6. l. 35. §. 1, 5, 6, 7. *D. de contrab. empt.* &c. [d] *Vid.* D. *ibid.* Leg. 35. §. 1. [e] *Vid.* D. *ibid.* Leg. 7. §. 1. See above in B. 3. Ch. 8.

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[1] *Max. Tyrius*'s Greek is, Οὐδὲν γὰρ ἧττον τῷ λαβόντι χρυσὸς πλέον, ἢ τῷ ἀλλαξαμένῳ ὁ χαλκὸς, ἔλαττον ἀλλὰ ἀμφοτέροις καλῶς ἔχει ἑκάτερα ἐν τῷ ἀνίσῳ τῆς ὕλης, ἰσαζόμενα τῇ γνώμῃ δοθέντα. See Mr. *Davis*'s Notes on it. We may, alſo, add here, That by the *Roman* Law an Exchange is a Contract without a Name, for which there lies no Action in Juſtice but the Delivery of the Thing exchanged is made on both Sides, and ſo, he who firſt gave the other a Thing to exchange may retract, tho', if he inſiſts upon it, the other is indiſpenſably oblig'd to keep his Word, and to give what he has promiſed on his Side. See *Digeſt. l.* 19. *t.* 4. *De rerum permutatione, and* Mr. DOMAT's *Civil Laws in their Natural Order*, Part. 1. l. 1. t. 3.

[2] The Words of the *Digeſts* are, *Et ſi quidem pecuniam dem, ut rem accipiam, emptio & venditio eſt.* So we may ſell a Service, an Inheritance, a Debt, in a Word all Sorts of Rights, Names, and Actions. See *Digeſt. De hæreditate, vel actione vendita*, l. 18. t. 4.

[3] Altho' the Buyer pays nothing down, nor gives any Earneſt. *Eſt autem emptio Juris Gentium, & ideo conſenſu peragitur, & inter abſentes contrahi poteſt, & per nuncium & per literas*, Digeſt. de contrahendâ Emptione, Leg. 1. §. 2. *Emptio & venditio contrahitur ſimulatque de pretio convenerit: quamvis nondum pretium numeratum ſit, ac ne arrha quidem data fuerit*, Inſtit. l. 3. t. 24. princ. See alſo *Digeſt. ubi ſupra, Leg.* 19, 34. §. 6. & 35. §. 5, 6, 7.

[4] As when they have not agreed upon the Price, but only have ſaid, We ſhall agree, I'll ſell it at a reaſonable Price, &c. It is the ſame, according to the *Roman* Lawyers, when we ſay, I'll ſell it for what you pleaſe, for what you think reaſonable, &c. *Illud conſtat imperfectum eſſe negotium, cum emere volenti ſic venditor dicit, QUANTI* VELIS, QUANTI ÆQUUM PUTAVERIS, QUANTI ÆSTIMAVERIS, HABEBIS EMPTUM. Digeſt. ibid. Leg. 35. §. 1. Some aſk, Whether a ſimple Contract to ſell or buy, is any way obligatory by the Law of Nature and Nations? Mr. THOMASIUS, in his Diſcourſe *De Arrhis emptionum*, §. 23, denies it abſolutely; and the Reaſon, ſays he, is clear, "Becauſe there is only a looſe Conſent which is come to no Determination, and "which gives no Right to him to whom the Promiſe is made, to demand any Thing: For what would he claim? Would he "ſay he has bought or ſold any thing actually? But if one has no Mind to ſell, 'tis eaſy to evade his Promiſe by exacting an "enormous Price, or by annexing ſuch Conditions as we think fit; and if the other has no Mind to buy, he can as eaſily get "off by very ſmall Offers, or by engaging the Seller to very hard Terms. Or how can a Man pretend to an Indemnification, "ſince there is neither any Goods ſet out, nor Price fixed; and the one hath nothing to do but to declare that he is ready to "conclude the Bargain, if the other reſolves to go on with it; and, to take away all Ground of Complaint, he may alledge "that the other has broken his Word, and ſo lay all the Blame on him that the Bargain is not compleated?" But if we will judge of the Thing by the ſole Law of Nature and Nations, I do not not think that any Man can come fully into the Sentiments of Mr. THOMASIUS. I diſtinguiſh here between an uncertain Promiſe, which neither ſignifies any thing, or engages any Man, and a real Promiſe, upon which the Perſon, to whom it is made, may depend, which nevertheleſs may have a real Effect, tho' ſubject to Failure. The firſt ſort may be eluded after the Manner that this able Lawyer hath repreſented, becauſe we have promis'd ſo far only as we pleaſe to keep it; and ſo he, to whom the Promiſe is made, has no Right, but the other ought certainly to be explain'd ſo, as not to come to Nothing, and the Promiſer cannot elude it at his own Pleaſure. Let us clear this by an Example; I ſee a Thing uſeful to me in another's Poſſeſſion, and aſk him whether he'll ſell it me? He anſwers, Yea. Whereupon I go away without bargaining, or requiring him to lay it aſide for me. In this Caſe 'tis plain, that if the Owner of the Goods ſells them to another, or refuſes to ſell them to me when I come again to deſire it, he does me no Injury, for he is under no Engagement to me, no otherwiſe than that we might have agreed, if I had at that Inſtant bargained; but ſince I neglected it, 'tis ſo much the worſe for me. And this hath chiefly a Place, when he who declared his Price, at that Inſtant, is a Trader by Profeſſion, and deals in Things of that Nature; for we know well, that if we do not take ſuch Men at their Word, when they offer to ſell a Thing at ſuch a Price, we do nothing; by a much greater Reaſon they are free to ſell, or not, when nothing is ſaid. But ſuppoſe that I ſay to a Tradeſman by Profeſſion, May I depend upon it that you'll ſell me ſuch or ſuch a Thing? And he thereupon poſitively promiſes me that he'll keep it for me, then he tacitly engages that he'll ſell it me at a reaſonable Rate, if I deal with him for a Thing whoſe Price often varies, or at the uſual Price, if there be any Rule for it; provided that I come ſoon to buy it, or in the Time agreed on; for if I let the Time paſs, or, if it not being ſet, I ſtay a long Time before I come again, the other Contractor is releaſed of his Word, by reaſon of the Occaſions which he may loſe of ſelling his Goods to Advantage; for before this he was not free to recant, becauſe I might fail of accommodating myſelf elſewhere. Add here what I have ſaid upon *Grotius*, Lib. ii. Cap. xii. §. 15. Not. 5.

[5] The Words of the *Digeſts* are, *Conditionales autem venditiones tunc perficiuntur, cum impleta fuerit conditio.* But this is not appropriated to a Bargain of Sale only. All ſorts of Agreements follow the ſame Rule. See what is ſaid above, *Lib.* 3. *c.* 4. *Quod ſi ſub conditione res venierit*, ſay the *Roman* Lawyers, *ſi quidem defecerit Conditio, nulla eſt Emptio, ſicuti nec eſt Stipulatio.* Digeſt. l. 18. t. 6. De Periculo & Commodo Rei venditæ. Leg. 8.

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ed [a], for here the Bargain goes upon a Supposition, that the Thing will not only appear as the *Seller* had represented it, but that it will then please too. For indeed the Knowledge of the Thing is always necessary for the determining of the Price; and it is imprudent to buy without seeing it, where we cannot depend upon the Word of the *Seller*.

The determining of the Commodity by Weight, Measure, or Number [b], is not properly a Condition of Sale, unless the Thing be so, as not to serve my Turn, but in such a Quantity. However, for putting the Contract in Execution, it is necessary to measure, number, or weight [2]; for we cannot otherwise specify the Thing, and set it apart from those of the [3] same sort. Nor, without this Measuring, can the Goods be deliver'd, or Property transferr'd; for I have no other Way of determining what belongs to me, and what to the *Seller*. Sometimes indeed we buy at a Lump; and then Measuring is only for Experiment, not for the Rating of the Commodity; for, in that Case, the Measure does not precede the Delivery; it being one thing to sell this Vessel of Wine which holds ten Gallons, and another to sell ten Gallons out of this Vessel [4].

Lastly, the Bargain is *incompleat*, if the Parties [c] particularly agree to have one another's Consent express'd in Writing, and the Writings be not yet finish'd. But 'tis another Thing, if this Writing is design'd only for a Help of the [5] Memory, or an Evidence of the Thing. What the *Hebrews* observ'd, in relation to this Contract, is curiously taken notice of by *Selden*, *De J. N. & G. secund. Heb.* l. vi. c. 1. & 4. Add a Place of *Theoph.* in *Stobæus*, Serm. 42.

III. And here we must take special Care to distinguish between the *Contract itself*, and the *Execution* of it. The *Contract* is compleated as soon as the Commodity and Price is agreed upon, provided there be no Condition added, that can suspend the Obligation, or any thing else, that can leave room for either Party to recede from the Bargain; but the *Execution* of the Contract consists in the actual Delivery of the Money by the *Buyer*, and of the Commodity by the *Seller*. It is indeed most natural, that, as soon as the Contract is compleated, it should be put in Execution; or that, as soon as the Price is agreed upon, the *Buyer* should deliver the Money, and receive the Commodity; which they call *Trucking with ready Money* [6]. *Vid.* Plaut. Asin. *Act.* I. *Sc.* iii. *v.* 47. As, also, *Plato de Leg.* l. xi. in his Commonwealth enacts, "That "whatsoever is bought and sold, be done in such "a certain Place of the *Forum*, the Seller deliver-"ing the Commodity, and the Buyer paying down "the Price immediately."

But when there is some Time between the Completion of the Bargain, and the Delivery of the Thing; it may be demanded to whom the Damage, or the Profit of the Commodity belongs in the mean Time, to the *Buyer* or to the *Seller*? [7] 'Tis well known that the *Roman* Law, as soon as ever the Bargain is compleated, imputes the Risque of the

[a] *Vid.* D. *ubi supra.* Leg 34. §. 5. [b] *Vid.* D. *ubi supra.* [c] This not only respects Contracts of *Selling*, but likewise all other Compacts, *Vid. C.* lib. 4. t. 21. *De fide instrumentor.* &c. Leg. 17. *Vid.* Instit. lib. 3. t. 24. *De emptione & venditione princip.*

[1] *Gustus enim ad hoc proficit, ut improbare liceat,* Digest. lib. 18. tit. De contrah. empt. Leg. 34. §. 5. *Difficile autem est, ut quisquam sic emat, ut ne degustet.* Ibid. tit. 4. De periculo & commodo rei venditæ, Leg. 4. §. 1. The Decisions of the Lawyers upon the Cases reported here, are conceiv'd in a very perplex'd Manner. See M. *Noodt*'s Commentary, pag. 414, as well as the Observations of the deceas'd M. *Best* Cap. viii, ix.

[2] As for Example: If I buy some Cloth for a Suit, and the Piece holds not out so many Ells as it ought.

[3] *Si id, quod venierit, appareat, quid, quale, quantum sit, & pretium, & purè venit, perfecta est emptio.* Digest. De periculo & commodo Rei venditæ, Leg. 8. princip. *In his quæ pondere, numero, mensuráve constant, —— si omne vinum, vel oleum, vel frumentum, vel argentum quantumcunque esset, uno pretio venierit, idem juris est, quod in cæteris rebus. Quod si vinum ita venierit, ut in singulas amphoras; item oleum ut in singulas metretas; item frumentum ut in singulos modios, item argentum ut in singulas libras certum pretium diceretur —— & de his quæ numero constant, si pro numero corporum pretium sit statutum. Sabinus & Cassius tunc perfici emptionem existimant, cum ad numerata, admensa, adpensáve sint; quia venditio sub hac conditione videtur fieri ut in singulas metretas, & modios, & libras, quos quasve admensus eris vel appenderis,* Lib. 18. t. 1. De contrah. empt. &c. Leg. 35. §. 5. Here, however, as well as in Bargains of conditional Sale, we cannot retract after the Things bought, are measur'd, weigh'd, or counted.

[4] This is not appropriated to Sales, but to all sorts of Agreements. *Contractus venditionum, vel permutationum, vel Donationum, quas intimari [non] est necessarium, dationis etiam Arrharum, vel alterius cujuscunque causæ, [quas tamen] in scriptis fieri placuit, transactionum etiam, quas in instrumento recipi convenit, non aliter vires habere sancimus, nisi instrumenta in mundum recepta, subscriptionibusque partium confirmata, & si per tabellionem conscribantur, etiam ab ipso completa, & postremo à partibus absoluta sunt,* Cod. lib. 4 tit. 21. De fide instrumentorum, &c. Leg. 18. See *Institut.* l. 3. t. 24. *De emptione & venditione princ.* We ought to observe that in this §, altho' the Author pretends only to relate the Determinations of the Civil Law, he so mixes his own Notions with theirs, which he endeavours to rectify and reduce to the Simplicity of the Law of Nature, that 'tis not possible to disintangle them in a Translation.

[5] This is commonly presumed till the contrary appear. *Fiunt enim de his [obligationibus quæ consensu contrahuntur] scripturæ, ut quod actum est per eas facilius probari possit, & sine his autem valet, quod actum est, si habeat probationem, sicut & nuptiæ sunt, licet testatio sine scriptis sit habita.* Digest. lib. 22. tit. 4. de fide instrumentorum, &c. See especially, with regard to the *Contract of Sale*, Mr. *Domat*'s Civil Laws in their natural Order, Part I. lib. ii. tit. ii.

[6] This is what is called *Græcâ fide mercari.* See *Plaut.* &c. as in the Text.

[7] The Words of the Laws are, *Quum autem emptio & venditio contracta sit, —— periculum rei venditæ statim ad emptorem pertinet, tametsi ea res tradita emptori non sit. Itaque si homo mortuus sit, vel aliquâ parte corporis læsus sit, aut ædes totæ, aut aliqua ex parte, incendio consumptæ fuerint, aut fundus vi fluminis totus, vel aliquâ ex parte ablatus sit, sive etiam inundatione aquæ, vel arboribus turbine dejectis, longe minor, aut deterior esse cœperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. Quicquid enim sine dolo & culpâ venditoris accidit, in eo venditor securus est.* Instit. lib. 3. tit. 24. §. 3. The Negligence for which the Seller is responsible, besides his Dishonesty, is, what the *Roman* Lawyers call a *small Fault*, which is oppos'd to the Care which a good Master of a Family commonly has of his own Affairs; for they require such a Degree of Exactness in all Contracts, as may be for the Advantage of both Parties. *Si nihil appareat convenisse, talis custodia desideranda est à venditore, qualis bonus Paterfamilias suis rebus adhibet, quam si præstiterit, & tamen rem perdidit, securus esse debet.* Digest. lib. 18. tit. 1. De contrah. empt. Leg. 35. §. 4. *Sed ubi utriusque utilitas vertitur, ut in empto, ut in locato, ut in dote, ut in societate, & dolus, & culpa præstatur.* Lib. 23. tit. 6. *Commodati vel contra,* Leg. 5. §. 2. But, if we judge by the Law of Nature alone, I hold to what I have said in the foregoing Chapter; and, without having regard to that Distinction about the Advantage, which accrues by a Contract, either to each of the Parties only, or to both together, I believe that the Seller, and every other Person, who is engaged expressly or tacitly to preserve a Thing that belongs to another, in any wise, is responsible for whatever happens, if he has not done as much as he could or would for himself, and his own Interests, in Things which he values most.

Commodity to the *Buyer*, [1] altho' it be not yet deliver'd, and altho' the *Seller* remains Master of it. By *Risques* they mean the Accidents 'tis liable to, from external Injuries, as Theft, *&c.* or internal Decay proceeding from natural Causes [a] [2]. But how can the Damage belong to the *Buyer*, when he is not yet the Owner, whereas the Loss of a Thing is to the Owner? To which some answer [b] [3], that that common Saying, *The Loss is to the Owner*, is true, when the *Owner* is oppos'd to those who have barely the Use and Custody of the Thing; and not to those who have Right in it, and a Power to call for it as their own. Which Distinction is founded upon this Reason, that the *Buyer* might, and ought to have immediately taken Possession of the Commodity, and to have paid down the Money; which if he had done, it had perish'd in his own keeping; and therefore his Delay and Negligence ought not to turn to the Loss of the *Seller*. Besides, the Risque belongs to the *Buyer*, not only because he is the *Owner*, but because the *Seller*, after the Completion of the Bargain, in respect of the *Buyer*, is not consider'd as *Owner*, but as *Trustee* of such a [4] particular Commodity, for which, if it be lost without his Fault, he ought not to be responsible.

[5] But after all, since it is the *Seller*'s Business to give the *Buyer* Possession, if he has not discharged this Duty, I do not see why *he*, rather than the *other*, should not stand to the Loss of it. For the Answer, *That a Person, having promis'd any certain Thing, does not stand oblig'd in case the Thing he lost*, does not come up to our Case [c]: For there the other Party was to have gain'd the things *gratis*; and it would be hard and unjust for a Man who had promised a certain Species, upon the Loss of it, to be bound to make good the Value. But, in such Dealings as admit of no Latitude, the Case is altered; for why should the *Buyer*, who has not yet had the Delivery made him according to the Contract, be deprived of the Goods, and yet pay the *Seller* the Price of them [d]?

The best Way to discover natural Equity, in this Point, is to distinguish whether the Delay was ab-

[a] *Vid. d. tit. de peric. & commod. rei venditæ.* [b] *Vid. C.* lib. 4. t. 24. *De Pigneratitia actione*, Leg. 9.
[c] According to *lib.* 45. *t.* 1. *leg.* 33. *l.* 83. §. 7. *D. de Verb. oblig. & lib.* 35. *t.* 2. *l.* 30. §. 4. *D. ad L. Falcid. in fine, & lib.* 4. *t.* 3. *Leg.* 18. §. 5. *D. de dolo malo.* [d] *Ziegler* ad *Grot.* l. 2. c. 12. §. 15.

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[1] Yea, when he has deliver'd it, provided he has not received the Payment, or given Credit, or taken some Pawn, or accepted a Security. *Sane qui nondum rem emptori tradidit, adhuc ipse dominus est.* Institut. *ib.* See also *Lib.* 2. *tit.* 1. *De divisione rerum*, §. 41.

[2] *Res domino perit*, say the Lawyers; a Maxim taken out of this Law of the Code, *Lib.* 1. *tit.* 24. *De pignoratitiâ actione*, Leg. 9. *Pignus in bonis debitoribus permanere, ideoque ipsi perire in dubium non venit.*

[3] This is a Rule of the *Roman* Lawyers, and the true Grounds on which they found their Reason in the present Case. But the Question is to know, if (setting aside their Authority) it can be extended so far, or, if it can be well reconciled with another Rule of their own, *That the Loss of a Thing should fall upon the Owner.* For myself, I see no Method of giving here a satisfactory Solution. That the Debtor of a Thing in kind should be freed, when the Thing is lost without his Fault, proves only that he is not bound for Damages and Interest to him by whom he was Commission'd or Intrusted; unless he has expresly bound himself, or the Law obliges him to it. But it does not follow that, when he is himself the Owner, the other contracting Party, who has no Means to take away the Goods, and is guilty of no Fault, should pay, or lose the Money which he promis'd only with a View of their being deliver'd. This is what the deceas'd Mr. *Vitriarius* acknowledges, in his *Institut. Jur. Nat. & Gent.* Lib. ii. cap xii. *Quæst.* 27, where, nevertheless, he follows the Principles of the *Roman* Lawyers. To support his Opinion he brings two Reasons. The first is, That the Buyer has it in his Power to take away the Thing sold, either by himself or another, which if he had done, the Thing had perished in his Hands. But it is an unjust Supposition that the Buyer can always remove the Thing sold, immediately after the Conclusion of the Bargain. It frequently happens, that this is impossible, either because he lives at too great a Distance from the Place of Contract, or for some other Reason. It is sometimes expresly agreed, That the Thing sold shall not be deliver'd but in a certain Space of Time. Yet the *Roman* Lawyers, in these Cases, would no Ways dispense with the Buyer from paying. They say it is sufficient that the Bargain was concluded. The other Reason of Mr. *Vitriarius* is, That, the Advantages arising from the Sale belonging to the Buyer, he ought to suffer whatever Damages happen before the Delivery of the Goods. But this is manifestly supposing the Thing in question, for whoever denies the one, denies the other: And the Objection drawn from this, That the Seller remains the Proprietor, has the same Force in Point of Gain, as in Point of Loss. The *Roman* Lawyers, and their Interpreters, might have avoided all this Perplexity, and established surer Principles; if they had not been possess'd with a false Notion about transferring of Property, which they affirm'd could not be done without Corporal Possession.

[4] In Mr. HERTIUS's Edition these Words are inserted here, "This hath no Place but in Contracts, wherein one of the "Contractors hath in his Hands the thing that belongs to another, and not in these, wherein one of the Contractors owes the "other a certain thing in Specie. Or, as others express it, the Loss is the Owner's, when, *&c.*" The *English* Translator has heal'd this Breach by skipping it.

[5] We may add here what CUJACIUS, and some other Lawyers affirm, that, according to the *Roman* Law, all Accidents, before Delivery, must fall upon the Seller. See CUJACIUS upon *Leg.* 33. of the *Digests. Tit. locati conducti*, in his Treatise, *ad Africanum, Lib.* 8. Mr. VAN ECK, Professor at *Utrecht*, observes in his *Principia Juris Civ.* under the Title. *De periculo & commodo rei venditæ*, §. 10. That the Learned despair of reconciling this Law with the common Opinion; and as for himself he declares freely, that he may say, without any Injury to the *Roman* Lawyers Reputation, that they never were perfectly agreed about that Matter. Mr. *Noodt*, in his Commentary, pag. 416, owns, That, in this Case, there is an Exception to the general Rule, as well as in that of Laws xii, xiii, and xiv, under the Title *De periculo & commodo rei Vend.* This is the last Case. A Man had bought some Pieces of Wood belonging to a Bed, the Seller leaves them in the Street, where an *Edile* (or a Magistrate of the City) unjustly breaks them in Pieces. The Lawyer *Paulus* decides, That the Loss should fall upon the Seller, even tho' he was no Way in Fault. In the other Law the Case was this. An Estate sold, is confiscated by the Laws of War, before the Delivery, tho' the Seller was in no Fault. And yet *Africanus* decides in the same manner, that he should bear the Loss. Mr. *Noodt* grounds this Exception on the Injury done to the Seller by the *Edile*, or by the victorious Prince; which, says he, ought reasonably to fall upon him, and not upon the Buyer; because the Damage here happens thro' a fatal Accident. But why shou'd the Effect of such an Injury be regarded more as a fatal Accident than Theft, or Rapine? And yet the *Roman* Lawyers, when a Thing is stolen or carried off before Delivery without any Fault in the Seller, throw all the Loss upon the Buyer. See Digest. Lib. xviii. tit. 1. *De contrab. empt.* Leg. 35. §. 4. It appears to me, That a Man may much sooner foresee, and prevent the Injuries done him by particular Persons, than those offer'd him by the Magistrate, or by Force of Arms. And the Robber who is ignorant that the Thing he takes is sold, how does he commit a greater Injustice to the Buyer than the *Edile* or the Conqueror? Besides the *Roman* Lawyers themselves, upon other Occasions, regard whatever happens thro' War, as an Effect of the most fatal Necessity: *Si iucursus hostium fiat.* Digest. Lib. xix. tit. ii. *Locati conducti.* Leg. xv. §. 2. I own I can see no solid Reason for the Difference. *William Ranchin*, a Disciple of *Cujas*, freely owns this, in his *variar. Lect.* Lib. iii. Cap. xi.

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ſolutely neceſſary, [1] for the Delivery of the Commodity; or only occaſioned through the Default of one of the Parties; and if occaſioned, whether by the *Buyer*, or the *Seller?*

The firſt Caſe may be put thus; ſuppoſe I buy [2] Cattle, which, at preſent, are at ſome Diſtance, and the *Seller*, in driving them to me, happens to have them intercepted by Robbers, Wolves, or ſome other Accident; in this Caſe no doubt the Loſs is the *Seller*'s.

Where the Delay has not been neceſſary, but occaſioned by the *Seller*, [3] then too the Loſs lies at his Door.

But if the *Buyer* be the Occaſion of it, then he ſtands to the Loſs of it. For the very Moment that the Commodity was due, and the *Seller* ready to make a Delivery of it, the Property paſt to the *Buyer*, and the Thing then began to belong to him only [a]. And therefore, if the [4] *Seller* out of Kindneſs keeps in Cuſtody the Goods, which the *Buyer* did not ſo much as commit to him in Truſt, it is unreaſonable to expect, that he ſhould ſtand to the Caſualties that may attend them. But in Caſe the *Buyer* had committed them to his Cuſtody, then muſt they be looked upon as a *Charge*, and, conſequently, the Receiver muſt be free from whatever Caſualties may happen to them. In which Caſe, the Delivery of the Commodity ought to be made by a Fiction *brevis manus* [b], but otherwiſe than is done in the *Loan*, or *Letting* of a Thing. For there, by the Delivery we alienate our own, but here the Alienation is made to us. What has been here ſaid of the Damage may be applied to the Gain alſo [5] [c].

IV. Moreover it is uſual for this Contract to be qualified with the Addition of ſeveral other Pacts, according to the Pleaſure of the Contractors, or the Law of the Land. In which the Law of Nature is concerned no farther, than that each Party ſtands to his Agreement, provided nothing abſurd, or unjuſt, is contained in it, and that every Subject conform himſelf to the Law of his Country, as he expects to have his Contract valid in it. Thus nothing is more common, than to agree upon Payment of the Money ſometime after the Delivery of the Thing; and, alſo, that the Thing ſhall not be delivered till ſuch a Time; the Property, in the mean Time, together with the Gain or Hazard attending it, lying in the *Seller* [6] [d].

Beſides, we frequently practiſe what the *Civilians* call [7] *Addictio in diem*, which gives the *Seller* Leave to accept of any better Bargain, that ſhall offer itſelf by ſuch a Day. This may be done [8] two Ways: Firſt, when the Bargain is compleated, but upon Condition that it ſhall be null, if better Terms offer themſelves; or ſecondly, if it be only agreed *de futuro*, that it ſhall be a Bargain, if better Offers are not made [e]. In the former Caſe, the Property paſſes over to the *Buyer*; in the latter, it remains in the *Seller*, till the Completion of the Contract.

[a] *Vid. ſupra*, l. iv. c. 9. §. 5.
[b] See above in B. iv. c. 9. §. 9.
[c] *Commodum ejus eſſe debet, cujus eſt periculum*, Vid. *Inſtit.* l. iii. t. 24. §. 3. *De empt. & vendit.*
[d] *Vid.* Inſtit. *ibid. Vid.* Caton. *de re ruſticâ*, c. 80.
[e] *Vid.* lib xviii. t. 2. l. 2. *D. de in diem addict.*

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[1] The *Roman* Lawyers ſay, alſo, That in this laſt Caſe the Seller is bound to Damages and Intereſts, *i. e.* he ought to indemnify the Buyer from the Loſs he has had, or the Profit he has miſſed of by his Delay. *Si res vendita non tradatur, in id quod intereſt, agitur; hoc eſt, quod rem habere intereſt emptoris,—— cum per venditorem ſteterit, quo minus rem tradat, omnis utilitas emptoris in æſtimationem venit; quæ modo circa ipſam rem conſiſtit. Neque enim, ſi potuit ex vino (puta) negotiari, & lucrum facere, id æſtimandum eſt, non magis quam ſi triticum emerit*, &c. Dig. lib. 19. Tit. 1. *De Actionibus empti & venditi.* leg. 1. *princ.* & xxi. §. 3.

[2] Though the Transferring the Right of Property naturally requires no more than the Conſent of Parties, yet it may be either expreſly, or tacitly agreed, that the Seller remain Maſter of the Goods till the Delivery. Now this Agreement may be eaſily preſumed here, when it is impoſſible for the Seller to put the Buyer in immediate Poſſeſſion of the Thing ſold, for as, then, a Thouſand Accidents may put it out of his Power to keep his Word, a prudent Purchaſer will not run the hazard of parting with his Money for nothing. Thus, unleſs it manifeſtly appears that the Seller has entirely diveſted himſelf of his Right of Property in Favour of the Buyer, and at his own Deſire; he is ſuppoſed to be anſwerable for all the Accidents that may happen in the Interval. Whereas, when the Thing ſold is preſent, and the Seller ready to deliver, as well as the Buyer ready to receive it, if we judge by Law of Nature, there is no Reaſon to believe that the Seller has preſerved his Property; unleſs the Engagement be only a ſimple Agreement about the Sale, as often happens. See my Remark upon *Grotius*, lib. ii. cap. 12. §. 15. not. 5.

[3] In this Caſe the Lawyers affirm, "That if one buy Wine, upon Condition that he will come and meaſure it, and take it away at a certain Time; the Seller, after the Term, may pour out the Wine, to make uſe of the Hogſheads, having given Notice to the Buyer firſt." *Licet autem venditori vel effundere vinum, ſi diem ad metiendum præſtituit, nec intra diem admenſum eſt; effundere autem non ſtatim poterit, priuſquam teſtando denunciet emptori, ut aut tollat vinum, aut ſciat futurum, ut vinum effunderetur.* Digeſt. lib. xviii. tit. 6. De periculo & commodo rei venditæ, leg. 1. §. 3. It is true, They add, That the Seller is more to be commended, if he uſes not his Right, but ſells the Wine as well as he can, or buys other Veſſels on his Account. *Si tamen, cum poſſet effundere, non effundit, laudandus eſt potius —— commodius eſt autem conduci vaſa, nec reddi vinum, niſi quanti conduxerit, ab emptore reddatur, aut vendere vinum bonâ fide*, i. e. *quantum ſine ipſius incommodo fieri poteſt, operam dare, ut quam minimo detrimento ſit ea res emptori.* But it is doubtleſs one of thoſe Precepts of Right, oppoſite to the Rules and Laws properly ſo called, of which Mr. NOODT treats in his *Julius Paulus*, c. 10. & 11. The Permiſſion is evidently unjuſt, and yet is not leſs full and entire in the foregoing Words; and it is noted with Reaſon, that GROTIUS did amiſs in placing this Example in the Number of Things good and innocent, although it be more commendable to abſtain from it. *Interdum enim licere dicitur, id quod rectum ex omni parte, piumque eſt, etiamſi forte aliud quid fieri poſſit laudabilius*, Lib. iii. ch. 4. §. 2. num. 1. See J. SAMUEL. STRYKIJ *Tract. de Jure Liciti ſed non Honeſti*, Ch. 2. §. 97. &c. I had taken Notice of this Example, about the Advice which the antient Lawyers gave againſt the Rigour of the Law, before I ſaw the *Euremática* of the learned and laborious Mr. *Brenkman*, Cap. 12. §. 16. *num.* 14. or Mr. *Noodt*'s Commentary on the *Digeſt.* pag. 413, 414.

[4] The Buyer here has the leſs Reaſon to complain, as often the Thing ſold might have been preſerved, if he had taken it away.

[5] He that ſuffers the Loſs, ought to have the Gain, this is an inconteſtable Maxim. If, for Example, a Piece of Ground be ſold, and a Flood adds ſomething to it, it is the Purchaſer's Gain. *Sed & ſi poſt emptionem fundo aliquid per alluvionem acceſſerit, ad emptoris commodum pertinet. Nam & commodum eſſe debet, cujus periculum eſt.* Inſt. Lib. iii. tit. 24. De empt. & vend. §. 3.

[6] The Words are, *Quod ſi fugerit homo, qui venüit, aut ſurreptus fuerit, ita ut neque dolus neque culpa venditoris intervenerit; animadvertendum erit, an cuſtodiam ejus uſque ad traditionem venditor ſuſceperit. Sanè enim ſi ſuſceperit, ad ipſius periculum is caſus pertinet: Si non, ſecurus eſt.* Inſtit. ibid.

[7] This is what the Lawyers call, *Addictio in diem*, of which the *Digeſts* treat, *Lib. viii. tit.* 2, and thus define it, *In diem addictio ita fit: Ille fundus centum eſto tibi emptus, niſi ſi quis intra Kalendas Januarias proximas meliorem conditionem fecerit, quo res à domino abeat.* Leg. 1. ibid.

[8] *Nam ſi quidem hoc actum eſt, ut meliore allatâ conditione, diſcedatur, erit pura emptio, quæ ſub conditione reſolvitur: ſin autem hoc actum eſt, ut perficiatur emptio, niſi melior conditio adferatur, erit emptio conditionalis.* Ibid. Leg. 2.

What they call [1] *Lex Commiſſoria* makes [2] void the Bargain, if the Price be not paid by ſuch a Day. And, in this Caſe, either the *Seller* may immediately deliver the Goods, and, in Default of the Payment, claim them again with the Emolument [a], or elſe the Goods may be kept in Poſſeſſion, till the Payment be actually made; which laſt ſeems to be the ſafeſt Way, for generally this Clauſe is deſigned in Favour of the *Seller*, to [3] ſave him from being put to any Trouble in queſt of his Money; whereas the Trouble would be ſame, were he to recover his Goods out of the Hands of an ill Paymaſter [b].

[4] Sometimes too either the Laws of the Land, or the Parties themſelves, grant one another the Liberty of breaking off the Bargain [c], which is done ſeveral Ways; for ſometimes a Clauſe is [5] added, that upon Tender of the Price at any Time, or by ſuch a certain Day, the *Buyer* ſhall be obliged to reſtore the Goods to the *Seller*, or his Heirs [d]. And this certain Day may be expreſſed with a different Deſign, either to ſignify the Term, after which the *Seller* may have Power to break off the Bargain: or the Term, to which, and not longer, ſuch a Liberty ſhall be granted. Where it is obſervable, that as this Power of redeeming is deſigned in Favour of the *Seller*, who ſometimes, upon urgent Occaſions, is forced to part with that which he would not willingly loſe for ever: So the fixing a Term to that Power, is in Favour of the *Buyer*; for it is to his Advantage, if he be not forced to quit the Poſſeſſion of his Purchaſe in ſome ſhort Time, to be at length ſure of the Perpetuity of it [6]. Sometimes too, when the Sale is made in Favour of the *Seller*, the *Buyer* is allowed the Liberty to bring back the Commodity whenever he pleaſes, or at ſuch a certain Time, and the *Seller* is obliged to refund the Money [e]. "The Em-
"peror *Marcus*, in want of Money, having ſold
"all his Imperial Furniture, afterwards gave leave
"to the Purchaſers, for any of them to bring
"back their Purchaſe, and receive their Money."
Jul. Capitol.

Another more eaſy ſort of *Redemption*, is what they call *Jus πϱοτιμήσεως*, or, *the Privilege of the firſt Refuſal*, that is, if the *Buyer* be hereafter diſpoſed to part with the Commodity, [7] he muſt let the *Seller* have the firſt Refuſal at the ſame Rate he would ſell it to another. In many Caſes certain Perſons pretend to this Privilege by Law; as the Landlord in [8] the Sale of his Tenant's Stock, the Creditor in his [9] Debtor's Goods, the Neighbour [10] in the Purchaſe of a neighbouring Farm, [11] any Member in a Thing that belongs to the Society, and

[a] *Vid* lib. xviii. t. 3. leg. 5. D. *de lege Commiſſor.* [b] Vid. L ii, iii. D. d. t. [c] *Retractus.* [d] *Vid.* C. lib. iv. t. 54. *de pactis inter empt. & vendit. compoſitis*, leg. 2. [e] *Vid.* Liv. l. xxxi. c. 13.

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[1] *Lex Commiſſoria* is treated of *Digeſt. Lib. xviii. tit.* 3. thus, "SI AD Diem Pecunia ſoluta non ſit, ut Fundus inemptus
"ſit, ita accipitur, inemptus eſſe fundus; ſi venditor eum inemptum eſſe velit, quia id venditoris cauſâ caveretur: nam ſi aliter
"acciperetur, exuſta villa in poteſtate emptoris futurum, ut dando pecuniam inemptum faceret fundum, qui ejus periculo fuiſſet.
"Nam legem commiſſoriam, quæ in venditionibus adjicitur, ſi volet, venditor exercebit: non etiam invitus.——Sed ſi fundus
"reveniſſet, Ariſto exiſtimabat, venditori de his [fructibus] judicium in emptorem dandum eſſe: quia nihil penes eum reſidere
"oporteret ex re, in quâ fidem fefelliſſet." *Digeſt. ubi ſupra, Leg.* 2, 3, 4. See Mr. *Noodt*'s Commentary on the *Digeſt.* pag. 399.

[2] That is to ſay, if the Seller think fit, for it is for his Sake, that this Clauſe is added; otherwiſe when a Thing ſold with a Commiſſary Clauſe happens to be loſt in the Hands of the Buyer, he might render the Sale null by Non-payment, and ſo the Seller would loſe both his Money and his Goods. See the preceding Note.

[3] Or rather we run no Hazard here, whereas the other Way there is great Hazard. As for the reſt, according to the *Roman* Law, when the Sale was annulled, through Defect of Payment, if the Buyer had given Earneſt, or a Part of the Price, this was all loſt. But, in this Caſe, he kept the Produce of the Thing ſold during the Time that he was in Poſſeſſion of it. *Et id, quod arrhæ, vel alio nomine datum eſſet, apud Venditorem remanſurum.* Digeſt. *ubi ſupra*, leg. 6. *princ. Ut interdum fructus* [emptor] *lucretur, quum pretium, quod numeravit, perdidit. Igitur ſententia* NERATII *tunc habet locum, quæ eſt humana, quando emptor aliquam partem pretii dedit.* Ibid. Leg. 4. §. 1. As upon this Footing the Produce on one Side might be inconſiderable, in Compariſon of the Earneſt which the Seller received on the other; ſeveral Lawyers have perplexed themſelves to explain theſe Laws in a different manner. In particular the deceaſed M. *Brancheu, Obſerv.* 7, has endeavoured to ſupport the Opinion of the late M. *Voet*, who ſuppoſes a ſeparate Convention here. But his Conjectures are entirely Chimerical. Mr. *Noodt* in his Commentary, pag. 399, ſticks cloſe to the common Interpretation, without regarding the Objections brought againſt it.

[4] *Retractus, ſeu pactum de Retrovendendo*, as the Lawyers ſpeak, and our Author terms it. *Retractus* comes of the Verb *retrahere*, which according to the *Roman* Lawyers ſignifies, to reſume what has been alienated. See the *Digeſts. lib.* 1. *tit.* 8. *De adminiſtrat. rer. ad Civit. pertinentium*, Leg. 9. §. 1. The Power of Redeeming a Thing ſold, allowed by the Law, is called a Legal Reſumption, but that which is done by the free Agreement of Parties is called a Conventional Reſumption. Some think this has a near Relation to a Bargain of Wages. See Mr. THOMASIUS's Diſcourſe, intituled, *De uſu practico accuratæ diſtinctionis inter emptionem cum pacto de Retrovendendo, & Contractum Pignoratitium.* Printed at *Hall*, in 1707.

[5] So the *Code* ſpeaks, "Si fundum parentes tui eâ lege vendiderunt; ut ſive ipſi, ſive hæredes eorum emptori pretium quando-
"cunque, vel intra certa tempora obtuliſſent, reſtitueretur; teque parato ſatisfacere conditioni dictæ, hæres emptoris non pareat, ut
"contractus fides ſervetur, actio præſcriptis verbis, vel ex vendito tibi dabitur." *Cod. lib. iv. tit.* 54. *De pactis inter empt. & venditorem compoſitis. Leg.* 2. See, upon this Law, Mr. *Noodt, de Pactis*, cap. 11. where he explains the Diſputes and Subtilties among the Lawyers, relating to the Action which might be brought in Juſtice for ſuch an Agreement. Compare, alſo, *Struvii Syntagm. Jur. Civ. Exerc.* 23. §. 43. whence our Author has taken what follows with Regard to the Limitation of Time.

[6] The Words of the *Digeſt* are, *Si convenit, ut res quæ venit, ſi intra certum tempus diſplcuiſſet, redderetur, ex empto actio eſt, &c. Digeſt. lib. xviii. tit.* 5. *De reſcindenda vendit. &c. Leg.* 6. See *tit.* 1. *De contrab. empt. Leg.* 3. *& lib.* 21. *tit.* 1. *De Ædilitio edicto, &c.* 31. §. 22.

[7] The Law is, "Qui fundum vendidit, ut eum certâ mercede conductum ipſe habeat; vel ſi vendat, non alii, ſed ſibi diſtin-
"hat, vel ſimile aliquid paciſcatur: ad complendum id, quod pepigerunt, ex vendito agere poterit." Digeſt. *lib. xviii. tit.* 1. *De contrab. Empt. Leg.* 75.

[8] So the *Code* has it, *Et ſi quidem hoc dominus dare maluerit, & tantam præſtare quantitatem, quantam ipſe revera emphyteuta ab alio recipere poteſt, ipſum dominum omnimodo hæc compărare.* Cod. lib. iv. tit. 66. De jure emphyt. Leg. 3.

[9] In this laſt Caſe, the principal Creditor, muſt be preferred according to the *Roman* Law, and, all Things elſe being equal, the Relations came next. *Cum bona veniunt debitoris, in comparationem extra nei, & ejus qui creditor cognatuſve ſit, potior habetur creditor cognatuſve: magis tamen creditor quam cognatus; & inter creditores potior is, cui major pecunia debetur.* Digeſt. lib. xlii. tit. 5. De rebus Auctoritate Judic. poſſid. &c. Leg. 16.

[10] See the Greek Novel of *Romanus* called *Lacapenus*, which is abridged by *Cujacius, Feud. lib. v. tit.* 15. Who gives us the original *Greek*. Add here what is found in *Hermenopulus*, lib. iii. tit. 3. *num.* 118. *& ſeqq.* By a Law of the *Code* the Inhabitants of a principal City could not ſell their Poſſeſſions to any, but to one of the ſame City, *Lib. xi. tit.* 55. *Non licere habitatoribus Metrocomiæ, loca ſua ad extraneum transferre.*

[11] As for Example, thoſe who are Coheirs, Partners or Legatees in common. See *Cod. lib. viii tit.* 54. *De Donationibus, Leg.* 34 §. 2. *& Feudor. lib. v. tit.* 14, *&c.*

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the next of Kin, in the [1] Goods of their Relations, which is peculiarly called *Retractus Gentilitius*, or *the Family Privilege* [2].

Usual too it is, at the Selling of Lands, to except one Spot, and the Use of it; as Prodigals, when they sell their Estates, do sometimes reserve a Title to as much as may serve for their Grave, to which many think *Virgil* alludes, *Ecl.* 3. v. 104, 105.

Dic quibus in terris, & eris mihi magnus Apollo,
Tres pateat cœli spatium non amplius ulnas.

Tell where the Round of Heaven, which all contains,
To three short Ells on Earth our Sight restrains.
Tell that, and rise *Apollo* for thy Pains.

Thus *Menius*, when he sold his House to the Censors for a *Basilicon*, reserved the Right of one Pillar to build upon, that from thence he and his Posterity might see the *Gladiators* who used to fight in the *Forum* [a].

What the Divine Law prescribes about *Redemption*, may be read in *Lev.* xxv. 13, *&c.* [b]. The [3] Reason of which Injunctions was taken from the particular Constitution of that Commonwealth founded by *Moses*; for his Design was that an equal Degree of Liberty should flourish amongst them; to which End it was necessary to hinder any from engrossing to themselves so much Land, as might make others, divested of their Patrimony, dependent on them; for so, by Degrees, Lordship and [4] Tyranny might be introduced. The same End [c] *Lycurgus* proposed to himself, when he divided the Territories of *Sparta* into 39000 Parts: which he distributed among the People by Lot; and forbad them to increase, diminish, subdivide, or sell. Among the *Lacedemonians* it was held unlawful and dishonourable to sell Land that had been a long time in the Family. *Heracl.* de Pol.

Besides, there is another common Way of Selling; which they call *per aversionem*, where Things of different Value are not rated separately, but sold together.

Lastly, Things are sometimes so sold, as to return again to the *Seller* after a certain Term of Years, without his being obliged to refund the Price. Thus, in *England* Gentlemen *sell* their Ground for 30, or 35 Years, upon Condition that the *Buyer* shall build upon it after such a particular Manner; which sort of Contract is something like that of *Renting*.

V. As for any other Obligations between the *Buyer* and the *Seller*, they easily appear from the Nature of the Contract, and the additional Pacts. The *Buyer* is obliged to pay the *Price* agreed for at the time appointed, and to give the Receiver a good Title to it, I mean, [5] to pay him with his own, and not another Man's Money [d]. And if he pays another Man's Money, and it happens to be challenged by the *Owner*, he is obliged by the *Owner*, he is obliged to pay it over again, and as much more as the Receiver loses, by having it thus challenged. As for the *Seller*, he is obliged [6] to deliver the Goods bargained for with such Qualities

[a] *Unde* Menianorum *nomen ejusmodi projectis adhæsisse creditur.* Ascon. Ped. *in Divin.* Cicer. c. 16. p. 328. Ed. *Græv.*
[b] Upon which Place, see Mr. *Le Clerc.* [c] *Plut. in Vitâ.* [d] *Vid. D.* lib. xix. t. 1. leg. 11. §. 2. & *C.* lib. xlix. leg. 7. & leg. 13. § 19. *D. ubi sup.*

[1] See the Law quoted above *Note* 9. preceding and *Digest. lib. iv. tit.* 3. *De Minoribus*, &c. *Leg.* 35. *& lib. xviii. tit.* 1. *De contrahend. Emptione. Leg.* 62. *Princ.* According to the antient *Roman* Law this did not take Place generally, not even with regard to those who were Joint-Proprietors of a Thing in Co-partnership. Under the *Christian* Emperors this Point began to be settled, and *Jaques Godefroi* believes, not without Reason, that this was done in the Time of *Constantine* the Great. But *Gratian, Valentinian*, and *Theodosius* broke this Constitution, and restored the Seller to his former Liberty. See CODE *Theodos.* lib. iii. tit. 1. *De contrab. Empt.* leg. 6. which is the 14th Law of the same Title in the *Justinian* CODE. Thus Things remained until the Time of the Emperor *Romanus Lacapenus*, whose Constitution has been cited above. See the learned Commentator on the *Theodosian* CODE, Tome I. pag. 207. *& seqq.*

[2] Here the Quotation out of the Law of *Moses*, and what our Author says upon it, ought to be placed.

[3] For, says our Author lower, in a Parenthesis, I do not approve the Reason alledged by *Grotius* upon *v.* 29. that it is more easy to find a Dwelling than a Subsistence. But *Grotius* explains here only how one might sell the Fee-simple of an House in the City, and not a Country-House.

[4] Our Author here relates a Sale in gross, and briefly, *per aversionem*, as the Lawyers speak; but, besides that he speaks something of it in the Beginning of §. 6, we may see that it is not fitly placed here, where he treats, not of the divers Sorts of Sales, but only of the Terms and Conditions added to a Bargain and Sale, whether by Wholesale or Retale. Wherefore I have been bold to leave out this short Period, equally superfluous, and fit to confound our Understandings.

[5] *Emptor autem nummos venditoris facere cogitur.* Digest. lib. xix. tit. 1. De actionibus empti, & venditi, Leg. 11. §. 2. *See* Cod. lib. iv. tit. 49. Leg. 7. Here there is a Difference put betwixt the Thing sold and the Price; because the Buyer has not promised such or such kinds of Coins, whereas the Seller has promised a certain determinate Thing, for which he can substitute no Equivalent, but must give it in the Condition it is. See Mr. *Noodt*'s Commentary, pag. 420. To conclude, if the Buyer fails to pay at the Time, he is bound to allow Interest for the Money. *Ex vendito actio venditori competit ad ea consequenda, quæ ei ab emptore præstari oportet. Veniunt autem in hoc judicium infra scripta: In primis pretium, quanti res venit: item usuræ pretii post diem traditionis: Nam cum re emptor fruatur, æquissimum est eum usuras pretii pendere.* Dig. Lib. xiii. §. 19, 20. See Mr. *Noodt*'s Treatise *De Fœnore & Usuris*, lib. iii. cap. 6. & 10.

[6] The Interpreters of the *Roman* Law do not agree here; for some think the very Thing ought to be delivered, if it be in our Power; but others affirm, that if we do not put it into the Hands of the Buyer, yet we may be free by paying him Damages and Interest. Mr. *Thomasius* has undertaken to maintain the former Opinion, both in his Dissertation so often quoted, *De Pretio Affectionis*, &c. and in a second Dissertation, published in 1721, *An Promissor facti liberetur, præstando id quod interest?* But I own he appears to me no way to have shaken the contrary Opinion, which the Reader may see established by two celebrated modern Lawyers, *viz.* Mr. *Noodt* in his Commentary on the *Digest.* pag. 419, 420. and Mr. *Schulting* in his *Jurispr. Ante-Justinian.* pag. 427, 428. All Things considered, this Opinion will have one great Advantage over the other, which is, That it wonderfully agrees with the Genius and Notions of the antient *Romans*. We know to what Excess they carried the Love of Liberty. The least Incroachment upon it they regarded as insupportable. It was natural for them to consider, as a Mark of Slavery, their being obliged to deliver a Thing, promised, indeed, but which, according, to their own Principles still belonged to them. Nor need we wonder at this, if we reflect that a *Roman* Citizen, whatever Crime he committed, could neither be punished with Death nor Banishment. Therefore in order to stop the fatal Effects into which Liberty began to degenerate, they were obliged to have recourse to fictitious Expedient, which appear ridiculous to us, who consider Things independently of the Disorders which occasioned them. See lib. viii. cap. 11. §. 7. following. And the *Probabilia Juris* of Mr. *Noodt*, lib. iii. cap. 12. They thought it therefore sufficient, in the Case in question, when the Buyer was frustrated of a Thing on which he depended, to procure him a reasonable Compensation. See Mr. *Noodt*'s Commentary, pag. 281. Mr. *Van Eck* nevertheless takes their Part, but observes, at the same Time, in his *Principia Juris Civilis*, under the Title *De Actionibus Empti & Venditi*, §. 9. "That this Case ought not to give any great "Trouble to the Judges or Lawyers, because the Damages and Interests may surpass the Value of the Thing itself; and in so doing it becomes very hard to keep what is sold up to the Price it was sold for." In reality it is contrary to the natural End of all Comtracts,

lities as the common Nature of Contracts, or [1] the particular Agreement requires, and that too at the Time appointed [a]. And if, between the Completion of the Bargain, and the Delivery of the Goods, the *Seller* ſhould repent, and be deſirous to return the Money with Amends, [2] the *Buyer* nevertheleſs is not obliged to accept it; but may force him to ſtand to his Bargain, unleſs in point of good Nature he be otherwiſe perſuaded; but if, through the Default and Knavery of the *Seller*, the Delivery cannot be made, the Money together [3] with Damages is to be reſtored. What the Law is, when the *Seller* is not in the Fault, we have ſaid above.

+ But if a Man *ſells* the ſame Thing to Two, and has, as yet, deliver'd it to neither, without doubt the firſt Bargain ought to take place; and much rather, if the Thing has been already deliver'd to him. But yet, in this Caſe, the knaviſh *Seller* ought to make Satisfaction to the laſt *Purchaſer*, for whatſoever Loſs he is at by being thus diſappointed. But ſuppoſing the Delivery to have been made to the *laſt*, he, upon the Grounds of the Civil Law, will be preferr'd to the *other*: For he receiv'd the Thing of the *Owner* upon a juſt Title; and the *firſt* can have no Action againſt him; not a real one, for he was not yet Maſter of the Thing; nor a perſonal, for no Intercourſe had paſſed between them; neither can the *Seller* have any Pretence to revoke the Bargain [b c]. *Grotius* [d] too, in this Caſe, prefers the Title of the laſt, *Becauſe, by the Delivery of the Thing, the* Buyer *makes over all his Right, which is not done by promiſing to* ſell *it*. But here *Grotius* does not ſeem to be conſiſtent [5] with himſelf; indeed the Promiſe to *ſell* is not *Selling*, but yet he had aſſerted, that the

[a] *Vid.* l. 11. §. 1. &c. *D. de Act. empt. C.* lib. 3. t. 32. *De rei vindic.* leg. 15. [b] *Add.* lib. 6. t. 2. l. 9. §. 4. *D. de publicanâ in rem actione* [c] *Add.* [d] *Add.* d. l. §. 15.

Contracts, as well as againſt the Simplicity of the Law of Nature, to leave the Seller the Choice of either delivering his Goods, or paying Damages and Intereſts. But though there was not ſo plauſible a Reaſon as this alledged for the Privilege of this Alternative; it would not be the only Point in which the antient Lawyers have deviated from the true Principles of Equity.

[1] The Law is, *Ex empto actione is, qui emit, utitur; & in primis ſciendum eſt, in hoc judicio id demum deduci, quod præſtari convenit. Cum enim ſit bonæ fidei judicium, nihil magis bonæ fidei convenit, quam id præſtari, quod inter contrahentes actum eſt: Quod ſi nihil convenit, tunc ea præſtabuntur, quæ naturaliter inſunt hujus judicii poteſtate. Et imprimis ipſam rem præſtare venditorem oportet, id eſt, tradere: Quæ res, ſi quidem dominus fuit venditor, facit & emptorem dominum. Si non fuit, tantum evictionis nomine venditorem obligat; ſi modo pretium eſt numeratum, aut eo nomine ſatisfaciunt.* Digeſt. Lib. xix. tit. 1. §. 1, 2.

[2] On the other Side, the Buyer cannot, unleſs the Seller conſent to it, avoid taking the Thing ſold, and paying for it. This Conſent is ſo neceſſary by the *Roman* Law, that even though we would pay double, or could obtain a Reſcript from the Emperor, the other Contractor cannot be obliged, againſt his Will, to forſake his Bargain, and neither the Treaſury nor Soldiers have any Privilege here. *De contractu Venditionis & Emptionis jure perfecto, alterutro invito, nullo recedi tempore bona fides patitur; nec ex Reſcripto noſtro, quo jure fiſcum noſtrum uti, ſæpe conſtitutum eſt, ——— Quamvis enim duplum afferas pretium emptori, tamen invitus ad reſcindendam venditionem urgeri non debet.* Cod. Lib. 4. tit. 44. De reſcind. Vendit. Leg. 3 & 6. See Leg. 7. which is a Reſcript directed to *A. A. Muracolus*, and other Soldiers. And Mr. *Noodt*'s Commentary on the Digeſt. pag. 420. But as ſometimes Earneſt is given (a Circumſtance which our Author ought not to forget) it is good to know what Effect it produces: Mr. *Thomaſius* hath publiſh'd a Diſcourſe on this Subject in 1702, quoted above, and which is reduced to this in general: He ſays, "That it belongs to the Buyer alone to give Earneſt commonly, and this is, at the ſame Time, a Proof that the Bar- "gain is made, and a Security of executing the Engagements entered into." As to the laſt, either it ſerves inſtead of the Penalty impoſed in Caſe of Delay, either in the Seller, who delivers not his Goods at the Time, or in the Buyer, who pays not at the Term fixed; inſomuch that the one loſes his Earneſt, and the other pays double, and yet is no leſs bound to ſtand to his Bargain; or it leaves the Giver at liberty to recant, ſo that he is diſcharged by loſing it, and this is preſumed in a dubious Caſe, or when the Parties are not otherwiſe agreed. But if the Bargain be broke by Conſent, he who has received the Earneſt is obliged to reſtore it: Or if the Engagements on both Sides be performed, the Earneſt muſt be reſtored or deducted in the Payment. Mr. *Thomaſius* looks upon it as certain, that Earneſt is never given but when the Contract is finiſhed, and the Bargain made: But I have prov'd, in my Opinion, by ſufficient Reaſons, that here may be a Convention of Sale which may produce a real Effect. See above, Sect. ii. and my Notes on the Place of *Grotius* there referr'd to. Indeed it is difficult to eſtabliſh any general Rules on this Subject. It is by Circumſtances, and above all, by Cuſtom, that we muſt judge of the Intention of thoſe who give, or take Earneſt. I can as little agree with Mr. *Thomaſius*, That his Notions are ſuitable to the Principles of the *Roman* Law. He affirms, That, even after a Contract of Sale is accompliſh'd, either Party may retract; the Buyer by loſing his Earneſt, or the Seller by paying double what he has receiv'd. But this took Place neither in the Old *Roman* Law, nor under the New, eſtabliſh'd by *Juſtinian*. This Emperor only ordain'd, That all Sales made by Writing ſhould be regarded as imperfect, and as only ſimple Minutes of a future Contract, unleſs they were fairly written, ſign'd by both Parties, or by a Notary, and deliver'd with all the neceſſary Forms. So that it was only before this Formality, That the Buyer or Seller might retract, the firſt by loſing his Earneſt, or the latter by paying double. It is true, the confus'd Manner in which *Tribonian* expreſſes himſelf, according to Cuſtom, has given occaſion to this Miſtake. Theſe are his Words in the *Inſtitutes: Nam quod arrhæ nomine datur, argumentum eſt emptionis & venditionis contractæ ——— Ita tamen impunè eis (emptori & venditori) recedere concedimus, niſi jam arrharum nomine aliquid fuerit datum. Hoc enim ſubſequuto, ſive in ſcriptis, ſive ſine ſcriptis* venditio celebrata eſt, *is qui recuſat adimplere contractum, ſi quidem eſt emptor, perdit quod dedit: Si vero venditor, duplum reſtituere compellitur, licet ſuper arrhis nihil expreſſum ſit.* Lib. 3. tit. 24. princip. It is neceſſary to explain theſe Words *venditio celebrata eſt*, which ſeem to ſay, That the Contract is accompliſh'd by the original Conſtitution found in the *Code*; which is much more clear upon this Head: *Illud etiam adjicientes, ut in poſterum ſi quæ arrhæ ſuper* FACIENDA EMPTIONE *cujuſcumque rei datæ ſunt, ſive in ſcriptis, ſive ſine ſcriptis: licet non ſit ſpecialiter adjectum, quid ſuper iiſdem arrhis, non* PROCEDENTE CONTRACTU, *fieri oporteat; tamen & qui* VENDERE POLLICITUS EST, *venditionem recuſans, in duplum eos reddere cogatur, & qui* EMERE PACTUS EST, *ab emptione recedens, datis a ſe arrhis cadat, repetitione earum denegandâ.* Lib. 4. tit. xxi. *de fide inſtrumenta.* Leg. xvii. There is no Way here, by the Rules of good Criticiſm, of eluding the Force of the Expreſſions which denote a ſimple Contract of Buying and Selling. Beſides, *Juſtinian* leaves Things upon the antient Footing, as ſoon as the Bargain is legally fulfill'd. Here the Earneſt is a Proof of the Accompliſhment of the Contract, and ſerves for a Pledge of its Execution, or a Part of the Price. When the Buyer has paid, he may redemand his Earneſt, unleſs it be otherwiſe agreed upon. But if he does not pay it, the Seller has an Action againſt him to oblige him to it, and then he becomes himſelf bound to deduct the Earneſt out of the Account, or reſtore it if he does not. On the other Hand, when the Seller has not deliver'd the Goods, he is not oblig'd to give back double the Earneſt. He can only be condemn'd to pay Damages and Intereſts to the Buyer, who muſt himſelf return the Earneſt, if he he has receiv'd any. See, upon this Head, Mr. *Noodt*'s Commentary on the *Digeſt*: pag. 387, & 406, 407.

[3] The Words of the *Digeſts* are, *Nec videtur abeſſe* [*dolus malus*] *ſi per eum factum eſt aut fiet, quo minus fundum emptor poſſideat. Erit ergo ex empto actio, non ut venditor vacuam poſſeſſionem tradat; cum multis modis accidere poterit, ne tradere poſſit, ſed ut ———dolus malus ejus æſtimaretur.* Dig. lib. 18. tit. 1. De contr. empt. Leg. 68. §. 2.

[4] So the Code tells us, *Quotiens duobus in ſolidum prædium diſtrahitur jure: manifeſti juris eſt, eum cui priori traditum eſt, in detinendo domino eſſe potiorem.* Cod. lib. 3. tit. 32. De rei vindicatione, Leg. 15. See *Digeſt. lib.* 6. *tit.* 2. *De publicana in rem actione*, Leg. 9. §.

[5] But our Author did not here rightly underſtand the Senſe of *Grotius*. See what I have ſaid above, and on the Queſtion itſelf on the Place of *Grotius* here cited.

Property

Property is made over at the very Moment of Contract, altho' the Thing be not delivered: And therefore, after such a Sale, no Right can remain in the *Seller*, any further than what tends to the Delivery of the Thing into the Hands of the *Buyer*; and, consequently, whatever Bargain the *Seller* concludes afterwards, it is null, and cannot stand in Prejudice of him, who before has got a Right to it. And this being granted, I question whether the favourable Plea of Possession, thus unjustly acquired, can always hurt the Title of the first Purchaser. Moreover, since a Man does not lose his Right in a Thing by being deprived of the Possession of it, and since a Man may honestly come by the Possession of another's Goods; if therefore such a Possessor *sells* a Thing to a third Person, he does not extinguish the Right of the *Owner*; nor can he transfer to another a better Title than [1] he had himself. And therefore although the Design of the *Buyer* be to acquire a Property in the Thing, yet since the Thing, which is thus sold, either ignorantly, or designedly, is another Man's, it is as much as can be expected, if the [2] *Seller* gives the *Buyer* free Possession, and puts him in Power of using it, and bears him harmless, [3] if his Title be disputed [4].

VI. There is, also, a peculiar sort of Sale, where the Purchase is no certain Thing, but *Hope* and *Expectation* only, on which, by Agreement of the Parties, a *Price* is laid. Nor is there [4] any Default in this sort of Sale, altho' afterward the Thing happens to be above, or below the Price. The same obtains at *Auctions*, and where Things of different *Prices* are sold altogether [5] at a Lump; for all such sort of Bargains have something [6] of Chance in them [b]: Such as was the Cast of a Net [c], bought of the *Milesian* [d] Fishermen, which occasioned a famous Suit between the Fishermen and the *Buyer* of the Cast; for, they having drawn out a golden Table in their Net, the *Buyer* claim'd it as his, for that he had bought whatever should be taken, or the Fortune of the Cast: whereas the Fishermen, on the other side, contended that the Bargain had regard only to what Fish should be caught. And indeed they seem to have been in the right, for in explaining any Contract we ought to consider the Intent of the Contractors; and here 'tis evident, they had no Thoughts of Gold, but of Fish only; nor does it make for the *Buyer*, that it was a Purchase of Chance; for that was only design'd to extend to the Quantity of Fish, and not to any Thing else, which, by great Fortune, might come to the Net. And therefore the Table ought to be look'd upon as a Treasure found by Chance.

As for the Decision of the Oracle, which adjudged it to the Wisest, that plainly savour'd of the [7] crafty Covetousness of the Priests, who thereby bid fair for the procuring such a glorious Prey to themselves: For what Mortal would arrogate to himself the Title of the *Wisest Man?* According to that of *Sophocl. Antigone*, 257. Edit. *H. Steph.* All Priests are greedy of Gain. See *Val. Max.* l. iv. c. 1. §. 7. *inter externa.* Mornac. *add.* l. xii. *D. de Act. empt.* &c.

VII. In this place something may be expected to be said concerning *Monopolies, Whether any, or all of them, be against the Law of Nature, or no?* For 'tis an odious Name, and the Laws of many States brand it grievously. But here we must exempt several Things from the invidious Title of *Monopolies*, which indeed are not such. For sure 'tis prohibited by no Law, nor can it come under the Name of a *Monopoly*, if only one Man, in any Town, has got the Way of making some sort of Manufacture, or if one Man only has got such a sort of Grain in his Ground, or if some certain Commodity be the Produce only of one particular Country. "Since "there is no such Produce of *Alum*, in any other "Country, which yet is of great Use, it is not to "be wondered at, that the *Lipareans* have the Mo"nopoly of it, and, setting what Prices they please "upon it, make vast Returns." *Diod. Sic.* l. v. c. 10. p. 293. Ed. *Rhodom.* For *Monopolies*, as such, imply that others too would sell the same, did not one one Man ingross the whole Trade to himself. And therefore, he who alone brings a Commodity from a foreign Country, cannot be said to set up a *Monopoly*, provided he does not hinder others from importing the same. Nor is it unlawful for any Nation, that abounds in one particular Commodity, to bargain with another Nation to let them only have the Trade of it [8], for any one may sell his own when and to whom he pleases; indeed when we happen to have a Superfluity of what another cannot be without, then the Law of Humanity requires, that we should not make such a Bargain to the Prejudice of others. But, if a Man, without contracting with the *Owners*, should of his

[a] Add. *Plaut. Perf.* Act. iv. Sc. 4. [b] *Vid.* l. 39. t. 4. l. 9. princ. *D. de publicanis.* But yet add *Plin.* l. 8. Ep. 2. See *Sueton.* in *Augst.* c. 75. [c] Concerning which see *lib.* 18. *t.* 1. *l.* 8. *D. de contrab. empt.* L. 11. §. 18. l. 12. *De de act. empt.* [d] *Plut.* in *Solon.* p. 80. *Edit. Wech.* says between the Fishermen of *Cos*, and a *Milesian* Stranger, *Diog. Laert.* lib. 1. §. 28. between some young Men of *Ionia*, and the *Milesian* Fishermen in *Thaletes.*

[1] The Words of the *Digests* are, *Traditio nihil amplius transferre debet, vel potest, ad eum qui accipit, quam est apud eum qui tradit. Si igitur quis dominum in fundo habuit, id tradendo transfert: Si non habuit, ad eum qui accipit nihil transfert.* Digest. lib. 41. tit. 1. De adquir. rerum Domin. Leg. 20.

[2] *Sive tota res evincatur, sive pars, habet regressum emptor in venditorem.* Digest. lib. 21. tit. 2. De evictionibus, &c. See the rest of this Title, and what I have said above. Lib. iv. Cap xiii. §. 13. Not. 1.

[3] *Quod sine ullius damno pars, quæ putatur esse vendentis, per longam possessionem ad emptorem transit.* Digest. lib. 41. tit. 2. De acquir. & amitt. Possess. Leg. 43. princ.

[4] Tho' there comes nothing of it: *Aliquando tamen, & sine re venditio intelligitur, veluti cum quasi alea emitur: quod fit, cum captus piscium, vel avium, vel missilium emitur. Emptio enim contrahitur, etiamsi nihil inciderit: quia spei emptio est.* Digest. lib. 18. De contrah. empt. Leg. 8. §. 1.

[5] *Per aversionem*, an Expression of the *Roman* Law: As for Example, in Law 62. §. 2. of the Title last mentioned, *Res in aversione empta, si non dolo venditoris factum sit, ad periculum emptoris pertinebit, etiamsi res adsignata non sit.* See *Cujas Observ.* 3. 15. This is when we buy Things in gross, either of the same kind, but without determining the Price of each according to their Number, Weight, and Measure; or Things of a different Nature, without regarding the Value of each in particular. See the *Opuscula varia de Latinitate Jurisconsult. vet.* publish'd by M. *Duker*, pag. 437.

[6] *Velati cum futurum jactum retis à Piscatore emimus, aut indaginem plagis positis à venatore, aut pantheram ab aucupe.* Dig. lib. 19. tit. 1. De actionibus empti & venditi. Leg. 11. §. 18.

[7] The *Greek* is, Τὸ μάντικον γὰρ πᾶν φιλάργυρον γένος. Soph. in Antigon. p. 257. Edit. H. Steph. See Mr. *Vandale*, in his Treatise *De Oraculis, & de Idolatria & Superstitione*, or Mr. *Fontenelle*'s History of Oracles.

[8] See above, *Lib.* 3. *c.* 3. §. 6. *& lib.* 4. *c.* 5. §. 10.

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own Head aim at a *Monopoly*, by hindering ſome by Force, and others by clandeſtine Contrivances, from coming to the ſame Place, and by that means lay a Neceſſity upon all others to buy him, it is plain that he offends againſt the Law of Humanity, and impudently breaks in upon the Liberty of the reſt.

As for *Monopolies* among private Citizens, it cannot be accounted illegal, or oppreſſive, that every one is not allowed to ſet up what Trade he pleaſes, but thoſe only who have gain'd a Right by the Charter of the Corporation; thus in moſt Cities of *Europe* no Man can open a Shop, or betake himſelf to any particular Trade, but he who has ſerved ſome Time an Apprenticeſhip at it, for it is not enough that he is expert in it.

Beſides, the Magiſtrate may give one Man, or one Company of Men, the ſole Power of Importing certain Commodities from certain Places, excluſive of all others. And there may be ſeveral good [1] Reaſons for the granting ſuch a Privilege. For it requires vaſt Charges to ſettle a Trade with a very remote Nation, and perhaps after great Expences it may not ſucceed at all; and therefore the Authors of ſuch a Commerce ought in Reaſon to have Security, that others may not intercept *gratis* what they have eſtabliſh'd at their great Riſque and Charge; and beſides ſuch privileg'd Companies are better able to aſſiſt the Publick with their Riches, upon any Emergencies, than private Perſons: By this means too a greater Trade may be carried on, and with better Credit: Nor is this Method liable to ſo many Tricks and Shifts, ſince the Gain comes into the common Bank to be divided proportionably amongſt them all. But as for theſe Privileges, a prudent Government will not grant 'em, but where the Commodities are imported from remote Places, and with great Hazard; and which do not ſo much concern the Neceſſaries as the Superfluities of Life. Nor even then muſt the Merchants be allowed to enhance the Price of thoſe Things at their Pleaſure; for it is againſt Reaſon to give an Opportunity of ſcraping up exorbitant Riches out of the Fortunes of the reſt, when the Publick gets nothing by it.

Laſtly, It ſeems unjuſt that Tradeſmen, or Farmers, ſhould be forced to ſell their Manufactures, or the Produce of their Ground to certain People only, who ſell the ſame to others by Retale; for by this Means the Riches of the State may come into the Hands of a few, to the Detriment and Oppreſſion of the reſt.

I cannot but take notice, by the way, that *Grotius* [a] brings the Example of *Joſeph*, when he was Viceroy of *Egypt*, in Juſtification of *Monopolies*; tho' that Example is not much to the Purpoſe: For neither did the King hinder others from *buying* up the Corn in the Years of Plenty, nor any from *ſelling*, who had too much: Neither had the *Alexandrians* in *Strabo* [b] the *Monopoly* of *Indian* and *Ethiopick* Commodities from any Privilege, but from the Situation of the Place.

But a *Monopoly*, properly ſo call'd, as having the Force of a Privilege, cannot be ſet on foot by private Men: For how can a private Man juſtify his hindering others from meddling with ſuch a ſort of Commodity, when he has no Command over, nor can lawfully uſe Force againſt them? And therefore the *Monopolies* of private Men are ſpurious and illegal, and do not depend upon Rights and Privileges, but are generally carried on by clandeſtine Frauds and Combinations: As if ſome few by a Trick ſhould debar others from Trading to thoſe Places from whence they have their Commodities, or ſhould hinder thoſe who have them from bringing them to Market: Or, if they ſhould enter into a Combination to buy up all ſuch ſort of Commodities, and then ſtifle them, that ſo the Scarcity may enhance the *Price*. Againſt whom may be apply'd that of *Apollonius Tyanæus* in *Philoſtr.* l. i. c. 12. *in the Beginning* [z]. "The Earth is the Mother of "all, for ſhe is juſt; but you being unjuſt have "made her only a Mother to yourſelves." The Knavery of ſuch ought as much to be corrected, as thoſe who [c] enter into Compact to raiſe extravagantly the Prices of other Things by agreeing privately to ſell nothing under ſuch a Rate: Which piece of Roguery Labourers and Workmen are ſometimes guilty of [d].

I cannot diſcommend the Sagacity of *Thales*, who rented all the Olive-yards, having foreſeen by his Skill in *Aſtrology*, that there would be great Plenty of *Olives* that Year [e f].

[a] L. 2. c. 12. §. 16. [b] L. 17. p. 549. Ed. *Gen. Cauſab.* [c] *Ut in* Velabro Olearii *de quo vide* Eraſm. Adag. [d] *Add.* Plin. *l.* 8. *c.* 37. *de erinacco*, *L. un. C. de Monopol.* L. 6. *D de extraord. crim.* and *Cujacius Obſ.* 10. 19. [e] *Arift. Pol.* l. 1. c. 7. (11) *Diog. Laert.* l. 1. §. 26. [f] *Vid.* Cicer. *de Divinitat.* l. 1. c. 49.

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[1] We may oppoſe theſe Reaſons to thoſe advanc'd by *John de Wit*, grand Penſionary of *Holland*, in his *Memoirs*, Cap. x. to ſhew that privileg'd Companies, or Monopolies, are prejudicial to a State.

[z] The *Greek* is, Ἡ γῆ πάντων μήτηρ, δικαία γάρ· ὑμεῖς δ' ἄδικοι ὄντες, ποιοῦσδε αὐτὴν ἀνθρώπων μόνον μητέρα. Philoſtr. de vitâ Apoll. Tyan. lib. 1. c. 15. in fin. Ed. Olear.

CHAP. VI.

Of Renting *and* Hiring.

I. *What Things Hiring hath common with Buying.*
II. *The certain Uſe of a Thing, if it be intercepted, tends to the Loſs of the Leſſor.*
III. *The uncertain regularly to the Loſs of the Leſſee.*
IV. *Whether the ſame Work may be let to many together.*

I. RENTING and *Hiring* [a], whereby the Uſe of a Thing, or Labour, is granted for a certain Rate [1], bears ſome Affinity to *Buying* and *Selling*, and may be brought under almoſt the ſame Rules [b]. For the *Rent* or *Wages* anſwers the *Price*; and the *Uſe* of the Thing or the Labour anſwers the *Property* which is acquired by *Buying*; and as the Contract of *Buying* and *Selling* is compleated, when the Price is agreed upon, ſo is this of *Renting* and *Hiring*, when the Parties are agreed about the *Rent* and *Wages* [2] [c]. And as a Thing ſells the cheaper, when ſold in Favour of the *Seller*, and the dearer when in Favour of the *Buyer*; ſo in *Renting* and *Hiring*, if a Man is at a Loſs for a Tenant, or wants Work, he is contented with ſmall *Rent* or *Wages*; but, if his Land or Work is ſought after, he may demand much greater. Laſtly, as in *Buying* and *Selling* 'tis generally the *Seller*'s Buſineſs to name the Price [d], and the *Buyer* ultimately reſolves upon it; ſo is it, alſo, in *Renting* and *Hiring* [3]. "Whoſe Buſineſs is it to aſſign the Price? He who "delivers the Thing, or he that receives it? He "who delivers it ſeems to leave it to the other: "As they ſay *Protagoras* uſed to do, for whatever "he taught, he left it to the Scholar to ſet a Value "upon what he learn'd, and was paid accordingly." *Ariſt. Nic.* l. ix. c. 1. Tho' concerning ths Cuſtom of *Protagoras* he himſelf thus ſpeaks in *Plato*, in the Dialogue that bears his Name; "My "Way is this, when I have taught any one, if he "pleaſes, he gives me as much Money as I de-"mand; if not, I bring him into the Temple, and "make him declare upon Oath what he thinks my "Teaching is worth, and ſo much I receive." But as he who *buys* any Commodity, without agreeing upon the Price, is ſuppos'd to oblige himſelf to the common Price of it; ſo in this Contract, if Terms are not agreed upon, [4] it is left to the Equity of the Perſon *renting* or *hiring*, who is nevertheleſs oblig'd to give as much as is uſually given [e]. That Way of paying for a Work of Pleaſure, which *Ariſtotle* [f] mentions, [5] is a perfect Cavil. *A certain Perſon promis'd a Muſician the better he play'd, the more he ſhould be rewarded. The next Day, when the Muſician claim'd his Promiſe, he reply'd that he had repay'd Pleaſure with Pleaſure* [6]. But *Ariſtotle* was right in ſaying, *He had as good received nothing, ſince he did not receive that which he expected. Rectius ſimilem cavillationem adhibuit Bochoris apud Plutarchum, Demetrio, pag.* 901. *D. Quum quidam amaret Thonidem meretricem, popoſcit illa ingentem pecuniæ ſummam. Adoleſcens inde, cum in ſomnis ſibi viſus eſſet cum illa concumbere, liberatus eſt libidine. Ob id mercedem ab illo inſtitit Thonis judicio exigere. Cognita cauſa juſſit Bochoris illi quantum poſtulaverat Thonis argenti in vas numeratum huc atque illuc manu jactare, ac meretricem umbra frui.* Quanquam ſententiam hanc arguit Lamia iniquitatis. *Neque enim*, inquit, *ademit meretrici umbra pecuniæ cupiditatem, ſomnium vero amore adoleſcentem expedivit.* In this Contract, alſo, if any Damage happens to the Labourer, whilſt he is about his Work [7], 'tis his own Loſs, and not the *Hirer*'s [g]. Among the *Epheſians* there was a remarkable Law concerning Architects, that if the Charge in Building amounted to a fourth Part more than what the Architect had computed it, he was bound to make it good out of his own Pocket [h].

II. But

[a] *Locatio & Conductio.* [b] *V. Inſtit. ibid. & l.* 3. *t.* 25. *princ.* [c] *V. Inſtit. ibid. & l.* 19. *t.* 2. *D. locati.* Which yet how it may be tacitly prolong'd, *V.* l. 13. §. 11. l. 14. D. *h. t.* [d] *Plaut. Perſ.* Act. 4. Sc. 4. v. 37. "'Tis your "Ware, you ought to ſet the Price." [e] See *Mat.* xx. 4, 7. [f] *Nicom.* l. 9. c. 1. *Vid. &* Plut. *de auditione*, p. 41. *D. & de fortunâ* Alexandri, *p.* 333, 334. [g] *Vid.* lib. 14. t. 2. l. 2. §. 1. l. 6. *D. de lege Rhodiâ.* [h] Vid. *Vitruv.* l. 10. *præf.*

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[1] The Words are, *Locatio & conductio proxima eſt emptioni & venditioni, iiſdemque juris regulis conſtat. Nam ut emptio & venditio ita contrahitur, ſi de pretio convenerit, ſic & locatio & conductio ita contrahi intelligitur, ſi merces conſtituta ſit: Et competit locatori locati actio, conductori verò conducti.* Inſt. Lib. 3. tit. 25. *Princip. quæri ſolebat de locatione & conductione, ſi forte rem aliquam utendam vel fruendam tibi aliquis dederit.* Ibid. §. 2. *At cum do ut facias, ſi tale ſit factum, quod locari ſolet, puta ut tabulum pingas, pecunia data, locatio erit.* Digeſt. lib. 19. tit. 5. De Præſcriptis verbis, *&c.* Leg. 5. §. 2. See more of this Matter in Mr. DOMAT's Civil Laws in their Natural Order. *Part.* 1. *lib.* 1. *tit.* 4.

[2] The Contract of Hiring may be renewed by a tacit Hiring anew, when, the Time being expired, the Tenant continues to enjoy the Thing hired without any Oppoſition from the Leſſor; for, in this Caſe, both of them are ſuppoſed not only to prolong the Contract for the ſame Time, and on the ſame Conditions, but, alſo, for ſo long a Time as the Leaſe bore; for it is ſufficient to be granted for the current Year, nor can the tacit Conſent of the Proprietor be extended farther. *Qui impleto tempore conductionis remanſit in conductione, reconduxiſſe videbitur. —— ipſo anno, ſed non in ſequentibus annis.* Digeſt. lib. 19. tit. 2. Locati, *&c.* Leg. xii. §. 11. Mr. *Hertius* here quotes the Paſſage of an antient Author on the Boundaries of Fields. *Quos dominus in poſſeſſionibus ſuis manere paſſus eſt, eorum Conditionem mutaſſe non videtur. Hygin. de Limit. conſtitut.* pag. 208. *Edit. Goeſ.* But it is in the Text, *Quos Dominos*, &c. which quite alters the Senſe.

[3] *Plautus's Latin* is, *S A. Indica fac pretium. DO. Tua merx eſt, tua indicatio eſt.* And *Ariſtotle's Greek* is, Ὁ γὰρ περιέμενον ἔοικεν ὀπτήριπεν ἐκείνῳ (τῷ περιλάβοντι.)

[4] Here, as in a Matter of Sale, every one may make his Market as advantageous as poſſible for himſelf. *Quemadmodum in emendo & vendendo naturaliter conceſſum eſt, quod pluris ſit minoris emere; quod minoris ſit plures vendere, & ita invicem ſe circumſcribere, ita in locationibus & conductionibus juris eſt.* Dig. lib. 19. tit. 2. Locat. & Cond. Leg. 22. §. 3.

[5] This was done by *Dionyſius* the Tyrant, to one who played on the Flute to him, to whom he had promiſed a great Reward.

[6] *Ariſtotle's Greek* is, Ὅμοιον γὰρ τῷ μηδὲν γίγνεσθαι, ὅταν ἃ ἐφίετο μὴ τυγχάνῃ.

[7] For Example, If a Smith, in working for us, break his Hammer or Anvil, we are not bound to pay for them. *Nam etſi Faber incudem aut malleum fregerit, non imputaretur ei, qui locaverit opus.* Digeſt. lib. 14. tit. 2. De Lege Rhodiâ, *&c.* Leg. 2. §. 1. In like manner, if a Tranſport Ship, being ſhattered by a fierce Tempeſt, is forced to put in at ſome Place to amend any Defect, the Expence muſt fall on the Owner of the Veſſel, and not on the Owners of the Cargo. *Navis adversâ tempeſtate depreſſa*

II. But if a Man *rents* a Thing, and any Accident intercepts the Uſe of it, or renders it worſe, *Ought the Loſs to be the Landlord's, or the Tenant's?* To which ſome anſwer, in ſhort, that if the Thing itſelf periſhes [1], the Loſs belongs to the *Landlord*; but as for Barrenneſs and other Miſchances, which intercept only the Uſe of it, they are, unleſs provided againſt by Covenant, generally at the Loſs of the *Tenant:* And the *Landlord* may juſtly demand the full *Rent* agreed upon, although perhaps the *Tenant* has not made ſo much of his Land as was expected. For the *Landlord* gave the *Tenant* Power to make the beſt of it; and the Hopes of the Produce, when they made the Bargain, was really worth ſo much; and therefore ſince *he* made good his Part, 'tis but fair that the *other* ſhould, alſo, make good his.

But to examine this Queſtion more nicely; 'tis manifeſt, [2] when the Thing periſhes without the *Tenant*'s Fault, he is not oblig'd to make it good, but from that Time his *Rent* ceaſes. For the Title to the whole *Rent* is founded upon Preſumption that the Thing be in Being, during the Time included in the Contract; but if the Thing ceaſes to be, the Contract ceaſes alſo [a]. And upon this is founded the Law of *Seſoſtris*, an *Egyptian* King: *That if the Violence of the River ſhould waſh away any Part of the Land, the* Tenant *ſhould be proportionably abated in his* Rent [b]. Again, we muſt diſtinguiſh between thoſe things, where the *Landlord* may and ought to aſſign [3] a certain and determined Uſe; and thoſe, whoſe Uſe, as to Quantity, is uncertain, and depends upon Chance, and which, upon that Account, neither can, nor ought to be determined. To inſtance in the former ſort; I *hire* a Houſe to dwell in, which my *Landlord* is obliged to make habitable, and therefore if the Violence of a Storm, or my Neighbour's Fire, ſhould intercept the Uſe

[a] *Vid.* lib. 19. t. 2. leg. 15. §. 2. *in fin. & ibid.* l. 9. §. 4. *D. locati.* [b] *Vid.* Herod. *Euterpe*, l. 4. § 12.

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depreſſâ, ictu fulminis deuſtis armamentis & arbore, & antennâ, Hipponem delata eſt, illique navalibus armamentis ad præſens comparatis Oſtiam navigavit & onus integrum pertulit: Quæſitum eſt an hi, quorum onus fuit, nautæ pro damno conferre debeant? Reſpondit, Non debere. Hic enim ſumptus inſtruendæ magis Navis, quam conſervandarum mercium gratiâ factus eſt. lb. Leg. 6.

[1] This is the Opinion of Grotius, lib. 2. c. 12. §. 18. where, to take notice by the Bye, *Gronovius* has expreſs'd his Words very badly. *Sicut res domino perit*; for he makes that great Man ſay, That if a Thing bought, and once delivered, come to be loſt, it muſt be accounted to him who is actually the Owner of it, and not to the former Proprietor. A ſtrange Thing! as if any Man queſtioned it! He need not be very acute to ſee, that Grotius ſpeaks, on the contrary, of a Thing ſold, but not delivered; which nevertheleſs, according to what is ſaid in the Beginning of §. 15. is to be at the Hazard and Peril of the Buyer, whoſe Loſs he makes parallel with that of Fruits, which being ſold, and eſteemed, as we may ſay, delivered to the Farmer, as far as depends upon the Proprietor, yet the Loſs belongs to the Owner: Even ſo a Thing ſold is ſuppos'd to be deliver'd to the Buyer, altho' it remains ſome Time in the Seller's Hands.

[2] The Words of the *Digeſts* are, *Si ager terræ motu corruerit, ut nuſquam ſit, damno domini eſſe; oportere enim agrum præſtari conductori, ut frui poſſit.* Dig. lib. 19. tit. 2. locati & cond. Leg. 15. §. 2. *Si capras latrones citra tuam fraudem abegiſſe probari poteſt, judicio locati caſum præſtare non cogeris: atque temporis, quod inſecutum eſt, mercedes ut indebitas recuperabis.* Ibid. Leg. 9. §. 4.

[3] As the Author applies himſelf only to treat of the Queſtion about Accidents, that happen to the Thing hired, and does only by the Bye, and in an imperfect Manner, ſhew the Engagements of him who lets his Goods or Labour, I ſhall ſupply this Defect in a few Words. I. He then who lets out his Fortune, ought 1. To put the Thing into a Condition to be ſerviceable for what it is hired, and for the Time fixed, as, alſo, in the Manner and Way agreed on. 2. To uphold it in that Condition, as far as it depends on him, and, to that End, to be at all neceſſary Expences, or reimburſe the Tenant for them, at leaſt, unleſs the latter be engaged by Contract to do them himſelf. See *Law* 15. §. 1. *Tit. locati, conducti*, quoted Note 2 following. *In conducto fundo, ſi conductor ſuâ operâ aliquid neceſſario vel utiliter auxerit, vel ædificaverit, vel inſtituerit, cum id non conveniſſet, ad recipienda ea quæ impendit ex conducto cum domino fundi experiri poteſt.* Ibid. Leg. 55. §. 1. See, alſo, *Leg.* 61. of the ſame Title. 3. The Leſſor ought to leave the Thing to the Tenant, till the Time that 'tis hired for is expired, at leaſt, if there happen no Caſe which may probably be excepted, if it were foreſeen; as, if the Maſter of an Houſe hath need of it himſelf, or will make ſome neceſſary Repairs, if the Tenant pays no Rent for a conſiderable Time, or damages the Houſe, or uſeth it ſo that it may be feared he'll ſet it on Fire, or does in it, or ſuffers ſome unlawful Trade to be maintained. *Ædi, quam te conductam habere dicis, ſi penſionem domino in ſolidum ſolviſti, invitum te expelli non oportet, niſi propriis uſibus Dominus eam neceſſariam eſſe probaverit, aut corrigere domum maluerit, aut tu malè in re locatâ verſata es.* Cod. lib. 4. tit. 65. De locato & conducto, Leg. 3. See, alſo, *Leg.* 15. & *Digeſt. lib.* 19. *tit.* 2. *Leg.* 30. *princ.* 35. 54. §. 1. 56. 61. & *Nov.* 14. *c.* 1. A Sale, and in general every Alienation of Property, made in Favour of him who is not the Heir General, diſannuls, alſo, Contract of Hiring (ſee Mr. Hertius's *Paræmia Jur. Germ. lib.* 1. *c.* 47.) but ſo that the Leſſor, or thoſe who repreſent him, are obliged to make good the Damages and Coſts of the Tenant, if the Purchaſer, for Example, or the Legatee, will uſe their Right. *Qui fundum fruendum, vel habitationem alicui locavit, ſi aliquâ ex causâ fundum vel ædes vendat, curare debet, ut apud emptorem eâdem pactione & colono frui, & inquilino habitare liceat, alioquin prohibitus is, aget eum eo ex conducto.* Digeſt. lib. 19. tit. 2. locati, &c. Leg. 35. §. 1. See, alſo, *Cod. lib.* 4. *tit.* 65. *Leg.* 9. *Qui fundum colendum in plures annos locaverat, deceſſit; & eum fundum negavit: Caſſius negavit cogi poſſe colonum, ut eum fundum coleret, quia nihil hæredis intereſſet. Quod ſi colonus vellet colere, & ab eo, cui legatus eſſet fundus, prohiberetur, cum hærede actionem colonum habere, & hoc detrimentum ad hæredem pertinere,* &c. Digeſt. ibid. Leg. 32. See Mr. Titius's Obſervations on *Lauterbach*, 597, &c. But the Fear of *Ghoſts* is not a juſt Cauſe for a Tenant to abandon a Houſe he has hired. For, ſuppoſing there was any Foundation for the Reality of theſe Apparitions, we cannot deny that there are a Thouſand fabulous Stories upon this Subject; ſo that, perhaps, nothing is more difficult than to alledge one Inſtance of this kind ſupported by any tolerable Proof. None, but People exceſſively credulous or timorous, are ſuſceptible of theſe panic Fears: And if a Tenant is of this Humour, he ought to inſert a Clauſe in his Leaſe to authorize him to break it for ſo whimſical a Reaſon. Beſides, this might eaſily furniſh a Pretence for Diſhoneſty in the Tenant, if he found it his Intereſt to throw up his Leaſe; for if he ſhould affirm he ſaw an Apparition, how will you prove the Contrary? Or if the Thing be left to the Teſtimony of Witneſſes, how ſhall we know that even theſe are not influenc'd by the Terrors of Imagination, as frequently happens? Add to this, the great Loſs the Proprietor ſuffers by having his Houſe ſo diſcredited. The Reader may conſult, upon this curious Subject, a Diſſertation of Mr. *Thomaſius* publiſh'd in 1701, with this Title, *De non reſcindendo contractu Conditionis ob metum Spectrorum.* And *Laſtly*, The Landlord ought to indemnify the Tenant for any Loſs he ſuffers by reaſon of the Faults of the Thing hired, which he knew, or ought to have known. As for Example, If a Man hires Hogſheads leaky, and loſes his Wine by it. But 'tis not ſo, if a Man hires a Paſture, where there grow ſuch Weeds as burſt the Farmer's Cattle; for, in this Caſe, it is ſufficient to demand no Rent, at leaſt, if there prove a Mixture of good Graſs with the Weeds. *Si quis dolia vitioſa ignarus locaverit, deinde vinum effluxerit, tenebitur in id, quod interiit, nec ignorantia ejus erit excuſata. Et ita Caſſius ſcripſit. Aliter, ſi ſaltum paſcuum locâſti, in quo herba mala naſcebatur; hic enim ſi pecora vel demortua ſunt, vel etiam deteriora facta, quod intereſt, præſtabitur, ſi ſciſti; ſi ignorâſti, perſonam imperites.* Digeſt. ibid. Leg. 19. §. 1. Thus much for the Hiring of Things. II. He that lets out his Labour, ought, 1. To attend faithfully to his Buſineſs, or the Work he undertakes. 2. Finiſh it in the Time agreed on, if poſſible. 3. Not to leave it without ſome great Reaſon, ſuch as may be credibly thought an Exception to his Engagement, if it had come into his Mind. 4. To make good the Damages which he may cauſe to him for whom he labours, either by his Negligence or even by his Ignorance, at leaſt unleſs the Imployer, knowing his Inability, has paſs'd over that Objection; for then he can blame none but himſelf, and the other is diſcharged from doing better than he was able. See Note 1. pag. 508.

of it [1], I may fairly withhold in Proportion ſo much of the *Rent*. For the *Rent* was determined for the Uſe, which the Houſe, in the Condition it was in at the making of the Bargain, was capable of affording during the whole Time I had *hired* it for; and, the Uſe being leſſened without any Fault of mine, the *Rent* ought to be leſſened alſo, unleſs it be immediately repaired without any conſiderable [2] Inconvenience, or Loſs to me [a]. And ſo, if a *Tenant*, or a *Farmer*, [3] by Force of Arms, be drove out of his Houſe, or Farm, 'tis manifeſt, the *Rent* from that Time ought to ceaſe; for, in this Caſe, the Thing is morally loſt to the Owner, till the Enemy be ejected. But if the Corn be gathered in, and then plundered by the Enemy, the Caſe is altered; and the *Tenant* is then obliged to ſtand to the Loſs.

As for *Labour*; if a Man be hired only for the Diſpatch of ſome tranſient Buſineſs, and any Miſchance hinders him from performing it, he can have no Title to his *Wages*: But if a Man takes another into his Service for a continued Time, and ſuch an Accident happens, in common Humanity he ought not to diſcard him, or to abate his *Wages* [4], eſpecially if there be Hopes that he may make Amends by his future [5] Diligence for the Time he has loſt; or if his former Behaviour has deſerved ſuch Favour.

III. But as for thoſe Things, whoſe Produce is uncertain, as Fields, Orchards, Vineyards, Rivers for Fiſhing, and ſuch like; as a plentiful Produce is to the Benefit of the *Tenant*, ſo a bad one is to his Loſs: Nor, in Strictneſs of Juſtice, can he deſire any of the *Rent* to be abated by reaſon of a poor Harveſt, eſpecially ſince the Barrenneſs of one Year is made up by the Plenty of another; for a good Husband is not uſed to *let* or *rent* ſuch Things for one Year only [b]. Nor can that common Objection take place here, That *no Body ought to grow rich at another's Loſs*: For the *Landlord* might urge the ſame in a plentiful Year for the raiſing the *Rent*, whom, in that Caſe, the *Tenant* would have no Regard to. For, becauſe the Produce is more one Year than another, the *Landlord* had rather be ſure of ſuch a *Rent*, than depend upon the Uncertainty of the Seaſon: And, on the other ſide, the *Tenant* lays out a Certainty for the Hopes of an uncertain Gain, for which, if it fails him, he can blame [6] no body but himſelf. However that *Medium* propoſed in the [7] *Digeſts* [c] may be rightly applied here, *If the Produce happen to periſh by Floods, or by Birds of Prey, or by the Inroads of an Enemy, or by a Blight, or Drought, the* Landlord *ought to make Allowance*; and the Reaſon added is, *leſt the* Tenant, *beſides the Loſs of what Corn he had ſowed, ſhould be forc'd to pay the* Rent *of the Ground too, and ſo bear a double Misfortune. But if the Corn proves bad, and nothing happens more than ordinary, the Loſs is then the* Tenant's. Where it appears, that this *Medium* conſiſts in a Diviſion of the Miſchances to which the Produce is liable, into ordinary and extraordinary [d], for if the *Rent* was to be abated for every little Loſs, it would give continual Occaſion for impertinent Law-ſuits. And therefore the *Rent* of Land is determined according to the middle Produce, computing one Year with another, leſt the *Farmer*, upon every little Loſs, ſhould have Occaſion to complain; and yet 'tis difficult to lay down preciſely how great the Loſs ought to be for the Abatement of the *Rent*, which may better be left to the Diſcretion of an honeſt Man, conſidering all Circumſtances, than to the Determination of any general Rule.

Sometimes a *Farmer* takes Land upon Con-

[a] *Vid.* l. 15. §. 1. l. 30. *D. h. t.* [b] *Vid. D. ubi ſupra.* [c] L. 15. §. 2. *D. h. t.* [d] *Vid.* l. 25. §. 6. *D. h. t.* Where it is well added, "The *Tenant* ought to bear contentedly a moderate Loſs, when an immoderate Gain is not taken "from him.

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[1] So the *Digeſts* order, "Si vitiatum ædificium neceſſario demolitus eſſet, pro portione, quanti dominus prædiorum locaſſet, "quod ejus temporis habitatores habitare non potuiſſent, rationem duci, & tanti litem æſtimari." *Ibid. Leg.* 30. *princip.*

[2] So the Words are, "Habitores non, ſi paulò minus commodè aliquâ parte cœnaculi uterentur, ſtatim deductionem ex "mercede facere oportet; eâ enim conditione habitatorem eſſe, ut ſi quid tranſverſarium incidiſſet, quamobrem dominum ali-"quid demoliri oporteret, aliquam partem parvulum incommodi ſuſtineret; non ita tamen ut eam partem cœnaculi dominus "aperuiſſet, in quâ magnam partem uſus habitator haberet." *Ibid. Leg.* 27. *princip.* Moreover, that the Proprietor is obliged to make neceſſary Reparations, appears from *Leg.* 15. §. 1. of the ſame Title.

[3] See, in the ſame Title, *Leg.* 33. *in fine*, & 35 *princ.*

[4] See *Digeſt. lib.* 40. *tit* 7. *De ſtatu liberis*, *Leg.* 4. §. 5. & *Columella de re Ruſticâ*, *lib.* 12. *c.* 1. *in fin.*

[5] It is for this Reaſon that *Columella* earneſtly adviſes Maſters to take great Care of their Slaves when they are ſick: *Quin etiam fidelius, quam prius ſervire ſtudent, qui convaluerint, quam eſt ægris adhibita diligentia.* De Re Ruſtic. Lib. xii. Cap. 1. *in fin.*

[6] *Pliny* junior nevertheleſs prides himſelf much in ſeveral Places of his Letters, in the Releaſes which he made to his Farmers in that very Caſe. See *lib.* 8. *Ep.* 2. & *lib.* 9. *Epiſt.* 38. & *lib.* 10. *Ep.* 24. But it appears by thoſe Letters, that, beſides Vanity, he had ſome future Intereſt in ſo doing.

[7] "Servius omnem vim, cui reſiſti non poteſt, dominum colono præſtare debere ait; ut puta, fluminum, graculorum, ſtur-"norum, & ſi quid ſimile acciderit; aut ſi incurſus hoſtium fiat. Si qua tamen vitia ex ipsâ re oriantur, hoc damno coloni eſſe: "veluti ſi vinum coacuerit, ſi raucis aut herbis ſegetes corruptæ ſint. Sed et ſi labes facta ſit, omnemque fructum tulerit, dam-"num coloni non eſſe, ne ſupra damnum ſeminis amiſſi mercedes agri præſtare cogatur. Sed & ſi uredo fructum oleæ corruperit, "aut ſolis fervore non adſueto id acciderit, damnum domini futurum. Si vero nihil extra conſuetudinem acciderit, damnum "coloni eſſe. Idemque dicendum, ſi exercitus præteriens per laſciviam aliquid abſtulit." *Ibid. Leg.* 15. §. 2. See *Cujac. Obſerv.* 15. 28. HOTOMANN. *Obſerv.* iv. 17. MENAGE, Amænitat. Jur. Cap. xxxviii. and the Commentary of Mr. *Noodt*, pag. 424 & *ſeqq.* Vis major, *quam Græci* Θεῦ βίαν, *id eſt*, vim divinam *adpellant, non debet conductori damnoſa eſſe, ſi plus, quam tolerabile eſt, læſi fuerint fructus: alioquin modicum damnum æquo animo ferre debet colonus, cui immodicum non aufertur.* Ibid. Leg. xxv. §. 6. Mr. TIRIUS on *Lauterbach*, *Obſerv.* 610, believes, that this Circumſtance in the laſt Law, *unleſs* I mean *That the Loſs of the Farmer be inſupportable*, ought to be chiefly regarded: For a bad Harveſt is ſo far from being prejudicial to the Farmer, that we may ſee that ſuch as hold great Farms love a Year of Scarcity more than one of Plenty, becauſe the leſs Proviſion there is, the dearer they ſhall ſell their Corn; ſo that, according to this Author, all that is ſaid of Abatement of Rent muſt have reſpect only to little Farmers. But when certain Proviſions become very cheap, for Reaſons independent on a good or bad Harveſt, there is no Cauſe that an Abatement of Rent ſhould be deſired upon that Account, becauſe the Price of Things is commonly very changeable. This is determined in the following Law, underſtood in the manner that Mr. *Bynkerſhoek* hath explained it learnedly and judiciouſly, according to his Cuſtom. *Cum quidem de fructuum exiguitate quereretur, non eſſe rationem ejus habendam, Reſcripto Divi Antonini continetur.* Digeſt. ubi ſupra, Leg. 15. §. 5. This Lawyer explains, at the ſame Time (*Obſerv lib.* 2. *c.* 12.) another Reſcript of *Antoninus*'s, recited in the ſame Place. *Item alio Reſcripto ita continetur: NOVAM* REM DESIDERAS, UT PROPTER VETUSTATEM VINEARUM REMISSIO TIBI *DETUR*, ibid. *i. e.* A Man who hath taken an old Vineyard to farm, ought to impute it to none but himſelf, if it bear not as much as he expected, becauſe he might have known that before he hired it.

dition of paying his *Landlord* the whole Produce of it, deducting first the Value of his Labour. And here the *Farmer* is, as it were, an *Hireling*, and if the Year prove barren, the Loss is to the *Landlord* only.

If the *Tenant* should, by any Accident, have the Use of the Land intercepted, and the *Landlord* should, in the mean Time, *let* it to another, or reap the Profit himself, which otherwise would be due to the *Tenant*; whatsoever Gain he makes of it, he ought to refund it to the first *Tenant*, or else to receive it in part of Payment for the *Rent*. The Duty of the *Tenant* and *Landlord*, in respect of any Thing or Labour let out to [1] Hire, is shew'd in *Instit.* l. 3. t. 25. §. 5. *& in* D. *ubi supr.* l. 9. §. 2, 3, 5. l. 11. l. 12. l. 13. l. 25. §. 3, 4, 7, 8. l. 27. l. 30. §. 4. l. 38. l. 55. §. 1, 2, l. 60. §. 2. l. 61. *prin.* D. *h.* t[2].

Hither may be referr'd the Law in *Egypt*, relating to Physicians; who, if they took care of their Patient, accoding to the Direction of the publick Book, were not answerable if he died under their Hands; but if they acted against those Directions, they were tried for their Lives [a]. *Alexander de Rhodes* [b] relates, that in the Kingdom of *Tunquin* they agree with the Physician for a certain Rate at the Beginning of the Distemper, but which he does not receive, till he makes his Cure: and if the Patient miscarries, he has nothing for his Pains: By this means they think to quicken the Diligence of the Physician. The same Author tells us of a Physician, who, being consulted and bargaining for his Fee, said, That, *were the Patient a young Man, he would not cure him under* 100 *Crowns, but since he was old, he would be contented with* 20; *because the Life he should restore was not likely to last long.*

IV. But if my Labour, suppose in a Journey, can be serviceable to many, and I am hired by one Person to the full Value, *Can I exact the same Price from others also? Grotius* [c] is of the Opinion I may, if the Law of the Land does not interpose; for it has no Relation to the Contract which I made with the first: Nor is my Labour the less valuable to him by being serviceable to others also. However such a Contract as this does not seem agreeable to Equity and good Nature, tho' perhaps it is not strictly unjust. For when one Man alone has paid for the whole Labour, if it can do Service to others also, without being the more painful to the Performer; in respect of them, [3] it ought to be rank'd among those Favours, which are of no Expence to the Doer, and are yet beneficial to the Receiver. But yet since 'tis hard that the first Contractor shou'd bear the whole of the Burden, it is but [4] reasonable, that the others shou'd contribute to him their Proportion. Thus if I hire a Ship to myself, the Owner cannot take in others without my Leave; and if I am disposed to admit of it, the Advantage redounds to me only.

But yet in Arts and Sciences, which receive a Value from the Scarcity of such as understand them, the whole Price may be fairly demanded of each, though the same Trouble would inform many; for such sort of Arts, the more common they are made, the cheaper they grow: And therefore though my Labour be never the greater to me by being apply'd to many, yet I can [5] demand a Price upon Consideration that my Knowledge will be less worth, the more it is communicated. Some indeed are not willing that the Salary, which a Man receives for teaching the liberal Sciences, should come under the Denomination of *Hiring*, because Learning cannot be sold for Money; and so they are for making this one of those Contracts which want a Name, reducible to the 4*th* general Head, *Work for Goods* [d]. Be it as it will, it seems to have this in common with *Hiring* of Labour, that the Honesty and Industry of the Party only, and not the Event, is to be regarded; so that although one's Labour happens to be in vain, yet the Salary agreed upon may be demanded.

[a] *Diod. Sic.* l. 1. c. 82. [b] *Itin.* Part. 2. c. 30. [c] L. 2. c. 12. §. 19. [d] *Vid.* L. 50. t. 13. l. 1. §. 4. D. *de extraord. cogn. Vid.* Sen. *de Benef.* l. 6. c. 11. How poor Schoolmasters are often cheated of their Wages, is shewn in *Lucian, De mercede conduct.*

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1 The Words are, "Conductor autem omnia secundùm legem conductionis facere debet, & si quid in lege prætermissum fu- "erit, id ex bono & æquo præstare. Qui pro usu aut vestimentorum, aut argenti, aut jumenti, mercedem aut dedit, aut "promisit; ab eo custodia talis desideratur, qualem diligentissimus paterfamilias suis rebus adhibet: quam si præstiterit, & aliquo "casu fortuito eam rem amiserit, de restituendâ ea non tenebitur." *Instit. lib.* 3. *tit.* 25. §. 5. "Celsus etiam imperitiam culpæ "adnumerandum scripsit. Si quis vitulos pascendos, vel farciendum quid, poliendúmve conduxit, culpam eum præstare debere, "& quod imperitiâ peccavit, culpam esse: quippe, ut artifex (inquit) conduxit." *Digest. ubi supra, Leg.* 9. §. 5. See, also, §. 2, 3. & *Leg.* 11, 12, 13, 15. §. 3, 4, 7, 8. *Leg.* 27. 30. §. 4. *Leg.* 38. 55. §. 1, 2. *Leg.* 60. §. 2. *Leg.* 61. *princ.* I have said at the End of Note 3. pag. 506. foregoing, how it is to be understood, That we must judge by the Principles of the Law of Nature only, what is here said of the Ignorance and Inability of him who takes upon him a Work or Labour. As for the Care that the Tenant ought to have of what he hires, the Lawyers are not well agreed about it; some will have him answerable for the least Negligence, and others for small Faults only. See Mr. Thomasius's Discourse *De Culparum Præstatione contractibus*, c. 1. §. 22. Mr. *Noodt*, in his Commentary, pag. 428. *& seqq.* distinguishes between the Hire of a *Thing*, and Hire of *Labour* or *Work*: and he maintains, according to the *Roman* Law, in the first kind of Contract, we are answerable for a *slight Fault*; in the last, for the *slightest Neglect*. What I have said of a Bargain of Sale in Note 2. upon §. 3. of the foregoing Chapter, ought to be applied here, if we follow the Simplicity of the Law of Nature.

2 We follow the Notions of the *Roman* Law, which looks upon the Tenant (*Conductor*) as he who undertakes a Work or Labour, and the Landlord (*Locator*) as he who lets it at a certain Price to be paid him. See Cujas *Observ.* Lib. ii. Cap. xxviii. and Mr. *Noodt*'s Commentary, pag. 421. But 'tis the Impropriety of Language which makes the Notions confus'd: For, in the main, he who lets his Labour and Work for Wages to a Person, who is to find Matter for him to work on, is no less a Landlord, than he who lets an House or Land: and because the Contract begins sometimes by one of the Contracting Parties, sometimes by the other (which is the Reason alledg'd here) it does not flow from any essential Difference, since the Price is always paid by him who enjoys the Labour or Work of the other. As for Bargains at a Price agreed on, where the Undertaker finds the Materials, and is at all Expences, this is properly Selling. See *c.* 2. §. 10. above.

3 This only proves that we can require no more of another than he has expresly agreed to pay. But if, after the former is engaged, some other Person can make an Advantage by it, nothing hinders but that some Recompence may be made to the latter for the Care he takes of his Affairs, unless there is some Reason of Humanity and Charity, which requires that the Service be done to him freely.

4 This is not always necessary; for provided that the Person hired doth not neglect the Affairs by him undertaken, if, at the same Time, he can attend upon another's, he may be allow'd to make that small Gain, as a little Perquisite, which we are contented he should have.

5 Sometimes, also, that which every one gives is so small a Thing, that what is paid for the Labour of all together, is little enough for the Labour of teaching one only.

Mercedem

Mercedem appellas? Quid enim ſcio? Culpa docentis
Scilicet arguitur, quod læva in parte mamillæ
Nil ſalit Arcadico juveni. Juv. *Sat.* vii. v. 159, *&c.*

Pray, Sir, for what? The Scholar knows no more
At Six Months End, than what he knew before.
Taught or untaught, the *Dunce* is ſtill the ſame,
Yet ſtill the wretched Maſter bears the Blame.

Sometimes that which *Pliny* mentions of the *Terandus* or *Buff*, *N. H.* l. viii. c. 34, may be applied; *when he appears in his own genuine Complexion, he is like an Aſs.* *'Tis an excellent Maſter that can make a Fool wiſe*, Eurip. Hipp. Coron. *v.* 921, 922, *Nature is too violent and powerful for any Diſcipline*, Lib. *Decl.* 29. Though ſometimes that may be reply'd which *Lucian* mentions in *Hermotim.* Tom. 2. *p. m.* 293. The Speech which *Aureng-Zebe* the great *Mogul* made to his Tutor, is worth Obſerving, *Vid.* Bernier *de rebus in regno Mogoris geſtis*, Part. ult. *p. m.* 57.

[1] *Eſchines* acted directly counter to this ſort of Contract, for he gave People Money to come and hear him [a]: And ſo did the pompous and ambitious Rhetoricians at *Rome*, who by Intreaties and Entertainments did what they could to get themſelves Auditors. *Socrates* did not demand Money of his Auditors, but wondered, *That a Man profeſſing himſelf to be a Teacher of Virtue ſhould inſiſt upon ſo mean a Reward, and not rather look upon himſelf to be the greateſt Gainer, in having procured a good Friend; that ſuch a Man ought not to fear, leſt he, whom he had made good and honeſt, ſhould forget to be grateful to his Benefactor* [b].

[a] Vid. *Diog. Laert.* l. 2. §. 62. [b] Vid. *Xenoph. Apomnem.* l. 2. p. 426. Ed. *H. Steph.* in fin.

[1] This Story is founded only on a bad Tranſlation of theſe Words, Ἐμμίσθους ἢ ἀκροάσεις ποιεῖσθαι, which ſignify the contrary, That *Eſchines* took Money of his Auditors, as *Aldobrandinus* obſerves. Beſides nothing is more common in the ancient Authors, both *Greek* and *Latin*, than their reproaching the Philoſophers of their Times with ſordid Covetouſneſs, and a mercenary Spirit, by which they diſgrac'd, and contradicted, their Profeſſion. See the Jeſuit *Louis Creſol, Theatrum vet. Rhetor. Orat. Declam.* &c. Lib. v. Cap. 3. *& ſeqq.*

CHAP. VII.

Of the Loan *of a* conſumable Commodity.

I. *What a Loan is, and what a conſumable Commodity.*
II. *A double Uſe of theſe Things.*
III. *For what Things we are wont to be credited.*
IV. *Of tacit Lending.*
V. *Whether Lending be an Alienation.*
VI. *What if Money be alter'd in the intrinſick Value?*
VII. *Or in the extrinſick Value?*
VIII. *The Doctrine of the* Jews *about Uſury.*
IX. *That Uſury is not contrary to the Law of Nature is prov'd.*
X. *The Arguments to the Contrary are anſwered.*
XI. *Some Contracts are much the ſame as Uſury.*
XII. *The Evaſions uſed to avoid the Diſgrace of Uſury.*

I. THE *Loan of a* [a] *conſumable Commodity* is founded upon this Condition, that the ſame Quantity and Quality be returned in kind [b]. Things thus let are called [1] *conſumable* [c], becauſe they are *conſumed* and periſh in the Uſe: [2] And therefore 'tis enough, if the ſame Sort of Things, tho' not the ſelf-ſame Individuals, be returned. The [d] *Loan of a conſumable Commodity* differs from the [e] *Loan* of any other Thing not *conſumable*, and from the [f] *Uſe* of a Thing *let out to hire*, in this Reſpect: In the two latter, the ſelf-ſame numerical Thing that was *lent* or *let out*, is to be reſtored, and no other without the Conſent of the Creditor: And that, not only becauſe the Value of ſuch Sort of Things is not always capable of being exactly adjuſted [3 g], but becauſe it was expreſly the Condition of the *Loan* or *Letting*. Whereas in the *Loan* of a *conſumable Commodity*; if, for Example, my Neighbour borrows a Buſhel of Wheat, and returns me another Buſhel of the ſame Goodneſs, I am ſuppos'd to have receiv'd my own.

Theſe *conſumable Commodities* are ſaid to conſiſt of Number, Weight, and Meaſure, as being thereby determin'd and ſpecified; whereas other Things

[a] *Res fungibilis.* [b] *Vid. Inſtit. l.* 3. *t.* 15. *princip.* [c] *Vocantur res, quæ mutuo dantur*, fungibiles, *ſeu quæ* functionem *in ſuo genere recipiunt, ideo, quia quodlibet ex iſto genere vice alterius ita* fungitur, *ſeu alterius vicem ſubit, ut qui ex eodem genere, eadem qualitate, & quantitate receperit, idem recepiſſe cenſeatur*, D. L. 12. t. 1. l. 2. §. 1. *quæ functionem*, &c. [d] *Mutuum.* [e] *Commodatum.* [f] *Locatum.* [g] *Vid.* D. *ubi ſupra de rebus creditis*, leg. 2. §. 1.

[1] The Words of the *Inſtitutes* are, "Mutui autem datio in iis rebus conſiſtit, quæ pondere, numero, menſura conſtant; "veluti vino, oleo, frumento, pecuniâ numeratâ, ære, argento, auro, quas res aut numerando, aut metiendo, aut adpen- "dendo, in hoc damus, ut accipientium fiant. Et quoniam nobis non eædem res, ſed aliæ ejuſdem naturæ & qualitatis "redduntur: inde etiam mutùum adpellatum eſt, quia ita à me tibi datur, ut ex meo tuum fiat." *Inſt. lib.* 3. *tit.* 15. See *Cujas Obſ.* 11. 37.

[2] *Res fungibiles.* See what is ſaid Note 4. pag 2. The Word *Fungibilis* is not found in the *Roman* Law; but *Functio* is uſed in the ſame Caſe, tho' it may be doubted whether the Ancient Lawyers called, *Res quæ in genere ſuo functionem recipiunt*, what the Moderns have abridg'd into *Res fungibiles*. The Law upon which it is grounded, is plainly corrupted, and ought to be read, in all Appearance, as Mr. *Bynkerſhoek* explains it, *Obſerv.* 1. §. 10. *Mutui datio conſiſtit in his rebus, quæ pondere, numero, menſurâ conſtant; quoniam eorum datione poſſumus in creditum ire. Quæ in genere ſuo ſolutionem recipiunt per functionem, quam ſpecie.* Digeſt. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. §. 1. *i. e.* (if we underſtand *tam* —— before *quam ſpecie.*) In theſe ſort of Things we pay what we owe, by reſtoring another Thing of the ſame Kind and Quality, as well as by returning the ſame we have received.

[3] The Words of the *Digeſts* are, *Nam in cæteris rebus idcò in creditum ire non poſſumus, quia aliud pro alio invito creditori ſolvi non poteſt.* Digeſt. lib. 12. tit. 1. De Rebus creditis, &c. Leg. 2. §. 1.

have

have their Quantities determin'd by Nature. And therefore *conſumable Commodities* are peculiarly termed *Quantities*: But other Things, which don't come under this Sort of *Loan*, are call'd *Species*. And here we muſt obſerve, that, *v. g.* Oxen are not therefore a *conſumable Commodity*, becauſe 50 or 100 of them may be ſold by Tale; for the Number, in that Caſe, does, not ſpecify them, but only denotes the Quantity of the Species [a].

II. The Uſe of theſe *conſumable Commodities* is either ordinary or extraordinary. The latter is when a Man borrows [1] to make an Appearance of being better provided than really he is; for ſometimes 'tis of great Importance to be thought rich; as if a Man, in order to gain upon the Affections of his Miſtreſs, ſhould borrow a Sum of Money, and ſhew it for his own; in this Caſe, the Money is not taken up as a *conſumable Commodity*, nor is the Borrower ever Owner of it; and therefore he ought to return the very ſame in Specie. But the ordinary Uſe of ſuch Things conſiſts in the Loſs of them; or, in other Words, I cannot directly apply them to my Uſe, unleſs they be conſum'd, and ſo become loſt to me. This is plain in Corn, Wine, and other Things that turn to Nouriſhment; and Money itſelf I cannot make uſe of in buying Neceſſaries, and paying Debts, unleſs I part with it: So that altho' the Subſtance of the Money remains, yet as to me it is utterly loſt. And therefore, when ſuch Things as theſe, to the end they may be put to their ordinary Uſe, are made over to another, not with a Deſign to barter, but with a Deſign to have the ſame return'd again; ſince the Species that was deliver'd muſt be conſum'd, the Reſtitution muſt neceſſarily be in the ſame kind [2].

III. Money, which commonly goes by Number, or Counting, Gold and [3] Silver in Bullion, Bread, *&c.* (which paſſes by Weight) Corn, Salt, Wine, Beer, Oil, *&c.* (which are ſpecified by Meaſure) and, in general, all ſorts of Proviſion; as Fleſh, Eggs, Milk, and even intire Animals, conſider'd as Proviſion, come under the Name of *conſumable Commodities* [b]. For ſuppoſe I am to make an Entertainment, and have not Proviſion enough at Home, or Money to buy it, I may borrow of my Neighbour, not only Eggs, and Fleſh, but Fiſh, Lobſters, Hares, Hens, Geeſe, and even Sheep and Calves, upon Condition to repay him again in kind [c]. Fair Paper may, likewiſe, be brought under the ſame Denomination, as being *conſum'd* in the Uſe; for Paper once ſcribbled upon is loſt for any other Writing. In ſhort, under this Denomination may be reduc'd any ſort of Commodity, which can be determin'd by any certain Meaſure, and which (if, after it has been apply'd to its genuine and principal Uſe, it cannot be intirely reſtored again to its former Condition) is capable of being repaid in kind. For ſuch ſort of Things, altho' they are generally the Matter of Sale, yet ſometimes happen to be borrowed. As if, *v. g.* I ſhould procure a certain Quantity of Cloth for my own Uſe, and ſhould let a Friend, who has immediate Occaſion for ſome of the ſame ſort, and has not wherewithal to buy it, make uſe of it, upon Condition to return me as much and as good of the ſame kind.

IV. And this Contract is perform'd not only expreſly, but ſometimes tacitly: As ſuppoſe I ſhould pay a Man Money by Miſtake, which I did not owe; or ſhould give a Man Money for ſome Reaſon which afterwards does not appear; in this Caſe the *Roman* Law admits of an [d] *Action for Money paid where not due*, and *for ſome Reaſon which does not appear*. For ſince ſuch Money was not paid as a Gift, but as a Debt, or for the procuring an Equivalent, and yet the Receiver became Maſter of it; it is the ſame Thing [4] as if it had been borrowed, and may be demanded back as ſuch. And therefore the Foundation of theſe Actions may not

[a] *Add.* Jac. Gothofredi *Diſſert. de æqualitate & functione in mutuo.* [b] *Vid.* D. *ubi ſupr.* l. 2. §. 1. D. *de reb. cred.*
[c] *Add.* Plin. *N. H.* l. 9. c. 55. [d] *Condictio indebiti, & condictio cauſa data, cauſa non ſecuta.*

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[1] So the Law ſpeaks, *Non poteſt commodari id, quod uſu conſumitur, niſi fortè ad pompam vel oſtentationem quis accipiat. Sæpe etiam ad hoc commodantur pecuniæ, ut dicis gratiâ numerationis loco intercedant.* Dig. l. 13. tit. 5. Commod. vel cont. Leg. § 6. 3.

[2] The true Character of Things, call'd *conſumable Goods*, is, that they periſh in the uſing, as our Author ſays. Now there are two ſorts of Conſumption: 1. *Natural.* 2. *Civil.* Natural Conſumption hath place either in ſuch Things as periſh in the Uſe, as thoſe are which we eat and drink; or in ſuch as are ſubject to be eaſily corrupted, tho' we do not meddle with them, as the Fruits of Trees, *&c.* For as for thoſe which decay inſenſibly as we uſe them, but don't altogether periſh, as Cloaths, Earthen Ware, *&c.* they don't belong to this Place; and 'twas an Overſight of *Tribonian* to exclude Cloaths from the Number of an Uſufruct, properly ſo call'd. *Inſtit. lib.* 2. *tit.* 4. §. 2. Conſumption Civil hath Place in Things, whoſe Uſe conſiſts in being alienated, altho' they have a continual Being. Such are not only Money, but all Things we barter, as, alſo, Things made uſe of in Building, and all other Materials for Compoſitions, and Work. See *lib.* 4. *c.* 7. §. 10. above. Upon this Foundation there are two ſorts of Things call'd *conſumable Commodities*: One, which are ſuch in their own Nature, and unchangeably; the other, which depend upon the arbitrary Will of Men, and mutable Appointment. The firſt are ſuch whoſe ordinary Uſe conſiſts in their Natural or Civil Conſumption: I ſay, ordinary Uſe; for tho' the Owner may lend ſometimes, for Example, a Sum of Money, merely for Form and Appearance, and a Beam only to ſupport a Building; yet, as that is rare, it has no regard to Laws, which reſpect Things that commonly happen only. The other ſort of conſumable Things contains ſuch, as, tho' they may be uſed or lent without Conſumption, are often appointed to be ſold, or enter into Trade after ſome other Manner; ſo that, according to the Deſign of him of whom they are borrowed, they are ſometimes *a Loan of Conſumption*, and ſometimes *a Loan of Uſe*. As for Example, when a Man who has a Library for his own Uſe, lends me a Book, he intends I ſhould return the ſame Copy again; ſo that if I would give him another as good, he is not obliged ordinarily to accept it: But if he of whom I borrowed the Book, be a Bookſeller, or Trader in Books, 'tis ſufficient that I return him another Book as good; becauſe, as he keeps it for Sale only, 'tis indifferent to him, whether I reſtore him the ſame Book, or another as good. 'Tis the ſame in other ſorts of Goods, unleſs they be ſuch as are very rare, or curiouſly wrought, as ſome ſort of Drugs not common, a Watch, Mathematical Inſtruments, an Air-Pump, or other Inſtruments to try Experiments, *&c.* becauſe 'tis hard to find others preciſely of the ſame Nature and Goodneſs, which may be returned for what's borrowed. This is taken out of Mr. THOMASIUS's Diſcourſe before quoted, *De pretio affectionis in res fungibiles non cadente*, c. 1. §. 16, *&c.*

[3] We may give Gold for Silver, and pay it in other Kinds, unleſs it be otherwiſe agreed on. See *Corn. Van Bynkerſhoek's* Obſerv. 1. 9.

[4] It is not neceſſary to ſuppoſe a tacit Loan. The Nature of the Thing ſufficiently ſhews the Neceſſity of Reſtitution, as appears by the Author himſelf. But if it be ſufficient to render an Equivalent, yet it does not follow that it ſhould be by virtue of a tacit Loan; but 'tis becauſe the Thing lent cannot be otherwiſe reſtored, or becauſe 'tis all one whether the Thing be recover'd in *ſpecie*, or by an Equivalent. See what is ſaid of *Quaſi-Contracts* in ſeveral Notes above, and among others on *lib.* 4. *c.* 13. §. 13.

improperly

improperly be call'd a [1] *tacit Borrowing* [2]. Thus *Mauritius* the Emperor having given *Childebert*, the *French* King, Money to drive the *Lombards* out of *Italy*, after he had made Peace with them demanded it back: *Childebert* indeed would not ſo much as vouchſafe him an Anſwer, but that was becauſe he was more powerful than juſt. *Paul Warneſrid.* degeſt. *Longobard.*

V. Some Years ago *Salmaſius* and ſome *Civilians* had a Diſpute, *Whether the* Loan *of a* conſumable Commodity *was an Alienation?* Now it is plain, ſince the ordinary Uſe of ſuch Things conſiſts in the Conſumption of them, they muſt be made over to the Receiver, with full Power to diſpoſe of them as he pleaſes; which cannot be done without inveſting the Property in him. But becauſe the *Creditor* gives, in order to receive back; and the *Debtor* receives, in order to refund; therefore neither is the Eſtate of the one leſſen'd, or the Eſtate of the other increaſed by it. Unleſs the *Creditor* may be rather thought a Loſer, having only an Action againſt the *Debtor*'s Perſon, in lieu of his Money, which, by Reaſon of the Trouble and Uncertainty attending it, may be reckon'd leſs worth than the Money itſelf. And hence it is, that as Debts, due to any Man, are look'd upon as Part of his Fortune; ſo a Man is ſuppoſed to be worth only ſo much as remains to him after his Debts are paid. And he who owes more than his Eſtate comes to, may fairly be ſaid to be worth leſs than nothing. To this Purpoſe was that Saying of *Ceſar*'s, that he wanted 2500 *H. S.* to be worth nothing, *App. de bello civil.* l. ii. p. 432. B. Ed. *H. Steph.* Hence Money borrowed is call'd *æs alienum*, another Man's Money; not that the Perſon borrowing has not the Property of it, but becauſe he receiv'd it upon Condition to return as much. On the other ſide, he who is out of Debt, may ſay, *Meo ſum dives in ære*, The Money that I have is my own. In a Word, he who lends Money does indeed *alieniate* it, yet ſo as neither to leſſen his own Eſtate, nor [3] to add to that of his *Debtor*.

VI. It is a Queſtion of greater Moment, *Whether, if a Change happens in the Money, between the Borrowing and the Payment, Regard muſt be had to the Value of Money, as it was* [4] *at the Time of Payment?* Here moſt think fit to diſtinguiſh between the *intrinſick* Goodneſs of Money, and the *extrinſick*; whereof the former conſiſts in the certain Quantity of ſuch, or ſuch a Metal; the *latter* in the publick Rate, or Value impos'd by the Magiſtrate. If the Change happen in the *intrinſick* Value, as ſuppoſe the Metal becomes baſer or lighter (for the Change in Money is generally for the worſe) then they think the Money ought to be reduc'd to the Value it bore at the Time of Borrowing. For this Contract obliges not only to reſtore the ſame Thing in kind, but in Goodneſs alſo [5]; indeed otherwiſe the

[2] Which is otherwiſe called by the *Civilians* Quaſi-Contractus.

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[1] The Lawyers call it *Promutuum*. See *Cujacius* Obſ. 8. 33.

[2] "By the way we may obſerve out of *Plutarch*, why the *Gnoſſians* us'd to take away forcibly the Money which "they borrowed at Intereſt: Perhaps, that the Creditor might evade the Law againſt *Uſury*. For, ſhould the *Debtor* "refuſe paying Uſe for what he thus took away, he would have an Action of Robbery againſt him." *Quæſt. Græc.* p. 303. Edit. *Wech.*

[3] That is to ſay, as Mr. PLACETTE, in his Treatiſe of *Intereſt* obſerves, *Chap.* xii. p. 133. "If he who lends, transfers "the Property of a Thing to another in Specie, yet he reſerves the Value." Now the Value always exiſts, and we know what it is: We put it into the Hands of the Debtor, but he is not the Owner; for if it were ſo, he might diſpoſe of it as he pleas'd, by giving, ſquandering, or playing it away, which he is not certainly allowed to do. But the Creditor, on the contrary, can make a Preſent of it to the Debtor himſelf, or any other. He may call it in, forbear it, ſpend it, or diſpoſe of it as he pleaſes. See the reſt of this Chapter, and the foregoing, of the Treatiſe from whence I have taken it. Hence it is, as our Author obſerves, that a Debt is called, in *Latin*, *Æs alienum*, *i. e.* Another Man's Money; not but that a Debtor acquires a Property to the *Species* he has received, but becauſe he gets it on Condition to return the like Value again. On the contrary a Man who owes nothing may ſay, *Meo ſum dives in ære.* As to what relates to the Notions of the *Roman* Law, upon this Subject, about which the learned *Salmaſius* furiouſly perplex'd himſelf, we have ſeveral Pieces written againſt him by *Wiſſenbach*; *Vandergoes*, *Fabrot*, *&c.* But he has been ſufficiently confuted, in a few Words, by M. *Schulting*, *Juriſpr. Ante-Juſtinian.* pag. 147. and Mr. *de Bynkerſhoek*, *Opuſcul. De Rebus Mancipi.* Cap. xix. *in fin.*

[4] The Deciſions of our Author upon this Queſtion are neither conformable to the *Roman* Law; (tho' the Interpreters he has follow'd pretend it is) nor founded upon the Principles of the Law of Nature. I ſhall in this, and the following Notes, ſhew what, to me appears, true and reaſonable, after a ſtrict Examination. To begin with the *Roman* Law, It is certain, that, according to the antient Lawyers, *Money* is a Thing incorporeal, whoſe Eſtimation depends neither on the intrinſic Value of the Coin, nor their Number or Denomination; but on the Price affix'd to it by publick Authority, unleſs it manifeſtly appear, that the Intention of the Parties, is to conſider the Coin as ſo many ſeparate *Bodies* of a determined Matter, Quality, and Weight. *Eaque materia, formâ publicâ percuſſa, uſum dominumque non tam ex* SUBSTANTIA *præbet, quam ex* QUANTITATE. Digeſt. Lib. xviii. Tit. 1. *De contrab. empt.* Leg. 1. *princip. ſive in pecuniâ non* CORPORA *cogitet, ſed* QUANTITATEM. Lib. xlvi. Tit. iii. Leg. xciv. §. 1. Hence it follows, That we may (except when it is otherwiſe agreed) give a different Coin from what we have receiv'd, ſmall Money for great, Gold for Silver, *&c.* Thus we ſee that in *Stipulations*, which were moſt rigorouſly obſerv'd, it was thought all one to promiſe 25 *Denarii* of Silver or a *Crown* of Gold (*aureus*) tho' the Creditor had mention'd only the former Pieces, to which the laſt alone was equal in Value *Nam ſtipulanti* denarios, *ejuſdem quantitatis* aureos *ſpondendo, obligaberis, &c.* Lib. xlv. Tit. 1. *De verbor. obligat.* Leg. lxv. §. 1. See FRAN. HOTOMAN. *Quæſt. Illuſtr.* xv. and Mr. *de* BYNKERSHOEK *Obſerv.* 1. 9. Now, this being granted, we may, alſo, ſay, That whether the *intrinſic* Value of the Coin be chang'd, or the *extrinſic*, he who pays the Sum borrow'd according to the *preſent* Value of the Money, pays the *ſame* Thing: ſince it is this Value, and not the Subſtance of the Coin, whatever they be, which made the Subſtance of the Bargain. Suppoſe, for Example, a Crown of the ſame Form with thoſe formerly be of worſe Alloy, or leſs Weight, yet, if it goes for as much in Commerce, it is all one to the Lender. But if the Alloy or the Weight remains the ſame when the Coin is heighten'd or lower'd, he who has lent a Crown then worth fifty Pence, and pretends to be repaid in kind when the Crown is worth ſixty, would gain ten Pence more than he has given. And he, on the contrary, who would repay it in kind, if the Crown was reduc'd to fifty, and he receiv'd it at ſixty, would ſave ten Pence. With regard to the Law of Nature, I ſee nothing here contrary to it. The Sovereign certainly may regulate the Value of Money as he pleaſes, unleſs his Power, in this Reſpect, be reſtrain'd by ſome fundamental Law. He does ill, no doubt, when he abuſes this Power, and alters the Value of the Coin, unleſs when the Exigencies of State require it. But even in this Caſe, every Subject may gain as well as loſe by the Change; and, in the different Affairs of Life, he may gain on the one Hand what he may loſe on the other. There is beſides a Method here to ſecure Perſons from any Loſs, by ordaining that the Debtor ſhould repay, not the *Value*, but ſuch and ſuch kinds of Coin; which, unleſs the contrary ſhould from the Nature of the Thing itſelf, as I ſhall ſhew below, takes place in *free Loans* independently of the Civil Laws. In a Word there is ſome Hazard here, as, when the Value of Silver alters on account of its Plenty or Scarcity, compar'd with other Things.

[5] So the *Digeſts* ſay, *Cum quid mutuum dederimus, etſi non cavimus, ut æque bonum nobis redderetur, non licet debitori deteriorem rem, quæ ex eodem genere ſit, reddere; veluti vinum novum pro vetere: nam in contrahendo quod agitur, pro cauto habend-*

the ſame Quantity would not be reſtor'd. And therefore, if, for Example, in Money newly coin'd a fourth Part of the *intrinſick* Goodneſs be wanting, for a 100 *l.* lent in old Money, I ought to receive 125 *l.* in the new. In like manner, if I lend another 100 *l.* half of which is perfectly Alloy, I ought to receive only 50 *l.* when the Baſeneſs of the Coin is redreſs'd. For tho' it be in the Breaſt of the Government to raiſe or lower the Value of Money, yet if the *extrinſick* Valuation differs very much from the *intrinſick* Goodneſs of the Coin (ſince Regard muſt be had to Foreigners, unleſs we would reduce our Commerce with them to pure Bartering) the Price of Commodities will be determined rather by the [1] *intrinſick* Goodneſs, than the *extrinſick* Value and Denomination of it. For ſuppoſing the Money diminiſhed a *4th* Part, we ſhould give 125 *l.* for that which we us'd to pay but 100 *l.* And therefore if a Man ſhould pay me an old Debt of 100 *l.* in ſo much new Money, he would really pay me a 4th Part too little.

VII. But if, without any Alteration in the *intrinſick* Goodneſs, the *extrinſick* Value ſhould riſe or fall; then Regard ought to be had to the Value of the Money, as it was at the Time of Contract, and the Increaſe or Decreaſe of it ought to be at the Gain or Loſs of the *Debtor*. For Example, if I ſhould lend a 100 *Guineas* in Specie, when they go for 26 *s.* and afterwards they ſhould riſe to 30 *s.* I can't demand more than 26 *s.* the *Guinea*, if my Debt be paid in Silver, and if the Payment be made in *Guineas*, I muſt deduct 4 *s.* from each, and ſo receive not much more than 86 *Guineas* in Specie.

And on the other Hand, if they ſink to 22 *s.* and my Payment be made in Silver, I can demand 26 *s.* for every *Guinea*. But if I be paid in *Guineas*, I ought to have an Addition of 4 *s.* to each, and ſo to receive above 118 *Guineas* in Specie.

But yet this does not clear the Buſineſs, for againſt the *former* Determination the *Creditor* may make his Exceptions; for had he kept [2] his *Guineas*, the Increaſe had been to him; which if he be now forc'd to loſe, another makes a Gain at his Loſs: And the ſame Plea may the *Debtor* have in Bar of the *latter*.

And therefore we muſt enquire further, *1ſt*, Whether any certain Sort of Money was lent, *v. g. Guineas* in Specie, upon Condition that ſo many ſhould be return'd in Specie, and in no other Money; or *2dly*, Whether they were paid as common current Money; or *3dly*, Whether all the Money of the Nation, or *4thly*, Only that particular Species has undergone a Change. In the *1ſt* Caſe, without Diſpute, the Number of *Guineas* is to be return'd. In the *2d*, the former Deciſion takes place, and therefore the Value of *Guineas* in ſuch a *Loan* muſt be referr'd to ſome other Species as a Standard; *v. g.* ſo many *Guineas* of 26 *s.* The *3d* Caſe, where the Change affects the whole Body of the Money, in Compariſon of the Plenty or Scarcity of other Things, may be determin'd from what has been ſaid in *Chap.* 1. §. 16. although it [3] hardly ever happens in Fact, that this general Change in the Money affects the Payment of an old Debt. As for the *4th* Caſe, when the Value of any one Species riſes without any *intrinſick* Alteration, all the other Money [4] muſt needs have been debaſed. Thus *v. g.* when *Guineas* roſe from 26 *s.* to 30 *s.* it was a ſign

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bendum eſt; id autem agi intelligitur, ut ejuſdem generis, & eadem bonitate ſolvatur, qua datum ſit. Dig. Lib. 12. tit. 1. De Rebus credit. &c. Leg. 3. But the Goodneſs depends here upon the Value, and it is the ſame Value we reſtore, as appears by the preceding Note. We may add to it, that if the Money had remained in the Hands of the Creditor, he had loſt nothing by leſſening the Species; and ſo, in the Alienation, this Conſideration paſſes into a Rule: *Alienatio quum fit, cum ſua cauſa dominium ad alium transferimus, quæ eſſet futura, ſi apud nos ea res manſiſſet: Idque toto jure Civili ita ſe habet, præterquam ſi aliquid nominatim ſit conſtitutum.* Digeſt. lib. 18. tit. 1. De contrah. empt. &c. Leg. 67. But the Lawyer *Pomponius* (whoſe Words theſe are) means only, That when we alienate a Thing we engage no more than to reſtore it, ſuch as it is at the Time, with all the Charges, and Inconveniencies to which it is ſubject: Unleſs one has, for Example, ſold a Farm by giving it to B in the beſt Condition it can be ſuppos'd, according to the uſual Form, found in Law lxix. with the ſame Title, *Ita ut optimus maximuſque eſt.* For theſe two Laws have a manifeſt Relation together; and as the great *Cujas* obſerves (Tome vii. *Opp. Edit. Fabrot.* pag. 756. 707.) The one is the Reaſon of the other. There is therefore nothing here which makes for our Purpoſe. The Lender may transfer the Property of the *Coin*; but he does not alienate the *Value*, and it is upon the *Value* that the Contract is founded. Now we have juſt ſhewn that this is always the ſame, whatever Alterations may happen in the Money.

[1] This appears by the following Law: *Pro imminutione, quæ in æſtimatione ſolidi forte tractatur, omnium quoque pretia ſpecierum decreſcere oportet.* Cod. lib. 11. tit. 10. De veter. numiſmatis poteſtate, Leg. 2. But the Caſe is here quite different. With regard to this obſcure Law, the Reader may conſult the learned *J. Fred. Gronovius*, in his excellent Treatiſe *De Pecunia Vetere*, Lib. iv. Cap. xiii, xiv. and the illuſtrious Mr. *Bynkerſhoek Obſerv.* Lib. ii. Cap. xxii. As to the Thing itſelf, it cannot be denied but the Alteration of Money changes the Price of Merchandizes, and Goods, eſpecially thoſe which come from foreign Countries; and therefore the Creditor muſt loſe in this Reſpect, when the Debtor ſhall give him the ſame Value in Specie either of worſe Alloy, or rais'd above the former Price. But the Civil Law has no regard to this Loſs, for the Reaſons alledg'd above, Note 4. preceding. With regard to the Law of Nature, we muſt diſtinguiſh, in my Opinion, whether the Loan be purely gratuitous, or whether it bears Intereſt. In the firſt Caſe it appears, to me, that the Creditor ought to loſe nothing for having oblig'd the Debtor. It is enough he lies out of his Money, which he might have improv'd different Ways. Few People would lend in this Manner, if they foreſaw the Alterations of Money, unleſs the Debtor would engage to indemnify them for their Loſs in this Caſe. We cannot ſay here 'tis their Fault if they did not ſtipulate this expreſly, becauſe the Nature of the Affair might diſpenſe with this. A Service done freely is not uſually attended with any Conditions of this kind. Now the Deſign of the Creditor, here, is to grant the Debtor the Uſe of his Money without any additional Burden. He no more ſubjects himſelf to the Loſs which may happen by any Alteration of the Coin, than he does to that of the Debtor if the Money was ſtolen from him, or he had the Misfortune to loſe it in the Buſineſs about which he employ'd it. But when the Debtor has made an advantageous Uſe of it, he would, with a very ill Grace, pretend that the Loſs (whence ſoever it ariſes, or in whatſoever it conſiſts) ſhould fall upon his Benefactor. But the Caſe is quite different with reſpect to a Loan at Intereſt. In ſuch Agreements every one ſeeks his own Advantage, and finds his own Account; and therefore ſo much the worſe it is for the one, ſo much the better it is for the other. There is no more Reaſon why the one ſhould gain or loſe than the other. Hence, as neither Creditor nor Debtor has expreſs'd the Quality of Coin in which the Money ſhould be repaid, they are ſuppos'd to underſtand the Current Value, and to leave to Chance the Loſs or Gain which may ariſe from any Alteration.

[2] This is, alſo, what other Authors ſay, whoſe Principles are better ſuported. *Pufendorf* here, as well as elſewhere, ſeems to follow *Struvius Exercit.* xvi. §. 30. *& ſeqq.* See Mr. *Titius*'s Obſervations on *Lauterbach*, Num. 311.

[3] There is nothing which obliges us here to have regard to this Alteration, unleſs it be agreed upon before-hand. See my Remark upon *Grotius*, Lib. ii. Cap. xii. §. 17. Not. 5.

[4] Mr. HERTIUS ſays here, That the Text is corrupted in all the Editions. It is true, that in the *Swediſh* and *Frankfort* Editions it is read *Valore agetur*, for *augetur*; but the Fault is ſo manifeſt, that it has been corrected in the *Dutch* Edition 1683, and Mr. *Hertius* might without Scruple correct it in his own. As for what he ſays, that *OB* ought to be added after *augetur*, I ſee no Reaſon for it, but think it contrary to the Reaſon and Senſe of the Author.

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that the Silver Money in its *intrinſick* Value was was grown worſe. And therefore, in this Caſe, if *Guineas* were lent in Specie, and the Payment be made in Silver, *Guineas* ought not to be valued as lent at 26 *s.* but at 30 *s.* But if common Money was lent, the *Debtor* gets the Advantage of the Riſe, unleſs the Largeneſs of the Sum, or the Enormity of the Change may plead for ſome Conſideration in behalf of the *Creditor*.

As for other *conſumable* Commodities, provided they be return'd at the Time and Place appointed [1], [a] 'tis little regarded whether their Price has riſen or fallen; but the Advantage of the Riſe, and the Loſs of the Fall belongs to the *Creditor*, unleſs they had agreed about it otherwiſe.

But when the *Debtor* is backward in his Payment, and the Price, in the mean Time, happens to be altered, the *Roman* Lawyers are at a Loſs to what Time or Place the Valuation ought to be aſſigned: It ſeems moſt reaſonable that it be adjuſted according to the Time and Place of Payment. But, if it be through the *Debtor*'s Fault that the Payment is protracted, and the Price in the mean Time alters, it ought to be to his [2] Loſs [b].

VIII. *Whether* Uſury, *which is generally given for the* Loan *of Money, be repugnant to the natural and divine Law*, is a Queſtion that has been warmly debated [3]. Which ought to be examin'd more nicely, becauſe moſt People are not of the *Perſians* Opinion, *Who*, as *Plut.* relates in his Book againſt Borrowing, *among their Sins, give the ſecond Place to Lying, but the firſt to Borrowing, becauſe it often happens that they who borrow, lye.* Tho' *Herodotus* in *Clio*, in my Opinion, better aſſigns the firſt to Lying, the next to Borrowing. How the old *Hebrews* explain the Divine Law [c], relating to *Uſury*, *Selden* [d] gives a large Account; *viz.* they thought it [4] was unlawful not only to receive, but even to give *Uſury*; and that the very Scriveners, Notaries, Witneſſes, and Procurers of ſuch Bargains contracted a Guilt. However, the Money of Orphans was allowed to be put out to *Intereſt* to a rich Man, provided he gave the Gain to the Orphan, but bore the Loſs himſelf.

Now they had two Sorts of *Uſury*, the one was [e] *Uſury properly ſo called*, which was covenanted for, and received at the Beginning, or during the Contract; and this was ſuppos'd forbidden by the Divine Law: The other was called [f] *The Reſemblance of Uſury*, and was forbidden only by the Decrees of the Elders.

A Man was guilty of *Uſury properly ſo called*, not only when he received back a *conſumable Commodity* with Increaſe, but if by Reaſon of ſuch a *Loan* he lived in another's Houſe *Gratis*, till he was paid; or gave leſs Rent for it, than otherwiſe he would have done; or if he received an Emolument from a Pawn left with him upon Account of the Debt. And yet a Man never ſuffered in their Courts for receiving *Uſury*, as was uſual for the Violation of other Divine Laws, but was obliged to Reſtitution only. But, if the *Uſurer* himſelf was Dead, his Heirs were not ſo much as obliged to that; for they did not refund Money, or any other *conſumable Commodity*, but only Plate, Cloaths, Inſtruments, Cattle, and ſuch like, which had been received upon that ſcore. And this was done in Honour of the Deceaſed, and out of Reſpect to his Memory, and that too only, if it appear'd that he repented of it, and had Thoughts of making Reſtitution before he died; for otherwiſe the Heirs were not oblig'd to refund at all. Beſides, Private Men were not permitted ſo much as to receive a ſmall Preſent from their *Debtor*, while he continued ſuch; the *Lawyers* indeed might, for they were preſum'd by no means willing to violate the Precept againſt *Uſury*, but to receive it purely as a *Gift*, and not as *Intereſt*.

By that which they called the *Reſemblance of Uſury* they were forbidden to receive any Profit, or Acknowledgment of the Kindneſs (altho' utterly beſide the Contract, and after the Expiration of it) except the Payment of the Principal before the Time appointed. And this again they divided into two Sorts; the *One* which related to the Difference of the Time, in which ſomething was perform'd by the *Debtor*, to the Profit and Advantage of the *Creditor*; the *Other*, which related to the different Manner of Contract.

The *former* they again divided into *antecedent* and *conſequent*. By *that* they underſtood whatſoever a Man, deſigning to borrow, gave to the Perſon, upon whom he had this Deſign, in hopes to bring him to it the more eaſily: By *this*, whatſoever the *Debtor* after the Receipt of the *Loan* beſtowed upon the *Creditor*, in order to prolong the Time of Payment. Nay, they would not ſo much as allow the common Offices of Humanity to be perform'd by the *Debtor* to the *Creditor*, unleſs what was uſed to paſs between them before the *Loan*.

[a] Inſtance in Wine, *lib.* 12. *tit.* 1. *l.* 22. D. *de reb. cred.* [b] *Add. lib.* 13. *t.* 3. *ult.* D. *de condict.* Triticaria. & *t.* 4 D. *de eo quod certo loco*, &c. [c] Which is extant, *Exod.* xxii. 25. *Levit.* xxv. 37. *Deut.* xxiii. 19. [d] *De J. N. & G. ſec.* Heb. *L.* c. 9. [e] רבית קצוצה i. e. *Uſury fixed and determined.* [f] אבק רבית i. e. *The Duſt of Uſury.*

[1] The Words of the *Digeſts* are, *Vinum, quod mutuum datum erat, per judicem petitum eſt: quæſitum eſt, cujus temporis æſtimatio fieret* ——— *Sabinus reſpondit, Si dictum eſſet, quo tempore redderetur, quanti tunc fuiſſet; ſi non, quanti tunc cum petitum eſſet. Interrogavi, Cujus loci pretium ſequi oporteat? Reſpondit, Si convenitſet, ut certo loco redderetur, quanti eo loco eſſet; ſi dictum non eſſet, quanti ubi eſſet petitum.* Dig. lib. 22. tit. 1. De rebus credit. &c. Leg. 22. *See* Lib. 13. t. 3. De conductione triticaria, Leg. 4. & tit. 4. De eo quod certo loco dari oportet. Leg. 3. lib. 17. tit. 1. Mandati vel contra, Leg. 37. lib. 45. tit. 1. De verbor. Oblig. Leg. 59. Mr. *Vaneck*, and ſeveral others, have done all they can to reconcile the Lawyers here. *Marc Lycklama* a Lawyer, of *Frizland*, has wrote a whole Book upon it, printed at *Leawarden*, in 1644. *Edmund Merillus.* (*Var. ex Cujac.* Lib. i. Cap. xvii.) ſhews that the great *Cujas* himſelf has varied about the Explications of this famous Law: as for himſelf he follows the Opinion which ſuppoſes that the Queſtion here relates to a kind of perſonal Action, which the Lawyers call'd *Condictio Trticaria*. But Mr. *Noodt*, in his Commentary, pag. 305, honeſtly owns, that he does not know what that Action is: a Confeſſion which ſhews a Freedom of Mind, and an uncommon Modeſty worthy of his Learning and good Senſe.

[2] As on the other Hand it is ſo much the worſe for the Creditor if he refuſes to receive his Money when the Debtor has offer'd to pay him. This is founded both on the Law of Nature and the Principles of the Civil Law. *Unicuique ſua mora nocet.* Digeſt. Lib. 1. Tit. xvii. De diverſ. Reg. Jur. Leg. clxxiii. §. 2.

[3] This Paſſage of our Author might have been left out, becauſe the Queſtion here debated refers directly to the Lender, and not to the Borrower.

[4] This is certain; and GOD forbad it for ſome ſpecial Reaſons, which our Author ſpeaks of a little lower; ſo that nothing is more ridiculous than the blind and malicious Zeal of certain modern Authors, who, to ſhew their Reading, have blinded the Eyes of the People, by quoting the *Talmud* and *Spaniſh* Rabbins, who explain the Law in *Deut.* xxiii. 19. ſtrictly. I ſhall ſpeak upon the Paſſage in St. *Luke* vi. 35. in *Note* 1. pag. 515.

The *latter* ſort was thought to have Regard to ſuch a Contract as this; ſays the Seller, if you buy To-day, you ſhall have it for 90 *l.* but if you put it off till To-morrow, you ſhall pay a 100 *l.* Here the Delay, together with the Increaſe of the Price, ſeems to intimate, that 10 *l.* is to be paid as Uſe. In this Caſe the Law did not oblige to a Reſtitution, nor did there lie an Action againſt the Party in the civil Court. Yet he, who offended againſt theſe Decrees of the Elders, was liable to corporal Puniſhment. He, likewiſe, that received a Farm in Pledge, was not allowed to let the ſame to the Owner for Rent, for that look'd like Uſury. But theſe obtain'd only between *Hebrew* and *Hebrew*; of a *Gentile* they might lawfully demand Uſury, from *Deut.* xxiii. 20. Nay, they thought themſelves commanded to do it, in order to drain them of their Riches, and weaken thoſe Nations which GOD had otherwiſe deſtin'd to Deſtruction. Yet *Leo* of *Modena* [a] ſays, That *Text is to be underſtood of the ſeven Nations only that dwelt in* Canaan; *and not of the other* Gentiles: *of whom it was not lawful to receive Uſury. But yet that many, by reaſon of the Miſeries of a long Captivity, and their Lands being withholden from them, and for want of a better Way of getting a Livelihood, had degenerated from the Integrity of their Forefathers. But he proteſts that to be falſe,* which ſome ſpread abroad, *That the* Jews *every Day take an Oath to do what they can to cheat the* Chriſtians; *and,* he ſays, *it was invented to render them odious.*

IX. Let us now conſider, whether what has been thus punctually obſerv'd among the *Jews*, be the Dictate of the Law of Nature; or the poſitive Law of GOD; and that not peculiarly calculated for the *Jews*, but for all Nations. As for what has been added by the *Jewiſh* Elders, 'tis plain, that is altogether *poſitive*, and impoſed only to prevent Cavils, which deſigning Men had found out to evade the Force of the Law. But in general our Opinion of Uſury [b] [1] is this; provided it does not oppreſs and hurt the Poor, but anſwers the Advantage which we ourſelves might have made, or which the *Debtor* does actually make of our Money (eſpecially if he borrows not out of Neceſſity, but in order to make a Gain of it) the Law againſt it is neither that of Nature, nor that of GOD univerſally obliging all Nations; but a poſitive Law to the *Jews* only, founded upon Reaſons in a manner purely politick. And it was generally the Opinion of the *Rabbins* themſelves [c], that *Uſury* was neither Theft, nor againſt the Law of Nature, as being founded upon Conſent and free Contract.

But the ſame may be evidently proved from Reaſon; for tho' the *Jews* were, by the Divine Precept, join'd together in a cloſer Tie of Amity than ordinary, yet they were oblig'd to exerciſe towards others all the common Duties of the Law of Nature [2] [3]. And therefore, if *Uſury* be againſt the Law of Nature, I don't ſee how the GOD of Holineſs could indulge that Nation, which he had peculiarly ſanctified, in the Practice of it, and in a manner charge them to violate a Precept of the Law of Nature, in Prejudice of thoſe who had never injur'd them; if indeed that Paſſage in *Deut.* xxxiii. 20. [d] ought to be expounded not of the [4] *Canaanites* only, but of any other Nation.

There ſeem to be ſeveral good Reaſons why ſuch a Law againſt *Uſury* ſhould more eſpecially obtain amongſt the *Jews*. The *firſt* may be taken from the Genius of the People; for they were as much addicted to the heaping up of Riches then, as now; in which they thought their greateſt Happineſs conſiſted. And therefore, that their Thirſt after Riches might not tend to the Oppreſſion of the Poor, GOD ſeems to have provided by this Law. But yet, leſt too great a Violence ſhould be offer'd to their Inclinations, he permitted them to uſe greater Liberties among Strangers.

Beſides, [5] the Conſtitution of that Commonwealth required ſuch a Law. For 'tis evident, *Moſes* deſign'd to have it *democratical* (for ſuch a State may

[a] *De Ritibus Hebraicis*, p. 2. c. 5. [b] See Mr. *la Placette*'s Treatiſe upon *Uſury*. [c] As *Selden* in the aforecited Place informs us. [d] See Mr. *Le Clerc* upon the Place abovecited.

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[1] I uſe the Word *Uſury* to avoid the ill Phraſe of *Lending at Intereſt*. But certain Authors who retain ſome Relicks of Popery, declaiming againſt the common Opinion of the Proteſtant Divines and Lawyers, maliciouſly affect to uſe the Word *Uſury* alone, and ſay, for Example, that *Uſury* is allowed, or not allowed, becauſe that Term is become odious through the Abuſe which is often made of a Contract innocent enough in itſelf, and originally denoted by it.

[2] This appears by the Law of *Moſes* itſelf; for it forbids *to oppreſs the Stranger or to do him any Injury*, Exod. xxii. 21. xxiii. 9. Deut. xxiii. 7. xxvii. 19. See Mr. NOODT, *De fœnore & uſuris*, lib. 1. c. 10. p. 66, &c.

[3] And therefore they are deſervedly cenſured by *Juvenal*, Sat. 14. v. 103, 104.

Non monſtrare vias, eadem niſi ſacra colenti;
Quæſitum ad fontem ſolos deducere verpos.

Ask them the Road, and they ſhall point you wrong,
Becauſe you do not to their Tribe belong:
They'll not betray a Spring to quench your Thirſt,
Unleſs you ſhew them Circumciſion firſt.
Mr. DRYDEN.

[4] "If that were ſo, ſaith Mr. *la Placette*, in his Treatiſe *Of Intereſt*, GOD would not have excepted the poor Strangers, as "they are not excepted among thoſe that are condemn'd to Death without Mercy. See *Lev.* xxv. 33, 36. But, tho' GOD doth "not approve that Intereſt ſhould be taken of every poor Stranger, he doth not formally forbid it; for the Law cited here "concerns Proſelytes, who were, in Appearance, naturalized, and enjoyed the ſame Privileges as the *Hebrews*." See *Exod.* xii. 48, &c. *Numb.* xv. 14, &c. and Mr. NOODT, *ubi ſupra*, p. 60. We ſhould rather ſay, as Mr. *la Placette*, alſo, does, that the Expreſſion of the Law, which allows Lending at Intereſt, is general, and there is no Reaſon to reſtrain the Senſe. 'Tis to no Purpoſe, that St. *Ambroſe* ſuppoſing of his own Authority, that the Permiſſion only reſpected the ſeven Nations of the *Canaanites*, who ought to have been deſtroyed, ſaith in his Book of *Tobias*, chap. xv. "That it was a lawful Act of Hoſtility, "and that ſince they might have ſlain thoſe Nations by the Right of War, by much greater Reaſon they might be allowed "to ſpoil them of their Goods; for he ſays, Lending on Uſury was an eaſier Way, and more gentle Means to impoveriſh and "ruin them." Mr. NOODT anſwers this, p. 65. "That when one lends to, or makes any other Contract with an Enemy, he "treats with him, not as an Enemy but as a Man, towards whom, conſequently, he ought to obſerve the Law of Nature and Na"tions, and, on that Account, ſuſpend all Acts of Hoſtility. Further, GOD allowed the *Jews*, alſo, to take Money at Intereſt of "Strangers; and then we may as well ſay, That GOD would have Strangers to impoveriſh and ruin his own People by it." Mr. NOODT urges many other Things, which utterly overthrow St. *Ambroſe*'s Notion, and which obviate all the Evaſions which that Father, and ſuch as are of his Opinion, could deviſe. We may obſerve, alſo, that, at one Time, the Lending at Uſury was forbidden at *Rome* between Citizens, altho' it was permitted in reſpect to the *Latins*, who were their Allies. See *Tit. Liv.* lib. 35, c. 7.

[5] We may find theſe two Reaſons explain'd, and ſupported with ſeveral other Remarks in the forementioned Chapter of Mr. NOODT's Book *De fœnore & uſuris*, p. 62, &c. We ſhould, alſo, do well to read what *J. Frederick Gronovius* ſays in his Treatiſe, *De Centeſimis & Unciis Uſuris*, Antexeg. 1. p. 467, &c. which follows his Book *De Seſtertiis*, &c. *Edit.* 1691.

admit

admit of a Chief at the Head of it) and nothing contributes more to this than to preſerve, as much as poſſible, an Equality of Riches amongſt the Members; and, to this End, were the Laws of *Jubilee* and *Remiſſion* inſtituted, and thoſe againſt alienating Land for ever. *Lev.* xxv. 14, 31, 35, 36. *Deut.* xv. 2. Add. *Num.* xxxvi. Which the Law of *Solon* reſembles, *That an Heireſs ſhould marry her next Kinſman by her Father's ſide.*

And the very Condition of thoſe Times furniſhes us with another Reaſon for the Law againſt *Uſury*. For that Nation had then a more plain Way of Trading, which conſiſted in Paſture and Huſbandry, or Manufactures; *Merchandiſe* was ſimple and moderate, the Secrets of Trade and Navigation being not known to them; and in ſuch a State no one borrows, but when he is preſſed with Neceſſity. And therefore *Deut.* xxviii. 12. it is mention'd as an Argument of the greateſt Happineſs, *Thou ſhalt lend unto many Nations, and thou ſhalt not borrow* [a]. Since the Gains, in ſuch a Caſe, could not but be very ſmall, the leaſt *Uſury* imaginable muſt needs be very burthenſome. And where the Money borrowed is laid out upon the Neceſſaries of Life, it will be next to impoſſible ever to recover it; for how can your Labour be able to bring you out of Debt, when it was not ſufficient to ſupport you from Borrowing? "Upon this Account the State of *Athens* "was involved in ſuch Troubles, by means of *U-* "*ſury*, that it could not be remedied otherwiſe than "by Means of *Solon*'s σεισάχθεια, i. e. *Shaking off* "*the Burthen.*". Vid. *Plut. Solone*, which Miſchief *Rome* alſo felt in its Infancy.

Grotius [b] brings this as one Reaſon among others of the Law in *Deut.* xxiii. 19. *That the Chief Riches of the* Jews *lay in Husbandry and Money, whereas moſt of the neighbouring Nations made vaſt Returns by Merchandiſe: And therefore* Uſury *was allowed the* Jews *in their Dealings with them, which, with very good Reaſon, was forbidden to be taken of one another*; *for* Uſury *laid upon Husbandmen is every where oppreſſive.* Beſides, *Moſes* endeavour'd by that Law to endear them to one another; and they had the more frequent Occaſion to put it in Practice, becauſe then only ſmall Sums were borrowed, and thoſe too by the meaner ſort, and ſuch a ſtruggled with Want and Poverty. From hence *Philo Judæus* [c] inforces the Exerciſe of Charity and Liberality among Fellow-Subjects [1]. Which Virtue the great *Legiſlator* has indeed eſtabliſhed by ſeveral other Laws. See *Exod.* xxi. 10, 11. xxii. 22, 23, 25, 26, 27. xxiii. 4, 5, 9, 11, 12. *Lev.* xix. 9, 10, 13, 33. xxiii. 22. xxv. 6, 10, 11, 35, 36, 37, 39, &c. *Deut.* xiv. 28, 29. xv. 2, 4, 7, 8, 9, 10, 11. xxiii. 24, 25. xxiv. 10, 11, 12, 13, 14, 15, 19, 20, 21. xxvi. 12, 13.

But now Money is borrowed for other Ends, *viz.* in order to increaſe and improve one's Wealth. When a Man borrows for this Purpoſe, why ſhould another lend for Nothing? Nay, 'tis an unreaſonable Thing, when you vaſtly improve your Fortune with my Money, not to admit me into ſome [2] Share of

[a] Add. *Deut.* xv. 7, 8. [b] Upon *Luke* vi. 35. [c] *De Charitate.*

[1] From all that has been ſaid, it appears, that *David*, Pſ. xv. 5. *and* Ezekiel xviii. 13. xxii. 12, give this Character of a good Man, *That he giveth not his Money upon Uſury*; but they treat only of the Loan forbidden by the Law, ſo long as the Government of the *Jews* was in Being, *i. e.* that which was done by one *Jew* to another. As for the Words of our Saviour JESUS CHRIST, *Luke* vi. 34, 35, they ſeem to me, if we conſider them in themſelves, or with their Connexion, not to reſpect Lending upon Uſury. His Divine Words are, *If you only love them that love you, what Thanks have you?* v. 32. *And if you do good to them that do good to you, what Thanks have you? Do not Publicans and wicked Men the ſame?* v. 33. *And if you lend to them of whom you hope to receive, what Thanks have you?* Sinners lend to Sinners, that they may receive as much again: *But love your Enemies, and do good and lend, hoping for nothing, and great ſhall be your Reward, and you ſhall be Children of the moſt High, for he is beneficent to the Unthankful and Sinners.* This Phraſe, *Hoping for nothing*, doth equally refer to Loving your Enemies, and *Doing good*, as to Lending; and I wonder that no Man, ſo far I know, hath taken notice of it. So *Lend, hoping for nothing*, plainly ſignifies, Lend, tho' you cannot expect that he who borrows ſhould do the like in his Turn. The Reaſon which our SAVIOUR adds, is taken from the moſt noble Motive, and that is, to imitate GOD, who doth Good to the Unthankful and Unholy, which makes the Thing very clear. But if we deſire a greater Plenty of Proofs and Arguments, let us read Mr. NOODT's Firſt Book *De Fœnore & Uſuris*, and Mr. LA PLACETTE's Chap. 3. of his Treatiſe of *Intereſt*. The Truth is, JESUS CHRIST in that Text neither forbids nor approves Giving of Uſury, nor had he any Occaſion to do it, ſince the *Jews*, to whom he ſpake, according to their Law, could not lend one to another, but freely. It belongs therefore to them, who condemn all Uſury in general, to prove, that it is unlawful in itſelf, and diſagreeable to our Goſpel Diſpenſation. But they'll never compaſs their Deſign, tho' they ſhould ſtudy the Natural and Moral Law with as much Care, as ſome of them do to ſhew, not only their groſs Ignorance, but, at the ſame Time, Weakneſs and Preſumption. A famous Caſuiſt, *Bannes* 2. 2 *Quæſt.* 78. *Art.* 1. *Dub.* 1. owns (as Mr. LA PLACETTE obſerves) that the Proof, which the Words of JESUS CHRIST afford, takes its Force, not from the Words themſelves, which may have another Senſe, but from the Authority of the Popes and Councils, which have ſo explained them. Thus the Knot is looſed, and they, who, tho' Proteſtants, fly out into groſs Invectives againſt the Opinions of their own Party, ſhew by this, that 'tis the Credit of the Fathers that they moſt value. But they make a Noiſe to no Purpoſe. All their Declamations and fierce Contentions ſerve only to ſhew that the Reading of the Fathers is capable of biaſſing their Thoughts, eſpecially when it meets with a melancholy Temper, and ſuch as are more careful to improve their Memory than their Judgment: For had theſe Men ſo much Zeal for the Honour of the Fathers, as not to ſuffer others to judge of them ſo long after their Death, as freely as they would of an Author of the laſt Age, they ought to prove, by good Reaſons, either that the Fathers were infallible, or were not guilty of the Errors imputed to them. And I am willing that they begin, for that End, with Lending upon Uſury, wherein they triumph moſt; and let them ſee whether they can confute the two Treatiſes before quoted, the one of a *Divine*, the other of a *Lawyer*. Waiting for what they'll do, I ſay boldly of thoſe Works, and ſome others, that have diſcover'd the Errors of thoſe antient Chriſtian Doctors, That they are Iron, Steel, and Diamond for them. See what ſhall be ſaid lower Note 1. pag. 517. I have ſince had occaſion to ſhew, in a few Words, the Innocence of a *Loan at Uſury*, conſider'd in itſelf, in my *Treatiſe of the Morality of the Fathers*, Cap. ix. §. 7. *& ſeqq.*

[2] This is what is called *Lucrative* Intereſt, or *Gainful* Intereſt; whereas *Compenſative* Intereſt is only a ſimple indemnifying a Man for a Profit ceaſing, and a Damage ariſing. There is no Difficulty of any Conſequence, but in the laſt; and he muſt ſhut his Eyes, who will not ſee the Juſtice of ſuch an Intereſt, ſince, in requiring it, no more is demanded, than what he had when we lent it. If any doubts of it, he may be fully convinced by reading of the 5th, 6th, and 7th Chapters of Mr. LA PLACETTE's Treatiſe of *Intereſt*. As to *Lucrative* Intereſt, ſomething may truly be alledged more ſpecious to oppoſe it: But if we bring a Mind free from Prejudice, we ſhall eaſily find that this Intereſt is neither leſs innocent nor lawful than the *Compenſative*. What Mr. LA PLACETTE has ſaid upon it is ſolid, and from him I ſhall borrow ſome Reflexions. As it depends on the Creditor to lend, or not; ſo 'tis at his Pleaſure when he purpoſes to lend, whether he will leave his Money in the Hands of the Debtor for ſeveral Years, or for one only, or for a Month, or for a Week, or for one Day only. Suppoſing then that he can lend for a Day, or a Week, yet he is willing to lend for one or two Years, engaging himſelf not to demand it ſooner, why may not ſuch a Renunciation, which depends upon him, and is beneficial to the Debtor, be ſettled at a Price? When one has a Right of Servitude upon an Houſe or Field, he can renounce it for a Time, or for ever, and ſet a Price upon ſuch a Re-

leaſe

of the Gain: For I, in the mean Time, am debarr'd from making that Advantage which I might otherwiſe have expected by applying it to my own Uſe. Beſides, I have parted with ſomething valuable, which ought therefore to be conſider'd: for in lieu of my Money I have only an Action againſt your Perſon, which cannot be proſecuted without ſome Trouble. For every Body does not conſider that of *Martial*, B. 2. Epig. 13.

Et Judex petit, & petit Patronus:
Solvas, cenſeo, Sexte, creditori.

It may, alſo, happen by ſome Accident or other, that my Debt may be loſt. "My Slowneſs, in paying "what I promiſed, has made me aſhamed of my "Debt; however, I may avoid the Cenſure of the "World by paying it with Intereſt." *Pind. Olymp.* Od. 10. Nay ſometimes the *Debtor* muſt be courted and careſs'd, that it may not be loſt. And ſome borrow on purpoſe to make their *Creditors* dependent on them. As the *Mareſchal de Rochelaure*, when he was tax'd by *Lewis* XIII, with taking Part with the Duke of *Mayenne*, pleaded in Excuſe, That *he did not follow the* Duke, *but his Money: For his Debt would be but in a deſperate Condition, if he did not ſtick cloſe to his Debtor* [a]. Beſides it is not ſeldom that we lend to Perſons who are utterly unable to pay. To whom that of *Martial* may be apply'd, *L.* 1. *Epig.* 76.

Dimidium donare Lino quam credere totum
Qui mavult, mavult perdere dimidium.

And therefore ſome are of Opinion, that it would be for the Advantage of the Publick, to allow none but Merchants to take up Money at Uſe; for this would make the Poor induſtrious, and force them to Frugality, who, ſome of them, are not afraid to pay Intereſt for Money to maintain their Extravagancies. And monied Men, rather than let their Money lie dead, would either take to Merchandiſe themſelves, or would put out their Money to thoſe that do; which would make Trade flouriſh, to the great Benefit of the Commonwealth [b]. *Grotius* [c] is of Opinion, That *the legal Intereſt ought to be ſtated, not according to the Gains of the Borrower, but the Loſs that thereby accrues to the Lender; as in Buying and Selling, and other Contracts, no regard is had to what the Receiver may make of the Commodity, but what goes away from the Seller. And, in this Caſe, ſo much goes away as every Man, in his own Calling, might and uſually does make of his Money; Allowance being made for Hazards, which, in ſome Caſes, are more, in others leſs.* With whom I ſo far agree, that no Man can complain, if his Debtor makes a vaſt and unexpected Return of his Money: But yet there is no Doubt, but I may demand higher Intereſt of him who carries on a very gainful Trade, than I can of another who drives a poor one.

X. The Arguments which are brought againſt *Uſury* are eaſily anſwer'd. It is urged, That *the Loan of a conſumable Commodity ought to be given* Gratis, *becauſe the Loan of all other Things is ſo.* But I anſwer, That as I have a Power of granting the Uſe of my Goods which are not conſumable, either *Gratis* or for *Rent*, whereof the one is a Loan, the other a Letting; ſo what ſhould hinder me from granting the Uſe of my Money alſo, either *Gratis*, or for a certain Recompence? But if you ſhould inſiſt, That *that only is a Loan which is lent out gratis*; the Conſequence would be, that Money lent upon Intereſt ought to be called by ſome other Name, and not that it is unlawful. Another Objection is, *That*

[a] *Grammond Hiſt. Gal.* l. 5. *Diodor. Sic.* l. 19. c. 24. *Plut. Eumene.* p. m. 591. C. Edit. *Franc.* 1620. [b] *Vid.* Lud. Septalium, *de ratione ſtatus*, l. 2. c. 15. [c] Ad *Lucam* vi. 35.

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leaſe. The ſame Thing hath a Place in the Buſineſs of Homages and Rents. Upon what Account then is it forbidden to be uſed in the Right we have to call in what is borrowed? 'Tis to no Purpoſe to alledge, that, when the Sum lent remains in our Hands, 'tis very probable that it affords us no Profit; and is it not then an Injury to our Neighbour to make him pay for the Uſe of it, when we loſe nothing ourſelves? This Anſwer ſuppoſes two Things, and both of them alike falſe: 1. Then, in treating with our Neighbour, he may enquire what we ſhall loſe by lending him. 2. This is a Conſequence of the former, That every one is bound to do all he can for his Neighbour, if it coſts him nothing. If the firſt be allowed, Commerce would be eſſentially unjuſt, for it conſiſts only in endeavouring to get by what one ſells; but if the Profit made hath nothing contrary to Charity or Juſtice (which is not impoſſible) nothing hinders but that we may lawfully purſue it. If the other Suppoſition be true, we muſt condemn a Thouſand Things every Day, and have nothing to oppoſe. As for Example: I have two Houſes, of which one is of no Uſe to me, but a Charge, becauſe, no Body dwelling in it, it runs to Decay. Again, I have two Copies of the ſame Book, of which one is of no Uſe. Does it follow from thence, that I may not ſell or let out that Houſe or Book? There are a Thouſand ſuch Inſtances, where it cannot be taken ill, if one ſell the Property or Uſe of certain Things which coſt nothing, and are uſeleſs to ſuch as ſell them, tho' profitable to ſuch as buy them. Why then may we not do the ſame with Money, in lending it, as innocently as in other Things? But there is another Proof more exact, and taken from the very thing itſelf. A Creditor allows his Debtor to make uſe of his Money lent him; this is ſufficient to entitle him to pay him Uſe. In ſhort, If we may lawfully let an Houſe, an Horſe, Oxen, Tools, and an hundred other Things of that nature, why may we not do the ſame with Money, and, in general, with every Thing that is uſed in Commerce? Divers Things are anſwered to this, of which we may find a Solution in the next Section, and in the Treatiſe from whence this is taken. We ſhall now only add the five Conditions which Mr. La Placette lays down to make *lucrative* Intereſt lawful. 1. That the Creditor is not otherwiſe bound to lend his Money freely. 2. That the Debtor obliges himſelf willingly to pay ſuch Intereſt. 3. That the Debtor may probably get by the Loan. 4. That the Intereſt is not greater than the Advantage he hopes to gain by it. 5. Laſtly, That he does not go beyond the Bounds fixed by the Laws. Let us, alſo, obſerve, with the ſame Author (*Chap.* 18.) that there are two ſorts of *Profit*: 1. *Poſitive*, when a Man gets that by his Money borrowed, which he could not otherwiſe have had. 2. *Negative*, which conſiſts not in getting what one has not, but in keeping what we have already, or may at length have, not in growing more rich, but to prevent being poorer. Borrowing is moſt commonly of this laſt Uſe, which happens ſeveral Ways. As for Example: A Man owes a conſiderable Sum, which he cannot pay, and pays 6 *l. per Cent.* for it; I lend him the ſame Sum at 4 *l. per Cent.* he really gets nothing, but he actually ſaves 2 *l. per Cent*, which, were it not for me, he muſt pay to his firſt Creditor. Another hath need of Money, and, not getting it, would be forced to ſell, at a low Price, thoſe Goods, which he was ſure to ſell dear in a little Time; I lend him Money, which he could not be without, and ſo prevent the Loſs he ſhould have had by his Goods. On theſe and the like Occaſions it cannot be unlawful to take Intereſt; for indeed 'tis as good an Office to prevent a Loſs, as further a Gain. Moreover, this is the only, or at leaſt, the principal Foundation of the Intereſt paid to the Directors of the Bank called *Monte di pietà*, an Eſtabliſhment which all the World has found ſo uſeful and profitable to ſuch as are in Neceſſity. We ought only to obſerve, that tho' this ſort of Intereſt is not ſo contrary to Juſtice as the other, yet it commonly is more oppoſite to Charity. The Need of the Borrower is ſuch very often, that he is obliged to borrow either without Intereſt, or content himſelf with a *Compenſative* Intereſt, which hath not Place ſo commonly in ſuch Loans as are made to them who borrow to make a *poſitive* Gain. To all that has been ſaid, we may join Chap. 5 and 6 of the 1ſt Book of Mr. Noodt's Treatiſe.

[1] See Mr. Noodt's *De Fœnore & Uſuris*, lib. 1. c. 6. p. 37, &c.

Money

Money is a [1] *barren Thing* [a], *of no uſe to human Life, as are Cloaths, Buildings, Cattle,* &c. *and therefore nothing ought to be demanded for the Uſe of it.* To which I anſwer, That tho' Money is ſo far barren, as not to produce its like; yet, after an eminent Price has been ſet upon it, by the Induſtry of Man it gains a Faculty, which naturally it had not, and becomes productive of thoſe Things which are both in natural and civil Reſpect fruitful. And therefore *Uſury* is not to be look'd upon as a natural, but as [2] a civil Increaſe. Of which however *Seneca* ſpeaks ſeverely enough: "I ſee, *ſays he*, "Deeds, and Bonds, and Writings, the Emblems "of Covetouſneſs, which deceive our vain Minds. "For what are *Uſury* and Accounts, but Names "unnaturally impoſed upon Things for the ſupport "of human Avarice? What are theſe Bills of "Contract, theſe Computations, theſe Prices ſet "upon Time, this cruel Intereſt upon Intereſt? "They are all Evils of our own making, and "depend upon ourſelves; they have nothing in "them of Solidity, that can be either ſeen, or held, "but are the empty Dreams of a covetous Mind." [b] *De Benef.* l. vii. c. 10. [3] *Ariſtotle* too is ſevere enough upon *Uſury*: "The Art of *Uſury*, *ſays he*, "is deſervedly odious, for it makes a Gain of Money itſelf, and not of that for the ſake of which "it was found out; for the Uſe of Money is to "carry on Traffick, but *Uſury* increaſes it, and is "therefore call'd Τόκος, for the Thing begotten is "like the Thing that begets; but in *Uſury* Money "is both the Thing begetting and begotten; and "therefore this ſort of Gain is unnatural." *Pol.* 1. 7. *towards the End.* Beſides, Money let out to Intereſt is not apply'd contrary to its proper Uſe; for he who borrows Money does it at leaſt for the ſake of Bartering. And Property itſelf was firſt ſettled with a Deſign, that every Man's Goods ſhould be immediately beneficial to himſelf; and yet it is not againſt Nature, to let out our Goods to another for Rent.

There is another Objection, which is ſomewhat nice: *In conſumable Commodities the Property cannot be diſtinguiſh'd from the Uſe, and therefore the Uſe can't be made over, but the Property muſt too,* and vice verſa. *For as the Subſtance of Corn, Wine, and Fleſh, periſhes in the Uſe of them; ſo the Money that I expend periſhes to me, as being remov'd out of my Eſtate. And therefore ſince the Uſe can't be diſtinguiſhed from the Thing, nothing ought to be demanded for the Uſe; it being enough, if the Thing be reſtored in kind.* To this I anſwer, that indeed the Uſe of a *conſumable Commodity* does not properly differ from its Subſtance [b c 4], but, yet it does not therefore follow, that the Power to make uſe of it upon an Obligation to return the ſame in Kind ſome Time after is not worth ſomething. Now 'tis a Condition in every *Loan*, that the Thing be not return'd till ſome Time after: But if I borrow Money for ſuch a certain Time, I may lay it out upon other fruitful Commodities, or make a Gain of it ſome other Way. And thus ſuppoſe I borrow Proviſions, or other Neceſſaries, my Gain conſiſts in this, that I am not neceſſitated to part with my Goods upon ill Terms to procure Bread: Or my Money, which muſt otherwiſe have been thus expended, may now be laid out to more Advantage.

[a] See *Mat.* xxv. 24. [b] *Vid.* lib. 7. t. 5. l. 1. and 2. *D. de Uſu. eor. quæ uſu conſumuntur.* [c] See Note 4. below.

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[1] Here the wicked and lazy Servant ſays to his Maſter, *I knew that thou wert an auſtere Man, who reapeſt where thou haſt not ſowed, and gathereſt where thou haſt not ſcattered.* But the Senſe is not, that it is Cruelty to take Uſe for Money lent, which is a Thing barren in itſelf; but it is a Proverbial Speech, which implies only, that ſome Men require more than others can do. See the Interpreters upon the Place. It may be better obſerved from the Parable, that it proves, that Lending at Intereſt is very innocent; for, if it were ſinful, we cannot think that JESUS CHRIST would have put into the Mouth of the Maſter in the Parable, who repreſents GOD himſelf, theſe following Words, *Thou wicked and lazy Servant, thou kneweſt that I reap where I had not ſown, and gather where I have not ſtrawed, you ought to have put my Money to the Bankers, that, at my Return, I might have received my own with Uſury,* ver. 26, 27. See further Mr. NOODT, lib. 1. c. 7, 8. *De fœn. & uſur.* where he confutes at large the Objections which our Author propounds here, and ſome others. The ſame Lawyer, alſo, examines in Chap 9. a Paſſage in *Seneca, De Benef.* lib. 7. c. 10. quoted, alſo, here, and proves it only meer Declamation.

[2] Some anſwer, That true it is, that the Debtor finds Means to improve the Money borrowed; but that's from his Induſtry only, and ſo conclude, he only ought to have the Profit. But (as Mr. PLACETTE obſerves, ch. 10.) his Induſtry is not the only Cauſe of the Profit made by the Money; for, tho' Money without Induſtry would bring no Profit, no more would Induſtry without Money; and ſo one Part of the Profit muſt be imputed to the Money, and another to Induſtry. This is, alſo, viſible in ſome Contracts of Letting: Land will bear nothing, if it be not tilled; Tools, let to an Artiſt, will do nothing, not only if they be not uſed, but, alſo, if there be not Skill to uſe them. Nevertheleſs, all this is no Hindrance but that the Rent may be paid for the Land, and Hire for the Tools: And why then may not Intereſt be paid for Money, as well as for other Things?

[3] ARISTOTLE's Greek is, Εὐλογώτατα μισεῖται ἡ Ὀβολοστατικὴ, διὰ τὸ ἀπ' αὐτὸ τὸ νομίσματος εἶναι τὴν κτῆσιν, καὶ ἐπ' ἐφ' ὅπερ ἐπορίσθη. Μεταβολῆς γὰρ ἐγένετο χάριν· ὁ δὲ τόκος αὐτὸ ποιεῖ πλέον. ὅθεν καὶ τοῦνομα τοῦθ' εἴληφεν· ὅμοια γὰρ τὰ τικτόμενα τοῖς γεννῶσιν αὐτά ἐστιν· ὁ δὲ τόκος γίνεται νόμισμα νομίσματος· ὥστε καὶ μάλιστα παρὰ φύσιν ἐστὶ χρηματισμῶν ὁ τόκος. De Republicâ *lib.* 1. *c.* 10. Mr. NOODT, *De Fœn. & Uſur.* lib. 1. c. 7. p. 43. hath obſerved that *Ariſtotle* may be confuted by *Ariſtotle*, who, in the Chapter immediately foregoing, ſays, "That all Things which we poſſeſs have a double Uſe, one proper "and natural, the other improper and foreign. As for Example, *ſays he*, Shoes are properly made to wear on the Feet, nevertheleſs we uſe them to get Money, or ſome other Thing in exchange for them." Ἑκάστου γὰρ κτήματος διττὴ ἡ χρῆσίς ἐστιν· ἀμφότεραι δὲ καθ' αὑτὸ μὲν ἀλλ' οὐχ' ὁμοίως καθ' αὑτό, ἀλλ' ἡ μὲν οἰκεία, ἡ δ' οὐκ οἰκεία τις πράγματος οἷον ὑποδήματος, ἥτε ὑπόδεσις, καὶ ἡ μεταβλητική· ἀμφότεραι γὰρ ὑποδήματος χρήσεις· Καὶ γὰρ ὁ ἀλλαττόμενος τῷ δεομένῳ ὑποδήματος, ἀντὶ νομίσματος· ἡ τροφῆς χρῆται τῷ ὑποδήματι, ἡ ὑπόδημα, ἀλλ' οὐ τὴν οἰκείαν χρῆσιν, οὐ γὰρ ἀλλαγῆς ἕνεκεν γέγονε· ὡσαύτως δὲ τέξεται ἔχει περὶ τἆλλα κτημάτων. chap. 9. princip.

[4] A Sum of Money (ſays Mr. LA PLACETTE) which is lent to a Man to be traded with, is not any more ſpent by that, than a like Sum which is put into the Hands of one who acts by Commiſſion, to be employed for the ſame End, or a like Sum truſted to a Partner, to act according to our Directions. All of them lay it out after the ſame Manner, and with the ſame Intentions. We confeſs that he who gives another a Commiſſion, and truſts a Partner, is ſtill Owner of the Money, and always in Poſſeſſion of an Equivalent. And why then may not the ſame Thing have Place with reſpect to the Creditor and Money lent? We lend not to the Man (ſays Mr. DE BEAUVAL very well, *Hiſt. de oper. Doct. Octob.* 1691. p. 66.) but to his Goods. We reckon upon the Ability to pay, and not upon the Induſtry and Fidelity of the Borrower. A Reflection, which MARTIAL puts into the Mouth of his Friend, *Lib.* 12. *Ep.* 25.

Quod mihi non credis veteri, Theleſine, ſodali
Credis colliculis, arboribuſque meis.

You truſt not me, altho' your antient Friend,
'Tis on my Lands and Trees that you depend.

And

And here we may obſerve by the Way, what *Ariſtotle* [a] relates of *Cypſelus*, *who, having devoted all his Goods to the Gods of* Corinth, *the firſt Year paid the tenth Part of them, and ſo for ten Years together*. But, in ſtrict Juſtice, this did not ſatisfy his Vow, unleſs, for the Relief of ſuch a raſh one, any favourable Interpretation may be allow'd. That Saying of *Cato* in *Cicero* [b], who thought Uſury as bad as Robbing and Murther, is to be underſtood only of Extortion, which reduces the poorer Sort to Extremities, and adminiſters to the Covetouſneſs of the Rich. *Our Anceſtors*, ſays the ſame *Cato* [c], *enacted in their Laws, that a Thief ſhould be condemn'd to pay double, but an Uſurer quadruple*. And yet he himſelf, if we may believe *Plutarch* [d], did craftily enough exerciſe that ſort of Uſury which we now call *Bottomry*. *Auguſtus* very juſtly cenſur'd ſome *Roman* Gentlemen, for taking up Money at low Intereſt, and letting the ſame out at high [e]. *The old* Romans *and* Greeks [f] *abhorr'd Uſury, as being burthenſome to the Poor, and the Foundation of Suits and Quarrels: The* Perſians, *as being not very far removed from Deceit and Lying*. And certainly 'tis unbecoming a Chriſtian for a ſmall Sum to accept of Intereſt from thoſe whom it is in a manner Charity to relieve [g]. The *Greeks* took an excellent Method to ſupport their Friends in Diſtreſs: For ſeveral entered into a Society, and had a common Cheſt, to which each contributed a certain Sum every Month; and out of this they lent Money without Intereſt, to any one of the Society who ſhould happen to be reduc'd to Neceſſity; upon Condition to refund it, if his Circumſtances ſhould ever happen to grow better [h] [i].

XI. In Confirmation of what has been ſaid for the Lawfulneſs of *Uſury*, it is obſervable, that thoſe who are againſt it, allow of ſome [1] Contracts, which in effect amount to the ſame Thing. Thus, ſuppoſe *Caius* is furniſh'd with Money enough to buy a Farm, which *Seius* has a mind to, but wants Money for the Purchaſe; *Caius*, at the Requeſt of *Seius*, buys the Farm, and lets it to *Seius*. No body can deny but that this Contract is lawful. But if *Caius* ſhould lend *Seius* the Money to buy it himſelf, and *Seius* ſhould pay ſo much for Intereſt as he muſt otherwiſe have paid for Rent, I don't ſee but that the Contract would be very juſt. Nay, this latter Contract is much more for the Advantage of *Seius* than the former, for here he purchaſes the Property of the Farm.

Again, Should any one put his Money into an honeſt Man's Hands, upon Condition to be admitted into an equal Share of the Gain which he ſhould make of it; no Man certainly would call this Contract unlawful. But in Equity 'tis the ſame Thing, if, inſtead of this uncertain Gain, he bargains for a certain Sum, which will never be the leſs lawful for being called by the Name of *Intereſt*.

The *Alcoran* forbids *Uſury*, and yet the *Moors* borrow Money to carry on Trade, and allow the *Creditor* half the Gain; but if the Principal happen to be loſt, the *Debtor* refunds that only; but if only part of the Principal periſh, the whole muſt be made up out of the Gain of the Remainder.

A *Mortgage*, whereby a Man receives the Produce of Land given in Pledge for the *Loan* of Money, is acknowledged to be lawful [k] [l]: But if no Pledge be given, why may not the *Creditor* receive ſomething [2] anſwerable to the Produce of it [m].

Grotius [n] rejects the Name of *Uſury*, but allows the Thing. *For*, ſays he, *there are ſome Things which look like* Uſury, *but are Pacts of another Nature: as the Amends that ought to be made a* Creditor *for the Loſs he is at by being out of his Money, and the regard that ought to be had to the Gain he might have made of it; ſtill Deductions being made for Uncertainties and Accidents, and the Pains he muſt have taken in the Management of it. Thus it is not properly* Uſury *to demand a Conſideration for the Charges he is at, who lends much Money, and provides it on purpoſe; and for the Danger of loſing the Principal where good Security is not given.* Now the Intereſt for Money lent, not to poor Man, but to one who makes a Gain of it, we demand upon this very Account, becauſe we are debarred from making that Gain of it, which otherwiſe we might; and becauſe it is worth ſome Conſideration to have, inſtead of our Money, only an Action againſt the *Creditor*; and certainly 'tis reaſonable we ſhould be admitted into Part of the Gain made of that Money, which we were not oblig'd to lend, either in Juſtice or Charity. What honeſt Man therefore will quarrel about Words? And who would not laugh at thoſe who pretend they don't take *Uſury* for their Money, but [3] only what they themſelves might have made of it? Beſides, this ſuperſtitious Nicety is not at all conſiſtent with the Decrees of the civil Law: for, according to them, the Uſury [4] is aſcertain'd and agreed upon beforehand: And the

[a] *Oeconom.* l. 2. c. 1. [b] *Off.* 2. *in fin.* [c] *De re ruſticâ, princip.* [d] Cato Major. [e] Suet in *Auguſt.* c. 39. [f] *Appian*, l. 1. *de Bello Civili*, p. 382. B. Edit. *H. Steph.* [g] *Vid.* Siracid. 29. 1, 2. &c. Pſal. xv. [h] That Contribution-Money was called ἔρανος. [i] *Vid.* Cicer. *de Offic.* lib. 2. *in fin.* See *Caſaubon*'s Comment. upon the 16th Chapter of *Theophraſtus*'s Characters. [k] *Add.* lib. 20. t. 2. l. 8. *D. in quibus cauſ. pignus tacite contrah.* [l] See hereafter, Chap. 10. §. 14. [m] Among the *Perſians Uſury* is forbidden, but *Mortgages* allowed even under the *Lex commiſſoria*, Olear. *Itin.* Perſ. *L.* 5. *c.* 36. [n] L. 2. c. 12. §. 21.

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[1] We may add to thoſe ſpoken of here a Contract between three Contractors, about which ſee Mr. PLACETTE's Treatiſe of *Intereſt*, chap. 14. See, alſo, Mr. NOODT, *De Fœn. & Uſur.* lib. 1. c. 12. of which the Title is, *Mores rigorem Juris Canonici circa Uſuras inflexiſſe ad æquitatem Juris Gentium, non omnino improbantibus ejus Juris interpretibus.*

[2] We ſhall treat of this, chap. 10. §. 14. following. *Cum debitor* (ſay the *Roman* Lawyers) *gratuitâ pecuniâ utatur, poteſt creditor de fructibus rei ſibi pigneratæ ad modum legitimum uſuras retinere.* Digeſt. lib. 20. tit 2. *In quibus cauſis*, &c. Leg. 8. See Mr. NOODT *de Uſuris & Fœn.* lib. 2. c. 9.

[3] *Id quod Intereſt.* And they underſtand by it, as the *Roman* Lawyers do, as well the Profit that was not made, as the Loſs that poſitively accrued. *Si commiſſa eſt ſtipulatio, ratam rem Dominum habiturum, in tantum competit, in quantum meâ interfuit*, i. e. *quantum mihi abeſt, quantumque lucrari potui.* Digeſt. lib. 46. tit. 8. *Ratam rem haberi*, &c. Leg. 13. See, alſo, *Code, lib.* 7. *tit.* 47. *De Sententiis, quæ pro eo quod intereſt, proferuntur*, and Mr. NOODT, *ubi ſupra*, lib. 1. c. 12. l. 2. c. 6.

[4] In Contracts of *rigorous Right*, the Engagements muſt be made exactly in the Forms. *Reſpondit* [*Africanus*] *pecuniæ quidem creditæ uſuras, niſi in ſtipulationem deductas, non deberi.* Digeſt. lib. 19. tit. 5. De præſcriptis verbis, Leg. 24. *Si pactum nudum de præſtandis uſuris interpoſitum ſit, nullius eſt momenti.* Paul. Sentent. lib. 2. tit. 14. A bare Agreement gives no Title to Intereſt in Juſtice, unleſs it be to Bankers, or Exchangers, to Communities, or ſuch as run Hazards with their Money and

the Damages allowed the Creditor, for what he might have made of his Money, are, among other Reaſons, demanded for Failure of Payment at the Time appointed, which ought to be ſtated according to the Loſs ſuſtained, be it was it will; but, becauſe it would be difficult to prove and adjuſt it exactly, it is therefore generally [1] reduced to regular Intereſt [a] [b].

Since therefore it is lawful to demand Damages for tardy Payment, or becauſe we loſe by not having our Money paid in at the Time appointed; why may we not bargain for ſomething certain beforehand, upon Conſideration that our Money is in another Man's Power, whereas we were not obliged for his Benefit to venture the Loſs, or to neglect the Gain that might be made of it [c]?

XII. Laſtly, It being evident that [2] Men could not be found who would lend as much Money *gratis*, as human Neceſſities and Commerce (as carried on now a-days amongſt moſt civilized Nations) required, ſeveral Shifts were found out and allowed of to evade the Decrees of the Canon Law againſt Uſury: Among which may be reckoned the [d] Purchaſe of a yearly Income [e]; where, for ſo much Money, I have ſuch an immoveable Thing made over to me for the Payment of it; out of which I receive a certain Rent for ever, or for ſuch a limited or unlimited Time, or for Life. And this Income may, upon Payment of the Principal, ſometimes be redeemed, ſometimes not. Nay, ſometimes if the Thing given for Security happens to be loſt, the Perſon of the Debtor is reſponſible for it. But that ſuch a Purchaſe as this differs only in Name and Shew from *Uſury*, no Man is ſo blind as not to ſee [f].

Nay, in Conſideration of the Uſefulneſs of moderate *Uſury*, the [3] *Popes* themſeves permitted, under a ſpecious Title, *Mountains*, as they call them,

[a] *Vid.* lib. xvii. §. 3. l. 22. t. 1. D. *de Uſuris.* [b] Concerning this, *Salmaſius de Uſuris*, and Mr. *Placette de l'Interet*, are worthy to be conſulted. [c] *Add. Baco. Serm. Fidel.* c. 39. [d] *Emptio Cenſus annui.* [e] See Notes 1, 2, below. [f] *Add.* Fran. Hotoman. *Obſ.* l. ii. c. 1. & Jo. Labard. *Hiſt. de Reb.* Gall. l. vi. p. 393.

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and lend in a Way ſomething like it, or to ſuch as lend Wheat or Barley. Neither can any Thing be required, when we ſay only that we lend upon Intereſt, without ſettling what the Debtor ſhall pay. Such an Agreement was only valid with Bankers, and *Juſtinian*, who gave them that Privilege, ordained that they ſhould be looked upon to lend at 8 *per Cent.* But, for a long Time before that Emperor, Money might be lent at 12 *per Cent* which was called, *Uſura Centeſima*, but not higher, except, 1. When it was lent at great Hazards; for then the Law preſcribed no Bounds, no more than in certain conditional Agreements. 2. In lending Proviſions; for a Law of *Conſtantine*, cited in the *Theodoſian* Code, allowed an Exaction of Three Buſhels of Corn, for Two lent. 3. When any one was fined a certain Sum by the Judges, and paid it not within two Months after the Sentence, he was obliged to pay Intereſt from that Time, at the Rate of 24 *per Cent.* if the Creditor ſummoned him to pay it when three Months were ended. But it was by the Force of the Law, and not from the Agreement of the Parties. As for honeſt Contracts, a ſimple Clauſe added upon the Spot empowers a Man to require Intereſt. See about this whole Matter Mr. NOODT, *lib. ii. c. 3, &c. lib. iii. c. 1, 2, 3, 4, 5.*

[1] The Words of the *Digeſts* are, *In ejuſmodi ſtipulationibus, quæ quanti res eſt, promiſſionem habent, commodius eſt certam ſummam comprehendere: quoniam plerumque difficilis probatio eſt, quanti cujuſque interſit, & ad exiguam ſummam deducitur.* Digeſt. lib. 46. tit. 5. De ſtipulat. prætoriis, Leg. 11.——When one owes a Thing in kind, as the Uſe of it is determined, ſo the Damage which ariſes from a Delay in ſuch and ſuch a Caſe may be fixed, and ſo it is not commonly neceſſary to limit the Value at a certain Rate, which may be a Rule in all Caſes. The Creditor, for want of Payment at his Time, may ſuffer a Loſs many Ways, which the Debtor cannot imagine, and as to him may ſeem only fortuitous; ſo that all which the Creditor can prove to be his Due upon Account of Delay, is only the Intereſt of the Sum in queſtion. Mr. NOODT, from whom this Remark is taken, *lib. ii. c.* 6, ſhews, alſo, *lib. iii. c.* 6. that, while the *Roman* Commonwealth ſtood, no Intereſt could be demanded in Juſtice, for the Debtor's Delay of Payment, unleſs ſomething were previouſly ſtipulated in the Contract. But, ſome Lawyers having introduced a Cuſtom chiefly in Matters of Companies, the Emperors enlarged it to all honeſt Contracts without Exception, as, alſo, to Legacies and Truſts. In Contracts of *rigorus* Right, there muſt be always an Agreement in Form, or nothing can be demanded, although a Proceſs be entered In fine, if we add to this excellent Work of Mr. NOODT's, ſo many Times quoted, the Treatiſes of the Learned SALMASIUS, entitled, *De Uſuris*, *De modo Uſurarum*, & *De Fœnore Trapezitico*, nothing more concerning the Hiſtory of Lending upon Uſury, or the Phraſe and Deciſions of the *Roman* Law about this Matter, can be deſired. See, alſo, J. VINCENT. GRAVINA's *Origines Jur. Civil* lib. ii. p. 333, &c. *Salmaſius*, in the laſt of the forementioned Treatiſes, defends the Magiſtrates of the United Provinces with regard to the *Lombard Loan*, of which our Author treats in the following Section, and which the Divines condemned ſo highly as to excommunicate thoſe concerned. The celebrated *Giſbert Voet*, and *John Cloppenburg*, were the principal Perſons who wrote againſt the *Lombards*. But *Samuel Deſmarais*, a Divine of equal Reputation, declared in their Favour, in an Epiſtolary Diſſertation, printed at *Leyden* in 1640, with the Notes of *Theodore Graſwinckel*. This Piece was wrote in Anſwer to a Treatiſe of *Marc. Zuerius Boxhornius*, Profeſſor of *Hiſtory* and *Belles Lettres*, who oppoſed *Salmaſius*. But in return *Martin Schoockius*, as great a Divine, publiſhed, in Defence of *Salmaſius*, and the *Lombards*, a Diſſertation *de Uſura Trapezitica*, which is the xxviiith of his *Exercitat. Variæ*, printed at *Utrecht* in 1663. It is by Miſtake that he is placed among the Writers againſt *Salmaſius*, in the *Biblioth. Jur. Select.* of M. *Struvius*, pag. 213. *Edit.* 5.

[2] Some, ſays Mr. LA PLACETTE, *ubi ſupra, chap.* 1, cannot live without Lending, and others have need of Borrowing. 1. If it were not allowed to take Intereſt, what would become of a great Number of Perſons whoſe Eſtate is all in Money? They would ſpend it in a few Years, and how then ſhould they ſubſiſt? It is to no purpoſe to ſay, they ought to learn ſome Art or Trade, and apply themſelves to Huſbandry or Commerce. This is quickly ſaid. But do we not really obſerve, that there are Labourers, Tradeſmen, and Merchants enough in the World? Are not Lands ſufficiently tilled throughout all *Europe*, unleſs it be in Places expoſed to the Ravages of War? And is it not plain, that there are Merchants and Tradeſmen more than enough, ſince many of theſe Profeſſions cannot get a Livelihood, and many of them that do, are forced to ſearch out new Inventions to excite and nouriſh Mens Vanity and Intemperance. 2. But (and this Conſideration renders Lending upon Intereſt more neceſſary) how many miſerable Men are there, who live only upon Borrowing at Intereſt? What would become of many Merchants, whoſe Trade depends entirely upon Funds of borrowed Money? How many Citizens and Labourers, who are preſſed from Time to Time with Want of an hundred Things, which they could not obtain any other Way? Could they find always Perſons ready to lend them what they want freely? This might be, perhaps, if all Men were charitable, but ſince there are ſo few truly ſuch, and, among thoſe that are, few are in a Condition to lend, whereas many more are in Neceſſity than can lend; it is plain that this Remedy has no Proportion to Mens Neceſſities: Nay, we may ſay, that what charitable Perſons can and ought to do freely, is not the hundreth, nay, not the thouſandth Part of what a great Number of Men are continually in want to borrow. So that it is of leſs Importance to Mankind that we ſhould be permitted ſometimes to lend upon Intereſt, than it is to confine that Permiſſion to certain Bounds, beyond which none may go. See, alſo, Mr. Mr. NOODT *De Fœn. & Uſur.* lib. i. c. 6. Experience heretofore convinced an Emperor of the Neceſſity of lending Money on Intereſt. *Baſil* the *Macedonian*, out of an inconſiderate Zeal, and ill-informed Piety, having abſolutely forbid it, *Leo* the Philoſopher, his Son, was obliged to aboliſh that Ordinance, and allow Lending at 4 *per Cent.* knowing, ſays he, that his Predeceſſor's Prohibition was prejudicial to the State, becauſe thoſe who had Money would not lend it to thoſe who needed it, ſo that that Law was above the Attainments of the human Nature. *Propter paupertatem res illa non in melius (quem tamen finem Legiſlator propoſuerat) ſed contra in pejus vertit. Qui enim ante uſurarum ſpe ad mutuandum pecuniam prompti fuerant, poſt latam legem, quod nihil lucri ex mutuo percipere poſſent, in eos qui pecuniis indigent, difficiles at que immites ſunt.——Propterea quod humana Natura ad illius* [legis] *ſublimitatem non perveniat, egregium illud præſcriptum abrogamus*, Novel 83.

[3] They were formally allowed by Pope *Martin* V. *Extravagant. commun. lib. iii. tit.* 1. *De Empt. & Vendit. c.* 1. and by Pope *Calixtus* III. *ibid. c.* 2. See JUSTINIAN's *Novels* 161. and Mr. NOODT's *Juſtinian*, *lib. i. c.* 12.

of

of Piety; that is, they did not allow either Pledge or Intereſt to be taken for three Crowns lent to a poor Man; but for larger Sums Pledges might be taken for Security, and every Month ſome ſmall Matter paid as Intereſt: And if the Pledge were not redeemed in a Year, it was to be ſold by *Auction*, and the Remainder, after Payment of the Debt, reſtored to the Owner. "*Alex. Severus* lent pub-
"lickly at 4 *per Cent.* but gave many poor People
"Money without *Intereſt* to buy Land, and was
"contented to be paid out of the Produce. *Vid.*
"*Lamprid.* Something of the ſame Nature (but
"that they part with nothing *gratis*, or without
"Security) is ſtill practiſed in *Lombardy*, ſo called
"becauſe formerly moſt of the Uſurers in *France*
"were *Lombards* and *Jews*, who afterwards were
"ſo odious as to be expelled the Kingdom." *Vid.* Hen. Steph. *Introduct. ad Apolog. pro* Herodoto, *l.* 1. *c.* 6. After much Debate, *Uſury* was allowed of in *Holland*, as a Thing beneficial to the State, and even thoſe who took it were permitted to enter into holy Orders.

How much the Laws againſt *Uſury* are evaded by [a] [1] *dry Exchange* [b] (as they call it) is well known among the Merchants. To which may be referred that ſort of Contract, which is called, in *Spaniſh*, *Mohatra* [c]. When a Man takes up Goods upon Truſt at a high Rate, and immediately ſells them again to his *Creditor* at a low one [2]. It is more tolerable when Goods are bought dear, by reaſon that a long Time is allowed for the Payment, and immediately ſold to a Third ſomething cheaper for ready Money: For hereby a Man may avoid the Neceſſity of taking up Money at unreaſonable Intereſt: or, in the mean Time, may make ſo much Gain, as to be well able to pay the Debt at the Time appointed. And this is common in *Muſcovy* [d].

It is requiſite indeed, that private Men ſhould be hindered by Law from exacting what Intereſt they pleaſe, and that it ſhould be fixed at ſuch a certain Rate. Yet a Man may fairly expect ſomething more when his Money is lent but for a ſhort Time [e f].

The *Egyptian* Law [g] did not permit the *Principal* to be more than doubled by *Uſury*, and allowed the *Debtor*'s Goods to be ſeized upon, but not his Perſon: Whatever they got by their Labour, or any other juſt Title, was looked upon as their Goods; but as for their Perſons they belonged only to the Publick, to be diſpoſed of in its Service, according as they were beſt qualified for the Duties of War, or Peace.

[a] *Cambium Siccum.* See the Fourth Sect. of this Chapter.
[b] Concerning this, ſee Mr. *La Placette*'s laſt Chapter of *Uſury*.
[c] *Vid.* Montaltii *Lit. provincial.* 8. & *ad eam* Wendrock. *not.* 3.
[d] *Olear.* Itin. *Perſ.* l. iii. c. 7.
[e] *Vid.* Leonis *Novel.* 84.
[f]
[g] *Diodor. Sic.* l. i. c. 79.

[1] This is, when Payment ought to be made in the very Place where the Sum had been told, ſo that it is really a true Interest. It is oppoſed to *real* Exchange, which is divided into *Minute* and *Local*; *Minute* conſiſts in the Change of Species, when, for Example, Silver is given for Gold, and Gold for Silver, for a ſmall Advantage. Exchange *Local* is, when one takes a certain Sum to return the like in another Place. See Mr. Placette about all this, in the laſt Chapter of his Treatiſe of *Intereſt*.

[2] The Reaſon of it is, and the Author ought to have mentioned it, that though the Intereſt ſeems exceſſive, yet it is a ſmall Matter to the Borrower, who uſually employs the Money to ſuch Uſes as produce a much more conſiderable Profit than he gives the Creditor for ſo ſmall a Time. Further, beſides, the Sums that are borrowed for a little Time, are often ſmall Sums, whoſe Intereſt, according to the common Rate, comes to nothing, and is not worth the Creditor's Trouble (See *Mr.* La Placette's Treatiſe, *c.* 22) it may happen, that, in that little Space, he may loſe the Opportunity of putting out his Money for a long Time, or make ſome conſiderable Advantage of it, for which he would receive no Manner of Recompence, if he received not greater Intereſt than he would receive of a Perſon who takes his Money for a longer Time. In the Concluſion the Author recites a Cuſtom of the Inhabitants of *Cnoſſus* in *Candia*, §. 4. above, to ſhew how they eluded the Giving of Uſury. At that Place ſuch as borrowed Money at Uſe, took it by Force, that, if they refuſed in earneſt to pay Uſe to the Creditor, he might have an Action of Aſſault and Battery, and cauſe them to be puniſhed ſeverely. Before we conclude this Matter, let me add one Word of what is called *Bottomry*, or Great Adventure, which conſiſts in Lending Money upon a Merchant's Ship, upon this Condition, that the Creditor loſeth his Money, in Caſe the Veſſel and Goods, upon which it is lent, be loſt. As the Creditor runs great Hazards, he requires more Intereſt than ordinary, proportionable to the Dangers he is expoſed to. The civil Law allows it, and there is nothing to oppoſe it in the Law of Nature, *Digeſt. lib. xxii. tit. 2. De nautico fœnore.* For the Danger to which the Lender is expoſed is capable of Valuation, and, conſequently, he may, on the one Hand, oppoſe himſelf to it by the Mediation of a certain Price, and, on the other, agree for the Price with them for whoſe Sake he runs the Hazard. In a Word, ſuch a Treaty hath nothing in it oppoſite to Juſtice, more than a Bargain of Aſſurance, of which we ſhall ſpeak in Chap. 9. §. 8. See Mr. Noodt *De Fœn. & Uſur.* lib. ii. c. 7.

CHAP. VIII.

Of Partnerſhip.

I. *How many Ways Partnerſhip may be begun.*
II. *Money and Labour are balanced ſeveral Ways.*
III. *Irregular Partnerſhip.*
IV. *A Partnerſhip in all Goods.*

I. PArtnerſhip is a Contract [1] by which two, or more, join together their Money, Goods, or Labour, upon Agreement, that the Gain or [2] Loſs ſhall be divided proportionably between

[1] *Grotius* believes it to be a *mixt* Contract; but ſee what is ſaid above, c. 2. §. 10. We muſt obſerve that a Partnerſhip is contracted ſometimes tacitly, when, for Example, a Thing being bought in common, it is not parted, but without explaining themſelves further they enjoy it equally, each taking his Share in the Profit that ariſes, and contributing his Part in the neceſſary Expences for its Maintenance: *Societatem coire, & RE, & Verbis, & per nuncium, poſſe nos, dubium non eſt,* Dig. lib. xvii. tit. 2. Pro Socio, Leg. 4. princ. See Mr. *Hertius*'s Diſcourſe, entitled, *De Societate facto contracta,* which is found in *Tom.* 3. of his *Comment. & Opuſcula.* Our Author quoted here the 83d Law of the ſame Title, probably to prove this Part of the Definition relating to the Proportion there ſhould be in Contracts of Partnerſhip, according to what every Man puts into the common Stock. But the Queſtion there is about Things common and general, which give riſe to the Partnerſhip. Beſides this Law contains many Subtilties about which the greateſt modern Lawyers pretend that the Antients were not well agreed. The Reader may conſult upon this Head Francis Hotoman, *Obſerv.* V. 14. Edmund Merillus, *Diſſert. Jur. ex libris* Manualium Jul. Pauli, cap. 8. & John de la Coste, on the *Inſtitutes*, Lib. ii. tit. 1. *De rer. diviſ.* §. 31.

[2] The *Digeſts* order, *Sicuti lucrum, ita damnum quoque commune eſſe oportet, quod non culpâ ſocii contigit.* But if the Loſs comes by

tween them [a]. And here, if every Man contributes equally, each muſt receive an equal Share in the Gain, or Loſs: but [1] if they contribute unequally, their Shares muſt be adjuſted according to the Laws of Geometrical Proportion [b]. And the ſame obtains, if two, or more, join [2] Labour; or one [3] Labour, and the other Money [c]; or each Party both Labour and Money [4].

II. Upon Breaking of Partnerſhip, if each Party contributed only Money, it is plain upon a Diviſion, each muſt receive according to his Contribution. But if both [5] Money and Labour was contributed, it muſt be conſider'd after what manner the Collation was made: For when Labour is contributed on one Side, and only the Uſe of Money on the other, he who contributed the Money does not admit the other to a Share in the Principal; but only to his Proportion of the Gain [6] that might be made of the Money and Labour joined together. And, in this Caſe, as he that contributed only Labour has no Title to any Part of the Money, when they break off Partnerſhip; ſo the other alone, as Owner, is concerned in the Riſque that the Money is expoſed to; and, in ſuch a Partnerſhip as this, not the Money itſelf, but the Riſque that it runs, and the Gain that may be probably expected from it, is compared with the Labour. And, therefore when the Gain is to be proportioned, we muſt not compare the Labour with the Principal (as if one having contributed Work to the Value of 100 *l.* and the other 1000 *l.* in Money, the former were to receive only a tenth Part of the Gain) but to the Riſque and Hazard that the Money is expoſed to, which if computed to be worth 100 *l.* each Party ſhall gain equally.

The beſt Way, in this Caſe, is to rate the Riſque of the Principal and the Hopes of the Gain, according to the Intereſt that is generally given for Money. Suppoſing then this Intereſt to be 6 *l. per Cent.* if one Party contributes Labour worth 60 *l.* and the other 1000 *l.* in Money, they ſhall ſhare equally of the Gain.

But ſometimes the Labour and Money are ſo interwoven together, as to give him who contributed only his Labour [7] a Share even in the Principal; the Labour of the one, and the Money of the other, being in a Manner united into one Maſs. As when one lays out his Money upon unwrought Commodities, and another ſpends his Labour in working them up, and managing them. Thus, if I give a Weaver 100 *l.* to buy Wool, and he makes Cloth of it, computing his Labour at 100 *l.* it is manifeſt, that here both of us have an equal Intereſt in the Cloth; and when it is ſold, the Money muſt be equally divided: Nor ought I to ſubtract the Money that I contributed at firſt, and then divide the Remainder with him [d].

III. Beſides, it is not unjuſt to enter into ſuch a Partnerſhip, as that one Party may have a Share in the Gain [8], without being in Danger of partaking of the Loſs [e]. But this is irregular and a mixt Contract of Partnerſhip and Inſuring; and here [9] an Equality will be obſerved, if the inſuring Party receives a greater

[a] *Vid.* lib. xvii. t. 2. l. 73. and l. 52. §. 3, 4. l. lx. §, 1. *D. pro Socio.* [b] In Partnerſhip, the more a Man contributes, the more does he receive. *Ariſt. Nic.* l. viii. c. 16. In the ſame Senſe ought that in the *Digeſts* to be explained, l. xxix. D. h. t. *If it be not mentioned what Share each Party contributed, they muſt be preſumed to be all equal. Si non fuerint partes ſocietati adjectæ, æquas eas eſſe conſtat.* But others think the Caſe here refers to a pure and ſimple Equality, as I have obſerved upon *Grotius*, lib. ii. cap. 12. §. 24. not. 4. Mr. *Noodt* has undertaken to refute their Reaſons in his *Commentary*, pag. 380, 381. I wiſh I could ſay there was no Difficulty here, but that would require too much Room, and this is not the Place for it. [c] *Vid. Inſtit.* l. iii. t. 26. *De ſocietate*, §. 2. [d] Compare *Grotius*, l. ii. c. 12. §. 24. [e] *Vid.* l. xxix. §. 1. D. h. t.

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by the Fault of one of the Parties, he is reſponſible for it, and ſo he muſt not expect a Recompence of the Loſs which came by his Negligence, in not doing what he was obliged to do to the Partnerſhip by the Contract: For ſo the *Digeſts* appoint, *Si ſocius quædam negligenter in ſocietate egiſſet, in pleriſque autem ſocietatem auxiſſet, non compenſatur compendium cum negligentiâ*, ibid. Leg. 26. See, alſo, *Leg.* 73 and about this whole Matter, M. DOMAT's Civil Laws in their natural Order, *Part I. lib. i. tit.* 8. As for Leg. 60. §. 1. which our Author quotes, it contains a Deciſion very harſh and unjuſt; for it requires, that a Partner who has been hurt by his Slave, whom he purſued, and who belonged to the Partners, ſhould be cured at his own Expence; becauſe it ſays, though he was engaged upon that Expence for the Partnerſhip, yet it was not done in the Partnerſhip: *Socius, cum reſiſteret communibus ſervis venalibus, ad fugam erumpentibus, vulneratus eſt. Impenſam, quam in curando ſe fecerit, non conſecuturum pro ſocio actione, Labeo ait, quia id non in ſocietatem, quamvis propter ſocietatem, impenſum ſit.* But was it not in the Buſineſs of the Partnerſhip that he was hurt? The contrary Opinion ought to prevail with Reaſon; for there is another Law under the ſame Title, where it is ſaid, That if a Partner going a Journey about the Buſineſs of the Partnerſhip, falls among Thieves, who takes away his Baggage, or Money, or hurt his Slaves, he ſhall be indemnified at the common Charge: *Quidam ſagariam negotiationem coierunt: alter ex his ad merces comparandas profectus, in latrones incidit, ſuamque pecuniam perdidit: ſervi ejus vulnerati ſunt, reſque proprias perdidit: Dicit Julianus, damnum eſt commune, ideoque actione pro ſocio damni partem dimidiam agnoſcere debere, tam pecuniæ, quam rerum cæterarum, quas ſecum non tuliſſet ſocius, niſi ad merces communi nomine comparandas proficiſceretur.* Leg. 52. §. 4. The Law here mentioned, which is the Lawyer *Pomponius*'s, is corrected by the following one of *Ulpian*; *Secundum Julianum tamen, & quod medicis pro ſe datum eſt, recipere poteſt. Quod verum eſt.* ibid. Leg. 61.

[1] *Ariſtotle*'s *Greek* is, Καθάπερ ἐν χρημάτων κοινωνίᾳ πλείω λαμβάνουσιν οἱ συμβαλλόμενοι πλείω, &c. Ariſt. Eth. Nicom. lib. viii. cap. 16.

[2] The Words of the *Digeſts* are, *Duo ſocietatem coierunt, ut Grammaticam docerent, & quod ex eo artificio quæſtus feciſſent commune eorum eſſet.* Digeſt. ubi ſupr. Leg. 71.

[3] The Words of the *Inſtitutes* are, *Num & ita coiri poſſe ſocietatem non dubitamus, ut alter pecuniam conferat, alter non conferat, & tamen lucrum inter eos commune ſit; quia ſæpe opera alicujus pro pecuniâ valet.* Inſtit. lib. iii. tit. 26. De Societat. §. 2. See *Digeſt. ubi ſupr. Leg.* 29.

[4] As when two Merchants are Partners, and are both concerned in the ſame Buſineſs. *See* Leg. 52. §. 4. *quoted Note ult.* pag. 520.

[5] What the Author ſays of Money muſt be underſtood of Effects, Goods, and every Thing that is different from Labour, and whatever may be reckoned to be the Stock of the Partners.

[6] Not more than he who lets Land to be tilled, makes the Labourer a Joint-Proprietor of the Lands, though he lets him Part of the Fruits; or he who commits a Flock to a Shepherd, on Condition that he ſhall have a Share in the Wool, Milk, and other Profits, muſt take Part with him when the Partnerſhip is ended: *Si in coeundâ ſocietate ——— artem operamve pollicitus eſt alter, veluti quum pecus in commune paſcendum, aut agrum politori* (M. *Bynkerſhoeck* reads it, *Olitori.* Obſerv. 3. 9.) *domus in commune quærendis fructibus, nimirum ibi etiam culpa præſtanda eſt.* Digeſt. lib. xvii. tit. 2. Pro ſocio. Leg. 52. §. 2.

[7] This takes Place in other Things as well as Money, as when one allows Ground for a Building, on Condition that he who builds on it, ſhall have a Moiety; or, when one truſts a Flock to be fed, or a Slave to be fed or taught, on Condition that, if it be ſold at the End of ſome Years, the Money ſhall be divided among the two Partners. *Sed ſi puerum docendum, vel pecus paſcendum tibi dedero, vel puerum nutriendum, ita ut, ſi poſt certos annos veniſſet, pretium inter nos communicaretur, abhorrere hæc ab areâ ——— ergo ſi quis areæ dominum non tranſtulerit, ſed paſſus ſit te ſic ædificare, ut communicaretur vel ipſa, vel pretium, erit ſocietas.* Digeſt. lib. xix. tit. 5.

[8] The Words of the *Digeſts* are, *Contra Quinti Mucii ſententiam obtinuit, ut illud quoque conſtiterit, poſſe convenire, ut quis lucri partem ferat, de damno non teneatur.* Yet it muſt be underſtood, that in ſeveral Matters of Partnerſhip, if there be Gain on the one Side, and Loſs on the other, nothing muſt be called Gain, but what remains when Loſſes are deducted. *Quod tamen ita intelligi oportet, ut ſi in aliâ re lucrum, in alia damnum illatum ſit; compenſatione factâ, ſolum quod ſupereſt, intelligatur lucro eſſe.* Inſtit. ubi ſupra, §. 2. See *Dig. lib. xvii. tit.* 2. *Leg.* 29. §. 1. And, touching the Opinion *Quintus Mucius Scevola*, which was rejected, conſult *Francis Baudoin, De Juriſ. Muciana*, pag. 254, & *ſeqq. Muret* upon the Paragraph, of the Inſtitutions cited, and *Anthony Favre, Rational.* T. v. pag. 152.

[9] So the *Digeſts* ſpeak, *Quod ita demum valebit ——— ſi tanti ſit opera, quanti damnum eſt. Plerumque enim tanta eſt induſtria ſocii, ut plus ſocietati conferat, quam pecunia: Item ſi ſolus naviget, ſi ſolus peregrinetur, pericula ſubeat ſolus.* Digeſt. ibid. But all that is

 ſaid

ter Gain than the other, in Proportion to the Riſque he runs in bearing the other harmleſs. But [for one to partake [1] of the Loſs and not of the Gain, is repugnant to the very Nature of Partnerſhip; for no Body enters into ſuch a Contract, but upon the Proſpect of ſome Advantage [a].

IV. Sometimes People enter into Partnerſhip [2] for all they are worth [b]; in which Caſe each Party, according to his Condition and the Laws of good Huſbandry, may take from the common Stock, as much as is neceſſary for the handſome Maintenance of him [3] and his [c]. But ſince few Mens Circumſtances will induce them to [4] continue long in ſuch a Partnerſhip as this [d], it would be convenient to agree at firſt, what Share of the Gain each ſhall pretend to at Breaking off. Where *Grotius* [e] obſerves, that no regard ought to be had to what has been actually gained by this or that Man's Contributions, but to what might probably have been expected from them: For therefore it is that many join their Stocks together, that each may be admitted into a Share of what is gained by the Goods of others.

Now though no Man ought to have his Liberty ſo far intrenched upon, as to be confined to a Partnerſhip longer than he deſires; yet, ſince a great [5] Degree of Fidelity is required among Partners, he ought not to break off unſeaſonably, and to the Detriment of others [f]. Upon this Point *Cicero* [g] diſcourſes very ſeriouſly [6]: *It is accounted*, ſays he, *a baſe Thing to deceive a Partner in ever ſo ſmall a Matter, and with Reaſon: For he who enters into Partnerſhip does it in hopes of gaining to himſelf an Aſſiſtant: To whom therefore can he fly for Succour, who ſuffers from him on whom he depended? Thoſe Crimes are of the blackeſt Hue, againſt which there is the leaſt guard: We may defend ourſelves againſt the Malice of others, but to an intimate Friend we lie open. For how can we provide againſt a Partner, whom we cannot ſo much as ſuſpect without violating our Duty? Well therefore did our Anceſtors judge him, who deceived his Friend in this Point, fit to be reckoned amongſt the worſt of Villains* [7].

[a] *Vid.* l. xxix. §. 1. D. h. t. [b] *Ibid.* §. 5. [c] *Ibid.* leg. 73. [d] *Vid.* l. lxx. D. h. t. [e] *D. L.*
[f] *Vid.* l. lxv. §. 5, *&c.* D. h. t. [g] *Pro Sext. Roſcio*, c. 40. *Add.* Quintil. *Decl.* 320.

ſaid here of the Equality of the Portions of Gain, ought to be underſtood with this Reſtriction, *If it be not otherwiſe agreed*; for then the Conſent of Parties ſupplies the Inequality of what each hath contributed of his own, and ſo there is a Mixture of Donation and Partnerſhip. *Et quidem ſi nihil de partibus lucri & damni nominatim convenerit, æquales ſcilicet partes & in lucro & in damno ſpectantur. Quod ſi expreſſæ fuerint partes, hæ ſervari debent. Nec enim unquam dubium fuit, quin valeat conventio, ſi duo inter ſe pacti ſunt, ut ad unum duæ partes pertineant, ad alium tertia.* Inſtit. ut ſupra, §. 2.

1 The *Digeſts* ſo order, *Ariſto refert Caſſium reſpondiſſe, ſocietatem talem coiri non poſſe, ut alter lucrum tantum, alter damnum ſentiret, & hanc ſocietatem Leoninam ſolitum appellare——Iniquiſſimam enim genus ſocietatis eſt, ex quâ quis damnum, non etiam lucrum ſpectet.* Digeſt. ut ſupra, §. 2. See *Phædrus*, lib. i. fab. v.

2 So the *Digeſts* ſpeak, *Societates contrahuntur ſive univerſorum bonorum, ſive negotiationis alicujus, ſive vectigalis, ſive etiam rei unius.* Digeſt. ibid. Leg. 5.

3 *Si ſocietatem* (ſays the *Digeſts*) *univerſarum fortunarum ita coierint, ut quicquid erogaretur vel quæreretur, communis lucri atque impendii eſſet, ea quoque quæ in honorem alterius liberorum erogata ſunt, utrinque imputanda.* Ibid. Leg. 73.

4 *Nulla ſocietatis in æternum coitio eſt.* ibid. Leg. 70. The *Roman* Lawyers ſay, that though a Partnerſhip hath been contracted with this expreſs Clauſe, *Never to ſeparate*; yet the very Nature of Society, which is the Source of Diviſions and Diſorders, if it be entirely free, requires, that it be permitted to each of the Partners to renounce it, when it ſeems good to him, provided he do it not at an unſeaſonable Time, and to the Prejudice of others. *Si convenerit inter ſocios, ne intra certum tempus communis res divideretur, non videtur conveniſſe, nè ſocietate abeatur. Quid tamen ſi hoc convenit, ne abeatur, an valeat? Eleganter* POMPONIUS *ſcripſit fruſtra hoc convenire. Nam etſi non convenit, ſi tamen intempeſtive renuncietur ſocietati, eſſe pro ſocio actionem. Sed etſi convenit, nè intra certum tempus ſocietate abeatur, & ante tempus renuncietur, poteſt rationem habere renunciatio, nec tenebitur pro ſocio, qui ideo renunciavit, quia conditio quædam, quâ ſocietas erat coita, ei non præſtatur; aut quid ſi ita injurioſus & damnoſus ſocius ſit, ut non expediat eum pati?* Digeſt. ibid. Leg. 14. See the laſt Note of this Section. *Quas diſcordias materia communionis ſolet excitare.* Lib. xxxi. De Legatis & fidei commiſſis, 2. Leg. 77. §. 20. Add here what Mr. *Noodt* obſerves in his Commentary, pag. 383. And M. HEINECCIUS, *Antiq. Roman.* INSTIT. lib. iii. tit. 23, &c. §. 18.

5 So the *Digeſts* order, *Venit autem in hoc judicium pro ſocio bona fides.* Ibid. Leg. 52. §. 1. *Cum in ſocietatis contractibus fides exuberat, &c.* Cod. lib. iv. tit. 37. Pro Socio, Leg. 3. *Socius ſocio utrum eo nomine tantum teneatur pro ſocio actione, ſi quid dolo commiſerit, an culpâ, i. e. deſidiâ, atque negligentia nomine: quæſitum eſt. Prævaluit culpæ nomine teneri eum, ſed culpa non ad exactiſſimam, ſed talem diligentiam, qualem rebus ſuis adhibere ſolet.* Inſtitut. ubi ſupra, §. 9. *Tribonian* joins here two Laws of the *Digeſts*, *Pro Socio*, which do not agree together, *viz.* Leg. 52. §. 2, & 58. See Mr. THOMASIUS's Diſcourſe, *De Culparum Præſtatione in contractibus*, c. 1. §. 24. VINNIUS alſo owns, that the Reconciling of this Section with *Leg.* 33. of that Title of the *Digeſts*, *Depoſiti vel contra*, is a *Gordian* Knot. Mr. *Noodt* in his Commentary, pag. 384, has endeavoured to reconcile theſe two Opinions, ſo as to make them both tend to eſtabliſh this, That a Partner is only anſwerable for his Diſhoneſty, or what the Lawyers call, *a ſlight Fault*. As for me, I have laid down a general Rule about all Contracts, wherein we have the Affairs or Goods of another in our Hands after any manner, that we ſhould act as we would do for ourſelves, and our own Intereſt, in Things that moſt nearly concern us. And this Practice is the more juſt, becauſe the *Roman* Lawyers ſay, that Partnerſhip is a kind of Brotherhood. *Societas jus quoddam fraternitatis in ſe habet.* Digeſt. Pro Socio. Leg. 63. princ. But as for ſuch Miſchances as no human Foreſight can prevent, neither of the Partners is reſponſible for them. *Damna, quæ in prudentibus* (it ſhould be read, as Mr. *Bynkerſhoek* obſerves, *Obſ.* 10. 10. imprudentibus) *accidunt, hoc eſt, damna fatalia, ſocii non cogentur præſtare,* Ib. Leg. 52. §. 3. Thus it does not appear neceſſary to correct the Text, as divers Authors do. See JOSEPH AVERANI, *Interpret. Jur.* lib. ii. cap. 26.

6 TULLY's Words are, *In rebus minoribus ſocium fallere turpiſſimum eſt——neque injuriâ; propterea quod auxilium ſibi ſe putat adjunxiſſe, qui cum altero rem communicavit. Ad cujus igitur fidem confugiet, cum per ejus fidem lædituv, cui ſe commiſerit? Atque ea ſunt animadvertenda peccata maxime, quæ difficillime præcaventur. Tecti eſſe ad alienos poſſumus, intimi multa apertiora videant neceſſe eſt; ſocium vero cavere quî poſſumus? Quem etiamſi metuimus, jus officii lædimus. Recte igitur majores eum, qui ſocium fefelliſſet, in virorum bonorum numero non putarunt haberi oportere.* Orat. pro Roſcio Amerino. Chap. 40.

7 The *Digeſts* thus ſpeak, *Labeo——ſcribit, ſi renunciaverit ſocietati unus ex ſociis eo tempore, quo interfuit ſocii non dirimi ſocietatem, committere eum in pro ſocio actione. Nam ſi emimus mancipia, initâ ſocietate, deinde renuncies mihi eo tempore, quo vendere mancipia non expedit, hoc caſu, quia deteriorem cauſam meam facis, teneri te pro ſocio judicio.* Digeſt. ubi ſupra. Leg. 65. §. 5. of which ſee the reſt.

CHAP.

CHAP. IX.

Of Contracts *depending on* Chance.

I. *Bargains mixt with Chance.*
II. *They are us'd, as well in Peace:*
III. *As in War.*
IV. *Contracts in laying Wagers.*
V. *Contracts in Play.*
VI. *Of Rafflings.*
VII. *Of Lotteries.*
VIII. *Of Insurance.*

I. WE come now to such Contracts as depend upon Chance; where the Parties refer themselves to some [1] uncertain Event, and give Security to stand to, and to be determin'd by it. Some of these indeed have no relation to Price, yet most of them have; and therefore we think fit to discourse of them all together in this Place.

II. These Contracts may be either publick or private. The publick are such as concern either War, or Peace. In Peace some Nations determine themselves by Lot [2] in choosing Judges, in assigning Provinces, and in disposing of Offices, when the Competitors, both in respect of their Right and their Abilities, are equal; for otherwise should one have a better Right, his Right might be prejudic'd: Or should another have greater Abilities, the Commonwealth might suffer by it. For as *Isocrates* in *Areopag* says, *pag.* 248. Ed. min. *Paris. Fortune governs the Lot.* [3] And *Callimachus* in *Hymn. Jovis*, v. 63, 64. *For a Thing that each has an equal Title to, 'tis convenient to cast Lots.* And *Philostr.* in vita *Apol. Tyan.* l. 3. c. 9. *Fortune has no Prudence, so that the worst may be chosen by Lot.* In such Cases the Parties are suppos'd to enter into Compact to acquiesce without Complaint in the Determination of the Lot, as having voluntarily submitted to it. And when a Superior uses Lots about that which he might enjoin of his own Authority, he is suppos'd to depart from his Right, and of his own accord to submit himself to their Determination.

The Design of these Lots is not to search into the hidden [4] Decrees of God, unless where he positively commands it [a], but to put an End to Strifes and Differences [b], or that a Person, who otherwise has Power to decide them by his own Authority, may avoid the *Odium* of the Party against whom he decrees; and leave no room for a Complaint of the Injustice of the Sentence.

But in a Controversy where the Party cast is punishable by Law, 'tis absurd to apply any Thing of Chance; for no Man ought to be punish'd, unless Matter of Fact be evidently prov'd against him: Whereas a Lot, let it fall out how it will, can never be able to undo what has been done, *& vice versa:* and therefore Lots are not capable of adjusting such Matters. But when a Multitude are in fault, and 'tis inconvenient for them all to suffer, then indeed the Criminals may be punished by Lot.

In private Affairs Lots are of great Use, either in dividing [5] of Inheritances, or conferring upon one a Benefit, or a [6] Burthen which cannot be divided, and yet which many have an equal Title to [c].

III. Nor are such Pacts as these of less use in War, either when the Issue of the whole is thrown upon the Event of a Battle between both Armies [7], or between two or more chosen out of each side [d]: Or when some dangerous and honourable Post is to be assigned, for which many are equally qualified [e].

Indeed almost all solemn Wars, at least after all Terms of Peace have been rejected, seem to suppose an Agreement between both Parties, that which Side soever shall have the good Fortune to be Conqueror shall have Right to give Laws to the vanquish'd [8]: and this is the Reason that no Party can ever urge as an Exception against any Treaty, that he was forced to it by Fear; for he who takes the Field, when the Controversy may be decided otherwise, is suppos'd to commit the Decision of it to the Sword, and therefore cannot complain, whatever Condition the Chance of it imposes upon him. And this too is the Reason, that when they come to Articles, the Parties engaged are presumed to stand upon equal Grounds as to the Justice of their Cause, and whatever Mischief has been done on either side is forgiven, as suppos'd to have been done by Consent.

Such a Covenant as this do they enter into, who decide their Quarrel by a Duel, and therefore he that

[a] See *Prov.* xvi. 33. [b] See *Prov.* xviii. 18. [c] Add *Numb.* xxiv. 13. *Jos.* xiv. 2. *Psal.* xvi. 6. [d] Vid. *Grot.* L. 2. c. 23. §. 10. & l. 3. c. 20. §. 42. [e] Vid. *Hom. Il. n.* v. 171.

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[1] Because of the Uncertainty, he to whom the Event is not favourable, cannot reasonably complain of the Loss that has befallen him, and to which he submitted beforehand. 'Tis the general Law of these Sorts of Contracts, to which we may refer *Bargains of uncertain Hopes*, of which our Author treats, *Chap.* 5. §. 6. above. Mr. HERTIUS, also, places, in the Number of Contracts which are hazardous, the *Rents of Grounds lost*, and *Partnership in all Goods*, both in present Possession, and future. See the *Paræmiæ Jur. German.* of the same Author, *lib.* 1. *c.* 43. But Chance does not here constitute the Essence of a Contract. It regards only the Degrees of Advantage, which may arise to one or other of the Partners, according to certain Circumstances, accidental or unforeseen.

[2] Concerning all these Matters, see *Hadrian Junius*'s *Animadvers. lib.* 2. *c.* 5. of the enlarged Edition in 1708. *Tho. Gataker* speaks more exactly and fully in his *English* Book, *Of the Nature and Use of divers Kinds of Lots*, c. 4 & 5. where he treats of this Matter, both historically, and as a judicious Moralist.

[3] *Callimachus*'s *Greek* is, Ἐπ' ἰσαίῃ γὰρ ἔοικε Πάλαῖς. See, also, *Justin.* L. 1. c. 10. n. 2. & L. 18. c. 3. n. 9, 10. See above, Lib. ii. Cap. iii. §. 5.

[4] They who believe that GOD is the Author of the Events which happen by Lot, alledge the *Text* in the *Proverbs*, xvi. 33. *The Lot is cast in the Lap*, (*i. e.* in the Hollow of some Vessel) *but the whole Disposal is in the Lord.* But according to the Language of Scripture, no more is meant by it, than that Men are not Masters of the Effects wrought by Lot, as Mr. LE CLERC proves very well in judicious Reflexions upon Mens good or bad Fortune in the Business of Lotteries, *&c.* c. 8. which the Reader would do well to peruse thoroughly. See also *Gataker*, of the Nature and Use of Lots, *c.* 8. §. 3, &c. And Mr. LA PLACETTE's Treatise *Of hazardous Games*, c. 2. To which we may add what I have prov'd more at length (since the second Edition of this Work) in my *Discourse on the Nature of Lots*, publish'd in 1714.

[5] See *Ps.* xvi. 6. For the other two Passages quoted by the Author, relate only to one of those rare and extraordinary Occasions, as God presides over the Lot; for every Tribe had his Portion of Land exactly in the Places where *Jacob* (*Gen.* xlix.) and *Moses* (*Deut.* xxxiii.) had foretold that they should be.

[6] See what I have said about *Hostages*. Lib. viii. Cap. 11. §. 6.

[7] See *lib* 8. *c.* 8. §. 5. following.

[8] See *lib.* 8. *c.* 8. §. 1. following.

kills, is not obliged to make Satisfaction to the other's [1] Wife and Children for the Loſs; for they join Battle by Agreement upon this Condition, to kill or to be kill'd. But ſince theſe Duels, when undertaken by private Men of their own Heads, directly thwart the End of civil Judicature, they are deſervedly reſtrained by ſevere Penalties. Formerly indeed they were allowed of (but abſurdly, and againſt the End of civil Government) either to clear a Man of a Crime objected, or to demonſtrate his Right in Conteſt [a]. Thus heretofore in *Germany* a Point of Law, whether the Uncle, or the Son of the elder Brother deceas'd, ſhould take place in the Father's Inheritance; was abſurdly left to the Determination of a Duel [b].

IV. Among theſe Contracts of Chance we may reckon [c] [2] Wagers [d], when two differ about ſome future or paſt Event, if not known to either Party, each laying down a certain Pledge, to be his, who ſhall happen to be in the Right. Theſe Wagers ſeem to be reciprocal Promiſes, and conditional Bargains; which are ſo far mixt with Chance, as not having their Event depending on the Parties. The Riddle indeed propos'd by *Sampſon* to his Friends, ſeems rather a Sport, than a Wager [e], it being a Conteſt of Wit, whether he could propoſe a Thing with greater Obſcurity than they ſhould anſwer with *Acumen*. But his Friends play'd foul, in ſolving his Riddle, not by their own Ingenuity, but by the Treachery of his Wife. Though perhaps it was not ſo very fair in him, to make a private Fact, and not ſome common Matter the Subject of his Riddle. For 'tis almoſt impoſſible to find out ſuch particular private Facts as thoſe, by gueſſing [3].

V. All Sorts of Plays [4], where the Parties contend for ſomething, carry with them a Covenant depending more or leſs upon Chance. And the more they admit of Ingenuity, Sleight, Cunning, or Strength, the leſs are they concern'd in Chance; and indeed are only ſo far dubious, as the Degree of Strength or Dexterity is not as yet manifeſt, or, as ſome unforeſeen Accident may interpoſe [f], or as human Wit and Induſtry does not exert itſelf ſo much at ſome Times, as it does at others. Many are independent both upon *Chance* and *Skill*, as *Gaming* at *Cards*, and the like; others are entirely at the Mercy of *Chance*, as *Dice* [5]. None of which are naturally unlawful; for it is by Conſent that we engage in them, and each Party ventures equally, and plays for Things that are in his own Diſpoſal. But becauſe the Publick is concern'd that no Man ſhould miſpend his Eſtate; and a Man may be eaſily undone by Gaming, [6]; if he plays high [g]; at leaſt [7] much Time, which is a precious Thing, may be conſumed in it [h]; and becauſe it is frequently the Occaſion of Quarrels [i], and ſeveral other [8] Inconveniences; it is therefore the Buſineſs of the Government to conſider, how far *Gaming* ſhould be permitted, and how high [k]; but generally

[a] Vid. *Jur. Canon.* tit. 10. *De purgatione vulgari, & paſſim.* Cod. *Legum antiquarum* Lindenbrogii, *ejuſq; Gloſſarium in Vocabulo* Campio & Duellum. [b] *Apud* Sigibertum Gemblacenſem *ad ann.* 942. As, alſo, an hiſtorical Diſſertation of the late M. *Laſhage* on *Duels, and the Orders of Knighthood*, publiſh'd in 1720. [c] *Sponſores.* [d] See Note 2. below. [e] *Judg.* xiv 12, *&c.* [f] *Vid.* Virg. *Æn.* l. 5. v. 328. [g] *Juv.* §. 1. v. 88, *&c.* [h] *Ovid.* Triſt. l. 2. v. 483, 484. [i] The *Alcoran*, together with Wine, forbids thoſe Plays which depend on Chance, becauſe they adminiſter frequent Occaſions of Quarrelling, *Cap. de Menſa.* [k] *Vid.* L. 11. t. 5. D. *de aleatoribus, & ibi juris Romani interpretes*, Phocius, Nomocan. *Tit.* 15. *c.* 29. Selden *de Jure, N. & G. ſec. Heb.* l. 6. c. 11.

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[1] See *lib.* 3. *c.* 1. §. 7. above. The Deciſion of our Author does not appear juſt, and we muſt diſtinguiſh (as I ſee is done by Mr. *Roſler*, Profeſſor at *Tubingen*, in a Diſſertation *De Reſtitutione Damni in Vitâ & Corpore dati*, §. 6) what is the Subject of *Reſtitution*. He who is defeated in a Duel, cannot exact, from the other Combatant, either the Charges of his Cure, nor a Satisfaction for the Time he loſes during his Incapacity to Labour, nor for any other Things of the ſame Nature. But to this it may be anſwer'd, That as he was not Maſter of his own Life, and could not diſpenſe with the Obligation he was under to maintain his Family and Children; ſo his pretended Renunciation is null, and theſe Perſons whom he is bound to ſupport, have a Right to be indemnified by him who is the Cauſe of his Death.

[2] They are allowed by the civil Law, provided they are not uſed about Things unlawful and diſhoneſt, as if we wager on the Side of Players who play at a forbidden Game: *In quibus rebus, ex Lege* Litia [& publica] & Cornelia, *etiam Sponſionem facere licet. Sed ex aliis, ubi pro virtute certamen non ſit, non licet.* Digeſt. Lib. xi. Tit. 5. *De Aleatorib.* Leg. iii. and he who wins them by fair Play, may recover them by Law. *Si quis ſponſionis causâ annulos acceperit, nec reddit victori, præſcriptis verbis actio in eum competit——Plane ſi inhoneſta cauſa ſponſionis fuit, ſui annuli duntaxat repetitio eſt.* Digeſt. lib. 19. tit. 5. De Præſcriptis verbis, Leg. 17. §. 5. See, alſo, *lib.* 11. *tit.* 5. *De Aleatoribus*, Leg. 3. Moreover, as Mr. Titius on *Lauterbach* obſerves, *Obſerv.* 294. when one lays a Wager about a Thing already done, the Wager is no leſs good, tho' one of the Contractors knows the Truth of it certainly. Indeed, whoever reſolves willingly to lay a Wager with any one without knowing whether he is ſure of what he maintains, or not, he muſt be thought to run the Hazard to engage a Perſon on the ſure ſide, and, conſequently, if it ſo happens, muſt blame himſelf. And with great Reaſon he muſt do it, when one of the Wagerers declares that he is perfectly well informed of the Matter in Debate, and tells the other ſo, that he may not engage in ſo raſh a Wager. It is another Thing, when, before the Wager is laid about an unknown Fact or Accident, one asks the other whether he knows any Thing of it; for in this Caſe, if he ſeems to be ignorant of what he knows, merely to draw in the other to lay a Wager, he is guilty of Deceit, and ſo the Wager is void. See my Treatiſe of Gaming, *lib.* 2. *c.* 2. §. 16. where this Queſtion is fully handled.

[3] See Mr. Le Clerc on *Judg.* xiv. 12, *&c.*

[4] I have ſearch'd this Matter to the Bottom in my Treatiſe of Gaming, Printed in 1709.

[5] See Mr. Placette's Treatiſe of *Hazardous Games, c.* 6. who cannot be ſuppoſed to be inclined to looſe Opinions. A learned *Engliſh* Divine a long Time ago confuted thoſe of his own Profeſſion, who abſolutely condemned all hazardous Games, as in themſelves evil and contrary to Chriſtianity. It was Mr. *Gataker*, in his forementioned Book of *Lots*, Chap. 6, 7, 8. and he has, alſo, in Chap. 9, laid down ſuch Conditions as he thinks Gaming may be allowed on. This Book I ſaw not till my *Treatiſe of Gaming* was printed, otherwiſe I ſhould have made uſe of ſo conſiderable an Authority. But I have had Occaſion to defend my Principles in two Pieces, wherein I anſwer M. *de Tremblai*, who had attack'd me upon this Subject. They were inſerted in the *Journal de Scavans.* (The firſt, in *Auguſt* 1712, the other in *December* 1713) I think it needleſs to ſay any more, tho' the celebrated M. *Buddeus*, as a Divine, has diſapprov'd my Reaſons (in his *Theolog. Moralis.* pag. 540.) which he pretends to confute in a few Words. As he has done no more than repeat what is commonly ſaid, and which I have already anſwer'd, I muſt leave the Judgment of the Affair to the Unprejudic'd.

[6] Juvenal's Words are, ——*Alea quando*
Hos animos! Neque enim nunc loculis comitantibus itur.
Ad caſum tabulæ, poſitâ ſed luditur arcâ.

[7] Ovid's Words are theſe:
Quique alii luſus (neque enim nunc perſequar omnes)
Perdere rem charam, tempora noſtra ſolent.

[8] Nothing is more delicate or true than the following Verſes of Mad. *Deſhoulieres*, which, tho' every where known, yet it may not be unpleaſant to read them here:

Les plaiſirs ſont amers d'abord qu'on en abuſe:
Il eſt bon de jouer un peu;
Mais il faut ſeulement que le jeu nous amuſe.
Un jouer, d'un commun aveu,
N'a rien d'humain que l'apparence;
Et, d'ailleurs, il n'eſt pas ſi facile qu'on en penſe
D'être fort honnête homme, & de jouer gros jeu.
Le déſir de gagner, qui nuit & jouer occupe.
Eſt un dangereux éguillon.
Souvent, quoique l'Eſprit, quoique le Cœur ſoit bon,
On commence par être duppe,
On finit par être fripon.

See alſo the Sixth *ſerious and comical Amuſement.* Pag. 92. *& ſeqq.* Amſter.

ſpeaking,

ſpeaking, thoſe *Plays* ſeem moſt allowable, that admit leaſt *Chance*, and moſt Ingenuity, and *vice verſa*. Now in all ſorts of *Gaming* 'tis a ſtanding Rule, that no foul Play be made uſe of, [1] *For they who run in a Race are ſuppos'd to contend by Swiftneſs, not by Tricks; to endeavour at the Victory by Speed, not by laying on of Hands, or the tripping up the Heels of their Adverſaries* [a].

VI. Of the ſeveral ſorts of *Gaming* that which we call [2] [b] *Raffling* is, when many contribute towards the Purchaſe of a Thing, and then leave it to Chance which one ſhall have the whole. In this there are two ſorts of Contracts; for, in reſpect of him who expoſes his Goods, it is Selling; in reſpect of them to whom they are expos'd, it is Caſting Lots for them. For, by Agreement, he whom Fortune favours is to have the whole, and the reſt are to be at the Loſs of what they contributed. The Rule here is, that the whole of the Money contributed ſhould equal, and not exceed the Value of the Commodity: And that every one of the Contributors ſhould have an equal Chance for it, in Proportion to their Contributions.

VII. Another ſort is, when a certain Number of Tickets, [3] *Benefits* and *Blanks*, are caſt into a Glaſs, and ſeveral, at certain Rates, buy the Liberty of drawing them with this Condition, that he who draws a *Benefit* ſhall receive the Value inſcribed upon it.

This ſomething reſembles our [c] *Lotteries*, and comes neareſt to that Sort of Contract, which we call the *Purchaſe of Hope*, tho' there be Hazard enough with it. The Rule here is, That the Price of all the Tickets ſhould not much exceed the Value of the *Benefits*; I ſay, *not much*, for Charges are to be conſider'd, and the beſt *Benefits* may happen to be drawn firſt, and if ſo, People won't be ſo forward to venture upon the remaining Tickets.

Such *Lotteries* as theſe are ſometimes ſet up to collect Money for publick Buildings, or for the Relief of the Poor; in which Caſe, the Price of all the Tickets together is generally much larger than the Value of the Benefits: which Overplus is, in the Nature of Alms and Charity, given after a free and chearful manner [d].

But, in fine, for an Equality in Gaming, it is not only requiſite that the Venture on each Side ſhould be equal, but alſo, that the Danger of loſing, and the Probability of winning ſhould bear Proportion to the Thing contended for; *v. g.* in a Game that depends upon Skill or Ingenuity, if one Man is twice as ſkilful as the other, it is fit he ſhould lay down a double Stake. So if ten lay down each of them a Guinea for him who throws higheſt, it may ſeem unreaſonable that he who ventures but one Guinea ſhould gain nine; but then we muſt conſider, that it is nine times more probable that he loſes, than he wins. Upon which Ground ſome [e] [4] think it a fooliſh thing to be afraid of Thunder, for of 2,000000 Men perhaps not one may periſh by it; and therefore not only the Greatneſs of the Evil, but the Probability of its not happening ought to be conſider'd.

VIII. To theſe Contracts that of Inſuring bears ſome Affinity; when for a certain Sum, a Man takes upon him the Riſque that Goods are to run in Tranſportation from *Place to Place*, chiefly by Sea; which, if they happen to be loſt, the *Inſurer* is bound to make good. This Contract is null, if either the *Inſurer* knows for certain that the Goods be already ſafe, or the *Merchant* that they be loſt. For the Matter of this Contract is ſuppos'd to be at a Loſs conſidered as uncertain. Whereas, if the *Inſurer* is certain that the Goods are arriv'd ſafe, he runs no Riſque; and if the *Owner* knows that they are loſt, he cannot demand another to run the Riſque of them; for what is not in Being cannot be liable to Riſque. As for the Price of ſuch *Inſuring*, it is to be ſtated by the common Rate, or by the Agreement of the Parties. Thus much is certain, that the more or greater the Dangers are, which the Commodity is expos'd to, the greater Rate may be demanded for *Inſuring* it; as if the Seas be infeſted by Enemies and Pirates, more may be demanded, than if only the Uncertainty of Tempeſts were apprehended. And in reſpect of them too, more in Winter than in Summer [f]. This Contract I have mention'd here, becauſe in reſpect of the *Inſurer* it chiefly depends on Chance. There is mention made in *Livy* [g] of an *Inſuring* which coſt nothing, for they who bought up Cloth and Corn to be tranſported to *Spain*, demanded, *That what was on Board ſhould be* inſur'd *by the Publick from the Danger of the Enemy and the Seas*; but what cheats were committed by this means we may read in the ſame Author [h] [i].

[a] *Ambr.* Off. 3. c. 4. Which is taken from the Saying of *Chryſippus* in *Cic.* Off. 3. c. 10. [b] *Lotoria.* [c] *Olla Fortunæ.* [d] *Add.* Martin. Delrio *Diſquiſit. Magic.* l. 4. c. 4. [e] This may be ſeen more at large in Mr. Bouhour's *Art of Thinking*, Part. 4. Chap. 16. and the laſt, whence our Author has taken moſt of this Section. [f] *Add.* Loccenius *de Jure Maritimo*, l. 2. c. 5. [g] L. 23. c. 49. [h] L. 25. c. 3. [i] See Mr. *La Placette*'s Treatiſe of *Reſtitution*, B. 4. c. 15. where he treats of Inſuring.

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[1] CICERO's Words are. *Scitè Chryſippus, ut multa: Qui ſtadium, inquit, currit, eniti & contendere debet, quam maxime poſſit, ut vincat; ſupplantare eum quicum certet, aut manu depellere, nullo modo debet.*

[2] The Author ſays *Lotaria*, which I expreſs'd in my firſt Edition by *Lottery*; but it may be better rendered *Raffling*.

[3] This I conceive is meant by *Olla Fortunæ* in our Author, tho' it cannot be exactly rendered in every Language, moſt Countries having ſome Terms proper to them. But whatever Difference there be in the Terms, the Thing itſelf is eaſily underſtood. This kind of Game was brought from *Italy* into *Thrace*, by the Name of *Blanque*, which is deriv'd from the *Italian Bianca* (White) becauſe the white Billets or Balls were more in Number than the Black. It has ſince gotten the Name of *Lottery*. See LAURENT BOUCHEL *Biblioth. du Droit Francois*, Tom I. pag. 481. *Edit. Paris* 1615. MENAGE *Diction. Etymolog.* and M. DE LA MARE. Treatiſe *de Police*. Tome I. pag. 427. Edit. Amſt. 1729. See my Treatiſe of Gaming, *lib. 2. c. 2. §. 11.* where I oppoſe the Author of the *Art of Thinking*, who condemns Lotteries in general, as Arts of Cheating.

[4] This is all taken out of the *Art of Thinking*, Part 4. Chap. 16. tho' our Author quotes it not.

CHAP.

CHAP. X.

Of accessory Bargains.

I. *Accessory Contracts of two Sorts.*
II. *Variety of additional Bargains.*
III. *An additional Bargain, if it's lewd, is void.*
IV. *Sometimes it disorders Business.*
V. *Being presently added, is valid, if other Things agree.*
VI. *Being added after some Time, in the Negative, is liable to an Exception.*
VII. *Being affirmative, how far 'tis good.*
VIII. *Of Trusting.*
IX. *A Surety cannot be engaged for more than the Debtor.*
X. *But he may be more strictly bound.*
XI. *What Advantages the Law allows a Surety.*
XII. *Of Bails.*
XIII. *The Use of Pawns.*
XIV. *A Pawn is either fruitful, or barren.*
XV. *Whether a Pawn may be gained by Use.*
XVI. *What is the Difference between a Mortgage and a Pawn.*

I. HAving done with principal Contracts that subsist by themselves, I come now to those that are only accessory, and have no Existence, but as they are added to others. These may be divided into two Sorts; for some are apply'd in order to add, or take away something from the principal Contract, and these the *Civilians* call *additional Pacts*: others are added only as a Confirmation and Security to Contracts already compleated.

II. The *Roman* Lawyers [a] distinguish between such *additional Pacts* as are added before, or immediately upon the entire Completion of the principal Contract, so as, in a manner, to be Part of it; and such as are added some Time after: Then they examine whether the Contracts, to which they are added, be such as admit of Equity [1], or such as are tied up to the Rigour of the Law; and lastly, whether they affect the Essentials of the Contracts, or such Things as naturally flow from them, or such only as are accidental to them. Whereof the first are so necessary [2], as that no Contract can be without them; the second generally proceed from the Contract [3], altho' they be not expressed; yet so as they may be varied by the Parties without affecting the Essence of it; the last have no Dependence at all upon the Essence of the Contract [4], but owe their Being purely to the Pleasure of the Parties. Moreover, they think it ought to be considered, whether these Pacts be added to increase, or to lessen the Obligation [5].

III. Concerning all which we may form these following Conclusions: *I. A Pact so affecting the Essence of a Contract, as to make it unlawful, or against good Manners, is null.* For we have proved above, that [6] no such Covenant can stand good. Thus if a Bride should add a Clause to her Contract of Marriage, by which she might be allowed the Use of other Men; or, if a Steward should add it as a Condition, that he should be permitted to imbezil his Master's Goods, they would neither be valid. So it would be absurd for a Man to make a Bargain, and, at the same Time, to protest that he is forc'd or frightened into it; or, for a Man in any Contract whatsoever, to confess that he does not design [7] to deal honestly [b].

IV. *II. When the Pact so affects the Essence of the Contract, as utterly to change the Form of it, Regard must be had to the Intent of the Contractors.* For if they designed the Contract, according to the Import of the Words in which it is express'd, 'tis plain that the Pact which is repugnant to it must be null; for they cannot be suppos'd to will Things, which are inconsistent and destructive of each other. Thus it would be ridiculous, if a Man should pretend to buy, and yet add such a Condition, as would make it impossible for him to receive the Commodity, and the other the Money; or, if he should so let a House, as to make over the Property of it to the Tenant; or to enter into Partnership, so as to have neither the Gain nor the Loss in common.

But if the Parties did really intend the Change, and mistook only in the Wording of it, or for some certain Reasons chose to speak improperly, provided it be not against the Laws, it will stand good, and not be quash'd for the Impropriety of a Term [8 c].

V. *III. Pacts which are added immediately upon the Completion*

[a] *Add. D.* lib. 2. t. 14. *de Pactis*, L. 7. §. 5. [b] *Vid. D.* lib. 16. t. 3. *Depos. vel contra*, L. 1. §. 7. & §. 35. [c] *Vid. D.* lib. 18. t. 1. *de contrab. empt.* &c. L. 80. §. 3. lib. 19. t. 5. *De præscript. verb.* &c. L. 4. & 6. & lib. 17. tit. 2. *pro Socio*, L. 5. l. 2.

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[1] See above, Chap. 2. §. 2. 8.

[2] Such is the Consent of Parties, without which no Contract can be made. The Chusing of Goods and Settling the Price are particularly essential to a Bargain of Sale.

[3] 'Tis a natural Quality of all Contracts, that each of the Contractors is answerable for what he is faulty in: Yet it may be agreed, that he shall not be responsible at all, or that he shall be answerable more or less for any Thing elsewhere done, by virtue of the Nature of a Contract. See §. 5. following. Our Author had here in view, as elsewhere, the *Syntagma Jur. Civ.* of *Struvius*, *Exercit.* 6. §. 23. *& seqq.* where he founds this Denomination of the *Natural Qualities* of a Contract upon the following Laws: *Quod si nihil convenit, tunc ea præstabuntur, quæ* NATURALITER *in sunt hujus judicii potestate.* Dig. Lib. xix. Tit. i. De Art. *empti. & vend.* Leg. xi. §. 1. *Et potest Mandatum ea pacto etiam* NATURAM SUAM *excedere.* Lib. eod. Tit. 20. *De præscript. verb.* Leg. 5. §. 4. They call *these*, also, the *Aids or Supports* of the Contract, (*adminicula*) and oppose them to the *Substance* or *Essence* of the Contract (as in Leg. lxxii. *De contrab. Emptione*, Lib. xviii. Tit. i.) which is nevertheless sometimes call'd the *Nature* of the Contract: *Et si post emptionem ex intervallo aliquid extra* NATURAM *contractûs conveniat*, &c. Lib. ii. Tit. 14. *De pactis*, Leg. vii. §. 9. They agree to give some Security, or to leave some Pledge in Hand, *&c.* See §. 5. following.

[4] As when a Buyer stipulates, that, in case of Recovery, the Seller shall forfeit four Times the Price of the Goods, or when

[5] See §. 6, 7. following, and *Cujacius*'s Observations 14, 28. *Francisc. Hotoman's Quæst. illustres* 36, 37. This Matter is much perplexed by the Interpreters, by reason of the subtle Distinctions which the antient Lawyers have confounded the Law with, and the Obscurity dispersed through the Fragments which we have of their Writings. See what Mr. THOMASIUS says in his Discourse, *De usu practico accuratæ distinct. inter empt. cum pacto de retrovend. & contractum pignor.* Chap. 11. §. 10. Mr. *Noodt* has however clear'd up this Matter as much as possible, in his Treatise *De Pactis & Transact.* Cap. xi. *& seqq.* He has judiciously follow'd this Rule, of giving a strict Attention to the Ideas which the antient Lawyers had, and to the Customs establish'd thereupon; rather than to the invariable Maxims of Reason and natural Equity. *Sequi nos oportet*, dit il, *non quo Æquitas & mera Ratio, sed quo Veterum usus & auctoritas ducit.* Cap. xix.

[6] See what I have said Note 3. pag. 298.

[7] This is decided by the *Roman* Lawyers. *Illud non probabis, dolum non esse præstandum, si convenerit: Nam hæc Conventio contra bonam fidem, contraque bonos mores est: & ideo nec sequenda est.* Digest. lib. 16. tit. 3. Depositi, vel contra, Leg. 1. §. 7. See also §. 35. and *lib.* 50. *tit.* 17. *De regulis Juris, Leg.* 23. See Mr. *Noodt*'s Treatise just cited. Cap. 19.

[8] This must be supposed in a dubious Case, says Mr. HERTIUS here, who quotes this Maxim about it: *Contractus non tam ex verbis quam*

Completion of the Contract, whether they concern the Eſſentials of it, or thoſe Things which naturally flow from it, or thoſe which are purely accidental to it, are valid, if they be not repugnant to Law. For ſince both Parties are here ſuppos'd to have Power to diſpoſe of theſe Things, they muſt be oblig'd to what [1] they conſent to; thus, although it be [2] natural in buying and ſelling, that the Buyer be put in Poſſeſſion of the Commodity, yet the Parties by an additional Pact may order it otherwiſe [a].

Thus the Obligation to make good a Defect may be augmented or diminiſhed, beſide what the Nature of the Contract would otherwiſe admit of; and the ſame obtains in [3] *conſenſual Contracts* [4], if between the Completion and the Execution of them a Pact be added; for this is the ſame Thing as if the Parties proceeded upon a new Contract.

The Purchaſe of an Annuity ſeems to be ſuch a ſort of borrowing, as may be referred hither. For I receive Money upon Condition to pay ſuch a certain Man ſo much Intereſt as long as he lives, provided, that after his Death the Principal be my own; whereas otherwiſe the Nature of a Loan requires, that the Principal be returned to the Creditor, or his Heirs.

VI. *IV. A Pact added to a Contract ſome time after its Completion, if it be negative and deſigned to take from the Obligation, and ſo made in Favour of the Debtor or Defendant, is valid* [5]. Thus ſome time after a Debt has been contracted, the Creditor and Debtor enter into Covenant concerning the putting off the Payment, the Changing the Place of it, the Species of Money, the forgiving the Intereſt, *&c.*

VII. *V. By the Law of Nature, as far as bare Pact is capable of Action, a Pact added to a Contract ſome time after its Completion, although it increaſes the Obligation, and ſo turns in Favour of the Creditor or Plaintiff, may be valid.* For the Reaſon why the *Roman* Law denies it(*viz.* becauſe a bare affirmative Pact does not bear an Action) is out of the Verge of the Law of Nature [b]. Thus ſuppoſe I had bought a Commodity, which by the Bargain is to be delivered by ſuch a Day, if afterwards we covenant to have it delivered ſooner, there is no Reaſon but that I ſhould receive the Benefit of it. Or, ſuppoſe I let you my Houſe for two Years, and we afterwards by Conſent limit the Time to one, at the End of the Year you ought to quit Poſſeſſion; but then I cannot demand the Rent that would be due for the other. And thus in Loan of Money, I do not ſee why the Time of Payment may not be anticipated as well as put off by [6] an additional Compact [c]; nay, although no Allowance be made to the Debtor for this [7] Anticipation, yet he has no Injury done him, if he voluntarily ſubmits to it. But it is manifeſt, that his Obligation ought not be increaſed againſt his Will, and therefore naturally as much as is added to him by this ſubſequent Pact, ought to be taken off ſomewhere elſe. Thus, if the Creditor will have me pay him at another Place, than that which we agreed upon, I, on the other Hand, can fairly demand an Agreement of ſo much as it is my Intereſt to pay it in the former. But it is againſt the Nature of bartering and chargeable Contracts, that any Pact *ſhould* be added to increaſe the Obligation ſo much on one ſide, as to make an Inequality; as if the Buyer and Seller ſhould agree upon ſuch a Price, being the true Value of the Commodity; and yet afterwards ſhould covenant, that the Buyer ſhould pay more than the Commodity is worth. Unleſs this be a mixt Contract of buying and giving, I cannot ſee how the additional Price can be demanded [d].

VIII. Hither I think may be referred what we call a [e] Truſt, [8] when we make over to another the Property of a Thing upon Condition to have it reſtored again; which I mention among the Addional Pacts, rather than the principal Contracts, becauſe it is always [9] added upon the Delivery of the Thing. And this ſeems to be called a [10] Truſt; becauſe, whereas otherwiſe, when the Property of a Thing is made over to to another, he may diſpoſe of it as he pleaſes, and either keep it himſelf for ever, or part with it to another; by this additional Pact we ſeem to truſt to his Honour and Honeſty, that he will not uſe his Property otherwiſe than according to Agreement, and will be willing to part with it again upon Demand. And therefore the ſolemn Form of this Contract a-

[a] *Vid. D.* lib. xix. t. i. *De act. empt. & vendit.* L. 11. §. 18. [b] In the Laws before-cited. [c] *Vid.* lib. xiii. t. 5; l. 3. §. 2. D. *de conſtit. pecun.* [d] Compare *Arn. Vinnii tract. de pactis*, c. 9. *&c.* [e] *Fiducia.*

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quam animo contrahentium æſtimantur, as if it was found in the *Digeſts, lib.* 19. *tit.* 2. *locati, conducti, Leg.* 15. §. 4. but there is nothing like it, neither in that Law, nor two others, which the ſame Author points at afterward, *Digeſt. lib.* 16. *tit.* 3. *Depoſiti, &c. Leg.* 24, 26. where we only find ſome Examples, which may have a Reference in ſome manner to this Subject. See upon the Laſt Mr. *Noodt, de pactis*, Cap. xix. where he explains them according to the Notions of the antient Lawyers. With regard to the firſt, I have already given my Sentiments in my Notes upon *Grotius*, Lib. ii. Cap. xvi. §. 5. Note 3.

[1] So the *Digeſts* ſpeak, *Contractus enim legem ex conventione accipiunt.* Digeſt. Depoſiti, *&c.* Leg. 1. §. 6. *Vid.* Leg. 24, 26. §. 1. Lib. ii. tit. 14. De Pactis, Leg. 7. §. 5. Lib. xviii. tit. 1. De contrahendâ empt. *&c.* Leg. 7. §. 1. Leg. 79. & Inſt. Lib. iii. tit. 26. De Societate, §. 1, 2. As for the reſt, I ſhall not examine the Laws, quoted by our Author, on the Subject of *additional Agreements*, made to the *principal Contract*; nor is here any Neceſſity of entering into the Subtilties of the *Roman* Law. Mr. *Noodt*'s Treatiſe, ſo often cited, will fully ſatisfy the Reader who is curious on this Head.

[2] We may here ſet down a Sale with a Clauſe of Commiſſion. *Addictio in diem*, and a Clauſe for leaving a Bargain, and one of taking Goods upon Trial, *i. e.* on Condition, if they do not agree, the Seller ſhall take them again. See above, *Chap.* 5. §. 2. and 4. As, alſo, that Sort of Contract, by which one lends a certain Sum on a loſt Fund, *i. e.* that he who hath received it on that Condition, ſhall pay Intereſt, either to ourſelves, during Life, or to another Perſon, as long as he lives; but after the Death of the Perſon nominated, then the Principal is his to whom it was lent: Whereas commonly, ſuch is the Nature of a Loan, that the Sum borrowed may be called in by him who lent it, or his Heirs, which laſt the Author mentions.

[3] See *Chap.* 2. §. 6. above.

[4] The Words of the *Digeſts* are, *Ut conſtet in emptione, cæteriſque bonæ fidei judiciis, re nondum ſecutâ poſſe abiri ab emptione. Si igitur in totum poteſt, cur non & pars ejus pactione mutari poteſt?———ut quodammodo quaſi renovatus contractus videatur.*

[5] See, above, chap. 2. §. 3. Vid. D. lib. ii. t. 14. *De pactis*, L. 7. §. 5. lib. xviii. t. 1. *De contrab. empt.* L. 72.

[6] This is called in one Word *Conſtitutum*, or *Pecunia conſtituta.*

[7] It has it in Effect, as appears by theſe two Laws, of which our Author quotes the Firſt; and by this we may obſerve what little Connexion there is between the Principles and the Determination of the *Roman* Law. *Si is, qui & Jure Civili & Prætorio debebat, in diem ſit obligatus, an conſtituendo teneatur? Et Labeo ait teneri* [*conſtitutum*]———*adjicit, vel propter has potiſſimum pecunias, quæ nondum peti poſſunt, conſtituta inducta: quam ſententiam non invitus probarem, habet enim utilitatem, ut ex die obligatus, conſtituendo ſe eadem die ſoluturum teneatur. Sed & ſi citeriore die conſtituat ſe ſoluturum, ſimiliter tenetur.* Digeſt. ubi ſupra, Leg. 3. §. 2. Leg. 4. It was neceſſary the Authority of the *Prætor* ſhould give this Agreement a Force which it would not otherwiſe have had, for it is one of thoſe legal Conventions ſpoken of lib. v. cap. 2. §. 2. And it muſt be owned would reſtore Things to the Principles of natural Equity: *Hoc Edicto Prætor favet naturali æquitati———quoniam grave eſt fidem fallere.* Leg. 1. *princip.* ibid. But when the Term of Payment is prolonged, it furniſhes the Debtor with a valid Exception in all ſimple Agreements, according to the general Rule which the *Prætor* had already eſtabliſhed.

[8] It is the Definition that BOETIUS gives in his Commentary upon *Cicero*'s Topicks, cap. 10. *Fiduciam accipere dicitur, is cui res aliqua mancipatur, ita ut eam aliquando mancipanti remancipet.* "As for Example, ſaith he, If in a Conjuncture, when we fear that we ſhall "be ſtript of our Goods, ſome potent Friend buys an Eſtate of us, promiſing that he will ſell it to us again at the ſame Price, as ſoon as "the Danger is over." *Veluti ſi quis tempus dubium timens, amico potentiori fundum mancipet, ut ei, cum tempus,* &c.

[9] Or, rather, becauſe it ſuppoſes an Alienation fully made by the principal Contract, of which it is an acceſſory Clauſe: for commonly it is made before-hand, though it does not begin to have Force till the principal Contract is made and executed.

[10] See J. MESNARD upon *Tully*'s Oration *pro Q. Roſcio Comœdo*, Chap. 6. in *Tom.* 1. of *Grævius*'s Edition, and *J. Vincent. Gravin. Orig. Jur. Civil.* lib. ii. p. 448, 449.

among

mong the *Romans* ran, [1] *As honeſt Men ought to deal together, without Deceit.* And becauſe the Truſt was ſo very extraordinary, the Breach of it was therefore branded with a particular Infamy by the *Roman* Laws. " [2] There are Three private Concerns, upon " the honeſt Diſcharge of which a Man's Reputation, " and almoſt his Life depends, A Truſt, Guardian- " ſhip, and Partnerſhip, *Cic.* pro *Roſcio*, *c.* 6. If a " Guardian ought be faithful, if a Partner, if one " entruſted with a Commiſſion, if one that has receiv- " ed a Truſt, *Id. Topicis.*

" He who by means of his Truſt has defrauded " any one, is condemned immediately, *Id. pro* Cæ- " cinna, *c.* 3, But in what Matters the *Romans* in- " terpoſed this Truſt, you may meet with every " where amongſt their Lawyers." [3] *De Fiduciario Patre*, *Vid.* Caium, *Inſtit.* 1, 6. " A Truſt was " contracted in Childrens ſucceeding to their Father's " Goods." *Vid.* lib. iii. t. 2. §. *ult.* Inſt. *de legit. agnat. ſucceſſ.* L. *ult.* lib. viii. 49. c. *de emanc. liber. de fiduciaria. poſſeſſione. Vid.* Budæum *ad* l. 2. lib. i. t. 2. *D. orig. juris*, Greg. Tholoſan. *Syntag. juris* l. xxiii. c. 5. §. 2. *Vid.* Inſt. l. 1. t. 19. *De tutela fiduciaria. Vid.* Bachov. *ad* d. t. *Inſtit. De fiducia circa pignus contracta. Vid.* Iſid. *Etymol.* l. v. c. 25. Cujac. *ad* Pauli *recept. ſent.* l. ii. t. 13. *Sic & in fidei commiſſis inſtar fiduciæ intercedit. Vid. princ.* l. ii. t. 23. Inſt. *de fidei commiſſ. & ibi* Bachov. *&c.* We have an Example of this ſort of Truſt in *Livy*. L. xxxii. c. 38. " So *Alboinus* delivered up *Pannonia* to his " Friends the *Hunns*, upon Condition, that if the " *Longobards* ſhould ever have occaſion to return, " they ſhould reſtore it back. *Vid.* Paul Warnefried. " *de geſtis* Longobard.¶ *L.* ii. *C.* 7. *Narbazanes* (in " *Curtius*. l. v. c. 9.) adviſes *Darius* to make over " his Kingdom to *Beſſus* for a Time, ſo as to receive " it back again when Things ſhould be ſettled. *Her-* " *cules* having ſubdued *Sparta*, placed *Tyndarus* the " Father of the *Dioſcuri* in the Throne, which being " his by Conqueſt, he entruſted with him, upon Con- " dition that he would reſtore it ſafe and ſound to " *Hercules*'s Sons. *Diod. Sic.* l. iv. t. 33. *Boetius* " (in *Topic.* Cicer. *ubi ſupr.*) begins a Caſe with, *If* " *a Man fearing the Badneſs of the Times ſhould make* " *over in Truſt a Farm to a powerful Friend, to return* " *it when Times ſhould mend.*" Philip, *when he ſaw that he muſt fight, raiſes Forces in all Parts, and, being ſolicitous for the City of* Argos, *thought it beſt to put it into the Hands of* Nabis *King of* Lacedemon *in Truſt, to be reſtored again, if he returned with Succeſs: but if not, to be* [4] *kept for himſelf.*

Among the *Turks*, if a Man ſwears to put away his Wife, although he immediately repents of it, he is yet obliged to ſtand to his Oath; but, in order to recover her again, he enters into a Truſt with his Friend, and gets him to marry her, and immediately after to part with her. For, after a Divorce, unleſs the Woman be married again, ſhe cannot return to her firſt Huſband [a].

But ſuch a Truſt as evades the Force of the Law, ought not to be contracted; as if I ſhould give a Man, who is free from Taxes, my Eſtate in Truſt, in order to cheat Tax-gatherers.

IX. As for ſuch Pacts as are added by way of Confirmation and Security to Contracts already compleated, the moſt uſual is that by which one Man gets another to be bound for him, ſo as to be reſponſible, in Caſe he ſhould fail. This perſonal Security is required in theſe three Caſes:

Firſt, Between Man and Man for the Performance of ſomething valuable, which is called *Suretiſhip*. *Secondly*, In criminal Affairs, which is commonly called [5] *Bail*. *Thirdly*, [6] In publick Concerns, where Security is given by [7] Hoſtages.

For the right Underſtanding the Nature of Suretiſhip, we muſt look back to the laſt Section of the ſecond Chapter of this Book, to which we add, that, being bound for another, we make ourſelves ſo far liable, as that if he does not pay the Debt, we muſt. But then Recourſe may be had to the principal Debtor [8], and the whole, with the Charges, may be recovered of him. Now ſince Suretiſhip is only an additional Confirmation to a Contract [9], the Surety cannot naturally be obliged to more than the Principal [b]; ſo that if the Principal

[a] Moncony's *Itiner.* Tom. 1. p. 465. compared with *Olearius* Itiner. *Perſic.* l. 5. c. 23.

[b] *Fidejuſſores ita obligari non poſſunt, ut plus debeant, quam debet is, pro quo obligantur*, &c. *Inſtit.* l. 3. t. 21. *de Fidejuſſoribus.*

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[1] *Ut inter bonos bene agier oportet, & ſine Fraudatione; vid.* Ciceron. *de Offic.* L. 3. c. 17. *& in Topicis*, c. 10. *& ad Famil.* L. 7. Ep. 12.

[2] CICERO's Words are, *Si qua enim ſunt privata judicia ſummæ exiſtimationis, & pene dicam capitis, tria hæc ſunt, fiduciæ, tutelæ, ſocietatis. Æque enim perfidioſum & nefarium eſt fidem frangere, quæ continet vitam: & pupillum fraudare, qui in tutelam pervenit: & ſocium fallere, qui ſe in negotio conjunxit.* Cic. Orat. pro Roſcio Comœdo, Chap. 6. See, alſo, *pro Cecinâ*, cap. 3.

[3] Moreover, This Head of Truſt hath Place in diverſe Sorts of Affairs, *viz.* making the Heir of a Family free, Poſſeſſion for a Time only, Guardianſhip, lending upon Pawns, and a firm Truſt. As to the firſt of theſe, among the Ancient *Romans*, if a Father would make his Son free, he muſt ſell him three Times as a Slave, to a Perſon who promiſes him to ſell him to him again, who was therefore called *Pater fiduciarius*. After which the true Father having redeemed his Son, he enfranchiſeth him, and ſo his Freedom is effected. See GAIUS's *Inſtit.* 1. 6. and ROSINUS's *Antiq. Rom.* lib. ix. cap. 10. But at length theſe pretended Sales were aboliſhed, and it was ordained that the Fathers ſhould appear alone, and declare to the Judges, that they renounced their Paternal Power over that Child which they made free. See *Inſtitut. lib. i. c.* 12. §. 6. See Mr. THOMASIUS's Diſcourſe *De quaſi-emancipatione Germanorum*, printed at *Hall* 1705. This Freedom produced a particular Effect as to the Succeſſion of Fathers to the Goods of their Children. About which ſee the *Inſtitutes*, *lib. iii. tit.* 2. *De legitimâ Agnatorum ſucceſſione.* §. 8. and Code, *lib. viii. tit.* 49. *De emancipationibus liberorum*, *Leg.* 6. Of Lending upon Pawns, ſee SALMASIUS's Treatiſe of Uſury, *cap.* 4. *& de modo Uſurarum, cap.* 14. and Mr. NOODT's *Obſervat. lib. ii. cap.* 8. as, alſo, Mr. THOMASIUS's Diſcourſe, *De Uſu practico accuratæ diſtinctionis inter emptionem cum pacto de retrovendendo, & contractum Pignoratitium.* Printed at *Hall* in 1707. c. 1. §. 3. &c. 2. §. 20, *&c.*

[4] See above in Chap. 2. §. 6. *Vid. D.* lib. ii. t. 14. *de pactis.* L. 7. §. 6. *Vid.* Leg. 58. & lib. xviii. t. 1. *De contrab. empt.* Leg. 72. t. 4. *De reſcindendâ vendit.* L. 1, 2. & C. lib. iv. t. 45. *Quando liceat ab emptione diſcedere*, L. 1.

[5] See above, lib. ii. c. 4. §. 18. and §. 12. of this Chapter.

[6] See lib. viii. c. 9. §. 12, 13. following.

[7] See *ibid.* §. 6.

[8] The *Digeſts* ſay, *Fidejuſſor in judicio ſiſtendi cauſâ locuples videtur dari, non tantum ex facultatibus, ſed etiam ex conveniendi facilitate*, Digeſt. lib. ii. tit. 8. *Qui ſatis dare cogantur*, &c. *Lib. ii. princ.* But when once a Man is taken by us for a Surety, we ought to be ſatisfied, unleſs he afterwards become poor through ſome ſudden Accident. *Qui ex cauſâ improbat ab arbitro probatos, alios improbatos probat: multoque magis ſi ſuâ voluntate accepit fidejuſſores, contentus his eſſe debet. Quod ſi medio tempore calamitas fidejuſſoribus injuncta, vel magna inopia accidit; cauſâ cognitâ ex integro ſatisdandum erit.* Ibid. Leg. 10. §. 1. See Leg. 3. tit. *De fidejuſſoribus*, &c. and the deceaſed M. AVERANI's *Interpret. Juris.* lib. i. cap. 22.

[9] The Words of the Law are, *Fidejuſſores ita obligari non poſſunt, ut plus debeant, quam debet is pro quo obligantur. Nam eorum obligatio, acceſſio eſt principalis obligationis: nec plus in acceſſorio poteſt eſſe, quam in principali re. At ex diverſo, ut minus debeant, obligari poſſunt. Itaque ſi reus decem aureos promiſerit, fidejuſſor in quinque rectè obligatur: contra vero obligari non poteſt. Item ſi ille pure promiſerit, fidejuſſor ſub conditione promittere poteſt: contra vero non poteſt. Non ſolum autem in quantitate, ſed etiam in tempore plus vel minus intelligitur. Plus eſt enim ſtatim aliquid dare: minus eſt, poſt tempus dare.* Inſt. lib. iii. tit. 21. This Maxim is carried ſo far, that if the Surety hath anſwered a larger Sum, or been bound in any other Manner for more than the Engagement of the principal Debtor, the Obligation is

Principal was obliged only Conditionally, the Surety cannot be obliged, unleſs the Conditions be made good, nor can he be confined to ſuch a Time or Place which the other was not obliged to [a]. And whatſoever [1] Exception the Debtor might make, the Surety can plead to his Advantage. [2] One who orders another to truſt a third Perſon, does the ſame Thing as if he made himſelf a Surety; for by ſuch an Order he is preſumed to interpoſe his Credit, But if he gives Order for 1000 *l.* and the Perſon takes up but 500 *l.* he will ſtand reſponſible for no more than was taken up; for the Meaning of the Order was, that he ſhould have Credit as far as 1000 *l.* But though the Surety cannot be obliged to more than the Principal, yet he may ſometimes [3] be obliged to leſs; as when he undertakes for only Part of the Debt, or for the whole, under certain Reſtrictions, or upon Condition that the Time of Payment ſhould be prolonged, or a more convenient Place aſſigned for it.

The End and *Deſign* of Suretiſhip makes it appear, that the Surety ought to be a Man of Subſtance and Credit, and able to anſwer the Creditor's Suit, which indeed is ſuppoſed by the Creditor's Acceptance of him. And, therefore, *Vulcan* (in *Homer* Odyſſ. viii. *v.* 352, 353.) when *Neptune* offered to be a Surety for *Mars*, replies, *That the Security was as bad as the Debt; for if* Mars *ſhould run away, how ſhould he be able to ſeize upon* Neptune *among the Gods?*

X. But yet it is not impoſſible but the Surety may lie under a greater and ſtricter Obligation than the Principal; for he interpoſes himſelf of his own Accord, the more to confirm the principal Contract, without whom the Creditor had not entered into it. And, indeed, Neceſſity forces ſome People to contract a Debt, but nothing but Generoſity, and an Oſtentation of Kindneſs, and a Confidence in his Riches engages the Surety in another's Concern. And therefore the Creditor has ſometimes more Reaſon to blame the Sureties, than the Principal; for it was upon their Account that he truſted at all, and they certainly are to be blamed, who, without the utmoſt Neceſſity, derive a Burthen upon themſelves, which they ought to have known they were not able to bear. And, therefore, wiſe [4] Men every where diſſuade us from Suretiſhip, unleſs we would involve ourſelves in unneceſſary Evils [5]. The *Romans* kindly provided for the Eaſineſs of Women by the *Velleian* Decree [b]; and by the *Roman* Law the Principal ſatisfied the whole Debt [6] by giving up all he was worth, though not ſufficient to diſcharge the Debt [c]; [7] which Favour was not indulged the Surety [d]. For he was looked upon as called in for the Relief of the Creditor, that, in Caſe [8] the Principal ſhould prove inſolvent, the Debt might be recovered of him. Though, indeed, this Way of ſatisfying a Debt, by parting with all a Man is worth, is altogether unknown to the Law of Nature; unleſs common Humanity may plead, that if a Man be brought to Want by ſome fatal Calamity, and not by Luxury or Idleneſs, it ought to ſuffice, if we ſtrip him of his Patrimony, and not proceed any farther againſt his Perſon.

Beſides, the [9] Surety may be more ſtrictly obliged than

[a] *Vid.* lib. ii. t. 11. *D. ſiquis cautionibus &* lib. ii. t. 14. L. 32. *D. de pactis,* lib. iii. t. 3. L. 51. *D. De procurat.* lib. xiv. t. 6. L. 9. 3. *SC to* Macedon. lib. xvi. t. 2. l. 4. l. 5. *D. De compenſ.* [b] D. Lib. xvi. t. 1. L. 1. §. 1, 2. [c] *V. C.* Lib. vii. t. 71. L. 1. *& Inſtit.* L. 4. t. 6. *D. actionib.* §. 40. [d] *V. Inſtit.* lib. iv. t. 14. *De Replicationib.* §. 4.

was void. *Illud commune eſt in univerſis, qui pro illis obligantur: quod ſi fuerint in duriorem cauſam adhibiti, placuit eos omnino non obligari: in leviorem planè cauſam accipi poſſunt. Propter quod in minorem ſummam rectè fidejuſſor accipietur.* Ibid. Leg. 8. §. 7. See *Vinnius* on the *Inſtitutes, ubi ſupra,* §. v. and, above all, the *Interpretat. Jur.* of the deceaſed M. *Averani,* lib. ii. cap. 3, 4. who has fully proved the Thing againſt the Opinion of *Cujas, Edmond Merillus,* and others, who have lately maintained, that, according to the *Roman* Law, an Engagement of *Surety* is valid as far as the principal Debt reaches. They have fallen into this Notion, only becauſe they believed (what is, indeed, true) That the oppoſite Deciſion was inconſiſtent with natural Equity. But this is a Conſequence of the ſubtle Principle of the *Roman* Law; nor can we, by any reaſonable Interpretation, elude the Senſe of the Laws here quoted. The Queſtion is not to know whether the Maxims of the *Roman* Lawyers were well grounded, if we conſider the Thing only according to the Light of Reaſon. For we muſt own, in this Senſe, nothing can be more extravagant. Theſe very Lawyers who annul every Engagement of Surety, which exceeds the Value of the principal Debt; affirm, at the ſame Time, That the Surety is civilly bound in ſeveral Caſes in which the principal Debtor is no way affected. For Example, if a Slave, or a Minor, has borrowed any Thing, or received it in Truſt, without the Conſent of the Maſter, or Guardian, the *Roman* Law allowed no Action for Damages, when the Thing was loſt by their Negligence or Diſhoneſty; but the Surety who was bound for them was obliged to pay. *Et commodati, & depoſiti fidejuſſor accipi poteſt: & tenetur, etiamſi apud ſervum, vel pupillum, depoſitum commodatumve fuerit; ſed ita demum ſi aut dolo malo, aut culpâ hi fecerunt, pro quibus fidejuſſum eſt.* Digeſt. *ubi ſupra,* leg. 2. But they fell into this Error by following Rules different from thoſe they had eſtabliſhed upon the Effects of *Obligation purely natural.*

[1] The Words of the *Digeſts* are, *Ex perſona rei, & quidem invito reo, exceptio & cætera rei commoda fidejuſſori, cæteriſque acceſſionibus competere poteſt,* Digeſt. ubi ſupra Leg. 32. *Si is, qui fidejuſſorem dedit, ideo non ſteterit, quod Reipublicæ cauſâ abfuit, iniquum eſt fidejuſſorem ob alium neceſſitate ſiſtendi obligatum eſſe, cum ipſi liberum eſſet non ſiſtere,* lib. ii. tit. 11. *Si quis cautionibus,* &c. Leg. 6. The Author quotes alſo Lib. ii. tit. 14. De pactis, Leg. 32. lib. iii. tit. 3. De Procur. & Defenſoribus, Leg. 51. lib. xiv. tit. 6. De Senatuſc. Maced. Leg. 9. §. 3. lib. xvi. tit. 2. De Compenſationibus Leg. 4, 5. Inſtit. lib. iv. tit. 14.

[2] So the *Digeſts* order, *Adhiberi autem fidejuſſor tam futuræ quam præcedenti obligationi poteſt, dummodo ſit aliqua, vel naturalis, futura obligatio.* Digeſt. lib. xlvi. tit. 1. De fidejuſſor. *&c.* Leg. 6.

[3] See Note 9. following.

[4] CHILON's *Greek* is, Ἐγγύα, παρὰ δ' ἄτα. Diog. Laert. l. 1. p. 73. Prov. vi. 1, *&c.* xi. 15. xvii. 18. xxii. 26, 27. xxvii. 13. Eccluſ. xxix. 24, 27. *Be a Surety, but at your Peril,* was the Saying of CHILON.

[5] The *Velleian* Law is ſet down in the *Digeſts, Velleiano ſentatuſconſulto pleniſſime comprehenſum eſt, ne pro ullo fœminæ intercederent. Nam ſicut moribus civilia officia adempta ſunt fœminis, & pleraque ipſo jure non valent: Ita multo magis adimendum eis fuit id officium, in quo non ſola opera nudumque miniſterium earum verſaretur, ſed etiam periculum rei familiaris.* Digeſt. lib. xvi. tit. 1. Leg. 1. §. 1, 2. The Reader may ſee, on this Head, M. *Thomaſius*'s Diſſertation, entitled, *De uſo exiguo Senatuſconſulti Velleiani in foris Germaniæ,* printed at *Hall* in 1607. And Mr. *Noodt*'s Commentary, pag. 351. *& ſeqq.*

[6] They were only diſcharged for the preſent, always provided there was no Diſhoneſty on their Part. Such a Ceſſion kept them indeed out of a Gaol, or releaſed them from it; but it did not hinder, but if afterward they got any Thing, Payment of what was remaining after the Sale of the firſt Goods, might be demanded. It is true, that, in this laſt Caſe, it was not allowed to impoveriſh the Debtor quite a ſecond Time; he was only condemned to pay what he could, over and above a comfortable Subſiſtence. *Qui bonis ceſſerint, niſi ſolidum creditor receperit, non ſunt liberati. In eo enim tantummodo non beneficium eis prodeſt, ne judicati detrahantur in carcerem,* Cod. lib. vii. tit. 71. *Qui bonis cedere poſſunt,* Leg. 1. *Cum eo quoque qui creditoribus bonis ſuis ceſſit, ſi poſtea aliquid adquiſierit, quod idoneum emolumentum habeat, ex integro in id quod facere poteſt, creditores experiuntur. Inhumanum enim erat, ſpoliatum fortunis ſuis in ſolidum damnari.* Inſt. lib. iv. tit. 6. See, alſo, *Digeſt.* lib. xlii. tit. 3. *De ceſſione bonorum,* leg. 4, 6, 7. With regard to the Origin and Progreſs of the *Ceſſion of Goods,* the Reader may conſult DIDIER HIRAULD, *de rerum judicatarum auctoritate,* lib. ii. cap. 24, 25. And JAQUES GODEFROI. on the *Theodoſian Code,* lib. iv. tit. 20. *Qui bonis, ex* Lege Juliâ, *cedere poſſunt,* tom. 1. pag. 402. *& ſeqq.*

[7] The Words of the *Inſtitutes* are, *Sane quædam exceptiones non ſolent his* [*fidejuſſoribus*] *accommodari. Ecce enim debitor, ſi bonis ſuis ceſſerit, & cum eo creditor experiatur: defenditur per exceptionem, ſi bonis ceſſerit. Sed hæc exceptio fidejuſſoribus non datur: ideo ſcilicet quia qui alios pro debitore obligat, hoc maximè proſpicit, ut cum facultatibus lapſus fuerit debitor, poſſit ab iis, quos pro eo obligavit, ſuum conſequi.* Inſtit. lib. iv. tit. 14. De Replicationibus, §. 4. See more about the Ceſſion of Goods, in Mr. DOMAT's civil Laws in their Natural Order. *Part* 1. *lib. iii. tit.* 5.

[8] See *lib. iii. c.* 7. §. 3. above.

[9] By the *Roman* Law, when one has anſwered for a Pupil in an Engagement contracted without the Allowance of his Guardian, or for a

Prodigal,

than the Principal, in Case he takes upon him by Oath, [1] or under a Penalty, what the other barely promised. Thus it is the Custom in some Places, in Default of Payment at the Time appointed, to oblige the Sureties to appear at such a certain Place, and not to depart thence, until [2] the Debt be satisfied, and this they call a *Pledge*. Though by reason of some Abuses, which proceeded from it, it is now generally disused.

XI. But, because *Suretiship* is only an *Addition* to another Man's Debt, it is most natural for the *Creditor* to make his Demands first to the [3] *Principal*, and, upon Failure there, apply to the *Surety*. "*This* "the *Roman* Law calls *Beneficium Excussionis & "Ordinis* [4]. The Condition of a *Surety* deserves "Pity, for his Kindness ruins him, and his good "Nature breaks him. But the *Creditor* cannot with "any Face apply to the *Surety*, but when he can- "not recover his Debt of the *Principal*, Quint. "*Decl.* 273." And if the *Surety* pays the Debt, the *Creditor* must make over to him all the Right that he had against the [5] *Principal*; if that can be of more Service to him towards the Recovery of the Debt, than if he sued in his own Name, especially if any Pawn had been given for Security in Part, it must be given up to the *Surety*. But if several had bound themselves for Debt, all jointly, and not each for the whole, in Case of Failure in the *Principal*, the Burthen ought to be divided among them, and each obliged to pay his [6] Proportion; unless one should prove insolvent, for then the Burthen must lie the heavier upon the rest. For a Number of *Sureties* were therefore provided, that, if this or that should fail, the rest might be *Security* to the *Creditor* [a]. [7] Those who entirely take upon themselves in their own Name another's Obligation [b], so as to be esteem'd as *Principals* in the Eye of the *Creditor*, differ in some Respects from *Sureties*. Whether such as these can recover of the Person, for whom they engaged, what they laid out in his Service, and what Method they ought to take to do it, is to be determined according to the Nature of the Kindness; for this Act in them may be a *Free Donation*, or a *Commission*, or a *Loan*, or a *Recompence*, or such like.

'Tis usual, also, for a *Surety* to provide for himself by [c] *Counter-Security*, whereby he may recover what he lays out for the *Principal*, if the *Principal* himself proves deficient [8]. The Person who gives this *Security* owes the same Obligation to the first

[a] *Add.* Phæd. *l.* 1. *fab.* 16. [b] *Expromissores.* [c] *Fidejussor indemnitatis.*

Prodigal, who is debarred of the Management of his Estate, or a Mad Man. In these and the like Cases, where the Obligation of the Debtor was purely natural, and no Action lay against him, the Engagement of the Surety is nevertheless good and valid. MARCELLUS scribit: *Si quis pro pupillo sine tutoris auctoritate obligato, prodigove, vel furioso fidejusserit: magis esse, ut ei non subveniatur, quoniam hic actio mandati non competit.* Digest. lib. xlvi. tit. 1. Leg. 25.

[1] Or by giving some Pledge. This is the usual Language of the Interpreters of the *Roman* Law, as appears from *Struvius*, whom our Author had here in view. (*Syntag. Jur. Civ.* exerc. xlvii. §. 41.) But to judge by the Law of Nature only, I do not see why a Surety may not engage himself to more, with respect to the principal Debt, than the Debtor himself is bound to. All that would follow from hence, would be a Mixture of Suretiship, with some Obligation, where the Surety becomes engaged, in his own Name, in Case the principal Debtor fails, to satisfy the Creditor. If this be the true Intention of the Parties concerned, there is not the least Injustice in it. The Creditor may have good Reasons not to accept the Surety but upon this Footing. The Surety, on the other Hand, may think he hazards nothing in being bound in this Manner, or, he may be willing to run the Risk, especially if the Debt be not in itself considerable.

[2] *Obstagium.* This was antiently in use among the *German* Princes, as Mr. HERTIUS observes, and gives some Examples of it. Mr. VITRIARIUS, in his *Universum jus civile privatum*, lib. iii. tit. 21. §. 9, informs us that the same Custom is still kept up in the Dutchy of *Holstein*. See above all the learned Dissertation of JOHN SCHELTER, *De Jure Obsidum*, cap. 9. inserted in his *Exercit. in Pandect.* Part 1. *pag.* 96. *& seqq. Edit.* 1713.

[3] See JUSTINIAN's Novels, 4. c. 1. *Ut creditores primo loco conveniant principalem.* QUINTILIAN's Words are, *Etiam cum istud periculum est sponsoris, miserabile est; bonitate labitur, humanitate conturbat —— Non enim aliter salvo pudore ad sponsorem venit creditor, quam si recipere à debitore non possit.* Declam. 273. But we ought to observe, that, by the antient *Roman* Law, the Creditor had his Choice to come upon either the Principal or Surety, as he pleased, unless it was otherwise agreed. *Jure nostro est potestas Creditori, relicto Reo, eligendi fidejussores, nisi inter contrahentes aliud placitum doceatur*, Cod. lib. 8. tit. 41. De fidejussoribus & mandatoribus, Leg. 5. See, also, *Leg.* 3. Mr. HERTIUS says, that it was antiently a Custom in *Germany*. But as for what he adds, that it was used among the *Jews*, he ought to have brought good Proofs, for the Text he quotes is nothing to the Purpose, as the Reader will be convinced by seeing it: *Take the Garment of him who is a Surety for a Stranger, and take a Pledge of him for a strange Woman*, Prov. xx. 16. xxvii. 13. M. *Gundling* observes, also, that the same Custom obtains at *Nuremburg*, and elsewhere. He affirms, That this is more agreeable to natural Equity, according to which it is sufficient that the *Debtor* refuses to pay; unless the *Surety* has expresly stipulated, That the Creditor, before coming upon him, shall do all that is in his Power to recover the Money from the principal Debtor. If the Surety has neglected this, so much the worse for him, since he suffers for want of Caution. *Jus Nat. & Gent.* Cap. xxv. §. 41. But a subsidiary Engagement so burdensome as that of Suretiship cannot be extended too far: Therefore we must turn the Tables, and say, on the contrary, That it is the Creditor's Fault in not requiring that the Surety be bound to satisfy him upon the simple Refusal of the principal Debtor. We may say the same Thing with regard to the *Benefit of Division* between Joint-*Sureties*, about which this Author decides the same Way, and upon the same Principles.

[4] They are Terms used by the Interpreters, and not by the *Roman* Law itself. The Reason of the first is obvious: The other is taken from *Excutere*, which signifies in the *Roman* Law to seek whether the Debtor be able to pay, and to come upon him.

[5] The Law is, *Potuisti sane, cum fisco solvere, desiderare, ut jus pignoris, quod fiscus habuit, in te transferretur; & si hoc ita factum est, cessis actionibus uti poteris: quod & in privatis debitis observandum est.* Cod. lib. 8. tit. 41. De fide-jussoribus & mandatoribus, Leg. 11.

[6] By the *Roman* Law the Creditor might apply himself to either of the Sureties, as he pleased, and make him alone to pay; for it supposes each of the Sureties to be obliged to pay the whole, which yet is not true, unless all the rest prove insolvent. But the Emperor *Adrian* ordained, that if, at the Time of the Process, the Sureties were solvent, the Creditor could demand of each no more than his Share. See *Institut. Lib.* 3. *tit.* 21. §. 4. And this consisted in what the Lawyers call *Beneficium Divisionis.* See Mr. NOODT, in his *Probabil. Juris*, lib. 2. c. 1.

[7] This is what is called *Expromissor*; as for Example, *Digest. Lib.* 12. *tit.* 4. *De Condict. causâ datâ, &c. Leg.* 4. *& lib.* 50. *tit.* 17. *De diversis regulis Juris, Leg.* 110. §. 1. One single Surety is call'd, on the contrary, *Adpromissor.* See *Digest. l.* 45. *tit.* 1. *De verborum obligation. Leg.* 5. §. 2. *& lib.* 46. *tit.* 3. *De solutionibus & liberationibus, Leg.* 43. This last Law will be quoted in the Notes on §. 1. of the following Chap. M. *Heineccius* (*Antiq. Roman. ad Instit.* Lib. iii. Tit. xxi. §. 4.) has said, That by *Adpromissor* is understood him, who, after having promised a Thing in his own Name, afterwards engages the same Thing for a Third. This he grounds upon a Passage of *Festus: Adpromissor est, qui, quod suo nomine promisit, idem pro altero quoque promittet.* But the deceas'd M. *Dodar* has, long ago, observ'd, that in this Passage we should read: *quod suo nomine promisit* ALTER, *idem*, &c. *Jac. Mesnard*, a learned Lawyer, has fallen upon the same Conjecture (*Not.* in CIC. *Orat. pro Rosc. Amerin.* pag. 17. Tom. 1. Orat. *Edit. Græv.*) upon the whole, See M. *Schulting Jurispr. Ante-Justin.* pag. 260. Nevertheless these two Terms as well as *Fide jussor* are sometimes confounded by an impropriety of Speech common to all Languages.

[8] Our Author, as Mr. HERTIUS observes, confounds a subsidiary Security, call'd *Fidejussor succedaneus*, with a Surety to indemnify, called *Fidejussor indemnitatis*, a Counter-Security, as also divers others have done, as appears by Mr. THOMASIUS's Discourse *De Fidejussore indemnitatis*, Printed at *Hall* in 1703. §. 2. This subsidiary Surety is a second Security, which answers for the first, and in respect to whom this last is look'd upon as a principal Debtor. The *Roman* Law calls him *Fidejussor Fidejussoris. Digest.* 46. *tit.* 1. *Leg.* 8. §. 12. *& Leg.* 27. §. 4. And the first Surety is called *Fidejussor principalis, ibid.* §. 2, 4. As for the Surety of Indemnity, the Lawyers mean by him a Person who is not obliged purely and barely for the whole Debt, but only for so much as the principal Creditor is not paid, *i. e.* if he can recover only one Part of his Debt, the Surety shall indemnify him as to the other. See *Digest. ubi supra, Leg.* 63. *& lib.* 45. *tit.* 1. *De verb. obligat. Leg.* 116.

Surety,

Surety, as the firſt *Surety* owes the *Creditor*; and has the ſame [1] Action againſt the *Principal*, as the firſt *Surety* himſelf had.

XII. As for *Bail* [a] or the Obligations that thoſe lie under, who engage for Criminals, 'tis obſervable that many of the Antients were of Opinion, that a Man was ſo far Maſter of his own Life, as to have Power by his bare Conſent to engage it for another, ſo far as even to forfeit it for another's Crime. *Andocides* (*orat. de myſter.*) relates, that *Manthiteus* and *Apſephion* ſat by the Altar humbly praying that they might not be put to the Rack, but that their *Bail* might be taken, which was no ſooner granted, but they mounted their Horſes, and fled to the Enemy; leaving their *Bail*, who were forced to undergo thoſe Tortures which they themſelves ought to have ſuffered. The Story of *Damon* and *Pythias* (whom *Diod. Sic.* in excerpt. *Pereſc.* calls *Phintias*) is well known as related by *Cicero* in *Offic. l.* iii. *c.* 10. Of whom *Manil.* Aſtr. l. ii. v. 1. ſays,

Et duo qui potuere ſequi vadimonia ſponſi:
Optavitque reum ſponſor non poſſe reverti,
Sponſoremque reus timuit ne ſolveret ipſum.

Once Death was ſtrove for, 'twas a generous Strife;
Not who ſhould keep, but who ſhould loſe a Life
Was their Diſpute, contending to deny
Each other the great Privilege to die.
The *Surety* fear'd the *guilty Friend*'s Return,
The *guilty Friend* did his own Abſence mourn.

Mr. CREECH.

[a] But that a *Surety* ſhould, by his bare Conſent, make himſelf liable to a Puniſhment, which otherwiſe ought to be inflicted on a Criminal, does not ſeem agreeable to thoſe Rules of *vindictive* Juſtice, which ought to obtain in human Societies; indeed if a Man knaviſhly interpoſes himſelf, that the Criminal may have an Opportunity of eſcaping Juſtice, he ought to ſuffer as much, as it is the Concern of the Magiſtrate that the other had not eſcaped his Hands; which may ſometimes be capital, eſpecially if he who thus eſcap'd be like to do more Miſchief [b].

Farther than this, ſuch a ſubſtituted Death is not lawful in the civil Court: For no Man has ſo much Power over his own Life, as to expoſe it at Pleaſure for no publick Advantage, but only to hinder another from ſuffering what he deſerves. Beſides, the End of Puniſhments would be fruſtrated by this means, for the Deſign of them is either to amend the *Delinquent*, or to deter *others*; but the *Surety* is not the *Delinquent*, as having not by any Act of his derived the Guilt upon himſelf: And as for *others*, they will not be deterr'd from offending by ſeeing an innocent Man ſuffer, but will either be moved with Compaſſion, or ſtruck with Admiration of ſuch Love and Conſtancy, as does not refuſe even Death for the ſake of a Friend [c d].

It appears therefore that *Bail* can be no farther admitted in criminal Caſes, than as a Security to the Magiſtrate, whoſe Duty it is to proſecute, that the Damages of the *Delinquent* ſhall be made good, or his Fine paid, or if he be abſent, that he ſhall make his Appearance, ſo that nothing in the mean Time may be decreed againſt him, as if he were convict; or if he be in Priſon, that he may not be forc'd to plead in Chains. And even in thoſe Caſes, the beſt Way is for the Magiſtrate to let the *Surety* know beforehand, what Security he expects from him, that ſo he may conſider whether his Circumſtances will permit him to venture ſo much upon the Honeſty of his Friend.

The Obligation that *Hoſtages* lie under, hardly ever taking place but in Leagues and civil Government, will be diſcuſs'd more conveniently hereafter. B. viii. c. 8. §. 6.

XIII. Another uſual Way of *Security* is to give the *Creditor* ſome certain Thing in *Pawn*, till the Debt be paid; the Deſign of which is not only, that the *Debtor* may be incited to a more ſpeedy Payment for want of his Goods [e], but that the *Creditor* [3 f] in Caſe of Failure may have ſomething equivalent, and, being in Poſſeſſion of the *Pawn*, need not to be at the Trouble and Expence of going to Law. And therefore the *Pawn* ought to be as much or more worth than the Debt itſelf. And ſince it is deſign'd for the *Security* of Debts, which bear either a *vulgar* or *eminent* Price, 'tis neceſſary that the *Pawn* ſhould have the ſame Faculty. So that we cannot approve of the *Egyptian* Cuſtom [g h] of *Pawning* the dead Bodies of their Parents, altho' whoever refus'd or neglected to redeem them, was proſecuted with the utmoſt Ignominy, and deny'd Burial after Death [4]. And for the ſame Reaſon it ſeems inhuman to ſeize upon the dead Body of a *Debtor*, that ſo his Relations might be ſhamed into a Payment of that which otherwiſe they were not oblig'd to.

By the Way, 'tis worth obſerving, that in the Kingdom of *Pegu* a Man may *pawn* his Wife and Children to his *Creditor*; but if the *Creditor* lies with either the Wife or the Daughter thus pawn'd to him, he loſes his Debt, and is liable to no other Puniſhment [i].

XIV. Things given in *Pawn* are either ſuch as yield Increaſe, or ſuch as do not; as for the *former*, 'tis uſual to allow the *Creditor* [5] the Profits, or a certain

[a] *Vades.* [b] *V.* 1 Kings xx. 39. [c] *Add.* Anth. Matth. *de crimin. ad. l.* 48. *D. d. tit.* 14. *c.* 2. §. 13. &c. [d] *V.* Grot. L. 2. c. 21. §. 11. n. 2. [e] *Vid.* Lib. 13. t. 7. l. 35. §. 1. *De action. pignerat.* &c. [f] *V.* Inſtit. *l.* 3. *t.* 15. *Quibus modis recontrahitur obligatio*, §. 4. [g] *V.* Diodor. Sic. *L.* 1. *C.* 93. [h] *V.* Herodot. *in* Euterp. & Lucian. *de* Luctu. *p.* 306, 307. Ed. *Amſt.* [i] Gaſpar. Balb. *Itiner.*

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[1] That is to ſay, That as the firſt Surety engages to ſatisfy the Creditor, in Caſe the Principal Debtor fails, and has afterwards his recourſe againſt him: So, if, after he has paid, the principal Debtor is found inſolvent, the firſt Surety may then come upon the *ſecond*, who, in this Caſe, repreſents the principal Debtor. And the ſecond Surety preſerves the Right of returning upon the firſt Debtor, after he has ſatisfied his Obligation.

[2] See *lib.* 2. *c.* 4. §. 17, 18.

[3] The Words of the *Inſtitutes* are, *Pignus utriuſq; gratia datur, & Debitoris, quo magis ei pecunia credatur, & Creditoris, quo magis ei in tuto ſit creditum.* L. 3. tit. 15. See, alſo, about this whole Matter Mr. THOMASIUS's Diſcourſe, *De diſtinct. inter emptionem cum pacto retrovend. & contract. pignor.* cap. 2.

[4] JUSTINIAN forbad it under a rigorous Penalty, *Novel.* 60. *cap.* 1, & 115. *cap.* 5. §. 1. as Mr. HERTIUS obſerves.

[5] Called *Pactum ἀντιχρήσεως*, as the Author ſpeaks, and the *Digeſts* expreſs it thus, *Si ἀντίχρησις, id eſt, mutuus pignoris uſus pro credito, facta ſit, & in fundum & in ædes aliquis inducatur: eouſque retinet poſſeſſionem pignoris loco, donec illi pecunia ſolvatur; cum in uſuras fructus percipiat, aut locando, aut ipſe percipiendo, habitandove.* Dig. lib. 20. t. 1. De pignoribus & hypothecis, &c. Leg. 11. §. 1. See Mr. NOODT's, Obſervations, *lib.* 2. *c.* 9. Mr. THOMASIUS in his Diſcourſe *De Accuratâ diſtinct.* &c. c. 2. §. 9. &c. maintains, that by the Natural Law, independent on the Civil, the Word Ἀντίχρησις is underſtood of itſelf, as containing the End of the Contract. It even imports that the Creditor ſhall have the Benefit of the Fruits, be what they will, without giving any Account. We ſhall examine the Reaſons of that able Lawyer in the Place noted. The Uncertainty of the Produce of ſuch Things as are engaged, is a Thing of great Weight; for, as *Cicero* ſpeaks in a Place quoted by Mr. HERTIUS, The Fruits of the Earth are always at the Mercy of the Winds and Tempeſts. *Totæ autem res ruſticæ ejuſmodi ſint, ut eas non ratio, neq; labor,*

certain Proportion of them in lieu of Intereſt. As for thoſe which do not yield Increaſe, they generally bargain, that if they be not redeem'd by ſuch a Time, the Creditor ſhall have the Property of them [1]: And this is not naturally unjuſt, eſpecially if the Pawn does not exceed the Value of the Debt, and the Intereſt of it; or if, provided it exceeds, the Overplus be return'd to the Owner. Tho' this the *Roman* Lawyers [2] never allow of [a]; for thus needy neceſſitous People might quickly be ſtript of all they were worth, through the Avarice of their Creditors, being often forc'd to leave in Pawn much more than the Value of the Debt.

But it is reaſonable, that [3] if the *Pawn* be not redeem'd by ſuch a Time, it ſhould be look'd upon as ſold at a fair Rate ſtated then, or ſome Time before, by ſome honeſt Man [b].

In ſhort, as the *Creditor* ought to reſtore the *Pawn* upon Payment; ſo, while he has it in his Cuſtody, he ought [4] to look after it as carefully as his own, and if it may be the worſe for uſing, he ought not to put it to any Uſe, unleſs Leave be expreſly given him by the Bargain. And therefore if it receives any Damage, or happens to be loſt through his Fraud, or want of, at leaſt, common Diligence, he is obliged to make it good.

XV. It is a receiv'd [5] Opinion, that a *Pawn* depoſited can never become one's own by *Preſcription* [c]; and the Reaſon is, becauſe the Redemption of a *Pawn* is ſuch an Action as cannot be exerciſed often, but once only. Beſides *Preſcription* was firſt introduc'd to put an End to Suits, which could not otherwiſe be determined, and to ſettle Property which would otherwiſe be uncertain. But in the Caſe before us there can be no Queſtion in whom the Property of the *Pawn* is, when I poſſeſs it as another's, and it evidently appearing upon what account he left it with me, I cannot preſume that he had ever relinquiſh'd it.

But yet the Caſe may ſo happen, as that the *Debtor* may fairly be debarr'd the Power of Redemption; as [d] if when he would have redeem'd it, he had been hindered, and has now paſſed it over in Silence ſo long, as to create a Preſumption that he never deſigns it; or if it be very much to the *Creditor*'s Diſadvantage to have the Payment continually put off, it cannot be thought unjuſt in him to diſpoſe of the *Pawn* as his own; eſpecially if by Length of Time the Value of the Money has been chang'd, ſo that the *Creditor* would receive leſs than he lent, ſhould he admit of a Redemption. As ſuppoſe a Man had lent another 1000 *l.* 100 Years ago, and had received in *Mortgage* a Farm, which was then worth the Money; in the mean Time the Value of Money has ſunk half in half, and therefore now, if the *Creditor* be forced to receive back his 1000 *l.* he would receive only enough to purchaſe half the Farm; whereas, at the Time of Contract, it would have purchaſed the whole.

XVI. The *Roman* Lawyers diſtinguiſh between a *Pawn* properly ſo called, and a *Mortgage* [e]; the *former* is the actual Delivery of ſome *Moveable*, the *latter* is the bare Aſſignment of ſomething *immoveable*, for Security of the *Debt*: For barely to aſſign over *Moveables* as Security, without putting them into the Cuſtody of the *Creditor*, would be ridiculous,

[a] *V. C.* L. 8. t. 35. *De pactis pignorum, & de lege Commiſſor. in pignorib. reſcind.* [b] *V. D.* L. 20. t. 1. *De pignorib. & hypothecis*, &c. l. 11. § 1. & l. 16. §. 9. [c] *V. C.* L. 4. t. 24. *de Pigneratitiâ Act.* l. 10. [d] Grot. *l.* 3. *c.* 12. §. *ult.* puts this Caſe. [e] *V.* Inſtit. *L.* 4. *t.* 6. *De actionib.* §. 7.

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labor, ſed res incertiſſimæ, venti, tempeſtateſq; moderentur. In Verrem, lib. 3. c. 98. *& ult.* See *Cod. lib.* 4. *tit.* 42. *De Uſuris Leg.* 17. Therefore we may eaſily admit this Notion, provided there was not a great Diſproportion between Intereſt and the Value of Rent; the bad Years being compenſated by the good.

[1] Theſe Reſtrictions are no ways neceſſary, according to Mr. Thomasius, *ubi ſupra*. §. 13, 14. Where he maintains, alſo, That the *commiſſory* Clauſe ought to be look'd upon as tacitly annex'd, whenever there is a Time limited for the Payment of the Debt. The Debtor, ſays he, is ſuppos'd, in this Caſe, to ſell his Eſtate for the Sum lent; for which Reaſon he look'd upon it himſelf as an Equivalent. And ſo after the Time is expired, the Creditor becomes full and irrevocable Proprietor of the Thing mortgaged, and as it is the worſe for him, if he finds it leſs worth than the Money lent; ſo it is, alſo, juſt that, if he ſells it for more, he ſhould have the Benefit, at leaſt, if it be not otherwiſe agreed on, or the Laws of Charity do not oblige him to recede from his Right. I admit this, ſuppoſing there be no great Diſproportions between the Value of the Pawn, and the Value of the whole Debt. Even when there is no Term fix'd, at the End of which the Debtor ſhould withdraw his Pawn by paying, it appears to me that we ſhould not otherwiſe decide here, as Mr. *Thomaſius* does, §. 16. For who would lend upon Condition of never being paid his Money, or having the Power to ſell his Pawn, or even to appropriate it to himſelf 'till he was ſecur'd? Now, provided the Creditor lends as much as another would do, it is the ſame Thing to the Debtor, and, in this Caſe, the former ought certainly to have the Preference. Beſides, the Alteration which Time may produce in the Value of the Pawn, and above all, the growing Intereſt of the Sum lent, occaſion this Inconvenience, that a barren Pawn would become inſufficient for the Creditor's Security.

[2] See *Cod. lib.* 8. *tit.* 35. *De pactis pignorum, & de Lege Commiſſoriâ in pignoribus reſcindendâ.* And the Commentary of *Jaqu. Godefroi*, upon the *Theodoſian* Code, Lib. iii. Tit. ii. Tom. 1. pag. 251. *& ſeqq.*

[3] The Words of the *Digeſts* are, *Poteſt ita fieri pignoris datio, hypothecæve, ut ſi intra certum tempus non ſit ſoluta pecunia, fiat emptoris poſſideat rem juſto pretio tunc æſtimandum: hoc enim caſu videtur quodammodo conditionalis eſſe venditio.* Digeſt. ubi ſupra, Leg. 16. §. 9.

[4] *Ea igitur, quæ diligens Paterfamilias in ſuis rebus præſtare ſolet, à creditore exiguntur.* Digeſt. lib. 13. tit. 7. De Pigneratitia actione, Leg. 14. See Mr. Noodt's *Probabilia Juris, lib.* 1. *c.* 4. *lib.* 4. *c.* 3. *& Obſerv.* 2. 13. But if, without his Fault, the Pawn be loſt, or deſtroyed by a Miſchance, he ſtill preſerves his Right, who remov'd it only to the other Goods of the Debtor. Tho' he cannot require that the Debtor ſhould give him another Pawn in the Place of that he has loſt, unleſs it was ſo ſtipulated in the firſt Agreement. *Quam [diligentiam exactam] ſi præſtiterit, & aliquo fortuito caſu rem amiſerit, ſecurum eſſe, nec impediri creditum petere.* Inſtitut. lib. 3. tit. 15. §. 4. Mr. Thomasius *ubi ſupra*, §. 17, 18. expreſſes himſelf a little differently, and ſuppoſes, as I think, without Neceſſity, that, in Things that yield a Profit, the Right of the Creditor to the Thing pawned, is a kind of Property, tho' revocable; and affirms, in this Caſe, That the Loſs ſhould fall upon the Creditor. *Gabriel Wolfius*, another Profeſſor at *Hall* (in his *Juriſpr. Natur.* Part. ii. §. 1. Cap. 10. §. 34.) goes farther, and upon this Principle makes the Rule general, of whatever nature the Pawn be, whether Barren or not. He ſays only, That it is more agreeable to the Laws of *Honeſty* and *Decency*, that the Creditor and Debtor divide the Loſs. But, laying aſide theſe indeterminate Ideas of *Honeſty* and *Decency*; I ſee no juſt Ground, neither to regard the Creditor as Proprietor of the Pawn, nor to make it an Exception to the Rule, *That the Loſs ſhould fall upon the Proprietor, when neither Side are in Fault.* Now either a Man lends without Intereſt; and then why ſhould the Debtor deſire the Creditor to loſe his Debt, only for doing him Service, and depriving himſelf of the Advantage he might have made of his Money? Or he lends at Intereſt, and here, tho' each of the Parties find their Account in the Contract, yet it is always principally in favour of the Debtor that the Loan is made. Beſides, the latter might ſooner have redeem'd his Pawn, whether there be a Time limited for it, or not; for, in the firſt Caſe, the Limitation is uſually made in his favour, that he may have leiſure to pay it. But if there be no Time limited, the Fault is no more the Creditor's than his own.

[5] The Interpreters of the *Roman* Law are not agreed about this; and the common Opinion, for the moſt part, is, that Preſcription prevails in the Caſe of Pawns. See Grotius, *lib.* 2. *c.* 4. §. 15. to which Place the Author alludes.

ridiculous,

for they might be removed away, and ſo not anſwer the End for which they were aſſigned [1]. This Way of *Mortgage* is very uſeful among Subjects of the ſame State; for it being abſolutely neceſſary that they ſhould frequently borrow of one another, and as neceſſary that the Payment ſhould ſometimes be put off for a conſiderable Time, there would not be *Moveables* enough for ſufficient Security; and it would be too hard to oblige the Borrowers immediately to part with their *Immoveables*, as their Houſes, or Land [2]. And therefore it ſuffices to aſſign ſuch an *Immoveable* for Security, as cannot be taken away, and of which the Law at any Time can give Poſſeſſion.

In the State of Nature ſuch *Mortgages* are needleſs; for if the *Debtor* refuſes Payment, the Poſſeſſion of the *Mortgage*, aſſigned in Security, muſt be detained by Force of Arms. Whereas in that State, without ſuch a particular Aſſignment, it is lawful to ſeize on any Thing that belongs to the *Debtor* [2].

[a] Compare *Exod.* xxii. 26, 27. *Deut.* xxiv. 6. *Job* xxii. 6. xxiv. 3. *Prov.* xx. 16. *& D. L.* 20. *t.* 1. *l.* 6, 7. *D. de Pignor.* &c. Diodor. Sic. *l.* 1. *c.* 79. *C.* lib. 8. t. 17. *L.* 8. *Authent. Agricultores quæ res pign. oblig. poſſ.*

1 Their Words are, *Pignoris adpellatione eam propriè rem continere dicimus, quæ ſimul etiam traditur creditori, maxime ſi mobilis ſit. At eam quæ ſine traditione nudâ conventione tenetur, propriè hypothecæ adpellatione contineri dicimus.* Inſtitut. lib. 4. tit. 6. De Action. §. 7. In fine, as to this whole Matter of Pawns and Mortgages, we may conſult Mr. DOMAT's Civil Laws in their Natural Order, *Part* 1. *lib.* 3. *tit.* 1. See, alſo, Mr. NOODT's *Probab. Jur. lib.* 1. *cap.* 8. *& lib.* 4. *cap.* 10, 11. *& Obſ.* 2. 8. where he corrects ſome Laws, and there we may ſee, among other Things, that, according to the *Pretorian* Law, a Mortgage was made and concluded, alſo, by a ſingle Agreement.

2 See *Grotius*, Lib. iii. Cap. vii. §. 2. and Cap. xiii. of this Book §. *ult.*

CHAP.

CHAP. XI.

By what Means Obligations *founded upon* Compact *may be diſſolved.*

I. *The moſt natural Way of diſſolving an Agreement is to perform the Things agreed on.*
II. *What if one pays a Debt for one who knows not of it?*
III. *To whom muſt we pay?*
IV. *What muſt be paid?*
V. *To whom and by whom may Compenſation be made?*
VI. *Where it may be uſed.*
VII. *A Debt is paid by a Releaſe.*
VIII. *How an Obligation is made void by a Diſagreement.*
IX. *The Knavery of one Party frees the other from his Obligation,*
X. *As alſo a Change of that Condition on which the Obligation was founded.*
XI. *How an Obligation ceaſes by Time.*
XII. *And how by Death.*
XIII. *Of Delegation.*
XIV. *Of Confuſion.*
XV. *Of Novation.*

I. WE come now to ſee by what Means Obligations thus founded upon Compact may be diſſolv'd. The moſt natural Way is [1] the Performance of the Covenants; for, that being done, the Obligation ceaſes of courſe. And here we may obſerve, that ſome Obligations are [2] ſo inherent in a Perſon, that they cannot be perform'd by any other [a]: Whereas ſome may be done by *Proxy*, it being all alike to the Party concern'd, by whom they be perform'd. Of ſuch a Nature are all thoſe Contracts which relate to common mercenary Work, ſuch as may be done as well by one Man as by another; as, alſo, thoſe which [3] concern *conſumable Commodities*, which if we do but get ourſelves poſſeſs'd of, it is indifferent by what Hand they come to us. In ſuch Caſes, altho' it be moſt natural for the *Debtor* himſelf, or ſome other by his Order, to pay and perform according to Agreement, yet the *Creditor* ought to acquieſce, if any other Man diſcharges [4] for the *Debtor*; I ſay, for the *Debtor*, for whoſoever pays [5] upon his own Account, and not the *Debtor*'s, does not releaſe him [b]. But in caſe of *Suretiſhip*, if the *Principal* diſcharges the Obligation, [6] he releaſes both himſelf and the *Surety*. Whereas if the *Surety* pays the Debt, the *Principal* is indeed releas'd from the *Creditor*, but at the ſame Inſtant becomes indebted to the *Surety* [7], even altho' this Payment was made without his Knowledge.

[a] See above in B. 1 c. 1. §. 19.

[b] *Nam quod quis ſuo nomine ſolvit, non debitoris, debitorem non liberat.* D. L. 5. t. 3. l. 31. *princip.*

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[1] *Tollitur omnis obligatio ſolutione ejus quod debetur,* Inſtit. L. 3. t. 30. *Quib. mod. tollitur oblig. princip.* See Digeſt. *Lib.* 46. *tit.* 3. *De Solut. & Liberat.* We muſt remark, That a Man is ſuppos'd to have paid when he has tender'd, conſign'd, or depoſited what he owed; ſo that if the Creditor has refus'd to receive it, ſo much the worſe for him. The Reader may ſee the Deciſions of the *Roman* Law, upon this Head, in M. Brisson's Treatiſe *De Solution. & Liberation.* Lib. ii. pag. 408. *& ſeqq. Edit. Antverp.* 1585. and in ſeveral Places of M. *Noodt*'s Works, particularly in his Piece, *De Uſur. & Fæn.* Lib. iii. Cap. xv. *Obſervat.* Lib. i. Cap. 30.

[2] See what is ſaid *Lib.* 1. *Chap.* 1. §. 19. upon the Diſtinction of a communicable and incommunicable Power.

[3] As when one gives another a Garment, or a Cheſt, *&c.* to make, for it implies, that the Taylor or the Carpenter ſhould do the Work themſelves, or procure it to be done by ſome other of their Trade; unleſs it be expreſly agreed, That he who takes the Work ſhould do it himſelf, or there be ſome great Inequality between his own Ability and the other Workman's, whoſe Aſſiſtance he uſes, *Si cui locaverim faciendum, quod ego conduxeram, conſtabit habere me ex locato actionem.* Digeſt. *Lib.* 19. *tit.* 2. *Locati conducti, &c. Leg.* 48. *Irene. Inter artifices longa differentia eſt, & ingenii & naturæ, & doctrinæ, & inſtitutionis. Item ſi navem à ſe fabricandam quis promiſerit, vel Inſulam ædificandam, Foſſamve faciendam, & hoc ſpecialiter actum eſt, ut ſuis operis id perficiat; fidejuſſor ipſe ædificans, vel foſſam fodiens, non conſentiente ſtipulatore, non liberabit reum.* Lib. 46. tit. 3. De ſolut. & liberat. Leg. 3.

[4] If the Debtor does not at all conſent. *Nec intereſt quis ſolvat: utrum ipſe qui debet, an alius pro eo, liberatur enim & alio ſolvente, ſive ſciente ſive ignorante debitore, vel invito eo ſolutio fiat.* The Reaſon is, ſay the Lawyers, becauſe he can do better for the Perſon who is ignorant of what is done for him, than the contrary. *Solvere pro ignorante & invito cuique licet: cum ſit jure civili conſtitutum, licere etiam ignorantis invitique meliorem conditionem facere.* Digeſt. Lib. 46. tit. 3. De ſolut. & liber. Leg. 53.

[5] For as the *Roman* Lawyers ſpeak in the Law, here quoted by our Author, What a Man pays in his own Name does not free the Debtor, *Dig. l.* 5. *tit.* 3. *leg.* 31. Moreover, we ought to obſerve, that according to the Stile of the *Roman* Lawyers, which is very ſuitable, and followed by our Author in this Place; the Terms, *Debt, Creditor, Debtor,* and *Payment*, do not only reſpect the Obligation of thoſe who owe a Sum of Money, or ſome other Thing capable of an Equivalent, but in general, thoſe Engagements which we may be under upon any other Account, as in a Contract of Hiring, or Truſting, *&c. Creditorum appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, ſed omnes, quibus ex qualibet causâ debetur.* Digeſt Lib. 50. tit. 16. De verborum ſignif. Leg. 11. *Credendi generalis adpellatio eſt: ideo ſub hoc titulo Prætor, & de commodato & de pignore edixit: Nam cuicunque rei adſentiamur alienam fidem ſecuti, mox recepturi quid ex hoc contractu, credere dicimur,* Lib. 12. tit. 1. *De rebus creditis, &c.* Leg. 1. *Solutionis verbo ſatisfactionem quoque omnem accipiendam placet, ſolvere dicimus eum, qui fecit, quod facere promiſit,* Lib. 50. tit. 16. de verb. ſignif. Leg. 176. *See, alſo,* Lib. 46. tit. 3. de ſolut. & liberat. Leg. 54. And Mr. *Domat*'s Civil Laws in their natural Order, Part 1. Lib. iv. Tit. 1. where he treats of all kinds of *Payment.*

[6] So the Law is, *Item ſi reus ſolverit, etiam ii, qui pro eo intervenerunt, liberantur. Idem ex contrario contingit, ſi fidejuſſor ſolverit; non enim ipſe ſolus liberatur, ſed etiam reus.* Inſtitut. ubi ſupra. *In omnibus ſpeciebus liberationum etiam acceſſiones liberantur; puta adpromiſſores, hypothecæ, pignora: præterquam quod inter creditorem & adpromiſſores confuſione facta reus non liberatur.* Digeſt. Lib. 46. tit. 3. De Solut. & Liber. Leg. 43.

[7] See *Digeſt, Lib.* 17. *tit.* 1. *Mandati vel contra,* Leg. 29. & 40.

II. But if a Man pays a Debt for another without either being his *Surety*, or having his Order for it, can he recover what he has thus paid of his own Head? In which Case we must distinguish whether he made his Payment against the other's Will, or only against his Knowledge. In the *former* Case 'tis plain [1] he cannot recover it; For how can any one impose an Obligation upon me against my Will, which ought to be founded upon Consent? But because no Body is presum'd to throw his Money away, we ought to consider further, whether he design'd what he thus paid [2] as a Gift to the *Creditor*, or not: If he did; the *Debtor* is not concern'd in it: But if he did not design it as a Gift; we ought to suppose, that he did it to transfer the *Creditor*'s Right and Title against the *Debtor* upon himself. And altho' the *Creditor*, at the Payment, knew not of his Design, but receiv'd the Money as paid in the Name of the *Debtor*; yet if he who paid it cannot recover it of the *Debtor*, the *Creditor* ought in Equity either to refund what he thus receiv'd, and still preserve his Action against the *Debtor*, or else to give up his Title to the other; especially if he may be presum'd to have made his Payment, in hopes it would have been acceptable to the *Debtor*. Upon which account the *Roman* Law allows him an [3] an *Action for Business done* [a]: But since the *Debtor* may put in his Exceptions, that it was not acceptable to him, and that he is not willing to owe this other Person such a Kindness, his best Way would be to [4] suppose that his *Creditor* has given up his Title to him, and to deal with him accordingly. But if a Man should lay out any Expence upon another's Goods, without his Knowledge, he [5] may keep the Goods as a Pledge till the Expences be repaid him, unless the Improvement is capable of being taken away from them.

III. No Payment or Satisfaction of any Obligation ought to be made but to the *Creditor* himself, or whom he has order'd to receive it in his Name [6]; and if I pay another by Mistake, the *Creditor*'s Title nevertheless stands good; but then I may recover of the other what I thus paid him [7]. The *Creditor* is here presum'd to be capable of managing his own Concerns [8], and to have a perfect Understanding of the Affair in

[a] V. L. 3. t. 5. *De negotiis gestis*, l. 43. *& ult.*

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[1] Especially if the Debt were not very lawful or clear. See Mr. DOMAT's Civil Laws in their Nat. Order. *Part* 1. *Lib.* 4. *Tit.* 1. *Sect.* 3. §. 2. We may, also, consult the rest of that Title, where the whole Matter of Payments is handled. Mr. *Trevor* affirms, That this Maxim of the *Roman* Law has no Foundation in the Law of Nature; and that for two Reasons. 1. That, because a Person pays for another against his Will, it no way follows he makes him a Present of the Money; for it may happen, that the Debtor, either thro' Passion, or for want of knowing his own Interest, may refuse a Payment he will afterwards be glad was made in his Name. II. That Naturally whoever pays for another, tho' against his Will, assumes the Place and Right of the Creditor, and must be esteem'd to have the same Power of coming upon the Debtor. See that Author's Notes on *Pufendorf*'s *Duties of a Man and a Citizen*, Lib. i. Cap. xvi. Sect. 1. To this I answer, That the last Reason is of no Force, but supposing the first to be true; unless the Creditor has expresly (as he may do) transferr'd his Rights and Powers to him who pays for the Debtor: But this is out of the Question. The Point then is to know, if in general there be a sufficient Presumption, that he, who pays for another against his Consent, does it with an Intention to be repaid; or, whether, even in that Case, he has a Right to pursue the Debtor he has freed. Now it is true, That Men do not easily part with their Money at mere Hazard, and therefore this cannot be easily presum'd: But this here gives Room for a contrary Suspicion. When we pay for any one against his Knowledge, tho' it be for his Advantage (as must always be suppos'd) we may believe that he would consent to it if he knew it, and, consequently, be willing to reimburse us for the Service we do him. But when the Debtor, knowing, and seeing it, forbids us to pay for it, or expresses in any manner his Dislike of our Office, upon what Ground do we hope to be repaid? The more a Man is obstinate otherwise, the more Ground we have to presume that he has some particular Reason, which leads him, in this Case, to act contrary to his usual Inclinations. Indeed, there are few People of this Character, or who would be willing to run so manifest a Risk. Those who would thus disengage a Debtor against his Will, should be generous and friendly People, and in such an easy Condition of Life, as to be able to confer such a Liberality. Supposing nevertheless their Designs be only to assume the Place of the Creditor, this can have no Effect on the Discharge of the Debtor. For besides, that he may oppose many Reasons about the Quality of the Debt, and the Necessity of Payment; it is sufficient for him, after all, to say: *Why do you concern yourself? This is no Business of yours. You know I declar'd that you should not pay for me.* And indeed there would arise great Inconveniences, if every one might thus officiously insinuate himself in obliging People against their Will. Whoever therefore does it, is suppos'd to do it at his own Peril. The natural Interpretation here is, That he who pays for the Debtor against his Consent, either designs to make him a Present of the Money, or, at least, leaves it to his own Option, whether he will pay it or not. I do not pretend to say, That the Debtor so disengag'd, is always honestly, and in Conscience dispens'd from Restitution. But the Question here relates to *Law*, and not to *Equity*.

[2] But that is not to pay for another, and so this Case is nothing to the Purpose.

[3] The Author refers us to this Law, *Cum pecuniam ejus nomine solveres, qui tibi nihil mandaverat, negotiorum gestorum actio tibi competit. Cum ea solutione debitor à creditore liberatus sit: nisi si quid debitoris interfuit, eam pecuniam non solvi.* Digest. Lib. 3. tit. 5. *De negotiis gestis*, Leg. 43. But there he only is spoke of, who pays without the Knowledge of the Debtor; whereas our Author is treating of the Case where Payment is made against the Will of him whose Debt is acquitted; for it is certain, as Mr. HERTIUS observes, that by the *Roman* Law no Man could have an Action for Business done, against a Man for whom he has paid against his Will. See *Digest.* Lib. 3. tit. 5. *De negotiis gestis*, Leg. 8. §. 3. also, *Lib.* 17. *tit.* 1. *Mand. vel contra*, Leg. 6. §. 2. Leg. 40. & Cod. Lib. 2. tit. 19. *De negotiis gestis*, Leg. 24. Here is some Confusion in the Sense, which makes one suspect that the Author, or Printers, have left out some Words, if not a whole Sentence. See the next Note.

[4] The Author should have said, *Against his Will, and his Prohibition*, and he hath written unawares, *pro ignorante*, for *pro invito*; or perhaps he put both the one and the other, if there be not a greater Omission here, for the Word *ignorantis* is met with again in the next Sentence, and we cannot see why the Author should pass clearly from the first Member of the Distinction to the last, and not particularly treat of this.

[5] See *Lib.* 4. *Chap.* 13. §. 13.

[6] The Words of the *Digests* are, *Solutam pecuniam intelligimus utique naturaliter, si numerata sit creditori. Sed & si jussu ejus alii solvetur, vel creditori ejus, vel futuro debitori, vel etiam ei donaturus erat: absolvi debet.* Digest. Lib. 46. tit. 3. *De Solutionibus, &c.* Leg. 49.

[7] The Words of the *Digests* are, *Indebitum est non tantum quod omnino non debetur, sed & quod alii debetur, si alii solvatur.* Digest. Lib. 12. tit. 6. *De conditione indebiti.* Leg. 65. §. 9.

[8] So we cannot pay a Minor without the Content of the Guardian; *Pupillo solvi sine Tutoris Auctoritate non potest.* Digest. Lib. 46. tit. 3. *De Solut. & Liberat.* Leg. 6.

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hand. For otherwiſe it would be to throw Money away, rather than to make Payment of it.

IV. Beſides, the very Thing muſt be paid that was bargain'd for, and not another [1] in its ſtead [a]; it muſt be paid entire, [2] not mangled; not partially, nor piecemeal; at the [3] Time and [4] Place appointed; eſpecially if it be the *Creditor*'s Intereſt to have it paid *here* rather than *there*, and at ſuch a *Time* rather than at another; for the Time is part of the Price. Yet any of theſe Conditions may be ſuperſeded by a new Agreement, which the *Creditor* is ſometimes forc'd to comply with, through the Poverty or Knavery of the *Debtor* being willing to receive Part rather than nothing, at another Place rather than no where, and after the Time expired rather than never. Tho' ſometimes Equity requires that the Payment be put off and accepted in Parcels, when it cannot be perform'd immediately, or all at once. Thus the *Athenians* having made a Vow to ſacrifice to *Diana* as many Goats as they ſhould kill Enemies, when they could not procure ſo many in the whole Country, they decreed to ſacrifice 500 every Year [b]. Sometimes too there is no other Way of ending the Suit, than by forcing the Debtor to pay an Equivalent.

'Tis manifeſt that the Creditor only can remit the Debt, and not his Servant or Steward, without his expreſs Order. But if the Debtor's Steward tranſacts with the Creditor, and compounds for leſs than the whole, the Gain does not redound [5] to the Steward, but to his Maſter; and it would be Theft and Purloining in the Steward, if, after having compounded with the Creditor, he ſhould bring the whole Debt in his Accounts, and put what he got by Compoſition in his own Pocket.

The Creditor is ſuppos'd to be ſatisfied, if he accepts of a [6] *Pawn* as Payment, or takes it in Truſt till Payment be made, or if it be ſold, and the Price receiv'd in lieu of the Debt. And if a Man owes Money by ſeveral different Bonds, and [7] pays part, the Payment ought in Favour to be applied to the moſt burthenſome [c]. The Way which *Vitellius* [d] took to pay his Debts was very ſcandalous; when he went to *Germany* he was ſo intangled, that his Creditors would ſcarce diſmiſs his Perſon upon any Security; who a little after, when he was made Emperor, and return'd to *Rome*, hid themſelves. But he order'd them to be brought before him, and told them, *That he had reſtor'd them Safety for their Money*, and demanded back the Bonds and Inſtruments of Contract.

[a] Vid. *Martial*, L. 6. Ep. 30. [b] Xenophon περὶ ἀναβ. τῦ Κύρ. p. 178. *Otherwiſe concerning the Time of Payment that of* l. 105. *of* D. B. 46. tit. 3. De ſolution. &c. *us'd to be obſerv'd.* [c] *V. D.* ubi ſupra, *l.* 1, 4, 97. [d] *V.* Xiphilin. *ad ann.* 69.

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[1] See the Law quoted above, *Chap.* 7. §. 1. *Note* 3. So that he who owes Money cannot, unleſs the Creditor agree to it, make over any Debt to him in Payment: *Eum, à quo mutuam ſumpſiſti pecuniam, in ſolutum nolentem ſuſcipere nomen Debitoris tui, compelli juris ratio non permittit.* Cod. lib. 8. tit 43. *De Solution. & Liberation.* Leg. 16. See what has been ſaid Note 2. pag. 510. and §. 6, 7. upon the ſeveral Species in which a Payment of Money lent, may be made. See Mr. Thomasius's Diſcourſe, *De pretio affection. in res fungibiles non cadente*, Chap. 2. §. 3, *&c.*

[2] At leaſt, if (as the *Roman* Lawyers ſay) there be not any Ground to conteſt the other part of the Debt, for in this Caſe the Judge may and ought to oblige the Creditor to receive what the Debtor offers him without Prejudice to the reſt: *Quidam exiſtimaverunt, neque eum qui decem peteret, cogendum quinque accipere, & reliqua perſequi: neque eum, qui fundum ſuum diceret, partem duntaxat judicio perſequi. Sed in utraque cauſa humanius facturus videtur Prætor, ſi actorem compulerit ad accipiendum id, quod offeratur: cum ad officium ejus pertineat lites diminuere.* Digeſt. Lib. 12. tit. 1. *De rebus creditis*, Leg. 21. Moreover, as it ordinarily behoves the Creditor to be entirely ſatisfied, he is not obliged to be contented with part of Payment, unleſs it be otherwiſe agreed on, *Quia ſæpe & ſolutio & exactio partium, non minima incommoda habet.* Digeſt. Lib. 10. tit. 2. *Famil. erciſcundæ*, Leg. 3. See Lib. 22. tit. 1. *De uſuris*, &c. Leg. 41. §. 1. Lib. 20. tit. 1. *De pignor. & hypoth.* Leg. 19. *Vinnius* on the *Inſtitutes*, Lib. 3. tit. 30. *princip.* Num. 5. *& ſeqq.*

[3] The Words of the *Digeſts* are, *Is qui certo loco dare promittit, nullo alio loco, quam in quo promiſit, ſolvere, invito ſtipulatore, poteſt.* Digeſt. lib. 13. tit. 4. *De eo, quod certo loco dari oportet*, Leg. 9.

[4] The Time was one part of the Price. See *Chap.* 1. §. 10. above. Yet Payment may be made before the Time, a longer Time being granted ordinarily for the Advantage of the Debtor, that he may diſcharge his Debt with leſs Inconvenience to himſelf. *Quod certa die promiſſum eſt, vel ſtatim dari poteſt: totum enim medium tempus ad ſolvendum promiſſori liberum relinqui intelligitur.* Digeſt. Lib. 46. tit. 3. *De ſolut. & liber.*, Leg. 70. Yet ſometimes the Term is fixed for the Creditor's Benefit, and in that Caſe he may refuſe Payment. See *Digeſts*, Lib. 46. tit. 1. *De verb. oblig.* Leg. 122.

[5] Mr. Hertius quotes *Digeſt.* 17. *Tit.* 1. *Mandati vel contra, Leg.* 10. §. 3. *Leg.* 20. and *Lib.* 26. *Tit.* 8. *De adminiſtratione & periculo Tutor. vel Curat.* Leg. 58. *princ.* But in the laſt he treats of Tutors and Curators, who trade with their Pupils Money, and in the two firſt of them who take upon them a Commiſſion freely, ſo that they cannot be applied, but by an Analogy or Accommodation, to what our Author ſays of them who are the Servants or Stewards of the Debtor, *Miniſtri aut Diſpenſatores.*

[6] *Veluti ſi quis pignus pro debito vendiderit Creditoris: evenit enim ut & ex vendito tollatur obligatio, & debiti.* Digest. Lib. xlvi. Tit. iii. *De Solution.* &c. Leg. 44. See, alſo, Leg. xvi. and Note 3. pag. 535.

[7] That is to ſay, If, for Example, of two Debts one be contended and the other clear, the Acceptation ought not to be given to the firſt, but the laſt. In like Manner Payment ought rather to be made of a Debt, which, if it be not diſcharged, will bring ſome Trouble on the Debtor, or a Condemnation to Damages and Loſs, or concerns his Reputation, than of another from which the like Conſequences are not to be feared, and ſo of a Debt with a Security rather than without one; of a Debt which is ow'd in his own Name, rather than where he is only a Security; rather of a Debt for which he has given a Pawn or a Mortgage, than upon a bare Promiſe: rather of a Debt for which the Time is come, than for that whoſe Time is not come; rather of an old, than new Debt; rather of a real and ſimple Debt, than of a Conditional. *Quotiens quis debitor ex pluribus cauſis unum debitum ſolvit: eſt in arbitrio ſolventis dicere, quod potius debitum voluerit ſolutum: & quod dixerit, id erit ſolutum. Poſſumus enim certam legem dicere ei, quod ſolvimus. Quotiens vero non dicimus id quod ſolutum ſit, in arbitrio eſt accipientis, cui potius debito acceptum ferat, dummodo in id conſtituat ſolutum, in quod ipſe, ſi deberet, eſſet ſoluturus, i. e. in id debitum, quod non eſt in controverſia, aut in illud, quod pro alio quis fidejuſſerat, aut cujus dies nondum venerat. Et magis quod meo nomine, quam quod pro alio fidejuſſorio nomine debeo, & potius, quod cum pœna, quam quod ſine pœnâ debetur ——— potior habebitur cauſa ejus pecuniæ, quæ ſub infamia debetur ——— quæ ſub hypotheca, vel pignore contracta eſt ——— vetuſtior contractus ante ſolvetur.* Digeſt. Lib. 46. Tit. 3. *De ſolut. & liberat.* Leg. 1. 4. 97.

V. The

V. The Obligation is sometimes released by [1] Compensation, which is by opposing Debt to Debt, or when a Man ceases to owe me, because I apparently owe him as much of the same Kind. For since as much (especially in consumable Commodities) is the same, and where the Debts are mutual, if I receive, I must immediately refund as much: Therefore to abridge such needless Payments, 'tis most convenient for each Party to pay himself by retaining his own [a 2]; especially since there is no Paying and Receiving without some Trouble in it: And it would be very imprudent in me to pay first when I need not do it, and so to put it in the other's Power to be behind-hand in his Payment to me [b].

But this Compensation does not take Place, but between those who are Creditors and Debtors to each other; for [3] if I have so much due to me from a third Person, I cannot obtrude that upon my Creditor for Payment, unless this Third and he be join'd in such a Partnership, as to have all their Obligations and Rights in common; for then their Goods may be look'd upon as one and the same Patrimony. Nay, if they be Partners in one Sort of Commodity only, [4] Compensation will take Place, if one be my Debtor, and the other my Creditor, for that Commodity; for so far they are to be esteem'd the same Person. So, if I owe Money to him who is my Debtor's Heir; or, if the Creditor of him whose Heir I am, is indebted to me, [5] Compensation may take Place. And thus I may oppose Debt to Debt, altho' my Creditor is against it; for with what Face can he demand me to pay him, when he declines paying me?

Since this Way of Compensation cannot be put in Practice, but between those who are mutually in Debt to one another, it follows, that I cannot oppose to my Creditor what he owes another, [6] whose Agent I am, without his express Orders. For tho' a Man intrusts me with the intire Management of his Affairs, I am not therefore to reckon his Things as my own, and by that Means make Compensation for my Debts; for perhaps he had rather have another Man his Debtor than me. Nor if I trust my Affairs to another, do I thereby take his Debts and Obligations upon myself? Thus *v. g.* should *Caius* enjoin me to exact his Dues of *Seius*, whose Debtor I myself am; neither can *Seius*, without *Caius*'s Leave, compensate his Debt with mine, and under that Pretence refuse Payment (for what has *Caius* to do with my Debt?) Neither can I take the Debt upon me instead of *Seius*. So one that is indebted to a Minor cannot make Compensation of that which the [7] Guardian owes him: nor can the Guardian release his Debt by opposing it to that which his Creditor owes the Minor [c].

On the other hand, if one, that is bound for another, be call'd upon for the Debt, [8] he may oppose, by Way of Compensation, not only what the Creditor owes to him, but, also, what he owes to the principal Debtor; and this even against the Knowledge and Will of the Principal: For since the Creditor cannot refuse such a Compensation from the Principal himself, why should not the Surety have the Advantage of it? And it would not be fair in the Principal to be against it, since he is oblig'd to repay what the Surety thus lays down for him.

VI. But in consumable Commodities Compensation does not regularly take Place, but in those of the [9] same Kind, and that too, not 'till the Time

[a] *V.* Grot. *Lib.* iii. *Ch.* xix. *s.* 15, &c. [b] *Lib.* ii, iii. *D. d. l. Dolo facit, qui petit quod redditurus est.* [c] *V. D.* Ibid. *Lib.* xxiii.

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[1] The Word of the *Digests* are, *Compensatio est debiti & crediti inter se contributio*, Digest. Lib. xvi. Tit ii. *De compensationibus*, Leg i. *Si causa, ex qua compensatur, liquida sit, & non multis ambagibus innodata, sed possit judici facilem exitum sui præstare*, Cod. Lib. iv. Tit. xxxi. Leg. xiv. § 1.

[2] The *Digests* so direct, *Unusquisque creditorem suum, eundemque debitorem, potentem summovet, si paratus est compensare. Ideo compensatio necessaria est, quia interest nostra potius non solvere, quam solutum repetere*, Digest. *ubi supra*, Leg. ii, iii. *Dolo facit, qui petit quod redditurus est*, Lib. xliv. Tit. iv.

[3] The *Roman* Law carried this Principle so far, that though, even in this Case, the third Creditor of the Person who summons his own proper Debtor to pay, should consent to acquit the first in Compensation of the Debt of the last; his Creditor is not obliged to take it. The *Digests* so order, *Creditor compensare non cogitur, quod alii quam debitori suo debet: quamvis creditor ejus pro eo, qui convertitur ob debitum proprium, velit compensare*, Digest. *de compensationibus*, Leg. xviii. § 1. See also Leg. xvi. *princip. & Cod.* Lib. iv. Tit. xxxi. *De compensationibus*, Leg. ix. See CUJAC, *in Resp. Papinian.* p. 115. Tom. iv. Part ii. and Mr. NOODT's *Commentary*, p. 361. *B.* This Decision shews the extravagant Subtlety of the Principles of the *Roman* Law. For to judge by Reason alone, is it not, in effect, the same Thing as if the third Creditor has assigned his Debt to the others Debtor? And if he who owes nothing to a Person may pay for him, and so discharge him against his Consent (as has been shewn above, § 1. *Note* 4.) much more may he, who is Debtor, be allowed to make a Compensation, which the Debtor of the other Creditor wishes, and in which all Parties equally find their Account.

[4] So the *Digests* speak, *Si duo rei promittendi socii non sint: Non proderit alteri, quod stipulator alteri reo pecunium debet*, Digest. Lib xlv. Tit. ii. *De duobus reis constituendis*, Leg. ii.

[5] This hath Place by the civil Law, when the Heir will not enter upon the Inheritance, till an Inventory is made, because he will not represent the Dead in all Things, but will only be obliged to expend so much as may be the Value of the Inheritance. See *Cod Lib* vi. *Tit.* xxx. *De Jure deliberandi, Leg* xxxi. § 4, 9. Upon the whole, a Compensation is made, at all Times, when the Debtors or Creditors come into the Rights or Obligations of a Third.

[6] For then is he *Procurator in rem suam*, as the *Roman* Lawyers speak. *In rem suam Procurator datus, post litis contestationem, si vice mutuâ conveniatur, æquitate compensationis utetur.* Digest Lib. xvi. Tit. ii. *De compensat.* Leg. xviii.

[7] So the *Digests*, *Id quod pupillorum nomine debetur, si Tutor petat, non posse compensationem objici ejus pecuniæ, quam ipse Tutor suo nomine adversario debet.* Digest. ibid. Leg. xxiii.

[8] The *Digests* say, *Si quid a fidejussore petatur, æquissimum est eligere fidejussorem, quod ipsi, an quod reo debetur, compensare malit: sed & si utrumque compensare velit, audiendus est.* Ibid. Leg. iv. See the precedent Law. Besides these Cases, where there is a Reunion of Obligation in different Persons, the *Roman* Law also authorizes *Compensation* where two Persons are regarded as one. Thus a Father is bound to make up the Debt of his Son while under his Power, as far as the Value of his Son's Fortune will go; and the Son, on the other hand, may compensate what he owes, with what is due to his Father, giving at the same Time a proper Security: *Si cum filiofamilias aut servo contracta sit societas, & agat dominus vel pater; solidum per compensationem servamus: quamvis, si ageremus, dumtaxat de peculio præstaretur. Sed si cum filiofamilias agatur, an quæ patri debeantur, filius compensare possit, quæritur? Et magis est admittendum: quia unus contractus est: sed cum conditione ut caveat, patrem suum ratum habiturum, id est, non exacturum, quod id compensaverit.* Ibid. Leg. ix. See, upon all this, Mr. NOODT's *Commentary*, p. 361, 362.

[9] In Reality, the Compensation ought to answer the Debt, for the Debtor is obliged to render the Thing in that Manner. *Cum quid mutuum dederimus, etsi non cavimus, ut æquè bonum nobis redderetur, non licet debitori deteriorem rem, quæ ex eodem genere sit, reddere: veluti vinum novum pro vetere. Nam in contrahendo, quod agitur pro cauto habendum est. Id autem agi intelligitur, ut ejusdem generis & eodem bonitate solvatur.* Digest. Lib. xii. Tit. i. *De rebus creditis, &c.* Leg. iii. As to the Quantity, although the Debt be on each side unequal, so that a Compensation cannot be fully made, yet the Compensation may make the Debt less, and so acquit him of the Greatness of it. *Si constat pecuniam invicem deberi, ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius, quod amplius apud alterum est, usuræ debentur, si modo petitio earum subsistit.* Cod. Lib. iv. Tit. xxxi. *De compensationibus*, Leg. iv.

of Payment is come, or past[a]; and therefore Things of a different Sort or Quality cannot be paid by Compensation, as a Bushel of Wheat for a Bushel of Oats, or a Hogshead of *Rhenish* for a Hogshead of *Port* Wine; nor Things of a different Species, as this Horse for that Ox; nor of a different Kind, as a Sheep for a Goose; nor a Species for a Thing indefinite of the same Kind, or for an indeterminate Quantity, as *Bucephalus* for a Horse, or a Vessel of Oil. Yet the *Roman* Lawyers admit of Compensation, where the Particulars are not assign'd, but the same Sort and Quality is owing on each side, as if I had promised you a Horse in general, and you happen to be Executor to one that leaves a Horse to me in Legacy. But, yet even in the former Cases, each Party may rate their Debt, and then pay them by Compensation. And yet, where Debts are thus reciprocal, the Obligation is rather [2] suspended, than taken away, by withholding what I owe another, till he pays what he owes me. But Work for Work, or Work for Goods, will not admit of Compensation at the very Instant that it ought to be perform'd; for that would frustrate the very [3] End and Design of such Contracts.

But if each Party release the other, the Obligation ceases upon another Principle, *viz. Mutual Disagreement*; so, also, if I cease to be obliged, because another, who ought first to perform his Part, omitted it, it is not by reason of Compensation, but because the Condition, upon which the Obligation was founded, does not appear. But if my Work has been neglected, by the Party that had undertaken it, I may rate it, and so bring it into Compensation. Nay, I can oppose to a Debt an equivalent Damage, or a Fine adjudged to me for any Injury done by my Creditor. But if two Persons be at Law, and, while the Cause is depending, strike up a Bargain, neither can oppose the Law-suite, or the Charges of it, to the other[b]; *v. g.* suppose I am at Law with another for an Estate, and during the Sute sell him a House, he cannot impute to me, as Payment, the Estate, or the Expences he has been at about it; for the Estate does not as yet appear to be his, and the Nature of the Thing shews, that the Bargain was made without any Regard to the Cause depending.

As for that Sort of Compensation, which cancels former Favours by subsequent Injuries, *Seneca* discourses largely of it[c]. So, also, equal Injuries may, by Compensation[4], be put up on both sides, provided the Right of the Magistrate be not infringed.

VII. The Obligation ceases, also, when the Creditor, or he who has a Title to it, forgives it; for 'tis evident any Man may recede from his own Right, and when the Right has been made over to another, there, too, the Obligation ceases upon that other's forgiving it. And as at first I cannot stand obliged, if the other Party refuses to accept of it; so neither can I continue bound, if he thinks fit to cancel the Bond. But this only in Case no Third Person is injur'd by it; for otherwise he alone cannot release me, although I was immediately obliged to him only.

This Release is perform'd either expressly, or tacitly; to the former belongs what the *Roman* Law calls [5] *Acceptilatio*, an Acquittance or Discharge, by which the Person acknowledged himself to have received what indeed he had not; as also the [6] *Stipulatio Aquiliana*, which, by a Sort of Novation, brought the Debtor to Articles of Agreement, and then released him by a Discharge; all which tedious Forms and Circumstances the Law of Nature knows nothing of, but makes the Obligation

[a] *V. Lib.* vii. *D. h. t. Ch.* iv, &c.

[b] *As* Grotius *well observes, Lib.* iii. *Ch.* xix. § 19.

[c] *Epist.* 81. *& de Beneficiis, Lib.* vi.

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[1] So the *Digests* speak, *Quod in diem debetur, non compensabitur, antequam dies venit, quanquam dari oporteat.* Dig. Lib. xvi. Tit. xii. *De compensat.* Leg. vii. These last Words, *quanquam dari oporteat,* obviate an Objection founded on the Subtlety of the *Roman* Law. For the Lawyers say, That though a Person should engage to pay, only within a certain Time; yet the Obligation becomes full and entire from the Moment of the Contract; so that, if through Error, the Person paid before-hand, he could not redemand what he had given. See Mr. NOODT's *Commentary*, p. 357.

[2] This is a Term borrowed from the *Roman* Law, which allows Retention in several Cases, where the Things due on both sides are not of a sort. See CUJACIUS's *Observat*, viii. 2. xv. 12. xviii. 10. *Vinnius* upon the *Institutes*, Lib. iv. Tit. vi. *De actionibus*, § 13. and Mr. NOODT's *Probabilia Juris*, Lib. iii. Ch. ix.

[3] For Actions are not capable of being put in the place one of another, as Things are; they cannot be reduced to an Estimation respectively, so that it be all one to a Person, whether he do what he hath promised or not, provided he be dispensed with, to do, or give, what he hath promised in his Turn; and, likewise, it be indifferent to him either to receive the Thing itself which is due, or another of equal Value. So when any one engages to do any thing for us, we can depend upon nothing, because he'll endeavour always to evade his Engagements under a Pretence of some Compensation due to him from us, and for which he will labour to get quit with us.

[4] The *Digests* thus speak, *Si duo dolo malo fecerint, invicem de dolo non agent.* Digest. Lib. iv. Tit. iii. *De dolo malo*, Leg. xxvi. *Viro atque uxore mores invicem accusantibus, causam repudii dedisse utrumque pronunciatum est. Id ita accipi debet, ut ea lege quasi ambo contempserunt, neuter vindicetur. Paria enim debita mutua pensatione dissolvuntur*, Lib. xxiv. Tit. iii. Leg. xxxix. It appears, by the first Law, That if in an Exchange, for Example, I have given a blind Horse, and the other hath given me a lame one, we are quit. In like manner, If a Man hath stolen from another, and the other hath stolen from him again, there's nothing can be demanded from each other, provided that the Things stolen were of equal Value. *Quotiens ex maleficio oritur actio, ut furti ex causâ furtivâ cæterorumque maleficiorum, si de ea pecuniarie agitur, compensatio locum habet*, Digest. Lib. xvi. *De compensationibus*, Lib. x. § 2. The other Law imports, That if an Husband, being desirous to be divorced from his Wife, for her scandalous Behaviour, is accused by her, and convicted of the same Faults, or such as are as contrary to conjugal Fidelity as those he blames her for, neither of them may pretend to any Advantage to dissolve their Marriage. This is just, but if Adultery be committed on both sides, the Woman's Crime affords a much stronger Reason for their Separation: See *Ch.* i. of the following Book. But 'tis not the same with Punishments inflicted by the Laws, as with some pecuniary Fines laid on the Parties. When two Persons have committed a like Crime one towards the other, the Magistrate hath nevertheless a Right to punish them both. See *Digest. Lib.* xlviii. *Tit.* v. *Ad legem Juliam de Adulteriis coercendis, Leg.* ii. § 4. & xiii. § 5.

[5] The Law is, *Item per acceptilationem tollitur obligatio. Est autem acceptilatio, imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, si id velit Titius remittere, potest sic fieri, ut patiatur debitorem hæc verba dicere: Quod ego tibi promisi habesne acceptum? & Titius respondeat, Habeo. Quo genere, ut diximus, tantum eæ solvuntur obligationes, quæ ex verbis consistunt, non cæteræ*, Instit. Lib. iii. Tit. xxx. § 1. In Time however this became reduced to the Simplicity of the *Law of Nations*. See *Digest. Lib.* xlvi. *Tit.* iv. *De Acceptilationib.* Leg. viii. § 4. and Mr. NOODT's Treatise *De Pactis & Transact.* Ch. viii.

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ligation to ceaſe upon the bare Conſent of the Party ſignified [1].

Beſides, the Obligation is preſum'd to be [2] remitted, if I deſignedly deliver up (not in Truſt, or ſuch like) the Inſtruments or Deeds, without which the Debt cannot be made out [a]; but if I have ſeveral Inſtruments, and each of them is capable of proving the Debt, then [3] the Obligation is not ſuppoſed to be cancelled upon the Delivery of one only.

As for what the *Roman* Law obſerves, that by Delivery of the Deeds the Creditor is judged to enter tacitly into Compact not to demand the Debt; that Nicety is unknown to the Law of Nature, which ſuppoſes the Obligation cancelled, not only by real Payment, but by the bare Remiſſion of it.

The Obligation is ſuppoſed to be tacitly forgiven, if the Creditor, [4] directly or indirectly, *hinders the Diſcharge of it*: Thus if I bargain with a Man to do any certain Work, and am myſelf to call upon him when I would have him perform it, my not calling upon him is preſum'd to be a Releaſe, as is, alſo, my ſubſtituting another to do it for him.

VIII. But as the former Methods take place, where one Party only is obliged; ſo where both are concern'd, if nothing be yet perform'd, the Obligation may ceaſe upon each Party's diſſenting and receding from the Bargain [5]; for 'tis natural that the contrary to that which cauſes the Obligation ſhould be capable of making it void, provided it be not of ſuch a Nature, as, when once contracted, never to be reſcinded; for no doubt a poſitive Law may, in certain Caſes, forbid, that what has been once agreed upon ſhould be [6] retracted, although nothing yet be perform'd in it: But if Part has been perform'd, and one Party done ſomething of his Duty, then 'tis plain [7] bare Diſſent is not ſufficient to take away the Obligation; which, in this Caſe, cannot be cancelled, unleſs he who perform'd releaſes the other, or has Amends made him ſome other Way [b].

IX. Moreover, an Obligation is releaſed, or rather broke off, by the Perfidiouſneſs of either Party, ſo that if one does not perform his Part, neither is the other obliged to make good his [c]: For when a Man takes upon him any Duty, not abſolutely and *gratis*, but upon the Proſpect of the other's doing ſomething on his ſide, the Obligation to make good his Undertaking is only conditional, as if he had ſaid; *I'll do this, in caſe you will firſt do that:* Now whatever is founded upon a Condition, falls of Courſe, if the Condition does not appear [8]. And therefore the ſuperſtitious Exactneſs of the *Indian*, if it be true, was more than he was obliged to; who, when another had taken away his Wife againſt all Right and Reaſon, would not however break off with him, becauſe he had taken a ſolemn Oath, that he would never, upon any Account, do any harm [d]. But this [9] holds only where the Non-performance lies [10] on his ſide, who ought to perform firſt. How far, or whether the Fear, left, after I have done my part, the other ſhould not perform his, frees me from the Obligation, has been diſcourſed of before [e].

But if one Party has perform'd in part, and the

[a] *Lib.* ii. *Tit.* xiv. *Lib.* ii. *D. de Pactis.* [b] *V. Lib.* lviii. *D. de Pactis, ubi ſupra.* [c] *V. Grot. Lib.* iii. *Ch.* xix. § 14. [d] *In Philoſtr. Lib.* iii. *Ch.* ix. *de vita Apollon. Tyanæi.* [e] *B.* iii. *Ch.* vi. § 9.

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[1] Whereas the *Roman* Lawyers affirm, That there is here a Difference between real Contracts, Contracts of bare Conſent, Contracts by Writing, and verbal Contracts, or Stipulations (ſee *Ch.* iii. § 6. above) there are none but the laſt, according to them, to which Acceptilation can be applied, as appears by this § of the *Inſtitutes*, *Quo genere, ut diximus, tantum eæ ſolvuntur obligationes, quæ in verbis conſiſtunt, non etiam ceteræ.*

[2] See the Law of the *Digeſts*, quoted above, *Lib.* iii. *Ch.* vi. § 2. *Note* 7.

[3] Several able Lawyers are of another Opinion, and that with Reaſon, as Mr. HERTIUS ſaith; for they draw Conſequences from what hath been done, rather than what hath not, and they preſume, that every wiſe Perſon will not do any thing but will have ſome Effect, and they cannot ſee what he can propoſe to himſelf, who gives up an obligatory Note (ſuppoſing that there be good Proof that the Bill was fairly given up) but that every Man ſhould believe that the Creditor would forgive the Debt, unleſs the contrary can be made fully appear. But to this Preſumption we may oppoſe another equally ſtrong, which is, that Men do not eaſily part with their Money. And unleſs the Creditor had forgot that he had two Notes for the ſame Debt, or was ignorant of it (which might happen if he was Heir to him who lent the Money) or had loſt one of the Notes (which might be the Caſe in the End) I do not ſee why he ſhould keep a Note, which furniſhes him with no new Title to demand the Debt; or why the Debtor, if he knows it, ſhould not require from the Creditor an expreſs Promiſe not to make uſe of it againſt him. Thus, unleſs the Intention of remitting the Debt appear by Circumſtances, it ſeems, to me, that in the Caſe in queſtion, we may preſume, that the Creditor has only given up a Paper that was uſeleſs to him. Mr. HERTIUS, when he ſays, that a wiſe Man does nothing without ſome End, ſuppoſes the Point in queſtion. For the Caſe here is to know, whether the Creditor, in reſtoring the Note, pretends that it ſhall have any Effect of Right with regard to the Debtor's Obligation, of which it is a ſuperfluous Proof.

[4] In Effect, the Obligation can ſubſiſt no longer, after he, who is the Object of it, renounces the Right he had acquir'd by it. There is no need here of the Conſent of him who was ingaged: for, though he ſhould refuſe the good Will of the Party who diſcharges him; this laſt, not being bound to preſerve his Right againſt his Will; the Moment he renounces it (as is ſuppoſed) it vaniſhes entirely, and, conſequently, the Obligation with it. The Caſe would be different, if he expreſſed an Unwillingneſs to quit it, unleſs the other accepted his Renunciation: which does not frequently happen. Therefore it is in vain that Mr. CARMICHAEL (in his Notes on the Abridgment of the *Duties of a Man and a Citizen*, Lib. i. Ch. xvi. § 3.) makes what is neceſſary to contract an Obligation, equally neceſſary to cancel it.

[5] So the *Inſtitutes* direct, *Eæ obligationes, quæ conſenſu contrahuntur, contrariâ voluntate diſſolvuntur. Nam ſi Titius & Seius inter ſe conſenſerint, ut fundum Tuſculanum emptum Seius haberet centum aureis; deinde re nondum ſecutâ, id eſt, neque pretio ſoluto neque fundo tradito, placuerit inter eos ut diſcederetur ab ea emptione & venditione, invicem liberantur.* Inſtit. *ubi ſupra*, § 4.

[6] In Caſe of Marriage, for Example, when it is not conſummated: which was introduced into Practice through the falſe Notions of the *Fathers of the Church*, and the *Scholaſtic Writers*. See the *Jus Eccleſiaſticum Proteſtantium* of Mr. BOHMER, *Lib.* iv. *Ch.* i. § 15, & ſeq.

[7] As if in a Bargain of Sale, the Buyer hath already paid for the Goods, and hath not received them, or the Seller hath delivered his Goods, but hath not taken the Money. *Sed non poterimus eadem ratione uti poſt pretium ſolutum emptione repetita, cum poſt pretium ſolutum infectam emptionem facere non poſſumus.* Digeſt. Lib. xviii. Tit. v. *De reſcindenda venditione*, &c. Leg. ii. *Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus, quin integris omnibus conſenſu eorum, qui inter ſe obligati ſunt, recedi poſſe, dubium non eſt. Ariſtoni hoc amplius videbatur, ſi ea, quæ me ex empto tibi præſtare oporteret, præſtitiſſem*, &c. *conſentiremus nè quid tu mihi eo nomine præſtares*, Lib. ii. Tit. xiv. *De Pactis*, Leg. lviii. See Mr. NOODT *De Pactis*, Ch. xi.

[8] Αὐ̓τοὶ δὲ σπονδὰς ἐχ οἱ ἀμυνόμενοι, ἀλλ' οἱ πρότεροι ἐπιόντες. Not thoſe that defend themſelves, but thoſe who are the Aggreſſors break the Truce. *Thucyd. Lib.* i. *Ch.* cxxiii. Edit. *Oxon.*

[9] So the Law is, *Nec adverſario tuo tranſactione uti concedendum eſt; niſi ea, quæ placita ſunt, adimplere paratus ſit*, Cod. Lib. ii. Tit. iii. *De Pactis*, Leg. xxii. *Fruſtra ſibi fidem quis poſtulat ab eo ſervari, cui fidem à ſe præſtitam ſervare recuſat.* Decretal. Lib. vi. Tit. ult. *De regulis Juris*, Leg. lxxv. We know the common Maxim, *Frangenti fidem fides frangatur eidem.*

[10] We may add here, that the Engagement is broke off only in favour of him who has kept his Word: for Perfidy can diſengage no Man. If therefore the Thing be yet poſſible, and we believe we can find our Account in the Execution of it, even after the Time agreed upon, we may force the unfaithful Contractor to it, without Prejudice to the Damages he is liable to for the Breach of his Engagement. See GROTIUS, *Lib.* iii. *Ch.* xx. § 38, and what I have ſaid above, *Lib.* iii. *Ch.* vi. § 8. *Note* 5.

of Payment is come, or [1] paſt[a]; and therefore Things of a different Sort or Quality cannot be paid by Compenſation, as a Buſhel of Wheat for a Buſhel of Oats, or a Hogſhead of *Rheniſh* for a Hogſhead of *Port* Wine; nor Things of a different Species, as this Horſe for that Ox; nor of a different Kind, as a Sheep for a Gooſe; nor a Species for a Thing indefinite of the ſame Kind, or for an indeterminate Quantity, as *Bucephalus* for a Horſe, or a Veſſel of Oil. Yet the *Roman* Lawyers admit of Compenſation, where the Particulars are not aſſign'd, but the ſame Sort and Quality is owing on each ſide, as if I had promiſed you a Horſe in general, and you happen to be Executor to one that leaves a Horſe to me in Legacy. But, yet even in the former Caſes, each Party may rate their Debt, and then pay them by Compenſation. And yet, where Debts are thus reciprocal, the Obligation is rather [2] ſuſpended, than taken away, by withholding what I owe another, till he pays what he owes me. But Work for Work, or Work for Goods, will not admit of Compenſation at the very Inſtant that it ought to be perform'd; for that would fruſtrate the very [3] End and Deſign of ſuch Contracts.

But if each Party releaſe the other, the Obligation ceaſes upon another Principle, *viz. Mutual Diſagreement*; ſo, alſo, if I ceaſe to be obliged, becauſe another, who ought firſt to perform his Part, omitted it, it is not by reaſon of Compenſation, but becauſe the Condition, upon which the Obligation was founded, does not appear. But if my Work has been neglected, by the Party that had undertaken it, I may rate it, and ſo bring it into Compenſation. Nay, I can oppoſe to a Debt an equivalent Damage, or a Fine adjudged to me for any Injury done by my Creditor. But if two Perſons be at Law, and, while the Cauſe is depending, ſtrike up a Bargain, neither can oppoſe the Law-ſute, or the Charges of it, to the other[b]; *v. g.* ſuppoſe I am at Law with another for an Eſtate, and during the Sute ſell him a Houſe, he cannot impute to me, as Payment, the Eſtate, or the Expences he has been at about it; for the Eſtate does not as yet appear to be his, and the Nature of the Thing ſhews, that the Bargain was made without any Regard to the Cauſe depending.

As for that Sort of Compenſation, which cancels former Favours by ſubſequent Injuries, *Seneca* diſcourſes largely of it[c]. So, alſo, equal Injuries may, by Compenſation [4], be put up on both ſides, provided the Right of the Magiſtrate be not infringed.

VII. The Obligation ceaſes, alſo, when the Creditor, or he who has a Title to it, forgives it; for 'tis evident any Man may recede from his own Right, and when the Right has been made over to another, there, too, the Obligation ceaſes upon that other's forgiving it. And as at firſt I cannot ſtand obliged, if the other Party refuſes to accept of it; ſo neither can I continue bound, if he thinks fit to cancel the Bond. But this only in Caſe no Third Perſon is injur'd by it; for otherwiſe he alone cannot releaſe me, although I was immediately obliged to him only.

This Releaſe is perform'd either expreſly, or tacitly; to the former belongs what the *Roman* Law calls [5] *Acceptilatio*, an Acquittance or Diſcharge, by which the Perſon acknowledged himſelf to have received what indeed he had not; as alſo the [6] *Stipulatio Aquiliana*, which, by a Sort of Novation, brought the Debtor to Articles of Agreement, and then releaſed him by a Diſcharge; all which tedious Forms and Circumſtances the Law of Nature knows nothing of, but makes the Obligation

[a] *V. Lib.* vii. *D. h. t. Ch.* iv, &c.

[b] *As* Grotius *well obſerves, Lib.* iii. *Ch.* xix. § 19.

[c] *Epiſt.* 81. *& de Beneficiis, Lib.* vi.

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IX. Moreover, an Obligation is releaſed, or rather broke off, by the Perfidiouſneſs of either Party, ſo that if one does not perform his Part, neither is the other obliged to make good his [c]: For when a Man takes upon him any Duty, not abſolutely and *gratis*, but upon the Proſpect of the other's doing ſomething on his ſide, the Obligation to make good his Undertaking is only conditional, as if he had ſaid, *I'll do this, in caſe you will firſt do that:* Now whatever is founded upon a Condition, falls of Courſe, if the Condition does not appear [8]. And therefore the ſuperſtitious Exactneſs of the *Indian*, if it be true, was more than he was obliged to; who, when another had taken away his Wife againſt all Right and Reaſon, would not however break off with him, becauſe he had taken a ſolemn Oath, that he would never, upon any Account, do any harm [d]. But this [9] holds only where the Non-performance lies [10] on his ſide, who ought to perform firſt. How far, or whether the Fear, leſt, after I have done my part, the other ſhould not perform his, frees me from the Obligation, has been diſcourſed of before [e].

But if one Party has perform'd in part, and the

[a] *Lib.* ii. *Tit.* xiv. *Lib.* ii. *D. de Pactis.* [b] *V. Lib.* lviii. *D. de Pactis, ubi ſupra.* [c] *V. Grot. Lib.* iii. *Ch.* xix. § 14. [d] *In Philoſtr. Lib.* iii. *Ch.* ix. *de vita Apollon. Tyanæi.* [e] *B.* iii. *Ch.* vi. § 9.

[1] Whereas the *Roman* Lawyers affirm, That there is here a Difference between real Contracts, Contracts of bare Conſent, Contracts by Writing, and verbal Contracts, or Stipulations (ſee *Ch.* iii. § 6. above) there are none but the laſt, according to them, to which Acceptilation can be applied, as appears by this § of the *Inſtitutes*, *Quo genere, ut diximus, tantum eæ ſolvuntur obligationes, quæ in verbis conſiſtunt, non etiam ceteræ.*

[2] See the Law of the *Digeſts*, quoted above, *Lib.* iii. *Ch.* vi. § 2. *Note* 7.

[3] Several able Lawyers are of another Opinion, and that with Reaſon, as Mr. HERTIUS ſaith; for they draw Conſequences from what hath been done, rather than what hath not, and they preſume, that every wiſe Perſon will not do any thing but will have ſome Effect, and they cannot ſee what he can propoſe to himſelf, who gives up an obligatory Note (ſuppoſing that there be good Proof that the Bill was fairly given up) but that every Man ſhould believe that the Creditor would forgive the Debt, unleſs the contrary can be made fully appear. But to this Preſumption we may oppoſe another equally ſtrong, which is, that Men do not eaſily part with their Money. And unleſs the Creditor had forgot that he had two Notes for the ſame Debt, or was ignorant of it (which might happen if he was Heir to him who lent the Money) or had loſt one of the Notes (which might be the Caſe in the End) I do not ſee why he ſhould keep a Note, which furniſhes him with no new Title to demand the Debt; or why the Debtor, if he knows it, ſhould not require from the Creditor an expreſs Promiſe not to make uſe of it againſt him. Thus, unleſs the Intention of remitting the Debt appear by Circumſtances, it ſeems, to me, that in the Caſe in queſtion, we may preſume, that the Creditor has only given up a Paper that was uſeleſs to him. Mr. HERTIUS, when he ſays, that a wiſe Man does nothing without ſome End, ſuppoſes the Point in queſtion. For the Caſe here is to know, whether the Creditor, in reſtoring the Note, pretends that it ſhall have any Effect of Right with regard to the Debtor's Obligation, of which it is a ſuperfluous Proof.

[4] In Effect, the Obligation can ſubſiſt no longer, after he, who is the Object of it, renounces the Right he had acquir'd by it. There is no need here of the Conſent of him who was ingaged: for, though he ſhould refuſe the good Will of the Party who diſcharges him; this laſt, not being bound to preſerve his Right againſt his Will; the Moment he renounces it (as is ſuppoſed) it vaniſhes entirely, and, conſequently, the Obligation with it. The Caſe would be different, if he expreſſed an Unwillingneſs to quit it, unleſs the other accepted his Renunciation: which does not frequently happen. Therefore it is in vain that Mr. CARMICHAEL (in his Notes on the Abridgment of the *Duties of a Man and a Citizen*, Lib. i. Ch. xvi. § 3.) makes what is neceſſary to contract an Obligation, equally neceſſary to cancel it.

[5] So the *Inſtitutes* direct, *Eæ obligationes, quæ conſenſu contrahuntur, contrariâ voluntate diſſolvuntur. Nam ſi Titius & Seius inter ſe conſenſerint, ut fundum Tuſculanum emptum Seius haberet centum aureis; deinde re nondum ſecutâ, id eſt, neque pretio ſoluto neque fundo tradito, placuerit inter eos ut diſcederetur ab ea emptione & venditione, invicem liberantur.* Inſtit. *ubi ſupra*, § 4.

[6] In Caſe of Marriage, for Example, when it is not conſummated: which was introduced into Practice through the falſe Notions of the *Fathers of the Church*, and the *Scholaſtic Writers*. See the *Jus Eccleſiaſticum Proteſtantium* of Mr. BOHMER, *Lib.* iv. *Ch.* i. § 15, & ſeq.

[7] As if in a Bargain of Sale, the Buyer hath already paid for the Goods, and hath not received them, or the Seller hath delivered his Goods, but hath not taken the Money. *Sed non poterimus eadem ratione uti poſt pretium ſolutum emptione repetita, cum poſt pretium ſolutum infectam emptionem facere non poſſumus.* Digeſt. Lib. xviii. Tit. v. *De reſcindenda venditione*, &c. Leg. ii. *Ab emptione, venditione, locatione, conductione, cæteriſque ſimilibus obligationibus, quin integris omnibus conſenſu eorum, qui inter ſe obligati ſunt, recedi poſſe, dubium non eſt. Ariſtoni hoc amplius videbatur, ſi ea, quæ me ex empto tibi præſtare oporteret, præſtitiſſem*, &c. *conſentiremus nè quid tu mihi eo nomine præſtares*, Lib. ii. Tit. xiv. *De Pactis*, Leg. lviii. See Mr. NOODT *De Pactis*, Ch. xi.

[8] Αὐθεσι δὲ σπονδὰς ἐχ οἱ ἀμυνόμενοι, ἀλλ' οἱ πρότεροι ἐπιόντες. Not thoſe that defend themſelves, but thoſe who are the Aggreſſors break the Truce. *Thucyd. Lib.* i. *Ch.* cxxiii. Edit. *Oxon.*

[9] So the Law is, *Nec adverſario tuo tranſactione uti concedendum eſt; niſi ea, quæ placita ſunt, adimplere paratus ſit*, Cod. Lib. ii. Tit. iii. *De Pactis*, Leg. xxii. *Fruſtra ſibi fidem quis poſtulat ab eo ſervari, cui fidem à ſe præſtitam ſervare recuſat.* Decretal. Lib. vi. Tit. ult. *De regulis Juris*, Leg. lxxv. We know the common Maxim, *Frangenti fidem fides frangatur eidem.*

[10] We may add here, that the Engagement is broke off only in favour of him who has kept his Word: for Perfidy can diſengage no Man. If therefore the Thing be yet poſſible, and we believe we can find our Account in the Execution of it, even after the Time agreed upon, we may force the unfaithful Contractor to it, without Prejudice to the Damages he is liable to for the Breach of his Engagement. See GROTIUS, *Lib.* iii. *Ch.* xx. § 38, and what I have ſaid above, *Lib.* iii. *Ch.* vi. § 8. *Note* 5.

Contract happens to be broke off before Completion, how ſhall he have Right done him? In this Caſe we muſt diſtinguiſh according to the Variety of Circumſtances. For if I have perform'd what I ought, and the other refuſes to perform his part, I have a Right to force him to it by any lawful Means: But if, after having perform'd Part, I begin to be tired, and neglect to make an End of it, I cannot oblige that other to make any Allowance for my imperfect Performance, 'till I finiſh the Whole according to the Agreement; nor can that trite Saying be objected here, that *no one ought to grow rich at the Loſs of another*, for no Regard is to be had to the Loſs which a Man by his own Fault brings upon himſelf [1]. And if he whom it concerns to have my part of the Covenant fulfilled, is the Occaſion why it is not, it is the ſame thing to me as if it was fulfilled. Nor if he ſhould afterwards repent of his Breach of Faith, and be willing to compleat his Contract, ſhall I be obliged to comply with it? For one Violation entirely breaks off the Contract, and frees the other from his Obligation; thus, ſhould I hire a Servant for a Year, and pay him his Wages beforehand, and, for no Fault of his, ſhould turn him off before the End of the Year, I ſhould not be able to oblige him to return me part of the Wages proportionable to the Remainder of the Time. Nay, if each Party has perform'd equally, yet even then, neither can break off the Bargain before the Time appointed: and if one ſhould give back, the other would have a Right to force him to compleat it; or to make as much Amends, as it was his Intereſt to have the Compact exactly perform'd.

X. Obligations alſo expire, when the [2] Perſon, in whom they are founded, changes [3]. Thus the Magiſtrate, having promiſed Protection to the Subject, is no longer obliged to it, than he continues in his Office: and the Subject, having ſworn Allegiance to the Magiſtrate, is freed from the Obligation, if either *he* ceaſes to be a Subject, or the other to be a Magiſtrate. But ſuch an Alteration in the Subject Matter as would have prevented the Obligation, had it exiſted at the making of it, will not be ſufficient to diſſolve it afterwards, provided the Party be not thereby render'd incapable of performing it [4]. For, unleſs Proviſion had been made at firſt for ſuch Accidents, the Right, which was irrecoverably given, ſhall continue firm, although, perhaps, *the other* be a little burthen'd by it. For he enter'd into Contract freely and of his own accord, and may thank himſelf for not having foreſeen thoſe Inconveniences, that might probably have been prevented. Thus when [5] a People have given up their Liberties to an Arbitrary Power, although afterwards they change their Minds, and ſhew a greater Inclination for another Form of Government, yet they cannot therefore ſhake off their Allegiance. And thus many, if they had known the Inconveniences of a married State, would never have embraced it; who yet, having enter'd into the Bond, whatever happens, [6] muſt endure it.

XI. Time puts a [7] Period to thoſe Obligations which were limited to a Day; and if the Parties deſire to have them continued, they muſt covenant again *de novo*, which needs not always be done expreſly, but may ſometimes be tacitly perform'd [a]. But ſuch an Obligation as is void after ſuch a Time, and yet has no room to exert itſelf in before the Time expired, is abſurd: As if I ſhould make myſelf indebted to you 100*l.* for three Years, yet ſo as that you ſhall have no Right to demand it before the Time be lapſed; for vain is the Obligation that has no Effect before it expires, nor leaves any behind it after.

But it is another Thing, if I covenant, That, unleſs you demand it within the Compaſs of three Years, it ſhall not be due: For that will be a Condition annex'd to the Obligation, which not appearing, the Obligation will ceaſe. Thus 'tis uſual for a *Surety* to bind himſelf for ſuch a Term only, to oblige the *Creditor* to demand his Money betimes, and while the *Debtor* is able to pay, leſt otherwiſe he ſhould remain bound for ever [8].

[a] Vide *Lib.* xiv. *Tit.* ii. *l.* 13. § ult. *D. Locati*, &c.

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[1] The Words of the *Digeſts* are, *Qui operas ſuas locavit, totius temporis mercedem accipere debet, ſi per eum non ſtetit, quo minus operas præſtat.* Digeſt. Lib. xix. Tit. ii. *Locati, conducti*, Leg. xxxviii. *princip.* See alſo *Leg.* xix. § 9, 10.

[2] See the next Chapter § 20. at the end. Mr. HERTIUS quotes a Law here, in which it is ſaid, That if one make a Promiſe to any one to give ſo much, either to him or to another, and that other comes to be adopted, baniſhed, carried into Slavery, or changes his Condition in any other Manner, the Engagement is null, as to him, becauſe it contains a tacit Agreement or Condition, that he remains in the ſame State. *Cum quis tibi aut Titio dari ſtipulatus ſit, magis eſſe ait, ut ita demum recte Titio ſolvi dicendum ſit, ſi in eodem ſtatu maneat, quo fuit cum ſtipulatio interponeretur. Cæterum ſive in adoptionem, ſive in exilium ierit, vel aquâ & igni ei interdictum, vel ſervus factus ſit: non recte ei ſolvi dicendum, tacite enim ineſſe hæc conventio ſtipulationi videtur*, &c. Digeſt. Lib. xlvi. Tit iii. Leg. xxxviii. But ſuch a Change of State hath no Connexion with ſuch a Promiſe, but by Reaſon of the Niceties of the *Civil Law*.

[3] So an Agent, after his Commiſſion is expired, is not obliged any longer to him, whoſe Affairs he before was engaged to manage. It is the ſame with a Tutor or Guardian, in reſpect to his Pupil's Affairs. See *Digeſts, Lib.* xiv. Tit. iii. De inſtitoriâ Actione, *Leg.* xx. *Cod. Lib.* v. Tit. xxxvii. De Adminiſtratione Tutorum vel Curatorum, &c. *Leg.* xxvi. and *Tit.* xxxix. *Quando ex facto Tutoris, vel Curatoris Minores agere, vel conveniri poſſunt*, Leg. i. Mr. HERTIUS quotes theſe Laws.

[4] See what Mr. BAYLE ſays, in his Anſwer to the *Queſtions of a Provincial*, Tom. i. Ch. ix. upon this Queſtion, Whether *Gebhard Truchſes* may juſtly take Poſſeſſion of the Archbiſhoprick of *Cologne*, ſince the Time he married?

[5] This cannot happen in the Life of the firſt Prince, unleſs he has exceſſively abuſed his Power, and, in that Caſe, he, from whom he holds it, hath a Right to put him out: but if, after ſome Generations, the Alteration of the State, or the Genius of the Nation requires another Form of Government, why may not the People introduce it? The Publick Good, for whoſe Safety it is, or ought to be eſtabliſhed, makes here a tacit Condition or Exception, which obliges us not to judge of the Engagement of a People in a Body, with Relation to the Eſtabliſhment of a Sovereign Power, after the ſame Manner as we regulate the Engagements of private Perſons one to another. We ſhall ſpeak of the Grounds of my Aſſertion in another Place.

[6] See the famous Mr. BAYLE's Anſwer to the *Queſt. of a Prov.* Tom. ii. p. 40.

[7] See *Lib.* vii. *Ch.* vi. § 15. following. This Author, in his Abridgment of the *Duties of a Man and Citizen*, Lib. i. *Ch.* xvi. § 7. adds this Reſtriction, *Provided, that during the Time agreed on, he was in a Condition of requiring the Performance of the Engagements of the other Party.* If he did not mean the ſame Thing as he does here, we muſt extend his Thought in the Manner I have explain'd it in the Notes on this Section: or elſe by ſuppoſing ſome Error in the Perſon who has engaged for a certain Time to do ſomething in our Favour.

[8] He would be ſo, according to the Principles of the *Roman Law*, which eſtabliſhed here one of the Subtleties moſt contrary to the *Law of Nature*. For the Lawyers had laid it down for a Rule, that of whatever Nature Obligations were, Time could no more extinguiſh them, than it could give them Birth. *Placet etiam ad tempus obligationem conſtitui non poſſe: non magis quàm legatum.* Digeſt. Lib. xliv. Tit. vii. *De oblig. & actionib.* Leg. xliv. § 1. Thus when a Man had anſwer'd for another, or promiſed any Thing in his Name, though at the ſame Time he declared, that he would engage only for a certain Time; yet the Law look'd upon him as always bound. But Cuſtom eluded this Rule, by granting an Exception, or bar in Law, to him who was ſummon'd to make good his Engagements after the Time was expired. See *Inſtitut. Lib.* iii. *Tit.* xvi. *De verbor. oblig.* § 3. and Mr. NOODT *De Pactis & Tranſact. Ch.* xii. It is ſurpriſing how ſome Authors endeavour to juſtify the Notions of the *Roman* Law here, by Reaſons as falſe and frivolous as the Deciſion is itſelf.

XII. By

XII. By *Death* those Obligations expire, which were founded in the Person of the deceased; for the *Subject* being gone, the *Accident* must necessarily follow, and the Performance be render'd [1] impossible in Nature. But yet in *Japan* the *Bonzy* persuade Men, That *those who give them Money here shall receive ten-fold in the other World:* And upon this Account give their *Creditors* a Note under their Hand, which they keep carefully, in order to be buried with them [a]. But generally the Obligation that lay upon the deceased is communicated and continued to the Survivors; and this, either when the Survivor takes it upon him, of his own accord to preserve the Reputation of the deceased, or for other Reasons, or when, the Goods of the deceased being made over to the Heir [2], the Incumbrances, also, go along with them.

But if a Man dies, and leaves not enough to satisfy his Debt, the Creditor's Action seems to die with him; for what can any one do to a dead Carcase [3]? Though among the *Egyptians*, the *Creditors* used to bury the Bodies of their *Debtors* in their Houses, which afterwards the Heirs of the deceased, if they were able, redeemed and interred honourably. Among whom too it was usual for the Children to pawn their Parents dead Bodies; but if they did not redeem them again, they were treated with the greatest Ignominy, and after Death were denied Burial [b].

XIII. By *Delegation* a Man substitutes his *Debtor* to his *Creditor* to make Payment for him [4]; or I make over to my *Creditor* the Debt another owes me: And here the *Creditor*'s Consent is necessary, but not the Consent of the [5] third *Debtor*, whom, in this Case, I can make over unknown to him; and against his Will: For 'tis the same Thing to whom a Man pays, but not the same from whom he is to demand a Debt.

XIV. There is no need to say much of *Confusion*; for since the same Man cannot be his own *Creditor* and *Debtor*, it follows, if a Man becomes Heir to his *Debtor*, his Action ceases, [6] not finding an Object to exert itself upon.

XV. [7] *Novation* seems to belong peculiarly to the *positive* [8] *Civil Law*, and not to the *Law* of *Nature* and *Nations*; for old Obligations may be alter'd by Consent of Parties, as suppose that the Loss of a Thing, through the Delay of the *Debtor*, should not be imputed to him; that no Penalty or Usury be demanded for Delay, that Pledges be restored, Sureties released, the *Creditor*, for the future, declaring himself willing to depend entirely upon the Credit of the *Debtor*; but those that deal according to the Simplicity of the *Law* of *Nature*, need not here suppose a new Obligation super-induced upon the former; for indeed nothing is here transacted, but only the *Creditor* gives up Part of his Right, or several Pretensions are blended into one: But that one Action should enjoy one Privilege more than another, is entirely owing to some [9] *positive Law*; for in the *Law* of *Nature* those Things that are equally due, may be equally demanded. But, as for what the [10] *Roman Law* delivers concerning such a *Novation* as is got by a Contest at Law (and which they call *necessary*, as they call the other *voluntary*) may be applied in some Respects to the *Law* of *Nature*; for he that [11] cast his Adversary, has an Action

[a] Vide *Bern. Varen. de relig. Japan. p. m.* 35. *Herod. Euterpe.*

[b] Vide *Diod. Sic. Lib.* i. *Ch.* xcii, xciii. *Lucian. de luctu, p.* 306, 307.

[1] Vide *Val. Max. Lib.* ii. *Ch.* vi. § 10. and *Pomp. Mel. Lib.* iii. *Ch.* ii. says of the Old *Gauls*; *The Management of their Concerns, and the Demand of their Debts were put off to the other World.*

[2] See *Lib.* iii. *Ch.* i. § 11. and *Lib.* iv. *Ch.* x. § 13. above.

[3] To which the Law of *Solon* has Regard, which forbids us to speak ill of the Dead. Vid. *Plut. Solone*, p. 189. Vid. *Lib.* xlvii. *Tit.* x. *Lib.* i. § 4, 6. and *Lib.* xxvii. D. de injuriis, &c.

[4] *Delegare est vice sua alium reum dare creditori, vel cui jusserit.* Digest. xlvi. Tit. ii. *De novationibus, & delegationibus*, Leg. xi.

[5] It is by the *Roman* Law, *Delegatio debiti, nisi consentiente, & stipulante promittente debitore, jure perfici non potest.* Cod. Lib. viii Tit. xlii *De Novat. & Delegat.* Leg. i. But our Author puts another Sense upon the Term *Delegatio*, than the Lawyers do; for he understands by it, the Translation or Resignation of a Debt, which in the *Roman* Law is looked upon as a kind of Sale, which a Man may make without the Consent of the Debtor. *Nominis autem venditio, & ignorante, & invito eo, adversus quem actiones mandantur, contrahi solet.* Cod. ibid. See also what Mr. HERTIUS says here, and Mr. WEBER, Professor at *Giessen*, in his Notes upon the Abridgment, *De Offic. Hom. & Civ.* printed in 1710. *Lib.* i. *Ch.* xvi. § 9. Mr. GUNDLING (in his *Jus Natur.* 2 Edit. *Ch.* xxiii. § 104.) takes the Part of our Author, and that justly, if we may judge by the *Laws of Nature*. As for the Rest, the Thing is of no Consequence; and our Author would have done well to have inform'd the Reader, that he took the Word *Delegatio* (as he might have done) in a Sense a little different from that of the *Roman* Lawyers, in order to avoid being charged with not understanding their Principles.

[6] So the *Digests* affirm, *Additio Hæreditatis nonnunquam jure confundit Obligationem, veluti si creditor debitoris vel contra debitor creditoris adierit Hæreditatem.* Digest. Lib. xlvi. Tit. iii. *De solution. & liberat.* Leg. xcv. § 2. "The Confusion happens there, "where Right and Obligation meet, and, joining in the same Person, vanish by that means." The Examples produced by Mr. HERTIUS to shew that the Notion of Confusion is of a more large Extent, concern only the Decisions of the *Roman* Law, about which we may consult Mr. TITIUS's *Jus privatum Romano-Germanicum, Lib.* v. *Ch.* xvi. § 9. And besides, our Author was not oblig'd to recite here all the Cases in which the Right or Obligation might be extinguished by a Reunion in the same Person.

[7] The *Roman* Laws mean by it, an Act by which the Creditor and Debtor, without any new Cause, change the Nature of a Debt, by adding some new Obligation to the old. *Novatio est prioris debiti in aliam obligationem, vel civilem, vel naturalem, transfusio atque translatio: hoc est, cum ex præcedenti causa ita nova constituitur, ut prior perimatur. Novatio enim à novo nomen accipit, & à nova obligatione.* Digest. Lib. xlvi. Tit. ii. *De novationibus, & delegationibus*, Leg. i.

[8] Mr. TITIUS, *Observ.* 415. *on Puffendorf*, maintains the contrary; for he says, That *Novation*, as every other lawful Act, is made by the mutual Consent of Parties, and in Consequence of that Liberty which all Men naturally have, to determine and change, as they see fit, their Engagements one to another. See what Mr. HERTIUS says about it.

[9] As in the Concurrence of several Creditors, or of different Persons to whom the same Thing has been mortgaged; about which there are many Decisions in the *Roman* Law much contested among the Interpreters. See *Digest. Lib.* xx. *Tit.* iv. *Qui potiores in pignore, &c. Leg.* xlii. *Tit.* v. *De rebus auctoritate judice possidend.* with the Commentators on this Title. Our Author speaks here of *privileged Actions*; because one of the principal Effects of *Novation*, according to the *Roman* Law, is to destroy the Right of Preference, by changing the Nature of the Obligation. See *Digest. Lib.* xlvi. *Tit.* ii. *De novation. Leg.* xxix. But even this might have taught our Author, that supposing Things regulated thus, by some *Civil Law*; the Alteration of Engagements, according to the *Law of Nature*, may still produce more considerable Effects.

[10] In the *Digests*, *Aliam causam esse novationis voluntariæ, aliam judicii accepti, multa exempla ostendunt.* Digest. *ubi supra*, Leg. xxix. This does not change the Nature of *Obligation*, and so far from extinguishing the Benefits and Advantages the Parties had, that it renders their Condition better. See the *Interpreters* upon this Title.

[11] *Judicati actio.* The public Good seems to require (and in Effect does require it) that the Sentence of the Judge be reputed just, and founded upon Truth, whether it be really so or not. *Res judicata pro veritate accipitur.* Digest. Lib. i. Tit. v. *De statu Homin.* Leg. xxv. Therefore it is never repealed but for very strong Reasons, which the Laws themselves determine: always reserving to the Sovereign the Right of interposing his Authority on extraordinary Occasions. See a learned and curious Treatise of DIDIER HERAULD *De rerum judicatarum auctoritate*, published at *Paris* in 1640. This however gives no Right in Conscience to him who knows, or may easily know, that he has gained his Cause unjustly. See what I have said upon *Grotius*, *Lib.* iii. *Ch.* ii. § 5. *Note* 2.

against

againſt him for what the Court adjudges, let the Merit of his former Cauſe be what it will: So when any Controverſy is decided by War, let that be as it will, after the War is at End, not only the firſt Pretenſions may be demanded, but, alſo, that which was determined by the Peace[1].

[1] To theſe ſeveral Ways of being freed from an Obligation, our Author might have added another, *viz.* When a Thing which was due in Specie, as our Lawyers ſpeak, ſo that it cannot be diſcharged by an Equivalent, is deſtroyed, without any Fault of the Debtor, or by any Delay in returning it. The *Roman* Law gives an Example of a Slave who dies before we put him into the Hands of him to whom we promiſed him, or to whom he was bequeathed, by a Perſon to whom we becomes Heir. *Si ex legati causâ, aut ex ſtipulatu hominem certum mihi debeas, non aliter poſt mortem ejus tenearis mihi, quam ſi per te ſteterit, quominus vivo eo eum mihi dares: quod ita fit, ſi aut interpellatus non dediſti, aut occidiſti eum.* Digeſt. Lib. xlv. Tit. i. *De verborum obligationibus*, Leg. xxiii. ſee alſo lxxii. § 1. and lxxxiii. § 7. and *Cod. Lib.* iv. *Tit.* ii. Si certum petatur, *Leg.* ix. and the *Jus privatum Romano-Germanicum*, by Mr. TITIUS, *Lib.* v. *Ch.* xvi.

CHAP XII.

Of the Interpretation of COMPACTS and LAWS.

I. *The Reaſon of the Order.*
II. *The Neceſſity of a right Interpretation.*
III. *The Words are ordinarily to be underſtood according to the common Uſage. And*
IV. *Words of Art according to the Art.*
V. *Conjecture is ſufficient, when Words are dubious.*
VI. *Or ſeem to contradict one another.*
VII. *Conjectures muſt be taken from the Matter treated on.*
VIII. *From the Effect, or*
IX. *From the Coherence, Original, and Place.*
X. *How the Senſe may be gathered from the Reaſon of them.*
XI. *Some Words have both a large and ſtrict Signification.*
XII. *Some Things are favourable, others odious.*
XIII. *Rules are to be made from theſe Diſtinctions.*
XIV. *An Example of Two who came to the Goal together.*
XV. *How this Order is to be interpreted. No Man muſt wage War without the Command of another.*
XVI. *Of theſe Words,* Carthage ſhall be free.
XVII. *A Conjecture when a Law muſt be enlarged.*
XVIII. *Of Tricks to evade a Law.*
XIX. *A Conjecture when the Law ought to be reſtrained upon the Account of ſome Defect in the Will of the Lawgiver.*
XX. *An Obſervation upon this Conjecture.*
XXI. *Or upon the Account of ſome Accident inconſiſtent with his Will, as where it is either unlawful,*
XXII. *Or too grievous in Reſpect of the Performance.*
XXIII. *What if two Laws are contrary one to another.*

I. SO much for *Pacts* in general, and partly in particular; let us now proceed to the Interpretation of them, for ſince in all Obligations certain *Signs* are made uſe of to expreſs the Minds of the Parties, and the Laws and Heads of the Contract; and ſince theſe *Signs* may ſometimes be taken in different Senſes, 'tis highly neceſſary to have ſome Rule to find out that which is true and genuine. Now although we deſign to treat hereafter of thoſe *Pacts* which preſuppoſe civil Government; and [1] moſt of what we have to ſay upon this Head has Relation to ſuch an Eſtabliſhment; yet ſince it would not be ſo convenient either to divide the Matter, or to reject the whole to the End of the Book, it will not, I hope, be thought ſo much againſt Method to treat of all together in this Place; as *Grotius* [2] has done before me, who has handled this Subject with the utmoſt Nicety.

II. If then we conſider for what End *Obligations* are made, we ſhall find that every Man is bound to that which he intended, when he enter'd into the *Obligation*. It is here ſuppoſed that he enter'd into it freely, and of his own accord, and that the Matter is ſuch as he lay under no Conſtraint to perform it otherwiſe: And therefore I do not ſee how a Man can poſſibly be obliged farther than he himſelf intended; in this Senſe is that of *Cicero* [2] to be taken, *In* Obligations *Regard is to be had not ſo much to the Expreſſion as to the Intent of the Party.*

Farther, ſuch is the Nature of Man, that his internal Actions are not, in themſelves, viſible to another, and may differ from his external Signs and Actions: And yet we lie under a Neceſſity to diſtinguiſh clearly what every Man is obliged to, or what may lawfully be demanded of him; for there would be no ſuch Thing as *Obligation*, if any one might free himſelf, by affixing what Senſe he pleaſed to his *Signs*, and by pretending that he meant different from their true Signification. And therefore right Reaſon dictates that he, to whom the *Obligation* is made, ſhould have a Right to compel him, from whom 'tis due, to the Performance of it, in that Senſe which the right *Interpretation* of the *Signs* made uſe of imports. For though the Man himſelf is chiefly concerned in what he meant, yet others muſt act by *Signs*; for elſe the Matter would be to no End or Purpoſe, which, in Morality, is abſurd. Conſonant to this was the

[2] *Lib.* ii. *Ch.* xvi.

[1] The Original is here obſcure, the Word *Pleraque* ſeeming to refer to *Pactorum*, and ſo it ought to be rendered, *The moſt of thoſe Pacts*; but then his Words are not true, for *Laws* are not properly *Pacts*, as our Author proves, *Lib.* i. *Ch.* vi. § 2. and the contrary appears in this Chapter, for the Rules here laid down may be applied as well to *Pacts* as *Laws*. As for the Reſt, ſome Authors, who have given, in their Way, Syſtems of the *Law of Nature*, improperly baniſhed this Interpretation; under Pretence that general Rules belong only to Logic and Criticiſm. But the Application of theſe Rules is too important, and uſeful, not to merit Attention; ſince they ſerve as a Foundation to thoſe particular Principles, which are to guide us in ſo great a Variety of Caſes, as the Laws offer to our Examination. Beſides, they are abſolutely neceſſary to diſtinguiſh Agreements and Contracts from certain arbitrary Interpretations, which the Lawgivers eſtabliſh and authorize, upon Preſumptions, ſometimes, very remote from Truth.

[2] CICERO's Words are, *Semper autem in fide, quid ſenſeris, non quid dixeris, eſt cogitandum. De Offic. Lib.* i. *Ch.* xiii. But theſe Words are a Part of a large Paſſage, which is neither found in the moſt antient Editions, nor the moſt Part of the Manuſcripts.

old

old Form uſed in making Leagues, *Sine dolo malo, utique ea hic hodie rectiſſime intellecta ſunt; Without any fraudulent Deſign, according*[1] *to the Senſe which the Words at preſent bear.*

The true End and Deſign of *Interpretation* is, *to gather the Intent of the Man from moſt probable Signs.* Theſe *Signs* are of two Sorts, *Words*, and *other Conjectures*, which may be conſidered ſeparately, or both together[2].

III. As for Words[3], the Rule is, *Unleſs there be reaſonable Objections againſt it, they are to be underſtood in their proper and moſt known Signification; not ſo much according to Grammar, as to the general Uſe of them*[a 4].

When *Tiberius* had uſed a Word which was not *Latin*, *Capito* ſaid, that, in Honour of the Emperor, it ought to paſs current for the future, although nobody before him had made uſe of it: But one *Marcellus* replied, *That* Ceſar *might, if he pleaſed*, naturalize *Men, but Words he could not. Procopius*[b] having ſaid, *That the Emperor had raiſed an Army partly among his own Subjects, and partly among the Allies*, ſubjoined, *That formerly, by the Name of* Allies, *were meant only the* Barbarians, *who were not Slaves; for they were never conquered, but had obtained the Privilege of Citizens, with Arms in their Hands, and were ſo called from the* Alliances *which they made. But now there is none but may have a Title to this Name: The Way of the World is not to keep Words ſtrictly to that Senſe which they did originally bear; for Men change at Pleaſure the Things themſelves, little regarding by what Names they were firſt called*[c]. The *Locrians*[d], arriving at the extreme Part of *Calabria*, found that Country poſſeſt by the *Sicilians*, who alarmed with their unexpected Arrival, received them, and ſtruck up a League in theſe Words, *That the* Locrians *ſhould preſerve an Amity with the* Sicilians, *and permit them to enjoy the Country in common with them, as long as they ſhould tread upon that Earth, and wear thoſe Heads upon their Shoulders.* Theſe Terms being agreed upon, the *Locrians* came to take the Oath, having firſt put *Earth* in their Shoes, and faſtened the *Heads* of Garlick upon their Shoulders, ſo as not to be ſeen. But when they had taken the Oath, they threw the *Earth* out of their Shoes, and the *Heads* of the Garlick from their Shoulders, and watching their Opportunity, fell upon the *Sicilians*, and drove them out of the Country. The *Bœotians*[e] made a League with the *Spartans*, and one of the Articles was, That they ſhould deliver up *Panactum*; which they indeed delivered up, but firſt demoliſhed it.

Leucippus[f] having borrowed of the *Tarentines* the Uſe of a Place *for a Day and a Night*, and not being willing to reſtore it, when they demanded it by Day, he put them off to the next Night; and when by Night, to the next Day.

When *Mahomet* took *Eubœa*, he told a certain Perſon that *his Head ſhould be ſafe*, but immediately cut his Body aſunder[g].

A petit Prince of the *Indies* fled to the King of *Perſia* for Protection, and when his Sovereign demanded him, by his Ambaſſador, the *Perſian*, during the Audience, order'd him to be put in a Baſket, and hung upon a Tree, and then denied that he was upon his Land[g]. Thus a certain Perſon denied poſitively that he had *laid Hands* on a Prieſt, for he had only *cugdelled* and [6] *kicked* him.

[a] *Uſus, quem penes arbitrium eſt & jus & norma loquendi.* Hor. *Uſe is the true Standard of Speaking, Words are like Money, none will paſs but what has the publick Stamp upon it,* Quint. Inſtit. Orat. Lib i. Ch. vi. [b] *Hiſt. Vandal.* Lib. i. [c] *The Signification of the Word* Sophiſter, *in Proceſs of Time, changed like Money,* Themiſt. Orat. 23. [d] *Polyb. Lib.* xii. *Ch.* iv.
[e] *Thucyd. Lib.* v. *Ch.* xlii. *Edit.* Oxon. [f] *Strabo, Lib.* vi. *p.* 183. *Edit.* Genev. [g] *Olearius, Itin. Perſ. Lib.* iv. *Ch.* xxx.

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[1] This well expreſſed, ſaith the Author after GROTIUS, in the Form of the Treaties of the antient *Romans, Ut illa palam prima poſtrema, ex illis tabulis cerâve recitata ſunt, ſine dolo malo, utique ea hic hodie rectiſſimè intellecta ſunt, illis Legibus Populus Romanus prior non deficiet.* Tit. Liv. Lib. i. *Ch.* xxiv.

[2] That is to ſay, So that the Conjectures be drawn hither from the Words alone, or ſomething contained in them.

[3] The Author ſuppoſes that ſuch as interpret Compacts and Laws, ſhould underſtand the general Rules of Criticiſm, which are abſolutely neceſſary to diſcover the Senſe of all Sorts of Words, whether delivered by word of mouth, or written. Such as theſe Maxims, for Example, 1. To underſtand a Man, who ſpeaks not diſtinctly, or has an Impediment in his Speech, we muſt be accuſtomed to hear him. As, alſo, to decypher a Deed, we muſt learn to read the Writing of him that made it; but this is not always ſufficient, becauſe through Diſtraction, or ſome other Impediment, we may pronounce aright, in a Manner very different from our Thoughts: and, in that Caſe, we muſt judge by Circumſtances. Whereupon the *Roman* Law determines, that if a Man ſpells a Syllable wrong, and ſays in his Will, *I affranchize my Slave* CRATINUS, inſtead of *Cratiſtus*, who was the only Slave he had, this laſt ſhall have his Freedom according to the Will of the Teſtator. *Qui habebat ſervum Cratiſtum, teſtamento ita cavit: Servus meus Cratinus liber eſto. Quæro an ſervus Cratiſtus ad libertatem pervenire poſſit, cum teſtator ſervum Cratinum non habeat, ſed hunc ſolum Cratiſtum? Reſpondit, nihil obeſſe, quod in ſyllaba erraſſet.* Digeſt. Lib. xl. Tit. iv. *De manumiſſis teſtamento*, Leg. liv. *princip.* Mr. THOMASIUS, *Inſtit. Juriſpr. Divin.* Lib. ii. Ch. xii. § 22. cites this Example. He alſo obſerves in § 25. following, That the Emperor *Juſtinian*, Cod. Lib. i. Tit. xvii. *De veteri Jure enucl. &c.* forbids with Reaſon, (*Leg.* i. § 13. *Leg.* ii. § 22. *Leg.* iii. § 22.) to uſe ſhort Hand in copying out Laws. And it were to be wiſhed that none had tranſgreſſed his Prohibition. 2. We ought to be well acquainted with the Language of him that ſpeaks or writes. 3. We ſhould know his Style, and the Style of the Time in which he ſpoke, or wrote. 4. We ought to be acquainted with the Opinions and Cuſtoms to which he alludes. 5. We ſhould endeavour to diſcover his Sentiments and Diſpoſition, his Character, his Capacity, End and Intention. 6. We ſhould ſee if the Deed be not forged, nor any thing fraudulently added or retrenched; if there be no Fault crept into the Writing, either through the Miſtake of the Author, or the Negligence or Ignorance of the Copier. For, to bring an Example of the laſt Caſe taken out of the *Roman* Law, "if the Clerk of a Notary hath falſly copied out the Heads of a Contract, it ſhall "not tend to the Prejudice of him upon whoſe Account it is made." *Si librarius in tranſcribendis ſtipulationis verbis erraſſet, nihil nocere, quominus & reus, & ſtipulator teneatur.* Digeſt. Lib. i. Tit xvii. *De diverſis Regulis Juris*, Leg xcii. 7. We muſt underſtand the Matter which is treated of. 8. Laſtly, There are a great Number of other Circumſtances which ought to be minded, and ſome of which are ſet down a little lower by our Author, but which may be better diſcovered by Uſe, and by reflecting upon particular Caſes, and upon every Paſſage, than by general Rules. See the Writers upon the Art of Criticiſm, but chiefly that excellent Work of Mr. LE CLERC, entituled, *Ars Critica*, where we may find a compleat Syſtem of that uſeful and neceſſary Art. Mr. THOMASIUS, and others which he mentions in the forementioned Chapter of his *Juriſpr. Divin.* furniſhes us with ſeveral Examples, which relate to Compacts and Laws.

[4] Inſomuch that an antient *Roman* maintains, That *Tiberius*, as potent an Emperor as he was, could not make one foreign Word become a Denizen of *Rome*. DIO CASSIUS, *Lib.* lix. See above, *Lib.* iv. *Ch.* i. § 6. and THEMISTIUS *Orat.* 23. *ſive Sophiſta*, p 287. Edit. HARDUIN, upon the Word *Sophiſta*, as alſo PROCOPIUS *Hiſt. Vandal.* upon the Word *Allies*.

[5] JOHN CUSPINIAN (*De Turcarum Origine, &c.*) mentions two Perſons to whom the *Sultan* promiſed Life, and whom he put to Death under Pretence of this groſs Equivocation. The one was the Commander of the Town of *Chalcis*; the other the *Venetian Governor*. *In Mahomet* II. p 132. *Edit. Lugd. Bat.* 1654. Our Author borrow'd this Example from GROTIUS, who cites it, *Lib.* ii *Ch.* xvi. § 2. without an Authority.

[6] Our Author, probably, took this Story from *Montagne*, whom he frequently quotes: the Reader will find it in his *Eſſaies*, *Lib.* i. *Ch.* xli. at the End.

him. Thus [1] *Tamerlan* having articled with the Garriſon of *Sebaſtia* that *no Blood ſhould be ſhed*, nevertheleſs ordered all the Priſoners to be buried alive. But theſe Quibbles, as they are too groſs and frivolous, ſo, as *Cicero* obſerves, inſtead of taking it off, they rather bind the Perjury upon the Conſcience [a].

IV. As for *Terms of Art*, which are [2] above the Reach of the common People, the Rule is, That *they be taken according to the Definition* [3] *of the Learned in each Art.* The *Logicians*, ſays *Cicero*, uſe not the ſame Words as other Men; they have Terms of their own, as indeed all other Arts have; *v. g.* the Word *Army*; ſuppoſe it had been ſtipulated between two Crowns, that one ſhould not paſs through the other's Territories with an *Army*, what Number of Soldiers would come under that Denomination? *Grotius* [b] defines an *Army* to be ſuch a Number as dare invade a foreign Country, or face an Enemy in the Field; for we find, in all Hiſtories, the open Actions of an *Army* oppoſed to what is done by Stealth in the Manner of Robbers: yet it cannot be ſo univerſally defined, how great a Multitude conſtitutes an *Army*, as to hold good at all Times, and in all Places: For both the Enemy's Strength, and our own, muſt be conſidered. If we have to do with a poor State, a ſmall Force may be eſteemed an *Army*, which yet againſt ſome flouriſhing Kingdoms would be deemed little better than a Handful of Foragers. And therefore when *Vegetius* [c] deſcribes an Army [4] to conſiſt of Legions and Auxiliaries, and a competent Number of Horſe to carry on a War, he does not deſcribe an *Army* in general, but as it was then amongſt the *Romans*; for an *Army* may be compoſed of only natural born Subjects, or of Allies and Foreigners only; or it may conſiſt of only Foot, or only Horſe. *Cicero* [d] tells us, that *Craſſus* denied any Man to be rich, who was not able to maintain an *Army* at his own Charge, which he [e] defines to conſiſt of ſix Legions, and a great Number of Auxiliaries. *Polybius* [f] ſays, the *Roman Army* generally contained 16,000 *Romans*, and 2000 Auxiliaries; though ſometimes it did not amount to that Number. In the *Digeſts* [g], he who has one Legion under his Command, is ſaid to be General of an Army. Beſides, another Queſtion might be moved upon this Word; as, Whether the aforeſaid Article be violated, if one marches a great Number of Soldiers through the other's Territories, not in a Body, but in ſeparate Parties? Now ſince a Man may be ſaid to have an Army, either if he has all his Forces united together in one Place, or has them ſo diſperſed as to be able to draw them together upon ſhort Warning, it ought to be farther conſidered, for what End this Article was made; for if it was only for our own Security, 'tis plain the Article is not violated by the *Army*'s marching in ſmall Bodies; but if it was for the Security of a Neighbour, ſuch a Paſſage as this breaks the Article. And the ſame may be applied to a *Fleet*, if in any Treaty it be provided, that no *Fleet* ſhall be ſuffered to paſs in ſuch a Part of the Sea; for here, not only the Number of Ships, but their Bigneſs, and the maritime Strength of the People concerned is to be conſidered [h]. And ſo in reſpect of a *Fort* prohibited to be raiſed within ſuch a Diſtance; the Word may ſignify either a high and regular Fortification, or any fortified Place whatſoever, although conſiſting of low pitiful Buildings. And therefore, if the Deſign of the Article be to prevent any fortified Place from giving Umbrage to our Territories, 'tis plain that it is againſt the Treaty to throw up ſo much as a little Bulwark of Earth, with ſmall Huts to lodge Soldiers in [i].

But if [5] *Terms of Art* happen to be differently defined, by different Perſons, to avoid Quarrels, it will be convenient to expreſs in common Words in what Signification the Word under Debate ſhall be taken.

V. When a *ſingle Word* or *Sentence* is capable of ſeveral Significations, Conjectures are neceſſary to find out the true. Both of theſe Caſes the *Rhetoricians* call *ambiguous*. But the *Logicians* are more nice, who, if the Variety of Significations lies in a Word, call it *equivocal*; if in a Sentence, *ambiguous*. An Example of the *former* we meet with in *Tertullian* [k], who tells us that the Word *Woman* in 1 *Cor.* xi. 5, *&c.* ought to be extended to *Virgins* alſo. Although ſometimes it is oppoſed to *Virgin*, as in *Cicero* [l], *To-morrow ſhe will be a* Woman. [6] *Cicero* gives this Example of the *latter*: A certain Man had bequeathed a Legacy in theſe Words, *Hæres meus vaſorum argenteorum ſondo centum novercæ, quæ volet, dato. Let my Heir give his Mother-in-Law* 100 *Weight of Plate at Pleaſure.* Upon this the Lady demanded the fineſt and beſt wrought Plate: But the Heir interpoſed that the Choice was left to his *Pleaſure*. The Ambiguity had been avoided by the Addition of the Word *His* or *Her*. The *Roman* Law in ſuch a Caſe [7] gives the Legatee the *Option*, and indeed

[a] *Off.* iii. *Ch.* xxxii. Fraus enim adſtringit, non diſſolvit perjuriam. [b] *Ubi ſupra.* [c] *De re militari*, Lib. iii. Ch. i. [d] *Paradox.* 6. [e] *In the ſame Place.* [f] *Lib.* vi. [g] *Lib.* iii. *Tit.* ii. *Lib.* ii. § 1. D. de his qui not infam. *&c.*

[h] *To this belongs that of* Florus, *Lib.* i. *Ch.* xi. *N.* 10. *Edit.* Græv. The Spoils of *Antium* are in being, which *Mænius* fixed in the *Forum*, having taken the Enemies *Fleet*, if it may be called a *Fleet*. For there were ſix Ships with Stems, and that Number then was enough to enter into an Engagement with. Add. *Alber. Gent. de jure belli, Lib.* iii. *Ch.* xx. [i] Add. *Alber. Gent. d. l. c.* 21. [k] *De velandis Virginibus*, Ch. iv. [l] *Apud Quinctil. Inſtit. Orat.* Lib. vi. Ch. iii.

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[1] This is taken from the Life that BOECLER has given of this famous Conqueror (*Diſſert. Academic.* Tome I. p. 296.) Who has related the Fact upon the Credit of a Co-temporary Author, *viz.* ACHMED EBEN-ARABSIA, who has wrote the ſame Life in *Arabic*.

[2] This is what CICERO obſerves about *Logick*, in the Paſſage quoted by our Author, after GROTIUS. *Qualitates igitur adjudavi, quas ποιότητας Græci vocant: quod ipſum apud Græcos non eſt vulgi verbum, ſed Philoſophorum, atque id in multis. Dialecticorum vero verba nulla ſunt publica: ſuis utuntur: & id quidem commune omnium ferè eſt Artium*, Academic. Quæſt. *Lib.* i. *Ch.* vii.

[3] Unleſs he that ſpeaks underſtands neither any Art, nor the Terms of it; for then we muſt judge by the Connexion of a Diſcourſe, or ſome other Circumſtances, what Senſe he had in his Mind.

[4] His Words are, *Exercitus dicitur tam legionum, quam etiam auxiliorum, nec non etiam equitum, ad gerendum bellum militum collecta.* De re militari. *Lib.* iii. *Ch.* i. Edit. *Plantin. Scriver.*

[5] This Reflection, as Mr. TITIUS obſerves, *Obſervat.* 419. is nothing to the Purpoſe, for he treats not of the Manner how one may expreſs himſelf clearly to make his Mind known, but only gives ſome Rules to diſcover another's, when 'tis darkly expreſſed.

[6] CICERO's Words are, *Paterfamilias, cum filium hæredem faceret, vaſorum argenteorum centum pondo Uxori ſuæ ſic legavit. Hæres meus uxori meæ vaſorum argenteorum pondo centum, quæ volet, dato. Poſt mortem ejus vaſa magnifica, & pretioſè cælata fere à filio mater. Ille ſe, quæ ipſe vellet, debere dicit.* Cic. de inventione, *Lib.* ii. *Ch.* xl. See *ad Herennium, Lib.* i. *Ch.* xii. and *Quinctil. Lib.* vii. *Ch.* ix.

[7] The Words of the Law are, *Quotiens ſervi electio vel optio datur, legatarius optabit, quem velit. Sed & homine generaliter legato, arbitrium eligendi, quem acciperet, ad legatarium pertinet.* Digeſt. Lib. iii. Tit. v. *De optione vel electione legata.* Leg. ii. *princ.* § 1. See DOMAT's Civil Laws in their natural Order, Part II. *Lib.* iv. *Tit.* ii. § 7. there

there is Reaſon for it. For had the *Option* been deſigned to be left at the Diſcretion of the Heir, there had been no need of the Clauſe *at Pleaſure*. For if a Thing is enjoined me at large[1], and I have ſeveral Ways of ſatisfying the Obligation, 'tis left to myſelf to chooſe which way to do it. But when a Clauſe is added concerning the Choice, 'tis deſigned in Favour of the Party which is to receive, that the other may not obtrude ſome pitiful, worthleſs Thing upon him[a].

As for the famous Deciſion of the Duke of *Oſſona*, Viceroy of *Naples*, who decreed the whole Inheritance to the Son againſt the Prieſts, who were left Heirs, with a Clauſe, *To give the Son what they would*; Strictneſs of Juſtice does not plead in Behalf of it, ſo much as the odious Covetouſneſs of that ſort of People, which are always hankering after other Mens Eſtates.

Another Inſtance we have in the Anſwer *Charles* V. gave the *French* Ambaſſador, when he demanded the Dukedom of *Milan*; *That which pleaſes my Brother the* French *King*, *pleaſes me alſo*. Which the Ambaſſador, in great haſte, gave his Maſter Advice of, as if he had gained his Point[b].

VI. Beſides, when we meet with a [c] *ſeeming Repugnancy* in the Terms, Conjectures are neceſſary to work out the genuine Senſe, by reconciling, if poſſible, thoſe Terms that ſeem to be repugnant. But if there be a clear evident Repugnancy[2], the latter Contract vacates the former: For no Man can will Contradictions, and it is the Nature of Acts, which depend upon the free Will of the Agent, or over which no Man has acquired a Right, to be diſclaim'd by a contrary Motion of the Will. And this Change of the Will, in order to annul an Act, is ſometimes required on one ſide only, as in making Laws, Wills, and Teſtaments, *&c*, and ſometimes on both ſides, as in Contracts, which, unleſs the Law interpoſes, cannot be diſſolved without the Conſent of both Parties[3]. From hence, by the way, it appears how *Lycortas* might have excuſed his Neglect, in not mentioning, when he went to renew the League between the *Achæans* and the King of *Egypt*, which, of the many Leagues that were between them, he would have renewed: for he might have ſaid, that thoſe which were never broken needed not to be renewed, and, in the renewing of thoſe which had been broken, he ought to be preſumed to mean the laſt[d].

For an Inſtance of two Laws, that ſeem to thwart each other[4], *one* enacts, *That a Statue be erected in the* Gymnaſium *in Honour of the Perſon that kills the Tyrant: Another* ſays, *That no Woman's Statue ſhall be placed in the* Gymnaſium: *Now a Woman kills the Tyrant*. In this Caſe I ſhould judge in Favour of the Woman. For the Reaſon of the *firſt* Law was, that the Youth which is trained up to Valour in the *Gymnaſium*, ſhould, by ſuch ſort of Honour, be ſtirred up to imitate brave Actions: The Reaſon of the *latter* is, becauſe the Virtues proper to Women are not generally the Object of Mens Imitation. But, in this Caſe, ſince a Woman has outdone her Sex, ſhe deſerves the rather to have her Statue put up in the *Gymnaſium*; for ſuch Bravery in a Woman

[a] *Add.* Auth. *ad Heren. Lib.* i. *Ch.* xii. *Quint. Inſtit. Orat.* Lib. vii. Ch. ix. [b] *Marſelaer Legato*, Lib. ii. Ch. xxxix.
[c] Ἐναντιοφάνεια. [d] *Vide* Polyb. *excerp.* Leg. xli.

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[1] The *Roman* Law places here a Difference between *Legacies*, and *Promiſes* or *Contracts*. In Reality, according to the antient Rules, the Choice belonged to the Heir, when the Legacy was left after a certain Manner; upon which ſee M. SCHULTING *Ante-Juſtiniana*, 655, 656. But the *new Law*, gave always the Choice to the *Legatee*, unleſs the Teſtator expreſsly declared, That the Heir ſhould chuſe which he pleaſed. Whereas, both by the *Antient* and *new Juriſprudence*, he who promiſes, in a Contract, any thing uncertain, may determine it as he pleaſes. *Cum illa aut illa res promittitur, rei electio eſt, utram præſtet.* Digeſt. Lib. xxiii. Tit. iii. *De jure dotium*, Leg. x. § 6. See alſo *Leg.* xviii. *Tit.* i. *De contrahenda emptione*, Leg. xxv. *princip.* and *Lib.* xix. *Tit.* i. *De action. Empti & Venditi*, Leg. xxi. § 6. Indeed it belongs to him only who lays the Obligation, to explain himſelf clearly and without Equivocation, or Reſerve, as to what he requires of another. *Quidquid adſtringendæ obligationis eſt, id niſi palam verbis exprimitur, omiſſum intelligendum eſt. Ac fere ſecundum promiſſorem interpretamur: quia ſtipulatori liberum fuit verba latè concipere.* Digeſt. Lib. xlv. Tit. i. *De verborum obligatione*, Leg. xcix. And we may lay this down as a general Rule, That when there is in a Deed any Obſcurity or Dubiouſneſs, which cannot be cleared by the Intention of the Contractors, or any other Circumſtance, the Interpretation ought to be againſt him, who ought to have explained himſelf, or made the other have delivered himſelf fully. Inſomuch as he who is obliged, might and ought to ſpeak clearly, the other hath a Right to explain the Clauſe for his own Advantage. *Nec rurſum promiſſor ferendus eſt, ſi ejus interierit, de certis potius vaſis forte, aut hominibus actum.* Digeſt. Ibid. The Queſtion here is to know, in ſuch Caſes, which of the two Parties is bound at his own Peril, either to explain himſelf to the utmoſt Exactneſs, or to take care, that the other leaves, in his Words, not Subject for Conteſtation. So that, by the *Roman* Law, it was a Maxim, That all Obſcurities and Ambiguities in a Bargain of Sale, or Living, muſt be interpreted againſt the Seller or Landlord. *Veteribus placet, pactionem obſcuram, vel ambiguam venditori, & qui locavit nocere: in quorum fuit poteſtate legem apertius conſcribere.* Digeſt. Lib. ii. Tit. xiv. *De Pactis*, Leg. xxxix. See alſo *Lib.* xviii. *Tit.* i. *Leg.* xxi. xxxiii. *Lib.* l. *Tit.* xvii. *De diverſis regulis juris*, Leg. clxxii. It is, ſay they, becauſe thoſe uſually preſcribe the Conditions of the Contract. See the *Interpretat. Juris* of the deceaſed Mr. AVERANI, *Lib.* ii. *Ch.* ii. This Reaſon is good, when the Matter relates to Clauſes which have any thing burdenſome, or diſadvantageous to the *Buyer* or *Leſſee*. But for thoſe which are ſo to the *Seller* or *Leſſor*, we may ſay, on the Contrary, by the *Law of Nature*, That the Interpretation ſhould be in their Favour. For this Circumſtance, of preſcribing the Conditions of the Agreement, has no Force, but on the Suppoſition I have juſt mentioned, and which is founded in the Nature of Things. Every one ſeeks his own Advantage, and, conſequently, engages himſelf as little as he can. This is an inconteſtable Fact, which furniſhes here a Rule certain, ſimple, uniform, and eaſily applicable in all Caſes: This is, That, without doubt, that contracting Party, for whoſe Benefit the Agreement is burdenſome to the other, is he who ſhould, either, explain himſelf, or make the other explain himſelf, with all the Clearneſs neceſſary to prevent Ambiguity or Obſcurity. Therefore the Interpretation ſhould always go againſt him. M. BOHMER, following the Footſteps of M. THOMASIUS, gives a Rule much like this, in his Diſſertation *De Interpretat. facienda adverſus eum qui clariùs loqui debuiſſet*, publiſhed in 1700. His Words are, *He ſhould have ſpoke more clearly (whenever there is a Conteſtation upon the Article) who, by the obſcure, or ambiguous Clauſe, intended to procure himſelf any particular and extraordinary Advantage*, § 20. He tries, even to reconcile theſe Deciſions with the *Roman* Law, and the Piece is well worth Reading. I will not, however, ſay, That the Fragments of the antient Law, compoſed of ſuch a Mixture of different Opinions, can furniſh us any clear or connected Rules upon this Head. To return to our Author, the Manner in which he expreſſes himſelf, would make one believe, that, according to the *Roman* Law, the *Legatee* had only his Choice, but when the Teſtator mentioned it in his Will; for he ſays, That the Principles of this Law are agreeable to natural Equity and yet he maintains, that, according to the *Law of Nature*, the Manner of acquitting one's ſelf of an uncertain Obligation, is left to the Will and Diſcretion of the Perſon bound. But this is apparently an Inaccuracy of Expreſſion.

[2] *Ubi duæ contrariæ leges ſunt, ſemper antiquæ abrogat Nova. Tit. Liv. Lib.* ix. *Ch.* xxxiv. Where two Laws thwart one another, the new one abrogates the old. Αἱ μεταγενέστεραι διατάξεις ἰσχυρότεραι τὴν πρὸ αὐτῶν εἶσιν. *Digeſt. Lib.* i. *Tit.* iv. *De conſtitutionibus Principum*, Leg. iv. See, alſo, the Canon Law in the *Decretals*, Lib. i. Tit. iii. *De Reſcriptis*, Ch. iii. and a Paſſage in *Plutarch*, which will be quoted *Note* 6. on § 9.

[3] See the foregoing Chapter, § 8.

[4] *Tyrannicidæ imago in gymnaſio ponatur: contra mulieris imago in gymnaſio ne ponatur. Mulier Tyrannum occidit.* Quinct. Inſtit. Orat. *Lib.* vii. *Ch.* vii.

would be a greater Incitement to Emulation in the Men. There is another Example in [1] *Cicero* de *Invent. Lib.* ii. *Ch.* xlix. One Law says, *Whoſoever kills the Tyrant, let him be rewarded as a Conqueror at the Olympick Games, and let him demand what he pleaſes of the Magiſtrate, and let the Magiſtrate grant his Requeſt.* Another Law runs thus: *Upon the Death of the Tyrant, let his five neareſt Relations be put to Death.* Alexander, *who had exerciſed Tyranny over the* Phereans *in* Theſſaly, *being killed by his Wife* Thebe, *ſhe, for her Reward, demands her Son, whom ſhe had by the Tyrant.* *[*]*Some were of Opinion, that by the Law the Son ought to be put to Death* [2].

But ſometimes the ſame Law ſeems to claſh with itſelf; [3] as for Inſtance, the Law ſays, *That a Woman, who has been debauched, may chooſe either to marry the Man who has injur'd her, or to have him put to Death. Here is a Man that has debauched Two, whereof one chooſes his Death, the other demands him in Marriage:* In this Caſe, the Reaſon of the Law will decide the Buſineſs: For here the Law, by permitting the Woman to chooſe the Death of the Man, did not ſuppoſe that many would deſire it; but the Good of the poor Woman was herein conſulted, leſt ſhe ſhould for ever continue without a Huſband; for the Man, after the Heat of his Love was over, might caſt her off, as not likely to deny others thoſe Favours which ſhe had ſo unlawfully granted him: nor would it be eaſy to find one who would willingly marry her that had been deflowred by another. And therefore ſhe that demanded the Man in Marriage ought to be preferred: For this anſwers beſt the Deſign of the Law, which had the Convenience of the Woman, rather than the Death of the Man in its Eye; and after this Rate, one of them, at leaſt, will be provided with a Huſband, whereas otherwiſe both will be forced to remain ſingle. Beſides, when there is as much to be ſaid on the one Side as on the other, the more favourable Sentence ought to prevail.

But ſometimes the Words claſh in ſome particular Caſe, as in this Inſtance; there is a Law, [4] *That a Man, who has behaved himſelf honourably in the War, ſhall have whatever he demands; here are Two ſuch, who both demand the ſame Virgin; ſince both cannot be ſatisfied, which muſt be preferred?* I anſwer, He that made the Demand firſt. But if both demanded together, they muſt draw Lots; for though the Law gives an unlimited Liberty of demanding, yet it muſt be ſuppoſed to be reſtrained to thoſe Things which can conveniently be granted. Another Example is propoſed by [5] *Philoſtratus* in the Life of *Secundus. He that raiſes a Sedition, is to be hanged; he that quells it, to be rewarded: The ſame Man both raiſes a Sedition, and quells it, and demands his Reward.* In which Caſe *Secundus* with good Reaſon argues thus, *Provided you firſt ſuffer Puniſhment for raiſing the Sedition, you ſhall then, if you pleaſe, receive the Reward for quelling it.* In ſuch Caſes as theſe, where Words are [6] evidently obſcure, we are forced to have recourſe to *Conjectures.*

Theſe *Conjectures* are ſometimes built upon ſuch good Grounds, as that the genuine Senſe forces itſelf upon us, even againſt the received common Signification of the Word. To this Purpoſe is that Diſtinction of the *Rhetoricians* between the *Letter* and the *Deſign.* As for Inſtance, [7] *The Law makes it capital for any Foreigner to preſume to mount the Walls:* [8] *But in a Siege a Foreigner mounted the Wall, and beat down the Enemy that was ready to ſcale it.* Now the *Letter* is againſt the Foreigner, the *Deſign* for him; according to which no doubt [9] Judgment ought to be given; for the *Deſign* of the Law was to prevent any Foreigner from mounting the Walls as a Spy; which Reaſon in the preſent Caſe ceaſes [a].

But we muſt take notice that ſometimes a *Repugnancy* is ſuppoſed, when indeed there is none, *viz.* when Words are taken in a larger Signification than the Speaker deſigned them. A notable Inſtance of this we meet with in *Joſephus* [b]; where King *Zedechias* would believe neither *Jeremiah* nor *Ezekiel*, becauſe he thought they contradicted one

[a] *Add.* Lib. xxxix. Tit. iv. Lib. xv. *D. De Publicanis*, &c.

[b] *Archeol. Jud.* Lib. x. Ch. x.

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[1] TULLY's Words are, *Ex contrariis autem legibus controverſia naſcitur, cum inter ſe duæ videntur leges, aut plures diſcrepare, hoc modo: lex eſt, qui Tyrannum occiderit, Olympionicarum præmium capito, & quam volet ſibi rem à magiſtratu depoſcito, & magiſtratus ei concedito. Et altera lex, Tyranno occiſo, quinque ej s proximos cognatione magiſtratus necato. Alexandrum, qui apud Pheræos in Theſſalia tyrannidem occuparat, uxor ſua, cui* Thebe *nomen fuit, noctu, cùm ſimul cubaret, occidit. Hæc filium ſuum, quem ex Tyranno habebat, ſibi præmii loco depoſcit. Sunt qui ex lege puerum occidi dicant oportere. Res in judicio eſt.* De Invent. Lib. ii. Ch. xlix.

[2] They were in the wrong, for, beſides that the firſt Law was manifeſtly barbarous and unjuſt, the End was, without doubt, to deſtroy all that had any Relation to the Tyrant, as Men to be feared, or who might have been his Aſſociates; for there is all the Appearance maginable, that the Mother, who had ſo much Courage and Zeal for the publick Good, as to ſtain her Hands with the Blood of her Huſband, would have had no Regard to her Son's Life, if ſhe thought him to be of the ſame Temper as his Father.

[3] This is the Subject of SENECA's Fifth Controverſy: *Lex: rapta raptoris, aut mortem, aut indotatas nuptias optet. Una noctu quidam duas rapuit: altera mortem optat, altera nuptias.* Moſt of the Declaimers, whoſe Fragments SENECA relates, would condemn the Raviſher to Death.

[4] I do not know from whence this Example is taken; the Law indeed is found in SENECA, *Controverſ.* 31. and in the *Excerpt. Controverſ. Lib.* x. *Declam.* 2. As, alſo, in AULUS GELLIUS, *Noct. Attic. Lib.* ix. *Ch.* xvi. but the reſt of the Caſe is altogether different. *Quinctilian* cites the Law ſimply, without applying it to any particular Caſe, which gives room to ſome Contradiction. *Vir fortis optato, quæ volet.* Inſtit. Orat. Lib. vii. Ch. vii. p. 642. See alſo *Marcus Victorinus, in* ii. *Rhetoric. Ciceron. inter Antiq. Rhetores Latin.* p. 227. *Edit. Pariſ.* 1599.

[5] PHILOSTRATUS's Words are, Ὁ ἄρξας στάσεως, ἀποθνησκέτω, κὴ ὁ παύσας στάσιν, ἐχέτω δωρεάν. ὁ αὐτὸς κὴ ἄρξας κὴ παύσας, αἰτεῖτὴν δωρεάν. τὴν δὲ ὑπόθεσιν, ὧδε ἐβραχυλόγησεν. ἐκεῖν, ἔφη, τὶ πρότερον; τὸ κινῆσαι στάσιν. τὶ δεύτερον; τὸ παύσαι· δὸς ἔν, ἐφ' οἷς ἠδίκεις, τιμωρίαν, τὴν ἐφ' οἷς εὖ πεποίηκας δωρεάν, εἰ δύνασαι, λάβε. *Philoſtrat. de Vitis Sophiſtarum*, in *Secundo, Lib.* i. *Ch.* xxvi. *Ed. Olear.* 1709.

[6] In the Example of apparent Contradictions by our Author, the Terms are not obſcure; but, on the contrary, very clear. But the Intricacy proceeds from this, That they include not in themſelves the Exceptions which the Lawgiver would have made to the Law, if he had foreſeen certain Caſes which are drawn from ſome other Thing, than the Words taken literally, and in their full Extent.

[7] Περὶ ἐντῦ κὴ διανοίας; which the *Latins* render, *Ex ſcripto & ſententia ſcripti:* or, as QUINTILIAN, *Lib.* vii. *Ch.* vi. and the Author of the *Rhetorick*, dedicated to *Herennius*, Lib. i. Ch xi. *Ex ſcripto & voluntate ſtatus.*

[8] QUINTILIAN's Words are, *Peregrinus, ſi murum adſcenderit, capite puniatur. Cum hoſtes murum adſcendiſſent, peregrinus eum depulit. Petitur ad ſupplicium.* Quintil. *Lib* vii. *Ch.* vi.

[9] We muſt, without doubt, in the ſame Caſe, explain, in the ſame Manner, that Law of the *Roman* Code, which forbids, upon pain of Death, the getting over the Walls of a Town, or mounting them with ſcaling Ladders. *Si quis violaverit muros, capite punitur: ſicuti ſi tranſcendat ſcalis admotis, vel aliâ qualibet ratione,* Digeſt. Lib. i. Tit. viii. *De diviſione rer.* Leg. ult.

another:

another: for the *one* asserted that he should be carried away into *Babylon*; the *other*, [1] that he should never *see Babylon* with his Eyes. The two Prophets were very consistent with each other; for he was carried away to *Babylon*, but his Eyes were first put out.

VII. *Grotius* has assigned three *common Places*, from whence we may trace out the Design, where the Words are obscure or ambiguous, *viz.* The *Subject*, the *Effects*, and the *Circumstances*.

As for the *former* [2] 'tis in the Mouth of every *Civilian*, That *Words ought to be understood according to the* Subject *of them* [2]; as [3] if a Man promises to defend you in the Possession of the Goods you buy of him, his Promise is not supposed to extend to any extrajudicial Violence [b]. I fansy this Rule may be applied to the Vow of *Jephtha* in *Judges* xi. 31. and to that of *Agamemnon* in *Cicero* [c] who having vowed to offer up to *Diana* the most beautiful Creature that should be born that Year, sacrificed *Iphigenia*, who indeed was the most beautiful which that Year produced: But he, who talks of sacrificing, is presumed to mean a *Subject* fit to be made a Sacrifice of [d].

So if a Truce be made for thirty Days, it must be understood of *natural* Days consisting of twenty-four Hours: not of *artificial*, or the Space of the Sun above the Horizon. And therefore it was a frivolous Quibble of *Cleomenes*, who had made a Truce with the *Argives* for so many Days, but the third Night finding them sleeping and unprovided by Reason of the Truce, set upon them, and slew some, and, took others; and when he was upbraided for his Perjury, denied that the Nights were comprehended in the Treaty [e]. In vain, also, did *Mycerinus* King of *Egypt* endeavour to convict the Oracle of Falshood; for the Oracle foretold that he should live no more than six Years: but he ordered Candles to be lighted up, and revelled by Night as well as Day, as if by thus using the Night as Day he could make twelve Years out of six [f].

Thus the Word *Arms* denotes sometimes the Weapons of War, sometimes the Warriors themselves, according as the *Subject* of the Discourse directs. For if it be an Article, that neither Party shall use *Arms* against a Third, 'tis plain Soldiers or an Army is meant by it: but if upon the Surrendry of a Garrison it be stipulated that they deliver up their *Arms*, not the Soldiers, but the Weapons are supposed by it [g].

The *Platæenses* having promised to restore the *Theban* Captives, ought to have restored them alive, not dead [h]. For the Treaty was concerning [4] living Men, and not the Carcases of them.

It was a wretched Fetch of *Labeo*'s; who having by the League a Title to half of *Antiochus*'s Fleet, cut every Ship in two, and so deprived the King of his whole Navy [i]. Thus the [k] *Campanians* struck up a League with their Enemies, and one Article was, that they should have half their Arms restored them; but they cut each Weapon in two, and so delivered them half.

Xiphilinus [l] tells us of two Soldiers, who having got a Hogshead of Wine amongst their Plunder, and being commanded to divide it, cut it in two with their Swords. *Rhadamistus* swore to *Mithridates*, that he would not either by Sword or Poison do him any Harm; but presently after he smothered him in his Bed [m].

VIII. *Secondly*, The *Effects* and the Consequence do very often point out the genuine Meaning of the Words. For where Words, if they be taken literally, are like to bear none, or at least, a very absurd Signification; to avoid such an Inconvenience [5] we must a little deviate from the received Sense of them [n]. And therefore it was absurd in the *Athenians* [o], having promised to relinquish the Territories of the *Bœotians*, to deny the Ground that they had encamp'd upon to be the *Bœotians*. With the same Cavil did *Alexander* elude the Conditions that *Darius* proposed to him. *Darius* had offered him all the Land that lay between the *Euphrates* and the *Hellespont*; to which *Alexander* replied, *He offers very liberally all on that side the* Euphrates, *where it is then that he speaks to me? I am already beyond the* Euphrates; *and therefore the whole of the Dowry he offers is less than what I am already Master of: drive me hence, that I may be assured that what you offer is your own* [p]. As if it was the same Thing to possess a Place by Force of Arms, and to possess it peaceably, and with the Concession of the former Master.

Lewis XII. agreed with the *Pope*'s Legat, that the Bishopricks, void by the Death of the Bishops in *France*, should be at the King's Dispósal. But a *French* Bishop happening to die at *Rome*, the *Pope* immediately nominated a Successor, and the *King* as soon another; which occasioned great Differences. In this Case, were I Judge, I should not scruple to pronounce in favour of the *King*; for to render an Office vacant, 'tis no matter in what

[a] *Vid.* Lib. xlv. Tit. i. Lib. x. *D.* [b] Lib. xix. Tit. ii. Lib. xv. § 4. *D. locati*, & Lib. xxxix. Tit. ii. Lib. xliii. *D. damni infecti*, &c. Lib. iv. Tit. xlix. C. Lib. xvii. *de act. empt. & vend.* [c] Off. iii. Ch. xxv. [d] *Add.* Everhard. *loc. legal.* xl. which is about the Subject matter. [e] *Plut.* Apopht. *Lacon.* p. 223. Such another Trick the *Thracians* used against the *Bœotians*, Strab. *Lib.* ix. *p.* 277. [f] Herodotus, *Euterpe.* [g] *Add.* Alber. *Gent. d. L. Ch.* xx. [h] *Thucyd.* Lib. ii. *init.* [i] Val. Max. *Lib.* vii. *Ch.* iii. though *Livy*, Lib. xxxviii. *Ch.* xxxviii. says nothing of the Cutting of the Ships, [k] Polyæn. *Lib.* vi. *Ch.* xv. [l] *Epist.* Dion. *in* Caracalla, *ad ann.* 217. [m] Tac. *Ann.* xii. 47. [n] There is an Example of this in the League whereby *Lewis* XII. of *France* took the City *Bologna*, and its petty Prince *Bentivoglio*, into his Protection; which he afterwards cavilled at, in a Manner very unbecoming a King. *Guiccard.* Hist. Lib. v. p. m. 134. & p. m. 146. [o] Thucyd. *Lib.* iv. *Ch.* xcviii. [p] Q. Curtius, *Lib.* iv. *Ch.* xi.

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[1] See *Jeremiah* xxxviii. 17, &c. and *Ezekiel* xii. 13.

[2] The Words of the *Digests* are, *Quoties in Stipulationibus ambigua oratio est, commodissimum est, id accipi, quo res, qua de agitur, in tuto sit.* Digest. Lib. xlv. Tit. i. *De verborum obligationibus*, Leg. lxxx. See also *Lib.* l. *Tit.* xvii. *De diversis Reg. Jur.* Leg. lxvii.

[3] So the Code assures us, *Expulsos vos de fundo per violentiam à* Nerone, *quem habere jus in eo negatis, profitentes, nullam vobis adversus eum, ex cujus venditione, fundum possidetis, actionem competere probatis*, Cod. Lib. iv. Tit. xlix. *De actionibus empti & venditi*, Leg. xvii. See other Examples, *Lib.* xix. *Tit.* ii. *Locati, conducti*, Leg. xv. § 4. and Lib. xxxix. Tit. ii. *De damno infecto*, &c. Leg. xlix.

[4] So *Ovid* speaks in the Passage quoted by our Author, but not mentioned from whom; *Hector erat tunc cum bello certaret, at idem Tractus ab Æmonio non erat Hector equo*, Ovid. de Trist. Lib. iii. El. xi. v. 27, 28. *Sic Pericles cum quibusdam hostium ita pactus legitur, ut ipsi* ferrum *deponerent; postea eosdem pacti violati insimulavit, argutatus eos non deposuisse* fibulas ferreas *quas in lacinis vestimentorum gerebant. Lex est, qui nocte cum* ferro *deprehensus fuerit, alligetur: cum* annulo ferreo *inventum magistratus alligavit*, Quint. Inst. Orat. Lib. vii. Ch. vi.

[5] Thus the *Roman* Lawyers say, *In ambigua voce legis ea potius accipienda est significatio, quæ vitio caret: præsertim cum etiam voluntas legis ex hoc colligi possit.* Digest. Lib. i. Tit. iii. *De legibus, & senatusconsultis*, &c. Leg. xix. *Cicero* says again very well, *Nullam esse legem, quæ aliquam rem inutilem, aut iniquam fieri velit*, De Invent. Lib. ii. Ch. xlvii.

Place the Incumbent dies: and if ſuch a Cavil had been admitted, the King's Right might have been invaded ſeveral Ways [a].

At *Bologna* it was enacted, that *Whoſoever drew Blood in the Streets ſhould be ſeverely puniſhed* [b]. Upon which Law a Barber was indited for opening a Vein in the Street, and it had like to have gone hard with him, becauſe it was added in the Statute, that the *Words ſhould be taken preciſely, without any Interpretation.* [1] In *Quinctilian* we have this Caſe, *A poor Man and a rich Man were Friends: The rich Man in his Will made another Friend his Heir, but bequeathed to the poor Man as much as he in his Will had bequeathed to him. The poor Man's Will is produced; by which it appears, that he had made the rich Man Heir of all; and therefore he demands the whole Inheritance. He that was the written Heir was for giving only ſo much as the poor Man was worth* [c]. And indeed, this is to be ſaid for the written Heir, that if he did not obtain the Cauſe, his being made Heir would have had no Effect. Which was the chief Reaſon why the *Falcidian* [2] Law, and [3] *Pegaſian* Decree aſſigned the Heir a [4] *Dodrans* over and above; for ſo the Heir and Legatee were both provided for. As for the Interpretation of the Laws of the Land, that of *Cicero* [5] muſt every where take place: *All Laws*, ſays he, *ought to be referred to the Benefit of the Commonwealth, and ought to be interpreted according to the publick Advantage, not according to the Letter; for no one would have the Laws regarded for the Sake of the Laws themſelves, but for the Sake of the Commonwealth.*

IX. Beſides, *Thirdly*, it gives great Light to the Interpretation of obſcure Paſſages to compare them with others that have ſome Affinity with them; as to conſider what the ſame Author ſays [6] in another Place, where he handles the ſame Matter; or to [7] compare them with what goes before and follows in the Context. For in a doubtful Point the Author muſt be ſuppoſed to be conſonant to himſelf: And therefore, if [8] in one Place he has expreſſed his Mind clearly, we ought to preſume, that he is ſtill of the ſame Mind in another Place, unleſs it expreſly appears that he has changed it. *Thus if two Men ſhould* bargain for Wheat, without mentioning the Quantity, it would be [9] an imperfect Bargain: But if by their former Dealings it appeared, that [10] ſuch a Sort and ſuch a Quantity was thought of and deſigned, it is as good as if it had been actually expreſſed [d]. This may be illuſtrated from *Homer* [e] in the Duel

[a] *F. Marſil.* Legat. *Lib.* i. *Ch.* xxxviii. [b] Everhard. *loc. legal.* viii. *ab abſurdo.* [c] *Declam.* 332. [d] *De verb. oblig.* Lib. cxiv. *D. conf.* Ziegl. *ad* Grot. *d. l. ſ.* 7. [e] Iliad. Γ. & Δ.

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[1] QUINCTILIAN's Words are, *Pauper, & dives, amici erant. Dives teſtamento alium amicum omnium bonorum inſtituit hæredem: pauperi juſſit dari id quod ille ſibi teſtamento daret. Apertæ ſunt tabulæ pauperis: omnium bonorum inſtituerat hæredem. Petit totam divitis hæreditatem. Ille, qui ſcriptus eſt hæres, vult dare tantum, quantum in cenſum habet pauper.* Declam. 332. *Peter Airault*, in a long Note upon this Declamation, decides the Matter in favour of the poor Man, as well as *Quinctilian*, and he founds his Opinion upon the Principles of the *Roman* Law, which ſeems to favour that ſide. But, if we examine the Thing ſeriouſly, the Deciſion of our Author, in favour of the Heir at Law, appears more reaſonable. If the poor Man had only left the rich Man Heir to a fourth Part, or the half, of his Goods, we might then preſume, that the rich Man intended his Heir ſhould give to the poor Man an equal Portion of the Inheritance, however, diſproportioned in Value, becauſe he had enough beſides to ſupport the Character of an Heir. But there is no Reaſon to believe that the Teſtator, who appointed another a Joint-heir with the poor Man, ever deſign'd that his Friendſhip ſhould have ſuch an Effect, as to diſappoint his *Heir-general.* And indeed a Truſt, which leaves only the Truſtee the bare Title of Heir, ought not to be preſumed without very ſtrong Proofs. All that the poor Man could pretend to, ſuppoſing the Thing fully made out, is, in my Opinion, that the Inheritance ſhould be divided between the Heir and him, there being no other Way of determining juſtly what Share he ſhould have.

[2] See *Lib.* iii. *Ch.* iv. § 5. *Note* 1. above.

[3] When the *Truſtees*, who depended upon the Honeſty of the legal Heir, with a Charge to give up the Succeſſion to another, were authorized by the *Roman* Law; the Heir, who had ſatisfied the Will of the Teſtator, was ſtill regarded in that Character, and, as ſuch, liable to all the Demands of the Creditors, and Legatees of the deceaſed. This was the Reaſon that ſeveral choſe rather to renounce the Heirſhip, than to accept it on theſe Conditions. To remedy this Inconveniency, which rendered all the Depoſitions of a Teſtator uſeleſs, in the Time of *Nero*, in the Conſulſhip of *Trebellius Maximus*, and the Philoſopher *Seneca*, a Decree of the Senate was made, That an Heir in Truſt, who was obliged to reſign to the lawful Heir, ſhould be diſcharged of all the Debts and Diſburſements, which, as well as the Rights, Names, and Actions, ſhould paſs with the Goods to him, for whoſe Advantage the Truſt was made. But ſince the Heirs, thus put in Truſt, had little or no Advantage by the Inheritance, which they were to make over; and ſo ſcarce any one cared to trouble themſelves with a Truſt, it was ordered by another Decree of the Senate, in the Time of *Veſpaſian*, in the Conſulſhip of *Pegaſus* and *Puſio*, That he that was obliged to reſign to the Heir, or another Party, ſhould keep a fourth Part. The Emperor *Juſtinian* united theſe two Decrees, which before were diſtinguiſhed by their different Effects in Law, and called them by the Name of their Author, the firſt, *The Trebellianic Decree*, and the other, *The Pegaſian.* The more antient Name, which was the *Trebellian*, remained only, and from thence it was called, *The Trebellianic Quarter*, or ſingly, *The Trebellianic*, *viz.* the fourth Part of the Inheritance which was to remain to the Heir who was to reſign. See the *Inſtitut.* Lib. ii. Tit. xxiii. *De fidei commiſſariis hereditatibus*, &c. and the *Digeſts*, Lib. xxxvi. Tit. i. *Ad Senatuſconſultum Trebellianum*; as alſo Mr. DOMAT's civil Law in their Nat. Order, *Part* 2. *Lib.* v. *Tit.* iv.

[4] In all the Editions of the Original our Author has it, *dodrantem*; three Parts, inſtead of one in four, *quartam partem quadrantem.* Yet we ought to obſerve, that, in the *Roman* Law, the *Trebellianic* fourth Part is often called the *Falcidium*, becauſe the *Trebellianic* is much the ſame as to the ſubſtituted Heir, as the *Falcidium* is, as to the true and real Heir. See *Digeſts*, Lib. xxviii. Tit. vi. *De vulgari & pupillari ſubſtitutione*, Leg. xli. § 3.

[5] CICERO's Words are, *Omnes leges, judices, ad commodum Reipublicæ referre oportet, & eas ex utilitate communi, non ex ſcriptione, quæ in literis eſt, interpretari* ——— *Neque enim ipſi* [qui leges ſcripſerunt] *quod obeſſet, ſcribere volebant, & ſi ſcripſiſſent, cùm eſſet intellectum, repudiatum iri legem intelligebant. Nemo enim leges legum cauſa ſalvas eſſe vult, ſed reipublicæ, quod ex legibus omnes rempublicam optimè putant adminiſtrari.* De Invent. Lib. ii. Ch. xxxviii.

[6] It is a judicious Maxim in the *Roman* Law, that every Part of a Law ought to be interpreted by the Tenor of the whole Law: *Incivile eſt, niſi tota lege perſpecta, una aliqua particula legis propoſita, judicare, vel reſpondere.* Digeſt, Lib. i. Tit. iii. *De legibus*, &c. Leg. xxiv. See alſo about *Compacts*, Lib. xlv. Tit. i. *De verborum obligat.* Leg. cxxxiv. § 1.

[7] The ſame Lawyers obſerve, alſo, That we muſt explain one Law by another, the Antient by the New; and on the other ſide, the New by the Old, unleſs the laſt have manifeſtly abrogated ſomething belonging to the preceding. *Non eſt novum, ut priores leges ad poſteriores trahantur* ——— *Sed & poſteriores leges ad priores pertinent, niſi contrariæ ſint: idque multis argumentis probatur.* Digeſt, Lib. i. Tit. iii. *De legibus*, &c. Leg. xxvi. and xxviii. Further, Mr. HERTIUS makes an odd Miſtake. As the Author ſays, *Cum illis* LOCIS *ubi idem de ſimili agit materia*; he quotes thereupon with a *for*, a Law, which imports, that when the Intention of the Contractor does not fully appear, they muſt follow the Cuſtom of the Country where they treat juſt as in Caſes of Bargain. *Aut, ſi non apparcat quid actum eſt, erit conſequens, ut id ſequamur, quod in regione, in qua actum eſt, frequentatur.* Digeſt, Lib. li. Tit. xvii. *De Reg. Jur.* Leg. xxxiv. This Rule is, otherwiſe, of great Uſe, and of very great Extent.

[8] CICERO obſerves well, That to diſcover the Senſe of a Writing, we muſt examine the Works of the ſame Author, his Actions, Words, Opinions, and Converſation: *Qua in ſententia ſcriptor fuerit, ex cæteris ejus ſcriptis, factis, dictis, animo atque vita ejus ſumi oportebit*, De Invent. *Lib.* ii. *Ch.* xl.

[9] The Words of the *Digeſts* are, *Imperfecta erit ſtipulatio* ——— *Si quod pondere, numero, menſura continetur, ſine adjectione ponderis, numeri, menſuræ ſtipulatus eſſem.* Digeſts, Lib. xlv. Tit i. *De verborum obligat.* Leg. cxv. *princip.*

[10] And again, *Triticum dare oportere ſtipulatus eſt aliquis. Facti quæſtio eſt, non juris. Igitur ſi de aliquo tritico cogitaverit, id eſt, certi generis, certæ quantitatis: id habebitur pro expreſſo.* Ibid. Leg. xciv.

between

between *Menelaus* and *Paris*. They had agreed, that the Conqueror ſhould enjoy *Helen*; *Paris* being worſted, provided for himſelf by Flight, and *Agamemnon* proclaimed *Menelaus* Conqueror, and that therefore *Helen*, according to Articles, ought to be his. And the *Poet* makes *Jupiter* of the ſame Opinion, who declares himſelf [a],

Ἀλλ' ἤτοι νίκη μὲν ἀρηιφίλῳ Μενελάῳ.

Brave Menelaus *gains the Victory.*

Beſides, he that impoſes the Conditions muſt be the beſt Interpreter of them; for he on whom they are impoſed, has no Power of adding to them. But the Conditions (as *Hector* expreſſed them) had no relation to Slaughter or Death, but to Victory only; for *Helen* was not to be adjudged to him that proved the better Man, but the Conqueror, and not he that ſlays the other is ſuch; for a Brave Man may fall by the Hands of a Coward. On the other ſide it might be argued, that in Decrees, Laws, Leagues, and Pacts, a latter Condition takes place [1] of a former: and that the laſt Condition that *Agamemnon* had added, was κατακράτησις, expreſſing the Death of the Conquered [b], and ſo *Priamus* ſeems to have underſtood, in ſaying,

Jove *and the Gods eternal only know,*
Which of the Two is doom'd to Shades below [c].

Beſides, the *former* Condition is included in the *latter*, for he that kills, conquers, but not *vice verſâ*. And therefore the Condition which *Hector* propoſed, *Agamemnon* did not annul, but explained [d]; did not change, but added to it that which was of the greateſt Moment, that the Victory ſhould conſiſt in the Death of the Adverſary; for that is undoubtedly Victory, whereas the other may bear a Diſpute: *As therefore where Laws are really repugnant, the Judges embrace that which is evidently clear, in preference to that which is obſcure; ſo we look upon that Pact to be better and more valid, which is deciſive of the Controverſy, and liable to no Exception* [2] [e].

X. But that which helps us moſt in the Diſcovery of the true Meaning of the Law, is the *Reaſon* of it, or the Cauſe which moved the Legiſlator to enact it. This ought not to be confounded with the [3] *Mind* of the Law; for that is nothing but the genuine Meaning of it; for the finding out of which, we call in the *Reaſon* of it to our Aſſiſtance. And this is of the greateſt Force, when it evidently appears that ſome one *Reaſon* was the only Motive that the Parties went upon, which is no leſs frequent in Laws than in Pacts. And here that common Saying takes place, that, *the Reaſon ceaſing, the Law itſelf ceaſes*. But if ſeveral *Reaſons* concur together, and only one ceaſes, the others do not immediately expire, or become leſs able to ſupport the Efficacy of the Law. Nay, ſometimes the general *Reaſon* of the Thing ſeems to draw one Way, and the *abſolute Will* of the Legiſlator another; and in ſuch a Caſe [4] the *Will* of the Legiſlator muſt be deemed, by the Subjects, a *Reaſon*, which if it be but clearly ſignified, although not altogether ſo congruous to the Laws of Prudence, yet ſuffices to create an Obligation. From theſe Premiſſes may be rightly inferred, that a Preſent made [5] in Proſpect of Marriage may be revoked and demanded back, if the Marriage does not ſucceed; eſpecially if it ſticks on that Side to whom the Preſent was made. Though generally in ſuch Preſents as paſs among the Living, the Reaſon of them [6] has not the Force of a Condition (unleſs it be expreſly mentioned) ſo as to make the Fact null, where that does not appear. And therefore the *Olynthii* were not unjuſt in refuſing to reſtore the Land which *Amyntas* King of *Macedon* had given them, when, being defeated by the *Illyrians*, he had loſt all Hopes of defending his Kingdom [f].

Yet in ſome Caſes, the Law itſelf may ſuſtains the Place of a Condition [g]. And therefore *Cicero* [h], to the [7] Interdict which [i], amongſt others, had theſe Words in it, [8] *From whence you, or your Family, or your Agent*, &c. rightly argues: altho' one Servant be not a [9] Family, yet if that one Servant diſpoſſeſſes me, 'tis plain I ought to be reſtored from the Reaſon of the Edict [k]. Nor is there any Difference whether my *Agent*, or any body elſe in my Name, diſpoſſeſſes another: He adds, the Reaſon is the ſame in this Caſe, whether your *Agent* (as the Word ſignifies one that manageth all your Concerns in your Abſence with full Power, as your Attorney or Subſtitute) or

[a] Iliad. Δ. *v.* 13. [b] *Homer.* Il. iii. v. 281. [c] *Homer.* Il. iii. v. 309. [d] *Ibid.* v. 91, 92. [e] *Plut.* Symp. *Lib.* ix. *qu.* 13. *p.* 743. A. [f] *V.* Diod. Sic. *Lib.* xv. *Ch.* ix. [g] *Vid.* Cod. *Lib.* viii. *Tit.* lvi. *de revoc. donat.* [h] *Orat. pro* A. Cæcina xix. [i] *V.* Inſtit. *Lib.* iv. *Tit.* xv. & D. *Lib.* xliii. *Tit.* xvi. *De vi & de vi armata*, Lib. i. *princip.* [k] Vide *Cicer. ubi ſupra, Ch.* xix. & xx.

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[1] PLUTARCH's Words are, Ἐν τε δόγμασι καὶ νόμοις, ἔν τε συνθήκαις καὶ ὁμολογίαις, κυριότερα τὰ ὕστερα νομίζεται, καὶ βεβαιότερα τῶν πρώτων. *Plut.* p. 742. *D. Ed. Wech.*

[2] PLUTARCH's Words are, Ὥσπερ ἔνιοι ταῖς ἀληθιναῖς ἀντινομίαις οἱ δικασταὶ τῷ μηδὲν ἀμφιβητήσιμον ἔχοντι προσίθενται, τὸ ἀσαφέστερον ἐάσαντες· οὕτως ἐνταῦθα τὴν ἀπροφάσιστον καὶ γνώριμον τέλῳ ἄγουσαν ὁμολογίαν, βεβαιοτέραν χρὴ καὶ κυριωτέραν νομίζειν. *Idem.* p. 743. A.

[3] This will not anſwer in our Language. By the *Mind of the Law*, is underſtood what the *Latins* called *Mens Legis*, which is no other than the *true Senſe of the Law*. And by *Ratio Legis*, they underſtood, one of the Means or Tokens uſed to diſcover it. See what will be ſaid, § 19. *Note* 5. about the Caſes where the Law ought to be reſtrained, becauſe the Reaſon, which effectually determined the Lawgiver, or Contractors, takes not place.

[4] See how the Author explains this in his *Abridgment of the Duties of a Man and Citizen*. Often, though we ſee not the Reaſon of a Law, the Will of the Lawgiver is ſufficient to impoſe, on them that depend on him, an Obligation to conform to it. *Lib.* i. *Ch.* xvii. § 8. But what he ſays goes farther, and regards thoſe Caſes, where, though we ſee a general Reaſon why the Law was eſtabliſhed, very inconſiſtent with the Law itſelf; yet we are otherwiſe aſſured, That the Legiſlator deſigned there ſhould be no Exception under Pretence of Equity. For then we muſt ſay, with the Lawyers, *This is hard, but ſo is the Law: Quod quidem perquam durum eſt: ſed ita lex ſcripta eſt.* Digeſt. Lib. xl. Tit. ix. *Qui & à quibus manumiſſi liberi non fiunt.* Leg. xii. § 1. We find a remarkable Example in this Law. See Mr. NOODT's *Commentary* on the *Digeſt*. Tit. *De legibus*, p. 13, 14.

[5] See above in *Book* IV. *Ch* ix. § 4. *Note* 6.

[6] So the *Digeſts* order, *Et generaliter hoc in donationibus definiendum eſt: multum intereſſe, cauſa donandi fuit, an conditio. Si cauſa fuit, ceſſare repetitionem. Si conditio, repetitioni locum fore.* Digeſt. Lib. xxxix. Tit. v. *De donation.* Leg. iii.

[7] This is what is called *Interdictum*. See the *Inſtitutes*, Lib. iv. Tit. xv. and FRANCI HOTOMAN upon CICERO's Oration for *Cæcina*, *Ch.* iv. There are ſeveral Sorts of it, and this, of which he treats, is called, *Interdictum unde vi*. It was the *Prætor*, or Judge ſupreme, who gave it.

[8] CICERO's Words are, UNDE TU, AUT FAMILIA, AUT PROCURATOR TUUS, &c. *Cicero pro Cæcina, Ch.* xix.

[9] CICERO's Words are, *Si me villicus tuus ſolus dejeciſſet, non familia dejeciſſet, ut opinor, ſed aliquis de familia. Rectè igitur diceres te reſtituiſſe? ——— Non enim alia cauſa eſt æquitatis in uno ſervo, & in pluribus: non alia ratio juris in hoc genere duntaxat, utrum me tuus procurator dejecerit, is qui legitimè procurator dicitur omnium rerum ejus, qui in Italia non ſit, abſitve reipublicæ cauſâ, quaſi quidam pro ſe dominus, hoc eſt, alieni juris vicarius.*

your

your Neighbour, or Client, or Freed-man, or any other disturb me upon your Account and Intreaty [a 1].

Another Instance of a Case which may be decided from the *Reason* of the Law [b 2], *The Law is, that those, who in a Storm forsake the Ship, shall lose all; and the Ship and the Lading shall be theirs that stay in it. But in a very dismal Tempest all forsake the Ship, except one sick Man, who is not able to get out and escape; the Ship by chance comes safe to Port; the sick Man seizes it as his; the Owner puts in his Plea against him.* Now the Reason of the Law was, that those who had exposed their Lives to save the Ship, should have some Encouragement; but this the sick Man cannot pretend to, who neither stayed in the Ship upon that Account, neither contributed any thing to the Saving of it.

XI. Besides, the same Word admits of sometimes a more *loose*, sometimes a more *strict* Interpretation, which may happen upon several Accounts. Sometimes the Name of the *Genus* is peculiarly applied to one of the *Species*; as in the Words *Adoption* [3] and *Cognation* [4]. In the Names of Animals, where the Word is not of the *common Gender* [5], the *Masculine* includes the *Feminine*, and *vice versâ*. Sometimes Art gives a Term a larger Signification than common Use: As *Death* in the *Roman* Law is extended even [6] to Banishment, which in popular Use signifies only the Separation of the Soul from the Body. Hither may be referred the Ambiguity in the Words, *mine*, *thine*, *yours*, &c. which *Martial* [c] plays with;

Carmina Paulus emit, recitat sua carmina Paulus:
Nam quod emis, possis dicere jure tuum.

You Verses buy, your Verses you recite:
For what you buy, that justly is *your Right.*

XII. Moreover, in Promises and Pacts, as also in Privileges, some Things are *favourable*, some *odious*, and others of a middle or *mixt Nature*.

Those are *favourable* which carry an Equality along with them, or which equally oblige [7] each Party, and which tend to promote the common Advantage [8]; and the greater and the more extensive the Advantage is, the better Title have they to *Favour*. Those also are favourable which make for the [9] Preservation of Societies, and without which some Act would be to no End or Purpose. Besides, to avoid an Inconvenience is more favourable than to gain a Convenience [10], and greater Favour is allowed to that which makes for Peace, than that which makes for War; and a defensive War is still more *favourable* than an offensive.

On the other side, those are *odious*, which lay the Burden on one Party only, or on one more than the other; that, also, which carries a [11] Punishment along with it; or makes any Act of no Effect; or changes [12] any thing in former Constitutions; and such as tend to the Destruction of Friendship and Society.

[a] Add. *Lib.* i. *Tit.* iii. *Lib.* xii, xiii. *& Lib.* xxvii. *de legibus.*
[b] *Which is put by the Aut.* ad Heren. *Lib.* i. *Ch.* xi.
[c] *Lib.* ii. *Ep.* xx. *Id. Lib.* vi. *Ep.* xii. *Jurat capillos esse, quos emit, suos Fabulla; nunquid, Paule, pejerat?*

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[1] Indeed, as the Law, to which the Author here refers us, imports, all Cases cannot be expressed in Laws, they ought to be applied to Cases perfectly alike, and where the same Reason takes place evidently. *Non possunt omnes articuli singillatim aut legibus aut senatus-consultis comprehendi: sed cum in aliqua causa sententia eorum manifesta est, is, qui jurisdictioni præest, ad similia procedere, atque ita jus dicere debet.* Digest. Lib. i. Tit. iii. *De legibus*, Leg. xii, xiii. See also *Leg.* xxvii.

[2] So the Author *ad Herennium* speaks, *Sit lex, quæ jubeat, eos, qui propter tempestatem navim reliquerint, omnia perdere; eorum navim, cetcraque esse, si navis conservata sit, qui remanserint in navi. Magnitudine tempestatis omnes perterriti navim reliquerunt, scapham conscenderunt, præter unum ægrotum: is propter morbum exire & fugere non potuit. Casu & fortuitu navis in portum incolumis delata est: illam ægrotus possidet; navim petit ille, cujus fuerat.* Ch. xi.

[3] Under the Term of *Adoption* is contained Adoption properly so called, by which the natural Father releases his Son from his paternal Authority, and transfers him to his adoptive Father; and Abrogation is by which a Son, who has lost his natural Father, and was under his own Power, submits himself to him who is willing to become a Father to him. See the *Institut. Lib.* i. *Tit.* xi. *De adoptionibus.*

[4] *Cognati* in the *Roman* Law is spoken generally of all the collateral Kindred, but more particularly *Cognati* are the collateral Kindred on the Mother's Side, and *Agnati* of the Father's Side. See *Institut. Lib.* i. *Tit.* xv. *De legitimâ Agnatorum tutelâ*, § 1. Digest. Lib. l. Tit. xvi. *De verborum significatione*, Leg. i.

[5] The Words of the *Digest* are, *Verbum hoc*, si quis, *tam masculos quam fœminas complectitur.*

[6] So the *Digests* speak, *Deportatos enim mortuorum loco habendos.* Digest. Lib. xxxvii. Tit. iv. *De bonorum possessione contra tabulas*, Leg. i. § 8. See above *Lib.* iii. *Ch.* vi. § 3. *Note* 5.

[7] Very well: If the Nature of the Contract be such, and then the Thing follows from the Contract itself, without any Consideration. But as Conventions are often made, where there is a Mixture of Equality and Inequality in the Conditions; it would remain always to be examined, in such Cases, whether the Parties did not treat upon this Footing. Besides, the Equality does not consist here in a fixt and determined Proportion, with regard to the Nature of the Things. The whole, in Reality, depends upon the Will of the Contractors, who, according to their Condition and Circumstances, each seek to find their Account in the Bargain.

[8] This Expression is very indeterminate, and subject to Dispute. The Question here does not relate to Things contrary to natural Equity, or the Civil Law. We suppose, as I have already said, that the whole depends upon the Will of the Parties. That a certain Sense of their Meaning may be more agreeable to the public Good, it does not follow that that Sense should be preferred. We must first be assured, that the Contractors, or the Legislator, hath known this, and had a Design to procure it. Now this throws us into new Difficulties from which it is not easy to get clear.

[9] The Intention of the Contractors in all serious Engagements, is sufficient to reject an Interpretation, which would render it of no Effect. And this takes Place, even though the Act should become null, unless we admit something which charges one Party more than the other; that is to say, something *odious:* whence there arises a Conflict. For he, who is prejudiced by this Inequality, will say, that at this Rate he had rather nothing was done. We may apply here several other Things which are put in the Rank of *odious*. As to the Preservation of *Society*, *Friendship*, and *Peace*, we must consider how far the Persons here are disposed that Way.

[10] QUINCTILIAN's Words are, *Incommoda vitantis melior, quàm commoda petentis est causa.* Instit. Orat. Lib. vii. Ch. iv. p. 539. Edit. *Lugd. Bat.* 421. Edit. *Obrecht.* But *Quinctilian* speaks here of quite another Thing, the Case relates to Accusation and Defence.

[11] When in a Contract a Penalty is laid on him, who violates his Engagements, it is design'd as a Tye upon him to keep them. Now the greater the Penalty is, the more effectually this End is answered. For these Reasons, we ought to follow what is included in the proper and general Sense of the Words: or else there will arise a Conflict which will render the Application of the Rule here impossible. We may say the same Thing of Penalties established by Law: for the Question here does not relate to such Cases as contain any thing contrary to Equity, or where the Will of the Legislator is dubious. We shall treat of these, § 21, 22. of this Chapter. The Principle of our Author may sometimes authorize Frauds in order to elude the Laws. Mr. THOMASIUS, *Ubi supra*, § 171. proves it by this Example. Suppose, says he, that the Magistrate has forbid the Exportation of *Corn*. A Man exports *Meal*. According to the Distinction here, such a Man cannot be punished; for Punishment not only affects his Liberty, but is, in itself, extremely *odious*. We must then follow the Letter, and, in that Sense, *Flour* or *Meal* is not *Corn*.

[12] But unless it appear, that the Intention of the Parties was to make no Innovation, why should we fly from the Sense of the own *Terms?* Indeed there may be very good Reason for making some Alteration. Those

Thoſe that are of a *mixt Nature* (as ſuppoſe former Conſtitutions are changed, yet for the Sake of Peace) according to the Greatneſs of the Good, or the Change, are ſometimes *odious*, ſometimes *favourable*; yet, *cæteris paribus*, *Favour* ought to take place [1].

XIII. Upon theſe Diſtinctions *Grotius* builds the following Rules:

1. *In Caſes that are* [2] *not* odious, *Words are to be underſtood according to the full Propriety of popular Uſe; and if in popular Uſe there be ſeveral Significations of the ſame Word, the largeſt is to be taken.* Thus ſometimes the *Maſculine* is to be taken for the *common Gender:* as if Leave be given to kill any Game in ſuch a Foreſt, except *Bucks*, under that Name [3] *Does*, alſo, ought to be comprehended. In ſuch Caſes too an *indefinite* Word is to be taken [4] univerſally; as if it be ſtipulated in a Treaty, That the Captives ſhall be returned on *both* ſides, it muſt be underſtood of all and every one of them. So *Cicero* [a] argues in the aforeſaid Interdict, that the Words, *From whence a Man has been ejected*, ought to be extended even to him who is hindered from coming to his own [5]. For this Senſe is not repugnant to the Nature of the Words; and in *Favour* a Man ought to be put in Poſſeſſion of his own; for to diſpoſſeſs is to hinder one from continuing in Poſſeſſion [b], but a Man continues in Poſſeſſion, although he ſometimes goes out upon neceſſary Occaſions. And therefore it is the ſame Thing whether a Man actually turns me out of my Houſe, or, while I am out upon neceſſary Buſineſs [6], hinders me from coming in [c]. From the Force of this Rule it is, that, in a doubtful Caſe, if it be a Matter of *Favour*, the Year begun is looked upon as compleat, [7] where another's Right is not injured by it [d]. And againſt this did *Caligula* [e] offend, in denying thoſe, whoſe Anceſtors had obtained the Freedom of *Rome* for themſelves and their Poſterity, a Title to it, unleſs they were their Sons, [8] affirming that *Poſterity* ought not to be underſtood beyond that Degree [f]. Yet I am afraid *Dido* made uſe of too *favourable* an Interpretation, who when ſhe had

[a] *Orat. pro Cæcina*, Ch. xxiii. [b] Add. *Lib.* iii. § 7. *D. h. t.* [c] Add. *Lib.* xix. *Tit.* ii. *Lib.* xxix. *D. locati, &c.*
[d] *V. Buſſier's Hiſt.* Franc. *Lib.* xix. *p.* 39. [e] *Suet. Ch.* xxxviii. [f] Add. *Lib.* L. *Tit.* vi. *Lib.* iv. *D. de jure immunitatis.*

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[1] This Diſtinction of Things *favourable* and *odious* is equally uncertain and uſeleſs. The Definitions given them by GROTIUS and our Author have no Foundation; for *Promiſes* and *Compacts*, as well as *Privileges*, relating to Things allowable and innocent, as we may here ſuppoſe, are all indifferent in their Nature, and, by Conſequence, ought not to be extended or reſtrained farther than the Intention of the Author requires. There are in theſe Definitions Things which do not well agree together: For we ſay, for Example, that what tends to the publick Advantage is *favourable*, and what includes any Puniſhment is *odious*, for we know, that the Infliction of Puniſhment makes for the publick Advantage. It is not but there are Cauſes *favourable* or *odious*; but what they have of that Nature proceeds not from the Thing itſelf, but depends only upon the Intention either of the Legiſlator, Contractors, or Teſtator, which ought to be otherwiſe known. In the *Roman* Law, for Example, the Liberty of a Slave (ſee the *Inſtit. Lib.* i. *Tit.* vi. *Quibus ex cauſis manumittere non licet*, § 2.) is a Thing *favourable*, as, alſo, the Portion of a Woman (ſee the *Digeſts Lib.* xxiii. *Tit.* iii. De jure Dotium, *Leg* lxviii lxx.) On the contrary, ſecond Marriages paſs for *odious* with moſt People (ſee *Novel. Juſtiniani* ii. *Ch.* ii. § 1.) I have, alſo, ſaid that this Diſtinction is uſeleſs: Indeed in the Examples alledged by our Author, the Interpretation which he gives, may either be given independently upon what he believes *odious* or *favourable*, or is directly contrary to his Rule. Mr. TITIUS, *Obſer.* 428, 429. See what ſhall be ſaid in the following Notes. The Author, whoſe Opinion I have related, follows Mr. THOMASIUS in this, none of whoſe Works I had ſeen when I put out my firſt Edition of this Book; ſee his *Juriſpr. Divin. Lib.* ii. *Ch.* xii. § 159, *&c.* and the Appendix following it, where he defends himſelf againſt a Profeſſor of *Hamburgh* named *Vincent Placcius*, who had criticized upon what he maintained, that he could not give a good Definition of *favourable* and *odious*. Add here what I have ſaid upon GROTIUS, *Lib.* ii. *Ch.* xvi. § 10. *Note* 1.

[2] That is to ſay, according to Mr. THOMASIUS, *ubi ſupra*, § 173. in Things of a *mixt* Nature, which are both *favourable* and *odious*. We muſt add, *Provided the favourable moſt prevail*; according to the Principles of our Author.

[3] That is true, but that is not becauſe a Thing *favourable* is treated of, but by reaſon of the uſual Signification of the Word *Cervus*, i. e. a *Buck*. Mr. TITIUS obſerves very well, That when indeed we ſpeak of a *Buck*, or any other Creature in the Maſculine Gender, which is the more noble, it comprehends the Female as well as the Male, unleſs there be ſome Circumſtance which ſhews plainly that we ſpeak of the Male in Oppoſition to the Female. But I am not of the Opinion of that Author, who affirms, That, according to the Principles of GROTIUS and PUFFENDORF, the Word *Buck* is only applied to the Males. *Becauſe* (ſays he) *this Clauſe*, except the Bucks, *imports a Change of what before it was wont to ſignify, and, conſequently, includes ſomething* odious. This Change was made after the firſt Agreement, and not a Reſtriction added on a ſudden, and in the Agreement itſelf, as that is, which is treated of in this Example.

[4] This is not becauſe a Thing favourable is treated of, but becauſe, in ordinary, Speech theſe indefinite Expreſſions are in their Nature equivalent to univerſal, unleſs there be otherwiſe ſome Reaſon to reſtrain them, as there is not here. For why is it, that in a Treaty of Peace we would keep any Priſoner taken in War? This might have ſome Appearance in a Capitulation, or any other Convention made during the Courſe of a War which ſtill ſubſiſts; but, even here, if it was purely and ſimply agreed to reſtore the *Priſoners taken on both Sides*, there would be no Exception, however diſproportioned their Number might be. It would be the Fault of that Side which had the greateſt Number of Priſoners, if they did not ſtipulate in the Agreement, that they ſhould be exchanged Man for Man. Let us add, That, according to the Principles of our two Authors, there would be here a Conflict of Reaſons againſt Reaſons, as Mr. THOMASIUS remarks, *ubi ſupra*, § 170. For he that having the greater Number of Priſoners, would exchange them only Man for Man, for otherwiſe it would be a Thing *odious*, becauſe he would give more than the other. This laſt, on his Part, affirms, That, according to the Agreement for Peace, he treated for the moſt *favourable* Thing, and ſo the Terms are to be underſtood in the moſt extenſive Senſe that they are capable of. Thus, through the Contrariety of Reaſons, nothing is determined by theſe Terms *favourable* and *odious*.

[5] This is determined in the *Digeſts: Si autem cum dominus veniret in poſſeſſionem, armati eum prohibuerunt, qui invaſerant poſſeſſionem, videri cum armis dejectum*, Lib. xliii. Tit. xvi. *De vi & vi armata*, Leg. iii. § 8.

[6] The Words of the *Digeſts* are, *Sive autem corpore, ſive animo poſſidens quis dejectus eſt: palam eſt, eum vi dejectum videri. Idcircoque ſi quis de agro ſuo vel de domo proceſſiſſet, nemine ſuorum relicto, mox revertens, prohibitus ſit ingredi vel ipſum prædium: vel ſi quis eum in medio itinere detinuerit, & ipſe poſſederit: vi dejectus videatur: ademiſti enim ei poſſeſſionem, quam animo retinebat, etſi non corpore.* Ibid. *Leg.* i § 24. Beſides, what our Author ſays is ſufficient to ſhew, that we need not examine whether the Thing treated of is *favourable* or not, for the Senſe of the Words, *drive out*, may be proved by other Principles. Mr. THOMASIUS ſays here, that *all depends upon the Reaſon of the Law, for* (adds he) *the* Roman *Law would, by it, prevent all Violence between particular Perſons. Francis Hotoman* nevertheleſs affirms, That *Cicero* uſes *Sophiſtry* in the Buſineſs of *Cæcina*, as appears by his Notes on that Orator's Harangue before quoted. See Mr. SCHULTING's Diſcourſe. *De Juriſpr. M. Tull. Cicer.* p. 283.

[7] I doubt much, whether the Quality of *favourable*, will authorize us to lay down this as a general Rule, ſufficient to decide all the Caſes which may happen on this Subject. All depends here upon the Manner in which we expreſs ourſelves, with regard to *Years*; according to the Nature of the Affair, or the Laws and Cuſtoms relating to it. Beſides, the Proportion of the Year, which is expired, makes a great Difference, and, conſequently, may authorize very different Deciſions, with regard to the ſame Thing; as, for Example, when but a few Days of the Year are paſt, or it wants but a few Days of the End. The *Roman* Law, on which our Author's Maxim is here founded, follows no fixt Principle, in its expreſs Deciſions, which can direct us in Caſes not yet decided. See Examples of this in PIENE DU FAUR, in *Leg.* ci. *De Reg. Jur.* ANTONINE FAURE *Juriſprud. Papin.* Tit. xxiv. *Princip.* i. *Illat.* iv. p. 1126. EDMOND MERILLUS, *Obſervat.* ii. 21.

[8] Nothing is more common, than to underſtand by the Word *Deſcendents*, all thoſe who deſcend in the Right line for ſeveral Degrees, without needing a favourable Conſtruction, to extend it farther than the firſt Degree. And the Determination of the *Roman* Law is poſitive, as to the Privileges granted a Perſon and his Deſcendents, as appears by the Law quoted by our Author, *Immunitates generaliter tributæ eo jure, ut ad poſteros tranſmitterentur, in perpetuum ſuccedentibus durant.* Lib. l. Tit. vi. Leg. iv.

purchaſed

purchaſed ſo much Ground, as ſhe could cover with an Ox's Hide, cut the Hide into thin Pieces, and ſo ſeized upon more Ground than ſhe had really bargained for [a]. By the ſame Trick did *Ivarus* buy as much Land as he could encompaſs with the Hide of a Horſe, which he afterwards cut into ſeveral ſmall Thongs, and encompaſſed Land enough to build a City upon [b].

2. *In a Matter of* Favour [1], *if he that ſpeaks be learned in the Law, or ſpeaks by the Advice of thoſe that are, his Words are to be taken in the moſt comprehenſive Signification; ſo as not only to import as much as they do in common Uſe, but to include that Signification, alſo, which is uſed amongſt the Lawyers, or which the Civil Law has impoſed upon them.*

3. On the other hand, *Words ſhall be taken in a ſtricter Senſe than the Propriety requires, if otherwiſe Injuſtice or an Abſurdity would follow* [2].

4. *Although it be not abſolutely neceſſary, for the avoiding Injuſtice, to take the Words in a ſtricter Senſe than their Propriety demands; yet if there be a manifeſt* [3] *Advantage in ſuch a Reſtriction, we ought to ſtop at the narroweſt Limits of their proper Signification, unleſs Circumſtances perſuade otherwiſe.*

5. *In an* odious *Matter a figurative Speech may be admitted* [4] *to avoid a Grievance*; thus in a Donation, or when a Man recedes from his Right, Words, although delivered at large, are uſually confined to thoſe Things only, which were ſuppoſed to be then thought of. And therefore *Cicero* argues right, that [5] though a Man bequeaths to his Wife all the Money he has, yet his Debts are not therefore bequeathed unto her; for there is a great deal of Difference between ready Money, and ſuch as is due upon Bonds. Thus *Aurelian*, when he ſet out on his *Eaſtern* Expedition, promiſed the People Crowns of two Pounds Weight, if he returned Conqueror: And when the People expected Crowns of Gold, which *Aurelian* [c] was neither able nor willing to beſtow, he gave them only Crowns of Bread [d]. Nay, though a Man expreſſes himſelf univerſally, if afterwards a particular Enumeration follows, the [6] Law will not allow any thing to be made over, but what was particularly expreſſed. And when one Nation has ſtipulated to ſend another [7] Auxiliary Forces, it is ſuppoſed that they are to be ſent at the Expence of him to whom they are promiſed, unleſs it was expreſly otherwiſe agreed between them. And thus a League made for the Defence of a Dominion, when the Lord is in Poſſeſſion of it, does not extend to the Recovery of it, when he is ejected. Sometimes the *Odium* of the Perſon juſtifies a *ſtrict* and almoſt quibbling Interpretation: Thus the Lady that betrayed the Capitol, and had bargained for her Pains to have what the *Sabines* carried upon their left Arms, meaning their Bracelets, was buried under their Shields [e].

XIV. *Grotius* applies theſe Rules in a few Examples: As thus, *It is demanded, if a Reward be propoſed to him that firſt gets to the Goal, and two come in together, whether it be due to both or to neither?* Indeed the *firſt*, in this Caſe, may ſignify either him who out-runs all the reſt, or him whom none out-runs: And therefore if the Reward was only a Wager between the Parties, and both come to the Goal together, they muſt draw Stakes. And the ſame holds, if two Spectators, as is uſual, had laid a Wager on this or that Man's Head. But if the Reward was propoſed by a third Perſon to encourage their Induſtry, then thoſe who come in together ought to divide it, if it be capable of Diviſion; or elſe to enjoy it both together; or, if that cannot be, to draw Lots for it, or to run again; for 'tis hard that both ſhould be deprived of the Reward, becauſe neither was worſe than the other: Beſides, the Rewards of Virtue ought

[a] *Juſt. Lib.* xviii. *Ch.* v. *Virg. Æn. Lib.* i. *v.* 371. *& Cerda ad h. l.* [b] *Apud Saxonem Gramm. Lib.* ix. *& Polyd. Virg. Hiſt. Angl. Lib.* v. [c] *See above in* B. iii. Ch. v. § 10. *and Mr.* Barbeyrac's *1ſt Note upon it.* [d] *Which were called* Siliginei. Panis Siligineus, *White Bread. V. Fl. Vopiſcum in Aurel.* Ch. xxxv. [e] *Tarpeia. V. Plut. Romulo, & Liv.* Lib. i. Ch. xi.

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[1] But why ſhould not this have place in a Donation, for Example, which is a Thing *odious*, according to Grotius and our Author. The Donor knowing all the Force and Extent of the Terms, may be ſuppoſed to uſe them without Reſtriction, unleſs there be ſome probable Reaſon to make us think he had ſomething leſs in his Mind, and in that Caſe it is not becauſe a Thing is not *odious* or chargeable, that the Signification of the Terms are reſtrained, but upon the Account of what the Donor probably had in his Mind, as our Author himſelf ſpeaks, a little lower, after Grotius.

[2] This and the following Rules are not peculiar to Things *favourable*, as is eaſy to ſee. They concern all Acts done with Knowledge and Deliberation.

[3] Grotius ſays, *A manifeſt Equity, or Advantage*; and the firſt Word is apparently omitted, either by the Careleſneſs of the Author, or Fault of the Printers. As for the Rule itſelf, if Equity requires that the Signification of a Word ſhould be reſtrained as much as poſſible, it is for that Reaſon, and not becauſe a Thing *favourable* is treated of. But Profit has no Influence here, farther than it is evident that the Lawgiver or Contractors would procure it.

[4] Provided, that there be Reaſon to believe, that he that ſpeaks would not ſubject himſelf or others to this chargeable Conſequence; for if he intends it, why ſhould we oppoſe his Deſign? And if we have no Reaſon to believe that he did intend it, why ſhould we have recourſe to a figurative Senſe?

[5] Cicero's Words are, *Non ſi uxori vir legavit omne argentum, quod ſuum eſſet; idcirco quæ in nominibus fuerunt, legata ſunt; multum enim differt in arcâne poſitum ſit argentum, an in tabulis debeatur.* Topic. Ch. iii. When he ſpeaks of his Money, he means not ordinarily his Debt, ſo the Senſe of the Teſtator is taken from the Signification of the Terms, and not from the Nature of the Legacies or Gifts themſelves. The Terms, in the Original, cannot be underſtood otherwiſe, according to the Ideas and Language of the *Roman* Law, as *Francis Hotman* ſhews, *Obſerv.* Lib. i. Ch. xxv.

[6] But then the Enumeration itſelf ſhews, that he that ſpeaks did not take the univerſal Particle in its full Extent. This Rule alſo, is not always ſure: for there may be particular Reaſons why we enter into ſome Detail, without Prejudice to the Generality of the preceding Terms, and of this we muſt judge by Circumſtances. The Lawyers are very little agreed upon this Head. See a Diſſertation of the deceaſed M. Ludovici, *An Species deroget Generi?* printed at *Hall* in 1721.

[7] In this Example it is clear, that the Promiſe to ſend Succours, does not include, according to the ordinary Uſe of the Words, and common Practice, an Engagement to furniſh the Troops at his own Expence. So that, when a Thing *favourable* is treated of, it cannot be extended to an Agreement, unleſs it be explained in other Terms. As for the Example following, I cannot ſee why the Author alledges it here. For when a Treaty of Alliance is made for the Defence of *his States*, or of ſuch and ſuch a State which he poſſeſſes, this Expreſſion alone, without any farther Explanation, can never imply an Engagement to aſſiſt this Prince to recover them, in Caſe he is driven from them. Theſe are two very different Things, and it is much more eaſy to hinder a Prince from loſing his Dominions, than to help him to recover them when they are loſt. This takes place eſpecially when the Caſe relates to a Country newly conquered, and on which other powerful Princes have Pretenſions. We have a fine Example of this in *Guiccardin.* It is a Sentence of *George Cornaro*, in a Speech to the Republic of *Venice*, when it was under Deliberation, whether that State ſhould abandon the Party of *Francis* I. King of *France*, to make a League with the Emperor *Charles* V. It had been objected, that the Republic had promiſed to ſuccour the King of *France, for the Defence of the Territories he poſſeſſed in* Italy. To this *Cornaro* replied, *It was true, but they had not promiſed to aſſiſt him to recover them if he loſt them*, p. 247. Edit. *Genev.* 1645.

[8] See Mr. Buddeus's Diſcourſe, entitled, *Juriſprudentiæ Hiſtoricæ Specimen*, § 11, *&c.* among his *Selecta Juris Naturæ & Gentium*, where he examines this Caſe.

ought not to be confined to ſo *ſtrict* an Interpretation; and therefore it would be generous in the Patron to give the whole Reward to each that performs equally [a 1]. But what *Auguſtus* gave the Robber *Coracota* (who, having heard that ſuch a Sum of Money was laid upon his Head, ſurrendered himſelf) proceeded rather from the Greatneſs of the Emperor's Soul, than that it was due from him [b].

XV. In the Treaty which put an End to the ſecond *Punick* War, there was a Clauſe, *That the* Carthaginians *ſhould not wage War, either in* Africa, *or out of* Africa, *without Leave of the* Roman *People* [c]. Ought this to be underſtood of an offenſive War only, or of a defenſive alſo? Certainly only of an offenſive War; for otherwiſe that Clauſe would be *odious*, as inconſiſtent with the very Being of the State of *Carthage*. Beſides, 'tis hard to retrench one's natural Liberty, ſo far as not to permit him to defend himſelf againſt an Injury [d]. Nor was it the Deſign of the *Romans* [2], by this Clauſe, to expoſe the *Carthaginians* to the Inſults of their Neighbours, or to render them entirely dependent upon their Arms for Protection; but only ſo to tie them up, as that they ſhould not enlarge their Territories, or increaſe their Strength by War. Indeed when the *Romans* made ſuch a League with *Antiochus*, they inſerted this expreſs Clauſe [e], *That if any Nation, againſt whom* Antiochus *by theſe Articles is debarred from waging War, ſhould ſet upon him firſt, he ſhould then have Liberty of Warring againſt them* [3].

XVI. The *Romans* promiſed the *Carthaginians*, that *Carthage ſhould be a free City:* And a little after demanded of them that they would demoliſh it, and build another at a greater Diſtance from the Sea; pretending that the Spot of Ground, upon which the City ſtood, was not *Carthage* [4 f]. Here though the Freedom which the *Romans* promiſed, cannot be underſtood of a full and entire Liberty, that having already ſuffered no ſmall Diminution; yet, at leaſt, ſo much Liberty ought to be underſtood, as that they ſhould not be obliged, at another's Command, to deſtroy their native Country, and betake themſelves elſewhere. Indeed Liberty, or a Privilege of being govern'd by one's own Law [5], is the Attribute of a People, not of a City, as it conſiſts of Walls and Houſes; yet ſince it was ſaid that *Carthage ſhould be free* (not the *Carthaginians*, by which Way of ſpeaking the *Romans* might have coloured over their Cheat) the natural Meaning of the Words intimate, that the People ſhould enjoy their Liberty in the City *Carthage* that then was, and, alſo, that the Buildings themſelves ſhould be ſecure. *Polybius* [g] relates, that the Senate had promiſed, that *they ſhould have their Liberty, their Laws, all their Lands, the full Poſſeſſion of all their Goods, both publick and private*; and that the *Carthaginians* preſently ſuſpected why there was no Mention made of the City. But indeed 'tis evident, that the *Romans* here were guilty of more than *Punick* Perfidiouſneſs.

XVII. There are other Conjectures founded upon ſomething elſe than the Signification of the Words in which the Thing is expreſſed, which make it neceſſary ſometimes to *enlarge*, ſometimes to *reſtrain* the Meaning. Yet it is obſervable, that we have oftener Reaſon to *reſtrain* than to *enlarge* it. For the Want of any one Cauſe is enough to hinder the Effect of a Thing, whereas all muſt neceſſarily concur to produce it: Thus, in ſuch Acts as create an Obligation, the Meaning muſt be *reſtrained*, if it appears that any one of the Cauſes be abſent; whereas to *enlarge* it, there muſt be a Concurrence of them all.

And this *Enlargement* is not ſo eaſily admitted here, as when I juſt now ſaid, that, in a Matter of *Favour*, the Words may bear another, though leſs received Signification than uſual: For there (ſince the only Uſe of Words is to expreſs one's Mind) ſuch a Senſe of the Words, not being entirely diſſonant to common Uſe, might probably have been in the Mind of the Speaker. But the Caſe before us ſuppoſes us to make Uſe of Conjectures, to prove that the Mind of the Speaker is ſuch as his Words will not admit of, and therefore we ought to be very certain of it.

Nor can a Law extend to a Caſe, which proceeds upon a Reaſon only like that which the Law is founded upon, for the Reaſon ought to be exactly the ſame. Nay even that is not always enough, for ſometimes the bare Will of the Legiſlator determines itſelf at Pleaſure, even againſt or without Reaſon, and yet is ſufficient to produce an Obligation.

To juſtify then ſuch an *Enlargement*, we ought to be ſure that the Reaſon, under which the Caſe in Debate comes, was the [6] only Cauſe and Motive that induced the Legiſlator to enact the Law; and that this Reaſon has been conſidered by him ſo generally, as that he would have applied it to the preſent Caſe, had he foreſeen it, becauſe otherwiſe the Law would have been uſeleſs or unjuſt.

Hither may be referred what the *Rhetoricians* ſay about *Reaſoning*, when a Thing, for which there is [7] no Proviſion made by any particular Law [h], is inferred, by a Parity of Reaſon, from a

[a] *V. Liv.* Lib. xxvi. Ch. xlviii. [b] *Dio. Caſſ.* Lib. lvi. [c] *Liv. Lib.* xxx. *Ch* xxxvii. *Polyb. Lib.* xv. *Ch.* xviii. The like Article we find in the Peace which *Flaminius* gave to King *Philip*, *Liv. Lib.* xxxiii. *Ch.* xxx. [d] Add. *Livy*, *Lib.* xlii. *Ch.* xli. [e] Add. *Livy*, *Lib.* xlii. *Ch.* xxiii. [f] Vid. *Appian. de Bello Punic.* p. 45. *Ed. Steph.* [g] *Ex. Legat.* cxlii. [h] Vid. *D. Lib.* i. *Tit.* iii. De legib. *Lib.* xii, xiii, & xxvii.

[1] See Mr. THOMASIUS's Diſcourſe, *De Prioritate & Poſterioritate dubiâ atque incertâ*, which are amongſt thoſe at *Leipſick*, *Ch.* iii. where the Queſtion propounded in this §, and ſeveral other curious ones are handled.

[2] This Reaſon alone hath ſo great Force, that it is not neceſſary to alledge what the Clauſe contains *hurtful* or *odious*, as *Grotius* does *ubi ſupra*, § 14.

[3] *Si qui ſociorum populi Romani ultro bellum inferent Antiocho, vim vi arcendi jus eſto: dum ne quam urbem aut belli jure teneat, aut in amicitiam accipiat.* Tit. Liv. Lib. xxxviii. Ch. xxxviii. "If any of the Allies of the *Roman* People ſet upon *Antiochus*, "let him have Liberty to repel Force by Force, provided he takes no City, either by the Right of War, or by Treaty." See alſo *Polyb. Excerpt. Legat.* xxxv. Ch. iv.

[4] Add here what I have ſaid upon GROTIUS, *Lib.* ii. *Ch.* xvi. § 15. *Note* 2.

[5] As *Nicias* and *Themiſtocles* ſay in *Thucyd. Lib.* vii. *Ch.* lxxvii. "That by a Town we underſtand the Inhabitants, not the "Buildings and Walls" Ἄνδρες γὰρ πόλις, ἠ τείχη. Add. Juſt. Lib. ii. Ch. xii. *Note* 14.

[6] There is no Neceſſity that the Reaſon of the Law ſhould be ſingle, to authorize the Extent of it; for there is often more than one Thing which cauſes Laws to be made, and in one and the ſame Thing ſeveral Ends may be propoſed, either equally, or ſo as ſome may be principal, and others ſubordinate. In this Caſe, if he that ſpeaks has equally propounded to himſelf diverſe Reaſons, which he had in View, they muſt all be joined in extending it, in ſuch a Manner, as the like Caſe, to which the Law may be extended by virtue of one of thoſe Reaſons, agrees with all the other. But when there is a principal one, there is no Neceſſity that the Caſe ſhould, alſo, agree to the other ſubordinate ones, as M. THOMASIUS obſerves, *Inſtit. Juriſp. Divin.* Lib. ii. Ch. xii. § 90.

[7] See the Laws quoted above, § 10. *Note* 8.

like Caſe which is provided for: or, as *Quinctilian* has it, *When a Thing not written is gathered from a Thing written:* which he illuſtrates by theſe Examples[1]. *To take a* Plough *in Pawn is not lawful, he takes the* Plough-ſhare, *The Exportation of* Wool *is prohibited, he exports* Sheep. *He that ſlays his Father, muſt be ſewed up in a Leathern Bag, he has ſlain his* Mother. *A Man ought not to be dragged out of his* Houſe *to Juſtice; he drags him out of his* Tent[a].

Hither too may be referred the Caſe defended by *Lucian*[b]; the Law is, *Whoſoever kills the* Tyrant *ſhall be rewarded: A certain Man climbs into the Citadel to kill the* Tyrant, *but, miſſing him, kills his Son, and leaves the Sword in the Body: The* Tyrant *coming in, and finding his Son ſlain, out of Grief, falls upon the ſame Sword, and dies: He that ſlew the* Tyrant's *Son demands the Reward, as the Slayer of the* Tyrant. *Eraſmus*[c] takes the other ſide, yet certainly the Reaſon of the Law is for having the Reward given, not only to him who ſlays the Tyrant with his own Hand, but to[2] him, alſo, who is the immediate Occaſion of it[d]. Since there is no Doubt but the Legiſlator would have decreed the Reward to him, alſo, had ſuch a Thing come into his Mind.

The Law ſays, that whoſoever kills his Wife ſhall be put to Death; but a certain Man, being willing to get rid of his Wife, and at the ſame Time to eſcape the Law, kept his Mule three Days without Water, and the fourth Day, pretending to ride out for his Diverſion, put his Wife upon the Back of the Mule; who, as ſoon as he came to the River, ran eagerly into it, and threw the Woman, who periſh'd in the Waters.

Thus the Brethren of *Joſeph* vainly thought, that they ſhould be guilty of a leſs Crime in throwing him into the Pit, where he muſt die of Hunger, than if they had actually cut his Throat[e].

It was ſtipulated between two neighbouring Nations, when there was no other ſort of Fortifications, That ſuch a Place ſhould not be walled in; which therefore ought not to be encloſed with ſo much as a Pile of Earth, if it evidently appeared, that the Reaſon why Walls were prohibited, was to render it incapable of holding out againſt Force.

A Man leaves his Eſtate to *Titius*, after the Death of the Child his Wife was then big with: He thought his Wife had been with Child, but it proves otherwiſe; and therefore *Titius* has a fair Title to the Eſtate: For 'tis evident, that the Reaſon why the deceaſed did not abſolutely make *Titius* his Heir, was, becauſe he thought he might have a Child; and therefore, had he known that no Child would have been born, he would have made him ſuch without any Condition[3][f].

It would have been too hard, ſays *Lyſias*[g], *for a Lawgiver to have crouded into his Law all the Words of the ſame Signification, and therefore what he has expreſt of one, he is ſuppoſed to have underſtood of all the reſt.* Thus the Law, in *Exod.* xxii. 33. is rightly extended to every tame Animal, and the Word *Pit* to every Ditch[4].

XVIII. Beſides, it is of great Uſe to *enlarge* the Meaning, ſo as to leave no Room for any ſort of Cavils, and, conſequently, to prevent[5] the Quirks, that crafty deſigning Men have found out to evade the Law[h]. Of theſe Cheats the *Roman* Lawyers make four Sorts; one by a Commutation of[6] Things, another by a Commutation of[7] Perſons; a third by Commutation of the[8] Contract; the laſt in the Way of[9] Contracting[i].

[a] Vide *D. Lib* ix. *Tit.* ii. ad Leg. Aquil. *Lib.* vii. § 7. [b] *In Declam. quæ inſcribitur Tyrannicida,* Tom. i. p. 693, &c. Edit. *Amſt.* [c] *In the Anſwer which he has made to* Lucian's Declamation, *Tom.* i. *p.* 914, &c. [d] *Is there any Difference whether you kill him yourſelf, or* afford *the* Cauſe *of his Death?* ibid. [e] *Joſeph. Archæol. Jud.* Lib. ii. Ch. iii. *Gen.* xxxviii. 21, 22. [f] *Add.* Lib. v. Tit. ii. Lib. xxviii. D. de inoff. teſt. *In a Law many Things are excepted, though not expreſt; the Letter is narrow, but the Meaning extenſive; but ſome Things are ſo plain as to need no Exceptions,* M. Senec. *Lib.* iv. *contr.* xxvii. *What? was this provided for by the Letter? By no Means? Upon what therefore do we proceed? The Deſign. Which could it be apprehended without ſpeaking, there would be no need of Words, but, becauſe it cannot, Words were found out, not to hinder, but to declare the Deſign,* Cic. pro Cæcin. *Ch.* xviii. *Every Thing is not expreſt in Writing, but ſome are evidently ſuppoſed to be tacitly excepted,* Id. de Invent. *Lib.* ii. *Ch.* xlii. Lyſias, Orat. x. Ch. ii. contr. Theomneſt. [g] *Orat.* i. *contr. Theom.* [h] *As alſo to anſwer any Cavils whatſoever,* Vide *Lib.* xxix, xxx. D. de leg. ubi ſupr. *&* *D. Lib.* x. *Tit.* iv. *Lib.* xix. ad exhibend. *&* *Lib.* xxxv. *Tit.* i. *Lib.* lxxvi. D. de condit. & demonſtrat. *&* *Lib.* xlviii. *Tit.* v. *Lib.* xxxiii. § i. *D. ad L Jul. de adult.* [i] *Lib.* viii. § 14. *D. ad SCtum Velli.*

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[1] QUINCTILIAN's Words are, *Hic ſtatus* [Syllogiſmi] *ducit ex eo, quod ſcriptum eſt, id quod incertum eſt: quod quoniam ratiocinatione colligitur, ratiocinativus dicitur——Quod in toto, idem in parte: Aratrum accipere pignori non licet, vomerem accipit——Quod in parte, idem in toto. Lanas vehere Tarento non licet, oves vexit——Majoris pugnæ eſt ex ſcripto ducere quod ſcriptum non eſt.* Inſtit. Orat. Lib. vii. Ch. viii.

[2] As SENECA expreſſes it, *Herc. Octæo, v.* 859, 860. *Quicquid in mortem trahit telum eſt abunde, i. e.* "Whatſoever kills, is "Weapon ſufficient." But we ought to obſerve, that, with regard to a moral Imputation, it is not ſufficient, that what a Man has done, ſhould be, by Accident, the Cauſe of what happens, as *Eraſmus* very well proves, and it may have place here. See Mr. THOMASIUS's *Inſtit. Juriſprud. Divin.* Lib. ii. Ch. xii. § 98, 99. and what I have ſaid above at *Lib.* i. *Ch.* v. § 3. *Note* 2.

[3] SENECA ſays, *Scriptum legis anguſtum eſt, interpretatio diffuſa eſt: quædam vero tam manifeſta ſunt, ut nullam cautionem deſiderent.* Senec. Controv. xxvii. See *Lyſias, Orat.* x. *contra Theomneſt.* ii. *Ch.* ii. and *Libanius Declam.* xxxi.

[4] QUINCTILIAN's Words are, *Nulla tanta providentia potuit eſſe eorum, qui leges componebant, ut omnes ſpecies criminum complecterentur. Nam & ſemper caventes nequitia vicisſet; & jus ita multiplex atque diffuſum eſſet, ut pro incerto haberetur ignotum. Fecerunt ergo, ut rerum genera complecterentur, & ſpectarent ipſam æquitatem. Multa ergo invenientur frequenter, quæ legum verba non teneantur, ſed ipſa vi & poteſtate teneantur.* Quin. *Declam.* cccxxxi. "It was impoſſible for thoſe that made Laws, to provide "particularly againſt all ſorts of Crimes: For, after all their Care, Knavery would find out Evaſions; and the Law would be "voluminous and confuſed, that inſtead of Uncertainty we ſhould lie in entire Ignorance. They therefore took care to have "general Heads, and to have regard to Equity. And therefore we frequently find Things, which are not expreſt in the Letter "of the Law, but yet come under the Force of it." See alſo *Cicero De Invent. Lib.* ii. *Ch.* xlii. and *Orat. pro Cæcin.* Ch. xviii.

[5] The *Digeſts* ſay, *Contra legem facit, qui id facit, quod lex prohibet: in fraudem verò, qui, ſalvis verbis legis, ſententiam ejus circumvenit. Fraus enim legi fit, ubi, quod fieri noluit, fieri autem non vetuit, id fit: & quod diſtat ἐντὸν ἀπὸ διανοίας, i. e.* dictum a ſententia; *hoc diſtat fraus ab eo, quod contra legem fit.* Digeſt. Lib. i. Tit. iii. *De legibus, &c.* Leg. xxix, xxx.

[6] The *Digeſts* enact, *Sed ſi fraus ſit ſenatuſconſulto* [Macedoniano] *adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut his diſtractis fructibus uteretur pecunia, ſubveniendum eſt filiofamilias.* Digeſt. Lib. xiv. Tit. vi. *De ſenatuſconſ. Macedon.* Leg. vii. § 4. See alſo *Leg.* iii. § 3.

[7] See the *Digeſts, Lib.* xxiv. *Tit.* i. De donationibus inter virum & uxorem, *Leg.* v. and *Tit. Liv* xxxv. *Ch.* vii.

[8] The Words of the *Digeſts* are, *Julianus, minoris factam venditionem nullius eſſe momenti ait.* Digeſt. ibid. § 5. See *Ch.* ii. § 10. *Note* 1. above.

[9] The Words of the *Digeſts* are, *Si, quum eſſem tibi contracturus, mulier intervenerit, ut cum ipſa potius contraham: videtur interceſſiſſe.* Digeſt. Lib. xvi. Tit. i. *De Senatuſconſ. Vellcian.* Leg. viii. Mr. THOMASIUS, *Inſtit. Juriſpr. Divin.* Lib. ii. Ch. xi. § 102. ſays, There is no great Difference between the laſt ſort of Fraud, and the preceding. He obſerves, alſo, that there are ſome ſorts of Frauds, that cannot be reduced to either of theſe Kinds.

Licinius

Licinius Stolo [a] having made a Law that no one ſhould poſſeſs above 500 Acres, he himſelf, nevertheleſs, purchaſed a Thouſand, and, to palliate his Crime, made over half to his Son: For which Reaſon he was accuſed by *Popilius Læna*, and was the firſt that fell by his own Law; teaching us that no Man ought to preſcribe to others but what himſelf is willing to perform. *By the* Voconian *Law no Man can bequeath above half his Goods to a Woman; and therefore when a certain Man had made two Women joint Heirs, his Relations impleaded the Will* [b].

The *Rhodians* had a Right to Tribute from the Iſle of *Pharos*, but when the Receivers came to demand it, the Queen of the Place detained them under ſome Pretence of Ceremony, 'till ſhe had caſt Moles into the Sea, and joined *Pharos* to the Continent; and then ſhe drove them away, as having Commiſſion to levy Taxes upon Iſlands, but not upon the Continent [c].

The *Athenians*, when a certain Harlot, called *Leæna*, i. e. *Lioneſs*, had ſlain the Tyrant, for fear of profaning the Temple with the Statue of a Harlot, they erected the Effigies of the Animal whoſe Name ſhe bore [d].

The *Rhodians*, becauſe it was unlawful to pull down a Trophy, hid that which *Artemiſia* had erected to their Diſgrace, by building a Houſe over it [e].

When the *Spartans* demanded to have the *Athenians* Decree, which hindered the *Megarenſes* from trading with them, aboliſhed, and *Pericles* objected that the Law forbad any Decree of the People to be pulled down; one of the Commiſſioners replied, *We do not deſire you to pull it down, but to turn it out of ſight, and that none of your Laws forbid* [f].

The King of *Portugal*, for certain Reaſons, forbad the Clergy the Uſe of Mules, but they pleaded their Privileges; upon which the King commanded all the Smiths, upon pain of Death, not to ſhoe any Mule; and ſo the Clergy quitted them of their own Accord [g].

Tiberius, becauſe it was eſteemed unlawful to ſtrangle Virgins, order'd them firſt to be defiled by the Executioner, and then to be ſtrangled [h]. The *Corinthians* were forbidden by the Law to give away their Ships, and therefore they ſold them to the *Athenians* for five Drachms a piece [i].

By a Decree of the Senate, no Slave could be Evidence againſt his Maſter, and therefore *Tiberius*, a crafty Evader of the Law, gave each of the Slaves their Liberty, that he might make uſe of them againſt *Libo*, without breaking the Decree of the Senate [k].

Tiridates refuſed to lay aſide his Sword at *Nero*'s Command, but put a Lock upon his Scabbard [l].

Robert Carncroſſe, a wealthy *Scotchman*, bought his Preferment of the King, who then wanted Money, and yet by a Trick eluded the Law againſt *Simony*; for he laid a great Wager with the King, that His Majeſty would not give him ſuch a Preferment [m].

In the Reign of *Philip* II. of *France*. the Biſhop of *Beauvais* appeared in the Field againſt *Otho* IV; but, to avoid ſhedding Blood, he fought with a Club, not a Sword: But did ſuch a Quibble excuſe the Prelate, or rather aggravate his Guilt [n]?

XIX. But ſometimes the Meaning of the Words are to be *reſtrained*, and although *general* Terms be made uſe of, yet they ought to be taken with ſome Exception or Limitation [1]; either, *Firſt*, Becauſe of ſome original Defect in the Will of the Speaker; or, *2dly*, [2] Becauſe of ſome Accident which happens inconſiſtent with his Deſign.

1. An original Defect is in the Will; Firſt, *When an Abſurdity proceeds from it*. For no Man, in his Wits, can be ſuppoſed to will Abſurdities: And I am miſtaken, if, upon this Principle, that

[a] *Val. Max.* Lib. viii. Ch. vi. § 3. *Idem. refert Plin.* xviii. *Ch.* iii. [b] *Quinctil. Decl.* cclxiv. Fraudes circa eludendam legem Papiam Poppæam memorat. *Suet. Auguſt. Ch.* xxxiv. *& Tib. Ch.* xxxv. *in fin. & Tacit. An* xv. 19. *The Trick that the* Romans *uſed to let fall the private Sacrifices, which otherwiſe would paſs over to the Heir, as an Incumbrance, with the Eſtate*, Salmaſius *gives an Account of*, ad Plauti Bacchi, Act. iv. Scene. ix. *voce* coemptionalem ſenem. [c] *Amm. Marcellinus*, Lib. xxii. Ch. xvi. [d] *Lactan. de falſa rel.* Ch. xx. [e] *Vitruv. de Architect.* Lib. ii. Ch. viii. [f] *Plut. Pericle.* [g] Sulpitius, *who had been againſt the Law to reſtore the* Baniſhed *Citizens, having afterwards changed his Mind, was for it, but would not own it was the ſame Law he was before againſt; for he was not for the Return of the* Baniſhed, *but of* thoſe who were forced from their Country: *As if the Controverſy had been what Name they ought to have been called by, or as if all, who were forbidden the Uſe of Fire and Water, did not come under the Denomination of* Baniſhed. Auctor ad Herenn. Lib. ii. Ch. xxviii. [h] Vide *Tacit. Ann.* v. *Ch.* ix. *& Suet. Tiberio, Ch.* lxi. [i] *Herod Erato*, p. 230. Edit. *H. Steph.* Add. *Lib.* xliv. *Tit.* vii. *Lib.* liv. *D. de obligat. & action.* [k] *Tacitus Ann.* ii. *Ch.* xxx. *Though* Dio *aſcribes the Trick to* Auguſtus, Lib. lv. Critias *uſed a more impudent Cavil againſt* Theramenes. Xen. Gr. rer. Lib. ii. p. 275. *Edit.* H. Steph. *It was a poor Trick to avoid the Name of* Aleatores, *which was branded by the Laws, to call themſelves* Teſſerarii; *between which there is much the ſame Difference, as between a* Thief *and a* Robber; *as* Amm. Marcell. *ſays, Lib.* xxviii. *Ch.* ix. [l] *Xiphilin. Epit. Dion.* [m] *Buchan. rer. Scot. Lib.* xiv. [n] *Buſſier's* Hiſt. *Franc. Lib.* viii.

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[1] CICERO's Words are, *Non ergo omnia ſcriptis, ſed quædam, quæ perſpicua ſunt, tacitis exceptionibus caveri.* Cicero *de Inventione*, Lib. ii. Ch. xlvii.

[2] Mr. THOMASIUS, *Inſtit. Juriſpr. Divin.* Lib. ii. Ch. xii. §104, 105. finds fault with this Diviſion, as neither exact, nor juſt: "For, ſays he, every Interpretation ought to be made according to what the Perſon, who ſpeaks the Words, willed and intended, "at the Time when he ſpake or wrote them; and not before or after: And ſo it can never lawfully be founded upon the Inconſiſtence of a Caſe which has happened after the Will of the Legiſlator or Contractors, through any Oppoſition, or original Defect in the Will. Moreover, Terms are ordinarily reſtrained, becauſe we preſume, that the Lawgiver or the Contractors have "ſpoken no more than what was in their Mind, and never thought of the Caſe treated of. So that a Reſtriction ſuppoſes always "a Caſe happened ſince, which is not agreeable with the Will of him, whoſe Words we examine. Conſequently no Man can "ſee how the original Defect of a Will can be oppoſed to the Inconſiſtency of a Caſe, which happened afterwards by the Will of "the Lawgiver or Contractors." See alſo Mr. TITIUS on *Puffendorf, Obſerv.* 438. where he obſerves ſeveral Defects in this Diviſion of *Grotius*, which our Author has carefully followed. But I have ſince ſhewn on the Paſſage of *Grotius* (from whom our Author borrowed this Diſtinction) that his Senſe may be explained in a very favourable Manner. *Grotius* had not the leaſt Thought of a poſterior Will, diſtinct from the original Will, or of oppoſing the one to the other. The Thing is too abſurd to be aſcribed to that great Man, without ſtronger Proofs than have been alledged, and which are only founded on a Miſtake. It appears by all the Places, where he has had occaſion to ſpeak of this Subject, that he had regard to what the Perſons themſelves would probably have declared, in Caſe they had been preſent to have ſpoke their Minds. But he reflected that there were Things which eaſily happen, and which, upon that Account, ought to be looked upon as foreſeen: And others, on the Contrary, ſo extraordinary, that we may preſume the Legiſlator or Contractors never thought of them. We may judge of the Truth, both of the one and other, by the *Intention* of the Parties at the Beginning: But, properly ſpeaking, how ſhall we judge of ſuch an Intention as was never expreſſed? Therefore it only remains to ſee how we ſhall reconcile the preſent Caſe with their original and real Intention. Now here, as the Caſe is extraordinary, it is very difficult to conjecture what the Legiſlator or Contractors had in their Minds; and beſides, the Principles, on which this Reſtriction is founded, have no plain or immediate Connection with the Thing, but in ordinary Caſes, where we ſuppoſe an original Defect of the Will. See § 22. *Note* 1. following.

like Caſe which is provided for: or, as *Quinctilian* has it, *When a Thing not written is gathered from a Thing written:* which he illuſtrates by theſe Examples[1]. *To take a* Plough *in Pawn is not lawful, he takes the* Plough-ſhare, *The Exportation of* Wool *is prohibited, he exports* Sheep. *He that ſlays his Father, muſt be ſewed up in a Leathern Bag, he has ſlain his* Mother. *A Man ought not to be dragged out of his* Houſe *to Juſtice; he drags him out of his* Tent[a].

Hither too may be referred the Caſe defended by *Lucian*[b]; the Law is, *Whoſoever kills the* Tyrant *ſhall be rewarded: A certain Man climbs into the Citadel to kill the* Tyrant, *but, miſſing him, kills his Son, and leaves the Sword in the Body: The* Tyrant *coming in, and finding his Son ſlain, out of Grief, falls upon the ſame Sword, and dies: He that ſlew the* Tyrant's *Son demands the Reward, as the Slayer of the* Tyrant. *Eraſmus*[c] takes the other ſide, yet certainly the Reaſon of the Law is for having the Reward given, not only to him who ſlays the Tyrant with his own Hand, but to[2] him, alſo, who is the immediate Occaſion of it[d]. Since there is no Doubt but the Legiſlator would have decreed the Reward to him, alſo, had ſuch a Thing come into his Mind.

The Law ſays, that whoſoever kills his Wife ſhall be put to Death; but a certain Man, being willing to get rid of his Wife, and at the ſame Time to eſcape the Law, kept his Mule three Days without Water, and the fourth Day, pretending to ride out for his Diverſion, put his Wife upon the Back of the Mule; who, as ſoon as he came to the River, ran eagerly into it, and threw the Woman, who periſh'd in the Waters.

Thus the Brethren of *Joſeph* vainly thought, that they ſhould be guilty of a leſs Crime in throwing him into the Pit, where he muſt die of Hunger, than if they had actually cut his Throat[e].

It was ſtipulated between two neighbouring Nations, when there was no other ſort of Fortifications, That ſuch a Place ſhould not be walled in; which therefore ought not to be encloſed with ſo much as a Pile of Earth, if it evidently appeared, that the Reaſon why Walls were prohibited, was to render it incapable of holding out againſt Force.

A Man leaves his Eſtate to *Titius*, after the Death of the Child his Wife was then big with: He thought his Wife had been with Child, but it proves otherwiſe; and therefore *Titius* has a fair Title to the Eſtate: For 'tis evident, that the Reaſon why the deceaſed did not abſolutely make *Titius* his Heir, was, becauſe he thought he might have a Child; and therefore, had he known that no Child would have been born, he would have made him ſuch without any Condition[3 f].

It would have been too hard, ſays *Lyſias*[g], *for a Lawgiver to have crouded into his Law all the Words of the ſame Signification, and therefore what he has expreſt of one, he is ſuppoſed to have underſtood of all the reſt.* Thus the Law, in *Exod.* xxi. 33. is rightly extended to every tame Animal, and the Word *Pit* to every Ditch[4].

XVIII. Beſides, it is of great Uſe to *enlarge* the Meaning, ſo as to leave no Room for any ſort of Cavils, and, conſequently, to prevent[5] the Quirks, that crafty deſigning Men have found out to evade the Law[h]. Of theſe Cheats the *Roman* Lawyers make four Sorts; one by a Commutation of[6] Things, another by a Commutation of[7] Perſons; a third by Commutation of the[8] Contract; the laſt in the Way of[9] Contracting[i].

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a Vide *D. Lib* ix. *Tit.* ii. ad Leg. Aquil. *Lib.* vii. § 7. b *In Declam. quæ inſcribitur Tyrannicida,* Tom. i. p. 693, &c. Edit. *Amſt.* c *In the Anſwer which he has made to* Lucian's Declamation, *Tom.* i. *p.* 914, &c. d *Is there any Difference whether you kill him yourſelf, or* afford *the* Cauſe *of his Death?* ibid. e *Joſeph. Archæol. Jud.* Lib. ii. Ch. iii. *Gen.* xxxviii. 21, 22. f *Add.* Lib. v. Tit. ii. Lib. xxviii. D. de inoff. teſt. *In a Law many Things are excepted, though not expreſt; the Letter is narrow, but the Meaning extenſive; but ſome Things are ſo plain as to need no Exceptions,* M. Senec. *Lib.* iv. *contr.* xxvii. *What? was this provided for by the Letter? By no Means? Upon what therefore do we proceed? The Deſign. Which could it be apprehended without ſpeaking, there would be no need of Words, but, becauſe it cannot, Words were found out, not to hinder, but to declare the Deſign,* Cic. pro Cæcin. *Ch.* xviii. *Every Thing is not expreſt in Writing, but ſome are evidently ſuppoſed to be tacitly excepted,* Id. de Invent. *Lib.* ii. *Ch.* xlii. Lyſias, Orat. x. Ch. ii. contr. Theomneſt. g *Orat.* i. *contr. Theom.* h *As alſo to anſwer any Cavils whatſoever,* Vide *Lib.* xxix, xxx. D. de leg. ubi ſupr. *&* *D. Lib.* x. *Tit.* iv. *Lib.* xix. ad exhibend. *&* *Lib.* xxxv. *Tit.* i. *Lib.* lxxvi. D. de condit. & demonſtrat. *&* *Lib.* xlviii. *Tit.* v. *Lib.* xxxiii. § i. *D. ad L Jul. de adult.* i *Lib.* viii. § 14. D. *ad SCtum Velli.*

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1 QUINCTILIAN's Words are, *Hic ſtatus* [Syllogiſmi] *ducit ex eo, quod ſcriptum eſt, id quod incertum eſt: quod quoniam ratiocinatione colligitur, ratiocinativus dicitur——Quod in toto, idem in parte: Aratrum accipere pignori non licet, vomerem accipit——Quod in parte, idem in toto. Lanas vehere Tarento non licet, oves vexit——Majoris pugnæ eſt ex ſcripto ducere quod ſcriptum non eſt.* Inſtit. Orat. Lib. vii. Ch. viii.

2 AS SENECA expreſſes it, *Herc. Octæo, v.* 859, 860. *Quicquid in mortem trahit telum eſt abunde, i. e.* "Whatſoever kills, is "Weapon ſufficient." But we ought to obſerve, that, with regard to a moral Imputation, it is not ſufficient, that what a Man has done, ſhould be, by Accident, the Cauſe of what happens, as *Eraſmus* very well proves, and it may have place here. See Mr. THOMASIUS's *Inſtit. Juriſprud. Divin.* Lib. ii. Ch. xii. § 98, 99. and what I have ſaid above at *Lib.* i. *Ch.* v. § 3. *Note* 2.

3 SENECA ſays, *Scriptum legis anguſtum eſt, interpretatio diffuſa eſt: quædam vero tam manifeſta ſunt, ut nullam cautionem deſiderent.* Senec. Controv. xxvii. See *Lyſias, Orat.* x. *contra Theomneſt.* ii. *Ch.* ii. and *Libanius Declam.* xxxi.

4 QUINCTILIAN's Words are, *Nulla tanta providentia potuit eſſe eorum, qui leges componebant, ut omnes ſpecies criminum complecterentur. Nam & ſemper caventes nequitia vicifſet; & jus ita multiplex atque diffuſum eſſet, ut pro incerto haberetur ignotum. Fecerunt ergo, ut rerum genera complecterentur, & ſpectarent ipſam æquitatem. Multa ergo invenientur frequenter, quæ legum cautis non teneantur, ſed ipſa vi & poteſtate teneantur.* Quin. *Declam.* cccxxxi. "It was impoſſible for thoſe that made Laws, to provide "particularly againſt all ſorts of Crimes: For, after all their Care, Knavery would find out Evaſions; and the Law would be "voluminous and confuſed, that inſtead of Uncertainty we ſhould lie in entire Ignorance. They therefore took care to have "general Heads, and to have regard to Equity. And therefore we frequently find Things, which are not expreſt in the Letter "of the Law, but yet come under the Force of it." See alſo *Cicero De Invent. Lib.* ii. *Ch.* xlii. and *Orat. pro Cæcin.* Ch. xviii.

5 The *Digeſts* ſay, *Contra legem facit, qui id facit, quod lex prohibet: in fraudem verò, qui, ſalvis verbis legis, ſententiam ejus circumvenit. Fraus enim legi fit, ubi, quod fieri noluit, fieri autem non vetuit, id fit: & quod diſtat ἐντὸν ἀπὸ διανοίας, i. e.* dictum a ſententia; *hoc diſtat fraus ab eo, quod contra legem fit.* Digeſt. Lib. i. Tit. iii. *De legibus, &c.* Leg. xxix, xxx.

6 The *Digeſts* enact, *Sed ſi fraus ſit ſenatuſconſulto* [Macedoniano] *adhibita, puta frumento, vel vino, vel oleo mutuo dato, ut diſtractis fructibus uteretur pecunia, ſubveniendum eſt filiofamilias.* Digeſt. Lib. xiv. Tit. vi. *De ſenatuſconſ. Macedon.* Leg. vii. § 5. See alſo *Leg.* iii. § 3.

7 See the *Digeſts, Lib.* xxiv. *Tit.* i. De donationibus inter virum & uxorem, *Leg.* v. and *Tit. Liv* xxxv. *Ch.* vii.

8 The Words of the *Digeſts* are, *Julianus, minoris factam venditionem nullius eſſe momenti ait.* Digeſt. ibid. § 5. See *Ch.* i § 10. *Note* 1. above.

9 The Words of the *Digeſts* are, *Si, quum eſſem tibi contracturus, mulier intervenerit, ut cum ipſa potius contraham: videtur interceſſiſſe.* Digeſt. Lib. xvi. Tit. i. *De Senatuſconſ. Vellcian.* Leg. viii. Mr. THOMASIUS, *Inſtit. Juriſpr. Divin.* Lib. ii. Ch. xi. § 102. ſays, There is no great Difference between the laſt ſort of Fraud, and the preceding. He obſerves, alſo, that there are ſome ſorts of Frauds, that cannot be reduced to either of theſe Kinds.

Licinius

Licinius Stolo [a] having made a Law that no one ſhould poſſeſs above 500 Acres, he himſelf, nevertheleſs, purchaſed a Thouſand, and, to palliate his Crime, made over half to his Son: For which Reaſon he was accuſed by *Popilius Læna*, and was the firſt that fell by his own Law; teaching us that no Man ought to preſcribe to others but what himſelf is willing to perform. *By the* Voconian *Law no Man can bequeath above half his Goods to a Woman; and therefore when a certain Man had made two Women joint Heirs, his Relations impleaded the Will* [b].

The *Rhodians* had a Right to Tribute from the Iſle of *Pharos*, but when the Receivers came to demand it, the Queen of the Place detained them under ſome Pretence of Ceremony, 'till ſhe had caſt Moles into the Sea, and joined *Pharos* to the Continent; and then ſhe drove them away, as having Commiſſion to levy Taxes upon Iſlands, but not upon the Continent [c].

The *Athenians*, when a certain Harlot, called *Leæna*, i. e. *Lioneſs*, had ſlain the Tyrant, for fear of profaning the Temple with the Statue of a Harlot, they erected the Effigies of the Animal whoſe Name ſhe bore [d].

The *Rhodians*, becauſe it was unlawful to pull down a Trophy, hid that which *Artemiſia* had erected to their Diſgrace, by building a Houſe over it [e].

When the *Spartans* demanded to have the *Athenians* Decree, which hindered the *Megarenſes* from trading with them, aboliſhed, and *Pericles* objected that the Law forbad any Decree of the People to be pulled down; one of the Commiſſioners replied, *We do not deſire you to pull it down, but to turn it out of ſight, and that none of your Laws forbid* [f].

The King of *Portugal*, for certain Reaſons, forbad the Clergy the Uſe of Mules, but they pleaded their Privileges; upon which the King commanded all the Smiths, upon pain of Death, not to ſhoe any Mule; and ſo the Clergy quitted them of their own Accord [g].

Tiberius, becauſe it was eſteemed unlawful to ſtrangle Virgins, order'd them firſt to be defiled by the Executioner, and then to be ſtrangled [h]. The *Corinthians* were forbidden by the Law to give away their Ships, and therefore they ſold them to the *Athenians* for five Drachms a piece [i].

By a Decree of the Senate, no Slave could be Evidence againſt his Maſter, and therefore *Tiberius*, a crafty Evader of the Law, gave each of the Slaves their Liberty, that he might make uſe of them againſt *Libo*, without breaking the Decree of the Senate [k].

Tiridates refuſed to lay aſide his Sword at *Nero*'s Command, but put a Lock upon his Scabbard [l].

Robert Carncroſſe, a wealthy *Scotchman*, bought his Preferment of the King, who then wanted Money, and yet by a Trick eluded the Law againſt *Simony*; for he laid a great Wager with the King, that His Majeſty would not give him ſuch a Preferment [m].

In the Reign of *Philip* II. of *France*. the Biſhop of *Beauvais* appeared in the Field againſt *Otho* IV; but, to avoid ſhedding Blood, he fought with a Club, not a Sword: But did ſuch a Quibble excuſe the Prelate, or rather aggravate his Guilt [n]?

XIX. But ſometimes the Meaning of the Words are to be *reſtrained*, and although *general* Terms be made uſe of, yet they ought to be taken with ſome Exception or Limitation [1]; either, *Firſt*, Becauſe of ſome original Defect in the Will of the Speaker; or, *2dly*, [2] Becauſe of ſome Accident which happens inconſiſtent with his Deſign.

1. An original Defect is in the Will; Firſt, *When an Abſurdity proceeds from it*. For no Man, in his Wits, can be ſuppoſed to will Abſurdities: And I am miſtaken, if, upon this Principle, that

[a] *Val. Max.* Lib. viii. Ch. vi. § 3. *Idem. refert Plin.* xviii. *Ch.* iii. [b] *Quinctil. Decl.* cclxiv. Fraudes circa eludendam legem Papiam Poppæam memorat. *Suet. Auguſt. Ch.* xxxiv. *& Tib. Ch.* xxxv. *in fin. & Tacit. An* xv. 19. *The Trick that the* Romans *uſed to let fall the private Sacrifices, which otherwiſe would paſs over to the Heir, as an Incumbrance, with the Eſtate,* Salmaſius *gives an Account of,* ad Plauti Bacchi, Act. iv. Scene. ix. *voce* coemptionalem ſenem. [c] *Amm. Marcellinus,* Lib. xxii. Ch. xvi. [d] *Lactan. de falſa rel.* Ch. xx. [e] *Vitruv. de Architect.* Lib. ii. Ch. viii. [f] *Plut. Pericle.* [g] Sulpitius, *who had been againſt the Law to reſtore the* Baniſhed *Citizens, having afterwards changed his Mind, was for it, but would not own it was the ſame Law he was before againſt; for he was not for the Return of the* Baniſhed, *but of* thoſe who were forced from their Country: *As if the Controverſy had been what Name they ought to have been called by, or as if all, who were forbidden the Uſe of Fire and Water, did not come under the Denomination of* Baniſhed. Auctor ad Herenn. Lib. ii. Ch. xxviii. [h] Vide *Tacit. Ann.* v. *Ch.* ix. *& Suet. Tiberio, Ch.* lxi. [i] *Herod Erato,* p. 230. Edit. *H. Steph.* Add. *Lib.* xliv. *Tit.* vii. *Lib.* liv. *D. de obligat. & action.* [k] *Tacitus Ann.* ii. *Ch.* xxx. *Though* Dio *aſcribes the Trick to* Auguſtus, Lib. lv. Critias *uſed a more impudent Cavil againſt* Theramenes. Xen. Gr. rer. Lib. ii. p. 275. *Edit.* H. Steph. *It was a poor Trick to avoid the Name of* Aleatores, *which was branded by the Laws, to call themſelves* Teſſerarii; *between which there is much the ſame Difference, as between a* Thief *and a* Robber; *as* Amm. Marcell. *ſays, Lib.* xxviii. *Ch.* ix. [l] *Xiphilin. Epit. Dion.* [m] *Buchan. rer. Scot. Lib.* xiv. [n] *Buſſier's* Hiſt. *Franc. Lib.* viii.

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noted Diſpute between *Protegoras* and *Euathles* [1] may not be decided; for although they agreed in general Terms, that the Maſter ſhould have no Right to his Reward 'till the Scholar had gained a Cauſe, yet, when the Maſter had ſued for his Reward, and the Judges had given Sentence in Favour of him, the Scholar ought by no means to have defended himſelf by that Exception: For when they enter'd into Contract that was not thought of: and it is abſurd for any one to make ſuch a Pact as ſhould cut him off from any Poſſibility of obtaining what might be due to him by it. Something akin to this is that which they tell of *Ariſtides*, who had promiſed a Penny to him that ſhould tell him the Truth: To whom ſays a Sophiſt, *You will not give me the Penny.* What muſt *Ariſtides* do in this Caſe? if he gives it, he gives it to one that did not tell the Truth; but if he does not give it, he refuſes it to one that did. In ſuch Caſes as theſe, that Rule of the *Civilians* ought to be applied; that *In a general Diſcourſe the Perſon of the Speaker is always excepted.* And therefore [2] *Epimenides* the *Cretan* cannot be proved a Lyar from his own Saying, Κρῆτες ἀεὶ ψεῦσται, *the* Cretans *are always Lyars* [b]. Nor can I approve of that of *Lucretius* [c],

> *Denique, nil ſciri ſi quis putat, id quoque neſcit*
> *An ſciri poſſit, cum ſe nil ſcire fatetur.*
>
> He that ſays, Nothing can be known, o'erthrows
> His own Opinion, for he nothing knows.
> So knows not that——
>
> Mr. CREECH.

For he that ſays, *Nothing can be known* [3], profeſſes himſelf to know this one Thing, *That nothing can be known* [d]. In the Schools we have this Example of an Inconſiſtency [e], *A Man dreamed that there was no Credit to be given to Dreams.* Now whatever *Genius* had infuſed this Dream into him, deſigned ſo much Credit ſhould be given to this, as that none ſhould be given to any other [f].

Beſides, *Secondly*, The Will is thought to be originally defective [4], *When the Reaſon ceaſes, which alone fully and efficaciouſly moved the Will*; for if the Reaſon of the Law be added, or if we be ſufficiently ſatisfied of it, the Thing is no longer conſidered ſimply, but as it comes under the Reaſon. An Example of this we have in the Law that forbids Patrons to lay an Oath upon their Bondmen not to marry, or to breed up Children, where it is added, that *although in the Law no Perſon* [5] *is excepted, yet it is to be underſtood of thoſe only who are capable of having Children; and therefore if a Man ſhould lay ſuch an Obligation upon an Eunuch, he would not come under the Penalty of the Law.* For the Reaſon of the Law was, leſt the [6] Patron, out of Covetouſneſs, ſhould put a ſtop to Propagation; which Reaſon, in the Caſe of an Eunuch, ceaſes.

But, *Thirdly*, the Will is originally defective, *If there be a Defect in the Matter:* For the Matter which he is about, is always ſuppoſed to be in the Mind of the Speaker, although his Words ſeem to be of a larger Extent. Thus, if an Eſtate be given to a Man and his Heirs Male, his Grandſons by his Daughter are not ſuppoſed to be meant by it: For the Nature of ſuch a Settlement interpoſes, which plainly excludes Women, and the Deſcendents of them.

XX. Yet as to the *ſecond* Head *Grotius* remarks [g], *That under the Reaſon may be comprehended ſome Things which do not actually exiſt, but are conſidered in a moral Poſſibility only; and when this happens, no Reſtriction muſt be admitted.*

The Meaning is, that a Covenant where the Parties had a certain Reaſon in View, as ſuppoſe the avoiding Danger, or an Inconvenience, does not only hold good in thoſe Caſes where ſuch Inconveniences would have followed, but in thoſe, alſo, where they may probably be ſuſpected: For

[a] *Apud. Gellium, Lib.* v. *Ch.* x. *Diog. Laert. Lib.* ix. § 56. *Apud. Florid. Lib.* iii. *Sext. Emp. adverſus Math. Lib.* ii. [b] *See* Titus i. 12. [c] *Lib.* iv. *v.* 471, 472. [d] *He acts abſurdly, who ſays, He is ſilent; for by ſaying, He is ſilent, he is not ſilent; and ſo deſtroys his own Aſſertion,* Apul. Apol. p. 529. *Edit.* in Uſum Delph. [e] *Lactant.* Lib. iii. Ch. vi. [f] *See the Example propoſed by* Gellius, *Lib.* ix. Ch. xvi. *this Reſtriction ought to be made,* That the Law may not deprive brave Men of their Reward. [g] *Lib.* ii. *Ch.* xvi. § 25.

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1. It is ſurprizing how the Judges of the *Areopagus* found this Queſtion inexplicable, and referred the Parties to a *long Time* (as *Aulus Gellius* ſays) that is to ſay, probably, for ever. Mr. *De Toureil (Eſſai de Juriſprud. Quæſt.* iv) ſays, That the good Senſe and Vivacity of the Diſciple's Reply put the *Laughers on his Side*; and he praiſes the Judges *for having ſaved the Honour of their Tribunal, by the courageous Acknowledgment of their Inſufficiency.* But I doubt if theſe Elogiums be juſt. As for the Reſt, other antient Writers, who tell the ſame Story, vary in the Perſons and Circumſtances. See Mr. FABRICIUS on the Paſſage of *Sextus Empiricus* cited below.

2. See Mr. BAYLE's hiſtorical and critical Dictionary, in the Article of *Euclid,* Not. D. and Art. *Philetas,* Not. E.

3. Very well. But if he has any good Reaſon why he believes that he knows nothing, he may make uſe of that very Reaſon to prove, that there are other Things which he may know, and conſequently 'tis falſe, that he knows nothing, or that he can be aſſured of it.

4. Here again, according to Mr. THOMASIUS, we muſt diſtinguiſh, if there be one or more Reaſons, how it might happen, that the Legiſlator or Contractors could have more Things in View, and if, ſuppoſing he had ſeveral Reaſons, he that ſpeaks, had Regard to them on the ſame Account, or no. If divers Reaſons had an equal Force upon his Mind, ſo that one alone fails, we may reſtrain the Terms in which the Law or Bargain is conceived. But if there be one principal Reaſon, ſo long as that is in force, 'tis of no Importance, that one or ſeveral ſubordinate Reaſons may be offered to make it defective; a Reſtriction can have no place for that Reaſon only, but, on the contrary, as ſoon as that Reaſon ceaſes, all the other loſe their Force. There is another Exception, alſo, which makes a ſecond Head, from whence ſome infer a Neceſſity of reſtraining the Terms, which of themſelves extend to one certain Caſe (beſides what the Author, after GROTIUS, ſpeaks of in the following §, and above, § 10) which is this, That 'tis not ſufficient that the Reaſon of the Law ceaſes in certain Caſes, which happen very rarely, but it muſt be of that Nature as to happen often. For Example, the Reaſon why a Child, who is not yet of Age, cannot be a good Witneſs, is becauſe he is not in a Condition to diſpoſe of his Goods with Diſcretion and ſound Judgment. If therefore there be any Child, whoſe Judgment is above his Age of Minority, which is a Prodigy, the Will of ſuch a Child is nevertheleſs null, according to the general Law. See Mr. THOMASIUS, *ubi ſupra,* § 153, 154. and what I have ſaid in my *Treatiſe of Games,* Lib. iii. Ch. ix. § 3.

5. The *Digeſts* thus ſpeak, *Quamvis nulla perſona lege excipiatur, tamen intelligendum eſt, de his legem ſentire, qui liberos tollere poſſunt. Itaque ſi caſtratum libertum jurejurando quis adegerit, dicendum eſt, non puniri patronum hâc lege.* Digeſt. Lib. xxxvii. Tit. xiv. *De jure patronatus,* Leg. vi. § 2. In this Example we plainly ſee, that the Foundation of this Reſtriction of the general Terms has a manifeſt Connection with the End of the Law; and therefore we have all the Reaſon in the World to ſuppoſe an original Defect in the Will. Beſides, the Uſe of Eunuchs being ſo common among the *Romans,* we may preſume the Legiſlator foreſaw this Caſe, yet did not judge it neceſſary to except it expreſsly, becauſe the Thing ſpoke for itſelf.

6. Thus, if a Freed-man dies without Children, all his Goods, or at leaſt a part, return to his Patron, or him whoſe Slave he was, for ſo the Word *Patronus* ſignifies. See *Inſtit.* Lib. iii. Tit. viii. De ſucceſſione Libertorum.

Inſtance,

Inſtance, ſhould two Nations enter into a Treaty that no Army or Fleet ſhould paſs within ſuch Limits, although the Reaſon of this Article be, that one ſhould not actually do the other any Harm, yet it won't be lawful to ſend an Army or a Fleet thither, although there be no Deſign of injuring the other. And thus, if the Law forbids that any one ſhould walk the Streets with Torches; though the Reaſon of the Law be to prevent any Miſchief from them, yet it would be no Excuſe for a Man to ſay, that he would uſe them ſo carefully as to do no Harm with them [1].

'Tis, alſo, a Queſtion, whether Promiſes carry this tacit Condition along with them, *That Things continue in the ſame Poſture that they are?* Which in general is denied; for ſince this Condition is *odious* [2], as being apt to render the Act null, it ought not eaſily to be preſumed, if it be not actually added; unleſs it appears plainly that the preſent Poſture of Affairs was included in that one only *Reaſon* which we have been talking of. For thus we frequently read in Hiſtory, that Ambaſſadors have return'd Home without opening their Commiſſion, upon ſuch Revolutions, amongſt thoſe to whom they were ſent, as may be preſumed to make void the whole Reaſon of their Embaſſy [a].

XXI. 2. That an Accident is inconſiſtent with the Deſign of the Perſon, may be made to appear; either, *Firſt*, From *natural Reaſon*; or, *Secondly*, From *ſome Sign of the Will.*

In order to make this Diſcovery from *natural Reaſon*, *Ariſtotle* [b] thinks that the *Underſtanding ought to be endued with a true Senſe of Equity, and the Will with an hearty Inclination to judge according to Equity* [c]. And he rightly defines [3] *Equity* to be a *Correction of the Law, where it is deficient, by reaſon of its being too univerſal.* Or, in other Words, A *dextrous Interpretation of the Law, ſhewing that ſuch a particular Caſe* [4] *ought not to be brought under it, becauſe an Abſurdity would follow:* Which may all be applied to *Wills* and *Pacts, mutatis mutandis.* And here *Grotius* [d] well obſerves, that *Equity* has no Place in the *Law of Nature*, ſince that Law does not ſpeak more univerſally than the Nature of Things requires. But yet that the Law of Nature, not as it is in itſelf, but as it is [5] generally expreſt by Men, may want the Aſſiſtance of an *equitable* Interpretation: For Inſtance, when that Law ſays, that *every Man ought to have his own*; we muſt in Equity qualify it with this Condition, that *he be in his Senſes*, and that *no ſuperior Right interpoſes.* For ſince, in Laws eſpecially, all Caſes cannot be foreſeen, or by reaſon of their infinite Variety expreſt [e f]; it is therefore neceſſary for them, whoſe Duty it is to apply particular Caſes to the general Decrees of the Law, to have a Liberty of excepting ſuch as are ſo peculiarly circumſtantiated, that the Legiſlator himſelf would have excepted them, had he been preſent, or had he foreſeen ſuch Caſes [g].

There is an Example in *Cicero*; it was a Law among the *Rhodians*, that if any Ship of Strength ſhould be found in the Haven it ſhould be confiſcated. A great Storm, notwithſtanding all the Seamen could do, drives a certain Ship into the *Rhodians* Haven: The Queſtor ſeizes upon it, and the Owner pleads, from the Reaſon of the Thing, that it ought not to be confiſcated. Again,

The Law [6] forbids the Gates to be opened at Night, in Time of War; nevertheleſs a Man opens them, and receives in ſome Allies, who, if they had been kept out, would have been cut in Pieces by the Enemy, which was encamped hard by [7].

However this Liberty muſt not be indulged too far, leſt any one ſhould raſhly make himſelf Judge of the Legiſlator's Deſign; for ſometimes he wills and commands that the very Letter of the Law ſhould be put in Execution. And therefore we ought to have Reaſon very evidently on our ſide, when we act counter to it; as we certainly have, when we find that the preciſe Adhering to the Letter is unlawful, *i. e.* repugnant to the Law of God or Nature: For, to ſuch, no Man can be obliged; indeed no Man in his Senſes can be preſumed willing to oblige another to it [h].

Sometimes *Equity* is taken in another Senſe, as when any Cauſe is ſaid to have the Benefit of Equity, or the Rigour of the Law is allowed to be ſoftened in Favour of the Criminal; for even private Men are ſaid to have Recourſe to *Equity*,

[a] Vide *Tac. Hiſt. Lib.* ii. *Ch.* i. Where *Titus* upon *Galba*'s Death returns back. [b] *Nicom. Lib.* v. *Ch.* x. [c] Vide *D. Lib.* xlvii. *Tit.* ii. De furtis *Leg.* lxi. § 5. [d] *Ad Campanellæ Pol.* [e] *Xen. Hipparch.* To commit to Writing every thing that ought to be done, is as difficult as to know all future Things. [f] *See above*, Section 17. *towards the End.* [g] Vide *Lib.* i. *Tit.* iii. *Leg.* iii, iv, v, vi, x, xi, xii, xiii. *D. de leg.* [h] *Grot. ad Heſt. Ch.* iv, xv. Circumſtances are ſuch as render the Obſerving of the Law a Breach againſt the chief Laws of Nature. Add. *V. Max. Lib.* iii. *Ch.* vii. *Note* 1. *Ch.* viii. *Note* 6.

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[1] See another Example of this Author, *Lib.* vii. *Ch.* vi § 11. following.

[2] 'Tis not becauſe the Condition is *odious*, but becauſe, if we ſuppoſe it included in every Engagement, there is nothing which may be relied upon ordinarily with ſome Certainty, conſidering the frequent Changes which happen in the Things of this World, and the Affairs of particular Perſons.

[3] His Words are, Καὶ ἐστὶν αὕτη ἡ φύσις ἡ τῆ ἐπιεικῆς; ἐπανόρθωμα νόμε, ᾗ ἐλλείπει διὰ τὸ καθόλε. *Ubi ſupra*, Lib. v. Ch. xiv. See his *Magn. Moral.* Lib. ii. Ch. i, ii. And a little Treatiſe of GROTIUS, *De Æquitate*, at the End of the laſt Editions of his Book *De Jure Belli & Pacis.*

[4] Equity, or an Interpretation according to Equity, hath a Place in Extenſion, as well as Reſtriction. And here we may apply, in general, the Saying of an antient Poet:

——————— Καλὸν	Laws are a fine Thing without Contradiction;
Οἱ νόμοι σφόδρ' εἰσὶν, ὁ δ' ὁρῶν τὺς νόμως	But he that will apply himſelf rigorouſly to the Letter of the Laws,
Λίαν ἀκριβῶς, συκοφάντης μοι φαίνεται.	Seems to me a Slanderer or Caviller.
Τὸ καλῶς ἔχον πᾶ κρεῖττόν ἐστι τᾦ νόμᾳ.	What is good, is better than the Law.

[5] The Author, through Miſtake, ſays here, *minus*, for, *nimis*, but it may be a Fault in the Printing, though it remains in the laſt Edition of 1706.

[6] *In quo genere* (ſays *Tully*) *non ſimplex voluntas ſcriptoris oſtenditur, quæ in omne tempus, & in omne factum idem valeat: ſed ex quodam facto aut eventu, ad tempus interpretanda dicitur——Ut in eum, qui, cum lex aperiri portas noctu vetaret, aperuit quodam in bello, & auxilia quædam in oppidum recepit, ne ab hoſtibus opprimerentur, ſi foris eſſent, quod prope muros hoſtes caſtra haberent.* De Invent. Lib. ii. Ch. xlii. See alſo *Ch.* xxxii.

[7] So the *Digeſts* again, *Quod quidem perquam durum eſt: ſed ita lex ſcripta eſt.* Lib. xl. Tit. ix. *Qui & à quibus manumiſſi liberi non fiunt*, &c. Leg. xii. § 1. See *Lex Wiſigothor.* Lib. ii. Tit. i. Ch. xii. The Lawyers ſay, alſo, that we cannot always know the Reaſons for which a Law is made, nor ought we always to enquire after them. *Non omnium, quæ à majoribus conſtituta ſunt, ratio reddi poteſt: & ideo rationes eorum, quæ conſtituuntur, inquiri non oportet; alioquin multa ex his quæ certa ſunt, ſubvertuntur.* Digeſt Lab i. Tit. iii. *De legibus*, &c. Leg. xx, xxi. See Mr. NOODT's Obſervations, *Lib.* i. *Ch.* ii. and Mr. LE CLERC's Reflexions upon it, in his *Biblioth. Choiſie, Tom.* xi. *p.* 222.

when

when they do not ſo rigidly inſiſt upon their Right againſt their Adverſaries, but remit ſomething of it.

Laſtly, Cauſes are ſometimes ſaid to be left to Equity, when the Civil Law takes no Cognizance of them, or when the Nicety of the Law is not regarded, but the Thing is left to the Arbitrage of honeſt Men.

XXII. Moreover, a general Law ought to be reſtrained; if, although it be not abſolutely [1] unlawful to ſtick to the Letter, yet, upon weighing the Thing in Candour and Prudence, it appears to be too grievous and burthenſome, either in reſpect of the Condition of Human Nature abſolutely conſidered, or in regard of the Perſon and Thing in Debate, compared with the End of it. For ſome Things ſeem intolerable to Mankind in general, others to ſome certain Perſons; ſome Buſineſs is ſuch, as to take much Pains about it would be *Folly*. And an Exception againſt thoſe is ſtill the more reaſonable, if the Law be not only poſitive, and the Matter of it ſuch, as makes it probable, that the Legiſlator would not, at the great Inconvenience of the Party, demand the Obſervance of it; but, alſo, if the Neglect of it does not tend to the Diſhonour and Contempt of the Authority that enacted it [a].

And therefore, without doubt, 'tis a fooliſh Piece of Superſtition in the *Abyſſines*, ſo to weaken themſelves by Faſting in *Lent*, as, for want of Strength and Courage, not to be able to reſiſt the Inroads of their Enemies; inſomuch that their Country has ſometimes been over-run at that Time without Reſiſtance [b].

Thus a Man that lends a Thing for a certain Time may demand it back before the Time expired, if, in the mean while, he happens to be in great Want of it himſelf; for by the Nature of ſuch a beneficial Act no Man can be preſumed willing to oblige himſelf to his great Inconvenience.

So if a Prince has promiſed to aſſiſt his Ally with Forces, he may be lawfully excuſed, as long as he is in Danger at home, and wants thoſe Forces for his own Defence: For ſince every Prince is, in the firſt Place, obliged to protect his own People, all the Promiſes, which he makes to Foreigners, are underſtood to extend no farther than the Safety of his own Kingdom admits.

And thus a Grant of Immunity from Taxes and Tribute ought to be underſtood of ordinary annual Taxes only, not of thoſe extraordinary Subſidies, which the urgent Neceſſity of Affairs may require, and which the Publick cannot ſubſiſt without. From hence it appears, that *Cicero* [c] is too free in ſaying, that *ſuch Promiſes are not to be kept, as are uſeleſs to the Perſons to whom they are made; nor if they be leſs beneficial to him, than prejudicial to the Maker.* For whether a Thing be uſeful, or not, to the Perſon to whom it is promiſed [2], it is not always for the Perſon promiſing to judge; unleſs he has Authority over him, or has him placed under his Care. Nor is any Prejudice or Burthen redounding to the Perſon promiſing, ſufficient to releaſe him from his Promiſe (for the Performance of every free Promiſe has ſome Burthen going along with it) but ſuch and ſo much as, according to the Nature of the Act, ought in reaſon to be preſumed, excepted. As in the Example brought by *Cicero* [d], *If you had promiſed to appear immediately as Advocate for another, and in the mean Time your Son falls dangerouſly ill, it would not be a Breach of Duty not to perform what you have promiſed* [e].

XXIII. But, *Secondly*, There are, alſo, ſome Signs of the Will, from whence it may be certainly collected, that a Caſe ought to be excepted from the general Expreſſions of the Law; as when the Words of the Legiſlator in another Place, though not directly oppoſite to the Law now ſuppoſed to be before us (for that would be a Contradiction) yet, by ſome peculiar Incident and unexpected Event of Things, happen to oppoſe it in the preſent Caſe; or, which amounts to the ſame Thing, when there are two different Laws, which do not interfere, and which eaſily may and ought to be obſerved at different Times, but cannot both of them be ſatisfied, when by ſome Chance they call for our Obedience at the ſame Inſtant [f]. In this Caſe, we muſt obſerve ſome certain Rules to know which Law or Pact ought to give place to the other, where both cannot be fulfilled. *Grotius* lays down theſe:

1. *That which is only permitted gives place to that which is commanded* [g 3]. For a Permiſſion includes a Liberty,

[a] Add. *Grot. ad Mat.* Ch. xii. v. 3. [b] *Fr. Alvarez. Deſc. Æth.* Ch. xiii. [c] *Off.* i. [d] *D. L.* [e] Add. *Sen. de Benef.* Lib. iv. Ch. xxxv. [f] *Char. de la Sageſſe*, Lib. i. Ch. xxxvii. § 5. [g] *A Command is of greater Force than a Permiſſion; for that which is commanded, is neceſſary; that which is permitted, voluntary.* Auth. *ad Heren.* Lib. ii. Ch. x.

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[1] However reaſonable theſe Principles may be, one may ſee that they have no viſible Connection with the Nature of the Affair in Queſtion. In effect, there is nothing here which implies a Nullity of the Act, or is directly repugnant to the End of the Law, or the Engagement; and this End does not ſhew the Foundation of the Reſtriction. To connect them, we muſt have recourſe to a third Idea; and this third Idea does not include ſomething whoſe Defect is abſolutely and neceſſarily inconſiſtent with the Will of the Legiſlator or Contractors. For the Rules of natural Equity are not always well known to them, nor are they always diſpoſed to follow them: For it ſometimes appears, by a clear and expreſs Declaration, that they authorize Things directly contrary. Thus we can be no ways ſure, that they are not liable to be miſled, in the Caſe in Queſtion. This rather takes Place when the Generality of the Terms imply ſomething ſevere and rigorous; to which, nevertheleſs, we may be obliged, without Injuſtice, either by our own Conſent, or by lawful Authority. However, the Doubt is ſufficient in either Caſe to authorize the Reſtriction. Nobody can juſtly complain, that we ſuppoſe him inſtructed in the Rules of Equity, and in a Diſpoſition not to exact the Rigour of the Laws. This is the rather to be expected, becauſe if a Man ſets himſelf above theſe Conſiderations, he may, and ought, to declare, in a poſitive Manner, that he will except no Caſe. It appears from what I have juſt ſaid, as well as my Remark, § 19. *Note* 2. That Grotius's Diſtinction between the original Defect of the Will, and the Inconſiſtency of a Caſe which happens with the Will of the Legiſlator or Contractors, has a real Foundation. I think I have explained it in a Manner agreeable to the Notions of that great Man. The Reader may be convinced of it, by giving Attention to the Examples alledged on both Sides. M. Carmichael, who (in his Notes on the Abridgment of *The Duties on a Man and a Citizen*, Lib. ii. Ch. xi. § 17. *Note* 1.) rejects my Explanation, did not even underſtand it. I hope, at preſent, that the Reader will now ſee the Point in Queſtion.

[2] But, as Mr. Fred. Gronovius obſerves, in a Note upon *Grotius*, (*Lib.* ii. *Ch.* xvi. § 27. *Num.* 2.) 'tis not what Cicero means, for he ſpeaks of a Thing hurtful, in the Judgment of all Perſons of Underſtanding, and not only in the Imagination of him that made the Promiſe. It is certain, that in all Tully's Diſcourſe there is nothing that can hinder us from explaining his Notion in this Manner.

[3] That is to ſay, commanded or forbidden. *Plus enim valet ſanctio permiſſione.* Auctor ad Herenn. Lib. ii. Ch. x. See *Quæſt. Decl.* 374. The Law which forbids is more powerful than that which permits. This is reſerved in the Power of the Magiſtrate. And one who forbids can do more than all who allow: For that which permits leaves us to our Liberty, whereas that which forbids binds us under a Penalty. *Nam id quod imperatur, neceſſarium: illud, quod permittitur, voluntarium eſt.* Cic. de Invent. Lib. ii. Ch. xlix. Theſe laſt Words are Part of a long Sentence, from whence Grotius takes all his Rules, which he draws up into better Order. I will recite *Cicero*'s Words upon every Rule, as our Author does, but not quite through. It is true, that he gives it

a Liberty, but a Command carries along with it a Neceſſity of acting.

2. *That which ought to be done at this preſent Time,* [1] *is preferable to that which may be done at any other Time:* Or when, at the ſame Time, I lie under two Obligations, whereof one cannot be ſatisfied but at this Inſtant, the other at any Time hereafter; the former ſhall be performed, the latter put off to ſome other Opportunity. From whence it follows, that no Man can be enjoined two Things, which cannot both be performed together, and which neither of them admit of Delay. From hence we may give an Anſwer to the Enquiry of *Plutarch*[a], Why it was not lawful for the *Flamines Diales* to bear any other Magiſtracy? For ſince the Duties of the Prieſts were certain and ſettled, and the Duties of other Magiſtrates uncertain and not ſettled, the ſame Man, being both Prieſt and Magiſtrate, would not have been able to provide for Buſineſs of ſo different a Nature, if they happened to interfere in the ſame Nick of Time: So that one muſt neceſſarily have been neglected for the Performance of the other. It ſeems that thoſe Prieſts had not found out the Secret of making an Honour and a Gain of the Prieſthood, and yet of throwing the Duty and Burthen of it upon their Curates.

3. *An affirmative Precept gives way to a* [2] *negative*; or when an affirmative Precept cannot be ſatisfied but at the Expence of a Negative one, then the Performance of the affirmative ſhall be deferred or put off, 'till it ceaſes to claſh with the other which is negative. The Reaſon of this is taken from the Nature of the affirmative and negative Precepts: For the Obligation of theſe is perpetual, uniform, and equally binding; whereas thoſe preſuppoſe an Opportunity of being put in Execution; which is preſumed not to offer itſelf, if it cannot be done without the Violation of ſome Law: And therefore Things, in ſuch a Poſture of Affairs, are eſteemed morally impoſſible. Hence it is, that no Man can injure another, or break his Word, to promote the Advantage of a Friend, or to get wherewithal to be grateful, or generous: For 'tis a ſtrange ſort of Piety to ſteal Leather, and then give the Shoes in Alms to the Poor. *Mahomet* in the *Alcoran* forbids any one to give Alms of ill-gotten Goods. However, I cannot ſay, that *Schach Abas*, King of *Perſia*, was in the Right in diſpoſing of no Money ſo freely to charitable Uſes, as that which he had raiſed from the Stews; *For this*, ſaid he, *was paid willingly, whereas the other Taxes were extorted with Sighs and Groans from the Subject:* Yet, methinks, it was not ſo decent to pitch upon Money, raiſed after that Manner for ſuch Uſes[b]. To this Head, in ſome Reſpect, belongs what *Leo* of *Modena*[c] tells us of the *Hebrews*, that whatſoever was forbidden the Men, was, alſo, forbidden the Women; but as for the affirmative Precepts, the *Rabbies* declared, that none of thoſe which were confined to a certain Time, obliged the Women, by reaſon of the Weakneſs of their Sex, and their living under the Government of their Huſbands.

4. *In Covenants and Laws, which are in other reſpects equal* [3], *that which is particular and applicable to the preſent Caſe takes place of that which is general.* For Generals muſt be reduced to Particulars, before they can be applied. As for what *Grotius* ſubjoins[4], *That a Prohibition, which has a Penalty annexed, ought to take place of that which has none; and that which has a greater, of that which has a leſs*, is not ſo clear; for a Prohibition that has no Penalty, either fixed or arbitrary, annexed to it, is of no Force at all. And that Rule, *Of two Evils to chooſe the leaſt*, cannot properly be applied to moral Evils or Sins: For when it happens, that one of two Prohibitions muſt needs be

[a] *Quæſt. Rom. in fin.* p. 291. C. [b] *Olearius, Itin. Perſ. Lib.* v. *Ch.* xxxi. *The Law which forbids is of greater Authority than that which commands; for every Law that forbids is therefore ſtronger, becauſe it corrects that which permits or commands*, Mar. Victorin. in exp. in 2. Rhet. Cic. [c] *De Rit. Hebr.* p. 5. Ch. v. § 1.

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the entire Paſſage at the End of the Chapter, but beſides he engages himſelf in an uſeleſs Repetition; as he has placed it, it ſeems to contain ſomething new, whereas it is no more than the Reſult of what he has ſaid. Moreover, as Mr. TITIUS obſerves, *Obſerv.* 441. this Rule is true only when the Permiſſion is general, and the Commands or Prohibitions particular. For, ſays he, 'tis certain, on the contrary, that a particular Permiſſion refers to a general Command, the Permiſſion, in this laſt, making an Exception to the Command, as in the firſt Caſe the Command reſtrains the Extent of the Permiſſion. There are, nevertheleſs, Caſes, where the Permiſſion and Prohibition are in one Senſe general. Join here my Remark upon *Grotius*, *Lib.* ii. *Ch.* xvi. § 29. *Note* 3. I ſhall add, That thoſe who explain this Rule otherwiſe, and found it on the Nature of Permiſſion and Prohibition (independently of Generals or Particulars) ſeem to confound it with the following Rule, which may, and ought to be, extended to what is permitted, as well as what is poſitively forbidden. This appears by the Inſtance I have examined in the Note referred to, and by another alledged by Mr. WEBER (in his Notes on *the Abridgment of the Duties of a Man and a Citizen*, Lib. i. Ch. xvii. § 13. *Note* 2.) *Hunting*, ſays he, *is allowed to all the World: Yet we ought to forbear it at a Time when our Sovereign commands us to do any other Thing.* We ſee that this Permiſſion in itſelf has no determined Time. We do not always hunt, though we may do it. Therefore whenever there intervenes a poſitive Obligation to do ſomething elſe, the Exerciſe of this Permiſſion is ſuſpended; nor do the Laws which command and forbid it, any way claſh in this Caſe. The Oppoſition is only imaginary, and they are eaſily reconciled. If under a general Pretence of doing this or that when we would, we might oppoſe the lawful Exerciſe of this Right, to the Neceſſity of acquitting ourſelves of any Duty: As we could not, at one Time, be in two different Places, or do two different Actions, it would be eaſy for us to diſpenſe with the Performance of any Duty. As for the Reſt, M. TREVOR cites this Rule improperly, in Caſes where human Laws permit any Thing contrary to the Rules of true Juſtice, and moral Honeſty.

[1] CICERO's Words are, *Deinde ex lege utrum ſtatim fieri neceſſe ſit: utrum habeat aliquam moram & ſuſtentationem: Nam id, quod ſtatim faciendum eſt, perfici prius oportet.* Cicero, *De Inventione, Lib.* ii. *Ch.* xlix.

[2] *Deinde utra lex jubeat, utra vetet. Nam ſæpe ea, quæ vetat; quaſi exceptione quadam corrigere videtur illam, quæ jubet.* That Law which forbids, ſeems, by ſome ſort of Exception, to correct that which commands. *Cic. de Invent. Lib.* ii. *Ch.* xlix. See above *Lib.* i. *Ch.* iii. § 8. and *Lib.* ii. *Ch.* vi. § 2. and *Lib.* iii. *Ch.* vii. § 5. But we are to diſtinguiſh here, whether the Laws which forbid, or command, are general, or particular. See above, § 1. In effect, this Rule cannot be properly applied, but to poſitive Laws, which relate to Things, which the Legiſlator may either forbid, allow, or direct as he pleaſes. As to Things eſſentially bad, there cannot be the leaſt ſeeming Diſpute between the Law which forbids them, and another Law which we cannot obey without violating the firſt. This is what our Author himſelf ſays, and the Inſtances he brings are ſufficient to prove it. It implies a Contradiction, morally ſpeaking, under any Pretence whatſoever, to obey a preſent Command of the Legiſlator by doing what he has declared ſhould never be done. A good End can never be procured by unlawful Means. *To do Evil that Good may come of it*, is as manifeſtly contrary to the Rules of Reaſon and natural Equity, as to the Precepts of the Goſpel. It is a monſtrous Thing in Morality, to imagine, for Example, that we promote the Glory of *God* by Fraud, Violence, Perſecution, or any other Methods unjuſt in themſelves.

[3] And again *Cicero* ſays, *Deinde utra lex de genere omni, utra de parte quadam; utra communiter in plures, utra in aliquam certam rem ſcripta videatur. Nam quæ in partem aliquam, & quæ in certam quandam rem ſcripta eſt, promptius ad cauſam accedere videtur, & ad judicium magis pertinere.* Ibid. The more particular a Law is, the more does it ſeem for to make the Caſe in hand.

[4] In which he follows *Cicero*, as in the other Rules. *Deinde in utrâ lege, ſi non obtemperatum ſit, pœna adficiatur, aut in utrâ major pœna ſtatuatur.* Ibid.

violated,

violated, then that whoſe Violation is of leaſt Concern is ſuppoſed to be permitted; for Example, one Law is, *That no Man ſhall appear abroad in Arms on a Holiday*; another, *That no Man ſtay at home upon hearing the Signal of a Tumult*. In this Caſe the latter is to be looked upon as an Exception to the former; as if the Law had been, That no Man ſhould appear abroad in Arms on a Holiday, unleſs he be commanded by the Magiſtrate in Caſe of a Tumult.

5. *When two Duties happen to interfere at the ſame Point of Time*[1], *that which is the more honeſt and profitable is to be preferred.* For the other Obligation is only upon Condition, that it can conſiſt with an Obligation of greater Moment.

6. *When two Covenants, one upon Oath*[2], *the other not, cannot be performed both together, the former ought to take place of the latter; unleſs the latter was added as an Exception and Limitation to the other*; for an Oath added to a Covenant excludes all ſuch Reſtrictions and tacit Exceptions, as are not neceſſary from the Nature of the Thing, and which, if there be no Oath, may be more eaſily admitted[a].

7. *An Obligation imperfectly mutual*[3] *gives place to one that is perfectly mutual, and binding on both ſides*[4]. Thus what I owe upon Contract, ought to be paid before what is due from me upon free Promiſe, or upon Gratitude, or any ſuch Reſpect, if both cannot be performed together. And therefore *Phocion*, when he was aſked a Largeſs for a certain Sacrifice, replied, *Aſk the Rich, for I ſhould be aſhamed to give to you, and not to pay this Man* (pointing to *Callides* the Uſurer) *what I owe him*[b].

8. *The Law of Generoſity gives place to the Law of Gratitude, cæteris paribus:* Although each implies an imperfect Obligation. For the Debt of Gratitude has more *Favour* to plead in its Behalf than that of Generoſity; for *that* requires that we ſhould give becauſe we have received; whereas *this* is built upon no ſuch Foundation. And therefore, in this Caſe, becauſe the Neceſſity of Gratitude interferes, the Object of Generoſity is ſuppoſed to be wanting, And this holds ſo far, that even Generoſity towards our own Relations, unleſs it be due upon ſome cloſer Obligation, gives place to the Duty of Gratitude.

9. *Where the Laws were made by ſubordinate Powers, that of the Inferior yields to that of the Superior, if both cannot be obeyed.* Thus we ought to obey GOD, rather than Man[c]. And the Command of a King carries more Weight with it, than that of the Maſter of a Family.

10. *The more noble, uſeful, or neceſſary the Matter of* one *Law is, than that of* another, *the greater Weight ought the Law to have with us.*

11. *The cloſer Tie there is between any Perſon and us, the more ought Obligations due to him, to outweigh thoſe due to others*, cæteris paribus[d].

Cicero[e] has a Paſſage very pertinent to the Matter in hand: *Contrary Laws*, ſays he, *admit of Diſpute, when two or more ſeem to claſh. As thus, one Law ſays*, That whoſoever kills the Tyrant, ſhall be rewarded as a Conqueror at the *Olympick* Games, and may demand what he pleaſes of the Magiſtrate, and the Magiſtrate ſhall grant his Requeſt. *Another Law enacts*, That upon the Death of the Tyrant his five neareſt Relations ſhall be put to Death. *Alexander*, who had exerciſed Tyranny over the *Phæreans*, was ſlain in the Night by his Wife *Thebe*, and ſhe, for her Reward, demanded her Son, whom ſhe had by the Tyrant. Some were of Opinion that the Son, by the Law, ought to be put to Death; the Thing may bear a Diſpute. *Now, in ſuch Caſes it ought to be conſidered, which of the Laws conduce to greater*, i. e. *to more honeſt, more profitable, and more uſeful Ends. And that ought to be obſerved which has the greater Ends to ſupport it. Then we ought to conſider which Law was made laſt, for the laſt is is of greateſt Obligation. Then which of the Laws commands, which permits only; for that which is commanded is neceſſary, that which is permitted, voluntary. Then which Law is penal, and which is enforced with the greater Penalty; for that ought to be moſt obſerved, which can be violated with the leaſt Impunity. Then which commands, which forbids; for that which forbids is often an Exception to that which commands. Then which ſeems deſigned to bind in general, which in part only: Which to conclude in common ſeveral Things, which ſome particular one only; for that which binds in part, or ſome certain particular Thing only, ſeems moſt capable of being applied and brought into Court. Then by the Law what ought to be done immediately, and what admits of Delay; for that which cannot be put off, ought to be obeyed firſt.*

[a] Medea *in* Euripides, *v.* 743. *having deſired* Ægeus *to entertain her, and not to deliver her up, when her Enemies ſhould demand her, would needs have it confirmed by Oath: Which* Ægeus *approved of, for ſo,* ſays he, *it will be the ſafer for me, if I can make ſuch an Excuſe to your Enemies.* [b] *Plut. Phocione*, 745. *C. D.* [c] *Act.* iv. 19. [d] *Gal.* vi. 10. 1 *Cor.* viii. 13. 1 *Tim.* v. 7. *Cic. Off.* 1. *Ch.* xiv, xv. Where he talks of the Degrees of Society. [e] *Lib.* ii. *de Invent.*

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[1] *Primum igitur leges oportet contendere, conſiderando, utra lex ad majores, hoc eſt, ad utiliores, ad honeſtiores ac magis neceſſarias res pertineat. Ex quo conficitur, ut, ſi leges duæ, aut ſi plures, aut quotquot erunt, conſervari non poſſint, quia diſcrepent inter ſe, ea maximè conſervanda putetur, quæ ad maximas res pertinere videatur.* Ibid.

[2] This Rule is only true, if we ſuppoſe all Things elſe equal; for if the Queſtion here is about two Agreements directly oppoſite to each other, the laſt in Date ought to be preferred, whether the firſt was ratified with an Oath, or not; but if the Agreements were only different, a Particular is of greater Force than a General. Our Author, following *Grotius*, blindly eſtabliſhes a Maxim here which he has confuted elſewhere. I mean, that Opinion of *Grotius*, in which he affirms, That an Oath added to Promiſe produces a new and particular Obligation, by virtue of which a much ſtricter Interpretation is to be made of ſuch Engagements, than of thoſe that are made without calling GOD to witneſs. *Titius Obſerv.* 445. Mr. *Thomaſius*, who, alſo, rejects our Author's Maxim, *Inſtit. Juriſp. Divin. Lib.* ii. *Ch.* xii. § 141. adds, That he knows not what theſe Words mean, unleſs the Agreement without an Oath hath been annexed to the other, by way of Exception or Limitation; and it were to be wiſhed that he had brought ſome Example. He might have ſaid, alſo, That our Author ſuppoſes here a Caſe in which there is not properly two Conventions, but one only; ſince the Laſt, whenever made, is only a Modification and Appendix to the other. I obſerve, alſo, that our Author omits this Reſtriction quite, in his *Abridgment of the Duties of a Man and a Citizen*, Lib. i. Ch. xii. § 13.

[3] I wonder that our Author was not aware, that all theſe following Rules are contained in the Fifth, of which they are only the Conſequences; and therefore he himſelf hath left out the three laſt, in his *Abridgment to the Duties of a Man and Citizen*, Lib. i. Ch. xvii. § 13.

[4] See the Explication of this Diſtinction, *Lib.* iii. *Ch.* iv. § 9. above. We have promiſed to give a Thing to a Perſon, and we have ſold the ſame Thing to another; the Buyer ought to be preferred to the Donee.

[5] See Mr. BUDDEUS's Diſcourſe, entitled, *De comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*; in the *Collect. Jur. Nat. & Gent.* p. 610, *& ſeqq.*

CHAP

CHAP. XIII.

Of the Way of deciding Controverſies *in the Liberty of Nature.*

I. *What is due to others is willingly to be performed.*
II. *In a State of Nature there is no Judge.*
III. *Controverſies, which cannot be decided by Conference, are to be referred to Arbitrators.*
IV. *There is a Covenant between an Arbitrator and the contending Parties.*
V. *Arbitrators, in a Doubt, are bound to judge by Law.*
VI. *Arbitrators are not to judge of the Poſſeſſion.*
VII. *Of the Mediators of a Peace.*
VIII. *What if Deeds be loſt.*
IX. *Of Witneſſes.*
X. *Of the Execution of the Sentence.*

BY the Law of Nature every Man is obliged to perform, and to pay, of his own Accord, what, by any Title, is due from him; and if any one has deſignedly damaged or offended another, the ſame Law moreover obliges that the Delinquent ſhould ſeriouſly repent, and give Security to live in Peace and Friendſhip for the future. And as this Repentance, where it is not extorted by Force, but proceeds from the Principle and Conſideration of Juſtice, is a ſufficient Indication of the Offender's Amendment: So, on the other Side, after ſuch Satisfaction is made, and Security given, the Party injured [1] ought to forgive him, and to live peaceably with him for the Time to come. And if a Man through Paſſion and a Deſire of Revenge refuſes it, he muſt be anſwerable for the Breach of the Peace, and the Conſequences of it [a]. For it is inhuman and brutiſh, not to be ſatisfied with any thing leſs than the Blood of the Offender: And when a Miſunderſtanding is once begun, to continue it on for ever. It was a curſed Speech of *Cato*'s [b], who, when he met a young Man juſt flushed with the Ruin of his deceaſed Father's Enemy, took him by the Hand; and *Thus*, ſaid he, *ought we* [2] *to appeaſe the Ghoſts of our Parents; not with Kids, or Goats, but with the Tears and Deſtruction of their Enemies.*

II. But all Men are not of ſuch a happy Temper, as to be willing, of their own Accord, to perform their Duty: And beſides, ſeveral Controverſies may ariſe, concerning the Certainty and the Quantity of a Debt, and the Rating of a Damage, the Competency and Exerciſe of certain Rights, the fixing Boundaries, the Interpretation of Pacts, and other Pretenſions; and yet *in the Liberty of Nature* [3] no Man can take Authority upon him to determine and compoſe ſuch Controverſies. Indeed *Hobbes* [c] makes every Man his own Judge in a State of Nature [d]; by which he can mean nothing elſe, but that he who has no Superior to govern him, may manage his Buſineſs as he pleaſes, and appoint Means for his Preſervation, according to his own Diſcretion. For if another Man ſhould take upon him to judge of my Affairs, yet, ſince he has no Authority to determine me by his Opinion, it will depend intirely upon my Will and Pleaſure, whether, or how far, I ſhall be governed by him; and ſo ultimately the Management of my Actions will lie in my own Breaſt; which yet I ought to govern according to the Rules of Nature.

As to what remains; though every Man may, in that State, either neglect or defend his own Right, either put up, or return an Injury; yet he cannot, in his own Cauſe, give Sentence ſo as to oblige him, with whom he has the Controverſy, to ſtand to it. For though he deſigns never ſo juſtly, nay, though he proteſts upon Oath, that he decrees what ſeems to him to be right; yet ſince the other may have as great a Reſpect for his own Opinion, if they happen to diſagree, nothing can be done by reaſon of that Equality, which is eſſential to the *State of Nature*. *Almoſt all wicked Men think fit to be* [4] *Judges in their own Caſe*, Ariſt. Pol. iii. Ch. ix. [5] *No Mortal ever thinks an Injury againſt himſelf ſmall, moſt think them greater than really they are*, Saluſt. Catil. Ch. li.

III. But yet the *Law of Nature* by no means allows, that every Man ſhould immediately fly to Arms, and put the Controverſy to the Deciſion of the Sword, before milder Methods have been attempted [6]. And therefore the Parties ought firſt to endeavour, by ſome friendly Debate between themſelves or their Agents, to compoſe the Difference [e]. Indeed even after Arms have been taken up, and each Party, by the Calamity of War, has been induced to hearken to gentler Accommodations, we generally find that the Difference is at laſt adjuſted by Treaties and Negotiations. If the Thing and the Temper of the Parties admit of it, the Diſpute may eaſily be decided by *Lot* [f]. But if neither a Debate is able to put an End to the Controverſy, nor either Party thinks fit to truſt that to Chance, which each, in Reaſon, thinks to be on his ſide; the only Thing they can do, is to pitch upon an *Arbitrator*, and each bind himſelf to ſtand to his Award [g]. And here *Grotius* [h] well obſerves, that in a doubtful Caſe, although each Party ought to come to Terms, rather than go to War, yet the *Plaintiff* is more obliged to

[a] *C. Pontius* in *Livy, Lib.* ix. *Ch.* i. argues excellently to this Purpoſe. [b] *Vide* Plutarch *in the Life of* Cato *the Elder*, p. 344. *E.* [c] *De Cive*, Ch. i § 9. [d] *How far this is true, may be ſeen in* B. ii. Ch. ii §. 3. [e] Vide *Grot.* Lib. ii. Ch. xxiii. § 7. [f] *V. eund. D. Lib* § 9. [g] *V. Grot. D. Lib.* § 8. [h] *D. Lib.* § 11.

[1] See *Lib.* ii. *Chap.* v. § xix. above.

[2] See what Mr. HERTIUS ſays upon the Notions of the *Pagans* upon that ſort of Revenge, in his Diſcourſe, *De Hærede Ulciſci Vindice*, Sect. i. §. iv. in *Tom.* III of his *Opuſcul. & Comment.*

[3] In which Senſe that of *Thucydides*, Lib. i. may be admitted; Βιάζεθαι γὰρ, οἷς ἂν ἐξῇ, δικάζεσθαι δὲ οἱ περισταται. *They that may uſe Force have no need to go to Law.*

[4] ARISTOTLE's *Greek* is, Σχεδὸν δ' οἱ πλεῖστοι φαυλοὶ κριταὶ περὶ τῶν οἰκείων.

[5] SALUST's Words are, *Neque cuiquam mortalium injuriæ ſuæ parvæ videntur. Multi eas gravius æquo habuere.* SENECA, as Mr HERTIUS obſerves, ſays, That every one in that Reſpect has a Royal Spirit in him. We deſire that all Things may be allowed us towards others, but are not willing others ſhould be permitted any thing towards us. *Regis quiſque intra ſe animum habet, ut licentiam ſibi dari velit in alterum, in ſe nolit.* De Irâ, Lib. ii Chap. xxxi.

[6] *Nam cum ſint duo genera decertandi, unum per diſceptationem, alterum per vim, cumq; illud proprium ſit hominis, hoc belluarum, confugiendum eſt ad poſterius, ſi uti non licet ſuperiore.* De Offic. *Lib.* i. *Cap.* xi. "There being two Ways of Conteſting, one "by Argument, the other by Force, and *that* being proper to Men, *this* to Brutes, Recourſe is to be had to the *latter*, when "the *former* is refuſed." See *Juſtin, Lib.* viii. *Ch.* i. *Note* 4, *&c.* When, without trying to compoſe Matters amicably, Arms are taken up, then that of *Ovid* takes place, *Injuſtum rigido jus dicitur enſe.* Triſt. Lib. v. El. x. v. xliii.

violated, then that whoſe Violation is of leaſt Concern is ſuppoſed to be permitted; for Example, one Law is, *That no Man ſhall appear abroad in Arms on a Holiday*; another, *That no Man ſtay at home upon hearing the Signal of a Tumult.* In this Caſe the latter is to be looked upon as an Exception to the former; as if the Law had been, That no Man ſhould appear abroad in Arms on a Holiday, unleſs he be commanded by the Magiſtrate in Caſe of a Tumult.

5. *When two Duties happen to interfere at the ſame Point of Time*[1], *that which is the more honeſt and profitable is to be preferred.* For the other Obligation is only upon Condition, that it can conſiſt with an Obligation of greater Moment.

6. *When two Covenants, one upon Oath*[2], *the other not, cannot be performed both together, the former ought to take place of the latter; unleſs the latter was added as an Exception and Limitation to the other*; for an Oath added to a Covenant excludes all ſuch Reſtrictions and tacit Exceptions, as are not neceſſary from the Nature of the Thing, and which, if there be no Oath, may be more eaſily admitted[a].

7. *An Obligation imperfectly mutual*[3] *gives place to one that is perfectly mutual, and binding on both ſides*[4]. Thus what I owe upon Contract, ought to be paid before what is due from me upon free Promiſe, or upon Gratitude, or any ſuch Reſpect, if both cannot be performed together. And therefore *Phocion*, when he was aſked a Largeſs for a certain Sacrifice, replied, *Aſk the Rich, for I ſhould be aſhamed to give to you, and not to pay this Man* (pointing to *Callides* the Uſurer) *what I owe him*[b].

8. *The Law of Generoſity gives place to the Law of Gratitude, cæteris paribus:* Although each implies an imperfect Obligation. For the Debt of Gratitude has more *Favour* to plead in its Behalf than that of Generoſity; for *that* requires that we ſhould give becauſe we have received; whereas *this* is built upon no ſuch Foundation. And therefore, in this Caſe, becauſe the Neceſſity of Gratitude interferes, the Object of Generoſity is ſuppoſed to be wanting, And this holds ſo far, that even Generoſity towards our own Relations, unleſs it be due upon ſome cloſer Obligation, gives place to the Duty of Gratitude.

9. *Where the Laws were made by ſubordinate Powers, that of the Inferior yields to that of the Superior, if both cannot be obeyed.* Thus we ought to obey GOD, rather than Man[c]: And the Command of a King carries more Weight with it, than that of the Maſter of a Family.

10. *The more noble, uſeful, or neceſſary the Matter of* one *Law is, than that of* another, *the greater Weight ought the Law to have with us.*

11. *The cloſer Tie there is between any Perſon and us, the more ought Obligations due to him, to outweigh thoſe due to others*, cæteris paribus[d].

Cicero[e] has a Paſſage very pertinent to the Matter in hand: *Contrary Laws*, ſays he, *admit of Diſpute, when two or more ſeem to claſh. As thus, one Law ſays*, That whoſoever kills the Tyrant, ſhall be rewarded as a Conqueror at the *Olympick* Games, and may demand what he pleaſes of the Magiſtrate, and the Magiſtrate ſhall grant his Requeſt. *Another Law enacts*, That upon the Death of the Tyrant his five neareſt Relations ſhall be put to Death. *Alexander*, who had exerciſed Tyranny over the *Phæreans*, was ſlain in the Night by his Wife *Thebe*, and ſhe, for her Reward, demanded her Son, whom ſhe had by the Tyrant. Some were of Opinion that the Son, by the Law, ought to be put to Death; the Thing may bear a Diſpute. *Now, in ſuch Caſes it ought to be conſidered, which of the Laws conduce to greater*, i. e. *to more honeſt, more profitable, and more uſeful Ends. And that ought to be obſerved which has the greater Ends to ſupport it. Then we ought to conſider which Law was made laſt, for the laſt is is of greateſt Obligation. Then which of the Laws commands, which permits only; for that which is commanded is neceſſary, that which is permitted, voluntary. Then which Law is penal, and which is enforced with the greater Penalty; for that ought to be moſt obſerved, which can be violated with the leaſt Impunity. Then which commands, which forbids; for that which forbids is often an Exception to that which commands. Then which ſeems deſigned to bind in general, which in part only: Which to conclude in common ſeveral Things, which ſome particular one only; for that which binds in part, or ſome certain particular Thing only, ſeems moſt capable of being applied and brought into Court. Then by the Law what ought to be done immediately, and what admits of Delay; for that which cannot be put off, ought to be obeyed firſt.*

[a] Medea *in* Euripides, *v.* 743. *having deſired* Ægeus *to entertain her, and not to deliver her up, when her Enemies ſhould demand her, would needs have it confirmed by Oath: Which* Ægeus *approved of, for ſo*, ſays he, *it will be the ſafer for me, if I can make ſuch an Excuſe to your Enemies.* [b] *Plut. Phocione*, 745. *C. D.* [c] *Act.* iv. 19. [d] *Gal.* vi. 10. 1 *Cor.* viii. 13. 1 *Tim.* v. 7. *Cic. Off.* 1. *Ch.* xiv, xv. Where he talks of the Degrees of Society. [e] *Lib.* ii. *de Invent.*

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[1] *Primum igitur leges oportet contendere, conſiderando, utra lex ad majores, hoc eſt, ad utiliores, ad honeſtiores ac magis neceſſarias res pertineat. Ex quo conficitur, ut, ſi leges duæ, aut ſi plures, aut quotquot erunt, conſervari non poſſint, quia diſcrepent inter ſe, ea maximè conſervanda putetur, quæ ad maximas res pertinere videatur.* Ibid.

[2] This Rule is only true, if we ſuppoſe all Things elſe equal; for if the Queſtion here is about two Agreements directly oppoſite to each other, the laſt in Date ought to be preferred, whether the firſt was ratified with an Oath, or not; but if the Agreements were only different, a Particular is of greater Force than a General. Our Author, following *Grotius*, blindly eſtabliſhes a Maxim here which he has confuted elſewhere. I mean, that Opinion of *Grotius*, in which he affirms, That an Oath added to Promiſe produces a new and particular Obligation, by virtue of which a much ſtricter Interpretation is to be made of ſuch Engagements, than of thoſe that are made without calling GOD to witneſs. *Titius Obſerv.* 445. Mr. *Thomaſius*, who, alſo, rejects our Author's Maxim, *Inſtit. Juriſp. Divin. Lib.* ii. *Ch.* xii. § 141. adds, That he knows not what theſe Words mean, unleſs the Agreement without an Oath hath been annexed to the other, by way of Exception or Limitation; and it were to be wiſhed that he had brought ſome Example. He might have ſaid, alſo, That our Author ſuppoſes here a Caſe in which there is not properly two Conventions, but one only; ſince the Laſt, whenever made, is only a Modification and Appendix to the other. I obſerve, alſo, that our Author omits this Reſtriction quite, in his *Abridgment of the Duties of a Man and a Citizen*, Lib. i. Ch. xvii. § 13.

[3] I wonder that our Author was not aware, that all theſe following Rules are contained in the Fifth, of which they are only the Conſequences; and therefore he himſelf hath left out the three laſt, in his *Abridgment to the Duties of a Man and Citizen*, Lib. i. Ch. xvii. § 13.

[4] See the Explication of this Diſtinction, *Lib.* iii. *Ch.* iv. § 9. above. We have promiſed to give a Thing to a Perſon, and we have ſold the ſame Thing to another; the Buyer ought to be preferred to the Donee.

[5] See Mr. BUDDEUS's Diſcourſe, entitled, *De comparatione obligationum, quæ ex diverſis hominum ſtatibus oriuntur*; in the *Selecta Jur. Nat. & Gent.* p. 610, *& ſeqq.*

CHAP.

CHAP. XIII.

Of the Way of deciding Controverſies *in the Liberty of Nature.*

I. *What is due to others is willingly to be performed.*
II. *In a State of Nature there is no Judge.*
III. *Controverſies, which cannot be decided by Conference, are to be referred to Arbitrators.*
IV. *There is a Covenant between an Arbitrator and the contending Parties.*
V. *Arbitrators, in a Doubt, are bound to judge by Law.*
VI. *Arbitrators are not to judge of the Poſſeſſion.*
VII. *Of the Mediators of a Peace.*
VIII. *What if Deeds be loſt.*
IX. *Of Witneſſes.*
X. *Of the Execution of the Sentence.*

BY the Law of Nature every Man is obliged to perform, and to pay, of his own Accord, what, by any Title, is due from him; and if any one has deſignedly damaged or offended another, the ſame Law moreover obliges that the Delinquent ſhould ſeriouſly repent, and give Security to live in Peace and Friendſhip for the future. And as this Repentance, where it is not extorted by Force, but proceeds from the Principle and Conſideration of Juſtice, is a ſufficient Indication of the Offender's Amendment: So, on the other Side, after ſuch Satisfaction is made, and Security given, the Party injured [1] ought to forgive him, and to live peaceably with him for the Time to come. And if a Man through Paſſion and a Deſire of Revenge refuſes it, he muſt be anſwerable for the Breach of the Peace, and the Conſequences of it [a]. For it is inhuman and brutiſh, not to be ſatisfied with any thing leſs than the Blood of the Offender: And when a Miſunderſtanding is once begun, to continue it on for ever. It was a curſed Speech of *Cato*'s [b], who, when he met a young Man juſt fluſhed with the Ruin of his deceaſed Father's Enemy, took him by the Hand; and *Thus*, ſaid he, *ought we* [2] *to appeaſe the Ghoſts of our Parents; not with Kids, or Goats, but with the Tears and Deſtruction of their Enemies.*

II. But all Men are not of ſuch a happy Temper, as to be willing, of their own Accord, to perform their Duty: And beſides, ſeveral Controverſies may ariſe, concerning the Certainty and the Quantity of a Debt, and the Rating of a Damage, the Competency and Exerciſe of certain Rights, the fixing Boundaries, the Interpretation of Pacts, and other Pretenſions; and yet *in the Liberty of Nature* [3] no Man can take Authority upon him to determine and compoſe ſuch Controverſies. Indeed *Hobbes* [c] makes every Man his own Judge in a State of Nature [d]; by which he can mean nothing elſe, but that he who has no Superior to govern him, may manage his Buſineſs as he pleaſes, and appoint Means for his Preſervation, according to his own Diſcretion. For if another Man ſhould take upon him to judge of my Affairs, yet, ſince he has no Authority to determine me by his Opinion, it will depend intirely upon my Will and Pleaſure, whether, or how far, I ſhall be governed by him; and ſo ultimately the Management of my Actions will lie in my own Breaſt; which yet I ought to govern according to the Rules of Nature.

As to what remains; *though* every Man may, in that State, either neglect or defend his own Right, either put up, or return an Injury; yet he cannot, in his own Cauſe, give Sentence ſo as to oblige him, with whom he has the Controverſy, to ſtand to it. For though he deſigns never ſo juſtly, nay, though he proteſts upon Oath, that he decrees what ſeems to him to be right; yet ſince the other may have as great a Reſpect for his own Opinion, if they happen to diſagree, nothing can be done by reaſon of that Equality, which is eſſential to the *State of Nature*. *Almoſt all wicked Men think fit to be* [4] *Judges in their own Caſe*, Ariſt. Pol. iii. Ch. ix. [5] *No Mortal ever thinks an Injury againſt himſelf ſmall, moſt think them greater than really they are*, Saluſt. Catil. Ch. li.

III. But yet the *Law of Nature* by no means allows, that every Man ſhould immediately fly to Arms, and put the Controverſy to the Deciſion of the Sword, before milder Methods have been attempted [6]. And therefore the Parties ought firſt to endeavour, by ſome friendly Debate between themſelves or their Agents, to compoſe the Difference [e]. Indeed even after Arms have been taken up, and each Party, by the Calamity of War, has been induced to hearken to gentler Accommodations, we generally find that the Difference is at laſt adjuſted by Treaties and Negotiations. If the Thing and the Temper of the Parties admit of it, the Diſpute may eaſily be decided by *Lot* [f]. But if neither a Debate is able to put an End to the Controverſy, nor either Party thinks fit to truſt that to Chance, which each, in Reaſon, thinks to be on his ſide; the only Thing they can do, is to pitch upon an *Arbitrator*, and each bind himſelf to ſtand to his Award [g]. And here *Grotius* [h] well obſerves, that in a doubtful Caſe, although each Party ought to come to Terms, rather than go to War, yet the *Plaintiff* is more obliged to

[a] *C. Pontius* in *Livy*, *Lib.* ix. *Ch.* i. argues excellently to this Purpoſe. [b] *Vide* Plutarch *in the Life of* Cato *the Elder*, p. 344. *E.* [c] *De Cive*, Ch. i § 9. [d] *How far this is true, may be ſeen in* B. ii. Ch. ii. §. 3. [e] Vide *Grot.* Lib. ii. Ch. xxiii. § 7. [f] *V. eund. D. Lib* § 9. [g] *V. Grot. D. Lib.* § 8. [h] *D. Lib.* § 11.

[1] See *Lib.* ii. *Chap.* v. § xix. above.

[2] See what Mr. HERTIUS ſays upon the Notions of the *Pagans* upon that ſort of Revenge, in his Diſcourſe, *De Hærede Occiſi Vindice*, Sect. i. §. iv. in *Tom.* III of his *Opuſcul. & Comment.*

[3] In which Senſe that of *Thucydides*, Lib. i. may be admitted; Βιάζεσθαι γὰρ, οἷς ἂν ἐξῇ, δικάζεσθαι ἐδὲν προσδέονται. *They that may uſe Force have no need to go to Law.*

[4] ARISTOTLE's *Greek* is, Σχεδὸν δ' οἱ πλεῖστοι φαυλοὶ κριταὶ περὶ τῶν οἰκείων.

[5] SALUST's Words are, *Neque cuiquam mortalium injuriæ ſuæ parvæ videntur Multi eas gravius æquo habuere.* SENECA, as Mr HERTIUS obſerves, ſays, That every one in that Reſpect has a Royal Spirit in him We deſire that all Things may be allowed us towards others, but are not willing others ſhould be permitted any thing towards us. *Regis quiſque intra ſe animum habet, ut licentiam ſibi dari velit in alterum, in ſe nolit.* De Irâ, Lib. ii Chap. xxxi.

[6] *Nam cùm ſint duo genera decertandi, unum per diſceptationem, alterum per vim, cumq; illud proprium ſit hominis, hoc belluarum, confugiendum eſt ad poſterius, ſi uti non licet ſuperiore.* De Offic. *Lib.* i. *Cap.* xi. "There being two Ways of Conteſting, one by Argument, the other by Force, and *that* being proper to Men, *this* to Brutes, Recourſe is to be had to the *latter*, when the *former* is refuſed." See *Juſtin*, *Lib.* viii. *Ch.* i. *Note* 4, *&c.* When, without trying to compoſe Matters amicably, Arms are taken up, then that of *Ovid* takes place, *Injuſtum rigido jus dicitur enſe.* Triſt. Lib. v. El. x. v xliii.

it than the *Defendant*; for the *Defendant*'s Plea is the more [1] *favourable* even in the Law of Nature.

IV. From the Deſign of appealing to an *Arbitrator*, it appears how he ought to be qualified. For therefore recourſe is had to him, becauſe a Man's Judgment, by reaſon of that natural Affection which every Man bears to himſelf, is ſuſpected to be partial to his own Cauſe [a]. Upon which Account the *Arbitrator* muſt take care not to ſacrifice Right to Affection, nor to be biaſs'd in Favour of one more than the other, any farther than the Merits of the Cauſe incline him. And if he behaves himſelf thus impartially, he ought not to regard the unjuſt Reſentments of him that is caſt. *Bias* [b] uſed to ſay, *that he had rather judge between thoſe that were his Enemies, than his Friends; for, in the latter Caſe, let him judge how he would, one of his Friends would turn his Enemy; whereas, if both were his Enemies, one probably would become a Friend.* And therefore it is manifeſt, that a Man who has any Intereſt in the Succeſs of either Party, ought not to be an *Arbitrator* between them; for fear he ſhould not be able to obſerve ſo exactly that Indifference and Impartiality which he ought [2].

From hence it follows, that there ought to be no Pact or Promiſe between the *Arbitrator* and the Parties, whereby he may be prejudiced in Favour of either of them [c]. Nor ought he to expect [3] any other Reward for his Sentence, than the Satisfaction of having judged right. Abſurd therefore was the *Arbitrage* which *Maximilian* and the *Venetians* ſubmitted to *Leo* X. whilſt each of them privately tampered with him to declare of his Side [d].

Now although the contending Parties enter into Compact with the *Arbitrator*, about taking upon him his Office (for as no *Arbitrage* can be exerciſed without the Conſent of the Parties, ſo no one can be forced to be *Arbitrator* againſt his own Conſent) yet it is not from the Force of that Compact, that he becomes obliged to judge according to what he thinks is agreeable to the Laws of Conſcience and Equity; or they to ſtand to his Award. For the Law of Nature, which can receive no Enforcement from any Compact, obliges him to judge according to Juſtice; and they are obliged to ſubmit, without any Reſerve, to his Determination, becauſe otherwiſe the Deſign of going to an *Arbitrator* would be fruſtrated, and there would be no End of ſuch Appeals.

For ſuppoſe they ſhould agree to ſubmit themſelves to his *Arbitrage*, not abſolutely, but upon Condition that he ſhould decree according to Juſtice, how would they ever be able to decide the Matter? For the Parties, being ſuppoſed to be in a perfect Liberty of Nature, are as yet equal; and each has Power to enquire whether the *Arbitrator* has performed the Condition, in judging according to Juſtice. And therefore, if, after the Sentence be given, it ſhould ſeem unjuſt to either Party, or ſhould really be ſo, another Controverſy would ariſe about it; which ſince neither this *Arbitrator*, nor the Parties could be able to determine, it would be rendered neceſſary to apply to another. And if with this other they enter into the ſame conditional Compact, and a Doubt ſhould ariſe about the Juſtice of his Sentence, alſo, they would be forced to apply to another for Relief, and ſo on *in infinitum*.

From hence it follows, that the Pact, which the Parties enter into, when they conſent to ſtand to the Award of an *Arbitrator*, ought to be conceived ſimply, and not upon Condition that he pronounces Sentence [4] according to Juſtice; for elſe, as was ſaid before, there might be an Appeal from one [5] *Arbitrator* to another, and from him to a third, and ſo on without End. Beſides, that there can lie no Appeal from the Arbitrator is plain, becauſe there is no ſuperior Judge to receive it, which obtains even in civil States, where the Parties by Conſent pitch upon an *Arbitrator*, provided the Cauſe be ſuch as it does not concern the Government to intermeddle with: And if any Country admits of ſuch an Appeal, it is by reaſon of ſome poſitive Law. Indeed, in ſome Places, thoſe extraordinary Judges who have Cauſes laid before them, to be examined and decided out of hand, without the tedious Forms of Law, come under the Name of *Arbitraters*. And from theſe nothing hinders but that an Appeal may lie to a Superior.

[a] Vide Lib. ii. Tit. i. Lib. x. *D. de juriſdict. Plut. de adulat. & amic. diſcern.* Every one is the greateſt Flatterer of himſelf.
[b] *Diog. Laert.* Lib. i. § 87. *Aul. Gell.* Lib. i. Ch. iii.
[c] *Compare* Hobbes de Cive, *Ch.* iii. § 14.
[d] *Guicciard. Hiſt.* Lib. xi. about the End; and *Lib.* xii. *P. M.* cccxlv.

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[1] See above *Lib.* ii. Ch. vi. § vi. Note iv. and Lib. iv. Ch viii. § 5.

[2] Παντα χῆ δὲ πιστότατος ὁ διαιτητὴς, ὁ διαιτητὴς δὲ ὁ μέσος. *Ariſt. Pol.* Lib iv. Ch xii. "An *Arbitrator* is every where to have a "Truſt repoſed in him." Upon the ſame Principle depended the Anſwer that *Amaſis* King of *Egypt* gave the *Æleans*, when they were to be *Arbitrators* in the *Olympick* Games, and had ſent to him to adviſe them, how they might perform the Office with greateſt Juſtice; *Let none of the Æleans*, ſaid he, *be concerned in the Games.* Hither may be referred that ſcandalous Decree of the *Roman* People, who, in the Controverſy between the *Aricinians* and the *Ardeates*, adjudged the Land to themſelves. *Livy*, Lib. iii. Ch. lxxii. *Add. Juſt.* Lib. viii. Ch. iii. Note 15. where is a like Example of *Philip* of *Macedon*. See DIODORUS SICULUS, *Lib.* i. *Ch.* xcv.

[3] PLINY gives this Commendation to *Trajan*, as to the Cauſes on which he gave his Sentence, *Nec aliud tibi ſententiæ tuæ pretium, quam bene judicaviſſe*, Plin. *Panegyr.* Ch. lxxx. Note 1. You had no other Reward of your Determination than that you judged well. We muſt remark, that what is ſaid here of the Reward regards only the Quality of the Sentence; for, as to the reſt, if the Arbitrator is obliged to be at the Expence, or to employ much Time and Pains in the Affair; as he is not obliged to do all this for nothing, he may accept or require an Indemnification or reaſonable Equivalent.

[4] The *Digeſts* ſpeak to this Purpoſe, *Qualem autem ſententiam dicat arbiter, ad prætorem non pertinere, Labeo ait, dummodo dicat, quod ipſi videtur. Et ideo, ſi ſic fuit in arbitrum compromiſſum, ut certam ſententiam dicat, nullum eſſe arbitrium*, Lib. iv. Tit. viii. *De receptis, qui arbitrium receperunt, ut ſententiam dicant*, Leg. xix. *princ.* Whence it comes, that, according to the Lawyers, the Sentence of an Arbitrator ought to end the Matter entirely, and not to be removed to the Judgment of another Arbitrator. *Idem Pedius probat, nè propagentur arbitria, aut in alios interdum inimicos agentium transferantur, ſua ſponte finem controverſiæ cum imponere oportet.* Ibid. Leg. xxxii. § 16. Further, as to what concerns the Agreement of Parties, and the Qualities or Duties of Arbitrators, as to the private Affairs of the Members of the ſame State, we may conſult the whole Title which I have quoted, as alſo Mr. DOMAT's *Civil Laws in their Natural Order*, Part i. Lib. i. Tit. xiv. and the *Publick Law* of the ſame Author, *Lib* ii. *Tit.* vii.

[5] *Adeo ſummam quiſque cauſæ ſuæ judicem facit, quemcunque elegit.* Plin. *Nat. Hiſt. Præf.* § 47. "Every one makes him "whom he has choſen, the chief Judge of his Cauſe." Ἦν δὲ τίνες ἐκόντες αὐτοὶ συνθῶνται δικαστὰς, κὴ προελόμενοι ἐπιτρέψαι, ἐὰν σφῶν, ὃν ἔτι δοκῶσιν ὁ νόμος εἰς ἕτερον ἐφεῖναι δικαστήριον. Lucian *Abdicat. Tit.* i. *Pag.* 715, *&c.* Edit. *Amſt.* "If any one pitches "upon thoſe to be Judges in his Caſe, whoſe Opinion he was not otherwiſe obliged to ſtand by, after having made the Choice "he ought to ſubmit to their Determinations." From hence may be brought a Reaſon of that in QUINCTILIAN, *Declam.* 372. *Judicia tamen judiciis reſcindi non poſſunt.* "One Decree cannot make void another."

But when we ſay that the Parties ought, right or wrong, [1] to ſtand to the Sentence of the *Arbitrator*, it muſt be underſtood with ſome Reſtrictions. For though I cannot fly off, becauſe he decrees otherwiſe than I expected; yet his Sentence ſhall not bind me, if it manifeſtly appears that he tampered with the other Party, and received Bribes of him, and concerted Matters to my Diſadvantage. For he who evidently [2] takes part with either Side, ceaſes to bear any longer the Perſon of an *Arbitrator* [a].

If it be thought fit to [3] refer a Cauſe to more than one, it is beſt to have an uneven Number; for elſe they may divide into equal Votes, and ſo leave the Buſineſs undecided.

V. Moreover, *Grotius* [b] would have it conſidered, whether the *Arbitrator* be choſen as a Judge, or as having Authority more at large of giving Sentence, not according to the [4] Rigour of the Law, but according to Reaſon and Equity. For ſometimes both Parties appeal to the Law; and there the *Arbitrator*, as if he were a Judge, ought to weigh the Merits of the Cauſe, and to determine according to Law. Sometimes one Party only inſiſts upon the Rigour of the Law, and the other, in Favour and Compaſſion, deſires a Mitigation of it; or, in other Words, appeals to Equity: Where by *Equity* I do not mean that dextrous Interpretation of the Law, mentioned in the foregoing Chapter, which even a ſubordinate Judge ought to make uſe of: but an Abatement of the Rigour of the Law, upon the Dictates of Humanity, Charity, Compaſſion, *&c.* which none but the ſupreme Judge [5], or an *Arbitrator* choſen on purpoſe, has Authority to apply.

If it be doubtful under which of theſe two Qualifications the *Arbitrator* is choſen, he ought to ſuppoſe himſelf tyed up to thoſe Rules, which a Judge would be obliged to follow; for it is for want of a Judge and Judicature that he is called in: And, in a doubtful Caſe, we ought to take that Side which is cleareſt [6]. Beſides, an *Arbitrator* cannot ſo eaſily act unjuſtly, if he has a limited, as if he has an abſolute Power delegated to him. Indeed to perſuade a Mitigation of the Rigour of the Law is properly their Buſineſs, who voluntarily, without entering into any Engagements, interpoſe as common Friends between the contending Parties.

Now as he that judges between Fellow-ſubjects, judges according to the *municipal* Laws of the Place; ſo he who judges between thoſe who acknowledge no common *municipal* Laws, ought to judge according to the [7] Law of Nature; unleſs the Parties ſubmit their Cauſe to the poſitive Laws of ſome particular State.

VI. The ſame *Grotius* [c] obſerves, alſo, that an *Arbitrator*, choſen by the ſupreme Authority, ought to take Cognizance of the Merits of the Cauſe, and not of the Poſſeſſion; for it belongs to the civil Law to determine that, whereas, by the Law of Nature, the Right of Poſſeſſion follows the Property. Concerning which my Opinion is, that although by the Law of Nature and Nations it does not ſeem neceſſary, that, if a Man be turned out of Poſſeſſion, he ſhould immediately be put in again, before the Merits of the Cauſe be heard, eſpecially if it can be immediately determined; yet, *in many Caſes, the Arbitrator* ought to make Enquiry who was in Poſſeſſion, that he may know whom it chiefly concerns to make out his Title. [8] For the Plaintiff ought to have very clear Proofs to ſupport his Pretenſions, whereas it is enough for the Defendant to confute the Arguments of his Adverſary; though ſometimes it may be convenient, over and above, to ſhew his own Title, alſo. However, 'tis not ſufficient for the Arbitrator to give Judgment concerning the Poſſeſſion only, for that is generally out of diſpute, and ſeldom brought before him; but his Buſineſs is to examine into the Merits of the Cauſe, and, by a final Determination, to put an End to the Suit. But while the Cauſe is depending, no Innovations ought to be made; and, if the *Plaintiff* cannot make out his Pretenſions, Judgment ought to be given for the Party in Poſſeſſion.

VII. But *Mediators*, who, interpoſe between contending Nations, either preparing, or actually engaged in War, and endeavour, by their Authority and their Arguments and Intreaties, to bring them to Terms of Accommodation, are not properly *Arbitrators* [d]. Theſe having ſo pious a Deſign in hand cannot be obſtinately rejected, without the greateſt Inhumanity, even although they ſhould appear to be more intimately allied to either Party. For the other ſtill has Liberty either to accept or refuſe what they offer: And it is the chief Buſineſs of a Friend, where he cannot join in

[a] Vide *Lib.* vii. *Tit.* ii. Lib. lxxvi, *&c. D. pro Socio.* [b] Vide *Grot. Lib.* iii. Ch. xx. § 46. Note 2. [c] *D.* Lib. § 47. [d] Vide *Guicciardin.* Hiſt. Lib. iv. where is debated whether *Hercules* Duke of *Ferrara* ſhould perform the Part of an *Arbitrator*, or *Mediator*, between the *Venetians* and the *Florentines*.

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[1] This is ſaid formally in a Law, where the Arbitrators ſpoken of are oppoſed to another ſort of Arbitrators, to whoſe Judgment we are not bound to ſubmit, unleſs it be conformable to the Rules of Equity. *Arbitrorum enim genera ſunt duo, unum ejuſmodi, ut ſive æquum ſit, ſive iniquum, parere debeamus; quod obſervatur, cum ex compromiſſo ad arbitrium itum eſt; alterum ejuſmodi, ut ad boni viri arbitrium redigi debeat.* Digeſt. Lib. vii. Tit. ii. *Pro Socio*, Leg. lxxvi. See the following Laws.

[2] The Law of the *Romans* grants, in this Caſe, an Exception of Fraud. *Arbitrorum ex compromiſſo ſententiæ non obtemperant, ſi ſordes, vel evidens gratia eorum, qui arbitrati ſunt, interceſſit; adverſus filiam tuam agentem ex ſtipulatu, exceptione doli mali uti poteris.* Cod. Lib. ii. Tit. lvi. *De receptis Arbitris*, Leg. iii.

[3] So the *Digeſts* direct, *In impari enim numero idcirco compromiſſum admittitur, non quoniam conſentire omnes facile eſt, ſed quia, etſi diſſentiant, invenitur pas major, cujus arbitrio ſtabitur.* Lib. iv. Tit. viii. *De Receptis, &c.* Leg. xvii. § 6.

[4] GROTIUS quotes here a Paſſage of *Seneca, De Benef.* Lib. iii. Ch. vii. where he does not treat of Arbitrators, but ſuch ſubordinate Judges, as the *Prætor* or Governor ordered for the Parties, who were obliged to follow the Forms preſcribed them ſtrictly, or the Maxims of Equity, according to which the Cauſe reſpected an Affair of ſtrict Juſtice, or of Honeſty. See Mr. NOODT's Treatiſe, *De Juriſdict. & Imperio*, Lib. i. Ch. xiii.

[5] This is what the Emperor *Conſtantine* expreſly ſpeaks of, in this Law quoted by Mr. HERTIUS: *Inter æquitatem juſque interpoſitam interpretationem nobis ſolis, & oportet, & licet inſpicere.* Cod. Lib. i. Tit. xiv. *De Legibus, &c.* Leg. i. See the preceding Chapter, § 21. Note 5.

[6] So the *Digeſts* ſpeaks, *Semper in obſcuris, quod minimum eſt, ſequimur*, Lib. i. Tit. xvii. *De Div. Reg. Jur.* L. ix.

[7] See what I have ſaid, with regard to the Diſputes about the Succeſſion to a Crown, on *Grotius*, Lib. ii. Ch. vii. § 2. Note 5.

[8] So the *Digeſts* appoint, *Exitus controverſiæ poſſeſſionis hic eſt, tantum, ut prius pronunciet judex, uter poſſideat: ita enim fiet, ut is, qui victus eſt de poſſeſſione, petitoris partibus fungatur, & tunc de domino quæratur.* Lib. xli. Tit. ii. *De adquirendâ, vel amittendâ poſſeſſione*, Leg. xxxv. Beſides, as there are ſometimes great Preſumptions for one of the Parties, Equity requires, if he hath been, for Example, diſpoſſeſſed by an unjuſt Force, he ſhould be again put in Poſſeſſion without a ſtrict Examination of the Petitioner, which may be long and intricate, that the Detainer, during that Time, may not enjoy peaceably the Fruits of his Force, and the Advantages of the Poſſeſſion. See Mr. TITIUS's *Obſerv.* on LAUTERBACH, *Obſ.* 1071.

the Quarrel, to endeavour to bring it to an amicable Compoſition. Beſides, it is frequently the Intereſt of a Prince, to prevent War from breaking out between Nations; for ſome Sparks of the Fire, kindled in his Neighbourhood, may poſſibly reach him; and, beſides, it may be dangerous for him to have both, or either of the Parties entirely ruined; and therefore, as he values his own Safety, he ought to endeavour with all his Power to hinder the Flame from coming to a Head. And the more earneſtly ought *Chriſtians* thus to labour in compoſing Differences, becauſe even the *Alcoran*[a] (how ſenſleſs ſoever it be in other Things) does wiſely in commanding, that if two *Mahometan* Nations go to War, the reſt ſhall interpoſe, and force the Aggreſſor to make Satisfaction, and after that oblige both to live in Friendſhip and Amity for the future.

'Tis certain, that if it be the Intereſt of ſeveral to have the Quarrel made up, they may enter into Compact jointly to labour for Peace; and if their Endeavours ſhould prove unſucceſsful, they may then mutually preſcribe to one another, how far each ſhall make himſelf a Party in the War. But this only, in caſe none of them has any Pre-engagement upon him to aſſiſt either of the Parties, in caſe of War; for ſuch an Obligation cannot be limited by a Treaty made afterwards with a third Perſon.

Moreover, two or more, whom it concerns to have an End put to the War, after having weighed the Pretenſions of each Side, may lawfully agree upon what Terms a Peace ought to be concluded, and then offer them to the Parties with a *Manifeſto*, that they will join Forces againſt him that refuſes them. For a Prince does not, by this Means, obtrude his *Arbitrage* upon another againſt his Will; nor decides another's Quarrel by his own Authority (both which are Encroachments upon the Liberty of Nature) nor are thoſe Terms offered to the Parties ſo, as if they were obliged to comply with them. But ſince, by the Law of Nature, a Man may join Forces with him, who, he thinks, has received an Injury, eſpecially if the Conſequence of it is likely to redound to his Damage; by ſuch a Method as this he openly declares for Equity and Peace, that he is deſirous others would act fairly, and that he is not willing to enter into a War, before the adverſe Party has rejected the Propoſals of Peace[b 1].

And this ſort of Mediation is the more commendable, if it puts an End to a War, that would prove deſtructive to one or both Parties; yet he, who makes himſelf a *Mediator*, ſhould take care that he be able to compel, by Force, that Party which refuſes to ſtand to his Determination[c].

VIII. How the Form and Proceſs of a Debate before an *Arbitrator* is to be managed, common Senſe will beſt direct, according to the different Circumſtances of the Thing; for it would be impertinent to give tedious Directions how each Party ought to open his Cauſe, how to ſtate the Queſtion, how, after the Arguments on both Sides have been weighed, the Sentence ought to be pronounced: We need only obſerve, that if the Pretenſions on one Side cannot be made out but by Deeds, and they happen to be loſt, the *Arbitrator* has nothing to do, but, with the Conſent of the other Party, to give him his Oath[2]: I ſay, *with the Conſent of the other Party*; for elſe, in the Liberty of Nature, no Man is obliged to put the Iſſue of his Cauſe upon another Man's Conſcience. It is, alſo, in the Power of the Parties to refer themſelves to the Deciſion of a Lot, or a [3] Duel, as has formerly been practiſed among many Nations.

However, I do not ſee how the [4] Loſs of my Deeds can extinguiſh my Right; indeed I cannot have Juſtice done me in the civil Court, being not able to produce ſufficient Evidence; but, in the Liberty of Nature, 'tis enough to juſtify me in the Proſecution, if I be fully convinced of my Right, though I be not able to make out my Pretenſions to another[d].

IX. This Arbitrators have in common with Judges, that, in the Examination of Matters of Fact, they ought to ſhew themſelves equal to the bare Aſſeveration of each Party, *i. e.* when they contradict one another, to believe neither. But when Deeds[e], Arguments, and undeniable Inſtruments cannot be produced, they muſt then give Judgment according to the Teſtimony of Witneſſes[5].

And theſe Witneſſes ought to ſhew themſelves indifferent towards either Party, and not to let Favour, Hatred, or Revenge weigh more with them than their Conſcience[f]. *Thuanus*[g] relates, that heretofore in *Great-Britain* an *Engliſh* Man could not be a Witneſs againſt a *Scot*, nor a *Scot* againſt an *Engliſh* Man, by reaſon of the Enmity between the two Nations: But *Cambden*[h] tells us, that this obtained only between the bordering *Scots* and *Engliſh*; ſo that if never ſo many *Engliſh* Men ſhould, with their open Eyes, ſee a *Scot* commit Murder, their Teſtimony would ſignify nothing, unleſs ſome *Scot* or other teſtified the ſame Thing.

And therefore as my Adverſary may refuſe to admit of my near Relations as Witneſſes[i]; ſo may I except againſt my profeſſed Enemies. Indeed ſometimes Relations are excuſed upon a Principle of Humanity, for fear they ſhould be forced to

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[a] *Cap. de Clauſtris.* [b] Vide *Livy*, Lib. xliv. Ch. xix. at the End. *Juſtin.* Lib. vi. Ch. vi. *Note* 1. [c] Vide *Vell. Patercul.* Lib. ii. Ch. L. *Livy*, Lib. ix. Ch. xiv. [d] Vide *Conneſtag. de Unione Luſitan.* Lib. v. p. m. 222. To this Purpoſe is that of *Quinctilian*, Declam. cccxii. *The Condition of Man is miſerable, ſince it ſeems neceſſary to have a Witneſs for every Thing; Truth has ſo little Power, and Faith ſo little Eſteem, as that ſcarce ſeems ſufficiently proved, which is atteſted by Two.* Vide *Suet. Galb.* Ch. vii.

[f] ——————— *cum ſint præmia falſi*
Nulla, ratam debet teſtis habere fidem. *Ovid Triſt.* Lib. iii. El. x. ver. 35, 36.

Add. *Lex Wiſigoth.* Lib. ii. Tit. iv. Ch. xii.
[g] *Lib.* L. [h] *Ad. Ann.* 1585. [i] V. *Ariſtot. Pol.* Lib. ii. Ch. vi.

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[1] The Words of VELLEIUS PATERCULUS are, *Feſtinationem itineris ejus* [Cæſaris] *aliquandiu morata Maſſilia eſt, fide major quam conſilio prudentior; intempeſtivè principalium armorum arbitria captans, quibus ii ſe debent interponere, qui non parentem turbare poſſunt.* Lib. ii. Ch. L. See Mr. BOECLER's Diſcourſe, entitled, *Quies in turbis*, which is the 34th of *Tom.* i. *p.* 996, &c.

[2] See *Lib.* iv. *Ch.* ii. § 21. aforegoing.

[3] See *Lib.* viii. *Ch.* viii. § 5. following; and *Grotius*, Lib. ii. Ch. xxiii. § 10.

[4] See *Lib.* iii. *Ch.* vi. § xvi. aforegoing.

[5] For as *Iſæus* ſays, *Orat.* vii. *p.* 504. 505. Ἁ τεκμήρια κρείττω τῶν μαρτυριῶν ἐστιν. "Arguments are better than Witneſſes." And in *Orat.* iii. he ſhews, That, in Matter of Inheritances particularly, *Deeds are preferable to Witneſſes.* Philo Jud. *de Decal. p.* 780. *Ed. Par.* "If Arguments and Writings be wanting, the Controverſy muſt be decided by Witneſſes." See *Lex. Wiſigoth. Lib.* ii. *Tit.* iv. *Ch.* iii.

offer Violence, either to their Affections, or to their Conſcience. And [1] therefore the *Roman* Law never obliged the Client to be Evidence againſt his Patron, nor the Patron againſt his Client [a]: But beſides this, there was another very good Reaſon why Servants ſhould not be allowed to give Evidence againſt their [2] Maſters [b]; for, as *Cicero* ſays, *If that which is done in our own Houſe, and among ourſelves, were permitted to be publickly expoſed and brought againſt us, the Maſter would be the Slave, and the Slave Maſter.* Indeed *Theodoric* [c] forbad the Abuſe of this Law by an Edict; for ſome bought up other People's Servants, who were conſcious of their Crimes, leſt they ſhould be brought as Evidence againſt them. Laſtly, it is very reaſonable, that [3] no Cauſe ſhould ſtand or fall by the Credit of any one ſingle Witneſs [d], not only becauſe one may more eaſily be deceived or corrupted than many, and there is no Falſhood ſo impudent, but may get the Aſſiſtance of one Witneſs [e]; but, alſo, becauſe an able underſtanding Judge may diſcover the Witneſſes to be falſe, by oppoſing to one another the Examinations of ſeveral [f], whereas one may eaſily be conſiſtent with himſelf; and although by this Means ſome Crimes muſt remain unpuniſhed in this World, and ſome muſt loſe their juſt Right, who perhaps have but one Witneſs to ſupport it; yet this Inconvenience is not ſo great, as if every one's Life and Fortune lay at the Mercy of any one Man's Impudence and Villany; for it is better that a few guilty Perſons ſhould eſcape Puniſhment, than that many innocent ſhould ſuffer [g].

Yet *Selden* [h] obſerves, that againſt a *Gentile* the *Jews* admitted of one Witneſs as ſufficient. And *Grotius* [i] takes Notice, that one Witneſs was enough, not to condemn, but to inform the Court, and, in pecuniary Matters, to put the Defendant to his Oath. At this Day, among the *Moors* the Evidence of two honeſt Men is ſufficient, but if the Witneſſes be ſuſpected, then twelve Perſons are required; for they think as much Credit may be given to twelve, let them be ever ſo profligate, as to two, be they ever ſo honeſt [k l]. The *Hebrews* admitted none to be Witneſſes, but ſuch as were of good Reputation; mad Men were excepted againſt, and Children, till they were thirteen Years of Age; and Thieves, even after they had made Reſtitution; thoſe too who lived by Gaming, and *Publicans* who exact more than their due, and ſuch as deal in thoſe Things which deſerve Stripes. Among the *Turks*, thoſe who have made a Pilgrimage to *Mecca* are equivalent to three Witneſſes [m]. [4] Add to this, that *one Eye-witneſs is worth ten that have the Fact by Hear-ſay only.* And therefore their Teſtimony is of no Weight which is built [5] upon the Authority of others.

But though the Oath of a Witneſs creates a great Preſumption of the Truth of what he aſſerts, yet, in the Law of Nature, nothing hinders but that a ſworn Witneſs may be convicted of Perjury; and, if he be ſo convicted, the Sentence founded upon his Teſtimony comes to nothing [n 6]: Yet it ſeems abſurd, that the Party concerned ſhould be permitted to make void the Evidence, by ſwearing on the other Side; for this would not only lay open a great Gap for Perjury, but, by reaſon of contradictory Oaths, the Controverſy would remain as uncertain as before. And therefore it is according to its uſual Silline[illegible] and Impiety, that the *Alcoran* [o] commands him who accuſes his Wife of Adultery, and has no Witneſs to prove it, to ſwear four Times, and the fifth Time to imprecate the Curſe of GOD upon himſelf, if what he affirms be not true. And on the other Side, it allows the Woman to be clear, if ſhe denies the Charge four Times upon Oath, and the fifth Time with an Invocation of the Curſe of GOD.

X. As for putting the Sentence of the Judge in Execution, we need not ſay much; for in a State of Nature, if a Man does not, of his own Accord, perform what is due to me, I may, by all the Power that I myſelf have, or my Friends can ſupply me with, force him to it. How far we may carry ſuch violent Proceedings ſhall be ſhewed more fully hereafter, when we come to diſcourſe

[a] *Plut. Romulo. Lex Wiſigoth.* Lib. v. Tit. vii. Ch. xi. [b] *Unleſs for Inceſt, as* Cicero *ſays,* Orat. pro Milone, *Ch.* xxii. [c] *Edict.* Ch. ci. And therefore *Ariſtotle, D. L.* does well call it a fooliſh Law. *If the Accuſer brings a Multitude of his Relations as Witneſſes, the Accuſed ſhall be found Guilty.* [d] *See* Numb. xxxv. 30. Deut. xvii. 6. *and* xix. 15. [e] *Plin. Nat. Hiſt.* Lib. viii. Ch. xxii. [f] Vide *Suſan Hiſt. v.* 51. [g] *Val. Max.* Lib. iv. Ch. i. § 10, 11. [h] *De Jure N. & G. ſec. Heb.* Lib. vii. Ch. vi. [i] *On* Deut. xix. 16. [k] *What Qualifications are neceſſary for Witneſſes, may be ſeen in* Lib. xxii. Tit. v. Lib. ii, iii. § 1, 2, 3, 4. 4, 5, 9, 14, 21, 23, 24. *D. de Teſtibus.* [l] *See above, in* B. iii. Ch. vi. § 16. [m] Vide *Chr. Richer. de moribus Turcarum.* [n] *The* Attick *Laws allow, that, after the Sentence, an Action of Perjury may be brought againſt the Witneſs, as is plain from* Demoſth. Orat. *in* Euergum, *in the Beginning. Add.* Plat. de leg. Lib. xi. *about the End.* [o] *Cap. de Lumine.*

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[1] There were, nevertheleſs, certain Caſes excepted, as well in criminal Caſes as civil See Mr. NOODT's *Probabilia Juris,* Lib. iii. Ch. v, vi. as, alſo, the Interpreters on CICERO's *Orat. pro Milone,* Ch. xxii.

[2] *Pro Rege Dejotar.* Ch. xi. *Lucian* in *Aſino.* Tom. ii. p. 80. Edit. *Amſt.* "Servants muſt needs know both the good and the "ill Things of their Maſters." There is ſuch another Paſſage in LYSIAS, *Orat. de ſacro Olivæ trunco Plaut. Bacch. Act.* iv. *Sc.* vi. *v.* 20, 21. "I know I am a Slave, and therefore I am ignorant of even that which I know." See a Paſſage in ISOCRATES TRAPEZ. *de fide quæſtionum, p.* 634, *&c.* and *Ariſtot. Rhet. ad Alex. Ch.* xvii. Hither may be referred the Hiſtory, or rather the Fable, of *Avicenna,* in *Gabriel. Sionit. de urbibus & moribus Oriental. Ch.* iii. See *Lex Wiſigoth. Lib.* v. *Tit.* iv. *Ch.* xiv. with which may be compared, *Ibid. Lib.* iii *Tit.* iv. *Ch.* x. and *Lib.* vi. *Tit.* iv. *Ch.* iii. and *Capitulare Caroli, Lib.* vii. *Ch.* cclxxx. Edictum Regis Theodor. *Ch.* xlviii, xlvi, ci.

[3] So the *Code* orders, *Et nunc manifeſtè ſancimus, ut unius omnino teſtis reſponſio non audiatur, etiamſi præclaræ curiæ honore fulgeat.* Lib. iv. Tit. xx. *De teſtibus,* Leg. ix. § 1. See, alſo, the *Digeſts, Lib.* xlviii. *Tit.* xviii. *De quæſtionibus,* Lib. xx.

[4] *Pl ris eſt oculatus teſtis unus, q:am auriti decem.* Plaut. Trucul. *Act.* ii. *Sc.* vi. *v.* 8. "The Ears are leſs faithful than the "Eyes." *Lucian de Domo.*

[5] Οὗ χάριν κὰ παρὰ τοῖς ἄριστα πολιτευομένοις ἀνεγέγραπται νόμος, ἀκοὴν μὴ μαρτυρεῖν, ὅτι φύσει τὸ δικαστήριον αὐτῆς πρὸς τὸ δικάζεσθαι ταλαντεύει. *Philo Jud. de Corrupt. Linguarum, p.* 340. *B. C.* Edit. *Paris.* "In a well regulated Commonwealth the Laws take Care, that "what is given upon Hearſay ſhall not go for Evidence. For ſuch a Teſtimony is naturally liable to Corruption. The Eye is ap"priſed of the Things themſelves, and in a Manner intermeddles with Buſineſs, and perceives all by Light, by which every Thing "is illuſtrated and diſcovered: but the Ear has leſs Credit, as having to do not with the Things themſelves, but with Rumours, "which do not always mind the Truth, *Id. de Judice. p.* 719.

[6] This had place, alſo, by the *Roman* Law, provided it appeared, that the Sentence was grounded upon a falſe Depoſition. See CODE, *Lib.* vii. *Tit.* viii. *Si ex falſis inſtrumentis, vel teſtimoniis, judicatum ſit.* DIDIER HERAULD, *De auctorit. rerum judicat.* Lib i. Ch. iv. § 7. But the ſame Law gave greater Force to an Oath, in another Caſe, where it ſhould have had leſs: for if the Perjury of a third Perſon, not concerned, was ſufficient to annul a Sentence, much more ſhould that of one of the Parties themſelves. And yet they eſtabliſhed a quite contrary Rule here; for though one Party might appeal from a Condemnation founded on the Oath of the other, which the Judge had required by his own Authority: Yet when the Parties mutually agreed to refer the Matter to an Oath, though the Perjury was diſcovered, the Deciſion was final. *Cauſſâ jurejurando, ex conſenſu utriuſque partis, vel adverſario inferente, delato & præſito, vel remiſſo, deciſa, nec perjurii prætextu retractari poteſt, &c.* COD. Lib. iv. Tit. i. *De rebus credit. & jurejurando,* Leg. i. See, alſo, DIGEST. Lib. xii. Tit. ii. Leg. xxxi. and the Commentary of Mr. NOODT, *p.* 288, *& ſeqq.* We ſhall find this Queſtion treated, with great Elequence, by the deceaſed M. *De Tourcil,* in his Eſſay *De Juriſprud. Quæſt.* xiii.

of

of War. Only here we may obſerve, that in ſuch an Execution I not only acquire the Property of the Thing adjudged to me, when by any Method whatſoever I have got Poſſeſſion of it; but moreover, if I cannot get Poſſeſſion of the Thing itſelf, I may ſeize upon any Thing of the ſame Value, the very Charges of the Execution being reckoned in, ſo as to become the rightful Owner of it[a]. Indeed the Goods of a Debtor, who becomes ſuch either by his own Contract, or by the Thing itſelf, or by his Injuſtice, are looked upon, in the Law of Nature, as tacitly mortgaged for the Debt; and, if it be not diſcharged, may be juſtly ſeized for it; nor is the bare Detention of the Thing enough for the Creditor, for that frequently has more Trouble than Profit in it; but he muſt, alſo, have full Liberty to diſpoſe of it as he pleaſes: For my Right is not ſatisfied, if inſtead of the Thing, with the Property of which I ought to be inveſted, I receive nothing but the Cuſtody of another Man's Goods; yet, in ſuch a Caſe, I ought to ſignify with what Deſign I make ſuch Seizure, whether in order to extort from the Debtor my Dues the ſooner, or to take the Goods thus ſeized upon in Part of Payment; indeed it ſeems but reaſonable to give the Debtor Liberty to receive his Goods, upon Payment of the Debt. But this Way of Execution is proper to the State of Nature, and has no Place in a civil Conſtitution[b].

[a] *For as* Grotius *obſerves*, Lib. ii. Ch. vii. § 2. *Expletive Juſtice, when it cannot get the Thing itſelf, demands an Equivalent, which morally ſpeaking is the ſame.* [b] Vide *Lib.* xli. *Tit.* ii. *Lib.* v. *D. de acquir. poſſeſſ.* Lib. xlvii. Tit. viii. Lib. ii. § 18. *D. de vi bonorum raptorum*, & Lib. iv. Tit. ii. Lib. xiii. *D. quod metus cauſa*, & Lib. xlviii. Tit. vii, &c. Lib. vii, viii. *D. ad L. Juliam de vi privata.*

BOOK VI.

CHAP. I.

Of *MATRIMONY.*

I. *The Coherence.*
II. *Matrimony the Propagation of Mankind.*
III. *Whether there be an Obligation to marry.*
IV. *A wandering Luſt oppoſite to the Law of Nature.*
V. *Mankind not to be propagated but by Marriage.*
VI. *What Obligation may be laid on Men to marry by the Laws of Nations.*
VII. *What it is by the Law of Nature*
VIII. *How far the Laws of Nations may order concerning Marriage.*
IX. *The diſorderly Marriages of the* Amazons.
X. *The Laws and Rights of a regular Marriage.*
XI. *Whence ariſes the Man's Power over the Wife.*
XII. *Whether it be beſtowed immediately by God.*
XIII. *Whether it neceſſarily implies a Power of Life and Death.*
XIV. *Whether Conſent, not* Bedding, *makes the Marriage.*
XV. *No Woman may marry more than one Huſband.*
XVI. *Polygamy in uſe among many People.*
XVII, XVIII. *Whether it be repugnant to the Law of Nature.*
XIX. *The true Nature of Marriage is for one Man and one Woman to be joined together.*
XX. *It is not lawful raſhly to part Man and Wife.*
XXI. *Adultery and wilful Deſertion make a Marriage void.*
XXII. *Whether an intolerable Ill-nature is a Reaſon for Divorce.*
XXIII. *The Opinion of ſome Men, about the Senſe of the Law of God about Divorce.*
XXIV. *Particularly of Mr.* Milton.
XXV. *Marriage requires ſuitable Qualifications of Nature.*
XXVI. *An Error concerning Matrimony.*
XXVII. *A married Woman cannot rightly marry another.*
XXVIII. *Marriages with near Kindred, why forbidden?*
XXIX. *How it comes to paſs that Men are aſhamed of their Genitals.*
XXX. *Of Nakedneſs.*
XXXI. *The original of natural Shame.*
XXXII. *Marriages between Parents and Children wicked.*
XXXIII. *The Opinion of the* Jews *about it.*
XXXIV. *Of the Marriages of Brothers and Siſters.*
XXXV. *Of the other Degrees forbidden.*
XXXVI. *Of ſecondary Wives.*

I. IT follows in courſe that we examine the Original and Nature of human Government, and that we [1] obſerve what Precepts of the Law of Nature and Nations do preſuppoſe it. But in as much as Government cannot otherwiſe be conceived than between ſeveral Perſons, and ſince the Holy Scriptures inform us, that in the Beginning GOD Almighty created one only human Pair, the original Parents of our Race; it may ſeem neceſſary, [2] before we proceed in our Enquiry

[1] The Connexion is ſomething different, and perhaps better in his Abridgment *of the Duties of a Man and a Citizen*, Lib. i. Ch. ii. where the Author follows the Notion, which he had before propounded: Lib. i. Ch. i. § 7. and ſays, That he paſſes to the Conſideration of the *Acceſſory States*; *i. e.* to them which are conſequent upon ſome human Act, which he reduces to four: *Marriage*, the *Relations* of *Father* and *Son*, *Maſter* and *Servant*, and the *Members* of a *State*. The *Stoics* diſtinguiſhing, alſo, the *Relations* founded in Nature, and thoſe which ariſe otherwiſe, and which they called *Acceſſory*, σχέσεις φυτικαὶ καὶ ἐπίθετοι. See ARRIAN, *Diſſert. Epictet.* Lib. ii. Ch. iv. p. 168, and Lib. iii. Ch. ii. p. 245. *Edit. Colon.* 1595. as, alſo, MARC. ANTONIN. Lib. i. § 12. with *Gataker*'s Notes.

[2] PLATO ſays, That if we will make good Laws, we muſt begin to regulate Marriages well. Γαμικοὶ δὲ νόμοι πρῶτοι κινοῦσι τιθέμενοι, καλῶς ἂν τίθεσθαι πρὸς ὀρθότητα πάσῃ πόλει. De Legib. Lib. iv. p. 835. *Edit. Wech. Ficin.* See alſo *Dion. Halicarn. Antiq. Rom.* Lib. ii. Ch. xxiv. p. 91. There is a Fragment of *Hierocles*'s, which deſerves to be recited here, where that Philoſo-

Enquiry about civil Power, to conſider the Relation of Matrimony; which being the Source of private Families, does, by conſequence, ſupply Matter for the compoſing of all Sovereignties and States. For as the Body of Man is made up of divers Members, each of which conſidered by itſelf, hath, likewiſe, in ſome ſort the Appearance of a Body; ſo States are formed out of leſſer Societies, of which ſome are called Simple and Primary, others Compound, and as it were Collegiate. Of the firſt Sort are three, according to the threefold Power of a Huſband, of a Father, and of a Maſter. And theſe bear the Name of Simple, not becauſe they conſiſt of no more than two Perſons, as ſome maintain [a], but becauſe they are not compounded of inferior Societies. For why may not one Father have more Children, and one Maſter more Servants, and yet the Societies thus conſtituted be as truly ſimple, as if each Father had but a ſingle Child, each Maſter but a ſingle Servant [b]?

II. To go on then; ſo ſoon as Man was rendred obnoxious to Mortality, leſt the Duration of ſo noble a Species ſhould be confined to a ſingle Age, or ſhould require the conſtant Miracle of new Creations to preſerve it in Succeſſion, it pleaſed the moſt wiſe GOD to provide againſt theſe Inconveniences [c], by enduing the two different Sexes with a natural Power of Propagating their Kind. And leſt they ſhould forbear ſo neceſſary a Work, either out of Negligence, or upon Apprehenſion of the great Pain of Bearing, and the great Trouble of Educating their Offſpring; he implanted in each Sex a moſt paſſionate Love, a moſt ardent Propenſion towards the other, with a moſt deep and tender Affection for their common Iſſue; that ſo they might not only willingly, but joyfully contribute their Service to the Preſervation and the Continuance of human Race [d].

III. The firſt Point of Enquiry concerning Matrimony muſt be, Whether Men, in all reſpects fit for ſuch a Condition, lie under any Obligation of entering upon it? For about this Action, as, likewiſe, about others, to which Men are inclined by a natural Appetite, as Self-preſervation, and the Love and Education of Off-ſpring, many have raiſed a Scruple, as if they were not under the Care and Cognizance of the Law of Nature. For, ſay theſe Authors, what need was there of a farther Engagement to ſuch Performances, as the ſenſitive Appetite, and Inſtinct did, with ſufficient Strength, incite and drive us to before? But indeed their Dependence on natural Inſtinct is ſo far from proving them to be uncommanded by the Law of Nature, that it rather argues a more peculiar and more earneſt Care in Nature to have them obſerved with the utmoſt Strictneſs, as the immediate Cauſes of the Safety and Welfare of Mankind; whilſt diſtruſting, as it were, the bare Force of Reaſon, ſhe aſſiſts and ſeconds it with ſo violent an Inſtinct, that Men cannot, without great Difficulty, bend the contrary Way [d]. Where ſhould we find a Man [z] who would venture the common Vexation of Children, were he not led to deſire them, as well by a natural Inclination [e], as by the ſober Advice of Reaſon? eſpecially ſince the Means of obtaining them are ſuch, as would appear both tedious and deſpicable to a wiſe Man, unleſs attended with ſome delightful Charm [f]? We acknowledge that there is a great Difference between *Inſtinct* and *Reaſon*, and that in moſt Caſes thoſe Powers take quite contrary Roads; and that therefore the Licentiouſneſs of the former is to be bridled, and controlled by the Authority of the latter; which to compaſs and effect is an Argument of a great and worthy Soul. But although *Inſtinct* hath not in itſelf the Force of an *Obligation*, yet it many Times happens, that we may, by ſome ſuperior Engagement, be obliged to undertake a Performance which bare Inſtinct before inclined us to.

And hence we may infer the Falſeneſs of that Poſition [g], which aſſerts, that a Mother who kills her Child to avoid publick Infamy, and ſo ſtifles her Inſtinct of natural Affection, by another Inſtinct of Averſion to Shame, is guilty of a Sin againſt the Law of Nature. For the Infant's

[a] *Vid.* Joh. Frid. Horn. *de Civitate*, Lib. i. Ch. i. § 2. [b] In beginning thus with Matrimony, PLATO himſelf is our Guide and Director. Let us hear his Managers of the Queſtion. LL. *Lib.* iv. Athen. *Come, tell me, by all that's Good, what Point ought firſt to fall under the Legiſlator's Care? Will not Nature teach him to ſettle, before all Things, by good Laws the Affair of Generation and the Origin of Mankind?* Clin. *Yes no doubt.* A. *But the Affair of Generation takes its Riſe from the Union and Community of Wedlock.* C. *It doth ſo.* A. *Why then if Nuptial Laws be in the firſt Place eſtabliſhed, they cannot but have a good Influence on all the future Regulations of the State.* [c] My Lord BACON, *De Augment. Scient.* Lib. vii. Ch. ii. obſerves, that amongſt Animals the Pleaſure of Generation is greater than that of Feeding.

Providit ille maximus mundi parens
Cum tam rapaces cerneret fati minas,
Ut damna ſemper ſobole repararet nova.

The wiſe Creator knew the World was frail,
And order'd quick Succeſſion to repair
Still with new Race the Breaches made by Fate.

——— *Cœlibem vitam probet*
Sterilis juventus; hoc erit, quicquid vides,
Unius ævi turba.

——— Let our barren Youth
Experience their miſtaken Chaſtity,
And all you ſee muſt prove a ſhort-liv'd Crowd,
A People of a ſingle Age ———

Senec. *Hippol.* v. 465, *&c.*

[d] *Add.* Oppian. *Cynæget.* Lib. iii. v. 107, *&c.* Halieut. *Lib* i. *v.* 702, *&c.* [e] *Vid.* Euripid. Medea, *v.* 1090, *&c.* Hyppol. *coron.* v. 616. [f] *Add.* Val. Max. *Lib.* vii. *Ch.* ii. § 1. *Extern.* Montagne *Eſſays*, Lib. iii. Ch. v. p. m. 137. Cartes *de Paſſion. Art.* xc. [g] *Vid.* Granſwinkel *ad* Grot. *Lib.* i. *Ch.* i. § 11.

ſopher ſays, That nothing is more neceſſary to be treated on than Marriage, becauſe Mankind is born for Society, and Marriage makes the firſt and moſt ſimple of all Societies; for, adds he, there cannot be a City without Families, nor can any Family be compleat, unleſs the Head of it be married. Ἀναγκαιότατός ἐστιν ὁ περὶ τοῦ Γάμου λόγος· Ἅπαν μὲν γὰρ ἡμῶν τὸ γένος ἔφυ πρὸς κοινωνίαν. Πρώτη δὲ καὶ σχεδιαστάτη τῶν κοινωνιῶν, ἡ κατὰ τὸν γάμον. Οὔτε γὰρ πόλεις ἂν ἦσαν, μὴ ὄντων οἴκων· οἶκός τε ἡμιτελὴς μὲν τῷ ὄντι ὁ τοῦ ἀγάμου. τέλειος δὲ καὶ πλήρης ὁ τοῦ γεγαμηκότος. *Hierocles* De Nuptiis apud Stob. Serm. lxv. p. 300. *Ed. Hier. Needham.*

[z] Some Divines having quarrelled with our Author for what he ſays here, he anſwers them thus in his *Specimen Controverſiarum circa jus Naturale, &c* Ch. iii. § 7. As God, who knows all Things, foreſaw that Man would inevitably become ſubject to Death, ſo he diſpoſed Things by this infinite Wiſdom from the Beginning after this manner: That the Diverſity of Sexes ſhould be of Uſe both in the State of Integrity, and of Sin: In the State of Integrity, it was to raiſe up an holy Seed, to increaſe the Number of the Worſhipers of GOD; but after they had ſinned, it was to propagate a corrupt Race, that Death, which is the Conſequence of Sin, might not quite deſtroy Mankind in the Space of one Generation only; the Creator not judging it fit to form a new Race of innocent Men, and chooſing rather, that the Earth ſhould be inhabited by a corrupt Generation, than remain a Deſert.

[z] And would not the Women alſo reject it on their Part for many Reaſons? See Mr. BAYLE in his News Letters upon Mr. P. MAIMBOURG's Critical Hiſtory of *Calviniſm*, Let. xvi. and Mr. LOCK's *Eſſay upon the Human Underſtanding*. Lib. ii. Ch. xxi. § 34.

Life

Life was guarded by that Law, as well as by the Inſtinct of the Mother; and it was her Duty to have known, that her Diſgrace was an Evil which ought not to have been weighed againſt the Death of an Innocent, brought into the World by her free Conſent. If the Care of her Reputation was dearer to her than the Pleaſure of being a Mother, ſhe ought to have conſidered this before ſhe changed her pure and ſpotleſs Condition. But afterwards, it would be barbarous Injuſtice to conceal the Sin of the Parent by ſacrificing the Child.

When Marriage is once contracted, in as much as the Gift of Fruitfulneſs is not conferred by human Power [a], a greater or a leſſer Number of Children equally anſwers the Obligation of *Nature*. Nor ſhould the Wife's Barrenneſs raiſe any Scruple in the Huſband, as if he had been wanting in his Duty to the World [b].

IV. To carry on our Enquiries as clearly as may be, this, in the firſt Place, we take to be moſt evident, that all thoſe impure Pleaſures are repugnant to the Law of Nature, which aim at no other End than the Satisfaction of Brutal Luſt. For the more warmly the Appetite of Love ſtirs in human Breaſts, the more is Nature and Reaſon concerned to provide, that the Irregularities of its Motions do not prejudice that *comely Order*, which is the very Life of Society; and that it be rather made to contribute to the Maintenance of Decency and Peace. Whence appears the moſt deteſtable Sinfulneſs of thoſe Pollutions which we ſo juſtly call *Unnatural* [1].

But the Sin of Uncleanneſs is not confined to thoſe groſs Degrees; many grievous Violations of *Chaſtity* there may be in what we are wont to term the ordinary Way of Nature; and theſe happen as often as we purſue our Pleaſure, without regarding the only juſt End of it, the due Conſervation of our Race. It hath indeed been aſſerted, that many Nations of old thought it a Part of natural Liberty to proſecute an amorous Entertainment, without being [c] tied by the Rules of matrimonial Strictneſs. But it is ſufficiently manifeſt, that if all Men ſhould make a conſtant Uſe of this irregular Freedom, human Society could not long ſubſiſt, either in a graceful, or in a quiet Condition [3]. And therefore, according to Biſhop *Cumberland*'s moſt true Rule, [d] *That in which it is impoſſible for all Men to agree cannot be according to right Reaſon.*

Nor was the Command of Natural Law, as to this Point, ſo quite worn out amongſt thoſe very

[a] *Geneſ.* xxx. 1, 2. [b] *Senec.* Lib. ii. Cont. 13. *Fruitfulneſs doth not come at our Pleaſure, nor at the Time fixed for it in our Accounts; Nature is abſolutely at her own Diſpoſal, and not tied up by human Laws: Sometimes ſhe haſtens and outruns our Wiſhes; ſometimes ſhe proceeds ſlowly, and diſappoints them with her Delay. Nature doth not work by Form, nor is Chance confined to Rules and Preſcriptions. The Law may appoint a ſet Day, but Nature takes no Notice of the Limitation.* [c] Thus Mr. *Selden, De J. N. & G. ſec. Heb.* Lib. v. Ch. iv. ſhews from the *Jewiſh Rabbies*, that before the *Moſaical* Law it was allowable for a Woman, not yet married nor betrothed, to beſtow herſelf, either *gratis*, or upon Conſideration of a Reward, without the Confinement of Cohabitation. Whereas the ſucceeding Inſtitution abſolutely forbid circumciſed Perſons to uſe any Community of Bed, without entering on a married State: though if this were practiſed between a circumciſed Perſon and a Heathen, it was, in ſome Caſes, adjudged lawful. To which purpoſe they cite, *Deut.* xxiii. 18. *Levit.* xix. 29. *Geneſ.* xxxviii. 14, *&c. Add.* Grot. *ad* Geneſ. xx. 9. The Reaſon given by *Maimonides* for this Prohibition is, that the Contentions and other Evils, uſually occaſioned by theſe irregular Liberties, might be avoided, and that Good of certain Notes and Diſtinctions of Families procured. 'Tis not neceſſary to appeal to the Teſtimony of Heathen Writers, yet ſee *Epict.* Enchir. *Ch.* xlvii. Plaut. Curcul. *Act.* i. *Sc.* i. *v.* 33, &c.

PH. *Quin leno hic habitat.* PAL. *Nemo hic prohibet nec vetat,*
Quin quod palam eſt venale, ſi argentum eſt, emas.
Nemo ire quenquam publica prohibet via,
Dum ne per fundum ſeptum facias ſemitam.
Dum tete abſtineas nupta, vidua, virgine,
Juventute, & pueris liberis; ama quod lubet.

PH "As I take it, here lives my worthy Procurer. PAL. "We have a fair Market; if you bring Money in your "Pocket, you are free to buy any Thing but prohibited Goods. "Nobody hinders you from travelling in the High-way, ſo "long as you don't break Hedges and Incloſures: and, in the "ſame Manner, ſo long as you refrain from Wives, Widows, "Virgins, Youth, and Freemen's Son's, you may e'en love "as you liſt.

[d] Of the Law of Nature, *Ch.* v. § 46.

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[1] Pliny ſpeaks of the two Sorts of infamous Copulations, as well as of the Abortions which Women cauſe by Medicines, to hide their unchaſte Lives, as Crimes unnatural, and more than beaſtly. *In hominum genere maribus diverticula veneris excogitata, omnia ſcelere naturæ; fœminis vero abortus. Quantum in hâc parte multò nocentiores, quam feræ ſumus!* Nat. Hiſt. Lib. x. Ch. lxiii. ſee *Phocylides, Æſchines's Orat. in Timarch. Dio Chryſoſtom. Orat. de Pulchritud Sadder, Port.* 9. *apud* Tho. Hyde, Martial Lib. i. Epig. xci. In *Peru* (as *Garcilaſſo de la Vega* reports in his Hiſtory of the *Yncas*, Lib. iii. Ch. xiii.) the Name of Sodomy was ſo abominable, that if any one in the Heat of a Quarrel reproached another with that Vice, he lived in Diſgrace all his Days: Yet it was ſo common among the *Greeks*, that *Plato* (*de Legibus*, Lib. vii.) found it very hard to baniſh it out of his *Commonwealth*. The *Turks*, alſo, who otherwiſe deteſt it, allow it with ſuch fair Boys as they have made their Priſoners, as if War licenſed them to do what they pleaſed with them. *Scipio Ammirat. Diſc.* Lib. v. Ch. v.

[2] Mr. Barbeyrac's ſecond Note upon this Section is chiefly contained in the Letters [d] and [e] following.

[3] The Matter is clear in itſelf, and will not bear Enlargement. Mr. Thomasius in his *Juriſpr. Divin.* Lib. iii. Ch. ii. had granted, that by the Law of Nature only it could not be proved that Beſtiality, Sodomy, wandering Luſts, *&c.* in a Word, all Uſe of the natural Parts only for Pleaſure, is unlawful abſolutely; and that, to prove it a Crime, recourſe muſt be had to the Laws of God which are purely poſitive and general: but that able Lawyer afterwards rectified his Opinion by diſtinguiſhing what is juſt from what is honeſt, and ſo in the main agreed with our Author. See his *Fundamenta Jur. Nat. & Gent.* Lib iii. Ch. ii. § 6, 7, 21, *&c.* We may, nevertheleſs, extend too far what is here ſaid of Pleaſure, and the natural Deſire which leads the two Sexes to unite together. See my Remarks on the *Abridgment of the Duties of a Man and a Citizen*, Lib. ii. Ch. ii. § 2. *Note* 1. I am glad I can ſupport my Opinion with ſo great an Authority as that of Mr. *Wollaſton*, who, in his *Religion of Nature delineated*, has theſe Words, *The End of Marriage is the Propagation of Mankind, and joint Happineſs of the Couple intermarrying, taken together: Or the Latter by itſelf.* "The Difference of the *Sexes*, with the ſtrong Inclination they have each to the Enjoyment of the "other, is plainly ordained by the Author of Nature for the *Continuance* of the *Species*, which without that muſt be ſoon extinguiſhed. And though People, when they marry, may have, many Times, not ſo much the Increaſe of their Family in their "Deſign or Wiſhes, as the *Gratification* of an importunate Appetite; yet, ſince Nature excites the Appetite, and that tends to "this End, *Nature* (or rather its great Author) may be ſaid to make this the End of the Marriage, though the Bridegroom and "Bride themſelves do not." He adds, That it is remarkable, that Perſons marry always with a View of being more happy than they were when ſingle. If it be aſked, Whether the Proſpect of this common Happineſs can authorize the conjugal Union, ſuppoſing the Propagation of the Species out of the Queſtion? Mr. *Wollaſton* decides in the Affirmative. And ſhews, that he is not ſingle in this Opinion. *Plato, Ocellus Lucanus*, and *Clemens Alexandrinus*, whoſe Words he quotes, carry Things ſo far, againſt Marriages which are unfruitful, as to rank them with the greateſt Crimes. The *firſt*, compares them to the Action of thoſe imprudent Labourers, who cultivate Lands naturally barren. The *ſecond*, informs us (as from the Author of Nature himſelf) that the Organs, Faculties, and Inclinations which adminiſter to Love, are not at all given us for Pleaſure, but only for the Preſervation of our Kind. On the *laſt*, more rigorous ſtill, gravely affirms, *That conjugal Pleaſure, conſidered in itſelf, is criminal.* His Words are as follows: Φιλὴ γὰρ ἡδονὴ, κἂν ἐν γάμῳ παρεληφθῇ, παράνομός ἐστι καὶ ἀδικος. καὶ ἄλογος. *Clem. Alexandr. Pædagog.* Lib. ii. Ch. x. p. 225. *Edit. Oxon.* The Paſſage of *Ocellus Lucanus* is found in *Ch.* iv. of his ſmall Treatiſe of the *Univerſe*, p 531. *Edit. Amſt.* That from *Plato*, is found in the viiith Book. *De Legibus*, p. 839. A. *Edit. Hen. Steph.*

Nations

Nations, which allowed a publick Security to ſuch Practices, as that they really approved of what they permitted, or abſolved the Actors from all Marks of Diſgrace. 'Tis a famous Aphoriſm of *Ulpian*, that a *Whore is Vile*, or Wicked, *by her Profeſſion*; and the *Romans* thought it a ſufficient Puniſhment to theſe looſe Ladies, to make them ſhew their Licenſe in Publick before the Magiſtrates, and thus to ſtand infamous on Record [a]. The Principle then, on which thoſe States and People proceeded, who connived at ſuch youthful Diſorders, was, by the Means of theſe publick Traders in Lewdneſs, to preſerve and guard the private Chaſtity of Virgins and of honeſt Matrons. In warmer Climates, the Extravagance of wild Gallants [b] might have injured the moſt ſacred Modeſty, had it not been diverted by a Tribe of forward Nymphs, who were proud of their Addreſſes, and met them in their irregular Deſigns. This, however, is manifeſt, that the ſame Nations which extenuated rather than defended theſe Immoralities, as no more than harmleſs Failings, and pardonable Slips of Youth, did yet, at the ſame Time, aſſert in the higheſt Degree, the juſt Honour of the Marriage-bed, and eſteemed Faithfulneſs to it, as a Mark of ſingular Sanctity and Goodneſs.

V. A diligent Obſerver of human Nature will eaſily diſcover how extravagantly unreaſonable it is, that Mankind ſhould be propagated by Chance-beds, without Confinement, and Rule [i]. Such a Life, they tell us, the People of *Attica* led before the Time of *Cecrops*, cohabiting like a Herd of Beaſts, under no Regard to Decency or Diſtinction. Whoever was made a Mother by ſo wide a Proviſion, preſented her Medly Off-ſpring to any one of the many Fathers who would be pleaſed to own and to accept it. When *Cecrops*, by the Inſtitution of Matrimonial Laws, had baniſhed this barbarous Cuſtom, he paſſed, in Fables with the common People, for a kind of an *Hermaphrodite*; either becauſe he taught them to know their Fathers, as well as their Mothers; or becauſe, by the conjugal Tie, he incorporated, as it were, two in one [c]. Who is there that can pretend to be inſenſible how little Difference would be left between Beaſts and Men, ſhould the Ordinances of Marriage be univerſally cancelled and repealed? Indeed the Beaſts would then have the Advantage of the Compariſon [d]. They are frequently obſerved to uſe ſome ſort of *Conſtancy* in their Way of Love, and ſome Semblance of conjugal Fidelity. And if the fair Miſtreſs raiſe a Quarrel in the Herd, 'tis only at certain Seaſons of the Year, when they feel a Warmth beyond their ordinary Temper. But Men would be perpetual Rivals; and human Race would be confounded and deſtroyed by ſo wild a Method of its Preſervation. Again, How miſerably weak and helpleſs would be the Condition of the breeding Mothers? Or, if they weathered out that Danger, how great would be the Trouble, how high the Charges of Education, above their ſingle Strength, or ſingle Fortune? It is plain, the Men would not be overforward to aſſiſt them under either of theſe Burthens; not in the Firſt, unleſs they knew themſelves to have been the Cauſe of their Pain; not in the Second, unleſs they could be aſſured, that the Child to be provided for was their own. And 'tis not likely, that they ſhould be able to obtain any Certainty in theſe Points, without the regular Reſtraints of Marriage. For what *Ariſtotle* [e] reports of a Nation in *Africa* [f], where the Wives are held in common, but the Children diſtinguiſhed and appropriated, by the Likeneſs of Features, is at beſt a very deceitful Method. Though indeed *Theocritus* [g] makes the Tokens of an Adultreſs τέκνα ὄπωπ' ἐοικότα πατρὶ, *Children unlike the Huſband*; and *Horace*'s Wiſh for the *Roman* Chaſtity is, *Laudentur ſimili prole puerperæ*, "Let the Wo-"men deſerve Commendation, for picturing the "legal Father in the Child."

Laſtly, Since without Matrimonal Preſcriptions we cannot well ſuppoſe any ſuch Thing as Families, nor without Families any publick States; and ſince therefore the whole Order and Harmony of civil Life is founded on theſe Regulations, it is moſt clear that, were Men entirely releaſed from ſuch Bonds, they muſt live in an unſociable, ſeparate Condition, little better than Brutal. And therefore *Horace* ſhewed his true Judgment in deriving the Calamities of his Country:

Fœcunda culpæ ſecula nuptias
Primum inquinavere, & genus, & domos:
Hoc fonte derivata clades
In patriam populumque fluxit. L. iii. Od. vi. V. 17, &c.

Firſt thoſe Flagitious Times
(Pregnant with unknown Crimes)
Conſpired to violate the Nuptial Bed;
From which polluted Head
Infectious Streams of crowding Sins began;
And thro' the ſpurious Breed and guilty Nation ran.

My Ld. *Roſcommon.*

To all which Conſiderations we may add, that without a Succeſſor, in way of Marriage, no Man could be born to an Eſtate or Inheritance; and ſhould we take away theſe Advantages, human Life would be deprived of its chief Ornaments, if not of its neceſſary Supports. 'Tis remarkable what *Juſtin* [h] relates of the *Partheniæ* amongſt the *Spartans*; they were born, as the Irony of their Name imports, from promiſcuous and irregular Embraces, and being grown up to a Senſe of their Shame and of their Poverty, fearing to

[a] Tacitus *of* Viſtilia, *Ann. Lib.* ii. *Ch.* lxxxv. That Youth in *Quintilian* (Decl. xiv.) was arrived at the higheſt Pitch of Impudence, who forms a publick Accuſation againſt his Miſs, for giving him a *Potion* that ſuppreſſed his Love. Amongſt other of his Rants, this is one, *I had juſt enough to furniſh myſelf with a moderate and ſparing Meaſure of unforbidden Joys, ſufficient for the Neceſſities of Life. Therefore, inſtead of a Wife, I was content with a Miſtreſs, and with a ſingle Miſtreſs, which is a moſt certain Sign of Frugality, and good Management in Pleaſure.* [b] *V.* Cicer. *pro* Cælio. *Ch.* xvii. *&c. Epict.* Enchir. *Ch.* xlvii. *Add* Maſon. *in* Stobæus, *Serm.* VI. Grot. *in Math.* v. 27. The *Mahometans* allow Fornication with their Women Slaves; which the more virtuous *Indians* do, in all Shapes, and on all Accounts, deteſt. *Plutarch (de Virtut. Mulier.)* reports, that among the People of *Chios*, for the Space of ſeven hundred Years together, there was no mention made of Adultery, or any other unchaſte Practice; though the Iſland was famous for Beauties. [c] Athenæus, *Lib.* xiii. *Ch.* i. [d] Quintil. *Inſtit. Orat.* Lib. ix. Ch ii. "Though *Dido* in *Virgil* complains of her late unhappy Match, yet her real Thoughts could not but break out, and ſhe declares, "in the Midſt of the Lamentation, that a Life abſolutely without Marriage was the proper Condition of Beaſts, not of Men.

Non licuit thalami expertem ſine crimine vitam
Degere more feræ? Æneid. iv. 550.

[e] *Pol.* B. ii Ch. ii. [f] Who perhaps are the ſame that *Nicol. Damaſcen. (de Mor.* Gent.) calls *Limyrnii.* [g] *Idyl.* xvii. [h] Lib. iii. Ch iv.

[i] *Dionyſ.* Lib. xli. v. 382.

ſtarve at home through Defect of Paternal Fortunes, they were neceſſitated to leave their County, and ramble abroad in a Body, to force a Maintenance and a Seat [1].

VI. In as much then as it appears evident, beyond Diſpute, that, in order to the keeping up a comely and a regular Society amongſt Men, it is neceſſary, that the Propagation of human Kind ſhould be ſettled and limited by Matrimonial Conſtitutions; we are in the next place to enquire what Obligation particular Perſons, of proper Years, and Abilities, have, to engage in a married State. And here we may firſt take a View how the Matter before us hath been ordered by the Laws of People and Governments, and then how far it ſeems to be determined by the bare Law of Nature. It was the Doctrine of the antient *Jews*, as Mr. *Selden* [a] informs us, that by the Divine Precept of *Increaſe and Multiply*, all their Males were bound to Marry before they had compleated twenty Years; unleſs upon account of ſome natural Defect, or becauſe they had devoted themſelves to a Life of Chaſtity, and conſtant Study of the Law. And this Command they ſaid extended to all the Poſterity of *Noah*. They added, that he who buried his Wife, without ſeeing a Son and a Daughter (and thoſe as *Perfect by Nature* as their Parents) had not yet fulfilled the Precept. But that in caſe a Man's Son and Daughter were dead, and had left Children of both Sexes, the Grandfather was then free. That, otherwiſe, upon Defect of Iſſue of either Sex, Men were obliged to contract new Marriages, ſo long as their Age would give them leave. And therefore, that if a Man had either taken a barren Wife, or one that was not yet old enough to be a Mother, he did not anſwer the Law, unleſs he took another immediately capable of *Bearing*. *Leo Mutinenſis* [b] obſerves farther, that although the bringing of a Son and Daughter into the World, ſeemed to be ſufficient for the full Obſervance of that Divine Command, yet a Man of convenient Age and Strength was ſtill bound to ſeek a married Life, for the avoiding Fornication [c]. But whether this Injunction extended to Women, as well as to the Men, was a Point not very well ſettled and agreed amongſt them. It is moſt probable, that their Judgment was to this Purpoſe, that the Women were not indeed obliged to any determinate Time, becauſe it is not in their Power to marry when they will; but that upon the firſt fair Offer made them, they ſtood engaged to contribute their Aſſiſtance to the World. 'Tis a Saying among the ſame Doctors, that *He who neglects the Precept about the Multiplication of Mankind, ought to be looked upon as a Murtherer* [d].

Many other Nations have, in their publick Inſtitutions, declared themſelves to the ſame Purpoſe [e]. *Plutarch* recites a Law of *Lycurgus*, by which it was enacted, that old Batchelors ſhould be excluded from the ſolemn Sports and Dances of the Women; and that in the Winter Seaſon they ſhould go naked up and down the *Forum*, ſinging a Song in Diſhonour of themſelves, the Burthen of which was, that *They owned themſelves to be thus juſtly puniſhed, for diſobeying the Ordinances of their Country*. And that, beſides all this, they ſhould have none of thoſe honourable Marks of Reſpect and Duty paid them, which the younger *Spartans* were, otherwiſe, obliged to pay to the elder. Upon this laſt account *Dercyllidas*, a famous, but unmarried General, deſiring a younger Perſon, according to Cuſtom, to reſign his Seat to him at a publick Solemnity, the Youth refuſed, with this ſmart Reaſon, *Becauſe*, ſays he, *you have brought no Son into the World, who might hereafter give place to me* [f]. At *Rome* the *Cenſors* ſometimes impoſed a Mulct (for that Reaſon called *Uxorium*) upon ſuch Men as had grown old in a ſingle Life [g]. And good *Metellus* ſpeaks home to the Buſineſs, in *Gellius*, *Could we, my Countrymen*, ſays he, *do altogether without Wives, we need not give ourſelves theſe unneceſſary Troubles. But ſince Nature hath ſo ordered Matters, that human Life can neither be very free and eaſy with them, nor poſſibly ſubſiſt without them, we ought rather to conſult our perpetual Safety, than our preſent Conveniency* [h].

It follows, from the ſame Principles [i], that it

[a] *De* J. N. & G. *Lib.* v. Ch. iii. [b] *De rit.* Hebr. *p.* 4. Ch. ii. [c] Plato (*de LL. Lib.* xi.) delivers the like Opinion, and adds, *One of each Sex is the leaſt Number of Children that ought to paſs for ſufficient.* [d] Yet the Sect of the *Eſſenes* amongſt them utterly forſwore the Uſe of Women. *Vid.* Plin. *N. H.* Lib. v. Ch. xvii. Solin. Ch. xxxviii. [e] Varro, *in Leg.* Mænia *apud* Nonium *in* Eunuchare. *He that deſtroys his Country, his greater Parent, is moſt inexcuſably guilty: And this every one does ſo far as in him lies, who either diſables himſelf from being a Father, or defers to act as ſuch.* See the Sayings of *Muſonius*, *Hierocles* and *Antipater* in *Stob.* Serm. LXV. *Add.* Arrian. *in* Epictet. *Lib.* iii. Ch. vii. *J.* Pollux, Lib. iii. Ch. περὶ γάμων, mentions Suits at Law carried on at *Athens* and *Lacedemon*, againſt *Celibacy* and late *Marriage.*

[f] Μὴ μείνῃς ἀγάμως, &c. Phocylides.

To live unmarried is to die unmourn'd:
Add to your Race; ſee Nature's Gift return'd.

[g] Valer. Max. *Lib.* ii. *Ch.* ix. Feſtus *in* Uxorium, & *ibid.* Joſ. Scal. *Plutarch* reports the ſame in his Life of *Camillus*. [h] *Poſidonius* calls the *Myſians*, who admitted no Women amongſt them, Ἀβίους, *Men without Life*, Strabo, *Lib.* vii. *p.* 205. Of the *Lex Papia Poppeæ*, ſee *Lipſ.* ad *Tacit.* Lib. iii. Ann. Ch. xxv. & *Jacob. Godofred.* Which Law the *Chriſtian* Emperors repealed probably by Advice of the Church-men. *Vid* Lib. viii Tit. lviii. C. *De infirmand. pœn. cœlibat.* & Sozomen. *Lib.* i. Ch. ix. The Speech of *Auguſtus* in *Dion. Caſſius*, Lib. lvi. is remarkable on this Subject. *Ælian.* (*V. H. Lib.* vi. *Ch.* vi.) recites a Law of the *Spartans*, enacting, that "If a Man had increaſed the Commonwealth with three Children, he ſhould be releaſed "from keeping Watch; with five, from all publick Duties and Charges." See likewiſe a long Paſſage of *Hierocles* in *Stobæus*, Serm. LXXIII.

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[i] Servius (*ad* iii. *Æn. v.* 551.) & Lactantius (*de falſ. Relig.* Ch. xx.) vary ſomewhat in the Relation of this Story. Hither may be referred moſt of the common Arguments urged againſt PLATO's Community of Wives. *Add.* Stob. *Serm* LXV. "*Cabas*, King of *Perſia*, having, by a Publick Ordinance, commanded the promiſcuous Uſe of Wives and Women, his Subjects "roſe in Rebellion and expelled him the Kingdom." *Procop.* Hiſt. *Perſ.* Lib. i. Ch. v. *Agath.* Lib. iv. Plato *de LL.* Lib. iv. p. 835. *Every Man, who arrives at the Age of thirty Years, ought to chuſe him out a Wife; conſidering with himſelf, that Mankind is by a kind of natural Deſire prompted to a Purſuit of Immortality; there being no Perſon who is not ambitious of keeping a perpetual Name and Memory with ſucceeding Ages. Now the Way by which human Race obtains an endleſs Duration, is by leaving an uninterrupted Courſe and Series of Poſterity. It cannot but be highly criminal, for a Man to rob himſelf of Immortality through his own Default; yet whoever neglects the Affairs of Marriage and Iſſue, voluntarily throws away his Title to this invaluable Benefit.* CICERO (*de Finib.* &c. Lib. iii. Ch. xx.) obſerves, that, in order to a Man's living as his Nature directs and enjoins, it is convenient, that he apply his Mind to the Choice of a Partner, and the Deſire of Poſterity. PHILIP BALDEUS (*de Idolat.* Ind. Gent. *Part* ii. *Ch.* iii.) reports of the People of *Benin*, "That they look on it as the baſeſt Reproach to want Children: *Such a Perſon* (they ſay) *is not worthy to ſee a Man firſt in a Morning.*"

[i] See *Cod.* Lib. viii. Tit. lviii. *De infirmandis pœnis cœlibatus*, &c. & *Sozomen. Hiſt. Eccleſ.* Lib. i. Ch. ix.

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is ſinful and unjuſt to emaſculate Perſons; at leaſt, without their Conſent. *Domitian* forbad the Performance of this Operation by an expreſs Law [a]. After which, thoſe who had ſo ridiculous a Deſign on themſelves, or on others, were obliged to ask leave of the Emperor, or the Preſident of the Province [1]. Upon what account the Eaſtern Monarchs were ſo fond of employing Eunuchs in their neareſt Offices, may be ſeen in *Xenophon* [b]. To whoſe Reaſons, we may add this one farther, that the Prince could, without Envy or Offence, make himſelf Heir to theſe Childleſs Favourites, and ſo ingroſs all they had got in his Service [c]. Amongſt the *Jews*, an *Eunuch* was not permitted to be a Judge in any Caſe; upon the Opinion of their exceſſive Spitefulneſs and Cruelty. And, in the *Indies*, 'tis a common Saying, that *To caſtrate Beaſts make them more tame and humble; but the ſame Experiment tried on Men makes them more Inſolent and Intolerable* [d] [e].

Some obſerve, that *Eunuchs* were firſt made in thoſe Countries, where Polygamy was permitted; the Number of Men being ſuperior, or, at leaſt equal, to the Number of Women. Others maintain, that they owe their Original to the Right of War; when a Conqueror, ſparing the Lives of thoſe he overcame, thought fit to put them into this unmanly Condition, that, having loſt the Springs of private Intereſts and Affections, they might, with the more Security, be truſted in his Service [2].

VII. If we conſider barely the Force of *natural Law*, we ſhall conclude, that in as much as *Matrimony* is the great Source [3], and the main Foundation of a *Social* Life [f], Men are ſo far bound to enter upon it, as they ſtand engaged to all Duties neceſſary for the attaining of that End; yet Nature lays this Injunction on us in the manner of an Affirmative, Indefinite, Unlimited Command; ſo as not to oblige neceſſarily all Men, and at all Times; but requiring due *Occaſion* before it exacts our Performance. Now in fixing the *Occaſion* of Matrimony, we are not to reſt in the Fitneſs of Age and of Ability, but are, likewiſe, to ſuppoſe that the *Match* offered us, is anſwerable to our Birth and Condition, and that we have both competent Wealth to maintain, and competent Prudence to govern a Family [g]. The Laws of the *Iſlanders* prohibit a Marriage to Perſons of extreme Poverty [h]. Sometimes too it happens, that the Condition of the preſent Times, or the ſtrict Care of a Function incumbent on us, will not give us leave to think of changing our State of Life [i]. And therefore it is not only unneceſſary, but ſenſeleſs and ridiculous, that thoſe young Fools ſhould run a Marriage-hunting, who have neither Means nor Wit to keep a Family from ſtarving; and who, at the beſt, are only able to ſtock the Nation with a young Succeſſion of Beggars. Thoſe again deſerve not only Excuſe, but Commendation, who decline a married State, that they may, with more Eaſe and Opportunity, improve and cultivate their Minds, for the publick Service of the World. For ſince the two great Uſes of Matrimony are the Preſervation of Race, and the avoiding thoſe fouler Luſts which would ſtain and diſgrace human Society; ſo long as neither of theſe Ends is like to be prejudiced, we ought not to blame a Reſolution of ſingle Life in ſuch Perſons as probably foreſee, that they ſhall be able thus to do more good to their Country, and to Mankind, than in another Condition. If therefore a brave and generous Soul ſhould either be inſenſible of the idle Stings of Love, or able eaſily to maſter and ſuppreſs them [k], and, at the ſame time, capable of benefiting the World, otherwiſe than by its advancing its *Stock* and *Breed*; we cannot in Reaſon imagine, that Nature lays any Obligation upon him to let the Charms of the fair Sex hinder or divert his worthy Deſigns [l]: Eſpeci-

[a] *Vide* Sueton. Domit. *Ch.* vii. Statius, iv. *Syl. v.* 187, 188.

Qui fortem vetat interire ſexum. . Forbids the nobler Sex to feel Decay.

Add Martial. *Lib.* vi. *Ep.* ii. [b] Cyropæd. *Lib.* vii. *p.* 116. Ed. *H. Steph.* [c] Heliodor. Æthiop. *Lib.* viii. *in fin.* *The Eunuchs are the Ears and Eyes of the* Perſian *Courts; who having neither Children nor Kinſmen to engage their Minds depend entirely on him that employs them.* Claudian. *in* Eutrop. *Lib.* i.

——Eunuchus nulla pietate movetur,
Nec generi natiſve cavet.

——An Eunuch feels no Tie
Of Duty, Nature, or of Progeny.

[d] Heliodor. *Lib.* ix. *Eunuchs have ever a great deal of Jealouſy in their Temper; and therefore they make the better Keepers of Women; being then employed to hinder others from Pleaſures, which they are themſelves incapable of enjoying.* [e] *See* Grotius *upon* Deuteron. xxvi. 18. [f] Plat. *de Leg.* Lib. iv. p. 835. [g] Plin. *Lib.* i. Ep. xiv. *When I reflect on the common Cuſtom of the World, and the Laws of our State, which command us, in Marriage, to have a conſiderable regard to Wealth and Fortune, I think it is very proper to mention, that the young Lady's Father is Maſter of a very fair Poſſeſſion. And beſides this, the Hopes of a very fruitful Bed ought, in my Judgment, to go a great Way in determining our Choice, and to be reckoned amongſt the chief Conditions of a Bride.* Add. *Orat. M. Hortali. Tacit. An.* Lib. ii. Ch. xxxvii. [h] Arngrim. Joh. *Deſcrip. Iſland.* Ch. viii. [i] *See* 1 Corinth. vii. 26. [k] Ἐραστὴς τῆ μὴ ἐρᾶν, as *Philoſtratus* ſpeaks, Apoll. *T. Lib.* viii. Ch. iii. *A Lover of Abſtinence from Love.* [l] *Add.* Arrian *in* Epictet. *Lib.* iii. Ch. xxii. *p.* 311, 312. Ed. *Wolfii.* Corn. Nep. Epamin. *Ch.* x.

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[1] *Vid.* Caſaubon. *ad* Sueton. *Domit.* Ch. vii. & Juſtin. Mart. *Apol.* ii. *Add* Deuteronom. xxiii. 1. Joſeph. *Antiq.* Jud. *Lib* iv. Ch. viii. Lib. xxvii. § 28. *D. ad* L. Aquil. *Novell.* cxlii. & *ib.* Dion. Godofred. *Lib.* iv. § 2. *Lib.* v. *D. ad* Cornel. *de Sicariis.* Euſeb. *Evangel. Præp.* Lib. vi. Ch. viii. *In* Syria *and* Osroene *many caſtrate themſelves like the Prieſts of* Cybele. *But King* Abgarus *commanded the Hands of all thoſe, who had abuſed themſelves in this manner, to be cut off: after which Order, the Infamous Practice ceaſed in that Country.* Quintil. *Inſtit. Orat.* Lib. v. Ch. xii. *For my own part, when I contemplate Nature, there is no Man who ſeems not more fair and comely to me than our Eunuchs*; who are thus abuſed, purely to render them more beautiful. *Providence can never be ſo negligent of its Work, as to let Infirmity paſs for Excellency; nor can that which would be Monſtrous, if produced by Nature, be Handſome if produced by Art. Let this Cheat, this feigned Alteration of Sex, delight the Votaries of Luſt; yet Vice and Immorality will never be able to gain ſuch an Empire, as to make that Good, which they make Coſtly and in Requeſt.* How *Hermotius* thus revenged himſelf on *Panionius*, who had thus diſmembered him. See HERODOT. URANA.

[2] See BRISSON. *Select. Antiq. Jur. Civil.* Lib. ii. Ch. xxi. and Mr. BYNERSHOEK's *Obſervat. Jur. Rom.* Lib. iv. Ch. v. P. 355.

[3] CICERO fully owns it, and would have every wiſe Man to marry and have Children, as well as concern himſelf with the Government of the State. *Cum autem ad tuendos, conſervandoſque homines, hominem natum eſſe videamus, conſentaneum eſt huic naturæ, ut ſapiens velit gerere, & adminiſtrare Rempublicam, atque ut è naturâ vivat, uxorem adjungere, & velle ex eâ liberos.* *De fin. bon. & mal.* Lib. iii. Ch. xx. See alſo PLATO DE LEGIBUS, Lib. iv. p. 825. PYTHAGORAS ſays, that we ought to bring Children into the World, that we may leave after us new Adorers of God. Ὅτι δεῖ τεκνοποιεῖσθαι, δεῖ γὰρ ἀντικαταλιπεῖν τὸς θεραπεύοντας τὸν Θεὸν, Jambl. de Vit. *Pythag.* Ch. xviii. Num. lxxxiii. ſee alſo PLATO, ibid. Lib. vi. p. 773. as alſo HIEROCLES in *Stobæus. Serm.* LXV. & LXXIII. to engage Men to marry; and GATAKER on *Marcus Antoninus*, Lib. viii. § 31.

ally ſince there are ſo very few, who can pretend to this Gift of Chaſtity; ſo that the World is in no Danger of coming to an untimely End by their Reſolution. Much leſs ought thoſe Perſons to fear Reproach and Cenſure, who, having ſerved Mankind by a former Marriage, decline a ſecond Engagement for the ſake of their Children. Though, on the other Side [1], the Law of *Charondas*, in *Diodorus Siculus*, Lib. xii. Ch. xii. ſeems a little too hard, excluding all thoſe Men from the publick Councils of the State, who had brought a Mother-in-law into their Family. The Reaſon he gave for ſo ſevere a Decree was this, *He eſteemed it impoſſible, that a Man ſhould be able to adviſe well for the Intereſt of his Country, who had been ſo far from conſulting the Good of his own Children. If his firſt Marriage proved ſucceſsful, he ought to reſt ſatisfied with that Happineſs; if unfortunate, he could not be reckoned in his Wits, for running on a ſecond Danger.* But indeed, a ſecond Marriage does not always prove injurious to the Children of a former Bed. And as to the other Part of the Objection, it may be eaſily retorted. We have ſomething like it in the old *Greek* Epigram,

Εἰτις ἅπαξ γήμας, πάλι δεύτερα λέκτρα διώκει,
Ναυηγὸς πλώει δὶς βυθὸν ἀργαλέον.

He that eſcapes one Wife, and ventures on,
Courts a new Ship-wreck, when but half undone.

To which *Harry Stephens* has given this ingenious Anſwer,

Ὅστις ἅπαξ γήμας, παλιδεύτερα λέκτρα διώκει,
Οὐχ ὅτῳ μομφὴς ἄξιος ὐδεμιῆς.
Εἰ κακὴ ἡ πρώτη, τάχα δευτέρη ἢ κακὴ ἔσται,
Εἰ δ' ἀγαθὴ, ἀγαθὴν ἐλπίδα καὶ τότ' ἔχοι [a].

When a ſtout Widower tries the ſecond Hit,
'Tis hard to blame his Memory or Wit.
This may be good, if one was bad before;
If good, kind Heav'n may have as good in ſtore.

On the other hand, it ſometimes falls out, that, beſides the general Ordinance of Nature, a Man may be obliged by a particular Reaſon to enter on a married State. As for Inſtance, ſuppoſe a Royal Family ſhould be reduced to one only Perſon, that Perſon is highly and peculiarly bound to ſeek an honeſt and lawful Way of increaſing his Race, to hinder the Confuſion which muſt follow in the State, upon Default of Succeſſion; and becauſe, as *Euripides* [b] ſays, *Male Children are the Pillars of great Families.* And what we have thus ſettled, in regard to the Obligation of *Matrimony*, ſeems more agreeable to the Nature and Condition of Men, than the Rule which Biſhop *Cumberland* [c] lays down, and ſo largely inſiſts on, that *Since the Earth is now well ſtocked, Men are left at their Liberty, to chuſe either a married, or a ſingle Life.*

VIII. From theſe Conſiderations Judgment may be made, how far the Laws of particular States have Power to ſtreighten, or to looſe, the natural Neceſſity of Marriage. And this, in the firſt Place, is evident beyond Diſpute, that a civil Legiſlator may, by Virtue of his Sovereign Authority, conſtrain all his Subjects, who are capable by Nature, and have means of procuring a ſufficient Maintenance, to engage in Matrimony by ſuch a Time. But to compel a Man to marry for the Propagation of a Race of Beggars, is equally Impolitick and Inhuman. Yet it looks more mild, in this Caſe, to enforce an Ordinance rather by Rewards to the Compliers, and Subtraction of Benefits from the Recuſants, than by direct and poſitive Puniſhment. Of this Sort was the famous [2] *Jus trium liberorum* [d] amongſt the *Romans*; and that *Spartan* Law mentioned by *Ariſtotle* [e], enacting, that *He who had increaſed the State with three Children, ſhould be free from the Trouble of keeping Watch; and he that had one above that Number ſhould ſtand farther exempted from all kinds of Burthens.* After the ſame manner *Strabo* [f] informs us, that the *Perſian* Kings propoſed a yearly Prize to thoſe who had been Fathers of moſt Children.

It is no leſs evident, that a Prince or State would act moſt ridiculouſly, as well as moſt unjuſtly, ſhould they, in general, forbid *Matrimony* to all their Subjects: Or ſhould they allow this Privilege to the Firſt-born only of every Family, and enjoin ſtrict Celibacy to all the reſt [g]. For it is impoſſible, that, in ſo great a Number, all ſhould be able to lead a Life of Severity and Continence. Nor would theſe Conſtitutions be a more merciful Way of retrenching the exuberant Flood of Subjects, than the cruel Practice of *expoſing Infants* ſo common in antient *Greece*, or the other of *procuring Abortion*, which *Ariſtotle* [h] himſelf adviſeth.

But if it appear, upon common Reaſon or Experience, that any particular Office in a *State* can be more conveniently diſcharged by an Unmarried, than a married Perſon, the civil Laws may fairly reſtrain ſuch an Employment to Men that are content to live ſingly [3], and may oblige them to quit the Honour, when they change their Condition. Provided ſtill, that the Number of Men, privileged to forbear Matrimony by the Gift of Continence, be ſufficient to fill theſe Offices with a conſtant Supply. For it muſt not be ſuppoſed that the Deſign of ſuch an Ordinance is either to licence irregular Luſts, or to do Violence to any Man's natural Temper; in as much as no Man is compelled to act in this Capacity, who judgeth himſelf unfit for the Service. And it muſt be a farther Proviſo, that as to the great Buſineſs of Poſterity, due Care hath been taken of it another Way, ſo that it may not ſuffer by theſe Reſtraints.

[a] *Add.* Charron de la Sageſſe, *Lib.* i. Ch. xlii. & xlvi. § 2, 3. Bacon's *Eſſay* viii. [b] Iphigen. *in* Taur. *v.* 57. [c] *De Leg. Nat.* Ch. vi. § 9. [d] *Vid.* J. Lipſ. *Excurſ. in* Tacit. *Ann.* iii. 25. [e] Polit. *Lib.* ii. Ch. vii. Ælian. *Var. Hiſt. Lib.* vi. Ch. vi. [f] *Lib.* xv. *p.* 504. *Ed.* Caſ. Herodot, *Lib.* i. *p.* 36. *Ed.* H. Steph. [g] *Vid.* Dig. *Lib.* xxiii. *Tit.* ii. *De ritu nupt.* Leg. xix. [h] Polit. vii. Ch. xvi.

[1] We know that moſt of the Fathers have been extravagant on the Subject of ſecond Marriages, of which I have given ſeveral Examples in my Preface. We may, alſo, conſult Mr. HERTIUS. See what I have ſaid, at large, upon this Subject, in my Treatiſe of the *Morality of the Fathers*, Ch. iv. § 6. *& ſeqq.*

[2] Among the *Romans*, there were great Advantages aſſigned to thoſe who had but one Child; and this was called *Jus liberorum*; but we muſt not confound this with the *Jus trium liberorum*, as ſome do. See the learned Notes of M. *Schulting*, in his *Juriſp. Ante Juſtinian*, p. 605, 612, *& ſeqq.*

[3] See what Mr. BAYLE ſays in his Anſwer to the Queſtions of a Provincial, *Tom.* i. p. 542, *&c.* about *Gebardb Truchſes*, Archbiſhop of *Cologne*; who having married *Agnes de Mauſfeldt*, and embraced the *Lutheran* Doctrine, would have kept his Electorate and Archbiſhoprick.

In the ſame manner, it is lawful to forbid an Ambaſſador, a General, or a Soldier, when ſent on a long or dangerous Adventure, to carry his Wife with him, in the Expedition [a].

Farther, ſince the natural Obligation to *Matrimony* is undeterminate, and admits of ſome Latitude, the civil Legiſlator may fairly fix the Age of the Perſons who ſhall be thus joined together; or aſſign a Period taken from ſome other Conſideration. Thus in the [1] *Lex Papia Poppæa* amongſt the *Romans* it was ordered, [2] that *no Woman under Fifty, ſhould marry a Man of Sixty; and no Man under Sixty, a Woman of Fifty.* Which we find afterwards repealed by *Juſtinian* [b]. So *Plato* [c] limits the Time of a Man's being a Father, from Thirty to Fifty-five Years of Age, and of a Woman's being a Mother, from Twenty to Forty [d]. Amongſt ſome People, it was unlawful for a Man to Marry, before he had given ſome ſignal Proof of his Valour upon the Enemy. As *Strabo* tells us of the *Carmanians*, no one of whom was permitted to have a Wife, till he had taken off the Head of an Enemy, and preſented it to his Prince [e].

And, what is more, though Perſons are naturally free to marry whom they pleaſe, yet a Government, if it ſeem for the Intereſt of the State, may, in ſome Caſes, reſtrain and limit this Privilege; for Inſtance, it may be ordered, that no Subject ſhall marry a Foreigner, none of the Nobility a Plebeian. *Arrian*, in his Hiſtory of the *Indians*, reports, that the ſeveral Orders of the People were forbid Marrying one into the other. A Husbandman could not give his Daughter to an Artificer, nor an Artificer return the Compliment in the ſame manner [f].

Laſtly, it may be enacted by civil Powers, that Marriages ſhall not be contracted but with the intervening Conſent of publick Authority; eſpecially between Perſons of conſiderable Figure and Importance in the State. The Force of which, and of the like Laws, may amount to this Effect, that all Matches contrary to ſuch [3] Injunctions, ſhall either be declared Void, or ſhall be diveſted of certain Privileges, with which they would be otherwiſe attended. Thus, in *Livy* [g], we find the *Campanians* petitioning, "That "they might have the Liberty of marrying *Ro*- "*man* Dames, and that, if they had formerly "been ſo happy, they might ſtill keep them un- "moleſted; and that the Children, already born "to them, might be acknowledged their juſt "and lawful Heirs." And, in *Dionyſius Halicarnaſſeus* [h], we meet with a Decree of the Senate, upon the Commencement of a War with the *Latins*, "Giving leave, on both Sides, to the "*Latin* Women, that had married *Romans*, and "to the *Roman* Women that had married *Latins*; "either to tarry with their Husbands, if they "thought fit; or elſe to return into their proper "Country, leaving behind them their Male Iſſue, "and carrying with them their unmarried Daugh- "ters." The Effect of which was, that almoſt all the *Roman* Dames quitted their Husbands, and returned to the City; whereas all the other Women, two only excepted, preferred their *Roman* Husbands to their *Latin* Friends [i].

IX. We are, in the next Place, to enquire by what Heads of Conditions, with regard to the Law of Nature, the Matrimonial Covenant is compleated; and, likewiſe, what Right accrues to both the Perſons from ſuch an Union. And here we ſuppoſe before-hand, that all human Perſons, whether of one Sex, or of the other, are naturally equal in Right: and that no one can claim the Sovereignty over another, unleſs it be obtained by the free Act of one of the Parties. For, though in Strength of Body and of Mind, we are allowed to have the Advantage of the *Fair Train*; yet this Superiority is not of itſelf ſufficient to juſtify us in ſetting up for their Maſters and Governors. Therefore whatever *Right* a Man holds over a Woman, in as much as ſhe is by Nature his *Equal*, he muſt acquire, either by her Conſent, or by the Sword, in a juſt War. Yet ſince it is moſt natural, that Marriages ſhould be founded on mutual Good-will, the former Way ſeems more proper for the winning of Wives, the other for the procuring of Slaves. And therefore, in thoſe Countries where it is uſual to marry their fair Captives, the Men lay aſide the ſevere Authority of Maſters, for a more gentle and more agreeable Sway [k].

If then we ſuppoſe all Mankind thus placed in a Condition of natural Equality and Liberty, it may happen that a Woman, as well as a Man, ſhall deſire Iſſue peculiarly for herſelf, over which ſhe may preſide and command. Now to accompliſh this End, it is neceſſary, that a Covenant paſs between a Man and a Woman, for their *mutual Aſſiſtance in ſerving Poſterity*. If this Covenant be *Simple*, not joined with any Agreement about conſtant Cohabitation, but reſpecting barely the Procreation of Children, it confers on neither Party any Sovereignty or Right over the other, except they may challenge, on either Side, the *promiſed Aſſiſtance*, with regard to *Poſterity*. And, in this Caſe, if it was expreſly intimated in the

[a] *Vid.* Lib. i. Tit. xvi. *D. de Offic. Proconſ.* Tacit. *Ann.* iii. 33, 34. Pliny (*Lib.* vi. Ch. xxii.) reports of the People of *Taprobane*, "That, in their Choice of a King, they do not only require, that the Perſon be Good and Merciful, but likewiſe that he "be advanced in Age, and without Children; and if, after his Admiſſion, he happens to obtain Iſſue, they depoſe him from "the Government, leſt the Kingdom ſhould become Hereditary, *Solin* Ch. lxvi. [b] *Vid.* Sueton. *in* Claud. Ch. xxiii. & Cod. *Lib.* v. *Tit.* iv. *De nuptiis*, Leg. xxvii. [c] Plato *de Rep.* Lib. v. *p.* 657. Ed. *Wech.* [d] *Add.* Ariſtot. *Polit.* vii. *Ch.* xvi. & Michael Piccart, *ibid.* Tacit. Germ. *Ch.* xx. [e] Strab. *Lib.* xv. *p.* 500. *Add.* Abrah. Roger. *de* Bramin. *p.* 1. Ch. xi. [f] We find the ſame Account in *Hieron. Oſor.* de Reb. Geſt. *Emanuel.* Lib. ii. & Montagne, *Lib.* iii. *Ch.* v. *p.* 630. Ed. *Pariſ.* 1657. Fol. [g] Lib. xxxviii. Ch. xxxvi. [h] Lib. vi. *init.* [i] Senec. *de Benef.* Lib. iv. Ch. xxxv. *I promiſed you my Daughter in Marriage, afterwards you appeared to be a Foreigner; under that Character I may not enter into ſuch a Relation with you: The ſame Law which lays this Prohibition on me, protects me from the Cenſure.* [k] Add *Deuteron.* xxi. Ch. x, *&c.*

[1] Our Author expreſſes this firſt Article in the Words of JAQ. GODEFROI, *De Lege Julia & Papia Pappæa*, Ch. ii. But for the other, this learned Civilian, looks upon it as added afterwards by a Decree of the Senate, *p.* 317. There are beſides very great Difficulties about the Manner in which they decided, at different Times, ſeveral Caſes relating to this Law. The deceaſed M. *Perizonius* has pretended to clear them by new Explications, in his Diſſertation *De Lege Voconia* (*in Diſſ. Triade*, p. 154, & ſeq.) M. *Shulting* adds his Teſtimony, *Not. in Juriſprud. Ante-Juſtinian*, p. 614. M. *Heineccius* follows the ſame Opinion, in his Treatiſe *Ad Leg. Jul. & Pap. Popp.* Lib. iii. But the late M. *Noodt*, with his uſual Modeſty and Sincerity, owns we have nothing upon this Head but uncertain Conjectures, and that he was entirely at a Loſs how to decide the Point. *Comment. in Digeſt.* p. 495.

[2] The Author doth not recite this Law exactly.

[3] The *Roman* Law was ſo rigorous upon this Article, that if either of the Perſons married came to loſe their Right of Citizenſhip, either by Captivity, or by Baniſhment, which they call *Deportatio*, or by any other Way; the Marriage was declared diſſolved. See M. *Noodt*'s Comment. p. 524.

Covenant,

Covenant, that the Woman desired Issue properly for herself and her own Management, the Children shall be under the Government of the Mother. Such a kind of simple and irregular Marriage we may call *Amazonian*, if any Credit is to be given to the Stories of those warlike Dames [a]. In the same manner, when *Thalestris* courted *Alexander the Great* [b], and, as some tell us, the Queen of *Sheba* King *Solomon*, the Off-spring could not fairly be reckoned spurious, but, in their way, honest and legitimate. So Travellers report of the Inhabitants of the Kingdom of *Congo*, that their main Strength consists in Companies of Women, who live by themselves in certain Territories assigned them by the Prince; and at set Times choose some that they like best among the Men, for the Sake of continuing their Breed: If the Child prove a Boy, they send him back to his proper Father; if a Girl, they keep her in their own Train, and educate her under the Severity of Martial Discipline [c].

Now though it must be confessed, that this kind of Coupling is barbarous, at least, if not beastly; yet, amongst the most civilized Nations, there are often to be found Instances of Marriages, in which either both Parties are declared *equal*, or else the Husband is obliged to submit to the supreme civil Authority of the Wife. As when a Queen, who enjoys a Crown in her own Right, takes a Husband, yet retains her Superiority in the Government [d].

X. But we may take Leave of these irregular Matches, and proceed to examine those which appear more suitable to the Condition of human Nature [e]. This then we take for granted, that the matrimonial Covenant ought to begin at the Man, not at the Woman; that the Courtship should be used not on her Side, but on his; this Method agreeing best with the Genius and Character of both Sexes. For though it be, in many Places, usual for the Relations of the Woman to make the first Offer to the Man, yet this is only to direct his Aim in the Attack, and to fix a particular Mark for his Addresses.

This Principle being supposed, it is clear, that the Man, when he makes his Suit, is desirous of such Issue as shall be true and genuine, not spurious or adulterous. And therefore we ought to abhor, as contrary to Reason and Nature, the licentious Practice of many Nations in this Point. Travellers tell us, that the King of *Calecut* hath two Wives, each of whom is constantly waited upon, with all Familiarity, by ten of the Idolatrous Priests; and that the King esteems it an Honour to be thus abused; though he hath the Prudence, not to let his own Illegitimate Race succeed to the Crown, that Dignity being reserved for his Nephews [f]. Indeed the Women are in that Country, for the most Part, held in common [g]; whence it comes to pass, that the Fathers neglect the Care of their Children, and all Inheritances descend by the Mother's Side [h]. *Buchanan* [i], to the Discredit of his own Country, reports a Law of *Evenus*, or *Ewen*, the third King of *Scotland*, by which it was ordered, that the first Night of a Nobleman's Marriage should be the King's Fee; and that the Nobleman, besides taking the same Liberty with the Commoners Wives, should again command their Company whenever they pleased. Till *Malcolm* the Third, at the Intreaty of his Queen *Margarite*, changed this scandalous Indulgence into a Fine of half a Mark, to be paid by the Husband, in lieu of parting with his Bed the first Night [k]. At this Time of Day, in the Kingdoms of *Pegu* and *Arracan*, at the Nuptial-feast, one of the Guests prevents the Bridegroom in his Addresses to the Bride; yet it is Capital for him to be catched a second Time, using the same Freedom [l].

We may conclude farther, that nothing is more repugnant to that Decency and good Order which ought to be kept up in the World, than to lead a wandering desultory Life, without any fixed Abode, without any certain Seat of one's Fortunes and Concerns [1]. The Education of the common Off-spring is then certainly carried on with most Convenience, when the Parents unite their Assistances to so good a Design; and their Minds are, by these sweet Pledges, knit together in a stronger Band of Affection [m]. Besides, a constant Cohabitation cannot but afford vast Delight and Satisfaction to an agreeable Couple: And then the Husband is, by this Means, much more secure of his Wife's Chastity, than if they dwelt at a Distance. Such Matrimony then, as is regular and perfect, conformable to natural Reason, and

[a] *Vid.* Arrian. *de expedit.* Alexand. *Lib.* vii. *Ch.* xiii. Procop. *H. G.* Lib. iv. Palæphat. *de fab. narr.* Lib. i. Ch. xxiii. Jornand. *de Reb.* Getic. *Ch.* viii. Steph. Cleric. *Quæst. Acad.* ii. Justin. *Lib.* ii. *Ch.* iv. *Diodorus Siculus*, Lib. ii. Ch. xlv. reports, "That the Sovereign Dames obliged their Husbands to perform all the Servile Employments, even those which, in other "Places, belong particularly to the Maids." He tells us the same of a People in *Libya*, whom *Hercules* utterly destroyed, thinking it a Reproach to Mankind, *That a Nation should be suffered to continue where the Government was in the weaker Sex*, Lib. iii. Ch. liii. & lv. [b] *Vid.* Curtium, *Lib.* vi. *Ch.* v. [c] *Vid.* Edvard. Lopez, *de Regno* Congo, *Lib.* ii. *Ch.* ix. *Add.* Franc. Alvarez *Descript. Æthiop. Ch.* cxxxiii. *Isaac Voss.* de *Nilo*, Ch. xix. *Michael Glycas*, Ann. *Part* ii. tells of the *Agilæans*, "That amongst them the Women bear Rule over the Men, and are very communicative of themselves, without any Danger of "their Husband's Jealousy: that they till the Ground, build the Houses, and perform all the nobler Labours of the other Sex." [d] See the Articles of Marriage between *Philip* and *Mary* in *Thuan.* Lib. xiii. *ad Ann.* 1553, & 1554. Those of *Mary* Queen of *Scots*, *ibid.* Lib. xx. *ad Ann.* 1558. & Lib. xxxvii. *ab init.* *Add.* Marian. *Hist.* Hispan. *Lib.* xxiv. *Ch.* v. *Diodor. Sic.* Lib. i. Ch. xxvii. mentions a Decree that passed among the *Egyptians* in Honour of *Isis*, importing, "That the Queen should "enjoy a greater Degree of Power and Dignity than the King; and that, amongst private Persons, in the Nuptial Writings, the "Wife should be invested with the Command, and the Husband be obliged to obey." Add. *Guicciardini*, Lib. vi. p. 178. where he speaks of the Government of *Castile* administred with joint Authority by *Ferdinand* and *Isabella*. [e] *Vid.* Aloys. Cadamust. *Navig.* Ch. lxxv. we meet with the like Account in *Ludov. Rom.* Navig. *Lib.* v. *Ch.* vii. [f] *Vid.* Pet. de Valle, *Itiner.* P. iii. Ep. 7. [g] The Practices of the *Colchians*, reported by *Busbequius*, in his third Epistle, are very filthy. [h] *Rer. Scotic.* Lib. iv. [i] *Id.* Lib. vii. *Polydor. Virg.* Hist. *Angl.* Lib. x. *Comp.* Sueton. Caligul. *Ch.* xl. & Boxhorn. *Not.* [k] Ludovic. di Barthema, *Itiner.* P. 2. Ch. xi. Of the Inhabitants of *Camclu*, see *Paul Venet.* Lib. ii. Ch. xxxviii. [l] *Xenophon* had reason to call a Man's *Home* or his *Fire-side*, the sweetest and the most sacred Possession that he enjoys. *Cyropæd.* Lib. vii. p. 116. Ed. *H. Steph.* *Add.* Aristot. *Oecon.* Lib. i. Ch. iii. [m] *Genes.* xxix. 32. Lysias, *Orat.* i. *Ch.* ii. "So soon as she bore me a Child, "I admitted her into the full Trust and Care of all my Affairs; judging this the firmest Band that could unite and engage us to "each other.

Conciliat animos conjugum partus fere.
Senec. Herc. Oet. *v.* 407.

"Children are commonly the Means of uniting and endearing a "married Pair.

[1] The Notion which the antient Lawyers had of Marriage, was taken partly from their Idea of Friendship, and partly from the Relation, which they had conceived to be between a Father and his Daughter. See Mr. Noodt's curious Chapter in his *Probab. Juris.* Lib. ii. Ch. ix.

to

to the Ends of civil Life, beſides the Covenant of Fidelity to the Bed [1], doth imply an Agreement on the Woman's Side, that ſhe will conſtantly dwell with the Man, and unite in the ſtrict Society of a Family; as well for the Education of the Children, as for mutual Aid and Pleaſure [2a]. The Cuſtom amongſt the *Chineſe*, for the Women to bind their Feet ſo very ſtreightly, that they cannot go without great Pain, ſeems to have been firſt introduced on this politick Account, that, being diſabled from gadding abroad, they might be obliged to fix, with the greater Application, on the Care of Domeſtick Affairs [b].

From what hath been obſerved before, it appears why the Huſband, and not the Wife, ought to have the Privilege of chooſing their Seat of Reſidence; for it is he that admits her into his Family, of which he himſelf is the Head and the Director. Though no Man, commonly ſpeaking, will be ſo hard as not to aſk his Wife's Conſent in this Point; eſpecially if ſhe brought him a conſiderable Fortune.

It is farther evident, that, without a Breach of the Matrimonal Contract, the Wife cannot, againſt the Huſband's Conſent, ramble abroad, lodge apart, or deny him reaſonable Favours, unleſs upon extraordinary Occaſions.

Upon the ſame Principles is founded that Preſumption in civil Law, that Children born in lawful Wedlock are really the *Huſband*'s, unleſs there appear ſome very ſtrong Argument to the contrary, ſufficient to overthrow the Favour of the Preſumption [c]. The *Engliſh* Laws are particularly complaiſant to the fair Sex, obliging the Huſband to own a Child, born after he hath been abſent many Years, provided he hath been all the while within the Bounds of the Iſland [d]. And they ground this Indulgence on two Reaſons, firſt, becauſe the Wife hath ſolemnly given her Faith, that ſhe will be true, which ſhe is preſumed not to have broken; and, ſecondly, becauſe it is in the Huſband's Power to ſecure his Wife's Honeſty; and what Right or Power any Perſon enjoys, he is always ſuppoſed duly to exerciſe [e].

And hence, the Opinion of the Vulgar is not altogether unreaſonable, when they fanſy, that the Wife's Diſhoneſty caſts ſome kind of ignominious Blemiſh on the Huſband [3]: As if, either out of Folly or Meanneſs of Spirit, he had neglected to uſe his Authority [f]. *Domitian* ſtruck a Gentleman's Name out of the Liſt of Judges, for receiving his Wife again, after he had put her away upon an Accuſation of Adultery [g]. Some give another Reaſon why a Mark of Shame ſhould be fixed on this Misfortune; and that is, becauſe it looks diſgraceful in a Huſband not to be Maſter of thoſe good Qualities which might engage his Wife's Affection, and ſecure her Fidelity. A Man that lies under this unhappy Cenſure, and cannot conveniently redreſs the Wrong which he ſuffers, would do well to conſider *Euripides*'s wiſe Aphoriſm, that

——— Ἐν σοφοῖσι γὰρ
Τάδ' ἐστὶ θνητῶν, λανθάνειν τὰ μὴ καλά.

It is a great Part of human Wiſdom, to cover thoſe Things with Secrecy, which look ill if they come abroad [h].

Charron's [i] Remark will not, in all Caſes, hold ſtrictly good, that it is a vulgar Error and Folly to upbraid a Man with his Wife's Diſhoneſty; as if this were to make him ſuffer for the Crime of another, which it is not in his Power to prevent.

[a] *Demoſthen.* in *Neær.* "The Reaſon of our taking Wives is to obtain Iſſue, and to ſee our Family Affairs under a faithful Di-" rectreſs." *Add.* Xenoph. *Oeconom.* & Columell. *de R. R.* Lib. xii. *Præfat.* [b] *Comp.* Martin. *Hiſt. Sin.* Lib. iii. Ch. xxviii. Plutarch. *Præcept. Conjugal.* "As Phyſical Humours and Qualities are ſaid to diffuſe themſelves whole through the entire Maſs, " ſo ought the Bodies, the Wealth, the Friends and Acquaintance of a married Couple to be thoroughly mixt and blended together. " When the *Roman* Lawgiver forbid either of the Pair to give any Thing to the other, the Meaning was not to exclude them " from a Participation of Benefits, but to ſhew that they ought to hold all Things common between them." *Quintil.* Declam. ccxlix. "Ye know that Marriages are the Things which hold a Commonwealth together, which preſerve Race and Iſſue, and con-" firm and regulate the Deſcent of Patrimonies and Inheritances, and maintain Domeſtick Safety and Peace. Without this Secu-" rity at Home, who would venture to travel into foreign Parts, or ſo much as take a Journey to a diſtant Eſtate; to go on publick " Ambaſſies, or to engage in military Expeditions?" See *Montaigne*'s *Eſſays*, Lib. iii. Ch. v. *p.* 630, 631, 632. *Edit* Pariſ. *Fol.* [c] See above, *Lib.* iv. *Ch.* xi. § 10. & *vid.* Gell. *Lib.* iii. *Ch.* xvi. Plin. *Hiſt. Nat.* Lib. vii. Ch. v. Where he treats of the Time of going with Child, which muſt be examined, before the Child brought forth is delivered to the Huſband. [d] See *Chamberl.* Preſent State of *England*, P. 1. Ch. xvi. [e] 'Tis a Saying of *Gyges* in *Herodot.* (*Clio.* p. 3. Ed. *H. Steph.*) *Every one ought to keep an Eye on his own Concerns.* PLATO obſerves (in *Alcibiad.* i. *p.* 441. Ed. *Wech.*) "That the Wives of the *Spar-" tan* Kings are publickly watched and overſeen by the *Ephori*, leſt any Heir ſhould be obtruded upon the Crown, who is not " truly of the Race of *Hercules*. Whereas in *Perſia* the King ſeems, in Excellency of Nature, ſo much above his Subjects, that " there is no Danger of counterfeiting his Strain: And therefore his Wives are under no Guard, but that of their own Repu-" tation." [f] *Add.* Carteſ. *Paſſ. Art.* 169. [g] Sueton. *Dom.* Ch. viii. So by the *Attic* Law, "A Man was reckoned baſe " and ſcandalous who kept his Wife, after he had diſcovered her Diſhoneſty, *Demoſthen.* in *Nær. Mariti lenocinium lex cöercuit, qui deprehenſam uxorem in adulterio retinuit, adulteriumque diſmiſit: debuit enim uxori quoque iraſci, quæ matrimonium ejus violavit. Jure autem puniendus eſt maritus, quum excuſare ignorantiam ſuam non poteſt, vel adumbrare patientiam prætextu incredibilitatis,* &c. *Add. Dig.* Lib. xlviii. *Tit.* v. *ad Leg.* Jul. *de Adulter.* Leg. ii. § 6. & Leg. xxix. *Princ.* In TACITUS (Ann. *Lib.* ii. *Ch.* lxxxv.) "*Labeo* the Huſband of *Viſtilia* was cited to give an Account why he had forborn to ſee the Law executed upon his Wife, after " ſhe had been openly convicted: and he could not otherwiſe excuſe himſelf than by pretending that the ſixty Days, which the " Law allowed him for conſidering Time, were not yet expired." [h] *Eurip.* Hippol. Coron. *Add.* Plutarch. *de Anim. Tranquil.* p. 467. E. F. [i] Lib. i. Ch. xxxix. *Note* 11.

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[1] See the Author's Abridgment of a *Man's and Citizen's Duty*. Lib. ii. Ch. ii. § 4.

[2] Mr. MONTAGNE ſpeaks well to this purpoſe: A good Marriage is a ſweet Condition of Life, full of Conſtancy, Fidelity, and an infinite Number of profitable and ſolid Duties, and mutual Obligations. Every Woman who has a true Senſe of it (*Optato quam junxit lumine tæda*, CAT.) would not be Miſtreſs of her Huſband: if ſhe be entertained in his Affections as a Wife, ſhe is much more honourably and ſurely ſettled. When he ſhall be diſturbed, or hurried, as he muſt needs be; to whom would he rather wiſh ſome Diſgrace to befal, his Wife, or his Miſtreſs? If any Misfortune happen to him: to whom would he wiſh the greateſt? Theſe Queſtions admit of no Doubt in a good Marriage. That we ſee ſo few good ones, is a Sign of its great Price and Value. If it be well ordered and managed, there is no happier Kind of Society. 'Tis to this Aſſociation, that this Saying is moſt fitly applied; *Homo homini deus, aut lupus.* It is a State that requires the moſt excellent Qualities. They that take this Affair in hand, and carry with them Hatred and Contempt, do unjuſtly and unprofitably. Marriage hath on its Part, both Profit, Juſtice, Honour, Conſtancy, a calm, but laſting Satisfaction. Love is grounded on Pleaſure only; and is therefore more bewitching, lively, and ſharp. *Eſſays*, Lib cxi. Ch. xi. p. 630, &c.

[3] It was one of PYTHAGORAS's Maxims, that care ſhould be taken, that Women ſhould not break their Nuptial Fidelity either through the Negligence or Ill-behaviour of their Huſbands; Αἱ τε γυναῖκες μὴ νοθεύσωσι τὸ γένος· ὀλιγωρία γὰρ καὶ κακία τῶν συνοικέτων. Jambl. de vitâ Pythag. *Ch.* ix. Numb. xlviii.

It

[1] It may not be amiſs, on this Subject, to throw in an occaſional Obſervation, that thoſe Marks of Reproach, which the common People fix on the Heads of ſuch unfortunate Huſbands, are no new Invention, nor confined to the Cuſtoms of our Weſtern World: For we read that the Emperor *Andronicus* cauſed the largeſt of the Stag's Horns he met with, to be faſtened on the Gate of the Market-place, on Pretence to ſhew the Vaſtneſs of the Beaſts he had killed in Hunting; but really as a ſilent Rebuke to the Immorality of the City, and the Lightneſs of the Dames[a]. But as ſhe cannot properly be called an Adultereſs who ſuffers in her Honour by Compulſion and Force[b], ſo to keep a Wife, who hath been thus injured, doth not, in itſelf, appear any way foul or reproachful[c].

XI. We are farther to examine, whether by the mere Law of Nature, from the principal Contract of true and perfect Matrimony, there ariſeth any proper Sovereignty or Dominion of the Huſband over the Wife. Indeed in Holy Scripture it is expreſly ſaid, that the *Will* or *Deſire* of the Wife *ſhall be to her Huſband*, and that *he ſhall rule over her*[d]. But this being enjoined the Woman, by way of Puniſhment, ſeems to bear the Face of a *poſitive Inſtitution*. To diſcover, then, how the Law purely natural directs in this Point, we may firſt obſerve, that to be bound to follow the Will of another in ſome certain Buſineſs, is not altogether the ſame Thing as to be ſubjected to his Dominion; becauſe the former may reſult from a *ſimple Pact*. For there are many Pacts, eſpecially of this kind, *I give you this to do ſuch, or ſuch a Thing*; *I do this, provided you will do ſo, or ſo for me*; in which it was at firſt in the Power of either Party to chooſe, whether he would enter into the Agreement, or not. Yet the Covenant being once conſented to on both Sides, one Party muſt follow the Will of the other (as to this particular Buſineſs) and not *vice verſa*. Whence it appears, that, how far ſoever the Wife may be obliged to ſubmit to the Huſband's Will in the Affairs proper to Matrimony, yet it doth not preſently follow, that he muſts needs have the ſovereign Command over her, in other Actions and Concerns.

Again, the End of Marriage is not like that of Commonwealths, the Defence and Security of Men (for how weak an Union, as to any mutual Safety, is that which conſiſts only of two Perſons?) but is directed wholly to the Propagation of human Race. Therefore as a Commonwealth cannot be underſtood without a ſovereign Ruler, ſo it ſhould ſeem that Marriage, without any Superiority of Government, might ſubſiſt well enough under the common Force of Contracts, aſſiſted with the Engagements of Friendſhip and the Charms of Love. It muſt be confeſſed, that a ſeparate Family hath ſomewhat in it much like a State or Community, which not regularly allowing of more than one Head, the Wife, when ſhe is admitted into it, ought, one would think, to yield a full Submiſſion to the Lord and Director of the Society. But it may be urged, in Anſwer to this Objection, that a Family, if increaſed with a numerous Train of Servants, hath two Ends and Deſigns, one common, the other proper. The common End conſiſts in mutual Defence and Security, ariſing from the united Strength of ſo many Perſons. In this reſpect, though ſome ſupreme Sway be neceſſary, yet, in as much as the Wife is but little concerned in that Affair, the Unity of the Family may be very well kept up, although ſhe be joined to her Huſband by no ſeverer Bands than thoſe of Affection and the Matrimonial Covenant. Thus we find the Patriarch *Abraham* exerciſing a Sovereignty over his Domeſticks, and yet treating *Sarah* with the kind Equality of a Siſter[e 2]. Though, at the ſame Time, her dutiful Behaviour towards him is highly commended in the Holy Scriptures; and it is ſaid particularly, that ſhe called him Lord[f]. The proper or peculiar End of Marriage ſeems, likewiſe, attainable, without any Inconvenience, although neither of the Parties ſhould bear any ſuch abſolute Authority over the other, as muſt include the Power of Life and Death, and of the moſt rigorous Reſtraints; but the Ties of Friendſhip and the Obligation of the free Contract, may very well ſerve to hold Man and Woman together. Yet this Contract (the Huſband having the better Part in the Terms and Conditions, and the additional Advantage of his Sex) ſeems to be formed in the manner of thoſe Leagues and Covenants which we call Unequal; ſo that the Wife is bound to Obedience, and the Huſband rather to Protection. Not that it is repugnant to the Law of Nature, for a Wife to be ſubjected to her Huſband in the way of ſtrict Political Government. For the Fear of ſupreme Authority, and the Endearments of Conjugal Affection, are really no more deſtructive of each other, than the Sovereignty of the Prince extinguiſheth the Love of the Subject. And this full Political Authority, as it may be acquired by any Huſband, by means of a new Covenant annexed to the Matrimonial Agreement, ſo we find it, in ſome Nations, allowed to all Huſbands in general, by Virtue of a publick Cuſtom or Conſtitution. *Ceſar*[g] tells of the antient *Gauls*, that they had the Power of Life and Death, [3] as well over their Wives, as over their

[a] Nicet. Acominat. *de Imper.* Andronic. *Lib.* ii. [b] *Vid.* Gratian. *Cauſ.* xxxii. *Qu.* v. *Ch.* ii, *&c.* [c] Yet we are to commend the Proceeding of *David* in 2 *Samuel* xx. 3. [d] *Geneſ.* iii. 16. *Epheſ.* v. 22, *&c.* [e] See *Geneſ.* xvi. 2, 5, 6. xxi. 12, 11, 12. [f] 1 *Pet.* iii. 6. [g] *De B. G.* Lib. vi. Ch. xix.

[1] If any one deſires to ſee more of this trivial Uſage, of which the Gravity of our Author would not permit him to ſay more, let him conſult SALMASIUS's Notes upon *Tertullian de Pallio*, p. 338, 339, *&c.*

Juvenilis ardor impetu primo furit;
Langueſcit idem facile, nec durat diu
In Venere turpi, ceu levis flammæ vapor:
Amor perennis conjugis caſtæ manet.
Senec. Octav. *v.* 189, *&c.*

" The Fire of Youth in Love's diſhoneſt Joys,
" At the firſt Blaze is Fury, Flaſh, and Noiſe;
" But ſpends in Smoak, and what it gave deſtroys.
" Whilſt the chaſte Paſſion of a lawful Dame
" Burns with a gentle, but an endleſs Flame.

[2] *Martial*, Lib. viii. Ep. xii. v. 3, 4.

Inferior matrona ſuo ſit, priſce, marito,
Non aliter fuerint fœmina virque pares.

Should Manly Empire not controul the Fair,
Huſband and Wife were an unequal Pair.

Plin. *Paneg.* Ch. lxxiii. *Many worthy Men have been hindered from being Chief in the State, by their not being Chief in their own Families.*

[3] The Author in theſe Citations ſeems to refer to a Cuſtom among the antient *Romans*, for by Marriages celebrated with certain Solemnities, and in a certain Manner (which they call *In manum conventio*) Women were put in the Power of their Huſbands just as Children.

Children

Children. Amongſt the *Germans*, the Huſbands were impowered to execute the Puniſhment of Adultery; not as an Indulgence to their Rage and Reſentment, but as an Effect of their juſt Power and Command [a]. How the Caſe ſtood at *Rome*, *Gellius* thus informs us from a Speech of old *Cato*'s. *A Huſband (except after a Divorce) is a Judge, a Cenſor, and a kind of ſovereign Prince over his Wife: if ſhe acts any thing perverſly, or ſcandalouſly, he ſets a Mulct upon her; if ſhe drink Wine to Exceſs, if ſhe commit any Diſhoneſty with another Man, he condemns her to a ſuitable Puniſhment.* Again, ſays that grave Senator, *ſhould you apprehend your Wife in the Act of Adultery, you might kill her without farther Proceſs or Trial; on the contrary, ſhould ſhe find you guilty of the ſame Crime, ſhe hath no Right to touch you with a Finger.* *Tacitus* hath recorded a later Inſtance of this antient Cuſtom [b]. He reports that *Pomponia Græcina* (Wife to the famous *Plautius*, who triumphed for his Victories in *Britain*) *being accuſed as a Favourer of forcign Superſtition, was remitted to the Judgment of her Huſband: And he, according to the old Inſtitution, calling an Aſſembly of her Relations, took ſupreme Cognizance of her Life and Honour.* We muſt not omit the moſt remarkable Practice of the *Saccæ*, a People of *Scythia*, among whom, as *Ælian* tells us the Story [c]; "When a young Man "ſeeks him out a Wife, he is obliged, in the firſt "Place, to engage her in ſingle Combat; and if "he gets the better, he leads off his Captive in "Triumph, and ever after acts the Sovereign "over her: if the Victory fall on her Side, ſhe is "the Queen, and he the Slave. And this Con"tention is not deſigned to endanger the Lives "of the Combatants, but only to determine the "Maſtery between them."

What Power the Huſband hath over the Goods of the Wife, is, likewiſe, to be adjuſted, either by the Contract and Agreement of the Parties, or by the Deciſion of the Civil Laws. Theſe Engagements are to be ſtrictly obeyed in the ſeveral Points which they have ſettled; as for Inſtance, whether the Woman ſhall bring a Portion at Marriage; whether or no the Couple ſhall join Purſes, and mix their Effects in the common Stock; whether the Huſband ſhall have an abſolute, or limited Diſpoſal of his Wife's Fortune; and the like Queſtions.

Amongſt the *Japoneſe* the Women marry without Portions: Indeed, the Maids Parents, if of the wealthy Sort, ſend a Sum of Money as a formal Preſent to the Bridegroom on his Wedding-day, but he preſently returns it in the ſame ceremonious Manner; the Reaſon they alledge for their Cuſtom is, that they may not give the Women an occaſion of Inſolence and Pride. And there they have this mortifying Proverb, *That a Woman, ſo long as ſhe lives, hath not ſo much as a Houſe that ſhe can call her own:* Before Marriage ſhe is a Dependent on her Father's Family, in Marriage on her Huſband's, in Widowhood on that of her Children [d]. It was a Cuſtom with the old *Thracians*, that the faireſt of their Maids ſhould be expoſed to publick Sale, and be given in Marriage to the higheſt Bidder: On the other ſide, that thoſe whom Nature had been leſs kind to, ſhould expend their Fortunes to buy themſelves Huſbands [e]. The *Aſſyrians*, likewiſe, diſpoſed of their Virgins in the way of Sale [f].

Where the Civil Laws have not defined theſe Matters, or where the Parties live in a State of natural Liberty, the Huſband and Wife may ſettle any ſuch Point as they pleaſe, by particular Contract.

XII. For the further Illuſtration of this Subject, it will not be amiſs to examine the Doctrine laid down by *Hornius* in his firſt Book *de Civitate* [g]. Firſt of all, he rejects the Opinion of thoſe who aſſert, that the Huſband hath, by Nature, a Sovereignty over the Wife. And thus far we approve his Cenſure, if the Perſons, againſt whom he diſputes, did maintain the Huſband's Sovereignty to be the free Gift of bare Nature, without any intervening Contract, or without the Wife's voluntary Submiſſion. For this indeed would be repugnant to the natural Equality of Mankind; and a Fitneſs or Ability to govern cannot, of itſelf, confer a Right of Government.

Hence he proceeds to affirm, That *there can be no Sovereignty, publick or private, of one Perſon over another, but that which ariſeth from the expreſs Appointment and the moſt ſolemn Intervention of Almighty GOD.* Now, as to this Poſition, we cannot but obſerve, that when Enquiries are thus made into the Origin and Fountain of Dominion, what we ſearch for is the neareſt, the immediate, and the ſecond Cauſe; the firſt and univerſal Cauſe of all Things being ever preſuppoſed. And therefore, though it appear moſt evidently, that God hath commanded ſuch an Order to be introduced among Men, yet the main Queſtion will be ſtill behind, what Contracts are required to put Men in a Way of conforming to the divine Precept. For he muſt have little Knowledge of Letters, who can imagine, that when we ſay God is the Author of ſuch or ſuch a moral Inſtitution, we mean that he produceth it, as he did at firſt the Heavens and the Earth, without the Intervention of any Thing formerly created. That God expreſly ordered the making of the *Jewiſh* Tabernacle, is no manner of Reaſon why we ſhould not ſay, that the Workmen were the next and immediate Cauſe of the Fabrick. Thus although it be enjoined by the Divine Oracle, that the Woman ſhall be in Subjection to the Man, yet to make him actually and immediately her Sovereign, it is neceſſary, that ſhe promiſe Obedience to him by her own free Covenant. To ſay the contrary would not be leſs ridiculous, than to pretend, when God bids us *have Dominion over the Beaſts of the Earth*; that there is no need of our uſing any outward means to obtain it, as by Hunting, *&c.*

The Argument this Author afterwards makes uſe of is certainly moſt trifling and childiſh. *The Wife*, ſays he, *hath no ſuch Thing as conjugal Sovereignty, and therefore ſhe can confer no ſuch Thing on her Huſband.* As if, by the Agreement of ſeveral Perſons, a new moral Quality could not be produced, which did not actually exiſt before [1]. To conſtitute a Dominion, it is by no means neceſſary, that it muſt be firſt really poſſeſſed by one Party, and then tranſlated on another (as phyſical

[a] *Tacit. Germ.* Ch. xix. What he ſays of their Power over their Servants ſee afterwards, *Ch.* iii. § 4. [b] *Ann.* xiii. 32. *Add.* Euripid. Medea, *v.* 230, *&c.* Varen. *Deſcrip.* Japon. *Lib.* xiii. Lex. *Wiſigothorum*, Lib. iv. Tit. iv. Ch. iii. [c] *V. H.* Lib. xii. Ch. xxxviii. [d] *Bern. Varen.* Deſcrip. *Japon.* Ch. xii. [e] *Solin.* Ch. xv. Thus *Scuthes* in *Xenoph. Exp. Cyr.* Lib. vii. 20. *Edit.* Wells, *Oxon.* *If you have a Daughter, I'll fairly buy her after the Cuſtom of* Thrace. *Add.* Heraclid. *de Polit.* Mela, Lib. ii. Ch. ii. [f] Ælian. *V. H.* Lib. iv. Ch. i. *Herodot. Clio,* Add what the *Roman* Laws deliver concerning the Prohibition of Donations between Huſband and Wife. *Lib.* xxiv. *Tit.* i. *D. De donat. inter Vir. & Uxor.* [g] *Ch.* i.

[1] See what the Author ſays, *Lib.* vii. *Ch.* iii. § 4. following.

Subſtances cannot be given away, unleſs they had before a full and formal Being) but this Superiority then ariſeth, when any Perſon diveſts himſelf of that Power of reſiſting another which his natural Liberty gives him, and engageth his Faith, that he will ſubmit, in all Things, to the Will of him whom he thus chooſeth for his Governor.

Farther: Although in the Holy Scriptures the Subjection of *Eve* is ſaid to have been enjoined her as a Puniſhment for ſeducing her Huſband; yet it doth not hence appear, that the Huſband's Sovereignty, after the Fall, hath not for its neareſt and immediate ſecond Cauſe the Agreement between Man and Woman. For, ſince a Neceſſity of Obedience doth not always include an Unhappineſs of Condition (as the moſt bleſſed State of the Holy Angels is not impaired by their yielding the ſtricteſt Service to God) the Puniſhment attending the Woman's Inferiority ſeems to be this, that ſhe bears the Yoak unwillingly, with inward Grudgings at her Station, and a natural Deſire of Command. And therefore it is no Contradiction to ſay, that the Superiority of the Huſband naturally ſprings from the Conſent of the Wife; and that GOD Almighty, in way of Puniſhment to the Woman, hath made her Subjection troubleſome and uneaſy.

The following Diſtinction looks but like an impertinent Niceneſs, *Whatever Will, or whatever voluntary Act we can now conceive in the Woman, belongs purely to the Act of contracting Marriage; and, conſequently, is to be underſtood of that Conſent and Approbation by which ſhe acquieſceth in the future Government of ſuch a particular Huſband.* This is no more than to ſay, that the Huſband's Sovereignty is not produced by the Conſent of the Wife, but, being before eſtabliſhed by GOD's Command, the Wife voluntarily enters under it. As a Traveller doth not build his Inn, but freely makes uſe of it, when he findeth it built to his Hands.

It is ſufficient on the whole to obſerve, that the Dominion of one Perſon over another, conſidered as a moral Entity, doth not exiſt without the Concurrence of ſome human Act, and cannot be underſtood without Subjection and Obedience: And that the Woman, for this Reaſon, lies under no Obligation to obey, before ſhe hath, by her own Conſent, ſubmitted to the Rule and Authority of an Huſband. And though that ſhe ſhould thus ſubmit herſelf, be indeed agreeable to the Divine Will, yet this doth not hinder, but that her own Covenant, and her Subjection conſequent upon it, are the immediate and neareſt Cauſe productive of the Huſband's Power.

XIII. Nor can we grant, what the ſame Author maintains, that the Huſband, beſides the Command of the Family, and of conjugal Affairs, is inveſted with an abſolute *Power of Life and Death, in which Right the Sum of his Authority conſiſts.* For though this Power be meant as it is unreſtrained by Civil Conſtitutions, and as it amounts not to a licentious Excuſe of Murther and Parricide, but to a lawful Authority of inflicting condign Puniſhment on capital Crimes: yet that *every Sovereignty, as it is ſeated in a proper Perſon, not precariouſly obtained, nor circumſcribed by a Superior, doth import the Power of Life and Death,* is an Aſſertion that we ſhould not be inclined to aſſent to, without very good Proof. Certainly the End of Matrimony requires no ſuch abſolute Authority. And if it be objected, that all grievous Enormities ought to be brought under human Cognizance, we will only aſk, who ſhall puniſh a ſovereign Prince, or who the Father of a Family, living ſeparate from all civil Government? We confeſs, that if the Wife prove guilty of intolerable Wickedneſs[1], ſhe may (in this natural State) be expelled the Houſe as an Enemy, and may be killed by the Right of War. And we have already granted[a], that even this moſt ſtrict political Power is not repugnant to the Nature of Marriage, though we are very far from allowing it to be eſſentially neceſſary.

XIV. We are obliged here to explain that common Maxim of the Lawyers, that [2] *Conſenting, and not Bedding, makes a Marriage.* Which will bear theſe two Senſes, that a Couple, whatever Freedom or Familiarity they may uſe[3], cannot be Huſband and Wife, unleſs they have paſſed their mutual Conſent to live in Wedlock[b]: Or, that ſo ſoon as both Parties are come to an Agreement, the Matrimonial Contract ought to be eſteemed perfect, even before the Ceremony of the Bed. Our Judgment on this Point is this, that as it is requiſite to the full transferring of Propriety, that the Thing be placed under the Power of another, in ſuch manner, that he may diſpoſe of it at his Pleaſure; ſo, to make a Wife, it ſeems neceſſary, that the Woman deliver herſelf, as it were, into the Poſſeſſion of the Man, for the common Ends of Matrimony: But it is by no means eſſential to this Agreement, that the Bed begin it. It is ſaid *Rebecca* became *Iſaac*'s Wife after he had brought her into his Mother *Sarah*'s Tent[c]. And I queſtion whether we ought to call it Adultery, when a Woman betrothed to a Man in his Abſence, but not *led home to his Houſe*, nor given into

[a] Sect. xi. [b] And therefore *Æneas* pleads for himſelf in *Virgil*,

Nec Conjugis unquam
Prætendi tædas, aut hæc in fœdera veni.

I ne'er pretended to the lawful Claim
Of Sacred Nuptials, and a Huſband's Name.

Æn. iv. v. 338, 339.

[c] *Geneſ.* xxiv. ver. *ult.*

[1] M. *Hertius*, in a Note upon § 11. criticizes our Author here, and accuſes him of a Contradiction. How is it, ſays he, the Right of War can take Place againſt a Woman who depends upon her Huſband by Virtue of her own voluntary Subjection? But this is plainly to ſuppoſe the Point in Queſtion; for if the Authority of a Huſband, conſidered as ſuch, regards only the Affairs of Marriage and the Family, in every Thing elſe the Woman remains free and independent; and when the Huſband dies, or is away, he ſets her at full Liberty, ſo that all Inequality between them vaniſhes. M. *Hertius* alledges no direct Reaſon of any Weight, to prove that, in a State of Nature, the Huſband's Authority over the Wife is a Kind of Sovereignty flowing from the Nature of conjugal Society. He ſays here, and in his Diſſertation *De uno homine plures ſubſtinente perſonas.* § 2, 4. That the Maſters of a Family exerciſe ſuch a Power over their Wives. But this proves only, that Huſbands being placed upon this Footing, the Cuſtom became introduced; ſo that then Women ſubmitted tacitly to it, unleſs they declared the Contrary at Marriage, which they might very well do. In a Word, it is the ſame Thing here, as with regard to Children, over whom a Father, as ſuch, has neither Power of Life or Death; as will be proved in the following Chapter.

[2] So the *Digeſts* affirm. *Nuptias enim non concubitus, ſed conſenſus facit.* Lib. xxxv. Tit. i. *De conditionibus & demonſtr.* Leg. xv. & *de Regul. Juris.* Leg. xxx.

[3] Or, as QUINCTILIAN, *Decl.* ccxlvii. expreſſeth it, *Familiarities and Meetings without proper Rites can never make a Wife.* *Vid.* Can. v. Cauſ. xxvii. Quæſt. ii. & *Cod.* Lib. v. Tit. v. Lib. viii. *de inceſt. & inutil. nupt.* Leg. viii.

his Poſſeſſion[1], is bedded by another Perſon: although we ſuppoſe, that the former Engagement, as made by Proxy, had, in the Eye of the Law, the full Force of conſummated Marriage. On the other ſide, it would be abſurd to ſay, that *Tobias*'s Wife had not a Title to that Name the [2]three firſt Nights[a]. Or that our Women are not Wives, when the Prieſt hath performed the ſolemn Office, until the Evening-Diverſions of the Bride-chamber.

According to the Opinion of the *Jews*[b], Conſummation, as well as Conſent, was, before the Law, required to the compleating of Matrimony. Yet, by their Law, Conſent alone rendered a Marriage valid[c]. *Grotius* obſerves[d], that no Proceeding was made in the nuptial Affairs, until the Solemnity had been uſhered in by the Hearing of *Divine Service* in a publick Aſſembly: Which moſt religious and moſt decent Inſtitution the *Jews* probably received from antient Tradition, and do ſtill obſerve; and from them, it was admitted into the Chriſtian Church. For this Reaſon, though at the Settling of the Contract they obliged the Man to ſwear to preſerve the Virgin's Honour, until the Day of Marriage: yet, for the greater Security, they ſhut her up from him in the *Apartment of the Women*, till the Time of that finiſhing Ceremony[e].

XV. We are, in the next Place, to enquire, whether, by the Law of Nature, the Matrimonial Bond be limited to a ſingle Man, and a ſingle Woman? Or, which is the ſame Thing, whether *Polygamy* be naturally allowed? *Polygamy* is of two Sorts; either when one Woman promiſcuouſly admits of many Men, or when one Man is, at the ſame Time, joined in Marriage to many Women. To the former Kind belongs the famous *Platonical* Communion of Wives: A Cuſtom propoſed by *Plato* in Idea[f]; but really practiſed by [3]many Nations. *Diodorus Siculus*[g] reports of the *Taprobanians* in *India*, "That the Men did not confine "themſelves to ſtrict Wedlock, but poſſeſſed the "fair Sex in common, and educated the Children "(in whom they reckoned themſelves all con-"cerned) with Care and Love. Nay, the Nurſes "often changed their little Infants, ſo as to hinder "them from knowing their own Mothers." *Ceſar*[4] tells us of the antient *Britons*, *That Ten or Twelve of them together have Wives in common amongſt them; eſpecially Brothers with Brothers, Fathers with their Sons.* But *every Woman's Children are attributed to him, who firſt married her, when a Virgin.* Where it is plain, that great Author cannot mean, that one Woman had, at the ſame Time, ten or twelve Huſbands, as Mr. *Selden*, amongſt others, imagines; but that ſo many Men having each of them married his proper Wife, afterwards agreed upon that friendly Way of poſſeſſing them. *Lycurgus*, as *Plutarch*[5] delivers, "Endeavouring to prevent "the vain womaniſh Paſſion of Jealouſy, thought "this the beſt Expedient, to allow honeſt Men "the Freedom of each other's Bed: Laughing "at thoſe who reſented, in ſo high a manner, theſe "petty Injuries, as to purſue their Revenge by "Murders and War. He looked on it as no in-"decent Cuſtom for a Man, ſtepped into Years "before his Wife, to recommend her to the "Arms of a young and virtuous Friend; and, "when there appeared Hopes of having a Child "by ſo good a Father, to challenge the Bleſſing "to himſelf. On the other ſide, a good and up-"right Man, who eſteemed a married Woman "for her own Virtue, and for the Comelineſs of "her Children, was encouraged to beg of her "Huſband, without Ceremony, the Favour of a "Night's Lodging; *That he might tranſplant "into his own Garden ſome Slip of ſo goodly a "Tree.* Indeed *Lycurgus* was of Perſuaſion, that "Children were not ſo much the Propriety of "the Parents, as of the whole Commonwealth; "and, therefore, he would not have them begot-"ten by the firſt Comers, but by the beſt Men "that could be found. He cenſured the Law-"givers of other States, who, whilſt they ſpared "no Pains or Charge in promoting and improv-"ing the Breed of their Dogs, and of their

[a] See *Tob.* viii. 10. [b] *Vid.* Selden *de J. N. & G.* Lib. v. Ch. iv. As alſo *Bingham*'s *Eccleſiaſtical Antiquities*, Lib. xxii. Ch. iv. But above all the *Jus Eccleſiaſt. Proteſtan.* of M. *Bohmer*, Lib. iv. Tit. iii. § 4. *& ſeqq.* [c] *Deuteron.* xxii. 23, 24. *Add.* Lib. viii. *C. de inceſt. & inutil. Nuptiis.* [d] Ad. *Matth.* i. 18. [e] Comp. *Geneſ.* xxiv. 67. *Deuteron.* xxi. 13. [f] *Vid.* Lib. v. *de Repub.* & Marcil. Ficin. *in Præfat.* [g] Lib. ii. Ch. lviii.

[1] I decide here, without Scruple, for the Opinion contrary to that which our Author has embraced. According to the Simplicity of the Law of Nature, it is ſufficient that a Man and a Woman have mutually given their Faith to marry, to conſtitute a real Marriage. The Example which our Author alledges ſerves to prove it; for, as has been ſaid above (*Lib.* iv. *Ch.* ix. § 8. *Note* 1.) it properly paſſes from one Perſon to another, by the ſole Conſent of him who transfers it, and of him who receives it. Therefore, from the Moment a Woman has promiſed a Man to regard him for the future as her Huſband, and, conſequently, has given him a Right over her own Perſon; ſhe no leſs violates her conjugal Fidelity when ſhe yields to another, in the Abſence of her Huſband, than if ſhe did it in his own Houſe after the Conſummation of the Marriage. His Preſence has, in itſelf, no other Force but to put him in a Condition of enjoying his *Right*; but this *Right*, and the *Enjoyment* of it, are two different Things. The *latter* is no more neceſſary to acquire the *former*, than it is to preſerve it.

[2] *The three firſt Nights.* The Hiſtory of *Tobias* mentions no ſuch thing. Moreover, the thing appears certain in itſelf, if we ſuppoſe the Story true; for the Text ſays only, that, after *Tobias* had driven away the Evil Spirit, they both of them ſlept that Night. *Ch.* viii. 10.

[3] Add. *Diod. Sic.* Lib. ii. Ch. lviii. Of the *Ichthyophagi*, Lib. iii. Ch. xv. Of the *Hylophagi*, Lib. iii. Ch. xxiv. Of the *Nomades*, Ch. xxxii. which are, likewiſe, mentioned by STRABO, Lib. vii. Of the *Garamantes*, vid. *Plin.* Lib. v. Ch. viii. *Solin.* Ch. xliii. Of the *Troglodytæ Agatharcid.* Ch. xxx. *Pompon. Mel.* Lib. i. Ch. viii. Of the *Agathyrſi*, *Herodot. Melpom.* p. 161. Ed. *H. Steph.* Of the *Gindani* and *Nomades*, ibid. Of the Inhabitants of *Thule*, SOLINUS reports (I know not with what Credit) that *they hold their Women in common, and are Strangers to fixt Matrimony*, Ch. xxxv. But if the Author had attended to the Sequel of this Diſcourſe, he would have ſeen that this Epitomizer ſpeaks there of the *Weſtern Iſlands*, and not of *Thule*. As for his Criticiſm on Mr. *Selden*, it is equally unjuſt. For this learned *Engliſhman* only gives an Example of Community of Women among ſeveral Huſbands of which each had his own. See the *Obſervationes Selectæ* of the *Meſſ.* of *Hall.* Tome vi. *Obſerv.* ii.

[4] *De B. G.* Lib. v. Ch. xiv.

[5] *Lib.* v. *Ch.* xi. The ſame Cuſtom is mentioned, though not ſo diſtinctly, by XIPHILIN. Epit. *Dion.* in *Ner.* in *Bonduica's* Speech; and again in *Severe*. STRABO reports ſomewhat like this of the *Sabæans*: "Their Poſſeſſions (ſays he) lie in common "to all of the ſame Blood and Family, but the eldeſt bears the chief Sway. One Wife ſerves them all: He that comes firſt hath "Admiſſion to her Bed, placing his Staff before the Chamber-door: But the Nights ſhe paſſeth with the eldeſt. They puniſh "Adulterers with Death, and ſuch they eſteem every Intruder into another Family, *Lib.* xvi. *p.* 538. *Vid.* Lib. xi. p. 353, "354. de *Maſſaget. & Tapyr.*" Of ſome Inhabitants of the Kingdom of *Calecut*, *Ludovicus Romanus* (*Navig.* Lib. v. Ch. viii.) informs us, "That every Woman is, at the ſame Time, married to ſeven Huſbands, who lodge with her by turns. When ſhe is "brought to Bed, ſhe preſents the Child to which of the ſeven Fathers ſhe pleaſeth and no Appeal lies from her Determination." *Vid. &* Pet *de* Valle *Itiner.* p. 3. Ep. 7. *Joan. Boem. de Mor. Gent.* Lib. iii. Ch. vii. reports of the *Lithuanians*, from *Æneas Silvius*, "That the Women, by Conſent of their Huſbands, have their Sparks, whom they call Aſſiſtants of their Bed; whereas, "on the other ſide, for the Huſbands to uſe the like Liberty, would be accounted highly infamous.

" Horſes; yet, being themſelves old and infirm, " ſhut up their Wives from other Men. Where- " as a little Reflexion would have taught them, " that the Virtues and Vices of Children, their " Succeſs or Miſcarriage, chiefly redounds to " thoſe who have the Care of their Education." And this Inſtitution of the *Spartan* Founder, the Hiſtorian judgeth to have been ſet on foot, φυσικῶς καὶ πολιτικῶς, *Agreeably to Nature and to Policy* [a].

The *Stoicks* [b] too were of Opinion, that wiſe Men ought to communicate their Beds, as well as their other Poſſeſſions: Becauſe by this means all eſteeming their Children their own, would love them with equal Tenderneſs; and there would be left no room for jealous Fears, no Suſpicion of Adultery or Diſhoneſty [c]. The Borrowing and Lending of Wives, amongſt the *Romans*, is a Practice much talked of by Authors. [d]. *Solon*, in his Laws, permitted an Heireſs, whoſe Husband proved impotent, to call in the Aſſiſtance of his neareſt Kinſman [e].

Yet we are not to make the leaſt Doubt but that all theſe licentious Indulgences are repugnant to the *Law of Nature* [f]. For the natural and regular End of Marriage is, the obtaining of Children, whom we may, with Certainty, call our own. But what room can there be for Diſtinction in this wild and confuſed Mixture? Again, the Buſineſs of Nature not requiring ſo numerous a Concurrence, all theſe additional Helps and Services proceeded not from Neceſſity, but from Luſt. Beſides, a moſt material Objection againſt theſe Irregularities, is, that the kind and endearing Titles of Relation are ſunk and extinguiſhed in them. *Plato* [g] propoſeth, by way of Remedy to this grand Inconvenience, that the civil Laws ſhall ſupply the Defect of natural Kindred; that all Perſons ſhall eſteem their Seniors in Age, as their Parents; their Juniors, as their Children; their Equals, as their Brothers and Siſters. But this is a moſt idle and vain Expedient; for to have *no certain* Father, *no certain* Child, &c. is, with regard to mutual Affection, the ſame thing as to have none at all. 'Tis well urged by *Lactantius* [h]: *If all*, ſays he, *are concerned in every Child, who can love a Child as his own, when he muſt needs be ignorant, or, at leaſt, doubtful, whether it be his own, or no?* On the other Side, *Who would reverence a Man as his Father, when indeed he is uncertain to whom he owes his Being? Whence it comes to paſs, that he muſt take a Stranger for his Father, and his Father for a Stranger.* And it was a good Anſwer to one, admiring there ſhould be no ſuch thing as *Adultery* heard of in *Sparta* [i], That *their very Matrimony was Adultery.* Farther ſtill; the main Difference betwixt the conjugal Union of Mankind, and the wild Freedom of coupling amongſt the Beaſts, is, that the Wife engageth her Faith to be true to the Husband's Bed. Which Engagement, if he voluntarily releaſe, and madly betray his own Honour to new Rivals, he is unworthy the Name, not only of a Husband, but of a Man; and is to be looked upon as a moſt vile Diſturber of human Decency and Society. As for the Excuſe of *Lycurgus*, and others of thoſe antient Lawgivers, that ſo fair a Soil as a young Wife ought not to lie fallow, under the Neglect of an unactive Huſband, their moſt ready and moſt honeſt Way of preventing ſuch Miſhaps, had been to prohibit Marriage between Perſons of improper Years. And then for the Point of *Jealouſy*, by it they muſt mean, either that ſenſeleſs Paſſion, which torments a Man's Head without good Suſpicion or Reaſon; or elſe a due and proper Vigilance and Caution, in order to the preſerving a ſpotleſs Bed: The former kind of Jealouſy, the moſt fooliſh, and the moſt miſerable Diſeaſe of human Minds [i], their Community of Wives could not cure; and the other, being the juſt Effect of Reaſon and Prudence, it ought by no means to have taken away [k] [2]. Nor ſhall I ever be perſuaded,

[a] The ſame Law is mentioned by *Xenophon, de Reb. & Leg. Lacedæmon.* [b] In *Diog. Laert. Zen.* [c] *Add.* Thom. Campanell. *de Civit. Solis.* [d] *Vid.* Plutarch. Num. & Cat. *Min.* So *Cato* is commonly ſaid to have lent his Wife *Marcia* to *Q. Hortenſius.* Vid. & *Lucan.* Lib. ii. *v.* 328. [e] *Plutarch, Solon.* [f] Comp. *Matt.* xxii. 25, &c. [g] Lib. v. *de Repub.* p. 658. A. Ed. *Wech.* [h] *Div. Inſtit.* Lib. iii. Ch. xx. [i] *Vid.* Oppian. *Cyneget.* Lib. iii. *v.* 237, &c. [k] Vid. *Senec. Herc. Oet.* v. 233, &c.

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[1] I do not know whence our Author has taken this Sentence, which he added in his ſecond Edition, and for which he gives no Authority; I find it neither in *Plutarch* nor elſewhere. This Hiſtorian only gives us a Repartee of *Geradas*, a *Lacedemonian*, by which he anſwers a Queſtion put to him, What Puniſhment they would inflict on an Adulterer, if he was found in *Sparta*? *Vit. Lycurg.* p. 49. C. D. p. 228. B.

[2] Mr. Bayle, in his New Letters againſt *Maimbourg*, Let. xvii. § 5. maintains ſtrongly, "That if we follow Reaſon, as " diſtinct from Grace, and the Light of Faith, a Man need not more to ſcruple to lend his Wife than his Book, and that " without the ridiculous Fear of Cuckolding. Reaſon would rather adviſe a Community than Propriety of Wives." I own, that here, as well as in many other Things, Men, for the Good of Society, might, by a certain Inſtinct, which prevents the Uſe of Reaſon, be led to it. If Hunger and Thirſt did not often put us in mind of our Nouriſhment, we ſhould often forget, or neglect to ſatisfy that natural Neceſſity; and ſo the World might be unpeopled. In like manner, were it not for that unquiet, and raging Paſſion, called *Jealouſy*, which always attends the Love of a Woman, the Community of Women would be eaſily introduced, or at leaſt Husbands for the moſt part would be very careleſs of the Honour of their Wives, and eaſy to permit them to communicate their Favours to others beſides themſelves. Not that Reaſon would incline them to it, but the contrary; becauſe, as Men are ordinarily made, there are few that conſult, or hearken to Reaſon, ſo that they muſt be led to their Duty by Senſe. With *Ariſtippus*'s good Leave, as a Philoſopher (cited by Mr. Bayle, § 4.) he had very ſuperficial and popular Ideas. If he uſed his Reaſon but a little, he might have diſcovered without Revelation, that Man is a Creature made for Society, and that no Society can ſubſiſt without Order, and that Community of Women (as Mr. Bayle owns) would breed Confuſion in civil Society; ſo that Men muſt not be judged of as Beaſts, by looking upon their Propagation, as a Thing abſolutely indifferent, and as to which every one may regulate himſelf only according to his own Fancy. In his Caſe, 'tis certain, that a Woman ought to be a Common Good, as the Water of a River; and ſo it would be a ſordid Paſſion to be diſpleaſed, that another ſhould quench his Thirſt at the ſame Spring. But ſince, by God's Appointment, Man ought to propagate his Kind in a Manner worthy a reaſonable and ſociable Creature, Jealouſy in itſelf, and reduced to its juſt Bounds, is neither more unjuſt nor unreaſonable, than the Inclination which leads both Sexes to join together: and we may ſay, that Nature hath wiſely put into Men that Delicacy, as a faithful Guardian of the Chaſtity of Women, which ſeveral Husbands would diſpenſe with, and be very careleſs about. All that is meant, is this, when a Woman is unfaithful to her Husband, without any juſt Cauſe from him, Reaſon requires, that he comfort himſelf, and ſay with the Comedian,

If my Wife deceive me, ſhe ſhall lament it;
I've done no Wrong, and can't repent it.
They'll call me Fool not to revenge it.
But I ſhould be hardy to haſten my End.

this

that to lay all Poſſeſſions in common, and to give each Man the Privilege of calling every Thing *his own*, is the ſureſt Method of preſerving Peace and Friendſhip in the World. Every one muſt indeed acknowledge, that it is much more for the publick Benefit to have a *State* filled with healthy and vigorous, than with diſeaſed and weakly Subjects; and, at the ſame time, that the Parents Conſtitution hath a conſiderable Influence on the Child's. Yet, did this Rule hold true more generally than it doth, it were by no means worthy of ſo high Regard, as that, in conſideration of it, we ſhould diſſolve the ſacred Ties of Marriage, and ſhake the main Foundation of all good Order amongſt Men [a].

XVI. The other kind of *Polygamy* [b], and that which more properly claims the Name, being the joint Relation of many Wives to one Husband, hath been the Practice of many Nations in antient and in modern Time. The *Moſaical* Law was ſo far from forbidding this Cuſtom, that it ſeems, in ſeveral Places, to ſupport it [c]. And GOD, by the Prophet *Nathan*, reckons amongſt the peculiar Favours and Bleſſings he had beſtowed on *David*, that *He had given him his Maſter's Wives into his Boſom* [d]. Mr. *Selden* [e] aſſures us, that the *Jews* eſteemed it lawful for a Man to marry as many Wives as he pleaſed, provided he could maintain them, and yield a Supply in all things anſwerable to their Relation. Yet it was the Advice of their ſageſt *Rabbies*, that, for the avoiding the Inconveniences of *Number*, no Perſon ſhould exceed *Four*, except the King. He that acted contrary to this Rule, was adjudged guilty of notorious Impudence, and of Diſobedience to the Inſtitutions of his Anceſtors. The *High Prieſt* was allowed one Wife at a time, though he was not hindered from marrying another, in caſe of the Death, or Divorce of his firſt. By the Prohibition of *Deuteron.* xvii. 17. they were perſuaded, that their King ought not to go beyond Eighteen. If the Men of their Nation lived in a Country, where *Polygamy* was not tolerated, they thought them obliged to conform; as particularly in the *Roman* Empire, the Laws of which expreſly reſtrained them from the Uſe of ſuch a Liberty [f]. As for the modern *Jews*, we are informed by *Leo Mutinenſis* [g], That *thoſe of them who live in the Eaſt, ſtill keep up their antient Practice of Polygamy*; *whereas in* Germany *they are not allowed this Privilege, and in* Italy *very rarely*; *and only in caſe a Man hath lived with his preſent Wife many Years without Iſſue* [h].

Tacitus [i] obſerves of the antient *Germans*; *They are almoſt the only People amongſt the* Barbarians, *who are contented with ſingle Marriages. Indeed ſome few Perſons of extraordinary Merit are advanced to the Favour of more Ladies than one*; *but then they are courted to this Liberty, not out of Luſt, but upon account of their ſingular Virtues and Worth.* Thus *Cæſar* [i] tells us of *Arioviſtus*'s two Wives choſen out of different Nations.

The *Grecians*, according to their regular Frame and Conſtitution, admitted but of one Wife; yet we find in one of the *Athenian* Decrees an Exception to this purpoſe, That *to increaſe the Number of Men, at preſent deficient, it ſhall be lawful for any Perſon to have Children by another Woman, beſides her that is, in a more ſtrict Senſe, his Wife* [k]. And hence *Atheneus* [l] urging the Improbability of the common Story, that *Socrates* had two Wives, inaſmuch as this was contrary to the primitive Ordinance of *Cecrops*, and was not objected to him by the Comedians, who handled him ſo reproachfully on other Occaſions; at laſt concludes, that if the Matter of Fact were really true, it muſt proceed from a particular Order of State, diſpenſing with the antient Strictneſs, by reaſon of the preſent Scarcity of Subjects. In *Gellius* [m], among the ſeveral Cauſes alledged, why *Euripides* ſhould get the Title of the *Woman-Hater*, this is brought as one, that he had two Wives together (*the* Athenian *Government at that time allowing it*) who made him quite weary of Matrimony, and quite out of love with the Sex. Amongſt the *Spartans*, we find in *Herodotus* [n], that when their King *Anaxandrides* refuſed to put away his Wife, on the account of Barrenneſs, he was compelled by the Authority of the *Ephori*, to admit another to his Bed, who did not lie under the ſame Imperfection. Every Body knows, that the *Romans* were content, each Man with his ſingle Wife [o]. Yet *Suetonius* [p] reports, that it was once in *Julius Cæſar*'s Head, to introduce a Law, to give Men Licence to marry what Sort, and what Number of Wives they thought fit, for the better ſtocking the Commonwealth. *Socrates*, the Eccleſiaſtical Hiſtorian [q], reports of the Emperor *Valentinian*, that, whilſt his Wife *Severa* was living, he admitted to the ſame Honour the moſt beautiful Lady *Juſtina*; and publiſhed an Order through his whole Dominions, permitting every Man to follow his Example; *To have Two lawful Wives*. *Paulus Diaconus* [r] gives the ſame Relation; and *Zonaras* mentions the Emperor's two Wives, though he ſays nothing of the Law enacted on that Occaſion. But in as much as the other Hiſtorians, *Ammianus*, *Zozimus*, and *Oroſius*, together with the Chriſtian Fathers, who ſo often diſcuſs the Queſtions concerning Matrimony, are abſolutely ſilent in this Point; *Baronius* [s] concludes the double Marriage of *Valentinian*, and the Law in Juſtification of it, to be perfect Forgeries.

Mahomet in his new Inſtitution allowed of *Polygamy*; craftily accommodating his Doctrines to the Temper of the People, whom he intended to deceive. For as the Force of Love is ſtronger in the Men of thoſe Eaſtern Parts, ſo the Women, either by their natural Genius, or

[a] The Argument which ſome are not aſhamed to bring from our Ways of promoting the Breed in Horſes, is too filthy and ſcandalous to deſerve a Refutation. Add *Ariſtotle*'s Diſcourſe againſt *Plato*, on this Subject, *Polit* ii. Chap. ii. It is a worthy Saying of his in the ſame Work, *Lib.* vii. *Ch.* xvi. *For Perſons who are truly and properly Man and Wife, to ſeek another Partner, and another Bed, ought to be reckoned amongſt the vileſt and moſt infamous of Offenders.* [b] Vid. *Grot.* Lib. ii. Ch. v. § 9. [c] See *Deuteron.* xxi. 15. xvii. 16, 17, & *loc.* Ambroſii, *apud* Gratian. *Cauſ.* xxxii. *quæſt.* iv. Ch. iii. vii. [d] 2 *Sam.* xii. 8. [e] *De Uxore Hebraic.* Lib. i. Ch. iv. [f] Lib. viii. *C. de* Jud. &c. *Add.* Selden. *de J. N. & G.* v. Ch. vi. [g] *De Rit. Hebraic.* P. iv. Ch. ii. § 2. [h] Here Mr. *Selden* obſerves, that in the firſt Edition was added, *Indultu tamen Romani Pontificis impetrato*, "Yet not without procuring the Indulgence or Diſpenſation of the Pope"; which Words are omitted in the *Paris* Edit. 1637. [i] *De B. G* Lib. i. Ch. liii. Note iv. [k] *Diog. Laert. Socrat.* Lib. ii. § 26. [l] Lib. xiii. Ch. i. [m] Lib. xv. C. xx. [n] *Terpſichore*, p. 190. Ed. *H. Steph.* Vid. *Potter Archæol. Græ.* Lib. iv. Ch. xi. p. 599. [o] Vid. *Cod.* Lib. v. Tit. v. Lib. ii. *de Inceſt. Nupt. &* Lib. iv. Tit. ix. Lib. xviii. *C. ad Leg. Jul. de Adult.* [p] Ch. lii. [q] Lib. iv. Ch. xxvi. [r] Lib. xi. [s] Tom. iv. *ad.* A. *Chr.* 370. § 125.

[i] Tacit. *de Mor. German.* Ch. xviii.

by

by the Power of Education, live in such perfect Subjection to their Husbands, that their Jealousies and Quarrels are seldom considerable enough to disturb the Peace and Union of the Family. Yet the wealthier Men shut up their Wives in separate Houses, or confine them to distinct Towns, to prevent Dissension [a]. *Boccaline* [b] will have this Indulgence to have been a Device, to dispose Men the better for a Life of Slavery; whilst dividing their Riches amongst so large a Progeny, they must continually grow weaker, and more absolutely at the Command of the Government. A Thought very ingenious indeed, and of refined Policy; and such as probably never entered into *Mahomet*'s Head, who died so long a Time before the Establishment of the *Turkish* Tyranny and Empire. As for the *Indians*, Travellers inform us, that the chief Reason why several of their Princes have refused to embrace the *Christian* Faith, hath been because, amongst other Conditions, it was required of them, to admit no more than one Woman to their Bed [i].

XVII. Whether or no this Practice be repugnant to the *Law of Nature*, is a Point not fully settled amongst the Learned. It shall be our Business to propose fairly the Arguments on both Sides, leaving the decisive Judgment to be passed by the Reader. Those then, who maintain *Polygamy*, as we now understand it, to be in itself agreeable to natural Law, argue in this Manner: "The regular End of Matrimony, that is, the "Certainty of Off-spring, and the Benefit of "mutual Assistance, is as well answered under "these Allowances, as under the strictest Con"finement. It is an idle Objection, which some "make, That *at this rate the conjugal Faith will "not be reciprocal, a Condition which Reason itself "requires as essentially necessary to every Covenant.* "For *mutual Faith* doth by no means suppose, "that the Performances on each Side must needs "be equal. Nor doth the true Intent of Matri"mony demand, that the Man should confine "his Desires so straitly as the Woman. The "Reason why one Woman ought to take up with "one Man, being the great Danger of the Un"certainty of Issue; which Hindrance doth not "lie in the Way of the other Sex. Yet is not "the Husband less obliged to make good his "Faith to every Wife; which Performance con"sists in the yielding her all due conjugal Help, "Kindness, and Support. As for the main End "of Marriage, the obtaining of Children, one "Man is, in this respect, equal to many Wo"men; at least to such as are Moderate and Vir"tuous [c]. And therefore it is chiefly Lust and "Intemperance which makes Women so averse "to *Polygamy*. Indeed, if a Wife, at her first "Contract with her Husband, binds him under an "Engagement to admit no Partners with her of "his Bed, (as *Laban* [d] bound *Jacob* in Behalf of "his Daughters) such a Covenant is faithfully "to be performed [e]. Where no such Condition "is made, there the Wife ought to rest satisfied "with a competent Share in the Husband [f]. "Nor doth she, in this Case, suffer any Injury; "for she can have no more Right over her Hus"band's Body, than what she obtained by the "Matrimonial Compact: But in that Compact "she received a Right only to a Part of the "Man, and voluntarily agreed to this imperfect "Possession. And therefore she hath only Rea"son to complain of her Husband, when, as "*Plautus* [g] says, *He lets his own Field lie fallow to "plough another Man's.* Nor doth this Allowance "of *Polygamy*, as some object, reduce the Wo"men to the Condition of Slaves. Nor is it "any Crime, to place the weaker Sex in an in"ferior Degree to the stronger, to whom they "owe their Defence and Support [h]. The Rea"sons alledged on the other Side, taken from the "fatal Effects of Jealousy, the Danger of Do"mestick Quarrels, the Hatred of the rival Mo"thers transmitted to their various Race, do not "amount to a Proof, that *Polygamy* is naturally "unlawful; but then the same Inconveniences "appear, as in all, so especially in *second Mar"riages*, which no one will, upon this account, "term unlawful. Nor are the Troubles and "Misfortunes of this Kind equal in all Places; "but they are chiefly to be discovered in such "Countries, where either the Women have too "high and commanding Spirits, or the Men too "low and servile. In many Nations the Wives, "either by their natural Disposition, or by Cu"stom and Education, pay a more strict and "quiet Obedience [i]. And besides, it is no dif"ficult Task, for a Man of tolerable Prudence "and Discretion, to keep the Family-peace a"mongst several Women [k].

XVIII. Those, who deny *Polygamy* to be agreeable to the *Law of Nature*, chiefly insist on the Seventh Commandment in the *Decalogue, Thou shalt not commit Adultery*; which must be acknowledged to affect the Man, as well as the Woman, "And therefore, say they, if the Prohibition "lies on both Parties, the Husband must be guil"ty of Adultery, whenever he receives into the "Covenant of Marriage, or into the Possession "of his Bed, another Woman, against the Con"sent of *Her*, to whom he first plighted his Faith, "and gave the Power over his Body [l].

[a] *Richer. de Morib. Turc.* [b] *Ragg. di Parnass.* Cent. ii. Ch. lxviii. [c] Especially, if they imitate *Zenobia*, Queen of the *Palmyrenes*, who would not admit the Embraces of her Husband upon any other Account, than the obtaining of Children. *Trebell. Poll. in* xxx. *Tyran.* Ch. xxx. [d] *Gen* xxxi. 50. [e] *Add.* Lib. xlv. Tit. i. Lib. cxxi. § 1. *D. de Verb. Obligat.* [f] See *Genes.* xxx. 15, 16. *Herodot. Thalia*, p. 120. Ed. *H. Steph.* "The *Persian* Wives take their Turns and Courses with their Husbands. [g] *Asinar.* Act. v. Sc ii. *Add.* Lib. xlviii. Tit. v. Lib. xiii. § 5. *D. ad L. Jul. Adult. & ad eam Grot. in Flor. Sparg. ad Jus Justinian.* Women are seldom so very ambitious of Honour, as to be satisfied with the Excuse which *Ælius Verus* (in *Spartian*) gave his Lady, when she complained of his Mistresses: *Give me leave*, says he, *to satisfy my Inclinations by some other means*: A *Wife* is a Name of Dignity, not of Pleasure. *Add.* Plaut. *Mercat.* Act. iv. Sc. ii. *Gratian*, Caus. xxxii. Qu. vi. Ch. ii, *&c.* [h] 'Tis a Saying of *Euripides* in *Supplic.* v. 40. That *Women who are wise will transact every Thing by Men.* [i] *Vid.* Benzo, *Hist. Nov. Orb.* P. i. Ch. xxxvii. [k] The Reasons urged by *Perezius, Godofred.* (*ad* Lib. i. Tit. ix. Lib. vii. *C. de Judæis*, &c.) will be found, upon Examination, very slight and trivial. *Grotian*, Caus. xxxii. Quæst. v. Ch. xv, xvi, xxiii. Vid. *Barcler.* ad *Grot.* Lib. ii. Ch. v. § 9. *Hobbes* hath made some kind of Reply, to this, in his Sixth Chapter *de Cive*, § 16. and in his Fourteenth Chapter, § 9. which we shall elsewhere take occasion to examine in Lib. vii. Ch. i.

[l] Add. *Abrah. Roger.* de *Bramin.* P. i. Ch. xiii. & *Alex.* de *Rhodes* Itinerar. P. ii. Ch. xi. *Add. Nouv. Memoires de la Chine.* Tom. ii. Lib. iv. & WILL. BOSMAN's Voyage to *Guinea*, Lett. xix. & Mr. BAYLE's *Nouvelles de Avril*, 1685. and LYSERUS's Book, entitled, *Polygamia Triumphatrix.* As to the Law of *Valentinian* I. mentioned above, the President BOHEMER (*De Jure Connubiorum*, p. 239. *Edit. Amster.*) seems to doubt of it. But the Reality of the Fact has been established with great Force, in an Article of the *Biblioth. German.* Tom. iii. p. 40. *& seqq.* written by M. *de Beausobre.*

In return to this Argument, *Antonius Matthæus* [a], the *Civilian*, affirms, that Adultery cannot be committed, either by *Polygamy*, or between a married Man and an unmarried Woman [b], but only with another Man's Wife [c]. Nor will he allow every Violation of the Marriage-Covenant to be the Sin of Adultery: For we never call him an Adulterer, who maliciously forsakes his Wife, who refuseth to give her Maintenance, and the like; yet such a Man, without doubt, breaks his matrimonial Faith. He [1] adds, "Although it be unjust in the Husband, to "require a stricter Chastity of his Wife, than "he practiseth himself; yet this by no means "proves the Sin on both Sides to be equal. For "every one knows, that the Wife is, upon many "Accounts, obliged to a much severer Degree "of Moderation and Purity; in regard, as well "to the Modesty of the Sex, as to the Danger "of confused Amours, and of a suppositious "Breed; as, likewise, to prevent the Scandal her "Lightness would bring, not only on her own "Family, but on the Government under which "she lives. For if it be reckoned so very disgraceful to be born of Parents, one of whom "is a Native, the other a Foreigner, in so much "that in most Countries a Name of Reproach is "fixed on Persons of this motly Race; how much "fouler an Infamy would it prove, as well to the "whole State, as to particular Men, should it be "left uncertain, whether the Subjects are born in "Adultery, or in lawful Marriage? In *Leviticus* [d] "Adultery is defined, *The coming to another Man's "Wife, the polluting another Man's Bed.* Nor can "it, on any Account, appear probable, that a "Law against Adultery, directed to a People "who actually used *Polygamy*, should forbid this "Practice, without declaring as much in [2] express Words. Those Expressions of Holy "Scripture [e], and of the [3] primitive Fathers [f], "which seem to make the coveting, or desiring "another Man's Wife, to be Adultery, are to be "understood in the same Sense, as when he that "*hates his Brother* [g], is stiled a Murderer."

Others choose to answer thus, "The Com"mandment alledged doth indeed bind Men, as "well as Women: And therefore for one Hus"band to dishonour another's Bed, is no less sinful, "than for a Wife to defile the Bed of her pro"per Husband. But then *Polygamy* doth not make "the Husband guilty of this Trespass against his "Neighbour. It is true, if in the original Con"tract between the Parties it was expressly pro"vided, that the Man should transfer the whole "Power over his Body to the Woman, then in "case he brings an Usurper to her Bed, whether "under the Name of an Harlot, or of a Wife, "he certainly violates his Faith given in the former Matrimony [4]: But we have no such Charge "of Perjury to lay against him, if, at the first "Marriage, he reserved to himself the Liberty of "adding a second Consort, as a Partner to her "whom he then received. Nor can he be said "to defraud her, inasmuch as he bargained to allow her only a Share in himself." To this it is reply'd, That *we must not suppose the Woman would thus consent to her own Loss and Injury, unless either compelled by Force, or Fear, or moved by Weakness and Defect of Judgment; neither of which Causes are able to found a Right in the Man.* But the Assertors of the other Opinion will not grant, that there is any Injury in the present Case. "All "the Right and Title, say they, that one Person "can have to the Body of another, must arise "from Covenant, and from the Consent of that "other Party. And, consequently, if so much "be performed, as was fairly covenanted for, "there ought to be no Complaint of injurious "Dealing. It is no good Consequence to say, "that because, in just and true Matrimony, the "Husband receives the full and perfect Possession of the Wife; therefore the Wife obtains "the same absolute Title to the Husband. Nor "will such an unequal Covenant prejudice the "natural Equality of Mankind. For to salve "this, it is not necessary, that the mutual Performances amongst all Persons should be exactly alike: If so, it would be repugnant to "the *Law of Nature*, that one Man should be "born a Prince, another a Subject, and both by "virtue of an antecedent human Covenant, not "made by themselves, but by others. Will any "one be so extravagant as to maintain, that it is "a Breach of natural Equality, unless the Wife "be allowed her Turn of Governing, as well as "the Husband? And there is the same Difference "observable in the Care of the common Offspring: How little Trouble doth this bring "to the Father, in comparison to the grievous "Pains undergone by the Mother? Would it "not be a most ridiculous Proposal, for the Wo"men of State to desire a Part in the supreme "Administration? And yet we must not say, "That the Men are guilty of Injury and Tyran"ny for excluding the fair Sex from this honour"able Privilege. Should any People be of such "a Temper, as to desire the Establishment of a "stricter Government (which the bolder Patrons "of Liberty are wont to call, the Treatment of "Slaves) if they too freely indulge the Reins to "the new Power, they act foolishly, and transgress "that *ruling Prudence*, which is the best-loved "Sister of *natural Law*. So that to commiserate "the Condition of the Wives in *Turky*, *&c.* is as "absurd and impertinent, as to bestow our Pity "on Husbandmen and Artificers, and condoling

[a] *De Crimin. ad L. Jul. de Adulter.* Ch. i. § 13. [b] S. xii. [c] Lib. vi. § 2. *D. h. t.* [d] *Levit.* xviii. 20. xx. 10. [e] *Matt.* v. 28. [f] Produced by *Gratian*, Ch. iii, iv, & i. Quæst. iv. Caus. xxxii. & Ch. v. Quæst. vi. Caus. *eadem.* C. iv, x. *De eo qui cognov. Consanguin. Uxor. suæ.* [g] 1 *John* iii. 15.

[1] So the *Digests* speak, *Periniquum videtur esse, ut pudicitiam vir ab uxore exigat, quam ipse non exhibeat.* Lib. xlviii. Tit. v. *Ad Leg. Jul de adulteriis coercendis*, Leg. xiii. § 5. What the Lawyers say here regards only the Case where the Husband makes a Handle of the Wife's Infidelity, to keep a Part of the Portion which she brought him. See above, *Lib.* v. *Ch.* xi. § 6. *Note* 5.

[2] Not only this: There are, in the Old Testament, Things which plainly suppose that GOD allowed of *Polygamy*. Whence there arises an invincible Argument, which, in my Opinion, can never be answered by those, who assert, that it is a Thing absolutely Evil, and unlawful in itself. See what I have said upon *Grotius*, *Lib.* i. *Ch.* i. § 17. *Note* 3.

[3] Of the Passages here quoted, the last is nothing to the Purpose, nor are the others founded upon the Words of JESUS CHRIST in question. Indeed there is another Place, where St. *Gregory* makes use of it, *Caus.* xxxii. *Quæst.* v. *Can.* xiii. The Fathers of the Church, founding themselves upon figurative, and improper Expressions, have confounded the Ideas of *Adultery*, *Fornication*, and *Concubinage*. See M. THOMASIUS's Dissertation *De Concubinatu*, § 19 *& seqq.* As for the Rest, what our Author here says, is his own, though he gives it as taken from *Anton. Matthæus*, whose Sentiments he recites.

[4] Upon this Footing, the *Roman* Law which forbid *Polygamy*, should, also, have regarded the Commerce of a married Man with a Maid as Adultery. Mr. THOMASIUS (*Jurisp. Divin.* Lib. iii. Ch. iii. § 97. And *Fundament. Jur. Nat. & Gent.* ibid. § 31.) says, upon this Subject, That the *Romans* held, in this Respect, the same Opinion with the Oriental Nations, though they did not follow the Principle upon which it was founded.

"with

" with them, that they ſhould be ſo unfortunate, " as to live in more uneaſy Circumſtances, than " the Nobility. The Reaſon why a Huſband " cannot honeſtly admit another Man to partake " of his Bed, is built upon a different Bottom. " On the Whole it may be concluded, that a Wo- " man lies under no reſtraint of Conſcience, from " agreeing to this kind of Matrimony, in a Coun- " try where the Practice is publickly received. " Eſpecially, ſince if it were in any degree Vici- " ous, yet the bare Force of the weaker Sex could " never prevail to the beating down a publick " Cuſtom; nor would all of them join in the " Attempt: Some being ever more kind and " friendly than others, and more unwilling to en- " gage againſt the Men[a]. The Example of the " Heathens, and of the *Mahometans* (who are al- " lowed four Wives, and as many Concubines as " as they can maintain) may indeed be of no great " Force in the Argument; becauſe it appears, " that thoſe People are guilty of many Viola- " tions of the *Law of Nature*; but the *Poly-* " *gamy* of the Fathers, under the old Covenant, " is a Reaſon, that ingenuous Men muſt confeſs " to be unanſwerable. As to the Saying of the " Apoſtle, 1 *Cor.* vii. 4. it doth not ſeem to reach " the primary Deſign and Uſe of Matrimony, " but only the ſecondary and indirect End, *the* " *avoiding Fornication*: which End belonging, in " the ſame Degree, to the Man and to the Wo- " man, Humanity and Equity enjoin, that the " ſame Proviſion ſhould, in this Reſpect, be made " for both Parties; and then it follows, that the " Huſband ought not to deny his Wife conjugal " Favours[1]. But the communicating his Fa- " vours to others beſides her, doth not here ſeem " to be forbidden[2]."

XIX. However it be, this is very clear and certain, that the moſt decent, the moſt proper, and the moſt peaceable Way of Wedding is, for *one to live contented with one.* This then is, without all doubt, to be eſteemed the higheſt, and the moſt perfect kind of Matrimony; and the Laws and Conditions of it are moſt religiouſly to be obſerved, as well by the Huſband, as the Wife[3,4,5]. It is worth remarking, that where ſeveral Wives are allowed to one Man, he ſeldom fails to ſingle out a Beloved, whom, in all Reſpects, he prefers to the reſt[b]. Thus Nature itſelf ſeems, out of Multitude, to lead us into Unity. 'Tis a wiſe Obſervation that of *Saluſt*[6], *The Relation*, ſays he, *of a Son-in-Law, is but ſlightly eſteemed amongſt the* Numidians, *and the* Moors[7]: *And the Reaſon is, becauſe they marry each as many Wives, as they think agreeable to their Fortune and Grandeur; ſome ten, ſome more, and their Princes with a far wider Li-*

[a] *Iſaiah* iv. 1. [b] *Geneſ.* xxix. 29. *Deut.* xxi. 15. *Eſther* ii. 17. *Cant.* vi. 7, 8.

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[1] Add here what I have ſaid upon *Grotius*, Lib. ii. Ch. v. § 2. *Note* 7. towards the End.

[2] Mr. *Derham*, in his *Phyſico-Theologia*, Lib. iv. Ch. x. endeavours to prove *Polygamy* unlawful for this Reaſon; *that there are more Males born than Females.* But to draw any Conſequence from hence, 1*ſt*. We ſhould not only have conſtant and certain Obſervation of ſuch a Proportion in a few Places only, but through all the Countries in the World; for if there be only one where the Caſe happens otherwiſe, this Proof falls immediately to the Ground, ſince the Foundations of the Law of Nature muſt be every where the ſame. 2*dly*, Suppoſing the Fact well proved, and univerſal, the Conſequence would be far from being demonſtrable: For it is neither true nor neceſſary, that all the Males who are born, marry. There are many who never concern themſelves about it. And, perhaps, the Number of Males, who die before they come to age, or unmarried, exceeds that of the Females. It is even confeſſed, *That Men are more expoſed to be killed in War than Women, to periſh at Sea, or be deſtroyed by other dangerous Accidents.* Moreover, it is ſuppoſed unjuſtly, that all thoſe who are at Liberty to take ſeveral Wives would do it; many Reaſons may hinder them to avoid certain Inconveniences. If they paſs over theſe, it only proves, that the Thing is ſubject to Abuſe as well as many others.

[3] *Euripid. Andromach.* v. 464, &c.

Οὐδέ ποτ' ἂν δ.δυμα
Λέκτρῳ ἐπαινέσω βροτῶν,
Οὐδ' ἀμφιμάτορας κόρους,
Ἔριν μὲν οἴκων,
Δυσμενεῖς τε λύπας.
Τὴν μίαν μοί τις ἀρκέτω πόσις γάμοις
Ἀκοινώνητον εὐνᾶν ἀνδρός.

——————— Ne'er will I commend
More Beds, more Wives than one; nor Children curs'd
With double Mothers, Banes and Plagues of Life.
Let each good Man poſſeſs his ſingle Bride,
And check the Intruſion of a Rival Dame.

Iſocrates Nicol. p. 59, 60. *Edit.* Pariſ. " I cannot but greatly condemn thoſe, who, having entered upon a married State for their " whole Life, neglect afterwards to ſtand to the Agreement; but, giving a Looſe to their Pleaſures, injure thoſe dear Partners, from " whom they expect nothing but Kindneſs and Comfort. In other Bargains, they are wont to practiſe Juſtice and Honeſty, and " yet make no ſcruple to violate the nuptial Contract, which ought to be much more ſtrictly obſerved than all others, as it is of " more ſacred Obligation, and of nearer and more important Concern." Theſe Diviſions, whether among ſeveral Wives, or their Children, are indeed very great Inconveniences, and ſuch as may well juſtify the civil Laws in forbidding *Polygamy*. But yet they are not abſolutely unavoidable. As for what regards the Children in particular, the Thing is as much to be apprehended, and as frequent, between thoſe of different Beds, *i. e.* When a Man has Children by different Wives after one another. Beſides, we muſt not judge, as we do, of the Temper of thoſe Women who live in a Country where *Polygamy* is forbid by the Humour of thoſe who live where it is allowed. The latter bear their Condition much more eaſily than the former.

[4] Plaut. *Mercat.* Act. v. Sc. i. v. 8.

Nam uxor contenta eſt, quæ bona eſt, imo viro;
Quî minus vir unâ uxore contentus ſiet?

A good Wife is contented with one Huſband,
And why ſhould not an Huſband with one Wife?

Plutarch. de Præcept. Conjugal. " They ſay, that a Cat, upon ſmelling certain Eſſences or Perfumes, is driven to Madneſs. " Did the ſame Effect hold in Women, ought not Men to abſtain from uſing ſuch Perfumes, rather than cauſe ſo great Misfortune " for the Sake of a worthleſs Pleaſure? Why, the Diſhoneſty of a Huſband is as likely a Means to throw his Wife into Diſ- " traction, as the moſt offenſive Smell could be: And, conſequently, it is moſt unjuſt, on the Account of an idle Satisfaction, to " bring ſo grievous Affliction on an innocent Perſon; and not rather to preſerve the nuptial Bed uncommunicated and unſtained."

[5] *Clytemneſtra* in *Eurip. Electra*, v. 1035, &c.

Μᾶρον μὲν ἓν γυναῖκες, εἰκ ἄλλως λέγω·
Ὅταν δ' ὑπόνῳ τῶδ', ἁμαρτάνῃ πόσις,
Τἄνδον παρώσας λέκτρα μιμεῖσθαι θέλει
Γυνὴ τὸν ἄνδρα, χ' ἕτερον κλᾶσθαι φίλον.
Κἄπειτ', ἐν ἡμῖν ὁ ψόγος, λαμπρύνεται,
Οἵδ' αἴτιοι τῶν δ', ἃ κλύουσ' ἄνδρες κακῶς.

Women are Fools: 'tis own'd; and by a Woman:
But when Men take Advantage of the Folly,
Slight home, and ſcout abroad for lawleſs Love;
No wonder if the Dames return the Wrong,
Seek out new Mates, and practiſe as they're taught.

[6] *Saluſt*'s Words are, *Etiam antea Jugurthæ filia Boccho nupſerat. Verum ea neceſſitudo apud Numidas, Mauroſque levis, &c. quia ſinguli pro opibus, quiſque quam plurimas uxores, denas alii, plures alii habent, ſed reges eo amplius. Ita animus multitudine diſtrahitur, nullam pro ſocia obtinet, pariter omnes viles ſunt.* In *Bell. Jugurth.* Ch. lxxxii.

[7] Claudian *de Bello* Gildon, v. 442. makes this Reflection on the ſame People of *Africa*:

——————— *Connubia mille:*
Non illis generis nexus, non pignora curæ;
Sed numero languet pietas.

———A thouſand nuptial Bands they wear,
Blood is no Union, nor their Race their Care;
But Love expires in Number.———

Im-

berty. Thus the Mind is divided and diſtracted with Number, and all are deſpiſed, becauſe all cannot be loved[a].

[1] *Grotius*[b] aſſigns theſe Reaſons for the Reception of *ſingle Marriage* among [2] *Chriſtians*; *That the Wife, beſtowing herſelf entirely on the Huſband, may receive the equal return of his whole Heart and Affection: That the Family Affairs may be carried on with more regularity under a ſingle Miſtreſs; and that many Mothers may not create Feuds and Quarrels amongſt the Children.* To which we may add, that after the ſufficient Multiplication of Mankind, *Polygamy* ought, amongſt all Nations of tolerable Civility, to be reſtrained on this politick Account, that by too great a Number of Children the nobler Family muſt in time be reduced to Poverty, the meaner to Beggary, and the *State* oppreſſed with an idle Swarm of baſer Populacy: which if not prevented and thrown off (as it cannot always be) will at length overturn all Order and Government, and ſink the Commonwealth under its own Weight[c]. We are told that the *Turks* themſelves, in the Point of Marriage, do not now take the ſame Liberty as they formerly uſed, and as their Law allows: The Cauſe of which Alteration is, not perhaps ſo much the Increaſe of *beſtial Luſt* amongſt them, as their Experiences of the Inconveniences and Miſchiefs attending *Polygamy*.

XX. Another Controverſy, no leſs warmly managed, is, Whether Matrimony, by the Law of Nature, be a *Society*, or Partnerſhip, capable of being diſſolved; and, conſequently, Whether *Divorces* be, by the ſame Law, allowable? And here we ſhall take the ſame Courſe as before, to lay down the Streſs of what both Parties urge upon the Point, leaving the conſiderate Reader to paſs Judgment for himſelf. Firſt of all, it is taken for granted, that according to the common Nature of *Covenants*, one Party cannot recede, unleſs the other hath either broken the Agreement, or elſe yielded his Conſent to this Releaſe. It will therefore be repugnant to the Law of Nature for either of the married Couple to depart from the other unconſenting, only for the Improvement of Condition, or Satisfaction of Humour, without being able to alledge any Breach of the matrimonial Pact on the other's Side. Nor, can the [3] Indulgence of the *Roman* Law[d], in ſome Caſes of Partnerſhip, be brought to juſtify a Deſertion of this Kind. For, beſides that the relinquiſhed Party is moſt certainly *endamaged*[4]; an Union entered into upon account of Gain, may much more eaſily admit of Separation, than this moſt ſtrict and ſacred Tie between Man and Wife. For in Marriage the Parties acquire a *Right* over the Bodies of each other, which ought not, on either Side, to be taken from them againſt their Will. And indeed, though there ſhould be a mutual Conſent of the Parties, yet it would be both indecent and unſafe to allow the Diſſolving of Marriage, without [5] very weighty Cauſe: In as much as this Liberty of frequent Divorces muſt exceedingly ſhock the Strength,

[a] To the ſame Purpoſe *Amm. Marcellinus* (Lib. xxiii. Ch. xii.) ſpeaks of the *Parthians*, *Their Affection grows cool and languid, by the unbounded Variety they make uſe of in their Pleaſures.* [b] *De Verit. Rel. Chriſt.* Procop. *Hiſt.* Vandal. Lib ii. *Be Ye concerned for your Children, ſay the* Barbarians, *who are chained to the Neceſſity of a ſingle Bed: As for* Us, *who, if we pleaſe, can have Fifty Brides together, we are in no fear of wanting Poſterity.* Europ. Androm. *v.* 177, *&c.* [c] It is a moſt barbarous Way which the People of *Angola* in *Africk* uſe, to get rid of their vaſt Stock of Men, occaſioned by Polygamy, when they ſell their ſuperfluous Numbers to the *Americans* for Slaves. [d] Digeſt. Lib. xvii. Tit. ii. Lib. xiv. *pro Socio.*

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[1] We may here add the Reflections of the famous Mr. BAYLE, in his *New-Letters* upon the Occaſion of *F. Maimbourg*'s critical Hiſtory of *Calviniſm*. It is certain from the Experience of all Countries, where *Polygamy* is allowed, that the Peace of Families is not ſo great in them, as amongſt Chriſtians. And as for thoſe Banterers, that would have Women to be taken upon trial, and if Men did not like them, leave them: I anſwer them, That if this Liberty were permitted Huſbands only, it would be unjuſt; and if it were granted to both Sides, the Huſbands would be catched; for when they would keep to their firſt Market, their Wife would not agree to it, and ſo they would ſee themſelves obliged to leave Things as they were, to avoid greater Trouble.—— As a Servant never does his beſt but for two or three of the firſt Weeks, ſo it would be in the Service of new Huſbands, who takes Wives upon trial. Women would not paſs all their youthful Days in ſuch Trials. This being ſo, our Banterers would get ſo little by it, that they would find it the ſhorteſt and beſt Way to keep to the Chriſtian Inſtitution, though there were no Command from God to authorize it. *Lett.* xxii.

[2] See what I have ſaid upon *Grotius*, Lib. ii. Cap. v. § 9. Note 10. The Opinion I follow, appears to me proper to ſatisfy thoſe who are willing to hear Reaſon; or, at leaſt, to prevent thoſe of the contrary Opinion from taking Fire, as if ours was dangerous to Morality. At the ſame Time that I clear thoſe innumerable Difficulties, which occur in attempting to prove, that *Polygamy* is eſſentially contrary to the Law of Nature; I prevent the Abuſe which may be made of this Principle, even though the Civil Laws allowed of more than one Wife. I, above all, obviate the weighty Objection drawn from the Example of the *Patriarchs*, againſt which nothing ſatisfactory has been ever yet propoſed, and which I look upon as unanſwerable. Compare here the *Biblioth. Angloiſe*, Tom. xii. P. 255, *& ſeqq.* Whether the Piece inſerted there be the deceaſed Biſhop *Burnet*'s, or not, is of no Conſequence; we ought to conſider the Reaſons in themſelves, and with regard to the general Queſtion, independently of any particular Caſe for which that little Treatiſe might be compoſed.

[3] The Words are, *Sed etſi convenit, nè intra certum tempus ſocietate abeatur, & ante tempus renuncietur, poteſt rationem habere renunciatio.*

[4] The Liberty allowed here, by the *Roman* Law, proceeds from the ſingular Notion which their Lawyers had embraced with regard to the *Contract* of human *Society*. For though, in all other Points, they followed the Laws of natural Equity, they left them here. Indeed, they did not deſign that *a Partner* ſhould ſeparate without plauſible Reaſons; but, provided he could alledge ſuch, they neither regarded the Loſs which the other Partner received by the Breach of the Society, nor Determination of the Time made by common Agreement. See the Law juſt cited, with the following, and Mr. NOODT's Commentary on the *Digeſt*. p. 383.

[5] The very Nature and End of that Society proves, that it ought to continue a long Time; for we marry not only to have Children, but to bring them up. Now a Woman is capable of Conception, and uſually finds herſelf big a conſiderable Time before a Child which is born, is able to provide for its Needs; ſo that the Husband ought to remain with her till her Children are grown up, and of Age to ſubſiſt, either of themſelves, or with ſuch Goods as he gives them. We ſee, that by the admirable Wiſdom of the Creator, this Rule is conſtantly obſerved by the Creatures deſtitute of Reaſon. Among the Beaſts, which feed on Graſs and Herbs, the Society of the Male and Female remains no longer than the Time of Copulation; becauſe the Milk of the Dam is ſufficient to nouriſh the Young, till they can feed upon the ſame Herbs. But as to Lions, and other Beaſts of Prey, ſeeing the Dam is not able to provide for her young Ones, the Male alſo hunts for them. We may obſerve the ſame thing in all Birds, unleſs it be tame Fowl, who live in ſuch Places as afford them plenty of Food. But though the Conjugal Union of the Husband and Wife continues longer than that of other Creatures, yet there is nothing in that Union (as I think) that can require them to remain together all their Lives, after they have brought up their Children, and put them into a Way of Living: That depends, as all voluntary Engagements do, upon the Contract of Marriage, unleſs they live in ſuch a State where the poſitive Laws command, that that Contract ſhould be for Life. *This is taken out of Mr.* LOCK's *Treatiſe of* Government, Part ii. Ch. vii. § 2, *&c.* *See, alſo,* ALGERNOON SIDNEY's *Diſcourſe of* Government, Ch. ii. § 4. *in fin.* I own, that I ſee nothing here (excepting what is due with reſpect to the neceſſary Education of Children) which hinders our having, as to Marriage, the ſame liberty we have in any other Sort of Society or Convention. So that on Condition we provide for this Education, in

ſome

and Credit of Families; and the Grace and good Order [1] of the whole Commonwealth [a]. And the ſame Reaſon will hold in *Eſpouſals*, which although no farther Progreſs hath been made in order to their Conſummation, yet ought not to be broken off by the Act and Motion of the Parties [2] contracted, unleſs ſome extraordinary Occaſion fall out; or ſome of thoſe Conditions are found defective, on the Suppoſal of which the Validity of the Covenant depends [b]. *Dionyſius Halicarnaſſeus* exceedingly commends the Inſtitution of *Romulus*, by which he ordered one Sort of Marriage [3], ſolemnized with the greateſt Ceremony, to be incapable of Divorces. *This Law* (ſays the Hiſtorian) *engaged the Wives* [4] (*who had no Refuge, nothing to truſt to in Caſe of a Rupture*) *to yield a ready Compliance to the Temper of their Husbands: And it obliged the Husbands, on the other Side, to uſe their Wives as a neceſſary Poſſeſſion, which they could not, on any account, throw up, or deſert.* And one may reckon, among the chief Cauſes of the Decay and Corruption of the *Roman* State, their too frequent Practice of Divorces, either upon ſo ſlight Pretences, or upon none at all [c]. *Ammianus Marcellinus* reports of the *Saracens* what ſeems very agreeable to their barbarous Cuſtoms. *They hire Wives*, ſays he [d], *to ſerve a preſent Turn: And to make ſome ſhew and ſemblance of Matrimony, the Woman preſents her Mock-Husband with a Spear and a Tent; at the fixed Day, ſhe may, if ſhe pleaſeth, break up and ſeek a new Mate.* *Varenius* [e] informs us, that the *Dutch*, now and then, contract this kind of Marriage in [5] *Japan*; having liberty to releaſe themſelves at their leaving the Iſland. The like is practiſed in many other Parts of the *Indies* and the Kingdom of *Perſia* [f]. How vile doth the *Roman* Liberty appear in *Juvenal* [g]?

Cur deſiderio Bibulæ Sertorius ardet?
Si verum excutias; facies, non uxor, amatur.
Tres rugæ ſubeant, & ſe cutis arida laxet,
Fiant obſcuri dentes, oculique minores;
Collige ſarcinulas, dicet libertus: & exi;
Jam gravis es nobis, & ſæpe emungeris; exi
Ocyus, & propera; ſicco venit altera naſo.

Theſe Truths with his Example you diſprove,
Who with his Wife is monſtrouſly in love:
But know him better: For I heard him ſwear,
'Tis not that ſhe's his Wife, but that ſhe's fair.
Let her but have three Wrinkles in her Face;
Let her Eyes leſſen, and her Skin unbrace;
Soon you will hear the ſaucy Steward ſay,
Pack up, with all your Trinkets, and away;
You grow offenſive both at Bed and Board;
Your Betters muſt be had to pleaſe my Lord.

Mr. DRYDEN.

For really, as *Claudian* [h] obſerves,

Fœmina cum ſenuit, retinet connubia partu;
Uxoriſque decus matris reverentia penſat.

A *Matron* for her fruitful *Bed* we praiſe:
And the *Wife's Charms* the *Mother's Awe* repays.

And how ſcandalous was that Law of *Charondas*, mentioned by *Diodorus Siculus* [i], giving Liberty to Husband, or Wife, after a Divorce, to chuſe a new Partner, provided they did not pitch on a younger than the former?

Beſides all this, to put away a Wife looks heinous in the Eyes of all the World, and loads the Woman with ſo much Reproach, that it would appear moſt Baſe and Unworthy to proceed in ſo ſevere a manner unleſs upon ſome extraordinary Grounds and Provocation. And this may extend itſelf as well to the Buſineſs of Contracts, as of the more ſolemn and perfect Marriage. Thus when *Radigis*, in *Procopius* [k], having eſpouſed the celebrated *Brittia*, broke off the Match without being able to alledge any Crime on her Side; the Hiſtorian tells us, *She, unable to bear the Scandal, bent all her Thoughts and Reſolutions on Revenge. For Modeſty and Chaſtity are ſo highly prized, and ſo nicely regarded by theſe* Barbarians, *that a Woman turned off and deſerted moſt infallibly loſeth*

[a] Vid. *Val. Max.* Lib. ii. Ch. ix. § 2. [b] Add. *Gell.* Lib. iv. Ch. iv. [c] Senec. *de Benef.* Lib. iii. Ch. xvi. *Who is now aſhamed of breaking the Nuptial Union, when ſo many Ladies of Eminence and Quality reckon their Years, not by the Number of Conſuls, but of Husbands; and are divorced in hopes of marrying, and marry in hopes of being divorced?* [d] Lib. xix. Ch. ii. [e] *Japon.* Ch. xiii. [f] Olear. *Itin.* Perſ. Lib. v. Ch xxii. Petrus de Valle *Itin.* P. ii. Ep. xvii. [g] Sat. vi. *v.* 141, &c. [h] In *Eutrop.* Lib. i. *v.* 72, 73. *Add.* Martial. Lib. x. Ep. xi. [i] Lib. xii. Ch. xviii. p. 83. *Ed. Rhodom.* [k] Hiſt. *Gub.* Lib. iv.

ſome Way or other, as we judge proper, we may regulate the Duration of the Conjugal Union by mutual Agreement, either in a State of Nature, or when the Civil Laws, under which we live, have determined nothing to the contrary. If there lie ſome Inconveniencies on this Side, there ariſe, perhaps, much more conſiderable ones, from the long Duration and Perpetuity of this Society. After all, ſuppoſing the former one greater, this would only prove that the Thing was ſubject to Abuſe, as well as *Polygamy*; and therefore, though it were not abſolutely bad in its own Nature, we ſhould conduct ourſelves with Caution.

[1] This would produce many Adulteries; for a Man, who in his Anger, or ſome other Paſſion, hath put away his Wife for a ſmall Cauſe, may be reconciled to her, when ſhe is married to another, and the Familiarity he has had with her, may eaſily afford him a Means to maintain the antient Converſation in private. Beſides, were the Women left thus to the Humour and Inconſtancy of Men, what muſt Children ſuppoſe, when they ſee their Mothers expelled for no Cauſe, or for Trifles? And how can they have any Reſpect afterward for them, from whom they have received their Beings?

[2] This was nevertheleſs allowed among the *Romans*, who believing that conjugal Society was formed by the free Conſent of the Parties, thought a like, though contrary, Conſent, ſufficient to diſſolve it. They called this voluntary Conſent *bonâ gratiâ divortium*. See *Digeſt.* Lib. xxiv. Tit. i. *De donat. inter Vir. & Uxor.* Leg. xxxii. § 10. *Juſtinian*, after having himſelf allowed it, for certain Reaſons abſolutely forbad it. *Novell.* cxxxiv Ch. xi. But the Emperor *Juſtin*, his Nephew and Succeſſor, reſtored the antient Liberty. *Novell.* cxl. See Mr. NOODT's Commentary, p. 524.

[3] The Ceremony was called, *Confarreation*, becauſe the married Couple, after a ſolemn Sacrifice had been offered by the Pontiff, who had joined them with a ſet Form of Words, eat of the ſame Barley-Cake which had been uſed in the Sacrifice. See LIPSIUS *on* Tacit. Annal. *Lib.* iv. *Ch.* xvi. Mr. *Dacier*, upon a Paſſage of *Dionyſius Halicarnaſſeus*, contradicts *Plutarch*, who ſays, *That* Romulus *forbad the Women to quit their Husbands, but allowed the Men to ſend away their Wives, when they had got them their Children, counterfeited the Keys, or committed Adultery.* But this Writer was not aware that the Hiſtorian does not ſpeak of Marriage in general, but only of that particular Kind, which was eſteemed Sacred on account of the Ceremonies with which it was ſolemnized: Γυναῖκα γαμετὴν (ſays he) τὴν (for ſo the *Vatican* MSS. reads it) κατὰ νόμους ἱερεὺς συνελθοῦσαν ἀνδρὶ, &c. Τὸν ἱερὸν γάμον, &c. Καὶ τὸ διαιρῆσαι τὸς γάμους τούτους ἀδύνατον. Therefore nothing hinders but that the Law of *Romulus*, mentioned by *Plutarch*, might take place, with regard to thoſe who are married in the common Manner, which they called *Coëmptione*, or *Uſu*. See the Interpreters on the Fragments of ULPIAN, Tit. ix. *Briſſon, de Ritu Nuptiarum*, p. 17, *& ſeqq. Edit. Amſter.* Beſides, Marriage made by *Confarreation* was not indiſſolveable; as Mr. *Dacier* might have remembered by his own Notes upon *Feſtus* at the Word *Diffarreatio*.

[4] DION. HALICARNASSEUS's Greek is; Οὗτος ὁ νόμος τὰς τε γυναῖκας ἠνάγκασε τὰς γαμετὰς οὐ μηδεμίαν ἐχούσας ἰτέραν ἀπόρρητον πρὸς ἵνα τὸν τῆ γιγαμημένῳ ζῆν τρόπον, ἢ τὸς ἄνδρας, ὡς ἀναγκαίου τι ἢ ἀναφαιρέτου χρήματος, τῆς γυναικὸς κρατεῖν. Lib. ii. p. 95. Ed. *Sylb.*

[5] Among the *Turks* there is a Marriage called *Kabin*, where the Parties mutually agree upon a fixt Time, ſecuring to the Woman a Sum of Money when they diſmiſs her. See LA GUILLETTIERE, *Lacedom. Anc. & Mod.* p. 338. *Edit. Hol.*

her Reputation, though her Virtue be really ſafe and unſtained. It was a wiſe and rational Choice when the Daughters of *Pollio* and *Agrippa*, "ſtanding for the Place of Governeſs over the *Veſtal* "*Virgins*, the former Lady was preferred on this "Account; becauſe her Father and Mother had "lived in a long and peaceable Marriage, without "Separation; whereas *Agrippa*, on the other "Side, had filled his Family with Jealouſies and "Diſſenſions. [1]."

XXI. We are farther to examine, whether we may apply that to Matrimony, which holds good in all other Covenants, that in caſe the Heads and Conditions, eſpecially the chief of them, are broken on either Side, the injured Party hath the Power of receding from the Agreement. And here we may venture to take the Affirmative Part, if the Queſtion be put concerning the neceſſary and eſſential Terms of the Contract. Thus the principal Deſign of Marriage is the procuring of Children, in order to the effecting which, it is requiſite, that there be the neareſt and moſt familiar Communication between Husband and Wife. And therefore if we regard barely the Law of Nature, either Perſon may quit and renounce the Relation, in caſe the other prove guilty of baſe [2] Deſertion,

[1] PUB. SYRUS's Latin is, *v.* 252, 425.

Habent locum maledicti crebræ nuptiæ,
Mulier, quæ multis nubit, multis non placet.

Many Marriages are next to many Curſes. A Woman that marries often, diſpleaſeth often. *Tacit.* Ann. ii. C. lxxxvi.

[2] St *Paul* allows a Diſſolution of Marriage, upon this Account, 1 *Cor.* vii. 15. If an Unbeliever (either a Man or Wife of a Chriſtian) depart, let him depart; a Brother, or Siſter, is not under an Obligation *in ſuch a Caſe; i. e. he is not ſo bound to* him, as either to recall him, or live without marrying. It is proper to make ſome Reflections here, from whence it will appear, in my Opinion, that the Words of the Apoſtle ſufficiently prove the Inference. For this End let us conſider the Connection of this Diſcourſe. Among other Queſtions propoſed to St. *Paul* about *Marriage*, the *Corinthians* had asked him, Whether a Chriſtian married to a *Jewiſh* or *Heathen* Wife, or a *Chriſtian* Woman married to a *Jew* or a *Pagan*, might not, in Conſcience, when the other Party would not forſake their Religion, uſe, for this Reaſon, the Permiſſion of Divorce granted by the Laws? The Doubt was founded (as it appears by the Anſwer St. *Paul* makes, *ver.* 14.) upon this, That the Chriſtian Spouſe ſeemed to partake, through the Strictneſs of the conjugal Union, with the erroneous and falſe Worſhip of the other, and, by that Means, contracted a kind of Impurity. The Chriſtians, who had been converted from *Judaiſm*, eaſily called to mind the Example of their Anceſtors, who, upon their Return from the *Babyloniſh* Captivity, repudiated their Pagan Wives, and that by Order of *Eſdras*, as we ſee in his Book, Ch. ix, x. This then was the State of the *principal Queſtion*, with regard to which the Apoſtle decides *another*, which perhaps had been propoſed to him at the ſame time, *viz.* Whether the Deſertion of the *Jewiſh* or *Pagan* Spouſe diſengaged the Chriſtian one, and left him at liberty to betake himſelf to a ſecond Marriage? For there is no Foundation for St. *Jerom*'s Suppoſition, who imagines the Doubt was, If the Complaiſance of the Chriſtian Wife or Husband ſhould extend ſo far, as to abjure Chriſtianity rather than quit their Conſort, who inſiſted on their doing ſo. *Cauſſiſque expoſitis, quòd candidatus fidei ſit infidelis, ſi nolit à credente diſcedere: e contrario jubet* [Apoſtolus] *ſi infidelis repudiet fidelem propter fidem Chriſti, diſcedere debere credentem, ne conjugem præferat Chriſto, cui etiam anima poſtponenda eſt.* Lib. i. adverſ. Jovinian. Tom. ii. pag 23. A. *Edit. Baſil.* 1537. [Non enim ſervituti ſubjectus eſt frater vel ſoror in ejuſmodi] *Non enim ita obligatus eſt in ejuſmodi cauſſa, quaſi verè illi ſervire neceſſe ſit, & propter alterum interire.* Comment. *in hunc loc.* Tom ix. pag. 309, C. In reality, how could the Chriſtians think of asking St. *Paul* ſuch a Queſtion, unleſs we ſuppoſe them actually inclined to apoſtatize? Surely the *Corinthians* could not be ſo little inſtructed, as to be ignorant of what JESUS CHRIST had ſo expreſly ſaid, (*Matth.* x. 37.) *He that loveth Father or Mother more than me, is not worthy of me.* Or what he repeats, in ſtronger Terms, (*Luke* xiv. 26.) *If any Man come to me, and hate not his Father, and Mother, and Wife, and Children, and Brethren, and Siſters, yea, and his own Life alſo, he cannot be my Diſciple.* Beſides, there is nothing in St. *Paul*'s Anſwers, which, in the leaſt, inſinuates, that the *Corinthians* could be capable of ſo ſtrange and impious a Notion, as that which St. *Jerom* lays to their Charge in his Explanation. And if the Apoſtle had any Suſpicion of this Kind, with what Severity would he not have reproved them? He would then have ſaid, *O fooliſh* Corinthians (ſee *Gal.* iii. 1.) *who has bewitched you*, ſo far, as to queſtion a Thing ſo contrary to all I have taught you? We muſt therefore neceſſarily agree, that the whole Point here is to examine, whether a Divorce, founded on Diverſity of Religion, can be ſufficient to diſſolve the nuptial Band? And in what Caſes it produces this Effect, ſo as to authorize a Chriſtian Husband or Wife to marry again, with one of their own Religion? Now this naturally leads us to a full Underſtanding of the Apoſtle's Deciſions; and, to conclude, that when our Saviour limits the antient and extenſive Liberty of Divorce, he no way pretends to make Adultery, properly ſo called, the only Reaſon for diſſolving the Marriage Tie. For, 1. If ſuch were the Senſe of the Words of the Goſpel, what occaſion had the *Corinthians* to conſult St. *Paul* about the Matter? To do this, either they muſt have known nothing of what our *Lord* ſaid, with regard to Divorce, or St. *Paul*, who firſt preached the Goſpel to them, muſt have miſrepreſented the Words of CHRIST; or they muſt have forgot them: All which Suppoſitions are deſtitute of Probability, and ſome of them abſurd. 2. But ſuppoſing that the *Corinthians* had been ſo negligent as to forget the Precept, and its true Senſe, St. *Paul*, at leaſt, both knew and remembered it. If then he believed that JESUS CHRIST abſolutely forbad all kinds of Divorce, except in Caſes of Adultery, he needed no more than to remind the *Corinthians* of the Words of their common Maſter; ſince, if the Chriſtian Religion admits only of this Exception, all Queſtions, about every other Caſe, are ſuperfluous. The Queſtion here has nothing in common with Adultery, as St. *Chryſoſtom* remarks, Ἐνταῦθα γὰρ ἐκέτι πορνέια τὸ πρᾶγμά ἐστι. In 1 ad *Corinth.* vii. 15. Homil. xix. p 360. Tom. iii. *Edit. Savil.* iii. In fine, the Character the Apoſtle aſſumes here, in anſwering the Queſtions propoſed to him, neceſſarily ſuppoſes that our Saviour's Words include no preciſe Determination, with regard to Divorce. For, otherwiſe, JESUS CHRIST would have laid down a certain Rule, and yet we find St. *Paul* expreſly declares, that he ſpeaks in his own Name, not of his Maſter's. *But to the reſt ſpeak I, not the Lord*, ver. 12. This gives us plainly to underſtand, that the Apoſtle does nothing but interpret a general Rule, which includes divers Exceptions, of which we muſt judge by the Foundation of that Rule. Now I ſee no Reaſon to believe, that, in Caſe of an Affair like Marriage, which certainly belongs to the Law of Nature, the Goſpel ſhould preſcribe any thing poſitive. Every thing tends to ſhew, that JESUS CHRIST meant only (as the Celeſtial Author of a Morality the moſt conformable to the Light of Reaſon) to condemn the Abuſe which the *Jews* made, of the boundleſs Liberty of Divorce: A Liberty, tolerated indeed for political and wiſe Reaſons, under the *Moſaic* Law, where God acted partly as a temporal Legiſlator. (See § 24. Note 3. following.) Adultery is, without doubt, what is moſt contrary to the natural End of conjugal Society. But it is not the only thing inconſiſtent with this End. The Deſertion of either of the Parties is equally repugnant, and an equal Violation of the Marriage Vow. It is upon this Principle that the Apoſtle, as inſpired by the Spirit of God, and as an infallible Interpreter of the general Precepts of the Goſpel, declares here, that, indeed, the Difference of Religion is not in itſelf a juſt Subject of Divorce, *ver.* 12, 13. nor has it any thing that defiles the Character of a Chriſtian. But, adds he, the thing is widely different, when the married Perſon, whether *Jew* or *Pagan*, has themſelves occaſioned the Divorce, by the Averſion they had to the Chriſtianity of the other Party. *But if the Unbelieving depart, let him depart; a Brother or Siſter is not under Bondage in ſuch Caſes.* Ἐν τοῖς τοιούτοις. Theſe Words inſinuate, both, that Deſertion on any other Account, as well as Difference of Religion, which produces the ſame Effect, and may be owing to other Cauſes. The Effect is, *That the Brother or Siſter are no longer bound*, that is to ſay, That they are free from all the Ties of Marriage. (See *ver.* 39.) There is no longer any Band which ſubſiſts; becauſe it is broken by the Deſertion of the other Party. And, indeed, it would be a real Slavery if the innocent Party ſhould, notwithſtanding this, look upon themſelves as engaged to live in a State of Celibacy, which might expoſe them to all the Temptations of Incontinence. (See verſ. 2.) St. *Chryſoſtom* thus explains the Word δεδούλωται, Βέλτιον διασπασθῆναι τὸν γαμὸν, ἢ μὴ τὴν εὐσέβειαν. And he gives the Reaſon of this a little lower, becauſe, in this Caſe, the Unbeliever gives occaſion for the Diſſolution of Marriage, in the ſame Manner, as if they committed Adultery. Ἐκεῖνος γὰρ λοιπὸν τὴν αἰτίαν παρέσχεν, ὥσπερ ἢ ὁ πορεύσας. *Ubi ſupra.* See what *Theodore Beza* ſays, in a Treatiſe he has written purpoſely on the Subject of Divorce. *Itaque omnibus non contentioſis conſtare puto, quum ducatur à Paulo* frater vel ſoror ſervituti non ſubjici, *intelligi abruptum eſſe omne conjugalis obligationis vinculum . . . . . Nam ſi, teſte Apoſtolo, deſertus non eſt ſervituti obnoxius, conſequitur, à lege alterius (ut idem* Paulus *ibidem loquitur,* 1 Corinth. vii. 39.) *id eſt, ab omni eo jure, quo perſona deſertrix eum obſtrictum tenebat, liberatum eſſe. Quod ſi liber*

tion, or of voluntary and obſtinate [a] Unkindneſs, as to the Affair of the Bed. This laſt Omiſſion would bear an Action of Law amongſt the antient *Jews* [b]; and the *conjugal Debt*, as well as others, might be recovered by Proceſs in open Court.

Again, the Intent of Marriage is not only that we may obtain Children, but that we may obtain ſuch as ſhall indeed be our own "On this Ac-"count, ſays *Joſephus*, *Moſes* abſolutely forbad "Adultery; thinking it would be every Way "more happy, that the Husband ſhould keep "the Poſſeſſion of his Bed ſecure and undiſturbed, "and that the Production of genuine Iſſue would "be alike advantageous to private Families, and "to the publick State." (*Antiqu.* iii. 10.)

Nay, and after this End hath been provided for, every honeſt Man is willing to keep his Bed to himſelf, and doth not think it either decent or ſafe, to take Paſſengers aboard, though the Veſſel be firſt laden to his Deſire. Very few Huſbands have ſo high Notions of Courtlineſs and Complaiſance, as to be concerned at *Ovid*'s Cenſure, that,

Ruſticus eſt nimium, quem lædit adultera Conjux,
Et notos mores non ſatis urbis habet [c].

He that won't lend his Bed's a ſtingy Clown,
Unpractis'd in the Freedom of the Town.

It is therefore to be eſteemed a juſt Cauſe of Divorce, if a Wife voluntarily expoſe her Honour to another Man. As on the other ſide, if ſhe be overcome by the Uſurper, in the Way of Force and Violence, we can on no Pretence call her Virtue in Queſtion [d]. And though it be commonly reckoned a more heinous Crime, to aſſault her Chaſtity thus, by main Strength and Power, than to enſnare or betray it by Flattery and Charms [e]; yet the Truth is, the former indeed offers the more grievous Injury to the Wife, but the latter to the Huſband [e].

It appears then, that the Reaſon why Adultery and wilful Deſertion are accounted ſufficient Cauſes of Divorce, doth not ariſe from any particular poſitive Law of God (as if theſe two Exceptions were added to that Ordinance which makes the Bond of Marriage perpetual) but from the common Nature of Covenants, which is ſuch, that when one Party hath broken the Agreement, the other is no longer obliged to keep it. And the Force of theſe Cauſes is ſo extenſive, as to juſtify the injured Perſon, not only in refuſing to cohabit with the perfidious Wretch, but, likewiſe, in paſſing to a ſecond Marriage; whatever the *Canoniſts* urge to the contrary. Indeed thoſe grave Profeſſors, when they are to gratify a Friend in this Point, do not ſcruple to find out a Way of eluding their own Decrees, by declaring the former Marriage to have been originally null and void; an Evaſion which they can ground on many plauſible Scruples [z].

But although Marriage be chiefly entered into upon the Deſign and Hopes of Children, yet the bare Inability of either Party (otherwiſe fit for a conjugal State) towards promoting this End, doth not ſeem a ſufficient Ground of Separation; in as

[a] *Vid.* Plutarch. *Amator.* p. 769. & *in Solon.* p. 89. *Ariſtot. Occon.* Lib i. Ch. iv. *Diog. Laert.* in *Pythag. Lactant.* Lib. v. Ch. xxiii. *Gratian.* Cauſ. iii. Quæſt. v. Ch. i. &c. [b] *Vid.* Selden. *de Uxore Hebraica*, Lib. iii. Ch. vi, vii. *Montague*'s Eſſays, *Lib.* iii. *Ch.* v. [c] *Amor. Lib.* iii. & *Lib.* iv. *v.* 37, 38. *Martial*, Lib. vi. Ep. xc.

Mæchum Gellia *non habet niſi unum,*
Turpe eſt hoc magis, uxor eſt duorum.

One Spark ſerves honeſt *Gellia* at a Time.
But her two Huſbands are a fouler Crime.

Add. *Abr. Roger* de *Bramin.* P. i. Ch. xiii. [d] Add. *Valer. Max.* Lib. vi. Ch. i. § 2. *extern. Liv.* Lib. xxxviii. Ch. xliv. *Xenophon* in *Hieron.* p. 578. Lib. xlviii. Tit. v. Lib. xiii. § 7. & 39. *princ.* D. *ad* L. Juliam *de Adult.* Ælian. *V. H.* Lib. xii. Ch. xlvii. [e] Lib. xi. Tit. iii. Lib. i. § 3. *D. de Servo Corrupto.* To inveigle and perſuade is more than to force and compel.

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liber eſt, ergo ſolutum eſt vinculum. Cur igitur, ſi continere non poteſt, matrimonii remedio, contra doctrinam Apoſtoli, privabitur, modo nubat in Domino, &c. De Repud. & Divortiis, p. 192, 193. *Edit. Genev.* 1610. The Verb δεδούλωται cannot here have any other Senſe. For the Interpretation of St. *Jerom*, in the Places above quoted, ſhews that that good Father did not conſider that St. *Paul had ſaid*, ὃ χρὴ δουλώσασθαι, and not as he does ὃ δεδούλωται. *But for us*, ſays the Apoſtle, *God has called us to Peace*, i. e. to live in Peace. But this is no Way a Reaſon of what he has juſt ſaid, Ἐν δὲ εἰρήνῃ κέκληκεν ἡμᾶς ὁ Θεός. This ſhews, on the contrary, a Diſtinction, and Oppoſition. Otherwiſe St. *Paul* had ſaid, γὰρ inſtead of δὲ, as he does in giving a Reaſon for his new Opinion: Τὶ γὰρ οἶδας, &c. See Beza's Notes upon this Verſe. The Apoſtle, according to his Cuſtom, returns to the Point he had eſtabliſhed a little higher, *Ver.* 12, 13. and he oppoſes, at the ſame Time, to the unjuſt Separation of the *Jewiſh*, or *Pagan* Spouſe, the Care the Chriſtian ſhould take not to imitate ſuch a Conduct. After eſtabliſhing the Right which ariſes from the Deſertion of one Party, he ſhews the Uſe the deſerted Party ſhould make of it, not to offend againſt any Chriſtian Virtue. Juſt as if he had ſaid, Let the *Jewiſh* or *Pagan* Conſort be ready to ſeparate on account of Religion, and Obſtinacy in their Opinion: But as for you, Chriſtians, be not ſo haſty, and neglect nothing in your Power to recal your Spouſes to their Duty. The Goſpel agrees with Reaſon, in this Point, that it inculcates, as much as poſſible, the Peace of Society. (*Romans* xii. 18.) Therefore this Reaſon holds much more ſtrongly with regard to ſuch as are united by Marriage. We ſhould never here come to the laſt Extremities, but when there is no more Hopes of Reconciliation; and then, indeed, we become free, and impowered to remarry. But (ſays the Apoſtle to the Chriſtians) if by your Patience, and gentle Exhortations, you can engage the unbelieving Party to remain with you, or return to you, you may, perhaps, one Day incline them to reliſh Chriſtianity, and, by that Means, become the happy Authors of their Converſion. *For what knoweſt thou, O Wife, whether thou ſhalt ſave thy Huſband,* &c. (Ver. 16.) This I take to be the Apoſtle's Senſe, and the moſt natural Connection of his Diſcourſe. Theſe Words can never be underſtood of the Time which follows the intire and obſtinate Separation of the unbelieving Spouſe. For, in that Caſe, how could the Apoſtle give any Exhortation to Peace? Or, how could there be the leaſt Hopes of converting a Perſon, whoſe Averſion to Chriſtianity was ſo obſtinate, as to occaſion their Separation? But, if after this, the deſerting Party married again (as the Laws allowed, and the Thing, no doubt, often happened) there could be no room for any Diſpoſition to Peace. The Love of Peace, and Chriſtian Patience, have certainly their Bounds. The Goſpel does not require us to bear every Thing, nor to bear for no End. It is in vain to endeavour to maintain Peace with thoſe, who live at open Emnity with us. This is ſufficient to defend the Opinion, and common Practice, of *Proteſtants* in the Caſe of a wilful and malicious Deſertion.

[z] It is in this Senſe the Law of the *Digeſts* is to be expounded: *Perſuadere autem eſt plus quam compelli, atque cogi ſibi patrem.* As at [c]. This Law, which treats of corrupting the Slave of another, has not the Senſe to which our Author applies it here. The Sequel of the Diſcourſe evidently ſhews, there is ſome Error in the Text. M. Noodt, with his uſual Penetration, has corrected it thus, *Perſuadere autem eſt plus,* Quam suadere: persuadere enim est, *compellere atque cogere ſibi patrem.* Comment. in *Digeſt.* p. 254. So that the antient Lawyer does not here oppoſe *Perſuaſion* to *Violence:* But only explains the Meaning of the Verb *Perſuadere* in the *Prætor*'s Edict; and ſhews that it ſignifies ſomething more than *ſuadere*, that is to ſay, an Advice or Perſuaſion which has a ſtronger Effect. I wonder this learned Commentator did not know that the *Baſilica* manifeſtly confirm his Conjecture. For after tranſlating the Word *Perſuadere*, by that of συμβουλεύειν, they thus explain the Senſe of the Words in Queſtion: *To perſuade, is to incite or conſtrain a Perſon to do what we would.* Συμβουλεύει δὲ ὁ συνωθῶν καὶ ἀναγκάζων ἑαυτῷ πιθέσθαι. *Lib.* lx. *Tit.* vi. § 1. *p.* 185. *Edit. Fabriot.* We find here that the Tranſlator, dropping the Compariſon of the Senſe of the Word *Perſuadere* with another *Latin* Word, is contented to expreſs the Idea it bore in the Edict, as he found it in the Original.

[z] We find a remarkable Example of this, in the famous Divorce of *Henry* VIII. King of *England.* See Burnet's *Hiſtory of the Reformation*, Book ii.

much as it is a Thing ſurpaſſing all human Power to beſtow the Bleſſing of Increaſe. Yet *Carvilius Ruga*, the firſt Man of the *Romans* that put away his Wife (523 Years after the Building of the City) is reported to have taken his principal Motive from the Oath, which the Cenſors required of every married Man, in this Form, *Se habere uxorem liberorum quærendorum cauſa*; That *he engaged in that Condition on the Account of Iſſue*[a].

XXII. But the chief Point of the Controverſy on this Head is ſtill behind, and may be thus ſtated: According to the true regular Way of contracting Marriage, the Wife conſents to a conſtant Cohabitation with the Huſband, promiſing, according to her beſt Strength, to aſſiſt and comfort him, as well with Sweetneſs of Converſe, as with the Participation of Buſineſs and Cares; and engaging farther to be guided and directed by him, as the Lord and Governor of the Family. In requital for which, the Huſband, on the other ſide, is obliged[1] to protect and defend his Wife, to treat her with Honeſty and Civility, and to pay her many other friendly Regards of the ſame kind. Now the Queſtion is, whether the ſignal and enormous Violation of theſe inferior Duties gives a full and fair Reaſon for a Divorce? And here, if we regard barely the Law of Nature, many venture to hold the Affirmative. For ſince a Father hath the Power of diſcarding an undutiful Son, who, at leaſt, in natural Conſideration, ſeems more nearly related to him than a Wife; why may not he baniſh his Wife, as a rebellious Member of the Family, when her Manners are intolerable[2], and her Amendment deſperate? Eſpecially if we reflect on the Remark of *Fulgentius*, that a *Wife, the nearer ſhe is joined to a Man by the Law, the more certainly ſhe proves to him, either Honey, by the Sweetneſs of her Temper, or Poiſon, by her froward and malicious Diſpoſition; being really, either a continual Comfort and Refuge, or a perpetual Plague and Torment.* An *honeſt Man*, ſays old *Simonides, can have nothing in this World better than a good Wife, nothing worſe than a bad one*[b]. On the other hand, in caſe the Huſband treats the Wife with unreaſonable Severity, and denies her the Reſpect due to her Sex and her Relation, ſo as to ſhew himſelf, not ſo much a kind Partner, as a troubleſome and vexatious Enemy, it ſhould ſeem very equitable, that ſhe might be relieved by a Divorce[c].

Another Scruple immediately ariſeth upon this, Whether it be allowable, by the Law of Nature, on the Account of intolerable Manners, or of barbarous Treatment, entirely to diſſolve the matrimonial Bond? or, Whether the other conjugal Duties, as the Propagation of Race, *&c.* may not ſtill be continued, though the Cohabiting in the ſame Family be broken off? In as much as the former Covenant, bearing a Regard to Children, ſeems to be eſſential to Matrimony, the latter only additional. Thus much then is certain, that ſeveral Pacts may be made between the ſaid Parties, under this Condition, That in caſe one of them ſhould be violated, the others ſhall nevertheleſs ſtand good. Nay, one and the ſame Pact may be divided into many Heads, and Proviſion may be made, that although one of the Heads be tranſgreſſed, yet the Parties ſhall proceed in performing the reſt. If the Marriage was contracted under ſuch a Form, it ſeems reaſonable, that the Wife, although ſhe hath, by her unpeaceable Carriage, forfeited her Title to a continual Cohabitation, yet may ſtill lie under the Force of that Part of the Covenant, which obligeth her to conſult Succeſſion. But, becauſe it is by no means probable, that ſhe, who is unfit for the firſt of theſe Privileges and Duties, ſhould, with any Convenience, be admitted to the other; that a Man ſhould deſire Iſſue by the ſame Woman, whom he is conſtrained to hate: And not rather entertain an abſolute Averſion to the Body, which lodgeth ſo froward a Gueſt: It is the common and regular Practice for the Parties to contract, by one and the ſame Agreement, for their Living together, and for their mutual Care of Poſterity: And thus the two Conditions are in ſo cloſe a Manner united and interwoven one with the other, that in caſe either be broke, both naturally fall aſunder. It is therefore contrary to the Law of Nature, that the Reaſon before alledged ſhould cauſe a Separation from Bed and Board, and yet continue ſome

[a] Vid. *Gell.* Lib. iv. Ch. iii. *Valer Maxim.* Lib. ii. Ch. i. § 4. Edit. *H. Steph* p. 227. *Euripid. Oreſt.* v. 602, *&c.*

[b] V. *Fulgent. Mythol.* Lib. i. *Simonidis inter Poet. Lyric.*

Bleſt is the Man, and ſweetly runs his Life
Where ſmiling Fortune ties the nuptial Band;
But he whom inauſpicious Hymen joins,
Wretched abroad muſt prove, and curs'd at home.

[c] Add. *L. Theod.* Lib. v. Tit. xvii. Lib. viii. *C. de Repud.*

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[1] Thus *Achilles*, in *Homer.* Il. ix. *v.* 340, *&c.* ſpeaks;

Ἦ μᾶνοι φιλέσσ' ἀλόχους μερόπων ἀνθρώπων
Ἀλρεῖδαι; ἐπεὶ ὅς τις ἀγαθὸς, ἠὲ ἐχέφρων,
Τὴν αὐτῆ φιλέει ἠὲ κήδεται.

The Wife and Good will cheriſh and defend
The Partner of their Bed, their neareſt Friend;
Their ſecond Self.———

[2] The Law of THEODOSIUS and VALENTINIAN deſerves to be recited here. They alledge firſt, that the Marriage Bonds ought not to be broken without good Reaſon, in Conſideration of Children. The Reaſons which they mention, and for which they allow the Uſe of that ſharp Remedy, but ſometimes neceſſary, are theſe; if an Huſband or Wife are convicted of Adultery, Aſſaſſinating, Poiſoning, or Treaſon; if they are Forgers of Wills, Sacrilegious, Thieves of any ſort, Harbourers of Robbers; if an Huſband has to do with a Whore in his Wife's Sight; if a Woman goes to a Feaſt with unknown Perſons, without the Knowledge and Conſent of her Huſband, and if ſhe lies abroad without very good Reaſons, or is preſent at Plays at her Pleaſure; if an Huſband lays Snares for his Wife's Life, or ſhe for his; if an Huſband beats his Wife. The Words of the Law are: *Solutionem matrimonii difficiliorem debere eſſe favor imperat liberorum. Cauſas autem repudii hâc ſaluberrimâ lege apertius ſignamus. Sicut enim ſine juſta cauſa diſſolvi matrimonia juſto limite prohibemus, ita adversâ neceſſitate preſſum, vel preſſam, quamvis infauſto, attamen neceſſario auxilio cupimus liberari. Si qua igitur maritum ſuum adulterum, aut homicidam, aut veneficum, aut certè contra noſtrum imperium aliquid molientem, vel falſitatis crimine condemnatum invenerit, ſi ſepulchrorum diſſolutorem, ſi ſacris ædibus aliquid ſubtrahentem, ſi latronem, vel latronum ſuſceptorem, vel abactorem, vel plagiarium, vel ad contemptum ſui, demiſſve ſuæ, ipsâ inſpiciente, cum impudicis mulieribus (quod maximè etiam caſtas exaſperat) cœtum incuntum, ſi ſuæ vitæ veneno, aut gladio, aut alio ſimili modo inſidiantem, ſi ſe verberibus (quæ ingenuis aliena ſunt) adficientem probaverit; tunc repudii auxilio uti neceſſariò permittimus libertatem, & cauſas diſſidii legibus comprobare. Vir quoque pari fine claudetur———nec ullo modo expellat jugalem, niſi adulteram, &c.———aut extraneorum virorum, ſe ignorante vel nolente, convivia adpetentem, aut ipſo invito, ſine juſta, & probabili cauſa foris ſcilicet pernoctantem, vel Circenſibus, vel theatralibus ludis, vel arenarum ſpectaculis in ipſis locis, in quibus hæc adſolent celebrari, ſe prohibente, gaudentem,* &c. Cod. Lib. v. Tit. xvii. *De repudiis & judicio de moribus ſublato*, Leg. viii. See, upon all this, a Collection printed at *Hall* in *Saxony*, in the Year 1622, with this Title: *Controverſiæ circa Jura Divortiorum*, &c. of which the principal piece is a Diſſertation of Mr. BOHMER *de Jure Principis Evangelici circa Divortia*, which I have often quoted.

part

part of the Marriage Obligation, ſo as to hinder the Parties from diſpoſing of themſelves another way. Unleſs ſuch a Separation be enjoined only for a Time as a Puniſhment to obſtinate Perverſeneſs, and to try, whether there is any Probability of Reforming[z]. For it is abſurd to ſay, that the Tie of a Covenant remains in Force, whilſt no Part of the Debt ariſing from that Covenant can, or ought to be diſcharged. And though we ſhould acknowledge, that the Party, who gave Occaſion to this Miſchief, is juſtly enough puniſhed, yet the innocent Party is, in the mean while, injured, ſuffering thus for the Fault of another, and being obliged to live in a State of Celibacy, probably inconvenient, perhaps intolerable.

Thus far then, in the Conſideration of natural Law, the Man and the Woman are upon the ſame Ground. And, for this Reaſon, *Plutarch*[a] calls that Order of *Romulus*, σφοδρὸν, *very hard and ſevere*, which forbad a Woman to deſert and turn off her Huſband, yet gave the Huſband leave to diſcard his Wife, *either upon her poiſoning the Children, counterfeiting the Keys, or committing Adultery*[b]. Amongſt the *Athenians* we find either Party might, upon ſufficient Cauſe, ſeparate[c] from the other: Though they diſtinguiſhed theſe two Kinds of Divorces by different Names. For a Man to put away his Wife was termed ἀποπέμπειν; for a Woman to quit her Huſband, was ἀπόλειψις. The Reaſon of this Variation in Terms is manifeſt; the Woman was received into the Man's Family, and therefore ſhe could not properly ἀποπέμπειν, *ſend him away*, or move him out of the Houſe, though ſhe might, ἀπολείπειν, *forſake him*, and retire to a Place of Eaſe and Security.

We have only this to obſerve farther, that upon whatever Reaſons Divorces are tolerated in a Commonwealth, it is highly expedient, that the Cauſe be heard and approved by the proper Magiſtrate; and that a Point of ſo very great Weight and Moment be not left to be decided by the private Conſcience and Diſcretion of the married Pair. For, the Reaſon which *Bodinus*[d] offers to the contrary, *Becauſe this publick Way of proceeding muſt neceſſarily impair the Credit and Character of one of the Perſons*, doth not ſeem to conclude with any Force to the Purpoſe[e].

XXIII. With Regard to the divine Law, either as originally declared, or as renewed by our Saviour, the Difficulty is much greater. This is evident, the *Jews* thought Divorces not only permitted, but commanded (in caſe the Wife diſpleaſed her Huſband) by the xxiv[th] Chapter of *Deuteronomy*. And farther, there is a Place in *Philo Judæus*[f] which ſeems to imply, that Barrenneſs was judged a ſufficient Cauſe for the like Separation. Nor are we to doubt but that the Thing was frequently practiſed in that Nation, although their ſacred and profane Hiſtory, for more than 700 Years, have recorded none, or very few Inſtances of this kind. For it is not indeed the Cuſtom to regiſter, in publick *Annals*, Matters which are done according to general Uſe, but ſuch only as appear ſingular and extraordinary. In *Iſaiah*[g], and *Jeremiah*[h], amongſt the many Ways of repreſenting and reproving the People's Sins, we find Similitudes taken from a Divorce, as an Action very well underſtood by the Vulgar. *Joſephus*[i] takes Notice of it, as a Thing very unuſual, and differing from the ordinary Law and Practice, that *Salome*, Wife to *Coſtobar*, Prefect of *Idumea* and *Gaza*, ſhould ſend a Bill of Divorce to her Huſband; whereas, [z] regularly, it was *not* allowable for the Woman to leave the Man, unleſs he put her away: Excepting only one Caſe, when the Huſband falſly reported, that his Wife did not prove a Virgin at their firſt Familiarity; here the Woman had her Choice, whether ſhe would ſtay, or depart; and the Huſband, if ſhe choſe the former, was obliged to keep her[k]. *Joſephus*[l] reports the ſame of *Herodias*, *Ariſtobulus*'s Daughter, the Lady who was the Subject of St. *John Baptiſt*'s Reproof[m].

But, that our Saviour abſolutely took away this antient Liberty of Divorce, is the Judgment of moſt Divines; grounded on *Matth.* v. 32. xix. 8, 9, &c. *Mark* x. 4, 6, 12. *Grotius*[n] is of Opinion, that it was, from the Beginning, moſt pleaſing to GOD, that the Bond of Marriage ſhould be perpetual; but, whereas, by the old Covenant, Men were not obliged to this Strictneſs, our Saviour, under the new Covenant, ratified, by an expreſs Law, what was before moſt agreeable to the divine Will. Mr. *Selden*'s Explication[o] of the ſame Places of Scripture is to this Purpoſe: "There were amongſt the *Jews* two Sects, the "*Sammeans* and the *Hillelians*, who maintained "contrary Notions on the Point before us. The "former aſſerted, That a Man ought not to quit "his Wife, unleſs upon ſome Diſcovery of Baſeneſs and Diſhoneſty: The latter, That any "Diſlike taken of the Woman, was enough to "juſtify a Divorce. Our Saviour then, as an "Arbitrator between the two diſputing Parties, "declares in Favour of the *Sammeans*; That it was

[a] In the Life of *Rom.* p. 89. See Mr. *Dacier*'s Note upon the Place. [b] *Euripid. Andromache.* v. 672, &c.

Whether the Man from a diſloyal Dame,
Or the chaſte Dame from an injurious Man
Suffers Reproach; each finds a juſt Relief.
Him his own Strength can vindicate; and Her
Parents and Friends combin'd protect from Wrong.

[c] Potter. *Archæol. Græc.* Lib. iv. Ch. xii. [d] *De Repub.* Lib. i. Ch. ii. [e] *Add.* Plat. *de LL.* Lib. xi. p. 974. Ed. *Wa* Charron *de la Sageſſe*, Lib. i. Ch. xlvi. *Note* 12. Selden *de J. N. & G.* Lib. v. Ch vii. [f] *De Leg. Special.* p. 782. B. Ed. *Pariſ. Herodot.* Lib. v. p. 190. Ed. *H. Steph* the whole Paſſage runs thus; "Men who take Wives, being uncertain of their "Fruitfulneſs, if, finding them afterwards to be Barren, they do not diſmiſs them and force them to lead a ſeparate Life, are not "excuſable; in as much as being won by a long Familiarity and a Courſe of mutual Love, they cannot eaſily do Violence to "thoſe Affections which are ſo deeply rooted in their Minds. But they who chooſe Women of known Barrenneſs, ſeeking only "like Beaſts, to ſatisfy their luſtful Inclinations, are to be reckoned amongſt the moſt impious Offenders, as contradicting and op"poſing GOD himſelf, who hath eſtabliſhed the Laws of human Succeſſion. [g] Ch. L. 1. [h] iii. 1, 6. [i] *Ant. Jud.* Lib. xviii. Ch. vii. [m] *Matth.* xi. *Mark* vi. [n] Lib. ii. Ch. v. § 9. [o] *De Uxore Ebræa*, Lib. iii. Ch. xxii.

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[z] This Separation of Body and Goods, which yet leaves the Tie of Marriage ſubſiſting, is unknown in the antient *Roman* Law though the modern Canoniſts pretend to find it there. See Mr. NOODT on the Title of the DIGEST. *De Divortiis & Repud.* 521. The Fathers of the Church, even after they began to regard *ſecond Marriages* as unlawful in their own Nature, differ this Point, as well as about the Cauſes of Separation. This M. BOHMER ſhews, in his Diſſertation *De Jure Princip.* &c. Ch. § 14. & *ſeqq.* See, alſo, the Notes of JOHN BAPTISTE COTELIER *in Patres Apoſtolic.* Tom. i. p. 87. & *ſeqq.* Who give the Deciſions of the Council of *Trent* for the Doctrines of the Goſpel.

[a] See 1 *Sam.* xxv. 44. ad Mr. LE CLERC's Note upon it.

" not lawful, upon ſlight Pretences, to diſſolve an " Union inſtituted by GOD himſelf; but only " upon the Commiſſion of [1] foul and ſcandalous " Crimes, comprehended, according to the Ge- " nius of the *Hebrew* Language, under the gene- " ral Term of Fornication [a]." He adds, that amongſt the moſt antient Chriſtians, Adultery was not eſteemed the only lawful Cauſe of Divorce: As appears from *Lib.* viii. *C. de Repudiis*, enacted by the moſt Religious of all the Emperors. 'Till by the Superſtition and the Corruption of the *Papal* See, the Bond of Matrimony was declared indiſſolvable during the Life [2] of the Parties. *Buxtorf* [b] hath endeavoured to make out, contrary to the Current of the *Jewiſh* Writers, that in the Words of *Moſes*, *Deuteron.* xxiv. 1, 2, 3, 4. this one Prohibition only is contained, " *That a Man ſhall not receive again to his Bed a* " *Wife which he hath once put away:* But that the " Cuſtom itſelf, of putting away Wives, is, in that " Place, neither approved by *Moſes*, nor plainly " condemned; but left as it were indifferent. " And, ſays he, the Obſervation of our Saviour, " that this Permiſſion was given by *Moſes*, *be-* " *cauſe of the Hardneſs of their Hearts*, ſufficiently " makes it appear, that the *Moſaical* Indulgence " doth not amount to an Approbation, but ſig- " nifies only a bare Toleration, or Connivance, " exempting from civil Puniſhment [c]."

XXIV. Mr. *John Milton* [d], provoked, as it ſhould ſeem, by the Misfortune of his own Family, hath, with great Pains, endeavoured to prove that, even by the Principles of the *Chriſtian Religion* [3], *an intolerable Diſpoſition, a Diſparity, or Contrariety of Mind, is a ſufficient Reaſon for Divorce*; nay, *that Perſons ſo unhappily paired are indeed under an Obligation to ſeparate.* We hope we ſhall not ſeem tedious, if we venture to run over his chief Arguments. In the firſt Place, then, he lays down this Aſſertion to build upon; *God, in the firſt Ordaining of Marriage taught for what End he did it, in Words expreſly implying the apt and chearful Converſation of Man with Woman, to comfort and refreſh him againſt the Evils of ſolitary Life: not mentioning the Purpoſe of Generation until afterwards; as being but a ſecondary End in Dignity, though not in Neceſſity.* Now this Foundation we take to be falſe. When God was pleaſed to give Man a *Helpmeet for him* [e], and afterwards commanded the primitive Couple to *increaſe and multiply* [f], he did not hereby ordain two different Ends of Marriage; but the latter Words ſeem deſigned to deſcribe the chief Fruit ariſing (thro' the divine Benediction) from the mutual Aſſiſtance firſt mentioned. And indeed, if the bare Delight of Converſation had been the principal Intent of the Creator, what need was there of a Difference in Sex? For take away the Procreation of Offſpring, together with the Pleaſures which by the Appointment of Nature ſweeten and recommend it, and Men alone would have been more agreeable Companions, and more able Aſſiſtants to each other. And thus we ſee, that Boys and old Men, thoſe who have not felt the Paſſion of Love, and thoſe who are paſt it, agree in preferring the Converſe of their own Sex to all the Charms and all the Entertainments of the Fair. But Mr. *Milton* ſeems to dream of ſome more delicate and more refined Pleaſures; and frames the Idea of a Wife ſuitable only to the Genius of a wiſe and learned Huſband: He would have her able to be the Companion of his Studies, or to refreſh him with her Wit, when he comes from ſeverer Meditations, to compoſe his Cares with ſweet Diſcourſe, and charm away a melancholy Fit. Whereas although there is no conſidering Man, who would not infinitely prefer the Pleaſure of the Mind, to the ſhort and empty Gratifications of Senſe: Yet, it is ſo very difficult to find a Woman of this philoſophical and elevated Temper, that there is ſcarce any Man eminent for Wiſdom and Learning, who might not ſue for a Divorce, on this Pretence. And, therefore, if there be any Perſon of ſo mortified a Spirit, as to think the continuing of his Name and Race ſo mean and worthleſs a Deſign, and who feels no Pains, that the Fair only can cure, he ſhould, on all Accounts, be adviſed to lead a ſingle Life: For, it is no wonder, if Coldneſs and Gravity prove ſo ill Companions for Charms and Beauty. Laſtly, whatever the Aſſertors of theſe Opinions pretend, it is impoſſible they ſhould give any other Reaſon, why the Converſation of Women was rather inſtituted as a Help for us, than that of Men like ourſelves;

[a] Vid. *Val. Max.* Lib. ix. Ch. ii. [b] *De Sponſal. & Divort.* [c] Add the excellent Diſſertation of *Grotius* on this Point, on *Matt.* v. 31, 32. [d] In his Book of *the Doctrine and Diſcipline of Divorces.* [e] *Geneſ.* ii. 18. [f] *Ibid.* i. 28.

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[1] See Mr. THOMASIUS's Notes upon LANCELOT. *Inſtit. Juris Canonic.* Lib. ii. Tit. xvi. p. 949. *& ſeqq.*

[2] For they built upon this falſe Principle, *That Marriage is a Sacrament.* By this Means, under Pretence of Religion, the Popes endeavoured to appropriate to themſelves the Cognizance of all Matrimonial Cauſes.

[3] It is certain, that JESUS CHRIST no way pretended to act as a political Legiſlator, or to give any new Laws with regard to Divorce or Polygamy. He had expreſsly declared (*Matth.* v. 17.) *That he was not come to deſtroy the Law*; which Aſſurance, no doubt, extended to that Part of the *Moſaic* Law, which reſpects civil Affairs, as well as all the reſt. Thus we ſee that our Lord, and his Apoſtles, by their Diſcourſe, and Conduct, ſhewed they deſigned to make no Alteration. We muſt, therefore, regard what they ſay, upon theſe Occaſions, as Precepts, by which they teach us not to abuſe the Advantages of the civil Law, and inſtruct us how we may profit by them, without violating any of our religious Duties. We ſee that they always ſuppoſe Men capable of uſing the Light of their Reaſon, by the Help of which they may eaſily diſtinguiſh what is evil in itſelf, from what is ſubject to Abuſe; may apply the Exceptions alledged for Example in a moral Way, to ſuch and ſuch Caſes; may conſider what gave Riſe to theſe Precepts, and Maxims, and ſo be able to judge of the Queſtion. Now here it is clear, that the only Point is to know, if under Pretence that the Law of *Moſes* allowed a Huſband purely and ſimply to repudate his Wife, leaving him intirely Judge of the Subject, and requiring only, that he ſhould give a *written Bill* of Divorce: I ſay, whether, under this Pretence, a good Man might uſe this Permiſſion *for every Cauſe.* (*Matth.* xix. 3.) We have clearly proved, that there was a Diſpute, upon this Head, among the *Jewiſh* Doctors; and in this Diſpute none of the Parties ſo much as pretended, that there was but *one ſole juſt Cauſe for Divorce*, much leſs that that Cauſe was *Adultery.* For Adultery being puniſhed with Death by the Law of *Moſes*, the Queſtion of Divorce was ſuperfluous in this Caſe. Therefore there is no Appearance that JESUS CHRIST meant to ſpeak of Adultery as the only lawful Cauſe: And it is agreed, that this is not the proper Signification of the Word Πορνεία, which the Evangeliſts make uſe of. The modern Verſions which render it by the Word *Adultery*, ſuppoſe the Point in Queſtion. *Selden* (*De Uxore Hebraic.* Lib. iii. Ch. 23.) has proved that, according to the Style of the *Helleniſtic Jews*, it ſignified, beſides *Fornication* (which does not agree to a married Woman) every Action that is vicious and diſhoneſt. We ſhould make no Doubt of this, if the Terms which JESUS CHRIST uſed were not foreign to our Language; but the ſame Author has conjectured them with a great Shew of Probability. So that, if we follow even the literal Senſe of the Term, the Exception in Queſtion is general, and excludes only ſuch things which, though diſhoneſt, have nothing contrary to the Nature and Engagements of Marriage. So far, is this Exception, from being confined to Adultery, that, according to our Saviour's Meaning, it can have no Relation to it, but by ſuppoſing Laws more ſevere, for the Puniſhment of this Crime, than that of *Moſes*; or a Huſband who either will not, or cannot, convict his Wife of Infidelity. If we add to this the Explication I have given (§ 21. *Note* 2.) of the Paſſage of St. *Paul*, all Difficulties will vaniſh.

except,

except, that Nature hath wisely fixed in the Difference of Sex sweeter Engagements, and more peculiar Propensions. It may then, on the whole Matter, be the safer Way not to endeavour the bringing this high and *Platonical* Strain of Notions into Practice (but, considering the ordinary Temper and Capacity of the Female Sex) to judge her a very convenient and proper Partner, who is able to sustain a Share in the Concern of Children, both as to their Birth and Education, and in the Care of directing the Family; although she be able to afford little Assistance in deep Speculations and in studious Enquiries. *Juvenal*'s [1] Advice hath something in it besides Satyr,

Non habeat matrona, tibi quæ juncta recumbit,
Dicendi genus, aut curtum sermone rotato
Torqueat enthymema, nec historias sciat omnes,
Sed quædam ex libris, & non intelligat: Odi
Hanc ego, quæ repetit volvitque Palæmonis artem,
Servatâ semper lege & ratione loquendi,
Ignotosque mihi tenet antiquaria versus,
Nec curanda viris Opicæ castigat amicæ
Verba: Solœcismum liceat fecisse marito.
Sat. vi. V. 447, &c.

O! what a Midnight Curse has he, whose side
Is pester'd with a Mood and Figure Bride!
Let mine, ye Gods! (if such must be my Fate)
No Logick learn, nor History translate;
But rather be a quiet, humble Fool:
I hate a Wife, to whom I go to School.
Who climbs the Grammar-tree, distinctly knows
Where Noun, and Verb, and Participle grows;
Corrects her country Neighbour, and abed,
For breaking *Priscian*'s, breaks her Husband's Head [2].
Mr. DRYDEN.

Strabo [a] reports of the *Brachmans*, that *they never communicate their Philosophy to their Wives: lest, if they prove wicked, they should divulge some Secrets which ought to have been concealed from the Profane; or, if they happen to be good, they should desert their Husbands. For the equal Contempt of Pleasure and Pain, of Life and Death, is no good Principle to fit a Person for a State of Subjection* [b].

This Remark will hold good in general of Mr. *Milton*'s Arguments, that they prove just nothing at all, in case it be apparent, that our Saviour declared Adultery to be the only sufficient Cause of Divorce [c]. To seem hard in some particular Instance, is no Objection against the express Words of a Law. We are not presently for repealing those human Constitutions, which appearing useful and beneficial to the Commonwealth in general, do yet turn to the Prejudice of one or two private Persons: Because these are looked upon as Inconveniences which it is impossible to avoid.

The only Point he gains is this, that if the Saying of *Christ* will bear another Interpretation, it should seem more agreeable to the Gospel Clemency and Goodness, to follow a milder Sense, than that which is at present received. The whole Strength of his Reasons may be thus represented in short: "Incorrigible Disparity of Mind, "or Stubbornes of Temper, rendering a Woman unfit to live in Society with such a particular Man, and hindering the chief Benefit of "Matrimony, mutual Help and Refreshment, is "a much weightier Cause of Divorce, than any "natural Defect, any Distemper, any Uncleanness "of Body; which yet were allow'd as lawful "Pleas by the *Jewish* Dispensation [d]. No Partnership can *oblige* Persons concerned, in Contradiction either to the chief End of its Institution, or to the Intentions and Hopes of both, "or of either Member. Now it was the Design "of the wise Creator, not to give Man a domestick Torment, but a kind Help to join with "him, not only in the Bringing of Children into "the World, but in the Education of them, and "in the whole Business of Life; which End intolerable Sowreness of Temper doth plainly "pervert and destroy. It looks absurd and unreasonable, that the *Canon Law* should, without "Scruple, declare *Impotency* a sufficient Cause of "dissolving Matrimony, and yet allow no Regard to the Manners and Dispositions of the "Parties: Especially since the former may immediately be discovered; whereas it is usual craftily to disguise and conceal the latter, until the "poor Man runs ignorantly into the Snare, "whence he can never be released. It is against "the Law of Charity: Nay, it is most barbarous and inhuman, to confine and chain down a "Man to such Miseries as are not to end until "his Death; and which would admit of an easy "Cure, did not the Severity of this positive Ordinance stand in the Way: Inasmuch as God Almighty, in his Laws and Commands, seems to "have mercifully accommodated himself to the "Infirmity of human Nature. The Holy Scriptures prescribe Matrimony, among other Reasons, for the avoiding of Temptations to Incontinence. But now the Man who can find in "Marriage no Rest or Comfort to his Mind, "who is perpetually teized and disturbed by an "untoward Partner, must needs be assaulted with "stronger Temptations, than if he lived in Celibacy. For his Heart will be ever full of Discontent; and, because his Wife is so unpleasing an "Object, he will seek to bestow his Love and "himself elsewhere. *Maimonides*, amongst the "Reasons of the Law about Divorce, assigns this "for one, That the Peace and Tranquility of particular Families might, by this Means, be the "more surely preserved [e]. Which Reason affecting *Christians* as much as *Jews*, it cannot "seem probable that GOD designed to lay a "heavier Yoak on the former, than on the latter [f]. We are commanded in Holy Scripture "to

[a] Lib. xv. p. 490. Ed. *Gen. Casaub.*

[b] *Euripid. Hippol. Coron.* v. 640, 641.
———From a Woman wise above her Measure
Protect me, Heaven.———

[c] *Vid.* Lib. v. Ch. xii. § 21.

[d] *Deuteron.* xxiv. 1.

[e] So *Bodinus, De Repub.* Lib. i. Ch. iii. affirms, *Never was any Law more just and holy than the Divine Ordinance of Divorces, either to curb the Pride of Women, or to restrain the Anger and Violence of Men.*

[f] Varenius *Descript.* Japon. *Ch.* xii. reports of the *Japonese*, *Divorces are very frequent in this Nation, though the nobler Persons still keep the rejected Wife in their Family, and take care of her Maintenance and Support. On this account, the Women apply their Endeavours to discover their Husbands Temper and Humour, by which Means they may in all Things gratify and please them, and be ever laying new Engagements on their Minds. And being once thrown off, they dissemble the Injury, and make not the least Complaint, that by the Sweetness of their Conversation, and Readiness of performing all kind Services, they may recover themselves in their Affections.*

[1] JUVENAL there pleasantly laughs at the learned Women of his Time, who falsly pretended to Arts and Sciences, or the Defects of that small Number of Women, who are, or might be truly knowing.

[2] All the World knows *Moliere*'s Comedy, called *Les Femmes Scavantes*, in which he admirably exposes *Female Pedantry*. See Mr. *Bayle*'s *Answers to the Questions of a Provincial*, Tome i. Ch. xliii. xliv.

" to remove from us all Obſtacles of Piety: A-
" mongſt the chief of which we may fairly reckon
" the Frowardneſs of an incorrigible and inſepar-
" able Companion. It is repugnant to Nature,
" that two Minds directly oppoſite, and admit-
" ting of no Poſſibility of Union, ſhould be tied
" together in a Bond never to be broken. The
" Chriſtian Emperors[a] have declared it as their
" Judgment, that the Plotting of either Party a-
" gainſt the *Life* of the other, is a good Reaſon
" of *Divorce*: And how many Mens *Lives* have
" been unhappily ſhortened by theſe continual
" Griefs and Diſcomforts? Marriage is a *Society*:
" But human *Societies*, inaſmuch as they are held
" together in a *Moral* Bond, conſiſt rather in the
" Union of Souls, than of Bodies. Should we ſay
" otherwiſe of Marriage, we ſhould degrade it
" below the Coupling of Beaſts, in which we fre-
" quently obſerve ſome ſort of Affection and
" Good-will in the Mates to each other. When
" therefore the Soul doth not find in Matrimony
" that ſweet Agreement which it ſought, ſo ill-
" matched a *Pair* live rather in the Miſery and
" Hardſhip of a Priſon, than in the Comfort of
" Society. Solemn Oaths, if either in themſelves
" improper, or tending to the Prejudice of a third
" Party, are capable of a Diſpenſation; and hath
" not the Marriage-Covenant a good Right to
" the ſame Favour? Nor will it ſignify any
" Thing to anſwer here, that unhappy Matches
" are laid on Men by Divine Providence, for the
" Trial and Exerciſe of their Patience: For Diſ-
" eaſes and other Calamities are moſt certainly
" ſent from Heaven; and yet the Application of
" human Remedies was never forbidden in ſuch
" Caſes."

After this, he holds a long Diſpute concerning the *Permiſſion* or Divorce among the *Jews*. " For,
" ſays he, if it be in the Nature of the Fact *A-*
" *dultery* for either Party, after a Divorce, to
" marry again, it follows that *Moſes* eſtabliſhed
" *Adultery* by a ſolemn Law. But to imagine this
" of Inſtitutions which had God for their Au-
" thor, would not only be abſurd, but moſt pro-
" fane and impious."

He, likewiſe, reprehends thoſe Authors who affirm, that the *Jews* had not a *Law* of Divorce, but rather a *Diſpenſation*. " A *Diſpenſation*, he
" obſerves, is of two Kinds, either *properly* ſo
" called, or improperly. The latter is rather a
" particular and exceptive Law, abſolving and
" diſengaging from a more general Command,
" for ſome juſt and reaſonable Cauſe: As that
" mentioned *Numb.* ix. 6, *&c.* and *Deut.* xxv.
" *v.* 5. and that in *Leviticus*, of marrying the
" Brother's Wife, upon his Deſceaſe without
" Iſſue. A Diſpenſation, properly ſo called, ob-
" tains only in particular Caſes rarely happening,
" and therefore not ſpecified in the Law, but left
" to the *Deciſion of Charity*, and to the Prudence
" of the Judges: As upon extreme Hunger, it
" was lawful for *David* and his Followers to eat
" the *Shew-Bread*[b]: So that this ſort of Diſpenſa-
" tion is nothing elſe but the interpreting a Law
" according to Equity."

Here it is worth our Notice that he confounds Diſpenſation and Equity with each other; whereas there is really a wide Difference between them. But, as to the Argument, this is certain, whoever will maintain the *Jewiſh* Divorces to have proceeded in the Way of Diſpenſations, it lies on him to prove, that there was then extant ſome general Law, declaring Matrimony not to be reverſible upon account of Manners and Temper; which Law muſt either have been a Branch of *Nature*'s Ordinances, or a *Divine Poſitive* Inſtitution. As for thoſe Words in *Geneſis* ii. 24[c], and *thoſe two ſhall be one Fleſh*, ſome are of Perſuaſion, that they expreſs indeed a moſt ſtrict Partnerſhip, and ſuch as, to break off on a ſlight Account, could neither be decorous nor advantageous to Mankind. But it doth not hence follow, that the Knot cannot be untied upon Reaſons which ſubvert the very End and Deſign of Matrimony: As it would be ridiculous thus to argue, *GOD joins Man and Wife together, therefore it is not in the Power of Man to join himſelf to whom he pleaſeth:* or, *therefore no human Covenant ought to intervene.* But what ought to be inferred is rather this: God joins the Parties by the Mediation of their Deed and Covenant; therefore it is his Will they ſhould not be ſeparated, unleſs that Covenant be, on one Side or the other, tranſgreſſed.

Mr. *Milton* proceeds to enquire into the Opinion of thoſe who aſſert, that Divorces were, by the Divine Law, *permitted* only, and not [1] *approved*. This he takes to be an irreverent Reflection on Almighty God; inaſmuch as it betokens Infirmity in a Governor, to allow his Subjects in any Practice, to which he does not really give his Approbation. And why muſt the *Jews* alone have been ſo notorious for *Hardneſs of Heart*, as not to be able to comply with the ſuppoſed primitive and general Ordinance, when ſo many *Chriſtian* Nations and Ages have yielded a ready Obedience to it?

On thoſe Words of our Saviour, *From the Beginning it was not ſo*, ſome thus deſcant: " In the
" State of Innocence[2] human Manners were more
" perfect and excellent, than to give Occaſion to

[a] See the Law already quoted in Sect. 22. [b] 1 *Sam.* xxi. 6. *Matt.* xii. 3, *&c.* [c] See Mr. *Le Clerc*'s *Comment* upon the Place.

[1] See what I have ſaid upon *Grotius*, Lib i. Ch i. § 17. *Note* 3. Nothing better proves the Weakneſs of their Principles, who obſtinately maintain, that *Polygamy*, *Divorce*, and ſuch like Things, are abſolutely bad in their own Nature; than the Extremity they are reduced to of ſuppoſing, on the Part of GOD, a *Permiſſion*, *Diſpenſation*, or even a ſimple *Toleration*. The laſt, though it implies no Approbation, would remove the Difficulties that lie in their Way, if it was not a mere Begging of the Queſtion. As to a *Permiſſion*, or *Diſpenſation*, properly ſo called, they can never be admitted in Things contrary to the Law of Nature, without deſtroying the Eſſence of that Law, and ſo doing Injuſtice to the Holineſs, as well as Wiſdom, of GOD. It would be to undermine the Foundations of all Morality, and make *Right* or *Wrong* depend upon arbitrary Will. There are ſome who pretend to extricate themſelves, in this Caſe, by diſtinguiſhing between the Rules of natural Law, *which flow from the Holineſs of* GOD, and thoſe *which do not*. Among the firſt they place thoſe, for Example, which forbid *Blaſphemy*, *Perjury*, &c. and ſay, theſe are the only ones with which GOD cannot diſpenſe. But this is a mere Suppoſition, and it would be no eaſy Matter to clear up this pretended Diſtinction, of what flows from the Holineſs of GOD, and what does not. There are, without doubt, ſome natural Laws of which the Obſervation is more important, than that of others, and, conſequently, the Violation more criminal. But this does not hinder them, with regard to their Eſſence, from flowing alike from the Sanctity of God; and therefore they are all equally immutable. The Nature of Man, upon which they are all founded, continuing always the ſame, GOD cannot diſpenſe with any of theſe Laws, without counter-acting his own Perfections.

[2] A fine Explication! As if Men had remained ſo long in a State of Innocence, as to make uſe of Divorce. Our Lord explains theſe Words very fully, when he ſays, *Mark* x. 6 *God created Male and Female, that they twain might become one Fleſh, and be no longer twain, but one Fleſh*, i. e. the Creator intended, that Marriage ſhould be ſo ſtreight and faſt an Union, as never to be diſſolved but by Death, or by ſomething extremely contrary to the Nature of that Society, ſuch as Adulteries, wilful Deſertion, *&c.*

" any ſignal Trouble and Diſagreement: And " therefore the Neceſſity of applying Divorce as " a Remedy to unhappy Marriages, is a remark- " able Evidence of the impaired Condition of " our Nature."

To conclude; Mr. *Milton* farther cenſures thoſe who alledge, that this Liberty of Divorce was therefore granted to the *Jews* by *Moſes*, becauſe they had been accuſtomed to it in *Egypt*. For now, when the Weight of the *Egyptian* Yoak was ſtill upon their Shoulders, muſt needs have been the moſt proper Time of teaching them to forget the Cuſtoms of that Country. As we ſee ſo many ſtrict and excellent Laws given them againſt *Idolatry*, which they had ſeen practiſed every Day, during their Servitude and Confinement.

But theſe Matters we leave undetermined, as not tending directly to our main Purpoſe.

XXV. The neceſſary Qualifications required by the Law of Nature, in Perſons rightly contracting Matrimony, are a Fitneſs or Ability, both *Phyſical* and *Moral*. By the former we underſtand ſuch a Conſtitution of Body as is capable of attaining the chief End of Marriage, the Procreation of Iſſue [1]. Therefore ſuch Perſons as labour under a perpetual and incurable [2] Impotency, ſuch as *Eunuchs*, and the like, ought not to aſpire to the conjugal Honour. It was certainly an unnatural Cuſtom in *Egypt*, to allow the *Eunuchs* Wives, becauſe they laid claim to ſome inferior Degree of uſeleſs Pleaſure [a]. And here a Doubt may ariſe, whether we can properly call it *Matrimony*, when an antient Couple are linked together without any Proſpect of a Bleſſing from the Bed. *Dionyſius*, in *Plutarch* [b], when his aged Mother deſired him to beſtow a Huſband upon her, replied, *It was in his Power to do Violence to the Laws of his Country, but not to the Laws of Nature* [c]. Yet in moſt Commonwealths theſe ſort of Matches are tolerated; inaſmuch as the other End of Matrimony, mutual Aſſiſtance and Comfort, will hold as ſtrongly here as in any other Caſe [d]. Perhaps we ſhall not ſpeak improperly if we call theſe [3] *Honorary Marriages*, as we term thoſe Offices *Honorary*, in which a Title only is conferred, without Action or Buſineſs. *Nero*, when he deſerted his Wife *Octavia*'s Bed, excuſed himſelf with ſaying, *ſufficere ſibi Uxoria Ornamenta* [e], *He was contented with the bare Ornaments and Badges of Marriage:* in Alluſion to the *Triumphalia Ornamenta* [f], ſometimes beſtowed on Perſons without the real Solemnity of a Triumph. The Caſe of *David* and *Abiſhag* [g] ſeems to fall under this imperfect Matrimony. Though *Solomon*, in all Appearance, eſteemed the Marriage good and valid; inaſmuch as he gave capital Judgment on *Adonijah*, for begging her for his Wife; becauſe this Attempt of marrying the King's Widow (which in the *Jewiſh* Conſtitution was accounted unlawful) ſhewed he was driving on ſome Deſign againſt the publick Peace and Eſtabliſhment [h].

XXVI. It is farther ſuppoſed in *Matrimony*, as in all other Covenants, that the Parties contracting it have ſufficient Uſe of Reaſon; that there is no Error, no Flaw [i] in the Eſſentials, and that no unjuſt Fear is on either Side occaſioned. In this laſt Point, the *Jewiſh* civil Laws were very particular; by them, if the Woman was compelled by Force or Fear [4], the Eſpouſals were reverſed; but not on the other ſide, if the Man alledged Compulſion, becauſe there could not be the ſame Preſumption of any Violence or Fright offered him: And if the Conditions had diſpleaſed him, he might afterwards have rejected her [k]. In like manner, if there were a Miſtake, either as to the Perſon, the Object of Conſent, or in any Quality, either relating to Matrimony itſelf, or [5] ſerving as a Condition on which the Conſent was built (eſpecially in caſe of Guile or Deceit uſed on either Side) the Contract was manifeſtly void. Thus a Wife pretending Virginity, and afterwards diſcovered defective, was, by the Divine Law, not only turned away from her Huſband, but made liable to ſevere Puniſhments. Though the barbarous Nations appear not to have been over curious in this Point of Purity [l]. Thus, again, if a Man in the Covenant of Marriage expreſly inſerted a Clauſe, importing that he took ſuch a Woman for his Wife only in caſe ſhe were of noble Blood, of ſuch a Fortune, or the like? he ſhall not be obliged to conſummate the Match till the ſuppoſed Condition be made appear. But if, neglecting to enquire into the Truth [6], he ſhall have proceeded to Conſummation, he ſhall, by this Act, be judged to have tacitly renounced the conditional Clauſe; and therefore if Things do not afterwards come up to his Hopes, he hath no good Reaſon for *Divorce*. For the Contract did not run in theſe Terms, *If you do not bring me ſuch a Fortune, I'll divorce you*; but, *if you do not bring me ſuch a Fortune, I'll not marry you*; which are manifeſtly different. He then, who in the Affair

[a] Grot. *ad* Deuter. xxiii. *v.* 1. Geneſ. xxxix. *v.* 1. [b] *In* Apophthegm. *p.* 175. *E.* Ed. Wech. [c] *Quintil.* Declam. ccvi. p 464. Ed. *Lugd. Bat. There may be ſome kind of Unchaſtity even in Marrying.* Idem Declam. ii. p. 23. in fin. *An old Huſband is (often) the moſt humble Inſtance of Slavery; and is the more charmed and overcome with the Magick of the Fair Sex, the colder his own Powers are in the Reception of it.* *Comp.* Val. Max. *Lib.* vii. *Ch.* vii. § 4. [d] V. *Lib.* v. *Tit.* iv. *Lib.* xxiii. *C. de Nuptiis.* [e] Sueton. Ner. *Ch.* xxxv. [f] Sueton. Auguſt. *Ch.* xxxviii. [g] 1 *Kings* i. [h] Grot. *ad* Reg. *D. L. v.* 11, 17. [i] See above in *Lib.* iii. *Ch.* vi. § 11. [k] Selden *de Uxore* Ebræa, *Lib.* ii. *Ch.* iv. [l] See the Cuſtoms of the *Barbarians*, *Diod. Sic.* Lib. v. Ch. xviii. of the *Armenians* and *Lydians*, *Strab.* Lib. xi. of the *Babylonians*, *Herodotus* in *Clio*; of the *Thracians*, Idem *Terpſich.* of the *Adrimachidæ* and the *Naſamones*, Id. *Melpomen.* See *Ariſtippus*'s foul Fancy in *Diog. Laert.* Lib. ii. Add *Boxhorn*'s Notes on *Sueton. Calig.* Ch. xl. towards the End. *Juſtin.* Lib. xviii. Ch. v. *Num.* iv. *Paul. Venet.* Lib. ii. Ch. xxxvii. of the Inhabitants of *Tebeth* and *Cathay*. *Conſtantine the Great* aboliſhed the like Immodeſty amongſt the *Phœnicians*; as we are told by *Sozomon*, Hiſt. Eccleſ. *Lib.* i. *Ch.* viii. *Lib.* v. *Ch.* ix.

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[1] SOSIMUS, *Lib.* v. *Ch.* xxviii. ſpeaking of the Empreſs *Mary*, Wife of *Honorius*, ſays, Καὶ τὸ παρ' ἡλικίαν εἰς μίξιν ἐκδοῦναι, βίαιον ἀδικίαν, καὶ οὐδὲν ἕτερον εἶναι. *To put a Virgin in the Marriage-Bed before the proper Age, is no leſs than to do an Injury and Violation to Nature.*

[2] See Mr. *Bayle*'s Reflections about *Jacqueline de Baviere*, Counteſs of *Holland*, in his *Anſwers to the Queſtions of a Provincial*, Tome ii. Art. lxviii. p. 1. *& ſeqq.*

[3] See the *Paræmia Juris Germanici* of Mr. HERTIUS, *Lib.* i. *Ch.* lxvii.

[4] In all this the *Roman* Law follows the Simplicity of the Law of Nature. See Mr. NOODT's *Commentary* on the Title of the DIGEST, *De Ritu Nuptiarum*, p. 489. *& ſeqq.*

[5] See what Mr. BAYLE ſays in his Anſwer to the *Provincial's Queſtions*, Tom. ii. p. 40, *&c.* on the Account of Madam *Mazarin.*

[6] Very juſtly: if we are ſo careleſs as not to inform ourſelves, though we may. But if we have been deceived in our Inquiry, why ſhould not that Deceit render our Engagements null, as well as it does in other Agreements? On the contrary, the more ſerious the Affair is, the leſs we ought to ſuffer from the Fraud of the other Party.

of

of Matrimony thus feels the Charms of the Portion more than of the Lady, is very ridiculouſly ſenſeleſs, if he let the Buſineſs be finiſhed before he hath good Security for that which was his chief Aim [a]. Much leſs ſhall it be lawful to break off a Match, or to forbear conſummating it, when a Man hath catched at the Bait of a ſuppoſed Fortune, without bargaining for any particular Sum. And therefore the *Ephori* in *Sparta* did very juſtly in Fining the Gentleman, who having been contracted to *Lyſander*'s Daughter, in her Father's Life-time, refuſed her, when that great General was found to die in ſo poor a Condition [b].

What we have been offering holds good only, in *natural Law*. For it is in the Power of civil States to enact, that no ſuch Clauſe, belonging indirectly to Matrimony, ſhall hinder or defer the due Conſummation of it.

XXVII. A *moral Ability* of contracting Matrimony is wanting in Women already diſpoſed of to other Men. For the Right of the Huſband over the Wife continues ſo long as he doth not actually renounce it. Therefore to marry another Man's Wife, not duly looſed and ſeparated from him, is not only unlawful, but void, and ineffectual: Becauſe it was not in the Woman's Power to make this ſecond Engagement, whilſt the firſt continued in force; and to cohabit with this new Huſband, is to live in conſtant Adultery. For the ſame Reaſon, in Countries where *Polygamy* is prohibited, a Man cannot, without Sin, proceed to another Marriage, whilſt he is held by the Bonds of a former.

By the *Jewiſh* Law, it was criminal for a Man to take his Wife again, whom he had put away [c]. The Reaſon of which Inſtitution no doubt was to prevent the Frequency of Divorces on ſlight and petit Occaſions, by cutting off all Hopes of Re-union, when Paſſion ſhould grow cold [d]. Yet ſome from *Jerem.* iii. 12. collect, that it was lawful to receive again the diſmiſſed Woman, provided ſhe had not contracted a new Marriage.

It is remarkable in the *Turkiſh Alcoran*, that a Man is allowed to take home his Wife, even after he hath three Times diſmiſſed her; but not unleſs ſhe hath been, in the mean time, married to another, and been diſcarded by him likewiſe. The *Mahometans* eſteem this as the higheſt Infamy and Reproach, and therefore the famous *Bajazet* thought he could not beſtow a heavier Curſe upon *Tamerlain*, who ſent to defy him to War, than by replying, *If he does not come as he threatens, may he fetch his Wife back, after he hath three times ſent her off* [e]. It is another Precept of the *Alcoran*, that a Man who puts away his Wife, ſhall fix a certain Time, during which, it ſhall be unlawful for her to chuſe a new Huſband: That he may thus uſe Deliberation in determining whether or no to take her again into Favour.

[1] *Joſephus* [f] mentions a *Jewiſh* Ordinance forbidding a Man to marry *Her* whom he hath perſuaded to leave her former Huſband; ſince this Irregularity could not but breed high Diſcontents and Troubles. On the ſame good Reaſon are thoſe *Chriſtian* Canons [2] founded, which deny an Adulterer the liberty of marrying the Woman whom he thus defiled [g]. In this Point *Euripides*'s [h] Obſervation ſeldom fails,

> ——*The Wretch that ſtains another's Bed,*
> *And takes the vile Adultereſs to his own,*
> *Condemn'd to wed her for his Puniſhment,*
> *Is wildly vain, if he expects ſhe'll prove*
> *In her new Vows more chaſte than in her old.*

XXVIII. Perſons allied within ſuch a Degree of *Blood*, or *Affinity*, are, likewiſe, under a Moral Incapacity of contracting Marriage [i], in ſo much that it is not only from the Beginning unlawful to ſtrike ſuch a Match; but this Engagement, though actually concluded, is ever eſteemed Vicious and Defective. This is an Opinion generally received by all Nations of Manners and Civility; yet to aſſign a ſolid Reaſon for it [3], ſuch as ſhall flow, like other Precepts, from the ſocial Nature of Man, ſeems at firſt ſight a Point of no ordinary Difficulty. Some Enquirers are content to fly to the Abhorrence of human Affections in this Caſe. "All Perſons, ſay they, "who are not corrupted by ill Education, or "wicked Habits, find, in their very Senſes, a "Repugnancy and Averſion to ſuch Impurities; "which is a plain Argument that thoſe Things "are prohibited by the Law of Nature." But indeed, this Repugnancy of Affections is not equally to be diſcovered amongſt all People, nor always, even amongſt thoſe who pretend to the Art of Culture and Refinement; And when Authors urge it for a Reaſon, it would not be altogether abſurd to anſwer them, that the Abhorrence may perhaps ariſe not ſo much from any in-bred Principle, as from long Uſe and Cuſtom, which often counterfeit Nature. Nor, in our Searches after *natural Law*, is it very ſafe to rely

[a] Eſpecially ſince the Managers of Matches uſually anſwer the Character which we find in *Libanius* (*Progymn.* p. 6. *They come armed with a great many ſtudied Flouriſhes and fine Sayings, and by leſſening what's preſent, and magnifying what's abſent, eaſily prevail on the kind and credulous.* [b] *Vid.* Ælian. *V. H. Lib.* vi. Ch. iv. [c] *Deuteron.* xxiv. 4. [d] Grotius *(ad d. l.)* gives this Reaſon, *Becauſe ſuch a Practice looks like lending one's Wife to another Man, and might yield Shelter and Countenance to the moſt ſcandalous Debaucheries.* [e] *V.* Laonic. Chalcondil. *Lib.* iii. [f] *Jud.* Antiq. Lib. iv. Ch. viii. [g] Gratian. *Cauſ.* xxxi. *Qu.* i. Ch. i, ii, *&c.* [h] Electra, *v.* 921, *&c.* [i] Vid. *Lib.* xxxviii. *Tit.* x. *Lib.* iv. § 3, 4, 5, *D. de gradibus & affinibus.*

[1] This Law of *Joſephus* is not conformable to Scripture, and the Tranſlation which our Author follows, doth not agree with the *Greek*. We ſhall therefore give the Original, and its true Meaning: Ὁ δὲ μὴ μέλλων ἄγεσθαι παρθένον, μὴ ζευγνύσθω συνοικοῦσαν ἄλλῳ, μηδὲ λυπῶν τὸν πρότερον αὐτῆς ἄνδρα: *Let him not eſpouſe a Woman married to another, nor give vexation to her firſt Husband.* This means only, that we ſhould not marry with a Woman who is married already, before ſhe is divorced. It is thus *Selden* explains it (*De Uxor Hebraic*, Lib. iii. Ch. xix. pag. 315, 316.) But *Cotelier*, in his Notes on the *Apoſtolical Conſtitutions* (Lib. iii. Ch. ii. p. 278, *Edit. Cleric.* 1724) has reſtored this Paſſage from the Authority of a MSS. in the *Louvre*, where after ἄλλῳ, there is the Word νοθεύσας, which is wanting, and which produces a Senſe agreeable to *Ruffinus*'s Verſion. That is to ſay, that he who had a Commerce with a married Woman, ſhould not eſpouſe her, even though her firſt Huſband divorced her. The deceaſed Mr. *Hudſon* has admitted this Correction into the *Oxford* Edition, Lib. iv. Ch. viii. § 23.

[2] It is not only the *Canon* Law which forbids ſuch a Marriage; it follows here the Deciſions of the Civil Law; and even the laſt Regulations of the Popes, have very much ſoftened the Rigour of the antient *Canons*. For they allow thoſe who have committed Adultery to marry, after the Death of the Huſband or Wife of the one or other, except in two Caſes. The firſt is, If in the Time of their unlawful Commerce they have promiſed each other Marriage. If in this Hope they have attempted the Life of him or her who ſtood in their way. See *Cujas* upon *Novell.* cxxxiv. Ch. xii. and on the Title of the DECRETALS, *De eo qui duxit in matrimonium, quam polluit per adulterium*; as, alſo, the *Jus Eccleſiaſticum proteſtantium* of Mr. BOEHMER upon the ſame Title, Tom. iii. pag. 1324. And Mr. BINGHAM's *Eccleſiaſtical Antiquities*, Book IX. pag. 333. *& ſeqq.*

[3] See Mr. NOODT, on the Title of the *Digeſt*, *De Ritu Nuptiarum*, pag. 490, *& ſeqq.*

upon the bare Judgment of our Senſes and Affections; ſince, at this rate, we might conclude, that thoſe Things are by the ſame Law commanded, towards which our Senſes and Affections are carried on with a vigorous Inclination; whereas, on the contrary, it is manifeſt that thoſe Acts to which we are ſo violently prone, Reaſon and Nature do really diſallow.

Plutarch [a] enquiring why the *Romans* did not take Wives from amongſt their near Relations, thus propoſeth his Reaſons after his doubting manner: *Was it that they might ſpread their Kindred more widely, and increaſe the Number of their Alliances; giving Wives to ſome, and taking them from others? Or did they it, to avoid conjugal Diſcords? which, ſhould they ariſe between Perſons allied by Blood, would not only deſtroy the Love between Huſband and Wife, but the very Principles of natural Affections* [b]*? Or, becauſe they knew the weaker Sex to ſtand in need of many Defenders, were they therefore unwilling to marry their Kinſwomen, that they might be ready to aſſiſt and protect them, if injured by other Huſbands* [c]*?* The firſt of theſe Reaſons, *The ſpreading and improving of Alliances*, is confirmed by the Approbation of St. *Auguſtin*, and of Biſhop *Cumberland* [d]. But on this Way of Arguing, we may obſerve, that as an Act leſs *uſeful*, or *profitable*, is not always *unlawful*, ſo the *Profit* here alledged is not attainable by this only Method: In as much as a far greater Advantage may reſult from the quite contrary Practice; that is, if the neareſt Relations would ſtill match themſelves to each other, their Eſtate and Wealth would be hindered from paſſing out of the Family. And, on this Account, in the Divine Law, *Numb.* xxxvi. 3. Women poſſeſſed of an Inheritance in *immoveable Goods*, are commanded to take Huſbands only from amongſt their Kindred; leſt the Land ſhould run out of one Tribe into another. Yet, in caſe they would quit their Title to the Inheritance, they were allowed to marry any Perſons of their own Nation. The Women of the Tribe of *Levi* were not concerned in this Injunction, as being incapable of holding Land [e]. In *Peru*, during the Command of the *Ynca's*, it was provided by Law, that every Man ſhould chuſe his Wife out of his own City, and his own Family: After the Marriage was concluded, a Houſe was built for the new Couple at the common Charge, and the neareſt Relations preſented them with Furniture [f]. It was one of the [1] *Attic* Laws [g], that *Heireſſes* ſhould be taken in Marriage by their neareſt Kinſmen, to preſerve the Riches of their Anceſtors in the ſame Line [h]. But the ſeeming Hardſhip of this Ordinance was ſufficiently made amends for by another, which commanded, That if the Circumſtances of ſuch a young Woman were but very mean and inconſiderable, the next of her Kindred ſhould nevertheleſs be obliged to wed her, or elſe to give her a Fortune ſuitable to her Birth and Quality [i].

XXIX. In order to the ſettling of theſe Queſtions, it is, in the firſt Place, neceſſary, we examine how it comes to paſs, that although the Propagation of ſo noble a Creature as *Man*, be in itſelf a Work of Honour and Credit; yet amongſt all civilized Nations, as well the *Inſtruments*, as *Act* of this good Service, ſhould be guarded with ſo tender a Senſe of Modeſty, as nothing but a Face hardened by habitual Wickedneſs, can conquer, or ſuppreſs? To which purpoſe we have a moſt remarkable Story, recorded by *Plutarch* [k] and *Polyænus* [l], of the *Miletian* Virgins, who being, [2] by ſome ſtrange and unknown Cauſe, driven to a mad Deſire of hanging themſelves, and their Diſtemper admitting of no Stop nor Remedy; it was at length decreed by a ſolemn Law, that the Bodies of thoſe who diſpatched themſelves, in this deſperate Way, ſhould be carried naked through the common Market. And by this means, whilſt the Fear of Death could make no Impreſſion on the Frenzy, the Senſe of Shame reſtored them to their Wits. It is farther remarkable, that whatever Nations, in antient, or modern Times, have entertained a Cuſtom of going naked, or of performing in open View the ſecret Affairs of Marriage, have been cenſured and condemned by the reſt of the World, as wild and barbarous [m]. Now the Reaſon of all this is not ſo eaſy to come at. For, as to the immediate Inſtruments of this Work of Nature, they lie under no Scandal of Deformity, and they ſerve to a great and worthy Deſign: And therefore, the *Egyptians* and *Athenians* paid religious Regards to them, in their myſterious Worſhip [n]. The Act itſelf, as it is agreeable to Nature, ſo is it of abſolute Neceſſity, and every Way proper for the producing of ſo brave and generous an Effect. And therefore, why ſhould the Exerciſe of it before others create more *Shame* in a Man, than *Eating* and *Drinking*; ſince the human *Species* can no more be preſerved without the former Means, than the *Individuals* without the latter? Nor will *Plutarch*'s Diſtinction ſatisfy the Doubt. *There is*

[a] *Quæſt.* Roman. 108. *p.* 289. *D.*

[b] For Inſtance, becauſe there often happen Quarrels between the Huſband's Mother and his Wife, therefore a Man (according to this Argument) ought not to marry one that owed a natural Reverence to his Mother; *that is*, his Siſter.

[c] V. *Auguſtin* De Civitate Dei, *Lib.* xv. Ch. xvi. cited by *Gratian*, Cauſ. xxxv. Qu. i. Ch. i.

[d] De Leg. Nat. Ch. viii. § 9.

[e] *Vid.* Grot. ad *Matth.* i. 16.

[f] Garcilaſſo de la Vega *Comment.* Reg. *Lib.* iv. *Ch.* viii.

[g] *V.* Sam. Petit. *in Leg. Attic.* Lib. vi. Tit. i.

[h] Many Suits of Law falling out amongſt the Pretenders to theſe Heireſſes, the young Women got the Title of Ἐπίδικοι.

[i] We find a Law of *Charondas* much to the ſame Purpoſe, in *Diod. Sic.* Lib. xii. Ch. viii.

[k] *De Virtute Mulier.* p. 249. C.

[l] *Stratagem.* Lib. viii. Ch. lxiii.

[m] Thus *Pomp. Mela* reports of the *Moſſynians*, that their Love-Affairs are *promiſcuous and open.* And *Apollonius Rhodius* in *Argonaut.* Lib. ii. has left this Character of the ſame People;

> The Manners and the Notions they purſue,
> Are the reverſe of ours; in publick View
> What we perform, or at the crouded Bar,
> They act by Stealth, and make a ſilent Care;
> But what our Modeſty at Home conceals,
> Their Tribes proclaim, and every Street reveals.
> Like Beaſts, beyond the Power of Shame to move,
> Stretch'd on the Ground they ply their common Love.

[n] *Vid.* Diod. Sic. Lib. xiv. Ch. xxxi. & Xenophon. *Exped. Cyr.* Lib. v. of the *Maſſagetans Herodot.* in *Clio*, towards the End; of the *Naſamones* in *Melpomen.*

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[1] See *Grotius*, Lib. ii. Ch. v. § 12. Note 5. and *Julius Pollux*, Lib. iii. § 33. and Lib. x. § 137, with the Notes of the Commentators.

[2] See ſeveral Examples of the like Nature, in Mr. BAYLE's Anſwer to the Queſtions of the Provinc. *Tom.* ii. p. 92, 93, in the Margin.

no Pleaſure (ſays he [a]) *which we can more innocently enjoy, than that which we receive from Food and Nouriſhment. All Men are agreed on this Truth, as they ſhew by their daily Practice. For they eat in full Company, and open View; whereas in their Love Affairs they ſeek the Shelter of the Night: Becauſe in theſe latter Ceremonies, to be publick and communicative, is eſteemed as brutiſh and unnatural, as to be private and ſecret in the former.* As to this Point of Openneſs and Secrecy, it was a ſevere Return which a *Scotch* Lady, in the Emperor *Severus*'s Time, gave *Julia Auguſta*, when reproached by her for the Cuſtom of holding Wives in Common amongſt the *Britons: We* (ſays ſhe) *obey the Neceſſities of Nature much better than You* Roman *Dames; for we do that openly with the beſt of our Men, which you do privately with the worſt of yours* [b].

Neither do they thoroughly clear up the Matter, who have recourſe to the Holy Scriptures, where the natural Shame is recorded to have been the immediate Conſequence of the *Fall*. For the chief Queſtion ſtill returns, Why the Paſſion of Shame ſhould fix on theſe Parts for its peculiar Reſidence, when our Hands, and our Tongues, are as readily diſpoſed to aid our ſinful Luſt, and diſorderly Deſires? Nay, in as much as the primitive Tranſgreſſion came by the Act of *Eating*, one might imagine that this *Opinion of Impurity* ſhould rather faſten upon the Mouth, as its original and proper Seat.

XXX. The Author of the Treatiſe *de Principiis juſti & decori*, touching on this Subject now before us, in the firſt Place lays down this for a Principle; *Every thing which cauſeth Shame is not a Sin, nor forbidden by the Dictates of natural Law* [c]. He inſtanceth in Poverty, mean Cloaths, innocent Miſtakes, Deformity, and the like; which frequently put us to the Bluſh, though we can by no means lay any *moral Turpitude* to their Charge. "He proceeds to obſerve, that the Reaſon why "we would avoid ſuch Things, is, becauſe they are "the Tokens of ſome Infirmity or Imperfection; "from which Cenſures every Man deſires to keep "himſelf at as great a Diſtance as poſſible. In "the ſame manner, although to diſcover the *Se*"*crets* of the Body be not in itſelf ſinful, yet a "Man ought not certainly to uſe ſuch a Freedom "in open View, whenſoever it would prove an "Offence and Blemiſh to natural Honeſty; which "is very often the Caſe. A Man hath then on"ly good Reaſon to be aſhamed, when he poſſeſ"ſeth or diſcloſeth ſuch Imperfections, as may "make others juſtly deſpiſe him, whilſt appear"ing thus below the Character which he ſuſtains: "To be ignorant of a Point of Learning, is no "Blemiſh in him who hath wanted the Benefit of "Education; but one who hath made a long "Pretence to Study, and yet can ſhew no Fruits "of his Proficiency, may well be aſhamed of the "Neglect. Plain Behaviour ſits decently enough "on a Countryman, but would be a faulty Stiff"neſs in a Perſon of Breeding. Thus then, he "who uncovers, in publick Sight, thoſe Parts of "the Body which the Cuſtom of the Nation bids "him conceal, is an Offender againſt natural "Honeſty and *Decorum* [d]. But he may take the "ſame Liberty in a Country where the Men go "naked; as, ſuppoſe, in the *Caribbies*, without "the Imputation of Obſcenity, or of Sin [e]. "Thus it is accounted Impudence to do ſome "things in the Preſence of Strangers, without "deſiring particular Leave, which we make no "ſcruple of practiſing before our Equals and our "Acquaintance [f]. Thus a Teacher of Anato"my lays open ſuch Objects to our View, as it "would not be decent for him ſo much as to name, "were he not engaged in his proper Buſineſs and "Exerciſe." The ſame Judgment we are to make of the *Point* before us: "For although a Nation, "which doth not cenſure theſe unſeemly Free"doms, muſt needs have caſt off all Modeſty [g], "and this is not without a grievous Sin in their "Forefathers, from whom the looſe Opinion is "derived; yet the Cuſtom being once firmly "eſtabliſhed, and ſuch a Way of living exempted, "by univerſal Conſent, from all Marks of Diſ"grace, the whole People may then openly ap"pear in the ſame Manner, and yet contract not "the leaſt Guilt. In as much as they do not ap"prehend, or acknowledge in this Practice, any "Imperfection, or Infirmity deſerving Shame; "more than we do in the Cuſtom of our Women "to go with their Faces unveiled, which, in ſome "Countries, would be reckoned a ſcandalous "Breach of Modeſty [h]. We may farther obſerve, "that even in thoſe Nations where the appearing "*Naked* is prohibited, the moſt ſecret Parts are "ſometimes diſcloſed without Sin, as when they "are recommended to the Care of Phyſicians, or "when Surprize, or Neceſſity, in regard of Time, "or of Want, hinders their Concealment; or "when Children are wrapt in their Swadling-"Cloaths. Becauſe, in theſe Caſes, the Mark of "Impudence ceaſeth; the Diſcovery being made "without any laſcivious Deſign [i]."

In another Part of his Work he repeats the ſame Argument; "The uncovering the ſecret Parts "(ſays he) is not in itſelf foul, or indecent, but "is only rendered ſuch by means of the Circum"ſtances; which Circumſtances are taken, ei"ther from the Luſt of others, or from their "Honour or Worth, or from our own Reputa"tion, which we are obliged to ſupport and pre"ſerve. But in as much as the external Tokens "of Reverence and Reſpect are capable of great "Variation, many Actions are (by the ſame "People) conſtrued as an Affront to our Neigh"bour, or a Diſcredit to ourſelves, which, upon "the Change of Circumſtances, would appear

[a] Conviv. Sapient. *p.* 158. F. [b] Xiphilin. *Epit.* Dion. *in* Sever. *Add.* Montaign's *Eſſays*, Lib. ii. Ch. xii. & Charron de la Sageſſe, *Lib.* i. *Ch.* xxii. [c] Pag. 59, *&c.* [d] *A Woman*, in this Caſe, as *Herodotus* expreſſeth it, *Lib.* i. *p.* 3. *Ed.* H. Steph. *when ſhe throws off her Garments, lays aſide her Modeſty with them.* [e] In ſome Parts of *Abyſſinia*, the Women go quite naked, without having an irregular Influence on the Men. *Franc. Alvarez* Deſcript. *Æthiop.* Ch. xxxii. *Add.* J. Leri. *Hiſt.* Amer. *Ch.* viii. & Rochefort *Deſcript.* Inf. Antill. *Part* ii. *Ch.* ix. If I miſtake not, amongſt ſome of the *Indians*, to go with the Waiſt covered, fell under the ſame Penalty as Adultery. [f] And ſince *Claudius* did not put out the wiſe Edict, which was ſo long under his grave Deliberation (*Claud. Suet.* Ch. xxxii.) we ſtill make a Scruple of offending the Company with ſome kind of Sounds, which we reckon not quite ſo improper Muſick when we are alone. *Add.* Diogen. Laert. *in vitam* Metrol. Lib. vi. [g] Since amongſt all civilized People, it hath been, even in Death, a Care εὐσχήμως πεσεῖν, *to fall in a decent and modeſt Poſture.* [h] Plato (*in* Diog. Laert. iii.) ſpeaking of unwritten Laws, proceeding from Cuſtom, inſtanceth in Τὸ μὴ γυμνὸν πορεύεσθαι εἰς τὴν ἀγοραν, *not to appear naked in publick Places.* [i] A *Pigmy* might well be aſhamed of his Size amongſt a People of larger Dimenſions; yet in his own Quarters he is not affected with the Diſgrace.

——*Ubi tota Cohors pede non eſt amplior uno:* Where the whole Troop make but a Foot in Height.

[k] *Tho. Herbert* (Travels, *pag.* 21.) reports of Women amongſt the *Cafars*, that, if you give them any thing, they uncover all, in Way of Civility.

harmleſs

" harmleſs and inoffenſive. Upon the Approach " of [a] our Saviour, we find St. *Peter* haſtening to " gird on his Fiſher's Coat; whereas he was not " aſhamed to work [1] naked with the Companions " of his Buſineſs. Becauſe the Dignity of *Chriſt*, " and the Honour St. *Peter* owed him, required a " grave and modeſt Appearance and Carriage; " which, in the Opinion of civilized Nations, are " inconſiſtent with Nakedneſs [b]. We tranſact " many things in ſecret with Decency and Con- " veniency, which, if performed openly, would " be reproached as Infamous; neither do we " reckon it diſhonourable, to let the Company " know on what account we retire. Laſtly, many " Actions paſs unblamed in *Men*, which would " look inexcuſably impudent in the other Sex."

From St. *Paul*'s manner of Speech, 2 *Cor.* xi. 17. he infers, " That when, upon the Formality of " begging Pardon, or deſiring Leave of others, " we ſay, or do a Thing fairly, or civilly, which " would otherwiſe be rude and indecent; the Im- " propriety here doth not affect the Thing, abſo- " lutely conſidered in itſelf, but depends wholly on " the Circumſtances, which, if taken away, leave " no Ground for Cenſure: For all that is here " done, is, that the other Party waves and remits " the Reverence, which was owing to him." He judiciouſly inſerts this Caution, *provided, that by the general Cuſtom of the Nation, all Men are allowed to indulge each other in theſe petit Liberties.* For otherwiſe particular Perſons do by no means wipe off the Blemiſh, when they give themſelves a mutual Diſpenſation in ſuch Points: As a Company of wild Sparks could not avoid Shame and Reproof, ſhould they, by joint Conſent, go naked in a Place of Manners and Civility. Laſtly, He makes no doubt but that our firſt Parents, before they ſinned, had, in reſpect of Shame [2], the innocent Inſenſibility of Children: But that, immediately after their Offence, this guilty Paſſion ſeized upon their Mind, by which they apprehended their Nakedneſs to be indecent, as we, when we grow up to Years of Reaſon, make the ſame Judgment. His Inference from the whole is this, " That no *Degrees* of Marriage are forbidden by " the *Law of Nature*; though to abſtain from " ſome is moſt agreeable to natural Honeſty [c]."

XXXI. For our Part, though we do not think this Way of arguing ought altogether to be condemned, yet we chuſe to fix the *Shame*, now under our Examination, principally on theſe two Reaſons: Firſt, becauſe Man is a Creature of high and proud Conceits, fondly deſirous of Honour and Grace, and abhorring any Thing that ſeems to leſſen him in theſe Reſpects. Now through thoſe Outlets of our Body Nature caſts off the uſeleſs Relicks of what we eat or drink; and theſe Relicks we have a great Averſion to, not only upon account of that *Uncomelineſs*, but in as much as they ſeem to upbraid us with our mean Condition, whilſt the greateſt Delicacies of Taſte, by being once received within us, are ſo vilely changed and corrupted. And hence our loſty Imagination engageth us to be very induſtrious in concealing ſo manifeſt Tokens of our Infirmity [d]. [3] *Nature* (ſays *Tully* [e]) *ſeems to have had a moſt kind regard to the Dignity of our Body, by expoſing only thoſe Parts to ſight, which appear beautiful, comely, and agreeable; and by covering and concealing thoſe which would be foul and offenſive, if laid open to view, and ſerve us only for the meer Neceſſities of our Being. This exquiſite Diligence, which Nature hath ſhewn in the human Fabrick, Men have imitated in their modeſt Cuſtoms and Manners* [f].

Our ſecond Reaſon is, ſince our Affections being depraved and corrupted by the *Fall*, our irregular Luſts endeavour violently to make a Sally through thoſe Paſſages; and ſince the due Reſtraints, and the legal Methods of *Propagation*, are the very Hinges on which human Order and Society ſeem to turn; *Nature*, to preſerve her own Dignity, and to cut off, as much as poſſible, all Occaſion of looſe Deſires, hath invented this Paſſion of *Shame*, engaging Men carefully to cover and to guard thoſe weak *Places*, leſt lying continually open, they ſhould tempt and invite the Enemy; and reſtraining the Purſuit of unlawful Pleaſures, whilſt Modeſty confines the Exerciſe of thoſe which are lawful, to the Privacy of Darkneſs and Retirement. Hence our firſt Parents, after the perfect Harmony of their Affections was diſordered and impaired, when they found the unreaſonable Inclination of Senſe, vigorouſly ſtriving to force a Way through theſe

[a] *John* xxi 7. [b] Hence, amongſt the *Romans*, Sons, grown up to the Condition of Men, never bathed with their Parents, nor Sons-in-Law with their Fathers-in-Law, *Val. Max.* Lib. ii. Ch. i. § 7. So in *Livy*, Lib. iii. Ch. xxvi. The Deputies command *L. Quintius*, whom they found ſtripped at his Country-Work, to hear the Orders of the Senate in his *Gown*. In the ſame manner, within our own Houſes, and in private, we are not aſhamed of the meaneſt Apparel, which yet we could not appear in at a Wedding, or ſolemn Meeting, without great Indecendency and Offence. See *Matth.* xxii. 12. [c] *Compare* Montaign's *Eſſays*, Lib. i. Ch. xxxv. & Charron de la Sageſſe, *Lib.* i. *Ch.* vi. & xiv. [d] *See* 1 Cor. xii. 23, 24. [e] Offic. Lib. i. Ch. xxv. [f] This ſeems to be taken out of *Xenophon*. Apomnem. Lib. i. where *Socrates* is ſpeaking of Providence. *Add.* Ambroſ. Offic. Lib. i. Ch. xviii. *Herodotus (Euterp.* p. 64. towards the End) reports of the *Egyptians*, that *They eat their Food in the public Streets; but retire Home, when they have Occaſion to get rid of it; upon this Principle, That whatever was foul and indecent, tho' neceſſary, was to be performed at Home in ſecret, and every thing which was not foul, Abroad.* Yet we may remark (by the bye) that the ſame People were jeſted upon, for tempering their Clay with their Hands, and their Bread with their Feet. In Sadi's *Perſick Roſary*, (Ch. viii.) this Reaſon is given why the Ring ſhould be worn on the Left-Hand, though leſs Honourable than the Right; *Becauſe the Right-Hand is a ſufficient Ornament to itſelf.* Aloys Cadamuſt *(Navig.* Ch. x.) tells us of the *Azenagians*, the Inhabitants of *Senega*, that *They are as much aſhamed of their Mouth, as of any other Part of the Body; and therefore they ordinarily go with a Cover upon it, which they only take off on the account of Eating. They take it for a kind of Sink always ſending out Stench and Naſtineſs.* Leo Africanus (*Lib.* i.) gives much the ſame Relation, and by him the People are called *Senegates*.

[1] He was not abſolutely Naked. See the Commentators. But ſtill this would have been indecent, and contrary to the Reſpect due to Christ.

[2] This is a falſe Suppoſition; for what ſhould *Adam* and *Eve* be aſhamed of, when they alone were in the World, and made one for the other by the Creator? When then the ſacred Hiſtorian ſays, They knew that they were naked; it ſignifies only in the Stile of the Eaſtern People, Their Conſcience accuſed them for the Sin they had committed, in eating of the forbidden Fruit. See Mr. Le Clerc upon *Gen.* iii. 7. The Example of Infants, alledged by Mr. Velthuysen, ſhews, that Shame is only the Effect of Education and Cuſtom, wiſely eſtabliſhed to prevent divers Inconveniences. See the Notes of *John Pherſonus* (or Mr. *Le Clerc*) upon St. *Auguſtine*, p. 585.

[3] Tully's Words are, *Principio, corporis noſtri magnam Natura ipſa videtur habuiſſe rationem, quæ formam noſtram, atque quamque figuram, in quâ eſſet ſpecies honeſta, poſuit in promptu; quæ partes autem corporis, ad Naturæ neceſſitatem datæ, aut ſpectum eſſent deformem habituræ ac turpem, eas contexit, atque abdidit. Hanc naturæ tam diligentem fabricam imitata eſt ſæpe verecundia. Quæ enim Natura occultavit, eadem omnes, qui ſanâ mente ſunt, removent ab oculis, ipſique neceſſitati dant operam quam occultiſſimè pareant; quarumque partium corporis uſus ſunt neceſſarii, eas neque partes, neque earum uſus ſuis nominibus appellant: quodque facere turpe non eſt, modo occultè, id dicere obſcœnum eſt. Itaque nec aperta actio rerum illarum petulantia orationis obſcœnitas.*

defence.

defenceleſs Parts of the Body, could not but conceive the deepeſt Shame at this wretched Diſcovery of their own Imperfection; which, in ſome Meaſure, to diſguiſe and conceal, they had recourſe to the [1] Shelter of Apparel. That this original *Shame* of Nakedneſs ſhould, amongſt many Nations, ſeem to have been quite ſubdued and effaced, was probably the Effect of Neceſſity: when Men being driven on uninhabited Coaſts, and having worn out their preſent Garments, found no Supply of new ones, nor yet wanted them, by reaſon of the kind Temper of the Climate. Thus their *Shame* dropped off by degrees with their Cloaths; or perhaps they expreſſed, for a little Time, ſome Marks of it in wearing a thin Covering round their Middle, which ſoon left them quite naked.

It is farther obſervable, that our *Shame* is ever increaſed to a high Degree, by the Preſence of thoſe Perſons to whom we naturally owe a Reverence, or towards whom we ought to carry ourſelves with Gravity and Caution; ſuch as are eſpecially our Parents, and our Children. So that he who cannot be hereby deterred from daring to offer, under theſe awful Reſtraints, the open Freedom and Familiarity of the conjugal State, is fairly judged to have an invincible Forehead, and to be well prepared for the Commiſſion of the greateſt Villanies, being poſſeſſed with hardened Impudence. [2] *The moſt violent Diſtemper of human Minds*, as it is termed by the wiſe Tragedian [a].

XXXII. This Shame, or Modeſty, may be aſſigned as one of the principal Cauſes, why we eſteem Marriages between Kindred, in a direct Line, to be forbidden by the *Law of Nature:* Eſpecially ſince there never did, and probably never will any ſuch Caſe happen, as ſhall render theſe Matches *neceſſary* for the Preſervation of human Race [3 b]. And with regard to this Reſtraint, we are to expound the Reaſon urged againſt thoſe Marriages by *Grotius:* [c] *The Son* (ſays he) *being ſuperior by the Law of Matrimony, could not pay to his Mother, if at the ſame Time his Wife, that Reverence which Nature requires; no more could the Daughter, in the like Caſe, to her Father; becauſe, although the conjugal Pact would keep her ſtill his inferior, yet ſo near a Familiarity muſt needs prejudice her natural Duty* [4]. For take away the Force of this original Modeſty, and it will not appear ſo very abſurd, for a Mother to marry her own Son; ſince it is agreeable enough, that a Huſband ſhould pay Reſpect and Honour to his Wife on account of her extraordinary Virtue, Wiſdom, or Birth. *Tacitus* obſerves of his Father and Mother-in-Law (*Agricola* and his Lady) *vixerunt mirâ concordiâ per mutuam charitatem & invicem ſe anteponendo:* They lived in *wonderful Agreement, through the Engagements of* mutual Affection, *and by their kind Care of giving each the* Preference *to the other.* Much leſs inconſiſtent would it be, for a Woman to pay, to the ſame Man, the Duty of a Daughter, and of a Wife, did ſhe not find a Reſtraint from the abovementioned Principle.

The Reaſon alledged by *Socrates* in *Xenophon* [d], appears very poor and inſipid, as if nothing deſerved Blame in theſe Matches, but the great Difference of Age, the Effect of which muſt either be Barrenneſs, or ſuſpicious and unreſembling Iſſue: For are there not many Marriages in which the Years of the Couple ſtand at as wide a Diſtance as thoſe of Parents and their Children?

We cannot, on this Head, but recommend the chaſte and pious Regard of the *Roman* Laws, which, out of Reverence to the bare Name of a *Father*, allowed no Man to marry [5] his *Adopted* Daughter, though all the Right of Adoption had been formally taken off and reverſed [e]. And the Emperor *Claudius* acted much beyond his ordinary Capacity, when a Woman refuſing to acknowledge her Son, and the Arguments appearing dubious on both Sides of the Cauſe, he obliged her to a Confeſſion of the Truth, by ordering the young Man to demand her in Marriage [f].

Some have attempted to ſhew the high Indecency of ſuch a Practice, from the ſtrange Confuſion it would cauſe in the quite contrary Names

[a] Eurip. Medea, v. 471, 472. Huart (*Trial of Wits*, Ch. i.) gives another Reaſon for this Modeſty, which we have not Leiſure now to examine. But if we conſult the Place referred to, we ſhall be convinced, that theſe are only abſtracted and perplexed Reaſonings, which ſuppoſe that, if Man had remained in a State of Innocence, the Uſe of the Parts, which we look upon as ſhameful, would not have been neceſſary. [b] And therefore the Daughters of *Lot* (*Geneſ.* xix. 31.) were too forward in their Concluſion. Though *Grotius* is of Opinion, that they thought their Practice abſolutely blameleſs, having heard that it was uſual with their Neighbours the *Arabians*, as it was, likewiſe, with the *Perſians*. [c] Book ii. Ch. v. § 12. *Note* 2. [d] Apomnem. *Lib.* i. [e] *Vid. Lib.* xxiii. *Tit.* ii. *Lib.* lv. *princip. D. de ritu nuptiarum.* [f] Sueton Claud. *Ch.* xv.

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[1] The original *Hebrew* may be explained as if the ſacred Hiſtorian had ſaid, That *Adam* and *Eve* made themſelves a kind of Cabin, to hide themſelves in, after they were ſenſible of the Fault they had committed. See Mr. LE CLERC upon *Gen.* iii. 7. For theſe irregular Deſires, of which our Author ſpeaks, could not yet be thought to have place, unleſs we will ſay, that the Love, which *Adam* and *Eve* had one for another, was unlawful after they had ſinned; which cannot be affirmed. See the Note upon the foregoing §.

[2] The *Greek* is,

Ἀλλ' ἡ μεγίστη τῶν ἐν ἀνθρώποις νόσων
Πασῶν ἀναίδεια.——

[3] Mr. LE CLERC ſuppoſes, that the common Uſe of *Sodomy*, which they had been brought up to, might contribute much to this, for he proves very well that they could not be influenced by this Motive, that Mankind ſhould not periſh. See his Note on *Gen.* xix. 31.

[4] GROTIUS does not mean ſo: He only ſpeaks of a Reſpect which is inconſiſtent with Inferiority, or at leaſt with the Equality which Marriage introduces. It ſeems (as Mr. LE CLERC obſerves) as if God by *Moſes*, the *Jewiſh* Lawgiver, had given us that Reaſon, when he commanded, *Levit.* xviii. 7. *Thou ſhalt not uncover the Nakedneſs of thy Father, or of thy Mother, ſhe is thy Mother, thou ſhalt not uncover her Nakedneſs.* Beſides, Marriage being inſtituted for the Propagation of Mankind, it is not convenient that any one ſhould be married to a Perſon to whom he gave a Being, either mediately or immediately, and ſo the Blood return again, as we may ſay, to the Fountain from whence it came. Laſtly, beſides that no good Reaſon can be given to juſtify Marriages in the aſcending and deſcending Line: If theſe ſort of Marriages were not abhorred, every Family almoſt would become, as I may ſay, a Stew, and there would be but little Union in Families, from whence would ariſe infinite Diſorders, and very troubleſome Inconveniences. This I think is all that can be ſaid to prove that this ſort of Inceſt is contrary to the Law of Nature as well as the civil Law. See the *Inſtitut.* Lib. i. Tit. x. § 1. So far is the Reaſon, which our Author ſo much depends on, from having that Weight which he imagines, that it has no Foundation, ſince, as I have already obſerved, the Shame of which he ſpeaks is the only Effect of Education and Cuſtom. Beſides, he is not aware that this Reaſon is not good but with reſpect to them who uſe Cloathing; for thoſe People who go naked, not being ſenſible of any Impreſſions of Shame, as he himſelf owns; according to his Principle, Inceſt would not be unlawful in thoſe Countries, becauſe it would be no Obſtacle to that Reſpect which Children ought to have to them that gave and preſerved their Lives.

[5] The Words of the *Digeſts* are, *Quinetiam nefas exiſtimatur, eam quoque uxorem ducere, quæ per adoptionem filia neptiſque eſſe cœpit, in tantum, ut, etſi per emancipationem adoptio diſſoluta ſit, idem juris maneat.*

and

and Titles of Relation. Thus *Myrrha* argues with herſelf in *Ovid*,

Nec, quot confundas & jura & nomina ſentit;
Tune eris & matris pellex & adultera patris?
Tune ſoror nati, genetrixque vocabere fratris[a]*?*

Canſt thou be call'd (to ſave thy wretched Life)
Thy Mother's Rival, and thy Father's Wife?
Confound ſo many ſacred Names in one;
Thy Brother's Mother, Siſter to thy Son?

Mr. DRYDEN.

And *Philo Judæus*[b] inveighing againſt the *Perſians*, who allowed the Marriages between Mother and Son, thus expreſſeth himſelf: *Nothing could have been invented more groſly Impious; to abuſe the Bed of the deceaſed Father, which claimed a moſt religious Reſpect; to pay no Reverence to the Mother; to have the ſame Man become her Huſband and her Son; on the other hand, to ſee the Mother aſſume the Name of a Wife; to hear their common Children called the Brothers of their Father, and the Grandſons of their Mother.*

No leſs unnatural and deteſtable is the Cuſtom of the Iſle of *Ceylon*, where a Father, when he hath provided a Match for his Daughter, foreſtalls the Huſband in the Office of the Bed; giving this ridiculous Reaſon, that *it is but juſt he ſhould gather the Fruits from a Tree of his own Planting*[c].

XXXIII. the *Jews*, in this Point, had recourſe, not ſo much to natural Reaſon, as to the original Prohibition of GOD. They taught, that, from the Beginning of the World, ſix Kinds of Conjunctions were Divinely forbidden; with a Mother, or Mother-in-Law, with another Man's Wife, with a Siſter by the ſame Venter, with a Male, and with a Beaſt. And all this (except the Caſe of a Siſter) they deduce from thoſe Words in *Gen.* ii. 24. *Therefore ſhall a Man leave his Father* (that is, ſay they, the Bed of his Father, and, conſequently, ſhall abſtain from his Mother-in-Law) *and his Mother* (that is, he ſhall obſerve Decency and Diſtance towards his proper Mother) *and ſhall cleave to his Wife* (thus both Males are excluded, and Women married to other Men) *and they two ſhall be one Fleſh*; therefore unnatural Deſires towards Beaſts are here, likewiſe, forbidden, inaſmuch as it is impoſſible for a Man and Beaſt to make one Fleſh. This is Mr. *Selden*'s Account of their Doctrine[d]. It was a very ſtrange and ſingular Fancy of theirs, which the ſame Author reports[e], that a *Gentile* becoming a Proſelyte of Juſtice, immediately loſt all Relation to his *Gentile* Friends, of what Nearneſs and Degree ſoever. Thus, if ſeveral Perſons of the ſame Family, as ſuppoſe a Mother with a Daughter, were admitted together into the *Jewiſh* Communion, they imagined that their Right of Kindred ſtraight expired, and that they ought to live as Perſons entirely diſengaged from each other. For, by this Act of embracing and acknowledging their Religion, they conceived Perſons to be abſolutely regenerated, and put into the Condition of Infants[f]. Thus their new Man having extinguiſhed all the Ties that were upon him from his firſt Nativity, lay, in that reſpect, under no Reſtraint or Limitation as to Marriage. And this Notion they pretended to found on the divine Law. Yet, by the Traditions of their wiſe Men, a Proſelyte was forbidden to marry his Mother, his Daughter, or his Siſter, though a Proſelyte as well as himſelf. And if any Perſon, during his Continuance in *Paganiſm*, had wedded into ſuch Degrees, at his Converſion he was obliged to releaſe himſelf by Divorce. The Caſe was not the ſame with a Slave, when received into their Worſhip under that Condition. For as they imagined him, likewiſe, to have no remaining Alliance of Kindred, or Blood; ſo farther, they judged it no Sin for him to paſs beyond the abovementioned Bounds of Marriage, which confined all Freemen, as well *Gentiles*, as *Jews*. The Reaſon of this Difference was, becauſe they eſteemed a Servant as nobody, in civil Conſideration: And thus the State was not concerned in regulating ſuch inferior Marriages, but they were confirmed or diſſolved, at the Maſter's Pleaſure. Yet the *Roman* Laws enjoin the ſame decent Regard to Kindred[g] in the Marriages of Slaves, as of free Subjects.

It is remarkable what Travellers report of the *Chineſe*, that they decline marrying Women of the ſame Name with themſelves, though not allied to them by Blood. And that, on the other hand, provided their Names be different, they never regard any Nearneſs of Birth between Huſband and Wife; ſo that a Niece and an Uncle is a very allowable Match[h].

XXXIV. We are now to examine the other Degrees of Conſanguinity, thoſe in a tranſverſe Line; and afterwards to paſs on to the Caſe of Affinity. To begin with Brothers and Siſters; there is commonly ſo very remarkable a Modeſty between them, that they are unwilling to be, at the ſame Time, preſent in a Place, where the Endearments of Love and Courtſhip are carrying on:

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[a] *Metam.* x. *v.* 346, &c. So *Oedipus* in *Seneca* (Phœniſſ.) *v.* 134, &c.

Avi gener patriſque rivalis ſui,
Frater ſuorum liberorum, & fratrum parens.

Son in-Law to his Grandfather, Rival to his Father,
Brother to his Children, and Father to his Brothers.

Thyeſtes in the *Agamemnon* of the ſame Poet, *v.* 34, &c.

——— *Verſa eſt natura retro*
Avo parentem——patri virum,
Natis nepotes miſcui.

——— I've turn'd the Courſe of Nature back,
Confounded all Relations, wildly mixt
The Names of Father, Grandfather, and Son,
Huſband, and Grandſon.

Ibid. *Per ſcelera natus, nomen ambiguum ſuis,*
Idem ſororis natus & patris nepos.

Conceiv'd in ſinful Love, and born a Riddle;
Puzzling his Friends to fix his doubtful Name,
Son to his Siſter, Grandſon to his Father.

We meet with what follows amongſt the antient Epitaphs;

Herſilus *hic jaceo, mecum* Marulla *quieſcit,*
Quæ ſoror & genetrix, quæ mihi ſponſa fuit.
Vera negas, frontem trahis, hæc ænigmata Sphingis
Credis? Sunt Pythio *vera magis* Tripode.
Me pater è nata genuit, mihi jungitur illa,
Sic ſoror & conjux, ſic fuit illa parens.

Here *Herſilus*, and next in deep repoſe
Marulla lies, his Mother, Siſter, Spouſe.
Start not, or frown to ſee the *Sphinx* renew;
The *Pythian Tripos* never told ſo true.
Sham'd by her Sire, ſhe weds their common Son,
And blends the three Relations into one.

[b] Philo Jud. *de Leg. Special. p.* 778. C. Ed. *Par.* *Bernier*'s Deſcription of the Empire of the *Mogul*.

[c] And the ſame vile Excuſe is alledged for his Inceſt by *Chacgchan* in hinted at this Opinion, when, in his Character of the *Jews*, he ſays, *Thoſe who paſs over to their Profeſſion, uſe the ſame Cuſtoms and one of the firſt Leſſons which they are taught, is to deſpiſe the Gods, to lay aſide all Duty and Regard to their Country, utterly to neglect and undervalue their Parents, Children, and Brothers.* Hiſt. Lib. v.

[d] *L. V. Ch.* i. ii.

[e] Ch. xvi.

[f] *Tacitus* ſeems to have obſcurely

[g] *Vid. Lib.* ii. § 1. *D.* unde cognati. *Lib.* viii. *Lib.* xiv. *Lib.* ii, iii. *D. de* ritu nuptiar. *Lib.* xxii. *de* reg. juris. Selden *Lib.* v. *Ch.* xvi.

[h] *Vid.* Martin. *Hiſt.* Sinic. *Lib.* i.

Nay

Nay, it may be obſerved, that Brothers themſelves are uſually averſe to talking with each other on theſe Points of Pleaſure, though only in Sport and Jeſt[a]. Yet the Reaſon why we cannot poſitively affirm that Marriages, in the firſt Degree, are of themſelves repugnant to the Law of Nature, is this; becauſe as the Origin of Mankind is recorded in the Holy Scriptures, ſuch Matches muſt neceſſarily have been made between the firſt Children of our firſt Parents[1]. For it is, by no Means, to be ſuppoſed, that GOD would appoint ſuch a Caſe in which the Law of Nature could not but be violated; and yet we ſee him commanding the Propagation of Kind, and, at the ſame Time, providing no other Way of performing that Duty, beſides theſe Contracts between Brothers and Siſters. Nor can we ſay, that the Creator lay under any Obligation of forming one only human Pair. Some have expreſſed great Contempt of this Argument, as raſh and impertinent, but their Cenſure will be of little Force, until their Reaſons are more conſiderable. They tell us, *GOD was pleaſed Mankind ſhould draw their Deſcent from one Head, that He might eſtabliſh a firm Alliance amongſt them on the Score of their Kindred.* But would not the Alliance have been ſufficient, ſhould ſeveral Pairs have been at firſt produced, all having the ſame Nature, and the ſame immediate Author of it? And would not they have been able, by Intermarriages, to keep up the near Relation amongſt their Poſterity? They urge farther, that if the Beginning of human Race had been otherwiſe ſettled, *Wars muſt have immediately followed, and the World have periſhed in its Infancy.* But of what Conſequence is this Objection, when, even according to the eſtabliſhed Method, we ſee one of the firſt Brothers falling by the Hands of the other? Therefore the Prohibition of theſe Marriages ſeems to have taken its riſe from ſome poſitive Ordinance[b]: The Ground and Occaſion of which might be, Firſt, the great Modeſty diſcoverable between Parties thus related; and, Secondly, this Conſideration, that in as much as their Circumſtances engage them to live together in a free and unobſerved Manner, were they farther allowed to unite in a wedded State, too frequent Opportunities would be offered of Adultery, and other ſhameful Diſorders[c].

It may contribute to the Illuſtration of this Point, to reflect again on the Opinion of the antient *Jews*, as collected by Mr. *Selden*[d][2]. They therefore, amongſt theſe ſix Kinds of Conjunctions originally forbidden by GOD, reckon the Marriage of a Brother with his Siſter by the Mother's Side. But they add, that this Command did not exerciſe its Force till, Mankind being ſufficiently multiplied, Plenty of other Women might be had, and there was no need of breaking in upon this Degree. It is an old Tradition with the Eaſtern People, that all *Adam*'s Children, except *Seth*, were Twins, and that it being neceſſary amongſt them for a Brother ſtill to marry his Siſter; yet they carefully abſtained from Siſters of the ſame Birth. Farther, the *Jews* believed a Siſter, by the Mother's Side, to be more cloſely allied to her Brother, than if by the Father's only. (And thus, *Deuteron.* xiii. 6. *Thy Brother, the Son of thy Mother*, is emphatically ſpoken, as a nearer Degree of Relation.) They thought the primitive Command affected only Siſters in the former Senſe, not in the latter; for theſe they judged might be taken for Wives by the pureſt of the *Gentiles*, thoſe who obſerved the Precepts of *Noah*, and governed themſelves by the Law of Nature and of Nations. And hence, they ſay, it came to paſs that *Abraham* married his Siſter *Sarah*; no Reſtraint being yet laid, in that Particular, from the poſitive Law. For leſt any ſhould imagine, that the Term of Siſter is there put for any Kinſwoman, the Patriarch himſelf explains his own Meaning, *Truly*, ſays he, *ſhe is my Siſter, for ſhe is the Daughter of my Father, but not the Daughter of my Mother*[e]. Yet that ſuch Matches were not uſual in thoſe Countries, is evident from this, that *Abraham* imagined he ſhould avoid being taken for *Sarah*'s Huſband, if ſhe pretended to be his Siſter. Unleſs we are rather inclined to ſay, that he hoped they would take the Word in the fulleſt and moſt vulgar Senſe, for the Siſter by both Sides.

A Difficulty ariſeth on this Subject, from 2 *Sam.* xiii. 13. where *Tamar* anſwers her Half-Brother *Amnon*, ſoliciting her to his Bed, *Speak to the King, for he will not withhold me from thee.* Here, on the one ſide, it is not probable that *Tamar* was ignorant of the divine Law, which expreſly forbids the Marriage of a Brother and Siſter by the ſame Father, as well as by the ſame Mother. And, on the other ſide, it would have been in vain for her to think of finally eſcaping the Violence of her Brother's Paſſion, by depending on this Reſerve, that whatever ſhe might ſeem to promiſe him, he could not at laſt wed her, without a manifeſt Violation of the divine Command; which yet is *Joſephus*'s Opinion[f]. The *Jewiſh* Doctors therefore give this Anſwer to the Caſe before us. They ſuppoſe *Maacah*, the Mother of *Tamar* and *Abſalom*, to have been taken Captive by *David*, in the War againſt the King of *Geſur*, and to have

[a] For which *Plato* aſſigns this Reaſon (*de* LL. *Lib.* viii. *p.* 912. A. *Ed.* Wech.) *That all the Talk of the World lies that way; Perſons, in their very early Age, hearing theſe Doctrines ever inſinuated, ſometimes in Jeſt, ſometimes in more ſerious Application; and particularly in the Tragedies on the Stage, where Narrations are commonly made, that ſuch vile Wretches, as* Thyeſtes, Oedipus, *or* Macareus, *who have committed Inceſt with their Siſters, were ſeen in a terrible Manner to be their own Executioners.* *Simplicius* on *Epictet.* Ch. xlvii. ſpeaks to the ſame Purpoſe. *Since Law and Cuſtom have forbidden the Familiarity of Brothers and Siſters, the Inclinations are no leſs powerfully ſuppreſſed, than if the Command of Nature itſelf had laid this Reſtraint upon them; except when Perſons are tranſported with Frenzy, and tortured by the Furies of a wicked Conſcience.* *Comp.* Charron de la Sageſſe, *Lib.* ii. *Ch.* viii. § 6. [b] *Add* Cumberland *de L. N. Ch.* viii. § 9. Selden *de J. N. & G. Lib.* v. *Ch.* i. & viii. [c] *Vid.* Ovid *Metamorph.* ix. *v.* 455, 535, 558, *&c.* [d] *Lib.* v. *Ch.* xi. [e] *Geneſ.* xx. 12. *Vid.* Grot. *ad loc. dict.* [f] *Antiq.* Jud. vii. 7.

[1] This Argument is undeniable, and the Anſwer uſually made to it ſerves to confirm it. It is ſaid, that GOD had diſpenſed with the Law, in the Caſe in Queſtion; but this is begging the very Point itſelf. Beſides, they reaſon upon this falſe and dangerous Principle, that GOD may diſpenſe with what is forbidden by the Law of Nature. See above § 24. *Note* 1. *p.* 585. Moreover, they ſuppoſe here, that the Diſpenſation preceded the Law, which is abſurd. I obſerve that the deceaſed Mr. NOODT (who had declared his Opinion upon this Head, in his Commentary on the Title of the *Digeſt. De Ritu Nuptiarum*) had occaſion afterwards to eſtabliſh his Opinion, in treating of a particular Caſe, about which he was conſulted. This was to know, whether a Diſpenſation could be granted for the Marriage of a Widow with her Uncle by the Mother's Side. His Anſwer was wrote originally in *Flemiſh*: But the deceaſed M. *Pagenſtecher*, Profeſſor at *Groningen*, publiſhed it in *Latin*. Although the Tranſlation be none of the moſt elegant, the Reader will find there the principal Reaſons, and a Solution of all the Objections which relate to all the collateral Degrees of Relation or Affinity. See the *Irnerius in Juriâ Vapulans*, Coit. xli. p. 409. *& ſeqq.*

[2] See Notes 3, 4, and 5. p. 591.

borne him *Tamar*, whilſt ſhe continued a *Gentile*, and *Abſalom*, after ſhe was made a Proſelyte. Since then they were perſuaded that Perſons, by embracing their Religion, were releaſed from all former Kindreds; and becauſe the Child of an *Iſraelite*, by a *Gentile* Wife, followed the Mother, not the Father, and was, likewiſe, reckoned a *Gentile*; they concluded that *Tamar*, when ſhe became a Proſelyte, loſt all the Relation ſhe had to *Amnon*, during her *Gentile* Condition: and that accordingly ſhe believed ſhe might be given in Marriage to him, without tranſgreſſing the divine Ordinance; her Nearneſs of Blood being extinguiſhed in her Regeneration.

To touch on the Cuſtoms of other Nations in this Affair, we find *Byblis* in *Ovid*, complaining that the Laws of Marriage ſhould be ſtricter amongſt Men than amongſt the Gods;

——— *Dii nempe ſuas habuere ſorores.*
Sic Saturnus Opim junctam ſibi ſanguine duxit;
Oceanus Tethyn, Junonem rector Olympi.
Metam. ix. *V.* 496, &c.

In *Homer* [a] the Daughters of *Æolus* are repreſented as married to his Sons. *Theocritus* [b] commends King *Ptolemy* and his Queen, for reſembling the Matches of the Gods, in being Brother and Siſter. *Lucian* [c] reports the ſame of *Mauſolus* and *Artemiſia*; in *Arrian* [d], *Hidreus*, the *Carian*, is ſaid to have married *Ada* his Siſter. Amongſt the old *Peruvians* the *Ynca's* alone were permitted to marry their Siſters, and all other Men forbidden to take the ſame Liberty [e]. On the other hand, the *Romans* abhorred this Practice as moſt odious and unnatural. *Plutarch* [f], giving the Reaſon why the Women, in that Nation, ſaluted their Relations with a Kiſs, hath left this Remark, *When the Laws had prohibited the Marriage of near Relations, they yet allowed them to proceed to this innocent Expreſſion of Love; and this became a mutual Pledge and Mark of their Alliance. For in antient Times the* Romans *abſtained from wedding their Kinſwomen, in any Degree of Blood; as they at preſent forbear their Aunts and their Siſters. It was late before the Marriage of Couſin-Germans was diſpenſed with* [g].

The *Athenians*, by the Conſtitution of *Solon*, might marry their Siſters by the Father's Side, not by the Mother's. Thus *Plutarch* [h] relates a Match between *Themiſtocles*'s Son and his Daughter by another Wife. *Demoſthenes* [i] reports the ſame of his Grandfather. *Cornelius Nepos*, in his Life of *Cimon* [k], obſerves that General to have made the like Marriage, which, he ſays, *Was agreeable to the* Athenian *Cuſtoms* [l]. Yet there is a Paſſage, in the Oration of *Andocides* againſt *Alcibiades*, which ſeems to overthrow all this: *Reflect*, ſays he, *upon the Examples of our Anceſtors; with what Bravery and what Wiſdom they proceeded, when they ſent ſo great a Man as* Cimon *into Baniſhment, for violating the Laws, in taking his own Siſter to his Bed* [m]. *Plutarch*, in *Cimon*'s Story, delivers himſelf with no Certainty on this Point; he tells us, *Some cenſured him for uſing too much Liberty with his Siſter, though only in Sport: Others affirmed, that the Matrimonial Contract had really paſſed between them, and that the Reaſon was, becauſe the young Lady, on account of the Poverty of the Family, could not find a Huſband abroad.*

The *Lacedemonians*, on the contrary, married their Siſters by the Mother's Side, not by the Father's; as *Philo Judæus* [n] informs us.

It appears from *Plato* [o], that he eſteemed Matrimony between Brothers and Siſters lawful; in as much as he forbids it only in the aſcending or deſcending Line of Kindred.

Amongſt the *Egyptians*, *Diodorus Siculus* [p] obſerves, this kind of Marriage was eſtabliſhed by an expreſs Law, and was grounded on a ſuperſtitious Conceit, that the ſame Practice had ſucceeded fortunately with *Iſis*. *Achilles Tatius* [q] reports the ſame Cuſtom of the *Phœnicians*.

Others of the Antients declared an abſolute Diſlike of this Freedom. It is one of *Phocylides*'s Precepts [r],

Μηδὲ κασιγνέτης ἐς ἀπότροπον ἐλθέμεν εὐνὴν,

Nor climb thy Siſter's interdicted Bed.

And indeed that theſe Matches were very unuſual through all *Greece*, may be gathered from *Hermione*'s Speech in *Euripides*, where ſhe thus upbraids *Andromache*,

Τοιοῦτον πᾶν τὸ βάρβαρον γένος, &c. *v.* 103, *&c.*

Thus the *Barbarians* with inceſtuous Love,
Fathers their Daughters, Sons their Mothers wed,
Brothers their Siſters; and no Law reſtrains
Their ſinful Paſſion.———

Or if they were once permitted in *Greece*, it is certain they grew entirely out of uſe with Poſterity; as that Paſſage of *Sextus Empiricus* [s] ſufficiently proves; *The* Egyptians *contracted Marriage with their Siſters, which, amongſt us, is diſallowed by Law.* The ſame Author ſays, in another Place [t]; *In our Country we eſteem it contrary to all Right and Decency, to make a Wife of a Mother or of a Siſter* [u]. Yet he chargeth both thoſe Practices on the *Perſians*; as do, likewiſe, *Strabo* [x], *Laertius* [y], *Curtius* [z], and *Lucian* [a]. Though the Anſwer given by the Judges to *Cambyſes*, in *Herodotus* [b], plainly ſhews, that the wiſer Men, even in the *Perſian* Nation, were of a very different Opinion.

It may not be improper to conclude our Search into the preſent Controverſy, by returning to the *Jews*. They then, in their Prohibition of Marriage between Brothers and Siſters, thought it made no Difference whether the Siſter, in ſuch a Caſe, came by Adultery, or by a lawful Bed: nay, if ſhe was born of a Mother-in-Law, in a diſhoneſt Way, the Rule held againſt her in this reſpect [c]: Though, otherwiſe, as to the Crime of Inceſt, they held it could only be committed by *Matrimony*, not by Adultery, nor by unmarried Pollution. Thus, amongſt them, he did not paſs for an Inceſtuous Perſon, who had defiled a Mother and her Daughter, but he only who had actually wedded both. Thus too a Man might marry her whom his Father, Brother, or Uncle, had been too familiar with, though he could not wed his Mother-in-Law, nor his Uncle's Widow, nor ſo

[a] *Odyſſ.* x. [b] *Idyll.* xvii. towards the End. [c] *Dial.* Diogen. & Mauſol. [d] *De Expedit.* Alexand. *Lib.* i. Iaſſo *de la Vega*, Lib. iv. Ch. ix. [e] *Garcil.* [f] *In* Qu. Rom. *p.* 265. C. [g] See the Reaſon, *ibid.* [h] *In* Themiſtocl. *in fin.* [i] *Contra* Eubulid. [k] Ch. i. [l] See *Bæcler*'s Notes on this Place. [m] To this agrees *Athenæus*, Lib. xiii. Ch. xxi. [n] *De Leg. Special.* p. 779. E. Ed. *Pariſ.* [o] *De* LL. *Lib.* v. [p] Lib i. Ch. xxvii. [q] Lib. i. [r] V. 170. [s] Pyrrhon. Hypoth. *Lib* i. *Ch.* xiv. *p.* 31. [t] Lib. iii. Ch. xxiv. [u] *Add.* Selden. *de J. N. & G.* Lib. v. Ch. xi. [x] Lib. xv. *p.* 505. *Ed Gr.* Caſaub. [y] *In Proœm.* [z] Lib. viii. Ch. ii. § 19. [a] *De* Sacrific. *p.* 364. *Edit.* Amſt. [b] Thalia, *Add.* What is related of the *Thraſcians*, the Inhabitants of Mount *Libanus*, I know not with what Credit, by *Leon Rachwolf*, Itin. Oriental. *Lib.* ii. *Ch.* xv. *in fin.* [c] *Add.* Lib. liv. *D. de Ritu Nupt.*

much

much as his Brother's Relict, unleſs in the extraordinary Caſe of his dying without Iſſue [a]. And ſo, on the other hand, a Man might take her to Wife, whoſe Mother, Siſter, Grandmother, Aunt, Daughter, or Niece he had corrupted. It is true, by the Traditions of their Rabbins, theſe Marriages were judged unlawful; yet the contracting Party was only corporally puniſhed, and the Contract ſtill allowed to ſtand good. From all which we may infer, that the *Jews*, in ſtating the Notion of Affinity, held it to proceed not from a bare Nearneſs of Blood, unleſs cauſed in a regular and matrimonial Way [b].

Nicetas Acominatus reports, that the Emperor *Andronicus Comnenus* having a Deſign of joining in Marriage *Alexius* and *Irene*, both inceſtuouſly begotten on *Theodora*, and conſulting his Judges on this Point, one of them gave his Opinion, that *the Parties being illegitimately born, were not to be eſteemed of Kin to each other, but had loſt all Right and Alliance of Blood; and were in the Condition and Diſtance of Strangers.* But the Hiſtorian cenſures theſe Judges, as Men of greedy and ſordid Tempers, who made a Gain of diſpenſing with GOD's Commands, and would ſell their Voices for the Feaſts and Favour of great Perſons.

XXXV. As for the other Degrees, forbidden [c] in *Leviticus* xviii, it will be ſtill more difficult to find a Reaſon why they ſhould hinder Marriage, on the bare Conſideration of the Law of Nature. Though it muſt be owned, that ſuch Matches have been condemned and deteſted by many Heathens. St. *Paul* [d] calls it *ſuch Fornication as is not ſo much as named amongſt the Gentiles, that a Man ſhould have his Father's Wife. Phocylides* [e] ſets it down as one of his Moral Leſſons.

Μητρυιὴς μὴ ψαῦέ γε δεύτερα λέκτρα γονῆος,
Μητέρα δ' ὡς τίμα τὴν μητέρος ἴχνια βᾶσαν.

Make not thy Father's injur'd Bed diſgrace
Thy Step-dame's Vows; but with Reſpect confeſs
A Mother her, that fills thy Mother's Place.

The Story of *Stratonice* is well known, whom *Seleucus* her Huſband gave away to his Son *Antiochus*, when the young Prince was fallen in Love with her beyond Cure. It was a remarkable Saying of *Seleucus* on this Occaſion, that *if his Wife expreſſed an Abhorrence of ſo unuſual a Practice, he begged his Friends to inform her, that whatever Action was pleaſing to the King, and beneficial to the Publick, ſhe ought to eſteem right and juſt* [f]. Yet *Appian* [g] doth not ſtick to call this Love of *Antiochus*, ἀθέμιστου πάθος, *a ſinful extravagant Paſſion.* It [1] is ſaid to be the ordinary Cuſtom amongſt the *Tartars*, for a Son to marry his Mother-in-Law, when left a Widow by his Father [h].

The antient *Jews*, as *Grotius* obſerves [i], founded the Prohibition of theſe Degrees chiefly on two Reaſons: Firſt, on *that natural Modeſty which hinders Parents from holding Familiarity with their Iſſue, either by themſelves, or by ſuch Perſons as are in Blood, or Affinity, neareſt to them.* Which Argument, as it is of good Force in the aſcending and deſcending Line, ſo, in as much as the Shame there alledged is exceedingly weakened, and almoſt brought to nothing in the collateral Kindred, eſpecially beyond the ſecond Degree, it can here, by no means, amount to a Precept of the Law of Nature. Yet are we to eſteem thoſe civil Conſtitutions moſt juſt and well grounded, which extend the Prohibition to a wider Compaſs; on purpoſe, as it were, to fence in and ſecure thoſe Degrees which the Dictate of Nature, or the poſitive Ordinance of GOD had before forbidden. Their ſecond Reaſon was, *Leſt too great Occaſion ſhould be offered to Fornications and Adulteries between Perſons thus related, and conſtantly converſing with Freedom together, if ſuch Pieces of Wantonneſs might be made good by the Remedy of Marriage.* This Argument, like the former, is ſufficient to give Occaſion to a *poſitive* Law, not to evince any Precept of Nature. The *Jews* apply it well, to account for that ſeeming Difficulty in the xviiith of *Leviticus*, where the marrying an Aunt is forbidden, and not the marrying a Brother's Daughter, though both ſeem equally diſtant in Degree. For they obſerve, that young Men, frequenting the Houſes of their Grandfather and Grandmother, and ſometimes dwelling with them, are very much in the Company of their Aunts; whereas they come not ſo often to their Brother's Houſes, nor have there the ſame Privileges and Freedoms. Yet the latter of theſe Degrees was eſteemed unlawful by the *Romans*, as appears from the Caſe of *Claudius*, when deſigning to marry *Agrippina* [k].

Many there are, notwithſtanding, who aſſert, that in the Place of *Scripture* but now mentioned, not ſuch paaticular Perſons are forbidden, but in general all ſuch Nearneſs of Degrees: whoſe Arguments, were there Occaſion, might perhaps find an Anſwer.

Thoſe who maintain that all the Degrees, mentioned in the xviii[th] Chapter of *Leviticus*, are, likewiſe, repugnant to the Law of Nature, urge the Words of the 24th Verſe, *For all theſe Abominations have the Men of the Land done which were before you, and the Land is defiled.* "For, ſay they, "in as much as every Tranſgreſſion preſuppoſeth "a Law, thoſe *Gentiles* in contracting ſuch Mar-"riages muſt needs have violated, either ſome "natural Law, or ſome divine poſitive Ordinance "univerſally binding Mankind: The latter is "hardly to be made out, and the former muſt "therefore be admitted." To this Mr. *Selden* [l] anſwers, that the Word [2] *theſe* is to be reſtrained to

[a] *Comp.* Lib. i. § 3. *D. de* Concubin. *Lib.* iv. § 8. *D. de* Gradib. & Affin. [b] Selden *ibid.* [c] V. *Grot.* Lib. ii. Ch. v. § 13, 14. [d] 1 *Corinth.* v. 1. [e] V. 168, 169. [f] Plutarch *in* Demetr. *p.* 907. *Ed.* Wech. [g] *In* Syriacis, *p.* 127. *Ed.* H. Steph. *Add.* Senec. *Controverſ.* Lib. vi. *Decl.* vii. Valer. Max. *Lib.* v. *Ch.* vii. § 1. *Ext.* Cicero, *pro* Cluent. *Ch.* vi. expreſſeth a grievous Abhorrence of Marriage between a young Man and his Wife's Mother, *O incredible Villany of a Woman,* ſays he, *and never heard of till this Time in the World! Add. D. Lib.* xxiii. *Tit.* ii. *Lib.* xii. xv, &c. *De ritu Nupt.* [h] Haython. *de* Tartar. *Ch.* xlviii. Paul. Venet. *Lib.* i. *Ch.* xv. [i] In the Places abovecited. [k] *V.* Tacit. *Ann.* xii. [l] Lib. v. Ch. xi.

[1] The *Pythagoreans* mightily approved the old Laws of the States of *Greece*, by which it was forbidden to have any Amorous Converſation with a Mother, Daughter, or Siſter, and to ſatisfy his Deſires with any Woman whatſoever in a Temple, or in the Sight of the World; for, ſay they, it is good and profitable to put as great an Obſtacle to it, as poſſible. Ἐπαινεῖσθαι δὲ αὐτοὺς ἔφασαν, καὶ τὰ τοιάδε τῶν προϋπαρχόντων νομίμων ἐν ταῖς Ἑλληνικαῖς πόλεσι, τὸ μήτε μητράσι συγγίνεσθαι, μήτε θυγατρὶ, μήτε ἀδελφῇ, μήτε ἐν ἱερῷ, μήτε ἐν τῷ φανερῷ, καλόν τε γὰρ εἶναι, καὶ σύμφορον, τὸ ὡς πλεῖστα γίνεσθαι κωλύματα τῆς ἐνεργείας ταύτης, Jamblich. in Vit. Pythag. § 210.

[2] This critical Remark, alledged by GROTIUS before § 14, deſtroys the whole Syſtem of them who ground Divine poſitive general Laws upon it; though they cannot ſhew, how they have been publiſhed to all People. See M. BUDDEUS's *Hiſtory of the Law of Nature,* § 43. And what I have ſaid upon *Grotius,* § 13. *Note* 1. of the Chapter juſt cited.

thoſe Sins which the Heathens were capable of committing. And as an Argument that it doth not extend to every Particular there mentioned, he obſerves, that one Caſe there prohibited [a] is the marrying of two Siſters together, which could not be before vicious, having been practiſed by ſo righteous a Man as *Jacob*. (Though to this Remark of Mr. *Selden*, it might well be added, that the Quarrels and Emulations between thoſe Siſters, *Jacob*'s Wives, was probably the Reaſon of this poſitive Prohibition.) In the ſame manner *Amram*, *Moſes*'s Father, married *Jochabad* his Aunt; another of the Degrees here forbidden [b].

By the *Turkiſh Alcoran* [c], a *Muſſulman* is reſtrained from wedding his Mother, his Step-dame, his Daughter, his Siſter, his Aunt, his Niece, his Nurſe, his Foſter-Siſter, his Wife's Mother, his Wife's Daughter by a former Huſband, his Son's Wife, two Siſters, a Daughter to a Woman whom he hath abuſed, and, laſtly, another Man's Wife, unleſs taken for a Slave in War [d].

[1] It may not be from the Purpoſe to obſerve, that many have imagined the Force of Affinity to ceaſe, on the Death of the Perſon in whom it was founded. It is a Saying of *Euripides* [e],

——*New Affinities efface the old.*

Iſocrates [f], ſpeaking of a Gentleman who had married his Aunt, ſays, *He took ſo much Delight and Satisfaction in my Father's Friendſhip, that, loſing my Aunt without Iſſue by her, he took my Father's Couſin-German for his ſecond Wife, to keep up the Affinity between our Families* [g]. *Florus* [h] tracing out the Cauſe of the Quarrel between *Cæſar* and *Pompey*, obſerves, that upon the Death of *Julia*, Daughter to the former, and Wife to the latter, the Band being broken aſunder which had ſo long held them together, they ſoon diſcovered their mutual Jealouſy, and appeared the moſt violent of Rivals. *Marriages*, ſays *Philo* the *Jew* [i], *are the Ties and Engagements which unite the Families of Strangers; and when they are diſſolved, the Affinity breaks off with them.*

XXXVI. It will be convenient to add a Word or two about thoſe inferior, [2] or ſecondary Wives in uſe amongſt ſome Nations: Such as do truly plight their Faith to their Huſband, and are united to him in the ſtricteſt manner of Society; yet ſo as that upon account of their unequal Condition, or Birth, or for other Reaſons, they are not admitted to the full Honours of their Character, nor acquire the ſame Rights for their Children, as other lawful Mothers [k]. Of theſe Mr. *Selden* [l] hath treated at large; and from him it appears, that their Difference from juſt and proper Wives is introduced purely by poſitive Law, or by the particular Covenant of the Parties, who to the principal matrimonial Pact may add any thing at their Pleaſure, which doth not contradict and overthrow it. The chief Reaſons on which this Practice ſeems to have been founded are theſe, the Preſervation of noble Families, the Fear of injuring former Children [m], and, laſtly, the avoiding of thoſe great Expences, which a Wife, in the higher or more perfect Degree, might challenge by the Cuſtom of the State. In order to the keeping up of great Families, it is convenient that they marry into equal Fortunes and Honours: For the better procuring of which it hath been enacted, in many Commonwealths, that in caſe a Man take a Wife beneath himſelf, the Marriage ſhall not have all thoſe Effects and Privileges, which it would otherwiſe, in courſe, enjoy. And then again, nothing more weakens a Family, than the diſmembering of an Eſtate into too many Parts; wherefore to prevent this Misfortune, ſome have thought it proper to take up with theſe ſecondary Wives, whoſe Children, if their Portions are not over large, have yet no Reaſon to complain. And as to the third Point, he is a notorious Fool, who makes himſelf a Beggar to maintain the Pride and Grandeur of a Wife.

On the Whole, it is clear how injuriouſly we deal with theſe inferior Wives, if we allow them no better a Title than the vile Name of Concubines [3]. For Concubines are properly ſuch, as exerciſe conjugal Freedom without conjugal Faith, and differ only in Degree from common Strumpets: Nor do they exempt themſelves from the Scandal by entering into a private Engagement, and confining their diſhoneſt Service to a ſingle Perſon [n]. But the Faith of the Marriage-Bed is infinitely more ſacred and ſolemn, than to be brought into Compariſon with the ſtricteſt of theſe illegal Compacts, founded on the baſe Proſpects of Lucre or of Luſt [o].

[a] *Levit.* xviii. 18. Upon which Place conſult *Grotius*. [b] We meet with ſome remarkable Things concerning the Degrees of Conſanguinity amongſt the *Indians*, in *Abr. Roger. de Bramin*, P. i. Ch. xii. [c] Chapt. of Wives. [d] *Vid.* Selden. *de J. N. & G.* &c. Lib. vi. Ch. xi. [e] Med. *ver.* 76. *& in* Oreſt. 1083. [f] In *Æginetic.* [g] Cicero *pro* Quint. *Ch.* vi, *The Affinity could by no means be broke off, whilſt the Children were alive*, Idem *Philipp.* xi. Ch. iv. concerning *Dolabella*, who had formerly married his Daughters; *And this Gentleman, O ye heavenly Powers, was once my Friend!* [h] Lib. iv. Ch. ii. Note 13. [i] *De Legat. ad* Caium. On the other Side we are told of the *Tartars*, that amongſt them it is an uſual thing for different Parents to make Matches between their deceaſed Sons and Daughters; fancying that, by this poſthumous Way of Marriage, a Relation is no leſs contracted by their ſurviving Friends, than if they had actually celebrated their Nuptials in their Life-time. [k] *Vid.* Selden. *de J. N. & G.* Lib. v. Ch. 7. [l] V. *Grot.* Lib. ii. Ch. v. § 15. [m] So in *Julius Capitolinus* toward the End, the Emperor *Marcus*, upon the Death of his Lady *Fauſtina*, took the Wife of his Procurator for a Concubine, *Ne tot liberis ſuperinduceret novercam, That he might not bring ſo numerous a Family of Children under the Power of a Mother-in-Law.* [n] *Vid.* Ælian. *V. H.* Lib. x. Ch xviii. [o] Yet ſometimes we meet with the Word *Concubina* in no diſgraceful Senſe. *Vid.* Lib. xxxii. Tit. iii. Lib. xlix. § 4. D. *de Legat.* and Lib. v. Tit. xxvii. Lib. iii. C. *de natural. liberis*, *Concubinage* is called *unequal Marriage*. *Add.* Godofred. *ad loc. dict.*

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[1] Yet among the *Tartars*, on the contrary, Fathers marry their deceaſed Sons with the deceaſed Daughters of ſome other, and imagine, that by that Poſthumous, or rather Imaginary Contract, the Parents of that Son, or Daughter, contract a true Alliance or Affinity. *Marc. Paul. Venet.* Lib. i. Ch. lviii. This Notion of our Author's, with regard to Affinity, is certainly agreeable to the ancient *Roman* Laws, according to which it was lawful to marry two Siſters, the one after the other, as, alſo, the Widower of a Brother, or the Husband of a Siſter deceaſed. It was the Emperor *Conſtantine* who firſt forbad theſe Kinds of Marriages in the ſecond Law of the *Theodoſian* Code, Tit. *De inceſtis Nuptiis*. See thereupon *Jacques Godefroi*, Tom. i. *p.* 296. *& ſeqq.* and the Preſident BRISSON, *De jure Connubiorum*, p. 209. *& ſeqq. Edit. Amſter.* as alſo Mr. NOODT on the *Digeſt*, p. 495.

[2] By this our Author means ſuch Marriages, as, though lawful, are otherwiſe, either wholly or in part, deſtitute of the Effects which Marriages produce according to the Laws. Such, for Example, among the *Romans*, were thoſe contracted by the ſimple Conſent of Parties, without the requiſite Formalities: For though the Perſons, thus united in conjugal Society, were not regarded by the Civil Law, as Man and Wife; yet their Cohabitation was eſteemed a true Marriage, according to the Law of Nature and Nations. See Mr. *Noodt*'s Commentary on the *Digeſt*. p. 485, *& ſeqq.* and *Grotius*, Lib. i. Ch. iii. § 4. Note 4.

[3] See CUJACIUS *Obſerv.* Lib. v. Ch. vi. where he treats of the Notion that the *Romans* had about them, and ſhews us, how they were looked on as Concubines.

Buſiris

Buſbequius [a] remarks ſomewhat very particular of the *Turkiſh* Emperors, that, after *Bajazet*, none of them entered into juſt and proper Matrimony. *For he, after his Defeat by* Tamerlane, *falling, together with his Wife, into the Hands of the Victor, took no part of the barbarous Treatment more to Heart, than the Affronts and Diſhonours put upon the Sultaneſs before his Eyes. In regard to this Accident, his Succeſſors abſtain from conjugal Engagements; and, as to the Affair of Iſſue, make uſe of Women in the Condition of Slaves, who are not capable of ſuffering ſo much Injury and Diſgrace. But indeed the* Turks *in general pay no leſs Affection and Kindneſs to their Sons by Concubines or Harlots, than to thoſe who are born of their legal Wives; nor have the former any leſs Degree of Right to the Goods and Eſtate of their Father.*

Abbas, King of *Perſia*, took another Way of preventing theſe Indignities: For, carrying with him into the Field all his Female Train, he commanded the Eunuchs, that had the Cuſtody of them, to cut off the Heads of all his Wives, in caſe he loſt the Battle [b].

The *Chineſe*, when they deſpair of obtaining Iſſue in juſt Marriage, have recourſe to the Remedy of Concubines; eſteeming it the moſt miſerable Thing that can befal a Man, to be at a Loſs for Children, who might mourn at his Deceaſe, and perform the decent Honours of his Burial [c].

We have only this Obſervation to add, that as the publick Laws of Commonwealths are wont to inveſt other Contracts with certain Rites and Solemnities, upon want of which they paſs for invalid in civil Cognizance; ſo in ſome States there are ſuch Ceremonies annexed to Matrimony, as if omitted make it illegal, or at leaſt deprive it of ſome Effects which would, otherwiſe, have ſprung from it, according to the local Cuſtoms and Conſtitutions [d]. Now although the Law of Nature be a Stranger to theſe Formalities, yet inaſmuch as it commands all Subjects to obey the Ordinances of the Government under which they live, it would be idle and ridiculous for ſuch Perſons, as have not the Power of making or of reverſing civil Laws, to plead the Indifference of natural Law in the preſent Caſe.

[a] Epiſt. i. [b] *Petrus della Vella* Itin. *P.* ii. *Epiſt.* v. [c] *Martin.* Hiſt. *Sin.* Lib. vi. Ch. i. p. 201. [d] V. *Conſtitut. Sicul.* Lib. iii. Tit. xx.

CHAP. II.

Of paternal Power.

I. *The common Opinion of the Original of paternal Authority.*
II. *According to* Hobbes, *the original Power over Children is in the Mother:*
III. *And from her is derived to others.*
IV. *On what Reaſon paternal Authority is grounded.*
V. *How far the Father has more Right than the Mother.*
VI. *How great the Power of the Father is, as ſuch, over his Children,*
VII. *Both in their Infancy and Childhood.*
VIII. *How far Children are capable of being governed at this Time.*
IX. *Whether a Father may ſell his Son.*
X. *Of the Obligation of Children made free.*
XI. *What Power Fathers have over their Children, out of civil Societies;*
XII. *What Power in civil Societies.*
XIII. *How this Power is loſt.*
XIV. *Whether Children ought to have their Parents Conſent to their Marriages.*

CHILDREN are the proper Fruit of Matrimony; as they are, likewiſe, the proper Subjects of paternal Dominion, that moſt antient, and, at the ſame time, moſt ſacred Kind of Government; by Virtue of which, the Children are engaged to acknowledge the Superiority, and to reverence and obey the Commands of their Parents. The Origin of this Power, *Grotius* [a], and moſt Writers, refer to the Act of Generation, by which the Parents, in ſome meaſure, reſemble the divine Creator, whilſt they make a Perſon really exiſt, who before had no Being. But in as much as both the Parents equally contribute to this ſignal Benefit, they ſay that both originally acquire a Right over their Iſſue; but that, in caſe they contend for the Sovereignty, and, by Reaſon of their contrary Commands, cannot both be obeyed together, [1] the Father's Authority is to carry the Precedence; not only on the account of the Advantage he hath in Sex, but, likewiſe, becauſe the Mother herſelf is placed under his Direction and Sway.

II. Mr. *Hobbes* [b] takes another Road in tracing out this *paternal Rule:* "Though, ſays he, "this be a true Conſequence, *A Man is the Fa-*"*ther of another, and therefore hath the Dominion* "*over him*; yet it is not ſo clear and manifeſt as "to ſhew its own Neceſſity, as thoſe do where "one of the Terms is included in the Definition "of the other; but muſt be made out by other "Arguments and Proofs: Beſides, ſince all ſo-"vereign Power, if regularly eſtabliſhed, is in-"diviſible, ſo that no one can, at the ſame time, "ſerve two Maſters, unleſs in Subordination; "and ſince two Perſons concur to the Act of be-"getting, that Act ſhould ſeem an improper "Foundation for Sovereignty; which may there-"fore be more conveniently deduced from a "State of Nature, in the following Method. "During ſuch a State every Man hath a Liberty "of practiſing againſt every Man, what he "thinks may conduce to his own Preſervation:

[a] Lib. ii. Ch. v. § 1. [b] *De Civ.* Ch. ix.

[1] QUINCTILIAN expreſſes this very well in this Paſſage of his, *Declam.* vi. quoted in part by GRONOVIUS: *Duo* [*Pater & Mater*] *unum vocabamus, videamus, quò ire debuerit. Poteram quidem fortiter dicere, Pater juſſi. Hoc nomen omni. Lege ajus eſt* ——*Neceſſe habuit parere.*——*Sint ſanè jura paria, ſedeat medius inter duos Judex: Non comparabo Perſonas, quam-is apud omnes Gentes plus juris habeat Pater: Sit ſanè Natura communis, non imputabo, quod nomen dedi, quod familiam, quod penſas,* &c.

" and

" and [1], consequently, the Conqueror is the Lord " and Master of the conquered. Whence we may " infer, that, by the Law of Nature, the Right of " governing an Infant is first in the Power of the " Mother; who, if she resolve to nourish and " breed him up, [2] as she is in Duty obliged to " do, is supposed to do it upon this Condition, " that he shall not prove her Enemy when grown " up, *i. e.* that he shall pay Subjection and Obe- " dience to her." (According to his Hypothesis, those are mutual *Enemies*, who are neither subject one to the other, nor own a common Master.) " For it is by no means to be presumed, that I " would give a Person Life, on purpose to put " him in a Capacity of growing up to my Pre- " judice, and of gaining Strength, in time, to re- " pay my Kindness with Hostility. Thus, there- " fore, a Woman becomes, at the same Minute, " a Mother and a sovereign Mistress. Nor is the " Excellency of Sex a sufficient Argument why " we should attribute this Right of Governing to " the Husband, rather than to the Wife: For the " Inequality is not so great between them, as that " the Man can immediately establish his Rule " over the Woman without Opposition; but, in " a State of Nature, he must fairly win her by a " Course of War. Farther, [3] the Woman, by " carrying the Child so long about her, and nou- " rishing it with her Substance, [4] doth certainly " contribute, if not the most noble, yet the most " laborious and troublesome Share to the Produc- " tion of Issue [a]. Lastly, in as much as in a " State of meer Nature, where no Common- " wealths and no Families are supposed, it is im- " possible to know who is the Father of the Child, " but by the Mother's Asseveration; it follows, " that the Child belongs to whom she pleaseth, " and therefore primarily to herself. On which " account it was enacted by the *Roman* Consti- " tution, that Issue brought forth without Ma- " trimony [b] should follow the *Venter*, or the Mo- " ther [c]."

III. From the Mother this Dominion, according to Mr. *Hobbes*, may pass to other Persons several Ways: " First, if the Mother renounce her " Right by *exposing* the Child; the Person who " finds, and breeds him up, shall enjoy the same " Right which the Mother had over him before. " For the Life which the Mother at the first gave " him, she, as far as she is able, takes away again " by this Act of exposing him: And, consequent- " ly, the Obligation he had to her, for her former " Kindness, is entirely cancelled by this Injury. " On the other Side, to the Person who saved and " educated him, he owes all possible Returns, and " ought to acknowledge him, both for his Parent " and his Master [d]." Here, though we should grant, that such a Child ought still to preserve an Inclination of paying Duty [5] to his Mother, and, upon her Sorrow and Repentance, to return, in some measure, under his old Relation and Subjection; yet he cannot do this otherwise than with the Consent and upon the Resignation of his Educator, by whom all his Charges, *&c.* are to be refunded. And this seems to be the only Case by which it is possible to acquire Rule over a Man by Seizure or Occupancy.

Secondly, " If the Mother were made a Cap- " tive in War, the Issue born to her belongs to " the Person who took her, as her other Goods " and Possessions." But here it must be observed, that the Right and Power of the Conqueror, over the Issue of his female Captive, is quite of another Kind [6] than that which she, as a Mother, before enjoyed.

Thirdly, " If the Mother be herself a Subject " in any Commonwealth, the supreme Gover- " nor there hath Dominion, likewise, over her " Child." Where we are again to remark, that the Power of the civil Governor is very different from that of the Parents: And that it doth not presently follow, that the Mother's Authority must be extinct, and, as it were, swallowed up in

[a] *Quintil.* Declam. cccxxxviii. *It is otherwise in the Case of the* Men, *who are made Parents by a short and transient Pleasure, and are endeared to their Children only by that outward Satisfaction. But the* Mothers *love with a much stronger Passion, remembering their ten Months Trouble, their long Course of Cares and Dangers.* It is a Saying of *Medea*, in *Ennius* (or rather in *Euripides*, ver. 250, 251. from whence it was borrowed) *I had rather be three times under the Sword, than once under the Hands of the Midwife.* Yet they tell us of the Women of *Paria* in *America*, that they bring forth without any Pain or Weakness, and immediately after their Delivery return to their ordinary Work and Employment. Much the same is reported of the Women of *Chili*; and 'tis added, that the *Spanish* Dames, if they live there any considerable Time, contract the same Hardiness. *Oreste* in *Euripides*, ver. 552, *&c.* when it makes for his Cause, gives his Father much the Advantage of his Mother.

My Father planted me, and his fair Dame
Was but the Soil that bred and brought me forth;
More tied I judg'd myself to succour Him
That gave me Life, than Her that gave me Food.

[b] See hereafter Section the Fifth.

[c] By the Law of the *Lycians*, if a Free-Woman married a Slave, the Children were adjudged Free; but if the greatest Man in the State wedded a Foreigner or a Strumpet, the Issue was accounted base and servile. The same People took their Names from the Mother, not from the Father, *Herodot. Clio*, p. 44. Ed. *H. Steph.* [d] Thus *Admetus* speaks in *Euripides*, *Alcest.* ver. 666, *&c.*

So far I died as Death was in Your Power:
And if a kind Deliverer hath restor'd me
To Light and Life, I own him for my Father;
And boast to be the Comfort of his Age.

Liban. Orat. xiii. *A Man who takes another out of the Water, where he was ready to perish, may well be esteemed a Father by the Person he hath preserved.*

[1] Our Author elsewhere has confuted this fundamental Principle of the false Hypothesis of Mr. HOBBES. See Book i. Ch. vi. § 10. and Book ii. Ch. ii. § 5, *&c.* so that all he builds here upon it falls to the Ground of itself.

[2] Mr. BUDDEUS sets down this *(as is certainly her Duty to do)* as Mr. HOBBES's Opinion, but it is plainly contrary to Mr. HOBBES's Notion, as the Course of his Reasoning makes evident; and Mr. HOBBES explains himself without Reserve, *De Cive*, Ch. ix. § 2. where he says, that a Mother may either bring up or expose her Child, *SUO ARBITRIO ET JURE*, at her own Pleasure. See, also, his *Leviathan*. In general, our Author mixes his own Notions and Arguments too much with Mr. HOBBES's, without Distinction, which ought to be carefully observed.

[3] This is our Author's Reason, though Mr. BUDDEUS attributes it to Mr. HOBBES in the Place before quoted.

[4] This our Doctors and modern Physicians will not allow, as most Men know.

[5] These are our Author's Words to the End of this Section, and agree with his Principles, only we must add, that what he says of the Mother, must equally be applied to the Father. Moreover, this Authority acquired *by Right of the first Occupant* (as our Author speaks) cannot be justly extended further, than that the Father or Mother would have had, and which, according to the true Principes laid down hereafter, is no way Arbitrary. Instead therefore of insisting here upon the Right of first Occupancy, which regards the Advantage of him who gets Possession; I would rather chuse to call it *The Right of the most Charitable*, or of him who has exceeded others in the Exercise of Humanity and Goodness.

[6] See Book viii. Ch. vi. § 19. following.

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the chief Ruler's; but in ſome States it is only limited and reſtrained, in others it is left almoſt perfect and entire.

Fourthly, "If a Woman enter into an Agree-
"ment of living with a Man, under this expreſs
"Condition, that the Man ſhall be Lord and So-
"vereign, then the Children born to them both
"ſhall belong to the Man, upon the Score of his
"Sovereignty over the Mother. But, if the Fa-
"ther be the Mother's Subject, the Children, like-
"wiſe, fall under her Command; otherwiſe the
"bearing Iſſue would be a Prejudice to her Su-
"premacy. And, in general, if the Society be-
"tween the Man and the Woman be ſuch a regu-
"lar Union, as gives one the Dominion over the
"other, the Children owe Subjection to the Ru-
"ling Parent. But, if in a State of Nature, a
"Man and Woman contract to cohabit in ſuch a
"Manner, as to be independent on each other's
"Rule, the Children ſhall fall to the Mother, un-
"leſs it was expreſly ordered *otherwiſe in the*
"Bargain. For the Mother may, by Covenant,
"diſpoſe of her Right as ſhe pleaſeth. Thus
"they tell us of the antient *Amazons*, that they
"agreed with the Men of the neighbouring Coun-
"tries, to whom they had Recourſe for Iſſue, to
"ſend back the Males, and only to preſerve the
"Females to themſelves. But in Commonwealths,
"if a Man and Woman engage by Contract to
"cohabit, the Children are the Subjects of the
"Man: Becauſe, in civil States, all the domeſti-
"cal Sovereignty belongs to the Fathers of Fami-
"lies, by whom the States were founded and
"eſtabliſhed, and who, we may be ſure, were wil-
"ling to ſettle the Point in Favour of themſelves.
"Such a Contract between a Man and Woman in
"a Commonwealth, if it be made in ſolemn
"Form, and according to the Laws of the Place,
"is called *Matrimony*. But in caſe the Parties bar-
"gain only for Concubinage, or for a leſs ſolemn
"kind of Cohabitation, the Children ſhall then
"fall either to the Father or to the Mother, ac-
"cording as the civil Conſtitutions have deter-
"mined."

IV. *We*, in this, as in other of the like Points, have recourſe, in the firſt place, to Almighty GOD, the univerſal Cauſe and Author of Things; and yet we think it a very lawful Attempt, to ſearch farther into the ſecond Cauſes and immediate Inſtruments. For as to that which ſome pretend, that *All Sovereignty, which one Man obtains over another, is communicated to him by God, as it were in the manner of a divine Commiſſion, and that all human Power is purely by Delegation*; we take it to detract from the Honour of God, although the Perſons, who have ſuch Sentences commonly in their Mouths, ſpeak with a great Appearance of Piety. For he who exerciſeth a delegated Power, hath the ſame Power altogether with him from whom he receives it; only with this Difference, that the former poſſeſſeth it only as *borrowed*, the latter as *his own*. But it would betray very low and unworthy Thoughts of the infinite Majeſty of Heaven, to conceive that the ſame Species of Sovereignty is enjoyed by God and Man [a].

Having premiſed this Caution, we go on to the main Buſineſs before us. And, firſt of all, we think it may be ſettled as an undoubted Truth, that the Act of Generation yields an Occaſion to the acquiring a Right over the Child, which ſhall hold good, not only againſt other Perſons, who have not the ſame Claim of Parentage [b], but, likewiſe, againſt any Pretenſion that can be made in behalf of the Child itſelf, We ſay an *Occaſion*; becauſe we are not perſuaded that [1] *Generation* alone is ſufficient to give a full Dominion over human Iſſue. For although our Children be indeed made of our Subſtance, yet in as much as they become Perſons like ourſelves, and our Equals, as to all thoſe Rights which naturally accrue to Men; before we can render them unequal to us, or ſubject them to our Dominion, it ſeems neceſſary for us to ſeek out ſome other Title: Eſpecially ſince, in the Method of bringing a Child into the World, the Parents have no little Regard to their own Pleaſure and Satisfaction; and therefore cannot rate the Kindneſs at ſo vaſt a Price, and ſet it ſo highly on the Child's Score, as to demand back, in Conſideration, a full Subjection and Obedience, whether the Child be willing or no. It is a Saying of *Lactantius* [c], *He that begets a Son, hath no Power to make him be conceived, to make him be born, to make him live: Whence it appears, that he is not ſo properly the Author of his Son's Being, as the Inſtrument.*

The Right then of Parents over their Children ſeems to be founded on theſe two Titles or Claims: Firſt, it ariſeth from that Duty which Nature (in enjoining Man to be a ſociable Creature) lays on them to take care of their Off-ſpring; ſhe having, at the ſame Time, to ſtir up their Diligence, wiſely implanted in them a moſt tender Affection towards theſe little Pictures of themſelves. For take away from the Parents all Care and Concern for their Childrens Education, and you make a ſocial Life an impoſſible and unintelligible Notion. But this Care cannot duly be exerciſed, unleſs the Parents have Power to direct and govern the Actions of the Child, in order to the procuring his Benefit and Safety, which he himſelf, through Defect of Years and Judgment, is incapable of apprehending and of providing for [d]; and, conſequently, Nature doth hereby enjoin Parents actually to make uſe of ſuch a Power and Dominion,

[a] See *Matth.* x. 28. [b] That as he who is Maſter of a Thing, is, likewiſe, Maſter of the Fruits or Profits of it; ſo he who is Maſter of the Body whence the Child proceeds, ſhould have the firſt Step or Title towards obtaining a Sovereignty over the Child itſelf. [c] *Divin. Inſtit.* Lib. v. Ch. xviii. [d] See *Sirac.* vii. 23. xxx. i. *&c.*

[1] It is certain, that, as our Author will prove a little lower, Education is the immediate Foundation of paternal Power, and the mutual Duties of Father and Child. But we muſt not exclude Generation, which, to ſpeak Truth, is the firſt Foundation of all Engagements to a Father, and, conſequently, of his Power. Indeed, how comes it to paſs, that a Father and Mother are obliged, above all others, to bring up the Child that is born of them? 'Tis, in my Judgment, becauſe they have joined together in a natural Act appointed by God for the Propagation of the Species, and ſo are, or ought at leaſt to be, engaged tacitly to bring up the Fruit they have produced; for that implied, that it was the Motive of that Conjunction; and though perhaps they then propounded only to ſatisfy their Deſires, it is ſufficient that the very Nature of the Thing, which they cannot truly be ignorant of, allows us to preſume upon that Engagement. This is ſo true, that our Author endeavouring to prove, that Fathers and Mothers ought to bring up their Children, hath ſaid above, *Lib.* iv. *Ch.* xi. § 4. that, by bringing them into the World, they are engaged to take care, as far as in their Power, to preſerve that Life they have given them. We may here apply what *Crito* ſays to *Socrates* in the Dialogue to *Plato*, that bears his Name; Ἢ γὰρ ὐ χρὴν ποιεῖσθαι παῖδας, ἢ συνδιαταλαιπωρεῖν ἢ τρέφοντα ἢ παιδεύοντα. *i. e.* Either get no Children, or reſolve to maintain them, what Trouble and Charge ſoever you are at for their Education and Support. *Tom.* i. *p.* 45. *Edit. Serr.* See, upon this Subject in general, Mr. *Wollaſton's Religion of Nature delineated*, § 8. p. 159. *& ſeqq.*

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ſo far as it is neceſſary to the Accompliſhment of ſo important a Work. For whoever obligeth a Perſon to the Proſecution of an End, is, at the ſame Time, ſuppoſed to have given him Authority to apply all Means that ſhall appear requiſite for its Attainment. And this Power of the Parents, reſulting from the Duty lying on them to provide for their Iſſue, doth neceſſarily create in the Children an Obligation to ſubmit themſelves to their Parents Direction, without which Act of Submiſſion the former Benefit cannot be obtained, and the Authority is to no Purpoſe.

Secondly, The Sovereignty of the Parents ſeems, likewiſe, to be built on the preſumed Conſent of the Children, and, conſequently, on a tacit Pact. For, as the Parent, by the very Act of breeding up the Infant, doth declare himſelf ready to fulfil the Obligation of Nature, and to conſult, ſo far as in him lies, the well educating of his Charge; ſo the Infant, on the other ſide, though on account of the imperfect Force of Reaſon, he cannot expreſly promiſe thoſe reciprocal Duties, which anſwer to the Parent's Obligation, yet, by virtue of this Care, imployed by the Parents about him, he contracts as firm an Engagement towards them, as if he gave his full and expreſs Conſent [a]. And this Engagement begins to exert its Power ſo ſoon as he arrives at the Knowledge and Apprehenſion of any Thing that his Parents have done for him. It being fairly preſumed, that had he, at his coming into the World, been furniſhed with the Uſe of Reaſon, and made capable of underſtanding that his Life could not be preſerved, without the kind Proviſion of his Parents, joined with their Command over him, he would gladly have yielded Obedience on ſo commodious Terms. Which Conſent of his, [1] being rationally ſuppoſed, hath the ſame Validity as if it had been openly declared [b]. In the ſame Manner, as a Perſon, who hath had any Buſineſs performed for him by another, in his Abſence, and without his Knowledge, is ſuppoſed, by a kind of ſilent Covenant, to contract an Obligation of refunding the Charges. It is clear therefore, that the Power which Parents have over a Child, is then actually conſtituted, when they apply themſelves to nouriſhing and educating him, and rendering him, ſo far as they are able, a uſeful Member of human Society.

[2] Some indeed have maintained, that the Obligation between Parents and Children can, by no means, be derived from their tacit Conſent and Covenant, upon this Argument: *Conſent, whatever the Subject or Occaſion of it be, doth not take Place, except in Actions that were free before the Conſent paſſed; but now it is not a matter of Freedom in the preſent Caſe, for the Parties to perform the mutual Duties of Education on the one Side, and of Obedience on the other.* But this Way of Reaſoning cannot weaken what we here aſſert. For it doth not imply the leaſt Contradiction, for a Duty to ariſe, at the ſame Time, from a Precept of the Law of Nature, and from tacit Conſent and Pact. It is not certainly free for a Man not to obey GOD; yet GOD hath been pleaſed to enter into Covenant with his faithful Servants. A Subject is, no doubt, obliged to perform all due Offices in the State under which he lives; and yet, when he is to be liſted in the Military Order, not only his Conſent is required, but his Oath. And thus, why may we not as well affirm, that, whilſt the Parent actually undertakes the Education of the Child, the Child's tacit Conſent is to be underſtood? The Effect of which Conſent amounts to this, that he ſhall not afterwards have Reaſon to complain, that the Parents Authority was obtruded upon him againſt his Will, and without ſufficient Grounds and Title.

V. When the Queſtion is carried farther, and it is demanded to which of the Parents this Right over their Iſſue doth moſt properly belong, a Diſtinction or two will decide the Point: For the Perſons concerned either live under ſome Commonwealth, or not; and again, the Parents either are, or are not, engaged to each other by Covenant. Without the Bounds of a Commonwealth, or in a State of natural Liberty, if the Parents were not united by any laſting Contract, the Child is under the Care and Command of the Mother. Becauſe, in ſuch a Condition of Life, it being as probable that one Man ſhould be the Father as another, the Mother can only determine the Controverſy; at leaſt, the Thing cannot be otherwiſe known, with ſo much Truth and Certainty, as Matters of Fact demand [c]. On this Principle, the *Roman* Laws award to the Mother Iſſue begotten [3] in common [d]. But if a Covenant hath paſſed between the Parents, by which they ſettled theſe Affairs, it will appear thence, which of the two is to bear Rule over the Children; for that two Perſons ſhould both hold the ſupreme Authority over a third, without Subordination or Diviſion, is no regular Practice. This Covenant then between the Parties, either terminates in the bare Procurement of Iſſue, or it includes farther the Sovereignty of the Man over the Woman, and ſo falls in with juſt Matrimony; where, no doubt, the Command over the Children is lodged in the Hands of the Father. But in Covenants of the former kind, though they uſually take their Beginning from the Man, who ſeeks Children for himſelf, not for her, and, conſequently, bargains to have the Rule and Diſpoſal of them; yet it may ſo happen, that, quite contrary to this Order, the Woman calls in the Man for an Aſſiſtant to her Deſign of Iſſue; not the Man the Woman. This

[a] *Add.* Lib. iii. Tit. v. Lib. ii. D. *de negot. geſtis.* Tit. i. § 31, 32. *Inſtit. de rerum diviſ.* & Lib. xli. Tit. i. Lib. vii. § 13. D. *de acquir. rer. dom.*

[b] *Com.* Senec. *Conſol. ad* Marciam. *Ch.* xviii. *in fin.*

[c] *Comp.* Lib. iii.

[d] The *Egyptians* followed a contrary Opinion. *They accounted none of their Sons ſpurious, although born of a Slave; imagining that the Father alone was the Author of the Generation, and that the Mother contributed no more than Place and Nouriſhment.* Diodor. Sic. *Lib.* i. *Ch.* lxxx. *p.* 72. Ed. *Rhodom.* To the ſame purpoſe ſpeaks *Theages*, the *Pythagorean*, in his Treatiſe of *Virtues*, *The Father produceth the Form, and the Mother only ſupplies the Matter.* *Opuſcula Mythol. Eth.* & *Phyſ.* printed at *Amſterdam* in 1688. *p.* 683, 684.

[1] This Suppoſition is equally ill grounded, and ſuperfluous. We cannot preſume a Conſent of a Child who is not in a Condition, either to give it, or refuſe it. The Author, alſo, here, as well as elſewhere, confounds a *preſumed* Conſent with a *tacit* one. See what I have ſaid above in my Note upon *Lib.* iii. *Ch.* vi. § 2. For this very Reaſon, that Nature puts Infants into ſuch an Eſtate, wherein they have an abſolute need to be helped and directed by others, and charges Fathers and Mothers with that Care; it ſufficiently impoſes upon the Firſt an Obligation to ſubmit to the Power of the latter.

[2] It is JAMES THOMASIUS, the Father of the preſent Mr. THOMASIUS, in his Diſcourſe, *De Patriâ Poteſtate*, § 49. This is what the Son informs us, in his *Juriſpr. Divin.* Lib. iii. Ch. iv. § 14. & *ſeqq.* where he anſwers our Author's Exceptions.

[3] *Vulgo concepti* (ſay the *Digeſts*) *dicuntur, qui patrem demonſtrare non poſſunt, vel qui poſſunt quidem, ſed eum habent, quem habere non licet, qui* & *ſpurii appellantur. Lex naturæ hæc eſt, ut qui naſcitur ſine legitimo matrimonio, matrem ſequatur, niſi lex ſpecialis aliud inducit.* Lib. i. Tit. i. *De Statu Hominum.* Leg. xxiii, xxiv.

was the Caſe with the antient *Amazons*; and is ſtill with any ſovereign Princeſs, that marries without quitting her Rights; the Man being here not ſo properly a King, as the Huſband of a Queen. Nor ought we to think that Pacts of this ſort are therefore repugnant to the Law of Nature, becauſe in them one of the Couple ſeems to renounce that Care of the Children, which Nature hath equally laid on both the Parents: For the Precept of Nature, in this Point, doth not preciſely require that both Father and Mother ſhall apply themſelves, in the ſame ſtrict Degree, to the Work of Education; but is ſatisfied if by Compact the main Charge be committed to either. In the ſame Manner, as the Mother is not ſo neceſſarily obliged to give her Infant Suck, but that ſhe may make uſe of a Nurſe [a]: And as the Father acts upon good Prudence, when he delivers his Children into the Hands of able Inſtructors, for the Forming of their Minds and Manners.

But in civil States, which, for the moſt Part, have been erected by the ſtronger Sex, as the Men, in common Courſe, are the Heads of the reſpective Families, and the private Dominion over the Children belongs to the Father [f]; ſo that here, the Mother's Commands are in themſelves little better than Counſels, and borrow their full Force of obliging, from that Share of Power imparted by the Huſband to his Wife. For as it is generally found convenient to admit the Woman to a Part in the Government and Direction of the Family; ſo the Father's Power over the Children doth, by no means, exclude the Mother's inferior Authority and Care. Not but that the Conſtitutions of particular Commonwealths may ſettle this Matter otherwiſe, as ſhall be judged expedient. *Peter della Valle*, in his Travels [b] informs us, that, amongſt the Inhabitants of *Babylon* or *Bagdet*, the ſupreme Power over the Sons is held by the Father, and over the Daughters by the Mother.

If, upon the Father's Deceaſe, the Government of the Family remain with the Mother, it is but juſt that ſhe exerciſe the ſame Authority over the Children which the Father formerly enjoyed [c]. And in Caſe ſhe marry a ſecond Time, and the new Huſband be intruſted with the Care of his Predeceſſor's Children, they are to pay him the like Reverence and Duty as was challenged by their proper Father. Yet we are told a very odd Cuſtom of the *Chineſe* in this Particular, that if a Wife, after ſhe hath buried one Huſband, proceed to a ſecond Match, her Children ſend her off, covered only with a ſingle Garment, as an ignominious Mark of her light Diſpoſition; and the Reaſon of the Cuſtom is, that, according to the Inclination of that People, the Children cannot bear a *Father-in-Law*, much leſs reſpect and obey him [d].

VI. The next Step we take, muſt be to enquire how far this Power of Parents over their Children extends; or what are the proper Bounds and Meaſures of it. And here it is neceſſary to diſtinguiſh, firſt between thoſe Fathers of Families, who live under no publick Government, and thoſe, who are the Subjects of a Commonwealth: And again, between that Power, which the Father holds, as he is a Father, and that which he bears, as he is the Head of a ſeparate Family. The Power which a Father enjoys, on the bare Score of his being a Father, inaſmuch as it accrues to him as a neceſſary Means of diſcharging the Obligation towards his Iſſue, which Nature lays upon him, muſt, conſequently, be ſo great, as ſufficiently to anſwer and effect that Deſign. Now the Obligation, or Duty of a Father, as ſuch, chiefly turns on this general Performance, that he duly educate his Children; that is, nouriſh, protect, inform, and govern them, in order to the rendering them uſeful to themſelves and others, till they are able to conſult their proper Benefit, and are grown Maſters of their own Wills and Actions. (For, as to the Act of begetting, that is not ſo properly a *Part* of the paternal Duty, as the *Occaſion* of it.) Parents ought to apply more Diligence and Caution in fulfilling this Obligation, the more Truth there is in that [e] Saying of *Plutarch* [e], *Good Inſtitution is the Fountain and Root of all Honeſty and Virtue.* Eſpecially if they take this Obſervation of *Plato* [f] along with it, which commonly holds true; *Perſons*, ſays he, *who are naturally endued with the moſt excellent Wits, if they happen to be ſpoiled in the Breeding up, commonly prove the very worſt of Mankind. Can you think that all thoſe barbarous Villanies, all that horrid Wickedneſs, which we ſee in the World, proceed from mean and lazy Diſpoſitions, and not rather from brave and generous Spirits perverted by ill Education? Or do you ſuppoſe, that a natural Weakneſs and Feebleneſs of Temper does ever prove the Cauſe of any very great Good, or very great Miſchief* [g]*?*

It is plain then, that the Power of the Father doth, by no means, reach to ſo extravagant a Degree, as that he may deſtroy the Child whilſt in the Mother's Belly [h], unleſs the Mother muſt other-

[a] The contrary Opinion is maintained by *Plutarch*, de *Educat. &c.* and by *Phavorinus* in *Gell.* Lib. xii. Ch. i. Add *Ferdinand Pinto*'s Travels, *Ch.* liv. where he tells us how Strict and Religious a Point the *Japoneſe* eſteem it, for a Mother to giver her Infant Suck. In the *Alcoran*, the Women are commanded to perform this Office to their Children for the two firſt Years. [b] P. i. *Epiſt.* 17. [c] Comp. *Gen.* xxi. 21. with xxiv. 4. [d] Neuhof. *in Legat.* p. 281. [e] *De Liberor. Educat.* p. 4. B. Ed. *Wech.* [f] *De Republ.* Lib. vi. p. 676. Ed. *Wech.* [g] *Idem de LL.* Lib. vii. calls a Child, *A Creature more intractable than a Beaſt.* Liban. *Declam.* xx. *Education is one of the higheſt Goods of human Life.* Horat. *Lib.* iv. *Ode* iv. *v.* 33.

Doctrina ſed vim promovet inſitam,
Rectique cultus pectora roborant:
Utcunque defecere mores,
Dedecorant bene nata culpæ.

But Learning feeds the in-born Flame,
And Culture gives great Souls a firmer Frame:
If generous Morals once decline,
Baſeneſs and Vice attaint the nobleſt Line.

[h] *Vid* Lib. xlvii. Tit. xi. Lib. iv. *D. de extraordin. crim.* & Lib. xlviii. Tit. viii. Lib. viii. *D. ad* L. Cornel. *de* Sicariis, & Tit. xix. Lib. xxxviii. § 5. *D. de pœnis.*

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[f] By the *Roman* Law, Wives had no Authority over their Children, although ULPIAN ſeems to attribute ſome to them, *Digeſt. Lib.* xxvii. *Tit.* x. *De Curatoribus furioſo, &c.* Leg. iv. *Pietas enim Parentibus, etſi inæqualis eſt eorum poteſtas, æqua debetur.* See about this Mr. NOODT's Obſervations, *Lib.* ii. *Ch.* xv.

[e] PLUTARCH's *Greek* is, Πήγη γὰρ ἡ ῥίζα καλοκαγαθίας, τὸ νομίμῳ τυχεῖν παιδείας. PLATO's *Greek* is, Καὶ τὰς ψυχὰς ἔτω φῶμεν τὰς εὐφυεστάτας κακῆς, παιδαγωγίας τυχούσας, διαφερόντως κακὰς γίγνεσθαι, ἢ οἴει τὰ μεγάλα ἀδικήματα, καὶ τὴν ἄκρατον πονηρίαν, ἐκ φαύλης, ἀλλ' ἐκ ἐκ γενναίας φύσεως τροφῇ διαλλυμένης γίγνεσθαι, ἀσθενῆ δὲ φύσιν, μεγάλων ἔτε ἀγαθῶν ἔτε κακῶν αἰτίαν ποτέ ἔσεσθαι. Further, we may find ſeveral excellent Precepts about the Education of Children in *Plutarch*'s Treatiſe before quoted, as, alſo, in MONTAIGN's Eſſays, *Lib* ii. *Ch.* viii. of the Affection of Fathers to their Children. In CHARRON, *of Wiſdom, Lib.* iii. *Ch.* xiv. but eſpecially in that excellent Treatiſe of Mr. LOCKE, which has been ſeveral Times printed, but the beſt Edition is in 1708. becauſe the Author has made ſeveral Additions to it, to which Mr. COSTE, who has tranſlated it into *French*, has added ſeveral excellent Notes in diverſe Places. To theſe we may add a *Treatiſe on Education* by M. DE CROUZAS, publiſhed in 1722, in Two Volumes.

wise infallibly perish [a], or after the Birth [1] *expose* or make away with it, much less after the Increase of Growth and Years. For although it be very true, that the Infant hath his Rise and Original from the very Substance of the Parents, yet he is immediately placed by Nature, [2] in a Condition of Equality with them [b]; at least so far as to be capable of receiving *Hurt* and *Injury* [c]. Therefore the Opinion delivered by *Aristotle* in his Politicks [d] is to be exploded as unjust and inhuman. *As to the exposing and the preserving of Children*, says he, *let it be ordered by the Law that nothing lame or defective be suffered to grow up. If any Nation think it not allowable to* expose *their Infants, there certain Bounds are to be set to the Number of Births; and if the Business of Generation happen to exceed the due Limits, it will be convenient to procure Abortion, before the* Fœtus *is arrived at Life and Sense; for such a Period of its Growth is to determine, whether the Act of destroying it be harmless, or sinful. Lycurgus* did not express more Mercy in his *Spartan* Discipline. We learn from *Plutarch*, that, *when a Child was born, it was not left to the Parents Choice to preserve and nourish him. But he was carried immediately before an Assembly of the Seniors, who considered and surveyed him. If they found his Limbs strong and well set together, they ordered he should be bred up: But the weakly and mishapen Infants they adjudged to be carried away and thrown into a kind of Whirl-pool near the Mountain* Taygetus; *as if to live, when Nature had provided them so infirm or so unsightly a Body, could neither be for their own Good and Credit, nor for the Advantage of the Commonwealth* [e]. Indeed this unnatural Practice of *exposing* Infants was so frequent and almost so universal a Custom with the Antients, that *Strabo* [f] mentions it as something very particular in the *Egyptians*, that *they breed up all their Children* [g]. So *Dionysius Halicarnasseus* [h] sets it down as a remarkable Opinion of the *Aborigines*, *They refuse to make away with any of their Infants, thinking this one of the highest and most execrable Villanies.* And *Tacitus*, in his Account of the *Jews* [i], makes their Abhorrence of this *Cruelty* one Part of their Character [k].

Nor doth it appear reasonable to extend the paternal Authority, as such, to the *Power of Life and Death*, even in the Case of Faults committed; but rather to fix its Bounds within the Exercise of moderate Correction: Because its whole Care and Business is taken up about so tender an Age, as can scarce be imagined capable of such grievous and incurable Offences, as demand capital Punishment [l]. It seems the more proper Way of proceeding, when a Child of obstinate and incorrigible Perverseness rejects and despiseth his Father's kind Labours on his Account, to cast him off, as unworthy of all Care and Notice. And thus to *abdicate*, or *disinherit* a Son, may pass for the severest Penalty that a Father, *by virtue of his being a Father*, can inflict [3].

VII. Of this paternal Power strictly taken, we must understand that Place of *Grotius* [m], where he divides the Age of Children into three Periods: First, "Of imperfect Judgment and Choice; "Secondly, When they have attained to Maturi- "ty of Judgment, but still remain as Members "of their Father's Family, and have not under- "taken the separate Management of their own "Affairs; Thirdly, When they have left their "Father's Family, either to join themselves to "some other, or to erect one of their own." Which Distinction *Ziegler* seems to have condemned on no very good Reason. For though, as he observes, the Holy Scriptures [n] press the Duty of Obedience on Children, without making any such Difference, yet they do, by no means, forbid that grown Persons should be treated in another way of Management than Infants; nor do they require that a Son, when arrived at a State of Discretion and Maturity, should ever remove out of his Father's House. "During the first "Period of Age, then (says *Grotius*) all the Acti- "ons of the Children ought to be regulated and "directed by their Parents; for he who cannot "govern himself, falls of course under the Go- "vernment of another; and the Parent, accord- "ing to Nature, is the most proper Person to "exercise this Authority over the Child."

VIII. It is here made a Question, whether a Child, under this imperfect Period of Reason, be, by the Law of Nature, capable of *Property*, or of being the Master of any Goods or Possessions, in such manner as to exclude the Claim of his Parents? On which Point it may be proper to distinguish between Goods gotten by private Industry, and those which are left or made over by the Liberality of others, as in Legacies, Donations, &c. In that tender Age, what can a Child be supposed to get by his own Industry? Cer-

[a] *Vid.* Ant. Matth. *de crimin. ad* Lib. xlvii. D. Tit. v. § 5. Grot. *in Flor. Sparf. ad* Lib. xxxix. *D. de pœnis.* [b] See Book i. Ch. i. § 7. [c] *Plin.* Lib. ix. Ep. 12. *So use your Fatherly Power as to remember that you are yourself a Man, and the Father of a Man.* *Vid.* Philo Jud. *de Special. Leg.* p. 794, 795. Ed. *Paris.* Lactant. *Div. Instit.* Lib. vi. Ch. xx. *Diodor. Sicul.* Lib. i. Ch. lxxvii. *Add.* Grot. *ad Exod.* xxi. 22. *Leg. Wisogoth.* Lib. vi. Tit. iii. Ch. vii. Selden. *de J. N. & G.* Lib. iv. Ch. i. It is a most absurd and most barbarous Custom which they practise in *Formosa*, where it is reckoned scandalous for the Women to conceive before their Thirty-fifth or Thirty-sixth Year. And if they breed sooner than that Time, by miserable Pains and Beatings they procure *Abortion*. [d] Lib. vii. Ch. xvi. (21.) [e] I know not whether we may venture to credit the Account given by *Diodor. Sic.* Lib. i. Ch. lxxx. of the Method taken by the *Taprobanians*, to make Experiment of the Temper of their Children. [f] Lib. xv. [g] Add *Diodor. Sic.* Lib. i. Ch. lxxx. [h] Lib. i. p. 13. [i] *Hist.* Lib. v. [k] Yet *Curtius*, Lib. iv. Ch. i. reports that the *Spartan* Custom was practised by some of the *Indians*. *They bring up their Infants*, says he, *not at the Pleasure of the Parents, but according to the Order and Direction of Officers appointed to supervise this Affair; who command all such Children to be killed, as they find either extremely slow and heavy, or useless and defective in any Part of the Body.* *Strabo, Lib.* xv, gives the like Account of the *Catheans*. It is common, amongst the *Chinese*, for the Parents to kill their Children, especially the Females, without falling under Censure or Punishment. And, holding the Transmigration of Souls, as most other People of the East do, they think they do them a Kindness, by preparing their Way to a happier Birth and a more advantageous Condition. [l] Thus the *Roman* Youths, whilst they wore the *Prætexta*, were not liable to Fines and Amercements, but received corporal Correction. *Plin.* N. H. *Lib.* ix. *Ch.* xxiii. [m] Lib. ii. Ch. v. § 2. [n] *Ephes.* vi. 1. *Col.* iii. 20.

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[1] This detestable and inhuman Custom was very common heretofore amongst the *Grecians* and *Romans*. See Mr. Noodt's *Julius Paulus*, where he thoroughly examines this Matter. The Law of the *Digests*, quoted by our Author, where the Lawyer *Paul* condemns this abominable Custom, as contrary to the Rules of Humanity, Civility, and natural Justice, though it was not punished by the civil Laws; deserves to be set down here at length. *Necare videtur, non tantum is, qui partum perfocat, fed & is qui abjicit, & qui alimonia denegat, & is qui publicis locis misericordiæ causâ exponit, quam ipse non habet.* He kills a Child, not only, who strangles it, but he who casts off all Care of it, and denies it Food, and he who lays it in a publick Road, that it may find that Mercy from others, that he is wholly devoid of. *Digest.* Lib. xxv. Tit. iii. *De agnoscendis, & alendis Liberis, &c.* Leg. iv. See, about this, *Ch.* viii, *&c.* of Mr. NOODT's Treatise before quoted.

[2] See above, *Lib.* i. *Ch.* i § 7.

[3] See what we have said, *Lib.* iv. *Ch.* xi. § 7, 11.

tainly not ſo much as his Parents have laid out on his Education. This therefore the Father may fairly challenge, in requital of his Pains and Charges. For though he were obliged indeed, by the Law of Nature, to ſupport and maintain his Off-ſpring, yet he was not, in the leaſt, prohibited to make what Fruit and Advantage he could of his Labour. One might as well ſay, that Parents are forbidden to take any Delight or Comfort in their Children; a Satisfaction ſo very great, that moſt, who are ſo happy as to enjoy it, eſteem it invaluable, and beyond all Compenſation or Equivalent [a]. For the ſame Reaſon, it would be a high Degree of Impudence, for a Son, in his State of Minority, to require a Reward for the Service he does his Father. 'Tis a wiſe Saying of *Sophocles* [b],

Good Children ſhould forget the Toils they bear
To help their Parents [1].

In *Peru* the Children were obliged to aſſiſt their Parents with their Labour, till the Age of five and twenty [c].

In the other Caſe, when any thing is to be tranſferred on the Child, by way of Gift or Legacy, at firſt View ſuch a Donation may ſeem invalid, becauſe Acceptance is a neceſſary Condition required in the Receiver, which cannot be performed without deliberate Conſent, and therefore not without the full Uſe of Reaſon. But becauſe it would be an intolerable Hardſhip to make Children incapable of theſe Advantages, on Account of their Immaturity, when, for that very Reaſon, they have more need of the Aſſiſtance of others, it is moſt agreeable to Equity, that another Perſon ſhould *accept* this Bounty in their Name, and ſhould, likewiſe, have the Goods in Charge, till the Children are capable of being their own Managers. And for this Truſt no Man is ſo fit as the Father. Whence it appears, that it is, by no means, natural for the Father to acquire a *Property* over a Poſſeſſion of this kind, though it be very equitable, that he take not only the Care, but the Profits of them, as Helps towards maintaining the Child, till arrived at proper Years of Inheritance. And hence too we may diſcover the juſt and ſolid Grounds of thoſe Diſtinctions, in the *Roman* Law, between the [2] *Peculium Profectitium*, *Adventitium*, and *Caſtrenſe* of Children; the Stock or Wealth they get by labouring under their Parent, by the Bounty of others, and by the Military *Pay*.

IX. Another Enquiry that may be raiſed on this Subject is, Whether the *paternal Power* and Duty can be made over by the Father to a Subſtitute? On which Point we are to know, that although the Father's Authority and Obligation took their Occaſion and Riſe from a [3] Perſonal Act, which is incapable of being transferred [d], yet this doth not hinder him from recommending his Office to a Deputy, the Advantage or Neceſſity of the Child ſo requiring. But then he would do well to keep *Plutarch*'s Advice always in mind: *Thoſe Parents*, ſays that wiſe Author, *do juſtly deſerve Cenſure, who, having committed their Sons to the Care of Maſters and Inſtructors, never trouble themſelves to make Trial of their Proficiency. This is a very ſcandalous Miſtake in Education. They ought, at proper Diſtances of Time, to enquire into the Boy's Parts and Improvement, and not to place all their Hopes in the Faith of a mercenary Teacher. Beſides, the Maſter himſelf will, by this means, be engaged to uſe more Diligence and Application, when he finds that ſo frequent a Judgment will be paſſed on his Pains.*

Farther, it is not, in the leaſt, repugnant to the Law of Nature, for a Father to reſign his Child to be adopted by ſome other honeſt Perſon, when it is likely to prove to the Child's Advantage [e]. But that he ſhould pawn, or + ſell his Child, Nature ſeems not to allow in any Caſe; except when he cannot otherwiſe feed and ſupport him. For then he ought rather to ſell him into ſome eaſy Servitude, whence there is Hope of being releaſed, than to let him periſh with Hunger. *Ælian* [f] hath recorded a memorable Conſtitution of the *Thebans* to this purpoſe: *No Man, under Pain of Death, ſhall expoſe an Infant, or caſt him out into an uninhabited Place. But if the Father be reduced to extreme Poverty, the Law directs him to carry the Child, immediately after the Birth, to the Magiſtrate, who upon receiving an eaſy Price ſhall deliver it, whether Male or Female, to another Perſon, taking Security of the Buyer that he ſhall honeſtly breed up the Infant, and for his Pains ſhall take its Service when grown to Man or Woman's Eſtate.* The Defence of which Law is grounded on this Rule, That Nature is ſuppoſed to give us a Right to every thing, which appears abſolutely neceſſary to our fulfilling her Commands. [5] In the ſame manner the Em-

[a] *Vid.* Senec. *Conſol. ad* Marciam, *Ch.* xii. [b] In *Oedip. Colon.* p. 289. Ed. *H. Steph.* [c] *Garcilaſſo de la Vega*, Lib. iv. Ch. xix. [d] *Liban.* Declam. xx. p. 523. *Edit.* Morell. *No Law can recal the Act of a Father, and cauſe him not to have begotten.* [e] *Add.* Gell. *Lib.* v. *Ch.* xix. *Euripides*, *Ion.* v. 1535, 1536.

If *that* Friend want a *Fortune*, 'tis but fair.
He give his Son to *this* who wants an *Heir*.

[f] *V. H.* Lib. ii. Ch. vii.

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[1] The *Greek* of *Sophocles* is,

——— ——— Τοῖς τεκέσι γὰρ
Οὐδ' εἰ πονεῖ τις, δεῖ πόνου μνήμην ἔχειν.

[2] We call a *Peculium*, the Patrimony, that a Slave, or Son, hath gotten of his own; what a Son hath gotten by War, or his Father, Mother, and other Relations have given him, while he followed that Buſineſs, belong abſolutely to him; ſo that he can diſpoſe of them, as he ſees fit, and his Father hath nothing to do with them. This is called *Peculium Caſtrenſe*. See *Digeſt. Lib.* xlix. *Tit.* xvii. It is the ſame with that which a Son has gotten in any other Employment, where he has a Salary from the Publick, and this is called *Peculium quaſi Caſtrenſe*. See *Cod.* Lib. iii. Tit. xxviii. *De inofficioſo Teſtam.* Leg. xxxvii. This is *Peculium Militare*. *Peculium Civile*, or as the *Code* expreſſes it *Paganum*, conſiſts in the Goods, which a Son gets, who is not in publick Buſineſs, either by his Induſtry, or by ſome Gift, or Will, or by the Diſpoſition of Laws, or by managing a Thing, of which his Father has only the Profits. This the Interpreters call *Peculium Adventitium*. Or in the Advantage that a Son makes of the Goods of his Father, or by their means, and this was abſolutely in the Diſpoſal of the Father, and is called *Peculium Profectitium*. See the *Inſtit.* Lib. ii. Tit. ix. *Per quas perſonas cuique acquiritur*, § 1. and Mr. DOMAT's civil Laws in their natural Order, *Part* ii. *Lib.* ii. *Tit.* ii. § 2.

[3] LIBANIUS's *Greek* is, Οὐ γὰρ τὸ παῤ ἐμοῦ σε γεγονέναι δύναται λυθῆναι νόμῳ.

[4] Theſe Quotations might have been put into a Note.

[5] This Law of *Conſtantine* is the ſecond, and laſt in the Title of the *Code* before quoted. The Words are, *Si quis propter nimiam paupertatem, egeſtatemque, victûs causâ* (*i. e.* for the Life of the Child, not of the Parent) *filium, filiamve ſanguinolentos vendiderit, venditione in hoc tantummodo caſu valente, emptor obtinendi ejus ſervitii habeat facultatem: Liceat autem ipſi qui vendidit, vel qui alienatus eſt, aut cuilibet alii ad ingenuitatem eum propriam repetere, modò ſi aut pretium offerat, quod poteſt valere, aut mancipium pro ejuſmodi præſtet.*

peror *Conſtantine* [a] permits a Father, in the Caſe of extreme Want [b], to ſell his Son or Daughter, ſo ſoon as they come into the World, leſt they ſhould otherwiſe ſtarve; yet ordering, at the ſame time, that whoever would repay their Price to the firſt Buyer, ſhould have the Power of redeeming them into Freedom [c]. And when, in an Edict of *Theodorick*, and a Law of the *Wiſo-Goths*, we find a Prohibition againſt *Selling Children for the ſake of Food* [d]: it is meant of Food for the Occaſions of the Parents, not for the neceſſary Suſtenance of the Children. Yet *Romulus* granted Parents a very unreaſonable Privilege, when, as *Dionyſius Halicarnaſſeus* [e] informs us, *He allowed a Father to make Money, by ſelling his Son three Times; thus giving him more Authority over his Son, than over his Slave. For a Slave once ſold, and then obtaining Liberty, is ever after at his own Command and Diſpoſal. But a Son, though twice ſold, and twice recovering his Freedom, returned under his Father's Dominion, and was not exempted from it till he had paſſed the third Sale.* *Numa*, in ſome meaſure, ſoftened the Rigour of this Law, by excepting from Sale thoſe Sons who had contracted Marriage, provided they had done it by their Father's Orders, or with his Conſent. The *Decemviri* durſt not quite take it away, but left it to wear off by gradual Diſuſe [1], till it was at length expreſly reverſed in the *Code*. Yet the old Cuſtom was ſtill kept up of ſelling a Son three Times, though only in way of Fiction and Formality, at the Ceremony of giving him his Freedom. Though this too was afterwards taken off by *Juſtinian* [f]. It appears from *Plutarch* [2], that amongſt the *Athenians*, at leaſt before *Solon*'s Time, a Father was allowed to ſell his Son for the Payment of his own Debts [2]. And we are lately told of the *Muſcovites*, that a Father makes this Advantage four Times, after which the Son is releaſed from his Authority [h]. The *Chineſe* make a frequent Practice of ſelling thoſe Children, whom they think they ſhall not be able to maintain; but with this good Condition, that any of them ſhall have the Privilege of buying themſelves into Freedom, at the ſame Rate at which they firſt were ſold.

X. In order to our underſtanding what Power the Father hath over the Son, during the ſecond Period, in our Diviſion of Age, we muſt remind ourſelves of what was before ſlightly hinted, that Fathers are inveſted with another kind of Sovereignty, as they are the Heads of their reſpective Families. Now this Authority is different, according as the Perſons live either within, or without the Limits of a Commonwealth. Separate Families, as they very much reſemble States and Kingdoms, ſo they are governed by their Heads, in a Way bearing ſome Proportion to regal Power. For we are not willing to give them abſolutely the Name of *Civitates*, as [3] Mr. *Hobbes* hath done [i]; becauſe Families and publick States are inſtituted on

[a] *V. C.* Lib. iv. Tit. ii. [b] V. *Grot.* Lib. ii. Ch. v. § 5. [c] *Ch.* xciv, xcv. *in Edict.* Theodoric. & *leg.* Wiſigoth. *Lib.* v. *Tit.* iv. *Ch.* xii. [d] *V. C.* Lib. iv. Tit. ii. [e] Lib. ii. Ch. xxvii. [f] Lib. viii. Tit. xlviii. L. *ult.* C. *de Adoption.* [g] *In vit.* Solon. [h] *Sigiſm. Baro* in *Herberſtein. Add.* Olear. *Itin.* Perſic. *Lib.* iii. *Ch.* vi. [i] *De Cive*, Ch. v. § 12.

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[1] We find a Law in the *Code* made by *Diocleſian* and *Maximinian*, where it is ſaid, That Fathers ſhall not have any Power to put their Children under the Authority of any other, either by ſelling them, or Gift, or Pawn, or any other manner, nor under a Pretence of Ignorance of him, who has either of thoſe Ways got him into his Power. *Liberos à parentibus, neque venditionis, neque donationis titulo, neque pignoris jure, neque alio quolibet modo, neque ſub prætextu ignorantiæ accipientis in alium transferri poſſe, manifeſtiſſimi juris eſt*, Lib. iv. Tit. xliii. *De Patribus, qui filios ſuos diſtraxerunt.* Leg. i.

[2] Comp. *Matth.* xviii. 25. 2 *Kings* iv. 1. *Philoſtratus*, in vit. *Apoll. Thyan.* Lib. viii. Ch. iii. p. 401. Ed. *Mordl.* reports of the *Phrygians*, *That it was an ordinary Thing with them to ſell their own Sons; and not to regard them, if they happened to be led Captives into Slavery.* Add. *Plutar. Lucull.*

From theſe Places it appears, that among the *Jews* a Debtor, who found himſelf unable to pay, might become a Slave to his Creditor with his Children; or might ſell himſelf and Children. See Mr. LE CLERC upon *Lev.* xxv. 39. and *Deut.* xv. 12. Laſtly, there was printed in 1708. a Book intitled *Diſſertatio Juridica, De Jure patrio, Auctore Abrah. à Kerkraad*, where we may find a Collection of all that this Author has put into his Lectures, about the *paternal Power*, principally in relation to the Cuſtoms and Notions of the *Romans*. It may ſerve as an Hiſtorical Dictionary upon this Subject.

[3] Since Mr. HOBBES, an *Engliſh* Baronet of the ſame Nation, named ROBERT FILMER, hath publiſhed a Book, entitled, *Patriarcha*, to prove, that all Government ought to be Abſolute and Monarchical, and for a Foundation of his Opinion aſſerts, That the paternal Power is the ſame as royal Authority, and is entirely Deſpotick. ALGERNOON SIDNEY in his Treatiſe of Government, and Mr. LOCKE, in the firſt Part of his Work upon the ſame Subject, have quite overthrown the Conſequences, which FILMER has drawn from his falſe Principles. Mr. SIDNEY has not dwelt long upon it; but Mr. LOCKE having taken Pains in his ſecond Part to overthrow the Principle itſelf, we have thought it convenient to give an Abridgement of the Reaſons he there gives. Firſt then, this able Writer obſerves, that all the Obligations that Infants have, being founded on Generation, to which the Mother concurs, and contributes as much, at leaſt, as the Father, it follows, that both of them have an equal Right and Power over thoſe who ſpring from their Union. So that to ſpeak exactly, we ought to call that Authority the Power of the Parents, and not of the Father, as we do ordinarily, ſince the Impropriety of the Expreſſion might be an Occaſion for Men to imagine, that all the Authority over the Children reſides only in the Father. The Laws, which God hath given both to the *Jews* and *Chriſtians*, plainly contradict this Miſtake. *Honour thy Father and thy Mother*, Exod. xx. 12. *Children, obey your Parents*, Eph. vi. 1, 2. This is the uniform Language of the old and new Teſtament. From whence it follows, that the Power which they have over their Children cannot be a Foundation for monarchical Government. But, ſuppoſe we grant that, it will not thence follow, that Kings have an abſolute and deſpotick Power, becauſe the paternal Power is not ſo, as will appear from the Conſideration of its Nature and Extent. All the Rights of the Father and Mother conſiſt in governing their Children, till they are able to govern themſelves by the ſame Laws, which are the Rule of the Parents Conduct; and in a certain Honour, which they owe their Parents, *i. e.* till they are of Age to underſtand and practiſe the Law. Although all Men are naturally equal, and every one is born free, *i. e.* has a Right to diſpoſe of his Perſon, Actions, and Goods, as he ſees fit, according to the Laws under which he lives. None of *Adam*'s Poſterity found himſelf in this State, when he came into the World. The Defect in the Uſe of their Reaſon, and the Impoſſibility that Children are in to preſerve themſelves, and provide for their Wants, obliges them neceſſarily to ſubmit to the Direction and Power of their Father and Mother, who, by the Law of Nature, are tied to maintain and bring them up, not as their own Work, becauſe they contributed to their Production only as bare Inſtruments, but as the Work of the Creator, to whom they muſt give an Account. If a Child never attains to ſuch a competent Degree of Reaſon, as to be able to order himſelf aright, as it happens to ſuch as are born Ideots and Lunaticks, he would depend always upon the abſolute Will of the Father and Mother; but this is rare, and out of the common Courſe of Nature. So that the Bonds of Subjection of Infants are like their Swadling-Cloaths, and their firſt Garments, which are only neceſſary upon the Account of their tender Years. When they come to the Uſe of Reaſon, their Age removes them from their Father's Juriſdiction, and makes them Maſters of themſelves; ſo that then they are equal to their Father and Mother, in reſpect to that State of Liberty, when a Pupil becomes equal to his Guardian, after the Time of his Minority, appointed by the Law. The Liberty of Children, become Men, and the Obedience they owe to their Father and Mother before that, are not more inconſiſtent, than is, according to the moſt zealous Defenders of Monarchy, the Subjection that a Prince is under, during his Minority, in reſpect to the Queen-Regent, his Nurſe, his Tutors, or Governors, with the Right he hath to the Crown, which he inherits from his Father, and the Authority of a Sovereign, with which he ſhall one Day be invested, when his Age will render him capable to manage it himſelf, and govern others. This is otherwiſe ſo true, that the paternal Power doth not appertain to the Father by any particular Privilege of Nature excluſive of the Mother; and that is but in the Quality

on different Ends and Designs, and, consequently, many Parents of civil Society are excluded from this private Dominion. And, indeed, Mr. *Hobbes* himself elsewhere confesseth [a], that *A Family is not properly a Commonwealth, unless it be of that Power, by its own Number, or other Opportunities, as not to be subdued without the Hazard of War.* Yet Family Rule, in this separate Condition, so nearly approacheth to the Legislative Authority, as to have the Power of Life and Death in Criminal Cases, as, likewise, the Management of Arms, and the Care of Leagues and Alliances. This Dominion of the Father over the Children, now grown up, is established by tacit Compact; the Father extending his Commands beyond the Affair of Education, and the Children freely putting themselves into a State, of farther Obedience. For the Laws of Equity and Gratitude direct, that a Son should yield his Strength and Service chiefly to him, to whom he owes all that he now is or enjoys; till such Time as, with his Father's Consent, he be released from the Subjection.

XI. But after the erecting of Commonwealths, of these Rights, which before belonged to Fathers of Families, some were contracted, others quite taken away. Yet so much Authority was almost in all Places allowed, as appeared sufficient for Educating the Children: Except that even this was much retrenched under *Plato*'s National Government; and in the *Persian* Constitution, if we admit *Xenophon* for a true Historian [b]. In many Nations the Privileges of Family Rule were little impaired. Thus, at *Rome*, the Fathers had the Power of Life and Death over their Children, which they exercised in a kind of judiciary Manner, calling a Council of their Relations and Friends, and causing Sentence to be executed according to their Determination [c]. *Justinian* [d] calls this Right *Proprium Civium Romanorum, Particular to the* Roman *Citizens*, and not pretended to by other Men; for which Position *Bodinus* [e] hath fallen heavily upon him; alledging, that the *Persians* and antient *Gauls* [f] made use of the same: And that the Abrogation of it in the *Roman* State was the Cause of many Troubles and Mischiefs. *Connanus* [g] is of the same Judgment; and *Dionysius Halicarnasseus* [h] is produced as an able Patron of the Custom. Some, on the other Hand, engage chiefly in the Defence of the Emperor's Words, confidently affirming, that no other Nations allowed the Fathers so extended a Power over their Children as the *Romans*, amongst whom it had indeed no Measure or Restraint. And in this Sense they interpret the Discourse of *Dionysius*, which was before alledged on the other Side. Others say the Emperor's Meaning was this; that the *paternal*

[a] *Leviath.* Ch. xx. [b] *De Educat.* Cyri, *Lib.* i. [c] Vid. *Val. Max.* Lib v. Ch. viii. § 2, 3, 5. Senec *de Clement.* Lib i. Ch. xv. 'Tis a Saying of *Turnus* in *Livy*, Lib. i. Ch. 1. *That there can be no shorter Way of deciding a Point, that between the Father and the Son; because, if the latter oppose or disobey the former, he is to expect the Plagues of Divine Vengeance.* [d] *Instit.* Lib. i. Tit ix. § 2. *De Patria Potestate.* [e] *De Repub.* Lib. i. Ch. iv. [f] So *Cæsar* Comm. *de B. G.* Lib vi. Ch. xix And some Footsteps of that antient Custom remained till the Year of *Christ* 1301. amongst the People of *Bourdeaux*, by whose Laws, Fathers and Husbands had supreme Power of Life and Death over their Children and over their Wives: And if a Husband happened to kill his Wife in any Violence of Anger or Grief, upon declaring his Repentance by a solemn Oath, he was discharged without Punishment. [g] *Comment. Jur. Civil.* Lib. ii. Ch. xiii. [h] Lib. ii. p. 96, 97. Ed. *Lipsi.*

Quality of a Governor or Tutor of his Children; that if he abandons them, and renounces all paternal Kindness to them, he deprives himself of the Power he hath over them, which is so inseparably annexed to the Care that he ought to take to nourish and bring them up, that it passes from him to the Person who brings up an exposed Child; for the single Act of Generation is a small Thing, if we go no farther. In certain Places of *America*, when a Man and Wife part, which happens there often, the Children go along with the Mother; and are not these Children indispensably obliged to obey the Mother, as much as those who, among us, lose their Father in their Non-Age? And can we say, that a Mother can prescribe such Laws to her Children, as shall be perpetually Obligatory, and by which she may dispose of all that belongs to them, and constrain them under some corporal Punishment, to conform themselves implicitly to her Will? Certainly a Father and Mother can dispose of their Goods as they see fit, when they put their Children into a Condition of subsisting of themselves; but the Power they have, as the Authors of their Being, doth not extend so far, as to be Masters of their Lives, Liberties, and Goods, whether they have gotten them by their own Industry, or are bestowed on them by others. God himself allows Children to withdraw themselves from the Parents Jurisdiction, when he says, *Gen* ii. 24. *Matth.* xix. 5. *Eph.* v. 31. *That a Man shall leave his Father and Mother, and be joined to his Wife.* But though Children as soon as they come of Age to see what the Laws of Nature and Civil Society, of which they are Members, demand of them, are not obliged to violate those Laws to please their Parents, yet they are bound to honour their Father and Mother, as the Instruments which God made use of to give them Life, and acknowledge the Care they have taken in their Education. They ought to have for them a particular Esteem, Affection, and Respect, and shew it them in all their Discourse and Behaviour; do or say nothing that may offend or trouble them in the least; defend, assist, and comfort them by all possible and lawful Means, and conform themselves to their Will, when it may be done without any great Inconvenience to them. There is no Age, Rank, or Dignity, that can exempt a Child from these Duties towards them, from whom he hath received his Life, and to whom he has such great Obligations; but he is not for all that bound to pay them an absolute Obedience and Submission. The most powerful Monarch ought to honour his Mother, though he is not to follow her Will in the Government of his State, or royal Family. We ought, therefore, to distinguish well between these two Sorts of paternal Right, *viz.* of directing a Child till he comes to the Use of his Reason, and that which requires only Respect and Acknowledgment. The first is really only a Duty to Fathers, rather than a Power; the Authority which it gives ends with the Wants of the Child, and when it is most in force, it may be alienated in some sort; as when a Father trusts the Care of his Son's Education to another; for, by putting him into that Person's Hands, he discharges him of a great Part of the Obedience due to himself and his Mother. But as to Respect and Acknowledgment, nothing can release a Child from it; and the Mother has as good a Right to require it as the Father; so that if the Father orders his Son, not to honour his Mother, the Son ought to disobey his Father. This Duty may be more or less enlarged, according as the Father or Mother has taken more or less Care, and shewed more or less Kindness to the Child. But it can never be entirely abolished; and in civil Societies themselves, Fathers and Mothers preserve their Right to require it, as well as to order them in their Education, insomuch that every Subject has not only as much paternal Power over his Children, as a Prince has over his; but, also, the Sovereign himself ought to have as much Respect to his Father and Mother, as the meanest of his Subjects has to his. Hence it appears that Sovereignty and paternal Power are two different Things, which have neither the same Foundations, End, nor Extent. It is true, that as several Persons cannot live together without some Order, and some sort of Government, so we may easily conceive, that in the first Ages of the World, when any Family was about to withdraw itself, and settle in a Place uninhabited, the Father became, as it were, the Prince over his Children, though at the Age of Discretion; but it seems as though that Authority were conferred by the express or tacit Consent of the Children, who could find nothing more advantageous to them, than to put themselves under the Government of their Father only, and give him the Right, which every one naturally has, to execute the Laws of Nature. They were accustomed from their Infancy to be guided by their Father, and leave their little Quarrels to him; and it was natural for them to continue their Subjection to his Direction and Authority, when they were become Men. Whom could they better choose for their Governor than He, who, after he had given them Life, had carefully educated and brought them up, and shewed them so much Kindness? If then Fathers became Kings of their Families by this Means, it was not by virtue of their paternal Power. And though political Authority actually began by the Fathers of Families, it does not follow, that the Right of Sovereignty is founded on the paternal Power, and, consequently, belongs to the Prince, and the Prince only, since it is evident from the highest Antiquity, that Fathers were the only Persons in Families that offered Sacrifices. *This is an Extract of Mr.* LOCKE's Part ii. *of his Treatise of* Government; *and we ought to remember this, when our Author treats of the* Original of Sovereign Power.

Power

Power in *Rome* was attended with certain Attributes and Properties, which it had not in other Parts of the World: As, for Inſtance, if a *Roman* ſuffered either the *Minima capitis Diminutio*, or the *Deportatio*, *The loweſt Degree of forfeiting Liberty*, or *the being tranſported*, he loſt his fatherly Rule; whereas it was never the Cuſtom to deprive a Man, by thoſe Puniſhments, of any Privilege he poſſeſſed by the Law of Nature and of Nations. And they farther argue, that ſince all *juſt Matrimony* is founded on *civil* Conſtitutions; this Power of the Father being the Conſequent of that Union, muſt derive its Force from the ſame Principle [a]. But, perhaps, the eaſieſt Way of clearing that Paſſage in *Juſtinian*, is to keep to the Terms of *Civium Romanorum*, and to expound them ſtrictly, in Oppoſition to all other Perſons who were not *free Subjects*, and who had not the ſame Authority over their Children.

Thoſe Founders of Commonwealths, who left the Fathers in Poſſeſſion of their old natural Rights in ſo wide an Extent, ſeem to have proceeded on theſe Conſiderations: That the Reſpect, paid by the Children, might be thus raiſed to the higheſt Degree of Awe and Veneration; that the Fathers were the moſt likely Perſons to know their Childrens Faults, keeping them generally under their Eye; and, that at the ſame Time, their natural Affection would probably reſtrain them from abuſing this Power to unjuſt Violence; the Exerciſe of it falling on an *Age* which requires Clemency rather than Cruelty. Thus *Phineus* obſerves in *Diodorus Siculus* [b], *No Father will ever ſhew an Example of very ſevere Puniſhment on his Son, unleſs his natural Tenderneſs be overcome by the Greatneſs of the Crime.* And *Sopater*, ſpeaking of the ſame unlimited Authority, *The Law*, ſays he, *thus ordered, well knowing how upright a Judge a Father muſt needs prove over his Children* [c].

On the other Side, thoſe Legiſlators who took off this Rigour of paternal Sovereignty, probably did not want their due Motives. They might have obſerved ſome Fathers making a very ill Uſe of their Power, when tranſported by the [1] Extravagance of Paſſion beyond all Nature and Juſtice. Again, they thought this Privilege altogether needleſs, ſince the Magiſtrates were ſufficient for the Puniſhment of capital Offenders. They might, likewiſe, eſteem it a great Hardſhip, that a Father ſhould be compelled, in Contradiction to his own Wiſhes and Affection, to pronounce Sentence of Death on his Son [2], though juſtly convicted.

By the *Jewiſh* Law [3], it was one Part of the Father's Power to cancel and make void the Vows of his Son, or of his Daughter. The Reaſon of which Conſtitution was not only for fear the Children, in their imprudent Age, ſhould ruin their own Fortunes by raſh Donations, moved by a falſe Appearance of inconſiderate Piety: But, likewiſe, leſt they ſhould imbezzle their Father's Goods on the ſame Score, or hinder themſelves from doing him the Service they ought. So that the reſtraining Authority, in this Particular, did not ariſe purely from the poſitive Ordinance, but had a Foundation in natural Reaſon; it being a known Principle, that no Perſon, under the Subjection of another, can, with any Force or Effect, diſpoſe of thoſe Things, with regard to which he is under Government. As for that Law in [4] *Deut.* xxi. 18, *&c.* about ſtoning the rebellious Son, which, in itſelf, appears ſo rigid, Care was taken to ſoften it, as far as poſſible, in the Interpretation. Thus they held that it did not extend at all to the other Sex; and that the Males, in two Periods of their Age, ſtood excuſed from its Force; when they were not arrived to the Maturity of Reaſon, and when they had left their Father's Family, and ſet up for Directors of their own Affairs. And then, the Words of the Accuſation running, *This our Son is rebellious, he is a Glutton, or a Drunkard*; there was a great Difference of Opinion how much the young Man muſt have waſted in theſe Exceſſes, before he could be proceeded againſt in this ſevere Method. They farther obſerved it to be requiſite, that both the Parents at the time of the Charge ſhould be alive; otherwiſe, the Son might have had ſome Fortune left him, ſufficient to make Compenſation for the Expence of his Vices [d].

Amongſt the preſent *Japoneſe*, the Father hath the moſt abſolute Power of Life and Death over his Children.

From theſe and other Conſiderations, it appears, how we are to underſtand that Rule laid down by *Grotius* [e]: *In the ſecond Period*, ſays he, *when the Childrens Judgment is ripe and perfect, thoſe Actions only of theirs are ſubject to the Command of the Parents, which immediately contribute to the well ordering of the Father's or Mother's Family: It being but equitable that every Part ſhould conform in promoting the Benefit of the Whole. In other Reſpects, the Children have a moral Liberty of doing whatever their own Judgment recommends; yet ſo that they are ſtill bound to take all poſſible care to pleaſe their Parents; though, ſhould they take contrary Meaſures, the Force of this Duty will not reach ſo far as to render their Actions invalid.* Theſe Words then are to be reſtrained to the Power of Fathers of Families, as now eſtabliſhed in moſt Chriſtian States; where

[a] This is the Judgment of *Mæſtertius de Juſtitia* Rom. *LL.* Ch. xxvii. [b] Lib iv. Ch. xlv. p. 247. Ed. *Rhod.* [c] Ælian. *V. H.* Lib. i. Ch. xlvii. [d] *Grotius* in *Deuteron.* xxi. [e] Lib. ii. Ch. v. § iii.

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[1] *Liban.* Declam. xxxiii p. 762. *Ed. Morell.* Μὴ γὰρ ἱκανὸν οἴεσθε, ὦ ἄνδρες δικασταὶ, δεσμὸν εἶναι τὴν φύσιν· ἀλλὰ κρατεῖ μὲν ὡς τὰ πολλὰ ὅταν δὲ τὰ νοσήματα τῆς ψυχῆς ἐξοιδαίνεσθαι γένηται, διακόπτεται· κἀ ὁ πατὴρ ἄλλο τι φαίνεται, τὸ τῆς ψυχῆς ἀναγκάζοντος πάθος. *Do not imagine that the Bond of Nature hath, of itſelf, ſufficient Force and Strength: Indeed, for the moſt part it holds firm and good; but any more violent Diſorder of Mind is able to break it aſunder; and a Father tranſported with Paſſion, lays aſide that Name and Relation, and acts quite another Part.*

[2] *Add.* Ælian. *V. H.* Lib. i. Ch. xxxiv. *Val. Max.* Lib. v. Ch. ix. § 4. *Add.* Charron. de la Sageſſe, *Lib.* i. *Ch.* xlii. xlvii. *Libanius* Declam. xxxv. *To do any thing againſt one's Children is the ſame as to undergo it one's ſelf.* The Sentence which the Men on this Side bring from *Lib.* xlviii. Tit. ix. Lib. v. *D. ad* L. Pompeiam *de Parricid.* *The Power of a Father conſiſts in Affection, not in Rigour*, contributes nothing to their Purpoſe. For *Adrian* had then baniſhed a Father for killing his Son as they were Hunting, on account of Adultery with his Mother-in Law. And the Father is there juſtly cenſured for taking off the Offender in a villanous and treacherous Manner, when he might have called a Council of Friends, and ſentenced him to capital Puniſhment by Virtue of his domeſtical Juriſdiction. Or it is enough to ſay, as to that Paſſage, that it is an Emblem of the good *Trebonianus*'s merciful Temper, who was the Author of it. See Mr. SPANHEMIUS's *Orbis Romanus*, Exercit. ii. Chap. xxiii.

[3] See *Numb.* xxx. 4, *&c.* with GROTIUS and LE CLERC's Notes thereon.

[4] This Text makes nothing for our Author's Purpoſe; becauſe it is probable that the Sentence was inflicted by the Judges, as Mr. LE CLERG proves againſt GROTIUS.

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the chief Buſineſs of it is taken up in Matters relating to Education. And 'tis indeed but juſt, that if the Children deſire to be ſupported at preſent by their Father's Wealth, and to ſucceed to it hereafter, they ſhould freely obey his Pleaſure, while enjoining nothing abſurd, or indecent. If, without ſufficient Cauſe, they refuſe thus to comply, it cannot be expected but that the Parents ſhould withdraw all farther Care and Expence on their account, and declare them Diſinherited. Yet here too it hath been the Care of civil Laws, to provide, that Parents ſhall not inhumanly diſcard their Children, upon every Fit of Humour and Paſſion, without ſolid Reaſon. Thus *Plato* [a] allows not a Father to caſt off his Son without the Conſent of the other Relations [b]. And, in general, as it belongs to the Wiſdom of publick Governments to ſettle the Rights of private Perſons, in Subordination to the common Benefit and Honour; ſo it hath been uſual with moſt Legiſlators, to prevent all Abuſes of this Power, whether tending to the publick Damage, or to the unjuſt Oppreſſion of the Children. For Inſtance, a Father is obliged, as far as his Abilities will reach, to render his Children uſeful Members of civil Society [c]: And ſince there is ſuch a Variety of Callings, ſo many different Ways of Living, it is very reaſonable that the Children, in chuſing their Profeſſion, ſhould be ſwayed by their Father's Judgment and Authority, provided he propoſe nothing contrary to Honeſty and Decorum; eſpecially in caſe he ſupply them with Money for carrying on of ſuch Deſigns. Yet it would be, at the ſame Time, a Breach of Wiſdom and Juſtice, to compel Children to a Method of Life, to which their Genius is utterly averſe; and a horrid Villany, to drive them to ſuch a Profeſſion as is either baſe and ſinful, as the waiting on the Stews; or intolerable to the common Temper of Mankind, as Celibacy without the Gift of Continence, and the Confinement of a monaſtick Vow.

XII. In the third Period of Age, when the Children have left their Father's Family, and are releaſed from his Command, they are perfectly at their own Diſpoſal, yet ſtill retaining the Debt of Reverence and Duty, which is of perpetual Obligation, ariſing from thoſe antecedent Merits of their Parents, which can never be cancelled or repaid [i]. *Plato* [d] is admirable on this Argument. *Juſtice requires*, ſays he, *that we endeavour to ſatisfy our greateſt and oldeſt Debt, our Debt to our Parents. Every one ought to be fixed in his Perſuaſion, that whatever he poſſeſſeth belongs to thoſe from whom he received his Birth and Education, and ought, ſo far as is neceſſary, to be ſpent in their Service. To them therefore he is freely to afford his Goods of Fortune, of Body, and of Mind; as if he had only borrowed them from their Kindneſs, and was now to reſtore them in their Age, when they had the greateſt Occaſion for them; gratefully remembering the Cares and Pains they long ſince underwent on his account. Nor ought we to expreſs our Reverence to our Parents in Actions only, but in all our Words and Converſation. We are obliged to yield to their Paſſions, and to the common Effects of them; ever conſidering what juſt Reaſon a Parent hath to reſent the leaſt Injury or Diſreſpect from a Child* [e]. He proceeds with the ſame Wiſdom, in adviſing what Honours and Services ſhould be paid to Parents after their Deceaſe; that we ought to grace their Reliques with a decent Monument, and purſue all Methods and all Occaſions of making their Memory ſacred. The *Chineſe* are remarkable in this Point of Duty; a Perſon engaged in the greateſt Affairs of the Court, upon the Loſs of a Parent leaves his Office, if not Military, and retires Home to ſpend three Years in Privacy and Mourning. The Reaſon of their fixing this Period of Grief was, becauſe the firſt three Years of our Life we give our Parents the greateſt Trouble [f]. Amongſt the ſame People the Son ever makes uſe of a lower Seat than his Father, and placeth himſelf at his Side, not over-againſt him. And indeed, that Children can never requite the Kindneſs of their Parents, is a Truth in every Body's Mouth [z]. Though *Seneca* [g] hath, for Oppoſition's ſake, endeavoured, in a long Diſpute, to prove that a Son may ſometimes even exceed a Father in Benefits: And *Alexander*, provoked once with ſome Complaints againſt his Mother, could not forbear ſaying, that *She made him pay very dear for his nine Months Lodgings* [h]. But how vaſt ſoever the Merits of our Parents be acknowledged, this is certain, that it will not bear them out in impoſing an unlawful Command; and therefore it was a brave Reply of the ſame Prince to the ſame Mother, urging him to put an innocent Perſon to Death, and reminding him of the Pains ſhe had undergone for his Sake: *My good Mother*, ſays he, *demand ſome other Reward for your Trouble; the Life of a Man is too precious to admit of any Equivalent* [i]. Mr. *Hobbes* [k] is of Opinion, that this filial Reverence ariſeth not only from the Law of Gratitude, but, likewiſe, from the Force of a tacit Compact; it not being preſumed

[a] *De LL.* Lib. xi. p. 973. [b] *Add.* Quintil. *Declam.* ix. Senec. *Contr.* i. 9. [c] And therefore it was one of *Solon*'s Laws, That a Child ſhould not be bound to maintain a Father, who had bred him up to no Art or Profeſſion, *Plutarch* in *Solon*. [d] *De LL.* Lib. iv. p. 832, 833. Ed. *Wech.* [e] *Vid. de LL.* xi. p. 975. *Arrian. Epict.* Lib. ii. Ch. x. *Remember you are a Son; and that it belongs to your Duty to think your Father's Good, in all Reſpects, your own: To yield Obedience to all his Commands; never to defame him to others; nor to do or ſay any Thing that may turn to his Prejudice or Inconvenience; to yield and give place to him on all Occaſions, and to aſſiſt him with your utmoſt Power.* Oppian. *Halieut.* Lib. v. ver. 89.

Πατρὶ δὲ γηράσκοντι νεὸν σθένος υἷες εἰσὶν. Sons are new Strength to a decaying Sire.

[f] Neuhof. *in Legat.* More Signs of their Mourning may be in *Martinius*'s Hiſt. *Sin.* Lib. i. *in* Imp. viii. [g] *De Beneficiis*, Lib. iii. Ch. xxix, xxx, *&c.* [h] Arrian. *de Reb. Geſt.* Alex. vii. [i] *Amm. Marcellin.* Lib. xiv. Ch. x. *Add.* Gell. Lib. ii. Ch. vii. [k] *De Cive*, Ch. ix. § 8.

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[1] PLATO's Words are, Γονέων δὲ μετὰ ταῦτα τιμαὶ ζώντων, ὡς θέμις, ὀφείλοντας ἀποτίνειν τὰ πρῶτά τε καὶ μέγιστα ὀφειλήματα χρεῶν πάντων πρεσβύτατα. νομίζειν δὲ ἃ κέκτηται καὶ ἔχει, πάντα εἶναι τῶν γεννησάντων καὶ θρεψαμένων πρὸς τὸ παρέχειν αὐτὰ εἰς ὑπηρεσίαν ἐκείνοις κατὰ δύναμιν πᾶσαν, ἀρχόμενον ἀπὸ τῆς οὐσίας· δεύτερα τὰ τοῦ σώματος· τρίτα τὰ τῆς ψυχῆς· ἀποτίνοντα δανείσματα ἐπιμελείας τε καὶ ὑπερπονήσεων οἷσπερ παλαιὰς ἐπὶ νέοις δανεισθείσας· ἀποδιδοντα δὲ παλαιοῖς ἐν τῷ γήρᾳ σφόδρα κεχρημένοις· παρὰ δὲ πάντα τὸν βίον ἔχειν τε καὶ ἐσχηκέναι χρὴ πρὸς αὐτοὺς γονέας εὐφημίαν διαφερόντως——Θυμωμένους τε οὖν ὑπείκειν δεῖν, καὶ ἀποπιμπλᾶσι τὸν θυμὸν ἐάν τ' ἐν λόγοις ἐάν τ' ἐν ἔργοις δῷσι τὸ τοιοῦτον ξυγγινώσκοντα ὡς εἰκότως μάλιστα πατρὸς υἱεῖ, δοξάζων ἀδικεῖσθαι, θυμεῖτ' ἂν διαφερόντως· τελευτησάντων δὲ γονέων ταφὴ μὲν ἡ σωφρονεστάτη, καλλίστη——τῷ δὲ μὴ παραλείπειν μνήμην ἐν δεξιᾷ παρεχόμενον, τούτῳ μάλιστ' ἀεὶ πρεσβεύειν. Read Mr. LE CLERC's Notes on *Exod.* xx. 12. and *Deut.* v. 16.

[2] *Ariſt.* Ethic. ad *Nicom.* viii. xvi. Οὐθὲν δὲ ποιήσας [υἱὸς] ἄξιον τῶν ὑπηργμένων ἀπέδωκεν· ὃν αἰεὶ ὀφείλει. No Perſon can fully return the Benefits of his Parents; but he who ſerves and reſpects them to his utmoſt Ability, may be pronounced Honeſt and Juſt. *Vid.* Xenophon. *Apomn.* Lib. ii. p. 431, 432. Ed. *Steph.* Stobæ *Serm.* lxxvii.

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that he who releaſeth another from his Rule and Dominion, intends ſo far to make him his Equal as not to reckon it to him as a Favour: But a Perſon, thus diſmiſs'd from Subjection, is ever ſuppoſed to promiſe, that he will conſtantly pay his Benefactor all thoſe external Marks, at leaſt of Honour and Eſteem, which Superiors are wont to receive from their Inferiors.

Yet it was, no doubt, a Strain of Superſtition in the *Jews*, when they would not allow a Son to let his Father Blood, to open a Sore for him, or to draw a Thorn out of his Fleſh [a].

Amongſt thoſe who live in a Commonwealth, it may happen, that, upon account of ſome Office or Dignity borne by the Son, the Father ſhall be obliged to do him Reverence, yet not ſo as to quit his Prerogative of private Reſpect [1]. Thus *Fabius Maximus* commended the Action of his Son the Conſul, who, as *Fabius* came riding towards him at a publick Meeting, ordered him to alight and make his Approaches to him on Foot [b].

Whether this perpetual Duty and Obligation of Children, remaining after their Father's Power is expired, ariſe from the Act of Generation, or from the faithful Care and Labour of Breeding them up, is a Controverſy that hath divided learned Men. Thoſe who contend for the former, are wont to tell us, that the Kindneſs of giving Life is not only, in its ſelf, the greateſt Good that can be beſtowed, but is, likewiſe, the Occaſion of all others; and that, by this Action of conferring a Being, the Parents do, in ſome meaſure, reſemble the Almighty Creator. Some, again, give their Judgment in favour of Education; as that which properly makes a Man deſerve his Name, and which is not performed without a long and difficult Courſe of Application and Expence. They illuſtrate their Opinion by this Obſervation in Nature, that amongſt Brute Creatures the Male is not diſcovered to have the leaſt Regard for the Young which he begets, and the Dam's Tenderneſs ceaſeth with her Care, when they are able to provide for themſelves; whereas the Affection between human Parents and Children is perpetual; which muſt needs be a Token that the great Tenderneſs on the one Side, and the Obligation to Duty on the other, do not chiefly reſult from that Act of the Parents which they exerciſe in common with Beaſts, but from their peculiar Diligence in forming and managing their Off-ſpring, in order to a Life of Decency and Society. *Ariſtotle* is cited in Defence of the former Notion, *A Father*, ſays he [c], *is the Cauſe of the Son's Exiſtence (which ſeems the greateſt of Benefits) and of his Nature and Inſtitution.* And again [d], *Men ſtand engaged in the higheſt Degrees of Friendſhip and Piety towards the Gods, and towards their Parents. For, from theſe they received the nobleſt of all imaginable Goods, their Being and Education.* On the latter of which Paſſages we may remark, that although the conferring of Life be firſt named, yet it is not expreſly compared with the other Benefit. *Philo Judæus* [e] is produced on the ſame Side; it is a Saying of his, *We can never return our Parents equal Favours; ſince we cannot repay, in the ſame manner, their Kindneſs of firſt bringing us into the World.* And thus too, the Father in the Declamation [f]; *We firſt produced you out of our own Life and Subſtance, and opened to your Proſpect this vaſt Scene of divine and human Things. We made you capable of ſeeing and of enjoying the Sea, the Earth, the unwearied Courſe of the Stars, the Heavens, with all their ſacred and ſhining Glories.*

Yet we cannot but deliver it as our Perſuaſion, that the Benefit of Educating is a much ſtronger Ground and Spring of filial Obligation, than the other of Begetting. *Plato* [g] ſeems to countenance this Opinion, *Parents*, ſays he, *ought either not to have brought their Children into the World, or not to refuſe any Pains in training and inſtructing them.* In another Place, [h] he introduceth *Demodocus* thus ſpeaking of his Son; *The Act (of planting ſhall I call it? or) of begetting my Son, was the eaſieſt imaginable; but the breeding him up was a Taſk of Difficulty and Trouble; ever filling me with Fears on his account.* And *Socrates*, in the ſame Dialogue, declares it as his Judgment, *I know not any Buſineſs in which a prudent Man ought to ſhew more Caution and Diligence, than in forming his Son's Mind to Goodneſs and Virtue* [i]. So the Father pleads in *Quinctilian* [k], *I do not now*, ſays he to his Son, *ſet to your Score theſe vulgar Favours of lending you Life, and Light, and Liberty; but whatever Bravery you have ſhewed, whatever gallant Action you have performed, this I charge upon you as my Merit; 'tis my Strength with which you have conquered. That Soul of yours, ſo unſhaken, ſo undaunted under the greateſt Dangers, had its Riſe and Original from mine. It hath been my long Employment to render you a Man of Abilities and Courage; in your early Years by my Precepts, and ſince, by my Example* [l]. It is not indeed eaſy to imagine or allow, that a Parent hath conferred any conſiderable Benefit on his Child, ſhould he caſt him away when he firſt comes into the World [2]; or, afterwards, entirely neglecting his Culture and Education, ſhould let him grow up like a Beaſt, to lead a Life uſeleſs to others, and ſhameful to himſelf [m].

[a] *Conſtant. L'Empereur* in *Babakama*, Ch. viii. § 3. *Add.* Selden. *de J. N. & G.* Lib. vii. Ch. ii. [b] Plutarch. *Fab. & in Apophthegm.* Valer. Max. Lib. ii. Ch. ii. § 4. *Add.* Bœcler *in* Grot. Lib. ii. Ch. v. § 6. [c] *Ethic.* viii. 13. [d] *Ibid.* Ch. xiv. [e] *Allegor.* Lib. i. p. 58. *in fin.* & Lib. ii. p. 62. D. Ed. *Pariſ.* [f] Quintil. v. [g] *In* Crito. *p.* 34. B. [h] Theag. *init.* [i] Eurip. Hecub. *Good Inſtitution is the Spring of Virtue.* [k] *Declam.* cclviii. [l] *Add. Declam.* cclxxviii. & Phædr. *Fab.* Lib. iii. Fab. xv. [m] *Si res nulla minoris conſtet patri, quam filius; If his Son ſtands him in the leaſt Charge of any thing he poſſeſſeth.* By the Law of *Solon*, in *Plutarch*, Children baſely born were not obliged to maintain their Parents. The Reaſon of which Exception was grounded on this Conſideration, that he who forſakes the honeſt Way of Marriage, plainly ſhews that he ſeeks a new Partner, not on the account of Iſſue, but of Pleaſure; and therefore his Vice is his Reward; and he can, by no means, complain of any Ingratitude in ſuch Children, becauſe he hath injured and diſgraced them by making their very Nativity a Reproach. *Add.* Vitruv. *Lib.* vi. *Præfat.*

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[1] *Nam, quod ad jus publicum attinet, non ſequitur* [*Pater*] *jus poteſtatis.* V. D. *Lib.* xxxvi. *Tit.* i. *Ad Senatus Conſult.* Trebell. *Lib.* vi. *princip.*

[2] Senec. *de Benef.* Lib. iii. Ch. xxxi. *Vis ſcire, quam non ſit magnum beneficium, vitam ſic dare? Expoſuiſſes; nempe injuſtè erat genuiſſe. Quo quidem colligo, minimum eſſe beneficium, Patris Matriſque concubitum, niſi acceſſerint alia, quæ proſequantur. Hoc initium muneris, & aliis officiis ratum facerent. Non eſt bonum vivere, ſed benè vivere—Tu me mihi rudem & imperitum, ego tibi filium, qualem genuiſſe gauderes.*

Juvenal's

Juvenal's [1] Reasoning is very just and true,

Gratum est quod patriæ civem, populoque dedisti,
Si facis, ut patriæ sit idoneus, utilis agris,
Utilis & bellorum & pacis rebus agendis.
Plurimum enim intererit, quibus artibus, & quibus
hanc tu
Moribus instituas.——

The State and People will your Zeal commend,
In giving that a Man, and these a Friend;
If fit to aid the publick Good; if skill'd
In rural Labours, or the martial Field,
Or grave Debates of Peace. Th' important Stake
Now waits your Care, what early Steps you take;
What Scheme of Arts or Manners is design'd,
To fix his Pains, or cultivate his Mind.

Aristotle [2] himself (who was cited to countenance the other Side of the Question) hath left this Saying on Record [a], that *Parents, who take Care to see their Children duly informed and instructed, deserve much higher Honours, than those who barely lend them a Being: The latter make them capable of living, the former of living honestly and happily.*

Nor doth that Consequence, on which the other Opinion is built, seem to hold; *Life is the greatest Good; therefore the Act of the Parent in giving that, is the most fit and proper to raise an Obligation in the Child.* For before I can charge any Action of mine on another, as a considerable Piece of Merit, it is necessary that I know to what Person I do the Kindness, and whether it will certainly reach him. Again, it will be convenient for me to reflect and consider, whether I really intended the Thing as a Favour; how much it stood me in; whether I undertook it more for the Sake of doing Good to the other Party, than for my own Pleasure, or Use; whether I was engaged in the Performance upon Reason and Deliberation, or was drawn to it by the Force of Passion, or Allurements of Sense: Lastly, whether the Action be capable of benefiting the other Person, without the Addition of some farther Services. Whoever diligently weighs these several Points of Enquiry, will be easily inclined to acknowledge, that the Kindness of Educating is much more proper to found an Obligation, than the vulgar Office of Begetting.

Yet we do, by no Means, approve of all that *Seneca* hath urged on this Head, in his Discourse of Benefits [b]. For he is not to be borne with, when he calls the Life of a Man, whom GOD hath endued with an immortal Soul, a *Thing common to us with the wild Beasts, with the smallest, and with some of the foulest of Creatures*; and, *the Happiness of Flies and of Worms.* But some Parts of his Argument may be admitted without Censure. [3] *Look*, says he, *upon my Nativity, as it appears barely in itself, and you will find it to be a short and uncertain Favour, a Subject lying equally open to Good and Evil. No doubt it was my first Step to all the Benefits I enjoy, but it was not, therefore, the greatest, because the first; nor, because the greatest, without it could never have been.* And again, *barely to live is the least Degree toward living well. I would thus talk with my Father: Suppose, as you first gave me my Life, so I had saved yours: In this I should certainly exceed your Kindness, for I conferred my Favour when you was sensible from whom you received it, and I to whom I did it; and then, I did not consult my own Pleasure, at least not my Pleasure alone, in the Performance. Would you conceive how small a Boon you bestowed on me in my Birth? Fancy yourself to have immediately cast me out to perish naked and helpless; in this Case your Act of Begetting me had been a manifest Injury. From all which I infer, that the Acquaintance of my Father and Mother had proved but a slender Kindness to me, had it not been followed with other good Offices which ratified and confirmed it* [c].

XIII. Lastly, As the Father ought not, without weighty Reasons, to expel the Children his House; so they, on the other hand, shall not, according to the regular Course, pass into another Family without his good Leave. Yet in case they have just Grounds for their Departure, and yet cannot prevail on their Father's Perverseness to give Consent, I should be of Opinion, that their Duty doth not hinder them from removing, so as to concert their own Affairs, contrary to his Humour; especially when they freely resign all future Dependence on him, for their Fortune and Inheritance. For as civil Constitutions wisely countenance and strengthen the Authority of Parents, so they are not wont to encourage impertinent Obstinacy and Moroseness. Nor doth

[a] In *Diog. Laert.* It is worth observing in *Martinius*'s Hist. *Sin.* Lib. iv. Ch. ii. what mighty Respect and Veneration the *Chinese* pay to their Masters; who, as *Juvenal* says, ought to be *Parentis loco*, to be honoured and obeyed as second Parents. The same Historian, *lib.* vi. Ch. i, reports, That the Son, in *China*, never riseth to a higher Degree of Honour than what had been formerly borne by the Father; and if, for his signal Services to the State, he be advanced farther, the Dignity, with which he is to be invested, is first to be preferred, by a kind of posthumous Promotion, on his deceased Father: That People esteeming Duty with Reverence to Parents, the first and chiefest of Virtues. [b] Lib. iii. Ch. xxx, *&c.* [c] A little after he stiles Generation a *Vulgar Benefit*; the Office of a Father, *Easy, slight, and of little Value*; *regarding any thing else, rather than the future Person to be produced.*

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[1] *Sat.* xiv. ver. 70, *&c.* He also speaks well to this Purpose. *Sat.* vii. ver. 184, *&c.*

Quanticunque domus, veniet, qui fercula doctè
Componat; veniet, qui pulmentaria condit.
Hos inter sumtus sestertia Quintiliano
Ut multum, duo sufficient: res nulla minoris
Constabit Patri, quam Filius.——

[2] *Solon* hath left us this wise Law, *Plutarch* in vita *Solon.* Ὁ γὰρ ἐν γάμῳ παροῶν τὸ καλὸν, ὃ τέκνων ἕνεκα δῆλός ἐστιν, ἀλλ' ὑβρεως, ἀγόμενος γυναῖκα, τόν τε μισθὸν ἀπέχει, καὶ παῤῥησίαν αὐτῷ πρὸς τοὺς γενομένους ἐκ ἀπολέλοιπεν, οἷς αὐτὸ τὸ γενέσθαι πεποίηκεν ἔνοχος.

That he that contemns the Honesty and Sanctity of Marriage, and desires Women only to satisfy his Desire, and not to have Children, has this Reward, that he has no Right over the Children that proceed from such a Conjunction, whose Life he has made an Eternal Disgrace.

[3] Senec. *de Benefic.* Lib. iii. Ch. xxx, xxxi, xxxiv. *Sed vide, ne illud verius sit æstimari, an id quod potui, & id quod feci, meum sit, mearum virium, meæ voluntatis. Illud quod natus sum, per se intuere quale sit: animadvertes exiguum & incertum, & boni malique communem materiam: sine dubio primum ad omnia gradum, sed non ideò majorem omnibus; quia primum.*—— *Puta me vitam pro vita reddidisse. Sic quoque munus tuum vici, cùm ego dederim sentienti, cùm sentiens me dare: cùm vitam tibi non voluptatis meæ causâ, aut certè per voluptatem dederim.*——*Ego vitam dedi statim illâ usuro: tu nescituro an viveret.*——*Paternum munus & simplex est & facile.*——*In quo consortem habet, in quo spectavit Legem patriam, præmia Patrum, domus ac familiæ perpetuitatem, omnia potius, quam eum cui dabat.*

it ſeem to be in the Power of thoſe who are Heads of ſeparate Families, to retain their Children, when they have reaſonable Occaſion to remove; inaſmuch as, in regular Commonwealths, it is not uſual to deny a Free-Subject the Liberty of tranſplanting himſelf, when tied to Reſidence by no particular Obligation.

XIV. To the ſame Head belongs that common Queſtion, Whether Children may diſpoſe of themſelves in Marriage againſt the Conſent of their Parents [a]? For the Solution of which we ought carefully and diſtinctly to conſider what is incumbent on Children by Virtue of their natural Duty; and what on Account of the Obedience which attends their State of Subjection: and again, what Rights belong to Fathers ſtrictly, as ſuch; what as they are the Heads of Families. Paternal Power, as ſuch, we have already obſerved to be juſt ſo great as is ſufficient to the Government of the Children, till able to be their own Managers. This therefore does not ſeem to extend itſelf ſo far as to the reverſing of a Matrimonial Contract: An Affair ſuppoſed to be carried on by Perſons of mature Age and Reaſon. Indeed the Duty of filial Piety and Reverence requires, not only that the Children apply themſelves to their Parents for Advice in theſe Proceedings, but, likewiſe, that they may make a Conſcience of oppoſing ſo awful Directions [b]. Yet if they happen to break their Duty in this Point, it doth not follow that the Act muſt be null and void. For an Obligation to hear and to reſpect another's Advice, doth not preſently diveſt a Man of the Power to govern his own Concerns. *The Liberty of a Son*, as [i] *Quintilian* obſerves, *if it be at all allowable, is ſo in the matrimonial Affair: For who can love by the Eyes, or by the Rules of another?*

But what ſhall we ſay of that other Power, which the Fathers hold as they are the Heads of Families? It is true, in many Commonwealths, the Laws have variouſly reſtrained the Liberty of Marriage. Thus, in ſome Places, no Perſon of the Royal Family can contract, without the King's Approbation; ſuch Matches often proving of very conſiderable Conſequence to the Publick. In *Japan* the Prince chuſeth Wives for his Nobles [c]. In ſeveral Countries Marriage contracted between a Subject and a Foreigner [z], between a Noble Perſon and a Commoner, are declared void. But as, in all States and Governments, a Liberty of marrying and of removing is ever ſuppoſed, except where there is either an expreſs Law to the contrary, or a Cuſtom equivalent to a Law; ſo in ſeparate Families, where moſt of the Reaſons fail, on which the civil Conſtitutions, about this Affair, are built; the Father of the Family doth not ſeem to have a Right of prohibiting or of reverſing his Childrens Marriage, when not defective in any thing but his Conſent: provided ſtill, that they are willing immediately to leave his Houſe; for it would be unreaſonable to bring a Perſon to live under his Eye whom he profeſſeth to diſlike. Yet, if a Father ſees his Authority ſlighted by his Children, without very ſufficient Grounds for their Non-compliance [e], he may, as a Puniſhment of that Neglect, exclude them from all preſent Benefits and all future Expectations [f].

What Rights thoſe Fathers of Families, who live not in a ſeparate Condition, but under ſome Commonwealth, in this reſpect enjoy, muſt be diſcovered by the Cuſtoms and Conſtitutions of different Nations. Amongſt the *Japaneſe*, Marriages are intirely directed by the Parents, or, if they are dead, by the next Relations [g]. And in *Peru*, under the antient Government of the *Ynca's*, all Matrimony engaged in, without the Parents Approbation, was declared null, and the Children illegitimate [h]. This, in general, is certain, that as the Laws of a particular Country may pronounce a Contract invalid, either becauſe defective in Form, or becauſe tranſacted between Perſons to whom ſuch particular Agreements are prohibited; they may, in like manner, ſuſpend the Validity of Marriage without the Conſent of the Parents; ſo that, if deſtitute of this neceſſary Condition, it ſhall paſs, in civil Eſtimation, for null and inſignificant [i]. For the Agreement of the Parties to cohabit like Man and Wife, can no more render Matrimony good, when contrary to Law, than the Bargain of a Minor, and the Delivery conſequent upon it, both undertaken without his Guardian's Influence, can effectually and irrevocably paſs away his Eſtate. Though Parents are to be admoniſhed, that, when the Government allows them ſo high a Prerogative, they ſhould be very cautious, and very merciful in putting it in Execution [k].

[a] V. *Grot.* Lib. ii. Ch. v. § 10.

[b] *Non æquum eſt pugnare, pater cui tradidit ipſe,*
Ipſe pater cum matre, quibus parere ne eſſe eſt:
Virginitas non tota tua eſt: ex parte parentum eſt.
Tertia pars patri data, pars data tertia matri;
Tertia ſola tua eſt: noli pugnare duobus,
Qui genero ſua jura ſimul cum dote dederunt. Catullus, 60.

'Twould be Rebellion to reſiſt thoſe Arms
On which your Parents have beſtow'd your Charms.
Your Virgin Jewel is not all your own,
A third each Parent claims, a third alone
Remains to you; forbear with Two to fight,
Who, in their Portion, give the Son the Right.

Thus *Hermione* moſt dutifully ſpeaks in *Euripides, Andromach. ver.* 987, 988.

———My Marriage is my Father's Care,
His Judgment guides my Choice.———

And *Xenophon Cyrop.* Lib. viii. tells us, that *Cyrus* would, by no means, engage in Nuptial Affairs without the Conſent of his Parents.

[c] Varen. *Deſcript.* Japon. Ch xii. *Add. Conſtit.* Sicul. Lib. iii. Tit. xxi. [d] *Geneſ.* xxvi. 34, 35. [e] Vid. *Lib* xxiii. Tit. i. Lib. xii. § 1. *D* De Sponſal. [f] *Vid Leg.* Wiſogoth. *Lib.* iii. *Tit.* ii. Ch. viii. *Leg.* Burgundion. Tit xiii. Ch v. [g] Varen. *Deſcrip.* Japon. Ch. xii. [h] *Garcilaſſo De la Vega*, Lib. vi. Ch. xxxvi. [i] *Vid Lib.* xxiii Tit ii *Lib.* ii. *D. De Ritu Nuptiarum, & Lib.* xlviii. *Tit.* v. *Lib.* vii. *D. ad* L. Jul. *De Adulter.* [k] *Add.* Bœcler. & Ziegler. *ad* Grot. *Lib.* ii. Ch. v. § 10.

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[1] Quintil. *Declam.* cclxx, ccclxxvi. *Nuſquam tamen libertas tam neceſſaria, quàm in matrimonio.——Quis enim amare aliquem animo poteſt?*

[2] According to the *Roman* Law, before the *Papian Poppean* Decree, no Man naturally free (*Ingenuus*) could lawfully marry a freed Woman. This became afterwards to be applied to Senators, and their Sons or Grandſons. See the *Antiquitates Roman.* of M. HEINECCIUS, *ad Inſtitut.* Lib. i. *Append.* § 35, 36. P. 265, 266. Edit. 2.

CHAP.

CHAP. III.

Of a *Master's Power.*

I. *What is the Relation of Master and Servant.*
II. *Servitude was not ordained by Nature:*
III. *Nor by God immediately.*
IV. *The Original of Servitude seems to have been from Contract.*
V. *War made the Number of Servants greater.*
VI. *What is the Duty of Captives to their Masters.*
VII. *They are almost of the same Nature with other Goods.*
VIII. *Yet an Injury may be done them.*
IX. *Of the Children of Servants.*
X. *The Inconveniences of Servitude.*
XI. *How many Ways a Servant may become free.*

I. AS the Husband and Wife (whence proceeds the common Off-spring) make the principal Parts of a Family; so Servants come in for inferior, secondary Members, to bear the Burthen of common Labour and Business. Now these being usually treated in a Way of severer Discipline, give Occasion to the forming of a new Species of Government on their Account; different from that which is exercised over Children, who demand a milder and more indulgent Sway. Yet we are persuaded, that neither this Society, between Master and Servant, can claim the Name of a Commonwealth or civil State, as Mr. *Hobbes*[a] is inclined to call it; not only because it generally consists of fewer Persons than are necessary for mutual Preservation, in a Condition of natural Liberty; but, likewise, because a Master furnisheth himself with Servants, not so much for the Sake of reciprocal Defence, as that, by means of their Labour, he may, in a more ample and more convenient manner, discharge his Domestick Affairs.

II. As to the Original of this kind of Society, we must, in the first Place, discard that old Opinion which makes Nature herself to have actually established the Relation of Master and Servant amongst Men. [1] It is true, we discover a strange Variety of Parts and Capacities. To give one Instance for all; we observe some Persons of so quick and piercing Sagacity, as to be able always to apprehend their own Interest and Benefit, and, at the same Time, of such Vigilancy, as to prosecute their Affairs by their own free Motion, without the Admonition or Compulsion of others. Some again are of so heavy Dispositions, as not to see their own Advantage, any farther than they are guided; being much fitter for the Labours of the Body, than the Imployments of the Brain; and further, so given over to Supineness and Sloth, as, unless they are forced and dragged to Application, they can manage no Concern with tolerable Care; nor so much as save or spend by the Direction of their own Judgment. The latter Kind are those whom *Aristotle* calls Slaves by Nature; not that Nature by her own immediate Act sets them in such a Condition of Bondage, without any human Deed or Covenant intervening: But because, by forming them with so much Disadvantage in their Frame, she hath rendered it more convenient for them to live under absolute Subjection and Controul, than to undertake the Government of their own Proceedings[b]. It was a Saying of *Agesilaus*, that *the* Asiaticks *were the worst of Freemen, and the best of Slaves:* Which *Passienus* turned upon the Emperor *Domitian*, when he observed, that *there was never a better Servant, and never a worse Master*[c].

III. *Hermius*, in his first Book *De Civitate*[d], harps upon the old String, in contradicting the general Opinion of the [2] Lawyers, who derive the Origin of Servitude from the Law of Nations. He says, *The Manner only of this Institution is to be referred to the Practice of Mankind; a Custom having prevailed amongst most People, to impose such a Condition upon their Captives in War. But we should always distinguish the Cause of the Society, from the Cause of the Sovereignty; the latter not being deducible from Custom, nor from the Law of Nations, but being established by* GOD *himself. For since all Victory is from* GOD, *and by his Providence the Conquerer gets into his Hands the Person of the Enemy, it follows, that the Life of the Captive might immediately be taken away: But since Humanity would scarce have suffer'd, that the Victor should always exercise this Rigour on an unarmed and suppliant Person, it was thought convenient to forbear Execution, and to retain his Power over the Prisoner, who might thus be of good Use in the Affairs of Life.* But indeed, as

[a] De Cive, *Ch.* v. § 12. [b] *V. supra*, Lib. iii. *Ch.* ii. § 8. [c] Tacit. *Ann.* vi. *Ch.* xx. [d] Lib. i. Ch iii.

[1] This Opinion is confuted at large, *Lib.* iii. *Ch.* ii. § 8. What our Author adds here, is an Abridgment of what he has there said, to which it is better to refer the Reader.

[2] Their Words are, *Servitus autem est constitutio juris Gentium, quâ quis domino alieno contra naturam subjicitur. Servi autem ex eo appellati sunt, quod imperatores captivos vendere, ac per hoc servare, nec occidere solent: qui etiam mancipia dicti sunt, eo quod ab hostibus manu capiuntur. Servi autem aut nascuntur, aut sunt: nascuntur ex ancillis nostris: sunt autem jure Gentium, id est, ex captivitate; aut jure civili, cum liber homo major viginti annis ad pretium participandum sese venundari passus est.* Instit. Lib i. Tit. iii. *De jure personarum*, § 2, 3, 4. We see here, that the Lawyers ascribed the first Origin of *Servitude* to the Right of War; in which they were as much mistaken, as in deriving the Etymology of the Word *Servus*, from *Servando*; whereas it comes from the Verb *Servire*, which signifies *to be useful*, as *Antonius Favre* has justly observed, in his *Jurisprud. Papinian. p.* 81. When we consider the Manner in which all human Establishments are made, and the Circumstances which many Persons must have been involved in, as a necessary Consequence of the Multiplication of Mankind; we can no ways doubt, but that *Servitude* became introduced insensibly, and by Degrees: And that it was not at first founded on any free Agreements, though Necessity might often occasion it, as our Author shews in the following Section. It is strange that the *Roman* Lawyers no where make mention of this other *kind of Servitude*, which is, at least, as conformable to natural Reason (by which they direct us to judge of what relates to the *Laws of Nations*) as that Slavery we are reduced to by Force of Arms. Perhaps this Silence proceeds from their Notions of the Civil Law, according to which, nobody could directly sell, or transfer, his Liberty to another, by any Agreement whatsoever. This is plain from the Exception alledged here of a young Man, who, being above twenty, suffered himself to be sold as a Slave by a third Person, from whom he received part of the Price: For then, by way of Punishment for the Deceit, which attended the Contempt he shewed for his Freedom, the Civil Law declared him, in earnest, a Slave. See § 7. *Note* 1. *infra* following.

the Occaſion of Mens engaging in War was ever partly their own Defence, and partly the Vindication of their Rights; ſo upon their obtaining the Victory, when they thought good to ſpare the Lives of the conquered, it was at their Pleaſure, either to put them in a State of Slavery, or only to keep them in Hold till ſuch Time as by Ranſom or Compact they ſhould be delivered. All which Privileges and Proceedings, together with the Authority over Perſons thus brought into Subjection, were not immediately appointed by GOD himſelf, but were approved by him upon human Inſtitution. Nor is that Aſſertion true, "The Victor ſtill retains that Power of Life and "Death over the Captive, which he once pro-"cured; and, conſequently, his Right is the "ſame, before he receives him into Fealty and "Service, and after he governs him as a Part of "his Family." For theſe are quite different Things. The conquering Party may, by the Right of War, diſpoſe how he pleaſeth of his Priſoner, either kill him or ſave him: But this was never before termed the *Power of Life and Death*, which denotes a lawful Authority of inflicting capital Puniſhment, in caſe of an antecedent Crime. Laſtly, what the ſame Author lays down, "That all Sovereignty, of what kind "ſoever, imports a Power over the Life of the "Subject, and therefore we muſt not ſeek for "Diſtinctions in the Power itſelf, but in the Ex-"erciſe of the Power; and, by conſequence, the "Authority of the Huſband over the Wife, of "the Father over the Children, of the Prince "over the People, is one and the ſame with "that of the Maſter over the Servant; except "that the Ways of Treatment are more kind "and gentle in the former Inſtances, than in the "laſt;" is an Argument, that we can, by no means, prevail with ourſelves to allow.

IV. In our Judgment, the Origin of *Servitude* ought thus to be traced out: In the early Ages of the World, when Men began to quit their primitive Plainneſs and Simplicity, to cultivate the Method of Living, and to enlarge their Fortunes and Poſſeſſions, it is very likely the wiſer and richer Sort invited thoſe of leſs Parts, and leſs Wealth, to aſſiſt them in their Buſineſs, for Hire. Afterwards, when both Parties found their Benefit in this Way of proceeding, the meaner Tribe were, by Degrees, perſuaded to join themſelves perpetual Members to the Families of the greater; under theſe Conditions, that the latter ſhould engage to ſupply Food and all Conveniences of Living, and the former ſhould bind themſelves to undertake all proper Labours and Imployments, as their Patrons ſhould direct. So that the firſt Riſe of Servitude is owing to the voluntary Conſent of the poorer and more helpleſs Perſons, and is founded upon that common Form of Contract, *Do, ut facias*; *I promiſe to give you conſtant Suſtenance, upon Condition you aſſiſt me with your conſtant Work.* What Power *Nature* allows a Maſter over Servants of this kind, may be eaſily diſcovered from the Ends of forming ſuch a Society[1]. He may enjoin them what Taſk he pleaſeth, [2] in Proportion to their Strength and Skill. He may, likewiſe, correct [3] their Sluggiſhneſs, by ſuch Methods of Severity as are moſt likely to prevail on their particular Diſpoſitions; though he cannot, on this ſcore, proceed to capital Puniſhments: So that the higheſt Degree of Penalty he can inflict on their Idleneſs is to expel the lazy

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1 GROTIUS, *Lib.* ii. *Ch.* v. § 30, diſtinguiſhes Servitude into 1. *Perfect*, and 2. *Imperfect*. The firſt he there treats on, the other is only for a certain Time, or on Condition, or for certain Things, according to certain Rules, or by the Laws of the Country, or by the Agreement of the Perſons concerned: See the Examples alledged by him. I ſhall content myſelf in reciting only what our Author ſpeaks in his Abridgment of the *Duties of a Man and Citizen*, Lib. ii. Ch. iv. § 2. about hired or domeſtick Servants. The Maſter, ſays he, owes his Servant the Wages agreed on, and the Servant is obliged to do the Work faithfully for which he is hired by his Maſter. Farther, as in this Contract, the Condition of the Maſter is more advantageous than that of the Servant, the Servant ought to reſpect his Maſter according to his Station in the World, and when through Malice, or Negligence, he diſcharges his Buſineſs ill, his Maſter may correct him with Moderation, but not inflict any corporal Puniſhment on him, unleſs it be inconſiderable, much leſs put him to Death by his own Authority. Mr. TITIUS, *Obſervat.* DXXIX. affirms, nevertheleſs, that this Chaſtiſement, as moderate as our Author ſuppoſes it, is not a direct Conſequence of the Rights of a Maſter over his Servant; for beſides, ſays he, that ſuch a Permiſſion ſeems what ought not to be allowed to Maſters in any well-governed State, the End of the Relation does not naturally require, that a Maſter ſhould have ſo great a Power over his Servant; it is ſufficient that the Servant be obliged, ſome way or other, to make good the Damage he has cauſed through his own Fault. But if he has deſerved Blows for doing ſome Wrong, or Injury to his Maſter, his Maſter doth not inflict them by way of Puniſhment, for that belongs only to the Magiſtrate, but by a Right of War, which allows us to revenge the Injury done us with Moderation. The Truth is, we muſt ſee here what the Laws and Cuſtoms of each Country allow. Nothing, in my Opinion, hinders us from ſuppoſing, that a Servant tacitly conſents, that his Maſter ſhould chaſtiſe him if he gives him Occaſion: Since, by a natural Conſequence of their Agreement, he engages to obey and reſpect him as a Superior, during the Time he remains in his Service. Nothing is more inſolent than a Domeſtic, who, whatever he does, is under no Apprehenſions of Puniſhment. The Obligation of repaying any Damage he may do his Maſter by Negligence, or Malice, is not always a ſufficient Motive to keep him in fear and reſpect: The rather, as, theſe ſort of People having nothing, the Maſter has no Means to indemnify himſelf. But yet our Author, in all this Matter, without doubt, ſuppoſeth, that no Servant or Slave is bound to obey his Maſter, if he command any Thing contrary to the Law of Nature, or the Nation he lives in. See GROTIUS, *Lib.* ii. *Ch.* xxvi. § 3.

2 We ought to obſerve, that one of the principal Reaſons for the Inſtitution of the Sabbath, was to procure Eaſe to Servants and Slaves: See GROTIUS, *Lib.* iii. *Ch.* xiv. § 1. and Mr. LE CLERC's Notes on *Exod.* xx. 10. and *Deut.* v. 14.

3 See GROTIUS, *Lib.* iii. *Ch* xiv. § 4. where, to ſpeak by the Bye, there is a falſe Quotation about Slaves, *Thou ſhalt not oppreſs thy Servant, nor rule over him with Rigour*, Lev. xxv. 17, 43, 53. and not out of *Deut.* xv. 17, 45, 53. and, likewiſe, the firſt Words, which are at *Ver.* 17, are not ſpoken of Slaves, for there it is ſaid, *You ſhall not oppreſs one another*, and it is ſpoken upon the Account of ſelling of Lands, which the Lawgiver forbids, upon any Pretence whatſoever, longer than the Year of Jubile. The ſame Fault is found § 2. Num. 2. where *Deut.* xviii. is quoted for *Lev.* xxv. But to return to our Subject. We ought to obſerve theſe two Laws chiefly, *viz. Exod.* xxi. 20, 21, and 26, 27. The firſt imports, That if a Maſter beats his Servant that he die under his Hands, he ſhall be puniſhed as a Murderer, but if he lives only a Day or two, the Maſter ſhall be exempted from that Puniſhment: And the Reaſon is, becauſe if the Slave dies not preſently, it is to be ſuppoſed, that the Maſter had no Deſign to ſlay him, and ſo it was thought a ſufficient Puniſhment to loſe what his Slave had coſt him, and his Service, which he might have had of him, which is meant, as Mr. LE CLERC expounds them, by theſe Words, *For the Slave was his Money.* I add, That upon a like Preſumption the *Roman* Law (when it took from Maſters the Power of Life and Death, leaving them only a Right to correct their Slaves with Moderation) diſtinguiſhed here, according to the Inſtrument which the Maſter uſed in killing the Slave. If it was a Whip or a Rod, it was ſuppoſed he only meant a legal Chaſtiſement. But if he ſtruck him with a Stick, Stone, or made uſe of any other hoſtile Weapon, it was preſumed he had a Deſign to kill the Slave. See *Cod.* Lib. i. Tit. xiv. *De emendat. Servor.* And Mr. NOODT, *Ad Leg. Aquil.* Ch vi. The other Law requires, That if a Maſter has ſmitten the Eye of his Servant, that it periſhes, or his Tooth, he ſhall let him go free as a Satisfaction for that Loſs; which without doubt hath Place, when the Damage is more conſiderable, with greater Reaſon: See the ſame Commentator.

lazy Drones from his Family, and leave them to their own beggarly Condition. Nor doth it appear, that he can tranſmit them to another Maſter, without their Conſent; they being really in the Capacity of [1] *perpetual Mercenaries*, or *Hirelings*, working for the Advantage of him that imploys [2] them, whilſt continuing in that State, but not at his diſpoſal, when obliged to leave it. Laſtly, if Perſons, in this limited Order of Servitude, commit any grievous Offence againſt the Members of another Family, their Maſter cannot, even on this Account, proceed to take away their Life. Yet, leſt he ſhould engage himſelf in Quarrels, by defending their Injuries and Crimes, he is allowed, or rather he is obliged to expel them his Houſe; which is a kind of delivering them up to Puniſhment. But if they prove guilty of any heinous Practice againſt the Maſter himſelf, and his Family, he may then juſtly kill them; yet not by Virtue of his Sovereignty, but as *Enemies*, by the Right of War [a].

And according to theſe Meaſures, the Condition of Servants and the Power of Maſters are, for the moſt Part, [3] deſcribed in the Old Teſtament.

V. The Convenience of diſcharging inferior Offices and Labours, by the Hands of others [b], being thus found out; in ſucceeding Times, when Wars grew frequent in the World, it paſſed, by Degrees, into a Cuſtom, to indulge Captives with Life and corporal Liberty, upon Condition that they ſhould yield perpetual Service to the Conqueror [4]. Thus *Diodorus Siculus* [c] reports of the antient *Egyptian* King *Seſoſtris*, that he performed all his publick Works by the Help of Captives; fixing this Inſcription on the Temples which he built, *None of the Natives have here imployed their Labour*. Now theſe Slaves of War were of courſe treated with ſeverer Diſcipline, being ſuppoſed ſtill to retain ſome Sparks of hoſtile Hatred. Beſides, an Act of Cruelty was judged ſomewhat excuſable, when practiſed upon thoſe who had formerly made an open Attempt on the Life and Fortune of their preſent Maſter; and the Licenſe in this Point improved ſo far, that it was eſteemed a harmleſs Matter to kill them, either in Violence of Paſſion, or upon committing any Offence [d]. This Privilege being once introduced, was extended, though upon leſs Pretence, to the Children of the Vaſſals; and to their Slaves, if they happened themſelves to be *inferior Maſters*. Yet, in ſome Commonwealths, it was quite taken off by publick Decrees, and in others very much abridged and reſtrained. The primitive Inſtitution therefore of Servitude was not founded on War, but on voluntary Conſent; though the Chance of War ſupplied Occaſion, not only to the increaſing the Number of Slaves, but to the rendering their Condition more hard and grievous [5].

VI. Let us ſee how Mr. *Hobbes* [e] derives the Sovereignty of Maſters, and the Subjection of Servants, from his *State of War*. And, firſt, we muſt diſcard that fundamental Error of his, that from the Condition of Nature, which he calls a War of every Man upon every Man, there can reſult to any Perſon a Right of invading another, and of reducing him into Servitude upon gaining the Victory. Yet thus much is Senſe; that as, by the Right of War, an Enemy may fairly be killed [5]; ſo the Conqueror may, if he pleaſeth, give him his Life, upon his Promiſe of perpetual Service. In which Contract and Compoſition, the Good which the vanquiſhed receives, is the Security of his Life, which, by the Right of War, might have been taken away; and the Good which he engages to bring to the Victor, is his Service and Obedience, and thoſe, as far as poſſible, *abſolute*. For he that obligeth himſelf to perform the Commands of another, before he knows the Particulars, is bound, without any Limitation or Exception, to do all that the other Party ſhall enjoin. Though the Law of *Humanity* affords ſome Relief and Temper to this rigorous Juſtice [g].

Farther, Mr. *Hobbes* [h] rightly obſerves, that not every Captive in War is thus ſuppoſed to covenant with the Conqueror. For ſome do not obtain an abſolute Grant of Life, but a temporary Reprieve to ceaſe at the Conqueror's Pleaſure; which was the Caſe of thoſe whom the *Romans* preſerved to adorn their Triumphs, and to entertain their Amphitheatres. Nor is ſo much Truſt and Credit given to every Captive, as that his Maſter ſhould venture to leave him ſuch a Degree of *natural Liberty*, as might enable him, were he ſo inclined, either to run away, to refuſe Working, or to attempt any Miſchief or Damage againſt the Family. Such a one, therefore, performs Service, not upon Account of mutual Faith and Contract, or by virtue of a moral Tye, but upon mere Force, like brute Creatures; being

[a] Yet after another Mannner than the Old *Germans*, who killed their Slaves, as *Tacitus* ſays, *Not out of Diſcipline and Severity, but pure Heat of Paſſion.* [b] Hence *Ariſtotle* (Polit. iii.) calls a Servant, Ὄργανον πρὸ ὀργάνου. [c] Lib. i. Ch. lvi. p 52. Ed. *Rhodom.* [d] *Add.* Grot. *Lib.* iii. *Ch.* vii. § 3. [e] *Add.* Bœcler *ad* Grot. *Lib.* ii *Ch.* v. § 27. [f] De Cive, *Ch.* viii. § 1. [g] *Vid.* Grot. *Lib.* iii. *Ch.* xiv. [h] *Ubi ſupra*, § 2, 3, 4.

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[1] *If thy Brother be waxen poor, and ſells himſelf to thee, thou ſhalt not conſtrain him to ſerve, as a Slave, but he ſhall be with thee, as an hired Servant, or a Sojourner to the Year of Jubile*, Lev. xxv. 39, 40. CHRYSIPPUS, as SENECA tells us, ſaid, That a Slave is a perpetual Servant. *Servus, ut placet Chryſippo, perpetuus mercenarius eſt.* De Benef. *Lib.* iii. *Ch.* xxii.

[2] That is to ſay, *The Produce of their Labour*, as our Author himſelf expreſſes it, in the Abridgment of *the Duties of a Man and Citizen*, Lib. ii. Ch. iv. § 3. And as appears by what he ſays a little lower, about the End of § 7.

[3] *Exod.* xxi. 21, *&c. Deut.* xv. 17, 43, 53, *&c. Sirac.* xxiii. 25, *&c.*

[4] See BUSBEQUIUS's *Epiſt.* iii. & CHRISTOP. RICHERIUS, *de Moribus Orientalium.* As to the Original of this Cuſtom, it is an Aſſertion of PLINY's, that *the* Lacedemonians *invented Servitude* (Lib. vii. Ch. lvi) which cannot be admitted, except in one of theſe two Senſes, either that they were the firſt in *Greece* who introduced this Practice, or that they made Slaves of their Countrymen the *Grecians*, as well as of the *Barbarians*, when taken in War. The former Senſe is favoured by that Place of HERODOTUS (*Erato*, towards the End) where ſpeaking of the Iſland *Lemnos*, its being ſeized by the *Pelaſgians*, he adds, *Neither they nor any other of the* Grecians *had then Slaves.*

[5] *Hobbes* does not ſpeak here of a *juſt War*, nor indeed is it neceſſary, according to his Principles; for, as he deſcribes the *State of Nature*, all War is juſt between People in that Condition. But if we reaſon upon better Principles, it is true, that he who in Conſcience knows, or may eaſily know, that he has taken up Arms unjuſtly, cannot make uſe of the Right he has acquired over his Priſoners, nor indeed improve any other Advantages he gains in ſuch a War. But it does not follow from hence, that the Engagement of a Priſoner towards the Conqueror, who ſpares his Life, is null, whenever the latter has not Juſtice on his Side. This would be to carry the Matter too far, and tend to invalidate all Treaties made between Enemies. We muſt apply, here, what I have ſaid upon *Grotius*, Lib. iii. Ch. vii. § 6. *Note* 2. and Ch. xix. § 11. *Note* 1.

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kept in Fetters, or under cloſe Confinement. The Obligation, therefore, of a Slave of War towards his Maſter, doth not ſpring from the bare ſaving his Life, nor deferring his Death; but is built on his Exemption from Chains and Impriſonment. By this Act the Maſter expreſſeth ſo much Confidence in him, as to leave him poſſeſſed of corporal Liberty; by which means, if no moral Bonds and Engagements had paſſed between them, the State of War would ſtill continue; and the Slave might not only make his Eſcape, but might fairly ſlay his Preſerver [a]. From all which it is clear, that there is a great Difference between thoſe Slaves who are ſecured in Priſons, Workhouſes, and the like, and thoſe who are tied by Covenant to their Maſter: The former ſerving not out of Duty, but to avoid Puniſhment; and, conſequently, not acting againſt the Law of Nature, ſhould they either run off, or aſſault their Maſter's Life. For to hold a Perſon in Chains, or Durance, is a Sign, that we do not think him ſufficiently enſured to us by any Obligation, or moral Reſtraint.

Yet that Aſſertion of Mr. *Hobbes* cannot paſs for Truth, that *the Maſter hath altogether the ſame Right over the Slave, whom he thus keeps in Bonds, and him whom he holds only by Articles; inaſmuch as his Right over both is ſupreme.* For that kind of hoſtile Privilege, which the [1] Victor reſerves to himſelf over his Priſoner, is a different Thing from his proper Sovereignty: Since, by means of the former, the Captive may, at any Time, be deprived of his Life, under Pretence of the State of War, from which he ſeems to be not yet perfectly exempted; whereas the higheſt Degree of ſovereign Rule or Dominion doth not directly include a Right over the Life of the Subject, except on a criminal Account.

VII. But although *Dominion*, which is properly the Right of governing another's Perſon, when eſtabliſhed with the free Conſent of the Subject, cannot regularly be transferred without his good Liking; Men having uſually peculiar Reaſons why they chooſe to ſubmit to this Perſon rather than any beſides: Yet in thoſe kinds of Dominion which are grounded upon [2] Force, it hath been ever judged allowable for the Sovereign to alienate them by his own ſole Will and Act. Yet ſo long as the Subjects enjoy any Remains of Liberty, we cannot in Strictneſs ſay, that the Men themſelves are thus alienated or made over, but only the Right of governing them, as being joined with ſome Uſe or Advantage. Every Sovereign may indeed, as Mr. *Hobbes* [b] remarks, ſay of his Subject, *Hic meus eſt*; *This Man is my Property*, yet it is in a quite different Senſe that we call a Thing our own. For by the former Expreſſion I mean no more, than that I, and none elſe, have the Right of governing ſuch a Perſon; yet ſo as to be myſelf under ſome kind of Obligation to him, and not impowered to exerciſe that Right upon him, in an unlimited abſolute Manner. But, on the other ſide, the Property I claim over a Thing, implies a Right of uſing, ſpoiling, and conſuming it, to procure my Advantage, or to ſatisfy my Pleaſure; ſo that what way ſoever I diſpoſe of it, to ſay it was my own, ſhall be a ſufficient Excuſe. It muſt be confeſſed, that although the Law of Humanity doth, by no means, allow us to extinguiſh all Marks of primitive Equality in a Slave, who, whatever he may have formerly deſigned, is now in a Condition of Peace and Kindneſs with us, ſo as to uſe him in the ſame Manner as a Beaſt or inanimate Creature, towards which we cannot ſtand under any Engagement; yet the barbarous Cruelty of many Nations hath proceeded ſo far, as to reckon their Slaves in the Number of their Goods and Poſſeſſions, and to treat them not in a Way of Sovereignty, but of arbitrary Violence, [3] calling them their own in the ſame Senſe, as their Cattle. Amongſt theſe People, if a Maſter performed the leaſt Good towards his Vaſſal, he did it purely for his own ſake, leſt he ſhould ſuffer by loſing him; and the poor Wretch was pitied only upon account of his Price [c]. But all this is not enough to prove what Mr. *Hobbes* affirms, that *whatſoever the Slave poſſeſſed before his entering on that Condition, doth then fall to his Maſter*: which can be admitted only in this qualified Senſe, *That as much as the Slave was, before his Captivity, able to get by his Work, ſo much his* [4] *Maſter may now claim, and oblige him to make good.* When a Man voluntarily engageth in Servitude, he may indeed deliver up his little Poſſeſſions, as well as himſelf, into his Maſter's Power. But there is no conſtant Neceſſity of thus proceeding. And as for thoſe Perſons, who, in antient Times, ſold themſelves into Slavery, it is probable, that they retained not only the Price given, but, likewiſe, their former

[a] See *Locke*'s Treatiſe of civil Government, *Ch.* iii. § 2. [b] *Ubi ſupra*, § 4. [c] *Add.* Dio. Chryſoſt. *Orat.* xv. *De Servitute*, p. 241. Ed. *Morell.*

[1] The Captive having deſerved to loſe his Life, as we ſuppoſe, it is no Injury to him to make him a Slave; and if he finds his Slavery more unſupportable than Life is ſweet, he may procure his Death at any Time, by diſobeying his Maſter. But when once there is an Agreement between the *Conqueror* and the *Slave*, by Virtue of which the *former* acquires a limited Power, and the *latter* engages himſelf to a limited Obedience; the State of War and perfect Slavery immediately ceaſes: For a Man cannot give another more Right over his own Life than he has himſelf. Mr. LOCKE's ſecond Treatiſe of *Government*, Ch. iv. § 23.

[2] The Right of *Alienation* does not here flow from *Subjection*, as I have obſerved in the Abridgment of *the Duties of a Man and a Citizen*, Lib. ii Ch. iv. § 5. Note 1. *Edit.* 4. To which we may add what I have ſaid on the Subject of *Patrimonial Kingdoms*, in my Notes upon GROTIUS, *Lib.* i. *Ch.* iii. § 2. *Note* 4. *Onerous* Engagements ſhould never be extended beyond their due Bounds; and there is a great Difference between our ſubmitting to the Power of another, and our giving him a Right to alienate that Power. Force is ſo far from making a Diſtinction here, that it rather authorizes its Reſtriction. When we ſubmit willingly to any one, as by doing ſo we expreſs a good Opinion of him, and promiſe ourſelves ſome Advantage by being under his Power, we would incline to grant him his own Conditions. But when we are forced, eſpecially by a declared Enemy, we engage ourſelves as little as poſſible, both on account of our natural Reluctance, and to avoid Inconveniences. The Buſineſs is his, who forces us, to exact from us a very expreſs Conſent, with Reſpect to whatever does not flow from the Nature of our Subjection; unleſs Cuſtom gives Room to preſume this Conſent on our Part.

[3] In the *Roman* Law, a Runagate Slave is ſaid to rob himſelf. *Ancilla fugitiva quemadmodum ſui furtum faciat interrogatum eſt. Ita partum quoque contrectando, furtivum facit.* Digeſt. *Lib.* xlvii. *Tit.* ii. *De Furtis*, Leg. lx. See, alſo, *Cod. Lib.* vi. *Tit. De Serv. fugit.* Leg. i. and *Quinctiliam.* Declam. vi. The poor Man, who by the Chance of War had been made a Captive and Slave, had Reaſon to ſay, *Meipſum perdidi*; *I have loſt myſelf.*

[4] This is by ſuppoſing a real Right of Property over the Perſon of the Slave, ſuch as Cuſtom gives, even at preſent, in Countries where Slavery is not aboliſhed. But this is no Conſequence of the Nature of Slavery itſelf, by Virtue of which the Maſter only acquires acquires a Right over the Actions of his Slave, and what he gains by his Labour. Therefore nothing hinders that the Goods which may accrue to a Slave by Donation, Teſtament, or Inheritance, ſhould be properly his own.

Goods, at leaſt, in the Manner of their *Peculium*; *ſo as to have themſelves the Property and Management of them, though their Maſters had the chief Advantage*; or elſe, that they ſurrendered them up to their Children, or [1] aged Parents, whom before they were obliged to maintain. Tho' indeed the [2] *Jewiſh* Doctors held it unlawful for a Man to ſell himſelf, except under danger of Starving. Amongſt the *Romans*, it was a known Trick with Sharpers, to ſuffer themſelves to be ſold, for the ſake of going Sharers in the Price: And for their Puniſhment they were condemned to real Servitude. The Cheat was this: *Caius*, ſuppoſe, pretended *Seius* to be his Slave, and, accordingly, offered him to Sale, though indeed a Freeman: *Seius* being, upon Bargain, to receive a good Part of the Gain, conſented to the Proceeding. But the Man being once paſſed off to the Cuſtomer, and the Price delivered; a third Perſon was ſuborned to claim *Seius* in the Court as a Freeman, by preferring an *Action* againſt the Purchaſer; who (*Caius* being thus, in the mean time, ſlipt out of the Way) was thus doubly cheated of his Money, and of his Man [a] [3].

If a Man be compelled to Servitude by the Right and Courſe of War, the Goods which are taken with him ſhall be the Victor's. But thoſe which are not taken with him ſhall be as if he were naturally dead: At leaſt till ſuch time as he recovers his Liberty. Thus much is certain, that what the Slave gets during his Servitude, he gets for his Maſter. For to whom any Perſon fully belongs, to him ſhall belong whatever that Perſon can procure or produce. And in this Senſe Mr. *Hobbes* ſays truly enough, that *the Slave hath nothing which he can retain as his own, in Prejudice to his Maſter's Title.* Yet what his Maſter peculiarly aſſigns or allows him for Management or Uſe, he may keep and defend, againſt his Fellow-Servants; as Victuals, Cloaths, Lodgings, Vails, and the like [b].

VIII. When the ſame Author [c] adds, that *a Slave cannot be injured*, the Words are not fit to be received without many favourable Allowances, large Abatements, and Limitations. The Argument which he makes uſe of, *the Slave having ſubjected his Will to the Will of his Maſter, whatever the latter does, is done with the Will of the former, and therefore can be no Injury to him*; only proves thus much, that the Slave ought not to complain, whatever Work is enjoined him by his Maſter, provided it lie within the Compaſs of his Strength, though never ſo contrary to his Inclination: No more than a Subject can pretend he is unjuſtly dealt with, when an abſolute Prince doth not manage things to his good Liking. That this *Subjection of Will* amounts to nothing more, we will elſewhere fully evince. In other Matters, who will deny but that it is an Injury to a Slave, to ſet him a Labour above his Ability; [4] to beat him for not performing ſuch an impoſſible Taſk; or to deny him neceſſary Food [d]? The *Jews* were ſo inhuman, as to think themſelves not obliged to furniſh a *Gentile* Slave with Cloaths, or Victuals, though, at the ſame time, they exacted from him the hardeſt Services, with all imaginable Cruelty [e]. The Reaſon of this barbarous Rigour might probably be, becauſe they had themſelves ſuffered the like Treatment in *Egypt* [f]. And as for that Command in *Leviticus* xxv. 43. prohibiting Severity, they confined it to Perſons of their own Nation. The *Romans* in their Cuſtoms and Laws, as to the Point of Food, expreſſed more Kindneſs [g]. It was a noted Saying of *Cato*'s, that *to quarrel with Servants about their Bellies, looks ſcandalouſly mean* [h]. Yet, in other Reſpects, the *Roman* Maſters were remarkably unmerciful; As in ſelling their Slaves, when grown aged and unfit to Work; a Practice which *Plutarch* [i] juſtly cenſures, upon this Argument, that *it is natural for Men to expreſs ſome kind of Clemency and Beneficence, even to brute Creatures*, which have un-

[a] We have an Inſtance of this Trick in *Plautus*, Perſ. *Act.* iv. *Sc.* iv. & ix. [b] *Vid.* Plin. *Lib.* v. *Epiſt.* xvi. [c] *Ubi ſupr.* § vii. [d] *Theano* (*Epiſt.* iii. *in Opuſc. Mythol. &c.* p. 746) makes it neceſſary to the juſt Uſe of Servants, that *They be rather broken by Labour, not by Want.* [e] *Vid.* Selden. *de J. N. & Gent. ſec. Hebr.* Lib. vi. Ch. viii. [f] *Exod.* v. 13, 14. [g] *Vid.* Lib. i. Tit. vi. Lib. i. § 2. De his qui ſui vel alien. jur. ſunt. & *Lib.* vii. *Tit.* vi. *Lib.* i. § 3. *C.* De Latin. Lib. Toll. [h] *Plut.* in *Cat.* M. [i] *Ibid.*

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[1] In the firſt Epiſtle of St. *Clement*, it is ſaid, That ſeveral Chriſtians ſold themſelves ſo to maintain other People, Ch. lv. a Paſſage which Mr. *Schulting* has not failed to quote in his *Juriſp. Ante-Juſtin*, p. 299. Sometimes a Son has been known to ſell himſelf, in order to redeem his Father from Slavery with the Purchaſe Money. The antient Lawyers ſuppoſe ſuch Caſes as common. See SALMASIUS, *De modo Uſurarum*, p. 861, & *ſeqq.*

[2] *Vid.* Selden *De J. N. & G. ſec. Hebr.* Lib. vi. Ch. vii.

[3] Here are ſome Things to be corrected. 1. Our Author maintains that the Buyer ſhould loſe his Slave; and yet he explains the Manner of becoming a Slave, according to the *Roman* Law, by ſuffering himſelf to be ſo ſold. By whom then was the Slave purchaſed? 2. The Author's Concluſion does not agree with his Premiſſes; he endeavours to ſhew how the Sale of a Freeman was valid, and yet what he ſays ſhews that it was null. 3. The Truth is, ſuch a Sale was ſometimes valid, ſometimes invalid, according as it had, or had not, the Conditions required by the *Roman* Law, and which our Author ſeems not to have attended to. For it was neceſſary that he who let himſelf be ſold ſhould be above Twenty; That he ſhould be out of his Father's Power; That he ſhould be ſubject to no Patron; That he ſhould believe himſelf free, and, on the contrary, that the Buyer ſhould be ignorant of it; and that he ſhould have received Part of the Price ſtipulated to be paid by him who ſold him. If any one of theſe Conditions, failed he might reclaim his Liberty. 4. When the Sale was null, by the Defect of any of theſe Conditions, if the Seller was diſcovered, and was ſolvent, the Buyer might loſe his Slave, but not his Money, for he might demand an Indemnification for all that the Fraud had coſt him. We may find Proofs of all this in the Interpreters of the *Roman* Law, in the Paſſage of the *Inſtitutes* quoted above, Note 2. p. 611. and *Digeſt.* Lib. xl.

[4] We ought always to remember, that they are human Creatures: *Theano*'s Greek is, Ἵνα μήτε διὰ τὸν πόνον κάμνωσι, μήτε διὰ τὴν ἀνδρίαν, εἰσὶ γὰρ ἄνθρωποι τῇ φύσει. To the Quotations of the Author, may be added what *Petronius* makes *Trimalchion* ſay, *Amici, & ſervi homines ſunt, & æquè unum lactem biberunt, etiamſi illos malus fatus oppreſſerit*, Chap. lxxi. upon which the Commentators have heaped up many Authorities. But the *Jews* believed, that they were not obliged to uſe any Kindneſs to Slaves, except of their own Nation: See *Selden de Jure Nat. & Gent.* &c. *Lib* vi. *Chap.* viii. Further, Our Author in his Abridgement of the Duties of a Man and Citizen, *Lib.* ii. *Chap.* iv. § 5, ſays, That if we ſell or alienate a Slave in any other manner, we ought not deſignedly, and without his Deſert, to put him into the Hands of ſuch as will uſe him inhumanly. I will, alſo, add here, that there was a Law among the *Greeks*, which allowed Slaves, when they were uſed hardly by their Maſters, to require that they might be ſold to ſuch as would uſe them better: See *Plutarch. de Superſtit. & Pollux. ib.* vii. § 13. The Emperor *Antoninus Pius* commanded much the ſame Thing, in a Law above quoted, *Digeſt. Lib.* i *Tit.* vi. *leg.* ii.

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dergone Labours for their Advantage [a]. On the whole, *Ariſtotle*'s Reaſoning will ever hold good; *We owe*, ſays he, *ſome Friendſhip even to a Slave; not as he ſtands in that Relation, but on the account of his being a Man: Since there is a common Right, which each Perſon may claim in regard to every other Perſon, with whom he is capable of partaking in Laws, or Covenant* [b].

As the other Rights of Fathers of Families have been moderated and reſtrained by national Conſtitutions; ſo it hath happened to this Authority over the Slaves, which, in different Countries, we find more or leſs reſtrained. But where it remains abſolute and unlimited, we muſt ſuppoſe it not to have been thus appointed by *civil* Ordinances, but to have been paſſed by, and left it as formerly ſtood, before the Erection of Commonwealths. Yet it is obſervable, that the Laws of ſome States encourage the Cruelty of Maſters, and impoſe greater Hardſhips on the Slaves, than the Law of Nature permits, under the moſt abſolute Command. We have a famous Inſtance of this in the *Roman* Cuſtom, of dragging the whole Family to Puniſhment, when the Maſter happened to be killed: Which *Caſſius* in *Tacitus* [c] endeavours to defend, by Arguments drawn from Uſe and Convenience. The Emperor *Adrian*, in ſome Meaſure, leſſened this Severity, by decreeing, That upon ſuch a Misfortune, not all the Slaves ſhould be arraigned for Murder, but thoſe only who were ſo near in the Houſe, as to be able to hear and apprehend the Miſchief [d].

IX. About the *Off-ſpring of Slaves* there are two Points of Enquiry, Whether it neceſſarily follows the Mother? And whether it aſſumes the ſame Condition of Servitude? As to the former Queſtion, it is a Rule in the *Roman* Laws, which holds of Slaves, as well as of Beaſts, that *Partus ſequitur ventrem* [1], *the Birth goes along with the Bearer*. This *Grotius* [e] judgeth not to be altogether conſonant to the Law of Nature, in caſe the Father can, by ſufficient Tokens, be diſcovered. "For, *ſays he*, ſince we may obſerve, even in ſome brute Creatures, that the Sire, as well as the Dam, expreſſeth a Care for the Young; we may hence infer, that both have an equal Intereſt in their common Iſſue; and, therefore, if the municipal Laws are ſilent in this Point, the Father's Claim is as good as the Mother's [f]." But we do not think this Argument of any Force; having before proved, that the original Right over the Child is in the Mother; and only transferred to the Father, according to the Tenor of the matrimonial Covenant.

As for the other Difficulty; ſince in a Condition of perfect Slavery, not only the Works, but the Perſons belong to the Maſter, their Children will, likewiſe, fall under his Dominion, as every Thing elſe which they produce [g]. Now why the *Maid*'s Maſter ſhould have a better Title in the Caſe, than the *Man*'s, there are ſeveral Reaſons to be given. As, firſt, conſidering the Life and Familiarity of Slaves, to point out the true Father, might prove a Matter of Difficulty [h]. Again, the Mother is, on account of her *Burthen*, rendered, for ſome Time, unfit to perform her uſual Work; and, conſequently, brings a Loſs and Prejudice to her Maſter, which ought thus to be repaired. To which we may add the common Maxim, that *Things planted belong to the Proprietor of the Soil* [2]. If the Maſter himſelf have Iſſue by his Female Slave, the Condition of it ſhall be ſuch, as either his Pleaſure, or the Laws of the Country ſhall determine. And by them, likewiſe, Judgment is to be paſſed on a Child, which was conceived by the Mother, whilſt in a State of Servility, but born after ſhe had obtained her Freedom; or *vice verſâ*. Though Humanity ever inclines to the favourable Side, and [3] declares for the Child's Liberty [i].

[a] Plaut. (Menæchm.) *If you are deſirous of keeping a Slave ſecurely, you muſt tie him to you with large Commons. You may eaſily pin down a Fellow's Noſe to a full Table.* *Juvenal* (Sat. xiv. ver. 125.) cenſures the Miſer, that

Servorum ventres modio caſtigat iniquo,

With ſcanty Meaſure ſhrinks his Servants Guts.

It was a commendable Decree of *Claudius*, which *Suetonius* mentions (Ch. xxv.) *When certain Perſons had expoſed their ſickly and crazy Slaves, in the Iſland of* Æſculapius, *being weary of providing for their Cure; he ordered all thoſe who had been thus expoſed, to be declared free, and not to return to their old Maſters, if they happened to recover; at the ſame time Enacting, that ſuch Perſons as choſe rather to kill their Slaves, than thus to diſpoſe of them, ſhould be held guilty of Murder.* We meet with the ſame Account in *Dion. Caſſius*, Lib. lx. [b] Ethick. *ad* Nicom. viii. 13. *Add.* Oeconom. Lib. i. Ch. v. Senec. *De Ira*, Lib. iii. Ch. iv. *De Clement.* Lib. i. Ch. xviii. & *Epiſt.* xlvii. Arrian. Epictet. Lib. i. Ch. xiii. [c] *Ann.* xiv. Ch. xlv. [d] *In* Spartian. *Adr.* Lib. xxix. Tit. v. *D. de* Senatuſconſulto Silaniano. *Conf.* 1 *Sam.* xxvi. 16. But this Paſſage has no relation to the Rigour of the antient *Roman* Law. The Caſe was very different, for the Servants of *Saul*, whom *David* declares *to have all deſerved Death*, were all guilty; ſince, inſtead of guarding their King, they had fallen aſleep. The *Scythians* put out the Eyes of their Slaves, as we are told by *Herodotus*, *Melpom.* in the Beginning. [e] Lib. ii. Ch. v. § 29. [f] *Vid. Edict. Reg.* Theodoric. Ch. lxvii. [g] Add. *Grot.* ad *Exod.* xxi. 4. where he ſhews, that the Marriages of Slaves were diſannulled at the Pleaſure of their Maſters. *Xenophon (Oeconom.)* laying it down for one Rule, that Servants ſhould not wed without their Maſter's Conſent, gives this Reaſon for it; becauſe *As thoſe who are Good, do by this means grow more Loving and Faithful, ſo thoſe who are Bad, improve in Knavery.* [h] *Vid* Plaut. Caſin. [i] *Plato* thus diſpoſeth of Servile Iſſue (*LL. Lib.* xi. p. 975. A) *If a Female Slave bear a Child to another Slave, or to a proper Freeman, or to one that hath been ſet at Liberty, the Child ſhall belong to her Maſter. If a Maſter, or a Miſtreſs, be convicted of having a Child by their proper Slave, the Father and the Child ſhall, in the former Caſe, be driven to another Country by the Woman; in the latter Caſe, the Mother and the Child ſhall be baniſhed by the Magiſtrates.*

[1] *Partum Ancillæ Matris ſequi conditionem, nec ſtatum Patris in hac ſpecie conſiderari, explorati juris eſt*, Cod. Lib. iii. Tit. xxii. *De Rei vendicatione*, Leg. vii. See, alſo, *Lib.* vii. Tit. xvi. *De liberali cauſâ*, Leg. xlii. And about Beaſts, what is ſaid above, *Lib.* iv. *Ch.* vii. § 4.

[2] See above in Book iv. Ch. vii. § 5.

[3] The *Roman* Law agrees here with the Laws of Humanity; for it requires, that the Child be Free, if the Mother be ſo when it is born, though ſhe conceived it, when ſhe was a Slave; and, on the contrary, if ſhe were Free, when ſhe conceived, the Child was Free, though the Mother was a Slave, when it was born; it being unreaſonable, that the Child (as JUSTINIAN ſays) ſhould ſuffer the Misfortune which happened to the Mother, while it was in her Womb. *Sufficit autem liberam fuiſſe Matrem eo tempore, quo naſcitur, licet ancilla conceperit. Et è contrario, ſi libera conceperit, deinde ancilla facta pariat, placuit, eum, qui naſcitur, liberum naſci: quia non debet calamitas Matris ei nocere, qui in ventre eſt.* Nay more, tho' the Mother ſhould be a Slave at the time of Conception, if ſhe was made free while ſhe was made big, and again became a Slave, the Child muſt be accounted Free. *Ex his illud quæſitum eſt, ſi ancilla prægnans manumiſſa ſit, deinde ancilla poſtea facta peperit, liberum, an ſervum pariat? Et* Martianus *probat, liberum naſci: ſufficit enim ei, qui in utero eſt, liberam Matrem vel medio tempore habuiſſe, ut liber naſcatur. Quod & verum eſt.* Inſtitut. Lib. i. Tit. iv. *De Ingenuis.*

It is eaſy to ſhew, that the Maſter doth no Injury to his Slave's Off-ſpring, [1] by dooming it to the ſame Subjection. For, ſince the Mother hath nothing of her [2] own, it is impoſſible ſhe ſhould maintain the Child, but with her Maſter's Goods. And in as much as the Maſter is obliged to furniſh ſuch an Infant with Food, and other Neceſſaries, long before he is capable of making any Requital for his Labour; and ſince, when he firſt begins to Work, his Pains are ſcarce equivalent to his daily [3] Maintenance, he cannot eſcape *Servitude*, unleſs by the Maſter's particular Diſpenſation. And this Reaſon will hold, not only whilſt he is ſuppoſed to continue, as it were, in the Maſter's Debt, but ever after; becauſe the Condition, on which the Maſter firſt undertook to keep him, was, that he ſhould perform perpetual Service; and to this Condition he is preſumed to have yielded a tacit Conſent; eſpecially if it be conſidered, that his very [4] Birth is owing to his Maſter's Favour; who, by the Right of War, might have put his Parents to Death. And as for that *natural Freedom*, with which all Men are in common inveſted, it then only takes place, when no Act or Agreement of ourſelves, or others, hath rendered us obnoxious to a State of Inferiority.

And thus we ſeem to have clearly ſtated the Caſe of Children born to *perfect Slaves*, ſuch as were Captives in War, and thence reduced to this Condition. As for thoſe of the other Kind, who engage themſelves in Servitude by their own free Motion, if there be no expreſs Law or Covenant to the contrary, Equity and common Favour incline to this Reſolution concerning them, that the Food of their future Iſſue is contained, or implied, in their own Maintenance, which their Maſter owes them as a [5] juſt Debt; and, conſequently, their Children are not involved in a neceſſity of Slavery [a].

X. Let us, in the next place, examine what Inconveniences really attends a State of *Servitude*, which, in the Opinion of moſt People, paſſeth for the greateſt Miſery incident to Mankind, and ſuch, as one ought rather to die than endure [b]. The full Sum and Notion then of *perſonal Servitude* amounts to this; that a Man, for the ſake of Food, and the other Neceſſaries of Life, ſhall lie under an Obligation to perpetual Labour; which, if taken in its true natural Extent, extracted from the barbarous Cruelty of ſome Maſters, and the unreaſonable Rigour of ſome Laws, doth not imply any extravagant Degree of Hardſhip and Severity. For that perpetual Obligation is well requited by a perpetual Certainty of Maintenance, for which thoſe who work by the Hire, are often at a Loſs, either through want of Buſineſs, or wilful Idleneſs [c]. Some have thought, and not altogether without Reaſon, that the

[a] *Comp* Bœcler. *ad* Grot. *Lib.* ii. Ch. v. § 29.

[b] Roſar. Perſic. Sadi. Ch. i. *It is better to ſit down feeding on one's own Bread, than to ſtand waiting at another's Table in a golden Girdle.*

[c] *Vid.* Arrian. Epictet. *Lib.* iii. Ch. xxvi. *p.* 257.

Lucan. *Pharſ.* Lib. iii. *ver.* 152.

Non tibi, ſed domino gravis eſt, quæ ſervit egeſtas.

Want in a Slave turns to the Maſter's Loſs.

Add. Grot. *Lib.* ii. Ch. v. § 27.

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[1] Mr. BUDDEUS (in his *Philoſ. Pract.* Part ii. Ch. iv. § 12. § 5. and Ch. v. § 6. § 12.) and after him ſome other *German* Authors, affirm, That this is unjuſt, and that the Children that are ſo born, are obliged only to acknowledge him their Mother's Maſter. I ſhall leave it to the Reader to examine whether the Reaſons of that able Profeſſor are ſtrong enough to overthrow GROTIUS's, and our Author's; eſpecially as this laſt has laid them down with a Temper in his Abridgment of the Duties of a Man and Citizen, *Lib.* ii. *Ch.* iv. § 6. where he ſays, *It is evident, that, theſe Children of a Slave being reduced to Servitude by their unhappy Birth, their Maſter can have no Reaſon to uſe them worſe, than perpetual Mercenary Servants.* I ſay the ſame thing, with regard to Mr. *Carmichael*, Profeſſor at *Glaſcow* in *Scotland*. It may not be amiſs for the Reader to examine what he has advanced againſt our Author, in his Notes on the Abridgment of *The Duties of a Man and a Citizen*, Lib. ii. Ch. iv. § 6. I ſhall make ſome Remarks upon what he ſays in the following Notes.

[2] As this is a Conſequence of the Mother's Perſon belonging to the Maſter; and it is upon this Right of Property eſtabliſhed by Cuſtom, That our Author here founds the firſt Reaſon of his Opinion: Mr. CARMICHAEL *(ubi ſupra)* ſays, *That it is abſurd that one Man ſhould have over another any Right of Property, ſtrictly ſo called, much leſs over Children.* To this I anſwer, Yes; if we underſtand by the Right of Property, The Power of conſuming or waſting his Subſtance, without any Reaſon but his own Pleaſure. But, by reſtraining it, as our Author has done above, § 7, there is no Abſurdity in maintaining, That a Maſter may (allowing for Cuſtom, and the expreſs or tacit Agreement which may interfere) acquire, with the Perſon of his Slave, whatever is born of her; juſt as he does a Right to the Produce of her Labour, and all the Goods which ſhe may acquire otherwiſe. *The Soul* (adds Mr. *Carmichael*) *which is the moſt noble Part of Man, is not infuſed by the Father and Mother; it is therefore juſt it ſhould draw after it the leſs noble Part.* I own, I cannot ſee the Force of this Argument, or, if it has any, it is very remote from the Subject.

[3] Mr. *Carmichael* denies the Conſequence: *For* (ſays he) *a Man, however weak the Faculties of his Mind and Body are, may, in much leſs Time, than that of his whole Life, gain enough to diſcharge this Debt. He may find ſome other Perſon willing to take upon him the Education of the Child born of the Slave, or to reimburſe the Maſter the Expences he has been at*, &c. But theſe are uncommon Caſes, and it is ſufficient that what our Author ſuppoſes, uſually happens; to ſhew that there is nothing unjuſt in the expreſs or tacit Agreement, by which the Mother-Slave has ſubjected the Children ſhe ſhall bear, to the ſame Servitude into which ſhe is fallen. Now the Maſter's Right depends directly and immediately upon this Agreement, which is a Point has not been duly attended to. Add here what I have ſaid, on the Abridgment of *The Duties of a Man and a Citizen*, Lib. ii. Ch. iv. § 6. Note 2.

[4] The Conſequence (ſays Mr. *Carmichael*) *is null:* But he does not tell why. *Beſides* (adds he) *the Suppoſition is falſe, that all thoſe who are taken in a juſt War, eſpecially the Women in queſtion, may be* LAWFULLY *killed.* But it is ſufficient they may be killed *without Puniſhment*, (as *Grotius* ſhews, Lib. iii. Ch. iv.) to make the Convention, which takes place here, valid; juſt as others are made between Enemies, independently of the Juſtice of the War in which they are engaged. See above § 6. Not. 1. Mr *Carmichael*, after all this, ſtarts an Objection againſt himſelf; *That divers Laws (among which are thoſe that* GOD *gave to* MOSES*) ſuppoſe an Exerciſe of a Right in the Maſters over the Children born of a Slave.* The Anſwer he gives, to remove this Difficulty, is, That *this was a ſimple Toleration, juſt ſuch as* GOD *allowed in the Caſes of Polygamy and Divorce.* But, unluckily, this Reply is as ſubject to Diſpute as the Objection it would ſolve. See Chapter i. of this Book, § 24. Not. 3 p. 583. And what ſhall we ſay of the Goſpel, which ſo frequently recommends the Submiſſion of Slaves to their Maſters, and forbids them to ſhake off the Yoke, without ever diſtinguiſhing the Manner in which they fell into Slavery?

[5] I do not ſee upon what Account this is laid down for a Rule here. As theſe Kinds of Slaves cannot be ſuppoſed to have willingly ſubjected their Children to the ſame Condition, unleſs Cuſtom has eſtabliſhed this with regard to all Slaves, however they become ſo: The Maſter, on the other Hand, does not neceſſarily oblige himſelf to maintain the Children of ſuch Slaves, as have placed themſelves for ever in his Service, by a Contract entirely free. So that if he refuſeth to do this, unleſs the Children become his Slaves for Life, and the Father and Mother have no Means to preſerve them; then the Law of Nature authorizes this kind of Sale, and the Children have no Reaſon to complain of their Lot, while the Maſter uſes his Right with that Moderation which the Laws of Equity and Humanity require.

[1] Prohibition of Slavery among *Chriſtians* hath chiefly occaſioned that Flood of thieving Vagrants, and ſturdy Beggars, which is uſually complained of. Though there are States which have, in a great meaſure, put a ſtop to this Nuiſance, by erecting publick Workhouſes, and compelling lazy Raſcals to a Life of Honeſty and Induſtry [a].

Mr. *Hobbes*, in his Book *De Cive* [b], ſtating the Difference between Liberty and Servitude, expreſſeth himſelf to this Purpoſe: "Liberty is "nothing elſe but the Abſence of all Impedi-"ments of Motion. Thoſe Impediments may "be either *natural* and external, or *moral* and "arbitrary. With regard to the former Kind, "Things are ſaid to be more or leſs *free*, as "they have more or leſs Space to move in; as a "Man in a wide Priſon is more at liberty, "than another under cloſe Confinement. And "thus a Perſon may be *free* to proceed one "Way, and not *free* to proceed another; as "when a Traveller is hindered, by Hedges and "Mounds, from going out of the Road in-"to the Corn-fields or Vineyards. This Spe-"cies of Liberty may be termed *phyſical* or *cor-"poral*; in which Senſe all Servants and Sub-"jects are *free*, who do not ſuffer Bonds or Im-"priſonment. Moral Impediments do not *ab-"ſolutely* hinder Motion, but by *Accident*; "that is, by our intervening Choice, whilſt "we judge it better for us to abſtain from ſuch "a Motion, than to perform it. Thus a Paſ-"ſenger in a Ship is not reſtrained from throw-"ing himſelf headlong into the Sea; yet, if "he be in his Senſes, he will think a ſafe Cab-"bin preferable to a Leap amongſt the Waves. "In like manner, whatever Penalties are de-"nounced againſt any Action, a Man that "fears not the Danger, ſticks not to break "the Command. And this is that intrinſick "Liberty of the *Will*, inſeparable from it, "which Slaves, no leſs than all other Kind of "Subjects, enjoy. We muſt ſearch therefore "elſewhere to diſcover a Difference. And, "firſt, although ſcarce any Maſter is ſo ſevere, "as to hinder his Servants from doing thoſe "Things which are neceſſary for the Preſerva-"tion of his Life and Health, which are the "chief Objects and Purſuits of human Care; "yet Freemen are, for the moſt Part, allowed "to provide for themſelves in theſe Reſpects, "with more Plenty and more Eaſe, than Per-"ſons of that low precarious Condition, whoſe "Conſtitution often ſuffers by their hard Fare, "and unreaſonable Labour [a]. Again, Free-"men in this ſhew their eminent Advan-"tage above Slaves, that they are admitted "to the more honourable Offices in Fami-"lies and Commonwealths; and that they "poſſeſs Superfluities in a far larger Meaſure. "Both which Privileges are wonderfully plea-"ſing to Men of lofty Spirits and Deſigns. "For the Trouble of Buſineſs is ſoftened and "ſweetened by the Honour and Credit of an "Employment; and to ſwim in Affluence, is "ever eſteemed a moſt valuable Happineſs; as "well, becauſe we ſeem by this means to be "well provided for, againſt all future Acci-"dents and Occaſions; as becauſe our Life "will thus paſs the more ſmoothly, and we "ſhall have larger Ability of doing Kindneſſes, "and gaining a numerous Party by our Bene-"factions." But the main Diſtinction of all is this, that free Subjects are only engaged to obey the ſupreme Power, and the general Laws of the State, and fearing no Puniſhment, but what is by them particularly denounced, in all other Things they follow their own Fancy with full Delight and Satisfaction. But Slaves are obnoxious to the private Commands, and to the coercive Power of their Fellow-ſubject, and are compelled to bear his Humour, though the moſt froward or imperious; which is the greateſt Hardſhip, by reaſon of their near Abode, and frequent Intercourſe with their Maſter. And, to render their Bondage ſtill more grievous, the publick Laws ſeldom afford them Relief againſt their Maſter, unleſs in Caſes of moſt barbarous Severity and Cruelty. The more ſoft and gentle a Man's Nature is, the more muſt he be afflicted under theſe uneaſy Circumſtances [c]. We may add, that the Yoke of Servitude is much the more galling on account of human Pride; which encourages every Man to think himſelf worthy of Command; and thus when the Slave eſteems himſelf altogether as fit, if not fitter, to bear Rule than his Maſter, he fancies that Fortune hath done him a mighty Injury, and deſires on any Terms to change his Condition [d].

XI. A Slave may obtain Freedom ſeveral Ways: As firſt, if his Maſter formally releaſe him; for what Right the Slave before tranſferred on his Maſter, the Maſter may reſtore to him again. Though it be cuſtomary, in many States, that the Slave, thus releaſed, ſhall ſtill yield ſome kind of Duty and [3] Reverence to his Maſter [e]. In caſe the Maſter owned a Su-

[a] *Add.* Bodin. *De Repub.* Lib. i. Ch. v. Buſbeq. *Epiſt.* iii. *p.* 118. [b] Ch. ix. § ix. [c] Yet there is a great Difference in Maſters. In *Terence* (*Eunuch.* Act. iii. Scen. ii. ver. 33) a Gueſs is made from the Slave, that his Maſter is poor and miſerable. But on the other Side, as *Juvenal* obſerves (Sat. v. ver. 66)

Maxima quæque domus ſervis eſt plena ſuperbis; Great Families are plagu'd with haughty Slaves.

[d] In *Xenophon* (*Cyropæd.* Lib. viii.) *Chryſantas* ſeems to eſtabliſh ſome ſuch kind of Difference. *In the ſame manner*, ſays he, *as we think it reaſonable to be obeyed by thoſe under our Command, let us yield a ready Obedience where it is our Duty. Yet there ſhould be this Difference between Subjects* (*as we are*) *and Slaves, that whereas thoſe are compelled to their Labour and Service, we ought to perform our Devoirs with Readineſs and willing Compliance.* *Add* Dion. Chryſoſt. Orat. xiv. *De Servitute.*
[e] *Lex* Wiſigoth. Lib v. Tit. vi. Ch. xvii, & xxi.

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[1] There are ſome who affirm, that Slavery is not quite aboliſhed among Chriſtians. Mr. THOMASIUS ſays, he has proved it in his publick Lectures on the Inſtitutes (*Not. in Huber. de Jure Civitatis*, p. 396.) and he publiſhed, in 1701, a Diſcourſe, *De Hominibus propriis Germanorum*, which proves it in reſpect to *Germany*, where he affirms, nevertheleſs, that the Manner of Servitude hath been different from the Cuſtoms of the *Romans*. Mr. HERTIUS has a Diſcourſe, alſo, upon theſe *Homines proprii* in *Tom.* ii. of his *Comment.* and *Opuſcula.*

[2] It is a Saying of TULLY (De Orator. Lib. ii. Ch. vi.) *Mihi liber eſſe non videtur, qui non aliquando nihil agit.* *I don't look upon him as properly Free, who hath not ſometimes the Privilege of doing nothing.*

[3] Among the *Romans* the Rights of Patrons extended much farther; for they might exact, of their *Freed-men*, certain Certain Services, and, in ſome Caſes, they had a Right to ſucceed to the Goods which theſe *Freed-men* left at their Death. See *Digeſt. De operis Libertorum*, Lib. xxxviii. Tit. i. & *Inſtitut.* Lib. iii. Tit. viii. *De ſucceſſ. Libertor.*

perſon,

perior, he cannot, otherwiſe, beſtow Liberty, than in a Way conſiſtent with the Rights of that Superior, and with the publick Laws. Secondly, if his Maſter renounce and diſcard him: Which, in Commonwealths, is reckoned a kind of Puniſhment; and differs not from Manumiſſion or formal Conferring of Liberty, in the Effect, but only in the Manner and Deſign. In both Caſes the Maſter reſigns his Right; but in the former, by way of Reward; in the latter, by way of Puniſhment: For that it is a real Grievance and Affliction to loſe a wealthy [1] and convenient Maſter, even free Servants are often ſenſible. Thirdly, in caſe a Slave be made a Captive, whether alone, or together with his Maſter, his new Servitude extinguiſheth his old. But if the Maſter be only made a Captive, the Slave falls into the ſame State and Condition as he would do, were his Maſter naturally [2] dead, at leaſt till ſuch Time as the Maſter be reſtored to Liberty. Fourthly, a Slave may be releaſed upon the Uncertainty of a ſucceeding Poſſeſſor [3]; as ſuppoſe his Maſter dies without making over his Right to any other; becauſe then he is under no Engagement of performing Service. For no Man is ſuppoſed to ſtand obliged, unleſs he can know the Perſon to whom the Debt is to be paid. But whether a Man, thus releaſed, can claim the Privilege of a free Subject in a Commonwealth, is a Queſtion that the particular Laws [3] and Cuſtoms muſt determine. Some tell us, that, amongſt the *Turks*, the Act of ſetting a Slave at Liberty will hold good only againſt his old Maſter, but that any other Perſon may again compel him into Service. Another Caſe when a Slave may be releaſed, upon the Uncertainty of a ſucceeding Poſſeſſor, is, if his Maſter die, either in a natural or civil Senſe, without an Heir. For the Goods of ſuch a Man are adjudged derelict, and paſs to the firſt Seizer; yet his Slave cannot be forced into a new Service by the ſame Claim. Things may be laid hold on by any [4] Man, if no other hath already a Right over them; but Perſons cannot be challenged by any other Title, than what ariſeth from their own Conſent, or from ſome antecedent Deed, in which they are concerned. And, therefore, that Right being now extinct, which the Victor by War obtained over his Slave, natural Liberty returns: And this, although the Diſpoſition of the Perſon ſhould make it more proper for him to continue in Servitude; for the Fitneſs of a Man's Temper, or Inclination, can, by no Means, give another a Right of dragging him into Bondage, nor is it always lawful for me to force a Perſon upon that which is really for his Intereſt and Advantage. Fifthly, When a Slave, not by way of Puniſhment [5] or on account of any preceding Offence, is thrown into Irons, or, otherwiſe, deprived of corporal Liberty, he is, by this Act, releaſed from his former Obligation by Compact; for his Maſter is ſuppoſed to take off his moral Bonds, by thus impoſing natural. It is inconſiſtent with Covenant, not to believe the Party covenanting, and that Faith cannot be violated, which was not given. And hence a Slave under this Treatment may, if Opportunity favour him, without incurring the leaſt Guilt, make his Eſcape.

[a] *Vid.* Grot. *Lib.* ii. Ch. ix. § 1.

[1] It was upon this Account, that, among the *Romans*, where a Maſter could ſet his Slaves at Liberty againſt their Will, many of them were troubled at it. CUJAS (*in Tit. De verbo. Oblig.* Leg. lxii. Tome i. p. 1238. *Edit. Fabrot.*) proves this, by ſome Verſes of an antient Comedy falſly aſcribed to *Plautus*, in which a Slave is introduced as ſpeaking thus: *Nobis quotidie nuptiæ, natalis, debacchationes, ancillarum feriæ; propter hoc quidam nec manumitti volunt.* We have every Day Weddings, Birth days, Feſtivals, Drinking bouts; in ſhort, we lead ſo merry a Life, that ſome of us have loſt all Taſte for Liberty.

[2] See *Grotius*, Lib. iii. Ch. ix. § 11.

[3] According to the *Roman* Law, ſuch a Slave remained always in his ſervile Condition; ſo that it frequently happened, there were Slaves who had no Maſters. See ULPIAN, *Tit.* i. § 19, with Mr. *Schulting*'s Notes, in his *Jureiſpr. Ante-Juſtin.* p. 568.

[4] The *Roman* Law has, nevertheleſs, carried the Fate of Slaves ſo far, upon this Principle, That it regarded them as *Things*, not as *Perſons*. See DIGEST. *Lib.* xli. *Tit.* vii. *Pro derelicto*, Leg. *ult.* and Lib. xlv. Tit. iii. *De ſtipulation. Servor.* Leg. xxxvi.

[5] We muſt take great Notice of this Reſtriction, for it may ſerve to rectify Mr. HOBBES's Notions, eſpecially if he were of that Opinion, which another Author of that Nation charges him with, *Richard Cumberland, De Legibus Naturæ*, Ch. ix. § 14. See what has been ſaid above, *Lib.* iii. *Ch.* vi. § 9. and *Ch.* vii. § 5. Our Author has borrowed all this Paragraph of *Hobbes*.

BOOK VII.

CHAP. I.

Of the Cauſes and Motives inducing Men to eſtabliſh civil Societies.

I. *Introduction.*
II. *Man naturally loves himſelf more than Company.*
III. *Yet the Love of Company does not immediately infer the Love of civil Society.*
IV. *Many Vices in Man prejudicial to civil Union.*
V. *Whether civil States aroſe in the World by natural Conſequence.*
VI. *Whether Indulgence was the Cauſe of civil Eſtabliſhments.*
VII. *The true Origin of civil Government.*
VIII. *The bare Reverence of the Law of Nature not ſufficient to ſecure the Peace of Mankind:*
IX. *Nor the ſole Force of Arbitrators; or of Covenants.*
X. *Difference in Opinion greatly prejudicial to the Peace of the World.*
XI. *Men need a much more ſevere Reſtraint, than the Law of Nature only.*

I. AFTER thoſe which are termed Primary Societies [1], we come now to treat of a Commonwealth [2], which is the laſt and moſt perfect Form of Society, and that whereby the beſt Proviſion is made for the Safety of Mankind, ſince their Increaſe. What induced Men to quit their primitive Way of living, in ſeparate Families, will be evident, upon our Enquiry into the Nature of civil Society, and the Diſpoſition of thoſe who compoſe it. For the better Illuſtration of which, it will be of great Uſe to examine the Accounts that are commonly given of this Matter.

II. And here the Generality have recourſe to the peculiar Frame of human Nature, by which Man is ſuppoſed to be ſo ſtrongly inclined to a civil State, that he would neither be willing nor able to live without it. This they confirm by Arguments drawn chiefly from the Miſeries of a ſeparate Life; the weariſome Condition of Solitude; the Ends of Speech, which would be loſt without Company; the natural Deſire of Converſation; the Advantage of uniting together; and the like; which we have before [b] alledged, to prove Man a ſociable Creature, from the Relation that there is between Society [2] and the Nature of Man. Mr. *Hobbes* [3], on the contrary, repreſents Man as a ſelfiſh Animal, whoſe Kindneſs chiefly terminates in his own Perſon and Intereſt [c], and whoſe Love for Society and other Men is Secondary, being entertained with a View of ſerving his own Pleaſure or Profit by their Aſſiſtance [4]. For no one (as he argues) was ever determined in the Choice he made of another's Company, by the bare Conſideration of his being a Man, but by ſome Proſpect of Honour or Advantage from his Acquaintance, preferable to what he could expect from the Acquaintance of any beſides. This he endeavours to illuſtrate, by Deduction from particular Societies. "They who unite in a Body for the "promoting of Traffick, are led to it purely "by the Hopes of advancing their Goods "more in Conjunction with others, than they "could by their private Induſtry: and whatever diſappoints, or puts an End to theſe "Hopes, prevails with [5] all, but Fools or "Madmen, to put an End, likewiſe, to "the Society. So where any are joint "Commiſſioners in a publick Office, they "contract a ſort of Law Friendſhip, implying "in it more of mutual Fear than Love; "and conſiſting rather in Forms and Ceremonies, than in any ſincere Union of Minds, "and Combination of Affections. So that "ſuch Men may ſometimes bandy together in "a Party or Faction, for the ſake of carrying on ſome private Ends; but to a generous and diſintereſted Friendſhip they are "commonly utter Strangers. Nor will any "one of theſe, if he dare rely on his own "ſingle Strength for accompliſhing his Aims, "ever trouble himſelf about Aſſociates. A-

[a] *Civitas.* [b] Book ii. Ch. iii. §. 15. [c] *Iſæus*, Orat. ii. No Man values others more than himſelf. *Euripides Medea*, ver. 85, 86.

——————All agree
In this firſt Maxim of Philoſophy:
That Love begins at Home——

Iſocrates, *de Pace*, p. 285. *Ed.* Pariſ. *In my Opinion, it is the common Deſire of Mankind to advance their own Profit; and it is common Labour to poſſeſs more than thoſe about them.*

[1] See above in Book vi. Ch. i. § 1.

[2] This is not the immediate Cauſe of the forming of civil Societies, as it appears by what our Author ſays at the third Section, and in the long Note on the ſeventh; yet it is certain, that Mankind naturally love Society: and he himſelf proves it in his ſecond Book. But if any one has a mind to ſee a larger and more exact account of this Matter, as, alſo, ſome Thoughts quite new, and expreſſed in the moſt lively and juſt Manner; he need only read my Lord *Shaftſbury*'s Treatiſe on *Ridicule*, which makes Part of the firſt Volume of his *Characteriſtics*.

[3] *De Cive*, Ch. i. § 2.

[4] Here we may obſerve, as well as in other Places, that our Author extends, explains, paraphraſes, and accommodates to his own Purpoſe, the Reaſonings of Mr. *Hobbes*.

[5] See above *Lib.* v. Ch. viii. § *ult.*

"gain,

" gain, when Perſons meet upon the common " Deſign of paſſing the Time away pleaſantly, " it is a mighty Satisfaction that each takes in " making himſelf and the Company merry: In " which he cannot ſucceed without expoſing " the Faults or Follies of other Men, in Caſes " ſuppoſed not to reach himſelf. (For Pru- " dence would never allow him to cenſure that " in another, of which he was not himſelf ac- " quitted in his own Conſcience: According to " *Juvenal*'s Rule,

" *Loripedem rectus deridcat, Æthiopem albus*[1].

" Let him cry filthy Black whoſe Skin is white; " And Bandy-legs, who treads himſelf upright.)
Mr. TATE.

" Therefore, for any one to deride others, is, in " effect, to declare his Contempt of them in " Reſpect of himſelf, and a certain malicious " Deſign of ſetting off his own Luſtre by their " Blemiſhes. Even with them who keep with- " in the Bounds of innocent Mirth and inoffen- " ſive Raillery, there is none but aims more at " his own Satisfaction, than that of other Men: " Nay, ſuch as make a Profeſſion of diverting " thoſe about them, mean nothing more than, " by ſhewing their Wit, to recommend them- " ſelves to the Company. Beſides, moſt Men " have naturally an itching Deſire to be exa- " mining, cenſuring, and expoſing the Words " and Actions of others; which, if they have " frequent Occaſion of gratifying, they look " upon it as a notable Ingredient in the Pleaſure " and Happineſs of Life. And this Humour " is a difficult Thing to ſuppreſs, or keep " within Compaſs, by the Proviſion made a- " gainſt it by Laws and Penalties[a]. Laſtly, " ſuppoſe ſome, who pretend to more Know- " ledge and Wiſdom than ordinary, met toge- " ther to confer about Matters of Learning; " each Man is for preſcribing his own Opinion " to the reſt, and, finding his Abilities or Au- " thority diſputed, reſents it as the moſt hein- " ous Affront. Whence it plainly appears, that " all Society, or Intercourſe, between ſuch Men, " is founded on the Deſign either of ſupplying " their Wants, or of gratifying their Vanity, or " of finding Diverſion and Entertainment. The " ſame is aſſerted upon another Argument, " taken from the Definition of the Will, and " of what is good, honourable, and profitable. " Societies are introduced among Men by their " voluntary Conſent. Now where there is an " Act of the Will, there is, of Neceſſity, an Ob- " ject of that Act; which Object is always ſome " ſuppoſed Good to the Agent. For be a Thing " never ſo good in itſelf, yet if it be not ſo, " likewiſe, with reſpect to us, it loſes all its In- " fluence on our Powers of acting. Thus, for " Inſtance, did Matters go never ſo well with " the King of *Perſia*, I ſhould not look upon " myſelf as having any Share in his good For- " tune. All Good is attended with ſome Plea- " ſure, either of the Mind alone, or of the Body " in Conjunction with it. That of the Mind is " either the Paſſion of Glory, or what may ul- " timately be reſolved into ſuch a Principle. " That which affects the Body is Profit: which " proves all Society to have firſt commenced " upon the Score either of Profit or Glory; " that is, upon account of Love to ourſelves, " excluſive of all others. However it is cer- " tain, that Glory cannot be a laſting Founda- " tion of Society for any number of Men; be- " cauſe, in Glory, as in Honour, where the Ti- " tle to it is general, there is, in effect, no Ti- " tle at all: The very Nature of Glory con- " ſiſting in the Opinion of ſome Advantage[2], " which, upon Compariſon, we appear to have " above the Reſt of the World. Neither does " our Joining in Society with others gives us any " farther Occaſion of Glory, than our Alliance " with Men of great and extraordinary Virtues " may ſeem to argue a Parity of Worth in our- " ſelves. For, otherwiſe, a Man is valued in " Proportion to that Ability he has of ſupply- " ing his own Wants, without depending on the " Aid of his Fellows[3]. It muſt be confeſſed, " that by mutual Aſſiſtance the Good of hu- " man Life is highly promoted. Yet to have " the Service of other Men at our Command, " would ſeem much more eaſy and agreeable: " As amongſt the other Conveniences and Helps " of Living, that is ſtill prized above the reſt, " which ſerves to more Purpoſes, and is pur- " chaſed, or preſerved with leſs Coſt and Trou- " ble. Whence we may conclude, for certain, " that Man would be more inclined to Empire " than to Society; that is, would much rather " command abſolutely, being himſelf exempted " from all Obedience, than be obliged to any " ſuch Exchange of good Offices, as ſeems to " be required in a ſociable Life: Were it not " that he is reſtrained from acting after ſuch " an arbitrary Manner, by the Danger which " he apprehends from ſuch violent Reſoluti- " ons[b]."

[a] *Arrian. Epictet.* Lib. ii. Ch. xxii. " Suppoſe in a Diſpute who was the chief Philoſopher, one ſhould tell you, he heard a " judicious Friend ſay, that you were certainly the Man: Would not your Heart ſwell with the ample Teſtimony, and en- " large its Dimenſions at the Blaſt of Fame? But what if another ill-natured Critick ſhould give ſuch Inſtructions as theſe; " *Why do you loſe your Time in hearing this Pretender to Wiſdom? What does he know? Perhaps he has learned his firſt Princi-* " *ples, but I will venture him for getting a Step farther:* Why, you would be Thunder ſtruck with this mortifying Sound; you " would be put to it keep your Colour; and would have only Spirit enough to ſay, *I will ſhew him what a Man he has af-* " *fronted, and what a Philoſopher he has under-rated.* Add. *Charron de la Sageſſe*, Lib. i. Ch. xxxvi. § 6. [b] *Arrian. Epict.* Lib. iii. Ch. xxi. " No Creature is engaged with ſo deep an Affection to another's Perſon, as to his own Profit: " whatever ſtands in the Way of this, whether Father, Brother, Son, Lover, or Beloved, he hates and rejects with Curſes " and Scorn. For ſo has Nature appointed, that the ſtrongeſt Charm ſhould be our own Intereſt. This is our Father, our " Brother, our Kinſman, our G Q D. Wherefore if we refer to one and the ſame End our Profit, our Piety, our Honeſty, our " Country, our Parents, and our Friends; all are ſecured. But if we meaſure our Profit by one Standard, and our Friends, our " Country, our Relations, our Juſtice itſelf by another; in this Caſe, Profit turns the Scale, and all other Conſiderations ſink " and are out-weighed. For *I* and *Mine*, are Words which never fail to draw the animal Nature after their Charm." *Did you never obſerve* (ſays he a little before) *Whelps playing and fawning upon each other as the very Patterns of Love and Affection? But would you know how long-lived this Endearment is? The Experiment will coſt you no more than a Bone.* Tully, *Off.* iii. *That every Man ſhould procure the Neceſſities of Life, for himſelf rather than any beſides, is an allowed Privilege, and ſuch as natural Inclination does, by no Means, oppoſe.*

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[1] Sat. ii. v. 23.
[2] See Book viii. Ch. iv. § 11.
[3] See the Hiſtory of CALVISIUS SABINUS in SENECA's Epiſt xxvii.

III. But

III. But although it cannot from hence be concluded (as we have before obſerved [1]) that Man is not by Nature a ſociable Creature; yet allowing him a natural Deſire of Society, ſince this may be gratified by the primary Societies already deſcribed, this infers not his Deſire of civil Society, any more than his general Love of Imployment beſpeaks his Affection for that of a Scholar, in particular. [a] *Ariſtotle* ſays, *That Man may be rather termed a conjugal Animal than a civil; as a Family, in Neceſſity as well as in Time, is antecedent to a Commonwealth; and as the Propagation of Race is the moſt common Labour of Animate Beings.* This is what Mr. *Hobbes* proves in the following Manner. Civil Society conſiſts not in a bare Aſſembly of Men; but in an Aſſembly combined together by mutual Leagues and Covenants. The Force of theſe Covenants ignorant People and Infants do not at all apprehend; nor is their Uſe diſcovered by thoſe who never felt the Miſchief of living without them. So that the former are utterly incapable of inſtituting a civil State, as being ignorant of its Nature; the latter are wholly regardleſs of it, as not being any way ſenſible of its Benefit, or, at beſt, they live under it in a manner, that teſtifies no Eſteem of its Excellence and Worth. And, therefore, all Men being born Infants, are, by Birth, unqualified for civil Society, and ſo a great Number of them remain to their dying Day: And the reſt are formed and adapted to it by the Force of Diſcipline, not of Nature. Neither is the Credit of this Doctrine ſhaken by that known Maxim of *Ariſtotle*, that *Man is born*, or *is by Nature, a political Creature.* For, ſometimes, affirming a Thing to be ſuch or ſuch by Nature, we denote it to be actually endowed with ſome Quality, without any antecedent Act of its own, or of any thing elſe, by which the Quality might be introduced. In which Senſe a Fiſh is endued with the Faculty of Swimming; a Bird of Flying; and an Oak of bearing Acorns. Sometimes the ſame Expreſſion ſignifies a Fitneſs in the Thing to receive ſome Perfection by Culture and Diſcipline; the Reception of which *Nature* ſeems to intend, or, at leaſt, to approve, as agreeable, or, however, no ways repugnant to its Temper and Frame. Thus, a Horſe has the natural Faculty of prancing, which an Aſs has not; a Parrot of prating; a Field of bearing Corn, and a Hill Vines; a Man of diſcourſing, and of learning divers Arts and Sciences: In which Senſe, alſo, we ſhall hereafter demonſtrate him to be a political Creature, notwithſtanding his being born an Infant: Since we are wont to take our Meaſure of what does, [b] or does not, agree to Man by Nature, from what he appears to be in his grown Eſtate, and under his full Uſe of Reaſon [2]. *Ariſtotle* ſays in the ſame Work [c], that *a Man is by Nature a* political Creature, *and therefore would deſire the Company of others, though he did not ſtand in need of their Aſſiſtance.* But now his Affection for *civil Government* can never be inferred from the bare *Deſire of Company*; ſince this, as was obſerved, may be equally gratified by *primary* Societies, ſuch as may well be ſuppoſed without admitting a Commonwealth. So again, the Philoſopher [d] proves Man to be a *political Creature* from the Reaſons of Speech, which elſe had been aſſigned him to no Purpoſe: whereas the Uſe of Speech is not confined to a Commonwealth; Men having lived and converſed together, long before the Inſtitution of Government. In like manner, is to be underſtood that Paſſage in his firſt Book of *Ethics* to *Nicomachus* [e]: *That Good may deſerve the Name of* perfect, *which appears to be* ſufficient; *and that we call* ſufficient, *which anſwers not only to the Wants of a ſingle Man in a ſolitary Life, but thoſe of our Parents, our Wife, our Children, our Friends and Fellow-ſubjects:* Ἐπειδὴ φύσει πολιτικὸς ἄνθρωπος, *Becauſe Man is by Nature a political Creature.* And yet, there is room for the ſeveral Relations of Parents, Children, Wife, and Friends, without ſuppoſing a Commonwealth.

IV. For the clearing up of this whole Matter, we ought to conſider, what that Condition is which Men enter into, upon their erecting a civil State; what Qualities they are which may entitle them to the Name of *political Creatures*; and laſtly, what there is in their Frame and Conſtitution which ſeems (if we may ſo ſpeak) to indiſpoſe them for a *Civil* Life. Firſt then, whoever enters into a *Community*, diveſts himſelf of his natural Freedom, and puts himſelf under Government, which, amongſt other Things, comprehends the Power of Life and Death over him, together with Authority to enjoin him ſome Things to which he has an utter Averſion, and to prohibit others, for which he may have as

[a] Ad *Nicom.* Lib. viii. Ch. xiv. *Vid.* Digby *de Origine Mundi*, Ch. ix. § 8, &c. [b] *Vid.* Cumberland *de LL. Nat.* Ch. ii. § 2. [c] Lib. iii. Ch. viii. p. 345. [d] *Polit.* Lib. i. Ch. ii. [e] Ch. v.

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[1] Book ii. Ch. ii. § 7, &c. and Ch. iii. § 16, &c.

[2] That is (according to our Author's own Obſervation) that the Word naturally does not here import the actual Exiſtence of ſome Quality in a Thing, with which it is endowed by Nature, independent of any antecedent Act or Operation of its own, or of that of any other; but only an Aptneſs or Diſpoſition to receive certain Perfections, by Improvement and Education, with which Nature deſigns to adorn it, or which at leaſt ſhe ſeems to approve of, as being agreeable, or, however, not contrary to its Make and Conſtitution. Beſides, we muſt obſerve, that ARISTOTLE *ſometimes* uſes the Words ζῶον πολιτικὸν in a general Senſe, to denote ſimply a *ſociable Creature*, or *one made for* Society, and not ſtrictly for *ſuch a one as has a natural Inclination for civil Society*, and is exactly by Nature fitted for it. (The Word *ſometimes* is an Addition of mine:) I know not whether I have in this cloſely followed my Author, but thus he ought to have expreſſed himſelf at leaſt: For in the Paſſage, which he has quoted in the Beginning of this Paragraph, it evidently appears, that ζῶον πολιτικὸν is a *Creature made for civil Society*, ſince it is oppoſed to ζῶον συνδυαστικὸν, *or a Creature made for Marriage.* However this be, let us ſee how he proves in what Senſe he takes this in. For Inſtance, *Ariſtotle* ſays (*Polit.* Lib. iii. Ch. vi. p. 345. A. B *Edit. Paris.*) *That Man being naturally a civil Animal (ζῶον πολιτικὸν) though he had no Need of the Succour of others, he would ſtill deſire to live with thoſe of his Kind.* Now, though we ſhould grant this, it does not follow that he would ſeek *civil Society*: For he might ſatisfy this Inclination by thoſe *primitive Societies* which ariſe from Marriage or Kindred, or by a familiar Converſe with thoſe who have no immediate Connection with him; things which we may eaſily conceive to exiſt independently of a State. In another Place, this Philoſopher, to ſhew that Man is a civil Animal (ζῶον πολιτικὸν, *Polit.* Lib. i. Ch. ii.) urges this as an Argument, That, otherwiſe, the Faculty of Speech would have been given him in vain. Now it is not in civil Society alone, that this Faculty is of uſe for Men, without Diſpute, converſed together long before there was any civil Government in the World. Let us hear what he ſays in another Paſſage, to this Purpoſe: *Perfect Good is in all Reſpects ſufficient for itſelf. When I ſay*, ſufficient for itſelf, *I underſtand that it is not only ſo for a ſingle Perſon who lives alone without any Correſpondence with others, but alſo for his Father and Mother, his Children, his Wife, and, in general, for all his Friends and Fellow-Citizens; ſince Man is naturally ſuited to, or made for, Society.* φύσει πολιτικὸν. *Ethic. Nicom* Lib. i. Ch. v.

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ſtrong an Inclination; ſo that it is poſſible he may often, in Obedience to this Authority, be obliged to ſacrifice his private Good to that of the publick. Whereas, were Man to follow his natural Inclinations, he would be ſubject to nobody, but live wholly at his own Diſcretion, and make his private Satisfaction and Intereſt the Scope of all his Actions. Some weighty Motives there muſt needs have been, and ſuch as amounted almoſt to Neceſſity, that could perſuade him to overcome theſe ſo very ſoothing Deſires. Man, therefore, firſt embraced civil Society, not as led to it by the Biaſs of Nature, but as driven by the Fear of greater Evils. The name of *political Creatures*, or good Members of a State, may be truly applied to thoſe who promote the common Welfare to the utmoſt of their Power, and freely prefer it to any private Conſideration; nay, and even meaſure their private [1] Good by the Relation it bears to that of the Publick; and, laſtly, at all Times, demean themſelves with Kindneſs and Courteſy to their Fellow-ſubjects [a]. But no one, now, is ſo little acquainted with human Nature, as not to know how ill-qualified the Generality are for diſcharging ſuch a Part, it being evident, that very few acquit themſelves in all Points of their Duty; that Nothing, beſides the Fear of Puniſhment, could keep the greater Number in any tolerable Order; and that very many continue, all their Life long, *impolitick Animals*, or, which is the ſame Thing, evil Subjects. Nay, it may be affirmed, that no Creature is more fierce and unruly than Man, or expoſed to more Failings, which tend to the Diſturbance of Society. Beaſts ſometimes contend about their Food, and then it is only in the [2] Caſe of Scarcity; ſometimes again they enter the Liſts, at the Inſtigation of their Luſt, which yet has only its Seaſons of returning. But, be they of never ſo ſavage a Diſpoſition, they ſeldom expreſs it againſt their own Kind. Whereas Men quarrel with Men, not only as excited by the Stings of Hunger, and by a Luſt ſo vigorous as never to be out of Seaſon, but, alſo, by other Vices and Paſſions, unknown to Beaſts, and often repugnant in Nature one to the other. Of theſe, the chief are an endleſs Thirſt after Things ſuperfluous [b], and Ambition, the moſt pernicious of all Evils; of which, as no Creature ſeems to have any Senſe, excepting Man, ſo he has the moſt lively and tender Senſe imaginable; while, in the mean Time, it is the Privilege of Brutes to be moved at nothing, but bodily Sufferings. Add to this, that quick Reſentment of Injuries, and eager Deſire of Revenge; an Evil leſs common and leſs active in Brutes. And, what is worſt of all, Men purſue the Ruin of each other with ſo much Induſtry, that, of all the Miſchiefs to which human Condition lies open, the moſt Part are owing to their own Malice. Nor may it unreaſonably be aſcribed to the peculiar Care of divine Providence, that Men advance to Maturity ſo much ſlower than Beaſts; to the End that they may, by Length of Time, be in ſome Meaſure broken of their Fierceneſs and Haughtineſs of Temper, and brought to an Accommodation with different Diſpoſitions. Otherwiſe, ſuppoſing Man to be put immediately in Poſſeſſion of his full Strength, the Foreſt could ſhew nothing ſo untractable [c]. What Mr. *Hobbes* [d] obſerves, concerning the Genius of Mankind, is not impertinent to our preſent Argument: That all have a reſtleſs Deſire after Power; not becauſe they really wiſh to be advancing ſtill to higher Degrees of Command, or that they may not, in their own Temper, be ſatisfied with a moderate Portion of it; but becauſe they have no Way of being ſecured in the Poſſeſſion of what they already enjoy, but by farther Acquiſitions: The old Stock being ever ſpending, and therefore ever requiring new Supplies. And, this End being accompliſhed, there again ſucceeds a freſh Deſire, either of Fame by new Conqueſts, or of Eaſe and ſenſual Pleaſure. Moreover, Competition for Riches, Honour, Command, or

[a] *Arrian. Epictet.* Lib. ii. Ch. x. *What then is the Duty of a good Citizen? That he meaſure nothing with reſpect to his own private Advantage; that he conſult about nothing, as if releaſed and diſfranchiſed from the Reſt of his Kind. But, that he ſo behave himſelf, as the Hand or Foot, if they were endued with Reaſon, and underſtood the Order of Nature, would never entertain any other Motion or Deſire, than what was directed to the Good of the whole Body.* *Herodotus* obſerves of the *Perſians* in *Clio*, that thoſe who ſacrificed amongſt them, did not put up Petitions for themſelves and their own private Happineſs; but in behalf of the whole Nation, and of the King in chief. [b] *Saluſt* in *Catilin.* "The Love of Money, and afterwards, that of Em-" pire were the Source of all our Miſchiefs. Covetouſneſs ſubverted Fidelity, Probity, and other worthy Endowments of " Soul; introducing in their ſtead Pride, Cruelty, Profaneneſs, and Corruption. Ambition inſpired Men with Perfidy; to have " one Thing in their Mouth, and another in their Mind; to meaſure Friendſhips and Enmities, not by Reality, but by Advan-" tage; and to endeavour more the keeping a good Face, than an honeſt Heart." [c] See *Proverbs* xiii. 24. xxiii. 13, 14. *Eccluſ.* xxx. 1, *&c.* 12. [d] *Leviath.* Ch. xi.

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[1] This is to be underſtood in a *negative Senſe*, and not always in a *Poſitive*; I mean, that if a Thing is but in the leaſt prejudicial to the Welfare of the State, a Subject ought to forbear doing it, what private Advantage ſoever he might make of it to himſelf. But for all that, there may be ſome Things that a particular Member may make an Advantage of, which are neither prejudicial nor ſerviceable to the State; and in that Caſe, why ſhould he not mind his private Intereſt? It is in this Senſe, that we muſt take the following Paſſage of CICERO *de Offic.* Lib. iii. Ch. xxvii. *Poteſt autem quod inutile reipublicæ ſit, id cuiquam civi utile eſſe?* Can a good Citizen think that advantageous to himſelf, that is prejudicial to the State?

[2] I ſhall, upon this Subject, cite the following Verſes of Mr. BOILEAU, which he has imitated from *Juvenal*, Sat. xv. *v.* 159. *& ſeqq.* (which our Author has inſerted, *Lib.* vi. *Ch.* i. § 4. *Note* 2.)

L'Ours a-t-il dans les bois guerre avec les ours?
Le vautour dans les airs fond-il ſur les vautours?
- - - - - - - - - - - - - - - - - - - -
L'Animal le plus fier qu'enfante la nature,
Dans un autre animal reſpecte ſa figure,
De ſa rage avec lui modère les accez,
Vit ſans bruit, ſans débats, ſans noiſe, ſans procès.
Sat. viii. Verſ. 129, *& ſeqq.*

"In the Woods does the Bear ever attack the Bear? Or the Vulture fall on the Vulture in the Sky? The fierceſt Animal " which Nature produces, in the Form of his Brother-Animal, regards his own. Their Rage never tempts them to quarrel " among themſelves. They live without Noiſe, Debates, Enmity, or Law-ſuits." See an Elegy of *Mad. Deſhoulieres*, entitled *Solitude*, Tome ii. p. 9. *Edit. Amſt.* 1709.

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any Prerogative and Power above others, inclines to Contention, Enmity, and War: The Way, by which any one Competitor may arrive at his Hopes, lying through the Death, or Defeat of his Rival. It may farther be urged, that whereas, in Brutes of all Kinds, there appears viſibly a great Affinity of Deſires and Propenſions; with us, there is not more Diverſity of Men, than there is of Opinions and Ways of Living; each of which is cried up, with a wonderful Perverſeneſs, by the ſeveral Patrons of them, in Preference to all beſides: A Thing ſufficient, of itſelf, to make Diſturbances in any Multitude, who are to unite in a Society [a]. So far it is, therefore, from being true, that Man is by Nature a *political Creature*, or by Birth is fitted for the Diſcharge of *civil Duties*; that it is as much as can be done, to train up ſome few, by long Diſcipline, to a tolerable Behaviour in this Reſpect [b]. Not to mention the Vices of the vulgar Sort (who are the greater Part of Mankind) ſo often enlarged upon by other Authors [c]. So that a thorough Knowledge of human Malice and Fraud, in order to the avoiding and diſappointing them, makes up a very conſiderable Part of civil Prudence [d]. From what has been ſaid may be ſufficiently gathered the Senſe and Import of this Expreſſion, that Man is, by Nature, a *political Creature*: By which is meant, not that all and each of us are fitted by Nature for ſuſtaining the Part of good Citizens; but that ſome, at leaſt, by the Force of Inſtruction and Diſcipline, may be ſo formed as to acquit themſelves well, under that Character; and that, ſince Men have increaſed and multiplied, civil Societies are abſolutely neceſſary to their Safety; for which as they are, by a natural Principle, engaged to provide, ſo they have the ſame natural Obligation to enter into regular States and Governments, the chief Benefit of which Inſtitutions is, the habitual Exerciſe of an orderly, decent, and friendly Life.

V. *Hornius* [e] calls a Commonwealth *the Work of Nature*, and accounts for its Riſe in a natural Way: As, that the firſt Pair, from whom deſcended the whole Race of Mankind, were united by the Bonds of conjugal Love, and their Children by thoſe of natural Affection, to them and to each other; that theſe Engagements founded a Family, which by conſtant Increaſe from new Births, with that Love of Society implanted in Men by Nature, and improved by Neighbourhood and Alliance, at length furniſhed out a civil State; it being abſurd and ſenſeleſs to imagine, that Men were once diſperſed in Woods and Deſerts, and there led a Vagabond Life like the Brutes about them. But admitting the Origin of Commonwealths, according to this natural Account, yet to exclude all Compacts, and all other Motives from a Share in their Inſtitution, is no leſs irrational than to ſay, that, becauſe a Seed grows up to a Tree, and becauſe a Tree is cut out into Planks and Beams, and theſe, rightly framed and compacted together, compoſe a Ship, therefore a Ship is the Work and Product of Nature; without allowing the Labour of the Artificer, or any other particular Cauſe, to conſpire in erecting that ſort of Fabrick. We, therefore, readily acknowledge it for falſe and fabulous, whatever is fancied of a great Number of Men firſt aſſembled together, *then diſperſed into* Woods and Deſerts, and after that reunited into one Commonwealth. But then their Opinion is better grounded, who ſuppoſe Mankind, from the primitive Couple, or from four Families after the Deluge, to have fallen immediately into the Order of civil State. For, however a Father might keep his Children under his Care, and the ſame common [f] Roof, till ſuch time as they came to Years of Maturity: Yet ſince, in thoſe firſt Ages of the World, they lived altogether on Tillage and Paſturage, when Children were married, the Father had no Reaſon to detain them longer. On the contrary, we are informed by Scripture, that it was uſual for them, when arrived at an Age proper for taking the Care of a Family upon them, to ſeparate and chooſe out new Habitations; eſpecially while the World was yet unſtocked, and while the Pleaſantneſs of the Scene invited them to diſtant Quarters [g]. Nor was it peculiar to *Sicily* of old, to have ſuch Inhabitants as [g] *Homer* deſcribes;

Τοῖσιν δ' ἔτ' ἀγοραὶ, &c.——

No Councils they, nor Courts of Juſtice hold,
But on ſome Mountain's Top in Caves grow old.
Each o'er his Wife and Children Empire bears,
And none beyond his Cave extends his Cares.

There is, it is granted, a natural Affection be-

[a] *Euripid. Phœniſ.* v. 502, &c.

If what is Good, or Beauteous, always bore
The ſame conſpicuous Marks to mortal Eyes,
Men would be Friends, the World a peaceful Scene.
But Name and Species only join us now:
Differing in Things, and claſhing in Deſires.

[b] Plato *de LL.* Lib. vi. p 864. Ed. *Wech. We affirm Man to be a mild and tractable Creature. And indeed, if, beſides the Happineſs of Nature and Birth, he obtains the Benefit of good Inſtitution, he becomes moſt gentle, lovely, and divine. But, upon ill or inſufficient Education, he grows the fierceſt Animal of all that the Earths produces.* Ariſt. *Pol.* Lib. i. Ch. ii. *in fin. As Man, if rightly perfected, is the beſt and nobleſt of living Creatures, ſo, if eſtranged from Law, and Juſtice, and Virtue, he is the worſt and moſt contemptible.* Idem. ad *Nicom.* Lib. ii. Ch. i. *in fin. It is not an indifferent Matter whether a Perſon has been thus accuſtomed from his Youth: But rather it is a Point of the greateſt Conſequence, and upon which all depends.* Ibid. Lib. vii. Ch. vii *in fin. A Man, left to himſelf, would do a thouſand Times more Miſchiefs than a Beaſt.* Add. *Senec.* Epiſt. ciii. Polyb. Lib xvii Ch. xiii. *As Men exceed other Creatures in Craft and Cunning, ſo they may many ways render themſelves the worſe of all that breathe. Other Animals being governed wholly by bodily Pleaſure, are, by that alone, led into Failings and Diſorders: But Mankind, who are diſtracted with Variety of Opinions, offend as often through Perverſeneſs of Judgment, or Rejection of Thoughts, as through Frailty and Imperfection of Nature.* Lactantius *de Ira Dei*, Ch. xii. *What could be more fierce and cruel than Man, if, living under no Reſtraint of a Superior, he might evade, or deſpiſe, the Authority of Laws?* *Plutarch* in *Cicer.* p 854 D Ed. *Wech. Were Power added to Paſſion and Inclination, Man would be the wildeſt Thing living.* [c] *Add.* Mornay *de Ver. Relig. Chriſtianæ*, Ch. xvi. [d] See *Bacon*'s Ad. of Learning, *Book* viii. *Ch.* ii. [e] *De Civitate*, Lib. i. Ch. iv. § 6. *Geneſ.* xiii. 5, 6, 9. [g] *Odyſſ.* Lib. ix. v. 113, &c.

[f] As for the Reſt, our Author does not deny, but Children who remain in a Family, together with Servants, and other Perſons, may form a kind of little State, by their Submiſſion to the Maſter of the Family. See what is ſaid, *Ch.* iii. § 6. of this Book; and above, *Lib.* vi. *Ch.* i. § 11. and *Ch.* ii. § 10.

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two a Brethren; yet not ſuch as excludes their Deſire of living rather upon the Level, than with any Diſtinctions of Superiority amongſt them; neither ſuch as does convince us, that their Friendſhip could not be long-lived enough, ſuppoſing their Effects to be diſtinct and ſeparate. So that, according to this Account, the Propagation of Mankind muſt rather tend to the increaſing their Diviſion, than to the uniting them in Society. But when the wiſer Part began to conſider, that, by their aſſembling into one Body, the Inconveniences attending ſeparate Families might be removed, they hereupon thought it not ſufficient to agree together upon entering upon the ſame Covenant, and ſubmitting to the ſame common Power, unleſs, for their better Convenience and Security, they, likewiſe, agreed to contract their Dwellings, and, for the future, confine them to the ſame Place. And in this Senſe are we to interpret thoſe Authors, who ſuppoſe Men, from being diſperſed about in the Woods, to have been afterwards aſſembled and united together by the firſt Founders of civil Government.

VI. Some make the Wants and Neceſſities of Men to be the principal Cauſe of their framing political Societies; upon a Proſpect of living in better Faſhion and greater Plenty, when united together, than they could poſſibly do in a Condition of Solitude. In which Account thus much is certain, that were Men left alone, each to ſhift for himſelf deſtitute of all Help from others, no Creatures could be more exquiſitely miſerable. On the other ſide, it is undeniable, upon the Inſtitution of Commonwealths, human Life grew refined to a Degree of Luxury and Delicacy [a]. But, notwithſtanding this, it ſeems evident to us, that Neceſſity was not the ſole, or the principal Cauſe of Commonwealths, howſoever *Plato* [b] may favour that Opinion: Since the Arts of making Wine, of providing Cloaths, and of turning Ground to Paſture and Tillage, being even then known, while Men lived as yet in ſeparate independent Families; there ſeems already to have been a ſufficient Proviſion made for all the Neceſſaries of Life [c]. For let us ſuppoſe a Father of a Family poſſeſſed of a large Portion of Land, and well ſtocked with Servants and Cattle, what could ſuch an one want for his Support? What, at leaſt, that might not be ſupplied by the Means of Commerce [d]? In like manner, as it is now uſual, for different Nations to import from each other any ſort of Commodities, for Uſe and Pleaſure; without thinking it neceſſary, for that Purpoſe, to unite together under the ſame Government and Conſtitution. And Inſtances may be given of People living for many Ages, under civil Eſtabliſhments, in a Condition no way ſuperior, for Plenty and Abundance, to that of the Fathers of Families in antient Time [e]. So that all that mighty Plenty and Luxury, which now reigns in ſome Parts of the World, ſeems to derive its Origin from great Cities, rather than from Commonwealths. Becauſe, in the Cities, the meaner People, having no Income from Cattle or Land, are forced (for a Livelihood) upon improving divers Arts and Inventions. Which, likewiſe, are not a little promoted by a Sort of Vanity, common to great Towns, of vying with each other in Dreſs and Finery, and thereby of running out into Extravagance; for the Supporting of which more Trades are intended, than for the Relief of Man's real Neceſſities: Which yet civil Life could very contentedly be without [f].

VII. Therefore the true and leading Cauſe, why the Fathers of Families would conſent to reſign up their natural Liberty, and to form a Commonwealth, was thereby to guard themſelves againſt thoſe Injuries, which one Man was in Danger of ſuſtaining from another [g]. For as

[a] Lactantius, *de Opif Dei*, Ch. iv. Note 20, 21. *If each Man alone had ſufficient Strength to ward off all Dangers, and ſtood in need of no Aſſiſtant: What Society would there be in the World? What mutual Reverence or Reſpect? What Order? What Reaſon? What Humanity? What would be more vile than Man? What more extravagant? What more fierce and cruel? but now while each ſingle Perſon is poor and indigent, and cannot ſubſiſt without the Help of his Fellows, all deſire Society for Ornament and Defence of common Life.* [b] *De Repub.* Lib. ii. p. 598, &c. Ed. *Wech.* [c] See *Geneſ.* xiii. 2. xxiv. 35. [d] *Vid.* Cornel. Nep. *Attic.* Ch. xiii. [e] Who, therefore, might make the ſame Boaſt with him in *Valerius Flaccus*, Lib. vi. v. 330.

——— ——— *Nec mœnia nobis*
Veſtra placent, feror Arctois nam liber in arvis,
Cuncta tenens mecum: omnis amor jacturaque plauſtri
Sola; nec hac longum victor poticre rapina:
Aſt epulæ quodcunque pecus, quæcunque ferarum.

I your Impriſonment of Walls diſdain,
Who live a Freeman on our northern Plain.
Of little Wealth I boaſt, but what I wear;
And, if the Plough goes well, ſhall never die with Care.
No other Prize can tempt a Victor's Toil,
Nor ſhall this long remain an envied Spoil.
Nature purveys for me; the fierceſt Beaſt
True Veniſon yields, and every Flock a Feaſt.

[f] See our Author's Diſſertation *De Statu Hominum Naturali*, § 6.

[g] This is the Opinion of Mr. DE LA BRUYERE (in his *Caracteres* at Chap. *du Souverain & de la Republique*, p. 319.) "'Twas the Injuſtice, *ſays he*, of the firſt Men, that was the Original and only Source of War; and which put them under "the Neceſſity of ſubmitting to ſome Power that might ſettle and eſtabliſh their Rights and Pretenſions: For if they would "have been contented with their own, and not have invaded the Rights of their Neighbours, the World would have enjoyed "an undiſturbed Peace and Liberty." Mr. BAYLE (in his *Nouvelles Lettres à l'occaſion de la Critique generale du Calviniſme de Maimbourg*, Letter xvii. § 2.) adds to theſe ſome ſtronger Reaſons. 'Tis worth the while to relate his Words. "'Tis not "to be ſuppoſed, *ſays he*, that Mankind, at the Beginning of Societies, had any great regard either to future Good or Evil. "They had no other Thoughts than to remedy the Miſchiefs they had experienced, or which they looked upon to be near at "Hand.——I cannot perſuade myſelf, that Communities were formed, becauſe Men foreſaw, by conſulting the Ideas "of Reaſon, that a ſolitary Life would be no Honour either to their own Species, or to their Creator, or to the World in "general. 'Twas the *preſent Satisfaction, and the approaching Hope of living ſecurely*, or elſe *Force*, that produced the firſt "Commonwealths; without Mens having had in View Laws, Trade, Arts, Sciences, the Enlarging of States, and all the other "Things in which the Beauty of Hiſtory conſiſts. They did not foreſee theſe Conſequences at the Beginning, and though they "had foreſeen them by the Light of an Underſtanding free from Paſſions, it would not have touched them in the leaſt.——— "Mankind are too cold and remiſs, when they are ſpurred on by nothing but Reaſon; and the Affairs of *human Society* would "have been but in a very ſad Condition, had Men been tempted to have lived together only upon this Conſideration; *that it "is not reaſonable for a Creature proper for Society, to live in Solitude.* As the Nature and Frame of our Conſtitution is, it is "only by the means of *Senſe* that we muſt be determined." We cannot, in my Opinion, but approve theſe judicious Reflections: And that the Original of States and Empires is partly to be attributed to *Force*, is what we may with great Probability conclude, from the manner in which the Holy Scripture ſpeaks of *Nimrod*, the moſt antient King, and the firſt Conqueror

nothing, next to Almighty God, can be more beneficial to Man, than Man himſelf; ſo nothing is able to work him greater Miſchief; as *Cicero* ſhews at large in his ſecond Book of *Offices*, Ch. v. *&c.* Now Man being infeſted with various Evils, has found out for each a proper Remedy. Sickneſs and Diſeaſe he prevents or removes by the Succours of Phyſick; Hunger, by tilling and manuring the Ground; againſt the Severities of Weather he is defended by Houſes, Cloaths, and Fire; and by Weapons or Stratagems, againſt the Fury of wild Beaſts. But for Redreſs of thoſe Evils, which Men, at the Suggeſtion of depraved Nature, delight to bring upon each other, they had recourſe to themſelves, as the ſureſt Defence, by joining together in one Body, and

queror we have any Account of. *This* Nimrod, ſays *Moſes*, *began to be a mighty one in the Earth: He was a mighty Hunter before the Lord; wherefore it is ſaid*, Even as *Nimrod* the mighty Hunter before the Lord. *And the Beginning of his Kingdom was* Babel, *and* Erech, *and* Accad, *and* Calneh, *in the Land of* Shinar, *Gen.* x. 8, 9, 10. The very Name of *Nimrod* may give us to underſtand ſo much, ſince it is derived from a Word which in *Hebrew* ſignifies to *rebel*, and in *Arabick to be obſtinate, fierce, inſolent*, as Mr. LE CLERC has obſerved. It is probable, that, before this Son of *Cuſh*, there was no Family but what lived in an entire independent State; ſo that the Members, of which it was compoſed, were ſubject to no Body but to their *Chief* or *Father of the Family*. But when *Nimrod*, contemning paternal Authority, ſet himſelf up as a *Sovereign* over People, who either wanted Strength or Courage enough to oppoſe him, or elſe who choſe rather to ſubmit to his Power than expoſe themſelves to worſe Inconveniences, by going to ſettle in ſome diſtant Place; then a Sort of *Kingdom* was formed. And therefore our Author is too indeterminate, and too imperfect in his Notions, in maintaining, that it was only the Fear of being injured and inſulted which gave Birth to all *civil Societies*. The very Cauſes of this Fear, as Mr. TITIUS obſerves (Obſervation DXLVII. Numb. 3, 4) were not in thoſe Days ſo great, as neceſſarily to induce Men to form *Political Governments*. For why could they not then have been able to have ſufficiently provided for their Quiet and Safety, by ſeveral of them joining together in Treaties and Confederacies, for the Defence of each other againſt ſuch as ſhould pretend to moleſt them in the Enjoyment of what they had purchaſed by their Labour and Induſtry? Theſe Treaties and Alliances being founded on the mutual Advantages of the Parties concerned, each would have been induced to have obſerved them by his own proper Intereſt; as our Author ſays himſelf a little farther in the ninth Section. This is ſo true, that, a long Time after Mankind began to multiply, there were Nations that, for ſeveral Ages, lived without Laws, without Magiſtrates, or without any Form of Government. See GRONOVIUS's 2d Note upon GROTIUS, Lib. i. Ch. i. § 1. Nay, even to this Day, there are ſeveral Examples of it to be found among the People of *Africa* and *America*. See *la Continuation des penſees diverſes* of Mr. BAYLE, Article CXVIII. Beſides, thoſe who refer the Riſe and Settlement of all States to one general and uniform Principle, ſuch as ſome ſuppoſe *Fear* to be, others the *Occaſions of Life*, others ſome other Motive (See *Lactantius Inſt. Divin.* Lib. VI. Ch. X. *Numb.* XIII, *&c. Edit. Cellar.* and *Tacitus* Annal. Lib. III. Ch. XXVI.) ſeem to ſuppoſe, that in the firſt Ages of the World, ſeveral *Fathers of Families* met together, to conſult in what Manner they might moſt commodiouſly provide for their Security, or for their Neceſſities; and that, upon mature Deliberation, they agreed that it was abſolutely neceſſary to form among themſelves a *civil Society*. Now this Notion is not agreeable either to Hiſtory, or to common Experience, which demonſtrate, that all human Inſtitutions of Government had but ſmall Beginnings; that they were at firſt very rude and defective, and that it was by Degrees, and in a long Series of Time, that they arrived to any tolerable Perfection. But though one could find out, in the Monuments of Antiquity, ſome Footſteps of ſuch an Aſſembly; it would be mighty difficult to ſuppoſe, that *thoſe Fathers of Families* immediately formed an Idea of *civil Societies*, and foreſaw and nicely weighed the Advantages and Inconveniences of it. This is a Thing that requires a long Experience, and it is very unlikely that the Plan of ſo beautiful a Building was deſigned and finiſhed all at one Time; ſince, even now that it has been formed ſo many Ages ago, the generality of Mankind know nothing of its Uſe, its Structure, or its Beauties: it being a Knowledge that even Perſons, who have had ſome Education, do not attain but by Study and Experience. Our Author himſelf (in his *Introduction to the Hiſtory of the States of* Europe, Ch. i. § 3) acknowledges, that the firſt States were very ſmall and very defective, and that the different Parts of *Sovereignty* were not eſtabliſhed but by little and little, and one after another. In my Opinion, there is not Reflexion enough made here upon the *Simplicity* of thoſe Times in which *civil Societies* began; and it ſeems to me, that it is the Poſture of Affairs at preſent which our Author had his Mind fixed upon too much. The World not being as yet very full of People; and Senſuality or Luxury not having as yet infinitely increaſed the Wants, or rather the Deſires of Mankind; every one could eaſily get enough to ſatisfy himſelf, and nothing, but the moſt exceſſive Malice in the World, could induce a Man to invade his Neighbour's Property. Beſides, though Ignorance and Ruſticity are not, without Diſpute, the Parents of Virtue and Regularity, nor were thoſe of *the Golden Age*, certainly, better than the People of the ſucceeding Ages (as Mr. LE CLERC has ſhewn us in his Comment upon *Heſiod*'s *Theogony*, ver. 211.) yet ſince they were not in thoſe Times Maſters of any great *Cunning*; and the Rules and Stratagems of War, together with thoſe deſtructive Inſtruments which make up what is wanting in the Strength of the Body, and render the Wickedneſs of Mankind more enterpriſing, were not yet found out, it was no difficult Matter to ſecure themſelves againſt Inſults, eſpecially by ſeveral joining together in a defenſive Alliance. It will, perhaps, be objected, that if People had not in thoſe Days a great deal of Cunning in carrying on an Attack, neither had they more in making a Defence; and that, therefore, things were ſo far upon a equal Foot. (This Difficulty was firſt propoſed by Mr. BERNARD, *Nouv. de la Republique des Lettres*, June 1706, p. 639.) But to me it ſeems, that generally ſpeaking, to find out new Ways and Methods of attacking, requires infinitely more Art and Ingenuity than to defend one's ſelf. 'Tis there is ſuch an Inſtrument, or ſuch a Stratagem, againſt which it is eaſy enough to be provided; and which a Perſon that is but moderately prudent, will, with the leaſt Difficulty, render the Deſign uſeleſs and ineffectual, and though the Contrivance of it coſt a great deal of Labour; and though abundance of Care and a particular Dexterity be required to manage it. In the firſt Ages, a Ditch, a ſtrong Wall, ſome large Maſtiff-Dogs were a Rampart and a Guard ſufficient for a Man's Security. If we do but conſider how long they were formerly in taking a Place, even after Battering-Rams and other warlike Engines, often pretty well contrived, that the Antients made uſe of, were found out, though the Fortifications were but very indifferent: If we do but obſerve, that even now-a-days, ſince the Invention of Artillery, the Beſieged have much the Advantage of the Beſiegers; I am certain we ſhall be obliged to conclude, that, in the Simplicity of the firſt Ages, an Attack muſt be, without Compariſon, more difficult than a Defence; and that, therefore, a Government had no ſuch preſſing Occaſions to unite the Forces of ſeveral for their common Security. What we have to offer in this Matter is, That, in proportion as Mankind increaſed, *civil Societies* were formed by Degrees for different Reaſons, more or leſs imperfect according to the Times, and according to the Abilities of the Founders. (Compare here what M. BOHMER has ſaid at length, in his *Jur. Pub. Univ.* Part i. Ch. i) Mr. TITIUS (*as above*, Numb. 6.) conjectures, and it is probable enough, that it was the Craftineſs of ſome ambitious Mind, ſupported by Force, which gave Mankind the firſt Plan of Governments; and what I have obſerved with reſpect to *Nimrod*, ſeems to favour this Thought. Such a *Body Politick* being once formed, ſeveral afterwards joined themſelves to it upon different Motives, others formed new ones upon the ſame Model: When there were ſeveral of them inſtituted, thoſe who had hitherto lived in a natural Independency, fearing to be inſulted and oppreſſed by theſe riſing States, reſolved, alſo, to form the like, and to chooſe themſelves a Chief. At firſt theſe petty Kings were little more than Perſons choſen for the Determining of Diſputes, and for the Commanding of Armies. This appears by the Hiſtory of the Judges, and of the firſt Kings of the *Iſraelites*, and by what HERODOTUS relates of *Dejoces* King of the *Medes*, Lib. i. p. 26, 27. *Ed. H. Steph.* ſee, alſo, HESIOD THEOGON. *v.* 85, *&c.* & *Oper* & *Dier. v.* 38, 39. And, therefore, it is that there were, ſometimes, ſeveral Kings among one and the ſame People, as Mr. LE CLERC has not failed to remark and to prove from the Teſtimony of HOMER, who mentions ſeveral Kings of the *Pheaciens*, Odyſſ. *Lib.* VIII. *v.* 40, 41. He, alſo, quotes a fine Paſſage of DIONYSIUS HALICARNASSEUS, from whence it appears, that the Abuſe which Kings made of their Power, obliged People to eſtabliſh *Ariſtocratical* or *Democratical* Government: Κατ' ἀρχὰς μὲν γὰρ ἅπασα πόλις Ἑλλὰς ἐβασιλεύετο, &c. "At firſt all the Cities of *Greece* were governed "by Kings, but not *arbitrarily* as barbarous Nations were, but according to the Laws and Cuſtoms of the Country; ſo that "he was eſteemed as the beſt King, who was the moſt juſt and ſtrict Obſerver of the Laws, and who never departed from the "Cuſtoms of the Country. This is what HOMER means, when he ſtyles Kings, *Men who diſtribute Juſtice*. Theſe little "Monarchies thus limited, ſubſiſted a long Time upon that Foot, as among the *Lacedemonians*; but ſome Kings beginning to "abuſe

and erecting a civil Society [a]. And when they were once reduced to ſuch Order, as to be ſecure from mutual Injury, they muſt, of courſe, enjoy a greater Share of thoſe Benefits, which it was in their Power to confer upon each other [f]. And this Account is ſeconded by thoſe who deduce the Original of Commonwealths from *Fear*. By which we are not to underſtand the violent Diſorder of one in a Fright and Conſternation; but only a wary Proviſion againſt future Evils. Of which *Ariſtophanes* [b] rightly obſerves, Ἡ εὐλάβεια σώζει πάντα, *Caution preſerves all Things*. And by this Expoſition of the Word *Fear* we avoid all the Force of what is objected, that, had Men been really afraid of each other, they would have been ſo far from uniting together in a civil State, that they would not have endured each other's Sight, but one flying this way, and another that, would thereby have remained in a perpetual Separation. As if *Fear* implied in it nothing but *Flight*, and not alſo *Diffidence*, *Suſpicion*, and *Caution*. Nay, this is one Property of being afraid, the providing againſt the probable Grounds of Fear. Thus, going to ſleep we ſhut the Doors, for fear of Thieves; when they are ſhut, our Apprehenſion is over. We go armed in a Journey for fear of Robbers; and, being well armed, fear no more. To which Purpoſe *Thucydides* [c] obſerves, that the Cuſtom of wearing Swords, which was generally received in the barbarous Nations, continued, likewiſe, among ſome People of *Greece*, by the Neceſſity of antient Times; when as yet they had no Walls to defend them from Enemies abroad, and could not meet together without ſome Fears and Jealouſies at home. Remarkable, likewiſe, is that Speech of *Pyrrhus* to the *Athenians*, recorded by *Plutarch* in his Life; when being permitted to enter the City, and offer Sacrifice to *Minerva*, upon his returning thence, he ſaid, "That, for his Part, he retained a grateful Senſe "of their Kindneſs, and the Confidence they "repoſed in him; but adviſed them, *not to open their Gates, if they were wiſe, to any King for the future*. Civil Communities, even in the Times of profoundeſt Peace, do yet fortify their Towns, guard their Frontiers with Troops, and fill their Granaries with warlike Stores; all which would be an unneceſſary Expence, did not they apprehend ſome Danger from their Neighbours: Of whom, after theſe Precautions, they are no longer afraid. So that it is the natural Effect of Fear, to find out Remedies againſt itſelf. And, in like manner, becauſe Men were afraid of each other, they ſupplied one another with Relief, by joining in a civil State. Of the Force and Efficacy of which thoſe Authors ſeem to have a deep Senſe, who affirm, that, *In Caſe there were no Courts of Juſtice in the World, Men would deſtroy and devour each other* [d]. And indeed, that Men have abundant Reaſon to apprehend and fence againſt mutual Danger, we have, in another Place, [e f] fully proved: Which is no leſs true for what *Hornius* objects, *That the Fathers of Families for many Ages lived together on Terms of Equality, without the Fear of any ſuch pretended Invaſion on their Rights: and that Ambition was but of late Growth amongſt Men; coming in after the Inſtitution of Commonwealths, and then giving occaſion to the Diſtinctions of Honour and Dignity*. As if it were not Ambition, which occaſioned the firſt Murder in the World; when *Cain* was enraged, that his Brother's Offering ſhould find more Acceptance with God, than his own [g]! Beſides, Ambition is but one Root of thoſe Evils, which ſpring, in like manner, from Perverſeneſs of Temper, and Competition of Deſires. Of which, even in thoſe plain and primitive Ages, the former produced that ſavage and brutiſh Fierceneſs in the Race of the Giants;

[a] The *Perſians* took the true Way of demonſtrating this; who had a Cuſtom, upon the Death of their King, to live the five enſuing Days without any Law; to the End, *That finding, by Experience, the miſerable Effects of Anarchy, the Slaughter, the Rapine, and if there be any Thing worſe, that accompanied ſuch a Condition, they might be engaged in a firmer Allegiance to their Sovereign for the future*, Sext. Empir. *adv.* Mathem. *Lib.* ii. *p* 70. Ed. *Genev.* To the ſame Purpoſe may be applied ſome of the Reaſons, which according to the Account of *Herodotus*, Book i, induced the *Medes*, living before in independent Villages, to inveſt *Dejoces* with the regal Authority over them. [b] *In Avibus*, p. 532. Ed. *Lugd. Bat.* [c] Lib. i. [d] *Comp.* Hobbes *de Cive*, Lib. i. § 2. [e] Book ii. Ch. ii. § 6, 12. [f] V. *Grot.* Lib. i. Ch. iv. § 4. Note 2. [g] *Geneſ.* iv. 4, *&c.*

"abuſe their Power, and to govern by their Fancy, rather than according to the Laws; the Generality of the *Greeks* would "not endure it, and, therefore, aboliſhed this Form of Government." *Antiq. Rom.* Lib. v. Ch. lxxiv. Ed. *Oxon.* I will here add a Paſſage out of *Iſocrates*, where this Orator having a Deſign to compliment the *Athenians*, ſays, that he will go back to the Time, ὅτ' ἐκ ἦν ὅτε δημοκρατίας, ὅτ' ὀλιγαρχίας ὄνομα πω λεγόμενον. Ἀλλὰ μοναρχίαι κὴ τὰ γένη τῶν Βαρβάρων, κὴ τὰς πόλεις Ἑλληνίδας ἁπάσας διώκων. "When the Name of neither *Democracy* nor *Ariſtocracy* was in Being; but *Monarchy* was the only Go-"vernment both among barbarous Nations, and amongſt all the States of *Greece*." *Panathenaic*, p. 443, 444. Ed. *Pariſ. min.* See, alſo, the Commentators on the Beginning of JUSTIN's *Univerſal Hiſtory*; and what is farther ſaid, in *Ch.* v. § 4. of this Book: Mr. LOCKE has, likewiſe, treated of the Origin of *civil Societies* in his ſecond Treatiſe of *civil Government*, Ch. vii, *&c.* As for the Reſt, all I have ſaid here in this Note, upon the different Motives which gave Birth to *civil Society*, does not exclude Conventions either expreſs or tacit. Theſe muſt always be ſuppoſed to intervene here to found the Authority of thoſe who command, and the Obligation of thoſe who obey; as well as to regulate the reſpective Limits of Power and Subjection. Mr. CARMICHAEL, who (*Obſ. in* PUFFEND. *De Off. Hom. & Civ.* Lib. ii. Ch. v. § 7.) has endeavoured to defend the Reaſon, which our Author lays down, as the true and principal one, agrees, "That artful and ambitious Men might have en-"couraged Maſters of Families to unite in *civil Society*, in hopes to hold themſelves the firſt Rank in the State. But (adds "he) they never could have ſucceeded in this, without alledging ſome Reaſon, capable of making an Impreſſion on the Bulk "of Mankind. Now there could be no Reaſon more ſpecious than than this, of uniting to defend themſelves from the Inſults "of their Neighbours." But this Motive was not conſiderable, and that it might be propoſed without Succeſs, is what I will not deny. But the Point is to know whether it was the principal one, or whether it could always take Place? Now the Contrary appears from what is ſaid above, and which has never been anſwered. "*Force* (continues the ſame Author) muſt have "ſome Influence here, becauſe it ſuppoſes that thoſe who imployed it already formed a Body of civil Society, otherwiſe they "might have been reſiſted." But this Suppoſition is no ways neceſſary. In the Times in which *civil Societies* were formed, there might be, and probably were, *Heads of Families*, who (like the Patriarch *Abraham* in after Times) had a numerous Family, by the Help of which it was not difficult for them to reduce to their Obedience inferior Chiefs, who, either ſingle or confederated, were unequal to them in Power; eſpecially in thoſe Days when the World was not very populous. However, though there were only one or more Reaſons, why Men firſt entered into civil Society, what is certain, and, indeed, ſufficient to know, is, That every Man, by engaging to become Member of a State, had in view his own Advantage, and endeavoured, as much as poſſible, to preſerve his natural Liberty. This is founded on the Conſtitution of Mankind, and that invincible Inclination which we muſt ſuppoſe to operate with much greater Force at that Time, than after civil Societies were eſtabliſhed; where Education, Prejudice, and private Intereſt, often, almoſt, ſtifle the natural Love of Liberty.

[f] The Remainder of this Section is taken from our Author's Abridg. *de Offic. Hom. & Civ.* Lib. ii. Ch. v. § 7.

the latter occaſioned Strife and Diſſenſion betwixt the neareſt Relations[a]. In the Breaſts of Kings, Ambition, it is true, reigns with greater Violence, and tranſports them to Actions more bloody and cruel; yet we may trace ſome Footſteps of the ſame Paſſion in Shepherds and Ruſticks[b]. *Hornius* proceeds to obſerve, That, in thoſe early Times, *to provoke others with Words or Blows, would have proclaimed a Man's Folly as well as his Malice: Becauſe this would have given a Right to the Party thus provoked, to take the firſt Opportunity of killing him. Again, there could be no Hopes of Booty amongſt People as yet unacquainted with Wealth, and poſſeſſing no other Stores but thoſe of Fruits, Plenty of which was to be had in other Places, with little Pains, and no Danger.* As if the Proſpect but of moderate Gains were not, with bad Men, Temptation enough to do wickedly! Or as if Thefts and Robberies were not as common of Old, as they are at this Day, amongſt People living wholly on Grazing and Tillage! Not to ſay, that the Occaſion of founding Commonwealths was not only to protect Men from Robberies, but, alſo, from any Injuries, which they might be capable of offering or receiving. What he afterwards affirms is very true, that, *Let the Suſpicions of another's miſchievous Deſign be never ſo well grounded, this will not juſtify an Attempt upon him, by way of Prevention.* And that Right and Power of all over all, with which Mr. *Hobbes* inveſts Mankind in his State of Nature, ought to be extended no farther than right Reaſon allows of; amounting only to this Senſe, that Man, in a State of natural Liberty, has a Right to imploy, againſt all Perſons, all ſuch Means for his Preſervation, as Reaſon judges neceſſary for him to uſe, and dangerous to let alone. Wherefore to carry our Caution farther than right Reaſon ſhall preſcribe, is doubtleſs a Breach of the Law of Nature. So that he, who, on any uncertain Fears, kills the Perſon he is afraid of, when he might as conveniently have eſcaped from him, muſt be adjudged guilty by the ſaid Law. Whence they appear to be certainly in the wrong, who imagine that this Principle juſtifies Rapines and Robberies, upon ſuch as are not open and profeſſed Enemies. For Robbery and Rapine plainly denote ſuch Means, as ſound Reaſon can never judge neceſſary to a Man's Preſervation, but ſuch as are rather made uſe of to ſerve the Ends of Avarice and Cruelty: It being never alledged in Plea for Robbers, that they ſpoil Men of their Goods in their own Defence. That other Expreſſion ſeems very ridiculous; *Suppoſing Hatred and Diffidence to have reigned never ſo much amongſt Men, yet this could never be ſaid to have happened purely for the Sake of Commonwealths:* For Men did not, therefore, hate or diſtruſt one another, purpoſely that they might conſtitute a civil State; but they, therefore, conſtituted a civil State, becauſe they diſtruſted or hated each other. And though we ſhould allow, as fully as can be deſired, that while the Hatred of one Perſon extended only to ſome few, who were diſagreeable to him, he might, at the ſame Time, love and favour all others, or at leaſt not be enraged againſt them; yet if each Man had but his ſingle Foe, this alone were enough to fill the World with Hatred and Diſſenſion. It is, therefore, a vain Attempt to aſcribe the Original of Communities to *the Accidents of Neighbourhood, and the natural Increaſe of Mankind by Generation.* This laſt, indeed, affords a conſtant Supply, whence civil Bodies are ſtocked and maintained: In like manner, the former might perhaps give Occaſion for Neighbours to join themſelves to the ſame Community, rather than to divide. But the Cauſe which firſt moved Men to eſtabliſh Societies, is, by no means, deducible from theſe Grounds.

VIII. Nor has any one Reaſon to imagine, that a bare Reverence of the Law of Nature, which prohibits indifferently all ſorts of Injuries, could ever have been able to ſecure the whole Body of Mankind (as conſidered in a State of natural Independency) *from mutual Prejudice.* Some there are (it muſt be confeſſed) with whom Honour, Juſtice, Faith, and Innocence are ſo much in Eſteem, that they would not violate theſe Rules, though ſure of Impunity. Many, alſo, may be well repreſented by that Character which we find in *Ariſtotle*[c]: *Who refrain from Injury upon a Principle of Fear (it being difficult to wrong others, without being, likewiſe, wronged by others) and who are, therefore, unwilling either to do wrong, or to receive it*[1]. Now, were all Men of this Temper, the Eſtabliſhment of civil Communities might not appear ſo very neceſſary a Work. But, on the contrary, what Numbers are there, who make light of breaking through the moſt ſacred Ties of Duty, whenever invited to injure others by the Proſpect of ſome Gain to themſelves, and the Hopes of eſcaping, by Force or Fraud, from the Hands of the injured Parties? Not to diſtruſt ſuch Men as theſe, would be voluntarily to expoſe ourſelves to their Wickedneſs and Inſolence. *Parum tuta per ſe ipſa probitas eſt*, ſays *Salluſt*[d], *Unguarded Honeſty is but an undefenſible Hold.* But as it is the Part of Prudence to keep a watchful Eye on bad Men, and to make an early Proviſion againſt their Attempts; ſo is that Aſſertion of Mr. *Hobbes*[e] unreaſonably harſh, wherein he affirms, *That the Hope of any Man's Security and Preſervation conſiſts in his being able, by his own Strength and Cunning, either openly or ſecretly to be beforehand with his Neighbour in Miſchief.* Indeed the generality of Men are ſo far corrupted, that wherefoever there is Appearance of greater Advantage from the Tranſgreſſion of Laws, than from the Obſervation of them, they make no Scruple to tranſgreſs them: According to that of *Plato*[f]; *Whoever conceives it in his Power to do unjuſtly, readily does ſo: each Perſon concluding Injuſtice to make much more for his private Intereſt, than Juſtice could do.* Yet to reproach all Mankind with this perverſe Diſpoſition, is carrying the Point and the Cenſure too far. Nay, by the Confeſſion of Mr. *Hobbes* himſelf[g], ſome modeſt Natures there are in the World, that do not aſſume to themſelves more than they leave

[a] See *Geneſ.* xiii. 7. xxvi. 15, 20, 21. [b] *Vid.* Virg. *Eclog.* iii. *v.* 25, *&c. Eclog.* vii. Theocrit. *Idyll.* 5. & 8. [c] *Ad* Nicomach. *Lib.* iv. *Ch.* iii. *p.* 46. *C. Ed.* Pariſ. [d] Adherbal *in Bell.* Jugurth. *Ch.* xiv. [e] *De Cive*, Ch. v. § 1. [f] *De Repub.* Lib. ii. p 593. Ed. *Wech.* [g] *De Cive*, Ch. iii. § 27.

[1] This Paſſage is not to the Purpoſe, reſpecting only Covetouſneſs: Our Author has expreſſed himſelf more to the Point, in his Abridgment *De Officio Hom. & Civ.* Lib. ii. Ch. v. § 8.

to others; always having their Eye on that Rule, *To do as they would be done by.* How any one, upon Pretence of providing for his own Security, could ruſh upon the Oppreſſion and Ruin of ſuch innocent and excellent Perſons, I muſt, for my Part, own myſelf at a Loſs to underſtand. Nor can it ever be, that right Reaſon ſhould warrant my going to kill or oppreſs another, of whoſe Deſigns to do me hurt I have not had very particular Indications: there being, till then, many better Ways left open of compoſing Matters amicably. For, as to that Pravity of Nature and Diſpoſition, which is common to the whole Race of Men, and which, therefore, admits of various Degrees, we cannot, on the Account of it alone, conclude a Man an open and profeſſed Enemy. It is owned, therefore, that, as to the Diſcharge of natural Duties from others to me, I cannot have it, in a State of Nature, ſo well ſecured, as under civil Government: Yet neither is it left in ſo miſerable an Uncertainty, as that hereby I muſt be obliged, or may be permitted, to treat all Men in a hoſtile Manner. For, while I find my own Strength to be equal or ſuperior to another Man's, and while that Man, by Word or Deed, teſtifies a Deſire of living peaceably with me, and by real Proofs confirms the Truth and Sincerity of that Deſire; what reaſon have I to account him my Enemy? Or how can the bare Suſpicion, that all this Friendſhip is but Counterfeit; or that in time he may come to alter his Mind, give me Authority to aſſault him by way of Prevention? And the Truth of this will appear more evidently, if we look upon the Practice of entire and independent States and Governments, which are, with regard to each other, in a State of Nature. Here all Men agree in judging it a Crime for one Nation, by ſecret Stratagem or open Force, to attack another (as yet not known by any Exchange of good or bad Offices, nor engaged in Friendſhip and Alliance by Covenant or other Act) only becauſe there is no common Power preſiding over both, by which the other State, if attempting any injurious Deſigns, might be reſtrained and puniſhed. Which clearly proves againſt Mr. *Hobbes* [a], that the *Law of Nature is not* altogether *dumb* even *in a State of Nature:* Though indeed there is much greater Security of having this Law obeyed, under civil Government; where the Power of the Magiſtrate is at hand, to compel thoſe who are wanting in Returns of Kindneſs and Peace. But, notwithſtanding all this, thus much Prudence ſuggeſts to us, that we ſhould not only provide, by a timely Defence, againſt the open and profeſſed Malice of wicked Men; but that we ſhould, likewiſe, eſteem the Goodneſs of others, not infallible and immutable. And, to anſwer all theſe Ends, no ſuch univerſal Safeguard, as *civil Society*, could be invented or conceived.

IX. Moreover, although the Law of Nature direct us, in caſe any Difference ariſe, to adjuſt it amicably amongſt ourſelves, or refer it to the Arbitration of others; yet neither thus would the common Peace be ſufficiently ſecured. For with the ſame Eaſe, that we diſpenſed with ourſelves in breaking the other natural Rules, we might, alſo, ſlight this of appealing to Arbitrators, and ſo have immediate recourſe to Arms. Beſides, ſuppoſing two Men had, by Conſent, referred their Differences to a third Perſon; yet, were either of the Parties diſſatisfied with the Deciſion, it were no hard Matter for him to renounce and reject it; in caſe he found his own Strength ſufficient to ſhelter him from human Puniſhment: eſpecially ſince the Arbitrator is not endued with any Authority and Command, by Virtue of which he might oblige the Parties to ſtand to his Sentence. Therefore, in a State of natural Liberty, Prudence will adviſe us, that we rely not too much on the bare Faith of others; but that we believe the Obſervation of all Compacts to be then beſt aſcertained, *when either they are grounded on the mutual Advantage of the Parties*, or when it is in our Power to force thoſe with whom we treat, to be juſt and honeſt. But where Perfidiouſneſs is encouraged by Hopes of Profit, and not reſtrained by Fear of Puniſhment, there it were Madneſs to think, that bare Covenants ſhould be able to warrant our Safety. This appears from the Practice of all Nations; who, when they break off their Alliance with one State, ſtrengthen themſelves with the Friendſhip of another: By which Act they do not preſently condemn themſelves of Treachery, in thus ſeeking for Protection to the Faith of others; but, inaſmuch as Communities are chiefly guided by Intereſt, in fixing their Alliances, they do but ſubſtitute an advantageous League in the room of one which was either unprofitable, or dangerous. And it is under theſe Reſtrictions and Mitigations only, that we can any ways admit of Mr. *Hobbes*'s [b] Poſition, that *Covenants founded upon mutual Faith, in a State of Nature, are invalid.* For though it be plauſibly enough ſaid by *Livy* [c], that *all Men are ambitious of being credited; and that, to repoſe Faith in them, is with moſt Men a Tie upon their Fidelity*; yet it is the ſafer Courſe, in a State of Nature, to think upon that vulgar Saying;

Πίστει χρήματ' ὄλεσσα, ἀπιστίῃ δ' ἐσάωσα,
Theogn. v. 830.
Undone by Truſt; and by Diſtruſt preſerv'd.

X. Again; there is another Reaſon why the Law of Nature cannot be able, of itſelf, to enſure the Peace of Mankind. For this is the Caſe of natural Liberty, that each Man, as he places his Defence and Safety in his own proper Strength; ſo as to the Means of obtaining that End, and the whole Management of his Actions, he purely conſults and follows his own private Judgment. And what a wide Difference there is between Men in this Reſpect, no one can be ſo ignorant, as not to have made Part of his Obſervation. [1] Few there are of ſo happy and noble a Temper, as to have, at the ſame Time, that piercing Sagacity, which

[a] *De Cive*, Ch. v. § 2. [b] *De Cive*, Ch. ii. § 11. [c] *Lib.* xxii. 22.

[1] Mr. BRUYERE, in his Chapter upon *Man*, has this fine Thought, "We aſk why the whole World does not make one ſingle Nation, nor ſpeak the ſame Language, nor live under the ſame Laws, nor agree in the ſame Uſages and Worſhip? And, as for me, conſidering the Variety of Mens Humours, the Difference of their Taſtes, and the Contrariety of their Judgments, I think it is ſtrange that even ſeven or eight Perſons can live amicably under the ſame Roof, within the ſame Compaſs, and compoſe one ſingle Family."

may

may diſcern what is for the laſting Advantage of all Men in general, and of each in particular; and that Strength and Firmneſs of Soul, which may conſtantly purſue what has been prudently foreſeen. The greater Number are, on account of their natural Dulneſs, impoſed upon by groſs Error, in the Likeneſs of Reaſon. Others are hurried by the Violence of their Paſſions, whereſoever the Gratifications of Luſt, or the falſe Appearance of Advantage ſhall draw them. Now, in ſo endleſs a Diverſity of Opinions and Deſires, what Hopes can there be of Peace and Agreement: whilſt every Fool is as ſtrongly conceited of his own Way, as the wiſeſt Man is convinced of his; and the former will no more ſubmit to the latter, than the latter will condeſcend to be inſtructed by the former? Since therefore Reaſon alone, according to the Tenor which we find it to hold in particular Perſons, is inſufficient to compoſe theſe Differences in Judgment; other Means are to be uſed, by which an agreeable Union and Harmony of Mind may, in ſome Degree, be obtained [f].

XI. In fine; although it be evident to all Men, that, by breaking the Law of Nature, they exceedingly obſtruct their own Happineſs (the Promotion of which depends on the Aſſiſtance of others) and bring many grievous Evils and Dangers on themſelves; though Nature has, likewiſe, imprinted it on the Minds and Conſciences of Men, that ſuch as act contrary to her Decrees, by lightly invading and harming their Neighbours, ſhall not, in the laſt Event, go unpuniſhed [a]: Laſtly, though the Benefits that would redound to them from their obſerving natural Precepts, and the Evils which they incur by tranſgreſſing them, are a manifeſt Argument, that it is better for Men to live kindly and ſociably, than otherwiſe; yet would not all this be enough to procure the ſettled Peace of Mankind. And that, becauſe the Multitude act not by rational Motives, but by wild Impulſe, miſtaking Paſſion for Reaſon; chiefly through the Fault of Cuſtom or Education, which ſtifle and ſuppreſs the Force of inward Reflection. As, alſo, becauſe the greateſt Part of Mankind are wholly intent upon the preſent, without any Care or Thought of the future; and are commonly moved by thoſe Objects which thruſt themſelves upon their Senſes, while thoſe of a higher and nobler Nature are too refined for their Affections, and too remote for their Deſires. Whence it comes to paſs, that the Dread of human Puniſhment is, with too many, more prevalent, than that of divine Vengeance; which yet ought to hold the ſovereign Place in our Fears. Becauſe the Juſtice of Providence is, for the moſt part, ſlow, and the Methods of it ſecret and retired [b]: Which, with bad Men, is an Argument, that the Calamities, which ſometimes attend Impiety, ariſe from other Cauſes [c]; eſpecially, when they find, that the worſt amongſt them often abound in thoſe Things, which the Vulgar take for the Meaſure and Standard of Happineſs, while the Good are oppreſſed with many Afflictions, ſufficient to perſuade the Wicked and Fooliſh, that Virtue has little Power, unleſs in making Men miſerable. Thus *Plutarch* [d] obſerves: *When Judgment is immediately executed on a Crime, it ſtops thoſe Men in the Courſe of their Wickedneſs, whom Succeſs would have encouraged to proceed. For nothing does ſo much enfeeble the Hopes, and deject the Mind of the Oppreſſed, as the Reſpite and Delay of divine Vengeance; and nothing more increaſes the Cruelty and Inſolence of their Oppreſſors. And with this very Proſpect it is, that the Wicked encourage and harden themſelves in Villany; that the Fruit of their Crimes they ſhall receive in Hand, but the Puniſhment in Reverſion, is at a great Diſtance from Enjoyment.* It may farther be added, that the Stings of Conſcience, preceding a villainous Act, are not ſo fierce and raging as thoſe which follow after, when what is once done, we find paſt our Skill to undo [e]: and that the Voice of Reaſon, which could not be heard in the Hurry and Tumult of our Paſſions, when theſe once begin to cool and ſettle, will ſound moſt forcibly in our Breaſt [f]. *In like manner*, ſays the wiſe Author but now cited [g], *as Malefactors, when led to Execution, carry each their Croſs; ſo does Sin, out of every Offence, frame its own Torments: that moſt ingenious Artiſt of a miſerable Life! ſuch as is not only confounded with Shame; but diſtracted with Horrors, Convulſions, Remorſe, and all the Tumults of a troubled Mind.* But, becauſe theſe inward Torments make no Impreſſion on Senſe, they have ſo much the leſs Efficacy towards reſtraining the Growth of Wickedneſs in others. Mr. *Hobbes* [h] is in the right, when he tells us, that *Scarce any human Action can be aſſigned, which is not the Beginning of ſo long a Chain of Conſequences, as our Foreſight ſeldom reaches to the End of. The pleaſant and painful Accidents of Life are ſo firmly linked together,*

[a] Claudian. *D.* IV. *Conſulat.* Honor. *ver.* 104.

Extruite immanes ſcopulos, attollite turres,
Cingite vos fluviis, vaſtas opponite ſylvas;
Non dabitis murum ſceleri.———

Heap Rocks and Towers the vaſt Aſcent to win;
Let Floods ſurround, or Foreſts hem you in;
All Nature is too weak a Fence for Sin.

[b] 'Tis an Obſervation of *Cæſar*, that *Divine Providence, to ſtrike Men with a deeper Senſe of Affliction, by a ſudden Change from proſperous Affairs, ſometimes grants to thoſe, whom it intends exemplarily to puniſh for their Wickedneſs, the more fortunate Succeſs, and the longer Enjoyment of Impunity*, De B. G. *Lib.* i. *Ch.* xiv. Not. 5. [c] *Add.* Eccleſiaſt. viii. 11. [d] De Sera Numinis Vindicta, *p.* 548. D. E. [e] Curtius viii. 2. *Nature ſeems unkind in leaving Men under this great Weakneſs and Diſadvantage, that generally they conſider Things leſs before they do them, than after they have done them.* [f] Plutarch De Ser. Num. Vindict. *p.* 555. E. *When a Man, out of Avarice, Envy, Ambition, or ſenſual Delight, has committed ſome heinous Wickedneſs, and, after the violent Thirſt of his Deſire is cooled and appeaſed, takes Time to reflect, that what he propoſed of Profit, Convenience, or Satisfaction in any Kind, has left him utterly diſappointed, while the baſe Impreſſions and horrid Tyranny of Sin remain in full Force; muſt neceſſarily be brought to this Perſuaſion, that when, for the ſake of empty Glory, or unaccountable Pleaſure, he broke through the moſt ſacred, moſt beautiful and excellent Rules of Mankind, he, at the ſame Time, filled his miſerable Life with Shame and Diſquiet.* [g] Ibid. [h] Leviath. *Ch.* xxxi. towards the End.

[f] The latter part of this Period is taken out of our Author's Abridgment, *De Officio Hom. & Civ.* Book ii. Ch. v. § 3.

together, that he who receives the Pleasure, is, at the same Time, obliged (whether he apprehends it, or not) to accept of the attending Pain. Thus the Abuse of Power is punished by the Power and Violence of others; Intemperance, by Diseases, &c. and these are what I call natural Punishments. Yet the generality of Men, either through Defect of Judgment, or Vehemence of Passion, are commonly hindered from giving these Considerations due Weight. Wherefore there remained no Way of laying so powerful a Restraint on human Corruption, as what is now afforded, since the Institution of civil States. *Plutarch* [a] seems to have forgotten himself, when he censures *Colotes* for the following Assertion: *They who first regulated Life, composed Laws, set up Governments, and Magistrates over Cities, and enforced Obedience to their Directions, were certainly the Persons who delivered us from Trouble and Tumult, and established Peace and Safety in the World. Take away these Engagements; and we should live like wild Beasts, and hardly forbear to devour the next we meet.* For that grave Writer, who reprehends this Way of speaking, could have no very deep Insight into human Nature and Disposition, if he imagined, that, upon reversing the Laws of all civil Communities, the Honour and Safety of Mankind could be preserved by the wise Rules of *Parmenides*, *Socrates*, *Plato*, or *Heraclitus*. And, though we should never so freely subscribe to *Aristippus*'s Boast [b], who, when asked, What Advantage Philosophers had above other Men? replied, *Were there a general Repeal of all Laws, we should continue to live as regularly and peaceably as we do at present*; yet, what would become of the far greater Number; who, if left to themselves, would fancy Lust and Passion the best Reason and Philosophy? Rather, therefore, let this be the final Decision of the Case; *Qui ratione traduci ad meliora non possunt, metu contineantur* [c]: *'Tis fit, that they whom Reason cannot persuade to do better, Fear should restrain from doing worse.*

[a] Against *Colotes*, p. 1124. D. [b] *In* Hesych. *De Vir Illustr.* [c] Quintil. *Instit. Orat.* Lib. xii. Ch. vii.

CHAP. II.

Of the inward Structure and Constitution of civil States.

I. *Men only are a sufficient Defence against the Wickedness of Men.*
II. *To this End it is necessary that many should join together.*
III. *Those who join in this manner ought to agree in their Resolutions.*
IV. *The Difference between the Polities of Bees and Men.*
V. *An Union of Wills and of Strength necessary to a civil State.*
VI. *This Union produced by intervening Covenants.*
VII. *The first Covenant, with the Decree following upon it.*
VIII. *The second Covenant, giving the final Perfection to a civil Establishment.*
IX. *The Reason for which* Hobbes *will acknowledge but one Covenant.*
X. *This Reason insufficient.*
XI, XII. Hobbes's *Arguments answered.*
XIII. *A civil State, how defined.*
XIV. *In a Monarch, the Will of the Prince is the Will of the State.*
XV. *Under other Forms of Government, according to the regular Course, the Community is concluded by the Votes of the major Part.*
XVI. *This Rule admits of a Limitation.*
XVII. *Of Equality of Votes.*
XVIII. *Of joining or dividing Suffrages.*
XIX. *How many Persons at least are requisite to a ruling Council.*
XX. Civis, *or a Member of the civil State, who may properly be so termed.*
XXI. *Subordinate Bodies, of how many Kinds,*
XXII. *Invested with what Rights and Privileges.*
XXIII. *Of unlawful Bodies, and Factions.*
XXIV. *The peculiar Duties incumbent on the Members of civil States.*

IT follows now, that we enquire more exactly into the inward Structure and Constitution of civil States. That Men therefore might render themselves secure against the Wickedness of others, so far as the Condition of their Nature will admit, no other Expedient could have been invented but this, that each Person should provide a sufficient Guard about him; by means of which, the Designs of others might appear so dangerous in the Execution, that they would think it their safest Course, rather to refrain than to engage, rather to keep the Peace, than to be the Challengers and Aggressors in a War. For the malicious Inclinations of Men, and their ready Disposition to their Neighbour's Hurt, cannot any Way be more effectually kept under, than by setting before their Eyes some present Danger, which must certainly fall on him that shall dare to assault another; and by taking away all Hope and Prospect of Impunity. Now such a Defence or Assistance as this, can by no Means be afforded by any fortified Place, whether it derives its Strength from Nature, or from Art: For to lie thus continually in Hold, is to be a perpetual Prisoner; nor would it be easy for a single Man to defend his Post. But if he let in others to help him, there will be a Danger from them, likewise, and he will stand in need of a new Protection. Some Kind of Aid might indeed be expected from Arms; but not to such a Degree, as that one Person alone should be able to promise himself any long Security from hence, against numerous Oppressors. So too, the Defence which might be made by brute Creatures, is very slender and uncertain, and by no Means capable of shielding us from Dangers of this Nature. For though we meet with a Story of two Dogs, that performed military Service against

againſt the *Americans* [a 1]; and though the Emperor of *Ceylon*, in his Royal City of *Candy*, is reported to have a Life-Guard, as it were, of an hundred Elephants, which go their Rounds upon the nightly Watch, and are the publick Executioners of Criminals: Yet many Men muſt join in teaching and training them, before they can be made fit for theſe Employments. It remains, therefore, that, againſt the Dangers which might be apprehended from Men, Men alone could afford an agreeable Remedy, by joining their Forces together, by interweaving their Intereſts and Safety, and by forming a general Confederacy for their mutual Succour [b].

II. But it is manifeſt, that the Joining together of two or three, or a few Perſons, muſt neceſſarily prove inſufficient for this Defence; becauſe, then, the leaſt Addition, on the Side of the Invaders, would turn the Scales, and carry them on to certain Victory; and, therefore, would encourage and embolden them to begin the Aſſault, by promiſing not only Impunity, but Succeſs. So that to obtain the Security of which we are now in ſearch, it is requiſite, that the Number of the Confederates be ſo great, as that the Advantage of a ſmall Odds, on the Enemy's Side, ſhall not viſibly determine the Iſſue of the War; and, conſequently, that this League and Union be made by a conſiderable Multitude. Hence *Plato* [c] demands ſuch a Number of Subjects in his Commonwealth, as ſhall be able to repel their Neighbours, when they prove injurious, and to ſuccour them, when they are oppreſſed. From what has been offered, this farther Remark may be drawn, that the juſt Meaſure of any State ought to be taken from the Proportion it bears to the Strength of thoſe about it [2]. And therefore thoſe Communities, which were heretofore looked on as ſufficiently large, when Mankind was divided into a prodigious Variety of diſtinct Governments, are too little ſince the forming of mighty Empires. *For*, as *Pliny* obſerves [d], *Bodies, however high and towering, ſenſibly diminiſh, when ſet in Compariſon with thoſe that overtop them.*

III. To proceed: It is no leſs neceſſary, that the Multitude united on this Account, agree about applying the Means for the Attainment of the deſired End. For, otherwiſe, how numerous ſoever they may be, yet if they conſent not in uſing the beſt Methods for effecting the common Security, but reſolve to manage each his own Strength according to his own Fancy, the Deſign will come to nothing: Becauſe, being divided in Opinions, and moving contrary Ways, they will not help, but hinder one another. Or, to ſuppoſe the beſt, if they ſhould once happen to agree well enough about the Undertaking of a ſingle Action, either upon ſudden Impulſe, or upon Counſel and Deliberation, led on by the Hope of Victory, of Booty, or of Revenge (as may ſometimes be obſerved, in the mad Diſorders of popular Tumults [e]) yet afterwards, either by the Difference of their Tempers and Judgments, or by that Envy and Emulation, which is natural to moſt Men, or through Lightneſs and Inconſtancy, they will be ſo torn aſunder, as that, for the future, they will have no manner of Inclination, either to afford their mutual Succour, or ſo much as to keep the Peace amongſt themſelves [f]. And, conſequently, theſe united Bodies, which are formed of a great Number of Perſons, are of all the moſt unlikely to hold for any long Time; unleſs they are kept together by ſome general Fear, reſtraining them from quitting a Reſolution at their Pleaſure, which they once made by Agreement. Whence it follows, that the bare Conſent of a Multitude, though confirmed by Covenant, cannot give us that Security, which we now ſeek after; or, that it is not enough, for many Perſons to enter into a Confederacy of mutual Aſſiſtance, and to promiſe on both Sides, that they will direct their Strength, and all their Actions towards this End, and towards the common Good. But it is ſtill neceſſary, that ſome farther Tie be laid upon them, that they who have once conſented, for their general Benefit, to be peaceful and helpful to each other, may be hindered, by ſome Fear, from drawing back and diſagreeing, when they find their private Advantage claſhing with the publick.

IV. For the Illuſtration of this Point, *Hobbes* [3] examines ſtrictly the Nature of ſome inferior Animals, which, after a Sort, appear, likewiſe, to maintain Society among themſelves; of which Kind, the moſt remarkable are the Ants and the Bees [4]. For theſe Creatures, though void of Reaſon, by which they might engage in Compact, and ſubmit to Government; yet by joining Conſent, that is, by deſiring and declining all the very ſame Things, do ſo direct their Actions towards the common Good, as that their petit Confederacies are liable to no Differences or Diſſenſions. Why it ſhould happen otherwiſe with Mankind, and why a conſiderable Multitude ſhould not be able to live amicably together for any Time, without the Reſtraint of civil Authority, is a Queſtion not unworthy of Debate. The Reaſon then, for which the wiſe Appointment of Na-

[a] Gomara, *Hiſt. Gener.* Ind. *Occid.* 44, & 65. E. *Ed.* Wech. [b] *Comp.* Hobbes *De Cive*, Ch. vi. [c] *De LL.* Lib. v. *p.* 845. [d] *Panegyr.* Ch. lxi. Note 2. [e] *Vid.* Tacit. *Annal.* i. Ch. xxxii. [f] Compare the Diſcourſe of *Polybius*, on the Vices of the *Athenian* Commonwealth, Lib. vi. Ch. xlv.

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[1] See MONTAIGN's Eſſays, Book ii. Ch. xii. p. 336. See, alſo, *an Account of the Iſland of* Ceylon by *Robert Knox*, Book ii. Ch. i. to which may be added, that, according to STRABO, the antient *Gauls*, in their Wars, made uſe of *Engliſh* Dogs, as well as thoſe of their own Country. *Geogr.* Lib. iv. p. 305. Edit. *Amſt.* See other Examples in PLINY, Hiſt. Nat. Lib. viii. Ch. xl. *Poliæn. Stratag.* Lib. iv. Ch. ii. § 16. Lib. vii. Ch. ii. § 1. *Ælian.* Hiſt. Animal. Lib. vii. Ch. xxxviii. *Pollux*, Lib. v. § 47. Ed. *Amſt. Spartian. in vit. Caracall.* Ch. vi.

[2] Without which they cannot maintain themſelves, but by the Jealouſy of the neighbouring States; and Mr. HERTIUS remarks here, who quotes what *Pliny* ſays, Lib. v. Chap. xxv. about the City of *Palmyra*, and what *Livy* ſpeaks of *Segguntum*, Lib. xxi. *Numb.* vii.

[3] *De Cive*, Ch. v. § 5.

[4] *Vid.* Virgil. *Georg.* iv.

[5] *Varro* (as Mr. *Hertius* remarks) ſays, that there happen Seditions among theſe little Inſects, when they have ſeveral Kings. *De Re Ruſticâ*, Ch. xvi.

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ture hath joined theſe little Creatures, rather than others, in publick Bodies, ſeems to be this; that they continue all the Winter, and are ſtill nouriſhed after their ordinary Manner, whereas moſt other Inſects, during that Seaſon, either periſh, or are preſerved, without any external Supply of Food. Now theſe Winter Stores may be much more conveniently brought together and laid up, if many join their Service, than if each labours apart from all the reſt. Whence it is evident, that the Communities formed by theſe Creatures have a quite different End from that of human and political Societies; though we may diſcover in them ſome Reſemblance of a Communion of Goods, whilſt they labour all for the ſame general Stock, and afterwards all receive their Maintenance from it. *Hobbes* offers this farther Reaſon of the Difference, that all the Government of theſe Animals is nothing but an univerſal Conſent, or, many Wills directed to the ſame Object, not one arbitrary Will, as in civil States: he means, that each of them, in particular, conſpires with the reſt to work together, and to treaſure up their Proviſion in the ſame Heap; and that all their Wills are not reduced into one ſovereign Will, as in politick Bodies; ſo that what a ſingle Ruler, or a governing Council determine, ſhould paſs for the Will of all in general. The main Cauſes why, in theſe Creatures, which live by the Guidance of no ſuperior Faculty than Appetite and Senſe, the bare Agreement of Inclinations ſhould be ſo laſting, and ſo effectual, as to ſtand in need of no other Aſſiſtance, ſeems to be theſe that follow: 1. Men are continually in Competition for Honour and Dignity, whereas theſe Creatures are not: And, conſequently, that Envy, Hatred, and Emulation, which flows from this Spring amongſt the former, is not to be diſcovered amongſt the latter. 2. The natural Appetite of the Bees, and that Faculty, which we may call the Judgment of their Senſes, are exactly uniform, and are carried on towards the publick Good, which in them differs not from the private. *Whatever is not good for the Hive* (as *Antoninus* [a] obſerves) *is not good for the Bee.* To ſee their Hives full and flouriſhing, is their whole Wiſh and Deſire. But amongſt Men, *So many Heads, ſo many Wits*; and ſcarce any Thing is looked on as truly Good, which doth not afford the Poſſeſſor ſomewhat ſingular and extraordinary above his Neighbours. 3. Creatures, which have not the Uſe of Reaſon, neither ſee nor fancy that they ſee any Defect in the Adminiſtration of their common Societies [1]; in as much as they erected them not with the Guidance of Judgment, but by the bare Inſtinct of Nature, and have not the Art of comparing them with others. Again, not one of the Bees ever entertains a Deſign of forming her Comb in any other, than the common ſexangular Figure; whereas, in human Polities, there are very many, who, thinking themſelves wiſer than their Fellows, are diſguſted with the preſent Condition, and are for introducing a Change in the Government. And, according to the Difference of Judgments, ſeveral of thoſe Projectors are for ſetting up ſeveral Models, or for reforming Things each in his own Way, the Conſequence of which muſt be the Diſtraction of the State, and, in the Iſſue, a civil War. 4. Theſe Creatures, though they have ſome Uſe of Voice, in making known to one another their Deſires, at leaſt, when their Affections are more warmly raiſed; yet they want that Art of diſguiſing Things in the falſe Colours of Speech, which is neceſſarily required to the diſturbing the Minds and Paſſions of Society: This being the Inſtrument, by which what is Good is repreſented, either under a greater or a leſs Degree of Goodneſs, than it really hath; and what is Evil is, in the ſame manner, either aggravated, or extenuated; or, perhaps, both are painted with a quite different Face from what they truly bear. But now, the Tongue of Man is often uſed for a kind of Trumpet of War and Sedition; which is able, not only to propoſe falſe Rules of living and of acting, but, alſo, with fair Gloſſes and much inſinuating Language, to recommend them to others, and thereby to render their Minds utterly averſe to the Genius of a peaceful and ſocial Life. On which Account it was not without Juſtice ſaid by the Comedian [2], of the eloquent *Pericles*, that *he thunder'd and lighten'd, and confounded all* Greece. 5. Irrational Creatures cannot diſtinguiſh between Contumely, or Contempt, and real Damage; or, rather, they have no Senſe at all of Contempt. Therefore, whilſt they find the Neceſſities of their own Bodies ſupplied, they commence no Quarrel with their Fellows. But of Men, thoſe are the greateſt Diſturbers of the Commonwealth, who enjoy the greateſt Opportunity of being eaſy. Nor do they engage in Contentions about their Honour or their Reputation, till after they have gained an abſolute Victory over the Force of Hunger, or the Injuries of Weather. Laſtly, the Agreement of theſe Creatures is *natural*; but that of Men only *federal*; that is, artificial, or rather moral; held together by no other than moral Ties, which do not in the leaſt extinguiſh the natural Difference of Mens Inclinations, the Roughneſs of their Tempers, and the Power which they have of taking contrary Meaſures. To all which we may add this farther Conſideration, that in the Kingdom of the Bees there is no ſovereign Authority, properly ſo called [3], (though this be the very Life and Soul of a Community) for which Reaſon their Monarch is not armed with a Sting. And therefore it is the greater Miracle of Nature, that

——*Rege incolumi, mens omnibus una;*
Amiſſo, rupere fidem.——

Their Prince ſecure, one common Mind they bear;
But, him once loſt, with wild Diſtraction jar [b].

[a] *Lib.* vi § 54. [b] V. *Virgil.* Georg. Lib. iv. *ver.* 212, *&c.* Add. *Xenophon. Cyrop.ed.* Lib. v. Ch. i.

[1] The Government among ſuch Creatures is but pretended and chimerical. See *Algernoon Sidney*'s Diſcourſe of Government, Ch. ii. § 8.
[2] *Ariſtoph.* Acharn. *ver.* 350. *Plin.* Lib. i. Ep. xx. Note 17, *&c.* Ed. *Cellar.*
[3] Though, by a kind of Miracle in Nature, the whole Hive diſperſe themſelves, as ſoon as their King leaves them. V. *Senec.* De Clementia, Lib. i. Ch. iv, *&* xix.

Yet here it ought to be well obſerved, that the Compariſon, thus purſued, between the two Multitudes, one of Men, the other of Bees, hath been alledged to no other End, but to ſhew why, in a great Body of Men, deſtitute of the Advantages of civil Government, no long Agreement or good Underſtanding can reaſonably be expected. But we would, by no means, be thought to inſinuate, as if theſe Inclinations, in which the Seeds of Diſcord are contained, were found to be of equal Force and Efficacy in each particular Man; or, as if ſound Reaſon did not, from the bare Conſideration of human Nature, ſuggeſt ſuch Arguments, as muſt engage and command Men, rather than any other Animals, to follow Concord and mutual Kindneſs. And therefore our Deſign, in this Matter, is not in the leaſt thwarted by a learned Author [a], who hath undertaken to retort theſe ſix Reaſons of Mr. *Hobbes*, by ſhewing, that as Man naturally loves Honour, ſo Honour is the natural Reſult of good Actions; that he more perfectly underſtands the Force of the publick Good, in ſecuring his own private Intereſt; that he enjoys the Gift of Reaſon, which equally diſpoſeth him, as his Lot ſhall fall, to govern or to obey; that he hath the Art of enlivening and adorning his rational Faculty, by ſetting an Edge and a Grace upon it, with the moſt proper Expreſſions; that he apprehends himſelf to be under the Guidance of a Law, by the Power of which he diſtinguiſheth a downright Injury, from a Damage offered without Injury; laſtly, that Agreements made amongſt Men are not only ſtrengthened and confirmed by Nature for a long Continuance, but, likewiſe, receive from Art, as the Aſſiſtance of Nature, many Defences againſt leſs uncertain Dangers, and, by means of Writing, a Duration beyond the Age of Man. The Argument doth not at all affect *us*, unleſs it could prove, that a numerous Body of Men, united under no common Government, might not be diſturbed by a very few: As, likewiſe, that all Men are judicious and wiſe, and, after the cleareſt Manner, apprehend the Dictates of ſober Reaſon, and have utterly diſabled all their evil Affections and Deſires. He certainly erects a civil State upon no better than a ruinous Bottom, who makes too large Allowances for the Modeſty and Ingenuity of Mankind; and meaſures the Integrity of others, eſpecially of the loweſt Rabble, by his own.

V. But what that is which we may depend upon, as ſufficient for the long keeping together the Conſents and Inclinations of an united Multitude, will eaſily appear to one that thoroughly examines the common Bent and Genius of Mankind. Now in this there are two Vices to be diſcovered, which eſpecially hinder any Number of Perſons from long continuing in the ſame general Deſign. One is, the great Variety of Inclinations and Judgments, about diſcerning what is moſt expedient for the common End: To which there is joined, in many Men, a Dulneſs of apprehending which, of ſeveral Means propoſed, is more advantageous than the reſt; as, likewiſe, the obſtinate Stubbornneſs in defending what they have once, right or wrong, happened to embrace. The other general Vice is a ſluggiſh Coldneſs in Buſineſs, and an Averſion to doing willingly what we know to be for our Intereſt; when we are under no neceſſary Force, which might drive us on, if we hung back, and oblige us, whether we will or no, to the Performance of our Duty. The former of theſe Evils may be remedied, by uniting, in a perpetual Bond, the Wills of all the Parties, or by ſo ordering Things, that, in all Affairs relating to the common Good of the Society, there ſhould be but one Will to govern their Proceedings. The latter, by conſtituting ſome Power, which ſhall be able to inflict a preſent and ſenſible Puniſhment, on thoſe who oppoſe or hinder the publick Benefit. *Tully* [b] hath a remarkable Saying to this Purpoſe: *They obſerve* (ſpeaking of the *Ariſtotelians*) *that even the Paſſion of Grief was not conſtituted by Nature, without our great Uſe and Advantage; that Men taken in Offences might be heartily troubled at the Correction, the Reproof, the Ignominy, which they undergo. For they, who can bear Infamy and Reproach without Concern, ſeem to have obtained the Privilege of ſinning with Impunity.*

Now the Union of Wills could not poſſibly be compaſſed in any of the following Ways: Either that by a natural Conjunction the Wills of all the Parties ſhould be amaſſed into one; or that one Perſon only ſhould exert his Will, and all the reſt ſuppreſs theirs; or that the natural Diſagreement of Inclinations and Contrariety of Deſires ſhould, by any means whatſoever, be abſolutely taken away, and combined in perpetual Harmony and Concord. The only Method then, by which many Wills may be conceived as joined together, is, at leaſt, this; that each Member of the Society ſubmit his Will to the Will of one Perſon, or of one Council; ſo that whatever this Perſon or this Council ſhall reſolve, in Matters which neceſſarily concern the common Safety, ſhall be deemed the Will of all in general, and of each in particular. For, when I have made over my Power to another, his Act and Choice is interpreted as mine [c].

So again, as to the other Remedy propoſed, it is impoſſible to conſtitute ſuch a Power as ſhall be formidable to the whole Multitude, by natural Means; that is, by transfuſing the real Strength of all and each of them into one Perſon, ſo as to leave all the reſt utterly weak and impotent. But one Man can thus only be ſuppoſed to poſſeſs the Strength of all, when the whole Body, and every particular Member, have obliged themſelves to uſe and apply their Strength, as he ſhall judge expedient. When this Union of Will and of Forces is once compleated, thence, at laſt, ariſeth what we call a Commonwealth, or civil State, the ſtrongeſt of all *moral Perſons*, or *Societies*.

What hath been offered may, perhaps, be more diſtinctly underſtood, if we conſider, that by the Submiſſion of their Wills, made on the Part of the Subjects, their *natural* Liberty of Choice is not extinguiſhed; by virtue of which they are ſtill able, *de facto*, to reſume what they once gave, and to deny and withdraw their Obedience which they promiſed: As, likewiſe,

[a] Bp. *Cumberland* de L. N. Ch. ii. § 22. [b] Tuſc. Quæſt. *Lib.* iv. *Ch.* xx. [c] *A good Man ſubmits his own Judgment and Choice to the Governor of the Univerſe, as good Subjects do to the Laws of the State.* Arrian. Epictet. *Lib.* i. *Ch.* xii. *p.* 118.

that

that the Strength and Power of the Subjects are not, by any natural Conveyance, transferred really on the Sovereign, as if, for Inſtance, the Strength, which lay in the Shoulders of all the Subjects, ſhould be removed to the Prince's Shoulders; and, conſequently, that both the Wills and the Strength of thoſe who are governed, are, as we may ſay, turned into the Scales, and rendered conformable to the Governor's Pleaſure, only by theſe two *moral Weights*, which we come now to examine. The firſt is taken from their own Act and Covenant, by which they engage their Allegiance: And this receives all poſſible Force from the Command of GOD, and from the ſacred Authority of an Oath; both which are ſo much the more effectual in overruling Mens Minds, the more carefully the Parties have, from their Childhood, been educated with good Diſcipline and Inſtruction, and the more Knowledge they have obtained of the Neceſſity and Uſefulneſs of civil Government. But they, who, through the extreme Pravity of their Mind, reſiſt the Force of this Weight, whilſt they either fooliſhly imagine Government to be a Stratagem found out for the vexing and oppreſſing of all others, to ſatisfy the tyrannical Pleaſure of a few; or elſe are overcome with a heavy Liſtleſsneſs, rendering them averſe to the voluntary Performance of what their Duty requires; theſe, we ſay, are drawn to obey their Superiors, by that other Weight which we have ſtill in reſerve; that is, by the Fear of Puniſhment, and by external Compulſion. Farther, ſince he who compels another, ought to ſurpaſs him in Strength, and ſince that Strength, by which Governors exceed the Force of private Perſons, ariſeth from hence, that the Subjects are ever ready to apply their united Power, as they ſhall be commanded; hence it is evident, that the Ability, which Rulers have to compel and reſtrain evil and diſobedient Subjects, is owing to the Obedience of the Good. Now, that the greater Part of a Nation's Strength ſhall always be in the Hands of the Sovereign, it is eaſy for him to effect [1]; provided that he firſt obtained his Crown by lawful Means, and that he expreſſeth any tolerable Care and Endeavour towards the Diſcharge of his Truſt. For as he may ever reaſonably hope, that the Majority of the Subjects will be mindful of the divine Command, and of their Oath of Allegiance and Fealty; ſo it is indeed ever the Intereſt of the larger and better Part of the People, that the State ſhould remain ſecure and undiſturbed, that the lawful Government ſhould be maintained in its due Privileges and Authority. But beſides all this, Governors have ready at Hand certain uſeful Engines, which afford a vaſt Addition to their Power; ſuch as are good Fortreſſes and a ſtanding Force, engaged to the Prince by more than ordinary Ties; by means of which Aſſiſtances, a Multitude, how numerous ſoever, may be reduced to Obedience, eſpecially if they want Arms, and are ſcattered at a wide Diſtance, through the ſeveral Parts of the Country; and in caſe the Sovereign uſeth due Caution, to hinder his People from bandying into Factions.

VI. That the Union, which we have been thus explaining, may be more thoroughly apprehended, we are to know, that many natural Perſons, before they cloſe into one moral Perſon, whatever they act, and whatever Obligations they take upon themſelves, they act and undertake in their ſingle Capacities, ſo that the Number of the Actions and Obligations is equal to the Number of the natural Perſons. And though often, when we would denote many independent Men, we uſe the Word *Multitude*, which ſeems to imply ſome kind of Unity; yet if we conſider more exactly, this Term is not one of thoſe which we call *collective* Words, or ſuch as ſignify an united Body, compoſed of many Individuals, as thoſe other Names of an *Army*, a *Navy*, an *Aſſembly*, a *Senate*, and the like; but really imports no more than a bare Number of Things in general, without ſpecifying whether they be of the ſame or different Kinds, whethey they be united or diſperſed. And, therefore, properly ſpeaking, a *Multitude* of Men is not one compound Body, but many ſeparate Perſons, each of which hath his own Judgment, and his own Will to determine him in all Matters that ſhall be propoſed. For which Reaſon, if we thus conſider a *Multitude*, and then abſtract it from the particular Men, of whom it conſiſts, we cannot aſcribe to it, in this general Notion, any one Action diſtinct from thoſe of the private Perſons, or any peculiar Privilege or Right. Hence ſuppoſe a Man to be in a *Multitude*, or to have many other Men about him, not joined in a common Society; ſhould moſt, or ſhould all the reſt of theſe perform any Act, or engage in any Compact, while he alone enters his Diſſent to the Buſineſs, or, negatively, doth not any way approve or partake of it, the ſaid Act or Compact ſhall, on no account, affect his Perſon. So that, on the whole, to join a Multitude, or many Men, into one *compound Perſon*, to which one general Act may be aſcribed, and to which certain Rights belong, as it is oppoſed to particular Members, and ſuch Rights as no particular Member can claim ſeparately from the reſt; it is neceſſary, that they ſhall have firſt united their Wills and Powers by the Intervention of Covenants; without which, how a Number of Men, who are all naturally equal, ſhould be linked together, is impoſſible to be underſtood.

VII. The Nature and the Number of thoſe Covenants, by the Mediation of which a civil State is compacted, may be diſcovered by the following Method of Enquiry. Let us conceive in our Mind a Multitude of Men, all naturally free, and naturally equal, going about voluntarily to erect themſelves into a new Commonwealth: Here it will be neceſſary, firſt of all, that they covenant each with each in particular, to join into one laſting Society, and to concert the Meaſures of their Welfare and Safety, by the publick Vote (though, in a Compact of this Nature, it is the moſt uſual Way, for particular Perſons, to reſerve to themſelves the Liberty of departing, if they ſhall ſee fit [2].) This Covenant may be made either abſolutely or conditionally. The firſt is done, when a Man engageth himſelf to ſtick to this Society, what-

[1] Mr. *Le Clerc* (in his Additions to *Moreri*'s Dictionary, at the Bottom of the Article of *Calvin*) ſays, That Princes who have but a moderate Share of Integrity, may be almoſt adored by their Subjects.

[2] See hereafter in Book viii. *Ch.* xi. § 2.

ever Form of Government ſhall afterwards be approved of by the major Part: The latter, when the Perſon engaging adds this Clauſe, provided ſuch a Form ſhall be introduced, as is agreeable to his private Judgment. Farther, when this Covenant is to be tranſacted, it is requiſite that all and each of them give their Conſent. He that ſhall diſagree, though he may happen, for ſome Time, to continue in the ſame Place with the reſt, yet ſtands without the Bounds of the riſing State, nor is obliged by the Vote of his Fellows, though the greater Number, ſo as to be under any Neceſſity of joining himſelf to the new Eſtabliſhment; but he remains under his natural Liberty, in which it ſhall be lawful for him to provide for his private Security, according to his own Meaſures. But after ſuch a Society, repreſenting the firſt Rudiments and Beginnings of a State, hath been united in the Manner deſcribed, it is then farther neceſſary, that a Decree be made, ſpecifying what Form of Government ſhall be ſettled amongſt them. For, before this Point is adjuſted, it is impoſſible they ſhould take any regular Step towards maintaining the Safety of the Publick. Now when Matters are come to this Iſſue, they who joined themſelves in the Society upon abſolute Terms, ſhall, if they deſign to continue longer in the Place where the Society is fixed, be bound by the Agreement of the Majority, to acquieſce in the Form eſtabliſhed, though their own Opinion more incline to ſome other Model. For, by adding no Exceptions to the Covenant, they are preſumed to have, in this Reſpect at leaſt, ſubmitted to the Will of the greater Number; from whom it can, with no manner of Reaſon, be expected, that they ſhould quit their own Judgment, to comply with a few that obſtinately ſtand out. But, on the other hand, they who entered themſelves in this Society upon Conditions, unleſs they expreſly conſent to the Government reſolved upon, ſhall not become Members of the State, nor be concluded by the Vote of the Majority.

VIII. After the Decree hath paſſed, to ſettle the particular Form of Government, there will again be Occaſion for a new Covenant, when the Perſon or Perſons, on whom the Sovereignty is conferred, ſhall be actually conſtituted; by which the Rulers, on the one hand, engage themſelves to take care of the common Peace and Security, and the Subjects, on the other, to yield them faithful Obedience; in which, likewiſe, is included that Submiſſion and Union of Wills, by which we conceive a State to be but *one Perſon*. And from this Covenant the State receives its final Completion and Perfection. But now, if the Form eſtabliſhed ſhould happen to be a Democracy, this latter Covenant doth not ſo manifeſtly appear; becauſe the ſame Perſons are in different Reſpects Sovereigns and Subjects: Whereas every Covenant requires two diſtinct Parties. Nor doth the different Reſpect ſeem a ſufficient Diſtinction; as, for Inſtance, when the ſame *Titius* is ſaid to be a Father, a Son, a Huſband, a Son-in-Law, a Father-in-Law, a Merchant, *&c.* for here if this *Titius*, as a Merchant, ſhall promiſe any Thing to the ſame *Titius*, as a Father, there is no Covenant in the Caſe. We are, therefore, to underſtand, that, in a popular Government, the particular Members and the Sovereign Aſſembly are not only diſtinguiſhed by different Reſpects, but are really different Perſons (though not of the ſame kind) who have diſtinct Wills, diſtinct Acts, and diſtinct Rights from each other. For the Will of particular Men is not immediately the Will of the People; nor can what particular Men ſhall happen to do, be conſtrued as the People's Acts, or *vice verſâ*. Again, particular Men neither enjoy the Sovereignty, nor any Part of it, but it is lodged in the Body of the People. For to have a Part of the Sovereignty, and to have a Vote in that Aſſembly in which the Sovereignty reſides, are two different Things. So that hitherto there ſeems to be no Reaſon why we may not ſuppoſe a Covenant to paſs between the general Aſſembly, and the private Members of the State. One Thing indeed there is, which may be urged, with ſome Colour, to the contrary: It is, that ſuch a Covenant would be of no manner of Uſe; becauſe each Man, by giving his Conſent to the ſetting up of a Democracy, is, at the ſame Time, preſumed to have ſubmitted his Will to the Will of the major Part; and beſides, the Love that he hath for his own Perſon and Fortunes, ſeems to lay a ſufficient Neceſſity on any Man to labour with his utmoſt Ability for the publick Good, with which his own private Welfare is inſeparably united. However, although it may not, perhaps, be altogether ſo neceſſary in Democracies, as in other Governments, that this Covenant, or mutual Engagement for performing the reſpective Duties of Sovereign and Subject, ſhould be openly and expreſly made; yet it is abſolutely requiſite, that we ſuppoſe it to have paſſed by tacit Agreement. For whether we look on the firſt Decree, for the Eſtabliſhment of the Democracy, as the bare Act of many Wills conſpiring in one Deſire, or as the Covenant of each Man with each, to this Purpoſe, *I will ſubmit my Will to a general Aſſembly for us all, upon Condition you will do the like:* Yet from all this, thus ſtrictly conſidered, there can no other Obligation ariſe, but what follows, that every Perſon ſhall be bound to acquieſce in this particular Form of Government, ſo long as it is not altered by univerſal Conſent. But now the Subjects in a popular State are certainly under a farther Obligation. For firſt, each Member is bound to ſtand to ſuch Decrees and Commands as ſhall proceed from the general Aſſembly; and then again, they are engaged, every one in particular, to contribute each his utmoſt Service to the State, and to prefer the public Good to his own private Advantage [a]. Otherwiſe, on what Pretence ſhould any Man be puniſhed, for not giving Attendance at the public [1] Councils? Since then ſuch an Obligation is evidently diſcovered, there muſt of Ne-

[a] In *Thucydides*, a Member of a Democratical State, unacquainted with publick Affairs, is ſtyled an *uſeleſs Citizen*, Lib. ii. Ch. xl. Ed. *Oxon*. *Socrates*'s Diſpute with *Charmides* in *Xenophon*, Memorab. *Lib.* iii. *p.* 486.

[1] All this, whatever our Author ſays, follows from the chief End of that civil Society which thoſe in queſtion had a Deſign to form. Thus the Eſtabliſhment of Democratical Government, implies in it a Convention between each Citizen, who, as ſuch, is a Subject, though, as he has a Vote in the public Deliberations, he forms a Part of that collective Body in which the Sovereign Power reſides.

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ceſſity be ſome Principle whence its Origin is derived; and this can be nothing elſe but the Covenant of which we have been now diſcourſing.

But, if the Society agree to erect an Ariſtocracy, or a Monarchy, then this latter Covenant is far more viſible. For upon creating the Senate, or the Prince, both Parties interchange their mutual Faith, and mutual Performances thence ariſe, as their neceſſary Duty. Inaſmuch as, after the Sovereignty hath been once conferred and received, the Prince or the Senate, no leſs than the Subjects, ſtand bound to diſcharge certain Offices, with which they were not before concerned: The People, before the Paſſing of this Covenant, being no more engaged to obey one Man, or one Council of Men, than that Man, or that Council of Men were engaged to undertake the Care of the Publick. But now, from what Principle could this mutual Faith and Obligation to Duties, which were not required before, take their Riſe, but from Covenant?

What we have hitherto delivered, concerning the two Covenants, and the one Ordinance or Decree, may be illuſtrated by that Account, which *Dionyſius Halicarnaſſæus* [1] gives us of the firſt Settlement of the Monarchy in *Rome*. For here, firſt of all, a Number of Men flock together, with Deſign to fix themſelves in a new State; in order to which Reſolution a tacit Covenant, at leaſt, muſt be ſuppoſed to have paſſed amongſt them. After this, they deliberate about the Form of Government, and that, by Kings being preferred, they agree to inveſt *Romulus* with the ſovereign Authority. And this holds too in the Caſe of an [2] *Interregnum*, during which, the Society being held together only by the prime Compact, it is frequent to enter the Debate about the Frame and Model of the Commonwealth [a].

We ought carefully to obſerve, that this Method of producing and conſtituting a civil State, by the Means of two Covenants and one Decree, is the moſt natural, and what agrees in general to every kind of Government [3]. Yet a Monarchy may ſometimes happen to be conſtituted by one Covenant alone; as ſuppoſe many Perſons, without any antecedent Agreement amongſt themſelves, ſhould, at the ſame or a different Time, each Man for his own Perſon only, ſubject themſelves to a ſingle Maſter, almoſt in the ſame Manner as an Army, which is formed out of Strangers and Mercenaries, who come from all Parts to offer their Service. So again, they who join themſelves to a Community already eſtabliſhed, have need of one Agreement only, by which they, on their own part, petition to be admitted into the State; and, on the other part, they who repreſent the State, upon Security given for their Obedience, admit and receive them.

It would be an unjuſt Suſpicion, in any Perſon, to imagine that what we have offered about theſe Covenants, in making them the Cauſe and Foundation of a civil State, is purely our own arbitrary Fiction; becauſe the firſt Riſe of moſt Governments is unknown, or at leaſt we do not certainly apprehend them to have been compoſed and cemented after the Manner here deſcribed. For it is certain every State once had its Beginning [4]. But now, before the Fixing of any State, the Perſons, of whom it was to conſiſt, could not be united to each other, by the ſame Ties as they are after the State is actually ſet up; nor could they yet be ſubject to thoſe, to whom afterwards they owe Subjection. And ſince we cannot underſtand, how either this Union, or this Succeſſion could be made, without the Covenants or Agreements before mentioned, it is neceſſary that the ſaid Agreements muſt tacitly, at leaſt, have paſſed in the Inſti-

[a] See the Debate of the *Perſian* Nobles in *Herodot. Thalia*, p. 121, &c. and of *Brutus* and his Aſſociates, in *Dionyſ. Halicarn.* Lib. iv.

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[1] Book. ii. in the Beginning.

[2] See *Ch.* vii. § 7. following.

[3] Although the firſt civil Societies in the World were not directly and preciſely formed in this manner (as I have ſhewn above, p. 625. *Note* 2.) yet, when once they were eſtabliſhed, whatever was their Origin, and at whatſoever Time each Citizen became a Member; we muſt ſuppoſe the three Conventions, mentioned by our Author, as if they had expreſsly and ſucceſſively intervened. Above all the firſt is neceſſary that civil Society may not be regarded as diſſolved during an *Interregnum*, or when the Succeſſion to a Monarchy comes to fail. I, therefore, freely retract what I ſaid, after Mr. *Titius* (Obſ. DLV.) in the preceding Editions, *That this firſt Convention is only, with regard to the ſecond, what Scaffolding is with reſpect to the Building, for whoſe Conſtruction it was erected.* See Mr. *Carmichael*'s Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. ii. Ch. vi. § 9. and Mr. *Otto*, on the ſame Chapter, § 7.

[4] 'It is not at all to be wondered at, ſays Mr. *Locke* excellently well, in his ſecond Treatiſe of *Civil Government*, Ch. vii. '§ 101, &c. that Hiſtory gives us but a very imperfect Accout of Men that lived together in the State of Nature; the Inconveniency of that Condition, and the Want of Society, no ſooner brought any Number of them together, but they preſently united and incorporated, if they deſigned to continue together. And if we may not ſuppoſe *Men* ever to have been 'in *the State of Nature*, becauſe we hear not much of them in ſuch a *State*, we may as well ſuppoſe the Armies of *Salmanaſſer* and *Xerxes* were never Children, becauſe we hear nothing of them till they were imbodied in Armies. Government 'is ever antecedent to Records, and Letters ſeldom come in among People, till a long Continuation of civil Society has, by 'other neceſſary Arts, provided for their Safety, Eaſe, and Plenty. And then they begin to look after the Hiſtory of their 'Founders, and to ſearch into their Original, when they have out-lived the Memory of it. For it is with Commonwealths 'as with particular Perſons; they are commonly ignorant *of their own Births and Infancies:* And if they know any thing of 'their Original, they are beholden for it to the accidental Records that others have kept of it. And thoſe that we have of 'the Beginning of any *Polities* in the World, excepting that of the *Jews*, where God himſelf immediately interpoſed, are all 'either plain Inſtances of ſuch a Beginning as I have mentioned, or at leaſt are manifeſt Footſteps. He muſt ſhew an Inclination to deny matter of Fact, who will not allow that the Beginnings of *Rome* and *Venice* were by the uniting together of 'ſeveral Men *free and independent of one another*, among whom there was no Superiority or Subjection: And if *Joſeph Acoſta*'s 'Word may be taken, he tells us (Lib. i. Ch. xxv.) *That in many Parts of* America *there is no civil Government at all: There 'are great and apparent Conjectures*, ſays he, *that theſe Men*, ſpeaking of thoſe of *Peru*, *for a long Time had neither Kings nor 'Commonwealths*, but lived in Troops, as do this *Day in* Florida, *the* Cheriquanas, *thoſe of* Brazil, *and many other Nations, 'which have no certain* King, but, as Occaſion requires either in Peace or War, *they chooſe their* Captains as they pleaſe. And 'I hope thoſe who went away from *Sparta* with *Palantus* mentioned by *Juſtin*, Lib. iii. Ch iv, will be allowed to have been '*free Men independent of one another*, and to have ſet up a Government over themſelves, by their own Conſent'. But though Hiſtory ſhould furniſh us with no poſitive Example of this, it does not hinder, but we may regard it as an inconteſtable Thing, that there was a Time when Men lived together in a State of Nature: And we might as well doubt that civil Society had a Beginning, as ſuſpect that the Men who compoſed the Armies of *Salmanaſſer*, or *Xerxes*, had never been Children, becauſe Hiſtorians deſcribe them as grown Men, and able to bear Arms. See *Algernoon Sidney upon Civil Government*, Ch. iii. § xxv, xxxiii.

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tution of Commonwealths. Nor is there any thing to hinder, but that the Original of some Things, not committed to the Monuments of Time and History, may be traced out by the Disquisitions of Reason.

IX. It may be worth our while, on this Occasion, to examine, with particular Strictness, the Opinion of Mr. *Hobbes*, who, in the Generation of States, acknowledgeth no more than one Covenant of each Man to each Man; frequently representing and declaring, that there passeth no Covenant between the Prince, or the Senate, and the Subjects. Indeed, we may easily gather from the Design of his Books of Policy, which is clearly discovered in the *Leviathan*, the Reason that put him upon this Assertion. His principal Aim was to oppose those seditious and turbulent Spirits, who, in his Time, laboured to bring down the regal Power to their own Model, and either utterly to extinguish, or to render it inferior to the Subjects. To cut off from these Men their ordinary Plea for Rebellion, which was, that there is a reciprocal Faith between the Prince and the People, and that when the former departs from what he engaged by Promise, the latter are released from their Obedience; as, also, to hinder restless and factious Persons from interpreting every Action of their Prince, which suited not with their own Humour, as a Breach of his Faith; he resolves to deny that there is any such Thing as a Covenant between Subjects and their Sovereign. And having undertaken to maintain, that every Monarch, properly and truly such, hath an absolute and unlimited Power; it followed of course, that he should exclude all Covenants or Compacts from this Affair, because these seem to be the chief Instruments of reducing Authority to Bounds and Rules. But now, although it highly concerns the Interest of Mankind, that the regal Power should be kept sacred and inviolable, and be secured from the impertinent Cavils of those busy Designers, who are always plucking at it; yet this Consideration doth, by no means, make it necessary for us to deny what is as clear as the Light, and to acknowledge no Covenant, in a Case where there is certainly a mutual Promise for the Performance of Duties not before required. Whilst I voluntarily subject myself to a Prince, I promise Obedience, and engage his Protection: On the other hand, the Prince, when he receives me as his Subject, promiseth his Protection, and engageth my Obedience. Before this reciprocal Promise, neither was he bound to protect me, nor I to obey him, at least by any *perfect* Obligation. And who will pretend to say, that an Act of this kind doth not fall under the Head of Covenants? Nor is this Covenant useless, because they, who, by their own free Choice, appoint a King over themselves, seem, before-hand, to have entered into an Agreement for the advancing such a particular Person to the Throne. For as the bare Election, without the Acceptance of the Party elected, confers on him no Power over the rest; so it is plain enough, from the Nature of the Business, that they who freely put themselves under the Power of another, desire he should, in the Exercise of that Power, pursue the End for which it was given him: And that he received the Power on this Condition, that those who conferred it on him, should not, by his means, miss of their Aim. They who create a Sovereign therefore, as they, at the same time, promise whatever the Nature of Subjection requires; so, on the other Part, engage him to endeavour the procuring of all those Benefits, for the sake of which civil Governments are introduced. And what can we call this but the entering into Covenant?

X. Nor, upon admitting this Covenant between Prince and People, do those Inconveniences, to which Mr. *Hobbes* seems to have had an Eye, *necessarily follow*. This, indeed, is common to all Covenants, that they lay upon Men an Obligation to some certain Performance. But, then, there is the greatest Difference imaginable between those Covenants, in which one of the Parties doth, at the same time, put himself under Subjection [1] to the other, and those, in which neither Party requires, with respect to the other, any Superiority or Command. Thus the Right of a Master over his Servant, at least over such an one as freely enters into that Condition, depends upon Covenant; and, in the same manner, the Authority of a Father over him that offers himself to be adopted, and the Command of a General over his mercenary Troops. And yet this doth not hinder, in the least, but that in all these Cases there is a Right of governing on the one Side, and an Obligation to Obedience on the other: Nor may the Party in Subjection throw off the Yoke, when his Superior's Command proves disagreeable to his own Humour [a]. For, in all these Covenants, which do not include a Submission of Will and of Strength, some certain Duties are specified, to be mutually performed on the inward Principle of Conscience; and when either Party refuseth voluntarily to fulfil his Engagement, there remains no Redress, but either from War and Violence, or from the Compulsion of their common Lord. But in Covenants, where one of the Parties is made subject to the other, the latter may, as he thinks fit, prescribe what shall be done by the former; and hath, likewise, a Power of forcing his Compliance, in case of Refusal; whereas the former Party cannot, on any Account, be said to hold the like reciprocal Power over him. Wherefore a Governor cannot be taxed with Breach of Covenant, unless he either utterly abandon all Care of the Publick, or take up the Mind and Carriage of an Enemy towards his own People, or manifestly, and with evil Design, recede from those Rules of Government, the Observation of which was, by the Subjects, made the necessary Condition of their Obedience. And it is very easy for one in Authority to avoid and escape all those

[a] Xiphilin. *Epit.* Dion. *in* Neron. *All Sovereign Force and Authority, when conferred by a private Person, passeth immediately from the Giver, and holds good against him in the Hands of the Receiver.*

[1] *See* Lib. i. Ch. iv. § 8, 9, preceding.

Impu-

Imputations, provided he will but conſider, that the higheſt of mortal Men are not exempt from the common Laws which attend their Fortune and Condition, and that, as *Pliny* [a] obſerves, *No Prince was ever himſelf deceived, who had not before deceived others.* Laſtly, That Prince muſt either be extremely vicious, or extremely weak and impolitic, who cannot ſo order Matters, as that it ſhall be always the Intereſt of the greater, or the ſtronger Part of the People, to ſee him preſerved in his Perſon and Government. And it may be a ſtrong Motive to him, to apply his beſt Endeavours towards the compaſſing this good End, if he barely reflect on that Saying in *Livy* [b]; *Is it to be imagined, that any People, or ſo much as any ſingle Man, will continue longer than they needs muſt, in a Condition which is grievous and uneaſy to their Mind?* If, then, the Majority of the People find it their Intereſt to ſtand by their Prince, and to defend the publick Adminiſtration as lodged in his Hands; as they cannot but do, if he guide his Councils with Juſtice and Wiſdom; then his Fortune reſts upon a Bottom. He that cannot compaſs thus much, is fitter for any other Employment, than for Sovereignty and Command.

XI. Let us proceed to weigh more particularly the Reaſons urged by Mr. *Hobbes* in favour of his Opinion. And here, firſt of all, we think it very inconvenient, that he ſhould go about to derive the Obligation of Subjects towards their Sovereign, from *ſuch a Covenant by which each Man obligeth himſelf to each of his Fellows, that he will not reſiſt the Will of that Perſon, to whom he hath yielded himſelf to be governed* [c]. Indeed, they who have agreed amongſt themſelves, to confer the Sovereignty on a certain Man, are preſumed to have agreed, likewiſe, that they ſhould all ſubmit their own Will to his Will; or, that, in the Management of the Commonwealth, his Will ſhould repreſent the Will of them all. Nor is it unuſual to ratify ſuch a Conſent about conferring the Sovereignty, as, alſo, the Terms under which it is conferred, by the mutual Covenants and Oaths of the People. Yet to agree about inveſting ſuch a Perſon with the Government, and to confirm their Inveſtiture by interchanging their Faith one with another, are two different Things. But to go farther, There's no Abſurdity in ſuppoſing, that Subjects ſhould mutually engage their Faith to yield Obedience to their common Prince; as we know, there are ſuch Covenants in which all engage for each, and each for all. Yet there is no Neceſſity, but that this may entirely be omitted, and, in fact, it is ſeldom practiſed. When a Stranger is incorporated into a State, he ſwears Allegiance to the Sovereign: But he is now here required, ſo far as we can diſcover, to contract with the other Subjects about paying this Allegiance. Laſtly, It would be a thing of very dangerous Conſequence, to build our Obligation to our Prince on a Covenant with each of our Fellow-ſubjects, which would import as follows; *I tranſfer my Right upon the King for your ſake, that you, for my ſake, may tranſfer your Right upon him alſo.* For at this Rate every Subject will ſeem to make the Obedience of every other Fellow-ſubject the neceſſary Condition of his own: And, conſequently, if any one happens to violate his Engagement, all the reſt ſtand releaſed from theirs. And this Reaſon alone ſhews what Neceſſity there is that each Subject ſhould be bound to his Sovereign in his own Perſon, without any Dependence on the Obedience of others; to the End that, how uneaſy ſoever one or two, perhaps, appear under their Confinement, the Sovereign may make uſe of the united Strength of all the reſt, in reducing the Rebellious to their Duty.

No leſs incongruous is that Aſſertion of Mr. *Hobbes*, to this Purpoſe; *That the Obligation to obey the ſupreme civil Power doth not ariſe immediately from the Covenant, by which particular Perſons give up all their Right to the State; but only mediately from hence, that without Obedience the Right of Sovereignty would have been vain and inſignificant, and, by Conſequence, no Commonwealth would have been formed* [d]. What need of this Winding and Turning, when he might have gone on in the ſtraight Road? The Reaſon, which moved him to this Poſition, is certainly idle and frivolous. He proceeds upon a tacit Suppoſal, that Things agreed to by Covenant cannot lawfully be refuſed; whereas a Prince may lawfully command his Subject, what the Subject may as lawfully diſobey; as if the King ſhould order me to kill myſelf, or himſelf, or my Father, though judicially condemned: Wherefore, in his Opinion, the Obedience of Subjects is to be drawn from ſome other Principle, than from any Compact with the Sovereign. But now, we maintain, that the lawful Power of the Prince, and the Duty of the Subjects, exactly and compleatly anſwer one to the other: And therefore we deny, that, in any Caſe, the Subject can lawfully refuſe what the Prince lawfully enjoins. For he can lawfully enjoin no more, than what really is, or, at leaſt, is judged to be agreeable to the End for which civil Communities were firſt eſtabliſhed. If either, through evil Deſign, or through unwiſe Counſel, he attempts any thing contrary to this End, the Act ſhall, on no Account, be eſteemed lawful. But whether the Subjects may reſiſt all ſuch unreaſonable Injunctions, is properly another Queſtion, and ſhall be diſcuſſed in another Place. Mr. *Hobbes*'s Inſtances are of no Weight in this Point. For, if the Prince might lawfully command any of thoſe Actions, which he mentions; that is, if the Performance of ſuch a Thing, by a Subject, ſhould ſeem conducive to the Good of the Commonwealth, the Subject could not lawfully refuſe to comply [e];

[a] *Panig.* Ch. lxvi. *in fin.* [b] Lib. viii. Ch. xxi. [c] *De Cive*, Ch. v. § 7. [d] *Ibid.* Ch. vi. § 13. [e] See *Judges* ix. 54. 1 *Sam.* xxxi. 4. *Zonaras*, Part iii, reports, that when *Theophilus* the Emperor, upon the Loſs of a Battle, ſtood almoſt benummed with Fear, and would not ſtir out of the Field; *Manuel*, with his Sword drawn, accoſted him to this Purpoſe, *Unleſs you follow me, I am reſolved to kill you on the Spot: for it is better you ſhould loſe your Life, than that you ſhould fix a Mark of the higheſt Diſgrace on the* Roman *State, by falling into the Hands of the Enemy.* At which Threats the Emperor, with ſome Unwillingneſs, awakened from this Lethargy, and following his Guide, got off ſafe. The Poet *Quint. Calab.* Lib. xiii. obſerves,

A Prince ſhould rather *fall* amongſt the Brave,
Than wear the Badges of a *Royal Slave.*

And,

And, on the other Side, if the Commands were void of all Juſtice and Reaſon, and the Subject ſlain for not performing them; no Man in his Wits will ſay, that ſuch an one was lawfully put to Death.

As to what he affirms in the ſame Chapter [a], That the Right of a Sovereign is conferred on him by the People, by Way of *Donation*; this is not ſo much as conſiſtent with his own Notions. *Donation* he himſelf allows [b] to be the Transferring of Right from one Party to another, without the like Return. But now when a Prince is inveſted with the Sovereignty, there is a mutual Transferring of Right, or a reciprocal Promiſe. The Subjects engage to be obedient, the Prince to take care of the Commonwealth, to which Duties neither of them ſtood bound, before this Act paſſed between them. For, as, before the Government was conferred on ſuch a Perſon, the reſt of the Society might have oppoſed or reſiſted his Command, though they afterwards appoint him for their Sovereign; ſo he, on his part, if they had demarded his Care or Protection, might, likewiſe, have reſiſted them; that is, might have denied thoſe Performances, as Things which they had no Right to require of him [c].

XII. The other Set of Reaſons, which he makes uſe of [d] to overthrow all Compacts between Prince and People, will appear to be no leſs weak than the former. In the firſt Place, he undertakes to prove that democratical States are conſtituted, not by Covenants between each Man and the whole People, but between each Man and each Man. His Argument is: "Becauſe, in every Covenant, the "Parties covenanting muſt exiſt antecedently "to the Covenant itſelf. Whereas, before the "Settlement of the State, the *People* cannot "be ſaid to exiſt, as being not one compound "moral Perſon, but only a Multitude of In-"dividuals. And then again, after the State "is ſettled, to enter into ſuch a Covenant would "be to no Purpoſe; becauſe the Will of the "People includes in it the Will of any pri-"vate Subject, to whom the People muſt "be ſuppoſed, in this Caſe, to engage their "Faith; ſo that they may releaſe themſelves "when they pleaſe, and, by Conſequence, "are actually free." But now it is manifeſt, that there's a Medium between theſe Suppoſitions. Before the Settlement of the State, many Men are not indeed a *People*, that is, a democratical Community: Therefore no Covenant can be made with them as ſuch. And ſo too, after the State is ſettled, a Covenant of this Nature would, in one Senſe, be in vain; that is, it would be in vain, for one or two particular Subjects, to make a private Compact with the People about the publick Adminiſtration: For he that hath once given his Conſent to the introducing a Democracy, is preſumed to have thereby obliged himſelf to obey ſuch Decrees, as ſhall proceed from the Majority of the People; which Obligation muſt needs ſuffer Prejudice from any particular Covenant. But, ſtill in the very Act of conſtituting a popular State, a mutual Covenant may, and really doth, paſs between the People and the private Members; the Nature of which we have already explained. A Man might argue, with juſt as much Reaſon and Conſequence, that a Husband cannot poſſibly have entered into any Covenant with his Wife: Becauſe, before Marriage, ſhe was not his *Wife*; and, after Marriage, it would be in vain to come to a Covenant; the Woman's Will being then put under Subjection to the Man's. Whereas, in the very Act of taking or chuſing ſuch a Woman for a Wife, a Covenant might paſs between the Parties. *Epicurus*'s Fallacy about Death was a Piece of Sophiſtry much of the ſame Strain, as 'tis recited and confuted by *Lactantius* [e]. *When we are in Being, Death is not; and when Death is in Being, we are not: Therefore Death ſignifies nothing to us; or, Death and we have nothing to do with each other. What a nice Cheat was this upon our Underſtandings? As if we feared Death when it was once over, and had taken away our Senſes with it; and not rather feared to die, by which Act our Senſes are thus taken from us! For there is a certain Point of Time, when* we *ſeem to be gone, and yet* Death *is not quite arrived. And here's the miſerable Moment, when* Death *begins its Being, and* we *conclude ours.*

But farther, ſhould a Man contend with never ſo much Earneſtneſs, that he cannot, in democratical Governments, conceive ſuch a Compact in his Mind, or that he judgeth it utterly uſeleſs; yet he cannot fairly take Occaſion thence to exclude it from other Forms, where thoſe who command, and thoſe who obey, are really and naturally different Perſons. For here, certainly, a mutual Covenant is required, by which the former engage to undertake the Care of the Publick, and to make the Safety and Welfare of the People the chief Law of their Actions; and the latter again engage to yield Obedience. Hence it is evident, what Judgment we ought to make of that other Aſſertion laid down by Mr. *Hobbes* [f] that, *becauſe the particular Members of the Society, not by any Compact with the People, but by private Covenants between themſelves, are bound to acquieſce in every Act of the People; they are, by the ſame Covenants, bound to acquieſce in that Act of the People, which transfers the Sovereign Right of the State upon a Senate, or upon a Monarch.* For it is no good Conſequence to ſay; if the general Aſſembly of the People agree to transfer the ſupreme Command on a Senate, or on a King, particular Perſons are bound to ſtand to their Reſolution; therefore there paſſeth no Covenant between the People, who transfer the Right, and the Nobles, or King, on whom it is transferred.

He has ſtill an Argument behind, of as much Strength and Weight as the reſt. He tells us, that a King, though elected by the *People*, cannot, by the ſame *People*, be obliged to any Performance; becauſe immediately upon his Election the *People* are diſſolved, and loſe the Exiſtence they had as *one Perſon*; for which Reaſon the Obligation directed towards them, as one *Perſon*, doth, likewiſe, periſh and is diſſolved. Now, what he fixeth here for the Baſis of his Opinion, that the Obligation

[a] *Sect. ult in fin.* [b] *Sect. ult. in fin.* [c] Comp. *Luke* xii. 13, 14. [d] Ch. vii. § 7, *&c.* [e] *Inſtitut. Divin.* Lib. iii. Ch. xvii. [f] *De Cive*, Ch. vii. § 9.

towards

towards any *Perſon* ceaſeth, the Perſon himſelf being taken away; is to be underſtood of thoſe Caſes only, in which, either the Perſon is extinct by a natural Death, or that Quality expires in which alone the Obligation was founded. But when a free People transfer the Government on a King, neither do themſelves die in a natural Senſe, nor is the King's Obligation founded in that *Quality* of the People, which denominated them a free State; but in that by which they reſolve to be, for the future, a Society of Men under a ſingle Governor. As a Suitor who is engaged by Covenant to a young Woman, cannot, after the Marriage hath been conſummated, except againſt the Contract, on Pretence that his Obligation is expired, becauſe ſhe is not a Virgin now, as ſhe was when the Covenant was made. For the Obligation of a Suitor was not founded in the Quality of Virginity; but he contracted with a Virgin in order to her changing her Condition to that of a Wife. Upon the Conſtituting a Monarch, the *People* are *diſſolved* in this Reſpect only, that the ſupreme Authority doth no longer reſide in a general Aſſembly; but they are, by no Means, diſſolved into a looſe Multitude, not united by any mutual Bands: For they ſtill continue one Society, held together by one Government, and by their original Covenant amongſt themſelves. The whole of the Matter, therefore, is this; Mr. *Hobbes* impoſeth upon leſs intelligent Readers, by the ambiguous Signification of the Word *People*. In Democracies, the *People* denotes the whole Body of Men, who, in different Reſpects, govern and are governed [a]. But who will venture to affirm, that an Obligation towards a People in this latter Senſe, or as they are ſubject to a Monarch, or to a Senate, may not continue and ſubſiſt, though contracted whilſt they were yet free, but in order to their future Subjection, and in certain Proſpect of it? To conclude, Mr. *Hobbes* himſelf elſewhere [b] expreſly aſſerts, that God was made the King of the *Jewiſh* People by virtue of a Covenant between him and them [1]. And how then can he pretend, that there is no Covenant between a mortal King and his Subjects? A little [2] before he delivers the direct contrary: *When a Man*, ſays he, *ſubmits himſelf to his Conqueror, he is bound by as neceſſary an Obligation as the trueſt Subject; for a Contract, lawfully entered into, cannot fairly be broken or tranſgreſſed* [3].

XIII. By the Means of theſe Covenants then a Multitude of Men are ſo united and incorporated, as to form a civil State; which is conceived to exiſt like *one Perſon* [c], endued with Underſtanding and Will, and performing other particular Acts, diſtinct from thoſe of the private Members. Again, as it is diſtinguiſhed and known from the ſame Members by one general Name [d], ſo it hath peculiar Rights and ſeparate Properties, which neither particular Men, nor many in Conjunction, nor all together, without him in whom the ſupreme Authority reſides, can make any Claim or Pretences to: And laſtly, it hath peculiar Actions proceeding from it, which private Perſons can, on no account, aſſume or challenge to themſelves. So that the moſt proper Definition of a civil State ſeems to be this, [4] "It is a compound moral 'Perſon, whoſe Will, united and tied together 'by thoſe Covenants which before paſſed among 'the Multitude, is deemed the Will of all; to 'the End, that it may uſe and apply the 'Strength and Riches of private Perſons to-'wards maintaining the common Peace and 'Security." Mr. *Hobbes* hath given us a very ingenious Draught of a civil State, conceived as an *artificial Man*: 'In which the Sovereign is 'the Soul, as giving Life and Motion to the 'whole Body; the *Magiſtrates* and the other '*Officers*, artificial *Joints*; *Rewards* and *Puniſh-*'*ments*, faſtened to the Seat of Sovereignty, and 'by which every Member is moved to the Per-'formance of its particular Duty, the *Nerves* 'which do the ſame in the Body natural; the '*Wealth* and *Riches* of particular Members are 'the *Strength*; *Salus Populi* (the *People's Safety*) 'its *Buſineſs*; *Counſellors*, by whom all Things 'needful for it to know are ſuggeſted to it, are 'the *Memory*; *Equity* and *Laws* an artificial

[a] *Vid.* Hobbes *de Cive*, Ch. xiii. § 3. [b] Leviath. *de Interregnis*, § 7. *Concluſ.* [c] Statius *Achil.* Lib. i. *v.* 457, 458.

——— *Sparſa ac diſſona moles*
In corpus vultumque coit, & rege ſub uno
Diſpoſita eſt. ———

——— A wild and ſhapeleſs Maſs
Aſſumes a Figure and a comely Grace,
Under a Monarch's Reign ———

[d] *Vid.* Lib. i. Tit. viii. Lib. vi. § 1. D. *De Diviſ. Rerum, &* Lib. ii. Tit. iv. Lib. x. § 4. D. *De in Jus vocando, &* Lib. iii. Tit. iv. Lib. vii. § 1. D. *Quod cujuſcunque Univerſ. Nom. &* Lib. xlviii. Tit. xviii. Lib. 1. § 7. D. *De Queſtion.* *Add.* Senec *de Beneficiis*, Lib. vi. Ch. xix, xx. [e] For that Definition of *Dion. Pruſæus* (in *Boryſthenic.*) *A State is a Multitude of Men living together, in the ſame Place, under the ſame Laws*, we may perhaps hereafter find Occaſion to examine; it being founded on the Maxims of *Grecian* Policy. Nor hath *Apuleius* much better Succeſs when he defines the *Platonic* Commonwealth, as the moſt perfect Model of Government, in the following Manner; from the Authority of *Plato* himſelf; *A State is a Union or Conjunction of many Men, amongſt whom ſome govern and ſome are governed, but all agree and mutually aſſiſt each other, guide themſelves in their Duty by the ſame Laws (ſuch as are good and juſt) and have accuſtomed themſelves to live within the ſame Walls, and to have the ſame Inclinations and Averſions in all Things.*

[1] *Vid.* Hobbes *de Cive*, Ch. xxxv, xl.

[2] Our Author means the Appendix to *Hobbes*'s Book, where this is found, *Ch.* ii. *p.* 353. But there is nothing in what he adds of having read it *a little before*. As for the Reſt, ſee what that Author ſays more at Length, with regard to that *Theocracy* of GOD over the *Iſraelites*, in Chapters xxxv, xl. And, touching the Agreement between the Victor and the Vanquiſhed, *Ch.* xx. of the ſame Book.

[3] *Vid* Hobbes *de Cive*, Ch. xx.

[4] This Definition is a little intricate, and as Mr. *Titius* obſerves (*Obſerv.* DLVII.) confounds the *Sovereign* with *the State*. The *State* indeed is a *Body* of which the *Sovereign* is the *Head*, and the *Subjects* the *Members*. Our Author has here too blindly followed *Hobbes*'s Definition *de Cive*, Ch. v. § 9. From whoſe Principles, however, he otherwiſe widely differs. Mr. *Carmichael*, who has attempted to defend *Hobbes* (*Note in* PUFFEND. *De Off. Hom. & Civ.* Lib. ii. Ch. vi. § 10.) ſays nothing to deſtroy the Foundation of this Criticiſm, though he tries to give a better Definition. I wonder our Author did not here give the Definition ſo often quoted by *Cicero*, found in his iii[d] Book, *De Repub.* and which St. *Auguſtine* has preſerved to us (*De Civ. Dei*, Lib. ii. Ch. xxi.) *Multitudo juris conſenſu, & utilitatis communione ſociata.* "A Multitude of People "united together by common Laws, to which they ſubmit with common Accord, and for their common Intereſt."

'*Reason*; *Concord* is *Health*, *Sedition Sickness*, and '*civil War*, *Death*. Lastly, the *Pacts* or *Co*-'*venants*, by which the Parts of this Body po-'litick are cemented together, resemble the di-'vine *Fiat*, or the *Let us make Man*, pronounced 'by GOD in the Creation[a].' Whence we may gather, by the Way, that *Isocrates*[1] was in the wrong, when he affirmed *the Form of Government* to be *the Soul of the State*, having the same *Force* and *Power* as the *Mind* hath in the Body. Whereas the Form of Government is rather the same in the State, as in a human Body, the Structure and Disposition of the several Parts and Members.

XIV. The State, in exerting and exercising its Will, makes use either of a single Person, or of a Council, according as the supreme Command hath been conferred, either on the former, or on the latter. Where the Sovereignty is lodged in one Man, there the State is supposed to choose and desire whatever that one Man (who is presumed to be Master of perfect Reason) shall judge convenient[2]; in every Business or Affair, which regards the End of civil Government, but not in others. For Instance, if a Prince declare War, if he make Peace, or enter into an Alliance, this is interpreted as the Will and Act of the State[b]: But not if he eat, or drink, or sleep, if he marry a Wife, or if he be guilty of any Vice or Disorder. So that we may form a Distinction between the publick Will of the Monarch, representing the Will of the State, and the private Will of the same Monarch, which he useth like any other Man, in the Prosecution of his personal Affairs. Hence there naturally ariseth this Question, Whether if he, in whom the publick Will resides, wills otherwise than he ought to do, and, consequently, sins in the Exercise of this publick Will, the Action, which proceeds from a Will thus depraved, is to be looked on as the Action of the State? For every Person, who submitted his own private Will to that of the Prince, is supposed to have done it with this Intention, that the Prince should will nothing, but what should be just in itself, and advantageous to the Publick. Here it seems reasonable to pronounce, that an Action, proceeding from the Abuse and Corruption of the publick Will, is, in itself, a publick Action, or the Action of the State; because performed by the Sovereign, as considered in that Capacity. Thus if a King or a Senate ordain evil Laws, execute wrong Judgment, appoint unfit Magistrates, or undertake unjust Wars, that Act in all these Instances is certainly publick. As, when a Coachman overturns, the Action is his as a Coachman, though as one unskilful or negligent in his Art. But then in the Court of Conscience no Man is accountable for such an Act, unless he contributed positively and effectually towards its Production. Therefore Subjects are not charged with the Faults of the Government, nor they in a Senate or ruling Council, who dissent from any such Proposal, and are outvoted by the rest. But the Inconveniences, which innocent Subjects suffer on account of these publick Crimes, are to be ranked amongst those general Evils to which human Nature, in this Condition of Mortality, lies necessarily exposed; and which we must, therefore, endure with the same Patience as we do extreme Drought, or immoderate Rain, and those other Misfortunes which we style *naturally Evil*. Though there are several Things, which Experience shews to have a very great Virtue and Efficacy towards the preventing of these Inconveniences; as fundamental Laws, good Education and Discipline, and above all, the Precepts of Religion.

It follows, on the other hand, that whatever any particular Person, or many together, or all, without the King, shall will or do, beside or contrary to his Authority or Command, not only in Business of the latter, but, also, of the former kind, shall not, in the least, be looked on as the Will or the Action of the State, but as a private Will, or a private Action: Nay, there shall be so many distinct Wills, and so many distinct Actions, as there are particular Men concerned in the willing, or the doing thus or thus. And the same Judgment is to be passed on that which single Men, or a Number of Men shall attempt by their own private Motion, without Authority or Order from that governing Council, in which the sovereign Power resides. Therefore amongst the Opinions which encourage Sedition, and which tend to the dissolving the inward Frame and Structure of any State, especially of a Monarchy, Mr. *Hobbes*[c] reckons this for one, that the Vulgar are not able rightly to distinguish between a State, or *People*, and a *Multitude*. A *People* or a State makes but one Person, having one Will, and performing only one and the same Action. Neither of which can be said of the *Multitude* of Subjects opposed to the Prince or sovereign Council. But what he affirms afterwards, that *the People rule in every State*, comes to nothing through his idle Affectation of overmuch Nicety. For the Word *People* must import one of these two Things; either the whole State, or the Body of the Subjects. In the former Sense it is ridiculous Tautology, *The People, that is the State, rules in every State:* In the latter Sense it is absolutely false, *The People, as distinct from the Prince, rules in every State*. As for that which follows: *In Monarchies the People govern*; *because the People, by the Will of one Man, exert their own*; he ought rather to have said more plainly thus: In a monarchical Government the

[a] Leviath. *Proœm.* [b] *Euripid.* Supplic. *v.* 1188, *&c.*

——— 'Tis fit *Adrastus* swear;
The King and Lord of *Greece* shall swear for all.

[c] *De Cive*, Ch. xii. § 8.

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[1] Areopagit. *p.* 245, & Panathenaic. *p.* 450. But it seems to me, that *Isocrates* is not speaking there of the Form of Government, and that Πολιτεία signifies here only Civil Government in general, which (as our Author himself allows in the following Chapter, Sect. 1.) is the Soul of the *State*. Mr. *Hertius* has lately observed the same Thing in his Remarks on *Wolfius*'s Translation, which led our Author into this Mistake. But it seems to me, that the Form of Government is, with regard to the State, what the Structure and Disposition of all the Members is, with regard to the human Body.

[2] Provided first, that he act with Knowledge, and not through Error, nor through any rash Motion, which for a Time deprives him of the Use of his Reason; and, secondly, that he do not violate the Fundamental Laws of the State. Time Observ. 559. Let us add, thirdly, that he does not violate, in any extraordinary Manner, those Engagements which every Sovereign is under, as such.

Will

Will of the Prince is ſuppoſed to be the Will of the State. Nor can that Paradox, *Rex eſt Populus, The King is the People*, be explained in any other Senſe than this. His other Remarks are true enough; as, that the Vulgar always ſpeak of a great Number of Men, as of the People, or the State, and are wont upon Occaſion to ſay, the State hath rebelled againſt the King, which is impoſſible; and that the People, or the State, deſire and refuſe what is deſired or refuſed by ſome troubleſome diſcontented Mutineers; under the Name and Colour of *the People*, animating the Members of the State againſt the State, the Subjects againſt the Sovereign.

XV. But where the ſupreme Authority is conferred on a *Council* made up of many Perſons, each of whom retains his own Will; the Queſtion firſt to be determined is, What Number of theſe Perſons, agreeing in the ſame Reſolution, ſhall repreſent the Will of the *Council*, and, by Conſequence, of the State? For otherwiſe, as no Man is bound to follow another's Judgment rather than his own, unleſs he hath ſubjected his Will to the Will of the other Party; ſo though a Man enter into Society with others, in order to the directing their Buſineſs by the common Vote, yet if by expreſs Condition he reſerve to himſelf the Privilege, that he will not be obliged to any Thing to which he doth not give his Conſent, the Decrees of the Majority ſhall not, in the leaſt, affect him, or force his Compliance. Thus there are *Bodies incorporate*, in which each Member hath a Negative, and by it can render the Conſent of all the reſt void and ineffectual[1]. Yet, if a Perſon abſolutely refuſeth to hearken to Reaſon, and out of mere Stubbornneſs oppoſeth thoſe who are in the right Opinion, he may be expelled the Society, as a Nuiſance; or, in ſome Caſes, may be brought to farther Puniſhment. For though here he is not bound to follow the Act of the greater Part by his own precedent Covenant; yet he is under the Obligation of a general Law, which commands him to ſhew himſelf friendly and eaſy to others, and, as a Part, to conform himſelf to the Good of the whole[a]. It muſt be confeſſed, that in Meetings of this kind, eſpecially when conſiſting of a great Number of Perſons, Buſineſs is never diſpatched without much Difficulty, and many Times falls and comes to nothing, by reaſon of the Difference of Mens Judgments, and the impregnable Obſtinacy of ſome Tempers. And, according to the ordinary Courſe, if any Perſon hath once abſolutely, and without Terms of Exceptions, united himſelf to any Society or Aſſembly, inaſmuch as he cannot require, that all the reſt ſhould be governed by his Vote, or that they ſhall omit what ſeems neceſſary or profitable for them, in Deference to one diſſenting Member; he is, at the ſame Time, preſumed to have obliged himſelf to the acknowledging and *ratifying all* Reſolutions, which the major Part ſhall have ſettled. For, if he looks on this as any Hardſhip, he ſhould have put in his Exception to it, when he firſt treated about his Admiſſion into the Society. But it would now betray a Spirit unreaſonably proud and troubleſome, to think himſelf wiſer than all his Fellows. If a Man ſo far perſiſt in his Opinion, as to be uneaſy, becauſe he cannot force it upon the whole Company, he is at his Liberty to quit the Union in which he was before engaged. But it would be high Injuſtice for a Perſon, when he had been out-voted, to follow the Example of thoſe we find deſcribed in the Hiſtorian[b]. *Every one of them*, ſays he, *taking it heinouſly that his own Opinion was not followed, applied himſelf more negligently and heavily to the common Buſineſs; nay, rejoiced upon any ill Succeſs or Miſcarriage, that he might have Occaſion thence to boaſt amongſt thoſe of his own Party, and demonſtrate that there could be no other Cauſe of the Diſappointment, but the Slighting his particular Advice.* Hence, according to the regular Courſe, the Votes of the Majority in Aſſemblies have the Force and Virtue of a general Decree; not becauſe there is any Neceſſity of this, by the Appointment of Nature, but becauſe there is hardly any other poſſible Means of tranſacting Buſineſs amongſt Numbers[a c]: Though it ſometimes happens, that a Propoſal more for the Benefit, or the Honour of the State, may be re-

[a] On which Subject, we may add the Argument in Father *Paul*'s Hiſtory of the Council of *Trent* (Lib. iv. p. 788.) that the *French* were not bound by the Decrees of the Council, having proteſted againſt it. Where the Judgment of the Parliament of *Paris* is, alſo, produced, and runs to this Effect: 'That the Authority of the whole Body is then, indeed, tranſ-'ferred on the major Part, when the Cauſe affects all in common, but toucheth none in particular: But when the whole 'Cauſe ſo belongs to all, as that each are to be allowed their reſpective Shares; in this Caſe, the Conſent of every one in 'particular is neceſſary, and the Negative is the more favourable Side: Nor are the Abſent in the leaſt obliged: Unleſs 'they confirm the Reſolutions by their own Vote. That Eccleſiaſtical Aſſemblies are of this kind; in which, how fre-'quently ſoever Councils may be held, the abſent Churches are not at all bound by their Decrees, except they pleaſe 'to receive them.' [b] Agathias, *Lib.* iv. *Ch.* v. [c] Vid. Lib. L. Tit. i. Lib. xix. *D.* Ad Municipalem. *Plin.* Lib. ii. Epiſt. xiii. Note 5. *The Votes paſs by Number, not by Weight; nor is it poſſible, that in a publick Aſſembly it ſhould be otherwiſe, where nothing is ſo unequal as the very Equality itſelf; whilſt all have not the ſame Wiſdom, and yet all have the ſame Right.* Idem Lib. vi. Epiſt. xiii. Note 4. *Whilſt the Point is unreſolved, every Man hath the Privilege of diſſenting*; but, *when it is once determined, all are bound to maintain what the Majority have decreed.* And of this regular Courſe of proceeding we are to underſtand that of *Ariſtotle*, Polit. iv. Ch. viii. *That which moſt agree in, is received under all manner of Governments. For in Oligarchy, in Ariſtocracy, and in popular States, the Reſolution of the greater Part of thoſe concerned in the Supreme Management, is confirmed and ratified as a publick Decree.*

[1] Every one knows, that in *Poland* the Oppoſition of a ſingle Member breaks up the *Diet*. See *Hartknoch de Polon.* Lib. ii. Ch. i. § 15. The *States of Holland*, likewiſe, obſerve this Maxim, when they have any Affair of great Importance to be debated. See Mr. *Hertius*'s Note. And our Author's Diſſertation, *De Syſtematibus Civitatum*, § 18.

[1] See, alſo, *Grotius*, Lib. ii. Ch. v. § 17. & *La continuation des penſées diverſes de Mr.* Bayle, p. 14. *Gronovius*, in a Note upon the Place I have juſt quoted of *Grotius*, adds the following Reſtrictions to this Maxim of the *Plurality of Voices*. *Firſt*, That the Point in Debate be determined by fair Voices, that is, that there be no Combination among the Members, and that the Majority of them, before they enter the Aſſembly, have not agreed to carry ſuch a particular Opinion. *Secondly*, That the Majority of the Aſſembly be not ſuſpected Perſons, who, according to the eſtabliſhed Laws and Cuſtoms, ought not to vote in the Buſineſs that is debating, that they may not be Judges in their own Cauſe. *Thirdly*, That the Matter in Debate be not contrary either to Divine Laws, or to Reaſon. *Fourthly*, That it does not deſtroy the Fundamental Laws of the State, and that it does not tend to the changing, without Neceſſity, the Form of the Government. *Fifthly*, and laſtly, That it be not in the leaſt prejudicial to the Rights of particular Perſons, nor to the Privileges and antient Cuſtoms eſtabliſhed for the Good of the Publick.

jected, when the Authors cannot form a Party strong enough to carry it. For in these general Establishments, for the Ordering of human Affairs, which often admit of so great Variety, since it was not possible for Men to invent such a Method, as should be free from all manner of Inconvenience, that must be followed which holds good for the most Part [a]. And, therefore, it is idle to pretend, that since it seems agreeable to Nature, that what proceeds from more Wisdom should take place, against what proceeds from less; it is, therefore, repugnant to Nature, that the weaker Opinion of many should outweigh the wiser Opinion of a few, and, consequently, that the former should compel the latter to an imprudent Undertaking. Indeed, in determining speculative Truths, Opinions are not passed by *Number*, but by *Weight*: And the Multitude of Patrons is itself looked on as a Mark of Error [b]. But this Rule can, by no means, be applied to the Management of Business in an Assembly, the Members of which have all an equal Right to influence the Proceedings. For who shall be the Judge here which Opinion is the wiser? Certainly not the Parties themselves, which are thus divided. For neither Side will allow the other thus to over-rule a Point, in which their Credit, as well as their Interest, is so nearly concerned. And where is the Man, who doth not think his own Parts and Wisdom more considerable than his Neighbour's? Nay, How many are there who take a Delight in disparaging an Opinion or a Project, though the best that could have been advanced, only because they were not themselves the Authors and Contrivers of it? Nor would it be easy, for the two dissenting Parties to refer such a Controversy as this, to the Decision of a common Arbitrator; for, again, the Arbitrator's Wisdom or Integrity might be called into Dispute, and might require a new Judge to determine the new Question: Not to say, that most of the Points, debated in these Assemblies, relate to such Matters as cannot conveniently be committed to the Judgment of those who do not belong to the Society. It hath been, therefore, thought most proper, to enter upon such a Method as should be the least exposed, either to Difficulty or Uncertainty; and none can be invented which should answer this Character better, than the counting of Voices [c]. Besides, whoever is allowed the Privilege to vote in a Council, is presumed of sufficient Ability to penetrate and comprehend all Affairs, that shall fall under their Deliberation. Which must be allowed to be true of those Councils, at least, into which Persons are not admitted, without some kind of Choice and Approbation of others. Neither would it be always expedient, to give any one Man in the Council, as suppose the President or chief Director, the Power of controlling the whole Matter by his Vote, and declaring which of the Opinions is the better. For, if the Prerogative should be granted to him, he might prefer the Judgment of the smaller Party to that of the greater; nay, he might reject both Proposals, on Pretence that neither was good; and thus he would, to all Intents and Purposes, be the sole and arbitrary Governor of the State. As absolute Princes may follow that Advice which is offered by the fewest of their Counsellors; or may take such Measures as are contrary to the Opinion of them all.

XVI. But as to this Point of the Plurality of Votes, it is needful to observe, that in some Councils it is not enough for an Opinion proposed to have the Advantage of one Vote, or of some few more than the contrary; but, before it can be carried, it must have a Majority to such a certain Number [d]. Thus the Law about the Election of the Pope [e] requires two Thirds [1] of the Cardinals to agree in their Nomination. And the same Rule appears to have been followed in [2] the Election, and in the Orders of

[a] Bodin. *De Republ. Lib.* iii. *Ch.* iv. *p.* 456. [b] *Senec.* De Beat. Vit. Ch. ii. *Whilst I am treating of a happy Life, you are not to answer me, as upon a Division in the Senate-House,* The greater Number is on this Side; *for the greater Part is, for that very Reason, the worst; Mankind are not so happy, as that the best Things shall have the most Patrons and Defenders. And, therefore, a Multitude is generally an Argument of the Wrong. Phocion,* when a certain Proposal of his was received with general Applause, turned to his Friends, and asked them, Whether he had unadvisedly let drop somewhat that was amiss? *Plutarch* in Apophthegm. p. 188. *A.* Idem De Educat. p. 6. *A.* Ed. *Wech. To please the Vulgar is to displease the Wise.* Euripides *will bear Testimony to this Observation, whom we find speaking to the same Purpose:*

> I've not the Art of tickling vulgar Ears,
> But yet my Vote weighs somewhat with my Peers.
> When *Asses* judge, 'tis *Musick* to be loud;
> And that which shocks the Thinking, charms the Crowd.

Hence, as *Quintilian* observes (Institut. Orat. Lib. x. Ch. 7.) *They who are ambitious of appearing Wise to the Fools, affect Fools to the Wise. Plato* Conviv. p. 1188. C. Ed. *Wech. A few Men of Understanding are more to be feared, than a whole Multitude composed of Ignorance and Weakness. Add.* Valer. Max. *Lib.* iii. *Ch.* vii. § 1. Ext. *Dio. Chrysost.* De *Illo* accepto, p. 190. *D.* Ed. *Pariſ. Morel. For a Thing to have been believed a long Time by Fools, is no Authority or Argument for its Truth.* [c] *Plin.* Panegyr. Ch. lxii. in fin. *It is better to trust the whole Company, than any private Member: Particular Persons may deceive, and may be deceived; no Man ever cheated all, no Man was ever cheated by all.* [d] V. *Grot.* Lib. I. Ch. v. § 17. ibid. *Bæcler.* [e] Jus. Canon. *Ch.* vi. De Elect. & Electi Potestate.

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[1] They add, in the same Place, that this Regulation should not affect the other Churches, where the Advice of the major and most orthodox Party ought to prevail. V. *Gratian.* Can. xxxvi. Distinct lxiii.

[2] Our Author is very much mistaken in this Point, in reference to the Election of the *Decurions* among the antient Romans; and, to prove the Truth of this Assertion, we need only cast our Eyes upon the very Laws here cited by him: For they evidently prove, that there must be two Thirds of the Members of the Council present in the Assembly; and not that two Thirds of the Votes of those that are present are required, to determine absolutely in an Affair. See, also, Dig. *Lib.* L. *Tit.* ix. *Leg.* ii, iii. The Passage of *Prudentius,* which our Author quotes to prove it, is no better applied; for it signifies, likewise, that to make a Decree of the Senate valid, it was antiently requisite, that there should be three hundred Senators present in the Assembly, and not that three hundred Senators should vote for the same Thing. For it was sufficient, that, among those three hundred Senators, the Majority of Voices was for one particular Opinion. This appears, among others, from this Passage of *Livy, Plebs sic jussit; quod Senatus juratus* MAXIMA PARS CENSEAT, QUI ASSIDETIS, *id volumus jubemusque.* Lib. xxvi. Ch. xxxiii. towards the End. Upon which see *Gronovius*'s Note. Our Author himself, Section 19, cites, in the same Sense I have done, the *very Laws* which he here misapplies wrong.

the *Decuriones* under the *Roman* Emperors. [a] In the *Venetian* Hiſtorian [b] we find this Clauſe, added to the Decree of the Senate for Baniſhing the *Jeſuits*, That nothing ſhould be determined in Prejudice of the ſaid Decree, unleſs eighteen Senators were preſent, and unleſs five Parts out of ſix conſented to the Reſolution. Yet, where there is no ſuch particular Appointment, that Side which exceeds the other, though by a ſingle Vote, ſhall be accounted a true Majority, and equivalent to the Conſent of the whole [c] Body: It is to no Purpoſe, that ſome urge, againſt this Judgment, the Maxim of the Civil Law, [d] *Quod omnes tangit, id ab omnibus approbari æquum eſt*; *Equity requires, that what affects or concerns all, ſhould have the Approbation of all:* For we cannot hence conclude, therefore, it is Injuſtice, that, for the more convenient Diſpatch of Affairs, a few diſſenting Members ſhould yield to the ſtronger Side. But, farther, the Maxim produced doth not relate to thoſe Aſſemblies or Councils, which are conſtituted for the Regulation of publick Affairs; but to private Partnerſhips and Confederacies, formed by bare Compact, or by the Agreement of ſeveral Men, to be Joint-poſſeſſors of ſome one Thing. Now ſuch an Agreement, or Confederacy as this, doth not give the Perſons concerned a Right to determine any Thing about the common Affair, if ſo much as one of the Partners diſagrees to the Propoſal, thinking it prejudicial to his own Intereſt [e]. As for that Clauſe, which is added by the Law before mentioned, about the Papal Election, that "What is there "particularly ordered about the two Thirds, "ſhall not abridge the Liberty of their "Churches, in which the Opinion of the "greater and ſounder Part ought always to "prevail": The Reaſon of it ſeems to be this; becauſe, according to their Hypotheſis, the ſupreme Judge, the Pope, may declare which Opinion is the *ſounder*, in caſe a Diſpute ſhould ariſe on that Point. Wherefore the *ſounder* Side, unleſs it be the ſtronger, likewiſe, ſhall not be conſidered, except in Caſes where there lies an Appeal to ſome Superior [f].

XVII. If the Parties divided are equal, no Reſolution ſhall paſs, but Matters ſhall continue as they ſtood before: Becauſe there is not Ground enough for any Alteration either Way, but, the Weight on both Sides being the ſame, the Balance hangs even, and the Buſineſs naturally ſtops. Hence, even in criminal [1] Caſes, upon an Equality of Votes the Party is acquitted: Though the Penalties enacted againſt falſe Accuſation, on litigious Suits, ſeem not to take place on theſe [2] Occaſions [g]. Amongſt the *Jews*, the Criminal was not condemned [3], though there happened to be one more Vote againſt him than for him: Which Cuſtom was, no doubt, founded on this Principle, that ſince there is no leſs Religion and Conſcience to be obſerved in what is pronounced by a Judge, than in what is depoſed by a Witneſs; as a ſingle Witneſs is not ſufficient to convict [4], ſo a ſingle Judge is not ſufficient to condemn. For the reſt of the Judges, by declaring directly contrary to each other, ſeemed mutually to evacuate the Force of their own Authority. We ought to add one more Remark on this Subject; and it is, that, where Suffrages are given by Companies or Tribes [5], the particular diſſenting Members in one Tribe, who were outvoted by the Majority of their Fellows, ſhall not be allowed to increaſe the Number of diſſenting Suffragans in any other Tribe.

XVIII. Laſtly, when more than two Opinions are ſtarted, the Queſtion is, Whether they are all to be reckoned ſeparately from each other, ſo as to give the Preference to that, which, taken apart, hath more Favourers than one beſides; or whether two or more Sentences, though different between themſelves, may be firſt joined together to caſt out a third, and then played againſt each other, ſo that the Motion, which upon the laſt Reſult hath moſt Voices, ſhall prevail? Here, if we conſider Things barely according to their natural Equity, without any ſpecial Compacts or Conſtitutions to the contrary, it

[a] *Lib.* iii. *Tit.* iv. *Lib.* iii, iv. *D.* Quod cujuſcunque univerſ. Nom. & *C. Lib.* x. Tit. xxxi. *Lib.* xlv. De Decurion. Prudent. *Lib.* i. *Contra* Symmach. *ver.* 604, *&c.*

Sic conſulta patrum ſubſiſtere conſcriptorum,
Non aliter licitum priſco ſub tempore, quam ſi
Trecentum ſenſiſſe ſenes legerentur in unum.
Servamus leges patrias; infirma minoris
Vox cedat numeri, parvâque in parte ſileſcat.

Whilſt antient Honeſty poſſeſs'd the Throne,
To Acts of Senate juſt Reſpect was ſhown,
Becauſe three hundred Heads had join'd in one.
Still let the Laws prevail; the Weaker *Few*
Yield up their Falſe Belief, a Captive to the True.

[b] Maurocen. *Lib.* xvii. [c] *Vid. Lib.* iv. *Tit.* viii. *Lib.* xvii. § 6. *D. De Receptis. Vid.* Grot. *dict. loc.* [d] *Cap. Quod omnes* de Reg. Jur. in Decretal. Lib. vi. [e] By which we are to explain Lib. xi. of Book viii. Tit. iii. D. *De Serv. Præd. Ruſt.* & Lib. x. Tit. iii. Lib. xxviii. *De Communi dividundo.* [f] *Add.* Gratian. Ch. xxxvi. *Diſtinct.* lxiii. [g] *Quintilian.* Declam. ccliv. *Equal Votes favour the Perſon in Danger. Antiphon.* Grat. xiv. *When Things are equal, they make for the Priſoner, not for the Accuſer; as an Equality of Votes aſſiſts the former, not the latter.* *Add* Ariſtot. *Probl.* § 29. Ch. xiii. *Vid. Lib.* xlii. *Tit.* i. Lib. xxxix. *D.* De Re Judicat. M. Senec. *Lib.* i. *Controv.* v. *One Judge condemns, the other acquits; of two different Sentences, the Milder ought to take place.* The *Greeks* called this favourable Caſe, *Minerva*'s *Vote:* On which Subject the Reader may conſult a whole Diſſertation of *Bæcler*'s.

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[1] There is, in the *Roman* Law, a particular Exception to the Rule in queſtion. It is when a legal Heir, having demanded the Annulling of a Will or Teſtament by which he is diſinherited, the Votes of the Judges, who are to determine his Complaint, are equal; for then the Perſon appointed Heir loſes his Cauſe, if it appears that there is a manifeſt Injuſtice in the Sentence, which prevented the Balance from leaning to the other Side. See *Digeſt.* Lib. v. Tit. ii. *De inoffic. Teſtam.* Leg. x. and CUJAS, *Obſerv.* x. 20. The Reader may, however, ſee ſome weighty Objections propoſed, with regard to this Law, by *Ant. Favre*, in his *Rationalia.*

[2] The Reaſon is, That, becauſe, the Votes being divided, there is Reaſon to preſume that the Proofs brought by the Plaintiff are as ſtrong as thoſe urged by the Defendant. The Civil Law does not always regard as Slanderers, ſuch whoſe Accuſation is diſmiſſed for want of Proof; eſpecially when there are no ſufficient Reaſons to denote Treachery or Malice in the Accuſer. See *Digeſt. Lib.* xlv. iii. Tit. xvi. *Ad Senatuſconſult. Turpillian.* Leg. i. § 3. COD. Lib. ix. Tit. xlvi. *De Calumniatorib.* Leg. iii. & *Cujas*, in his *Paratituli*, upon the laſt Title. As, alſo, Mr. SCHULTING's *Juriſpr. Ante-Juſtin.* p. 232.

[3] See *Grot.* B ii. Ch. v. § 18. Note the laſt.

[4] See above in B. v. Ch. xiii. § 19.

[5] Such were the four Tribunals of the *Centumviri*, eſtabliſhed among the *Romans* to take Cognizance of certain Cauſes. See M. *Noodt De Juriſdic. & Imper.* Lib. i. Ch. xii. and *Cujas Obſerv.* Lib. x. Ch. xx.

ſeems

ſeems proper to diſtinguiſh between thoſe Opinions which really and totally differ one from the other, and thoſe of which one is included in the other as a Part, or which differ only in Quantity; ſo that the latter may be allowed to unite in that common Point where they agree, but the former may not be joined, being abſolutely inconſiſtent. Thus they who adjudge a Delinquent to pay twenty Pounds, and they who adjudge him to pay ten Pounds, may unite in the ten Pounds, againſt thoſe who would entirely acquit him; and he ſhall ſtand guilty to the Value of the ſaid Sum, as that in which the Majority of thoſe that are to try him agree: The Fine of Ten Pounds being contained under that of Twenty [a]. Hence aroſe that Cuſtom in the *Roman* Senate, of ordering a Member *Sententiam dividere* [b], *to divide his Opinion*, when he had not delivered himſelf diſtinctly, but had advanced two Motions at once, one of which was approved by the Company, the other not. But if ſome vote a Criminal to Death, others to Baniſhment, and a third Part are for clearing him; neither can they who propoſed Baniſhment join with thoſe who declared for his Death, againſt the acquitting Party, nor the Acquitters and the Baniſhers againſt thoſe who condemned him to capital Puniſhment. For theſe Sentences are altogether incompatible; Death being neither a Part of Baniſhment, nor Baniſhment of Death. And though the acquitting and the baniſhing Parties thus far agree, that both are for ſaving the Man's Life; yet their Opinions do not directly produce this Agreement, but only by Way of Conſequence; the Opinions being, in themſelves, really different. For they who would abſolve the Criminal, do thereby releaſe him from all manner of Suffering; whereas they who ſentence him to Baniſhment, inſiſt poſitively upon having him puniſhed, though in ſuch a particular Manner and Degree [c]. *Polybius* [d] reports a remarkable Cauſe of this Nature. Certain *Grecians* were held Captives at *Rome*, and a Motion made in the Senate after what Manner they ſhould be diſpoſed of. Upon the Debate three Opinions were propoſed; one, that they ſhould be releaſed, another that they ſhould be condemned, and a third that they ſhould be detained Priſoners ſome Time longer; the firſt in the Number of Votes exceeding both the other, if ſeparately taken. Here *Poſthumius*, the Pretor, who then preſided in the Senate, having a Grudge againſt the Captives, made uſe of the following Stratagem to the great Prejudice of their Cauſe. When the Members were to divide, he omitted one of the Opinions, and propoſed two only, ordering thoſe who were for releaſing the Men, to go to one Part of the Houſe, and thoſe who were for diſpoſing of them any other Way, to go to the other Part. By which Means, they who would have confined them for a Time, united themſelves with thoſe who would have condemned them; and ſo both together outvoted thoſe who would have granted them their Liberty. In *Gellius* [e] we find the following Controverſy propoſed: *Seven Judges were to ſit upon a Criminal, and that Opinion was to ſtand, in which the greateſt Part of that Number ſhould agree: Upon hearing the Caſe, two of the Judges declared for the Priſoner's Baniſhment, two more would have him fined, and the other three voted him to ſuffer Death; being demanded, in order to his Execution, he demurs to the Sentence.* This Caſe was then offered for ſuch an one as they termed ἄπορον, or *unexplicable*. *Cnemon*, in *Heliodorus*'s Hiſtory [f], is condemned by ſeventeen Hundred Voices to Death, and by a Thouſand to Baniſhment: Yet, in as much as the former Party was divided, ſome requiring that he ſhould be ſtoned, others that he ſhould be thrown alive into a vaſt Cavern of the Earth: The Thouſand who decreed to baniſh him, made the greater Number [g].

It is farther obſerved by *Grotius* [h], that when ſeveral Perſons joined together do not form a Society, or general Body, properly ſo called, but are only tied to each other with regard to ſome certain Thing which they all partake of, yet by unequal Shares; then not only the Order and Precedency ſhall be fixed according to their different Manners of partaking, but the Votes, inſtead of being numbered, ſhall be meaſured by that Proportion which each Suffragan holds in the common Poſſeſſion [i]. On which Rule we may add this Remark; that ſince a Society or Combination of this Nature is founded only upon ſomewhat, which all have a common Title to enjoy, and not upon ſuch a Covenant as is requiſite to the Eſtabliſhment of a juſt and regular Community, and by which each Member ſubmits his private Will to the Will of the Majority; therefore, when it is affirmed, that the Vote of him, who holds a larger Share in the Poſſeſſion, ſhall have the Advantage of another's Vote, who holds a ſmaller Share, we are to underſtand it with this Limitation; that the former ſhall not be allowed, by Virtue of his ſuperior Vote, to diveſt the latter of his Right, or any Way to procure his Prejudice. And thus we may apprehend what is to be looked on as the *Will of the State*, where the Sovereignty is lodged in many Hands.

XIX. As to the Number of Men who may compoſe a Council or Aſſembly, in which publick Affairs are to be debated and determined, it is manifeſt that *three*, at leaſt, are abſolutely required [k]. For ſhould there be but *two*, if they happen to be divided in Judgment, there is none elſe to turn the Scale on either Side, and

[a] To this Purpoſe, ſee *Lib.* xxxviii. § 1. *d. l. D.* de Re Judicat. & *Lib.* xxvii. *D.* de Receptis, *d. l.* & *Ch.* i. Jur. Can. de Arbitris *in* vi. It is but loſt Labour in *Grotius* (*Flor. Sparſ.*) when, as to the Caſe propoſed in one of theſe Laws, (*Lib.* xxvii) he oppoſeth the Determination there made, and ſays, the Criminal ought to be condemned in *ten*, becauſe the greater Part agreed to this Sum, and that what they diſagreed in, ought to be rejected. For in *five* they all agreed, but the Majority only then prevails, when the whole Body do not unite in any ſingle Reſolution. [b] *Vid.* Cicer. *Epiſt. Fam.* Lib. i. Ep. ii. Senec. xxi. *What is cuſtomary in the Senate, ought, likewiſe, I think, to be the Practice in Philoſophy: When any Man delivers an Opinion, which I like in part, I bid him* divide, *and I follow accordingly.* [c] *Vid.* Plin. *Lib.* xiii. *Epiſt.* xiv. [d] *Excerp. Legat.* 129. [e] Lib. ix. Ch. xv. The ſame Caſe is the Subject of *Quintilian*'s 365th Declamation, where, among other Things, there is this good Remark: *Non idem ſentientes non potes jungere, idem ſentientes compara. You cannot join those that diſagree; therefore compare thoſe that agree.* See, likewiſe, the Argument of the 30th Declamation in *Liban.* [f] Lib. i. [g] *Add.* Cujac. *Obſerv.* xii *Ch.* xvi. & Ziegler *ad* Grot. *Lib.* ii. Ch. v. § 17. [h] *Ibid.* § 22. [i] On this Subject, *Vid. Lib.* ii. *Tit.* xiv. *Lib.* viii. *D.* De Pactis, & *Lib.* xvi. Tit. iii. *Lib.* xiv. *D.* depoſiti, & *Lib.* xlii. *Tit.* v. *Lib.* xv. *D.* De Reb. author. judic. poſſid. [k] *Vid. Lib.* l. *Tit.* xvi. *Lib.* lxxxv. *D.* De Verb. ſignif.

ſo no Buſineſs can be concluded [a]. Nor is it any Objection againſt this Rule, that ſometimes two Perſons only are termed *Colleagues*, as, for Inſtance, the *Roman* Conſuls. For that Word often imports no more than the Equality of Office and Dignity [b]. In *Latin* we meet with *Collegium Tribunorum*, the *College of the Tribunes*; and yet any one of thoſe Magiſtrates, by entering his particular Diſſent, could [1] evacuate any Reſolution agreed on by the reſt. So that they who are united to each other by ſuch a Relation, and bear ſuch a common Title of Honour, do not always form a regular Aſſembly, in which the Wills of all the Members are, by Virtue of ſome Covenant, compacted into one Will. But Men may happen to compoſe a Body or Society, and yet retain each his particular Will, diſtinct from the Will of his Fellows. Therefore to urge, that a *Contract of Fellowſhip* may be made between two Perſons only [c], is of no Conſequence in the Point before us. As for what may be alledged to the contrary out of the *Digeſts*; the Meaning of the Law in that Place is, not that a *College* or *Company* may be originally conſtituted by a ſingle Perſon; but that, upon Failure of the other Members, by any extraordinary Accident, one Man ſhall be ſufficient to preſerve and repreſent the Body already eſtabliſhed, till ſuch Time as new Members may be ſubſtituted in the room of the former.

According to regular Courſe, the abſent Members are not conſidered in theſe Aſſemblies, provided they have received lawful Notice [d], but their Right devolves (as it were) upon thoſe that are preſent. *When two*, ſays [e] *Seneca*, *act by a common Commiſſion, he that is preſent hath the Power of both.* Yet, in our Judgment, this Maxim ought to be reſtrained to Buſineſs of daily Occurrence, and ſuch as will admit of no Delay. It is, likewiſe, an Exception to the ſame Rule, if the Laws require ſuch a preciſe Number of the Members to concur in every Buſineſs [f]. In ſome Places the abſent Members are allowed to exerciſe their Power by delegating ſome others, who appear in Perſon, and thus to give their Suffrage amongſt the reſt, either in Writing, or by the Mouth of their Proxy [g].

XX. The Civil State being thus framed and ſettled, the Perſon or Perſons on whom the ſupreme Authority is conferred, whether one Man or a Council, either particular or general, obtain the Name of a *Monarch*, or *Senate*, or a *People*; and private Men, as oppoſed to theſe, are ſtiled Subjects. Here we muſt obſerve, that a Man may become Member of a State two Ways, by *expreſs*, or by *tacit Covenant*. For they who were the original Founders of Commonwealths, are not ſuppoſed to have acted with this Deſign, that the State ſhould fall, and be diſſolved upon the Deceaſe of all thoſe particular Men, who at firſt compoſed it; but they rather proceeded upon the Hope and Proſpect of laſting and perpetual Advantages, to be derived from the preſent Eſtabliſhment, upon their Children and their Poſterity. We muſt, therefore, preſume them to have had this in their Aim, that their Children, and their future Race, ſhould, as ſoon as they come into the World, enjoy the Benefits and Bleſſings of the publick Conſtitution. Which, ſince it is impoſſible to obtain without Government, the very Life and Soul of a State, therefore, all who are born within ſuch Dominions, are hereby ſuppoſed to have ſubmitted themſelves to the ſtanding Government. Hence there is no Neceſſity, that they who have been once inveſted with the ſupreme Command, ſhould require the expreſs Homage and Allegiance of their new Race of Subjects, though all the Perſons, who firſt conferred their Authority upon them, may poſſibly be extinct. Farther, ſince every civil Community is fixed in ſuch a particular Scene, where the Members have placed themſelves and their Fortunes in Security, which could not but be endangered, were all Men allowed promiſcuouſly the Privilege of coming thither without acknowledging the Government; therefore it is to be looked on as a general Law in all States, that he who comes within the proper Limits of a State, and much more, if he deſire to reap the Benefit of it, ſhall be preſumed to have abandoned his natural Liberty, and to have ſubjected himſelf to the Government there eſtabliſhed; at leaſt, for ſo long as he thinks fit to reſide in thoſe Parts. If he deny to make this Acknowledgment, he is to be reputed as an Enemy; ſo far, however, as that he may lawfully be expelled the Borders. So it is manifeſt, that they are no leſs ſubjected to the civil Authority, who join themſelves to a State already ſettled, than they, who, by aſſembling and uniting themſelves together, formed it at the Beginning.

It may not be improper to remark on this Occaſion, that there is ſome Diſagreement amongſt learned Men about the true Notion of *Civis*, *a Member of a civil State*. Mr. *Hobbes* [h] ſeems to make *Civis* an equivalent Term with *Subditus*, *a Subject*. According to which Way of ſpeaking, Women, Children, and Servants, will be made proper Deniſons. Our Judgment on the Point is, that ſince every State is conſtituted by Mens ſubmitting their Wills to a ſingle Perſon, or to an Aſſembly, they principally have a Title to the Name of *Members*, by whoſe Covenants the [2] Society was firſt incorporated,

[a] *Vid.* Ch. i. Jur. Can. de Arbitris. [b] *Vid.* Lib. clxxiii. *D. d. l.* De Verb. ſignif. & *Lib.* xxvi. *Tit.* vii. Lib. xiv. *D.* De Admin. tut. & *Lib.* xlvi. Tit. iii. Lib, ci. *D.* De Solutione, *&c.* [c] *Lib.* iii. Tit iv. Lib vii. § 2. *D.* Quod cujuſcunque Univerſit. Nomine, *&c.* [d] *Vid.* Ch. xxxvi. Jur. Can. de Electione & Electi Poteſtat. [e] *Controv.* vii. 4. [f] *Vid.* Lib. iii. *D. d. l.* Quod cujuſcunque Univerſit. Nomine, *&c.* & *Lib.* xlv. *D. d. l.* De Decurion. [g] *Vid.* Ch. xlvi. De Electione & Electi Poteſtate, in Ultimo. [h] De Civ. Ch. v. § 11.

[1] In certain Caſes, however, where they judged it proper to prevent this Inconveniency, the Majority of Voices carried it. We find an Inſtance of this in the *Roman* Hiſtory, when the *Tribunes* of the People, jointly with the *Prætor* of the City, were authorized by the *Atilian* Law to appoint Guardians or Tutors to ſuch Minors as had none before: *Si enim nullus omnino Tutor fuerat, ei dabatur, in Urbe quidam à Prætore Urbano & MAJORE PARTE Tribunorum plebis, &c* INSTITUT. Lib. i. Tit. xx. *De Ataliano Tutore, &c. princ.* We have another Example of this, with regard to the Conſecration of a Temple or Altar, in *Livy*, Lib. ix. Ch. *ult. Numb.* vii.

[2] Mr. *Titius* (*Obſerv.* 565.) juſtly obſerves, that, upon this Footing, it would be very difficult, not to ſay impoſſible, to diſtinguiſh *true Citizens* from *Strangers naturalized*, in a State that has laſted for ſome Ages. Nor is this Diſtinction of any great

porated, and they who regularly ſucceed into the Place of theſe primitive Founders. And, ſince theſe Acts belong to the Maſters of Families, they ſhould ſeem to merit this Name by an eſpecial Right; but Women, Children, and Servants, whoſe Wills were before included in the Wills of their domeſtical Governor and Director, can challenge it only by way of Conſequence, and by Virtue of their Dependence upon him; inaſmuch as they, likewiſe, enjoy the common Protection of the State, and hold ſeveral Rights and Privileges on the Score of that Relation. But Inmates, Strangers, and other temporary Inhabitants, are not Members of the Commonwealth, becauſe they propoſe only to tarry for a certain Space, but not to ſettle their Perſons and Fortunes on the publick Bottom. *Ariſtotle*'s Definition, framed to expreſs a Member of State, and taken from *his holding a Share in the Magiſtracy, and in the judicial Proceedings*, agrees only to a democratical Government, as he himſelf obſerves [a].

XXI. To proceed; in moſt Commonwealths the Members are found eſpecially diſpoſed to two ſubordinate Bounds or Engagements, by one of which they unite in certain Numbers, to form a particular Body, yet ſtill under the Direction of the Publick; and by the other, the ruling Power calls them to ſome inferior Share in the Adminiſtration. Theſe Bodies of Men, formed in Subordination to the State, or general Body, whether they are termed Companies, Corporations, Colleges, or paſs under any other Title, may firſt be divided into thoſe which were framed before the Settlement of civil States, and thoſe which have been erected ſince. The Bodies or Syſtems, preceding civil States in point of Antiquity, are *Families*; in which the Authority and the Right, held by the Father and the Maſter, have been already explained. Of which Right, ſo much remains in their Poſſeſſion, as hath not been cut off, either by the Nature and Frame of the publick Society, or by civil Ordinances, or laſtly, by general Cuſtom. Such *Bodies* as have been formed, ſince the Eſtabliſhment of the civil Society to which they belong, may be diſtinguiſhed by the Names of *publick* and *private*. The *publick* are thoſe, which have been ſet up by Authority from the Sovereign Power in the Commonwealth. The *private* are, either thoſe which have been compoſed by the ſole Act of the Subjects amongſt themſelves, or ſuch as depend upon ſome foreign Power, which, within the Dominions of another, is to be looked upon only as a private Right and a private Act. *Private* Bodies may again be divided into *lawful* and *unlawful*; of which the former are, or ought to be, approved of and allowed by the State, the latter not. We ſay, *ought to be allowed*: For ſuppoſe under a State where the Divine Worſhip is corrupted, ſome endued with Senſe and Knowledge of the true Religion, ſhould hold private Aſſemblies, without either open Tumults, or ſecret Conſpiracies againſt the Government eſtabliſhed; how much ſoever the Perſons in Authority may diſlike what differs from their own Perſuaſion, yet no one will preſume to term theſe Aſſemblies *unlawful*, ſince the ſupreme Governors themſelves [1] lie under an Obligation to acknowledge, approve, and maintain the ſame Truths that are there profeſſed. So, likewiſe, if in a barbarous State, where all Improvements of Learning are publickly diſcouraged, ſome Perſons ſhould meet [2] together, to join in the Purſuit and Enquiry of Wiſdom; ſuch a Body of Men cannot be pronounced an unlawful Society. Both are again divided into *regular* and *irregular*. The former are thoſe, in which, by Virtue of certain Covenants, there is an Union of Wills amongſt all the Members: The latter thoſe, in which we do not ſo much apprehend any Union of Wills, as a Conſent and Conſpiracy, without any mutual Bond or Engagement, ſuch as may proceed from ſome common Affections, as ſuppoſe, from Hope, from Deſire of Gain, or of Revenge; from Ambition, Anger, and the like.

XXII. With Regard to all [3] *lawful* Bodies, it is to be obſerved, that whatever Right they poſſeſs, and whatever Power they hold over their Members, is all under the Determination of the ſupreme Authority, which it ought, on no account, to oppoſe or to overbalance. For, otherwiſe, if there could be a Body of Men not ſubject to the Regulations of the civil Government, there would be a State within a State. Therefore, if any Commonwealth was at firſt framed by the Union of ſeveral abſolute and independent [4] Bodies, it was altogether requiſite, that the reſpective Bodies ſhould give up ſo much of their former Power and Right, as was neceſſary for the forming a civil Community: Becauſe elſe they could not but fall ſhort of the End which they propoſed. But, if we look on

[a] Polit. *Lib.* iii. *Ch.* i. See the reſt of this Chapter where he thus goes on, *According to different States, the Members are different. Wherefore the Deſcription we have given belongs eſpecially to the Members of a Democracy; to thoſe of other Governments it may accidentally, but doth not neceſſarily agree.* Idem *Polit.* Lib. iii. Ch. viii. *There being many Forms of Civil Bodies, there muſt, by Conſequence, be many kinds of Members, who compoſe them.*

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great Uſe; it is ſufficient to know who are thoſe who have the Rights of natural Citizens, however they acquired them, in oppoſition to thoſe who are only ſimple Inhabitants, or Travellers; all which depends upon the Laws and particular Cuſtoms of each Government. There are Countries (as for Example *Great Britain*) where foreign Invaſions, and frequent domeſtic Revolutions, have ſo changed the Face of Things, that the Race of the firſt Founders of the Conſtitution, as well as that of other Nations who have ſucceeded them, has been often extinguiſhed. Strangers are oftentimes more affectionate to the Place of their new Abode, than the Natives of the Country, as our Author remarks in his Diſſertation *De Obligatione erga Patriam*, § 13.

[1] It is not for this Reaſon: For the Sovereign doubtleſs believes his own Religion better than that which differs from it, and, as long as he is of this Perſuaſion, nothing obliges him to alter it. But it is becauſe Sovereigns, of what Religion ſoever, have no Right to hinder any one from peaceably ſerving GOD according to the Light and Dictates of his Conſcience. See hereafter, *Ch* iv. § 11. *Note* 2.

[2] In civilized States, if ſuch Societies are ſometimes authorized by the ſupreme Power, it is only to enjoy an Honour or ſome Privilege, which, otherwiſe, they would not have; and not that this Authority is abſolutely neceſſary. Moſt part of the Academies we ſee in *France*, *England*, &c. began by private Meetings, which Men of Learning agreed to hold regularly.

[3] Among the *Romans* they could form no *Collegium*, or legal Body, which was not firſt approved by ſome Law, or by the Senate or Emperor. See the learned Preſident BRISSON, *Select. Juriſ. Civ. Antiquitat.* Lib. i. Ch. xiv. and DIDIER HERAULD, *Obſervation.* Ch. xliii.

[4] See what our Author ſays below, *Lib.* viii. *Ch.* xii. § 6.

their

theſe Bodies or Syſtems in a State already ſettled, we are then to conſider, what was the Intention of the ſupreme Governor, in founding or in confirming ſuch a Company. For if he hath given, and aſcertained to them, in expreſs Words, an abſolute and independent Right, with Regard to ſome particular Affairs which concern the publick Adminiſtration; then he hath plainly abdicated Part of his Authority, and, by admitting two Heads in the Conſtitution, hath rendered it irregular and monſtrous; which no one in his Wits will do, unleſs upon extreme Neceſſity. But if the Sovereign is deſirous to preſerve the Power whole and unimpaired, it is neceſſary that the ſubordinate Body ſhould ſo reſtrain and moderate its Rights, as not to prejudice the ſupreme Authority, nor put any ſuch Extent upon their Privileges, or to draw any ſuch Conſequence from them, as ſhall tend to the releaſing the ſaid Body from their inferior and ſubordinate Condition. Now after what manner the Power of theſe Bodies is limited, we are to learn from the particular Charters of their Foundation, or Confirmation; as, likewiſe, from the common Laws of the State, which are ſuppoſed to bind all and each of the Members, unleſs where they have been expreſly abridged or repealed. From all which it follows, that, if the Adminiſtration of ſuch a Body be committed to a ſingle Man, whatever he acts according to the Rules of their Foundation, or according to the general Conſtitutions of the State, ſhall be looked on as the Act of the whole Body. But what he doth contrary to, or beyond either of theſe, ſhall be his own proper[1] perſonal Act, which ſhall not affect the reſt, and for which he alone ſhall be accountable. If the Government of ſuch a Body be lodged in a Council of ſeveral Perſons; when any thing is done by them contrary to Law, or to their Foundation, thoſe only ſhall be liable to Puniſhment on this account, who agreed to the Proceeding, but they who either diſſented, or were abſent from the Aſſembly, ſhall be judged innocent: Whom, therefore, it concerns, for the Sake of their own Security, to proteſt againſt the Decree of the reſt, and to regiſter their Proteſtation in the publick Acts and Memorials, leſt they ſhould happen to be involved in the Puniſhment of their Fellows Crime. Whereas, on the other ſide, in an independent Aſſembly no particular Member hath the Liberty of proteſting againſt a Decree; becauſe this would be to deny the ſupreme Power of the ſaid Aſſembly.

As to the Debts of theſe Bodies or Companies, the firſt Thing to be conſidered is in whoſe Name they were contracted. For what any Member owes on his own private Account[2], is not a Debt of the Company. Only in this Reſpect, that, when the Sentence of the Court obligeth him to Payment, Execution may be taken, not only upon the Reſt of his Goods, but upon thoſe, likewiſe, which belong to him as a Partner in that Society. But ſuch Debts as are contracted by the Governors of the Company (whether this Power be lodged in the Hands of one, or of more Perſons) according to their Charter of Foundation, and thoſe Rules which are to guide their Proceedings, oblige the whole Body, as ſuch; and unleſs they have a common Stock, each Member is to anſwer for his *Quota*. Yet here again there is this Difference, that ſuch Creditors as do not belong to the ſame Commonwealth, upon Denial of Payment, may treat the Members no otherwiſe than if each had engaged for the whole. As in all other Caſes, any Perſon under a foreign Juriſdiction ſtands liable to ſuffer Repriſals for the Debts of his Countrymen. Debts contracted otherwiſe than the Rules of the Company[3] allow, bind thoſe only who gave their expreſs Conſent to the contracting them; and not thoſe who diſſented, except to the Value of what they have been Gainers by them. And ſuch a Debt, when the common Stock, ſo far as it is affected by it, will not hold out, is to be diſcharged by Contribution of the diſſenting Members, according to their reſpective Proportion. But if a particular Member lend Money to the Company, as ſuch, he can only charge the Goods of the Company; and if they fall ſhort, he muſt thank himſelf for the Loſs[a]. If a Controverſy ariſe between any Member and the Company, the Company ſhall not be Judge, but the State to which the Company is in Subordination. For it would be very inconvenient, that they ſhould be allowed to give Sentence in their own Cauſe, when the Matter may be referred to a common Power.

XXIII. *Unlawful* Bodies are not only thoſe which unite on the Account of ſome manifeſt Villany, or ſome Deſign contrary to expreſs Law; as the Companies of Thieves, Beggars, Strowlers, Pirates, Highwaymen, *&c.* but, likewiſe, any Confederacies between Subjects built on a private Compact, without the Conſent of the Government, and repugnant to the End of civil Communities: Which are uſually termed *Conſpiracies* or *Factions*. The Deſign of theſe is various. Sometimes the Perſons thus aſſociating aim at the chief Command, and would ſeize the Government into their own Hands: Sometimes they propoſe, by this means, to bring the Management of publick Buſineſs to their own Humour or Advantage. Some are for increaſing their private Fortunes by plundering the Publick: Others join in Factions, only to ſecure themſelves from Puniſhment. Nay, thoſe Confederacies which carry a plauſible Pretence, as ſuppoſe Protection from Danger, Re-

[a] Comp. *Hobbes*, Leviath. *Ch.* xxii.

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[1] In which there is a Difference between the Actions of ſuch a Head of a ſubordinate Community, and thoſe of a Sovereign, whoſe Subjects, with regard to Strangers, are ſuppoſed to co operate with him, on account of the Submiſſion they owe his Will; as Mr *Hertius* remarks here. See above § 14. It is upon this is founded the Right of *Repriſals*, treated of *Lib.* viii. *Ch.* vi. § 13.

[2] See *Grotius*, *Lib* iii. *Ch.* ii. § 1. *num.* 4.

[3] According to the *Roman* Law, upon whatever Account, or in whatever Manner, the Directors of a Society had borrowed Money, without a particular Order from their Conſtituents, the Society is not bound to pay the Debt, but as far as it has received Advantage by it: *Civitas mutui datione obligari poteſt, ſi ad utilitatem ejus pecuniæ ſunt: alioquin ipſi ſoli, qui contraxerunt, non civitas tenebuntur.* DIGEST. *Lib.* xii. *Tit.* i. *De rebus credit.* &c. *Leg.* xxvii. See, alſo, ANT. FAVRE, *Rational.* Tome iii. p. 60, 61, and the deceaſed M. HUBER, *Prælect. Jur. Civ. in Dig.* ad Tit. *De reb. credit. num.* 8. *& ſeqq.*

dreſs of Grievances, Removal of evil Counſellors, and thoſe, likewiſe, the Cauſe of which is kept ſecret, are ſuſpicious and dangerous. For, in the firſt Place, this is to invade the Office of the Sovereign, by entering upon thoſe Affairs which belong ſolely to his Care and Direction; and then farther, when the Mutineers are grown confident of their own Strength, they may eaſily be encouraged to turn it upon the State [a]. Hence many Actions, not otherwiſe culpable in their own Nature, become unlawful, when performed in a tumultuous or factious Manner. Thus to petition the Government, or to accuſe any Perſon of a ſuppoſed Crime, are Proceedings which the Law allows; but to do either of theſe, with a numerous Body of Men gathered for that Purpoſe, bears the Appearance of Riot and Sedition. And ſo in martial Laws, it is uſually made a capital Offence, for Soldiers to petition for Pay, in a large Company drawn together on that Deſign [b].

XXIV. Beſides that common Bond, which engageth all Subjects to their reſpective Sovereigns, there lies a particular Obligation on thoſe who are entruſted by the higher Powers with the Exerciſe of ſome Part of the Government, in their Name and by their Authority; and who paſs under the general Style of *Magiſtrates* and *publick Miniſters*. Diſtinct from theſe are the private Miniſters or Servants of the Prince, who perform common Offices for him, as they would for any other Maſter. Amongſt the former Kind, or thoſe who ſerve the Prince in this politick Capacity, there is this Difference obſervable, that ſome of them exerciſe a Part of the Government and princely Office, and, therefore, in ſuch a particular Meaſure repreſent the Perſon of the Sovereign; who are properly and ſtrictly termed *publick Miniſters*: Others barely aſſiſt in the Diſpatch and Execution of publick Buſineſs. To the firſt Claſs belong the Regents [1], or Protectors of the Kingdom, during either the Minority, or Captivity, or *Delirium* of the Prince; then the Governors of Provinces, Cities, and Diſtricts; the Commanders of the *Militia*, by Land or Sea; the Directors of the Treaſury; the Judges and others concerned in pronouncing or executing Juſtice; the publick Cenſors of Doctrines, Ambaſſadors to foreign States, and the like. In the other Claſs, we are to reckon the Counſellors, who do not themſelves exerciſe any Part of the Sovereignty, but only declare to the Sovereign their Opinion about Affairs: Thoſe, likewiſe, who are any other way ſerviceable to the publick Management; as the Secretaries, the Gatherers, Keepers or Diſpenſers of the Revenue, the Soldiery; thoſe who lend an inferior Aſſiſtance in the Proceedings of Juſtice, and if there be any others of the like Characters; the Order and Diſtinction of which, in every particular State, may eaſily be underſtood [c].

[a] Thus *Otho* ſpeaks in *Tacitus*. (Hiſt. Lib. i. Ch. lxxxiv. in the Beginning.) *At preſent indeed, and in the Poſt you now hold, you are for me; but whilſt you run up and down in the dark, and all are in Confuſion round you, Chance or Opportunity may engage you againſt me.* [b] *Add* Acts xxix. 39, 40. *Vid.* Hobbes, *De Cive*, Ch. xiii. § 12, 13. & Leviath. *Ch.* xxii. where he compares *lawful* Bodies to the *Muſcles*, and *unlawful* to *Wens, Boils, and Poſthumes, engendred by the unnatural Conflux of evil Humours.* [c] Com. *Hobbes* Leviath. *Ch.* xxiii. & *Bodin.* De Republ. *Lib.* iii. *Ch.* vii.

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[1] See *Ch.* vii. § 8. following; and *Grotius*, *Lib.* i. *Ch.* iii. § 15, 24.

CHAP. III.

Of the Generation of Civil Sovereignty or Majeſty.

I. *Sovereignty the Reſult of thoſe Covenants by which the publick Body was firſt united.*
II. *This is done by the Divine Will and Approbation.*
III. *Whether the Majeſty of Princes is immediately derived from GOD.*
IV. *The Arguments which ſome make uſe of to prove the Affirmative.*
V. *Civil Authority not the Effect of War.*
VI. *Whether a Father of a Family may, without any new Act, commence a Prince.*
VII. *How a Vaſſal or Feudatory may become a ſovereign Lord.*
VIII. *Whether a free State, or a Monarch, reſigning their Power into other Hands, are the efficient Cauſe of the Sovereignty produced.*
IX. *Who has properly the Power of conferring the regal Title.*

I. LET us proceed to examine, whence that Sovereignty or ſupreme Command, which appears in every State, and which, as a kind of Soul, informs, enlivens, and moves the publick Body, is immediately produced. In order to which Enquiry, we ſuppoſe, firſt of all, that Civil Authority, for the obtaining of its juſt Effect, requires as well natural *Strength*, by means of which the Subject, if he preſumes to decline Obedience, may be terrified into his Duty, through the Fear of Puniſhment; as, alſo, a *Title*, by Virtue of which, as by juſt Right, the Performance, or the Omiſſion of any Action, may be impoſed on others: To which *Title* there anſwers in the Subject an Obligation to comply with what is thus enjoined. Now both theſe Requiſites immediately flow from thoſe Pacts by which the State is united and ſubſiſts. For though no Perſon can transfer his Strength to another by any real and natural Conveyance, yet he is ſuppoſed to be Maſter of other Mens Strength, according to whoſe Pleaſure they are bound to exert and apply it, not having any Power to reſiſt or to refuſe his Commands. In as much as there can be no other Way of transferring Strength amongſt Men. And ſince all the Members of the State, in ſubmitting their Wills to the Will of a ſingle Director, did, at the ſame Time, thereby oblige themſelves to Non-reſiſtance, or to obey him in all his Deſires, and Endeavours of applying their Strength and Wealth to the Good of the Publick; it appears,

pears, that he who holds the ſovereign Rule, is poſſeſſed of ſufficient Force to compel any Perſons to a Diſcharge of the ſeveral Injunctions, which he lays upon them [a]. So, likewiſe, the ſame Covenant affords a full and eaſy *Title*, by which the aforeſaid Sovereignty appears to be eſtabliſhed, not upon Violence, but in a lawful Manner, upon the voluntary Conſent and Subjection of the reſpective Members. This then is the neareſt and immediate Cauſe, from which ſovereign Authority, as a moral Quality, doth reſult. For if we ſuppoſe Submiſſion in one Party, and in another the Acceptance of that Submiſſion, there accrues preſently to the latter a Right of impoſing Commands on the former; which is what we term Sovereignty or Rule. And as by private Contract, the Right of any Thing which we poſſeſs, ſo by Submiſſion the Right to diſpoſe of our Strength and our Liberty of acting, may be conveyed to another. Whence, if any Perſon ſhould, for Inſtance, voluntarily and upon Covenant, deliver himſelf to me in Servitude, he thereby really confers on me the Power of a Maſter. Againſt which Way of arguing, to object the vulgar Maxim of *Quod quis non habet, non poteſt in alterum tranſferre, No one can tranſmit to another what he doth not poſſeſs himſelf*; is but a Piece of trifling Ignorance. Yet ſtill, to procure to the ſupreme Command an eſpecial Efficacy and a ſacred Reſpect, there is need of another additional Principle, beſides the Submiſſion of the Subjects. And, therefore, he who affirms Sovereignty to reſult *immediately* from Compact, doth not, in the leaſt, detract from the ſacred Character of civil Government, or maintain that Princes bear Rule by human Right only, not by divine.

II. Yet this is beyond Diſpute, that ſound Reaſon ſufficiently intimated to Mankind, how that, upon their Multiplication in the World, their Honour, Peace, and Safety could not ſubſiſt, without the Eſtabliſhment of civil States, which cannot be underſtood without a ſupreme Authority. And thus both the States themſelves, and the chief Government erected in them, are ſuppoſed to proceed from God, as the Author of the Law of Nature. For not thoſe Things alone are from GOD, which he inſtitutes and ordains by his own immediate Act, without the Concurrence or Interpoſition of Men; but thoſe, likewiſe, which Men themſelves, by the Guidance of good Reaſon, according as the different Circumſtances of Times and Places required, have taken up, in order to the fulfilling of ſome Obligation laid upon them by GOD's Command [b]. And, inaſmuch as the Law of Nature cannot, amongſt a great Multitude, be conveniently exerciſed, without the Aſſiſtance of civil Government; it is manifeſt, that GOD, who impoſed the ſaid Law on human Race, commanded, likewiſe, the Eſtabliſhing of civil Societies, ſo far as they ſerve for Inſtruments and Means of improving and enforcing the Law of Nature. And hence, likewiſe, it is, that GOD, in the Holy Scriptures, expreſly approves of ſuch Government, acknowledging and confirming it, as his own Appointment, and guarding by the ſevereſt Penalties the ſacred Awe and Veneration of it. But whether or no [1] GOD expreſly commanded the Inſtituting of States, as to particular Times and Places, is a Point in which we have no certain Information. For the Precept of the Sons of *Noah*, concerning *Judicatures* [2], which may perhaps be urged to this Purpoſe, doth not ſpecify the particular Time and Place of erecting them. So that we may underſtand it in this Senſe, that the Methods of judicial Proceſſes, when once ſettled, ought diligently to he exerciſed and adminiſtered. *Bæcler* [c], explains the Origin of civil Government with very little Difference from what hath been here delivered on the ſame Head. *The Supreme Authority*, ſays he, *is not to be derived from the bare Act of Man, but from the Command of God, and from the Law of Nature: Or from ſuch an Act of Men, by which the Law of Nature is followed and obeyed. For he that enjoins Society, enjoins, likewiſe, the Order and Method to be obſerved in it: But now the very Soul of Society is Government; and of all the Societies the moſt perfect is a civil State.* Which is right enough; provided we add, that the Divine Command, concerning the Erection of civil States, exerted and diſcovered itſelf through the Suggeſtion of Reaſon, by which Men came to underſtand, that the Honour, Gracefulneſs, and Peace, which the Law of Nature propoſeth as its Aim, could not poſſibly ſubſiſt without civil Society; eſpecially after Mankind was conſiderably multiplied. And in this very Point conſiſts the Difference between civil Communities and other human Inſtitutions: The latter, alſo, being introduced through the Perſuaſion of ſound Reaſon, yet not after ſuch a Manner, as if the Honour, Safety, and Welfare of human Race could not be preſerved without it. As to the Fifth Commandment in the Decalogue [3], which enjoins Obedience to the civil

[a] Liv. *Lib.* ii. *Ch* lix. *The Force of the ſupreme Command is built on the Conſent of thoſe who obey.* [b] Comp. 1 *Tim.* ii. 2.
[c] *Ad* Grot. *Lib.* i. *Ch.* iii. § 6.

[1] This is what our Author means by theſe Words: *Num autem diſerte Deus juſſerit hoic & nunc Civitatem conſtitui, non liquet.* The Sequel of the Diſcourſe ſufficiently ſhews this. Therefore the Criticiſm of the deceaſed M. HERTIUS falls to the Ground, who alledges the Example of the *Hebrew* Republic, which God had founded; as if our Author had either not known, or forgot it.

[2] *Vid.* Selden. *de Jur. N. & G. ſec.* Hebr. Lib. vii. Ch. iv, *&c.* & Le Clerc *on Deut.* i. 17.

[3] It is in the Original the *Fourth Commandment*, inſtead of the *Fifth*, in which our Author follows the *Lutheran* Diviſion of the *Decalogue*. Beſides, he too freely grants, that it relates in that Place to *Sovereigns*. I know very well, that *Divines* and *Preachers*, by Strength of Conſequences, or rather Artifices, include all *Superiors* under the Names of *Fathers* and *Mothers*. But no good Interpreter will draw any ſuch Concluſions from thence; and without examining the general Foundation of thoſe tedious Expoſitions that are commonly made on the *Decalogue* (on which we may ſee what Mr. *Le Clerc* ſays in his Note on the firſt Verſe of the xx[th] Chapter of *Exodus*, and what our Author ſays, after *Grotius*, Lib. viii. Ch. i. § 4. towards *the End*) we need only but conſider a little the Reaſon that the Legiſlator ſubjoins, to induce the *Iſraelites* to obſerve this Precept, *That thy Days may be long upon the Land which the Lord thy God giveth thee.* This is a manifeſt Alluſion to the Efficacy that is attributed to the Prayers of Fathers and Mothers for their Children who are obedient. See Mr. *Le Clerc* upon this Commandment, and upon *Gen.* xxvii. 33. This will appear more evident, if the ingenious Expoſition of Mr. *des Maizeaux* (in his *Nouvelles de la Republique des Lettres, November* 1700. *p.* 500, *&c.*) be well grounded.

Magiſtrates (urged by *Bœcler*) we are to obſerve, that this doth not exclude the next and immediate Cauſe of Government; as the Commandment againſt Theft doth not, in the leaſt, exclude or ſuperſede the [1] Origin of Property. And then for the Title of GOD's *Vicegerents upon Earth*, aſcribed to Governors, we think it may very fairly and conveniently be explained in this Senſe; that whereas the Peace and good Order of Mankind was not ſufficiently procured by a bare Reverence towards the Law of Nature, and towards the Author of it, that End is now happily produced by the Virtue and Efficacy of civil Dominion. In which Senſe the following Poſitions of the ſame Writer are plain and intelligible: Therefore, *That a State might properly be a State, and might obtain its End*, GOD, *by the Law of Nature, inſtituted a certain Order and Method of commanding and obeying, in which Order, by the Will of* GOD, *and by the Dictate of natural Reaſon, there muſt be ſomewhat ſupreme and independent, controulable by no human Pleaſure, which, as it is ſubject to* GOD *alone, ſo it is the Second or the Deputy of his Power; and this is nothing elſe but the ſupreme civil Authority. But it is purely the Act and Diſpoſal of Men, whether they will intruſt the ſupreme Authority with one, or with many Perſons; and what particular Methods they will follow in eſtabliſhing diſtinct Forms of Commonwealths.* *Grotius*'s Opinion concerning the Original of Government is not ſo prophane, but that it may be borne with, if aſſiſted by a dexterous Interpretation. He ſays [a], that *Men, not influenced by the expreſs Command of* GOD (and no ſuch expreſs Command doth indeed appear) *but of their own accord* (yet not without the Dictate of right Reaſon, and the Will and Pleaſure of GOD) *having experienced the weak Defence of ſeparate Families againſt the Aſſaults of Violence* (after Mankind had conſiderably ſpread and increaſed) *united themſelves in civil Society; the Effect of which was civil Power, ſtiled on this Account, by St.* Peter [b], *the Ordinance of Man*, as eſtabliſhed immediately by human Appointment. But as for the other Aſſertion of *Grotius*, That *the civil Authority is therefore termed Divine, or ſaid to be of* GOD, *becauſe* GOD *approved of what Men wholſomely inſtituted*; we can, on no Account, admit it in this Senſe, as if GOD approved of the Eſtabliſhment of civil Government (as it were) *ex poſt facto*, or after it had been actually ſettled; as he hath been pleaſed, in many Places of Scripture [c], to confirm and ratify the Condition of Servants, which, no doubt, is an human Invention. But it was abſolutely requiſite to add, that Men were [2] antecedently to apprehend the Divine Will, by duly weighing the Condition of Mankind upon its Multiplication; which, as it could not be preſerved without civil Societies, or in a ſolitary Life; ſo Men, whilſt in this Matter they followed the Guidance of Reaſon, agreeably to the Scope and Deſign of the Law of Nature, muſt be ſuppoſed to have fulfilled the Divine Pleaſure.

III. Though we think what hath been here delivered ſufficient, as well to ſanctify the Original of civil Government, as to engage the Veneration of Subjects towards their Rulers; yet it may be worth our while to conſider, what Solidity there is in the Arguments of a late Author [3], who maintains that we ought to go much higher in this Point. He ſuppoſeth then, that what is the Cauſe of civil States is not, likewiſe, the Cauſe of the Publick Government and ſupreme Authority in them. And, therefore, he allows the States themſelves to be eſtabliſhed by Covenants; but, aſſerts, on the other Side, that the Sovereignty is conferred on Princes immediately by GOD himſelf, and that nothing which proceeds from Men, doth at all contribute to its Production. And, conſequently, that a free People, when they voluntarily chuſe to themſelves a King, do not confer Majeſty upon him, but only mark out the particular Perſon on whom that Character is, by the Divine Gift, beſtowed: As, in many Boroughs or Towns incorporate, the Election of

[a] Lib. i. Ch. iv. § 7. [b] Epiſt. i. Ch. ii. *ver.* 13. [c] *Epheſ.* vi. 5, 6, 7, 8. *Coloſſ.* iii. 22. 1 *Tim.* vi. 1. *Titus* ii. 9.

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[1] Theſe Agreements were not neceſſary to introduce *Property of Goods*, as I have ſhewn in its proper Place.

[2] This ſuppoſes our Author's Syſtem founded on pure Speculation, and not on Facts, or the Genius of Mankind in general, as well as that of the primitive Ages in particular. See what I have ſaid Note 2. Page 625. Therefore we may very ſafely aſſent to *Grotius*'s Opinion. *Cicero* has a remarkable Paſſage, importing, "That there is nothing more "agreeable to the ſupreme Being, than civil Societies legally formed: *Nihil eſt illi principi Deo, qui omnem hunc mundum regit, quod quidem in terris fiat, acceptius, quam concilia cœtuſque hominum, jure ſociati, quæ Civitates appellantur.* Somn. Scip. Ch. iii. I ſhall only obſerve, that *William Barclay*, one of the moſt zealous Aſſertors of the Power of Kings, regards GOD only as the Approver and Protector of their Sovereignty, *De Regno & Regali poteſtate, contra Monarchomathos*, Lib. iii. Ch. ii.

[3] Joh. Fred. Hornius *de Civitate*, Lib. ii. Ch. i. Never were more pitiful and weaker Reaſons given than in this Matter. If any one has a mind to ſee a Specimen of them, among abundance of Authors whom their Prejudices, Intereſt, or the Situation of Affairs where they lived, have moſt groſly perverted; let him only read, for Inſtance, *Bœcler*'s Diſſertation *de Auſpicio Regio*, in the firſt Volume of the Collection of his *Diſſertations Academiques*; and Mr. *Creech*'s *Engliſh* Notes upon his Tranſlation of *Lucretius* in 1683. in King *James* II's Reign, *pag.* 52, *&c.* The laſt is ſo much the more ridiculous, as he has brought it in by Head and Shoulders, and that, of ſixty Pages which he ſpends in giving us ſome few Notes upon his Tranſlation, he waſtes five or ſix in an impertinent Digreſſion. But when he afterwards publiſhed the *Original*, with larger Notes in 1695. upon the Revolution, the Reader will find that he takes care not to mention any Thing of this *pretended immediate Emanation* of *Divine Authority*. A *Daniſh* Divine has, in our Time, in a more effectual manner, refuted the contrary Opinion, by cauſing to be burnt, by the Hangman at *Copenhagen*, a Book of Mr. *Thomaſius*, in which that Civilian maintained, that GOD *is not the immediate Cauſe of Sovereignty*. See what the blind Zeal, or rather Flattery, of *Churchmen* can do! As for *Hector Godfroy Maſius*, who is the other I am ſpeaking of, which is to be found in the *Bibliotheque Univerſ.* Tom. xi. Pag. 47, *&c.* Mr. *Thomaſius*, from whom I have the Account of the Fact I have juſt now related, obſerves in the ſame Place, *Inſt. Juriſpr. Div.* Lib. iii. Ch. vi. §. 68. that it was formerly propoſed in *France*, in the general Aſſembly of the States of the Kingdom, to canonize this Propoſition, *That Kings derive their Authority immediately from* GOD; but it came to nothing, becauſe ſeveral made it appear, that the Welfare of the State did by no means depend on any ſuch Opinion; and, if ſo, that the Queſtion muſt be left to the Determination of the Schools. *Gramond. Hiſt. de France*, Liv. i. This Article, which the *Third Eſtate* of the Kingdom wanted to paſs into a Law, did not aim ſo much to eſtabliſh the ſovereign Power in itſelf, as to ſecure it from the deteſtable Maxims of thoſe who made it depend upon the Pope, by giving, this pretended Head of the Church, a Power of abſolving Subjects from their Oath of Allegiance, and by authorizing thoſe who aſſaſſinated their Princes as Hereticks. The Reader may ſee this Affair, at length, in M. LE VASSOR's *Hiſt. de Louis* XIII. on the Year 1615. Tom. ii. p. 74, *& ſeqq.* Compare, alſo, what Mr. *Thomaſius* has ſince ſaid on this Subject, in the 4th Edition of his *Fundamenta Jur. Nat. & Gent.* Lib. iii. Ch. vi. § 9, 10, *in Not.*

Magiſtrates

Magiſtrates belongs to ſuch an Order of Men; and yet the Magiſtrates receive their Power of acting, not from that Order of Men, but from the ſupreme Ruler in the State. Which Poſition, though it may poſſibly take with ſome Perſons, thro' a ſpecious Appearance of more than ordinary Piety; yet it is manifeſt, that it tends to the breaking in ſunder all thoſe Compacts and fundamental Laws which paſs between Princes and Subjects, with regard to the publick Adminiſtration. And, in the firſt Place, we cannot admit, that he ſhould aſcribe Majeſty to Kings alone, and utterly deny it to free States and Democracies. It is true, the Cuſtom of Speech, during theſe laſt Ages, ſeems to have appropriated the Term of Majeſty to Kings, by placing it amongſt their Royal Titles. Yet this doth not hinder but that the ſame Word may be uſed to denote the ſupreme Authority under any Form of Government. And thus too, that Definition of Majeſty, poor and dry as it is, in which he calls it, *The chief Power every where over the State*, agrees as well to a Senate, or to a popular Aſſembly. Though, in this reſpect, Kings have the Pre-eminence, that each particular Member of the Senate, or of the General Aſſembly, is ſubject to the ſupreme Power of the People; whereas the Perſon of a King acknowledgeth no Superior upon Earth. Yet as to the Force and Efficacy of Command over Subjects, it is the very ſame under all Sorts of Conſtitutions. To proceed, the ſole Cauſe of this Majeſty he makes GOD himſelf, *Who, upon the People's Election, immediately transfuſeth it on the Prince.* Here I am miſtaken, if he did not conceive Majeſty under the Notion of a real and phyſical Quality; as they manifeſtly do, who affirm civil Government to be the *Creature*, or the Act and the Work *of GOD, ſo that no other Creature* [1], *either in an equal or in a ſuperior kind of Cauſation, or by any innate Principles, doth at all contribute to its Inſtitution.* By which Diſcourſe their groſs Ignorance of moral Things is ſufficiently betrayed. The Argument which ſets forth, how that Perſons, exalted to the Throne from an inferior Station, have ſuddenly been ſurrounded with an unuſual Glory or Splendor, which could not ſhine from any other Place than Heaven; may ſerve for a Declamation before ſuch an Audience, as are unable to diſtinguiſh empty Flouriſhes from ſolid Truth. That Kings are the peculiar Care of GOD Almighty, ſerves not in the leaſt towards the Proof of his Opinion. And, beſides, the Divine Providence hath been pleaſed to ſhew no leſs Evidences, as it were, of a particular Favour, to other Perſons preſerved to be hereafter in an eminent manner uſeful to the World. At the ſame Time, we read of no inconſiderable Number of Kings, who have drunk Poiſon out of their precious Cups, or have fallen by the Treachery of their own People. As to that Temper and Conſtitution of Body in ſome Princes [2], which is obſerved to produce Effects not unlike to Miracles, the Phyſicians are to be conſulted on the Point. Nor doth he prove what he aims at, by alledging the Puniſhment, either of tyrannical Kings, or of ſtubborn and rebellious Subjects; or by heaping up Teſtimonies in ſo plentiful a Store (which too acknowledge GOD no leſs for the Author of ariſtocratical than of monarchical Government) or by reciting thoſe Divine Predictions concerning ſome Kings, the like to which have not been wanting in popular States. And as to what paſſed in the Nation of the *Jews*, this can carry no Evidence as to the Original of Kingly Government in general [3]; there having been many other Kingdoms eſtabliſhed long before: But it belongs rather to the Manner of conferring the ſupreme Command on a particular Perſon, according to particular People.

IV. Let us conſider the Arguments by which he labours to prove, that all human Cauſes are of a far more inferior Power, than to be capable of producing Majeſty or Sovereignty, the moſt auguſt Thing upon Earth. Amongſt which, that which carries the Prize from all the reſt, is this; *That neither particular Men, nor a looſe and ungoverned Multitude, are themſelves endued with Majeſty; therefore neither can they confer it on the Prince.* But now it may, and often does, happen, that a moral Quality (in which Claſs Government ought to be reckoned) ſhall be produced in another Perſon, by the Concurrence of thoſe who had it not truly and properly in themſelves before; ſo as that they may be rightly deemed the productive Cauſe of the ſaid Quality [a]. As many Voices joining in Concert produce a Harmony, which no ſingle Perſon could pretend to by himſelf. And, on this account, it muſt be cenſured as very falſe Reaſoning in *Socrates*, when he encouraged *Alcibiades* not to fear the venturing himſelf in an Aſſembly of the People, by telling him, *If you deſpiſe them Man by Man, you ought, likewiſe, to deſpiſe them when gathered into a Multitude* [b]. Farther, ſince Sovereignty reſults from the Non-reſiſtance of the Subjects, and from their Conceſſion that the Sovereign ſhall diſpoſe of their Wealth and Strength; it is eaſily ſeen, that ſome ſcattered Seeds, as it were, of Government lie hid in particular Perſons, which, by Means of concurrent Compacts, being excited into Motion, grow and ſhoot forth. So that it is groſly abſurd to infer, that Sovereignty is not *immediately* of human Original, becauſe it is not diſcoverable in the natural Powers or Faculties of Men: As if we were all this while ſpeaking of a phyſical Quality; or as if there were no moral Qualities, diſtinct from the phyſical. I know not what Reliſh wiſe and chriſtian Princes can have for ſuch flattering Titles as theſe; that GOD *tranſcribes in the Perſon of the King that Right of governing Mankind, which he held alone by Virtue of*

[a] *Vid.* Lib. xli. Tit. i. Leg. xlvi. D. *de Acquir. Rer. Dom.*

[b] *In* Ælian, *V. H.* Lib. ii. Ch. i.

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[1] Theſe are the Words of *J. Adam Oſiander*, a *German* Divine, in his *Obſerv.* on *Grotius*, Lib. i. Ch. iii. § 7. p. 478.

[2] 'The Souls of Kings and of Coblers are caſt in the ſame Mould. When we conſider the Importance of the Actions of Princes, and their Weight, we imagine that they are produced from ſome Cauſes as important and weighty. We are miſtaken; they are moved to and fro in their Inclinations by the ſame Springs as we are in ours. The ſame Reaſon that makes us quarrel with a Neighbour, happening in a Prince, makes him ruin a whole Province. Their Wills are as fickle as ours, but their Power is greater. The ſame Deſires move a *Worm* and an *Elephant*. *Montaigne*'s Eſſays, Book ii. Ch. xii. p. 343. *Edit.* Pariſ. *in fol.*

[3] See *Algernon Sidney*'s Diſcourſe upon Government, *Ch.* ii. § 9.

Creation:

Creation: Yet ſo as that GOD ſtill retains his antient Right, and therefore reacheth out this Power to Kings by *Accumulation, and not by an abſolute Abdication:* Together with the like Inſinuations, by which baſe and wicked Paraſites delight in raiſing the Glory of their Prince to the Diſhonour of their GOD. You would think it was a moot Point with them, whether, after the conſtituting of Monarchs, GOD reſerved to himſelf any Power or Command over mortal Race; and whether theſe who govern below, ought to own his ſuperior Authority. Certainly nothing can be more manifeſt, than that civil Government is quite different in Kind from that Command of GOD, which he holds by Right of Creation; and therefore it is not only abſurd, but blaſphemous to affirm, that *the Sovereignty which* GOD *alone is inveſted with, as the Maker of all Things, he, out of his ſingular Benevolence, communicates to Men.*

Endeavouring to give us another Proof that GOD is the immediate Cauſe of Sovereignty, he diſtinguiſheth between *the immediate efficient Cauſe*, and *the immediate conſtituting*, or appointing *Cauſe*. The *Sovereignty* only is, he ſays, immediately produced by GOD; the *Crown* and *Scepter* being commonly received from other Hands. Hence he obſerves, "that we "ought to ſeparate theſe two Ways of ſpeak- "ing, GOD *is the immediate Cauſe of Sove-* "*reignty*; and GOD *immediately conſtitutes* "*the Prince*, or GOD *immediately confers the* "*Sovereignty*. It being ſomewhat tolerable to "affirm, that GOD confers the Sovereignty "by the Mediation or Interpoſition, either of "the popular Vote, or of Succeſſion, or of Oc- "cupancy [a]. But that, in every Act of producing "Sovereignty, GOD cannot bear or permit any "proximate or ſecondary Cauſe." Now, whoever looks more nicely into Things, will perceive that theſe Men apprehend Sovereignty under the Idea of ſome phyſical Being, which, after the Production of it by GOD, wanders up and down in the World, without any certain Seat or Subject, till, the Prince being, at length, deſigned by the People, it falls upon him, and cloaths him with auguſt Majeſty and Splendor. Where they muſt certainly be at a Loſs, if a Man ſhould be ſo importunate as to demand, whether this Sovereignty, before it finds a Place of Reſt in the Perſon of ſome Prince, be a Subſtance or an Accident; and if the latter, how it can exiſt without a Subject? Farther, at what Time it was created? At the Beginning of the World, or afterwards? As, likewiſe, whether there be but one Sovereignty only, diffuſed through the whole World; or whether particular Princes have each a peculiar and entire Sovereignty of their own? Whether upon the Death of the Prince the Sovereignty dies with him; or whether it ſurvives, like the Soul in Separation from the Body, or finds Reception, by a kind of *Metempſychoſis*, is the new King [b]? But, in truth, to enquire after the Cauſe of Majeſty or Sovereignty, taken in a ſeparate Senſe, is no better than Impertinence, in as much as it never exiſts, but in the Subject. It is juſt the ſame as if I ſhould make a particular Search into the Cauſe of human Nature, ſeparately conſidered; when as to the Cauſe of *Men*, as they exiſt, I have ſufficient Information. And ſince this Author, before any hath obtained a Right to the Sovereignty, leaves it in the Power of the People, to elect what Perſon, and at what Time they pleaſe, or to introduce any Form of Government [c]; I would deſire to know what would become of his Sovereignty, ſhould all the People agree in preferring an ariſtocratical or democratical State to it? We acknowledge indeed, that Election, properly and ſtrictly ſpeaking, is no more than the *Manner* of acquiring Empire. But there ſeems to be no Reaſon which ſhould hinder, why by one and the ſame Act the *Perſon* may not be marked out, and, likewiſe, the *Sovereignty* conferred, as then firſt commencing its Exiſtence. For it is very childiſh to imagine, that, in moral Things, when any Right, or any moral Quality is conferred on another, it muſt of Neceſſity have ſomewhere exiſted ſeparately before. On the contrary, it is evident, that Rights, and all moral Qualities, rather ariſe from the Concurrence of Mens Minds in mutual Compacts [d]. Nor will there be any Difficulty in removing that other Scruple; *If the People be the ſecondary Cauſe of Sovereignty, then the Power, by which they produce it, muſt have been received from* GOD; *which doth not appear to be true in Fact.* For, ſince GOD hath implanted in Men a Care of their own Safety, hath commanded them to maintain a peaceable and well ordered Converſation, and hath, likewiſe, endued them with Reaſon, whence they are enabled to find out Means conducing to this End, amongſt which the Eſtabliſhment of civil Government juſtly challengeth the firſt Place; who will make any farther Queſtion, whether or no the Power of ſetting this Conſtitution on Foot was a Privilege vouchſafed to them by GOD himſelf? Thoſe Maxims of Philoſophy, which our Author ſo frequently lets fly againſt us, are partly but of ſlender Credit, and partly, through Ignorance and Miſtake, are unſkilfully transferred from natural to moral Things; which we are not now at leiſure to diſcuſs in particular. And then, as for the Account which *Ovid* gives of the Origin of Sovereignty, in the Fifth Book of his *Faſti*, it is meer poetical Fiction.

V. No leſs Pains hath he taken in confuting the Opinions of thoſe, who derive the ſupreme Authority from any other Head. Upon which Argument, as he hath delivered a great deal of Truth, ſo are there ſome Things which are juſtly liable to Cenſure. He is ſo far in the right, when he denies that Wars, occaſioned by the Ambition or the Luſt of Tyrants, could give Riſe to the ſovereign Power. For *Wars occaſioned by Tyrants* certainly preſuppoſe civil Communities. Yet ſtill, the notorious Vio-

[a] In this Senſe we are to underſtand that Paſſage of *Themiſtius*, Orat. vi. Ed. *Harduin*. p. 73. C. *Do not imagine the Soldiers to have been the main Cauſes and Authors of this Election. The Concurrence of their Votes was the Act of Heaven: The Vacancy of the Throne was the Appointment of the Gods, and Human Aſſiſtance was only the Inſtrument of compleating and executing the Divine Counſels.* But what Right had the *Roman* Armies to chuſe their Emperors? Were they not fine Interpreters of the divine Will? [b] Add the Diſpute in Father *Paul*'s Hiſtory of the Council of *Trent*, Lib. ii. p. 213. concerning the Nature of the *Sacramental Symbols*, where the Managers are put to great Shifts, by Reaſon of their Unſkilfulneſs in *Moral Things*. To which we may add, their groſs Ignorance of the Principles of true Divinity, and the Simplicity of the Goſpel; to ſay nothing of other Motives. [c] See *Deuteron*. xvii. 14. [d] *Comp.* Hobbes *de Cive*, Lib. ii. § 4. See alſo, above, in B. iii. Ch. v. § 2, 3, 4.

Iene-

lence of many Perſons, and their Deſire of oppreſſing others, might poſſibly give occaſion to the Fathers of Families, living independent and ſcattered up and down, to unite in political Bodies [1]. It is, moreover, evident, that moſt Empires, which have made a Noiſe and Figure in the World, if not all in general, have owed their Growth and Progreſs to War. And yet this is no Reaſon why we ſhould pitch upon War for the Original and Fountain of Government. For, at leaſt, that Band of Men, which firſt conſpired to invade their Neighbours, voluntarily engaged in Subjection to a common Leader. And as for thoſe who were invaded, no lawful Sovereignty could be eſtabliſhed over them, till, by giving their Covenant and Faith, they had promiſed Obedience to the Conqueror.

VI. Yet it is not ſo utter an Impoſſibility, that civil Empire might ariſe from paternal Government [2]; *ſuch*, we mean, as extended itſelf to ſome Breadth, taking many petty Villages under its Direction. It is true, the Command of Fathers belongs properly to the Care of educating Children, as that of Maſters doth to the Management and Improvement of Eſtates; nor can either be altered by the bare *Number* of Children, or of Servants. Yet there is not ſo wide a Diſtance between paternal and civil Government, but that Men might paſs from one to the other, without the Production of any new Sovereignty by the immediate Power of GOD. For ſuppoſe a Father of a Family, bleſſed with a plentiful Iſſue and with a numerous ſervile Train, to allow both the Children and the Servants, by Emancipation or Infranchiſement, the Privilege of managing their own Concerns, and of conſtituting particular Families, upon this Condition, that, in order to the common Security, they ſhall ſtill be ſubject to his Government; I know not what ſuch a Perſon wants to make him a compleat Prince, provided he be Maſter of ſo much Strength, as is ſufficient to compaſs the End of a civil State. Upon his Deceaſe, if he left any Appointment with Regard to a Succeſſor, eſpecially if his Sons conſented to the Diſpoſal, that Settlement ſhall be followed. If he did not, then the People, as if they were to frame the whole Conſtitution anew, ſhall reſolve what Government or what Governor they will hereafter receive. In which Caſe there will be no Breach of the Law of Nature, though the younger Son ſhould, by the free Votes of the Aſſembly, be elected in his Father's room [a].

VII. *He* farther endeavours to evince, that neither can ſuch a Perſon be termed the Cauſe of Sovereignty, who, firſt poſſeſſing it himſelf, confers the regal Dignity on ſome one who is at preſent his Subject, releaſing him from all future Dependence: As if a King remits to his Vaſſal his former Engagement, and allows him to hold, as [3] a ſovereign Prince, what he before enjoyed only as a feudatary Tenant; or if he makes a Grant to any of his Subjects of ſome Province in his Dominions, exempting it, for the future, from his own Juriſdiction. For a Ceſſion of this kind is, he ſays, no more than the *Manner* of obtaining Sovereignty, and may be reduced to the Head of Elections. Now whoever thoroughly conſiders the Matter, will eaſily find out, how the ſupreme Authority is produced in this Caſe. And it is plainly thus; the King by quitting his Right, both over the Vaſſal and over the Feud, at the ſame Time, makes one Perſon capable of ſovereign Power, and others capable of ſubmitting to the Exerciſe of it. For that feudal Territory cannot hereafter belong to the *Vaſſal*, as an abſolute and independent Prince, unleſs it be firſt utterly diſengaged from the Authority of the *Lord:* And by this Means the Government, thus eſtabliſhed, really and truly proceeds from the Conſent of the People. For if the *Lord* hath Power, by his own ſole Act, to beſtow ſuch a Province on whom he pleaſeth, he certainly, at the Beginning, received this Power from the Conſent of the People, either voluntarily given, or obtained by the Iſſue of a juſt War. But if the *Lord* cannot do this by his own bare Authority, then it is evident, that the expreſs Conſent of the People muſt concur in the Diſpoſal [4].

VIII. To conclude this Diſpute; the ſame Author in the laſt Place maintains, that even then the People are not the Cauſe of Sovereignty in this Prince, when having before lived under a democratical Form, they chooſe a ſingle Governor. For, ſays he, the Sovereignty cannot here be conferred on the Monarch, till ſuch time as the People have firſt renounced their Right; but the People in that very Moment, in which they renounce their Right, have no longer any Thing to do with the Sovereignty: Therefore all that they do, is to elect a Perſon, who, having received his Power from GOD, ſhall, for the future, rule over them. But now, upon the ſame Argument, it may be denied, that Property can paſs from one Man to another. For, juſt in this manner, another cannot become Proprietor of my Poſſeſſion, till I have firſt reſigned my Property. But, after my Reſignation, I have loſt my Property, and, conſequently, cannot transfer that on another, which I have not myſelf; and, therefore, all that I do, is to chooſe a certain Perſon, into whom the Property (ſprouting up anew, I know not where) is afterwards to be infuſed.

As to the voluntary Abdication of Monarchs, his Opinion runs in the following Senſe; *That the Government being firſt abdicated, and the People looſed from their Allegiance; the Sovereignty doth afterwards return to its original Author, in order to*

[a] See *Geneſ.* xxvii. 29, 37.

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[1] See Page 625. Note 2.
[2] See Page 604. Note 3. and Mr. *Locke*'s ſecond Treatiſe of civil Government, *Ch.* viii. § 105, *&c.*
[3] For there are Vaſſals who are themſelves Sovereigns. See *Grotius*, Lib. i. Ch. iii. § 23. Thus the Lord *Paramount*, by releaſing his Right over ſuch a Vaſſal, only diſengages the Subjects of the latter from the Reſpects and Engagements they owed him, in Conſequence of their *feudal Obligations* to their immediate Lord. But to make this Diſcharge valid, in a Kingdom not hereditary, the Conſent of the People was requiſite. The Caſe was the ſame in giving a Vaſſal, who was not already a Sovereign, the Power of becoming one, becauſe this was a kind of Alienation. See *Grotius*, Lib. ii. Ch. vi. § 8, 9.
[4] For the Lord *Paramount* might renounce his Right, but not force the Province, againſt its Will, to acknowledge the Sovereignty of a Vaſſal to whom it only owed a *feudal Duty*. See the Place of *Grotius* juſt quoted § 4.

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its being again brought back, and communicated to the appointed Heir. This is manifeſtly a *Metempſychoſis*, or *Tranſmigration* of the ſovereign Power; which a wiſe Man will not require us to be at the Trouble of confuting. In reality, he who abdicates a Crown, gives his Succeſſor an Occaſion, and a Capacity, of receiving it from the Hands of the People, upon their Submiſſion; or, of actually entering upon the Government, to which the Decree of the People, ſettling the Order of the Succeſſion, had before given him a Right.

IX. It may not be improper, before we leave our preſent Subject, to enquire in ſhort, to whoſe Power it belongs, to confer the regal Titles and the Enſigns of Majeſty, or any Denomination by which the ſupreme and independent Authority in State, inhering in a ſingle Perſon, is wont to be expreſſed. And here it is manifeſt, that to beſtow the Name and Title belongs to the ſame Perſons, who have a Right to beſtow the ſame Thing itſelf, that is, the ſupreme Command. And, by Conſequence, a People, that either now firſt unite themſelves in a civil Body, or elſe, laying aſide their former Frame of Government, reſolve on a monarchical Conſtitution for the future, whilſt they confer on one Man the Authority over themſelves, they, by this very Act, give him a Right to bear the Title and Style [1] of King, and to ſignify his high Station by decent Badges of Honour. Such a King, as he owes his Dignity and Empire to no foreign Power, ſo he need not wait for the Conſent and Approbation of other Princes or States, in order to the aſſuming the Actions or the Character proper to his Office. But as a Foreigner could not diſpute his Right to the Government, without a manifeſt Injury, ſo would it be [2] injurious, likewiſe, to deny him the Appellation of King. Nor can any Pretence to the contrary be drawn from the ſmall Extent of his Dominions. For a *Kingdom* doth not denote any certain Meaſure of Territory, or of Power; but a particular Form of civil State, which may happen to be greater or leſs. But to make him a King, who before owned the Command of ſome Superior, it is neceſſary, that he obtain the Conſent of his Superior, to releaſe himſelf and his Dominions from the Bond, by which they ſtood engaged to their former Lord. Thus he who is under a [3] *feudal* Obligation, cannot, without his Lord's Conſent, take up the Character of a ſovereign Prince. And unleſs he be releaſed from this Obligation, though his Lord ſhould grant him the *Title*, yet he will hold the *Dignity* itſelf after an imperfect and ſubordinate Manner. So we find that the Succeſſors of *Alexander the Great* durſt not aſſume the regal Style, till *Alexander*'s own Family was extinct, to which the Sovereignty of Right belonged. And, even after this, it was neceſſary for them to have the Conſent of the People under their Command, which the numerous Forces kept in Pay about them, ſecured beyond the Poſſibility of a Denial [a]. In the ſame Manner, he who ſubdues a Territory by Arms, as he may, by the Right of War, acquire the Power and Authority, ſo may he, likewiſe, obtain the Title and Character of a King [b]. If a Prince would erect any particular Province of his Empire into a [4] diſtinct Kingdom, the Way of compaſſing this Deſign is to ſeparate it from the reſt of the Body, and to govern it by a peculiar Juriſdiction, independent of his other Dominions. That the *Roman* Senate frequently beſtowed the Title of *Friend* and *King*, as Marks of Eſteem and Honour, is a Piece of Hiſtory vulgarly known. And this they might juſtly do with Regard either to thoſe Princes, on whom they themſelves had conferred the reſpective Dominions, or to thoſe, over whoſe [5] Kingdoms they ſtill held ſome ſuperior and tranſcendent Right. But to have offered the ſame Title, as purely a Matter of Favour, to other Monarchs, over whom they could not pretend to the leaſt Authority, had been a moſt inſolent Piece of Uſurpation. And yet ſuch a preſuming Prerogative the Popes have not been aſhamed to challenge over the moſt free and independent States of *Europe* [c].

[a] *Vid.* Cornel. Nep. *Eumen.* Plutarch Demet. Juſtin. *Lib.* xv. *Ch.* ii. Appian. Alexand. *in Syriac.* Diodor. Sic. *Lib.* xx. *Ch.* liv, lv. [b] *Vid.* Juſtin. *Lib.* xli. *Ch.* iv, v. [c] See Father *Paul*'s Hiſtory of the Council of *Trent*, Lib. v. p. 354. where he reports, how *Paul* IV. advanced *Ireland* to the Honour of a Kingdom. King *Henry* VIII. had already aſſumed the Title of *King of Ireland*, and his Daughter Queen *Mary* kept the ſame Style. The Pope, in order to pleaſe this *Princeſs* who was devoted to his Intereſts (without departing from the Right he pretended to of erecting new Kingdoms) made *Ireland* one ſecretly. See the deceaſed Biſhop *Burnet*'s Hiſtory of the Reformation, *Part* ii. *Book* ii. *Anno* 1595. *p.* 194. So we find that Pope *Pius* V. gave the Title of *Grand Duke of Tuſcany* to *Coſmo* I, for which ſee *Thuanus*'s Hiſt. *Lib.* xliv. on the Year 1569. This puts me in Mind of the *Roman* Senate, who, to preſerve the Shadow of Authority they had over the People, ratified before-hand whatever the People decreed in their Aſſembly. See *Livy*, *Lib.* i. *Ch.* xvii. *num.* 9.

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[1] *Agathocles*, Tyrant of *Sicily*, ſeeing that ſeveral other Cotemporary Princes, as *Antigonus*, *Demetrius*, *Seleucus*, *Lyſimachus* and *Caſſander*, had taken the Title of King, aſſumed it, alſo, himſelf; and the rather as he found himſelf equally powerful. See *Diodorus Siculus*, Lib. xx. Ch. lv.

[2] Mr *Titius* (Obſerv. DLXI.) aſſerts *not*: And that Foreigners are at their Liberty whether they will acknowledge or not acknowledge ſuch a Sovereign for *King*; becauſe, *ſays he*, this Title generally gives a Rank and Prerogatives that may occaſion ſome Prejudice to other States. See *Lib.* viii. *Ch.* iv. § 15, *& ſeqq.* following.

[3] See M. STRUVIUS, *Jus publicum Romano-Germanic.* Ch. xi. § 4. *Edit.* 1710.

[4] He cannot do this without the Conſent of the People in general, and of each Province in particular, unleſs his *Title* to the Crown be *Hereditary*.

[5] Such, for Example, eſpecially in the latter Times of the *Roman* Republic, were moſt of thoſe Kings to whom the *Romans* left only a Shadow of Liberty. See the *Orbis Romanus* of the deceaſed Baron *Spanheim*, Exercit. ii. Ch. x. and what I have ſaid, after him, upon *Grotius*, Lib. i. Ch. iii. § 21. Note 25.

CHAP. IV.

Of the Parts of Sovereignty, and their Natural Connexion.

I. *In what Sense the supreme Power may be said to consist of Parts.*
II. *The legislative Power.*
III. *The vindicative Power.*
IV. *The judiciary Power.*
V. *The Power of War and Peace, and of making Leagues.*
VI. *The Right of appointing Magistrates.*
VII. *The Right of levying Taxes.*
VIII. *The Right of examining Doctrines.*
IX. *Government a more strict Obligation than bare Compact.*
X. *Who may properly be said to hold a Part in the Government.*
XI. *The Connexion of Parts in the supreme Authority demonstrated;*
XII. *And illustrated.*
XIII. *Many are for dividing those Parts:*
XIV. Grotius *amongst the rest; whose Opinion is particularly discuss'd.*

I. THE supreme civil Authority, though in its own Nature it be one indivisible Thing [1], yet because it exerts its self in different Acts, according as it is imployed about different Means, necessary to the Preservation of the State, is generally conceived as *consisting* of many Parts; with Resemblance to those Parts which are termed *Potential* [2], in natural Philosophy. For the sovereign Command is, by no means, such an entire compound Being, as is made up of heterogeneous Parts, which, as they are joined and knit together by some common Band, compose one Body, yet so as that each Part is capable of subsisting separately by its self. But as the Soul is one single Substance, dispensing Life and Vigour through the whole Body, and yet as it exerciseth different Operations, in Proportion to the Difference of the Objects presented to it, or of the Organs through which it works, is conceived as having *Potential* Parts; so, in like manner, the supreme Authority, as it is busied in prescribing general Rules of Action, is termed the *Legislative Power*; as it determines the Controversies of the Subjects by the Standard of these Rules, it is the *Judiciary Power*; as it either arms the Subjects against Foreigners, or commands them to lay down their Hostility, it is *the Power of War and Peace*; at it takes in the Assistanee of Ministers in the Discharge of publick Business, it is called the *Right or Power of appointing Magistrates*; and so with regard to its other Offices and Functions [3].

II. What, therefore, these Parts of Sovereignty are, may plainly be discovered from the Nature and End of Civil States. A State then is a Moral Body conceived to act by one Will. But inasmuch as it is made up of many Natural Persons, each of whom hath his particular Will and Inclination; and since these several Wills cannot, by any Natural Union, be joined together, or tempered and disposed into a lasting Harmony, therefore that one Will, which we attribute to the State, must be produced by the Agreement of all Persons, to submit their own private Wills to the Will of one Man, or one Assembly of Men, on whom the Government hath been conferred. Farther, since the respective Members ought in Duty to conform themselves to the Will of the State, it is necessary, that this Will be made known to them by clear and evident Signs. Hence we apprehend it to be one of the chief Offices of Sovereignty, to prescribe and declare to others what they ought to perform, or to omit. And because it would be impossible, in so great a Multitude, to give Injunctions to every particular Man, on occasion of every particular Action; therefore general Rules are established, for the perpetual Information and Direction of all Persons in all Points, either of positive, or of negative Duty. Besides, since we easily discover amongst Men an immense Variety of Judgments and of Appetites, whence an infinite Field of Controversy might arise; it is, on this Score, highly conducive to the common Peace, that publick Determinations should settle what each Man ought to look on as his own, what as another's; what is to be esteemed lawful, or unlawful [4] in the State, what honest, or dishonest; as, likewise, what Degree every Man retains of his natural Liberty, or after what Manner each Person is to moderate the Use and Exercise of his own private Rights, in order to the publick Tranquillity.

[1] These are *Grotius*'s Terms, in Book i. Ch. iii. § 17. Note 1. It is founded upon a false Hypothesis, which our Author has confuted in the preceding Chapter; by which the *Supreme Civil Authority* is conceived to be a *physical* Being, that has no Parts, and that only receives different Names according the Diversity of Objects, with regard to which its acts. Indeed, the *Supreme Civil Authority* contains an *Union* of *divers Rights*, or *distinct Powers*, but conferred for the same End, that is, for the Good of the Publick, so that to consider them in themselves, nothing hinders but that they may be either entirely separate one from another, or in the Hands of different Persons. It is sufficient they be found in the Body of the State, to the Exclusion of any foreign Power. See Mr. *Titius*'s Observ. DLXIX. Numb. ii. and his Specimen *Juris Publici*, &c. Lib. vi. Ch. viii. § 26, &c. as, also, what the learned *Obrecht* says against our Author, in his Dissertation *de Unitate Reipublicæ in S. Imperio Romano*, § 5. It is the sixth of the Collection published in 1704.

[2] By that is understood the *Species* of the same *Genus*: For *the potential Whole* is what the *Schoolmen* call, in other Terms, the *Logical* or *universal Whole*; upon which we may consult the Metaphysicians. Thus *Sovereignty* is conceived as a *Genus*, whose *Species* are the *Sovereign* Power of making War or Peace; the Sovereign Power of punishing, the Sovereign Power of raising Taxes, &c. To that is opposed the *subordinate Parts of Sovereignty*, that is, the different Subjects, or the different Persons among whom the *Sovereignty* is divided, as when the *Roman* Empire was in the Hands of the TRIUMVIRI, *Augustus*, *Mark Anthony*, and *Lepidus*, &c. But I must observe by the Bye, that Mr. *Courtin*, according to his usual Exactness, says in his Index, that, by *potential Parts* of a State, *Grotius* means *the Parts that have the Sovereign Power*; so that, adds he, *it happened that the same* Roman *Empire has had two* Sovereigns *or* two potential Parts, *who reigned at once, one in the* East, *and the other in the* West, *the* Imperial *Authority, however, remaining still one and indivisible.* On the contrary, the *Subordinate Parts* are, according to him, *those that are subject to the Sovereign Power*, that is, *the Subjects of the Provinces that compose* the State, *which are, with respect to the* State *or* Sovereign Power, *what in the Schools several* Species *are with respect to the* Genus. By this small Specimen one may easily see what Dependence there is upon this Translator's Explanation both of the Terms and of some Thoughts of *Grotius*; without saying any Thing of the Translation itself. This Heap of Nonsense is so much the more inexcusable in him, because he might easily have avoided it by following *Gronovius*, whose Notes it is plain he had read.

[3] Mr. *Locke*, in his Treatise of *Civil Government*, Part ii. Ch. xii, reduces all these Parts of the Sovereign Power to three, viz. 1. The *Legislative Power*. 2. The *Executive Power*. 3. The *Confederative Power*. To the *first* he refers all that our Author speaks of here, in Sections, 2, 3, 7, 8. To the *second*, the Subjects of Sections 4, 6. And to the *last*, the *Rights of War and Peace*, with that of making *Treaties*, mentioned in Section 5.

[4] Though here our Author uses the Terms of *Hobbes* (*De Cive*, Ch. vi. § 9.) yet he means always, that the Laws of a Sovereign include nothing contrary to the Divine Laws, whether Natural or Revealed, as he will prove in the first Chapter of the next Book. As for the rest, he shews at length, in the same Book, the principal Parts of the sovereign Power, which he does but point at here.

[5] The latter Part of this Section is taken from our Author's Abridgment, *De Offic. Hom. & Civ.* Book ii. Ch vii. § 2.

III. To proceed; the chief End of Civil Communities is, that Men, by conſpiring mutually to aid and aſſiſt each other, may be ſecured againſt thoſe Damages and Injuries, which they might otherwiſe ſuffer from their own Kind; and, by this means, may either enjoy Peace, or have ſufficient Defence againſt any Aſſaults or Moleſtations. Now, in order to the procuring of Peace, it is in an eſpecial Manner neceſſary, that each Perſon be ſo far guarded againſt the Violence of his Fellows, as that he may be able to live ſecurely; that is, without having juſt Cauſe to fear Injury from any, whilſt he himſelf is not injurious to others. Indeed, that Men ſhould be abſolutely protected from mutual Hurt, or that all Injuries ſhould be impoſſible, the Condition of human Things will not allow. Yet ſuch Care may be taken, ſuch Proviſion made, as that there ſhall be no probable Grounds for the Apprehenſion of Danger. And this Security is the Aim which Men propoſe, when they ſubmit themſelves to the Direction of others. Of which, if no greater Degree could be obtained by joining Strength, than each private Man could give himſelf by ſtanding ſingly upon his own Guard, it would be Folly to renounce our natural Liberty, in which every Perſon is his own Protector. But, to compaſs this Security, it is not enough that each of thoſe who are about to form a Civil Body, covenants with the reſt, by Word, or Writing, that he will not kill, ſteal, or offer any other Harm or Prejudice: For it is manifeſt how far Human Nature is, in moſt Perſons, corrupted; and Experience ſadly informs us, how little Force the Reverence of verbal Engagements, or the Authority of Oaths, hath with the Generality of Mankind, towards the keeping them in their Duty, ſhould the Fear of Puniſhment be once removed. For which Reaſon, likewiſe, it is not enough to have one who ſhall preſcribe Rules of Acting, if he be inveſted with no farther Power. Therefore, to engage Men to an Obſervance, both of the common Precepts of Nature, and thoſe particular Laws, which are enacted for the Good of the State, there muſt be added the Fear of Puniſhment, and the Power of inflicting what is feared. And, that Puniſhment may produce the proper End of its Inſtitution, it ought to riſe to ſuch a Meaſure and Proportion, as that there ſhall be manifeſtly a greater Evil in tranſgreſſing the Laws, than in obeying them; ſo that the Severity of what is to be ſuffered may over-balance any Pleaſure, or Profit, which may now, or hereafter be obtained by the Offence: It being impoſſible for Men, out of two Evils, not to chooſe that which to their Judgment appears the [1] leaſt. And thus the Regard which Men have to their own Lives and [2] Safeties ſecures mine. And although it may, ſometimes, happen, that Perſons ſhall be ſo tranſported, either through Raſhneſs and Precipitancy, or ſome other extravagant Commotion of Mind, as to prefer the Satisfaction of the Crime to the Bitterneſs of the Penalty; yet this is to be reckoned amongſt thoſe uncommon and extraordinary Accidents, which the Condition of our Nature, and the Circumſtances of our Affairs will not ſuffer us to prevent. This Power of inflicting Puniſhment, on thoſe who tranſgreſs the Commands of the Sovereign, is preſumed to be then conferred, when particular Men yield up the Uſe of their own Strength to the Service of the Community. By which Act they oblige themſelves to execute Juſtice on Delinquents, when the Sovereign demands their Aſſiſtance in this Particular; or at leaſt, not to aid and defend thoſe who are to ſuffer. But for a Man to oblige himſelf to undergo Puniſhment, without [3] Reluctancy, or Reſiſtance, is a void Engagement, and ſuch as cannot hold good, on account of that natural Averſon, which we bear to all Things deſtructive of our Safety and our Life. It is truly enough affirmed by Mr. *Hobbes* [a], that this is the higheſt Degree of Power, which Man can hold over Man, to be able to preſcribe to others, in whatever he thinks beneficial to the State; and, by denouncing juſt Penalties, to terrify the Stubborn and Diſobedient into a Compliance with what he thus enjoins. But then, as for what the ſame Author farther aſſerts, *That he who hath a Right of inflicting Puniſhment as he ſhall ſee fit, hath a Right of compelling all Perſons to all Things at his Pleaſure*; it ought to have a Limitation affixed to it, taken from the End of Civil Government: Inaſmuch as we are to preſume, that he in whom the Supreme Authority reſides, hath no other Will or Pleaſure, but ſuch as upon good Principles of Reaſon appears to have ſome Tendency towards the ſaid End.

IV. Moreover, ſince, under the exacteſt Syſtems of Laws there ariſe frequent Diſputes, about the right Application of them to particular Caſes, and many Circumſtances are to be conſidered, before a Fact can be pronounced illegal, or the Author of it convicted: On this Account the [4] *Judiciary* Power is ſuppoſed to come in to the Aſſiſtance and Support of the two Powers already mentioned. The Office of the *Judiciary* Power is to hear and decide the Cauſes of the Subjects, to examine the Actions of particular Men, which are repreſented as Breaches of the Law; and to pronounce Sentence according to the Legal Penalties. Mr. *Hobbes* [b] ſeems to have had an improper Notion of this Power: Since the Right of Judging, as to the Uſe and Exerciſe of any Part of the Sovereignty, is underſtood to be implied or included in the reſpective Part.

V. But though the Means hitherto preſcribed may afford the Subjects full Security againſt thoſe of their own Body; yet this is not enough to anſwer the End of civil Eſtabliſhments. For it is to little Purpoſe for Men to be at Peace amongſt themſelves, if they are not able to defend themſelves againſt Strangers; and this they cannot effect, unleſs they are united in their Strength. Becauſe it's purely owing to Con-

[a] *De Cive*, Ch. vi. § 6. [b] *Ibid.* § 8.

[1] See *Lib.* i. *Ch.* iv. § 9. and *Ch.* v. § 14. preceding.

[2] Compare this with what our Author has ſaid, *Lib*, ii. *Ch.* iv. § 16. at the End.

[3] See above *Lib.* iii. *Ch.* vii. § 5. with the Notes, and *Lib.* viii. *Ch.* iii. § 4. following.

[4] The Character of this Power conſiſts in determining in the laſt Reſort, and without Appeal; in Oppoſition to the inferior Tribunals, which the Sovereign has eſtabliſhed, and which derive all their Authority from him. See *Grotius*, Lib. ii. Ch. xx. § 13. and the *Jus Publicum Univerſ.* of M. *Bohmer Part. Spec.* Lib. ii. Ch. vii. § 15. & *ſeqq.* To this Power, alſo, belongs the *Right of pardoning Criminals*, when the publick Good requires it. See *Ch.* xiii. § 4. of this Book, and *Lib.* viii. *Ch.* iii. § 17. following. Hence it was, that when the Emperor *Auguſtus*, by Degrees, uſurped all the Parts of the ſovereign Power, he cauſed it, among other Things, to be enacted, That an Appeal ſhould lie to him from the ordinary Judges; and that he ſhould have the *Calculus Minervæ* in all Tribunals. See *Dion Caſſius*, Lib. li. p. 521. C. *Edit. H. Steph.* Now this *Calculus Minervæ* ſignified no more than the Power of pardoning thoſe who were legally convicted and condemned. See the Oration of J. FREDERIC GRONOVIUS, *De la Roi Royale*, *p.* 281. & *ſeqq.*

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junction, that many are ſtrongér than one ; in as much as otherwiſe a thouſand ſeparate Men are not ſuperior in Force to a ſingle Perſon. In order, therefore, to the general Safety and Welfare, it is neceſſary, that there be ſuch a Power in the State as may aſſemble, unite, and arm ſo many Subjects (or hire Mercenaries in their room) as ſhall be thought ſufficient for the common Defence, with Proportion to the uncertain Number and Strength of the Enemy ; and may, likewiſe, when it ſhall be afterwards expedient, embrace Conditions of Peace. And ſince both the Seaſons of Peace and of War receive a conſiderable Advantage from Leagues, for the better communicating the Benefits of different States, and for repelling and reducing to Reaſon ſome ſtronger Enemy, by a confederate Force ; there muſt be inherent in the Sovereignty a *Power to enter into ſuch* [1] *Alliances* as ſhall be ſerviceable in either Condition, and to engage all the Subjects to a juſt Obſervance of them ; and, at the ſame Time, to derive upon the Publick ſuch Fruits and Advantages, as ſhall accrue by their Means.

VI. Again, ſince the Affairs of the Community, occurring as well in Peace as in War, cannot be adminiſtered and executed without Officers and ſubordinate Magiſtrates, there is need of ſuch a Power as may appoint Men to enquire into the Controverſies [2] ariſing between Subjects [a], to dive into the Policies of neighbouring States, to gather in and give out the publick Revenues, and, laſtly, in every Reſpect to conſult and promote the common Benefit. And then it muſt be another Part of the ſame Power, to compel theſe Officers, when once conſtituted, to the Performance of their Duty, and to call them to account upon proper Occaſions [b].

VII. Farther, in as much as publick Buſineſs in the Time of War, or of Peace [3], cannot proceed without Expence, ſuch a Power is, likewiſe, requiſite, as may ſet aſide for theſe Uſes ſome Part of Goods or Products of the Country ; or may compel private Men to contribute ſo much out of what they ſeparately poſſeſs, as is judged neceſſary to ſupport the common Charges ; as, likewiſe, to command and require the Hands of the Subjects, upon Occaſion of any needful Work. To the ſame Power belongs the Invention of other lawful Ways and Means of increaſing the Riches of the State. The Principal of which is the Right of impoſing Duties on Goods imported, or [4] exported ; and, alſo, of taking off ſome moderate Proportion from the Price of Commodities conſumed by the Subject.

VIII. Laſtly, Though to deſtroy the intrinſick Liberty of the Will, and, at the ſame Time, to unite and compoſe Mens Judgments of Things in a perpetual Harmony, by an inward Principle, be above human Ability to effect ; yet to provide that theſe Sentiments and Perſuaſions, however different, may not diſturb the publick Peace, is a Buſineſs abſolutely neceſſary. For ſince all voluntary Actions take their Riſe from the Will, and have a natural Dependence upon it ; and ſince the Inclination of the Will, to the doing, or the not doing of any thing, is built on the Opinion of that Good, or Evil, of that Reward, or Puniſhment, which the Party conceives will follow from the Performance, or the Omiſſion ; and, conſequently, ſince Mens Actions are ever guided by their Opinions ; ſome outward Means *muſt needs be found out*, by which theſe Opinions and Judgments ſhall be brought, as near as poſſible, to conſpire and agree ; at leaſt, ſhall be hindered from giving the State any Diſturbance by their Oppoſition. To this End it is expedient, that the State do publickly own and profeſs ſuch Doctrines, as are agreeable to the End and Deſign of Civil Government, and the Minds of the Subjects be, from their Childhood, grounded in them [5]. In as much as the generality of Mankind judge of Things according as they have been accuſtomed, and according to the common Notions, which they ſee obtain in the World ; very few being able, by the Strength of their own Parts, to diſcern what is good and ſolid in the Conduct of human Life. There is, indeed, ſcarce any Opinion, either relating to the Worſhip of GOD, or concerning thoſe Things, the Knowledge of which is ſtrictly termed *human*, but may be made the Occaſion of Diſſenſion, Diſcord, Reviling ; and, in the final Iſſue, of Blood and War. And this doth not happen on account of the Falſity of the Opinion, or becauſe to admit the contrary, would bring heavy Inconveniences on Mankind, or on Civil Communities ; but by reaſon of Mens unhappy Diſpoſitions, who, always imagining themſelves to be wiſe, would gladly appear ſo to all others, and are violently enraged againſt thoſe who preſume to be of the contrary Perſuaſion. This any one will readily confeſs, who hath but chanced to caſt his Eye on thoſe Quarrels of the Learned about meer Trifles, carried on with no leſs Heat and Fury, than if their Lives and Religions lay at Stake. Now ſuch Differences and Diſputes, though they cannot be abſolutely prevented, yet they may be hindered from interrupting the publick Peace and Tranquillity,

[a] See *Exod.* xviii. 15. Philo. Jud. *de Creation. init.* Joſep. *Archæolog.* iii. 3. [b] *Add.* Bœcler *ad* Grot. *Lib.* i. *Ch* iii. § 6. *p.* 218.

[1] See *Grotius*, Lib. ii. Ch. xiv. § 9. *num.* 2. And what I have ſaid in my *Defence of the Rights of the* Dutch Eaſt India *Company*. Ch. iii.

[2] He ſhould have ſaid to adminiſter Juſtice in general; both in Civil and Criminal Affairs ; which the Sovereign never does himſelf. It was, therefore, a very frivolous Diſpute, which *Henry* VI, Emperor of *Germany*, was obliged to decide in the xiiith Century, between *Lotharius* and *Azo*, two *Italian* Lawyers, *viz.* whether thoſe Magiſtrates who have a Criminal Juriſdiction (ſuch as the *Romans* called *Imperium Marum*) exerciſed, as belonging to themſelves, or as flowing from the Sovereign in whom it originally reſides. See PANZIROLLUS, *De Claris Legum Interpret.* Lib. ii. Ch. xxv. p. 215. *Edit. Lipſ.* 1721. JOSEPH AVERANI, *Interpret Jur.* Lib. i. Ch. ii. and M. SCHULTING, *Enarrat.* Part. i. DIGEST. in Tit. *De Juriſdict.* § 33.

[3] This is what St. *Paul* intimates to us, when he ſays : *For this Cauſe pay you* Tribute alſo (to the Magiſtrates) *for they are God's Miniſters, attending continually upon this very Thing*, Rom. xiii. 6. They cannot (*ſays* Mr. *Le Clerc upon this Place*) leave the Care of their own Affairs to apply themſelves to thoſe of the State, without having ſome Recompence for it ; nor maintain the Dignity of Miniſters of a Society, and defend it againſt thoſe who diſturb and invade it without an Expence. So that this is the Foundation of all the Taxes of lawful Power, and which, conſequently, a Subject ought to pay ; becauſe every one is obliged to contribute to the Support of the Society, in which he lives quietly, and enjoys the Protection of the Laws. And to this Part of Sovereignty we may, alſo, refer the Right of *coining Money*, the Right of *Hunting* or *Fiſhing* ; and, in general, the Power of appropriating the Uſe of Things that have been left in common, and that cannot conveniently be divided among private Perſons. See what has been ſaid, touching the Diſtinction of *Regalia majora, & minora*, on *Grotius*, Lib. ii. Ch. iv. § 13. Not. 1. And add the *Jus Publicum Univerſ.* by M. *Bohmer*. Part. Spec. Lib. i. Ch. iv. § 10. *in Not.*

[4] See above Lib. iii. Ch. iii. § 7.

[5] It is to this Part of the Sovereign Power we muſt aſcribe the Right of *founding Univerſities, Colleges, Academies*, and *public Schools* of all Kinds. As for the reſt, the Advantages and Privileges which theſe enjoy, depend on the Legiſlative Power, to whom properly belongs the Care, both of all the Communities which form the State, as well as that of every particular Subject.

by due Penalties enacted againſt thoſe who ſhall maintain and foment them [a]. Yet, what we would obſerve on this Subject, is not properly levelled againſt thoſe Opinions concerning indifferent Points, but againſt ſuch as being obtruded upon Mankind, either under the Colour of Religion, or with ſome other fair Pretence, ſhock and confound the Laws of Nature, and the Principles of ſound Policy, and tend to the breeding of Moral Diſeaſes in a State. Nor will any true and juſt Opinions be in Danger of ſuffering by this Cenſure. For no true Doctrine is oppoſite to the common Peace; and that which contradicts Peace cannot be true; unleſs we may, at the ſame Time, affirm, that Peace and Concord are repugnant to the Laws of Nature. Wherefore the Power of examining the aforeſaid pernicious Doctrines, and of baniſhing them from civil Societies, is juſtly attributed to the ſupreme ruling Authority [b].

IX. Our next Buſineſs is to ſhew, that theſe Parts of the Sovereign Power are naturally ſo united, and, as it were, interwoven with one another, that ſhould we ſuppoſe ſome of them to inhere in one Perſon, ſome in others, the regular Frame of the State muſt abſolutely be deſtroyed [c]. Which Truth that we may thoroughly apprehend, it ought to be obſerved, that there are, above all others, two Bands eſpecially, by which the Wills of many Men, or of whole Aſſemblies, are united into one; *Covenant* and *Command:* Of which, nevertheleſs, the latter adds a much ſtronger Tie than the former. They who are held together by bare Covenant, ſtand obliged by the Law of Nature voluntarily to perform the Terms of Agreement; their natural Equality, in other Reſpects, remaining as before. Now ſo long as the Articles are on both Sides obſerved, a fair Union and Concord may continue amongſt them. And when any one Party, with a wicked Deſign, flies from the Engagement, he is guilty of a Breach of the Law of Nature: But then the reſt, whoſe Intereſt it was that the Covenant ſhould remain inviolable, have no means left of reducing the falſe Brother to Reaſon, but meer Force of Arms, in which he who offered the Injury, is frequently not inferior to him that received it. After the ſame manner, they, who upon equal Terms ſtand bound to each other, by Virtue of ſome League or Confederacy, are at Peace and Agreement, ſo long as each Party makes good what he promiſed; but when either proves perfidious, the Band of Union is diſſolved, and an Occaſion of Hoſtility enſues. Whence it appears, that bare Covenants are not Bands ſufficient, at leaſt, for the long holding together many Perſons in a moral Body; eſpecially ſince it doth not always ſo happen, that the ſmaller and weaker Party recede from their Obligation, to the Prejudice of the more numerous and the more powerful, but very often the direct contrary. And though we ſhould ſuppoſe, in the principal Compact, a Clauſe to this Purpoſe, that whoever preſumed to break this Article, ſhould be proſecuted with the united Strength of all the reſt, yet (not to ſay, that this Clauſe would be of no Effect, in caſe many Perſons ſhould join in ſuch a Breach, unleſs a Democratical Government were eſtabliſhed amongſt the Members, or unleſs they who compoſed before a *Society*, unite more cloſely in a formal *State*) there will be need of another Covenant, to determine what Method ſhall be obſerved in proceeding againſt him who ſhall refuſe to ſtand to this additional Engagement; and ſo on, *in infinitum*. But now Sovereignty or Command is a much ſtronger Tie, for the keeping an united Body of Men in firm Agreement. For they who are bound to each other under the ſame Government, do not continue equal to the Government itſelf; but whilſt the Power of preſcribing Rules to, and of inflicting certain Evils, by Way of Puniſhment, upon ſuch as tranſgreſs the Rules preſcribed, is conferred either on a ſingle Perſon, or upon an Aſſembly; all Perſons lie under a far greater Neceſſity to remain obedient, than if they were united by Compact only; which could not take away the Equality of the Members, or their Right of adminiſtring their private Affairs according to their own Judgment.

X. It ought farther to be conſidered, that if any will maintain the *Potential* Parts of the Sovereignty (as they are termed) to be within the ſame State, ſeated in diſtinct Perſons or Councils, they muſt, at the ſame Time, neceſſarily allow, that he to whom any Part belongs, muſt be furniſhed with ſufficient Power, as well to compel the Subjects to the Obſervance of what he ordains, by Virtue of that Part, as to defend this his Right, when attacked, or diſturbed; tho' that particular Limb of the Prerogative, which contains the Power of War and Peace, may poſſibly reſide in another Perſon: And, laſtly, that he have a Right of determining, by his own Judgment, at what Time, and in what Manner, the Part of the Government which he holds ſhall be exerciſed and employed. For to poſſeſs a Right of declaring to others what you would have them do, and yet to be deſtitute of Power,

[a] Plato *de LL.* Lib. xi. p. 977. *D. Ed.* Wech. *Let no Man revile another; but, in Caſes of Doubt and Controverſy, let the Parties behave themſelves towards each other, and towards the Company, after the manner of Learners, as well as of Teachers; as utterly to refrain from Reproach. For, to abuſe each other in a Diſpute with foul and ſcandalous Language, is to ſcold like Women: And very frequently Words, which in themſelves are trifling Matters, give Occaſion to the deepeſt Hatred and Enmity among Men.* [b] *Diogenes Laert.* (in *Theophraſt.* § 38.) reports a Law of *Sophocles*, Son of *Amphiclidas*, to this Purpoſe, *That no Philoſopher ſhould keep a School, unleſs by the Decree of the Senate and Commons; and that to do the contrary ſhould be a Capital Crime.* Plato *de LL.* Lib. vii. p. 888. *C. Ed.* Wech. *Let no Poet preſume to feign any thing, but what is conſiſtent with the Laws of the State, and is juſt, honeſt, and good. Nor ſhall he be allowed to ſhew his Compoſitions to any private Perſons, before the Guardians of the Laws, and the Judges appointed for this Service, have reviſed and approved of the Performance.* To this Purpoſe ſee *Caſaubon* Exercitat. in *Baron.* and his Epiſtle to *Fronto Ducæus*, Not. 624. Ed. *Grav.* Nor is it a deſpicable Remark of Mr. *Hobbes*, which he gives us in his Book *de Homine*, Ch. xiii. § 8. *Many Books*, ſays he, *we have, compiled by* Romans, *under the Commonwealth, or ſoon after its Extinction, and by* Grecians, *during the flouriſhing Condition of the* Athenian State, *repleniſhed as well with Precepts as Examples, by which the Minds of the Vulgar are rendered averſe to Regal Power; and that for no other Reaſon, but becauſe they find theſe Authors making Panegyricks on the Villanies of baſe and perfidious Men, that is, on the Murthers of Kings, when they have before branded them with the Name of Tyrants. But ſtill the Genius and Diſpoſition of the Multitude is much more corrupted by the Reading of thoſe Books, and the Hearing of thoſe Preachers, who would have a Kingdom within a Kingdom, and Eccleſiaſtical within a Civil Supremacy. Hence inſtead of the Old* Bruti *and* Caſſii, *we have our Modern* Clements *and* Ravalliacs, *who whilſt, in aſſaſſinating their Princes, they were only the wicked Inſtruments of other Mens Ambition, thought they did God Service.* But we may add, that the Exerciſe of this Right may be, and often really is, ſubject to great Abuſes; either becauſe Men miſtake, as prejudicial to a State, things in their own Nature innocent, nay ſometimes beneficial; or, becauſe Princes of themſelves, or by the Inſtigation of bad Miniſters, ſet up for Inquiſitors in the moſt indifferent Matters, eſpecially of ſuch as regard Religion. [c] Add the Preface of Mr. *Hobbes* to his Book *de Cive*; as alſo *Leviath.* Ch. xxix, where he reckons up the Miſchiefs, that have ariſen from the *Ariſtotelian* Doctrine of Liberty. *Comp. de Cive*, Ch. vi. *Leviath.* Ch. xxix, xlvi, xlvii. Add, alſo, what I have ſaid on the Abridgment of *the Duties of a Man and a Citizen*, Lib. Ch. vii. § 9. Not. 1. Compare what M. *Trevor*, Profeſſor at *Helmſtadt*, ſays on the ſame Place, in his Edition of 17[illegible]

for the obliging thoſe to a juſt Compliance who [illegible] your Injunctions, deſerves any other Name rather than that of Authority, or Command. And we hold *that* by a very precarious Title, which we cannot defend againſt others. Nor is he any better than another's Officer, or Miniſter, who exerciſeth any kind of Right at the Pleaſure and Diſpoſal of that other Party.

XI. From what we have laid down, it will be evident, that there is ſo near and ſo neceſſary a Connexion between all the Parts of the Sovereignty, as that not one of them can be ſeparated from any other, but the regular Frame of the Commonwealth muſt be deſtroyed; and inſtead of it an irregular Body muſt ſtart up, held together only by an infirm and ineffectual Covenant. For if we appropriate the legiſlative Power to one, and to another the judiciary, each primarily and independently, it will, of Neceſſity, follow, that either the former is null and void, or that the latter miniſters only to the former. Becauſe, to make Laws which you cannot put in Execution is vain and inſignificant; and, on the other Side, to have Strength whereby you may compel and controul, and yet ſuch as you muſt not uſe or apply, but at the Pleaſure of another, is to be an Officer barely executive. Again, ſhould we grant the latter the Privilege of applying his Strength according to his own Diſcretion, without being accountable to others, then we utterly overthrow the legiſlative Power, as before. It is neceſſary therefore, that both theſe Powers ſhould depend upon one and the ſame Will. Nor can the Power of Peace and War, or that of exacting Tribute, be ſeparated from this *vindicative*, or *judiciary* Right. In as much as no one can fairly compel the Subjects to bring in Contributions towards the Expences of the State, on either account, but he who hath alſo the Right to puniſh the diſobedient. Farther, it would be abſurd to give the Right of making Leagues for the Service either of Peace, or War, to any other Perſon, beſides him who hath, alſo, the Right of decreeing Peace, or War, as he judgeth convenient. For, otherwiſe, either the former will be only a bare Miniſter, or the latter will depend upon another's Pleaſure, in acquiring Means for the Exerciſe of his own Right. So, likewiſe, if you conſtitute any Perſon for the chief Management of Buſineſs, and do not, at the ſame Time, impower him to appoint inferior Aſſiſtants, and to require their Service in their reſpective Poſts (without which Aſſiſtants the Buſineſs cannot be performed) you really make him as meer a Servant as the reſt. For which Reaſon, neither can the Power of appointing Magiſtrates be divided from the other Parts of the ſupreme Authority. Laſtly, to the ſame Authority it muſt belong, to take Cognizance of Doctrines and Opinions, of ſuch eſpecially, as bear any Relation to the End of civil Government, and which are of Force and Efficacy either in promoting, or in hindering Obedience to the ſovereign Ruler. For if one ſhould command the Subjects to do a thing under Pain of temporal Death, and another perſuade them, that to do it would be to incur eternal Death, and each by his own Right, ſeparately and independently enjoyed [1]; the Conſequence muſt be not only that the Subjects, though innocent, may be juſtly puniſhed, but, alſo, that the State muſt ſink into an irregular Syſtem, a Monſter with two Heads. For neither can any Man *ſerve two Maſters*, nor, in the Caſe before us, is he whom we think we ought to follow, upon Pain of eternal Damnation, leſs our Maſter, than he whom we obey upon the Fear of temporal Deſtruction. And, were the Right of controlling and regulating Doctrines once taken away, the more ſuperſtitious Subjects would be drawn into Rebellion by their own Fancies [a]. What farther Power the Sovereign hath, as to ſacred Matters under Chriſtian Government, is a Point which we leave to be more diſtinctly ſtated by others [b] [2]. Nor are we here at leiſure to diſcuſs the Opinion of *Philo* the *Jew* [c], who having

[a] *Comp.* Hobbes *ibid.* & Horn. *Lib.* iii. Ch. xi. § 3. [b] See eſpecially *Grotius De Imperio ſummarum Poteſtatum circa ſacra*, Ch. i. [c] *De Præm. & Pœn.* p. 919. *A.* Edit. *Pariſ.* Our Author might plainly have ſaid, that this Opinion, having no other Foundation than *Philo*'s Authority, was not worth refuting.

[1] See a Diſcourſe of our Author's, intituled, *De Concordia veræ Politicæ cum Religione Chriſtiana*, § 11. *and the Rights of the Chriſtian Church*, &c. The celebrated Mr. *Thomaſius* publiſhed, in 1722, a curious hiſtorical Treatiſe, entitled, *Hiſtoria contentionis inter Sacerdotium & Imperium*, where the Reader will find the Notions of all Ages of Chriſtianity on this Subject; and a very exact Catalogue of all the Books written upon it in different Countries and Languages, as far as they came to the Author's Knowledge.

[2] It is, however, worth our while to ſay ſomething upon this important Matter. If we here make uſe of an unprejudiced Mind, it may be decided in few Words, at leaſt as far as is neceſſary to eſtabliſh general Principles, from whence we may eaſily draw Conſequences in particular Caſes; and in other Points depending upon that. The following *Letter* (publiſhed in *Latin* at *Tergow* in 1689, and ſince in *French*, in 1710) *concerning Toleration*, contains what is ſufficient to ſatisfy us. 'The 'Toleration of thoſe that differ from others in Matters of Religion, is ſo agreeable to the Goſpel of *Jeſus Chriſt*, and to the 'genuine Reaſon of Mankind, that it ſeems monſtrous for Men to be ſo blind as not to perceive the Neceſſity and Advantage of 'it in ſo clear a Light. I will not here tax the Pride and Ambition of ſome, the Paſſion and uncharitable Zeal of others. 'Theſe are Faults from which human Affairs can, perhaps, ſcarce ever be perfectly freed; but yet ſuch as no Body will bear 'the plain Imputation of, without covering them with ſome ſpecious Colour; and ſo pretend to Commendation, whilſt they 'are carried away by their own irregular Paſſions. But, however, that ſome may not colour their Spirit of Perſecution and 'Unchriſtian Cruelty with a Pretence of Care of the Publick Weal, and Obſervation of the Laws; and that others, under 'Pretence of Religion, may not ſeek Impunity for their Libertiniſm and Licentiouſneſs: In a word, that none may impoſe 'either upon himſelf, or other, by Pretences of Loyalty and Obedience to the Prince, or of Tenderneſs and Sincerity in the 'Worſhip of God; I eſteem it above all Things neceſſary to diſtinguiſh exactly the Buſineſs of Civil Government from that 'of Religion, and to ſettle the juſt Bounds that lie between the one and the other. If this be not done, there can be no End 'put to the Controverſies that will be always ariſing between thoſe that have, or at leaſt pretend to have, on the one Side, a 'Care of the Commonwealth. The Commonwealth ſeems to be a *Society of Men conſtituted only for the procuring, preſerving, 'and advancing their own Civil Intereſt*. Civil Intereſts I call Life, Liberty, Health and Indolency of Body; and the Poſſeſ'ſion of outward Things, ſuch as Money, Lands, Houſes, Furniture, and the like. It is the Duty of the Civil Magiſtrate, by 'the impartial Execution of equal Laws, to ſecure unto all the People in general, and to every one of his Subjects in particular, 'the juſt Poſſeſſion of the Things belonging to this Life. If any one preſume to violate the Laws of Publick Juſtice and Equi'ty, eſtabliſhed for the Preſervation of thoſe Things, his Preſumption is to be checked by the Fear of Puniſhment, conſiſting of 'the Deprivation or Diminution of thoſe Civil Intereſts or Goods, which otherwiſe he might and ought to enjoy. But ſeeing 'no Man does willingly ſuffer himſelf to be puniſhed by the Deprivation of any Part of his Goods, and much leſs of his Liberty 'or Life, therefore is the Magiſtrate armed with the Force and Strength of all his Subjects, in order to the Puniſhment of thoſe 'that violate any other Man's Right. Now that the whole Juriſdiction of the Magiſtrate reaches only to theſe Civil Concern'ments; and that all Civil Power, Right, and Dominion, is founded and confined to the only Care of promoting theſe Things; 'and that it neither can, nor ought, in any Manner to be extended to the Salvation of Souls, theſe following Conſiderations 'ſeem unto me abundantly to demonſtrate. *Firſt*, Becauſe the Care of Souls is not committed to the Civil Magiſtrate any more 'than other Men. It is not committed unto him, I ſay, by GOD, becauſe it appears not that GOD has ever given any

'ſuch

having ſhewn that *Moſes* was a King, a Law-giver, a Prieſt, and a Prophet, adds, *Since all theſe Offices are reducible to one and the ſame Head, they ought, by mutual Ties, to be united and incloſed one with the other; and they are all requiſite in the ſame Perſon, ſo that he who wants any one of the four, is to be looked on as a lame Ruler of an imfect Commonwealth.*

XII. This will be more clearly diſcerned, if we examine thoſe ſeveral Diviſions of the Sovereignty, which might be propoſed. Let, therefore, the Power of Peace and War be in the Prince; the Power of making Laws and executing Juſtice, in the Senate; the Right of levying Tribute in an Aſſembly of the People. Here, if the King commands the Subjects to Arms, and they refuſe to obey his Orders, either the King may compel them by Puniſhments, which he himſelf has a Right of inflicting, or he ought to deliver them up to take their Trial before the Senate. Now ſhould we admit the former of theſe, it doth not appear, how he, whom we ſuppoſe not to have the Power of putting the Laws in Execution, can [1] puniſh the Subjects before they are actually

[1] ſuch Authority to one Man over another, as to compel any one to his Religion. Nor can any ſuch Power be veſted in the Magiſtrate by the *Conſent of the People*; becauſe no Man can ſo far abandon the Care of his own Salvation, as blindly to leave it to the Choice of any other, whether Prince or Subject, to preſcribe to him what Faith or Worſhip he ſhall embrace. For no Man can, if he would, conform his Faith to the Dictates of another. All the Life and Power of true Religion conſiſts in the inward and full Perſuaſion of the Mind; and Faith is not Faith without Believing. What Profeſſion ſoever we make, to whatever outward Worſhip we conform, if we are not fully ſatisfied in our own Mind that the one is true, and the other well pleaſing unto GOD, ſuch Profeſſion, and ſuch Practice, far from being any Furtherance, are great Obſtacles to our Salvation. For, in this manner, inſtead of expiating other Sins by the Exerciſe of Religion, I ſay, in offering thus unto God Almighty ſuch a Worſhip as we eſteem diſpleaſing to him; we add, unto the Number of our other Sins, thoſe, alſo, of Hypocriſy and Contempt of his Divine Majeſty. *Secondly*, The Care of Souls cannot belong to the Civil Magiſtrate, becauſe his Power conſiſts only in outward Force; but true and ſaving Religion conſiſts in the inward Perſuaſion of the Mind, without which nothing can be acceptable to GOD. And ſuch is the Nature of the Underſtanding, that it cannot be compelled to the Belief of any thing by outward Force. Confiſcation of Eſtate, Impriſonment, Torments, nothing of that Nature can have any ſuch Efficacy, as to make Men change the inward Judgment that they have framed of Things. It may indeed be alledged, that the Magiſtrate may make uſe of Arguments, and thereby draw the Heterodox into the Way of Truth, and procure their Salvation. I grant it; but this is common to him with other Men. In teaching, inſtructing, and redreſſing the Erroneous by Reaſon, he may certainly do what becomes any good Man to do. Magiſtracy does not oblige him to put off either Humanity or Chriſtianity; but it is one Thing to perſuade, another to command; one Thing to preſs with Arguments, another with Penalties. This Civil Power alone has a Right to do; to the other, Good will is Authority enough. Every Man has Commiſſion to admoniſh, exhort, convince another of Error, and, by Reaſoning, to draw him into Truth: But to give Laws, receive Obedience, and compel with the Sword, belongs to none but the Magiſtrate. And upon this Ground I affirm, that the Magiſtrate's Power extends not to the Eſtabliſhing of Articles of Faith, or Forms of Worſhip, by the Force of his Laws. For Laws are of no Force at all without Penalties; and Penalties, in this Caſe, are abſolutely impertinent, becauſe they are not proper to convince the Mind. Neither the Profeſſion of any Articles of Faith, nor the Conformity to any outward Form of Worſhip (as has been already ſaid) can be available to the Salvation of Souls, unleſs the Truth of the one, and the Acceptableneſs of the other unto GOD, be thoroughly believed by thoſe that ſo profeſs and practiſe. But Penalties are no ways capable to produce ſuch Belief. It is only Light and Evidence that can work a Change in Mens Opinions; which Light can, in no manner, proceed from corporal Sufferings, or any other outward Penalties. *Thirdly*, The Care of the Salvation of Mens Souls cannot belong to the Magiſtrate; becauſe though the Rigour of Laws, and the Force of Penalties, were capable to convince and change Mens Minds, yet would not that help at all to the Salvation of their Souls. For there being but one Truth, one Way to Heaven; what Hope is there that more Men would be led into it, if they had no Rule but the Religion of the Court, and were put under a Neceſſity to quit the Light of their own Reaſon, and oppoſe the Dictates of their own Conſcience, and blindly to reſign up themſelves to the Will of their Governors, and to the Religion which either Ignorance, Ambition, or Superſtition had chanced to eſtabliſh in the Countries where they were born? In the Variety and Contradiction of Opinion in Religion wherein the Princes of the World are as much divided as in their ſecular Intereſt, the narrow Way would be much ſtraitened; one Country alone would be in the right, and all the reſt of the World put under an Obligation of following their Princes in the Ways that lead to Deſtruction; and that which heightens the Abſurdity, and very ill ſuits the Notion of a Deity, Men would owe their eternal Happineſs or Miſery to the Place of their Nativity.' Theſe are the Author's own Words: From whence he aſſerts, that the Magiſtrate ought to leave every one the Liberty of profeſſing ſuch Opinions as he believes the moſt reaſonable, and to take care that no Violence be offered to any Perſon upon that Account. He ſhews at large the Inconveniences that there would be in ſubmitting one's ſelf to the Humours of Princes; who act nothing but by the Suggeſtion of the *Churchmen* that are about them. If a Man were obliged to follow the Religion of the Prince, he muſt change his Religion as often as his Prince; ſo that if Princes of different Opinions ſhould ſucceed one another, as it happened in *England*, the Inhabitants of a Country muſt, in a few Years, be of different Religions to be ſaved. 'But as in every Church there are two Things eſpecially to be conſidered, the outward Form and Rights of Worſhip, and the Doctrines and Articles of Faith; the Author takes Notice there of the Duties of a Magiſtrate with reſpect both to the one and the other. As for Ceremonies, or the outward Form and Rites of Worſhip, it appears by the Definition of a Church, which is, according to him, *a voluntary Society of Men joining themſelves together of their own accord, in order to the public Worſhipping of God in ſuch Manner as they judge acceptable to him, and effectual to the Salvation of their Souls.* It appears, I ſay, by this Definition, that the Prince has no Power to enforce by Law, either in his own Church, and much leſs in another, the Uſe of any Rites or Ceremonies whatſoever, in the Worſhip of God. We cannot ſay, that, being things indifferent, the Prince has a Right to regulate them as he finds convenient, becauſe when ſuch Things are brought into the Church and Worſhip of GOD, they are removed out of the reach of the Magiſtrate's Juriſdiction, and in that Uſe they have no Connexion at all with Civil Affairs. Beſides, if they are indifferent, in themſelves, they do not by the Prince's Approbation become acceptable to GOD, who has not promiſed to be pleaſed with the Worſhip that the Magiſtrate ſhould eſtabliſh. As to the Doctrines and Articles of Faith: *Firſt*, Princes ought not to tolerate any Opinions contrary to Civil Society. *Secondly*, They ought not in particular to tolerate thoſe who under the Pretence of Religion would diveſt private Perſons, or even Magiſtrates, of their Civil Rights and Poſſeſſions. *Thirdly*, They ought not to ſuffer Churches which are conſtituted upon ſuch a Bottom, as that all thoſe who enter into them, *ipſo facto*, deliver themſelves up to ſome foreign Authority which they are ready to pay a blind Obedience to, notwithſtanding they have Princes of their own. *Fourthly*, and laſtly, Atheiſts who deny the Being of a God are not to be tolerated, becauſe, having no Religion, they make a Conſcience of nothing but what is puniſhable by the Civil Laws.' Two Reaſons induced me to ſet down here the Principles of this little Treatiſe. One is, Their being a neceſſary Conſequence of a Truth which our Author himſelf has ſolidly proved in his Diſcourſe *de habita Religionis Chriſtianæ ad Vitam Civilem*, I mean, that Religion is antecedent to Civil Societies, and that it has nothing at all to do with their Eſtabliſhments. See Sect. 1, 2, 3, 4, 5, 6. The other Reaſon is the Authority of the Perſon who wrote the *Letter concerning Toleration*, which is of very great Weight: Since the Learned Mr. *Locke* has, in his laſt Will and Teſtament, owned it for his. And it is now to be found in the Collection of his Works in Three Volumes, Folio, 1714. See, alſo, Mr. *Noodt*'s excellent Diſſertation *de Religione ab Imperio jure Gentium libera*; publiſhed by me in *French* in the Beginning of the Year 1707, and ſince tranſlated into *Engliſh*. The Reader will find, in my Notes, the principal Treatiſes that have been written upon this Subject, ſpecified and referred to. To conclude, I have had occaſion to ſpeak fully of this Subject, in my Treatiſe of *The Morality of the Fathers*, Ch. xiii. § 9. & *ſeqq*.

[1] But there may be an *executive Power* where there is no *legiſlative Power*. Theſe are two very different Things; therefore there is no Contradiction here but in ſuppoſing, that the *Senate had forbid* the Citizens by a Law to go to War: A Suppoſition which, generally ſpeaking, cannot be admitted as true. On the contrary, a King, having the Power to make War or Peace, muſt be regarded as authorized to compel his Subjects when he has ſuch Occaſion for them. We muſt apply the ſame Thing to the *Judiciary Power*. The Senate will have ſufficiently both of the one and the other, in all Things which do relate to War and Peace.

liſted

liſted, and brought under martial Diſcipline. If you ſay, that, in this particular Caſe, the King hath a Right to puniſh the Diſobedient, though not in other Caſes; you, at the ſame Time, give him the Privilege of oppreſſing and grieving his People, as he thinks [1] fit, and ſo you cancel the Rights of all beſide. For when he orders them to take up Arms, he will puniſh them, if they dare to refuſe; and when he hath once led them out on an Expedition, then the Nature of military Diſcipline gives him the Power of Life and Death over them: And nothing is eaſier than for a General to cut off any Soldier, who hath the Misfortune to fall under his Hatred, or Diſpleaſure [a]. On the other hand, if the King muſt be obliged to have recourſe to the Senate for Juſtice, when any Perſons refuſe to liſt themſelves under his Command; in this Caſe, either the Senators muſt pronounce the Sentence of their Condemnation, and give Orders for the Execution of it, barely by the King's Commiſſion and Authority; which is contrary to the Suppoſition: Or they muſt judge whether the Act alledged be criminal, or not; and this Proceeding will certainly be vain and fruitleſs, unleſs the ſame Judges may, likewiſe, take upon them to examine, whether or no the War now engaged in by the Prince, be for the Advantage of the Commonwealth; and thus the King's Right will again be deſtroyed. We ſhall diſcover the ſame Inconveniences, if we compare the Right of the *Prince* with that of the *People*, under ſuch a Conſtitution, as we did before with that of the *Senate*. For as the Meaſures of War are now ſettled in moſt Countries, *Tacitus*'s Obſervation [b] holds true, that *Armies cannot be without Pay, and Pay cannot be had without Taxes.* If, therefore, the Prince have not a Power of compelling the Subjects, by virtue of his ſovereign Command, to bring in their Shares of the publick Contributions, his Right over the Affair of War will be no more than a bare Power of perſuading and adviſing [2] the People, that, in ſuch or ſuch a particular Juncture, to engage in a War would be for the Advantage of the Commonwealth. On the other hand, if the People are not impowered to judge whether the War, towards which theſe Subſidies are levied, be for their Intereſt, or not; then what have they to boaſt of, but the laborious and ſervile Office of Aſſeſſors and Collectors? Nor will Things be in a better Poſture, ſhould we ſeparate the Branches of Sovereignty, according to any other Diviſion that could be invented [c]. So juſt was that Remark of *Aſinius Gallus*, in *Tacitus* [d], that *as a Government hath but one Body, ſo it muſt be directed but by one Mind* (whether of a ſingle Perſon, or of a Council, or Aſſembly). This may be well illuſtrated by the Example of the human [3] Soul, to which the ſovereign Authority in a State ſeems to bear ſome Reſemblance. Now ſhould we ſuppoſe the potential Parts of the rational Soul, the Underſtanding and the Will, to exiſt ſeparately, in two different Subjects or *Suppoſitums*, one of which ſhould have only the Faculty of the Underſtanding, the other only the Faculty of the Will; neither of theſe *Suppoſitums* could be called a Man, nor could human Actions be expected from either; whilſt one lay unactive and immoveable, the other blind and inſenſible. To which Purpoſe the Epigram in the *Anthologia* [e] ſeems Proper to be applied:

Πηρὸς ὁ μὲν γυιοῖς, &c.

The blind Man bears the lame: What Fate denies
The wretched Pair, their mutual Help ſupplies;
One lends his Feet, the other lends his Eyes.

Here the two unfortunate Perſons were able in ſome ſort to make up the Defects of Nature, ſo long as they agreed to afford their mutual Aſſiſtance. But ſhould this Agreement have been once broken, and a Quarrel have happened between them, each Party would have been alike at a loſs about their Way. In the ſame manner ſhould any perſiſt in dividing the Parts of the Sovereignty, he will, by no means, compoſe a regular State, but a diſorderly Body, the Members of which, holding theſe ſeparate Limbs of Government, ſhall be kept together, not by any common Authority, but bare Compact or Agreement. Now in ſuch a Society ſome kind of Peace and Concord might be maintained, ſo long as particular Perſons kindly conſpired in their Opinions with regard to the public Good, and were each of them ready voluntarily to perform what was requiſite towards this End. But ſhould any Diſſenſion ariſe, no Means of Redreſs would be left, but either to ſeek abroad for an Arbitrator, or to decide the Controverſy by the Sword.

XIII. Though the Caſe be manifeſtly thus, as we have repreſented it, yet there is no inconſiderable Number of Men, who ſtand up reſolutely for the Diviſion of the ſovereign Power, that hereby they may frame I know not what Mixture of Commonwealths, which being rightly tempered and qualified muſt needs, forſooth, produce the moſt happy Syſtem of Government. They would gladly engage *Ariſtotle* to be of their Party, but without Effect; he in the Place of his Works, which they alledge [f], ſpeaking of a Mixture far different from any that can be applied to the Parts of the Sovereignty. Which makes it ſeem the more ſtrange, that ſome Interpreters (and *Mich. Piccart* amongſt the reſt) when they come to treat of this Mixture, put ſuch Things together, as probably never entered into the Philoſopher's Head. The Temperature which *he* ſo much adviſeth and recommends, runs in the following Manner: *That the King ſhall have the Power of making War, of coining Money, of engaging in Leagues, of conferring public Rewards: that the Senate ſhall poſſeſs ſuch Rights as demand Experience and Deliberation; the framing and the executing of Laws, and the adminiſtring of public Juſtice: Laſtly, that the Populace ſhall manage ſuch Affairs, as their Knowledge chiefly directs them to; the Examination of the Revenue, the Diviſion of Lands, the Creation of Magiſtrates, the Inſpection of Buildings, Highways, Aqueducts, Corn, and other Helps and Aſſiſtances of the State.* In like manner, it would not argue any Diviſion in the Sovereignty, ſhould we, for Inſtance, ſuppoſe that the Senate had the Power of condemning, but the Prince or the People of pardoning and acquitting. For here the Prince might by his

[a] *Vid.* Liv. *Lib.* ii. *Ch.* xxiii, xxxii, lviii. *Lib.* iii. *Ch.* x, xx, xxiv. *Lib.* iv. *Ch.* i, v, lviii. *Lib.* v. *Ch.* ii, x, and in many other Places. *Diodor. Sic.* Lib. xiv. Ch. lxxiii. *Quintus Curtius*, Lib. vii. Ch. ii. *Polyb.* Lib. i. Ch. ix. [b] Hiſt. Lib iv. Ch. lxxiv. *Add.* Bodin. *De Republ.* Lib. ii Ch. i. p. 287. with the Obſervation made on that Author, by *Arniſæus, De Republ.* Lib. ii. Ch. vi. § 1, 56. [d] Annal. *Lib.* i. *Ch.* xii. [e] Lib. i. [f] Polit. *Lib.* iv. *Ch.* viii, ix.

[1] No more than, if he had the *legiſlative* Power, and all the other Parts of the Sovereign. The Abuſe is the leſs authorized here, as the Power is more limited.

[2] This proves only that the Power of the Prince will be confined, in the Exerciſe of this Part of the Sovereignty: A Limitation which our Author himſelf admits, without Prejudice to the Exiſtence of the Supreme Power. See *Ch.* vi. § 9. following.

[3] This Compariſon is very lame, for the Reaſons aſſigned in the preceding Notes.

Prerogativa

Prerogative abſolve any Perſon, againſt whom the Judges had pronounced Sentence; and, conſequently, the latter would be only an inferior Court, whoſe Deciſions muſt borrow their Force and Ratification from the Authority of the former. Whence it ſufficiently appears, that if, in any State, the Judgment of capital Cauſes belongs to the Senate, the King ſtill retaining the Right of *Grace*, or Pardon; the Senate doth really hold, by Deputation from the King, this Power of preſiding in criminal Proceſſes, and of pronouncing Sentence as the Law directs; and this as well for the Baniſhing all Partiality from the Methods of Juſtice, as to divert the *Odium* from the King: Yet ſo as that the Power of Life and Death are radically, or originally, inherent in the King's Perſon. Some would frame a Diviſion in the judiciary Power itſelf; ſo that the Prince ſhould have the Power of Life and Death over Strangers only, but the People over the Natives. But now, if the People exerciſe this Power over the Natives, only as an inferior Court, then they do not in the leaſt intrench upon the Prerogative of the Prince. On the contrary, if they hold it originally and independently, then the King will have nothing left him but an empty Title, and will only perform the Office of *Prætor peregrinus*, a Judge of foreign Cauſes. As for what they add, about dividing the Right of Coinage, it is too impertinent to deſerve a Repetition.

Arniſæus [a] is very large on this Point, and, amongſt many accurate Remarks, juſtly rejects ſome ſpurious kind of Mixtures in Government. And at laſt, the faireſt Model he could invent was, that the King ſhould have the Power of War and Peace, of levying Tribute, of Coining Money, of diſtributing publick Rewards; that the Senate ſhould be employed in judging Cauſes, and in receiving Appeals, as, likewiſe, in the Reformation of Manners by good Laws, and in exerciſing the Power of Life and Death; and laſtly, that the People ſhould be allowed the Care of the Revenue, and the Creation of Magiſtrates. Of which Model a Judgment may be formed, by what we have before obſerved.

XIV. *Grotius* himſelf [b] hath attempted ſomewhat towards dividing the Parts of the Sovereignty. Where he is ſo far in the Right, when he denies that any ſuch Partition of Power, between the Prince and the People, can be made, as that the prime Compact ſhall be thus looſely expreſſed, *If the King govern well, then the People ſhall obey him; if he govern ill, then the People ſhall compel him to his Duty:* Obſerving, that certain Bounds and Limits ought rather to be aſſigned to the Power of either Party; ſuch as may eaſily be apprehended from the Difference of Places, Perſons, and Affairs; but that the bare Good or Evil of an Action, conſiſting in the Application of fit Means to the public Safety, which often admits of very great and obſcure Debates, cannot be a proper Bottom to ground a Partition upon; in regard to that extreme Confuſion which muſt follow, whilſt the King, on the one hand, would inſiſt upon the Management of an Affair, alledging that he ordered it well; and the People, on the other hand, would challenge the Direction of it, pretending that it had been ill managed before. His other Remark is no leſs true, that for a Prince to promiſe the People by an Oath, that he will perform, in ſuch a peculiar Manner, Things which belong to the Adminiſtration of the Government, doth not argue a Partition of Power. But through all the reſt of his Diſcourſe he falls into the common Error. One Way then, by which he thinks the Sovereignty may be divided, is, when a Partition ſhall be made by expreſs Agreement. A Precedent of this kind he alledgeth from the *Roman* State in the Time of *Probus*, when the Senate confirmed the Prince's Laws, heard Appeals, created Pro-conſuls, and ſupplied the Conſuls with Lieutenants. As if any Perſon could be ignorant, how that, amongſt the Emperors, thoſe who affected to ſeem more modeſt than others, exerciſed the Sovereignty under the Maſk and Diſguiſe of the antient Commonwealth; leaving to the Senate ſome inferior and petit Affairs, ſuch as had little Influence on the main Government; but reſerving ſtrictly to themſelves the chief Force and Command, which conſiſted, for the moſt Part, in the Soldiery. Another Project of dividing the Sovereignty he expreſſeth in this Manner: *If the People, being as yet free, ſhall require thus much of him whom they chooſe to be their King, and ſhall lay it upon him after the Manner of a ſtanding Rule or Command.* Now here it is not eaſy to apprehend what kind of thing a *ſtanding Command* is, when ſuppoſed to continue after that the Party hath loſt the Power of Commanding. For every Command preſuppoſeth a compulſive Force, to be exerted ſo often as the Command ſhall be tranſgreſſed. Wherefore the People, who appoint themſelves a King on ſuch Terms, ſhall either keep this compulſive Power over him, or they ſhall not keep it. If the former, the King is only ſo in Name; the Force and Efficacy of the Government reſiding in the People: If the latter, the Command will be inſignificant [z]. He ought, therefore, to have ſaid, that a People, as yet continuing in a State of Liberty, may oblige the future King to follow certain Rules in the Diſcharge of the Government. But that ſuch a Compact doth not imply or infer a Diviſion of the ſovereign Power, we ſhall hereafter make appear. His laſt Inſtance of dividing Sovereignty is, *When, in conferring the Government, ſome Clauſe was added, importing that the King might be compelled or puniſhed* upon Default. But indeed the Sovereignty can, by no means, be ſaid here to be divided, but the People really poſſeſs it entire, only allowing the King, under a great and ſpecious Title, the Office of an extraordinary Magiſtrate; in caſe the People have a Right, on any account, to compel or to puniſh their Prince. For Puniſhment ever proceeds from [3] a Superior, conſidered in that Capacity. And as for Compulſion, this may be uſed two ways, either morally, or phyſically; that is, either by way of Authority and Command; or by way of Force and Violence. Authority over an *Equal*, as ſuch, is impoſſible. Therefore when *Grotius* argues that the People at leaſt are equal to the Prince, becauſe in ſome particu-

[a] Rel. Polit. *Lib.* I. *Ch.* vi. § 1. This Author publiſhed ſeveral Treatiſes of Politics, full of Learning, and not ill written for the Time in which he lived. He ſays the ſame Thing, in his *Doctrina Politica*, Edit. Lipſ. Lib. i. Ch. viii. p 115. This Example, beſides, does not much differ from that of *Michel Piccart*, quoted in Note 1. [b] Lib. i. Ch. iii. § 9, 17.

[1] He preſerves it as much as is neceſſary to execute that Command, and it does not follow from thence that he is only a nominal King. He remains a Sovereign with regard to every thing elſe; and by obſerving what he has promiſed he avoids all Conſtraint in every other thing.

[2] It is not inſignificant, even upon this Suppoſition. But the Command being a fundamental Law, upon the King's violating it, the People return to the natural State of Independency, as in every limited Monarchy, which our Author acknowledges.

[3] This is a falſe Suppoſition, which we ſhall refute in its Place, *Lib.* viii. *Ch.* iii.

ticular Caſes they may compel him; he muſt, at the ſame Time,[1] allow, that neither Prince nor People have Authority or Sovereignty over the other; which is repugnant to the Nature of a civil State. The other kind of Compulſion, by Arms and hoſtile Violence, takes place only between Equals, or ſuch as are not properly ſubject one to the other. And of this Compulſion muſt we underſtand the Caſe urged by *Grotius*; *That a Creditor hath naturally a Right of compelling his Debtor.* For certainly he hath no ſuch natural Right, by way of Command or Sovereignty, inherent in his Perſon; for then it muſt neceſſarily follow, that every one who commenceth a Debtor, muſt fall under *Subjection* to his Creditor. But ſtill the Creditor hath the full Privilege of compelling his Debtor to Payment, either by the Aſſiſtance of the Judge (ſuch as cannot be had between Prince and People) or elſe, if he live in a Condition of natural Liberty, by hoſtile Force. If then we would aſſign this Way of compelling to the People, we muſt withal allow, that both Prince and People live in a State of natural Freedom; that is, that the civil Government is utterly diſſolved. To conclude, we readily acknowledge the Truth of *Grotius*'s Obſervation, That *in civil Inſtitutions there is nothing abſolutely free from all Inconvenience; and that, therefore, we ought not, on account of the Inconveniences attending a divided Power, to conclude it impoſſible: Inaſmuch as every Right is to be meaſured, not by the Opinion of one or two particular Perſons, but by the Will of him from whom the Right proceeds.* But then it muſt be granted us in requital, that, if any pleaſe themſelves with framing ſuch a Partition, they will hereby conſtitute, not a regular State, but an ill-jointed and diſtempered [2] Body.

[1] This Conſequence is not juſt, as I have ſhewn above Note 1. p. 664.

[2] But (as *Mr. Hertius* remarks here) our Author has himſelf diſtinguiſhed in the following Chapter, § 14, between the *Diſeaſes* of of a State, and the *Irregularities* of a Government.

CHAP. V.

Of the different Forms of Government.

I. *The Accidents of civil States cannot conſtitute a new Species.*
II. *Irregular Forms and Syſtems of Government.*
III. *The three Forms of regular Government.*
IV. *Democracy ſeems to be the moſt antient Form.*
V. *Democracy no leſs inveſted with ſupreme Power, than Monarchy.*
VI. *Democracy, how conſtituted.*
VII. *The ordinary Requiſites of Democracy.*
VIII. *How Ariſtocracy is eſtabliſhed:*
IX. *And how Monarchy.*
X. *In Bodies politick there may be Vices of Men, and Vices of State.*
XI. *Yet theſe compoſe not a peculiar Species of Government.*
XII. *As neither do the various Accidents of Democracies and Ariſtocracies.*
XIII. *Of the mixt Government propoſed by modern Authors.*
XIV. *The Nature of irregular States.*
XV. *This Irregularity beſt illuſtrated by Examples.*
XVI. *States which admit of Provinces do not hence become neceſſarily ſyſtematical:*
XVII. *Of Syſtems occaſioned by a common Prince.*
XVIII. *Of Syſtems compoſed by League and Confederacy.*
XIX. *Of the Communication of Councils and Buſineſs in theſe united Bodies.*
XX. *Whether the greater Part ought here to conclude the leſs.*
XXI. *How theſe Syſtems are diſſolved.*
XXII. *The ſeveral Forms of Government compared.*

I. THE Sovereign Authority, beſides that it inheres in each State, as in a common or general [1] *Subject*; ſo, farther, according as it reſides either in one Perſon, or in a Council (conſiſting of ſome, or of all the Members) as in a proper or particular *Subject*, it produceth different Forms of Commonwealths. And here, e're we proceed to enquire into this Variety, we take it for granted, that we may have free leave to retain the Word *Form*, when we would expreſs that Conſtitution or Model of State, which ariſeth from the Difference of the *Subject*, in which the ſupreme Power is primarily and originally ſeated. That the actual Adminiſtration of the Government recedes, in many Caſes, from the particular Form, is a Thing vulgarly known: As in *Democracy*, for Inſtance, ſome Affairs are managed in the Way of *Monarchy*, others in the Way of [2] *Polyarchy*; according as Buſineſs is committed to the Care of one Perſon, or to ſuch a Number of Commiſſioners. And becauſe it is a Matter of great Conſequence, whether the Power any Perſon exerciſeth be his own, or whether it be another's, of which he may at any Time be deprived, holding it only by a precarious Title; therefore it is great Want of Accuracy in a certain Author to affirm, that 'when a King ſuffers himſelf to be led by the Noſe by ſome few Counſellors, who abuſe the Eaſineſs of his Temper, or a People by ſome powerful Demagogue, or when in a ruling Senate one Member leads the reſt, by his Wiſdom or Eloquence, or overawes them by his Intereſt and Strength; a *Polyarchy* is really introduced in the firſt of theſe Caſes, and a *Monarchy* in the two latter; and that in the firſt Caſe there is nothing but an empty Name, and outward Semblance of Monarchy, in the ſecond of Democracy, in the Third of Polyarchy or Ariſtocracy.' Thus, alſo, no intelligent Perſon will imagine the *Form* of a Commonwealth to be altered, upon a Change either in the Perſons, or in the Number of Miniſters; no more than he will think, that when a new Succeſſor baniſheth from his Councils and Preſence one who was chief Miniſter under the former Prince, and had the Management of all Affairs, an *Interregnum* muſt hereupon enſue. The Capacity and Inclinations of him or them, who either by their own Right, or by Delegacy from others, exerciſe the ſovereign Power, do indeed affect and vary their Adminiſtration, but do, by no means, touch the *Form* of Government. In the ſame Manner, ſuppoſing the chief Authority to be exerciſed well in one Place, and ill in another; yet a new Model of State doth, by no means, reſult from the different Exerciſe of the ſame Power. Wherefore as a Perſon in ſound Health doth not differ *in Specie* from one that is ſick, and as the unnatural Diſtortion of the Body doth not produce Men of a new kind; ſo neither do the Vices of thoſe who command, or of thoſe who obey, nor the Corruption of Laws, make the leaſt Step towards conſtituting another Species of a Commonwealth.

II. It may be uſeful farther to obſerve, that moſt Authors who have treated of civil Knowledge, have imployed themſelves in explaining the regular Forms of Government; as for the irregu-

[1] See *Grotius*, Lib. i. Ch. iii. § 7.

[2] A Prince, for Example, or a Council. See the deceaſed Mr. *Hertius*'s *Elem. Prudentiæ Civil.* Part i. § 10, 19.

lar Forms, many have not ſo much as thought of them, ſome few have very ſlightly touched upon them. Hence it came to paſs, that if they happened to meet with a *civil Body*, which did not exactly come up to one of thoſe uſually termed *ſimple* Forms, they had ſcarce any Word left to expreſs it by, beſides the Name of a *mixt* Government. But now, not to urge how very ill this *Mixture* is applied to ſome Commonwealths; it is weak to imagine, that, beſides theſe three *regular* Forms, there are none other, which may be termed *irregular*. For all Men do not build their Houſe juſt according to that Model which the Rules of Architecture preſcribe. The *Regularity* of a [1] State we conceive to conſiſt in this, that all, and each of the Members, ſeem to be governed, as it were, by one Soul; or, that the ſupreme Authority is exerciſed through all the Parts of the State by one Will, without Diviſion or Convulſion. And hence the Nature of an *irregular* State may, without much Difficulty, be collected. Farther, there are ſome political Syſtems compoſed of ſeveral perfect States in Conjunction, which with unſkilful Judges paſs for ſingle States, and theſe too may have their Uſe in our Enquiries, concerning the ſeveral Forms of Commonwealths.

III. The Forms of a regular State are three, only ariſing from the *proper* or particular *Subject*, in which the ſupreme Power reſides; which is either a ſingle Perſon, or a Council ſelect or general. For the Sovereignty is committed either to one Man, or to a Council of ſeveral Men. And this Council compoſed, either of all the Members, or of the ſmaller indeed, but the better and more ſelect Part. One Species or Form therefore is, when the Sovereignty is lodged in a Council conſiſting of all [2] the Members, and where every Member hath the Privilege of a Vote; and this is called a *Democracy*. Another is, when the Sovereignty reſides in a Council compoſed of ſelect Members, termed an *Ariſtocracy*. A third, when the Sovereignty is in the Hands of one Man, called a *Monarchy* or a Kingdom. In the firſt, the Sovereign is ſtiled a *People*; in the ſecond, *Optimates* or Senators; and a *Monarchy* in the third. *Pindar* [a] hath expreſſed all the three together:

> ——————*When Choice of Fate*
> *Puts to the Reins a ſingle Maſter's Hand;*
> *Or when th' impetuous Multitude command,*
> *Or when wiſe Patriots guard the thriving State.*

IV. In the firſt place, we will examine the Nature of a *democratical* Government; not that we think it to excel the other Forms, either in Dignity or Splendor, or in real Uſefulneſs and Advantage [3]; but becauſe, in the greateſt Part of the World, it appears to have been the moſt [4] antient; and becauſe Reaſon ſhews it to be more probable, that many Men, being in a Condition of natural Freedom and Equality, when they reſolved to join in one Body, ſhould, at firſt, be inclined to adminiſter their common Affairs by their common Judgment, and ſo to conſtitute a Democracy. Nor is it to be ſuppoſed that a Father of a Family, as yet free and independent, who, upon weighing the Inconveniences of a ſeparate Life, voluntarily joined himſelf to thoſe of his own Condition, in order to the forming a civil Community, ſhould, in a Moment, have ſo far forgot his former State, under which he diſpoſed of all Things relating to his own Safety meerly as he pleaſed, as to be willing to ſubmit himſelf immediately to a ſingle Director, with regard to the common Intereſt, with which his own private Security had a neceſſary Connexion. But at the Beginning it ſeems rather to have been thought more equitable, that what belonged to all, ought to be managed by all; till, in Progreſs of Time, moſt receded from this Model, either voluntarily or by Neceſſity; whether this Neceſſity was brought upon them by ſome of their own Members, or by Strangers. What *Plato* [b] diſcourſeth concerning the *Athenian* Commonwealth, ſeems to be of Weight on this Subject: *The Original* (ſays he) *of our Government* (under which the chief Authority was in the People, and the Magiſtracies were conferred on Perſons of the greateſt Ability and Merit) *was taken from the Equality of our Race. Other States there are, compoſed of different Blood, and of unequal Lines; the Conſequences of which are diſproportionable Sovereignty, tyrannical or oligarchical Sway. Under which Men live in ſuch a manner, as to eſteem themſelves partly Lords, and partly Slaves to each other. But we and our Countrymen, being all born Brethren of the ſame Mother, do not look upon ourſelves to ſtand under ſo hard a Relation, as that of Lords and Slaves. But the Parity of our Deſcent inclines us to keep up the like Parity by our Laws; and to yield the Precedency to nothing, but to ſuperior Virtue and Wiſdom.* Now it is manifeſt, that moſt civil Communities aroſe, at firſt, from

[a] Pyth. *Od.* ii. *v.* 157, *&c.* Ed. *Oxon.* I add theſe two Paſſages, the one of ISOCRATES, in *Panathen.* p. 259, 260. *Edit. H. Steph.* Ἐγὼ δὲ φημὶ, &c. "I allow, that, according to my Notions of Policy, there are three Kinds of Government, *Oligarchy*, *Democracy*, and *Monarchy*." The other is from SENECA, *Epiſt.* xiv. where he ſays, "That Government is ſometimes adminiſtered by the *People*, ſometimes by the *Senate*, and ſometimes by a *few*." *Interdum* POPULUS *eſt, quem timere debeamus; interdum, ſi ea Civitatis diſciplina eſt ut plurima per* SENATUM *tranſigantur, gratioſi in co viri; interdum* SINGULI *quibus poteſtas populi, & in populum data eſt.* A *Latin* Hiſtorian, a great Politician, ſays, That all Nations are governed by one of theſe three Ways. *Nam cunctas Nationes & Urbes* POPULUS, *aut* PRIMORES, *aut* SINGULI *regunt.* TACIT. *Annal.* Lib. iv. Ch. xxiii. *Edit. Rychii.* And *Quinctilian* ſays, *Partes incertas eſſe, ut quibus conſtet Republica; formas certas, ut quot ſint ſpecies Rerum publicarum quas tres accepimus, quæ* POPULI, *quæ* PAUCORUM, *quæ* UNIUS *poteſtate regerentur.* "It is uncertain of how many Parts a Commonwealth conſiſts; but we know the *Forms* of it to be certainly *Three*, *viz.* where the Government is lodged in the Hands of the *People*, or, in the Hands of a *few*, or in thoſe of a *ſingle Perſon*." *Inſtit. Orat.* Lib. v. Ch. x. p. 415. *Edit. Burman.*

[b] *In* Menexeno, *p.* 519. B.

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[1] This Regularity is a Chimera; the true Rule of Practice ought here to be that which is moſt agreeable to the End of civil Society, by ſuppoſing Men what they really are, and taking the Affairs of Life upon the ordinary Footing, according to the Experience of all Times and Places. Now if we judge of Matters by this Rule, ſo far are thoſe States (where all depends upon the Will of one Man) from being the moſt happy; that we may affirm the Subjects, under ſuch Governments, have the greateſt Reaſon to regret the Loſs of their natural Independence. To ſay, as ſome do, that this proceeds from the Fault of thoſe who adminiſter the Government, and not from the Conſtitution itſelf, is to give up the Queſtion, without removing the Difficulty, which is founded on inconteſtable Matter of Fact.

[2] That is to ſay, of all thoſe who are Maſters of Families. See Ch. ii. § 20, of this Book, and *Grotius*, Lib. i. Ch. iii. § 8. Num. 3.

[3] Philo Jud. *De Mundi Opificio*, gives this Cenſure of the Favourers of Polytheiſm; *They who are not aſhamed to transfer, from Earth to Heaven, the worſt Frame of Government, the Dominion of the Multitude.* Our Author cites this Paſſage, as if *Democracy* were there acknowledged to be the worſt Form of Government in the World. But what is ſaid in that Place is only meant of the Abuſe that crept into it whenever the Populace is at the Head of Affairs (ὀχλοκρατία) and beſides the ſame Author in another Treatiſe (*de creatione principis* towards the End) ſays in expreſs Words, that *Democracy* is the beſt and moſt lawful Form of Government. Ἐν δ' ἅπασιν ἡ εὐνομωτάτη καὶ ποιτείων ἀρίστη δημοκρατία.

[4] See what I have ſaid above, Note 2. p. 625. from whence the contrary evidently appears.

the Union of ſuch Families as were allied in Race and Blood [a]. Nor is this Judgment oppoſed by the Authority of antient Story, which, though it makes frequent mention of Kings, yet, at the ſame Time, informs us, that moſt of them were ſuch, as had rather an Influence in perſuading, than any Power of commanding. So *Juſtin* [1], in the Enterance of his Work, deſcribes that kind of Government as the moſt primitive, which *Ariſtotle* [2] ſtiles an *Heroical Kingdom*; ſuch, as is by no means inconſiſtent with a democratical State. To the ſame Purpoſe *Thucydides* [b] obſerves, that *the moſt antient Kingdoms paſſed by Inheritance, and were confined within ſettled Honours, and tied to certain Terms and Conditions.* Thus, in moſt Nations, Liberty and popular Sway were at firſt eſtabliſhed; till, by degrees, that vaſt Multitude of petit Commonwealths was reduced, chiefly by War and Violence, into ſome few great Empires. What *Ariſtotle* [c] urgeth for the Antiquity of regal Government, is as follows: *Wherefore Cities were at firſt under Kings, as the barbarous Nations are at this Day; for the Perſons who joined in forming thoſe States, were themſelves before under the ſame Government; the Sovereign Rule in Families being that which is kept up in Kingdoms.* Which laſt Words receive a fair Illuſtration from the ſmart Saying of *Lycurgus*, who, when a Perſon adviſed him to introduce a Democracy in the State, anſwered, *Do you firſt eſtabliſh a Democracy in your own Houſe* [d]. But, really, *Ariſtotle*'s Argument is not concluſive. The contrary might rather be inferred; that theſe antient Fathers of Families, having been accuſtomed before to bear Rule, ſhould be more inclined to a democratical Form, under which they might ſtill enjoy the Privilege of giving their own Judgment upon Affairs, and might bear a Part in the publick Adminiſtration. Nor do they ſettle the Point, who tell us, that 'paternal Government 'was the moſt antient amongſt Men; being at 'firſt wild and gentle, till, upon the Increaſe of Fa'milies and of Vices together, it was ſtrengthen'd 'with the Power of Life and Death. That this 'Government was continued down through ſuc'ceeding Families, in the Perſons of the Firſt'born, who, by a kind of natural Right, held 'both the ſacred Office, and the civil Authority; 'that, by this means, the Heads of Families grew 'into ſo many petit Kings; the great Multitude 'of whom, diſcovered in the Land of *Canaan* [e], 'ſeems a plain Argument in the preſent Caſe.'

But, indeed, as the Right of Primogeniture was not of ſo great Force and Efficacy, as to eſtabliſh regal Dominion amongſt Brethren without their Conſent, and to oblige them to unite their Families to that of their Elder Brothers; ſo beſides, theſe primitive Governors, whom we find dignified with the Title of Kings, were commonly no more than ſuperior Magiſtrates in popular Societies; though this Honour was moſt frequently beſtowed on the chief of the Race, when the reſpective Society was compoſed of Families, which had the ſame Original; yet ſo as that Right of Birth and Seniority was not always obſerved.

V. It ſeems needful, on the preſent Argument, to bring the Opinions advanced by *Hornius* [f] under a particular Examination. He then, in relation to Ariſtocracies and Democracies, which he compriſeth under the general Name of *Free States*, paſſeth his Judgment to this Purpoſe: *There may be ſuch an Eſtabliſhment found out, as ſhall avoid the Confuſion of the promiſcuous Multitude, and ſhall attain to a decent and agreeable Order, making Proviſion for the common Safety by Pacts and Covenants, without Subjection, and without the Loſs of that Liberty which is extinguiſhed under a Monarch's Reign.* Here we have almoſt as many Miſtakes as Words. That the Order, which may be obſerved in free States, is the only thing which ſhields off the Confuſion of the promiſcuous Multitude; that free States are held together barely by Compact and Covenant, without any Sovereign Command; that particular Perſons are not ſo ſtrictly ſubject to a popular Aſſembly, or to a Council of Senators, as to a Prince under a Monarchy; that all the Parts of Sovereignty are not ſo fully exerciſed under the former Governments, as under the latter; that the Power of Life and Death is leſs employed, with regard to private Men, by a People, than by a Prince. What he aſſerts farther, that *certain Fathers of Families, living as yet in a ſeparate Condition, learned from the neighbouring Kingdoms, what Form of Government to introduce*; is ſo far from appearing true, that, in the firſt Union of Families and Nations, moſt Communities ſeem rather to have been of the [3] popular Form; till, upon Diſcovery of the Inconveniences attending ſuch a Government, they fell, ſooner or later, under the Command of a ſingle Sovereign; ſome, by their own voluntary Act, ſome, by Force and Compulſion. No leſs vain is that Remark; *As Art endeavours to imitate Nature, but can never reach*

[a] *Iſocrates* is of the ſame Judgment, *It ſeemed unjuſt to us* (Athenians) ſays he, *that many ſhould be ruled by the Authority of a few; that thoſe who were inferior in their Fortune alone, and in no other Reſpect, ſhould be debarred from a Share in the Magiſtracies and Honours: And that, whilſt we have All the ſame Common Country, the ſame Privileges of Birth, ſome ſhould be Maſters and Proprietors of the State, others no better than Strangers and Dependents; and that, under the Pretence of Law, Perſons by Nature Members of the Commonwealth, ſhould be denied the Offices and Employments in it.* *Add* Liban. *Progym. loc. comm. contra* Tyrannum.
[b] Lib. i. Ch. xiii. p. 8. Ed. Oxon. [c] *Polit.* Lib. i. Ch. ii. [d] Plutarch *in* Lycurg. *p* 52. A. [e] *Vid* Joſh. xii. & Judg. *i.* 7. [f] *De Civitate*, Lib. iii. Ch. xi.

[1] *Principio rerum Gentium Nationumque Imperium penes erat Reges*, Lib. i. Ch. i. We find ſeveral other ſimilar Paſſages in the *Elementa Prud. Civilis*, of M. *Hertius*, Part i. § 5, 10. There is no one Fact more generally atteſted by the antient Authors, nor can any plauſible Reaſons overthrow it. Our Author, in all he ſays here, ſuppoſes, that from the Beginning civil Governments were ſuch as they are now, and formed upon the Principles of ſpeculative Policy. But this Opinion is both repugnant to Hiſtory, and to the Genius of the firſt Ages. Mr. *Locke*, in his Treatiſe of civil Government, Ch. viii. § 107, very juſtly obſerves, *That the Idea of Monarchy was the moſt ſimple, and that which moſt naturally preſented itſelf to People, whom Experience had not yet inſtructed in the different Kinds of Government that might be formed; and who were not yet reduced, by the Ambition or Inſolence of the Perſon they choſe to command them, to ſeek the Means of bridling his Power*, &c. *The firſt Men*, adds he, *had more need of Defence againſt foreign Enemies, than of domeſtic Laws.* It therefore remains certain that the moſt antient Form of Government, whether eſtabliſhed by Force, or by free Conſent, is that which moſt nearly reſembles our Monarchies. But we muſt here avoid another Extream, into which thoſe fall, who (being bred under arbitrary Sway, where Men dare not ſpeak their Minds freely) affirm, That the firſt *Kings*, ſo called, were *abſolute Monarchs*. This is what the *literary Memoirs of the Royal Academy of Inſcriptions and Belles Lettres*, Vol. VI, would perſuade us. But the contrary appears from what I have ſaid, Note 2. p. 625.
[2] In his Politicks, Book i. Ch. iv.
[3] This Suppoſition, which we have ſhewn the Falſhood of, is no Way neceſſary to refute the ridiculous Opinion of the Author here cenſured.

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to equal or to excel her; ſo in theſe artificial Forms of Government, the Nature of Kingdoms is, in ſome ſort, repreſented, as to the Influence which they have on the common Uſe and Benefit; but the inward Force, and Virtue, and Dominion, with which Monarchies are ended, being the Work of Almighty GOD, was beyond the Power of Men to produce. Of the Origin of Majeſty or Sovereignty we have already treated; and why may not this as well agree to a moral compound Perſon, as to a ſingle Man? For, ſurely, it is no Contradiction to affirm, that the Senators, under an Ariſtocracy, are all equal, as to their private and ſeparate Capacities, and yet are each of them ſubject to the Authority of the whole Council. And it requires no Depths of Parts to apprehend the Difference between all in general, and each in particular; between the Aſſembly of the People in Democracies, and private Men diſperſed according to their reſpective Habitations. Therefore it is but a trifling Argument which we find urged by this Author; *Where the Sovereignty is aſcribed to all, there either all do really poſſeſs it, or ſome few only. If all, then they will have none to be their Subjects; becauſe to command and to obey cannot belong to the ſame Perſon: If it be ſaid that the particular Men are Subjects, then all cannot be Governors; becauſe, when each ſeparate Perſon is in a Condition of obeying, the Multitude, which they compoſe, muſt likewiſe ſtand under the ſame Engagement; for Obedience is the only thing, which, in this Caſe, the private Members confer on the common Body.* Certainly, in moral compound Bodies, ſomewhat may be attributed to all in Conjunction, which we cannot aſſign either to each Member taken apart from the reſt, or to any one of thoſe Particulars; and, conſequently, the whole Society is in reality a moral Perſon diſtinct from the ſeparate Members, to which ſuch a peculiar Will, ſuch Actions, and ſuch Rights, may be appropriated, as private Men are not capable of poſſeſſing. Thoſe Scruples, likewiſe, muſt ſoon vaniſh, which are raiſed from this Conſideration, that, in popular Aſſemblies, the Majority always prevails. For this is one of the moral Affections which attends the very Eſſence of a compound Body, that the Conſent of the greater Part of thoſe, who make up the Council, ſhall be deemed the Conſent of all; in as much as no other Means can be aſſigned, by which the Wills of many natural Perſons, when they happen not exactly to conſpire, ſhould be brought to a moral Union. Wherefore it cannot be pretended, that, in ariſtocratical or democratical States, the *Subject*, in which the chief Authority reſides, is obſcure and uncertain, though it ſhould happen that thoſe individual Perſons, whoſe Voices upon one Occaſion compoſed a Majority, upon another ſhould prove to be of the weaker Side. For none of theſe Circumſtances take away that Unity of Will, which is to be attributed to the whole Body. In a Senate, if ſo many Members happen not to agree, as are required towards making a Majority, the Senate is preſumed to deſign or to declare nothing, and therefore no Step is to be made in the new Affair. Which though it often turn to the Diſadvantage of the State, yet doth not prove that the Senate is not inveſted with ſovereign Command. Beſides, that other Allegation is falſe: *True and proper Sovereignty cannot be aſcribed to a Multitude, by reaſon that the Obedience which is neceſſary upon ſuch a Suppoſition, muſt be here wanting; ſince the Multitude cannot be bound always to keep the Reſolution which they once embraced; and ſince the Obligation, riſing from their Authority, doth not affect them as taken all together in a general Body.* For as it doth not deſtroy the Sovereignty of a King, that he may, when his Pleaſure alters, revoke a former Decree, upon which Act the Obligation of the Subject to the ſaid Decree expires; ſo whatever Power the common Aſſembly may have, as to the altering of their own Decrees, yet, in the mean Time, particular Perſons are no leſs engaged by them, than they would by regal Injunctions. If not, let thoſe who maintain the contrary Opinion ſhew us, that Offenders againſt the Laws are not ſo liable to Puniſhment under free States, as they are under Monarchies [a]. It is no better than trifling to argue; that *if the Sovereignty be lodged indiviſibly in the Hands of many together, then each of theſe many muſt neceſſarily hold ſome Part of it, out of the Collection of which Parts the whole Sovereignty muſt at length be conſtituted. But, at the ſame Time, it will be, likewiſe, neceſſary, that each of theſe Parts be ſupreme; and thus in one State there will be more than one ſupreme, which is abſurd.* For in moral Conſideration there is no manner of Abſurdity in ſuppoſing, that thoſe particular Wills, which unite and conſpire to make up the Will of the Community, ſhould want ſome Power or Quality which the general Will is poſſeſſed of. So that it is no good Conſequence to ſay, the Sovereignty is the ſupreme Right; therefore each Man holds a Part of it, which Part is, likewiſe, ſupreme. We might with as much Reaſon infer, that becauſe the Votes of particular Perſons, ſeparately and ſolitarily conſidered, are ineffectual towards the enacting a Law, therefore many of them in Conjunction are ſtill unable to perform this Work. Laſtly, he adds, that *ſince in a governing Senate there is no one Member, who may not, if he offend againſt the State, be brought to due Puniſhment by his Brethren; it follows, that, in caſe all the Senators ſhould prove guilty, the Puniſhing of them would belong to the People. But, each Member being thus puniſhed and removed, the Sovereignty of the whole Council could no where ſubſiſt.* This Difficulty will admit of an eaſy Solution, if we firſt rightly explain what it is to offend againſt the State. He then is properly ſaid to be thus guilty, who commits any thing tending to the Prejudice of the Publick, contrary to the Laws and Injunctions of the Sovereign. Wherefore the whole Body of Senators cannot offend againſt the State, unleſs they either violate thoſe Laws, the Obſervation of which was made the Condition of their holding the Sovereignty; or turn profeſſed Enemies to the People under their Charge: Upon which Suppoſitions their Fate will be the ſame, as that of Kings in the like Caſes. What he farther vents in prejudice of free States is notoriouſly falſe. As that, *The Sovereignty exerciſed by a Monarch is quite a different Thing from that which appears in free Governments, tho' their Effects may be alike. Becauſe a Monarch*, beſides that perſonal Dignity and Splendor, of which no Man is capable in a Commonwealth, *is endued with Majeſty, which free States may not aſſume.* But now we look on it as a certain Truth, that GOD may with

[a] *Add.* Liv. Lib. ii. Ch. iii.

equal

equal Juſtice, be ſtyl'd the Author of Monarchies and of free Commonwealths; and the former are no leſs produced by Covenants, than the latter; from which Covenants the Sovereignty reſults in both Caſes; the immediate Cauſe of Obedience being in the People: That a Subject conſider'd under that Capacity is obliged to the ſame Duties in a Commonwealth, and in a Kingdom; that his Obedience is no leſs ſtrictly required, and his Subjection is in no leſs Degree, under the one Form, than under the other; and that both Governments have the ſame Right of puniſhing Criminals. For who will believe, upon the bare Word of this Author, *that in a Kingdom the Puniſhment of Offenders is grounded on a Right over the Lives of the Subjects, which is wanting in free States*; and that therefore *under the latter, the Tranſgreſſors of the Laws are puniſh'd as Enemies*; or only by the Right of War?

VI. We may now enquire how a *Democracy* is erected, and what this Form of Government hath in it peculiar from others. When therefore a Number of free Perſons aſſemble together, in order to enter upon a Covenant about uniting themſelves in a civil Body, this preparative Aſſembly hath already ſome Appearance of a Democracy; properly in this Reſpect, that every Man hath the Privilege freely to deliver his Opinion concerning the common Affairs. Yet he who diſſents from the Vote of the Majority, ſhall not in the leaſt be obliged by what they determine, till ſuch time as, by means of a ſecond Covenant, a popular Form ſhall be actually confirm'd and eſtabliſh'd. Mr. *Hobbes* [a], for want of diſtinguiſhing theſe two Covenants, hath handled this Subject with great Confuſion. For we have formerly proved [b], that no Man can be obliged by the Plurality of Votes [1], before he hath given his Conſent to ſuch a Form of publick Adminiſtration. Therefore what he aſſerts is falſe, that, *by their voluntary Aſſembling themſelves together, we are to ſuppoſe that they ſtand obliged to whatever the major Part ſhall reſolve.* What he farther delivers, may, in the following manner, be more clearly explained. When many Men, upon a general Meeting, oblige themſelves by Compact to unite their Strength and Wealth; either in this very Meeting a Decree is paſs'd, for the introducing ſome particular Form of Government, or not. In Caſe no ſuch Decree about the Government be made, nor the Time and Place aſſign'd for the holding another Aſſembly, then the preſent Meeting is preſum'd to be void, and each Perſon continues in his natural Condition of Liberty as before. For a Number of Men cannot become one Body, unleſs they have agreed upon a conſtant Method of tranſacting publick Buſineſs. If they break up without ſettling this Point, yet prefix a Time and Place for conſidering and debating the Matter farther, in order to a final Reſolution; we have then no more than the Rudiments and firſt Principles of a State, which cannot be properly ſtyl'd a Democracy. For we muſt not preſently make uſe of this Name, when every Man hath a Right to give his Opinion, or when the Time and Place are pitch'd upon for another Congreſs; in as much as this Way of Proceeding is common to all kinds of Societies and Conventions at their firſt Riſe, and before they are fully eſtabliſh'd: But we are then to call it a democratical Government, when the Right of ſettling Matters, relating to the publick Safety, is conferr'd for ever on a general Aſſembly.

VII. Towards compleating the Nature of a democratical State, theſe Conditions ſeem eſpecially neceſſary. Firſt, that a certain Time and Place be aſſign'd for holding thoſe Aſſemblies, in which the common Affairs are to be debated and determined. For, as on the one ſide, the private Buſineſs of particular Men will not ſuffer them always to attend the Publick, ſo, on the other ſide, if nothing be agreed upon as to the Time and Place; thoſe who belong to the Society may either meet at different Times and Places, by which means Factions are neceſſarily introduced; or elſe not aſſemble at all, in which Caſe they will not be a *People*, but a ſcatter'd Multitude, to whom no Action, and no Right can be attributed as to one compound Perſon [2]. Secondly, that the Vote of the Majority ſhall paſs for the Vote of the whole Body. Since, as the World goes, it ſo very rarely happens, that a great Multitude of Men agree in their Judgments as to the ſame Matter. In the laſt place; ſince ſome Affairs of the Commonwealth occur every Day, and are of inferior Moment; others are leſs frequent, and affect the main Intereſt; and ſince it cannot be convenient, for the whole People to meet about ſettling the former Concerns, either in daily Councils, or at Intervals of ſo little Diſtance, as to let nothing of this Nature eſcape their Examination; it is therefore neceſſary to appoint certain Magiſtrates, as Subſtitutes or Delegates, who, by the Authority of the whole People, may diſpatch Buſineſs of every Day's Occurrence; may with mature Diligence ſearch into more important Affairs, and, in caſe any thing happens of greater Conſequence, may report it to the popular Aſſembly; and may, likewiſe, ſee the Decrees of the People put in Execution: For a large Body of Men is almoſt utterly uſeleſs in reſpect of this laſt Service, and of many others.

VIII. An *Ariſtocracy* is then conſtituted, when the Aſſembly, who, by means of their firſt Covenant united themſelves, as it were, into the Rudiments of a State, do, by common Decree, entruſt the ſupreme Adminiſtration in the Hands of a Council, conſiſting of ſome ſelect Members. Theſe Members, when they have been de-

[a] De Cive, *Chap.* vii. *Sect.* 5. [b] Chap. ii. Sect. 7.

[1] Mr. *Hertius* pretends that our Author contradicts himſelf here, as if he had laid it down, That every one was bound to ſubmit to a Plurality of Voices, even before a *Democratical Government* had been eſtabliſh'd by common Conſent. But he diſtinguiſhes the different Caſes, according to which we are ſometimes oblig'd not to aſſent to what has been reſolv'd by a Majority, and ſometimes to agree to it. There is therefore nothing here inconſiſtent: The Author only ſuppoſes, That we are not conſtantly or neceſſarily under ſuch an Obligation.

[2] *Thucydides* (Lib. ii. Ch. xxii. Ed. *Oxon.* in the Beginning) reports, 'That *Pericles*, once finding the *Athenians* to be of a wrong Opinion about the Method to be uſed in a War, would neither call an Aſſembly of the People, nor hold a ſelect Council; leſt ſome very falſe Step ſhould be taken, whilſt their Debates would be guided rather by Paſſion than by Reaſon.' The Republic of *Athens* is, as every one knows, one of the moſt antient and illuſtrious Examples of *Democratical Government*.

clared

clared and design'd by the said Assembly, either by their [1] Names, or by some other Mark of Distinction, and have, also, accepted of their Designation, are then supposed to enter upon the sovereign Command. And here we may observe, that Mr *Hobbes* [2] is mistaken, when he draws the Origin of Aristocracy from Democracy, if his Meaning be, that all Governments of the former kind were Changes from the latter, which are supposed to have been before compleatly establish'd. For Experience proves, and Reason does not deny, that Men might pass [3] on from the first preparatory Covenant, either to Aristocracy or to Monarchy, without taking Democracy in their Way. Besides, we have before made it appear [4], that Mr. *Hobbes* doth but play with an Argument, when he tells us, 'That no Covenant can be transacted between the Senators and People, because the Government, being once conferr'd on the former, the latter no longer exists after the manner of one Person.' For to make Men capable of sustaining Obligations towards others, 'tis sufficient that they still continue natural Persons, tho' the moral Personality, which they once bore, may be expired. We may add, tho' the People, upon transferring the Sovereignty from themselves, do not henceforth exist as one compleat Person, opposed to their newly received Head; yet this doth not dissolve them into a loose Multitude; in as much as being join'd to their Head, the Senate, they still constitute one Person. Farther, what he infers in another Place [5] is false; that *As the People under a Democracy, so the Court of Senators under an Aristocracy, are free from all manner of Obligation.* For should we be never so willing to grant the Antecedent [6], upon Supposition that the Respect, which all in general bear to each in particular, may perhaps seem insufficient to found a mutual Obligation between them; yet it cannot hence be concluded, that neither is there any mutual Obligation betwixt Senators and People, as 'twould be no Consequence to say, I do not any Way stand obliged to myself, whilst I manage my own Affairs in Person; therefore, if I transfer the Care of them on another, he, likewise, shall be exempt from all Obligation. One thing this Author rightly observes [7], that under an aristocratical, as well as under a democratical Form, unless certain Times and Places are appointed for the Senators to meet, there will be no longer any such Thing as a *Court* or a compound Person, but a disorderly independent Multitude, without Authority or Rule. In as much as the Wills of the particular Members, from the Combination of which we apprehend the Will of the Court to spring, cannot be known otherwise than by their assembling together for this Purpose. For to take the Senators Votes, by a distant Scrutiny sent about in Writing, is a Method full of Inconvenience. Farther, it is no less necessary in an Aristocracy than in a Democracy, that the Times of meeting in a Council be not fixt too far asunder, unless the Exercise of the sovereign Power, at least, with regard to Business of daily Occurrence, be, in the mean time, entrusted with some one Magistrate, or with Commissioners not many in Number.

IX. Lastly, A *Monarchy* is settled, when the sovereign Authority is conferr'd upon one Man. And that this is done by means of a Covenant intervening, we have already sufficiently demonstrated against the Opinion of Mr. *Hobbes* [8]: Before we proceed farther, we cannot but take under Examination the pestilent Notion of a certain anonymous [9] *Dutch* Author, in his *Political Balance*, which runs in the following manner: 'Since the Act of conferring the sovereign Power is always design'd for the more convenient 'Prevention and Removal of Evils, whether proceeding from inward or from outward Causes; 'it cannot be presumed that a democratical Society should ever have devolv'd this Authority 'upon one Man and his Heirs, by a perpetual 'Succession. For, in as much as their Hopes 'of a more commodious Protection under a single Government, were grounded purely on the 'Virtues which appear'd at first in the Person 'elected; and since no one can be ignorant, 'that all Men are changeable and mortal, and 'that, in a short time, either Age will render 'them unfit for Government, or, if they die 'sooner, they will leave either no Issue, or such 'as must be young and unexperienced; or that, 'should they happen to leave Children grown to 'mature Years, yet these may either not be more 'able to rule than others, by any natural Capacity; or may want Will and Inclination to defend their Charge; we must therefore by no 'means suppose that a popular Society ever intended to debar themselves of the Privilege of 'choosing a better Governor, in the room of 'one who is either weak, or wicked. But that 'when Persons had thus got the Sovereignty into their Hands, it was easy for them, by drawing to their Assistance the greatest Part of the 'People, especially the Soldiery, so to confirm 'their Power to themselves and their Posterity, 'as to be able ever to hold the Command even 'against the Will of the Subject.' To which we reply, if it ever enter'd into the Thoughts of a Society, to confer the chief Rule on a Person under this Condition, that whensoever the People should vote his Government not so effectual towards procuring the common Safety, as their democratical State was before, he should be depriv'd of his Office, they did not, by such an Act as this, constitute a Monarch, but only an extraordinary Magistrate, who was to depend upon the Breath of the Multitude, and therefore

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1 As at *Venice*, where all the *Patricians*, as soon as they have attained the Age of Twenty, are admitted into the *Great-Council*, having first given Proofs of their Nobility. CONTAREN. *De Repub. Venet*, Lib. i. Pag. 105, *& seq. Edit. Elzevir.* 1628. See the *Elementa Prud. Civil* of the deceased *M. Hertius*, Part i. Sect. 10. §. 16.

2 *Ubi supra*, § 8.

3 But if we ask which is the most antient of these two Forms of Government, after Monarchy; it appears natural that those who dislike this last should give the Preference to *Democracy*, which establishes an Equality between all the Members of the State. For it seems likely, That either the Inconveniencies of tumultuous and popular Assemblies, or the Credit and Artifice of powerful Citizens first gave rise to *Aristocracy*. Our Author follows a quite opposite System.

4 C. ii. § 12. 5 The Fifth Section of this Chapter. 6 C. ii. § 9, *&c.* 7 § 9. 8 § 10.

9 I do not know this Book, and by the Manner in which our Author expresses himself here, it seems to be wrote in *Flemish*. I have never found it quoted, as far as I can remember, by any Writer who has treated of these Subjects; tho' some of them have spared no Pains to give us a Catalogue of all those Authors who have wrote against the Power of Kings.

Will

was not inveſted with the ſupreme Authority. Beſides, ſince 'tis evident, how little a State is a Gainer by in the frequent Changes in the Throne, other *Men* rather than other *Manners* ſtill ſucceeding; and how great a Blow it muſt be to the Publick to force a Prince from his Command, who hath had Opportunity, in his publick Adminiſtration, to ſtrengthen his private Intereſt; it is but a fair and eaſy Preſumption, that a People ſhould be willing to truſt their Fortune once for all, by fixing the Government irrevocably in a King: the Evils which naturally flow'd from their former uncertain, unſettled Condition, being much more to be dreaded, than any which a degenerate Monarch might create. Eſpecially, if we conſider how far the exorbitant Inclinations of ſuch a Prince may be limited and retrench'd by fundamental Laws. And laſtly, 'tis by no Means allowable to revoke all ſuch Acts, the Iſſue of which doth not exactly anſwer our Expectation: Since human Affairs muſt be always liable to Accidents, and ſince we can eſtabliſh nothing, but what will be attended, at leaſt, with ſome Inconveniencies [a].

A *Monarchy* differs from the two former Species of Government in this reſpect [b], that under them, before any Matter can be debated or determin'd, that is, before Authority can be actually exercis'd, 'tis neceſſary that certain Times and Places be appointed for this Purpoſe: Whereas, in a *Monarchy* (at leaſt if it be ſuch as we term *abſolute*) Deliberations may be held, and Reſolutions taken, at all Places and Times [c]. For a People, or a Senate, in as much as they do not compoſe one natural Body, muſt wait an Opportunity of meeting together. But a *Monarch*, who is but one Perſon in natural, as well as in moral Account, is always furniſh'd with an immediate Power of exerciſing his ſovereign Command, through all Inſtances of Government. It is, likewiſe, true what Mr. *Hobbes* [d] obſerves on this Head, that in a People, or in a Court of Senators, in Caſe any Decree paſs which is contrary to the Law of Nature, the State itſelf, or the *moral* Perſon, is not affected with the Guilt, but thoſe Members only whoſe Votes concurr'd in the Reſolution. For *Sin* regards only the natural or expreſs Will, not the moral or political Will, which is purely artificial. Otherwiſe they, alſo, who diſliked the Proceeding, would be included in the Crime [e]. But, in a Monarchy, if the Prince decree any thing which the Law of Nature forbids, the Prince himſelf is the Sinner; becauſe, in his Perſon, the civil or political Will is the very ſame with the natural.

X. To theſe regular Forms of Government, it hath been the Cuſtom, with moſt Authors, to add certain others, which they term *vicious*, *diſtemper'd*, or *corrupt*. Now here it is certain, that in many Commonwealths, no leſs than in particular Men, we may obſerve a very plentiful Field of Corruption and Diſeaſes; ſo that it may be look'd on as ſome kind of Perfection to have the the feweſt Failings. Of thoſe Diſeaſes, which infect civil Societies, ſome we ſee, take their Riſe from the Wickedneſs of particular Perſons, others from ſome Defect in the publick Conſtitution. The former we may ſtile the *Vices of Men*, the latter *the Vices of the State*. It may be proper to touch on ſome Inſtances of each Kind, for Illuſtration and Diſtinction. In a Monarchy then, *the Vices of Men*, or perſonal Faults, are as follow; if he, whom either the Chance of Blood, or the unhappy Suffrage of the People, hath advanced to the Throne, be deſtitute of the Arts of Government, and very little or not all affected with any Care or Concern for the common Intereſt, which he proſtitutes to the Ambition, or to the Avarice, of bad Miniſters; if he render himſelf terrible by Paſſion or Cruelty, forgetting that he is a *Man* himſelf, or that he governs *Men*: if he takes a Delight in expoſing the Commonwealth to unneceſſary Hazard or Danger; if he ſquanders away what hath been gather'd to defray the Expence of the Publick, either in Luxury, or in unadviſed Grants and Bounties [f]; if he heaps up Money beyond the Bounds of Reaſon, firſt ſqueez'd out of the Subject; if he be notoriouſly abuſive or unjuſt [g]; or guilty of any other Practice, which enters into the Character of a bad Prince [h]. The *Vices of Men* in an Ariſtocracy are: if, by Corruption and baſe Acts, Perſons of no Honeſty, or of no Ability, find an eaſy Admiſſion into the Senate, whilſt true Merit is excluded; if the Senators break into Parties and Factions among themſelves; if they make it their Endeavour to enſlave the Commonalty to the Service of their private Intereſt, and to increaſe their own Eſtates at the Expence of the Publick. In a Democracy, perſonal Faults are ſuch as theſe; if Men, who really want Judgment, turbulently and importunately maintain their own Opinions; if extraordinary Virtue, yet ſuch as is not likely to prove too hard a Match for the Commonwealth, be oppreſs'd and borne down by Envy; if, through a Lightneſs and Inconſtancy of Humour, Laws are raſhly made, and as raſhly repeal'd; and what was embraced but now with Applauſe, is ſoon after diſliked and rejected without Reaſon; and if ſordid and worthleſs Perſons are entruſted with the Management of Affairs [i]. Laſtly, ſuch *Vices of Men*

[a] *Add.* Grot. *Lib.* i. *Ch.* iii. *Sect.* 8. *Note* 1. [b] *Vide* Hobbes, *De Cive*, Chap. vii. Sect. 13. [c] *Ibid.* Sect. 14.

[d] *Herodian*, Lib. i. Chap. xiv. Page 13. *Ed. Oxon.* Ἐκεῖ τε ἡ Ῥώμη, ὅπου ποτ' ἂν ὁ βασιλεὺς ᾖ. *Where the* Emperor *is, there* Rome *is.* [e] See *Luke* xxiii. 51. [f] *Drepan.* Paneg. upon *Theodoſius*, Chap. xxvii. Note 1. Ed. Cellar. *'Tis the laſt Defence of wicked Princes, to plunder ſome, that they may be bountiful to others.*

[g] 'Tis remarkable what *Philoſtratus* reports (*De Vit. Apollon.* Lib. iii. Ch. xxx. in the Beginning) of the old *Indians*, that they allow no Manner of Honour or Privilege to the Heirs of the Crown; *That neglectful Treatment may be a Leſſon to them againſt unreaſonable Pride.* [h] Such as *Claudian* ſets down, *De Bello* Gildon. *Ver.* 157, &c.

——Quodcunque profunda
Traxit avaritia, luxu pejore refundit:
Inſtat terribilis vivis, morientibus hæres,
Virginibus raptor, thalamis obſcœnus adulter.
Nulla quies: oritur præda ceſſante libido;
Divitibuſque dies, & nox metuenda maritis.

Thoſe Heaps, which boundleſs Avarice ſupply,
Vainly he ſpends in viler Luxury;
Tyrant to all that live, and Heir to all that dye.
Alike the Nymphs and injur'd Matrons move,
Or Brutal Rape, or foul Adult'rous Love.
Sin never ſleeps; new Spoils, new Luſts invite:
The Wealthy fear the Day, the Married dread the Night.

Themiſt. Orat. x. *De Pace ad* Valent. Imper. *He is but a lame Prince or Legiſlator, who is fit for the Service of War, but unſkilful in preſerving Peace.* [i] In *Plutarch*, Dion. Pag. 978. E. *Popular Ambition* is term'd *a wild Diſtemper, not inferior to Tyranny itſelf.*

as may affect any Species of Government, are: If the Persons on whom the chief Administration lies, perform their Office negligently or dishonestly; and, on the other Hand, if the Subjects, who ought to rest contented with the Glory of obeying, grow refractory, and aspire to Command [a].

The *Vices* or Faults *of a State*, in general, are; when the Laws and Institutions are not accommodated to the Nature of the People, or of the Place; or when they are so framed, as to breed inward Distractions, or to provoke the just Hatred of Forcigners; or when they render the Subjects incapable of performing such Service as is necessary for the Preservation of the Commonwealth: As suppose the Constitution be such, that Men, whilst they comply with it, cannot avoid sinking into effeminate Weakness; or, on the other hand, cannot bear the easy unactive Condition of Peace [1]; or lastly, when they contradict some of the principal Maxims of civil Doctrine; and the Mischief will still be the greater, if these Irregularities happen to wear the Disguise of Religion [b].

XI. Though a sound and a distemper'd Commonwealth are vastly different from each other, yet we are not, on this Account, to multiply the *Forms* of Government, and to oppose one or two *vicious* Forms to each of those which we term good and regular. For these *Vices* or Defects do neither change the Nature of the Authority itself, nor the proper Subject in which it resides. And thus far Mr. *Hobbes* [c] is in the right, when he denies, that *Anarchy* opposed to *Democracy*, *Oligarchy* to *Aristocracy*, *Tyranny* to *Monarchy*, are three other kinds of Commonwealths [2]. *I think* (says he) *no Man believes that Want of Government is any new kind of Government.* But what he farther observes [3], is not universally true; 'That *Anarchy*, *Oligarchy*, 'and *Tyranny*, are three Names impos'd by 'those who either misliked the Government, or 'the Governors. It being usual with Men to 'signify by Names, not the Things only, but 'at the same Time their own Affections, as their 'Love, Hatred, or Anger, their Contempt, or 'Esteem.' For, as it happens in other Matters, that one Man loves what another violently abhors, so the same Form of Government meets with the Approbation of some, and with the Aversion of others. And this not only because some perhaps reap a particular Advantage from such, or such a Species of Commonwealth; but, likewise, on Account of peculiar Tempers and Inclinations [d]. Men of haughty Spirits, and who dislike the Equality of a popular State, when they see all Men without Distinction, giving their Votes in publick Business, of whom the inferior Commonalty always make up the greater Number, call this an *Ochlocracy*, or a State where the base Rabble sit at the Helm, and where no Prerogative is allow'd to such extraordinary Merits, as they look on themselves to be possess'd of. And yet this Name, as full of Contempt as it is, might, with Justice, be applied to such a Government as we read of amongst the *Ephesians* of old: Who, when they expell'd *Hemodorus* out of the City, gave this Reason for their Proceeding; *Let no Man amongst us excell his Neighbour; if he doth, let him find out another Seat, amongst another People.* And whom *Heraclitus*, for this Judgment, declared to be all worthy of Death [e]. Again, if any Person is discontented that he hath not a Place in the Senate, and, at the same time, thinks himself not in the least inferior to many of that Order; Envy and Contempt together prompt him to give them the Name of οἱ ὀλίγοι, *the Few*; that is, some inconsiderable Mortals, who, having in no respect the Advantage of those about them, do yet exercise Authority over their Equals or their Betters. And a Man under this Chagrin hath commonly in his Mouth the Complaint which *Ajax* makes in the Poet [f]:

——— ἀ γὰρ ἔτ' ἐσθλὸς ἔχει γέρας, &c.

Merit no longer finds a just Reward:
Folly's a Favourite, and Vice prefer'd.

People of a more lofty Genius, and those, on the contrary, who are more mild and tractable, both join in giving the Title of *Lords* and *Masters* to foreign Princes, who govern with a stricter Hand: Whereas 'tis well known, that when a Father treats a stubborn Child with Severity, and one that is more submissive with Gentleness and Kindness, in both Instances he exerciseth the very same paternal Power. The like may be affirm'd of the Name of *Tyrant*, which is now attended with an indelible Mark of Hatred and Detestation, from the Custom of the *Grecians*, who thought the chief Happiness of the States to consist in a popular Liberty. *Lucian* [g] himself passeth this Censure upon them: *In general*, says he, *People, not considering whether the Person who bears Rule be just or unjust, have an Abhorrence to the bare Name of Tyranny.* Many of their Authors apply the same Word to any kind of Government in the Hands of a single Person. Thus *Æschines* [h] particularly says, *There are three political Forms in use in the World, Tyranny, Oligarchy, and Democracy* [i]. Hence 'tis worthy our Remark what *Mnemon* [k], in *Photius*, reports of *Dionysius*, the Fourth *Tyrant of Heraclea*; *Having*

[a] *Add.* Hobbes *Leviath.* Ch. xxix. about the End, where he discourseth ingeniously on some Diseases of the State.

[b] We have a very ancient Example of this in the Kings of *Meroe*, an *Island* of the *Nile* in *Ethiopia*. The Priests of this Island, whenever they thought proper, sent Word to the King that he must die, and then they put another in his Place. At last there was a King call'd *Argamenes*, who, not liking this Treatment, took a right Method to abolish it. Attended with a good Guard, he one Day ascended to the Temple of these Priests, which was situated on a Rock, and caus'd them all to be put to the Sword, Diodor. Sicul. Lib. ii. Chap. vi. Strabo. *Geograph.* Lib. xvii. Pag. 1178, Ed. *Amst.* When a *Christian* Prince, absolute as he is, at present acknowledges a foreign Ecclesiastic Power, which assumes a Right of deposing Princes, and absolving Princes from their Oath of Allegiance, how can he believe himself much safer than the Kings of *Meroe*?

[c] *De Cive*, Chap. vii. Sect. 2.

[d] So that we cannot universally allow that of *Lysias*, *De Populari Statu*, Orat. xxiv. *No Man is more inclined by Nature either to a Popular, or to an Aristocratical State; but every one endeavours to establish that Form of Government, which tends most to his particular Advantage.* With whom *Isocrates*, *De Pace*, Pag. 320, joins his Opinion: *No Man hath a natural Affection for any of these States; but all love that best, in which they themselves meet with the greatest Honour and Esteem.*

[e] In *Cicero*, Tusc. Quæst. *Lib.* v. *Ch.* xxxvi. *Diog. Laert.* Lib. ix. in *Heraclit.* Sect. 2. *Strabo*, Lib. xiv. Pag. 441.

[f] *Quint.* Calaber. *Lib.* v.

[g] In *Phalarid.* i. *Pag.* 735. *Tom.* I. Ed. *Amst.*

[h] *Contra* Ctesiphont.

[i] *Add.* Corn. Nep. *Miltiad.* Chap. viii. Note 3.

[k] Of the Tyrants of *Heraclea*, Chap. v.

[1] These Instances are taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* Lib. ii. Ch. viii. Sect. 10.

[2] See *Hobbes*'s *Leviath.* Book ii. Chap. xix.

[3] De Cive, *ubi supra.*

says

ſays he, *arrived to a high Pitch of Glory, he diſdain'd the Name of* Tyrant, *and aſſumed that of* King; the latter being leſs odious and more honourable. Yet there is no one who doth not apprehend, that theſe invidious Titles are ſometimes affixed with ſufficient Juſtice, to diſtinguiſh the Government of bad Princes or Senators from that of good, the Fury of a turbulent and inconſtant Multitude, from the wiſe Adminiſtration of a modeſt People. *Ariſtotle's* Deciſion of this Point differs little from what hath been here eſtabliſh'd; who terms *Tyranny*, *Oligarchy*, and *Anarchy* (for, as to this latter Word, he uſeth the general Name of *Polity* for a ſound popular Government) παρεκβάσεις *Deviations* or Degeneracies from a Kingdom, an Ariſtocracy and a Democracy [a]. And who will pretend that a bare *Deviation* is ſufficient to conſtitute a new *Species?* As for that Latitude of which the Word Εἶδος or *Species* is capable, we think it not conſiderable enough to afford any juſt Matter of Diſpute [1].

XII. But when we meet with ſuch a Government, as we can neither bring under any of thoſe Forms, which are ſound and regular, nor yet explain how it differs from them, by the bare Notion of a Diſeaſe or Deviation, then the Learned are put upon a more laborious Enquiry. Moſt Authors judge it the ſhorteſt Way of getting over this Difficulty, to call ſuch Governments *mixt* States; as if they were the Reſult of the more regular Forms, allay'd and blended together. *Ariſtotle* is called in by many to countenance this Project; and therefore it may be worth our while to examine his Opinion in the Caſe. Firſt then, as for what he delivers, in the Fourth Book of his *Politicks* [b], concerning the ſeveral Kinds of Democracy and Ariſtocracy, it bears no Reſemblance to the Mixture propoſed by our modern Deſigners. The chief Thing he there inſiſts on, is, the reckoning up of certain Conditions and Qualities, to be found in thoſe who are to be admitted into the popular Aſſembly, or into the ruling Senate. By which means neither is the Sovereignty itſelf any Way varied, nor are the Parts of it torn and wreſted from each other, nor the State rent into two or more diſtinct Bodies; but the Forms of Government which he there mentions, are only hereby ſlightly diverſified, according to their ſeveral *Accidents*, or circumſtantial Differences. Thus, although in the Definition of a Democracy, the chief Authority ſhould be laid to reſide in a general Council, or a Council made up of *all* the Members, and, at the ſame time, though it be true, that Women and Children have as much Intereſt as others in the common Welfare; yet who will maintain that a new Form of Government is eſtabliſh'd, when the Women, the Children, and Servants, are excluded from the publick Debates? Tho', in our Judgment, 'tis ſufficient for the conſtituting a Democracy, if thoſe Perſons are allowed the Privilege of Votes, who, by uniting together, firſt compoſed the State, and after them their Succeſſors, to whom their Places and Rights properly deſcended. But now it is manifeſt, that civil States were originally compoſed by Fathers of Families, who held the interior Train beforemention'd, under their domeſtical Sway, and certainly did not intend to relinquiſh all Authority over them, or to ſet them on the Level with themſelves. It was neceſſary therefore, that Perſons who were thus in Subjection, ſhould be debarr'd from giving their Suffrage with their Lords. After the Democracy was once ſettled, 'twas in the Power of the Members to receive others [2] into the State, or not; to give them a full, or imperfect Right; to let them have the ſame Share with themſelves in the Adminiſtration, or utterly to exclude them from it. Whence it may happen, that in free Governments many ſhall want the Privilege of a Voice, whilſt yet the popular Eſtabliſhment continues as perfect as ever. On the other hand, 'tis poſſible indeed, that a State, at firſt democratical, may, by receiving large Additions, and by ſhutting out all theſe new Comers from their Honours and their Councils, at length commence an Ariſtocracy. In the ſame manner, the Species of ariſtocratical Government will not be multiplied, though, in one Place, Virtue and Merit ſhould be a ſufficient Qualification for a Senator, in another, the Eſtate and Family ſhould be, likewiſe, [3] conſider'd. No more could it be ſaid, that there were ſo many ſeveral diſtinct Forms of Democracy; if, under one State, every free Deniſon had a Vote in the Aſſembly; under another, none but Men of ſuch and ſuch [4] Fortunes were admitted; under a third ſome particular Profeſſion rendered Perſons incapable of this Honour. Much leſs do any new Forms or Species (properly ſo call'd) ariſe from the different Laws of Democracies, relating to the Election of Magiſtrates; whilſt, in ſome Places, for Inſtance, all Perſons promiſcuouſly have a Right to bear theſe Employments; in others again, an Eſtate, to ſuch a Value, is made a neceſſary Condition: As ſuppoſe, under one Government, the Rich were allowed to abſent themſelves from the publick Councils without Cenſure, the Poor not; or *vice verſâ*. And indeed this whole Matter is plain beyond Diſpute. What Judgment we ought to paſs on the Mixtures ſuppoſed to be in the Commonwealths of *Sparta* and *Crete*, as deſcribed by *Ariſtotle*, we ſhall elſewhere [5] diſcuſs. The *Athe-*

[a] *Vid.* Polit. *Lib.* iii. Chap. vii, viii. [b] Chap. iii. *&c.*

[1] *Add.* Salluſt. *Philoſoph. de Diis & Mundo*, Ch. xi. and to the ſame Purpoſe, *Themiſtius*, Orat. xvi. Pag 336. *Edit. Petav.* Who then will be ſo bold as to maintain, that the Corruption of a *State* is ſufficient to conſtitute a new Form of *Government?* See, likewiſe, what Mr. *Perizonius* ſays concerning ſome of *Ariſtotle's* Terms, in his fourth Note on *Ælian. Var. Hiſt.* Lib. ii. Chap. xx.

[2] See *Lib.* iii. *Chap.* iii, § 9, 10, preceding.

[3] See above, § 8. *Not.* 1. In the Republic of *Carthage*, they regarded Riches as well as Merit, for this Reaſon; That thoſe who are not eaſy in their Fortune, can neither have Leiſure, nor Capacity, to mind publick Affairs: Οὐ γὰρ μοῦσν ἐυσ'χολον, &c. ARISTOT. *Politic.* Lib. ii. Chap. ix. Pag. 222. *Edit. Heinſ.* See other Examples of this in Mr. HERTIUS's *Elementa Prud. Civil.* Part I. Sect. 10. § 15.

[4] It is thus in the *Ommelands*, which make a Part of the Province of *Groningen*, every Man who poſſeſſes thirty Acres of Ground, and pays a Tax proportion'd to that Quantity, has a deliberative Voice in the Aſſembly of the States.

[5] I do not know that our Author has done this any where. He probably hints here at a Treatiſe he deſign'd (as he informs us himſelf in his Preface to the Second Edition) to which he intended to give the Title of *De Politica Græcanica*, and where he propos'd to have examin'd the Political Principles of the antient *Greek* Authors, eſpecially *Plato* and *Ariſtotle*. He there ſays, that more important Affairs have hinder'd him from beginning this Work, and I have never ſince heard, that he has executed his Project. With regard to the ancient Republics of *Sparta* and *Crete*, See M. HERTIUS's *Elementa Prud. Civil.* Part I. Sect. 6. § 13.

nian State, which *Ariſtotle* [a] and *Iſocrates* [b] deſcribe and commend, was, in all reſpects, truly *popular*. *Polybius*'s Opinion [c] concerning the mixt Government in the *Roman* Commonwealth comes under our Examination in another [x] Place.

XIII. As for the Moderns, ſome of them have invented many kinds of mixt States; yet ſo as that, upon the whole, rejecting the greateſt Part of them as inconvenient, they applaud two Ways, as eſpecially proper and uſeful. The firſt is, when the Parts of the Sovereignty reſide ſeparately and independently in different Perſons, or Bodies of the ſame Commonwealth, ſo that each Perſon or Body hold their reſpective Parts by their own proper Right, and adminiſter it according to their own Judgment, whilſt, in reſpect of the other Parts, they are altogether in the Nature of Subjects. Much after this Manner was the Diſpoſal of the Kingdom of *Numidia* by *Scipio*, after *Maſiniſſa*'s Death; his three legitimate Sons being all allowed to bear the Regal Title and Dignity; but with this Difference, that the elder Brother *Micipſa* ſhould keep his Court at *Cirtha*, the ordinary Seat of the Kings; that *Guluſſa*, the next to him, ſhould have the chief Command of War and Peace; and that the youngeſt, *Manaſtabales*, ſhould preſide in judicial Affairs [d]. The other Way which they propoſe is, when the ſovereign Authority inheres indiviſibly in many together, yet ſo as that neither the moſt conſiderable Majority, without ſome few diſſenting Members, nor indeed all the reſt, when any one of the Number ſtands out, can act to any purpoſe, or exerciſe any part of the ſupreme Power. And this again is ſubdivided into two Models, either that all the Members ſhall have equal Power; or that ſome one or two of the Number ſhall be inveſted with certain extraordinary Rights and Prerogatives, which they may uſe without the Aſſiſtance of their Brethren. They proceed to alledge many Authorities from the Antients, where Mention is made of *mixt* Commonwealths; with regard to which Authorities we have already obſerv'd, that what is deliver'd in them concerning the *Mixture* of Governments, doth not, in the leaſt, belong to the Diviſion of the ſovereign Power amongſt ſeveral Perſons or Councils; but either to the ſettling the due Qualifications of thoſe Perſons, of whom the governing Council is to be compoſed, or to the joining together of ſeveral good Inſtitutions drawn from different States. Beſides, we are of Opinion, that ſome Examples of theſe Mixtures might receive a convenient Explication, by diſtinguiſhing between the Sovereignty itſelf, and the Manner of adminiſtring it. So that we may affirm thoſe States to have mingled, as it were, ſomewhat of others in their Compoſition, in which the Method of Adminiſtration ſeems to have been borrowed from another Form: As ſuppoſe, for Inſtance, in a popular State, the main Buſineſs ſhould be diſpatch'd by ſome one principal Officer, or by a Senate; or if, under an Ariſtocracy, one Magiſtrate ſhould be inveſted with extraordinary Authority, or the People conſulted in many important Affairs; or if, in a Kingdom, the Difficulties of publick Buſineſs ſhould be referr'd to the Debates of a Senate, or of a popular Aſſembly. And if this come not up to a full Solution of the Paſſages cited from Antiquity, the Point will be thoroughly clear'd from what follows. We have above demonſtrated that, in order to compleat the Eſſence of a juſt and regular State, ſuch an Union is required, as ſhall make all Things, which belong to the Government of it, ſeem to proceed from one Soul. Now hence it is manifeſt, that the former Way of Mixture conſtitutes ſuch a Body as is held together, not by the Bond of one ſupreme Authority, but barely by Compact; and which therefore is to be rank'd, not amongſt the regular, but amongſt the irregular States; being but weakly guarded againſt foreign Aſſaults, and very obnoxious to inward Diſorders and Convulſions. As to the other kind of Mixture propos'd, we think it ought to be conſider'd, whether thoſe Perſons, in whom the ſovereign Power is ſaid thus indiviſibly to reſide, do make up a ſtanding Senate, which is to guide and direct the whole State as one laſting Body. If ſo, the Form will be ariſtocratical; yet ſuch as muſt be very unfit for the Diſpatch of Buſineſs, whilſt ſome few, or but one of a contrary Judgment, may vacate the Reſolutions of all the reſt. Again, if thoſe particular Members, in other reſpects equal, do each of them hold ſome Part of the Government, yet ſo as that the ſovereign Acts cannot be exercis'd without the unanimous Conſent of the whole Number, then the State is *ſyſtematical*, according to the proper Notion of that Word; yet ſuch as will, likewiſe, have great Diſadvantages, as to the Management of Affairs, by reaſon of this very great and unneceſſary Streightneſs. If ſome one Perſon be endued with high Degrees of Authority, and ſeveral Parts of the ſupreme Power above others in the Council, then the State will be plainly irregular, lying between ſuch a Monarchy as is over-awed by an aſſuming Senate, and a *ſyſtematical* Form. And this Irregularity will, in Proportion, be the greater, in Caſe more than one are inveſted with theſe ſignal Prerogatives above the reſt.

XIV. For our Part, as we envy no Man the Praiſe of his Conſtancy and Reſolution, who will on no Account lay aſide the Term of a *mixt* State; ſo we think it the more commodious and eaſy Method, and the more expeditious for the Explication of certain *Phænomena* in particular Commonwealths, to call thoſe Governors *irregular*, in which we can neither diſcover any one of the three regular Forms, nor yet any proper Diſeaſe or Deviation; and which, at the ſame time, cannot, with due Exactneſs, be rank'd amongſt the *ſyſtematical* Models. Concerning which we may in general obſerve, that they differ from regular States in this reſpect, that all Things do not ſeem to proceed in them from one Soul and one Will, nor all and each of the Members to be ruled by one common Power. Again, they vary

[a] *Polit.* Lib. ii Chap. ix, x. *Bill.* Pag. 64. Ed. *H. Steph.*

[b] *In* Areopagit.

[c] Lib. vi. Sect. 20.

[d] Appian. in Libyc.

[x] It is in his Diſſertation *De Forma Republic. Mamanæ*, § 20. Compare here *Grotius*, Lib. i. Chap. iii. § 19.

[a] See Mr. *Bayle*'s Reflections on *La difficulté de trouver un juſte Milieu dans un Gouvernment mixte*. Tom. I. of the *Reponſe aux Queſtions d'une Provincial*, Page 611, &c.

from

from *ſyſtematical* Forms, becauſe they are not compos'd of ſeveral compleat and diſtinct States. Laſtly, They do not fall in with [1] *Diſeaſes* or *Deviations*, becauſe a diſtemper'd State always appears under Circumſtances of Ignominy, and hath, as it were, ſomewhat of the Baſtard in its Countenance; in as much as it proceeds either from the ill Management of a good and regular Frame, or from incoherent Laws and improper Inſtitutions. Whereas the Irregularity of a Government doth not only affect its Frame after an intrinſick and ſecret Manner, but, being openly confirm'd, and as it were declared legitimate, ſhews itſelf in publick without Shame or Guilt. Therefore the former, or the *Diſeaſe*, cannot be ſuppos'd to have enter'd into the Intention of thoſe who firſt founded the Commonwealth, ever appearing as a ſubſequent Vice or Defect: But the latter, the *Irregularity*, owes, if not its Original, yet, at leaſt, its Confirmation to the Will and Approbation of the firſt Authors. It is juſt the ſame Difference as may be obſerv'd between two Buildings, one of which is deſign'd according to the Rules of Architecture, but either the Materials are naught, or through the Negligence of the Inhabitant, the Roof gapes, the Walls ſhake, the Beams crack, the Foundation ſinks and gives Way: In the other, either the Builder at firſt propos'd a Model not agreeable to the common Rules; or ſome great Fault, which afterwards happen'd, hath been cur'd and made up after a ſtrange and unſeemly Manner. Farther, ſome Irregularities appear'd upon the firſt Settlement of a State, others crept in by ſilent Steps, and in long Progreſs of Time. For it might ſo happen, that the Authors or the Reformers and new Modellers of a Commonwealth might not be able to introduce a regular Frame, either on account of Ignorance, or becauſe the preſent Poſture and Exigence of Affairs would not ſuffer them to conſider of a more accurate Conſtitution [a]. Sometimes too, Perſons, who have been the chief Leaders and Aſſiſtants in winning a Kingdom, have, before-hand, contracted for ſuch Lordſhips, or ſuch Privileges in it, as that they cannot be rank'd in the Number of true and proper Subjects. Again, many Times, either through Neglect of the Governors, or upon ſome other Occaſion, a Diſtemper ſeizeth a State, and having taken ſo deep Root, that it cannot be removed without the Deſtruction of the publick Frame, there remains no Cure for it but this; to diveſt it, as it were, of its Faultineſs, and to vindicate it from Cenſure, by turning it into a ſolemn and legal Appointment; by which means, what was before term'd Uſurpation, Faction, or Contumacy, ſhall, for the future, bear the Style of a juſt Right and Privilege.

XV. Theſe irregular Forms [2] of Government can neither be brought within any certain Number, nor divided into proper Kinds, by reaſon of that great Variety, which either really occurs in Fact, or, at leaſt, may be framed in our Imagination. So that we have ſcarce any other means of diſcovering their Nature, but by gathering it from particular Inſtances, and the illuſtrious Examples in Story. Such an Example we endeavour'd to exhibit in the [b] *Roman* Commonwealth: As the like hath been attempted in the *German* Empire by *Severinus de Monzambo* [3]. At preſent, 'twill be ſufficient to offer a Remark or two concerning the Irregularity, which ſome obſerve, in the Government of *Rome*, under the antient Emperors: Whilſt ſometimes the State appear'd a Monſter with a double or *triple* Body, one Prince ruling the Eaſt, another the Weſt, or three dividing the World amongſt them; ſometimes again, with a double or triple *Head*, whilſt two or three of the Royal Family held the Sovereign Power, as Copartners, and govern'd in common. Now as to the former of theſe Caſes, we may note, that while two Emperors preſided, one over the Eaſtern, the other over the Weſtern World, ſeparately and independently from each other, then there were really two diſtinct Kingdoms, which, taken both together, ſtill retain'd the Name of the *Roman* Empire, out of which they had been compos'd. Beſides which Agreement as to their Original, the Reſemblance of Laws and Manners, the natural Relation between the reſpective Sovereigns and between their Subjects, their ſtrict League and Alliance, which inſured their mutual Help and Support, all con-

[a] *Add.* Hobbes *Leviath.* Chap. xxix. *poſt princip.*

[b] In a Diſſertation entituled, *De Forma Reipublicæ Romanæ*, among thoſe juſt now cited.

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[1] The celebrated M. *Thomaſius* (*Jurisſpr. Divin.* Lib. iii. Cap. vi. § 40, *& ſeq.*) does not approve this Diſtinction; and he believes our Author only contriv'd it to elude an odious Objection, rais'd by applying it to the Empire of *Germany*. "But, adds he, it is no "Fault to acknowledge the Diſeaſes of a Government under which we live." And indeed our Author, in this Treatiſe, *De Republicâ Romanâ*, owns freely, *That the Empire of* GERMANY, *from a regular Monarchy, which it was at firſt, is inſenſibly fallen into ſo confus'd a Form of Government, that, whatever external Appearance it may have, it is neither a limited Kingdom, nor a true Collection of confederated States: but ſomething which floats between theſe two Extreams. This is the perpetual Source of fatal Inconveniencies, and dreadful Revolutions; The* EMPEROR, *on the one hand, ſeeking to bring back Things to the Form of Monarchy: And the* STATES, *on the other, uſing all their Endeavours to ſet themſelves in a Condition of Independence.*

[2] See our Author's Diſſertation *De Republica Irregulari* among his *Diſſertationes Academicæ ſelectiores*, where he treats more fully of this Matter.

[3] This Work is generally attributed to our Author: However, he has never, as I know of, publickly own'd it; he has indeed ſtrenuouſly defended it againſt ſeveral Authors who have attack'd it, in his Diſſertation *De Republica Irregulari*; and thoſe who are acquainted with his Style and Character, do not much doubt of its being written by him; neither after all, is it a Work that does him any manner of Diſcredit, but rather the contrary, for not to mention the principal Deſign of the Work which the World has highly approv'd of, the Preface has Abundance of Wit and Life in it. Since the firſt Edition of this Tranſlation, the *Monzambano* has been printed in 1706, at *Berlin*, with the Author's Name to it; who, at his Death, order'd his Heir to publiſh it from a Copy full of ſeveral Alterations, Corrections, and Additions. There are, likewiſe, ſome Things left out, which, together with the Suppreſſion of the Preface, will doubtleſs make the Learned very well pleaſed to have the Edition, which was ſurreptitiouſly publiſhed, as well as that which is now extant with the Author's Name and Approbation. Mr. *Titius* has taken care to ſatisfy their Curioſity in that Point at an eaſy Rate, in bethinking himſelf of a Thing ſingular enough; which was his printing in 1708 at *Leipſick* the Book we are here ſpeaking of, in ſuch a Manner, as to give the two Editions all together; for the Paſſages which Mr. *Puffendorf* had either retrench'd or alter'd, are here inſerted again, in their proper Places, between two Crotchets, and diſtinguiſh'd by a different Character, as well as the Additions. Beſides, the Editor has made a Sort of *Variorum* of it, by putting at the Bottom of every Page the Notes of ſeveral Commentators upon the old *Monzambano*. Mr. *Thomaſius*, who has already publiſh'd this Book with his Notes, publiſh'd in 1714 a new Edition corrected and enlarg'd, where, without changing any thing in the ancient Text, he has mark'd in the Notes all the Alterations in the poſthumous Edition.

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curr'd to make up ſome Appearance of Unity. But what Name we are to impoſe on that Form of Government, when two or three Royal Partners adminiſtred Affairs in Conjunction, it is not eaſy to determine. Certainly *two* Perſons cannot make an Ariſtocracy. For ſince each is inveſted with equal Power (upon which Suppoſition the Caſe before us proceeds) they cannot be united, otherwiſe than by Covenant; and there could be no Expedient found out for the Diſpatch of Buſineſs, ſhould they happen to diſagree about any Propoſal, there being no third Perſon to turn the Scales. And tho' the ſame Inconvenience may ſeem to attend any ruling Council or College, where the Members are of an even Number; yet it cannot ſo frequently happen, that upon a Diviſion in Judgment the Votes ſhall be equal. Beſides, in this Caſe it is not difficult to bring over ſome one out of ſuch a Number to the oppoſite Sentence: Or, if this can't be done, the next Expedient is to let that Opinion prevail, which declares againſt Innovation, and would have Things continue in their preſent State. Farther, neither can we, properly ſpeaking, affirm the united Government of three *Cæſars*, reigning together, to have been *ariſtocratical*. For this Royal Triumvirate did not compoſe ſuch a *collegiate* Body, as was to determine State Affairs by the Plurality of Voices, or where two Members, agreeing in Opinion, might, by their proper Right and Authority, compel the third, who diſſented, to follow their Reſolution. And in all Caſes, a Council or Body of Men, in which the major Part cannot influence and draw over the reſt, ſeems to be held together, rather by bare Compact, than by any Government or Command. We may therefore ſay, as to the Queſtion before us, that the ſovereign Authority did truly and radically inhere in that Perſon alone, who aſſumed the other into a Partnerſhip with him; tho' both might ſeem equal as to the exterior Enſigns of Majeſty. Thus the Hiſtorian [a] tells us of *Lucius Verus*, *That he lived not as a free and ſovereign Prince, but under* Marcus, *inveſted with the Imperial Authority*. Nor was it eaſy to ſuſpect, that any Man would be guilty of ſo notorious Ingratitude, as to oppoſe the Will of his Patron, to whom he owed his Promotion and Honour. To which we may add this Conſideration, that for the moſt part the Perſons thus ſharing the Government, were either Father and Son, Father-in-Law and Son-in-Law, or two Brothers; ſo that the Party admitted as a ſecond in the Dignity, might be farther reſtrain'd by the Ties of Blood, or the Alliance of Marriage, from abuſing the Power which had been given him, to the Prejudice of the Donor. Whence it appears, that this Practice of aſſuming a Colleague was not any Portion of the Sovereignty, but as it were the Deſignation of a Vicar-general and Heir apparent, who was immediately receiv'd into the Buſineſs of State, and join'd with the other in the Adminiſtration; being, likewiſe inveſted with the moſt ſhining Ornaments and the richeſt Trappings of Greatneſs. Now what put the Emperors upon this Method, was the inconſtant Humour of the Soldiery; who, on frequent Occaſions, took a Pride in complimenting their Leaders with the Imperial Title [b]. If this Explication will not ſatisfy ſome Men, or if it ſeems not applicable to every particular Inſtance, which we find upon Record; we have no Way left but to affirm, that the *Government* then commenced *irregular*, when more Perſons than one held the *Monarchy* (if it might ſtill deſerve that Name) in Conjunction; and yet were engaged to each other only by Compact or Faction. Amongſt whom if any Diſſenſion or Hatred ſhould chance to ariſe, the Conſequence could be nothing leſs than mutual Suſpicions, Plots, and Deſigns, and in the final Iſſue, a civil War [c]. Such an Irregularity the *Roman* State was evidently ſenſible of, whilſt *Romulus* and *Tatius* ſat as Partners in the Throne [d]. In general, we may apply to all theſe *polyarchical* Governments, what *Solyman* the *Turk* obſerved in the *German* Empire; that it might be well compar'd to a Lute, which coſts a great deal of Labour and

[a] *Julius Capitolinus*, Chap. i.

[b] *Themiſt.* Orat. xvi. *Fratres Amantes*, Pag. 76. B. Ed. *Pariſ.* ſpeaking of *Valentinian*, who had admitted his Brother *Valens* into a Partnerſhip with him in the Empire, uſeth the following Expreſſion: *He receiving the Whole and giving the Whole, at the ſame Time a Brother and a Father, the one by Nature, the other by his own Act and Choice, tho' he hath conferr'd an equal Share of his Power, yet, in effect, he ſtill keeps it entire; by reaſon of the Obedience and Compliance of him on whom it was conferr'd.*

Thus *Solinus*, Chap. viii. reports of *Æneas*, that he reign'd with *Latinus*, his Father-in-Law, three Years, *ſocia poteſtate*, as his *Fellow*, or Equal in the Supreme Authority.

[c] *Lucan*, Lib. i. Ver. 92, &c.

Nulla fides regni ſociis; omniſque poteſtas
Impatiens conſortis erit.

To truſt a Partner's Rule impairs our own,
And Empire hates a Conſort in the Throne.

Statius, Theb. i. Ver. 130. —— *Sociiſque comes diſcordia regnis.*

—— Howe'er the Crown is *ſhar'd*,
Diſcord's a *Partner*.

[d] *Vid.* Plutarch. Romul. *Add.* Eryc. Putean. *Hiſt.* Inſubric. *Lib.* ii. the Story of *Pertharite* and *Gundebert*, joint Kings of *Lombardy*. *Procopius* relates a like Caſe, *Hiſt. Goth.* Lib. i. *The* Goths, *ſays he, and* Odoacer's *Army came to this Agreement, That* Theuderick *and* Odoacer *ſhould reign in the City* Ravenna *with equal Power. And for ſome Time the Compact was faithfully obſerved; but the Iſſue was, That* Theuderick, *according to the vulgar Report, inviting* Odoacer *to a Banquet treacherouſly ſlew him.* In Effect, a Sovereign can never reſolve to bear an Equal, and thoſe who divide the Regal Power, never look upon each other with a good Eye. In this Caſe no Kindred can hold. We ſee this in the Example of *Romulus* and *Remus*, Twin-Brothers, of whom the former murther'd the latter, to reign alone in a little Corner of the Earth, where he had open'd an *Aſylum* for all Sorts of Villains. 'Tis a true Remark of *Euripides*, Andromach. *ver.* 471, &c.

Two Tyrants can no more be borne than one,
But preſs the Subjects with a double Load;
Till Diſcord and Sedition work their Fate.

Plin. Paneg. Chap. viii. Not. 4. *What a ſmall Difference is there between laying down the Imperial Honour, and ſharing it with another, unleſs the latter be difficult and dangerous? Add.* Herodian. *Lib.* iv. *Chap.* i. &c. See, likewiſe, *Racine*'s *Fréres Ennemis*, Act I. Scen. V. and the *Fables de la Fontaine*, Lib. i. Fab. 12. intituled *le Dragon a pluſieurs Têtes, & le Dragon à pluſieurs queues*.

Skill

Skill to put it in Tune, and is very eaſily put as far out of Tune as ever [1].

XVI. When ſeveral States are, by ſome ſpecial Band, ſo cloſely united, as that they ſeem to compoſe one Body, and yet retain each of them the ſovereign Command in their reſpective Dominions; theſe we term *Syſtems* of *States*. Whence it is, in the firſt Place, evident, that when a State is compos'd of ſeveral ſubordinate Bodies, we muſt not on this account preſently give it the Name of *Syſtem*: Though Mr. *Hobbes* [a] is pleas'd thus to ſtyle it, and to compare the ſaid Parts with the Muſcles in the natural Body. No more are we to apply this Term, in general, to all thoſe larger States which have vaſtly increaſed their Dominions by ſwallowing up their little Neighbours, and by reducing them into the ſame Body with themſelves. Which we may obſerve to be done chiefly in the following Methods. Firſt, when the Victor either removes the Vanquiſh'd into his own Territories, or however gives them the ſame Privileges with his former Subjects. Secondly, when the conquer'd Nation is left to poſſeſs its antient Seat, but utterly loſing the Sovereignty which it held before, is render'd purely the Subject of the conquering People. In both Caſes the State thus ſubdued loſeth its Name; but in the former the conquer'd are made equal to the Conqueror; in the latter they are put under an inferior Condition, being reduced into the Form of a *Province*. Though it often happens, that the vanquiſh'd are partly left in Poſſeſſion of their antient Laws or Priviledges, how different ſoever from the Manners and Inſtitutions of the conquering State [b]. For, in order to preſerve the Unity of a Commonwealth, 'tis not required, that all its particular Parts ſhall uſe the ſame poſitive Ordinances, or ſhall ſtand exactly upon the ſame Bottom; but 'tis enough, if they depend upon one Government. And it is frequently the Art and Policy of a Conqueror, to make no Alterations in the Cuſtoms of thoſe who are fallen under his Dominion: Or, at leaſt, to accommodate himſelf to them for ſuch a Time as he thinks convenient.

In relation to the Government of Provinces, we are to examine what Mr. *Hobbes* delivers on that Subject [c], *Whereas*, ſays he, *heretofore the* Roman *People govern'd the Land of* Judea, *for Example, by a Preſident; yet was not* Judea *therefore a Democracy, becauſe they were not govern'd by an Aſſembly, into which any of them had Right to enter; nor by an Ariſtocracy, becauſe they were not govern'd by an Aſſembly, into which any Man could enter by their Election; but they were govern'd by one Perſon: Which, tho' as to the People of* Rome *it was an Aſſembly of the People, or a Democracy; yet as to the People of* Judea, *which had no Right at all of participating in the Government, was a Monarch. For tho', where the People are govern'd by an Aſſembly, choſen by themſelves out of their own Number, the Government is call'd a Democracy or Ariſtocracy; yet when they are govern'd by an Aſſembly, not of their own Chooſing, 'tis a Monarchy; not of one Man over another Man, but of one People over another People.* So that Mr. *Hobbes* ſeems to look on theſe Provinces which are dependent on ſome ariſtocratical or democratical State, as ſo many diſtinct Monarchies. Now tho' we eaſily allow, that 'tis the more uſual Practice to govern *Provinces* by one Man, than by an Aſſembly conſiſting of many, as the ſame Author ſhews at large [d]; yet we think it needleſs to enquire what Form of Government it eſtabliſh'd over a dependent People. For *Provinces* have loſt the Nature of *States*, and are made the Appendages of other *States*, having no kind of ſovereign Authority in themſelves. Whether therefore ſuch a Province is govern'd by a Preſident, or by an Aſſembly, is an indifferent Point, which doth not, in the leaſt, affect the proper Sovereignty, in as much as both *he* and *they* bear only a ſubordinate or delegated Power. So that the Sovereignty exercis'd over theſe additional Dominions, is exactly of a Piece with that of the main State, and cannot, without Impropriety, obtain the diſtinct Name of a Monarchy or an Ariſtocracy; which are Terms belonging to true and independent States, ſuch as really poſſeſs a ſupreme Government of their own.

XVII. Of *Syſtems* properly ſo call'd, theſe two Kinds do eſpecially fall under Notice: One, when two or more States are ſubject to one and the ſame King [2]; the other, when two or more States are link'd together in one Body, by Virtue of ſome League or Alliance. In regard to *Syſtems* of the former Kind, 'tis obſervable, that it implies no Contradiction in *Moral* Bodies, to have but one Head over ſeveral of them together, and, conſequently, to have one Perſon the Head of many diſtinct Bodies; which in *Nature* would bear ſo monſtrous an Appearance. But becauſe the Union of theſe *Syſtems* is founded either in the ſole Perſon of the Prince, or in his Family, hence it comes to paſs, that when the Perſon is deceas'd, or the Family extinct, the reſpective People recover their particular Right of ſettling their own Government, and are no longer obliged to make Uſe of a common Head. Nay, during the Continuance of the ſaid Head, the States are really diſtinct from each other. The Cauſes whence ſuch Combinations ariſe are various; but the moſt frequent ſeem to be the Marriages of Princes, and the Right of Inheritance. For there are many States, in which the Crown deſcends to the Female Iſſue of the Royal Houſe, not only when the Male Line is utterly extinct, but when there is no Male Heir in a nearer, or in an equal Degree. Now here if the Lady Sovereign happen to take another Sovereign for her Husband, the two [3] Kingdoms will

[a] *Leviath.* Chap. xxii. [b] Hobbes *Leviath.* Chap. xxvi. [c] *Leviath.* Chap. xix. [d] *Ibid.* Chap. xxii.

[1] We do not think that we ought to admit, under the Head of irregular Forms, what *Francis Carron* reports of the *Dayro* in *Japan*, who, he ſays, was the true Heir of the Crown, yet was depos'd by the Uſurper, leaving him only the Shadow of outward Majeſty, and empty Badges of Honour. Much to the ſame purpoſe, *Alexander de Rhodes* relates, that in the Kingdom of *Tonquin*, there are two Kings, one called *Bua*, the other *Chua*; yet ſo as that the former barely enjoys the Title, the latter really holding the Command; only *Bua* hath the Power of conferring the Degree of Doctor, and receives the Oaths of the Subjects, when they renew their yearly Allegiance; as to other Matters, he paſſes his Time ſhut up in an old Palace, without Action or Buſineſs, *Itin.* Part ii. Chap. vi.

[2] Such, for Example, was *England*, *Scotland*, and *Ireland*, at the Time our Author wrote this, when he could not foreſee the Union which ſoon after happen'd between *England* and *Scotland*. Conſult his Diſſertation *De Syſtemat. Civit.* §. 9, 10.

[3] It is thus the Dominions of the *Houſe* of *Burgundy* were united to the Kingdom of *Spain*, under *Philip the Fair*, by the Marriage of *Maximilian* his Father, with *Mary* the Heireſs of that Houſe.

come to a Conjunction, if not in their Perſons, at leaſt in their common Iſſue. For it is not neceſſary, that, in a Match of this Nature, the Princeſs ſhould put herſelf and her Dominions in Subjection to the [1] Prince. So, likewiſe, in one undivided Kingdom, where the Hereditary Succeſſion is eſtabliſhed, either [2] according to the plain and direct, or the lineal Courſe, if one of the remote Heirs any way become Maſter of another Crown, and the Rule of Succeſſion (all the reſt failing who ſtood nearer) call him to receive that of his own Country, the two Kingdoms will by this means be united under his Reign. The Conſequence is the ſame, if a People chooſe for their King one who bears the ſame Character elſewhere, in Poſſeſſion, or in Reverſion. Again, two or more Nations may engage by League to elect one Prince over both by joint Suffrages, and yet, as to other Matters, continue ſeparate Kingdoms, without tranſacting their Affairs in a common Aſſembly. Laſtly, ſuch a *Syſtem* doth then ariſe, when a Prince, conſtituted by the free Conſent of the People, ſubdues by Arms another People, in his own Name, and at his own Hazard and Expence; not in the Name, or at the Charges of the State over which he preſides. For that this is no impoſſible Caſe, *Grotius* [a] hath ſufficiently prov'd, againſt the Opinion of *Hottoman* the Civilian [b].

As for the Diſſolution of theſe *Syſtems*, 'tis manifeſt it muſt happen, either upon the Death of the Prince, if the Union was founded in his Perſon only; or upon the Extinction of the Royal Family, in caſe the reſpective Kingdoms were all entail'd in the Way of Inheritance. For then each ſeparate People recover their Right of conſtituting a new King, or of introducing what Form of Government they think fit, without conſulting the reſt; they being ſuppoſed to have no other Bond of Union. If a Prince holds one Kingdom by Right of Inheritance, and another by free Election; upon his Deceaſe the Union betwixt them will be broken, and the latter Kingdom ſhall have no Obligation to advance his Son to the Crown.

But if this Union depend upon a League between the Kingdoms, 'tis no leſs manifeſt, that if the Agreement happen to be violated, eſpecially in the principal Articles, then the injured State may diſengage itſelf from the other. Yet here we ought carefully to diſtinguiſh between the Obligation by which particular Kingdoms are tied to their reſpective Kings, and the Obligation by which the ſame Kingdoms are united amongſt themſelves. A King once elected, and who hath received the Fealty and Allegiance of his People, may not afterwards be deſerted on account of any Misbehaviour, or any Action contrary to his Engagement, ſo long as he doth not profeſs open Hoſtility towards the State. Unleſs perchance the Compact, between the Elected King and the People, had this conditional Clauſe expreſsly annexed to it [3], that the Obedience of the latter ſhould be due on no other account, but upon the former's performing all and each of the Articles ſettled betwixt them. On the contrary, the Engagements by which united Kingdoms are held together, may be renounced on that Side, to the Prejudice of which the Laws of the Union have been violated, tho' the Injury be not very conſiderable; in caſe the other Kingdoms concurr'd in the Action, or if it was undertaken for their Sake, or converted to their Uſe and Service. Wherefore, upon the Deceaſe of the common Prince, the injured State may diſclaim the Union, reſerving a Right to proſecute the Authors or Abettors of the Fact, and to recover what is loſt by their means. If, by the Marriage of Hereditary Princes, ſeveral States are conjoin'd, which obſerve a different Courſe and Order of Succeſſion, the Union will be diſſolv'd, if ſuch a Caſe happen, as that the ſame Perſon proves incapable of ſucceeding to both Crowns, according to the publick Laws. Let us ſuppoſe two Kingdoms in Conjunction, one of which receives the Method of lineal Deſcent by *Agnation*, the other by *Cognation*. Here, if it ſo fall out, that the common Prince deceaſe without Male Iſſue, the latter of the two Kingdoms ſhall paſs to his Daughter, the former to the Heir Male in the next Degree. But if an Union, at firſt contracted on the Occaſion of Marriage, ſhall be afterwards confirm'd, and turn'd into a perpetual Eſtabliſhment, by means, either of a ſolemn League paſſing between all and each of the Kingdoms to this Purpoſe, or a Decree made by the common Sovereign, with the Approbation of the reſpective States; then any Difference, which was before obſerv'd in their Way of Succeſſion, ſhall be underſtood to be actually taken off. And, for the future, ſuch a Method ſhall be follow'd, as is expreſsly ſpecified in the League, or in the Decree; or ſuch as the Authors of the Union appear to have been moſt inclined to; or ſuch as is moſt agreeable to Reaſon, and moſt conducive to the Safety of the United States. But when one Kingdom happens to be join'd to another, in the Manner of a Province, the Union founded on a precedent League expires, and a much cloſer Bond ſucceeds in its room, by means of which they unite into the ſame civil Body.

XVIII. The other kind of *Syſtem* is, when ſeveral States are joined to each other, each by a perpetual League or Alliance [4]; the chief Occaſion of which ſeems to have been, that each particular People loved to be their own Maſters, and yet each was not ſtrong enough to make Head

[a] Lib. i. Chap. iii. Sect. 12. [b] Quæſt. Illuſtr. 1.

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[1] See Examples of this in M. Hertius's *Elem. Prud. Civil.* Part i. Sect. 12. §. 5.

[2] See the Seventh Chapter of this Book, §. 12, 13.

[3] *Lex Commiſſoria:* See *Grotius*, Lib. i. Chap. iii. Sect. 16. Numb. 5. by that is generally underſtood a conditional Clauſe added to a Contract, the not performing of which renders void or makes the Thing in diſpute to be forfeited. We have ſeen ſome Inſtances of it relating to the *Contract of Sale*, Book v. Chap. v. Sect 4. and of *Pawns* and *Mortgages*, Chap. x. Sect. 14. ſo in that Place the *Lex Commiſſoria*, or *Conditional Clauſe*, is an Article impoſed upon the King; by Virtue of which, if he breaks the Engagement which that obliges him to perform, he forfeits *ipſo facto* the Crown: Juſt ſo in *Manors*, when the *Vaſſal* does not do Homage, or does not pay the Rent due to his *Lord*, or becomes guilty of *Felony*, the *Fee* falls into *Lapſe*, as the Law terms it; that is, is forfeited to the Use of the *Lord*, and is re-united to the *Manor*.

4 As for Example, the United Provinces of the *Netherlands*, the *Swiſs* Cantons, &c. With regard to the firſt, See *Grotius's Apologeticum*, Chap. i. and the *Declaratio Ordinum Hollandiæ & Weſtfriſiæ*, &c. *de Conceſſione Inſtrumenti ſecluſionis Principis Auriaci*, &c. Printed at *Leyden* in 1654. As to the latter, the Reader may conſult M. *Stanyan's Preſent State of* Switzerland, Chap. v.

againſt

againſt a common Enemy. The Purport of ſuch an Agreement uſually is, That they ſhall not exerciſe ſome Part of the Sovereignty there ſpecified, without the general Conſent of each other. For the Leagues to which theſe *Syſtems* owe their Riſe, ſeem diſtinguiſh'd from others (ſo frequent amongſt different States) chiefly by this Conſideration; that in the latter, each confederate People determine themſelves by their own Judgment to certain mutual Performances, yet ſo as that, in all other Reſpects, they deſign not in the leaſt to make the Exerciſe of that Part of the Sovereignty, whence thoſe Performances proceed, dependent on the Conſent of their Allies, or to retrench any thing from their full and unlimited Power of governing their own States. Thus we ſee that ordinary Treaties propoſe, for the moſt part, as their Aim, only ſome particular Advantage of the States thus tranſacting; their Intereſts happening, at preſent, to fall in with each other: But do not produce any laſting Union, as to the chief Management of Affairs. Whereas in thoſe Leagues we are now ſpeaking of, the contrary is obſervable; they being carried on with this Deſign, that the ſeveral States ſhall for ever link their Safety one within the other, and, in order to this mutual Defence, ſhall engage themſelves not to exerciſe certain Parts of their ſovereign Power, otherwiſe than by a common Agreement and Approbation. For the Promiſes made in the two Caſes here compared, run in very different Terms; in the former thus: 'I will join you 'as a Confederate in this particular War, and 'the Manner of our attacking the Enemy ſhall 'be concerted by our common Advice: In the 'latter thus: None of us, who have entered in-'to this Alliance, will make uſe of our Right, 'as to the Affair of Peace and War, except by 'the general Conſent of the whole Confede-'racy.' We obſerv'd before, that theſe Unions ſubmit only ſome certain Parts of the Sovereignty to mutual Direction. For it ſeems hardly poſſible, that the Affairs of different States ſhall have ſo cloſe a Connection, as that all and each of them muſt look on it as their Intereſt, to have no Part of the chief Government exercis'd without the general Concurrence. Or, if there be any Communities thus mutually depending, it had been the wiſer Courſe for them, rather to have incorporated themſelves under the ſame Government, than to rely on the bare Engagement of a League. The moſt convenient Method therefore ſeems to be, that the particular States reſerve to themſelves all thoſe Branches of the ſupreme Authority, the Management of which can have little or no Influence (at leaſt directly) on the Affairs of the reſt. The ſame muſt be ſaid of ſuch publick Buſineſs, as either occurs every Day, or elſe requires ſuch ſpeedy Meaſures as to prevent a general Debate. But then as to all Affairs, on which the Safety of the Allies hath a joint Dependence, theſe ought in reaſon to be adjuſted by [1] common Conſtitution. And in this Number War, whether offenſive or defenſive, ſeems to claim the firſt Place; after that, Peace as the Reſult and Iſſue of War. To which we may add Taxes and Subſidies, as they contribute to the mutual Support; and Alliances with foreign States, as they promote the common Safety. It falls under the ſame Head of Duties, that in Caſe any Diſpute ariſe amongſt the Confederates themſelves, the other Members, who are unconcern'd, ſhall immediately interpoſe their Mediation, and not ſuffer the Controverſy to come to Blows. Thus the wiſe Prince *Philip* of *Macedon* declares in the Hiſtorian [a], that *The mutual Wrongs of his Allies ſo particularly concern'd himſelf, as that he could not but uſe his beſt Endeavours for a Compoſition, by Words to the preſent, and by Letters to the abſent Parties: Whereas thoſe other Dangers or Injuries, which affected the whole Confederacy, belonged to the Care of the common Aſſembly, and were thence only to receive their proper Redreſs.* As for other Matters, which ſeem not ſo neceſſary to be tranſacted in common, as Negotiations of Traffick, Subſidies for the particular Occaſions of any ſingle State, the conſtituting of Magiſtrates, the enacting of Laws, the Power of Life and Death over their reſpective Subjects, the Eccleſiaſtical Authority, and the like; there is no Reaſon, but that they may be left to the Pleaſure of each diſtinct Government: Though, at the ſame Time, particular States ought ſo to manage theſe Privileges, as that they ſhall cauſe no Diſturbance in the general Union. Whence 'tis evident, that one or more of the Allies cannot be hindered by the reſt, from exerciſing, according to their own Judgment, ſuch Parts of the civil Adminiſtration, as were not, in the Treaty of Alliance, referr'd to the common Direction. Yet as to the Power of Life and Death, ſome Scruple may be made on account of that Paſſage in the Civil Law [b] [2]: *At fiunt apud nos rei ex Civitatibus fœderatis, & in eos damnatos animadvertimus. But ſome Perſons, Members of our confederate States, are here arraign'd in Judgment, and receive from us both their Condemnation and Puniſhment.* *Grotius* [c] hath taken a great deal of Pains to ſolve this Difficulty; but whoever thoroughly conſiders his Diſcourſe, will find that he hath labour'd to little Purpoſe. For he certainly leaves the following Queſtion unanſwered, How that State can entirely preſerve its Liberty, the Subjects of which are liable to be arraign'd under another Government, and to be puniſh'd upon Conviction? We find that the Freedom of the *Achaians* was look'd on as conſiderably impair'd, when, by the Treachery of *Callicrates*, the moſt worthy Perſons in that Commonwealth were accus'd of favouring *Perſeus*'s Side, againſt the *Romans*, and were cited to *Rome*, there to anſwer the Charge, upon Occaſion of *Xenon*'s Proteſtation, who, under a juſt Aſſurance of his own Innocency, happen'd to declare, that if any Man had Thoughts of impeaching him amongſt the reſt, he was ready to take his Tryal, not only in the Common Aſſembly of his Countrymen, but amongſt the *Romans* themſelves [d]. On another

[a] Polyb. *Lib.* iv. Chap. xxiv. [b] Lib. xlix. Tom. xv. Lib vii. Sect. 1. D. *De Captiv. & Poſtlim.* [c] Lib. i. Chap. iii. Sect. 21.
[d] See the Caſe at large in *Pauſanias, Achaiac.* It is, likewiſe, touched upon by *Polybius, Excerp. Legat.* 105.

[1] This does not however hinder but each confederated State may provide for its particular Safety, by repreſſing its rebellious Subjects. See *Grotius*'s *Apologeticum*, Chap. x, xi.
[2] This Law is more naturally brought in hereafter, in the Eighth Book, Chap. ix. Sect. 4.

Occaſion, the *Achaians* ſeem to have made a Breach on the Laws of Regular Government, when they demanded thoſe *Spartans* to be delivered up into their Hands, who had been the chief Inſtruments in promoting the Siege of *Las*, a *Laconian* Town [a]. Whereas the Cauſe ought firſt to have been heard in a common Council of both States, and upon Conviction, the *Spartan* Government ſhould have been moved either to puniſh the Criminals, or to ſurrender them to their Accuſers. As for the Place alledg'd from the *Civil Law*, we think this the cleareſt Way of replying to it; that whereas the precedent Diſcourſe had explain'd what the Nature of Leagues would bear, and what *ought* to be done, the Words here cited declare what *was* actually done in later Times; when the *Romans*, growing inſolent on Succeſs, uſed their Allies, who by free and voluntary Leagues had engaged their Friendſhip, with the ſame Treatment as thoſe whom they had conquer'd by their Sword. Of which Injuſtice *Cicero* himſelf complains [b].

XIX. Since, in theſe *Syſtems*, 'tis neceſſary there ſhould be a Communication of certain Affairs expreſs'd in the League, and ſince this cannot be done ſo conveniently by Letters, a determinate Time and Place ought to be ſettled for the holding Aſſemblies, and one or more Perſons appointed, who ſhall have Power to call the States together, in Caſe of any extraordinary Buſineſs, which will not admit of Delay. Tho' it ſeems a much more compendious Method, to fix a [1] ſtanding Council, made up of Perſons deputed by the ſeveral Confederates, who ſhall diſpatch Buſineſs of daily Occurrence, or of leſs Importance, according to the Tenor of their Commiſſion; who in Matters of greater Conſequence ſhall make Report to the States, and ſhall publiſh and execute ſuch Decrees as are return'd to them on theſe Occaſions; to whom the Miniſters of the Confederacy in foreign Parts ſhall give an immediate Account of their Proceedings, and who ſhall treat with the Ambaſſadors of other Nations, and conclude Buſineſs in the general Name of the Confederates. But who ſhall determine nothing that exceeds the Bounds of their Commiſſion, unleſs all the Subjects have been firſt conſulted on the Point. How far the Power of this Council of Delegates extends, is to be gather'd either from the Words of the League itſelf, or from the Warrant by which they act. This is certain, that the Power, whatever it be, is not their own, but deriv'd to them from thoſe whom they repreſent and altho' the Decrees which they publiſh paſs ſolely under their own Name, yet the whole Force and Authority of them flows from the States themſelves, by whoſe Conſent ſuch a Council hath been erected. So that the Deputies are no more than *Miniſters* of the confederate States, and are altogether as unable to enjoin any Thing by their own proper Authority, as an Ambaſſador is to command and govern his Maſter.

XX. Yet it may ſtill appear doubtful, whether or no the whole Body of the Aſſociates, or the Majority of them, have not a Power over particular States, or over thoſe whom they exceed in Number, with regard to ſuch Matters as were the firſt Occaſion of the Alliance, and which, by the expreſs Terms of the League, were appointed to be managed in a common Aſſembly; ſo far as that the few diſſenting States ſhall be bound, tho' againſt their Will, to do as the major Part have determin'd. Here, in our Opinion, the negative Side of the Queſtion ought to be preferr'd; if we ſpeak of regular Syſtems, and where the particular States reſerve to themſelves the entire Poſſeſſion of their former Liberty. In as much as the Liberty of a State, which is nothing elſe but the Power of finally reſolving and determining, according to its own Judgment, all Matters in which its Safety is concern'd, cannot be underſtood, in caſe the State may, by Virtue of the Authority held over it by ſome other, be compell'd to certain Performances againſt its Will. Nor can any Reaſon to the contrary be drawn from hence, that in the League 'twas agreed not to exerciſe ſome particular Parts of the Sovereignty there expreſs'd, unleſs by common Conſent. For 'tis one thing to ſay, *I engage not to uſe my Right unleſs you are willing*; and another to ſay, *I gave you a Power of compelling me to uſe my Right, though againſt my Inclination.* Now the firſt of theſe Forms is only implied in the League, not the latter. For the clearer Apprehenſion of which Point, it ought well to be obſerv'd, that when the Wills of many Perſons are bound to conſpire in one, this muſt ariſe either from a Compact between them to this Effect, or becauſe one of them hath ſubmitted his Will to the Will of the other. An Union or Concurrence of Wills grounded on bare Compact, doth not, in the leaſt, deſtroy the Liberty of which we have been now ſpeaking. For they agree beforehand in ſettling thoſe Affairs, which are referr'd to their joint Management; or if any new Buſineſs offers itſelf to their Debates, they deſire to be influenced not by Authority, but Argument and Reaſon. But when I have ſubmitted my Will to the Will of another, and by this means have given him a full Authority over me, I may then be obliged to Things which are very inconſiſtent with my Good-liking. Nor doth *The Right of the Majority* [c] (which ſome may urge) oppoſe our Judgment in this Caſe. For firſt, *The greater Part draws the leſs*, only in Bodies already conſtituted, not in thoſe which are ſtill to be eſtabliſhed. And then farther, the Prerogative of the Majority in a ſettled Council to oblige the reſt is owing to Human Compact and Inſtitution, not to Nature; tho' natural Reaſon adviſeth the Reception of this Method (as the moſt convenient) in numerous Aſſemblies, and where Buſineſs of various Kinds, and of every Day's Occurrence, is to be diſpatch'd. Now in order to this, 'tis neceſſary that each Member do in ſuch Manner ſubmit his Will to the Will of the whole, or of the major Part, as

[a] Liv. *Lib.* xxxviii. *Chap.* xxxi. [b] *Offic.* Add the Story of *Decius Magius*, who was laid in Irons by *Hannibal*, Liv. Lib. xxiii. Chap. vii. x. and *Scipio*'s Advice to the *Romans*, that they ſhould not hear the Informers againſt the ſame great Enemy, Liv. Lib. xxxiii. Chap. xlvii. [c] See Book vii. Chap. ii. Sect. 15.

[1] As that of their *High Mightineſſes* at the *Hague*. I doubt if we ſhall find another Example of the Kind. That which M. *Huet* alledges of the κοινοδίκιον of the *Prianſians* and *Hieropotamians* (or rather *Hierapytnians*) is nothing to the Purpoſe. *Baron Spanheim*, in his *Orb. Roman.* Exercit. ii. Chap. xvi. makes mention of ſeveral other Aſſemblies of confederated Nations, but they either did not conſtantly aſſemble, or their Meetings were fix'd to no certain Place.

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that he, tho' himſelf of a contrary Opinion, ſhall be bound abſolutely to follow what they determine; which we cannot conceive, unleſs, at the ſame time, we ſuppoſe the latter to hold a Command or Authority over the former. Beſides, in an Aſſembly of Confederates, there ſeems to be no Occaſion for this Right of the Majority; inaſmuch as they are ſeldom compoſed of any conſiderable Number of States, and are chiefly united by the Proſpect of general Advantage, which 'tis preſumed none in their Wits will obſtinately oppoſe. Yet if any, thro' a malicious and unreaſonable Perverſeneſs, ſhall refuſe to join the wholeſome Counſels of the reſt, and by this means ſhall endeavour to betray the common Safety, or Intereſt; it will then be lawful to apply the ſame Methods of Redreſs, as they who live in a Condition of natural Liberty are allow'd to uſe againſt the Violaters of Faith and Contract. Unleſs it be judg'd the more eligible Courſe, utterly to purge the Society of ſo intractable a Partner. To all which we may add, that it muſt frequently occaſion great Injuſtice, if in a confederate Syſtem the Plurality of Votes were to bind the whole Body: As when the Allies are diſproportion'd in their Wealth and Strength, and conſequently ſome contribute more than others to the common Defence. For tho' we may be apt to imagine, that they who contribute according to the Proportion of their Ability, do really bring equal Shares; yet it may happen very frequently, that one who hath but ſlender Fortunes, may be more willing to expoſe them to Danger, than another who hath larger Poſſeſſions. Thus let us ſuppoſe, that, in a Confederacy, ſome one State contributes more to the common Security, than all taken together; here it would be a manifeſt [a] Breach of Equity, if this State ſhould, by the Agreement of the reſt, be compell'd to engage in any Action, the chief Burthen of which muſt lie upon its own Shoulders. On the other hand, if the Votes were to take place according to the Proportion of Force, or Treaſure ſupplied to the common Cauſe; then the more powerful State would actually obtain a Sovereignty over all beſides [b] So that we may conclude from the whole, that where-ever Buſineſs is decided by a Plurality of Voices, in ſuch a Manner, as that the diſſenting Parties are, likewiſe, bound to ſtand to the Reſolution; there the regular Form of *Syſtems* or Confederacies is deſerted, and the Members either break into an irregular Body, or cloſe together in one undivided State.

XXI. The Diſſolution of theſe *Syſtems* happens, when ſome of the Confederates voluntarily quit the League, and govern their own States apart; which they are induced to chiefly by this Motive, that they hope to receive more Advantage by a Separation, than they could expect under a Conjunction, and apprehend their Allies to be rather a Burthen to them, than an Aſſiſtance [c]. Inteſtine Wars are another Cauſe which muſt neceſſarily break theſe Unions, unleſs, upon the Eſtabliſhment of the Peace, the League be alſo revived. If a confederate Power happen to be overcome in a foreign War, it is ſometimes a Policy of the Conqueror to cut the Knot, and to make each Government independent of the reſt. As the *Romans* did in the Caſe of the vanquiſh'd [1] *Achaians* [d]. We are farther to obſerve concerning thoſe Diſſolutions, which ariſe from external Force, that the Enemy, by poſſeſſing himſelf of one or two more of the united States, acquires no Manner of Right over thoſe that remain, nor can demand to be admitted into the Confederacy, by virtue of that League which engag'd the conquer'd States to the others. But a new Agreement muſt neceſſarily paſs, before any ſuch new Member can be receiv'd into the Alliance, in the room of thoſe whom he hath ſubdued [2] Thus we find King *Philip*, by a Decree of the *Amphyctionians*, obtaining a Seat in their common Aſſembly, in the room of the *Phocæans* [e]. For altho' the League, by which the ſeveral States are thus combin'd, may ſeem to be a real laſting Engagement [f], and tho' a State doth not ceaſe to be the ſame, upon the Alteration of its Government; yet the Alliance muſt always be preſumed to expire, when any one People are brought under a foreign Yoak, or made the *Acceſſion* of another Kingdom. Becauſe, the League being made between *free* States, conſider'd in that Capacity, whenever this Condition fails, the League muſt fail with it. Nay, tho' we ſhould go ſo far as to ſuppoſe, that in the Terms of the League there was an expreſs Clauſe, that the Change of Government in any State ſhould not exempt it from the Engagement, yet the Change here ſpoken of muſt be preſumed to be made in a lawful manner, and with the Conſent of the People. And, conſequently, neither an unlawful Uſurper, nor any foreign Enemy, ſhall have a Place in the Congreſs of Allies.

On the other hand, theſe *Syſtems* do more cloſely unite, and are incorporated into the ſame civil State, by the following Means: Either, if all the Confederates, by a voluntary Submiſſion, put themſelves under the Government of ſome one Perſon or Council; or if ſome one People, which hath the Advantage in Strength and Power, ſhall reduce the reſt to the Condition of dependent Provinces: Which uſually happens, when weaker States allow any laſting Preference of Prerogative to thoſe that are ſtronger, and engage themſelves in unequal Alliances [g]. Laſtly, if ſome particular Man invade the ſovereign Command, through the Favour of the Soldiers, the Eſteem of the Commonalty, or the Strength of a prevailing Faction.

XXII. To conclude; the laſt Diſpute upon this Head commonly is, concerning the Excel-

[a] *Vid.* Grot. *Apologet.* Chap. i. *ſub fin.* [b] Add. *Diodor. Sic.* Lib. xv. Chap. xxviii. [c] Add. *Liv.* Lib. xxxviii. Chap. xxxi, xxxii. [d] Comp. *Xenoph.* Lib. iv, v. Rer. *Græc.* where he ſpeaks of the Peace with *Antalcidas*. [e] *Diod. Sic.* Lib. xvi. Chap. lxi. [f] See, hereafter, in Book viii. Chap. ix. Sect. 6. [g] Vid. *Grot.* Lib. i. Chap. iii. Sect. 21. Not. 10. *circa fin.*

[1] The *Romans* had not yet ſubdued theſe People; but, under the ſpecious Name of *Allies*, they held them in a Dependence, which left their Liberty quite precarious. Let us ſee how *Juſtin* relates this Matter: *Legatis* [à *Romanis* miſſis ad inſpiciendas res ſociorum & ad injuriam demerendam] *occultè mandata data ſunt, ut corpus* Achæorum *diſſolverent, ſingulaſque urbes proprii juris facerent, quo facilius ad obſequia cogerentur; & ſi quæ urbes contumaces eſſent, frangerentur,* &c. *Igitur decretum Senatûs recitant*——Expedire omnibus, ut ſingulæ civitates ſua jura & ſuas leges habeant. Lib. xxxiv. Chap. i.

[2] Unleſs, after having been conſtrain'd to ſubmit to the Conqueror by Force of Arms, they come afterwards to be delivered from this Subjection. See Lib. viii. Chap. vi. §. 23.

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lency of particular Forms of Government, and which ought to be preferr'd to another: whether that under which the publick Welfare may with more Expedition, and more Certainty, be procured, or that where the Sovereign Authority is leſs expos'd to Corruption and Abuſe. Now, as to the Point of Compariſon, thus much, in the firſt Place, is evident, that no Frame of civil Conſtitution can be ſo exactly modell'd, and ſo well guarded by Laws, but that, either through the Negligence or the Wickedneſs of thoſe who bear Rule, the ſame Government which was inſtituted for the Security of the Subjects, may turn to their Prejudice and Miſchief. The Reaſon of which is, becauſe Government was firſt eſtabliſh'd as a Defence againſt thoſe Evils, which Men were capable of bringing on each other. But, at the ſame time, they who were to be inveſted with this Government were, likewiſe, *Men*, and, conſequently not free from thoſe Vices which are the Spurs to mutual Injury. *Vitia erunt, donec homines* [a], *Whilſt there are Men in the World, there muſt be Faults:* And therefore we cannot but ſometimes ſuffer from their Hands the very Evils from which they ought to protect us. Hence the old Remark is ſo often true,

Quicquid delirant reges, plectuntur Achivi [b].

The Kings grow frantick, and the People ſmart.

As therefore the Condition of Human Affairs will not bear an abſolute Perfection; ſo 'tis controverted between many Perſons, what Form of Government ſeems to have the feweſt Imperfections: And the Generality of Judges pronounce in Favour of Monarchy [c]. It is not our Deſign to examine the particular Allegations of each Party. Only thus much we would obſerve, that Arguments of this Kind are by no means ſo very ſtrong and concluſive, as that the Inferences, drawn from them, muſt neceſſarily fall out in all Places and at all Times: And that the Actions of one or two Governors are no manner of Proof, that all others, of the ſame Order or Title, muſt needs follow their Example. And in our Judgment, the wiſe Speech of *Marcellus* in *Tacitus* [d] is what every good and uſeful Subject ought to meditate upon: He ſaid, 'He 'could not but remember that happy Age, under which, he himſelf came into the World, 'and that Form of Government which had 'been inſtituted by their Forefathers; yet 'twas 'his Principle,' *Ulteriora mirari, præſentia ſequi; bonos Imperatores voto expetere, qualeſcunque tolerare: To admire what was paſt, but to follow what was preſent; to wiſh for good Emperors, but to bear with any* [1].

It may not ſeem improper, on this Occaſion, to ſhew briefly the Reaſon why, amongſt the antient *Grecians*, ſuch Perſons, as, under a *democratical* or *ariſtocratical State*, aſſumed a *monarchical* Power, met with ſo univerſal Hatred and Cenſure: And what Motives induc'd them to maintain their Authority by ſuch evil Arts, as we find deſcribed in *Ariſtotle* and other Authors; on account of which the Name of *Tyrant* hath been branded with an indelible Mark of Deteſtation. Now the *Grecian* States ſeldom ſtretch'd their Dominion beyond the Compaſs of a ſingle Town. And to ſuch the moſt agreeable Government was, either a Democracy or an Ariſtocracy moderately exercis'd; or laſtly, what *Ariſtotle* terms an *heroical Kingdom*, a princely Sway, founded rather upon the Authority of Perſuaſion, and upon the general Character of extraordinary Virtue, than upon any proper Sovereignty, or Force of Command. Beſides, the *Grecian* Nation, being of a haughty Spirit, and of a ſtirring and reſtleſs Temper, was moſt in love with ſuch a Conſtitution, under which every Man might bear a Part in the Government. Wherefore in a State of this Kind, he who had taken on himſelf a regal Authority, a thing ſo odious to the People, againſt their Conſent, was obliged, for his own Security, to awe the Town with a Caſtle or Citadel, and to place a ſtrong Guard round his Perſon; and then this Guard was to conſiſt of Foreigners, becauſe it had not been ſafe to truſt his own Subjects, and becauſe he had not the means of bridling one Province by another, by interchanging the Native Forces. Farther, the Truth and Loyalty of the Guard was not otherwiſe to be purchaſed than by the Largeneſs of their Pay; and hence, for the raiſing of ſufficient Funds, the Subjects were to be drain'd by conſtant Impoſitions. Again, it was no leſs neceſſary that the Natives ſhould be diſarm'd, and render'd as weak and *little* as poſſible; that *the Heads of the Poppies* ſhould be *cut off*; that all Meetings of the wealthier Subjects ſhould be ſuppreſs'd; and that Informers and Court-Spies ſhould be maintain'd and encourag'd. So that 'twas not Injuſtice only, but downright Madneſs, in theſe *Tyrants*, to affect ſuch a Government as was to be preſerv'd by evil Arts, which could not be laſting, and under which 'twas impoſſible for them to gain the Love of their Subjects. And it is equally abſurd to inſtitute a Monarchy in a State, confin'd to a ſingle Town; and a Democracy in larger Territories, and vaſtly extended Dominions. But,

[a] Tacit. *Hiſt.* Lib. ii. Chap. lxxiv. [b] *Horat.* Lib. i. Ep. ii. Ver. 14.

[c] Vide *Iſocrat.* in *Nicocl.* *Herodot.* (*Thalia*) where the *Perſian* Nobles debate about eſtabliſhing a Form of Government, after the *Magi* had been kill'd. *Euripid. Supplicibus*, ver. 405, &c. Bodin. *de Rep.* Lib. vi. Chap. iv. Arniſæus, *Reflect. Polit.* Lib. ii. Chap. iii. Sect. 2. and many others. On the other hand, the *Dutch* Writer of the *Political Balance* ſeems to have omitted nothing that Malice or Envy could ſuggeſt againſt Monarchy. A great Part of whoſe Arguments may be turn'd upon him, by what Mr. *Hobbes* obſerves *De Cive*, Chap. x. & *Leviath.* Chap. xix. [d] *Hiſt.* Lib. iv. Chap. viii.

[1] See *Maximus* of *Tyre*, Diſſert. vi. Pag. 66. *Edit. Davis*, where he maintains, that as *Ariſtocracy* is better than *Democracy*, ſo *Monarchy* is preferable to both. See, likewiſe, *Montagne*, Lib. iii. Chap. ix. Pag. 711. Ed. Par. *in Folio*, where he ſays, "That theſe violent "and tedious Diſputes about the beſt Form of Government, and the moſt convenient Rules for eſtabliſhing it, are only proper to exerciſe our Learning, &c." And he concluded, that in Truth, "The wiſeſt Policy of each Nation, is that, by which it has always "ſupported itſelf." And *les Caractères* of Mr. *la Bruyere*, Chap. *du Souverain, ou de la Republique*, at the Beginning. *Rousseau*, however, ſays in another Place, That *Democracy* is moſt natural and moſt equitable, *Liv.* i. *Chap.* iii. *Pag.* 11. But after all, no body has better handled this Queſtion relating to the Excellency of particular Forms of Govenment, than Mr. *Sidney* in his *Diſcourſe on Government*. 'Tis worth while to ſee what he ſays from the ſixteenth Section of the ſecond Chapter, quite to the End of it; or, if any one has a mind to have a general Idea of it at one View, he need only read the *Nouvelles de la Republique des Lettres*, *Avril* 1[illegible] Pag. 444, &c. See, alſo, the *Perrhaſiana*, Tom. ii. Pag. 161, &c. and the *Eſſay upon popular Diſcontents*, which is the firſt Piece in Sir William Temple's *Poſthumous Works, publiſh'd in* 1704.

ſince Princes who ſtand poſſeſs'd of wide and ſpacious Realms, have no need to make uſe of theſe Arts for their Support, inaſmuch as they may be able to poize and balance one Province with another; thoſe Perſons are guilty of no leſs Baſeneſs and Wickedneſs, who ſuggeſt any ſuch Practices of Tyranny to the Imitation of great and potent Monarchs, than thoſe who make it their Endeavour to turn the *Odium* of the old *Grecian* Tyrants upon Monarchy in general. And hence, likewiſe, it is evident, that Princes live much more ſecurely in ample Dominions; becauſe there the Diſobedient and Rebellious cannot ſo eaſily communicate their Deſigns, unite their Strength, or touch and taint the Loyalty of others. Whereas, when a whole State is confin'd within the ſame Walls, the Way lies ready for a Handful of Mutineers to ſpread the infectious Madneſs, and to corrupt the whole Body of the Subjects, before the Government can either prevent, or apprehend the ſurprizing Danger [a].

[a] Compare the Reflections which Mr. *Cravina* makes in his *Origines Juris Civilis, &c.* publiſh'd at *Leipſick*, in 1708, with theſe of our Author in this Section.

CHAP. VI.

Of the Affections or Properties belonging to Sovereignty.

The CONTENTS.

I. *How the ruling Power in a State comes to be ſtyl'd Supreme.*
II. *He that is inveſted with this Power is unaccountable:*
III. *And above Human Laws.*
IV. *Of the Diſtinction between real and perſonal Majeſty.*
V. *That a King may be ſuperior to a whole People, demonſtrated.*
VI. *The Arguments to the contrary refuted.*
VII. *Abſolute Government, what.*
VIII. *Not occurring alike in all Forms of civil Eſtabliſhments.*
IX. *Limited Governments, how occaſion'd:*
X. *Founded on what Covenants.*
XI. *In what reſpect the different Parts of the Government may be limited.*
XII. *Of the Power of Eſtates, and Councils.*
XIII. Hobbes *anſwer'd.*
XIV. *The various Ways of holding the Sovereign Power.*
XV. *A temporary Sovereignty, whether poſſible.*
XVI. *Of patrimonial Kingdoms*
XVII. *Of Kings, aſſumed by the free Act and Grant of the People.*

WHEN we would enquire into the *Affections* and *Properties* of the *ſupreme* Power, the firſt Point, which falls under Examination, is, how it comes to obtain that Name and Title. And the chief Reaſon ſeems to be this; becauſe 'tis impoſſible, that one Man ſhould bear a greater Sway over another, than that the latter ſhall be oblig'd to employ his Strength and his Fortunes for the Advancement of the publick Good, as the ruling Party directs, and ſhall farther be obnoxious to capital Puniſhment upon Default. To which may be added this Conſideration, that as, ſetting aſide the Divine Sovereignty, particular Men cannot enjoy a higher Degree of Liberty, than the Power of guiding and applying, by their own Judgment, their Actions, Perſons, and Goods; ſo the Freedom of a Community or Body of Men conſiſts in their being able, by their own joint Diſcretion, independent of the Will of any Superior [1], to reſolve and decree ſuch Matters, as appear conducive to the general Benefit and Safety. And hence, likewiſe, it follows, by neceſſary Conſequence, that ſuch a Power being *ſupreme*, or not acknowledging any Superior upon Earth, the Acts, which proceed from it, cannot be diſannull'd at the Pleaſure of any other [a] Mortal [2]. But that a Perſon or a State ſhould be able to alter the Decrees and Reſolutions of their own Will, is ſo far from abridging that it really enhanceth their Liberty.

II. For the ſame Reaſon muſt the *Sovereign* be acknowledg'd *unaccountable:* That is, not obnoxious to Human Judgment, or Human Puniſhment [3]. For both theſe ſuppoſe a ſuperior; but a Superior to the Supreme, in the ſame Order of Men, and the ſame Notion of Government, is a Contradiction. But it will be

[a] Vid. *Grot.* Lib. i. Chap. iii. Sect. vii. Not. 1.

[1] *Propria, & aliunde non dependente judicio*; theſe are the Author's own Words; but if this be true, then Princes whoſe Power is limited, are not *Sovereigns:* Since they cannot do any thing good in Law, in ſome certain Caſes, without conſulting an Aſſembly of the People, or of thoſe who repreſent them: But our Author, in the tenth Section of this Chapter, plainly aſſerts the contrary. He ought therefore to have expreſs'd himſelf here in ſuch a Manner, as to have compriz'd more clearly what is agreeable both to an abſolute *Sovereignty*, and to a *limited one*.

[2] See Sir *George Mackenzie*'s *Jus Regium*, Archbp. *Uſher* of the Obedience of Subjects to their Princes, and the Homily of the Church of *England* againſt Rebellion.

[3] *Nam impunè quælibet facere id eſt Regem eſſe. C. Memmius apud Salluſt. Bell. Jugurth.* Chap. xxxvi. 'To do with Impunity whatever one will, is to be a King.' *Pliny the Younger* ſays, That what is moſt agreeable in Sovereignty, is the not being liable to be forc'd to any thing whatſoever: *Ereptumque principi* [*Nervæ*] *illud in principatu beatiſſimum, quod nihil cogitur.* Panegyr. Cap. vi. Numb. 1. Our Author cites theſe Paſſages. See *Grotius*, Lib. i. Chap. vi. Num. vi. Sect. 6. However, all that our Author here ſays, is to be underſtood with this Reſtriction, *as long as he does not forfeit his Right.* See hereafter, Chap. viii.

proper

proper here to obſerve, that I may give an Account two Ways, either to a *Superior*, who upon his Diſlike may reverſe all my Acts, and further inflict a Puniſhment upon me: or elſe to an *Equal*, whoſe bare Approbation of my Proceedings I am willing to obtain; only to keep up my [a] fair Character with him, and to juſtify my Integrity and Honour. In the former Manner, ſupreme Rulers are not accountable to any earthly Power. But in the latter Way, Princes who are tender of their Reputation commonly endeavour to lay open their Actions and Counſels to the View of the whole World: Which being done only to ſecure the Credit of their Reign, cannot imply the leaſt ſhadow of Subjection. In the ſame Manner, I may expend my Money and Fortunes at my own Pleaſure, and as I ſee Occaſion; and yet I am willing to keep Books of my Accounts, to ſatisfy my Friends, that I am no ill Husband.

And then as for the other Point, the being obnoxious to Puniſhment, this cannot affect him, who owns no Court that can give him his Tryal, no Judge that can pronounce or execute Sentence upon him. For the Courts of Juſtice in a Commonwealth reach no farther than the Subjects, and are beholden to the Sovereign for all their Authority and Power. But if, as it frequently happens, Princes condeſcend to anſwer an *Action* in their own Courts, in Matters of Debt, and the like Caſes; this is not done, as if they acknowledg'd any ſuperior Force, that could oblige and compel them, but only expreſſeth their Deſire of ſeeing the Plaintiff's Pretenſions clearly made out; which, if they once appear juſt, they are ready to ſatisfy and diſcharge in a voluntary Manner. Yet we ſpeak here of Human Puniſhment only, inflicted by a ſuperior earthly Judge. For the Divine Juſtice finds many Ways of ſhewing itſelf on thoſe high and potent Sinners, who violate the Laws of Nature, in Contempt of all earthly Tribunals. *Reges in ipſos imperium eſt* Jovis [b]. *Princes are but the Subjects of Heaven.* As to what Hiſtory [c] tells us of the *Egyptians*, that when their Kings had been ill Governors, they denied them the uſual Honours of Burial; this Piece of Diſreſpect can ſcarce fall under the proper Notion of Puniſhment.

III. Farther, when a civil Power is conſtituted *Supreme*, it muſt, on this very Score, be ſuppoſed exempt from Human Laws, or, to ſpeak more properly, *above* them. As for the Laws of GOD and Nature, to bring them into the Queſtion, would be no leſs abſurd than impious [d]. Now Human Laws are nothing elſe, but the Decrees of the ſupreme Power, concerning Matters to be obſerved by the Subjects, for the publick Good of the State [1]. That no ſuch Edicts can directly oblige the Sovereign is manifeſt; becauſe his very Name and Title ſuppoſeth that no Bond or Engagement can be laid on him by any *other* Mortal Hand: And for a Perſon to *oblige himſelf* under the Notion of a Law-giver, or of a Superior, is an Impoſſibility [e] [2]. Yet, in an indirect Manner, and by Way of Reflection, the Force of his own Ordinance frequently reacheth the Legiſlator, on Account of natural Equity, and publick Decorum, to excite and encourage Obedience in the Subject, by acting that himſelf, which he preſcribes to others, as expedient for the common Intereſt; and, leſt by forbidding ſuch Practices, as he is himſelf obſerv'd paſſionately to purſue, he ſhould ſeem to envy others the Sweetneſs of Vice, and engroſs it all for his own Poſſeſſion and Prerogative. *The Life of a Prince, ſays* Pliny [f], *is a perpetual Cenſorſhip; by this we are turn'd and directed in all our Proceedings, and, to ſecure our Obedience, we have ever more need of his Pattern, than of his Preſcriptions. For Fear is a moſt unfaithful Guide to Virtue. Men are much better influenced into Goodneſs by the Power of Examples, which, at firſt Sight, diſcover this Advantage in themſelves, above all other Methods of Inſtruction,*

[a] See our Author's Treatiſe, intitled, *The Preſent State of Germany*, Chap. vi. §. 7.

[b] Hor. *Od.* i. *ver.* 5, 6. *Lib.* iii. [c] *Vide* Diodor. Sic. *Lib.* i. *Cap.* lxxii. [d] The Generality of Mankind imagine, 'that the principal Advantage of Sovereignty conſiſts in not acknowledging any ſuperior Power——who then ſhall govern the Governor? 'That Law which *Pindar* calls the living and ſupreme Directreſs of Men and Gods: not written in Books, or engraven in Tables; 'but imprinted in a lively Senſe upon the Reaſon, ever reſiding and keeping a conſtant Watch, nor ſuffering the Mind to be one Moment without a Guide and Ruler.' *Plutarch ad principem indoctum*, Pag 780. C. See, alſo, upon the ſame Subject Mr. *Baddam*'s Diſſertation, intitled, *Principem Legibus Humanis, ſed non Divinis ſolutum.* Printed at *Hall* in 1695.

Omne ſub regno graviore regnum.
Monarchs muſt anſwer to a higher Throne.

[e] *Vide* Hobbes *de Cive*, Chap. vi. Sect. 14. [f] *In Panegyr.* Chap. xlv. Not. 6.

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[1] Our Author is here guilty of the very ſame Error which I have taken Notice of in the firſt Note upon the foregoing Section. For neither does this agree with Sovereigns whoſe Power is limited; becauſe tho' they ratify the Acts which the Aſſembly of the People, or their Repreſentatives, have paſs'd relating to publick Affairs, the whole Management of which they are not willing to leave entirely to them; and tho' theſe Acts derive their Power and Authority immediately from them, yet however they cannot revoke them, or make any Alterations in them without the Conſent of the People. It muſt ſtill be obſerv'd, that what our Author here ſays, only regards the Actions of the Sovereign, and not the Effects which the Laws that he has abrogated may have already produced with reſpect to the Subjects. See Book i. Chap. vi. Sect. 6.

[2] Vide *Grot.* Lib. ii. Chap. iv. Sect. 12. Not. 1. *Gronovius* in his Notes on this Place of *Grotius* cavils like a true *Grammarian*, at the ſame time that he reproaches that great Man with a wretched Piece of Sophiſtry *(Sophiſtica Cavillatio)*. *When the People*, ſays he, *make a Law, does not the Law itſelf oblige them to obſerve it? Do they not make the Law above themſelves? Whence then proceeds that Remark of* Titus Livy (Lib. ii. Chap. i.) that, from the Time of the *Expulſion of the Kings out of* Rome, the Empire of Laws, more powerful than that of Men, immediately began? *If each particular Man can bind himſelf by a Promiſe, or by an Oath, why ſhould a whole People be bound by the Laws* of their own making? The Law is, *according to the Civilians*, a general Convention of the Citizens (*Communis Reipublicæ Sponſio*, Digeſt. Lib. i. Tit. iii. Leg. 1, 2.) *and a ſort of Oath, by which they engage themſelves to one another to obſerve what they have agreed upon.* This is the Reaſon why Juſtin *calls the Laws of an antient Society of* Pythagoreans, *Sodalitii Sacramenta* (Lib. xx. Chap. iv. Numb. 14.) But, I. *Grotius* had a Mind, and certainly he ought to ſpeak with a philoſophical Exactneſs, and not as *Gronovius* does, to diſpute about a figurative Expreſſion very common both in antient and modern Authors, as well as in common Diſcourſe. Properly ſpeaking, one cannot ſay that the Law is either above the Legiſlator who made it, or even thoſe to whom it is preſcrib'd; with leſs Reaſon than that the Law itſelf impoſes on them any Obligation. The Obligation proceeds from the Authority of a Superior; and every Superior is a Perſon, and not a Thing. If we are bound to obey the Laws as Law, it is not directly becauſe it ſeems to be, or is even really juſt, or advantageous to the Publick (otherwiſe we might diſpenſe with obſerving thoſe which only related to indifferent Things) but becauſe it is preſcribed by a Superior, who has a Right to demand our Obedience in every Thing that is not contrary to the Laws of God or of Nature. Therefore when a free People eſtabliſh Laws of their own Accord, to govern themſelves, every Member indeed promiſes to obſerve them as long as they are in being, becauſe, with reſpect to him, they are ſo many *Ordinances* of a Superior, or of the whole Body of the Community, to whoſe Will he has ſubmitted himſelf. But the whole People are not bound by any Compact, becauſe they cannot be Superior to themſelves. I own, that if theſe Laws are conſiſtent with the Good of

that they ſhew the Poſſibility of obtaining what they adviſe us to purſue. There is a Remark not unworthy the Majeſty of Kings, which *Athenæus* [a] hath made from the Reports of more antient Hiſtories, that of the two great Monarchs in *India* and in *Perſia*; the former was abſolutely forbid to exceed the moderate Bounds of Drinking; and the latter allow'd his Liberty in this reſpect, but one Day in a Year, at a ſolemn Sacrifice and Feſtival. *Claudian*'s Admonition to the young Emperor was wiſe and proper:

In commune jubes ſi quid, cenſeſque tenendum,
Primus juſſa ſibi: tunc obſervantior æqui
Fit Populus, nec ferre negat, cùm viderit ipſum
Authorem parere ſibi: componitur orbis
Regis ad exemplum; nec ſic inflectere ſenſus
Humanos edicta valent, ut vita regentis [b].

Would you your publick laws ſhould ſacred ſtand?
Lead firſt the way, and act what you command.
The crowd grow mild and tractable to ſee
The author govern'd by his own decree.
The world turns round, as its great maſter draws,
And princes lives bind ſtronger than their laws [c]:

IV. For the better aſſerting and vindicating the juſt Pre-eminence of the ſupreme Power, eſpecially in monarchical Governments, it will be proper to take under our Cenſure that vulgar Diſtinction of Sovereignty into *real* and *perſonal*; which ſeems, in our Judgment, to be not only very abſurd, but of very pernicious Conſequence, if applied to this Senſe, that there ſhall be ſuppoſed, at the ſame time, in the ſame Monarchy, a *real* and *perſonal Sovereignty*; the latter to be lodg'd in the King, the former in the People, as oppoſed to the King; and that in this, as in moſt other Caſes, the [d] *real* Authority and Right ſhall have the Aſcendant of the *perſonal*. Nothing can be more evident, than that ſuch a Notion contradicts itſelf, turning every Kingdom into a Monſter with two Heads, and expoſing it to utter Convulſion and Ruin. The Neceſſity of this Diſtinction doth by no means appear from the Reaſon commonly alledg'd, that the King, or the Royal Family being extinct, the People ſo far return to their firſt Right and Freedom, as that they may, at their Pleaſure, either chooſe a new King, or ſet up another Form of Government. It may as well be affirmed, that we ought to ſuppoſe a *real Power* in a Servant, contra-diſtinct to the *perſonal Power of* his Maſter, merely becauſe if the Maſter dies without Heirs, the Servant is at his own Diſpoſal. Nor can any better Argument be drawn from the Poſition of *Grotius* [e] and others, that there is a twofold Subject, in which the ſupreme Power reſides, one *common*, the other *proper*; the former the whole State or Kingdom, the latter a ſingle Perſon, or a Council, whether conſiſting of many, or of few. For the Senſe of that Obſervation can be only this, if we ask in a general and confuſed Manner, Where the ſupreme Power is lodg'd? The Anſwer will be, In the whole Commonwealth: But if we propoſe the ſame Queſtion diſtinctly, and enquire, What *Perſon* bears the Sovereignty in the State? It will be anſwer'd, The King, or the Senate, or the People. But who will hence infer two diſtinct ſovereign Powers, one *real* in the People, another *perſonal* in the Prince? This would be no leſs ridiculous, than to conceive two diſtinct *Sights* in a Man; one reſiding in a *common Subject*, the Perſon; the other in a *proper Subject*, the Eye.

V. Many have taken the Liberty to aſſert, that the Power of the Prince neither can, nor ought to be ſuperior to that of all the People. *Ariſtotle* ſeems very much to countenance this Opinion, in the ſixteenth Chapter of his Third Book of Politicks [f]. And in the fifteenth Chapter of the ſame Book, he diſcourſeth to this purpoſe [f]: *A King ought indeed to be inveſted with Strength and Power; but in ſuch a Degree, as that he ſhall be greater indeed than ſingle Perſons: And than*

[a] *Lib.* x. *ex Oteſ.* [b] *De* IV. *Conſul.* Honorii, ver. 296, *&c.* [c] Liv. *Lib.* xxvi. *Chap.* xxxvi. *Would you lay an Injunction on an Inferior? The moſt likely Means to engage his Obedience, will be to apply yourſelf, and thoſe about you, to the ſame Practice.* Plin. *Lib.* IV. *Epiſt.* xxii. towards the End, *As in a Body, ſo in a Government, the moſt dangerous Diſeaſe is that which flows from the Head. Vide* Juſtin. *Lib.* iii. *Chap.* ii. *Not.* 8. The old *Perſian* Proverbs to this Purpoſe carry much good Senſe in a very odd Dreſs: *If a King pluck but an Apple in a Subject's Garden, his Servants will root up the Tree. If a King allows his Soldiers the ſtealing of half a dozen Eggs, their next Exploit will be to victual the Camp with Hens.* Roſar. Perſic. *Chap.* i. [d] Thoſe are call'd Rights *purely perſonal*, which are only lodg'd in the Perſon who is inveſted with 'em; and thoſe *real Rights*, which indeed ſuit with a certain Perſon (for that is common to all Sort of Rights) but which are, alſo, in ſome manner fix'd to a certain Thing, which they always follow, ſo that whoſoever acquires the Thing, has from that Moment the Right, by that very Circumſtance, that he lawfully poſſeſſes it. See *Grotius*, Lib. i. Chap. i. Sect. 4. [e] Lib. i. Chap. iii. Sect. 7. [f] Towards the End.

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of the Society, they ought not lightly to be aboliſh'd, as long as things remain in the ſame Situation. But it is not becauſe they are Laws that have been impos'd and eſtabliſh'd as ſuperior to themſelves; 'tis only by Virtue of the Law of Nature, which the Creator and Sovereign Legiſlator impoſes on every particular Society, as well as on every individual Perſon, to take care of their own Preſervation. II. The Conſequence that *Gronovius* draws from the Obligations, into which we enter by Promiſes or Compacts, and by an Oath, is evidently falſe. When I make a Promiſe to any one, he to whom I promiſe, acquires, from that Moment, a Right with reſpect to me; and I am actually bound by my Word till I have accompliſh'd it, or he acquits me of it. But who does acquire (by the Laws that a People eſtabliſh to govern themſelves) a Right, by Virtue of which he can demand of them not to aboliſh 'em? The ſame is to be ſaid of an Oath: For, in every valid Oath, the Divinity which we call to witneſs, acquires, if I may ſay ſo, a Right to demand the Performance of what we have ſworn; whether the Oath be reduced to a Sort of Vow, or whether 'tis only inſtead of an Acceſſory, as in the Engagements which we enter into with other People. See what I have ſaid in one of my new Notes, Book iv. Chap. ii. Sect. 17. III. The Laws, properly ſpeaking, can never be look'd upon as Conventions. See what our Author has ſaid, Book i. Chap. vi. Sect. 2. IV. In ſhort, *Grotius*, as well as our Author, is here only ſpeaking of the Civil Laws *purely poſitive*, and not of the *Laws of Nature*: For with reſpect to the laſt, nothing is more true than what *Pliny* the Younger ſays, *Non eſt Princeps ſuper Leges, ſed Leges ſuper Principem*, Panegyr. *Trajan.* Chap. lxv. Numb. i.

[f] In the Beginning: Where he cites the Reaſon of thoſe who are of Opinion, that *Abſolute Monarchy* is contrary to Nature. For that Philoſopher calls *an Unlimited and Abſolute Monarchy*, a Government, where the King manages as he thinks proper all the publick Affairs, with the ſame Authority, as a Father commands in his Family, and a Commonwealth governs itſelf. In the ſeventeenth Chapter *Ariſtotle* decides this Queſtion according to his Ideas; and ſays, that as the Temper and Genius of every People require one certain Form of Government more than another, if, in a Nation proper for Monarchy, there be any Perſon or Family that ſurpaſſes all the reſt of the Subjects in Virtue, that then it is equally juſt and advantageous to the State, that that Perſon, or that Family, ſhould, reign with an abſolute Power. Therefore that Philoſopher does not aſſert, that no King can ever be above the People, tho' our Author ſeems here to charge him with it. The Qualifications that *Ariſtotle* requires in an *Abſolute Monarch* are very rare; and that gave room to Mr. *Sidney*, in his Diſcourſe upon Government (Chap. iii. Sect. xxiii.) to maintain, that that Philoſopher ſuppoſes a Man that is not to be found in the World, to inſinuate by that, that we ought not to truſt any one whatſoever with abſolute Power. But perhaps *Ariſtotle* never conceiv'd any Idea of a perfect Virtue, and that only ſuppoſing Men to be as they generally are, he deſign'd only to exclude

than many in Conjunction; yet ſtill inferior to the whole Body of the People. *Grotius* [a] hath undertaken the Controverſy with theſe Men; and the firſt Argument he urges againſt them is, that as each particular Man may give up himſelf in perſonal Servitude to another; ſo a whole People or Nation may transfer on a ſingle Governor all their Right and Power over themſelves, without Limitation or Reſtriction [f]. Tho' indeed, in other Reſpects, it ſeems by no means fair, to compare the Condition of Subjects, under an *abſolute* Monarch, with that of Slaves. For as *Claudian* [b] well obſerves,

Fallitur egregio quiſquis ſub Principe credit
Servitium: Nunquam Libertas gratior extat,
Quam ſub Rege pio. ----------

They groſsly err, that think a ſlaviſh chain
Binds 'em beneath a virtuous monarch's reign.
When juſtice, piety, and goodneſs ſway
The regal power, 'tis *freedom* to *obey* [c].

Grotius proceeds to reckon up ſeveral Cauſes and Occaſions which may induce a People to renounce all their Right in this Manner, and yield it up into the Hands of an abſolute Lord. Many of theſe we find put together by *Tully* [d]: *Men*, ſays he, *ſubject themſelves to the Power and Command of another, for ſeveral Reaſons. They are led by Kindneſs and Good-will, by extraordinary Benefits, by ſuperior Worth and Excellency, by the Hopes of Advantage, and by the Fears of Compulſion; large Promiſes of Bounty and Favour; and laſtly, as we have ſeen it often happen in our Commonwealth, by downright Wages and Hire.* But thoſe Caſes which *Grotius* chooſeth to inſiſt upon are, If a People ſhould chance to lie under manifeſt Danger of Ruin from an Enemy, and have no other Means of being deliver'd, than to put themſelves, without any Reſerve, under the Command of their Protector [e]: Or, if being in Diſtreſs, with violent Want, they cannot otherwiſe procure Suſtenance and Support [f]: If a Father of a Family, having large Territories, ſhould refuſe to admit any Perſon into his Lands, but upon Covenants of abſolute Subjection: Or if a Maſter, who poſſeſſeth a vaſt Number of Slaves, ſhould give them their Freedom on the ſame Condition. Beſides, it's poſſible, that ſuch a Form of Government may ſuit with the Genius of ſome particular People. Nor ought the Deſire of living under an abſolute Monarchy to be always judg'd a Token of a low and abject Spirit, tho' it hath uſually lain under this Cenſure, in the Opinions of Perſons born in Democracies; who, on that Score, will never pardon the *Cappadocians* for refuſing Liberty, when offer'd them by their *Roman* Conquerors [g]. But, on the contrary, to any People amongſt whom there are a Number of proud, inſolent, aſpiring Men, impatient of Equality, a popular Liberty muſt be the moſt pernicious Thing in the World; and yet the ſame Men very contentedly ſubmit to a Monarchical Government. For they had rather ſerve One, and lord it over all others in the State, than live on the common Level; and, as *Auſonius* ſays [h], *For the ſake of commanding they are willing to obey.* The *Eaſtern* Nations have been of old, and are ſtill ſo accuſtom'd to Monarchy, that we are told, the *Chineſe* could not form any Notion of the *States* of *Holland*, having heard of no Government, but that by Kings [i]. And a *Venetian* Traveller [k] reports, that the King of *Pegu*, when he was inform'd, that the ſovereign Power at *Venice* was lodg'd in the *Senate*, burſt out into a Fit of Laughter, taking it for a meer Jeſt in Politicks. On the other ſide, ſuch Men are fit only to live in a popular State, as have moderate Spirits, and eaſy Paſſions, and know how to reſt ſatisfied with the ſame humble Condition as their Neighbours. Laſtly, it often falls out, that free States are, by inteſtine Diviſions, brought into ſuch Circumſtances, as that they cannot be ſafe otherwiſe, than under the abſolute Command of a ſingle Perſon; and, as *Lucan* obſerves,

Cum Domino Pax iſta venit [k].

They gain a *Maſter* when they gain a *Peace*.

VI. It may, perhaps, ſeem more to the purpoſe, to examine the Reaſons of thoſe Men,

[a] *Vid.* Exod. xxi. 6. Levit. xxv. 39. *Add.* Selden. *De J. N. & G. ſic. Heb. Lib.* vi. *Chap.* vii. *V. Lib.* xl. *Tit.* xii. *Lib.* xxxvii *D.* De liberali Cauſa, & *C. Lib.* vii. *Tit.* xvi. *Lib.* x. *D. d. t. Lib.* vii. & *Lib.* xxxiii, & *D.* Quib. ad Libert. proclam. non licet. *Lib.* xl. *Tit.* xiii. *Lib.* iv, & *Lib.* xxviii. *Tit.* iii. *Lib.* vi. *Sect.* 5. *D.* De injuſt. Teſtam. &c. *Novell. Leonis*, lix. *Cæſar* reports of the antient Gauls, that amongſt them, moſt of the inferior Populacy, when oppreſs'd either by Debts or Taxes, or the Injuries of too powerful Neighbours, ſold themſelves as Vaſſals, on ſome of the Nobility, who enjoyed all thoſe Rights over them, which Maſters ordinarily bear over their Slaves. *De B. G.* Lib. vi. Chap. xiii. Not. 2. [b] *De laudibus Stilicon.* Lib. iii. ver. 113, &c. [c] There is an excellent Saying to the ſame purpoſe in *Philoſtrat.* De Vit. *Apollon.* Lib. v. Chap. xii. Pag. 245, *B.* Ed. *Morel. As ſome one Man in a Commonwealth, ſignally ſurpaſſing others in Wiſdom and Virtue, ſeems by his good Management to turn the popular Government into the Command of a ſingle Perſon; ſo a ſingle Perſon reigning Sovereign in a State, if he direct all his Counſels to the Publick Good, ſeems to expreſs, in his Authority, the Freedom of a popular Government.* *Add.* Hobbes *De Cive*, Chap. x. Sect. 8. [d] Offic. ii. *Chap.* vi. [e] *Vide* Liv. Lib. vii. *Chap.* xxxi. [f] *Vide* Geneſ. xlvii. 19. [g] *Vide* Strabo, *Lib.* xii. *Pag.* 273. & Juſtin. *Lib.* xxxviii. *Chap.* ii. Thus Saying of *Euripides*, in (*Helen.* ver. 283) and 'tis no more than what was the current Notion of the *Græcians*;

Τὰ Βαρβάρων δ' ἅλα πάντα πλὴν ἑνός. In Barbarous Kingdoms all are Slaves but One.

[h] —— *Et dominari Ut poſſint, ſervire volunt,* —— Idyll. xv. ver. 37, 38. [i] Neuhof. *in Legat.* [k] Caſpar Balbi, *in Itinerar.* [k] *Lib.* i. Pharſal. *ver.* 670.

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clude thoſe enormous Vices which denominate a Tyrant. Beſides, our Author here cites another Paſſage out of *Ariſtotle*, which does not at all relate to the Superiority of the People above the King, but only to the Strength and Power with which the King is inveſted to put his Laws in Execution, and to reſtrain his rebellious Subjects. *He ought indeed to be greater than every Subject in particular, than many in Conjunction, but ſtill inferior to the whole Body of the People.*

[f] Ibid. Sect. 1. *Gronovius* here, alſo, finds Fault with that great Man; but his Cenſure is no better grounded, than that mentioned in our fourth Note, Sect. 3. He takes abundance of Pains to prove, that when a King degenerates into a Tyrant, and governs in a Manner manifeſtly tending to the Ruin of the State; or if he violates the fundamental Laws, to which he has ſworn to conform himſelf, the People may reſiſt him, and free themſelves from that unjuſt Subjection. But this is what *Grotius* himſelf owns in expreſs Terms, Chap. iv. Sect. 7. Numb. 1, 2, 3, 4, 5. And Sect. 11, 13, 14. All that he pretends to eſtabliſh in the Place here mention'd is, That the *Sovereignty does not belong to the People always, and without Exception, ſo that they may reſiſt and puniſh their Kings as often as they abuſe their Power.* So that *Gronovius* might have ſav'd himſelf the Trouble of refuting what his Author does not maintain.

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who are so fond of exalting, above Kings, that *real Sovereignty*, of the People, [a] which they have fram'd in their own Fancy. They tell us, then, that all Kings are constituted by the People, and that 'tis natural the Parties, who confer the Dignity, should be superior to the Parties who receive it. Now, as to this Point, it must be observ'd, that altho', in the constituting of all Kings, the People interpose their Consent, yet, there is a great Difference, in the Manner how such Consent is obtained and applied. Some Nations take a King upon their own free and voluntary Motion: Others, under the Distress of War, or some other great Necessity, receive the same Kind of Government, which they would have been very far from desiring, had they not been driven to it, by these Misfortunes. It is agreeable to the common Usage of Speech, to say, that those Princes only are constituted by the People, whom the People appoint by their own free Act. On the other hand, those, who extort the People's Consent by Arms, or the like Means, are not said to have been made by the People's Appointment, but to have subjected the People to their Command. But farther, then, only the Parties who constitute another, are properly superior to him, when it is always in their Power to determine, how long he shall possess the Dignity with which they have once invested him. Whereas, in many Cases, it is, at first, a Matter of free Pleasure and Choice to appoint the Person, and yet the Appointment, being once made, becomes necessary and irreversible. Others answer the same Argument, with this Distinction; a Man may constitute another, either over a third Person, or over himself. In the former Case, the constituting Party is superior to him whom he thus constitutes. For, 'tis supposed before-hand, that the third Man both was, and still is, under the Power of him, who thus sets a new Ruler over him. Whence it follows, that this new Ruler must depend on the Will and Pleasure of the old: For, since *no one can serve two Masters*, unless in Subordination; I cannot appoint another Lord over my proper Subject, without making him accountable to myself: And, consequently, he is no more than a subordinate Governor. Thus a free State, when it gives a General a full Command of its Soldiers, was, and still is, superior to him and them. But he, who constitutes another with Authority over himself, can no more be supposed to continue superior to him, than he can, at the same time, and in respect of the same Person, command and obey,

But 'tis farther urg'd, on the other Side [b], that, since all Government is instituted for the Sake of those who obey, not of those who rule; or, since the King is made for the People, not the People for the King; on that Score, the People must be superior to the Prince: In as much as that, for which another Thing is ordain'd, seems more noble and excellent, than what is thus framed on its Account. Here the Assertion, if held in general, is false; for all Government, or Command, is not instituted for the Sake of those who obey; as is clear in the Authority of Masters over their Servants. Altho' the Master cannot, indeed, well enjoy the Fruits of his Sovereignty, unless he takes some Care of those, who are thus plac'd in Subjection under him. Besides, the Question is not, Whether the Person of the Prince be of more Value than the whole People; as it is, in Case either he or they were necessarily to perish: But, Whether, since Civil Government *is set up* for the Benefit of the Community, the Means of procuring this End should be determin'd by the Judgment of those, who have submitted their Wills to the Will of the Prince; or by him, to whose Prudence and Conscience, the Administration of Affairs hath been given in Charge?

Some, because we read of the People's being punish'd for their Prince's Sins, thence infer [c], that the People had a Power to restrain them from sinning, which cannot be supposed, without a Right superior to the Regal Authority [d]. For I am not chargeable with the Guilt of another Man's Action [e], when I contributed nothing to it. But, 'tis impossible to conceive, how the People can partake in the Sin of their Prince, at which they are heartily displeas'd, unless by neglecting to use some proper Method of Correction. In answer to what is thus urged, we take it for a certain Truth, that the Sins of the Princes do not directly, and on their own Account, derive any Guilt on the Subject, unless the Subjects themselves have contributed some positive Assistance to them [f]. But they cannot contract a Guilt from the Omission of any Restraint or Punishment; because, being inferior to the Prince, they had neither Power nor Obligation, to apply such Means of reclaiming him. For, as our Ability, so our Duty of hindering another Man's Sins, ariseth from our Power over him, or from such an Authority, as implies our Right of directing and controuling his Proceedings. Therefore, what the Prince acts, before he receives that Dignity, certainly cannot affect the rest of the People; since *Equals* have no Command one over the other. No more can the Subjects be charged with what he commits after his Accession to the Crown: Since 'tis ridiculous to say, that those, who, during his private Station, had no Command over him, to restrain him from offending, whilst he was in all Points their Equal, should then, at last,

[a] Our Author hints at especially, the famous Book, intituled, *Vindiciæ contra Tyrannos*. See Question iii. of that Book, p. 67, &c. Ed. *Franc-of.* The Author of this Book took the Name of STEPHANUS JUNIUS BRUTUS *Celta*, but who he was is, as yet, uncertain. The late Mr. *Bayle* has wrote an entire Dissertation upon this Subject, which the Reader may see at the End of his *Historical and Critical Dictionary*.

[b] Vid. *Grot.* Lib. i. Chap. iii. Sect. viii. Not. 13. [c] Vid. *Grot. ubi supra*, Sect. 14.

[d] See the *Vindiciæ contra Tyrannos Junii Bruti*, p. 29, &c. We shall here observe, that the Principle itself is acknowledg'd, in a Treatise publish'd in 1667, by Order of LOUIS XIV. and entitled, *The Rights of her Most Christian Majesty to divers Territories belonging to the Crown of Spain*: We find there these remarkable Words, "God has not given Crowns to Kings for their own Sakes, "but for the Protection and Advantage of the People they govern, who cannot want a Head," Pag. 139.

[e] *Vide* Grot. *ubi supra*, Sect. 16. [f] Euripid. *Suppl. ver.* 879, 880.

——— The State which suffers in its Fame
For a bad Prince, itself is innocent.

obtain such a Command, when they gave up themselves to his Direction and Sway. Nor doth that Act or Covenant, by which Subjects invest a Prince with *absolute* Power, by any means make them Partakers of his Sins. For by such a Covenant the People do not indulge an Impunity to the King, but only leave him in Possession of that, which he before enjoy'd, by Virtue of his natural Liberty: Since he could not exercise the supreme Authority, were he not exempt from Human Punishment [a].

What some urge, that, as he, who hath given himself up for a Slave, still keeps a Right of recovering himself from that State; so a People, who have submitted to the Yoak of Monarchy, retain an equal Right of re-assuming their Freedom: This no Man in his Wits will allow for Truth, unless it be added, as a necessary Condition, that such a Return to Liberty be made, with the Consent of the Master, or the Prince, by their voluntary receding from that just Right and Authority, which they had before obtain'd over the Servant, or over the Subject [b]. Besides, 'tis a groundless Assertion, to say, that a People, to whose Temper and Disposition an absolute Monarchy was once agreeable, when they have, in Course of Time, worn off their servile Genius, may re-establish themselves in a free Commonwealth. For, if such a Case should happen, it will be incumbent on the Prince, so far as Prudence permits, to humour this Change of Inclination in the Subject, by softening the Rigour, and varying the Measures of his Reign. No less ridiculous is it to infer, that, because a Master or Proprietor, who abuseth his own Possessions, may be punished, or deprived of his Goods; therefore, a Prince too, who makes ill Use of his Power, may be corrected, and reduced to Reason. For that which makes such a Proceeding lawful, in the former Case, is the Prince's superior Right over the Goods of the Subjects, which 'tis the Interest of the whole Community to preserve from being thrown away to no Purpose. But, who will pretend, that the People have a kind of Prerogative, or a more eminent Right over the Rights of their King; or, that they are Masters to their own Master?

As for the Sayings of some Princes, produced in Favour of the opposite Opinion, it cannot be denied, but that many such fine Speeches have been used out of a Principle of Ostentation. But they will all fall under this general Answer, that a Prince ought, indeed, to direct every thing to the Good and Safety of his People: But the People are not, thereupon, invested with a Power of punishing him, as often as they shall judge, that he applies wrong Means towards the obtaining of that End. Alike senseless and trifling it is to argue, that, in as much as the People have not a Right of destroying themselves, or of practising any grievous Cruelty on their own Body, therefore they can transfer no such Right on the King. For, who ever maintain'd, that Princes had a Right of destroying their People? We shall, hereafter, make it appear, that absolute Government is by no Means so formidable a Thing, as these Men are willing to fancy: And, how far a People may proceed, in case the Prince manifestly seeks their Ruin, will be, likewise, consider'd in its proper Place [c]. When we are told of the ancient *Consuls*, and other Magistrates, said to be placed over the People, and yet frequently reform'd by the People's Censure and Punishment; these Allegations are vain and idle, the Instances not coming up to the Question [1].

Lastly, As to what is objected from Scripture History, that the *Jews* threw off the Yoak of the *strange Nations*, when they seem'd to have been sufficiently chastised for their Rebellion against GOD; we thus reply, that either they still continued in a State of War with those Nations, never engaging their Faith, or submitting as true Subjects; and so they had a Right of treating their Oppressors as Enemies: Or else, they acted in these extraordinary Proceedings by express Command from Heaven; which, if it seem to intrench on the common Measures of *Right*, is no Precedent for the Imitation of others [d].

VII. To proceed, nothing is more apparent, than that in some States the ruling Power (especially, if monarchical) is free in its Proceedings; in others, it is restrain'd to a particular Manner of acting: Which Difference gave Occasion to the Distinction of Sovereignty into *absolute* and *limited*. And here we think ourselves obliged, in the first Place, to explain, with what Accuracy we can, the proper Signification of this Term *absolute*; which bears a hateful Sound in the Ears of Persons born under free Governments. Indeed, the Word, if falsly applied and understood, may encourage ill Princes to grieve and oppress the State, and to commit the worst of Disorders. Especially, since there will be seldom wanting a Tribe of Flatterers to second the Motion, and under this fair Pretence to feed and inflame the Ambition, and other Vices of their Master. 'You are 'absolute, will they say, therefore your Pleasure 'is your Law: Therefore waste your Subjects 'and your Neighbours with unnecessary Wars, to 'procure yourself the Name of a great Commander: Therefore, take the Liberty of treating with 'Insolence and Abuse whomsoever you think fit: 'Therefore, drain your People with Rapines and 'Exactions, to supply your Luxury, or your 'Pride.' A high Strain of this parasitical Rhetoric was that which *Anaxarchus* used to *Alexander*, when under Discontent for his Murther of *Clytus*; he told him, 'That Justice was therefore feigned 'by the Poets to sit on the same Throne as the 'Gods, or to stand behind *Jupiter*'s Chair, that 'Men might apprehend and acknowledge whatever a King acts to be good and right [e].'

[a] The Argument urged from 2 *Sam.* xxiv. is sufficiently answer'd by *Grotius*, in the Place above quoted. But, as Mr. *Le Clerc* observes, this does not hinder the Argument in question from being false; because the Prince is there regarded, as depriv'd of that Right which made it unlawful to resist. See a remarkable Passage in *Martinius*'s History of *China* (Lib. iii. Chap. i.) applicable to the last Chapter, ver. 17.

[b] *Vid.* Xenophon. Cyrop. *Lib.* iii. *princip.* [c] Chap. viii. [d] *Add.* Sanderson *De Obligat. Conscient. Prælect.* ix §. 16. &c. & *Prælect.* x. §. 13, 16, 22, 23. [e] Plutarch. *ad Princip. Indoct.* p. 780. And so in *Sophocles*, *Antigon.* p. 234. Ed. *H. Steph.*

Kings have large Privileges; and, in chief,
The Power to act or speak whate'er they please.

[1] For those Consuls and Magistrates were not Sovereigns, but the meer Ministers of the People.

Nay,

Nay, there are Authors, who, upon profeſs'd Principles, maintain the abſolute Right of Kings, by ſuch Arguments and Reaſons, as if they meaſured it only by a general Impunity, and a Licence to oppreſs and ſpoil the People. The true State of the Point then is this: As we cannot conceive, in ſingle Perſons, a higher and more abſolute Liberty, than that they ſhall determine and diſpoſe of their Goods and Actions, not by the Will of another, but by their own Judgment and Pleaſure, yet ſtill with a full Obedience to the Law of Nature; and as this Liberty naturally belongs to all Perſons, who are not ſubject to the Command of others: So, where many Men cleave together in an eſtabliſh'd *State*, there too, as in a *common Subject*, muſt neceſſarily reſide the ſame Liberty, or the Power of chooſing, by their own Judgment, all Means and Methods tending to the Preſervation of the whole Society. And this Liberty is attended with an *abſolute Command*, or a Right of preſcribing thoſe Means to the particular Members, and of compelling them to a due Obedience and Conformity. Therefore, in every *State*, properly ſo call'd, there muſt always be ſuch an *abſolute Authority*, at leaſt in *Habit* and *Power*, if not always in *Exerciſe* and *Act*. For 'tis a Contradiction to ſay, that ſuch a Community is obnoxious or ſubject to none, but purely free and independent, and yet, that it hath not a Right of adminiſtring its proper Affairs by its own Inclination and Judgment. And that this *abſolute* Sovereignty implies Nothing, that can be term'd unjuſt or intolerable, we may eaſily apprehend, from the End of Civil Eſtabliſhments and Communities. For theſe publick Bodies were never inſtituted, with a Deſign that Men ſhould throw off the Reſtraints and Commands of Nature, and run into all the Extravagancies of evil Luſts; but that, by the united Strength of a Multitude, a better Proviſion might be made for the Intereſt and Security of each Member; and, conſequently, that we might be put into an eaſier and ſafer Courſe of obſerving the Edicts of natural Law.

VIII. But when we conſider the ſupreme Power, as it inheres in one Man, or in a Council, whether of all, or of a few, as in its proper and peculiar *Subject*; it is not every where thus free and abſolute, but, in ſome Places, we find it under the Reſtraint of certain Rules and Laws. Indeed, as for Democracies, the Diſtinction between *abſolute* and *limited* Sovereignty is not in them ſo eaſily diſcoverable. For, altho' in every ſuch free State, there muſt be ſome ſettled Rules, founded either upon Cuſtom, or written Law, determining at what Time, and by what Perſons, the People ſhall be called together, publick Affairs propoſed, and the Reſolutions executed (for we can form no Notion of a Civil Community, without theſe conſtant Methods of proceeding) yet, ſince the Council, in which the Sovereignty reſides, conſiſts of all the People, and, conſequently, every Man is there, who *obtains any Right*, by ſuch Rules or Orders; therefore Nothing hinders, but that the People thus aſſembled may, at any Time, alter or repeal them [a]. *Anacharſis* in *Plutarch* [b] laugh'd at *Solon*, for hoping that he ſhould be able to curb the Injuſtice, and the other Vices of his Countrymen, *by written Ordinances, things of no more Strength than Cobwebs*: *Solon* wiſely anſwer'd, That Men commonly ſtand to Bargains and Agreements, when it is the Intereſt of neither Party to break them: And that he would ſo frame and temper his Preſcriptions, as to make it evident to all Perſons in the State, that it would be much more for their Benefit and Advantage to obey the Laws, than to tranſgreſs them. But the Event of Things confirm'd the Judgment of *Anacharſis*, rather than the Hopes of *Solon*. The moſt likely Means that can be thought of, for the inſuring and perpetuating theſe Decrees, is for the People to bind themſelves by a ſolemn Act of Religion, that they will ever obſerve them: As was practiſed in *Rome*, with regard to the Law prohibiting regal Government. Yet, whether ſuch an Oath is any longer obligatory, when none of the Perſons ſurvive, who firſt engag'd in it, hath been the Subject of a former Enquiry [c]. *Cæſar* found an eaſy Piece of Sophiſtry to elude ſuch a publick Conſtitution. The *Roman* People had laid up a certain Sum in the Treaſury, with a ſolemn Execration of any one that ſhould dare to touch it, unleſs in Caſe of an Invaſion from the *Gauls*: *Cæſar* laid Hands on the Money, and ſolv'd all Scruples with this *Bravado*, That, by ſubduing the *Gallick* Nation, he had, at once, freed the Commonwealth from their Oath, and from their Enemy [d]. *Herodotus* informs [e] us, that the *Athenian* Law-giver, but now mentioned, made his People ſwear, that they would not reverſe one of his Ordinances within the Space of ten Years. Others have endeavour'd to preſerve ſuch publick Rules, by decreeing a Penalty againſt any Perſon, who ſhould *move* to have them repeal'd; tho' the Penalty, in this Caſe, may as well be abrogated as the Law. Thus, the *Thaſians* made it Death for any Man to propoſe a League with the *Athenians* [f]. And the *Athenians* themſelves denounced a Fine againſt him, who ſhould preſer a Bill for the Recovery of the Iſland *Salamis* [g]. *Charondas* decreed amongſt the *Thurians*, that whoever attempted to correct or alter the ſettled Laws, ſhould come into the publick Aſſembly with a Halter about his Neck [h]. In the ſame Manner, *Xenophon* [i] reports, that by an Order of War, in *Cyrus*'s Expedition, it was declared Capital for any Perſon to ſpeak of dividing the Army.

But in Ariſtocracies and Monarchies, where the Perſons governing are different from thoſe who are governed, and, conſequently, where the latter may obtain a Right, by the Pacts and Promiſes of the former, the Diſtinction between *abſolute* and *limited* Sovereignty is clearly diſcernible. He then, under ſuch States or Kingdoms, is properly *abſolute*, who exerciſeth the publick Adminiſtration by his Judgment, not according to any ſettled Rules, or perpetual Decrees, but as the various Conditions of

[a] Add. *Minuccii* Hiſt. *Venet.* Lib. xiii. Pag. 517, &c.
[b] In *Solon*. p. 81. A. B.
[c] Book iv. Chap. ii. Sect. 17.
[d] Appian. Alexand. *de Bell. Civ.* Lib. ii.
[e] *Clio*. Pag. 82. B.
[f] Polyæn. *Stratag.* Lib. ii. Chap. xxxiii.
[g] *Plutarch. Solon.*
[h] *Diodor. Sic.* Lib. xii. Chap. xvii.
[i] Περὶ ἀναβάσεως. Lib. vi.

Affairs

Affairs ſeem to require: Or, in ſhort, who procures the Safety of the Commonwealth, by ſuch Means as his own Prudence ſuggeſts, in every Exigency of Things and Times. And in this Senſe the Term *abſolute* is ſo far from implying any thing that looks odious and tyrannical, that it lays on Princes a Neceſſity of applying a ſtricter Care and Caution, than thoſe who proceed in all Buſineſs by conſtant Forms; if they would fully ſatisfy their Conſcience and their Duty. *Dio*, the Orator [a], ſpeaks admirably to this purpoſe: *A good Prince, ſays he, covets nothing, becauſe he thinks himſelf to poſſeſs all things: He abſtains from Pleaſures, becauſe he knows they are all within his Reach, if he ſhould be inclined to make uſe of them: He is juſter than all others, becauſe he knows himſelf to be the Fountain of Juſtice to the whole State: He takes a Delight in Buſineſs and Labour, becauſe he engageth in it by his own free Motion: And he loves the Laws, becauſe he doth not fear them. And, in this Way of arguing, he proceeds truly and rationally. For, who hath need of greater Prudence, than one who is to ſteer and direct ſuch important Affairs? Who of a ſtricter and more accurate Juſtice, than one who is above the Laws? Who of a more tender Modeſty, than one who hath a Licence to do all things? And who of a more reſolute Courage, than one, who is, by his Office, the common Guardian and Protector?*

IX. But ſince, in conſulting the publick Safety, the Judgment of a ſingle Perſon may eaſily be deceiv'd; and ſince all Men are not arrived at ſuch a Strength of Soul, as to be able to rule their Paſſions; under ſo vaſt and ſo tempting a Liberty [1]; many Nations have thought it the more ſecure and prudent Courſe, not to put ſo unbounded a Power entirely into the Hands of one Man, who can neither be infallible in his Underſtanding, nor inflexible in his Will; but rather, to preſcribe to him a certain Method of governing: It having been firſt diſcover'd, that theſe fixt Rules and Forms of publick Buſineſs are agreeable to the Genius of the People, and the Conſtitution of the State. Nor is this Limitation of Power an Injury to thoſe Princes, who owe their Crown to the free Gift of the People. For, if they thought it hard to receive an Authority, which they could not exerciſe at their own Pleaſure, they were at Liberty to have refuſed it. But, when they have once accepted of the Sovereignty, under theſe Conditions, the ſolemn Oath, by which, they engage to obſerve the Conditions, utterly forbids them to uſe any Means, whether of ſecret Contrivance, or of open Violence, in order to ſubvert the Laws of the Kingdom, and render themſelves *abſolute*. Becauſe, as *Pliny* [b] obſerves, *No one ought more religiouſly to obſerve his Oath, than he who has the greateſt Intereſt in not being forſworn* [2].

'Tis a very poor Argument, which ſome make uſe of, when they tell us, that, ſince Princes are ordain'd by God, and ſince he hath commanded them fully to diſcharge their Duty, which cannot be done without the Exerciſe of the ſovereign Power; therefore, we ought to ſuppoſe, that God, by the ſame Act, gives them ſuch a certain Meaſure of Authority; of which as they ought not to ſuffer themſelves to be in the leaſt abridg'd; ſo the People cannot, with any Juſtice, deſire to make an Encroachment upon it; nor, if they did, could they be able to bind the Prince, by a Contract ſo prejudicial to his Right, and to the Truſt which he received from GOD. At the ſame Rate, they ſay, a Wife might engage her Husband, by Covenant, to wink at her ſtolen Amours: So as to anſwer the Poet's Character,

------ Doctus ſpectare lacunar,
Doctus & ad calicem vigilanti ſtertere naſe.

Who his taught eyes up to the cieling throws,
And ſleeps all over but his wakeful noſe.
Mr. DRYDEN.

Or the Bargain might be mutual;

Ut faceres tu quod velles; necnon ego poſſem
Indulgere mihi [4]:

[a] *Orat.* lxiii. *de Regno & Tyranno*, Pag. 588. *A. B.* Ed. *Morell.*

[b] *Paneg.* Chap. lxv.

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[1] This is what *M. Antoninus* acknowledges in *Herodian*, Book i. Chap. viii. *Ed.* Oxon. Χαλεπὸν δὲ μετρῆσαι τε, ὅσῳ ἐπιθυμίας ὑπηρετούσης ἐξουσίας This is a Quotation of the Author's. *Plato* ſaid, long before that Time, That, tho' a Prince ſhould be perfectly inſtructed in the Maxims of true Politicks, yet, if he were to be accountable to none, he will not be able, during the whole Courſe of his Life, to have only in view the publick Good, and to prefer it always to his own private Advantage: The Propenſity of Human Nature, which inclines to ſeek Pleaſure, and raſhly to avoid Pain, will conſtantly put him upon trampling under Foot the Laws and Intereſt of the State, to ſatisfy his immoderate Deſires, and to bring at laſt, by that means, both upon himſelf, and the Publick, an infinite Number of Evils. Ἐὰν ἀεὶ καὶ τὸ γνῶναι τὶς ὅπ ταῦτα ἔτω πέφυκε, &c. *de Legibus*, Lib. ix. Pag. 875. *B. C. Edit. Serran.* As for the reſt, I refer the Reader to Mr. *Sidney*'s *Diſcourſe upon Government*, Chap. ii. Sect. 30. where that able Politician ſhews, for ſeveral Reaſons, and by a great Number of Inſtances, how very difficult it is for a Monarchical Government to be regulated as it ought to be, when it is not limited by ſome Laws, and I ſhall content myſelf, with only relating the following Words, taken from another Place of the ſame Author. 'If the *Rulers* of Nations be *reſtrain'd*, not only the People are by this 'Means ſecured from the Miſchiefs of their Vices and Follies, but they themſelves are preſerved from the greateſt Temptation to Ill, 'and the terrible Effects of the Vengeance that frequently enſues upon it. *An unlimited* Prince might juſtly be compar'd to a weak 'Ship, expos'd to a violent Storm, with a vaſt Sail, and no Rudder. We have an eminent Example of this in the Book of *Eſther*. 'A wicked Villain having fill'd the Ears of a fooliſh King, with falſe Stories of the *Jews*, he iſſues out a Proclamation for their utter Extirpation; and, not long after, being inform'd of the Truth, he gave them leave, by another Proclamation, to kill whom they 'pleaſed, which they executed upon Seventy Thouſand Men. The Books of *Ezra*, *Nehemiah*, and *Daniel*, manifeſtly diſcover the 'like Fluctation in all the Counſels of *Nabuchodonozor*, *Cyrus*, *Darius*, and *Artaxerxes*. ——— If a frantick Fit come into the Head 'of a drunken Whore, *Perſepolis* muſt be burnt, and the Hand of *Alexander* is ready to execute her Will. If a dancing Wench pleaſe 'Herod, the moſt venerable of all Human Heads muſt be offer'd in a Diſh, for a Sacrifice to the Rage of her impure Mother. The 'Nature of Men is ſo frail, that whereſoever the *Will* of a ſingle Perſon has had the Force of a *Law*, the innumerable Extravagancies 'and Miſchiefs it has produced have been ſo notorious, and numerous, that all Nations, who are not ſtupid, ſlaviſh, and brutiſh, 'have always abominated it, and made it their principal Care to find out Remedies againſt it, by ſo limiting and balancing the Powers 'of their Government, that *one*, or a *few*, might not be able to oppreſs and deſtroy thoſe they ought to preſerve and protect. This 'has always been as grateful to the beſt and wiſeſt of Princes, as neceſſary to the weakeſt and worſt. (Chap. iii. Sect. 43.) ——— Mr. 'Jis was a Man of as great Parts as any in the World, and yet could not bear the Weight of Government *alone*, and therefore GOD 'choſe out Seventy Perſons to eaſe him of it. ——— Power, as *Theopompus*, King of the *Lacedemonians*, ſays very well, was ſecure 'when 'twas leſs courted, and leſs hated, Book ii, Likewiſe, Mr. *Titius* Obſ. in *Puffen.* DCI.

[2] See, *Sidney* upon Government, *Chap.* iii. *Sect.* 14.

[3] Juvenal. *Satyr.* i. *ver.* 56, 57.

[4] Juvenal. *Satyr.* vi. *ver.* 281, 282.

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The parties ſhould be pleas'd on either ſide;
And both may for their private needs provide.
Mr. DRYDEN.

But, as we have already prov'd [1] the Origin of Sovereignty to be from God, ſo we take it for a certain Truth, that it was left to the Pleaſure and Judgment of Men to chooſe what particular Form of Government they thought moſt convenient; except where Civil Laws have been divinely inſtituted, by the extraordinary Interpoſition and Appointment of Heaven. 'Twas a wiſe Saying of *Melanchon* [a], *States and Kingdoms differ in their Frame, ſome admitting Liberty in one Degree, ſome in another. But God approves of all Forms of Government, which are agreeable to Nature, and to Reaſon.* None will pretend, that when a free People are about to elect a King, one Candidate can plead the Divine Deſignation more than another: Or, that there is any peculiar Form of Words eſtabliſh'd by GOD himſelf, under which the Inveſtiture of Sovereignty muſt neceſſarily be made.

Nor will the famous Deſcription of a King, by *Samuel* [b], do theſe Authors any Service, which they expound, as a general Right belonging to every Monarch; whilſt others will have it to be a bare Account of Matter of Fact, what ſome Kings *will* do, tho' none may juſtly do it. *Grotius* [c] takes the middle Way between theſe contrary Interpretations, and tells us, that the Prophet's Words do neither expreſs a Matter of *Right*, nor yet a bare *Fact*, ſuppoſed to be wrong and injurious; but ſuch a Fact, as carries in it the *Force* or *Conſequence* of a *Right*, tho' it hath not the *Foundation*; and this *Force* or *Conſequence* is, that it obligeth the Subject to Non-Reſiſtance: In other Words, that, however the Prince may in Actions violate his Duty, yet the People have no more Licence to oppoſe his Proceedings, than if he did nothing but what was highly juſt and equal. And on this Account, he obſerves it to be, that *Samuel* foretels the People, they ſhould *cry to GOD* under theſe Oppreſſions; intimating, that the Things were above Human Relief or Remedy. In fine, he ſays, ſuch Acts as theſe, in Kings, may be term'd *right*, by the ſame Way of Speech, as when the Civil Law [d] affirms the Prætor *jus reddere*, to *do Right*, even when his Sentence is unjuſt. But the true Import of that Place of Scripture may, perhaps, better appear, if we take this plain and eaſy Method of explaining it. The *Jewiſh* Nation had hitherto liv'd under a Democracy, but ſuch one as often bore the Semblance of that kind of Government, on which *Ariſtotle* beſtows the Title of *Heroical*. Their Judges, rais'd up, for the moſt Part, by Divine Impulſe, either deliver'd them from their Oppreſſors, by War, or adminiſter'd Juſtice, in Peace: Yet, in ordinary Caſes, they had more *Authority* to *perſuade*, than *Power* to *command*: And no Taxes were allow'd them, beyond the ſtanding Revenues, to increaſe their Strength, or to adorn their Dignity [e]. At length, the People, grown weary of this Conſtitution, deſired a King, after the Manner of other Nations; that is, one who ſhould ſhine with external Pomp and Grandeur, and ſhould either keep a conſtant Body of regular Forces, or, at leaſt, ſhould train up the Subjects to Arms, that they might be ready to make Head againſt any ſudden Invaſion [f]. When Matters ſtood thus in the People's Opinion, *Samuel*, to put them upon a ſerious Deliberation, before the Thing was paſt Recovery, ſets out to them, in lively Colours, the Rights of ſuch a Sovereign, and the Inconveniencies which would attend the Government. You would have a King, ſays he, who ſhould appear with State and Magnificence: Why, to compaſs this End, he muſt be attended with a numerous Train of Guards [z]; therefore, *He will take your Sons, and appoint them for himſelf, for his Chariots, and to be his Horſemen, and ſome ſhall run before his Chariots.* You would have a King who ſhould be furniſh'd with a ſtanding military Force: It will be neceſſary, therefore, for him, to *appoint Captains over Thouſands, and Captains over Fifties*, out of your Sons, who might otherwiſe have been employed in the Improvement of your private Eſtates. Again, the Care of publick Affairs will not allow ſuch a King, to undertake the Culture of his own Lands; therefore he will take your Sons, *to ear his Ground, and to reap his Harveſts*; as, likewiſe, *to make his Inſtruments of War and Inſtruments of his Chariots.* Beſides, ſince his Court will be large and full, and ſince it will be beneath the Dignity of his Wives, or Daughters, to govern the Kitchen, and to provide Suſtenance for ſo vaſt a Houſhold; *He will take your Daughters to be Confectionaries, and to be Cooks, and to be Bakers.* He will have Occaſion for a Multitude of Officers, to inſpect and regulate the Affairs of War and Peace; and all theſe muſt have their fix'd Salaries to reward their Service; for which Purpoſe, *he will take your Fields and your Vineyards, even the beſt of them, and give them to his Servants:* And, for the ſame

[a] *In Epitom. Moral. Philoſ.* [b] 1 *Sam.* viii. 11, *&c.* [c] Lib. i. Chap. iv. Sect. 3. [d] Lib. i. Tit. i. Lib. xi. D. *De Juſt. & Jure.* This is what *Pedo Albinovanus* calls, *Jus injuſtum*, Eleg. i. Ver. 54. *Edit. Gorall.* [e] Add. *Grot.* ad *Judic.* [f] See 1 *Sam.* xiii. 2. xix. 48, 52.

[1] In the Third Chapter of this Book.

[2] How ingenious ſoever our Author's Paraphraſe on this Place may be, it is highly probable, that *Samuel* does not repreſent what Kings have a Right to do, but only to ſet before the *Jews* the Misfortunes that they would be expoſed to, under a regal Government, to endeavour to put them out of Conceit with it. See Mr. *Sidney's Diſcourſe upon Government*, Chap. iii. Sect. 3, 4, 5, 7. The Aſſertors of abſolute Power depend chiefly upon the firſt Words of *Samuel's* Diſcourſe, which they thus tranſlate: *This will be the Right of the King, &c.* But the Word משפט, in the Original, *Miſchpath*, often ſignifies, as Mr. *Le Clerc* obſerves, the Manner of acting, the common Method whether good or bad, juſt or unjuſt. 'Twill be ſufficient to give one ſingle Inſtance of it, taken from the ſame Book of *Samuel*: Now the Sons of *Eli* were Sons of *Belial*, *they knew not the Lord. And the Prieſts* (Miſchpath) *Cuſtom with the People was, that when any Man offered Sacrifice, the Prieſt's Servant came, while the Fleſh was in ſeething, with a Fleſh-hook of three Teeth in his Hand: And he ſtruck it into the Pan, or Kettle, or Cauldron, or Pot; all that the Fleſh hook brought up, the Prieſt took for himſelf*, 1 *Sam.* Chap. ii. 12, 13, 14. Now the Prieſts had no Right to do that; for only the Breaſt and the right Shoulder of the Sacrifices, here mentioned, belong'd to them, *Lev.* vii. 30, *&c.* Mr. *Le Clerc* has, likewiſe, ſhewn, by the Sequel of *Samuel's* Diſcourſe, that the Interpretation which they put upon it, is entirely contrary to the Rules of Criticiſm, as well as to the Maxims of Reaſon.

Uſe,

Uſe, he will require the *Tenth* of your Cattle. And, after all, if need be, he will not ſtick *to take your Servants and your Beaſts, and put them to his Work.* In a Word, if you reſolve to have a King, you muſt maintain him like a King, and ſettle a large Revenue for his Support; and, ſhould you afterwards grow weary of the Burthen, you cannot lay him aſide at your Pleaſure; your Election having given him ſuch a Right to the Crown, as may not be taken from him without his Conſent. It is plain then, on the whole, that this Paſſage in the Scripture-Hiſtory doth, by no Means, patronize ill Princes, nor doth contain any certain Meaſure and Standard of regal Power, there preſcribed by GOD, in the Manner of a Law, ſo as to be incapable of receiving Addition or Diminution from any Human Agreement; but, that the Prophet barely enumerates the Burthen and Charges of a Monarchical State, whether abſolute or limited. 'Tis certainly, therefore, left to the Judgment of a free People to determine, whether they ſhall confer the Sovereignty on a Prince, in an abſolute Manner, or whether they ſhall bind him to certain Conditions; provided theſe Conditions imply Nothing, which is either impious towards GOD, or deſtructive of the proper End of Government. For, altho' it be true, that Men firſt enter'd into regular Bodies and States, upon their own free Choice, yet, in as much as they were always under the Command of the *Law of Nature*, they ought, on all Accounts, to inſtitute ſuch Rules of Sovereignty, and of civil Obedience, as ſhould be conformable to that Law, and to the juſt Deſign of political Societies.

X. But that we may rightly apprehend what Promiſe or Engagement (for all have not the ſame Force) is required to the rendering a Monarchy *not abſolute* (and the ſame will hold of an Ariſtocracy) we muſt obſerve, that a King, at his undertaking the chief Government, binds himſelf to the due Diſcharge of it, either by a general, or by a particular Promiſe, to which is uſually added the Confirmation of an Oath. A *general* Promiſe may be made, either *tacitly*, or *expreſsly*. A King, by the Act of accepting the Adminiſtration, is ſuppoſed *tacitly* to engage, that he will conſcientiouſly perform his Truſt; altho' no *expreſs* Promiſe be given [a]. But the moſt common Way is to make this Promiſe in *expreſs* Words, with the Addition of an Oath, and the Solemnity of certain Rights and Forms. And nothing is more frequent, than to have the Prince's Duty deſcribed in theſe ſet Speeches, by Way of *Periphraſis*, or an Enumeration of its principal Parts: As, ſuppoſe, that he will be diligent and watchful in promoting the publick Security, that he will protect the Good, and puniſh the Bad, that he will faithfully adminiſter Juſtice, will not oppreſs the Subject, and the like. Now, Promiſes of this kind do not, in the leaſt, prejudice the [1] *Abſoluteneſs* of a Sovereignty. The King is, indeed, obliged by them to govern well; but they leave it to his Judgment and Pleaſure to chooſe and apply the Means, in order to the obtaining this End. A *particular* Promiſe, which ſpecifies the Manner and Means of governing, may be divided, according to its different Force and Effect. For, ſometimes, it only binds the Conſcience of the Prince; ſometimes, it makes his due Performance the Condition of his Subjects Obedience. The former is done, when the Prince engageth, for Inſtance, that he will confine the Offices, and Places of Truſt, to Men of ſuch Rank, or ſuch Qualifications; that he will inveſt no Perſon with Privileges and Immunities, burthenſome or prejudicial to others; that he will enact no new Laws, impoſe no new Taxes or Tributes, employ no foreign Soldiers, and the like. But then we ſuppoſe the People to demand all this of the Prince, without conſtituting any certain *Council*, to which he ſhall be bound to apply himſelf, in caſe the Neceſſities of the Commonwealth require a Digreſſion from ſuch Promiſes and Engagements; which are always to be underſtood with this tacit Expreſſion, *Unleſs the publick Safety* (the ſupreme Law) *command the contrary*. Such a *Council*, we mean, as might proceed, not precariouſly, but by its own proper Right, in determining theſe Affairs, and, without the Conſent of which, the Subjects ſhould not be obliged to obey the Prince's Orders, in Points of this Nature. Now, in ſuch a State as we have been here deſcribing, the Adminiſtration of the Government is bounded and confined by certain Laws; and the Prince, who ſhall act otherwiſe, except in Caſes of Neceſſity,

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[1] Thoſe Princes who have been the moſt jealous of their abſolute Authority, have ſometimes acknowledged, that they could do nothing contrary to the Laws. There is a remarkable Inſtance of it, which Mr. *Sidney* has taken Care to relate; it is, in the *Treatiſe of the Rights of the Queen of* France, printed in 1667, by the Command of *Lewis* XIV, to juſtify that Monarch's Pretenſions to Part of the *Spaniſh Netherlands*; there are theſe very Words, *That Kings have that happy Want of Power, that they can do nothing contrary to the Laws of their Country.* This is, certainly, the Place which the *Engliſh* Author had in View: "It is neither Imperfection nor Weakneſs in the ſupreme Authority to ſubmit to keep its own Promiſes, or obſerve its own Laws. A Neceſſity of doing Good, and the Incapacity of doing Wrong, are the higheſt Degrees of all Human Perfection. God himſelf (according to the Opinion of *Philo* the *Jew*) can go no farther; and it is in this Reſpect, that Monarchs, who are his Images upon Earth, ought particularly to reſemble him." (Pag. 299.) And, in another Place, he ſays, "That Cuſtom being a Law neceſſary to the Subject, and granted by the Prince, it is certain, that both the one and the other have voluntarily renounced all Authority to change it. For it is a Stipulation, ratified by a ſeeming Contract, which, being once perfect, muſt have an immutable Effect; ſo that the King, as well as every one of his Subjects, is preſum'd to have agreed to what is required by the Laws." Pag. 161. If what is here ſaid, with Regard to Cuſtoms, and particularly thoſe which relate to the Succeſſion of Princes, be true; the Argument will hold much ſtronger, concerning the Engagements Sovereigns are under to obſerve the fundamental Laws of the State, and whatever Limits theſe may ſet to their Power. "Let us not, then, ſay (continues the ſame Author, ſpeaking in the Name of *Lewis* XIV) That "the Sovereign is not ſubject to the Laws, ſince the contrary Propoſition is a Truth, evident from the Law of Nations. Flattery "has often, indeed, attack'd this Truth, but good Princes have always embraced and defended it, as the Guardian Angel of their "Dominions. How much better is it to ſay, with wiſe Plato, *That the perfect Happineſs of a Kingdom is, when the Prince is "obeyed by his Subjects, when he himſelf obeys the Laws, and when the Laws are always juſt, and calculated for the Publick Good?*" Pag. 310.

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hath, no doubt, violated his Word and Faith. And yet the Subjects are not impower'd to reject his Commands, or to reverſe his Proceeding upon this Pretence. For, whilſt he declares that the Safety of the People, or ſome extraordinary Benefit to the Publick, is the Cauſe and Motive of what he does, as indeed this Preſumption always attends the Acts of ſovereign Princes, the Subjects are cut off from all farther Anſwer or [1] Plea: Inaſmuch as they have no Authority to take Cognizance of thoſe Matters, and to judge, whether the Neceſſities of the Commonwealth require them, or not. Whence 'tis eaſy to draw this Obſervation, That a People do not ſufficiently guard and ſecure their Liberties, when they create a King only with a *limited* Sovereignty, and yet do not appoint a *Council*, without the Approbation of which, thoſe Acts, excepted in the limited Grant, ſhall not be perform'd. Or, unleſs they oblige the King to hold an Aſſembly, in which thoſe extraordinary Affairs may be debated. For this is a much better Expedient, than if the King ſhould be only bound, in theſe Caſes, to follow the Opinion of a ſmaller Council: Since it might ſo happen, that the private Intereſt of thoſe few Members, who compoſed ſuch a Meeting, ſhould interfere with the publick Good; whence they might be prevail'd on, by the Motive of particular Advantage, to with-hold their Conſent from the ſalutary Propoſals and Intentions of the Prince.

But Monarchy is brought into much narrower Bounds, and under much ſtricter Ties, if, at the firſt conferring of Sovereignty, it be expreſly covenanted between the People and the Prince, that the latter ſhall govern according to certain fundamental Laws, and in all ſuch Affairs, as are not left to his abſolute Diſpoſal, ſhall have Recourſe to a Council of the Commons, or of the Nobles, and determine nothing without their Conſent: That, in caſe he do otherwiſe, the Subjects ſhall not be obliged by any of thoſe illegal Commands. A People, who conſtitute a King over them in this Manner, are ſuppoſed to have promiſed him Obedience, not abſolutely and in all Points, but ſo far as his Government is agreeable to the original Contract, and the fundamental Laws: From which whatever Acts of his recede are thereby void, and loſe all Force of engaging the Subjects to a Compliance. Nor can it be truly ſaid, that theſe fundamental Laws render the ſupreme Power lame and imperfect. For all the Acts of Government may be exercis'd here, as well as in an abſolute Kingdom: Only, that whereas in the latter the Prince proceeds by his own ſole Judgment, at leaſt as to the final Determination of Things; in the former there is a Council eſtabliſh'd, which doth, as it were, bear him Company in the adjuſting of Affairs; and on the Authority of its Deciſions the Sovereignty depends; not as on the proper Source of Power, but as on a neceſſary Condition. Neither are there in ſuch a State two Governing *Wills*; ſince whatever the common Body acts it is by the *Will* of the Prince: The Limitation of the original Grant only producing this Effect, That, unleſs, under ſuch a Condition, the Prince ſhall not incline his Will to ſome particular Deſigns, or that ſuch Acts of his Will ſhall have no Force or Virtue. Neither can it be pretended, that the King, in a Realm thus conſtituted, loſeth his ſovereign Power, or that the Council is ſuperior to him. For theſe are very faulty Conſequences, 'The 'Prince cannot act in every thing according to 'his own Pleaſure; therefore he hath not the 'ſupreme Authority: I am not obliged to obey 'him in all things; therefore I am his Superior, or at leaſt his Equal: I can't command 'a Subject in an arbitrary Manner; and therefore he muſt have his Turn of peremptorily 'commanding me who am his Prince.' There is a great deal of Difference [2] between theſe two Propoſitions, 'I am bound to act with this 'Perſon's Approbation, becauſe I have engaged 'myſelf to it by Covenant: And I am bound to 'follow this Perſon's Will and Pleaſure, becauſe, 'by virtue of his Sovereignty, he hath a Right 'of laying theſe Injunctions on me.' *Supreme* and *abſolute* are by no means one and the ſame Term. For the former only denies a Superior or an Equal in the ſame Order: The latter farther imports a Power of exerciſing any kind of Right, according to one's own Judgment and Inclination.

But what ſhall we ſay, if in the original Agreement it was expreſly [a] [3] made a Condition, that, if the Prince acted otherwiſe, he ſhould forfeit his Sovereignty? We have many Inſtances of this Practice in Hiſtory. *Diodorus Siculus* [b] reports, that, amongſt the *Sabæans*, the King, though in all other reſpects unaccountable, yet if he ſet a Foot beyond his own Palace, was to be ſtoned by the People. And this, he ſays, was ordain'd by the Advice of an antient Oracle. The People of *Arragon* heretofore, when the King had taken an Oath to preſerve their Privileges, engaged their Allegiance to him in

[a] We ſay *expreſsly*, for if the Clauſe run only thus, *In caſe the King act otherwiſe, the Subject ſhall not be obliged*; it will not amount to ſuch a peremptory Condition, as the *Civilians* call *Lex Commiſſoria*. [b] Lib. iii. Chap. xlvii. *Add.* Agatharcid. *de Mari Rubro*, Chap. 1. *Strabo*, Lib. xv. Pag. 488. Edit. *Genev. Cauſab.* tells us of a Cuſtom much like this; that in *India*, if the Prince happens to drink to Exceſs, the very Women have Liberty to kill him; and ſhe that doth the Feat, for her Reward, may claim his Succeſſor in Marriage.

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[1] This Preſumptien takes Place where Things are entirely at the King's Diſpoſal: But, when the regal Power is limited by a formal or expreſs Engagement, either the Promiſe ſignifies nothing, or we muſt neceſſarily acknowledge, That all which is done, in this Reſpect, without the manifeſt Conſent of the People, is void and of no Effect. Otherwiſe, under Pretence of ſome ſeeming Neceſſity or Advantage, the Prince might always eaſily elude his Word, and uſurp that Authority, which he makes a Shew of renouncing. It makes no Alteration here, whether there be, or be not, an Aſſembly of the People, appointed to judge in extraordinary Caſes. It is enough, that the People are always in a Capacity to be conſulted, either by themſelves, or ſuch as they ſhall chuſe to repreſent them. The more or leſs Facility with which this is done, no Way diminiſhes the King's Engagement. On the contrary, the Want of a Regulation on this Head ſuppoſes, either the Caſe would never happen, or ſo ſeldom, as to require no extraordinary Proviſion.

[2] *Vide* Grot. *Lib.* i. *Chap.* iii. *Sect.* 16. Number 1. Where he explains this Matter, by the Example of a Father of a Family, who, if he has promis'd his Family any thing, even relating to its Management, he is indiſpenſably obliged to keep his Word, without ceaſing, upon that Account, to be leſs the *Head*, or *Sovereign*, if I may ſay ſo, of that little Society. A Husband, likewiſe, does not loſe any thing of his Authority over his Wife, for having promis'd her ſomething, which he cannot lawfully diſpenſe with the performing of. [3] *Vide* Grot. *d. l.*

Uſe, he will require the *Tenth* of your Cattle. And, after all, if need be, he will not ſtick *to take your Servants and your Beaſts, and put them to his Work.* In a Word, if you reſolve to have a King, you muſt maintain him like a King, and ſettle a large Revenue for his Support; and, ſhould you afterwards grow weary of the Burthen, you cannot lay him aſide at your Pleaſure; your Election having given him ſuch a Right to the Crown, as may not be taken from him without his Conſent. It is plain then, on the whole, that this Paſſage in the Scripture-Hiſtory doth, by no Means, patronize ill Princes, nor doth contain any certain Meaſure and Standard of regal Power, there preſcribed by GOD, in the Manner of a Law, ſo as to be incapable of receiving Addition or Diminution from any Human Agreement; but, that the Prophet barely enumerates the Burthen and Charges of a Monarchical State, whether abſolute or limited. 'Tis certainly, therefore, left to the Judgment of a free People to determine, whether they ſhall confer the Sovereignty on a Prince, in an abſolute Manner, or whether they ſhall bind him to certain Conditions; provided theſe Conditions imply Nothing, which is either impious towards GOD, or deſtructive of the proper End of Government. For, altho' it be true, that Men firſt enter'd into regular Bodies and States, upon their own free Choice, yet, in as much as they were always under the Command of the *Law of Nature*, they ought, on all Accounts, to inſtitute ſuch Rules of Sovereignty, and of civil Obedience, as ſhould be conformable to that Law, and to the juſt Deſign of political Societies.

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[1] Thoſe Princes who have been the moſt jealous of their abſolute Authority, have ſometimes acknowledged, that they could do nothing contrary to the Laws. There is a remarkable Inſtance of it, which Mr. *Sidney* has taken Care to relate; it is, in the *Treatiſe of the Rights of the Queen of* France, printed in 1667, by the Command of *Lewis* XIV, to juſtify that Monarch's Pretenſions to Part of the *Spaniſh Netherlands*; there are theſe very Words, *That Kings have that happy Want of Power, that they can do nothing contrary to the Laws of their Country.* This is, certainly, the Place which the *Engliſh* Author had in View: "It is neither Imperfection nor Weakneſs in the ſupreme Authority to ſubmit to keep its own Promiſes, or obſerve its own Laws. A Neceſſity of doing Good, and the Incapacity of doing Wrong, are the higheſt Degrees of all Human Perfection. God himſelf (according to the Opinion of *Philo* the *Jew*) can go no farther; and it is in this Reſpect, that Monarchs, who are his Images upon Earth, ought particularly to reſemble him." (Pag. 299.) And, in another Place, he ſays, "That Cuſtom being a Law neceſſary to the Subject, and granted by the Prince, it is certain, that both the one and the other have voluntarily renounced all Authority to change it. For it is a Stipulation, ratified by a ſeeming Contract, which, being once perfect, muſt have an immutable Effect; ſo that the King, as well as every one of his Subjects, is preſum'd to have agreed to what is required by the Laws." Pag. 161. If what is here ſaid with Regard to Cuſtoms, and particularly thoſe which relate to the Succeſſion of Princes, be true; the Argument will hold much ſtronger, concerning the Engagements Sovereigns are under to obſerve the fundamental Laws of the State, and whatever Limits theſe may ſet to their Power. "Let us not, then, ſay (continues the ſame Author, ſpeaking in the Name of *Lewis* XIV) That the Sovereign is not ſubject to the Laws, ſince the contrary Propoſition is a Truth, evident from the Law of Nations. Flattery has often, indeed, attack'd this Truth, but good Princes have always embraced and defended it, as the Guardian Angel of their Dominions. How much better is it to ſay, with wiſe PLATO, *That the perfect Happineſs of a Kingdom is, when the Prince is obeyed by his Subjects, when he himſelf obeys the Laws, and when the Laws are always juſt, and calculated for the Publick Good!*" Pag. 310.

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hath, no doubt, violated his Word and Faith. And yet the Subjects are not impower'd to reject his Commands, or to reverse his Proceeding upon this Pretence. For, whilst he declares that the Safety of the People, or some extraordinary Benefit to the Publick, is the Cause and Motive of what he does, as indeed this Presumption always attends the Acts of sovereign Princes, the Subjects are cut off from all farther Answer or [1] Plea: Inasmuch as they have no Authority to take Cognizance of those Matters, and to judge, whether the Necessities of the Commonwealth require them, or not. Whence 'tis easy to draw this Observation, That a People do not sufficiently guard and secure their Liberties, when they create a King only with a *limited* Sovereignty, and yet do not appoint a *Council*, without the Approbation of which, those Acts, excepted in the limited Grant, shall not be perform'd. Or, unless they oblige the King to hold an Assembly, in which those extraordinary Affairs may be debated. For this is a much better Expedient, than if the King should be only bound, in these Cases, to follow the Opinion of a smaller Council: Since it might so happen, that the private Interest of those few Members, who composed such a Meeting, should interfere with the publick Good; whence they might be prevail'd on, by the Motive of particular Advantage, to with-hold their Consent from the salutary Proposals and Intentions of the Prince.

But Monarchy is brought into much narrower Bounds, and under much stricter Ties, if, at the first conferring of Sovereignty, it be expressly covenanted between the People and the Prince, that the latter shall govern according to certain fundamental Laws, and in all such Affairs, as are not left to his absolute Disposal, shall have Recourse to a Council of the Commons, or of the Nobles, and determine nothing without their Consent: That, in case he do otherwise, the Subjects shall not be obliged by any of those illegal Commands. A People, who constitute a King over them in this Manner, are supposed to have promised him Obedience, not absolutely and in all Points, but so far as his Government is agreeable to the original Contract, and the fundamental Laws: From which whatever Acts of his recede are thereby void, and lose all Force of engaging the Subjects to a Compliance. Nor can it be truly said, that these fundamental Laws render the supreme Power lame and imperfect. For all the Acts of Government may be exercis'd here, as well as in an absolute Kingdom: Only, that whereas in the latter the Prince proceeds by his own sole Judgment, at least as to the final Determination of Things; in the former there is a Council establish'd, which doth, as it were, bear him Company in the adjusting of Affairs; and on the Authority of its Decisions the Sovereignty depends; not as on the proper Source of Power, but as on a necessary Condition. Neither are there in such a State two Governing *Wills*; since whatever the common Body acts it is by the *Will* of the Prince: The Limitation of the original Grant only producing this Effect, That, unless, under such a Condition, the Prince shall not incline his Will to some particular Designs, or that such Acts of his Will shall have no Force or Virtue. Neither can it be pretended, that the King, in a Realm thus constituted, loseth his sovereign Power, or that the Council is superior to him. For these are very faulty Consequences, 'The 'Prince cannot act in every thing according to 'his own Pleasure; therefore he hath not the 'supreme Authority: I am not obliged to obey 'him in all things; therefore I am his Super-'rior, or at least his Equal: I can't command 'a Subject in an arbitrary Manner; and there-'fore he must have his Turn of peremptorily 'commanding me who am his Prince.' There is a great deal of Difference [2] between these two Propositions, 'I am bound to act with this 'Person's Approbation, because I have engaged 'myself to it by Covenant: And I am bound to 'follow this Person's Will and Pleasure, because, 'by virtue of his Sovereignty, he hath a Right 'of laying these Injunctions on me.' *Supreme* and *absolute* are by no means one and the same Term. For the former only denies a Superior or an Equal in the same Order: The latter farther imports a Power of exercising any kind of Right, according to one's own Judgment and Inclination.

But what shall we say, if in the original Agreement it was expressly [a] [3] made a Condition, that, if the Prince acted otherwise, he should forfeit his Sovereignty? We have many Instances of this Practice in History. *Diodorus Siculus* [b] reports, that, amongst the *Sabæans*, the King, though in all other respects unaccountable, yet if he set a Foot beyond his own Palace, was to be stoned by the People. And this, he says, was ordain'd by the Advice of an antient Oracle. The People of *Arragon* heretofore, when the King had taken an Oath to preserve their Privileges, engaged their Allegiance to him in

[a] We say *expressly*, for if the Clause run only thus, *In case the King act otherwise, the Subject shall not be obliged*; it will not amount to such a peremptory Condition, as the *Civilians* call *Lex Commissoria*. [b] Lib. iii. Chap. xlvii. *Add.* Agatharcid. *de Mari Rubro*, Chap. I. *Strabo*, Lib. xv. Pag. 488. Edit. *Genev. Casaub.* tells us of a Custom much like this; that in *India*, if the Prince happens to drink to Excess, the very Women have Liberty to kill him; and she that doth the Feat, for her Reward, may claim his Successor in Marriage.

[1] This Presumption takes Place where Things are entirely at the King's Disposal: But, when the regal Power is limited by a formal or express Engagement, either the Promise signifies nothing, or we must necessarily acknowledge, That all which is done, in this Respect, without the manifest Consent of the People, is void and of no Effect. Otherwise, under Pretence of some seeming Necessity or Advantage, the Prince might always easily elude his Word, and usurp that Authority, which he makes a Shew of renouncing. It makes no Alteration here, whether there be, or be not, an Assembly of the People, appointed to judge in extraordinary Cases. It is enough, that the People are always in a Capacity to be consulted, either by themselves, or such as they shall chuse to represent them. The more or less Facility with which this is done, no Way diminishes the King's Engagement. On the contrary, the Want of a Regulation on this Head supposes, either the Case would never happen, or so seldom, as to require no extraordinary Provision.

[2] *Vide* Grot. *Lib.* i. *Chap.* iii. *Sect.* 16. Number 1. Where he explains this Matter, by the Example of a Father of a Family, who, if he has promis'd his Family any thing, even relating to its Management, he is indispensably obliged to keep his Word, without ceasing, upon that Account, to be less the *Head*, or *Sovereign*, if I may say so, of that little Society. A Husband, likewise, does not lose any thing of his Authority over his Wife, for having promis'd her something, which he cannot lawfully dispense with the performing of. [3] *Vide* Grot. *d. l.*

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[1] *Ubi ſupra.* [2] This is not the Senſe of *Grotius*. See what I have ſaid upon the Place quoted, Note 3, 4.

ſquander

ſquander away what hath been gotten by the Induſtry and Sweat of other Men. On this Score therefore, leſt the Riches of the Subjects ſhould ſerve only for Fuel to the Vices of the Sovereign, many Nations have wiſely aſſign'd their Kings ſuch fix'd Revenues, as they thought ſufficient for his ordinary Expences on the Commonwealth; and left the raiſing of larger Sums, when there ſhould be Occaſion for them, to the Conſideration of a Council or Aſſembly. In like Manner, ſince ſome Princes, out of too great a Fondneſs for martial Glory, hazard themſelves and their Realms, by engaging in unneceſſary Wars; it was a prudent Caution in thoſe People, who, when they conferr'd the Sovereignty on their Kings, obliged them not to enter upon a War, at leaſt, not on the offenſive Side, without the Advice and Concurrence of a proper Council. We are told of the Inhabitants of the the Iſland *Borneo* [a], that they have ſuch a natural Averſion to War, and to martial Princes, that when they find their Monarch to be of a fiercer Diſpoſition, they oblige him to fight at the Head of his Army, where he may meet with the greateſt Danger. In theſe therefore, and in all Inſtances of Buſineſs, which a People find to be of publick Uſe and Benefit, they may provide for their own Security, by ſettled Conſtitutions and Decrees: Leſt, if they ſhould leave the abſolute Diſpoſal of ſuch Affairs in the Hands of the Prince, the common Intereſt might poſſibly ſometimes ſuffer.

From what hath been obſerv'd on this Head, it appears in what Senſe we ought to explain that common Aſſertion of the *Grecian* Politicians, and others who follow them, when they tell us, *That the Government of a State ought rather to be committed to Laws, than to Men.* For the only rational Interpretation of ſuch a Maxim muſt be this, that it is more expedient the Rulers of Commonwealths ſhould govern according to the ſtanding Preſcriptions of the Law, than according to their own private and unconfined Pleaſure. For otherwiſe bare Laws are no fitter to govern a State, than the bare Needle to govern a Ship, without the Aſſiſtance and Direction of [1] a Pilot.

Many Examples and many Methods we find in Hiſtory, how the regal Power hath been limited and reſtrain'd [b] [2]. But, perhaps, no Relation is ſo extraordinary as that which *Solinus* [c] gives us of the People of the Iſlands *Hebrides* in *Scotland*: *Their King*, ſays he, *hath nothing of his own; all Poſſeſſions lie in common: He is tied to Equity by eſtabliſh'd Laws. And, leſt Covetouſneſs ſhould tempt him from Truth and Right, he is taught Juſtice by the Diſcipline of Poverty; having no fix'd Revenue, nor private Eſtate, but owing his Maintenance to the publick Stock. He is allowed no Wife, but makes free with any of his Subjects Beds, as he thinks convenient. And thus he hath no Hopes of a Family and Children, to engage and to enſnare him.* *Apollonius Rhodius* [d] tells us a lamentable Story of the Kings of the *Moſtynæci*, that, if at any time they pronounced an unjuſt Sentence, they were immediately ſhut up in a Tower, and there ſtarv'd to Death.

XII. But whereas, as hath been already ſhewn, Princes in a limited Monarchy are, for the moſt part, obliged, in ſuch Affairs as the People thought fit not to leave to their abſolute Diſpoſal, to apply themſelves to a Council, either of all the Subjects in general, or of Deputies, repreſenting the particular Claſſes and Orders; it is farther to be obſerved, that the Power of ſuch Councils is not in all Places alike. For there are Realms, where the King, being in other reſpects *abſolute*, appoints a Council or Senate, the Approbation of which he makes eſſential to the Validity of his Decrees [e] [3]. Now a Senate of this kind is, as to its Authority, no more than a Board of Counſellors; and when it proceeds to take the royal Edicts under Examination and Cenſure, and to reject ſuch as ſeem leſs expedient to the Commonwealth, it does this, not by its own proper Right, but by a Power delegated from the Prince; who makes this prudent Proviſion, that nothing may be enacted prejudicial to the Publick, either through his own Inadvertency, or through the Inſtigation of Flatterers. *Plutarch* [f] reports it as 'A Law of the *Egyptian* 'Kings, which they conſtantly obſerved, to 'bind the Judges by Oath, that they ſhould 'not obey the Prince himſelf, if he deſired 'them to paſs an unjuſt Sentence.' And, on the ſame Occaſion, he tells us, that *Antigonus* the Third gave Notice to the States, 'That in caſe 'he ſhould, by any Letter to them, command 'any thing contrary to the Laws, they ſhould 'not perform ſuch an Injunction, but ſhould 'take it for granted that he had forgot him-'ſelf [g]. By this means too Princes often get rid of bold Petitioners, whilſt in Appearance they grant the Requeſt, but, at the ſame time, know, that the Senate will cancel and reverſe it [h].

Yet under this Conſtitution, if at any time the Prince poſitively inſiſts in having his Will take place, and doth not own the Reaſons, urged by the Senate, to be of Strength enough to prove the contrary; the Senate cannot proceed farther in oppoſing the Prince's Power. For it is not ſuppoſed, that he, in appointing ſuch a Council, intended to give up irrevocably his abſolute Right of governing, and, of his own Accord, to make his Subjects Obedience only conditional, when he might have claim'd it without any ſuch Terms of Reſtraint. The Senate therefore, in this Caſe, hath its Authority only by Commiſſion from the Prince, who may, conſequently, put a Stop to it, when he thinks

[a] Franc. Lopez *de* Gomara *Hiſt.* Ind. *Occidental.* Chap. xcv. [b] How the Power of the *Egyptian* Kings was confined, See *Diodor. Sic.* Lib. i. Chap. lxxi. *Add.* Plin. *Nat. Hiſt.* Lib. vii. Chap. xxii. *in fin.* & Solin. *Chap* lxvi. *Philoſtratus* (Vit. *Apollon. Tyan.* Lib. iii. Chap. xxxiii.) reports, that the antient Conſtitutions of the wiſe *Indians* permitted the King to ſtay amongſt them but a ſingle Day at once. [c] *Chap.* xxxv. [d] *Argonaut.* Lib. iii. [e] See what *Neuhof* relates of the Empire of *China*, *Deſcrip.* Sin. *Chap.* i. [f] *Apophthcg.* Pag. 174. *B.* 183. *F.* [g] *Vide* C. *Lib.* i. *Tit.* xix. *l.* 1. *De Precib. Imperat. offerend.* [h] *Vide* Lib. x. Tit. xii. l. 1. C. *De P. tit.* Bonor. *ſublat.* Bodin. *de Republ.* Lib. iii. Chap. iv. Pag. 455. Gramond. *Hiſt.* Gall. *Lib.* v. *Pag.* 277. &c. Joh. Labardæ, *Hiſt.* Gall. *Lib.* iii. *Pag.* 132, 133. Ed. *Pariſ.* 1671.

[1] This is by no means the Intention of the Writers of whom our Author ſpeaks. See Lib. i. Chap. vi. § 14. towards the End.
[2] *Grotius*, Book i. Chap. iii. § 16. Num. 3, is more worthy to be conſulted upon this, than the Places juſt mentioned.
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And to the general Vote the mighty Cauſe refers.

[f] Nicetas Acominat. *Lil.* i. *De Imper.* Andronic.

[1] *Ubi ſupra.* [2] This is not the Senſe of *Grotius*. See what I have ſaid upon the Place quoted, Note 3, 4.

ſquander

ſquander away what hath been gotten by the Induſtry and Sweat of other Men. On this Score therefore, leſt the Riches of the Subjects ſhould ſerve only for Fuel to the Vices of the Sovereign, many Nations have wiſely aſſign'd their Kings ſuch fix'd Revenues, as they thought ſufficient for his ordinary Expences on the Commonwealth; and left the raiſing of larger Sums, when there ſhould be Occaſion for them, to the Conſideration of a Council or Aſſembly. In like Manner, ſince ſome Princes, out of too great a Fondneſs for martial Glory, hazard themſelves and their Realms, by engaging in unneceſſary Wars; it was a prudent Caution in thoſe People, who, when they conferr'd the Sovereignty on their Kings, obliged them not to enter upon a War, at leaſt, not on the offenſive Side, without the Advice and Concurrence of a proper Council. We are told of the Inhabitants of the the Iſland *Borneo* [a], that they have ſuch a natural Averſion to War, and to martial Princes, that when they find their Monarch to be of a fiercer Diſpoſition, they oblige him to fight at the Head of his Army, where he may meet with the greateſt Danger. In theſe therefore, and in all Inſtances of Buſineſs, which a People find to be of publick Uſe and Benefit, they may provide for their own Security, by ſettled Conſtitutions and Decrees: Leſt, if they ſhould leave the abſolute Diſpoſal of ſuch Affairs in the Hands of the Prince, the common Intereſt might poſſibly ſometimes ſuffer.

From what hath been obſerv'd on this Head, it appears in what Senſe we ought to explain that common Aſſertion of the *Grecian* Politicians, and others who follow them, when they tell us, *That the Government of a State ought rather to be committed to Laws, than to Men.* For the only rational Interpretation of ſuch a Maxim muſt be this, that it is more expedient the Rulers of Commonwealths ſhould govern according to the ſtanding Preſcriptions of the Law, than according to their own private and unconfined Pleaſure. For otherwiſe bare Laws are no fitter to govern a State, than the bare Needle to govern a Ship, without the Aſſiſtance and Direction of [1] a Pilot.

Many Examples and many Methods we find in Hiſtory, how the regal Power hath been limited and reſtrain'd [b] [2]. But, perhaps, no Relation is ſo extraordinary as that which *Solinus* [c] gives us of the People of the Iſlands *Hebrides* in *Scotland*: *Their King*, ſays he, *hath nothing of his own*; *all Poſſeſſions lie in common*: *He is tied to Equity by eſtabliſh'd Laws. And, leſt Covetouſneſs ſhould tempt him from Truth and Right, he is taught Juſtice by the Diſcipline of Poverty; having no fix'd Revenue, nor private Eſtate, but owing his Maintenance to the publick Stock. He is allowed no Wife, but makes free with any of his Subjects Beds, as he thinks convenient. And thus he hath no Hopes of a Family and Children, to engage and to enſnare him.* *Apollonius Rhodius* [d] tells us a lamentable Story of the Kings of the *Moſſynæci*, that, if at any time they pronounced an unjuſt Sentence, they were immediately ſhut up in a Tower, and there ſtarv'd to Death.

XII. But whereas, as hath been already ſhewn, Princes in a limited Monarchy are, for the moſt part, obliged, in ſuch Affairs as the People thought fit not to leave to their abſolute Diſpoſal, to apply themſelves to a Council, either of all the Subjects in general, or of Deputies, repreſenting the particular Claſſes and Orders; it is farther to be obſerved, that the Power of ſuch Councils is not in all Places alike. For there are Realms, where the King, being in other reſpects *abſolute*, appoints a Council or Senate, the Approbation of which he makes eſſential to the Validity of his Decrees [e] [3]. Now a Senate of this kind is, as to its Authority, no more than a Board of Counſellors; and when it proceeds to take the royal Edicts under Examination and Cenſure, and to reject ſuch as ſeem leſs expedient to the Commonwealth, it does this, not by its own proper Right, but by a Power delegated from the Prince; who makes this prudent Proviſion, that nothing may be enacted prejudicial to the Publick, either through his own Inadvertency, or through the Inſtigation of Flatterers. *Plutarch* [f] reports it as 'A Law of the *Egyptian* 'Kings, which they conſtantly obſerved, to 'bind the Judges by Oath, that they ſhould 'not obey the Prince himſelf, if he deſired 'them to paſs an unjuſt Sentence.' And, on the ſame Occaſion, he tells us, that *Antigonus* the Third gave Notice to the States, 'That in caſe 'he ſhould, by any Letter to them, command 'any thing contrary to the Laws, they ſhould 'not perform ſuch an Injunction, but ſhould 'take it for granted that he had forgot himſelf' [g]. By this means too Princes often get rid of bold Petitioners, whilſt in Appearance they grant the Requeſt, but, at the ſame time, know, that the Senate will cancel and reverſe it [h].

Yet under this Conſtitution, if at any time the Prince poſitively inſiſts in having his Will take place, and doth not own the Reaſons, urged by the Senate, to be of Strength enough to prove the contrary; the Senate cannot proceed farther in oppoſing the Prince's Power. For it is not ſuppoſed, that he, in appointing ſuch a Council, intended to give up irrevocably his abſolute Right of governing, and, of his own Accord, to make his Subjects Obedience only conditional, when he might have claim'd it without any ſuch Terms of Reſtraint. The Senate therefore, in this Caſe, hath its Authority only by Commiſſion from the Prince, who may, conſequently, put a Stop to it, when he thinks

[a] Franc. Lopez *de* Gomara *Hiſt.* Ind. *Occidental.* Chap. xcv. [b] How the Power of the *Egyptian* Kings was confined, See *Diodor. Sic.* Lib. i. Chap. lxxi. *Add.* Plin. *Nat. Hiſt.* Lib. vii. Chap. xxii. *in fin.* & Solin. *Chap* lxvi. *Philoſtratus* (Vit. *Apollon. Thyan.* Lib. iii. Chap. xxxiii.) reports, that the antient Conſtitutions of the wiſe *Indians* permitted the King to ſtay amongſt them but a ſingle Day at once. [c] *Chap.* xxxv. [d] *Argonaut.* Lib. iii. [e] See what *Nieuhof* relates of the Empire of *China*, *Deſcrip.* Sin. *Chap.* i. [f] *Apophthog.* Pag. 174. *B.* 183. *F.* [g] *Vide* C. *Lib.* i. *Tit.* xix. *l.* 1. *De Precib. Imperat. offerend.* [h] *Vide* Lib. x. Tit. xii. l. 1. C. *De Petit.* Bonor. *ſublat.* Bodin. *de Republ.* Lib. iii. Chap. iv. Pag. 455. Gramond. *Hiſt.* Gall. *Lib.* v. *Pag.* 277. &c. Joh. Labardæ, *Hiſt.* Gall. *Lib.* iii. *Pag.* 132, 133. Ed. *Pariſ.* 1671.

[1] This is by no means the Intention of the Writers of whom our Author ſpeaks. See Lib. i. Chap. vi. § 14. towards the End.
[2] *Grotius*, Book i. Chap. iii. § 16. Num. 3, is more worthy to be conſulted upon this, than the Places juſt mentioned.
[3] See *Grot.* Book i. Chap. iii. § 18.

fit: Tho' indeed he ought not to do ſo, unleſs on very extraordinary Occaſions. But thus much may be done on the People's Side; when one King hath, by his own free Act, conſtituted ſuch a Senate, they may oblige his Succeſſors (by an Oath, at their Admiſſion to the Government) not to diſſolve it.

A Senate thus form'd, and eſpecially if it be left in the King's Power to ſuppreſs it, doth not hinder the King from being *abſolute*. For, when we apply this Denomination to a Prince, we do not preſume that he acts whatever he pleaſeth, according as he is led by the Blindneſs of Luſt, or the Raſhneſs and Inadvertency of Paſſion; but only that he determines, by his own final Judgment, all Matters belonging to the Commonwealth: Which is very far from being inconſiſtent with a Neceſſity of hearing good Reaſon and ſound Advice. Hence, altho' the Counſel, which ſuch a Senate offers the Prince, doth not oblige him, by its own Force, or by any Authority inherent in itſelf, yet, it affords the Ground and Occaſion of an *Obligation*, by repreſenting to the Prince after what Manner he may truly diſcharge his Duty, in the Buſineſs at preſent under Debate [a]. For ſo a Phyſician cannot be ſaid to *oblige* a Patient by his own Power and Authority; yet, when he ſhews him what will conduce to his Health, the Patient is bound to follow his Preſcriptions by the Law of Nature, which enjoins every one to take care of his own Health and Safety. The ſame muſt be ſaid of the Aſſemblies of the Eſtates in a Realm; which ſerve only for a larger Council of the Prince, by means of which, the Complaints of the People, which are often neglected or ſuppreſs'd in private Councils, may be brought to the Prince's Ear; who hath the Liberty of taking what Method he pleaſeth for their Redreſs [b]. It is well obſerv'd by Mr. *Hobbes* [c], that unleſs we would rob the King of his Sovereignty, and make a State with two Heads, ſuch an Aſſembly cannot undertake more Buſineſs than the King hath propounded to them: *Since the People cannot chooſe their Deputies to other Intent, than is, in the Writing directed to them from the Sovereign, expreſs'd.* For the ſame Reaſon, when the Sovereign ſhall declare, that nothing more at preſent remains to be propounded to their Debate, the Body is diſſolv'd. Yet they are allow'd, of their own accord, to inform the King of ſome Matters by way of Addreſs and Petition.

But the Sovereignty may then properly be term'd *limited*, when the People at firſt conferr'd it on the Prince, under this Condition, that, before he proceeded to the Exerciſe of certain Acts, he ſhould conſult the Aſſembly of the Eſtates, and that without their Conſent his Decrees ſhould be of no [1] Force. Yet ſtill we ought to leave it in the King's Power, to call this Aſſembly, and to diſſolve it [2]: As, likewiſe, to propoſe the Matters which are to be debated in it; unleſs we would give him only the Name and Shadow of a King, or would throw the Commonwealth into an irregular Shape. And altho' it be granted, that the Eſtates aſſembled may, of their own accord, lay before the King Conſiderations relating to the publick Safety, yet the Decrees which they form on ſuch Heads, ſhall derive their Force from the royal Aſſent and Ratification. The Difference between ſuch a Body of Repreſentatives, and *Counſellors* properly ſo call'd, is this, that although, in their Applications to the Sovereign, they both act in the ſame manner by Reaſons and Advice; yet the Sovereign may reject the Reaſons of the latter, but not of the former. Nor ought the Prince to think it hard, if the Eſtates do ſometimes deny their Concurrence to what he offers. For he hath engaged himſelf by his Promiſe, to have always an Eye and Regard to the common

[a] Add. 1 *Kings* xii. 7, 8. *Martinius* in his Hiſtory of *China* (Lib. v. Chap. xxxvii. Pag. 122.) relates, that the better Sort of Princes amongſt that People made it a Cuſtom, when they were admoniſh'd by Perſons celebrated for Wiſdom and Goodneſs, of ſhunning Vice, or of purſuing Virtue, or of any Affair relating to the publick Welfare, to receive the Advice with bended Knee. *Add.* Lib. vi. Chap. i. Pag. 204. [b] See *Grot.* Lib. i. Chap. iii. § 10. [c] *Leviathan*, Chap. xxii.

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[1] To this may be refer'd the Example of the *Engliſh* Parliaments, and above all the Houſe of Commons; if we had but demonſtrative Proofs from thoſe, who maintain, That the preſent Conſtitution of that Country is as ancient as their Monarchy. See the late M. *Rapin*'s Diſſertation on the *Saxon Wittena-gemot*, in the firſt Volume of his *Engliſh* Hiſtory.

[2] 'Tis worth the while to explain that Point a little. Let us hear Mr. *Sidney* upon it: 'The Power of calling and diſſolving Parliaments, is not ſimply in Kings. They may call Parliaments, if there be Occaſion, at Times when the Law does not exact it. They are placed as Centinels, and ought diligently to obſerve the Motions of the Enemy; and give Notice of his Approach: But, if the Centinel falls aſleep, neglects his Duty, or maliciouſly endeavours to betray the City; thoſe who are concern'd, may make uſe of all other Means, to know their Danger, and to preſerve themſelves.——The Conſuls, or other chief Magiſtrates in *Rome*, had certainly a Right of aſſembling and diſmiſſing the Senate: But, when *Hannibal* was at the Gates, or any other eminent Danger threaten'd them with Deſtruction; if that Magiſtrate had been drunk, mad, or gain'd by the Enemy, no wiſe Man can think that Formalities were to have been obſerved. In ſuch Caſes, every Man is a Magiſtrate; and he who beſt knows the Danger, and the Means of preventing it, has the Right of calling the Senate or People to an Aſſembly. The People would, and certainly ought to follow him, as they did *Brutus* and *Valerius* againſt *Tarquin*, or *Horatius* and *Valerius* againſt the *Decemviri*; and whoever ſhould do otherwiſe, might, for Folly, be compar'd to the Courtiers of the two laſt Kings of *Spain*. The firſt of theſe, by Name *Philip* the *Third*, being indiſpos'd in cold Weather, a Stove with Coals was brought into his Chamber, and plac'd ſo near to him, that he was cruelly ſcorch'd. A Nobleman then preſent ſaid to one who ſtood by him, *The King is burnt*; the other anſwer'd it was true; but the Page whoſe Office it was to bring and remove the Stove was not there; and, before he could be found, his Majeſty's Legs and Face were ſo burnt, that it caus'd an *Eryſipilas* of which he died. *Philip* the *Fourth* eſcap'd no better, who being ſurprized as he was a Hunting, by a violent Storm of Hail and Rain, and no Man preſuming to lend the King a Cloak, he was ſo wet, before the Officer could be found who carried his own, that he took a Cold, which caſt him into a dangerous Fever. If Kings like the Conſequences of ſuch a Regularity, they may cauſe it to be obſerv'd in their own Families; but Nations looking in the firſt Place to their own Safety, would be guilty of the moſt extreme Stupidity, if they ſhould ſuffer themſelves to be ruin'd for adhering to ſuch Ceremonies.——The Law for Annual Parliaments expreſsly declares it not to be in the King's Power, as to the Point of their Meeting, nor, conſequently, their Continuance: For they meet to no Purpoſe, if they may not continue to do the Work for which they meet; and 'tis abſurd to give them a Power of meeting, if they muſt not continue till it be done: For, as *Grotius* ſays, *Qui dat finem, dat media ad finem neceſſaria*, the only Reaſon why Parliaments do meet, is to promote the publick Good; and they, by Law, ought to meet for that End. They ought not therefore to be diſmiſs'd, till it be accompliſh'd.' Mr. *Sidney*'s Diſcourſe upon Government, Chap. iii. Sect. xxxviii.' See the reſt of the Chapter. The Hiſtory of the *Engliſh* Kings, and eſpecially thoſe, who in the laſt Age, inceſſantly labour'd after Arbitrary Power, plainly ſhews the Neceſſity of what is here advanc'd, by this illuſtrious Defender and Martyr of *Britiſh* Liberty. For it was chiefly by governing without Parliaments, or diſſolving thoſe which they call'd, that theſe Princes endeavour'd to attain their Ends; tho', by theſe Methods they rather prejudic'd than promoted their Deſign.

Welfare,

Welfare, which in all Probability muſt be better underſtood, and more ſurely conſulted by a Number of ſelect Judges, than by a ſingle Man. The Prince therefore, in caſe his Eſtates ſhould thus happen to diſſent from his Opinion, muſt attribute the Misfortune to his own Inadvertency or Paſſions, or to the ill Fate of the Kingdom. 'Tis an idle Fear which poſſeſſeth ſome Men, that by this means we ſhall put it in the Power of the Eſtates to preſerve, or to deſtroy the Commonwealth, as they think fit. For 'tis ridiculous to ſuppoſe ſo much [1] Imprudence, either in the King, as that he ſhall be unable to repreſent to the Aſſembly the real Neceſſities of the Kingdom; or in the Aſſembly, as that, when they ſee the Buſineſs thus clearly laid before them, they ſhall obſtinately betray their own Security. But this is certain, ſince the Perſons who firſt inveſted the Prince with a limited Sovereignty, cannot be preſumed to have been deſirous, either of overturning and deſtroying the Government, or of hindering, by their Acts and Covenants, the true End of civil Communities from being obtain'd; it may hence be gather'd, that theſe original Covenants and Agreements are always ſo to be interpreted, as that they may conſiſt with the publick Safety, and, on no account, contradict and oppoſe it: And, conſequently, that the Perſons thus covenanting muſt be ſuppoſed to have done all with this Reſerve in their Mind, that the Terms and Conditions, which they now ſettled, ſhould not in the leaſt prejudice the general Intereſt or Security, or cauſe a Convulſion or a Diſſolution in the Commonwealth. If then ſuch a Caſe ſhould happen, that the Covenants firſt entered upon by the People, ſhould afterwards, in any Inſtance, appear prejudicial or deſtructive to the publick Welfare, it will be convenient, if the Matters ſhall admit of Delay, to propoſe them in an Aſſembly of Eſtates. When this cannot well be done, the King hath it in his own Power to correct, by Wiſdom and Art, thoſe dangerous Eſtabliſhments. And the ſame Rule will hold, with regard to the ſtanding Laws; which are now and then enjoin'd Silence, by the ſupreme Law, the Safety of the People. Thus *Ageſilaus* commanded the Laws to *ſleep one Day*; that thoſe who had fled in the Battle of *Leuctra*, might have Leave to return, without the uſual Penalty and Diſgrace. In the ſame manner, the ordinary Courſe of judicial Proceedings is often hindered, either by the Neceſſity of the Times, or by the Condition of the Parties offending; who, perhaps, were they to be formally arraign'd, muſt firſt be vanquiſh'd as Enemies, before they can be try'd as Criminals. Therefore Mr. *Hobbes*'s Poſition will not ſtand, without ſome Grains of Allowance, when he aſſerts [a], *That the Evil inflicted by publick Condemnation is not to be ſtyl'd by the Name of Puniſhment, but of an hoſtile Act.* He ſpeaks Truth, in caſe there was no precedent Crime: But when the Offence is evidently proved, the Evil inflicted will be truly and properly a Puniſhment, tho' the preſent Poſture of Affairs hinder the Offender from being condemn'd in the common Method of Juſtice.

XIII. But Mr. *Hobbes* ſeems inclin'd to allow no Diſtinction between ſupreme and abſolute Power; or rather to make all Power abſolute, that is, ſupreme. To whoſe Notions this general Remark may be applied, that what he ſo crudely delivers, ſhould be limited with this Condition, *So far as the End of civil Government will admit*: As, for Inſtance, when he ſays, that *he, to whom the Right of Puniſhing belongs in a Commonwealth, may juſtly compel all Men to all Things that he pleaſeth* [b]. And indeed he himſelf inſerts this Reſtriction; for he tells us, that by *all things*, he means, *all things that are neceſſary to the common Peace and Security* [c]. And ſo again, he obſerves, that *there is connected with the Right of the Sovereign ſo much Obedience in the Subject, as the Government of a State neceſſarily requires.* By the ſame Rule therefore, when he affirms [d], that *he, who hath in ſuch a Manner ſubjected his Will to the Will of a Prince, as that the Prince may, without Reſtraint, do what he pleaſes; make Laws, judge Cauſes, inflict Puniſhment, uſe the Strength and Riches of the People at his Pleaſure, and all this by Right; hath certainly granted the higheſt Power of Sovereignty that can be given*: We are to conſider, with what Purpoſe and Intention Men firſt applied their Minds to the conſtituting of civil States: And then we ſhall ſuppoſe no Perſon to have voluntarily transferr'd on the Prince any farther Degree of Power, than appears conducive to that End, in the Judgment of any wiſe Man: Tho' to determine what is thus conducive, according to particular Circumſtances and Occaſions, doth not belong to thoſe who transfer their Right, but to him, on whom it is transferr'd. The Sovereign therefore hath a Right of compelling the Subjects to all ſuch things as he judgeth to be of any Conſequence to the publick Good. But to conſtrain them to that which is inconſiſtent with the Safety of the Commonwealth, or with the Laws of Nature, is what he ought not to entertain, even in Thought and Inclination. And if he ſhould engage in any ſuch Attempt, no doubt he tranſgreſſeth the proper Bounds of his Authority.

It may not be amiſs, if we here examine the Arguments alledg'd by the ſame Author [e], by which he endeavours to prove, that it would be a vain Deſign to introduce a limited Sovereignty. For, in this Caſe, ſays he, 'The Aſſembly, which preſcribed Laws to the future Prince, had certainly an abſolute Power, at leaſt actually, or virtually. If then, the Aſſembly continues; or, proroguing itſelf from time to time, meets again at a fix'd Day, and at a certain Place; this abſolute Power remains ever as it was firſt ſeated; and ſo the Prince will not have the ſupreme Authority, but will be a bare Magiſtrate.' (And thus much we grant, if the Aſſembly thus meets by

[a] Leviath. *Chap.* xxviii. [b] De Cive, *Chap.* vi. Sect. 6. [c] Chap. v. Sect. 6 & Sect. ix. *in fin.* [d] *Ibid.* Chap. vi. Sect. xiii. [e] De Cive, *Chap.* vi. Sect. 17.

[1] The Hiſtory of *England* clearly confirms what our Author ſays here, for, while their Kings appear'd to have no Deſign of invading the national Liberty, they always eaſily obtain'd the Conſent of Parliament to whatever they propos'd; being ſure of having in their Intereſt a Majority in both Houſes.

its own Right, and hath the Power of determining all kinds of publick Buſineſs, and of calling the King himſelf to an Account.) 'But 'if the Aſſembly diſſolves itſelf, unleſs the State 'be diſſolv'd with it, there muſt be left ſome-'where a Power of puniſhing thoſe who tranſ-'greſs the Law; *which cannot be done without ab-'ſolute Authority*.' This Clauſe we deny, as utterly falſe; and we have no better Opinion of the Reaſon on which he builds it. 'A Prince '(ſays he) who hath ſo much Strength granted 'him in a rightful Manner, as to enable him to 'puniſh any Subject whatſoever; enjoys the 'greateſt Power that a People can give.' For the Weakneſs of this Argument will eaſily be diſcover'd by any one, who reflects on the Deſign of civil Eſtabliſhments, and conſiders, that by ſubmitting their Will, and their Strength, Men do not turn themſelves into meer Engines, to move no otherwiſe than as they are drawn; but that they only grant to another the Uſe of their Powers under a Condition; ſo as that they themſelves are to judge whether this Condition be made good, and, if it be not, are at Liberty to retract what they gave. Alike abſurd is it to pretend, that there is not more Security againſt the Abuſe of Power, in a limited, than in an abſolute Government [1]. He who hath Strength enough to defend his People (as all wiſe Subjects muſt allow their Prince) hath not always Strength enough to oppreſs or to deſtroy them. The Commands of a General may work with good Force upon his Soldiers, when he orders them vigorouſly to attack the Enemy: And yet they would be found very inſignificant, ſhould he bid them turn their Swords againſt each other. On the whole, he is a prudent Prince, who, tho' intruſted with an abſolute Sovereignty, yet in ſome Inſtances waves his own particular Advantage, when he finds the Subjects are not to be brought to a Compliance, without endangering the publick Welfare. But they are no leſs a prudent People, who, well knowing what things would be inexpedient to their Conſtitution, have, by means of fundamental Laws, put it out of the Power of Princes to conſtrain them in thoſe Inſtances.

XIV. Laſtly, it is incident to the ſupreme Power, that it may be enjoy'd, either fully, or under more or leſs Degrees of Diminution. And this chiefly belongs to monarchical Government. For ſome Kings poſſeſs their Realm in the way of Patrimony, others in the way of *Uſe* only, not of *Property*; and this either for the Term of their own Life, or with the Power of tranſmitting it to their Poſterity under certain [a] Conditions: And others are commiſſion'd to hold their Sovereignty only for ſuch a fix'd Period of Time, which being once elapſed, their Power terminates with it, and they return to the Condition of private Men. Indeed Mr. *Hobbes* [b] will have thoſe Monarchs, likewiſe, to be call'd *temporary*, who receive their Power for Life, and affirms them to be properly no Monarchs, but only the Miniſters [c] of the People. But it is contrary to the common Cuſtom of Speech, to call him a temporary Prince, who doth not lay down his Dignity, but with his Life: This Term being properly applied to thoſe, whoſe Authority expires at ſuch a certain and definite point of Time, not by Chance, but by Right.

XV. But learned Men are not agreed to acknowledge any ſuch Thing, as a temporary Monarch. *Grotius* will have the Dictator, amongſt the *Romans*, whoſe Power laſted but ſix Months, to have been truly a Monarch: *Becauſe*, ſays he, *whilſt this Period laſted, he exercis'd all the Acts of ſupreme Authority, with the ſame Right, as thoſe who are moſt juſtly and properly ſovereign Princes; neither could his Acts be revers'd by any other Power. But we underſtand the Nature of moral Things by their Operations, and, conſequently, thoſe Powers which produce the ſame Effects, ought to go under the ſame Name.* Tho' the Continuance of a Thing doth not change the Nature of it; yet there is no doubt to be made, but that a temporary Command is in Dignity much inferior to a perpetual one; ſince Men are wont to reſpect thoſe with a much more ſolid Veneration, whom they apprehend to be incapable of returning to a private Condition, than thoſe whom in a little time they are again like to ſee on the ſame Level with themſelves. But indeed, *Bodinus* [d] before *Grotius*, and many good Authors ſince him, have ſhewn, that the Dictator was by no means a Monarch, but only an extraordinary Magiſtrate. Nor doth this Axiom ſtand on very ſure Ground, *Thoſe are the ſame Powers, which produce the ſame Effects*: For it muſt be farther conſider'd, whether the Perſon exerciſeth this Power as properly *his own*, or as *delegated* to him, by *others*, to uſe in their ſtead. On which Account, it is a Miſtake, likewiſe, in *Grotius* [e], to rank thoſe Perſons in the Claſs of temporary Monarchs, *Who, during the Minority of Kings, or in the time of their Captivity, or Lunacy, are appointed Protectors: In as much as they are neither ſubject to the People, nor is their Power revocable, before the Time fix'd by Law*: For theſe Governors exerciſe the ſupreme Authority, not in their own Name, but in another's; and therefore can no more be term'd Monarchs, than we call a *Guardian* the Proprietor of the Goods of his *Ward*. And then no Man, who is vers'd in the *Roman* Hiſtory, will allow that the Dictator had all, and each preciſe Part [3] of the Sovereignty ſo committed to him together, as that, during the ſix Months Space, he might exerciſe it as he pleas'd.

[a] *De Cive, ubi ſupra*, Chap. vii. Sect. 16. [b] Chap. ix. Sect. 11. [c] *Lib.* i. *Chap.* iii. Sect. 11. [d] *De Republ.* Lib. i. Chap. viii. [e] Chap. iii. Sect. 11.

[1] *Vid.* Hobbes, *Chap.* vi. *Sect.* 13. *ibid. Annotat.* not excepting the Clauſe by which it is ſtipulated, that the Prince ſhall be of ſuch a Religion. See Mr. *Hertius*'s Diſſertation *de Superioritate Territoriali*; which makes Part of the ſecond Tome of his *Commentationes & Opuſcula*, &c. Sect. 13. Pag. 217, &c. as, alſo *La Reponſe aux Queſtions d'un Provincial*, by Mr. *Bayle*, Tom. i. Pag. 535, &c.

[2] *That is true* (ſays Mr. *Buddeus*, in his excellent Diſſertation, intituled, *Juriſprudentiæ Hiſtoricæ Specimen*, among his *Scheda* ſ. *Natur.*) *provided that the Nature of a thing has ſo cloſe a Connexion with the Continuance, that the Change of the one neceſſarily infers the Change of the other.* Sect. 47. See from his 43d Section to the 48th. But this is ſuppoſing the Thing in Queſtion. See what I have ſaid upon the Place of *Grotius*, Not. 5.

[3] See *Roſin. Antiq. Rom.* Lib. vii. Chap. xvii. This is only true with reſpect to later Times, and we here ſpeak of the Dictatorſhip, ſuch as it was originally, and as it remain'd for ſeveral Ages, when there was any Neceſſity to have Recourſe to it. See what I have ſaid upon the ſame Place of *Grotius*, Not. 7.

pleas'd. And as for what is urged, that *his Acts could not be revers'd by any other Power*; it is not abſurd to ſuppoſe a Magiſtrate ſo commiſſion'd and impower'd, that, at leaſt, in ſome certain Affairs, there ſhall lie no Appeal from his Sentence; and yet he ſhall be no more than a Magiſtrate [a].

It is worth obſerving, on this Head, that the Power of the Dictators, and of all other Magiſtrates appointed for a certain Time, doth at that very Inſtant expire, and the Perſons do by Right return to a private Station; and that therefore, whatever they do, after this preciſe Point of Time, is look'd on as a private Act, to which any Man may refuſe Obedience [1]; tho', perhaps they ſtill bear the external Enſigns of Power. Hence, to abrogate the Command of ſuch Repreſentatives, there is no need of a new Decree of the People; but, if they refuſe to reſign, the old Decree is ſufficient to be immediately put in Execution againſt them. For thoſe Rights, the Validity of which depends on a certain Space of Time, as on a neceſſary Condition, ceaſes with the elapſed Time, without farther Proceſs: But in Controverſies about Rights, when the Quality of certain Actions is to be proved, there is need of long Debate, and of a formal Sentence. The Reaſon of which Difference is this; there can be no Diſpute whether ſuch a Point of Time is paſs'd, but whether an Action was good or bad, may be argued with Probability on both Sides [b].

But it is by many thought impoſſible to give an Inſtance of temporary Sovereignty, if we ſpeak of ſuch Power as is properly ſupreme, and not conferr'd by Deputation. For what we read of *Auguſtus* [c], that he would ſuffer his Empire to be granted to him only for Ten Years, and, upon the Expiration of that Term, renewed it again for Ten Years more; was a mere Jeſt, and a popular Cheat. *Nabarzanes*, in *Q. Curtius* [d], hid the vileſt Treachery under the ſame ſpecious Propoſal: *Put your Government*, ſays he to *Darius*, *into the Hands of another, who ſhall bear the Name of a King, till ſuch a Time as he ſhall have driven the Enemy out of* Aſia; *and when his Victory hath ſecured the Kingdom, let him reſtore it to its proper Maſter. Let* Beſſus *enjoy the Sovereign Command, during this Juncture, and when things are ſettled, let him deliver to you, the lawful Prince, that Power which he receiv'd only in Truſt* [e]. In *Nicephorus* [f], we find *Michael Palæologus* obliged by Oath to adminiſter the Government, 'till the lawful Heir and Succeſſor ſhould be grown up, and then to reſign freely to him the Throne and all the Enſigns of Majeſty. Tho', indeed, his Oath was never kept. And for the Compact between *Eteocles* and *Polynices*, that they ſhould reign each a Year by Turns, this Inſtance may eaſily be anſwered, by ſaying, That it was contrived only as an Expedient to keep the Kingdom undivided; each Brother thus poſſeſſing the entire Command, tho' in an alternate Courſe [g].

XVI. As for that Way of poſſeſſing Kingdoms, by which they are ſaid to be *in the Patrimony of the Prince*, we are firſt of all to obſerve, that a Man's Patrimony is not, ſtrictly ſpeaking, ſo much what he derives by Inheritance from his Parents, as what he enjoys with full Property or Dominion, by whatever Means it came into his Hands. Hence, as *Property* is chiefly applied to *Things*; ſo they too are eſpecially term'd *patrimonial*, in as much as they have no inherent Right, which might hinder the Poſſeſſor, either from employing, or from abuſing them at his Pleaſure. Afterwards, Slaves came to be added to the Things or Goods, which compoſed the Patrimony of their Lords; who challeng'd ſo abſolute a Right and Title over them, as to make the Servant not at all concern'd in his own Safety or Deſtruction, affirming the one and the other to be entirely the Maſter's Advantage, and the Maſter's Loſs. And within theſe Bounds the Fathers of Families confin'd Patrimonies in the early Times. For, as to the Right of governing their Wives and Children, tho' this, indeed, belong'd to them, and to them alone; yet, in as much as theſe near Relations were Perſons conſiderable on their own Account, they did not pretend to put them amongſt their Poſſeſſions, or to reckon them Part of their Wealth and Eſtate [3]. Nor are Men wont to ſet down their Learning and their Skill in the Liſt of their Fortunes, however advantageous to them [h]: tho' many a Perſon by theſe Accompliſhments ſupplies the Want of real Poſſeſſions, and comes under that Character in *Ovid* [i]:

Ars illa ſua cenſus erat.------

-----His Art was his Eſtate.

But when the Ambition of Princes began to rank, among the chief Goods, a Power and Com-

[a] Such were heretofore among the *Romans* the *Præfecti prætorio*; upon which ſee a Reſcript of *Conſtantine*: *A præfectis autem prætorio provocare non ſinimus.* Cod. Lib. vii. Tit. xlii. *de Appellat. & Conſult.* Leg. xix. See, alſo, *Tit.* xlii. *de Sententiis præfect. prætor. & Digeſt.* Lib. iv. Tit. iv. *de Minoribus*, Leg. xvii, xviii. The Biſhops, who never fail'd to take the Advantage of the Indulgence of Princes to ſatisfy their own Ambition, obtain'd that Privilege of the Emperors *Arcadius*, *Honorius*, and *Theodoſius*, with reſpect to the Cauſes that were determined by them. *Epiſcopale judicium ratum ſit in omnibus, qui ſe audiri à ſacerdotibus elegerint; eamque illorum judicationi adhibendam eſſe reverentiam jubemus; quam veſtris deferre neceſſe eſt poteſtatibus, à quibus non licet provocare.* Cod. Lib. i. Tit. iv. *de Epiſcopali Audientia*, &c. Leg. viii. See *Geneſ.* xli. 40, 44. [b] *Vid.* Liv. *Lib.* iii. *Chap.* xxxviii, *&c.* [c] Dio. *Lib.* liii. [d] *Lib.* v. *Chap.* ix. [e] What we meet with in *Diod. Sic.* (Lib. iv. Chap. xxiii, & xxxiii.) may be produced with a better Colour, for an Inſtance of a Kingdom *in Truſt*. [f] Lib. vi. [g] *Vide* Euripid. *in* Phœniſſ. Statius, *Theb.* Lib. i. [h] Philo Jud. *De Plantatione* Noe, *Pag.* 224. *C. Ed.* Pariſ. *The Painter reckons his Art, and every Mechanic the Myſtery of his Calling, a kind of Inheritance or Fortune to him, not as an earthly Poſſeſſion, but as a free Reward. For theſe Advantages, tho' they do not fall under Property, yet are highly beneficial to the Perſons who enjoy them.* [i] Metam. *Lib.* iii. ver. 588.

[1] See *Sidney* upon Government, Chap. ii. Sect. 24.
[2] See upon this, a learned Note of *J. Fridric Gronovius*, in the Edition of *Seneca*'s *Controverſies*, Contr. ix. Pag. 150. *Ed. Var. Amſt.* 1672.
[3] Our Author here refers to a Rule of the Civil Law, which ſays, That a Man grows no richer for having got a Freed-Man, even tho' he has a Right of Patronage over him: *Locupletior non eſt fâctus, qui Libertum adquiſivit.* DIGEST. Lib. L. Tit. xvii. *De div. reg. Jur.* Leg. cxxvi. § 1. To report which he juſtly urges the Opinion of the learned JACQUES GODEFROI, in his Commentary; and cites another Law of the DIGEST. Lib. ix. Tit ii. *Ad Leg. Aquil. Leg.* xxxiii.

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mand over Men; and many of them brought it into a Cuſtom, to maintain their own Pleaſures and Vices at the Subjects Coſt; thoſe Kingdoms came to be look'd on as Patrimonies, which the Sovereign had receiv'd a Power of alienating, as he ſhould think fit: This being eſteem'd the utmoſt Force of *Property*, and the very Eſſence, in which a real Poſſeſſion conſiſted [1]. Whereas other Monarchs, who had not obtain'd ſo vaſt a Privilege, and ſo unbounded a Power over their Realms, were ſaid to hold them in the manner of *Perſonal* Poſſeſſions, and rather to have the *Uſe* of them, than the *Property*. Which Diſtinction ſeems to have taken its Riſe from the different Ways of acquiring Government, eſpecially monarchical. For altho' no Prince can be lawfully conſtituted, without the Conſent of the Subject, yet there are different Manners of exerting and applying this Conſent. So that, in ſome Caſes, the King confers a Benefit on the People, in taking them under his Sovereignty; in others, the King is highly obliged and indebted to the People, for advancing him to the Throne. Thoſe, who have given a Prince juſt Cauſe of proceeding to Hoſtility againſt them, in caſe they loſe the Day, may, by the Right of War, be deprived of all their Poſſeſſions, and of their perſonal Liberty itſelf. Therefore, if Men, under theſe Circumſtances, are admitted to any Terms or Conditions, they are to acknowledge it as the pure Favour and Mercy of the Conqueror: Who, tho' he leaves them to enjoy their Life and perſonal Liberty, and their private Eſtates; yet is ſuppoſed to challenge the Sovereignty over them, in the fulleſt and moſt [2] irrevocable manner, for himſelf and his Poſterity [3]. The ſame Claim is preſumed to be made by a Prince, who receives a People into his Protection, when they had otherwiſe been inevitably ruin'd [a]. Now the Effect reſulting from a Sovereignty thus ordain'd, is chiefly ſeen in this, that not only the Condition of the Subjects depends entirely on the Pleaſure of the Prince; but that Prince may transfer his Right of governing ſuch a Realm on any Perſon whom he ſhall chooſe; and, conſequently, may appoint any Method of Succeſſion that ſhall be agreeable to his Judgment or Inclination.

XVII. But where the King receives his Crown from the Grant of the People, there each Perſon thus concurring is ſuppoſed to have reſerv'd and ſecured to himſelf ſo much of his former Rights and Privileges, as is conſiſtent with the Nature of a civil State. And therefore, the Condition of the Subjects, under ſuch a Conſtitution, rather depends on their own Choice, than on the Prince's Pleaſure. Yet they could not but find it neceſſary, to abridge themſelves of their natural Liberty in ſuch a Degree, as the Form of Government required, which they are now about to introduce. Farther, ſince, in conferring Sovereignty by a voluntary Act, Men are uſually prevail'd on by the Conſideration of ſome peculiar Merit or Advantage in the Perſon, and therefore would not perhaps ſubmit to the Authority of *another*, as they are willing to yield to *his*; it follows, that, according to the regular Courſe, the People are to determine on whom the Crown ſhall devolve, after the Deceaſe of the King now elected. And here, if the People ſhould not think it proper to conſtitute every new King by a particular Election, it ſhall be in their Power to ſettle the Method of Succeſſion; and the Prince's Nomination ſhall, in this point, by no means hold good againſt their Act. Upon this account chiefly it is, that many Authors have affirm'd theſe Monarchs to hold their Realms *jure uſufructuario* [4], by the Right of *Uſe* and *Profit*; as we have already hinted: In as much as by their own Pleaſure, and without the Conſent of the People, they can ſettle nothing, either in regard to the inward Frame and Conſtitution of the State, or to the alienating and transferring it on any Perſon [b]. We are by no means for extending the Compariſon farther between Princes, conſtituted by the free Grant of the People, and thoſe Perſons whom the civil Law terms *Uſufructuarii*, Poſſeſſors of Things with a Title only to the *Uſe*. And therefore we utterly diſlike the Aſſertion of Mr. *Hobbes*, which we meet with in his Book *De Cive* [c]; *If*, ſays he, *the People, e're they departed from the Election of a temporary Monarch* (that is, in his Notion, a Prince who receives the Government for Life) *made a Decree to meet again at a certain Time and Place after his Death; then, ſo ſoon as he ſhall happen to deceaſe, the Sovereignty returns in full to the People; not by any new Act of theirs, but by the Right which they before enjoy'd. For, during that whole Interval, the ſupreme Dominion was in the People, as to the Property, and only as to the Uſe and Exerciſe in that temporary Monarch.* This Notion, if taken in the groſs Senſe in which it is deliver'd, we cannot but look upon as highly dangerous and prejudicial to all thoſe limited Princes, who are ordain'd by the voluntary Donation of the People, and bound up to certain fundamental Laws. And the rather, becauſe, as he hath taken the Liberty to call a King for Life a *temporary Monarch*, others may, with as much Reaſon, extend the Name to thoſe who receive the Sovereignty, with the Privilege of tranſmitting it by Inheritance, yet ſo as to keep it within their own Line and Family. Beſides, ſince Mr. *Hobbes* hath not determin'd how far he would ſtretch the Parallel which he uſeth, he may eaſily be intangled in a Train of very pernicious Conſequences. For ſince Property, con-

[a] *Comp.* Lib vii. Tit. i. Lib. xiii. Sect. *ult.* Sect. 15. Sect. 1. D. *De* Uſufruct. & *Lib.* iii. *Tit.* xxxiii. *L.* 9. C. *uli ſupra*, Sect. 13. [b] *Vide* Grot. [c] Chap. xii. Sect. 16.

[1] See the next Chapter, Sect 11. and Book viii Chap. v. Sect 9, &c

[2] All theſe Reaſons do not prove, That there are *Hereditary Kingdoms*, which are ſuch in themſelves: To render them ſuch, there muſt be an expreſs or tacit Conſent of the People, who have, upon that Condition, ſubmitted to the Sovereign. See my Notes upon *Grotius*, Lib. i. Chap. iii. § 11. Not. 4.

[3] 'Twas thus among the *Jews*, that the King choſe which of his Sons he pleas'd, to be his Succeſſor. See 1 *Kings* i. 35. 2 *Chron.* xi. 20, 22. with Mr. *Le Clerc*'s Notes thereupon. Our Author in the laſt Section of the following Chapter, among other Examples, urges, but without Reaſon, that thoſe who acted ſo, exceeded the Limits of their Power. But ſuch was the Cuſtom of the Eaſtern Kings, according to which Pattern, the *Iſraelites* beſought GOD to grant them a King. The Reaſons urged againſt Patrimonial Kingdoms by *Francis Hottomann*. Quæſt. *Illuſtr.* 1. are anſwer'd by *Grotius*, Lib. i. Chap. iii. Sect. 12.

[4] Juſt as a *Uſufructuary* cannot chance any thing in what he holds by Way of *Uſufruit*, even tho' it were for Improvement; neither can he alienate his Right, as appears by ſeveral Laws, beſides thoſe cited by our Author here.

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ſider'd in itſelf, is a much more noble Right, than that of temporary Uſe; ſome Men may, on theſe Principles, conclude that the People are ſuperior to the Prince, and have a Power of bringing him to Correction, in caſe he doth not govern according to their Pleaſure and Humour. On the like Score we ought to reject what the ſame Author lays down in his *Leviathan* [a], that *Elective Kings have not the ſupreme Power*; that *They, who have the Privilege of appointing a Succeſſor after the Death of the preſent King, really hold the Sovereignty even in his Life-time: Since none have Right to give that which they have no Right to poſſeſs.* For as to the Power of a Sovereign over his Subjects, it matters little what Proviſion is ſettled, or what Method agreed on, in Caſe of an *Interregnum*. And even when this Point is ſtated and determin'd by Law, the Subjects may, nevertheleſs, yield a more ſtrict Obedience to the Prince, and be far from invading any part of the Sovereignty, or from thinking of a Succeſſor, or of a new Form of Government, during the Life of their preſent Maſter. And then, beſides, 'tis a very weak Conſequence to ſay, that, becauſe an elective Prince cannot appoint a Succeſſor at his Pleaſure, therefore he hath the *Uſe* only, and not the *Property* of the ſupreme Command, and is no more than the Miniſter of a Power which reſides in others. For all the Power, which, in this Caſe, continues in others, is, that, upon the Deceaſe of the Prince, the Liberty of conſulting their own Security, and of governing their Actions by their own Judgment, ſhall return to them. But for the maintaining of this Power, 'tis by no means neceſſary ſo to break and divide the Sovereignty, as to ſay that the κτῆσις, the *Property* or real Poſſeſſion reſides in the People, and the χρῆσις only, or the *Uſe* in the Prince. Since, even in Caſe of an *abſolute* Lord or Governor, when he is extinct, the Perſon who was under his Dominion, falls again into the Liberty which Nature gave him, and the Force of which *ſeems* now to revive in him. Thus he, who for Inſtance, will pretend, that a Father hath only the χρῆσις of paternal Authority, becauſe upon his Death the Children are at their own Diſpoſal? Or that a Maſter hath only the χρῆσις of the deſpotical Power, becauſe, in caſe he die without Heirs, the Slave recovers his Liberty?

[a] Chap. xix.

CHAP. VII.

Of the Ways of acquiring Sovereignty, eſpecially Monarchical.

The CONTENTS.

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XIV. *Or tranſverſe.*
XV. *Of the Judge of Controverſies ariſing in the Caſe of Succeſſion.*

SINCE, in examining how Sovereignty is acquired, it muſt regularly be ſuppoſed beforehand, that the Perſon who acquires it, is different from thoſe over whom he acquires it; 'tis manifeſt, that the Queſtion before us is but little concern'd with Democracies; under which thoſe who command, and thoſe who obey, are diſtinguiſh'd by a moral Reſpect only, and not a phyſical. And though this Form of popular Government is ſometimes ſet up, upon the Expulſion of a King, or of the ruling Members in an Ariſtocracy; yet ſince ſtill the governing and the governed Parties are the ſame, 'tis abſurd to ſay, that the People have obtain'd the chief Command by a violent Courſe; or that the People have, by ſuch Force as properly belongs to Subjects, erected a Sovereignty over themſelves. In Democracies therefore (contrary to what we ſee in Monarchies) the Way of holding Sovereignty is ever one and the ſame. Yet theſe, as well as other States, ſometimes owe their *Increaſe* and *Improvement* to the Force of Arms, tho' never properly their *Original*.

II. In *Ariſtocracies* there appears ſome Difference, with regard to the manner of obtaining the ſovereign Power. Not only becauſe, in ſome Places, this Form of Government was introduced by the voluntary Act of the People, and in others by Violence; but, likewiſe, becauſe, upon the Deceaſe of any Member in theſe ruling Councils, the vacant Seat is fill'd up in

ſome Places by Election; and others, Birth and [1] Inheritance give a Title to the Honour. But, in Monarchies, this Difference of Acquiſition moſt viſibly diſcloſeth itſelf. For tho' all Princes, in order to a legal Eſtabliſhment of their Authority, have need of the People's Conſent, yet this Conſent is obtain'd ſeveral Ways; and even when the Sovereignty is conferr'd by the free Motion and Grant of the People, there is ſtill this Diſtinction, that ſome Princes are advanced to the Crown by Election, others by Succeſſion [2].

III. The Way of acquiring Sovereignty by Violence, is uſually term'd *Occupatio*, or *Seizure* [3]: Which yet we muſt obſerve to be different from that by which we lay hold on things that want a Proprietor, and thus we make them our own. For ſince, in things of this kind, there is no inherent Right, which might cauſe them to belong rather to one Man than to another (excepting the Determination of civil Laws) hence to obtain the Property of them, there is no need of a particular Title, but it is ſufficient barely to lay our Hands upon them, with a Deſire of poſſeſſing them [4]. But ſince every Man is by Nature equal to every Man, and conſequently not ſubject to the Dominion of others, therefore this bare ſeizing by Force is not enough to found a lawful Sovereignty over Men, but muſt be attended with ſome other Title. When *Grotius* [a] therefore tells us, *That of Things which properly belong to no Body, two are capable of Seizure, Sovereignty and Property*; we muſt not underſtand the Word *Sovereignty* in the ſtrict Senſe, for ſuch as is exercis'd over Men; but for a Sovereignty over Lands, the Effects and Virtue of which amount to this, That no Perſon ought to fix in ſuch a Lordſhip, or Diſtrict of ours, againſt our Conſent, or unleſs he will yield himſelf a Subject to us. For Men cannot be ſaid to *belong to no Body*; *he* is *his own Man*, who is not *another's* [b]. And on this account the ſame Author [c] truly remarks, *That in caſe a Perſon dies without Heirs, his Servants regain their Freedom, and his Subjects are left to their own Judgment and Diſpoſal*; inaſmuch as neither of theſe fall under the Right of Seizure. But as for the Limitation which he adds, *unleſs they voluntarily relinquiſh their Liberty*; it might perhaps have been better omitted. For where can we find a Man, who will thus utterly wave and abdicate his Freedom? He may perhaps think it convenient always to be under ſome Maſter; but he will, likewiſe, claim it as his Privilege to chooſe one Service rather than another. Such *Occupancy* then is a proper Means for the obtaining of Sovereignty, as preſuppoſeth a juſt Cauſe of the Invaſion, and is confirm'd by the Conſent of the Subject, and by ſubſequent Articles and Covenants [d]. For without theſe mutual Ties the *State of War* continues; and there can be no Fidelity or Obligation, and therefore no true Authority or Command. On which Score *Hornius* [e] ought to fall under Cenſure, when he aſſerts, *That he who ſubdues another upon precedent Injuries and juſt Provocation, immediately obtains a lawful Dominion over the conquer'd Party, and needs not to wait for his Conſent.* For how is it poſſible to deſcend from the Condition of War to that of Peace, without ſome intervening Compact? Or how can Allegiance be due to him, who hath not purchas'd and receiv'd it by ſome certain Terms of Agreement? All the Advantage which the Conqueror in a juſt War gains in this reſpect is, that he lies under no Neceſſity of careſſing thoſe whom he hath ſubdued, and of winning their Conſent by Flatteries or Intreaties, but may extort it by denouncing the ſevereſt Evils. And therefore *Hornius*'s Argument comes to nothing, when he ſays [f], *That if the Conſent of the conquer'd were*, in this Caſe, *neceſſary, a lawful Conqueror could never gain Dominion by Occupancy*: *In as much as the Occupancy would be of no Force, ſhould this Conſent of the conquer'd be with-held.* For ſince ſuch Occupancy ſuppoſeth the Victor to be ſuperior in Strength to the vanquiſh'd, and therefore able to ſet before them any Pains or Puniſhments; it can't but have ſo much Effect, as to hinder them from with-holding their Compliance. Becauſe, as there is no Man who would not rather conquer than be conquer'd, ſo every wiſe Man, when he finds himſelf worſted, will be glad to come off as cheap as he can, and will by no means think himſelf prejudiced, in yielding a Conſent to the Victor's Sway [5], when, without this, he muſt have inevitably periſh'd.

IV. But what ſhall we ſay in caſe the Dominion be *ſeized by unjuſt Force?* As to this Queſtion, it is firſt acknowledg'd, on all Hands, that a popular State, or the Majority in ſuch a State, may, for the avoiding any grievous Evil (whatever be the Occaſion which threateneth it) relinquiſh their preſent Liberty, and put themſelves under the Command of a ſingle Perſon, or of a ſelect Council. And for the ſame Reaſon, that a People ſubject to a Kingly Government may,

[a] Lib. ii. Chap. iii. Sect. 4. [b] Xenophon. *Cyrop.* Lib. iv. Lib. xlix. Ed. *H. Steph. Nothing is ſo much our own as our ownſelves.*
[c] Lib. ii. Chap. ix. Sect. 2. [d] It was a wiſe Rule with the *Inca's* of *Peru*, to advance the Empire by the ſloweſt and moſt inſenſible Degrees, and rather to invite new Subjects by Clemency and Kindneſs, than to compel them by Arms and Violence. *Vid.* Garcil. de la Vega, *Com. Reg.* Lib. ii. Chap. xix. [e] *De Civitate*, Lib. ii. Chap. ix. Sect. 2. [f] *Ibid.*

[1] See Chap. v. Sect. 8. Not. 1. foregoing. [2] This Manner of acquiring Sovereignty by the *Right of Succeſſion*, takes place in Kingdoms originally eſtabliſh'd by a forc'd Conſent of the People, as will be ſhewn hereafter in the 11th Section.
[3] See above in Book iv. Chap. vi. the laſt Section. [4] Of this we ſhall treat in the Sixth Chapter of the Eighth Book, § 21.
[5] 'Tis not only by this Act of Clemency which the Victor ſhews to the vanquiſh'd, that he obtains a lawful Dominion over them. The Title of his Sovereignty is farther grounded upon the Reaſon, that the vanquiſh'd (having undertaken a War againſt him) upon precedent Injuries, and a Refuſal to give him that juſt Satisfaction which was due to him, have expos'd themſelves, by ſo doing, to the Fortune of Arms, and have tacitly conſented, beforehand, to whatever Conditions the Victor ſhould think fit to impoſe upon them. See our Author's Abridgment, *De Offic. Hom. & Civis*, Lib. ii. Chap. x. Sect. 2. But we muſt here diſtinguiſh between what the *Rigour of the Law* demands, and what the Rules of *Humanity* and *Equity* require; for which, ſee *Grotius*, Lib. iii. Chap. xv. By this Means, all the Objections vaniſh, which Mr. *Carmichael* brings againſt our Author. Eſpecially that drawn from this, "That he who "is in the wrong, generally believes his Cauſe juſt, and appears to be perſuaded of it." For, with regard to the external Effect, the Injuſtice of War, on the Side of the Conqueror, no ways hinders the Vanquiſh'd from being oblig'd to keep the Agreement, tho' forc'd, by which he is brought under Subjection. This is what the Peace of Mankind requires, as well as the Want of a common Judge to determine the Controverſy between independent Princes or States. Provided always each Party be at Liberty, according to their Conſcience, to ſee how far the Laws of true Equity allow them to improve their Advantage. See my Notes on *Grotius*, Lib. iii. Chap. vii. § 6. Not. ii. & Chap. xix. § 11. Not. 1.

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to escape Destruction, and, when their Prince can no longer assist or protect them, submit themselves to another. But all the Stress of the Difficulty lies in this, that since Fear unjustly caus'd invalidates a Covenant, and since he, who by his injurious Proceedings hath endamaged another, is obliged to make a Restitution, how such a Consent of the Subject, as is extorted by unjust Force, can confer the Sovereignty in so lawful a manner upon the Invader, as to give him Quiet of Conscience in the Possession. For what *Hornius* says [1] is meer Trifling, *That since the Sovereignty, which the Invader receiv'd by the Consent of the People, he did not take from the People, but was invested with it by GOD, therefore, were it to be restor'd, it must be restor'd to GOD, not to the People.* But we should rather conclude, That since the People, as *Hornius* himself allows, have the Power of appointing the Person in whom the Majesty should be infused by GOD; therefore it is sufficient, if the Oppressor restores this Power only to the People. For, if the People do but recover the Privilege of marking out the Person who is to govern them by their own free Choice, they will not think themselves much concern'd, whether the Invader retains the pretended Majesty he hath seized, or restores it to Heaven. Our Judgment in this Point is, that we ought first to consider, whether the forcible Invader hath turn'd a Democracy into a Monarchy, or whether he hath driven out a Monarch, and settled himself in his room. In the latter Case, the Obligation to Restitution doth not expire, till the expell'd Prince and his Heirs, who had a Right of succeeding, are all deceas'd; or till such an unfortunate Prince hath quite abdicated, or relinquish'd his Claim to the Kingdom: And this he is presumed to have done, as by other Inclinations, so, if in a long Course of Time he hath made no Effort towards the recovering of his Crown [a]. And in the mean time, even whilst the Invader's Title and Conscience are both unsettled, the Allegiance, promis'd by the Subjects to him, holds strong and binding; provided they did not give it, till they had [2] done all that could be requir'd of them towards serving their old Master [3]. As for the former Case, this seems the most probable Way of determining it, to say, that since a Nation may live in all respects as happy under a Monarchy, as under a Democracy, 'twill be easy for them to digest the Loss of their popular Liberty, if their new Sovereign proves a good Governor. And we may presume, they are thus satisfied, when their quiet Deportment and long Use seem to have reconciled them to the Alteration. As for the few Murmurers and Malecontents which remain, they are not worthy to fall under regard: Since there will not want some of this uneasy Temper, in every Form of Government, however freely and fairly constituted by the Community. But in case the Invader, after having made this Change and Revolution in the State, should treat his Subjects in a wicked and injurious manner, we can scarce conceive, that they are by any intrinsical Obligation engaged to obey him. We must therefore grant *Hornius* [b] what he asserts without Proof, *That it doth not belong to the Nature of Sovereignty, to consider what Way it was obtain'd; inasmuch as at all Times, and in all Places, it demands the same correspondent Obedience.* For indeed, when a Person hath not only intruded into the Throne, by Force or Fraud, but, likewise still grievously oppresseth the People, and seems to make open and arbitrary Violence the Standard of his Reign; this is a Guilt which seems incapable of being purg'd by any Course of Years, tho' Time, in other Cases, be thought sufficient to found a Right of Prescription. For long Possession is here nothing else but a long continued Injury [c] [4].

V. To these Enquiries another may be added, By what means and at what times a Community, which hath thrown off monarchical Government, is confirm'd in its new Democratical Frame? In resolving which Doubt different Judgments must be given, according to the Difference of the Cases that may arise. *First*, then, if a City or Country hath, on any Occasion whatsoever, discarded the Sovereignty it once stood under, and set itself up for a free independent State, upon Supposition that it hath transacted the Affair in a friendly [5] Manner with its former Lord, and hath by him been acknowledg'd for a free Commonwealth, it immediately commenceth such, with the fullest Right of Liberty, and need not wait for the tedious Confirmation of Prescription and Use. *Secondly*, If a Sovereign hath upon just Reasons been divested of his Power, the Liberty is presenly valid so soon as it is actually asserted; nor is there any Necessity of its being either confirm'd by long Possession, or acknowledg'd for lawful by the former Lord; except so far as this last Circumstance may be a means of preventing all unjust Claims and quarrelsome Pretensions for the future [d]. *Thirdly*, If the Constitution be alter'd by an unjust Rebellion, the Liberty thus usurp'd so long continues unlawful, as the rightful Prince shall labour to reduce the Rebels to Obedience, or, at least, by solemn Declaration shall protest and preserve his Right over them; till, by long Acquiescence and Silence, he may be presum'd to have given up his Claim. *Fourthly*, If it so happen that a City or Country, being in great Distress and Danger from an Enemy, shall in vain beg the Assistance of its Sovereign, who is unable to afford any Shelter or Support, so as to be put on its own Defence, and oblig'd to seek for Safety from its own Strength and Counsel; we are of Opinion, that the Right of the said Sovereign doth expire, when for a considerable time the People

[a] *Vide* Justin. *Lib.* iv. *Chap.* ii. *Not.* 3. Ed. *Grævii.* [b] *De Civitate*, Lib. ii. Chap. ix. Sect. iv. [c] *Vide* Justin. *Lib.* iii. *Chap.* v. [d] *Vide* Baudium *de Inducits Belli* Belgici, *Lib.* iii. Pag. 178.

[1] *Ubi supra.* [2] The Author, who sometimes makes use of Expressions taken from *Plautus*, *Terence*, &c. says here. *Adversus Regem expulsum*, for *ergo*, that is, *erga*, instead of *for*. I should not take Notice of this, if I had not observ'd, that M. *Thomasius* (*Instit. Jurispr. Divin.* Lib. iii. Chap. vi. § 101.) believes there is a Mistake here, and imagines the Author has said, inadvertently, the contrary of what he thought.

[3] *Comp.* Grot. *Lib.* ii. *Chap.* iv. Sect. 14. & Lib. i. Chap. iv. Sect. 19.

[4] Comp. *Grot.* Lib. ii. Chap. iv. Sect. 14. & Lib. i. Chap. iv. Sect. 19.

[5] Here, naturally presents itself the illustrious Example of the *United Provinces*; for which the Reader may see the Annals of *Grotius*, under the Year 1581. Pag. 70, & *seq.* And M. *Le Clerc*'s History, Tome i. Pag. 19.

have manag'd their own Affairs in a ſeparate Manner, and have no Intercourſe or Communication with their former Governor: Inaſmuch as this manifeſtly argues a *Dereliction* or *Deſertion* on the Part of the Sovereign. For tho' a King, or a Commonwealth, ſhould be forc'd, by the moſt preſſing Neceſſity, thus to abandon a City or a Country under their Dominion, to its own Care and Defence [a]; yet, ſo ſoon as they recover out of that Neceſſity, they ought immediately to return to the Exerciſe of their former Sovereignty. Otherwiſe how can he pretend to be my Prince, who, for a long Time, hath neglected every Part of his princely Office towards me, when 'twas in his Power to have perform'd it [b]?

VI. The Manner of acquiring Sovereignty by *Election* is, when a People already incorporated, or now about to incorporate, do, by their own free Choice and Judgment, *deſign* or *nominate* a certain Perſon for the ſupreme Command; who, upon receiving ſuch a Decree of the People, or of their Repreſentatives, together with the Promiſe of their Obedience, and having accepted the Offer, is thereby inveſted with the governing Power. *Election* is uſually divided into *free* and *limited*. By the former any Perſon, without Exception, may be *deſigned*, who either is at preſent, or probably will be hereafter, in all natural Reſpects fit for Empire. By the latter no Perſon can rightly be pitch'd upon who is not of ſuch a Nation, or of ſuch a Family, or endued with ſuch a particular [1] Qualification. But, indeed, if we conſider the Right of Electing, as it radically and fundamentally inheres in the People, every Election will appear to be in itſelf *free*. For, tho' an Order may have been once made, excluding ſuch a certain kind of Men from the Crown; yet, nothing hinders, but that this Order may be repeal'd and diſannull'd. But, if the People devolve their Right of electing on a few Deputies, they commonly tie them up to certain Laws, defining the Conditions and Requiſites to be conſider'd in thoſe who are Candidates for the Sovereignty. In ſome Places the Government is confirm'd by a kind of Mixture of Election and [2] Succeſſion: When the Crown deſcends, in Courſe, to the Sons of the deceas'd Prince, yet ſo as that the Conſent of the People, or of the Nobles, ſhall firſt intervene. Which Conſent is not a bare Ceremony, like that of Inauguration, or of doing Homage, but hath the Force and Virtue of a negative Vote. As ſuppoſing a People to have firſt conferr'd the Government on the Author and Founder of the preſent royal Family under this Condition, that he ſhould tranſmit it to his Deſcendents, provided they appear'd fit to receive it: In ſuch Kingdoms the People or the Nobles aſſemble on the Vacancy of the Throne, not properly to chooſe a new Prince, but only to declare that they find no Objection in the Son to hinder him from inheriting his Father's Crown.

VII. An Election may be made, either in a *riſing* State, now about to be ſet up, or in one formerly erected and eſtabliſh'd. In the former, after the original Compact between the Members thus uniting, and after a Decree paſs'd for the introducing of ſuch a Form of Government; the Community of the deputed Repreſentatives proceed to Election. Which being finiſh'd, the Grant accepted, and a Covenant thereupon ratified between the Prince elect and the People, there immediately commenceth a State perfectly monarchical. But, in a Kingdom already eſtabliſh'd, it may happen that a Monarch deceaſeth before his Succeſſor is appointed; and then the Nation is ſaid to ſuffer an *Interregnum* [3]. Now, what Frame a State falls into during ſuch an Interval, may eaſily be apprehended, if we conſider what thoſe Bonds were which held it together, in its former more regular and perfect Condition. Since then the intrinſick *Perfection* of the State, and the actual Exiſtence of the ſovereign Power, were both owing to the *latter* Compact between the Prince and People; it follows, that, the Perſon in whom the Sovereignty properly reſided being extinct, the Kingdom ſinks into an *imperfect* Form, and is united only by the *firſt* antecedent Pact, by which we conceive the particular Members of the Community to have agreed to incorporate in one Society. Not but that this primitive Pact uniting the general Body, is during the Time of an *Interregnum* conſiderably ſtrengthen'd and aſſiſted, by the Endearment of a *common* [c] *Country*, and that kind of Relation or Affinity which reſults from thence: Together with this Conſideration, that the Fortunes of moſt Men are fix'd and rooted in that particular Soil, and the Effects of others not eaſily to be tranſported or removed [d] [4]. And

[a] *Vide* Liv. *Lib.* iii. *Chap.* vi. *Lib.* xxiii. *Chap.* xxi. [b] *Vide* Liv. *Lib.* xxxv. *Chap.* xvi. [c] See a Diſcourſe of our Author's, *de Obligatione erga patriam*, which is in the ſame Work of his juſt now mention'd.

[d] Lyſias *contra* Philon. *Orat.* xxx. Chap. ii. p. 471. *Thoſe who are natural Subjects, but yet of ſuch an Opinion, as to eſteem any Country their own, where they can promote their own Intereſt and Gain, muſt certainly neglect the common Good of the State, to ſerve their own private Advantage: Since 'tis not the Place where they were born, but the Fortunes and Riches they poſſeſs, which they look upon as their Country, and their deareſt Concern.* Livy, Lib. ii. Chap. i, well obſerves, *That* Brutus *would have done the* Roman *Commonwealth a bad Office, if, through too eager a Deſire of Liberty, he had driven out one of the firſt Kings, before that vaſt Multitude of People, which were gather'd together from all Parts, had been engaged and united by the dear Pledges of Wives and Children, and by a kind of natural Affection to the Soil where they had ſo long taken Root.*

Antiphon. *Orat.* xvi. *Nor was it an eaſy Thing for him to deſert the City; his Children and his Wealth being ſufficient Pledges for his Stay.* Hence, as *Plutarch* remarks *(in Mario,* Pag. 401. *A)* the *Romans* choſe Men in their Army according to their *Eſtates; that being Pledges and Securities for their Fidelity, whilſt they ſeem'd now to have pawn'd or ſtak'd all they were worth.*

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[1] See Lib. viii. Chap. iv. § 12. Not. 4. following. Thus, for Inſtance, it is ſometimes neceſſary, That the Prince elected ſhould be of a certain Religion. Among the antient *Perſians*, no Perſon could be advanced to the Royal Dignity, who had not been inſtructed by the *Magi*; as *Cicero* informs us, in his Book, *de Divinat.* Lib. i. Chap. xli. See Mr. *Davies*'s Note on that Paſſage; as, alſo, the late M. *Hertius*'s.

[2] We find Examples of this Mixture, in the *Elementa Pruden. Civil.* of M. *Hertius*, Part i. § 10. § 9. and in Mr. *Bohmer's Introduct. ad Jus Public. Univerſ.* Part. Special. Lib. i. Chap. iii. § 33. The *Abbe Vertot* finds it in the firſt and ſecond Race of the Kings of *France*. 'The *French*, ſays he, were not confin'd to prefer Children to Brothers, or Brothers to Couſins, but the Nation reſerv'd 'to itſelf a Right of chuſing, in the reigning Family, that Prince who appear'd moſt capable of governing, without regard to lineal 'Deſcent, or Conſanguinity.' We find a learned Diſſertation of that excellent Hiſtorian, upon this Subject, in the *Literary Memoirs of the Royal Academy of Inſcriptions and Belles-Lettres*, Tome vi. But M. *De Foncemagne*, another Member of that Society, has prov'd, with great Force of Argument, and by undeniable Examples, That, under the *firſt Race*, the Crown of *France* was hereditary. [3] See a Diſcourſe of our Author's, *De Interregnis*, which is amongſt his Academical Diſſertations.

[4] The Reaſons which our Author has juſt alledg'd, demonſtrate, That it is a Thing morally impoſſible to ſuppoſe, a Nation ever

And this too is the Reaſon why a Commonwealth, under an *Interregnum*, holds more firmly together than an Army (eſpecially if compos'd of Mercenaries) when it hath loſt its General: Inaſmuch as the Perſons, who compoſe the latter Body, are ſuch as either have no proper Country, or elſe a Country at a Diſtance. But now the wealthy Part of a Nation, to preſerve and ſecure what they poſſeſs, will be ever moſt forward in maintaining a good Agreement, and moſt induſtrious in re-eſtabliſhing and ſettling a Government.

Tho' we may, with *Livy* [a], call a Nation, during an *Interregnum*, *A State without Government*, and, as it were, an Army without a General; yet, becauſe Communities at their firſt uniting, before the Sovereignty hath been conferr'd, either on a ſingle Man, or on a Council, ſeem to bear the Semblance of Democracies [1]; and farther, ſince it is natural, that all Perſons upon the Deceaſe of him to whom they committed their Guidance and Safety, ſhould take Care of themſelves; therefore an *Interregnum*, regularly ſpeaking, hath the Appearance of a kind of temporary Democracy: At leaſt ſo far, as that the Conſent of the whole People is to determine all Points, both in regard to the Adminiſtration of publick Affairs, and to the Creation of a new Prince; unleſs they are more inclin'd to introduce ſome other Frame and Conſtitution. And yet it is not properly a perfect Democracy; in as much as no Decree hath yet paſs'd to fix the Sovereignty, in a Council of the whole People, by perpetual Right; and becauſe the Laws and publick Inſtitutions are ſtill adapted to monarchical Government. Tho' it may, likewiſe, happen, that when a Kingdom conſiſts of very large integral Parts, as ſuppoſe of diverſe Nations, Provinces, or great Cities; it ſhall, in caſe of an *Interregnum*, appear like ſome collective or *ſyſtematical* Form [2].

Hence 'tis evident, in what Senſe we are to expound that Aſſertion laid down by *Grotius* [b] and others, *That, when a King dies without a Succeſſor, the Sovereignty returns to the People.* That is, altho' during an *Interregnum*, the ſovereign Authority may ſo far be ſaid not to be properly in the People, as that they have not receiv'd it in a formal Manner, or by a perpetual Decree; yet they may in the mean time, either by themſelves, or their Delegates, exerciſe all thoſe Acts of Sovereignty, which appear conducive to their Safety and Preſervation. For thoſe Authors are manifeſtly in an Error, who aſſert, that, upon the Extinction of the royal Family, the *Sovereignty* doth not return to the People, but only the Power of deſigning and chooſing a new King. As if, in the Caſe of an *Interregnum*, the People were neceſſarily obliged to conſtitute another Monarch! And, as if they could not confer the ruling Power on a ſelect Council, and ſo make an Ariſtocracy; or, eſtabliſh the preſent Democracy, for a regular and ſtanding Government.

VIII. But thoſe States have conſulted their own Peace in the ſafeſt manner, which, to avoid the Inconveniences uſually ariſing from an *Interregnum*, have ordain'd beforehand, on what Perſons the chief [3] Adminiſtration ſhall fall, when there happens to be a Vacancy in the Throne. And theſe, by whatever Names or Titles they paſs, whether of *Interreges*, Protectors, Regents, or the like, are temporary (or, as we may ſay, *proviſional*) Magiſtrates, who, by the Authority of the whole People, are to perform, during the preſent Exigency, the Acts of the ſupreme Power, at leaſt, ſuch as are neceſſary to hold the Community together; yet ſo as to be accountable for their Management to the People; which Account the new King doth, as in the Name of the People, demand. The Power of theſe Officers, upon the Election of another Prince, or the ſetting up another Form of Government, preſently expires.

In thoſe Kingdoms where there are conſtant and perpetual *Senates*, yet ſuch as in the Lifetime of the Prince do not hold the ſovereign Authority; upon the Prince's Death, the Senate cannot, by any proper Right, claim that Authority which before they wanted. Yet 'tis moſt convenient, that, in caſe of an *Interregnum*, the chief Adminiſtration of Affairs ſhall, for that time, be delegated to them; as they were before imploy'd by the King to aſſiſt him in his Counſels and his Cares. But then the Power which they exerciſe on this Occaſion, ſhall be ſuppoſed to be conferr'd on them by the Grant of the whole People. For whatever Authority they receiv'd from the King, as a Body of Magiſtrates, expires upon his dying without a Succeſſor [c]; and if they are allow'd to proceed in the Exerciſe of their former Function, the Privilege is not owing to the Commiſſion of the Prince, but to the Favour of the People [d]. And therefore they can hold their Power no longer than the Community pleaſeth; much leſs can they challenge a perpetual Sovereignty, or, by their own Authority, erect themſelves into an *Ariſtocratical*

[a] Lib. i. Chap. xvii. [b] Lib. i. Chap. iii. Sect. 7. *Numb.* 2. [c] *Vide* Conneſtag. *de Unione* Luſitan. *Lib.* iii. *Pag.* 116.
[d] *Add.* Bodin. *de Republ.* Lib. iii. Chap. ii. Pag. 417.

ſo little conſiderable, which has maintain'd itſelf ſome Ages under a civil Government, ſhould ever think of diſſolving the Bands of Society, to fall into Confuſion and Anarchy. Therefore, tho' we ſhould not allow the firſt of the *three Conventions* which our Author diſtinguiſhes, the Inconveniency is not much to be dreaded. As ſoon as an *Interregnum* happens, if the State has not before-hand taken proper Meaſures to preſerve the publick Order, till a fix'd Government is ſettled, they provide for it as well as they can; and by that means confirm their Engagements to remain an united civil Body. But if it ſhould ſo fall out (as the Thing is very poſſible in Infant States) that the Majority of Maſters of Families ſhould be deſirous to break the Union, and return to the Independence of a State of Nature: I do not ſee how they would do the others Wrong. The Plurality of Voices, in this Caſe, has as much Power to diſſolve the Union, as it would have to continue it: While the Form of Government, whatever it be, ſubſiſts, its Authority maintains the Force of the firſt Convention, both with regard to all in general, and every Member in particular. But from the Moment there is no Government fix'd, or provided for, there remains no other Method of ſecuring the publick Good (the ſole End of all civil Society) than the Will of the Majority. Tho' the firſt Convention requir'd a general Conſent of the whole Body, it does not follow, that the ſame Conſent is neceſſary to diſſolve it. Otherwiſe we muſt allow, That no Man could quit Society, after he was once enter'd into it; the contrary of which is evident. For our Author himſelf acknowledges, That every Member of a State has reſerv'd to himſelf the Liberty of quitting it when he ſees proper. See, above, Chap. ii. § 7. of this Book, and Lib. viii. Chap. xi. § 2. following.

[1] See above in Chap. v. Sect. 6. [2] Upon this ſee above in Chap. v. Sect. 16. See alſo a Diſcourſe of our Author's, *De Syſtematibus Civitatum*, which is amongſt his Academical Diſſertations. [3] As in *Poland*, the Archbiſhop of *Gneſna*, with the Deputies of the *great* and *little Poland*.

Body,

Body, or a ſelect governing Council. For 'tis the Prerogative of the Community, to eſtabliſh what Frame of Government they think fit; unleſs they have, by Oath, obliged themſelves to avoid ſome particular Conſtitution. *Dionyſius Halicarnaſſeus* [a] reports, that when the frequent Changes of the *Interreges* diſpleas'd the *Romans*, who ſeem'd thus to have brought a hundred Kings upon themſelves by getting rid of one, the Senate referr'd it to the Judgment of the People, to put the Commonwealth into the Hands, either of Kings, or of annual Magiſtrates; as ſhould ſuit beſt with their Inclinations. Tho' indeed we find the People returning the Compliment, and leaving this Option to the Senate [b].

IX. To give farther Light to this Enquiry, it may be worth our while to examine the *Caſe* which Mr. *Hobbes* [c] puts, and the Iſſue of his Opinion upon it. *If*, ſays he, *the People aſſembled deliver the Sovereignty to one particular Man to hold, only during Life; and, when they have ſo done, depart, without ordering any thing about the Place where they ſhall meet to make a new Election after his Death; they will be no longer one compound Perſon, but a looſe independent Multitude: In which it ſhall be lawful for any Man to meet and conſult with any others, at any Time, and at any Place.* Whence he concludes, that ſuch a Monarch is, by the Law of Gratitude, obliged to take Care that the State be not diſſolv'd upon his Deceaſe; either by fixing a certain Time and Place, when and where as many of the People, as think fit, may meet and form an Aſſembly; or elſe by nominating a Succeſſor, according as the Intereſt of the Commonwealth ſhall ſeem to require. Now here Mr. *Hobbes* is in a Miſtake, whilſt he thinks, 'That the People, by departing from one Aſ-'ſembly, without appointing the Time and 'Place for another, do disband and ſeparate into 'a diſorderly Multitude; applying it, as he doth, to thoſe, who, in chooſing a King, have eſtabliſh'd themſelves into a regular and perfect State; and not to thoſe who have it ſtill under Doubt and Conſultation, what State or political Syſtem they ſhall introduce. For when a Multitude come together on the laſt Account, and depart without agreeing to meet again, 'tis plain they are diſſolv'd *re infectâ*, and conſequently remain in the ſame divided independent Condition, in which they were before. But they, who have once incorporated themſelves into a regular Commonwealth, and have ſubjected themſelves to a King, have fix'd all their Fortunes in this Seat, and cannot be preſum'd guilty of ſuch a Folly as to deſire, that, upon the King's Deceaſe, the State ſhall, likewiſe, be extinct, and themſelves thrown into the natural Condition of Anarchy, not without manifeſt Danger of loſing the Security, which they enjoy under the preſent Eſtabliſhment. Therefore, if they have not conferr'd the Sovereignty on the Prince, with the Right of Inheritance, or with a Power to diſpoſe of the Succeſſion as he ſhall think fit, they muſt be ſuppoſed, at leaſt, to have tacitly agreed, that immediately upon the Prince's Death they will hold an Aſſembly, either at the uſual Place, or where the Prince kept his Court. Nor will there be wanting, in a whole People, ſome Perſons of great Authority and Worth, whoſe Influence will be able to keep the Multitude in good Order, and to bring them, as ſoon as poſſible, to general Conſultation, for ſettling the Commonwealth. Hence too it is evident, how far we are to admit of another Aſſertion of Mr. *Hobbes* [d], that, *When a Monarch renounces and abdicates the Government for himſelf and Heirs, the Subjects return to their abſolute and natural Liberty.* For it can never be true in this [e] Senſe, that the People, on ſuch an Occaſion, relapſe into a confuſed Multitude, without any Tye or Relation to each other; but only that they receive an abſolute Right of liſting and diſpoſing themſelves anew, under any Frame and Conſtitution.

X. In hereditary Realms there ariſeth ſome Semblance of an *Interregnum*, when the King dies leaving his Queen with Child, or, at leaſt, under probable Hopes of Breeding. Now by the Conſent of moſt Nations, a Right may be transferr'd [f] even on un-born Heirs, ſo as to give them the juſt Title and Property, tho' as yet incapable of the Uſe or Exerciſe [g]. But now, whereas there is a proper *Subject*, in which the ſupreme Authority reſides, there cannot be really an *Interregnum*. On which Account neither the Minority [h], nor the Captivity of Princes create an *Interregnum*, in the ſtrict Senſe of the Word. Yet as to the latter Caſe, it hath been a frequent Practice in the World, for the Relations of a captive Prince to hold him for dead, and to proceed accordingly; whereas they ought rather to adminiſter the Government in his Name, till he ſhall return from his Impriſonment, or die under it [i]. Now, altho', before the Royal Iſſue be brought into the World, it cannot certainly be known, whether the Child will prove alive or dead, a Son or a Daughter (in Nations where the Fair Sex is excluded from the Crown) yet, till this Point is clearly determin'd by Time, the People can, by no means, challenge ſuch a Right, as they obtain in a proper *Interregnum*; but the Kingdom muſt, in the mean while, be govern'd in the ſame Method as is wont to be obſerv'd, during the Minority of a Prince [k].

[a] *Vide* Lib. ii. & Liv. *Lib.* i. *Chap.* xvii. [b] See the Hiſtory of the *Interregnum* in *Poland*, upon the Death of King *Sigiſmund* in Paul. Piaſec, *ad Ann. Chriſti*, 1632. [c] *De Cive*, Chap. vii. Sect. 15, 16. [d] *Leviath.* Chap. xxi. [e] Hence the *Perſians*, when their Prince *Hormiſdas* died, leaving his Queen with Child, proclaim'd the unborn King, and crown'd him too, by fixing the Diadem on the Royal Burthen: Nay, they voted the Infant a particular Name, firmly believing it would be a Son. And this prov'd the great *Sapores*, ſo renown'd in Story. *Agathias*, Lib. iv. 10. [f] *Vide* Juſtin. *Lib.* xxxvi. *Chap.* i. *Trebell. Poll.* in *Gallien.* Chap. i. We have a Story to this Purpoſe in *Dion Caſſius*, Lib. xxxvi. *Tygranes*, the *Armenian* Prince, had vaſt Treaſures laid up in the forfeited Places of *Sophene*. When *Pompey* demanded all his Wealth to be deliver'd up to him, by thoſe who had it in Charge, their Anſwer was, *That they would do nothing without expreſs Orders from their Maſter.* And when *Tygranes*, though againſt his Will, commanded them to open the Caſtles, they ſtill refuſed to comply, urging, that the King laid this Injunction on them, not voluntarily, but through Compulſion. Yet they afterwards were oblig'd to deliver all up, when they found their Prince was ſeverely uſed, and thrown into Chains upon their Refuſal. *Demetrius*, being made a Priſoner by *Seleucus*, commanded his Son, with his Captains, and Friends that were at *Athens* and *Corinth*, not to believe his own Writing or Seal, when they ſhould be ſhewn to them: But to keep for *Antigonus* his Towns, and the Remains of his Kingdom, as if he were actually dead. *Plutarch* in *Demet.* Pag. 914 D. [g] *Vide* Serran, *Hiſt.* Gall. *in* Philipp. Valeſ. *init.*

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[1] Compare this with what is ſaid above, Lib. iv. Chap. ii. § 17. Not. 1. [2] See what I have ſaid above, Sect. 7. Not. 5. [3] See, above, Lib. iv. Chap. iv. § 15. [4] Compare *Grotius*, Lib. i. Chap. iii. § 24. and Lib. iii. Chap. xx. § 3.

XI. By

XI. By the Way of *Succession* or Inheritance, the sovereign Right which one Person hath obtain'd or receiv'd, is continued to his Posterity. This Succession [1] is appointed, either at the Pleasure of the Prince, or at the Pleasure of the People [2]. Those Princes who possess their Realms after the Manner of *Patrimonies*, have a Right to dispose of the Succession, according to their own Inclinations; and when they have once declared their Pleasure in this Point, it ought no less strictly to be observed, than the last Will of any Testator. And in this Case, a King may divide his Dominions among his Children by equal Portions, and without regarding the Difference of the Sex. Or, if his legitimate Issue fail, he may transmit the Crown to his natural [3], or to his adopted Son; nay, if he thinks fit, to one no Way related to his Family [4]. But, when such a Monarch hath made no Provision about the Succession, it must then be consider'd, what Person the common Course and Order of Nature calls to inherit the Throne. For, tho' the Prince, in his Life-time, did, neither by Testament, nor any other Way, signify his Resolution in this Affair, yet we must presume, that he did, by no means, desire the State should, upon his Decease, fall into Anarchy; common Humanity not suffering him to leave his Subjects in a Condition of Misery and Ruin. Especially, since, if he purposely declin'd to make a future Settlement, it had been easy for him to have given the People Notice; so that, upon this Intimation, they might have agreed on some Expedient for their own Security. Besides, we ought in Reason to suppose, that Princes, as well as other Persons, are unwilling, that the Rights, or the Possessions, which they have acquired, should, at their Decease, either be embezzel'd, or left as it were to the first Taker; but that they would have them devolve entire to their dearest Friends. Therefore, when such an Omission happens in patrimonial Kingdoms, the same Order is to be observ'd, as in private Inheritances; except so far as the Disposition and Safety of the Nation made it advisable to recede from that Method. For, altho' 'tis very likely, that a Father bears an equal Affection towards all his Children; yet, if he be wise, he will so far moderate and restrain it, as not to weaken the hereditary Estate, on which the Security and Honour of a Family, in a great measure, depend: And he shall be presumed to have taken this Resolution, if he hath not expressly declared any thing to the contrary. From these Considerations it follows, that such a Prince as we are now speaking of, is desirous to have the monarchical Frame of Government preserved after his Death [5]; in as much as he shew'd his Approbation of it by his own Example, and did not afterwards reverse, or alter it, by his Word or Deed. And farther, since Men are naturally inclined to wish best to those, from whose Success some Honour and Glory is reflected on themselves, rather than on others; and since the Power of Children casts the brightest Glory on Parents after their Decease; it must be concluded, that a Father is more heartily concern'd for the Happiness and Greatness of his own Issue, than of Strangers. If he had any other Design, he ought, in express Manner, to have declared it: Since, commonly speaking, we do not suppose a Man to have been so little Master of his Wits, as to deprive his Children of so fair an Advantage, and to leave it, as it were, on purpose to create Quarrels and Disputes. But Mr. *Hobbes* is in the wrong, when, amongst the Tokens which a reigning Prince may give of his Resolution not to transmit the Crown to his Family, he reckons for [6] one *long Custom*; 'In as much as he, who 'says nothing about his Succession, is supposed 'to consent to the ordinary Custom of the 'Kingdom; which Custom, whether it derives 'its Original from the primitive Founder of the 'Race, or from any of his Posterity, hath, in 'Time, pass'd into the Force and Authority 'of a fundamental Law.' But the Enquiry which we are now upon, is, What Order is to be observ'd in the Succession, when it is neither determin'd by the Appointment of the last Prince, nor by the Law or Custom of the Nation? To proceed then, our *silent* Monarch must be presumed to desire, not only that the Kingdom shall preserve its regular Frame, that is, that the Sovereignty shall not be divided into Shares amongst his Sons, or near Relations, nor yet held in common by them all, with equal Power; but, likewise, that the State shall not be parted into distinct Governments, and many Kingdoms introduced instead of one: In as much as either of these Alterations would draw after it, not only the exceeding great Hazard and Detriment of the Realm, but, also, the utter Confusion of the royal Family. The next Thing which, in this Case, must be presumed to have been the Will of the Monarch, is, that, notwithstanding the Prerogative of Age, his Sons [7] should be preferr'd before his Daughters; because Men are, for the most part, much fitter to command, and the Government of Women is generally attended with a long Train of Inconveniences, which must needs be increas'd, if the Brothers are to be set aside to make room for a female Sovereign. Another Thing to be taken for granted on these Occasions must be, that amongst Children of the same Sex, the eldest is to be advanced rather than any of the rest: And this not

[3] Thus *Alphonsus*, King of *Arragon*, gave the Kingdom of *Naples*, which he had conquer'd, to his illegitimate Son *Ferdinand*: Whereas others pretended, that it ought to have been united to *Arragon*, by the Arms and Wealth of which Nation it had been subdued. *Guicciardin.* [4] *Add.* Justin. *Lib.* xii. *Chap.* v. *Not.* 10. where *Phraates* leaves the *Parthian* Empire to his Brother *Mithridates*, all his own Children being excluded. [5] *De Cive*, Chap. ix. Sect. 15.

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[1] *Vide* Grot. *Lib.* ii. *Chap.* vii. Sect 12, 13.
[2] See Mr. *Buddeus*'s Dissertation *de Successione Primogenitorum*, Sect. 22, &c. and, also, that *De Testamentis summorum Imperantium*, & *peciatim* Caroli II. Hispan. *Reg. Chap.* i. *Sect.* 21, &c See, likewise, *Sidney* upon Government, *Chap.* iii *Sect.* 18. and Tom. v. of the *Reponse aux Questions d'un Provincial*, by Mr. *Bayle*, Pag. 138, &c.
[3] This is the Notion of *Hobbes*, *De Cive*, Chap. ix. Sect. 15. whose Words our Author copies. But the natural Affection of Fathers for their Children is not necessarily or generally founded upon this; nor is there any Occasion to suppose it, in order to establish, here, the strong Presumption of the Will of the deceased.
[4] See M. *Buddeus*'s Dissertation, already quoted, *de Successione Primogenit.* § 25. and Tome v. of Mr. *Bayle*'s *Answer to the Questions of a Provincial*, Pag. 138. & *seq.*

only

only, becauſe he is judg'd to excel the younger in Wiſdom, as well as in Years, but becauſe, if we conſider them with Relation to the Father, all Brothers are equal: And, were the Crown to be beſtow'd on the moſt worthy of them, they could not avoid falling into irreconcileable Differences and Contentions. A famous Inſtance of which Truth we have in the Revolutions, that not long ſince happen'd in the Empire of the *Mogul*, deſcribed at large by Monſieur *Bernier*. To prevent therefore all ſuch Confuſions, it is the beſt and ſafeſt Method to follow the Order of Birth, which is embraced by the univerſal Agreement of all Nations, as a Rule which Nature herſelf ſeems to have preſcribed [a]. Yet here it will be neceſſary, that the eldeſt Son, who is thus preferr'd to the Crown, take effectual Care for the honourable Subſiſtence and Support of his younger Brothers. But that he ſhould be obliged to make their Fortunes as large, as if the Kingdom were to be divided into equal Shares, is both needleſs, and indeed impoſſible. For let us ſuppoſe four Brothers; whence can the elder, who is to fill the Throne, procure ſo much Treaſure to pay the Portions of the reſt, as ſhall be equal in Value to three Parts of the Realm [b]? If, in Monarchies of this kind, the Prince dies without Iſſue, his Brothers or Siſters are to ſucceed; and, upon Failure of theſe, the next in Blood to the deceas'd King; with due regard ſtill to the Prerogative of Sex and of Age. Nay, the Government may, at length, devolve to thoſe who were actually related to the laſt Poſſeſſor, tho' of a different Blood from the Author of the regal Line. And this, not only, if the deceas'd Prince thus declared his Will, but if, by the Cuſtom of the Country, the ſame Method of Succeſſion obtains in private Inheritances: For then, we muſt ſuppoſe, that the Prince would have the Cuſtom hold in regard to his own *Patrimony* [c], as well as to thoſe of others, when he hath made no expreſs Diſpoſal to the contrary.

Mr. *Hobbes* ſeems to have carried this Point a little too far, when he tells us [d], *By the ſame Way as the Sovereignty deſcends, the Right of Succeſſion, likewiſe, deſcends: For, in caſe the eldeſt Son dies before his Father, he ſhall be ſuppoſed, unleſs the Father hath made any other Settlement, to tranſmit the Right of Succeſſion to his own Children; and therefore the Nephews and Nieces ſhall ſooner come into the Succeſſion, than their Uncles by the Mother's* (he means by the Father's) *Side.* It cannot indeed but be acknowledg'd, that this Right of the Children [e] to *repreſent* their Father, and come into his Place, looks very fair and equitable [f]; and that his untimely Death ſhould not be the Cauſe of a new Loſs and Prejudice to them, ſeems to be but a reaſonable Favour. And yet, ſince the Son, during his Father's Life, hath not a full Right to the Inheritance, but only a juſt Hope and Expectation; and ſince it doth not appear, that this bare Hope can be ſo well tranſmitted to Children, as the Right itſelf might be; we may with more probability conclude, that, by the meer Right of Nature, the Nephews have not the Precedency of their [g] Uncles; unleſs their Title is ſtrengthen'd and ſupported by the Laws or Cuſtoms of the Kingdom [h].

XII. But in Kingdoms which were firſt conſtituted by the voluntary Act of the People, the Order of the Succeſſion doth, likewiſe, originally depend on the People's Will. And if they expreſly confer on the Prince, not only the Sovereignty, but, likewiſe, the Right of nominating his Succeſſor (which is ſeldom done, unleſs upon a very extraordinary Account) then he ſhall leave his Crown to whom he pleaſeth. But, if the People themſelves ſettled the Succeſſion, they either were willing to have it paſs in the uſual Way of other Inheritances, ſo far as that Method can conveniently be applied to Kingdoms; or elſe they appointed a particular Courſe, by which it ſhould be regulated and determin'd. Now the Safety of the State requires, that the Succeſſion of a Kingdom, *ſimply Hereditary* (or where it is barely appointed that the Crown ſhall paſs from each Prince to the next of his Kin) ſhould vary from the Order and Method of private Inheritances [i], chiefly in the following Reſpects. *Firſt*, That the Kingdom ſhall not be divided amongſt ſeveral Brothers, or other Joint-heirs [k], equally diſtant in Blood from the deceas'd Prince. In as much as this Prohibition is highly conducive to the Agreement of the Subjects, and to the Support of the Nation and Government. *Secondly*, That the Succeſſion ſhall ſtop at thoſe Perſons who are deſcended directly from the Monarch; and not paſs to the collateral Line, much leſs to the Degrees of Affinity [l]. For the People, by their primitive Grant, deſign'd only to confer the Kingdom on ſuch a Perſon and his Poſterity; upon Failure of which, they again recover the Right of ſettling the Commonwealth, as they judge convenient. *Thirdly*, That no Perſon ſhall be capable of *ſucceeding*, but ſuch as are born according to the Laws of the Country. By which Caution are excluded *natural* or *baſe* Sons, however they ſtand in the Father's Affection, who may perhaps equal them to his legitimate Iſſue. For in thoſe Nations at leaſt, which have any Honour or Spirit, ſuch Men muſt muſt lie open to Contempt, whoſe Mothers were not thought worthy of legal Matrimony, and were uſed rather for occaſional Inſtruments of Pleaſure, than for agreeable Companions of Life. Beſides, ſince the Ladies of that Profeſſion are ſeldom famous for Conſtancy and Fidelity, and

[a] Add. *Xenophon. Cyropæd.* Lib. viii. Pag. 139. Ed. *H. Steph.* in *Cyrus*'s laſt Speech. [b] *Add.* Bœcler. *ad* Grot. *Lib.* ii. *Cap.* vii. *Sect.* 13. [c] Vide *Grot.* Lib. ii. Chap. vii. Sect. 11. Not. 2. [d] *De Cive*, Chap. ix. Sect. 19. [e] See above, in Book iv. Chap, xi. Sect. 12. [f] *Add.* Bodin. *de Repub.* Lib. vi. Chap. v. Pag. 144, *&c.* [g] *Vide* Grot. *d. l.* Sect. 14. *&c.* [h] This is a Remark which the Hiſtorian *Juſtin* attributes to the Soldiers of *Dionyſius*, Tyrant of *Sicily*, who, after the Death of that Prince, advanced to the Throne *Dionyſius* his eldeſt Son. *Extincto in* Sicilia Dionyſio *Tyranno, in locum ejus Milites maximum Natu ex filiis ejus, nomine* Dionyſium *ſuffecere; & naturæ jus ſecuti, & quod firmius futurum eſſe regnum, ſi penes unum remaneret, quam ſi portionibus inter plures filios divideretur, arbitrabantur.* Juſtin. Lib. xxi. Chap. i. [i] *Add.* Bœcler. *ad* Grot. *Lib.* ii. *Chap.* vii. *Sect.* 15.

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[k] See Lib. iv. Chap. xi. Sect. 12. preceding.

[l] *Quàm ipſorum* AVUNCULI Our Author obſerves here, that we ſhould ſay *Patrui*. But *Hobbes*, under the Word *Avunculi*, includes both by the Father's and Mother's Side. This is an *Angliciſm*, for, in *Engliſh* as well as *French*, the Words *Uncle* and *Aunt* are applied to both; there being no Word in either, to diſtinguiſh the Brother and Siſter of the Father, from the Brother and Siſter of the Mother. ſince

since they want the Advantage of a fix'd Cohabitation, it cannot so very certainly be known, whether the Prince be really the Father of this unworthy Progeny, which they charge upon him. But now 'tis highly expedient, that the Person of a King should be awful and venerable, and, as little as possible, exposed to Controversy and Doubt [a]. For which Reason, 'tis the Custom in some Nations for the Queen to be *deliver'd* in an open Chamber, to take off all Suspicion of a supposititious Birth. And we read that Queen *Constance*, Mother of *Ferdinand* the Second, was brought to Bed of him, when she was past Fifty Years old, in a Pavilion erected in a most publick Part of the City, before a large Assembly of the Nobility of both Sexes [b]. *Adopted* Sons come, likewise, under this Rule or Exclusion; as well because to be descended from the true regal Line makes a Prince more respected, and fills the Subjects with better Hopes, that he will resemble his great Ancestors, no less in Virtue than in Blood; as because the People originally conferred the Crown on the immediate Race of the first Possessor; designing, when that should prove extinct, to resume the Power of settling the Government for the future [c]. But, allowing Adoption to give a Right to the Kingdom, this Power of theirs might be for ever forestall'd and eluded. *Fourthly*, That in the same Degree of Kindred, whether amongst the Children or the Grand-children of the last Monarch, the Males shall be preferr'd to the Females, tho' the latter happen to be their Superiors in Age [c]. *Fifthly*, That in the same Degree, and the same Sex, the Advantage shall be given to the Elder [d]. *Lastly*, The Succession of such Realms differs from the Course of vulgar Inheritances in this, that altho' they are deliver'd, as it were, *from hand to hand*, and do not devolve to a new Possessor, 'till the Death of the former; yet, of these Persons, the one is the *Occasion* only, and not the proper Cause of transmitting them to the other; whereas common Inheritances pass to a *new* Proprietor by the Right, and Will, and the Favour of the *last*. For 'tis not the Pleasure of the Prince, under these Governments, which bestows the Crown on the next Wearer; but it descends in the royal Line, by virtue of the original Act and Constitution of the People. And for the same Reason it is not necessary, that the Prince who succeeds, though the nearest in Blood, should take upon himself the private Affairs, Incumbrances, and Debts of the deceas'd. But, if he thinks fit, he may take Possession of the Kingdom, and refuse the Inheritance of the private Patrimony [e], to which that nobler Right of the Crown is, by no means, inseparably united; but is of itself an entire, distinct, and transcendental Inheritance. For the People must be supposed willing to have the Crown descend by a clear and unquestion'd Title; but as for the peculiar Estate and Fortune of the Prince, they are not in the least concern'd or affected with it. Besides, it might prove a Burthen to the Nation, were the royal Heir, at his Entrance on the Government, obliged to discharge such Debts as his Predecessor personally contracted; since, in Case the private Patrimony would not hold out, the Deficiency must be supplied by the publick Stock. To conclude, the chief Reasons which move any People to establish such an Order of Succession, as we have been all along describing, seem to be these: That the Throne may be fill'd without any Controversy or Doubt; and the Inconveniences of new Elections avoided: That the Splendor of the Prince's Birth may increase his Respect, and his Race and Education give the Promise of more illustrious Virtue; and that the reigning Monarch may still govern the Kingdom with more Vigilance, and defend it with more Courage, whilst he is to deliver it down to those Persons, who, on the Score of natural Affection, are the dearest to him in the World [e].

XIII. But since, in this way of Succession, which we call *simply hereditary*, it may easily happen amongst Persons, far remov'd from the Author of the Race, that it shall not be clearly known which of the many ought to be preferr'd, if the Crown fell thus absolutely to him who was next in Blood to the deceas'd Prince; especially since the Favour of *Representation* (or of letting the Children *represent* their Parents in *Right*) quite [3] vanisheth in these distant Degrees:

[a] See a famous Instance of this in *Martinius*'s History of *China*, Lib. vi. Chap. i. Pag. 202. When *Perseus* and *Demetrius* disputed which should succeed *Philip*, it was urged on the Behalf of the latter, that, although he was the younger of the two, yet he was born in honest Wedlock, whereas *Perseus*'s Mother was only a Mistress of the King's: And that, for Evidence of this Distinction, *Perseus* had no Mark of *Philip* in his Body, whilst *Demetrius* exactly resembled his Royal Father, *Livy*, Lib. xxxix. Chap. liii. Add the Story of *Ferdinand* King of *Naples*, in *Paul. Jov.* Hist. *Neapol.* Lib. ii. [b] *Pandulf. Collenut.* Rer. *Neapol.* Lib. iv. The Child born in this publick Manner was *Frederic* II. Emperor of *Germany*, Son to *Henry* VI. [c] *Add.* Bœcler. *ad d. l.* Grot. Sect. 17. [d] Thus *Perseus* urgeth against his younger Brother *Demetrius*, Competitor with him for the Crown, 'That he endeavour'd to invert the Order of Age, of Nature, of the Customs of *Macedon*, and of the Laws of Nations. *Livy*, Lib xl. Ch. xi. [e] The *Persians* had a very extraordinary Custom, by which, one-ey'd Persons, and those who labour'd under any other corporal Blemish, were excluded from the Crown. *Procop.* de B. *Pers.* Lib. i Chap. xi. In reality, these Defects, in themselves, imply no Incapacity for Government; and may be found in the wisest and most virtuous Princes.

[1] In all dubious Cases we must interpret it to be the Will of the People, that the Right of disposing of the Succession should return to them as soon as possible. They did not part with it but to avoid the Inconveniences which our Author mentions. But, when Birth gives a Right to the Crown, it produces very great Inconveniencies, and the longer that Constitution continues, these increase; so that the Remedy becomes worse than the Disease. Even in Monarchies, where the Right of Succession is temper'd by a Kind of Election, yet, when the People make use of their negative Voice, Experience has shewn, That the Persons excluded often find Partizans to cabal for them, and cause great Disorders in the State.

[2] This is *Grotius*'s Opinion, Lib. ii. Chap. vii Sect. 19. *Gronovius*, in his Note upon this Place, finds Fault with his incomparable Author, but without the least Appearance of Reason. *Grotius* is speaking only of what a Prince has borrowed, or owes upon any other Account whatsoever, not as Head of the State, but as a private Person; so that his own private Patrimony, which he possesses independent of the Crown Lands, is as it were mortgaged for the Payment of such Debts and Incumbrances. Whereas all *Gronovius*'s Reasons only prove, That a Successor is obliged to discharge all Debts and Incumbrances that were contracted by his Predecessor, as Head and Governor of the People, and for the Occasions of the State, as could easily be proved, if the Thing were not evident to any one who, with never so little Care, will examine that Note. Now this is what *Grotius* does not deny: On the contrary, he confirms it himself sufficiently at large in Chapter xiv. of the same Book, Sect. 11, 12. See what our Author says after him. Book viii. Chap x. Sect. 8.

[3] Because the Person to whose Right, those in a distant Degree pretend to inherit, as representing him, has been already excluded by those who are nearer of Kin.

To prevent any such Controversy, many Nations have introduced a more accurate Succession, which they term *lineal* [1]. Now according to this, all the Descendents of the royal Founder are conceiv'd to form a Number of perpendicular Lines, each of which approacheth nearer to the Throne, according as the Persons, in the same Degree, stand possess'd of those natural Advantages, the Prerogatives of Sex and of Years. And the Kingdom shall not pass into another Line, till the former is quite exhausted and extinct. It is needless [2] therefore for Persons in this List of Succession, to shew in what Degree they are related to the last Possessor, or to appeal to the Right of *Representation*; but, according as they are born, the Law gives them a perfect Right of inheriting, in their proper Order: Which Right, tho' they should happen themselves not to wear the Crown, they transmit in the same Order to their Children. Here then the first Regard is to be paid the Children of the deceas'd Prince, and not to the living only, but to the dead, in case they have left Issue in any Degree whatsoever; for such Issue shall exclude all others, if their Parents were the nearest lineal Heirs: Yet so as still to allow, in the same Degree of the same Line, a due Preference first to the Advantage of Sex, and then to that of Age. (For that the bare Prerogative of Age should out-weigh and over-rule the Prerogative of Sex, can perhaps be instanc'd in no Example of History.) If the last Possessor died childless, the Account passeth back to the next Line above him, and so on; still *ascending* from the *deceas'd*; and not *descending* from the first *Progenitor*: With the same Allowance as before to the two Prerogatives of Nature.

The two Species of *lineal* Succession, commonly assign'd, are what they term *cognatical*, and *agnatical* [3]: The former kind which, on account of its being receiv'd in the Kingdom of *Castile*, goes, likewise, by the Name of *Castilian*, hath its Peculiarity in it, that, in the same Degree of the same Line, the younger Males are preferr'd to the elder Females; yet so as that no Transition is made from one Line to another on the bare Obstacle of Sex. Thus it doth not exclude the Women, but postpones them to the Men; and runs back to the Female again, in case the Males, who were superior or equal to them in other Respects, shall happen to fail, together with their Issue. By Consequence, therefore, a Grand-daughter by a Son comes before a Grand-son by a Daughter, a Niece by a Brother, before a Nephew by a Sister. The other kind of lineal Succession, or the *agnatical*, differs from this, in that it excludes from the Crown the Females and their Descendents for ever. A Custom which seems chiefly to have been taken up, to hinder the Kingdom from passing by Marriage to Strangers; and to maintain the antient Stock in its due Veneration, which might be in danger of growing weak and despicable, by suffering so many foreign Graffs. This is commonly known by the Name of *French Succession*, having long obtained in that Nation. In some Places the *agnatical* Method is temper'd with this Reserve, that, in case all the Male Line fails, the Right returns to the Females [a].

We may remark in general of lineal Succession, that, since 'tis so very plain and easy, it might be a principal Means of deciding Controversies in Kingdoms, to enquire first of all, what kind of Succession hath been there by Custom establish'd. A remarkable Instance of this the History of the last Age presents us with, in the Dispute about the Succession to the Crown of *Portugal*; when *Raynutius* of *Parma* stood on the Right of *lineal*, the other Competitors on the Right of *simple* Inheritance [b].

XIV. Another Method of Succession [4] may be introduc'd, by Virtue of which he shall always stand nearest to the Crown, who is nearest to the Founder of the royal Family. Thus then the Founder's Sons are the first in the List, according to their Age; next to them his Nephews, with regard still to their Father's Age, and to their own: Upon Failure of all these, the Founder's Grandsons come in, then his Grand Nephews, and so on. This was the Course observ'd of old in *Numidia*, as we may gather from *Livy* [c]. The like is practis'd in the Kingdom of *Siam* [d]; and hath been in *Fez* and *Morocco* [e]: As it was heretofore amongst the *Curacs*, or petty Kings in *Peru*, under the Empire of the *Ynca's* [f]. Thus in many Parts of the *East Indies*, especially on the Coasts of *Malabar*, 'tis the Custom for the Father to be succeeded not by his own Son, but his Sister's Son: The People fancying themselves to have more evident Proof, that the latter is of the royal Blood [g]. In *Hispaniola*, the Nephews by the Sister are admitted for the same Reason; tho' not till the direct Line fails [h]. And amongst other *Indian* Nations, in that Neighbourhood, even in private Inheritances, the present Possessor prefers his Sister's Children to his own; excepting the Family of the *Ynca's*, where the Son constantly succeeds the Father [i]. The same Rule is follow'd in *Canada*, with regard to Honours as well as to Estates [k]. *Strabo* [l] reports a very strange

[a] *Vide* Guicciardin. *Lib.* xii. Pag. 367. [b] *Vide* Conneflag. *de Unione* Lusitan. *Lib.* iii. About which we may also consult a Dissertation of the late Mr. *Henry Coccejus*, entituled, *Justitia Belli & Pacis in Statu Regni Portugallici fundata, &c.* Art. iii. Quæst. iv. [c] Lib. xxix. Chap. xxix. [d] Jodoc. Shouten, *in Descript. Regn.* Siam. [e] Thuanus, *Lib.* lxv. *ad Ann.* 1578, & Conneflag. *de Unione* Lusitan. *Lib.* i. the last of which Authors seem to hint, that this proceeded from a particular Compact between the Brothers. [f] Garcilass. de la Vega, *Lib.* iv. *Chap.* x. [g] Petrus de Valle, *Itin.* Part. iii. Epist. vi. & *Hieron. Osorius* in several Places of his Work. [h] Franc. Lopez *de* Gomora, *Hist.* Ind. *Occidental.* Chap. xxviii. [i] *Idem*, Chap. xii. [k] Franc. Creuxius *Hist.* Canad. *Lib.* i. [l] Lib. xv. Pag. 528. Ed. *Genev. Casaub.*

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[1] See *Grot.* Book ii. Chap. vii. Sect. 22, 23.

[2] For here it may often happen, That the nearest in Blood is excluded. For Instance, a King leaves three Sons, *Lewis*, *Charles* and *Henry*. The Son of *Lewis*, who succeeded him, dies without Children. *Charles*, the second, has only one Grandson. *Henry* the third, is still living. This last is Uncle to the deceased King: The Grandson of *Charles* is but his Cousin. And yet this Grandson is entitled to the Crown, as transmitted to him by his Grandfather, whose Line excludes *Henry* and his Descendants, till it becomes extinct.

[3] These Names come from the Words *Cognati* and *Agnati*, the former whereof signifies, in the *Roman* Law, the Kindred by the Mother's Side; the latter, the Kindred by the *Father*'s Side. The latter only inherit the Crown by an *Agnatical* Succession, but one or other may obtain it by a *Cognatical* Succession.

[4] *Vide* Grot. *Lib.* ii. Chap. vii. Sect. 24.

Way

Way of Succeſſion amongſt the *Chatramotitæ*, a People of *Arabia*. *The Crown paſſeth*, ſays he, *from the preſent Poſſeſſor, not to his Son, but to the firſt Nobleman that was born in his Reign. For, as ſoon as every new Monarch is ſettled in the Government, a Liſt is taken of all the Wives of the Nobility, who appear then to be with Child; and Keepers are ſet over them to obſerve which Lady is firſt brought to Bed of a Son: And the Child which thus gets the ſtart is declared lawful Heir, and educated in a royal Manner againſt the next Vacancy in the Throne.*

XV. 'Tis a Queſtion uſually canvaſs'd, who ſhall be Judge of the Controverſy between two or more Competitors for a Crown; eſpecially if the Kingdom be not patrimonial [1]? For to diſpute an uncertain Title by the Sword, is a manifeſt Breach of the Law of Nature. Here then it is evident, in the firſt place, that Diſputes of this kind cannot poſſibly be determin'd in the way of Juriſdiction, or proper Sovereignty; and that therefore they muſt be left to that Method of Deciſion, which holds amongſt Perſons living in a State of natural Liberty, in Subjection to no judicial Authority [2]. In which Senſe we ought to underſtand what *Grotius* [a] hath deliver'd on this Point. Now thoſe are ſaid to live in a State of Nature, who are neither ſubject one to the other, nor both to a common Lord. And tho' the *Parties* themſelves may perhaps, whilſt they are contending, acknowledge a Sovereign; yet the *Cauſe* is of ſuch a Nature, as not to bear the Sentence of any Perſon under the Notion of a Superior. Firſt, a Foreigner cannot pretend to interpoſe as a Judge. Nor, Secondly, is the King himſelf, if the Controverſy happen'd to be ſtarted in his Life-time, a ſufficient Arbitrator; in as much as the People, in theſe Monarchies which we now ſpeak of, are not ſuppoſed to have left the Method of Succeſſion to the Pleaſure of the Prince. Not but that we have many Examples in Hiſtory of Kings, who, relying on their own Authority and Worth, have aſſumed greater Power in this reſpect, than the Conſtitution of free Kingdoms would otherwiſe allow. Thus *Darius*, in *Herodotus* [b], decides the Quarrel between his own Sons: And in *Plutarch* [c], *Arſicas* and *Cyrus* ſubmit to their Father's Determination [d]. And laſtly, it may be maintain'd, that neither the People themſelves can have ſuch a Competition in an authoritive Manner. Yet not for the Reaſon aſſign'd by *Grotius*, *becauſe the People have transferr'd all their Juriſdiction to the King and royal Family, and therefore can claim no Reliques of it for themſelves, whilſt any of that Line ſurvive.* For Succeſſion in ſuch a Caſe doth not belong to that Juriſdicti n, which the People conferr'd on the King: And if a Quarrel of this kind ſhould ariſe during an *Interregnum*, the People cannot be debarr'd, at leaſt, from a temporary Juriſdiction. But the true Reaſon muſt be drawn from the Nature of theſe Diſputes. For the Effect of judicial Power, as exercis'd over Subjects, is, that they ſhall be obliged to acquieſce in the Sentence given, and upon Refuſal, ſhall by virtue of the ſovereign Authority, be compell'd to ſubmit. And this, becauſe 'tis one Part of civil Subjection, to expect from their Superior the Deciſion of any Controverſy that may happen between them and their Fellows. But now, if we run over all the various Doubts which may be rais'd on the Point of Succeſſion, we ſhall find that not one of them is capable of being ſolv'd by the People, in the ſame commanding Manner, as the Cauſes of private Perſons are ended by the ordinary Judge. For, ſuppoſe a Prince already ſettled in the Throne, with the Approbation of the People, ſhould have a Claim put in againſt him by another of the royal Family, who pretends to be the nearer Heir: In this Caſe, the People having acknowledged the Prince in Poſſeſſion, it cannot be imagin'd, that the new Claimant will appear, or ſtand to their Verdict. Nor, on the other Side, will the Poſſeſſor of the Throne ſubmit to be judg'd by thoſe who have already own'd him for their Sovereign. Much leſs have the People a ſufficient Power to give Judgment, when they refuſe to own the Perſon who puts in his Pretenſions. But if, upon a Vacancy in the Throne, two Competitors offer themſelves, and engage in a Diſpute about their Title, and the People only ſtand ready to receive him for their Prince, who ſhall have the better Right; there is here no need of *Judgment* properly ſo call'd, or ſuch as is given by the Sentence of the Court, to compoſe Matters between private Men. For, in this Caſe, the controverted Point muſt be one of theſe two; either barely, which of the Rivals ſtands in the neareſt Degree, or elſe which Degree ought to have the Preference? When the former happens to be the Queſtion, the contending Parties are to clear their Deſcent as well as they are able; and he who ſhall appear to the People to make out his Claim moſt evidently, ought to carry the

[a] Lib. ii. Chap. vii. Sect. 27. [b] Polymnia, *init.* Yet *Juſtin* (Lib. ii. Chap. x. Not. 9, 10.) reports, that the Cauſe was referred by the Conſent of the Brothers to their Uncle *Artapharnes*, as to a *domeſtical Judge*. [c] Artaxerx. *init.* [d] Add. 1 *Kings* i. 5, *&c.*

[1] The beſt Way is to refer it to an Arbitrator that is of the ſame Royal Family. *De Offic. Hom. & Civ.* Lib. ii. Chap. x. Sect. 12. Very well: provided all the Parties concern'd agree to it. But we muſt not here wholly exclude the People, who have always a great Intereſt in the Deciſion of ſuch Diſputes. The Quality of Hereditary Kingdom does not hinder but we may apply here the Reaſons I have alledg'd (upon *Grotius*, Lib. ii. Chap. vii. § 27. Not. 4) to ſhew, That the People have a Right to determine ſuch Differences as ariſe about the Succeſſion, in Kingdoms which were originally eſtabliſh'd by the Will of the People. This is the rather true, becauſe, when a King, who has it in his Power to ſettle the Succeſſion, has not done it; there is Reaſon to preſume, That he has left it to be decided by Cuſtom. Now there is none who can ſo properly judge of this, as the People, or whoſe Judgment is leſs liable to Partiality. All Arbitrators, choſen from the Royal Family, may be juſtly ſuſpected; becauſe each of them, according to his Rank, having a Right to the Succeſſion, they may favour that Competitor whoſe Intereſt is moſt agreeable to their own. In ſhort, according to my Opinion, we ſhould reaſon here, as I have done, concerning the Regency of a Kingdom, in my Notes upon *Grotius*, Lib. i. Chap. iii Sect. 15. Numb ii.

[2] If, then, the King or People find, that either of the Competitors refuſes to make uſe of ſuch amicable Methods of deciding Controverſies, as are practis'd by Perſons living in a State of natural Liberty, and that he endeavours to involve the Commonwealth in Civil Wars, only to gratify his own Ambition; they may certainly bring him to reaſonable Terms, by forcible Means, tho' the Determination be not in the Way of Judicial Sentence. If *Gronovius* had minded that, he would not have thrown away ſo many Words in cenſuring his incomparable Author, on whom he puts a wrong Conſtruction, in his Note upon Lib ii Chap vii. Sect 27. For I doubt not, but that *Grotius* ſuppos'd what I have juſt now ſaid. I, likewiſe, find, that Mr. *Hertius* takes Notice of the ſame Thing in his *Notes*, which were publiſh'd almoſt at the ſame Time of the firſt Edition of *mine*.

Day. Now tho', in this Method of proceeding, the People's Vote weighs considerably towards turning the Scale, yet it is not pronounced like a Sentence from the Tribunal, but only in the Way of a bare Approbation; as a Debtor who is ready to pay, desires only to see the Bill, and to satisfy himself of the Truth of what he is charged with.

But if the Dispute be, which Degree or which Line ought to have the Preference, this shall be adjusted by the common Declaration of the People, since every one is presumed to understand what Way he likes best; and since the *People* is still reckon'd the same as it was heretofore, when the Order of Succession was originally establish'd. Thus the Controversy between *Edward* King of *England*, and *Philip Valois*, as, likewise, that which happen'd before between *Jane*, Daughter to *Lewis Hutin*, and *Philip* the *Long*, was discuss'd before an Assembly of the Estates of *France* [a]. Thus we find in *Mariana* [b] nine select Judges settling the Succession in the Kingdom of *Arragon*. And in *Dionysius Halicarnassæus* [c], the People end the Differences between *Sylvius* and *Iulus*, in favour of the latter; chiefly on this Argument, *That he was born of a Mother who had been the true Heiress of the whole Kingdom.* And yet, this Declaration hath no more of the Nature of a judicial Sentence in it, than when a Person, who hath first conferr'd a Grant, afterwards explains some Terms that were thought ambiguous or obscure in the Instrument of Donation.

In Case either of the Competitors shall represent it as a Grievance, that the Affections of the People seem prejudiced in favour of his Rival, it may be the most ready Expedient to refer the Contest to proper Arbitrators; such as are neither inclin'd to one Party more than to the other, and in regard to whose Interest, 'tis an indifferent Matter which of the Two gets the Victory [d].

[a] See the *French* Historians, and *Polydor. Virg.* Hist. of *Eng.* Lib. xix. *init.* [b] Hist. *Hispan.* Lib. xv. Chap. ii. iii. [c] Lib. i. [d] *Vide* Conestag. *de Unione* Lusitan. Lib. iii. & v. The most usual Controversies that occur on this Head, see in *Grotius*, Lib. ii. Chap. vii. Sect. 28, &c. Arnisæus *Select. Polit.* Lib. ii. Chap. ii. F. 10, &c. and in other Authors.

CHAP. VIII.

The Supreme Power is to be held Sacred in Civil States.

I. *The supreme Power not to be resisted in lawful Commands.*
II. *Whether a private Member can suffer Injury from the State.*
III. *Subjects very prone to unjust Complaints against their Governors.*
IV. *How many Ways a Sovereign may injure his Subjects.*
V. *Whether in the Case of grievous Injury and Oppression a lawful Prince may be resisted.*
VI. *The Name of a Tyrant does not justify the Use of Violence in the Subject.*
VII. Grotius's *Opinion.*
VIII. *No Princes are to be held sacred, but such as are truly invested with royal Authority.*
IX. *In what Case an Usurper may be acknowledg'd for a lawful Prince.*
X. *How far the Commands of an Usurper oblige the Subjects, while their lawful Sovereign is alive, tho' in an exil'd Condition.*

I. AS civil Empire, or Sovereignty, was first introduced to guard the Safety of Mankind, and to take off the almost infinite Miseries of a State of Nature, so that it be held sacred and inviolable by all Men, is highly the Interest of the whole World [a] [1]. And thus much indeed every Man in his Wits will confess, that 'tis a Sin to oppose a lawful Ruler, whilst acting within the Limits of his Authority. In as much as it appears evidently from the Nature and Design of Government, that there must of Necessity be join'd with it an Obligation to Non-resistance; or to a ready Obedience in performing or omitting any thing, which it shall command or forbid. The main Question therefore must be, Whether in case the Sovereign should enjoin the Subjects what is unlawful, or treat them in an injurious Manner, he is then, also, to be esteem'd *Sacred*; and so, that the Subjects ought not in a violent Way to resist and repel the Injury?

II. Mr. *Hobbes* [b] indeed maintains, that *A State cannot do Injury to a Subject, as* [2] *neither can a Master to his Slave.* And he builds his Notion on this Argument, 'That no Covenant hath 'pass'd between the State and the Subject (all 'Injury, according to him, consisting in the 'Violation of a Covenant) and that the Will of 'the Subject is entirely submitted to the Will of 'the State; so that whatsoever the State acts 'is supposed to be done with the Subject's Con'sent. But now that what a Man willingly con'sents to receive, can be no Injury to him, is a 'Maxim that every Body is acquainted with.' But we have already evinced [3], both that Injury doth not barely consist in the Violation of a Covenant, and that there doth really a Covenant

[a] *Add.* Diodor. Sic. *Lib.* i. *Chap.* xc. [b] *De Cive,* Chap. vii. Sect. 14. & Chap. viii. Sect. 7.

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[1] Vide *Grot.* Lib. i. Chap. iv. Sect. 2. And two *Latin* Discourses of Mr. *Noodt*'s, Publish'd in *French* by Mr. *Barbeyrac*, in the Beginning of the Year 1707, Entituled *Du Pouvoir de Souverains, & de la Liberte de Conscience*, at *Amsterdam*.

[2] This is a false Supposition. See, above, Lib. iii. Chap. vi. Sect. 8. [3] In the seventh Chapter of the first Book, *Sect.* 15.

[4] See above in the second Chapter of this Book, *Sect.* 8, &c.

pass

paſs between the Monarch and his Subjects. And as for Subjects ſubmitting their Will to the Will of the State, this muſt be interpreted and reſtrain'd according to the true End and Deſign of civil Communities; and then the whole Matter will come to this Iſſue: Every Subject ſubmits his Will to the Will of the State in all thoſe Affairs which reſpect the common Intereſt and Safety; and in any Buſineſs of this kind a private Member cannot complain of Injury, tho' he ſhould happen to diſlike the publick Proceedings. But ſince it is very poſſible, that the ſovereign Power may enjoin the Subject ſuch Performances, or inflict on him ſuch Evils, as bear no regard to the publick Welfare, but intrench on the particular Perſon's Right, whether acquired by Covenant, or by the univerſal Law of Humanity; there appears no Reaſon why we ſhould not affirm, that a private Member is capable of being *injur'd* by the State, to which he belongs.

III. But here it ought well to be conſider'd, that turbulent and querulous Subjects are wont to cenſure many Actions of their Prince as Injuries, which are by no means ſuch. Every thing is by them condemn'd for Oppreſſion and Miſmanagement, that doth not exactly ſuit with their private Judgment. Now as the great Variety of Mens Inclinations, and the Irregularity of their Aims and Wiſhes, make it impoſſible that the publick Adminiſtration ſhould be equally grateful to all Perſons; ſo he who exclaims againſt all Proceedings as injurious, which do not hit his particular Humour, is either contriving to overthrow the Conſtitution, or hath a Mind to be tampering in the Government himſelf. The laſt is the Caſe with many Murmurers; who are diſcontented only, becauſe the Commonwealth is not in their own Hands. Of this Number was *Avidius Caſſius* [a], who boaſted that he took up Arms againſt *Marcus Antoninus*, becauſe he was diſpleas'd at the Prince's Greatneſs, and *could not bear the Name of an Emperor*. The ſame Pretence was made uſe of by [1] *Peſcennius Niger* [b], and by *Clodius Albinus* [c], in their Rebellions againſt *Severus*. Many complain of their Prince for imploying bad Miniſters; when, if we ſearch into the Bottom of their Diſcontent, we ſhall find it to be only, that they are not themſelves preferr'd to a Share in the Miniſtry. The common People often grumble at the Hardſhip of Taxes, when no more is demanded than what the preſent Occaſions of the Publick, or ſuch Neceſſities as are likely to ariſe hereafter, ſeem to require. And what Anſwer they ought to receive, Mr. *Hobbes* [d] will inform us. As for the ſtrict and ſevere Execution of the Laws, no Perſon can make this the Ground of his Diſſatisfaction, but ſuch an one as deſires a Liberty of committing Wickedneſs. After all, in caſe any Man looks on thoſe Burthens as intolerable, which the Affairs of the Commonwealth make neceſſary, he hath the Privilege of quitting the State. And if he is not inclined to make uſe of that Privilege, he hath nothing to blame but the common Condition of Mankind, who are not to expect in this World any Degree of pure and untainted Felicity. But, ſhould he think it allowable for him, on this Account, to rid himſelf of the lawful Government by violent Means; 'twere the ſame Thing, as if he ſhould reſolve to improve his Fortune by Rapine and Theft, becauſe he thinks it a Hardſhip to maintain himſelf by his own Induſtry and Labour.

IV. Tho' all this muſt be acknowledg'd to be true; yet there is no doubt, but that a State, or the ſovereign Ruler of it, may do an *Injury* to a private Subject: Since here the Parties are both under the ſame common Law of Nature at leaſt, which is ſufficient to make them capable of being *injured* one by the other. Now a Sovereign may be conceived to *injure* his Subjects two ways, if in his Dealings with them he violates either the Duty of a *Prince*, or the Duty of a *Man*; that is, if he either treats them *not as Subjects*, or *not as Men*. The Duty of a Prince reſpects either the whole People, or particular Perſons. Thus much a Prince owes to the whole People, that he procure the Good and Safety of the Community, either by his own Judgment, in caſe he be abſolute, or if his Power be limited by Laws, according as thoſe Laws ſhall direct and preſcribe. Therefore he *injures* the whole People, if he quite throws off all Care of the Government, in his own Perſon, and doth not ſo much as ſee that the publick Buſineſs be diſpatch'd by his Miniſters. As for Inſtance, if he ſhould neither undertake the Defence of the Kingdom againſt foreign Enemies, nor, by a due Execution of the Laws, ſecure its inward Peace; and yet, in the midſt of all this Neglect, ſhould continue to enjoy the Title and Revenues, and ſhould judge the Greatneſs of a Prince to conſiſt in the unbounded Extent of his vicious Pleaſures. For if, together with the Adminiſtration, he lays aſide the Honours and Profits of the regal Office, he ſhall be ſuppoſed to have plainly abdicated the Government. Which Privilege of reſigning the Crown ought to be allow'd him, unleſs he hath firſt, by evil Counſels, put the State under great Difficulties, and then would deſert it in the midſt of its Danger. And this muſt be own'd for a manifeſt Injury, thus to diſcharge no Part of a Duty, and yet to deſire the Reward and Advantage of it. But it will be a much greater Injury, ſhould he, with hoſtile Intentions, directly endeavour to overthrow the common Safety, and put on the Perſon of an Enemy, which cannot poſſibly conſiſt with the Perſon of a Sovereign [2]. But ſuch a Caſe as this can never happen, where a Prince is Maſter of his own Reaſon. For who, in his Wits, would ruin what belongs to himſelf [3]? Or where will *he* meet with *Subjects*, who uſeth them as *Enemies*? Yet indeed, if he happens to enjoy two Kingdoms at once, 'tis poſſible that he may ſeek the

[a] In *Vulcat. Gallican.* Chap. i. [b] In *Ælian Spartian.* [c] In *Jul. Capitolin.* [d] *De Cive*, Chap. xii. Sect. ii.

[1] We ſee by a Letter of the Emperor *Commodus* (quoted by *Capitolinus*, at the End of his Life of *Clodius Albinus*) that this laſt, in order to pave his Way to the Empire, ſaid, *That the State ſhould not be govern'd by a ſingle Perſon, but that the Senate ſhould have a Share in the Adminiſtration.* But I do not find that *Spartian* ſays any thing like this of *Peſcennius Niger*. As for the reſt, if we examine Matters juſtly, we ſhall find that the Title of *Septimius Severus* was no better founded than that of *Niger*, and *Albinus*.

[2] As the Emperor *Caligula*, who wiſh'd that the *Roman* People were but one Head, that he might cut it off at one Blow, as we have it related in *Sueton.* Chap. xxx. [3] Vide *Grot.* Lib. i. Chap. iv. § 11.

Deſtruction

Deſtruction of the one, to advance the Intereſt and Greatneſs of the other [1]. But we have an Inſtance even of the former Madneſs, in the Story of a certain King of *Peru*, in the laſt Age, who by the Practice, as 'twas reported, of ſome Magicians, was poſſeſs'd with ſo utter an Averſion to his Subjects, that he took up a Reſolution to deſtroy them all; and, in order to this, commanded that no Perſon, under the Pain of Death, ſhould till the Ground for the Space of three Years. Which occaſion'd ſo grievous a Famine, that the People murther'd each other for Food [a]. Again, a Prince injures the Community, if he ſubverts the fundamental Laws, without the Conſent of the People, and upon no urgent Neceſſity; or if he goes about to change the Manner of holding the Government. As, likewiſe, if he ſhould ruin the publick Patrimony; or if, by impoſing greater Tributes than the Occaſions of the State require, he ſhould firſt imploy the Subjects Purſes, and then ſquander away the Money in Extravagance, or ſend it out of the Realm; with many Acts of the ſame Nature. To all which may well be applied the ſmart Concluſion of the old *Greek* Epigram [b]:

Ἀλλὰ λύκης ἔργει τι δὲ τὸ πρᾶγμα, εἰ τὸ φύλαχθεν
Ὤλλυθ', εἴτε λύκοις, εἴθ' ὑπὸ τοῖς φύλαξι.

But he keeps off the wolf; *we own the deed*;
But where's the difference, if the ſheep muſt bleed,
Whether the keeper, or the wolf, they feed?

The Duty which a Prince owes to his particular Subjects is, that he permit them to enjoy the ſame Rights with others of their Rank and Order; that he protect and defend them, and adminiſter Juſtice to every one, ſo far as his Regard to the publick Safety will allow him. If he fails in any of theſe Performances towards particular Perſons, when the Condition of the Commonwealth would give him leave to diſcharge them, he certainly does the reſpective Perſon an Injury [c]. An Old Woman who came with a Petition to the Emperor *Adrian*, and was by him told that he had no Leiſure at preſent to hear her, in a very angry Mood made him this ſmart Reply, *Ergo noli imperare, Therefore don't pretend to govern* [d].

That Duty, which the Prince ſtands under as a Man, he may violate ſeveral Ways, in his Tranſactions with particular Subjects. As ſuppoſe he ſhould undeſervedly brand an honeſt Perſon with Diſgrace and Ignominy; if he ſhould with-hold the Reward promis'd to his Service; if he ſhould refuſe to diſcharge his Debts, or to fulfil his other Contracts or Engagements, or to repair a Damage which he hath occaſion'd by ſome extravagant Humour; if he ſhould aſſault the Honour of chaſte Virgins, ſhould defile his Subjects Beds by Adultery, ſhould hurt their Bodies, ſeize or deſtroy their Goods; laſtly, if he ſhould take away the Life of an innocent Perſon, either by direct and downright Violence, or by ſuborning falſe Witneſſes againſt him, or compelling the Judges, through Threats and Promiſes, to paſs an unjuſt Sentence of Death: *Ammianus Marcellinus* [e] hath made a very ſenſible Reflection on the Grievances laſt mentioned. *Amongſt Arms and Trumpets*, ſays he, *the Equality of Condition makes the Danger ſeem lighter; and the Power of martial Valour either poſſeſſeth itſelf of what it attempted*; or, *if taken off by the Surprize of unexpected Fate, carries no Mark of Infamy along with it, but concludes Life and Pain together. But when the Pretence of Rights and Laws ſerves to cover and diſguiſe wicked Counſels, when the Judges ſit maſqu'd in the ſevere Gravity of* Cato *or* Caſſius, *but act every thing according to the arbitrary Pleaſure of their inſolent Maſter, and the whole Affair of Life and Death is weigh'd and determin'd by his Humour, nothing elſe can enſue but capital Deſtruction and precipitate Ruin.*

V. But 'tis a Point of greater Difficulty to explain, whether Subjects are obliged to endure all thoſe Injuries without reſiſting, or whether in ſome Caſes they may not repel them by Force? Our Judgment on the Matter is this: Since ſuch is the Condition of human Life, that it cannot be exempt from all Inconveniences, and ſince 'tis not eaſy to find a Man in the whole World, who is ſo nicely exact in his Behaviour, as to give a compleat and univerſal Satisfaction; 'twould be equal Folly and Impudence to oppoſe a Prince for every Fault; eſpecially ſince we ourſelves, on the other Hand, are not ſo very punctual in the Diſcharge of our Duty towards *him*; and ſince, even in private Perſons, the Laws are wont to paſs over ſlight Miſcarriages. Therefore how much more juſt and reaſonable muſt it be to overlook the pardonable Failings of a Prince, on whoſe Care the Tranquility of the whole Nation, and the Security of every Man's Life and Fortune depends? And ſo much the rather, ſince Experience informs us, with how fatal a Deſtruction of the People, and how miſerable a Convulſion of the State, the very worſt of Princes have been dethron'd. We are to forgive then the ſlighter Injuries of Rulers; as well in regard to their high and noble Office, and to the many Benefits we conſtantly derive from them in other Reſpects, as out of a due Concern for our Fellow-ſubjects, and for the whole Commonwealth [f]. *We ought to bear*, ſays *Tacitus* [g], *with the Tempers of Princes; ſince frequent Alterations can never turn*

[a] Joan. Moquet. *Itiner.* Lib. iv. [b] Antipater *in Anthолog.* In the Epigram from whence theſe Verſes are taken, the Poet prefers *Mercury* to *Hercules*, becauſe the former only required Sacrifices of Milk and Honey, whereas the latter demanded a Sheep, a Lamb, or ſome ſuch choſen Beaſt of the Flock. [c] Vide *Juſtin.* Lib. ix. Chap. vi. near the End. Tho', indeed, *Pausanias*'s Action is by no means to be commended. [d] Xiphilin. *Epit.* Dion. & Zonar. *Tit.* ii. [e] Lib. xxvi. Chap. xiii.
[f] Vide *Juſtin.* Lib. xv. Chap. iv. [g] *Ann.* xii. Chap. xi.

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[1] This is what *Philip* King of *Macedon* formerly did, as is related in *Livy*, Book xl. Chap. iii. *&c.*
[2] Vide *Grot.* Lib. i. Chap. iv. Sect. 4. That muſt be duly conſider'd. For the Sovereign has never any Right to do the leaſt Injuſtice. If then we ought not to reſiſt him but in the laſt Extremity, 'tis not for his Sake, or by Virtue of his Power, but on Account of the Intereſt of the State; which would, by that means, be expos'd to Troubles and Commotions. Beſides that (as *Gronovius* obſerves, in his Notes upon *Grotius*, Lib. i. Chap. iii. *Sect.* 8. *Numb.* 15.) it often happens, that a People, upon the Expulſion of one bad Prince, fall under the Dominion of another worſe than the former; the *ſpecious* Name of *Liberty* ſerving thoſe for a Pretence, who are ambitious of bringing them under their Subjection. 'Tis a Reflection which *Tacitus* puts into a General's Mouth, *Certare Libertatis*

turn to the Advantage of a State. 'Tis a ſenſible Argument, which *Cerialis* (in the ſame Author [a]) uſeth to the rebellious *Treviri*. *As you would endure*, ſays he, *the Barrenneſs of a Soil, the immoderate Force of Rain, and the other Inconveniences of Nature, ſo endure the Luxury or the Avarice of your Rulers. There will be Vices in the World ſo long as there are Men; but then theſe are not perpetual, and are amply recompenſed by the Intermixture of better Qualities.* *Plato* [b] ſpeaks admirably to the ſame Purpoſe, *We ought never to uſe Violence to our Parents, unleſs they are depriv'd of their Reaſon: But if we diſlike their Manner of Living, we muſt not provoke them by unprofitable Remonſtrances, or cheriſh in them by ſervile Flattery, and a criminal Compliance, the Vices to which we would not be ſubject ourſelves. A wiſe Man will take up this Reſolution in regard to his Country; then only to reprehend the Miſcarriages in the State, when his Reproof is likely to meet with good Effect, and not to draw down Ruin on himſelf: But when a Reformation cannot be wrought without the Expulſion and Slaughter of many Perſons, he will never attempt to introduce a Change in the Government, by violent Means; but will give himſelf up to Quiet and Retirement, and pray for his own and the publick Happineſs* [c]. Beſides, a Man conſults his own Safety, when he chooſeth rather to diſſemble the Affronts of too powerful an Oppreſſor, than to draw on himſelf ſome greater Miſchief, by unreaſonable Reſentments and Complaints [d]. Add to this, that as we are commanded by the Holy Scriptures [1], ſo are we adviſed by ſound Reaſon, patiently to ſuffer the Moroſeneſs and Severity of our Parents and Maſters [e 2].

Nay farther, this too is moſt certain, That when a Prince, with plain hoſtile Intentions, threatens the worſt and moſt cruel of Injuries, it is better, if we can, to withdraw ourſelves from the Stroke, and either to ſecure ourſelves by Flight and Concealment, or to remove into another Country and Government for Protection. But what if a Prince ſhould with this hoſtile Fury attempt to deſtroy an innocent Subject, without leaving any Poſſibility of Eſcape? Many, as to this Caſe, are not able to conceive how the ſame Man can thus bear the *Perſon* of a Prince, and of an Enemy together, in reſpect of the poor Sufferer, or with what Face he can claim the Privilege of being held inviolable, who thus is bent on ſacrificing a guiltleſs Member of the State, as a miſerable Victim to his Luſts. But they are of Opinion, that if he, who owes another his Protection and Patronage, ſhall, upon no Cauſe at all, or upon an unjuſt one, aſſume the Mind of an Enemy towards him, he releaſeth the other Party from his Duty of a Client or Dependent; ſo far, at leaſt, as that it ſhall be lawful for the latter to make uſe of Force in defending himſelf from the unreaſonable Cruelties of the former. Which Defence may the better plead for Favour, the greater the Number is of thoſe whom the Prince endeavours thus injuriouſly to deſtroy. But ſince 'tis hardly poſſible to find any Examples of Princes, who entertain a Deſign againſt the Lives of innocent Men, and openly profeſs that they do it out of meer arbitrary Pleaſure; a greater Doubt ariſeth, what Courſe can be lawfully taken, when a Prince goes about to exerciſe Cruelty under the Pretence and Colour of Right; as ſuppoſe, in way of Puniſhment, for the Neglect of an unjuſt Command. Now here we firſt of all take it for granted, that ſince in conferring any Power there is a *Salvo* made to the Right of all Superiors, therefore the Subjects, upon the eſtabliſhing a ſovereign Civil Authority, neither could, nor would by that Act renounce the Subjection which they before ſtood under to Almighty GOD, and, conſequently, that they are not bound by any Injunctions of the civil Power, plainly repugnant to the Divine Commands. What a Subject ought to do in this Caſe, if threatened with Violence on the Account of his Chriſtian [3] Profeſſion,

[a] *H.* iv. Chap. lxxiv. [b] *Epiſt.* vii. Pag. 1281. D. Ed. *Wech.* [c] *Cicero* produceth this Paſſage out of *Plato* in the Ninth Epiſtle of his Firſt Book *ad Familiares.* [d] See the Sentences cited to this Purpoſe by *Grotius, ubi ſupra.* Æſchylus Prometh. *Vinct.*

——— ἀκ ἔν πρὸς κέντρα, &c.

——— When a ſelf-will'd Lord
Too big to be controul'd, and fiercely bent
On Cruelty and Rage, aſcends the Throne;
Strive not in vain, nor kick againſt the Goad.

[e] *Pliny*, Lib. iii. Ep. xiv. ſpeaking of Maſters being murther'd by their Slaves, ſays, *Non judicio, ſed ſcelere perimuntur*, They are kill'd, not in the Method of Judgment, but of Villainy.

Libertas & ſpecioſa nomina prætexuntur, nec quiſquam alienum ſervitium & dominationem ſibi concupivit, ut non eadem iſta vocabula uſurparet. Hiſt. Lib. iv. Chap. lxxiii. Another *Latin* Hiſtorian gives us an Inſtance of it, in the Perſon of *Sandocrottus*, who made himſelf Maſter of the *Indies*, after the Death of *Alexander the Great. Auctor Libertatis* Sandocrottus *fuerat; ſed Titulum Libertatis poſt victoriam in ſervitutem vertebat.* Juſtin. *Lib.* xv. *Chap.* iv. *Numb.* 13.

[1] 1 *Epiſt.* Pet. ii. 17, 18.

[2] *Ut Parentum ſævitiam, ſic Patriæ, patiendo ac ferendo, leniendam eſſe*, Livy, *Lib.* xxvii. *Chap.* xxxiv. See *Epictet. Enchirid.* Chap. xxxvii. and *Juſtin.* Lib. xv. Chap. iii. Numb. 10. *Plato* in the Dialogue, intituled, the *Criton*, compares, likewiſe, the Patience wherewith we ought to ſuffer any Injuſtice we receive from our Country, or the Commonwealth, to the Manner in which a Child ought to bear with the Moroſeneſs and Severity of his Parents, or a Slave the ill Uſage of his Maſter. Nay, he even ſays, that the Subject ought to ſuffer with ſo much the more Reaſon, as the Obligation which we are under, with reſpect to the State, is greater than that which a Man owes to a Maſter, and to thoſe from whom he receiv'd his Being. Ἦ πρὸς ἄρα σοι τὸν Πατέρα ἀκ ἦν τὸ δίκαιον, &c. Tom. i. Pag. 50, 51. *Ed. Steph.*

[3] As it cannot be prov'd, neither by the Principles of the Law of Nature, nor by the Holy Scripture, that Sovereigns are veſted with a Power to hinder any one from ſerving God in a peaceable Manner, according to the Dictates of his Conſcience (See, above, *Chap.* iv. *Sect.* 11. *Note* 2.) it follows from thence, that the People have as natural and as unqueſtionable a Right to defend their Religion by Force of Arms, againſt a Sovereign who endeavours to compel them to renounce it, or to forbid them the free Exerciſe of it, as they have to defend their Lives, their Eſtates, and Liberties againſt the Attempts of a Tyrant. This Right is even more allowable than any other, in as much as it regards the greateſt of all Intereſts, and the ſtrongeſt of all Obligations, or rather, that which is the Foundation and Source of all others; I mean, the indiſpenſable Neceſſity that obliges every Man to follow the Light of his own Conſcience. 'Tis to no purpoſe for *Grotius*, after having approv'd of the Conduct of the *Macchabees*, to maintain, however, that the Chriſtian Religion leaves its Followers no other Remedy but Flight, or Patience. The Paſſages which he produces regard only private Perſons, who are not in a Capacity to reſiſt. But (as Mr. *Bernard, Nouv. de la Rep. des Lettres, Mai* 1700, Pag. 557, obſerves.) Jeſus Chriſt, *moreover, leaves People the Liberty of defending their Rights by the common Ways of Juſtice.* See, alſo, *Gronovius*'s long Note upon *Grotius*, Lib. i. Chap. iv. Sect. 7. Numb. 8. and Mr. *Vander Muelen*'s Diſſertation *de Sanctitate ſummi Imperii civilis, &c. Pag.* 70. &c. and Mr. *Sidney*'s Diſcourſe upon Government. Mr. *Rechenberg*, the preſent Profeſſor of Divinity at *Leipſick*, likewiſe, publiſhed a Diſſertation *de Religione armis defenſa*, in the Year 1689, at the ſame time that he had a Profeſſorſhip in another Place. He applies the general Propoſition to the *Proteſtants* in particular.

ſion, it is not our Buſineſs to determine [1]: In as much as the ſame Scriptures, in which that holy Doctrine is deliver'd, may fully inform any Perſon, how infinitely it concerns him, not really, nor ſo much as ſeemingly to act any thing contrary to his Religion [a], and at how great a Price, if Occaſion be, he ought to purchaſe his Innocence. But that, upon the Apprehenſion of certain Death, a Man may undertake the Performance of an Action in itſelf repugnant to the Law of Nature, without any Sin on his Part, we ſhall preſently make appear [2]. Yet, if the Action enjoin'd be ſuch, as I cannot perform without deriving Guilt on myſelf, or ſuch as I eſteem to be, in its own Nature, more bitter than Death, and at the ſame time no Reaſon is ſhewn, nor ſo much as Probability pretended, either from ſome Fault of mine, or from the publick Good, why I ſhould be put under this Neceſſity of doing what either might have been done by another, or ought not to be done at all; it is manifeſt, that the whole Deſign of ſuch a Command is, that I may be deſtroy'd, who have committed no Offence, purely to gratify the Will of the Enjoiner, and his cruel Diſpoſition towards me. By which Act, ſince he lays aſide the *Prince* to put on the *Enemy*, he is ſuppos'd, at the ſame time, to have remitted the Obligation, which lay on the Part of the Subject. But ſtill, as far as 'tis poſſible, we are to avoid this Danger by Flight, and to ſeek the Patronage of ſome third Perſon, who is not by any Ties engaged to the ſame Prince. Nay, if all Means of eſcaping are cut off, we ought rather to be kill'd than to kill [3]: Yet not ſo much out of Veneration to the Perſon of ſuch a Ruler, as out of Regard to the Commonwealth, which, on ſuch an Occaſion, cannot but be imbroil'd in the moſt unhappy Troubles. But when a Ruler proceeds againſt a Subject by way of Puniſhment for a real Crime, altho' here the Subject is not bound to meet the Miſchief by voluntarily appearing and offering up himſelf; yet the Reaſon why he cannot, in this Caſe, defend himſelf by Force is, that the Prince acts nothing here but what is conſiſtent with his Right; and therefore it would be highly injurious, whatever the Pretence might be, to offer him any Hurt on ſuch an Account. It ought farther to be obſerv'd, that altho' we ſhould grant never ſo fully, that a particular Subject may, in ſome Caſes, guard his Safety by Violence, againſt the injurious Aſſaults of his Superior, and this without Sin, yet it doth not hereby become lawful for the other Subjects to throw off their Allegiance, or protect the innocent Party by forcible Means. For beſides, that they ought not to make Inquiſition into theſe Acts of the Prince, which he exerciſeth, as it were by Virtue of his judiciary Power, and that many guilty Perſons, to draw *Odium* on the Government, make high Pretenſions to Innocence; tho' the Perſon ſhould happen to be really injured, the reſt of the People are not at all releas'd from their Obligation to Obedience. And that for this Reaſon, becauſe, in the firſt Contract, every particular Subject engageth the Prince's Care and Protection only for himſelf, and doth not ſuppoſe it a Condition of his own Obedience, that all and each of his Fellows ſhall be juſtly treated. Nor is the Fear of being hereafter uſed, in the ſame manner, ſufficient to break off this Obligation in the other Subjects; Firſt, becauſe it is uncertain; and, Secondly, becauſe 'tis poſſible the Prince's Hatred to this Perſon might be founded on ſome particular Reaſons, which do not appear in others. But, whilſt the Subject's Obligation towards the Prince remains in Force, it ſhall not be lawful for him, on what Pretence ſoever, to make any violent Reſiſtance.

VI. Now, as what hath been hitherto deliver'd is, in the Opinion of many Men, not at all derogatory from the Sacredneſs of Princes; ſo, on the other Hand, thoſe Perſons are not to be endured, who aſſert in groſs, that a King, when he degenerates into a Tyrant, may be deprived of his Crown, and brought to Puniſhment by the [4] People. For ſince the Acts of civil Government are for the moſt part ſo obſcure, that the

[a] See *Matth.* x. 31, *&c.*

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[1] See Sir *George Mackenzie*'s *Jus Regium*, Pag. 113, *&c.* [2] B. viii. Chap. i. Sect. 6. [3] Vide *Grot.* Lib. ii. Chap. i. § 9. *cum Not.* Gronov. And Mr. *Locke* on civil Government, Book ii. Chap. xviii. § 203, *& ſeqq.*

[4] When we ſpeak of a Tyrant that may lawfully be dethron'd by the People, we do not mean by the Word *People* the vile Populace, or Rabble of the Country, nor the Cabal of a ſmall Number of factious Perſons; but the greater and more judicious Part of the Subjects of all Ranks in the Kingdom. Beſides, the Tyranny muſt be ſo notorious, and evidently clear, as to leave no Body any Room to doubt of it. See what Mr. *Buddeus* ſays to this Matter, upon *Tarquin the Proud*, in his Diſcourſe intituled, *Juriſp. Hiſtoricæ Specimen*, Sect. 35, *&c.* Among the *Selecta Jur. Nat. & Gent.* See, likewiſe, Mr. *Le Clerc* upon *Judges* iii. 20. v. 24. Now a Prince may eaſily avoid making himſelf ſo univerſally ſuſpected, and odious to his Subjects: For, as Mr. *Locke* ſays, in his ſecond Treatiſe of *civil Government*, Chap. xviii. Sect. 209. *It is as impoſſible for a Governor, if he really means the Good of the People, and the Preſervation of them and the Laws together, not to make them ſee and feel it; as it is for the Father of a Family, not to let his Children ſee he loves and takes Care of them.* And therefore the general Inſurrection of a whole Nation does not deſerve the Name of Rebellion. We may ſee what Mr. *Sidney* ſays upon this Subject, in his *Diſcourſe concerning Government*, *Chap.* iii. *Sect.* 36. Neither are Subjects bound to ſtay till the Prince has entirely finiſh'd the Chains which he is preparing for 'em, and has put it out of their Power to oppoſe. 'Tis ſufficient that all the Steps he takes tend manifeſtly to Slavery, and that he openly avows his Deſigns againſt the State. In ſuch a Caſe, ſays Mr. *Locke* admirably well, *ubi ſupra*, Sect. 210. *How can a Man any more hinder himſelf from believing in his own Mind which Way Things are going, or from caſting about how to ſave himſelf, than he could from believing the Captain of the Ship he was in, was carrying him and the reſt of his Company to* Algiers, *when he found him always ſteering that Courſe, tho' croſs Winds, Leaks in his Ship, and Want of Men and Proviſions, did often force him to turn his Courſe another Way for ſome time, which he ſteadily returned to again, as ſoon as the Winds, Weather, and other Circumſtances would let him?* This chiefly takes Place with reſpect to Kings, whoſe Power is limited by fundamental Laws. If it is objected, that, the People being ignorant, and always diſcontented, to lay the Foundation of Government in the unſteady Opinion, and the uncertain Humour of the People, is to expoſe it to certain Ruin; the ſame Author will anſwer you, 'That, on the contrary, People are not ſo eaſily got out of their old Forms, as ſome are apt to ſuggeſt. *England*, for 'Inſtance, notwithſtanding the many Revolutions that have been ſeen in that Kingdom, has always kept to its old Legiſlative of Kings 'Lords, and Commons: And whatever Provocations have made the Crown to be taken from ſome of their Princes Heads, they never 'carried the People ſo far as to place it in another Line.' But 'twill be ſaid, this Hypotheſis lays a Foundation for frequent Rebellion. 'No more, ſays Mr. *Locke*, than any other Hypotheſis. For when the People are made miſerable, and find themſelves expoſed to 'the ill Uſage of arbitrary Power; cry up their Governors as much as you will for Sons of *Jupiter*, let them be ſacred and divine, 'deſcended or authoriz'd from Heaven; give them out for whom or what you pleaſe, the ſame will happen. The People generally 'ill treated, and contrary to Right, will be ready upon any Occaſion, to eaſe themſelves of a Burthen that ſits heavy upon them. '2. Such Revolutions happen not upon every little Miſmanagement in publick Affairs. Great Miſtakes in the ruling Part, many 'wrong

the Multitude cannot apprehend the Equity or the Neceſſity of them, and often, through Prejudice or Paſſion, will not apply their Minds to a Diſcovery of the Truth; and ſince, generally ſpeaking, it makes for the Intereſt of the Commonwealth to let the Reaſons of the State and the Grounds of publick Counſels and Proceedings be known by a very few: It will be a moſt difficult Task to point out exactly thoſe ſeveral Actions, on the Performance of which a Prince may juſtly be call'd a Tyrant, and as juſtly be oppoſed by the People, with any Violence whatſoever [a]. Whence it may eaſily come to paſs, that an *Odium* of this Nature ſhall be brought even on a good Prince, by ſuch as either diſlike his Perſon, or the preſent Conſtitution; ſince Men have been now long accuſtom'd in the Uſe and Signification of Words, to make them ſtand not only for the real Nature of Things, but for their own Humour or Affections. Thus much is acknowledg'd by general Opinion, that neither private and perſonal Vices, nor ſmaller Neglects in the publick Adminiſtration, are ſufficient to denominate a Tyrant. Are heavy Taxes impoſed? The Subjects who are not admitted to Council, cannot poſſibly judge whether the Neceſſity of the State requires this Proviſion, or not. Are ſevere Penalties executed? Why, if this be done upon ſome precedent Offence, and according to the Laws, no Man can, with Juſtice, complain; tho' perhaps the Caſe would better have allow'd of Mercy and Pardon. Are ſome great Men innocently taken off, on the Account of private Hatred or Suſpicion; which, in vulgar Eſtimation, paſſeth for the higheſt and moſt provoking Grievance? Yet if Plots againſt the Prince's Government, or other Crimes are, in pretence at leaſt, laid to their Charge, or the ordinary Courſe of Judgment obſerv'd in condemning them; although perhaps the Perſons themſelves, and ſome few others may be thoroughly ſatisfied of their Innocence; yet how is it poſſible that the reſt of the People ſhould have the ſame Certainty and Aſſurance? Eſpecially ſince the Preſumption of Juſtice always lies on the Prince's Side. Well, but perhaps Promiſes are broken, or Privileges formerly granted retrench'd. Still, if the Prince be abſolute, 'tis but to alledge ſome Offence in the Parties, or ſome ſignal Advantage to the Commonwealth, and then he ſhall be ſuppoſed to have acted according to his ſovereign Right; and whether theſe Pretences be real, or no, the Subjects are not able clearly to judge. And all Privileges muſt be conſtrued with this Limitation and Exception, *Unleſs the Safety or Neceſſity of*

[a] *Comp.* Bœcler. *ad* Grot. *Lib.* i. *Chap.* iv. *Sect.* 14.

'wrong and inconvenient Laws, and all the Slips of human Frailty will be borne by the People without Mutiny or Murmur. 3. 'This Power in the People of providing for their Safety a-new, by a new Legiſlative, when their Legiſlators have acted contrary to 'their Truſt, by invading their Property, is the beſt Fence againſt Rebellion, and the probableſt Means to hinder it. For Rebellion be-'ing an Oppoſition, not to Perſons, but Authority, which is founded only in the Conſtitutions and Laws of the Government; thoſe 'whoever they be, who by Force break through, and by Force juſtify the Violation of them, are truly and properly Rebels. For 'when Men, by entering into Society and civil Government, have excluded Force, and introduced Laws for the Preſervation of Pro-'perty, Peace, and Unity among themſelves, thoſe who ſet up Force again in Oppoſition to the Laws do *rebellare*, that is, do bring 'back again the State of War, and are properly Rebels, as the Author ſhews. In the laſt Place he demonſtrates, that there are, alſo, 'greater Inconveniencies in allowing all to thoſe who govern, than in granting ſomething to the People. But it will be ſaid, that ill-'affected and factious Men may ſpread amongſt the People, and make them believe, that the Prince or Legiſlative act contrary to their 'Truſt, when they only make uſe of their due Prerogative. To this Mr. *Locke* anſwers, That the People, however, is to be Judge of 'all that; becauſe no Body can better judge whether his Truſtee or Deputy acts well, and according to the Truſt repoſed in him, 'than he who deputed him. He might make the like Query (ſays Mr. *Le Clerc*, from whom this Extract is taken) and aſk, whether, 'the People being oppreſs'd by an Authority which they ſet up but for their own Good, it is juſt that thoſe who are veſted with this 'Authority, and of which they are complaining, ſhould themſelves be Judges of the Complaints againſt them? The greateſt Flatter-'ers of Kings dare not ſay, that the People are obliged to ſuffer abſolutely all their Humours, how irregular ſoever they be; and 'therefore muſt confeſs, that when no Regard is had to their Complaints, the very Foundations of Society are deſtroy'd; the *Prince* 'and *People* are in a *State* of War with each other, like two Independent States that are doing themſelves Juſtice, and acknowledge no 'Perſon upon Earth, who, in a ſovereign manner, can determine the Diſputes between them.' *Bibliotheque Univerſal.* Tom. xix. Pag. 591. Mr. *Sidney* in his *Diſcourſe upon Government*, Chap. iii. Sect. 41, ſays, 'They who create Magiſtracies, and give to them ſuch Name, 'Form, and Power, as they think fit, only know whether the End for which they were created, be perform'd, or not. They who 'give a Being to the Power which had none, can only judge whether it be employ'd to their Welfare, or turn'd to their Ruin. They 'do not ſet up one or a few Men that they and their Poſterity may live in Splendor and Greatneſs; but that Juſtice may be adminiſter'd, 'Virtue eſtabliſh'd, and Proviſion made for the publick Safety. No wiſe Man will think this can be done, if thoſe who ſet themſelves 'to overthrow the Law are to be their own Judges. If *Caligula*, *Nero*, *Vitellius*, *Domitian*, or *Heliogabalus* had been ſubject to no 'other Judgment, they would have compleated the Deſtruction of the Empire. If the Diſputes between *Duſtus*, *Evenus* the Third, '*Dardannus*, and other Kings of *Scotland*, with the Nobility and People, might have been determin'd by themſelves, they had eſcap'd 'the Puniſhments they ſuffer'd, and ruin'd the Nation as they deſign'd. Other Methods were taken; they periſh'd by their Madneſs; 'better Princes were brought into their Places, and their Succeſſors were, by their Example, admoniſh'd to avoid the Ways that had prov'd 'fatal to them. If *Edward* the Second of *England*, with *Gaveſton* and the *Spencers*, *Richard* the Second, with *Treſilian* and *Vere*, 'had been permitted to be Judges of their own Caſes, they who had murther'd the beſt of the Nobility, would have purſu'd their 'Deſigns to the Deſtruction of ſuch as remain'd, the Enſlaving of the Nation, the Subverſion of the Conſtitution, and the Eſtabliſh-'ment of a meer Tyranny in the Place of a mix'd Monarchy. But our Anceſtors took better Meaſures. They, who had felt the 'Smart of the Vices and Follies of their Princes, knew what Remedies were moſt fit to be applied, as well as the beſt Time of apply-'ing them. They found the Effects of extreme Corruption in Government to be ſo deſperately pernicious, that Nations muſt ne-'ceſſarily periſh, unleſs it be corrected, and the State reduced to its firſt Principle, or alter'd. Which being the Caſe, it was as eaſy 'for them to judge whether the Governor who had introduced that Corruption ſhould be brought to Order, or remov'd, if he would 'not be reclaim'd; or whether he ſhould be ſuffer'd to ruin them and their Poſterity; as it is for me to judge, whether I ſhould put 'away my Servant, if I knew he intended to poiſon or murther me, and had a certain Facility of accompliſhing his Deſign, or whether 'I ſhould continue him in my Service 'till he had perform'd it. Nay, the Matter is ſo much the more plain on the Side of the Na-'tion, as the Diſproportion of Merit between a whole People, and one or few Men entruſted with the Power of governing them, is 'greater than between a private Man and his Servant.' To this let us add the following Verſes of an antient *Greek* Poet, *viz.*

A. Σέβειν δὲ τὰς κρατοῦνλας νόμος.
B. Οὐ παντελῶς δεῖ τοῖς πονηροῖς ἐπιτρέπειν,
Ἀλλ' ἀντιτάττεσθαι, εἰ δὲ μὴ, τ' ἄνω κάτω
Ἡμῶν ὁ βίος λήσει μεταστρέφων ὅλος.

A { An ancient Law commands us to obey
Thoſe who in Government do bear the Sway:
B { But wicked Magiſtrates we may reſiſt,
Nor ſuffer them to do whate'er they liſt;
For then the World would in Confuſion lie,
And Civil States be Scenes of Anarchy.

Philemon in Adelph. Fragm. ix. *Edit. Cleric.*

ſion, it is not our Buſineſs to determine [1]: In as much as the ſame Scriptures, in which that holy Doctrine is deliver'd, may fully inform any Perſon, how infinitely it concerns him, not really, nor ſo much as ſeemingly to act any thing contrary to his Religion [a], and at how great a Price, if Occaſion be, he ought to purchaſe his Innocence. But that, upon the Apprehenſion of certain Death, a Man may undertake the Performance of an Action in itſelf repugnant to the Law of Nature, without any Sin on his Part, we ſhall preſently make appear [2]. Yet, if the Action enjoin'd be ſuch, as I cannot perform without deriving Guilt on myſelf, or ſuch as I eſteem to be, in its own Nature, more bitter than Death, and at the ſame time no Reaſon is ſhewn, nor ſo much as Probability pretended, either from ſome Fault of mine, or from the publick Good, why I ſhould be put under this Neceſſity of doing what either might have been done by another, or ought not to be done at all; it is manifeſt, that the whole Deſign of ſuch a Command is, that I may be deſtroy'd, who have committed no Offence, purely to gratify the Will of the Enjoiner, and his cruel Diſpoſition towards me. By which Act, ſince he lays aſide the *Prince* to put on the *Enemy*, he is ſuppos'd, at the ſame time, to have remitted the Obligation, which lay on the Part of the Subject. But ſtill, as far as 'tis poſſible, we are to avoid this Danger by Flight, and to ſeek the Patronage of ſome third Perſon, who is not by any Ties engaged to the ſame Prince. Nay, if all Means of eſcaping are cut off, we ought rather to be kill'd than to kill [3]: Yet not ſo much out of Veneration to the Perſon of ſuch a Ruler, as out of Regard to the Commonwealth, which, on ſuch an Occaſion, cannot but be imbroil'd in the moſt unhappy Troubles. But when a Ruler proceeds againſt a Subject by way of Puniſhment for a real Crime, altho' here the Subject is not bound to meet the Miſchief by voluntarily appearing and offering up himſelf; yet the Reaſon why he cannot, in this Caſe, defend himſelf by Force is, that the Prince acts nothing here but what is conſiſtent with his Right; and therefore it would be highly injurious, whatever the Pretence might be, to offer him any Hurt on ſuch an Account. It ought farther to be obſerv'd, that altho' we ſhould grant never ſo fully, that a particular Subject may, in ſome Caſes, guard his Safety by Violence, againſt the injurious Aſſaults of his Superior, and this without Sin, yet it doth not hereby become lawful for the other Subjects to throw off their Allegiance, or protect the innocent Party by forcible Means. For beſides, that they ought not to make Inquiſition into theſe Acts of the Prince, which he exerciſeth, as it were by Virtue of his judiciary Power, and that many guilty Perſons, to draw *Odium* on the Government, make high Pretenſions to Innocence; tho' the Perſon ſhould happen to be really injured, the reſt of the People are not at all releas'd from their Obligation to Obedience. And that for this Reaſon, becauſe, in the firſt Contract, every particular Subject engageth the Prince's Care and Protection only for himſelf, and doth not ſuppoſe it a Condition of his own Obedience, that all and each of his Fellows ſhall be juſtly treated. Nor is the Fear of being hereafter uſed, in the ſame manner, ſufficient to break off this Obligation in the other Subjects; Firſt, becauſe it is uncertain; and, Secondly, becauſe 'tis poſſible the Prince's Hatred to this Perſon might be founded on ſome particular Reaſons, which do not appear in others. But, whilſt the Subject's Obligation towards the Prince remains in Force, it ſhall not be lawful for him, on what Pretence ſoever, to make any violent Reſiſtance.

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[1] See Sir *George Mackenzie's Jus Regium*, Pag. 113, *&c.* [2] B. viii. Chap. i. Sect. 6. [3] Vide *Grot.* Lib. ii. Chap. i. § 9. *cum Not.* Gronov. And Mr. *Locke* on civil Government, Book ii. Chap. xviii. § 203, *& ſeqq.*

[4] When we ſpeak of a Tyrant that may lawfully be dethron'd by the People, we do not mean by the Word *People* the vile Populace, or Rabble of the Country, nor the Cabal of a ſmall Number of factious Perſons; but the greater and more judicious Part of the Subjects of all Ranks in the Kingdom. Beſides, the Tyranny muſt be ſo notorious, and evidently clear, as to leave no Body any Room to doubt of it. See what Mr. *Buddeus* ſays to this Matter, upon *Tarquin the Proud*, in his Diſcourſe intituled, *Juriſp. Hiſtoricæ Specimen*, Sect. 35, *&c.* Among the *Selecta Jur. Nat. & Gent.* See, likewiſe, Mr. *Le Clerc* upon *Judges* iii. 20. v. 24. Now a Prince may eaſily avoid making himſelf ſo univerſally ſuſpected, and odious to his Subjects: For, as Mr. *Locke* ſays, in his ſecond Treatiſe of *civil Government*, Chap. xviii. Sect. 209. *It is as impoſſible for a Governor, if he really means the Good of the People, and the Preſervation of them and the Laws together, not to make them ſee and feel it; as it is for the Father of a Family, not to let his Children ſee he loves and takes Care of them.* And therefore the general Inſurrection of a whole Nation does not deſerve the Name of Rebellion. We may ſee what Mr. *Sidney* ſays upon this Subject, in his *Diſcourſe concerning Government*, *Chap.* iii. *Sect.* 36. Neither are Subjects bound to ſtay till the Prince has entirely finiſh'd the Chains which he is preparing for 'em, and has put it out of their Power to oppoſe. 'Tis ſufficient that all the Steps he takes tend manifeſtly to Slavery, and that he openly avows his Deſigns againſt the State. In ſuch a Caſe, ſays Mr. *Locke* admirably well, *ubi ſupra*, Sect. 210. *How can a Man any more hinder himſelf from believing in his own Mind which Way Things are going, or from caſting about how to ſave himſelf, than he could from believing the Captain of the Ship he was in, was carrying him and the reſt of his Company to* Algiers, *when he found him always ſteering that Courſe, tho' croſs Winds, Leaks in his Ship, and Want of Men and Proviſions, did often force him to turn his Courſe another Way for ſome time, which he ſteadily returned to again, as ſoon as the Winds, Weather, and other Circumſtances would let him?* This chiefly takes Place with reſpect to Kings, whoſe Power is limited by fundamental Laws. If it is objected, that, the People being ignorant, and always diſcontented, to lay the Foundation of Government in the unſteady Opinion, and the uncertain Humour of the People, is to expoſe it to certain Ruin; the ſame Author will anſwer you, 'That, on the contrary, People are not ſo eaſily got out of their old Forms, as ſome are apt to ſuggeſt. *England*, for 'Inſtance, notwithſtanding the many Revolutions that have been ſeen in that Kingdom, has always kept to its old Legiſlative of King, 'Lords, and Commons: And whatever Provocations have made the Crown to be taken from ſome of their Princes Heads, they never 'carried the People ſo far as to place it in another Line.' But 'twill be ſaid, this Hypotheſis lays a Foundation for frequent Rebellion. 'No more, ſays Mr. *Locke*, than any other Hypotheſis. For when the People are made miſerable, and find themſelves expoſed to 'the ill Uſage of arbitrary Power; cry up their Governors as much as you will for Sons of *Jupiter*, let them be ſacred and divine, 'deſcended or authoriz'd from Heaven; give them out for whom or what you pleaſe, the ſame will happen. The People generally 'ill treated, and contrary to Right, will be ready upon any Occaſion, to eaſe themſelves of a Burthen that ſits heavy upon them. '2. Such Revolutions happen not upon every little Miſmanagement in publick Affairs. Great Miſtakes in the ruling Part, many 'wrong

the Multitude cannot apprehend the Equity or the Neceſſity of them, and often, through Prejudice or Paſſion, will not apply their Minds to a Diſcovery of the Truth; and ſince, generally ſpeaking, it makes for the Intereſt of the Commonwealth to let the Reaſons of the State and the Grounds of publick Counſels and Proceedings be known by a very few: It will be a moſt difficult Task to point out exactly thoſe ſeveral Actions, on the Performance of which a Prince may juſtly be call'd a Tyrant, and as juſtly be oppoſed by the People, with any Violence whatſoever [a]. Whence it may eaſily come to paſs, that an *Odium* of this Nature ſhall be brought even on a good Prince, by ſuch as either diſlike his Perſon, or the preſent Conſtitution; ſince Men have been now long accuſtom'd in the Uſe and Signification of Words, to make them ſtand not only for the real Nature of Things, but for their own Humour or Affections. Thus much is acknowledg'd by general Opinion, that neither private and perſonal Vices, nor ſmaller Neglects in the publick Adminiſtration, are ſufficient to denominate a Tyrant. Are heavy Taxes impoſed? The Subjects who are not admitted to Council, cannot poſſibly judge whether the Neceſſity of the State requires this Proviſion, or not. Are ſevere Penalties executed? Why, if this be done upon ſome precedent Offence, and according to the Laws, no Man can, with Juſtice, complain; tho' perhaps the Caſe would better have allow'd of Mercy and Pardon. Are ſome great Men innocently taken off, on the Account of private Hatred or Suſpicion; which, in vulgar Eſtimation, paſſeth for the higheſt and moſt provoking Grievance? Yet if Plots againſt the Prince's Government, or other Crimes are, in pretence at leaſt, laid to their Charge, or the ordinary Courſe of Judgment obſerv'd in condemning them; although perhaps the Perſons themſelves, and ſome few others may be thoroughly ſatisfied of their Innocence; yet how is it poſſible that the reſt of the People ſhould have the ſame Certainty and Aſſurance? Eſpecially ſince the Preſumption of Juſtice always *lies on the Prince's Side*. Well, but perhaps Promiſes are broken, or Privileges formerly granted retrench'd. Still, if the Prince be abſolute, 'tis but to alledge ſome Offence in the Parties, or ſome ſignal Advantage to the Commonwealth, and then he ſhall be ſuppoſed to have acted according to his ſovereign Right; and whether theſe Pretences be real, or no, the Subjects are not able clearly to judge. And all Privileges muſt be conſtrued with this Limitation and Exception, *Unleſs the Safety or Neceſſity of*

[a] *Comp.* Bœcler. *ad* Grot. *Lib.* i. *Chap.* iv. *Sect.* 14.

'wrong and inconvenient Laws, and all the Slips of human Frailty will be borne by the People without Mutiny or Murmur. 3. 'This Power in the People of providing for their Safety a-new, by a new Legiſlative, when their Legiſlators have acted contrary to 'their Truſt, by invading their Property, is the beſt Fence againſt Rebellion, and the probableſt Means to hinder it. For Rebellion be'ing an Oppoſition, not to Perſons, but Authority, which is founded only in the Conſtitutions and Laws of the Government; thoſe 'whoever they be, who by Force break through, and by Force juſtify the Violation of them, are truly and properly Rebels. For 'when Men, by entering into Society and civil Government, have excluded Force, and introduced Laws for the Preſervation of Pro'perty, Peace, and Unity among themſelves, thoſe who ſet up Force again in Oppoſition to the Laws do *rebellare*, that is, do bring 'back again the State of War, and are properly Rebels, as the Author ſhews. In the laſt Place he demonſtrates, that there are, alſo, 'greater Inconveniencies in allowing all to thoſe who govern, than in granting ſomething to the People. But it will be ſaid, that ill'affected and factious Men may ſpread amongſt the People, and make them believe, that the Prince or Legiſlative act contrary to their 'Truſt, when they only make uſe of their due Prerogative. To this Mr. *Locke* anſwers, That the People, however, is to be Judge of 'all that; becauſe no Body can better judge whether his Truſtee or Deputy acts well, and according to the Truſt repoſed in him, 'than he who deputed him. He might make the like Query (ſays Mr. *Le Clerc*, from whom this Extract is taken) and aſk, whether, 'the People being oppreſs'd by an Authority which they ſet up but for their own Good, it is juſt that thoſe who are veſted with this 'Authority, and of which they are complaining, ſhould themſelves be Judges of the Complaints againſt them? The greateſt Flatter'ers of Kings dare not ſay, that the People are obliged to ſuffer abſolutely all their Humours, how irregular ſoever they be; and 'therefore muſt confeſs, that when no Regard is had to their Complaints, the very Foundations of Society are deſtroy'd; the *Prince* 'and *People* are in a *State* of War with each other, like two Independent States that are doing themſelves Juſtice, and acknowledge no 'Perſon upon Earth, who, in a ſovereign manner, can determine the Diſputes between them.' *Bibliotheque Univerſal.* Tom. xix. Pag. 591. Mr. *Sidney* in his *Diſcourſe upon Government*, Chap. iii. Sect. 41, ſays, 'They who create Magiſtracies, and give to them ſuch Name, 'Form, and Power, as they think fit, only know whether the End for which they were created, be perform'd, or not. They who 'give a Being to the Power which had none, can only judge whether it be employ'd to their Welfare, or turn'd to their Ruin. They 'do not ſet up one or a few Men that they and their Poſterity may live in Splendor and Greatneſs; but that Juſtice may be adminiſter'd, 'Virtue eſtabliſh'd, and Proviſion made for the publick Safety. No wiſe Man will think this can be done, if thoſe who ſet themſelves 'to overthrow the Law are to be their own Judges. If *Caligula*, *Nero*, *Vitellius*, *Domitian*, or *Heliogabalus* had been ſubject to no 'other Judgment, they would have compleated the Deſtruction of the Empire. If the Diſputes between *Durſtus*, *Evenus* the Third, '*Dardannus*, and other Kings of *Scotland*, with the Nobility and People, might have been determin'd by themſelves, they had eſcap'd 'the Puniſhments they ſuffer'd, and ruin'd the Nation as they deſign'd. Other Methods were taken; they periſh'd by their Madneſs; 'better Princes were brought into their Places, and their Succeſſors were, by their Example, admoniſh'd to avoid the Ways that had prov'd 'fatal to them. If *Edward* the Second of *England*, with *Gaveſton* and the *Spencers*, *Richard* the Second, with *Treſilian* and *Vere*, 'had been permitted to be Judges of their own Caſes, they who had murther'd the beſt of the Nobility, would have purſu'd their 'Deſigns to the Deſtruction of ſuch as remain'd, the Enſlaving of the Nation, the Subverſion of the Conſtitution, and the Eſtabliſh'ment of a meer Tyranny in the Place of a mix'd Monarchy. But our Anceſtors took better Meaſures. They, who had felt the 'Smart of the Vices and Follies of their Princes, knew what Remedies were moſt fit to be applied, as well as the beſt Time of apply'ing them. They found the Effects of extreme Corruption in Government to be ſo deſperately pernicious, that Nations muſt ne'ceſſarily periſh, unleſs it be corrected, and the State reduced to its firſt Principle, or alter'd. Which being the Caſe, it was as eaſy 'for them to judge whether the Governor who had introduced that Corruption ſhould be brought to Order, or remov'd, if he would 'not be reclaim'd; or whether he ſhould be ſuffer'd to ruin them and their Poſterity; as it is for me to judge, whether I ſhould put 'away my Servant, if I knew he intended to poiſon or murther me, and had a certain Facility of accompliſhing his Deſign, or whether 'I ſhould continue him in my Service 'till he had perform'd it. Nay, the Matter is ſo much the more plain on the Side of the Na'tion, as the Diſproportion of Merit between a whole People, and one or few Men entruſted with the Power of governing them, is 'greater than between a private Man and his Servant.' To this let us add the following Verſes of an antient *Greek* Poet, *viz.*

A. Σέβειν δὲ τὰς κρατούσας νόμος.
B. Οὐ παγκάλως δεῖ τοῖς πονηροῖς ἐπιτρέπειν,
Ἀλλ' ἀντιτάττεσθαι, εἰ δὲ μή, τ' ἄνω κάτω
Ἡμῖν ὁ βίος λύσει μεταστρέφεις ὅλος.

A { An ancient Law commands us to obey
Thoſe who in Government do bear the Sway:
B { But wicked Magiſtrates we may reſiſt,
Nor ſuffer them to do whate'er they liſt;
For then the World would in Confuſion lie,
And Civil States be Scenes of Anarchy.

Philemon in Adelph. Fragm. ix. *Edit. Cleric.*

the Publick forbid them to hold any longer. No ſmall Part of the Arguments, uſually brought for the oppoſite Opinion, fall of their own Accord, if it be well conſider'd, that theſe are two very different Things; A People have Power of applying Force to their Rulers, and of reducing them to Amendment, when they do not govern according to their Will; and, There is in the People, or in particular Perſons, a Right of defending their Life and Safety againſt their Prince, upon the Approach of extreme Danger, and when the Prince is manifeſtly turn'd an Enemy towards them. For the Reaſons which prove the latter of theſe Poſitions, do not, in like manner, evince the former: And yet many Men confound the one with the other. And thus too when it is ſaid, that a People who have given themſelves up to Slavery, have not thereby loſt all Right of reſcuing themſelves into Liberty and Security [r]; the Aſſertion will hold true only in this Senſe, that a People may defend themſelves againſt the extreme and unjuſt Violence of their Prince: Which Defence, if it ſucceeds proſperouſly, brings Liberty along with it as a neceſſary Attendant. In as much as the Lord, by thus changing himſelf into an Enemy, ſeems to abſolve the Subjects from their Obligation towards him: So that they are not bound to return under his Yoak, tho' he ſhould alter his cruel Reſolutions. Excepting in this Caſe, a People who have given themſelves under the Command of an abſolute Sovereign, have no more a Right of regaining their Liberty by Force, than I have of recovering a Thing by Force, which I have already, upon Bargain, deliver'd to another Man. For this civil Servitude is not ſo abhorrent from Nature, as ſome imagine; as that a Perſon, who at one Time, to avoid a greater Evil, finds it neceſſary for him to conſent to it, may afterwards, when Occaſion favours him, throw it off again, by the Right and Privilege which Nature allows him. And although the State of Slavery ſhould be contrary to the Inclinations of a particular People, either from the Beginning, or upon the changing of their Minds; yet 'tis by no means lawful, barely on this Account, to deprive the Prince of that Right which he hath already obtain'd: No more than it is lawful for the Seller to take away from his Chapman what he before deliver'd to him upon Contract; tho' he ſhould happen to find that the Sale did not prove to his Advantage.

VII. *Grotius* [a], in adjuſting theſe Matters, hath taken a Courſe not very different from that which we have here follow'd. Amongſt other things he well obſerves, that whether or no the extrem

[a] Lib. i. Chap. iv. Sect. 7.

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[r] No Man can ſo far part with his Liberty, as to give himſelf up wholly to an arbitrary Power, to be treated abſolutely as that Power thinks proper; for this would be to diſpoſe of his own Life, of which he is not Maſter. Much leſs has a whole People ſuch a Right, as every one of thoſe who compoſe it, is entirely deſtitute of. 'The natural Liberty of Man is to be free from any ſuperior 'Power on Earth, and not to be under the Will or Legiſlative Authority of Man, but to have only the Law of Nature for his Rule. 'The Liberty of Man in Society is to be under no other Legiſlative Power, but that eſtabliſh'd by Conſent in the Commonwealth; 'nor under the Dominion of any Will, or Reſtraint of any Law, but what the Legiſlative ſhall enact, according to the Truſt put in 'it. Freedom then is not what Sir *Robert Filmer* tells us, *A Liberty for every one to do what he liſts, to live as he pleaſes, and not be tied by any Laws:* But Freedom of Men under Government, is to have a ſtanding Rule to live by, common to every one of that 'Society, and made by the legiſlative Power erected in it. A Liberty to follow my own Will in all things, where the Rule preſcribes 'not; not to be ſubject to the inconſtant, uncertain, unknown, arbitrary Will of another Man: As Freedom of Nature is to be under 'no other Reſtraint but the Law of Nature. This Freedom from abſolute arbitrary Power is ſo neceſſary to, and cloſely join'd with 'a Man's Preſervation, that he cannot part with it, but by what forfeits his Preſervation and Life together. For a Man, not having 'the Power of his own Life, cannot by Compact, or his own Conſent, enſlave himſelf to any one, nor put himſelf under the abſo'lute arbitrary Power of another, to take away his own Life, when he pleaſes. No body can give more Power over it. Indeed, 'having, by his Fault, forfeited his own Life, by ſome Act that deſerves Death; he, to whom he has forfeited it, may (when he has 'him in his Power) delay to take it, and make uſe of him to his own Service, and he does him no Injury by it. For, whenever he 'finds the Hardſhip of his Slavery outweigh the Value of his Life, 'tis in his Power, by reſiſting the Will of his Maſter, to draw on 'himſelf the Death he deſires. This is the perfect Condition of Slavery, which is nothing elſe but the State of War continu'd between 'a lawful Conqueror and a Captive. For, if once Compact enter between them, and they make an Agreement for a limited Power on 'the one Side, and Obedience on the other; the State of War and Slavery ceaſes, as long as the like Compact endures. For, as has 'been ſaid, no Man can by Agreement paſs over, to another Nation, that which he hath not in himſelf, a Power over his own Life. 'I confeſs, we find among the *Jews*, as well as other Nations, that Men ſold themſelves; but 'tis plain, this was only to Drudgery, 'not to Slavery. For, it is evident, the Perſon ſold, was not under an abſolute, arbitrary, deſpotical Power. For the Maſter could 'not have Power to kill him at any Time, whom at a certain Time he was obliged to let go free out of his Service; and the Maſter 'of ſuch a Servant was ſo far from having an arbitrary Power over his Life, that he could not at Pleaſure ſo much as maim him, but 'the Loſs of an Eye or Tooth ſet him free.' Mr. *Locke* of *Civil Government*, Book ii. Chap. iv. Let us add the following Reflections of Mr. *Abbadie*. 'The natural Right of our Preſervation is altogether unalienable, that is to ſay, ſuch as we can never renounce en'tirely and abſolutely. It is true, that when I confederate myſelf with other Men to form a Society, 'tis upon this Condition, that I 'ſhall expoſe my own particular Perſon for the Preſervation of the whole; there would be no Way for a Society to ſubſiſt, if every 'one conſulted his own Safety only; and I ſhould loſe the Support that I meet with for my own Preſervation, in my Union with 'others. But, as we cannot ſay that Soldiers, who maintain themſelves in their Ranks, and fight valiantly in War, renounce the 'natural Care of their Preſervation, ſo we cannot ſay that private Perſons renounce the Right of their Preſervation, when, for the 'Love of their Country, they expoſe themſelves to the Danger of periſhing. 'Tis a Contradiction, that we ſhould for ever alienate 'this Right. How have Men, who enjoy the Privileges of civil Society, renounced this Right of Self-Preſervation, when thoſe who 'are cut off from Society, as Criminals condemn'd to Death, do not renounce it? So that if they make their Eſcape, and are taken 'again, they ſhall ſuffer the Puniſhment that their former Crime deſerv'd, in Execution of the Sentence that was pronounced againſt 'them before; but there will be no Indictment brought againſt 'em for their being willing to ſave themſelves, which is founded upon 'this Principle, That as Nature always returns, ſo the Rights of Nature are never loſt —— A Man who finds himſelf ill, may, and 'ought to make choice of a ſkilful Phyſician, to whom he will give a Power apparently arbitrary over his Body. I put my ſelf into 'your Hands, *he will ſay*, to do with me what you pleaſe. I will not contradict your Preſcriptions, and when I would do ſo, I deſire that my Servants may execute your Orders, and not mine, and that you may have the ſole Power in this Matter. I am certain 'that you would believe that ſuch a Man has, notwithſtanding all that, renounced neither the Right nor the Care of his Preſervation; 'if the Power which he gives over himſelf, unlimited in Appearance, were ſo in reality; and if it were evident, that the Phyſician 'would poiſon the ſick Man, might he not oppoſe him without breaking his Word and his Engagements? Is it not apparent, that there 'are, in that Caſe, two Extremities to be avoided? That a ſick Man ought not to be ſuffer'd to be Maſter of his Phyſician; but that 'tis 'alſo juſt for him to oppoſe the Phyſician, when it is notorious that he would poiſon the ſick Man? If it were not juſtifiable to dethrone a King, who is evidently endeavouring to ruin and undo us, it would follow that the Right of deſtroying us, without being 'capable of loſing the Crown on that ſcore, paſſing from Father to Son, we ſhould have loſt, or alienated for ever the Right of our 'own Preſervation.' *Defence de la Nation Britannique*, Pag. 260, 261. See the Homily of the Church of *England* againſt Rebellion, the ſecond Part.

extreme Injuries of Sovereigns may be forcibly reſiſted, is beſt to be underſtood by conſidering, as well the Nature of Sovereignty, as the preſumed Deſign of thoſe who firſt incorporated themſelves in a civil State. As for the former, 'tis not in the leaſt repugnant to the Nature of Sovereignty, that all the Actions of the Subjects ſhould by it be directed towards the publick Good, and that thoſe who oppoſe its Decrees, ſhould undergo the ſevereſt Puniſhment; without allowing it the Power to murther Men out of meer Humour, ſo as on no Account to be reſiſted. Nor is there any natural Connexion between an abſolute Power of procuring a Man's Safety, and an abſolute Power of deſtroying a Man at Pleaſure. And 'tis impoſſible to make out what ſuch a Power in the Sovereign, or ſuch an Obligation in the Subject, can contribute to the Peace and Security of the Commonwealth. On which Score it is evident, how falſe that Inference is, which ſome Men make; the ſupreme Authority is accountable only to GOD, therefore we have ſufficient Reaſon to conclude, that the Perſons who firſt united in a Community, deſigned to reſerve to themſelves no Degree of Right which ſhould hold good againſt the ruling Power. As if to defend one's Life againſt an injurious Aſſailant, were to proceed againſt him in a judicial Manner [a]! Nor is their Scruple of any Moment, who diſallow the Liberty of reſiſting Governors, in Caſes of barbarous Cruelty, on this Argument, *Becauſe we cannot frame to ourſelves any lawful Call, that the Subjects have to take up Arms againſt the chief Magiſtrate; ſince no Mortal can pretend to have a Juriſdiction over a Perſon of that Character.* As if Defence were the Effect of Juriſdiction! Or, as if he who ſets himſelf to keep off an unjuſt Violence, which threatens his Life, had any more need of a particular *Call*, than he who is about to fence againſt Hunger and Thirſt with Meat and Drink [b].

As to the latter Conſideration propoſed by *Grotius* about the Deſign of Societies, he rightly judgeth, that if thoſe Perſons, who by incorporating themſelves in States, gave the firſt Riſe to ſovereign Power, had been ask'd, whether they intended to lay this Burthen on all their Conſciences, that they ſhould rather chooſe to die, than, in any Caſe, to oppoſe by Arms the unjuſt Violence of their Superiors; they would certainly have anſwer'd, that it was never in their Thoughts to enjoin ſuch a Hardſhip. For this would have been a greater Inconvenience, than that which they endeavour'd to avoid by entering into a civil Community. For before they lay open to the Injuries of many; but ſtill with the Right and Power of reſiſting them: Whereas by this means they muſt have bound themſelves quietly to ſuffer any Injuries from him, whom they had arm'd with their own Strength. And no doubt Fighting and Contention is a leſs Evil than certain Death.

VIII. But this Sacredneſs which we have been hitherto touching upon, doth not belong to any Kings, but thoſe who are really and ſtrictly ſuch. It cannot therefore be claim'd by thoſe, who, though they bear the Title of Kings [1], are yet ſubject to the Power of the People; as were the antient Kings of *Sparta*, and many elſewhere; inveſted rather with the Authority to perſuade, than with Power to command [2]. Such a King was *Mezentius* in *Virgil* [c], againſt whom

----furiis ſurrexit Etruria juſtis,
Regem ad ſupplicium præſenti morti repoſcens.

By juſt Revenge the *Tuſcans* ſet on fire,
With Arms their King to Puniſhment require.

Thoſe Princes, likewiſe, forfeit this Sacredneſs, who have either laid down their Dignity, or have utterly deſerted or abandon'd the Kingdom; againſt whom, in caſe of grievous Injuries offer'd by 'em to others, it is lawful to proceed altogether in the ſame manner, as we might againſt private Perſons. As for the Example of *Semiramis*, who, having prevail'd with her Huſband to reſign the Sovereignty to her for Five Days, made uſe of the Grant to take away the Life of the Giver; this Story proves nothing elſe but the great Wickedneſs of the Wife, and the no leſs Folly of the Husband [d]. Yet it ſometimes happens, that thoſe who have either voluntarily laid down their Authority, or have been deprived of it by ſome Misfortune, are ſtill permitted to enjoy that formal Veneration of the People, which uſed to be paid to Princes, and all other external Badges of Majeſty. Which Privilege, as it is to be look'd on as meer Imagery, made up of nothing but the regal Trappings and Ornaments; ſo, unleſs it hath been confirm'd by ſome Pact and Agreement, it muſt be conceiv'd to depend entirely on the Favour and Complaiſance of others [e]. Thus *Labarde*, in his Hiſtory of *France* [f], rightly obſerves, That whilſt *Sedan*, and the Territories depending on it, was neither feudatory to the Emperor, nor to the King of *France*, nor to any other Monarch, or State, the Lords and Proprietors were truly ſovereign Princes. But after that *Frederic Maurice*, Duke of *Bouillon*, had reſign'd this City, with its Dependencies, to *Lewis* the Thirteenth of *France*, receiving in lieu of it certain Lands belonging to the *French* Crown; he required Security to be given him, that he and his Poſterity ſhould retain the Title and Character of the former Dignity: Which could not be afterwards reckoned a true independent Honour, ſuch as accompanies ſovereign Power; but only a nicer Shadow of princely Greatneſs, having no farther Effect, than the obtaining ſuch a certain Place among the noble Families of *France*, and ſome other ornamental Privileges. And the Truth of this appears evidently from that Act of the Duke, in deſiring Security for his Titles, when he gave up his Dominions. Since thoſe

[a] *Comp.* Bœcl. *ad* Grot. *d. l.* [b] *Comp.* Ziegler. *ad Grot. d. l.* [c] *Æn.* viii. *v.* 494, 495. [d] *Diodor. Sic.* Lib. ii. Chap. xviii.
[e] An Inſtance of which we have in *Dairo* of *Japan*. [f] Lib. x. Pag. 684.

[1] Vide *Grot.* L. Chap. iv. Sect. 8. [2] This is what *Tacitus* relates of the ancient Kings of *Germany*; *Mos Rex vel Princeps, prout Decus belloru, prout facundia eſt, audiuntur, auctoritate magis ſuadendi, quam jubendi poteſtate. De Morib. Germanor.* Chap. xi. *Vide, etiam*, Chap. vii.

who truly and properly poſſeſs the ſovereign Dignity, have no need thus to bargain for the Enjoyment of it.

Another Way by which a King falls back [1] into the Condition of a private Man, is in caſe his Kingdom be ſeized upon as forfeited, either by *Felony*, committed againſt him whoſe *Fief* it is; or by Virtue of ſome Clauſe inſerted in the Donation of the Crown, importing, that if the King ſhould act thus or thus, the Subjects ſhould be immediately releas'd from all Obligation to Obedience. So, likewiſe, if, in conferring the Sovereignty, it were expreſsly agreed, that the Prince, in ſome particular Deſigns or Practices might be reſiſted; ſuch a Covenant may, no doubt, be put in Execution. Laſtly, if a Prince conſtituted by the People ſhall go about to alienate his Kingdom, or to change the Manner of holding the Government, 'tis manifeſt, not only that any ſuch Act of his is null and void; but, likewiſe, that, in Caſe he endeavour to compaſs his Deſign by Force, the People may oppoſe him in the ſame Manner [a].

IX. It is another difficult Queſtion, What may lawfully be done, and what not, againſt Invaders and Uſurpers of Sovereignty; and this, not after that long Poſſeſſion, or ſome ſubſequent Pact, hath given them a proper Right to govern, but ſo long as the unjuſt Cauſe of their poſſeſſing the Throne continues, and whilſt they ſeem to be ſupported only by Strength? On this Head we are firſt of all to enquire, Whether the Commands of ſuch Uſurpers, whilſt in Poſſeſſion, have the Power of obliging? And here we muſt recollect from what hath been formerly obſerved, that no Obligation to Obedience can be produced in me, unleſs the other Party had a lawful Authority over me. Meer Violence may indeed lay on a Man ſome extrinſecal Neceſſity of doing this or that; but it cannot impoſe an Obligation, which is an intrinſecal Engagement ſo binding to the Mind, as to make the Neglect or Omiſſion of it ſinful. When, therefore, a Man is threatened with Violence from a ſtronger Hand, he is perhaps compell'd to perform thoſe things to which he hath no Obligation, and which he really hates and abhors. But, if he afterwards find Opportunity, no Man will cenſure him for breaking his Way through theſe unjuſt Impoſitions. But what is to be done, if a Perſon, who at firſt indeed ſeiz'd upon the Government by Violence and evil Arts, would yet be thought to obtain it by Right, and, tho' he repoſeth his Confidence in Arms, yet profeſſeth to be no Enemy, but a true and proper Prince? As to ſuch Caſes this ſeems in general to be the moſt probable Solution, that he who actually poſſeſſeth the Sovereignty, by whatſoever Means he acquires it, is ſo long to be acknowledg'd by the Subjects for their lawful [2] Prince, as there appears no one who can claim the Crown by a better Right. For then it is conſonant to Reaſon, that the Poſſeſſor's Power ſhall hold good, provided he act like a legal Governor: It being the common Intereſt of the People, that the Care and Direction of the State ſhould rather lie in any one Perſon, than that, on the Account of having no certain Head, it ſhould be involv'd in endleſs Diſputes and Diſturbances. Since, therefore the Subjects muſt be, in this Caſe, ſuppoſed to have, at leaſt tacitly, conſented to the Authority of their new Maſter, they ſhall be truly oblig'd to yield Obedience to him. Thus 'tis well known, by what Means the Family of the *Cæſars* rais'd themſelves to the Imperial Dignity; and yet St. *Paul* [3] aſcribes the ἐξουσία, the proper Power to them, as thoſe who were to be obey'd for *Conſcience Sake*. And 'twas our bleſſed Saviour's Command, *Render unto* Cæſar *the things that are* Cæſar's [4]. For at that Time there was no particular Perſon who had a better Title to challenge the ſupreme Authority; and as for the *Senate* and *People* of *Rome*, they had receded from their ancient Right, tho' more out of Fear, and for Want of Strength to make Oppoſition, than becauſe they approved of this Alteration in the Government. It was a remarkable Law of *Henry* VII. of *England*, which enacted, that no Perſon who had follow'd the Party of the Prince then reigning, ſhould be ever impleaded or condemn'd for that Act as a Criminal, either by legal Proceſs, or by Act of Parliament [5]. The Reaſons of which are diſcuſs'd by my Lord *Bacon*

[a] Add. *Bæcler* ad *Grot.* Lib. i. Chap. iv. Sect. 10. [b] *Ariſtophanes* (*in Ranis*, Act v. Sc. iv. V. 21, 22, 23.) hath a notable Remark to this Purpoſe: 'Men ſhould not breed up a Lion's Whelp in their City; but if he be once bred up, his Temper muſt be complied with.'

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[1] *Vide* Grot. *ubi ſupra*, Sect. 12. See our Author in the ſixth Chapter of this Book, *Sect.* 10, 11. [2] This may ſerve to decide the Queſtion about the Aſſaſſination of *Julius Cæſar*, which has lately been diſputed with great Warmth, in *England*, between the Author of *Cato*'s Letters and Mr. *Dennis*. Compare Mr. *Bayle*'s *Hiſtorical and Critical Dictionary*, Art. *Brutus*, Lett. E. F.

[3] *Rom.* xiii. 1, 5. [4] *Matt.* xxii. 21.

[5] 'They who have more Regard to the prevailing Power than to Right, and lay great Weight upon the Statute of *Henry* the Seventh, which authorizes the Acts of a *King de Facto*, ſeem not to conſider, that thereby they deſtroy all the pretended Right of Inheritance; that he only is *King de Facto* who is receiv'd by the People; and that this Reception could neither be of any Value in itſelf, nor be made valid by a Statute, unleſs the People and their Repreſentatives who made the Statute, had in themſelves the Power of receiving, authorizing, and creating whom they pleaſe. For he is not *King de Facto* who calls himſelf ſo, as *Perkin* or *Simnel*, but he who by the Conſent of the Nation is poſſeſs'd of the Regal Power. If there were ſuch a Thing in Nature as a natural Lord over every Country, and that the Right muſt go by Deſcent, it would be impoſſible for any Man to acquire it, or for the People to confer it upon him, and to give the Authority to the Acts of one, who neither is, nor can be a King, which belong only to him who has the Right inherent in himſelf, and inſeparable from him. Neither can it be denied, that the ſame Power which gives the Validity to ſuch Acts as are perform'd by one who is not a King, that belongs to thoſe of a true King, may, alſo, make him King; for the Eſſence of a King conſiſts in the Validity of his Acts. And 'tis equally abſurd for one to pretend to be a King, whoſe Acts as King are not valid, as that his own can be valid, if thoſe of another are; for then the ſame indiviſible Right which our Author and thoſe of his Principles, aſſert to be inſeparable from the Perſon, would be, at the ſame time, exercis'd and enjoy'd by two diſtinct and contrary Powers. Moreover it may be obſerv'd, that this Statute was made after frequent and bloody Wars, concerning Titles to the Crown; and whether the Cauſe were good or bad, thoſe who were overcome were not only ſubject to be killed in the Field, but alſo to be proſecuted as Traytors, under the Colour of Law. He who gain'd the Victory was always ſet up to be King, by thoſe of his Party, and he never fail'd to proceed againſt his Enemies as Rebels. This introduced a horrid *Series* of deſtructive Miſchiefs. The Fortune of War varied often; and I think it may be ſaid, that there were few, if any, great Families in *England*, that were not either deſtroy'd, or, at leaſt, ſo far ſhaken, as to loſe their Chiefs, and many conſiderable Branches of them: And Experience

Bacon in his Hiſtory of that Reign [a]. After the ſame Manner in an hereditary Kingdom, when the Right ſeems to lie doubtfully between two or more Competitors; whilſt the Controverſy is yet in Agitation, and 'till ſuch Time as it may be determin'd, either by an amicable Accommodation, or by Arms, 'tis the ſafeſt Courſe to obey him who hath the actual Poſſeſſion [b]. And much more will this Conduct be juſtifiable in Strangers, whom it doth not concern to examine the [1] Titles by which the Sovereignty hath been obtain'd, but who barely go along with the Poſſeſſion; eſpecially when the Poſſeſſor is ſupported by great Strength and Power.

X. But when a Perſon, driving out the lawful Prince, ſeizeth the Government, and ſets himſelf up for King, tho' he be really the Uſurper of another Man's Right; what Courſe ſhall an honeſt Subject take under this Difficulty, in as much as he ſeems ſtill to owe Allegiance to his rightful Sovereign during his Life? On which Point it appears reaſonable to affirm, that things may often come to ſuch an Iſſue as ſhall make it not only allowable, but good and neceſſary to obey the Ruler in Poſſeſſion by what Means ſoever the Poſſeſſion was gain'd. As if the lawful Sovereign be reduced to ſuch Streights, that he can no longer exerciſe any Part of the regal Office towards his People. For then, though the Commands of the Uſurper, being deſtitute of regal Power, are not, in themſelves, obligatory; yet it becomes a wiſe Man to conſult the Welfare of himſelf and his Affairs, to make Proviſion againſt the future, and with Warineſs and Caution to reflect on his preſent Condition; that he may not raſhly thruſt his Life and Fortunes into Danger: As he would do, ſhould he, by vain Obſtinacy and Oppoſition, draw the Uſurper's Rage upon his own Head, without procuring the leaſt Advantage, either to his Country, or to the ejected Prince. Some are willing to deduce this Doctrine from the xiiith Chapter of the Epiſtle to the *Romans*, where the Apoſtle ſays, we ought to obey, οὐ μόνον διὰ τὴν ὀργήν, not *only for Wrath*; as if he ſhould have told us, it was not the Part of a prudent Perſon to provoke the Anger of him who bears the Sword, by an unneceſſary Stubborneſs; and that therefore, out of Regard to our own Safety, we ſhould be ſubject ταῖς ὔσαις ἐξουσίαις, *to the Powers that are in being*, that is, which have the preſent [2] Poſſeſſion. Since then a State cannot ſubſiſt without ſome Government, and ſince he who actually wears the Crown, doth, at leaſt, in ſome tolerable Meaſure, maintain the publick Security; an honeſt Man and a Lover of his Country ought not, when the Poſture of Affairs requires this Proceeding, by an uſeleſs Reſiſtance, to give Occaſion to farther Troubles. But what ſeems hardeſt of all to be reſolv'd is, how the Subjects can, at the ſame Time, keep up two contrary Obligations, one to the lawful Prince now expell'd, and the other to the Poſſeſſor, who hath conſtrain'd them to ſwear Allegiance to him, and for the preſent executes the regal Office. For how can a Man pay Fide-

[a] 'Tis *Irene*'s Advice in the Hiſtorian (*Nicet. Choniat.*) *Nec imperatorem qui abſit quærendum, nec qui adſit pellendum eſſe*; Neither to ſeek after a Prince who hath deſerted the Crown, nor to diſturb a Prince who poſſeſſeth it.

[b] *Caſſius Clena*, who had ſtuck to the Party of *Niger* againſt *Severus*, thus makes his Defence to the latter: 'I own'd neither You 'nor *Niger* for my proper Maſter; and tho' I appear'd on the other Side, yet my Aim and Endeavour was not to oppoſe You, but 'but to vanquiſh *Julian*. Since then my Deſign was the ſame with Yours, I am in this Reſpect certainly guilty of no Fault. Nor 'am I more worthy of Blame for not revolting afterwards to your Party. For You would not Yourſelf have been willing that any 'Friend of Yours ſhould have relinquiſh'd your Cauſe, and gone over as a Deſerter to *Niger*.' Xiphilin. *Epit.* Dion. *ad Ann.* 194. & Zonar. *Tom.* 2.

'taught, that inſtead of gaining any Advantage to the Publick, in Point of Government, he for whom they fought, ſeldom prov'd 'better than his Enemy. They ſaw that the like might again happen, tho' the Title of the reigning King ſhould be as clear as Deſcent 'of Blood could make it. This brought Things into an uneaſy Poſture; and 'tis not ſtrange, that both the Nobility and Commonalty ſhould be weary of it. No Law could prevent the Dangers of Battle; for he that had Followers, and would venture himſelf, 'might bring them to ſuch a Deciſion as was only in the Hand of GOD. But thinking no more could juſtly be required to the full 'Performance of their Duty to the King, than to expoſe themſelves to the Hazard of Battle for him; and not being anſwerable for 'the Succeſs, they would not have that Law, which they endeavoured to ſupport, turned to their Deſtruction by their Enemies, who 'might come to be Interpreters of it. But as they could be exempted from this Danger only by their own Laws, which could authorize 'the Acts of a King without a Title, and juſtify them for acting under him, 'tis evident, that the Power of the Law was in their 'Hands, and that the Acts of the Perſon who enjoy'd the Crown were of no Value in themſelves; the Law had been impertinent, if 'it could have been done without Law, and the Intervention of the Parliament uſeleſs, if the *Kings de Facto* could have given Authority to their own Acts. But if the Parliament could make that to have the Effect of Law which was not Law, and exempt thoſe 'that acted according to it from the Penalties of the Law, and give the ſame Force to the Acts of one who is not King, as of one who 'is, they cannot but have a Power of making him to be King who is not ſo; that is to ſay, all depends entirely upon their Authority. Beſides, he is not King who aſſumes the Title to himſelf, or is ſet up by a corrupt Party; but he who, according to Uſages re'quir'd in the Caſe, is made King. If theſe are wanting, he is neither *de Facto* nor *de Jure*, but *Tyrannus de Titulo*. Nevertheleſs, 'this very Man, if he comes to be receiv'd by the People, and placed in the Throne, he is thereby made *King de Facto*. His Acts 'are valid in the Law, the ſame Service is due to him as to any other: They who render it are in the ſame Manner protected by the 'Law: That is to ſay, he is truly King. If our Author therefore allow ſuch to be Kings, he muſt confeſs that Power to be good 'which makes them ſo, when they have no Right in themſelves. If he deny it, he muſt not only deny that there is any ſuch Thing as 'a *King de Facto*, which the Statute acknowledges, but that we never had any King in *England*; for we never had any other than 'ſuch, as I have proved before. By the ſame means he will ſo unravel all the Law, that no Man ſhall know what he has, or what he 'ought to do or avoid; and will find no Remedy for this, unleſs he allow that Laws made without Kings, are as good as thoſe made 'with them, which returns to my Purpoſe: For they who have the Power of making Laws, may, by Law, make a King as well as 'any other Magiſtrate. And indeed the Intention of this Statute could be no other than to ſecure Mens *Perſons* and *Poſſeſſions*, and 'ſo far to declare the Power of giving and taking away the Crown to be in the Parliament, as to remove all Diſputes concerning 'Titles, and to make him to be a legal King, whom they acknowledge to be King.' *Sidney*'s Diſcourſe upon Government, Chap. iii. Sect. 35.

[1] See the Note of the deceas'd Mr. *Hertius*, who gives ſeveral Inſtances of this. It is certain that this commonly takes place, both becauſe Prudence requires it, and becauſe of the Difficulty there is in determining, whether there can be a true Uſurpation, deſtitute of all Shadow of Right. But, tho' the Injuſtice ſhould be moſt manifeſt, and we might, without Fear, refuſe to acknowledge the Uſurper, how are we oblig'd to it? It is plainly the Intereſt of Mankind that we ſhould not, in order to avoid giving a Handle to bold and wicked Men, by a ſeeming Approbation of their Crime. I ſay nothing of Treaties, by which we may be bound to aſſiſt an oppreſs'd People, or to ſupport a lawful King when he is dethron'd. Theſe Caſes will admit of no Diſpute. What is yet more, we may legally take Arms to deliver the Subjects of another State, from the Oppreſſion of a Sovereign, who has abus'd the Power they have given him. *Grotius* is ſufficient to prove this, Lib. ii. Chap. xxv. Sect. 8. See, alſo, Chap. xvi. Sect. 17, 18. of the ſame Book, and my Remark on Chap. xviii. Sect. 7.

[2] The Author has taken this Explication from an *Engliſh* Writer, (I mean Dr. *Sanderſon*, Biſhop of *Lincoln*) who wrote a learned Treatiſe, *De Obligatione Conſcientiæ*, Prælect. v. Sect. 17. Pag. 178. *Edit. Londin.* 1661.

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lity to two together, who are bent upon mutual Deſtruction? And yet, on the other Hand, the Covenant made with the Uſurper by the Subjects, and the Faith which they have engaged to him, ſeem utterly unable to take away the Rights and Pretenſions of the lawful Sovereign: As the Compoſition which a Countryman makes with Robbers, to hinder them from waſting his Eſtate, is incapable of extinguiſhing his Landlord's Right and Property. *Grotius*'s Opinion on the Caſe is this, that, *whilſt the Uſurper is in Poſſeſſion, the Acts of Sovereignty, which he exerciſeth, have a Power of obliging; not by Virtue of his Right (for Right he hath none) but becauſe 'tis in the higheſt Degree probable, that he who hath the juſt Right to the Throne, had rather, as Things now ſtand, that the Commands of him who is thus in Poſſeſſion ſhould hold good, than that, by the ceaſing of all Laws and Juſtice, the Commonwealth ſhould be thrown into utter Confuſion* [a].

And, indeed, we ought, by all Means, to preſume, that every Prince hath ſo much Humanity, as to deſire that his Subjects ſhould be preſerved by any Method whatſoever, rather than by ſtriving in vain with their ill Fortune, and unſeaſonably expreſſing an Affection without Strength to ſupport it, they ſhould give themſelves up for a fruitleſs Sacrifice [b]. When the *Romans*, being themſelves in Diſtreſs, were petition'd by their Allies the *Petilini* for Relief, their Anſwer was, 'They confeſs'd themſelves to be no longer 'in a Condition of ſupporting their diſtant De-'pendents, and therefore deſired the Petitioners 'to return Home, and, ſince they had already 'given the utmoſt Specimen of their Fidelity, 'to conſult amongſt themſelves for the future 'how to make the beſt of their Affairs [c].' There appears nothing therefore that can with more Probability be affirm'd in the Point before us, than this, that if the lawful Prince be brought into ſuch Streights, as that neither he himſelf is able to afford his Subjects due Protection, nor they, on the other hand, able to reſiſt the Uſurper, without their imminent Ruin; it muſt be taken for granted, that he hath, for a while, releas'd his Subjects from their Obligation towards him, till ſuch time as Providence ſhall open a Way to his Reſtoration; ſo far as is neceſſary to ſecure them from Deſtruction and Danger. And thus too the Fealty promis'd to the Uſurper, ſeems ſo far only to be binding, as that it ſhall be a kind of temporary Engagement, to expire ſo ſoon as the expell'd Prince ſhall recover his Dominions; and conſiſting not ſo much in any internal Neceſſity laid upon the Conſcience, as in the Force of that Terror under which they now ſtand. *Grotius* [d], in another Caſe, allows of *external* Right and Property; and we ſee no Reaſon why there may not be admitted ſome kind of *external* Obligation, not affecting the Conſcience [e]. If we put all theſe Conſiderations together, we ſhall find, that there is ſcarce any Caſe, in which a private Perſon may, by his own Authority, diſturb an unjuſt Poſſeſſor of the ſovereign Dignity: Eſpecially ſince Experience witneſſeth, that ſuch Conſpiracies commonly exaſperate the uſurping Powers to greater Violence and Oppreſſion [f] [3].

[a] Lib. i. Chap. iv. L. 15. Add. Lib. ii. Chap. iv. Sect. 14.

[b] Comp. 2 *Sam.* xv. 25, 26. 1 *Kings* iii. 26.

[c] Add the Speech of King *Ferdinand*, when he fled from *Naples*, in *Guicciardine*, Book i. near the latter End.

[d] Lib. iii. Chap. vii. Sect. 6.

[e] See 1 *Kings* ii. 2 *Chron.* xxiii. On which Place Mr. *Hobbes* rightly obſerves that *Athaliah* was dethron'd, not by any Right which the High-Prieſt had in that Capacity, but by the Right of the young King. *Leviath.* Chap. xliv. What Opinion we ought to entertain of thoſe Laws which permit or reward the Killing of Tyrants, ſee in *Bæcler.* on *Grot.* Lib. i. Chap. iv. Sect. 17.

[f] *Vide Juſtin.* Lib. xvi. Chap. v. *ſub. fin.*

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[1] See what Mr. *Buddeus* ſays about the Laws of *Sylla*, in his *Specimen Juriſp. Hiſtoricæ*, Sect. 108, 109. As, alſo, the *Nouv. de la Rep. des Lett.* of Mr. *Bernard*, for *March* 1707. Pag. 260.

[2] Vide *Livy*, Lib. xxiii. Chap. xx.

[3] As this whole Chapter regards one of the general Duties of Subjects, I think I cannot do better, before I proceed to the following one, which treats of the *Duties of a Sovereign*, than to ſet down here in a few Words the principal *Duties of Subjects* of what Rank and Condition ſoever. Our Author has ſaid nothing of 'em in this Work: But he has given us a conciſe and clear Idea of them in the laſt Chapter of his Abridgment *de Officio Hominis & Civis*, which I ſhall here tranſlate, and add ſomething to it here and there, which will clearly be diſtinguiſh'd by Crotchets. The *Duties of Subjects*, ſays he, are either *general* or *particular*. The firſt ariſe from the common Obligation which they are all under as ſubmitting to the ſame Government, and as Members of the ſame Civil State. The others reſult from the different Employments and particular Offices, with which each Subject is entruſted by his Sovereign. I. The *General Duties* of Subjects reſpect their Behaviour either towards the *Governors of the State*, the *whole Body of the People*, or their *Fellow-Subjects*. 1. As to the *Governors*, every Subject owes them the Reſpect, Fidelity, and Obedience which their Character demands: So that, conſequently, they ought to live eaſy under, and be ſatisfy'd with the preſent Government, and not to form any Cabals, or ſeditious Practices againſt it; to be attach'd to the Intereſt of their Prince, and to reſpect and honour him more than any other, to ſpeak and think favourably and with Deference of him and all his Actions. [We ought even to have a Veneration for the Memory of good Princes: But for thoſe who have not been ſuch, behold the judicious Reflections of *Montague*: 'Among thoſe Laws, *ſays he*, 'which relate to the Dead, I take that to be the beſt, by which the Actions of Princes are to be examin'd after their Deceaſe. They 'are equal to at leaſt, while alive, if not above the Laws: So that what Juſtice could not inflict upon their Perſons, is but reaſonable 'ſhould be executed upon their Reputation, and the Eſtates of their Succeſſors, Things that we often value even above Life itſelf. 'This is a Cuſtom of ſingular Advantage to thoſe Nations where it is obſerv'd, and by all good Princes as much to be deſired, 'who have Reaſon to complain that the Memories of the Tyrannical and Wicked ſhould be treated with the ſame Honours and Re-'ſpects as theirs. We owe, indeed, Subjection and Obedience to all our Kings alike, for that reſpects their Office; but as to Eſteem, 'as well as Affection, thoſe are only owing to their Virtue. Let it be allow'd then, that, according to the Rule of Politicks, we are 'patiently to endure unworthy Princes; to conceal their Vices, and to aſſiſt them in their indifferent Actions, as long as their Authority 'ſtands in need of our Support. But the Relation of a Prince and Subject being once ended, there is no Reaſon why we ſhould 'deny, to our own Liberty and common Juſtice, the Publiſhing of our real Wrongs and Sufferings; and to forbid good Subjects the 'Glory of having with Reſpect and Faithfulneſs ſerv'd a Prince, whoſe Imperfections were to them ſo well known, were to reach 'Poſterity of ſo uſeful an Example. And thoſe, who out of Regard to ſome ſecret Obligation, contrary to their own Knowledge 'and Conſcience, eſpouſe the Quarrel, and vindicate the Memory of a faulty Prince, do a particular Act of Juſtice, at the Expence of, and 'to the Diſadvantage of the publick one. *Livy*, with Abundance of Truth, ſays, That the Language of Men educated in Court, was 'always full of Vanity and Oſtentation, and that the Characters they give of their Princes are ſeldom true; every one indifferently 'magnifying his own Maſter, and ſtretching his Commendations to the utmoſt Extent of Valour and ſovereign Grandeur. And perhaps ſome may condemn the Boldneſs of thoſe two Soldiers, who, the one being aſk'd by *Nero*, *Why he did not love him*, anſwer'd him plainly to his Face, *I lov'd thee whilſt thou wert worthy of it, but ſince thou art become a Parricide, an Incendiary, a Waterman, 'a Player, and a Coachman, I hate thee as thou doſt deſerve*: The other being aſk'd, *Why he ſhould attempt to kill him*, as warmly reply'd, *Becauſe I could think of no other Remedy againſt thy perpetual Miſchiefs*. But the publick and univerſal Teſtimonies that were given of him after his Death, and will be to all Poſterity, both of him, and all other wicked Princes like him, his Tyrannies and abominable Deportment conſider'd, who in his right Senſes can blame? I am ſcandaliz'd, I own, that in ſo ſacred a Government as that of the *Lacedæmonians*

'*Lacedemonians*, there should be mixt so hypocritical a Ceremony at the Interment of their Kings; where all the Confederates and 'Neighbours, and all Sorts of Degrees of Men and Women, as well as their Slaves, cut and slash'd their Foreheads in Token of 'Sorrow, and repeated in their Cries and Lamentations, that that King (let him be as wicked as the Devil) was the best that ever they 'had, by this means attributing to his Quality the Praises which only belong to Merit; and that which is properly due to the su-'preme Merit, tho' lodg'd in the lowest and most inferior Subject.' *Essais*, Lib. i. Chap. iii] 2. With Respect to the *whole Body of the People*, 'tis the Duty of every good Subject to make it an inviolable Law to himself, to prefer the Good of the Publick to any other Motive or Advantage whatsoever; chearfully to sacrifice his Fortune, Life, and even all that he values in the World for the Preservation of the State; and to employ all his Wit, Industry, and Address, to advance the Honour, and to promote the Advantage of his own Country. [But we must here observe, that a private Interest is not always oppos'd to that of the Publick. Moreover, the common Duties of Subjects answer in this Respect to one another, so that the Engagement of every particular Person does in some Manner depend upon the performing of what the rest are oblig'd to do, as well as himself, for the publick Good. For, indeed, the publick Good is only the Consequence of the united Force and Services of many conducing to the same End. If then, in a State, it become customary for the Generality openly to prefer their own private Interest to that of the Publick; a good Subject will not in that Case be to blame in the least, in not caring to expose his Person or his Fortune, by a Zeal impotent and useless to his Country. *Titius Observ.* DCCXXVIII.] 3. And lastly, the Duty of a Subject towards his *Fellow-Subjects* is to live with them in a peaceable and friendly Manner; and to be good-humour'd and complaisant to 'em in the Affairs of Human Life, to give Mankind no Uneasiness, by peevish and obstinate Tempers; and, in short, not to envy or oppose the Happiness or Advantage of any.

II. The *Particular Duties* of Subjects are annex'd to certain Posts and Employments, the Discharge of which influences, in some Measure, either the whole Government of the State, or only one Part. There is one general Maxim which serves for all, and that is, that no one aspire to any publick Employment, or even presume to accept of it, when he knows himself not duly qualified. '[Those few wise and good Men who are Members of the Commonwealth, would doubtless be better pleas'd to retire and live at Ease; 'full of that sweet Content, which excellent and worthy Persons taste, in the Contemplation of the Beauties of Nature, and the 'Works of Providence, than to *sacrifice all this Satisfaction* to Business and a publick Post; were it not that they hope to do some 'good, in being serviceable to their Country by their Endeavours, and in preventing the Administration of Affairs from falling into 'unskilful Hands. This may, and ought to prevail with Persons of this Character, to consent to the Trouble of being Magistrates: 'But to cabal and make Parties, and court Employments of Trust with Eagerness and Passion, especially such as are judicial, is a 'very base and scandalous Practice, condemn'd by all good Laws, even those of Pagan Republicks (as the *Julian* Law among the '*Romans* abundantly testifies) unbecoming a Man of Honour; and the strongest Sign that can be, that the Person is unfit for the Trust 'he seeks so vehemently. To buy publick Offices is still more infamous and abominable, the most sordid, and the most villainous Traf-'fick in the World: For it is plain, he that buys in the Piece, must make himself whole by selling out again in Parcels. Which was 'a good Reason for the Emperor *Severus*, when he was declaiming against a Fault of this Nature, to say, *That it was very hard to 'condemn a Man for making Money of that which he had given Money for before.* ——— Just as a Man dresses and sets 'his Person in Order and Form, putting on his best Face before he goes Abroad, that he may make a Figure, and appear well in Com-'pany; so is it fit that a Man should learn to govern his own Passions, and bring his Mind to good Habits, before he presume to 'meddle with publick Business, or take upon him the Charge of governing other People. No Man is so weak, as to enter the Lists 'with an unmanag'd Horse, or to hazard his Person with such an one, in any Service of Consequence and Danger; but trains and 'teaches him first, breeds him to his Hand, and uses him to the Exercise he is design'd for: And is there not the same Reason that this 'wild and restless Part of our Soul should be tamed and accustomed to bear the Bit? Should be perfectly instructed in those Laws 'and Measures which are to be the Rules of our Actions, and upon which the good or ill Conduct of our Lives will depend? Is it 'not reasonable, I say, that a Man should be Master of his own private Behaviour, and expert in making the best of every Accident 'and Occasion, before he venture upon the publick Stage; and either give Laws to others, or correct them for the Neglect of those 'already made? And yet (as *Socrates* observ'd very truly) the Manner of the World is quite otherwise: For, tho' no body undertakes 'to exercise a Trade, to which he has not been educated, and served a long Apprenticeship; how mean and mechanical soever the 'Calling be, several Years are bestowed upon the learning of it; yet in the Case of publick Administrations, which is of all other 'Professions the most intricate and difficult (so absurd, so wretchedly careless are we) that every body is admitted, every body thinks 'himself abundantly qualified. These Commissions are made Compliments and Things of Course, without any Consideration of 'Mens Abilities, or regarding at all, whether they know any thing of the Matter; as if a Man's Quality, or the having an Estate in 'the Country, could inform his Understanding, or secure his Integrity, or render him capable of discerning between Right and Wrong, 'and a competent Judge of his poorer (but perhaps much honester and wiser) Neighbours. *Charron de la Sagesse*, Liv. iii. Chap. 17. 'Sect. 1, 2.] But we must still say something more. 1. *Ministers of State*, or *Privy-Counsellors*, ought with the greatest Application to study perfectly the Affairs and Interests of the State in all the Parts of Government: And to propose faithfully, and in the most proper manner, whatever appears to them to be advantageous to the Publick, without being influenced by either Affection, Passion, or any sinister Views: The publick Good ought to be the only Design of all their Advice and Endeavours, and not the Advancement of their own private Fortunes, and the promoting their own Greatness and Power. Nor must they ever, by vile and nauseous Flattery, countenance or encourage the criminal Inclinations of the Prince. They should never be engag'd in any Faction or Party whatsoever; keep nothing secret that ought to be discover'd, nor discover any Thing that ought to be kept secret; should still shew themselves above the Power of all Temptations; and never neglect the Affairs of the State for their Pleasures, or private Concerns. ['Now 'in Persons thus to be chosen and employ'd, several Qualifications are necessary: As first of all, it is necessary to choose such as are 'faithful, and fit to be trusted; that is, in one Word, Men of Virtue and good Principles. *I take it for granted* (says *Pliny*) *that the 'better Man any one is, the more firm and true he is, and more safely to be depended upon.* 2. They must be Persons of Ability, and pro-'per for this Office, not only in Regard of their Knowledge and Learning in general, but upon the Account of their Skill in Poli-'ticks, and that express Form of Government in particular; such as have been used and try'd before, and have come off with Ho-'nour and Success, versed in Business, and accustomed to Difficulties: For Hardships and Adversities are the most useful and improving 'Lessons. *Fortune*, says *Mithridates* in *Salust, in the Room of many Advantages which she has torn from me, has given me the Faculty 'of Advice and Persuasion.* And, in one Word, they must be wise and discreet, moderately quick, and not too sprightly and enter-'prizing, for such Men will be always projecting. And *Men of Fire* are more for Change than for steady Management. Now in 'order to these Qualifications, it is necessary they should be Men of ripe Years, to give them Gravity, Experience, and Considera-'tion: Nay, I may add, to inspire them with Caution, for it is one of the many Unhappinesses attending Youth, that Persons then 'are easily impos'd upon; of which the Tenderness and Softness of their Brain may, perhaps, be one Reason, that may dispose them 'the more easily to receive any Impression, and, consequently, to Credulity and Easiness of Temper. It is for the Convenience of a 'Prince to have notable Men of all Sorts about him; those that excel in Subtlety and Cunning. The former indeed ought to be more 'numerous, and are more especially requisite, because they are more for the Honour of their Master, and of more constant Use; for 'these are the Managers of all regular and ordinary Proceedings. The Men of Art are for Cases of Necessity, and extraordinary 'Emergencies, to help at a Pinch, and to countermine a Danger. A third Qualification necessary for *Privy-Counsellors*, is Openness 'and Freedom and Courage in all their Behaviour, when consulted with. They must use their utmost Care, that all their Proposals 'be for the Honour and Advantage of their Prince; and, when once they have secured this Point, that the Advice be wise and good, 'all Flattery and Disguise should be laid aside; all Equivocation, and Reservation, and Craftiness of Expression detested and despised, 'by which they may seem to aim at ingratiating themselves, or to contrive that what they say may be acceptable o their Master. 'These are the Men *Tacitus* describes, who accommodate their Language as they see Occasion, and *do not so properly discourse with their 'Prince, as with his present Inclinations and Circumstances.* They consider him as a great Man, as one able to make their Fortunes; 'they observe what he would do, not what is best for him to do. Whereas, indeed, all these Regards ought to be utterly banished 'their Thoughts, they should have a constant Eye upon the Sacredness of their Office, and the Importance of the Trust reposed in 'them; and, looking no further than the Reason, Justice and Convenience of the Thing, speak the Truth freely: For however 'harsh and distasteful this Liberty and Openness may be at present, to those Persons, whose Opinion and Inclinations it happens to 'cross; yet there will soon come a Time when 'twill obtain Respect and Esteem. *Opposition is offensive just at the Instant; but, upon cooler 'Thoughts, the very Persons you opposed, will commend and admire your plain Dealing.* A Man should, likewise, take Care to be consistent with 'himself, firm to his Principles, without veering about perpetually, as oft as other People's Humours shift. But as he must not be 'changeable and obsequious, in a base Compliance with the Passions and Pleasures of others, so neither must he be too stiff and pe-'remptory in his own Opinions. There is always a Decency to be observed, and great Difference to be made between Constancy and 'Contradiction. For Obstinacy and Fierceness confound all manner of Deliberation; and therefore I am far from desiring my good 'Counsellor to be inflexible; as knowing very well, that hearkening to other Mens Reasons, and changing our own Opinions upon

'them,

'them, is ſo far from deſerving the Reproach of Raſhneſs and Inconſtancy, that it ought rather to be look'd upon as a Teſtimony of 'Modeſty, Ingenuity, and great Prudence. *For although the wiſe Man always walks in the ſame Way, and by the ſame Rule, yet he 'does not always go the ſame Pace, nor tread in the ſame Steps; he does not then ſo properly change as accommodate himſelf*; like the ſkil-'ful Sailor, who plies to every Wind, and whoſe Excellency lies in trimming the Sails that Way that the Gale blows freſheſt. Thus 'the Man muſt often go about to make the Port he deſigns, when there is no Coming at it by a ſtraight Courſe. And it ſhews the 'Dexterity and Addreſs of a Stateſman, to be able to change his Methods, when thoſe which were firſt choſen are either diſapproved, 'or, by ſome Accident, rendered ineffectual. Another neceſſary Accompliſhment for this Poſt, is the making of a Conſcience of reveal-'ing any Debates he ſhall be privy to. For Silence and Secrecy are exceeding neceſſary in the Management of all publick Affairs: 'Inſomuch, that a great Author has pronounced it impoſſible for that Man to manage any Matter of Conſequence, who is not ſo 'much Maſter of himſelf as to keep his own Counſel. For *how ſhould he ſupport the Weight of Publick Buſineſs, to whom even Silence 'is a Burthen?* But, upon this Occaſion, the concealing what one knows is not ſufficient, I muſt, likewiſe caution, him againſt knowing 'too much. A curious and inquiſitive Temper, which loves to be buſy, and inform itſelf of other People's Actions and Concerns, is 'no commendable Quality in any Caſe; but to pry into the Affairs of Princes, and to value one's ſelf upon knowing their Secrets, is 'as dangerous as it is indecent: And as *Tacitus* has well obſerv'd, *Nothing is more hazardous, nothing more unfit for us, than officiouſly 'to diſcuſs into, and be bold with their retired Thoughts and Intentions.* And therefore whatever a Man knows of this kind ſhould come 'freely and without his ſeeking; nay, I make no difficulty to affirm, that it is commendable in a Man to decline the Opportunities of 'having ſuch Things imparted to him, and to know as little of them as poſſible. This argues Reverence and Modeſty, prevents all 'Jealouſies, and ſuits the Diſtance between a Prince and his Subjects. Thus have I given my Reader a ſhort Account of thoſe good 'Conditions which ſeem neceſſary for the qualifying Men to be Politicians or Privy-Counſellors. And by theſe he will be able to tell, 'what are thoſe ill Qualities which incapacitate a Man for ſuch a Truſt. That a Prince, in making his Choice. ſhould be ſure to re-'ject all ſuch as are of confident, aſſuming, and preſumptious Tempers; becauſe theſe Vices make Men hot and arrogant in Debate, 'poſitive and bold in their own Senſe: And a wiſe Man, quite contrary, will be content to examine every thing over and over. It 'is the Character of ſuch a one to ſuſpect himſelf, to be jealous of the Conſequence, fearful in adviſing and reſolving, that ſo he may 'afterwards be more vigorous and aſſured, when he comes to Execution. *For the Mind that knoweth how to be afraid, and un-'dertakes warily, will act more ſecurely, and go upon ſurer Grounds.* Fools, quite contrary, are eager and aſſured, blind and bold in 'Debate; but when they come to Action, cowardly and tame. Advice given with Heat and Confidence, looks fair and gay at firſt 'Sight; but the Execution of it is hard and deſperate, and the Event of it full of Grief and Diſappointment. Next to this preſump-'tuous Vanity and Heat, Paſſion is improper for ſuch Miniſters of State; all Anger and Envy, Hatred and Spight, Avarice and 'Ambition, all ſelfiſh Narrowneſs of Spirit and private Intereſt; for theſe are all of them Corrupters of the beſt Senſe, the very 'Bane of all ſound Judgment; Integrity and faithful Diſcharge of a publick Character cannot dwell in the ſame Breaſt with theſe 'perſonal Piques, and private Affections. *Private Advantages ever did, and ever will obſtruct and confound publick Counſels, and each 'Man's Profit is that which poiſons all good Senſe, and kind Inclination to the common Good.* One thing more remains abſolutely neceſ-'ſary to be avoided, and that is *Precipitation*; an irreconcileable Enemy to Prudence and good Counſel; and fit for nothing but to 'put Men upon doing amiſs, and then being aſham'd and unfortunate upon that Account. *Charron de la Sageſſe*, Liv. iii. Chap. ii. 'Sect. 17.'] 2. The Clergy, as being the *publick Miniſters of Religion*, ought to diſcharge their Function with the utmoſt Gravity and Application; ſhould teach no Doctrine, nor advance any Opinion in Religion, which does not appear to them to be ſincerely true; ſhould be themſelves a ſhining Example by their own Deportment of thoſe Inſtructions which they deliver to the People; nor ſhould diſhonour their Character, or loſe all the Advantage and Efficacy of their Calling, by the Diſgrace of a ſcandalous and irregu-lar Life. ['Since then the *Clergy* are, or ſhould be at leaſt, the publick Maſters of Virtue for the People, who gladly hear them, 'and put a mighty Confidence in them; it is of great Moment to make a good Choice of them, eſpecially in Places that are very full 'of People. They are, in ſome meaſure, like the *Demagogues* among the *Greeks*, and the *Tribunes* among the *Romans*; with this Ex-'ception, that they do not meddle, or ought not to meddle with, State-Affairs. Thoſe who gain the Hearts of the Populace, can 'often ſet 'em in a Flame, or calm 'em juſt as they pleaſe; can raiſe them in what Paſſion they have a mind to, or, on the contrary, per-'ſuade them to Moderation and Peace. If the People, from ſome Accident or Opinion, take the Opportunity of making Diſturbances, 'tis not ſo much the People whom we ought to condemn, as thoſe who ſpirit them up, and excite them to it. One ſhall rarely hear 'of any Commotions in a Town, unleſs backed by thoſe whoſe Buſineſs it is to teach in publick, or private. Thoſe who take 'upon themſelves to diſcharge, with Reputation, ſo difficult an Employment, ought chiefly to be endowed with two *Qualifications*. The 'firſt, is their *having a Knowledge*, and being acquainted with Religion, that is to ſay, that they have with Care and Diligence 'applied themſelves to the Study of the Holy Scriptures, and meditated ſo upon them, as to be able perfectly to under-'ſtand all the Duties of Chriſtianity, and all their Conſequences, together with the Grounds on which they are built. 'This ought to be the Foundation of their Studies, and the End to which all their Reading and all their Meditati-'ons ſhould be directed. To this Purpoſe all their Knowledge in *Hiſtory*, in *Morality*, in *Philoſophy*, in polite Learning, and all 'in general that they make their ſtudy, ought to be employed by them, nor ought they to eſteem any thing but according as it may 'be of ſervice in putting them in a Condition to perſuade Men to the Obedience of the Goſpel. The ſecond Qualification neceſſary 'for them, is that *their Behaviour be conſiſtent with what they* teach, ſo that they be a Pattern of thoſe Chriſtian Virtues which they 'inſtruct others in. For tho' an Angelical Perfection, as being above the Power and Abilities of Human Nature, is not to be re-'quired, and one ought to excuſe their Frailties as well as thoſe in other Men; yet it is certain that Mankind expect from them 'and with good Reaſon, not only more Knowledge and Learning, but more Virtue alſo. An *Honeſt* Man, when we ſpeak of ſuch 'as follow another way of Living, who acts nothing ſcandalous, or puniſhable by the Laws, and who performs the external Duties 'of Society, ſo as not to deſerve to be reproach'd by the World with any thing that is baſe and infamous, according to the manner 'of Living and the Cuſtom of the Country of Perſons of his Rank and Circumſtances. This Notion of an *Honeſt Man* is con-'formable to all the vicious Cuſtoms, and all the Corruptions of the Times and Places where thoſe who made it, happen to be 'educated in; and tho' the Depravation of Manners is not every where equal, nor it may be the ſame, yet it is too true, that there 'is no Place whatſoever, where Men do not forgive in each other a great many Vices, and even to a Degree far beyond what the '*Evangelical* Rule allows of. For Example, a Man may be immoderately ambitious, or aim at Employments that he is not quali-'fied for, and endeavour to get into them by all the Methods that are not liable to Puniſhment; and this purely to gratify his own 'Vanity, and not with a Deſign to be ſerviceable to the Publick; yet not be reputed a diſhoneſt Man, nor be looked upon by any 'with Scorn and Indignation. A Man may, and ſtill maintain this very Character, be infinitely more covetous, and more addicted 'to his Pleaſures than the Goſpel ſuffers, or do any thing that does not give any occaſion of Scandal in Places where he lives, ei-'ther to improve his Fortune, or to waſte his Time in Voluptuouſneſs. But a great deal more is required to make ſuch a kind of '*Honeſt Man* paſs for a *Good Man*, according to the Precepts of the *Goſpel*, or indeed according to thoſe of *Moral Philoſophy*: They, 'whoſe Profeſſion it is to inſtruct others in the Principles of Religion, muſt not be ſatisfied with being *Honeſt Men*, in the Senſe which 'thoſe Words are generally taken; but muſt be *Good Men* in the Goſpel Senſe; that is, they muſt be ſubject to no habitual, Sin, 'but eſpecially to ſuch as are upon all Accounts inconſiſtent with true Piety and Devotion. Now if the Perſons who are choſen, 'in this Affair, are not of the cleareſt Characters, two Evils muſt neceſſarily ariſe. The firſt is, that their bad Example will do 'abundantly more Miſchiefs, than their good Sermons can do good. Mankind are by Nature much more inclined to follow the 'World; and therefore a *Clergyman*, who lives a regular Life, does, by his Manners, much better convince People, that it is their 'Duty to live well, than the greateſt Orator could do by the moſt ſtudied and Rhetorical Diſcourſe; as, on the contrary, if he leads 'a diſorderly one, his vicious Manners will make a deeper Impreſſion upon their Minds, than all he can be able to ſay to them. There 'is no need of producing Inſtances to prove this; it is what daily Experience tells the whole World. And therefore adviſe People 'as much as you will, to do as ſuch Men ſay, and not as they do; they will always be ſure to follow the Ill they do, and forget 'all the Good they ſay. Never did a Perſon of an ambitious and wrangling Temper inſpire, by his Diſcourſes, a Contempt of the 'Grandeur of the World, or the Love of Peace. Never did a covetous Preacher make his Hearers liberal. Never did a volup-'tuous *Clergyman* perſuade any one to abſtain from Pleaſures, or to uſe them with Moderation; at leaſt when thoſe Perſons were diſ-'covered to be what they really were. *Parrhaſianna*, Tom. ii. Pag. 235, &c.'] 3. The *Publick Profeſſors* and *Maſters of Arts* and *Sciences*, muſt not teach any thing that is falſe or pernicious to the Minds of the People whom they are employed to inſtruct; nor advance any Principle, tho' never ſo true, that they do not prove by ſolid and convincing Reaſons, ſufficient to enlighten the Underſtanding of their Scholars; muſt carefully avoid broaching any Opinion that may be likely to diſturb the Government; and ought to look upon all human Learning that is not needful to Mankind, either in private or publick Affairs, to be vain and empty Speculation. 4. *Magiſtrates*, and all *other Officers of Juſtice*, ſhould be eaſy of Acceſs to every Body; protect the common People againſt the Oppreſſions of the more powerful; be as forward in doing Juſtice, and that with the ſame Impartiality to the Mean and the Poor, as to the Great and Rich; not ſpin out the Cauſe to an unneceſſary Length; never ſuffer themſelves to be corrupted by

Bribes

Bribes and Sollicitations; examine thoroughly into the Matter before them, and then determine it without Paſſion or Prejudice; regardleſs of every thing while they are doing their Duty. ['Magiſtrates have a mixt Quality, and are placed in a middle Station between ſovereign Princes and private Subjects. Theſe Subalterns therefore have a double Taſk incumbent on them, and muſt learn both how to command and how to obey. To obey the Princes, who truſt and employ them, to ſubmit to the paramount Authority of their ſuperior Officers; to pay Reſpect to their Equals; to command thoſe under their Juriſdiction, to protect and defend the Poor, and thoſe who are unable to contend for their own; to ſtand in the Gap and oppoſe the powerful Oppreſſor; and to diſtribute Right and Juſtice to all Sorts and Conditions of Men whatſoever. And, if this be the Buſineſs of the Magiſtrate, well might it grow into a Proverb, that *the Office diſcovers the Man*, ſince no mean Abilities, no common Addreſs, can ſuffice for the ſuſtaining ſo many Characters at once, and to act each Part ſo well as to merit a general Applauſe and Approbation. As to the Sovereign, by whoſe Commiſſion the Magiſtrates act, his Commands muſt be the Rule of their Behaviour. Some of his Orders they ought to execute ſpeedily; ſome again they muſt by no means comply with; or be in any Degree inſtrumental in the Execution of them; and in others the moſt adviſeable Courſe of the Matter to the Magiſtrate, ſuch as thoſe of *Oyer* and *Terminer*; and in all others where there is this Clauſe *(ſo far as to you ſhall appear)* or any other Clauſe equivalent to this, inferred; on which, tho' they do not refer the Cogniſance to him, yet order ſuch things, as are either manifeſtly juſt, or, at leaſt, lawful or indifferent in their own Natures, he ought readily to obey, and without demur; for here is no Difficulty, nor any ground at all for a juſt and reaſonable Scruple. In ſuch Commiſſions and Orders, as do not leave the Cogniſance of the Matter to him, but only decree ſome point of executive Obedience; as in thoſe particularly, which we commonly call Mandates and Warrants; if they be contrary to any poſitive Law, which the Sovereign has Power to diſpenſe with, and there be Clauſes of *Non-Obſtante* for that Purpoſe, to ſave the Party harmleſs; he is obliged to obey his Orders without more to do. Becauſe, according to the Civil Conſtitution, and the Laws of the Land, the Sovereign has a Liberty reſerved to him of relaxing, or ſetting aſide the Laws in ſuch particular Caſes. And the having ſuch a Power over all Laws whatſoever, is the very thing in which abſolute and unlimited Sovereignty conſiſts. In Caſes contrary to Law, or ſuch as manifeſtly make againſt the publick Good (tho' there *ſhould* be an indemnifying Clauſe) or where the Magiſtrate knows his Orders *to be* obtain'd by Surprize, or upon falſe Suggeſtions, or by corrupt Methods, he ought not, in any of theſe Caſes, to be haſty in the executing his Orders; but let them lie by a while, and with all Humility remonſtrate againſt them; and, if Occaſion be, repeat thoſe Remonſtrances a ſecond or a third Time; but if the Command be peremptory, and unalterable, and repeated as often; then he is to comply ſo far as in Honour and good Conſcience he may, and for the reſt, to excuſe himſelf as well as he can. In Matters contrary to the Law of God and Nature, he muſt lay down his Office, and be content to quit all; nay, reſolve to ſuffer the worſt that can come, rather than be inſtrumental in, or conſenting to them. I cannot ſo much as allow him to deliberate, or once to doubt in ſuch Circumſtances what to do; for natural Juſtice cannot be hid, it ſhines clearer and brighter than the Sun; and all Men muſt ſee it, except thoſe who wilfully ſhut their Eyes againſt it. All this Advice relates to things in agitation, and intended or ordered to be done; but, as for thoſe which the Sovereign has done already, let them be never ſo wicked and unreaſonable, a Man had better diſſemble the Matter as well as he can, and try to wipe out all Remembrance of it, than loſe all by provoking and expoſtulating with a Prince to no Purpoſe; as *Paſſienus* did. For it is the very Extremity of Madneſs to ſtrive *againſt a Stream; where no Ground is got, nor any thing but Hatred and Diſfavour for our Pains.* As for their Duty, when conſidered in their other Capacity, and with Regard to the private Subjects under their Government, Magiſtrates muſt always remember whoſe their Authority is, and from whence they derive it. That this is none of their own proper Right, but meerly a Truſt; that they hold it from and under the Prince; that he has the Fee, and is the Lord and conſtant Proprietor; but they are Tenants and Stewards at Will, put in to exerciſe this Part of his Juriſdiction for ſo long a Term only, as their Commiſſion purports; or during his Pleaſure, and no longer. Now hence it is very natural and obvious to infer, that a Magiſtrate ought to be eaſy of Acceſs; always ready and at leiſure to hear and receive the Petitions and Complaints preferred to him: That his Doors ſhould be open to all Comers, and he as ſeldom out of the way as poſſible; but eſpecially not ſo wilfully, and by Contrivance; for he ſhould conſider himſelf no longer at his own Diſpoſal, but a Servant to the Publick, and devoted to the Uſe and Benefit of the People: And this was the Reaſon why *Moſes*'s Law commanded that the Judges ſhould keep their Seſſions, and decide Controverſies in the Gates of their Cities; that ſo Juſtice might offer itſelf to all that went out or in, and none might find any Difficulty in addreſſing for, or obtaining it. He ought to receive the Applications of all Perſons and Conditions alike; and be open and kind to all, the Mean as well as the Great; and the Poor no leſs than the Rich. Upon which Account it is, that one of the Philoſophers compares a Magiſtrate to an Altar; to which all People have Recourſe in their Affliction and extreme Neceſſity, to pour out their Souls there, and depend upon Relief and Conſolation for their Troubles from ſo doing. But, though, in Point of Juſtice, he ſhould be free and open, yet in Friendſhip and Acquaintance he ought to be exceedingly reſerved, not to make himſelf cheap and common, not to admit any one into his Familiarities, and intimate Converſation, except ſome very choice Perſons, ſuch as are known to be Men of ſound Senſe and ſtanch Virtue; and theſe too but privately. For a large and general Acquaintance debaſes the Authority of his Character, and abates of that Firmneſs and Vigour which is neceſſary for the Diſcharge of it. When *Cleon* was choſen and admitted to the Government, he called all his Friends together, and ſolemnly renounced, from that Time, whatever Friendſhip had been formerly between them, as thinking the continuing under ſuch Engagements by no means reconcileable with the Truſt he had now taken upon him; and *Cicero* obſerves accordingly, that a Man muſt put off the Character of a Friend and lay that quite aſide, before he can do Right to the Part of a Judge. There are two Things, wherein the Office of a Magiſtrate conſiſts; the one is, to preſerve the Honour and Dignity, and juſt Right of the Prince who has employed him, and of the Publick, whoſe Repreſentative he is, with a becoming State, with Gravity, authoritative Behaviour, and a well tempered Severity. Next, he is to act like a true and faithful Tranſcript, from the Original; an Interpreter and Executor of his Maſter's Will; and to ſee that this be duly declared, and diligently obſerved. By his Will, I mean the Law; for this is the authentick Will of the Prince, and the only Declaration of it, which Subjects are bound to take Notice of. Of this the Magiſtrate is to exact a faithful Account and punctual Obſervance; for which Reaſon we often find him termed by Authors, *the living and the ſpeaking Law*. Now, tho' it be the Duty of a Magiſtrate, and an excellent Qualification in him, to temper Juſtice with Prudence; and Severity with Gentleneſs and Forbearance; yet, it muſt be confeſſed much more for the common Advantage, to have ſuch Magiſtrates as incline to the Exceſs of Sharpneſs and Rigour, than thoſe who are diſpoſed to Mildneſs, Eaſineſs, and Compaſſion. For even God himſelf, who highly recommends, and ſo ſtrictly enjoins all thoſe humane and ſoft Diſpoſitions upon other Occaſions, yet poſitively forbids a Judge to be moved with Pity. The ſtrict and harſh Magiſtrate is the better Reſtraint, the ſtronger Curb; he contains People in Bounds, and preſerves a due Awe and Obedience of the Laws. The mild and merciful one expoſes the Law to Contempt; makes Magiſtracy cheap, and leſſens the Prince who made both the Law and the Magiſtrate, in the Eyes and Eſteem of his People. In one Word, there muſt go two Qualifications to the capacitating a Man for the diſcharging this Office compleatly, Integrity and Courage; the firſt cannot ſubſiſt alone, but ſtands in need of the ſecond to ſupport and back it; the former will be ſure to keep the Magiſtrates Hands clean from Avarice, Partiality, and Reſpect of Perſons, from Bribery and Gifts, which are the Bane of Truth; and from any other Violation of Juſtice; which *Plato* calls (as indeed it ought to be) a pure unblemiſhed Virgin: This will, alſo, be a Guard againſt his Paſſions; the Averſions or Affection he may bear to the Parties concerned; then he will find great Occaſion for Courage too, to ſtand his Ground againſt the Menaces and imperious Sollicitations of great Men, and Requeſts and Importunities of Friends, who fancy they have a Sort of Right to diſpoſe of him, and will not take a reaſonable Refuſal: To harden him againſt the Prayers and Tears, the loud Cries and bitter Complaints of the Miſerable and Afflicted; for all theſe are very moving and forcible Inducements, a great Violence, upon Reaſon and Duty; and yet ſo committed, that there is plauſible Appearance of both, in the very Diverſion they labour to give us from both. And the Truth is, this Firmneſs and inflexible Conſtancy of Mind is the moſt maſterly Virtue, and particular Excellence of a Magiſtrate; that he neither be terrified and ſubdued by Greatneſs and Power, nor melted by Miſeries and deplorable Circumſtances. Theſe are what very brave Men are often tranſported by; and therefore it is the greater Praiſe to continue Proof againſt them. For, though being ſoftened by the latter, it have an Air of good Nature, and is more likely to prevail upon the better Sort of Men; yet either of the Extreams are ſinful, and both foreign to the Merits of the Cauſe, which is the only Thing that lies upon a Judge. The Motives of Pity then are very dangerous Temptations; and what a Man in Authority ought as much to ſtop his Ears againſt, as Promiſes or Threatenings; for even that God himſelf, who is Love and Mercy in Perfection, has diſcountenanced this unſeaſonable Compaſſion. And the ſame Legiſlator, who ſaid, *Thou ſhalt not receive a Gift to blind thine Eyes therewith, neither ſhalt thou accept the Perſon of the Mighty*, found it no leſs neceſſary for the Good of Mankind, and the equal Diſtribution of Juſtice, no leſs agreeable to his Goodneſs, to add that other Command, *Thou ſhalt not favour a poor Man in his Cauſe*. Charron de la Sageſſe, *Lib.* iii. *Chap.* xvii. *Sect.* 3, *&c.*'] 5. The *Generals, Captains*, and other *Officers in the Army* ought to exerciſe their Soldiers carefully and at conve-

nient Times, to inure them to bear the Hardships and Fatigues of War; should strictly observe all the Rules of Military Discipline: never expose, nor hazard their Troops, but when there is an absolute Necessity for it; should take care, as far as in them lies, that their Soldiers have a constant regular Supply of Provisions, and not defraud them of their Pay and Allowance; never strive to win their Affection to the Prejudice of the Government, but always inspire them with Sentiments conformable to the Good of the Country and the publick Welfare. 6. *Soldiers*, on the other Hand, ought to be content with their Pay, and not plunder, nor abuse in any Manner whatsoever, either Citizens, or the Country-people; should chearfully and with Resolution expose themselves to the Fatigues and Hazards to which they are called, for the Defence and Honour of their Country; should as much avoid the imprudent Ardour of running into unnecessary Dangers, as the base Cowardice of flying when there is Occasion for their standing; should shew their Valour and Intrepidity upon the Enemy, and not upon their Comrades; should valiantly maintain their Posts, and prefer a glorious and honourable Death to an ignominious Flight and Life. 7. *Ambassadors, Plenipotentiaries, Envoys*, and others *that bear any publick Character abroad*, ought to behave themselves with great Prudence and Circumspection; to be Persons of Penetration, carefully to distinguish Solidities from Trifles, and Truth from Falshood; inviolable in keeping a Secret, and Proof against any Corruption or Temptation that might make them neglect or abandon the Interest of their Prince. [' A publick Minister, or a Plenipotentiary, is a *Camelion*, a *Proteus*; sometimes, like a cunning Gamester, he dissembles his very Humour and Temper, as well to avoid the Conjectures and Penetration of others, as to prevent any Secret escaping, through Passion or Weakness; is always ready to put on that Shape his Designs and Occasions require, and artificially appears what it is his Interest to be thought. Thus, when he designs to dissemble that his Master is very Formidable, or very Low, he is resolute and inflexible, to prevent any large Demands; or easy and complaisant, to give others Occasion to make them, and to secure the same Liberty. At other Times he is profound and subtle, to conceal a Truth in the very publishing of it; because it concerns him to divulge it, and that it should not be believed: Or else free and open, that, whenever he shall have Occasion to conceal what must be kept secret, People may not so much as suspect him; but, on the contrary, believe he has discover'd whatever he knew. In like Manner, he is warm and verbose, to excite others to talk, or to hinder their speaking what he desires not to hear, or their acquainting him with what he would be ignorant of; talks of indifferent Things which soften one another, and leave the Mind confounded betwixt Confidence and Distrust; that he may make amends for one lost Opportunity by dexterously gaining another: Or, he is cool and silent to engage others to talk; hears patiently to obtain the same Favour himself; talks with Superiority and Weight when he designs to make such Promises or Threats as may carry a great Stroke with them, and make a strong Impression upon such to whom they are directed. Sometimes he speaks first, the better to discover the Oppositions and Contradictions, Intrigues and Cabals of foreign Ministers, upon the Propositions he has to advance, and take his Measures from their Answers. At another Meeting he stays till the last, that he may be sure not to lose his Labour; to be more exact; to observe every thing that may be serviceable to his Master, or his Allies: To know what to ask, and what he can obtain: He knows how to be clear and expressive, or obscure and ambiguous; can use equal Words and Turns, which he can render more or less forcible, as his Interest and Occasions require. He asks little, because he wo'nt grant much; or his Requests are large, that he may be sure of a little: Desires small things which he pretends to be of no Value, that they may not hinder him of greater; avoids the gaining an important Point at first, as it is like to hinder him of several, which, tho' in themselves of less Value, yet united exceed the other. His Demands are extravagant, with Design to be denied, that he may be furnish'd with a just Excuse for refusing those he knows will be made: As industrious to aggravate the Enormity of these, and as warmly to urge the Reasons why he cannot hearken to them, as earnestly to endeavour to enervate those which they pretend for their Denial: Equally concerned to aggrandize the little he offers, as to slight openly the little they are willing to grant. Feigns extraordinary Proffers, which beget a Distrust, and oblige them to reject what indeed accepted would be useless; this serves to colour his exorbitant Demands, and to throw the Blame of the Refusal upon them: He grants more than they can ask, to get more; shews himself very unwilling to grant trivial Things, that he may quash all Expectations of better from him; or, if he is persuaded to part with any thing, 'tis on such Conditions that he may share the Advantages. He directly or indirectly espouses the Interest of an Ally, as he finds it profitable, or as it tends to advance his Pretensions; talks of nothing but Peace and Alliances, the publick Good and Tranquillity; in all which he means nothing but his Master's Interest; sometimes he reconciles disagreeable Parties, at other Times he divides those he found united; terrifies the Strong and Potent, and encourages the Weak: Unites several feeble Interests against a powerful one, to render the Balance equal; joins with the former, that they may desire his Alliance and Protection, which he sells at a dear rate; knows how to interest those with whom he treats, and by a dexterous Management, by fine and subtle Turns, makes 'em sensible of their private Advantage, the Riches and Honours they may hope for by a little Easiness which will not, in the least, clash with their Commissions, nor the Intentions of their Masters. And, that he may not be thought impregnable on this Side, betrays some small Concern for his own Fortune; discovers by this their most secret Intentions, the most profound Designs, and last Efforts; which he turns to his own Advantage. If he is injur'd in any considerable Article, he is very loud, but if he finds he is not so, is yet louder, and throws the Injur'd on their Justification and Defence. Tho' his Measures are order'd, his Steps pointed out, and his least Advance prescrib'd by the Court; yet he appears as complaisant and free in the most difficult Contests, as if all his Compliances are *extempore*, and purely owing to his condescending Temper. He dares even engage to an Assembly, that the Proposals shall be approv'd of, and that his Master will not disown him. He spreads false Rumours concerning those Things which he alone is entrusted with; if he closely reserv'd some particular Instructions, these he never discloses, but at such Extremities, as to neglect the Use of them would be pernicious. All his Intrigues tend to solid and substantial Ends, for which he willingly sacrifices Punctilio's, and imaginary Points of Honour. He has a great deal of Phlegm, and is arm'd with Resolution and Patience; fatigues and discourages others, but is himself unwearied. He's forewarn'd and fortify'd against all tedious Delays and Affronts, Jealousies and Suspicions, Difficulties and Obstacles; fully persuaded that Patience and an happy Conjuncture will influence their Minds, and accomplish his desired Ends. He feigns a secret Interest to break off the Negotiation, when he passionately desires its Continuance; but, on the contrary, when he has strict Orders to use his last Endeavours to break it off, thinks the best Way to effect it is to press its Continuation. After a very great Event, he is either stiff or easy, according as it is advantageous or prejudicial; and if by a vast Prudence he can foresee any thing advantageous to the State, he follows close, temporizes and manages himself according to the Hopes, Fears, and Necessities of his Master; takes his Measures from the Place, and Occasion, his own Strength and Weakness, the Genius of the Nation he treats with, and the particular Temper and Character of their Ministers. All his Maxims, Designs, and most refin'd Politicks, tend only to prevent being deceiv'd, and deceive others. Mr. *de la Bruyere*'s *Characteres* at *Chap. du Souverain & de la Republique*. This indeed is a very fine Description of a publick Minister, or a Plenipotentiary; but, however, such a Description as in every Particular is not to be imitated. We must consult Mr. *Wicquefort*'s Book intitled, *L'Ambassadeur & ses Fonctions*.'] 8. The *Commissioners*, or Receivers of the Revenue belonging to the State, and in general all those who have the Management of the publick Money, ought to take Care not to use unnecessary Severity, or to exact more of the Subjects than what they are tax'd at, to enrich themselves, and burden others; apply none of the publick Treasure that passes through their Hands to their own Use, and satisfy those whom they have Order to pay out of it, without making them stay a long Time for their Money. But all *these particular Duties* of Subjects cease with the Posts and Employments from whence they flow. Whereas the *general Duties* remain still in force, so long as Men are bound to live under any Form of Government.

CHA

CHAP. IX.

Of the Duty of Sovereigns.

I. *The Office and Duty of Sovereigns, whence to be diſcover'd.*
II. *The Obligation that Princes have to be well inſtructed in it.*
III. *The People's Safety is the ſupreme Law.*
IV. *The Subjects are to be train'd up in good Manners.*
V. *Fit Laws are to be enacted,*
VI. *And put in Execution.*
VII. *Penalties are to be inflicted with Juſtice and Moderation.*
VIII. *The Subjects are to be reſtrain'd from mutual Injuries.*
IX. *An able and honeſt Miniſtry is to be employ'd in State Affairs.*
X. *Taxes are to be equally laid, and rightly gather'd.*
XI. *The Wealth of the State is to be advanced.*
XII. *Factions to be prohibited.*
XIII. *A ſufficient Force to be kept up for the oppoſing of foreign Invaders.*

IT remains that we take a View of the Duty of Sovereigns; which ought to be explain'd with eſpecial Care and Diligence; as well in Regard, that the Ignorance or Neglect of this Duty is the Occaſion of ſo many Miſchiefs in the World [1], as becauſe to deliver the Rules and Meaſures of it, is the proper Buſineſs of this general Part of civil Knowledge, it being placed beyond the Bounds of municipal Laws. Yet in as much as others have frequently inculcated theſe Points, we ſhall reckon our Task diſcharg'd, in barely repeating the chief Heads [a]. The Precepts then which unite in the making up of this Duty, may eaſily be gather'd, by examining the Nature and End of civil Communities, and the proper Offices belonging to the ſovereign Power.

II. Here then it is, before all Things, neceſſary that Princes induſtriouſly apply themſelves to the underſtanding of every Thing, that falls under the compleat Diſcharge of their Truſt; ſince no Man can manage, with Commendation, what he hath not firſt rightly learn'd and conſider'd [b]. And as the [c] Art of Government is ſo very difficult as to require the whole Man, tho' of the greateſt Parts and Abilities [2], they ought

[a] See Lord *Bacon*'s *Serm. fid.* Chap. xix. [b] See 1 *Kings* iii. 9. *Virg. Æn.* vi. V. 852, 853. *Iſocrates* has a wiſe Remark on the ſame Subject; It is, *ſays he*, 'that according as Princes cultivate their own Minds, ſo they muſt expect to find their Kingdom. 'And therefore no Champion at the Games has ſo much need to exerciſe his Body, as a Governor has to exerciſe and improve his Wit.' *Ad Nicoclem.* And the Admonition of the Satyriſt, as it belongs to Mankind, ſo it eſpecially affects Princes:

Diſce ——————————
—————— *quem te Deus eſſe*
Juſſit, & humanâ qua parte locatus es in re.
Perſ. Satyr. iii. V. 71, 72.

Study thyſelf, what Rank or what Degree
The wiſe Creator hath ordain'd for Thee,
And all the Offices of that Eſtate
Perform, and with thy Prudence guide thy Fate.
Mr. DRYDEN.

See, alſo, *Philip de Comines*, Lib. i. Pag. 342. & Lib. iii. Pag. 388.

[c] That thoſe Things which appear neceſſary to be known, in order to the well-governing of a State, are not ſo very trite and vulgar, and ſo obvious to all Capacities, may be gather'd from what Mr. *Hobbes* has particularly deliver'd on this Point, *De Cive*, Chap. x. Sect. 10.

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[1] 'How happy is that Poſt which every Minute furniſhes Opportunities of doing good to Thouſands! How dangerous is that which 'every Moment expoſes to the injuring of Millions! (*Charactères de la Bruyere*, Chap. *du Souverain & de la Republique*, Pag. 337. 'Ed. de Bruxelles 1697) the Good which Princes do, reaches even to the moſt diſtant Places, and the Evils that they occaſion are mul'tiplied from Generation to Generation, to lateſt Poſterity.' Theſe are the Archbiſhop of *Cambray*'s own Words, in his *Avantures d'Idomeneé* (Page laſt but one of the laſt Tome) a Work from whence I ſhall take ſeveral fine Paſſages, with which the Reader, I preſume, will not be diſpleaſed, to have his Memory refreſhed, to renew the Pleaſure which he took in the firſt reading of ſo many excellent Precepts, where the Solidity of the Thoughts, and the Beauties of the Expreſſion, ſtrive in Emulation of each other, which ſhall moſt charm thoſe who have a Taſte for fine Things. This is what I ſaid in the firſt Edition of my Tranſlation, nor do I now retract it. Tho' a Panegyriſt, of that illuſtrious Author, has attempted to ext ol his Morality, at the Expence of *Grotius* and *Puſendorf*, whom he ſets upon a Level with *Hobbes* and *Machiavel*. I have fully refuted this unjuſt Parallel, in my Preface to *Grotius*, Pag. 32. And the Paſſages I have quoted in this Chapter, are ſufficient to deſtroy the Accuſation; ſo great a Conformity is there between our Author's Maxims and thoſe of *Telemachus*. For the Queſtion here is not about the Style or Language, but about the Principles and Thoughts. This Syſtem of our Author's, of *the Law of Nature and Nations*, is not a moral Poem in Proſe; and beſides our Author has declar'd, that he intended only, briefly, to touch upon the Heads of the Duties of a Sovereign.

[2] 'The moſt painful and difficult Employment in the World, in my Opinion ſays *Montaigne*, is worthily to diſcharge the Office of 'a King. I excuſe more of their Failings than Men generally do, in Conſideration of the inſupportable Weight of their Office, 'which amazes me. 'Tis hard to keep Meaſure in ſo unmeaſurable a Power. Whether it be, that it is, to thoſe who are of a leſs excellent Nature, a mighty Incitement to Virtue to be fix'd in a Place where you cannot do the leaſt Good, that is not put upon Record; and where the leaſt Benefit accrues to ſo many Perſons; and where your Capacity, like that of Preachers, is principally addreſs'd to the People, no very exact Judge, eaſily impoſed on, and eaſily contented.' *Eſſais*, Liv. iii. Chap. vii. *de l'incommodité de la Grandeur*, Pag. 681. in *Fol.* See, alſo, *Lib.* i. *Chap.* xlii. where there is, in the Margin, *Sceptre de Grand poids.* Here are Mr. *de la Bruyere*'s Thoughts, which are as beautiful as ſolid. 'There are, *ſays he*, no general or certain Rules of governing well; they depend on Times and Conjunctures, the Prudence and Deſigns of the Governors: So that perfect Government is the Maſter piece of the Underſtanding, and, perhaps, it would be impoſſible to arrive at it at all, did not Subjects contribute one Moiety to the Work, by an Habit of Dependence and Submiſſion. —— If the Care of a ſingle Family be ſo burthenſome, if a Man has enough to do to anſwer for himſelf; what a Weight, what a Load is the Charge of a whole Kingdom? Is the Sovereign recompenſed for all his

ought therefore, as it were, to forget their own Persons, and live only for the Sake of the People. From these Considerations it follows, that Princes ought [1] to renounce all those Studies and Pursuits which contribute nothing to this good End; much more are they obliged to retrench their Pleasures and useless Diversions, so far as they intercept their main Imployment: For the same Reason they ought to admit into their Familiarity none but Men of Wisdom and Experience [2]; and, on the contrary, to discountenance and chace away all flattering Para-

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' anxious Cares by the Prostrations of his Courtiers, or the Pleasures an absolute Power seems to afford? When I think on the troublesome, hazardous, and dangerous Paths he is forc'd to tread, to arrive at *publick Tranquillity*; and when I reflect on the extremely difficult, tho' necessary Methods, he is frequently obliged to use, to compass a good End; that he is accountable to God even for the Felicity of his People, that Good and Evil are in his Hand, and that Ignorance is no Excuse; I can't forbear asking myself, Would'st thou reign? Would a Man meanly happy in a private Condition, quit it for a Throne? Is is not even to one, who comes to it by Hereditary Right, almost insupportable to be born a Monarch?——There is a Sort of Commerce or reciprocal Return of the Duties of the Sovereign to his Subjects, and of theirs to him. Which are most strongly binding, or most difficult in the Performance, I will not determine: 'Tis not indeed very easy to judge between the strict Engagements of Reverence, Assistance, Service, Obedience and Dependence on the one Side; and the indispensable Obligations to Goodness, Justice, and Protection on the other. To say the Prince is the supreme Disposer of the Lives of the People, is to tell us only, that the Vices of Mankind have entailed on them a natural Subjection to Justice and the Laws, with the Execution of which the Prince is entrusted: To add, that he is absolute Master of his Subjects Goods, without any Reason, or legal Process, is the Language of Flattery, the Opinion of a Favourite, *who will recant it when he feels Death upon him. When, on a fine Evening, you see a numerous Flock of Sheep spread* over a little Hill, quietly grazing on the fragrant Thyme; or in a Meadow, nibbling the short and tender Grass that has escap'd the Mower's Scythe, the diligent and careful Shepherd, you observe, is always amongst them, suffers 'em not to go out of his Sight, leads 'em, follows 'em, changes their Pasture; if they wander, he fetches 'em in; if the greedy Wolf appears, he sets his Dog on, to beat him off; he nourishes and preserves them; the Morning finds him in the open Field in which the Sun left him: What Care! What Vigilance and Slavery is this! Which Condition looks to you the most delightful and free, that of the Sheep or the Shepherd? Was the Flock made for the Shepherd, or the Shepherd for the Flock? This is the genuine Image of a good Prince and his People. There is no Occasion (on the contrary) for Arts and Sciences in the Exercise of Tyranny; the Policy which consists only in Bloodshed, is very shallow, and has nothing of Art in it. It prompts us to murther all, whose Lives are Obstacles to our Ambition, and this a Man, naturally cruel, does with Ease. 'Tis the most barbarous and detestable Way of supporting and aggrandizing ourselves: *Caractères ou Mœurs de ce Siecle.* Chap. *du Souverain & de la Republique.* See, likewise, *les Avantures de Telemaque*, Tom. v. Pag. 18. *Ed. de Bruxelles. Xenophon*, as our Author has remark'd, said a long Time since, That *Man is able more easily to govern all other Creatures, than those of his own Kind*; Ὡς ἀνθρώπῳ πεφυκότι, πάντων τῶν ἄλλων ζώων εἶη ῥᾴδιον ἢ ἀνθρώπων ἄρχειν, *Cyrop. Lib.* I. *init.* See, also, in the *Memorabilia* of *Xenophon*, *Socrates*'s Dispute with a Youth, named *Glaucon*. *Isocrates* (ad Nicoclem) in the Beginning calls a Kingdom the greatest of human *Affairs, and such as requires more than ordinary Degrees of Prudence and Foresight*; and says that the Cause of all the Misfortunes which Kings are exposed to, and of the Diversity of Opinions about their Condition, is, *That People think that all the World is as capable of reigning, as of discharging the Offices about the Temple: Whereas, of all human Affairs, the most difficult, and that which requires the highest Degree of Attention and Wisdom, is, without doubt, the Government of a King.* Ταύτης δὲ τῆς ἀνωμαλίας, &c. In this Passage, the *Greek* Orator, speaking of the *Priesthood*, as an Office which any Man might exercise, without any due Qualification or Merit; had apparently in View those kinds of *Priesthood* that were *hereditary*, such as the *Eumolpides* and *Cerryces* (Κήρυκες) among the *Athenians*. Yet, nevertheless, adds our Author, there are many who think the *Italian* Proverb not altogether groundless, That *there needs but a very little Brains to rule the whole World*; nor this other *Latin* one, *The World does not know what little Wisdom it is that governs it*: Upon which I have read a Dissertation of a Professor at *Leipsick*, named Mr. *Adam Rechenberg*, printed in 1676. I own, That if we mean by it, that generally the Government of States is a Thing which requires the least Ability, Care, and Application, one might admit of these Proverbs. But it must, likewise, be acknowledg'd, that if the Rulers of States would discharge their Duty as they ought to do, they would be more sensible of the Weight of Government than they are; and that if they would inform themselves of the Rules of so nice and difficult an Art, and practise them exactly, the World would be much better govern'd than it is, and the People infinitely more happy. As for the rest, the Sentence above-mention'd is ascribed to one of the Popes. See the Extract of Mr. *Selden*'s *Table-Talk*, in M. *Le Clerc*'s *Biblioth. Ant. & Mod.* Tom. vi. Pag. 301.

1 ' 'Tis a Sort of an Affront and Mockery, to extol a Man for Qualities misbecoming his Rank and Condition, tho' otherwise commendable, and for Qualities, also, that ought not to be his principal Endowments: As if a Man should commend a King for being a good Painter, a good Architect, a good Marksman, or a Racer. Commendations that do him no Honour but when mention'd together, and in the Train of those that are more properly belonging to him, to wit, his Justice, and his Knowledge in governing his People, both in Peace and War. 'Twas after this Manner that *Agriculture* was an Honour to *Cyrus*, and the Knowledge of Letters to *Charlemagne*——*Demosthenes*'s Companions in the Ambassy to *Philip*, extolling that Prince, as being handsome, eloquent, and a stout Drinker, were answer'd by *Demosthenes*, that these were Commendations more proper for a Woman, a Lawyer, or a Sponge, than a King.

' *Imperet bellante prior, jacentem*
' *Lenis in hostem.*
' *Horace* Carm. Sæcul. V. 51, 52.

First, let his Empire from his Valour flow,
And then by Mercy on the prostrate Foe.

'Tis not his Profession to know either how to hunt, or how to dance well.

' *Excudent alii spirantia mollius æra,*
' *Credo equidem, vivos ducent de marmore vultus:*
' *Orabunt causas melius, cœlique meatus*
' *Describent radio, & surgentia sidera dicent:*
' *Tu regere imperio populos, Romane, memento.*
(Virg. Æneid. vi. 846, &c.)

Let others better mold the running Brass,
And soften into Flesh a Marble Face;
Plead better at the Bar; describe the Skies;
And when the Stars descend, and when they rise.
Roman, 'tis thine alone with awful Sway
To rule Mankind, and make the World obey.

Dryden

' *Plutarch* says, moreover, that to appear so excellent in these less necessary Qualifications, is, to produce a Witness against a Man' self, of his having misspent his Time, and applying his Studies ill, which ought to have been employed in the Acquisition of more necessary Things. So that *Philip*, King of *Macedon*, having heard *Alexander* the Great, his Son, singing at a Feast, in Emulation of the most skilful Musicians there, *Art thou not ashamed*, says he to him, *to sing so well?* And to the same *Philip*, a Musician with whom he was disputing about his Art; *Heaven forbid, Sir, that so great a Misfortune should ever befal you, as to understand these Things better than I.* A King should be able to answer, as *Iphicrates* did the Orator, who press'd hard upon him in his Invectives after this Manner; *And pray what art thou, that thou dost swagger at this Rate? Art thou a Soldier, dost carry a Musket, or the Pikeman? I am none of all this, but I am one who knows how to command all these.* Essais de Montaigne, *Liv.* i. *Chap.* xxxix.

2 ' The wise *Mentor* says to *Idomeneus*, in *les Avantures de la Telemaque*, Do you not see that Princes who are corrupted by Flattery take every Thing to be harsh and austere that is free and ingenuous? They are become so nice, that every Thing that is not Flattery offends and provokes them. But if a Man has not a servile Soul, and is not ready to applaud them in the most unjust Use of their Power, he is not for their Purpose. Every free and generous Expression appears to them insolent and seditious. They are to delicate, that every Thing but downright Adulation offends and provokes them. But let us proceed a little further: Suppose that *Philocles* is really harsh and austere, is not his Austerity much better than the pernicious Flattery of your Counsellors? Where will you find a Man without Faults? And should you not fear, least of all, the Fault of one who tells you the Truth a little too boldly? But is not this a Fault necessary to the Correction of your own Faults, and to the conquering that Aversion to Truth, which

Parasites [1], all trifling Genius's, and such as are skilled in nothing but what is empty and insignificant. But now to render themselves capable of applying, as they ought, the general Maxims of State Policy, Princes must be perfectly acquainted with the Constitution of the State [2], and the Temper of their Subjects [3]; they should, also, in a more particular Manner endeavour to excel

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‘tery has raised in you? You ought to have a Man about you, that loves nothing but Truth, and who loves you better than you know how to love yourself; who will tell you the Truth in spite of you, who will force through all your Intrenchments; and this necessary Man is *Philocles*. Remember, that a Prince is extremely happy, when but only one Man of such an Elevation of Mind is born in his Reign, and who is certainly the most valuable Treasure of his Kingdom; and that the greatest Punishment he ought to fear from the Gods, is to lose such a Man, if he renders himself unworthy of him, for want of knowing how to make use of him. As for the Faults and Errors of good Men, you ought not to be ignorant of them; but however you should make use of their Service. Set them right; but be not implicitly managed by their rash and indiscreet Zeal; give them a favourable Hearing, honour their Virtue, and shew the Publick that you know how to distinguish it; but more especially take Care that you be not like those Princes, who, contenting themselves with despising corrupt Men, do notwithstanding employ them, trust in them, and heap Favours upon them; and who, pretending to have Judgment to know virtuous Men, yet give them nothing but empty Commendations; not daring to trust them in any Employments, nor to admit them into their familiar Conversation, nor to bestow any Kindnesses upon them, *Tom.* iii. Pag. 3, *&c.* *Isocrates*, as our Author observes, gave, likewise, this Advice to *Nicocles*: φίλους κτῶ μὴ πάντας τοὺς βουλομένους, ἀλλὰ, *&c. Pag.* 34. *Ed. Par. min.* Receive into your Friendship not every Body, but only such as are worthy of your Station; not those with whom you might pass your Life most agreeably, but those by whose Assistance you may best govern the Commonwealth. Use yourself to take Delight in such Company, as may both increase the Stock of your Wisdom, and raise the Character of your Virtue among others. ——— Rely upon the Fidelity, not of those who praise every Thing you say or do, but of those who admonish you when you commit any Fault. Suffer wise and prudent Persons to speak with Freedom to you, that, when you are in any Difficulty, you may find People that will endeavour with you to clear Matters up. Distinguish artful Flatterers from such as serve you with Affection; that bad Men may not have a larger Share in your Favour, than Men of Honour and Honesty.’

[1] ‘A King is not to be believ'd, when he boasts of his Constancy in standing the Shock of an Enemy for his Glory, if for his Good and Amendment he cannot stand the Liberty of a Friend's Advice, which has no other Power than to wound his Ear a little, the rest of its Effects being still in his own Hands. Now there is no Condition of Man whatever that has so great Occasion for true and free Informations as theirs. They support a publick Character, and are to please the Opinion of so many Spectators, that, as it has been customary for Men to conceal from them whatever might have Power to divert them from the Course they are taking, they find themselves insensibly involv'd in the Hatred and Detestation of their People, often upon such trivial Occasions as they might easily have avoided, and without the least Prejudice even to their Pleasures themselves, had they been advised and set right in Time. Their Favourites have commonly more Regard to themselves, than to their Masters; and certainly 'tis their Interest to think so, forasmuch as the greatest Part of the Offices of true Friendship, when used to a Sovereign, are a rude and hazardous Undertaking: And therefore there is Occasion not only of very great Affection and Freedom, but for Courage too. ——— There is none of us all that would not be worse than Kings, if so continually corrupted as they are by such kind of Vermin. *L'Essais de Montaigne*, Liv. iii. *Chap.* xiii. *Pag.* 803, 804.’ There follow in that Place some solid Thoughts upon the Way that ought to be taken to inform Princes of their Faults, and to make them give Ear to Truth. *See*, also, Two *fine Chapters of Charron*, in his Treatise *de la Sagesse*, Liv. iii. Chap. ix, x.

It were indeed to be wish'd, that *Carneades*'s Observations were not too often found true, that *the Sons of Princes, and other wealthy and great Men, learn no Art well but that of Horsemanship, 'tis because in other Exercises their Master flatters them by praising them; and even he who wrestles with them, has the Complaisance to let them get the better, but their Horse does not understand Jesting. He does not trouble himself to know whether his Rider be a Prince or a private Man, rich or poor: Let him be who he will, he throws him, if he does not know how to keep his Seat.* Add. *Diodor. Sic.* Lib. i. Chap. lxxi. & Lib. xii. Chap. xii. Where the same Author reports, that *Charondas*, among his other Institutions, order'd an *Action of ill* Company, and set a very severe Penalty on those, who, being prosecuted upon this *Action*, should be convicted. See *Plutarch. de Discrim. Amic. & Adulator.*

[2] ‘In the first Place he must apply himself to Study, and understand the Humour and Genius of his People. For this Knowledge will be a very great Direction, and model the Person to whose Government they are committed. Now the reigning Qualities of the People in general——are Fickleness and Inconstancy; a Spirit of Faction and Discontent; of Impertinence and Folly; Love of Vanity and Change; Insolence and insupportable Pride in Prosperity; Cowardice and Dejection of Mind in Adversity. But besides these Characters, which are common to Persons of that Condition every where, a Man must be still more particularly instructed in the Temper peculiar to that Country, and those Subjects, where himself is concern'd. For the Dispositions of Men differ extremely, and are almost as various as the Towns wherein they dwell, or the Persons that inhabit them. Some Nations are, in a peculiar and distinguishing Manner, passionate or cholerick, bold and warlike, cowardly or luxurious, addicted to Extravagance, to Wine, to Women; laborious or slothful, frugal or expensive. And of those who agree in these Qualities, there is a Difference in the Measure; in some they are more, in others less predominant. So necessary is that Rule, *Noscenda natura vulgi est, & quibus modis temperanter habeatur.* That the common People must be studied, first to know what they are, and then what is the best Method of dealing with them. And in this Sense it is, that we are to understand the old Philosophers, when they pronounce Subjection and Obedience a necessary Preparation to the Art of Ruling: *Nemo bene imperat, nisi qui ante paruerit imperio.* No Man (says *Seneca*) ever governs well, who has not first liv'd under Government, and known what it is to be commanded himself. (Where nevertheless the Terms are a little different. *Nemo autem regere potest, nisi qui & regi.* But *Charron*, deceiv'd by *Lipsius*, *Polit.* iv. 5, has confounded this with a Passage of *Cicero*: *Nam & qui bene imperat, paruerit aliquando necesse est.* *De Legibus*, Lib. iii. Chap. ii.) Not that we are to infer from hence any Necessity, or indeed so much as a Possibility, that all Princes ought to be rais'd to that Dignity from an inferior Condition; for several of them are born Princes; and a great many Governments pass on in a Line, and come by Succession and Proximity of Blood: But the true Importance of that Maxim is, that whoever is desirous to be a good Governor, must inform himself of the Humours and Inclinations of his Subjects, and understand which are the reigning Qualities in them, as perfectly well as if he had been one of the same Rank himself, and had felt and had been acted by them in his own Person. But then it is no less necessary, that the Condition of the Government should be, likewise, thoroughly understood, and that not only what Sovereignty and Power is in general; but the Frame and Temper of that Government and that State in particular, where this Person himself presides, what the Form and Constitution of it is, how it was fix'd and adjusted, and what Extent of Power is vested in him; whether it be an old or later Establishment; whether it descends by Inheritance, or whether it be conferr'd by Election; whether it were obtain'd by regular and legal Methods, or whether acquired by Force of Arms; how far this Jurisdiction reaches: what Neighbours are about him; what Strength and what Conveniences he is provided with. For according to all these, and a great many other Circumstances, too tedious to be specify'd here, a different Sort of Conduct will be found necessary. The Sceptre must be sway'd, as such Considerations shall direct; one and the same Method will not serve all alike; but the Rules and Administration must be suited to the Temper of the Beast, and as he proves to be harder or softer mouth'd, so the Rider must take Care to keep a stiffer or a slacker Reign. *Charron de la Sagesse*, Lib. iii. Chap. ii. Sect. 1. We shall see the Usefulness of these Instructions, when we come a little farther to treat of the Manner in which Laws ought to be made. (*Sect.* 5.) *Plutarch*, likewise, gives it as the *first Maxim*, to those whose Business it is to govern the State, to study the Disposition of the People, and to accustom themselves to it as much as possible, or else, says he, if they should endeavour to introduce Changes and Alterations in it all at once, they would be engag'd in an Affair that is neither easy nor safe, and that requires a deal of Time, and a Power firmly establish'd. Τὸ πρῶ[illegible] χρὴ πρὸς κα[illegible]όνσιν, &c. *Præcept. Reip. gerendæ*, Pag. 749. *B. Ed. Wech.* There are in the rest of this Treatise many excellent Maxims for the Art of Government.

[3] ‘After the Knowledge of the State and Government, which is in the Nature of a Preface or Introduction, the next, both in Order and Dignity, is Virtue. And no Man can wonder that so honourable a Place is assign'd to this, among the necessary Qualifications of a Governor, who at all considers how absolutely and indispensably needful it is to a Prince, and that both upon his own Account, and for the Benefit of the Publick. First of all it is highly reasonable, as *Cyrus* well observes, that he who is above all

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excel in such Virtues [r] as will be of Service to them in supporting the Weight of so difficult and important

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'the rest in Honour and Authority, should be so in Goodness too; this is no more than what such a great and elevated Station may 'justly seem to require of him. Then his own Reputation is nearly concern'd in it; for common Fame makes it one great Part of 'its Business to pick up and disperse every Thing our Governors do or say: The Prince stands expos'd to the publick View, every 'Eye is upon him, and he is curiously watch'd. There is no such Thing in Nature, as Privacy in Princes; they can no more be hid 'than the Sun in the Firmament. They are the constant Subject of Discourse in every Company, and so are sure to have a great deal 'of Good, or a great deal of Ill said of them. And it is of exceeding great Consequence to any Governor, both with Respect to his 'personal, and the common Interest and Safety, what Opinion the World have of him. Nor is it enough, that the supreme Gover- 'nor be virtuous in his own Temper and Conversation, but he is, likewise, obliged to take care that the Subjects be like him in Good- 'ness. And how deeply this concerns him, I appeal to the universal Consent of all good and learned Men, who, with one Voice, de- 'clare it impossible for that Kingdom or Nation, that City or less Society of Men, to prosper; nay, so much as to subsist long, who 'have banish'd Virtue from amongst them. And those nauseous Flatterers prevaricate much too grossly, who pretend, that it is for 'the Advantage and Security of Princes, that their Subjects should be abandon'd to Wickedness and Vice. Because, they say, this 'emasculates their Minds, and renders them more tame and servile in their Dispositions. So *Pliny*, in his Panegyrick (Chap. xlv.) 'says, *Patientiores servitutis, quod non decet esse nisi servos.* They are more patient under Slavery, who are fit to be nothing but 'Slaves. For, quite contrary, we find by unquestionable Experience, that the more vicious Men are, the more do they grow unruly 'under the Yoke: The Good and the Gentle are much better qualified to live in Fear and Awe of Authority themselves, than to 'be an Awe, or give Occasion of Jealousy to their Governors. *Pessimus quisque asperrime rectorem patitur.* (Salust. ad *Cæsar.* de Rep. 'Ordinand. Orat. i init.) Every Man is more ungovernable, *in Proportion as he is a worse Man.* Mutiny, Discontent, and per- 'petual Uneasiness, are the sure Attendants of a profligate Mind. *Contra, facile imperium in bonos, qui metuentes magis quam time- 'ndi.* On the other Hand, good Men are very easily kept in order; they give their Superiors little Trouble, but had rather 'submit with Reverence and Fear, than be a Terror and Disturbance to them. Now there cannot be a more powerful Motive, a more 'efficacious Means of bringing over the People, and forming them unto Virtue, than the Example of the Prince. For (as daily Ex- 'perience shews) every one affects to be like him; and the Court is the Standard of Manners, as well as of Fashions. The Reason 'is, because Example is what Men are sooner moved with, and sooner wrought upon by, than by Laws; for, this is a silent Law, but 'has more Credit and Authority than the Voice of the Law speaking in Commands. *Nec tam imperii nobis opus, quam exempli* (Plin. 'Paneg. *Chap.* xlv. *Num.* 6.) *& mitius jubetur exemplo.* We do not want Precepts so much as Patterns, and Example is the softest and 'least invidious Way of commanding. Now, if all Example be a mighty Inducement, that of great Persons must be so, in 'a Degree proportionable to their Quality and Station. For all their Inferiors fix their Eyes and Hearts here, and take their Ob- 'servations from those above them. They admire and imitate at a Venture; and conclude, that their Superiors would not be guilty 'of any Behaviour unbecoming their Character; and if they do any Thing, it must be excellent and good. And, on the other Hand, 'Governors are so sensible of the Force of this Motive too, that they think their Subjects are indispensably obliged to these Rules, 'which they are content to be govern'd by themselves; and that their own doing what they would have done by others, is singly a 'sufficient Inducement to bring it into Practice and common Vogue, without the Formality of a Command to enforce it. From all 'which it is abundantly manifest, that Virtue is exceeding necessary and advantageous to a Prince, both in point of Interest, and in 'point of Honour and Reputation.' *Charron de la Sagesse*, Liv. iii. Chap. ii. Sect. 2. Let us add to this the following Reflection of *Montaigne*: 'I know not how 'tis, but the World requires of Princes, more than other Men, to hide and conceal their Faults: 'For what is only reputed in us Indiscretion, the People esteem in them to be Tyranny, and a Contempt of the Laws. And, besides 'their Propensity to Vice, are apt to censure, that, as a heightening Pleasure to their Crimes, they insult over, and trample under 'Foot the publick Ordinances. *Plato*, indeed, in his *Gorgius*, defines a Tyrant to be one who is at his Liberty in a State to do what- 'ever his own Will leads him to. And 'tis by Reason of this Impunity, that the Publication of their Vices does often more Mischief 'than the Vice itself. Every one fears to have his Actions discover'd; and to be controul'd in his Pleasures: But Princes are, even to 'their very Gestures, Looks, and Thoughts, the Observation of the People, who think they have a Right and Title to be Judges of 'them. Besides that, the Blemishes of the Great naturally appear greater, by Reason of the Eminence and Lustre of the Place they 'are seated in; as a little Scar, or a Wart in the Forehead, is a much greater Deformity than a considerable Gash any where else. 'And this is the Reason why the Poets feign the Amours of *Jove* to be perform'd in the Disguise of so many borrow'd Shapes, and, 'among those many amorous Intrigues, there is but only one, as I remember, where he appears in his own Majesty and Grandeur. '*Essais*, Liv. i. Chap. xlii. Pag. 190.'

[r] The Virtues proper for this Purpose are, 1. *Piety*, which is the Foundation of all Virtues; but it must be a solid and reasonable Piety, free from Hypocrisy, Superstition, and Bigotry. 2. *The Love of Justice and Equity.* For the chief Design a Prince was made for, is to take Care that every Man has his Right. This obliges him to study, not only *that Part of human Learning which qualifies those famous Civilians that are fit to be Legislators themselves; who go up to that primitive Justice, which at first regulated Human Society, who exactly know what Liberty Nature has left us in Civil Governments, and what Freedom the Necessity of States takes from private People, for the Good of the Publick: But that Part of the Law too, which respects the Rights, and descends to the Affairs of particular Persons.* 'This is a Part of Education which is left the Gentlemen of the long Robe, and is not admitted into that of Princes, 'as being beneath them, tho' they are every Moment of their Reign to pass Judgment upon the Fortunes, Liberties, and Lives of 'their Subjects. Princes are perpetually talk'd to of Valour, which is of no Use but to destroy; and of Liberality, which is good 'for nothing but Extravagance, unless regulated by Justice. 'Tis true, every Temper must be instructed, if I may so say, in a Virtue 'proper for its respective Occasion; the Covetous must be aspir'd with Generosity, the Soft and the Slothful must be inflam'd with the 'Desire of Glory, and the Ambitious must, as much as possible, be restrain'd within the Rules of Justice. But whatsoever Variety 'there may be in the Disposition of Princes, Justice is always the most necessary; for that Virtue keeps up Order in him who does 'it, as well as in those to whom it is done. 'Tis not any Constraint that limits the Powers of the Prince, seeing, that at the same 'Time that he renders it to others, he teaches them to return it to himself, and that willingly too, tho' his Power necessarily obliges 'us to receive it from him. (St *Evremond*, Tom. iii. Pag. 74, 75.) From whence it follows, that he ought especially to be a reli- 'gious Observer of his Word.' Let us hear what the Oracle of *Gascoigne* says farther upon this Subject. 'Those of our Monarchs 'have consider'd, in the Establishment of the Duty of a Prince, the Good of his Affairs only, and have preferred that to the Care of 'his Faith and Conscience, might say something to a Prince, whose Affairs Fortune had put into such a Posture, that he might 'ever establish 'em by only once breaking his Word; but 'twill not go so. They often buy in the same Market; they make more 'than one Peace, and enter into more than one Treaty in their Lives. Gain tempts them to the first Breach of Faith, and that 'always presents itself, as in all other ill Acts, Sacrileges, Murders, Rebellions, Treason, as undertaken for some kind of Advan- 'tage: But this first Gain is attended with infinite mischievous Consequences; throws the Prince out of all Correspondence and Ne- 'gotiation, by such an Instance of Infidelity. *Solyman* of the *Ottoman* Race, a Race not very sollicitous of keeping their Word 'and Contracts, when, in my Infancy, he landed his Army at *Otranto*, being inform'd that *Mercurino de Gratinare* and the Inhabi- 'tants of *Castro* were detain'd Prisoners, after they had surrender'd the Place, contrary to their Articles of Capitulation, order'd 'them to be set at Liberty, fearing, *That, having other great Enterprizes in Hand in those Parts, this Perfidiousness, tho' it carried with 'it a Shew of present Advantage, would, for the future, bring on him a Discredit and Distrust of infinite Prejudice.* (Mikis Liv. ii. 'Chap. vii. Pag. 478.) To whom ought not Treachery to be hateful, when *Tiberius* refused it in a Thing of so great Importance? 'He had Word sent him from *Germany*, that if he thought fit, they would rid him of *Arminius* by Poison. This Prince was the most 'potent Enemy the *Romans* had, who had so shamefully beaten them under *Varus*, and who alone put a Stop to the Growth of their 'Power in those Countries. *Tiberius* returned Answer, *That the People of* Rome *were always us'd to revenge their Injuries of their Ene- 'mies* by fair and open Ways, with *their Swords in their Hands*, and not clandestinely, and by Fraud. He quitted the advantageous 'for the honest Part. You will tell me he was a Deceiver, and did not speak as he thought. I believe so too, and 'tis no great Mi- 'racle in Men of his Profession. But the Acknowledgment of Virtue is of no less Importance for being in the Mouth of one who 'hates it; since it is Truth that forces it from him; and if he will not inwardly receive it, he, at least, assumes the Mask of it. *Lipsius*, 'Chap. i. at the Beginning. See what *Telemachus* says, to dissuade his Allies from making use of the Treason of a certain Citizen of 'Venusium, who offer'd to deliver up to them one of the Gates of the Town by Night, Tom. viii. Pag. 41, *&c.* 3. Valour is likewise a very necessary Qualification in a Prince; but then it must be govern'd by Prudence. *Mentor* gives *Telemachus* very excellent 'Advice upon this Matter. Go, *says he*, into the greatest Dangers, as often as it is necessary you should go. A Prince dishonours

important a Charge [1]; and, alſo, learn how to regulate their outward Behaviour in a Manner ſuitable to the Grandeur and Dignity of ſo exalted a Station.

III. The

' himſelf more by avoiding the Dangers of a War, than by never going to it at all. The Courage of him who commands others ' ſhould never be doubtful: If it be neceſſary for a People to preſerve their General and King, it is ſtill more neceſſary for them not ' to doubt of his Valour----But then on the other Hand, do not run headlong into Danger, when there's no Neceſſity for it; for ' Valour can no longer be a Virtue, than as it is regulated by Prudence; otherwiſe 'tis a ſenſeleſs Contempt of Life, and a brutal ' Ardour. *Inconſiderate Valour* is always inſecure; he that is not Maſter of himſelf in Dangers, is rather fierce than brave. He is ' forc'd to be beſide himſelf, that he may be rais'd above Fear; becauſe he cannot overcome it by the natural Diſpoſition of his Heart; ' now in this Caſe, if he does not run away, he is, at leaſt, confounded; he loſes all that Preſence of Mind which is neceſſary to him, ' in making uſe of Opportunities to defeat the Enemy, or ſerve his Country. If he has all the Courage of a Soldier, he has none ' of the Prudence of a Captain; nay, he has not even the true Courage of a private Soldier; for a Soldier ought, during the Time ' of Action, to keep ſuch a Preſence of Mind, and ſuch a Moderation as is neceſſary to obey Orders. He that raſhly expoſes himſelf, ' diſcompoſes the Order and Diſcipline of the Troops, ſets an Example of Temerity, and often expoſes the whole Army to very great ' Dangers. Thoſe who prefer their vain Ambition to the Safety of the *common Cauſe*, deſerve *Puniſhments* inſtead of *Rewards*. Take ' Care then not to ſearch after Glory with too much Eagerneſs: The moſt certain Way of finding it, is patiently to wait a favour' able Opportunity: Virtue gains ſo much the more Reſpect and Eſteem, as ſhe ſhews herſelf plain, modeſt, averſe to Pride and Oſten' tation; and the greater the Neceſſity of expoſing yourſelf to Danger grows, the greater ſtill your Courage and Foreſight ought to ' be. *Tom.* viii. Pag. 43, *&c.* See, likewiſe, *Montaigne*'s *Eſſais* (*Liv. i. Chap.* xiv. and Liv. ii. Chap. xvi. that treats of *Glory.*) 4. A Prince ought *to be very reſerv'd in diſcovering his Thoughts and Deſigns.* This Virtue is apparently neceſſary to all thoſe who are concern'd in Government. It includes a wiſe Miſtruſt and innocent Diſſimulation. See *Charron de la Sageſſe*, Liv. iii. Chap. ii. § 6, 7. And what our Author has ſaid above, *Book* iv. *Chap.* ii. *Sect.* 17. 5. A Prince muſt, above all Things, *accuſtom himſelf to moderate his Deſires:* For having it in his Power to ſatisfy them, if once he ſhould give a Looſe to them, he would be tempted to proceed to the laſt Exceſs, and, by ruining his Subjects, would, in the End, ruin himſelf. To prevent theſe terrible Inconveniences, and to form himſelf to this Moderation, nothing can be more proper for him, than to accuſtom himſelf to Patience. ' 'Tis the moſt uſeful of all ' Virtues for thoſe who are to command. A Man muſt be patient, if he will become Maſter of himſelf and others. Impatience, ' which appears to be the Strength and Vigour of the Soul, is only its Weakneſs, and implies an Impotency to ſuffer Pain. He that ' can't wait and ſuffer, is like one who can't keep a Secret: Both of 'em want *Reſolution* of Mind to contain themſelves, as a Man ' that runs a Race in a Chariot, and has not a Hand ſtrong enough to ſtop, where he ought, his unruly Courſers---An impatient Man, ' by his mad ungovernable Deſires, is thrown into an Abyſs of his Misfortunes: The more powerful his Authority is, the more fatal ' to himſelf is his Impatience. He will not ſtay, he will not allow himſelf Time to meaſure any Thing; he forces all Things to ' ſatisfy his Pleaſures; he tears off the Boughs to gather the Fruit before it is ripe; he breaks down the Gates, rather than ſtay till ' they are open'd to him; he will be a reaping while the prudent Huſbandman is but ſowing; every Thing that he does is in a Hurry, ' is unſeaſonable, ill done, and has no longer Duration than his own fickle Inclination. Such are the fooliſh Projects of a Man who ' believes he is at Liberty to do every Thing, and who is entirely govern'd by his Paſſions, to the Abuſe of his Power. (*Avant. de* ' *Telemaque*, Tom. v. Pag. 179, 180.)' The Philoſopher *Arrian* (*de expedit. Alex Lib.* iv. Chap. vii.) ſays, That it is eaſy to ſee by the Example of *Alexander*, that, whatſoever fine Actions a Man performs to outward Appearance, it ſignifies nothing to true Happineſs, if he does not know at the ſame Time how to rule and moderate himſelf. Τούτων ἓν τι ὄφελος ἐς εὐδαιμονίαν ἀνθρώπῳ, ἢ μὴ σωφρονεῖν ἐν ταὐτῷ ὑπάρχον τούτῳ τῷ ἀνθρώπῳ τῷ τὰ μεγάλα, ὡς δοκεῖ, πράγματα πεφυκότι. 6. *Goodneſs* and *Clemency* are, alſo, Virtues, very proper in, and very uſeful to a Prince. ' Let him ſhine bright (ſays *Montaigne*) in Humanity, Truth, Fidelity, Tem' perance, and eſpecially in Juſtice; Marks that are rare, unknown, and exil'd. 'Tis by no other Means, but by the ſole good Will ' of the People, that he can do his Buſineſs; and no other Qualities can attract their good Will like thoſe, as being of the greateſt ' Advantage to them. *Nihil eſt tam populare quam bonitas.* Nothing is ſo popular as Goodneſs. (*Cicer.* Orat. *pro Ligar.* Chap. xii.) ' Eſſais Liv. iii. Chap. xvii. Pag. 477.' See *Charron de la Sageſſe* (Liv. iii. Chap. ii. Sect. 12.) 7. Liberality, well underſtood, and well apply'd, is ſo much the more neceſſary for Princes, as Avarice and Niggardlineſs are a Diſgrace to a Perſon whom it almoſt coſts nothing to be liberal. But then, alſo, there are no People that ought to take more Care in regulating the Uſe of this noble Virtue: As this requires Abundance of Circumſpection, and ſuppoſes moreover very commendable Diſpoſitions in Princes, who know how to place their Favours as they ought to do, and to confer them on deſerving Perſons; one can't, in my Opinion, abſolutely ſay with *Montaigne*, that Liberality is not in its true Luſtre in the Sovereign's Hand, and that private Men have the moſt Right to it; that it is a very improper Subject to be preach'd up to young Princes; and that it is but of little Value in Compariſon of other royal Virtues. However, there is nothing more ſolid than the Reflections which this Author makes in the ſame Place. ' To take it ex' actly, *ſays he*, a King (as King) has nothing properly his own; he owes his very ſelf to others. Authority is not given in the ' Favour of a Magiſtrate, but of the People. A Superior is never made ſo for his own Profit, but for the Profit of the Inferior, and ' the Phyſician for the ſick Man, and not for himſelf. All Magiſtracy, as well as Art, has its End without itſelf. *Nulla ars in ſe* ' *verſatur.*——A Prince being to give, or, to ſay better, to pay and render, to ſo many People, according to their Services, ought ' to be a truſty and prudent Diſpoſer of what he has to lay out. If the Liberality of the Prince be without Bounds or Diſcretion, I ' had much rather he were covetous; Royal Virtue ſeems to conſiſt moſt in Juſtice, and of all the Parts of Juſtice, that beſt denotes a ' King, that accompanies his Liberality; for that they have particularly reſerv'd to themſelves, whereas all other Sorts of Juſtice ' they remit to the Adminiſtration of others. An immoderate Bounty is a very weak Means to gain them good Will; becauſe it ' baulks more People than it encourages. *Qua (largitione) quò in plures uſus ſis, eò minus in multos uti poſſis----Quid autem eſt ſtultius,* ' *quàm quod libenter facias, curare ut id diutius facere non poſſis?* (*Cicer. de Offic.* Lib. ii. Chap. xv.) *By how much you uſe it to many,* ' *by ſo much leſs will you be in a Capacity to uſe it to many more —— And what greater Folly can it be than to order it ſo, that what you* ' *do willingly, you cannot do long?* And where it is conferred without due Reſpect of Merit, it puts them out of Countenance, on ' whom it is beſtowed, and is receiv'd without a juſt Acknowledgment, and that grateful Senſe which the Bounty of a Prince ought ' to meet with. Some Tyrants have been ſacrificed to the Hatred of the People, by the Hands of thoſe very Men whom they have ' unjuſtly advanced——The Subjects of a Prince, profuſe in Gifts, grow exorbitant in their Demands, and accuſtom themſelves to ' aſk, not according to Reaſon, but Example---The more a Prince exhauſts himſelf in giving, the poorer he grows in Friends. How ſhould ' he ſatisfy Deſires, which ſtill increaſe, the more they are filled? He who has his Thoughts fix'd upon getting, never thinks of what ' he has already received. Covetouſneſs has nothing ſo properly its own as Ingratitude.' *Eſſais*, Liv. iii. Chap. vi. Pag. 669, *&c.* The reſt may be ſeen in the Original; for it would be too much to tranſcribe it all. See, alſo, Mr. *Le Clerc*'s Reflections upon Happineſs and Misfortune, *&c.* Chap. xii. Pag. 282, *&c.* and *Charron de la Sageſſe*, Liv. iii. Chap. ii. Sect. 13. Here is a general Idea of thoſe Virtues which are moſt neceſſary for a Sovereign, beſides thoſe that are common to him with private Perſons, and of which ſome are included even in thoſe we have been mentioning. *Cicero* is not very wide of theſe Ideas in the following Enumeration. *Fortem, juſtum, ſeverum, gravem, magnanimum, largum, beneficum, liberalem* [*dici* :] *hæ ſunt regiæ laudes.* Orat. *pro Rege Deiotar.* Chap. ix.

[1] 'Tis thus that I thought the *Latin*, *Moreſque ad tanti faſtigii dignitatem*, ought to be rendered. For, beſides that the Author plainly diſtinguiſhes *Manners* from *Virtues*, I am much inclin'd to believe, that he form'd all this little Addition upon *Charron*'s Notions in the Chapter I have ſo often quoted, and to which he himſelf refers in the ſecond Edition of my Original. Here is what *Charron* ſays: ' The next Thing that comes under our Conſideration, after the Prince's Virtue, is what they call his *Manners*, ' that is, his Behaviour and Way of Living; the Mein, the Port, the Addreſs that ſuit with the Majeſty of a Prince; and all thoſe ' grand Appearances ſo neceſſary to be kept up.——Now tho' Nature contributes a great deal to this in the Form, and Temper, and Perſon, yet all that Nature does is capable of Amendment and Improvement, both by the additional Helps of Study and Art. Under the Head we are now upon, we may reckon the Air of his Face, the Compoſure of his Countenance, his Faſhion and Behaviour, his Gait, his Tone and Manner of Speech, his Clothes and Dreſſing: The general Rule to be obſerv'd in all theſe Particulars, is ſuch a Mixture of Sweetneſs and Moderation tempered with Gravity, as may win upon Mens Minds, and move their Affections pleaſantly; ſuch as may keep the middle Way between Love and Fear; engage their Affection, and yet command their Honour and Reſpect. His Court and Converſation are, likewiſe, worth taking Notice of. For the former, it is convenient that it ſhould be very publick, that the Palace he dwells in ſhould be noble and magnificent, fit for Reſort and Correſpondence; and that, if it can

' be

III. The general Rule which Sovereigns are to proceed by, is, *Salus Populi ſuprema Lex eſto* [1]; *Let the Safety of the People be the ſupreme Law.* 'Tis *Plato*'s Deſcription of a Prince, that *He neither thinks, nor commands, what may advance his own private Intereſt, but what may promote the Benefit of his Subjects: and whatever he ſays or does is ſaid or done for their Advantage, and for their Ornament and Grace.* For the Authority which Governors bear, was firſt conferr'd on them with this Intention, that it might prove a Means of procuring that End for which civil Societies were eſtabliſh'd. And therefore they ought to eſteem nothing as contributing to their own private or perſonal

' be well contrived, not far from the Middle of his Country, or at leaſt the moſt ſignificant Part of it; that ſo his Eye may ' command all his Dominions; and, like the Sun in the midſt of the Firmament, pierce, enlighten, and warm all round about ' him with the Influence of his Beams. For, when a Prince reſides in ſome remote Corner of his Dominions, his Diſtance em- ' boldens thoſe in the contrary Extremity to behave themſelves inſolently and grow tumultuous and unruly. As for his Converſa- ' tion, that ſhould be very reſerved, his Confidents and familiar Friends but few, his Progreſſes and other Appearances in publick ' but ſeldom; that the People may be glad to ſee him: For the ſhewing himſelf often, and giving too eaſy Acceſs to his Perſon, ' will mightly leſſen the Majeſty of his Character. *Continuus aſpectus minus verendos magnos homines ipſa ſatietate facit* [*Majeſtati* ' *major ex longinquo veneratio.* Tacit. Annal. Lib. 47. quia *omne ignotum pro magnifico eſt.* Idem *Agricol.* Chap. xxx.] The being al- ' ways admitted to the Sight and Preſence of great Perſons, does mightily impair and diminiſh our Reſpect, by glutting our Cu- ' rioſity. Majeſty is always moſt reverenced at a Diſtance; for Nature forms all our Ideas beyond the Life; and what we are not ' acquainted with, is always fancied to be very great and ſtately. *Cherron de la Sageſſe.* Liv. iii. Chap. ii. Sect. 15.

1 The Words our Author uſes, after ſeveral others, to expreſs this common Maxim, are taken from *Cicero*; *Ollis ſalus populi ſuprema lex eſto.* De Legib. *Lib.* iii. *Chap.* iii. (Conſult here the *Biblioth. Ant. & Mod.* of Mr. *Le Clerc* Tom. vi. Pag. 299. & *ſeq.*) See what a great Emperor ſays to this Matter: Δύο ταύτας ἑτοιμότητας, ἔχειν, &c. that is, *you ought always to have theſe two Maxims in View; to do for the Good of Mankind all that the Condition of a Legiſlator and a King requires of you: And the other, to change your Reſolution, whenever Men ſkill'd in ſuch Matters give you better Advice. But ſtill the Change muſt be made from the Motives of* Juſtice, *and the publick Intereſt, and never for your own Pleaſure, your own Advantage, or your own particular Glory.* Marc. Antonin. *Lib.* iv. *Chap.* xii. You will find ſeveral excellent Things upon the ſame Subject, in the *Cyrop* and in the 3d Book of *Socrates's Choſe memorables* by *Xenophon*; as, likewiſe, in the Works of *Plato* and *Ariſtotle.* According to theſe wiſe Heathens, whoſe Ideas are very different from thoſe of many Chriſtian Princes, who rather follow *Machiavel*'s Politicks, *A good Prince is one who endeavours to make his Subjects happy*; ὁ εὐδαίμονας ποιῶν ὧν ἂν ἡγῆται [*Socrat. ad Xenophon. ubi ſupra*] *a Tyrant*, on the contrary, *is one who has nothing but his own private Intereſt in View*, ἡ μὲν γὰρ τυραννίς ἐστι μοναρχία πρὸς τὸ συμφέρον τὸ τοῦ μοναρχοῦντος. *Ariſt. Polit.* Lib. iii. Chap. vii. See *Cic. de Offic.* Lib. i. Chap. xxv. *Plin.* Panegyr. Chap. lxvii. and the *Parrhaſiana*, Tom. i. p. 212, &c. of the firſt Edition. But after all, the Maxims of good Politicks have nothing in them contrary to natural Right; and our Author has, alſo, written a fine Diſſertation in 40 Pages in *Octavo*, in which he proves, in a few Words, that they are very agreeable to the Precepts of the Goſpel. This Diſſertation is entituled, *De Concordia veræ Politicæ cum Religione Chriſti*, and is among his *Academical Diſſertations.* One may, alſo, See that of Mr. *Buddeus*, entituled, *Concordia Religionis Chriſtianæ Statuſque Civilis*, where he has treated more at length of this Matter, for it conſiſts of a hundred and forty Pages in *Quarto.* It was printed at *Hall*, in 170[illegible], and is very well worth reading. But as the Actions of Sovereigns, and the Body of a State, ſeem often to depart from the Rules of thoſe Duties, which private Perſons are obliged to obſerve towards each other, our Author had a Deſign to compoſe a Treatiſe, to ſhew expreſly how far what is called a Stroke of *Policy*, or ſomething done for a *Reaſon of State*, may be juſtifiable; as he informs us himſelf in his little Preface to the ſecond Edition. It was indeed to be wiſhed for the ſake of the Publick, that Death had not prevented his executing that Project, and ſeveral others. I find in *Charron* ſome Thoughts upon the ſame Subject, which, I preſume, no one will be diſpleaſed to ſee here. ' The Juſtice, Virtue, and Probity of a Prince is not in all Points tied ' up to the ſame Methods of Proceeding with that of Perſons in a private Capacity. It has a larger Range, and freer Scope ' allowed; and all this Latitude is Indulgence little enough; no more than is abſolutely neceſſary for the weighty and [illegible] ' ous Office our Governors are engaged in, and the infinite inconceiveable Difficulties that ariſe in the Adminiſtration. This ' makes it reaſonable for them to be in a Way by themſelves; the common and direct Tract is too narrow; they are obliged to ' ſhift, and wheel about, and whatever Cenſures People, who underſtand not the Nature of the Caſe, may paſs, as if every ' Thing that is unuſual and indiſcreet, were preſently wicked and unjuſt; yet thoſe, who are capable of conſidering, and ' competent Judges of the Matter, muſt admit it to be lawful and allowable, as well as prudent and needful for them ſo to do. ' For Prudence muſt be mixed with Juſtice; ſome Feints and Stratagems, and little Sleights made uſe of, and (as they com- ' monly expreſs it) when the Lion's Skin is not big enough of itſelf, it muſt be lengthened out, by tacking a Fox's Skin to it. ' Nor would I be ſo miſtaken here, as to be thought a Juſtifier of theſe crafty Dealings at all Times, and in all Caſes indifferently. ' By no Means; this is not a ſtanding Rule of Action, but muſt be reſerved for ſpecial Occaſions, and particularly there muſt ' be three Conditions to warrant it. The firſt is abſolute Neceſſity, or, at leaſt, ſome evident and conſiderable Advantage to ' the Publick.—— And this muſt, by all means, be conſulted and the chief Aim. This is a natural and indiſpenſable Obligation: ' For the publick Good is a Condition ſuperior to all others; and the Man who is procuring it, cannot but be doing his Duty. ' *Salus Populi ſuprema Lex eſto.* The Safety of the People muſt be the ſupreme Law. The ſecond Qualification which theſe Me- ' thods muſt have to recommend them, nay, indeed to acquit them of Blame, is, that they be uſed defenſively only, and not offen- ' ſively; with a Deſign to preſerve a Prince or a State, but not aggrandize them, and oppoſe others. For this Reaſon they ſhould ſel- ' dom or never be begun with, but only retaliated; and are then in proper Time and Place, when employ'd to ſave the Publick from ' Snares and ſubtle Deſigns; and not to conceal, but to diſcover and defeat miſchievous and wicked Practices. For one Trick may ' be anſwer'd with another, and it is reaſonable to play the Fox with the Fox. The World is exceeding full of Malice and Cunning. ' And *Ariſtotle*'s Obſervation is moſt true, that the Subverſion of Kingdoms and States is uſually owing to Treachery and De[illegible] ' What then ſhould hinder? What forbid? Nay, in ſuch Exigencies, what can excuſe the Conſervators of the *publick Safety* [illegible] ' preventing and diſappointing ſuch Calamities and villainous Intentions by countermining? Why may not the State ſave itſelf by ' the ſame Methods that were practis'd to ruin it, and retort the Artifice of Factions and wicked Malcontents back upon their own ' Heads? For a Man to be too ſqueamiſh in theſe Caſes; to play conſtantly above Board, and upon the Square; and to deal with ' thoſe Men according to the Rules of that rigorous Equity and plain Dealing, which Reaſon and Conſcience require from us in pri- ' vate Affairs, is inconſiſtent with the Nature and the Meaſures, nay, with the very End of all Government; and the Event would ' often be the betraying and loſing all, and ſacrificing the Publick to an unreaſonable Scruple. The third Qualification is, that theſe ' Methods be uſed moderately and diſcreetly; as they are not fit for all Times, nor all Occaſions; ſo neither are all Perſons fit to be ' truſted with them. For they are capable of great Abuſes: And if abuſed will prove of ill Example and ill Conſequence, by miniſtring ' Occaſion to ill Men, to practiſe and juſtify their Frauds and indirect Dealings, and to give Countenance to Wickedneſs and Injuſtice, even ' in private Commerce and Tranſactions: For a Man is never at Liberty to forſake Virtue and Honeſty, to follow Vice and Injuſtice; ' theſe Things are ſo far from indifferent, that there is no Poſſibility of reconciling thoſe diſtant Extremes, no Satisfaction capable ' of being made for ſo ill a Choice. And therefore away with all Injuſtice and Infidelity, all treacherous and illegal Proceedings, and ' curſed be the *Principles* and *Politicks* of thoſe Men who would poſſeſs ſovereign Commanders with a Belief that all Things are law- ' ful, if they be but expedient for them. There is a vaſt Difference between ſuch an arbitrary Notion of Right and Wrong, and the Rules ' of Limitations I have here laid down. Reaſons of State may ſometimes make it neceſſary to temper Honeſty with Profit, and [illegible] ' if theſe two can be ſo mingled together as to make a good Compoſition. But, tho' we may try to compound and ſoften the Matter ' a little, yet we muſt never act in Oppoſition to Juſtice: We may, nay, we muſt ſometimes wheel off a little, and fetch a Compaſs ' about it; but we muſt never loſe Sight of it, much leſs turn our Backs upon it, and caſt all Regards for ſo ſacred a Thing behind ' us. For there is a Cunning very conſiſtent with Virtue and ſtrict Honour, such as St. *Baſil* the Great calls a *great and com[illegible]* ' *Cunning (magna & laudabilis aſtutia)* ſuch as tends to Good; and may be uſed as Mothers and Phyſicians deal by their Children ' and their Patients, when they tell them fine Stories to amuſe and entertain them, and by Degrees cheat them into Health. [illegible] ' many Things may be acted ſecretly and in the Dark, which are not fit for publick View, and will not bear an opener [illegible] ' Prudence and Stratagem may be added to Courage and Strength; Art and Wit may ſupply the Defects of Nature and Force [illegible]

perſonal Good, which is not at, the ſame Time, profitable to the Commonwealth [1]. *Would it not ſeem a Wonder to you* (ſays *Socrates* to *Xenophon* [a]) *if he ſhould be owned for a good Herdſman, who leſſens the Number, or multiplies the ill Qualities of his Drove? 'Tis a much greater Wonder, if he who hath the Command of a State, and both waſtes the Strength, and corrupts the Manners of his Subjects, doth not bluſh at his Miſmanagement, and confeſs himſelf an ill Governor.*

IV. In order to the internal Tranquillity of States, it is neceſſary that the Wills and Inclinations of the Members be ſo moderated and directed, as ſhall appear conducive to the Safety of the whole Body. Hence it is the Duty of ſupreme Rulers, not only to preſcribe Laws fit for the obtaining of this End, but, likewiſe, ſo to keep up the Strictneſs of publick Diſcipline [2], eſpecially as to what relates to the Education of Children, as that the Subjects may conform to the Laws [3], not ſo much out of Fear of Puniſhment, as out of Habit and Cuſtom: In as much

[a] Ἀπομν. Lib. iii.

' Caſes which theſe are not ſufficient to manage: A Governor may, nay he ought to be, as *Pindar* calls it, a Lion in the Field, and ' a Fox at the Council-Table; or as that divine Saviour, who was Truth itſelf, has expreſs'd himſelf upon another Occaſion, he ' may be a ſubtle Serpent, but ſtill a harmleſs Dove, *Liv.* iii. Chap. ii. §. 2.' The Author afterwards proceeds to Particulars in this Affair; but how nice and delicate ſoever the Speculation of them may be, *the Practice is infinitely more difficult*; and there are but few Princes who keep themſelves, on many Accounts, within the juſt Bounds there mentioned. See Mr. *Bayle's Diction. Hiſtor. & Crit.* Tom. ii. p. 114. *Col.* A. 2. *Edit.* In the Articles *Elizabeth* and *Machiavel*. *Gabriel Naude*, in a Treatiſe entituled *Conſiderations Politiques ſur les Coups d'Etat*, has carried this Matter much further than Virtue and the true Ends of civil Government will allow.

[1] The Truth of it is, that the very Intereſt of the Sovereign requires that he ſhould direct all his Actions to this End.

Qui ſceptra duro ſævus imperio regit,
Timet timentes; metus in auctorem redit.
Senec. *in Oedip.* ver. 705, 706.

The following Words of Mr. *de Fenelon* will ſerve to explain and illuſtrate this Sentence. ' Where the ſovereign Command is moſt ' abſolute, there Princes are leaſt powerful. They take, they ruin every Thing, and are the ſole Poſſeſſors of the whole State; but then the ' State languiſhes, the Country is unmanur'd and almoſt deſert, the Towns every Day decay and grow thin, and Trade is quite loſt. The ' King, who can neither be ſuch by himſelf, but muſt be ſuch with regard to his People, undoes himſelf by Degrees, by inſenſibly ' undoing his Subjects, to whom he owes both his Riches and his Power; his Kingdom is drain'd of Money and Men, and the ' Loſs of the Latter is the greateſt and moſt irreparable of all Loſſes. His arbitrary Power makes as many Slaves as he has Sub- ' jects; they all ſeem to adore him, and all tremble at the leaſt Motion of his Eye: But mark the Conſequence upon the leaſt ' Revolution; this monſtrous Power, raiſed to too exceſſive an Height, cannot long endure; it wants Supplies from the Hearts ' of the People; it has wearied out and exaſperated the ſeveral Ranks of Men in the State; and forces all the Members of that ' Body to ſigh with equal Ardour for a Change. At the firſt Blow the Idol is pull'd down, and trampled under Foot. Contempt, ' Hatred, Fear, Reſentment, Jealouſy; in a Word, all the Paſſions combine together againſt ſo injurious and deteſtable a Power. ' The King, who in the Days of his vain Proſperity could find no Perſon that durſt tell him the Truth, ſhall not find one in his ' Adverſity that will vouchſafe to excuſe, or defend him againſt his Enemies. *Tom.* iii. p. 74, 75.

[2] Ὄφελος γὰρ ἐθὲν τῶν ὠφελιμωτάτων νόμων, &c. ' The beſt and moſt uſeful Laws, and which are approved of by all ' ſuch as are ſubject to them, are of no Uſe, unleſs Subjects be trained up and educated in a Manner of Living conformable to Go- ' vernment, *Ariſtot. Polit.* v. *Chap.* ix.' *Plato* ſays, that, to lay the Foundation of a good Government, we muſt firſt begin by the Education of Children, and muſt make them as virtuous as poſſible: As an experienc'd Gardener employs his Care about the young and tender Plants, and then goes on to others. Καὶ φαίνεταί μοι τῶν πολιτικῶν μόνῳ ἀρχόσθαι ὀρθῶς. ὀρθῶς (*Henry Stephens* corrects it ὀρθῶν, but without any Neceſſity, as might be demonſtrated, if this were a proper Place to do it) γάρ ἐστι τῶν νέων πρῶτον ἐπιμεληθῆναι, ὅπως ἔσονται ὅτι ἄριστοι, ὥσπερ γεωργὸν ἀγαθὸν τῶν νέων φυτῶν εἰκὸς πρῶτον ἐπιμεληθῆναι, μετὰ δὲ τοῦτο καὶ τῶν ἄλλων.. *Euthyphron.* p. 2. *Ed. Serrani.* ' Children belong leſs to their Parents than to the Publick, ſays ' *Mentor*; they are the Children of the People, they are the Hope and Strength of the State: 'Tis too late to mend them, when ' they are ſpoiled; it ſignifies nothing to debar them from Employments, when they have render'd themſelves unworthy of them; it ' is much better to prevent the Evil, than to be obliged to puniſh it. A King——who is the Father of all his People, is ſtill more ' particularly the Father of all the Youth, who are the Flower of the whole Nation; and it is in the Flower that Fruits are prepared. ' Let not the King then diſdain to watch over them, and make others do the ſame, alſo, in their Education; let him take Care ' that the Laws of *Minos* be duly obſerved, which ordained that Children be taught to contemn Pain and Death; to place an Honour ' in the Neglect of Pleaſures and Riches; to look upon Injuſtice, Lying, Ingratitude, and Slothfulneſs to be infamous Vices; that ' from their tendereſt Infancy they be inſtructed in ſinging the Praiſes of Heroes who were beloved by the Gods, who have done ' glorious Things for their Country, and who ſignalized their Valour in Battle; let the Charms of Muſick ſeize their Souls, ' to make their Manners gentle and pure; let them learn to be tender of their Friends, faithful to their Allies, and juſt to all ' Men, even to their moſt inveterate Enemies; let them learn leſs to fear Death itſelf, and all Manner of Torments, rather than the leaſt ' Reproach of Conſcience. If Children are inſtructed betimes in theſe noble Maxims, and if they are inſtilled into their Hearts by the prevail- ' ing Force of Muſick, there will certainly be few but will be inflamed with the Love of Glory and Virtue.—— It is of the higheſt ' Importance, alſo, to eſtabliſh publick Schools, to accuſtom Youth to robuſt Exerciſes of the Body, to hinder them from growing ' lazy and effeminate, which will ſpoil the beſt Tempers in the World. There ought to be a great Variety of Games and pub- ' lick Shews to animate the People, but eſpecially to exerciſe their Bodies, to make them ſprightly, ſupple, and vigorous, with Re- ' wards and Prizes to inſpire them with a noble Emulation. But what is chiefly to be wiſh'd for, to encourage good Manners, ' is, that young People ſhould marry early, and that their Parents, without any baſe or ſordid Proſpect of Intereſt, ſhould leave ' to them the Choice of their Wives, ſuch as are moſt agreeable to them both in Body and Mind, with whom they might live ' for ever happy. *Avant de Telemaque*, Tom. iii. at the End.

[3] *Quid Leges ſine moribus*
Vanæ proficiunt?
Horat. Lib. iii. Ode. xxiv. 35, 36.
Laws without Manners are but Words and Wind.

Upon which ſee Mr. *Dacier*'s Note. The Method of the ancient *Athenians*, which an Orator of that Country makes an Encomium on, in a Place which our Author has quoted after that of *Horace*, is indeed admirable, and deſerves to be propoſed as a Pattern to all Princes. Ἀλλὰ γὰρ ἦν ἐν τοιούτῳ, &c. ' They cenſured thoſe as guilty of extreme Ignorance, who imagined, that where ' there were the moſt accurate Laws, there muſt be the moſt excellent Men; when it is evidently ſo very eaſy a Matter to borrow ' and tranſcribe the good Regulations of other States. Therefore they did not believe, that Virtue derived ſo much Advantage ' and Aſſiſtance in its Growth from good Statutes, as from Cuſtom and Practice. That the greateſt Part of Men muſt, of Neceſſity, ' frame their Minds according to thoſe Patterns by which they were firſt taught and inſtructed; but that a numerous and accurate ' Eſtabliſhment of Laws was really a Sign of the ill Condition of the Commonwealth: Edicts and Ordinances being then heaped upon ' one another, when Governments find themſelves obliged to endeavour the Reſtraining of Vice, as it were by Banks and Mounds. ' That it became wiſe Magiſtrates, not to fill the publick Places with Proclamations and Decrees, but to take care that the Subjects ſhould ' have the Love of Juſtice and Honeſty firmly rooted in their Minds. That not the Orders of the Senate or People, but good and ge- ' nerous Education, was the Thing which made a Government happy: In as much as Men would venture to break through the

much as bare Penalties are not so apt to produce a Care of doing well (this being the proper Effect of Reason and Institution) as a Solicitude to avoid Discovery in doing Ill.

Towards the Accomplishing of so good an End in States, where Christianity [1] is profess'd, this Religion itself doth, in a high Manner, contribute; provided it be such as is preserved in its primitive Sincerity, purg'd from human Corruptions, and inculcated both by the Doctrine and Example of a learned and pious Clergy: In as much as that holy Institution doth not only comprize all the Points conducing to Eternal Salvation, but, likewise, the most perfect Scheme of moral Precepts, which are admirably useful in disposing the Minds of Men to a Compliance with civil Life, and yet, which cannot so conveniently be established by the bare Force of civil Laws. For this Reason, in all Christian Governments, which we are acquainted with, the exhortatory Part of the Law of Nature is given in Charge to the Ministers of the Church, to be by them press'd and enforc'd upon the Conscience; tho' the dogmatical Part belongs rather to those who have made this Science their peculiar Profession [a]. Of great Advantage to the same Design are publick Schools, if employ'd for the teaching not of useless Trifles, and the Inventions of idle Brains, the Reliques of the *Kingdom of Darkness* [b], but solid Learning and Knowledge, the Use of which, diffuseth itself through all the Business of Life. Amongst these Studies, the chief is that which, upon sound and rational Principles, explains the Right of Sovereigns, and the Obligations correspondent to it in the Subjects [c]. Another Thing which adds Strength and Vigour to publick Discipline, is the Example of those who hold the supreme Authority. *The Manners of the whole State* (as *Isocrates* [d] well observes) *are drawn and express'd from the Pattern of the Prince.* And therefore *Spartian* had Reason to say of *Caracalla*, when he married his Mother-in-Law, *He engag'd in such Nuptials, as, had he understood himself to be a true Lawgiver, he, of all Men, ought to have prohibited.* To see then, that all these Particulars are duly regulated in a Commonwealth, should be the Care of the supreme Directors.

V. Of great Service and Benefit it is, in order to the same End, to have a System of just, plain, and perspicuous Laws, for the settling of such Affairs, as the Subjects are most frequently concern'd in with one another, and [3] suitable to the Condition and Genius of the People they are prescribed for. 'Tis the Advice of *Isocrates* to a young Prince, *As for Laws, seek those in general which are equitable and useful, and such as may render the Differences amongst the Subjects as few as possible, and the Accommodation of them as less easy and expeditious.* The Marks which the same Orator hath set [f] to distinguish good Laws,

[a] Add *Grotius, de Imperio Summ. Potest. circa Sacra*, Chap. i. Numb. 13. [b] Vide *Hobbes* Leviath. Chap. xlvi, *&c. Lucret.* i. vi. ver. 981. [c] *Vide* Hobbes *Leviath.* Chap. xxx. There is a famous Passage, relating to the Instruction of Youth, in *Dio Cassius* (Lib. lii.) in *Mæcenas*'s Speech to *Augustus*. Add the Dispute about suppressing the University of *Conimbra* in *Conneseog.* De Unione *Lucitan.* Lib. viii. Nor is that to be disregarded, which *Gramond*, in his History of *France* (Lib. iii.) offers, concerning the Number of Schools. [d] *Ad* Nicoclem, *Pag.* 36. [e] *Ibid.* Chap. xxxii. [f] *In* Panathen. *Pag.* 453.

'nicest Exactness of political Constitutions, if they had not been bred up under a strict Obedience to them: Whereas, those who had 'been form'd to Virtue, by a regular and constant Discipline, were the only Persons, who, by their just Conformity, could make 'good Laws obtain a good Effect. The principal Design of the *Athenians*, when they made these Reflections, was not how they 'might punish Disorders, but how they might find a Way of making the People to be willing not to do any thing that might deserve 'Punishment. This last View seem'd worthy of themselves and their Employment: But as for the other, or an exact Application to 'punish People, they thought it a Business proper only for an Enemy; and therefore they took care of all the Subjects in general, but 'particularly of the Youth.' *Isocrat. in Areopagit.* Pag. 254, 255. *Ed. Paris. min.* What follows in the same Place, very well deserves to be read. See, also, *Maxim. de Tyr.* Dissert. iii. Pag. 64. *Ed. Davis*, and *Jamblique*, de Vita Pythagor. § 171, *&c.*

[1] We must not here forget the following Reflection of *Montaigne*: 'The Christian Religion has all the Marks of the exactest Justice 'and the greatest Usefulness: But none more manifest than the severe Injunction it lays indifferently upon all to yield Obedience to the 'Civil Magistrate, and to maintain and defend the Laws. Of which, what a wonderful Example has the Divine Wisdom left us, who, 'to work and establish the Salvation of Mankind, and to carry on his glorious Victory over Sin and Death, would do it no other 'Way than at the Mercy of our ordinary Forms of Justice, submitting the Progress and Issue of so high and salutary an Effect, to the 'Blindness and Injustice of our Observations and Customs, suffering the innocent Brood of so many of his Elect, and so many Years 'to be lost in ripening this inestimable Fruit? *Essais, Liv.* i. *Chap.* xxii. towards the End.

[2] Chap x. [3] 'Tis upon this Account, that those who make Laws, and govern States, ought thoroughly to know the Disposition of the People they have to command, as we observ'd above, Sect. 2. Not. 5. Legislators and Magistrates, who are not sufficiently instructed in this Matter, fall unavoidably into a very grievous Inconveniency, which is this; 'Supposing the People to be of 'a Temper and Complexion quite different from what they really are, they give them Laws which they cannot observe; upon which 'either a vast Number of People must be punished, without the State reaping any Benefit from it; or else, they must behold the Au'thority of the Law contemn'd, that is, the Constitution upon the Brink of Ruin. On the contrary, when they give a People 'Laws but such as are fitted to their Capacities, and such as suppose them to be what they are, they have the Satisfaction of 'seeing them observ'd by every body, without proceeding but rarely to such Punishments, which those who violate them are made 'to suffer: And they peaceably enjoy all the Advantages that result from the Observation of those Laws. The Fault I have here 'now mentioning, was notorious in the *Roman* Commonwealth, which could not subsist, but upon Supposition, that those who pos'sess'd the chief Employments in the State, were exempt from Ambition, Luxury, and Avarice: This was a ridiculous Suppo'tion, and what ruined that Government in a very short Time, after it was arrived at the last Period of its Greatness. The Consuls 'and Pretors, who generally governed large Provinces, and who often commanded powerful Armies, were absolute in their Govern'ments and in their Armies, during the Time of their Power; so that there was no Appeal, either from their Judgment, at least in 'Favour of the People of the Provinces, or any Way of making them alter their Conduct, by any Authority whatsoever — — — 'out even being assured of having Justice at *Rome*, when the Time of their Magistracy was expired — — But, besides, their Punish'ment was very inconsiderable, and to be feared only by such as had been guilty of the most horrible Excesses; as we may be informed by *Cicero*'s Harangues against *Verres* — — — If, on the contrary, we compare the Laws of *Moses* to the Genius of the People to 'whom he gave them, we may remark, that GOD suited himself, if I may so speak, to the Temper of the *Jews*, and that he tole'rated some Things, which he would never have suffer'd in a more enlightened Nation, and which are, at this Day, likewise, forbid'den under Christianity. For Example, our Lord tells us, that he had not allow'd of Divorce (*Matt.* xx. 8) *but for the Hardness 'their Hearts*: And he has forbidden it Christians, except in one Case only. The same Commendation is, also, given to *Solon*, who 'before he undertook to prescribe Laws to the *Athenians*, had studied their Tempers, and regulated himself thereupon according 'as far as the Good of the State would permit him; — — — Being afterwards ask'd, *Whether he believed he had given the Athenians 'best Laws that it was possible to give them*; he reply'd, *He had given them the best Laws that it was possible to make them receive.* Plutarch Pag. 86. C. (in *Solon.*) I have taken all this from Mr. *Le Clerc*'s Reflections *sur ce que l'on appelle Bonheur & Malheur en matière des Loteries*, Chap. x. Pag. 127, *&c.* But it would be well to read all the rest of that Chapter.

are, that they be *Few in Number* [1], *yet satisfactory and intelligible to those who are to use them; just and profitable, and consonant to each other; and rather directed towards keeping up the publick Institutions, than towards preventing the petty Frauds of private Dealings* [a]. It ought to be a settled Rule in this Point, not to enact more Laws than conduce to the Good of the Subject, and of the State. For since Men, in their Deliberations about what they ought, or ought not, to do, are more frequently guided by their natural Reason, than by reflecting on the publick Constitutions [b]; wherever there are more Laws than can easily come within the Compass of their Memory, and those prohibiting such Things as Reason of itself doth not prohibit, here the Subjects must through meer Ignorance, without any ill Intention, fall into the Laws as into so many Snares. And, by this means, the Government brings the People under an unnecessary Inconvenience; which is contrary to the original Design of civil States. Moreover, the ordinary Form and Course of Justice ought to be fix'd in such a Manner, as that every Subject may recover his Right by as short and as cheap a Process as can be contriv'd. The *Persians* have a Proverb, that *Short Injustice is better than tardy and tedious Justice.*

VI. And because 'tis in vain to enact Laws, if Governors suffer them to be transgress'd with Security; it is therefore their Part carefully to put their own Decrees in Execution, and to inflict new Punishments [c], according to the Nature and Circumstances of the Fact, and the Intention and Malice of the Offender. In which Affair they ought so to proceed, as that the true Force of the Laws may be exercis'd, not only upon the Subjects of moderate Fortune and Condition, but upon the Wealthy and Powerful; whose Riches and Honours ought, on no Account, to give them the Privilege of insulting over their Inferiors with Impunity; especially since Commonwealths are never in more Danger, than from the Fury of the Populace, exasperated by unreasonable Oppressions [c]. Nor ought Indulgences of Pardons to be allow'd without any sufficient Cause [d]: Since not to treat alike those who, *cæteris paribus*, have deserv'd alike, is not only unjust, but hath, also, a peculiar Efficacy towards inflaming the Minds of the Subjects [e].

VII. But as nothing is to be guarded with penal Sanctions, which doth not contribute to the Advantage of the State, so, in the annexing of those Punishments, such Moderation is to be used, as that they may bear a just Proportion to the same End; and, consequently, that they may be no more to the Grievance of the Subject, than to the Benefit of the Publick. In general, if it be desired, that Punishments should obtain their due Effect, they ought to be rais'd to such a Degree of Severity, as that the Pain and Sharpness of them may outweigh the Profit, or Pleasure, which might arise from the Transgression [f].

VIII. Farther, since Men first incorporated themselves in Communities, to obtain Security against the Injuries of others [3]; it concerns every Government to forbid the mutual Injuries of Subjects, so much the more strictly and severely, as their perpetual Living together affords more easy Opportunities of Hurt and Mischief. Neither ought the Distinction of Orders, or

[a] Lycurgus (*Orat. contra* Leocrat.) says, that *Laws, by Reason of their Brevity, do not* teach (as is done in the Science and Study of the Law) *but* command *Men how to act. Quintil.* Declam. 264. *Where's the Difference, whether there be no Laws, or such as are ambiguous and uncertain?* To this let us add what *Cicero* says, 'That the Use of Laws having been established for the Good and Advantage of States, and to make Mankind better and happier; no Law that is unjust or prejudicial to a State, can have the Force of a Law, nor deserve to be call'd by that just and equitable Name. *Constat profecto ad salutem civium*, &c. de Legib. Lib. ii. Chap v.

[b] *Hobbes* De Cive, Chap. xiii. Sect. 15. Leviath. *Chap.* xxx. [c] *Leviath.* ibid. [d] See the *Parrhasiana*, Tom. ii. Pag. 178, &c. [e] Pindar. *Olymp. Od.* xiii. *Ver.* vi. &c.

Εὐνομία βάθεσν πολιῶν, &c.

Good Law, the Basis of a State,
Here with her Sisters takes her Seat;
Strict *Justice* with unshaken Mind,
And *Peace*, engaging to be kind,
Through their fair Hands the Treasure flows,
Which Heaven on craving Men bestows;
Daughter of *Themis*, who presides
In Councils, and wise Motions guides.

[f] Add. *Hobbes* Leviath. Chap. xxx.

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[1] A Multiplicity of Laws is a Sign of an ill-govern'd State. *Corruptissima Republica plurimæ Leges*, says *Tacitus*, Annal. Lib. iii. Chap. xxvii. *The more the* Roman *Government was corrupted, the more Laws there were.* See *Strabo*, Geogr. Lib. vi. Pag. 260. *Ed. Paris.* 399. A. *Ed. ult. Amst.* and the *Parrhasiana*, Tom. ii. Pag. 300, &c. As for whatever relates to Laws and the Administration of Justice, we may consult Mr. *Buddeus*'s *Philosoph. Practic.* Part iii. Chap. v. § 4. There are, also, a great many excellent Things in a Dissertation of Mr. *Thomasius*'s, entituled, *Morum cum Jure scripto contentio*, printed at *Hall* in 1701.

[2] 'The Crimes and Disorders that are not to be prevented, must be immediately punish'd with Severity: 'Tis an Act of Clemency 'to put a Stop to the Course of Iniquity, by making early Examples of those who presume to offend. A little Blood shed in due 'Time, prevents the Shedding of a great deal, and makes a Prince to be dreaded, without making use of Severity too often. *Avant.* 'de Telem. Tom. iii. Pag. 73. We shall treat of *Punishments* more at large in the Third Chapter of the following Book.' See Mr. *Buddeus*'s *Philosoph. Pract.* Part iii. Chap. v. Sect. 5. concerning the Manner of the Distribution of Punishments and Rewards.

[3] 'What signifies it to me, or to any of my Fellow-subjects, that my Sovereign is successful, that the prudent Management of his 'Ministers, nay, that of his own personal Merits, exalt him to the highest Pitch of Glory; that my Country is powerful, the Terror 'of all the neighbouring Nations? What should I be the better for all these Things, if I were forced to labour under the dismal and 'melancholy Burthen of Poverty and Oppression? If, whilst I was secur'd against foreign Invasions, I was expos'd within the Walls 'of Cities to the Barbarity of a treacherous Assassin? If Rapine and Violence were less to be feared in the darkest Nights, and in 'the widest Deserts, than at mid Day in the Streets? If Safety, Cleanliness, and good Order had not rendered Living in Towns so 'delightful, and had not added to the Plenty the Means of our conversing with so much Ease one with another? Or, if being weak and 'defenceless, I were encroached upon in the Country by every neighbouring great Man? If there was not a Provision made to pro-'tect me against his Injustice? If, I had not at Hand so many Masters, and those eminent Masters too, to breed up my Children in 'those Arts and Sciences which will one Day raise their Fortunes? If the promoting of Trade had not made good substantial Stuffs 'for my Clothing, and wholesome Food for my Nourishment, both plentiful and cheap? If, to conclude, the Care of my Sovereign 'had not given me Reason to be as well contented with my Fortune, as his extraordinary Virtues must needs make him with his? '*Characteres ou Mœurs de ce Siecle, par Mr. de la* Bruyere, *Pag.* 334.

Dignities, to be allow'd such a Force, as to encourage the Great and Powerful in tyrannizing over those of meaner Condition. The Way to purchase an *honest Popularity* [a], is (in *Isocrates*'s Words) *neither to let the Commonalty grow extravagant and abusive, nor to let them suffer from the Insolence of the superior Order; but to bestow Honour always on Persons of the greatest Merit, and to see that the rest are not wrong'd or trampled upon.* 'Tis a good Saying of the Historian [b], *Tho' it be enough for private Men to do no Injury themselves; yet 'tis the Duty of Princes to take care farther, that others do none.* It is likewise repugnant to the End of Government, to allow Subjects in revenging, by their own private Force, the Injuries which they think themselves to have suffered.

IX. Besides, altho' a single Ruler cannot, in Person, discharge all the Affairs of an extended Realm, so that he must of Necessity assume Ministers into the Partnership of his Cares; yet these, as they derive all their Authority from their Master's Commission, so, whatever they act, whether well, or ill, must finally be set to his Account. And therefore *Isocrates* [1] prudently adviseth, *So appoint others over the Business which you can't execute yourself, as considering, that whatever they perform, will be ascribed to you.* And again, *If you happen to obtain a Magistracy, never use the Service of a wicked Person in exercising your Office; for in whatsoever Point he offends, the Guilt will be laid to your Charge* [c]. For which Reason, and because as the Ministers are, so the Business will be well or ill manag'd [d], Governors are obliged to employ, in publick Trusts, Men of Integrity and Ability; often to inspect their Proceedings, and to reward, or punish them, according as they find them deserve; to the End, that the rest may understand how strictly they stand engaged, to apply no less Fidelity and Diligence to the Affairs of the State, than they would to their own personal Concerns. The *Chinese*, to avoid all Inconveniencies that might arise from Favour on the one Hand, and from Resentment on the other, allow no Man to bear an Office in the Place where he was born; it being most likely, that he should there meet with Persons whom he particularly loves or hates. Thus too, since wicked Men are tempted to the Commission of the greatest Sins, through Hopes of Impunity, which they easily entertain, where the Judges lie open to Bribery and Corruption; it's the Duty of Sovereigns severely to punish such Judges, as the Patrons of all those Villanies which disturb the publick Security [e], and to revoke their unjust Sentences and Proceedings. For the Practice said to be observ'd in *Arragon*, seems reasonable; to punish the Judges for a false Sentence, and yet to put the same Sentence in Execution. Besides, tho' the ordinary Management of Affairs is entrusted in the Hands of Ministers, yet the supreme Rulers themselves ought never to disdain the lending a patient Ear to the Complaints, or Requests, of their Subjects.

What Qualifications Sovereigns ought to regard in those, whose Advice they would use in the Dispatch of publick Business, and what seems the most convenient Way of getting out their Opinion, Mr. *Hobbes* [f] hath shewn at large. As to the latter Point, there's a remarkable Instance in *Davila*'s History of the Civil Wars of *France* [g], where the Pope consults the Cardinals, not in a Consistory, but each apart, about the Absolution to be granted King *Henry*. *Isocrates* [h] calls a Counsellor, *The most useful of all Treasures, or Possessions, and the most worthy of a King.* *Neuhof* [i], in his Description of *China*, reports many Things very worthy of Observation, concerning the Magistrates of that wise People. Nor ought we to undervalue the Directions of King *James* the First of *England*, in his Βασιλικὸν Δῶρον [k]; That a Prince should choose his Counsellors chiefly by his own Judgment, not at the Pleasure of others; and that he should take them indifferently out of all Orders of the People, in as much as he is the common Father of all. In the same Piece, the King hath assign'd the Reasons, why Men of moderate Condition should be pitch'd on, for the Offices relating to the publick Money [l].

X. Since the Subjects are obliged to the bearing of Taxes, and the like Burthens, on no other Account, but as they are necessary to defray the publick Expences in War or Peace; it is the Duty of Sovereigns, in this Respect, to draw no farther Supplies [3], than either the meer Necessity, or the signal Benefit and Interest

[a] *Ad* Nicoclem, *Pag.* 31. [b] Xiphilin. *Epit.* Dion. *in* Galba. See, also, the *Parrhasiana*, Tom. ii. Pag. 283, *&c.* where it is shewn that every Man ought to have Justice done him.

[c] *Themist.* Orat. viii. Pag. 117. *Mentor* gives *Telemachus* very excellent Advice and very judicious Rules relating to this Point (*Tom.* v. Pag. 124, *&c.*) but, as this Chapter is already clogged with Notes, it would be too much to copy it out here. See also *Charron de la Sagesse*, Lib. iii. Chap. ii. Sect. 16, *&c.* And Mr. *Buddeus*'s *Philosoph. Pract.* Part iii. Chap. v. Sect. vi. Our Author has here cited that Verse of *Martial*, *Principis est virtus maxima, nosse suos.* Lib. viii. Epigr. xv. But it relates to quite another Thing: For the Poet means, that the great Virtue of a Prince consists in the Knowledge how to gain the Affections of his People, as it plainly appears from the Design and Fancy of the Epigram: The following Example is more to the Purpose.——When *Satibarzanes* petition'd his Master *Artaxerxes* for the Government of a certain Province, of which he was very incapable, together with the Sum of Three Thousand Pieces of Gold; the King granted the latter Part of his Request, but deny'd the former: For, says he, to give you so much Money will not make me more indigent, but to give you such a Government, would make me more unjust. *Euripides* (in *Rhes.* v. 626) Every Man ought to be assigned that Part in which he is capable of doing most Service. *Libanius* (Legat. ad *Julian.*) According as the Man is, whom you place in the Box, accordingly the Chariot will be guided.

[d] *Add* Xenophon. Cyropæd. *Lib.* viii. *post princip.* [e] *Vide* Diodor. Sic. *Lib.* ii. *Chap.* lxxv, lxxvi. [f] Leviath. Chap. xv. p. [g] Lib. xiv. Pag. 966. [h] *Add* Nicoclem. [i] Descript. *gen. Sinic. Chap.* i. [k] Lib. ii. [l] *Add* Liban. *Orat.* v. *De* Assessoribus.

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[1] *Ad* Nicoclem, *Pag.* 35. [2] *Charron*, dict. loc. [3] Too great Exactions considerably lessen the publick Revenues, tho', at first Sight, they seem to increase them. The Reason of it is, that Trade is thereby quickly ruined, and so that Source of the publick Revenues is entirely, or in part, dry'd up. For when there is very little to be got by Trading, People grow tired of it, and traffick as little as possible. Being by Degrees destitute of Money, or having no considerable Sum by them, they can undertake no great Enterprize; so that Trade is, at last, by Degrees reduced to what is only necessary for the Support of Life, and brings but a small Matter to the Prince's Treasury. This is what one of the most antient *Greek* Poets above Two Thousand Years ago says, speaking of his Brother, who had brib'd the Judges, who, in those Days, were called Kings, that he might have a larger Share in the paternal Estate than *Hesiod*: *We have formerly*, says he, *divided our Inheritance; but you took from me what did not belong to you, by* [illegible]

reſt of the State ſhall require [a]. And then they are to ſee that theſe Impoſitions be levied according to the juſteſt Proportion; and that no Immunities or Exemptions be granted to certain Perſons, to the defrauding or oppreſſing of the reſt [b] [1]. Farther, that the Way of gathering them be with as little Charge as poſſible, and that much do not ſtick to the Collectors Fingers: Leſt it ſhould happen to the Treaſury, as it fares with Buckets in a Fire; they are filled to throw upon the Flames, but by paſſing through ſo many Hands, and being frequently ſhook from Side to Side, they are ſcarce half full when they reach the Place, which requires their Service. 'Twas a notable Anſwer, that which *Hybreas* the Orator gave *Mark Antony* the *Triumvir*, when order'd by him to double the Tribute in *Aſia*; *You ſhould, at the ſame Time, command us* (ſays he) *to have a double Summer, and a double Autumn this Year* [c]; Care ought likewiſe to be taken, that what is collected, be laid out on the Occaſions of the Commonwealth, and not waſted in Luxury, Donatives [c], ſuperfluous Magnificence, or idle Vanities. Laſtly, Matters are to be ſo ordered, as that the Expences, as near as poſſible, keep a Proportion to the Revenues; or where they fail, the Defect muſt be made up by frugal Management, and by retrenching unneceſſary Charges. 'Tis of pernicious Conſequence to affect more Pomp and State than the ordinary Income will ſupport; and he doth, in Reality, live *great* enough, who gives every one their due. Nor ought we to be moved with that Sentence of *Tully* [d], *'Tis no great Commendation in a Prince to be reputed a frugal Man*: Which Mr. *Hobbes* [e] thus explains; *Frugality, tho' in poor Men a Virtue, maketh a Man unapt to atchieve ſuch Actions, as require the Strength of many Men at once; for it weakens their Endeavours, which are to be nouriſh'd and kept in Vigour by Reward.*

XI. Tho' Rulers are not bound to afford Suſtenance to their Subjects (only, ſo far as Charity commands them to have a particular Regard to thoſe, who, by ſome undeſerved Calamity, are rendered inſufficient for their own Support [f]) yet, in as much as the Sums, neceſſary to the common Safety, are collected from the Ability of private Perſons; farther, ſince the Strength of a State conſiſts in the Valour, and the Wealth of the Subjects; and becauſe,

---- gravis eſt domino, quæ ſervit egeſtas [g];

Poor Vaſſals are a Burthen to their Lord;

therefore, ſo far as in them lies, they are to take care, that the Eſtates and Poſſeſſions of their People be well cultivated and improved. *Iſocrates* [g] is admirable in his Advice to this Purpoſe; *Keep a ſtrict Eye* (ſays he) *over the Fortunes of private Men; believe the Prodigal to ſpend out of* your *Stock, and the good Husbands to increaſe* your *Wealth. For all the Subſtance of the People is* (as it were) *the domeſtick Treaſure of a good Prince.* It will contribute much towards this End, if the Subjects be encouraged to take as plentiful Supplies as poſſible, from the Land and from the Water; to improve induſtriouſly the Materials of their own Native Growth, and never to hire other Hands for thoſe Works which they can conveniently perform themſelves; and this is done by furthering and promoting Manual Arts. And, in purſuance of the ſame Deſign, it will be of mighty Uſe, to advance the Exerciſe of Merchandiſe and Navigation in Maritime Countries [h]. Nor is it enough to baniſh Idleneſs, but Men are to be brought to a frugal Method of living by *Sumptuary* Laws [4], which may forbid all unneceſſary Expences; eſpecially thoſe by which the Wealth of the Natives is tranſlated to Foreigners. 'Twas a Saying of *Mæcenas*, That *great Riches are gathered, rather by ſpending little, than by receiving much* [i]; Yet, in this Reſpect, the Example of Sovereigns hath more Efficacy, than the Force and Authority of any Laws [k]. But if a Country abound with Men and Money, it is there convenient to tolerate ſome unneceſſary *Conſumptions*, and ſuch as may ſeem to border upon Luxury; that the common People may

[a] *Vide* Phil. *De* Comines, Lib. v. Chap. xviii. *circa fin. Grotius* on *Luke* iii. 13. 'Tis the Duty of Princes to adjuſt the publick Burthens, according to the publick Neceſſities; ſo as that they may lawfully provide for their own Support, in a Way agreeable to their Quality; but not to make the Luxury and the Luſt of themſelves, and their Court-Slaves, the Meaſure of what they demand, which are indeed without Meaſure. [b] *Add.* Tho. Mori *Utop. Lib.* i. [c] *Drepan* Panegyr. Chap. xxvii. *It is the laſt Defence and Refuge of wicked Princes, to take away from ſome, what they may beſtow on others. Add* Montaigne's *Eſſ.* Lib. iii. Chap. vi. Pag. 175. *Add.* Machiavel *Prin.* Chap. xvi. Plin. *Panegyr.* Chap. iv. [d] Orat. pro Rege *Deiotaro*, Chap. ix. [e] Leviath. Chap. xi. [f] The *Inca's* of old in *Peru*, amongſt all their Titles, delighted chiefly to be ſtyl'd *Lovers of the Poor*, as *De la Vega* informs us (*Comment. Reg.* Lib. ii. Chap. xiv.) who, likewiſe reports, (Lib. iv. Chap. vii.) That the Lands of Widows, in that Kingdom, had more Privileges than thoſe of their *Inca* himſelf. [g] *Ad* Nicoclem, Pag. 33. [h] See an Inſtance of this in the Diligence of *Seſoſtris*, by which he rendered *Egypt* capable of Trade, and convenient for the Communication of Goods and Products. *Diodor. Sic.* Lib. i. Chap. lvii. See, alſo, upon this whole Matter, the *Parrhaſiana*, Tom. i. Pag. 264, *&c.* Tom. ii Pag. 291, *&c.* And *les Avant. de Telemaque*, Tom. i. Pag. 85, *&c.* Tom. iii. Pag. 50, *&c.* And Mr. *Buddeus's Philoſoph. Pract.* Part iii. Chap. v. Sect. 8. Where he, alſo, treats of what relates to Money Add the Rules laid down by Mr. *Hobbes* (Leviath. Chap. xxx.) to be obſerved in Relation to the *Companies* of Merchants. [i] *In* Dion. Caſſ. Lib. lii. [k] *Tacitus* Ann. Lib. iii. Chap. lv. *Veſpaſian* was the principal Author of theſe ſtrict and grave Faſhions; himſelf uſing the antient Habit, and the antient Diet: Hence there aroſe in Men a Deſire of expreſſing, by ſuch Obſervances, their Duty to their Prince, accompanied with a Love of Emulation, ſtronger than any Fear of Law or Punithment. Add *Bernier's* Deſcription of the Empire of the *Mogul*, near the End, where he ſpeaks of the Cauſes contributing to the great Conſumption of Gold in that Kingdom.

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preſenting many Gifts to the Kings, who are greedy of 'em, and pretend that they determin'd the Cauſe. Blind Wretches, who know not that one half is much better than the whole.

Νήπιοί ἐσ' ἴσασιν ὅσῳ πλέον ἥμισυ παντός.
Oper. & Dier. ver. 40. upon which ſee *Le Clerc.*

[1] He means, that it were better for Kings to be ſatisfy'd with one half of what they exact from the People, than to extort from them 'all that they have, and, by that Means, render them incapable of Contributing any more to the ſupplying of their Wants.' *Parrhaſiana*, Tom. i. Pag. 281, 282. See what follows; and in Tom. ii. Pag. 291, *&c.* As alſo *Charron de la Sageſſe*, Liv. iii. Chap. ii. § 20.

[1] Vide *Hobbes* De Cive, Chap. xiii. Sect. 8. [2] *Plutarch.* in *Marc. Anton.* Pag. 926. *B.* See, alſo, upon this whole Matter, the *Philoſoph. Pract.* of Mr. *Buddeus*, Part iii. Chap. v. Sect. 7. [3] *Lucan.* Pharſal. Lib. iii. v. 152. [4] See the next Book, Chap. v. Sect. 3.

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hence be furniſhed with Opportunities of maintaining themſelves, and that the vaſt Stock of Money may not lie dead and uſeleſs. Provided, that no Encouragement be given to Extravagance and Exceſs, and that thoſe Commodities be not idly waſted at home, which might be exported with Advantage to foreign Parts.

XII. Farther, ſince the internal Health, and the firm and robuſt Habit of a Commonwealth depends on the Unity of the Subjects [1], the more exactly this Union is obſerved, the more effectually the Force and Authority of Government diffuſeth itſelf through the whole Body of the State; it is, for this Reaſon, incumbent on Sovereigns, to prevent all Factions among the People [2], from which it is but an eaſy Slip into Sedition, and Civil War; a Condition ſo much worſe than a War carried on, with univerſal Conſent, againſt Foreigners; as War is in general leſs amicable than Peace [a]. As, likewiſe, to take care, that the Subjects do not bind and aſſociate themſelves by particular Covenants and Engagements [b]; and that neither the whole People, nor any Part of them, place a greater Dependence, or rely more for Defence and Succour on any other Perſon, within or without the Realm, under any Pretence whatſoever, whether ſacred or civil, than on their lawful Prince. And that, on the contrary, there be no Perſon to whom *Seneca*'s Deſcription may be applied,

---- *Stat ingens arbor, atque umbrâ gravi*
Sylvas minores urget [c].

---- He ſtands a mighty *Tree*,
The *Underwood* oppreſſing with his Shade;

XIII. Laſtly, ſince the Condition, under which different Nations and Kingdoms ſtand, in Regard to each other, is but a deceitful Kind of Peace, and ſuch as cannot be relied on with any Security; it is a Part of the Office of ſupreme Governors, to take Care, that as well the Courage of the Subjects, as their Skill in Arms, be kept up and improved [4]; and that all things neceſſary to be employed againſt an invading Enemy, as fortified Places, Arms, and Men, be provided betimes: For, to uſe the old Proverb in *Plautus* [d], *'Tis a lamentable Work to begin digging a Well, when we are almoſt dead with Thirſt.* But to be the Aggreſſor in a War, how juſt ſoever the Occaſion of it may be, is what ought not to be practis'd [5], unleſs a very fair Opportunity offer itſelf, and when the State of the Commonwealth may

[a] *Herodot.* (*Uran.*) init. Add *Evagrius* (*H. E. Lib.* iv. *Chap.* xiii.) concerning *Juſtinian*'s Favour to the *Factio Veneta*, with the Miſchiefs that aroſe from it; as, likewiſe, *Procop. Hiſt. Arcan. & De Bell.* Perſ. *Lib.* i. *Chap.* xxiv. & Bacon's *Serm. fid. Chap.* xv. & xlvii.

[b] *Vide* Diodor. Sic. *Lib.* i. *Chap.* xxi.

[c] *In* Oedip. *ver.* 542, 543.

[d] *In* Moſtellar. *Act.* II. *Scen.* I. *ver.* 32, 33.

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1 'No Body doubts that Union will make a Nation flouriſh, and that Diſſenſion is very dangerous to it; but there muſt be Care 'taken to have a juſt Notion of the Meaning of thoſe Words. An Union ſerviceable to Monarchical or Ariſtocratical Go'vernment, is what deſigns the univerſal Good of thoſe who live under it. If in a Monarchical State, where the Power of the 'Sovereign is limited by the Laws, the principal Subjects of the State ſhould willingly, or by Force, conſent to ſubmit all the 'Laws to the Prince's Pleaſure, ſuch an Union would not be advantageous to him in any Reſpect. It would change a Society of 'free People into a Company of miſerable Slaves. The ready Compliance of the *Chineſe*, to obey their King blindly, does but 'ſtrengthen his Tyranny, and add to their Miſery. For thoſe who depend on the Will of one Man, addicted to a thouſand Paſ'ſions, whoſe Fancies are above the Reſtraint of Law, can be certain of Nothing; ſuch a Man has ſome Favourites, who have 'other Favourites of their own, and ſuffer themſelves to be bribed; and ſuch a Form of Government is only a Subordination of 'Tyrants, every one of them endeavouring to get Something by the Subjection of the People. But it is aſſerted, that 'the general Obedience of the *Chineſe* is of Service to preſerve the Peace of their Country, and that they enjoy by it all the Ad'vantages that the ſtricteſt Union can procure. They mean, all the Advantages that can be poſſeſſed in Slavery. But ſure there 'is not a Freeman but had rather ſee more frequent Commotions, than ſuffer eternal Slavery. Moreover, it is falſe to affirm 'that there are no inteſtine Wars under ſuch a Form of Government. The moſt enſlaved People will, in Time, grow weary of 'an exorbitant Tyranny, and, upon the firſt Opportunity, ſhew, that the Deſire of Liberty is not quite ſtifled in their Souls. This 'has happened often among the *Chineſe* and *Turks*. As there are few People concerned in ſupporting arbitrary Power in a par'ticular Family, or a particular Perſon, and the Generality having Reaſon to complain of it, ſo few will be againſt a Change in 'the Government, and others believe that, if they get Nothing, they will loſe no great Matter by it. The ſame ought to be ſaid 'of an Ariſtocratical Government. The Union of thoſe who govern ſuch a State, would be uſeleſs, if it did not procure the 'Obſervation of the Laws, and the univerſal Good of the Commonwealth. This we may underſtand from the Hiſtory of the '*Thirty Tyrants* of *Athens*, and the *Decemviri* of *Rome*. The Union of thoſe Men ſerved only to cruſh the People, and make 'them miſerable; becauſe their principal Deſign was to gratify their Paſſions, without having the leaſt Reſpect to the publick Good. '*Union* may, alſo, be conſidered with Regard to the People, who, when the State is ſo fixed as that they may peaceably enjoy the 'Fruits of their Labours by obeying the Laws of their Country (which are not to be changed or tranſgreſſed by any Member of 'the Society at his Pleaſure) ought to eſteem themſelves happy, and to obey unanimouſly the Commands of the ſupreme Power. 'Now to keep the Populace in ſo firm a Union, it is requiſite that not only they may be the better for it, but, alſo, that they ſhould 'be ſenſible of their own Happineſs. Without that, there will be always ſome turbulent Men, who, having waſted all their Sub'ſtance in Debaucheries and Idleneſs, would endeavour to recover it by ſome new Commotion. Such Men will eaſily induce Peo'ple, who fancy they live unhappily, to take up Arms againſt their Prince the firſt Opportunity. On the other Hand, when 'the People are of Opinion that they cannot mend their Condition by a Turn of Affairs, and that they ſhould venture loſing 'a great deal by it, it is a very difficult Matter to ſeduce them.——The Agreement and Union both of Governors and People 'ought to tend to the publick Good; from whence it follows that whatſoever has not ſuch a Deſign, is injurious to it, and ought rather 'to be termed a Conſpiracy than a Union; ſince the Name of a Virtue cannot, with Reaſon, be attributed to a Thing which injures and 'ruins a Society. What has been ſaid of the Civil, may, alſo, be ſaid of the Eccleſiaſtical Society, which can only flouriſh by the 'great Number of its Members, and by Learning (which is in that Society what Riches are in the other) and by Union. Not to 'mention here the Number and Learning of ſuch a Society; I ſhall only take notice, that the Union of thoſe who govern it, 'ought not to be a tyrannical Combination, which deſtroys it. Such is, for Inſtance, the Union of the Inquiſitors in *Spain* and '*Italy*, who perfectly agree among themſelves: But to do what? To hinder both Lay-Men, as they term them, and Eccleſiaſticks '(who might diſcover the Errors that were introduced into Religion, through Ignorance, or the Abuſes crept into the Diſcipline 'out of Ambition or any other Paſſion) from propoſing a Reformation, be there never ſo much Occaſion for one; and of courſe, 'to keep every Body in extreme Ignorance, or a ſinful Diſſimulation and Hypocriſy. It would be more for the Advantage of the 'Church, that there were many Conteſts, rather than a perpetual Tyranny, that quite overthrows the very End of its Eſtabliſh'ment, which was, to be taught the Principles of the Chriſtian Religion, and convinced of the Certainty of it, by very ſubſtantial 'Reaſons. *Parrhaſiana*, Tom. i. p. 289, *&c.*

2 See *Hobbes* de Cive, Chap. xiii. Sect. 12.

3 *Vide* Bacon's *Serm. fid.* Chap. xxxv.

4 See the *Avantures de Telemaque*, Tom. iv. Pag. 5, *&c.* and *Charron de la Sageſſe*, Liv. iii. Chap. iii. Sect. 18, *&c.*

5 'Ah! with what Deliberation ought Princes to conſider every thing before they begin a War. The Motives of it ought to be 'juſt; nor is that ſufficient, they ought to be neceſſary: The Blood of a People muſt not be ſhed, unleſs for their own Preſervation in 'Caſes

may with Convenience bear ſuch an Undertaking. To the ſame End, the Counſels and Motions of the neighbouring Governments are nicely to be inſpected and obſerv'd (in which Reſpect the *perpetual Reſidence*, now fix'd in moſt Courts, are of very great Uſe) and Friendſhips and Alliances prudently to be contracted [a].

[a] *Vide* Marſelaer *Legat. Lib.* ii. *Chap.* xi. *Add* Hobbes *de Cive*, Chap. xiii Sect. 7, 8, *and* Bacon's *Serm. fid.* Not. 29.

' Caſes of Extremity. (*Avantures de Telemaque*, Tom. iv. Pag. 91.) The Evils of a War exhauſt a Nation, and always put it in ' Danger of being deſtroyed, even while it is moſt victorious: With what Advantage ſoever they may undertake a War, they are ' never certain of concluding it, without being expos'd to the moſt tragical Reverſes of Fortune; whatever Superiority you have in ' the Fight, the leaſt Miſtake, a ſudden Terror, a meer Nothing, ſnatches the Victory out of your Hands, and carries it to the Ene- ' my: Nay, tho' you ſhould hold Victory chain'd, as it were, in your Camp, you ruin yourſelf in ruining your Enemy; you depopu- ' late your Country, let the Ground be almoſt uncultivated, put a Stop to Trade; and, which is worſe, you weaken your Laws, and ' ſuffer Corruption of Manners. The Youth no longer apply themſelves to Learning; the preſſing Neceſſity of your Affairs makes ' you tolerate pernicious Liberties in your Army; Juſtice, Government, every thing ſuffers by this Diſorder. A King who ſheds the ' Blood of ſo many Men, and occaſions ſo many Miſchiefs, only to gain a little Glory, or to extend the Bounds of his Kingdom, ' does not deſerve the Glory he is in Purſuit of, but rather deſerves to be deprived of what he poſſeſſes, for deſiring to uſurp what does ' not belong to him, *Page* 4, 5, *of the ſame Tome.* Theſe beautiful Verſes of M. *Boileau* may be juſtly applied here:

Ce n'eſt pas que mon cœur du travail ennemi
Approuve un Fainéant ſur le thrône endormi, &c.
Epiſt. i. ver. 19, & ſeq.

" It is not becauſe that, being naturally indolent, I approve of a Prince of the ſame Diſpoſition on the Throne. Whatever vain " Laurels War may promiſe, a King may be a Hero without Rapine and Bloodſhed. There are more Kinds of Glory than one. It " is a great Miſtake to give the firſt Place among Kings to Conquerors. Wiſdom only regards them as vulgar Heroes. Theſe " happy Mad-men, theſe Favourites of *Mars*, are produc'd in every Age, and every Climate. The *Tiber* had its *Cæſars*, and the " *Seine* has its *Bourbons*. The *Gothic* Nations have produc'd a Thouſand Heroes. But a King, who is truly ſo, wiſe in his Projects, " knowing how to govern his People peaceably and happily, and founding his own Glory on the publick Good; ſuch a King, I " ſay, is ſcarcely to be met with in Hiſtory. Heaven is a long Time in forming ſuch a Prince. Such was that Emperor, under " whoſe benevolent Sway, *Rome* ſaw the Golden Age return, who was the Delight of Mankind, and who ſigh'd to loſe *that Day* " in which no Opportunity offer'd of doing Good." In an antient *Latin* Poet, *Nero* advances a quite oppoſite Maxim:

Extinguere hoſtem, maxima eſt Virtus Ducis.

Seneca anſwers him,

Servare Cives major eſt Patriæ Patri.
Octav. ver. 433.

There are ſeveral beautiful Paſſages in this Tragedy, where *Nero* admirably well ſupports the Character of a Tyrant. See M. *Buddeus's Philoſoph. Practica*, Part. iii. Chap. v. Sect. 11.

BOOK

BOOK VIII.

CHAP. I.

Of the Power to direct the Actions of the Subject.

I. *Of the Nature of Civil Laws in general.*
II. *Whether a Civil Law may contradict the Natural?*
III. *Whether the Definitions of Crimes is left arbitrarily to the Determination of the Civil Laws?*
IV. *The Precepts of the Decalogue, whether Civil Laws.*
V. *Whether any Thing was just antecedently to the Civil Laws?*
VI. *Whether a sinful Command of a Superior may, at any Time, be obey'd without Sin?*
VII. *No Sin lawfully committed at the Command of a Superior.*
VIII. *Whether a Subject may lawfully bear Arms in an unjust War, at the Command of his Prince?*

I. HAVING explain'd what related to the Nature of *Sovereign Power* in general; I come now to consider the most material Difficulties that arise upon the particular Parts of it. And since I at first supposed, that the Power to direct the Actions of the Subject, was that from which all civil Laws were deriv'd; to what I have already said of Laws in general [a], I now shall add what more particularly relates to *civil* Laws, and the Commands of the *sovereign Power*. A Law therefore is call'd *civil*, either with Respect to its *Authority*, or to its *Original*. In the former Sense, all Laws may be call'd *civil*, which are the Rules for the Administration of Justice in *civil Courts*, from whatever Original they arise [b]. The Laws of GOD and *Nature*, it must be own'd, are of universal Obligation, and they who break them must expect to be punish'd by divine Justice. But it is the *civil Power* that gives them the Force of Laws in *civil Courts*. And the same Power must determine, what Crimes are to be punished by the *civil Justice*, and what shall be left to the *divine*; as, also, upon what natural Obligations an *Action* may commence in the *civil Court*; and what will not bear an *Action*, but must be left to the common Ingenuity and Probity of Mankind. Hence, under *civil Government*, no Man is call'd to Account, or can, properly speaking, be *punished* for the Violation of those Laws of *Nature*, which have not the Authority of *civil Laws* stamp'd upon them. For the Evils that attend such Crimes, are only such as are usually called *Natural Punishments* [c]. Those Laws of *Nature* indeed, upon the Observation of which the common Quiet of Mankind entirely depends, have, in all Commonwealths, the Force of civil Laws. But there are others that have no such Force allow'd them, either in express *Terms*, or in any *Practice of civil Courts*; as well because the Controversies about the Violation of them would be very perplex'd and intricate, as to prevent the Multiplication of litigious Suits; and, also, that the Good and Virtuous might not be depriv'd of the most valuable Part of their Character, the doing well out of Reverence to their Creator, without Regard to the Fears of human Penalties; for this they must necessarily lose, when there is no Distinction made whether a Man doth well out of Love to Virtue, or out of Fear of Punishment. 'd And 'indeed, as *Seneca* saith, how cheap a Thing is 'it to be good only as far as the Law obligeth 'us, when the Rule of our Duty is of so much 'wider Extent? For how many Things do 'Piety, Humanity, Justice, and Fidelity re'quire of us, which yet are without the Reach 'of the Law [1]?' *Civil Laws*, with Respect to their *Original*, are such as flow entirely from the Will of the *supreme civil Power*, and respect only such Things as are left indifferently by the *Laws* of *GOD* and *Nature*, and which particularly conduce to the Benefit and Advantage of the Commonwealth. And these demand the same Obedience from the Subject as other Laws do; since it must evidently be more for the Good of Society, that in indifferent Things the Determination of the Government should take Place, and the Subjects should look upon that to be good, which is thought so by their Governors, than that there should be endless Disputes between them about it, which do not usually end but in War and Bloodshed, certain and undeniable Evils. 'The publick Good, saith *Cicero*, 'ought to be the End of all Laws, and is the 'best Comment upon, and Interpretation of

[a] Book i. Chap. vi. [b] *Vid.* Grot. *de Imper. summar. Potest. circa sacra*, Chap. iii Not. 4, 11, &c Chap. iv. Not. 1.
[c] See, above, in Book ii. Chap. iii. Sect. 21. [d] *Sen.* de Ira, *Lib.* ii. *Chap.* xxvii.

[1] *Quod non vetat Lex, hoc vetat fieri Pudor Senec.* Troad. ver. 332. *Grot.* Lib. iii. Chap. x Sect. 1. See, likewise, what has been said above in Book iii. Chap. iv. Sect. 6.

c them;

'them; and we do not desire the Preservation 'of our Laws meerly for the sake of the Laws 'themselves, but for the common Interest and 'Advantage [a].' And hence the Constitutions of particular Commonwealths, made for the publick Good, are call'd by some, *Appendages* to the *Law of Nature* [b]. But it must be observ'd, that tho' all these Laws put together, are commonly call'd the *Civil Law*, yet, that there are several Particulars contain'd in the *Bodies* and *Codes* of the *Civil Law*, which are not properly and strictly Laws. For, besides *those Commands* which the *sovereign Power* lays upon the Subject for the particular Utility of the Commonwealth, there are many other Things inserted, which should be reduc'd properly to the *Law of Nature*. What belongs more particularly to the *Civil Law* [1], may be reduc'd to these two Heads: First, to certain *Forms* prescribed, and certain Methods to be observ'd in civil Affairs, either in *transferring Rights*, or else in laying Obligations upon *Persons*, which shall be look'd upon to be valid in the *Civil Court*: And Secondly, To the several Ways how a Man is to *prosecute* his *Rights* in the same *Courts*. So that, if we give *the Law of Nature* all that belongs to it, and take away from the *Civilians* what they have hitherto engross'd, and promiscuously treated of; we shall bring the *Civil Law* to a much narrower Compass; not to say at present, that, whenever the *Civil Law* is deficient, we must have Recourse to the *Law of Nature*; and that therefore in all Commonwealths the *natural* Laws supply the Defects of the *Civil*. For which Reason, *Hobbes* calls the Law of Nature, *the unwritten Civil Law* [c].

II. But notwithstanding, *Hobbes de Cive*, Chap. xiv. Sect. 10, will maintain this strange Sort of Opinion, 'That it is impossible any *civil Law* 'should be made repugnant to that of Nature, 'except it be to the Dishonour of GOD.' The Argument he uses to prove it is this: 'Men, 'saith he [d], when they enter into *civil Societies*, 'oblige themselves by *Compact* to obey *his* Com-'mands, who hath the *sovereign Power*, that is, 'to obey the *civil Laws*; and this *Compact* they 'are obliged by the *Law of Nature* to observe. 'But since the *Compact* itself, and, consequently, 'the Obligation to obey the *Civil Laws*, was 'antecedent to the *Promulgation* of the *Laws* 'themselves; by the Force of the same *Law of* '*Nature*, which commands not to violate the '*Compacts*, we are oblig'd, also, to obey every '*civil Law*. For where we are obliged to Obe-'dience before we know what will be command-'ed, there we are obliged to obey *universally*, 'and in every Respect.'

But the Truth is, it must be presum'd, that when Men enter into *civil Societies*, they have already a competent Knowledge of the *Law of Nature*; and that one of the chief Ends of erecting civil Governments was, that the *Laws of Nature*, upon which the common Peace of Mankind is established, might be obey'd without Danger. And in short, that there is nothing in the *Laws of Nature*, which is any way repugnant to the Nature and End of *civil Society*; but on the contrary, that they are entirely necessary to assist and promote it. And therefore when Men form'd themselves into *civil Societies*, and oblig'd one another by Compact to obey the *civil Laws*, we must suppose that they took it for granted, that nothing would be establish'd by the *civil Law*, which was contrary to the *natural*; and that the particular Advantages of the Commonwealth could not be contrary to the common End of all Government. It is possible indeed, that a *civil Law* might be made in Opposition to the *natural*; but no Man in his Wits would ever attempt to make such a Law, unless he resolv'd to ruin and overturn the whole Commonwealth. And therefore *Stratocles* was very justly taken for a Madman, when he publish'd his Law at *Athens*, that whatever King [e] *Demetrius* commanded, *should be Law to Gods and Men*. And *Parysatis* was guilty of detestable Flattery, when she persuaded *Artaxerxes to marry his own Daughter, and despise the* Greek *Law*; *adding, that Heaven had made him the* Persian *Law, and the proper Judge of Good and Evil* [f].

III. The same *Author* argues further in Defence of his Opinions, *de Cive*, Chap. vi. Sect. 16. Chap. xiv. Sect. 9, 10. 'That tho' *Theft*, '*Murther*, *Adultery*, and all Kinds of *Injuries*, 'are forbidden by the *Law of Nature*; yet that

[a] *Cic.* de *Invent.* Lib. ii. Chap. xxxviii. [b] *Philo Judæus* de *Josepho*, Pag. 351. B. *Ed. Paris.* This is, also, the Notion of the *Roman* Lawyers, who say, That the Civil Law either *adds* something to the Law of Nature, or *retrenches* something from it; that is to say, with Regard to Things allowable, so far as it retrenches natural Liberty when the public Good requires it: *Jus Civile est, quod neque in totum à Naturali vel Gentium jure recedit, nec per omnia ei servit: Itaque, quum aliquid* ADDIMUS *vel* DETRAHIMUS *Juri communi*, JUS PROPRIUM, *id est* CIVILE, *efficimus.* DIGEST. Lib. i. Tit. i. *De Justit. & Jure*, Leg. vi. As to the natural Laws, which prescribe or forbid any Thing, the civil Law either confirms, or ought to confirm them, as far as the public Good requires. And then the Obligation to observe them becomes stronger. See Mr. WOLLASTON's *Religion of Nature delineated*, Sect. 7. § 4.

[c] *De Cive*, Chap xiv. § 14. It is upon this is founded the Action *inscripti malefici*, that is to say, an Action brought against Crimes not express'd in the Laws, and of which the antient Orators often speak. *Quinctilian*, in particular, proves the Equity of them, "Because, says he, it is impossible for the wisest Legislators to foresee all the Crimes which Mankind are capable of committing." *Diligentissimè majores hanc videntur excogitasse legem*, &c. Declam. CCLII. Pag. 555. *Edit. Burn.* This Action, known to the antient *Greeks* by the Name of ἀγραφου δικήματος, is, in the *Roman* Law, called *Stellionatus*. See CUJAS *Observ.* Lib. x. Chap. xxvi. NICHOLAS FAVRE upon SENECA, *Excerpt. Controv.* Lib. iii. *Præfat.* PIERRE AYRAULT upon QUINCT. *Declam.* cccxliv, and SALMASIUS, *De modo Usurarum*, Chap. xiv. Pag. 589. TURNEBIUS *Adversar.* Lib. x. Chap. vi. [d] Ibid. Sect. 9.

[e] Plut. Demetrius, Pag. 900, 901. [f] Plut. Artaxerxes, Pag. 1022. B. See Lib. ii. Chap. iii. Sect. 4. and Mr. *Wollaston*'s *Religion of Nature delineated*, § 7.

[1] Besides, as there are a great many Things which the *Law of Nature* prescribes only in a general and indefinite Manner; so the *Time*, *Manner*, *Place*, Application to such or *such Persons*, and the like Circumstances, are left to the Discretion and Prudence of every private Man. The *Civil Laws* generally regulate all that Matter, for the Order and Tranquillity of the State; sometimes they propose Rewards to those who would willingly perform such Actions, to which they are not determinately bound, in such and such a particular Case. They, also, explain whatever may happen to be obscure or doubtful, either in the Maxims of the *Law of Nature*, or their Application; and private Men are bound to submit to the Decisions that are made by publick Authority, even tho' they should not find 'em upon Examination to be very just. In short, they limit, in several Respects, the Use of those *Rights* which naturally belong to every one; which they ought not to do any farther than the Good of the State requires it. Moreover, every private Man is oblig'd to comply with all these Regulations, as far as they contain nothing that is manifestly contrary to the *Divine Laws*, whether Natural, or Reveal'd; and that not only through Fear of the Punishments which are annex'd to the Violation of them, but even upon a Principle of Conscience; and, also, by the Virtue of a Maxim of the *Law of Nature*, which commands to obey our lawful Sovereign. The Author's Abridgment, *De Offic. Hom & Civ.* Book ii. Chap. xii. Sect. 6, 7, 8.

'what is to be call'd *Theft* in a Subject, what '*Murther*, what *Adultery*, and what an *Injury*, 'is not to be determin'd by the *Law of Nature*, 'but by the *Civil Law*. For barely the *taking* '*away* what another Man is in Poſſeſſion of, is 'not *Theft*, but only to take away that which 'of *Right* belongs to another. But what of '*Right* belongs to me, and what to another, is 'a *Queſtion* of the *Civil Law*. And in the ſame 'Manner, barely to *kill a Man* is not *Murther*, 'but to *kill* him the *Civil Law* forbids. And 'ſo, alſo, no *Act of Generation* is *Adultery*, but 'that which the *Civil Law* declares ſuch; and 'laſtly, *Breach of Promiſe* is indeed an *Injury*, 'where the *Promiſe* itſelf is lawful; but where 'there is no *Right* to make an *Agreement*, there 'no *Right* is transferred, and, conſequently, no '*Injury* follows; but what we may make *Agree-*'*ments* about, and what we may not, depends 'upon the *Civil Laws*.' To which I anſwer, that all who believe the *Scriptures*, as to ſeveral Sorts of Crimes, are ſufficiently aſſured, both from the Laws of the *Jews*, which were of Divine Inſtitution, and from other Parts of the holy Books, how God, the Author of the *Law of Nature*, would have them *defin'd*; ſo that tho' the civil Government ſhould *de facto* make ſome particular Acts not criminal, yet they would nevertheleſs be contrary to the Law of GOD, Eſpecially ſince there can be no ſufficient Reaſon given, why GOD in his Laws ſhould give ſuch Definitions of ſuch Actions, unleſs they ought equally to be obſerv'd in all Nations. The *Spartans* allow'd the Frigid and Impotent to ſupply their Deficiency in the Conjugal Duties, by the Aſſiſtance of the Young and Vigorous [1]: And this was done at *Sparta*, without any bad Imputation of the Husband, the Wife, or the Gallant, when they had no Hopes of Children otherwiſe: Becauſe the *Civil Laws* of that State did not comprehend that Method of anſwering the Husband's Part at his own Requeſt, under the Name of Adultery. And yet, ſince it is evident from the Laws of GOD, that, by the Law relating to Adultery, any Familiarity of the Bed with a Woman actually married to another is forbidden; it is evident that thoſe Aſſiſtances, alſo, were contrary to the Law of Nature. But if it be reply'd, that the *Definitions* of particular Acts in the Scriptures were intended for, and only belong'd to the *Jewiſh* Commonwealth, and ſo are of poſitive Inſtitution; yet thus much however muſt be allow'd, that the *Civil Law* ought to have ſo cautious a Regard to the *Definitions* of Acts forbidden by the *Law of Nature*, as not to defeat the Intention and End of it, the Preſervation of a peaceable *Society* and honourable *Correſpondence* among Men. And therefore if any *Definitions* of the *Civil Law* be oppoſite to this End, it muſt be granted that it is, alſo, contrary to the *Law of Nature*. For Example; if the *Civil Law* ſhould define Adultery to me, by telling me, that it is *when a Man invades another's Bed againſt his Wife's Conſent*; or of Theft, that it is, *when a Man takes away ſomething from another by Night*; or of Murther, that it is *when a Man openly aſſaults another and kills him*: It is manifeſt, that the publick Quiet and Security of the Commonwealth could not long ſubſiſt under ſuch Methods of Government. For we are not to imagine, that the *Univerſality* of ſuch *Definitions* would ſufficiently ſecure the publick Peace, that is, that though particular Perſons might perhaps ſometimes be ſenſible of Inconveniences from them, yet that at other Times they might find Advantages proportionable to the Inconveniences; and that the *Equality* of *Right*, which ſuch Laws would ſettle among the Subjects, would take off all Occaſion of Complaint: For tho' perhaps a Man might deſire that ſome particular Things might be lawful only for himſelf; yet if others ſhould have as large Immunities granted them in Oppoſition to him, he would ſoon be willing to throw up his Privilege. And ſhould the *Civil Laws* make any ſuch Eſtabliſhments, it muſt be impoſſible that the Peace and Order, which Nature intended, ſhould be preſerv'd. And if the *Equality* of ſuch Laws alone were Reaſon enough to introduce them, why muſt we any longer be confin'd by any Laws at all, ſince, by taking them wholly away [2], we ſhould make the greateſt Equality? Which it is impoſſible any Man in his Wits ſhould think of doing. In ſome Accounts of the *Tartars* [a] we are told, that they are utter Strangers to all Juſtice; and that when any of them wants any Thing, he may take it without Fear of Puniſhment wherever he finds it: [3] And when the Party robb'd complains to the Magiſtrate of the Injury done him, the other doth not deny the Fact; but pleads only that he wanted what he took; and then 'tis uſual for the Magiſtrate to give Sentence, That the Party who complains, may, if he pleaſes, right himſelf in the ſame Manner upon others. There are others indeed [b], who give a more favourable Account; telling us only, that the *Tartars* are very free in communicating what they have to Strangers; but that they will expect a Return of the ſame Kind, or elſe will take it by Force. A *Tartar's Definition* therefore of *Theft* would be, When ſomething is taken away without the Conſent of

[a] Sigiſmund. Baro Herberſtein de Rebus Moſcov. [b] Haytho de Tartaris, Chap. xlviii.

[1] *See, above, in* Book vi. Chap. i. Sect. 15. *It was ſometimes common among the* Romans *to lend their Wives to Perſons of well-born. See* Plutarch. *in* Numa, *Pag.* 76. D. & *in* Catone, *Pag.* 771, A.

[2] 'Tis neceſſary to obſerve here, that tho' ſome Nations, that were not much enlightened, have permitted and authoriz'd, in ſome meaſure, Things manifeſtly contrary to the *Law of Nature*, it was not through Ignorance of this Oppoſition; much leſs ſtill out of a Conceit, that the Sovereign had a Power to determine the Nature of Crimes according to his own Fancy; but moſt commonly on Account of Circumſtances which made 'em judge it proper to let ſome Crimes go unpuniſh'd, to prevent greater Inconveniencies. Thus among the *Egyptians* there was a Law, which ordain'd, That thoſe who made a Profeſſion of Stealing, ſhould enroll themſelves before a Captain appointed to command them, to whom they engag'd to bring, immediately, whatſoever they took. Thus thoſe who had loſt any Thing, provided they took care to mark the Day, Hour, and Place, where they were robb'd, eaſily recover'd their Effects, by giving about a fourth Part of their Value. *Diodorus Siculus*, after reciting a Law which appear'd ſo ſtrange, obſerves, at the ſame Time, That, as it was not poſſible to prevent Men from ſtealing, the Legiſlator found out this Expedient, for every Man to recover his own, at as little Expence as poſſible. Ἀδυνάτου γὰρ ὄντως τὸ πάντας ἀποσῆσαι τῆς κλοπῆς, &c. Lib. i. Pag. 72. *Edit. Rhodom.* It is upon this Account that Mr. *Le Clerc* obſerves, (*Exodus* xx. 15.) That the modern *Egyptians*, as well as the *Arabs*, have great Inclination to this Vice.

[3] *This Permiſſion takes Place, likewiſe, in* Colchis; *See* Buſbequius's *third Epiſtle*, Page 155.

the Proprietor, which the other had need of; a *Definition* evidently imperfect, and which manifeſtly ſubverts the *Law of Nature* relating to *Theft*. 'Tis certain, none but the worſt of Men could wiſh for ſuch a Law, ſince it might often happen, that a Man might have the ill Fortune to be robbed of that, which of all Things he was moſt unwilling to loſe, and which he either might never find another Man poſſeſs'd of, or elſe ſo ſecured, that he muſt deſpair of being ever able to take it from him. But beſides, the Suppoſition Mr. *Hobbes* goes upon is falſe; that what belongs of *Right* to me, and what to another [1] Man, is a Queſtion of the *Civil Law*; and that out of civil Government there is no *Propriety*: For tho' Men that live under it have a more ſecure Enjoyment of their *Proprieties*, than they that live out of it; ſince the *firſt* are defended in their Rights and Fortunes by the united Strength of a Number of Men, beſides the Aſſiſtance of the Magiſtrate; and the latter can ſupport themſelves only by their own ſingle Power; yet, notwithſtanding, there can be no Grounds of Proof to aſſert, that there was no *Propriety* before the Inſtitution of *Civil Government*. For all ſovereign Princes and Commonwealths are now actually in a *State of Nature*, and their *Proprieties* are not determin'd by any common *Law* or *Judge*, but ſolely by Compact, and the natural Means of *Acquiſition*; and yet I believe no Body ever imagin'd, that Princes might ravage, or ſteal from one another, without incurring the Guilt of *Rapine* or *Theft*. So that admitting, that a Man cannot make any Compact that will be valid about what is forbidden by the *Civil Law*, yet certainly it cannot be denied, but that they who live in a *Liberty of Nature*, may make certain Compacts, which it will be an Injury to violate. And therefore it is falſe to ſay, we muſt be oblig'd entirely to the *Civil Law*, to know what an *Injury* is. Beſides, neither will it, I think, be denied, that a Man is guilty of *Homicide*, tho' he be only under the Government of the *Law of Nature*, when he takes away another's Life without making War upon him, or in his own Defence. Nor is it difficult to underſtand barely by the Law of Nature, without any aſſiſtance from the *Civil*, that *Adultery* is the *Violation of conjugal Faith*: But that the *Civil Laws* may ſuperadd certain Obligations to the *matrimonial Contract*, for want of which, the Marriage may be look'd upon to be deprived of certain *Effects*, was never deny'd. But further, it may be neceſſary to diſtinguiſh between what is commanded by the *Civil Law*, and what is only permitted [2], and not forbidden by the *Sanction* of any Penalty to be inflicted by *civil Juſtice*. For a *Prohibition* of the *Law of Nature*, and a *Permiſſion* of the *civil* about the ſame Thing, are not oppoſed to one another; for a *Permiſſion* of the *Civil Law* doth not make any Act not to be contrary to the *Law of Nature*, that really is ſo, or excuſe the Man that is guilty of it from Sin againſt GOD: But it only declares, that the *Civil Power* hath laid no Reſtraint upon the Perſon that will commit ſuch Acts; that if a Man doth commit them, he is not to be puniſhed on that Account; and that *human Juſtice* alloweth ſuch Acts to have the ſame Effects with other Acts, that are agreeable to the *Law of Nature*. And therefore the Laws of *Tartary* do not, 'tis preſumed, command Men to ſteal, nor, I ſuppoſe, forbid the *Proprietors* to defend their own: Only the Perſon that robs is not liable to be puniſh'd, nor oblig'd to make Reſtitution; ſo that, according to the common Juſtice of that Nation, Robbery and Stealing are look'd upon to be lawful Ways of [3] *Acquiſi-*

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[1] This is what the deceaſed M. *Boſſuet*, Biſhop of *Meaux*, has made no Scruple to advance, in a political Treatiſe, taken, as he pretends, from the very Words of the Holy Scripture; but often very ill underſtood, or applied. "Take away Government, ſays he, "and the Earth, and all it contains, will be as common among Men, as Air and Light: Very well: but will it follow from hence, "That, according to this primitive Law of Nature, no Perſon has any particular Right over any thing, but that all things are left a "Prey to all Men; ſo that it is neceſſary, in a regular Government, every Individual ſhould renounce the Right of taking by Force "whatever he thinks convenient? From hence, ſay they" (that is, from the Eſtabliſhment of Civil Government, "ariſeth the "Right of Property. And, in general, all Right ſhould ſpring from publick Authority, without its being lawful to invade, or attempt any thing by Force." *Lib.* i. *Art.* iii. *Propoſit.* 4. The Principles of *Hobbes* cannot be more faithfully expreſs'd; and it is, perhaps, upon this Account, that the Biſhop elſewhere calls *Anarchy*, by Way of Oppoſition to Civil Government, *A State in which all are at War againſt all.* Lib. vii. Art. ii. *Propoſit.* 2. at the End. Let us oppoſe, to ſuch falſe and groſs Notions, the following Words of Mr. *Wollaſton*, "Before all human Laws——The Effect or Produce of the Work of B is not the Effect of the Work of "C. This Effect then belongs to B, and not to C: It belongs as really to B, as his own proper Labour; becauſe all the Labour "that produces B, is really produc'd by B, and not by C, or any other Perſon. If C therefore reclaims the Property of what only B can "truly call his own, C would act in a Manner contrary to Truth; (that is to ſay, to the Right which B truly has, by Virtue of his Property.") Now the Right which every Man has over Things, which in the Beginning were common, proceeds from this, "That the firſt Occupier, by his own Labour, drew Things from the common Stock, in which they lay, and ſo appropriated them to himſelf." See, above, Lib. iv. Chap. iv. Sect. 4. "Moreover, there are ſeveral Things which B may truly call his own, in a Senſe, and for Reaſons, which are peculiar to himſelf; and to which D has no more Right than F, *&c.* The Property of theſe is, conſequently, peculiar to B, becauſe C has no more Title to them than D, nor D than F, *&c.* Now, when all Men, excepting B, have an equal "Title to the Property of a Thing, the Title is of no Force; becauſe their Pretenſions counter-balance, and deſtroy, each other, "while that of B ſtill ſubſiſts. Now, in this Caſe, a very ſmall Matter oppoſed to Nothing, is ſtill ſufficient to maintain the Pretenſions of B." Sect. 6. 130. I wiſh, however, that this Author had, in the laſt Words, omitted the Expreſſion about *Equality of Title*, &c. For if one alone have a Title, and all the others have none, there is no Room for any Diſpute about the Queſtion.

[2] "There are certain *Evils* in a Commonwealth, that are ſuffer'd, becauſe they hinder or prevent greater Evils. There are "others, which are only ſo by their Eſtabliſhment; and which being, in their Original, an Abuſe, or ill Cuſtom, prove leſs pernicious in their Conſequences and Practice, than a Law or Cuſtom which is more juſt and reaſonable. There is a Sort of Evils that "might be corrected by Change or Innovation, which is a very dangerous *Evil*. There are others, which are hidden and ſunk like "Ordure in a Common-Sewer, I mean buried between Shame, Secrecy, and Obſcurity; ſo that one cannot ſtir 'em, without their "caſting forth Poiſon and Infamy. The Wiſeſt ſometimes doubt, whether 'tis better to underſtand theſe *Evils*, than to be ignorant "of 'em. Sometimes a great *Evil* is tolerated in a State, but it is ſuch as prevents a Million of leſſer *Evils*, or Inconveniencies, "which were all inevitable and irrecoverable. There are *Evils* under which every private Man groans, and which, however, become a publick Good: Tho' the Publick is nothing but a Compoſition of Individuals. There are, alſo, perſonal *Evils*, which concur toward the Good and Advantage of each Family. There are ſome which afflict, ruin, and diſhonour Families; but they tend "to the Good and Conſervation of the State and Government." *La Bruyere Caractères ou Mœurs de ſe ſiecle.* Chap. *du Souverain & de la Republique*, Pag. 316, 317. See, alſo, a Fragment of *Philemon*'s, related by *Athenæus*, Lib. xiii. Pag. 569. and a Paſſage of St. *Auguſtin*, cited by Mr. *Le Clerc*, Pag. 298, which ſhews the Reaſon why a State is ſometimes obliged to tolerate *Courteſans*. See, alſo, the Diſſertation of *Veltkuyſen*, entituled, *Diſquiſitio de tolerando malo in Republica.*

[3] By the *Roman* Law, a Man who ſuffer'd Gaming at his Houſe, could not recover in Juſtice what was ſtolen from him during that Time. *Prætor ait*, SI QUIS EUM, APUD QUEM ALEA LUSUM ESSE DICETUR, VERBERAVERIT, DAMNUMVE EI DEDERIT, SIVE QUID EO TEMPORE DOLO EJUS SUBTRACTUM EST, JUDICIUM NON DABO. *Digeſt.* Lib. xi. Tit. v. *De Alcatoribus*, Leg. i. See what I have ſaid upon this Law, in my *Treatiſe upon Gaming*, Lib. iii. Chap. ix. Sect. 25.

tion. And the ſame may be ſaid for the *Children* at *Lacedemon*; for we need not tranſlate the Sentence of *Plutarch* [a] κλέπτειν νενόμισο τὲς παῖδας, *the Children were commanded by the Law to ſteal*; ſince the Senſe of it may as well be, that *they were permitted by the Law. Xenophon* [b] indeed ſays, *That it was ſo far from being thought ſcandalous for the Children to ſteal at* Sparta, *that they were under a Neceſſity of doing it:* But this was ſpoken only in a Way of Raillery, and to mortify *Chiroſophus* the *Lacedemonian.* Neither was that Practice ſo inexcuſably bad as ſome believ'd it, or deſerv'd ſo ſevere an *Invective* as *Iſocrates* gave it [c]. For the Truth of the Matter was, that the Liberty the *Boys* were allow'd in, was only that of robbing Orchards, and ſtealing Victuals; and then too if they were taken, they pay'd ſeverely enough for it [d]. We are told too of *Dionyſius* the Tyrant, That tho' he puniſh'd other Crimes very ſeverely, yet he would often pardon them that ſtole Cloaths, in hopes that by this Method he might reſtrain the *Syracuſians* from the Riot and Drunkenneſs they were given to. Neither do I think, that the Law of *Sparta* before-mention'd, laid any Command either on the Husband, or Gallant; that Matter ſeems to have been no more, than if they two agreed, the Law did not interpoſe; but look'd upon the Children ſo begotten to be legitimate, and admitted them Heirs to the Eſtate of the Family. So, alſo, where *Duelling* is permitted, the Blood which is ſhed in them may be excuſed from the Puniſhment of Murther at the Bar of *civil Juſtice*, but will not be ſo acquitted hereafter at the *divine Tribunal.* That the *civil Power* may, with Juſtice, permit Things of ſuch a Nature, and that not by bare Silence and Connivance only, but by expreſs Mention made in the *publick Laws*, is what I dare not affirm; by ſuch a Method the *civil Power* would ſeem almoſt to invite the Subjects to tranſgreſs the *Laws of Nature:* Poſſibly it may be excuſable to diſſemble Things, where the Times or the Humour and Diſpoſitions of the People will not endure a Reformation by direct Remedies. And ſo there was good Reaſon why the *Roman Law* [1] call'd that, *Actio rerum amotarum*, when there was indeed a real *Theft* committed.

IV. Our *Author*, alſo, de Cive, Chap. xiv. § 9, affirms, 'That the *Precepts* of the *Decalogue* are 'merely *civil*, and not *natural Laws*, and that 'they are to be explain'd after this Manner: *You 'ſhall not deny your Parents the Honour the civil 'Law alloweth them. You ſhall not kill any Man, 'the Law forbids you to kill. You ſhall avoid e-'very unclean Act which the Law forbids. You 'ſhall not take away what belongs to another Man 'againſt his Conſent. You ſhall not fruſtrate the 'End of Law and Judgment, by bearing falſe Wit-'neſs.*' But it will here be eaſily obſerv'd, that he depends upon an utterly falſe *Hypotheſis*, and ſuppoſeth what will never be allowed, that there was no *Propriety*, no *Marriage*, and that *every Thing was lawful for every Man* before the Inſtitution of *civil Governments.* It is certain, the Precepts he ſpeaks of, are obligatory, and bind even thoſe Perſons to one another, who do not live under any common Government, but only in a *State of natural Law.* For certainly Men could, and actually did divide Things between one another by Compact even in ſuch a State; and therefore would have ſinn'd as much againſt the Eighth Commandment, if they had neither openly or ſecretly robb'd each other, as they do that rob their Fellow-Subjects in civil Governments. It may, alſo, be perhaps denied, that a Man in a State of *Nature* is guilty of *Adultery*, when he violates his Neighbour's Bed: But the Anſwer may be ſeen, *Gen.* xx. 3. xxvi. 10. And further, ſince *Arbitrators* muſt be often made in a *State of Nature*, to decide Diſputes about *Matters of Fact*, by Intervention of *Witneſſes*, as Mr. *Hobbes* admits himſelf, *de Cive*, Chap. iii. § 23. we may hence find the Uſe and Neceſſity of the *Ninth Commandment.* In general, the *Precepts* of the *Decalogue*, it is evident, may be reduced to the *Law of Nature*; but when they are conſider'd as written in *two Tables*, and promulg'd to the *Iſraelites* by *Moſes*, they may properly enough be call'd *Civil Laws*, or rather the *general Heads of the Jewiſh Civil Laws*, which are afterwards divided into particular Laws, with penal *Sanctions* added to them [e]. Upon which Account, *Grotius* ſaith [f], the *Decalogue* does not, in expreſs Words, comprehend every Crime, not even all thoſe which are puniſhable by the *Civil Law*, but only ſuch in every kind as are moſt heinous and malignant. For there is no Mention made of *Wounding*, but only of *Murther*; nor of any other Sort of *Gain made by another's Loſs*, but that of *Theft*; nor of any *other Falſity*, but *Falſe Witneſs.*

V. It may be proper in the next Place to conſider, that the ſame Author in his Book *de Cive*, Chap. xii. § 2, among thoſe ſeditious Doctrines he ſuppoſes to be the internal Diſeaſes, and Cauſes of the Diſſolution of the Commonwealth, ſets down this for the Firſt: 'That every pri-'vate Man is Judge of Good and Evil. For, 'ſaith he, the Meaſure of Good and Evil, of 'Juſt and Unjuſt, is the Civil Law, and whatever 'the Legiſlator commands muſt be look'd upon 'as juſt and good, whatever he forbids, as un-'juſt and evil; and therefore it is a very ill 'Maxim, that we are to obey our Sovereign 'only, when his Commands are juſt. There 'was nothing juſt or unjuſt before Civil Go-'vernment; their Nature relates to the Com-'mands of the Sovereign: And every Action 'is, in its own Nature, indifferent; that it be-'cometh juſt or unjuſt, is owing to the Will of 'the Sovereign. And therefore lawful Princes 'make thoſe Things juſt, which they command, 'by commanding them; and thoſe Things,

[a] Plut. Apophth. Lacon. Pag. 175. F. [b] Xenophon. περὶ ἀναβασ. Lib. iv. [c] Iſocr Panathen. [d] Vide Plut. Lycurgus Xenophon. de Repub. Lacedæmon. Baſbequius *gives a much worſe Account of the Liberties allow'd among the* Mengrelians, Ep. iii. p. m. 155. Vide Lib. xi. Chap v. L. 1. D. de Aleator. [e] Vide Philon. Judæum, de Decalogo. [f] Grot. ad Matth. ver. 27.

[1] 'Twas when a Huſband or a Wife, upon their Separation, had kept back ſomething that ought to be reſtor'd to the Party it belong'd to, after the Divorce; but becauſe of the ſtrict Union that was between 'em, by their Marriage, they ſoften'd the Notion of *Theft*, which he is guilty of in reality, that does not reſtore whatever he is not the lawful Poſſeſſor of, and only barely call'd it *the detaining another's Goods.* Vid. Digeſt. Lib. xxv. Tit. ii. *De Actione rerum amotarum.* And Mr. *Noodt*, in his *Julius Paulus*

'which they forbid, unjuſt, by forbidding them. 'But while private Men aſſume to themſelves 'the Cognizance of Good and Evil, they affect 'to be like the Sovereign, which it is impoſſible 'ſhould be conſiſtent with the Quiet and Peace 'of any Commonwealth.' In Anſwer to him, it may be readily allow'd, that *ſovereign Princes* have indeed Power, by annexing or taking away the Penal Sanction, to give or take from the Laws of Nature the Force of *civil Laws* in human *Courts of Juſtice*; as, alſo, to make many Things, which do not belong to the Law of Nature, *juſt*, by commanding, and *unjuſt*, by forbidding them. But to ſay, that, before *civil Governments* were erected, there was nothing *juſt* or *unjuſt*, either *defin'd* by *Nature*, or obliging Mens *Conſciences*, is as falſe, as to aſſert, that *Truth* itſelf hath only a precarious arbitrary Dependence upon the Pleaſure of Men, and is not founded in the *Nature* of Things; or that *Sovereign Princes* may faſhion and diſpoſe the Nature of Things as they pleaſe, or that the ſame Truth may be different from itſelf. And indeed the Thing itſelf ſufficiently confutes *Hobbes*. For is it at all probable, that thoſe *Maſters of Families*, who, at firſt, united, and form'd themſelves into Commonwealths, ſhould, all the Time they liv'd ſeparately, behave themſelves only like ſo many wild Beaſts; break all Manner of Compacts they ever made; rob one another of Life and Fortune at Pleaſure, upon every Pretence of a Right; and that all their Actions were to be thought purely indifferent? Upon the ſame Grounds, *ſovereign Princes* now, who are ſtill with Reſpect to one another in a *State of Nature*, ſhould not be thought guilty of Injuſtice, when they break their Compacts, and invade one another's *Rights*: And yet it is certain, they are not ſubject to *civil Laws*. But on the contrary, it is not to be conceiv'd, that *civil Governments* could ever have been eſtabliſh'd, or, after their Eſtabliſhment, preſerv'd; if there had not been ſomething *juſt* or *unjuſt* antecedent to their Exiſtence. For 'tis certain, Compacts muſt have been made uſe of at the firſt Forming of Commonwealths. But how could Men perſuade themſelves, that ſuch Compacts could be of any Force, except they knew before, that it was juſt to obſerve them, and unjuſt to do otherwiſe? And if it be no Juſtice to ſtand to Compacts antecedently to the *Definition* of the *Civil Laws*, there can be no Reaſon why Subjects may not, when they pleaſe, renounce their Obedience, diſſolve *civil Government*, and ſo utterly aboliſh all the Diſtinction between *Juſt* and *Unjuſt*. For it is extravagant to imagine, that ſuch Numbers of Men, as a Commonwealth conſiſts of, will always be kept in Subjection by no other Reſtraints, but Fear and Power. Nor therefore can I believe there was ever any Prince heard of, ſo far depriv'd of Reaſon, as to have commanded what the general *Laws of Nature* forbad, or forbid what they commanded; for Inſtance, *that it ſhould* be unlawful to perform Truſt or Promiſe, or to give any Man his due; that *it ſhould be a Crime to live with any Reſpect to Reaſon or Juſtice, that every Man might have full Liberty to do all the Miſchief he could*, and the like. But now, why might not ſuch Laws have been made, if there had been nothing *juſt* or *unjuſt*, antecedent to the Determinations of the *civil Laws*? 'Tis certain the Command of the *civil Power* may as well make Poiſon itſelf wholeſome and neceſſary Food, as make ſuch Things as theſe *juſt* and *good*. And therefore *Polybius* was equally in the wrong, when he ſeems to derive the Original of Juſtice and Injuſtice from *civil*[a] *Government*. In *another Senſe*, indeed, what Mr. *Hobbes* ſaith, may be ſafely enough admitted; that is, ſuppoſing that by *Good* and *Evil* we underſtand no more than the *Advantage* or *Diſadvantage* of the Commonwealth. For then it will really appear to be a *ſeditious Doctrine*, that *every private Perſon is Judge of Good and Evil*, meaning by it, what is for the *Advantage* or *Diſadvantage* of the Commonwealth; that is, that *every private Man* is a competent Judge, whether thoſe are proper Means, which the *Prince* commands ſhall be made uſe of in promoting the *publick Good*; and that, in Conſequence, every Man's Obligation to Obedience may depend upon that Judgment. For it is neceſſary that Subjects (as *Otho* in *Tacitus* told his *Soldiers*) *ſhould be ignorant of ſome Things as well as know others. For if every one ſhould have the Liberty to diſpute what he was commanded, Obedience and Authority would ſoon ſink together*[b]. It was *Cato*'s Saying, that *the Tenant ought not to think himſelf wiſer than his Landlord*; and of *Plato*, that *no Man ſhould pretend to be wiſer than the Laws*[c].

VI. Our next Conſideration ſhall be, Whether a *Subject* may be guilty of Sin, in executing the Commands of his *Prince*; ſuppoſing he pretends, that he barely undertook the *Performance* of the *Action*, and left the *Deſign*, *Contrivance*, and the *Neceſſity of Account*, entirely upon *him* who gave the Command? For there is a Difference between the *Laws* and the *Commands* of *Princes*:

[a] Polyb. Lib. vi. *where he is tranſcrib'd with very little Judgment*, by Machiavel, Diſc. in Liv. Lib. i. Ch. ii. Theſe are *Polybius*'s Words: Καὶ τότε [ἐξαρχῆς βασιλείας] πρώτως ἔννοια, &c. "When they began to eſtabliſh Monarchy (which, according to him, is the "Form of Government which moſt naturally offered itſelf to the Mind) Men firſt conceiv'd the Ideas of Honeſty and Juſtice, and of "what was contrary to it." It does not however appear, that *Polybius* imagined Mankind would not have any Notions of what was juſt or unjuſt, honeſt or diſhoneſt, without the Eſtabliſhment of Civil Society; much leſs, that he thought them obliged to follow no Rules of Honeſty or Juſtice, in the independent State of Nature. He ſpeaks of the *Fact*, not of the *Right*. He reaſons upon a falſe Suppoſition, but a Suppoſition which, in ſome Meaſure, excuſes him: This is, That the firſt Men liv'd like Beaſts, having no other Light but that Inſtinct which they held in common with other Animals. This was the Opinion of the greateſt Part of the Heathens, and proceeded from the Ignorance they were in, with Regard to the Origin of Mankind; as our Author has ſhewn, Lib. ii. Chap. ii. Sect. 2. However, if *Polybius*'s Sentiments be really ſuch as they are repreſented, they refute themſelves; ſince it is eaſy to prove, That what he ſays about the Manner in which Men, by forming Civil Society, acquir'd the Ideas of Juſt and Unjuſt, might, alſo, take place before, provided they made uſe of their natural Reaſon. Vid. R. Cumberland, de Leg. Nat. *Lib.* v. *Chap.* v. [b] *Tam neſcire quædam milites, quam ſcire oportet, Tacit. Hiſt.* Lib. i. Chap. lxxxiii. H. Lib. ii. Chap. xxxix. It is one Part of the Character of a good Soldier, that he had rather put his General's Commands in Execution, than make any Debates upon them. *Cato de Repub.* Chap. v. *And ſo far* Terentius *was in the right*. Tacit. Ann. vi. Chap. viii. We are not to examine whom you prefer, or upon what Account Heaven hath given you the ſupream Diſpoſal of Things, and it is our Glory to obey. [c] *Plat. Polit.* Pag. 555. D. Ed. *Wech. Ariſt. Rhetor.* Lib. i. Chap. xv. To endeavour to be wiſer than the Laws, is what the beſt Laws take care to forbid. That is to be underſtood in Reference to the written and perpetual *Laws*, eſtabliſh'd by the Conſent of the People; whereas, in this Place, the Matter in Queſtion is chiefly, concerning particular Orders given by a Prince, according to the preſent Circumſtances, and Poſture of Affairs.

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The *Laws* are general Precepts, which affect every Subject; the *Commands* are only occasionally imposed upon particular Persons; but have the same Effect the Laws have in obliging those they are directed to. In this Case it is the known Opinion, that a Man may sometimes sin by obeying the *Commands* of the *civil Sovereign*, and therefore that *the Subject* may and ought to examine such *Commands* by his own Conscience rightly informed [1]. For certainly it ought to be supposed, that good Men promise Obedience upon certain Conditions only; that, since they are sure to give an Account of their Actions at the *Divine Tribunal*, and since all the Governments of this World are under an infinitely great over-ruling Power; they are always ready to obey the *Commands* of their *Sovereign*, except when they contradict or interfere with the *Law of Nature*, or the *manifest* Laws of God. For, without Dispute, should a *Prince* give out any Command contrary to the *Civil Laws*, he may be obeyed without Sin. But, on the other Hand, Mr. *Hobbes de Cive* Chap. xii. Sect. 2. declares this for a seditious Doctrine, 'That Subjects are 'guilty of Sin, when they obey those Commands 'of their Sovereign, which they think unjust.' And it may indeed be allowed to be dangerous not only to the Commonwealth, but, also, to the Consciences of private Subjects, to believe, that upon any Scruple or Doubt, concerning the Equity of what is *commanded*, Obedience may lawfully be refused. For should this Doctrine be admitted, it must often necessarily happen, that a Man must be reduced to a Necessity of Sinning; if he obeyeth, he must act contrary to his *Conscience*; and contrary to his *Allegiance*, if he doth not. For I think it is, on all Hands, allowed, that, in Cases where the Conscience is doubtful, the best Resolution a Man can come to, is, to take that Side where there will be least Danger of Sin. But now the Danger of Sin is in a much nearer View, when, upon an uncertain Doubt, a Man quits his *Allegiance* which he hath expressly sworn to keep; since the Commands of Superiors are always attended with the *Presumption* of being just, and are often built upon Reasons, of which private Persons cannot be allowed to be Judges. And therefore what the same Author says a little after in the same Book, may deserve to be considered, 'That 'that is my *own* Sin, which when I commit, I 'think my own; but that which I think is *another Man*'s Sin, I may sometimes commit without deriving any Guilt upon myself. For if I 'am commanded to commit that which must be 'the Sin of him that commanded it, so he be my 'lawful Governor, I do not sin if I obey him.' So *an Ambassador is supposed to speak the Sentiments of his Master; and whatever bears an ill Sense in them, is not to be imputed to him that speaks, but to him that gave him his Instructions. Since such Ministers are under a Necessity of conforming to the Directions of them that send them* [a]. I will not deny but a Man may engage barely [2] in the *Execution* of an *Action* commanded by his *Prince*, the Guilt of which shall be imputed solely to him who commanded it, and not to him who was the *Instrument* in the Execution

[a] *Procop. Hist. Goth.* Lib. i. p. 175. Ed. *August. Vindel. Senec. Tro* ver. 868, 869. The Guilt of a Crime forced upon a Man, recoils back upon the Authors of it. Vid. Lib iii. Tit. ii. L. D. *de his qui infam. not. Quique suo nomine non jussu ejus, &c.* M. *Senec.* Lib. iv. *Contro.* 27. That Woman is not immodest that hath been corrupted in her Chastity by a Tyrant, neither is he guilty of Sacrilege, that takes the Offerings of the Gods, and brings them to the Tyrant; or that sets up his Statue among the Images of the Deities.

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[1] An ancient *Greek* Poet, in one of his Tragedies, makes *Antigone*, who had buried her Brother *Polynices*, contrary to the Prohibition of *Creon* King of *Thebes*, answer that Prince, when he demanded of her, how she durst act contrary to his Laws, "I could not "think, that the Edicts of a mortal Man, as you are, could be of such Force, as to oblige me once to violate the fixed unwritten Laws of Heaven; for they are not of yesterday or to-day, but subsist perpetually, and for ever; and no one knows when "they began. I ought not then, for Fear of any Man, by violating them to expose myself to the Punishment of the Gods. &c. "*Phoeles Antigone*, ver. 458, &c. *Ed. H. Steph.*

[2] This Distinction does not remove the Difficulty. For in what Manner soever the Subject acts, whether in his own Name, or in that of his Prince, his Will always consents, in some sort, to the unjust and criminal Action, which he executes by the Order of his Sovereign. So that we must either always impute these Sorts of Actions partly to him, or else never any of them. And it would signify nothing to say, that in the Case our Author is speaking of the *Action* is of the Number of those that are called *Mixt*; or to alledge, in their Defence, the Laws and Privileges of Necessity. Vid. Remark, Book i. Chap. v. Sect 9. Note 3. and Book ii. Chap. vi. Sect. 12. Note 5. The surest Way then is to maintain in General, and without any Restriction, that the severest Menaces in the World should never induce us to act, even by the Order, and in the Name of a Superior, the least Thing that manifestly appears to us to be unjust or criminal; and that tho' we may be very excusable before the *human Tribunal*, for having been conquered by so severe a Trial, we shall not be entirely so, before the *Divine*. There is but one single Case, where we may conscientiously obey the Orders of a Prince, which plainly appear to be unjust; and that is, when the Person concerned in the unlawful Action which the Prince commands to be done, dispenses with our exposing ourselves in his Favour, to the grievous Consequences of a Refusal: provided the Business in Hand is a Thing, as to which it is in his Power to consent to the Mischief that the Sovereign commands to be done him, or the Violation of any Right, which it is lawful for him to renounce. For if any one should give me leave, for Example, to kill him, I could not however innocently make myself the Minister of my Prince's Anger; because no Man is Master of his own Life. This is very near what *M. Titius* says *Observ.* DCXXXI. I add, that we must take care not to confound, with the Case in Question, such others where the thing itself is innocent, tho' on the Part of a Superior, who commands it, it may be bad. The Reader will find, in my Notes upon *Grotius*, Lib. ii. Chap. xxvi. Sect. 3. Note 22, a remarkable Example of some ill grounded Scruples in this Respect; and in Lib. i. Chap. iv. Sect. 5. Note 10. an Instance of a seditious Resistance founded on this Pretence. To these we may join the Story of the Bishop *Abdaa*, mentioned in my Preface to this Work, Sect. 9. near the End. Compare also M. *Bohmer*'s *Jus Public. Univers.* Part. Spec. Lib. iii. Chap. ii. Sect. 10, 11. Yet, nevertheless, our Author pretends (in his Apology, Sect. 20.) that if we do not admit of the Opinion which he here maintains, we shall necessarily be forced to acknowledge, that all Soldiers, Executioners, and other inferior Officers of Justice, ought to understand *Politicks* and the *Civil Law*; and that they may excuse themselves from Obedience, upon Pretence that they are not sufficiently convinced of the Justice of what they are commanded: which would reduce the Authority of a Prince to nothing, and render him incapable of exercising the Functions of Government. But this only proves, that Subjects may not, or ought not, always, to examine the Orders of the Sovereign, to know if they are just, or not. If that were to be done, I must own, there would be scarce one Soldier in the World, that could innocently serve. How few are there that know the Justice of the Cause for which they fight? And suppose they did know, how few are capable of judging of them? Thus generally speaking, the greatest Part of those whom the Sovereign lists in his Dominions, may not excuse themselves on Account of their Doubts of the Justice of the War, whither they are ordered to march; because that demands an Examination much above their Capacity; whereas they have no need of any great Knowledge or Penetration, to be clearly convinced of the Obligation they lie under, of obeying their Prince. But if a Commander that is skilled in Politicks, and thoroughly acquainted with the Affairs and Interest of the State, plainly perceives that his Prince is engaged in an unjust, or an unnecessary War; ought he not to sacrifice every Thing, nay even his own Life, rather than serve in such a War as that? There is not always an Occasion of any great Penetration, or Entry into the Cabinet-Council, to discover the Injustice of the Wars that ambitious Princes undertake.

cution of it. But then it will be neceſſary for him to take with him theſe Cautions: Firſt, That he be commanded barely to execute the Action, that is, only to apply the Strength of his Body to the Performance of the Action, and neither give Occaſion to it, or furniſh Pretext, or make uſe of any Excuſe for it; but undertake it as an Action that belonged wholly to another Perſon, and which he will not take upon himſelf. *Secondly*, That he ſhould ſhew his Unwillingneſs to be employed in ſuch a Service, and deſire earneſtly to be excuſed from it [a]. And *Laſtly*, That upon declining the Action, he be threatened with preſent Danger of Life, or ſome other great Evil, which he is not obliged, either in Juſtice or Charity, to ſuffer for another Man, and which the Perſon that commands him hath Power to inflict; and eſpecially if he ſees that tho' he refuſeth his Aſſiſtance in the Action, it will be executed by other Hands. It is undoubtedly true indeed, that no Commands of Men, contrary to the Law of God, can have any binding Force, that is, lay an intrinſick Neceſſity of Obedience on the Conſcience, and that therefore it can be no Crime to refuſe to obey them. But there is a wide Difference between being bound in Conſcience to do a thing, and being able to do a thing without Sin to avoid ſome very great Evil. For there are ſeveral Things which we are under no Manner of *intrinſick* Obligation to do; which yet upon preſſing Neceſſity we may lawfully undertake. And, in this Caſe, the Queſtion is not, Whether we are bound to do ſuch a Thing, but whether we can do ſuch a Thing without any Guilt of our own, when we ſee we muſt otherwiſe loſe our Lives to no Purpoſe? Neither is any thing I have here ſaid, in the leaſt weaken'd by what *Pliny* ſaith, Ep. ix. Lib. iii. 'Where he tells his 'Friend of a very ill Cauſe he had been engaged 'againſt, that he had proved before the Se-'nate, that it was criminal even to have aſſiſted 'in it. (*Miniſterium etiam crimen eſſe*)'. For the Perſons he pleaded againſt, had not been barely the Inſtruments of another Man's Crimes, but had charged innocent Perſons with falſe Crimes, that the Proconſul might take Occaſion to ſeize on their Fortunes and Eſtates; and their informing againſt, and wrongfully accuſing them, was entirely their own Act; the Impeachments they made, were all in their own Names, and not in the Proconſul's, nor were they pretended to have been made at his Command; neither were they forced to be Delators, by any immediate Fear of Death, if they had refuſed to be ſo. They pleaded indeed, that they were provincial Subjects, and therefore were obliged by Fear to be abſolutely at the Command of the Proconſul. But what looked moſt probable was, that the Expectation of the Gain they hoped to make, was their greateſt Encouragement; tho' perhaps it might be true too, that the Proconſul had given them Reaſon to be afraid, if they refuſed to obey him; yet it is not likely he ſhould threaten them with Death, and there was no other poſſible Method left for them to eſcape it [a6]

[a] *We have a particular Inſtance of this Nature in* Olearius's Travels into Perſ. Lib. v. Chap. xxxii.

take. The Manifeſto's they publiſh themſelves, compared a little attentively with thoſe of their Enemies, are often ſufficient to ſhew to any one that has but a moderate Share of good Senſe and Honeſty, the Weakneſs of their Reaſons and the Injuſtice of their Cauſe. In ſuch a Caſe, we are not only exempted from Obedience, but we ought, alſo, to forbear, and refuſe doing it upon any Terms whatſoever. The ſame Thing muſt be ſaid of a Parliament whom a Prince commands to regiſter an Edict which is manifeſtly unjuſt; of a Miniſter of State whom a Prince will oblige to diſpatch or put in Execution an Order full of Iniquity or Tyranny; of an Ambaſſador to whom his Maſter gives Inſtructions, attended with an apparent Injuſtice; of an Officer whom his King commands to kill a Man, whoſe Innocence is as clear as the Day, *&c.* And they are not only Perſons of a diſtinguiſhed Rank, or of Parts and Underſtanding above the common Level, of Mankind, that may and ought to excuſe themſelves from obeying for the abovementioned Reaſon; but ſometimes, tho' very rarely, the moſt ſimple and ignorant find themſelves, alſo, under an indiſpenſable Obligation to deny their Sovereign their Aſſiſtance, at the Hazard even of their own Lives. Such was the Caſe of the Soldiers that were ſent by King *Ahaziah* to apprehend *Elijah*, and who were puniſhed by the Fire which came down from Heaven upon them, at the Prayer of that Prophet, and conſumed them all. ii *Kings* Chap. i. ver. 9. A Tip ſtaff, or a Serjeant at Arms, indeed is not, generally ſpeaking, bound to enquire, whether the Magiſtrate that orders him to take the Body of ſuch an one into Cuſtody, has any juſt Reaſon or no, for commanding him to execute that Order; that is not his Buſineſs, and he ought to have a favourable Opinion of thoſe who adminiſter Juſtice, as long as there are no evident Proofs of the contrary. But ſuppoſing they had in Reality ſuch Proofs, I maintain they ought not in that Caſe to obey. And this Suppoſition contains nothing that is impoſſible. It may happen, for Example (and every one will eaſily conceive it) that an Officer of Juſtice may fully know the Innocence of a Perſon falſly accuſed, of either Murther, or Robbery, who is infallibly ruined, if ever he ſhould once be taken. In the late Perſecutions in *France*, could not they plainly ſee (who were ſent againſt thoſe poor Creatures whoſe only viſible Crime was ſerving God according to the Dictates of their Conſcience) the tyrannical Injuſtice, and barbarous Cruelty of the Orders they received, and ought they not to have ſeen it? If, in thoſe Caſes, they can reconcile their Intereſt with their Conſcience, by pretending to ſearch after thoſe unfortunate Creatures, whom they will not find, and, at the ſame Time, contriving under Hand the Means for them to make their Eſcape; Well and Good. But I cannot perſuade myſelf, that Men can punctually execute ſuch Orders, without making themſelves Accomplices of the Iniquity of him that gives them. The ſame muſt be ſaid of Executioners. Upon which conſult *Grotius* Lib. ii. Chap. xxvi. Sect. 4. Num. 9. as, alſo, Mr. *Sidney's Diſcourſe upon Government*, Chap. iii. Sect. 20. and the Apology of *Socrates* by *Xenophon*. In which there are ſeveral fine Paſſages which ſhew that we ought never to obey our Superiors to the Prejudice of our Duty. So far from it, and unleſs we are in an entire Incapacity to reſiſt them, we ought to exert ourſelves to the utmoſt of our Power, and endeavour to hinder thoſe that would oppreſs the Innocent, from doing them any Miſchef. *Saul's* Guards refuſed to put to the Sword a great Number of Prieſts, whom that Prince ſacrificed to his Anger againſt *David*, 1 *Sam.* xxii. 19, *&c.* but as Mr. *Le Clerc* has obſerved, they would have been ſtill more commendable, if they had interceded with the King in Behalf of thoſe innocent Perſons, by repreſenting to him in the beſt Manner they could, that he had commanded a Thing that was forbidden by the Laws, both divine and human; and if, after all their Prayers and Repreſentations had proved ineffectual, they had ſeized upon the King as a mad Man, and ſecured him till the Prieſts had made their Eſcape. Since the firſt Edition of this Note, one Mr. *Adam Rechenberg*, a Profeſſor at *Leipſick*, has publiſhed a Diſſertation, entituled, *de Miniſterio, quod Crimen eſt, Diſquiſitio politica*. In which the ſame Opinion that is here advanced, is maintained, and confirmed by ſeveral Examples and Authorities. There is, alſo, a Diſſertation *de injuſto Pontii Pilati Judicio*, written by Mr. *Thomaſius*, againſt a Civilian named *Stellerus*, who was willing to juſtify *Pilate*, in a Treatiſe called *Pilatus defenſus*, upon this Principle, among the Reſt, that the Governor of *Judea*, in condemning JESUS CHRIST to Death, had only acted as a bare Executor of the Sentence of the *Jews*. This Diſſertation of *Stellerus* was printed in 1674, but it was ſoon ſuppreſſed by publick Authority. Mr. *Thomaſius* refuted it, the following Year, by another Diſſertation, which is the firſt in a Collection publiſhed at *Leipſick*, and in which *Stellerus*'s Piece is re-printed. As for the Reſt, I obſerve that the modern Writers, who have treated this Queſtion, have quite abandoned our Author's Notions; tho', in other Points, they agree with his Principles. It is ſurprizing to me that Mr. *Hertius* did not ſee his own Error.

it [a]. And in this Caſe, the Deſires or Intreaties of Superiors muſt not be ſuppoſed to have the ſame Force in them, as Neceſſity or their Commands [b], though in others it may ſometimes be true, that *the Intreaties of Tyrants are mixt with a ſort of Neceſſity*. Neither is the Example of *Doeg*, 1 *Sam.* xxii. 18, any Objection againſt what has been ſaid. For it was expreſly added, that a Man ought to deſire earneſtly to be excuſed, as *Paul*'s Guards very honourably did. (And thus the Midwives were commended for defeating the barbarous Command of *Pharaoh*, tho' it were with an Untruth, *Exod.* i.) But *Doeg*, on the contrary, ſhew'd himſelf ready and willing to put the King's Command in Execution upon the Prieſts, tho' we do not find that any Threats were added to it, when he had himſelf before falſly accuſed them, inſinuating that they had entered into a ſecret Conſpiracy with *David*, againſt the King: For it is evident from *Pſal.* lii. that he had brought ſome falſe Accuſations againſt them. But notwithſtanding, it muſt be confeſs'd, that there are ſome Actions, the bare Execution of which a Man would rather die, than [1] undertake: Such as to *murther* Parents, or Children; to commit Inceſt with a Mother, or a Daughter, or to lie with a Beaſt. A ſmall Stock of Courage would make a Man prefer Death to the Guilt of being an Inſtrument in ſuch Actions. And I cannot but think it was a noble Spirit of Conſtancy and Bravery in thoſe *Romans*, 'Who when ſin-'gled out by *Hannibal*, to fight with one an-'other, Brothers with Brothers, Fathers with 'their Children, and Kinſmen with their near 'Relations, choſe rather to die under Torture, 'than be ſtain'd with Blood which Nature had 'ſo nearly [c] ally'd.' Neither can I think it at all lawful, that, to ſave my own Life, I may aſſiſt to take away another Man's; for that would be to make another's Life the *Price* of my own: And there are many Things which we cannot do for *Price*, which, upon other *Conſiderations*, we may [d].

VII. But in general, that a Man may not at the *Command* of a *Superior* undertake an Action, as his own, which is repugnant to the Dictates of a good Conſcience is, what no Man who hath any Senſe of Religion can deny. The *Judges* therefore *Joſephus* ſpeaks of [e] (to conſider ſome Examples under this Head) refus'd to condemn the innocent *Zacharias*, tho' they were ſenſible what Danger threaten'd them from the Fury of the Zealots. And on the other Hand, the *Judges* mention'd 1 *Kings*, Chap. xxi, were certainly guilty of a very great Sin; becauſe they paſs'd Sentence not by *Order* from the King, but as the pure Reſult of *judiciary Proceſs* upon the Evidence of the Crime; nor can the *Witneſſes* be excuſed from an equal Share of Guilt. Nor were the Detectors Perſons leſs guilty, whoſe Buſineſs it was to charge falſe Accuſations upon the Great and Rich, that ill Princes might have a Pretence to ruin them in Circumſtances leſs criminal. *Marcellus Eprius* was once a Perſon very well known by that Character, but more particularly infamous, for the *Impeachment* of *Thraſeas*: Tho' *Tacitus* tells us, he pleaded in his Excuſe for that, that his Accuſation charged no more upon *Thraſeas*, than what the Judgment of the whole *Senate* confirm'd; which was only to ſpread the Crime wider, not clear himſelf. 'Tis true indeed, as the Hiſtorian ſays, That *Nero endeavour'd only to diſguiſe his own natural Cruelty, under the Formality of ſet Accuſations* [f]. But ſtill it was the Avarice and Ambition of ſuch auxiliary Villains, which provoked and encouraged him. Others engaged in the ſame Practices excuſed themſelves by ſaying, that in thoſe Times they were under a Neceſſity to do what they did, to *ſecure their own Honour and themſelves*: A kind of *Defence* which means no more than that they choſe rather to *expoſe others to Danger*, than *hazard themſelves*. Neither did *Curtius Montanus* [g], as the ſame Hiſtorian ſays, allow it to be a *tolerable* Excuſe, becauſe he thought the Perſons that uſed it not to be criminal in the Occaſion of it; but in a *Rhetorical* Way he choſe to paſs by *ſome Things*, that he might preſs *others* with more Vehemence. 'And the Senate acted with

[a] *Vid. Tacit. Ann. Lib.* xiii. *Chap.* xliii. Where *Silius* pleads that he had done Nothing out of any Deſign of his own, but that all was entirely out of Obedience to his Prince. Afterwards he pretended the Commands of *Meſſalina*, and waved his Defence. For why was there no Body elſe made Choice of that would ſell his Voice to oblige that cruel and impudent Woman? But it is neceſſary that the Inſtruments of Oppreſſion and Tyranny ſhould be puniſhed: For, when they have received the Rewards of their Wickedneſs, they ſhift the Crime over upon ſome Body elſe: and *therefore* Jul. Græcinus *very well deſerved Commendation, who was commanded to accuſe* M. Silanus, *and was killed for Refuſing*. Tacit. Agricola; *and* Seneca *gives him a very great Encomium.* De Benef. Lib. ii, xxi. [b] Plato Epiſt. vii.

[c] Vide *Diod. Siculum*, Lib. xxv. *in excerpt. Peireſcianis*. Vid. *Laonic. Chalcondyl.* Lib. i. where *Amurath*, Emperor of the Turks, commanded that the Parents of all thoſe who had been in the Inſurrection with *Sauzes*, ſhould kill their Sons with their own Hands. There were two Fathers that would not obey ſo cruel a Command, and were therefore cut to Pieces at the ſame Time with their Sons. For *Amurath* uſed to ſay, That the Sons would not have join'd with *Sauzes*, without the Advice of the Parents.

[d] *Abr. Rogerius, in his Account of the* Bramins, *ſaith*, That the *Bramins* believe that the Wife may do any Thing, tho' never ſo bad, which the Huſband commands her, without Sin; for the Sin, they ſay, cannot be imputed to her, but is to be charg'd upon the Huſband, whom ſhe is oblig'd to obey. [e] *Joſephus* de Bello Judaic. Lib. iv. Chap. xix. The Author here takes an Occaſion of praiſing the Intrepidity of the Seventy Judges mention'd by *Joſephus*, who choſe rather to expoſe their own Lives, than unjuſtly give Sentence of Death againſt *Zacharias* the Son of *Baruc*, one of the moſt conſiderable *Jews* at that Time, whom the *Zealots* would fain have deſtroy'd upon any Terms. But this Example does not well ſuit with this Place; for thoſe *Zealots* were nothing but a Set of factious and wicked Perſons, that had no Authority over the Seventy Judges, whom they had choſen out from among the People, to try and deſtroy *Zacharias* with ſome Colour of Juſtice, ſuppoſing that they would have ſeconded their furious Intentions.

[f] *Tacit.* Hiſt. iv. Chap. viii. [g] *Tacit.* Hiſt. iv. Chap. xlii.

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[1] But ſuppoſing this, all that our Author ſays, of the Repreſentation of a Prince, in whoſe Name we act, is nothing to the Purpoſe; ſince it may be extended to Caſes where a Prince commands abſolutely, without uſing any Menaces. The Officer may then plead, with Reaſon, That he never would have thought of killing him whoſe Innocence he knew; that he did all that he could to be excus'd, and complied with the laſt Reluctance: But that his Maſter was reſolved to be obey'd at any Rate, and therefore he alone was accountable for the Action, *&c.* If our Author anſwers, that the Prince has no Right to command in this Caſe, I reply, That, even according to his own Principles, he has no more Authority in one Caſe than another, and therefore, ſo far, Things are equal. But, if the Fear of Death, or any other immediate Evil, makes a Difference here, it is neceſſary, that it muſt have this Power in itſelf. Thus it will follow: That when another Perſon, who has no Authority over me, ſhall force me by the like Menaces, which he has in his Power to inflict; I may excuſe myſelf in the ſame Manner. For all the Conditions, which our Author requires, equally take place here, ſince where the Orders of a Prince have no Right to oblige us, his Quality of Sovereign can add no Weight to them. I might add other Remarks, to ſhew, that the Notions of our Author, on this Subject, are very inconnected.

'great

‘ great Juſtice, when, after *Nero*’s Death, they ‘ decreed his Inſtruments the Informers ſhould ‘ be puniſh’d as a Race of Miſcreants, who liv’d ‘ upon the Ruin of private Men [a].’ The Emperor *Titus*, with the ſame Juſtice, commanded all ſuch Perſons to be publickly whipt and beat in the *Forum*, then dragg’d through the Amphitheatre, made Slaves, and ſold; and ſome of them to be tranſported to uninhabited Iſlands; and after him *Trajan* ſent away Numbers of them in a few ſhatter’d Veſſels, that they might be left to the Mercy of the Sea, and be ſhipwrack’d wherever the Waves threw them [b]. Neither could the *ſecret Command* of *Tiberius* excuſe *Piſo* from the Guilt of *Germanicus*’s Death, if he was *really* the Cauſe of it: And if he had confeſs’d ſuch a Command in the Senate, tho’ that muſt have been enough to have put even *Tiberius* to the Bluſh, and depriv’d him of all his Shifts, to excuſe himſelf from commanding ſo barbarous an Action; yet the Senate had ſtill Power very juſtly to condemn him as the Criminal, becauſe he did not pretend any publick Authority for it, but voluntarily undertook an Action which *Tiberius* had not the leaſt Pretence of Juſtice to command; only that he might engage the Emperor to him, by ſuch an Act of Villany [c]. Neither do I think that *Joab* was abſolutely free from the Guilt of *Uriah*’s Murther, 2 *Sam.* xi. 14, 15, 16, tho’ *Chap.* xii. 9. *David* only is mention’d as the Principal in it. And it was very brave in *Papinian* to refuſe to defend the Murther of *Geta*, with that noble Saying, *That it was eaſier to commit Parricide, than to excuſe it.* Others tell the Story, that he refuſed to ſpeak an Oration for the Emperor, in which he would have had him inveigh againſt his Brother; and that he excuſed himſelf by ſaying, that *to accuſe a murther’d innocent Perſon, would be a ſecond Parricide.* But *Spartianus*, in his Life of *Caracalla* [1], denies this Account, becauſe, he ſays, *Papinian* could not, as being Prefect, make any ſuch Oration (tho’ it doth not appear why it might not have been extraordinarily commanded by him) and only adds, that it was certain he was put to Death, for being a Favourer of *Geta*. However this be, that Man is certainly in the right, who refuſes to proſtitute Wit and Parts to defend Wickedneſs, tho’ the Defence be publiſh’d afterwards in another’s Name. For the Invention of ſpecious Arguments, ſet off with the Art and Dexterity of an eloquent Speaker, can never be ſuppoſed to be barely the Execution of another Man’s Action. In this particular Caſe, the Thing would have appear’d otherwiſe indeed, if *Caracalla* had only commanded ſome Perſon to have recited ſuch an Oration in the Senate, as a Piece of his own, or ſome other Man’s Compoſure, under a capital Penalty, if he refus’d it [d]. But ſtill it muſt be remember’d, that, where the Actions of Princes do not plainly appear to be unjuſt, Subjects ought to be very cautious, and eſpecially publick Miniſters, how they give them an ill Character; becauſe it is their Duty, always to preſume for the Juſtice of their Maſter [e].

VIII. Upon the ſame Grounds we may determine, whether a Subject may lawfully bear Arms in an unjuſt War, at the Command of his Prince. *Grotius*, Lib. ii. Chap. xxvi. Sect. 3, 4, is of Opinion, that when it manifeſtly appears that the War is unjuſt, it is not lawful for a Subject to maintain ſo bad a Cauſe: And that when the Caſe is doubtful, he ought to take the ſafeſt Side, which is, to ſit ſtill, and not engage himſelf at all in the War. But I think, a Man ought to be very cautious, how he reſolves in ſuch a Manner, about Things of ſuch Conſequence as theſe. When, according to this Opinion, the Power of the civil Sovereign, and the Obedience of the Subject, in a Caſe of ſo great Importance, are made to depend upon every particular Man’s Judgment; and when, eſpecially, it would be eaſy for a Man to pretend Scruple of Conſcience, only to diſguiſe his Fears and Cowardice [2]. ’Tis true, where a Man is admitted to the Counſels and Debates, and hath a Right to give his Voice in them, if he is not obliged by the Determination of the Majority, without his own Conſent, he cannot, with Juſtice, ſo much as undertake any thing manifeſtly unjuſt. Which will hold true too, if it be left to his Choice, whether he will take Arms, or not: But if he ſhould be commanded ſimply to obey, in this Caſe it muſt be conſider’d, that all Nations, acted by any Senſe of Juſtice or Honour, before they engage in a War, always ſuppoſe, that the Cauſe of it is juſt; and where they do not, it is to no Purpoſe to talk of Conſcience. But the Point in diſpute turns chiefly upon this, Whether, in Regard of certain particular Circumſtances, it be convenient for the Government to begin a War, notwithſtanding the Truth of ſuch a Pretence? In this Caſe, the Perſon particularly intruſted with the Government of the Commonwealth, and entirely acquainted with its Strength, muſt be preſumed to ſee better what will be for the Advantage of the Publick, than any private Man can. And if a Man, admitting the Juſtice of the Cauſe, ſhould yet doubt whether it might not be better to neglect, or forgive, the Injury done the Commonwealth, than revenge it with a War; it muſt be told him, that this is, by no means, a ſufficient Reaſon, for a Subject to refuſe to obey his Sovereign, and provoke him to uſe Severity upon him; that he ſuppoſeth his Sovereign hath not obſerved a certain Virtue, which hath only the Force of an imperfect Obligation. And therefore the ſafeſt

[a] *Tacit.* Hiſt. Lib. iv. Chap. xxx. [b] *Suetonius, Titus* Chap. viii. *Plin. Pan.* 34, 35.
[c] *Tacit.* Annal. Lib. iii. Chap. xvi. [d] *There are ſeveral Paſſages in* Plato’s *Defence of* Socrates, *which might be applied this Way: And to this we may refer the Account.* Dio Caſſius *gives of* Salluſt, Lib. xliii. who he ſays was made Prefect of *Numidia* by *Cæſar*, upon Pretence of his taking the Adminiſtration of that Province, but in reality only, that he might ſqueeze all that he could from it. But, after his Return, he was accus’d of Extortion and Corruption, and of ſeveral Oppreſſions in the Province; and ſo was look’d upon to be more particularly infamous, becauſe having wrote an Hiſtory, where he frequently and very ſeverely reflects upon ſuch as made their Fortunes by publick Rapine in their Governments, he himſelf had not made his Actions agreeable to his Writings, and therefore, tho’ he was acquitted by *Cæſar*, yet he ſufficiently publiſh’d his Crimes, by the lively Character he had drawn of them, in his own Writings. [e] See the *Solœciſm* in Politicks *Aligrius* Chancellor of *France* was guilty of. *Gramond.* Hiſt. of *France*, Lib. xvi.

[1] Chap. viii. [2] See our Author’s Diſſertation *De Obligatione erga Patriam*, Sect. 19. And what I have ſaid upon *Grotius*, Lib ii. Chap. xxvi. Sect. 4. Not. 12. 19.

Method a Subject can take, is simply to obey [r], and leave his Sovereign to answer for the Justice of the War before GOD [a]. But yet it must be observ'd, that what hath been said affects only Subjects, who take Arms at the Command of their *Sovereign*. For they that voluntarily put themselves into the Service of a *foreign Prince*, ought, by all means, to be sure of the Justice of the Cause they engage in. And therefore the sensible Part of the World will always justly condemn those who let their Lives out to hire, without any Manner of *Consideration* of the *Cause* they fight for [b].

[a] *Hector* in *Homer* saith very well, *Iliad.* xii. ver. 243.

Εἷς οἰωνὸς ἄριστος, ἀμύνεσθαι περὶ πάτρης.

In *Tacitus* Hist. Lib. iii. 25. it is called a publick Crime, when a Son had killed his Father in the Fight. *Vide* Lib. ix. Chap. iv. Lib. ii. 1 *D. de noxal. act.* Lib. ix. Tit. ii. Leg. 37. D. ad L. *Aquiliam.*

[b] *Gunther. Ligurinum*, Lib. vii.

Ære dato conducta cohors, & bellica Miles,
Dona sequens, pretioq; suum mutare favorem
Suetus, & accepto pariter cum munere bello,
Hunc habuisse, dator pretii quem jusserit, hostem.

Lur'd to the Field by Pay, and Hopes of Spoil,
In servile Arms the Mercenaries toil;
Inconstant, False, and Faithless to their Trust;
The Cause that is most Gainful seems most Just:
He that first hires, commands them to the Wars,
And those he calls his Enemies are theirs.

[1] See What has been said concerning Soldiers, in Sect. 6. Yet Mr. *Buddeus*, however, pretends, *Dissert. de Officio Imperantium circa conscribendum militem* Parmi les *Selecta Jur. Nat.*) that, in a doubtful Case, the Subjects are not bound to obey their Prince when he commands 'em to serve in the Wars; yet after all, he does not destroy the Reasons which our Author makes use of to establish the contrary Opinion.

CHAP. II.

Of the Power of the Sovereign over the Lives of the Subject, in Defence of the Commonwealth.

I. *The Sovereign may hazard the Lives of his Subjects in War.*
II. *Whether lawful to refuse bearing Arms upon a Compact with an Enemy.*
III. *No Man to make himself unfit to bear Arms.*
IV. *The Obligation of a Soldier, what?*
V. *Whether the Commonwealth may give up an innocent Subject?*

I. THO' the End Men proposed to themselves, by entering into civil Societies, was to provide, not only for the Security of their Estates, but more especially of their Lives; yet it was found necessary to the Preservation of civil Government, that the Sovereign should have some Power over the Lives of his Subjects; and that for these two Ends: *First*, To guard the Commonwealth from Evils and Dangers; and *Secondly*, To suppress Disobedience to the Laws. By the *First*, The Sovereign hath Power to hazard the Lives of his Subjects in Defence of the Commonwealth, and to assert the Rights that belong to it; since in War Men always propose to take away one another's Lives. And since the Art of War itself is not to be learn'd without Experience, it was *Plato*'s Opinion [a], that the Lives of the Subjects might be exposed to some Danger for the Attainment only of the military Accomplishments (tho', I confess, I am not of his Mind) and accordingly he proposes, that the Weapons used in all military Exercises should differ little from the real and dangerous ones, such as might strike some Apprehensions of Fear into the Persons that used them; and he afterwards adds a Law, *That if any Man happen'd to be kill'd in those Exercises, that the Person who kill'd him should be acquitted by the Law, and be look'd upon as innocent. For*, saith he, *the Legislator ought to consider, that, tho' perhaps he may kill some few of his Subjects by this Method, yet that the rest will suffer nothing by it; but that if there were no Apprehensions of Danger in these Exercises, there would be no Way to distinguish between the Brave and the Coward; and the Want of such a Distinction would certainly be of worse Consequence to the Commonwealth, than the other Evil.* And such Military Exercises we are told are now in use in *Japan* [b]. *Demosthenes* mentions an *Athenian* Law [c], by which, *if a Man kill'd another accidentally in any Exercise, he was not to be banished:* 'The Reason of which was, saith he, because 'Law doth not consider the Event, but the In'tention of the Person, which was only to over'come his Adversary, not to kill him: But 'if his Adversary was too weak to bear the 'Fatigue a Victor must expect, the Law thinks 'him the Cause of the Misfortune which befalls 'him.' And indeed there is very good Reason that even the Exercise in military Duties should be under a severe Discipline, since in War the Fate of Things may frequently turn upon a very small Neglect. And therefore, tho' *civil Courts* are sometimes easily induced to make Allowance for those Passions, that have generally a violent Influence upon us, yet a Court-Martial hardly will

[a] *De Leg.* Lib. viii. Pag. 907. *A. B.* Ed. *Wech.* [b] *Vide* Bern. Varen. *Descr.* Japon. *Chap.* xix. [c] *Orat. adv.* Aristocrat. *circ.*

ever afford them any Favour. And hence military Judicature makes it capital to desert the Post a Man is commanded to, tho' perhaps to avoid present Death [a]. (Though some have thought the Shame of some ignominious Punishments might be a better Expedient to prevent Cowardice.) And therefore to refuse to list into the Military Service, hath, in some Nations, been severely punished [b]. There was a Law at *Sparta*, which made *it Death for any Man to refuse to hazard himself for his Country*; so that, as the Orator speaks upon it, 'The Occasion of their Fear 'was made their Punishment; and there being 'two such Extremities in View, there would be 'hardly any Man who would not sooner venture 'the Loss of Life among Enemies, than suffer 'it to be taken away by the Laws in his own 'Country [c].' 'Tis true, there are few Nations in which there are *not* Numbers of Subjects by their Years and Strength of Body fit to bear Arms, who have nevertheless Immunities from that Service granted them, either out of Respect to their Way of Life, or upon some particular Indulgence of the State; but it must be understood, that all such Privileges are to continue no longer in Force, than while there are other Subjects enough, or else Allies, or hired Forces in readiness to defend the Commonwealth: In Cases of the last Extremity, they must be superseded; and they who enjoy them must arm, as well as others, in the common Defence. For certainly it is more reasonable that such Privileges should be laid aside for a Time, than that, by an unreasonable Superstition for them, the whole Commonwealth should be ruin'd. And therefore at *Rome*, all Exceptions from military Service, allowed to the Old, and the Priests, always ceased upon Expectation of a *Gallick* Invasion [d]. That too should be observ'd, as a wise and good Institution made by *Solon* or *Pisistratus* (which is mention'd by *Plutarch* in the Life of *Solon* [e]) *That such as were disabled in the Wars, should be allow'd Pensions out of the publick Treasure.* And indeed, if the State of the Commonwealth will permit, there is all the Reason in the World that they should have some Consideration made them, who are upon hard Duty, while others sit at Ease, and are not only forced to neglect the Concerns of their Families, but to undertake a larger Share of Service for the Publick, than other Subjects [f].

II. And here it may be inquired, whether, if a Man detain'd Prisoner by an Enemy, to obtain his Freedom, promiseth, *that he will never, for the future, bear Arms against him*, his own Country can afterwards oblige him, contrary to his Promise, to draw his Sword against the same Enemy? Some, I know, suppose, that such a Compact in itself is *void*, because it is contrary to the Duty every Subject owes the Commonwealth: But I should not think it so sufficient an Answer, to say that every Thing contrary to Duty is therefore immediately void and null; as to deny that it is contrary to the Duty a Subject owes the Commonwealth, to procure himself Liberty, by promising that which is already in the Enemy's Power. For, except the Enemy give the Captive his Liberty, he can never bear Arms against him. And therefore the Commonwealth loseth nothing by such a Compact; for, unless the Captive recover his Freedom, he must be consider'd as lost already. And therefore when the Commonwealth receives him again from his Captivity, it is supposed to receive him upon such Terms, as leave him Power to keep his Promise with his Enemy, especially if he gain'd his Liberty by his own Interest only, without any publick Assistance from the Commonwealth. But cannot the transcendental Power of the Sovereign disannul such an Obligation, when the common Safety requires it; as suppose the Commonwealth be in imminent Danger, except he in particular take Arms? In this Case, I think, that since it is next to a Contradiction for me to be a Subject, and yet to be under an Obligation which must make me unserviceable to the Commonwealth in the greatest publick Extremities; no less absurd is it for me to imagine it possible, that I should be obliged, by a simple Compact, not to resist the unjust Violence of a Person, who attempts the Ruin of myself and all that belongs to me: Therefore the Force of such a Compact extends to the offensive only, and not to the defensive Wars; especially if the Hazard of the common Safety of the whole State be like to endanger mine too. For to what Purpose did my Enemy grant me my Liberty, if he intended to tie me up so that I could have no Power left me to make any Opposition against him, if he should ever after design any thing against my Life and Fortunes [1]? And therefore such a Compact is no Objection against my taking Arms at my Sovereign's Com-

[a] *Vide* Liv. *Lib.* v. *Chap.* vi. *Fustuarium meretur, qui signa reliquit, aut præsidio decedit.* He deserves the *Bastinado* that flies away from his Colours, or deserts the Post he was commanded to. *Mich. Montaigne*'s Essays, *Lib.* iii. *Chap.* xii. *Pag.* 775. *Justin.* Lib. xxxii. Chap. iii. *in fin. Ferdinandus Pinto*, Chap. x. [b] Lycurgus *Orat. contra* Leocrat. But the Orator, here, speaks only of those, who, being inrolled, deserted, or fled at the Sight of Danger, in order to preserve their Lives. The Law, says he, punishes them by that which they fear most; and, by shewing them the equal Danger on both Sides, leads them to chuse that to which they are exposed, by fighting bravely for their Country. It is true, he afterwards extends this Law to the Case of those, who, like *Leocrates*, abandon their Country when it is attack'd. See NICHO. CRAGIUS, *De Repub. Laced.* Lib. iii. Tab. xii. Instit. xi. where however he takes no Notice of this Passage of *Lycurgus*. [c] *Vid. Leg.* Longobardorum, *Lib.* iii. *Tit.* xiii. *Sect.* 1. [d] Appianus *de Bello Civili*, Lib. ii. Pag. 523. Ed. *H. Steph. Vid.* Lib. x. Tit. xlviii. l. *ult.* C, *de quibus muneribus Nem. lic. se excusare.* Andræas Maurocenus *Hist.* Venet. *Lib.* iv. *Pag.* 147. [e] Pag. 96. C. [f] Vid. *Diodorus Siculus*, Lib. i. Chap. lxxiii. *where he gives an Account of the* Egyptian *Laws relating to the Soldiery.*

[1] *Grotius*, who treats of this Question, *Lib.* iii. *Chap.* xxiii. Sect. 7. *Numb.* 3, 4, does not mention the Restriction our Author recommends. It must be confess'd, That unless the Prisoner himself be involv'd in the Danger, without any Power to extricate himself, the Permission granted here, tends to elude the Faith of the Treaty, and render it useless. For the Nature of War being such, That we seek to attack as much as to defend, when we find Opportunity; an Enemy, who has releas'd his Prisoner upon the Conditions above-mentioned, no doubt expects he will not, in either Case, make use of it against him. There must be a very express Clause to restrain the Obligation to Acts of Hostility, purely offensive, since it would be easy to colour them with the Pretence of Self-defence. Of the two Reasons, alledg'd by our Author, the *first* taken from the Care of our own Preservation, which does not allow us to renounce our Defence against an Aggressor, this Reason, I say, only regards the Prisoner himself, in the Circumstance just suppos'd. The *second*, drawn from the Prisoner's being useless to the State which recovers him, is of no Force; since the Reason for which our Author admits the Condition of his not serving, equally takes place here; since it is certain, That if the Enemy have not releas'd the Prisoner, he could have been in no Capacity of assisting his Sovereign. The higher the Rank of the Prisoner be, or the greater his Degree of Usefulness to his Country; the more forcible will the Clause in Question be, according to the manifest Intention of the Enemy who exacts it.

mand in Defence of the Commonwealth. It is a Question something like this, Whether a Captive who has his Freedom given him by his Enemy upon a certain Condition, upon Non-performance of it, [a] be obliged to return to his Captivity? And it is affirmed of private Persons: But *Bussiere*'s *Hist. Franc.* Lib. xvi, speaking of King [1] *Francis*, doubts whether it may be so of sovereign Princes. I shall not determine the Controversy: But I think it would be the safest and wisest Way, not to let a captive Prince have his Liberty, before the Conditions of it are actually performed.

III. From what hath been said it follows, That tho' the Necessities of the Commonwealth do not at present require military Service from the Subject, yet that it is a Crime which ought to be severely punished, for a Man to make himself or others unfit for that Service: For *tho' other Parts of my Body*, as *Seneca* saith [b], *are my own, yet my Hands belong to the Publick.* Instances of this Sort of Cowardice are frequently to be found even among that martial People, the *Romans* themselves. *Suetonius* tells us the Reason why *Tiberius* reform'd the Houses of Correction in *Italy*, was, *because the Keepers of them were suspected, not only to have often taken up Travellers, but to have concealed Persons that fled to such Holes for fear of being impress Soldiers* [c]. And this might perhaps be the Reason why the Emperor *Hadrian* afterwards suppress'd all those [2] Houses [d]. *C. Vettienus* was known to have cut off the Fingers of his left Hand, that he might be excused from serving in the *Italick* War; and his Goods were confiscated for it by the Senate, and himself condemned to perpetual Imprisonment. And *Augustus* exposed a *Roman* Knight, with all his Estate to Sale, for cutting off his two young Sons Thumbs, that they might not be forced into the Wars [e]. And therefore *Ammianus Marcellinus*, speaking of the Dispositions and Manners of the *Gauls*, saith, *That none of them ever cut off their Thumbs, to make themselves uncapable of military Duties as the* Italians *had done.* And accordingly there were several Laws made among the *Romans*, to restrain such Practices. *Trajan* made a Law, *That the Person who disabled his Son, when any Levy was made for War, so that he could not be fit for military Service, should be banished* [f]. And there is another of *Constantine*'s extant, to this Purpose, *That the Sons of* Veteran *Soldiers fit for the Service of the War (some of which have refused to list themselves out of Sloth and Laziness, and others have been so cowardly as to maim themselves, only to avoid the Necessity of that Duty) if they are thought uncapable to serve in the Army, shall be forced to attend the most servile Offices about the Court* [g]. *He that thinks to excuse himself from bearing Arms, by cutting off his Fingers, shall not escape what he designed to avoid, but shall, with that Mark of Infamy, be forced to undergo the Drudgery of the Service, since he refused the Honour.* And further, *Those provincial Subjects, that by such Practices are forced to make their Levies weaker, shall be allow'd so much Favour as to bring two maim'd Persons for one whole.* But the severest Law is that in *D. tit. supra*, Lib. v. *de* Re Mil. *If there be any Person who, to avoid being impress for the War, hath, as he thinks, secured his Body from Danger by cutting off his Fingers, he shall be condemn'd to be burnt, and the Master that doth not hinder him, shall incur a severe Penalty.* But it is probable that this Punishment was to be inflicted only on *Slaves*, but the Laws before mention'd comprehended the *Freemen.* For it is very well known, that the *Romans* would not at first permit their *Slaves* to bear Arms, but in Cases of the greatest *Extremity.* Tho' it is manifest, that this was not observ'd in the latter End of the Empire, as appears from Lib. xvi. *C. Theodos. Tit. eod.* where there is this Law of the Emperors, *Arcadius* and *Honorius*: *Against the Irruptions of the Enemy we command, that not only the Persons, but their Abilities shall be regarded; and tho' we believe, that Freemen may be moved with a more generous Concern for their Country, yet, by the Authority of this Edict, we command the Slaves, also, to list themselves with all Speed for the War, and if they are found fit for the Service, they shall be rewarded with their Liberty*, &c. For that *Law* in the *Eleventh Book*, under the same *Title*, which is, also, extant in the *Twelfth Book* of the Codes of *Justinian*, *Tit.* xliv. *Lib.* ii, speaks of *Slaves* that were *alieni juris, belong'd to other Men, that the Person that offered to send them to the Wars, should be forced to pay a Libra of Gold into the Treasury.* But the *Eighth Law* in the *Theodosian Code*, under the same *Title*, doth not simply forbid the Levying of *Slaves* for Soldiers, but only commands *that no Slaves should be taken into the choice Companies.* And [h] *Vegetius* complains, that, *either by the Favour or Connivance of the Officers, the new listed Men all pass'd the Muster, and that such as were not fit for their Masters Service, were taken to serve the Publick.* But some will have it, that the *Italians* and *French* derive their Word *Poltrones* from this cutting off the Thumbs: But I am inclined to think *Menage* is more in the right [i], in deriving it from the *Italian* Word *Poltro*, which signifies one that always lies at Home upon his Couch.

IV. A Man therefore that is obliged to *attend* the *War*, is bound to defend the *Post* his *Commander* appoints him to, tho' perhaps he foresees he must, in all Probability, lose his Life in it. And tho', in general, all *Burthens* ought to be laid proportionably on the Subjects, so that they may

[a] Vid. *Grotius* Lib. iii. Chap. xxiii. Sect. 6. and M. *Buddæus* in his *Specimen Jurispr. Histor.* Sect. 65. among his *Selecta Juris Naturæ.* But when the Effect of the Condition fails, without any Fault of the Person; as if, for Example, a Prisoner of War, that is to be exchang'd for one that has been releas'd, should happen to die before the Exchange was made. In that Case (says *Grotius*) he that is at Liberty, ought not to return to Prison, but only pay the Price of what he cannot effect, that is, give for his Ransom as much as would have been given for the Person that is dead. [b] *Seneca*, Lib. i. Controv. 7. [c] *Suetonius*, Tiber. Chap. viii. [d] *Spartianus*, Chap. xviii. Vide Not. *Salmas.* in loc. *Valer. Max.* Lib. vi. Chap. iii. [e] *Suetonius*, August. Chap. xxiv. *Am. Marcellinus* Lib. xv. *sub fin.* [f] Lib. xlix. Tit. xvi. Lib. iv. Sect. 12. D. *De Re Militari.* [g] Vide *Theod.* de fil. militar. apparitor. & veteran. *Lib.* i. Et de Tironibus, *Lib.* iv. 10. [h] *Vegetius* de Re Militari, Lib. i. Chap. vii. [i] In Origin. Ling. Franc. Add. here MENAGE *Amœnitates Juris*, Chap. iii. Sect. 15, *& seq* and M. SICHTERMAN, *de pœnis militaribus Romanorum*, Chap. ix. But above all, JAC. GODEFROI, in his Notes on the *Theodosian* Code above quoted.

[1] See M. *Gundling*'s Treatise *De efficientia metus*, &c. Chap. ii. Sect. 19, *& seq.* And M. *Böhmer*'s Dissertation *De exceptione mali injusti*, Chap iv. Sect. 19 *& seq.* where we shall find Reasons urg'd in Favour of *Charles* V, and a Refutation of those of *Francis* I.

[2] These Houses were properly Prisons, and call'd *Ergastulæ.*

assist

assist each other in the bearing them; or where that cannot be, or there is no Necessity of it, that they may relieve one another by Turns, or else excuse themselves by an Equivalent another Way, or else appoint every one his Share by Lot; yet the Nature of War will not permit, that those dangerous Posts should always be appointed by *Lot*. And therefore it must be left to the *Commander* to choose the Persons he thinks fittest, or if there be any Number fit, which of them he pleaseth. Unless there be any that will voluntarily undertake the Danger, as *Calpurnius Flaccus* did [a], and before him *Decius Mus* [b]. And no Man of *Bravery* or Spirit will ever complain that he is commanded upon such Duty, but will rather commend his General's Judgment and Conduct in it [c]. And besides, since 'tis by the Protection of the Commonwealth that we enjoy our Lives for a long Space of Time, which, if we had been exposed to a State of Nature, we should soon have been deprived of; we must not think it a severe Piece of Duty to part with them in Defence of the Commonwealth, especially since we are so many other Ways indebted to it. And therefore it is not at all unjust, that upon an extraordinary Command of the Commonwealth, and in its greatest Extremities, we should hazard that Life in its Defence, which it doth, in Effect, bestow upon us every Day; and especially, since, in a State of Nature, every Man must be forced to defend himself with his own single Strength, unless he will choose to die, or be enslaved. But now in Commonwealths it is much better to hazard ourselves with a Number, not only because the Hopes of Victory are greater, but because, tho' a Man be kill'd in the Fight, yet, by the Protection of the Commonwealth, his Goods and Fortunes will be preserv'd for his Relations; which, in a State of Nature, there could be no Hopes of. But however, it ought to be observ'd, that the Design of such Commands is not, or at least, ought not to be, to take away the Lives of the Soldiers directly: I say, ought not to be; for we have an Instance in *David*, that Generals are sometimes guilty of such Crimes, 2 *Sam.* xi. 15. and he is therefore call'd a Murtherer, Chap. xii. ver. 9. And it is not uncommon to expose such as are less beloved, where they must inevitably be cut off by the Enemy [d], as *Micipsa* sent *Jugurtha* to *Numantia*, that either his own Valour or the Enemy's might be fatal to him. But the Design of such severe Commands ought to be, either to avert some great Evil, or to procure some great Good to the Commonwealth, and then the Soldiers may justly be engaged in such hard Parts of Duty; tho' it may happen, that they may fall in the Enterprize. For the Conditions of a decisive Combat are either, kill your Enemy, or die with him: For this is better than to fall alone. And therefore I think those Commanders at Sea may justly be quitted from the Guilt of Self-Murther, who upon the express Order of their Superiors, or at least, upon a Presumption of it, from the State of the Engagement, blow themselves up with their Ship, rather than be made a Prize to the Enemies. For let us suppose the Number of Ships equal on both Sides; when one of ours is taken, the Enemy hath an Advantage of two Ships more than we: If ours only be lost, then we have but one more; but if both sink together, the Strength on both Sides will still be equal. And 'tis scarce possible if our Ship be blown up, but it must ruin one or more of the Enemy's with it. For the greatest Danger of being taken, is when the Ships are grappling, Side by Side; and generally the Enemy must suffer more than we by such an Act: For 'tis evident they must have much the Advantage of us, when they force us to fly to so desperate an Expedient. But to blow up, only to avoid being sunk, is, I think, a very ill Choice; because a Man may have some Hopes of escaping by *swimming* [e]. It was an old Law among the *Chinese*, *That the General should forfeit his Head, who had the Misfortune to succeed ill in the Fight, tho' not through his own Fault*, by which they design'd to oblige their Commanders, whenever they engaged an Enemy, to think of nothing but Victory or Death [f].

V. But what if the Life of a Subject be demanded without the Hazard of a Fight; for Instance, to appease a powerful Neighbour, and, in Consequence, to divert some imminent Evil, or perhaps prevent the Ruin of the Commonwealth? In such a Case it must be consider'd, what Reasons such a Neighbour may have to demand the Subject to be yielded up to him. If it be for any Crime he hath been guilty of, tho' perhaps there may be some easy Way, or other, for him to escape, yet he ought to be particularly cautious how he exposes the Commonwealth to Danger upon this Account. And therefore though we may suppose, that a Man under such Circumstances is not obliged to deliver himself up to his Enemy; yet he is bound to dispose of himself so, as to bring no Inconveniences upon them that give him Reception. And I make no doubt but his own Country and Commonwealth may, for that Reason, eject him against his Consent: For perhaps it may be thought less Cruelty to do so, than to surrender him up. But it may be supposed that the Lives of certain Subjects may be demanded for some publick Crime, of which those particular Persons are wholly innocent. Such a Kind of Calamity is related to have befallen the State of *Athens*, for the Death of *Androgeos*; in Revenge of which, *Minos*, after he had subdued the *Athenians*, demanded of them, by way of Tribute, Seven young Men, and as many young Women, to be devour'd by the *Minotaur* [g]. And, in a Case like this, I do not see how any Subject can refuse to take the

[a] *Flor.* Lib. ii. Chap. ii. [b] *Liv.* Lib. vii. Chap. xxxiv. [c] *Seneca* de Provid. Chap. iv. 'Why are the bravest Men in 'the Army commanded upon the most difficult Enterprize? It is the Choice of the Troops that the General sends out to surprize the 'Enemy by Night, to observe their Motions, or to force a Party to dislodge them; and yet none of them that are sent, complain 'that their Commander deals hardly with them, *&c.* [d] Vide *Q. Curtium*, Lib. vii. Chap. ii. *Polyb.* Lib. i. Chap. ix. *Diodor. Siculus*, Lib. xiv. Chap. lxxxiii. Et Lib. xix. Chap. xlviii. *Justinum*, Lib. xii. Chap. v. N. 8. *Zonar.* Tom. ii. in Maurit. *Sallust.* B. *Jugurth.* Chap. vii. [e] *Lucan*, Lib. iii. V. 701, 702.

——— *Non perdere letum*
Maxima cura fuit. ———

——— ——— Whose greatest Care
Was not to be depriv'd of Death.

[f] *Vide* Virg. *Æn.* vi. 20. *Hygin.* Fab. xli. *Ovid.* Met. viii. 170. *Plut. Thesius.*

[1] See our Author's Abridgment, *De Offic. Hom. & Civ.* Lib. ii. Chap. xiii. Sect. 2.

Chance

Chance which falls to his Lot (which is the fairest Way of Decision between Equals) unless there be a *Theseus* found, who will voluntarily undertake to conquer the Monster. But the Difficulty will be greater, if we suppose the Life of an innocent Person to be demanded, or suppose some other Evil threatened him as great as Death, without any Pretence of publick Guilt, or private Crime. We have an Instance of a Case in *Libanius*, Tit. i. Decl. xxvii, where a Tyrant demands a certain beautiful young Man of a neighbouring City, threatening War if he was denied. The City chooseth to hazard a War, rather than deliver him up. But when it was closely besieged by the Tyrant, the Father of the young Man kills his Son, and throws him over the Wall; and afterwards when the Siege is rais'd, he is accused of Murther [a]. I shall not here either accuse, or defend the Father: He might possibly make a better *Defence* for himself than *Virginius* did in *Livy*, Lib. iii. Chap. l. However, I think it is past Dispute, that the Commonwealth is not oblig'd to protect such a Person to its own Ruin: For so the Commonwealth must be destroy'd, and the innocent Person be far from being secured by it. Neither can any Man desire that the whole Commonwealth should perish with him, and upon his Account. The only Refuge such an unhappy Person can take, must be either to provide for himself, if he can, by Flight; or else by attempting some bold and dangerous Enterprize. When all fails, he must submit to unavoidable Misfortune, in which it may be possible at least for him to preserve his Mind innocent [b]; since it is utterly unlawful for a Man to destroy himself, to avoid the most injurious Usage. And the Commonwealth (after it hath defended such an unfortunate Person to the utmost of its Power, and endeavour'd, as far as possible, to assist his Escape some way or other; and all proves to no Purpose, and inminent Ruin cannot be well otherwise avoided) may, at the last, forsake him; that is, not hinder his Enemy from taking him: For it is a cheap Peace that can be bought with the Loss but of one Subject. But that the Commonwealth should deliver him up to his Enemy, or force him to surrender himself, is, I think, neither lawful nor necessary. We have an Example of this Nature in [1] *Megacles* of *Messina*, *Marselaer Legat.* Lib. i. Chap. xxxiii. and of something greater in the Story of *Sperthias* and *Bulis*, who voluntarily surrender'd themselves up to *Xerxes*, to satisfy him for the Injury the *Lacedemonians* did him in killing his Ambassadors [c]. But however the Commonwealth ought to set a greater Value upon the Lives of the Subjects, than to squander them away profusely upon the Fear of uncertain Danger, or upon Prospect of unnecessary Good; neither is any *Subject* obliged to sacrifice himself upon such Occasions. And therefore the two Brothers, the *Philæni*, did more for their Country than could have been desired of them [d]. And *Caiaphas* made a very ill Application of what was otherwise a good Saying, *John* xi. 50, implying, that it was lawful to take away an innocent Person's Life, that the *Romans* might not be jealous of any Revolt among the *Jews*, and so take an Occasion to bring a War upon them; especially since it would have been easy to have prevented such Suspicions by Measures much gentler than that of the Death of an innocent Man. And I do not see how the Action of *Darius* was excusable, when he threw away so many Thousand Lives, only to gain *Zopyrus* Credit among the *Babylonians* [e].

VI. It is, also, often necessary, that, for the Ratification of publick Compacts, some of the Subjects be given for Hostages [2]. And the Civil Power may force them to undertake this Duty, when there are none who offer themselves voluntarily. And if any over powerful Enemy demand certain particular Subjects for Hostages, they cannot, I think, upon any Pretence refuse. But where there is any Number of Persons proper to be given for Hostages, and it is indifferent to the Party we make the Agreement with, or ourselves, which of them be given; to take away all Occasion of Complaint, or Suspicion of Partiality, the proper Method will be to determine the Matter by Lot. And if the Hostages are to be detain'd for any long Time, it will be reasonable to relieve the first, by sending new ones in their Places: As, also, to take Care, that the extraordinary Service the Hostages undertake, more than other Subjects, shall be compensated to them some other Way. And here it may be enquired, Whether the Lives, or only the Liberties of Hostages, are engaged? And I think it sufficiently appears, by giving up the Hostages, that thus much is actually done and intended: 'We deliver these Persons into your 'Hands, as a Part of the Commonwealth we 'particularly value, and if we break the Articles 'of Compact, we leave it entirely to your Mercy to do with them what you think fit.' Thus the City of *Liege* gave *Hostages* to *Charles*, Duke of *Burgundy*, upon Condition, *That, if they did any Thing contrary to the Agreement, he might freely give himself Satisfaction upon the Hostages*; tho' the Duke afterwards dismiss'd them [f]. And therefore since the Breach of Compacts of this Nature is a just Reason for levying War against the Party which is guilty of it; it is manifest, that after such a Breach of Compact, and after the War is begun, that the Hostages themselves may be look'd upon to be Enemies, in the same Manner, as all the Subjects of that Commonwealth, comprehending such as were no way necessary to the Occasion of the [3] War. And 'tis certain

[a] *Vide* Bœcler *in* Grot. *Lib.* i. *Chap.* i. *Sect.* 6. *p. m.* 95. [b] *Vide* Lib. iii. Tit. i. Lib. i. Sect. 6. D. *de Postulando.* [c] Herodot. Thalia. *Polymn. Grot.* Lib. ii. Chap. xxv. Sect. 3. [d] *Vide* Sallust. *de Bell.* Jugurth. Pomp. Mela. *Lib.* i. *Chap.* vii. [e] Herodot. Thalia. *in fin.* [f] *Phil. de Comines*, Lib. ii.

[1] This Story is taken from Polyænus, *Stratag.* Lib. v. Chap. xv. This *Megacles* of *Messina* being deliver'd by his own Country to *Agathocles*, but under the Title of Ambassador, found Means to escape, by the noble Freedom with which he spoke to this Tyrant. See *Grotius*, Lib. ii. Chap xxv. Sect. 3. Not. 5. 11.

[2] See hereafter, in Chap. viii. Sect. 6. and *Grotius*, Lib. iii. Chap xx. Sect. lii, *&c.* As, also, a Dissertation of John Schilterus, *Jure Obsidum*, inserted in his *Exercitationes in Pandect.* and a Piece of Mr. *Buddeus*, intituled, *Jurisprud. Histor. Specimen.* § 54.

[3] Hostages can give the Enemy no Power over their own Lives, of which they are not themselves the Masters. See, above, Lib. ii. Chap. iv. Sect. 18. As to what concerns the State, it has a Power of exposing the Lives of its Subjects to Danger, when the

certain that Hoſtages have often ſuffer'd in the ſame Manner as profeſs'd Enemies. Tho', on the other Hand, there have been many others, who have thought it barbarous and inhuman, to revenge the Injuries others have done, with the Deaths of innocent and unhappy Perſons [a]. And it is certainly falſe to ſay, that the Hoſtages are given with Intention that they ſhould ſuffer Puniſhment for the Compacts violated by the Commonwealth. For I cannot ſee how the End Men ought to propoſe to themſelves from puniſhing, can poſſibly be obtain'd by the Puniſhment of an innocent Hoſtage, who did not properly conſent to the Violation of the Compacts, but only did not refuſe to ſuffer Evil in another's Stead, which in itſelf is no Crime. And the Hoſtages will, notwithſtanding, be a ſufficient Caution, tho', by the Law of Nature, they cannot properly be puniſhed for another's Default: For it is enough that they are in ſuch a State, as leaves them at any Time expoſed to the Liberties of War, and that their Security depends ſolely upon the Pleaſure of an injured and angry Enemy. But however, the Truth is, the Commonwealth directly engageth only the corporal Liberty, and not the Lives of its Hoſtages; becauſe it firmly reſolves (or at leaſt ought to do ſo) to obſerve its Faith; and therefore morally ſuppoſeth no ſuch Caſe by which it ſhall give the other Power over the Life of the Hoſtage. And, without Diſpute, the Commonwealth offers great Injury to the Hoſtages, either by unjuſtly breaking Compacts, and expoſing them to the Mercy of the Enemy; or by giving them up, only with a Deſign to betray him into Security, and ſo make the greater Advantages upon him. But, on the other Hand, let us ſuppoſe the Party who receives the Hoſtages may take Advantage from thence, either to imploy them in ſome ſecret Treachery againſt us, or to provoke us with open Injuries, threatening Death to them, if we reſiſt him: In ſuch a Caſe, it muſt be thought reaſonable, that if the Injuries are ſo great, as to make it more ſupportable, to hazard the Lives of innocent Hoſtages, rather than the Commonwealth ſhould ſuffer them, we may very juſtly neglect the Conſideration of their Danger, and make all the Strength we can to reſiſt the Enemy. And the Commonwealth, in ſuch a Caſe, doth no greater Injury to the Hoſtage, than it doth, when in War, it appoints particular Subjects to certain Poſts, in a brave Defence of which they muſt either die, or be made Priſoners. And the Hoſtages ought patiently to ſubmit to ſuch fatal, unavoidable Misfortunes, and not to be diſſatisfy'd with their Country, ſince it could not be ſuppoſed to foreſee ſo unexpected a Caſe [b]. Neither ought we upon this Account to ſet the leſs Value upon a civil State; ſince ſuch extraordinary Caſes ſeldom happen in it; when, in a State of Nature, it is impoſſible but ſuch Inconveniences muſt be very frequent. And this Reaſoning muſt determine the Caſe that happen'd to the People of *Utica*; ſome of the Subjects of which City *Agathocles* intercepted, and tied in certain *Engines*, which he placed in the Front of the Battle, that ſo their Fellow-Subjects might be under a Neceſſity of killing them, whenever they attempted to beat him back [c].

[a] Vide *Grot.* Lib. iii. Chap. xi. Sect. 18. [b] Vide *Ammian. Marcellinum*, Lib. xxviii. Chap. vi. [c] Vide *Diodor. Sicul.* Lib. xx. Chap. lv. *Gunther. Ligurinus*, Lib. x. *Grotius*, Lib. iii. Chap. xx. Sect. 52. *&c. Bucler.* in *Grot.* Lib. i. Chap. i. p. m. 102.

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lick Good requires it: But it cannot, in my Opinion, at that Price, make them reſponſible for its own Infidelity, when they have themſelves no Share in it; for this would be to make the Innocent guilty, which it has no Right to do. Thus it does not engage the Lives of Hoſtages; for tho', by the Breach of that Treaty, of which they were the Pledges, they are left to the Mercy of the Enemy, who is freed from all Obligations of treating them otherwiſe than as common Priſoners of War; yet, it does not follow, that he has a Power, in Conſcience, to put them to Death. He ought not even to exerciſe againſt them the Right which War gives him, for fear, leſt it ſhould ſeem, that, under that Pretence, he would puniſh the Innocent with the Guilty. In a Word, it is ſufficient, in this Caſe, that Hoſtages be treated as Priſoners of War.

CHAP.

CHAP. III.

Of the Power of the Sovereign over the Lives and Fortunes of the Subjects, in Criminal Cases.

I. *The Power of Life and Death, whether, and how transferr'd, from particular Men to the Commonwealth.*
II. *In a Liberty of Nature no human Punishment.*
III. *But only in a Commonwealth.*
IV. *Punishment, what?*
V. *Punishing, to what Species of Justice reducible.*
VI. *That one Man should punish another, not unjust.*
VII. *The Power of punishing, where lodg'd.*
VIII. *Human Punishment ought to have some End.*
IX. *The first End of Punishment, the Amendment of the Offender.*
X. *Whether lawful for any Man to correct any.*
XI. *The second End of Punishment, Caution for the Injured.*
XII. *The third the general Security.*
XIII. *How far private Men are allowed to inflict Punishment.*
XIV. *What Offences it is needless for human Justice to punish.*
XV. *Whether lawful at any Time to pardon.*
XVI. *How far this is lawful antecedently to the Civil Law.*
XVII. *How far after it.*
XVIII. *The Quality of the Crime to be estimated from the Object of it.*
XIX. *And from the Passion that gave the Impulse.*
XX. *And from the Force of the Inclination and Intention.*
XXI. *And from the Obstinacy and Resolution of the Criminal.*
XXII. *And lastly, from Custom and Habit.*
XXIII. *What to be regarded in demanding the Quantity of the Punishment.*
XXIV. *The Measure of Punishments, what?*
XXV. *In Punishments, the Person of the Sufferer to be regarded.*
XXVI. *The* Jewish *Law, whether an universal adequate Measure of the Punishment.*
XXVII. *Of Retaliation.*
XXVIII. *A Corporation or Community, how punish'd.*
XXIX. *The Crimes of Corporations wear out in Course of Time.*
XXX. *Every fatal Evil not an human Punishment.*
XXXI. *Difference between Damage suffer'd directly, and by Consequence.*
XXXII. *Difference between the Occasion and the Cause of Evil.*
XXXIII. *No Man to be punish'd for another's Crime.*

I. THE Sovereign hath, also, a Power over the Bodies and Lives, as well as Fortunes of the Subjects, in criminal Cases, which is usually call'd in short, *The Power of Life and of Death* (a Power manifestly different from that which God hath over his Creatures, *Psal.* xc. 3. or that of Men over Beasts.) And the first Dispute that ariseth upon this Subject, is, How such a Power could by Compact, from particular Men, be transferr'd to the Commonwealth? For since Punishment is an Evil inflicted against the Consent of the Party punished, and that which a Man inflicts upon himself, cannot be said to befall him against his Consent; it will be some Difficulty to account, how a Man can have a Power to punish himself, and, consequently, be in a Capacity to transfer such a Power to another. For the Severities of the monastick Life, and the Pains Men inflict upon themselves by *ecclesiastical Discipline*, are either no Punishments properly speaking, but are rather applied by way of Physick, to suppress the Force of Lust, or else are wholly involuntary, and imposed by the Priests, upon the Pretensions of the Divine Authority of their Office. And therefore it makes no Alteration in the Nature of the Punishment, that the Stripes are inflicted with their own Hands, because the Fear of a greater Evil threatened to the Disobedient, forces them to execute that Rigour upon themselves; as we see Malefactors go to the Place of Execution, who would be dragg'd thither if they refused. So it is the Custom in some Nations for the condemn'd Criminals to dispatch themselves [a]. And therefore, as to the Matter in Dispute, it will be easy to conceive, that as in natural Bodies the Mixture and Temperament of several Simples forms a Compound, in which we often perceive such Qualities as cannot be found in any of the Ingredients that compose the Mixture: So Bodies politick, which are compounded of a Number of Men, may have a Right resulting from such a Composition, which no one of the Particulars was formally possess'd of; which Right derived from the Union, is lodged in the Governors of such Bodies [1]. Thus it was never pretended, that every particular Man hath a Power, to make Laws for himself, and yet, when every Man

[a] *Diod. Siculus*, Lib. iii. Chap. v. speaking of the *Æthiopians*, says, One of the Officers is sent to the Criminal, to carry him the Signal of Death, upon the Sight of which, he goes home and kills himself.

[1] Lib. xli. Tit. iii. Lib. xlvi. D. *de acquir. rer. domin.* The Author here cites a Law of the *Digests*, which does not concern *Rights* that belong to whole Societies in general, tho' the particular Members of which they are compos'd are not invested with but which only shews, that we may make over to another a Right that we have not ourselves; as for Example, a Creditor who his Debtor's Pledge, makes the Purchaser Master of the Pledge, tho' he himself had no Property in it. *Non est novum, ut qui Dominium non habet, alio Dominium præbeat. Nam & Creditor, pignus vendendo, causam dominii præstat, quam ipse non habuit.* Here, in main, the Creditor is only the Occasion of the transferring of Property; for it is the Will of the Proprietor, either express or tit, which produces originally this Effect. See, above, Lib. v. Chap. x. § 13.

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ſubmits his Will to one, 'tis confeſs'd, there commences a Power to preſcribe Laws to [1] all. After the ſame Manner, the Head of a Body Politick may have a Power to inflict Puniſhments on the particular Members, tho' the Members had no ſuch Power before themſelves. And this will be eaſy to account for, ſince every particular Man obligeth himſelf not only to defend the Perſon that is to be puniſhed; but, if need be, to aſſiſt the Sovereign as far as he is able againſt him [a b]. And from hence the Reaſon is evident, why it does not follow, as ſome ſuppoſe, that whatever the Sovereign takes away from the Subjects by Way of Puniſhment, is done by their Conſent, becauſe they at firſt conſented to allow of, and confirm every Action of the Sovereign; becauſe, ſince that particular Caſe, which gives the Sovereign a Power over the Life of the Subject, is left entirely in the Power of the Subject himſelf, ſo as he may for ever prevent it, if he pleaſes; therefore, ſuch a Caſe is never conſider'd by particular Men, as ever like to [2] happen *Hobbes*, indeed, in his *Leviathan*, Chap. xxviii. in the Beginning, aſſerts, That the Right the Commonwealth has to puniſh, is not grounded on any Conceſſion, or Gift of the Subjects, but that the Foundation of that Right is built upon that other, which, before the Inſtitution of Commonwealths, every Man had to every thing, and to do whatever he thought neceſſary to his own Preſervation. And, therefore, that that Right was not given, but left to the Commonwealth; which, yet, ſince it has Power ſufficient, it may make uſe of, as it pleaſes, to the Security of the Subject. To which it may be anſwer'd, that the Right of Puniſhing is different from the Right of [3] Self-preſervation: and, by the Exerciſe of it upon Subjects, we can never underſtand what a State of Nature allowed; where there is no Subjection. But I muſt farther add, That the Puniſhments I here ſpeak of, are ſuch only, as human Legiſlators arbitrarily preſcribe againſt *Offenders*, and as are diſtinguiſh'd from thoſe Evils which are the natural Conſequences of Sin.

II. But, in treating of the Right of puniſhing the Subjects, I will premiſe, that I intend to confine myſelf to that Right only, which one Man exerciſes over another, without Regard to the Methods and Proceedings of *Divine Juſtice*, which, it muſt be allowed, is, in many Caſes, of a Nature much different from human Judicature [c]. To begin, therefore, as high as we can; it muſt be obſerved, that, in general, in almoſt every Sin, but eſpecially in ſuch as bear Relation to another Perſon, there are two Things conſiderable; *Firſt*, the Defect or Deviation from the Law: *Secondly*, the Harm or Damage another Perſon ſuſtains, either *directly* or *indirectly* by it. And ſo far we may be certain, that every Man is obliged, by the Law of Nature, to make Satisfaction for the Harm or Damage another ſuffers on his Account; and, in caſe it proceeded from malicious Deſign, to give *Security* for his good Behaviour for the future. But there is a Difference, indeed, between ſuch Security, when it is to be given by Men that live in a Liberty of Nature, and them that are *Subjects* of a *Commonwealth*. The Law of Nature ſeems to oblige the firſt to give no other Security, than that, after they have expreſs'd a Concern for what they have done, and voluntarily offer to compenſate the Damage they ſhould either by ſimple Aſſeveration, or, at fartheſt, by Oath, oblige themſelves to forbear the like Injuries for the future. For a voluntary Repentance is a ſufficient Evidence of an Alteration of Mind, and that their Reſolution to abſtain from Violence for the future is ſincere [4]. And therefore, if the injured Party refuſes to accept of ſuch an Accommodation, and is either ſo diffident, or ſo perverſe, as to endeavour to force upon them Articles of larger Extent; ſince the others are not obliged, by the Law of Nature, to comply ſo far; the Blame of Breach of Peace muſt lie on his Side, and the others may juſtly reſiſt him. And, in ſuch Circumſtances, the Juſtice of the War muſt be determined for them who offer'd the Injury, and the Injuſtice will be on his Side that receiv'd it. But, when a Man will give no *Satisfaction*, unleſs he be forced to it, ſince, from thence, he ſufficiently diſcovers the Obſtinacy of his Temper; and, when no Terms of Compoſition will be accepted, unleſs the Party injur'd has Strength enough to over-power the Injurious; it muſt be left to the Pleaſure of the Conqueror, to inſiſt upon what Propoſition he thinks moſt likely to ſecure his future Quiet. And, when the Difference is grown to that Height, the Conqueror may take the Liberty, not only to diſarm his Enemy, to demoliſh and take Poſſeſſion of fortified Places, to condemn him to perpetual Impriſonment, and the like; but may, alſo, put him to Death, upon ſufficient Aſſurance, that, if ever he recovers Liberty, he will renew his Outrages, and there can be no other effectual Way found to prevent it. But then, as this Caution is demanded rather in a Way of War, than Puniſhment properly ſo call'd (tho' 'tis uſual with ſome to call all Manner of Evils, whether ſuch as are the natural Conſequents of Sin, or thoſe that are inflicted in a Liberty of Nature, for Injuries committed, by the Name of Puniſhments, in a more looſe Senſe of the Word) ſo it cannot properly be ſaid that a Man is

[a] *Conf.* Hobbes *de Cive*, Chap. ii. Sect. 18. [b] See, above, in Book iii. Chap. vii. Sect. 5. [c] And this *Plutarch* ſeems, in ſome Meaſure, to be ſenſible of, *Lib. de Sera Num. vindict.* Pag. 449. F. A Man can hardly conceive any thing good with better Aſſurance, than that he is one, who exactly knows the proper Time for the Cure of Vice, that Puniſhment is the uſual Remedy he applies to every Sin, which he does not always diſtribute in the ſame Proportion to all, or at the ſame Time.

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[1] The Laws only limit the Freedom which every Man has to diſpoſe of his own Actions, as he pleases, and without conſulting any one. Now, a Perſon may renounce this Right, as far as he judges proper, and in Favour of whom he thinks fit. Therefore, this Objection is of no more Force, than if we ſhould ſay: A Man can buy nothing himſelf, therefore, he cannot give the Buyer the Right he has, as ſuch. Juſt, as if we ſhould ſay; a Perſon cannot conſtrain himſelf; therefore, he cannot give another, with whom he treats, a Right of obliging him to keep his Word. See Examples of ſuch falſe Reaſoning, Lib. vi. Chap. i. Sect. 12. Lib. vii. Chap iii § 4.

[2] But is it not ſufficient, that this may happen? Our Author ſeeks here only to elude the Obligation of Subjects to ſuffer Puniſhment, of which we ſhall treat lower, N. 1. Pag. 764.

[3] A falſe Suppoſition, which I ſhall refute, N. 8. Pag. 762.

[4] See, above, in Book ii. Chap. v. Sect. 3. towards the End.

obliged [1] to ſtand to it. Becauſe it ſuppoſes and implies a Sort of Blemiſh and Stain upon the Mind, and a Sin againſt the Law of Nature, in the Perſon 'tis extorted from, *viz.* his refuſing to give a voluntary Satisfaction, and a violent Defence of his Fault. Nay, ſince the Evils that are the Effects and Incidents of War, cannot properly be call'd Puniſhments (as will ſufficiently appear from what follows) it is manifeſt that human Puniſhments in a ſtrict Senſe, or ſuch as are derived from human Authority, cannot affect them that live in a Liberty of Nature, though it cannot be denied, but that they too are ſubject to thoſe Evils which flow by a natural Connexion from Sin.

III. But in Commonwealths, if a Man ſuffer Harm or Damage, it is not only recovered with much greater Eaſe, than in a State of Nature, by a War that muſt be ſupported by his own ſingle Strength; but there is before-hand as much Care taken, as the Nature of human Affairs will permit, to prevent Injuries or Harm that he offer'd the Subject, by awarding Puniſhments to be inflicted by publick Juſtice on all Offenders againſt the Law. For ſince the Wills and Inclinations of Men are ſo eaſily byaſs'd, either to Good or Ill, it was certainly the moſt effectual Expedient that could have been pitch'd upon, to direct, or reſtrain them, to ſet in View the Dread of ſome preſent Evil.

IV. *Puniſhment* therefore, in general, may be thus defined; *It is an Evil of ſuffering, inflicted for an Evil of doing*; Or, *it is ſome uneaſy Evil inflicted by Authority, in a compulſive Way, upon View of antecedent Tranſgreſſion* [2]. For though 'tis common to enjoin ſeveral Sorts of Labour in Puniſhment; as, ſuppoſe a Man be condemn'd to the *Mines*, to the *Gallies*, to the *Work-houſe*, to raiſe a *Fortification*, to cleanſe the *Common-Sewers*, or the like; yet theſe are to be look'd upon only, as they are Hardſhips, or ſervile laborious Employments, and cauſe an Uneaſineſs in the Perſon who is forced to ſubmit to them; and therefore may be reduced to Sufferings. It is ſaid therefore, that *Puniſhment is inflicted upon View of antecedent Tranſgreſſion.* And hence it follows that none of thoſe Inconveniences a Man ſuffers by an infectious Diſtemper [3], by an infirm or maim'd Body [4], or by any Uncleanneſs [5], can properly be called Puniſhments. Many of this Nature are mentioned in the *Jewiſh* Law; as when the *Lepers* are commanded to be *ſeparated from the Reſt of the People*; and when ſuch as were maimed or blemiſhed in any Limb, were to be excluded the Prieſthood, and the like [a]; which are no more Puniſhments, than it is for a Stranger, or a Perſon of mean Quality to be made uncapable of certain Offices in the Commonwealth, or than it is for a Man to be in Pain at the Setting a broken Leg. Tho' ſometimes ſuch Misfortunes are improperly called Puniſhments, by the Reſemblance they bear to the real. As we ſay in common Diſcourſe of Perſons extremely infirm, or miſerably deformed, that *their Life is a Puniſhment to them.* And hence it, alſo, follows, that Impriſonment, the Deſign of which is only the ſafe Cuſtody of the Party accuſed, is not properly Puniſhment, becauſe no Man can be ſuppoſed to be juſtly puniſhed, before he be judicially heard. And therefore whatſoever Hurt a Man ſuffers by Bonds or Reſtraint, before his Cauſe be heard, and he be declared guilty, more than is a neceſſary to ſecure his Perſon, is againſt the Law of Nature, and ought to have Satisfaction, or at leaſt ſome Allowance [6] made for it in the ſubſequent Puniſhment. I add, inflicted by [7] Authority, to diſtinguiſh Puniſhment from thoſe Evils a Man ſuffers, either by War, particular Quarrels, and Self-Defence, or by private Malice. And therefore, there is no real Diſgrace in loſing an Ear, ſuffering the Blows of a Cudgel, or the like, but only in the Cauſe of it. It is *Selden*'s Opinion indeed [b], That

[a] *Solent præſides in carcere continendos damnare, aut ut in vinculis continentur. Sed id eos facere non oportet: Nam hujuſmodi pœnæ ſunt interdictæ: Carcer enim ad continendos homines, non ad puniendos haberi debet. D.* Lib. xlviii. Tit. 19. *De Pœnis*, Lib. viii. Sect. 9. It is certain that, by the ancient *Roman* Law, it was not cuſtomary, before the Proceſs, to put Perſons in Priſon who were accuſed of any Crime. To do this it was neceſſary either to have their own Confeſſion, or full Proofs. Otherwiſe if the Accuſed was a Freeman and well known, it was ſufficient that he gave good Securities; unleſs he was a Robber, an Aſſaſſin, or one of that Sort, who are often taken in the Fact. See DIDIER HERAULD, *De rerum judicatarum Auctoritate*, Lib. i. Chap. xii.

[b] *De J. N. & G. ſec. Heb.* Lib. iv. Chap. xi.

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[1] The Author here follows a falſe Idea of the Nature of the Obligation. See Note 1. Pag. 764.

[2] V. Grot. Lib. ii. Chap. xx. Sect. 1.

[3] See *Levit.* Chap. xiii.

[4] See *Deuter.* xxiii. 1.

[5] See *Levit.* Chap. xv.

[6] See *Levit.* xxi. 17, &c.

[7] By a Reſcript of the Emperors *Honorius* and *Theodoſius*, it is ordained, that thoſe who were condemned to Baniſhment, ſhould be releaſed and diſcharged from the Puniſhment, provided it was found, upon Examination, that during their Impriſonment the Term of their Baniſhment was expired. *Omnes, quos Damnationis Conditio diverſis Exſiliis deſtinatos, metas temporis præſtituti in carceris impleviſſe cuſtodia deprehenderit, ſolutos pœna vinculiſque laxatos, cuſtodiæ liberari præcipimus, nec formidare miſeriæ ullas exilii. Sit ſatis immenſorum cruciatuum ſemel huiſſe ſupplicia, ne hi qui diu privati ſint cœcæ communis hauſtu, & lucis aſpectu, intra breve ſpatium catenarum ponderibus prægraveti, etiam exilii pœnam ſuſtinere compellantur.* Cod. Lib. ix. Tit. xlvii. de pœnis. Leg. xxiii. See *Jaques Godefroi*, on this Law of the *Theodoſian* Code, Lib. x. Tit. xl. *De pœnis*, Tom. iii. Pag. 321.

[8] The Author here leaves *Grotius*, and, in my Opinion, without any Neceſſity; tho' he is very much followed in that Reſpect by thoſe Authors who have lately written Treatiſes of the *Law of Nature*, and even by Mr. *Titius*, who, alſo, extols abundance of Things in his Obſervations on his Abridgement *de Officio Hom. & Civ.* However I will contradict them both, with ſo much the more Confidence, ſince, beſides the Advantage of defending *Grotius*, I ſhall only follow the Opinion of Mr. *Locke*. The *Laws of Nature (ſays that great Philoſopher, in his ſecond Treatiſe of Civil Government*, Chap. ii. Sect. 7. *&c.)* as well as other Laws that are impoſed on Men here below, would be entirely uſeleſs, if, in the State of Nature, no Body had the Power to put them in Execution, and puniſh thoſe who break them, whether with Reſpect to private Perſons, or in Reference to Mankind in General, whoſe Preſervation is the End of thoſe Laws which are common to all Men. Perhaps they will ſay, that in the *State of Nature* there are ſome *Evils* annexed to ill Actions by a neceſſary Conſequence, and which our Author calls, upon that Account, *natural Puniſhments* (ſee above Book ii. Chap. iii. Sect. 21.) without ſpeaking of the Puniſhments which God exerciſes beſides at his own Pleaſure, by Virtue of his being our Sovereign Legiſlator, and Author of the *Law of Nature*. Mr. *Locke* has not thought it to obviate this Objection: But if it had been propoſed to him, he would have anſwered, in all Appearance, that neither of theſe two Sorts of Puniſhments are ſufficient to reſtrain human Malice, or procure the *Peace and Tranquillity of Mankind*; as it appears by the Complaints that have been made in all Ages, of the Proſperity of the Wicked, and the unfortunate Condition of the Good; neither thoſe who ſuffer the Puniſhments, (*Moreover (ſays Mr.* Bernard, *in his Nouvel. de la Rep. de Lettres Juin.* 1706. pag. 648.) neither thoſe who ſuffer the Puniſhments here in Diſpute, nor thoſe who are Eye-witneſſes of them, regard them as Puniſhments inflicted for ſuch or ſuch Crimes. How many Diſtempers are there occaſioned by Debauchery, which no Body imputes to the true Cauſe that produced them? L.

That the Slaughter and Spoils committed in War are a Sort of Puniſhments; which may be true enough in this Senſe, that a juſt War, begun upon juſt Provocations, and the Calamities the injurious Party ſuffers by it, may be looked upon as natural Puniſhments, and that a conſcientious Warrior ſhould endeavour to reduce the Outrages of War to the ſame Calmneſs and Proportion the civil Court obſerves in inflicting Puniſhments. But it is evident, there are other Diſtinctions between the Evils of War, and Puniſhments; ſince, as *Tacitus* obſerves, *In Time of Peace the Cauſe and Merits of the Perſon are always regarded, when in War the Sword makes no Difference between the criminal and the innocent.* Neither

' This is ſtill more true, with Regard to the Puniſhments that God inflicts, and of which Crimes are not the phyſical Cauſe. Thus he ' cauſes an Adulterer, an Uſurer, or a Murderer, to periſh by a Shipwreck, or break their Limbs by a Fall; but yet it is very ' ſeldom, that either the Perſon to whom theſe Accidents happen, or thoſe who ſee them happen, ever gueſs the true moral ' Cauſe of them. Now that the Puniſhment inflicted for a Crime may work ſome Effect, both upon him who ſuffers it, and upon ' them that are Witneſſes of it; both muſt thoroughly be perſuaded, that the Puniſhment was inflicted for ſuch and ſuch a Crime.' One cannot then forbear acknowledging, that, in the *State of Nature*, it is requiſite to have ſome Body here below, to puniſh Crimes; and if ſo *(continues Mr.* Locke*)* then every one is inveſted with that Power with reſpect to any other, ſince all Men are by Nature equal. However, this is not abſolute and arbitrary: We muſt never ſuffer ourſelves to be ſo tranſported with Paſſion, as to puniſh a Crime with too much Severity. All that is to be done on this Occaſion, ought only to tend towards the Reparation of the Injury, and preventing them for the future, from doing the like. When any one violates the *Laws of Nature*, he in ſo doing demonſtrates to the World, that he tramples under Foot the Maxims of Reaſon and Equity, which are the Rules GOD has preſcribed to human Actions, as a common Security to Men; and thus he becomes dangerous to Mankind. As then every one has a *Right* to take Care of what relates to the Preſervation of human Society, he may, by following the Light of Reaſon, inflict on ſuch a Perſon what Puniſhment he thinks moſt likely to produce Repentance, and hinder him from falling again into the ſame Crime, or to deter others by his Example. When a Man kills another on Purpoſe, he ought to be deſtroyed himſelf, like *Lions, Tygers*, and other wild Beaſts, with whom no Society or Security is to be had. *Whoever ſhall meet me, will kill me*, is the Voice of Nature, which the Remorſe of Conſcience forced from *Cain*, after he had ſlain his Brother *Abel*, *Gen.* Chap. iv. ver. 14. By the ſame Reaſon, we may puniſh, excluſive of all *civil* Community, the leaſt Infringement of the *Law of Nature*, as well as in a State, if it be neceſſary to the End for which Inflicting of Puniſhments ought to be deſigned. The very ſame Laws that forbid the Crime, preſcribe, alſo, the *Manner* and *Degree* of *Puniſhments*; and theſe Laws are as intelligible and plain to every one who conſults the Light of Reaſon, as the poſitive Laws which often have no other Foundation than the capricious or vicious Paſſions of the Legiſlators of the Earth. I therefore willingly abandon, as unneceſſary, another Argument uſed by Mr. *Locke*, drawn from this, " That, according to the common and approved Practice of the World, every Sovereign believes he has a Right to puniſh, even " in a capital Manner, ſuch Strangers as have committed any Crime in his Dominions." But it may be anſwered, that this is true; that theſe Strangers, during the Time they are in a Country, are not, in all Reſpects, exempt from the Juriſdiction of the State; and that they tacitly ſubmit to the Laws, as far as they are known to them, and as it ſuits their Advantage. (See Lib. iii. Chap. vi. Sect. 2. and Lib. vii. Chap. ii. Sect. 20.) All the Objections, which divers Authors propoſe, no Way affect the Reaſons alledged above. It is ſaid that every Crime does not diſturb the Peace of Mankind, and therefore does not concern them. (HERTIUS, Diſſertation *De Societate, primo juris Nat. princip.* Sect. 3. §. 25. TREVER. *in Offic. Hom. & Civ.* Lib. ii. Chap. xiii. Sect. 5.) But neither do we pretend, that in a State of Nature every Man may actually puniſh all Sorts of Crimes. If this takes Place, with Regard to Puniſhments, which the Sovereign decrees, or inflicts, in civil Society, as is agreed on both Sides, much more ought he, who, in the independent State of Nature, would puniſh his Equal, to take Care not to uſe his Right in ſuch a Manner as may do more Harm than Good. It is objected again, that we muſt leave to him, who is offended, the Care of revenging the Injury done him, or at leaſt wait till he deſire our Aſſiſtance. (HERTIUS *ubi ſupra*. BOHMER, *Juri. Publ. Prud.* Part. Spec. Lib. ii. Chap. viii. Sect. 1.) But the offended Perſon cannot always revenge the Injury himſelf, nor even ſometimes by the Aſſiſtance of another. Such, at leaſt, is the Caſe of a Man who is killed. Moreover, why have we a Right to aſſiſt others, even when we are not concerned in the Injury done? Is it not, becauſe the Intereſt of human Society demands it? Now the ſame Intereſt is found here, when the offended Perſon either cannot implore our Succour, or neglects thro' Ignorance, or ſome other Cauſe, the Means of doing himſelf Juſtice. Impunity always produces the ſame Effect. And M. *Bohmer*, who has attempted to confute Mr. *Locke*, afterwards admits the Thing itſelf, by another Name: It is not, ſays he, a *Puniſhment* but *Vengeance, (Vindicta) ubi ſupra* Sect. 2. Another Objection is the Equality of Men in a State of Nature, which, ſay they, does not allow one Man to ſet himſelf up as a Judge of another's Actions. And here they deſcribe the Troubles, Diſorders, and Wars, which would ariſe on one Man's having a Power to puniſh another. But this proves only that there is nothing which Men do not abuſe. Beſides, they do not conſider that the ſame Inconveniencies, and Difficulties, fall upon the inconteſtable Right which every one has of doing Juſtice to himſelf. The Uſe of this Right is ſtill the more dangerous, as it is more ſubject to deceive itſelf, and paſs its juſt Bounds, in a Caſe where we are particularly concerned, than in thoſe where we have no Intereſt, or, at leaſt, a very remote one. I omit other leſſer Objections which ſcarce deſerve Conſideration. However confidently moſt of the modern Writers reject the Opinions of thoſe two great Men whom I defend, I dare venture to maintain that it will prevail with all thoſe who are not blinded by Prejudice. It is not leſs neceſſary for the Good of human Society, in a State of Nature, than it is for the Intereſt of civil Government, that the Wicked ſhould be puniſhed; and that even tho' the offended Perſon either would not, or could not revenge himſelf. We may, nay we ought, certainly to intereſt ourſelves in the Welfare of Mankind, and prevent, as much as poſſible, the Evils to which they are expoſed. And if this be once granted, we may repreſs, or intimidate, by juſt Puniſhments, the Malice of thoſe, who, thro' their own bad Examples, or the Hopes of Impunity, are likely to be the Cauſe that others be inſulted, the Laws of Nature deſpiſed, and the Peace of Society violated. It is true that in the State of Nature theſe Sort of Puniſhments are not inflicted with Authority, and this is what deceives thoſe who would confine the Right of puniſhing to civil Society. But the Thing itſelf is neither leſs real nor leſs juſt. Even M. GUNDLING, who pretends it is a Quibble *(vocabulo ludere)* to ſay that an Equal ſhall puniſh his Equal, *(Jus Nat.* Chap. xxxvi. Sect. 21.*)* does no more himſelf than beg the Queſtion. As, by a neceſſary Conſequence of the Conſtitution of human Society, Puniſhments are inflicted only by a Superior, Men are accuſtomed to regard that Circumſtance as eſſential to Puniſhment, and to lay it down as a Fact, without Proof, as if it was a Thing ſelf-evident. But to return to Mr. *Locke*. He obſerves farther, that beſides the *Right* which is common to all Men in the State of Nature, to puniſh the Violation of the *Laws of Nature*, he that is directly injured, or that receives ſome immediate Damage by a Crime, has an entire and particular Right to demand Reparation for the Injury that has been done him. And if another Perſon find his Complaints and Pretenſions to be well grounded, he may join with him, and aſſiſt him to make the Offender give him Satisfaction. *(It is alſo much more honourable and generous* (as *Grotius* very well obſerves upon this Subject, Lib. ii. Chap. xx. Sect. 40. Num. 7.*) to purſue the Reparation of Injuries done to another, rather than demand Satisfaction for thoſe done to ourſelves, which is more to be feared on Account of the Laſt, that an Exceſs of Reſentment ſhould make us exceed the Bounds of a juſt Revenge, or at leaſt fret our Spirits too much.)* Of theſe two Sorts of *Rights*, the firſt, I mean that of puniſhing the Violation of the Laws, is intirely conferred upon the Magiſtrate, to whom, every one, upon his Entrance into any State, immediately ſubmits, ſo, that whenever the Good of the Commonwealth allows it, he may, barely upon his own Authority, ſhew Mercy to the Guilty: But he has not the ſame *Right* or *Power* to demand Satisfaction for an Injury, or Reparation of a Damage done. The Magiſtrate cannot excuſe the Offender; and the injured Perſon ſtill keeps his *Right*, ſo that they do him no wrong, if they hinder him from the Reparation that is due to him. Mr. *Locke* afterwards makes an Objection himſelf againſt the *Power* which he gives to every Particular Perſon, in the *State of Nature*, of putting the *Laws of Nature* in Execution, and puniſhing thoſe that infringe them; which is, that Men being by this Means become Judges in their own Cauſe, and being beſides full of Paſſions, eſpecially the Spirit of Revenge, they would generally exceed the Bounds of Equity; from whence a thouſand Evils and Diſorders follow. I own *(anſwers he)* that the Civil Government is a proper Remedy for theſe Inconveniencies, which, without Diſpute, are very grievous. But if the *State of Nature* is to be diſannulled upon that Account, we ought to think the ſame Thing of a Government, where one Perſon alone, having a ſupreme and abſolute Authority, is Judge in his own Cauſe, and executes what he pleaſes, without being liable to be called to an Account, or oppoſed by any one. If we muſt always ſubmit to whatever he commands, by what Principle ſoever he does it, whether he acts reaſonably or no; we ſhall find ourſelves, in that Reſpect, in a worſe State, than that of Nature, in which we are not bound to ſubmit to every one, after that Manner. I finiſh this Note by obſerving that Mr. *Carmichael*, Profeſſor at *Glaſcow*, has, in his Notes on *the Abridgement of the Duties of a Man and a Citizen*, followed the Opinion of *Grotius* and Mr. *Locke*, without ſuffering himſelf to be miſled by our Author's Authority. The deceaſed Mr. *Noodt*, in his Treatiſe on *the Power of Sovereigns*, has, alſo, declared himſelf on the ſame Side.

obliged [1] to ſtand to it. Becauſe it ſuppoſes and implies a Sort of Blemiſh and Stain upon the Mind, and a Sin againſt the Law of Nature, in the Perſon 'tis extorted from, *viz.* his refuſing to give a voluntary Satisfaction, and a violent Defence of his Fault. Nay, ſince the Evils that are the Effects and Incidents of War, cannot properly be call'd Puniſhments (as will ſufficiently appear from what follows) it is manifeſt that human Puniſhments in a ſtrict Senſe, or ſuch as are derived from human Authority, cannot affect them that live in a Liberty of Nature, though it cannot be denied, but that they too are ſubject to thoſe Evils which flow by a natural Connexion from Sin.

III. But in Commonwealths, if a Man ſuffer Harm or Damage, it is not only recovered with much greater Eaſe, than in a State of Nature, by a War that muſt be ſupported by his own ſingle Strength; but there is before-hand as much Care taken, as the Nature of human Affairs will permit, to prevent Injuries or Harm that he offer'd the Subject, by awarding Puniſhments to be inflicted by publick Juſtice on all Offenders againſt the Law. For ſince the Wills and Inclinations of Men are ſo eaſily byaſs'd, either to Good or Ill, it was certainly the moſt effectual Expedient that could have been pitch'd upon, to direct, or reſtrain them, to ſet in View the Dread of ſome preſent Evil.

IV. *Puniſhment* therefore, in general, may be thus defined; *It is an Evil of ſuffering, inflicted for an Evil of doing*; Or, *it is ſome uneaſy Evil inflicted by Authority, in a compulſive Way, upon View of antecedent Tranſgreſſion* [2]. For though 'tis common to enjoin ſeveral Sorts of Labour in Puniſhment; as, ſuppoſe a Man be condemn'd to the *Mines*, to the *Gallies*, to the *Work-houſe*, to raiſe a *Fortification*, to cleanſe the *Common-Sewers*, or the like; yet theſe are to be look'd upon only, as they are Hardſhips, or ſervile laborious Employments, and cauſe an Uneaſineſs in the Perſon who is forced to ſubmit to them; and therefore may be reduced to Sufferings. It is ſaid therefore, that *Puniſhment is inflicted upon View of antecedent Tranſgreſſion.* And hence it follows that none of thoſe Inconveniences a Man ſuffers by an infectious Diſtemper [3], by an infirm or maim'd Body [4], or by any Uncleanneſs [5], can properly be called Puniſhments. Many of this Nature are mentioned in the *Jewiſh* Law; as when the *Lepers* are commanded to be *ſeparated from the Reſt of the People*; and when ſuch as were maimed or blemiſhed in any Limb, were to be excluded the Prieſthood, and the like [a]; which are no more Puniſhments, than it is for a Stranger, or a Perſon of mean Quality to be made uncapable of certain Offices in the Commonwealth, or than it is for a Man to be in Pain at the Setting a broken Leg. Tho' ſometimes ſuch Misfortunes are improperly called Puniſhments, by the Reſemblance they bear to the real. As we ſay in common Diſcourſe of Perſons extremely infirm, or miſerably deformed, that *their Life is a Puniſhment to them.* And hence it, alſo, follows, that Impriſonment, the Deſign of which is only the ſafe Cuſtody of the Party accuſed, is not properly Puniſhment, becauſe no Man can be ſuppoſed to be juſtly puniſhed, before he be judicially heard. And therefore whatſoever Hurt a Man ſuffers by Bonds or Reſtraint, before his Cauſe be heard, and he be declared guilty, more than is a neceſſary to ſecure his Perſon, is againſt the Law of Nature, and ought to have Satisfaction, or at leaſt ſome Allowance [6] made for it in the ſubſequent Puniſhment. I add, inflicted by [7] Authority, to diſtinguiſh Puniſhment from thoſe Evils a Man ſuffers, either by War, particular Quarrels, and Self-Defence, or by private Malice. And therefore, there is no real Diſgrace in loſing an Ear, ſuffering the Blows of a Cudgel, or the like, but only in the Cauſe of it. It is *Selden*'s Opinion indeed [b], That

[a] *Solent præſides in carcere continendos damnare, aut ut in vinculis contineantur. Sed id eos facere non oportet: Nam hujuſmodi pœnæ ſunt interdictæ: Carcer enim ad continendos homines, non ad puniendos haberi debet.* D. Lib. xlviii. Tit. 19. *De Pœnis*, Lib. viii. Sect. 9. It is certain that, by the ancient *Roman* Law, it was not cuſtomary, before the Proceſs, to put Perſons in Priſon who were accuſed of any Crime. To do this it was neceſſary either to have their own Confeſſion, or full Proofs. Otherwiſe if the Accuſed was a Freeman and well known, it was ſufficient that he gave good Securities; unleſs he was a Robber, an Aſſaſſin, or one of that Sort, who are often taken in the Fact. See DIDIER HERAULD, *De rerum judicatarum Auctoritate*, Lib. i. Chap. xii.

[b] *De J. N. & G. ſec. Heb.* Lib. iv. Chap. xi.

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[1] The Author here follows a falſe Idea of the Nature of the Obligation. See Note 1. Pag. 764.

[2] V. Grot. Lib. ii. Chap. xx. Sect. 1.

[3] See *Levit.* Chap. xiii.

[4] See *Deuter.* xxiii. 1.

[5] See *Levit.* Chap. xv.

[6] See *Levit.* xxi. 17, &c.

[7] By a Reſcript of the Emperors *Honorius* and *Theodoſius*, it is ordained, that thoſe who were condemned to Baniſhment, ſhould be releaſed and diſcharged from the Puniſhment, provided it was found, upon Examination, that during their Impriſonment the Term of their Baniſhment was expired. *Omnes, quos Damnationis Conditio diverſis Exiliis deſtinatos, metas temporis præſtituti in carceris impleviſſe cuſtodia deprehenderit, ſolutos pœna vinculiſque laxatos, cuſtodia liberari præcipimus, nec formidare miſeriæ ullas exilii. Sit ſatis immenſorum cruciatuum ſemel duiſſe ſupplicia, ne hi qui diu privati ſint auræ communis hauſtu, & lucis aſpectu, intra breve ſpatium catenarum ponderibus prægravati, etiam exilii pœnam ſuſtinere compellantur.* Cod. Lib. ix. Tit. xlvii. de pœnis. Leg. xxiii. See *Jaques Godefroi*, on this Law of the *Theodoſian* Code, Lib. x. Tit. xl. *De pœnis*, Tom. iii. Pag. 521.

[8] The Author here leaves *Grotius*, and, in my Opinion, without any Neceſſity; tho' he is very much followed in that Reſpect by thoſe Authors who have lately written Treatiſes of the *Law of Nature*, and even by Mr. *Titius*, who, alſo, extols abundance of Things in his Obſervations on his Abridgement *de Officio Hom. & Civ.* However I will contradict them both, with ſo much the more Confidence, ſince, beſides the Advantage of defending *Grotius*, I ſhall only follow the Opinion of Mr. *Locke*. The *Laws of Nature (ſays that great Philoſopher, in his ſecond Treatiſe of Civil Government*, Chap. ii. Sect. 7. *&c.)* as well as other Laws that are impoſed on Men here below, would be entirely uſeleſs, if, in the State of Nature, no Body had the Power to put them in Execution, and puniſh thoſe who break them, whether with Reſpect to private Perſons, or in Reference to Mankind in General, whoſe Preſervation is the End of thoſe Laws which are common to all Men. Perhaps they will ſay, that in the *State of Nature* there are ſome *Evils* annexed to ill Actions by a neceſſary Conſequence, and which our Author calls, upon that Account, *natural Puniſhments* (ſee above Book ii. Chap. iii. Sect. 21.) without ſpeaking of the Puniſhments which God exerciſes beſides at his own Pleaſure, by Virtue of his being our Sovereign Legiſlator, and Author of the *Law of Nature*. Mr. *Locke* has not thought it to obviate this Objection: But if it had been propoſed to him, he would have anſwered, in all Appearance, that neither of theſe two Sorts of Puniſhments are ſufficient to reſtrain human Malice, or procure the *Peace and Tranquillity of Mankind*; as it appears by the Complaints that have been made in all Ages, of the Proſperity of the Wicked, and the unfortunate Condition of the Good. ' *Moreover (ſays Mr.* Bernard, *in his Nouvel. de la Rep. de Lettres Jain.* 1706. pag. 648.) neither thoſe who ſuffer the Puniſhments ' here in Diſpute, nor thoſe who are Eye-witneſſes of them, regard them as Puniſhments inflicted for ſuch or ſuch Crimes. ' How many Diſtempers are there occaſioned by Debauchery, which no Body imputes to the true Cauſe that produced them!

That the Slaughter and Spoils committed in War are a Sort of Puniſhments; which may be true enough in this Senſe, that a juſt War, begun upon juſt Provocations, and the Calamities the injurious Party ſuffers by it, may be looked upon as natural Puniſhments, and that a conſcientious Warrior ſhould endeavour to reduce the Outrages of War to the ſame Calmneſs and Proportion the civil Court obſerves in inflicting Puniſhments. But it is evident, there are other Diſtinctions between the Evils of War, and Puniſhments; ſince, as *Tacitus* obſerves, *In Time of Peace the Cauſe and Merits of the Perſon are always regarded, when in War the Sword makes no Difference between the criminal and the innocent.* Neither

' This is ſtill more true, with Regard to the Puniſhments that God inflicts, and of which Crimes are not the phyſical Cauſe. Thus he ' cauſes an Adulterer, an Uſurer, or a Murderer, to periſh by a Shipwreck, or break their Limbs by a Fall; but yet it is very ' ſeldom, that either the Perſon to whom theſe Accidents happen, or thoſe who ſee them happen, ever gueſs the true moral ' Cauſe of them. Now that the Puniſhment inflicted for a Crime may work ſome Effect, both upon him who ſuffers it, and upon ' them that are Witneſſes of it; both muſt thoroughly be perſuaded, that the Puniſhment was inflicted for ſuch and ſuch a Crime.' One cannot then forbear acknowledging, that, in the *State of Nature*, it is requiſite to have ſome Body here below, to puniſh Crimes; and if ſo *(continues Mr. Locke)* then every one is inveſted with that Power with reſpect to any other, ſince all Men are by Nature equal. However, this is not abſolute and arbitrary: We muſt never ſuffer ourſelves to be ſo tranſported with Paſſion, as to puniſh a Crime with too much Severity. All that is to be done on this Occaſion, ought only to tend towards the Reparation of the Injury, and preventing them for the future, from doing the like. When any one violates the *Laws of Nature*, he in ſo doing demonſtrates to the World, that he tramples under Foot the Maxims of Reaſon and Equity, which are the Rules GOD has preſcribed to human Actions, as a common Security to Men; and thus he becomes dangerous to Mankind. As then every one has a *Right* to take Care of what relates to the Preſervation of human Society, he may, by following the Light of Reaſon, inflict on ſuch a Perſon what Puniſhment he thinks moſt likely to produce Repentance, and hinder him from falling again into the ſame Crime, or to deter others by his Example. When a Man kills another on Purpoſe, he ought to be deſtroyed himſelf, like *Lions, Tygers*, and other wild Beaſts, with whom no Society or Security is to be had. *Whoever ſhall meet me, will kill me*, is the Voice of Nature, which the Remorſe of Conſcience forced from *Cain*, after he had ſlain his Brother *Abel*, *Gen.* Chap. iv. ver. 14. By the ſame Reaſon, we may puniſh, excluſive of all *civil* Community, the leaſt Infringement of the *Law of Nature*; as well as in a State, if it be neceſſary to the End for which Inflicting of Puniſhments ought to be deſigned. The very ſame Laws that forbid the Crime, preſcribe, alſo, the *Manner* and *Degree* of *Puniſhments*; and theſe Laws are as intelligible and plain to every one who conſults the Light of Reaſon, as the poſitive Laws which often have no other Foundation than the capricious or vicious Paſſions of the Legiſlators of the Earth. I therefore willingly abandon, as unneceſſary, another Argument uſed by Mr. *Locke*, drawn from this, " That, according to the common and approved Practice of the World, every Sovereign believes he has a Right to puniſh, even " in a capital Manner, ſuch Strangers as have committed any Crime in his Dominions." But it may be anſwered, that this is true; that theſe Strangers, during the Time they are in a Country, are not, in all Reſpects, exempt from the Juriſdiction of the State; and that they tacitly ſubmit to the Laws, as far as they are known to them, and as it ſuits their Advantage. (See Lib. iii. Chap. vi. Sect. 2. and Lib. vii. Chap. ii. Sect. 20.) All the Objections, which divers Authors propoſe, no Way affect the Reaſons alledged above. It is ſaid that every Crime does not diſturb the Peace of Mankind, and therefore does not concern them. (HERTIUS, Diſſertation *De Societate, primo juris Nat. princip.* Sect. 3. §. 25. TREVER. *in Offic. Hom. & Civ.* Lib. ii. Chap. xiii. Sect. 5.) But neither do we pretend, that in a State of Nature every Man may actually puniſh all Sorts of Crimes. If this takes Place, with Regard to Puniſhments, which the Sovereign decrees, or inflicts, in civil Society, as is agreed on both Sides, much more ought he, who, in the independent State of Nature, would puniſh his Equal, to take Care not to uſe his Right in ſuch a Manner as may do more Harm than Good. It is objected again, that we muſt leave to him, who is offended, the Care of revenging the Injury done him, or at leaſt wait till he deſire our Aſſiſtance. (HERTIUS *ubi ſupra*. BOHMER, *Juri. Publ. Prud.* Part. Spec. Lib. ii. Chap. viii. Sect. 1.) But the offended Perſon cannot always revenge the Injury himſelf, nor even ſometimes by the Aſſiſtance of another. Such, at leaſt, is the Caſe of a Man who is killed. Moreover, why have we a Right to aſſiſt others, even when we are not concerned in the Injury done? Is it not, becauſe the Intereſt of human Society demands it? Now the ſame Intereſt is found here, when the offended Perſon either cannot implore our Succour, or neglects thro' Ignorance, or ſome other Cauſe, the Means of doing himſelf Juſtice. Impunity always produces the ſame Effect. And M. *Bohmer*, who has attempted to confute Mr. *Locke*, afterwards admits the Thing itſelf, by another Name: It is not, ſays he, a *Puniſhment* but *Vengeance, (Vindicta) ubi ſupra* Sect. 2. Another Objection is the Equality of Men in a State of Nature, which, ſay they, does not allow one Man to ſet himſelf up as a Judge of another's Actions. And here they deſcribe the Troubles, Diſorders, and Wars, which would ariſe on one Man's having a Power to puniſh another. But this proves only that there is nothing which Men do not abuſe. Beſides, they do not conſider that the ſame Inconveniencies, and Difficulties, fall upon the inconteſtable Right which every one has of doing Juſtice to himſelf. The Uſe of this Right is ſtill the more dangerous, as it is more ſubject to deceive itſelf, and paſs its juſt Bounds, in a Caſe where we are particularly concerned, than in thoſe where we have no Intereſt, or, at leaſt, a very remote one. I omit other leſſer Objections which ſcarce deſerve Conſideration. However confidently moſt of the modern Writers reject the Opinions of thoſe two great Men whom I defend, I dare venture to maintain that it will prevail with all thoſe who are not blinded by Prejudice. It is not leſs neceſſary for the Good of human Society, in a State of Nature, than it is for the Intereſt of civil Government, that the Wicked ſhould be puniſhed; and that even tho' the offended Perſon either would not, or could not revenge himſelf. We may, nay we ought, certainly to intereſt ourſelves in the Welfare of Mankind, and prevent, as much as poſſible, the Evils to which they are expoſed. And if this be once granted, we may repreſs, or intimidate, by juſt Puniſhments, the Malice of thoſe, who, thro' their own bad Examples, or the Hopes of Impunity, are likely to be the Cauſe that others be inſulted, the Laws of Nature deſpiſed, and the Peace of Society violated. It is true that in the State of Nature theſe Sort of Puniſhments are not inflicted with Authority, and this is what deceives thoſe who would confine the Right of puniſhing to civil Society. But the Thing itſelf is neither leſs real nor leſs juſt. Even M. GUNDLING, who pretends it is a Quibble *(vocabulo ludere)* to ſay that an Equal ſhall puniſh his Equal, *(Jus Nat.* Chap. xxxvi. Sect. 21.) does no more himſelf than beg the Queſtion. As, by a neceſſary Conſequence of the Conſtitution of human Society, Puniſhments are inflicted only by a Superior, Men are accuſtomed to regard that Circumſtance as eſſential to Puniſhment, and to lay it down as a Fact, without Proof, as if it was a Thing ſelf-evident. But to return to Mr. *Locke*. He obſerves farther, that beſides the *Right* which is common to all Men in the State of Nature, to puniſh the Violation of the *Laws of Nature*, he that is directly injured, or that receives ſome immediate Damage by a Crime, has an entire and particular Right to demand Reparation for the Injury that has been done him. And if another Perſon find his Complaints and Pretenſions to be well grounded, he may join with him, and aſſiſt him to make the Offender give him Satisfaction. *(It is alſo much more honourable and generous (*as *Grotius* very well obſerves upon this Subject, Lib. ii. Chap. xx. Sect. 40. Num. 7.*) to purſue the Reparation of Injuries done to another, rather than demand Satisfaction for thoſe done to ourſelves, which is more to be feared on Account of the Laſt, that an Exceſs of Reſentment ſhould make us exceed the Bounds of a juſt Revenge, or at leaſt fret our Spirits too much.)* Of theſe two Sorts of *Rights*, the firſt, I mean that of puniſhing the Violation of the Laws, is intirely conferred upon the Magiſtrate, to whom, every one, upon his Entrance into any State, immediately ſubmits, ſo, that whenever the Good of the Commonwealth allows it, he may, barely upon his own Authority, ſhew Mercy to the Guilty: But he has not the ſame *Right* or *Power* to demand Satisfaction for an Injury, or Reparation of a Damage done. The Magiſtrate cannot excuſe the Offender; and the injured Perſon ſtill keeps his *Right*, ſo that they do him no wrong, if they hinder him from the Reparation that is due to him. Mr. *Locke* afterwards makes an Objection himſelf againſt the *Power* which he gives to every Particular Perſon, in the *State of Nature*, of putting the *Laws of Nature* in Execution, and puniſhing thoſe that infringe them; which is, that Men being by this Means become Judges in their own Cauſe, and being beſides full of Paſſions, eſpecially the Spirit of Revenge, they would generally exceed the Bounds of Equity; from whence a thouſand Evils and Diſorders follow. I own *(anſwers he)* that the Civil Government is a proper Remedy for theſe Inconveniences, which, without Diſpute, are very grievous. But if the *State of Nature* is to be diſannulled upon that Account, we ought to think the ſame Thing of a Government, where one Perſon alone, having a ſupreme and abſolute Authority, is Judge in his own Cauſe, and executes what he pleaſes, without being liable to be called to an Account, or oppoſed by any one. If we muſt always ſubmit to whatever he commands, by what Principle ſoever he does it, whether he acts reaſonably or no; we ſhall find ourſelves, in that Reſpect, in a worſe State, than that of Nature, in which we are not bound to ſubmit to every one, after that Manner. I finiſh this Note by obſerving that Mr. *Carmichael*, Profeſſor at *Glaſcow*, has, in his Notes on *the Abridgement of the Duties of a Man and a Citizen*, followed the Opinion of *Grotius* and Mr. *Locke*, without ſuffering himſelf to be miſled by our Author's Authority. The deceaſed Mr. *Noodt*, in his Treatiſe on *the Power of Sovereigns*, has, alſo, declared himſelf on the ſame Side.

does the civil Court look upon those Evils to be Punishments, that are only the natural Consequents of Sin; as when a Man loses his Health by committing any unlawful Act, or by assaulting another, is beat himself; for these are Evils not inflicted by the Authority of the civil Sovereign. And therefore if a Man by ill Courses happens to weaken his Constitution, impair his Estate, or lose the good Opinion of his Friends, from whom otherwise he might possibly have expected Favours; this does not make him the less liable to Punishment. And lastly, it was necessary to subjoin, that the *Penalty was to be inflicted in a Way of Compulsion*, or *by Force*: Because otherwise it would be impossible to attain the End designed by punishing; which is to deter Men from offending by the Severity of the Punishment. And therefore some have not thought it proper to allow the Criminals the Choice of their own Punishment; because, as the *Declaimer* says [a], 'It might seem to give Countenance to Vice; and because it would take off 'those Fears that are generally the strongest 'Guard upon Mens Innocence, to allow *Delinquents* to suffer what Way they pleased. For, 'as he reasons, a Man allowed the Liberty before-hand to compose himself to an obstinate 'resolute Temper of Mind, may defy all our 'Racks and Tortures. It is a Mistake to measure 'the Security of the Punishment by the Terror 'only of the Name of it, for there can be no Punishment but that which a Man suffers unwillingly and with Regret. And there can be no 'Pain but that which our own Impatience gives 'us. It is our Fears only that make Cruelty itself look terrible. How can we call that a Punishment, which Men will meet half Way, and 'which they are ready to demand? Condemned 'Criminals should be dragged to Execution, and 'not left to go as they please.' But after all, such a Choice does not always make the Punishment involuntary, but only perhaps mitigates the Degree, or alters the Manner of it; still the Punishment, whatever it be, that at last determines the Choice, is certainly involuntary and the Effect of Force [b]. And therefore it may be further inferred, that it is an improper Expression to say, a Man is obliged to be punished, or that such a one owes a Punishment; because Punishment signifies Harm inflicted against a Man's Consent, and implies an Aversion of the Will to it. But now it is always supposed, that what we are properly obliged to, we ought to be ready and willing to perform. And, therefore, the Reason is plain, why, for Instance, in working upon a Fortification, a Servant at the Command of his Master, without any particular Wages, and a Malefactor condemn'd to that Labour, may be employed in the same Service, and the Work be a Punishment to one, and not to the other; because the Servant undertakes it upon the Obligations he is under to his Master, and is therefore supposed to do it voluntarily; but it is imposed upon the other as a Task, which he cannot submit to, but with Unwillingness and Reluctance [c]. And when we are told, that in some Countries (as particularly in *Japan*) the condemn'd Criminals are their own Executioners, we are not to look upon that as a voluntary Action, any more than that with us they usually go to the Place of Execution; or than that, in *Spain*, the Executioner suffers his Prisoner to be unbound, and only commands him to follow him; or, when (as it was the old Custom in *Lithuania*) the Malefactors are forced to erect their own Gibbets, and hang themselves. For these can never be suppos'd to be properly the Acts of the Criminals themselves, but to be only Compliances they submit to, in Hopes of avoiding greater Evils that might be the Effects of the Refusal. Thus it was very particular when *Gracchus*, in *Livy* [d], is said to have made some of his Soldiers, who had not behaved themselves with the same Bravery as the rest of his Army, take an Oath, *That they would not eat or drink in any Posture but standing, as long as they should be in the Service.* For as they could not refuse the Oath, so they thought they ought rather to bear the Disgrace than be perjured. But further, neither can a Man properly be said to be punished, who is bound for another, and is afterwards forced to pay the Bond. For the other Man's Misdemeanour is only the bare Occasion of his sustaining that Damage, but the Obligation which he voluntarily took upon himself, is the proper and immediate Cause of it. Moreover, from what has been said it follows, that, as a Man is not oblig'd to inform against himself [1], that

[a] *Quint.* Decl. xi. Pag. 156, 157. Edit. *Lugd. Bat.* [b] *Senec.* Lib. iv. Controv. xxiv. Pag. 234. Ed. *Gronov.* Imprisonment was no Punishment to me, I came thither of my own Accord. *Arrian. Epict.* Lib i. Chap. xii. Where-ever a Man is detain'd against his Will, that Place is his Prison. *Add. Charron de la Sagesse*, Lib. i. Chap. vi § 8, & Chap. xxxix. § 9 [c] *Ictus fustium infamiam non importat, sed causa propter quam id pati meruit, si ea fuit, quæ infamiam damnato irrogat. In cæteris quoque generibus pœnarum eadem forma statuta est.* Lib. iii. Tit. ii. L. xxii. D. *de his qui infam. not.* [d] Lib. xxiv. Chap. vi.

[1] All that our Author says here and a little farther, upon the Subject of Obligation, cannot be admitted but in this Sense, that Men are not oblig'd to go before a Magistrate and inform against themselves: For that is not necessary to the End for which the Establishment of Punishments was design'd. But he is in the wrong to deny, that there is absolutely an Obligation, in Reference to the Punishment in the Person committing a Crime punishable by the Law. It is certain, that the *Sovereign* has a *Power* to punish Criminals. Now one cannot conceive a *Right* annexed to a Person, without supposing, at the same Time, an Obligation in him, towards whom he may lawfully exercise that *Right*. Our Author distinguishes in another Place, Book iii. Chap. v. Sect 1, *between what one has a Right to demand of another, and what one has a Right to do, with Respect to him*; the First, according to his Opinion, always imposes a true Obligation on him, from whom we may demand to have something given us, or something done in our Favour, but the other does not always suppose an Obligation answerable to it. For my Part, I do not see, why the first *Right* does not take away the Obligation, as well as the last; if I can lawfully do a Thing, in Reference to a Person, methinks he is bound to suffer it, or not to resist me, when I make use of my Power; otherwise it would be useless and of no Effect. Mr. *Titius* (Observ. DCXLI.) seems to make the Obligation of a Criminal, with Respect to Punishment, consist only in our not doing him any wrong in punishing him, and in his not complaining of our Usage. But we must go farther, in my Opinion. 'Tis already granted, that when the Question is concerning a bare *pecuniary Punishment*, to which we have lawfully been condemn'd, we ought to pay it, without expecting to be compell'd by the Magistrate to do it: We are oblig'd to it, not only by the Maxims of Prudence, because it would be to no Purpose to refuse doing what we may be forced to, but still more by the Rules of Justice, which require us to make Satisfaction for the Damage, and to obey a lawful Magistrate. The greatest Difficulty in this Point then regards *Corporal Punishments*, and especially those that are capital. Now I must here own, that the *publick Good*, and the Power of him who holds the mighty Sword of Justice in his Hand, do not require, that a Criminal should go chearfully to suffer the Punishment that is inflicted on him; or that he should not endeavour to make his Escape, provided he can do it, without doing Mischief to any Body. But, at the same Time, it is just, without Dispute, that when the Criminal has

that the Penalty the Law appoints may be put in Execution upon him, after he has made Satisfaction for the Damage or Harm he has done; ſo, for the ſame Reaſon, he may lawfully endeavour to eſcape from it, either by denying the Matter, concealing himſelf, or flying, without the Violation of any Obligation whatever [1].

Bœcler indeed, in his Preface to *Grotius*, writes very obſcurely upon this Subject, *Pag.* 9. "The Merits of human Puniſhments, ſays he, "belong to the Law of Nature, both as it is a "Law, and as it is natural. If it be a Law, it "produces an Obligation; but there can be no "Obligation, neither can it be conceiv'd how "there ſhould be, without ſome Penalty at- "tending the Violation of the Law". 'Tis beyond Diſpute, that ſuch as tranſgreſs the Law of Nature muſt expect to be puniſhed, becauſe Puniſhments are unavoidably annex'd to every Law; and it is not, in the leaſt, repugnant to Nature [a], that a Man who does Evil, ſhould ſuffer Evil. But it would be falſe Reaſoning to infer, that, becauſe the Law produces an Obligation, therefore every Man that breaks it, is obliged voluntarily to deliver himſelf up to be puniſhed by the civil Sword. *Hobbes* in his Book *de Cive*, Chap. xiv. Sect. 7, ſays very well, That the ſecond Part of the Law, which is call'd the *Penal*, is mandatory, and ſpeaks only to the publick Miniſters. There is no particular Clauſe in the Law, which commands the Criminal to go voluntarily to the Place of Execution; but there is a particular Injunction to the Magiſtrate, to take care that Malefactors be executed. And therefore the Delinquent is not in Fault, if he be not put to Death, but the Blame lies wholly upon the Magiſtrate, who neglects a Matter of ſuch Concern and Importance to the Commonwealth. *Socrates*, when *Crito* perſuaded him to make his Eſcape out of Priſon, told him [b], that *that would be to break the Laws of his Country, which every good Subject was bound to obey; that every Man ought to yield to the Sentence the Government paſſes upon him; and not return the Injury upon the State, or pretend to ſhew it has been unjuſt.* But theſe are only noble Sayings, which perhaps, in ſome particular Circumſtances, a Perſon truly brave and innocent might reſolve to practiſe, but which can be of no Force (as I can ſee) againſt any thing here aſſerted. And therefore we may further conclude, That as no Man is bound to accuſe himſelf in the civil Court, or to make any voluntary Confeſſion of his Crime, ſo it is unjuſt, in Criminal Caſes, to put the Priſoner to declare his Innocence upon Oath: Tho' this Cuſtom was uſual at *Athens* [c], and the thing might look very dreadful, when the Party was obliged, at the ſolemn Sacrifice of a Boar, a Bull, and a Ram, to imprecate, as as the Form ran, *Deſtruction to himſelf, his Race, and Family.* And hence *Hobbes* infers, *de Cive*, Chap. ii. Sect. 19. "That the Anſwers which "are forced from a Man in Torture, are no "Evidence to the Fact; but only help to "find out the Truth. So that a Man has a "Right to give a true or falſe Anſwer, or, "if he pleaſe, not to anſwer at all [2]." 'Tis an odd Story to this Purpoſe, we have in *Cteſias*'s

[a] Vid. *Grot.* Lib. ii. Chap. xx. § 1. [b] *Plato* in *Criton.* Pag 37, *&c. Ed.* Wech. [c] Demoſthen. *contra* Ariſtocrat. But it was the *Accuſer*, and not the *Accuſed*, who, laying his Hand upon the conſecrated Fleſh of the Victim, utter'd horrible Imprecations againſt himſelf, his Family, and all his Race.

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has been taken, and condemn'd upon a thorough Hearing of the Cauſe, in Form of Law, if he finds no Way to eſcape, either by breaking open the Priſon, or ſome other Stratagem, he ſhould ſuffer the Puniſhment without murmuring, and having Recourſe to any violent Means, to get away, or oppoſing the Magiſtrate in the lawful Exerciſe of his *Power*. Neither ought he to reſiſt or defend himſelf, againſt thoſe who endeavour to hinder him from making his Eſcape, as he would have a Right to do againſt an unjuſt Aggreſſor, or Magiſtrates of Juſtice, whom, ſuppoſing their being convinced of his Innocence, he finds manifeſtly endeavouring to deſtroy him, and cannot avoid being unjuſtly condemn'd, if once he falls into the Hands of Judges that are exaſperated and prejudiced againſt him. The Reaſon our Author alledges for acquitting Criminals of all Obligations in Relation to Puniſhment, has nothing in it that is ſolid; and if it were allow'd of, it would as well prove, that a Criminal is no more oblig'd to pay a Fine, or make Satisfaction for Damage done, becauſe the generality of Mankind have much ado to perſuade themſelves to it, and violent Means muſt be uſed to force 'em to it; we ſhould conclude from thence, againſt what our Author himſelf maintains, that a Soldier is not oblig'd to go, or defend a Poſt, where, according to all Appearance, there is but little Hopes of eſcaping with Life. See the former Chap. iv. & B. iii. Chap. vii. § 5. Mr. *Gundling* (in his *Jur. Nat.* Chap. xxxvi. § 44.) anſwers me here, That the Soldier may have Hopes of ſaving his Life by making a brave Defence; whereas the Criminal, who is led to Execution, is undone without Remedy. But, I. What I have ſaid ſhews plainly, That we muſt ſuppoſe the Caſe here to be ſuch, where the Criminal is in a Condition to reſiſt with ſome Hopes of Succeſs. A Man led to the Gallows has no Arms to make uſe of againſt the Hangman or Guards who attend him. The Queſtion here relates to a Man arm'd, who is about to be ſtopp'd, or whom the Gaoler and other Officers of Juſtice try to apprehend, after he has eſcap'd. And then I would aſk, whether ſuch a Criminal has not as much Hopes of Safety in defending himſelf to the laſt Extremity, againſt thoſe who do their Duty; as the Soldier has in fighting againſt his Enemy? II. They ſuppoſe here the falſe Principles of *Hobbes*, which our Author has refuted, Lib. iii. Chap. vii. § 5. I mean, That, by a phyſical and unſurmountable Neceſſity, Men cannot ſubmit to ſuffer Death, or any other great Evil without Reſiſtance, and therefore there is no Means of obliging them to it. See what I have ſaid upon the Place laſt cited, and Lib. i. Chap. v. § 9. Not. 5. But, to cut the Matter ſhort, III. Let us ſuppoſe a Man guilty of wilful Murther, Perſons come to apprehend him, and he cannot avoid being taken, unleſs he exerts himſelf to the utmoſt. He kills one, or more, of the Perſons. Is this ſecond Murther innocent, or is it not? No one will venture to affirm it is, for he, againſt whom the Murtherer defended himſelf, was not an unjuſt Aggreſſor. He only did his Duty, and the Magiſtrate, by whoſe Orders he acted, had a Right both with Regard to him and the Criminal, to ordain his Seizure. But if the killing the Officer of Juſtice is a real Murther, why ſhould it not proceed from hence, That the Murtherer, as a Subject of the State, is bound not to reſiſt Perſons inveſted with public Authority, when they uſe the Right of puniſhing the firſt Murther according to the Laws? I might add many other Reflections, but what I have ſaid is more than ſufficient. As to what M. *Gundling* ſays, That there may be a *Right* without any *Obligation* anſwering to it; and the Example which he brings, from M. *Thomaſius*, who had formerly himſelf been of a contrary Opinion; I have formerly taken Notice of them, Lib. iii. Chap. v. § 1. Not. 1. I may, alſo, oppoſe to them Mr. *Hertius*, who has here declar'd againſt our Author, and *Titius, Obſerv. in Puffend.* DCXL. and Mr. *Carmichael* in his Notes on the ſame Place, in his Abridgment of the Duties of a Man and a Citizen.

[1] *Quintil. Declam.* cccxiv. All Confeſſion is of ſuch a Nature, that a Man would be thought mad who was guilty of it. *Id. Declam.* cccxxviii. Neither is there any Man ſo deſperate, or that hath ſo little Love for himſelf, who doth not commit his Crimes with a Deſign to deny them.

[2] *Vide* Lib. xlviii. Tit. i. L. 1. § 23. D. *de Quæſtionib. Charron de la Sageſſe*, Lib. i. Chap. iv. § 6. "This Invention of the "Rack is a dangerous Invention; and ſeems rather a Trial of Patience than of Truth. And he that can bear, and he that cannot "bear it, equally conceals the Truth. For why ſhall Pain make me rather confeſs what is, than force me to ſay what is not? And, "on the contrary, if he, that has not committed the Fact of which he is accus'd, is patient enough to ſuffer theſe Torments, why "will he not be ſo that has, when ſo great a Reward as Life is propoſed to him? I believe that the Foundation of this Invention was "owing

ſias's Account of the *Indies*; he ſays, "That "there is a Spring in *India*, the Water of which, "as ſoon as drawn, turns into a Curd like that "of Cheeſe, and that, if a very little Quantity "of this be infuſed into Water, and ſo drank, "there will follow a Diſtraction upon it, which, "the ſame Day, will certainly make a Man diſ-"cover every thing he hath been concern'd in. "He adds, the King takes the Advantage of "this Water, when he would make a full Diſ-"covery, whether the Party accus'd is really "guilty of the Crimes he is charg'd with, or "no; and, if a Man diſcovers himſelf to be "guilty of what he is indicted, he is forced "to be his own Executioner; but, if his own "Confeſſion proves nothing againſt him, he is "immediately acquitted." But it ſhould be carefully obſerv'd, that generally, in all Laws, the diſpoſitive Part, or that which contains the Matter of the Law, and the comminatory, or that which comprehends the penal Sanction, are expreſs'd by two diſtinct Forms of Words; as thus, *You ſhall not do this*; and, *He that does ſo, ſhall ſuffer the Penalty*. In ſome Laws, the latter Part ſeems to be no more than the Condition of the foregoing Prohibition, thus, *You ſhall not do ſo and ſo, except you pay ſo much by Way of Mulct*. And, in Laws of this Nature, that which looks like a penal Sanction, is, in reality, no more than a Tax; ſince it is left to the Diſcretion of Subjects, whether they will pay the Money the Law demands, or forbear ſuch a particular Act. And this is generally the Method obſerv'd in ſumptuary Laws; the Deſign of which is commonly alternative, either to induce the Subject to a frugal Way of Life, or to enrich the publick Treaſury; for to allow of any Price for Privilege, or Exemption from the Law of Nature, is abſolutely unlawful. But the common Deſign of other Laws is only to diſpoſe Men to Obedience, by the Fear of Puniſhment. And, therefore, that Perſon knew nothing of the true Nature of Puniſhment, who, when he had ask'd the Magiſtrate, what was the Fine for ſtriking a Blow on the Face, threw down the Money, and ſtruck the Magiſtrate himſelf. For the Laws were made to redreſs Injuries, not to allow of Diſpenſations to commit them upon the Payment of a Sum of Money. And, therefore, it is evident, that thoſe Laws only, where the Prohibition is alternative or conditional, excuſe a Man from the Offence, who has paid his Mulct, or is in a Readineſs to pay it; which he is, likewiſe, obliged to do upon Demand; but not in other Laws, where the Interdict laid is abſolute. But it muſt be confeſſed, that there ought to be no ſuch Laws as the purely penal, or ſuch as propoſe no other End, but to make Advantage by the Fine. Some indeed call ſuch a Law purely penal, which barely annexes a Penalty to a plain Command, and neither expreſsly commands nor forbids any thing; and this is given for an Inſtance, A Perſon *elected Mayor of a Town, refuſing the Office, ſhall be fined an Hundred Pounds to the Publick.* But in my Opinion, this, and all other Statutes of the like Nature, imply ſome ſuch Precept as this: *No Man, when he is lawfully elected, ſhall refuſe to aſſiſt the Commonwealth*; ſo that, that before ſeems to be a penal Clauſe annex'd to this[a].

[a] *Vide* Sanderſon *de Obligat. Conſcient.* Prælect. vii. Sect. 13. *ſeqq.*

"owing to the Conſideration of the Effort of Conſcience. For to the Guilty it ſeems to aid the Torture, to make him confeſs "his Crimes, and to enfeeble him; and, on the other Hand, to fortify the Innocent againſt it. To ſpeak the Truth, 'tis a Me-"thod full of Uncertainty and Danger: For what would not a Man do, or ſay, to avoid ſuch intolerable Pains? *Etiam innocentes* "*cogit mentiri dolor.* Publ. Syr. ver. 191. Whence it happens, that he, whom the Judge has put to the Torture, to prevent his "Death innocently, dies both innocent and rack'd. Thouſands and Thouſands have loaded themſelves with falſe Confeſſions; "among whom I place *Philotas*, conſidering the Circumſtances of *Alexander*'s Perſecution againſt him, and the Manner of his Tor-"ture. But however, ſay they, 'tis the leaſt Evil that human Weakneſs could invent; very inhuman however, and, in my Opinion, "very uſeleſs. Several Nations, leſs barbarous in that Reſpect, than the *Greeks* or *Romans*, who call'd 'em ſo, held it horrible and "cruel to torment and tear a Man in Pieces, for a Crime of which you are ſtill in doubt; what can it be but the Effect of your Ig-"norance? Are you not unjuſt, who, rather than put him to Death unjuſtly, torture him worſe? Let it be ſo, ſee how often he had "rather die without a Cauſe, than to undergo this Scrutiny, which is more painful than the Puniſhment; and often, by its Severity, "antedates both the Puniſhment and Execution." MONTAIGNE's Eſſays, Book ii. Chap. v. GROTIUS in one of his Letters (Let. DCXLIII. Printed at *Amſterdam* in 1686.) ſays, That there are numberleſs Examples of People who have been put to Death unjuſtly, upon a Confeſſion extorted from 'em by the Rack; and therefore he does not at all wonder that there have been ſeveral grave and pious Perſons of Opinion, that *Chriſtians* ought not to make uſe of Torments, to force Men to Confeſſion of Crimes, ſince it is certain, that there is no ſuch Thing in the Law of *Moſes*; that in *England* People live in as great Security as in any other Nation, tho' the Rack is not uſed there; and that, during the Time which *Rome* preſerv'd her Liberties, no Citizens could be put to the Torture. However this be, it is, at leaſt certain, That we ought to uſe this violent Remedy but ſeldom, and with great Caution; neither are we always to believe what the ſuffering Perſon ſays. The *Roman* Lawyers acknowledg'd this, as is evident from the following Law. *Quæſtioni fidem non ſemper, nec tamen nunquam habendam Conſtitutionibus declaratur: Etenim res eſt fragilis & periculoſa, & quæ ſæpe veritatem fallat. Nam plerique patientiâ ſive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo poſſit: alii tantâ ſunt impatientiâ, ut in quovis mentiri, quàm pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantum ſe, ſed etiam alios comminentur.* DIGEST. Lib. xlviii. Tit. xviii. *De quæſtionibus*, Leg. i. § 23, where, to obſerve by the bye, the laſt Words are very corrupt. We may ſee divers Methods of correcting them, in the *Obſervationes* of *Nic. Catharini*, Tome i. *Theſaur. Jur.* Pag. 401. It may not be improper to add here the Reflection of Mr. LE CLERC, on this Subject; in his Abridgment of a Book, where this maintain'd, that the inevitable Neceſſity of uſing the Rack, for the Preſervation of the State, has made it as lawful, as War, and other violent Remedies, which are imploy'd againſt the Enemies of the publick Tranquillity. "This Reaſon, ſays he, may prevail "when they are perſuaded that there are ſeveral Perſons, who are Accomplices in a Crime, and when it is neceſſary to diſcover 'em, "in Order to defend ourſelves; but certainly, where they uſe the Rack, only becauſe the Formality of the Law requires a Confeſ-"ſion from a Criminal before he is puniſh'd, there it is an uſeleſs Cruelty: Since if there are ſufficient Proofs, they need ſearch for no "more, and ſince a Criminal, who knows that he is in no leſs Danger of being put to Death, tho' he does not confeſs, than if he "does, ſuffers not himſelf to be put to the Torture to confeſs the Truth, when he finds that the Judges are convinced of his Crime. "On the contrary, when the Fact is doubtful, and he knows, that, by reſolutely ſuffering the Torture without confeſſing, they will do "nothing to him, how great ſoever their Preſumptions againſt him may be; the Deſire of avoiding the Puniſhment he deſerves, makes "him often reſolve to ſuffer that ſevere Trial, to ſee if he can bear it, and thus it renders him more obſtinate and harden'd." There are ſeveral Inſtances of *Jews*, that have eluded the *Spaniſh* Inquiſition, by affirming in the midſt of their Torments, that they were *Chriſtians* in Reality. *Biblioth. Univerſ.* Tom. xvii. Pag. 484. See the Example of *Iſaac Orobio*, mention'd in the viith. Tom. of the ſame Journal, Pag. 289, &c. and the *Dict. Hiſtor. & Critique* of Mr. BAYLE, Tom. ii. Pag. 1399. 2 Edit. as, alſo, a curious Diſſertation written by Mr. THOMASIUS, *de Tortura ex foris Chriſtianorum proſcribenda.* Printed at *Hall* in 1705.

[1] *Aullus Gellius* tells us ſomething like this, *Noct. Attic.* Lib. xx. Chap. i. But this is not altogether the ſame Story as Mr. *Hertius* pretends. This malicious Fool diverted himſelf with giving Boxes to Perſons of a free Condition, he met with in the Streets. As the Laws of the Twelve Tables laid a Fine of twenty five Pence for this Injury, he was always attended by a Slave, who carried a Bag of Money, in Order to pay the People whom he thus affronted.

V. But

V. But further, since we look upon a Judge to be just, when he inflicts Punishments agreeably to the Demerit of the Offender; and since Justice is said to be administred, whenever the Penalties are duly allotted; it has, from hence, been disputed among Philosophers, what Branch of Justice the Imposition of Punishments belongs to; whether to the commutative or distributive; or, as *Grotius* [a] changes the Terms, to the expletive or attributive. They that refer the Infliction of Punishments to distributive Justice, give us these Reasons for it, that in the Distribution of Punishments, as well as Goods, there is a proportionable Regard had to the greater or less Desert of the Persons. And since, according to their Opinion, distributive Justice is concern'd in all those Things, which the Whole applies to the Parts, or the Commonwealth to particular Subjects; it is evident, that the Commonwealth inflicts the Punishments on particular Subjects. But it may be replied, That it is a Mistake, to suppose that distributive Justice takes place, as often as there is an Equality to be made between more than two Terms [b], or, whenever any thing is to be divided proportionably between more than one. For, in Partnership, the Dividends of the Profit are shared among every one of the Members, according to their different Proportions; and yet, in this Contract, the Dividend of the Profit becomes due a quite different Way from that of Rewards and Punishments. For I think it is manifest, that Punishments are not consequent upon Force of Compact, and that no Man, when he submits himself to Government, makes any particular Agreement to be punished for the Crimes he may commit [1]. And, therefore, the Imposition of Punishments does not any way agree with the Description of distributive Justice, which I gave before. But farther; it is only by Consequence, and purely accidental, that greater Criminals are punished with greater Rigour, and less, with proportionable Severity, not that it was primarily and in itself intended. For there is no Necessity, that, in awarding Punishment to any particular Crime, the Magistrate should make a Comparison between that Offence and some other, and so proportion the Measure of the Punishment for both, according to their different Degrees of Malignity: But every Crime has, as it were, a separate Punishment allotted to it, with more or less Severity, as the publick Benefit requires it; tho' it usually happens, that the Punishment is either increas'd or alleviated, according to the different Degrees of the Transgression.

Some Persons that reduce Punishment under commutative Justice, consider it, as if Punishment were something assign'd to the Delinquent, in the same Manner, as is usual in Contracts. A Mistake they were led into upon a common Expression, *that Punishment is the Due of every Offender*; which is manifestly an improper Way of speaking. For a Man that has any thing due to him, has a Right over the Debtor to oblige him to the Payment of it. But I think there will be no body so absurd as to say, that the Delinquent has a Right to challenge his Punishment of the Magistrate. And, therefore, the Meaning of that Saying is only this, That the Magistrate may justly punish a Criminal as the Law directs. *Grotius*, Lib. ii. Chap. xx. Sect. 2, says, "That the Distribution of Punishments does originally and principally belong to expletive Justice; for this Reason; "because nobody can punish another lawfully, "unless he has a Right to do it; which Right "ariseth from the other's Crime." But he was impos'd upon by the doubtful Meaning of the Word *Right*. For there is a very great Difference between a Right to do a Thing, and a Right to receive something from another. The Meaning of the former Right is this, I have a Power to exercise this particular Act, and nobody ought to hinder me in it; the Sense of the latter is this, I have a Right to receive something from another, and he, at the same Time, is under an Obligation to let me have it. Now, when the Discourse relates to expletive Justice, the Word *Right* is not to be taken in the former Signification, but in the latter. And this Right is fix'd in him that receives the Thing, and not in him that bestows it; as for Instance, when I pay my Servant his Wages, I am engaged in an Act of expletive Justice; not because I have a Right to pay him his Wages, but because he has a Right to demand it of me. Thus, I may safely say, I have a Right to command my Servant to take off my Shoes; but certainly 'twould be strangely impertinent to infer from thence, that, therefore, to command him that Service was an Act of Justice. And it is an Argument much of the same Nature, to say, that because Punishment cannot lawfully be inflicted but by a Person who has Authority to do it, therefore Punishing is a Branch of expletive Justice. Another Argument produced by *Grotius*, is this, "That in Crimes and Penalties there is some-"thing that much resembles the Nature of Con-"tracts; for, as the Seller of any Commodity "is supposed to have obliged himself to every "thing natural to the Sale, tho' he mention "nothing particularly; so every Delinquent "seems voluntarily to oblige himself to be pu-"nished; for every Man's Reason tells him, that "it is absolutely necessary, that every great "Crime should be punishable; and therefore, a "Man who chooses to transgress, directly and "deliberately, may, by Consequence, be said to "consent to be punished: And, therefore, in "Scripture we find, that Sin is frequently call'd "by the Name of a Debt, which we are as "much obliged to discharge, as they that are "under Bond to their Creditors [c]." To which I answer, That thus much is certain, that if a Man knows the Penalty the Law appoints for

[a] See above in Book i. Chap. vii. Sect 11. [b] See *Grot.* Book ii. Chap. xv. Sect. 2.

[1] This is true: But, since upon a Sovereign the Right of Life and Death, or the Right of the Sword is conferr'd: His Subjects are obliged not to resist him, tho' he makes Use of it upon their own Persons.

[c] V. L. xlix Tit. xiv. L. 34 D. *de Jure Fisci.* Lib. ix. Tit. viii. L. ult. C. ad L. *Juliam Majestatis.* In *Tacitus*, Ann. xii. Chap. iii. The Woman that married another Man's Slave without the Knowledge of his Master, is said to have confeated to her own Slavery.

such

ſias's Account of the *Indies*; he ſays, "That "there is a Spring in *India*, the Water of which, "as ſoon as drawn, turns into a Curd like that "of Cheeſe, and that, if a very little Quantity "of this be infuſed into Water, and ſo drank, "there will follow a Diſtraction upon it, which, "the ſame Day, will certainly make a Man diſ-"cover every thing he hath been concern'd in. "He adds, the King takes the Advantage of "this Water, when he would make a full Diſ-"covery, whether the Party accus'd is really "guilty of the Crimes he is charg'd with, or "no; and, if a Man diſcovers himſelf to be "guilty of what he is indicted, he is forced "to be his own Executioner; but, if his own "Confeſſion proves nothing againſt him, he is "immediately acquitted." But it ſhould be carefully obſerv'd, that generally, in all Laws, the diſpoſitive Part, or that which contains the Matter of the Law, and the comminatory, or that which comprehends the penal Sanction, are expreſs'd by two diſtinct Forms of Words; as thus, *You ſhall not do this*; and, *He that does ſo, ſhall ſuffer the Penalty*. In ſome Laws, the latter Part ſeems to be no more than the Condition of the foregoing Prohibition, thus, *You ſhall not do ſo and ſo, except you pay ſo much by Way of Mulct*. And, in Laws of this Nature, that which looks like a penal Sanction, is, in reality, no more than a Tax; ſince it is left to the Diſcretion of Subjects, whether they will pay the Money the Law demands, or forbear ſuch a particular Act. And this is generally the Method obſerv'd in ſumptuary Laws; the Deſign of which is commonly alternative, either to induce the Subject to a frugal Way of Life, or to enrich the publick Treaſury; for to allow of any Price for Privilege, or Exemption from the Law of Nature, is abſolutely unlawful. But the common Deſign of other Laws is only to diſpoſe Men to Obedience, by the Fear of Puniſhment. And, therefore, that Perſon knew nothing of the true Nature of Puniſhment, who, when he had ask'd the Magiſtrate, what was the Fine for ſtriking a Blow on the Face, threw down the Money, and ſtruck the Magiſtrate himſelf. For the Laws were made to redreſs Injuries, not to allow of Diſpenſations to commit them upon the Payment of a Sum of Money. And, therefore, it is evident, that thoſe Laws only, where the Prohibition is alternative or conditional, excuſe a Man from the Offence, who has paid his Mulct, or is in a Readineſs to pay it; which he is, likewiſe, obliged to do upon Demand; but not in other Laws, where the Interdict laid is abſolute. But it muſt be confeſſed, that there ought to be no ſuch Laws as the purely penal, or ſuch as propoſe no other End, but to make Advantage by the Fine. Some indeed call ſuch a Law purely penal, which barely annexes a Penalty to a plain Command, and neither expreſsly commands nor forbids any thing; and this is given for an Inſtance, A Perſon *elected Mayor of a Town, refuſing the Office, ſhall be fined an Hundred Pounds to the Publick*. But in my Opinion, this, and all other Statutes of the like Nature, imply ſome ſuch Precept as this: *No Man, when he is lawfully elected, ſhall refuſe to aſſiſt the Commonwealth*; ſo that, that before ſeems to be a penal Clauſe annex'd to this[a].

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" owing to the Conſideration of the Effort of Conſcience. For to the Guilty it ſeems to aid the Torture, to make him confeſs " his Crimes, and to enfeeble him; and, on the other Hand, to fortify the Innocent againſt it. To ſpeak the Truth, 'tis a Me-" thod full of Uncertainty and Danger: For what would not a Man do, or ſay, to avoid ſuch intolerable Pains? *Etiam innocentes* " *cogit mentiri dolor.* Publ. Syr. ver. 191. Whence it happens, that he, whom the Judge has put to the Torture, to prevent his " Death innocently, dies both innocent and rack'd. Thouſands and Thouſands have loaded themſelves with falſe Confeſſions; " among whom I place *Philotas*, conſidering the Circumſtances of *Alexander*'s Perſecution againſt him, and the Manner of his Tor-" ture. But however, ſay they, 'tis the leaſt Evil that human Weakneſs could invent; very inhuman however, and, in my Opinion, " very uſeleſs. Several Nations, leſs barbarous in that Reſpect, than the *Greeks* or *Romans*, who call'd 'em ſo, held it horrible and " cruel to torment and tear a Man in Pieces, for a Crime of which you are ſtill in doubt; what can it be but the Effect of your Ig-" norance? Are you not unjuſt, who, rather than put him to Death unjuſtly, torture him worſe? Let it be ſo, ſee how often he had " rather die without a Cauſe, than to undergo this Scrutiny, which is more painful than the Puniſhment; and often, by its Severity, " antedates both the Puniſhment and Execution." MONTAIGNE's Eſſays, Book ii. Chap. v. GROTIUS in one of his Letters (Let. DCXLIII. Printed at *Amſterdam* in 1686.) ſays, That there are numberleſs Examples of People who have been put to Death unjuſtly, upon a Confeſſion extorted from 'em by the Rack; and therefore he does not at all wonder that there have been ſeveral grave and pious Perſons of Opinion, that *Chriſtians* ought not to make uſe of Torments, to force Men to Confeſſion of Crimes, ſince it is certain, that there is no ſuch Thing in the Law of *Moſes*; that in *England* People live in as great Security as in any other Nation, tho' the Rack is not uſed there; and that, during the Time which *Rome* preſerv'd her Liberties, no Citizens could be put to the Torture. However this be, it is, at leaſt certain, That we ought to uſe this violent Remedy but ſeldom, and with great Caution; neither are we always to believe what the ſuffering Perſon ſays. The *Roman* Lawyers acknowledg'd this, as is evident from the following Law. *Quæſtioni fidem non ſemper, nec tamen nunquam habendam Conſtitutionibus declaratur: Etenim res eſt fragilis & periculoſa, & quæ veri-tatem fallat. Nam plerique patientiâ ſive duritiâ tormentorum ita tormenta contemnunt, ut exprimi eis veritas nullo modo poſſit: alii tantâ ſunt impatientiâ, ut in quovis mentiri, quàm pati tormenta velint: ita fit, ut etiam vario modo fateantur, ut non tantum ſe, verùm etiam alios comminentur.* DIGEST. Lib. xlviii. Tit. xviii. *De quæſtionibus*, Leg. i. § 23, where, to obſerve by the bye, the laſt Words are very corrupt. We may ſee divers Methods of correcting them, in the *Obſervationes* of *Nic. Catharini*, Tome i. *Theſaur. Jur.* Pag. 497. It may not be improper to add here the Reflection of Mr. LE CLERC, on this Subject; in his Abridgment of a Book, where 'tis maintain'd, that the inevitable Neceſſity of uſing the Rack, for the Preſervation of the State, has made it as lawful, as War, and other violent Remedies, which are imploy'd againſt the Enemies of the publick Tranquillity. " This Reaſon, ſays he, may prevail " when they are perſuaded that there are ſeveral Perſons, who are Accomplices in a Crime, and when it is neceſſary to diſcover 'em, " in Order to defend ourſelves; but certainly, where they uſe the Rack, only becauſe the Formality of the Law requires a Confeſ-" ſion from a Criminal before he is puniſh'd, there it is an uſeleſs Cruelty: Since if there are ſufficient Proofs, they need ſearch for no " more, and ſince a Criminal, who knows that he is in no leſs Danger of being put to Death, tho' he does not confeſs, than if he " does, ſuffers not himſelf to be put to the Torture to confeſs the Truth, when he finds that the Judges are convinced of his Crime. " On the contrary, when the Fact is doubtful, and he knows, that, by reſolutely ſuffering the Torture without confeſſing, they will do " nothing to him, how great ſoever their Preſumptions againſt him may be; the Deſire of avoiding the Puniſhment he deſerves, makes " him often reſolve to ſuffer that ſevere Trial, to ſee if he can bear it, and thus it renders him more obſtinate and harden'd." There are ſeveral Inſtances of *Jews*, that have eluded the *Spaniſh* Inquiſition, by affirming in the midſt of their Torments, that they were *Chriſtians* in Reality. *Biblioth. Univerſ.* Tom. xvii. Pag. 484. See the Example of *Iſaac Orobio*, mention'd in the viith. Tom. of the ſame Journal, Pag. 289, &c. and the *Dict. Hiſtor. & Critique* of Mr. BAYLE, Tom. ii. Pag. 1399. 2 Edit. as, alſo, a curious Diſſertation written by Mr. THOMASIUS, *de Tortura ex foris Chriſtianorum proſcribenda*. Printed at *Hall* in 1705.

[1] *Aullus Gellius* tells us ſomething like this, *Noct. Attic.* Lib. xx. Chap. i. But this is not altogether the ſame Story as Mr. *Herlin* pretends. This malicious Fool diverted himſelf with giving Boxes to Perſons of a free Condition, he met with in the Streets. As the Laws of the Twelve Tables laid a Fine of twenty five Pence for this Injury, he was always attended by a Slave, who carried a Bag of Money, in Order to pay the People whom he thus affronted.

V. But

V. But further, since we look upon a Judge to be just, when he inflicts Punishments agreeably to the Demerit of the Offender; and since Justice is said to be administred, whenever the Penalties are duly allotted; it has, from hence, been disputed among Philosophers, what Branch of Justice the Imposition of Punishments belongs to; whether to the commutative or distributive; or, as *Grotius* [a] changes the Terms, to the expletive or attributive. They that refer the Infliction of Punishments to distributive Justice, give us these Reasons for it, that in the Distribution of Punishments, as well as Goods, there is a proportionable Regard had to the greater or less Desert of the Persons. And since, according to their Opinion, distributive Justice is concern'd in all those Things, which the Whole applies to the Parts, or the Commonwealth to particular Subjects; it is evident, that the Commonwealth inflicts the Punishments on particular Subjects. But it may be replied, That it is a Mistake, to suppose that distributive Justice takes place, as often as there is an Equality to be made between more than two Terms [b], or, whenever any thing is to be divided proportionably between more than one. For, in Partnership, the Dividends of the Profit are shared among every one of the Members, according to their different Proportions; and yet, in this Contract, the Dividend of the Profit becomes due a quite different Way from that of Rewards and Punishments. For I think it is manifest, that Punishments are not consequent upon Force of Compact, and that no Man, when he submits himself to Government, makes any particular Agreement to be punished for the Crimes he may commit [1]. And, therefore, the Imposition of Punishments does not any way agree with the Description of distributive Justice, which I gave before. But farther; it is only by Consequence, and purely accidental, that greater Criminals are punished with greater Rigour, and less, with proportionable Severity, not that it was primarily and in itself intended. For there is no Necessity, that, in awarding Punishment to any particular Crime, the Magistrate should make a Comparison between that Offence and some other, and so proportion the Measure of the Punishment for both, according to their different Degrees of Malignity: But every Crime has, as it were, a separate Punishment allotted to it, with more or less Severity, as the publick Benefit requires it; tho' it usually happens, that the Punishment is either increas'd or alleviated, according to the different Degrees of the Transgression.

Some Persons that reduce Punishment under commutative Justice, consider it, as if Punishment were something assign'd to the Delinquent, in the same Manner, as is usual in Contracts. A Mistake they were led into upon a common Expression, *that Punishment is the Due of every Offender*; which is manifestly an improper Way of speaking. For a Man that has any thing due to him, has a Right over the Debtor to oblige him to the Payment of it. But I think there will be no body so absurd as to say, that the Delinquent has a Right to challenge his Punishment of the Magistrate. And, therefore, the Meaning of that Saying is only this, That the Magistrate may justly punish a Criminal as the Law directs. *Grotius*, Lib. ii. Chap. xx. Sect. 2, says, "That the Distribution of Punishments does originally and principally belong to expletive Justice, for this Reason; "because nobody can punish another lawfully, "unless he has a Right to do it; which Right "ariseth from the other's Crime." But he was impos'd upon by the doubtful Meaning of the Word *Right*. For there is a very great Difference between a Right to do a Thing, and a Right to receive something from another. The Meaning of the former Right is this, I have a Power to exercise this particular Act, and nobody ought to hinder me in it; the Sense of the latter is this, I have a Right to receive something from another, and he, at the same Time, is under an Obligation to let me have it. Now, when the Discourse relates to expletive Justice, the Word *Right* is not to be taken in the former Signification, but in the latter. And this Right is fix'd in him that receives the Thing, and not in him that bestows it; as for Instance, when I pay my Servant his Wages, I am engaged in an Act of expletive Justice; not because I have a Right to pay him his Wages, but because he has a Right to demand it of me. Thus, I may safely say, I have a Right to command my Servant to take off my Shoes; but certainly 'twould be strangely impertinent to infer from thence, that, therefore, to command him that Service was an Act of Justice. And it is an Argument much of the same Nature, to say, that because Punishment cannot lawfully be inflicted but by a Person who has Authority to do it, therefore Punishing is a Branch of expletive Justice. Another Argument produced by *Grotius*, is this, "That in Crimes and Penalties there is some-"thing that much resembles the Nature of Con-"tracts; for, as the Seller of any Commodity "is supposed to have obliged himself to every "thing natural to the Sale, tho' he mention "nothing particularly; so every Delinquent "seems voluntarily to oblige himself to be pu-"nished; for every Man's Reason tells him, that "it is absolutely necessary, that every great "Crime should be punishable; and therefore, a "Man who chooses to transgress, directly and "deliberately, may, by Consequence, be said to "consent to be punished: And, therefore, in "Scripture we find, that Sin is frequently call'd "by the Name of a Debt, which we are as "much obliged to discharge, as they that are "under Bond to their Creditors [2]." To which I answer, That thus much is certain, that if a Man knows the Penalty the Law appoints for

[a] See above in Book i. Chap. vii. Sect. 11. [b] See *Grot.* Book ii. Chap. xx. Sect. 2.

[1] This is true: But, since upon a Sovereign the Right of Life and Death, or the Right of the Sword is conferr'd: His Subjects are obliged not to resist him, tho' he makes Use of it upon their own Persons.

[2] V. L. xlix Tit. xiv. L. 34 D. *de Jure Fisci*. Lib. ix. Tit. viii. L. ult. C. ad L. *Juliam Majestatis*. In *Tacitus*, Ann. xii. Chap. iii. The Woman that married another Man's Slave without the Knowledge of his Master, is said to have consented to her own Slavery.

such

ſuch a particular Crime, and yet is wilfully guilty of it, he can have no Reaſon to complain of unjuſt Uſage, or to think himſelf hardly dealt with, when he is brought to Puniſhment. But it cannot from hence be inferr'd, that a Man gives a direct and immediate Conſent to his own Puniſhment; or rather, that he has obliged himſelf, by his own Conſent, to ſuffer it; ſince no Man is ever guilty of a Crime, but he has ſome Hopes, either by concealing himſelf, or ſome Way or other to ſecure himſelf from Juſtice [1]. *Vaſquius* indeed [a] attempts to prove, that Criminals are obliged by their own Conſent to ſuffer Puniſhment, becauſe the penal Laws, as well as others, are made by the Conſent of the Subject; or at fartheſt, becauſe the legiſlative Power is derived originally from the Conſent and Agreement of the People. But I think there is little or no Force in the Argument: For, as I have proved elſewhere, Laws are not Compacts or Agreements. And I think there is no Abſurdity in the Thing, that I ſhould give my Conſent to the Eſtabliſhment of a Power, which may perhaps afterwards exerciſe certain Acts upon me, whether I will myſelf, or no. Only, I can pretend no Reaſon of Complaint, if I do afterwards feel its Severity, becauſe I conſented to ſuch a Power. But Sin is compared to a Debt, not becauſe a Man is oblig'd to conſent to his own Puniſhment, but becauſe the Legiſlator has the ſame Right to challenge the Penalty of the Delinquent, as a Creditor has to demand the Money lent to the Debtor; and becauſe the Body and Goods of the Offender are no leſs liable to the Magiſtrate on a Criminal Account, than the Goods of the Debtor are to the Creditor in Caſes of Debt. In the Elements of the *Roman* Law [b], Obligations are divided into ſuch as ariſe from Conſent, and ſuch as are the Reſult of Tranſgreſſion; but it ſhould be obſerv'd, that from Tranſgreſſion there ariſes an Obligation, only to make Satisfaction for the Harm that is done, but not to ſuffer the Puniſhment: And that Obligation itſelf is not properly founded upon a Man's Conſent to the Penalty; but upon that Neceſſity of Reſtitution, which, upon a Settlement of Property, evidently flows from the Law of Nature. Thus *Ariſtotle* diſtinguiſhes Contracts into the voluntary, and the involuntary [c]. But his Meaning may be thus explain'd; that as in Contracts of Duty there is a Return made of equal for equal, ſo in criminal Caſes the Satisfaction ought to be an Equivalent to the Damage. But the Reaſon why he calls the Obligation to make Satisfaction, an involuntary Contract, is becauſe, for Example, in Caſes of Debt, it depends upon the Creditor's Pleaſure whether the Debtor ſhall pay the Money, or no: But, for Example, the Obligation a Thief is under, to reſtore me what he has robb'd me of, or the Value of it, bears no Manner of Relation to any Conſent of mine, but he brings it upon himſelf much againſt my Will. For 'tis certain, I had rather he ſhould have left me in quiet Poſſeſſion of what was my own, than have given me the Trouble of bringing an Action of Theft againſt him, eſpecially where there is no Hope of recovering more than barely the Principal by it [3]. But it may be further conſidered, that generally every Right has an Obligation that anſwers it in another Perſon. And, therefore upon Commiſſion of the criminal Action, the Party that is injured has a Right to demand Reparation for his Loſs, or the Harm he has ſuffered; and the Injurious is under an Obligation to make him Satisfaction; and this is the Matter which expletive Juſtice relates to. But as the criminal Action is a Deviation from the Law; the Governors of the Commonwealth have Power to puniſh as they think neceſſary; but the Delinquent is under no Obligation to offer himſelf voluntarily to be puniſh'd. For which Reaſon the Inſtitution of Puniſhments cannot fall under expletive Juſtice. So that it may be ſaid [4], upon the whole, that Puniſhment does not belong to either Species of Juſtice, but makes a particular Branch itſelf. Unleſs it may be thought more proper to ſay, that both the Impoſition of Puniſhments, and the Diſtribution of Rewards, which have not been determined beforehand by particular Compact, are Parts of Prudence neceſſarily belonging to the Government of others, and therefore ſhould be rank'd under Juſtice in general.

VI. It will therefore, I think, be allow'd by every Man that pretends to Reaſon, that tho' by Nature all Men are upon the Level, and Puniſhment itſelf ſeems a ſevere and rigid Sort of Diſcipline, while Men endeavour only to afflict and ruin one another; and tho' the wiſe Creator of the World hath ſo diſpoſed the Nature of Man, and the Events of Things, that ill Actions are generally purſued by ill Conſequences, which, in a Manner, revenge themſelves upon the Cauſes of them: Yet that poſitive human Puniſhment, after all, hath nothing in it repugnant to natural Equity; but that, on the contrary, it is abſolutely neceſſary to the common Quiet and Security of Mankind. For as it was requiſite to the publick Peace of the World, to

[a] *Vaſq.* Controv. Illuſtr. *Lib.* i. *Chap.* xxviii. *N.* 12, 13. [b] *Inſtitut.* Lib. iii. Tit. iv. *De Obligat.* Sect. 2. [c] See above, Book i. Chap. vii. Sect. 12.

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[1] THUCYDIDES, Lib. iii. Chap. xlv. Edit. *Oxon.* init. There are ſeveral Crimes which the Commonwealth hath forbid under Pain of capital Puniſhment; and yet Men have Hopes ſtrong enough to perſuade them to venture and run that Riſque; and there is no Man who will undertake an hazardous Enterprize, when he deſpairs of the Succeſs of his Plot, and we never heard that one State refrain'd from another, which did not imagine itſelf ſtronger and better prepar'd for War.

[2] Altho' a Law, as ſuch, is not an Agreement; it does not follow from thence, That the Obligation of obeying it is not founded upon the general Convention, by which Subjects ſubmit themſelves to the Legiſlative Power of the State. Now this is certainly the Point we muſt come to. Therefore we may ſafely affirm, That whatever Reluctance Men have to ſuffer Puniſhment, or however they may flatter themſelves with the Hopes of avoiding it; yet, as they wilfully offend every Day, and know there are Laws by which they may be puniſh'd, thro' the Effect of their own proper Conſent; they are ſuppos'd, with Reaſon, whenever they commit a Crime to render themſelves obnoxious to the Pgniſhment. So that, not only, we do them no Injury by inflicting it, but their Conſent is the immediate Foundation of their Obligation to undergo it, eſpecially when they cannot eſcape without infringing the Rights of the Magiſtrate, in the Manner mention'd above, N. 1. Pag. 764.

[3] According to the *Roman* Law, there lay an Action for Reſtitution four-fold: See above, Lib. iii. Chap. i. § 5. Not. 2.

[4] All this Diſpute is very unneceſſary, as well as the Diviſion of Juſtice, upon which it is founded. See my Notes upon Lib. i. Chap. i. § 8. and Lib. ii. Chap. xx. § ii. Note 5.

put an End to the Equality of Nature, by erecting civil Governments; ſo in the general Looſeneſs and Corruption of Manners, and natural Averſion to Virtue, the Force of Government would ſoon be diſſolv'd, if bad Men were not confin'd, and frighten'd into Obedience, by the Dread of ſome preſent Evil. And ſince every Man is beforehand told publickly what he ought to do, and what forbear doing, and what Puniſhments will be inflicted on ſuch as act otherwiſe, no Man can blame any Body but himſelf, if, by a wilful Tranſgreſſion of the Laws, he falls under the Severity of the Puniſhment.

VII. As to the Perſons the Right of puniſhing is to be lodg'd in, and exerciſed upon, 'tis *Grotius*'s Opinion, *Lib.* ii. *Chap.* xx. § 3. "That "Nature has not given any Determination upon "it. So far indeed, ſays he, we may diſcover "from Nature, that 'tis moſt convenient, ſome "Superior ſhould be impower'd with it; tho' "that is not abſolutely neceſſary neither; un-"leſs we take the Word *Superior* in ſuch a Senſe "as will imply, that a Man who is guilty of a "criminal Action, ſhall be thought to have "made himſelf inferior to all the reſt of Man-"kind by that very Act. The Conſequence of "which is, that no Man ought to be puniſh'd "by one equally guilty with himſelf[a]." But I confeſs I cannot be perſuaded, but that the Power of puniſhing is a Part of Sovereignty, and, conſequently, that no body can properly be ſaid to inflict Puniſhment upon a Man, unleſs he has [b] Authority over him. For tho' upon a View of the ill Diſpoſitions of Men, and how eaſily they are inclined to injure and moleſt one another, we find it abſolutely neceſſary to the Preſervation of Society in the World, that Puniſhments ſhould be inflicted; and tho' every Man ought to direct his Actions to the Support of Society, as the general Good of all Mankind; yet it does not follow, that every Man is obliged to undertake every Action that tends to advance that End; ſince that would be to no Purpoſe, without a Concurrence of certain other particular [1] Requiſites. Thus, it is neceſſary Men ſhould be under ſome Sort of Government or other; tho' nobody imagines, that it is left at random, for any Man to aſſume a Right or Power over others as he [2] pleaſes. Now then, every Evil which is inflicted upon antecedent Tranſgreſſion, cannot properly be call'd Puniſhment, but that which was threatened before, and is inflicted after the Crime is known. And, therefore, the Evils of War, and all Acts of Hoſtility, muſt not be call'd Puniſhments, tho' 'tis true, that we procure Caution againſt future Injuries by them; for, in a State of War, every Man provides Caution for himſelf, by his own Force, and in what Manner he pleaſes; but the Caution an injured Perſon receives from Puniſhments muſt be procured by the Power, and according to the Determination of the Superior; in War, the injured Party only is directly concern'd to puniſh and ſuppreſs his Enemy; but in civil [3] Government the whole Commonwealth is as much concern'd, as the Party that is injured, to puniſh a Criminal. Again, 'tis left to the Diſcretion of the injured only, whether he will revenge himſelf upon his Enemy, with a War or not; but 'tis left entirely to the Superior, whether Puniſhment ſhall be put in Execution, or not; nay, he has Power to inflict it, tho' [4] the injured Party deſire the contrary. And laſtly, the Quantity of the Puniſhment is generally determined, before the Fact is committed; but, in War, the Caution muſt be ſettled according to the Circumſtances of my own, or my Enemy's Condition. But, beſides, tho' Nature has not determined, whether I, or any other particular private Man, ought to have the Right of inflicting Puniſhments, any more than it has deſigned us to be Princes; yet, I think it is ſufficiently clear from Reaſon, that Puniſhment, as it is the Execution of a judiciary Sentence, ought to be derived from ſome Superior, or from a Perſon who has Authority over the Criminal. Neither is there any Reaſon why we ſhould be ſo nice in the Explication of the Word *Superior*; for 'tis abſolutely falſe, that every Sin leaves ſuch a Blot upon a Man's Honour and Character, that he muſt preſently be thought no better than a Beaſt. Neither is it good Reaſoning to infer, that, becauſe ſuch a Man is guilty of ſuch a Crime, therefore I have Power to puniſh him. For, if I ſuffer by the Criminal Action, in a Liberty of Nature, I may demand Satisfaction of him for the Injury, and Caution for the future, in a Way of War: If the Action does not affect me, but ſome other Perſon, whom I am not particularly obliged to defend, I can have no more Pretence to engage myſelf in his Cauſe, than I have to preſcribe Laws to thoſe that owe me no Subjection. *Ex.* ii. 14. It was a Saying of *Democritus*, That *it was moſt agreeable to Nature, that the moſt deſerving Perſon ſhould govern*; which is, perhaps, true enough in this Senſe, That where the Go-

[a] See *John*, Chap. viii. ver. 7. *Rom.* ii. 22. [b] See what has been ſaid on Sect. 4. All the Reaſons our Author alledges, prove nothing, unleſs we allow of his Definition of the Word *Puniſhment*.

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[1] The Queſtion here is, whether any other than a Superior can uſefully exert the Right of Puniſhment, or whether it belongs to him one? The Compariſon drawn from this, That every Man cannot pretend to the Sovereign Power, is quite out of the Queſtion. The Sovereignty is ſo far from being neceſſary to thoſe who live in an independent State of Nature, That it is directly contrary to the eſſential Character of that State. Whereas, by our Author's Confeſſion, the Uſe of Puniſhment is neceſſary for the Preſervation of civil Society, and, conſequently, between thoſe who live out of ſuch a State. Therefore every Man ought to have a Right of puniſhing; where all are equal. Hence it follows, That it is no ways eſſential to the Nature of Puniſhment, that it ſhould be inflicted by a Superior. So that thoſe who affirm this do nothing but beg the Queſtion.

[2] If every Man, in the State of Nature, has a Right of puniſhing, whoever wilfully violates the Rules of the natural Law, ought to expect that ſome body will exert that Right againſt him. As to what regards the Sentence, there muſt be one here, for one ſhould never puniſh without due Deliberation, and a thorough Knowledge of the Crime. But if this Sentence is not given, nor executed, by the Authority of a Superior, it is only inſufficient by ſuppoſing the Point in Queſtion.

[3] It is falſe that, among thoſe who live in an independent State of Nature, it only concerns the injured Perſon to repreſs the Offender. Others, in this Caſe, have as much to apprehend from the Effect of Impunity, and this the rather, becauſe there is wanting that quick and efficacious Method which is found in civil Society, for the Prevention of this Evil. In the State of Nature, if the Perſon aggrieved is incapable of procuring himſelf Satisfaction, which may often happen, it is the Intereſt of all others, who are ſubject to the like Invaſion, to take the Alarm.

[4] This may, alſo, take Place between thoſe who live in a State of Nature, ſuppoſing that others believe it their Intereſt not to leave the Crime unpuniſh'd. For every Man may renounce his own Right, tho' he has no Authority to take away that of others.

vernment is to be conferr'd upon a ſingle Perſon elected by a Plurality of Voices, and no one Man has any particular Claim of Right to it more than another, it would be the moſt rational Way of Proceeding, to make Choice of a Perſon of the greateſt Merits, and that ſeemed to be beſt acquainted with the Arts of Government. But ſuch a Perſon can pretend to no Authority over others, except they voluntarily ſubmit to him. As for what *Grotius* ſays, That *a Criminal ought not to be puniſhed by a Perſon as guilty as himſelf*; this does not properly concern them that have publick Authority to puniſh, but only affects ſuch People as love to cenſure and impeach others, barely upon their own private Authority, and out of a pretended Hatred to Vice, without Warrant from any Obligations they are under by the Duties of their Office and Place. Tho' without Diſpute it is very unbecoming, and muſt neceſſarily leſſen the Reſpect that is due to the Magiſtrate and the Laws, when the Perſon who adminiſters Juſtice, is guilty of the ſame Vices he puniſhes in others, for a Man who puniſhes that in others, which he allows himſelf to be guilty of, does not ſeem to be out of Love with the Crime, but to envy others the Enjoyment of it [a]. Yet I don't think it had been unlawful for [1] *Nero* himſelf, after he had kill'd his Mother, to have put others to Death that had been guilty of the like Crime [b]. And in this *Hobbes* is of the ſame Opinion, *Leviath.* Chap. xxviii. that Puniſhment is derived from the Superior as ſuch. The Definition, indeed, which he gives of Puniſhment is hardly ſo full as it ought to be, containing only thoſe Puniſhments that are inflicted by the civil Power, and making mention but of one End only. *Puniſhment*, ſays he, *is an Evil inflicted by publick Authority on him that has done or omitted that which is judg'd by the ſame Authority to be a Tranſgreſſion of the Law, to the End that the Will of Man may thereby be the better diſpoſed to Obedience.* But he rightly infers from thence; that neither *private Revenges*, nor *Injuries of private Men*, nor *Pains inflicted by publick Authority without precedent publick Condemnation*; nor *Evils inflicted by uſurped Power*, nor *Harms inflicted on the Subject without Regard to future Good, are properly Puniſhments, but rather Acts of Hoſtility.* But it muſt be obſerv'd, that ſuch falſe Puniſhments as theſe do not immediately place us in a State of War, or give us Licence to make uſe of the Liberties of an Enemy, or that a Man who has ſuffered ſuch Evils is left to his Freedom to return Hoſtilities upon thoſe that inflicted them. The ſame Author, alſo, excludes thoſe Evils from being Puniſhments, which are the natural Conſequences of evil Actions; as when *a Man, in aſſaulting another, is himſelf ſlain or wounded*, or when *he happens to fall ſick upon the Commiſſion of ſome unlawful Act*; *tho' this indeed will look like a Puniſhment from God.* Again, he ſays, that when *the Harm inflicted is leſs than the Benefit that naturally follows the Crime committed, it is rather the Price or Redemption, than the Puniſhment of a Crime.* And, among his Acts of Hoſtility, he mentions the Exceſs of Puniſhment; or when *a greater Puniſhment is inflicted than the Law allows of*; and when *Hurt is inflicted for a Fact done before any Law forbad it*; and when *any Evil is inflicted on the Sovereign*; and when *Harm is inflicted upon a declared Enemy.* But what he adds to this afterwards; that *one who has been a Subject, and declares himſelf an Enemy, is not to ſuffer as a Subject, but an Enemy, and therefore that ſuch as are guilty of Treaſon, may be made to ſuffer whatſoever the Repreſentative of the Commonwealth will, or as Enemies.* I cannot agree with him; becauſe whatever Puniſhment is inflicted upon Treaſon, is inflicted upon the Force of Authority, and proceeds from the ſupreme Power, tho' the Traitor himſelf may rebel and deny his Authority, and ſometimes put the Commonwealth to a Neceſſity of ſuppreſſing him by Arms, before he can be proceeded againſt as a Criminal; as

[a] Vide *Plin.* Lib. viii. Epiſt. xxii. *Plato Minoe.* He is a wicked Man who does one thing himſelf, and commands another. Add *Gratian*, Cauſ. iii. Queſt vii. Chap. iii, iv, & *ſeq.* [b] But yet, not for *Domitian* to puniſh Women convicted of Adultery, when he himſelf had debauch'd them, *Zonaras*, Tom. iii. To this we may refer that which *Medea* ſaith, in *Seneca*'s Trag. *ver.* 500, &c.

> He did the Crime, that hath th' Advantage of it,
> He's innocent to You, who only was
> Your Inſtrument.

And certainly all voluntary Informers and Cenſurers of others, ought to take Care how they fall under the Reach of what *Juvenal* ſaith, *Sat.* ii. ver. 23, &c.

> *Loripedem rectus derideat, Æthiopem albus,*
> *Quis tulerit Gracchos de ſeditione querentes?*
> *Quis cœlum terris non miſceat, & mare cœlo,*
> *Si fur diſpliceat Verri, aut homicida Miloni,*
> *Clodius accuſet mœchos, Catalina Cethegum,*
> *In tabulam Syllæ ſi dicant diſcipuli tres?*
>
> Let him cry Blackmoor-Devil, whoſe Skin is White,
> And Bandy-legs, who treads himſelf upright;
> Let him reprove that's Innocent.——In vain
> The *Gracchi* of Sedition muſt complain.
> 'Twould make you ſwear the Planets from their Spheres,
> Should *Verres* peach Thieves, *Milo* Murtherers,
> *Clodius* tax Bawds, *Cethegus Cataline*,
> Or, *Sylla*'s Pupils *Sylla*'s Rules decline.

And again the ſame Satyr, *ver.* 38.

> ——— *Felicia tempora; quæ te*
> *Moribus opponunt; habeat jam Roma pudorem:*
> *Tertius è cœlo cecidit Cato.*
>
> ——Bleſt Times!
> That made thee Cenſor of the Age's Crimes!
> *Rome* now muſt needs reform, and Vice be ſtopt,
> Since a third *Cato* from the Clouds is dropt.

Mr. TATE.

Seneca, Controv. *Lib.* ii. *contr.* 14. There is nothing more deſpicable than a Man who chaſtiſes Vice, and yet imitates it. *Cic.* Tuſc. Queſt. *Lib.* iii. *Chap.* xxx. It is the particular Character of Folly, that it diſcovers another's Faults, and forgets its own. *Plaut.* Trucul. *Act.* i. *Scene* ii. *v.* 58. He that accuſeth another of a diſhoneſt Action, ought to be cautious himſelf. *Ovid.* Faſt. *Lib.* ii. *v.* 647.

> *Sic agitur Cenſura, & ſic exempla parantur,*
> *Cum Judex, alios quod monet, ipſe facit.*
>
> Unenvied he a brave Example ſtands,
> Who by his Deeds confirms what he commands.

[1] See what I have ſaid upon *Grotius*, Lib. ii. Chap. xx. § 3. Not. 5.

when a Man is in Purſuit of his Slave who is run away, he does it by a Right of Property, and not of War. I may further add, that the Evils an Enemy ſuffers, are none of them thought to be infamous, whereas the Infamy of it is a particular Addition to the Puniſhment of Traitors.

VIII. The next Thing that falls under Conſideration, is the End [a] of Puniſhment, which every Man ought to propoſe to himſelf in inflicting it, after Satisfaction made for the Damage, or when the Nature of the Caſe will not admit of Satisfaction. And here my firſt Aſſertion is, that though it does not appear to be unjuſt in itſelf, that the Man who did Evil ſhould ſuffer Evil [b], yet that Puniſhment ought never to be inflicted without a Proſpect of making ſome Advantage from it. And therefore *Hobbes* makes this one of his Laws of Nature, *de Civ.* Chap. iii. Sect. 11. *That, in Revenges or Puniſhments, Men ought not to look at the Greatneſs of the Evil paſt, but the Greatneſs of the Good to follow; whereby we are forbidden to inflict Puniſhment with any other Deſign than for the Correction of the Offender, or the Admonition of others.* And 'tis *Plato*'s Judgment [c], *That a Man who acts with Prudence, will never puniſh barely for the paſt Offence; for it is impoſſible for him to undo what is done already; but he will always regard what is to come, either to prevent the ſame Offender from being guilty a ſecond Time, or elſe to frighten others from tranſgreſſing by his Example* [d]. It is indeed abſolutely neceſſary, that ſome Regard ſhould be had to the Crime committed, becauſe, without that, 'tis evident there can be no Puniſhment; but then the End of Puniſhment ought, alſo, to be conſidered, that a Man may not ſuffer Evil for what is too late for him to remedy; for, tho' he be a Criminal, yet he is of the ſame Fleſh and Blood with other Men. And *Hobbes* proves this Law by theſe two Reaſons; firſt, *Becauſe a Man is obliged, by the Law of Nature, upon Caution for the future, to pardon them who repenting deſire it*; and ſecondly, *Becauſe Revenge, as it reſpects only the paſt, without Regard to the Example and Profit to come, is only a Triumph and Glorying in the Hurt of another, tending to no End, and is therefore vain and contrary to Reaſon.* It might perhaps be a Saying proper for an *Attila* [e], that *he knew nothing ſweeter than Revenge, and thought no Satisfaction in Nature greater:* But a Judge, when he is forced to puniſh, ought by no means to take Pleaſure in the Sufferings of the Criminal [f].

Qui fruitur pœnâ ferus eſt, legumque videtur
Vindictam præſtare ſibi; diis proximus ille eſt,
Quem ratio, non ira movet: qui facta rependens
Conſilio punire poteſt.------

'Tis cruel Pleaſure to enjoy the Pain
Our Sentence dooms the Guilty to ſuſtain;
Juſtice forgets her firſt and great Intent,
When to Revenge ſhe turns the Puniſhment.
But 'tis a Godlike Happineſs of Mind,
Freely to judge, with Paſſion unconfin'd;
To reaſon calmly, and, as Things appear
In their true Light, be gentle, or ſevere.

And therefore *Auguſtus* ſtruck out the Names of ſuch Criminals, that by their Meanneſs could afford their Enemies no other Satisfaction, than that of Revenge [g]. And thus, *when the Magiſtrate puniſhes a Criminal with Death or Ignominy, it is not becauſe he takes any Delight in their Puniſhment, but becauſe he intends ſuch Examples for publick Inſtruction, and that the Commonwealth may make ſome Advantage by their Death, who did it no Benefit in their Lives* [h]. But I am not ſo far of *Hobbes*'s Opinion, as to call it an Act of Hoſtility, whenever the Government puniſhes without conſidering the true End of Puniſhment; ſo the Puniſhment in other Reſpects be inflicted according to the Laws of the Commonwealth [i].

IX. But the true and genuine End of Puniſhment is Precaution againſt Injuries; which is obtained, either by the Amendment of the Offender, or by deterring others by his Example from offending for the future; or by inflicting ſuch Puniſhment on the offending Party, as ſhall deprive him of a Capacity of tranſgreſſing any more; which *Grotius*, in other Words, in the Second Book, *Chap.* xx. *Sect* 6, expreſſes thus, *Puniſhment either reſpects the Perſon's Good that offended, or his, whoſe Intereſt it was he ſhould not have offended: or indifferently, the Good of every one* [k]. The firſt Sort of Puniſhment is that which deſigns the Amendment of the Offender, or to correct his bad Inclinations by a contrary Method of Cure. For ſince every Action, and eſpecially one which is deliberate and repeated, is apt to biaſs our Deſires, to give us a Hankering after it, and to grow into what we call an Habit; it will be neceſſary to deprive Vice, as ſoon as we can, of all that looks tempting in it [l]. *And therefore*, as *Socrates* ſaid, *of all Delinquents he is certainly the moſt unfortunate, who never ſuffered for his Crimes, and he's ſure to be leſs happy, whenever he does; ſince then he ſatisfies the Juſtice of God and Man; for he that ſuffers diſcharges the Guilt of his Conſcience* [m]. *Correction*, as *Seneca* ſays, *well deſign'd, and uſed with Judgment, is ſometimes abſolutely neceſſary; there being no ſuch Hurt in it as is commonly imagin'd; for under an appearing Evil it carries with it a very ſucceſsful Remedy. For a vicious Diſpoſition is reform'd by Pain and Uneaſineſs inflicted on the Body, after the ſame Manner, as it is uſual to bring crooked Timber to Straitneſs, by plying it over Fire, or by opening its Parts for Uſe, by the Wedge and Saw.* Though we need not go ſo far, as to agree to what the ſame Author ſaith in another Place; *that when either by ourſelves,*

[a] See *Grot.* Book ii. Chap. xx. Vide *Bacon.* Serm. fid. *Chap.* iv. [b] *Pindar.* Nem. Od. iv. ver. 52.

Ῥέζοντά τ᾽ ἢ παθεῖν ἔοικε.

He that doth Ill, 'tis juſt ſhould ſuffer.
When you have had the guilty Confidence
To do a Crime, learn to ſubmit and bear
The Puniſhment. *Euripid.* Hecub. *ver.* 1250, *&c.*

[c] *Plato* Protag. Pag. 226. A. B. Edit. *Wech.* [d] *Seneca* de Ira, Lib. i. Chap. xvi. ſpeaks to the ſame Senſe. [e] *Jornandus* de rebus Geticis, *Chap.* xxxix. [f] *Claud.* de Conſ. Mallii, ver. 223, &c. *Valer. Max.* Lib ii. Chap. ix. Sect. 3. *Vulcat. Gallicanus* Avid. Caſſ. *Chap.* xii. It never looks well for a Prince to be guilty of Revenge, purely to ſatisfy his own Reſentments. [g] *Sueton.* Aug. *Chap.* xxxii. [h] *Senec.* de Ira, *Lib.* i. *Chap.* xvi. [i] Leviath. *Chap.* xxviii. Add Lib. xviii. Tit. vii. *in fin.* Lib. vii. L. *ſervis exportandis.* [k] Conf. *Senec.* de Clem. *Lib.* i. *Chap.* xxii. [l] *Plato*, Gorgias, 325, &c. [m] *Seneca* de Ira, *Lib.* i. *Chap.* v.

or by Friends, we have injured any Person, it is our Duty immediately to apply ourselves to the Magistrate to be punished, as we would to a Physician; lest the injurious Distemper should so far infect us, as to settle in an incurable Disease: For a Man who is of so good a Disposition, as to be in a Readiness to deliver himself up to Justice to punish his own Faults, has no need of making the Magistrate his Physician, but may be safely trusted with his own Cure [1].

X. As to the Person who is to inflict this Sort of Discipline, *Grotius* thinks [a], "That it is naturally free for any Man to exercise that Sort "of Punishment, which designeth only the Reformation of the Offender; provided he be "Master of a good Judgment, and not guilty "of the same Faults, or others of the like Nature himself." (*For they are certainly the most unpardonable Criminals, who have the Impudence to impeach others of Crimes they are guilty of themselves; and if a Man would reform others, he must first mend himself* [2].) "But that as to other Sorts of "Punishments which are of a compulsive Nature; such as Whipping, Beating, and the "like; Nature hath made no Distinction be"tween the Persons that may, and those that "may not, inflict them upon others; except it "be, that Reason hath particularly allowed "Parents the Use of this Right over their Chil"dren, upon the Force of natural Relation. "And therefore generally the civil Laws, to "prevent Confusion and Disturbances, have justly "restrained the common Affinity of Mankind, "only to the nearer Branches of Blood." But there does not seem to be much Satisfaction in this; for, as I said before, no Punishment, whatever the End of it be, can be inflicted, but by the Authority of the [3] Sovereign: And therefore all Reproof by Words look rather like Counsel and Advice, than Punishment; which, when vehemently delivered and pressed in harsh Language, seems to be founded rather upon the particular Laws of Friendship [b], than upon any common Right. And the Truth of this appears from the common Return that is made to any Man, who undertakes to reprove a Person he has no Acquaintance with (as *Terence* [c] represents it.) *Have you so little Business of your own, as to intrude into another's, and meddle with what doth not concern you?* And therefore *Chremes*, in that Author, when he justifies his reprimanding *Menedemus*, appeals to the Right of a Neighbour, which, he said, he thought *might claim the next Title to Friendship* [4]. But besides, 'tis a very necessary Part of Prudence, to know how to apply our Reproof; for an unseasonable Mistake of this Nature may be of very ill Consequence to a Man's self, and harden the Person he intended to reform, in the vicious Course he was in before. Parents [d] indeed have a Right to correct their Children upon a double Account; both because the Methods of Education, which Nature obliges them to bestow upon their Children, would be to no Purpose, if they had not the Liberty, as they see Occasion, to use them with a little Sharpness and Severity; and because, out of civil Government, they would have an absolute Sovereignty over them. And though in many Commonwealths this Power is reduced to a very little Compass, yet they have so much almost every where left them, as giveth them Leave to correct their Children at Discretion, for those petty Misbehaviours, which are the Effects rather of the Levity and Imprudence of Youth, than of any inveterate settled ill Habits of the Mind; and which more disturb domestick Quiet, than the publick Peace. And 'tis as necessary, that such as in the Parents Stead have the Care of educating young People committed to them, as Tutors, Governors, and Masters [e], should be allowed the same Power; because they can never discharge their Duties as they should, without the moderate Use of gentle Discipline [5]. But this Sort of Punishment, *Grotius* says, *ought ne-*

[a] Lib. ii. Chap xx. Sect. 7. [b] Vid. *Terent.* Heautontimor. Act. 1. Sc. 1. Ver. 24, &c. [c] *Ibid.* Act. 1. Sc. 1. Ver. 23, &c. [d] V. L. xlvii. Tit. x. Lib. vii. Sect. 3. *D. de Injuriis. Libanius* Declam. 20. [e] See Mr. *Noodt*'s Treatise *ad Legem Aquiliam*, Chap. vi. Where he alledges, and explains, judiciously, several Decisions of the *Roman* Lawyers upon this Subject.

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[1] *Apuleius* de Dogm. *Plat.* p. 615. Edit. *in usum Delph.* There is more Disquiet and Uneasiness in the Impunity a Delinquent enjoys, than there is in the most severe Punishment. *Plato* de LL. Lib. ix. in the Beginning. No Punishment appointed by Law is intended for an Evil, but only to effect one of these two Things, either to make the Offender better, or, at least, not so bad as he was. *Aristot.* Eth. ad *Nicom.* Lib. ii. Chap. ii. pag. 20. Ed. *Paris.* Punishment is a Sort of Physick, and Physick commonly works by Contraries. *Alcinon.* de Doctrin. *Platon.* Chap. xxxii. It is as necessary for an Offender to be punished, as it is for a sick Man to apply himself to the Physician: For Correction is a Sort of Remedy for a vicious Mind. *Tacitus*, Ann iii. Chap liv. A debauched, a crazy and violent Temper, must be cooled and kept under by Restraints as strong as the Force of its Lusts. *Plato* in *Critias*, in the Beginning. The proper Punishment for one who transgresseth out of Negligence, is that which makes him cautious.

[2] But see what is said to prove the contrary, Sect. 4. Not. 3. of this Chapter.

[3] *Isocrat.* de Permutatione, pag. 539. Edit. *Paris. Lactantius* Div. Inst. *Lib.* iv. *Chap* xxiii. *When* Crispus *in* Tacitus, *Hist. Lib.* ii. *Chap.* x. towards the End, *condemned* Faustus, *tho' he himself had been employed and rewarded for bringing in Accusations of the Kind before, it is said*, That the Punishment of the Crime did not grieve *Faustus* so much, as it did that such a one should inflict it. *Arnobius* adv. *Gentes*, Lib. i. It is a great Injustice in you, to make that Criminal in us, which you do yourselves; or to allow yourselves in the Practice of those Things, which you strictly forbid to others.

[4] Q. *Curtius*, Lib. iii. Chap. xii. Not. 16. speaking of *Hephestion*, No one could take that Liberty to reprove the King which he did, which yet he was so tender of using, that the King seemed rather to allow him in it, than he to assume it. *Cic.* Off. Lib. i. Chap. xvii. Advice, Persuasion, Exhortation, Consolation, and sometimes Reproof, are particularly used in Friendship. *Hom.* Iliad. Lib. xi. Ver. 792. Ἀγαθὴ δὲ παραφασίς ἐστιν ἑταίρῳ. And to this we may refer that of *Musonius Rufus* in *Tacitus*, Hist. Lib. iii. Chap. lxxxi.

[5] SENECA de Ira, *Lib* ii. *Chap.* xxvii. The Corrections of Parents and Masters must be looked upon to be of the same Nature with Cutting and Abstinence, and other severe Methods of Cure, which do us Good when they hurt us. *What Power other Relations have over others in this Case, may be seen* Lib. ix. Tit. v. C. *de Emendatione propinquorum.* PLATO de LL. Lib. vii. Pag. Sup. A. *decrees, that in his Commonwealth,* since young People are as untractable as the wildest of Beasts, those Children that were Free should be subject only to the Correction of those that had the Charge of their Education. But that any Freeman should have the Liberty to chastise any Slave, whether Boy, Master, or Tutor, if he took him in any Fault. *Xenoph.* de Repub. Lacedæmon. *Lycurgus* made a Law, that no Man should command his own, or another Man's Children, to do any Thing but what was just. And that if a Child should be beaten by another, and complain of it to his Father, it should be thought mean and irreputable, if the Father did not correct him again. *But what* Xenophon *says* Lib. v. περὶ ἀναβάσ. (That, if I strike any Man for his own Goods I can

ver to proceed ſo far as Death; ſince 'tis very abſurd to hope to reform a Man by throwing him into a Condition, in which 'tis impoſſible for him to expreſs any Amendment: Though 'tis the Opinion of ſome, that when a Man is grown incorrigibly vicious, 'tis juſt and reaſonable to deprive him of Life; eſpecially ſince ſuch Sort of Perſons are generally very bad Neighbours to others. So *Seneca* ſays, "That Death is the "beſt Remedy for an incorrigible Diſpoſition; "and that 'tis the ſafeſt Way for him to leave "the World, who is never like to be Maſter of "himſelf in it [1]." And *Plato* ſays, "That a "wicked Man had better not live, ſince he is "under a Neceſſity of living ill." *Sulpitius Aſper*, in *Tacitus*, gave this Reaſon for his engaging in the Conſpiracy againſt *Nero*, *that it was impoſſible for him to ſtop his Cruelties otherwiſe*; or as *Suetonius* tells the Story in his Life of *Nero*, *Some of the Conſpirators charg'd all the Guilt of the Plot upon* Nero *himſelf; as if they could not have better expreſs'd the Reſpect they had for him than by killing him, after he had diſhonour'd himſelf by ſuch Variety of Wickedneſs* [2]. Yet Charity ſhould perſuade us not to be too eaſily prevail'd upon to give any Man over for deſperate. But this Sort of Puniſhment may, alſo, promote the Good of others. For 'tis certainly ſufficient Caution to others, when a Man reforms upon the Senſe of the Severity of his Puniſhment; and when an incorrigible Perſon ſuffers Death, greater Security cannot be given that he will never create freſh Diſturbances. And that none but ſuch incorrigible Perſons ſhould ſuffer Death, may perhaps be well enough admitted, in Crimes of a lower Rank, and leſs Malignity; but Crimes of a deeper Stain muſt not be allowed the ſame Privilege. For ſince no Man is to be declared incorrigible, till he hath been frequently guilty of the ſame Fault, it would be but little for the Advantage of the Commonwealth, to defer the Puniſhment of a Criminal, till he had frequently repeated perhaps the worſt of Villanies.

XI. Another End of Puniſhment is his Good, whoſe Intereſt it was the Criminal ſhould not have offended, or who ſuffer'd by the other's Offence; that he may not, for the future, be in Danger of the like Injury from him, or any one elſe [a]. And this is to be obtained theſe three Ways: *Firſt*, by the Death of the Criminal; or *Secondly*, if he be allowed Life, by depriving him of Power to hurt; as by keeping him in Cuſtody, taking his Arms, and other Inſtruments of Miſchief from him, ſecuring him in ſome diſtant Place, and the like: Or elſe, *Thirdly*, by obliging him to learn, at his own Peril, not to incur further Guilt, or offend any more; which falls in with the Amendment, I before treated of. But now there can be no effectual Way to ſecure the Party injured from ſuffering the like from other Hands, but by ſuch a Puniſhment, as ſhall be publick, conſpicuous, and make the Criminal an Example. And for this Reaſon Malefactors are ſeldom executed in Priſon, but in Places of common Reſort, and with ſuch frightful Solemnity, as may ſtrike Terror into the Multitude. And this is an End ſo natural to Puniſhment, that when, in Heat of Paſſion and Revenge, a Man thinks he hath had ſufficient Satisfaction from the Perſon that had abuſed him, 'tis uſual to add, *as you like this, provoke me another Time.* But however, the Sovereign only has juſt Power to inflict this Puniſhment: Though Legiſlators in ſeveral Commonwealths, in Compliance with the fierce and obſtinate Tempers of their People, have made ſeveral Allowances and Indulgences to that ill-natur'd Paſſion, which urges Men to proſecute their own Reſentments, and do themſelves Juſtice. The Revenger of Blood in the divine Law ſeemeth to have been eſtabliſh'd by ſuch an Allowance [b]; except we rather think this to have been ſome Remainder of the State of Nature. And ſome think they diſcover a Cuſtom like this in *Homer*, in that Paſſage which relates to *Theoclimenus*. Indeed, I think the Law *Euripides* mentions, can hardly be explain'd in any other Senſe [c], φυγαίσι δ' ὡσίαν, ἀνθ' ἀποκτεῖναι δὲ μή, that is, *they made Satisfaction by Baniſhment, and did not kill one another*; implying that the old Cuſtom of private Revenge was abrogated, to prevent the Danger of its going too far; which, in Puniſhments inflicted by the Magiſtrates, there is no Fear of. It appears indeed from *Homer*, that it was uſual to buy off the Baniſhment, by paying a pecuniary Mulct to the next of Kin to the Party kill'd [d]. And at this Day, in *Morocco*, 'tis permitted the Kindred of the murther'd Perſon, either to compoſe all Difference by an Agreement with the Murtherer, or to diſpatch him without formal Proceſs, if publick Juſtice hath not apprehended him before; becauſe it is there taken for a ſettled Rule, that Revenge is no Sin. And *Tacitus*, in his *Account of the Germans*, Chap. xxi, tells us, *That the Father, or the next of Kin, are under a Neceſſity of engaging in the Quarrel; but the Difficulty of an Accommodation* (ſaith he) *is not great, for 'tis uſual to expiate a Murder, by a Preſent of a certain Num-*

[a] See *Grot.* Book xx. Chap. ii. Sect. 8. [b] *Numb.* xxxv. Deut. xix. Vide *Selden* de J. N. & G. ſec. Hebr. Lib. iv. Chap. ii. *Grotius* upon *Exod.* xxi. 12. Add *Rochefort Deſcr. Antill.* Pag. 2. Chap. xix. *Homer.* Odyſſ. ϛ Ver. 276. [c] *Euripid.* Oreſtes, Ver. 512. [d] *Homer.* Iliad. ix. Ver. 628. Vid. *Apoll. Rhod. Argonaut* Lib. i. Ver. 90.

I own I deſerve to be puniſhed, but then it muſt be ſo as Parents are puniſhed by their Children, or Maſters by their Scholars: For thus Phyſicians are allowed to cut and burn their Patients, when it is in Order to their Cure) *was only to excuſe that Severity and Moroſeneſs of Humour that was obſerved in him. But what may be lawful for a General or a Commander to do, is not therefore lawful for every one elſe.*

[1] SENECA de Ira, Lib. i. Chap. xvi. in the Beginning. You are now grown incurably Wicked, and are perpetually adding one Crime to another; you no longer give yourſelf the Trouble to bring Excuſes (which ill Men are ſeldom without) for your Vices, but think the Sin itſelf Reaſon enough for you to ſin on. You have ſuch a Thirſt after Wickedneſs, and have indulged, and pleaſed yourſelf in it ſo long, that it is impoſſible you ſhould quit it, till you take leave of yourſelf. You will one Time or other endeavour to lay violent Hands upon yourſelf. Well; we will be your Friends, and remove that Madneſs from you, which ſo diſorders you; and, ſince you are ſo deeply engaged in your own and other Mens Puniſhments, will ſhew you all the Good that is now left for you, and that is, Death. *Senec.* de Benef. *Lib.* vii. *Chap.* xx. *Plato* in *Gorgia*, Pag. 349. B. *Tacitus* Ann. xv. Chap. liii.

[2] *Sueton. Nero*, Chap. xxxvi. *Jamblicus* in Protrept. *Chap.* ii. As it is ſafer to apply Cauſticks to a Swelling, than leave it to itſelf; ſo it is better for a wicked Man to die than live, *Roſar. Perſic.* Chap. i. When a Man is never Innocent but in his Sleep, it is better he ſhould die than live, as PLATO will have it, *de LL.* Lib. ix. Pag. 928. D.

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ber of Sheep, and other Cattle; and then all of the Family will be fully satisfied [1].

XII. The third End of Punishment is the Good of all indifferently; the Severity of the Punishment being sufficient Caution for every Man's Security [2]. The Design of which Sort of Punishment is, either to prevent Malefactors that have done Injuries to some, from doing the like to others; an Effect to be obtain'd, either by putting them to Death, by confining or disabling them in such a Manner, as shall deprive them of the Power of doing Harm [3], or, by the Rigour of the Punishment, overcoming their Inclinations to transgress: or else to better others, that might be encouraged by the Impunity of Delinquents, from hurting and disquieting their Neighbuors. And this may be effected by publick Executions, or, as they are usually call'd, publick Examples, at the Sight of which others are to take Warning [4]. And the more publick the Punishment is, the greater Effect it is like to have in reforming others. The *Lacedemonians* had a Custom contrary to the rest of the World, in punishing their Criminals in the Night [a]; thinking perhaps that the Darkness added something to the Terror of the Punishment [b]. And under this End of Punishment we may comprise all those Advantages, which result from the Support and Preservation of the Authority of the civil Government, among all the impudent and violent Invasions upon the Laws, which so frequently disturb and weaken it. For 'tis the Interest of the whole Commonwealth, to be concern'd for the Preservation of the supreme Authority; and, as long as that contines entire, the most profligate Criminals may be kept under Restraint. But, besides these Ends of Punishment I have here mention'd, I see no Necessity of allowing those other *Selden* mentions *de J. N. & G. Lib.* i. *Chap.* iv. as the *satisfactory*, *purgatorial*, or *expiatory*, or either that the *Deviation* from the Law may in some Measure be made up, and the Inequality of the Action be corrected. The Arguments he produces from Scripture, seem to relate only to divine Justice, or the particular Sanctity of the *Jewish* Nation.

XIII. As to those Exceptions which *Grotius* [c] adds to this Proposition, *That the Infliction of all exemplary Punishments ought to be lodg'd in the Government of every State*, it must be observ'd, that whatever is inflicted in certain Places, and on certain Persons, which are not subject to any determinate Court of Judicature, as, for Example, upon Pirates, must be reduced under the Right [5] of War, which is utterly different from the Power of punishing. For Pirates and Freebooters are common Enemies, and every Man may draw his Sword against them. 'Tis good Advice indeed which *Grotius* gives afterwards [d], that it would be the most proper Method for Merchants and Seamen, before they begin their Voyage, to procure Commissions for themselves from publick Authority to take all Pirates, wherever it be their Fortune to come up with them, that so, when they are obliged to it, they may engage them, not as by their own, but upon the publick Authority. The Law mention'd [6] *Deuteronomy*, Chap. xiii. ver. 9, doth not give every private Man Right to kill the Person that would lead him into Idolatry; but only to bring him forth to Justice, that, upon Cognizance of the Matter, the People should stone him. But yet, admitting that every private Man had Power given him to punish one convicted of such a Crime, the Establishment of such a Power by a previous Law makes the private Person an Instrument of Government; and what Actions he undertakes on this Account, must be look'd upon as commanded by publick Authority [e]. The Action of *Phineas* [f], tho' favour'd by GOD's particular Approbation, is not an Argument to be insisted on; for such a [7] Zeal allow'd to any Man indifferently at other Times would soon confound and distract all civil Order, and give Colour and Protection to every one's Rashness and Passions. The Power of Life and Death, which, in some Commonwealths, Masters of Families have over their Children and Servants, tho' it does not ori-

[a] *Herodot.* Melpom. Pag. 107. Edit. *H. Steph.* [b] Comp. *Val. Max.* Lib. ii. Chap. ix. Sect. iii. [c] Lib. ii. Chap. xx. Sect. 9. [d] *Ubi supra*, Sect. 14. [e] See *Grotius* upon the Place. [f] *Numb.* xxv. [g] Vide *Selden* de J. N. & G. &c. Lib. iv. Chap iv.

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[1] Vid. *Dionys. Halicarnass.* Lib. i. Pag. 68. Edit. *Lips.* Leaving *Numitor* to inflict the Punishments as he pleas'd, because he thought it reasonable, that the Party who was injured should have the Right to punish.

[2] PLATO de LL. xi. Pag. 977. B. Criminals are punish'd, not because they have offended, for what is done can never be undone; but that, for the future, the Criminals themselves, and such as see their Crimes punished, may take Warning, and be put out of Love with Vice. TULLUS in *Livy*, Lib. i. Chap. xxviii. Let others at their Peril attempt the like afterwards, when I have made him an Example to all Mankind.——And let the World learn, by your Punishment, to think those Things sacred which you have violated. *Livy*, Lib. i. Chap. xxxiii. *Ancus* built a Prison in the Middle of the City, just by the *Forum*, to frighten the growing Boldness of Vice. Add *Agathias*, Lib. iv. Init. *Lucian. Phalaris*, i. Pag. 735. *in fin.* It would be to no Purpose, to expect any Benefit from any thing, if Malefactors were not perpetually terrified by the Fears and Expectations of Punishments.

[3] Gunth. Ligurin. *Lib.* i. *ver.* 527, *&c.*

Nec melius stultæ, furor atque superbia, plebis
Puniri poterat, quam tanti ut causa tumoris
Eriperentur opes, ut, quos opulentia dudum
Fecerat elatos, in se revocaret egestas.

What happier Art could he have us'd t'assuage
A haughty Town, and a bold Faction's Rage;
Than to deprive them of that Wealth, from whence
The fatal Ills unhappily commence?
Seditions are by Wealth and Ease maintain'd,
But soon by Want and Poverty reclaim'd.

Speaking of the Citizens of Utrecht, *who had been fined a great Sum of Money by* Frederick, *for an Insurrection there.*

[4] *Vide* Lib. ix. Tit. xxvii. Lib. i. *C. ad L. Jul. repetund.* Lib. ix. Tit. xx. Lib. vii. *C. ad L.* Fabiam *de Plagiar.* Quintil. *Declam.* CCLXXIV. When Criminals are executed, the most publick Places are chosen, where there will be the greatest Number of Spectators, that the Fear of Punishment may work upon them. *Senec.* de Ira, *Lib.* iii. *Chap.* xix. The more publick the Punishments are, the greater Effect will they have upon the Reformation of others.

[5] Nothing hinders, but we may do it by the Right of Punishment. See what I have said, Sect. 4. Note 3.

[6] See *Grotius*, Lib. ii. Chap. xx. § 9. Not. 14, 15, 16.

[7] *Non est singulis concedendum quod per Magistratum publicè possit fieri, ne occasio sit majoris tumultûs faciendi.* DIGEST. Lib. I. Tit. xvii. Leg. CLXXVI. See, upon this Subject, a Dissertation of Mr. *Buddeus*, intitled, *de Jure Zelotarum in Gente Hebræa*, printed at *Hall* in 1694, and reprinted in 1699, with Additions.

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ginally flow from the Commonwealth, yet under civil Government we may imagine it to be a Branch of publick Authority, which the Sovereign permits Heads of Families to exercise over those under their Charge. And there is no Reason to the contrary, why there may not be a Magistrate in every Commonwealth, who, in certain Cases, may be allow'd Power to punish Criminals extraordinarily, without any judicial Hearing, provided Care be taken he shall not abuse an Authority of so large Extent. Thus when the Government sets a certain Price upon the Head of a Traytor, the Person who kills him, is supposed to do it by publick Authority; for altho' such a Declaration has not always the Force of a Command, yet when the Traytor is kill'd upon a View of that Encouragement, the Action may be defended as undertaken by publick Allowance and Authority [a]. *Grotius*, in his Comment upon *Esther*, Chap. ix ver. 10, observes, *That it was an Opinion which obtain'd among the* Jews, *that if any Man attempted to betray an* Israelite, *or his Estate, to the* Gentiles, *or put any publick Affront upon the whole Body of their Nation, that it would be no Sin for a* Jew *to kill him, his Estate being left his Heirs.* But the Liberty which the *Jews* at that Time took in the Execution of their Revenge, does not seem to be agreeable to the Nature of the civil Government. There is a Law mention'd in *Andocides*, Orat. i. *That if any Person attempted the Subversion of the Democracy at* Athens, *or if any Person, upon the Dissolution of the popular Form of Government, should create any Magistrate, he should be pronounced an Enemy to the State*; *and no body that kill'd him should be punishable*; and then follows the Oath which all the *Athenian* Tribes engag'd in, to kill the Person that should do so. And *Valerius* instituted a Law at *Rome*, *That no Magistrate should ever be created, from whom there should lie no Appeal*; *and that it should be lawful to kill any Person that should make such a Magistrate. And that it should not be capital for any Man that did kill him* [b]. And the *Panchæi* are said to have look'd upon it as unlawful for their Priests to pass the Borders of their consecrated Country; and if any Man found them without those Limits, he was allow'd to kill them [c]. Here therefore we may observe, that in these, and all other Laws of the like Nature, upon such Evidence of the Fact, as admits of no Scruple and Dispute, the general Edict has the Force of a positive Sentence of Condemnation; and the Death of the Person that follows upon it, seems to be authorized by the Command of the Magistrate [d]; and if a private Man, upon the Influence and Instigation of such a Law (supposing the Reasons of it be just) should kill the Party, he will not only be indemnified in the civil Court, but may be fairly acquitted by his own Conscience, so he was not induc'd to that Action by any private Grudge or Resentment, but barely by a Belief, that by such an Action he should do Good to his Country; and especially, if the Reason why the Law permitted or commanded any Man to be the Executioner of the Penalty was, that the Commonwealth was in imminent Danger from such treasonable Attempts. But the Case is different as to the Blood which is spilt upon an Indulgence, the Law sometimes alloweth to a just Concern and over violent Passion; which only takes off the civil Punishment, but doth not excuse the Guilt of the Act. Of this Nature are the Laws which permit Husbands to kill Adulterers and their Wives, when they surprize them in the Act; for human Laws pardon only the Violence of a Discontent conceiv'd upon the most severe Injuries. Though possibly it might be a more convenient Way, to leave such Injuries to be punish'd by the Magistrate, so the Commonwealth might be in no Danger by the Delay of the Revenge [e].

XIV. But notwithstanding, from the Ends of Punishment, and the State of human Nature, 'tis manifest, there may be some Actions in themselves evil, which yet it would be needless, and to no Purpose for human Justice to punish. Such as are, *first*, Acts meerly internal, as sinful Thoughts, evil Inclinations and Desires; though it may afterwards happen, they may (as suppose by a subsequent Confession) be discover'd [f]. For, since no Man is injur'd by such an internal Motion, no Man can be concern'd for the Punishment of it [g]. 'Tis true indeed, as *Philo* saith, *That while we entertain, tho' it be only, our Imagination, with bad Thoughts, we are guilty of those Thoughts*: But this holds true with Relation only to divine Justice. Tho' *Grotius* in his Comment upon the vth of St. *Matthew*, ver. 28, shews from several Testimonies of Heathen Writers, that such Thoughts, from bare Reason only, may be proved to be real Sins [h]. But 'tis quite a different Thing, when the internal Acts are considered in Conjunction with the external; for the Influence these have upon the Quantity and Quality of our Actions, is very considerable. And therefore many Crimes are punish'd, which have yet been stopt in the Attempt, and fail'd of final Success [i]. But besides, it would be too rigorous to make every Peccadillo subject to the Severity of human Punishments, since, in the

[a] Add C. Lib. iii. Tit. xxvii. *Quando liceat unicuique, sine judice se vindicare, vel publicam devotionem.* Lib. i. [b] *Livy*, Lib. iii. Chap. lv. [c] *Diodorus Siculus*, Lib. i. Chap. xlvi. [d] Vide *Grot.* Lib. ii. Chap. xx. Sect. 17. [e] Vide *Gratian*, Can. quicunque, &c. Caus xxxiii. Quæst. viii. *Senec.* Controv. *Lib.* i. Controv. iv. *Lib.* iv Controv. xxiv. *Xenoph.* de Educat. *Cyri*, Lib. iii Pag. 42. Edit. *H. Steph. Valer. Max.* Lib. vi. Chap. i. Sect. 13. *Bœcler.* ad *Grot.* Lib ii. Chap. i. Sect. 14. *Ant. Matthæus* de Criminib. ad *Lib.* xlviii. *D. Tit.* v. *Grot.* in flor. sparf. ad *Jus Justinian.* ad *Lib.* xlviii. *Tit.* v. *D. Lib.* xxii. *Sect.* 4. ad *Leg. Jul.* de Adult. [f] Add *Grotius*, Imper. de Summar. Potest. circa sacra, *Chap.* iii *Sect.* 1. [g] *Cogitationis pœnam nemo patitur.* Vide Lib xlviii. Tit. ix. Lib. xviii. *de Pœnis*, *Philo Lib.* quod. det. pot. insid. The *Origines Juris Civilis*, by Mr. *Gravina*, Lib. iii. Pag. 584, *& seq.* and the *Observationes Jur. Civil.* by Mr. *Bynkershoeck*, Lib. iii. Chap. x. *Meursius* (as cited by Mr. *Hertius*) informs us, That *Christian* II, King of *Denmark*, put to death *Torberne-Oxe*, Governor of the Castle of *Copenhagen*, because he own'd, that he had wish'd to lie with the Mistress of this Prince, named *Duvecke* (or the *Pidgeon*) altho' the Senate did not think such a Wish was punishable by Law. *Hist. Dan.* for the Year 1516. [h] *Vide* Grot. *in Flor. sparf. ad* Lib. xlviii. Tit. viii. Lib. xiv. *D. ad L.* Cornel. *de Sicariis.*

[i] Add. *Bodinus* de Repub. Lib. iv. Chap. vii. p. m. 734. *Ammianus Marcellinus* gives us a very strange Instance of Calumny, *Lib.* xv. *Chap.* ii. The Story he tells is of one *Mercurius*, whose Practice it was, when any Man happen'd to tell his Friend his Dreams, (and Dreams in Nature we know use to be odd and extravagant) to paint them in the worst Colours his Malice could give them, and then represent them to the suspicious Emperor; upon which the Dreamer was indicted, as guilty of as great and high a Misdemeanour, as if he had actually committed some unpardonable Fact. So that, when this came to be publickly known, People were so far from telling their Dreams before strange Company, that they would hardly own that they had been asleep. And some learned Men were concern'd, that it was not their Fortune to be born among the *Atlantai*, where they say, nobody dreams.

preſent State of human Nature, the greateſt Caution and Intention imaginable is not ſufficient to guard us from a Multitude of Slips and Infirmities. And therefore *Themiſtius* [a], when he had divided Mens Failings into three Sorts, *viz. Misfortunes, Miſtakes*, and *criminal Actions*, very juſtly adds, That a Prince ought to pity the firſt, correct the ſecond, and puniſh the third [b]. 'Tis ſaid of *Alphonſus* King of *Aragon*, "That, having carefully read over the "whole Body of the *Portugueze* Laws, he highly commended the Wiſdom, and the Order, "and Adminiſtration that was obſerved in the "Commonwealth; but was as much diſpleaſed "to find ſo many particular Laws calculated for "the moſt trivial and minute Caſes; and, to ex"poſe the ſcrupulous Exactneſs of them, he "ask'd the *Portugueze* in way of Raillery, How "a Man was to be puniſh'd that ſet his Foot to "the Ground [c]?" *Grotius*, in his iid *Book*, *Chap.* xx. § 19, ſpeaking to this Subject, ſeems not to have ſaid what is exactly proper, or true: *Our Slips and Failings*, ſaith he, *can hardly be call'd Sins*; *becauſe, if we conſider them in the general, they are not committed with that Liberty, which in particular they ſeem to be*: For I can't think it is a Conſequence, that if it be morally impoſſible, but a Man muſt fall into ſome Sins; therefore ſuch Sins of daily Infirmity, or Incurſion, as they are call'd, ceaſe to have the Nature of Sin. He adds in the ſame Chapter, that thoſe Sins do not deſerve Puniſhment, which neither directly, nor indirectly, bear any Relation to human Society, or other Perſons; for that there can be no Reaſon, why we ſhould not leave ſuch Sins to be puniſhed by GOD Almighty, who has the higheſt Wiſdom to know them, the greateſt Juſtice to examine them, and the moſt abſolute Power to puniſh them; and that therefore 'tis without any Proſpect of Advantage, and, conſequently, to no Purpoſe for Men to inſtitute ſuch Puniſhments. Though, I think, it may be very well made a Queſtion, whether there be any ſuch Sins as thoſe he ſpeaks of, if we except Thoughts before they are produced into Action. Beſides, the civil Laws deny to ſome Acts the Power of producing an Action, or exempt them from human Penalties; either for publick Peace and Quiet, or upon other reaſonable Accounts; ſometimes it may be ſuppoſed that a certain Action would look better, if it could not ſeem to have been undertaken upon Fear of human Puniſhment; ſometimes the Matter may be too frivolous to give the Judges the Trouble of hearing it; or perhaps be too perplexed and intricate, to be determin'd; or when the Evil is grown inveterate, and ſo rooted in the Temper of the People, that it is not likely to be ſuppreſs'd without a Convulſion, which might prove fatal to the Commonwealth [d]; or elſe to prevent an unreaſonable Increaſe of Suits at Law [e]. In fine, it is abſolutely neceſſary, that all thoſe Diſorders of the Mind, which are the Effects of the common Corruption of Mankind, ſhould be exempted from Puniſhment; ſince they are ſo general, that 'tis impoſſible but all civil Government ſhould be diſſolv'd, if ſuch Sins ſhould fall under the Severity of human Penalty, before they diſcover themſelves by an open Enormity; ſuch as are Avarice, Ambition, Inhumanity, Ingratitude, Hypocriſy, Envy, Detraction, Pride, Anger, Diſcord, and the like: All which Vices it was our Saviour's great Deſign, by the Holineſs of his Doctrine, to extirpate and ſuppreſs. For 'tis certainly true, as *Seneca* ſays, "That "if every Man was to be puniſh'd who was of a "wicked and depraved Diſpoſition, none could "be excuſed from Puniſhment [f]."

XV. But neither is it always neceſſary that ſuch Miſdemeanours, as may properly be puniſhed by the civil Court, ſhould therefore always be puniſh'd by it [g]; but there may be ſometimes Room left for Pardon. The *Stoics* indeed, as *Stobæus* [h] repreſents them, were violent againſt this Opinion: For a wiſe Man, they ſaid, ought never to pardon any Body; becauſe the Perſon who pardons muſt ſuppoſe that it was not the Offender's Fault that he tranſgreſs'd; tho' 'tis certain, that every Man's own natural Depravity is the Cauſe of his Tranſgreſſion: And therefore 'tis ſtill true, that Offenders ought not to be pardon'd. What they meant by this Argument ſeems to be this: Either 'tis a Man's own Fault that he offends, or it is not; if it be not his Fault, there is no Offence committed, ſince every Man tranſgreſſes from his own natural Depravity, and therefore, in this Caſe, there is no need of Pardon; and if it be a Man's own Fault, then he can't be admitted to Pardon [i], becauſe Pardon is not to be allowed to any wilful Tranſgreſſors. Which Reaſon manifeſtly begs the Thing in Diſpute. They add, that a good Man is not to be compaſſionate or merciful; for a compaſſionate or merciful Man deprecates and endeavours to alleviate the Puniſhment a Criminal deſerves, but every Man ought to have Retribution made him, according to his Deſerts. But now, the Nature of Deſert or Merit is different with Reſpect to Good, and with Reſpect to Evil. The Good which is due to a Man cannot in Juſtice be denied him; but the Nature of Evil is ſuch (it not intending the Benefit of the Perſon that muſt ſuffer it) that it is no Injury to deny it him. They argue further, that a Man cannot be inclinable to Mercy, without thinking that the

[a] *Orat.* ix. *ad* Valentin. Jun. *Add.* Sanderſon. *de Juram. Oblig. Prælect.* iii. § 18. [b] *Hier* Oſorius, *Lib.* x. [c] *Julius* in *Cæſaribus* de Probo. 'Tis very difficult for a Man to govern an Horſe, or any other Beaſt, and much more Men, without indulging them in ſome Things they have an Inclination to; as Phyſicians uſually allow their Patients in little Irregularities, that they may be the ſtricter in the Obſervation of the great and chief Preſcriptions. The great Lord SHAFTSBURY, in an imperfect Piece of Mr. *Locke*'s, ſays, (*Biblioth. Choiſie* of Mr. *Le Clerc*, Tom. vii. Pag. 162) "That in every Perſon there are two Men, the one Wiſe, "and the other a Fool; and you muſt allow 'em the Liberty of following their Genius, each in his Turn. But if you pretend to "have the Wiſe, the Grave, and the Serious One, always ſit at the Helm, the Fool will grow ſo uneaſy and troubleſome, that he will "diſorder the Wiſe One, and render him incapable of doing any Thing: You muſt let the Fool, alſo, in his Turn, have the Freedom "to follow his Whims, to play and divert himſelf according to his own Fancy, if you will have your Affairs go on ſmoothly and "eaſily." [d] To this Purpoſe is *Tiberius*'s Epiſtle about Luxury, *Tacitus*, Ann. iii. 53. [e] *Add* Seneca *de Clementia*, Lib. i. Chap. xxii. [f] *De Irâ*, Lib. ii. Chap. xxxi. *in fin.* [g] *Vid.* Grot. *ubi ſupra*, Sect. 21. [h] *Stob.* Serm. XLIV.

[i] The Author's Words are, *quod illa utique conveniat delictis ſpontaneis*; but 'tis eaſy to ſee, from the Senſe and Connexion, that it ſhould be *non ſpontaneis*, and that this Error has been left uncorrected in all Editions.

Puniſhments,

Puniſhments, which the Law appoints for Delinquents, are too ſevere; or that the Legiſlator has preſcribed Penalties without due Regard to Fact. But this is ſtill but weak Reaſoning. For it is no Contradiction, that the Puniſhments preſcribed by the Law may be juſt, and yet may ſometimes be mitigated; for the Law determines only in general, what Puniſhments are to be inflicted on ſuch and ſuch Crimes, without Conſideration of the particular Circumſtances which may ſometimes happen, in certain Perſons, in certain States and Conditions of the Commonwealth. But particular Men are pardoned for certain Reaſons, which do not take place either in all Offenders, or at all Times. *Seneca*[a], in his Book *de Clementia*, ſays, That *Pardon is a Remiſſion of the Puniſhment which is due* (*pœnæ debitæ*) but that a wiſe Man always doth what he ought to do. But here the Miſtake lies in the Word *due* (*debitæ*) for if it be meant, that Puniſhment is due to Offenders; that is, that an Offender may be puniſhed without Injury or juſt Occaſion of Complaint; in this Senſe it will not follow, that, if a Man doth not puniſh an Offender, he doth what he ought not to do: For a Man may very juſtly and lawfully do many Things, which he is not always neceſſarily obliged to do. Beſides, as it is a Miſtake to ſay, that Puniſhment is due to an Offender, meaning by it, that there is an inherent Right in the Delinquent which the Puniſhment is to ſatisfy (for I think no Man ever complained that his Puniſhment was remitted; except it may be ſaid, that a Man may wiſh that ſuch Correction, as might have reclaimed him when he was young, was neglected, when he finds that his childiſh Levities and Faults are grown up into bold and manly Vices) ſo it is improper to ſay, that a Delinquent ought to ſuffer Puniſhment (*pœnam dare*) meaning by it, that he is under an [1] Obligation to ſuffer it: the Reaſon of which I have explained before. But if by the Word *due* (*debitæ*) it be underſtood, that a wiſe Man is obliged to inflict the Puniſhment: I anſwer, firſt, that no Man can be under any ſuch Obligation, unleſs the executive Power of the Laws be either publickly or privately committed to his Care. And, ſecondly, That the Obligation which lies upon the Governors, doth not relate to the Delinquent, but to the whole Commonwealth or Society, whoſe Safety they are bound to provide for, and eſpecially this Way, by puniſhing the Inſolence of Offenders; which if they neglect to do, there is no Injury done the Criminals, but they have violated the Obligations which they owe to the Commonwealth. But it is evident, that the Peace and Safety of the Commonwealth is ſo far from being ſubverted, that it is ſometimes ſecured and eſtabliſhed by granting [2] Pardon, in proper Times and Places.

XVI. *Grotius*, Lib. ii. Chap. xx. Sect. 21, 22, ſays, That there is room for Pardon even antecedently to the penal Law; but this ought to be dexterouſly explained, otherwiſe it will appear to be but a very vulgar Thought, that where there is no Law, there is no Puniſhment, no Tranſgreſſion, or Pardon of Tranſgreſſion. And a penal Law is not only a Law, which defines the particular Sort of Puniſhment; but that Law, alſo, is a penal Law, which leaves the Determination of the Quality and Quantity of the Puniſhment to the Diſcretion of the Judge. Here therefore it muſt be obſerved, that, in Commonwealths which have no written Laws, the Laws of Nature ſerve inſtead of civil Laws, and Juſtice is adminiſtered according to them; and Perſons tranſgreſſing them are puniſhed at the Pleaſure of the Judge: but even, where the civil Laws are written, yet ſince it is impoſſible they ſhould be ſo expreſs and particular, as to compriſe all that Variety and Compaſs of Action, in which Mens Impieties may be diſcovered; it is neceſſary that Reaſon and the Law of Nature ſhould ſupply the Defects of the civil Law: and where the expreſs penal Sanction is not ſufficient, it muſt be left to the Diſcretion of the Judge to determine the Penalty [b]. And thus we may underſtand how Puniſhment came to take Place antecedently to the penal Laws [c]. But although, in ſuch Commonwealths, the Magiſtracy hath Power to inflict Puniſhment on Malefactors, yet this is no Reaſon why every Malefactor ſhould be puniſhed; but that muſt depend upon the Connexion there is between thoſe Ends for which

[a] Senec. *de Clementia*, Lib. ii. Chap. vii. *in fin. Vid.* Ciceron. *Orat. pro* Muræna, *C.* 29.

[b] *Lycurgus* contra *Leocratem*. It was not through any Overſight in the Legiſlators, that the Puniſhments for ſuch Crimes happened to be omitted; but becauſe, in the firſt Times, there were no ſuch Actions ever heard of.

[c] And from hence that Paſſage in *Cicero* may be explained, *Lib.* i. in *Verrem.* Chap. xlii. No Law takes Cognizance of the Time paſt, except it be in a Thing in its own Nature criminal and wicked, ſo that, if there were no Law in Force, it ought nevertheleſs to be abſolutely avoided.

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[1] This does not require him to offer himſelf up voluntarily to it, nor hinder him from ſeeking to avoid it as much as he can innocently. It only obliges him not to reſiſt the Magiſtrate, as has been ſhewn, in Oppoſition to our Author, on Sect. 4. preceding. This, however, makes nothing for the *Stoics*. It is ſufficient the Magiſtrate, on his Side, is not indiſpenſably bound to puniſh ſuch as have deſerved it.

[2] This is what firſt gave Riſe to the Eſtabliſhment of *Aſyla*, or certain Places, where thoſe, who had committed any Crime puniſhable by Law, found a Refuge from the Execution of it. The Uſe of them was very antient, as appears from the Law of *Moſes*; and their Protection was, at firſt, only deſigned for Perſons, either entirely innocent, or in whoſe Faults there was a greater Degree of Misfortune than Guilt. (See *Grotius* Lib. ii. Chap. xxi. Sect. 5. and *M. Le Clerc* on Numbers xxxviii.) But the Thing, in many Nations, ſoon degenerated into Abuſe, the greateſt Villains becoming thus ſcreened from Puniſhment, to the manifeſt Prejudice of the State. (See the Hiſtory of the *Academy of Inſcriptions*, &c. Tom. v. Pag. 52.) Even among the *Chriſtians*, Religion has afforded a Pretence for out-doing the *Pagans* in this Reſpect. A Cuſtom being introduced, in the Reign of *Conſtantine*, of regarding Churches as Sanctuaries, or Places of Refuge, *Theodoſius* and his Succeſſors were obliged to ſet Bounds to this Privilege, which had been extended to Perſons unworthy of it, ſuch as fraudulent Debtors, and fugitive Slaves. But neither their Laws, nor thoſe made by *Juſtinian* long after, were a ſufficient Barrier to hinder the Clergy from making uſe of this Liberty in Order to eſtabliſh their own Domination, and invade the Rights of the civil Power. The *Councils* opened a Door to all Sorts of Criminals, and ſecured them by the Thunder of Excommunication, which they darted againſt all thoſe who preſumed to take them away. The Popes did not fail to puſh, as far as poſſible, this impious and deteſtable Immunity of Places; tho' the Sanctity aſcribed to them was openly defiled by the Uſe made of them. In Proceſs of Time the Law proceeded ſo far as to extend this Protection to Highway-Men, Murtherers, and the moſt infamous Villains. See JACQUES GODEFROI on the *Theodoſian Code*. Lib. ix. Tit. xliv. and xlv. Tom. iii. Pag. 356. *& ſeq.* M. BUDDEUS *Juriſ. Hiſt. Specimen*. Sect. 15. *& ſeq.* Mr. THOMASIUS's, Note upon LANCELOT. Lib. ii. Tit. xx. Pag. 1038. *& ſeq.* M. HERTIUS's Diſſertation *De Superiorit. Territor.* Sect. 11. Another Thing, which, at preſent, maintains the Abuſe of thoſe Places, is the Privilege claimed by Ambaſſadors. See Mr. *Thomaſius*'s Diſſert. *De Jure Aſyli, Legatorum Ædibus compet.* And the Treatiſe of M. DE BYNKERSHOEK *du Juge competent des Ambaſſadeurs*, Chap. xxi.

Punishments were at first instituted, and the Punishment itself. And therefore, if, in a particular Case, those Ends, upon a moral Estimation, do not appear to be necessary; as suppose, first, it is thought most advisable, that such a particular Crime should not be divulged; or, secondly, if there be other opposite Ends of no less Utility and Necessity, as suppose, the same, or a greater Good might be obtained by omitting the Punishment; or, lastly, if the Ends proposed by punishing, may be more conveniently obtained some other Way; I can see no direct Obligation that lies upon the civil Court to inflict Punishment [a]. To instance in the first Case, we must imagine some Sin, which is not yet grown into common Acquaintance, and in consequence, the publick Impeachment and Prosecution of which will appear neither necessary, nor safe: for many Mens Obedience depends more upon their Simplicity and Ignorance [1] of Vice, than any real Love they entertain for Virtue; and the punishing such a Crime, so new and strange, would not frighten so much, as sollicit and provoke their perverse Curiosity, to make an Experiment upon it too, and to love what is forbidden them. For this Reason, it is said, [2] *Solon* instituted no Law against Parricide, that he might not seem, by forbidding it, to have put People in Mind of it. And *Busbequius* tells us, "That the *Turks* "seldom make Inquiries after secret Criminals, "for fear they should only find Occasion for "Scandal; but that every open Breach of Law "they severely punish [b]." An Instance to the second Case may be conceived in a Criminal who pleads his own, or his Parents, or his Ancestors Merits to balance his present Transgression; for it may sometimes be equally, or perhaps more beneficial to the Commonwealth, to reward a brave Action of a particular Nature, than to punish a bad one: and the Expectation of future Benefits, as well as the Memory of past, may be thought sufficient to expiate the [3] Crime, *For though what is once ill done can never be remedied, yet it may be atoned for by the brave Actions of the same Persons afterwards, and so be honourably forgotten* [c]. An Instance in the third Case may be taken from a Man who is won by good Advice to reform, makes a verbal Satisfaction to the Person injured, and giveth Security that there shall be no further Occasion of Punishments to these Ends, and that his Fault shall not be of any mischievous Influence. And then *Seneca* himself says [d], "That a wise Man will be very "ready to pardon a guilty Person, when his "Sorrow for his Fault giveth him promising "Hopes of Amendment; and when he perceives he acted not by Principle, but only "out of Rashness and Folly; nor will the Impunity so given either be dangerous to the "Person who receives, or to him who gives it." From all which, by the Way, it appears how far a Crime may be released by Composition and Agreement with the Accuser or injured Party; namely, that they may safely remit and forgive it, so far as their private Concerns are engaged in it; but that no particular Composition with them can supersede or prejudice the Right of the Commonwealth. And therefore such Agreements [4] between private Men may take away the second End of Punishment, but not the third [e]. But to this Case we may reduce those Misbehaviours which we commonly call Follies of Youth, which any Man of candid Temper is willing to pardon; since, when the Warmth

[a] V. *Gratian.* Caus xxiii. Quæst. iii. Chap. xviii, xxiv. concerning the Imposition of Punishments. *Dio. Cassius*, Lib. lii.

[b] Which is almost the same with the Counsel *Mæcenas* gave *Augustus*

[c] *Procop.* Hist. *Vandal.* Lib. ii. Chap. xvi.

[d] Seneca *de Ira*, Lib. i. Chap. xvi. Pag. 20. Edit. *Gronov.* ought to be slow in pardoning the Indignities offered to himself,

[e] *Tacitus*, Ann. iii. Chap. lxx. There was Reason why he that he might be cautious how he forgave those that injured the Publick.

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[1] This is what *Justin* says of the *Scythians*, in Opposition to the *Greeks*. See Note 3. Pag 122.

[2] This is not the Reason which *Solon* gave himself; for he only answered, "That he did not think any Body capable of commit- "ting so horrid a Crime." Ἐρωτηθεὶς διὰ τὶ κατὰ πατροκτόνυ νομὸν οὐκ ἔθηκε; διὰ τὸ ἀπελπίσαι. *Diog. Laert.* Lib. i. Sect. 59. But *Cicero* (whose Words our Author uses, without quoting him) says, "That we ought to regard the Silence of this Legislator "as a great Mark of Prudence. For he chose not to forbid a Thing of which there had been no Example; fearing, lest if he had men- "tioned the Crime, it had rather excited their Curiosity to commit it, rather than withheld Persons from it." *Is cùm interrogaretur, cur nullum supplicium constituisset in eum qui parentem necasset, respondit, se id neminem facturum putasse. Sapienter fecisse dicitur, cùm de eo nihil sanxerit, quod antea commissum non erat, ne non tam prohibere quam admonere videtur.* Orat. pro *Sext. Rosc. Amerin.* Chap. xxv. *Seneca* observes the same Thing, to confirm a judicious Reflection of his, "That too frequent Punishments only render Crimes more common, "and that it is dangerous to publish the great Number of wicked Men there is in a State." *Præterea videbis ea sæpè committi, quæ sæpè vindicantur——Summâ——prudentiâ altissimi viri & rerum naturæ peritissimi maluerunt, velut incredibile scelus, & ultra audaciam positum præterire, quàm, dum vindicant, ostendere posse fieri. Itaque parricidæ eum Lege cæperunt, & illis facinus pœna monstravit——Periculosum est, mihi crede, ostendere Civitati, quantò plures mali sint.* The Philosopher gives his Pupil a domestic Example of it. "Your Father, says he, has punished more Parricides within these five Years, than have been punished in all the preceding "Ages." *Pater tuus plures intra quinquennium culleo insuit quàm omnibus sæculis insutos accepimus.* De Clement. Lib. i. Chap. xviii. *Apuleius* has a Passage, but the Sense of which is very different from the Subject in Question. He makes a Step-Mother, who was in love with her Husband's Son, discover her Passion with this Argument: *Nam, quod nemo novit, pœne non fit.* "That which no "Body knows is as if it were not done." *Metam.* Lib. x. Pag. 211. A wicked Maxim which represents a Crime, committed in secret, as innocent.

[3] The Words which our Author here makes use of, shew that he had in View a Passage of SENECA's, quoted by GROTIUS, Sect. 22. Numb. 1. But as that great Man has manifestly cited it from his Memory (for he does not so much as mention the Treatise where it is) so he entirely changes and perverts the Thought of the *Stoick* Philosopher, in Writing *Injuriam* instead of *Injuria*: And it is surprizing, that this Oversight was not taken Notice of by GRONOVIUS, who, before his writing a Comment on *Grotius de Jure Belli & Pacis*, had published an Edition of *Seneca*. The Philosopher handles this Question, Whether we are obliged to shew any Acknowledgement of Gratitude to a Person, who, after he has been serviceable to us, does us an Injury? And he concludes, that the Injury effaces the former Service or Benefit. *Quomodo si quis scriptis nostris alios supernè imprimat versus, priores litteras non tollit, sed abscondit; sic beneficium* SUPERVENIENS INJURIA *adparere non patitur. De Benefic.* Lib. vi. Chap. vi. *in fine.* GROTIUS on the contrary, makes him say, that the Benefits efface the Injury. But this last Maxim will be better illustrated by the following Passage in CICERO, to which GRONOVIUS refers in his Notes, and where that great Orator says, in Favour of *Julius Cæsar*; *si jam violentior aliqua in re C. Cæsar fuisset, si eum magnitudo contentionis, studium Gloriæ, præstans Animus, excellens nobilitas, aliquo impulisset——maximis rebus, quas postea gessit, obliterandum. Orat.* in *Vatin.* Chap. vi. To which may be added, that Law of the Digests, that allows Pardon to a Deserter, who since his Desertion has discovered a considerable Gang of Robbers, or several other Deserters. Lib. xlix. Tit. xvi. *de re militari* Leg. v. Sect. 8.

[4] See above Lib. i. Chap. ix. Sect. 3. and M. NOODT's *Diocletianus & Maximianus*. It is, moreover, a general Rule that Agreements between private Persons are of no Force, when they are contrary to the Laws. *Privatorum conventio Juri publico non derogat.* DIGEST. Lib. i. Tit. xvii. *De diverf. Reg. juris.* Leg. xlv. Sect. 1. See, also, Leg. xxvii. and the Commentary of *Jacques Godefroi* on these Laws.

Warmth of that Age is over, Men uſually admit of more cooler and ſober Thoughts [a]. And ſo, alſo, when a Man has been injured [b], as he thinks the Injury much the leſs, if the injurious Party confeſs, that it was a raſh and inconſiderate Action; ſo in all ſuch Caſes he will be more inclined to pardon than puniſh [c]. For ſince all Sorts of Puniſhment, and eſpecially the more ſevere, ſeem to have ſomething in them, which, conſider'd in itſelf, is, though not repugnant to Juſtice, yet contrary to that Love and Affection, which ſhould be the Reſult of the common Affinity of Mankind; upon this Account Reaſon will eaſily permit the Puniſhment ſhould be ſometimes ſuperſeded. And ſo we find *Plutarch* reaſoning [d], "Why, ſays he, were the Rods and "Ax always carried tied and bound up before "the *Roman* Magiſtrates? Unleſs either to ſig-"nify to us, that their Anger ought not to be "left looſe and unconfin'd; or elſe that the ſlow "unbinding the Inſtruments of Execution might "give them Occaſion to demur and delay Sen-"tence; and, as it hath ſometimes happen'd, to "reverſe the Puniſhment, after it hath been pro-"nounc'd [e]? For ſome Vices are curable, others "are paſt Remedy; the Rods are to correct "thoſe that may be reform'd, and the Ax cuts "off what there is no Hopes of amending." For ſometimes a greater and juſter Charity forces Juſtice to inflict the Puniſhment, that the pardoning one Man might not incommode many others: For 'tis but cruel Compaſſion to ſpare one Malefactor to the Wrong and Hazard of a Number of innocent Perſons [f]. King *James*, in his *Donum Regium*, Lib. ii, gives us this Catalogue of Crimes that ought never to be pardoned; namely, *Sorcery*, *Robbery*, *Inceſt*, *Sodomy*, *Witchcraft*, *Falſifying the Coin*, *Oppreſſion*, *or publick Violence*. In theſe Caſes, I have mentioned, therefore, the *Stoics*, ſay, *A wiſe Man would ſpare, and not pardon* [g]. But 'tis a ridiculous Nicety to refuſe to call that a Pardoning with the reſt of the World, which they themſelves will have to be Sparing; and 'tis certainly beneath Men of Senſe to diſpute about Words, when the Senſe of the Thing is agreed upon.

XVII. But, after the Eſtabliſhment of the penal Law, the Difficulty ſeems to be greater, how the Delinquent can be excuſed from Puniſhment [h]. For there ſeems to be more Room left for Pardon, where the Penalty is arbitrary, than where 'tis expreſly determin'd by a Law; and that, not ſo much, becauſe 'tis expected that the Legiſlator ſhould act conformably to his own Laws; as becauſe the Authority of the Laws will be loſt, if the due Execution of them is, without good Reaſon, neglected; and becauſe the Magiſtrate himſelf would ſeem to invite others to tranſgreſs, when the Hopes of Pardon which he gives the Criminal is equal, or greater than the Fear of Puniſhment [i k]. Therefore, though the Force of human Laws depends upon the Will of Man, not only as to their Original, but, alſo, as to their Continuance; yet they ought not, but upon very urgent and weighty Reaſons, to be alter'd or repeal'd. For this would be a Breach of the Rules of Prudence in the Art of Government. *But I* don't know whether it be not a more dangerous Miſtake, without very good Reaſon, to ſuſpend the Execution of a Law ſtill in Force, for the Sake of certain Perſons; than utterly to abrogate it: Since, generally, none of the common Grievances of Men ſeem more inſupportable than this, that Perſons of equal Merit are not uſed with equal Juſtice. But notwithſtanding, as the Sovereign may, when he ſees good Reaſon for it, repeal an entire poſitive Law; ſo he has Power to ſuſpend its Effect, with Regard to certain Perſons, and certain Crimes, the Law, in other Reſpects, being ſtill in Force. The Sovereign I ſay; for ſubordinate Judges are not to make or alter Laws, but only to paſs Sentence, according to thoſe already made [l]. *Grotius*, in the Chapter before-mention'd, *Sect.* 25, 26, diſtinguiſhes the Reaſons of Pardon given after the penal Law, into intrinſick and extrinſick. The intrinſick Reaſon, according to him, is, when the Puniſhment would not be unjuſt, as being before lawfully enacted and promulg'd, but however has the Appearance of too much Severity, when ſet in Compariſon with the Fact; though I confeſs, I ſhould think, that, if the Penalty the Law enforces be in general too ſevere, it would be a wiſer Method to correct the Law itſelf, than to pardon ſome few, and leave others expos'd to the Rigour of the Puniſhment. But, undoubtedly, Judges are oblig'd, upon all Rules of Equity, if not entirely to remit, at

[a] *Juvenal*, Sat. viii. Ver. 166, *&c.*

Quædam cum prima reſecantur crimina barba. Some Faults of Courſe with Childhood end.

Vid. Ariſtot. *Rhet.* Lib. ii. Chap. iii. *init.* [b] *Vid.* Arrian. *de Expedit.* Alexand. *magn.* Lib. vii. [c] Vide *Grot.* Lib. ii. Chap. xx. § 22. [d] *Plut.* Quæſt. *Rom.* 82. [e] *Juvenal.* Sat. vi. *ver.* 220. *Nulla unquam de morte hominis cunctatio longa eſt.* [f] *Julian.* in fin. *Miſopog.* Pag. 371. Ed. *Spanheim.* 'Tis an Encouragement to the Growth of Wickedneſs, to ſhew any Favour to Thieves and Villains. *Appianus Alexand. Mithrid.* Bello, *Pag.* 250, Ed. *H. Steph.* There is nothing more ungrateful than a pardon'd Criminal. *And therefore none ought to be pardon'd, but ſuch as repent of their Wickedneſs.* [g] *Gunth. Ligurin.* Lib. i. ver. 478, *&c.*

——*Plus ſæpe nocet ſapientia Regis,*
Quam rigor: ille nocet paucis, hic incitat omnes
Deum ſe ferre ſuos ſperant impune reatus.

Exceſs of Mildneſs in indulgent Kings
More Danger than the ſtricteſt Rigour brings.
Some few, perhaps, may by Injuſtice die,
But who can any pleaſing Sin deny,
Secure of Pardon and Impunity?

Sadus Roſar. Perſ. Chap. viii. 'Tis brave and generous to forgive. But there is no Reaſon we ſhould find a Cure for his Wounds, who hath been a publick Enemy. A Man ought to think it an Injury to Mankind to let go a Serpent. To this relates what *Lepidus* ſaid in *Tacitus*, Ann. ii. when he was againſt dealing ſeverely with the fooliſh Poet; If he be pardon'd, the Commonwealth will be in no Danger by it; and if he be puniſh'd, his Example will have no Effect.

[h] *Vide* Grotius, *Lib.* ii. *Chap.* xx. *Sect.* 24. [i] See above, in Book i. Chap. vi. Sect. 17. [k] *Arnob.* Lib. vii. The Number of Criminals certainly increaſeth, according to the Hopes they have of buying off their Crimes; and Men are leſs ſcrupulous of offending, when they ſee the Favour of a Pardon is eaſily purchas'd. [l] *Lyſias* ii. Orat. xiii. Chap. iii. in *Alcibiad. Themiſtius*, Orat. ix. de Humanitate *Theodoſii*. There is a great Difference between the Power and the Duty of a Prince, and a Judge; the latter is to be directed by the Laws, the former may amend and alter them, alleviate and ſoften their Rigour and Severity; as being himſelf a Living Law, *Lib.* xl. *Tit.* ix. *Lib.* xii. *Sect.* 1. *qui, & a quibus manumiſſ.* & Lib. xlix. Tit. viii. Lib. i. Sect. 2. *D. quæ ſentent. ſine Appellat. reſcind.*

leaſt to [1] mitigate the Puniſhment, when they find, in certain particular Facts, a Concurrence of Circumſtances, which alleviate the Crime, as to the Quantity and Quality the Law ſuppoſes. In which Caſes the Fact itſelf hath the intrinſick Grounds, though not of Pardon, yet of ſome Mitigation of the Penalty adherent to it. And, therefore, I am of Opinion, 'twould be much more proper, to allow of no other but the external Cauſes of relaxing Puniſhment; ſuch as the [2] former Deſerts of the Criminal himſelf, the Merits of his Family [3], or Relations, or ſome other commendable Action or Thing; or laſtly, the Hopes that the Delinquent may make Amends for his Fault by many good Actions afterward. And therefore, *Tully* ſaith [a], *That a Man who petitions for Pardon, ſhould firſt of all put the Judges in Remembrance, what good Things he hath formerly done, and ſhew how they over-balance the Guilt of his preſent Crime; and that, in ſhort, he has been the Cauſe of more Good than Evil: And then,* ſaith he, *in the next Place, he ſhould recount the good Actions of his Family, whatever he thinks proper to be inſiſted on, and then he is to prove that he did not commit the Fact either out of Malice, or Cruelty, but out of Raſhneſs, or from ſome other Perſon's Inſtigation, or upon any other creditable or honourable Cauſe, which engag'd him in it; and after all make what Promiſes, and give what Aſſurance he is able, that the Senſe of his Crime, and the Lenity of the Judges in pardoning him, ſhall have ſuch an Influence upon him for the future, as ſhall entirely reſtrain him from ever attempting the like again.* And thus it hath been uſual to pardon ſome Criminals, upon the Deſert and Merit of their Anceſtors, or at the Requeſt of Men in Favour. 'Tis related of the Emperor *Hadrian*, that he alleviated the Puniſhment of Criminals, according to the Number of Children they had [b]. And ſome have been acquitted, becauſe they happen'd to be the laſt of noble and illuſtrious Families. *Phryne*, an *Athenian* Courtezan, when ſhe was tried for her Life, was brought off by the Art of *Lyſias* the Orator [c], who took off her upper Garment, and expos'd her naked [4] Breaſt to the Court. And *M. Antony*, the *Roman* Orator, brought off *M. Aquilius*, when he was plainly convicted of Bribery, by the like Art. For bringing him in publick View into the Court, at the Cloſe of his Defence, he open'd his Boſom, and ſhew'd the People the honourable Wounds he had receiv'd there [d]. *Polydore Virgil* relates it, as a Cuſtom which obtain'd formerly in *England*, that no Criminals, except ſuch as were convicted of Treaſon, ſuffer'd Death, but were condemned only to perpetual Impriſonment, if they could but read [e]. And theſe Reaſons will appear more ſatisfactory, if, upon Examination of the Fact, it ſeems to be particularly exempted from the Reaſon of the Law. The general Reaſon indeed, for the Obſervation of every Law, is the Authority and Will of the ſovereign Legiſlator; which, when there appears no other Reaſon, is Reaſon ſufficient; but the particular is either ſome Benefit likely to accrue to the Commonwealth, or ſome Inconvenience which may be avoided, by the Obſervation of the Law; as for Example, let us imagine ſome Place where ſumptuary Laws are in Force; the general Reaſon of theſe Laws is the Will of the Legiſlator; the particular, that the Eſtates of the private Subjects may not be waſted or ſquander'd away by extravagant and unneceſſary Charges; and in this Inſtance, though the geneal Reaſon of the Law may be enough to ſupport the Authority of it; yet, when the particular Reaſon of it ceaſes, the Puniſhment may juſtly be remitted with greater Eaſe, and leſs Diſcredit to the Authority of the Law; as for Example, in this Caſe, if we ſuppoſe the Offender in ſuch plentiful Circumſtances, as to be out of Danger of being reduced to Poverty by the Vanity and Laviſhneſs of his Expences. Rigid Governments indeed will hardly bear Neglect in the Execution of their Laws or Commands, only becauſe the particular Reaſon of them is ceas'd. As 'tis ſaid, *Cambyſes* was very well pleas'd that *Cræſus* was ſaved, but yet put the Perſons to Death that ſpared him, for their Remiſſneſs in executing his Commands. Again, it may be a reaſonable Plea for Pardon, either when a Man is intangled in a Crime through Ignorance, though perhaps not ſuch an Ignorance as wholly diſchargeth the Fault, but ſuch as might proceed from Remiſſneſs or Negligence; or if he were taken with any ſudden Weakneſs or Diſorder of Mind, which could not be eaſily prevented or overcome. Under the firſt of theſe we may place the Misfortune of *Charondas*, in *Diod. Siculus*, who came through Inadvertency with a Sword on into a publick Aſſembly, contrary to a Law he himſelf had made; and therefore I think he had no Reaſon, upon that Account, to lay violent Hands upon himſelf [f]. There is another Story in the ſame Author, of *Diocles* the *Syracuſian* [g], who inſtituted a Law, by which it

[a] Cicero, *de Invent.* Lib. ii. Chap. xxxv. *Hyperides* and not *Lyſias*, V. *Athen.* Lib. xiii.
[b] *Vide* Xiphilin. *Epit.* Dion. *Vide* Liv. *Lib.* viii. *Chap.* xxxv.
[c] The Orator was
[d] *Herodot. Thalia*, Pag. 112. Ed. *H. Steph.*
[e] *Polyd. Virg.* Hiſt. *Angl.* Lib. xxi
[f] Vide *Diodor. Sicul.* Lib. xii. Chap. xix.
[g] Lib. xiii. 33.

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[1] It is of this only *Grotius* ſpeaks. See what I have ſaid upon the Place itſelf. Lib. ii. Chap. xx. § 25. Not. 1.

[2] See what M. *Buddeus* ſays, with regard to *Manlius*, in his *Specimen Juriſpr. Hiſtor.* § 59, *& ſeq.* It will from thence appear, that the Expreſſion of *Quintilian*, in one of his Declamations, is too general; where he ſays, "That there is no Crime but what we ſhould pardon in favour of Merit:" *Qualecumque crimen donari meritis, donari virtuti.* Declam. cccx. *in fine.*

[3] *Ad beſtias damnatos, favore populi Præſes dimittere non debet: ſed ſi ejus roboris vel artificii ſint, ut dignè Populo Romano exhiberi poſſint, Principem conſulere debet,* DIGEST. Lib. xlviii. Tit. xix. *De Pœnis*, Leg. xxxi. This Law is uſually alledg'd; but it proves Nothing. For beſides, That the Caſe here relates to a Magiſtrate, who has no Power to pardon, by his own Authority, and not to a Sovereign: It ſignifies only, That the Governor of a Province ought not, without firſt conſulting the Emperor, to defer the Puniſhment of a Man condemn'd to fight with the wild Beaſts, under Pretence, that the Criminal, by his extraordinary Skill, ſhould be ſent, as a Spectacle, to the People at *Rome*. See ALCIAT. *Parerg.* Lib. ii. Chap. xxviii. and JACQUES LECT. *ad* MODESTIN. *de Pœnis.* Pag. 150. Tom. i. *Theſaur. Juriſ.* It is not then by *an Indulgence of the* Roman *Law*, as M. *Bayle* believes, after the Authors he quotes, in his *Hiſt. & Crit. Dict. Ant. Goudimel*, Let. D. That the Courts of Juſtice aſcrib'd to themſelves a Right of exempting from Puniſhment, or of mitigating it in favour of Criminals who excell'd in any Art. This Practice was introduc'd, like many others, by a falſe Explication of the Law juſt cited, and of which I have given the true Senſe.

[4] But is this a good Reaſon to exempt Perſons from the Severity of the Law? I would rather chuſe to approve the grave Reflection of P. *Maimbourg*, who ſaid, one Day in the Pulpit, *It was a great Pity, that ſuch handſome and well-ſhap'd Ladies ſhould be damned.* Defenſe de la Traduct. de Mons, v Partie.

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was made Death for any Man to be ſeen arm'd in the *Forum*, without any Allowances to be made for Inadvertency, or any other Circumſtances; and yet he, upon the News that the Enemy had made an Incurſion into his Territories, arm'd himſelf, and, hearing that there was a Sedition rais'd in the *Forum*, went thither with his Sword on; but, being told of it by a private Perſon, kill'd himſelf with it. But indeed there was no Pity due to him, becauſe in his Law he had cut off all Exceptions of Inadvertency, or any other Circumſtances of the like Nature. Neither is what has been ſaid on this Point, in the leaſt, refuted by all that tedious Diſpute of *Matthæus*, *de Criminibus ad* Lib. xlviii. Tit. xix. Chap. v. *D.* To what has been already ſaid, it muſt be added, That as the Meaſures of Puniſhment in human Judicature muſt be taken by the Advantages of the Commonwealth; ſo the ſame Rule may make it *neceſſary* to admit Criminals to Pardon upon Account of their Numbers. For tho' in general 'tis no Excuſe to plead, that there were others guilty of the ſame Crimes [a] [b], yet every wiſe Government ought to take Care that Juſtice, which is intended for the Preſervation of human Society, ſhould not prove the Ruin and Deſtruction of it.

Cautius ingentes morbos, & proxima cordi
Ulcera Pæoniæ tractat ſolertia curæ,
Parcendoque ſecat; ferro ne longius acto,
Irrevocandus eat ſectis vitalibus error.

The skilful Surgeon all his care applies,
When nigh the heart the burning ulcer lies;
With gentleſt touch he tries th' affected part,
And probes the throbbingwound with cautious art,
Nor wide th'inciſion makes, but ſpares th'unſound,
For fear the vitals ſuffer by the wound [c] [d].

And therefore 'tis a very good Character of a Prince, *Ovid* gives us, *Lib.* i. *de Ponto* [e], that *He reforms more Vices by threatening Puniſhment, than by Puniſhment itſelf.* Beſides, 'tis frequently neceſſary either to ſoften the Rigour of ſome Laws, or elſe ſuffer them to grow out of uſe. So *Tacitus* ſaith, *Ann.* l. iii. [f], "That it was propos'd "to reform the Law called *Papia Poppæa*, be- "cauſe the Number of Perſons obnoxious in- "creas'd, and every Family lay at Mercy, ready to be ruin'd upon the Suggeſtion of the "Informers; and becauſe, *as he ſaith afterwards*, "the Informers had advanced themſelves ſo far, "that they had prevail'd not only in the City, "but, alſo, over all *Italy*, and over every Citizen "they could find any where elſe; ſo that many "were already ruin'd, and almoſt every one was "under the ſame Apprehenſions." And thus, *Tiberius*, in his Letter to the Senate [g], tells them that he thought it a more proper Method *to paſs by the head-ſtrong over-grown Vices, than, by attempting to correct them, to diſcover only what Crimes they had not Strength enough to maſter*; that it would be beſt *to reform them firſt in themſelves*, and then to be content *to wait till Shame had corrected them in the Nobility, Neceſſity in the Poor, and the Rich would grow weary of them.* For Men were not made for Puniſhment, but Puniſhment for Men. And therefore, if they who have the Right to inflict Puniſhment are under Apprehenſions of imminent Danger upon the Infliction of it, they can be no more oblig'd to puniſh, than a Man is to lay violent Hands upon himſelf. In a Ship, if a Pilot ſhould commit a Crime, when no Body but he underſtands the Management of the Veſſel, 'tis plain that the Man who would do Juſtice upon him muſt unavoidably ſhipwreck himſelf, and all the reſt of the Paſſengers. And ſo, alſo, the Magiſtrate may lawfully wink at ſome Crimes, the Puniſhment of which would be of dangerous Conſequence to the Commonwealth; and eſpecially, when the Perſons guilty are neceſſary to the common Safety and Preſervation. Though the Magiſtrate ought never to make any direct Agreement for the Permiſſion of Vice, much leſs make publick Gain by it [h]. In *Italy* Pardons are ſometimes publickly promis'd to any of the *Banditti*, that ſhall bring with him the Head of another of the ſame Gang. (Tho' *Harry Stephens* [i] ſeems to have diſapproved that Cuſtom, and ſays, that the Reaſon of it might appear agreeable enough in an *Ariſtotle* or a *Plato*, but could never become a Chriſtian.) Upon ſuch a Promiſe that the Villains might have a Jealouſy of one another, and be hinder'd from uniting into Bodies, and from doing ſo much Miſchief as otherwiſe to the Commonwealth. (Sir [1] *Thomas Moor* was of a contrary Opinion in his *Utop.* Lib. ii.)

[a] *Vide* Iſocrat. *laudat.* Buſirid. *circa fin.* Page 397. [b] *Quæ ſit auctoritas ejus, qui ſe alterius facto, non ſuo, defendat?* Cic. *Orat. in* Vatin. *Chap.* vi. *Pag.* 243. *Ed.* Græv. [c] Claudianus *de Bello* Getico, *ver.* 138, *&c.* [d] Lucanus *Pharſal.* Lib. ii. ver. 141, *&c.*

——— Dumq; nimis jam putrida membra recidit,
Exceſſit medicina modum, nimiumque ſecuta eſt,
Qua morbi duxere, manus: pericre nocentes,
Sed cum jam ſoli poſſent ſupereſſe nocentes.

While he, the Sound, freed from th'infected Part,
With Diligence ſevere, and barbarous Art,
The weaken'd Body ſank beneath the Smart.
The Guilty only were of Life depriv'd,
But when the Guilty only had ſurviv'd.

Tot ſimul infeſto juvenes occumbere leto,
Sæpe fames, pelagiq; furor, ſubitæq; ruinæ,
Aut cæli terræq; lues, aut bellica clades
*Nunquam Pœna fuit.———*lb. ver. 198.

In Plagues and Famines, and relentleſs Seas,
By Earthquakes, and by common Enemies,
Rome, oft her nobleſt Lives in Numbers ſpent:
But ne'er before gave up to Puniſhment.

Senec. *de Ira*, Lib. ii. Chap. x. There is a Neceſſity of Pardon when the whole Army deſerts. [e] Epiſt. ii. ver. 127. *Multa metu pœna, pœna qui pauca, coercet.* [f] Chap. xxv. 28. [g] Tacit. *Ann.* Lib. iii. Chap. liv.

[h] See 2 *Pet.* ii. 15. One might here put the Queſtion, Whether Magiſtrates may hire and command private Perſons, to turn Informers, as was practis'd by the antient *Romans*, at leaſt in Reference to ſome Sorts of Crimes? Conſult *Huber. de Jure Civil.* Lib. iii. Sect. ii. Chap. iv. Sect. 27. and Mr. *Hertius*'s Diſſertation, *de Hærede occiſi vindice*, Chap. iv. Sect. 3. in the third Tome of the Collection, publiſh'd in 1700. [i] Apolog. pro *Herodot.* Chap. xviii.

[1] I find nothing like it in all that ingenious Work. Mr. *Hertius*, alſo, approves the Conduct of the *Venetians*, in order to diſcover thoſe who attempted to aſſaſſinate F. *Paul.* They not only promiſed a large Sum to the Perſon who ſhould deliver them up, alive or dead, but, alſo, that he might demand the Liberty and Pardon of two Perſons condemn'd for other Crimes.

XVIII. I ſhall in the next Place enquire into the Method of rating Penalties, or what Meaſure of Puniſhment it is reaſonable to allot to particular Crimes. And here, beſides what I have before [a] ſaid concerning the Quantity of Actions, 'tis obvious to obſerve, that in civil Courts the Meaſures of criminal Actions are taken chiefly, firſt, from the Object they are concern'd in: And ſecondly, as their Malignity doth more or leſs Harm to the Commonwealth; and thirdly, from the Intention and Malice of the Delinquent, which may be diſcovered by Variety of Circumſtances. The greater therefore and more noble the Object injured is, the greater and more criminal is the Fact eſteem'd. As therefore, as, of all Objects, GOD Almighty is the greateſt and moſt excellent, ſo any Action which tends to his Diſhonour, is, of all others, the moſt wicked and deteſtable. And as the Obedience and Reverence due to him, which conſiſts chiefly in the Actions of our Minds, ought to influence and govern our whole Lives; ſo (as he himſelf has diſcover'd his Pleaſure) thoſe Actions by which we expreſs our external Reverence to him may be ſuperſeded, when they come in Competition with thoſe, which deſign any extraordinary Benefit to Mankind, or to avert any great Evil from them, where there is Danger in the Delay. *Luke* xiv. ver. 5. The Actions next in Remove from theſe, are ſuch as affect the whole Body of Mankind; and then ſuch as diſturb the publick Order of the Commonwealth. Afterwards follow thoſe criminal Actions, that affect only particular Men; and, under this Rank, the civil Court ſets thoſe foremoſt, which ſtrike at Life, the Foundation of all our temporal Happineſs; and next ſuch as concern the Members, not vital, but without which Life itſelf would be an uneaſy Burthen; and which are to be valued according to the Dignity of their Uſe [b]. The next Claſs of criminal Actions are thoſe, that diſorder the Quiet and Honour of private Families; the Foundation of which is Matrimony, (though *Philo* the *Jew*, in his Book *de Decalogo & de Special. Leg.* places the Command againſt Adultery, before that againſt Murther) and in the next Place we may rank thoſe who rob us of, or deny us thoſe Bleſſings, which make up the Neceſſaries and Conveniencies of Life; and that either directly or indirectly, by depriving us of them out of wicked Deſign. And in the laſt Place, we may reckon ſuch as deprive us of our Reputation or civil Character and Eſteem. In the Particulars of theſe Crimes, ſuch are of the firſt Rank, which have reach'd to the greateſt Height of a conſummate Perpetration. The Inferior are thoſe that terminate in ſome Acts, and are not arrived at their full Growth. And in theſe the Degrees of Malignity differ according to the Pitch they have arrived at. And here we may obſerve, that, naturally, a Deſign and Inclination to tranſgreſs, in any particular Act, muſt not be conſider'd under the ſame Degree of Enormity, with the Fact itſelf actually finiſhed; becauſe Evil preſents itſelf to the Mind under more odious and diſagreeable Colours, when we come to cloſe with the Commiſſion of it; and, conſequently, a Man muſt have greater Obſtinacy and Reſolution to overcome it, than when it lies, as it were, at a Diſtance, and he hath but newly entertain'd the Thoughts of the Attempt. When therefore we ſay the *Will is the ſame with the Deed*, we muſt underſtand, that this is meant only of ſuch an Act of the Will which is united with the utmoſt Endeavour, ſo that no new Operation of the Will intervene between this and the Event of the Crime, though the Succeſs of the Action fail; as ſuppoſe a Man takes Aim at another to ſhoot him, tho' he ſhould miſs his Mark [c]. And therefore Sir *Thomas Moor*, Eutop. *Lib.* ii, ſaith, "That there is no leſs Danger in having attempted any one's Chaſtity, than in having actually violated it. For in every criminal Action a ſettled and determinate Endeavour is equal to the Deed. For 'tis not reaſonable, that that Man ſhould have any Allowance made him for what was wanting to the Completion of his Action; ſince 'twas far enough from his Intent that any ſuch Defect ſhould happen." But the Generality of ſuch kind of Evils are rated higher or lower, according to the Diſparity of the Subjects they happen to light upon, as to their State and Condition, Happineſs or Infelicity, Age, Time, or Neceſſity, or any particular Paſſion or Affection, that might byaſs to ſome particular Good, or give an Averſion to ſome Species of Evil. Neither muſt we only barely conſider, what are the direct and immediate Conſequences of any Action, but, alſo, what elſe may probably enſue; as in Fire, and Inundations, the Miſeries and Deaths of a Number of unfortunate People, are always to be conſider'd [d]: And therefore the *Chineſe* make it Death, for any Man to be the Occaſion of the breaking out of Fire, tho' it were only by his Neglect.

XIX. The Intenſeneſs or Remiſſneſs of the Will and Inclination are to be meaſured principally by the Cauſes and Motives, which engage Men in Sin [e]. There is hardly any Man wicked without Cauſe or Deſign [f]; for if a Man be in Love with Vice, purely for its own Sake, and ſin only out of Vanity and Affectation, or *has no other Reaſon to give for his Vices, than that they are unaccountable and incredible* [g], he muſt certainly be arrived at the higheſt Pitch 'tis poſſible for human Impiety and Impudence to reach. And, therefore, *we never find any Malefactor ſo confident, but he will either deny the Fact, or pretend ſome plauſible Reaſon for Excuſe, and endeavour it from ſome Pretence of Nature* [h]. 'Tis certain, the greateſt Part of the World are perſuaded into Sin by their Paſſions. Some of theſe preſs us with a Sort of Violence, to eſcape preſent or imminent Evil. And 'tis reaſonable theſe ſhould be allowed to excuſe or extenuate the Crime

[a] Book i. Chap. viii. [b] See *Grotius*, Book ii. Chap. xx. Sect. 30. [c] See, hereafter, in Sect. 27, towards the End.
[d] Vide *Grot.* d. l. Lib. ii. Chap. xix. [e] Vide *Grot.* d. l. § 29. [f] Vide *Senec.* de Benef. Lib. iv. Chap. xvii. V. Auctor. ad *Herennium*.
[g] *Calpurn. Flaccus*, Declam. ii. Princip. [h] *Cicer.* de LL. Lib. i. Chap. xiv.

[i] It was upon this Foundation, that *Thales*, one of the Wiſe-men of *Greece*, ſaid, *That Perjury was a greater and more odious Crime than Adultery.* Πρὸς τὸν μοιχὸν, ἐρόμενον εἰ ὀμόσει μὴ μεμοιχευκέναι, Οὐ χεῖρον, ἔφη, μοιχείας ἐπιορκία. *Diog. Laërt.* Lib. i. Sect. 36. *Edit. Amſterd.*

And therefore ſuch Crimes as are the Effects of the Fear of Death, Impriſonment, or any great Diſcontent, Pain, or Paſſion, or of extreme Poverty, are always look'd upon to be excuſable. The wiſe *Hebrew* pronounces, That the Thief, whoſe mean Circumſtances tempt him to ſteal, is a more excuſable Criminal than the Adulterer. So Theft, in Caſe of Hunger, is a leſs Crime, than the ſame, when it is the Effect of unmeaſurable Avarice; and Perjury, upon Fear of Death, is more excuſable, than only upon the View of Gain, or to betray a Truſt. And thus, as the Author *ad Herennium* ſpeaks, Book ii [a]. *'Tis a greater Crime to debauch a Woman of Quality, than commit Sacrilege; becauſe 'tis poſſible Extremity may force a Man upon the one, but the other can be the Effect only of ungovernable Luſt* [b]. And therefore Bawds who live by encouraging and ſupplying the Luſts of others, deſerve more ſevere [1] Puniſhment, than any Man who purſues only his own Pleaſure. It is the Opinion of the Emperor *Antoninus* [c], That thoſe Crimes which Anger gives Occaſion to, are more excuſable than thoſe that ariſe from Luſt. *For*, ſaith he, *a Man who yields to the Paſſion of Anger, ſeems to break with the Laws of Reaſon, with ſome Regret and ſevere Reluctance of Mind; but one who ſins in Complaiſance to his Luſts, gives himſelf up to Pleaſure, and therefore is more intemperate, as well as more ſoft and effeminate in his Compliance.* And as another obſerves [d], *Anger has a much ſtronger and a more violent Influence upon us, than Love; for that gives us Time to deliberate and conſider with ourſelves; but Anger raiſes ſuch Storms in Mens Breaſts, as hurry them beſides themſelves, and is never quiet till it is ſatisfied.* The Byaſs of the other Paſſions inclines Men either to ſome real or imaginary Good; the Things that are really good, can have no natural Tendency in them to tempt us into Sin; ſuch as are all kind of Virtues, and the Actions which flow from them. Other Things may indeed be good in themſelves, but may be, alſo, Inducements to Sin, according to the Diſpoſition of the Man's Mind, who is in Poſſeſſion of them. Of this Kind, ſome are pleaſing and delightful; others inſtrumental only in the Procurement of Delights, which are ſuch as we call uſeful. Now every Crime committed in Purſuit of any of theſe Things, is (*cæteris paribus*) look'd upon to be more excuſable, the more that Good which was in View, appears to be agreeable to Nature, or the more uneaſy Men are without it [2]. The imaginary good Things are ſuch as Men owe the Credit and Value of, either to their Folly, their Vanity, or their Vices; among theſe, we may rank Vain-glory, or an Opinion of more than common Worth, neither grounded upon Virtue, nor with any Mixture of real Profit join'd to it; as, alſo, Revenge, as it propoſes to itſelf nothing elſe but the Harm of the injurious Perſon. And the leſs of Nature there is in Theft, and the eaſier it is for a Man to be without them, the more criminal are thoſe Actions judg'd that flow from the Purſuit of them [e]. It is, alſo, certain, that all Crimes which are the Reſult of clear and diſtinct Knowledge, are greater than thoſe which ariſe from Error and Miſtake; and that thoſe Errors are more dangerous and criminal, which a Man runs into through an obſtinate Purſuit of his own Principles, and falſe Reaſon, than thoſe which he imbibes from publick Teachers. And it is, alſo, well obſerv'd by *Hobbes, Leviath.* Chap. xxvii. *That the ſame Fact committed upon a Preſumption of Power, Friends, or Riches, by the Aſſiſtance of which the Offender hopes to reſiſt the publick Miniſters of Juſtice, is a greater Crime than when it proceeds from Hopes of not being diſcovered, or eſcaping by Flight; for the one is an open Contempt of the Law, the other not* [f]. And therefore *Ariſtotle* ſaith [g], "Such as deny and "perſiſt in their Crimes, are puniſh'd with more "Severity; but ſuch as think themſelves juſtly "dealt with, deſerve to be us'd with Gentleneſs "and Lenity; and the Reaſon is plain, becauſe "'tis Impudence to deny what is plainly prov'd; "and Impudence is Contempt and wilful Oppoſition." *And upon this View* (*ſays* Seneca [h]) *a wiſe Man will ſometimes pardon a great Crime eaſier than a leſs, if he finds that it was the Effect rather of Weakneſs and Infirmity, than of Rancour and Malice; and that this is the Product of a cloſe, deſigning, inveterate Craft. Neither will he puniſh the ſame Crime after the ſame Manner, in different Offenders, when what the one committed through Indiſcretion and Negligence, the other did induſtriouſly and deliberately.*

XX. Another Argument of the great Force and Violence of the Inclination and Intention, is, when beſides the common Reaſons that ought to be ſufficient to reſtrain a Man from Sin, there happen to be other particular Reaſons founded either in the Perſon of the Delinquent, or in the Perſon of him who was injured in the Fact, or in any other Circumſtances. Thus, as *Juvenal* ſaith [i],

[a] *Chap.* xxx. towards the End. See hereafter, Sect. 21, towards the End. [b] Add. *Val. Max.* Lib. viii. Chap. i. in fin. [c] Lib. ii. Chap. x. [d] *Libanius*, Declam. xxiii. [e] *Grot.* d. l. § 29. [f] Add. *Ariſtot.* Rhet. Lib. i. Chap. xii. & xiv. [g] Rhet. Lib. ii. Chap. iii. [h] *Senec.* de Irâ, Lib. i. Chap. xvi. [i] Sat. viii. ver. 140, 141. *Dio Chryſoſt.* Orat. i. de Regno, *Pag.* 9. *C.* Any Vice in a Prince is more heinous, and more in View. *And to this Senſe we may apply that of* Pliny, *Nat. Hiſt.* Lib. v. Chap. i. Men are never more credulous and eaſy of Belief, than when any Falſity is promoted under the Authority of a great Man.

[1] This Example is related in Sect. xxi, where it is ſaid, That Actions committed in cold Blood, are more enormous than thoſe to which we are driven by violent Paſſion.

[2] 'Tis upon this Account, that there are ſome Crimes which appear little in themſelves, and which indeed are ſo, as they relate to a Thing of ſmall Value; which nevertheleſs are more heinous, when conſidered in Reference to the Diſpoſition of him who committed 'em, than if they related to a Thing of greater Value. Thus an antient Orator, in his Accuſation againſt a Man, ſtrenuouſly inſiſted upon his Baſeneſs of having defrauded of three Farthings certain poor Workmen employ'd in building a Chapel, over whom he was appointed as their Pay-Maſter. ARISTOTLE obſerves (Lib. i. Chap. xiv. Pag. 244, *Edit. Victor.*) upon this Occaſion, that it is quite the contrary in good Actions; that is to ſay, that a Man, for Example, who returns a large Sum of Money that has been depoſited in his Hands, is more commendable, than if the Charge was leſs conſiderable: Becauſe that demonſtrates a larger Stock of Honeſty, as the Proſpect of a ſmall Gain, that is capable of inducing a Perſon to commit a Crime, diſcovers in him a larger Share of Wickedneſs, than if he had been tempted to it by the Allurement of greater Gain. What is not he capable of, ſays the Philoſopher, who has the Courage to ſteal ſo ſmall a Thing?

Omne

Omne animi vitium tanto conſpectius in ſe
Crimen habet, quanto major qui peccat habetur.

------More publick Scandal Vice attends,
As he is great and noble, who offends.

And thus the ſame Sort of Sin, committed by a Churchman, is look'd upon to be a greater Fault than by any one elſe, becauſe 'tis expected he ſhould be a Pattern of a pious and unblameable Life to others: *For a Man who neglects himſelf, what he perſuades others to do, confutes his own Counſel by his Practice; for the Force of his Example by which he diſſuades, is much ſtronger than all the Arguments by which he would convince* [a]. *Tully* ſaith, "the Guilt there is in the Vices of a "Prince, is not ſo much to be conſider'd (tho' "that too may be great enough) as the Conſe-"quences which attend them, that there will be "always great Numbers ready to imitate them; "and therefore Princes of bad Morals deſerve "very ill of the Commonwealth; not only as "they are vicious themſelves, but as they ſpread "and propagate Vice: Not only as they are "wicked themſelves, but as they do more Harm "by their Example than by their Sin [b]." Thus *Tacitus* [c] ſaith of *Capito*, *That he was the more remarkably ſcandalous, becauſe, being ſo great a Maſter in the Knowledge of human and divine Laws, he had forfeited his publick Character, and diſgraced his own private Skill.* And *Tully* ſaith in another Place [d], "As it would be unpardon-"able in a Man who profeſs'd himſelf a Gram-"marian, to ſpeak improperly, or in one who "profeſs'd to have Skill in Singing, to ſhew none "in the Practice of it; becauſe theſe are Faults "in the Arts they pretend to: So a Philoſopher "who is guilty of Misbehaviour in the Conduct "of Life, is the moſt inexcuſable; becauſe he "is deficient in thoſe Duties he affects to be "thought a Maſter of; and commits Miſtakes "in the Art of Life, which he profeſſeth [e]." In *Peru*, under the Empire of the *Ynca*'s, a Magiſtrate found guilty of any Crime was puniſh'd with greater Severity, than any private Offender: For this Reaſon, that he was expreſly preferr'd to the Adminiſtration of Juſtice, and plac'd in an Office of Truſt, upon the Preſumption that he was a Man of more than common Probity and Goodneſs [f]. Upon this Account the Injuries of a Friend affect us more, than thoſe of an Enemy [g]. And, on the other Side, a Benefit conferr'd by an Enemy is more pleaſing, and more valued, than the Kindneſs of a Friend: Notwithſtanding what *Terence* ſaith, *That when a Man ſtands in Need of a good Turn, he is glad to receive it at any Hand; but 'tis a double Pleaſure to receive it from one he has Reaſon to expect it from* [h]. For the ſame Reaſon, an Affront from a Man of mean Circumſtances is more inſupportable, than from an Equal or Superior [i]: Or from a Man's own Children or Servants, than from another's. There are, alſo, ſome particular Crimes, which are branded with particular Infamy, as conſiſting in the Violation of ſuch Acts of Duty, which Men are obliged to pay to certain particular Perſons [k], and are therefore judg'd to be more highly wicked; ſuch as Diſobedience to Parents [l], Inhumanity, and Rudeneſs to Relations, Ingratitude to Benefactors; which are look'd upon to be more heinous, than if they terminated in any other Perſons [m]. In fine, 'tis a material Aggravation, to conſider the Time, and Place, when, and where the Fact was committed. And thus the ſame Crime committed in a publick Place, before Witneſſes, is greater, than when a Man endeavours to conceal it; becauſe, what is acted with the Advantage of Secreſy, at leaſt, gives leſs Scandal; and becauſe 'tis a ſtrong Preſumption, that that Man is a bold and harden'd Offender, who has the Impudence to out-face the World, and to ſin, as it were, in Defiance to all the good and ſober Part of Mankind [n]. Thus it is a greater Sin, to be guilty of unchaſte Actions in a Church, than in a Tavern; to ſtrike in the Court, than in a private Houſe; and to be guilty of Intemperance on an ordinary Day, *cæteris paribus*, is more excuſable, than on Days ſet aſide for Devotion [o]. Thus *Cicero* ſecretly aggravates *Anthony*'s Crime, for coming into the Court ſo diſorder'd with Wine, as to be forc'd to vomit while he ſate on the Bench [*]. Thus the Declaimer ſaith [†], "That though Rudeneſs "in any other Place may perhaps be excuſable, "yet in the Temple, where we ſet guard upon "our Words, where we compoſe our Souls "and confine even our Thoughts, to offer an "Injury or Affront there, with the ſame Bold-"neſs, as in an unfrequented, private Place,

[a] *Libanius*, Declam. xxix. [b] *Cicer.* de LL. Lib. iii. Chap. xiv. *Senec. Hercul. Fur.* ver. 745, 746. The Crimes of Princes are of deeper Stains. [c] Annal. iii. 70. [d] *Tuſc. Quæſt.* Lib. ii. Chap. iv. [e] *Quintil.* Declam. iii. Pag. 38. 'Tis the Misfortune of Superiors to be thought to command others, what they do themſelves: And Evil is always moſt pernicious when the Author of it is Great and Powerful. [f] Garcilaſſ. *de la Vega, Com. Reg.* Lib. ii. Chap. xv. [g] *Petron.* One who offers Violence to a Stranger is a Villain, but a Man that injures his Friend is little leſs than a Parricide. *Among the* Celtæ, *according to* Nic. Damaſcenus, de Moribus Gentium, *a Man who kill'd a Foreigner was puniſh'd not ſeverely, than if he had kill'd a Subject. The Puniſhment of the firſt was Death, of the ſecond, only Baniſhment.* [h] *Terent. Adelph.* Act ii. Sc. iii. ver. 1, 2. But the Queſtion here relates only to the Pleaſure which an Obligation gives to the Perſon who receives it; and not to the Value or Degree of the Obligation, conſider'd in itſelf. This is *Terence*'s Thought. It is certain, on the contrary, That a Benefit receiv'd from an Enemy, is frequently diſagreeable; becauſe we are uneaſy to ſee ourſelves reduc'd to the Neceſſity of being oblig'd to thoſe we do not love: For it is rare to ſee People diſarm'd by the Generoſity of their Enemy, ſo far as to be ſincerely reconcil'd to him. See a remarkable Inſtance of this in an *Engliſh* Gentleman, mention'd by Mr. *Locke*, in an imperfect Memoir, relating to Sir *Anthony Aſhly Cooper*, afterwards Earl of *Shaftſbury*. See M. *Le Clerc*'s *Biblioth. Choiſie*, Tom. vii. Pag. 160 & 161. [i] Vide Lib. xlvii. Tit. x. L. 17. § 3. *D. de Injur.* [k] *D. ubi ſupra*, Lib. vii. § 8. [l] Vide *Gret.* Lib. ii. Chap. xx. § 30. & 2 *Sam.* Chap. xvi. ver. 11. [m] *To this Purpoſe is that Paſſage in* Lyſias, *ſpeaking to the* Athenians, *Orat. in.* contra *Andocid.* Chap. vi. Ye ought to ſhew yourſelves more ſevere to your own Subjects, when they profane the Rites of your Religion, than to Foreigners; becauſe the Crime, as thoſe commit it, ſeems to come from Abroad; in your own People 'tis Native and Inteſtine. [n] Vide *Ariſtot.* Probl. § 29, q. 14. Vide D. *De injuriis*, Lib. vii. § 8. [o] *Ibid.* Lib. ix. § 1. D. *de Injuriis*, &c. [*] *Cicer.* Orat. *Philip.* ii. Chap. xxv. [†] *Quintil.* Declam. cclii. If any Injury be done to the Magiſtrate, it is an Act of Hoſtility againſt this State; if to an Ambaſſador, Satisfaction muſt be demanded by War, and the Laws of Nations. The ſame Sum of Money taken from a private Man, is Theft; from the Altar, or Temple, Sacrilege. And ſo one who violates another's Chaſtity, ſhall pay, to the Party demanding barely Satisfaction for Virginity, ten thouſand Seſterces; but one that hath been publickly guilty of the ſame Crime, and raviſh'd a Candidate to the Prieſthood, muſt not be allow'd the ſame Terms. *Quintil.* Decl. cclxiv. Add. *Inſtit. Orat.* Lib. vi. Chap. i.

" is insufferable [a]." Lastly, The Methods and the Instruments used in the Commission of the Fact, seem to be accessory to the Aggravation or Extenuation of the Crime; because 'tis usual to infer from them the Force or Weakness of the Intention. And therefore 'tis a greater Crime to rob a Man of his Goods, by forcing his House, by digging through his Walls, or artificially picking his Locks, than by going in boldly at an open Door.

XXI. Another Thing which aggravates or extenuates the Crime, is the Power or Ability the Person was Master of, to forbear the Fact [b]. For some Men have clearer and more lively Apprehensions of the Reasons, why they should decline ill Acts, than others. And some have stronger Propensities than others to some particular Sorts of Sins, which may be accounted for, either by the particular Mixture and Constitution of the Body; or else by the Age, Sex, Education, or other Circumstances [c]. For 'tis easy to observe, that young People, Women, and Men of grosser natural Parts, or that have had no Advantages of Education, do not so accurately distinguish between just and unjust, lawful and unlawful; and know very little of the Measures of them, or how to weigh and consider them [d]. In Persons where Choler is the prevailing Humour in the Body, Anger is the governing Passion; others, of more and warmer Blood, are easily inclined to Lust: Age turns our Desires one Way, and Youth another [e]. Again, the nigher any Evil seems to threaten, the stronger is the Fear it causes, and the more difficult it is to resist it. A fresh Resentment strikes us with more Violence, than that which hath been cool'd by Interval of Time. And though Grief and Discontent will not always be silenc'd at first by Reason, yet they have not the same Excuse, when they had Time to be composed and quieted. In general, it is more criminal to go [f] sedately and calmly to commit Sin, than in a Disorder and Disturbance of Passion [f]. And therefore *Aristotle* says, *That every Man must think him less excusable, who engages in a bad Action upon weak Temptations, than one, who is guilty of the same, upon the violent Persuasions of strong Passions. And that when a Man strikes in cold Blood, he is more criminal, than if he were angry; for how far would such a one proceed,* saith he, *if he were heated into a Passion?* It was *Pittacus*'s Law indeed [g], *That such as abus'd others in their Wine, should pay double the Sum they should do, if they had been sober*: " For since People in that Condition (saith *Aristotle*) are generally inclined to be more abusive " than others, the Law doth not so much regard " the Pardon which ought rather to be allow'd to " Men in the Disorders of Drink, as the public Good [h]." But the Crimes that arise from Passions are look'd upon to be no less odious, when they are the Effects of a Passion alarm'd and rouz'd in us at the Appearance of Evil; and such as arise from an Appetite or eager Pursuit after Pleasures, especially the more needless ones, to be more criminal. For Pleasure doth not affect us so sensibly, and may be easier delay'd, or satisfied more innocently some other Way without Guilt. And (*Aristotle* saith) therefore, *That 'tis a greater Uneasiness to bear Pain of any Sort, than to deny Pleasure. For* (saith he in another Place) *Pain distracts and weakens Nature in the Person who suffers it; but Pleasure hath a different Effect, and offers itself fairer to our Choice, and therefore ought to be thought more criminal and opprobrious* [i]. Lastly, Another Motive to alleviate the Penalty, is when a Man's Friends and Relations persuade him to transgress the Laws [k].

XXII. 'Tis, also, usually considered, whether the Malefactor were himself the first of the Kind, or were seduced by the Examples of others; whether this be the first Time he is found guilty, or whether he be an old Offender. For, in every Commonwealth, the first Man who has the Boldness to commit a Crime, which is like to be of ill Example, and which he does in a Manner inform others in, is more highly criminal, than another that has been encouraged by frequent Precedents in the like Crime before [l]. Again, the same Fact, if it hath been constantly punish'd in other Men, is a greater Crime, than if there have been frequent Instances of Impunity; because the first is greater Contempt of the Go-

[a] *Demosthen.* adv. *Midiam.* I was abused by my Enemy in cold Blood, in the Morning, out of Malice, not upon any Heat of Wine; publickly, before Strangers, as well as Citizens, and that in the Temple, whither I was obliged to go by the Duty of my Office. [b] Vide *Gros.* Lib. ii. Chap. xx. § 31. [c] Vide Lib. xlviii. Tit. xiii. L. 6. D. ad *L. Juliam peculatus*, &c. *in Princip.* [d] *Procop.* Hist. *Vandal. Lib.* ii. Chap. xiv. As it is very unusual, so it would be the more commendable, for the Son to lay aside that Fallenness and Violence of Temper which run through the Family, and to take up a contrary Coolness and Probity. [e] *Giraldus.* Hist. *Gall.* Lib xiii. Young People seldom trouble themselves to be Wise, because they look upon it to be their Privilege to do what they please. *Libanius* Decl. xxi. Pag. 531. C. D Ed. *Paris.* It borders very much upon Youth, to neglect the Obligation of Duty, and to be ignorant of what is Just and Honourable. *Ibid.* In all Nations their Age is made the Excuse for young People. [f] *Cic. Off.* Lib. i. Chap. viii Those Faults which are the Effects of any sudden Commotion, are more excusable than such as are premeditated and designed. *Philo Jud. de Specialibus Legib.* Pag. 791. B. Edit. *Paris.* says, That it is an imperfect Crime which is not the Effect of much Deliberation, *Plato* de LL. Lib. ix. Pag. 931. C. Ed. *Wech.* They who kill a Man upon propense Malice, are to be punish'd more severely, than such as are guilty of Manslaughter only out of a sudden Rashness. [g] *Arist.* Polit. Lib. ii. Chap. xii. [h] *This Law is also mention'd by* Plutarch *in* Conviv. vii. Sapient. Pag. 155. F. [i] *Arist. Nicom.* Lib. vii. Chap. viii. The Intemperance of Anger is less criminal than that of Lust. *Id. Magn. Moral.* Lib. iii. Chap. vi. A violent Inclination for Pleasure is much more faulty than any Excess of Anger. For Anger is a very restless uneasy Passion, and every one who is under the Power of it, finds himself discomposed. But the Incontinence that ariseth from the concupiscible Appetites is attended with Pleasure, and therefore is less excusable, because it seems to be the Effect of Wantonness and Effeminacy. There is a Passage like this, in *Marcus Antoninus*, Lib. ii. Sect. 10. Add. *Aristot* Probl. Sect. 29. Q. 16. [k] *Vide* Lib. xlvii. Tit. xvi L. 2. D. *de receptator.* Ad. *Grotius*, d. l. § 29. [l] *Velleius Paterc.* Lib ii. Chap iii. Precedents seldom stop where they begin, but, if allowed never so little Liberty, will soon make Way for themselves to break out farther. Vide *Gell.* Lib. x. Chap xix. Polyb. *excerpt. leget.* xciii. Chap. v.

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[1] See M. NOODT's *Probabilia Juris*, Lib. iv. Chap. vii, viii, ix. where we shall find many curious Things, with Regard to the Decisions of the *Roman* Law, upon this Subject.

[2] Καὶ ὁ μόνος, ἢ πρῶτος, μετ' ὀλίγων πεποίηκεν· καὶ τὸ πολλάκις τὸ αὐτὸ ἁμαρτάνειν, μέγα. " It is the Circumstances " which aggravate the Crime. Such as to know, whether the Criminal is the only one, or the first who has committed it? Whether " he has had few or many Accomplices? Or whether he has been often guilty of it? *Aristot. Rhetor.* Lib. i Chap. xiv. And *Quintilian* says, *Et [infame est] si quod est exemplum deforme posteris traditum, quale libidinis vir Persis in muliere Samia instituere ausus dicitur primus.* Instit. Orat. Lib. iii. Chap. vii. Pag. 270. *Edit. Burn.* In this last Passage the Orator speaks of a new Kind of Wickedness invented by a *Persian*. The Commentators have not been able to explain what it was; and it is better to be ignorant of it, for the very Reason which oblig'd him to give it as an Example.

vernment and Laws, than the latter. But the more or leſs frequent Repetition of the ſame Action doth not make it in itſelf better or worſe, any farther than as it diſcovers it to proceed from inveterate Cuſtom or Habit [a]. And ſince Regard is principally had to the Frequency of the Repetition, in the making an Eſtimate of moral Actions (ſince from thence 'tis uſual to meaſure the Force of a Man's Reſolution; and therefore it is commonly ſaid, that ill Habits are worſe than ill Acts) it ſufficiently appears why a good Action, which a Man has frequently repeated, is look'd upon to be better than one he has but newly begun, or very ſeldom practiſed: And, on the other Hand, why a bad Action often reiterated, is judg'd a greater Crime, than one the ſame Perſon has but once or twice been found guilty of [b]. To this Purpoſe was the Emperor *Julian*'s Law againſt Lyars [c]; *If any of my Servants be found guilty of a Lye, the firſt Time, I pardon it; if he preſume a ſecond Time, I bear with him: If it be proved upon him a third, he has not abſolutely incurr'd my Diſpleaſure; but if he venture the fourth Time, I forbid him my Preſence.* But the *Peruvians*, under the Government of the *Yncas*, took particular Care to puniſh the firſt Eſſays of their Criminals, becauſe by this Method they thought they might prevent the Return of the ſame Crime another Time. For, unleſs the Weeds are rooted up, when they firſt appear, it muſt be expected that they will plentifully increaſe. And where Juſtice moves ſo ſlowly as not to reach the Offender, till he has repeated his Crime, private Subjects are apt to grow impatient, and to take the Liberty to redreſs themſelves, to the Prejudice of the publick Peace [d]. Neither is it any Objection, that a good Habit gives an Eaſineſs to good Actions; or that, on the contrary, an ill Habit makes it difficult to forbear doing ill. For that Labour it muſt coſt a Man to attain the good Habit at firſt, is a ſufficient Reaſon why the Value of it ought not to be leſſen'd, though the Exerciſe of it be eaſy and pleaſant. And, on the other Side, the Averſion to Sin ought to be therefore the greater, becauſe, by a Frequency in doing ill, a Man ſhall contract ſuch a Familiarity with Vice, as he will hardly ever be able to renounce, and by repeated Tranſgreſſions will be abandon'd to Impudence, and forget the Senſe of Shame. For the common Infirmities of human Nature will excuſe ſome Errors and Slips in the Conduct [e] of Life; but to be often guilty of the ſame Miſcarriages is a Degree of Madneſs not to be borne with. [e] *The Faults a Man is guilty of at ſixteen will not appear the ſame, tho' all other Circumſtances be ſuppoſed to continue, as when he is forty; for by that Time, beſides that his Habit appears inveterate and inexcuſable, the Maturity of his Judgment muſt cut off all Pretences of Excuſe and Plea for Pardon.* And all theſe Things are, with good Reaſon, to be conſider'd in levying Puniſhment. For a Crime of no extraordinary Malignity, upon the firſt Commiſſion, may be more eaſily pardon'd; or at leaſt puniſh'd with leſs Rigour, than one which has been the common Practice of the Delinquent [f]. Sometimes, alſo, future Reformation is made the Condition of Pardon for paſt Offences; and, in Defect of that, the Puniſhment of the paſt is join'd with that of the repeated Crime; and former Miſdemeanours are again brought under the Reach of Juſtice [g]. From whence it appears, in what Senſe that common Aphoriſm is allow'd to be true, *That the Eſtimation of a Crime is never increas'd by any after Act* [h]. And here it might be, alſo, enquir'd, how far that Cuſtom of the *Perſians*, which *Herodotus* ſpeaks of, was agreeable to natural Equity, when, in criminal Caſes, the whole Courſe of the Delinquent's Life was examin'd, together with his particular Offence; and if, upon the whole, it appeared, that there was an Over-balance of good Actions, the Crime was pardon'd. But, upon a ſtrict View, it muſt appear that all that ſignified nothing to the intrinſick Eſtimation of the Crime; and therefore 'tis probable, this Method was not us'd in Crimes of an higher Quality, and where there were manifeſt Proofs of the propenſe Malice of the Criminal, but as *Grotius*, *d. l.* § 30, thinks, was, or at leaſt ought to have been, confin'd to ſuch Caſes only, where the Delinquent, being not otherwiſe notoriouſly vicious, was unwarily betray'd, by ſome Satisfaction or other, he conceiv'd he ſhould find in the Commiſſion of the Fact, or elſe, where the Proof of the Fact lay intricate and perplex'd, a View of the Criminal's Life might be neceſſary to give the Matter ſo much Light, as to diſcover whether it were probable, he was guilty, or not; ſince a Man muſt make ſeveral Steps, before he can come to the higheſt Pitch of Guilt [i]. Yet *Herodotus* [k] gives us an Example of *Sandaces* a *Perſian* Judge, whom *Darius* commanded to be crucified for taking Bribes, and giving a wrong Judgment; but when he call'd to mind, that the Services and good Offices he had done him, were more than his Crimes, he order'd him to be taken down, and admitted him again to Favour. And *Cicero*, in his Defence of *Sulla*, reaſons the ſame Way. *In all Matters of Importance and Concern*, ſaith he, *we are not to meaſure a Man's Intentions, Thoughts, or Actions, by the Fact itſelf, but by the Circumſtances of his Life: And the Reaſon*, ſaith he, *is becauſe, according to the Opinion we receive of a Man's Morals, we generally conjecture how far he may be guilty, and how far not* [l]. And for this Reaſon it was uſual in the old *Roman* Judgments, for the Accuſer to begin with a Cenſure upon the Life and Behaviour of the Criminal; and on the other Side, the *Patroni* either made Excuſes for him themſelves, or brought in the *Laudatores*, Perſons that ſhould give Teſtimony of his good Behaviour. And there was good Reaſon for the Practice; for, conſidering

[a] *Vide* Lib. xlviii. Tit. xix. L. 28. § 3. D. *de pœnis.* Ant. Matthæus *de Crimin. Tit. de furtis.* § 9. *& ſeq. & Lib.* xlviii. *D. Tit.* [illegible] *Chap.* iv. § 27, 28. [b] Vide *Grot.* Lib. ii. Chap. xx. § 30. [c] *Libanius Legat.* ad *Julian.* [c] *Garciles de la Vega, Com.* [illegible] *Lib.* ii. *Chap.* x. [e] Sir *Tho. Browne*'s Religio Medici, § 41. [f] Vide *Grot.* d. l. [g] See 1 *Kings* i. 52. ii. 23. [h] *Nunquam creſcit, ex poſt facto, præteriti delicti æſtimatio,* Lib. l. Tit. xvii. *De diverſ. reg. Juris,* Lib. cxxxviii. § 1. [i] *Nemo repente fuit turpiſſimus* ——— Juven. *Sat.* ii. *ver.* 83. [k] *Polymnia,* Chap. xiii. [l] *Orat. pro Sulla,* Chap. xxv.

[1] Our Author here tacitly makes uſe of a Reflection of *Diodorus Siculus,* Fragm. è Lib. xxi. which *Grotius* had quoted without naming the Author, Lib. ii. Chap. xx. § 30. Not. 2.

ſidering the general Depravation of Mankind, a Judge ought to be very cautious, how he takes away the Life of any Subject, who, upon the whole, may rather be thought a good, than a bad Man. But it is to be obſerved, that an Inquiry into the Criminal's Morals, and paſt Life, where the Fact is intricate and obſcure, may make the Preſumptions great on both Sides; and therefore, that if any Man has clearly acquitted himſelf of the Crime he was indicted of, he may lawfully plead, *that he was not oblig'd to make a Defence for his Morals, or vindicate his former Behaviour, but only to acquit himſelf, before the Court, of the Crimes his Accuſers directly charg'd him with* [a]. But yet when a Man, that has always been a regular and dutiful Subject, changes his whole Courſe of Life, there is good Reaſon the Laws ſhould deal ſeverely with him, upon a double Account; both becauſe he hath been guilty of a Crime, and becauſe he has made ſo ill a Choice, as to change a good Courſe of Life for a bad one [b].

XXIII. Now although, from what has been ſaid, it ſufficiently appears, that one Crime is greater than another; and that human Juſtice ought not to puniſh every Crime with equal Severity; yet, notwithſtanding, it muſt be confeſs'd, that both the preciſe Quantity and Quality of human Puniſhments depend upon the Determination of the civil Sovereign, which is principally to be directed by the Advantages and publick Good of every Commonwealth. Upon this View *Amaſis* King of *Egypt* puniſh'd no Criminal with Death in all his Reign; but, according to the Degrees of every Man's Offence, condemn'd him to bring a Quantity of Earth, or Rubbiſh, to the City he belong'd to. And by this Method the Ground the Cities ſtood upon was rais'd higher, and the Cities ſecur'd againſt the Inconveniences of the Flood upon the Riſing of the *Nile* [c]. But indeed there is no Neceſſity, that there ſhould be always the ſame Proportion obſerv'd between the Penalties, as there is Diſtance between the Objects injur'd by the Offender. Every particular Crime may be ſentenc'd to a particular Puniſhment, as it happens to be moſt agreeable to the Circumſtances of the State; without any Regard, whether another Crime, which, in itſelf, may ſeem greater or leſs than this, be puniſh'd with more or leſs Severity. *Plato* propoſes a Law of this Nature [d], *That if any Man robb'd the Publick, whether of more or leſs, his Puniſhment ſhould be the ſame.* "For, ſaith he, a Man who takes "away a Thing of leſs Value, though he doth "it with leſs Force than another, that robs the "State of ſomething greater, yet he is guilty "of the ſame ill Principles and Intentions; and "a Man who takes away Something of conſide-"rable Worth, which he never depoſited, can "but be unjuſt and criminal. The Law there-"fore doth not inflict greater or leſs Penalties "upon the Offenders, from the Compariſon it "makes between the Degrees of their Theft; "but becauſe it ſuppoſes, that one is more ca-"pable of being reform'd, than the other." 'Tis certain, a Judge ought ſo far to obſerve Equality in the Diſtribution of Puniſhments, as to take Care that ſuch as are equally guilty ſhould be *equally* puniſh'd; and that a Fault, which was ſeverely corrected in one Man, ſhould not, without very good Reaſon, be excuſed in another; ſince it muſt be expected that ſuch Partiality would be a certain Cauſe to raiſe Diſturbances in the Commonwealth; and becauſe a Puniſhment can have no Effect when it is not inflicted upon any View of publick Good, but barely in Gratification to private Paſſion. But ſtill an Equality of Puniſhment muſt be ſuppos'd only where the Criminals are guilty of the ſame Fact in Specie, and not of different. For 'tis common for human Juſtice to puniſh ſmall Faults with greater Rigour, or to take the contrary Method, as the Exigencies of the State, or the Will of the Legiſlator determines. And the Criminal has no Reaſon to complain of the Partiality, ſince he knew before-hand what he was to expect [e]. For Inſtance, though Theft in itſelf be a much leſs Crime than Murder, yet the Thief has not juſt Reaſon to complain, ſhould he be condemn'd to ſuffer the ſame Puniſhment with the Murderer, tho' his Crime was not equal in Degree. The Reaſon why Crimes of different Degrees are equally puniſh'd with Death is, becauſe Death is the greateſt and laſt Evil Men inflict [f]: unleſs it be that ſometimes the Way to it is ſhort and eaſy, and at other Times made terrible, and grievous by Delay and Torture [g]; or that ſometimes Diſhonour is done to the dead Body, and Infamy fixed upon the Memory

[a] Author. *ad Herennium*, Lib. ii. Chap. iii. [b] Polyb. *Lib.* vii. *in Excerpt. Peireſcian.* But when he took a quite contrary Way of Life, and grew every Day worſe and worſe; 'twas fit every body ſhould change their Opinions of him. [c] *Herodot.* Euterp. Pag. 90. Ed. *H. Steph.* *Diodor. Sic.* Lib. i. Chap. lxv. Tho' *Actiſanes* King of *Egypt*, when he built *Rhinocolura*, took Care that all thoſe Sort of People, the Scum and Filth of the Nation, ſhould be carried into a Place by themſelves, that they might not infect others, *Diodor. Sic.* Lib. i. Chap. lx. [d] *Plato* de LL. Lib. xii. init. Pag. 982. C. Ed. *Wech.* [e] *Calpurnius Flaccus* Declam. v. When the Conſequences are threaten'd before-hand, the Fault lies no where but in the Sufferer.

[f] *Lycurg.* Orat. contra *Leocrat.* The greateſt and the laſt of Puniſhments in Death.
[g] *Ovid. Her.* Epiſt. Lib. x.

Morſque minus pœnæ, quam mora mortis habet. Death hath leſs Pain itſelf, than the Delay.

Tho' ſome think a quick Diſpatch an eaſier Puniſhment than a miſerable Life. Vid. *Cæſaris* Orat. in *Salluſt.* Conjur. *Catilin.* and *Tiberius's* Anſwer in *Suetonius*, Chap. lxi. *to one who deſired his Puniſhment might be ſhort, was*, I am not yet reconciled to you.

Senecæ Hercules Fur. ver. 512.	Death to the Miſerable is Eaſe.
Senec. Æg. Agamem. ver. 989.	He's yet unſkill'd in the Arts of Tyranny, That puniſhes with Death.
El. Ibid. ver. 996.	Why is there any Thing beyond the Grave?
Æg. Ibid.	Yes Life when one deſires to die.
Euripid. Hippol. Coron.	Τὰς γὰρ ἄδης ῥᾷστ' ἀνδρὶ δυστυχεῖ. ver. 147. Th' Unfortunate deſires a ſpeedy End.

Nay, *Charron de la Sageſſe*, Lib. i. Chap. xxxix. (vi.) Sect. 10, ranks it among the ridiculous Notions of the Vulgar, to think to be revenged of an Enemy by killing him. *For this*, ſaith he, *is only to take from him the Senſe of Misfortune, and to ſecure him from all*

Memory of the Perſon[a], which is ſometimes inflicted a conſiderable Time after the Delinquent's Death; and may again be recalled, and taken off[b]. Beſides, the Will of the Legiſlator is often conſidered in determining the Penalty, though not in ſo abſolute a Degree, as to exclude the Intereſt and Advantage of the Publick, yet to ſuch a Degree, that the particular Puniſhment ſeems in a Manner entirely to depend upon it. There are, alſo, ſome Crimes of ſo black a Nature, as will juſtify the greateſt Severity that can be uſed upon Criminals, who have contracted the ſlighteſt Acquaintance with them[c]. So *Philo* ſays, *That a Man who attempts only to kill another treacheroſly, is not the leſs guilty of Murder, tho' he fails of Succeſs:* And the written Law, in this Caſe, commands, *That if a Man come preſumptuouſly upon his Neighbour to ſlay him with Guile, thou ſhalt take him from mine Altar, that he may die*[1]. The *Athenian* Judges indeed were too ſevere, when they condemned a Boy for pricking out a Bird's Eyes, upon Suſpicion, that it was a Sign of a barbarous Temper, and that he might prove a very ill Member of the Commonwealth, if he were ſuffered to grow up to Years of Maturity[d]. *But it is not the actual Commiſſion of a wicked Act that makes a Criminal; it is enough that a Man has armed himſelf, and diſcovers his Inclinations to rob and murder: For the Wickedneſs doth not always begin, but is exerciſed and improved only by the Practice.* For as *Paterculus* reflects upon *Caius Cato*'s being condemned for a ſmall Offence[e]; *The Inclination and Intent of the Offender may ſometimes be of greater Force with the Judge, than the Crime itſelf. For it is natural enough to argue from the Fact to the Deſign of the Criminal, and to conſider rather of what Nature the Offence is, than how great*[f]. In Caſes of Treaſon and Conſpiracy againſt the State, bare Conſciouſneſs, or Privity without any Aſſent, and Silence[2] only, and the Concealment of it deſerves Puniſhment[g]. However in the Diſtribution of Puniſhment there ought always to be as much[3] Gentleneſs and Lenity uſed, as is poſſible. And therefore the Severity of *Draco*'s Laws might juſtly appear inſupportable, and deſerve *Solon*'s Corrections[h]. Yet the Courſe of Juſtice in *Peru* was altogether as rigorous; for there almoſt every Crime was puniſhed with Death; the Judges not ſo much conſidering the ſimple Nature of the Offence, as that it was a Breach of the Commands of the *Inca*, whom they looked upon and reverenced as a GOD[i]. But there is good Reaſon for enhanſing the Severity of the Puniſhment, when juſt Reſentment, and Care for the common Good, makes it neceſſary to ſecure the publick Quiet by puniſhing Malefactors. For Inſtance, ſuppoſe the Criminal threaten Danger to the State, if he be not puniſhed in Time. *H. Stephens* gives us a Story[k], of a Man who, having begged for a Pardon of the King of *France* for the ſeventh Murder he was guilty of, and finding he could not obtain it, boldly told the King, that he would own only the firſt Murder to be his own proper Action; and that the Imputation of all the reſt muſt lie upon the King himſelf; for that he ſhould never have committed the other, if the King had not given him Encouragement, by pardoning the firſt. Sometimes, alſo, it is neceſſary to make Examples of ſome Malefactors to frighten others; eſpecially where the general Perſuaſives and Inducements to Wickedneſs are ſtrong[4]; ſuch as are Eaſineſs[4] and Uſe, which nothing but a ſevere Diſcipline can reform. The *Jewiſh* Law lays a greater Penalty on the Perſon who ſteals out of the Field, than one who robs an Houſe, becauſe the firſt is done with greater Eaſe; compare *Exod.* xii. v. 1. with the 7th and 9th ver.[m]. And thus the *Scythians* thought no Crime ſo heinous as Theft, becauſe, having neither Houſes nor Folds to keep their Cattle in, no Man's Property could be ſecure, if Robbery had any Indulgence. And in ſome Nations Theft is looked upon to be a greater Crime in a Domeſtick, than in a Stranger[n]. It was Death at *Athens* for a Man to ſteal from the Baths, from the Schools of Exerciſe, or from the Market, or any ſuch publick Place; but one who robbed a private Houſe was only to pay double the Worth of what he ſtole[o]. *Q. Curtius* ſays, *There was a Cuſtom among*

[a] *Ælianus* N. Hiſt. Lib. iv. Chap. vii. [b] Vid. *Socrat.* Hiſt. Eccleſ. Lib. vii. Chap. xliv. [c] *Vide* Ant. Matthæum *de Crimin. Prolog.* Chap. i. Sect. 5, 6. & *ad L.* 48. *D.* Tit. v. Chap. iii. Sect. 10. & Tit. xviii. Chap. iv. Ziegler *ad Grot. d. l. Sect.* 39. Valerius Maximus *Lib.* vi. *Chap.* i. *Sect.* 8. *Vide* Lib. xlvii. Tit. xi. Lib. i. Sect. 2. *D. de extraordin. Crim. D. ad L.* Cornel. *de ſicariis. Vide* Lib. xlviii. Tit. viii. Lib. iii. Sect. 1, 2, 3. *Philo Judæus de Confuſione Linguarum*, Pag. 343. C.
[d] *Quintil.* Inſtit. Orat. Lib. v. Chap. ix. *Senec.* de Benef. Lib. v. Chap. xiv. [e] Lib. ii. Chap. viii. [f] Ad. Lib. iv. Tit. viii. Lib. v. princ. C. ad *L. Jul.* Majeſt. *Grotius* in *Flor.* ſparſ. in *Jus Juſtinian.* [g] We have an Example of *Thuanus* in *Benj. Priolus* Hiſt. *Gall.* Lib. i. Chap. vi. and of *David Berchinus*, in *Buchanan.* Rerum Stoic Lib. viii. Ad. *Diodorus Siculus*, Lib. xv. Chap. liv. [h] Vid. *Plutarch. Solon.* [i] *Garcilaſſ. de la Vega*, Com. Reg. Lib. ii. Chap. xii, xiii. [k] Apolog. pro *Herod.* Chap. xvii. [l] V. *Grot.* d. l. Sect. 34, 35. [m] Lib. xlvii. Tit. xvii. Lib. ii. D. de Effractor. *Jud.* Lib. ii. Chap. ii. de *Scythis.* [n] Tho' the *Roman* Law ſeems to have the contrary Method, *Lib.* xlviii. *Tit.* xix. *Lib.* xi. *Cod. D. de pœnis. Vide* Ant. Matthæum *Crim. tit. de Furtis*, Chap. iii. Sect. 2, 3. Ad. *Ariſt.* Probl. *Sect.* 29. *Quæſt.* 14. [o] *Vide Lib.* xlvii. *Tit.* xvii. *Lib.* i. *D. de Furibus Balear.* Ant. Matthæum *de Crimin. ad h. t.* & *t.* 14. *de Abigeis.* Add what *Philo Jud.* urges, to aggravate the Crime of Sorcery, *de Special. Legibus, Pag.* 791, 792. Ed. *Paris.* Q. Curtius, *Lib.* iv. *Chap.* vi. *Sect.* 5. b.

all further Harms; unleſs a Man thinks it neceſſary to his own Security, to leave no Body alive that is like to be his Enemy, or to make him uneaſy. In *Philoſtratus* Lib. i. *Apollonius* condemned the Eunuch, who lay with the King's Concubine, to live, by Way of Puniſhment.

1 Vide *Philon.* de ſpecialibus legibus, Pag. 791. Tacitus *Hiſt. Lib.* ii. *Chap.* lxxvii, *Qui deliberant deſciverunt*, to demur is to deſert. *And to this we may refer that of* Plutarch, Cæſar. Penalties are not always inflicted for the Fact, but ſometimes for the Intention and Deſign. *Quintil.* Declam. 362. The Law lays the Puniſhment upon the Will. *Lyſias* Orat. in *Simonem*, Chap. v. It is certain that thoſe we received our Laws from, did not intend that a Man, who in a Quarrel had done harm to another, ſhould therefore be baniſhed: But that ſuch as violently aſſaulted and injured a Man with a Deſign to take away his Life, tho' they failed in the Attempt, ſhould yet ſuffer that ſevere Punniſhment; becauſe they ſuppoſed it juſt, that he ſhould ſuffer as much, who was guilty of the Fact, who deliberately endeavoured to put it in Execution; for, tho' it happened that they were miſtaken in the Succeſs of the Action, yet they purſued it as far as they had Power. *Add.* Ælian. *Var.* Hiſt. Lib. xiv. Chap. xxvii.

2 With Regard to the Crime of concealing Treaſon, and the Puniſhments it deſerves; the Reader may ſee an excellent Diſſertation of M. *Gundling*, entitled *Singularia ad Legem Majeſtatis, itemque de Silentio in hoc Crimine*, publiſhed in 1721.

3 This is the ſecond Branch of Clemency. The firſt conſiſts in entirely exempting from Puniſhment, unleſs the Good of the State requires otherwiſe. See *Grotius*, Lib. ii. Chap. xx. Sect. 36. and the *Parrhaſiana*, Tom. ii. Pag. 182. & *ſeq.* It is, alſo, one of the Rules of the Civil Law, that in the Explication of penal Laws, or where the Application is dubious, we ought always to lean to the favourable Side. *In Pœnalibus Cauſis benignius interpretandum eſt.* DIGEST. Lib. l. Tit. xvii. *De diverſ. Reg. Jur. Leg.* clv.

4 See an excellent Paſſage of *Cicero*, cited above, Lib. v. Chap. viii. Sect. 4. at the End.

the Perſians, *that obliged them to be ſtrict in concealing any Secret that concerned their Kings*; and adds, *that neither Hope, nor Fear, could extort any Expreſſion from them that might give Light to diſcover it; the antient Conſtitutions of that Empire obliging them to ſuch Silence, upon Pain of Death; and that therefore no Intemperance was puniſhed ſo ſeverely among them, as that of the Tongue, it being thought that no Man could be capable of any great Attainments, who could think it a Pain to be ſilent, when it was plain there is Nothing in Nature eaſier.* Further, alſo, Cuſtom, or when a Vice is grown popular, or in Faſhion (for as to that habitual Cuſtom or Familiarity, particular Men contract by repeated Sins, I have ſpoken already) though it be ſome Extenuation of a Crime, yet doth certainly deſerve very ſevere Puniſhment [a].

——Veteri poſt obruta morbo
Corpora, Pæonias nequicquam admoveris herbas
Non leviore manu, ferro ſanantur & igni, [b].
Ne noceat fruſtra mox eruptura cicatrix, &c.

A crazy Body, long inur'd to Pain,
From healing Med'cines ſeeks Relief in vain:
When at the Bone the fretting Ulcer ſmarts,
It fears the Lance, but mocks the gentler Arts.
With Cauſticks and Inciſions force your Way,
The treacherous Wound will elſe your Skill betray.
Skinn'd o'er without, it ſeems to heal inclin'd,
But ſtill the Sore lurks feſtering deep behind.
But ſearching Fires the ſecret Faults diſcloſe,
Purſue the watry Humour as it flows;
From ſickly Veins prevent the freſh Supplies,
And ſtop the Springs whence firſt Corruption riſe.
If obſtinate the Sore, and ſtill unſound,
And dangerous *Gangrenes* gnaw within the Wound,
A Limb cut off muſt for the whole compound.

And therefore *Grotius* judiciouſly obſerves [c], that in publick Trials it is ſome Excuſe for an Offender to plead, that his Fault is common; becauſe in all Trials the Point in Diſpute is, what Share of Guilt that particular Perſon has contracted; and this, without Doubt, muſt appear the leſs, when the Man was carried away with the Violence of the Stream, rather than the Force of his own Inclinations; but when Laws are to be made, a prevailing Cuſtom is an undeniable Argument, that there is greater need of ſevere Sanctions to ſuppreſs it; becauſe Laws muſt be ſuppoſed to regard the Advantages that may accrue by the Puniſhment in General. However, when a Vice has raiſed itſelf to ſuch an Head, and Offenders are grown ſo numerous, that, if all of them were to fall under the Reach of Juſtice, the Commonwealth muſt be much diſpeopled, if not entirely ruined by rigorous Executions of Law, the Law muſt yield to the Neceſſities of the State, and rather be neglected, or laid aſide, than occaſion the Deſolation of the Commonwealth [d]. *But Laws are to be applied only where Things are capable of being effected, and ſo may very well puniſh Offenders when they are few, and may eaſily be reclaimed by Puniſhment, but to attempt upon Multitudes is to no Purpoſe* [e]. *Laſtly*, where the Neceſſities of the State are preſſing for the Purpoſe, if upon an Invaſion and War there ſhould be no other Perſon fit for the Command and Charge of a General, there can be no Reaſon why a Criminal of experienced Courage and Conduct might not be releaſed even from capital Puniſhment, when it appears that the State cannot be ſafe without his Aſſiſtance; and therefore there was Reaſon in what *Fabricius* ſaid, when he gave his Vote for *Cornelius Rufinus* a good General, but a very covetous Man, to be Conſul; that he had *rather he robbed than ſold* [f]. And ſo *Junius* the Dictator, after the Defeat at *Cannæ*, publiſhed an Edict, *That if any Man, whether he was a Priſoner for a capital Crime, or for Debt, would liſt himſelf for the publick Service, under his Command, he would grant him a Pardon, and diſcharge his Debts* [g].

XXIV. From all which I think it is evident, that there is no *vindictive Juſtice* in the civil Court, which determines what Degrees of Puniſhment ought to be inflicted on particular Crimes, by any Deciſion of Nature. But the true Meaſure of all human Puniſhment muſt be taken from the Utility of the Commonwealth; and according as the Ends of Puniſhment ſeem moſt eaſy to be attained, the Puniſhment may either be enhanſed or alleviated, according to the Diſcretion of the Government; yet ſtill ſo as that the Method of Puniſhment may admit of great Latitude. And therefore, as it would be too ſevere to inflict a Penalty when the Ends of puniſhing may be attained by gentler Methods [h]; ſo the *Puniſhment* is much too eaſy, when it has not Sharpneſs enough to produce the Ends deſigned by it, and, conſequently, to reſtrain the Inſolence of the Subject, or ſettle the internal Security of the [i] Commonwealth; or in ſhort, when it is a Puniſhment the Delinquents themſelves deſpiſe [i]. If the Legiſlator go too far on the one Hand, he is liable to the Infamy of being cruel; [k] and if he incline to the other Side, he makes all Puniſhment inſignificant; and gives abſolute Liberty to Vice. For ſince the natural End of all Puniſhment is to *diſpoſe Men to obey the Law*, and, in Conſequence, to reſtrain them from Actions contrary to it; and ſince Men, whenever they allow themſelves to conſider, always weigh the Conveniences and Inconveniences which ariſe from the ſame Thing; it is evident, that if the Harm or Pain inflicted be leſs than the Benefit or Satisfac-

[a] Leg. 16. Sect. ult. D. de Pœnis, ubi ſupra. [b] *Claudianus* in *Eutropium*, Lib. ii. Ver. 11, *&c.* [c] In the above-mentioned Place, Sect. 35. [d] See *Tiberius*'s Epiſtle concerning Luxury, *Tacitus* Ann. v. Chap. liv. in the Beginning. [e] *Plutarch.* in *Solon.* Pag. 90. Ed. *Wech.* [f] V. *A. Gellium*, Lib. iv. Chap. viii. [g] *Livy*, Lib. xxiii. Chap. xiv. Add. *Grot.* upon 1 *Kings* ii. 6. [h] See *Montaign*'s Eſſays, Book i. Chap. xi. Pag. 309. Ed. *Pariſ.* [i] V. *Gellium*, Lib. xx. Chap. i. *de Veratii petulantia.* [k] *V.* Hobbes *de Cive*, Chap. iii. Sect. 11.

[1] There is not a more ſenſible Example of this, than that pernicious Indulgence (always attended with Encroachments upon the Rights of the Sovereign) by which the Canon Law places the Clergy ſecure againſt thoſe Puniſhments which the moſt terrible Crimes deſerve. After having exempted them the ſecular Juriſdiction, it requires of them only an external Penance; and, provided they perform this, even tho' they kill the Pope, they would get off for perpetual Impriſonment. The Quarrel between the Republic of *Venice* and *Paul V.* is an evident Proof of this, and ſhews plainly the Ardor and Zeal with which the Clergy endeavoured to maintain themſelves in the Poſſeſſion of a Right, which they would ſoon be forced to renounce, if Princes every ſo little underſtood their own Intereſt. See what the celebrated F. *Paul* has ſaid upon this Article, in his Examination of the Pope's Bull, Pag. 66. *& ſeq.* of the *Latin* Verſion, printed at *Groningen* 1607. Conſult alſo M. *Thomaſius*'s Notes upon *Lancelot*, Pag. 1786. *& ſeq.*

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tion that naturally follows from the Crime committed, the Punishment will be but a very slender Inducement to persuade any Man to resist the Temptation to Disobedience [a].

XXV. I am to add farther, That since the same Punishment doth not affect all Persons alike [b], and, consequently, will not raise the same Dispositions in all to Obedience, it is easy to discover, that both the general penal Sanction, and the Application of it to particular Parties, ought to be made with a suitable Regard to the Person of the Delinquent, and in that, to all those Qualities of Age, Sex, Dignity, Fortune, Strength, and the like; which may either increase or mitigate the Sense of Punishment [c]. For the same Mulct, for Instance, will press hard upon a poor Man, which will be no Burden at all to a rich; an ignominious Punishment will sit easy upon a Wretch mean and despicable, when to a Person of Honour and Quality nothing will be more insupportable and afflicting; and Men and full grown People have more Strength to bear Punishment, than Women and Children [d]. And the *Moors* therefore punish Women guilty of Unchastity, with greater Severity than Men; because they suppose that generally the Arts and Enticements of the Women first give them Encouragement. But yet it doth not from hence follow, that Punishment ought to be inflicted in geometrical (or, as *Bodinus* [e] affectedly calls it, an *harmonious*) Proportion; all that is intended here is no more than to make a simple Equation between the Crime and the Penalty, which the Circumstances of the Person are necessary to find out. But if on the Account of such Qualities, which neither aggravate the Crime, nor augment the Sense of the Punishment, Crimes equal in Demerit are unequally punished, it is a shameful Partiality and Respect of Persons; of which *Grotius* doth not always acquit the *Roman* Laws. And some produce this for an Instance [f], a Man who kills his Wife, when he has taken her in Adultery, if he be a Person of inferior Rank, is sentenced to perpetual Banishment; but if he be in any Dignity or Office, he is only to suffer the *Relegatio* for some short Time; for a mean Person may be as much concerned and afflicted at the Disgrace he suffers by the Falseness of his Wife, as a Man of Honour, and leave his Country with equal Grief and Regret [g]. And lastly, it may, also, be observed, that in some Nations certain Sorts of Punishment are attended with particular Infamy; thus *Euripides* [h],

High on the Gallows ignominious Pains
The very Slaves regret and think dishonourable;
But by the Sword to fall looks generous and brave.

And *Telemachus* in *Homer* [i] would not dispatch his Maids, Καθαρῷ θανάτῳ, that is, would not kill them by the Sword, but hangs them. The Punishment of Strangling, on the other Hand, is looked upon to be honourable by the *Ottoman* Family, who think it infamous that noble Blood should be spilt upon the Ground. And the *Jews* thought it a more ignominious Death to be beheaded than to be strangled or stoned [k]. On the contrary, some Punishments have had the Fortune to be accounted honourable. And, upon such a Notion as this, we are told that the *Athenians* were angry, that so mean and contemptible a Wretch as *Hyperbolus* should be banished by *Ostracism* [l]; *because it was usually thought an Honour to suffer that Punishment; and they could readily yield ten Years Banishment to have been really a Punishment, when* Thucydides *and* Aristides, *and such great Men suffered it; but they thought it was too great a Credit to* Hyperbolus, *and would only encourage him to boast, that he had suffered the same Punishment which was inflicted upon the most gallant Men of* Athens [l].

XXVI. Neither can I see any Necessity that every Commonwealth should take its Measure and Standard for the Punishment of Crimes, from the penal Sanctions of the *Jewish* Law. Because that Part of the Law was the positive and civil Law of the *Jews*, and was accommodated to the Genius of that People and Commonwealth. From which, since the Constitutions and Tempers of other Nations and Commonwealths are very different, there is good Reason why the Penalties too should be different. Whether this indeed will hold true with Respect to the capital Punishment of Murther, as well

[a] *Vid.* Hobbes *de Cive*, Chap. xiii. Sect. 16. *Leviathan* Chap. xxvii. *Author. De princip. justi & decori p. m.* 200. *Cumberland. de Legibus Nat.* Chap. v. Sect. 39. [b] *Vid.* Grot. *ubi supra*, Sect. 33. [c] *Vid.* Lib. xlvii. Tit. xix. Lib. iv. Sect. 1. & Lib. xii. Sect. 1. *D. de Incendio, ruina*, &c. & Tit. x. Lib. *ult. D. de Injuriis*, &c. & Tit. xi. Lib. vi. *D. de extraord. Crim.* & Tit. xii. Lib. *ult. D. de Sepulchro violato*, & Tit. xiv. Lib. i. Sect. iii. *D. de termino moto.* Lib. xlviii. Tit. viii. Lib. iii. Sect. 5. *ad.* L. Cornel. *de Sicariis.* In most of these Laws which are here cited by the Author, there is an unjust Respect of Persons, which he himself blames a little farther, as we shall find, if we take the Pains to examine them. See the *Orbis Romanus* of the late Mr. *Spanheim*, of the Diversity of Punishments among the *Romans*, according to the Difference of Persons. [d] *Vid.* Lib. xlviii. Tit. v. Lib. xxxviii. Sect. 24. Lib. xxxix. Sect. 4. *D. ad* L. Jul. *de Adult.* Lib. xlviii. Tit. xiii. Lib. vi. *D. ad* L. Jul. *Pecul.* & Tit. xiii. Lib. v. Sect. iii. *D. ad* L. Jul. *Pecul.* Lib. iv. Tit. iv. Lib. xxxvii. Sect. 1. *D. de minor.* Lib. l. Tit. xvii. Lib. cviii. *D. de diversf. reg. jur. Add.* Olearius *Itin.* Pers. *Lib.* iii. *Chap.* vi. of the Pecuniary Mulct, paid among the *Russians* for an Abuse offered, called by them *Biszestia.*
[e] *De Repub.* Lib. vi. Chap. *ult.* [f] *V. D.* Lib. xlviii. Tit. viii. Lib. i. Sect. 5. [g] *Vid. Edictum* Theodorici *Reg.* Chap. xci. *Add.* Zieg. *ad* Grot. *Lib.* ii. *Chap.* xx. Sect. 33. [h] *Helena*, ver. 306, *&c.* Plin. *Nat. Hist.* Lib. ii. Chap. 63. Strangling is an odd Sort of Death, by stopping the Breath which endeavours to find a Passage. *Add.* Lib. xlviii. Tit. xix. Lib. xxviii. Sect. 2. *D. de Pœnis.* To this, also, may we apply that of *Dio Chrysostom.* Orat. ad *Alexandrinos.* The one is the Death of a Malefactor, the other of an unfortunate Slave. [i] *Odyss.* Lib. xxii. Ver. 465, *&c.* [k] Seld. *J. N. & G.* Lib. vii. Chap. vi. Thus *Philo Jud.* in *Flaccum*, is very angry that the *Jewish* Magistrates and Senators at *Alexandria* should be scourged in the same Manner, and with the same Instruments, as the meanest *Egyptian* Slaves were. To this we may refer that of *Seneca, de Constantia Sapient.* Chap. iv. There are some Slaves that had rather be scourged than beat. And it was I presume a very ignominious Punishment which is mentioned *Additament.* i. *Leg.* Burgund. *Tit.* x. [l] Vid. *Plutarch. Alcibiades*, Pag. 197. B. Where there are these Verses quoted out of *Plato* the Comick Poet.

Worthy to suffer what he did, and more,
But not in such an honourable Way;
The Abject Wretch the Sentence did disgrace.

Vid. *Plut. Nicias*, Pag. 530. *E.* where he speaks of the same Matter.

[l] Thus it was some Sort of Comfort, *Æneæ magni dextra cadis* —— Virg. *Æneid.* Lib. x. Ver. 830 & *de la Cerda in loc.*

as to other Crimes, may bear ſome Diſpute. Becauſe the Law, which determines that Puniſhment, ſeems to have been promulg'd to all Mankind, as well as to the *Iſraelites*. And the Reaſon of the Puniſhment is evident: Becauſe a Man who is barbarous to that Degree, as to take away any Man's Life maliciouſly, can never give ſufficient Caution to others, without loſing his own [a]. However, I think it ſhould not be thought a Breach of that Command GOD gives, *Gen* ix. 6 [b], if a Murtherer ſhould be releaſed from capital Puniſhment, upon ſome extraordinary Exigence of the Commonwealth. For ſince the Determination of all Puniſhment is of poſitive Inſtitution, and all poſitive Laws may be accommodated to the Neceſſities of the State; that Law may, alſo, reaſonably be ſuppos'd to admit of the ſame Exception. Some indeed are of Opinion, that that Paſſage is rather a divine Commination [c] than a Law, and that GOD only declares by it, that he will execute Vengeance upon Murtherers, either by Men, or by ſome other ſevere Method, if they happen to eſcape the Inquiſition, and Rigour of human Juſtice. See *Acts* xxviii. 4. Neither doth *Grotius*'s Interpretation of it, Lib. i. Ch. ii. § 5, exclude the Exception which is grounded upon the State of the Commonwealth [c]. But *Selden*, Lib. iv. Chap. i, expreſly affirms, that the *Jewiſh* Rabbins did not underſtand that Place to be a Law of ſuch Force, as that it ſhould always oblige the Magiſtrate neceſſarily to puniſh Murther with Death; but that it was an expreſs Indication of GOD's Hatred to that Crime, from the Severity of the Penalty he annexed to it; which it might be lawful for Man, according to the Poſture of Affairs, and Variety of Circumſtances in the publick Government of the State, either to limit, or inflict. And, for this Reaſon, the *Jews* (as their Law directs in other Caſes) did not inflict Death upon any of their own Nation who kill'd a Proſelyte of the Gate, or any other *Gentile*. Nay, if any Number of *Jews*, or other circumciſed Perſons, had by Blows or Kicks, or any other Way, kill'd one of their own Nation, ſo that no one of them ſeperately did any Thing which might be the immediate Occaſion of his Death, all of them were acquitted from ſuffering that Penalty which was otherwiſe due by Courſe of Law; becauſe neither of them ſingly was guilty of the Murther [d]. However this be, I would not be thought to perſuade the World to an unwarrantable Eaſineſs in diſpenſing with the Puniſhment of this Crime. Neither would I undertake to defend that Expreſſion in one of the Conſtitutions of the Kings of *Poland*, relating to the Puniſhment of [e] Murther in the Nobility, *Nos divini Juris rigorem moderantes*, We mitigating the Rigour of the divine Law [f]. And here I ſhould take ſome Notice of the Diſpute, which ſome ſcrupulous Perſons have rais'd againſt the Lawfulneſs of puniſhing Theft with Death. But upon this I refer you to the Opinion of *Grotius*, Lib. ii. Ch. i. § 14 [g]. Yet *Selden* ſays, *De J. N. & G.* Lib. vii. Chap. vi, That among the *Jews* the Puniſhment of a *Gentile*, found guilty of Theft, was Death; but that the natural *Jews* were uſed with more Gentleneſs [h]. And *Herod*'s Laws are condemn'd as too ſevere by *Joſephus*, *That ſuch Perſons as were guilty of Burglary, or breaking up, or digging into Houſes, and ſuch as robbed in the Night, ſhould be ſold out of the Land to Strangers.* By a Law of *Solon*'s at *Athens*, it was decreed, *That the Penalty for ſimple Theft, if what was ſtolen was recover'd, ſhould be to pay double; or if it was not recover'd, ten times the Value of it.* But it was added, *That if any Perſon had ſurreptitiouſly taken away out of the* Lyceæum *or* Academy, *or the publick Schools, either Clothes, or Cups, or any Thing of the leaſt Value, or any Veſſels out of the Schools of Exerciſe, the publick Walks, or Portico's, worth more than ten Drams, he ſhould be puniſh'd with Death* [i]. What Puniſhment the *Roman* Law inflicted is very well known. *Juſtinian* does not allow that a Man who was guilty of no more than ſimple Theft, ſhould ſuffer even ſo much as Mutilation of Members [k]; though otherwiſe it cannot be thought abſurd that every Criminal ſhould be puniſh'd in the Part which offended; ſo *Alexander Severus* puniſh'd a Notary who exhibited a falſe Libel of a Cauſe before the Council, by paſſing Sentence upon him, that the Nerves of his Fingers ſhould be cut, ſo that he might never uſe them to write more [l]. So *Seleucus* paſs'd a Decree, *than an Adulterer ſhould be condemn'd to loſe his Eye, becauſe the Eye makes the firſt Breach upon the Chaſtity, and ſo much forbidden Paſſion may be expreſs'd in Looks, as may eaſily kindle the moſt unlawful Luſts.* And ſo, alſo, the Law of GOD commands, *That the Woman's Hands ſhould be cut off, who in any Strife, between her Husband and another Man, drawing near to deliver her Husband out of the Hand of him that*

[a] To this Purpoſe is that of *Antiphon*. Orat. xv. All Courts of Juſtice which ſit upon Murder, are always in the open Air, that the Judges may not be forced to come into the ſame Place with the Malefactors; and that the Proſecutor may not be under the ſame Roof with the Murderer. *Add.* Libanius *Progymn. loc. com. contra* Homicidam. [b] See *Grot.* on that Place, and on *Matt.* v. 22. [c] *Add.* Grot. *in* Flor. *ſparſ. ad Jus* Juſtin. *ad* L. Corn. *de Sicar.* [d] See more in the ſame Place. [e] See the Abſtract of the *Latin* Letters of *Tollius* in the *Nouvelles de la Republ. des Lettres Avril* 1700. Pag 371, 372, and Mr. *Thomaſius*'s Diſſertation, *de Jure aggratiandi principis Evangelici in cauſis Homicidii.* Chap. iii. Sect. 9. Printed at *Hall* in 1707, alſo another of his *de Latum Imperii poteſtate Legiſlatoria*, &c. Sect. 43. Both theſe Diſſertations are well worth the peruſing; tho' in the former our Author conjectures, I think, without Foundation, That *Caſimir*, King of *Poland*, by the *divine Laws*, underſtood the Explanation which the Clergy gave of them, for their own Intereſt. [f] *Add.* Philo Judæus *de legibus ſpecial.* [g] *Grot.* Lib. ii. Chap. i. Sect. 14, ſays, *That the Laws have no Right to puniſh with Death all Sorts of Crimes, but only thoſe that are ſo heinous as to make the Offender deſerve to be cut off from the Commonwealth.* But *Gronovius* judiciouſly remarks thereupon, that the ſmalleſt Faults in themſelves may become capital Crimes, when they relate to Things, from which it is eaſy to abſtain, and which there have been good Reaſons to forbid on Pain of Death. For, in that Caſe, he that violates the Law, ought to complain of no body but himſelf. 'Tis upon that Account, that the Severity of military Diſcipline is grounded; and we ſee that God forbid *Adam* and *Eve*, on Pain of Death, to eat of the Fruit of a certain Tree, which, in itſelf, was a very indifferent Thing. We may add, That this Sentiment of *Grotius* does not very well agree with what he elſewhere maintains, touching the Obligation of the Law of *Moſes*, with Regard to other Nations. See Lib. i. Chap. i. Sect. 16, 17. [h] *Joſephus* Archæol. *Jud.* Lib. xvi. Chap i. [i] *Add.* Ariſtot. *Problem.* § 29. Chap. xiv. [k] Juſtinian. *Novell.* cxxxiv. Chap. *ult.* [l] *Lampridius*, *Alexander*, Chap. xxviii.

[l] Theſe Words ought not to be underſtood, but with Regard to what commonly happens. See M. *Le Clerc*'s Commentary, and my Notes upon *Grotius*, Lib. i. Chap. i. § 15. Not. 4.

ſmiteth

ſmiteth him, putteth forth her Hand and taketh him by the Secrets, Deut. xxv. 11 [a]. However, *Anton. Matthæus*, *De Criminibus*, *Tit. de Furtis*, Chap. ii, puts a handſome Interpretation upon *Juſtinian*'s Inſtitution [b], by urging for it, That ſince 'tis generally either Idleneſs, or Poverty, that forces People to ſteal, the Emperor was not willing Thieves ſhould be puniſh'd by loſing the Uſe of their Limbs, that they might not be depriv'd of the Inſtruments neceſſary for them to reform their bad Courſe of Life; and when they ought rather to be forced upon ſome laborious Imployment. In *Germany*, the Law, that all Thieves ſhould be hang'd, was made by *Frederick* the Second [c]. And it was afterwards confirm'd by *Charles* V. but look'd more ſevere in him than in *Frederick*, becauſe he took no Care of the Value of the Coin which was then [1] ſinking. Upon the whole, though I am of Opinion, that 'tis poſſible for Judges to be too free in inflicting capital Puniſhments, and that ſometimes it might turn more to the Advantage of the State, if ſuch Criminals as are here ſpoken of, were rather condemn'd to ſome uſeful Labour and Service [d]; and ſo we are told *Sabaco*, King of *Egypt*, forced all Malefactors, that were condemn'd in capital Puniſhments, to publick Labours; and that the Country was ſoon ſenſible of the Benefit it receiv'd from ſuch an Application of them [e]: Yet I make no doubt but that Theft may lawfully be puniſh'd with Death. And, from what has been ſaid, it will be eaſy to anſwer all the Objections urg'd to the contrary, eſpecially thoſe from *Ant. Matthæus*.

XXVII. Neither, laſtly, is it neceſſary that a Man ſhould ſuffer in the ſame Manner in which he offended, or that a Criminal ſhould always be puniſh'd by [f] Retaliation. This Opinion is commonly aſcrib'd to the *Pythagoreans*, who defin'd Puniſhment by Ἀντιπεπονθὸς, or a Suffering the like. And the Judgment of *Rhadamanthus* is brought to confirm this Method. *Juſtice is duly then adminiſter'd* [g], *when the Offender ſuffers as his Sins.* But *Ariſtotle*, *Nicom.* Lib. v. Chap. viii, proves the Abſurdity of the Ἀντιπεπονθὸς, or Retaliation, by this Inſtance: *If a Magiſtrate*, ſays he, *ſtrikes another Perſon, he is not to be ſtricken again; but if another Perſon ſtrikes a Magiſtrate, he is not only to be ſtricken again, but to be further ſeverely puniſh'd.* As to that Command in *Ex.* xxi. 23, and *Levit.* xxiv. 20, the *Jewiſh* Doctors are generally of Opinion, that it does not oblige to a rigid Retaliation, but that ſuch Crimes may be redeem'd by a pecuniary Mulct. *Bodinus de Repub.* Lib. vi. Chap. *ult.* denies that this Law was ever in Force. For Example, that it was never underſtood, *that when one Man broke another's Leg, his ſhould be broken too*; and he adds, that that Form, *An Eye for an Eye, and a Tooth for a Tooth*, is no Argument to the contrary; becauſe that was only a proverbial Expreſſion, and implied no more, than that the Penalty ought to be proportion'd to the Offence: That what deſerv'd only a Reproof ought not to be puniſhed with Death; and that ſuch Offences as deſerved Death, ought not to be corrected with a Reprimand; and that this may eaſily be inferr'd from hence, that thoſe divine Laws do not puniſh Theft with Theft, Adultery with Adultery, nor Wound with Wound. But Theft with double, or four Times the Value of the Thing ſtolen; Adultery with Death; and a Wound with a pecuniary Mulct. The ſame divine Law hath, alſo, Reſpect of Perſons; for Inſtance, if a Man curſes a private Perſon, the Law preſcribes no ſevere Puniſhment to be inflicted on him; but, if a private Man curſes the Ruler, or a Son his Father, the Puniſhment is capital. On the other Hand, *Conſtantius L'Empereur Babakama*, Chap. viii. Sect. 1, contends for the literal Senſe of theſe Words. I ſhall not undertake to determine the Diſpute between 'em; but, after all, 'tis confeſſed however, that it was left to the Power of the Judge to tranſmute the corporal Puniſhment of Retaliation into a pecuniary, according to the Nature of the Circumſtances, from that Paſſage of the Law, *Ex.* xxi. 29, 30, where a greater Puniſhment is admitted to be chang'd for a leſs. And *Joſephus* ſays in his *Antiquities*, Lib. iv. Chap. viii, *That he who put out another Man's Eyes, was to ſuffer the like, and loſe the ſame himſelf, which he deprived the other of; unleſs the Perſon that loſt his Eye, was content to take a Sum of Money in lieu of that Penalty; the Law allowing the Sufferer to ſet the Rate upon his own Misfortune.* But, on the other Hand, they that endeavour to prove Retaliation, urge that Paſſage in *Deuteronom.* xix. 19 [h]. But it may be anſwer'd, that the Laws there mentioned cannot, with any Appearance of Reaſon, be thought to belong to this Subject; ſince the Puniſhment for Evil-ſpeaking, and Curſing, exceeds all the Meaſures of Retaliation; the bare Endeavour having the full Evil ſet in View. However, in

[a] Thus *Vulcatius Gallicanus* in *Avidius Caſſius*, Chap. iv, relates, That he had cut the Nerves of the Deſerters Legs. Add *Cujacius*'s Obſerv. Lib. vii. Chap. xiii. [b] *Inſtitut.* Lib. iv. Tit. i. *De obligat. quæ ex delicto naſcuntur*, Sect. 5. [c] *Fenbr.* Lib. ii. Tit. xxvii. § 8. *de Pace tenenda.* [d] *Vide* Herodot. *Euterpe*, Pag. 90. Ed *H. Steph.* *Diodor. Siculus.* Lib. i. Chap. lxx. [e] Sir *Thomas More*, Utop. Lib. i. [f] See *Grot.* B. ii. Chap. xx. § 32. [g] Ovid. *de Arte Amandi*, Lib. i. ver. 655, 656.

——— *Neque enim lex æquior ulla eſt,*
Quam necis artifices arte perire ſua.

——— Th' Inventors, as 'tis juſt,
Should feel thoſe Pains themſelves diſcover'd firſt.

Quintil. Decl. xi. Pag. 154. The Juſtice of Revenge is ſhorteſt when the Crime is the Meaſure of the Puniſhment. And if the Nature of Revenge be conſider'd, a Man is beſt reveng'd, when his Injuries are puniſh'd in the ſame Way they were committed. *Senec.* Lib. v. *Contr. Præfat.* Pag 276. What a Man deſigns for a Puniſhment to another, is often, by a very juſt Method of puniſhing, chang'd into its own. *Polyb.* Lib. xii. *in Excerpt. Peireſc.* Since he hath carried himſelf with ſo much Bitterneſs and Moroſeneſs to others, 'tis juſt others ſhould uſe him with the ſame Unkindneſs. [h] *Conf.* Lib. ix. Tit. ii. L. *ult.* *C. de Accuſat. & Inſcript.* Lib. ix. Tit. xlvi. L. *ult.* *C. de Calumn.* Lib. ix. Tit. xii. L. 7. *C. ad Jul de Vi Publica.* *Joſephus de Archæol Jud.* Lib. iv. Chap. iv. No *Iſraelite* ſhall have by him any mortal Poiſon: And if any ſuch be found in his Poſſeſſion, he ſhall die, and ſuffer what he was to have done whom the Poiſon was prepar'd for. *Diod. Siculus*, Lib. i. Chap. lxxvii, repeats an *Egyptian* Law of the ſame Nature.

[1] But ſome very learned *Germans* maintain the contrary; and ſay, That *Charles* V. rais'd the Sum for which a Robber was to be condemn'd to Death, ſo that, conſequently, his Edict was leſs rigorous. They are of Opinion, that, by *Solidi*, the Emperor *Frederick* II underſtood *Schillings*, or little Pieces of Silver nearly the Value of thoſe which go by that Name in *Holland*: Whereas *Charles* ſpeaks of *Hungarian* Ducats. See SCHILTER *in Pandect.* Excer. xlix. § 11.

other Reſpects, the Penalty of that is not unjuſt. *For there is no Difference between an Evil-ſpeaker, and one that does Ill, but only in the Opportunity* [a]. Thus by the Law of GOD, a Man that brought an evil Report upon a Virgin, was look'd upon to be equally guilty with one that forced her Honour. *Deuteronon.* xxii. 19, 29 [b]. *For there can be nothing more injurious and malicious than Detraction; it maketh us think well of Falſhood, and forces Innocence itſelf to look guilty* [c]. *And the State of human Affairs muſt be reduced to a very deſperate Condition indeed, if every Man's Malice has Power to make us criminal: For Innocence can never be happy enough, to eſcape the pernicious Diligence of a ſlanderous Tongue* [d]. In one of the Laws of the Twelve Tables it is inſtituted, that *the Man who breaks another's Limbs, unleſs he can make his Peace, and compound with him, ſhall ſuffer the like.* Upon which Law I refer to you the Diſpute between *Favorinus* and *Sex. Cæcilius* in *Gellius* [e], Lib. xx. Chap. i. But it is plain, that Retaliation was grown out of Uſe at *Rome*, from the 7th Section of the *Inſtitute*, *De Injuriis* [f]. *Diodorus Siculus*, Lib. xii. Chap. xvii, gives us an Account of a Law made by *Charondas*, to this Effect: *If any Man puts out another's Eye, let his Eye, alſo, be put out.* "It happen'd, that a Perſon blind in one Eye was ſet upon, and loſt his other, and conſequently was entirely deprived of Sight: Now in this Caſe, tho' the Criminal was to be depriv'd of one Eye, yet his Puniſhment was juſtly thought leſs than he deſerv'd; becauſe, tho' he might ſeem to be ſufficiently puniſh'd by the Letter of the Law, yet his Loſs was not conſiderably ſo great as the other's. And therefore it would look more like Juſtice, where the Penalty was to be laid equal to the Injury, that the Perſon, who entirely depriv'd the Man of Sight that had loſt one Eye before, ſhould loſe both his. The blind Man grown therefore impatient at his Misfortune, and the Partiality of the Caſe, took the Courage to repreſent his Caſe to the People, bewail'd the unhappy Condition of his Life, and begg'd them to alter the Law; at laſt, putting the Rope about his Neck (as the Cuſtom was there upon ſuch Occaſions) his Intreaties had the deſir'd Effect, the Law was abrogated; a new one better conſider'd was preferr'd, and he eſcap'd the Death he was ready to have ſuffer'd [g]". But, however this be, 'tis certain, that ſo rude a Notion of Retaliation can never be a juſt Meaſure of Puniſhment. For, in the firſt Place, there are a great many Crimes, which it cannot poſſibly be apply'd to. As, I believe, Retaliation was never thought a proper Puniſhment for *Adultery*, *Raviſhment*, *Beſtiality*, *Treaſon againſt the State*, *Reviling*, *Detraction*, *Sorcery*, *Forgery of Wills or Deeds*, *Counterfeiting the Coin*, *impoſing of falſe Births, or adulterous Children*, *procuring Abortion* [1], *Kidnapping*, Crimen [2] Ambitus, *Inceſt*, *Sacrilege*, *Removing the Landmark*, *Defacing* [3] *Sepulchres* [4], *Cozenage and Colluſion* [5], *Prevarication, and the like.* And, by the Way, it ſhould be mention'd as an Inſtance of the Wiſdom and Piety of the Emperor *Theodoſius*, that he took off the ſhameful Puniſhment of Women taken in Adultery then uſual at *Rome*, by which they were to be condemn'd to the publick Stews, and were there to be proſtituted to all that came, a Bell ringing all the Time they ſuffer'd that infamous Puniſhment. For though an Ignominy of this Nature might poſſibly produce the ſame Effects, as the moſt ſevere Puniſhment; yet ſince this Puniſhment could not be put in Execution without Sin, it ſeem'd rather to increaſe than take away the Guilt of the Fact it puniſh'd [h]. But admitting that thoſe Laws which ſeem to eſtabliſh Retaliation, apply it only to Injuries and Hurts that affect the Body; and admitting that one may imagine a Caſe, where the Crime committed may be well enough turn'd into the Puniſhment of it; and that neither the Perſons, the Place, the Time, Quality, or Cauſe, inhanſe or aggravate the Crime; yet even upon ſuch Suppoſitions ſimple Retaliation will not be a proper Puniſhment. For Inſtance, a common Man ſtrikes another a Box on the Ear, in ſome private Place; now if the Perſon that ſuffer'd the Stroke is to return the other the like, 'tis to be fear'd, he will hardly be exact enough to obſerve a juſt [6] Proportion [i]. And if the Execution be referr'd to a third Perſon, how ſhall he know with what Force the firſt Blow was given? Beſides, in many Crimes, Retaliation might be too ſevere, if there ſhould be no Diſtinction made, whether the Fact were committed maliciouſly, or not; or if no Difference of Perſons be obſerv'd. For [7] Example, a Man deſigning

[a] *Quintil.* Decl. cccxxxi. 'Tis a Sort of Murther to attempt any Man's Life, who ought not to be kill'd. And *Pliny* in his *Panegyr.* Chap. xxxv. Not. 3. ſpeaking to the Delators, tells them, "That they were to expect Puniſhments equal to the Rewards they had had before, that their Hopes ſhould be no greater than their Fears, and that they ſhould be as much afraid themſelves, as they were fear'd before by others. [b] Iſocrates *de Permutatione*, Pag. 540, 541. Detraction makes Judges perjure themſelves; extinguiſhes the Light of Truth, involves all that hearken to it in a Miſt of Lies, and then eaſily finds a Way to deprive Men of their Lives. [c] *Quintil.* Declam. xi. Defamation can have no Effect, but by the Injuſtice of the Judge. [d] Conſtitut. *Sicul.* Lib. ii. Chap. xiv. [e] *Noct. Attic.* [f] Inſtitut. Lib. iv. Tit iv. l. 7. [g] Demoſthenes *mentions the ſame Law*, adv. Timocratem. *Ariſtot.* Rhet. *Lib.* i. *Chap.* vii. The Puniſhment is not the ſame, when a Man puts out his Eye that has but one, and one of his that hath two. *Add.* Pet. Gregor. Tholoſanus *Syntagm.* Lib. xxxi. Chap. x. [h] Socrates *Hiſt. Eccl.* Lib. v. Chap. xviii. i Add. *Lex Wiſigothorum.* Lib. vi. Tit. iv. Chap. iii.

[1] *Plagium.* This was when a Man took by Force, or bought for a Slave, a Perſon whom he knew to be free; or when he appropriated to himſelf, or diſhoneſtly kept the Slave of another Man; or conceal'd him; or perſuaded him to run away from his Maſter; &c. See *Digeſt.* Lib. xlviii. Tit. xv. *De Lege Fabia de Plagiariis.*

[2] See *Digeſt.* Lib. xlvii. Tit. xxi. *De termino moto*; and the Interpreters upon it.

[3] See *Digeſt.* Lib. xlvii. Tit. xii. *De Sepulchro violato.* [4] See above, Lib. iii. Chap. vii. Sect. ii. at the End.

[5] See *Digeſt.* Lib. xlvii. Tit. xv. *De Prævaricatione.*

[6] It is for this the Law of the *Wiſigoths*, cited by our Author, forbids the Puniſhment of the *Talio*, for a Box on the Ear, or any Stroke given on the Head, tho' it ordain'd it for many other *corporal Injuries: Pro alapâ vero, pugno vel calce, aut percuſſione in capite, prohibemus reddere talionem: ne dum talio rependitur, aut Caſio major, aut periculum ingeratur.*

[7] *Ariſtotle* makes uſe of this Proof, and of a ſimilar Example, to ſhew that the Law of *Talio* ſhould not be always practiſed. Πλαχῆ δὲ διαφανεῖ, &c. "The *Talio* does not often agree with Juſtice." If a Magiſtrate, for Example, beats a Man, this latter ought not ſtrike him in his Turn. If, on the contrary, a Man ſtrikes a Magiſtrate, he ought not only to be beaten in his Turn, but otherwiſe puniſh'd. Beſides, there is a great Difference between what a Man does voluntarily, and what he does againſt his Will. *Ariſtot. Nicom.* Lib. v. Chap. viii.

ſmiteth him, putteth forth her Hand and taketh him by the Secrets, Deut. xxv. 11 [a]. However, *Anton. Matthæus*, *De Criminibus*, *Tit. de Furtis*, Chap. ii, puts a handſome Interpretation upon *Juſtinian*'s Inſtitution [b], by urging for it, That ſince 'tis generally either Idleneſs, or Poverty, that forces People to ſteal, the Emperor was not willing Thieves ſhould be puniſh'd by loſing the Uſe of their Limbs, that they might not be depriv'd of the Inſtruments neceſſary for them to reform their bad Courſe of Life; and when they ought rather to be forced upon ſome laborious Imployment. In *Germany*, the Law, that all Thieves ſhould be hang'd, was made by *Frederick* the Second [c]. And it was afterwards confirm'd by *Charles* V. but look'd more ſevere in him than in *Frederick*, becauſe he took no Care of the Value of the Coin which was then [1] ſinking. Upon the whole, though I am of Opinion, that 'tis poſſible for Judges to be too free in inflicting capital Puniſhments, and that ſometimes it might turn more to the Advantage of the State, if ſuch Criminals as are here ſpoken of, were rather condemn'd to ſome uſeful Labour and Service [d]; and ſo we are told *Sabaco*, King of *Egypt*, forced all Malefactors, that were condemn'd in capital Puniſhments, to publick Labours; and that the Country was ſoon ſenſible of the Benefit it receiv'd from ſuch an Application of them [e]: Yet I make no doubt but that Theft may lawfully be puniſh'd with Death. And, from what has been ſaid, it will be eaſy to anſwer all the Objections urg'd to the contrary, eſpecially thoſe from *Ant. Matthæus*.

XXVII. Neither, laſtly, is it neceſſary that a Man ſhould ſuffer in the ſame Manner in which he offended, or that a Criminal ſhould always be puniſh'd by [f] Retaliation. This Opinion is commonly aſcrib'd to the *Pythagoreans*, who defin'd Puniſhment by Ἀντιπεπονθὸς, or a Suffering the like. And the Judgment of *Rhadamanthus* is brought to confirm this Method. *Juſtice is duly then adminiſter'd*, *when the Offender ſuffers as his Sins*. But *Ariſtotle*, *Nicom.* Lib. v. Chap. viii, proves the Abſurdity of the Ἀντιπεπονθὸς, or Retaliation, by this Inſtance: *If a Magiſtrate*, ſays he, *ſtrikes another Perſon*, *he is not to be ſtricken again*; *but if another Perſon ſtrikes a Magiſtrate*, *he is not only to be ſtricken again*, *but to be further ſeverely puniſh'd*. As to that Command in *Ex.* xxi. 23, and *Levit.* xxiv. 20, the *Jewiſh* Doctors are generally of Opinion, that it does not oblige to a rigid Retaliation, but that ſuch Crimes may be redeem'd by a pecuniary Mulct. *Bodinus de Repub.* Lib. vi. Chap. *ult.* denies that this Law was ever in Force. For Example, that it was never underſtood, *that when one Man broke another's Leg*, *his ſhould be broken too*; and he adds, that that Form, *An Eye for an Eye*, *and a Tooth for a Tooth*, is no Argument to the contrary; becauſe that was only a proverbial Expreſſion, and implied no more, than that the Penalty ought to be proportion'd to the Offence: That what deſerv'd only a Reproof ought not to be puniſhed with Death; and that ſuch Offences as deſerved Death, ought not to be corrected with a Reprimand; and that this may eaſily be inferr'd from hence, that thoſe divine Laws do not puniſh Theft with Theft, Adultery with Adultery, nor Wound with Wound. But Theft with double, or four Times the Value of the Thing ſtolen; Adultery with Death; and a Wound with a pecuniary Mulct. The ſame divine Law hath, alſo, Reſpect of Perſons; for Inſtance, if a Man curſes a private Perſon, the Law preſcribes no ſevere Puniſhment to be inflicted on him; but, if a private Man curſes the Ruler, or a Son his Father, the Puniſhment is capital. On the other Hand, *Conſtantius L'Empereur Babakam*, Chap. viii. Sect. 1, contends for the literal Senſe of theſe Words. I ſhall not undertake to determine the Diſpute between 'em; but, after all, 'tis confeſſed however, that it was left to the Power of the Judge to tranſmute the corporal Puniſhment of Retaliation into a pecuniary, according to the Nature of the Circumſtances, from that Paſſage of the Law, *Ex.* xxi. 29, 30, where a greater Puniſhment is admitted to be chang'd for a leſs. And *Joſephus* ſays in his *Antiquities*, Lib. iv. Chap. viii, *That he who put out another Man's Eyes*, *was to ſuffer the like*, *and loſe the ſame himſelf*, *which he deprived the other of*; *unleſs the Perſon that loſt his Eye*, *was content to take a Sum of Money in lieu of that Penalty*; *the Law allowing the Sufferer to ſet the Rate upon his own Misfortune*. But, on the other Hand, they that endeavour to prove Retaliation, urge that Paſſage in *Deuteronom.* xix. 19 [h]. But it may be anſwer'd, that the Laws there mentioned cannot, with any Appearance of Reaſon, be thought to belong to this Subject; ſince the Puniſhment for Evil-ſpeaking, and Curſing, exceeds all the Meaſures of Retaliation; the bare Endeavour having the full Evil ſet in View. However, in

[a] Thus *Vulcatius Gallicanus* in *Avidius Caſſius*, Chap. iv, relates, That he had cut the Nerves of the Deſerters Legs. Add *Cujacius*'s Obſerv. Lib. vii. Chap. xiii. [b] *Inſtitut.* Lib. iv. Tit. i. *De obligat. quæ ex delicto naſcuntur*, Sect. 5. [c] *Feudor.* Lib. ii. Tit. xxvii. § 8. *de Pace tenenda*. [d] *Vide* Herodot. *Euterpe*, Pag. 90. Ed *H. Steph.* *Diodor. Siculus*, Lib. i. Chap. lxv. [e] Sir *Thomas More*, Utop. Lib. i. [f] See *Grot.* B. ii. Chap. xx. § 32. [g] Ovid. *de Arte Amandi*, Lib. i. ver. 655, 656.

——— *Neque enim lex æquior ulla eſt*,
Quam necis artifices arte perire ſua.

——— Th' Inventors, as 'tis juſt,
Should feel thoſe Pains themſelves diſcover'd firſt.

Quintil. Decl. xi. Pag. 154. The Juſtice of Revenge is ſhorteſt when the Crime is the Meaſure of the Puniſhment. And if the Nature of Revenge be conſider'd, a Man is beſt reveng'd, when his Injuries are puniſh'd in the ſame Way they were committed. *Strab.* Lib. v. *Contr. Præfat.* Pag 276. What a Man deſigns for a Puniſhment to another, is often, by a very juſt Method of puniſhing, chang'd into its own. *Polyb.* Lib. xii. *in Excerpt. Peireſc.* Since he hath carried himſelf with ſo much Bitterneſs and Moroſeneſs to others, 'tis juſt others ſhould uſe him with the ſame Unkindneſs. [h] *Conf.* Lib. ix. Tit. ii. L. *ult.* *C. de Accuſat. & Inſcrip.* Lib. ix. Tit. xlvi. L. *ult.* *C. de Calumn.* Lib. ix. Tit. xii. L. 7. *C. ad Jul. de Vi Publica.* *Joſephus de Archæol Jud.* Lib iv. Chap. viii. No *Iſraelite* ſhall have by him any mortal Poiſon: And if any ſuch be found in his Poſſeſſion, he ſhall die, and ſuffer what he was to have done whom the Poiſon was prepar'd for. *Diod. Siculus*, Lib. i. Chap. lxxvii, repeats an *Egyptian* Law of the ſame Nature.

[1] But ſome very learned *Germans* maintain the contrary; and ſay, That *Charles* V. rais'd the Sum for which a Robber was to be condemn'd to Death, ſo that, conſequently, his Edict was leſs rigorous. They are of Opinion, that, by *Solidi*, the Emperor *Frederick* II underſtood *Schillings*, or little Pieces of Silver nearly the Value of thoſe which go by that Name in *Holland*: Whereas *Charles* ſpeaks of *Hungarian* Ducats. See SCHILTER *in Pandect.* Excer. xlix. § 11.

other Reſpects, the Penalty of that is not unjuſt. *For there is no Difference between an Evil-ſpeaker, and one that does Ill, but only in the Opportunity* [a]. Thus by the Law of GOD, a Man that brought an evil Report upon a Virgin, was look'd upon to be equally guilty with one that forced her Honour. *Deuteronon.* xxii. 19, 29 [b]. *For there can be nothing more injurious and malicious than Detraction; it maketh us think well of Falſhood, and forces Innocence itſelf to look guilty* [c]. *And the State of human Affairs muſt be reduced to a very deſperate Condition indeed, if every Man's Malice has Power to make us criminal: For Innocence can never be happy enough, to eſcape the pernicious Diligence of a ſlanderous Tongue* [d]. In one of the Laws of the Twelve Tables it is inſtituted, that *the Man who breaks another's Limbs, unleſs he can make his Peace, and compound with him, ſhall ſuffer the like.* Upon which Law I refer to you the Diſpute between *Favorinus* and *Sex. Cæcilius* in *Gellius* [e], Lib. xx. Chap. i. But it is plain, that Retaliation was grown out of Uſe at *Rome*, from the 7th Section of the *Inſtitute*, *De Injuriis* [f]. *Diodorus Siculus*, Lib. xii. Chap. xvii, gives us an Account of a Law made by *Charondas*, to this Effect: *If any Man puts out another's Eye, let his Eye, alſo, be put out.* "It happen'd, that a Per-
"ſon blind in one Eye was ſet upon, and loſt
"his other, and conſequently was entirely de-
"priv'd of Sight: Now in this Caſe, tho' the
"Criminal was to be depriv'd of one Eye, yet
"his Puniſhment was juſtly thought leſs than he
"deſerv'd; becauſe, tho' he might ſeem to be
"ſufficiently puniſh'd by the Letter of the
"Law, yet his Loſs was not conſiderably ſo
"great as the other's. And therefore it would
"look more like Juſtice, where the Penalty was
"to be laid equal to the Injury, that the Per-
"ſon, who entirely depriv'd the Man of Sight
"that had loſt one Eye before, ſhould loſe both
"his. The blind Man grown therefore impa-
"tient at his Misfortune, and the Partiality of
"the Caſe, took the Courage to repreſent his
"Caſe to the People, bewail'd the unhappy
"Condition of his Life, and begg'd them to
"alter the Law; at laſt, putting the Rope
"about his Neck (as the Cuſtom was there upon
"ſuch Occaſions) his Intreaties had the deſir'd
"Effect, the Law was abrogated; a new one
"better conſider'd was preferr'd, and he eſcap'd
"the Death he was ready to have ſuffer'd [g]".
But, however this be, 'tis certain, that ſo rude a Notion of Retaliation can never be a juſt Meaſure of Puniſhment. For, in the firſt Place, there are a great many Crimes, which it cannot poſſibly be apply'd to. As, I believe, Retaliation was never thought a proper Puniſhment for *Adultery*, *Raviſhment*, *Beſtiality*, *Treaſon againſt the State*, *Reviling*, *Detraction*, *Sorcery*, *Forgery of Wills or Deeds*, *Counterfeiting the Coin*, *impoſing of falſe Births, or adulterous Children*, *procuring Abortion* [1], *Kidnapping*, Crimen [2] Ambitus, *Inceſt*, *Sacrilege*, *Removing the Landmark*, *Defacing* [3] *Sepulchres* [4], *Cozenage and Colluſion* [5], *Prevarication, and the like.* And, by the Way, it ſhould be mention'd as an Inſtance of the Wiſdom and Piety of the Emperor *Theodoſius*, that he took off the ſhameful Puniſhment of Women taken in Adultery then uſual at *Rome*, by which they were to be condemn'd to the publick Stews, and were there to be proſtituted to all that came, a Bell ringing all the Time they ſuffer'd that infamous Puniſhment. For though an Ignominy of this Nature might poſſibly produce the ſame Effects, as the moſt ſevere Puniſhment; yet ſince this Puniſhment could not be put in Execution without Sin, it ſeem'd rather to increaſe than take away the Guilt of the Fact it puniſh'd [h]. But admitting that thoſe Laws which ſeem to eſtabliſh Retaliation, apply it only to Injuries and Hurts that affect the Body; and admitting that one may imagine a Caſe, where the Crime committed may be well enough turn'd into the Puniſhment of it; and that neither the Perſons, the Place, the Time, Quality, or Cauſe, inhanſe or aggravate the Crime; yet even upon ſuch Suppoſitions ſimple Retaliation will not be a proper Puniſhment. For Inſtance, a common Man ſtrikes another a Box on the Ear, in ſome private Place; now if the Perſon that ſuffer'd the Stroke is to return the other the like, 'tis to be fear'd, he will hardly be exact enough to obſerve a juſt [6] Proportion [i]. And if the Execution be referr'd to a third Perſon, how ſhall he know with what Force the firſt Blow was given? Beſides, in many Crimes, Retaliation might be too ſevere, if there ſhould be no Diſtinction made, whether the Fact were committed maliciouſly, or not; or if no Difference of Perſons be obſerv'd. For [7] Example, a Man deſigning

[a] *Quintil.* Decl. ccexxxi. 'Tis a Sort of Murther to attempt any Man's Life, who ought not to be kill'd. And *Pliny* in his *Panegyr.* Chap. xxxv. Not. 3. ſpeaking to the Delators, tells them, "That they were to expect Puniſhments equal to the Rewards they "had had before, that their Hopes ſhould be no greater than their Fears, and that they ſhould be as much afraid themſelves, as they "were fear'd before by others. [b] Iſocrates *de Permutatione*, Pag. 540, 541. Detraction makes Judges perjure themſelves; extinguiſhes the Light of Truth, involves all that hearken to it in a Miſt of Lies, and then eaſily finds a Way to deprive Men of their Lives. [c] *Quintil.* Declam. xi. Defamation can have no Effect, but by the Injuſtice of the Judge. [d] Conſtitut. *Sicul.* Lib. ii. Chap. xiv. [e] *Noct. Attic.* [f] Inſtitut. Lib. iv. Tit iv. l. 7. [g] Demoſthenes *mentions the ſame Law*, adv. Timocratem. *Ariſtot.* Rhet. *Lib.* i. *Chap.* vii. The Puniſhment is not the ſame, when a Man puts out his Eye that has but one, and one of his that hath two. *Add.* Pet. Gregor. Tholoſanus *Syntagm.* Lib. xxxi. Chap. x. [h] Socrates *Hiſt. Eccl.* Lib. v. Chap. xviii. [i] Add. *Lex Wiſigothorum.* Lib. vi. Tit. iv. Chap. iii.

[1] *Plagium.* This was when a Man took by Force, or bought for a Slave, a Perſon whom he knew to be free; or when he appropriated to himſelf, or diſhoneſtly kept the Slave of another Man; or conceal'd him; or perſuaded him to run away from his Maſter; *&c.* See *Digeſt.* Lib. xlviii. Tit. xv. *De Lege Fabia de Plagiariis.*
[2] See *Digeſt.* Lib. xlvii. Tit. xxi. *De termino moto*; and the Interpreters upon it.
[3] See *Digeſt.* Lib. xlvii. Tit. xii. *De Sepulchro violato.* [4] See above, Lib. iii. Chap. vii. Sect. ii. at the End.
[5] See *Digeſt.* Lib. xlvii. Tit. xv. *De Prævaricatione.*
[6] It is for this the Law of the *Wiſigoths*, cited by our Author, forbids the Puniſhment of the *Talio*, for a Box on the Ear, or any Stroke given on the Head, tho' it ordain'd it for many other *corporal Injuries: Pro alapâ vero, pugno vel calce, aut percuſſione in capite, prohibemus reddere talionem: ne dum talio rependitur, aut Caſio major, aut periculum ingeratur.*
[7] *Ariſtotle* makes uſe of this Proof, and of a ſimilar Example, to ſhew that the Law of *Talio* ſhould not be always practiſed. Ὁ γὰρ ἀλλαχὰ ἁρμόττει διαφανῆ, *&c.* "The *Talio* does not often agree with Juſtice." If a Magiſtrate, for Example, beats a Man, this latter ſhould not ſtrike him in his Turn. If, on the contrary, a Man ſtrikes a Magiſtrate, he ought not only to be beaten in his Turn, but otherwiſe puniſh'd. Beſides, there is a great Difference between what a Man does voluntarily, and what he does againſt his Will. *Ariſt. Nicom.* Lib. v. Chap. viii.

to ſtrike another a ſlight Blow in the Face with his Diamond perhaps, or ſome Stone he wears on his Finger, unhappily, againſt his Intention, ſtrikes out his Eye; it would be very ſevere, if ſuch a Perſon ſhould, upon that Misfortune, be condemn'd to loſe his Eye too. So if a Gentleman kick a common Porter or Labourer, it would be too ſevere to ſentence that the Kick ſhould be returned again upon him, becauſe 'tis a Diſhonour to a Perſon of Quality to receive a Kick, and none to one of mean Condition. Again, on the other Hand, in many Crimes the Puniſhment of Retaliation ſeems too eaſy: And this may happen particularly from a Diſparity between the Perſons who did, and who ſuffer'd the Injury; or elſe from a Diſparity of Place, Time, and other Circumſtances. But in the general, the Arguments which *Grotius* produces in the Chapter before cited, § 32, entirely confute that wild extravagant Notion of Retaliation; where he, alſo, with very good Reaſon denies, that when a Man hath deliberately, and without much alleviating Circumſtances, done Hurt to another Perſon, he ought to ſuffer juſt as much Harm as he has done, and no more. For 'tis a Contradiction to Equity, that the Fears and Dangers of the innocent and the criminal ſhould be equal. And there would be but ſlender Proviſion made for common Security, if Malefactors ſhould be under no greater Fears from publick Juſtice and the Laws, than good Men are from their Inſolence and Wickedneſs; eſpecially ſince the Hopes of Concealment, of eſcaping by Flight, or by ſome Way or other evading Juſtice, are in a Manner additional Advantages to every Villain. And beſides, the moſt ſacred Laws themſelves ſometimes ordain the ſame Puniſhments for imperfect and finiſh'd Crimes, *Deut.* xix. 19. *Exod.* xxii. 9 [a]. It was a remarkable Law which *Strabo* mentions, Lib. xv, among the *Indians*, *He that deprives Men of the Uſe of a Limb, ſhall not only ſuffer the like, but ſhall have his Hand cut off alſo. But if any Perſon deprives an Artificer or Mechanick of the Uſe of an Hand, or an Eye, he ſhall be put to Death.* And by *Solon*'s Law, the Perſon who put out one of another Man's Eyes, was to loſe both his own [b]. And ſo, alſo, a Man that went [i] arm'd, with a Deſign to kill any Perſon, fell under the Reach of the Law *de Sicariis*, Lib. xlviii. T. viii. L. 1. D. *ad L. Corneliam.* Now though the Conſequence of this be, that the Puniſhment of a mature finiſh'd Crime ſhould be proportionable to the Degrees of its Conſummation, yet ſince human Juſtice can inflict no Puniſhment greater than Death, and it is impoſſible that ſhould be repeated, there muſt neceſſarily be a Stop made there; though, according to the Degrees of the Crime, the Puniſhment of Death may be made more painful by Torture, or appear more grievous from the Circumſtances of Ignominy and Diſgrace, which either attend or follow after it.

XXVIII. I proceed, in the next Place, to conſider thoſe Puniſhments which are inflicted by human Juſtice, for other Mens Crimes. And here, without Diſpute, [c] they who really partake of the Guilt of the Offence, ought to ſhare, alſo, in the Puniſhment, in Proportion to the Influence they may be ſuppoſed to have in the Fact; ſince they ſuffer not for another Man's Fault, but their own. But now how, and by what Method of acting, a Man may be ſaid to partake of another's Crime, I have ſhewed before [d e]. But it muſt be obſerv'd, that there is this Difference between Satisfaction for Damage and Puniſhment, that 'tis more uſual for human Juſtice to condemn an Offender to make Reſtitution, than beyond, and beſides that, to ſuffer Puniſhment alſo: Becauſe Imprudence or Levity of Offence may be ſufficient Motives to ſuperſede Puniſhment, though perhaps not to excuſe Reparation for Damages. It was a remarkable Law which was made by *Thomas Randolf*, Regent of *Scotland*, [f] to ſuppreſs the Robberies which were then frequent; and that was, *That all Husbandmen ſhould leave their Ploughs, and other Inſtruments of Tillage, in the open Fields; and that at Night they ſhould not ſo much as lock or ſecure their Houſes or Barns; and that the Loſſes they ſuffer'd ſhould be paid to them by the Juſticiaries of the Kingdom, who were to be reimburs'd by the King, and the King was to ſatisfy himſelf by the Goods and Chattles of the Robbers that were apprehended.* But now as to Crimes contracted by Corporations or publick Bodies, it muſt be obſerved, that tho' the Decrees, to which the major Part conſents, are generally look'd upon to be Decrees of the whole Body; ſo that the leſſer Number diſſenting, ſhall be oblig'd, notwithſtanding, to ſee them executed [g h]; yet, if there be any Enquiry made about the Guilt of ſuch an Act, thoſe Perſons only are to be ſuppoſed liable, who actually gave their Conſent. And thoſe are innocent, who denied their Agreement to it from the Beginning, and conſtantly perſiſted to diſſent from it [i]. *Alexander* the Great took *Thebes*, and commanded that all the *Thebans* ſhould be ſold for Slaves, excepting only ſuch of them, as were againſt paſſing the Decree to break Alliance with the *Macedonians* [k]. Nay, it is not uncommon to excuſe thoſe at leaſt (as to the higheſt Degrees of Guilt) who diſſented at firſt, but afterwards fell in with the prevailing Number, and then purſu'd the Execution of the criminal Decree as far as they had Power. So the *Greeks* were ſaid to have ſpared *Antenor* and *Æneas* [l], who had perſuaded the *Trojans* to reſtore *Helena*, though the latter of them perform'd many brave Actions in Defence of his Country. It is, alſo, to be further obſerv'd, that the Puniſhment of a Corporation or Body politick, as ſuch, is different from the Puniſhment of particular Perſons and Subjects. The Puniſhment of a particular Subject is ſometimes Death. And that which anſwers it in the Body politick is Diſſolution [m];

[a] *V. Edictum Regis* Theodorici, *Chap.* xiii. & l. [b] *Diogenes Laert. Solon.* [c] Vide *Grot.* Lib. ii. Chap. xxi. § 1. [d] See above in Book i. Chap. v. §. 14. and in Book iii. Chap. i. § 4, 5. [e] *Vide* Jacob. Godofredum *diſc. in* C. L. ix. T. viii. *ad L. Juliam. Majeſt.* Lib. v. Chap. ix & x. [f] Buchanan *Rer. Scotic.* Lib. ix. [g] *Vide* Polyb. Lib. v. Chap. xlix. *in fin. Plin.* Lib. vi. Ep. xiii. Particular Men at the firſt Propoſition of any Matter may lawfully diſſent; but wnen the Decree is paſs'd, that which the Majority agreed to, muſt oblige all. [h] Upon this, ſee, above, in Book vii. Chap. ii. § 15. [i] See *Luke* xxiii. 51. [k] *Plut. Alexandr.* Pag. 670. D. [l] Vide *T. Liv.* Lib. i. Chap i. [m] Add. *Conſtitut. Sicul.* Lib. i. Tit. xlvii.

[i] See the *Roman* Law on this Subject, cited § 23. and *Grotius*, Lib. ii. Chap. xx. § 39.

and

and when a Corporation or Community is thus dissolv'd, all usufructuary Advantages are said to be at an End with it, in the same Manner as in Cases of Death [a]. Sometimes particular Persons are, by Way of Punishment, made Slaves, and the Body politick suffers the like, in case it were once immediately subject to the civil Sovereign only, but is afterwards subjected to some other subordinate Body, or perhaps to a particular Subject. And lastly, as particular Persons may be punish'd by Way of Mulct levied upon their Estates; so the Body politick, when it commits any publick Crime, is punish'd by Deprivation of the publick Goods belonging to it, such as Forts, Naval Stores, Ships of War, Arms, Treasure, publick Lands, Privileges [1], and the like. So when the People of *Antioch*, upon the Imposition of a new Tax, pull'd down the Emperor *Theodosius*'s Statues in all the publick Places, he punish'd them by forbidding them the Use of the Theatre and the Baths, and by taking from them the Title of Metropolis, which their City enjoy'd before [b]. And so *Marcus* the Emperor took away from the same People all the publick Shows and other Ornaments of their City (though he afterwards restored them again) [c]. So *Severus* demolish'd the greatest Part of *Byzantium*, ruin'd the Theatres, and Baths, and all the Ornaments of the City, reduc'd it almost to a Village, and made it subject the *Perinthians* [d]. And thus the Emperor *Constantius*, by Way of Punishment to the same City, because they had kill'd his General *Hermogenes*, took away from them the Dole of Corn, which he had usually before distributed among them [e]. But, however, in Crimes where there are Numbers of Accomplices, 'tis reasonable the chief Promoters and Abettors should be punish'd with greater Severity [f]. And, in short, in estimating the Crimes and Penalties of Corporations and Bodies politick, it should be consider'd, as *Quintilian* very well observes [g], That "generally whatever a Community undertakes, "must be ascribed to the Power of the Counsellors "which direct it; and that all popular Disturb-"ances and Insurrections are of greater or less "Violence, according as the People are exaspe-"rated. Just as all Motion in our Bodies de-"rives itself from our Minds, and our several "Parts are, as it were, dead and useless, till put "in Action by the Soul. 'Tis the easiest Thing "in Nature to raise any Kind of Passion in a "Multitude; for there was never an Assembly, "where every Man could perfectly govern him-"self by his own Thought, Sense and Reason. "Nor was there ever a Multitude that had the "Foresight and Prudence particular Men have. "Whether it be that all Men are less affected "with publick Concerns; or that every Man is "less sollicitous, where he doth not think him-"self in particular answerable for the Success. "For the Presumption and Dependence Men "have upon others, make them negligent and "remiss themselves. And so *Cicero* says, that among the *Romans*, if any Number of Soldiers had offended against the Laws military, some few of them were punish'd as their Lot happened, *That so the Terror might reach all, though but few fell under the Punishment* [h]. And this is implied in the Answer of *Germanicus*'s Army to him in *Tacitus*, that he should *punish the Guilty, but pardon such as had been misguided* [i].

XXIX. And here it may be question'd, whether a Crime committed by a Community or Corporation will always leave it under Execution of the Punishment; for Instance, if a Community has been publickly guilty of some criminal Act, perhaps two or three hundred Years past [k]? It may perhaps have some Shew of Reason for the Affirmative to say, That, as long as the Community lasts, it continues the same [l], though the particular Members in it change, and succeed one another. But when the Question is of human Punishment, it ought in Truth to be denied. For it is more necessary, even in particular Men, to punish fresh, and therefore more scandalous Crimes, than old forgotten Faults. And therefore, there was very good Reason for that Prescription of Crimes which the *Roman* Laws allow'd [m]. Besides, it is to be observed, that some Things may be immediately and naturally predicated of a Community, as such; for Example, the having a common Stock, common Constitutions, Rights, and Privileges,

[a] *Modestinus in* Lib. vii. Tit. vi. L. 21. *D. quibus mod. Usufruct. amit.* [b] *Libanius* Orat. xiii. [c] *Vulcatius Gallicanus* in *Avid. Cassius*, Chap. ix. [d] *Herodianus*, Lib. iii. Chap. xix. [e] Socrates *Eccles. Hist.* Lib. ii. Chap. xiii. [f] Vide *Liv.* Lib. xxviii. Chap. xxvi. *ab. init.* [g] *Quintil.* Declam. xi. Pag. 156, Ed. *Lugd. Bat.* [h] *Cic.* pro *Cluentio*, Chap. xlvi. *Tacitus*, Ann. Lib. i. Chap. xliv. *init.* [i] Add. *Polyb.* Lib. xi. Chap. xxvii. *in fin. & excerpt. Legat.* Lib. xxviii. Chap. iv. Bodinus *de Republ.* Lib. iii. Chap. vii. P. M. 527, *& seqq.* Ant. Matthæus *de Crimin ad* Lib. xlviii. D. Tit. xviii. Chap. iv. § 30. *Const. Sicul.* Lib. i. Tit. *ult.* [k] Vide *Grot.* Lib. ii. Chap. xxi. § 8. [l] Plutarch *de sera numinis vindicta*, Pag. 559. A. [m] *Vide* Ant. Matthæum *de Crim. ad* Lib. xlviii. T. xix. Chap. iv. T. xx. Chap. iv. § 14.

[1] We sometimes restore to a Community those Sort of Things, just as we do to private Persons, after they have been sufficiently chastised. To this we may refer an Example alledg'd by *Grotius*, Lib. ii. Chap ix § 6. Not. 6, of what the Emperor *Severus* did, with Regard to the City of *Alexandria*. This Prince restor'd the Right they had of a publick Council, which they had lost, during the Time which they were governed by a Judge named *Juridicus*, sent them from *Rome*. See *Spartian in Severo*, Chap. xvii, whose Words *Grotius* has nearly copied. M. *Gundling*, in a Dissertation, *De Universitate delinquente, ejusque pœnis*, § 45, pretends, that I have misunderstood both *Spartian* and *Grotius*, but it is easy to shew, that he himself is in the Error. To begin with *Grotius*, We need only consider, upon what Occasion he cites this Example. He joins it with that of the Town of *Capua*, and, consequently, supposes, a like Right was taken from the City of *Alexandria*. Besides, the Concession of such a Right, if the Town of *Alexandria* had never possessed it, would here have been nothing to the Purpose. As to the Passage of *Spartian*, M. *Gundling* is mistaken, for Want of understanding an ambiguous Expression, of which we find frequent Instances in the best *Greek* and *Latin* Authors: *Qui sine publico Consilio, ita ut sub Regibus, ante vivebant*, &c. This no Way signifies, that the City of *Alexandria* had no publick Council under its Kings, nor, that it had any, till the Emperor *Severus*'s Time; but, on the contrary, it means, that it had one under its Kings. It is just as if the Historian had said, *Qui sine Publico Consilio, quale habuerant sub Regibus, ante* [Severum] *vivebant*, &c. It is thus that *Casaubon* plainly understood it, and if M. *Gundling* had taken the Pains to have examined the Notes of this learned Critic, he had found an inconteſtable Proof, both of the Sense of *Spartian*, and of the Truth of the Fact. It is a Passage of *Dion Cassius*, who expressly says, "That *Augustus*, apprehensive of the turbulent Spirit of the People of *Alexandria*, made this Difference between them "and the other Towns of *Egypt*; that he left the Government of the latter, upon the Footing it was before, whereas he depriv'd the "*Alexandrians* of their publick Council:" Ἀλλὰ τοῖς μὲν ἄλλοις ὡς ἑκατοῖς, τοῖς δ' Ἀλεξανδρεῦσιν ἄνευ βουλευτῶν πολιτεύεσθαι ἐπέλευσε τοιαύτην νεωτεροποΐαν αὐτῶν κολάζων. Lib. lii. Pag. 521. B. *Edit. H. Steph.* This plainly proves, that, before the Time of *Augustus*, there was a publick Council at *Alexandria*.

which the particular Members cannot call their own. And again, that there are other Things which agree to the Body, only as derived from the particular Members, or which first of all inhere in the Members, and afterwards influence and denominate the whole Body. Thus it is usual to call a Society learned, noble, wise, honourable, or contemptible, as the Majority of its Members is learned, noble, wise, honourable, or contemptible, tho' perhaps some of the Members may be unlearned, base, or imprudent. And in this latter Sense it is, that such Bodies may be said to have incurr'd Punishment. For the Demerit adheres to the particular Members, as they are suppos'd to be Persons who have the Use of their Understanding, and are capable of acting with Reason and Choice. But a Community, as such, and as it is conceiv'd to be distinct from the particular Members, has no Faculties by which it is capable of exercising such Actions as primarily and immediately contract Demerit; and which may therefore be suppos'd to be distinct from those of the particular Members. And therefore it follows, that if the Members, by whom the Body contracted the Demerit, are dead and gone from the Society, and the Guilt has not been continued by any Act of their Successors, that the Demerit itself expires with them; and, consequently, that which made the Body liable to Punishment; since the one cannot be justly indicted without the other. *Plutarch* [a] indeed, in this Case, appeals to the Methods of divine Justice, which sometimes, as we read, *visits the Sins of the Fathers upon the Children.* But as the Proceedings of divine Justice are not always to be made a Pattern to human; so neither doth it follow that if it be Equity, to allow Posterity the Possession of those Rewards and Honours which were acquired by the Deserts of Ancestors; it is therefore Equity, that they should, also, suffer the Punishments due to their Ancestors Offences. For it is the Nature of a Benefit, that it may freely be bestow'd at the Pleasure of the Donor, even upon a Person wholly undeserving; but the Nature of Punishment is quite different. The *Romans* (as *Justin* tells us) made use of the Pretence of an old forgotten Kindness, to undertake the Defence of the *Acarnanians* against the *Etolians* [b], declaring that the Reason why they assisted them was, because the *Acarnanians* did not join with the other Cities of *Greece*, to send Forces against *Troy*, from which City the *Romans* would be thought to have derived themselves: Though it was clear this was nothing else but Pretence, and was only a Colour to excuse themselves for interposing in Things it did not belong to them to be concern'd in [c].

XXX. But however it is still true, that human Justice ought not to force a Man to bear Part of the Punishment of another's Crime, when he was not accessory to the Commission of it. The Reason is, because all Merit and Demerit are entirely personal, and founded in the Will of each Man; which certainly is, or nothing is, at his Command, and which can't contract any Guilt, but by some internal Motion of its own [d]. But because it often happens, that some Mens Offences are the Occasions of Evil to others, that we may not be apt from hence to make a wrong Inference, it is necessary to observe, in the first Place, that not every Thing which brings Uneasiness, Inconvenience, or Loss, upon a Man, is properly Punishment [e]. A Man when his Estate is confiscated upon some criminal Account, and he is reduced to Want and Poverty, may properly be said to have suffer'd Punishment. But how many Men are there, that come into the World without any other Fortune or Estate than their own Persons? How many are there that by Fire, Shipwreck, Incursions, and Depredations of Enemies, are stripp'd of all, and whose Poverty cannot be call'd human Punishment, but fatal Misfortune? And I may say, that therefore the Evils, for Example, which Subjects sometimes feel, from the Miscarriages and bad Government of their Princes, should be thought, also, to be of the same Nature with those other Inconveniencies and Afflictions, which attend Human Life; such as ill Constitution of Body, Infirmities of Age, unwholesome Air, Barrenness, and the like.

XXXI. And Secondly, it must be further observed, that there is great Difference between the Damage which a Man suffers directly by another's Hand, and that which falls upon him only by Consequence. A Man suffers the first, when he is deprived of that which he has already all proper Right to. The other happens, when that Condition is intercepted, without which he could not enjoy such a Right [f]. Thus, when the Estate the Parents were possessed of is forfeited, the Children, also, feel the Loss of it. But, however, that is not a Punishment properly with respect to the Children, because they cannot come to the Inheritance of their Father's Estate, unless their Fathers preserve it for them till they die. And therefore, the Confiscation or Forfeiture only intercepts the Condition, without which the Children can have no Right to their Father's Estate [g]. But however, it was truly an unjust and barbarous Law (as *Buchanan* calls it) which was made by *Mogaldus* King of *Scotland*, *That all the Goods and Chattels of condemn'd Criminals were to be forfeited to the Crown, excluding their Wives and Children from any Part of them* [h].

XXXII. Again, Lastly, it ought to be observ'd, that sometimes the Evil a Man may suffer, or the Loss of any Good he may sustain, may be occasioned by another Man's Offence, or because another Man has not perform'd his Obligation; but still, that this Man's Offence, or Deficiency in Performance of the Obligation, is not the proper and immediate Cause why the other suffers Evil; nor can any third Person pretend any direct Right from such an Offence to inflict Evil upon him [i]. Thus it is common for Fidejussors, or Bondsmen, to suffer Loss, when the Debtor they engage for, breaks his Promise. But the immediate Obligation that binds the Fidejussor or Bondsman to discharge the other's Debt, is his own Promise. For as a Man who engages himself to be bound for a Buyer, is not

[a] Plut. *de sera Num. Vind.* d. l. [b] *Justinus*, Lib. xxviii. Chap. i *in fin.* [c] But the Expressions *Mahomet* the IId. used to Pope *Pius* the IId. were more ridiculous than this; That he was surprized to find *Italy* joined in a Confederacy against him, since the *Trojans* were his Ancestors as well as theirs, and since it ought to be their common Concern to revenge *Hector*'s Death upon the *Greeks*, whom the *Italians* had now made an Alliance with, against him, *Mich. Montaigne*'s Essays, Lib ii. Chap. xxxvi. Pag. 556. [d] This Reason is taken from the Beginning of the xxxiiid Section [e] Vide *Grot.* Lib. ii. Chap. xxi. [f] We have an Instance of this in Lib. xxxix. T. ii. L. 24. § *ult.* L. 26. *D. de Damno Infecto*, & Lib. xxxv. T. ii. L. 63. *D. ad L. Falcidiam.* [g] Vide Lib. xlviii. T. xxii. L. 3. *D. de Interdict. & Relegat.* &c. [h] Buchanan *Rerum Scotic.* Lib. iv. [i] *Vide* Grot. *d. l.* § 11.

properly

properly obliged from the Thing bought, but from the Promiſe he made; ſo a Man bound for a Criminal is not properly obliged by the other's Crime, but by his own Engagement. From whence it follows, that when the Fidejuſſor or Bondſman is to ſuffer Evil, it muſt not be meaſur'd by the other's Crime, but by the Power he had to promiſe. And therefore, when the Delinquent eſcapes, and it is neceſſary his Surety ſhould make Satisfaction to Juſtice, 'tis not to be conſider'd what Evil might have juſtly been inflicted on the Delinquent, but what Degrees of Evil the other could oblige himſelf, by his own ſole Conſent, to ſuffer for him. And hence it may, alſo, be inferr'd, how far Bondſmen or Fidejuſſors may be admitted in capital Caſes. And that may be only thus far; either that the Bondſman may promiſe the Magiſtrate (whoſe Duty it is to proſecute the Offender) that he will ſatisfy for the Damage he has done, or elſe, that he will take care to bring him to Tryal, upon Condition that the Criminal may be admitted to Bail, if he be already apprehended; may be free from the Inconveniencies of a Priſon, and may not be oblig'd to appear at his Tryal in Irons; or if not apprehended, that nothing be iſſued out againſt him in his Abſence, and before he has had a judicial Hearing. But no Man can oblige himſelf to ſuffer Death for a Criminal [a]; ſince no Man hath ſo much Power over his own Life. Neither can the Nature of Human Juſtice allow ſuch Puniſhments to be inflicted. For the End of Puniſhment is to *reſtrain Men from Tranſgreſſions, and diſpoſe them to Obedience.* But in this Caſe, neither has the Fidejuſſor himſelf offended, neither by his Act of Engagement doth he derive the Guilt of the other's Crime upon himſelf. For it can be no Crime in him, to deſire that the Criminal ſhould have a fair Hearing in a convenient Place, and be without Trouble and Diſquiet, before Judgment paſſes upon him; nor is it any to promiſe he will pay the pecuniary Mulct impoſed on the Criminal, in what manner the Magiſtrate ſhall think fit to ſet it, when the Criminal is fled from Juſtice. Beſides, the End of human Puniſhment cannot be obtain'd by puniſhing the Surety; for if he is puniſh'd, he muſt be puniſh'd, not becauſe he himſelf is guilty of any criminal Action; but becauſe he was ſo imprudent as to expoſe himſelf to Danger, upon the Preſumption of another Man's Honeſty. And then all the Effect of ſuch a Puniſhment will be this, that other Men will be more cautious for the future how they engage themſelves; not that they will be more careful to avoid the Crime the Offender was guilty of. And therefore, ſuch a Puniſhment would ſeem to have no Regard to the Fact of the principal Criminal, but only to the unwary Credulity of the Surety. And, therefore, the Magiſtrate who puniſhes a Bondſman; or Fidejuſſor, underſtands neither the Nature of Puniſhment, nor his own Duty in inflicting it; except it appear, that he deſign'd only to abuſe him, and elude the Force of publick Juſtice. And again, ſince no Man has ſuch Right over his own Members, as to take Liberty to deprive himſelf at Pleaſure of any of them; it is evident, that no Man can oblige himſelf to ſuffer the Puniſhment of Mutilation for another Perſon. But 'tis a different Caſe, when Jaylors, the Keepers of Malefactors, are puniſh'd with Death, who either by Neglect, or Colluſion, gave them Opportunity to make their Eſcape; for they ſuffer for their own criminal Default, not for their Priſoners [b]. *Nay further*, though it muſt be allow'd, that the free Heads, and Maſters of Families, had the Liberty of ſetting up what Sort of Government or Law they pleaſed; yet it does not ſeem to be a proper Method to baniſh the [1] Fidejuſſors; as well, becauſe Baniſhment can hardly be call'd a Puniſhment; as becauſe it is not the Intereſt of the Commonwealth, to drive away ſuch Subjects [c]. There are ſeveral other Caſes, where a Man may ſuffer Inconvenience by another's Offence. For Inſtance, if a Friend be ſo kind to me as to let me live in his Houſe Rent-free, and it happens, that my Friend, the Proprietor, be found guilty of ſome Crime for which his Houſe is forfeited; 'tis plain that I muſt be ſenſible of Inconvenience in ſuch a Caſe, becauſe I muſt be forced to provide myſelf of a new Habitation, when perhaps he would have allowed me to have lived there longer upon the ſame Terms. But the Puniſhment doth not properly affect me. For the Publick, which has ſeiz'd on the Propriety of the Houſe, may when it pleaſes, by its own Right, deny me the Uſe of it, at the Rate I had it before. So, alſo, [2] Children of Traitors and Rebels are often denied civil Honours in the State. And this indeed aggravates the Puniſhment in the Parents, ſince their Children (whom they are ſuppoſed to have the greateſt Affection and Regard for) muſt, for their Fault, live without any publick Character or Mark of Honour and Eſteem in the Commonwealth. But this is, in reality, no Puniſhment to the Children; becauſe the Government may beſtow Honours where it pleaſes, and therefore may, by its own Right and Authority, exclude ſuch Perſons as have not in the leaſt offended, from all Titles and Dignities it has Power to confer, as often as it is thought agreeable to the Rules of Government, and the publick Good.

[a] See above, in Book v. Chap. x. § 12. [b] See 1 *Kings* xx. 39. *& ſeq. Acts* xii. 19. [c] *Garcilaſſa de la Vega Comm. Reg.* Lib. vi. Chap. iii relates, That the Provinces which bordered on the imperial City *Cozco* were obliged, by Way of Tribute, to furniſh the Court of the *Ynca* with Officers and Servants. And that, upon any Crime or Neglect they were guilty of, the Provinces that preſented them were to be reſponſible.

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[1] *Grotius* (Lib. ii. Chap. xxi. Sect. 11.) ſays that a *Fidejuſſor* may ſubmit to Baniſhment, and in this he is right. For as *Ziegler* remarks (after *Antonius Matthæus*, Lib. xlviii. Tit. xiv. Chap. ii. *Num.* 16) the Queſtion here is about a Thing which the *Fidejuſſor* may diſpoſe of as he thinks good; *viz.* the Change of his Dwelling, and what regards his Effects, and the Eſtabliſhment of his Fortune. If then there is any Law which ordains, That, in certain Caſes, a ſimple *Fidejuſſor* ſhould ſuffer Baniſhment, we cannot call it unjuſt. But it certainly would be ſo, if it condemn'd him to Death, or any corporal Puniſhment The whole Matter here is, that the Prudence of Government requires, we ſhould not, without Neceſſity, eſtabliſh a Thing of this Kind.

[2] See a Paſſage of *Plutarch*, cited by *Grotius*, Lib. ii. Chap. xxi. § 14. *Cicero* has, alſo, ſaid, "That, in Reality, it appears a "very hard Thing to puniſh Children for the Crimes of their Fathers, but that the Laws have very wiſely ſettled this Kind of Pu"niſhment; that the Tenderneſs of a Father for his Children might make him more cautious of offending againſt the publick Wel"fare." *Nec verò me fugit quàm ſit acerbum, Parentium ſcelera Filiorum Pœnis lui. Sed hoc præclerè Legibus comparatum eſt, ut caritas Liberorum amiciores Parentes Reipublicæ redderet.* Epiſt. ad *Brut.* xii.

XXXIII. From

XXXIII. From these Distinctions it appears, that no Man can be justly punished by any civil Court for another Man's Offence, when he is free from the Guilt of it. And the Reason is, because that Aptitude which disposes a Man for Punishment proceeds from Demerit, and Demerit in the last Resort is founded in the Will, which is certainly, or nothing is, at a Man's own Command, and which cannot contract any Guilt, but by some internal Motion of its own. It is a [1] Mistake of *Grotius*, in the Chapter before cited, *Sect.* 12, to think that there may be an Instance given to the contrary, extrinsical to the Person of the Delinquent, in the Person of one he hath a violent Affection for. And I think it is nothing to the Purpose to say as *Plutarch* does [a]; "that the Master, by correcting some "of his Scholars, puts all the Rest in Mind "of their Duty, and a General, by making a "Decimation, punishes the whole Army." For both the Youth that is corrected, and every tenth Soldier that suffers, is really criminal himself. And hence therefore it follows, also, that innocent Children are not to be [2] punished for the Crimes their Parents were guilty of [b c]. And therefore some Interpreters explain *Joshua* Chap. vii. Ver. 24. thus, that *Achan*'s Children were brought out only that they might hear the Instructions *Joshua* gave them, and the rest of the People; and be advised to take Warning how they were found guilty of the like Crimes themselves; not that they were to be stoned with their Father. But if this Comment upon the Text will not be allowed, see [3] what *Grotius* saith, *de J. B. & P.* Lib. ii. Chap. xxi. Sect. 14. *in princip.* [d]

------Ne perge queri, casusque priorum
Annumerare tibi. Nec culpa nepotibus obstat.
Tu modo dissimilis, rebus mereare secundis
Excusare tuos.

Lament no more, nor to yourself misplace,
The Crimes or Fortunes of a former Race.
Our Parents Guilt but to themselves extends,
Taints not the Blood, nor to the Sons descends;
By your own Worth you blot out the Disgrace,
And raise the faded Lustre of your Race [e].

And therefore that Law of the *Persians*, by which, when any single Person was found guilty of a Misdemeanour against his Prince, his whole Family and all his Relations were to suffer with him, was justly censured by *Ammianus Marcellinus*, as insupportable, and barbarously rigorous, beyond Example [f]. It is certain indeed, that by Punishments of such Cruelty Princes intended, above all Things, to provide for their own Safety [g]. For though a Man may have Bravery enough to despise his own Life (as *Hellanicus*, in *Justin*, is said to have done when he was old and childless, and was therefore the more animated in his Conspiracy against the Tyrant *Aristotimus*, because he had nothing to fear, neither his Age, nor Family) yet he will not be perhaps without Fear, when he knows that his Friends and Relations may be ruined with him, and upon his Account. And again, it might seem to be a further Security to cut off the Sons, to prevent them from revenging their Father's Death. For says *Aristotle*, *it is but Folly to kill the Father when the Sons are spared* [h]. Besides, it is not easy to be believed, that a Man will have the Boldness to undertake an Enterprize of so much Danger, without communicating his Design to his Relations. For which Reason *Arian* says [i], *Alexander* put *Parmenio* to Death. And perhaps it may be true as *Cassius* in *Tacitus* said [k], "That though there is "a Mixture of Injustice in every exemplary Punishment, yet the Evil particular Men suffer "by it, is sufficiently recompensed by the Be-"nefit it brings to the Publick." Thus in the ninth Book of the *Codes*, Tit. viii. *ad L. Juliam Majest.* the Sons of Traitors were to suffer the same Punishment as their Fathers, when it was to be feared they might be influenced by their Fathers Example [l]. Thus the Children of the *Maratocupeni* (Robbers in *Syria*, who had that Name given them from the Place they inhabited) were all cut off with their Parents, for fear they should grow to imitate them. *Hobbes* in his *Leviath.* Chap. xxviii gives this Reason for the Justice of this Sort of Punishment, "Because such as are guilty of Treason against "the State, are professed Enemies to it, and "therefore it is lawful by the original Right of

[a] *De sera Numinis Vindict.* Pag. 561. *A.* Ed. *Wech.* [b] *Vid.* Lib. ix. Tit. xlvii. Lib. xxii. *C. de Pœnis.* Lib. xlviii. Tit. xix. Lib. xxvi. *D. de Pœnis.* [c] *Vid.* Grot. *ubi supra*, Sect. 13, *&c.* [d] Ovid. *Metam.* Lib. iv. Ver. 669, 670.

Illic immeritam, maternæ pendere linguæ,
Andromedam pœnas, injustus jusserat Ammon.

There partial *Jove* did, for her Mother's Crime,
The fair *Andromeda* in Chains confine.

[e] *Statius Thebaid.* Lib. i. towards the End. [f] *Vid.* Herodot. *Lib.* iii. *Pag.* 235. *Edit.* H. Steph. *de Intapherne. Justin.* Lib. x. Chap. ii. The *Macedonians* had a Law much of the same Nature. *Vid.* Curtium, *Lib.* vi. *Chap.* xi. *Lib.* viii. *Chap.* vi. [g] *Justin.* Lib. xxvi. Chap. i. Lib. xxi. Chap. iv. towards the End. *A. Cœsellius* in *Val. Maximus*, Lib. vi. Chap. ii, speaks to the same Purpose. [h] *Rhet.* Lib. ii. Chap. xxi. [i] *B.* iii. [k] *Ann.* xiv. Chap. xliv. [l] *Vid.* Ant. Matth. *de Crim.* Lib. xlviii. Tit. ii. Sect. 10. *Ammian. Marcell.* Lib. xxviii.

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[1] But *Grotius* does not mean, as some suppose here, that the Evil which happens to innocent Children, on Account of the Crimes of their Parents, is, with Regard to them, a real Punishment meant for an Example. All that he maintains is, that the Fear of drawing the like Misfortunes upon their Children, is capable of deterring any other Fathers, who may be tempted to commit the same Crime. Now this is a Point beyond Dispute. As for the Rest, *Grotius* affirms, in the strongest Manner, that we cannot inflict, upon innocent Children, any corporal Punishment, nor deprive them of what belongs to them, by Virtue of any legal Right.

[2] The *Roman* Law establishes this Maxim of the Law of Nature, in the most clear and expressive Terms.. *Crimen vel pœna paterna nullam maculam filio infligere potest. Namque unusquisque ex suo admisso sorti subjicitur: nec alieni criminis successor constituitur, idque divi fratres Hierapolitanis rescripserunt.* DIGEST. Lib. xlviii. Tit. xix. *De pœnis*, Leg. xxvi. *Sancimus, ibi esse pœnam, ubi noxia est. Propinquos, notos, familiares procul à calumnia submovemus, quos reos sceleris socictas non facit. Nec enim adfinitas, vel amicitia, nefarium crimen admittant. Peccata igitur suos teneant auctores: nec ulterius progrediatur metus, quàm reperiatur delictum.* CODE Lib. ix. Tit. xlvii. *De pœnis*, Leg. xxi.

[3] What *Grotius* says is this, "That God, being the sovereign Arbiter and absolute Master of human Life, may take it away at "Pleasure. And that, in the Case in Question, he puts the Children to Death, to punish the Fathers by so afflicting a Sight. Besides, "the Children themselves being guilty, before God, on Account of their own Sins, he does them no Wrong by depriving them "of a Life, which they held only from his Clemency." See M. *Le Clerc* upon *Exodus* xx. 5. and *Deuteronomy* xxiv. 16. But it is more probable that the Children of *Achan* were really Accomplices in the Sacrilege, as Mr. *Le Clerc* observes on *Joshua* vii. 24. though the sacred Historian has omitted this Circumstance.

Natu-

" Nature to make War upon them; but in War " the Sword judgeth not, nor doth the Victor " make Distinction between guilty and inno- " cent, nor has other Respect of Mercy, than as " it conduceth to the Good of his own People. " And besides, in publick Judgments and Trials " in Case of Treason, there is this Thing par- " ticular, that the Sovereign may sit Judge in " his own Cause; and sometimes, laying aside " the Formalities and Intricacies of Process, be- " gin with the Execution [a]." But yet conscientious Princes ought to consider what *Tiberius* said in the Case of *Cn. Piso*, *Tacit. Ann.* iii. Chap. xii. And indeed, neither in War ought the Sword to be so mercileſs, as not to spare such as Age and Innocence plead for. And since such as are born in the Commonwealth are Subjects, there is no Reason why they should be treated as Enemies, unless their own Acts make them such. And, therefore, there can be no other Way of punishing an innocent Son for the Treasons and Rebellions of his Father, than by intercepting those Goods from him which would otherwise have descended from his Father to him. In *Peru* under the Government of the *Inca's*, if a *Curaca* were put to Death for any Misdemeanour, his Son was not therefore denied to succeed in his Father's Place and Office, but was shewed his Father's Crime and Punishment, that he might take Warning from thence how he offended [b]. But to be denied those Honours which a Man can lay no Claim to, is not properly Punishment. But neither do the other Reasons that are given, excuse the Injustice of this Sort of Punishment. As for Instance, when the *Greeks* (as *Dionys. Halicarnassæus* tells us) cut off any Tyrant, they always either killed or banished his Children, upon an Opinion, that it was a Contradiction to Nature, to suppose good Children could be born of bad Parents, or bad Children of good [c]. Neither can this Sort of Punishment be justified by any Arguments from divine Threatenings, since the Dispute relates only to human Justice [d]. And therefore it was a wise and good Constitution of the *Egyptians*, that no Woman with Child should suffer Death, till she was delivered, which is, also, now observed in other Nations [e]. And here it may be observed, that it is an Abuse of the Legislative Power, when the Legislator takes Advantage of the Crimes of particular Offenders, to enact rigorous Laws against a whole Sex or Order; though perhaps afterwards, in Tract of Time, the Punishment itself may grow into Credit, and the Death inflicted by it be thought honourable. As it happened by that Law among the *Indians*; by which the Wife was to be burnt with her deceased Husband The Occasion of which Law was, that the Women when they were tired, or out of Love with their Husbands, made no Scruple to poison them to make Way for the Embraces of others [f]. And hence, also, it appears, that the Heir is not affected by any Punishment inflicted upon the Body, or Reputation of the Delinquent [g]. But a pecuniary Mulct will reach him, tho' in Equity it ought not to exceed the Value of the Inheritance which descends to him [h].

[a] Add. *Grot.* Comment. upon *Joshua* i. 18. [b] *Garcilass. de la Vega Comm. Reg.* Lib. ii. Chap. xiii. [c] And it was very well said by *Marcus* in *Vulcat. Gallicanus* in *Avidius Cassius*, Chap. xii. And therefore ye ought to pardon *Cassius*'s Children, his Son-in-law and Wife. But did I say pardon? Since they are guilty of no Crime. [d] GOD, being the sovereign Arbitrator, and absolute Master of Mens Lives, may, when he pleases, take away the Life of whomsoever he thinks fit in his Wisdom; and in the Case now in Dispute, he destroys the Children, to punish the Fathers, by the afflicting Sight of beholding their Execution. But besides, the Children themselves, being guilty before God, on account of their own Sins; he does them no wrong in taking away their Lives, which he only spared, purely as the Effect of his own Clemency. Grot. Lib. ii. Chap. xxi. Sect. 14. [e] *Diod. Sicul.* Lib. i. Chap. lxxvii. *Ælian.* V. Hist. *Lib.* v. *Chap.* xviii. *cum* Schefferi *Notis.* Lib. xlviii. Tit. xix. L. D. *de Pœnis.* Lib. i. Tit. v. Lib. v. Sect. 2. Lib. xviii. *D. de statu hom.* Plut. *de sera Numin. Vindict.* Pag. 552. *D. Add.* Quintil. *Declam.* 277. What Severity of Punishment, on the other Hand, is used in *Japan*, we are informed by *Bern. Varenius* Descr. *Japoniæ*, Chap. xviii. *Ferdin. Pinto* Itin. *Chap.* lv. *Varenius* de Relig. *Japan.* Chap xi. Pag. 129. [f] *Vid.* Cic. *Tusc. Quæst.* Lib. v. Chap. xxvii. *Strabo*, Lib. xv. *Abr. Rogerius* de *Braminib.* Pag. 1. Chap. xix, & xx. [g] Lib. xlviii. Tit. xix. Lib. xx. *D. de Pœnis.* [h] *Vid.* Lib. xlvii. Tit. i. Lib. i. *D. de privatis Delictis.*

CHAP.

CHAP. IV.

Of the Power of the Sovereign in determining the Value of Subjects.

I. *Esteem defin'd and divided.*
II. *Simple Esteem natural:*
III. *Which may be either entire;*
IV. *Or impair'd;*
V. *Or utterly lost.*
VI. *Simple Esteem civil lessen'd or lost, either from a certain State;*
VII. *Or upon a Criminal Account.*
VIII. *No Dishonour to refuse to engage in a Duel, when the Laws forbid it.*
IX. *Simple Esteem not dependent upon the Pleasure of the Government;*
X. *Nor to be sacrificed for it.*
XI. *Intensive Esteem.*
XII. *The Foundations of it.*
XIII. *Whether Power be the sole Foundation of Honour.*
XIV. *An Aptitude only for Honour the Result of those Foundations.*
XV. *What Persons have a Right of Precedence to others.*
XVI. *Arguments upon which Precedence is pretended to:*
XVII. *That of Antiquity examin'd.*
XVIII. *That of Power.*
XIX. *The Quality and Titles of Power.*
XX. *One Sovereign Prince not oblig'd to yield the Precedence to another.*
XXI. *How such Princes might meet, without any Dispute for Places.*
XXII. *Of Order between Equals.*
XXIII. *The Power of appointing the Order of the Subjects lodg'd in the Sovereign.*
XXIV. *Subjects of different Commonwealths, how compar'd.*
XXV. *Nobility of Birth not from Nature;*
XXVI. *But from the Institution of Commonwealths.*
XXVII. *Usually is, and ought to be founded upon Merit.*
XXVIII. *The Nature of the* Roman *Nobility in the earliest Times.*
XXIX. *Offices borne in the State, the Measure of it afterwards.*
XXX. *What is the Nature of the modern Nobility in the greatest Part of* Europe.
XXXI. *Nobility of Blood little regarded in some Places.*
XXXII. *How far Civil Honours depend upon the Commonwealth.*

I. THOUGH there may be discover'd certain *Foundations* for the Preference of one Man to another, even in a *Liberty of Nature*, out of *Civil Government*; yet since those *Foundations* cannot give any Man a *Right*, unless enforced by *Compact*, or the *Definitions* of the *Civil Power*, I think this a proper Place to explain the Nature of those *Distinctions*, which are made between Men, according to the *Esteem* they are differently rated by. Now *Esteem* is the *Value* which is set upon Persons in common Life, according to which they may be *equall'd* or *compar'd* with others, and be rated either *higher* or *lower* than those they are *compared* with. For there is a near Affinity between the two most noble *Branches* of *moral Quantity*, *Esteem*, and *Price*. The *first* is consider'd in *Persons*; the *second* in *Things*: Because as the *one* is the *Rate* of *Persons* in common Life, so the *other* is of *Things*. And as the chief Reason why a *Price* was set upon *Things*, was, that when they were to be exchanged or removed from one Person to another, they might be the better *compared* with one another; so the End intended by *Esteem*, is, that we may be able to form a *Comparison* between Men, by setting, as it were, a *Value* upon them, and, in Consequence, establish a becoming *Order* and *Distance* between them, whenever they should happen to be *united*; it evidently appearing, that nothing was more absolutely inconsistent with the *Convenience* of Life, than an *universal* Equality. Now *Esteem* may be divided into *simple* and *intensive*. I shall consider both *Parts* of the Division, with the different *Relations* they may bear to such Persons as live in a *Liberty of Nature* [1], and such as are *Members* of the same *Commonwealth*.

II. *Simple Esteem*, with Regard to such as live in a *Liberty of Nature*, seems *chiefly* to consist in this; When a Man's Behaviour and Character prove him to be one who acts upon *Principles* of *Conscience*, one ready to comply with the *Laws* of *Human Society*, and prepared, as far as he has Power, to observe the *Law of Nature* towards other Men [2]. For as we say of a *Thing* which is of *Use* in common Life, that it is of *Value*; and, on the contrary, say of a *Thing* there is no *Use* of, that it is *worth nothing*; so it may be said, that that Person is a Man of some *Value*, who will suffer himself to be treated like a *sociable* Creature. But when a Man plainly shews himself *unfit* for *Society*, by disregarding and confounding the *Law of Nature*, and the good

[1] Such are Sovereigns, and Citizens of different States, with Respect to one another.

[2] This *simple Esteem* answers to a perfect Obligation in another, by Virtue of which every Man is indispensably bound to look upon all those to be Persons of Honour and Honesty, who have done nothing to render them unworthy of that good Opinion; and not stain their Reputation in the least. Whereas, in the *State of Nature*, the Foundations of *Esteem of Distinction* produce by themselves but a very imperfect Obligation, as the Author shews a little further. We may, also, see, upon the Matter in Debate, a Dissertation, written by Mr. *Thomasius*, entituled, *De Existimatione, Fama, & Infamia*, printed in 1709, in which, he endeavours to set our Author right in some certain Particulars. As to the rest, our Author does not deny what M. *Thomasius* lays to his Charge; that, considering the Thing in itself, there are divers Degrees of Probity and Virtue, to which we may proportion our Judgment and Actions, in such Cases as do not regard the common Rights of all Men. It would be easy to prove this from a great many Passages of his Work.

Offices

Offices he owes to other Men upon the Force of it; he may deservedly be look'd upon to be a Man of no *Worth* or *Value*.

III. Now this Sort of *Esteem* may be consider'd three Ways: *First*, as *entire*; *Secondly*, as *impaired*; *Thirdly*, as *utterly lost*. It continues *entire*, till a Man, by some Act of deliberate wilful Malice, out of wicked Design, violates the *Law of Nature* to the Prejudice of another Person. For the Frailties of Human Nature excuse Sins of Infirmity; and a Man does not by them forfeit the Reputation [1] of being an *honest Man*, as long as he continues to have a firm *Sincerity* of Mind, and endeavours to do nothing but what is *just* and *virtuous*. And every Man is supposed to deserve this *Esteem*, till his own evil Actions deprive him of it. And therefore it may be said, that all Men *naturally* have an equal [2] Share of this *Species* of *Esteem*, and, before they have been guilty of any *Criminal Action*, must be suppos'd to be *equally good* and *virtuous* [3]. And this is the Ground for that common Saying [4], *Every Man should be suppos'd a good Man, till the contrary is proved*. And this will hold true, notwithstanding those ill Dispositions *Hobbes* chargeth upon Human Nature [5]. If he be in the right, indeed every Man must be supposed an ill Man, till the contrary be prov'd, or rather, till he is deprived of all Power to do Hurt. But it must be said, that the Principle he at first lays down, *That all Men have Power and Will to hurt or destroy one another*, is far from being universally true, as I have prov'd already [a]. But yet, because *Men* may *wish* and *endeavour* one another's Hurt and Ruin, therefore it may be said, that every Man may *naturally* be look'd upon to be a good Man; but that it is not impossible he may happen to be otherwise, and that Men may be kind and friendly to one another, but that it is not safe absolutely to rely upon or trust them.

IV. The same *Species* of *Esteem* is *lessen'd* or *impair'd* by *criminal malicious Actions*, especially by those of more than ordinary *Guilt*, and which were intended, contrary to the *Law of Nature*, unjustly to disquiet other Men: The Effect of which *Actions* is, that it will not be thought safe to give Credit for the future to such a *Deceiver*, or to engage in Business, or important Affairs with him, without *solid Caution*. But though a Man's *Esteem* may be *impair'd*, and his *Reputation* sink upon such ill Actions, yet it is not *absolutely lost*. For, though I may justly suspect, that a Man will use me in the same Manner he hath used others; yet I cannot be always so absolutely certain of this, but that sometimes it may fall out contrary to my Expectations. For, perhaps, there might have been some particular Reasons which moved him to injure other Men, which he may not have against me; and a Man may sometimes be under the Power of violent Passions, which, at other Times, he is free from. However, the Blot which a bad Action leaves upon a Man's *Reputation*, may be taken off by a voluntary *Tender* of *Reparation* for Damages, or of some *Equivalent*, and by giving Evidences of Sorrow and Repentance. For all these voluntary unforced Motions may be Conviction enough, that his Intentions are really alter'd, and that he *sincerely* repents.

V. But a *State* and *Way of Life* which directly tends to the Harm of other Men without Distinction, and to make Advantages by manifest Injustice, utterly *destroys* all this *Esteem*. Now there are in most Commonwealths *People*, who, by a particular *Way* and *Manner of Life*, own and profess the Exercise of certain Vices; such as are, all *Whores*, *Bawds*, *Strolers*, and *sturdy Beggars*; all those *Plato* banisheth his Commonwealth [6]. And they are (as *Isocrates* [b] saith) a a Disgrace to *that* they live in [7].

But now, how little Share of *Esteem* all *these* are to have, must be determin'd by the Government that *tolerates* them [8]: When the *Publick* thinks fit to give them Indulgence [9], they cannot certainly, at least, be denied the common *Rights* of Men. So the *Pimp* expostulates in

[a] Book ii. Chap. ii. § 7, 8 [b] In *Areopagitico*.

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[1] That is to say, Whom we have Reason to presume such: For, as the Case here relates only to the *external Effects of Right*, we neither can, nor ought to regard any Thing but the *external Signs*, which are often very equivocal. On the other Hand, we must distinguish between the *internal Judgment*, and the *external Marks* of that Judgment. See what I have said in my Notes on the Abridgment of *The Duties of a Man and a Citizen*, Lib. ii. Chap xiv. § 4. last Editions.

[2] M. *Thomasius*, in a Dissertation already quoted, (*De Existimatione*, &c.) maintains, That this Maxim should have a different Meaning. "We must not (says he) lay it down in a *positive Sense*, as if it supposed, that whoever has not done an infamous Action, "is a good, or an honest Man: But in a *negative Sense*, which amounts to this, *That such a Man is not a bad Man*." But this, in my Opinion, implies some Degree of Probity; without which it is difficult for a Person not to do some Things which must hurt his Reputation. Besides, as there are Degrees of *real Probity*, so there are of that Probity which may be call'd *imperfect*. See what I have said upon this, in the Abridgment of *The Duties of a Man and a Citizen*, Lib. i. Chap. ii. § 12. Not. 1. *Edit. fourth*.

[3] *Plin. Lib.* v. *Ep.* iii. The Inequality of the Orders among Men should make no Difference in the Exactness of their Behaviour, *Sanctitas morum non distat ordinibus*.

[4] See Mr. *Bayle*'s *Nouvelles Lettres*, occasion'd by *F. Maimbourg*'s *Critique de l'Histoire du Calvinisme*, Tom. xi. Pag. 435, and Mr. *Thomasius*'s Dissertation *de Præsumptione Bonitatis*, printed at *Hall*, in 1700. Where he shews in what Cases this Maxim does, or does not, take Place.

[5] *De Cive*, Chap. i.

[6] Plato *de LL.* Lib. i.

[7] *Atticus*, Bishop of *Constantinople*, in *Socrates*'s Ecclesiast. History, tells *Calliopus*, That he should distribute his Charity not among those who made a Trade of begging only for their Bellies, and spent their whole Life-time in nothing else; but among such whose Modesty would not suffer them to ask it, *Socrat.* Lib. vii. Chap. xxv. With Regard to this Sort of Vermin, see the Historical Remarks of *Menage*, in his Notes on *Diog. Laertius*, Lib. i. Sect. lv. *Edit. Amst.*

[8] Thus neither were *Beggars* tolerated in *Peru*, under the Government of the *Yuca's*. But they who were disabled, so that they could not maintain themselves, were kept by the *Publick*. Vide *Garcilass. de la Veg. Com. Roy*, Lib. v. Chap. ix. & Lib. v. Chap. xi.

[9] But formerly, in *Egypt*, there were *professed Thieves* allow'd of, of whom *Diodorus Siculus*, Lib. i. Chap. lxxx, gives this Account: "Such as would be employed in the Trade of Thieving, enter'd their Names with the Grand-Master of the Order, and "were obliged, by Article, to bring all the Things they stole to him; and they who lost any thing, were to apply themselves by Letter "to him, in which they were to signify the Particulars they lost, together with the Time and Place, when and where they were lost; "and so every Thing being easily discovered, the Person robb'd was to pay a fourth Part of the Value of the Things, and take them "again. For, since it would have been impossible to prevent all Manner of Thieving, the Legislator found out this Expedient, that "what was lost might be recovered, by paying only a small Price for Redemption. But, no Question, it would have been a better "Method, and less inconvenient for the *Subjects*, to have made *severe* Laws against such Sort of *People*, and to have taken care they "should be strictly put in Execution."

Terence, *Though I am a Pimp, the common Bane of Youth, a perjur'd Wretch, and publick Nuſance, yet I never did you any Wrong* [1]. 'Tis certain indeed, that a *Way of Life* maintain'd by the Profeſſion of any Sort of Vice, muſt very much tend to ruin all [2] *Natural Eſteem*; but, unleſs the particular Vice be, alſo, attended with Injury to other Men, I do not ſee why the Perſons who profeſs the Practice of it, ſhould be treated as *publick* Enemies to all the World. But where the Profeſſion of a Vice is accompanied with Harm and and Injury to other Men; and where the Perſons profeſſing it treat no Man who is not of their own Society with better Uſage than they would Beaſts, declaring *Hoſtility* not againſt any certain Enemies, but againſt Mankind in general, 'tis manifeſt they utterly *forfeit* all that *Eſteem* Men uſually meaſure one another by. And ſuch are all *Pyrates* [a], *Highwaymen*, *Robbers*, *Ruffians*, *Pickpockets*, and the like. And the Difference will not be material, nor will their Characters be much better'd, whether ſuch Perſons act always up to the Height of Wickedneſs and Villany, or not; whether a *Robber* will ſatisfy himſelf barely with committing *Spoil* and *Robbery*, and forbear *Bloodſhed*, and be contented only to have taken away my Money or my Goods. For as 'tis no *Juſtice*, ſo it can deſerve no Commendation, not to be an accomplish'd finiſh'd *Villain*. And, without Diſpute, whole *Bodies* and *Clans* of *Pyrates* and *Robbers* ought to be rank'd under this *Denomination*, as long as they continue their *Courſe of Life*, notwithſtanding they may ſeem to have ſome Reſemblance of Juſtice among them [3]. Neither will whole *States* and *Commonwealths* deſerve better *Rank*, when they are not content to acquieſce in the Enjoyment of their own *Rights* at *home*, but invade and ravage the reſt of the World, without Regard to *Faith* or *Compacts* to the contrary. But where *States* or *Commonwealths* are ſo partial, as to be juſt in the Obſervation of *Compacts* with ſome particular *Allies*, but to *all other* their Neighbours, or at leaſt to certain *Nations*, ſhew little Regard in the Obſervation of the *Law of Nature*, and ſcruple not, without juſt Provocation, to break it; their Credit, it is evident, muſt very much ſink, but it would be too [4] ſevere to deny them every Degree of *Eſteem*. Now, the Effects that attend Men under ſuch a *Loſs* of *Eſteem*, are generally ſuch as theſe; that, unleſs they leave off their *unjuſt* and *bloody* Way of *Life*, it will be neceſſary for other Men to ſhew them no more Mercy than they do to Beaſts of Prey; that when they are apprehended, they will be uſed with more *Severity* than any other Sort of *Enemies*, though others might have threaten'd equal Danger; that they will not be look'd upon to deſerve the *common Offices* of *Humanity*; and that all merciful Uſage will be denied them, leſt it may ſeem to encourage them in their Villanies. Moreover, as there can be no Streſs laid upon their *Faith*, ſhould they offer it, ſince the *Habit* of Outrage they live in, muſt have cancell'd all *good Opinion* of them; ſo I doubt not it may very well be maintain'd, that neither are they capable of receiving *Obligations* of *Faith* from other Men, as long as they continue in their *ill Courſe* of *Life* (which muſt always be preſuppos'd) for I either make a *voluntary* Agreement with ſuch a *Perſon*, or he *compels* me by *unjuſt* Force. I cannot do the *firſt*, without deriving [5] upon myſelf ſome Share of his *Guilt*, by treating ſuch a Man as a *Friend*, who profeſſes himſelf a *common Enemy* to all the World, except his own Accomplices. Not to ſay further, that it may be often an Injury to other Men to keep their *Faith* with Robbers; for Inſtance, in the Caſe of leaving ſome *Depoſitum* in Truſt with them [6]. But if a *Robber* ſhould have done me ſome *good Office*, which it was no Diſcredit to me to receive from ſuch Hands, it can be but reaſonable that I ſhould give him the Reward I promis'd [b]; but then he is not the Perſon he was ſuppos'd to be, a *common Enemy* to all Mankind beſides his own Companions. On the other Hand, if he *compels* me by *unjuſt* Force to engage my Faith to him, it appears from what has been ſaid before [c], that *Compacts* extorted by Fear are invalid. But, after all, *ſuch Perſons* may recover their *loſt Eſteem*, by giving over their infamous *Courſe of Life*, and by taking upon them ſome other *creditable* Profeſſion. And ſo may whole [d] *Bodies* of *Thieves* and *Robbers* by ſuch a *Change*, as well as particular

[a] See, above, in Book ii. Chap. ii. § 10. [b] See, above, in Book iii. Chap. vi § 11, towards the End. [c] See the ſame Book and Chapter, § 10. [d] See *Grotius*, Lib. iii. Chap. iii. § 3. and *Specimen Juriſprudentiæ Hiſtoricæ*, by Mr. *Buddeus*, among his *Selecta J. N. & Gent.* § 2, 3, 4, 5, where this Principle is applied to the old *Romans*, whoſe Commonwealth was founded by a Troop of Robbers, and other Rogues of all Sorts.

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[1] *Ter. Adelph.* Act. II. Scen. I. ver. 34, 35. *Vid. Conſtitut. Sicul.* Lib. i. Tit. x.

[2] M. *Thomaſius* (*Diſſ. De Exiſtimatione*, §. 38, 39.) juſtly obſerves, That our Author confounds *ſimple Eſteem*, with an *Eſteem of Diſtinction*, which, alſo, takes place here, and the Loſs of which, only implies the Cenſure incurr'd by thoſe, who, without injuring any body, lead a bad Kind of Life. We may nevertheleſs ſay, That as the Habitude of any Vice, which a Man openly profeſſes, eaſily leads him to Injuſtice, properly ſo call'd, when he finds no other Way to gratify his Paſſions; tho' by that he renders himſelf unworthy to be truſted to, without very good Proofs.

[3] Thus in *Heliodorus*'s Ethiopicks, Lib. v. Chap. xv. There is mentioned a Law that was among the *Pyrates*, by which, he who firſt boarded the Enemy's Ship, and expoſed himſelf to the greateſt Danger in the Fight, was to have his Choice of the Booty. And in the ſame Place we are told, That the *Robbers* obſerve ſome Sort of *Conſcience* among one another, and ſhew Kindneſs and Humanity to thoſe they are acquainted with

[4] Our Author has here in view the People of the Coaſt of *Barbary*, who do not plunder the *Mahometans*, but only exercise their Pyracies againſt the *Chriſtians*. They do this the rather (adds he, in a Diſſertation *De Exiſtimatione*, among his *Diſſertat. Academ.* § 1.) that they can ſay, 'There are People among the *Chriſtians*, who profeſs to declare an irreconcileable War againſt the *Mahometans*. See the *Perſe Rebelliante*, Tome i. Pag. 204 *Edit.* 2.

[5] But (ſays Mr. *Thomaſius*, very juſtly, in the Diſſertation already quoted, (*De Exiſtimatione*, &c. § 57) our Author ſuppoſes here what is falſe, becauſe it is not always certain, That, by treating with any one, we enter into ſome Kind of Friendſhip or Acquaintance with him. Experience manifeſtly proves the contrary. We daily buy, ſell, hire, and negotiate, without having any Friendſhip for the Perſons with whom we tranſact, no more than we have with thoſe who are entirely indifferent or unknown to us. Let 'That our Author's Opinion can only be admitted in ſuch a Caſe, where we have imprudently promiſed Robbers ſomething agreeable to their Character; as, for Inſtance, to oblige them to releaſe a Traveller who has fallen into their Hands. This is what I have already obſerv'd againſt our Author, who maintains the contrary. See Lib. iii. Chap. vi. § 11. in which he manifeſtly contradicts himſelf, as well as here, where, according to Mr. *Thomaſius*, he overthrows his *Theſis*, by the Example of a Robber to whom a Sum is promiſed.

[6] *Vide* Lib. xvi. Tit. iii. Lib. xxxi. § 1. D. *Depoſiti*, &c.

Men. And from that Time they are to be dealt with as Men of *Repute* and *Honesty*. But they ought first of all, either to make *Reparation*, or obtain their *Pardons* for the Injuries they have done.

VI. *Simple Esteem* [1], *with Regard to such as live under Civil Government, is that Sort of Esteem* by which a Man is look'd upon to be the *lowest*, a *common*, but a *sound Member* of the *State*: Or when a Man hath not been declar'd a *corrupt Member*, according to the *Laws* and *Customs* of the *State*, but is supposed to be a *good Subject*, and is look'd upon and *valued* as such. And this *Esteem* may be lost under *Civil Government*, either, *first*, when it is denied to *certain States* or *Conditions*; or, *secondly*, when taken away upon a *criminal Account*. The *First* may happen *two* Ways; either, 1*st*, when the *State* hath *naturally in itself* nothing *bad* or *wicked* belonging to it; or, 2*dly*, when it *really* deserves, or, at *least*, is *thought* to deserve such an *Imputation*. Thus a *State of Slavery*, though it implies in its own Nature nothing *bad* or criminal to belong to it, yet in many *Commonwealths* deprives Men of all *simple Esteem*; and *Slaves* are neither look'd upon to be *Civil Persons*, rated or number'd in *Civil Assessments*, or *considered* or *valued* as *Subjects*. It is well known how *despicable* their Condition was among the *Romans* [2]; and the *Esteem* the *Jews* allow'd their *Gentile Slaves* was not greater [3]. So, also, in *some Commonwealths*, 'tis a Dishonour to be *base Born*, though the *Blemish* of the *Birth* is certainly only the Parents *Fault* [4]. And thus in *India* there is a certain *Race* of Men called *Peneaës*, which are look'd upon to be *infamous* [5]. A *State* under the *latter* Consideration *takes away* or *lessens civil Esteem*, either because the Persons who live under it, are employ'd in Things which cannot be perform'd without the Guilt of some Vice or Sin; or else are obliged by it to undertake such mean *Offices* and Duties, which none but Persons of base and abject Spirits would stoop to be employ'd in. What *Value* is to be set upon those of the first Sort must be known from the *Laws*, or *Customs* and Manners of every *Commonwealth* [6]; those of the second Sort are *common Hangmen* and *Executioners*, *Bailiffs*, *Gold-finders*, and the like; *Persons* who in most *Commonwealths* are denied the Society of all People of *Fashion* or *Reputation*. And in some States the Laws themselves have expresly so determined. In *Rome*, *Cicero* says [7], "The Executioner was "forbid by the Laws of the *Censors*, not only "to be seen in the *Forum*, but to see the Light, "or breathe the Air of that Place, or to have "any Habitation in the *City*;" as if his Presence would strike Infection and Pollution upon the *publick Assemblies*. In other States, it is thought scandalous to mix in Company with such Persons, only upon the Force of Custom and common Opinion; it seeming natural to suppose, that Persons employ'd in *cruel* and *slavish Offices*, would have generally Humours and Dispositions suitable to their Employments; and that none but Men of mean and servile Tempers could *voluntarily* submit to them. Among the *Romans*, the *Soldiers* indeed were often made use of in *publick Executions* in the *City*, as well as in the *Camp*, without *Infamy*, or Diminution of their *Esteem* [8]. For there is much Difference between doing an *Execution* at the particular Command of a *Superior*, and between doing it by Profession. So, also, among the *Jews*, *Criminals* were *stoned* by all the People. And *Montaigne* tells us [9], that *Witoldus*, Duke of *Lithuania*, introduced a Custom in that Country, that condemn'd *Criminals* should put themselves to Death with their own Hands, it appearing unreasonable to him, that innocent Persons should be employ'd to commit *Murther*; though this was but a silly Reason, for the *Executioner* cannot be said to commit *Murther*, by inflicting the *Punishment* the *Law* awards. But others give this better Reason for the Law, that none might be forced upon the *Office* of an *Executioner*, to cause and to see the Agonies of the Criminals, to which the innate Tenderness and Compassion of *human Nature* must give every Man an Aversion.

The *Roman Laws* set a *Mark* [10] of *Infamy* upon all Persons that acted upon the *Stage* for Hire [11],

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[1] *Natural simple Esteem* takes place, also, in civil Society, where every Man has a Right to require it, as long as he has done nothing unworthy the Character of a Man of Honour and Probity. All the Difference is, That as it is sometimes confounded with *civil Esteem*, which is not always conformable to the Laws of natural Equity; so a Man is not, in a civil Sense, less reputed an honest Man, tho' he does some Things, which, in the Independence of a State of Nature, would diminish, or destroy that *simple Esteem*, as being opposite to Justice. On the contrary, *civil Esteem* may be lost by things, which are not bad in themselves, but only so, as forbid by the Law.

[2] *Vide* Lib. xviii. Tit. v. Lib. vi. ad *L. Juliam.* de Adulter.

[3] *Joseph. Archæol. Jud.* Lib. iv. Chap. viii. Neither are Slaves permitted to be Witnesses, because of the Baseness of their Minds; since it may justly be believed, that their Testimonies are corrupted, either by the Hopes of Gain, or else out of Fear. Ad. *Selden.* de *J. N. & G. sec. Heb* Lib. v. Chap. iii. *Lex Wisigoth.* Lib. ii. Tit. iv. Chap ix.

[4] *Vide* Lib. vi. Tit. lvii. Lib. v. C. *ad Senatacon. Orficianum. Stobæum*, Serm. lxxv, *Unless we perhaps allow there is something in that which is said in* Procopius *Hist. Arcan.* That the Infamy of a Woman's Vices not only spreads itself to her Husband, but descends in a greater Degree to the Children, and they are condemn'd to bear a perpetual Mark of Disgrace, as if Nature had stain'd them with the Dishonours of their Mother. See, upon this Subject, M. *Gundling*, on the Title of the DIGEST. *De his qui notantur infamiâ*, § *ult.* M. *Schulting*, § *ult. ibid.* and a Dissertation of M. HEINNECCIUS, *De levis Notæ macula*, publish'd at *Hall*, in 1720, and reprinted in 1725.

[5] Vide *Abr. Rogerium* de *Bramin.* Part i. Chap. ii.

[6] To this Purpose is that which is related by *Valerius Maximus*, Lib. vii. Chap. vii. of *Q. Metellus* the *Prætor Urbanus*, who would not allow *Vecilius*, the Bawd, the Possession of *Inventius*'s Goods, though they were left to him by Will; because he would neither seem to approve *Inventius*'s Action, in throwing away his Fortune into such a Sink of Lewdness, nor allow *Vecilius* the Rights of a true Citizen, since he had renounced every honourable Way of Life. And thus in the same Author, when *Genucius*, a Priest of *Cybele*, had obtained a Decree of *Cen. Orestes*, the *Prætor*, that *Navianus*'s Goods should be restor'd to him, the Consul *Æmilius Lepidus* revers'd the Prætor's Decree, that the Court of Justice might not, under the Pretence of his suing for his Rights, be polluted by the obscene Presence and contaminated Voice of *Genucius*. And to this belongs, also, that, in Lib. xi. T. v. L. 1. *D. de Aleator.* Where the Prætor saith, He would give no Judgment, if any Person should beat or do any Damage to him at whose House he should hear they play'd at Dice, or if any stole or cheated him of any Thing at that Time.

[7] Pro *Rabirio*, Chap. v. [8] Vide *Petr. Fabr. Semestr.* Lib. ii. Chap. vi. [9] Essays, Lib. iii. Chap. i.

[10] Provided they actually appear'd upon the Stage, or enter'd into the Pit to fight with the Gladiators; whereas those who were hir'd to fight with the wild Beasts, were mark'd with Infamy on that Account alone, although they did not appear upon the Spot. See M. NOODT, *Comm. in Tit. Dig. De his qui Not. infamia*, Pag. 75, 76. And BRISSON. *De Jure Connub.* Pag. 127, *& seqq.* Edit. *Amst.*

[11] Vide Lib. iii. T. ii. L. 1. D. *de his qui Infam. not.*

or ſuffered themſelves to be hired to fight with *Beaſts* [1]. But the Reaſon why *Infamy* was annexed to ſuch Actions, was not that any Immorality was ſuppoſed in them (for ſuch Actions may, it is poſſible, be innocent enough) but the *Gain* made by them was that which made them look diſhonourable and baſe to the natural Gravity of the *Romans*; for it is often the *Hire* only which makes the Service mean and baſe. By the *ſame Laws* it was looked upon to be infamous [2], for a Man to permit his Daughter to marry while ſhe was a Widow, within the Time of *Mourning*; or to be marry any Perſon in ſuch Circumſtances himſelf; or to ſuffer any Perſon under his Charge to marry, or to be married within that Time; becauſe it might ſeem to betray much Levity and Unſettledneſs of Mind, to argue weak Inconſtancy of *Faith*, and wild deſultory Luſt. Among the antient Inhabitants of the *Canary Iſlands* it was thought very great *Ignominy* and *Diſgrace* to be a *Butcher* [3]: And Sir *Thomas Moore* make his *Utopians* of the ſame Opinion [4]. *Selden* tell us, that the *Jews* refuſed to admit four Sorts of Men either to be *Witneſſes*, or to have any Hand in *judicial Matters*, becauſe of the ill *Repute* they bore among them; and thoſe were *Gameſters*, *Uſurers*, *Perſons who made Gain by the Produce of the ſeventh Year, or Year of Remiſſion*; and *ſuch as taught Pidgeons to fly*. And he adds, they gave this Reaſon for it; becauſe none of theſe Sorts of People applied themſelves to any Way of Life which tended to promote publick *Good*, or bring any Advantage or Convenience to *human Life* [5].

VII. Thus the *Loſs* of *ſimple civil Eſteem* may be owing purely to a *State of Life*. But a *Man* may, alſo, *entirely* be deprived of it *upon a criminal Account*; when for ſome *particular Sort of Crime* he hath committed (for every [6] *Offence* will not deprive a Man of *civil Eſteem*) [7] the *Laws* of the *Commonwealth* fix a *Mark* of *Infamy* upon him: Which is uſually done, either by taking away his *natural Life* at the ſame Time, and by *condemning* his *Memory*, or by *ejecting* him out of the *Commonwealth* with *Shame* and *Diſgrace*; or perhaps by allowing him to continue in the *Commonwealth*, but not as a *ſound*, but *diſordered*, *infected Member*; or, in other Words, by permitting him to inhabit in the Dominions of the *State*, and to enjoy the common Protection of the *Laws*, but by excluding him out of all *publick Offices* and *Employments*, and all *honourable Societies*, by making him uncapable to make any *Will*, and by diſabling him to do any *legal Act*, which ſuppoſes an *untainted* Reputation. But now what are the *Crimes* which contract all this *Infamy*, muſt be known from the *Laws* of every particular Commonwealth [8]. And here it may be obſerved, that, according to the *Civilians*, the *Infamy* which is contracted by any bad [9] *Action* may be either the Effect of an immediate [a] Impoſition of the *Law* itſelf; or of ſome antecedent *Examination* and *Sentence* of [10] ſome *Judge* [b]; or elſe of the *Cenſure* of Men of *Character* and *Eſteem*, which is commonly called *Infamy of the Fact* [11]. [12] But I am rather inclined to think, this *Infamy of the Fact* is not ſo much the immediate Effect of the Opinions of Men of *Character*, as a Puniſhment

[a] Vid. Lib. iii. Tit. i. Lib. i. Sect. viii. *De poſtulando.* [b] Vid. *D. d. l.*

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[1] Vid. Lib. iii. Tit. i. Lib. i Sect. 6. *D. de poſtulando*

[2] This is neither the true, nor only Reaſon. Not that it would follow from hence (as M. *Hertius* thinks) that Huſbands were thought bound, under Pain of Infamy, not to marry again till their Year of Mourning was expired. For here might be, as in other Caſes, a Difference between the Huſband and Wife, on Account of the Superiority which Marriage gives the former. It is undoubtedly the Reſpect which a Woman owes her Huſband, and which ought to extend to his Memory, which occaſioned them to mark as infamous thoſe Widows, who, by marrying too ſoon, ſhewed a Want of Regard to their deceaſed Huſband. This Reaſon was ſupported by another, which the Lawyers called *turbatio ſanguinis*, (DIGEST. Lib. iii. Tit. ii. *De his qui not. infam.*) that is to ſay, the Fear that a Widow might be with Child by her deceaſed Huſband. The firſt Reaſon alone was ſufficient to hinder a Widow from marrying before her Year of mourning was expired, and therefore tho' it was certain that ſhe was not pregnant, or had been delivered ſoon after her Huſband's Death, ſhe was equally obliged to wait the Time preſcribed by the Law. But if this Reaſon ceaſed, as it happened when the deceaſed was become a publick Enemy, or a State Criminal, or had been ignominiouſly put to Death, or had made away with himſelf thro' a Conſciouſneſs of his own Guilt; then the other Reaſon ſtill ſubſiſted, as much as it could do in itſelf; ſo that if the Widow of ſuch a Huſband was brought to Bed before the Expiration of the Year, it was free for her to re-marry. It is thus the moſt judicious Commentators explain after CUJAS (Obſerv. vi. 32.) the iid and iiid Sections of the Law juſt cited. See JACQUES GUTHIER, *De jure manium*, Lib. iii. Chap. xxviii. and Mr. *Noodt*'s Commentary, Pag. 80. as, alſo, M. *Schulting* upon the ſame Title, Sect. 4.

[3] *Aloiſius Cadamuſtus* Navigat. Chap. viii. [4] *Utop.* Lib. ii. [5] *Selden* de *J. N. & G. ſec. Heb.* Lib. iv. Chap. v.

[6] Or Cuſtoms which have the Force of a Law: *Exiſtimatio eſt dignitatis inlæſæ ſtatus, legibus ac moribus comprobatus, qui ex noſtro* AUCTORITATE LEGUM *aut minuitur, aut conſumitur.* DIGEST. Lib. i. Tit. xiii. *De extraord. cognition.* &c. Leg. v. Sect. i.

[7] Vid. Lib. i. Tit. liv. Lib. i. C. *de modo Mulctarum.*

[8] Vid. Lib. l. Tit. xiii. Lib. v. Sect. 1, 2, 3. D. *de extraordin. Cognit. Though in this Place I obſerve, that, in ſome of the Examples, there is hardly any Diſtinction made between the ſimple and intenſive Eſteem. And here we may obſerve a Law of the* Egyptians, *by which* Soldiers who deſerted, or did not obey the Orders of their Commanders, were not puniſhed with Death, but only with Infamy and Shame. And if they could by their Courage afterwards wipe off the Ignominy, they were reſtored to their former Dignity. And thus the Legiſlator, by making Ignominy a greater Puniſhment than Death, taught them to think Infamy the greatest Evil; and, at the ſame Time, ſeems to have conſidered, that ſuch as were puniſhed with Death, muſt for ever be made incapable of doing any further Good in common Life; but that ſuch as were only deprived of their Honour, would be always endeavouring to do ſomething that might recover it, *Diodor. Siculus*, Lib. i. Chap. lxxviii.

[9] *Ipſo Jure.* This is, becauſe it is ſufficient that what the Law marks with Infamy, has been done. And ſuch often in the Nature of theſe Kind of Things, that no Body can doubt of it, as appears by the Examples alledged at the End of the preceding Section. The Action is in itſelf declared infamous by the Law alone, and the Lawyers ſpeak of a Woman ſurprized in Adultery, tho' ſhe ſhould neither be accuſed nor condemned, nay even tho' ſhe were abſolved by the Church. *Ego puto, etſi abſoluta ſit ſ. deprehenſionem, adhuc tamen illi notam obeſſe debere; quia factum Lex, non ſententiam notaverit.* DIGEST. Lib. xxiii. Tit. ii. De ritu Nupt. Leg. xliii. Sect. 12.

[10] See hereupon the Deciſions of the *Roman* Law, in Mr. NOODT's Commentary, Pag. 77. & *ſeq.* and M. SCHULTING, *Enarr. Pandect. in T. de his qui not. infam.* Sect. 6. & *ſeq.* [11] *Infamia.*

[12] It is thus the Reproaches and Reprimands which a Father, by his Will, throws upon one of his Children, only carry a Mark of Infamy in the Eyes of *wiſe* and *good Men*. *Ea quæ pater teſtamento ſuo filios increpans ſcripſit, infames quidem filios* JURE *non faciunt, ſed* APUD BONOS ET GRAVES *opinionem ejus, qui patri diſplicuit, onerant.* Vid. Lib. ii. Tit. xii. Lib. xiii. C. *ex quibus Cauſ. infam. irrog.* Add. Lib. xxxvii. Tit xv. Lib. ii. D. *de obſeq. Parent. præſtand.* Lib. xx. & D. Lib. iii. Tit. ii. Lib. xx. *de his qui not. infam.* Vid. Lib. ix. Tit. ix. Lib xxv. C. ad L. *Jul.* de Adult. *And to this you may refer that which* Rochefort, Deſcript. des Antillar. Part. ii. Chap. viii, *relates of the* Apalachitæ. They have no other Puniſhment, ſaith he, for Thieves, beſides the Reflections that are made upon them in all Company upon that Account; and this is generally taken ſo hard by them, that, to avoid it, they will fly away into the moſt uninhabited Deſerts.

which the *Law*, alſo, inflicts upon that View, that *good Men* always condemn ſuch *Actions* [1], and look upon them to be *baſe* and *wicked*. For though it may be thought a Diſcredit, to fall under the Cenſure of *Perſons* of *approved* Lives, and *Reputation*, yet unleſs the *Law* joins with, and confirms that Cenſure, no Man can ſuffer ſo far in his *civil Eſteem* by the Judgment only of private Men, as to be excluded from any *Rights* and *Advantages* which the *civil Laws* allow to an *unblemiſhed* Reputation. And therefore it is evident, that a Man doth not immediately forfeit *Eſteem*, when he is accuſed of, and charged with any Crime of *infamous* Nature and Quality. For as *Julian* righly anſwered *Delphidius* the *Orator*, [a] when he cried out, *Who would be guilty, if it were ſufficient to deny the Fact?* 'Who would be innocent, if it were enough 'only to accuſe?' But it is then a Crime produceth *Infamy*, when the Perſon is condemned for it, or confeſſeth it. And that he is, alſo, ſuppoſed to do, when he agrees with the Proſecutor [3] to let his *Action* drop: Becauſe all ſuch *Agreements* naturally ſuppoſes *Confeſſion* [4]; except perhaps it may be made appear, that he chooſes to come to Compoſition with the Proſecutor, not out of any Conſciouſneſs of Guilt, but for other juſt Reaſons, as to eſcape the Vexation and Trouble of *Trial*, the Severity or Partiality of the *Judge*, or upon ſome particular Diſlike he bears to his Perſon. To which our Author might have added, that not only the little Share of Honeſty, and the Paſſions of the Judges, but, alſo, their Prejudices, and Careleſneſs, often loſe the beſt [5] Cauſes [6]. But though a Man's *Reputation* is ſuppoſed to be cleared, when he is *acquitted* from the Crime which was charged upon him; yet to make his Innocence appear the more unqueſtionable, and to puniſh Calumny and falſe Accuſation, it is uſual in many States and Commonwealths to force the *Accuſers* to beg Pardon, confeſs themſelves guilty of Falſhood, make their Submiſſions, and pay Reſpect and Honour to the *Party* accuſed, and the like [7].

VIII. From what has been ſaid it may, alſo, be inferred, that it is no *real Infamy* or *Diſhonour*, when a Man hath ſuffered an Abuſe either by Words or Actions, not to *revenge* it with his own Sword; as the Cuſtom is in ſome Countries, eſpecially among *Perſons* of *Rank*, and Men of *military Profeſſion*; but puniſh it by the *Magiſtrate*, or paſs it by in Silence, ſuppoſing ſuch *Patience* doth not imply *Confeſſion* of any bad or baſe *Action*. It ſeems to argue indeed much Cowardice and Littleneſs of Spirit, tamely to ſubmit to every Man's Inſults and Injuries, without endeavouring bravely to vindicate and aſſert his *Rights* and *Liberty*; and it ſeems natural, in ſuch Caſes, for every Man to be of the Opinion of *Neoptolemus* in the Poet [8].

Τεθναίην μᾶλλον, ἢ ἀστόλεμος καλεοίμην.

I'd ſooner die, than be a Coward thought.

There are certain Injuries, which if a Man chooſes generouſly rather to deſpiſe, than to revenge, he will not bring his Courage in Queſtion. Nor can I ſee any Thing in ſuch Conduct that can rob him of his *natural* or *civil Eſteem*. And therefore *Hobbes* ſays, "If a Man receive Words "of Diſgrace, or ſome little Injuries from ano"ther, for which there is no Puniſhment aſſigned "by Law, and is afraid he ſhall fall into Con"tempt, and be obnoxious to the like Injuries "from others, and, to avoid this, protects him"ſelf by the Terror of his private Revenge; "this is a Crime, and ſuch a Fear will not ex"cuſe it, becauſe the Commonwealth would "have the publick Words, that is, the Laws, "be of more Force with the Subjects, than "the Words of any private Man, which they "who made the Laws therefore aſſigned no Pu"niſhment for, becauſe they thought it not "worthy a Man who had the Uſe of Reaſon "to take any Notice of them [9]." And much leſs is it any *Diſhonour* for a Man, in a Commonwealth, where the *Laws* expreſly forbid *private* Revenge, to prefer Obedience to the *Laws*, rather than expoſe himſelf at once to the Danger of the *Fight*, and the Severity of *civil Juſtice*, upon a vain Pretence of *Honour* [10]. Neither is it always, I preſume, a Sign of Cowardice, for a Man to refuſe to put his Life and Fortunes to the Venture upon every little inſignificant Quarrel, when there may be often leſs

[a] Vid. *Ammian. Marcellin.* Lib. xviii. Chap. i.

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[1] The Laws cannot here, more than elſewhere, ſpecify all the Actions which hurt, in a civil Senſe, the Reputation of an honeſt Man. It was for this Reaſon that formerly, among the *Romans*, there were *Cenſors* appointed, whoſe Buſineſs it was to take Cognizance of the Morals of the People, and ſet down what, they thought, every Man deſerved. See upon this M. *Noodt*'s Comment. Pag. 74. M. *Schulting*, Sect. 2, 10, and M. *Gundling*, Sect. 7, 8. upon the Title of the *Digeſt*. De *his qui notantur inf. miâ.*

[2] *And to this we may apply that of* Plautus *in* Trinum. *Act.* i. *Sc.* ii. *Ver.* 44, 45. Not to commit a Crime, is in a Man's own Breaſt; the Suſpicion whether he does not, is in another's. Moreover an interlocutory Decree, according to the *Roman* Law, is not ſufficient here, there muſt be a definitive Sentence. See Mr. NOODT's Comment. Pag. 78. *& ſeq.*

[3] The *Roman* Law reſtrains here the Convention to that which is made by giving Money not to be accuſed or arraigned in Juſtice: *Si cum pretio quantocunque pactus eſt. Alioquin & qui precibus imperavit, ne ſecum ageretur, erit notatus; nec erit veniæ ulla ratio: quod eſt inhumanum.* DIGEST. Lib. iii. Tit. i. *De his qui notantur infamiâ*, Leg. vi. Sect. 3.

[4] *Vid.* Lib. iii. Tit. ii Lib. v. D. de his qui infam. notant. *Quoniam intelligitur confiteri crimen, qui paciſcitur.*

[5] Beſides, to uſe the Words of M. *De la Bruyere*, "The greateſt Evil, next to being convicted of a Crime, is to be legally ac"cuſed of it. Men are often diſcharged and abſolved by a Sentence of their Judges, who are branded as guilty, by the Voice of "the Public" *Caract. ou Mœurs de ce ſiecle*, Chap. xii. *Des jugemens.*

[6] *Thus in* Iſocrates *adv.* Callimach. *in the Beginning. Some perſuaded the Defendant to compound the Matter with the Plaintiff*, becauſe in Trials there are ſeveral Things which fall out otherwiſe than are expected; and, in paſſing the Vote, there is more Chance than Equity. And therefore it is a much ſafer Way to be at a ſmall Expence, to get clear of ſome Crime, than to refuſe to pay any Money, and run ſo great a Hazard.

[7] *It is evident from* Joſephus *de Bello Judaico*, Lib. iv. Chap. xxxix. That the Ignominy of having been in Chains was ſuppoſed to be taken away, if the Chains were not unlocked, but filed aſunder; and this, he ſaith, was the Way, when any one had been put in Chains innocently among the *Romans*. [8] *Q. Calaber*, Lib. ix. [9] *Leviath.* Chap. xxvii. Vid. Leg. *Salicam.* Tit. xxxii.

[10] ——— *Injuſtum rigido jus dicitur enſe.* Ovid. *Triſt.* Lib. v. El. x.

'Tis cruel Juſtice which the Sword inflicts.

dangerous,

dangerous, and more innocent and lawful Occasions offered to shew his *Courage* [1]. Thus when *Pyrrhus*, in *Plutarch*, called *Antigonus* Villain, and challenged to meet him upon the Plain, and fight him for the Kingdom, *Antigonus* answered, τὴν μὲν ἀληθῆ στρατηγίαν ἐκ ὅπλων μᾶλλον ἢ καιρῶν εἶναι, *That his Way of making War consisted as much in knowing proper Times and Opportunities, as in Strength; and that if* Pyrrhus *were weary of his Life, he might easily find Ways enough to go out of it.* And so *Augustus* answered *Antony*'s Challenge, in the same *Author*, *That he might easily find a Way to die* [2]. And in such Cases, no prudent, considerate Man, hath any Reason to be disturbed at the Opinions or Censures of the *Vulgar*; since the *Esteem* of every Subject is to stand and fall by the *Judgment* of his *Sovereign*, and the *Laws* of the State; and since it is sufficient Proof of *Bravery* and *Resolution* to obey the *Laws*, in Defiance to all the *little* Cavils and Calumny of the vain and idle Part of Mankind. And hence it will be no Difficulty to answer what *Hobbes* says in his *Leviathan*, Chap. xx. "That "it is hardly possible, but private *Duels* should "be thought honourable, because they are the "Effects of Courage, which is *Power*." For why should it not be rather looked upon to be a Sign of *Greatness* and *Bravery* of Spirit, to know how to govern the *Heats* and Passions of our Minds, and to give them no other Liberty, but what the *Laws* allow? Though I think the same *Author* says very well afterwards, Chap. xxx. 'That all Laws 'which forbid *Duels*, should ordain Honour for them 'who refuse, and Ignominy for them who make the '*Challenge*;' and thus those that refuse to fight would have an honourable Excuse. The Remedy the *Sicilian Constitutions* proposed against *this* Custom was, by inflicting severe Penalties upon them who *offered* any *Affront* [3].

An Account, *by the Way*, of the *Antiquity* of *Duels*, and whence they at first began, we may see in *Diodorus Siculus* [4]. "The *Gauls*, saith he, in the Height "of their Entertainments, upon the least Quarrel "that arose, would break off their Mirth, take their "Swords, and, without expressing any Value for "their Lives, go out and fight. And this they did "upon a Belief, that they should enjoy ano-"ther Life, in a new Body; and therefore easily "despised the Care of this; as *Lucan* expresseth "it:"

----Inde ruendi
In ferrum mens prona viris, animaque capaces
Mortis, & ignavum est redituræ parcere vitæ [5].

----Hence they so bravely dare
Defy the Sword, and all the Dread of War,
Scarce satisfied with Death; and think it mean,
To spare a Life that must return again [6].

IX. But *Further*; It is, also, evident, that the *Government* cannot deprive any Man of his *natural simple Esteem* [7] *arbitrarily, at Pleasure*, but only upon some *antecedent Crime* he hath been guilty of, which is attended with *Infamy*, either by its own *intrinsick Turpitude*, or by *express Sanction* of *Law*. For since such a *Power* can no Way be supposed to promote *civil Society* or the *Interest* of the Commonwealth, it is not to be supposed it was ever conferred upon the *Sovereign* Governors in it. But as the *civil Sovereign* may unjustly *eject* a Subject out of the Commonwealth, so he may unjustly, also, take away his *civil Esteem*, so [8] far at least, as to deprive him of all those *Rights* and *Advantages* which attend an *untainted Esteem* in the Commonwealth. But his *intrinsical natural Esteem* can no more be taken away from a Man, than his *Virtue* and *Integrity*. Besides, it is next to a Contradiction, that a Man should be declared *infamous* at the *Pleasure* only of the Government; that is, that a Man should be charged with a Suspicion of being guilty of some *dishonourable* or *criminal* Action, not because he is really guilty, but because it is the Pleasure of the *Government*, by such means to use an innocent Person as if he were criminal. And I think it is, also, beyond Dispute, that there lies no Obligation upon any Subject, to sacrifice his own *simple Esteem* and *Character* to the *civil Government*, or to contract any *real Infamy* for the *Advantage* of the *Publick*. For neither hath the Government Power to command any *base* or *ill* Action, which will be the Cause of *real Infamy*; neither ought a Subject to obey, if it should.

X. Whether, indeed, it may not be required of a Subject of *good Character*, to take upon himself the [9] *Infamy* of his *Prince*, or his *Country*; or, as it were, make himself *criminal* for their *Faults*, is not so clear. But here (though I think it hardly possible for a Man to counterfeit himself a Criminal, without being in some measure really so) I conceive, there ought to be a Distinction made

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[1] Vid. *Cæs.* Com. de *Bell. Gallic.* Lib. v. Chap. xliv. Vid. *Busbeq.* Epist. 3. de *Velibego*. This *Velibeg* was Governor of a Province of *Lower-Hungary* for the *Grand Signior*. Being at *Constantinople*, as the *Bashaws*, in full Divan, examined him about a Quarrel he had with the *Sangiac* (or Governor) of a neighbouring Province; he told them, among other Things, that his Enemy had not the Heart to accept of a Challenge, he had often sent him. The Bashaws thereupon reproved him in this Manner: "What did you dare to call "your Fellow-Soldier a Challenge? Were there no Christians for you to draw your Sword against? Do you eat your Master's "Bread, and venture to expose your Life in a Duel? By what Right did you take this Step? Or who advised you to it? Do you "not know, that, which ever of you had been killed, it had been a Loss to your Sovereign?" After this Lecture the Divan sent *Velibeg* to Prison, where he remained for several Months, and suffered greatly in his Reputation. Upon which *Busbequius* makes this solid Reflection. "Among us, says he, there are many Men who get a Name by drawing their Swords against their Countrymen or Friends, without ever facing an Enemy. *O Tempora! O Mores!* Vice assumes the Place of Virtue; and what ought to be "Punishment, intitles a Man to Honour and Glory."

[2] *Plut.* in *Pyrrh.* Pag. 404. A. & in *Anton.* Pag. 950. E. *Alexander de Rhodes* Itiner. Lib. ii. Chap. vi. relates of the Soldiers in the Kingdom of *Tonquin*, that though they are very valiant against an Enemy, and set but little Value upon their Lives, yet among one another they never draw their Swords, but are as loving as Brothers: And that, when they once saw a *Frenchman* and a *Portuguese* fight a Duel, they were amazed at it and said they never saw such Barbarity before.

[3] Const. *Sicul.* Lib. iii. Tit. xxxiii. Sect. 4. Add here M. Slicher's Dissertation upon *Duels*, which I have translated and published, in the iid Tome of a Collection of Treatises, in 1701.

[4] Lib. v. Chap. xxviii. [5] *Lucan*, Lib. i. Ver. 455, &c.

[6] Vid. *Appian Celtic.* Where he gives the same Reason for the Boldness and Bravery of the *Germans*.

[7] See, upon this, Mr. *Silhon*'s Book intitled *The Minister of State*. Part. ii. Lib. i. Disc. 10.

[8] It is for this Reason that, however unjust the Sentence of Condemnation be, by which a Man is declared infamous, it is necessary, to restore his Reputation, that the Sovereign should revoke his Sentence. To this Purpose M. *Hertius* alledges the Example of the Emperor *Arcadius*, with Regard to a whole Province of *Lycia*, whose Inhabitants had been unjustly branded with Infamy, and deprived of their Privileges. Upon this the Reader may see the *Theodosian* Code, Lib. ix. Tit. xxxviii. *De Indulgentia criminum*. Leg. ix. with the Commentary of the learned *Jacques Godefroi*, Tome iii. Pag. 278, *& seq.*

[9] Add here what I have said on the Abridgment of *The Duties of a Man and a Citizen*, Lib. ii. Chap. xiv. Sect. 10. Not to be between

between a *Prince's domeſtick* or *private* Faults, and thoſe that are *publick*, or which have an *Influence* upon the whole Commonwealth. Now that a Man ſhould take the *firſt* Sort upon himſelf, and make himſelf *criminal* for his Prince, can neither be *lawfully* and *juſtly* deſired by the one, nor ſafely be complied with by the other; whether with Deſign to put ſome plauſible *Colour* upon the Action of the *Prince*, or whether to take the *Blemiſh*, that would otherwiſe be fix'd upon *his natural Eſteem*, upon himſelf. For no body can take away the *Civil Eſteem* of the *Sovereign*, becauſe he is placed above the Reach of any *Civil Judicature*. Thus it cannot be thought that any good Man can approve the *Action* of *Anicetus*, when he declar'd, he had been guilty of Adultery with *Octavia*, only that *Nero* might have Pretence to diſſolve his Marriage with her [1]. But yet 'tis not uncommon, that when *publick Miniſters*, by ſecret Order from their *Maſters*, enter into *Treaties* with *foreign States*, or oppoſe and form Deſigns againſt them, which, if known to be the Reſult of *publick Counſel* or *Inſtructions*, would bring Danger or Inconvenience upon the State, to avoid the ill Conſequences which might follow, by laying the the Fault upon the *Miniſters*, as if they had acted only by their own *private Judgment*. And, in ſuch a Caſe, I think no *good Subject* would refuſe to divert the *Evil* from the Commonwealth, by favouring the *Excuſe*, and yielding that what he did, was beyond his Inſtructions, and without *Command*; provided his Puniſhment be no greater than ſome ſmall pretended *Diſgrace* [2]. For to ſuffer *Death* upon that Account, or to be *given* into the Hands of the *injured* Party, would be a Severity not to be borne or excuſed. But the pretended *Puniſhment*, whatever it be, may be eaſily either remitted or *compenſated* otherwiſe. For 'tis unqueſtionable, that he that hath Power to inflict *Civil Infamy*, hath, alſo, Power to remove it [3]. But notwithſtanding, if *Infamy* be inflicted for any *impious* or *flagitious* Action, *Reſtitution* of a Man's *Fame* will only produce the *external Civil Effects* of an *unblemiſh'd Reputation*; but it will not in the leaſt wipe out the Blot which lies upon his *natural Eſteem*.

XI. *Intenſive Eſteem* is that Species of Reputation, by which Perſons, otherwiſe equal in the *ſimple Repute*, are preferr'd to one another, according as one poſſeſſes a larger Share than *another of thoſe Things*, whatever they be, which are apt to raiſe in other Men *Reverence* and *Reſpect*. Now *Honour*, which anſwers the *Intenſeneſs* of *Eſteem*, is the *Signification of our Opinion of another Man's Excellencies*. And therefore the *Honour* is not really in him who *receives*, but in him who *gives it* [4]. For though a Man may ſet what *Value* he pleaſes upon himſelf, as the *Seller* does upon his *Commodities*: Yet, as in theſe, it is the *Buyer* at laſt that determines the *Price*; ſo the *Value* of Men is no higher or greater, than as others are pleas'd to ſet it [5]. For as *Hobbes* ſays, *Let a Man (as moſt Men do) rate himſelf at the higheſt he can; yet the true Value of him is no more than he is eſteem'd at by others* [6]. But yet every Man is affected more or leſs with the *Honour* others pay him, as it anſwers to that *Value* which he puts upon himſelf [a]. But the *Eſteem itſelf*, or that which gives Men the *Title* of *Deſert* to *Honour*, is often *figuratively* expreſſed by that *Word*. And ſo certain *publick Stations*, and *Places* of *Dignity* attended with Honour, are peculiarly called *Honours*. 'Tis rightly obſerv'd by the *Author* before mention'd [7], "That it is impoſſi-
" ble any *Society* ſhould be either great, or of
" any long Continuance, that at firſt united
" only upon ſuch a *Bottom* as a *common* Deſire of
" *Glory*, or upon mutual Obligation to aſſiſt one
" another in their Purſuits after *Honour*; becauſe
" *Glory*, and the *Honour* that is built upon it,
" conſiſt in *Compariſon* and *Preference*; and ſo
" what belongs to every Body, belongs to no
" Body; and becauſe the *Rate* that is common-
" ly ſet upon a Man, is taken from what he is
" able to do without the Aſſiſtance of others [8]."
On the other Hand, the further *Ignominy* ſpreads, the lighter it ſeems, and the eaſier it is ſupported. Now this *intenſive Eſteem* may, alſo, be conſider'd, either with Regard to ſuch Perſons as live *in a Liberty of Nature*; or ſuch as are *Members of the ſame Commonwealth*. But I ſhall now proceed only to examine the *Foundations* of this *Intenſeneſs* or *Eminence*, as they fall under theſe two Conſiderations: Firſt, as they produce barely an *Aptitude* or *Diſpoſition* in Men to receive *Honours* from others; and Secondly, as they give them a *proper Right* to demand *Honour* as their *Due*.

XII. The *Foundations* of *intenſive Eſteem*, in *general*, are all thoſe Things, which diſcover, or are ſuppoſed to imply, extraordinary Excellence or Perfection of any kind [9]. The Effects of which are conſonant to the *Laws of Nature*, and the

[a] See above in Book vii. Chap. i. § 2, towards the End.

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[1] Vide *Tacit.* Ann. xiv. 62. *Euripides, Helena*, ver. 106, 107. *Nor for my Brother can I bear that Stain.* In which Caſe, however, the Matter in Diſpute is not about Subjects with Reſpect to their Prince. Add the Story of *Anton. Perez.* in *Thuanus*, Lib. 104.

[2] Add. *Marſelaer.* Legat Lib i. Chap. xxxiii. p. m. 200.

[3] See *Cornel. Nepos, Alcibiad.* Chap. vi. § 5. *Libanius*, Orat. vii. To diſſolve, and undo Things that are already done, is what we reckon among Things impoſſible; but to take off Ignominy from them who are in Diſgrace, is not ſo difficult a Taſk; and you are the only Phyſician who can cure this Diſeaſe: *Speaking to* Julian *the Emperor.* See *Juſtin*, Book v. Chap iv.

[4] *Ariſtot.* Nicom. Lib. i. Chap. 3. We ought to think the Honour is rather in thoſe that honour, than in them that are honour'd.

[5] Vide *John* viii. ver. 54. [6] *Leviath.* Chap. x. [7] *Hobbes* de Cive, Chap. i. § 2. [8] *Seneca*, Epiſt. xxvii. *de Calviſio Sabino.*

[9] *Cic.* de Nat. Deor. Lib. i. Chap. xvii Every Thing who excels, may juſtly command a Veneration " Honour is a Privilege,
" that derives its principal Eſſence, and even Virtue, from the Rarity of it; *cui malus eſt nemo, quis bonus eſſe poteſt? Martial.* Lib. xii.
" Ep. lxxxi. We never take Notice of a Man, by Way of Recommendation, that he is induſtrious and careful in maintaining his Fa-
" mily, becauſe 'tis a common Action, notwithſtanding it is very juſt and commendable: Nor of a great Tree in a Foreſt, where
" they are all of the ſame Bigneſs. I am of Opinion, that a Citizen of *Sparta* ought not to have boaſted of his Courage, ſince it was
" the popular Virtue of their Nation; and as little of their Fidelity or Contempt of Riches. There is no Occaſion of recompenſing
" a Virtue, how great ſoever it is, that is once become cuſtomary; and I know not whether we ſhould ever call that great, which is
" common. Since, then, theſe Rewards of Honour have no other Worth or Value in them, than what ariſes from the ſmall Number
" of thoſe that enjoy them; a liberal Diſtribution of them is the Way to make them contemptible, and bring them to nothing." *Montaigne's* Eſſays, Book ii. Chap. vii, towards the Beginning.

Ends

Ends of *Civil Government*. For 'tis unuſual to ſee *Perſons* of diſſolute Morals, and *eminent* for nothing but their Vices, *celebrated* and *admired* by the Multitude. So, in particular, are Men of unuſual Strength and Abilities at Eating and Drinking [1]; of extravagant, inſatiable Luſt; of mad, raſh, ungovernable Humours; dextrous, ingenious, crafty, artful Villains; and in ſhort, all Miſcreants whatever, that are arriv'd at ſome ſignal Proficiency, and ſeem to be Leaders in their ſeveral Vices: And who, the more they are accompliſh'd in their different vile Practices, will appear only the more inſupportably wicked to all the good and ſober Part of Mankind [2]. It may poſſibly require much *Strength of Body*, and Readineſs of *Parts*, to be compleatly vicious; but 'tis, alſo, certain, that Vice will govern with greater Power and Violence, where there is more *Vigour* and *ſtronger* Appetites to entertain and ſupport it. From all which it is eaſy to infer, that *Commendation* and *Glory* muſt be *rated* only by the *Valuation* of the Perſons we receive it from. And therefore, that the greateſt *Commendation* is that which comes from Perſons who deſerve it themſelves; and, conſequently, that a *wiſe Man will ſet no Value upon their Praiſe* (*as* M. Antoninus *ſaith*) *who cannot ſo much as appear pleaſing to themſelves* [3]. But, in *particular*, the *Foundations* of this *Eſteem* are ſuch as theſe; *Perſpicacity* of Mind, *Parts* and *Abilities* capable of much Improvement and Variety of Knowledge, eſpecially when great Capacities are anſwered by great Attainments. A Judgment turn'd for Buſineſs, eaſily diſcerning the true State of Things, and Difficulty impoſed upon [4]. *Steadineſs* of Reſolution, unſhaken and unmoved at external Accidents, above Fear, and beyond the Force of *Temptation*. *Eloquence*, or the Power of expreſſing the Thought with much Fluency of Words, and Gracefulneſs of Utterance. And next theſe, *Strength*, *Beauty*, *Comelineſs*, and good *Proportion* of Body; as theſe may be ſuppos'd to be either Inſtruments, or Promiſes and Signs of certain Graces and Perfections in the Mind [5]. Hence it has been vulgarly thought, that extraordinary *Tallneſs* of Body implies a Mind and Perſon *great* and *noble*: And the *Gods* and *Heroes* were therefore repreſented upon the *Stage* in the *Buskin*, that the *Actors* might appear of an unuſual Size. And 'tis obſervable, that there are many Men who wiſh to be *taller* than they are; but that there are very few who would be content to loſe an Inch of their *Stature*. But, how ridiculous ſoever this Opinion ſeems to be, it prevail'd ſo far, that upon the Force of it the *Ethiopians* (as *Herodotus* ſaith [6]) *choſe their Kings by a certain Meaſure*. A Method of Election, which would no doubt have been much approv'd by the *Indian* mention'd in *Montaigne*, who happening to be at *Roan*, while the *Court* was there, in the Reign of *Charles* IX. ſaid, that he thought it very ſtrange ſo many tall Men with long Beards, and ſo bravely arm'd, as they were that ſtood about the King's Perſon (meaning the *Swiſs-Guards*) ſhould be content to obey a beardleſs Boy, and that he wonder'd they did not chooſe one of them King [7]. But it is often ſeen (as the *Poet* ſays) that,

-----Natura breves animis ingentibus ætas
Finxerit. ----

Nature large Souls in little Room confines [8].

And that [9],

———Ἥ τοι μὲν
Ἀπρηξίη τελέθει, μέγεθος δ' ἐν οὐδὲν ἄρηι
Ἀνέρος, εἰ μὴ οἱ πυκινὰ νόον ἐν στήθεσσιν ἔπῃ

'Tis fond to hope ſucceſs from ſtrength or might,
Except, with force, prudence and art unite.

But beſides *theſe* Foundations of *intenſive Eſteem*, there are, alſo, others to be mention'd, ſuch as the *Goods of Fortune* (as they are call'd) which ſeem either to ſuppoſe Induſtry, Wit, and Prudence, neceſſary to obtain them, or to promiſe *Power*, or to ſupply *Matter* to do great Things. But that which advances Reputation moſt, and is the *Foundation* of the higheſt and moſt *intenſe Eſteem*, is *good Succeſs*, and *Fortune* in great and *important* Actions. *This* firſt of all ſeeming to ſuppoſe *intrinſick Worth* and *Excellence*, and then to demonſtrate the Advantages that ariſe from it, and the lawful Ends it may, and has been applied to [10]. And as the *Fame* of ſuch *Atchievements* gains Belief in the World, it is properly call'd *Renown*. A *Reputation* of particular *Prudence* and *Conduct* in Difficulties relating to common Life and Practice, or to *ſpeculative abſtracted Truths*, is what is uſually call'd *Authority*; which others more truly call *an Opinion of greater Knowledge, joined with Probity and Sincerity*. And

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1 Such as *Juvenal* deſcribes, *Sat.* iv. Ver. 139, 140.

——— Nulli major fuit uſus edendi
Tempeſtate mea.

In Arts of Eating, none more early train'd;
None, in my Time, had equal Skill attain'd. Mr. *Dry*.

Ariſtoph. Acharnenſ. *Act* i. *Sc.* ii Ver. 35, 36. The barbarous People value Men only, as they can eat and drink moſt.

2 *Philo Judæus* de Migrat. *Abrahami*. Pag. 413. A. Ed. *Pariſ.* To excel in many Things that are bad, is only a more famous Infamy. *Arrian. Epictet.* Lib iii. Chap. xiv. If you tell me you kick with a great deal of Strength; I anſwer, You value yourſelf upon that which belongs to an Aſs. To which we may add this Sentence of *Publius Syrius*, with Regard to profeſs'd Gameſters, who, according to him, are the more contemptible, the more ſkilful they are in the Art.

Alcator, quanto in Arte eſt melior; tanto eſt nequior.

Ver. 772. *Edit. Amſt.* 1708. See *Gruter*'s poſthumous Commentary upon it. 3 *M. Ant.* Lib. iii. § 4. 4 Vide *Eccleſiaſt.* ix 15. 1 *Kings* iii 28. 5 Vide *Virg. Æneid* v. Ver. 344. *Iſocrat.* in Encom. *Helenæ*. Though he is there a little too much an Orator. 6 *Thalia*. Vide *Themiſt.* Orat. xiv. Lord *Bacon*'s Eſſays, Chap. xli, xlii.

7 *Montaigne*'s Eſſays, Lib. i. Chap. xxx. Add. 1 *Sam.* x. 23, 24. And here, alſo, we may apply, to this Senſe, that of *Oppian. Cynaget.* Lib. iii. Chap. lxviii.

Μείοσι μὲν μείζων τελέθει, μεγάλοισι δὲ μείων. The Great excels the Leſs, the Leſs the Great.

8 *Claudian*, de Bello Getico, Ver. 584. 9 *Q. Calaber*, Lib. v.

10 *Ariſtot.* Rhet. Lib. i. Chap iii. 'Tis juſt to honour thoſe that do Good; but not ſuch as barely have it in their Power. *Pind. Olymp.* Od. vi. Ver. 123, 124. τεκμαίρει, χρῆμ' ἕκαστον, The Work diſcovers what the Author is. hence

hence those *Degrees* of *Esteem*, which *Age* is thought to confer, are *founded* upon nothing more than the common Persuasion, that *Experience* and long Observation upon Business and Things generally produce *Caution* and *Prudence* [1]; though it is not to be denied, that there are Instances where *grey Hairs* are not *Signs* of *Wisdom* [2]. But now, on the other Hand, Women generally desire rather the Compliments of *Youth* and *Beauty*, than the Respect and Honours paid to *Age*. And therefore *Lais*, when she grew old, dedicated her *Looking-glass* to *Venus*, adding as it is in the *Epigram* [a]:

——ἐπεὶ τοίη μὴ ὀφεῖλε
Οὐκ ἐθέλω, οἵη δ' ἦν πάρος, ἃ δύναμαι.

The Face I once could boast no Glass can show,
And that I now have left I would not know.

The *Roman Law* seems to allow more *Worth* and greater *Dignity* to *Men* than *Women* [b]. Though, in *general*, there are some *Foundations* of *Esteem* common to both Sexes. And there are others which are particular to the *Women*, such as the several *Accomplishments* of *Virtues* and *Duties peculiar* to their *Sex*. And there are others again, which are *borrowed* and *derived* to them, when they are said to *shine with the Rays of their Husbands* [c]; or when they value themselves upon the *Number* or *Worth* of their *Children* [d].

XIII. From *all which* it readily appears what Judgment may be made upon what *Hobbes* says in Chap. x. of his *Leviathan*, where he reduces all the *Foundations of Honour* or *intensive Esteem* to *Power*, which he calls a *Possession of present Means, to obtain some apparent future Good*. And this he divides into *natural* and *instrumental*. "Natural Power (he says) consists in the Eminence of the Faculties of Body or Mind, as "extraordinary Strength, Beauty, Prudence, "Arts, Eloquence, Liberality, Nobility, and "the like. Instrumental Powers are those which, "being acquired by these, or by Fortune, are "the Means and Instrument of acquiring more, "as Riches, Reputation, Friends, and good "Luck; and in short, any Quality whatever, "or the Reputation of any such Quality, as "makes a Man to be lov'd, or fear'd of many. "*And then he defines Worth* or *Dignity*: That it "is the Value or Price of a Man, or as much "as would be given for the Use of his Power. "And the Manifestation of that Value we set "on one another is that, *he saith*, which is called Honouring and Dishonouring. Thus to "value at an high Rate, is to honour a Man; "at a low Rate, is to dishonour him. *Afterwards "he recounts* the natural Tokens, or Ways of "Honour, as to pray to another for Aid, to "obey, to give great Gifts [e], to be sedulous in "promoting another's Good, to give Way or "Place to another in any Commodity; to shew "any Sign of Love or Fear, to praise, magnify, "or call happy, to speak to another with Consideration, or appear before him with Decency "and Humility, to believe, to trust, to rely "on another, to hearken, to counsel or discourse "of what Kind soever, to agree with in Opinion, to imitate, to honour those and other honours, to employ in Counsels or Actions of "Difficulty. *And further*, Civil Dignity, *according to him*, is that Value which is set on a "Man by the Commonwealth, which is understood by Offices of Command, Judicature, "publick Employment, or by Names or Titles, "introduced for Distinction of such Value. "*And he rightly observes, that* the Commonwealth may make whatsoever it pleases to "stand for Signs of Honour, though it be otherwise in its own Nature indifferent; as, for In-

[a] *Antholog.* Lib. vi. *Quintil.* Declam. cccvi. Pag. 462. There is nothing to be lov'd in an old Woman, but the Memory of what she was. *Add.* Lord *Bacon*'s Essays, Chap. xl. [b] *Lib.* i. *Tit.* ix. *L.* 1. *D. de Senatoribus. Add.* Jac. Godofred. *de precedentia*, Part i. Chap. v. § 35. [c] *Vide Lib.* viii. *D. de Senatoribus, ubi supra.* [d] *Vide.* Ovid. Metam. *Lib.* vi. *Fab.* iv. *Ver.* 172, *& seq.* Valer. Max. *Lib.* iv. *Chap.* iv. § 1. Plut. in C. Gracch. *Vide* Buchanan. *Rerum Scotic. Lib.* xii. *init. Orat.* Kennedi. [e] And upon this Foundation I suppose (though the Respect intended was oddly expres'd) the Prince of *Zanaga* in *Africa*, as *Leo Africanus*, Lib. i, relates it, kill'd a great Number of Camels and Ostriches, to entertain his Guests; which Sort of Provision they desiring him to spare, he told them, that he should not deal civilly by them, if he treated Guests he thought so Noble, and that he had never seen before, with only the lesser Sort of Animals.

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[1] Vide D. L. l. T. vi. L. 5. init. de *Jure Immunitatis.* Q. Calaber, Lib. v.

Αἰεὶ δ' ἐν βουλῇσι γέρων πολυΐδρις ἀμείνων
Ὁπλοτέρῳ πέλει ἀνδρὸς, ἐπεὶ μάλα μύρια οἶδε.

Youth is less fit than Age for wise Debates;
On sacred Wrinkles sage Experience waits.

Diod. Sicul. Lib. xix. Chap. xxxiv. It seems more natural to pay greater Reverence and Respect to Aged, than to young People *Oppian. Halicut.* Lib. i. Ver. 683.

Τῖμας γὰρ ἐναίσιμον ἄνδρα τίθησιν. Age makes Men venerably Great.

[2] To such we may apply that of *Ovid* Metam. Lib. ix. Ver. 436, 437.

——*Qui propter amara senectæ*
Pondera despicitur, nec quo prius ordine regnat.

Who tir'd with Age, and Years oppressive Weight,
Sink to Contempt, and lose their former State.

And as *Lucan*, Lib. i. Ver. 135, expresseth it:

——*Stat magni nominis umbra.* —— Retains the Shadow of a glorious Name.

And therefore *Horace* saith very well, *Ep. Lib.* i. *Ep.* i. *Ver.* 8, 9.

Solve senescentem mature sanus equum, ne
Peccet ad extremum ridendus, & ilia ducat.

Wisely in Time the generous Horse release,
E're, batter'd and decay'd, he lose the Race.

Antiphanes. Life is like Wine, when it runs low, it will turn soure. *Add.* Charron *de la* Sageesse, Lib. i. Chap. xxxv. § 5. *Strabo*, Lib. xv. Pag. 488. The *Indians* allow no Pre-eminence to the Aged, unless their Prudence deserve it. *Philo de Abrahamo*, Pag. 387. A Man ought not to be called Old from the Time he hath liv'd, but from the Way he hath spent his Life in. For many who have continued a long Course of Years in ill Practices, can only be call'd Long-liv'd Boys. *And it is sometimes true, as* Varro *saith*, de Re Rustica, Lib. ii. Chap. ii. That is a better Age which is attended with Hopes, than that which is followed by Death. *Quint.* Inst. Orat. Lib. ii. Chap. i. Pag. 104. We ought not to value any one according to his Age, but according to the Improvements he hath made. *Isocrat.* in *Archidam.* init. It is not our Years, but our Parts and Industry that makes us wiser than others. *Philostrat.* in *Apollon. Thyan.* Lib. vi. Chap. viii. Pag. 287. *Ed. Morel.* Youth doth not hinder a Man from seeing Things clearer than even old Age itself.

" ſtance, it was a Sign of Honour among the " *Perſians*, to be conducted through the Streets " in the King's Garments, upon one of the " King's Horſes [a]", (as it is, alſo, to wear certain Marks or Badges.) Thus the *Chineſe* ſalute with the *Head* and *Hand*; the *Japoneſe* by putting off their *Slippers*; the *Chineſe* always riſe to any Perſon they deſign to honour. They of *Japan* pay their Honours ſitting on the Pavement, and think it *Rudeneſs*, and *ill Breeding*, to *ſtand*, when they perform their *Ceremonies* [b]. However all this be, that *Notion* of his, that *Honour conſiſts ſolely in the Opinion of Power*, is by no means to be admitted; neither what he infers from thence, " That it doth not alter the " Caſe of Honours, whether an Action (tho' it " be great and difficult, and, conſequently, a Sign " of much Power) be juſt or unjuſt. And that " therefore the antient *Heathens* did not think " they diſhonoured, but greatly honoured their " Gods, when they introduced them in their " Poems, committing Rapes, Adulteries, Theſts, " and other great, but unjuſt or unclean Acts." For though it might be *granted*, that the *Foundations* of *Honours* may ſo far be properly enough reduced to *Power*, *namely*, as they are naturally apt to produce ſome *Effect* or *other* in *Human Life*; ſince what is of that dull, unactive Nature, as will produce no *Effect*, either *good* or *bad*, ſeems to be capable of having no Value one Way or other ſet upon it: Yet that *Power* alone, without Relation to, or in Conjunction with *Goodneſs*, ſhould be the *proper* and *natural Foundation* of *real Honour*, is what is contrary to to *Reaſon*, and *Hobbes* himſelf: For in his Book *de Cive*, *Chap.* XV. § 9, he gives this *Definition* of *Honour*; that *it is an Opinion of the Power of another in Conjunction with Goodneſs*. And thence he infers, that *there are three Affections neceſſarily conſequent upon Honour*; *Love that bears Relation to Goodneſs*; *and Hope and Fear, that have Regard to Power*; and thus that only is *true Honour*, which is attended with all theſe *three Affections* together. Fear alone, excited by a *Power* determined to *Evil*, can never be look'd upon to be a *Sign* of *Honour*. For *Fear* hath always a Mixture of *Hatred* in it; and where a Man *hates*, he naturally wiſheth *Harm* and *Ruin*, and not *Honour* [c]. Thus, by the *Chriſtian* Religion, we are aſſured of the great *Power* of the *Devil*, but that it is utterly averſe to all Goodneſs, and always bent upon all Evil; but certainly no Man in his Senſes can ſuppoſe that he deſerves *Honour* upon that Account. And therefore *he himſelf*, when he *tempted* our *Saviour*, did not ſhew him his *Force* and *Power*, but his *Giſts*, the *Glories* and *Kingdoms* of the World, *Matt.* iv 8, 9. Nor can any Man of Senſe think it a good Reaſon, which the People of ſome barbarous Countries in the *Indies* give for their worſhipping the *Devil*, *that he ſhould do them no Harm*. And therefore, alſo, methinks, I have no Patience to ſee *Hobbes* mentioning *Flattery* among the reſt of his *natural Signs* of *Honour*. For *Flattery*, in every *Kind* of it, implies and ſuppoſes ſome *Deficiency*, or *Blemiſh*, both in the Perſon who gives, and in him who receives it; and is an *Act* and *Species* of *Scorn* and *Deriſion*, without the leaſt *Mixture* of *Love* or *Sincerity* in it [d]. But as to the *Fables* of the *Poets*, there are ſome Men indeed who think, that they imply no more than that the *Gods* are above all the [1] Confinement of Laws. And others rather ſuppoſe [e], that *all was* [2] *Myſtery in them*, *and that many ſecret Truths were concealed under the Diſguiſe of thoſe Vices and Abſurdities*. But whatever they make of them, it will never by me be conceivable, that *Rapes* and *Adulteries* could be an *Honour* to the Gods, any more than they would be to any ordinary *Mortal* here on Earth [f].

XIV. But after all, *theſe Foundations* of *intenſive Eſteem* produce only an *imperfect Right* to demand *Honour* and *Reſpect* from others; ſo that, if a Man *deny it* where it is really *deſerv'd*, he cannot be ſaid to have done an *Injury*, but only to have been guilty of ſome *Diſcourteſy* or *Incivility*: For *among* Perſons who live in a *Liberty of Nature*, where all are *equal*, it doth not appear how any Man can pretend *Right* to demand Honour from another; ſince from that *Love* every

[a] *Eſther* vi. 8. [b] *Bern. Varen. Japon.* Deſcript. Pag. 21. Add. *Neuhof.* in Gen. Deſcript. *Chinæ*, Chap. iv. Vide *Rochefort.* Deſcript. *Antill.* Part ii. Chap. xix. where, alſo, he tells of ſome unuſual Signs of Honour. [c] *Silius Italicus*, Lib. i. Ver. 149.

——— *Et metui demens credebat honorem.*

——— And vainly thought it Honour to be fear'd.

[d] And therefore *Lucan*, Lib. v. Ver. 385, 386, calls it,

——— *Voces, per quas jam tempore tanto*
Mentimur dominis. ———

The Words with which we have long Time abus'd
Our Princes. ———

Vide *Plutarch.* de adulator. & amici diſcrimine. Peſcennius Niger *in* Spartianus, Chap. xi, *when one was preparing to addreſs him, with a Panegyrick upon his being made Emperor, ſtopp'd him by ſaying*, That he ought to write an Oration in Praiſe of *Marius*, or *Hannibal*, or any one of the famous antient Generals, and recommend their brave Actions to the Imitation of the preſent Age. For to commend Perſons that are living, *added he*, is only to deride and expoſe them, and eſpecially *Emperors*, ſince 'tis evident, what you may hope, or what fear from them, ſince they have the Power of the Laws, can do as they pleaſe, and take away your Lives, or ſend you into Baniſhment. [e] *Salluſtius* Philoſoph. de diis & mundo, Chap. iii.

[f] Pindar *ſays very well*, Olymp. Od. i. ἔστι δ' ἀνδρὶ φάμεν ἐοικὸς ἀμφὶ δαιμόνιον καλά. Men ought to ſpeak with Reverence of the Gods. *Iſocrates* in laudat. *Buſirid.* Pag. 395. *calls thoſe Fables Blaſphemies*, by which *(ſaith he)* they boldly fix ſuch Things upon the Gods, as no Body would dare ſpeak of his Enemy. For they do not only charge them with Theſts, Adulteries, and Slavery to Men; but accuſe them further of devouring their Children, depriving Fathers of their Genitals, Copulation with Mothers, and a thouſand other wicked Actions. The Authors of which Stories were not indeed puniſhed as they deſerv'd, but yet neither did they altogether eſcape; for ſome of them were Strolers, Vagabonds, and Beggars; others were ſtricken blind; and others were driven out of their own Country, and forced to make War continually upon their Relations and Friends; and *Orpheus*, the chief Inventor of theſe Fables, was torn to Pieces. *Seneca*, *de brevitat. Vitæ*, Chap. xvi. To make the Gods Authors of Vice, what is it but to encourage and inflame our own Luſts, and to bring the Example of the Deities for our Liberty and Excuſe? *Fulgentius* Mythолog. Lib. i. Pag. lv, &c. If the Gods were guilty of Theft, Juſtice would have nothing to do with Criminals or Crimes, ſince they would be countenanc'd by Heaven.

[1] See what Mr. *Bernard* ſays, in his *News from the Republic of Letters*, for *March* 1705, Pag. 298, 299.

[2] Or, rather, they were only antient Hiſtories, but corrupted and diſfigur'd different Ways; or they were bold and wicked Men, whom Ignorance and Superſtition rais'd to be Gods. See what Mr. *Le Clerc* has ſaid in ſeveral Places of his *Biblioth. Univerſ.* as, alſo, that Part of his *Biblioth. Choiſie*, Tome vii, which relates to Mr. *Selden*'s Book *de Diis Syris*, Pag. 88, *& ſeq.*

Man

Man naturally bears to himself, it is very easy for him to *imagine* that there are *Qualities* or *Endowments* in himself, *equal*, or perhaps *superior* to those which others *value* themselves upon. For Instance, one Man thinks *Age* deserves *Reverence* and *Esteem*; another, that *Youth* and *Vigour* have a much better *Title* to it [a]. The Hopes and Expectations of some raise them to as great a Pitch of Vanity, as the real Success of others. Some *value* themselves upon *Strength of Body*; others think *Wit* and *Prudence*, the Endowments of the Mind, much *nobler* Qualities [b]. This Man measures his *Worth* by the *Largeness* of his *Fortune*; another by an *Easiness* and *Freedom* of Mind, which he thinks equal to all the Wealth and Opulence in the World. Some presume upon their *Learning*; others will suppose that there is nothing *true* and *real* in *human Knowledge*, more than *Resolution*, *Fidelity*, and *Sincerity*; the Τὸ βέβαιον καὶ πιστὸν, καὶ ὑγιὲς, as *Plato* states it [c]. Some insist upon the *Honours* they have attained; others satisfy themselves that *Honour* is not always paid where it is deserv'd, or deserv'd where it is paid [d]. And others set little Value upon *Greatness of Birth*, and despise it when it is not attended with an answerable Greatness of Fortune [e]. And certainly the *wiser Part* of Mankind will always think it as false a Method to value [f] Men by their *Riches*, *Dignities*, or *Honours*, or by Things *external* to them, as it would be to take the *Worth* of *Horses* from the fine Furniture which may belong to them. But besides, since *Honour* is then properly paid, when a Man acknowledges *superior* Excellencies in

[a] *Pind.* Olymp. Od. iv. towards the End.

And Youth sometimes with hoary Hairs
Before the Noon of Life is crown'd.

The Strongest have not still the best Success,
But Prudence never is unfortunate.

[b] *Sophocl. Ajax. Flagell.* Pag. 69. Ed. *H. Steph.* [c] *Plato*, Ep. x. [d] *Cic.* Ep. ad Fam. Lib. iii. Epist. xiii.
[e] *Euripid.* Phœniss. Ver. 445, & Electra, Ver. 37, 38.

Ἀμπορὶ εἰς γένος, χρημάτων δὲ πέπτες.

Noble in Birth, but miserably Poor.

To which we may add this Verse of *Horace:*

Et genus, & virtus, nisi cum re, vilior algâ est.

"For Birth and Virtue, without Money, are more despicable than Dirt." Lib. ii. Sat. v. Ver. 8.

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[f] I have borrowed *Charron*'s own Words, *Treatise of Wisdom*, Book i. Chap. v. Sect. 9. Numb. 5. from whence it is visible that our Author has taken the Thought: But *Charron* himself has done nothing, as 'tis usually his Way, but abridged this fine Passage, from *Montaigne*. "'Tis strange, that nothing, except ourselves, is valued or esteem'd but for its own innate Qualities. We praise a "*Horse* for his being strong and well manag'd, and not for his Furniture: A *Greyhound* for his Swiftness, not for his Collar; a *Hawk* "for his Wings, not for his Tessels and Bells. Why then do we not, in the same Manner, esteem a Man for what is his own? He "has indeed a numerous Retinue, a fine Palace, a great Reputation, and a plentiful Estate; but all this is about him, and not in "him. You do not buy a Pig in a Poke: If you buy a Horse, you take off the Saddle, and view him naked and uncovered; or, if "he is cover'd, as they formerly presented Horses to Princes to buy, 'tis only upon the Parts which are least necessary, that you may "not amuse yourself, with the Smoothness of his Coat, or the Largeness of his Crupper; but have Time enough to observe chiefly his "Legs, his Eyes, and Feet, which are the most useful Members. (See *Horace*, Lib. i. *Satyr.* ii. *Ver.* 86, *& seq.*) Why then, in your "Esteem of a Man, do you value him covered and wrapped up as he is? He shews us no Parts, but what are by no Means his own; "and conceals from us those by which only we can truly form a Judgment of his Merit. 'Tis the Value of the Sword, not the "Scabbard, that you seek after: And perhaps you will not give a Farthing for it, if you see it unsheath'd. You must judge a Man "by himself, and not by his Dress. And as one of the Antients says, very agreeably, *(Seneca Epist.* lxxvi. Pag. 221. *Ed. Gronovii,)* Do "you know why you take him to be a tall Man? You reckon the Height of his Shoes: But the Basis does not belong to the Statue: "Measure him without his Stilts. Let him lay aside his Riches and Honours, and shew himself in his Shirt. Is his Body sound, vigorous, "and fit to discharge its Functions? What Soul has he? Is it noble, great, and happily furnished with all the Endowments belonging "to it? Is it rich in Accomplishments of its own, or another's? Does there only want an Opportunity to shew, whether it can brave-"ly stand the Sight of a drawn Sword; whether it cares not which Way Life issues out, through the Mouth, or the Breast, whe-"ther it is firm, calm, and contented? 'Tis this that must shew, and by this you must judge of the vast Difference between us. "Essays v. Book i. Chap. xlii. towards the Beginning. *Juvenal* has admirably well express'd this Passage, which is quoted by *Mon-*"*taigne*, and applied to the Nobility; in the following Lines.

Dic mihi, Teucrorum proles, Animalia Muta
Quis generosa putet, nisi fortia? *nempe volucrem*
Sic laudamus equum, facili cui plurima palma
Fervet, & exultat rauco victoria circo.
Nobilis hic, quocunque venit de gramine, cujus
Clara fuga ante alios, & primus in æquore pulvis.
Sed venale pecus Corithæ, posteritas &
Hirpini, si rara jugo victoria sedit:
Nil tibi majorum respectus, gratia nulla
Umbrarum, dominos pretiis mutare jubentur
Exiguis, tritoque trahunt epirhedia collo,
Segnipedes, dignique molam versare nepotes.
Ergo ut miremur te, non tua, primum aliquid da,
Quod possim titulis incidere, præter honores,
Quos illis damus & dedimus, quibus omnia debes.

Great Son of *Troy*, who ever prais'd a Beast,
For being of a Race above the Rest?
But rather meant his Courage, and his Force.
To give an Instance—we commend a Horse
(Without Regard of Pasture, or of Breed)
For his undaunted Mettle and his Speed;
Who wins most Plate with greatest Ease, and first
Prints with his Hoofs his Conquest on the Dust.
But if fleet *Dragon*'s Progeny at last
Proves jaded, and in frequent Matches cast,
No Favour for the Stallion we retain,
And no Respect for the degenerate Strain:
The worthless Brute is from *New-Market* brought
And at an under Rate in *Smithfield* bought,
To turn a Mill, or drag a loaded Life
Beneath two Panniers, and a Baker's Wife.
That we may therefore you, not yours admire,
First, Sir, some Honour of your own acquire;
Add to that Stock which justly we bestow
On those *bless'd Shades*, to whom you all Things owe.

Mr. *Stepney*.

Horace, to shew the Folly of those who only value and esteem Men for external Things, appeals to the Judgment of Children at Play, in whom Nature is not corrupted, by Example and Custom.

Si quadringentis sex septem millia desunt,
Est animus tibi, sunt mores & lingua, fidesque;
Plebs eris. At pueri ludentes, Rex eris, aiunt
Si rectè facies.

Horace, Epist. i. Lib. i. Epist. i. Ver. 57, &c.

If you have not ten thousand Pounds in store,
But want a thousand, or a little more,
Though you have Virtue, Constancy, and Skill,
In Arts, thou shalt be thought a *Common* still.
And yet our Boys another Tale will tell
And say, you shall be King, if you do well.

Mr. *Creech*.

another, and pays ſome *voluntary* Submiſſions to him upon that Score; and ſince no Man can be *forced* to pay this by outward *Violence*, that Method being more likely to confirm him rather in an obſtinate Refuſal of them; it is evident, that it is a *Miſtake* to allow theſe *Foundations* the *Force* of any ſuch *perfect Right* which might be aſſerted by *Violence* and *Arms*. For the *Reſpect* a Man pays to another upon *Compulſion* and *Command*, is no *Sign* of any *internal* Reverence he has for him, but only that he is afraid of Puniſhment. And further, ſince *external Signs* of *Honour*, unleſs they proceed from *Submiſſion* of Mind, are to be call'd *Shew* and *Mockery*, rather than *Honour*, it would be Folly to threaten Violence when they are denied; eſpecially if the Perſon, from whom they are expected, declares, that it is not out of Contempt that he omits to pay the *Formalities* of his Reſpect, but only becauſe he would enjoy his *Liberty*, and not be *forced* to do that which ought to be left to his own *Pleaſure* and *Courteſy*. And therefore the *Scythian* Ambaſſadors told *Alexander* the *Great*, "That they hoped it was excuſable in them who "lived in Deſerts, not to know who he was, and "whence he came." And *Arioviſtus*, in *Cæſar*'s *Commentaries*, tells *Cæſar*, "That, if he had "been to deſire any Thing for himſelf, he would "have attended him in Perſon; and that he "could not but expect that *Cæſar* ſhould ſhew "him the ſame Reſpect [a]." From all which it ſeems to be evident, that though it be agreeable to natural Reaſon, that *Honours* ſhould be paid to Perſons of *ſuperior Excellencies*; or further, that though it might be, alſo, allow'd, that it is no leſs a Command of the *Law of Nature* to *honour Perſons of Worth*, yet ſtill that this *Duty* muſt be one of *thoſe*, which a Man hath no *Right* to demand from others, but which muſt be left entirely to their *good Nature* and *Civility*. But when a Man pretends *Right* to demand *Honour*, or any *Sign* of it from another, 'tis neceſſary he ſhould either have *Power* and *Authority* over him, or produce ſome *Compact* for his *Right*, or prove it by ſome *Law* made or approved by their *common Lord* or *Maſter*. *Mandeſlo* in his *Travels* [b] relates, that in a *Treaty of Peace*, after a long War between the *Portugueſe* and the King of *Cochin*, it was a long Time before the Diſputes on each Side could be brought to a Concluſion, becauſe the *Indian Nobles* inſiſted, that the *Portugueſe* ſhould give them the Way, as the *common People* of their own Country were obliged to do. But, that the *Portugueſe* refuſing ſuch diſhonourable Terms, it was agreed at length, that the Debate ſhould be decided by *ſingle Combat*, in which the Victory happening to the *Portugueſe*, the *Indian Nobility* were obliged to give the Way to the *Portugueſe*, and to ſtand till they were paſſed by.

XV. But, however, between *private Men*, certainly the nobleſt Conteſt [1] for *Honour* and *Eminence* would be, to diſpute who ſhould expreſs the greateſt Readineſs to pay *Honour* to others, or more Modeſty in declining it themſelves. And it is ridiculous enough for Men to grow warm and angry in a Contention about outward *Honour*; eſpecially when there is little or no Profit or Advantage to be made by it, and when it may end perhaps like the *Diſpute* mention'd in the *Epigram* [c], *Who only ſhall go through the Dirt firſt*. It was a good Determination enough which a certain Prince made, when two of the meaneſt of his Servants had quarrell'd which ſhould take Place at Church, that the greateſt [2] Fool ſhould ſit firſt. For as to what *Quintilian* ſays, that *a poor Man's Honour is his beſt Eſtate* [d], it muſt be underſtood only of *ſimple Eſteem*. But, between *Princes* and *Nations*, the Diſputes about *Eminence* of *Worth* and *Dignity*, and the *Precedence* which depends upon it, have generally, and in all Ages, been managed with greater Shew of Reaſon, and ſtronger Pretences. The Argument uſually urged in *theſe* Controverſies will perhaps deſerve cloſer Conſideration. Thus much therefore is beyond Diſpute, that where a *Prince* depends upon *Another* of *ſuperior Power*, the greater is the moſt *honourable*, and has a *perfect Right* to *Precedence*; tho' perhaps the ſame *Title* may be common to both of them. Thus there are Inſtances of greater *Kings* who have others call'd *Kings* under them, though in Reality they are no more than *Magiſtrates* and *Governors* of *Provinces*. Some Princes do *Homage* to others for their *Kingdoms*, as *feudal*; and there are others who hold theirs by other *Titles*. So in *Tacitus*'s Life of *Agricola*, 'tis ſaid to be *an old received Art of* Rome, *to make and maintain Kings to be their Inſtruments of Slavery*. And thus *Adherbal*, in *Salluſt*, ſays, that, when his Father *Micipſa* died, he commanded him to think nothing in the *Kingdom* of *Numidia* his own, but the *Adminiſtration* of it, and that the *Right* of it belong'd to the *Roman* Senate [e]. And ſo, alſo, a *Prince*, who has made an *unequal League* with another, doth by that very *Act* acknowledge a *Superiority* of *Worth* and *Dignity* in the *other*; ſince he obliges himſelf to pay more Reſpect than will be given. And it is, I think, alſo, further clear, that where a *Prince* hath obtain'd againſt another a *Right* of *Superiority of Dignity* or *Precedence*, either for his own *Perſon*, or as *Head* of ſuch a *State* or *Commonwealth*, whether by *Compact* or *Cuſtom*, and ſuch a Sort of *Sufferance*, as no other

[a] *Cæſ.* de B. G. Lib. i. Chap. xxxiv. *And* Vologeſes, *King of the* Parthians, *anſwer'd* Nero *when he ſent for him almoſt in the ſame Manner*. It is eaſier for you to paſs ſo great a Sea, than me; when you are in *Aſia*, we ſhall eaſily agree when to meet. *Xiphilinus* Epit. *Dionis*. [b] *Mandeſlo* Itin. Part ii. [c] *Mart.* Ep. x. Ver. 8. *Per medium pugnas & prior ire lutum*, Senec. *de Ira, Lib.* iii. *Chap.* xxxvii. Becauſe you were placed in a little leſs honourable Seat, you preſently break into a Paſſion, and are angry with the Maſter of the Feaſt, him that invited you, and him that was put above you: How ridiculous is it? What Difference is there, what Part of the Table you ſit at? Can a Seat make a Man more or leſs Honourable? [d] Declam. cclii. [e] *Salluſt.* Jugurth. Bello.

[1] In which, however, we ought not to go too far. "I love, ſays *Montaigne*, to obſerve the Rules of Civility; but not ſo ſervilely "as to make my Life uneaſy by them. There are ſome tireſome Formalities in them, which provided we omit through Diſcretion, and "not want of Judgment, we are not the leſs Genteel. I have often known Men uncivil by too much Civility, and troubleſome by "too much Kindneſs. This induſtrious and genteel Way of puſhing one's ſelf forward in the World, is in ſhort a very uſeful Science. "It is, as it were, the Beauty and Grace which makes us acceptable upon our firſt Admittance into Society and Converſation; and, by "Conſequence, opens us a Door of Inſtruction, by the Example of others, and gives us an Opportunity of producing our own, if "there is any Thing that is inſtructive and communicable." *Montaigne*'s Eſſays, Book i. Chap. xiii.

[2] The Author ſays, *duos Miniſtros minorum gentium*, but, as he quotes no body, I have follow'd the *Abbe St. Real*, who aſcribes this Sentence to *Charles* V. See his Treatiſe upon *The Uſe of Hiſtory*, Diſc. vi.

probable

probable Account can be given of, than that he was allowed to be the *greater Prince*; *that Right* may be insisted on and maintained, as long as that *Prince* lives, who is, as it were, the *Character* or *Mark* of the *Dignity*, and under whom *that Right* was at first obtain'd [a].

XVI. But where no such *Right* has been already fix'd, there Variety of Arguments are used to prove *Superiority* of *Eminence* and *Dignity*. The *Antiquity* of *Kingdoms*, *Families*, and *Governments*, the *Extent*, *Riches*, and *Power* of *Dominions*, the *Quality* of that *Power* which the *Prince* holds over his *Subjects*, and the *Magnificence* of his *Title*, are the common and general *Topicks*. That *Antiquity* adds a Sort of *Reverence* and *Veneration* to *States* and *Families*, is an Opinion commonly receiv'd. And they who endeavour to support themselves upon the Strength of it, usually urge, they enjoy'd their *Dignity* in full Lustre long ago, when other *Kingdoms* were subject to the basest *Slavery*; or, it may be, when the *Family* which now wears the *Crown*, and triumphs so insolently in its new *Honour*, lay undistinguish'd among the common Herd of the People; that 'tis unpardonable Arrogance to dispute *Precedence* with *Princes*, whose Predecessors might, if they had pleased, have made the *Ancestors* of the others their *Slaves*; that it is a Sort of natural and universal *Law*, that *Things* of *later* should be *inferior* to *Things* of *earlier* Original. And from hence they usually pass to a pompous Representation of the several great Actions in *War* and *Peace*, which have been atchiev'd in that *Kingdom* by the *Princes* of the *Blood Royal*: Few of which Sort those *upstart Nations* and *Families* can presume to challenge. Moreover, *Power* adds *Terror* to *Reverence*, and makes it not only Impudence [1], but Rashness and Folly, to contend for *Honour* with those, in whose Power it is to do us Good or Harm, as they please. And, without Dispute, 'tis a certain Way to demand and to obtain *Honour*, to tell the World with Sword in Hand, that, *if they will not, THAT shall give it.* Further, 'tis look'd upon to be an higher *Degree* of *Eminence* to be *free* from all other Restraints of *Subjection*, but those which are due to GOD, the *supreme Governor* of the World, than to be confin'd by *human Laws*, and to live under *Ties* of *Compact*. And lastly, since the *Title* is commonly used to express the *Thing*, the *Magnificence* and *Greatness* of it; *that* may be supposed, also, to imply an Argument against *Inferiority* of *Dignity* [b].

XVII. These, with Arguments of a like Nature, may perhaps be speciously urged; but after all, it must be confess'd, they can produce no more than an *imperfect Right*, unless confirm'd by *Compact express* or *tacit*, according to receiv'd Custom. And it will be no Difficulty to destroy the Force of these and all such Arguments, by answering, that *Antiquity* alone can have no *real Honour* in it, since it only implies *Tract* of *Continuance*, which may be urged for the most *inconsiderable* Things as well as the most *valuable*; that all *Kingdoms* are, by their own Nature, *free* and *independent*; and that it is not material to enquire how long they have been so; that it may indeed be allow'd, that, when a *Kingdom* hath *long* continued in a flourishing Condition, the Strength of its *Constitution* and the *Wisdom* of its *Government* ought not to be question'd; and that it need not be denied, that the *Favour* of *Heaven*, and the *Bravery* of *Subjects*, was sufficient to defend them against foreign Arms. But then, that *Commonwealths* of *later* Growth may possibly be *settled* as *wisely*, and *govern'd* as *happily*, as those that have stood much longer, nay, perhaps be establish'd with greater Wisdom, and enjoy greater Happiness, since the wise and good *Institutions* of *antient States* and *Commonwealths* generally cost them *dear*, and they of later Date have the Advantage of seeing and using what others discover'd before them; that the Favours of *Heaven* are not in human *Disposal*, or certain to be long *enjoy'd*; but yet that it is not impossible to provide so far, that the *State* may not fall to Ruin of itself, for want of *good* and *wholesome Laws*. In fine, that all Things ought to be valued according to their *present State*; what is pass'd we have no more to do with, and what is to come doth not yet concern us. That *distinct States* and *Commonwealths* never unite into *Systems*, or form *General Assemblies*, where it may be necessary to oblige them of latest Standing to be content to be placed lowest. All are allowed to enjoy distinctly their separate Freedom. That the *Government* of any *State* should continue in one particular *Family* for a long Course of Time, may be allow'd to be sometimes an Argument, that the *Posterity* succeeded and imitated the the Virtues of their *Ancestors*; but it must, also, be allow'd, that great Wealth and Riches only are sufficient Guards, and not easily to be overpower'd. Much, also, in the long Possession of a *Throne* must be ascribed to the Disposition and Temper of the *People*, averse to *Change*; and much in the *Succession* of *good* Princes to the Blessing of Heaven alone. But still *Princes* and *States* of larger *Origin*, ambitious to be thought *great*, may easily answer, that they cannot look upon any Thing as their own, which was not got by their own Industry or Power [2]; that it is a very easy Thing to take Possession of large Estates or Dominions, purchas'd by the Success of Ancestors; but to raise a great Fortune, or an Empire, requires Bravery and Virtue; that *others* owe their *Greatness* to the Chance of being well born, *they* to their own *Worth* and *Excellencies*; that others can produce nothing for themselves, but old forgotten *Monuments* of their *Fathers* great *Actions*; theirs is no *borrow'd* Lustre, but the *fresh* Acquisitions of their own Virtue and

[a] Vide *Jac. Godofred.* de Præcedentia, Part i Chap. i. Add the Dispute between the *French* and *Spanish* Ambassadors in *Andr. Maurocenus* Hist. *Venet.* Lib. viii. Pag. 301, &c. & *Memoirs touchant les Ambassadeurs.* By Mr. *Wicquefort.*

[b] Vide *Andr. Maurocen.* Hist. *Venet.* Lib. xii. Pag. 484. *Where he talks of the Emulation that happen'd between the* Princes *of* Italy *upon* Pius Quintus's *presenting* Cosmus *with the Title of* Great Duke of Tuscany. Vide *Paul.* Hist. Concil. *Trident.* Lib. v. Pag. 402. Where he speaks of a new Dispute for Precedence, between the Duke of *Ferrara*, and the Duke of *Tuscany.*

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[1] The greatest Part of this Chapter, is Word for Word, taken out of our Author's Dissertation *de Existimatione*, which is amongst his Academical Dissertations.

[2] *Nam genus, & proavos, & quæ non fecimus ipsi,*
Vix ea nostra voco ——— Ovid. Metam. *Lib.* xiii. *Ver.* 140, 141.

Valour.

Valour. Laſtly, that no Degree of *Honour* is beyond that of being a *Sovereign Prince*, and that this ſets the lateſt Families upon the Level with thoſe of the moſt antient Date[a].

XVIII. As for *Power* indeed, that may often force the Weaker to pay the *Signs* of *Honour* to the Greater, becauſe it is Madneſs not to yield to them who have Power to do us Harm, when they pleaſe. As *Favorinus* in *Spartianus*[b] pleaſantly told his Friends (who were angry with him for giving up a *Word* to the Emperor *Hadrian*, that was uſed in *good Authors*) *certainly he ought to be allowed to be more learned than every Man, who has thirty Legions at his Command*[c]: But if a *Prince* hath Strength enough to defend his own Dominions, he cannot be obliged to yield *Precedence* to any others, however ſuperior in Riches; ſince he has no Reaſon to be afraid of them, or to ask Relief or Protection from them. For where *Liberty* is equal, a Diſproportion in Wealth can make no Difference. And therefore, if one *Prince's Territories* be ſix hundred Miles in Extent, and another's but one hundred, yet the Difference in the Kingdoms makes none between the *Sovereigns*; for their *Power* is of the ſame Nature in the greater and in the leſs; and the *one* may anſwer the Ends of *Government* as well as the *other*. Not to ſay further, that *Power* alone, as it implies Ability to do Harm, doth not include any *Excellence* in it, which is naturally proper to command *ſincere Reſpect*: For all *Reſpect* hath a Mixture of *Love* in it, but *Power* to do Harm can certainly produce nothing but *Hatred*[d].

XIX. Further, *abſolute unlimited Power* may perhaps force from *Subjects greater* Degrees of *Reſpect*, not without a Mixture of *Fear*: But with Sovereign *Princes* it can have no ſuch Effect, ſince they muſt look upon another *Prince's abſolute Power*, as it relates to them, to be no more than *Liberty of Nature*, which, in itſelf, gives no Man *Pre-eminence* to another, not ſubject to him. And ſince every *Prince* is to be valued, not by his own *Rights* only, but by the State and Condition, alſo, of the *Commonwealth* he governs; it will not be difficult to imagine that a *limited Monarch* may, from *that*, enjoy Advantages, which will make him *greater* and more *conſiderable*, than a *Prince* entirely *abſolute*. Laſtly, *Titles* and Words of all Sorts take their *Value* as *Money* doth, from *Uſe*[e]. And ſince the higheſt *Dignity* of *Princes* is the *Sovereign Power*, it is ſufficient if that be expreſſed in its *natural ſimple* Senſe, or according to *common Uſe*. For the *Pomp*, or *Modeſty* of *Words*, neither can add to, nor leſſen the *Thing*[f]. So the *Turkiſh Monarch* is uſually called *Emperor*, the *Perſian* no more than *King*; yet this Diſtinction in itſelf gives no *Preference* one to the other. For an affected Multiplicity of *Titles* added to the proper *Style*, ſeems to have a Sort of *Barbariſm* in it; and may perhaps ſtrike ſome Awe upon inferior and ignorant Subjects, but can make no Impreſſion upon foreign States and Princes. For how was the *Roman Emperor*, for Example, concerned, whether *Sapores* King of *Perſia* called himſelf *Brother of the Sun and Moon*, as *Ammian Marcellinus* relates, or of *Saturn* and *Venus*[g].

XX. From all which it is ſufficiently clear, that there is no *perfect Obligation*, which preſuppoſes proper *Right* in another, by which a *Prince*, really poſſeſſed of *ſovereign Power*, is bound to yield *Precedence* to any other *King* or *Prince* as more *honourable*, however *Superior* in the *Particulars* before mentioned; neither is one *free State* or *Commonwealth* obliged to yield more, though perhaps another is more antient, or more powerful. Nor indeed is a *State* governed by the *Populace* inferior in Dignity to a *State* governed by a *Prince*, though in a *Democracy* there is no *particular* Perſon to be compared with a *King*. And hence an *Ambaſſador* from a *free Commonwealth* is not neceſſarily obliged to give *Precedence* to an *Ambaſſador* from a *crowned Head*. But becauſe *vicarious* and *derived Honour* cannot be ſuppoſed to appear with the ſame Advantage as *original*; and a *Miniſter* cannot be inveſted with the ſame *Dignity* as a *Prince*; and ſince *free Commonwealths* can never meet in the ſame Place with *Sovereign Princes*, but by their *Ambaſſadors* and *Deputies*; it is evident, that the *Ambaſſadors* of *free States* ought to yield *Precedence* to all *crowned Heads*, and *Sovereign Princes*.

XXI. And this *Equality* between the Power inveſted with *ſovereign Power* need not be any Objection againſt *Interviews*, or *Conferences*, to be made either in their own *Perſons*, or by their *Miniſters*, or againſt their *uniting* into an *eſtabliſhed Council*. For if a *Prince* make a Viſit to another in a *foreign Country*, the *Laws of Civility* give the *Stranger* the *Precedence*, except he comes in the Quality of a *temporary* Subject. For though every *Prince* be *ſupreme* in his own *Dominions*, yet *Princes* in the ſame Manner as *Ambaſſadors*, by a Sort of *Fiction*, ſeem ſtill to continue as Perſons *free*, and within any *Prince's Territories*, to whom and by whoſe Conſent they make a Viſit, without laying aſide or diſguiſing their *Quality*. For it is certainly unadviſable and dangerous, for a *Prince* to venture *incognito* into a *foreign Country*, without having firſt procured *Leave*. It is certain *Gramondus*[h] confidently pronounces, that *it is no Violation of any publick Law, to ſeize and detain diſguiſed Princes*.

[a] Ovid. *De Faſt.* Lib. v. Ver. 26.

Quoque die partu eſt edita, magna fuit. — The Day that gave her Birth firſt made her Great.

And to this we may apply that of *Arnobius*, Lib. ii. Is this a new Thing which we are engaged in? In Time it will be old. Is that old in which you are concerned? In the Times when it firſt began, that, alſo, was new.

[b] Hadrianus *in* Spartian. *Chap.* xv.

[c] *Juvenal.* Sat. v. Ver. 130, 131.

——Plurima ſunt, quæ
Non audent homines pertuſâ dicere læna. — ——No Freedom will from him be borne,
Whoſe Cloaths are thread-bare, and whoſe Cloaks are torn.
Mr. *Boulter.*

[d] Add. *Jacob. Godofred.* d. Tit. de præcedent. Part. i. Chap. iii. [e] Add. *Geor. Bates* Elench. motuum nuperorum in Anglia, Part. ii. p. m. 246, *&c.* & Author. *Cardinaliſmi*, Part. i. Lib. iii. p. m. 375. [f] *Ammian Marcellin.* Lib. xvii. Chap. 1. Add. *Ibid.* Lib. xxiii. Chap. vi. [g] Hiſt. *Gall.* Lib. xiii.

[h] See *Grot.* Book i. Chap. iii. Sect. 10. *And* Algernoon Sidney's *Diſcourſe upon Government*, Chap. iii. Sect. 32.
[i] See M. *Bynkerſhoek*'s Treatiſe *Du Juge Competent des Ambaſſadeurs*, Chap. iii. with my Notes.

Bt

But I confeſs I do not ſee for what Reaſon; unleſs it be, that to come in *Diſguiſe*, without giving Notice, may ſeem to imply ſome *Suſpicions* of, and *Diſreſpect* to the *Prince* of the *Country*. If *two* or *more* Princes are to meet in a *third* Place, it would not be difficult to diſpoſe Things ſo, that no *Preference* be given to either of them. For the *Rooms* they are to meet in, might be ſo contrived, as to leave it abſolutely uncertain, which is the *firſt* and moſt *honourable* Place in it. And upon this View, *round Tables* have been ſometimes uſed upon ſuch Occaſions [a]. *The* Princes may, alſo, declare before-hand, that the *Congreſs* ſhall be made without regard to *Precedence*, and that they intend to ſit *promiſcuouſly*, or as they pleaſe, or happen to place themſelves. So *Philoſtratus* relates of the *Brachmans* of *India* [b], that they appointed no particular Place for their *Prince* (as the *Greeks* and *Romans* would think it neceſſary to do) but every one ſits where he pleaſes. But this will ſtill be much eaſier to be done, if *Princes* will pleaſe to meet *incognito*, and without their uſual Pomp and Retinue. Nor could they by any other Method more fully declare, that they would not raiſe Difficulties and Diſputes about the *Points* of *Dignity*. Or if this *Method* be not thought the beſt, it may be determined by *Lot*; and that two Ways, either with *Condition* that every *Prince* ſhall, for the future, remain contented with what *Place Chance* determines for him; or elſe that every *Prince*, in *Turn*, ſhall ſucceed in a certain Order ſettled by *Lot*. But Diſputes may be much more eaſily ended, if the *Congreſs* be formed only by *Ambaſſadors*; eſpecially ſince there is one Way more of preventing Difficulties among *them*, *namely*, if the ſeveral *Princes* their *Maſters* ſend them with *Characters* of different *Value*. For ſince different *Degrees* of *Dignity* ariſe purely by *arbitrary* Impoſition, they may eaſily be *varied* ſeveral Ways [c]. But here it is to be obſerved, that the *Value* of ſuch *Characters* muſt be determined by the *common Conſent* of *Sovereign Princes* [d]. For if one *ſingle Prince* ſhould, by his own *Authority* alone, create a *New Character*, to beſtow upon his *Miniſters*, whenever the *Ambaſſador* makes his Demand for any ſuch particular *Honour* from others, they may juſtly except againſt his *Maſter's* Power to *oblige* them to pay it. But after all, it muſt be confeſſed, that ſuch an Evenneſs of Temper as *Ageſilaus* expreſſed, when he was placed in an *obſcure Place* in the *Theatre*, is often much the happieſt, in preventing Diſputes: For as he ſaid, *It ſhould not be thought that the Place adds Honour to the Man, but the Man to the Place* [e]. It was a good Method which *Abbas*, *King* of *Perſia*, took to prevent Differences at a *publick Entertainment*; them who were inclined to the *Perſian Perſuaſion* he placed on his right Hand; thoſe of the *Turkiſh* he ſeated on his left, becauſe the *Perſians* thought the right Hand the moſt *honourable*, and the *Turks* the left [f]. And it was an artful *Stratagem* enough, which *Alphonſus* XI. uſed to ſilence an old Diſpute for *Precedence* between the *two Towns* of *Burgos* and *Toledo*; when he came to ask their Opinions in *Council*, before any mention of their *Diſpute* began, they of *Toledo*, I know, *ſaith he*, are ready to comply with my Commands; let them of *Burgos* ſpeak: Which immediately ſilenced both; both equally thinking themſelves preferred to each other; thoſe of *Toledo*, becauſe the *King* ſpoke in their Name firſt; and they of *Burgos*, becauſe they were commanded to ſpeak for themſelves firſt [g].

XXII. But if a laſting *Society* is to be erected between a Number of *Equals*; and every particular *Member* be deſirous that the *Equality* ſhould continue, but unwilling to admit the Determination of the *Lot*, or that a conſtant *Succeſſion* in *Turn* ſhould preſcribe their *Places*; there is another *Method* left reſembling the Chance of *Lots*, and which can be no Way prejudicial to the *Dignity* of any Member; and that is, that every Member ſhould take *Place* in the *common Aſſembly*, in the ſame Courſe and *Order* in which he was *admitted* into it. And this Method is to be particularly obſerved with regard to all Members that are admitted into the *Society*, after it is eſtabliſhed: For they that at firſt conſtitute the *Society*, had better perhaps take *Place* by *Lot*, or by common Conſent and *Agreement*. And becauſe it is generally received in *Colleges*, and other *Societies*, that every Member is to be *placed* according to the *Order* of *Admiſſion*, *Grotius* gives it for an *univerſal* Rule, *that the natural Order between Fellows of ſuch Societies is to be placed according as they were received into them* [h]. But it muſt be obſerved, that in ſuch *Societies Priority* or *Poſteriority* of *Place*, *doth not*, in the leaſt, imply *greater* or *leſs* Degrees of *Dignity*, but is only the *Order* of *Equals* in *Honour*. And therefore there is no Difference between the *firſt* and *laſt* in *that Reſpect*. For it is a different Caſe when the *Preference* is given for *ſuperior Eminence* of *Worth* in the Perſon *preferred*; as *Auſonius* tells the *Emperor Gratian*, "It is no *Diſ-*
"*honour* to be *ſecond*, but of two *honourable* Per-
"ſons he who hath the *Precedence* is the moſt
"*honourable* [i]". But it is, alſo, obſerved by *Grotius*, in the *Place* before mentioned, that in *Aſſemblies* of *Chriſtian Kings* and *People*, met to repreſent the *Body* of the *univerſal Church*, it was the Cuſtom, that they who firſt embraced *Chriſtianity* ſhould, in all *religious Aſſemblies*, have the *Precedence* to others. And upon this Bottom, ſome

[a] Auſonius *in ludo ſeptem Sapientum*. Ver. 78, 79, 80.

Recte olim ineptum Delphicus luſit Deus,
Quærentem, quiſnam primus Sapientum foret:
Ut in orbe tereti nomina eorum inſcriberet,
Ne primus eſſet, ne velimus quiſpiam.

One to *Apollo* once this Queſtion brought,
Which he the firſt of all the Sages thought?
Write in a Ring their Names, the God reply'd,
And equal Dignity to each divide.

[b] De Vita *Apollon. Thyan.* Lib. iii. Chap. viii. Pag. 134. *C. D. Lucian.* Epiſt. Sat. ad divit. Pag. 628. It is eaſieſt and moſt agreeable in Entertainments, that all ſhould be equal. Add. *Athenæus Dipnoſoph.* Lib. i. Chap. iv.

[c] See *Mr.* Wicquefort, *des Memoirs touchant les Ambaſſadeurs. Add.* Jac. Godofred. *de præcedentia*, Part iii. *P. Paul.* Hiſt. Con. *Trid.* The Diſpute between the *French* and *Spaniſh* Ambaſſadors at *Trent* and *Rome* about Precedence, Lib. viii. [d] See *Mr.* Wicquefort's *Mem. touchant les Ambaſ.* [e] *Plut. Apoph. Lacon. Pag.* 208. *D. Damonides* in a like Caſe ſaid, it is very well you have found out a Way to make even this Place honourable. *Ibid. Apoph. Add. Plut. Sympoſiac.* Lib. i. Chap. ii, iii. [f] Pet. de Valle, *Itin. Part* ii. Ep. v. [g] Hieron. Oſorius *de Rebus geſtis Eman. Lib.* i. *Add.* Gramond. *Hiſt. Gall. Lib.* iii. *init.* [h] Grot. *Lib.* ii. *Chap.* v. *Sect.* 21. *Add.* Bœcler. *in locum, add. Lib.* I. *Tit.* iii. *Lib.* i. *D. de Albo ſcribendo. Lib.* xii. *Tit.* iii. *Lib.* i. *C. de Conſul.* &c. *Tit.* xliv. *d. l. C. de* Tiron. *Lib.* iii. *C. Tit.* v. *d. l. de Præpoſ. ſacri Cubiculi. Lib.* i. *C. Tit.* iv. *d. l. de Præf. Prætor. Lib* ii. *C. Lib.* x. *Tit.* v. *Chap.* ii. *Lib.* x. *de Profeſſ.* Jac. Godofred. *Part.* ii. *Chap.* iii. *Sect.* 17, 18. *de præcedentia.* [i] *Auſon.* Panegyr. ad *Grot.* Chap. xxiv. *in fin.*

have

have taken the Liberty to challenge *Precedence*, and claim the *Superiority* of *Dignity* as their *Right*, in all other *Assemblies* of what Nature soever. But whatever good Reasons there might be to introduce Observations of such an *Order* in those sacred Conventions; yet that the same should be observ'd in all other *Assemblies*, and that the *Antiquity* of the *Christian Profession* alone should produce such *Pre-eminence* of *Dignity*, is what I can see no Reason for; especially since it is one of the Commands of the *Religion*, *In Honour to prefer one another* [a]. Besides, in *Councils* the *Clergy* generally were the Parties *principally* concerned; the *Lay Persons* appeared only as *Assistants* [1], and, however this be, it cannot be Reason, that because a Person in a *certain Assembly*, for a *certain Respect*, which hath no Influence upon his *Honour* in general, yields the *Precedence* to another; he is therefore obliged to yield it every where, and when there is no Regard had to those *Respects*. And thus there are few *States* or *Commonwealths*, in which there are not particular Persons who are *Members* of several different *Societies*, and who therefore may in *one* be obliged to give *Place* to a *certain* Person; when out of *that*, or in another, they are known to be his *Superiors*.

XXIII. But, however, it is evident, that there is that Force in *sovereign Power*, which will always give the Person invested with it *absolute Right* to the *Preference* to all Persons subject to it. For, without Dispute, *Authority* is *superior* to *Obedience*; and it must be allowed to be greater, to controul and command the Wills of others, than to submit and comply one's self. Nor can a Man have Power to deny *Reverence* and *Regard* to that Person, to whom he owes his Protection, and who has Power by Punishments to compel him to obey him. So that *Government* doth of itself naturally introduce *Inequality* among Men. Tho' it is not unnatural to think, that, besides that *Veneration* which is due to the *Place* and *Office* of the *Sovereign*, good Subjects often suppose themselves obliged to pay other particular *Marks of Esteem*, to the particular Virtues and Excellencies eminent in their *Prince* [b]. But it is, also, further manifest, that the greater and more *absolute* the *Prince's Power* is, the greater will the *Honour* be his Subjects pay him. Nay, long Possession of *Sovereign Power*, though in itself it can give him no real Strength, doth yet wonderfully raise the *Dignity* of the *Prince*. But notwithstanding, *Subjects* may sometimes excel their *Princes* in those *Foundations* of *Esteem*, which produce only an *imperfect Right*. And therefore it was a most extravagant Vanity in *Hadrian* the *Emperor*, to make himself a professed *Rival* to all the *best Masters* in the *Arts* they were famous for. And it was ridiculous in *Alexander* the Great, when reading that Place in *Homer*, where the *Greeks* wished the Lot might happen to *Ajax*, or *Diomedes*, or *Agamemnon*, he broke into a Passion and said, *He would have killed the Person who should have named him last*. For it is no Discredit to a General, to have *Soldiers* under him of more *Valour* and *Bravery* than himself, though it is true, as *Domitian* said, *The Honour of being a good Commander is as great as that of being a good Prince* [c]. But among *Subjects* of the *same Commonwealth*, it is left entirely to the *Sovereign* to prescribe the Measures and Limitations of *intensive Esteem*; and to grant to some Persons *perfect Right* of *Precedence* to others. And whatever *Station* he thinks fit to assign to any Man, that he may lawfully maintain against any of his *Fellow-Subjects*, and that he ought to be satisfied with [d]. For as the *old Centurion* in *Livy* said [e], *Subjects should think every Post honourable in Service*. And though perhaps sometimes undeserving Persons may be preferred to Men of *Worth* and *Merit*, yet if a Man should, upon that Account, be uneasy and dissatisfied with his own *State*, or give them Disturbance in theirs, he will deserve to be punished for Contempt of the *Sovereign Authority*. For, as *Terentius* said in *Tacitus* [f], "It is not the Subjects Business to enquire "who their *Prince* prefers, or for what Reasons "Heaven has placed the supreme Disposal of "Things in his Hands, and it is their Honour "to obey" [g]. But it might seem a good Way to silence the Complaints of ambitious Subjects, if *Princes*, when they prefer Persons to *Places* of *Honour*, would always have regard to those *Foundations* of *Esteem*, which were before mentioned; and more especially to the particular Services they have done to the *Publick*; which to reward with eminent Degrees of *Esteem*, rather than with Money, or Reward of like Nature, is

[a] *Rom.* xii. 10. *Phil.* ii. 3.
[b] *Nestor* in *Homer* Iliad. Lib. i. Ver. 277, &c.

Μήτε σὺ, Πηλεΐδη, ἤθελ' ἐριζέμεναι βασιλῆϊ
Ἀντιθέῳ, ἐπεὶ οὔποθ' ὁμοίης ἔμμορε τιμῆς
Σκηπτοῦχός περ ἔων, ᾧ τε Ζεὺς κῦδος ἔδωκεν.

Cease, Noble Youth, to Peace your Mind compel,
Nor let your Rage against the King rebel;
No Prince like him in God-like Honour reign'd,
That e'er from Heaven his envied Throne obtain'd.

Though *Achilles* rather submitted to the Conduct, than the Power or Command of *Agamemnon*.

[c] *Tacitus* Agricola, Chap. xxxix. [d] Vid. Lib. i. Tit. xiv. Lib. iii. *De Offic. Prætoris.* [e] Lib. xlii. Chap. xxxiv.
[f] *Ann.* vi. Chap. viii. [g] To this we may apply that of *Lucian*, *Judic. Vocal.* It is fit and proper that every Letter should continue in that Order in which it was at first placed; and to go out of that, is to break all that is just and equitable. And he that first made these Laws for you, settled this Order, by which every Letter was for ever to continue in its own Place and Dignity. *Plin. Lib.* ix. *Epist.* v. If the Distinctions between Degrees and Dignities were mixed, disordered, and confounded with one another, nothing will be more unequal than Equality itself.

[1] "So that, says our Author, in his Dissertation (*de Existimatione*, Sect. 27.) Kings and Princes were only looked upon in Councils, as "were Subjects of Ecclesiasticks——It is perhaps through the Remains of this pernicious Custom, that in certain Places the *Clergy*, in their "publick Prayers for the whole State of Mankind, never fail to mention themselves first; and in speaking of the three Estates, or Orders "of the Kingdom, always name the *Clergy* first, then the *Nobility*, and lastly, the *Commonality*. However Persons of good Sense do not "think it very decent nor reasonable, that a Minister, for Example, in the Prayers he makes on *New-Year's-Day*, does not pray to God "for the Prosperity of the Prince, till after he hath wished a thousand Blessings to himself, and the rest of his Brethren, as if the "Welfare both of the *Church* and *State* depended more on the Felicity of the *Clergy*, than that of the *Prince*. So much the more "as this Prince is not one of those Enemies, or Persecutors of the Church, to whom nevertheless the Apostle St. *Paul* commands "us, *to render Honour*, as well as to others, as a Sort of *Tribute*, (*Romans* xiii. 7.) by Virtue of an indispensable Obligation, but as "a Foster-Father, and a Protector of the Church, &c."

generally

generally the politick Art of *Princes* [f]. But ſo much the rather, becauſe, except the *Dignity* and *Pre-eminence* of great Men among Subjects be meaſured by the *Benefits* and *Aſſiſtance* they give, or at leaſt are capable to give among their *Inferiors*, it will be but inſignificant, and without Reality. But becauſe, if *Princes* were obliged always to place their *Subjects*, according to their *intrinſick Worth* and *Merit*, the Trouble would be infinite to make Reviews of them, ſo often as it would be neceſſary, and beſides, that no ſuch Review could be made without diſpleaſing the greateſt Part of them, ſince 'tis certain, that the Generality of Men never conſider how many they have left below them; but how many they ſtill ſee above them; it might ſeem perhaps to be the moſt proper and eaſieſt Method to beſtow *Honours* upon the *Subjects*, at leaſt upon them of the *beſt Rank*, according to the *Offices* they bear in the *Commonwealth* [a]. And then again, it will be eaſy to prevent Complaints, if none but Men of *Merit*, and Perſons well *qualified*, are put into thoſe *Offices* [b]; and if the *Offices* themſelves are diſpoſed in a natural and proper *Order*. And in general, the moſt juſt and perfect *Order* of *Offices* ſeems to be, when the *Honours* annex'd to Offices are greater or leſs, proportionably, according to the Nature, Weight, and publick Importance of the Affairs and Buſineſs which belong to the Management of them; and according as it requires the greateſt *Parts* and *Accompliſhments* to diſcharge them [c]. In *Homer*, *Dignity of Office* is preferr'd to that of *Blood*, *even of natural Bravery and Courage*. For thus *Neſtor* tells *Achilles*:

Εἰ δὲ σὺ καρτερός ἐσσι, θεὰ δέ σε γείνατο μήτηρ,
Ἀλλ' ὅγε φέρτερός ἐστιν, ἐπεὶ πλεόνεσσιν ἀνάσσει [d].

We own you brave, your Race divine adore,
Him greater think, becauſe his Power is more.

But it ſometimes alſo happens, that ſome *Offices* in the *Commonwealth* have larger Shares of *Honour* annex'd to them, than of *Authority* and *Power*; and ſometimes the quite contrary; perhaps, for Fear, leſt *Honour* attended with much *Wealth*, and *Power*, might tempt the *Magiſtrate* to take Arms againſt the *Commonwealth* [e]. But, in every *Rank* of *Offices*, Men ſhould be thought more or leſs *honourable*, according to the *Dignity* of the *Employment* they have in it. Now though it is unavoidable, that one *Office* will be look'd upon as more *honourable* than another; yet this will be no Reaſon that all and every particular Perſon, entruſted in the more *honourable Office*, ſhould therefore challenge *Precedence* from all and every Perſon in the leſs *honourable*; but only that the *higheſt* Perſon in the *inferior Office* ought to give *Place* to the *firſt* in the *ſuperior*, but may ſtill have *Preference* to all that are *ſubordinate* to the *firſt*. It is but rarely ſeen, that the Perſon gives *Luſtre* and *Honour* to the *Office*. So it happened once at *Thebes*, to the Office of *Tax-gatherer*, after *Epaminondas* had borne it [f]. But as to the *intrinſick Value* of all *Marks* of *Honour* and *Dignity*, *that depends upon the Virtues and Qualifications of the Perſons who wear them* [g]. And this was what *Antiſthenes* meant, when he deſired the *Athenians* to make a *Decree* that *Aſſes* ſhould be *Horſes*. "For though, *as they told him*, nothing "could be more contrary to common Senſe and "Reaſon; yet, *as he anſwer'd*, to preſer Perſons "to *Places* of *Truſt*, and *Command* in the *Com-*"*monwealth*, that are no way qualified for them, "but only by that publick *Act* and *Declaration*, "which puts them into them, is almoſt as ab-"ſurd [h]." But if the *Subjects* come to an Agreement among themſelves, about their *Order* of *Place*, or if *Cuſtom* hath introduced any particular *Order*, either Method may be ſuppoſed to have the Force of *Law*, unleſs the *Government* except againſt, or forbid it [i].

[a] *Add.* Lord *Bacon*'s Eſſays, Chap. liii.

——*Quis non conſule tali*
Vilis honos?

[b] Otherwiſe it will fall out, as *Claudian* ſaith in *Eutropium*, Lib. ii. Ver. 322.

——Honour itſelf grows mean,
When ſuch a Conſul rules.

[c] *Ovid.* Metam. Lib. xiii. Ver. 366, 368.

——*Ratem qui temperat, anteit*
Remigis Officium.

'Tis more to rule the Helm
Than ply the Oar.

[d] *Hom.* Lib. i. *Iliad.* Ver. 280, 281. [e] Vide *Bodin.* de Repub. Lib. iii. Chap. vi. p. m. 501. [f] *Vide* Plut. *in præcept. gerend. reip.* Pag. 811. [g] *Salluſt.* Jugurth. [h] *Diog. Laertius*, Lib vi. § 8. [i] *Vide* Lib. xii. Tit. viii. L. 2. *C. ut dignitatum Ordo ſervetur.* And it is a remarkable Place in *Suetonius Veſpaſ.* Chap. ix. That it might be known, that the two Orders were not diſtinguiſhed ſo much by the Liberties they might uſe one another with, as by their Dignity; upon a Quarrel that happen'd between a *Roman* Senator and a Knight, he thus pronounced, That ill Language ought not to be given firſt to a Senator; but that it was lawful enough to return it, when he began it himſelf.

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[f] Vid. *Xenoph.* Cyropæd. Lib. viii. Pag. 130. *Ed. H. Steph.* where he ſpeaks of the Order in which he placed his Friends at an Entertainment. "It was a fine Invention, ſays *Montaigne*, and received by moſt Governors in the World, to eſtabliſh certain vain and "worthleſs Marks to reward Virtue with, ſuch as Crowns of *Laurel*, *Oak*, and *Myrtle*; the Form of certain Robes; the Privilege "of riding in a Coach through the City, or going by Night with Torches; ſome particular Seat in Publick Aſſembles; the Prerogative of Sirnames, and Honours, certain Diſtinctions in Coats of Arms, and the like: The Uſe of which has been differently received, according to the Opinion of the People, and ſtill remains. As for our Part, we have, as, likewiſe, ſeveral of our Neighbours, the Orders of Knighthood, which were eſtabliſhed purely for this End. It is certainly a very good and profitable Cuſtom, "to find out a Way to diſtinguiſh the Merit of Men of rare and excellent Parts, and to content and ſatisfy them by Payments which are "not burthenſome to the Publick, and coſt the Prince nothing. And it has been always known by Experience, and we ourſelves "have formerly ſeen ſomething of it, that Men of Quality were more jealous of ſuch Rewards, than of thoſe where there was Gain "and Profit; and this is very reaſonable and likely. For, if to the Value which ought to be ſimply of Honour, you put Riches and "other Commodities of Profit, that Mixture, inſtead of enhancing the Worth of it, debaſes and leſſens it. The Order of St. *Michael*, which has been ſo long in Eſteem among us, never had any greater Advantage, than that of having no Communication "with any other Thing but Honour. This was the Reaſon, that, formerly, there was no Employment or Eſtate whatſoever, to "which the Nobility aſpired with ſo much Ardour and Affection as they did to this Order; nor any Quality that bore more Reſpect and "Grandeur: Virtue embracing, and more willingly deſiring a Reward purely its own, rather glorious than profitable. For, indeed, "other Rewards are not given on ſo noble an Account, ſince we uſe them upon every Occaſion: With Money we recompenſe the "Fidelity of a Servant, the Diligence of a Courier, a Dancing-Maſter, a Tumbler, a Flatterer, &c. and the moſt vile Offices they "do us; nay, even Flattery, Pimping, Treaſon, and all Sorts of Vice, are paid with Money: It is no Wonder then, that Virtue "receives, and deſires leſs willingly this Sort of common Payment than that which is proper and peculiar to it, and is all generous "and noble." *Montaigne*'s Eſſay, Liv. xi. Chap. vii.

XXIV. But if *Compariſon* is to be made between *eminent Men* of different Commonwealths, it is clear, that the *Foundations* of *intenſive Eſteem*, even where ſuch Perſons are concern'd, can produce nothing more than an *Aptitude* to receive *Honour* from others, who have leſs *Pretenſions* to thoſe *Foundations* than themſelves. And that whether the Perſon of *greater Eminence* come into a *foreign Commonwealth*, as a *Traveller* or *Stranger*; or meet others in a *third Place*; it muſt be excepted only, if the *Prince* oblige his *Subjects* to *give place* to the *Stranger*; or if the Diſpute be determined by ſome *third Prince* where they meet, or if it be decided by *Agreement* or *Cuſtom*. And therefore the *Dignity* of an *Office*, which a Man bears in his *own* Commonwealth, gives him no *Right* to *prefer* himſelf to the *Subjects* of a *foreign State* that may perhaps bear *Offices*, which he, in his own Country, demands *Precedence* upon. For a *Right* which is of Force againſt *Fellow-Subjects*, is not therefore of Force againſt *all other Perſons*; for the ſame Reaſon that the *Laws* of *foreign Nations* oblige none but their own *Subjects* [a]. Nor is it any material Objection, that perhaps the *Foreigner* in his own Country may have a greater *Title* than the Perſon he diſputes againſt. For every *State* and *Commonwealth* may ſet what *Value* they pleaſe (within themſelves) upon *Titles* and other *Marks* of *Honour*, whether given by themſelves, or others. Beſides, the *Value* of *Offices*, by the *Greatneſs* of which the *Meaſures* of *Honour* are generally taken, is different in different *Nations*. And even the moſt beneficial and uſeful *Arts* are not every where equally eſteem'd; as it is well known, that in ſome *Countries* the *Arts of Peace* are moſt *valued*, in others thoſe of *War*. Beſides, it is particularly obſervable, that the *Words* by which the different Degrees of *Honour* are expreſs'd, do not only denote different *Dignities* in diſtinct Commonwealths, but have, alſo, ſometimes *greater Value* ſet upon them, and ſometimes *leſs*, even in the ſame Commonwealths, according to the Alterations of Time, which *raiſes* or *leſſens*, we know, the *Price* of every Thing elſe. For the *external Signs* of *Eſteem* have their determinative *Value* ſet by the *Impoſition* of every particular Commonwealth; but the *Foundations* of *intenſive Eſteem*, taken as they are in their own Nature, and in the Eſtimation of wiſe Men, can never loſe their *Value*. And therefore the World is every where ſo juſt to *Virtue*, to all celebrated *Arts*, *Functions*, and *Employments*, as to pay them *Honour* and *Reſpect*. But, by the Poſſeſſion of theſe only, a Man hath no *Right* to demand any particular *Marks* of *Honour* in *foreign States*; except he can obtain ſuch a Right by ſome of thoſe Ways before mention'd. But, becauſe *Marks* of *Honour* are always preſumed to be given as *Rewards* of *eminent Virtue*; therefore the *civiliz'd Part* of the World *abroad* generally pay almoſt the ſame *Degrees* of *Reſpect* to the *Honours* of *foreign Nations*, that are allowed them at *home* [1]. But ſtill they would be thought to do ſo, more out of Civility and Complaiſance, than from any *perfect Obligation*. But there are, alſo, ſome States that allow but little *Value* to *foreign Honours*. *Cicero* ſpeaking [b] of ſome particular *Foreigners*, who were of *noble Families*, does not call them *abſolutely noble*, but ſays they were (*domi*) at *home*, or (*apud ſuos nobiles*) among their own People *noble*; the Meaning of which is, that *foreign Nobility* was not allowed the ſame *Value* at *Rome*, that it had in its own Commonwealth. What *Cicero* ſays in another Place ſeems more inſolent [c]. *If*, ſays he, *we make a Compariſon between the Men, the meaneſt Citizen of* Rome *is equal to the greateſt Man in* Gallia. The *Honours* that were given them who won the *Prize* at the *Olympick Games* in antient *Greece* are well known: But it would have been ridiculous for them to have expected the ſame in other Places, where Strength and Activity of Body were not in ſo much *Eſteem*.

XXV. *Laſtly*, Since almoſt in every Nation ſome Degree of *Dignity* is ſuppoſed to adhere to *Birth*; it will not be improper in this Place to enquire particularly what is implied in *Nobility* of *Blood*, and what Value ought to be ſet upon it, when conſider'd *in itſelf* [d].

And here it will undoubtedly be allow'd, that *Nobility* of *Birth* doth not of itſelf beſtow better *Conſtitution* of Body (though perhaps Goodneſs and Elegance of *Diet* may ſometimes ſeem to contribute to it) neither does it produce more excellent *Diſpoſitions* of Mind, or a *brighter Wit*, or more *vigorous Underſtanding*; but all theſe Endowments may as well attend the *meaneſt* as the moſt *noble Extraction*. *Nature* does not take any other Method in giving *Birth* to *noble*, than ſhe does to common Men. And *conjugal Honour* is, or may be kept as *ſacred* among *common People*, as Perſons of the higheſt *Quality*. Nor would it be an eaſy Task to prove, that *noble Families* are leſs corrupted, or expos'd to *Adulteries*, than the *poor* or *mean* [e]. So that if even the *Virtues* of *Pa-*

[a] Add *Memoires de Wicquefort touchant les Ambaſſadeurs*, Pag. 519.
[b] *Pro M. Fonteio*, Chap. viii. *in fin.* [c] *Pro L. Flacco*, Chap. xiii. *in fin.* [d] And this *Value*, I believe, is ſcarce any where higher, than among the *Indians*, according to the Account we have of it in *Oſorius*, *De rebus geſtis Emanuel.* Lib. ii. Who tells us, that if any of the *Inferior People* chance to touch a *Nobleman*, they think it a Stain upon their *Nobility*, and a Diſgrace to their *Family*, and revenge it as an *Injury* of the higheſt Nature, by the *Death* of thoſe unfortunate Perſons, who happened to touch them. And therefore, he ſays, all below the Rank of *Nobility*, when they take a Journey any where, are forced to call out and make a Noiſe; and by that the *Nobles*, having Notice of their Coming, command them to break the Way, and ſo the *meaner* People eſcape Death, and thoſe of *Quality* the Danger of a perpetual *Blemiſh* to themſelves and *Family*. And as the greateſt Crimes do not deprive the one of their *Nobility*, ſo neither can the greateſt Virtues excuſe *Obſcurity of Birth* in the others, but every Man muſt of Neceſſity ſubmit to the Condition and State his Father left him in. And theſe *Nobles*, we are further told, were allowed the *Privilege* to lie with other Men's *Wives*, when and where they pleas'd; and if any of them happen'd to be with another Man's *Wife* (a Sign of which was a *Target* hung up at the Door) the poor *Huſband* dared not go into his own Houſe. [e] *Phil. Baldæus* Deſcript. *Oræ Malabar. & Coromandel*, Chap. xxvi. *& de Idolat. Indor.* Part ii. Chap. xvi. Mandeſlo *Itiner.* Lib. ii. Chap. x. *Add.* Abrah. Rogerius *de Brammanibus*, Chap. i, ii. *Diodor. Siculus*, Lib. i. Chap. lxxiv. In *Euripides Hippolyt. Coron.* Ver. 409, 410, 'Tis ſaid of Adulteries,

> This Evil firſt from noble Families,
> With wide Infection tainted the whole Sex.

[1] Vide *Ciceron.* Orat. in *Ver.* Lib. iii. Chap. xxiii. Pag. 44. Ed. *Græv.*

rents could be always suppos'd to be *transfused* into the *Children*, yet it would be extreamly [1] difficult for many *noble* Persons to prove, that their *Blood* descended to them *pure* from the first *Rise* of their *Family*, without *spurious* or *foreign Mixtures* [a]. And it is so far from being always true, that

Fortes creantur fortibus & bonis [z].

The Brave do from the Brave and Good descend.

That, on the contrary, we see nothing more common than *Instances* of the *Degeneracy* of the *Children* of the *greatest Men*. "Our Parents (as *Ma-*
"*rius* [b] saith in *Sallust*) may leave us all that it
"is possible for them to leave, their Estates and
"Pictures, and an happy Memory of them-
"selves; but their Virtue they never did nor
"can leave; for that alone is what can neither
"be given or received." But further, 'tis possible that *common* Persons may be as well educated as the *noble*; and 'tis not unusual to see the Advantages the *Great* and *Rich* have of cultivating and improving their *Minds*, scandalously misspent in Sloth and Luxury, to supply and support the most extravagant Vices. It may well be presumed, as *Plato* says [c], *That Nobility of Birth, if attended with good Education, may produce eminent Virtues.* But it is, also, evident *in Fact*, what *Degeneracy noble Families* sometimes sink into, and how much the Glory of *Ancestors* is obscured by the Blemishes of *Posterity* [d]. And 'tis certain, that many who have been *obscurely* born, have rais'd themselves to the *highest Honours*, purely upon the Stock of their own *Virtues*. *Isocrates* [e] took it for a Topick to commend *Nobility*, that it did not, like other Gifts of *Fortune*, soon decay, or remove into other Hands, but continued always with the Person it once belonged to; and therefore was the best Inheritance Men could leave to their Children. But certainly, except a Man can support his *Nobility* by his own *Merits*, or except he enjoys by it some particular *Privileges* in the Commonwealth, it can be but a very *worthless inconsiderable* Thing. And therefore there is no Necessity in the Nature of the Thing, that the *Son* should succeed either to the *Places*, or Degrees of *Esteem* his Father enjoyed, only by his *Birth*; especially, since, in the *last Resort*, Mankind are deriv'd from the same *Original*. For as *Marius* in *Sallust* says [f], "Every
"Man partakes of the same *common* Nature, and
"the Brave only have the best Title to Nobi-
"lity." And therefore a Man's own *Virtues*, not those of his *Ancestors*, ought to recommend him; according to the Character *Tibullus* gives of *Messala* [g].

Nam, quanquam antiquæ gentis superant tibi laudes,
Non tua majorum contenta est gloria fama,
Nec quæris quid quaque index sub imagine dicat,
Sed generis priscos contendis vincere honores,
Quam tibi majores, majus decus ipse futuris.

For you, tho' grac'd by long descending Fame,
Despise the dull hereditary Name;
Nor from the Dead will borrow sleeping Praise,
Or rob their Monuments, your own to raise.
Greater than all the Heroes of your Line,
To your own single Merits, you confine
Your Praise; and to Posterity will leave
A greater Name than all your Race could give.

XXVI. But however, it hath obtain'd in many States and Commonwealths, that Persons of *Merit*, who have been placed by the *Government* in *Stations* to which particular *Privileges*, and peculiar *Degrees* of *Esteem*, are allow'd, might have the *Advantage* of deriving the same down to their Children by *Birth*, and in the Nature of an *Inheritance* [h]. For 'tis certain, that *Nature* has made no real Distinction between the *Birth* of the *Noble* and the *Plebeian*. The *Difference* between them is grounded entirely on the *Imposition* and *Indulgence* of the Commonwealth, which allows, that such a particular *State*, to which certain *Rights* and *Degrees* of *Esteem* are annexed,

[a] *Vide* Dio. Chrysostom. *Orat.* xv. *init. Pag.* 236, Ed. *Morel.* *Grotium*, Lib. ii. Chap. vii. § 8. [b] *B. Jugurth.* Chap. lxxxix. [c] *Alcibiad.* I. *Pag.* 440, 441. Ed. *Wech.* [d] Arist. *Rhetor.* Lib ii. Chap. xv. Nobility consists in Greatness of Extraction; Generosity in not departing from Nature, which all that are *Noble* cannot pretend to; for many of them are Persons of no Worth or Value. *Add.* Stobæus, *Serm.* lxxxiv, lxxxv. [e] *Encom.* Helenæ. [f] *B. Jugurth.* Chap. lxxxviii. It was upon this Principle, that the antient *Egyptians* held what we call *Birth* in no Manner of Esteem. This appears from a Passage of *Diodorus Siculus*, where that Historian says, "That, in the Funeral Orations they pronounced over their Dead, they never spoke of the Birth of the deceas'd Person, as the *Greeks* were accustom'd to do in the like Case; because, adds he, the *Egyptians* look'd upon all Men as equally noble. Καὶ περὶ μὲν τῶ γένες, &c. Lib. i. Chap. xcii. Pag. 58. Edit. *H. Steph.* [g] *Tibull.* Lib. iv. El. i. Ver. 28, &c. [h] Lesbonactes *Orat. hortat.* The Children of such as have behaved themselves with Bravery, in Dangers that threaten'd the Commonwealths, are look'd upon to be *noble*. "The Great ought not to love the first Ages of the World; it affords them a melancholy Prospect to look
"into them, and see that we are all descended from one Brother and Sister. Mankind compose together but one great Family, where
"the Ties of Affinity are only more or less distant." *La Bruyere's Manners or Characters of the Age.* Pag. 308. This is agreeably express'd in the following Verses of a modern Author;

D'Adam nous sommes tous enfans:
La preuve en est connuë;
Et que tous nos premiers parent
Ont mene la charruë.
Mais las de cultiver enfin
Sa terre labourée,
L'un a detelé le matin,
L'autre l'après-dînée.

"That we are all descended from *Adam*, appears by this Proof; that all our first Ancestors drove the Plough: The only Difference
"lies in this, that some left off in the Morning, and some not 'till Afternoon.

[1] I cannot forbear here applying the following Verses of Mr. *Boileau.* which very well express our Author's Meaning. This Poet says, "It would be very hard to prove, that some Interloper had not interrupted the Line of their Ancestry; and that their Blood, as
"pure as their Nobility, had flow'd down to them from *Lucretia* to *Lucretia*."

——— *Que quelque audacieux*
Na point interrompu le cours de leurs Ayeux;
Et que leur sang tout pur, ainsi que leur Noblesse,
Est passé jusqu' a eux de Lucrece *en* Lucrece. Sat. v. Ver. 83, *& seqq.*

[z] *Horat.* Lib. iv. Od. iv. Ver. 29.

ſhall deſcend to the *Poſterity* of the Perſon it was firſt conferr'd upon [a], barely by *Birth*, without any new *Grant*. And if this *Impoſition* be taken away, all the Diſtinction of *Birth* ceaſes. And therefore, when a *Prince* removes a *Commoner* into the *Nobility*, he cannot be ſuppoſed to make any Alteration in his *Nature* or *Extraction*, or to infuſe new *Vigour* into his Mind; but only to place him in a *State* oppoſite to the *Commonalty*, and to give him Liberty to entail *that*, and the *Rights* conſequent upon *it*, upon his *Children*. Which was properly enough ſignified by *Amaſis* King of *Egypt*, when to ſhew that the *Obſcurity* of his Birth was no Reaſon why he ſhould be denied his due *Honour*, as he was King, he melted a Baſon of *Gold* into an *Image*, and ſet it up to be *worſhipped* [b]. On the other Hand, if any Man be *degraded* from his *Nobility*, either by Way of *Puniſhment* for ſome Fault, or becauſe he refuſeth to conform to the *Laws* of the *Nobility*; it is not ſuppoſed, that his *Nature* or *Temper* of Mind is therefore *altered*, or that the *Blood* he derived from his *Anceſtors* is *changed*, neither can it be denied, that he continues to be of *noble Extraction*; but he is only deprived of a certain *State*, and of the *Privileges* that belonged to *it* in the *Commonwealth*. And then he is in all Reſpects no better than a *Commoner*. And in the ſame Manner it muſt be ſaid, that neither *Legitimation* nor *Reſtitution* [1] *in Blood* make any real *Change* in Nature, but only introduce certain *moral* Effects [c]. *Machiavel* in his Hiſtory of *Florence* tells us [d], that, after the Tyranny of the Duke of *Athens* was expired, the ſovereign Power being lodg'd in the *People of Florence*, and the *Nobility* excluded by Law from any Share of the *Government*, a certain Gentleman call'd *Benchi*, of the *noble Family* of the *Boundelmonti*, for his Gallantry and good Services in the Wars againſt the *Piſans*, was preferr'd to be one of the *People*, that is, was made a *Plebeian*. And the ſame Hiſtorian, in another Place, ſays [e], that the ſame Privilege was granted ſeveral others of the *Nobility*. And, among the *Romans*, *Clodius* left the *ſenatorian Order*, and was *adopted* into the *plebeian*, that he might be capable to be made *Tribune* of the *Commons* [2].

XXVII. But however, it muſt be allowed, that generally all Governments, when they beſtow any ſuch *publick Honour* as that of *Nobility* on their Subjects, have Regard to Perſons known by ſome diſtinguiſhing *Excellencies*, or extraordinary *Merits*. And as ſuch Perſons juſtly deſerve a larger Share of *Eſteem* than others, ſo 'tis to be ſuppoſed, that their *Virtues* are thought more valuable, when the Rewards of them are allowed to be derived to thoſe, for whom Nature gives all Men the ſtrongeſt Affection; eſpecially ſince 'tis natural to believe, ſuch Favours may provoke the Emulation of other Subjects, and make them ambitious to gain the like Rewards. Beſides, it is but natural to expect, that the Children, influenced by the Example of their Parents, may be proud to rival the Virtues of their Families, and maintain their Title to their Honours, by the ſame Methods which at firſt gain'd them. Nor is it leſs eaſy to ſuppoſe, that Parents may think their Honour engaged to take Care, that the State ſhould not have Reaſon to complain, that their Children were grown degenerate. Now, when it was allowed therefore, that Nobility ſhould be annexed to the Birth, and run in the Blood, it was to be expected that Perſons would not ſubmit to mix with Families of mean Extraction; leſt, by marrying beneath themſelves, they might ſeem to debaſe their Quality, and cut off thoſe Rights which they would derive to their Children. It might ſeem alſo prudential, rather to admit the Daughters of Equals than Inferiors to ſhare in their Dignity; and it might be thought of Moment, that the rich Tradeſman's Daughter might not be capable of being preferr'd before the poorer of the Nobility. And that Poſterity might not diſpute their Deſcent, it would ſeem neceſſary to keep an exact Account of their Families and Pedigrees. When, on the other Hand, it would be needleſs for Perſons of meaner Rank to take the ſame Care to regiſter their Anceſtors, ſince they enjoy no ſpecial Privileges upon the Score of Birth, but are obliged to ſupport themſelves by their own Induſtry and Virtue.

XXVIII. Further, to illuſtrate what has been ſaid, it may not be improper to enquire, what particular Inſtitutions, relating to *Nobility*, were obſerv'd amongſt the *Romans*. Now *Romulus* therefore, that he might digeſt his rude diſorder'd Multitude, into the proper Form of a Civil Body or People, made Choice of an hundred Perſons out of the Maſs [3] to be his Council; and theſe he call'd *Patres*, either to expreſs the Nature of their Station, or their Age; the reſt of the People were ſtill no more than *Commons*. The Deſcendents of the firſt were call'd *Patricians*, by an eaſy and plain Denomination, implying, that they were of the Family of the *Patres*; or, as others ſuppoſe, *That they only could ſhew their Fathers*, the reſt being only a Company of Fugitives, that could not tell who their Fathers were, nor prove that they were free Parents, and therefore were no better than *Filii Terræ* [f]. And this Suppoſition they attempt to prove, becauſe, whenever the *Patricians* were aſſembled by their Kings, the *Præcones*, or *Criers*, call'd every Man by his own, and by his Father's Name; but that the *Plebeians* were ſummon'd to the Aſſembly by a Trumpet, or *Ox-horn*, the publick Servants going through the City, and calling them by that Sound only. *Dionyſius Halicarnaſſeus* indeed, according to his

[a] *Add.* Huartus *Scrut. Ing.* Chap. xvi. p. m. 488, *&c.* [b] *Herodot. Euterp.* Pag. 99. Ed. *H. Steph.* [c] And in this Senſe may underſtand that of *Euripides. Phœniſ.* Ver. 821, *&c.*

ὁ γὰρ ὅ μὴ καλὸν, ἓ πρὸ' ἔφυ καλὸν, &c.

For what is once diſhonourable and foul,
Is never otherwiſe; the baſe-born Son,
Still on his Mother's black Reproach reflects,
And on his Father's Obloquy and Shame.

[d] *Lib.* iii. [e] *Lib.* v. [f] Vide *Plutarch. Romulus*, Pag. 24. *D. Et Quæſt.* Rom. *Pag.* 278, *C D.*

[1] *V. C.* Lib. vi. Tit. viii. *De jure aurorum annulorum, & de natalibus reſtituendis.* [2] Vid. *Liv. Epitom.* L. 103.
[3] Vide *T. Liv.* Lib. i. Chap. viii.

usual Turn, gives a softer Interpretation to this Custom [a], telling us that the *Præcones* call'd the *Patricians* by Name, by way of Honour; and that the *Commons* were summon'd by the Horns only for Expedition. But 'tis clear that *Decius* in *Livy* seems to contradict him [b]. "For was it "never heard, says he, in what Manner these "*Patricians* were at first constituted? That "they did not drop down out of the Clouds, "but were only such Persons as could (*Patrem* "*ciere*) name their Fathers, that is, were no "more than *Free-born*: I myself can now call a "*Consul* my Father, and my Son, his Grandfa-"father [c]." From all which it appears, that it was Title enough to the primitive Nobility of *Rome*, to be born in lawful Wedlock, and of free Parents; "For indeed, in all new erected Com-"monwealths, Nobility must necessarily be late, "and rais'd by Virtue [d]. And hence the *Pa-"tricians* urged, that they were the only Persons "who were of any Family, that were related by "Gentility to one another." And therefore *Cicero* in his *Topicks* gives this Definition of the *Gentiles* or Persons of Extraction and Quality: "They are Persons who have all the same "Names, are descended from free Parents, none "of their Ancestors were ever Slaves, nor were "they themselves ever depriv'd of Liberty [e]." Though, in Course of Time, 'tis certain the *Plebeians*, also, form'd and asserted their *Gentes* or Families [f]. And hence the modern Languages, derived from the *Latin*, call Noblemen and Persons of Quality (Gentlemen) *Gentiles Homines*: But afterwards when the *Plebeians* were allowed to make Intermarriages with the Nobility, and so all the Dishonour and Baseness of their Original, if there were ever any such, might seem to have been worn out; then the *Patricians* found out another Difference to distinguish themselves from the *Commons*, by instituting certain Religious Rites particular to each Family, and assuming a peculiar Sort of Sanctimony to themselves. And upon this Account they insisted, that all the Offices in the Commonwealth ought to be given entirely to them, because they only had the proper *Auspicia* or Omens of Success. But this ridiculous Pretence was soon, as it deserv'd, exposed and neglected by the *Plebeians*. Though some of them too, to shew that the *Patricians* had no just Grounds to assume such a Prerogative, set up their *private Sacra* and Family Rights [g]. Which afterwards growing burthensome upon their Heirs, were taken off by Coemption, as *Cicero* informs us [h].

XXIX. But afterwards, when the Senatorian Dignity, and great Offices of the Commonwealth, which had been engross'd all by the *Patricians*, were left open and free for the *Plebeians* especially, the Nobility of *Rome* was not measur'd so much by the Date of Families, or *Patrician* Descent, as by by Number of Images. And, from that Time, the noble Families of *Rome* were distinguish'd into *Patrician* and *Plebeian* [i]. The *Equestrian* Order was not properly Noble by Institution of the Commonwealth. *Tacitus* says, indeed, in his Life of *Agricola*, that *Agricola's Grandfathers on both Sides* had been *Procurators* or *Sollicitors* to the *Emperor*, *which is the Equestrian Nobility*: But the right Sense of that Place is, that they who were *Senatorian* Families, measured their Nobility by the great Offices they had borne, usually call'd *Magistratus Curules*; so the *Procuratorship* to *Cæsar* was look'd upon by the Knights to have been a Sort of Nobility, especially because, besides that of *Prefect* to the *Prætorian Cohorts*, or the *Emperor's Life-Guards*, there was no higher Office which belong'd to that Order, as such. So that, in the latter Ages, the Nobility of *Rome* did not constitute any particular Order, separated from the rest of the People by peculiar Rights, but every Man was allowed to be noble upon his own, or his Ancestors Merits, either as he was able to produce their Statues or

[a] Rom. *Antiq.* Lib. ii. Chap. viii. [b] *Liv.* Lib. x. Chap. viii. *in fin.* [c] *Juvenal.* Sat. viii. Ver. 272, &c.

Et tamen ut longe repetas, longeque revolvas
Nomen, ab infami gentem deducis Asylo.
Majorum primus quisquis fuit ille tuorum,
Aut Pastor fuit, aut aliud quod dicere nolo.

Boast then your Blood, and your long Lineage stretch
As high as *Rome*, and its great Founders reach;
You'll find in these Hereditary Tails,
Your Ancestors the Scum of broken Jails;
And *Romulus*, your Honour's antient Source,
Was a poor Shepherd's Boy, or something worse. Mr. *Stepney*.

[d] *Liv.* Lib. i. Chap. xxxiv. [e] *Boetius* in *Topicis*, The *Gentiles* are such as bear all the *same Name*, as the *Brutus's*, the *Scipio's*; but if they are Slaves, they are not *Gentiles*. And though perhaps the Children and Descendents of *Freed Men* may have the same Name, yet they are not therefore in the Number of the *Gentiles*, because Gentility must be derived down from a long Race of such as were *Free-born*. [f] *Add.* Franc. Connanus *Com. Jur. Civil.* Lib. ii. Chap. xi. [g] Vide *Liv.* Lib. iv. Chap. ii. Lib vi. Chap. xl, xli. Lib. x. Chap. vii. [h] *Cic.* pro *Muræna*, Chap. ii. *Add.* Godof. *in* Cic. *Epist. Fam.* Lib. vii. Ep. xxix. But it appears from hence, that our Author has follow'd those who confound two Sorts of *Coemptio* very different from each other; and, at the same Time, two Sorts of Old-Men, whom the *Romans* called *Senes Coemptionales*. The last Editors of *Cicero* have taken Notice of this, in the Places quoted by the learned *John Frederic Gronovius*, who has prov'd this in his Treatise, *De pecun. Veter.* Lib. iv. Chap. vii, viii. This was the Manner, in short, in which they acted in these Cases. The Heir, in Concert with the Usurer, sold him, for a Trifle of Money, *with the Formality of the Balance, (per æs & libram)* the Inheritance, either in Whole, or in Part; with this express Stipulation, That the imaginary Buyer should restore him what he had so bought. The Name of *Heir* being thus extinguish'd, he who truly recover'd the Inheritance, was, by this Means, freed from all Expences, and, consequently, from all the domestic Ceremonies attach'd to that Character. This is what the *Romans* call'd, *Sacra detestari, Sacrorum detestatio*: Upon which the Lawyer *Servius Sulpitius* has wrote a Book, mention'd by *Aulus Gellius*, Lib. vi. Chap. xii, tho' he had not a very exact Idea of the Subject. (See *Joseph Scaliger*, *in Festum*, upon the Word *Pure*.) There was another Way of getting rid of those domestic Sacrifices, which was done in an Assembly of the People, call'd *Calata Comitia*, as we are inform'd by *Aulus Gellius*, Lib. xv. Chap. xxvii. We may see, also, with Regard to several Cases, similar to this, and the subtle Expedients which the Lawyers invented about them, FRANCIS BAUDOUIN, *De Jurispr. Muciana*, Pag. 67, *& seqq.* Several learned Men have been deceived for want of understanding the Terms and Principles of the *Roman* Law, upon this Subject: For Example CHARLES SIGONIUS, *De Antiq. Jur. Civ. Rom* Lib. i. Chap. xii. *in fin.* where he explains a Passage of *Cicero*, which he applies very ill, *De Legibus*, Lib. ii. 20. *in fin.* I might, also, shew how much M. *Dacier* has confounded himself upon the same Account, in his Notes to *Horace*, Lib. ii. Sat. v. Ver. 109. But this is not the Place for it. [i] *Liv.* Lib. x. Chap. vii. The *Plebeians* can number their Triumphs; and it doth not now repent them of their Nobility, Lib. vi. Chap. xxxvii, *towards the End*. From that Time the *Commons* will enjoy every Thing the *Patricians* value themselves upon, Authority and Honour, Glory of War, Descent, Nobility.

Images,

Images, or to raiſe himſelf to Places of Honour by his own Virtue [a 1]. But though many of the *Roman* Offices were no leſs neceſſary and ſerviceable in Times of War than Peace, as that of *Dictator*, *Maſter of the Horſe*, *Conſul*, *Prætor*; yet ſince Peace is, as it were, the ordinary State of a Commonwealth, War the extraordinary; and ſince thoſe *Offices*, alſo, ſeem, as well by their Nature as [2] Appellation, to bear a nearer Relation to Peace than War; it muſt be allowed, that *Roman* Nobility had rather a civil Original, than a military. And, indeed, it would have been a Method altogether impolitick, to have confin'd Nobility to ſimple martial Courage, ſeparated and diſtinguiſhed from the Office and Conduct of a Leader (ſo as hereby to have conſtituted a particular Order, enjoying large Rights and Immunities) in ſuch a Commonwealth, where War was the common Profeſſion, as I may call it, of every Subject. The *Roman* Nobility, therefore, did not conſtitute any peculiar Rank of Perſons in the Commonwealth; nor did it afford any other Advantage more conſiderable than this, that the Images of famous Anceſtors uſually made the Way to Honour more open and eaſy.

XXX. From all which it is evident, that the Nature and Genius of modern Nobility, in moſt of the Kingdoms of *Europe*, is much different. For with us the Nobility conſtitutes a *particular Order*, diſtinguiſhed from the reſt of the Subjects in Dignity, and by extraordinary Rights and Privileges. Beſides that, the Prince frequently confers the Honour of Nobility, without giving any publick Employment with it, and that too, not ſo often in Conſideration of *civil* as of *military* Accompliſhments and Virtues. One Argument of which, among others, is, that noble Families diſtinguiſh themſelves from one another, as well as from Commoners, by Devices impreſs'd upon Shields, with an Helmet placed above; and which are therefore call'd *Arms*. Of the Antiquity of which *Diodorus Siculus* may be thought to give an Account [b], when he tells us, "That the Arms of the *Gauls* were Shields "about the Height of a Man, flouriſh'd and "emboſs'd with every one's proper Device, as "he pleaſed to have it. Some, he adds, held "before them Images of Beaſts in Braſs, artfully "contrived to ſerve both for Defence and Orna-"ment. On their Heads they wore Helmets of "Braſs, beautified, as they thought, with ſome "Mark upon the Creſt of them, which might be "ſeen at a Diſtance. Their uſual Ornament was "the Horns, or the Head of ſome Bird or Beaſt "form'd upon them, or fixed to them [c]." For what Reaſons this Part of the World ſeems to pay ſo much Honour only to the Virtues *military*, when the *Chineſe*, on the other Hand, prefer the Men of Learning to thoſe of the Sword, will not be difficult to reſolve. For it may be conſider'd, that though the Advantages which the Commonwealth receives from Men of civil Life and Profeſſion, are no Way inferior to thoſe it gains by Perſons *military* (for certainly, to form good Laws; to adminiſter Juſtice impartially; to increaſe the Riches of the State, by Improvement of Trade and Commerce; to be able, by the Force of Eloquence, to compoſe popular Diſcontents, and to incline the Minds of the People what Way ſoever the Poſture of Affairs requires; to diſcover the Counſels and Deſigns of foreign Enemies, and to prevent or fruſtrate them; are Excellencies of the higheſt Nature, and that deſerve the greateſt Honours) yet civil Perſons have not always that Eſteem and Value paid them, which is their Due, and eſpecially among People of ſcanty Knowledge and Obſervation, both becauſe the natural and acquired Perfections, which are neceſſary to the Attainment of civil Accompliſhments, lie generally out of common View, and are not well underſtood by vulgar Apprehenſions; and becauſe they ſeem to diſcover themſelves in a ſedate ſilent Way, without Noiſe, or Violence, or Danger. But now the military Virtues and Qualities are perfectly of another Nature. And therefore, though Courage and Reſolution are no leſs neceſſary in civil Adminiſtration and Conduct, than military; yet People of martial Temper and Spirit, who had rather purchaſe a Subſiſtence with their Blood, than by their Sweat and Induſtry, think nothing more glorious and noble, than to be prepar'd againſt all the Terrors of War, than to face and defy Death and Danger, and to hazard, what is of all Things moſt valuable, Life itſelf; that other Men may live in greater Eaſe and Security [d]. For theſe Reaſons, in many Kingdoms of *Europe*, the Nobility hold their Eſtates by a *feudal Right*, and have *Immunities* from ſeveral *Duties* ſettled upon them, which are exacted from thoſe of inferior Rank, purely becauſe they are obliged to attend the Wars, and aſſiſt the State in military Service. The *Original* of which *feudal Right* ſeems to be hinted in *Lampridius*'s Life of *Alexander Severus*, Chap. lviii, where he tells us, "That the Lands which "the *Emperor* took from the Enemy, were given "to the Officers and Soldiers who lived upon "the Borders, to enjoy them for ever, provided "they would oblige their Heirs to enter into "military Service, and never to live a private "Life; the *Emperor* ſuppoſing that they would

[a] To this Purpoſe is that of *Claudian*, *De Conſ. Prob. & Olyb. Paneg.* Ver. 13, &c.

——Quemcunque requires
Hac de ſtirpe virum, certum eſt de Conſule naſci.
Per faſces numerantur avi, ſemperque renata
Nobilitate virent.

Through all the Line, each Worthy you can name,
His noble Birth doth from a Conſul claim;
Th'Imperial *Faſces* each Deſcendant grace,
And add repeated Honours to the Race.

[b] Lib. v. Chap. xxx. [c] *Add.* Hobbes *Leviathan*, Chap. x. *in fin.* [d] *Vid.* Ariſt. *Probl.* § 27. q. 5. The Nobility expoſe their Lives for the Preſervation of the State, and their Sovereign's Glory. "The Magiſtrate eaſes the Prince of Part of the Care in "Judging the People; on both Sides ſublime Functions, and of great Advantage: And Men are ſcarce capable of performing greater "Things Yet I know not the Reaſon, why the Sword and the Gown are always quarrelling with each other; and have almoſt ex-"hauſted their whole Stock of Invectives on both Sides." *La Bruyere*'s *Manners or Characters of the Age*, Pag. 305. Ed. *Braſſ.* 169[illegible]

[1] Vide *Juvenal.* Sat viii. Ver. 8, 19.

[2] But every Body knows, that the Name of *Prætors*, who were the ordinary Judges, is derived from *Præ-eundo*, that is to ſay, *going foremoſt*, or commanding in War. See the deceaſed M. *Perizonius*'s Diſſertation *De Prætorio*, § 3, *& ſeq.* The Truth is, that the Foundation and Conſtitution of the *Roman* Government was intirely turn'd to War.

"it

" be the better Soldiers, when they were, alſo, to " defend their own Eſtate." And hence, it is unuſual for the Nobility to turn to Trade or Merchandize, not becauſe ſuch Profeſſions are really mean and diſhonourable [a]; but becauſe they would divert them from their military Way of Life, and force them upon the Diſhonour of enjoying *Fiefs* and *Privileges gratis*, without any Returns of Service. And therefore, wherever the Nobility are allowed, without Diſparagement to their Honour, to apply themſelves to *Trade* and *Merchandize*, it may ſafely be inferr'd, that they had no *military Original*. The *Egyptians*, *Scythians*, *Perſians*, *Lydians*, and almoſt all the old barbarous Nations, according to *Herodotus's* Account of them [b], look'd upon all Perſons, who apply'd themſelves to Trades, and Handicraft Employments, to be the meaneſt and loweſt Sort of Subjects; and their Children they always thought mean and baſe. They only were allowed to be of Quality, who were above all *mechanical* Employments; and eſpecially, who made War their Buſineſs and Profeſſion [c]. And at *Rome* there was a Law preferr'd by *Quintus Claudius*, Tribune of the Commons, " That no Senator, or Senator's Father, ſhould " have any Ship of greater Burthen than would " contain the Quantity of three Hundred *Amphoræ*." Such a Ship being ſuppos'd large enough to carry their Corn out of the Field; and all Trade was look'd upon to be beneath Perſons of that Dignity [d].

XXXI. But, notwithſtanding, there are, and have been ſome States and Commonwealths, where the Honours allow'd to Birth [e], have been and are very inconſiderable; every Man being left to raiſe and ſupport his Nobility, by his Merits to the State. " So the *Egyptians*, we are " told, in their Funeral Orations, never uſed to " make mention, as the *Greeks* did, of the Family of the Party deceaſed; becauſe they " thought every Man equally noble: But his " Education they were always ſure to ſpeak of and " Manner of Life, his Piety and Devotion, his Juſtice, Continence, and what other Virtues he was " known to have practiſed [f]." So the *Turks* never ſet a higher Value upon themſelves, than what may ſeem due to their own *Merit*: To the *Ottoman* Family only they allow *Nobility of Blood* [g]. Neither do the *Chineſe* expreſs any *Honour* for *Antiquity* of *Deſcent*, the *pooreſt* and *meaneſt* Perſon in the *Empire* is capable by his *Learning* only of preferring himſelf to the higheſt Places of *Honour* [h]: And in their *Marriages*, neither the *Emperor* himſelf, nor any of his *Children*, make Choice of their *Wives* with regard to *Extraction*, but only to the Beauty and Agreeableneſs of the *Woman* [i]. Such Cuſtoms, perhaps, may be contrary to thoſe which are received in this Part of the World; but notwithſtanding the wiſer Part of Mankind ever have, and always muſt allow it to be true, that *Nobility* ought not to depend only upon the *Blood*, but ſhould much rather be raiſed and eſtabliſhed upon *Virtue* [k]. It was a ſevere, but a very proper Anſwer which *Antigonus* gave to the Son of a brave *old Officer*, ambitious of *Honours* he had not deſerved, *It is your own Virtue, and not the Blood you derive from your Father, that muſt recommend you to*

[a] Conf. Bodinus *de Repub.* Lib. iii. Chap. viii. p. m. 546. Some indeed fetch the Reaſon of this from *Eccleſiaſticus* xxxviii. 25, &c. and becauſe, as *Cicero* ſaith, *Offic.* Lib. i. Chap. xlii, they make no Profit, unleſs they reſolve not to ſpare for Lies. To this I may add, That 'tis only in late Times, that Merchandize has become a mean Occupation, and unworthy of People of Diſtinction; for in the firſt Ages of the World it was honourable. See the late Archbiſhop POTTER's *Archæolog. Græca*, Lib. i. Chap. viii. Pag. 31. The Reader may ſee in the deceaſed M. AVERANI, *Interpretat. Juris*, Lib. ii. Chap. xiii, the Reaſons why the antient *Romans* were no Friends to Commerce. M. *Le Clerc* has given an Extract of this, and joined his own Reflections, *Biblioth. Anc. & Mod.* Tome IV. Pag. 102, & *ſeq.* See, alſo, M. *Huet's* Treatiſe of the *Commerce of the Antients*, Chap. xvi. [b] Lib. ii. Pag. 98. Ed. *H. Steph.* [c] *Add.* Lib. iv Tit. lxiii. l. 3. *de Commerc. & Mercator.* & Lib. xii. Tit. i. l. 6. *C. de Dignitatibus.* Ariſtot. *Polit.* Lib. iii. Chap. iii. Cic. *Offic.* i. *d. l.* The Gains that all Mercenaries make, who ſell their *Labour*, and not their *Art*, are baſe and ſordid: and the Wages they receive is the ſame Thing as an *Earneſt* of their Slavery. [d] *Livy*, Lib. xxi. Chap. lxiii. and *Juvenal* calls the Merchant, *Vilis facci mercator olentis*, Sat xiv. Ver 269. a ſordid Wretch that trades for naſty Wares. [e] *Juvenal*, in the following Verſes, admirably well expoſes the falſe Notions of the *Roman* Nobility, and the ridiculous Pride of the Gentry, who had no perſonal Merit of their own, but owed every Thing to their *Anceſtors*.

Tota licet veteres exornent undique ceræ
Atria, Nobilitas ſola eſt atque unica virtus.
Paulus, *vel* Coſſus, *vel* Druſus, *moribus eſto.*
Prima mihi debes animi bona. Sanctus haberi
Juſtitiæque tenax, factis, dictiſque mereris?
Agnoſco procerem
- -
Tum licet à Pico numeres genus, altaque ſi te
Nomina delectant, omnem Titanida *pugnam*
Inter Majores, ipſumque Promethea *ponas:*
De quocumque voles proavum tibi ſumito libro.
Quod ſi præcipitem rapit ambitio, atque libido,
Si frangis virgas ſociorum in ſanguine, ſi te
Delectant hebetes laſſo lictore ſecures:
Incipit iſtorum contra te ſtare parentum
Nobilitas, claram facem præferre pudendis.

Long Galleries of Anceſtors, and all
Thoſe Follies that adorn a Country-Hall,
Challenge no Wonder or Eſteem from me:
Virtue alone is true Nobility.
Live therefore well: To Men and Gods appear
Such as good *Paulus, Coſſus, Druſus*, were. ——
Convince the World that you're devout and true,
Be juſt in all you ſay, and all you do,
Whatever be your Birth, you're ſure to be
A Peer of the firſt Magnitude to me. ——
Then trace your Birth from *Picus*, if you pleaſe;
If he's too modern, and your Pride aſpire
To ſeek the Author of your Being higher,
Chooſe any *Titan*, who the Gods withſtood,
To be the Founder of your antient Blood,
Prometheus, and that Race before the Flood:
Or any other Story you can find;
From Heralds, or in Poets, to your Mind.
But ſhould you prove ambitious, luſtful, vain,
Or could you ſee, with Pleaſure and Diſdain,
Rods broke on our Aſſociates bleeding Backs,
And Headſmen lab'ring till they blunt the Ax;
Your Father's Glory will your Sin proclaim,
And to a clearer Light expoſe your Shame.

Mr. *Stepney*.

[f] *Diod. Sicul.* Lib. i. Chap. 92. *Tullus Hoſtilius* in *Dionyſ. Halicarn*, Lib. iii. Pag. 148. Ed. *Lipſ.* ſays, I cannot think that human Nobility can conſiſt in any Thing but Virtue. [g] *Auger. Buſbequius*, Epiſt. i. And what he ſaith of the *Janiſaries* in the ſame Place. [h] Martin. *Præf. Hiſt. Sin.* [i] Neuhof. *in Legat.* Pag. 280. [k] *Senec. Hercul. Fur.* Ver. 339, 340. *Qui genus jactat ſuum, aliena laudat.* Bœtius *de Conſolat. Philoſoph.* Lib. iii. Metr. 6.

Quid

to me [a]. For as *Plato* ſaith [b], "Every Man has had "a numerous Race of *Anceſtors* before him, ſome "of which were perhaps *rich* Men, and ſome "*poor*; ſome may have been *Princes*, and ſome "*Slaves*; ſome *barbarous*, and ſome *civilized* [c]." And it is not unlikely, as another ſuſpects [d], that the *Poets* derived their *Heroes* from the *Gods*, only to cover ſome Misfortunes or Defects in *Birth* or *Quality*, which might perhaps have been found out, upon a ſtrict Enquiry into their *Deſcent*. For it is certain, *if we were to unravel any Man's Nobility, we ſhould at laſt come to ſomething mean and little* [e]: And therefore *Lycurgus* proved by the famed *Example* of the *two Dogs*, that it is not *Nature*, but *Education* that forms Men to *Virtue* [f]. And it eaſy for a Man of the *lateſt* Quality to give them of *antient*, but corrupt and degenerate *Nobility*, the ſame Anſwer that *Iphicrates* did to *Hermodius*, one of the *old Race* of the *Hermodii*, when he objected to him the *Meanneſs* of his *Birth*, *I am the firſt of my Family, and you are the laſt of Yours* [g]. Nor are there wanting thoſe who argue, that it is unjuſt to *exempt* any Man, or to grant him *Immunity* from any particular Duty and Burden in the Commonwealth, to the Prejudice of other Subjects; or to give him eaſier Admiſſion to Preferments and Offices, barely upon the Score of Birth, which, it is certain, can of itſelf confer no extraordinary Virtues, and which it is in no Man's Power to procure for himſelf [h]; ſince others may be as well, perhaps better acquainted with the Arts neceſſary for the Adminiſtration and Management of thoſe Offices, than he is, and particularly if he be a Perſon given to the Enjoyments of Eaſe and Pleaſure [i]. In ſhort that it may ſeem to be a very great Misfortune in a Commonwealth, when the civil Sovereign is ſo tied up and confined to a particular *Order of Men*, in diſpoſing Places of publick Truſt, that he cannot have the Aſſiſtance of his other Subjects, though in Buſineſs they are well qualified for; and eſpecially, if he has not Power to elect any Perſon of Worth into ſuch an Order. For when it becomes neceſſary for Princes to ſupport and favour the Nobility only, that by their Aſſiſtance they may more eaſily reſtrain and keep in Awe the reſt of their Subjects, it is certain that their Power grows feeble, and that the Reins of Government are ready to drop out of their Hands; ſince they are forced to enter into a kind of Faction with Part of their Subjects, to diſtruſt the Force of an open Authority, and take Refuge in the artful Deſigns of ſecret Policy. I ſhall add only what my Lord *Bacon* ſays in his Advancement of Learning [k], "That a Kingdom that would be "great, muſt not increaſe its Nobility to too "great a Number."

XXXII. It may be proper now, in the laſt Place, to enquire, whether Civil Dignity and Marks of Honours depend upon the ſovereign Power as to their Durations, alſo, and Continuance, as well as in their Original. And here it muſt be enquired, whether the Marks of Honour, and the Privileges and Rights annexed to it, are confined to any particular Office or Em-

Quid genus & proavos ſtrepitis?
Si primordia veſtra,
Autoremque Deum ſpectes,
Nullus degener extat;
Ni vitiis pejora fovens,
Proprium deſerat ortum.

Horace, *Sat.* vi. Lib. i. Ver. 7, 8. *to* Mæcenas.

Fondly our high Deſcent we boaſt:
If whence at firſt our Breath we drew,
The common Springs of Life we view;
The airy Notion ſoon is loſt.
Th' Almighty made us equal all,
But he that ſlaviſhly complies
To do the Drudgery of Vice,
Diſowns his high Original.

Referre neges quali ſit quiſque parente
Natus, dum ingenuus.

Claudian, *Lib.* ii. *Ver.* 133. *de Laudib.* Stilicon.

You own 'tis nothing whence a Man began,
When every Action proves the Gentleman.

——Lectos ex omnibus oris
Evehis; & meritum, nunquam cunabula quæris
Et qualis, non unde ſatus.

From every Land the Braveſt you ſelect,
And, when their Virtues pleas'd, their Blood neglect;
Nor for Deſcent enquire, our noble Lines:
Careleſs of Birth, where Worth ſuperior ſhines.

Add. Seneca *de Beneficiis*, Lib. iii. Chap. xxviii. & Epiſt. xliv. and thus *Canulejus* in *Livy*, Lib. iv. Chap. iii. The Growth of the *Roman* Empire was owing to this, That no Family was thought mean and contemptible which was eminent for its Virtues. *Herodian.* Lib. v. Chap. i. The Gifts of Fortune are frequently beſtowed upon ſuch as do not deſerve them; but the Virtues of the Mind are every Man's own proper Glory. And Greatneſs of Birth, Riches, and the like, though we think them happy who enjoy them, yet can add no real Praiſe to a Man, becauſe they are derived from others. [a] Plutarch. *de Vicioſ. Pudore*, Pag. 534. & *in Apophth.* Pag. 187. B. [b] In *Theæteto*, Pag. 128. *C. Ed.* Wech. [c] There is a Paſſage like this in *Dio Chryſoſtom*, Orat. 15. *de Servitute*, Pag. 238. B. It is impoſſible, that, from the Beginning of the World, there ſhould have been any Race of Men, in which there have not been almoſt innumerable Inſtances of ſome of the Progeny that have been Slaves, of others of them that have been Tyrants and Princes, Captives and Criminals, Tradeſmen and Mechanicks; and in ſhort, ſome of all States, Profeſſions, and Conditions, that have been in the World, and that have, in their Turns, gone through all the Buſineſs and Employments, all the Fortunes and Calamities of human Life. [d] *Dio. Chryſoſt.* ibid. [e] *M. Seneca*, Lib. i. Controv. vi. [f] *Plut.* Apoph *Lacon.* Pag. 225. [g] *Plut.* Apoph. *Add.* Philo Judæus *de Nobilitate.* Stobæus, *Serm.* 84, 85, 86, 87. Tho. Browne *de Religione Med.* Part. ii. Chap. i. When I ſpeak of the Vulgar, I do not underſtand the common People only, and the loweſt Dregs of the Rabble. For, even among thoſe of the higher Ranks, there is a Sort of vulgar inferior Multitude, you may ſafely ſay, made entirely of the ſame Materials with the meaneſt of the Populace. For my Part, I make no Scruple of ranking them with the Mechanicks, however their Fortunes may conceal the Defects of their Underſtanding, and their Riches ſeem to excuſe their want of Senſe. [h] Euripides *Electra*, Ver. 551.

Πολλοὶ γὰρ ὄντες εὐ γενεῖς, εἰσὶ κακοί. The Noble often are Degenerate.

[i] *Such as thoſe* Ariſtophanes *mentions*, Ran. Act. iii. Sect. 1. Ver. 2. That were good for nothing but to Eat and Drink; *or thoſe* Juvenal *ſpeaks of*, Sat. xi. Ver. 11.

Quibus in ſolo vivendi cauſa palato eſt.

Such whoſe ſole Bliſs is Eating, who can give
But that one brutal Reaſon why they live. Mr. *Congreve.*

[k] Lib. viii. Chap. iii. Not. 3. *Vid.* Eſſays, Chap. xiv. *by the ſame Author.*

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ployment in the Commonwealth, which the Sovereign has the Diſpoſal of; or, whether they are ſettled upon the Subject in the Nature of Property. Upon the firſt Suppoſition, it is evident, the Sovereign has the ſame Power that he has to appoint or to remove his Officers and Magiſtrates. *Fabius* the *Cunctator* very well expreſſed, not only the Greatneſs of his Spirit, but the Submiſſion, alſo, he thought himſelf obliged to pay to the Power of the Commonwealth, by that Calmneſs of Temper which he ſhewed, when the Maſter of the Horſe was made equal with him, while he continued Dictator [a]. *Solon* uſed to ſay, "That Courtiers and the Favourites of "Princes were like Counters uſed in caſting up "Sums; for as Counters ſometimes ſignify a "a greater Number, and ſometimes a leſſer, ſo "theſe Creatures are abſolutely at the Mercy of "their Princes, whoſe Pleaſure makes them great "and noble, or mean and deſpicable [b]." But upon the ſecond Suppoſition, when the Subject enjoys his Dignity and the Marks and Badges of Honour in the Nature of Property, the Government cannot, in Juſtice, take them from him, unleſs by Way of Puniſhment. In this Caſe, as *Ariſtotle* in *Ælian* ſaith [c], *There is a wider Difference between not obtaining Honour, and between being turned out of it after a Man has obtained it: For it is no great Pain to a Man not to gain what he purſues; but to be diſpoſſeſſed of what he has gained muſt be a ſenſible Affliction.* But notwithſtanding, the Immunities and Privileges annexed to Honour may either be laid under Suſpenſion, or be entirely taken away upon ſome preſſing Emergency in the Commonwealth; Allowance being made for them, as it beſt may, in ſome other Method. For ſince the Extremities and Neceſſities of the State muſt always be ſuppoſed to be Exceptions to all ſuch Privileges; it would be the moſt extravagant Abſurdity imaginable, to make them ſacred and inviolable beyond the neceſſary Defence and Preſervation of the Commonwealth. From what hath been ſaid, it may, alſo, be diſcovered, how far any Commonwealth may, with Juſtice, enact, that Children of Traytors ſhall be excluded from all Honours in the Commonwealth? So it was decreed by the State of *Athens* in the Caſe of *Antipho*, as appears in his Life [d]: And at *Rome*, *Sylla* made a Law, that the Children of all Perſons proſcribed ſhould not appear Candidates for any Honour. And the Anſwer to it in ſhort is, that the State may juſtly enough deny them all publick Dignities and Employments, but cannot rightly deprive them of ſimple Eſteem.

[a] Vid. *Livy*, Lib. xxii. Chap. xv, xxvi [b] Vid. *Polyb.* Lib. v. Chap xxvi. [c] Var. Hiſt. Lib. xiv. Chap. i.
[d] *Vid.* Plutarch. *in Ejus Vit. in Orat.* x. Chap. i.

CHAP. V.

Of the Power of the Sovereign, both over the Publick Patrimony, and the Eſtates of Private Subjects.

I. *What Power the Prince hath over the Goods of the Commonwealth, where the Kingdom is his Patrimony.*
II. *The Subjects do not every where owe the Propriety of their Eſtates to the Commonwealth.*
III. *The Sovereign may make Laws to direct the Subjects in the Uſe of their Goods and Eſtates.*
IV. *And, alſo, impoſe Taxes upon them.*
V. *What is to be obſerved in the Impoſition of Cuſtoms.*
VI. *And other Taxes.*
VII *Of the Sovereign or Tranſcendental Propriety.*
VIII. *What Power the Prince hath over the Goods that belong to the Commonwealth, as ſuch.*
IX. *Of the Alienation of the Kingdom, or any Part of it*
X. *A Prince cannot make his Kingdom a Fief, or mortgage it, without Conſent of his People.*
XI. *Nor alienate any Thing incorporated in the Crown.*

I. TO underſtand diſtinctly what Power the Sovereign has over the Eſtates and Fortunes of the Subject, it will be neceſſary to obſerve, that this Power is derived either from the Nature of *Sovereignty* in itſelf; or elſe from the particular Manner of the Acquiſition of it. For it is manifeſt, that there is a great Difference between a Prince [1], who has rais'd his own [2] Kingdom, collected, as it were, his own Subjects, and who was at firſt the univerſal, abſolute Proprietor of every Thing in the Commonwealth; and another freely call'd to Government, and inveſted with Sovereign Power, by Perſons already in Poſſeſſion of their diſtinct Proprieties. The firſt, it is clear, hath not only all that Power over the *Bona Reipub.* the Goods contain'd in the

[1] See above, in Book vii. Chap vi. § 16
[2] Our Author ſpeaks here of a Kind of *Hereditary Kingdom*, which he diſtinguiſhes from *Patrimonial Kingdoms*, which, as he ſays, are poſſeſſed by a Kind of *Uſufruit*. Now in the one and the other he has ſuppoſed, that Subjects originally had, and ſtill reſerv'd to themſelves, the Property of their Goods; ſo that the Difference only regards the Right of alienating the Crown. This is what the deceaſed M. *Cocceius* ſhould have taken Notice of, who, in the laſt Work of his publiſhed, intituled, *Autonomia Juris Gentium*, Cap. xii, is ſo far angry with *Grotius* and *Puffendorf*, as to rail at what they call *patrimonial* Kingdoms, as an *Abſurdity*. It would be eaſy to refute all he has ſaid, and to ſhew, that, beſides the Miſtakes he has committed, he reaſons upon falſe Principles, which he gives for Demonſtration. But this would lead me too far. See what I have ſaid upon *Grotius*, Lib. ii. Chap. xx. Sect. 6. Not. 3.

Commonwealth, which flows from the Nature of ſovereign Power itſelf, but, alſo, the ſame which every Maſter of a Family has to his Eſtate, except he is pleas'd voluntarily to remit any Part of his Right. If ſuch a Prince therefore keeps his Propriety entire, the Subjects can have no better Right to what they poſſeſs, than the *Roman* Slaves had to what they got by their own Labour, that is, a precarious Poſſeſſion revocable at Pleaſure, whenever the Prince thinks fit. But however, as long as the Subjects are in Poſſeſſion of ſuch Goods and Eſtates, they may juſtly ſupply themſelves with Suſtenance and other Neceſſaries from them, by way of Wages, for the Trouble of improving and preſerving them. And therefore what *Hobbes* [a] falſly applies to all manner of Subjects holds true only with regard to theſe, *viz.* "That the Propriety, which a Sub-"ject hath to his Goods, conſiſts in a Right to "exclude all other Subjects the Uſe of them, but "not to exclude the Sovereign; as in a Family, "the Father grants ſome of his Sons a Propriety "to certain Goods, diſtinct from the Proprieties "of other Sons of the ſame Family, but not from "that of the Father himſelf; ſo that every Son in "the Family enjoys a Propriety barely to ſo much, "and for ſo long as the Father pleaſeth." But if the Prince, I am ſpeaking of, recedes from any Part of his Right, the Subjects will have juſt as much Right to their Goods, as the Conceſſions of their Prince make over to them. And this, by different Princes, hath been done different Ways. *Pharaoh* was to have the fifth Part of the Increaſe of all the Land of *Egypt* to himſelf; the other four were to continue to Husbandmen; only the Lands that belonged to the Prieſts were not ſold, and they had a third Part of the Land by the Donation of *Iſis* [b]. *Strabo* ſays, that in *India* the Land was the Prince's, and Husbandmen were hired to cultivate it for the fourth Part of the Produce [c]. And this is the Cuſtom now in the Dominions of the *Great Mogul*; where the Emperor is alſo Heir to all his Miniſters and Servants, and to all Merchants. In the Kingdom of *Congo* [1] no Subject has any Property which he can tranſmit to his Heirs, but all falls to the Prince; and he adminiſters and diſpoſes the Goods to what Uſes he thinks fit. In ſuch Countries therefore, all the Right private Subjects have to their Goods and Eſtates, depends originally upon the Favour of the Prince, who hath an abſolute Power to diſpoſe of all they have, ſo far as the Compacts and irrevocable Grants he hath made will permit. But after all, it is uſually obſerved by Travellers of thoſe Countries, and particularly of the *Empire* of the *Great Mogul* [d], that that abſolute Propriety of the Prince has been the Reaſon why that and other Kingdoms of the *Eaſt*, otherwiſe very happy in the Advantages Nature has given them, ſhould lie wild, deſolate and barbarous, and either be always poor and decaying, or at leaſt never arrive at the Splendor and Greatneſs of the *European* Nations, where the Princes are generally more tender of invading the Properties of their Subjects, and where Subjects have the Liberty to defend their own, even againſt their Princes [e].

II. But there are, on the other Hand, Commonwealths, where the original Right the Subjects have to their Properties does no Way depend upon the Favour or Indulgence of the civil Government. And this ſeems to have happened theſe two Ways; either firſt, when a People under the Conduct of a Prince they ſet over themſelves remove in Search of new Seats: Or, ſecondly, when a Number of Maſters of Families, already poſſeſſed of their ſeveral Properties, freely erect themſelves into a Commonwealth, or voluntarily join themſelves to ſome Commonwealth already eſtabliſhed, and ſubmit themſelves and their Fortunes to civil Government. In the former Caſe, the Method uſually obſerved is this: The whole Body of the People, under the Conduct of their Leader, poſſeſs themſelves of ſome new Country, which perhaps in its large Extent is bounded by Limits which Nature herſelf, or the arbitrary Conſtitutions of the World, have given it; but which is afterwards cantoned into Parts, and diſtributed to particular Perſons, either by Lot, or at the Diſcretion of the Commander, or poſſibly (tho' very ſeldom) by every Man's own Choice [f]. Now, in this Caſe, tho' every particular Man's Property ſeems rather to be grounded upon the Leader's Appointment, than his own Seizure; yet it does not follow, that therefore all he has is owing purely to the Favour of his Commander. For every Man who voluntarily went in the Expedition, has certainly an abſolute Right to ſhare in the Acquiſitions of it, and be conſidered in the Diviſion of the Land [g]. But much leſs do the Properties of the private Subject own any original Dependency upon the Favour and Indulgence of the civil Sovereign, where (as was ſuppoſed in the ſecond Caſe) a Number of Maſters of Families, poſſeſſed of their Liberties and diſtinct Properties, freely ſubmit to civil Government. For I take it to be clear, notwithſtanding all that *Hobbes* has ſaid to the contrary [2], that Perſons who live without civil Government, in a Liberty of Nature, may nevertheleſs enjoy their ſeveral Properties [3]. For admitting that Nature gave every Man a Right to every Thing, yet this is no Argument why every Man might not, by Intervention of Compact, have his ſeparate Property divided to him. And tho' a Compact of two or more about Things left in a Community of Nature, does not, in the leaſt, prejudice other Men, but leaves them to their full primitive Right; yet if all Men conſent by common Compact, either expreſs or tacit, to make a Diviſion of Things, without Diſpute this muſt introduce a true and real Propriety. And therefore *Hobbes*'s [4] Aſſertion is falſe, "That every Father "of a Family, who is under no Subjection either "to another Father, or to any common Maſter, "has a common Right to every Thing [h]." Tho'

[a] *De Cive*, Chap. vi. Sect. 15, &c. xii. Sect. 7. [b] *Gen.* xlvii. Ver. 23, 24, 26. Vid. *Diod. Sicul.* Lib. i. Chap. xxi. Sect. 7. Et *Grot.* Com. in *Gen.* xlvii. 26. [c] *Strabo;* Lib. xv. Pag. 484 Ed. *Genev. Caſaub. Diod. Sicul.* Lib. ii. Chap. xl. Vid. *Garcilaſſ.* de la Vega, Com. Roy. Lib. v. Chap. v. [d] *Bernier* de Nuperis Motibus in Imp. Magn. Mog. [e] Garcilaſſ. *de la Vega, Com. Roy.* Lib. v. Chap. ii. relates, that it was the Command of the *Ynca*'s, that none of their Subjects ſhould be obliged to plow the *Emperor*'s Lands, before they had taken care of their own; becauſe it was not likely any Man would be ſo diligent as he ought in his *Prince*'s Buſineſs, who had not before well ſettled his own. The Poor, the ſame *Hiſtorian* ſays, were always looked upon to be an uſeleſs Multitude among them, both in War and Peace. [f] See *Cornel Nepos* in *Miltiades*, Chap. ii. [g] Vid *Gen.* xiv. 14, 21, 22, 23, 24. Vid. *ubi Supr.* Lib. iv. Chap. vi. Sect. 3, 4. [h] Vid. *Gen.* iv. 4. xiii. 5, &c.

[1] Vid. *Edward. Lopez.* [2] *Ubi Supra.* [3] See above, in Book iii. Chap. iv. Sect. 2, 3. [4] *De Cive*, Chap. vi. Sect. 15.

it muſt indeed be allowed, that they who live under civil Government have their Properties better ſecured and defended, than who that live in a Liberty of Nature; for theſe muſt ſupport themſelves by their own ſingle Force alone, while the others can call the whole Strength of the Commonwealth to aſſiſt them, either againſt the Encroachments of Foreigners, or the Injuries of their Fellow-Subjects [a].

III. In Commonwealths therefore, where the Properties of the Subjects do not originally depend upon the Government, the civil Sovereign hath no further Power over them than what immediately flows from the Nature of the Supreme Power in itſelf, unleſs the Subjects freely conſent to enlarge it. "Every Thing, ſays *Seneca* [b], by "a civil Right may be ſaid to belong to the "Prince, while yet the particular Parts of that "wide Poſſeſſion are divided among different "Proprietors, and every Thing belongs to a "diſtinct Owner. And therefore, when we "preſent our Prince with our Houſes, our "Slaves, or our Money, we do not think we "give him back his own. The Prince hath "indeed a Power over all we have, but the Pro-"priety is in the private Subject. 'Tis com-"mon to ſay, that ſuch and ſuch Territories "belong to the *Athenians* or *Campanians*; but "the People of thoſe Countries diſtinguiſh and "divide them further between one another by "private Boundaries; the whole Extent of a "Country may be under ſuch or ſuch a Com-"monwealth, but there are diſtinct Proprietors, "who have their ſeparate Portions of it. And "therefore we may give away our Eſtates to the "Publick, tho', in ſome Senſe, they may be ſaid "to have belong'd to it before; becauſe the Title "we have to them is of a very different Nature "from that which the Publick can be ſaid to "have. For the Prince poſſeſſes all by his Sove-"reign Command and Authority, the private Sub-"jects by their Propriety [c]." And therefore the Emperor *Adrian*, when the People petition'd him to give a Slave Liberty who had pleas'd them in the *Chariot-Race*, reprimanded them for it, and told them, That *it neither became him to free another Man's Servant, nor them to offer ſuch an Injury to his Maſter* [d]. And the Emperor *Claudius* made an Edict, to ſuppreſs a common Practice of begging other Mens Eſtates of the Emperor; it being an Opinion current at that Time, that it was in his Power to give them away; and he reſtor'd an Eſtate he had obtain'd that Way himſelf, when he was a private Subject [e]. But now this Power we are here ſpeaking of, may, I think, be properly enough reduc'd to three Heads: Firſt, to the Right of making Laws to direct ſuch a Proportion in the Uſe and Conſumption of certain Goods and Commodities, as the State of the Commonwealth requires. Secondly, to the Right of levying Taxes. Thirdly, to the Exerciſe of the Tranſcendental Propriety [f]. To the firſt Head we may reduce all *Sumptuary* Laws [r], or ſuch as preſcribe Bounds to extravagant

[a] Vide *Geneſ.* xxxiv. 30. Vide *Xenoph.* Memorab. Lib. ii. Pag. 433. Ed. *H. Steph.* where Socrates *ſaith*, a Man is happier who lives ſecure in Society with a moderate Fortune, than he who leads a lonely melancholy Life, full of Fears and Dangers in the Enjoyment of the Riches of a whole Commonwealth. *And in this Senſe we may admit of what* Cicero *ſaith*, Orat. pro *Cæcina*, *Chap.* xxv. That, if we take away Civil Right and Government, there will be no Diſtinction left between one Man's Property and another's; *and in his* iid *Book of Offices*, Chap. xxi, *more clearly*, "The principal Thing to which thoſe who are charg'd with the Adminiſtration of Go-"vernment ought to attend, is that each private Perſon ſhould preſerve his Property, and that the public Authority ſhould never en-"croach upon it. For this Reaſon there never was a more pernicious Example than the Law which *Philippus* undertook to paſs, while "he was *Tribune* of the People, and the Deſign of which was to make a new Partition of Lands. It is true, he did not much inſiſt "upon it, when he ſaw it rejected; and in this he ſhew'd a great deal of Moderation. But among other Things, which the Deſire "of pleaſing the People drew from him, he dropped an Expreſſion of very dangerous Conſequence. For he was heard to ſay, pub-"lickly, *That there were not two thouſand Men in the City, who were worth any Thing.* This was a ſeditious and criminal Diſcourſe; "for it tended to no leſs than to make all Men equal, than which nothing could be more pernicious. The only Inducement which "Men have to enter into civil Society, is only that each may the better ſecure his own Property. I know very well that Nature of "herſelf perſuades Men to unite, and embrace a ſocial Life. But that which prevails upon them to build Cities, and retire into them "as Places of publick Refuge, is, chiefly, the Hope of enjoying their Goods in Security." *In primis autem videndum erit ei, qui Rempubli-*"*cam adminiſtrabit, ut ſuam quiſque teneat, neque de bonis privatorum publice deminutio fiat*, &c. [b] *Senec.* de Beneficiis, Lib. vii. Chap. iv, v. [c] Vide *Grot.* Com. in 1 *Reg.* xvi. 24. [d] *Zonaras*, Tom. ii. [e] And therefore it was a Miſtake in the Emperor *Frederick* to think that

Quicquid habet locuples, quicquid cuſtodit avarus,
Jure quidem noſtrum, populo concedimus uſum.
Rege figuratam Regis patet eſſe monetam;
Cæſaris & domino ſub Cæſare fulget imago.

All that the Rich and Covetous receive,
Is mine by Right, to them the Uſe I give;
The Royal Stamp, who claims the Coin, declares,
And *Cæſar*'s Money *Cæſar*'s Image bears.

Gunth. Ligurinus, *Lib.* iii. *Ver.* 480, &c.

It may be obſerv'd, that, in theſe two laſt Verſes, there is an Alluſion to what our *Saviour* ſaid to the Diſciples of the *Phariſees* and *Herodians*, after he had aſk'd 'em *whoſe Image and Inſcription* the Piece of Money they brought him as a Tribute bore: They anſwer'd *Cæſar*'s; upon which he replied, *Render unto* Cæſar *the Things which are* Cæſar's, *and unto God the Things that are God's.* Matt. xxii. *Ver.* 19, &c. But this does not prove, that by Right all the Subjects Goods belong to their Sovereign, as ſeveral of the Reform'd in *France* have improperly maintain'd, who were in an Error, with Regard to the Rights and Authority of the Prince. (*Nouvel. de la Republ. des Lettres, Avril* 1703. Pag. 415.) Our Saviour only means, that, ſince the *Jews* made Uſe of the Emperor's Coin, it was a Sign of his being Maſter of their Country, and of their tacit acknowledging him for their lawful Sovereign; ſo that they ought to obey him in every Thing that was not contrary to the divine Laws. See the Interpreters on this Paſſage. [f] *Dominium Eminens.*

[r] "The other almoſt incurable *Evil* in a State (*ſays the ſage* Mentor *to his Pupil* Telemachus) is Luxury. As too great Authority "poiſons Kings, ſo does Luxury a whole Nation. 'Tis pretended that Luxury ſerves to maintain the Poor at the Expence of the Rich, "as if the Poor could not get their Livelihood more uſefully, by increaſing the Fruits of the Earth, without effeminating the Rich "by the Niceties of Voluptuouſneſs. When once a Nation is accuſtom'd to look upon Superfluities to be Neceſſaries of Life, they "will every Day be inventing new ones. They can no longer diſpenſe with the Want of Things, which were utterly unknown thir-"ty Years ago. This Luxury is call'd a good Taſte, and the Perfection of Arts; this Politeneſs of a Nation, this Vice that draws "ſo many after it, is commended as a Virtue, and ſpreads its Infection to the very Dregs of the People. The King's Relations imi-"tate his Magnificence and Grandeur, the Nobility that of his Relations, and the Gentry or middle Sort of People equal the Nobi-"lity; for who is he that does himſelf Juſtice? The common People will paſs for Gentry, every Body lives beyond what he has; "ſome out of Pride and Oſtentation to ſhew their Riches, and others out of an ill Shame, and to conceal their Poverty. Thoſe even "who are ſo wiſe as to condemn this great Diſorder, are not wiſe enough to dare being the firſt in ſetting a contrary Example. Thus "a whole Nation is ruin'd; and all Orders and Diſtinctions confounded. The Deſire of getting Riches to ſupport a vain and extra-

vagant unneceſſary Expences, which would, in Courſe of Time, be the Ruin of private Families, and, in Conſequence, weaken the Commonwealth itſelf, by carrying the publick Money abroad into foreign Countries; whither the Humour or Vanity of Luxury and Waſte generally runs [a]. Beſides, another Inconvenience to be prevented by ſuch Laws is this, That they ſquander away their Fortunes extravagantly, make themſelves incapable of ſerving the Publick. For a Man, for Inſtance, who ſpends but two Parts in five of what he hath yearly coming in, and pays two more in Taxes to the State, feels no Inconvenience by it, and lays up to increaſe his Stock one fifth Part more; whereas one who ſpends every Year all that he receives, if he pays never ſo little to the Publick, muſt either leſſen his Eſtate, or retrench his Expences. Of this Sort were thoſe ſumptuary Laws in the *Roman* Commonwealth, which *P. Manutius* recounts out of *Macrobius* [b]. And that Law of *Plato*'s [c], "by "which he would not have a Marriage Invita- "tion bring together more than ten Perſons, "and thoſe Relations; nor that Perſons of the "beſt Quality ſhould ſpend above a *Mina*, or "ten Crowns, on ſuch Occaſions [d]." To this Head, alſo, may be reduced Laws againſt Gaming [e], and Prodigality; of which Nature was *Periander*'s Law at *Corinth*, by *which no Man was allowed to ſpend more than he had coming in* [f]. A Law which deſerves to be particularly enforced upon Perſons concern'd in the publick Affairs and Places; ſince it is very well obſerv'd [g], *That 'tis impoſſible any Man ſhould govern well in the Commonwealth, who is negligent in his own Concerns, or forbear miſpending the publick Treaſure, who hath uſed to live above his private Fortune; for a Man who hath managed his own ill, muſt be ſuſpected when he undertakes for others* [h]. And further, under this Head we may rank all Laws that determine the Rates and Qualities of Poſſeſſions and Eſtates: Such was the *Licinian* at *Rome*, That *no Man ſhould have a Poſſeſſion of more than five hundred Acres of Land, nor above one hundred Head of large Cattle, or five hundred of the leſs* [i]. As, alſo, the Law, which *Ariſtotle* ſays was generally obſerv'd in popular Governments, That no *Man ſhould ſell his firſt Inheritance*. And *Oxylus*'s Law, That *Money ſhould not be lent upon Mortgage of Land* [k]. And, alſo, that Decree of the *Roman Senate* [l], that *all Candidates for Offices in the Commonwealth ſhould be obliged to turn a third Part of their Eſtates into Lands in* Italy. And we may further reduce under this Head all Laws which determine the Quantity and Meaſures of Grants and Legacies, that lay Reſtraints upon the Power of making Wills, or that put a Stop to Exceſs in dedicating Things to pious Uſes [m]. As, alſo, Laws that forbid certain Subjects to poſſeſs certain Kinds of Goods; as, in *India*, no private Subject is allow'd to keep an Horſe and an Elephant, the Prince only enjoying that Privilege [n].

[a] Vide *Plin.* Nat. Hiſt. *Lib.* vi. *Chap.* xxiii. The *Arabians* are certainly the richeſt People in the World, for they are Merchants that exhauſt the Wealth of the *Roman* and *Parthian* Empires: They are continually importing among us the Produce of their Seas or Woods, and never buy any Thing of us in Return. *N. H. Lib.* vi. *Chap.* xxviii. Every Year conſtantly the *Indies* drain us of little leſs than 500000 *Seſterces*, beſides that the Commodities we have from thence ſell here for an hundred Times double the Advantage they do there. *Vide Lib.* xii. *Chap.* xviii *N. H.*

[b] Manut. *de L. L. Roman.* Macrob. *Saturnal.* Lib. iii.

[c] Plato *de L. L.* Lib. vi. 870. D. E. Ed. *Francof.*

[d] Vide *Ælian.* Var. Hiſt. *Lib.* iii. *Chap.* xxxiv. *Garcileſſ* de la Vega, Com. Roy. *Lib.* v. *Chap.* xi.

[e] Vide Lib. xi. Tit v. *D. & C.* Lib. iii. Tit. xxviii. de Aleatoribus. *Gratian.* Chap. vii, viii, ix. Diſtinct. 86. As, alſo, what I have ſaid in my Treatiſe on Gaming, Lib. iii. Chap. ix.

[f] *Heraclides* de Politiis.

[g] *Polyb.* Lib. x. Excerp. Peireſc.

[h] *Lucian* in Antholog Tit. ii. Pag. 834. Ed. *Amſt.*

[i] Vide *P. Manutium de L. L.* Rom. *Numb.* xxxvi. 7, 9. *Ariſtot.* Polit. *Lib.* ii. *Chap.* v, vii. *Lib.* vi. *Chap.* iv, v.

[k] Vide *L. L. Burgund.* Tit. lx xiv. § 1.

[l] *Plin.* Lib vi. Epiſt. xix.

[m] *Exod.* xxxvi. 6.

[n] *Strabo*, Lib. xv. Pag. 484. Ed. *Gen.*

"vagant Way of living, corrupts the pureſt Minds. Their only Buſineſs is to be rich; to accompliſh which, they borrow, they "cheat, and uſe a thouſand other mean and unworthy Artifices. *Avantures de Telemaque*, Tom. v. Pag. 120, 121. Hiſtory informs "us (to borrow Mr. *Le Clerc*'s Words, in the *Parrhaſiana*, Tom. ii. Pag. 275, &c.) that *Julius Cæſar* had never attempted to deſtroy "the Liberties of his Country, had he been able to have pay'd the Debts which he had contracted by his exceſſive Prodigality; or had "known how to have ſupported his expenſive Way of Living. (See *Suetonius*, Chap. xxx.) Abundance of People ſided either with "him, or *Pompey*, only becauſe they wanted to ſupply their Luxury, and were in Hopes of getting, by the Civil Wars, enough to "ſupport and maintain their former Pride and Greatneſs. (See *Salluſt. ad Cæſarem, de Republ. Ordinanda*, and the other Authors of "that Time.) One may ſay the ſame Thing of all Sorts of Crimes, which every Hour, as it were, knock at the Door of indigent "and proud Perſons, and which ſeldom are deny'd Entrance, when they come attended with a large Sum of Money. To prevent "theſe Evils and Diſorders, there is nothing ſo uſeful as good *Sumptuary Laws*, that reſtrain Luxury, and a rigorous putting them in "Execution. By which---*you deprive Money, which is the moſt pernicious Thing in the World, of its Uſe and Luſtre---Id ita eveniat, ſi "pecuniæ, quæ maxima omnium pernicies eſt, uſum atque decus demſeris.* (Salluſt. Orat. i. *de Republ. Ordin.*) By that, alſo, we procure "ſtill another Advantage to the State, which is of no ſmall Conſequence, and that is, that People marry on much eaſier Terms, "when a moderate Expence is ſufficient for the Maintenance of a Family, than when they cannot handſomely avoid a greater; "which, however, there are Abundance of honeſt People, which are not able to be at. *Auguſtus*, alſo, being deſirous to reform the "Manners of the *Romans*, among other Laws that he either made or renew'd, eſtabliſh'd at the ſame Time both the *Sumptuary Laws*, "and that *de maritandis ordinibus*, which oblig'd the *Romans* to marry. (See *Sueton.* Chap. xxxiv.) If he could not oblige the *Romans* to obſerve the ſecond, it is very likely, it was becauſe the firſt was not ſevere enough. (See *Tacit. Ann. Lib.* ii. Chap. xxxvii.) "We muſt obſerve farther, that Abundance of People who decline Marriage for the foreſaid Reaſon, make no Scruple to commit all "Manner of Debauchery, which tends to the utter Ruin both of private Families, and the Commonwealth, and which might be "prevented by *Sumptuary Laws*." See what Mr. *Le Clerc* adds concerning the Republicks of *Venice* and *Geneva*. To make theſe *Sumptuary Laws* more effectual, Princes and Magiſtrates themſelves, *ſhould*, as the Author of *Telemachus* obſerves, "*By the Example of their "own Moderation, put thoſe out of Countenance that love Extravagance, and encourage the Prudent, who would eaſily ſubmit to follow the "Pattern of an honeſt Frugality.*" To this we may add the fine Paſſage of *Montaigne*'s, on the ſame Subject. "The Manner, ſays "he, in which our Laws endeavour to regulate the vain and fooliſh Extravagance in our Clothes and Eating, ſeems to be contrary to "the Intention of it. The true Way would be, to raiſe in Mankind a Contempt of Gold and Silks, as Things vain and uſeleſs; "but we enhance their Honour and Value which is a ridiculous Method of putting People out of Conceit with 'em. For ſuppoſe, "that none but Princes were allowed to eat Turbot, and to wear Velvet, and gold Lace; and the People prohibited the Uſe of 'em; "what would it be but to bring thoſe Things into Credit, and make every Body deſirous of having them? Let Princes boldly part "with theſe Marks of Grandeur, they have enough of others; ſuch Exceſſes are more excuſable in another Perſon than a Prince---- "'Tis ſtrange how eaſily and ſuddenly Cuſtom aſſumes an Authority in theſe indifferent Matters: They had ſcarce worn black Cloth a "Year at Court for Mourning for *Henry* II. but Silks were already grown ſo very contemptible in every Body's Opinion, that whoever "appear'd dreſs'd in 'em, was immediately taken for ſome Citizen or Tradeſman. At laſt none but Phyſicians and Surgeons wore "'em; and tho' every Body went dreſs'd pretty near alike, yet there were beſides apparent Diſtinctions enough of Mens Qualifica- "tions.——Let Kings begin to leave off theſe Expences, and it will be done in a Month, without either Edict or Ordinance; we "ſhall all follow after. The Law ſhould expreſs the contrary, That, all except Whores and Watermen, were prohibited to wear Scar- "let, and Gold and Silver. By ſuch an Invention *Zaleucus* reform'd the corrupted Manners of the *Locrians*, Eſſay, Lib. i. Ch. xliii." We ſhall find, alſo, ſome good Reflections on *Luxury* in general, in a *French* Treatiſe on this Subject, publiſh'd in 1705; of which an Extract appear'd in the *Paris Journal* for the ſame Year, Pag. 919. *Edit. Holl.*

Moreover,

Moreover, Laws againſt idle [1] and lazy People, ſuch as was that among the *Nabathæi*, by which *every Man was publickly puniſhed who waſted his Eſtate* [a]. And thoſe *againſt Perſons who ſuffered their Eſtates to run to Ruin purely by Careleſneſs and Neglect* [b]. And that made by *Amaſis* King of *Egypt*, by which *every Subject in his Kingdom was obliged every Year to make it appear to the Governor of the Province he liv'd in, what Trade or Profeſſion he was of, making it Death for any Man to refuſe to obey* [c]. To this Head, alſo, belong thoſe Laws, by which Subjects are forbid the Acquiſition of certain Goods, and to increaſe their Eſtates certain particular Ways. So *Pliny* ſays, there was a Decree of the *Roman Senate*, to *forbid the digging after any Kind of Ore or Metal in* Italy, *tho' it was very well known that no Country had greater Abundance or Variety* [d]. To this Head belongs, alſo, the famous *Venetian* Law, *by which no Subject of that State can, either by Will or Sale, or any other Way, upon any Account, leave, ſell, or alienate the Perpetuity of any immoveable Goods to the Church, or Perſons Eccleſiaſtical, without Leave from the Senate* [e]. And laſtly, the Laws that forbid the Exportation of Money, and command that all Trade with Foreigners ſhall be managed by Barter only, and Exchange of Commodities.

IV. But Secondly, a farther Right which belongs to the Sovereign is, that he can take away Part of the Goods of the Subject by way of Tax. For Taxes moderately impoſed, and faithfully laid out in the Service of the Publick, are only the Wages which every Man pays the Commonwealth for the Defence and Security of himſelf and Fortunes; and to maintain the Expences unavoidably neceſſary to that End. And therefore when *Nero* propos'd to give Orders to lay aſide all Sorts of Taxes, ſuppoſing that *that would certainly be the nobleſt Grant he could ever poſſibly make to the World, the Senate put a Stop to his Heat, by ſhewing him that the Empire muſt be diſſolv'd and ruin'd, if he cut off the Revenues from it which ſupported it* [f]. Which if a Man would be at the Trouble fairly to conſider, he will be forced to confeſs, that the Complaints of the People (who are apt to think the Burthen of the Taxes the great Occaſion and Cauſe of all their Miſeries) are generally very unjuſt, as well as very impudent [g]. But their Complaints are moſt groundleſs and intolerable, *that wear whole Eſtates upon their Backs* (as *Plautus* ſays [2]) *and yet, when they are to be tax'd, pretend they are not able to pay, though, at the ſame Time, they find enough to allow their Vanity, which lays a much more unreaſonable Tax upon them, than the State.* Archidamus *in his* Peloponnelian War, *when his Allies deſired him to ſettle ſome ſtated Proportion for their Contributions*, told them, that *War could not be carried on by fix'd Allowances*, for that *there is no determining before-hand, what Supplies of Money will be neceſſary* [h]. *It being impoſſible for them who engage in a War to know what will be the certain Event of it* [i]: For it very ſeldom happens, that, as *Cato* ſaid, *a War will maintain itſelf.* And indeed in general, the publick Expences cannot be confin'd within any particular Bounds, becauſe of that Variety of Caſualties and Accidents which happen, and which do not depend upon ourſelves, but our Neighbours which will always demand Supplies of Money to be defeated or avoided [k].

[a] *Strabo*, Lib. xvi. Pag. 539. [b] Vide *Gellium*, Lib. iv. Chap. xii. [c] *Herodot. Euterpe.* [d] *Plin.* Nat. Hiſt. *Lib.* iii. *Chap.* xx. [e] *Mauroceuus*, Hiſt. Ven. *Lib.* xvii.

[f] *Tacit.* Ann. xiii. Chap. l. *Vide Hiſt.* iv. *Tac.* Chap. lxxiv, where *Cerealis* tells the *Treviri*, All the Harm we have done you by our Right of Conqueſt, hath been only to defend and ſecure your Peace; for it is impoſſible to ſupport Peace in the World without War, to maintain a War without Money, or to have Money without a Supply from Taxes. *Iſocus*, Orat. vi. He thought that he ought to be very thrifty in his own Expences, and reſerve all that was left for the Uſe of the Publick, that there might be enough to defray the Charges of the State. *Themiſtius*, Orat. xiv. The Laws forbid every Man who is return'd into the Exchequer, to take any Place of publick Truſt, before he hath diſcharged that Debt. [g] Vide *Hobbes* de Cive, Chap. xii. § 9. [h] *Plut.* Apophth. Pag. 219. & in *Craſſus*. [i] *Procop.* de Bello *Perſic.* Lib. ii. Chap. xxvi.

[k] It will not be impertinent to the Diſcourſe, or difficult to apply to any *Preparations* for War, what is mention'd by *Nicetas Choniates*, Lib. i. "The Emperor *Manuel Comnenus* was over-perſuaded by his Treaſurer *Joannes Puzenus* to apply the Money that was "uſually raiſed to maintain the *Navy*, to his own Uſe, and bring it into the *Exchequer*. The Reaſons he gave to induce him to it were, "That

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[1] "Idleneſs, or Want of honeſt and uſeful Employment, is the Source of an infinite Number of Diſorders: The human Mind "being of ſuch a Nature, that it cannot remain in a State free from Action; and if it is not employ'd in ſomething good, it inevita- "bly applies itſelf to what is ill: For, tho' there are ſome Things of an indifferent Nature, they become ill when they wholly engroſs "the Mind: If it is true, however, that there are idle Perſons in the World, who buſy themſelves more about indifferent Things "than ill ones.——One cannot commend thoſe who ſpend their whole Time in Things neither uſeful to Man, nor pleaſing to God; "if it is true, as there is no Doubt of it, that Men were born to do Good. But——we ſee by Experience, that thoſe who apply "themſelves to no honeſt Calling, generally run into Debauchery, or Gaming.——It were then to be wiſh'd, that there were Laws "againſt Idleneſs, to prevent its ill Conſequences, and that no Perſon were ſuffer'd to live without having ſome honeſt Buſineſs to fol- "low, either of the Mind or Body.——Thoſe who aim at Employments, either Political, Eccleſiaſtical, or Military, ought not to "be ſuffer'd to ſpend in Idleneſs their youthful Time, which is moſt proper for the Study of Morality, Politicks, Religion, and the "Art of Reaſoning, and, if they pleaſe, Mathematicks, and Hiſtory. There are ſtill other Perſons who betake themſelves to nothing "but living upon the Eſtates that their Relations left 'em, and care not for learning any Thing, being well enough ſatisfied with them- "ſelves, if they do not conſume their main Stock. All the Virtue of thoſe Men conſiſts in regulating their Expences, ſo as not to live be- "yond their Income. But if their Eſtates are conſiderable, it infallibly happens that they make an ill Uſe 'em, and plunge themſelves "into a thouſand Debaucheries, which make 'em grow uſeleſs both to others and themſelves.---We muſt compel 'em to follow the "Advice which *Ovid*, who had but too well known the ill Effects of Idleneſs, gives in his *Remedia Amoris*, Ver. 135.

Ergo ubi viſus eris noſtræ medicabilis arti,
Fac monitis fugias otia prima meis.
Hæc ut ames faciunt, hæc ut fecêre tuentur,
Hæc ſunt jucundi cauſa cibuſque mali,
Otia ſi tollas, periêre Cupidinis arcus
Contemptæque jacent, & ſine luce faces.

When you ſeem fit my healing Art to try,
From Idleneſs at firſt be ſure to fly:
'Tis that, that in your Boſom rais'd the Flame,
And with freſh Fuel ſtill ſupplies the ſame.
Be ſtill employ'd, and *Cupid*'s Darts and Bow,
Together with his Torch, will uſeleſs grow.

Parrhaſiana, Tom. ii. Pag. 279, &c. See the Law of the *Egyptians* mention'd above, Book iii. Chap. iii. § 2, & *Herodot.* in *Euterp.*

[2] In *Epidicus*, Act. ii. Scen. ii. Ver. 42, &c.

V. How-

V. However, a wise Prince will so far comply with the querulous Humour of his People, as to take care that his Taxes be collected with as little Disturbance, and as much Gentleness as possible. Now the Generality of People think it harder to be obliged to part with what they look upon to be their Property, than to be denied the Appropriation of some few particular Things [a]. 'Tis generally true, *That Men have hardly any Sense of publick Calamities* (*as* Hannibal *told the* Carthaginians) *but when they affect them in their private Fortunes; and there is no Loss they feel so much, as that which touches any Part of their own Estates.* And, therefore, some have thought it the best Way to provide for that Inconvenience once for all, and set aside a Portion of their Estate, purely for the Use and Service of the Publick [b]. Some again are of Opinion, that the Generality of the People are burthen'd less by Taxes rais'd by [1] Custom or Excise, than when levy'd in a Way of Subsidy and Tribute. In laying Impositions or Customs upon foreign Commodities imported, it should be consider'd, whether the Commodities are for necessary Use, or only for Luxury. If they are of the latter Kind, the Custom may very justly be laid heavier, to prevent and suppress Extravagance and Riot; and because the Rich, or they who enjoy large Privileges otherwise, and contribute little to the Publick, are generally the only Buyers. It should, also, be consider'd farther, whether the same Commodities might not be produc'd at home, or wrought to the same Perfection, by the Industry and Application of our own People. And, if it appears they may, the *Imposts* ought to be rais'd higher upon them, especially upon Commodities which serve only to supply Luxury and Vanity, and make us pay Tribute to other Nations, *not for our Land, indeed, or Possessions, but what is much worse, for our Folly* [c]. As to the Exportation of Commodities of our own Growth, it should be considered, whether it be the Interest of the Commonwealth, that they should not be exported; or whether it be necessary to lend them to foreign Markets, that the Subjects may have a Way to continue Trade, or increase their Wealth. The first naturally raises the Customs upon the Commodities, the second lowers them. But besides, it may be further consider'd, whether our Commodities are absolutely necessary in other Countries, and whether they are to be had from any other Place. For all know the Industry and Diligence of the Merchant, and what Difficulties and Dangers he will venture himself in, upon the Hopes of Advantage; and that, if the Impositions upon their Commodities be too high in one Place, the Market will soon be carried to another; or else, that they who buy, will content themselves to be without the Commodities; as *Gallianus* once said, *What can't we live without this* Egyptian *Linen, and can't the Commonwealth be safe without these Robes of Honour?* And, in my Opinion, *Hesiod*'s Rule may be very well applied to Customs, πλέον ἥμισυ παντὸς [2], *The Half is more than the Whole.* For a good Harbour is worth but very little, when it hath lost its Trade. And such a Constitution too as *Nero* made, might possibly deserve Consideration, *That Vessels of Trade should not be taken into the Valuation of Estates*, and that the Merchants should not be obliged to pay Taxes for them [d]. The Government should, also, provide against the Frauds which Collectors of Customs usually have, to promote their own private Gains, and take care to hinder their Importunity and Impertinence, and the Trouble they give Subjects and Traders, which are borne with more Impatience and Regret, than the Customs themselves. Thus *Dio Cassius*, Book xlii, saith, *That* Cæsar *delivered* Asia *from the Exactions and Oppressions of the Publicans, and reduced all their Customs into a Form of Tribute* [e]. So *Tacitus* [f] commends an Edict of *Nero*'s, *by which he commanded, that the Laws re-*

[a] That the State had not always Occasion for a *Fleet*; and that the Charges to keep it were constant, and ran generally very high; and that, therefore, it would be a better Way to call the Money into the *Exchequer*; and whenever the Posture of Affairs made a *Fleet* necessary, the *Emperor*'s Coffers would be full enough to defray the Expences of it. The Proposition took, and *Puzenus* was applauded for an extraordinary Man, and look'd upon to have more than common Sagacity and Skill in the Management of publick Affairs. But, in reality, the greatest Enemy to the Commonwealth could not have given more pernicious Advice. For he deceived the Emperor two Ways; on the one Hand, by misrepresenting the Greatness of the Expence; and on the other, by falsely stating the Easiness of the Charge it might be reduc'd to And upon this Counsel, rashly given, and obstinately adher'd to, the Provinces which lay upon the Sea were continually afterwards infested with Piracies. And therefore the Historian infers, that the Calamities which followed, might as justly be charged upon the Author of that Advice, as a Fire is as much upon the Person that does not put it out when he can, as him that at first kindled it." Vide *Niceph. Gregoras*, Lib. vi, who gives an Account of some Instances, in the publick Affairs like this, in the Time of *Andronicus Paleologus*.

[a] Vide *Livy*, Lib. v. Chap. xxiii. Lib. xxx. Chap. xliv. *Plut. Camillus.* Where the People took it very ill, that they were forced to give back a Tenth Part of the Booty that had been shared among them. *Homer*. Iliad. i. Ver. 125, 126.

Ἀλλὰ τὰ μὲν πολίων ἐξέπραθ', μετὰ τὰ δ' ἔδασσαι,
Δαὸς δ' οὐκ ἐπέοικε παλίλλογα τοῦτ' ἐπαφείειν.

W'have shar'd the Spoils of the victorious Field,
And none will to a new Division yield.

Claudian de Laudib. Stilicon. Lib. i. Ver. 379, 380.

Graviorem amissa dolorem,
Quam necdum quæsita, movent.

The Loss of our Enjoyment grieves us more
Than not to have enjoyed. ———

[b] Vide *Diodor. Sicul.* Lib. i. Chap. lxxii. *Paulum Warnefridum* de Gest. *Longobardorum*, Lib. iii. Chap. xvi. [c] *Dio Chrysost.* Orat. lxxix. p. 664. D. Ed. *Morell.* [d] *Tacit.* Ann xiii. Chap. li. This Edict only affected the Corn-Merchants. See JOSEPH AVERANI, *Interpretat Juris*, Lib. ii. Chap. xiii. § 15. [e] *Vide* Lib. xxxix Tit. iv. l. 12. *Princip. D. de Publicanis.* [f] *Tacit.* Ann. xiii. d. l.

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[1] *Quintilian*, in one of his Declamations, justly observes, That there is no Contribution more equitable, or less liable to be complained of, than that which is raised by Way of Customs; because it proceeds from a future Gain. I shall give the Reader his preceding Words, where the Necessity of Taxes in general, is prov'd in a very concise Manner: *Sed Respublica quoque, cum qua queri poterit, habet quod respondeat. Primum illud; necessaria esse vectigalia civitati: exercitus stipendium accipiunt, bella quotidie geruntur, adversus barbaras & bellicosissimas gentes: defendimus ripas, & flumina, & litora: huc adjice & illud: aliquid & spectacula: opus est vectigalibus. Inter vectigalia porro quod æquius inveniri potest, & sine majore hominum querela? quanto illud injustius videri potest, quo partem hereditatis sibi vindicat? at plurimùm in hoc vectigal confert negotiatio: quidquid est, de futuro lucro est.* Declam. CCCXLI. Pag. 714. *Edit. Burman.*

[2] Vide *Hesiod.* Oper. & Dier. Ver. 40. ubi vid. *Cleric.*

latius

lating to the Taxes, that had been out of uſe till then, ſhould be entirely laid aſide; and that no Suit for any Tax which had been dropp'd, ſhould be revived after the Year was expired; and that the Magiſtrate ſhould have a Power extraordinarily to paſs Judgment againſt the Publicans. Neither indeed ſhould the *Exchequer* itſelf be always allowed too much Favour, becauſe that *ſeldom loſeth a Cauſe, but under a good Prince*, and becaule *there are never wanting thoſe who have Impudence enough to aſſiſt all its Pretenſions* [a].

VI. But in levying Taxes, and indeed, any Sort of Impoſition upon the Subjects, particular Care ſhould be taken not to give any juſt Occaſion of Complaint, which will be unavoidable where the Taxes are laid unequally. For, as *Hobbes* very well obſerves, *A Burthen which the whole Body of Subjects may poſſibly think eaſy and gentle, will, if any conſiderable Number releaſe or excuſe themſelves, lie heavy and inſupportable upon the reſt* [b]. For, generally, it is not the Tax itſelf ſo much as the Diſproportion and Inequality of it, which ſits uneaſy upon the People, either from the Diſcontent that followeth upon the Injury, or from Envy that others ſhould be excuſed. And indeed, ſince all which the Subjects pay the Commonwealth, in reality, is nothing elſe but the Price of Peace, 'tis but reaſonable, that ſuch as have an equal Share in the Peace, ſhould pay equally for it, by aſſiſting the Commonwealth, either with their Money or their Perſons; ſo that all Immunities and Privileges granted in Commonwealths to particular Men, or Orders of Men, are no further reaſonable, than as they who enjoy them balance them, by the extraordinary Merit of the Service they do [c]. But, to diſcover in what this Equality conſiſts, it muſt carefully be obſerved, that the Enquiry is not after Equality in Money, but in Charge and Burthen; or in other Words, it is not neceſſary to this Equality I ſpeak of, that every Man ſhould pay an equal Sum of Money, but that the Share every Man is to pay, ſhould not lie heavier upon one than another, which may eaſily enough be effected, by making the Proportions equal, between the Burthen of the Tax and the Benefit of Peace. For tho' all equally enjoy Peace, yet they do not all make the ſame Advantages by it. Some get much more than others; and again, ſome ſpend much more than others. And from hence *Hobbes* makes an Enquiry, "Whether the "Subjects ought to contribute to the Publick, "in Proportion to what they get, or what they "ſpend? Or, whether a Man ſhould be taxed "according to what he hath coming in, or ac"cording to what he conſumes?" Where firſt I think I may ſay, that, ſince every Man is ſecured in his Property by the Care the Commonwealth takes of him, he may juſtly be taxed in Proportion to his Income, as *Servius Tullius* ſaid, in Defence of the Inſtitution of the *Cenſus* [d]: *It is very juſt, I think, and very much for the publick Good, that ſuch as have large Fortunes ſhould pay largely, and ſuch as have leſs in a due Proportion.* And thus all Subſidies levied upon extraordinary Exigencies in the Commonwealth, ought to be laid according to the Value of Eſtates. And then, ſecondly, ſince every Man's Life is defended by the Sword of the Commonwealth, and Life is equally dear to Poor and Rich, they are both equally obliged to attend the Service of the Wars, and to pay an equal moderate Tax upon that account, ſuch as a *Poll-Tax*, in which the Rich pay no more than the Poor. But becauſe it is owing, in like Manner, to the publick Care of the Commonwealth, that the Subjects have the Advantage and Opportunities of raiſing Eſtates by their own Induſtry, the great Difficulty in this Caſe is, how the Tax upon this Account ought to be laid? And perhaps, the moſt convenient Way may be, to tax Men according to what they conſume, rather than what they get; eſpecially, ſince Men generally ſpend in Proportion to what they have coming in. For, if the Tax be laid according to what People have coming in; and it ſhould happen, that ſome who have equal Incomes, ſhould yet have unequal Poſſeſſions (which is as common as it is for one Man to be frugal, and lay up what he can, and for another to ſpend what he gets in Waſte and Luxury) the Conſequence will be, that they who equally enjoy the Benefit of the common Peace, muſt yet bear an unequal Share of the Burthens of the Commonwealth. For Inſtance, here are two Perſons which get equally an Hundred Pounds a Year, and one of them ſpends conſtantly Forty of it, and the other perhaps Fourſcore; ſince both of them equally enjoy the Benefit of Peace, it ſeems reaſonable that both ſhould pay equally for it. But then, in this there will be theſe two Inconveniencies: Firſt, That it will be very difficult for the Government to diſcover what each Subject gets every Year by his Induſtry; beſides, that there cannot be a Review made ſo often, of what every Man is worth. And, Secondly, That if the Tax be levied at the Year's End, when both have made up their Accounts of what they have received, and how much expended, and the Tax be laid upon each of them in Proportion to what they have remaining of the laſt Year's Income; 'tis manifeſt, that one muſt pay double as much as the other, though both equally enjoyed the common Peace. And what is worſe, the one ſuffers for his Parſimony, and the other is eas'd by his Extravagance. And therefore it muſt be the beſt Method to lay the Tax upon the Things which are to be conſumed, and then every Subject will inſenſibly pay his Share to the Publick, in Proportion to his private Conſumption, not indeed for what he now actually is, but for what, by the Protection of the Commonwealth, he was formerly poſſeſſed of; and to that which is paid to the Publick, will be look'd upon to be Part of the Price of the Things that are conſumed [e]. But what hath been ſaid before, in other Reſpects, of the Cuſtoms, may, alſo, be applied to Taxes, and all other publick Impoſitions [f]. What

[a] *Plin.* Panegyr. Chap. xxxvi. [b] *Hobbes* de Cive, Chap. xiii. § 9 [c] Vide *Diodor. Sicul.* Lib. iv. Chap. lxxiii. de *Macbon.* & *Podalir. Iſocr.* in laudat. *Buſirid.* de Priv. Sacerd. *Egyptior.* p. 389, 390. [d] *Dionyſ Halicarn.* Lib. iv. p. 215 Edit *Sylburg.* [e] Beſides, theſe Contributions, by Way of *Exciſe*, are a Means to reſtrain the Excels of Luxury and Profuſeneſs. People need only forbear magnificent Feaſts and Entertainments, and wearing fine Clothes, and then they will not pay much. But if they will, at any Rate whatſoever, indulge their Appetite, and humour their Vanity, they ought to blame nobody but themſelves. See *Hochſtetteri Collegium Pufendorfianum*, &c. *Exercit.* xi. § 12 [f] Vide *Tacit.* in *Agricola*, Chap. xix. Where he ſays, that if *Agricola* raiſ'd the Tribute upon the *Britons*, or obliged them to pay a greater Quantity of Corn, he made them amends, by allowing 'em proportionable

What Ways of raiſing Money Neceſſity may ſometimes force a Government to take, may be ſeen at large in *Ariſtotle*'s OEconomicks, *Lib.* xi. *Chap.* i. I cannot, by the Way, forbear mentioning a very odd Sort of a Tribute, which the *Yuca*'s of *Peru* laid upon the pooreſt of their Subjects, which was to bring every Year to the Governors of their Provinces a certain Number of *Gnat*'s Horns; the Deſign of which might poſſibly be, either that no Body ſhould think himſelf exempt from paying Taxes, or elſe perhaps to free themſelves from thoſe Inſects [a].

VII. [b] *Sovereign*, or *Tranſcendental Propriety* (which is the third Head) is what ſome pretend to be afraid of, more upon the Account of the Name than the Thing [1]. The *Sovereign* Power, they ſay, was erected for the common Security, and that alone will give a Prince a ſufficient Right and Title, to make uſe of the Goods and Fortunes of his Subjects, whenever Neceſſity requires; becauſe he muſt be ſuppoſed to have a Right to every thing, without which the publick Good cannot be obtained. But the *tranſcendental Propriety* is too arrogant and ambitious a Name; and which ill Princes may ſometimes abuſe to the Damage and Ruin of their Subjects. But as it is trifling to diſpute about Words, ſo I think there can be no Abſurdity or Danger, in giving a particular Name to a particular Branch of the Sovereign Power, as it exerts itſelf in a certain Way, upon certain Things. What the Force of this *Propriety* is, I ſhall now endeavour to explain [2]. It will be confeſs'd, agreeable to natural Equity, that when Contributions are to be made for the Preſervation of ſome particular Thing, by Perſons who enjoy it in common, every Man ſhould pay his *Quota*, and one ſhould not be forced to bear more of the Burthen than another. And the ſame holds to be Equity, alſo, in Commonwealths; but, becauſe the State of a Commonwealth may often be ſuch, that either ſome preſſing Neceſſity will not give leave, that every particular Subject's *Quota* ſhould be collected, or elſe, that the Publick may be forced to want the Uſe of ſomething in the Poſſeſſion of ſome private Subject; it muſt be allowed, that the ſovereign Power may ſeize upon it, to anſwer the Neceſſities of the State. But then, all above the Proportion that was due from the Proprietors, is to be refunded to them by the reſt of the Subjects. For Example, when a Town is to be fortified, the Fields and Gardens of private Subjects muſt be laid open, and perhaps their Houſes be pull'd down, to give room for the Works and Ditches. In Sieges, Houſes and Trees which belong to private Perſons are taken down, that the Enemy may not be ſhelter'd by them, or the Beſieged incommoded. Materials, private Men lay by for their own Uſe, may be taken, and made Uſe of in publick Fortifications. In general Scarcity, the Store-houſes and Granaries of private Subjects are ſet open. In the Extremities of State, Monies entruſted with the Government are ſeized. And private Men's Coffers are rifled, when they are not kind, or publick-ſpirited enough, to offer their Money voluntarily by Way of Loan; as *Xenophon* ſays *Cyrus* did [c]. Perhaps what *Cæſar* did of this Kind, when he came to *Rome*, after the Defeat of *Pompey*, is not to be juſtified, though he be ſuppoſed a lawful Prince. For as *Dio* relates it; "He pretended to borrow the publick Money, "when he found there was no other Way of "getting it, but continued to threaten Force, "and to demand it as his Due; and yet was re- "ſolved never to pay it back [d]." So again, if there be no other Way to oblige a common Enemy to retreat, our own Country is to be laid [3] waſte, and all things which might be ſerviceable, to be carried away, or left unfit for Uſe [e]. From all which it appears, that *tranſcendental Propriety* never takes Place, but in the Extremities and Neceſſities of the Commonwealth. Though *Bœcler*, in his Comment upon *Grotius*, Lib. i. Chap. i. Sect. 6, obſerves, "That the "Neceſſity here meant hath its different De- "grees, and that it is not only at the laſt "Extremity, this Power may be made uſe of." But neither, on the other Hand, is this Power to be extended too far; but ſhould be reduced to Equity, as nigh as it is poſſible. And a famous Example of this we have in *Livy*, Lib. xxxi. Chap. xiii. From hence it may, alſo, be further inferr'd, that the Prince himſelf cannot releaſe a Subject from the Force of this [4] *tranſcendental Propriety*; becauſe the publick Extremities of the Commonwealth muſt always be ſuppoſed to be unanſwerable Exceptions to all Sorts of Privileges. For it is a Contradiction to pretend to be a Subject, and yet to inſiſt upon a Right

proportionable Favours, and by taking away all thoſe Exactions and Oppreſſions which were more inſupportable than the Tribute itſelf; for they had been forced before to wait ridiculouſly at the Granaries, though they were ſhut againſt them, and to buy their own Corn, and ſell it again at a ſet Price; and it had been common to cauſe the neighbouring Villages to carry their Corn to the moſt diſtant Garriſons, and in the worſt Ways, that ſo what lay open for all, might turn to the Advantage of a few. *Vide* Cic. *in Ver.* 3. And it was too ſevere an Anſwer *Peſcennius Niger* gave the *Jews*, when they begged him to leſſen the Taxes upon their Eſtates: You would have me take off the Tax upon your Lands, but I aſſure you, if I could, I would lay another upon the Air you breathe in, *Spartianus*, Chap. vii.

[a] *Garcileſſ. de la Vega*, Lib. v. Chap. vi. Moreover, as to what relates in general to the Manner in which a Prince ought to manage ſo as to make the Revenues of the State conſiderable, without oppreſſing the People; ſee *Charron de la Sageſſe*, *Liv.* iii. Chap. ii. Sect. 21. the *Parrhaſiana*, Tom. i. Pag. 274, *&c.* and Mr. *Buddæus*'s *Philoſophe Pratique*, Part iii Chap. v. Sect. 7, & Lib. viii. Chap. v, vi. [b] *Dominium Eminens.* [c] *Xenoph. Cyropæd.* Lib. viii. Chap. ii. [d] *Dio Caſſius*, Lib. xlii. [e] *Cneius*, when the *Romans* were making War upon him, agreed with the *Achaian* Magiſtrates, that all Suits for Debts ſhould be put off, and no Man ſhould be obliged to make any Payment till the War was at an End, *Vid.* Polyb. *Excerp. Leg.* 144. Chap. iii. *V.* Lib. xviii. Tit. iii. l. viii. *D. de leg. Commiſſoria*, *Curtius*, Lib. iii. Chap. iv. See *Sueton.* Chap. xlii. of *Jul. Cæſ.* the Law made by Cæſar about the Payment of *Debts*.

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[1] See above, in Book iv. Chap. vi. Sect. 3, *&c.* See Mr. *Buddæus*'s Hiſtory of the Law of Nature, in his *Selecta Jur. Net.* Sect. 53. Beſides, we muſt remember, that every thing which lies in the Territories of a State, and has no particular Proprietor, belongs originally to the State, unleſs it is otherwiſe left in common by a conſtant and received Cuſtom. See Mr. *Titius*, in his *Specimen Juris publici Romano-Germanici*, Lib. ii. Chap. iii. And the *Jus Publicum Univerſale* of M. *Boehmer*, Part. Spec. Lib. ii. Chap. x

[2] See *Grotius*, Book i. Chap. i. § 6, and Chap. iii. § 6; and Book ii. Chap. xiv. § 7, 8; and Book iii. Chap. xix. § 7; and Chap. xx. § 7, *&c*

[3] Or elſe they overflow the Country, to prevent the Enemy from advancing; as is often practiſed in the *United Provinces*.

[4] See M. BOEHMER's *Jus Publicum Univerſale*, Part. Spec. Lib. ii. Chap. iii. § 64, 65.

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utterly inconſiſtent with common Safety. But, however, without Diſpute, they who have loſt or ſacrificed their Fortunes to the publick Safety in ſuch Extremities, ought to have a Reſtitution or Satisfaction made them, as far as it is poſſible by the whole Commonwealth [1]. Some indeed will make this Exception, when, though the Damage ſuſtained be unavoidable, it might yet have been eaſily foreſeen and prevented. For Example, when Houſes built in the Suburbs are pulled down in the Time of War. For the Proprietors of theſe can demand no Compenſation for their Loſſes; becauſe they knew before, that they could not build in thoſe Places upon other Terms. And, conſequently, by building there notwithſtanding, did, in a Manner, tacitly conſent to it But much leſs can any *Compenſation* be allowed, where the Neceſſity was univerſal, and every Subject ſuffer'd equal Loſs. For the Publick is concern'd no farther, than to take care that the Subjects be not injured by any ill Conduct in Government, but never obliged itſelf to bear all the Damages they might at any time ſuſtain [a].

VIII. As to the publick Goods which belong to the Commonwealth itſelf as ſuch, it is to be obſerv'd, that, in ſome Kingdoms, they are divided into two Parts, one of which is intended for the Maintenance of the Prince, and the other to defray publick Expences for the Preſervation of the State [2]. So *Dionyſius Halicarnaſſeus* makes a Diſtinction between the Δημοσια κτησις, or the *publick Poſſeſſions*, and the Γῆν ἀπὸ βασιλέως κλῆρος, the *Patrimony of the Prince* [b]. And in *China* one Part in nine of the Lands belongs to the *Emperor* [c]. By that Part intended to maintain the Prince, I mean, that the Prince in ſome States hath certain Goods aſſign'd him out of the Publick, the Income of which is to maintain the Expences of his Palace. And of all theſe the Prince hath the full Profits, and may diſpoſe of what he hath coming in from them, as he pleaſes; and what he lays up out of his Income, where the Laws of the Kingdom do not provide otherwiſe, makes an Acceſſion to his own *private Patrimony* [d]. The Emperor *Pertinax* [e], upon this View, refuſed to have his Name put upon any of the Imperial Poſſeſſions; becauſe, as he ſaid, *They were not the* Emperor's *Propriety, but the common publick Eſtate of every* Roman. In *Peru*, under the Empire of the *Yuca*'s, the Lands were divided into three Parts; one Part belong'd to the *Emperor*, another to their *God* the Sun, the third to the *Commonwealth*; and therefore, the Subjects paid no Taxes out of theirs [f]. But ſecondly, the Goods which are to defray the Expences for the Conſervation of the State, are only barely intruſted to the Care and good Huſbandry of the Prince, who ſhould always have eſpecial Regard for the publick Goods, and expreſs the ſame Caution and Conſcience as a Guardian ought to have for the Eſtate of his Ward. From whence it may be eaſily inferr'd, on which Side the Right lies, to what a Prince gets or lays up, in the Time of his Reign, on his, or on the Commonwealth's. For, if a Prince grows rich out of that Branch of the publick Revenues, which belongs to the Commonwealth, or by impoſing Taxes upon his Subjects, or by the Expence of their Blood, or by employing them in any of thoſe Services, which, by common Obligation, they owe the Commonwealth; it is clear, that his Wealth muſt accrue to the Publick, and not to his own private Eſtate. But ſuppoſe, as it may, alſo, happen, that a Prince may make all neceſſary Preparation for a War, and carry it on afterwards, without any Aſſiſtance of the publick Treaſure, upon the Strength of his own private Riches and Eſtate, without engaging the Commonwealth, either in the Expence or Hazard of it, or it may be, perhaps, barely from the Profits and Revenue of his Crown-Lands: In ſuch a War 'tis, alſo, clear, that whatever Acquiſitions a Prince makes, will be abſolutely his own Right, and that he may, if he pleaſe, exclude the Commonwealth. For I have an undeniable Right to the Profits of what I have the Uſe and Produce of, and therefore may diſpoſe of them as I think fit [3].

IX. I ſhall, in the next Place, enquire, what lawful Power any Prince may have to *alienate* the *whole*, or *any Part* of his Kingdom. By which I do not mean a *patrimonial Kingdom*, but a *Kingdom* receiv'd by *free Conſent* of the People. *Grotius* is very large upon this Queſtion [h]. The Iſſue of the Matter in Diſpute, in ſhort, is this; That a Prince hath no Manner of Power to *transfer* or *give away* his Kingdom by his own *ſingle Authority*; and that his Subjects are not at all obliged by ſuch an Act, if made; and that the Conſent of the People is entirely as neceſſary as that of a Prince. For, as the People cannot juſtly take the Crown from their Prince, ſo neither can he, without their Conſent, ſet it upon whoſe Head he pleaſeth. But, in the Alienation of a Part of a Kingdom, beſides the Prince's Conſent, there is required not only the Conſent of the People, who are to continue under their old Prince and Government, but the Conſent of that Part too eſpecially which is to be alienated. The Reaſon is, becauſe they who at firſt erected the Commonwealth, and they who came voluntarily into it afterwards, bound themſelves by mutual Compact, to be governed by one and the ſame Government, as long as they thought good to continue in the Dominions of the ſame Commonwealth And therefore, as every particular Subject acquired a Right by

[a] *Jo. Chriſtoph Becmannus*, Medit. Polit. Diſſ. xxi. § 8. [b] *Dion. Halicarn.* Lib. iii. *Antiq. Roman.* Lib. iii. Chap. i. *Martin.* Hiſt. *Sin.* Lib. iv. Chap. xxiv. [d] Senec. *de Benef.* Lib. vii. Chap. vi. Every thing belongs to *Cæſar*, but to his Exchequer nothing but his own private Fortune; every thing is at his Command, but his Patrimony only is his own Propriety. *Herodian.* Lib. ii. Chap. xv. [f] Vide *Garcilaſſ. de la Vega Comm. Roy.* Lib. v. Chap. xiv. and *Francis Hottoman*'s *Quæſt. Illuſt.* Vide *Grotius*, Lib. i. Chap. iii. § 12. [h] Lib. i. Chap. iv. § 10, & Lib. ii. Chap. vi. § 3. (Upon both which Places ſee *Barbeyrac*'s Annotations) & Lib. iii. Chap. xx. § 5, &c.

[1] If not at preſent, at leaſt for the future; in ſhort, as ſoon as the publick Affairs will allow. See *Grotius*, Lib. iii. Chap. xx. § 7. Numb. 3, and the following Section with my Note; as alſo M. *Hertius*'s Diſſert. *de Colliſione Legum*, Chap. ii. § 26, in the firſt Volume of his *Commentat. & Opuſcula*.
[2] See *Grotius*, Book ii. Chap. vi. § 11.
[3] See the laſt Section of this Chapter.

Virtue of that Compact, not to be violently ejected out of the Commonwealth, nor to be given up to any foreign Power, except by Way of Punishment; so the whole Body of the Subjects, from the same Compact, acquires a Right to itself over the particular Subjects, by which no Subject can put himself under a foreign Government or Power, or disclaim and renounce the Authority of his own, as long as he is allowed to live in any of the Dominions belonging to it. And therefore, since all Commonwealths (as all moral Bodies) are formed, and grow by a Consent of the Parts, we must look back upon the original Design and Intentions of the primitive Founders of them, when we enquire what Power the whole Body hath over the Parts, in such a Case as this. And it cannot be presumed, that their Intentions were, that the Body should have a Right to cut off its own Members, when it pleased, and deliver them up to another's Power and Command. And, for this Reason, the People of *Guienne* justly refused to be separated from the Kingdom of *England*, notwithstanding the Grant and Donation of *Richard* the Second [a]. But indeed there is one Exception against what was said before, that a Part ought not to disown or separate from the Body, while it continues within the same Dominions, and that is this; except it be in the last Extremities, and that it be impossible for it to preserve itself otherwise, than by submitting to the Enemy's Power and Authority. For, in all Agreements of this Nature, the utmost Necessity seems of Course to be excepted; which, it is always allowed, gives a Man full Liberty to secure himself all the Ways he can possibly. And therefore, 'tis no more than what must be expected, and is far enough from being criminal, that a Town, after it hath made the best Resistance it could against an Enemy, should at last choose rather to surrender, than suffer itself to be carried by Storm, and be put to the Sword. For, since every Man who submits himself voluntarily to civil Government, had before, from Nature, a Right to defend himself all the Ways he could, and therefore enters into the Commonwealth for the better Attainment and Security of that Right; when the Commonwealth can no longer afford Protection or Defence to the Subjects, they must be suppos'd to be releas'd from the Ties they were under before, and to be at Liberty to consult their own Safety as they think best. And, without Dispute, the Commonwealth itself can have no other Right over the Members of it, than what was granted and left by them who at first erected it. And therefore, as the Commonwealth engageth to protect and defend every one of its Members, unless hinder'd or prevented by unavoidable Necessity; so whenever it struggles under such a Necessity, it is supposed, that no Man is forbid to provide for his own Security as well as he can. In the natural Body indeed it is lawful to cut off any particular Member to preserve the whole, because every Member lives entirely by the Life of the Body, and cannot live otherwise; but in a moral, or politick Body, 'tis possible the Members may exist and live in a separate divided State; and therefore, the Body moral hath not the same Right over its Members, as the natural. But, if a Prince should be necessitated, by Extremity of his Affairs, to compound for a Peace with an over-powerful Enemy, by giving him a certain Country in his Dominions, and that Country should disown and deny the Grant; in this Case, it is my Opinion, that the Prince may draw his Forces out of their Towns and Garrisons, and leave them naked, not hindering the Conqueror from taking Possession of them. But then, that he hath no Power to oblige or force them to surrender themselves, or to submit to the Conqueror's Authority. Neither can I think, that the Country is under any Obligations, if they have Strength enough in it, not to make Resistance against such a Conqueror, or afterwards, if they can, not to erect themselves into a distinct Commonwealth. For, thus, when the Emperor *Jovian* was obliged by Treaty to give up the City *Nisibis* to the *Persians*, the Citizens desired they might have Leave to defend themselves [b]. By such Agreements therefore, the Prince indeed, and People, lose their Right to such a Country; but the Conqueror, if they consent to receive him, and swear Allegiance to him, acquires a lawful Authority and Power over them. As to that Opinion some are fond of, either with regard to all Kingdoms, or, perhaps, only to some Particulars, that whatever *Goods are appropriated to*, or, as they say, *incorporated in the Crown*, can never be any Way *alienated*, and that neither the longest Course of Years, or another's quiet and peaceable Possession, can secure them from an Act of Resumption, at any time after, it is, without Dispute, false and groundless. And much more absurd and ridiculous is it to assert, that any Kingdom may have Privilege to waste and ruin others, and yet, that what it hath once seized, can never afterwards be recover'd from it.

X. From what hath been said, it is further evident, that a Prince cannot, without his People's Consent [1], make his Kingdom *feudatory* to another, or hold it upon Condition of [c] Forfeiture, whenever the *feudal Oath* is violated, or that, when his Family is extinct, it shall devolve to the Prince it is held from. For, if the Conditions be such as these, the making the Kingdom *feudatory* is, indeed, a *conditional Alienation*. And again, on the other Hand, the People may recall any Act of Homage, which the Prince hath remitted without their Consent. And it further follows, that a Prince cannot mortgage any Part of his Dominions, so that the [2] Government of it, and natural Possession, shall be for so long resign'd to the Creditor, without the Consent of his People, and the Part engaged by the Mortgage; and much

[a] *Froissard.* Lib. iv. *Polyd. Virgil.* Hist. *Angl.* Lib. xx. See the late M. *Rapin*'s History of *England*, upon that Reign, in the Years 1390, 1396. [b] *Ammian. Marcellinus*, Lib. xxv. Chap. xii. *Zosimus*, Lib. iii. [c] *Sub onere Commissi ex Feudo.*

[1] See *Grotius*, Book ii. Chap. vi. Sect. 9. As, also, M. *Hertius*, in his Treatise, *de Feudis Oblatis*, Part. ii. Sect. 27, in the Third Tome of his *Comment & Opuscula*.

[2] And much more, when he transfers the Property of the Country mortgag'd under a fiduciary Clause of Restitution, as is sometimes practis'd. See M. *Gundling*'s Treatise just quoted, *De jure oppignor. Territorii*, Sect. 76, *& seq.*

leſs, if there be any Conditions of [a] Forfeiture annexed. The Reaſon of which is, not only becauſe a final [1] Alienation is generally the Conſequence of Mortgaging; but, beſides, becauſe the People, when they made Choice of their Prince, choſe to be govern'd by him, and not by any other. And becauſe it may juſtly be preſumed, that they who are grown, and are ſtrictly united in one People, can never be willing to be broken, and canton'd into Parts and Diviſions.

XI. And it is, alſo, further evident, that the Prince hath no Power, without Conſent of his People, to alienate thoſe Goods, the Revenues of which are deſign'd, either to ſupport the publick Expences, or to maintain the neceſſary Greatneſs and Dignity of his Court. For, in thoſe Goods, the Prince is allowed only the Uſe and Produce of them, which can never amount to a Right of Alienation [2]. And tho' perhaps, he may think himſelf well enough provided for, for his own Life, yet it ſhould be conſidered, that there are to be other Princes to ſucceed him, who are all to be maintained agreeably to the Dignity of crown'd Heads. But, however, we are to diſtinguiſh carefully between the Goods themſelves, or the publick Patrimony, and the Profits or Produce of them. The firſt the Prince hath no Power to alienate, the other he hath free Liberty to diſpoſe of, as he pleaſeth. Thus where *the Right* [b] *of what the Sea or Rivers caſt up, and join to the Land*, is the *publick Patrimony*, or belongs to the Crown, the Prince cannot make away, or transfer that Right to any one elſe; but I can ſee nothing that can oblige him, not to diſpoſe of what is *thrown up by the Tide or the Stream*, as he thinks fit; becauſe this is the Produce of that Right. So the Right of Confiſcation may be a publick Patrimonial Settlement, and the confiſcated Goods be the Produce of that Settlement. The firſt is appropriated to the Commonwealth, the ſecond belongs to the Prince. But after all, a Prince who hath Power, when Reaſons of State require it, to levy new Subſidies upon the Subject, as he pleaſeth, may, when the Neceſſities of the Commonwealth command, mortgage any Part of the publick Patrimony. For, as the People are obliged to pay the Subſidies, ſuch a Prince lays upon them, upon ſuch *Reaſons of State*; ſo are they obliged to redeem what was mortgaged upon ſuch Reaſons. Since the Thing is the ſame, whether they pay the Money beforehand, to prevent the Neceſſity of the Mortgage, or whether it be levied upon them afterwards to redeem it. And here it is manifeſt, that every particular Subject is not the Debtor of that Money, though every one be obliged to contribute his Share to diſcharge it [c 3]. So, alſo, where the Prince lays out Money for the Uſe of the Publick, out of his own private Eſtate, the Commonwealth muſt be ſuppoſed to mortgage to him the publick Patrimony upon that Account, till ſuch time as the Debts contracted upon it are cleared by the People. But all this will hold only upon Suppoſition, that there be no fundamental Law, or Capitulation, which provideth otherwiſe, and either enlargeth or confineth the Rights of the Prince or People.

[a] *Lex Commiſſoria.* [b] *Vid.* Senec. *de Beneficiis*, Lib. vi. Chap. xx. [c] *Alluvionum Jus.*

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[1] This is not only thro' a Default of paying the Debt; but alſo, becauſe, tho' we were in a Condition to pay it, it is ſometimes not eaſy to get the Lands again out of the Hands of the Mortgagee.
[2] *Vide* Grotius, *ubi ſupra*, Sect. 11, 12, 13.
[3] See *Grotius*, Book iii. Chap. ii. Sect. 1.

CHAP. VI.

Of the Right of War.

I. *The Division of what follows in the Chapter.*
II. *Peace the ordinary proper State of Man; War extraordinarily indulged by Nature.*
III. *War either offensive or defensive.*
IV. *The Causes of War ought to be manifest.*
V. *The unjust Causes of War recounted.*
VI. *Fraud lawful against an Enemy.*
VII. *How far Violence may be lawfully used against an Enemy.*
VIII. *In a Commonwealth particular private Men lose their Right of War.*
IX. *War either solemn or less solemn.*
X. *A Magistrate as such hath no Right to make War.*
XI. *Whether he may make War upon a Presumption of his Prince's Consent.*
XII. *How far an Injury, done by a Subject, may give Reason for a War against the Commonwealth.*
XIII. *Of the Equity of Reprisals.*
XIV. *For whom we may justly make War.*
XV. *Of the Declaration of War.*
XVI. *Of the Liberties commonly used in War.*
XVII. *Of the Liberties used upon the Person of an Enemy.*
XVIII. *Whether lawful to kill an Enemy by Assassines?*
XIX. *Things sacred not exempt from the Liberties of War.*
XX. *Things, how acquired in War.*
XXI. *To whom the Acquisitions of War belong.*
XXII. *Things incorporeal, how far acquired in War.*
XXIII. *A Loan, whether acquirable in War.*
XXIV. *Dominion over the Conquered, how many Ways acquired*
XXV. *Things lost in War, how recovered.*
XXVI. *Whole Nations, how restored to Liberty.*

I. SINCE every particular Man in *a Liberty of Nature* hath the same *natural* Right, which States and Commonwealths have, to defend himself against unjust Violence, and to defend and assert his Rights by Force, when others injure him in, or endeavour to deprive him of them, it will, I think, be a proper Method to enquire, first, what may be supposed common to the Wars of particular Men, and Commonwealths; and then, secondly, what hath either by Custom of Nations, or by Nature, been appropriated to the latter.

II. First therefore, it is certain that nothing is more consonant to the *Law of Nature*, than that no Man should offer unjust Violence or Injury to another; and, on the other Hand, than that all Men should shew Kindness and Humanity to one another, and be particularly exact in the Observation of Agreements and Compacts. And when Men duly attend to, and obey these Laws, they may be said to enjoy *Peace*; which is a State most agreeable to human Nature, which tends most to promote its Happiness and Security, and indeed which the *Law of Nature* was given to Men principally to establish and preserve [a]. Nay further, *Peace* is a State of proper to human Nature, *as such*; since it ariseth from a Principle peculiar to Mankind above the Brutes; whereas *War* flows from Principles common to both. Brutes indeed by Instinct of Nature will endeavour to defend and preserve themselves as well as they can [1]. But Man alone understands the Nature and Constitution of *Peace*, for it is he only, that can voluntarily undertake or forbear the Performance of any Action, which may bring Good or Harm upon another Person, upon a Consideration of certain Obligations on one Side, and certain Rights on another. All which depends entirely upon the Use and Exercise of *Reason*. Beasts indeed perform the Service their Masters are pleased to use them in: But the Reason of that Obedience goes no higher than the Fear of Blows, or the Temptation of good Keeping; for the Sense of any Obligation, without doubt, lies much out of their Reach. We find too, that Beasts are seldom inclined to hurt Men, or each other; but this must be supposed either the Effect of Fear and Weakness, or because they find nothing to provoke their Appetite. Again, there are others of them that seem to be fond of, and to caress and assist one another. But it is not to be supposed, that they do so, because they are sensible they are obliged to it [b]. But notwithstanding, it is very lawful, and may sometimes be necessary for Man himself to make *War*; for Example, when he finds that another

[a] Vid. *Polyb.* Lib. xii. Chap. xiv. [b] This is admirably expressed in a beautiful Passage of *Quintilian*, whose Words are as follows, "Of all that Nature has formed for the Good of Mankind, and to furnish them a Support against the Changes of Fortune, I see "nothing more excellent, or more effectual, than *Friendship* and *Concord*. For she has placed in our Hearts a Desire of Society, "unknown to other Animals, which leads us to love the Company of our Fellow-Creatures, to form Communities, and build "Towns Among the various Sentiments with which she has inspired our Souls, she has rendered us susceptible of mutual Benevo- "lence, which is the most useful Passion we can feel. For what would be more happy than Mankind if all Men were Friends to "one another? We should then neither see Wars, nor Seditions, nor Robberies, nor Law-Suits, nor Quarrels, nor any of those Evils "which, proceeding from Men themselves, serve to increase the Troubles which Fortune occasions. Perhaps the supreme Powers "thought this Happiness would be too great. But, at least, in all Times, and among all Nations, it has been a capital and sacred "Maxim, that a generous Mind should keep its Word, and return Friendship for Friendship. 'Tho' indeed it belongs only to "the most exalted Spirits to know how to love, and be beloved in this Manner." *Neque enim reperio quid in rebus humanis excogitarit natura præstantius amicitiâ*, &c. Quintilian *Declam.* ix. Chap. xiii. Pag. 201. *Edit. Burm.*

[1] Vid. *Lactan.* Institut. Divin. Lib. v. Chap. 17.

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Perſon hath malicioufly deſigned to do him Harm, or denies him his *Right*. For, in ſuch Caſes, the Care he is ſuppoſed to have of his own Safety, giveth him Power to defend himſelf, and aſſert his Right what Ways he thinks beſt, though it be with the Hurt of the injurious Perſon; or to recover his Right by Force, when he cannot obtain it by eaſier Means[a]. For Nature hath not only given Man a quick Senſe of Injuries, that he might not ſuffer himſelf to be oppreſſed and inſulted; but ſhe hath, alſo, armed him with Strength and Agility of Body, that he ſhould not be forced tamely to ſubmit. But then, when Nature permits War, Peace is the Price and Reward of War. And when Men are forced to fight, it is not becauſe they are to make War perpetually, but that they may enjoy a laſting Peace and Security for the future[b]. But beſides, though the Perſon who doth Harm, doth immediately, as far as he is concerned, give a Man Power to make War upon him, yet it ought to be conſidered, what Good or Evil may probably be brought upon himſelf or others who did him no Injury by it. For Injuries, which do not entirely rob a Man of Quiet and Safety, ought not to provoke him to revenge them with War; when either the Inconveniences he may bring upon himſelf, and thoſe who belong to him by it, are like to be greater than the Advantages he can propoſe; or when others he at preſent is at Peace with, muſt, by his War, ſuffer ſuch Evils, as by the Laws of Humanity, on a quiet Submiſſion to the Injuries offered, he ought to defend them from. And therefore, that a Man is juſtly to be commended, who will not revenge an Injury, when he ſees that a War will, in all Probability, produce greater Evils than Good.

III. The Cauſes of juſt War may be reduced to theſe three Heads[1]. Firſt, *To defend ourſelves and Properties againſt others who deſign to do us Harm, either by aſſaulting our Perſons, or taking away or ruining our Eſtates.* Secondly, To aſſert

[a] *Dictys Cretenſis*, Lib. ii. Chap. xxi. Pag. 44. Ed. *Amſt. Max. Tyrius*, Diſſert. xiv. Pag. 138. Ed. *Lugd. Bat.* A good Man never begins a War but when he is forced to it; but a bad Man makes it his Choice. *V. Barker* in *Grot.* Lib. i. Chap. iii. Sect. i.

[b] *Ariſtot.* ad *Nicom.* Lib. x. Chap. vii. We make War that we may live in Peace. There is no Body who deſires, or makes Preparations for War, purely for the Sake of the War itſelf. For a Man muſt be of an inhuman Temper, who will make Enemies of his Friends, barely for the Satisfaction of a Quarrel. *Tacit.* Hiſt. Lib. iv. Chap. lxxvi. There is no Body ſo forward in taking Arms, who had not rather obtain that peaceably, which he truſts to the Deciſion of a War. *And therefore it is a very ill Character of ſome,* which Silius Italicus *deſcribes*, Lib. iii. Ver 330, 331.

Nec vitam ſine Marte pati, quippe omnis in Armis
Lucis cauſa ſita eſt, & damnatum vivere paci.

They think Life pleaſant when in Arms employ'd,
But dull and worthleſs if in Peace enjoy'd.

Therefore we ſhould never refuſe a Peace offered ſincerely, unleſs it be where we ſuſpect the Enemy has a Deſign to lull us aſleep, in order to take Advantage of our Security. *Meâ quidem ſententiâ, paci, quæ nihil habitura ſit inſidiatum, ſemper eſt conſulendum.* CICERO *De Offic.* Lib. i. Chap. xi. See *Grotius* Lib. iii. Chap. *ult.*

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[1] "When we make War, we complain of ſomething that has been done by thoſe againſt whom we take up Arms,——We ſay, "that they have cheated us, that they have inſulted us, and taken our Goods from us." *Plato* in the firſt *Alcibiad.* Pag. 109. *A. T.* ii. Ed. *H. Steph.* 432. *T.* Ed. *Wechel. Ficin.* See *Grotius*, Lib. ii. Chap. i. Sect. 1, 2. Our Author here tacitly excludes, from the Number of *Lawful Cauſes* of War, the *Puniſhing of criminal Actions*; by which we are not injured ourſelves. But we have ſhewn above (Chap. iii. Sect. 4.) that the Reaſons on which he eſtabliſhes his Opinion, are not very ſolid. It is true, that, between Equals, we muſt not lightly take up Arms to puniſh all Sorts of Crimes, that do not relate to ourſelves; we muſt always uſe the following Precautions, which *Grotius* juſtly recommends to us. I. *Not to take them up for puniſhing the Violation of the Maxims of the Law of Nature, which is contrary only to certain Cuſtoms, though received upon ſome Foundation, among ſeveral Nations; ſuch as were almoſt all thoſe that gave the antient* Greeks *ſuch an Antipathy againſt the* Perſians. For this Reaſon (ſays *J. Freder. Gronovius* thereupon) King *Darius* was to blame, to require the *Carthaginians* to eat no more Dogs-Fleſh, and not to burn their dead Bodies; ſince theſe two Cuſtoms had nothing in them to give a juſt Occaſion of War: But what he pretended, at the ſame Time, I mean their not offering any human Sacrifice, was manifeſtly founded upon the *Law of Nature*, (Juſt. Hiſt. Lib. xix. Chap i. Num. x. Ed. *Græv.*) II. *Not lightly to place, in the Number of things forbidden by Nature, thoſe which we are not well aſſured are contrary to it, and which are rather ſimply prohibited by a Divine poſitive Law: Such are perhaps Conjunctions out of Marriage, and thoſe which are called inceſtuous. Grotius* here adds *Uſury*; but let us ſet aſide the Abuſe of it, and there is nothing in it contrary to the *Law of Nature*, as we have ſhewn in another Place. III. *To diſtinguiſh carefully the general Principles of the Law of Nature, ſuch as, we muſt live honeſtly*, that is to ſay, after a Manner conformable to Reaſon, *and ſome others like that, but which are manifeſtly inconteſtable, as when we ſay, that we muſt not take away another Man's Goods; from the Conſequences that we draw from them. Some of which are eaſy to be perceived*, ſuch is the Prohibition of *Adultery, ſuppoſing Marriage; whereas, there are others more difficult to be diſcovered; as for Example, that Revenge where we propoſe nothing but Evil for Evil, is criminal——As then political Legiſlators excuſe thoſe to whom their Laws have not been declared, or who are uncapable of underſtanding them; ſo in, Matters of natural Laws, it is juſt to excuſe thoſe who violate them, through the Weakneſs of their Underſtanding, or the Unhappineſs of an ill Education.*——IV. *In ſhort, Wars undertaken only to puniſh thoſe againſt whom we take up Arms, are ſuſpected of Injuſtice, when the Crime is not undeniably plain, and very flagrant, or when there is no other Reaſon beſides, that makes a juſt War.* This is what *Grotius* ſays, Lib. ii. Chap. xx. Sect. 41, 42, 43. This eſpecially takes Place in *religious Wars*, that is to ſay, thoſe which are carried on againſt Perſons, whoſe Sentiments and Practice, in religious Matters, differ from our own: For, with regard to the defenſive Part, it is undeniable that we may lawfully reſiſt thoſe who would hinder us from profeſſing that Religion we think the beſt. See M. *Buddæus*'s Diſſertation on the *Cruſade*, in his *Selecta Juris Naturæ & Gentium*, Pag. 97. *& ſeq.* So far is a ſimple Difference of Sentiment, in Matters of Religion, from furniſhing a juſt Subject for purſuing with Arms, or otherwiſe moleſting thoſe we believe to be in an Error; that I rather queſtion whether the Proteſtant Princes may not, with a better Conſcience, unite to deſtroy the *Inquiſition*, and to oblige the Powers, who ſuffer it in their Dominions, to ſuppreſs this horrid Tribunal, under which Chriſtianity has groaned ſo long. It would be a laudable Undertaking to deſtroy a Court, which, under a falſe Pretence of Zeal for the Glory of God, exerciſes the moſt deteſtable Tyranny, and the moſt contrary to the Good of human Society. Thoſe who love to gain Glory by Arms could never find a more honourable, or lawful Occaſion of ſignalizing their Courage; ſuppoſing they had Force enough to attempt ſuch an Enterprize. The greateſt Heroes of Antiquity, who had quelled the moſt formidable or deſtructive Monſters, muſt have yielded to him, who could ſucceſsfully have cleared the World of a *Society*, who, under the moſt ſpecious Pretence of Religion, ſeek the Means to live in a ſhameful Indolence, while they hold Sovereigns and Subjects in as ſhameful a Dependance. The Chevalier *Folard* pretends, *that, while I preach this chimerical Cruſade, I have forgot the Bible. Which* he ſays *I ought not to have done*, if I had read the *Book of F. Francis Macedo, a very grave Author*, intitled, *Schema ſacræ Congregationis S. Offic. Roman.* "Indeed I own myſelf in the wrong, ſays *Folard*, to abuſe ſo much the Inquiſitors, in their Tribunal, whom good F. *Macedo* finds ſo plainly in the holy Scripture. He places their firſt Inſtitution in Paraſiſe, and affirms that *God* was the firſt Inquiſitor-general; and that he began the firſt Exerciſe of his Office, in examining *Adam* and *Eve*; that he continued it againſt *Cain*, and thoſe who built the Tower of *Babel*; that St. *Peter* acted in the ſame Quality againſt *Ananias*; and that he tranſmitted this Power to the Popes, who beſtowed it upon St. *Dominic*, and his Succeſſors; ſo that in ſhort St. *Peter* has nothing more to do with it." See his *Obſerv.* upon *Polybius*, Lib. i. Chap. xviii. Is not ſuch an Authority, and ſuch Reaſons, undeniable? I thought at firſt to have treated this Argument with Ridicule, but this is a Talent not allowed to every Body, and demands the Spirit and Vivacity of M. *Folard*. I am ſo far from complaining of him, that I am very ſorry he has tried the Effects of one *Inquiſition* (for he knows there are a great many Sorts) which has prevented him from continuing his Deſign, in the Manner he had ſo nobly begun; as well as prevented our having the Benefit of his Learning and Sincerity.

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our Rights *when others, who are justly obliged, refuse to pay them to us.* And lastly, *To recover Satisfaction for Damages we have injuriously sustained, and to force the Person who did the Injury, to give Security for his good Behaviour for the future*[1]. And hence ariseth the Division of just Wars into *offensive* and *defensive.* The *latter* of which I take to be those Sorts of Wars, in which Men endeavour to defend and keep what is their own. The *Former*[2] are, when Men extort their Rights that are denied by Force, attempt to recover what hath been unjustly taken from them, and require *Security* for the future. Sometimes indeed the Party who first began the War may have the Credit of being on the *Defensive.* For Instance, suppose he be often alarm'd and haras's'd with sudden Incursions upon him, the Enemy retiring always when he appears to oppose him; or suppose a Man be assured that his Enemy hath form'd Designs against him, and so disables him for the Attempt, while he is making his Preparation [a].

IV. But, in general, the *Causes* of[3] every *War*, and[4] especially of the *offensive*, ought to be *evident*, and without Mixture of *Doubt* and *Uncertainty*[4]. For it is very usual in Cases of this Nature for Doubts to arise; either perhaps out of Ignorance of the Matter of Fact, when it is not absolutely certain, whether it was done, or not; with what Intention it was done; or else out of a negligent, slight Comparison between strict Justice and the *Laws* of Love and Charity; or it may be from a mistaken Computation of the Proportion of the Utilities, which it is probable will be the Effects of undertaking or forbearing the *War.* In these Cases therefore, as no uncertain Pretensions[5] ought to be made use of; so neither should Men immediately seek Redress by Arms,

[a] Vide *Justin*, Lib. ii. Chap. iii. N. 12.

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[1] Upon which we must refer to our Observation in another Place, that, in a Case of Necessity, an *imperfect Right* is changed into a *perfect Right*; so that then the Refusal of him who will not yield up to us what he ought to do, gives a just Occasion of War.

[2] In the fourth Tome of the *Observations Choisies*, printed at *Hall* in *Saxony*, Observ. viii, there are some Reflections which I will here set down in the very Words of Mr. *Bernard*, who has given us an Abstract of them in *Nouvel de la Rep. des Lett. Sept.* 1704. Pag. 304, *&c.* "'Tis now-a-days the Custom to excuse the most unjust Wars, by saying they are purely *defensive.* There are some "People who believe, that every unjust War ought to be called *offensive*, which is not true; for if there are *offensive* Wars that are "just, as there is no Doubt of it, there are, also, *defensive* Wars that are unjust; as when we defend ourselves against a Prince who "has Reason to attack us. Neither must we believe, that he who is the first Aggressor begins by doing so an *offensive* War; and that "the other, who demands Satisfaction for the Injury receiv'd, is always upon the *Defensive.* There are a great many unjust Acts that "may kindle a War, and which however are not the War; as the ill Treatment of a Prince's Ambassadors, or the plundering his "Subjects: If then we take up Arms to revenge such an unjust Act, we begin an *offensive*, but a just *War*; and the Prince who has "done the Injury, and refuses to give Satisfaction, commences a *defensive*, but an unjust War. An *offensive* War then is not unjust, "but when it is undertaken without a lawful Cause; and then that *defensive* War, which, upon other Occasions, would be *unjust*, be-"comes *just.* In general then, he who first takes up Arms, whether he does it *justly* or *unjustly*, commences an *offensive* War; and "he who opposes that War, whether he has or has not Reason to do so, begins a *defensive* one. Those who look upon the Word *offen-"sive* War to be an odious Term, as containing something that is always unjust; and who consider, on the contrary, a *defensive* War, "as inseparable from Equity, confound all the Ideas, and perplex an Affair, which, of itself, would appear plain and clear enough. "It is with Princes as with private Persons. The *Plaintiff*, who commences a Suit at Law, is sometimes in the Wrong, and some-"times in the Right: It is just so with the *Defendant.* We are in the Wrong not to pay a Sum that is justly due, as we are in the "Right to forbear paying what we do not owe." M. *Gundling*, who seems to have approved this, in his Dissert. *De efficientiâ metûs*, &c. Chap. ii. § 14, has since said, *That there can be no just offensive War, unless we play with Words.* (*Jus Nat. & Gent.* Chap. ix. § 6.) But I am afraid he is guilty of this Fault himself. We are agreed in the main, and the Question is to understand the common Practice, independently of the Morality, of *offensive* and *defensive Wars.* Now it appears to me, that, upon this Footing, whoever begins Acts of Hostility, behaves *offensively*, and he who repels him behaves *defensively*, and that without considering which is in the Wrong, and which is in the Right.

[3] See *Grot.* Book ii. Chap. i. § 1. and Chap. xxii. § 2. where he divides them into *justifying Reasons*, and *persuasive Motives*: (*Causæ justificæ, & causæ suasoriæ:*) The first are those that render, or seem to render, the War *just* with Regard to the Enemy; so that we believe we do him no Injustice in taking up Arms against him. The *Motives* are the Views of Interest which oblige us to declare War. In a War, innocent upon all other Accounts, the *justifying Reasons* must not only be truly lawful, but must be blended with the *Motives*, that is, we must never undertake a War but through the Necessity to which we are reduced of defending ourselves against another's Insults, of making him give up what is our undoubted Right, and of obtaining a Satisfaction for an apparent Injury done us. Thus a War may be vicious or unjust, with Regard to the Causes, four several Ways: First, when we undertake it either without any *justifying Cause*, or any Motive of Profit, tho' never so little, but only out of a fierce and brutal Fury, that makes us delight in Blood and Slaughter purely for the Sake of killing. But there is Reason to doubt, whether we can find any Example of so barbarous a War. (See *Grotius*, Lib. ii. Chap. xxii. § 2.) Secondly, when we attack others only for our own Interest, without their having done us any Injury. And these Sorts of Wars are, with Respect to the Aggressor, downright Robberies. (See *Grotius*, ibid. § 3.) Thirdly, when we have some *Motives* founded upon *justifying Reasons*, but which still have only an apparent Equity, and which, upon a nice Examination, are found at the Bottom to be unlawful. Such are those mention'd by our Author in the following Section, after *Grotius* (*ubi supra* § 4. *& seq.*) In short, Fourthly, when, notwithstanding our having good *justifying Reasons*, we undertake the War upon other *Motives*, that have no Relation to the Injury we have receiv'd, as acquiring Vain-Glory, enlarging our Rule and Dominion, enriching ourselves, satiating our Revenge, or upon any other View of Interest, either publick or private, but quite divested of the *justifying Reasons* of the War in which we are engag'd. (See *Grotius*, ibid. § 17.) Of these four Sorts of Wars, whose Undertaking contains something that is *just*, or *unjust*; the third and the last are very common, there being very few People so barbarous and savage as to take up Arms, without declaring at least some Sort of *justifying Reason.* The third is, also, very common; but it is not difficult to discover the Injustice of it. As for the fourth, perhaps it is the most common of all; it is not so unjust in itself, as with Regard to the Disposition and Views of him who does it. It is, besides, very difficult to be convinced of it, the Motives being generally so impenetrable, or the greatest Part of Mankind so very careful in concealing them. Thus we are not oblig'd to restore what we have taken from the Enemy in such a War, exactly to the Value of the Damage and Injury he has done us. This is taken almost from Mr. *Buddeus*'s *Philos. Pratict.* Part ii. Chap. v. § 2, *&c.* As he does very little besides abridging *Grotius*, in all this, I shall here make use of his Book in some other Places; and by that, as well as by *Grotius* himself, and, also, by the Abstract *de Officio Hom. & Civ.* I will supply what our Author wants, who has but lightly treated of all that concerns the Right of *War and Peace*, without doubt because *Grotius* had already almost exhausted the Matter. Moreover, whoever is desirous to see the Application of what we have just now said in this Note, to remarkable Examples, need only consult Mr. *Buddeus*'s Dissertation, entituled, *Jurisprudentiæ Historicæ Specimen*, § 82, *&c. seq.* in which he examines the Justice of the Wars of the *Romans.*

[4] See above in Book i. Chap. iii. § 7, 8, and *Grot.* Book ii. Chap. xxiii. § 1, 2, 3, 4, 5, and 6. (Besides, to the Question whether there can be a just War on both Sides, Mr. *Buddeus*, in his *Philos. Pratict.* § 16, answers *No*, if we consider the Justness of the Cause in itself: For it implies a manifest Contradiction, that two Persons should have equal Right; the one to demand, and the other to refuse one and the same Thing. But it may happen, that one of the two who are at War together, may have a very lawful Reason for it, and the other be in an invincible Ignorance of the Injustice of his Cause. In that Case both of 'em make War *justly* and *unjustly*; the invincible Ignorance on his Side, whose Cause is unjust, hindering his Action from being reputed unjust in itself. But that cannot happen but very rarely; for those who engage in a War, examine, or at least ought to examine, with a great deal of Care, all the Reasons on both Sides.) See *Grotius*, Lib. ii. Chap. xxiii. § 13.

[5] See *Grot.* Book ii. Chap. xxiv.

but

but ſincerely endeavour, and that theſe three Ways eſpecially, to compoſe the Differences, before they break out into a War: Firſt, by *Conference* between the *Parties*, or their *Agents* [1]. Secondly, by *Appeal* to the *Arbiters* [2]. Or in the laſt Place, by Lot [a] [3]. But, how evident ſoever the *Cauſes* of *War* may be, a wiſe Man, before he draws his Sword, ought to conſider what *Grotius* ſays, That it is a great Folly in particular Men, as well as Commonwealths, not to accept of Accommodation, or hear of Reconcilement, while Things ſtand whole on both Sides; *but when they have ſufficiently puniſhed and mortified one another, then quietly to give over, without giving any Body the Trouble of parting them* [b].

V. The *unjuſt Cauſes of War* are recounted by *Grotius*, Lib. ii. Chap. xxii. § 5, *&c.* Some of them are manifeſtly unlawful; others of them have ſome Colour to be thought lawful, tho' it be but weak and faint. Under the firſt Rank is to be placed *Avarice* and *all extravagant Deſire of increaſing Wealth, as, alſo, Ambition, and the Hopes of enlarging Rule and Dominion, of growing great, and purchaſing a falſe Fame and Glory, by the Oppreſſion of others.* Avarice is a Cauſe of War uſually conceal'd and diſſembled with great Care, becauſe it ſuppoſes a baſe and ſordid Spirit. But Ambition is generally favour'd in the World, under the Name of Gallantry and Fortitude. And it is commonly thought Greatneſs and Bravery of Mind, to graſp after, and fight for what belongs to other [4] Men. But yet Princes, as *Philiſcus* told *Alexander* [5], *Tho' they are never ſo ambitious of Glory, ſhould not think it any, to be remember'd, as Famines and Peſtilences are, as the Plagues of Mankind, but as the greateſt Bleſſings, as Peace and Happineſs.* For tho' the great GOD often makes Uſe of War to purge and puniſh the World [c], yet, when Princes make War without any other Deſign than that, it is the greateſt Impiety. And yet the *Jews* thought that they were allow'd, when their *Sanhedrim* declared War, tho' without any other Reaſon than barely for the Greatneſs and Glory of their Nation, to invade their Neighbours, and, if they could, make an abſolute Conqueſt of them [d]. Under the latter Claſs may be rank'd *Fears, which ariſe from the Strength and Power of Neighbours; and when Men think, as the Poet ſays, they don't want Will to do what they have Power* [e]. But this ſingle Suſpicion is not ſufficient to make a *Cauſe* of War *juſt* unleſs Men have very good moral Certainty, that they have form'd Deſigns againſt them. For an uncertain Jealouſy of Danger may be Reaſon enough to perſuade a Man to be circumſpect, and fortify himſelf as well as he can, but can never give him a Right to ſtrike the firſt Blow, tho' it be only with Intent that the other ſhould give him *real Caution*, as they call it, that he will attempt nothing againſt him [f]. For as long as my Neighbour doth me no Injury, and

[a] Valerius Flaccus, Lib. v. Ver. 665, *&c.*

An nullas præferre preces, nec fœdera Regis
Ulla ſequi? cæca ſed cuncta impellere pugna
Debuimus? ſic Thraces agunt.

Never to peaceful Overture to yield,
Or ſacred League, but in the bloody Field.
Always in Arms to breathe relentleſs War,
None but the wildeſt Savages will dare.

[b] Iſocrates, *Orat. ad* Philip. *Pag.* 154, *Ed.* Min. Pariſ. This Period is taken from the Abſtract *de Officio Hom. & Civ. Lib.* ii. *Chap.* xvi. § 3. See *Grotius*, Lib. xi. Chap. xxiii. § 11, 12, where he makes the two following Remarks, which are worth our taking Notice of here. The firſt is, that what Aſſurance ſoever we may have of the Juſtice of our Cauſe, if it is not in our Power to produce a Title ſufficient to convince him who detains what is ours, of the Illegality of his Poſſeſſion, we cannot lawfully declare War againſt him on that Account; becauſe in that Caſe we have no Right to force him to deliver up to us the Thing he is poſſeſs'd of. Beſides, if the Poſſeſſor is a Perſon of no Honeſty or Sincerity, tho' we ſhould have loſt the Deeds, that were neceſſary to be produced before the Arbitrators, that would diminiſh nothing from our Pretenſions, nor hinder us from purſuing our Right by Force of Arms, as our Author has obſerv'd above, Book v. Chap. xiii. § 8. *Grotius*'s other Remark is, that when the Right is doubtful on both Sides, if neither of the Parties is in Poſſeſſion of the Thing in Diſpute between 'em, or if both of 'em are equally poſſeſs'd of it, they muſt decide the Matter by way of Diviſion, and he who refuſes this Expedient, ought to be look'd upon to be unjuſt, and an Enemy to Peace.

[c] As in *Euripides, Helena*, Ver. 38, *&c.* Jupiter *is ſaid to have engaged the* Greeks *and* Phrygians *in a Quarrel.*

To eaſe the Earth of her too numerous Sons.

[d] *Seldenus*, de J. N. & G. ſec. Hebr. Lib. vi. Chap. iii. & xii. To which we may add a fine Paſſage of *Cicero*'s, upon the falſe Idea of Conquerors. "If this Greatneſs of Soul which they ſhew in bearing Fatigues, and expoſing themſelves to the moſt hazardous "Dangers, is not adorn'd with a large Stock of Juſtice; and if they uſe it for themſelves, and their own private Advantage, inſtead "of imploying it for the *publick Good*, ſo far is it from being a Virtue, that it is a Vice, and a downright Fierceneſs, that ſtifles all "Sentiments of Humanity and Tenderneſs," *De Officiis*, Lib. i. Chap. xix. [e] *Lucan.* Pharſal. Lib. iii. Ver. 100, 101.
[f] *Gellius*, Lib. vii. Chap. iii. A Gladiator who prepares himſelf to fight, muſt accept of theſe Conditions of Combat, either to kill his Enemy, or to fall himſelf; but the Life of a Man is not confin'd by any ſuch hard and ſevere Laws, as to oblige us to do others Injuries firſt, that we might not ſuffer them ourſelves.

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[1] See above, in Book v. Chap. xiii. § 3. [2] See the ſame Book and Chapter, § 4, *&c.* [3] See the ſame Book, Chap. ix. § 2, 3.
[4] Tho' the Author was contented to refer to *Grotius*, for this Enumeration for the unjuſt Cauſes of War; yet the Reader will find a better Account of them in the Abridgment of *The Duties of a Man and a Citizen*, Lib. ii. Chap. xvi. § 4. M. *Gundling* maintains ſtrenuouſly, That the ſole Fear of the Power, or Agrandizement of a neighbouring State, is a ſufficient Reaſon to declare War againſt it. He founds his Opinion upon this, That the State of Nature is a State of War: Whoever can hurt another will do it, and therefore the Fear is always certain. See a Diſſertation entitled *Status Naturalis* HOBBESII *in Corpore Juris Civilis d ſenſus & defendendus.* But I doubt very much whether thoſe, who ſhall compare this Piece, with what our Author has ſaid above, Lib. ii. Ch. ii. & v. § 6, will find the Defender of *Hobbes* has neither well eſtabliſhed his own Principles, or enter'd into the true Meaning of the famous *Engliſh* Philoſopher. With regard to the preſent Queſtion, M. *Gundling*'s chief Argument is, "That Experience ſhews us, that "there never was any great Power but what, ſooner or later, ſwallow'd up all the leſſer States which ſurrounded it." To be aſſur'd of the Truth of this general Propoſition he ſhould have prov'd it, not only by a Series of Hiſtory known to all People, but, alſo, he ſhould have divin'd what had paſs'd in Countries unknown. Beſides there may be, and are States, whoſe Conſtitution requires them neither to aggrandize themſelves, nor to undertake War without great Neceſſity: Even ſuppoſing (what is very poſſible) that theſe States ſhould, by favourable Conjunctures, become very powerful, without Injury to their Neighbours, why ſhould theſe take Umbrage at their Greatneſs? The particular Examples, brought by M. *Gundling*, are no Way to the Purpoſe, ſince they only regard Caſes where thoſe in queſtion have ſufficiently teſtified their Diſpoſition to abuſe their Power: For tho' it might be againſt other States, yet then every State is at Liberty to take Care of itſelf. We always ſuppoſe here a Power both lawfully acquir'd, and which has uſed its Authority with Moderation. Now it would be very hard to prove ſuch a Suppoſition impoſſible.
[5] Vide *Ælian.* V. H. Lib. xiv. Chap. xi.

I do

I do not apparently take him in any Preparation for ſuch a Deſign (for ſometimes an intended Injury, and but begun, may as juſtly be puniſh'd with *War*, as an Injury that is finiſhed) I ought to preſume, he will always continue in the ſame Mind. But eſpecially, if I have his Word and Faith to aſſure me of his Sincerity. And it would be extreamly unjuſt in me to force him to give me *real Caution*; becauſe thus he muſt be in a more ſuſpected Condition than myſelf, being forced himſelf to rely upon my Faith alone. Suppoſing indeed, that there be *juſt Cauſe* of *War*, the Growth and Power of Neighbours may very well deſerve immediate Conſideration and Regard, in Debates about it: For Experience hath often proved it true, that Mens Deſires of being great increaſe, in Proportion to their Strength and Power [a]. "And it is natural for "Men to be ſuſpicious, and afraid of being op-"preſs'd, whenever they apprehend that there "is an Over-balance of Power in their Neigh-"bours; for it is eaſy to imagine, that ſuch as "have too great a Share of Strength, will find "Reaſons, when they pleaſe, to make uſe of "it upon them who are weaker, though they "do nothing to deſerve it." But now as for *Utility*, to make that a *Cauſe* of *War*, or to pretend the ſame Right from thence to what belongeth to others, as Neceſſity may give, is unpardonably impudent; though it is no more than what the *Athenians* [1], in *Thucydides*, ſaid for themſelves, "That no Body is ſo much a Friend "to Juſtice, as to neglect an Opportunity of "poſſeſſing himſelf of what he can get by Force, "barely becauſe it is unjuſt." Eſpecially ſince nothing can be more oppoſite to the publick Intereſt of Mankind, than to admit the Introduction of ſuch a Right, which will give a Man Leave to take away any Thing by Force from another Perſon, which he thinks will be an Advantage to himſelf: For it muſt be expected that other Perſons will uſe him with the ſame Liberty he takes with them. And as to other Pretences for War, which *Grotius* mentions in the ſame Place, they may be anſwered the ſame Way. My Lord *Bacon*, in his *Advancement of Learning*, gives this for a ſufficient Reaſon for making War upon the *Americans* [b], which I muſt confeſs I cannot agree with him in: "That they were to "be look'd upon as People proſcribed by the "Law of Nature, inaſmuch as they had a bar-"barous Cuſtom of ſacrificing Men, and feed-"ing upon Man's Fleſh." For it ought to be diſtinctly conſidered, whether Chriſtian Princes have ſufficient Licence given them to invade thoſe *Indians*, as People proſcribed by Nature, only becauſe they made [2] Man's Fleſh their common Food? Or becauſe they eat the Bodies of Perſons of their own Religion? Or, becauſe they devoured Strangers and Foreigners? And then again it muſt be ask'd, whether thoſe Strangers they are ſaid to kill and eat, come as Enemies and Robbers, or as innocent Gueſts and Travellers, or as forc'd by Streſs of Weather? For this laſt Caſe only, not any of the others, can give any Prince a *Right of War* againſt them; and this to thoſe Princes only, whoſe Subjects have been uſed with that Inhumanity by them.

VI. Tho' it be, alſo, common to all *Sorts of War* that the particular Nature, and, as I may call it, *Genius* of them is *Violence* and *Terror*, yet it is, alſo, lawful to make uſe of *Stratagem* and *Fraud* againſt any Enemy, provided there be no Treachery, or Violation of Compact and *Faith* in it. For as *Ageſilaus* ſaid, *To break the Faith of Articles and Leagues, is no leſs than a Contempt of GOD: But to circumvent an Enemy, is well enough conſiſtent with Juſtice, and may be attended with as much Glory as Succeſs* [c]. And the proper Senſe of that famed Saying of *Cleandridas* implies no more: *When the Lion's Skin fails, it is neceſſary to put on the Fox's* [d].

VII. But the better to underſtand how far it is lawful to purſue *Revenge*, and uſe Violence againſt an Enemy, it will be neceſſary to obſerve, that there is a great deal of Difference between the *Liberties* which a *State* of *Hoſtility*, ſimply conſidered, gives a Man againſt his Enemy, and the Liberties which the Mercifulneſs and Gentleneſs of the *Law of Nature* would ſuffer him to take. The *Law of Nature* obligeth Men to a mutual Exerciſe of the Offices and Duties of *Peace*; and the Perſon who firſt violates them to my Prejudice, releaſes me, as far as lies in his Power, from paying any of thoſe Offices to himſelf: And, in Conſequence, as long as he profeſſes himſelf my Enemy, he gives me a *Liberty* to uſe *Violence* againſt him *in infinitum*, or as far as I

[a] Vide *Cumberland.* de Leg. Nat. Chap. ii. § 15. *in fin.* *Bacon*'s Eſſays, Chap. xix. *Seneca, Oedip.* Ver. 542, 543. *Stat ingens arbor atque umbra gravi ſylvas minores urget.*

A lofty Tree that ſtands, which with its Shade
Oppreſſeth all the Underwood——

Procop. Hiſt. *Goth.* Lib. iv. *Herodes* Orat. de Repub. Neighbouring Nations are never concern'd at the Miſchiefs which befal one another from their own domeſtick Broils and Quarrels; the Weaker have no Reaſon, becauſe thus they are ſecure from being enſlaved; they that are equal in Strength, think of gaining a Superiority by it; and the Strongeſt, of purchaſing an eaſier Conqueſt, *Polyb.* Lib. i. Chap. lxxxiii. A Man ſhould never truſt another with ſo much Power, as to place him out of his Reach, when he is to conteſt with him about any Right that is confeſſedly his own. *Appianus Alexand. Lybic.* Pag. 32. Ed. *Steph.* Tho' it be a Friend, yet it is neceſſary to be cautious how he is made too great.

[b] De Auginen. Scient. p. m. 384. I do not know what Edition the Author made Uſe of; but I cannot find this Paſſage in that of *Amſterdam*, 1652, tho' I have carefully read it over. This occaſion'd me to doubt, whether here, as well as elſewhere, the Author has not quoted one Work for another. And accordingly I have ſince, by Chance, found the Paſſage in the Dialogue *De Bello Sacro*, Pag. 1310, of *Bacon*'s Works, printed at *Copenhagen* in 1694. [c] *Plutarch.* Apophtheg. Lacon. Pag. 209. B. [d] *Cleandrid.* in *Polyen.* Stratag. Lib. ii. Chap. x. N. 5. Vide *Xenophon.* Cyropæd. Lib. i. & *Grot.* Lib. iii. Chap. i. § 6. add. ſupr. Lib. iv. Ch. i. § 19.

[1] Book i. Chap. lxxvi. Ed. *Oxon.*

[2] If theſe *Anthropophagi*, or Canibals, eat only the Fleſh of human Creatures that die a natural Death, or are killed by others, and not themſelves, how barbarous and ſavage ſoever ſuch a Cuſtom was, it would give us no *Right* to attack them purely for that ſingle Reaſon. But ſince they themſelves kill human Creatures, either to eat them or ſacrifice them to their Idols, 'tis a Thing ſo cruel, ſo contrary to Humanity, and ſo deſtructive to Society, and Mankind in general, that we cannot look upon, but as juſt and commendable, a War that ſhould be undertaken to endeavour to have the Uſe of it aboliſh'd, though theſe Men practiſed it but only among themſelves, and always ſpared Strangers. If our Author maintains the contrary, 'tis becauſe he always argues upon a Principle, whose Falſeneſs I have prov'd elſewhere. See Note 1. § 3, of this Chapter, and Chap. iii. § 4.

pleaſe,

pleaſe. Eſpecially ſince, if I am not allow'd this Liberty, but am neceſſarily obliged to confine my Violence within certain Bounds, and in no Caſe to proceed to Extremities, the proper End of War, whether *offenſive* or *defenſive*, can never be obtain'd. And therefore every open publick War ſeems to have ſomething in it like ſuch a Sort of Compact as this: *Try your Strength, and I will try mine.* And this holds not only where my Enemy reſolves to puſh Things to the utmoſt againſt me, but, alſo, tho' he deſigns to deſtroy me, without going to Extremities: For he hath no more Right to give me a ſlight Wound, than one that may prove mortal. And therefore it is not only ſo far lawful for me to uſe Violence againſt my Enemy till I have repulſed the Danger he threaten'd me, or till I have recovered, or forced from him what he either unjuſtly deprived me of, or refuſed to pay me; but I may further oblige him to give me *Caution* for the future. Which if he ſuffers to be forced from him, he ſufficiently diſcovers, that he ſtill entertains malicious Deſigns againſt me, and that one Time or other he may put them in Execution. Neither indeed is it always unjuſt, to return a greater Evil for a leſs. It may, 'tis true, be objected, that Retribution ought to be made in due Proportion; but it muſt be ſaid, that this is to be applied only to Courts of Judicature, where Puniſhments are inflicted always by Superiors. The Evils, which are the Effects of a *Right of War*, are [1] properly Puniſhments, becauſe they are not inflicted by a Superior as ſuch, nor have any Tendency to reform either the injurious Perſon, or any others, but only to defend or regain the Security of a particular Man's Rights and Properties. In Purſuance of which End, it is lawful for me to make uſe of ſuch Means as I think will beſt prevail againſt a Perſon, who, by his injurious Treatment of me, hath put me out of all Capacity of doing him any Injury, till ſuch Time as it ſhall be agreed between us to forbear Hoſtilities. But now the Law of Humanity would have Men conſider not only what an Enemy may ſuffer without Injury, but what it may be proper for a generous Conqueror to inflict. And therefore they ought to be particularly careful, that, as far as is poſſible, and their own neceſſary Defence and future Security will permit, to proportion the Evils they inflict upon their Enemy, to the Meaſures and Moderation obſerved by Civil Courts in puniſhing Criminals and Offenders. Upon this Moderation *Grotius* [2] is very large, *Lib.* iii. *Chap.* xi, *&c. ad* 16. And the three Rules he preſcribes, *Lib.* iii. *Chap.* i. § 2, 3, 4, will give us a clear View of the Liberties of Hoſtility. But beſides, the Uncertainties and Turns of Fortune which may happen in War, ought to perſuade Men to be very temperate in the Uſe of thoſe Liberties, for fear an Alteration in Affairs ſhould, as it were, make their own Weapons recoil, and return upon themſelves the Uſage they gave others [a]. So when *Colonna*, in *Gratianus* [b], gave Orders that the *Turks*, who were taken Priſoners in the Fight at *Lepanto*, ſhould be well uſed at *Rome*, he turn'd to *Mahomet*, and ſaid aloud, Learn to be merciful to us, you who are generally ſo cruel

[a] Vide *Diod. Sicul.* Lib. x. Chap. xlvii. *Virg.* Æneid. x. Ver. 533.

——*Belli commercia Turnus*
Suſtulit ille prior, jam tum Pallante perempto.

[b] *Gratianus* de Bello Cyprio, Lib. v.

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[1] Our Author always goes upon this falſe Principle, That there is no War which we can undertake only on Account of Puniſhment. See the preceding Section, Not. 3.

[2] *Grotius* (Lib. iii. Chap. i. § 1, 2, 3) lays down at firſt three general Rules, which ſerve to explain the Extent of the *Rights of War*. Firſt, All that has a Relation morally neceſſary to the lawful End or Deſign of the War, is permitted, and no more: For it would be to no Purpoſe to have a Right to do a Thing, if we could not make uſe of the Means neceſſary to bring it about. But, at the ſame Time, it would not be juſt, that, under the Pretence of purſuing our Right, we ſhould ſuffer ourſelves to do every Thing, and carry on Matters, without any Manner of Neceſſity, to the laſt Extremity. *Secondly*, The Right which we purſue by Arms ought not to be conſider'd only with regard to the Cauſe which began the War, but ſtill in Reference to the freſh Cauſes that happen afterwards: Juſt as at Law, one of the Parties often acquires ſome new *Right* before the Ending of the Suit. There lies the Foundation of our *Right*, to act againſt thoſe who join with our Enemy, whether they are his Dependents or no. *Thirdly*, There are Abundance of Things, which, tho' otherwiſe unlawful, are permitted, becauſe they are inevitable Conſequences of War, and happen contrary to our Intention; otherwiſe there would never be any Way of making War without Injuſtice, and the moſt innocent Actions would be look'd upon as unjuſt; ſince there are but few from whence ſome Evil may not accidentally happen, contrary to the Intention of the Agent. (See above, Pag. 44. *Notes*, 1, 3.) Here now follow the Particulars of the *Rights* that War gives over the Enemy's *Perſon* and *Goods*, with the Moderation that ought to be obſerv'd in them. *Firſt* then, It is certain that we may kill our Enemy, otherwiſe our taking up Arms would be to no Purpoſe. And, to conſider the Thing in itſelf, it is no Matter which Way we rob him of Life; whether by open Force, or by Fraud and Stratagem, by the Sword, or by Poiſon, tho', according to the Notions and Cuſtoms of civilized Nations, the not only cauſing any poiſonous Draught to be given to our Enemy, but, alſo, the poiſoning of Fountains, Wells, Springs, Arrows, Darts, Bullets, and other Weapons employ'd againſt him, is eſteem'd as a baſe and criminal Cowardice. (Our Author a little lower, § 16, handles the Queſtion, Whether it is lawful to aſſaſſinate our Enemy?) We may, alſo, kill him wherever we find him, either in his own Territories or ours, in Places that belong to no Body, but not in *Neutral States*; for violent Means are not ſuffer'd in a *Civil Government*, where we ought to beg the Aſſiſtance of the Magiſtrate. Now, if it is lawful to take away our Enemy's Life, much more may we wound, maim, or do him any Damage in his Perſon or any other Way whatſoever. (See *Grotius*, Lib iii Chap. iv) But the *Rights* of War do not extend ſo far as to authorize the Outrages commited upon the Honour and Chaſtity of Women: For that contributes nothing towards our Defence or Security, or the maintaining our *Rights*, but only ſerves to ſatisfy the Brutality of the Soldiers. (*Grotius*, ibid. § 19.) Beſides, when we can defend ourſelves, or have Satisfaction for the Injury the Enemy has done us, without making a Slaughter, we ought to forbear it, and not ſhed human Blood unneceſſarily. Neither muſt we directly and deliberately take away the Lives of Priſoners of War, nor of thoſe who demand Quarter, and ſurrender themſelves, much leſs of Children, Women, and old Men; and in general of all thoſe who are neither of an Age nor Profeſſion fit to bear Arms, or who have no other Share in the War than their being in the Country or Party of the Enemy. (See *Grotius*, Lib. iii. Chap. xi.) Secondly, in Relation to the Enemy's *Goods*: It is plain that we may carry 'em off, ravage, ſpoil, or entirely deſtroy them, even without excepting *ſacred* and *religious Things*, as they call 'em, that is, Things deſign'd for the Uſe of Religion: For thoſe either belong to the State or the Sovereign, and they are not called *ſacred* but on Account of a certain Uſe to which they are applied. Thoſe who believe that they contain ſomething that is *divine* and *inviolable*, do ill indeed to meddle with 'em at all, but it is only becauſe they act againſt their own Conſcience. (See *Grotius*, Lib. iii. Chap. v, and Mr. *Buddæus*'s Diſſertation, *de Jure Belli circa res ſacras* among his *Selecta Juris N. & Gent.*) However, of what Nature ſoever the Things belonging to the Enemy are, whether *Sacred* or *Profane*, we ought not to deſtroy or damage them but as it is neceſſary and conducive to the Deſign of the War, and the Accelerating of Peace. To do *evil* to another, without a Proſpect of doing ourſelves any *good* by it, either directly or indirectly, would be a Madneſs equally fooliſh and criminal. There are but few, for Example, which are neceſſary after the taking of a Town, and ruining the Churches, Statues, and publick or private Buildings; but we ſhould generally ſpare all theſe, as well as the Tombs and Sepulchres.

and barbarous to Christian Captives: To which the *Turk* replied, The Cruelty, Sir, you object, is however pardonable in us, because we never knew before what it was to be Prisoners, and be left to the Mercy of an Enemy. The *Turks* understood well enough how to take Prisoners, but never thought of being made such. How they are to be dealt with [1] who supply an Enemy with what he wants, may be seen in the Author mentioned before, *Lib.* iii *Chap.* i. *Sect.* 5, &c. 17.

VIII. I come now to consider what Difficulties and Enquiries relate to *Wars* raised by Commonwealths and Civil Governors. And here it is first to be observed, that the *Right of War*, which always attends all Men in the *State of Nature*, is taken away from private [2] Persons in Commonwealths; and that therefore in Civil States Subjects are not to punish such as injure them with their own Swords, and as they please; nor endeavour to recover their Rights, when denied them, by their own Force; but they must apply themselves to the Magistrates in such Cases, whose Duty it is to take care that their Wrongs be redressed, Satisfaction be made for Damages sustained, *Caution* be given for the future, and that every Man be maintained in his own just Rights[a]. For though, at some Times, and in some Cases, private Subjects may be allowed Liberty to defend themselves with their own Strength; yet such a Liberty is, by no Means, to be called a *Right of War*. For a Right to make War implies a Power to begin it at my own Discretion, to continue it as long as I please, and to put an End to it by Compact with the

[a] *Vid.* Lib. I. Tit. xvii. Lib. clxxvi. *D. de reg. juris*, & Lib. iv. Tit. ii. *D. Quod metus causa gestum erit*, Lib. xi, xii, xiii & Lib. xliii. Tit. xxiv. Lib. vii Sect. 3. *D. quod vi aut clam.*

[1] To give a clear and distinct Idea of this Matter, something must here be said in general about *Neutrality*, of which our Author speaks no where. I shall here borrow pretty nearly what Mr. *Buddeus* says in his *Elemens de la Philosophie Pratique*, Part ii. Chap. v Sect 6. Sect. 36, &c. There is a *general Neutrality*, and a *particular Neutrality*. The *general Neutrality* is, when, without being in Alliance with either of the two Enemies engaged in War, we are very ready to do equally to both the good Offices which every State is naturally bound to render to others. The *particular Neutrality* is, when we are particularly engaged to stand *Neuter*, by some Compact, either express or tacit. This last Sort of *Neutrality* is either *full* and *entire*, when we act equally in all Respects toward both Parties: or *limited*, as when we favour one Side more than the other, with Regard to certain Things and Actions. We cannot lawfully force any one to enter into a *particular Neutrality*, because every one has the Liberty of making or not making *Alliances* and *Treaties*, or because, at least, they are not bound to do it but by Virtue of an imperfect Obligation. But he who undertakes a just War, may oblige other Nations to observe an exact and *general Neutrality*, that is to say, not to favour his Enemy more than himself. This then is, as it were, an Abstract of the Duties and Obligations of *Neutral Nations*. They are obliged equally to put in Practice, towards both Parties that are at War, the *Laws of Nature*, as well *absolute* as *conditional*, whether they impose a *perfect Obligation*, or only an *imperfect one*. If they do one of them any Office of Humanity, they must not refuse to do it the other, unless there be some manifest Reason which engages them to do something for the one, that the other had besides no *Right* to demand. But they are not bound to do Offices of Humanity to one Party, when they expose themselves to great Dangers by refusing them to the other, who have as much *Right* to demand them. They ought not to furnish either of them with Things employed in exercising Acts of Hostility, unless they are impowered by any particular Engagement: And as for those that are of no Use in War, if they supply one Side with them, they must, also, the other. They ought to use their best Endeavours to bring Matters to an Accommodation, that the injured Party may obtain Satisfaction, and that the War may be brought to a Conclusion as soon as possible: And if they are under any *particular* or *private Engagement*, they ought to execute it punctually. On the other Side, those who are at War, must exactly observe, towards *neutral Nations*, the Law of Sociability; and not suffer their Country to be ravaged or plundered. They may however, in a Case of great Necessity, make themselves Masters of a Place situated in a *neutral Country*; provided that, as soon as the Danger is over, they restore it to the right Owner, and make him Satisfaction for the Damage he has received by it. See what our Auther has said, Book ii. Chap vi. Sect. last, *at the End*; and *Grotius*, Lib. iii. Chap i. Sect 5. and Chap. xvii. Moreover, as to what relates to the Question, whether we may hinder *neutral* Nations from trading, during the War, with the Enemy; see a Letter of our Author's, published in a Book printed at *Hamburgh*, and intitled, *Jo. Groningii Bibliotheca universalis Librorum Juridicorum*, &c. Pag. 105. of the Treatises that are in the Beginning of it, and *Baecler*'s Dissertation, intitled, *Quies in Turba*, Pag 1024. of the Collection of his Dissertations, printed in 1701. I shall translate it, both because it is short, and because, M. *Groning* being an Author of a very bad Taste, the Copies of his Book have fallen into the Hands of the *Grocers* and *Chandlers*, and are, by that means, become very scarce. This Gentleman had formed, in 1692, a Design of writing a Treatise upon *Free Navigation*, which he has since published, tho' I do not know when, having never seen it. Before the Execution of his Project, he consulted M. *Pufendorf*, to whom he communicated his Plan. The following is the Copy of the Answer our Author sent him from *Berlin*. "The Work, Sir, that you have in View, relating to "the Liberty of Navigation, excites my Curiosity. It is a curious Subject, and what no Person as yet, that I know of, has particularly "handled. I very much, however, fear, if I may judge from your Letter, that you will find People who will dispute your Notions. "The Question is certainly one of those which have not yet been settled upon any clear or undeniable Principles, so as to afford a "general Rule to Mankind. In all the Examples brought upon this Subject there is a Mixture of *Right* and *Fact*. Each Nation "usually allows, or forbids, the maritime Commerce of neutral People with its Enemy; either according as it is its Interest to pre-"serve the Friendship of those People, or it finds itself strong enough to obtain from them what it requires. For Example, the *En-"glish* and *Dutch* may say, without Absurdity, that it is lawful for them to do all the Ill they can to the *French*, with whom they "are at War, and, consequently, to employ the Method the most proper to weaken them, which is to traverse and ruin their Trade. "They say it is not reasonable that neutral Nations should enrich themselves at their Expence, and by engrossing to themselves a "Commerce, which the *English* and *Dutch* want, furnish the *French* with Money to continue the War. This seems the rather just, "because *England* and *Holland* commonly favour the Trade of neutral Nations, by suffering them to transport, and sell, in foreign "Markets, Merchandizes of their own Growth and Manufacture. In short, they say that they are willing to leave them the Trade "they usually carry on, in Time of Peace, but they cannot see them take Advantage of the War to extend their Commerce, to "the Prejudice of *England* and *Holland*. But as this Matter of Trade and Navigation does not so much depend upon Rules founded "on a general Law, as upon Conventions made between particular Nations; so, in order to form a solid Judgment of the Point "in Question, we ought previously to examine, what Treaties subsist between the Northern Crowns, and *England* and *Holland*; and "whether these last Powers have offered the former just and reasonable Conditions. On the other Hand, nevertheless, if the "Northern Princes can maintain their Trade with *France*, by sending strong Convoys with their Fleets, I see nothing to blame in "it, provided their Vessels do not carry contraband Goods. The Laws of Humanity and Equity between Nations, do not extend "so far as to require, without any apparent Necessity, that one People should give up its Profit in Favour of another. But as the "Avarice of Merchants is so great, that, for the smallest Gain, they make no scruple of exceeding the just Bounds of Commerce; "so Nations that are at War may certainly visit neutral Ships, and, if they find prohibited Goods on board, have a full Right to "confiscate them. Besides I am no way surprized that the *Northern Crowns* have a greater Regard to the general Interest of *Europe*, "than to the Complaints of some greedy Merchants, who care not how Matters go, provided they can satisfy their Thirst of Gain. "These Princes wisely judge, that it is not at all convenient for them to take precipitate Measures; while other Nations unite "all their Forces to reduce, within Bounds, an insolent and exorbitant Power, which threatens *Europe* with Slavery, and the Pro-"testant Religion with Destruction. This being the Interest of the *Northern Crowns*, it is neither just nor necessary, that, for a pre-"sent Advantage, they should interrupt so salutary a Design; especially as they are at no Expence in the Affair, and run no Ha-"zard, &c."

[2] Not only from private Persons in a *Commonwealth*, but even from a whole entire Body of People, who are under the *Direction* of any other, or a *Sovereign*. However, the antient Kings of *Persia* often permitted their Subjects to war one with another. See *Esther* ix. 6, &c. and Mr. *Le Clerc*'s Commentary upon it. And my Defence of the Rights of the *Dutch East-India* Company. Chap ...

Enemy.

Enemy: But Subjects are never to be permitted to defend themselves by their own Force, except in Dangers unavoidable [1], and then no longer, than till they have overcome them. And as no private Subject hath a *Right of War*; so neither is it necessary that Peace should be made by any Compact of the Subjects, when the Authority of the Sovereign hath sufficiently settled it before. Nay, though private Subjects be perfectly reconciled to one another, yet, when all is over, the Magistrate may, if he pleaseth, punish the Injury, which first gave occasion to the Quarrel. But it may indeed sometimes happen, that any private Subject may assume the same Right of Defence, which he would have had in a *State of Nature*; for Instance, if he happened to come into any Place which belongs to no Commonwealth, but continues in its primitive *Liberty of Nature*. But then, in this Case, it is to be considered, whether the Person be assaulted by his Fellow-Subject, or by a Stranger: For if we suppose by the first, he is allowed the Use of his own Force to resist only the present Danger: But the further Punishment of the Injury must be referred to their common Sovereign; except it appears that the Person who makes the Assault, intends to return no more into his own Country, and hath left nothing behind him that can make Satisfaction for the Injury. But if a Man be assaulted in any such Place by a Foreigner, he hath Liberty, if he can prevail against him, to bring him to the last Extremities. And he may, also, enter an Action against him in the Commonwealth he is a Subject of, and there demand Satisfaction and Punishment, and make use of the Interposition of his own Commonwealth. And then if Justice be denied him, his own Commonwealth hath Right to demand Satisfaction for him in a Way of War. And therefore, if a Man be set upon in the open Seas, he need not give himself the Trouble to use all his Force; but only just so much as will resist present Danger, because, when his Enemy comes back to his own Country, he may enter an Action against him there. But if a Man be assaulted by a Subject used to despise and defy the Authority of the Magistrate, or the Magistrate himself openly refuse to do Justice, he must right and defend himself as he can, whenever he goes out of the Dominions of his own Commonwealth. But if the Magistrate should excuse himself, by pleading the Iniquity of the Times, or the bad State of the Commonwealth, and desireth either that the Prosecution of the Cause should be deferred to some other Time, or that the Neglect of Justice should be thought pardonable in the present Unhappiness of the Commonwealth; every sensible and good Man ought to acquiesce in, and be satisfied with the Answer.

IX. War is commonly distinguished into *solemn*, and *less solemn* [2]. In the *first*, it is necessary the War should commence and be directed by the supreme Authority on both Sides, and that it should be duly proclaimed [3]. The *less solemn Wars*, are those that are either not publickly declared, or else that are levied by, or against private Subjects. The *first* looks like an Incursion or Depredation of Robbers: The *second* supposes that one Side or other is in Rebellion, or, at least, in such a Way of Life, as can at no Time make the War just. And thus civil Wars may happen to be a Species of the less solemn, when the Commonwealth is so divided, that it doth not appear on which Side the *Sovereign* is engaged. And here it is observable with regard to *solemn Wars*, that Authors usually call two distinct *People*, their *Generals* and *Governors* concerned in them, *just Enemies*, in Opposition to Robbers and *Pyrates* [a]. So *Cicero* says [b], "A "just Enemy is one who hath a Commonwealth, "Courts of Justice, and publick Treasure un-"der his Command. And besides, also, the Con-"sent and Agreement of his People, and Power, "when Occasion offers itself, to make Peace, or "enter into League." Though a Commonwealth is not therefore to be looked upon as only a Confluence of Robbers, when it hath been publickly guilty of some unjust Things Neither, on the other Hand, can a Company of Robbers assume to themselves the Honour of a Commonwealth, though perhaps there be some Appearance of Justice among them [c].

X. And here, upon what *Grotius* asserts, Lib. i. Chap. iii. Sect. iv, a Question is moved, Whether a *Magistrate* properly so called, as such, hath Power to make War? Which I think is to be denied. For since War is a Matter of that Nature and Consequence, that it may involve the whole Commonwealth in Danger, to give the Magistrate, as such, Power to *declare* and *determine War* by his own Authority, would be the same Thing with giving him the *sovereign Power* [d]. It must be allowed indeed, that whatever *Branch* of publick Business the *Sovereign* entrusts with the *Magistrate*, he must be supposed to give him all the Power necessary to the due Discharge of his Duty in it. And therefore it is a *Maxim* of the *Roman Law* [4], "That every Magistrate who "hath Jurisdiction, as such, hath a mixed Au-

[a] *Vid.* Lib. l. Tit. xvi. Lib. cxviii. *D. de verb. signif.* Lib. xlix. Tit. xv. Lib. xxi. Sect. 1 & Lib. xxiv. *D. de captiv. &c.*
[b] *Cic. Philip* iv. Chap. vi. [c] Vid. *Grot* Lib. iii. Chap. iii. Sect. 2. [d] By the *Roman* Law whoever levies Troops, or makes War without the Order of his Prince, is adjudged guilty of high Treason. *Eadem Lege (Juliæ Majestatis) tenetur, & qui injussu Principis bellum gesserit, delectumve habuerit, exercitum comparaverit.* DIGEST. Lib. xlviii. Tit. iv. *Ad Legem Juliam Majestatis*, Leg. iii.

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[1] See above, in Book ii. Chap. v. Sect. 7, 8. [2] See *Grot.* Book i. Chap. iii. Sect. 4.
[3] The Declaration of War, considered in itself, and independently of the particular Formalities of every People, does not simply belong to the *Law of Nations*, taking this Word in the Sense that *Grotius* and others give it, but to the *Law of Nature*. Indeed, Prudence and natural Equity equally demand, that, before we take up Arms against any one, we should try all amicable Ways, to avoid coming to such grievous Extremities. We ought then to summon him who has done us any Damage, to make us a speedy Satisfaction, to see if he will have regard to himself, and not put us to the hard Necessity of pursuing our Right by forcible Means. See Mr. *Buddeus's Elemens de Philosophie Pratique*, Part ii. Chap v. Sect. 4, 8, 9. and his Dissertation, intituled *Jurisprud. Historicæ Specimen*, Sect. 34. From whence it appears, that the Declaration of War has no Place but in *offensive Wars*: For when we are actually attacked, that alone gives us Reason to believe, that the Enemy is absolutely resolved to enter into no Treaty of Accommodation. From thence it, also, follows, that we must not begin Acts of Hostilities immediately upon declaring War; but must stay till he from whom we received the Damage, plainly refuses to give us Satisfaction, and has put himself in a Condition to receive us with Bravery and Resolution: Otherwise the Declaration of War would be nothing but a vain Ceremony, without any Effect. See *Grotius*, Lib. iii. Chap. iii. where all this Matter is treated of.
[4] V. D. Lib. ii. Tit. i. *De Jurisdictione*, Lib. iii. *V. etiam* Lib. i. Tit. xxi. *De officio ejus cui mandata est Jurisdictio*, Lib. v. Sect. 1.

" thority, which [1] mixed Authority is defined " by a moderate Power, to punish obstinate Of- " fenders, as far as is necessary to support his " Jurisdiction, and a due Administration of " Justice." But when a *Magistrate*, who is entrusted with *Jurisdiction*, useth Force only to reduce a few disobedient Subjects, it is not to be supposed that he is making *War*; for a *coercive Power* over Subjects is not a *Right of War: War* seeming to lie entirely between *Equals*, or, at least, those who pretend themselves to be such. But if the Number of the *Malecontents*, or disaffected Persons, grow so incurable, as to make it to be feared, that an Attempt to suppress them would endanger the Safety of the Commonwealth, and the common *Officers* of *Justice* are too weak to reduce them, the *Magistrate* ought to expect the Resolutions of his *Sovereign* to direct him in his Proceedings in the Matter. And therefore *Grotius* is under a Mistake when he says, Lib. i. Chap. ii. Sect. 4. " That if we consider the Thing " without Relation to the Civil Laws, every Ma- " gistrate as he ought to protect the People under " his Charge, so if he be opposed by Force in " the Exercise of his Authority, he hath a Right " to make War." For the Defence and Protection of the People properly belongs to the *Sovereign*, and a *Magistrate* entrusted with *Jurisdiction* is only so far to defend them, as he is obliged to guard the Poor and Weak by Justice against the Oppressions of the Rich and Great. To which End there is no Necessity he should have a *Right* of making *War*. By the Way it may be observed, that though the Slaughter of above three thousand Men, at the Command of *Moses*, upon the *Idolatry* of the *Golden Calf*, may with more Propriety be called a *Punishment* than a War; yet that the Destruction of the *Benjamites* [a]. looks more like a Route [2] in War than Punishment, though *Erasmus* is of a different Opinion [b]. And here it will not be improper to add something in general of the Power of *military Magistrates*, or of *Generals* and *Leaders*, to whose *Conduct* the *War* is entrusted by their Sovereign. A *General* therefore sent to take the *Field* with an *unlimited* Power, may use what Measures he thinks fit, either to disquiet and offend his Enemy, or defend himself; but as he is not impowered to levy any *new War*, so neither, when *War* is begun, can he make *Peace* without the Authority of his *Sovereign*. But *Generals* confined by *limited Commissions* have, it is plain, no further Power than those give them. However so much Power every *General*, whether his *Commission* be *unlimited*, or not, may justly assume, as to use what Method he thinks best, to defend himself against the Enemy, when they have advanced too far to give him an Opportunity of making an honourable Retreat. And in such a Case as this only, what *Tully* saith ought to be allowed. " That, in Affairs of such unexpected and straitening Circumstances, a Man should not think " of staying for the Instructions of the Senate, " but be a Senate to himself, and do what he " thinks will be best for the Advantage of the " Commonwealth." But a *Defence* indeed doth not consist only in a brave Resistance, or in repelling or avoiding the Enemy's *Attacks*, but, also, in making an *Assault* upon him, and returning the same Treatment back. And therefore, for Example, an *Admiral* at Sea, who is by his *Orders* to be only on the *defensive*, may yet, notwithstanding such a Confinement, upon Provocation sufficient, break in upon the Enemy's Fleet, and sink and burn as many of their Ships as he can; all that he is forbidden is to challenge the Enemy first, when they do not think of *Fighting*. And so a *General* at Land, though his Instructions be not to engage the Enemy, may yet, if he be attacked in his *Intrenchments*, not only repulse them, when they would force his Camp, but make a Sally, and give them Battle; and, if he be set upon in his March, and finds he cannot make a safe and an honourable Retreat, he may justly venture a Fight. And therefore, a *Governor* of a Province or Town, especially, if he hath any good Number of Soldiers under his Command, ought to make the best Resistance he can, when he is invaded by an Enemy, without expecting *Instructions* from his *Sovereign*. But he is not to carry the *War* into a *foreign Country*, without express *Commission*. An *inferior* Commander, who is left in Trust with a Body of Soldiers, for the Defence of a Town, or Fort, is obliged to do the utmost he possibly can for its Security; and indeed, to hold out so long in the Defence of it, till he sees the Place must inevitably be carried by Storm, and his Forces cut off. And therefore, from what has been said, we may judge of the Action of *Pinarius*, mentioned in *Livy*, Lib. xxiv. Chap. xxxvii. His *Orders* were to defend the Castle of *Enna*; and to deliver up the Keys of it to them of the *Town*, would have forfeited his Head; and therefore, when he saw that both himself and Soldiers must necessarily have been left to the Mercy of the Enemy, and be put all to the Sword, unless he prevented it, by suppressing the Insurrection that was forming in the *Town* against him, he did nothing beyond what the Powers he had would allow him, in putting the faithless Citizens to Death, except, perhaps, it was carrying his Severity too far without Necessity, after he knew the Danger was over. Neither can it be said, that *Pinarius* rais'd a new War [d]. For the *publick War* was at that Time carried on in *Sicily*, against the *Carthaginians* and their *Allies*, with whom *they* of

[a] See *Exod.* xxxii. 27, *&c.* and *Judges* xx, xx. [b] *Erasm.* Epist. Lib. vi. Ep. xxix. [c] *Cic.* Ep ad Familiar. Lib. x. Chap. vii. [d] As *Manlius* made War upon the *Gallo-Graci*. See *Livy*, Lib. xxxviii. Chap. xlv, *&c*, and Lib. xli, Chap. vii. and *Florus*, Lib ii Chap xi.

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1 This is what they call *imperium non merum*, or *mixtum*, that is to say, temperated, or moderated; in Opposition to *imperium merum*, which is more violent: for this last belongs to those who had a criminal Jurisdiction, or carried the Sword. *Imperium aut merum est aut mixtum. Merum est Imperium habere gladii potestatem ad animadvertendum in facinorosos homines, quod etiam Potestas appellatur. Mixtum est Imperium, cui etiam jurisdictio inest, quod in danda bonorum possessione consistit.* Digest. Lib. ii. Tit. i *De Jurisdictione*, Leg. *Mandatâ Jurisdictione privato, etiam Imperium quod non est merum, videtur mandari; quia Jurisdictio sine modica coercitione nulla est.* Lib. i. Tit. xxi. *De officio ejus cui mandata est Jurisdictio*, Leg. v. Sect. 1. The Reader may see, upon all this, M. *Noodt*'s excellent Treatise, *De Jurisdictione & Imperio.*

2 It was rather by Right of War that the *Israelites* put to the Sword 25000 Men, of the Tribe of *Benjamin*, to revenge the Inhumanity, which the Inhabitants of *Gibeah* had exercised, with Regard to the Concubine of a Levite, belonging to the Tribe of *Ephraim*. See Judg xix 20, with Mr. *Le Clerc*'s Commentary.

Emma endeavoured to join. But, whether particularly when a *War* is at an End, the same Arms may be turned against them who assisted the Enemy with Succours and Supplies, is more than a *General* hath Power to determine. But, if a *Governor* of a *Province* [1], at a great Distance from the *Metropolis* of the Empire, be impowered to make *War* or *Peace* with his Neighbours; the *Wars* he undertakes must be look'd upon to be *solemn*: Because, he who gives another Power to do a Thing, must be supposed to be the *Author* of what he doth by Virtue of that Power. But, if a *Governor* who hath no such Power, makes *War* upon another, without Authority from his *Sovereign*, it is left to the *Sovereign*, whether he will own the Action of his *Minister*, or not. If he owns it, the *War* must be looked upon to be *solemn*. And this *Ratification* doth, as it were, reflect back an Authority upon the *War*, so that the whole Commonwealth is obliged by it. But if the *Sovereign* disown the Action of his *Governor*, the *War* must be looked upon to be a *Sort* of *Robbery*; and if the *Governor* be given up, or punished at home, and *Satisfaction* be made for the *Damages* sustained, the Commonwealth is not engaged in, or obliged by the War. And this was the Reason why the *Roman Ambassador* demanded of the *Carthaginians*, Whether *Hannibal* laid Siege to *Saguntum*, by his *own*, or by the *publick Authority* [a]? To which the *Carthaginians* rightly answered, *That, the Question first to be determin'd was, Whether the Siege of* Saguntum *was contrary to any Articles of* League *between them and the* Romans? *That before this was decided, the* Romans *had no Reason to enquire, whether a Subject of* Carthage *did any thing by his* own, *or* publick Authority [b]?

XI. It may be further enquired, Whether a *Prefect* or *Governor*, who hath no *general* or *particular* Commission to warrant him, can justly make *War* upon a *foreign State* or *Prince*, only upon *Presumption*, or because he believes his *Sovereign* will approve his *Action*? Which, in my Opinion, must be denied [2]. For it is not sufficient to know what it is probable his *Sovereign* would approve, if he were consulted in such a particular Posture of Affairs; but it should rather be considered, what it is probable he would desire should be done without his Advice, when the Matter will bear Time, and the Point is nice and difficult, if a Law were to be made upon it, where he must determine universally of all such Cases. And then, no Doubt, it will appear, that it would be provided, that no Minister should undertake any Action in which the Commonwealth is nearly concern'd (such as a *War* is, and especially the *offensive*, which is the proper Subject of the present *Enquiry*, and which will, generally, well enough admit of Delays) without the Advice of his *Sovereign*. And therefore, tho' it should happen that the *Sovereign* should, at the same Time, think a *War* with a certain Enemy necessary, yet, to be sure, he cannot be pleased to see his *Minister* go beyond the Bounds of his Duty. Thus *Cambyses* put his Servants to Death who saved *Crœsus*'s Life, though, at the same Time, he was well enough pleased that they had spared him [c].

XII. But now, as Persons who live in a *Liberty of Nature* cannot justly be punished with *War*, unless the Injuries they themselves do to others deserve it; so how it comes to pass, that in a *Civil State* the Guilt of the Injuries, and the Cause that give Birth to War, diffuse themselves from the Persons who were immediate Authors of them, over the whole Commonwealth, will be Matter of further Enquiry. This therefore is certain, that no *Community*, whether *civil* or *otherwise*, is obliged by any Action of *particular Members*, without some culpable *Act* or *Omission* of its own. For, how severely soever the Commonwealth may threaten, the Subjects are still left to their natural Liberty to do otherwise if they please: So that the Commonwealth can no Way be responsible for the Actions of the particular Subjects [d]. But among the several Ways, the *Governors* of Commonwealths are involv'd in Wars from the Injuries committed by their Subjects, these two, I think, will most deserve our Consideration, *viz.* [e] *Sufferance* and *Reception*. As to the Matter of *Sufferance*, it is manifest, that the Person who knoweth the Commission of a Crime, and hath Power to hinder it, without apparent Danger of greater Evil by doing it, and is obliged to do it, must be supposed to be guilty of the Crime [3] himself. For it is necessary the Knowledge of the Fact should be attended with Power to hinder it; one of these separately not being sufficient to communicate any Share in the Guilt [f]. And the *Gover-*

[a] *Livy*, Lib. xxi. Chap. xviii. [b] Vide *Xenophon* Rer. *Græc* Lib. v. Where the Justice of the Action of *Phœbidas*, in seizing *Cadmea*, is disputed. [c] *Herodot.* Thalia, Pag. 112. Ed. *H. Steph.* Vid. *Senec.* de Ira, Lib. i. Chap. xvi. Concerning the Action of *Piso*, *Pro-prætor* of *Sicily*, *Livy*, Lib. xliv. Chap. x. [d] Vid. *Grot.* Lib. ii. Chap. xxi. Sect. 2. and the Example he there produceth out of *Livy*, Lib. xxix. Chap. xvi. Lib. xxxv. Chap. xxxi. Lib. xlv. Chap. xxiii. *Valerius Maximus*, Lib. vi. Chap. vi. Sect. 3, 5.
[e] *Patientia & Receptus.* [f] *Vide* Lib. xlvii. Tit. vi. Lib. i. Sect. 1. *D. si familia furtum fecerit.*

[1] As the Governors in the *Indies*, for the Kings of *Spain* and *Portugal*, or for the *Dutch East-India* Company.

[2] It is *Grotius*'s Decision, Lib. i. Chap. iii. Sect. 5. Num. iii. upon which *Gronovius* pretends that this great Man ought not absolutely to maintain the Negative, but to distinguish between *Defensive* and *Offensive* Wars: *For*, adds he, *there is no Doubt, but that a Governor of a Province, especially if he has any Forces ready in Pay, as it is the usual Custom in Frontier Provinces, may, without exceeding the Limits of his Power, oppose his Neighbours, upon their attacking him, and repel Force by Force, without staying for a particular Order from his Prince.* For my Part, I cannot conceive, how it is that this Commentator was not aware, that this Exception is understood of itself? Tho' *Grotius* had not explained himself here, what he has said elsewhere of the Privileges of Necessity, would have been more than sufficient to have hindered us from attributing any other Thought to him. But it is not plainly expressed in the preceding Paragraph, Num. iii. *Si ita præsens sit periculum, ut tempus non ferat cum consuli qui supremum in civitate jus habent: an etiam Necessitas exceptionem porriget?* After which he instances in the Example of *L. Pinarius*, related by *Gronovius* himself, and by our Author also; and in the very Place in dispute; *Sed hoc magis videndum, quod ille, ubi res moram fert* ——— *se inconsulto potiat fieri*; which manifestly supposes, that, when the Business admits of no Delay, we are not obliged to stay for our Master's Orders; and that in such a Case it is reasonably to be presumed, that he leaves us at Liberty to act as we shall judge most proper. All the Difficulty here would be with Respect to the Application to particular Cases; as for Example, *Gronovius* defends against *Grotius* the Opinion of *Cicero*, who, in a Panegyrick on *Octavius* and *Brutus*, commends them, for taking up Arms upon their own Authority against *Mark Anthony*. See what I have said Not. vi. upon the Place in Question.

[3] This is the Decision of the *Roman* Law, with Regard to the Faults of a Slave, for which the Master was responsible. *Is autem accipitur scire, qui scit & potuit prohibere; scientiam enim spectare debemus, quæ habet & voluntatem.* DIGEST. Lib. xlvii. Tit. vi *Si familia furtum fecisse dicatur*, Leg. i. Sect. 1. See, also, what is said above, Lib. i. Chap. v. Sect. 14.

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nors of Commonwealths are presumed to know what their Subjects openly and frequently commit, and their Power to hinder it is always supposed, unless the Want of it be manifestly proved. *The Guilt of a Crime, before it hath been judicially tried, remains upon them who committed it; but, after Sentence is passed upon it, they are the Criminals who neglect to put the Law in Execution* [a]. The Case of *Reception*, and how far the Commonwealth gives *Reason* for *War* against itself, by receiving and defending Persons who have injured others, may be seen at large in *Grotius*, Lib. ii. Chap. xxi. §. 3, 4, 5, 6. [1]

XIII. The same *Author*, also, Lib. iii. Chap. iii, gives us a full Account of the Nature of *Reprisals*, which are violent *Executions* made upon the *Persons* or *Goods* of the Subjects of a *foreign Commonwealth*, that refuseth to administer Justice [2]. In Defence of the Equity of which I further add, that as it is a natural Consequence of the Combination of Men into civil Bodies, that the Injuries which one Member suffers from a *Foreigner*, seem to affect the whole Commonwealth; so it doth not appear to be unjust, that every particular Subject should be obliged to assist the Discharge of the publick Debts: Since, whatever they pay upon that Account, must be refunded to them by the Commonwealth. But, if it should be any Man's Misfortune to be a Loser by the Publick, he must look upon it to be one of those Inconveniencies, that are almost unavoidable in a *Civil State*, and consider that these are very tolerable Evils, in Comparison of those, which he must have felt in a wild *Liberty of Nature*.

XIV. It is manifest, that Men often make *War*, not only upon their own Accounts, but also for others [3]. But, to answer for the Justice of it, it will be necessary, first, that the Party who is *assisted* should have *just* Reasons for *War*. And secondly, That the Party who *assists* should be under some particular *Ties* and *Obligations* to him who is principally concern'd in the War; because, otherwise, it would be very unjust to assist one Man against another; since, as they are Men, they both equally deserve Favour [b]. They therefore, whom we not only may, but are obliged to defend, are first of all our own Subjects. And that not only because they are, as it were, a Part of the Government, but, because the End Men at first propos'd to themselves, by giving up their natural Liberty, and submitting voluntarily to a *Civil State*, was the Enjoyment of such a Defence. So the *Campanians* thought that by yielding themselves, and all that they had to the *Romans*, they laid a Necessity upon them to arm in their Protection [4]. Though, in this Instance, it may be observed, that since the *Campanians* had exasperated the *Samnites*, and raised an unjust *War* against them before, the *Romans* could not justly resolve to defend them, notwithstanding that they had yielded themselves to be their Subjects, till they had made *Satisfaction* for the *Damages*, and defray'd the *Expences of the War* [5]. But, in Defence of any particular Subject, the Government can then only *justly* make War, when it will be no great Inconvenience or Disadvantage to the Whole, or the Majority of the other Subjects, because the *Government* is obliged to have a greater Concern for the Whole than for a Part; and the greater the Part is, the nearer it approaches to the Whole. The next to Subjects, whom we are obliged to assist, are those *Allies* who have made this particular *Condition* and *Article* of *League* with us. But then all *Allies* are to give place to our own Subjects, when both cannot be assisted, and that without any Breach of the *League*: For no Com-

[a] *Lycurg.* Orat. adverss. *Leocratem. Polyb.* Lib. iv. Chap. xxvii. ab init. *Gratianus*, Caus. i. & iii. Distinct. xxxvi. [b] *Lucan.* Lib iv. Ver. 707, &c.

Quis conferre duces meminit? Quis pendere causas?
Qua stetit inde favet; veluti fatalis arenæ
Muneribus, non ira vetus concurrere cogit
Productos, odere pares.

The Cause belongs not to a General's Care,
Theirs he thinks best for whom his Arms declare;
As when in bloody Shews upon the Stage
The *Gladiators* generally engage,
Not Malice, nor Revenge creates the Fight,
But rival Bravery, and equal Might.

[1] But as Mr. *Titius* observes (*Observ.* DCXCVI.) our Author here reasons upon a false *Hypothesis*, which has been already confuted, (Chap. iii. Sect. 4. Not. 8. of this Book) I mean his Principle, that the Criminal who is attainted and convicted, is exempt from all Obligation, which answers to the Right of inflicting Punishment upon him. It is better therefore to say, that, independently of all particular Agreements the State is bound to give up the Person who hath taken Refuge in its Territories, supposing he be really guilty; or else to punish him itself.

[2] This Definition of *Reprisals* is taken out of our Author's Abridgment, *De Offic. Hom. & Civ.* Lib. ii. Chap. xvi. Sect. x. For he contented himself here with referring to *Grotius*, Lib. iii. Chap. ii. The Reader may see there (Sect. 2. Not. 1.) what I have said, to shew that Reprisals are a Consequence of the Constitution of civil Society, and that their Practice is founded upon the Application of the Rules of the Law of Nature to this Constitution. However, as *Grotius* has not treated of this Right with Exactness enough, I shall give the Reader a general Idea of it from M. *Buddeus*, *Elem. Philos. Pract.* Part. ii. Chap. v. Sect. 3. & 6. &c. *Reprisals* being a Sort of an Act of Hostility, or, at least, the Prelude and Forerunner of War, it is plain that no Body can lawfully use this Right but in the Name, and by the Authority of the Sovereign, who, before his granting that Permission, ought carefully to examine whether the publick Interest of the State allows him to carry Matters to that Extremity. The Occasion on which we make Use of *Reprisals*, must, also, be very clear, and the Thing in Dispute of great Consequence: For it would be equally imprudent and unjust to accuse a foreign Magistrate of Connivance, or a malicious Denial to do Justice in an obscure and litigious Affair, or in one of no Importance, or without having sufficient Proofs of the Insincerity of the Prince, to whom we have made our Application; or before having tried to do Justice to ourselves by some milder Way, as that of Compensation. But how just a Cause soever we may have to use *Reprisals*, we can never directly, for that single Reason alone, put those to Death whom we have seized upon, but only secure them, and not use them ill till we have obtained Satisfaction: So that during all that Time they are in the Nature of Hostages. As for Goods seized by Right of *Reprisals*, we must take Care of them till the Time set for the Payment is expired; after which we may either adjudge them to the Creditor, or sell them to discharge the Debt, and return to him from whom they were taken the Overplus, deducting out of them all Charges and Expences. But it is not lawful to make *Reprisals*, but with Regard to Subjects properly so called, and their Goods; for as to Foreigners, who do but pass through a Country, or only come to make a short Stay in it, they have no such great Union with the State, of which they are only Members but for a Time, and in a very imperfect Manner, that we may indemnify ourselves upon them, for a Loss we have received by any original and perpetual Subject, and by the Sovereign refusing to do us Justice. We must farther except *Ambassadors*, who are sacred Persons, even in the Height of War. But as for Women, Ecclesiasticks, Men of Letters, &c. the *Law of Nature* gives them here no Privilege, unless they have otherwise got it by Virtue of some Treaty. See this, more at length, in the Text and Notes of the Chapter of *Grotius* before cited.

[3] See *Grotius*, Book ii. Chap xxv.

[4] *Livy*, Lib. vii Chap. xxxi. Florus, Lib. i. Chap. vii.

[5] See, upon this, M. *Buddeus Jur. isp. Histor. Specimen*, among his *Selecta Juris. Nat. & Gent.* Sect. 89. & *seq.*

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monwealth can be more obliged to a *foreign State* than to its own Subjects. And therefore in every *Promiſe* of *Aid* and *Aſſiſtance* the Commonwealth makes, this *Limitation* is implied, *As far as is conſiſtent with the Obligations owing to the Subject.* And therefore it is very abſurd to place any Confidence in a *League*, which is not the Intereſt of our *Ally* to obſerve. But as we ought not to undertake any *raſh* or *unjuſt War*, ſo neither can we be obliged by any *League* to aſſiſt an *Ally*, who engages only in ſuch. It is true, this holds chiefly in *offenſive* Wars, but it may, alſo, bear ſometimes in the *defenſive:* For if my *Confederate* is ſenſible that he is much weaker than his Enemy, and that his own Forces, and all I can ſupply him with, will not make him a *Match* for him, and yet is obſtinately bent to hazard himſelf, tho' it be to his certain Ruin, when he may treat upon tolerably good Terms; I ſhould be a mad Man to join myſelf with him in ſo extravagant and hopeleſs an Attempt. And thus far what *Grotius* ſaith [1] is very true, "That we are not obliged "to ſend Aſſiſtance, when there is no Hopes "of Succeſs; for Society is formed for Good, "and not Evil." [2] But then it is, alſo, to be conſidered, that it would be to no Purpoſe to make *Leagues*, if we were to run no Hazard, or ſuſtain no *Loſſes* in the Defence of an *Ally*. Next to our *Allies* are our *Friends*, or thoſe we have joined ourſelves to by particular *Ties* of *Kindneſs* and *Reſpect*. To theſe, tho' we have not promiſed by expreſs *Article of Treaty*, to ſend a certain determinate Aid or Supply, yet the Nature of *Friendſhip* itſelf ſuppoſeth an Interchange and Union of Faith, and that one *Friend* muſt be concerned for the other's Safety, as far as the ſtricter *Obligations* he is under will ſuffer him; and that his *Concern* ought to be much ſtronger for him, than that which is due from one Man to another, by the common *Affinity* and publick *Relations* of Mankind; tho' ſometimes thoſe alone may be ſufficient Motives to us to undertake the Defence of a Perſon manifeſtly injured and abuſed; eſpecially ſince it may eaſily be made our own Intereſt to do it; and ſince nothing can tend more to promote publick Good than to puniſh thoſe who take pleaſure in diſquieting and injuring others. And therefore *Solon*, upon this View, when he was asked, how there might be fewer Injuries committed in the World, anſwered, *If they who were not injured would be as much concerned as they who were* [3]. But then we are not to imagine that every Man, even they who live in the *Liberty of Nature*, hath a Right to correct and puniſh with War any Perſon who hath done another an Injury, barely upon Pretence that common Good requires, that ſuch as oppreſs the Innocent ought not to eſcape Puniſhment, and that what toucheth one ought to affect all. For otherwiſe, ſince the Party we ſuppoſe to be unjuſtly invaded, is not deprived of the Liberty of uſing *equal* Force to repel his Enemy, whom he never injured; the Conſequence *then* would be, that, inſtead of one *War*, the World muſt ſuffer the Miſeries of two. Beſides, it is, alſo, contrary to the natural *Equality* of Mankind, for a Man to force himſelf upon the World for a *Judge*, and *Decider* of *Controverſies*. Not to ſay what dangerous Abuſes this Liberty might be perverted to, and that any Man might make War upon any Man upon ſuch a Pretence. The Wrong therefore another Man ſuffers is not Reaſon ſufficient to engage me in his Quarrel, unleſs he calls me particularly to his Aſſiſtance; ſo that whatever I undertake to do, is not to be charged upon me, but upon the Perſon who deſires my Help. But whether it be lawful to take Arms in Defence of the Subjects of a *foreign* Commonwealth, againſt the *Invaſions* and *Oppreſſions* of their *Sovereign*, is a Queſtion; for the Solution of which I refer you to the Opinion of *Grotius* [a]; the faireſt [4] Anſwer that can be given to it ſeems to me to be this, That we cannot lawfully undertake to defend the Subjects of a foreign Commonwealth in any other Caſe, than when they themſelves may lawfully take Arms to ſuppreſs the inſupportable Tyranny and Cruelties of their own Governors.

XV. Of the Declaration neceſſary to *ſolemn War*, *Grotius* largely informs us, Lib. iii. Ch. iii.

XVI. The ſame Author, Lib. iii. Chap. iv. *&c.* gives us a long Account of many Nations that never ſet Bounds to themſelves in any of thoſe Liberties which, as I ſaid before, the *Law* of *Nature* allows againſt Enemies. But here it is to be obſerved, that tho' Generals uſually give Laws to their Soldiers, preſcribing how far they are to uſe Hoſtilities againſt the Enemy, and puniſh the Violation of them upon the Offenders; yet this is not done becauſe they ſuppoſe the Enemy is or may be injured, but becauſe it is neceſſary that the General's Orders ſhould be obey'd, and that military Diſcipline ſhould be ſtrictly obſerv'd. So that tho' a Perſon, who in a *ſolemn War* had behav'd himſelf with greater Cruelty and Outrage than the *Law* of *Nature* will permit, ſhould afterwards happen to be indicted or accuſed for it in any third Commonwealth unconcern'd in the War, it would be a very uncommon Way of Proceeding, ſhould he

[a] Book ii. Chap. xxv. § 8.

[1] Vide *Grot.* Lib. ii. Chap. xxv. Sect. 4. Mr. *Buddæus* (in his Diſſertation *de comparatione obligationum, quæ ex diverſis hominum gentibus oriuntur*, Sect. 60.) ſays, that we ought to eſteem thoſe of the ſame Religion with us more than our Friends and Allies, or elſe put them in the ſame Rank at leaſt. But he forgets not to obſerve, at the ſame Time, Sect. 62, that we muſt not think it lawful, under a Pretence of defending and favouring that Religion which we believe to be the true, to do every Thing againſt thoſe of another Religion whatſoever; which is a deteſtable Maxim, univerſally and juſtly blamed in the Conduct of *Roman Catholicks*, but which, *continues he*, thoſe who have the greateſt Abhorrence of the Tyranny of the *Roman Church*, do not ſeem to be entirely out of Conceit with.

[2] And this Hope, however great it is, as it implies no Certainty, is, conſequently, always accompanied with Danger, and liable to Diſappointment.

[3] *Plutarch* in *Solon*. Pag. 88. D. *Quintilian*. Inſt. Orat. Lib. iv. Chap. i. Pag. 270. It is natural for us to pity the Diſtreſſed: *Euripides* Supp. Lib. Ver. 267, 268.

Ἔχει καλαφυγὴν θὴρ μὲν πέτρων, &c.

The Beaſts purſued, to Rocks and Cliffs retreat,
The Slave clings to the Altars of the Gods.
And States diſtreſſed, their Neighbours Aid implore.

[4] The Princes the moſt jealous of the Rights of Sovereignty over their Subjects, have often maintain'd the Juſtice of ſuccouring thoſe of others in like Caſes. We have ſeen this *Theſis* maintain'd in *France*, when the *Catalonians* withdrew themſelves from their Subjection to the Crown of *Spain*. See *Silhon*'s *Miniſter of State*, Part ii. Lib. ii. Diſc. v, vi.

be

be ſentenced for a Ruffian or Murderer, and be uſed as ſuch; becauſe as it does not belong to the People of one Nation to enquire what others are guilty of Abroad, ſo there ſeems to have been a *tacit* kind of Agreement of Nations, that one ſhould not paſs Judgment upon the Wars another engages in. For why ſhould one at a Diſtance from the Diſpute, and no *Ally* to either of the Parties engaged, give himſelf the Trouble of making another's Quarrel his own? Beſides that, even in a *juſt War*, it muſt be allow'd difficult to know what are the juſt Meaſures of Self-Defence, in what Method to exact Satisfaction for Damages, and what Ways to take *Caution* for the future. So that, in ſhort, it is ſafer to leave theſe Things to the Conſciences of the Parties engaged in the War, than to venture to give Sentence upon an Affair, the Condemning of which may be of dangerous Conſequence to ourſelves; eſpecially ſince the Parties at War themſelves, by a tacit ſort of Compact, agreed either to increaſe or abate the Heat of the War, as they pleaſe.

XVII. How far in particular it is uſual to extend the *Liberties of War* upon the Perſons of the Enemy, may be ſeen at large in the ſame Author, Lib. iii. Chap. iv.[1]

XVIII. It may, alſo, in the next Place be particularly enquired, whether it be lawful to aſſaſſinate an Enemy? And here *Grotius*[a] thinks that there ought to be a Diſtinction made between Perſons who violate their Faith, whether expreſly or tacitly given, as Soldiers, Subjects, Vaſſals, Refugees, and Perſons that were never bound by Faith. And that to employ the latter as Aſſaſſines, is what no Law forbids[b]: But that to make uſe of them, who muſt by the Act be guilty of Falſhood and Treaſon, is what the more civilized Part of Mankind always look upon as the greateſt Infamy and Baſeneſs; tho' againſt *Rebels*, *Pyrates*, and *Highwaymen*, the moſt ſcrupulous Princes never doubt to propoſe even Rewards to the Perſons who can kill or apprehend them. Nor does any Body blame the Conduct, or think the Meaſure hard, becauſe theſe are known to be common Enemies, and lie under the publick Odium of all. The ſame Anſwer will ſerve that other general Queſtion, Whether it be lawful to uſe *any Man's Service promiſcuouſly* in War? Where we are to diſtinguiſh between them who betray or revolt from their Maſters, and offer themſelves voluntarily, and them who ſuffer themſelves to be corrupted in their Faith by the Force of Rewards and Promiſes. By the common Practice of the World the former may lawfully be employ'd; but as *Grotius* thinks, Lib. iii. Chap. i. § 21, 22, not the latter[c]; tho' I think it may very well bear Diſpute. For ſuppoſing the Cauſe I engage in be juſt, I have a Right to diveſt my Enemy of all Forces and Succours, to make him as defenceleſs, and to give him all the Diſturbance, and do him all the Damage I can, which are the Things aim'd at in ſolliciting his Subjects to a Defection. And I do not ſee any ſufficient Reaſon why I may not purſue that End, by tempting my Enemy's Subjects with the Hope of Rewards, as well as any other Way; eſpecially ſince it is on all Hands allow'd, that an Enemy's Subjects may be lawfully frighted by falſe Threats, and Shews of Fear to ſurrender themſelves, and, conſequently, to deſert their Maſter: Which Sort of Deſertion is not wholly excuſable, ſince it is known, that, by the Laws military, they who ſuffer themſelves to be impoſed upon in that Manner, are as liable to Capital Puniſhment as they who are guilty of Perfidiouſneſs and Diſloyalty; for Cowardice and Credulity are as inconſiſtent with the Duty of a Soldier as Faithleſneſs and Treachery. And further, tho' Force is the moſt lawful, and the braveſt Way of attacking an Enemy, yet this doth not make it unlawful to have Recourſe to Fraud. And tho' theſe Deſerters I ſpeak of are certainly criminal themſelves, yet there is no Reaſon why the Party who ſollicited them to a Deſertion, ſhould bear any Share in the Guilt of it: Becauſe I don't ſee any Manner of Obligation why I ſhould abridge myſelf of the Liberty of making uſe of the eaſieſt Methods to obtain my Right, only becauſe by doing ſo I may give them occaſion to be guilty of Sin, who have already, by the Injuries they have done me, broken off all Communication of Right with me. And why may it not be lawful for me to win thoſe with my Money, whom I might otherwiſe conquer with my Sword? Eſpecially, ſince after all the Propoſitions and Sollicitations I can make them, it is ſtill left to their own Choice, whether they will look upon me for an Enemy, or buy my Favour by entering into my Service. But in Time of Peace there are theſe two Reaſons why I ought not to importune another Man's Servant or Subject, unjuſtly to deſert from his Maſter, and come over to me. *Firſt*, becauſe I have no lawful Power to intercept any Thing that belongs to another. And *ſecondly*, Becauſe I cannot juſtly puniſh, or do any Harm to him, tho' he ſhould refuſe to deſert, and make me his Maſter; both which are manifeſtly allowed me in the Caſe before us. As therefore the Propriety my Enemy hath to what he calls his own, is no Manner of Reaſon to me why I may not take it from him; ſo the Right he hath over his Subjects is ſo far inſignificant with me, as I am under no Obligations to be in the leaſt concerned, that he ſhould always inviolably enjoy it. And therefore the Objection uſually made againſt this Opinion, that a Man cannot incite another to do a Thing, which he muſt ſin in doing, or that, that Man is guilty of Sin himſelf, who ſupplies another with a Cauſe or Occaſion of Sin, ſeems to me to hold only between ſuch as are not *Enemies*. For an *Enemy*, in Reſpect to me, is in ſuch a State, that as long as I am in Purſuit of my Right, and in Arms againſt him, I have no Reaſon to trouble myſelf whether he takes from thence an Occaſion to ſin, or not. And therefore, tho' perhaps my Promiſes or my Money may be really the Inducement to another to be falſe, and de-

[a] Lib. iii. Chap. iv. § 18. [b] *Mori.* Utop. Lib. ii. [c] Vide *Quintil.* Decl. ccxv.

[1] Or it is lawful to kill an Enemy wherever we find him, and, to accompliſh this, it ſignifies nothing whether we make uſe of a great Number of Men or of one only. See M. *Buddæus* Diſſert. entitled *Juriſpr. Hiſt. Specimen*, § 49. *& ſeqq.* I have treated this Queſtion more exactly and diſtinctly in the Chap. of *Grotius* before cited.

ſert; yet, in Reaſon, the Crime of Falſeneſs and Perfidiouſneſs cannot be charged upon me as my own, becauſe, for the preſent, the State of War hath entirely broken off all Commerce and Communication of Right, between him and me; and he himſelf, as far as in him lay, gave me an unlimited infinite Power and Liberty againſt himſelf. And ſince it is not in the leaſt unlawful to put an Enemy to the Sword, when the State and Poſture of War requires it, I do not ſee why it ſhould be thought criminal to offer him a Temptation that may poſſibly tempt him into Sin: For it is evidently a weak Argument, which ſome produce to the contrary, that *Faith* ought to be kept by Enemies; and that therefore an Enemy's Subjects are not to be ſeduced to Deſertion. But after all, a Man ſhould be cautious, that he don't ſet an Example to others, that one Time or other may be of dangerous Conſequence to himſelf. And without Diſpute, it is an Evidence of uncommon Greatneſs and Generoſity of Spirit, when a Man hath it in his Power to refuſe to make uſe of ſo eaſy a Way of Acquiſition. Beſides that, "It is certainly true [a], that a "Man who accepts the Service of a Traytor, "tho', upon the Heat of his Succeſs, he may "think himſelf obliged by him; yet afterwards, "when he reflects upon the Action, he will be"gin to ſuſpect, and then to fear, and ſo to "hate the Traytor, tho' he loved the Treaſon, "becauſe he knows he hath had already ſuffici"cient Experience of the Inſincerity of his "*Faith* [b]."

XIX. How far the Liberties of War may be extended upon the Goods of an Enemy, and Things we call Sacred, we are inform'd by *Grot.* Lib. iii. Chap. v.

XX. The *Laws* of *Nature* and *Conſcience* in a *juſt War*, allow [1] a Man to make ſuch Acquiſitions out of what his Enemy poſſeſſeth, as will either reſtore him what was due to him, or give him an *Equivalent* to it [2] further, and all that the Refuſal of the Payment of which gave Birth to the War; and beſides, to ſatisfy himſelf for the Charge he was at in recovering his Right by Force; and to all if there be any Thing elſe, which he thinks neceſſary to ſecure further to himſelf, and take by way of *Caution* from the Enemy. And therefore if a Man inſults and oppreſſeth his Neighbours, upon the Confidence he repoſeth in his Riches, when he happeneth to be over power'd, it is but juſt he ſhould be deprived of his ſuperfluous Wealth, that for the future he may learn to be more quiet and peaceable. But, by the Practice of the World, a Man makes himſelf abſolute and perpetual Maſter and Proprietor of every Thing he takes from his Enemy in a *ſolemn War*, tho' much exceeding the Pretenſions the War begun upon, *Vid. Grot.* Lib. iii. Chap. vi. § 1, 2. Where he, alſo, ſheweth, when both *Moveables* and *Immoveables* may be ſuppoſed to be taken [3]. Where it is to be obſerv'd, that the Right to Acquiſitions of War is of Force only againſt any third diſintereſted Party. But to give the Conqueror a Right of Propriety, that will hold good againſt the Conquer'd, there muſt, of Neceſſity, be a Pacification and Agreement between both the Parties, otherwiſe the Right is ſuppoſed to continue ſtill in the old Proprietor, and, whenever he is ſtrong enough, he may juſtly ſtruggle to recover it.

XXI. It is, alſo, diſputed, to whom the Acquiſitions of *ſolemn War* belong, whether to the whole Body of the People, or to any particular Perſons among the People, or to them who made the firſt Seizure [4]? Which Controverſy I think may thus in ſhort be concluded. It is certain that the Right of War is lodg'd in the Sovereign, under which Right is comprized the other of arming the Subjects, of leading or ſending them abroad upon Expeditions, as, alſo, the Right to raiſe Money upon them, and other Neceſſaries for War. *But* ſince Wars are undertaken either to recover the Rights or Dues of the private Subject, which the Enemy wilfully refuſeth to pay, or elſe upon ſome publick Cauſe, which concerns the whole Commonwealth, it eaſily appeareth, that, in the firſt Caſe, the principal Thing to be taken Care of is, that the Perſons, upon whoſe Wrongs the War began, may be reſtored to their Rights. And the Overplus in this Inſtance, and in Wars that begin from a more publick Cauſe, all that is taken is firſt acquired to the Sovereign, as to him who gives Authority to the War, whatever Hands it firſt fell into, whether the mercenary Soldiers or Subjects obliged to military Service upon Summons, without receiving Pay [c]. But becauſe War lies heavy upon the Subjects, whether they are only taxed to ſupport it, or are obliged to *ſerve* in it themſelves, it is no more than a good Prince, who hath a Love for his Subjects, would yield to, that the Subjects ſhould be allowed in Return to make ſome Advantage to themſelves by the War; which may be done, either by aſſigning to them a certain *Pay* from the *Publick* when they go out upon any *Expedition* [d], or by ſharing the *Booty* among them, or by giving every one Leave to keep the *Plunder* he gets himſelf (as the *Cuſtom* was among the *Greeks*, when they proclaim'd War, to declare, at the ſame Time, that every Man ſhould have free *Plunder* [e]) or elſe by giving the *Booty* to the *Publick*, in Order to eaſe the Subjects of the Burden of the *Taxes* for the future. *Mercenary* Soldiers have no Right to any Thing but their Pay. What is given them above, that is Matter of *Bounty*, or perhaps Reward for their good Service, or Encouragement to their Valour: *Grotius*, in the Place above mention'd, is very large upon this Subject. But upon his Diſtinction of *Acts* of *Hoſtility* into *publick* and *private Acts*, which are undertaken only upon the *Occaſion* of the *publick War*, it may be obſerv'd, that it may be very

[a] *Procop.* Hiſt. *Goth.* Lib. i. Chap. viii. [b] Vide *Valer. Max.* Lib. vi. Chap. v. § 7. [c] *Ælian.* V. Hiſt. Lib. vi. Ch. vi. The *Spartan* Soldiers were not allowed ſo much as the Spoils of the Enemy. [d] Vide *Liv.* Lib. iv. Chap. lx. & Lib. v. Chap. iv. [e] Vide *Polyb.* Lib. iv. Chap. xxvi, xxxvi.

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[1] This is ſhewn above in Book iv. Chap. vi. § 14. Where I have explain'd the Right of Acquiſition of Things taken from an Enemy.

[2] Provided they are his: For it is not ſo with thoſe Effects that are found in his Country, but belong to Strangers, with whom he is in Peace, unleſs they have ſent them to him with a Deſign to aſſiſt him in the preſent War. As for the Cargo of Ships belonging to the Enemy, they are lawful Prize, as long as Strangers have not demanded and clearly prov'd what Effects they had in them. [3] Vide *Grot.* d. l. § 3, 4. [4] See *Grot.* Book iii. Chap. vi. § 8, 9, &c.

juſtly queſtion'd, whether every Thing taken in *War* by *private Hoſtilities*, and by the Bravery of *private Subjects*, that have no *Commiſſion* to warrant them, belongeth to them who take it. For this is, alſo, *Part* of the *Right of War*, to appoint what *Perſons* are to act in a *hoſtile* Manner againſt the Enemy, and how far. And in Conſequence, no *private Perſon* hath Power to make *Devaſtations* in an Enemy's Country, or to carry off *Spoil* or *Plunder*, without *Permiſſion* from his *Sovereign*. And the Sovereign is to determine how far private Men, when they are permitted, are to uſe that *Liberty* of *Plunder*; and whether they are to be ſole *Proprietors* in the *Booty*, or only to ſhare a Part in it: So that all that a private *Adventurer* in War can pretend Right to, is no more than what his *Sovereign* will pleaſe to allow him. For to be a *Soldier*, and to act *offenſively* in an *hoſtile Manner*, a Man muſt be *commiſſion'd* by *publick* Authority. And therefore *Cato* us'd to ſay, that *no Man had any Right to fight an Enemy who was not a Soldier* [a].

XXII. As to the *Acquiſition* of Things *incorporeal*, it is to be particularly obſerved, that they are never acquired but with the Subject they [1] *inhere* in. The Subjects they *inhere* in, are either in *Perſons*, or in *Things*. Thus for Inſtance, in *Things*, there are often certain peculiar *Rights* inherent in certain *Lands*, *Rivers*, *Ports*, *Towns*, and *Countries*; or rather the *Perſons* who are the *Proprietors* of thoſe *Things*, are inveſted with certain *Rights* over other *Perſons* and *Things*. But here it is to be conſidered, whether this *Right* be annexed to this particular *Thing*, by *perſonal* Compact, or by *real*; or whether the Perſon who firſt united this *Right* to the *Thing*, agreed by Compact, that that *Right* ſhould continue in the *Proprietor* of the *Thing*, whoever *he* might happen to be, or by what *Title* ſoever he came to the Poſſeſſion of it; or whether he intended that the *Right* ſhould be no longer valid, than *certain Perſons* ſhould poſſeſs the *Thing* by a *certain Title*. If the *Right* be annexed *to the Thing* in this *latter* Method, it is manifeſt, that it is not *every one* who poſſeſſeth himſelf of the *Thing* by any *Title* whatever *at Random*, that hath Power to exerciſe that *Right*; but it muſt be conſidered, whether that *Right* ought to follow a *Title* of an *Acquiſition of War*, by its firſt Inſtitution. But thoſe *Rights* [2] which are *immediately*, and in *themſelves* applied, and annex'd to *Perſons*, relate either to other *Perſons* or *Things*. The *Rights* which are annexed to *Perſons* over other Perſons, ſince they are not obtain'd but with the *Conſent* of the *Perſons* themſelves (and this *Conſent* doth not reſpect any Man *promiſcuouſly*, but only ſome *certain Men*) cannot be ſuppoſed to be acquired with the *Perſons*, tho' perhaps the *Perſons* they were annex'd to, and lodg'd in, may fall into their Enemy's Power. Thus, for Inſtance, tho' a *Prince* happens to be made a *Priſoner* of War, his Enemies have not therefore acquired his *Kingdom* with him. And the taking an *Husband*, or a *Father*, doth not give an Enemy Power over the *Wife* or *Children* [b]. When indeed an Enemy hath taken the *Wife* and *Husband* together, he hath a *Right* over the *captive Wife*, but not becauſe he took the *Husband* with her, but ſolely becauſe he hath made her his *Priſoner*. Neither would he have had more or leſs *Power* or *Right*, whether he had taken her *Husband*, at the ſame Time, or not. Neither doth the Conqueror acquire any *Connugal Power* over the captive *Wife*, but barely ſuch a *Right* as is uſually *acquired* over *Captives*. As to the *Rights* which relate to *Things*, we muſt diſtinguiſh, whether the *Perſon* be a Member of a Commonwealth, or live out of *Civil Government*, in a *State of Nature*. If he liveth in a *State of Nature*, the Enemy who taketh the *Perſon* is ſuppoſed to have taken all the *Things* with him, or at leaſt, to have poſſeſs'd himſelf of Power to take them, becauſe there is no Body to reſiſt him, or, that hath any *Right* to hinder him from *ſeizing* upon all he had. But in Commonwealths the *Thing* is not loſt with the *Perſon*, but the *Right* of it devolves to other *Perſons* of the ſame Commonwealth, or, upon *Default* of theſe, to the *Publick*. And therefore if a Subject of any Commonwealth be taken by an Enemy, his *Goods* that were not taken with him, are not acquir'd by his *Conqueror*, but fall to him who would have been his *Heir at Law*, if he had died a natural Death. But if the Enemy hath taken the *Goods* with his *Perſon*, that the Things taken are *Prize of War*, is Title enough to juſtify his *Propriety* in them, and it is perfectly needleſs for him to derive that *Propriety* from the *Perſon* of the laſt *Poſſeſſor*, whom he took with them. And ſo the Thing is the ſame, as far as concerns the *Right* of the *Conqueror*, to the *Things* he hath taken, whether he takes the *Proprietor* with them, or not.

XXIII. The fam'd Queſtion once moved in the *great Council* of *Greece*, may ſerve to illuſtrate what has been ſaid, which *Quintilian* [c] ſays was occaſion'd thus: When *Alexander* the *Great* took and deſtroyed the City of *Thebes*, he found an *Inſtrument*, in which it appear'd, that the *Thebans* had lent the *Theſſalians* an hundred *Talents*. *Alexander*, becauſe the *Theſſalians* were in his Service, freely gave them up the *Inſtrument*. The *Thebans*, who afterwards were reſtored by *Caſſander*, demanded the Debt. The Reaſons the *Thebans* brought to juſtify their Demand, are to

[a] *Cic.* Off. Lib. i. Chap. xi. Add. *Ziegler* upon *Grot.* Lib. iii. Chap. vi. § 12. As for the reſt, he ſays nothing of *Allies*, who it is evident, ſhould come in for a Share of the Booty; and that even tho' there was no expreſs Convention made between them and the State to whoſe Aſſiſtance they came. See *Grotius*, Lib. iii. Chap. vi. § 23. [b] Vide *Grot.* d. l.

[c] *Inſt. Orat.* Lib. v. Chap. x. 387, 388. Mr. *Titius* in his *Obſervat.* in *Compend. Lauterbach. Obſ.* 1438, and *Francis Hottoman's* Quæſtion. Illuſt. Quæſt. v, have taken the Part of the *Theſſalians*. But it would be eaſy to ſhew, that neither the one nor the other ſay any Thing to deſtroy the Reaſons of *Grotius*, and our Author.

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[1] Thus (as M. *Hertius* obſerves here) tho' we ſhould take among the Booty a Bond or promiſſory Note, yet, unleſs we take the Creditor to whom it is given, we acquire no Right to exact the Debt. This Author ſays it is, alſo, the ſame Thing when we ſeize the Creditor, becauſe the Right, proceeding from the Contract, is perſonal. But this is only true, ſuppoſing that a Priſoner of War preſerves his Liberty. For even at preſent, in Countries where they make Slaves of thoſe they take in War, the Conqueror acquires, as formerly, with the Priſoner, a Right over all his Goods, of whatever Nature they be; among which muſt be reckon'd his real Debts, tho' founded upon Contract. All we can ſay is, That this only takes Place with regard to neutral Nations, who, as ſuch, ought to look upon Acts of Hoſtility as juſt on both Sides: Whereas the Nation itſelf, to which the Priſoner belong'd, always ſuppoſes them unjuſt; and leaves the Enemy, by a Treaty of Peace, only what they have taken, unleſs ſomething further be expreſly ſtipulated. With reſpect to the firſt Caſe, See Joach. Burgers, *Sing. Obſerv.* Cent. i. Obſ. xxvi.

[2] See *Grot.* Book iii. Chap. vii. § 4, and Chap. viii. § 4.

be ſeen in the ſame Place in *Quintilian*. To which the *Theſſalians* might have anſwered, Firſt, That what was taken away by juſt Force cannot be demanded again; that, by the Cuſtom of Nations, the *Hoſtilities* committed in *ſolemn* War are look'd upon to be *juſt*; and, in Conſequence, the *former Proprietor* can have no *Pretenſion* left to any Thing that was taken from him, after a *Peace* is eſtabliſhed. Secondly, That a *Right* of *War* is a *valid Title*, when a *Thing* comes to be diſputed in the *Civil Court*: For, after a *War* is ended, if any *Controverſy* ariſes about any *Thing* I have taken in the War, 'tis enough to plead that I have a *Title* to it as *Prize of War*. Thirdly, That what is taken in a *juſt War* may very juſtly be retain'd in *Peace*, eſpecially after the *Articles of Peace* are ſettled, and agreed upon on both Sides. For then every Thing is ſuppoſed to be left entirely to the Poſſeſſor, which he is not expreſly obliged to reſtore by the *Articles of Treaty*. Fourthly, thoſe *Rights* which are *properly* and *ultimately* founded in the *Things* themſelves, may be *acquired* with the Perſon who is made *Captive*, ſuppoſing the *Captive* giveth his *Conſent* to *transfer them to me*; which *Conſent* I have Power to force him to by threatening him with ſome greater Evil. Wherefore as I can make over an *Action* of *Debt* to another Man, and the Effect will be, that the *Debtor* muſt be obliged to pay his Debt to him, as much as he was before to me; ſo if a *Captive* conſent to make over his *Action* to me, what the *Debtor* owed before to my *Captive*, is now become due to me. And thus *Alexander* might, if he pleas'd, have made himſelf the *Creditor* in the Inſtance before us, though he had left the *Theban Commonwealth* ſtanding, only by forcing them to *transfer* their *Right* to the *Debt* to him. And indeed, he muſt be ſuppoſed to have made himſelf *ſuch*, ſince he made himſelf *abſolute* Maſter of *Thebes*, without any *Exception*; and therefore had a *Right* either to demand the *Debt* of the *Theſſalians*, or to forgive it them: Nay, he might immediately have forced the *Thebans* to remit the *Debt*. And therefore when *Alexander* gave up the *Inſtrument* of the *Debt* to the *Theſſalians*, it is not to be ſuppoſed, that he did it for fear the City of *Thebes*, which he had then laid in Ruins, might ſome Time or other afterwards demand the *Debt* of them, but to give them Aſſurance that he himſelf would never require any Thing of them upon that Account. Fifthly, it is abſolutely falſe, that, as long as there is any one Subject of a Commonwealth left alive, he muſt be ſuppoſed to be the *Creditor* of the whole *Debt*, and, conſequently, that he hath the ſame *Right* the Commonwealth had to demand its *Debts*. For thoſe particular Perſons who outlive the utter Diſſolution of the *Body* of the Commonwealth can have no Manner of Pretence to aſſume to themſelves the *Right* of the Commonwealth; ſince it is not to be ſuppoſed that they any longer conſtitute it. And it is manifeſt that *Alexander* totally diſſolv'd and extirpated the *Theban* Commonwealth, ſo that they who eſcaped the general Deſtruction, could not be look'd upon to be a *People*. And they who afterwards re-eſtabliſhed the *Commonwealth* of *Thebes*, were manifeſtly a new *People*. And tho' perhaps the antient *Thebans* might have had certain peculiar *Rights*, yet theſe *new Inhabitants* could not pretend to aſſume the ſame to themſelves, barely from the Place they liv'd in, unleſs they obtain'd them all anew: Which was not done with Relation to the *Theſſalian Debt*. Sixthly, the *Theſſalians* did not take any unjuſt Methods to obtain the *Inſtrument*, but received it from *one* who voluntarily offer'd it to them, and who had *Thebes*, and all that belong'd to it at Mercy, purely with Intent to forgive them the *Debt*.

XXIV. Conquer'd *Nations*, as well as particular Perſons, may be brought under *Dominion*; but that it be *lawful*, and oblige the *Conſciences* of thoſe who ſubmit to it, it is requir'd, that the Vanquiſh'd promiſe expreſly or tacitly to acknowledge the *Conqueror* for their *Maſter*, and that he for his Part will not treat them any longer as his *Enemies* [1].

XXV. I ſhall now briefly enquire how Things *loſt* in *War* return to the *antient Proprietors* and *Maſters*. And here, in my Opinion, nothing can be more agreeable to natural Equity, than that ſuch as have been made *Priſoners* of *War*, when they find Means to eſcape out of their Enemy's Reach, and are under no Obligations of *Faith* to them, and return to their own *Country*, ſhould not only recover their former *Quality* and *State* in the Commonwealth, but be, alſo, reſtored to all their *Rights*, *Goods*, and *Fortunes*. But with Reſpect to *Things*, whether they be *Moveables* or *Immoveables*, if while the War continues they are retaken from the Enemy, either by *ourſelves*, by our *Subjects*, or by our Soldiers, it is juſt and reaſonable, if they are to be diſtinguiſhed, that they ſhould be reſtored to the *antient Proprietors*. For ſince the Commonwealth is engaged to defend and ſecure the Subjects as far as is poſſible, in their *Goods* and *Properties*, there muſt, it is evident, be the ſame *Obligations* upon the Publick to take care that what is taken from them be reſtored. And it is no *Exception*, that the *Goods* were recovered by the *Soldiers*: For *Soldiers* are only the *Hands* of the Commonwealth, and what they win by their *Swords*, they *acquire* to the Commonwealth, and are not to make their own private *Purchaſe*. And ſince it would be *Oppreſſion* and *Injuſtice* in the Commonwealth to recover thoſe *Goods* only for itſelf, which the *private Subjects loſt* in War, there can be no Way left but to return them to the *antient Proprietors* [2]. Thus in *Homer* it is ſaid that the *Booty* was divided among them who had loſt by

[1] This Paragraph is taken out of our Author's Abridgment *de Offic. Hom. & Civ.* Book ii. Chap. xvi. § 14. See *Grot.* Book iii. Chap viii. & xv. See above, in Book vii. Chap. vii. § 3, 4.

[2] Vid. 1 *Sam.* xxx. 23, *&c. Homer*, Iliad. Lib. xi. as, alſo, Mr. *Buddeus*, in his *Elemens de Philoſ. Pratique*, Part. ii. Chap. v. Sect. 6. Sect. 9 to which we may add Mr. *Locke*'s Principles thereupon, in his Treatiſe of *Civil Government*, Chap. xv. A Conqueror, ſays he, even in a juſt War, acquires no Power over thoſe who have been the Companions of his Conqueſt. It is only over thoſe who have concurred or conſented to the making an unjuſt War on him. The Power he acquires over thoſe whom he ſubdues, is altogether deſpotick, with Reſpect to their Lives, but not with Reſpect to their Poſſeſſions. The Reaſon of this laſt Article, which at firſt ſeems to be a Paradox, is, becauſe we may kill thoſe who have taken up Arms unjuſtly, to take away their Lives, if they could have done it, that have conquered them: But, that being only a perſonal Fault in thoſe who made an unjuſt War, their Poſterity ought

by the Enemy before. How the *Roman Laws* provided in ſuch Caſes, and eſpecially with regard to the *Poſtliminium*, is with much *Exactneſs* explained by *Grotius*, Lib. iii. Chap. ix.

XXVI. A whole Nation, when it hath either by its own Strength, or by the Aſſiſtance of *Friends* and *Allies*, ſhaken off an Enemy's Yoke, without doubt recovereth its Liberty and antient State. And if any Part of what they were poſſeſſed of remains ſtill in the Enemy's Hands, they have juſt *Pretenſions* to attempt to recover it, as long as a War is kept on Foot, and Peace is not yet concluded. But if a *third* Commonwealth reſcue a *Nation* by a War, which was overpowered and enſlaved by Enemies, in its own Name, and for its own Advantage, the *Nation* only changeth its [1] *Maſter*, but is as far from *Liberty* as ever. And we may ſay the ſame of a *Part* of any *Nation*. But if a *Part* of a *People* be recovered by the *People* they were for ſome Time divided or torn from, or by their *Allies*, they again *incorporate* with the old *Body*, and return to the Place and *Rights* they had before: Though perhaps, indeed, with an *Ally* it may be agreed, that he may keep what he won from the Enemy, tho' it before belonged to us. *Demetrius*, in *Juſtin*, when he loſt his *Kingdom*, choſe rather to yield it to *Philip*, than leave it to the *Romans*[a]. But though a *Part* of a *People* aſſert their own *Liberty*, and ſuppreſs their Enemies by their own Strength, they muſt return of *Courſe* to their antient *Body*, and muſt not pretend to *erect* a *ſeparate* Commonwealth by *themſelves*, when the old Commonwealth hath not quitted its *Right* to them, as a Part of its *Body*.

[a] *Juſt.* Lib. xxix. Chap. ii.

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ought not to feel the Effects of it. Now the ſame Thing would happen if we ſhould ſeize upon all their Eſtates, deſigned for the Maintenance of their Children, which we ſhould, by that Means, reduce to Beggary on Account of their Fathers Crime. All that a Conqueror can do with Juſtice, is, to indemnify himſelf, if he has ſuffered any Loſs. Thus the People, whoſe Predeceſſors and Country have been oppreſſed by Force, have always a Right, according to Mr. *Locke*, to recover it, and to uſe the ſame Means to regain their Liberties. Indeed it would be abſurd to ſay, that a Prince hath a Right to take all he can, and that, after he has been in Poſſeſſion of it for ſome Time, the People that ſhall be born in thoſe conquered Countries in After-ages, are beforehand, by a divine Right, ſubject to his Dominion, and that theſe People may never attempt to take away from his Deſcendents what their Predeceſſors ſeized on by Force. "The *Truth* of it is (adds Mr. *Le Clerc*, of whom I have borrowed this Abſtract) *there are great* Diffi- "culties in this Matter on Account of the Misfortunes of Civil Wars, which we ought to endeavour to prevent as much as poſſibly "we can. But ſince it ſeems that all the Right that we can eſtabliſh in this Matter is grounded upon the *Publick Good*, which is "the ſovereign Law, we muſt conſider whether what we are undertaking will, in all Probability, do more Harm than Good to So- "ciety. If it be ſo, then what we do becomes unjuſt; but if the Good which accrues from it is much greater than the Evil, the "Enterpriſe muſt be called juſt. *Biblioth. Univerſal.* Tom. xix. Pag. 586." Mr. *Locke*'s principal Reaſon is ſo little demonſtrative that it neither agrees with the juſt Wars of which he ſpeaks; nor with unjuſt Wars, in ſuppoſing (as our Author does) an expreſs or tacit Conſent, on the Side of the vanquiſhed People, and a peaceable Poſſeſſion on the Side of the Conqueror. If a Father has loſt all Right to his own Property, he can never tranſmit that Right to his Children. See what I have ſaid above, Not. 5. Pag. 706. Mr. *Locke* objects himſelf (Sect. 176.) that, by leaving Deſcendents the Liberty of aſſerting the Rights of their Anceſtors, every Time they find a favourable Opportunity, we ſhould open a Door to *endleſs Confuſion and Troubles*; and yet he ſays nothing to remove ſo great a Difficulty. But it muſt be owned, that, how excellent ſoever, in general, his Treatiſe on Government be, he keeps too much in View the Conſtitution of his own Country, which is, by no means, a Rule for that of other States. Nor does he ſufficiently diſtinguiſh between the Uſe a Conqueror may make of his Right, according to Conſcience, from that which he may do, according to Rigor: ſo that the vanquiſhed are obliged to ſubmit, even for the Good and Tranquillity of Mankind. See according to this Law *de Poſtliminio*, what Men acquire by their Return into their own Country, or that of their Friends and Allies (*ex reditu in limen*) *Grotius*, Lib. iii. Chap. ix. and Mr. *Buddeus's Elem. Phil. Pract.* Part. ii. Chap. v. Sect. 6. Sect. 25. *& ſeq.* As to the Ideas of the *Roman* Law, we ſhall find ſeveral Remarks in Mr. *Bynckerſhoek's Obſervations*, Lib. i. Chap. xx. Lib. iii. Chap. vi.

[1] We muſt here except the Caſe of a People allied with others, by a perpetual Confederacy; as it happened in the War of 1672. to ſome of the united Provinces, which were recovered from the *French*. See M. *Hertius*'s Note on our Author, Lib. vii. Chap. v. Sect. 21.

CHAP.

CHAP. VII.

Of Compacts that relate to War.

I. *The Division of Compacts that presuppose War.*
II. *Compacts that have no Tendency to remove the War, whether valid.*
III. *A Truce, what.*
IV. *Of the Duration of Truces.*
V. *A Truce leaves the Dispute, the War began upon, undecided.*
VI. *No need of a new Declaration of War, when the Truce expires.*
VII. *Truces contracted and made by express Compact.*
VIII. *Of the Beginning and End of Truces.*
IX. *The Subject when obliged by Truces.*
X. *What Liberties a Truce allows, and what forbids.*
XI. *Whether a Man, taken in an Enemy's Country, and forcibly detained, may be kept Prisoner after the Truce is expired.*
XII. *What ensues upon the Violation of the Truce.*
XIII. *Of Compacts, that relate to safe Conduct.*
XIV. *Of the Redemption of Captives.*
XV. *Of the Compacts of Generals.*
XVI. *Of the Compacts of private Persons in War.*

I. IT may now be proper to take a View of that Sort of publick Compacts, which presuppose a *State of War.* And these are of two Sorts: *First*, such as put an End to *War. Secondly*, such as do not put an End to it, but only, in some Respects, qualify and confine it. But, before I consider these Compacts in particular, I shall enquire in general, into the Validity of those of the latter Sort.

II. All Compacts therefore made with an Enemy, saith *Grotius* in general, ought to be observed, Lib. iii. Chap. xix. which indeed is true of Compacts which tend to Peace, but is, I think, liable to Dispute with Relation to such as leave us in a State of War, without a Design to remove it. For I question, whether it be a conclusive Argument, that because a certain particular Man understands what is done, and hath Power to give his Consent to it; therefore that from his Promise another Person may derive a Right, and he himself may contract an Obligation to the other. For a State of War, as such, hath no other Measure of Action but Force. The proper Use of Faith is to advance Peace. And therefore it looks like an Absurdity to employ Faith without Thoughts of restoring or preserving [1] Peace by it, and much more to make use of it, to protract and carry on War, rather than put an End to it. Besides, when I enter into Articles of Treaty, it is implied, that I desire the Person I treat with should believe me, and rely upon my Faith: But now it is a Sort of a Contradiction, to require of him such a Dependence upon me; and yet, at the same Time, to profess, that I resolve to continue his Enemy, that is, to do him all the Mischief every Way I can. For a State of Hostility in itself gives a Man unlimited Liberty, to take all the Advantages he can against his Enemy. And it is a Contradiction to my Actions to make a Protestation not to use the Liberty of an Enemy, while I persist to continue in an absolute State of War. And therefore what I said before doth not extend to this Case; *that such as enter into Compact with one another, do, by that very Act, renounce all Exceptions to one another's Persons, which may make them suspect one another to be false to their Faith.* For where both Parties seriously renounce all such Exceptions, they are already ceased to be Enemies: But where they openly profess that they intend to continue Hostilities, the Evidence of Fact confutes their Pro-

[1] Notwithstanding whatever our Author here asserts, I am of Opinion that these Sorts of *Compacts* ought to be as religiously observed as any other. His Reasons prove nothing, because they prove too much. For in short, if the *Law of Nature* did not impose on us an indispensable Obligation of keeping whatever Contract we have voluntarily made with the Enemy during the War; if it was lawful, for Example, to break on Purpose a solemn Truce, to detain, without having any Reason for it, Persons to whom we had given Passports, *&c.* I do not see what Crime it would be to circumvent the Enemy even under a Pretence of negotiating Peace. When a Treaty is set on Foot for this last Design, we are notwithstanding Enemies; it is properly but a Sort of Truce, which we agree to, to see whether any Method of Accommodation can be found out. If the Negotiations prove unsuccessful, it is not then a new War that we commence; since the Differences which occasioned our taking up Arms, are not yet adjusted, but only a Continuation of the Acts of Hostility that were suspended for some Time. Thus we could no more depend on the Enemy's Sincerity in the Business of *Compacts* which tend to the Establishing of Peace, than with Respect to those which only relate to the Moderating or Suspension of Acts of Hostility; and this would be a perpetual Source of Jealousies, which occasion eternal Wars, and would create an invincible Obstacle to a Peace of any Kind. All that our Author says then only proves, that we ought to be very cautious how we engage our Word to the Enemy; since Mankind are apt to break it for their own Interest, especially when they have to deal with People who wish them ill, whom they hate themselves. But, from the very Moment that the Treaty is concluded, we must keep it exactly, till either the Time is expired, or the Enemy's Violation of the Engagement on his Side, dispenses with the observing ours any longer. Our Author is not here consistent with himself, for he has established elsewhere, (Lib. iv. Chap. i. Sect. 19.) the indispensable Necessity *of keeping Treaties made with an Enemy, either to suspend, or put an End, to Acts of Hostility* But I do not see how we can say, to justify our Author, as some do, that he has altered his Opinion in this Chapter To prove this J. *Schneider* (in his Dissertation, *De Fide perfidis servandâ*, Sect. 19. *Hall* 1723.) refers us to Sections 4, 12. It is necessary, in supposing this, to believe that in writing these Sections our Author forgot what he had said in the first. The Writer of this Dissertation seems not to have read the Beginning of the Chapter, since he barely quotes the *Element. Jurispr. Univer.* Lib. i. Diff. xii. Sect. 22, from which nevertheless all this is copied.

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miſes. And therefore a Man muſt rather ſuppoſe that they only deſign to impoſe upon and enſnare one another, and by making each other heedleſs and ſecure, to lay Trains for further Miſchiefs; ſo when *Narſetas*, in *Procopius*, ſent to ask *Totilas*, what Day he would ſet for Battle, his Anſwer was, *After eight Days I'll meet you in the Field.* Upon which, they who were ſent returned and told their Maſter what was agreed to. But he, ſuſpecting ſome Falſehood, put himſelf in a Readineſs to give his Enemy Battle the next Day; and he proved not to be miſtaken, for the next Morning, before Intelligence could be brought by the Scouts, *Totilas* was advanced and marching towards him with all the Body of his Army [a]. But then, neither can the Perſon who happens to be ſurprized by ſuch a Compact, claim any new Right againſt the Perſon who betrayed [1] him by it; becauſe the State of Hoſtility itſelf already gives him as much Liberty as he deſires. If it be ſaid, that ſuch Compacts ſhould be obſerved, for fear the Enemy, when he finds himſelf deluded, ſhould be exaſperated, and purſue the War with greater Rage and Obſtinacy: I anſwer, that this Objection allows, that theſe Compacts are to be meaſured only by the Uſe and Advantage of them. And I confeſs it is true, that, *when the Time or Place for Battle is agreed upon with an Enemy, it is a Sort of Injuſtice to fail in either, becauſe the Revenge of it will generally recoil upon the Cruel and Faithleſs* [b]. We are not always obliged indeed to make uſe of the utmoſt Liberties of War; nay, it is often the greateſt Glory to ſpare an Enemy, when it is in our Power to ruin and deſtroy him. But ſince War becomes lawful upon this Account, namely, when it is neceſſary we ſhould defend or aſſert our own Rights, where they are not to be obtained by peaceable Means, we ought to think that the ſhorteſt Way to the Attainment of that End is moſt agreeable to Nature. And therefore ſince by Compacts, that tend only to moderate and qualify Hoſtilities, the War is only drawn out into greater Length; it is evident they muſt be contrary to Nature [c]. But, however this be, it is a Cuſtom which among others hath obtained in the more civilized Part of the World (perhaps out of a particular Reſpect to military Bravery) that ſuch Compacts ſhould be looked upon to be valid, which were not intended to put an End to the *State of War*, but only to abate the Heat [2] of it, and give the Parties engaged Liberty to take Breath. Of this Sort are Truces for certain Days, and ſometimes *Hours to bury the Slain*; the *Agreements to grant Paſſage through one another's Guards* [3]; and ſometimes that no *Hoſtilities ſhall be uſed in certain Places, upon certain Perſons and Things; that there ſhall be a Ceſſation of Arms at ſuch a particular Time; that certain Weapons and Inſtruments of War ſhall not be made uſe of.* Olearius relates [d], "That the *Turks* and *Perſians* made "an Agreement, that the Merchants on both "Sides ſhould have free Exerciſe of Traffick and "Commerce, and Liberty to paſs to and fro un-"moleſted; becauſe it was the Intereſt of them "both to continue their Trade with one ano-"ther." For ſince Men, to gratify their Ambition and Avarice, will often raiſe Quarrels and foment Wars in the World; it may be thought abſolutely neceſſary to the State of human Affairs, to make War a Sort of Trade and Profeſſion, and to form it into an Art; that ſo, at leaſt, the Injuries which the Innocent muſt ſuffer may be leſs inſupportable, when the Liberties of the Sword, and the Miſeries natural to a *State of War*, are more reſtrained. Beſides, the Reputation of being falſe and treacherous, and of deluding others by Compacts, is generally of dangerous Conſequence to Perſons often engaged in Wars: Since no wiſe Man will be impoſed upon more than once. But after all, a cautious Man can never lay any great Streſs upon ſuch Compacts; becauſe, if he perſuades himſelf into Security by them, he leaves himſelf open to the Attempts of his Enemy. And therefore he ought to be careful, how he agrees to any ſuch without manifeſt Neceſſity, unleſs he is in a Capacity, upon any foul Play, to give himſelf Satisfaction, or hath other ſufficient *Caution* to depend upon.

III. Among other Compacts, which do not put an End to the War, but only ſuſpend the Effects of it, muſt be numbered *Truces*, which are *Agreements to forbear Hoſtilities for a particular Time, the War ſtill continuing. Which Definition* is explained by *Grotius*, Lib. iii. Chap. xxi. Sect. 1. For *Truces* are ſometimes granted for ſeveral Years. But, in that Place, it may be ſaid in Excuſe for *Varro* and *Paulus*, that they had regard only to ſuch *Truces*, as are uſually made when the Armies on both Sides are in the Field and in Motion [4], which are generally limited to a few Days, and not to thoſe which put a Stop to all Hoſti-

[a] *Procopius* Hiſt. *Goth.* Lib. iv. [b] *Ambroſ.* De Offic. Lib. i. Chap. xxix. [c] Vid *Hobbes* de Cive, Chap. iii. Sect. 27.
[d] Itin. *Perſic.* Lib. v. Chap. xx.

[1] This is ſuppoſing the Point in Queſtion. For if it be true that all Conventions made with an Enemy are valid and obligatory, it will manifeſtly follow, That he who violates them gives the other a new Cauſe of Complaint, and, conſequently, a new Right.

[2] Theſe Conventions do not, of themſelves, directly contribute to nouriſh the War. When an Enemy ſees that his Antagoniſt propoſes to himſelf all the Advantage of a Treaty, he is not readily prevailed upon to agree to it. Every Party uſually finds his Account in this Sort of Negotiations, or, at leaſt, he flatters himſelf that he receives no Prejudice from them. Therefore they never put off a Peace. On the contrary they often ſerve to moderate the Rage of War, which, without this, would frequently have no Bounds. They prevent its being extended ſo far as to trample under Foot the Laws of Humanity, which even Enemies ſhould mutually obſerve towards each other, as far as the lawful Ends of War will permit. The Reaſon given by our Author a little higher, drawn from the Fear we have of provoking an Enemy by breaking our Word, and ſo bringing Miſchief upon ourſelves; does not prove that we think ourſelves obliged, from this Motive of Intereſt, to keep our Faith. It is as little to the Purpoſe that our Author quotes St. *Ambroſe*, as if he held the ſame Principle. This antient Father of the Church, on the contrary, plainly inſinuates, "That the "Reaſon why we ſeek to revenge ourſelves more ſeverely, on a perfidious Enemy, is becauſe we think ourſelves authorized by his "Treachery, and Violation of the Rules of Juſtice; which (continues he) ought to be obſerved, without Diſtinction of Times, "Places, or Perſons, and, conſequently, between the greateſt Enemies." I ſhall give the Paſſage to ſhew, that, when I can do it, I defend the Fathers of the Church, with the ſame Impartiality, and Freedom, as I condemn their Errors, and falſe Reaſonings. *Quanta autem Juſtitia ſit, ea hoc intelligi poteſt, quòd nec locis, nec perſonis, nec temporibus excipitur, quæ etiam hoſtibus reſervatur: ut ſi conſtitutus ſit cum Hoſte aut locus, aut dies, prælio, adverſus Juſtitiam putetur aut loco prævenire, aut tempore —— Si quidem vehementioribus hoſtibus & inſidiis, & his qui amplius læſerint vehementior refertur ultis.* Offic. Lib. i. Chap. xix.

[3] See *Grot.* Book iii. Chap. xxi. Sect 14, &c.

[4] V. D. Lib. xlix. Tit. xv. *De Captivis, & de Poſtliminio,* &c. Lib. xix.

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lities, and Preparations for War, and, for the Time they laſt, are little different from an abſolute *Peace*; particularly where any Clauſe is inſerted in the *Truce*, that mentions any Conference to be formed in the mean Time, towards the ſettling a full and entire *Peace*. But it muſt be obſerved, that though *Truces* of this latter Sort generally comprehend all the Territories and Dominions of both the Parties engaged in the War; yet it may be, and often is agreed, that the *Truce* ſhall be obſerved only in certain particular Places, and that the War may be carried on, as it was before, in others. For Inſtance, thoſe Nations in *Europe*, that have Plantations in the *Eaſt* or *Weſt-Indies*, may make a *Truce*, that ſhall be of Force only in *Europe*, and continue the War all the while in the *Indies*.

IV. But it is a Queſtion, whether if Peace be limited to any determinate Time, for Inſtance, that it ſhall continue for *twenty* or *forty Years*, or the like, it ſhould be look'd upon to be a *Truce?* Now I confeſs, that, in my Opinion, every Peace, is in its own Nature, eternal, that is, whenever a Peace is concluded, both Parties agree never to take up Arms again upon that Controverſy which firſt gave Birth to the War; but that the Diſpute ſhall be abſolutely ſilenced; or be referred to the Deciſion of *Mediators*, or be ſome other Way amicably compoſed. And the Perpetuity of ſuch a Peace is not to be ſuppoſed to be interrupted, though a freſh War afterwards breaks out between the ſame Parties upon new Reaſons, and different from the former. For it is not to be imagined, that a perpetual Peace obliges Men always tamely to ſubmit to another's Injuries, without oppoſing him, or making Reſiſtance. And therefore though the Word *Peace* may be uſed, yet if the particular Time be limited for its Continuance, ſo that the Diſpute, upon which the War began, is not entirely at an End, it can amount to no more than a Truce; which, as long as it continues, obliges them mutually to exerciſe the Offices of Peace. Thus the *Lacedemonians* [1] are ſaid to have made a Peace for *fifty Years*, but yet, when the War broke out again *ſix Years* after, they were complained of only for Breach of Truce. But then, on the other Hand, it may ſeem abſurd to make a Truce, as *Romulus* did with the *Vejentians*, for an *hundred Years* [a]. Though *Dionyſius Halicarnaſſeus*, Lib. ii, calls it ſimply a *League*, becauſe there can hardly be an Injury, but muſt be worn out of Memory, in ſo long a Courſe of Time; ſo that to defer the Revenge and Proſecution of it to another Age, ſeems unreaſonable. *Livy* indeed ſays, Lib. vii. Chap. xx, That a Peace was granted to the *Cerites*, but that the Act of the Senate ran only for an *hundred Years Truce*. But I am inclined to think, that the Deſign of that was, that the *Senate* might not ſeem to leſſen their own Authority, by appearing eaſy in pardoning ſo ſenſible an Injury [b]. Thus, alſo, *Theodoſius the Second* made a *Truce* with the *Perſians* for an *hundred Years*. And *Diodorus Siculus*, Lib. xii. Chap. lx, mentions a Peace made for an *hundred Years*, between the *Ambraciotæ*, and the *Acarnanians*. And thus *Ferdinand* King of *Spain*, and *Alphonſus the Firſt of Portugal*, agreed to a Peace for an *hundred and one Years* [c].

V. Since therefore, notwithſtanding the *Truce*, a *State of War* continues; which could not be, unleſs the Pretenſions were ſtill kept on foot, and the Controverſy the War began upon remained undecided; it is evident, that it would be abſurd to deſire to make only a *Truce* with an Enemy, and yet require him to give up all his Pretenſions; for, if this be done, an abſolute Peace is concluded. And it would be unreaſonable to deſire to have Liberty to renew the War without Grounds, when ſuch a particular Time is expired [d].

VI. And it is further evident from the Nature of *Truces*, that if, after the *Truce* expires, Hoſtilities begin afreſh, there is no need the War ſhould be [2] proclaim'd again [e]. But yet, where the Truce is of long Date, and hath entirely put a Stop to the Progreſs and Appearance of War; and where there is any Clauſe in the Truce, that expreſly mentions Conferences to be held in order to put an End to the Diſpute; if it be not neceſſary, it is at leaſt honourable, ſome Time before the Truce expires, to ſignify our Deſign to the Enemy, and to make ſuch Overtures as may convince him, that we take no Delight in War, and that it is no Fault of ours, that the Peace is not concluded.

VII. It may, alſo, be further obſerved, that all *Truces*, which have any binding Force and Obligation in them, are contracted either by expreſs Compact, or by Acts that bear ſuch an Affinity to Friendſhip and Peace, as they can be referred to no other Cauſe. Though Treaties of Peace have not, in themſelves, the Force of Truces, except it be expreſly ſo agreed. And therefore an Enemy can have no good Reaſon to conclude, that, becauſe I forbear Hoſtilities for a little Time, therefore I conſent to give him a Truce. Neither can he charge me with Breach of tacit Faith, if after ſuch Ceſſation of Arms, which he hath been ſo unhappy as to grow ſecure upon, I make a ſudden Deſcent upon him, and ſurprize him. And in this Senſe are thoſe Authors to be explain'd, that give ſuch accidental Interminſions of Hoſtilities, without Compact, the Name of *tacit Truces*, as *Juſtin* and *Livy* frequently do [f]; but which muſt be ſuppoſed to mean no more

[a] *Livy*, Lib. i. Chap. xv. [b] Vide *Sozom.* Hiſt. Eccleſ. Lib. ix. Chap. iv. [c] *Conneſtagius* de Unione Luſitan. Lib. i. [d] Vid. Bandium *de Induciis Belli* Belgici, Pag. 128. [e] Vide *Grotium*, Lib. iii. Chap. xxi. § 3. [f] *Vide* Juſt. Lib. vi. Chap. vii. *Livy*, Lib. ii. Chap. xviii, & Chap. lxiv. Lib. xxiii. Chap. xlvi.

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[1] *Juſtin.* Lib. iii. Chap. vii.

[2] For this is not a new War. The Uſe of this Principle extends to divers other Caſes. M. *Hertius* gives a remarkable Example of it from RICHARD ZOUCHE, *Jur. & Judic. Fecial.* Part ii. § 9. *Quæſt.* 47, who had himſelf borrow'd it from ALBERIC GENT. *De Jure Belli*, Lib. ii. Chap. xii. Pag. 303. In a Treaty of Peace, concluded between the Biſhop and Prince of *Trent*, and the *Venetians*, it was mutually agreed, that each Party ſhould be put in Poſſeſſion of what they held, before the preſent and laſt War. At the Beginning of the War, the Biſhop had taken a Caſtle of the *Venetians*, which the latter afterwards recover'd. The Biſhop refus'd to renounce his Right to it, under Pretence that it had been retaken after ſeveral Truces (ſome of them pretty long) which had been made during the Courſe of the War. The Lawyers above quoted decided the Caſe in Favour of the *Venetians*, and that in Oppoſition to the Opinion of the famous Civilian *Alciatus*, who declar'd for the Biſhop.

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than that for such a Time the Enemy lay still, without offering any Action in the same Manner as is usual upon formal Agreements, or Truces.

VIII. As for the Time Truces are generally limited to, I refer you to *Grotius* in the Place before cited, Sect. 4. But I cannot, by any Means, allow what he there insists upon, that the Day from which the Measure of the Time is to commence, is not included within that Measure or Compass of Time, because (says he) the Force of the Preposition *From* implies *Separation* and *Division*, and not *Union* and *Conjunction*. For certainly the *Beginning* of any Thing is a Part of that which it *begins*. And therefore if, for Instance, it be agreed that there shall be a Truce for *ten Days*, from the First of *July*, I believe it would be difficult for any Man to interpret this otherwise, than to take in the *first Day* of that *Month* within the Compass of the Truce. Besides, it is not true that the Particle *From* hath always such a Force as to divide what it is joined with, from what follows it. For it often signifies a *Beginning comprehended* within that which it begins. Thus what Expressions are more common, than *from Head to Foot*, *and from the Beginning to the End*[1]?

IX. When Truces begin more particularly to oblige the *Subjects* on *both* Sides, we may find in *Grotius*, in the Place before cited, Sect. 5.

X. What Liberty a Truce allows, and what it forbids, *Grotius*, also, accounts for in the same Chapter, Sect. 9, *&c.* But here I confess I am of Opinion, that Acts barely *defensive* are lawful in Truces of any Sort; though perhaps the Truce was desired and obtained upon some other Pretext. Thus, for Instance, though a Truce be granted only to bury the Slain, yet I should not think it unlawful to make use of it to retreat to a Place of better Defence, or to repair or raise a Fortification; or if a besieged Town request a Truce only to defer the Assault, I should not question but that they meant, also, to take in fresh Supplies of Men and Provisions. And *Grotius*'s Reason to the contrary seems to me to have no Force in it, Lib. iii. Chap. xxi. Sect. 10, that since the Truce makes for the Advantage of one Party, the other who granted it ought not to be prejudiced by it. For since Men cannot, by any Sort of Compact, give up their Right of Self-Defence; the Party who granted such a Truce can only charge the Fault upon his own Easiness and ill Conduct, that he did not take sufficient Care that the Enemy should have no Opportunity to reinforce himself[a]. So *Tissaphernes*, in *Xenophon*, made a Truce with *Agesilaus*, but continued his Preparations for War all the Time. And I do not think that if he really signified his Circumstances to his Master the King of *Persia*, and had Leave from him to enter into Articles with the *Lacedemonians*, that he was guilty of Perjury, only for arming, and putting himself in Readiness to expect any Event[b].

XI. When the Truce expires; *Grotius* says, that a Man taken in his Enemy's Territories, and forcibly stopped, may be detained a Prisoner. Lib. iii. Chap. xxi. Sect. 9.

XII. When either Party breaks the Truce, the Party injured is at Liberty to renew the War without making a new Proclamation of it. Though if he thinks it convenient, he may forbear till the Truce expires. But if it happen'd to be agreed, that the Party who first broke the Truce should be liable to pay a certain Sum of Money by way of Penalty; where the Money is demanded and paid accordingly, it is evident that there is no Pretence for War left. For the Reason why the Party pays the Money is, because he is willing to keep himself secure from War. But, on the other Hand, if the injured Party makes War, he must be supposed to recede from his Right to the Penalty. Though it must certainly be contrary to the Agreement, to declare War immediately, and neglect the Penalty. For it is not usual in such Compacts, to leave it to Choice, whether the Penalty should be accepted, or the War renewed[c].

XIII. Compacts that relate to safe Conduct, that secure free Passage and Return through Places in an Enemy's Power, and how they are to be interpreted, are largely explained by *Grotius*, Lib. iii. Chap. xxi. Sect. 11, 12, to whom I refer you.

XIV. Compacts relating to Redemption of Captives[3] are allowed much Favour among Christians, especially when the Captives are detained in barbarous Countries; and even the Treasures

[a] *Vide* Xenophon. *Orat. de* Agesil. *laudibus.* Cornel. Nepos, Agesil. Chap. ii. [b] See *Montaigne*'s Essays, Lib. i. Chap. vi. As to what regards the Question in itself, our Author's Opinion is none of the best founded, as I have shewn on the Section of *Grotius* which he attempts to refute, Not. 1. See, also, M. *Gundling. Jus. Nat. & Gent.* Chap. xxxvi. § 135, Edit. 2. 1728.
[c] Vide *Grot.* Lib. iii. Chap. xxi. § 11, 12.

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1 'Tis because the *Latin* Preposition *à*, which in this Place answers to our *From*, separates the two Words to which it relates, from what is between them; so that, according to *Grotius*, when we say *from the First of* June, *to the First of* August, those two Days must be understood exclusively. But our Author says, that this Preposition, also, includes very often the two Terms, as in the following usual Ways of speaking, *a capite ad calcem*; *ab ovo ad mala*. Besides, though the Generals of the two contending Armies ought to forbear all *Acts of Hostilities* from the very Moment of the Conclusion of the Truce; yet the Soldiers, on both Sides, are not bound to observe it, till it has been publickly proclaim'd in their Camp. But all *Acts of Hostility*, that may have been committed during that Time, are of no Force, so that we must indemnify those who have been Sufferers by them. See *Grotius*, Lib. iii. Chap. xxi. § 5.

2 Mr. *Budæus*, in his *Elem. Philosoph. Pract.* Part xi. Chap. v. Sect. 7. § 16, is of Opinion, That it is the Part of Humanity to let those go who are seized as Prisoners in a Country, not through any Fault of theirs; since no Body is responsible for an Accident. I must add that there is a great Difference between those that are found in the Territories of another State, immediately after its declaring War against their Prince; and those who after *Truce* stay in the Enemy's Country, by an unforeseen Accident. There has been no Compact between the first, and the Prince in whose Territories they are; whereas the other demand nothing but what is manifestly pursuant to the Execution of the Treaty of Truce. For since, by Virtue of that Engagement, we are obliged to grant them the full Liberty of going and coming during the whole Time of the Truce; we ought, also, to give them, in my Opinion, the same Permission, even after the Truce, if it plainly appears, that any violent Misfortune, or unexpected Accident, has hindered them from making use of it, during the Time agreed upon: Otherwise, as these Sorts of Accidents may happen every Day, we should not be so earnest in stipulating such a Permission, which would hinder us from being always in fear of a Surprize, and would be as it were a Snare to make us fall into the Enemy's Hands.

3 See *Grotius* in the Place above mentioned, § 23, *&c.*

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and conſecrated Veſſels of the Church are ſometimes juſtly given for Ranſom [a]. The Practice indeed of the old *Romans* is known to have been contrary [b]: For when *Hannibal* permitted them to redeem their Captives, the Senate anſwered, *That they who would be made Priſoners, when they had Arms to defend themſelves, were very unneceſſary Subjects* [c]. And *Plato* [d] determines, that in his *Commonwealth, if a Soldier were made Priſoner, he ſhould be left to the Enemy's Mercy, though they were willing to give him Liberty.* Nor were they without Reaſon thus ſevere. For (as the Declaimer ſays) [e], "The greateſt Glory in War is Victory; "and next to Victory, the greateſt is to die for "the Cauſe you engage in; there is indeed a "third Way too, but that a diſhonourable one, "which is to fly when there is no Hopes of "Conqueſt. But then it may be ſaid in Excuſe "for ſuch a Perſon, that he reſerved himſelf for "a ſecond Trial, and that he hath ſtill Cou-"rage to meet his Enemy once more. But a "Man who yields in the Heat of Fight, who "lays down his Arms, and tamely ſubmits to "the Conqueror's Mercy, muſt for ever be given "for loſt. For what Hope can be entertained of "a Perſon who had rather be a Slave than free, "and that makes Captivity his Choice?" What is to be obſerved upon this Sort of Compacts may be ſeen in *Grotius*, Lib. iii. Chap. xxi. § 23, *&c.* to the 28th Section. I ſhall only add this Story [f] out of the Life of *Caſtriot*; a *young Man* of the *barbarous Nations*, who happen'd to be made a Priſoner, was preſented to *Muſachius* for his Share of the Booty; who agreed to give him his Liberty for two hundred Pieces in Gold. The *young Man* immediately took the Money out of his Pocket, and offered to give it for his Ranſom: But *Muſachius* refuſed to accept it, or give him his Liberty, telling him that Money was his own before, when he became Maſter of his Perſon. But when the Caſe was brought before *Caſtriot*, he determined in favour of the young Man.

XV. Of Compacts of Generals of Armies, and what Obſervations may be made upon them [1], ſee *Grotius*. But to the eighth Section of it I add, that Generals have Power only to grant *Truces* of ſhorter Date, and not ſuch as withdraw all Appearance of War; for theſe are to be granted only by the ſovereign Power.

XVI. Laſtly, how far private Perſons have Power to make Compacts with an Enemy, may be ſeen at large in the ſame Author, Lib. iii. Chap. xxii [2]. To which I add the Cuſtom obſerved formerly between the *Engliſh* and *Scots*, with Regard to Compacts of this Kind. If any Perſon (ſays the Hiſtorian *Buchanan*, Lib. ix.) did not make his Appearance at the Day appointed, this was his Puniſhment: "In the pub-"lick Meetings upon the Borders between the "the two Nations (which uſually were held in "order to the recovering and reſtoring what had "been loſt on either Side in War) if any Perſon "happened to complain of another's Falſeneſs "to him, he only carried publickly a *Glove* or "*Gauntlet* upon the Top of his Spear: And this "they look'd upon to be the greateſt Diſgrace "that could be inflicted. Nor was it uſual for "Perſons who had thus violated their Faith, ever "after to be receiv'd by Friends or Relations, "or ever to be admitted to the Acquaintance or "Converſation of Perſons of Reputation or "Quality." It was, alſo, a memorable Compact which happen'd to be made between a *Roman* and a *Gothick* Soldier, mention'd by *Procopius*, when they were both fallen into the ſame Pit [g], by which they promiſed to aſſiſt one another, and the *Goths* afterwards ratified their Agreement.

[a] Vide Lib. i. Tit. ii. L. 21. *C.* de S. Eccleſ. *Gratian.* Jus Canon. Cauſ. xii. Quæſt. ii. Chap. xiii, xiv, xv. And the third Pleading of M. *Pietru.* One of the principal Queſtions, with regard to Priſoners of War, is to know, whether Money or other Things which a Priſoner has conceal'd, belong to him ſo that he may employ them for the Payment of his Ranſom? *Grotius* (*ubi ſupra*, § 28) maintains the Affirmative. For, ſays he, The Enemy could not take Poſſeſſion of what he had no Knowledge of, and which the Priſoner was under no Obligation to diſcover to him. It is thus that *George Caſtriot*, or *Scanderbeg*, decided with reſpect to a young Man, who, having agreed to give two hundred Crowns for his Ranſom, drew them from beneath his Clothes. See the Life of this Prince, written by *Marino Barletti*, Lib. viii. I have treated this Queſtion more diſtinctly, on the Place of *Grotius* above cited, Note 2. The Reader may conſult a Piece of *Boecler*, entitled *Miles Captivus*, in the 1ſt Vol. of his *Miſcellan. Diſſert.* publiſh'd in 1700. [b] *Livy*, Lib. xxii. Chap. lix, lxi. *Horat. Carm.* Lib. iii. Od. v. *Silius Italicus*, Lib. x. Ver. 654.

——— Noxam ſuperaverat omnem,
Armatum potuiſſe capi———

[c] *Euterp.* Lib. iii. Chap. vi. [d] *De Republ.* Lib. v. Pag. 662. *Ed.* Wech. [e] *Quintil.* Declam. 339.
[f] Vide *Martinus Barletius* de Vita *Caſtriotæ*, Lib. vii. [g] *Procopius* Hiſt. *Goth.* Lib. ii. Chap. i.

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[1] The *Sovereign* is obliged to keep the *Compacts* which are made by his Generals, Commanders, and other Military Officers, when they contain nothing beyond the Power that their Poſts, or the Extent of private Orders they were charged with, give them, whether they are executed openly in the View of the whole World, or privately known to thoſe with whom they treat. But if a *Compact* be made without Orders, and afterwards ratified by the Sovereign, by an expreſs or tacit Conſent; it is plain, that, in that Caſe, it ought to be kept the very ſame as if it had at firſt been made by his Authority. Nay, when an Officer has gone beyond his private Inſtructions, the Sovereign is no leſs obliged by ſuch a *Compact*: Otherwiſe the Execution of all Sorts of Treaties would or might be evaded. See *Grotius* Lib. iii. Chap. xxii.

[2] "Theſe Sorts of *Compacts* ought not to paſs for *valid* but when they are authorized by the expreſs or tacit Conſent of the Sovereign, "or State; and, in that Caſe, the Sovereign may force thoſe that have made them, to keep them. Now the *Laws* and *Orders* of *Sove-*"*reigns* ought always to be explained, as enjoining and commanding nothing above human Capacities."

CHAP. VIII.

Of Compacts that reſtore Peace.

I. *Whether Compacts of Peace are invalidated by an Exception of Fear.*
II. *Whether a Peace made with Rebels is valid.*
III. *How far, upon a Pacification, the Goods of private Subjects may be excuſed.*
IV. *The Term limited for the Performance of the Conditions of Peace, to be ſtrictly interpreted.*
V. *How if a Peace be referr'd to the Deciſion of the Sword.*
VI. *An Hoſtage ſucceeding his Prince can be no longer detained.*
VII. *Of the Mediators of Peace.*

I. I Should now conſider that Sort of Compacts which entirely put an End to War; but *Grotius* is ſo large on this Subject, Lib. iii. Ch. xx, that all I can add upon it, will be only a few Things he happened to omit. The principal Doubt on this Head is, whether an *Exception* of *Fear* unjuſtly given is ſufficient to diſannul or reſcind theſe Compacts? Which *Grotius*, in the Caſe of a *ſolemn War*, denies, Lib. ii. Chap. xvii. Sect. 19, and Lib. iii. Chap. xix. Sect. 11, becauſe it is contrary to the common Practice of the *Laws of Nations*, and becauſe it would be otherwiſe impoſſible to put an End to this Sort of Wars, which are known to be very frequent, when it is the publick Intereſt of the World that it ſhould be done. But it muſt be ſaid, that the Extortions and Ravages of *unjuſt War* can never be retain'd or defended by Conſcience. And as it is beyond Diſpute, that an unjuſt Conqueror is obliged to make Reſtitution, ſo I cannot think it appears by any *Law of Nations*, that it is unlawful to plead an *Exception of Fear* againſt him. And though there were ſuch a Law, yet I confeſs I do not apprehend what Injury it would be to the common Quiet and Security of Mankind, if no Notice is taken of it. For, according to *Grotius* [1], whatever be the *juſtifiable Cauſe* of *ſolemn War*, the *Effect* of it is the *Acquiſition* of the *external Dominion*, as he calls it, or what belongeth to the *Enemy*. If therefore the Vanquiſh'd return a *ſolemn War* upon his Conqueror, however he may have no other juſtifiable Reaſon for doing it, beſide that of [2] *Fear*; yet if he happeneth to be ſucceſsful, he will not only recover what he himſelf loſt before to his unjuſt Enemies, but poſſeſs himſelf, alſo, of what he can win from his Conqueror. And therefore a Man muſt be very impudent, who imagines to ſecure himſelf in the Poſſeſſion of what he hath unjuſtly gotten, by the ſame Force and Violence that made him at firſt Maſter of it. And it is equally abſurd in a Conqueror, after he hath forced the Vanquiſh'd to ſubmit to hard Terms and Conditions of Peace, not to ſee them obey'd, while he hath him under his Reach, and at Mercy: But to content himſelf barely in the Agreement and Compact of the Vanquiſh'd, and then leave him in a Poſture which may give him Power to turn the Game upon him [a]. And therefore, in Reality, the Caſe ſeems to be this, if a Prince be invaded with an unjuſt War, and, after he hath offer'd peaceably to concert and compoſe the [3] Difference, be forced to conſent to rigorous Demands, and accept an hard Peace, he is under no Confinement from any Law, while the Peace continueth unſettled, not to object his *Exceptions of Fear*; or afterwards as he ſeeth Opportunity, to endeavour to give himſelf Satisfaction for the Injury. And ſo *Polybius*, Lib. iii. Chap. xxx, pronounceth, that the *Carthaginians* had juſt Reaſons for their declaring a ſecond War againſt the *Romans* upon this Account, becauſe, while they were embroil'd in Troubles and Confuſions at Home, the *Romans* forced them to give up *Sardinia*, and extorted a vaſt Sum of Money from them. And therefore, ſaith that Author, the *Opportunity the*

[a] Vide *Guicciardin.* Hiſt. Lib. xvi. ſub fin. & Lib. xvii. ſub init.

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[1] *Grotius* only means by that a *Right* of Property valid before an human Tribunal, ſo that no body can lawfully uſe Violence to diſpoſſeſs us of what we have thus gotten, beſides our diſpenſing with the Reſtitution of it, in our own Conſcience, when we know, or may know, the Injuſtice of the Acquiſition. See Book iii. Chap. vii. § 6, and Chap. x. § 5.

[2] The Conſequence is not juſt: For no Body doubts but that we are bound to keep our Word, and, in the Caſe in Queſtion, it is certain we have given it. Therefore there can be no Uncertainty in the juſtificative Reaſon, drawn only from unjuſt Fear, but by ſuppoſing the Point in Queſtion. Conſequently it will hold good that Princes and Nations, having no common Judge, who has a Right to examine and decide their Quarrels; they could never depend upon any Treaty of Peace, if the Exception of unjuſt Fear were allow'd commonly to take Place. I ſay, *commonly*, becauſe there are ſome Caſes where the Injuſtice is plainly notorious. Such, for Inſtance, are ſome of thoſe alledg'd by *Grotius*, Lib ii. Chap. xxii. See what I have ſaid upon the ſame Author, Lib. iii Chap. xix. § 2. Not. 1.

[3] In the Caſe our Author lays down here, there is a manifeſt Reaſon which leaves no Room to doubt of the Injuſtice of the Aggreſſor. From the Moment that we offer to enter into a Diſcuſſion of the Right he may have to take Arms againſt us, we expreſs a Willingneſs to give him ſuitable Satisfaction, as ſoon as he has convinc'd us of the Juſtice of his Pretenſions and Demands. Therefore, by refuſing ſo reaſonable a Propoſal, he condemns himſelf. He gives the World Room to believe that he diſtruſts his Cauſe, and then the Caſe becomes the ſame as if he made War unjuſtly. But indeed this is a Caſe which ſeldom happens among civiliz'd Nations. Thoſe who undertake the moſt unjuſt Wars, are often the firſt who are willing to enter into a Negotiation; becauſe they have taken their Meaſures to colour their pretended Claims with all the Subtilties of Law; by which they are ſure of finding a thouſand Evaſions. We may ſay, alſo, that hence ariſe the greateſt Difficulties, which even render that Injuſtice dubious, which would otherwiſe be viſible to all the World. For the Bulk of Mankind, being neither clear-ſighted nor attentive enough, to diſtinguiſh Truth from Falſhood, there will always be too many ready to be deceiv'd with ſpecious Reaſons, which are never wanting to cover unjuſt Pretenſions. Car-

Carthaginians *took to revenge themſelves, was of the ſame kind with that which the* Romans *had taken to injure them* [1]. But the State and Deciſion of the Caſe will be different, if the Parties engaged in a War conſent at firſt, as it were, to a *Contract of Fortune*; that is, if, while the Reaſons of War lie yet in Diſpute, they reject all [2] Terms of Accommodation, take up Arms, and commit the Juſtice of their Pretenſions, and the Purſuit of their Revenge, which might have been determined and ended by Treaty, or ſome other Way of Compoſition, to the Event of War. For, in this Caſe, the Sword is evidently made Judge of the Diſpute, and both Parties put the Controverſy upon this Iſſue, *Either I will right myſelf, and redreſs the Injuries I have ſuffered, or will ſuffer more*; and they who begin a War with ſuch Reſolutions as theſe, have no more Reaſon to complain of the Injuſtice done them, than a Man would have who is hired to fight a Duel, and happeneth to be wounded in it. And therefore where a Man puſhes on the Conteſt to ſuch Extremities, and then finds the Fate of the Day turn againſt him, he muſt be content to ſay as one of *Plautus* [3] *Soſia*'s did to the other, *Well, do as you pleaſe*, ſince you have the *ſtrongeſt Arm* [a].

II. It hath, likewiſe, been a Queſtion variouſly diſputed, whether the Commonwealth or Government is obliged to obſerve a Treaty or Peace made with rebellious Subjects? *Grotius* is very large in the Affirmative Lib. iii. Chap. xix. Sect. 6, *&c.* But, in my Opinion, the Caſe in a ſhorter and clearer View is this: A Prince, who hath ſuppreſſed his rebellious Subjects, may deal with them as he ſees beſt; but if he recovereth them by Compacts, the very Nature of ſuch a Negotiation is an Evidence that he pardons the Crime. So that the Compact is not to be declared void, upon Pretence of the Rebellion: But the Rebels are by that Accommodation reſtored and reunited to the Commonwealth, and are ſuppoſed to promiſe Obedience to it. And the Obſervation of thoſe Compacts by the Commonwealth, the Rebels may well ſuppoſe to be the Condition of the Obedience they promiſe. So that in kingly Governments eſpecially, ſuch a Compoſition may ſometimes obtain the Force of a Capitulation or fundamental Law. But as *Gramondus* obſerves, "When Subjects rebel purely that they may force their Prince to yield to "their Demands, they certainly quit the only "Bond of Security Subjects can have, their Allegiance to their Sovereign [b].

III. What Power the Commonwealth hath to excuſe the Goods [c] of the private Subject upon a Pacification, muſt be diſcovered from the Nature of [d] the tranſcendental Propriety [4]; upon the Force of which, the Goods and Fortunes of private Men, whatever Title purchaſed and poſſeſſed by, may be given up, whenever the Neceſſities of the State and publick Intereſt require it. But with this Conſideration, that the State is obliged to make good ſuch Loſſes to the Subject, out of the publick Revenues, either immediately, or at leaſt as ſoon as it is able. But whether a particular Subject's Goods ought to be excuſed, or taken from him, muſt in a Monarchy be determined by the Prince. And the whole Body of the Subjects, upon his Command, is obliged to make Satisfaction to the Perſon who has ſuſtained Loſs upon the publick Account beyond his own Proportion. But the Foreigners, who are left to the Poſſeſſion of ſuch Goods, need not trouble themſelves to enquire, whether it was for the Intereſt of the Commonwealth to part with them, or no. For the Act of a Prince is ſufficient to give them a juſt and lawful Propriety, becauſe of the Preſumptions that attend the Actions of Princes, and becauſe there could be no Way of negotiating with Foreigners, without admitting that Things are juſtly diſpoſed, when managed under the Conduct of the Head of the Commonwealth. Beſides, as the Laws of Society oblige the reſt of the Subjects, to make good what hath been given up to the Enemy; ſo they ſeem to engage them, alſo, to the Relief of thoſe Perſons who have ſuffered Loſſes by the War; eſpecially if it began without any particular Fault of theirs [e]. Though it is too evident, that the unfortunate Subjects have hardly any where other Redreſs or Satisfaction, than to be told, that it was an unforeſeen and unavoidable Calamity.

IV. If the Time be limited, in which the Conditions of Peace are to be performed [5], it muſt be interpreted in the ſtricteſt Senſe; ſo far as to exclude all Excuſes for the leaſt Delays, except ſuch as are manifeſtly the Effects of Force and Neceſſity, and ſuch as give no Jealouſy of Deſign and Subterfuge. The Reaſon is plain; becauſe a ſhort Delay may make a ſtrange Turn and Alteration of Affairs. If therefore either of the Parties ſhould be indulged in deferring Performance of the Conditions, it would be eaſy for them to find Occaſions to elude the Agreement. Be-

[a] Vide Lib. xlvii. Tit. x Lib. iii. Sect. iii. D. de Injuriis, & Lib. ix. Tit. ii. Lib. vii. Sect. 4 D ad *L. Aquiliam.* [b] *Gramond.* Hiſt. *Gall.* Lib. ii. [c] Circa condonanda Bona. [d] Dominium eminens. [e] *Vid.* Lib. xvii. Tit. ii. Lib. lii. Sect. 4. *D. pro Socio*, & Tit. i. *D. de lege* Rhodia, *de jactu*, Lib. xiv. Tit. ii.

[1] But *Polybius*, alſo, informs us of the Reaſons, which the *Romans* made uſe of juſtify themſelves, *viz.* The Deſtruction of *Saguntum*, and the Violation of the Treaty made with the Conſul *Lutatius, &c.* See M. *Gundling, De Efficien. Metûs*, Chap. ii. Sect. 24. This learned Civilian ſeems to carry too far the Difficulty of diſcovering the Injuſtice of a War between thoſe who live in the Independence of a State of Nature. He too poſitively contradicts the Examples brought by *Grotius* (Lib ii. Chap. xxii. Sect. 3) of Heroes who have profeſſed never to follow any other Rules of Juſtice, than what tended to promote their own Power and Intereſt. I will defy any Man to give me the leaſt Shadow of Reaſon, for *Alexander the Great*, rambling over the World, and making War upon Nations who had never heard of him till they felt his Arms.

[2] The Reaſons alledged ſhew that commonly the Affair ought to be regarded as litigious; and therefore the Idea of a Tranſaction, by which we refer the Deciſion of a Difference to an uncertain Event, may be here generally applied, not indeed as a Conſequence of the actual Intention of the Parties, but of ſuch as they ought to have. Otherwiſe we ſhould never be ſure that the War would end, nor ſufficiently ſecure againſt its Breaking out upon the firſt Occaſion. It is true that in Reality he who has the beſt Right is not always the Conqueror. Nor does God think fit, in the ordinary Courſe of his Providence, always to favour the Succeſs of a juſt War. But beſides that we here leave in Time the Obligation which binds an unjuſt Aggreſſor in Conſcience, not to make uſe of his Advantages, there is much leſs Inconvenience in making this Obligation, with Regard to its external Effect, on the meer Will of the unjuſt Conqueror; than if, under a Pretence of Juſtice (which every Party thinks it has on its Side) we render all Treaties of Peace uſeleſs and ineffectual. Now in whatever regards the Rules of natural Law common to all Men, as well as in Caſes that relate to the Civil Law, we ſhould always take that Side which is ſubject to fewelt Inconveniences.

[3] *Plaut.* Amphitr. Act. i. Scen. i. Ver. 240.

[4] See *Grot.* Book iii. Chap. xx. Sect. 7, 8, 9, 10.

[5] See *Grotius*, in the above-cited Place, Sect. 25.

ſides that, it muſt be a vaſt Expence to a Prince to maintain a ſtanding Army; as he muſt in Prudence be obliged to do, till the Articles of Peace are put in Execution.

V. Sometimes [1] the Peace and the Conditions of it, are left to be determined by a deciſive Battle; in which ſometimes only two particular Combatants for both Sides, and ſometimes two, and ſometimes three on each Side, and ſometimes whole Armies engage. And here a difficult Queſtion occurs, Whether the Fate of the Commonwealth may lawfully be committed to the Fortune of ſuch a Fight? This ſeems indeed to be a Way to prevent a greater Effuſion of Blood, and to reduce the Miſeries and Calamities of War to a leſſer Compaſs. But then, on the other Side, it is more ſatisfactory, promiſeth fairer, and looks like a better Venture to ſtand the Shock even of a bloody War, than to loſe the Security and Liberty of the Commonwealth all at once in ſuch an Engagement. Since, on the other Hand, the War may be ſet on Foot again, and perhaps the Succeſs of it be changed after two or three unhappy Encounters or Defeats. But indeed when there are no Hopes of making a good End of a War, tho' the whole Force of the Commonwealth [2] ſhould engage, if the Enemy will admit of it, the Diſpute may juſtly be decided by ſome ſuch Sort of Combat, as the leaſt of two Evils. Nay, and where Princes themſelves make War upon their own private Diſputes, without any Reſpect to the Intereſts or Rights of the Commonwealth, the State may eaſily give them Leave to decide the Controverſy between themſelves by ſingle Combat. And we have an Example of this Nature in *Diodorus Siculus*, Lib. iv. Chap. lx. [a] Though Princes ought not to proceed to ſuch violent Methods, while the Matter in Diſpute is doubtful and uncertain. But here it muſt be obſerved, that they who leave the Iſſue of the Controverſy to the Event of Combat or Battle, may determine as they pleaſe of what themſelves are poſſeſſed of, but cannot tranſfer or forfeit to others any of thoſe Rights, which are not in their Power to diſpoſe of. And therefore if a Prince ſet his Kingdom to Stake, except it be his in a patrimonial Right, it will ſignify nothing, unleſs he hath his People's and their Conſent for it, who have by Birth a Right of Succeſſion. But farther, in ſuch pitched Battles it often comes to a Diſpute, on which Side the Victory lies. And here it is to be conſidered, that generally ſuch Fights are deciſive, and put an End to the Controverſy they began upon. And therefore where two particular Combatants engage, the Victory muſt be declared for him who kills his Enemy, or at leaſt that ſo weakens and diſables him, as to force him to confeſs himſelf conquered, as *Turnus*, when he was wounded, doth in *Virgil* [3]. Where a greater Number fight, that Side is victorious which deſtroys the Enemies, or puts them into ſuch Diſorder, that they are not able to make longer Reſiſtance. But where the Quarrel is left to be diſputed between two entire Armies, the Plunder of the Field, the Burying of the Slain, the Lodging upon the Place of Action, the Offering Battle a ſecond Time, are not in themſelves any Proof of Victory; ſince all theſe may happen when the Battle is fought with equal Bravery and equal Loſs. But if other Circumſtances concur, there may perhaps be Arguments enough to prove the Enemy fled. And certainly when an Enemy retreats, ſo far as to quit the Field after the Engagement, it is a juſt Suſpicion that he is fled. But when neither Side can ſhew any good Arguments to prove a Victory, Matters continue in the Poſture they were in before the War, and the Parties muſt either come to a new Trial by the Sword, or end the Diſpute by Treaty [b]. Thus when the Diſpute was between the *Lacedemonians* and *Argives* about the *Thyreatick* Lands, it was agreed, in a general Aſſembly of the States of *Greece*, that the Controverſy ſhould be decided by Battle between a ſelect Number of Subjects on both Sides, and that the Lands ſhould fall to the Conquerors. The *Lacedemonians* pitched upon *Othryades* for their Part in the Engagement; and the *Argives* made Choice of *Theriander*. Two of the *Argive* Party ſurvived the Fight, *Agenor* and *Cromius*, who came home and brought News of their own Victory to the State: But after the Battle had been ſome Time over, *Othryades*, with the little Life he had left, made a Shift to ſupport himſelf with Pieces of broken Lances, took off the Shields from the dead Bodies, and erected a Trophy with them, leaving upon it an Inſcription in his own Blood, *To Jupiter Guardian of Trophies.* For my Part I ſhould make no Doubt to pronounce the Victory for the *Argives* [c].

VI. As to Hoſtages [4] given for the Ratification of the Peace, beſides what we find in *Grotius* [5],

[a] *Dionyſ. Halicarn.* Lib. iii. Pag. 149, 150 Ed. *Lipſ.* When the *Generals* deſign only to aſſert their own Power and Authority, the ſingle Combat between them is an honourable and neceſſary Way to end the Diſpute; but when the Commonwealths themſelves contend for Superiority, the Uncertainty of ſuch a Trial makes it mean as well as unſafe to venture it.

[b] *Vid.* Plut. *in Parallelis* Herod. Clio. [c] *Vid.* Jo. Meurſ. *Miſcell. Laco.* Lib. iv. Chap. xiv.

[1] *Vid.* Grot. *ubi ſupra*, Sect. 42, *&c.* and Mr. *Buddeus*'s Diſſertation, intitled *Juriſprudentiæ Hiſtoricæ Specimen*, Sect. 21. to 30, excluſively. This Cuſtom was ſo firmly eſtabliſhed among the Antients, that there have ſometimes been Princes who have loſt their Crown, and been forced to reſign it to another, becauſe they would not ſubmit to it. It was thus the Poſterity of *Theſeus* loſt the Kingdom of *Athens*. *Conon.* Lib. xxxix. *apud Phot.* Cod. 186. See the Diſſertation *de Prætorio* by Mr. *Perizonius*, Pag. 6, 7. Ed. 1696.

[2] Mr. *Hertius* objects that, in this Caſe, the Party, which was ſuperior in Force, and from thence certain of Victory, would never neglect a ſure Advantage to refer the Deciſion of the Controverſy to the dubious Succeſs of ſuch a Combat. It muſt be owned (and indeed Prudence requires it ſo) that it is probable ſuch an Agreement is never made, but when each Party thinks its Forces equal to thoſe of its Enemy. It is however not wholly impoſſible but the Strongeſt may be ignorant of his Superiority. After all, when once theſe Sort of Combats became faſhionable, People did not examine Things ſo nearly; eſpecially when Champions preſented themſelves, of whoſe Valour they had an high Opinion. Mr. *Hertius* adds, that, however weak we be, if we are convinced of the Juſtice of our Cauſe, we ought not to deſpair, but depend upon the Aſſiſtance of Heaven, which can, and uſually does, protect Innocence, as well when it is unaided as when it is armed. But all this does not hinder but that we may, and ought to make uſe of the ſureſt Means which human Prudence can dictate. Confidence in divine Providence no Way excludes theſe; it rather ſuppoſes the Uſe of them, and that God will crown them with his Bleſſing.

[3] *Virg. Æn.* xii. Ver. 931, *&c.* [4] See the ſecond Chapter of this Book, Sect. the laſt. And Mr. *Buddeus*'s Diſſert. entitled *Juriſpr. Hiſtor. Specimen*, Sect. 54. *& ſeq.* as, alſo, my Notes upon *Grotius*, Lib iii. Chap. xx. Sect. 52. *& ſeq.*

[5] See *Grotius*, Book iii. Chap. xx. Sect. 52, *&c.*

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it may be further obſerved, that if the Hoſtage happeneth to be the Prince's Heir and Succeſſor who giveth him up, when that Prince dies, he is no longer to be detained as an [1] Hoſtage, though the League doth not expire at his Death. For this Caſe is ſuppoſed to be tacitly excepted; that he ſhould be no longer an Hoſtage, when he ſucceeds himſelf in the room of the Principal: But then he is obliged to ſubſtitute another in his ſtead, whenever it is demanded.

VII. There is, alſo, another Way of ſecuring Peace; and that is, when others, and eſpecially ſuch as interpoſed as Guarantees and Mediators of the Peace, engage their Faith, that the Articles ſhall be obſerved on both Sides; which Engagement of theirs implies a Sort of Agreement, by which they oblige themſelves to aſſiſt the Party invaded contrary to Treaty, againſt the injurious Aggreſſor [a]. But the Guarantees are not obliged to ſend Aids to any War that begins upon other Reaſons, than the Violation of the Articles of Peace.

a Vid. *Diod. Sicul.* Lib. iv. Chap. lv.

1 It is no Way probable that a Prince, who gives for Hoſtage the Perſon deſigned to ſucceed him, intends that, in Caſe of his own Death, the State ſhould be deprived of its Head; nor can the State itſelf, in whoſe Name the *preſumptive Heir* is thus delivered up, be ſuppoſed to conſent to it.

CHAP. IX.

Of Leagues.

I. *The Diviſion of Leagues.*
II. *Leagues that eſtabliſh nothing but what was due by the Laws of Nature.*
III. *Equal Leagues, which and what Sorts of them.*
IV. *Of unequal Leagues.*
V. *Of two Confederates, which a third ought to aſſiſt.*
VI. *Leagues Real or Perſonal.*
VII. *Which may be diſtinguiſhed either by particular,*
VIII. *Or general Marks.*
IX. *Whether exiled and depoſed Princes can have the Benefit of their Leagues.*
X. *Future Allies, whether comprehended under the Name of Allies in general.*
XI. *Leagues not to be ſuppoſed to be tacitly renewed.*
XII. *What Obligations lie upon the Engagers, when their Engagements are not owned and confirmed.*
XIII. *An Engagement, whether ratified by the Silence of the Sovereign.*

I. I Shall in the next Place conſider that Species of publick Compact [1], which is uſually called *Leagues* [2]. *Pliny* in his natural Hiſtory, Lib. vii. Chap. lvi, gives *Theſeus* the Honour of being the firſt that made or uſed them; which is not to be allowed, in any other Senſe, than that perhaps he might be the firſt in *Greece* who entered into *League*, or that perhaps annexed certain Rights and Solemnities to be obſerved at the making of them. The moſt proper Diviſion of them ariſes from the Matter of them; and from thence they may be divided, firſt, into *Leagues* that conſtitute what was an Obligation of the Law of Nature before. Secondly, into Leagues that ſuperadd ſome Particulars to the Duties of natural Law; or at leaſt, that, where theſe are too general and indefinite, reſtrain them to certain and particular Articles.

II. Under the firſt Head may be ranked all *Leagues* [3], that provide barely for the Exerciſe of Civility and Humanity, or to prevent Injuries on either Hand; ſee *Geneſ.* xxi. 23. And in the League the *Lacedemonians* made with the King of *Perſia* there was this Article [a], *Whatever Towns and Countries the King is at preſent in Poſſeſſion of, and were before in the Poſſeſſion of his Predeceſſors, ſhall continue in Subjection to him. And no* Lacedemonian, *or* [4] *Ally to the* Lacedemonians, *ſhall make War upon them, or injure them any other Way, or demand Tribute from them upon any Pretence whatſoever. The King ſhall have the entire free Rule in his own Dominions.* But perhaps it may be thought, that by this Article the *Lacedemonians* renounced all Claims and Pretenſions whatever, in *Aſia*: For *Aſia* was the King's, notwithſtanding the *Lace-*

a *Thucyd.* Lib. viii. Chap. xviii. Ed. *Oxon.*

1 See *Grot.* Book ii. Chap. xv. Sect. 1, *&c.*

2 I could not find a more proper Word to expreſs the *Latin* Word *Fœdera* by. *Treaties* would have been too general; for it is plain that the Author here excludes all *Compacts* made during the War, whether to moderate or ſuſpend Acts of Hoſtility, or barely to treat of Peace, having already treated of them in the preceding Chapters. Beſides, he ſays himſelf in this very Chapter, Sect. iii. *Utraque Fœdera iidem fetiſſimum ſolent OB ALIQUAM SOCIETATEM contrahendam,* &c. So that the Word *League* may not be very improper here, though it is generally reſtrained to Treaties, by which ſeveral Princes or States unite, confederate, or league together, to defend each other, or in Conjunction to attack the common Enemy.

3 *Vid.* Grot. *ubi ſupra.* Sect. 5.

4 We do not find in this Treaty, which is very ſhort, the ſecond Clauſe quoted by our Author, And no LACEDEMONIAN, &c Our Author here has confounded the Words of two Treaties as if they were but one. For the laſt Words are in the ſame Book, Chap. xxxvii. except in the End, *The King ſhall have,* &c. There is, alſo, the ſame reciprocal Clauſe, in Favour of the *Lacedæmonians.*

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IV. Having thus explained the *equal Leagues*, it will be eaſy to underſtand what are the *unequal* [1]. And theſe are when either the Promiſes are unequal; or when either of the Parties is obliged to harder Conditions. The Promiſes may be unequal, either with Regard to the ſuperior, or inferior Confederate. The firſt happens when the more powerful Confederate promiſes his Aſſiſtance to the other, without requiring the like; or when the Aids he promiſes, are greater than what the other promiſeth; or when the other is not bound to bring proportionate Aids. The latter happens when the inferior Confederate is obliged to Conditions of larger Extent than the other. Some of this Sort of Leagues include a Diminution of the ſovereign Power. Of this Nature was the League between the *Romans* and *Carthaginians*, in the End of the ſecond *Punick War*; by an Article of which the *Carthaginians* were not to begin any War without Leave from the People of *Rome*. And thus *Armenia Major* received its Kings from *Rome*, though it paid no Tribute to the *Romans* [a] [2]. On the other Hand, thoſe Leagues are no Diminution to the ſovereign Power, which include only a [b] tranſient Burthen; or one which may be complied with once and for all. For Inſtance, if when a Peace is concluded, one Party is obliged to pay the other's Army; to defray the Charges of the War; or to pay a Sum of Money by way of Mulct; or when either Party is obliged to diſmantle Towns, demoliſh Forts, evacuate certain Places, remove from certain Countries, give Hoſtages, deliver up Ships, and Arms, and the like. Thus in the Articles of Treaty, which *Porſenna* allowed the *Romans* upon their Excluſion of the Kings, it was particularly mentioned, that *they ſhould have no Inſtruments of Iron for any Uſe, but in Husbandry* [c]. And here, by the Way, the Story which *Procopius* relates in the fourth Book of his Hiſtory of the *Goths*, may perhaps deſerve Obſervation: "When the Truce was made between "*Juſtinian* and *Coſroes*, by the Conditions of "it, *Juſtinian* was to pay two thouſand *Libræ* "of Gold; whereupon *Iſdiagunas* the *Perſian* "Ambaſſador demanded immediate Payment; "but *Juſtinian* propoſed rather to pay every "Year four hundred, thinking by that Means "to lay the ſtronger Obligations upon *Coſroes* "not to break the Truce. But the *Romans* com-"plied at laſt, and paid the entire Sum, for a "yearly Payment might look like Tribute." *So common* (ſaith the Hiſtorian) *it is for a Man to be more afraid of a diſhonourable Name, than diſhonourable Actions.* But here it may be ask'd, whether ſuch *unequal Leagues*, as are attended with permanent and perpetual Burthens, do always and in themſelves leſſen and impair the ſovereign Power? Or, whether an unequal Confederate may be ſuppoſed to retain his Sovereign? Now permanent and perpetual Burthens are ſuch as theſe; when the one is obliged to have the ſame Allies with the other, and not on the contrary; when one Party is obliged not to build Forts in ſuch particular Places, not to levy Forces, or raiſe an Army (and this was one of the Conditions of the League between the *Romans* and the *Latines*, that the *Latines* ſhould make no Levies of Men, nor ſet any Officers of their own over them, or ſend them out upon any Expedition. The neceſſary Conſequence of which was, that the *Romans* paſs'd the Decrees of War or Peace, and that the Allies were Partners only in the Toil, while they took the Conduct themſelves, and enjoyed the Honour and the Benefit of the Victory [d]) that one ſhall not have above a certain Number of Ships, ſhall not build new Cities, fit out Fleets to Sea, raiſe Soldiers in ſuch particular Places, and the like; but eſpecially when one of the Confederates is oblig'd to pay a Deference and Submiſſion to the other; or, what is the ſame Thing, to acknowledge him ſuperior in Dignity, and to expreſs a Reverence to him in all his Actions [e]. Thus the *Athenians* allowed their Allies their ſeparate Liberties, and erected a popular Form of Government among them; but reſerved Superintendence and ſupreme Direction of Affairs to themſelves. *Grotius* anſwers this Queſtion, Lib. i. Chap. iii. § 21, out of Lib. xlix. Tit. xv. L. 7. § 1. *D. de Captivis*, &c. But the Difficulty lies in the following Words of the *Civilian*, *At fiunt apud nos rei ex civitatibus fœderatis, & in eos damnatos animadvertimus. But the Subjects of our Confederates are brought to Trial before us; and we paſs Sentence, and puniſh them.* For this certainly implies Subjection, when another hath a Right to ſummon our Subjects to appear and ſtand their Trials in his Courts, and to puniſh them according to Sentence given. The Story of *Decius Magius*, in *Livy*, is an Inſtance of this [f]. But particularly, that which *Pauſanias* relates [g]. When, upon the Motion and Inſtance of *Callicrates*, the *Roman Legate* charged the

[a] *Appianus Alexand.* Præfat. Pag. 2. A. Ed. *H. Steph.* Vide *Procop.* Hiſt. *Gothic.* Libr. i. Chap. vi. The Agreement *Peter* made with *Theodatus*, concerning *Sicily*. [b] *Onus tranſitorium.* [c] *Plin.* Nat. Hiſt. Lib. xxxiv. Chap. xiv. *See*, alſo, 1 *Sam.* xiii. 19, 20. [d] Vide *Dionyſ. Halicarn.* Lib. viii. Chap. xv. [e] *Vide* Iſocrat. *Panegyr.* [f] *Livy*, Lib. xxiii. Chap. vii. [g] *Pauſanias* in *Achaicis.*

[1] *Vide* Grot. *ubi ſupra*, § 7. [2] Vide *T. Liv.* Lib. xxx. Chap. xxxvii.

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For

For Example, ſuppoſe it be agreed that none of the Subjects of the confederate Commonwealths ſhall be obliged in any of the Ports, or any other Parts of the Territories belonging to one another, to pay Cuſtom or Toll; or not more than is paid at preſent; or not above a certain Rate or Quantity; or not more than Subjects, or other Allies pay; and the like. *Equal Leagues* relating to a Community of War are ſettled thus; when, for Example, it is agreed, that both the Confederates ſhall furniſh out an equal Aid of Men and Ships, and other Neceſſaries for War; and that, either both, when either of the Confederates is invaded by Enemies, or make War upon others, or only when either Party is invaded. Sometimes Aids and Supplies are promiſed only for a particular War, or againſt a particular Enemy, or againſt all Enemies in general, excepting only the particular Allies of each Confederate. *Laſtly*, Leagues about any other Matter are equal, when it is agreed, that one ſhall have no Forts upon the other's Confines; that one ſhall not defend the other's Subjects, or receive them into Protection, but apprehend and ſend them back to the other; that one ſhall not give the other's Enemies Paſſage through his Country, and the like.

IV. Having thus explained the *equal Leagues*, it will be eaſy to underſtand what are the *unequal* [1]. And theſe are when either the Promiſes are unequal; or when either of the Parties is obliged to harder Conditions. The Promiſes may be unequal, either with Regard to the ſuperior, or inferior Confederate. The firſt happens when the more powerful Confederate promiſes his Aſſiſtance to the other, without requiring the like; or when the Aids he promiſes, are greater than what the other promiſeth; or when the other is not bound to bring proportionate Aids. The latter happens when the inferior Confederate is obliged to Conditions of larger Extent than the other. Some of this Sort of Leagues include a Diminution of the ſovereign Power. Of this Nature was the League between the *Romans* and *Carthaginians*, in the End of the ſecond *Punick War*; by an Article of which the *Carthaginians* were not to begin any War without Leave from the People of *Rome*. And thus *Armenia Major* received its Kings from *Rome*, though it paid no Tribute to the *Romans* [a] [2]. On the other Hand, thoſe Leagues are no Diminution to the ſovereign Power, which include only a [b] tranſient Burthen; or one which may be complied with once and for all. For Inſtance, if when a Peace is concluded, one Party is obliged to pay the other's Army; to defray the Charges of the War; or to pay a Sum of Money by way of Mulct; or when either Party is obliged to diſmantle Towns, demoliſh Forts, evacuate certain Places, remove from certain Countries, give Hoſtages, deliver up Ships, and Arms, and the like. Thus in the Articles of Treaty, which *Porſenna* allowed the *Romans* upon their Excluſion of the Kings, it was particularly mentioned, that *they ſhould have no Inſtruments of Iron for any Uſe, but in Husbandry* [c]. And here, by the Way, the Story which *Procopius* relates in the fourth Book of his Hiſtory of the *Goths*, may perhaps deſerve Obſervation: "When the Truce was made between "*Juſtinian* and *Coſroes*, by the Conditions of "it, *Juſtinian* was to pay two thouſand *Libræ* "of Gold; whereupon *Iſdiagunus* the *Perſian* "Ambaſſador demanded immediate Payment; "but *Juſtinian* propoſed rather to pay every "Year four hundred, thinking by that Means "to lay the ſtronger Obligations upon *Coſroes* "not to break the Truce. But the *Romans* com-"plied at laſt, and paid the entire Sum, for a "yearly Payment might look like Tribute." *So common* (ſaith the Hiſtorian) *it is for a Man to be more afraid of a diſhonourable Name, than diſhonourable Actions.* But here it may be ask'd, whether ſuch *unequal Leagues*, as are attended with permanent and perpetual Burthens, do always and in themſelves leſſen and impair the ſovereign Power? Or, whether an unequal Confederate may be ſuppoſed to retain his Sovereign? Now permanent and perpetual Burthens are ſuch as theſe; when the one is obliged to have the ſame Allies with the other, and not on the contrary; when one Party is obliged not to build Forts in ſuch particular Places, not to levy Forces, or raiſe an Army (and this was one of the Conditions of the League between the *Romans* and the *Latines*, that the *Latines* ſhould make no Levies of Men, nor ſet any Officers of their own over them, or ſend them out upon any Expedition. The neceſſary Conſequence of which was, that the *Romans* paſs'd the Decrees of War or Peace, and that the Allies were Partners only in the Toil, while they took the Conduct themſelves, and enjoyed the Honour and the Benefit of the Victory [d]) that one ſhall not have above a certain Number of Ships, ſhall not build new Cities, fit out Fleets to Sea, raiſe Soldiers in ſuch particular Places, and the like; but eſpecially when one of the Confederates is oblig'd to pay a Deference and Submiſſion to the other; or, what is the ſame Thing, to acknowledge him ſuperior in Dignity, and to expreſs a Reverence to him in all his Actions [e]. Thus the *Athenians* allowed their Allies their ſeparate Liberties, and erected a popular Form of Government among them; but reſerved Superintendence and ſupreme Direction of Affairs to themſelves. *Grotius* anſwers this Queſtion, Lib. i. Chap. iii. § 21, out of Lib. xlix. Tit. xv. L. 7. § 1. *D. de Captivis*, &c. But the Difficulty lies in the following Words of the *Civilian*, *At ſiunt apud nos rei ex civitatibus fœderatis, & in eos damnatos animadvertimus. But the Subjects of our Confederates are brought to Trial before us; and we paſs Sentence, and puniſh them.* For this certainly implies Subjection, when another hath a Right to ſummon our Subjects to appear and ſtand their Trials in his Courts, and to puniſh them according to Sentence given. The Story of *Decius Magius*, in *Livy*, is an Inſtance of this [f]. But particularly, that which *Pauſanias* relates [g]. When, upon the Motion and Inſtance of *Callicrates*, the *Roman Legate* charged the

[a] *Appianus Alexand.* Præfat. Pag. 2. A. Ed. *H. Steph.* Vide *Procop.* Hiſt. *Gothic.* Libr. i. Chap. vi. The Agreement *Pyrrhi* made with *Xerxes*, concerning *Sicily*. [b] *Onus tranſitorium.* [c] *Plin.* Nat. Hiſt. Lib. xxxiv. Chap. xiv. See alſo 1 *Sam.* xiii. 19, 20. [d] Vide *Dionyſ. Halicarn.* Lib. viii. Chap. xv. [e] *Vide* Iſocrat. *Panegyr.* [f] *Livy*, Lib. xxiii. Chap. vii. [g] *Pauſanias* in *Achaicis.*

[1] *Vide* Grot. *ubi ſupra*, § 7. [2] Vide *T. Liv.* Lib. xxx. Chap. xxxvii.

greateſt

greateſt Men among the *Athenians* with being in *Perſeus*'s Intereſt; *Xenon*, who was one of them, upon Confidence of his Innocence in that Matter, anſwered, that he did not doubt but he could clear himſelf of that Charge, even before the *Roman Senate* itſelf; which the *Legate* immediately took the Advantage of, as if he had appeal'd to *Rome*; and thereupon he and ſeveral others were ſent to *Rome*. And yet *Polybius* informs us [a], ſpeaking of thoſe who were ſent thither, *that the Senate did not think that it belonged to them to bring them to a Trial.* And therefore, the Anſwer to the Difficulty mentioned is eaſy, that the former Part of the Words muſt be underſtood of the primitive Times of the *Roman* Commonwealth, when they were ſtrict in their Obſervance of the Laws of Confederacy, and uſed to make a Diſtinction in their Carriage and Treatment, between ſuch as voluntarily enter'd into an Alliance with them, and ſuch as their Arms had conquer'd. And this *Cicero* confeſſes, that the old *Romans* thought themſelves obliged to protect their *Allies*, and never aſſumed the Command over them [b]. And *Scipio* made it a particular Part of their Commendation, that the *Romans* did not confine the foreign Nations to their Intereſt by Severity and Servitude, but by the Ties of Friendſhip and Alliance. But the latter Words refer us to After-ages, when the Reſpect and Reverence they had to their old Confederacies ran low, and their Allies as well as the conquer'd Nations were reduced to equal Terms of Slavery [c]. So *Sylla* forced all the *Roman* Allies, who had been free till his Time, to pay Tribute. At which Time it was, alſo, common to bring the Subjects of the confederate States to *Rome*, to be tried, and to puniſh them there, as *Roman* Subjects. But it is evident, that in the Epiſtle of *Proculus*, between the former and latter Words, there were ſeveral intermediate Things mention'd. But here *Grotius*, after he hath tediouſly recounted the ſeveral Kinds of Diſputes, which might happen between Allies and Confederates, at laſt diſmiſſeth the Difficulty, without anſwering any Thing to it [d]. However, it is well obſerved by wiſe Men, that it generally happens, that if the Party ſuperior in the League be conſiderably ſtronger, and more powerful than the other Confederates, he will by Degrees arrive at an *abſolute Sovereignty* over them, eſpecially if the Confederacy be perpetual, and allow him a Right to place Garriſons in their Towns [e].

V. Another Queſtion *Grotius* enters upon [f], is this, Suppoſe two Parties, both Allies, and Confederates to a Third, make War upon one another, which of them the third Confederate ought to aſſiſt [g]? In which Place, it may be added, that in all *Leagues* which a Prince enters into with his Neighbours, upon the Points of Aſſiſtance and Supplies, this Exception ought always to be ſuppoſed, *if the Condition and Circumſtances of my own Kingdom will permit.* For that Conſideration ought always to over-balance, not only any private Reſpect, but even the Ties of Blood and Affinity [g]. For ſince it is impoſſible a Prince ſhould be under nearer or ſtricter Obligations to an Ally, than to his own Subjects; 'tis plain he can make no Promiſe that can be binding to any Confederate, when it is manifeſtly inconſiſtent with the Good of his own Subjects. It was ſaid by King *Francis* I. in *Guicciardine*, that *he thought the Oath he took at* Rhemes *was of the ſtrongeſt Obligation; and by that the Kings of* France *were obliged not to alienate any Part of the Partimony of the Crown* [h]. And in this Senſe, what my Lord *Bacon* ſaith, in his *Wiſdom of the Antients*, Ch. v, may be very well admitted: "That there is but "one true and proper Foundation of Faith among "Princes, and that is Neceſſity (a Deity of great "Power with the Great) the Danger of the "State, and the Communication of Profit. And "*Ariſtotle* ſpeaks very plainly [i]: Advantage "ſeems to be the main Cauſe of Confederacies "between Commonwealths [k]:" *Polybius* ſays of the *Rhodians* [l], that they made no Alliance with the *Romans* for a *hundred and forty Years* together, though they ſent them Aſſiſtance in ſeveral Wars; and the Reaſon of this, he ſaith, was, "Becauſe they were willing to appear fair to all the World, "and to give every Prince Hopes of their Aſſiſtance and Friendſhip, but, at the ſame Time, "unwilling to abridge themſelves of any Part of "their Liberty, by binding themſelves under "Oaths and Compacts, to adhere to the Inter-"eſts of any one Nation." Sir *Thomas Moore* would have his *Utopians* forbear entering into Confederacies upon other Reaſons [m]. But a Prince who ſuffers by an Alliance, that expires upon a Change of Affairs with his Confederates, muſt charge the Misfortune upon himſelf, that he did not make ſtricter Search into the Circumſtances of his Ally [n]. Tho' an honourable Confederate, when he finds that the Poſture of Affairs he is in

[a] Polyb. *Excerp. Legat.* cv. [b] Cic. *Off.* Lib. ii. Chap. viii. [c] Vide *Liv.* Lib. xlii. Chap. i. Appian. *de Bello Civ.* Lib. i. [d] *Vide* Anton. *Matth. de Criminibus, ad tit.* L. Jul. *Majeſtatis*, Chap. i. § 5, 6. [e] Vide *Bodin. de Republ.* Lib. v. Chap. vi. *Iſocrates Archidam.* Pag. 217. People who are jealous of their Liberty, ſhould avoid all unequal Confederacies, for there is hardly any Difference between them and Slavery. [f] Vide *Simlerum de Repub. Helvetiorum*, Lib. i. Pag. 119. [g] Vide *Gellium*, Lib. ii. Chap. xxix. [h] *Guicciardine*, Hiſt. Lib. xvi. [i] *Ariſt. Ethic. Nicom.* Lib. viii. Chap. v. [k] *Ariſt.* Rhet. Lib. iii. Chap. xiv. 'Tis incredible, that any Man ſhould chooſe to do a Thing without any Proſpect of Advantage by it. *Valer. Flaccus*, Lib. iv. Ver. 744.

Certa fides animis idem quibus incidit hoſtis. They're certain Friends who have a common Foe.

Iſocrates Orat. ad *Philip.* Pag. 156. A Commonwealth hath no Regard either to Enemies or Oaths, or any Thing elſe, further than it thinks it tends to Advantage: Thus *Polybius*, Lib. ii. Chap. xlvii, ſaith of *Aratus*, That he knew Kings naturally look'd upon none either as Friends or Enemies, but rated Friendſhip and Enmity, purely according to their own Profit. *Andr. Mauroceuus*, Hiſt. *Venet.* Lib. i, ſpeaking of the State of *Venice*, ſaith, We meaſure our Alliances and Friendſhips only by the Credit and Intereſt they bring us. [l] *Polyb.* Excerp. Legat. xciii. Chap. vi. [m] *Moore*, Utop. Lib. ii. [n] *Vide* Lib. I. Tit. xvii. L. 19. *init. D. de reg jur.*

[f] Lib. ii. Chap. xv. § 13. His Deciſion is reduced to this: When two Allies make War unjuſtly againſt each other, we muſt aſſiſt neither of them. But if the Cauſe of one of the Allies is juſt, we muſt aſſiſt him, not only againſt Strangers, but even againſt one of our Allies; unleſs there be any expreſs Clauſe in the Treaty that does not ſuffer us to undertake the Defence of the firſt againſt the laſt, though he is in the Wrong. But if ſeveral of our Allies enter into a Confederacy againſt a common Enemy, we muſt then equally aſſiſt them all, as far as poſſible: And when it is not in our Power to aſſiſt them all at the ſame Time, we muſt give the Preference to the moſt antient Ally. See Mr. *Buddeus*'s Diſſertation *de Comparatione Obligationum quæ ex variis hominum Statibus oriuntur*; and that by Mr. *Thomaſius de Sponſione Caudina*, Sect. 17. & ſeq.

[g] will

will not ſuffer him to continue any longer in the Alliance, ſhould give Advice of it to the others who are concerned, that they may have Time to provide for themſelves, and ſecure their own Intereſt. For it is certainly *the higheſt Pitch of Baſeneſs poſſible, to ſacrifice a Friend to ſave myſelf* [a]. And therefore, in all *Leagues of War*, it is look'd upon to be a very important and neceſſary Article, that no one of the Confederates ſhall make a ſeparate Peace with the common Enemy, excluding the reſt of the Allies. Though 'tis reaſonable this Article ſhould be underſtood with *this Limitation, ſuppoſing the other Confederate, or Confederates, do not refuſe to comply with fair Terms and proper Overtures of Peace.* For, in ſuch a Caſe, this looks like a Violation of the Confederacy, and, in conſequence, the other Ally may juſtly take ſeparate Meaſures for his own Security. But then this, alſo, muſt be allowed in a mitigated Senſe only, and with certain Alleviations, that it may not be a Pretext to elude Confederacies, and that one of the Allies may not, in ſome Senſe, be made the other's Judge [b].

VI. Another celebrated Diſtinction of *Leagues*, is that which divides them into *real* and *perſonal*. The *latter* are ſuch as are made with the Prince, purely with Relation to his Perſon, and expire with him. The *former* are ſuch as are made with the Kingdom and Commonwealth, rather than the Prince or Government; and theſe outlive the Miniſtry and the Government itſelf, under which they were firſt made. To which of theſe every *League* belongs, will appear from what follows. This therefore is certain, that whatever *Leagues* are made with a free People, are in their own Nature, *real*, and muſt continue till the Term limited in the *League*, notwithſtanding that the Government, by whoſe Intervention the *Leagues* were made, may die or be changed [c]. And hence we may infer, that if a free People enter into a *League*, and afterwards the State of the Commonwealth happen to be changed from a *Democracy*, into a *Monarchy*, the *League* is ſtill in Force, becauſe the People is the ſame, tho' the Form of the Commonwealth be changed. And becauſe a Prince called to the Throne by the free Voice of the People is always ſuppoſed to take the ſovereign Power upon him, together with all the Obligations contracted by the People, when it lay in their Hands. Beſides, *Leagues* are made by them who are inveſted with ſovereign Power. The common Subject of which Power is the Commonwealth; and ſovereign Power is the ſame, both when it is exerciſed by the common Suffrages of the whole Body of the People, and when it is afterwards entruſted to a Prince, created by the Conſent of the People. But here all thoſe *Leagues* are excepted, that were made only for the Preſervation of the preſent State of the Commonwealth. For Example, ſuppoſe two free Commonwealths enter into a Confederacy, by which they agree to aid and aſſiſt one another, againſt all ſuch as ſhall endeavour by Force to ſubvert the preſent Eſtabliſhment of the Government in either Commonwealth. For if afterwards, either of the two Nations freely conſent to an Alteration of the State of their Commonwealth, the Reaſons ceaſing, the Confederacy is ſuppoſed of Courſe to expire. But however in the general, though every *League* made with a free People be *real*; yet it does not [1] follow, on the other Hand, that therefore every *League* made with a Prince is *perſonal*, and dies with him. For the inſerting a Perſon in a Compact doth not make the Compact perſonal, but only ſhews by what Perſon's Intervention the Agreement was [2] made [c]. But becauſe it is evident, that Princes make ſome *Leagues* with no farther Intention, than that they ſhould continue till their Death; and others with a Deſign to derive them down to their Succeſſors; it muſt therefore be enquired, what are the Marks whereby we may diſtinguiſh, which Sort every *regal League* ought to be reduced to.

VII. And it is *Grotius*'s Opinion [d], that it is eaſier to diſcover this, from the Form and Phraſe of the *League* itſelf, than from any general Rules or Obſervations. And thus all *Leagues* will appear to be *real*, in which 'tis expreſly mention'd, either that they are to be [3] perpetual; or that they are made for the common Good; or made with the Prince and his [4] Succeſſors; or when a particular Time is limited for the [5] Continuation of them. But beſides, the other Words of the *League* ſometimes, and ſometimes the Matter of it, and ſometimes the Motives of entering into it, may make a Conjecture eaſy in this Caſe. If the Conjectures are equal on both Sides, *favour-*

[a] *Euripid.* Iphigenia in *Taurus*, Ver. 605, 606, 607.
[b] Vide *Joh. Labard. Hiſt.* Gall. Lib. v. Pag. 313. *Ed.* Pariſ. *An.* 1671.
[c] *Vide* Lib. ii. Tit. xiv. L. 7. Sect. 8. *D. de Pactis.*
[d] *Grot.* Lib ii. Chap. xvi. Sect. 16.

[1] So far from this, That, even in dubious Caſes, the Preſumption is always, that a publick Treaty is *real*; as I have ſhewn upon *Grotius*, in the Place quoted, § 16, Not. 6.

[2] Whence it follows That, as after the Change of Government, from *Democracy* to *Monarchy*, the Alliance ſtill ſubſiſts with the new King; ſo if a new Government, formerly *Monarchical*, ſhould become a *Republic*, the Treaties made with its Kings do not, for that Reaſon, expire, unleſs they are manifeſtly perſonal. Mr. *Hertius* alledges here the Opinion of *Claudius* (or rather *Clauſius*) an eminent Man among the *Sabines*, who maintain'd alone, contrary to the Sentiments of all his Nation, That the *Sabines* could not (without Breach of their Alliance made with *Tarquin the Proud*, and confirm'd by Oath) declare War againſt the *Romans*. See DION. HALICARN. *Antiq. Rom.* Lib. v. Chap. xi. Pag. 295. *Edit. Oxon.* As, alſo, Chap. xii. § 1. of this Book.

[3] In the Alliance renew'd between the *Romans* and the *Latins*, A. U. C. 261. (or 263) it was ſtipulated *That it ſhould laſt as long as the Heavens and Earth ſhould keep the ſame Situation.* (DION. HALICARN. Lib. vi. Chap. xcv.) Perpetuity cannot be expreſs'd in ſtronger Terms. But ſometimes the Treaty mentions this more formally, as appears by two Examples, quoted by DIDIER HERAULT, (*De auctorit. Rerum judicat.* Lib. ii. Chap. xxvii. *in fin.*) both taken from the Annals of *Charles* VI. of *France*, written by *John Juvenal Des Urſins*. His Words are, "He (the Duke of *Anjou*) repeated the Alliances made by his Father, the deceas'd *Charles* V. of glori-" ous Memory, which were ſolemnly ſworn, and confirm'd by Oath, by the Kings, Princes, and Barons of the Country; which Al-" liances were not only *perſonal*, but *real* between the Kingdoms, in order to promote their mutual Honour and Advantage" (See BOREL. *Recherches & Antiq. Franc. & Gaul.* Pag. 336.) He adds, "That they (that is to ſay *Charles* VI. and the King of *England*) " made a *perpetual Alliance* for themſelves and their Succeſſors, between Nation and Nation, People and People, as well *real* as " *perſonal*."

[4] See a remarkable Example of this, in my *Defence of the Rights of the* Dutch Eaſt-India *Company*, Chap. iii *& ſeqq.*

[5] When we determine a certain Time, we are well aſſur'd that the King, with whom we treat, may die before the Expiration of it, and perhaps much ſooner; in which Caſe the Alliance ſignifies nothing. Therefore it plainly follows, That a King not only engages for himſelf, but, alſo, for his Succeſſors, during the full Term limited; unleſs there be otherwiſe evident Proof, that the Treaty is purely *perſonal*.

able [a] *Leagues* must be supposed to be the [1] *real*, and the [b] *odious*, the *personal*. The *favourable Leagues* are those that are made for the Advancement of Commerce. Not that all *Leagues* of War are *odious*; for the *defensive* generally incline to the *favourable* Part; the *offensive* hath more of that which is *odious* in them.

VIII. But how far a Successor is obliged by the *Leagues* of the Prince his Predecessor, is what we may take a more distinct View of. For, in the first Place, 'tis certain, that, if the Predecessor makes a Peace, the Successor is obliged by it. For by a Peace, 'tis manifest, all past Injuries which gave Birth to War are forgotten, the Articles of the Peace being duly observed. And then, *secondly*, 'tis beyond Dispute, that the Successor is obliged to stand to all those lawful Agreements, by which his Predecessor transferred any Right to a third Person. And again, *thirdly*, it is, also, certain, that when one of the Confederates hath performed what the *League* obliged him to, and the Prince dies before he satisfies what was required on his Part, the Successor is obliged to satisfy it. For since what the other performed upon a Condition of an Equivalent to be paid him, did either really, or at least was intended to promote the Advantage of the Commonwealth; it is evident, that, unless the Equivalent be paid him, he hath a Right to demand Restitution or Satisfaction, for what he performed, in a Manner before it was due; and, consequently, that the Successor is obliged to refund all back, except he chooseth to pay the Equivalent, according as the Articles of Confederacy before determined. *Lastly*, as to these *Leagues*, where nothing hath been performed on either Hand, or where the Performances have been equal, it may I think be said in general, that the Prince, if he enter'd into the *League* as Head of his People, and with Design to advance the publick Good by it, must be supposed to have made a *real League*, and to have obliged his Successor by it. Because such a *League* affects the whole Body of the People; and the succeeding Prince, the Head of them, enters upon the same Rights, and takes upon him the same Incumbrances with his Predecessor. But where the *League* directly regards the Benefit of the Prince's Person and Family, 'tis evident that when he dies, or that is extinct, the *League* must, also, be at an End. But it is grown into a Custom upon any new Succession, to renew the *Leagues*, though in themselves undoubtedly *real*, at least in general Terms, for fear any Dispute or Exception should arise, that since the Commonwealth hath not yet perceived the Use and Advantage of such a *League*, that therefore it hath no other Foundation but his Faith that made and doth not descend to the Successor. And especially since the Design of every *League* is to promote the publick Good; and since the Successor may perhaps have Sentiments in relation to that different from his Predecessor, he hath in consequence a Right to take different Measures; and therefore may neglect a *League*, which he thinks is now grown useless and unserviceable to the Commonwealth [c]. And here it may be observ'd, that where several different *Leagues* have formerly pass'd interchangeably between Nations, and they afterwards renew them in general [2], the *League* that was last made, must be suppos'd chiefly to be renew'd. Since the latter always lessen the Force of the former [d]. And therefore it was unpardonable Inadvertence and Neglect in the Ambassadors that went to renew a *League* with King *Ptolemy*, and in them too, who sent them without knowing what *Treaties* and *Leagues* had formerly passed between that Prince and the *Achaians*, or which of them the *Achaians* were desirous to renew.

IX. And here Enquiry may be made, whether, if one of the Princes of a *League* happen to be depos'd and expell'd by his own Subjects, the other Confederate be obliged to send him the same Aids and Supplies, which were promised when he was in Possession of his Kingdom? *Grotius*, in the Chapter before quoted, § 17, affirms that he [3] is. Because a Prince, unjustly deposed and expelled, hath still a Right to his Kingdom, tho' he hath lost the Possession. To me, so much in this Case seems to be certain, that if the Terms of the *League* expressly mention and intend the Defence of the Prince's Person and Family, he ought to be assisted in the Recovery of his Kingdom. But if the *League* was formed for publick Good only, 'tis a disputable Point, whether the exil'd Prince can demand Assistance by virtue of his *League*. For the Aids mention'd are presumed to have been promised against foreign Enemies, without a View to this particular Case. Not but that still such a *League* leaves Liberty to assist a lawful Prince against an Usurper. And thus if, while we are engaged in a *League* with a free People, an inteſtine domestic Enemy endeavours to enslave them, we may, with Justice, send them Assistance to suppress him, before he is grown into a lawful Prince. For the [e] *Qualities* in *Leagues* (as suppose it be expressly mentioned, that the *League* is made with the Prince and his Successors) imply a strict and proper Right, and intend such Princes only as have a just Title to the Kingdom, not that keep it by bare Usurpation, or that have no other Title to depend upon, but Force and Power.

X. It is, also, a famous Question, whether it be provided by the *League*, that neither of the Confederates shall injure or invade the other's Allies? By Allies is meant such only as were Allies at the Time the *League* was made, or such as were afterwards taken into an Alliance on either Side. What was urg'd in a Dispute of this Kind between the

[a] *Favorabilia.* [b] *Odiosa.* [c] *Vide* Johan. Labard. *Hist. de R. b.* Gall. Lib. v. Pag. 74, 75. Ed. Par. *An.* 1671. [d] *Vid.* Polyb. *Excerpt. Legat.* xli. [e] *Qualitates.*

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[1] But I have shew'd above (Lib. v. Chap. xii. § 12.) That this Distinction is too confin'd.

[2] See above, in Book v. Chap. xii. Sect. 6, in the Beginning.

[3] *Grotius* only says, That the Treaty does not expire on this Account: And probably he had in View the Case, wherein a King dispossess'd finds Means to recover his Dominions; for then the other Ally cannot take Advantage of this Interruption of Possession, to regard the Alliance as broke; even tho' the Usurper, or rebellious Party, should consent to it. As for the rest, *Grotius* says himself, Sect. 18. (as our Author does here) That the Ally may assist the lawful King to recover his Dominions, *without Prejudice to the Alliance contracted with him, during the Time he was in Possession.* Now this evidently supposes that the Succour was not due to him directly by virtue of the Alliance; otherwise it would be ridiculous to question whether the Alliance was violated on this Account.

Romans on one Hand, and the *Carthaginians* on the other, at the Beginning of the ſecond *Punick War*, may be ſeen in *Polybius*, Lib. iii. Chap. xxvii, and in *Livy*, Lib. xxi. Chap. xix. The Deciſion *Grotius* makes of it is this [a], that it was no Breach of *League* either for the *Carthaginians* to make War upon the *Saguntines*, though after they were taken into Alliance by the *Romans*, or for the *Romans* to undertake to defend them. For it may happen without Breach of *League*, that, of two Confederates, one may make War upon, and the other aſſiſt the ſame Parties. And it is uſual in *Leagues* to make Articles that relate particularly to ſuch Caſes; ſee the *Leagues* made between the *Romans* and the *Carthaginians* in the Time of the *Tarentine* War, *Polyb.* Lib. iii. Chap. xxv. Tho' when Confederates are ſo far engaged in oppoſite Intereſts, 'tis evident they muſt be upon the Brink of an open Rupture. For the Senſe of Pain is the ſame, whether the Wound be given in another's Name, or in the *Striker's* own; but it is yet clearer, when the Seat of the War happens to be carried into the aſſiſting Prince's Country [b].

XI. And it is to be further obſerved, that *Leagues* limited to a particular Time, when that expires, muſt not be ſuppos'd to be tacitly renewed. Both becauſe no Man can be preſum'd to bind himſelf raſhly by new Obligations [1]; and becauſe otherwiſe it could never be known how long a *League* is to continue. And therefore if, after the *League* expires, ſome Acts of ſeeming Alliance are [2] continued, they are to be look'd upon as Acts of Kindneſs and good Nature, but not as Arguments of the Renovation of the *League*. For Friendſhip continues after the *League* is at an End. Again, it is evident from the Nature of all *Compacts* [3], that where one of the Parties refuſeth to ſtand to the Conditions of the *League*, the other is, alſo, at Liberty to break them. Confederates may indeed agree, that tho' one Article of the *League* be neglected, yet the reſt ſhall be inviolably obſerved. But then the other Party is not obliged to perform the Equivalent to the neglected Article, and ſo not to ſuffer any poſitive [4] Evil by it.

XII. I come now to conſider the Nature of [c] *Engagements*, or thoſe *publick Compacts* which are made by *Miniſters* of *State* [5], in *Negotiations* relating to the Sovereign Power, but without Advice and Command from it. And here, the firſt Queſtion is concerning that difficult Caſe, where if the Engagement is paſs'd abſolutely without Proviſo or Condition of being accepted and ratified by the Sovereign, and the Sovereign afterwards refuſe to give it any Ratification; what the [6] *Engagers* are obliged to do in Satisfaction to the Party they made the Engagement with? This was a Caſe once warmly diſputed among the old *Romans*, upon the Engagement made at

[a] *Grot.* Lib. ii. Chap. xvi. § 13. [b] Vide *Juſtin.* Lib. iii. Chap. vii. [c] *Sponſiones.*

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[1] See *Grotius*, Book ii. Chap. xv. Sect. 14.

[2] Unleſs theſe Acts in themſelves can bear no other Interpretation, than a Renewal of the Alliance, as *Grotius* remarks in the Place cited. See what I have ſaid above, Not. 3. Pag. 866. Whence it appears how much M. *Hertius* is in the Wrong, to lay down, as a Matter of Fact, That no Caſe can be conceiv'd where this takes Place. [3] See the above quoted Place of *Grotius*, Sect. 15.

[4] Or that this Evil be repair'd, if it be diſcover'd.

[5] As our Author no where explains, in expreſs Terms, the *Right* of AMBASSADORS, and has only but juſt mention'd it by the bye, Lib. i. Chap. iii, it will not be improper to treat of it in general and ſuccinctly, ſince Treaties are uſually negotiated and concluded by the Power of theſe Miniſters. I ſhall borrow from Mr. *Buddeus*'s *Elem. Phil. Pract.* Part ii. Chap. iv. Sect. 5. §19. *& ſeq.* enough to give a ſhort and clear Idea of this Matter by the Principles of the *Law of Nature*, common to all Men, and not of the *Law of Nations*, taken in *Grotius*'s Senſe (Lib. ii. Chap. xviii) for a tacit *Compact* of all People, or at leaſt the greateſt Number. We can then make it appear, that theſe Sort of Miniſters are to be eſteem'd as ſacred and inviolable Perſons, independently of this pretended *Compact*. We cannot doubt but that it highly concerns Mankind in general, and Nations in particular, not only to put an End to Wars and Diſputes, but, alſo, to eſtabliſh and maintain Friendſhip and Commerce between each other. Now *Ambaſſadors* are neceſſary to procure theſe Advantages. GOD then, who, without Diſpute, commands every Thing that contributes to the Good and Preſervation of human Society, cannot but forbid, by the *Law of Nature*, the doing any Injury to theſe Sort of Perſons. We injure an *Ambaſſador*, either by *refuſing to receive him*, without having any powerful Reaſon to oblige us to do ſo; or by doing him ſome Injury either in his Perſon, his Goods, his Honour, or his Domeſticks, *&c.* We may lawfully diſpenſe with receiving an *Ambaſſador*, when his Maſter, for Example, has already cheated us under Pretence of Ambaſſies, and we have Reaſon to ſuſpect the like Deceit; or when he who ſends the *Ambaſſadors*, has betray'd us, or is guilty, with reſpect to us, of any other heinous Crime; or when we are aſſur'd, that, under Pretence of Negotiations, the *Ambaſſador* comes only but to raiſe ſome Diſturbance, or as a Spy, *&c.* But if we have no Reaſon to miſtruſt any Thing of the like Nature, we muſt honourably receive every *Ambaſſador* that is ſent to us, and not do him the leaſt Injury, not even by the *Right* of *Retaliation*, or *Repriſals*, ſince, by our bare receiving him in that Character, we have renounced, with Regard to him, the Right which we might have had otherwiſe upon that Account. *Ambaſſadors* then muſt be regarded as ſacred and inviolable Perſons, that is to ſay, as far as the Deſign and Nature of their Ambaſſy requires it. Thus an *Ambaſſador* cannot be puniſhed by the Prince or State to whom he is ſent: For, as he repreſents his Maſter, he treats in that Quality with the Power to whom he is ſent, as one of an equal Rank with him. But if he has committed any Crime of Importance, ſufficient to demand Satisfaction, and we have Intereſt enough to get him puniſh'd, we muſt apply ourſelves to his Maſter: And then, if his Maſter refuſes to give us Satisfaction, we may uſe againſt him all the *Rights* that we have againſt a Prince who boldly tolerates and approves of the Crimes of his Subjects: Nay, it is allowable, when the Buſineſs requires it, to ſeize upon his Perſon immediately, as a declared Enemy, to impriſon him, and even put him to Death, if it appears abſolutely neceſſary for our Preſervation; for we are not to bear every Thing from *Ambaſſadors*, neither does the Deſign of their Ambaſſy require it. Nor does this Character oblige an Enemy to their Maſter, to reſpect them in their Paſſage through his Territories to another State, or to hinder him from doing them any Injury: It not being neceſſary to the Deſign of the Ambaſſies that their *Rights* ſhould extend ſo far; unleſs there be ſome particular *Compact* made for that Purpoſe. What we have here ſaid concerning *Ambaſſadors*, is, alſo, to be applied, in ſome Sort, to *their Domeſticks, and their whole Retinue*. If any one of their *Domeſticks* has done any Damage or Injury, we may require his Maſter to deliver him up to us; otherwiſe he makes himſelf acceſſory to his Crimes, and, in that Caſe, he gives us *Right* to act againſt him as if it were his own perſonal Crime. Now he cannot puniſh his *Domeſticks* himſelf; becauſe, this *Right* contributing nothing to the Deſign of his Ambaſſy, it is not to be preſum'd that his Maſter has given it him. As for his Goods, we cannot ſeize upon them for Debt by Way of Juſtice; for that would ſuppoſe a taking away from the Juriſdiction of the Sovereign to whom his Ambaſſy is made: But if he refuſes to pay his Debts, we muſt take the ſame Meaſures with him, as, we have already obſerv'd, are to be uſed in obtaining Satisfaction for the Damage and Injury he has done us. As for the *Right* of *Privileges*, it is not a Conſequence of the Nature and Deſign of Ambaſſies. Nevertheleſs, if we have once granted it to *Ambaſſadors* of a certain State, nothing authorizes us to revoke it, as long as the Good of the Commonwealth does not require it. Neither muſt we refuſe, without preſſing Reaſons, to grant *Ambaſſadors* the other *Rights* and *Honours*, which are ſettled by the common Conſent of *Sovereigns*, for then this would be a Sort of an Affront to them. I have ſince had Occaſion to examine this Matter more cloſely and exactly, in my Notes upon *Grotius*, Lib. ii. Chap. xviii, and eſpecially in thoſe I have added to my Tranſlation of the illuſtrious M. *De Bynkerſhoek*'s Treatiſe *Du Juge compétent des Ambaſſadeurs*, publiſh'd in 1723, and reprinted in 1730, at the End of Mr. *Wicquefort*'s Book, intitled, *L'Ambaſſadeur & ſes Fonctions.* [6] *Sponſores.*

the *Furcæ Caudinæ*. The Story is at large in *Livy*, Lib. ix. Chap. viii, &c. [1] And indeed if the Measure of that Matter were to be given by strict Justice, it must be said that the *Romans* were neither obliged to ratify the Engagement, nor to set Things in the Posture they were in before. But then it had been enough for them to surrender up the Persons who made it [a]. But if the State of the Case be rather estimated by Equity, certainly the *Romans* ought to have ratified the Agreement, however it was concluded without their Advice and Consent. The *Consuls* indeed had not Power to determine War, conclude Peace, or enter into *League* with an Enemy, without particular Instructions and Commissions from their Masters, the Senate and People; yet since they did not presume upon the People's Consent without very good Reason; when it was impossible otherwise to save the Lives of many thousand Citizens, the Flower of all the *Roman* Commonwealth; and when the Enemy had perform'd all that could seem equivalent to a *formal Peace* and *League*; the People in reason ought to have confirmed the Conditions, especially since there was nothing intolerably hard or unjust in them [b]. For it would have been enough for the People to have stood resolutely to their Principle, that *their Magistrates could oblige them to nothing without their own Consent and Command*, if the *Samnites* had demanded any Thing that was unreasonable and insupportable. But 'tis clear, the great Mortification to that proud ambitious People was, that their Army was forced to submit to the Ignominy of passing under the *Jugum*. Which was indeed very ill Conduct in the *Samnite* General. For that Disgrace did not lessen the Strength of the *Romans*, but only provok'd and exasperated that fierce People to revenge the Dishonour. However, the *Roman* Army very well deserved the Treatment they met with, for venturing rashly to pass a Place they were Strangers to, without sending before to discover it. And it was certainly their wisest Way to submit to the Disgrace, rather than suffer the Strength of *Rome* to be cut off. And here the Arguments of *Lentulus* offered in defence of the Engagement may be consider'd, *Livy*, Lib. ix. Chap. iv. And further, that a Commonwealth may often be obliged to ratify the Acts and Promises of its Generals, because of their Authority, and to oblige them not to go over to the Enemy. Hence *Tacitus* saith, *Ann.* xii. Chap. xviii. "That *Mithridates* was at a Loss "whose Clemency he should address himself to; "because none of the *Romans* had Powers large "enough to give him any Assurance in depend. "ing upon their Promises." But in the Case before us 'tis manifest, that the haughty *Romans* never consider'd, that they might some Time or other be forced to accept as hard Conditions themselves, as they had imposed upon others. However, it was a Point of Generosity in the *Samnites* not to accept the Surrender of the *Sponsors*: And it was an extravagant Action in *Posthumius*, when the Surrender was offer'd, to strike the *Fecialis*, and then cry out that he was a *Samnite* Subject, and that, contrary to the *Laws of Nations*, he had injured a *publick Minister*; and therefore, that the *Romans* might carry on their War with more Justice. The Judgment of *Livy* upon this whole Proceeding may perhaps deserve our Observation: The *Sponsors*, says he, after they had been offer'd to be yielded up, and were not accepted, return'd back to the *Roman* Camp, *sua fide liberati*, absolv'd from their own Faith and Engagement; but he adds doubtfully, *forsan & publica*, and perhaps from the Publick.

XIII. The last Question upon this Subject is, if the Sovereign knows that his Ministers have enter'd into an Engagement, and is silent upon it, whether it may be inferr'd from thence, that he owns and approves it? But, for an Answer to this, I refer you to *Grotius*, Lib. ii. Chap. xvi. § 17.

[a] Vide *Grot.* Lib. ii. Chap. xv. Sect. 16. *Val. Max.* Lib. iv. Chap. viii. Sect. 1. *Jo. Mariana.* Hist. *Hisp.* Lib. xxi. Chap. xii.

[b] See *Guicciardine*'s Hist. Lib. xii p. m. 342, & 344, where he talks of the Treaty that *La Trimouille* concluded with the Swiss at *Dijon*, without the King of *France*'s Orders. Sir *W. Temple*, in his *Observations* upon the *Government* of the *United Provinces*, says, That, in the Year 1668, he prevail'd with the States-General to conclude three Treaties, and to draw up and sign the several Instruments in the Space of five Days, without any Recourse to the Provinces, and from them to the several Cities, where, by the Interest and Arts of others, the Affair would have been opposed and eluded, tho' it was of the greatest Importance to the States that it should be concluded. He adds, That, doing this without Commission from their Principals, they ventured their Heads if they had been disown'd by their Provinces.

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[1] See Mr. *Buddeus*'s *Dissertation*, intitled, *Juriſp. Historicæ Specimen*; as, also, those by Mr. *Thomasius de Sponsione Caudina & Numantina*, which are the sixth and fourteenth of the Collection of his Disputes maintain'd at *Leipsick*. I have given a Detail of this Subject, in my Notes upon *Grotius*, Lib. ii. Chap. xv. Sect. 14.

CHAP.

CHAP. X.

Of Promiſcuous Compacts of Sovereign Princes.

I. *The Diviſion of the Chapter.*
II. *How far a Prince may reſtore himſelf to his Right, when injured in Compact by a Foreigner.*
III. *How far, when by his own Subjects.*
IV. *The Contracts of Princes, how far exempted from the Civil Laws.*
V. *A Prince cannot diſpenſe with any valid Oath he hath taken.*
VI. *How far a Subject may have an Action againſt his Prince upon Matter of Contract.*
VII. *The Contracts of the Subject liable to be overruled by the Tranſcendental Propriety.*
VIII. *How far Succeſſors are obliged by the Contracts of their Predeceſſors.*
IX. *The Grants and Donations of Princes, whether revocable.*

I. I Am, in the next Place, to conſider the Difficulties which relate to any Sort of *promiſcuous Compacts* made by ſovereign Princes, which may be reduced to theſe three Heads[1]. Firſt, whether a Sovereign Prince has any particular Power, with Regard to Compacts that affect himſelf? Secondly, what Liberty he hath in Obligations contracted with his Subjects? And, thirdly, how, and how far he can oblige his Succeſſor?

II. The firſt Difficulty therefore is, that ſince a Prince has the Power to reverſe any Contract made to the Prejudice of his Subjects, and can reſtore them to the State they were in before ſuch a Contract was made, or, upon juſt Reaſons, releaſe them from their Obligation to obſerve it; whether he cannot make uſe of the ſame Power in Caſes which concern himſelf? For Example, ſuppoſing that by Fraudulence or Force, or through Indiſcretion of Age, he ſhould have agreed to prejudicial Terms; or hath been any other Way notoriouſly abuſed in his Contracts; or bound himſelf by any raſh Oath[2]? And here it is to be obſerved, that the Queſtion, as it is ſtated in this rude Form, and as the Words of it lie, implies a Contradiction. For to reſtore Perſons to the State they were in, and to releaſe from Oaths, are Acts which bear Relation and Tendency to another Perſon; and which are derived and flow from one inveſted with Power and Authority over the Perſon who is to be reſtored and releaſed. And therefore the Queſtion ought rather to be ſtated thus: Whether, when a Prince has prejudiced himſelf, by conſenting to certain Obligations and Conditions of Contract, upon a Senſe of the Injury he ſuffers, he may, by his own Authority, declare, that, by Reaſon of certain Faults adhering to the Contract, he looks upon himſelf to be releaſed from the Obligation? To which it may be anſwered, that as Perſons who live in a Liberty of Nature, and own no Subjection, are under their own Conduct, and are Judges in their own Affairs; ſo, if they are unjuſtly injured in their Contracts, they may, by their own Authority, demand Reſtitution or Amendments to be made to their Agreement, on Suppoſition that the Prejudice and Injury they ſuſtain be viſible and manifeſt. For when the Thing is diſputed, the Matter muſt be referred to the Deciſion of Arbitrators. And therefore if a Prince, ſince he is ſtill in Poſſeſſion of his natural Liberty, finds any Abuſe put upon him in the Terms he has conſented to, he may, by his own Authority, declare to the Party concerned, that he will not be obliged to ſtand to any ſuch Compact. And there is no Neceſſity that he ſhould procure a Releaſe, ſince the Thing is, in its own Nature, incapable of producing Obligation or Right. Thus *Lewis* XIII. of *France* declared, That *there lay a juſt Appeal from the King under Confinement and Bonds, to the King at Liberty.* But becauſe it may ſometimes happen, that ill Men, when they have a Mind to put a Cheat upon the World, and falſify their Faith, may pretend an Abuſe or Fault in their Contracts, to cover their own Frauds and Perfidy; therefore under Civil Government it is very neceſſary to enact, what Acts ſhall in their own Right be looked upon to be invalid and null, and what are to be examined into and determined by Sentence of Court.

III. But when the Caſe lies between the Prince and his Subjects, the Difference of the Circumſtance will, I think, deſerve a diſtinct Conſideration. A Prince's Minority is ſuppoſed to continue as long as the Adminiſtration of the Government and Affairs of the Kingdom remain in the Hands of his Governors and Tutors; and, during their Adminiſtration, the Prince himſelf can make no Contract with any Perſon of a foreign State: But if he enter into any Contract with a Subject, and afterwards find himſelf injured in it, I ſee no Reaſon why he ſhould not

[1] See *Grotius*, Book ii. Chap. xiv. [2] See *Grotius*, in the Place above mentioned, Sect. 1. 2. 3. 4. 5.

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enjoy the same common Benefit of the Law, which he allows and secures to other Men; otherwise his Condition would be more confined than that of private Subjects. Nor can any Renunciation of Exceptions, which might be made to his Minority, be supposed of Force sufficient against the Presumptions of the real Weaknesses that Age is liable to. A Prince cannot disannul the Treaties and Compacts that were lawfully made by his Governors with [1] foreign Powers or Persons, when he is come to Age, upon Pretence that they were made in his Minority. Because then, nothing could be passed with any Security under a Prince who happened to be a Minor. However, the Prince's Governors, the Regents, are obliged to give an Account of their Administration. But no Exception whatever of Fear, Injury, or Fraud, is of Force against any of those Capitulations, which in limited Monarchies the People propose, and the Prince consents to, at his Accession to the Government. For if the Capitulations or Conditions seemed too strict and severe, the Prince had his Liberty of accepting or refusing them; and the People would not have forced him to take the Government upon him. And it is not to be supposed, that any People would be so inconsiderate, as to tie up the Hands of their Prince with such Laws, as must make the Sovereign Power weak and feeble, and his Government unactive and unprofitable. And here I will, by the way, enquire whether *David* could have retracted his Oath, when he sware not to punish *Shimei* who cursed him as he fled from *Absalom?* And I confess, in my Opinion, he could not. For the King was under no Apprehension of Force or Fear, when he gave him his Oath, neither could he be thought to have sworn out of Rashness or Indiscretion; but, on the contrary, rather with mature Consideration and Design, that, upon so remarkable an Instance of his Clemency, the People who had been engaged in the Rebellion, might return the more willingly, and with greater Assurance of being pardoned, to their Obedience. Neither was the Promise of Impunity in itself unlawful; for the King might very justly, and without Injury to any Man, pardon a Crime which was committed purely against his own Person. But it hath given further Matter of Dispute to some, whether he can be excused for leaving such a Remembrance of *Shimei*'s Crime in all his last Commands to *Solomon*. In my Opinion, *David* did nothing in this, contrary to his former Oath; for he did not leave any Command with his Son to punish *Shimei* for his Crime; but only advised him to keep a strict Eye upon that malicious bad Man and Enemy to his Family, and to take care that he did not create him any fresh Disturbance; and that, if he should afterwards find him guilty of any Misdemeanour, not to be easy to forgive him. And therefore *Solomon* commanded him to live in *Jerusalem* under the Eye of the Court, and forbad him to pass over the Brook *Kidron*, that he might not insult upon his Impunity, nor conceive any secret Satisfaction in seeing the Place where he had, with so much Bitterness, reviled and cursed *David*. But divine Providence so disposed, that he should break those easy Conditions which he had himself approved and consented to, that there might be just Occasion given to take off so ill a Man by punishing him as he deserved.

IV. But here it is to be observed, that however Princes, when they enter into any particular Acts with their Subjects, not as Princes, but as other private Men, are presumed always to comply with the positive Laws of the Commonwealth which relate to the Validity of such Acts; yet, since they are above the Civil Laws, they are under Necessity of following those Laws always in their private Acts. And therefore if they voluntarily and advisedly enter into any Contract that would otherwise be invalid in Law; they are supposed to have exempted that particular Contract from the Force of the Laws, where there are such, and to declare that no Nullity shall ensue upon that Account. For, otherwise, all that was done would signify nothing [a]. And I think it is very reasonable to allow, that if a Prince find himself very much injured in a Contract, which at first he did not perceive, he may if, he please, annul, or at least correct and amend it [b].

V. That no Prince hath Power to release himself from his Oath, when there lies no Objection either against the Validity of his taking it, or the Matter contained in it, or the Circumstances belonging to it, upon Pretence that it is lawful for him to relieve his Subjects in some particular Oaths, I think is evident. For the Oaths which he has Power to annul in his Subjects, have always this Condition annexed to them, if it please the Sovereign. And it is certain it would be impossible to lay any Obligation upon a Man, if he reserves to himself a Power to break it, whenever he thinks fit [c].

VI. But though Princes are as much obliged in Conscience by their Promises and Compacts as private Men; yet, in this Respect, there is a Difference between the Obligation of a Prince and that of a Subject, that it is easy for the Prince to force the Subject to stand to easy Terms, when perhaps he would willingly go back; but a Subject, as long as he is such, hath no way to oblige his Prince to give him his Due, when he refuses it. But no wise Prince will ever refuse to stand to a lawful Contract; since he must necessarily consider, that his Honour and Security depends upon the Credit he hath of observing his Compacts; and that it is the worst Thing that can be said of a Prince, that he observes not himself that Justice, which it is his Duty to administer and support. But however, if a Prince upon Contract give the Subject Liberty to enter an Action against him in his own Courts, the Action itself proceeds rather upon natural Equity than the Civil Laws; as if it were implied, that, upon the Knowledge of his Obligation, he would not refuse the Performance of it. And therefore the End promised by such an Action is not to force the Prince to stand to the Contract, but only to make it appear to the Subject, that the Prince had obliged himself to observe it. And in such *Trials*, that

[a] Of the Action of *Philip* II. of *Spain*, who, *by a Fetch of Law, would have released himself from paying his Debts*, See Grot. Hist. *Belg.* Lib. v. [b] Vid. *Grot.* Lib. ii. Chap. xiv. Sect. 2. [c] Vid. *Grot.* Lib. ii. Chap. xiv. Sect. 3

[1] See the Dissertation of M. Hertius *De Tutela Regia*, Sect. 2. §. 12. Pag. 478. Tome i. *Commentat. & Opuscul.*

stand

ſhould be no Regard had to Honour or Greatneſs, but Judgment ought to be given barely according to the ſtrongeſt Probabilities of Argument [a].

VII. It may, alſo, happen, that the Subjects may be deprived of a Right acquired by Contract[1], either by way of Puniſhment, or by the Force of the Tranſcendental Propriety[b]. Always ſuppoſing in this Caſe, that the Neceſſities of the Commonwealth demand it, and that the Publick ought to make Reſtitution. And therefore for the ſame Reaſon the Prince may defer his Payments, when any preſſing Exigence of State obliges him to turn the Money another Way, which ſhould have been paid to the private Subject. And from hence it appears, what is to be determined about the *Tabulæ novæ*, or general Diſcharges from Debts or Obligations, which *Solon* call'd Σεισάχθεια, or the Shaking off a Burden[c].

VIII. But laſtly, that it may appear, whether and how far a Prince hath Power to tranſmit an Obligation upon a private Contract down to his Succeſſors; it is to be firſt conſider'd, whether the Prince's Kingdom be his Patrimony, or whether he poſſeſs it only, as it were, upon an uſufructuary Right. A Succeſſor to a Prince who holds his Kingdom in the former Right, ſince he ſucceeds to all his Goods and Poſſeſſions, muſt be ſuppoſed to inherit all Debts of Princes who poſſeſs their Kingdoms; in the latter, *Grotius*, Lib. ii. Chap. xiv. Sect. 10. *&c.* is of Opinion, that the Succeſſors are not immediately, and purely, becauſe they ſucceed them in the Kingdom, obliged to diſcharge them. For ſuch Princes do not derive their Right to the Throne from the King their immediate Predeceſſor, but from the People themſelves. But even theſe Succeſſors are obliged by the Debts of their Predeceſſors, mediately and by Interpoſition of the Commonwealth, not as upon their own Account, but as they are Heads of the Commonwealth. For in the laſt Reſort the Debts of the Prince affect the State itſelf, as they were contracted by the Head and Governor of it. And the Truth of it is this, that Princes have Power to devolve Debts upon the Commonwealth itſelf, is evident from hence, that ſometimes it would be impoſſible to ſupply the Neceſſities of the State otherwiſe than by contracting ſuch Debts. And ſince the Adminiſtration and Security of the Commonwealth is entruſted with the Prince, he muſt be allowed to have the Command of thoſe Means, without which that End cannot be purſued or obtained. But then, on the other hand, this Power to oblige the Commonwealth ought to be ſtrain'd no farther than the Prince can have good Reaſons for contracting the Debt. But then again, neither ought the Prince to be ſo far limited, as not to have Power to devolve any Debts upon the Commonwealth, but what have actually given ſome Advantage to the State; tho' it is fit inferior Magiſtrates ſhould be ſo confin'd[d]. But it is ſufficient if he hath a fair Probability in Reaſon for what he attempts, though perhaps the Event may fall out contrary to his Expectations. And therefore, upon the whole, all Contracts made by the Prince oblige the Commonwealth, unleſs when they are manifeſtly abſurd and unjuſt. And when the Caſe is doubtful, 'tis always to be preſumed in favour of the Prince. And ſuch Contracts as theſe, alſo, oblige the Succeſſor, as he is the Head of the Commonwealth. Nay, the People themſelves will be obliged by them, if they ſhould change their Form of Government, and erect a free State. And ſo whatever a free People contract, devolves upon and obliges the Perſon they afterwards confer the Sovereignty upon, though they give him never ſo full and abſolute a Power. And this I think is a better Way of deciding the Queſtion, than by diſtinguiſhing between the greater and the leſſer Injuries For, in the Adminiſtration of publick Affairs, the Probability of the Means ought to be allowed a fairer Conſideration than the Succeſs of the Event, ſince an unforeſeen Accident may ſometimes break and diſtract the wiſeſt Meaſures and Deſigns.

IX. What hath been ſaid of the Contracts of Princes, may, alſo, be applied to their Grants and Donations[1], *viz.* that they cannot be *recall'd* by the Succeſſors, where they were made upon fair and favourable Reaſons[e]. Yet it is certain, on the contrary, that *Galba* endeavoured to recover the *Largeſſes* and *Donatives* made by *Nero*, allowing no Man to keep more than the tenth Part of his Liberality[f]. So, alſo, the *Roman* Senate reduced thoſe Cities to a tributary State, that had bought their Privilege or Immunity of *Sylla*. *Cicero* indeed thought them too ſevere in it[g]. And I think it had been but reaſonable to have refunded them their Money, ſince it had been employ'd in publick Uſes. And ſo *Baſilius* of *Macedon*, when his Predeceſſor *Michael* had exhauſted the publick Treaſure, publiſhed an Edict, commanding *all Perſons who had received any of the Money, and could give no fair Account, why, or for what they received it, to return it again, or at leaſt the Half of it*[h]. But indeed as to Grants of this Nature, it ought to be conſidered out of what they are made. If the Prince give out of his own Pocket, or Eſtate, without Diſpute the Grant is irrecoverable. And if he diſtribute his Bounty out of the Revenues or Income of thoſe Goods or Poſſeſſions which are entruſted to his Adminiſtration, it ought always to be conſidered, upon what Reaſons and with what Caution and Moderation the Donations were made. For as no Body denies but that the Prince hath Power to reward the Services of his Friends and Subjects out of the publick Monies, as far as the Riches and Occaſions of the State will allow; ſo if the Money of the Nation be profuſely ſquander'd away upon Perſons who do the Commonwealth neither Credit nor Service, and the publick Stock is laviſh'd away only to ſatisfy their Ambition; in my Opinion, they ſhould be repleniſh'd from their Purſes who at firſt exhauſted it. It was the wiſeſt Method *Ferdinand* King of *Arragon* obſerv'd, never to part with

[a] *Heliod. Æthiop.* Lib. x. [b] Vi Dominii eminentis. [c] Vid. *Plutarch. Solon Cic.* Off. Lib. ii. Chap. xxiv. ad fin. [d] Vid. Lib. xii. Tom. i. Lib. xxvii. *D.* de rebus Creditis, *&c.* [e] Vid. *Sueton.* in *Tito*, Chap. viii. *Plin.* Lib. x. Ep. lxvi. *Gratian.* Cauſ. xxv. Queſt. i. Chap. xv. [f] Vid. *Sueton.* in *Galba*, Chap. xv. [g] *Cic.* Off. Lib. iii. Chap. xxii. [h] Vid *Hieron. Oſorium de* Reb. geſt. *Emanuel*, Lib i. *Where he gives an Account of the Grants King* John *made juſt before his Death.*

[1] See in *Grot.* the Place quoted, Sect. 7. [2] See *Grot.* ubi ſupra, Sect. 13.

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any of the Lands that belonged to his Crown; and his Reaſons were good, *that Princes who alienated their Lands, generally created themſelves more Enemies than Friends by it, becauſe they made ſome of their Subjects ſo great by it, that they would always be ſuſpicious and fearful of being deprived of their Rights*[a]. What hath been ſaid with Relation to Grants, may, alſo, be applied to [1] Privileges and Immunities, namely, that it ought to be conſidered upon what Reaſons, and with what Caution and Moderation they were given; and whether they are conſiſtent with the common Peace and Security of the State. For without Diſpute, theſe Things are of far greater Concern than the unwary Eaſineſs of the Prince. And indeed all Privileges are to be confin'd under ſuch Limitations and Reſtrictions, whenever they begin to lie heavy upon the other Subjects[b]. So when the *Romans* demanded an Aid of Men and Money from the *Celtiberi*, and they thought to excuſe themſelves by pleading the Privileges that had been granted them by the *Romans* themſelves, the *Hiſtorian* ſays, "That what they inſiſted "upon was allowed to be true; but that the Se- "nate, when they gave ſuch Privileges, always "annexed this *Exception, that they were to conti- "nue in Force as long as it ſhould ſeem good to them "and the* Roman *People, and no longer*[c]. *Lewis*, King of *France*, after he had reduced the *Genoeſe* who had revolted from him, diſannulled all the Agreements and Treaties formerly paſſed between him and that State, and gave them all back again by the way of Privileges, not as Compoſitions or Compacts; *that ſo it might be always in his Power to recal them.* Perhaps indeed that was not to hold with relation to Privileges of all Kinds, but to ſuch only as were to have barely a precarious Dependence.

[a] Vid. *Bacl.* ad *Grot.* Lib. i. p. m. 107. *Grot.* Lib. ii. Chap. xiv. Sect. 12. *Laurentius Valla* de rebus geſtis *Ferdinand. Arrag.* Lib. iii. [b] Vid. Lib. xliii. Tom. viii. Lib. i. Sect. 16. *D. ne quid in loco publico*, &c. *Demoſthen.* Orat. adv. *Leptin.* He had probably in View that Part of his Oration where he ſays, "That the Contributions and Taxes raiſed for the Neceſſities of War, and the Safety "of the State, are excepted from the Immunities granted to private Perſons." Τῶν γαρ εἰς τὸν πόλεμον, &c. Pag. 364. A. B. Edit. *Baſil.* 1572. As for the Law of the *Digeſt*, it relates to a very different Queſtion. See an Explanation of it by Mr. *Noodt*, in his Commentary, Pag. 9. laſt Edition. [c] *Appian.* Iberic. *Guicciardine* Hiſt. 7.

[1] See upon this Subject the *Obſervationes Select. ad rem litterariam ſpectant.* printed at *Hall* in *Saxony*, Tom. iii. Obſ. 13, 14, 15 or Mr. *Bernard*'s Abridgment of them in the *Republ. des Lettres Auguſt*, 1704. p. 190, &c. See, alſo, Mr. *Le Clerc*'s *Biblioth. Choiſie*, Tom. i. p. 41, &c. To which we may add, that the moſt lawful Way of *revoking Privileges* is a very nice Point, and requires a great deal of Prudence. For, to uſe Mr. *La Bruyere*'s Words (*Caract. ou Mœurs de ce Siécle*, p. 316.) "There are certain Circum- "ſtances of Affairs, in which we cannot humour the People too much. You may To-day deprive this City of its Liberties, Rights, "and Privileges; but To-morrow, do not ſo much as think of regulating their very Signs." "Indeed (as Mr. *Le Clerc* ſays in the "Place I have cited) we cannot make the Duration of all Sorts of Privileges depend upon the variable Caprice of Princes, without "expoſing the State to Diſturbances, which would be difficult to appeaſe.——What Eſteem could we have for Privileges that were to "laſt no longer than the Prince's Will and Pleaſure? Thus in ſetting up Princes above Privileges, we do them as much Injury as the "People."

CHAP. XI.

How Subjection ceaſes.

I. *A Man ceaſes to be a Subject when his Prince dies without a Succeſſor.*
II. *Or, if he removes out of the Commonwealth.*
III. *What to be obſerved in ſuch a Remove.*
IV. *Whether lawful to remove in great Companies.*
V. *Whether lawful to counterfeit a Refuge.*
VI. *Whether the Commonwealth may eject a Subject, when it pleaſes, without Reaſon.*
VII. *Of Baniſhment.*
VIII. *A Man is deprived of the Privileges of a Subject when overpowered by an Enemy.*
IX. *Whether a Subject ſurrendered to an Enemy, and not accepted, continues a Member of the Commonwealth.*

I. AMONG the ſeveral Ways by which Men ceaſe to be under Subjection, it is by ſome thought to be one, when a Prince dies and leaves no Heir or Succeſſor behind; or gives his Kingdom for loſt. For then (they ſay) every particular Subject is left free to a Liberty of Nature. But ſince it is clear that a Kingdom, in ſuch a Caſe, is not abſolutely diſſolved, but only reduced to a State of *Interregnum*; it follows that though the Obligation of the Subjects to the Prince they have loſt, are indeed at an End, yet that they continue ſtill united to one another by the original Bond and Compact of Society.

II. But now the uſual Way by which Subjection ceaſes, is, when a Man by Permiſſion of his own Commonwealth voluntarily removes into another, and ſettles himſelf and his Effects, and the Hopes of his Fortune there [1]. How far ſuch voluntary Removes may be permitted, muſt be diſcovered by the Methods by which Subjects are admitted into the Commonwealth. For ſome Perſons are forced to put themſelves under the

[1] See *Grot.* Book ii. Chap. v. Sect. 24.

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Protection and Government of certain Commonwealths, by being conquered in War, or reduced to the last Necessities. And what Liberty is allowed to these must be known by the Laws of those Commonwealths. But if a Person absolutely free, who never knew what it was to be Subject (such as the Patriarchs and Masters of Families of old) or is at present free from all Subjection he had been under before, voluntarily joins himself to any Commonwealth; it must, also, be determined by the Constitutions of that Commonwealth, what Liberty to remove thence was left him [1]. For in some Commonwealths no Man is permitted to leave them without the express Consent of the Government. In others, a Man may be allowed that Liberty, if he will submit to certain Impositions; as suppose, if he will pay a certain Sum of Money, or leave Part of his Goods behind him [a]. But where there are no Laws about the Matter, we must be determined by Customs arising from the Nature of civil Subjection. What Custom admits of, every Subject is supposed at Liberty to use. But if this gives no Light to the Matter, and the Compact of Subjection makes no mention of it; it must be presumed, that every Man reserved to himself the Liberty to remove at [2] Discretion, and that he chose rather to be a Citizen of the World (as *Socrates* said) than a Subject in any particular Commonwealth [b]. For, when a Man enters himself into a Commonwealth, it cannot be supposed that he gives up all Care of himself and Fortunes, but rather that by so doing he takes the best Expedient to defend and secure both. But because it often happens, that the Nature of the Government does not suit with every private Man's particular Circumstances, or he thinks at least he can make his Fortune with more Advantage elsewhere; and since it would be unreasonable to reform and make Alterations in the Commonwealth at the Desire, and for the Benefit only of a few private Subjects; the only Method left is, to give them leave to remove, and provide for themselves where they think best. 'So "*Demaratus*, the Father of King *Tarquin*, fled "with his Family to *Corinth*, and settled there, "because he could not bear the Insolence of the "Tyrant *Cypselus*, wisely preferring Liberty, "though in Banishment, to Servitude at Home [c]." So, also, sometimes it is known, that there is not sufficient Encouragement allowed to Men of Parts in their own Nation. And some have found it true by Experience, *that a Prophet hath no Honour in his own Country* [3]. For Men of base Natures are apt to look with Envy upon Persons who would rise, by their own Worth, to an Height of Greatness above their Reach; when perhaps they remember themselves once superior, at least upon the Level with them; and as *Lacydes* said [d], *Statues ought to be seen at a Distance*, because too near a View lessens the Beauty of them. Now to deny such Persons the Liberty of Removing would in effect be all one, with laying a Command upon Men free and at their own Disposal, and not to presume to rise above the Rank and Condition of their Ancestors. But the Commonwealth, also, itself may make Advantages by these Removes, by inviting in Persons of Worth and Eminence from Abroad. "By the Constitution of the *Roman* "Commonwealth, no Citizen could be forced to "leave the Commonwealth, or if he pleased, not "to leave it, when he was made a Member of "another he preferred to it. And therefore *Tully* "says [e], that, a little before his Remembrance, "several Citizens of *Rome*, Men of Credit and "Fortunes, voluntarily left that, and settled "themselves in other Commonwealths. And "the Way, saith he, lies open from every State "to ours, and from ours to every other." And this Right he very often highly extols [f]. Neither is it any Objection against what is here said, that the Fathers of Families, who at first erected the Commonwealth, may be supposed to have bound one another by Compact, to assemble and unite their Strength in common. For even in other Societies any Member has Liberty to leave it, so it be not with fraudulent Design, at an ill Time, or to the Prejudice of the other Members, especially if the Society were not established with any particular Limitation of Time. And therefore many Commonwealths have appeared to be very little concerned, when their Subjects left them, as being already overstocked with Men, and glad to have their Numbers lessened.

III. But however, since it is generally the Interest of every Commonwealth to know the Number of its Subjects; they who remove ought, in point of Duty or Honour, to signify their Departure; unless a Man has good Reason to suppose, that it will be no publick Concern whether he leaves it with such Ceremony, or not. But all Persons who have engaged themselves in any particular Service or Employ, for a certain Time, ought, without question, to have the express Consent of the Commonwealth for their Remove.

[a] *Ovid. Metam.* Lib. xv. Ver 28, 29. speaking of the *Argives*,

——*Prohibent discedere leges,*
Pœneque mors posita est patriam mutare volenti.

The Laws forbid my Flight, and threaten Death
To those that leave the Land which gave them Breath.

[b] Valerius Flaccus, *Argon.* Lib. vii. Ver. 227, &c.

Omnibus hunc potius communem animantibus orbem,
Commune & crede Deos; patriam inde vocato,
Qua redit itque dies; nec nos diis nata Malignis
Cluserit hoc crudo semper sub frigore messis.
Fas mihi non stabiles, fas & tibi linquere Colchos.

The World to all her ample Fields extends,
And God and Providence are common Friends;
Where-e'er the Day discovers distant Earth,
The Country's mine; nor are we doom'd by Birth
To this cold frozen Soil: But unconfin'd
May change our Country, as we change our Mind.

[c] Cic. *Tusc. Quæst.* Lib. v. [d] *Diog. Laert.* Lib. iv. Sect. 60. [e] Cic. *Orat. pro* Balbo. Chap xiii.
[f] *O jura præclara, atque divinitus jam inde a principio* Romani *nominis a majoribus nostris comparata, &c. Cicero* d. l. What noble Rights are these! Which by the Blessing of Heaven have been enjoyed by us and our Ancestors, ever since the *Roman* State began, that none of us should be forced to leave our Country, or to stay in it against our Wills. This is the immoveable Foundation of our Liberty, that every Man is Master of his Right, and may keep or resign it as he pleases.

[1] V. Dig. Lib. xlix. Tit. xv. De Captiv. & de Postliminio, &c. Lib. xii. Sect. 9.
[2] *Plato* says that at *Athens* it was lawful for every private Man, after he had examined the Laws and Customs of the Republic, if he did not approve of them, to quit the City, and retire where he pleased, with his Effects. [3] Luke iv. 24,

For Example, Subjects who are ſent on Ambaſſies, Expeditions, or that are entruſted in any other Buſineſs which they undertook upon particular Compact and Agreement. But beſides, a Remove ought to be at a proper Time, and when it is not directly againſt the Intereſt of the Commonwealth to ſuffer it. For Example (to make uſe of the Inſtances in *Grotius* in the Place above quoted) when the publick Debts are great, a Subject ſhould not have Leave to depart, except he would pay his Share of them before he remove; nor when the Commonwealth is engaged in War upon Preſumption of the Number or Bravery of certain Subjects; and eſpecially when there is Danger of Invaſion, or of being beſieged; except the Subject who would depart can be ſure to leave others behind him, every way as fit to defend the State as himſelf [a]. Neither can they be good Subjects who ſerve their Country, as *Horace* [1] ſpeaks of his Friends, *Diffugiunt cadis cum fæce ſiccatis amici, ferre jugum paritur doloſi*, that is, who when they have drained all they could from it, leave it to ſtruggle with Misfortune by itſelf. But then it muſt be obſerved, that by Removing in this Place I underſtand the Departing out of the Dominions and Territories of the Commonwealth, and not the Denying its Authority, and Continuing to live in its [2] Dominions. For the Commonwealth, when it bounds its Power within certain Limits, is ſuppoſed, at the ſame Time, to prohibit every Perſon to inhabit within that Compaſs, who will not acknowledge its Authority. And therefore it may be obſerved by the way, that the Grandees of *Spain* were very much miſtaken, when they thought themſelves releaſed from the Obligations of the Commonwealth, by renouncing the Laws of their Country, and then retiring to other Places. Though it was uſually ſuppoſed, that when that was done, they might lawfully take up Arms againſt their Prince, and begin open Hoſtilities, without incurring the Guilt of Treaſon and Rebellion [b]. From what has been ſaid we may infer, what Force thoſe Avocatory Commands may be ſuppoſed to have, by which the Commonwealth endeavours to recall its Subjects from Employments in foreign Countries. For Inſtance therefore, if a Subject, who is under no particular Ties or Reſtraints, remove from his Commonwealth, where that Liberty hath always been promiſcuouſly allowed, and ſettles himſelf and his Effects under the Protection of a foreign State; the Commonwealth he left hath no longer any Authority over him. And therefore it is to no purpoſe to think to reduce ſuch an one by threatening him with the Loſs of Fame, which is the utmoſt that can be done, when he is determined not to obey. But the Commonwealth hath ſtill Authority over Subjects who depart either contrary to the Laws, or are obliged to it by any particular Ties, or hold Poſſeſſions of Goods, eſpecially of Immoveables, under its Dominions, or are abſent only upon Travel, and reſerve to themſelves the Right of Subjects. And by the way, it was a prudent Law of *Solon*'s, which *Plutarch* [3] mentions in his Life, by which he obliged the *Athenians*, "To admit "no Perſons into their Commonwealth, except "ſuch as were condemn'd to perpetual Baniſh-"ment from their own Country, or elſe ſuch as "remov'd with their whole Families to *Athens*, "for the Convenience of Trade and Employ-"ment in the Arts they profeſs'd. And this "Law it was ſaid he made, not ſo much to keep "out Foreigners, as to invite them to ſettle at "*Athens*, by giving them Aſſurance of incorpo-"rating them into the Body of the Common-"wealth. For he made no Doubt, but both "theſe ſorts of People would make very good "Subjects, the one becauſe they voluntarily "quitted, and the other becauſe they were forced "out of their own Country." But further, ſince the Commonwealth really hath no Power or Authority over Perſons free from all Civil Obligations to it, it is manifeſt, that if the new Commonwealth they ſettle in, ſend them in Quality of Ambaſſadors or publick Miniſters to the State they left; that they ought to be received agreeably to their Characters, and enjoy all the Privileges of Ambaſſadors, one of the chief of which is to be free from the the Authority and Power of the Commonwealth they are ſent to. For, if this be thought too great an *Honour* to be ſhewn to Perſons who have formerly been Subjects, 'tis eaſy to deny them Reception. Nay, to carry the Thing farther, if, for Inſtance, a Subject in the Face of his own Commonwealth engage his Faith to a foreign State, in order to take upon him to negotiate for it there, under the Character of Ambaſſador and publick Miniſter; the Commonwealth muſt be ſuppoſed to have releaſed him from all Civil Obligations to itſelf. Since it is impoſſible the ſame Subject ſhould be capable of two Obligations of the ſame Nature. And, in conſequence, that Perſon muſt from that Time be admitted to all the Rights and Privileges of an Ambaſſador in his own Country, which by a ſort of Fiction he is ſuppoſed to have changed.

IV. But however, to depart in Companies, great Numbers together, *Grotius* [5] thinks unlawful for this Reaſon, becauſe ſuch a Liberty would be utterly inconſiſtent with the Nature of civil Society. And in Morality that muſt be judged neceſſary, without which, an End propoſed cannot be attain'd; and that inconſiſtent with it, which prevents or deſtroys the End [c]. But the Truth of this Opinion may I think be queſtioned; for if it be lawful for particular Subjects to remove as they pleaſe themſelves, why is it not law-

[a] *Vid.* Lycurg. *Orat. contr.* Leocratem. [b] *Vid.* Mariana *de rebus* Hiſp. Lib. xiii. Chap. xi. [c] Vid. *Liv.* Lib. xli. Chap. viii.

[1] Book i. Od. 35, Ver. 26, 27, 28.

[2] M. *Hertius* alledges here the Example of the *Phalburger* (or rather *Pfalburger*) of *Germany*, againſt whom the Emperors were obliged to iſſue ſeveral Decrees. Theſe were People, who, without ſtirring out of that Territory in *Germany* where they were born, obtained a Right of *Burgherſhip* in ſome other States; and, under this Pretence, refuſed to pay the Taxes, in the Places where they lived and had their Eſtates. See *a Diſſert* of the ſame Author, *De Subjectione Territoriali*, Sect. 20. Tome ii. of his *Comment. & Opuſc.* And the *Jus Public. Roman. German* of M. *Struvius* Chap. xxvi. Sect. 46. As, alſo, M. *Gundling* on the *Digeſt.* Lib. i. Tit. v. *in fin.*

[3] *Plutarch*, Pag. 91. F. [4] See M. *De Bynkerſhoek*'s Treatiſe *Du Juge compétent des Ambaſſadeurs*, Chap. xi. where this Question is fully treated. [5] Ubi ſupra.

[6] Mr. *Wernher*, Profeſſor at *Wittemberg*, anſwers our Author (in his *Elementa J. N. & Gent. Chap.* xxiv. *Sect.* 4.) that though particular Members of a Body, taken one by one, have ſuch and ſuch *Rights*, it does not always follow, that a whole Multitude may have them alſo, becauſe there may have been ſome Reaſon which hinders the Granting to a great Number of Men what is allowed

ful for greater Numbers to take the same Liberty, who all propose to themselves the like Conveniences of bettering their Fortunes by changing their Country; supposing none of those Objections against it that were mentioned before? For it is nothing to the Purpose to answer, that by this Means the Commonwealth must be enfeebled and dissolv'd. For where a Person hath no *Right* to *detain me* contrary to my own Inclinations, he suffers no Injury, tho' perhaps by my *Departure* some *future Benefit*, but not yet *due*, is *intercepted* from him. There is no Necessity such a *particular* Commonwealth should have so many *Millions* of Subjects, or should always appear formidable to its Neighbours, any more than it is that any particular *private Man* should be worth so *many thousand Pounds*, though 'tis true indeed, that neither one nor the other ought to be reduced to a *lower* Condition by *unjust Means*. And therefore I think there is but little Force in *Grotius*'s Argument. For though, perhaps, *this* or *that* particular Commonwealth may be much *weaken'd*, or perhaps by continual *Drains* in Time be utterly *dispeopled*, where the Subjects are permitted to *desert* in Numbers together; yet *civil Society* among Men is in no Danger of being absolutely *dissolv'd* by it. For the *Corruption* of one Commonwealth is the *Generation* of another, and what is *lost* in one Place, is *gain'd* in another. *Nature*, when Men began to *increase* and *spread* themselves over the *World*, *formed* and *divided* them into *civil Societies*, but never gave Command that *such* or *such* a particular Commonwealth should stand for ever in an uninterrupted Course of Greatness and Fortune. *Babylon* was exhausted by *Seleucia*, and *that* by *Ctesiphon* [a]. However, when *Companies* depart, they are obliged, as well as *particular Subjects*, to depart out of the *Dominions* and *Territories* of the Commonwealth. For otherwise there must ensue such Distractions and Confusions, as would necessarily be *fatal* to all *Governments*, that is, if whole Cities or Provinces were allow'd *Liberty* to withdraw at Pleasure from their *Obedience*, and either to put themselves under the *Protection* of *others*, or to erect separate *States* of themselves.

V. I shall now in the next Place, enquire, whether, and how far those Persons may be *justified*, who pretend to be *Refugees* and *Deserters* only with Design to injure them who receive them, and to bring some *Advantage* to their *Prince* or *Country*. It is not indeed to be excused from great Imprudence, to be easy in giving Credit to such Sort of Men, 1 *Sam.* xxix. 4, nor does the World generally appear dissatisfied, that *Traitors* are punished after their *Treason* hath taken Effect [b]: Yet it ought not to be thought therefore lawful or honourable for me to betray a Man, because I find him of an easy Temper, and likely to be taken by the *Train* I have laid for him. Nor is any Man obliged to serve his Country at the Expence of his Honour and Conscience, as has been already shewed. And, without Dispute, for a Man to *engage* his *Faith* purely with Design to make Advantage by the *Violation* of it, in doing Harm to a secure and heedless Enemy, is a very great Sin. And it was no Question an execrable Saying of *Lysander*'s, or *Philip*'s, That *Children were to be cheated with Trifles, and Men with Oaths* [c]. If therefore a *Deserter* expressly engages his *Faith*, he cannot break it without Sin, whatever *Pretence* or *real Design* he may have of advancing *their* Interest he *deserted* from. It may perhaps be replied, that since they who give *Reception* to *Deserters*, know, before-hand, that they can do them no Service without Sin, and that no Man can lay any binding *Obligation* upon himself to commit Sin, and therefore that the *Faith* given by Deserters signifies nothing; it follows, that no Injury is done them, if they are imposed upon by their own *Credulity* in depending upon such *slender* Arguments. But I answer, that it is foreign to the *Question*, to enquire whether it be a Sin, or not, to make use of the Service of *Deserters*. For it does not follow, that if I *sin* myself, in employing such a Person in my Service, that therefore for that Reason he hath a *Right* to do me an *Injury*. As it does not follow, that because if a Man hire a *Ruffian* to commit Murder, he contracts the same *Guilt* with the *Villain* himself, therefore it is *lawful* for the *Ruffian* to kill, also, the Person who hired him. It is commonly said indeed, that *Deserters* are received by the *Laws of Arms* [d]; that is, that it is contrary to the *Laws of Arms*, not to give *Admittance* to Persons who *leave* the *Enemy*, and *come over to us*, as *Grotius* and *Cujacius* explain that Law [e]. But whether we ought to understand *this* Passage of the *external Laws of Arms* (as *Grotius* calls it) or of the *internal*, may very well be Matter of Dispute. But however, if a Man will *defend* that all Persons have absolute Liberty to make use of the Assistance of *Deserters*; methinks it should not be thought so proper for the Purpose to insist, that even *God* himself makes use of the Actions of the *Devil* and *wicked Men*; as to plead the *Favour* which ought to be allow'd to the *Justice* of *Arms* taken up, either to *punish* the Insolence of an *injurious* Enemy, or to *assert* and *regain* just and oppressed *Rights* [f]. For, upon the Supposition of this *Favour*, a *Prince* engaged in a *just War* needs not think himself obliged to make a curious Enquiry, whether the *Deserters* gave over *Hosti-*

[a] Vide Plin. *Nat. Hist.* Lib. vi. Chap. xxvi. [b] Vide Vopis. *in* Aurelian. Chap. xxiii. [c] Vide *Elian. Var. Hist.* Lib. vii. Chap. xii. [d] *V. D.* Lib. xli. *De acquirend. rerum dominio*, Lib. li. [e] *Cujac.* Obs. iv. Chap. ix. *Grot.* Lib. iii. Chap. i. § 22.

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a small one; as it is here, where it plainly appears, that it is the Interest of the *State*, that their Subjects do not remove out of it into another, in large Bodies. Besides, that is contrary to the *original Contract*, which forms *Civil Governments*, and by Virtue of which the Subjects are bound to act nothing that tends to the Destruction of the State. And it signifies nothing to say, that one *State* makes an Advantage of the Ruins of another. For the *Compact* here in Dispute relates to the Advantage of that particular State into which they enter; and it is not with Respect to *Civil Governments* in general, but in Relation to the Interests of every particular State, that we must judge of the Extent of Engagements and Duties of Subjects. This is the Manner in which that Author defends the Opinion of *Grotius*. However, the Case here in Question can seldom happen, but when *Princes* have made themselves odious and insupportable to their *Subjects* by their tyrannical Goverment; and then it is certainly their Business to alter their Measures, if they are unwilling to see their Countries depopulated. Otherwise all the Prohibitions in the World would not be very prevailing, nor hinder their being forced in Time to reign over vast Deserts.

[f] See the sixth Chapter of this Book, § 16.

lities againſt him upon honourable Motives, or not. And ſince he may preſume, that they had good Reaſons who moved them to relinquiſh the Cauſe they were before engaged in, he cannot contract Guilt by ſeeming to give Encouragement to *unjuſt Deſertions*. But however this be, 'tis certain, that it is utterly *unlawful* to make *Faith* an Inſtrument to deceive and abuſe Mankind. And again, 'tis, alſo, certain, that, where a *Deſerter* owns he *deſerted* without *reaſonable* Cauſe, his *Faith* can ſignify little; ſince it muſt either tend to advance *new* Treaſons, or to continue the *old*; and therefore that it muſt be very great Imprudence to lay any Streſs upon it [a]. But *Deſerters* therefore, who propoſe to ingratiate themſelves with them who receive them, and yet, to carry on their ſecret *Deſign* under the Mask of *Refugees*, generally pretend that the inſupportable Nature of the Injuries they ſuffered, forced them to take this only Way for their Security. The Stories of *Zopyrus* [1] and *Sextus Tarquinius* are very well known; and what *Arts* the *one* uſed to gain upon the Credulity of the *Babylonians*, and the other upon the *Gabinians* [2]. So *Mezeras* the *Syrian*, as *Florus* calls him, or *Abarus* the *Arabian*, as *Appian*, or *Ariammes*, as *Plutarch*, who drew *Craſſus* into the Plains, gained Credit with him by extolling the Favours and Obligations he had received from *Pompey*, and by relating the Misfortunes he had ſuffer'd in eſpouſing the *Roman* Cauſe. *Virgil* [3] ſeems to deſcribe the Cunning of *Sinon* with more than uſual Life and Beauty, that he might free the *Trojans* from the Imputation of being an imprudent credulous People. For, firſt, *Sinon* pretends he was a Perſon mortally hated by *Ulyſſes*, a Man the *Trojans* would eaſily think bad enough to be guilty of any Fraud that could be charged upon him, and to whom to be an Enemy, was, with them, the greateſt Recommendation. The Cauſe of this Animoſity between *Ulyſſes* and *himſelf* he then derives from the Death of *Palamedes*, who was put to Death for having impoſed the Continuing the War. He goes on with this Story, that he was at laſt doom'd to be *ſacrificed*, not by any Oracle or Command from the Gods, that he might not ſeem to have refuſed even to be made a Victim for the common Safety; but only by the Malice of *Calchas*, who was ſuborn'd and hired to do it by *Ulyſſes*. And certainly an Injury of ſo high a Nature as this might very well juſtify him in ſaying, he thought himſelf now releas'd from all Obligations to his Country. And yet with much perſuaſive Art and Cunning, he firſt of all beſeeches Heaven that it might now be lawful for him to renounce Faith and Love with thoſe *Greeks*, who were ſo unjuſt and unkind to him, tho' he had once conſidered them as Country-Men and Fellow-Subjects. And yet all he could ſay was hardly enough to overcome the *Trojans*, till the Gods themſelves ſeem'd to confirm the Truth of what he had ſaid by a very ominous Accident. But after all, 'tis certainly true, that *a Deſerter who comes over to an Enemy ſingly by himſelf, without betraying ſome conſiderable Advantage to him, brings but a poor Prize with him either of Credit or Value.* But however ſuch Perſons are not to be look'd upon as *Deſerters*, who go privately to an Enemy with Deſign to ſurprize, or make a ſudden *Attack* upon him, without engaging their *Faith* to draw their Swords in his Aſſiſtance. And it is not to be ſuppoſed, that ſuch are under any *tacit Engagement* upon this Account, becauſe 'tis not probable they would make any Attempt againſt an Enemy, when they were within his Reach. For ſuch a *tacit Obligation* can be preſumed only in Perſons, who go over to a *foreign State* in Time of *Peace*, and not in *War*.

VI. The next Enquiry I ſhall make, is, whether the Commonwealth, on the other Hand, can *forcibly eject* the *Subject* at Pleaſure, and without antecedent Tranſgreſſion? *Cicero*, in the Paſſage before cited, makes it one of the *Foundations* of *Liberty*, that *a Subject ſhould not be forced to change his Country*. But now admitting this to be true, the *State* of the Commonwealth is not therefore granted to be *inferior* in the leaſt to that of *private Subjects*, becauſe they are allowed to have Liberty to remove as they pleaſe, when the Commonwealth has not Power to *force* them to depart againſt their Will. For, when a Man puts himſelf under the *Protection* of any Commonwealth, he does, at leaſt for the preſent, entruſt himſelf and *Fortune* entirely with it, and *that*, at leaſt, muſt neceſſarily be expoſed to *Diſtraction* and *Ruin*, if he may at any Time be *forcibly ejected* from it. And ſince this would be the greateſt Hardſhip imaginable upon the *Subject*, every Man muſt be ſuppoſed to have made an *Agreement* with the *State*, that *he ſhould not be forced to leave it contrary to his own Demerits*. But now on the other Hand, the Commonwealth doth not build its *Fortune* and *Security* upon a few common Subjects, and therefore loſes little or nothing by the *Departure* of ſome few of them. For where the great and particular *Truſt* is placed in any Subject of *extraordinary* Value, 'tis uſual to oblige him by particular *Ties* and *Agreements* not to leave the Commonwealth without *Licence* from the *Government*. And certainly it hardly deſerves any Man's Envy, that the Subject in this *Particular* ſhould be allowed to have more *Liberty* than the Commonwealth. For the other *Advantages* which the Commonwealth enjoys more than, and beyond the Subject, are of much larger Extent. So when a Subject refuſes to conform to the Commands of the Sovereign, 'tis an eaſy Thing to force him to comply. But when a Subject is diſſatisfied with the *publick Adminiſtration*, he hath nothing elſe to do, but to *ſubmit* and be *patient*, or to *remove*. But however, there is ſometimes a leſs *invidious Way* made uſe of in Commonwealths to *remove* ſuſpected or uſeleſs Subjects, or burdenſome

[a] *Liv.* Lib. xxii. Chap. xxii. *Vid. ap. eund. Orat. Indibilis*, Lib. xxvii. Chap. xvii, and that of *Cn. Marcius* to the *Volſci*, in *Dionyſ. Halicarnaſſ.* Lib. viii. And that of *Segeſtes*, in *Tacitus*, Ann. Lib. i. Chap. lviii. *Neque odio patriæ*, &c. This I did, not out of any Ill-will I bear to my Country (for Traytors are hated even by thoſe they deſign'd by their Treaſon to oblige) but becauſe I look'd upon it to be the common Concern both of *Romans* and *Germans*, and becauſe I was more inclined to Peace than War. Vide *Am. Marcellin.* Lib. xviii. Chap. xi. *in fin.*

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[1] Vide *Herodot.* Lib. iii. & *Juſtin.* Lib. i. Chap. x. [2] *Liv.* Lib. i. Chap. liii, liv. [3] Vide *Virgil. Æneid.* Lib. ii. lvii, &c.

Number

[illegible] of them, to make room for the *others*; [illegible] that is, by sending them Abroad in *Colonies*. These *Colonies* indeed generally consist of Persons who voluntarily offer themselves, either upon the Hopes of mending a broken and and decay'd Fortune; or else, that are out of Humour with the *Government*, and willing to be out of its Sight, when they find they are not to expect Favours from it. So *Isocrates* persuaded *Philip* "to "build [a] *Cities* in *Asia*, and to *people* them with "such Sort of Persons, whose *Poverty* forced "them to lead loose vagabond Lives, and to "rob and pillage the Country; in short with "the Scum and Refuse of the People." And *he* commends the Prudence of that Method in the *Athenians* [b]. What Account is to be given of that Custom, common among the *Antients*, both of *barbarous* Nations as well as the *Greeks*, of sending out great Numbers of their young People in Search of new Seats, as it were, under the Conduct of some *titular God*, to whom they were supposed sacred, may be seen at large in *Dionysius Halicarn.* Lib. i. And the same Author is of Opinion, that the *Aborigines* were a Settlement of this kind, that is, of young People, who after the Custom of their *Countries* had been consecrated to the Gods, sent in Quest of new Seats, and that settled wherever their Valour or Fortune carried them [c]. And so *Pliny* tells us, that the *Picentes* were sent out by the *Sabines*, *upon a Vow which they look'd upon to be sacred.* And *Strabo* says the *Samnites* were descended from the *Sabines* the same Way [d]. "So *Lydus* and "*Tyrrhenus* (as *Paterculus* tells the Story) upon "a great Scarcity, threw Lots which of them "should take his Share of the People, and go in "Search of new Seats [e]." And *Paulus Warnefridus* [f] gives very near the same Account of the People of *Scandinavia*. But *Colonies* may be, and often are settled in different Methods. For either the *Colony* continues a Part of the *Commonwealth* it was sent out from; or else is obliged only to pay dutiful Respect to the *Mother Commonwealth*, and to be in a Readiness to defend and vindicate its *Honour*, and so is united to it by a Sort of *unequal Confederacy*; or lastly, is erected into a *separate Commonwealth*, and assumes the same *Rights* with the *State* it is descended from.

VII. A Man ceases to be a *Subject against his Will*, when, for some *Crime*, whether truly or wrongfully laid to his Charge, he is ejected out of the Commonwealth. For when the Commonwealth refuses to own any Man for a Member of it, and forces him to depart the Dominions; he is releas'd from all *Obligations* which before, as a Subject, he ow'd to it. Upon which he is left to his own Choice to settle where he can. And, as long as he continues in this *Exile*, the Commonwealth hath no *Authority* over him. So *Iolaus* [g] said, that the *Argives* had no Power to bring him away from *Athens*, when they had before condemn'd him to *Banishment*. But certainly to be forced into *Banishment*, if upon a *false* Accusation, is a very great *Injury* (though a Man of Courage will not want Supports under such a Misfortune.) And if upon a *real* Crime, a very severe *Punishment*, *Philo* the *Jew* thinks it worse than *Death* itself [h]. For though the *exiled* Person may perhaps be allowed to enjoy the best or greatest Part of his Estate in his *Banishment*, yet the Difficulties and Inconveniences that must attend *removing* it to another Place are unavoidable. It must be allowed too, that it is a very sensible Affliction to a Man to be forced to part with his *Relations* and *Friends*; and besides, to be judged a Person unfit to live any longer in the *Commonwealth* is a severe Disgrace, and must leave a foul Blot upon a Man's Honour and Memory [i]; nor can a Man have lost less than all Sense of Shame, who can have no Apprehensions of the *Infamy* of it [k]. *Tully* saith much, on the other Hand, to the contrary, but it does not seem to me of much Force [l]. "*Ba-* "*nishment*, says he, is so far from being a Pu- "nishment, that I think it a Refuge only and "Security from it. For, when Men fly from "Punishment and Misfortune, they only change "the Air and Soil, remove and settle in other "Countries. And therefore, by the *Roman Law*, "*Exile* is never made a Punishment, as it is in "those of other *Commonwealths*. But when Men "would avoid Imprisonment; Death, or Igno- "miny, or other Punishments which the Laws "appoint, they take Sanctuary in *Exile*; if they "choose to stay in the *Commonwealth*, and suffer "the Law, 'tis certain they cannot be deprived "of the *Right of Subjects*, but with their Lives: "but because there are none who will make that "Choice, their *Rights* are not forcibly taken "away from them, but they voluntarily relin- "quish and resign them [m]." It was indeed peculiar to the antient *Roman* Constitution, that no Man should be forcibly deprived of his *Right* of being a Member of that *State* [n]. And by the *Porcian* and *Sempronian* Laws it was provided, that no *Magistrate* should inflict capital Punishment on any *Citizen* without the *People*'s Consent. But that Criminals might not enjoy absolute Impunity, and none seem to be ejected, or forced to quit his *Privilege* of a *Citizen*, they would

[a] *Orat. ad* Philip. [b] In *Panatheniac.* See *Bacon*'s Essays, Chap. xxxiii. [c] *Dionys. Halicarn* Lib. ii. *Plin.* N. H. Lib. ii. Chap. xiii. [d] *Strabo*, Lib. v. Vide *Justin.* Lib. xxiv. Chap. iv. & *Festum in Ver sacrum & in Mamertini Liv.* Lib. xxxiv. Chap. xliv. [e] *Paterculus*, Lib. i. Chap. i. [f] *Paulus Warnefridus* de gestis *Longobardorum*, Lib. i. Chap. ii. [g] *Eurip. Heraclid.* Ver. 186. [h] *Philo Judæus* de *Abrahamo*, Pag. 359. A. Ed. *Paris.* [i] *Oppian. Halieut.* Lib. i. Ver. 274, &c.
[k] As *Juvenal* describes *Marius*, Sat. i. Ver. 47, 48, 49.

Hic damnatus inani
Judicio, &c.
Exul ab octava Marius bibit & fruitur Diis
Iratis——

——Contemns his Infamy,
Can rise at Twelve, and get him drunk e're Three,
Enjoys his Exile, and's condemn'd in vain.

[l] *Vide* Cic. *Orat. pro* Cæcina, Chap. xxxiv. [m] Vide *Polyb.* Lib. vi. Chap. xii. [n] Cic. *pro domo sua*, Chap. xxix. *Hoc jus à majoribus proditum*, &c. Chap. xxix. This is a Right we all received from our Ancestors, That no *Roman* Citizen should ever lose that Privilege, but by his own Choice.

[g] See *Grotius*, Book ii. Chap. v. § 25.

have had it believed, that the *Citizens* voluntarily choſe *Exile* to eſcape Puniſhment [a]. But the Neceſſity of the Delinquent's leaving his *Country* was ſufficiently implied in the forbidding all that were condemn'd to *Capital Puniſhment* the Uſe of *Fire* and *Water* within the *Roman* Dominions. Though it is to be confeſs'd, that, when *Baniſhment* is inflicted, Care ſhould be taken that the Commonwealth may be ſecure from all Danger that may happen, by making the Perſon baniſhed an Enemy to it. For which Reaſon ſome *Nations* never puniſh with *Baniſhment*; as the *Turks* and *Moſcovites* now, and formerly the *Jews*, tho' they might be rather ſuppoſed to have Regard to other Reaſons, *viz.* that they might not change their Religion. The *Relegatio* is a milder Sort of Puniſhment, by which the Criminal is not entirely diveſted of the *Right of a Subject*, but is only confined to inhabit within a particular Diſtrict, or elſe prohibited coming within a particular Part of the *Dominions*. They who lay under this latter Penalty, were by the *Romans* properly called (*Interdicti*) *Perſons interdicted* [b]. But to be baniſhed ſome particular *Countries* and *People*, may well enough be thought no *Puniſhment*; as *Diogenes* ſaid, when *one* told him that the *Sinopenſes* had condemn'd him to *Baniſhment*, *And I have condemn'd them to ſtay where they are.*

VIII. Again, a Man is forced, *againſt his Will to change his* Commonwealth, when he is ſubdued and maſtered by a powerful Enemy, is forced to put himſelf under his *Protection*, and to ſubmit to his *Authority* as a *Subject*, whether, at the ſame Time, he be removed into another *Country*, or [1] not. And this Method muſt be allowed to be lawful, not only for *particular Subjects* to take, at leaſt for ſuch as are under none but the common *Obligations* of *Subjection*; but, alſo, for entire *Cities* and *Provinces*, when they find no other Way left for their Safety and Preſervation [c].

IX. Sometimes, alſo, it happens, that a *Subject* upon *Injury* done by him to a *foreign Commonwealth*, is, by his own *Sovereign*, deliver'd up to the *injured State*, to prevent *Wars* that might otherwiſe follow upon his Account. *Herodotus*, in his *Calliope* [2], gives us the Story of *Timegenides* and *Attaginus* to this Purpoſe, who had been Authors of engaging the *Thebans* in an *Alliance* with the *Perſians*. And here a Queſtion is moved, whether a *Subject ſurrender'd* by his own State or Commonwealth, but not accepted by the *other*, continues a *Member* of that which was his own, or not [3]? *P. Mutius* was of Opinion that he did not [4], becauſe, when a *Subject* is deliver'd up by the publick Voice and Conſent of the *People*, he ſeems to be as much ejected out of the Commonwealth as he would be, had he been forbid the *Uſe of Fire and Water*. And the ſame Queſtion was diſputed with great Heat in the Caſe of *Mancinus* [5], who had been ſurrender'd at *Numantium*, but not received. For, when *Mancinus* afterwards offered to go in to take his Place in the *Senate*, *Rutilius* the *Tribune* of the *Commons* ſtopp'd him, and refuſed him Admiſſion; telling him, that when the *Pater Patratus*, to releaſe the Commonwealth from the Obligations of the Treaty he had ſign'd, ſurrender'd him up to the Enemies of the *Roman* State, he then ceaſed to be a *Roman* Citizen. However, when the Caſe was debated and put to the Vote, the Majority declared in favour of him; and among others for this Reaſon, That no Perſon could properly be ſaid to have been delivered, who was not accepted by the Party the Offer was made to. Now to me the State of the Controverſy ſeems to be this, The Commonwealth that ſuffer'd the Injury, hath a Right to proſecute the Subject of the foreign State with War. But by the Surrender of him he is entirely conſigned over to the injured Commonwealth, and may be puniſhed as one of its own Subjects. And if he be received, the Commonwealth he was formerly a Member of, muſt be ſuppoſed to quit all Right to him; ſince, by publick Conſent and Approbation, he is delivered up to the Authority of the foreign State. But if the injured Commonwealth refuſe the Offer, and decline the Acceptance of the ſurrender'd Perſon, the State that offered the Surrender may diſpoſe of him as it pleaſes, and may either abſolutely eject, or puniſh him according to the Demerits of his Crime. But if no Puniſhment happen to be inflicted on him, it is not to be ſuppoſed that he hath loſt the Right of a Subject. For the *Act of Surrender*, is, in itſelf, only a Tender made to the foreign State of that Right, which every Commonwealth hath over its own Subjects, and not an utter Abdication and Renunciation of him. And therefore the Surrender doth not in itſelf deprive any Man of the Right of a Subject, unleſs it be declared by any particular Law in expreſs Words, that, in a Concurrence of ſuch Circumſtances, the Perſon ſhall be ſuppoſed to have forfeited all Rights of a Subject. And *Cicero* is of the ſame Opinion. For, ſays he [6], *A Citizen who hath been deliver'd by the* Pater Patratus, *if he is not accepted by the Enemy, retains the Rights and Privileges of a Citizen entire* [6]. But from what hath been ſaid it may be inferr'd, that if the Surrender is accepted, and afterward the Perſon who was given up ſhould happen, by ſome Chance or other, to return to his own Country again; he cannot be admitted as a Subject, but

[a] *Diodorus Siculus*, Lib. iii. Chap. v, mentions an Inſtitution of a quite contrary Nature among the *Æthiopians*. *Salluſt. Bell. Catil.* Chap. l. *Cæſar* in his Oration to the Senate tells them, That there were Laws by which no Citizen's Life could be taken from him, but that after Condemnation he ſhould be permitted to go into Exile; and again afterward, Baniſhment was always allow'd the condemn'd Criminal. [b] *Vide* Briſſon. *Select. Antiq.* Lib. iii. Chap. v. Anton. Matthæ. *de Crimin. ad Tit. de Pœna*, Chap. i. § 6, 7.
[c] Vide *Grot.* Lib. ii. Chap. vi. Sect. 5. [c] *Cic.* Orat. pro *Cæcina*, Chap. xxxiv.

[1] See, above, Lib. vii. Chap. vii. Sect. 4. Chap. viii. Sect. 10, and Lib. viii. Chap. v. Sect. 9.
[2] Pag. 344. Ed. *H. Steph.*
[3] See *Grot.* Book ii Chap. xxi. Sect. 4.
[4] *Vide D.* Lib. l. Tit. vii. *De Legat.* Lib. xvii. See what I have ſaid upon all this at large, in *Grotius*, Lib. ii. Chap. xxi. Sect. 4. Not. 16, and Lib. iii. Chap. ix. Sect. 8. M. *Noodt*, who has ſince handled it, in the Concluſion of his *Comment.* on the *Digeſt. (ad Tit. de Tutor. & Curator. dat.* Pag. 551, *& ſeqq.)* owns, That the Opinion of *Q. Mucius Scævola* paſs'd at firſt for the Rule of Law, but that that of *Brutus* at laſt prevail'd; and this he infers from the Law itſelf. I confeſs however I ſee no Reaſon to alter the Reaſons I have given in the Notes to which I refer.
[5] *Vide* Freinſhemii *Supplementor. Livianor. Decad. in* Lib. lv.
[6] *Vide* Ciceron. *Topic. in* Chap. viii. *Vide etiam de Orat.* Lib. i. Chap. xl. & Lib. ii. Chap. xxxii.

by a new Grant of Favour [a]. For the Right of *Poſtliminium* belongs only to Perſons forced to ſubmit to an Enemy's Power, contrary to the Conſent and Approbation of their own Commonwealth; not to thoſe who are voluntarily given up to foreign Authority by their own State.

[a] *Vide* Lib. xlix. Tit. xv. L. 4. *D. de Captiv. & Poſtlim.* &c.

CHAP. XII.

Of the Changes and Diſſolution of the Commonwealth.

I. *The People continue the ſame, tho' the Form of the Commonwealth be changed.*
II. *The Debts of the Commonwealth not diſcharged by a Change in the Form of it.*
III. *The Acts of an Uſurper, how far valid after his Government is expir'd.*
IV. *What Place a Commonwealth may challenge after a Change in it.*
V. *One Commonwealth may divide into more.*
VI. *More may unite into one.*
VII. *The People, how eternal?*
VIII. *How the* Materiale *of the People may be deſtroy'd.*
IX. *How the* Formale.

I. CHANGES happen in the Commonwealth three Ways; Firſt, it may be ſo changed as ſtill to continue the ſame; ſecondly, it may be ſo changed as ſtill to continue, tho' not the ſame it was before; thirdly, it may be ſo changed as to be utterly deſtroy'd. The firſt ſort of Change happens when the Form of the Commonwealth is changed; as when a Monarchy changes into an *Ariſtocracy*, or an *Ariſtocracy* or *Democracy* change themſelves into a *Monarchy* [1]. For in either of theſe Changes the *eſſential* Form of Civil Government is ſtill preſerved, only the *accidental* Form which reſults from the proper Subject of ſovereign Power is changed [2]. So that the People are the ſame, whether the Government be *Monarchical*, *Ariſtocratical*, or *Popular*. Nay, tho' it ſhould happen, that a free People ſhould, in ſome War with a Sovereign Prince, be reduced to ſo entire a Subjection, as to be made an Acceſſion to his Patrimony, yet they do not ceaſe to be the ſame People as long as the Conqueror governs them as a diſtinct and ſeparate *Kingdom*, and does not annex them as a *Province* to another People. For, ſince the *People* in a large Extent may be ſuppoſed to comprehend the *ſovereign Power*, it is no material Difference, whether the *Prince* exerciſes the *Government* over them in the moſt full and abſolute Manner, or not. For either Way he is *Head* of one and the ſame *Body*.

II. From what hath been ſaid, the Queſtion propoſed by *Ariſtotle* [3] may be anſwered, Whether if a *Commonwealth*, from a *Tyranny*, or an *Oligarchy*, become a *free Popular State*, it be obliged [4] after ſuch a *Change* to obſerve the *Treaties*, *Capitulations*, *Pacta*, *Conventa*, and other *Acts*, made during the Government of the *Tyrant* or *Oligarchy*? The Reaſons of the Negative are, that the *Acts* of a *Tyrant* or *Oligarchy* are not *Acts* of the *Commonwealth*, and that the *Commonwealth* can only be obliged by its own *Acts*; that the *Commonwealth* is concern'd only where the Advancement of the *publick Good* is conſider'd, and that where it is otherwiſe, the *Right* and *Name* of a *Commonwealth* is abuſed, and Force and Violence only have the *Rule*. But theſe Reaſons are certainly weak. For not to repeat what was ſaid before [5] concerning *Tyranny*, a diſtemper'd and diſorder'd *Head* is certainly a *Head*; and the *Acts* of an *Head*, though indiſpoſed, are look'd upon to be *Acts* of the Commonwealth. And a Commonwealth muſt not be denied a *Being*, becauſe it is in ſome Diſorder. There was a Diſpute of this Nature formerly among the *Athenians*, which begun on this Occaſion: The *Thirty* who govern'd the *Athenian* State, borrow'd Money of the *Lacedemonians* upon *publick Faith*; after the *Athenians* had ejected the *Thirty*, and recovered their Liberty, the *Lacedemonians* demanded their Money of them; the Matter was debated at *Athens*, and it was reſolved that it was juſt, and for the Peace of the State, to pay it. *Demoſthenes*'s Opinion of the Caſe was [6], *That the People choſe rather to pay the Money, than not to make good their Articles of Agreement*; and again (he ſays) ſpeaking to the *Athenians*, *And then you conſented to pay*

[1] See *Grot.* B. ii. Chap. ix. Sect. 8. [2] See above, in B. vii. Chap. v. Sect. 1. [3] *Ariſtot.* Pol. Lib. iii. Chap. iii. [4] *Vid.* Grot. *ubi ſupra.* [5] In B. vii. Chap. viii. Sect. 3, 8.

[6] *Demoſthenes* contra *Leptin.* The Author propos'd this for two different Reaſons; and yet afterwards he refutes it himſelf but as one ſingle Reaſon. Indeed there is but one with its Proof. For if the Commonwealth (according to *Ariſtotle*) is not obliged to diſcharge the Debts, and obſerve the other Acts and Engagements of an abſolute Monarch, or of a ſmall Number of Men, who had got the Adminiſtration of the Government into their Hands; 'tis, according to him, becauſe what was done is not look'd upon to have been done by ſuch a King, or by ſuch Magiſtrates. And the Reaſon why it is not look'd upon as being done, is becauſe the Dominion of thoſe Men was not founded upon the publick Good, but only upon the Superiority of their Force and Violence; and, conſequently, that it was not lawful: From whence he would infer, that the People ought not to ſtand to what they did in their Name, but without their Conſent.

your Money to thoſe who had injured you, rather than go back from any Part of your Articles[a]. Nay, though a Commonwealth ſhould be reduced to a Province, and loſe the very Nature of a Commonwealth, yet the Debts it has contracted are ſtill due. For Debts being founded in the Commonwealth, not preciſely as ſuch a Commonwealth, but as poſſeſſed of certain Goods, whoever is Maſter of thoſe, muſt take the Debts with them.

III. But though the Caſe ſeems to be beyond Diſpute, as to the Debts contracted for the Uſe of the Commonwealth, and ſuppoſed to continue upon the whole Body of it; yet whether all the Acts of an Uſurper will fall under the like Determination, when he is depoſed or ejected, is ſtill a Queſtion. If an Uſurper indeed make a League with a foreign State for mutual Supplies of Aid againſt ſome common Enemy, and then either divide the Booty of War with his Confederate, or ſell Part of it to him; the League, the Donation, and the Sale, muſt continue in Force after the Uſurper is depoſed. For the foreign Commonwealth acquires a ſolid Right from ſuch Acts, becauſe it agreed upon them with the Uſurper as Head of his Commonwealth, and in Appearance for its Intereſt and Advantage: And there was no Reaſon why the foreign Commonwealth ſhould concern itſelf what Title the Uſurper might have to his Government; ſuppoſing there be no other Fault in the Acts ſuppoſed. But then the Difficulty is, if any Uſurper by Oppreſſion and Violence rifle his own Subjects of their Goods and Fortunes, and ſell them to foreign States, whether, upon Diſſolution of Government, they can demand them back again? *Bœcler*[b] thinks they may; and that if they who bought them did it adviſedly and deliberately, they ought to acknowledge their Fault, and be content to part with what they could neither buy, nor the other ſell, without Injuſtice. He adds, nay, though they knew nothing of the Caſe when they bought them. All which may perhaps appear reaſonable enough in *Foro Conſcientiæ*; but if we conſider the general Practice of the World, I don't ſee how the Sufferers can recover what they have been thus deprived of. For, as long as the Uſurper continues his Oppreſſions, he is look'd upon to be an Enemy to the Commonwealth, and the Spoils he takes from his Subjects, when tranſferr'd to foreign States, are retain'd with the ſame Pretences of Right as other Acquiſitions of War[1]. But if the Uſurper's Government has been confirmed by the[2] Conſent of his Subjects, Foreigners may pretend Right to the Goods of his Subjects, as lawfully confiſcated. For, as in other Caſes, Nations at Peace with, and unconcern'd in the Wars of their Neighbours, treat the Parties engaged with equal Reſpect, attending only to the Event: So foreign States are not ſuppoſed to be concern'd what Meaſures their Neighbours take in their Government at home. But the unjuſt Acts of Uſurpers which are confin'd within the Commonwealth, may, when their Government expires, be reſcinded and repeal'd by a lawful Power, as far as the Occaſions of the Commonwealth require. And by the Acts is, alſo, meant, not only the Laws they made, but all Grants and Alienations whatſoever, contrary to the Conſtitutions of the Commonwealth.

IV. In the next Place, it is a common Queſtion, What Place ought to be allowed Princes who have raiſed themſelves to ſovereign Power over People before free, and what to free People after Extirpation of kingly Government? To this *Gratius* anſwers[c], that a Commonwealth may challenge the ſame Place after ſuch a Change, which it had by itſelf, or Repreſentative, in any Aſſembly[3] before. But to me it ſeems neceſſary to diſtinguiſh, whether, for Example, the Prince who has obtain'd the Government of the People before free, continue in the Aſſembly or Syſtem he was before Member of: Or whether he divides from it, and enters upon a ſeparate Adminiſtration of his own Affairs. For, in the firſt Caſe, without Diſpute he can have no Pretence to any other Place than what the free People were before contented with, notwithſtanding that Greatneſs and Majeſty with which the Perſons of ſovereign Princes are inveſted. And ſo, on the other Hand, a free People, after Extirpation of kingly Government, may demand the ſame Place in any Common Aſſembly which was allow'd to their Princes before. But if the Prince or People ſeparate from their old Aſſemblies or Syſtem, the Place that antiently belonged to them ought to be no Prejudice to them, or be any Argument for the Precedence of others who had formerly that Privilege in the common Aſſembly; ſince all ſovereign Powers are naturally equal.

V. Changes which ſo diſguiſe the Commonwealth, that it appears no longer the ſame, happen generally theſe two Ways; either firſt, when one Commonwealth breaks into two, or more; or ſecondly, when many diſtinct Commonwealths unite into one. The firſt may be the Effect either of mutual Conſent, or elſe of Force of War[4]. Different Commonwealths may be form'd out of one by common Conſent, by ſending out Colonies in the Manner uſual in *Old Greece*. For the *Romans* afterward (who are follow'd now by the Nations of *Europe*) when they ſent a Colony abroad, continued it under the Juriſdiction of the Mother Commonwealth, or greater Country. But the Colonies planted by the *Greeks*, and, after their Method, conſtituted particular Commonwealths, were oblig'd only to pay a kind of Deference and dutiful Submiſſion to their Mother Commonwealth[d]. But however, a Colony ſettled after this Form is not obliged to pay the Debts contracted by the Mother Commonwealth, unleſs that Article was expreſly agreed upon when the Colony was ſettled. Becauſe all publick Debts in the laſt Reſort affect the Goods and Effects of the Commonwealth, which the Colony ('tis ſuppoſed) hath no Share in. And tho' particular Perſons in the Colony might perhaps have enjoy-

[a] See *Iſocrates* in *Areopag.* [b] Bœcler. *Diſſert. de eo quod agit Civitas.* [c] Lib. ii. Chap. ix. Sect. 8. [d] Vid. *Thucyd.* Lib. I *Hen. Valeſius* ad Excerpt. *Peireſc.* Pag. 6. and 7. *Hobbes* de Cive, Chap. ix. Sect. 8.

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[1] See *Grot.* B. iii. Chap. ix. Sect. 4. [2] Conſult here *Grot.* Lib. ii. Chap. xiv. Sect. *ult.* Mr. *Hertius* alledges the Example of the *Athenians*, who annull'd all the public and private Acts, which had paſſed under the *Thirty Tyrants*; DEMOST. *Orat. adv. Timocr.* Pag. 469 B. And the Emperor *Honorius*, who did the ſame, with regard to *Heraclian*'s Uſurpation. COD. *Theodoſ.* Lib. xv. Tit. xiv. *De infirmandis his*, &c. [3] But *Grotius* ſpeaks only of *Confederated States*, while they remain ſuch. [4] See *Grot.* ubi ſupra Sect. 10.

ed the Benefit of thoſe Debts, while they were Members of the old Commonwealth; yet when the Mother Commonwealth diſmiſſes them free, it ſeems to declare that they ſhall not be liable to pay any Thing upon that Account. But indeed, upon a ſtricter View, the Commonwealth is not really in itſelf changed upon the ſending out Colonies; neither doth it ceaſe to appear the ſame; but only, as in a natural Generation, one Commonwealth gives Birth to another. But where a Kingdom divides by common Conſent into two or more diſtinct Commonwealths, the publick Patrimony, with all the Debts and Incumbrances upon them, ought to be equally ſhared among them. Tho' indeed when ſuch Separations are made by mutual Agreement, there is commonly expreſs Proviſion made for ſuch Caſes.

VI. Another Change in the Commonwealth, and by which it ceaſeth to be the ſame, is where two People unite (not by way of Confederacy or Subjection to one common Sovereign, but) in ſuch a Manner that the two States grow entirely into one. In which Caſe *Grotius* [1] thinks, that the Rights, which the particular Commonwealths that make the Union enjoyed before, are not loſt, but communicated to the whole Body, as, alſo, the Debts and Incumbrances, unleſs the contrary hath been particularly agreed upon [a]. But it muſt be conſidered, whether the two or more People unite with Deſign to erect a new Commonwealth, where all are to enjoy the ſame Rights; as ſuppoſe two diſtinct People ſubject to a Government of the Populace aboliſh their Form of Conſtitution, and unite into one Kingdom; or two Kingdoms take away their fundamental Laws, diſplace the antient Line Royal, and ſet up a new Kingdom. By this Union it is manifeſt, that their former Commonwealths are ſubverted, and a new one erected upon their Ruins. But when one Commonwealth unites with another, in ſuch Manner that one keeps its Government and States, and the Subjects of the other change their Country, and are taken into the Rights and Privileges of the foreign Commonwealth, it is evident that one is ſwallowed up and loſt in the other. But that which remains doth not ceaſe to be the ſame, though from ſuch an Acceſſion it receiveth a conſiderable Increaſe in Strength and Power. But there are no Ways of uniting diſtinct Commonwealths, ſo that each ſhall preſerve its own ſeparate Conſtitutions, and be as it was before; but by ſtrict Alliance and Confederacy, which rather gives Riſe to a Syſtem [2] than a Commonwealth, properly ſo called.

VII. The laſt Change, that by which the Commonwealth entirely ceaſeth to be, happens when the People themſelves are either diſſolv'd or deſtroy'd [3]. It is a common Saying, that *Kings are mortal, but Commonwealths eternal* [4]. By which it is not meant, that it is impoſſible that a People ſhould ever be ſcattered, or utterly extinguiſhed by any Violence or fatal Period; but that they do not ſuffer ſuch Decays of Nature, as particular Men do, after a certain Courſe of Years. For, though Individuals change, yet there continues a conſtant Succeſſion, either by Reſort from neighbouring States, or by the natural Iſſues of Procreation at home. By a continual Courſe of which Succeſſions the People always appear the ſame, and poſſeſs the ſame Rights and Privileges, tho' particular Subjects are frequently changed [b], as *Virgil* ſaith of his Bees,

Ergo ipſas quamvis anguſtus terminus ævi
Excipiat (neque enim plus ſeptima ducitur æſtas)
At genus immortale manet, multoſque per annos
Stat fortuna domus, & avi numerantur avorum.

Tho' ſeven ſhort Springs conclude their vital Date,
Yet, by repeopling their decaying State,
Their antient Stocks eternally remain,
And in an endleſs Race their Childrens Children reign.

Mr. *Addiſon.*

The Senſe of the old Philoſophers upon the Diverſity of Bodies will perhaps give us a clearer View of this Matter. And *Plutarch* tells us [c], that ſome Bodies (according to them) are compounded of Parts diſjoined, as a Navy, an Army, and the like; others conſiſt of compacted Parts; as an Houſe, a Ship, *&c.* a third Sort are framed of united Parts, ſuch as are combined into one Nature, as every particular Animal [d]. Which in other Words may be thus expreſſed; a Body in general is a Thing contained by ſome Habitude, Coherence, or Tie, ſo that it conſtitute one. The Ligament or Tie, by which the Parts of a Body are joined and united, is threefold; *natural*, *artificial*, and *moral*. The natural Tie or Bond, is that by which natural Bodies are contained; the artificial, is that by which Things otherwiſe divided in Nature, are by human Induſtry brought to Unity and Community; and the moral Tie, laſtly, is that by which ſeveral Individuals are connected by human Inſtitution, and ſuppoſed to make one Body. And this Body may indeed conſiſt of Beaſts, as in a Flock or Herd: But here I ſuppoſe it to extend no farther than to a Combination of a Number of Men. And from theſe different Modes of Union reſult thoſe three Sorts of Bodies, the *natural*, *artificial*, and *moral*. All which are ſuppoſed to continue the ſame, as long as that *Connection* which at firſt joined the Parts together, is not all at once diſſolved and broken. And thus therefore a Man ſtill appears the ſame, tho' innumerable little Particles of his Body perſpire; and are conſtantly ſupplied with new, from the Nutriment he takes in [e]. And though ſome of

[a] Vid. *Liv.* Lib. i. Chap. lii. init.

[b] Vide *Lucianum*, in amoribus, Pag. 888. Ed. *Amſt.* Tit. i. Nature, being ſenſible that we were all framed of periſhing Matter, and that Fate had given ſo ſhort a Period to every Man's Life, provided that the Loſs of one Man ſhould be repaired by the Birth of another; and ballanced the Number of them that died with a new Generation, that ſo by continued Succeſſions we might, in ſome Senſe, live to Immortality, *Virg.* Georg Lib. iv. Ver. 206, *&c.*

[c] *Plutarch.* conjug. Præcep. Pag 142. F.

[d] Vide Lib. xli. Tit. iii. Lib. xxx. D. de Uſurp. Uſucap. & Lib. vi. Tit. i. Lib. xxiii. Sect. v. D. de rei vindicat. *Seneca* Epiſt. 102.

[e] *Brown.* Relig. Med. Sect. 36. This very Body I carry about me came in at my Mouth, and all this Bulk of Fleſh lay once upon my Trencher; in fine, we devour our own ſelves. *Seneca* Epiſt. 58. *Plut.* de *Ei* apud *Delph.* Edit. *Xyland.* Pag. 392. A. B. *Lucret.* Lib. iii. Ver. 860, &c. *But this Paſſage muſt be cautiouſly interpreted, that it may not reach the Article of the Reſurrection.*

[1] Ubi ſupra, Sect. 9. [2] See above Lib. vii. Chap v. Sect. 18. [3] Vid. *Grotium*, ubi ſupra, Sect. 3. [4] *Tiber* apud *Tacit.* Annal. Lib. iii. Chap. vi.

the Antients thought *Theſeus*'s Ship (about which they had ſo many Diſputes) the ſame; though in Tract of Time it went through ſo many Repairs, that hardly any Thing remained of the Materials it was firſt built with [a]. *Plutarch* ſays on this Subject [b], *A Commonwealth is one entire Body, which comprehends a Number of Members, and reſembles the natural, that it neither loſeth its Nature by Succeſſion of Years, nor is it liable to Change by Alteration of Time, but always preſerves the ſame Affections and Properties, that are agreeable to its Conſtitution, as long as it continues united by common Ties and Obligations, and preſerves the Unity of the publick Body.* He adds, that *particular Men are more expoſed to the Injuries of Time, than Commonwealths; for, if a Man be abſent from his Friend but a few Years, at his Return he diſcovers a Change in his Conſtitution and Face, and often ſuch Alterations in his Humour and Behaviour, that he hardly knows him again. But if a Man, after thirty Years Abſence, come again into the ſame Commonwealth, he not only finds the ſame Houſes and Buildings, but the ſame Inſtitutions, and the ſame Manners and Diſpoſitions in the People* [c]. Tho' indeed it is impoſſible but, in a long Courſe of Time, a Nation ſhould receive ſome Alterations, and not appear the ſame as to all Effects [d]. *Hobbes* (*Philoſ. Prim.* Chap. xi. Sect. 7.) chooſes to expreſs the ſame Thing thus, *When any Thing is denominated from ſuch a Form, which is the Principle of Motion in it, as long as that Principle remains, the Individual is the ſame.*

VIII. But, notwithſtanding the Truth of all this, it is poſſible for a Commonwealth to be utterly deſtroyed; and that either when the *Materiale* of the People, or whole Number of Subjects, periſh or ſcatter, or when the moral Tie which joins the People together is utterly broken and diſſolved; the *Materiale* or Body of the People periſhes, either when the Parts abſolutely neceſſary to the Subſiſtence of the Body are taken away, or when the Body itſelf is deſtroyed. *Grotius* [e] gives ſeveral Inſtances of Nations utterly deſtroyed all at once, by publick Fatalities. And here Enquiry may be made, whether, if after ſuch a general Deſolation ſome weak Remainders are left that cannot be called a People, they may be ſuppoſed to retain the Rights of their antient Nation? *Grotius* is of Opinion, Lib. ii. Chap. ix. Sect. 4, that the Propriety which the People had, as they were private Perſons, might ſtill ſubſiſt in their Remains, but that nothing belongs to them which agreed to the People as ſuch; that is, that they may claim Inheritance of the Poſſeſſions and Subſtance of thoſe who were once their Fellow-Subjects, but have no Right to aſſume Sovereign Power, or any of thoſe Rights that are the neceſſary Conſequents of it [f]. But however, if the few that are left were reduced to ſo thin a Number, not by War, but ſome other caſual Misfortunes, and are able to defend themſelves againſt the Invaſions of their Neighbours, till either by Supplies of their own Growth, or by Invitations to others to ſettle among them, they grow up again into a People, I ſee no Reaſon why they may not claim the Rights of the former People [g]. Eſpecially ſince it has not yet been agreed what Number of Maſters of Families is neceſſary to make a People; and ſince, when firſt Mankind divided into Nations, a very ſmall Number made a People. In *Juſtin* [h] *Artaxerxes*'s fifty Sons are called *Tantus Populus*, and *Niobe* calls her fourteen Children a People [i]. Again a Multitude of Men of which a People conſiſts is broken and diſſolved, when not every particular Subject periſhes; but when upon Peſtilence, Diſcontent, or Sedition, they voluntarily deſert and ſcatter elſewhere; or elſe are diſunited, and forcibly carried away, ſo that they can never meet or make Head again. And therefore it was Flattery rather than Truth, when the People of *Ilium* boaſted, that they were Anceſtors to the *Romans* [k].

IX. The Form or Species of the People is deſtroyed [l], if either the whole or the perfect Community of Right be loſt. The Community of Right

[a] *Plut. Theſeus* Pag. 10. C. *Vid.* Lib. v. Tit. i. Lib. lxxvi. D. de Judiciis. Vid. Lib. vii. Tit. iv. Lib. 10. D. quibus modis Uſusfructus amittitur. *Tho' this Law ſeems to be contrary to thoſe in* Lib xlvi. Tit. iii. Lib. xcviii. Sect. ult. *D. de Solution. in* Lib. lxxxiii. Sect. 5. Here our Author is in the Right. In the Law, upon the Title *De Quib. Mod. Uſufr. Ulpian* declares for the Opinion of the *Sabinian* Lawyers, who believed that when a Man has demoliſhed a Houſe, or taken in Pieces a Ship, tho' with a Deſign of immediately rebuilding them, it is no longer the ſame Houſe nor the ſame Ship: and that conſequently the Right of *Uſufruit* which any one had upon them extinguiſhes. But, in the two other Laws, *Paul* maintains the Contrary. M *Noodt* has freely owned this, in his excellent Treatiſe *De Uſufructu*, Lib. ii. Chap. xi. *Vid.* Dionyſium Halicarnaſſæum, Lib. i. de Caſâ Romuli. Alex. *ab* Alexandro, Lib. iii. Chap. i. Mich. Piccardus *ad* Polit. Ariſtot. Lib. iii. Chap. iii.

[b] *Plutarch.* de ſera Num. Vindict. Pag. 555. B. C. Edit. *Wech.* He, alſo, ſays, Pag. 559. *ibid.* that a *Commonwealth* may be compared to an Animal, that does not become unlike itſelf by the different Changes that happen to it with Time, and which has different Ages, without ever changing for all that its Nature; but has always the ſame eſſential Properties, and is anſwerable or commendable for every Thing it does or has done as ſuch, as long as the ſame Ties and *Compacts* which unite it remain pure and undiſturbed; ſo that to conceive a Commonwealth as different, only becauſe the Members which compoſe it are a new Generation of People, is as if one Man were made ſeveral diſtinct Perſons, as being a Child, a Youth, and an old Man.

[c] Vid. *Grot.* Lib. ii. Chap. ix. [d] Vid. Supra, Lib. viii Chap. iii. Sect. 29.

[e] Lib. ii. Chap. ix. Sect. 4. *Vid.* Lib. vii. Tit. iv. Lib. xxi. xxxi. D. quibus modis Uſusfruct. amitt. *&c.*

[f] Vid. D. d. l. [g] Vid. *Juſtin.* Lib. v. Chap. vi. Not. 5. [h] Lib. x. Chap. i. Not. 6. *Ovid.* Met. Lib. vi. Ver. 197.

[i] *Apulcius* Apolog. Fifteen Freemen make a People. *Vid.* Lib. iii. Tit. iv. Lib. vii. Sect. 2. D. quod cujuſcunque Univerſit. &c. *Where the Title of a Community* (a Corporation, not a Commonwealth) *is ſaid to remain in one Perſon, but that he is under a Neceſſity of taking Aſſociates in Time.* The *Digeſt* ſays, that tho' a State be reduced to one ſingle Perſon, that Perſon preſerves the Name and Rights of the whole State. *Sed ſi univerſitas ad unum redit, nihilo minus admittitur, poſſe eum convenire, & conveniri: cum jus omnium in eum reciderit, & ſtet nomen univerſitatis,* Lib. iii. Tit. iv. *Quod cujuſcunque univerſit. nomine.* &c. Leg. vii. Sect. 2. It is neceſſary however that this Perſon ſhould, as ſoon as poſſible, procure new Aſſociates, to make up the Body of the State. I ſhall add, to this Subject in general, a beautiful Paſſage of *Cicero*, where he ſays, "That a State is not ſubject to what we call natural Death; and that "when it does periſh, it is a kind of Emblem of the Deſtruction of the World." *Civitatibus autem mors ipſa pœna eſt, quæ videtur à pœna ſingulos vindicare; debet enim conſtituta ſic eſſe civitate, ut æterna ſit. Itaque nullus interitus eſt Reipublicæ naturalis, ut Hominis, in quo mors non modo neceſſaria eſt, verum etiam optanda perſæpe. Civitas autem quum tollitur, deletur, exſtinguitur, ſimile eſt quodammodo, ut magnis parva conferamus, ac ſi omnis hic mundus intereat ac concidat,* Apud *Auguſtin.* De Civit. Dei, Lib. xxii. Chap. vi.

[k] Vid. *Buchanan.* Rer. Scot. Lib. iv. fin. How the *Scots* were diſperſed by *Maximus*, Juſt. Lib. xxviii. Chap. i. & Lib. xxxi. Chap. viii. But a very learned *Scotchman* (Mr. *Carmichael*, in his Notes on the Abridgment of *the Duties of a Man and a Citizen*, Lib. i. Chap. *ult.* Sect. *ult.*) ſays, that the Sequel plainly ſhewed, the *Scotch* were never ſo totally defeated, but they could recover themſelves

[l] *Grot.* ubi ſupra, Sect. 6.

and Government is entirely loſt, when the Subjects ſcatter different Ways, and ſettle in different Commonwealths, whether they retain perſonal Liberty, or are forced to ſubmit to a Condition of Slavery; the Story of *Capua* is an Example of this Nature [a]. A perfect Community of Right between the Members of the ſame Commonwealth is loſt, when though the particular Subjects are allowed their perſonal Liberty, and are permitted to inhabit their own Cities, and live in their own Country, yet they are under the Government and Dominion of a foreign State. And ſuch a People are uſually ſaid to be reduced into the Form of a [1] Province. But barely the changing Country, evacuating Towns, demoliſhing Forts, are not Alterations ſufficient to make a People ceaſe to be the ſame.

[a] Vid. *Liv.* Lib. xxvi. Chap. xvi.

[1] See above Lib. vii. Chap. v. Sect. 16.

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A N

I N D E X

OF THE

Moſt material THINGS

Which are mentioned or explained in the

TEXT, NOTES, or M. BARBEYRAC'S PREFATORY DISCOURSE.

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FINIS.